

WORKS OF B. B. MITRA.

THE CRIMINAL PROCEDURE CODE.

10th Edition. 1911. Rs. 12-8

THE TRANSFER OF PROPERTY ACT.

9th Edition 1939. Rs. 7-8

THE INDIAN LIMITATION ACT.

12th Edition 1938. Rs. 7-8.

THE INDIAN SUCCESSION ACT.

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A handy book. 1934. Re. 1.

THE CODE OF
CRIMINAL PROCEDURE
(ACT V OF 1898)

As amended up to date

WITH THE CRIMINAL LAW AMENDMENT
ACT, 1933

EDITED BY

B. B. MITRA, B.A., B.L.

AUTHOR OF THE TRANSFER PROPERTY ACT, THE INDIAN
LIMITATION ACT, THE INDIAN SUCCESSION ACT, THE
GUARDIANS AND WARDS ACT, THE PROVINCIAL
SMALL CAUSE COURTS ACT, ETC., ETC.

TENTH EDITION

REVISED AND BROUGHT UP-TO-DATE

BY

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1941

EASTERN LAW HOUSE, LTD.
LAW PUBLISHERS AND BOOK-SELLERS
15, College Square, Calcutta.

Published by B. C. Dey
for
EASTERN LAW HOUSE,
15, College Square, Calcutta.

<i>First Edition</i>	...	...	August, 1920.
<i>Second Edition</i>	...	...	August, 1923.
<i>Third Edition</i>	...	...	March, 1924.
<i>Fourth Edition</i>	...	...	June, 1925.
<i>Fifth Edition</i>	...	...	July, 1926.
<i>Reprinted</i>	...	...	August, 1927.
<i>Sixth Edition</i>	...	...	February, 1928.
<i>Reprinted</i>	...	...	August, 1929.
<i>Seventh Edition</i>	...	...	August, 1930.
<i>Eighth Edition</i>	...	...	January, 1934.
<i>Reprinted</i>	...	...	December, 1934.
<i>Ninth Edition</i>	...	...	January, 1937.
<i>Reprinted</i>	...	...	November, 1938.
<i>Tenth Edition</i>	...	...	January, 1941.

Proprietress—Sm. Asalata Mitra.

Printed by J. C. Ghosh,
BHARATI PRINTING WORKS,
141, Vivekananda Road, Calcutta.

PREFACE TO THE TENTH EDITION.

In this edition amendments introduced by the Government of India (Adaptation of Indian Laws) Order, 1937, the Criminal Law Amendment Act, 1939 (Act XXII of 1939), the Offences on Ships and Aircraft Act, 1940 (Act IV of 1940) and the Code of Criminal Procedure (Amendment) Act, 1940 (Act XXXV of 1940) have been inserted in proper places. For the use of the Bench and the Bar in Burma, the amendments introduced by the Government of Burma (Adaptation of Laws) Order, 1937, and the Schedule annexed thereto, have been quoted in Note 4 (pages 12 to 18). Rulings reported up to the end of January, 1941, have been incorporated in the notes and the addenda with copious cross-references. The book has again been thoroughly revised with a view to enhance its usefulness, keeping it at the same time handy for the purpose of ready reference.

BERHAMPORE, BENGAL,

31st January, 1941.

NAGENDRA KUMAR BHATTACHARYYA.

PREFACE TO THE NINTH EDITION.

In this edition the book has been thoroughly revised and partly re-written, keeping in view the ideal followed in the previous editions. Rulings reported up to the end of February, 1937, have been incorporated in the notes and the addenda with copious cross-references. Every attempt has been made to make the book more useful both to the Bench and the Bar. I shall deem my labour fully recompensed if I have been able to maintain the reputation of the learned editor who met with an untimely death after the publication of the last edition.

BERHAMPORE, BENGAL,

28th February, 1937.

NAGENDRA KUMAR BHATTACHARYYA.

PREFACE TO THE SEVENTH EDITION.

As I have observed in a previous edition of this work, the sweeping Amendments of 1923 have not been able to cope with the tremendous task of removing the divergencies of opinion among the High Courts which exist under almost every important section of the Code. Perhaps the Committees which sat on the Bills of 1914 and 1921 had decided to direct their attention more towards defining the policy of the law than attempting to settle the conflicts of opinion which they accepted as a matter of result.

PREFACE TO THE SECOND EDITION.

But the most far-reaching amendments have been wrought by the Criminal Law Amendment Act, XII of 1923 (popularly known as the Racial Distinctions Act) and the Criminal Procedure Code Amendment Act, XVIII of 1923. The first Act is the result of a compromise between the members of a Committee appointed in 1921 to amend certain provisions of this Code which differentiated between European and Indian British subjects in criminal trials and proceedings. The disabilities of second and third class Magistrates to try European British subjects, the requirement of the first class Magistrate being a European British subject and a Justice of the Peace in order to be able to try European British subjects, the right of such subjects to claim a jury before a District Magistrate, their exemption from security proceedings, the lower scale of punishment, the more extensive rights of appeal—all these privileges have now been taken away though certain inequalities are still retained under the present Code. The amendments have been duly noticed in this book not only by reference to the Statement of Objects and Reasons of the Bill, but also to the Report of the Racial Distinctions Committee.

The Amendment Act XVIII of 1923 has got a long history behind it. The kernel of the Act was a Bill prepared in 1914, in which three-fourths of the present amendments were contained. This Bill was referred to a small Committee (known as the Lowndes Committee) in 1916, which submitted its Report at the end of the same year, but owing to the interposition of the war, further consideration on the Bill was postponed. Meanwhile, suggestions and criticisms were invited and collected, and in 1921 another Bill was prepared (embodying the above Report with certain alterations made in pursuance of the suggestions received) and was referred to a Joint Committee which submitted its Report in 1922. This Bill, with various alterations, ultimately passed into law in 1923.

From this it is evident that neither the Bill of 1921 nor the Report of the Joint Committee of 1922 gives the whole history of the amendments;

CRONOLOGICAL TABLE OF AMENDMENTS.

The Criminal Procedure Code has been amended by the following Acts
from 1900 to 1940.

- Act VI of 1900 (Lower Burma Courts Act).
- Act I of 1903.
- Act XIV of 1903.
- Act IV of 1909 (Whipping Act).
- Act XV of 1910.
- Act IV of 1912.
- Act VIII of 1913.
- Act X of 1914 (Repealing and Amending Act).
- Act XIII of 1916.
- Act XVIII of 1919 (Repealing and Amending Act).
- Act XXXVIII of 1920 (Devolution Act).
- Act XXXIX of 1920 (Election Offences and Inquiries Act).
- Act XIV of 1922 (Press Law Repeal and Amendment Act).
- Act XI of 1923 (Repealing and Amending Act).
- Act XII of 1923 (Criminal Law Amendment Act).
- Act XVIII of 1923 (Criminal Procedure Code Amendment Act).
- Act XX of 1923 (Indian Penal Code Amendment Act).
- Act XXXV of 1923 (Criminal Pro. Code Further Amendment Act).
- Act XXXVII of 1923 (Criminal Pro. Code 2nd Amendment Act).
- Act VII of 1924 (Repealing and Amending Act).
- Act XVIII of 1924 (Criminal Law Amendment Act).
- Act VIII of 1925 (Obscene Publications Act).
- Act XXIII of 1925 (Legislative Members Exemption Act).
- Act XXIX of 1925 (Indian Penal Code Amendment Act).
- Act XXXII of 1925 (Oudh Courts Act).
- Act XXXVII of 1925 (Repealing and Amending Act).
- Act II of 1926 (Criminal Procedure Code Amendment Act).
- Act X of 1926 (Criminal Procedure Code Second Amendment Act).
- Act XXXIV of 1926 (Sind Courts Supplementary Act).
- Act XXXVI of 1926 (Criminal Pro. Code Third Amendment Act).
- Act X of 1927 (Repealing and Amending Act).
- Act XXV of 1927 (Criminal Law Amendment Act).
- Act XXI of 1932 (Criminal Procedure Code Amendment Act).
- Act XXXV of 1934 (Amending Act).
- Act VIII of 1935 (The Central Provinces Courts Supplementary Act).
- 26 Geo. 5, ch. 2 (The Government of India Act, 1935).
- The Government of India (Adaptation of Indian Laws) Order, 1937.
- 26 Geo. 5, ch. 3 (The Government of Burma Act, 1935).
- The Government of Burma (Adaptation of Laws) Order, 1937.
- Act XXII of 1939 (The Criminal Law Amendment Act, 1939).
- Act IV of 1940 (The Offences on Ships and Aircraft Act, 1940).
- Act XXXV of 1940 [The Code of Criminal Procedure (Amendment) Act, 1940].

but in order to understand the Objects and Reasons, one has also to consult the earlier Bill of 1914 and the Report of 1916. The editor has, therefore, spared no pains to trace each amendment to the original Bill and Report in order to elucidate the lawyer as to the reasons of the particular amendment, and where an amendment has been effected during the discussions in the Legislative Assembly, reference has been given to the Debates in the Assembly (with dates), together with extracts from speeches, where necessary. All the rulings modified or overruled by the amendments have been duly noticed. The amendments have been shown in *italics*, and where a section or subsection has been materially amended, it has been printed in *parallel columns*, the left hand column representing the old Act, and the right hand column giving the new.

The citations have been brought down to the present year, and, as in the previous edition, the notes have been supplemented by extracts from Police Code and Manuals, High Court Rules, Notifications, and Circulars.

20th August, 1923.

B. B. MITRA.

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The Criminal Procedure Code has been amended by the following Acts
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- Act VI of 1900 (Lower Burma Courts Act).
- Act I of 1903
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- Act XIII of 1916
- Act XVIII of 1919 (Repealing and Amending Act)
- Act XXXVIII of 1920 (Devolution Act).
- Act XXXIX of 1920 (Election Offences and
- Act XIV of 1922 (Press Law Repeal and Amendment)
- Act XI of 1923 (Repealing and Amending Act)
- Act XII of 1923 (Criminal Law Amendment)
- Act XVIII of 1923 (Criminal Procedure Code)
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- Act XXXV of 1923 (Criminal Pro. Code 1st)
- Act XXXVII of 1923 (Criminal Pro. Code 2nd)
- Act VII of 1924 (Repealing and Amending Act)
- Act XVIII of 1924 (Criminal Law Amendment)
- Act VIII of 1925 (Obscene Publications Act)
- Act XXIII of 1925 (Legislative Members Election)
- Act XXIX of 1925 (Indian Penal Code Amendment)
- Act XXXII of 1925 (Oudh Courts Act).
- Act XXXVII of 1925 (Repealing and Amending Act)
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- Act X of 1926 (Criminal Procedure Code Amendment)
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- Act XXXVI of 1926 (Criminal Pro. Code 3rd)
- Act X of 1927 (Repealing and Amending Act)
- Act XXV of 1927 (Criminal Law Amendment)
- Act XXI of 1932 (Criminal Procedure Code Amendment)
- Act XXXV of 1934 (Amending Act).
- Act VIII of 1935 (The Central Provinces and Berar)
- 26 Geo. 5, ch. 2 (The Government of India Act 1935)
- The Government of India (Adaptation of Indian Law)
- 26 Geo. 5, ch. 3 (The Government of Burma Act 1935)
- The Government of Burma (Adaptation of Indian Law)
- Act XXII of 1939 (The Criminal Law Amendment)
- Act IV of 1940 (The Offences on Ships and Aircraft)
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Extension to former Acts.
 4. Definitions. Words relating to acts. Words to have same meaning as in Indian Penal Code.
 5. Trial of offences under Penal Code. Trial of offences against other laws.
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PART II.

CONSTITUTION AND POWERS OF CRIMINAL COURTS AND OFFICES

CHAPTER II.

OF THE CONSTITUTION OF CRIMINAL COURTS AND OFFICES.

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E.—Justices of the Peace.

22. Justices of the Peace for the Mufassil.
23. *[Repealed]*.
24. *[Repealed]*.
25. *Ex-officio* Justices of the Peace.

ABBREVIATIONS.

A I.R.	.	.	.	All India Reporter.
All.	.	.	.	Indian Law Reports, Allahabad Series.
A L J.	.	.	.	Allahabad Law Journal.
A L R.	.	.	.	Annotated Law Reporter.
A.W.N.	.	.	.	Allahabad Weekly Notes.
B L R.	.	.	.	Bengal Law Reports.
B R.	.	.	.	Bihar Reports
Bom	.	.	.	Indian Law Reports, Bombay Series.
B H C R.*	.	.	.	Bombay High Court Reports
Bom.L R	.	.	.	Bombay Law Reporter.
Bur L J.	.	.	.	Burma Law Journal.
Bur L R.	.	.	.	Burma Law Reports.
Bur.L T.	.	.	.	Burma Law Times
Bur.S R.	.	.	.	Burma Sessions Reports.
Cal.	.	.	.	Indian Law Reports, Calcutta Series.
C.L.J.	.	.	.	Calcutta Law Journal.
C.L.R.	.	.	.	Calcutta Law Reports.
C.W.N.	.	.	.	Calcutta Weekly Notes.
C.P.L.R.*	.	.	.	Central Provinces Law Reports.
Cr C.	.	.	.	Criminal Cases
Cr.L.J.	.	.	.	Criminal Law Journal of India.
I C.	.	.	.	Indian Cases.
Ind Jur.	.	.	.	Indian Jurist.
Ind. Rul.	.	.	.	Indian Rulings.
L.B.R.	.	.	.	Lower Burma Rulings.
L.W. or M L.W.	.	.	.	Law Weekly (Madras).
Lah.	.	.	.	Indian Law Reports, Lahore Series.
Lah L.J.	.	.	.	Lahore Law Journal.
Luck.	.	.	.	Indian Law Reports, Lucknow Series.
Mad.	.	.	.	Indian Law Reports, Madras Series.
Mad Jur.	.	.	.	Madras Jurist.
M.H.C.R.	.	.	.	Madras High Court Reports.
M L J.	.	.	.	Madras Law Journal.
M L T.	.	.	.	Madras Law Times
M.W.N.	.	.	.	Madras Weekly Notes.
N L J.	.	.	.	Nagpur Law Journal.
N L R.	.	.	.	Nagpur Law Reports.
N.W.P.	.	.	.	North West Provinces High Court Reports.
O C.	.	.	.	Oudh Cases.
O L J.	.	.	.	Oudh Law Journal.
O S C	.	.	.	Oudh Sessions Cases.
O W.N.	.	.	.	Oudh Weekly Notes
Pat	.	.	.	Indian Law Reports, Patna Series.
P L I.	.	.	.	Patna Law Journal.
P.L.T.	.	.	.	Patna Law Times.
P L W.	.	.	.	Patna Law Weekly.
†P L R.	.	.	.	Punjab Law Reporter.
†P.R.*	.	.	.	Punjab Record.
†P.W.R.*	.	.	.	Punjab Weekly Reporter.
Rang L R.	.	.	.	Rangoon Law Reports.
Ratanlal	.	.	.	Ratanlal's Unreported Criminal Cases (Bombay).
S L R.	.	.	.	Sind Law Reporter.
U.B.R.	.	.	.	Upper Burma Rulings.
Weir	.	.	.	Weir's Criminal Rulings (Madras).
W.R.*	.	.	.	Weekly Reporter (Calcutta).

* The Criminal portions of these Reports are referred to

† In these Reports the cases are known by their *numbers* and not by the pages on which they are printed From 1925, the P.L.R. is cited by Volumes and pages.

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—78A, 849, 937.

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U. Zawana—71.

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Uma Charan v. Joshein—350, 354.

Umakanta v. Kalpada—357A.

ADDENDA

Page 2, Note 2, *add*—

It is not the intention of the Procedure Codes that they should encourage the hindering of justice and all procedure is intended to help justice—*Bhagubhai Ranchhodas v. Bai Arvinda*, AIR. 1937 Cal. 334 (335).

Page 3, under the heading "Is the Code exhaustive?" add—

The Criminal Procedure Code is an exhaustive one, only with regard to matters specifically dealt with by it. Absence of any provision on a particular matter does not mean that there is no such power, and the Court may act on the principle that every

to be prohibited by law—
1940 N.L.J. 449, following
VII. 267 (F.B.) and *Rahim*
C.L.J. 595.

Page 5, under the heading "Proviso," add—

The normal rule of construction in the case of a proviso is that the proviso governs what goes before it and does not affect what follows after it—*Maung Thein Aung*, A.I.R. 1940 Rang 280 (281), 1940 Rang L R 507.

Page 18, Note 4, add—

190
Mot
Kha
10 R.S. 203.

—*Devki Nandan v. Emp.*, 41 Cr.LJ 857, *Dev Samaj Counsel, Lahore v. Amrit Lal* 29 SLR 54, 7 RS 200 and *Tahil Ram* 3 IC. 322, 32 S.L.R. 134, 39 Cr.L.J. 298.

Page 19, under a new heading " ", add—

Section 162, Cr P C, is a
of sec. 1 (2) of the Code—*Hak*
AIR 1940 Lah 129, ILR 194
IC 562, AIR 1940 All 263, 19

Page 27, under the heading "Limitation", add—

will be the recollection, at least of truthful witnesses who do not imagine or invent, but it becomes more difficult for the accused person to defend himself and all the more difficult if he happens to be an innocent man—*Ret v Krishnan*, A.I.R. 1940 Mad 329 (335), 1939 M.W.N 1213, 1939 M.Cr.C 289, 190 I.C. 123.

Page 28, *add* at the bottom—

(18) a petition addressed to a Magistrate containing an allegation that an offence

Page 30, *add* at the bottom,—

Even if there had been some evidence to show that the grandfather of the applicant was born in England that would not be sufficient to bring the applicant within the provisions of sec 4, Cr. P. C., as regards the definition of "European British subject" which appears in sub-section (i) of that section. In order that the applicant should bring himself within the four corners of that definition, he will have to show that his grandfather was of European descent—*Plucknett v. Emp.* 41 Cr. L.J. 72 (79), 184 I.C. 757, A.I.R. 1939 Cal 545, I.L.R. (1939) 1 Cal 162, 43 C.W.N. 120.

Page 49, after *Bejoy Krishna v. Shyam Narain*, add—

41 Cr.L.J. 442, 187 I.C. 310, 1 L.R. (1939) 2 Cal. 532.

Page 82, at the end of Note 70, add—

A servant acting under the direct orders of his master should not be punished as severely as the latter—*Yar Bakht v. Emp.*, 41 Cr.L.J. 719 (723), 189 I.C. 173, A.I.R. 1940 Cal. 277, I.L.R. (1940) 1 Cal. 531, 71 C.L.J. 181, 44 C.W.N. 474.

Page 82, line 25, after "1936 Cr.C. 76", add—

Youth by itself is not a reason why the Court should evade its duty of sentencing the accused to death especially in the case of a cruel murder—*Chenna Reddi*, A.I.R. 1940 Mad 710 (716), 1940 M.W.N. 86, 1940 M.Cr.C. 54, I.L.R. 1940 Mad. 254.

Page 90, at the end of Note 77, add—

The provisos to sec. 33, Cr. P. C., do not extend the period of imprisonment which may be awarded under the provisions of sec. 65, I. P. Code. Therefore the sentences of two months' rigorous imprisonment passed upon the accused persons in default of payment of fines of Rs 50 each imposed upon them by a Second Class Magistrate under sec. 143, I. P. C., are illegal as they exceed one-fourth of the maximum period of imprisonment that can be awarded under the section—*Goukul Chandra Nandi v. Sribodh Chandra Banerjee*, 41 Cr.L.J. 957, 190 I.C. 598, 21 P.L.T. 795, A.I.R. 1941 Pat. 48, 7 B.R. 58.

Page 94, after "Mt. Champa Pasin... 29 Cr.L.J. 325", add—

This ruling has been followed in *Ragho Prasad v. Emp.*, 40 Cr.L.J. 759, 183 I.C. 224, A.I.R. 1939 Pat. 388, 20 P.L.T. 403, where it has been held that the imposition of separate sentences was not justified where the acts constituting two different offences form part of the same transaction against the same accused (The High Court set aside the sentence under sec. 279, I. P. C., in this case where the accused was convicted and sentenced under both secs 279 and 338 I. P. C., by the Magistrate.)

Page 97, at the end of Note 84, add—

Chanan Singh, A.I.R. 1940 Lah. 388, I.L.R. 1940 Lah. 143.

Page 114, at the end of the first paragraph of Note 113A, add—

Jograj Mahto v. Emp., A.I.R. 1940 Pat. 696 (698).

Page 115, after *Raja Mia v. Emp.*, add—

41 Cr.L.J. 744, 189 I.C. 480, A.I.R. 1940 Cal. 321,

Page 121, after *Raja Mia v. Emp.*, add—

41 Cr.L.J. 744, 189 I.C. 480, A.I.R. 1940 Cal. 321,

Page 121, at the bottom, add—

The Sub-Inspector's asking the constables to bring a person to the *thanah* with the papers is in no sense a direction for arrest as contemplated by sec. 56, Cr. P. C., which requires an order in writing—*Gulabi Mahto v. Emp.*, 41 Cr.L.J. 742, 189 I.C. 539, A.I.R. 1940 Pat. 361, 21 P.L.T. 144.

Page 135, at the end of the Note 151, add—

41 Cr.L.J. 500, 187 I.C. 682.

Page 137, at the end of Note 154, add—

The procedure of the Sessions Court upholding a sentence of imprisonment is to issue a warrant to the jail under sec. 383, Cr. P. C., and where the accused is on bail and is not present the Court issues a warrant for his arrest to a Police Officer under sec. 77, Cr. P. Code. There is no procedure laid down by the Code that the Court should ask the sureties to ask the accused to surrender—*Mumtaz v. Chhutwa*, 41 Cr.L.J. 741 (742), 189 I.C. 468, A.I.R. 1940 All. 386, 1940 A.L.J. 309.

Page 140, at the end of Note 160, add—

Reading sec. 75 (1), sec. 1 (2), sec. 82 and sec. 83, Cr. P. C., together it is clear and beyond all question that the warrant contemplated by sec. 75 is a warrant issued by a Court in British India and that such warrant is executable at any place in British India within or without the local limits of the jurisdiction of the Court issuing the warrant. There is no provision in the Cr. P. Code authorizing the issue of a warrant to be executed at any place outside British India. Section 82, Cr. P. C., empowers a Magistrate in British Baluchistan to issue a warrant of arrest which may be executed at any place in British Baluchistan. Just as a Court of British India has no power under the Cr. P. Code to issue a warrant for execution at a place outside British India, so as applied side British n the Balu- le has been Territories, rritories can and fallacious.

No doubt the Cr. P. Code has been extended in its application to British Baluchistan and to the Baluchistan Agency Territories, but when the Cr. P. Code is read by a Magistrate in British Baluchistan or in the Baluchistan Agency Territories, it must be read as if all references to British India in the Code of Criminal Procedure were references to British Baluchistan and the Baluchistan Agency Territories—*Karimbux*, A.I.R. 1940 Sind 154, 42 Cr.L.J. 49, 190 I.C. 661, approving *Tahilram Khanchand v.*

Emp., AIR. 1938 Sind 46, 173 I.C. 322, 32 S.L.R. 134, 39 Cr.L.J. 298; *Devki Nandan v. Emp.*, 41 Cr.L.J. 857, 190 I.C. 203, A.I.R. 1940 Pesh. 30. The Court in Baluchistan must proceed under the provisions of the Extradition Act (XV of 1903)—*Devki Nandan v. Emp.*, supra; *Tahilram Khanchand v. Emp.*, supra.

Page 140, at the bottom, add—

The provisions of this section, in the case of a warrant to be executed outside the local limits of jurisdiction, would override the express direction of sec. 77, Cr. P. C., that a Presidency Magistrate must direct the warrant to a police officer. The power outside the local limits of the jurisdiction or removed from the local limits, is one of cumspection. In any case warrants must not be sufficiently definite either in the name of the person to whom the warrant is addressed or in the description of the person to be arrested, are invalid—*Sagarmal Khemraj*, AIR. 1940 Bom. 397, 42 Bom.L.R. 904.

Page 142, after sec. 86, add—

161A. The effect of secs. 85 and 86 is that the person arrested outside the local limits of the jurisdiction of the Court issuing the warrant has to be taken before a Magistrate or Commissioner or District Superintendent of Police, and such Magistrate or Commissioner or District Superintendent has to satisfy himself that the person arrested appears to be the person intended by the Court which issued the warrant, and when so satisfied he is bound to direct the removal of the arrested person in custody to the Court which issued the warrant. The Magistrate is not entitled to institute an inquiry under sec. 186, Cr. P. Code—*Sagarmal Khemraj*, AIR. 1940 Bom. 397 (398), 42 Bom.L.R. 904.

Page 156, Note 187, at the end under the heading "Scope", add—

The discretion under this section must be exercised judicially, and it should be exercised in such a way as not to conflict with the policy of the Legislature as disclosed in sec. 162, Cr. P. C., and in secs. 123 to 125, Evidence Act. Statements made to the police are in their nature confidential and sec. 162, Cr. P. C., illustrates the limited purposes for which their production should be required. It is also necessary to bear in mind, that under sec. 125, Evidence Act, a police officer cannot be compelled to say whence he got any information as to the commission of any offence. No exception can be made in favour of a statement made by the informant—*Bilal Mahomed*, AIR. 1940 Bom. 361, 42 Bom.L.R. 787, 42 Cr.L.J. 58, 190 I.C. 779, I.L.R. 1940 Bom. 768.

Page 161, after *K. Hoshide v. Emp.*, add—

I.L.R. (1940) 1 Cal. 231.

Page 164, in Note 199, add—

Contents of search-warrant.—The search-warrant, which does not contain a description of the boundaries of the shop to be searched, is ineffective—*Crown v. Prahlad*, 1939 N.L.J. 357. But if the description in the warrant is otherwise adequate to identify the place without ambiguity it is immaterial that the boundaries are not given—*Govind Prasad*, 42 Cr.L.J. 32, 190 I.C. 764, 1940 N.L.J. 297.

Page 187, under the heading "(g) Oudh Chief Court", after "11 R.O. 156", add—

One has to see not whether on the facts the persons against whom an order under sec. 106, Cr. P. C., is passed did commit a breach of the peace but whether they were convicted of an offence which necessarily involves a breach of the peace. If the offence is one in which a breach of the peace may have been committed in the circumstances of the case but which in other circumstances does not necessarily involve a breach of the peace an order under sec. 106, Cr. P. C., cannot be passed—*Akhil Husain v. Emp.*, 41 Cr.L.J. 505, 187 I.C. 808, 1940 O.W.N. 423, AIR. 1940 Oudh 323, 1940 O.L.R. 248.

Page 188, after *Maung Kyi Nyo*, add—

1940 Rang.L.R. 256.

Page 190, under the heading "(g)", after "(Lah)", add—

AIR. 1924 Lah. 311, 71 I.C. 879; *Akhil Husain v. Emp.*, 41 Cr.L.J. 505, 187 I.C. 808, 1940 O.W.N. 423, AIR. 1940 Oudh 323, 1940 O.L.R. 248.

Page 190, after the heading "(j)", add—

(k) offence under sec. 510 I.P. Code—*Mekala Ventatappa*, AIR. 1940 Mad. 755, 1940 M.Cr.C. 125, 1940 M.W.N. 531, 52 M.L.W. 66, 42 Cr.L.J. 16, 191 I.C. 240.

Page 198, after *Maahir Gope v. Samrathi Singh*, add—

41 Cr.L.J. 746, 189 I.C. 457, 21 P.L.T. 652.

Page 205, after *Mahabir Gope v. Samrathi Singh*, add—

41 Cr.L.J. 746, 189 I.C. 457, 21 P.L.T. 652.

Page 212, at the end of the second paragraph of Note 242, *add*—

A person who makes a seditious speech, or who is found on one occasion only circulating notices which may have the effect of promoting enmity between classes, may possibly be prosecuted under sec. 153-A, I P. C., but he cannot be proceeded against under sec. 108, Cr. P. Code—*Swami Sarupanand*, 42 Cr.L.J. 35 (37), 190 I.C. 805, 1940 O.W.N. 1018.

Page 213, at the end of the second paragraph of Note 243, *add*—

Swami Sarupanand, 42 Cr.L.J. 35 (36), 190 I.C. 805, 1940 O.W.N. 1018.

Page 214, after *Jagannath Prasad v. Emp.*, *add*—

41 Cr.L.J. 713, 189 I.C. 74,

Page 221, just above the heading "With sureties," *add*—

The accused was found walking about midnight on a *bandh* which was apparently used as thoroughfare. On being questioned by the *dafadar* he replied that he was going to a marriage party and that he had other companions with him. Later on three other persons came out of a reservoir. Held that on the facts stated, cl. (a) of sec. 109, Cr. P. C., had no application to the case and that no order could be passed under cl. (b) in absence of evidence to show that the statement made by the accused was untrue. The statement of the *dafadar* that the accused, after the arrest had been effected, had stated before him that he had been invited by a person to commit theft, was inadmissible under sec. 26, Evidence Act—*Karu Kandu v. Emp.*, 41 Cr.L.J. 777, 189 I.C. 641, A.I.R. 1940 Pat. 410, 21 P.L.T. 171.

Page 228, at the end, *add*—

But the Bombay High Court did not follow this view of the Calcutta High Court in *Hanmantrao Annarao Kalgil*, 41 Cr.L.J. 686, I.L.R. 1940 Bom. 397, 188 I.C. 850, A.I.R. 1940 Bom. 204, 42 Bom.L.R. 353. According to it, a Magistrate, in order to have jurisdiction, must receive information that the person to be dealt with is within the limits of his jurisdiction. The section cannot grammatically be read as referring to the place where the acts on which an order is to be based were committed. The words of the section do not refer to the place where the person proceeded against became a robber or a receiver of stolen property and so forth; it refers merely to the place where he was when the information was received. When it comes to proving the truth of the information, no doubt the words of the section must be construed in a common sense manner, and a person can be said to be within the jurisdiction of a Magistrate if he was ordinarily within the jurisdiction of the Magistrate. The mere fact that on the particular date on which the information was received he had gone temporarily out of the jurisdiction would not prevent the section from applying. But where the evidence in the case shows that the person proceeded against was not in fact within the local limits at the time when the information was received, and had not left such limits for a purely temporary purpose, the Magistrate had no jurisdiction to proceed against him.

Page 249, after *In re, Muthuswami*, *add*—

I.L.R. 1940 Mad. 335,

Page 249, after *Jagannath Prasad v. Emp.*, *add*—

41 Cr.L.J. 713, 189 I.C. 74,

Page 258, after "*Sakib Dino* Sind 148", *add*—

; *Sumar*, 41 Cr.L.J. 937 (938), 190 I.C. 532, A.I.R. 1940 Sind 175.

Page 259, after the first paragraph, *add*—

Sub-section (3) of sec. 117, Cr. P. C., provides for a temporary order in an emergency but such order must have some direct relation to the object for which the proceedings are taken. An order under sec. 117, Cr. P. C., is in the nature of an *interim* order and must be of a kind which could be made in a permanent order in the proceedings. The temporary order under sec. 117, Cr. P. C., must be capable of direct relation to the application under secs. 107, 108, 109 and 110, Cr. P. C., on which the proceedings are based and it is not intended to apply to an offence that has no relation whatever to the object of the proceedings under the Cr. P. C., no relation whatever to proceedings under Chap. VIII, Cr. P. Code. For instance sec. 117, Cr. P. C., could not be said to apply to an offence relating to the adulteration of food or drugs, or, to an attempt to abet or the abetment of the offence of perjury—*Sumar*, 41 Cr.L.J. 937, 190 I.C. 532, I.L.R. 1940 Kar. 494, A.I.R. 1940 Sind 175. It may well be urged that a Court in revision is not in a position, as is the Magistrate, to understand the emergency and the necessity for the order under sub-section (3) of sec. 117, Cr. P. C., and will not substitute its own opinion for that of the Magistrate; yet the order of the Magistrate must have a legal basis though proceedings under this Chapter are only of a quasi-judicial nature—*Ibid*.

Page 266, after *Jasoda Lekhraj v. Emp.*, *add*—

40 Cr.L.J. 703, 182 I.C. 698, I.L.R. 1939 Kar. 662, 12 R.S. 31.

Page 282, at the bottom, add—

Under the provisions of sec. 123 (6), Cr. P. C., the sentence of rigorous imprisonment for one year in case of failure to give security for good behaviour, where proceedings have been taken under sec. 108, Cr. P. C., is illegal—*Swami Sarupanand*, 42 Cr.L.J. 35, 190 I.C. 805, 1940 O.W.N. 1018.

Page 293, after first three lines, add—

The provisions of the sections in Chapter X of the Cr. P. C., relate to the existing state of affairs and not to the possibility of future results. Assuming that a nuisance might be caused in future, that must be left to be dealt with if and when occasion arises—*Rameshwar*, 40 Cr.L.J. 444 (448), 180 I.C. 511, A.I.R. 1939 Bom. 92, 41 Bom.L.R. 84, 11 R.B. 301.

Page 306, after "*Abu Hussain Shaikh v. Emp.*," add—

41 Cr.L.J. 864, 190 I.C. 228, I.L.R. (1940) 2 Cal. 110,

Page 306, after "*Jiblal v. Gena* Pat 229", add—

See also *Kewal Saran v. Kamla Pati*, A.I.R. 1940 Pat. 717 (718), 21 P.L.T. 793.

Page 314, at the end of Note 354, add—

When the jury one of the jurors has already given the verdict, the jury and the constitution of the jury stands the report of the majority cannot be acted upon. In such cases, the jury must not deal with the defect, appoint a fresh jury and dispose of the case according to law—*Kewal Saran v. Kamla Pati*, A.I.R. 1940 Pat. 717, 21 P.L.T. 793.

Page 319, at the end of Note 357A, add—

The provisions of sec. 139 A, Cr. P. C., are clearly designed to ensure that where there is reliable evidence in support of the denial of the existence of the public right the Magistrate shall have no jurisdiction to pronounce on the cogency of that evidence but refer the matter to a Civil Court. When the Magistrate does not direct his mind at all to ascertaining whether there is any evidence in support of the denial of the existence of the public right and takes upon himself to decide the question whether a public right exists or not he usurps the function of a Civil Court and deprives the party concerned of the right to have the matter decided by that Court. Where, therefore, the Magistrate has taken evidence with regard to the existence of the public right and on a consideration of that evidence he has been able to decide that the right does exist, it cannot be contended that the order should not be set aside merely because the Magistrate did not comply with the provisions of sec. 139-A, Cr. P. Code—*Muni Lal Agarwala v. Public of Bhagalpur*, 42 Cr.L.J. 34, 190 I.C. 879, 21 P.L.T. 843, A.I.R. 1941 Pat. 38, 7 B.R. 36.

Page 328, after *Haji Sulleman Yusuf Kumbhar*, add—

I.L.R. 1940 Kar. 425,

Page 331, at the end of Note 364, add—

It is true that sec. 144, Cr. P. C., gives wide powers to the Magistrate and that imminent danger to the public peace justifies the subordination of private interests. At the same time care should be taken to see that use of this section is not invoked by one party to dispute in order to obtain material advantage over the other—*Viru Kamu v. Dewandas Jhamandas*, 41 Cr.L.J. 952 (953), 190 I.C. 618, A.I.R. 1940 Sind 158, I.L.R. 1940 Kar. 508.

Page 335, after *Abu Hussain Shaikh v. Emp.*, add—

41 Cr.L.J. 864, 190 I.C. 228, I.L.R. (1940) 2 Cal. 110,

Page 345, after *Viru Kamu v. Dewandas Jhamandas*, add—

41 Cr.L.J. 952, 190 I.C. 618, I.L.R. 1940 Kar. 508,

Page 346, after *Damon Gope v. Het Narain Singh*, add—

41 Cr.L.J. 907, 180 I.C. 425,

Page 346, after *Viru Kamu v. Dewandas Jhamandas*, add—

41 Cr.L.J. 952, 190 I.C. 618, I.L.R. 1940 Kar. 508,

Page 348, at the end of Note 377, add—

There is no justification for periodical recourse to sec. 144, Cr. P. C., on the plea of emergency in cases where emergency exists only by reason of neglect of the authorities to take proper order when the facts first came to their notice. What the Court deprecates is the habitual and unjustifiable use of sec. 144, Cr. P. C., as a substitute for secs. 107 and 145, Cr. P. Code—*Viru Kamu v. Dewandas Jhamandas*, 41 Cr.L.J. 952 (953), 190 I.C. 618, A.I.R. 1940 Sind 158, I.L.R. 1940 Kar. 508.

Page 349, after *Abu Hussain Shaikh v. Emp.*, add—

41 Cr.L.J. 864, 190 I.C. 228, I.L.R. (1940) 2 Cal. 110,

Page 351, after *Abu Hussain Shaikh v. Emp.*, add—
41 Cr.L.J. 864, 190 I.C. 228, I.L.R. (1940) 2 Cal. 110,

Page 351, at the end of Note 379, add—

It would be putting a somewhat narrow construction on the word "frequenting" to exclude a member of the public who occupies a house within a defined area from the category of those who frequent that area. The words "or to the public generally when frequenting or visiting a particular place" are wide enough to include all members of the public within the defined area or at the defined place, whether he or she is present there "frequently", e.g., as a resident—or merely casually or occasionally, e.g., as a "visitor"—*Bhagwati Prasad v. Emp.*, A.I.R. 1940 All. 465 (466, 467), 42 Cr.L.J. 120, I.L.R. 1940 All. 662, 1940 A.L.J. 547, following *Shander v. Emp.*, A.I.R. 1935 All. 552, 155 Cr.L.J. 125, 1935 I.C. 228, 1935 I.L.R. 1935 Mad. 242, 131 Cr.L.J. 125, 1931 Ind. Rul. 640.

absolutely clear.

When therefore the Act says that a "particular place" has to be defined it means what it says, namely that the public must be informed with certainty of the exact place in, at or within which the proscribed acts are forbidden to them. It must not be a matter of doubt, inference, calculation or inquiry. The order itself must define with particularity the place to which the prohibition extends. The order must specify the place or area of its operation with such certainty that, in the minds of those to be affected by it, there can be no reasonable room for mistake. Therefore the somewhat casual reference to the village of Haswa in the words "this order shall remain in force within the local limits of the boundary of Haswa" is not a sufficient compliance with sec. 144 (3), Cr. P. Code—*Bhagwati Prasad v. Emp.*, supra, following *Belvi*, A.I.R. 1931 Bom. 325, 134 I.C. 344, 32 Cr.L.J. 1144, 33 Bom.L.R. 673 and *Sat Narain v. Emp.*, A.I.R. 1939 All. 746, 185 I.C. 172, 41 Cr.L.J. 121, I.L.R. 1939 All. 934, 1939 A.L.J. 1011.

Page 356, at the end of Note 381, add—

The Local Government has power under sub-section (6) of sec. 144, Cr. P. C., to extend an order already in force. Section 144, Cr. P. C., does not permit the Local Government to resuscitate an order which is no longer in force—*Chanan Singh v. Emp.*, 42 Cr.L.J. 90, 191 I.C. 162, A.I.R. 1940 Lah. 459.

Page 370, after *Sheoprasad Shriram v. Govindram Hardit*, add—
41 Cr.L.J. 799, 189 I.C. 774,

Page 375, after *Sheoprasad Shriram v. Govindram Hardit*, add—
41 Cr.L.J. 799, 189 I.C. 774,

Page 381, after *Rahimalishah v. Emp.*, add—
I.L.R. 1940 Kar. 421,

Page 384, after *Sheoprasad Shriram v. Govindram Hardit*, add—
41 Cr.L.J. 799, 189 I.C. 774,

Page 384, after "*Sheoprasad Shriram v. 375*", add—

But where a person claims to be in possession of the entire village, it is not permissible under this section for a Magistrate to divide the village into parts. *Pandian*, 42 Cr.L.J. 67, 191 I.C. 53, M.L.J. 355, 52 M.L.W. 346

Page 399, at the end of Note 416, add—

There is no provision in the Cr. P. C., for reference of any matter to arbitration or delegation of its power by Criminal Court to an arbitrator. It appears from sec. 145, Cr. P. C., that it is for the Court itself to make an enquiry and to find out who is in actual possession. The procedure laid down under sec. 145, Cr. P. C., does not contemplate that the question as to who is in actual possession should be delegated, even by the consent of the parties, to an arbitrator. The section directs the Magistrate himself to receive the evidence adduced by the parties and, on a consideration thereof, to come to a decision—*Ahmad Ullah v. Srinivas Joshi*, A.I.R. 1941 All. 42, 1940 A.L.J. 758.

Page 402, after *Sheoprasad Shriram v. Govindram Hardit*, add—
41 Cr.L.J. 799, 189 I.C. 774,

Page 404, after *Hotchand Ramchand v. Emp.*, add—
42 Cr.L.J. 27, 190 I.C. 746, I.L.R. 1940 Kar. 504,

Page 404, after *Muhammad Ali v. Shamsul Haq*, add—
I.L.R. 1940 Kar. 162,

Page 419, after *Maung Kan v. Maung Po Tok*, add—
1940 Rang.L.R. 157,

Page 421, after "*Raj Nandan v. Chhedi*. . . 1933 Pat. 117", add—

Bahali Singh v. Safayat Gop, 39 Cr.L.J. 379, 173 I.C. 756, A.I.R. 1938 Pat. 105, 10 R.P. 449, 4 B.R. 335.

Page 427, at the end of the last but one paragraph, add—

In *Chandeshwar Prasad Narayan Singh v. Dwarka Singh*, 1937 P.W.N. 571, 171 I.C. 593, A.I.R. 1937 Pat. 557, 38 Cr.L.J. 1096, 4 B.R. 41, 10 R.P. 223 and *Bahali Singh v. Safayat Gop*, 39 Cr.L.J. 379, 173 I.C. 756, A.I.R. 1938 Pat. 105, 10 R.P. 449, 4 B.R. 335, the High Court thought it proper to interfere with the finding of fact arrived at by the Magistrate although he committed no error of jurisdiction.

Page 449, after *Badridas v. Sohan Lal*, add—

42 Cr.L.J. 94, 191 I.C. 171, A.I.R. 1940 Cal. 545, I.L.R. (1940) 1 Cal. 468,

Page 459, after *Plucknett v. Emp*, add—

41 Cr.L.J. 72, 184 I.C. 757,

Page 465, after "*Lalit Mohan* A.I.R. 1922 Cal. 342," add—

See also *Bharosa v. Crown*, I.L.R. 1940 Nag. 679 (685).

Page 465, after "See also *Subedar* in Note 480", add—

and *Shewakram Issardas v. Emp*, 40 Cr.L.J. 661 (663), 182 I.C. 464, A.I.R. 1939 Sind 130, 12 R.S. 8

Page 467, after *Bherumal Khanchand v. Emp.*, add—

39 Cr.L.J. 57, 10 R.S. 134,

Page 467, in Note 484A, add—

The prohibition contained in sub-section 2 of this section is not absolute but is qualified by the phrase 'without the order of a Magistrate'—*Thakurs*, 41 Cr.L.J. 778, 189 I.C. 655, 1940 O.W.N. 655, A.I.R. 1940 Oudh 413, 1940 O.L.R. 492.

Page 470, at the bottom, add—

Sub-section (3) of sec 156, Cr. P. C., does not alter the rule laid down in a long line of cases that it is the duty of a Magistrate on presentation of a complaint of an offence immediately to proceed in the manner laid down in Chap XVI. Section 156 (3), Cr. P. C., relates to a stage before the Magistrate has taken cognizance of the offence and not after, but it does not mean that a Magistrate can refuse to take cognizance of an offence upon a complaint made to him within the definition of sec. 4 (1) (b), Cr. P. Code. A Magistrate on receipt of a complaint is bound to examine the complainant under sec. 200, Cr. P. C., and proceed in accordance with the following sections. Therefore, when a complaint of an offence is made to a Magistrate as such, he cannot refuse to take cognizance of it and send it to the police for enquiry under sec. 156 (3), Cr. P. C., and then dispose of it by executive orders and by what is known as a "B" summary—*Shahdad Gada v. Emp*, A.I.R. 1940 Sind 215, I.L.R. 1940 Kar. 431

Page 472, after "Statement of Objects and Reasons (1914)", add—

After the amendment of sec 157, Cr. P. C., it is not imperative on the Police to arrest the suspects as soon as they seize some property from their houses and elicit confessions from them. They have indeed a discretion in arresting them. The Police are entitled to get the suspects at the place of investigation and also to record their statements under sec. 162, Cr. P. C., and further to defer their arrest at their discretion; but all this power does not, by necessary implication, authorise the Police to detain the suspects. When the suspect's examination is over, he must either be arrested or allowed to depart. Informal detention without arrest is prohibited—*Dinanath Ganpat Rai*, A.I.R. 1940 Nag. 186, I.L.R. 1940 Nag. 232, 41 Cr.L.J. 757 (760), 189 I.C. 591.

Page 474, after "*Dinanath Ganpat Rai*", add—

41 Cr.L.J. 757, 189 I.C. 591,

Page 485, after "*Mor Mahomed v. Emp.*," add—

41 Cr.L.J. 924, 190 I.C. 499, I.L.R. 1940 Kar. 487,

Page 490, after "*Dinanath Ganpat Rai*", add—

41 Cr.L.J. 757, 189 I.C. 591,

Page 490, after "*Hakam Khuda Yar v. Emp.*," add—

I.L.R. 1940 Lah. 242,

Page 490, after "*Baldeo v. Emp.*," add—

I.L.R. 1940 All. 396,

Page 490, at the bottom of the page, add—

According to the Nagpur High Court the provisions of sec. 27 of the Evidence Act are still valid and are not affected by their Lordships' judgment in *Pakala Narayana Swami v. Emp*, 40 Cr.L.J. 364 (P.C.)—*Bharosa v. Crown*, I.L.R. 1940 Nag. 679 (684), following *Mayadhar Pothal*, 40 Cr.L.J. 625, 181 I.C. 1001, A.I.R. 1939 Pat. 577, 1939 P.W.N. 300, 18 Pat. 450, 20 P.L.T. 420.

Page 492, after "*Girdhari Teli*", add—

A.I.R. 1940 Pat. 605, 6 B.R. 693, 188 I.C. 429, 1940 P.W.N. 625,

Page 495, at the end of the first paragraph of Note 502D, add—

This section excludes the statements mentioned in it only during the *enquiry or trial in respect of any offence under investigation at the time when the statement was made*. It does not apply to every proceeding whether civil or criminal—*Bhaiya Saheb v. Ramnath Rampatlap Bhadupati*, I.L.R. 1940 Nag. 280 (292).

Page 497, after "*Shivlal v. Emp.*," add—

I.L.R. 1940 Nag. 320,

Page 502, after "*Shivlal v. Emp.*," add—

I.L.R. 1940 Nag. 320,

Page 502, before the last paragraph, add—

Where the evidence of the police investigating officer is interpolated during the cross-examination of a prosecution witness, there is no ruling opposed to the course taken, although in *Nga U Khne*, 36 Cr.L.J. 665, 155 I.C. 66, A.I.R. 1935 Rang. 98, 13 Rang. 1, 1935 Cr.C. 307, there is a dictum which shows that a different course may often be expeditiously taken—*Brahmayya v. The King*, A.I.R. 1938 Rang. 442, 40 Cr.L.J. 265, 179 I.C. 783, 11 R.Rang. 347.

Page 505, at the end of the heading 'Contradict', add—

A witness who had been examined by the Police can reasonably be asked whether a particular version which he was giving in Court was given by him to the Police. If he did give it, he is not contradicted. But if he did not, or there is no mention of it in the diary, the value to be attached to the omission will depend upon the circumstances and may even mean the rejection of the version. The question in any case would be perfectly relevant and legitimate. However, rejection of the question cannot be a ground for transfer—*Lal Bahadur Raut v. Emp.*, 39 Cr.L.J. 527 (528), 175 I.C. 110, A.I.R. 1938 Pat. 238, 4 B.R. 533, 10 R.P. 581.

Page 516, after "*Dinanath Ganpat Rai*", add—

41 Cr.L.J. 757, 189 I.C. 591,

Page 516, after "*Nanamuthu Kannappan*", add—

I.L.R. 1940 Mad. 428,

Page 518, after the second paragraph in Note 512A, add—

Section 164, Cr. P. C., cannot be rendered nugatory by the stock argument that if the statement of a witness is recorded under sec. 164, Cr. P. C., the evidence of the witness should be discarded. If this were accepted as universally true, there will be no scope for taking action under sec. 164, Cr. P. Code. If a statement of a witness is previously recorded under sec. 164, Cr. P. C., it leads to an inference that there was a time when the police thought the witness may change but if the witness sticks to the statement made by him throughout the mere fact that his statement was previously recorded under sec. 164, Cr. P. C., will not be sufficient to discard it. The Court, however, ought to receive it with caution and if there are other circumstances on record which lend support to the truth of the evidence of such witness, it can be acted upon—*Parmanand v. Emp.*, A.I.R. 1940 Nag. 340 (346), 1940 N.L.J. 459, 42 Cr.L.J. 17, 190 I.C. 849.

Page 523, after "*Kala Mohammad Akbar v. Emp.*," add—

I.L.R. 1940 Lah. 217,

Page 526, under the heading "Signature", add—

If an inadvertent omission to obtain the signature of the accused to a statement made under sec. 164, Cr. P. C., were to vitiate the confession, sec. 533, Cr. P. C., would be rendered entirely otiose. It is exactly for a case of this nature that the provisions of sec. 533, Cr. P. C., are enacted. Where in such a case not only has the Magistrate given evidence to show that the statement was made as recorded by him, but the accused himself has admitted that he made the statement, there can be no possible prejudice to the accused in giving proof that the statement actually was made—*Shamla Hardeo Teli v. Emp.*, A.I.R. 1941 Nag. 17 (19), 1940 N.L.J. 497.

Page 530, after "*Perumal Kundumban*", add—

42 Cr.L.J. 64, 191 I.C. 37,

Page 570, after "*Huda v. Ali Hussain*", add—

41 Cr.L.J. 812, 189 I.C. 876,

Page 584, after "*Huda v. Ali Hussain*", add—

41 Cr.L.J. 812, 189 I.C. 876,

Page 591, under sec. 186, add—

571A. Scope :—This section deals with the case of a Magistrate seeing reason to believe that any person within the local limits of his jurisdiction has committed an

offence without such limits, and in that case he can send the person to the Magistrate having jurisdiction to inquire into the offence. It is dealing with a case in which the Court which has jurisdiction, has not taken cognizance of the matter, and the offence is brought to the notice of a Magistrate who is not competent to try it, in which case he may send it to a Magistrate who is competent. It does not override the provisions of secs. 75 to 86, Cr. P. C., which deal with the execution of warrants of arrest—*Sagarmal Khemraj*, A.I.R. 1940 Bom. 397 (398), 42 Bom L.R. 904.

Page 609, at the end of Note 592, add—

It is not a condition requisite for the initiation of proceedings in a Criminal Court that there should necessarily be a person named as the offender. The Magistrates mentioned in sec. 190, sub-section (1) are empowered to take cognizance of an offence whether committed by a particular individual or individuals named in the complaint the Magistrate the complaint, other persons by the Magistrate he is empowered to confer upon him by sec. 190, Cr.P.C. 41 Cr.L.J. 750 (752), following *Dedar Buksh v. State*, 16, 41 Cal. 1013, 18 C.W.N. 921 and *Mehrab v. Emp.*, A.I.R. 1924 Sind 11, 85 I.C. 885, 26 Cr.L.J. 181, 17 S.L.R. 150 (F.B.).

Page 632, after "*Dharmumal v. Tenumal*", add—

41 Cr.L.J. 821, 190 I.C. 119, I.L.R. 1940 Kar. 500,

Page 632, after "*Assudomal Ramandas v. Jhamandas Hotchand*", add—

41 Cr.L.J. 861, 190 I.C. 222, I.L.R. 1940 Kar. 435,

Page 633, at the end of Note 614C, add—

Nabibux, A.I.R. 1940 Sind 209 (212), I.L.R. 1940 Kar. 414.

Page 634, after "*Dharmumal v. Tenumal*", add—

41 Cr.L.J. 821, 190 I.C. 119, I.L.R. 1940 Kar. 500,

Page 634, after "*Sadhuram Chimandas v. Chimandas Budhuram*", add—

I.L.R. 1940 Kar. 275,

Page 638, after "*Sher Mohammad v. Emp.*", add—

I.L.R. 1940 Lah. 396,

Page 638, after "*Ram Prasad Dube*", add—

A.I.R. 1940 Oudh 424, 189 I.C. 702, 1940 O.L.R. 498, 1940 O.W.N. 917,

Page 638, at the end of the heading "Clause (a)" in Note 615A, add—

Where a boy, aged 14, sent a telegram to the Sub-divisional Officer alleging that his father's life was in danger and requesting the Sub-divisional Officer to hasten to the spot, the Sub-divisional Officer or some one to whom he is subordinate. In the absence of such a complaint the proceedings were invalid *ab initio*—*Tejnarayan Lal v. Emp.*, 42 Cr.L.J. 57.

Page 640, after "*Syed Khan*", 91 I.C. 36", add—

Nabibux, A.I.R. 1940 Sind 209 (211), I.L.R. 1940 Kar. 414

Page 646, after "*Ma E*", 11 R.R. 441", add—

Ganga Prasad Singh v. Emp., 45 C.W.N. 195 (196).

Page 648, after the first paragraph, add—

When false information to the police is followed by a complaint to a Court based on the same facts and the same charge, sec. 195 (1) (b), Cr. P. C., requires the complaint of the Court itself for the prosecution of the informant under sec. 211, I. P. C., in respect of the false charge to the police, even where the complaint to the Court is made by a person other than the informant—*Nabibux*, A.I.R. 1940 Sind 209 (210), I.L.R. 1940 Kar. 414.

Page 650, after the first paragraph in Note 621, add—

The words 'in relation to' make it clear that sec. 195 (1) (b), Cr. P. C., is sufficiently wide to cover cases where the offence alleged was committed in relation to a proceeding subsequently instituted in Court—*Nabibux*, A.I.R. 1940 Sind 209 (210), I.L.R. 1940 Kar. 414.

Page 651, after "*Sashi Bhusan v. Fulkhan*", add—

41 Cr.L.J. 951, 190 I.C. 448, A.I.R. 1940 Cal. 454, I.L.R. (1940) 2 Cal. 158,

secs. 209 and 342, Cr. P. C., cast upon the Magistrate the duty to interrogate the accused if the facts and circumstances proved are of such a nature that they tend, if unexplained, to implicate the accused. The interrogation is to be made in order to afford him an opportunity for offering an explanation. Section 342, Cr. P. C.,—the same may be said of sec 209, Cr. P. C., as well—enables the Magistrate to examine the accused only if there are circumstances appearing against the accused in the evidence given by the prosecution and answers given by the accused in the absence of such evidence to questions put by the Magistrate, cannot be used for filling up gaps in the proof adduced by the prosecution. Where the evidence before the committing Magistrate which, even if taken at its face value, falls far short of making out a *prima facie* case against the accused and the Magistrate proceeds to examine the accused and records his answers, the examination of the accused cannot be said to have been duly recorded by him within the meaning of that expression in sec. 287, Cr. P. C., and consequently the presumption under sec. 80, Evidence Act, cannot apply to it—*Kuppamal*, A.I.R. 1941 Mad 1 (4, 5), 1940 M.W.N. 1105, 52 M.L.W. 710, following *Abdulla Ravuthan*, A.I.R. 1916 Mad 407, 30 I.C. 447, 39 Mad 770, 16 Cr.L.J. 623, *Mohideen Abdul Qadir*, 27 Mad. 238, 2 Weir 408 and *Basanta Kumar*, 26 Cal. 49.

Page 756, after "*Musahru v. Emp.*," add—
41 Cr.L.J. 931, 190 I.C. 517,

Page 764, after "*Mihi Lal*," add—
I.L.R. 1940 All 531,

Page 806, after "*Madho Singh v. Emp.*," add—
A.I.R. 1940 Oudh 396, 1940 O.L.R. 420,

Page 825, at the end of Note 757, add—

(24) Where there was only one complaint filed under secs. 124-A and 153-A, I. P. C., and only one sanction was obtained for the prosecution of the accused from the Government, there was no need for a separate trial under sec. 153-A, I. P. Code. The accused could have been convicted under sec. 153-A, I. P. C., in the trial under sec. 124-A, I. P. Code. The provisions of sec. 235, Cr. P. C., are quite clear in this respect. But where by this procedure of holding separate trials the accused has not in any way been prejudiced, the trial cannot be said to be illegal—*Vishambhar Dayal v. Emp.*, 42 Cr.L.J. 40 (41, 43), 190 I.C. 887, 1940 O.W.N. 965.

Page 826, at the end of Note 758, add—

(15) Where the offence under sec. 6, Merchandise Marks Act (IV of 1889), was not committed in the course of the same transaction as the offences of cheating, the joinder of these charges amounts to misjoinder of charges—*A. K. Sen v. Madhu Mongal Das*, A.I.R. 1940 Cal. 583.

Page 848, after "*Sar Kee v. The King*," add—
1940 Rang.L.R. 203,

Page 849, after "*Parmanand v. Emp.*," add—
42 Cr.L.J. 17, 190 I.C. 849,

Page 868, at the end of Note 786, add—

If a summons case is tried as a warrant case, the defect is cured by sec. 537, Cr. P. Code—*D. Moody v. Emp.*, A.I.R. 1940 Cal. 579, 45 C.W.N. 53.

Page 876, after "*Laxmi Prasad*," add—
41 Cr.L.J. 919,

Page 878, after "*Laxmi Prasad*," add—
41 Cr.L.J. 919,

Page 882, after "*Laxmi Prasad*," add—
41 Cr.L.J. 919,

Page 882, after "*Elias Arz Muhammad*," add—
I.L.R. 1940 Kar. 429,

Page 889, in the first line, after "1936 Cr.C. 514," add—

In *Mt. Daropiti v. Paras Ram*, A.I.R. 1941 Lah. 19 (22), 42 P.L.R. 678, Skemp. J., of the Lahore High Court, however, preferred to follow the view taken by the Rangoon High Court in *Ma Sin v. Maung Maung Lay*, A.I.R. 1936 Rang. 230, 163 I.C. 163, 37 Cr.L.J. 773, 14 Rang. 378.

Page 890, after "*Muhammad Alan*," add—
I.L.R. 1910 Kar. 119,

Page 892, at the end of Note 810, add—

The law does not require a categorical finding that the complaint is false but that the Magistrate should be of opinion that the accusation is false—*Mt. Daropiti v. Paras*

Ram, A.I.R. 1941 Lah. 19 (21), 42 P.L.R. 678. Surely a false accusation of rape is vexatious to the person accused—*Ibid*.

Page 896, after "*Muhammad Hashein v. Emp.*," add—
I.L.R. 1940 Kar. 470,

Page 903, at the end of Note 820, add—

It is permissible in a case where there are two charges arising out of the same transaction, one triable as a summons case and the other as a warrant case, for the Magistrate to try them together; but if he does so, he must follow the procedure laid down for warrant cases and he cannot, whilst proceeding with the two cases together, treat them separately. If he wishes to do that, he must deal with them separately from the inception. If he is dealing with the two cases together under one form of procedure, and makes an order of discharge on account of absence of the complainant, the order of discharge is one under sec. 259, Cr. P. Code. The order cannot be construed in one sense in respect of the warrant case and in another sense in respect of the summons case. The order does not prevent the lodging of a fresh complaint in respect of the same matter—*Kanji Vijpal v. Pandurang Keshav Rane*, A.I.R. 1940 Bom. 413, 42 Bom L.R. 902.

Page 904, at the end of Note 821A, add—

Section 252, Cr. P. C., does not make it obligatory on the Magistrate to summon all the witnesses whose names are given him by the complainant—*Musahru v. Emp.*, 41 Cr.L.J. 931 (934), 190 I.C. 517, A.I.R. 1940 Pat. 355, 21 P.L.T. 13, 19 Pat. 413.

Page 904, at the end of Note 821A, add—

Section 252, Cr. P. C., like other sections in Chap. 21, applies to warrant cases generally. It, therefore, applies to a case started on a police challan. The power given to the Magistrate under sec. 252 (2), Cr. P. C., may be exercised from time to time as the occasion requires—*Hansraj Hariwan v. Emp.*, A.I.R. 1940 Nag. 390 (391), 1940 N.L.J. 449.

Page 907, after "*Musahru v. Emp.*," add—

41 Cr.L.J. 931, 190 I.C. 517,

Page 916, in the 10th line after "(1938) 1 M.L.J. 403," add—

; *Oonna Mudali v. Emp.*, 42 Cr.L.J. 86, 191 I.C. 156, 1940 M.W.N. 530, 52 M.L.W. 65, (1940) 2 M.L.J. 215.

Page 916, after "*Beni Madho v. Emp.*," add—

A.I.R. 1941 Oudh 19 (20), 1940 O.L.R. 521, 190 I.C. 71, 1940 O.W.N. 923,

Page 927, at the end of Note 838, add—

The words "any remaining witnesses for the prosecution" in sec. 256, Cr. P. C., cannot be confined strictly to witnesses mentioned before the charge was framed. If witnesses have been accepted by the Court as competent for the prosecution at any stage before the point for further examination under sec. 256, Cr. P. C., arrives, even if that stage is after charge, they come under the category of "any remaining witnesses"—*Hansraj Hariwan v. Emp.*, A.I.R. 1940 Nag. 390 (392), 1940 N.L.J. 449.

Page 932, after "*Mirza Jaffar Beg v. Emp.*," add—

41 Cr.L.J. 948, 190 I.C. 561,

Page 932, in Note 845, add—

A Court is not bound to summon all the witnesses cited by an accused person and under provisions of sec. 257, Cr. P. C., it has power to refuse to summon all the witnesses on the ground that the application is made for the purpose of vexation or delay or for defeating the ends of justice. Where the Court refuses to summon witnesses on the ground that the accused has cited them for the purpose of delaying the case and the accused gives up those witnesses, he cannot subsequently make a grievance of it. If he has insisted on their being summoned and the Court has refused to do so, it will then be open to the accused to argue in the High Court that the trial Court has wrongly refused to summon his witnesses—*Vishambhar Dayal v. Emp.*, 42 Cr.L.J. 40 (43), 190 I.C. 887, 1940 O.W.N. 965. See also *Sukhraddas Hiranand v. Emp.*, 42 Cr.L.J. 80, 191 I.C. 127, A.I.R. 1940 Sind 193, I.L.R. 1940 Kar. 498.

Page 934, Note 874, at the end add—

See also *Bilal Mahomed*, A.I.R. 1940 Bom. 361, 42 Bom L.R. 787 quoted in the Addenda under page 156.

Page 939, at the end of first paragraph of Note 853, add—

See also *Kanji Vijpal v. Pandurang Keshav Rane*, A.I.R. 1940 Bom. 413, 42 Bom L.R. 902.

Page 943, at the end of Note 857, add—

If any Magistrate tries a case summarily which he cannot under sec. 260, Cr. P. C., do, he acts without jurisdiction, and an illegality of such a nature, going to the root

of the trial, clearly cannot be cured under sec. 537, Cr. P. Code—*Mahanand Kherajmal*, 41 Cr.L.J. 190, 185 I.C. 543, A.I.R. 1939 Sind 341, following *Bishu Shaik v. Saber Mollah*, 29 Cal. 409, 6 C.W.N. 713.

Page 945, *after* (XII), *add*—

(XIII) Offences under sec. 4 of the Bombay Prevention of Gambling Act (IV of 1887).

Page 946, under sec. 261, *add*—

Under sec. 15 of the Bengal Food Adulteration Act (VI of 1919), in the case of an offence committed within a municipality, no prosecution can be instituted without the consent in writing of the Chairman of the Commissioners. A provision of this sort, however, is not sufficient to make the Bengal Food Adulteration Act a Municipal Act. The intention of the legislature in referring to Municipal Acts under sec. 261 (b), Cr. P. C., was to provide that offences against Acts such as the Calcutta Municipal Act or the Bengal Municipal Act should be tried by Benches of Magistrates duly empowered, but this provision would not cover an Act of general application like the Bengal Food Adulteration Act—*Jagannarayan Haluwa v. The Bhatpara Municipality*, 45 C.W.N. 139.

Page 951, at the end of Note 867, *add*—

The words "if any" in sec. 263 (g), Cr. P. C., are not sufficient to override the requirements of sec. 342, Cr. P. C., which applies to all trials, including summary trials. If the Legislature had meant to exclude summary trials from the obligation to take the statement of the accused, it would have done so in clear terms. The words "if any" in sec. 263 (b), Cr. P. C., merely indicate that if the accused makes no statement there is nothing to record. Where the statement of the accused has not been taken at all, *prima facie* he is prejudiced—*Kondiba Balaji*, 42 Cr.L.J. 71, 191 I.C. 90, A.I.R. 1940 Bom. 314, 42 Bom.L.R. 695.

Page 994, *after* "*Fazal v. Emp.*," *add*—

42 Cr.L.J. 29, 190 I.C. 761, 42 P.L.R. 714,

Page 971, *after* "*Shewaram v. Emp.*," *add*—

I.L.R. 1940 Kar. 249,

Page 996, *after* "*Nebti Mondal*," *add*—

41 Cr.L.J. 910, 190 I.C. 457, 19 Pat. 369,

Page 997, *after* "*Parmanand v. Emp.*," *add*—

42 Cr.L.J. 17, 190 I.C. 849,

Page 998, *after* "*Nebti Mondal*," *add*—

19 Pat. 369,

Page 1003, *after* "*Musahru v. Emp.*," *add*—

41 Cr.L.J. 931, 190 I.C. 517,

Page 1008, *after* "*Bapurao Maroti*," *add*—

41 Cr.L.J. 894,

Page 1012, *after* "*Bapurao Maroti*," *add*—

41 Cr.L.J. 894,

Page 1013, *after* "*Bapurao Maroti*," *add*—

41 Cr.L.J. 894, 190 I.C. 283,

Page 1039, *after* "*Shewaram v. Emp.*," *add*—

I.L.R. 1940 Kar. 249,

Page 1041, *after* "*Bapurao Maroti*," *add*—

41 Cr.L.J. 894, 190 I.C. 283,

Page 1061, *after* "*Ganga Ram*," *add*—

I.L.R. 1940 All. 365,

Page 1066, *after* "*Dattatraya Sadashiv v. Emp.*," *add*—

I.L.R. 1940 Nag. 394,

Page 1072, *after* "*Dattatraya Sadashiv v. Emp.*," *add*—

I.L.R. 1940 Nag. 394,

Page 1111, *after* "*Horilal v. Emp.*," *add*—

I.L.R. 1940 Nag. 668,

Page 1117, *after* "*Fernandez* 22 Cr.L.J. 17," *add*—

Emp. v. Kondiba Balaji, 42 Cr.L.J. 71, 191 I.C. 90, A.I.R. 1940 Bom. 314, 42 Bom.L.R. 695;

Page 1118, *after* "*Emp. v. Kondiba Balaji*," *add*—

42 Cr.L.J. 71, 191 I.C. 90,

Page 1125, after "*Kondiba Balaji*," add—
42 Cr.L.J. 72, 191 I.C. 90,

Page 1131, after "*Beni Madho v. Emp.*," add—
A.I.R. 1941 Oudh 19 (20), 1940 O.L.R. 521, 190 I.C. 71, 1940 O.W.N. 923,

Page 1153, after "*Harswarup Chaubey v. Emp.*," add—
I.L.R. 1940 Nag. 195,

Page 1154, after "*Harswarup Chaubey v. Emp.*," add—
I.L.R. 1940 Nag. 195,

Page 1161, after "*Fazal v. Emp.*," add—
42 Cr.L.J. 29, 190 I.C. 761, 42 P.L.R. 714,

Page 1179, after "*Sukhramdas v. Emp.*," add—
42 Cr.L.J. 80, 191 I.C. 127, I.L.R. 1940 Kar. 498,

Page 1184, at the end of Note 1021, add—

Section 190, Cr. P. C., appears in a chapter dealing with conditions requisite for initiation of proceedings, whereas sec. 351, Cr. P. C., appears in a chapter dealing with matters arising out of proceedings already initiated. After a Magistrate has taken cognizance of an offence in one of the three methods mentioned in sec. 190, Cr. P. C., he gets the seisin of the whole case and his jurisdiction to bring everybody concerned in the commission of the offence to justice is in no way restricted. When a Magistrate detains a person under sec. 351, Cr. P. C., and tries him, sec. 191, Cr. P. C., is not a bar to his jurisdiction—*Maung Thei v. Maung Chit Kywe*, A.I.R. 1941 Rang. 30 (31), 1940 Rang.L.R. 676, following *Nga Chan Tha v. Emp.*, A.I.R. 1923 Rang. 31, 73 I.C. 55, 24 Cr.L.J. 519, 11 L.B.R. 398 (F.B.) and *Nga Paing v. Queen-Emp.*, ('97-01) 1 U.B.R. Cr. 56.

Page 1239, after "57 Mad 85," add—
See also *Maila Gowda*, 42 Cr.L.J. 89, 191 I.C. 149, 1940 M.W.N. 224, 51 M.L.W. 480.

Page 1297, after "*Bejoy Kumar v. Sita Nath*," add—
42 Cr.L.J. 87, 191 I.C. 154,

Page 1384, after "*Manghanmal Gianchand v. Emp.*," add—
I.L.R. 1940 Kar. 102,
Galley No. Six

Page 1385, after "(17)," add—
(18) The District Magistrate passed an order under sec. 144, Cr. P. C., in which he held that a certain procession was an innovation and that as there were strained relations between the Shias and Sunnis there was the danger of a breach of the peace and so the procession should not be taken out. Subsequent to this order certain Shias approached the Government in order to get the order reversed but the Government rejected the petition. Later on the Shias again petitioned the Commissioner against the order and the Commissioner asked the successor of the District Magistrate to look into the matter. He permitted the taking out of the procession but laid down certain conditions to prevent any breach of the peace. Held that the order was purely an executive order for controlling the procession which he could pass as a District Magistrate and that conditions or formalities which were required under sec. 144, Cr. P. C., were not observed and that therefore no revision against that order lay under sec. 435, Cr. P. Code—*Mohammad Ahmad Khan v. Emp.*, A.I.R. 1940 Oudh 416, 41 Cr.L.J. 781, 1940 O.W.N. 652, 189 I.C. 666, 1940 O.L.R. 490.

Page 1400, after "A.I.R. 1932 Lah. 362," add—
It is not permissible under sec. 436, Cr. P. C., to direct the Magistrate to frame a charge and dispose of the case—*Patnam Sidda Reddi v. Ambati Venkata Girianna*, A.I.R. 1941 Mad. 65, 1940 M.W.N. 536, 1940 M.Cr.C. 132, 52 M.L.W. 66
Page 1435, in the last line, after "A.I.R. 1934 Oudh 179," add—
Emp. v. Swami Sarupchand, 42 Cr.L.J. 35, 190 I.C. 805, 1940 O.W.N. 1018

Page 1442, at the end of Note 1214, add—
In passing orders the Magistrate should use more decorum and more restraint in choosing words. But where the language used in reference to a party, although objectionable, is not so harsh or uncalled for as to be corrected judicially, the High Court would not interfere and expunge the objectionable part of it in revision—*Perumala Rana Ratu v. Zamindar, Gazzavaram*, 39 Cr.L.J. 922 (924), 177 I.C. 584, A.I.R. 1938 Mad. 654, 1938 M.W.N. 252, 47 M.L.W. 340, (1938) 1 M.L.J. 453, 11 R.M. 346

Page 1443, after "*Jumo Machhi*," add—
I.L.R. 1940 Kar. 157,

Page 1457, after "*Chandrika Prasad v. Mohammad Jafar*," add—
A.I.R. 1941 Oudh 7, 1940 O.L.R. 565,

Page 1463, after "*Nga Ba Saing*," add—
1940 Rang L.R. 145,

Page 1465, after "*Ramji Vala*," add—
I.L.R. 1940 Bom. 500,

Page 1470, after "*Sat Narain Lal v. Emp.*," add—
I.L.R. 1940 All. 539,

Page 1510, in Note 1245, add—

There is no authority which lays down that a proper construction of this section makes an enquiry essential in law, and that the proceedings under sec. 476, Cr. P. C., without such enquiry would be illegal—*Mohammad Tahir v. The Crown*, I.L.R. 1940 Lah. 669 (671).

Page 1521, after "*Bhagwandas Narandas v. D. D. Patel & Co.*," add—
I.L.R. 1940 Bom. 403,

Page 1535, after "*Kumaravel Nadar v. Shanmuga Nadar*," add—
I.L.R. 1940 Mad. 762,

Page 1562, at the end of Note 1278 under the heading "Compromise," add—

Both according to law and common sense alike an order for monthly maintenance alone based on an application of compromise is not illegal. Where, however, the compromise not merely relates to the amount of monthly maintenance but embodies other consideration or terms or conditions, then the order based on the compromise goes beyond the scope allowed to a Criminal Court, and a Criminal Court has no jurisdiction either to pass or enforce it—*Ma Khin Yi v. Edward Khin Maung*, 1940 Rang L.R. 151.

Page 1569, after "10 Bur L T 209," add—

Following this ruling it has been held that where the order has become of no effect in that it cannot be partially enforced, the remedy is to make a fresh application for maintenance—*Ma Khin Yi v. Edward Khin Maung*, 1940 Rang. L.R. 151

Page 1583, after "*Charan Das v. Surasti Bai*," add—
I.L.R. 1940 Lah. 755,

THE CODE OF CRIMINAL PROCEDURE.

(ACT V OF 1898)

As amended up to date

RECEIVED THE GOVERNOR GENERAL'S ASSENT ON THE
22ND MARCH, 1898.

*An Act to consolidate and amend the Law relating to
Criminal Procedure.*

WHEREAS it is expedient to consolidate and amend the law relating to criminal procedure; It is hereby enacted as follows:—

The 1923 Amendments. The Criminal Procedure Code, 1898 underwent drastic amendments at the hands of the Legislature in 1923 by two Acts, *viz.*, the Criminal Law Amendment Act, XII of 1923 (popularly known as the Racial Distinctions Acts) and Criminal Procedure Code Amendment Act, XVIII of 1923. Of these the latter Act was the more important and was the outcome of a general revision of the whole Code, whereas the former Act was limited to the amendment of certain sections relating to the trial of European British Subjects. These Amendment Acts came into force from 1st September 1923.

The genesis of Act XVIII of 1923 dates as far back as 1914. In the year a Bill (No. 3 of 1914) was introduced in the Imperial Legislative Council, and was thereafter referred to the Local Governments and Administrations. Their opinions were received and partially examined, but further progress with the Bill was suspended until the conclusion of the war. Meanwhile in 1916 the Government referred this Bill and the opinions received to a Select Committee (known as the Lowndes Committee). The Bill as revised by this Committee was again introduced in the Imperial Legislative Council in 1917, but further consideration of the Bill was postponed until after the war. Meanwhile some further suggestions for the amendment of the Code were considered by the Government, and after the termination of the war, a new Bill was prepared in 1921 which was substantially the Bill as revised by the above Committee. This Bill (No. 3 of 1921) was introduced in the Council of State on the 21st February 1921 and was referred to a Joint Committee, composed of representative members of the Legislative Assembly and the Council of State. This Committee submitted its report after a year (in September 1922); and the Bill as revised by this Committee, with certain alterations made during the discussions in the Council of State in September 1922 and in the Legislative Assembly in January and February 1923 ultimately passed into law, and has been enacted as Act XVIII of 1923.

(For Bill 3 of 1914, see Gazette of India, Part V, 28th March 1914; for the Report of the Select Committee of 1916, see Gazette of India, Part V, September 1917, reprinted

in the Gazette of India, February 26, 1921, at p 39; for Bill 3 of 1921, see Gazette of India, Part V, February 26, 1921; for the Report of the Joint Committee, see Gazette of India, Part V, September 9, 1922).

The changes made from time to time by other minor Amendment Acts up to date have been noticed in this book in their proper places.

1. Pending cases are not affected by changes in the Law:—The general rule as to new laws of procedure is that they take effect from their coming into operation, so that the procedure from that date would be governed by such laws. It is also a general rule that such laws are not to affect vested rights. Therefore, where a person was being tried under an old Act, and before the conclusion of the trial, the new Act came into force, the trial ought to be continued in accordance with the procedure laid down in the earlier Act, which was in force at the commencement of the trial—*Srinivasachari*, 6 Mad 336; *Mukund v. Ladu*, 3 Bom L.R. 584.

2. Construction:—A penal statute must be construed strictly; that is, nothing is to be regarded as within the meaning of the statute which is not within the letter—which is not clearly and intelligibly described in the very words of the statute itself—*Kola*, 8 Cal 214; *Lakshmi Chand*, 1901 P.R. 24; *Bishumbhur*, 5 C.W.N. 108. Penal provisions have to be strictly construed, nor can the liability to punishment for the neglect of a statutory obligation be extended by inferential reasoning—*Kazi*, 28 Cal. 504. In interpreting statutes of a penal character, it is important to see that the powers conferred upon the Magistrates are duly exercised with reference to the rendering unlawful of acts that would otherwise be lawful—*Sheodan*, 10 All. 115. A penal statute must be construed strictly, and Magistrates ought to be very careful before they proceed to inflict imprisonment in a summary manner. They must avoid all appearance of oppression—*Ganesh Narayan*, 13 Bom. 600. Words importing a doubtful or ambiguous meaning must be construed strictly, and in favour of the subject; that is to say, unless the meaning of the Legislature is perfectly clear, no penalties are to be imposed upon the subjects of the Crown, nor are their liberties to be restricted—*Imam*, 10 All 150 (F.B.). The language of the Code is conclusive and must be construed according to ordinary principles, so as to give effect to the plain meaning of the language used. No doubt in the case of an ambiguity, that meaning must be preferred which is more in accord with justice and convenience, but in general the words used as read in their context must prevail—*Babulal Choukhani v. King Emp.*, AIR 1938 P.C. 130 (133), 55 I.A. 158, 32 S.L.R. 476, 1938 O.L.R. 189, 1938 O.A. 398, 1938 M.W.N. 505, 19 P.L.T. 343, 1938 A.L.R. 309, 10 R.P.C. 250, 4 B.R. 490, 39 Cr.L.J. 452, 67 C.L.J. 161, 40 Bom L.R. 787, 42 C.W.N. 621, 1938 A.Cr.C. 27, 1938 O.W.N. 416, 1938 A.L.J. 382, 178 I.C. 1, 1938 A.W.R. (P.C.) 116, 1938 P.W.N. 320, (1938) 1 M.L.J. 647 (P.C.). Although the language of a statute is the first test for its interpretation there are other equally important tests, when the language is not clear and unambiguous, and when more than one interpretation is possible. In such circumstances, the interpretation which appears to be most 'in accord with reason, convenience and justice' is to be preferred. Another accepted canon of interpretation is that a penal statute should be construed strictly and that in case of doubt benefit should go to the subject—*Parmanand v. Emp.*, 40 Cr.L.J. 497 (500), 180 I.C. 835, AIR 1939 Lah. 81, 41 P.L.R. 137 (F.B.). See also *Balakrishna*, 17 Bom. 573; *Patandin*, 2 A.L.J. 26; *Bhista*, 1 Bom. 308.

When the meaning of the words is plain, it is not the duty of the Courts to busy themselves with supposed intentions. When the words themselves declare the intention of the Legislature, it appears inadmissible to consider the advantages or disadvantages of applying the plain meaning whether in the interests of the prosecution or the accused—*Pakala Narayana Swami v. The King Emperor*, 40 Cr.L.J. 364 (369), 180 I.C. 1, AIR 1937 (P.C.) 47, 1939 M.W.N. 185, 1939 O.W.N. 282, 20 P.L.T. 265, 49 M.L.W. 319, 43 C.W.N. 473 (P.C.).

It is beyond question that Judges have to deal with law as they find it, and must give effect to any enactment of the Legislature. The fact that a Judge thinks that

a particular enactment is irrational or unfair, is irrelevant provided the enactment is in such clear terms as to admit of no doubt as to its meaning. But a Judge, construing an Act of Parliament, is not a mere automaton whose only duty is to give out what he considers to be the primary meaning of the language used. A Judge must always consider the effect of any construction which he is asked to put on an Act of Parliament, and if he comes to the conclusion that a particular construction leads to a result which he considers irrational or unfair, he is entitled, and indeed bound, to assume that the Legislature did not intend such a construction to be adopted, and to try to find some more rational meaning to which the words are sensible—*Sombhai Gobindbhai*, 40 Cr.L.J. 97 (100), 177 I.C. 588, A.I.R. 1938 Bom. 484, 40 Bom.L.R. 1082 (F.B.).

The same rules of interpretation apply to notifications issued under penal statutes—*Lakshmi Chand*, 1901 P.R. 24.

When a definition is intended to be exhaustive, the Legislature, as a rule, uses the word 'means' and not the word 'includes'—*Narpat Singh*, 1901 A.W.N. 10; *Ram Sarup*, 39 Cr.L.J. 154 (155), 172 I.C. 530, 1938 A.Cr.C. 1, 1938 O.L.R. 8, 1938 O.A. 7, 10 R.O. 182, 1938 O.W.N. 7, A.I.R. 1938 Oudh 80.

Is the Code exhaustive?—The essence of a Code is to be exhaustive on the matters in respect of which it declares the law and it is not the province of a Judge to disregard or go outside the letter of the enactment according to its true construction. On any point specifically dealt with by it, the law must be ascertained by interpretation of the language used by the Legislature—*Gokul Mandar v. Pudmanund*, 6 C.W.N. 825 (828) (P.C.), 29 Cal. 707, 4 Bom.L.R. 793, 29 I.A. 196; *Hukum Chand Baid v. Kamalanand Singh*, 3 CLJ 67 (71), 33 Cal 927 Criminal Courts, no less than Civil Courts, exist for the administration of justice, and Courts of both descriptions have inherent power to mould the procedure, subject to the statutory provisions applicable to the matter in hand, to enable them to discharge their functions as Courts of Justice—*Pulin Behari Das*, 16 C.W.N. 1105 (1136), 15 CLJ. 517, 13 Cr.L.J. 609, 16 I.C. 257. The Criminal Procedure Code does not contain a provision corresponding to sec 151 of the Civil Procedure Code; but that section does not lay down any new principle; it merely embodies a legislative recognition of the inherent power of the Court to make such orders as may be necessary for the ends of justice. This inherent power is in no sense restricted in application to civil cases, it is equally applicable to criminal matters. The power is not capriciously or arbitrarily exercised; it is exercised *ex debito justitiæ* to do that real and substantial justice for the administration of which alone Courts exist; but the Court, in the exercise of such inherent power, must be careful to see that its decision is based on sound general principles and is not in conflict with them or with the intentions of the Legislature as indicated in statutory provisions—*Budhu Lal v. Chattu Gope*, A.I.R. 1918 Cal 850, 44 Cal 816 (827, 828), 25 CLJ 193, 18 Cr.L.J. 497, 21 C.W.N. 269, 39 I.C. 456; *Pigot v. Ali Mahammad Mandal*, A.I.R. 1921 Cal. 30, 22 Cr.L.J. 213, 48 Cal. 522, 32 CLJ 270, 60 I.C. 325; *Akhil Bandhu Ray v. Emp.*, A.I.R. 1938 Cal 258 (260), 39 Cr.L.J. 596 (598), 175 I.C. 409, I.L.R. (1938) 1 Cal. 588. So far as it deals with any point specifically, the Code of Criminal Procedure must be deemed to be exhaustive, and the law must be ascertained by reference to its provisions; but where a case arises which obviously demands interference, and it is not within those for which the Code specifically provides, it would not be reasonable to say that the Court had not the power to make such order as the ends of justice require—*Rahim Sheikh*, 50 Cal 872 (875), 24 Cr.L.J. 677, 37 CLJ 595, 73 I.C. 773; *Nagen v. Emp.*, A.I.R. 1934 Cal 428 (429), 38 C.W.N. 501, 35 Cr.L.J. 911, 119 I.C. 345, 61 Cal 498, 59 CLJ 516, 1934 Cr.C. 538; *Bipat Gope v. Emp.*, 38 Cr.L.J. 777 (779), 169 I.C. 495, 16 Pat. 8, 1937 P.W.N. 271, 10 R.P. 19, 3 BR 584, A.I.R. 1937 Pat 369. But it is not open to a Court to travel outside the Code for finding powers either for the Police or for private persons 'to interfere with the liberty of the subject'—*Gopal Naidu*, 46 Mad. 605 (625), 44 M.L.J. 655, 73 I.C. 343 (F.B.). *Vide* also sec. 561A of this Code which is a legislative recognition of the inherent power of the High Court. The Criminal Procedure Code cannot be said to be

exhaustive in regard to the conditions under which a jury can be discharged—*Yeshvant Vithu*, 38 Cr.L.J. 850 (851), 170 I.C. 153, I.L.R. 1937 Bom. 369, 39 Bom.L.R. 355, A.I.R. 1937 Bom. 260, 10 R.B. 49. See also Note 889 in this connection.

An order obtained by fraud must be treated as having no legal effect—*Patel Bhagubhai Ranchhodas v. Bai Arvinda*, A.I.R. 1937 Cal. 334 (335).

See also *Lala v. Emp.*, in Note 838.

Preamble:—The preamble of an Act has been called a key to its understanding, and may properly be consulted in order to fix the scope or limit of a Statute—*W. D. Edwards and F. C. Vemor*, 9 Bom. 333 (343). The preamble does not control the enacting provisions of the Act—*Mani Lal Singh v. Trustees for the Improvement of Calcutta*, 45 Cal 343, 27 C.L.J. 1, 22 C.W.N. 1, 44 I.C. 770. In cases of doubt and in the absence of express provision to the contrary, the preamble must be taken in restricting and governing the rest of the enactment—*Shankar Sahai v. Din Dial*, 12 All. 409 (418). It is well settled that the preamble to a statute can neither expand nor control the scope and application of the enacting clause, when the latter is clear and explicit; but if the language of the body of the Act is obscure or ambiguous, the preamble may be consulted as an aid in determining the reason of the law and the object of the Legislature and thus arriving at the true construction of the terms employed. It cannot be disputed that where the words of the enacting clause are more broad and comprehensive than the words of the preamble, the general words in the body of the statute, if free from ambiguity, are not to be restrained or narrowed down by particular or less comprehensive recitals in the preamble. The preamble of a statute is no more than a recital of some inconvenience, which by no means excludes any others for which a remedy is given by the enacting part of the statute—*Gopi Krishna v. Raj Krishna*, 12 C.L.J. 8 (11). The preamble does not control any plain enactment which follows it but it may be a most useful guide when a question of doubt arises upon construction of a particular provision and considerations relating to the scope of the Act are involved—*Sital Chandra v. Mrs. A. J. Delanny*, 20 C.W.N. 1158 (1163); *Debi Das v. Maharaj Rup Chand*, 49 All. 903 (911), 102 I.C. 792, 25 A.L.J. 609, A.I.R. 1927 All. 593. See also *Kumar Punyendra Narain Deb v. Kumar Jogendra Narain Deb*, 64 C.L.J. 212. It is not to be doubted that both the heading and the preamble are to be taken into consideration in interpreting the clauses of the Act, but they are not the operative portion of the Act—*Mohammad Yusuf v. Imtiaz Ahmad Khan*, 40 Cr.L.J. 421 (427), 180 I.C. 745, 1939 O.W.N. 296 (F.B.).

Marginal Notes:—Marginal notes are no part of an enactment—*Dukhi Mullah v. Haluay*, 23 Cal 55 (59). Marginal notes to the section of an Act of Parliament cannot be referred to for the purposes of construing the Act. There seems to be no reason for giving the marginal notes in an Indian Statute any greater authority than marginal notes in an English Act of Parliament—*Balraj Kunwar v. Jagatpal Singh*, 26 All. 393 (406), 8 C.W.N. 699 (706) (P.C.); *Natesa Mudaliar*, 50 Mad. 733; *Syamo v. Emp.*, A.I.R. 1932 Mad 391, 55 Mad. 903, 1932 Cr.C. 355, 62 M.L.J. 742, 35 M.L.W. 705; 5 M. Cr. C. 75, 137 I.C. 9, 33 Cr.L.J. 418, 1932 M.W.N. 305; *Bhagia v. Emp.*, 28 Cr.L.J. 340, 100 I.C. 820, A.I.R. 1927 Nag. 203; *Ram Lal v. Emp.*, 28 Cr.L.J. 1929, 3 Luck. 244, A.I.R. 1928 Oudh 15, 106 I.C. 213. Though the headings and marginal notes should not be held to govern the clear text of a section, yet they can be taken as an indication of what the Legislature meant—*Narayanasami v. Rangasami*, 49 Mad. 716 (722), 50 M.L.J. 547, 24 M.L.W. 235, 95 I.C. 731, A.I.R. 1926 Mad. 749. Marginal notes are not parts of the sections, but there is no reason why they should not be consistent with the sections themselves—*Bahadur Molla v. Ismail*, 29 C.W.N. 151 (152), 52 Cal. 463, 41 C.L.J. 45, 26 Cr.L.J. 455, 85 I.C. 135, A.I.R. 1925 Cal. 329. Whether a marginal note can be referred to for an exposition of the meaning of a section, depends upon whether the note has been inserted by or under the authority of the Legislature. King, J., while discussing the practice in the U. P. Legislative Council, asserted that in that Legislative Council at any rate, the marginal notes are treated as being part of the enactment, and are inserted with the assent and authority of the

Legislature—*Ramsaran Das v. Bhagdat Prasad*, 27 A.L.J. 290, A.I.R. 1929 All. 53, 51 All. 411, 113 I.C. 442 (F.B.); *Abdul Hakim v. Fozu Mia*, 39 C.W.N. 57 (60), 36 Cr.L.J. 857, 155 I.C. 1003, A.I.R. 1935 Cal. 287, 1935 Cr.C. 392, 62 Cal. 266; *Ismail*, A.I.R. 1933 Bom. 417, 57 Bom. 537, 35 Bom.L.R. 886, 146 I.C. 248, 34 Cr.L.J. 1239, 1933 Cr.L.J. 1289.

Proviso:—Arguments from a proviso which seek to extend the operative effect of the substantive enactment are not legitimate unless there is real ambiguity in the substantive enactment—*Ram Chunder v. Gowri Nath*, 53 Cal. 492 (509), A.I.R. 1926 Cal. 927, 97 I.C. 376. A proviso should not by mere implication withdraw any part of what the main provision has given—*Commr. of Income-tax v. Suppan & Co.* A.I.R. 1930 Mad. 124 (125), 123 I.C. 801, 31 M.L.W. 141, 1930 M.W.N. 20, 58 M.L.J. 46.

Illustration:—The general words of the section cannot be controlled by any limiting words that may be used in one or more of the illustrations—*Balmalund v. Mt. Sohano Kueri*, A.I.R. 1929 Pat. 164 (167), 8 Pat. 153, 10 P.L.T. 259, 119 I.C. 817; *Chhotey Lal v. Emp.*, 25 Cr.L.J. 578, 85 I.C. 722, A.I.R. 1925 All. 220. A Court should not lightly disregard the illustrations merely because they do not seem to be in accord with generally accepted ideas as to the law in other places—*Kandappa Mudahar v. Muthuswami Ayyar*, 50 Mad. 91 (120), 99 I.C. 609, 24 M.L.W. 782, 1926 M.W.N. 990, 51 M.L.J. 765, A.I.R. 1927 Mad. 99. An illustration is useful so far as it helps to furnish some indication of the presumable intention of the Legislature, and does not bind the Courts to place a meaning on the section which is inconsistent with its language—*Satish Chandra v. Ram Doyal*, 48 Cal. 388 (398), 59 I.C. 143, 22 Cr.L.J. 31, A.I.R. 1921 Cal. 1 (S.B.). When a Court is called upon to interpret a piece of an enactment which comprises both the substantive provision and an illustration of the same, the Court is not justified in rejecting the illustration as a guide to the interpretation of the substantive provision—*Ramlal v. Emp.*, 28 Cr.L.J. 1029 (1031), 106 I.C. 213, A.I.R. 1928 Oudh 15, 3 Luck. 244. It is the duty of a Court of law to accept, if that can be done, the illustrations given as being both of relevance and value in the construction of the text. The illustrations should in no case be rejected because they do not square with ideas possibly derived from another system of jurisprudence as to the law with which they or the sections deal. And it would require a very special case to warrant their rejection on the ground of their assumed repugnancy to the sections themselves. It would be the very last resort of construction to make any such assumption. The great usefulness of the illustrations, which have, although no part of the sections, been expressly furnished by the Legislature as helpful in the working and application of the statute, should not be thus impaired—*Mahomed S'edol Ariffin v. Yeoh Ooi Gark*, 2 A.C. 575, L.R. 43 I.A. 256; *Durga Priya v. Durga Pada*, 55 Cal. 154, 109 I.C. 752, A.I.R. 1928 Cal. 204. If there be any conflict between the section and the illustrations, the latter must give way to the former—*Mt. Sajidunnissa v. Sayed Hidayat*, A.I.R. 1924 All. 748, 80 I.C. 896, 22 A.L.J. 425. Illustrations are not exhaustive and will not in case of conflict with the express words of the section override those words—*Mukhi Tirathdas v. Jethanand Matvalornal*, 38 Cr.L.J. 512 (514), 168 I.C. 89, A.I.R. 1937 Sind. 68, 9 R.S. 222, 31 S.L.R. 123 (F.B.).

Heading:—Though the headings and marginal notes should not be held to govern the clear text of a section, yet they can be taken as an indication of what the Legislature meant—*Narayananasami v. Rangasami*, 49 Mad. 716 (722), 95 I.C. 731, A.I.R. 1926 Mad. 749, 50 M.L.J. 547, 24 M.L.W. 235; *Dicaika v. Tafazar*, 20 C.W.N. 1097 (1099). For contra see *Chunni Lal v. Sheo Charan Lal*, 47 All. 755 (760), A.I.R. 1925 All. 787, 89 I.C. 122, 23 A.L.J. 725. There is authority for the proposition that the mere heading of a Chapter is to be dealt with as though it were a preamble and that it cannot be used to cut down the clear words of the sections which are contained in the Chapter—*In re Ananda Lal*, 35 C.W.N. 1103 (1106). No doubt headings in the body of an Act are of some help in clearing up obscurities when there is an ambiguity, but they cannot control the provisions of the sections when they are unequivocal and clear. The headings are like preamble which supply a key to the

mind of the Legislature, but do not control the substantive sections of the enactment—*Durga v. Narain*, A.I.R. 1931 All. 597 (599), 1931 A.L.J. 875 (F.B.) ; *Debi Das v. Maharaj Rup Chand*, 49 All. 903 (911), 102 I.C. 792, 25 A.L.J. 609, A.I.R. 1927 All. 593.

See *Mohammad Yusuf v. Imtiaz Ahmad Khan*, quoted above under the heading "Preamble".

Select Committee's Reports:—Although it is not proper to rely on Select Committee's reports for interpretation of a statute, they are sometimes looked into. But where the language is clear, it is not for a Court to probe into the mind of the legislator or to indulge in surmises—*Qamarali v. Tulsi*, 39 Cr.L.J. 981 (982), 173 I.C. 54, A.I.R. 1938 Nag 433, 11 R.N. 197.

Statement of Objects and Reasons:—Proceedings of the Legislature in passing an Act—including Statement of Objects and Reasons, and Debates of the Legislature—must be excluded from consideration in order to construe an Act. Nor is it permissible to construe an Act by reference to the Bill in its original form—*Kumar Punyendra Narain Deb v. Kumar Jogendra Narain Deb*, 64 C.L.J. 212 (265).

Conflicting Rulings:—When there are different rulings of the different High Courts on a particular point, a Judge should follow the rulings of the High Court to which he is subordinate—*Swamirao Narayan v. Kashinath Krishna*, 15 Bom 419 ; *Balaji Ganesh v. Sakharam Parshram*, 17 Bom. 555 ; *Emp v. Nga Tun Zan*, 4 I.C. 827, U.B.R 1909, II Quarter, W.B. of C. Act, sec. 1 ; *Korban Ally v. Sharoda Prasad*, 10 Cal. 82 ; *Azizur Rahman v. Hansa*, 47 I.C. 441, 40 All. 670, 16 A.L.J. 715.

If there is a conflict of judicial opinion then the Courts are bound to follow the decisions, if any, of the High Court to which they are subordinate. But in the absence of any pronouncement by the High Court, to which they are subordinate, their duty is to study the law as laid down by other High Courts for the purpose of coming to a proper decision—*Ahmad Ali v. Emp.*, 32 Cr.L.J. 271 (272), 129 I.C. 276, A.I.R. 1930 Lah 1051, 32 P.L.R. 92, 1930 Cr.C. 1127, Ind Rul, 1931 Lah. 164.

A ruling in which two Judges differ on a point cannot be held to support the point—*Alopi Din v. Emp.*, 36 Cr.L.J. 1103 (1105), 157 I.C. 205, A.I.R. 1935 All. 366, 1935 A.L.J. 653, 1935 Cr.C. 384.

2A. The Government of India Act, 1935 [26 Geo. 5.]:—Section 270 of this Act grants indemnity against Civil or Criminal proceedings for past acts done or purported to have been done by a servant of the Crown in India or Burma in the execution of his duty as such servant. Section 271 provides for protection of public servants against prosecution and suits. They are quoted below

270.—(1) No proceedings civil or criminal shall be instituted against any person in respect of any act done or purporting to be done in the execution of his duty as a servant of the Crown in India or Burma before the relevant date, except with the consent, Indemnity for past acts. in the case of a person who was employed in connection with the affairs of the Government of India or the affairs of Burma, of the Governor-General in his discretion, and in the case of a person employed in connection with the affairs of a Province, of the Governor of that Province in his discretion

(2) Any civil or criminal proceedings instituted, whether before or after the coming into operation of this Part of this Act, against any person in respect of any act done or purporting to be done in the execution of his duty as a servant of the Crown in India or Burma before the relevant date shall be dismissed unless the Court is satisfied that the acts complained of were not done in good faith, and, where any such proceedings are dismissed, the costs incurred by the defendant shall, in so far as they are not recoverable from the person instituting the proceedings, be charged, in the case of persons employed in connection with the functions of the Governor-General in Council or the affairs of Burma, on the revenues of the Federation, and in the case of persons employed in connection with the affairs of a Province, on the revenues of that Province.

(3) For the purposes of this section—

the expression "the relevant date" means, in relation to acts done by persons employed about the affairs of a Province or about the affairs of Burma, the commencement of Part II of this Act and, in relation to acts done by persons employed about the affairs of the Federation, the date of the establishment of the Federation;

references to persons employed in connection with the functions of the Governor-General in Council include references to persons employed in connection with the affairs of any Chief Commissioner's Province;

a person shall be deemed to have been employed about the affairs of a Province if he was employed about the affairs of the Province as constituted at the date when the act complained of occurred or is alleged to have occurred.

271.—(1) No Bill or amendment to abolish or restrict the protection afforded to

Protection of public servants against prosecution and suits. certain servants of the Crown in India by section one hundred and ninety-seven of the Indian Code of Criminal Procedure, or by sections eighty to eighty-two of the Indian Code of Civil Procedure, shall be introduced or moved in either Chamber of the Federal Legislature without the previous sanction of the Governor-General in his discretion, or in a Chamber of a Provincial Legislature without the previous sanction of the Governor in his discretion.

(2) The powers conferred upon a Local Government by the said section one hundred and ninety-seven with respect to the sanctioning of prosecutions and the determination of the Court before which, the person by whom and the manner in which, a public servant is to be tried, shall be exercisable only—

(a) in the case of a person employed in connection with the affairs of the Federation, by the Governor-General exercising his individual judgment; and

(b) in the case of a person employed in connection with the affairs of a Province, by the Governor of that Province exercising his individual judgment:

Provided that nothing in this sub-section shall be construed as restricting the power of the Federal or a Provincial Legislature to amend the said section by a Bill or amendment introduced or moved with such previous sanction as is mentioned in sub-section (1) of this section.

(3) Where a civil suit is instituted against a public officer, within the meaning of that expression as used in the Indian Code of Civil Procedure, in respect of any act purporting to be done by him in his official capacity, the whole or any part of the costs incurred by him and of any damages or costs ordered to be paid by him shall, if the Governor-General exercising his individual judgment so directs in the case of a person employed in connection with the affairs of the Federation or if the Governor exercising his individual judgment so directs in the case of a person employed in connection with the affairs of a Province, be defrayed out of and charged on the revenues of the Federation or of the Province as the case may be.

The Federal Court has jurisdiction in criminal as well as civil case. It would be very surprising if it were otherwise, since it has been in the Criminal Courts that many of the great constitutional questions of the past have been determined; the words "judgment, decree or final order" ought to receive no narrow interpretation. (*Per Gwyer, C.J.*). The juxtaposition of the words "judgment, decree or final order" is, no doubt, suggestive of civil litigation; but it cannot be said that the word "judgment" is not comprehensive enough to include a judgment pronounced in a criminal case; see sec. 366 of the Criminal Procedure Code and other sections in that Chapter, and also cl. 41 of the Letters Patent of the Chartered High Courts. Unlike sec. 206 of the Constitution Act, sec. 205 is not in terms limited to civil cases; and it is worth noting that sec. 210 (2) places orders of the Federal Court on the same footing as orders made "by the highest Court exercising civil or criminal jurisdiction, as the case may be" (*Per Varadachariar, J.*). Although the words 'judgment or

final order' in the section may be assumed to apply to criminal cases as well, the order of the High Court directing a re-hearing of the criminal appeal by the Sessions Court is not a judgment within the meaning of sec. 205 of the Government of India Act (*Per Sulaiman, J.*)—*Dr. Hori Ram Singh v. Emp.*, 40 Cr.L.J. 468, A.I.R. 1939 F.C. 43, 1939 M.W.N. 497, 181 I.C. 317, 1939 O.L.R. 366, 1939 P.W.N. 429, 1939 M.Cr.C. 148, 50 M.L.W. 95, 20 P.L.T. 539, (1939) 2 M.L.J. Sup. 23, C.W.N. 1939 F.C. 50, 41 P.L.R. 680.

As the consent of the Governor, provided for in sec. 270 of the Government of India Act, 1935, is a condition precedent to the institution of proceedings against a public servant, the necessity for such consent cannot be made to depend upon the case which the accused or the defendant may put forward after the proceedings had been instituted, but must be determined with reference to the nature of the allegations made against the public servant, in the suit or criminal proceeding. If these allegations cannot be held to relate to "any act done or purporting to be done in the execution of his duty" by the defendant or the accused "as a servant of the Crown," the consent of the authorities would, *prima facie*, not be necessary for the institution of the proceedings. If, in the course of the trial, all that could be proved should be found to relate only to what he did or purport to do "in the execution of his duty," the proceedings would fail on the merits, unless the Court was satisfied that the acts complained of were not done in good faith (sec. 270A). Even otherwise, the proceedings would fail for want of the consent of the Governor, if the evidence established only official acts (*per Varadachariar, J.*)—*Ibid.*

Section 270 of the Government of India Act, 1935 does not mean that the very act which is the *gravamen* of the charge and constitutes the offence should be the official duty of the servant of the Crown. Such an interpretation would involve a contradiction in terms, because an offence can never be an official duty. The words as used in the section are not "in respect of any official duty" but "in respect of any act done or purporting to be done in the execution of his duty." The two expressions are obviously not identical. The offence should have been committed when an act is done in the execution of duty or when an act purports to be done in the execution of the duty. The reference is obviously to an offence committed in the course of an action, which is taken or purports to be taken in compliance with an official duty, and is in fact connected with it. The test appears to be not that the offence is capable of being committed only by a public servant and not by any one else, but that it is committed by a public servant in an act done or purporting to be done in the execution of his duty. The section cannot be confined to only such acts as are done by a public servant directly in pursuance of his public office, though in excess of his duty or under a mistaken belief as to the existence of such duty. Nor is it necessary to go to the length of saying that the act constituting the offence should be so inseparably connected with the official duty as to form part and parcel of the same transaction. If the act complained of is an offence, it must necessarily be not an execution of duty, but a dereliction of it. What is necessary is that the offence must be in respect of an act done or purported to be done in execution of duty, that is, in the discharge of an official duty. It must purport to be done in the official capacity with which he pretends to be clothed at the time, that is to say, under the cloak of an ostensibly official act, though, of course, the offence would really amount to a breach of duty. An act cannot purport to be done in execution of duty unless the offender professes to be acting in pursuance of his official duty and means to convey to the mind of another the impression that he is so acting. The section is not intended to apply to acts done purely in a private capacity by a public servant. It must have been ostensibly done by him in his official capacity in execution of his duty, which would not necessarily be the case merely because it was done at a time when he held such office, nor even necessarily because he was engaged in his official business at the time. (*Per Sulaiman, J.*) *Ibid.*

The question whether a criminal breach of trust can be committed while purporting

to act in execution of duty is not capable of being answered hypothetically in the abstract, without any reference to the actual facts of the case. But when a public servant simply embezzles some property entrusted to him and thereby commits a criminal breach of trust under sec. 409, I.P.C., he is not doing an act, nor even purports to do an act in execution of his duty; when he commits the act, he does not pretend to act in the official discharge of his duty. A case like that would not ordinarily fall within the scope of sec 270 (1) of the Government of India Act, 1935. But an offence under sec. 477A, I.P.C., is committed if an officer or servant or anyone employed or acting in such capacity, wilfully and with intent to defraud falsifies any book or account. Thus where it is his duty to maintain a record or a register, and in maintaining that register he makes some entries which are false to his knowledge, he is certainly purporting to act though not actually acting, in the execution of his duty, because he is making certain entries in the register, knowing them to be false. He is ostensibly professing to be discharging his official duty in maintaining the register, which he is bound to maintain correctly. In making the entries he pretends or purports to act in the execution of his duty: but in point of fact he is acting in direct dereliction of it. Consent under sec 270 (1) is necessary for the trial of such an offence. *Ibid*.

Section 270 of the Government of India Act, 1935, is very wide in its terms and prohibits the initiation of proceedings in respect of the acts described therein against all servants of the Crown employed in connection with the affairs of the Province whether they are "gazetted officers" or not—*Arjan Singh v Emp*, 41 Cr.L.J 65 (68), 184 I.C. 680, A.I.R 1939 Lah. 479.

The provisions of sub-section (1) of sec. 270 are mandatory and admit of no reservation or exception. They contain a positive prohibition against the institution of civil and criminal proceedings against the persons described in the section in respect of the acts mentioned, without such consent. In other words, the Governor's "consent" is an essential pre-requisite to the competency of the Court to entertain the proceedings. It is the very foundation of the Court's jurisdiction, and its absence renders the entire proceedings void *ab initio*. This matter has also been put beyond doubt by the decision of the Federal Court in *Dr Hori Ram Singh's* case, cited above, where it was held that the "consent of the Governor is a condition precedent to the institution of the proceedings against the public servant". Where, therefore, the initiation of the proceedings against the accused was illegal, the subsequent production of the "consent", even though it was before the commencement of the trial *de novo*, could not validate what was invalid at its inception. The statute contains a positive prohibition against the initiation of proceedings without the prescribed consent, and such an illegality cannot be cured under sec. 537, Cr. P. C., even when no prejudice has been shown to have been caused—*Ibid*. For contra see *Manzur Ali v. Emp.*, in Note 647.

Where the 'consent' stated that it was granted by the Governor of a Province and there is no indication that in doing so the Governor was acting "with his Ministers," it must be presumed that he granted it "in his discretion"—*Ibid*.

Where the charges against the accused persons not only state that the alleged criminal acts were done by them while they were engaged in the execution of their duties as Sub-Divisional Officer and Overseer, respectively, but they showed that their "official capacity was involved in the acts complained of as amounting to a crime," clearly, the gravamen of the charges is that the accused persons had acted fraudulently in the discharge of their duties, and therefore, as laid down by the Federal Court in the case cited above, the 'consent' prescribed in sec. 270 was required for initiating proceedings against them—*Ibid*.

2B. Rules or Police Regulations:—The Police Regulations are a volume of orders by the Local Government and there is no paragraph in the Criminal Procedure Code giving the Local Government power to issue orders for carrying out the provisions of the Criminal Procedure Code. The Criminal Procedure Code, therefore, cannot be

final order' in the section may be assumed to apply to criminal cases as well, the order of the High Court directing a re-hearing of the criminal appeal by the Sessions Court is not a judgment within the meaning of sec. 205 of the Government of India Act. (*Per Sulaiman, J.*)—*Dr. Hori Ram Singh v. Emp.*, 40 Cr.L.J. 468, A.I.R. 1939 F.C. 43, 1939 M.W.N. 497, 181 I.C. 317, 1939 O.L.R. 366, 1939 P.W.N. 429, 1939 M.Cr.C. 148, 50 M.L.W. 95, 20 P.L.T. 539, (1939) 2 M.L.J. Sup. 23, C.W.N. 1939 F.C. 50, 41 P.L.R. 680.

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Section 270 of the Government of India Act, 1935, is very wide in its terms and prohibits the initiation of proceedings in respect of the acts described therein against all servants of the Crown employed in connection with the affairs of the Province whether they are "gazetted officers" or not—*Arjan Singh v. Emp.*, 41 Cr L J. 65 (68), 184 I.C. 680, A.I.R. 1939 Lah. 479

The provisions of sub-section (1) of sec 270 are mandatory and admit of no reservation or exception. They contain a positive prohibition against the institution of civil and criminal proceedings against the persons described in the section in respect of the acts mentioned, without such consent. In other words, the Governor's "consent" is an essential pre-requisite to the competency of the Court to entertain the proceedings. It is the very foundation of the Court's jurisdiction, and its absence renders the entire proceedings void *ab initio*. This matter has also been put beyond doubt by the decision of the Federal Court in *Dr Horn Ram Singh's* case, cited above, where it was held that the "consent of the Governor is a condition precedent to the institution of the proceedings against the public servant". Where, therefore, the initiation of the proceedings against the accused was illegal, the subsequent production of the "consent", even though it was before the commencement of the trial *de novo*, could not validate what was invalid at its inception. The statute contains a positive prohibition against the initiation of proceedings without the prescribed consent, and such an illegality cannot be cured under sec 537, Cr. P. C., even when no prejudice has been shown to have been caused—*Ibid.* For contra see *Manzur Ali v. Emp.*, in Note 647.

Where the 'consent' stated that it was granted by the Governor of a Province and there is no indication that in doing so the Governor was acting "with his Ministers," it must be presumed that he granted it "in his discretion"—*Ibid*

Where the charges against the accused persons not only state that the alleged criminal acts were done by them while they were engaged in the execution of their duties as Sub-Divisional Officer and Overseer, respectively, but they showed that their "official capacity was involved in the acts complained of as amounting to a crime," clearly, the gravamen of the charges is that the accused persons had acted fraudulently in the discharge of their duties, and therefore, as laid down by the Federal Court in the case cited above, the 'consent' prescribed in sec 270 was required for initiating proceedings against them—*Ibid.*

2B. Rules or Police Regulations:—The Police Regulations are a volume of orders by the Local Government and there is no paragraph in the Criminal Procedure Code giving the Local Government power to issue orders for carrying out the provisions of the Criminal Procedure Code. The Criminal Procedure Code, therefore, cannot be

modified by any order of the Local Government in a departmental Code—*Muhammad Yakub v. Emp.*, 39 Cr.L.J. 971 (973), 177 I.C. 867, A.I.R. 1938 All. 534, 1938 A.L.J. 782.

There is no section of the Criminal Procedure Code which gives the Executive Government power to make rules to supplement the Code, and whatever value may be attached to the paragraph in the *Manual of Government Orders*, it cannot have any legal effect as regards the admissibility or inadmissibility of the confession—*Lal Singh v. Emp.*, 40 Cr.L.J. 132 (137), 178 I.C. 694, A.I.R. 1938 All. 625, 1938 A.L.J. 943, I.L.R. 1938 All. 875

PART I.

PRELIMINARY.

CHAPTER I.

1. (1) This Act may be called the Code of Criminal
Short title.
Commencement.
Procedure, 1898; and it shall come into force on the first day of July, 1898.

(2) It extends to the whole of British India; but, in the
Extent.
absence of any specific provision to the contrary, nothing herein contained shall affect any special or local law now in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force, or shall apply to—

(a) the Commissioners of Police in the towns of Calcutta, Madras, and Bombay, or the Police in the towns of Calcutta and Bombay;

(b) heads of villages in the Presidency of Fort St. George; or

(c) village Police Officers in the Presidency of Bombay:

Provided that the *Provincial Government* may, if it thinks fit, by notification in the official Gazette, extend any of the provisions of this Code, with any necessary modifications, to such excepted persons.

2C. Amendment:—In the proviso to sec 1, cl (2), the words "Provincial Government" have been substituted for the words "Local Government" by sec. 4 of the *Government of India (Adaptation of Indian Laws) Order, 1937*

3. Object of the Code:—The object of the Criminal Procedure Code is to provide a machinery for the punishment of offences against the substantive law—*Ganesh Narain*, 13 Bom. 590; *Abdul Rahaman*, 16 Bom 580; *Dular v. Nijabat*, 12 Cal 536; *Rama Chandra*, Ratanlal 776 (778); *Mona Puna*, 16 Bom 661 (669); *Abdul*, Ratanlal 577 (579); *Ramasami*, 43 M.L.J. 710, 23 Cr.L.J. 691 (692).

4. Extent:—*British India*: 'British India' shall mean, as respects the period before the commencement of Part III of the Government of India Act, 1935, all territories and places within His Majesty's dominions which were for the time being governed by His Majesty through the Governor-General of India or through any Governor or officer subordinate to the Governor-General of India, and as respects any period after that date means all territories for the time being comprised within the Governors' Provinces and the Chief Commissioners' Provinces, except that a reference to British India in an Indian law passed or made before the commencement of Part III of the Government of India Act, 1935, shall not include a reference to Berar. [*Vide* sec. 3, cl. (7) of the General Clauses Act (X of 1897) as amended by the Government of India (Adaptation of Indian Laws) Order, 1937.]

Aden:—Aden has ceased to be a part of British India from the 1st day of April, 1937. *Vide* sec. 94, cl. (2) and sec. 288, cl (1) of the Government of India Act, 1935 (25 Geo. 5).

If any such Order is made, it shall confer appellate jurisdiction from Courts in Aden upon such Court in India as may be specified in the Order, and it shall be the duty of any Court in India upon which jurisdiction is so conferred to exercise that jurisdiction, and such contribution, if any, as His Majesty in Council may determine shall be paid out of the revenues of Aden towards the expenses of that Court.

The Order shall also make provision specifying the cases in which an appeal from that Court in India may be brought to His Majesty in Council. *Vide* sec. 288, cl. (4) of the Government of India Act, 1935 Section 20 of the Aden Colony Order, 1936, which has conferred such jurisdiction, runs as follows:—

20. (1) An appeal shall lie from the Supreme Court to the High Court of Judicature at Bombay (in this section referred to as "the High Court")—

(a) *

(b) in criminal cases, from any judgment of the Supreme Court from which, if it were a judgment of a Court of Session in the Province of Bombay, an appeal would lie to the High Court under the Indian Code of Criminal Procedure, 1898, as amended prior to the appointed day:

Provided that no appeal shall lie where the sentence imposed is one of imprisonment not exceeding six months or fine not exceeding five hundred rupees or of both such imprisonment and fine

(2) When any person is sentenced to death and no appeal has been lodged by him within the time limited for that purpose, the Supreme Court shall transmit the record of the case to the High Court and an appeal shall thereby be deemed to have been lodged by the said person; and the sentence shall not be carried out unless and until it shall have been confirmed by the High Court.

(5) (a) The High Court shall, in relation to appeals under this section, have the like powers as are conferred upon it by the Indian Code of Civil Procedure, or the Indian Code of Criminal Procedure, 1898, as amended prior to the appointed day, in relation to appeals from a District Court or a Court of Session, as the case may be, in the Province of Bombay.

Unless repealed, amended or otherwise affected by or under any Order of His Majesty in Council or any law made by the Governor all Acts (including this Code of Criminal Procedure, 1898) shall continue to have effect in the Colony of Aden. *Vide* sec. 16 of the Aden Colony Order, 1936

Burma.—Burma has ceased to be part of India from the first day of April, 1937. *Vide* sec. 46, cl (2) of the Government of India Act, 1935 and sec. 159 of the Government of Burma Act, 1935

Section 148 of the Government of Burma Act, 1935, provides that the existing law is to continue in force. Sec. 4 (1) of the Government of Burma (Adaptation of Laws) Order, 1937, provides "The enactments mentioned in the Schedule to this Order, until repealed or amended by the Legislature or other competent authority, have effect subject to the adaptations and modifications directed by that Schedule to be made therein or, where so directed, shall cease to have effect." Therefore, the Criminal Procedure Code (V of 1898) is in force in Burma subject to the following adaptations and modifications introduced therein by the Government of Burma (Adaptation of Laws) Order, 1937, and the Schedule annexed thereto.

The adaptations and modifications, which have not been incorporated in the body of the sections as given in this edition to avoid confusion with the changes introduced therein by the Government of India (Adaptation of Indian Laws) Order, 1937, are given below:—

5. (1) Whenever an expression mentioned in the first column of the Table hereunder printed occurs (otherwise than in a title or preamble or in a citation or description of an enactment) in any Burman law then, unless that expression is under the last preceding paragraph expressly directed to be otherwise adapted or modified or to

stand unmodified or to be omitted, there shall be substituted therefor the expression set opposite to it in the second column of the said Table

Table of General Adaptations.

1	2
Governor-General of India; Governor-General; Governor-General of India in Council; Governor-General in Council; Chief Commissioner of British Burma; Chief Commissioner; Lieutenant-Governor of Burma; Lieutenant-Governor; Local Government of Burma; Local Government;	Governor.
Gazette of India, Gazette of British Burma, Burma Gazette, Local Official Gazette, Official Gazette,	Gazette.

(2) Any words contained in any Burman law, otherwise than in a title or preamble, which require the consent, assent, approval, sanction or control of the Governor-General or the Governor-General in Council in relation to anything done by the Local Government or the Governor shall be omitted.

(3) A direction in the Schedule to this Order that a specified Burman law or section or portion of a Burman law shall stand unmodified shall be construed merely as a direction that it is not to be modified or adapted in accordance with the foregoing provisions of this paragraph

[Vide sec 5 of the Government of Burma (Adaptation of Laws) Order, 1937.]
For greater details see other sections of the same Order

Throughout the Act, unless otherwise provided, for "British India" substitute "British Burma", for "India" substitute "Burma", for "a High Court", "any High Court", "the High Courts", and "every High Court" substitute "the High Court"; and omit "established by Royal Charter" wherever those words are used in relation to any High Court

Section 1—In sub-section (2) omit the words from "or shall apply to" to the end of the sub-section.

Section 3—Omit "the expression 'Magistrate of Police' shall be deemed to mean 'Presidency Magistrate' and".

Section 4—In sub-section (1), omit clause (a) and renumber existing clause (b) as clause (a).

Insert as clause (b)—

"(b) 'Burman', when used as a noun, means a native of Burma; and 'Burman British subject' means a subject of His Majesty who is a native of Burma".

In clause (f), omit "within or without the presidency-towns".

Omit clause (j)

In clause (n) omit "within or without a presidency-town".

In clause (r) omit "or a mukhtar" and "a vakil and an attorney"

After clause (s) insert—" (ss) 'Political Agent' has the same meaning as that assigned to the expression in section 2 (g) of the Burma Extradition Act".

Section 6.—Omit "II—Presidency Magistrates"

Section 7—In sub-section (1) for "Every province (excluding the presidency-towns) shall be a sessions division, or" substitute "British Burma".

Omit sub-section (4).

Section 8.—Sub-section (1)

Section 9.—In the heading

Section 10.—Sub-section (1)

Section 12.—Sub-section (1)

Section 14.—Sub-section (1)

Section 15.—Sub-section (1)

} Omit "outside the presidency-towns".

Omit sections 18, 19, 20 and 21.

Section 22.—For "Every Local Government, so far as regards the territories subject to its administration" substitute "The Governor".

For section 25 substitute the following section.—

"25 In virtue of their respective offices, the Governor, the Judges of the High Court, Sessions Judges and District Magistrates are Justices of the Peace within and for the whole of British Burma".

Omit sections 26 and 27.

Section 29B.—Omit "or a Chief Presidency Magistrate".

Section 30.—Omit the words from "In the territories" to "Assistant Commissioners".

Section 32.—In clause (a) of sub-section (1) omit "Presidency Magistrates and of".

Section 40.—Omit "under the same Local Government".

Sections 42 and 44.—Omit "whether within or without the presidency-towns".

Section 45.—In sub-section (1) omit "village-accountant, village-watchman", "or the Court of Wards" and "accountant, watchman".

Section 48.—For "notification" substitute "announcement".

Omit sub-section (2) of section 54, sub-section (2) of section 55, sub-section (2) of section 56 and sub-section (3) of section 68

Section 70.—Omit "or, in a presidency-town, with his servant residing with him".

Section 77.—In sub-section (1) omit "and when issued by a Presidency Magistrate shall always be so directed", and for "other Court" substitute "the Court".

Section 83.—In sub-section (1) omit "or the Commissioner of Police in a presidency-town" and in sub-section (2) omit "or Commissioner".

Section 84.—Omit sub-section (4).

Section 85.—Omit "or the Commissioner of Police in a presidency-town" and "or Commissioner".

Section 86.—Omit the first "or Commissioner" and for "District Superintendent or Commissioner" substitute "or District Superintendent".

Section 88.—In sub-sections (2), (6B) and (6C) omit "or Chief Presidency Magistrate" and in sub-section (6C) omit "or to any Presidency Magistrate, as the case may be".

Section 94.—In sub-section (1) omit "in any place beyond the limits of the towns of Calcutta and Bombay".

Section 95.—Omit "Chief Presidency Magistrate".

Section 96.—In sub-section (2) omit "or Chief Presidency Magistrate".

Section 98.—In sub-section (1) omit the first "Presidency Magistrate" and for "Subdivisional Magistrate or a Presidency Magistrate" substitute "or a Subdivisional Magistrate".

Section 100.—Omit "Presidency Magistrate".

Section 106.—Omit "or the Court of a Presidency Magistrate".

Section 107.—In sub-section (1) omit "Presidency Magistrate";

In sub-section (2) omit "Chief Presidency or".

Section 108.—Omit "Chief Presidency or", "Presidency Magistrate or" and "or the Local Government".

Sections 109 and 110.—Omit "Presidency Magistrate".

Section 123.—In sub-section (2) omit "or, if such Magistrate is a Presidency Magistrate, pending the orders of the High Court";

In sub-section (3A) omit "or the High Court".

Section 124.—In sub-section (1) omit "or a Chief Presidency Magistrate";

In sub-section (2) omit "Chief Presidency or";

In sub-sections (5) and (6) omit "or Chief Presidency Magistrate".

Section 125.—Omit "Chief Presidency or".

Section 126.—In sub-section (1) omit "Presidency Magistrate".

Section 127.—Omit sub-section (2).

Section 128.—Omit "whether within or without the presidency-towns"

Section 144.—In sub-section (1) omit "Chief Presidency Magistrate" and "or the Chief Presidency Magistrate".

Section 155.—In sub-section (2) omit "or of a Presidency Magistrate".

Section 164.—In sub-section (1) omit "Any Presidency Magistrate".

Section 174.—Omit sub-section (4).

Section 178.—After "Act, 1915" insert "or section 85 of the Government of Burma Act, 1935".

Omit section 184.

Section 185.—In sub-section (1) omit "same" and for "that" substitute "the"; and omit sub-section (2).

Section 186.—In sub-section (1) omit "a Presidency Magistrate".

Section 187.—In sub-section (1) omit "Presidency Magistrate or".

Section 188.—For "Native Indian Subject of Her Majesty" substitute "British subject domiciled in Burma"; for "the territories of any native Prince or Chief in India" substitute "Burma outside British Burma".

Section 190.—In sub-section (1) omit "Presidency Magistrate".

Section 192.—In sub-section (1) omit "Chief Presidency Magistrate".

Section 194.—In sub-section (1) for "granted under the Indian High Courts Act, 1861, or the Government of India Act, 1915" substitute "of the High Court";

In sub-section (2) omit "or the Local Government" and for "Government of India" substitute "Crown"

Section 196.—Omit "the Local Government".

Section 196A.—Omit the first "the Local Government" and "Chief Presidency Magistrate or".

Section 196B.—Omit "or Chief Presidency Magistrate".

Section 197.—For "a Local Government" and "Such Government" substitute "the Governor".

Section 200.—Omit proviso (b).

Section 202.—Omit sub-section (3)

Section 206.—Omit "Presidency Magistrate".

Section 208.—Omit sub-section (4).

Section 213.—In sub-section (1) omit "(unless the Magistrate is a Presidency Magistrate)".

Section 219.—In sub-section (2) omit "where the Magistrate is not a Presidency Magistrate".

Section 221.—For sub-section (6) substitute,—

"(6) The charge shall be written either in English or in the language of the Court".

Omit section 266.

Section 267.—Omit the words from "under this Code" to "1915".

Section 275.—In sub-section (1) for "European or Indian" substitute "European or Burman or Indian"; for "an Indian" substitute "a Burman or Indian"; and for "Indians" substitute "Burmans or Indians".

Section 276.—In the proviso 'Thirdly' for "before any High Court in the town which is the usual place of sitting of such High Court" substitute "at Rangoon before the High Court".

Section 281A.—In sub-section (1) for "Indian" substitute "Burman or Indian", and for "Indians" substitute "Burmans or Indians".

Section 285A.—For “an Indian British subject” substitute “a Burman or Indian British subject;” for “being an Indian” substitute “being a Burman or an Indian;” and for “Indian British subject or American” substitute “such Burman or Indian British subject, or such American, as the case may be”.

Section 312.—For “Indians” substitute “Burmans or of Indians”.

Section 313.—For sub-section (4) substitute:—

“(4) The Governor may exempt any salaried officer of Government from serving as a juror”.

Section 315.—In sub-section (1) for “the town which is the usual place of sitting of each High Court” substitute “Rangoon”.

Section 316.—For “the town which is the usual place of sitting of such High Court” substitute “Rangoon”.

Section 320.—For clause (aa) substitute:—

“(aa) members of either Chambers of the Legislature”.

Section 326.—In sub-section (3) for “Indians” substitute “Burmans or Indians”.

Section 335.—In sub-section (1) for the words from “Governor General in Council” to “other High Courts” substitute “Governor”;

In sub-section (2) omit the words from “in the case of” to “in all other cases”.

Section 337.—In sub-section (1) omit “a Presidency Magistrate”.

Section 346.—Omit “outside the presidency-towns”.

Sections 354 and 355.—Omit “other than a Presidency Magistrate”.

Section 356.—Omit “other than Presidency Magistrates”.

Omit section 362.

Section 364.—Omit “or the Chief Court of Oudh” and “or in the course of a trial held by a Presidency Magistrate”.

Section 365.—Omit “and the Chief Court of Oudh”.

Omit section 370.

Section 377.—For “shall, when such Court consists of two or more Judges, be made, passed and signed by at least two of them” substitute “shall be made, passed and signed by at least two of the Judges of the Court”.

Section 387.—Omit “or Chief Presidency Magistrate”.

Section 401.—In sub-section (1) omit “or the Local Government”;

In sub-section (2) omit “or the Local Government” and “or the Local Government as the case may be”;

In sub-section (3) omit “or of the Local Government as the case may be” and “or the Local Government”;

In sub-section (6) omit “and the Local Government”.

Section 402.—Omit “or the Local Government”.

Section 403.—In sub-section (5) for “section 26 of the General Clauses Act, 1897” substitute “the Burma General Clauses Act”.

Section 406.—For paragraphs (a) and (b) substitute:—“to the Court of Session”, and in the proviso omit “or a Presidency Magistrate”.

Section 406A.—Omit “(a) if made by a Presidency Magistrate, to the High Court”.

Omit section 411.

Section 412.—Omit “Presidency Magistrate or”.

Omit sections 432 and 433.

Section 434.—Omit “consisting of more Judges than one and”.

Section 439.—In sub-section (3) omit “a Presidency Magistrate or”.

Omit section 441.

Chapter XXXIII.—In the heading for “Indian” substitute “Burman or Indian”.

Section 443.—In sub-section (1) omit “outside a presidency-town”; in clause (a) for “Indian” substitute “Burman or Indian”; in clause (b) for “an Indian” substitute “a Burman or Indian”.

Section 445.—In sub-section (1) for “an Indian” substitute “a Burman or an Indian”.

Section 446.—In sub-section (2) for "Indian" substitute "Burman or Indian" and for "Indians" substitute "Burmans or Indians".

Section 449.—Omit clause (c) of sub-section (1) ;

In sub-section (3) omit "where the High Court consists of more than one Judge".

Section 475.—In sub-section (1) for "such Local Government" substitute "the Governor".

Section 476.—In sub-section (1) omit "For the purposes of this section, a Presidency Magistrate shall be deemed to be a Magistrate of the first class".

Section 479.—Omit "Presidency Magistrate".

Section 486.—In sub-section (4) omit "or, in the presidency-towns, to the High Court".

Section 488.—In sub-section (1) omit "a Presidency Magistrate".

Section 491.—In sub-section (3) omit all after "1818".

Section 491A.—For "Any High Court established by letters patent" substitute "The High Court".

Section 492.—In sub-section (1) omit "or the Local Government".

Section 495.—In sub-section (1) omit "Standing Council, Government Solicitor".

Section 503.—In sub-section (1) omit "a Presidency Magistrate" ;

In sub-section (2) for "Prince or Chief in India" substitute "Chief of Karenni", and omit "British Indian".

Omit section 504

In section 506, sub-section (1) of section 514, and sections 514A and 515 omit "Presidency Magistrate or".

Section 514.—In sub-section (3) omit "or Chief Presidency Magistrate".

Section 524.—In sub-section (1) omit "Presidency Magistrate".

Section 526.—In sub-section (2) omit "other than the Court of a Presidency Magistrate".

Section 528.—In sub-section (2) omit "Chief Presidency Magistrate" ;

Omit sub-section (6).

Chapter XLIV—A.—In the heading for "Indian" substitute "Burman or Indian".

Sections 528A, 528B and 528C.—For "Indian" substitute "Burman or Indian".

Section 528b.—Omit "made by the Governor General in Council or the Indian Legislature".

Omit section 542

Section 552.—Omit "Presidency Magistrate or".

Omit section 553.

Section 554.—For sub-section (1) substitute —

"(1) With the previous sanction of the Governor, the High Court may make rules for the inspection of subordinate courts";

Omit sub-section (2).

Section 555.—For "section 107 of the Government of India Act, 1915" substitute "section 85 of the Government of Burma Act, 1935".

Section 558.—Substitute the following section —

"558. *The Governor may determine what, for the purposes of this Code, shall be deemed to be the language of each court other than the High Court*"

Section 559.—In sub-section (2) omit "the Chief Presidency Magistrate in a Presidency-town, and" and "outside such towns".

Section 561.—Omit "a Chief Presidency Magistrate or".

Section 564.—Omit sub-section (2).

Section 565.—In sub-section (1) for "Prince or State in India" substitute "Chief of Karenni", and omit "or of any Local Government" and "Presidency Magistrate".

Schedule II.—Omit the references to "Presidency Magistrate" and "Chief Presidency Magistrate".

Schedules III and IV.—In the headings omit "Provincial".

Schedule V.—Omit "Empress of India" and "Emperor of India".

In clause (1b) of Form XXVIII for "[when the charge is framed by a Presidency Magistrate, for Court of Session substitute High Court]" substitute "[or High Court]"; Omit clause (2).

[*Vide* the Schedule annexed to the Government of Burma (Adaptation of Laws) Order, 1937.]

The following are within British India:—Chief Commissioners Provinces of British Baluchistan, Delhi, Ajmere-Merwara, Coorg and the Andaman and Nicobar Islands and the area known as Panth Piploda *Vide* sec. 94 (1) and sec. 311 (1) of the Government of India Act, 1935; Lacadive Islands (*Cheriyā Kōya*, 13 Mad. 353); Island of Perim (*Mangal Tekchand*, 10 Bom 258).

Native States:—The Native States and Tributary Mahals are not within British India; therefore this Code does not apply to Rajkot (*Abdul Latif*, 10 Bom. 186 (188)); Civil Station of Wadhwan (*Chiman Lal*, 37 Bom. 152; but see 9 Bom 244); Moyurbhanj (*Keshub*, 8 Cal 985); Keonjhar (*Bichitranund v. Bhugbat*, 16 Cal. 667 at p. 675); the lands occupied by the Hyderabad State Railway (*Muhammad Yusufuddin*, 25 Cal. 20 (P.C.)); Railway Station in a Native State (*Raghunathrao*, 5 Bom.L.R. 873).

But although the Code as such does not apply to the Native States many of those States have in fact adopted it, *e.g.*, the Civil and Military Station of Bangalore (*In re Hayes*, 12 Mad. 39), Mysore, Kashmir, the Native States in the Rajputana Agency, etc.

Transfer of territory from British India to Native State:—The British Court has jurisdiction to proceed with the trial of an offence committed in a territory which formed part of British India at the date of the offence and at the date of commitment to the Sessions, but was transferred to a Native State before the case came in for trial—*Ram Naresh*, 34 All 118. Similarly, the British Appellate Court has jurisdiction to hear an appeal if the transfer took place after a conviction but before the appeal therefrom was heard—*Mahabir*, 33 All 578.

Other places where the Code does not apply—The Code does not apply to the North Cachar Hills (*Soonderjee v. Maylon*, 26 Cal. 874) or to the Chittagong Hill Tracts (*Sonai Mugh*, 27 Cal 654). It also does not apply to the Garo Hills, the Khasia and Jaintia Hills, the Naga Hills, the North Cachar Subdivision of the Cachar District, the Mikur Hill Tracts in the Nowgong District, the Dibrugarh Frontier Tracts in the Lakhimpur District, and the Lushai Hills; see Assam Gazette, 1898, Part II, page 788.

Places to which the Code has been extended.—The Code has been extended to the following places:—

(1) The District of *Angul* (with effect from 1st August, 1898); see Calcutta Gazette, 1898, Part I, p 779;

(2) *Upper Burma* (excluding the Shan States); see Burma Laws Act (XIII of 1898);

(3) the *Shan States* (by the Shan States Laws and Criminal Justice Order, 1895, as amended by Notification No 29, dated 19-12-1898, Burma Code);

(4) the Scheduled Districts in *Ganjam* and *Vizagapatam*: see Fort St George Gazette, 1898, Part I, page 206; see also *Public Prosecutor v Sadanandra*, 23 M.L.J. 670, 13 Cr.L.J. 856;

(5) *Sonthal Parganas*: see Calcutta Gazette, 1898, Part I, page 665;

(5) Districts of *Hazaribagh*, *Lohardaga*, *Manbhum*, *Palamau*, *Pargana Dhalbhum* and the *Kothen* in the *Singbhum* District: see Calcutta Gazette, 1898, Part I, page 714; and Gazette of India, 1899, Part I, page 779;

(7) *Pargana of Manpur*: see Gazette of India, 1899, Part I, page 419;

(8) *British Baluchistan*: see Gazette of India, 1898, Part I, page 221;

(9) *Chittagong Hill Tracts*: see section 4 of the Chittagong Hill Tracts Regulation I of 1900; but see *Sonai Mugh*, 27 Cal. 654.

By Notification No. 260-1, dated the 24th April, 1929, in exercise of powers conferred by the Indian (Foreign Jurisdiction) Order in Council, 1902, the Governor-General applied *inter alia* the Indian Penal Code and the Indian Code of Criminal Procedure to the Administered Areas in the Hyderabad State, with certain modifications, which

included a provision that references to the Local Government should be read as referring to the Resident at Hyderabad, and references to the High Court should be as referring to the Court of the Resident at Hyderabad. Further, sec. 268 of the Criminal Procedure Code, which provides that all trials before a Court of Session shall be either by jury or with the aid of assessors, was applied subject to the modification that "trials before a Court of Session may, in the discretion of the Sessions Judge, be without jury or aid of assessors"—*Fakira v. King-Emp.*, 41 C.W.N. 741 (743), 167 I.C. 790, 39 P.L.R. 334, 1937 O.L.R. 216, 1937 M.W.N. 546, 9 R.P.C. 231, 1937 A.Cr.C. 74, 3 B.R. 426, 38 Cr.L.J. 498, 1937 O.W.N. 412, 1937 A.L.R. 328, 64 I.A. 148, 46 M.L.W. 134, 39 Bom.L.R. 966, 11 L.R. (1937) Bom 711, 1937 A.W.R. 1128, 1937 A.L.J. 1055, A.I.R. 1937 P.C. 119, (1937) 2 M.L.J. 323 (P.C.).

The Code has also been extended to the *British Protectorates* on the East Coast of Africa (Order of Council, 1897); *Somaliland* (Order, 1899); the *Persian Coast and Islands* (Order, 1897); and *Zanzibar* (Order, 1884), under which Zanzibar is to be treated as a District in the Bombay Presidency).

As regards *Muscat*, it has been held that the Bombay High Court is invested with original criminal jurisdiction over it, but not appellate or revisional jurisdiction—*In re Rattansee*, 24 Bom. 471.

High Seas:—The trial of a British seaman for an offence committed on the high seas on a British ship must be conducted under the Code of Criminal Procedure, though the offence charged was an offence under the English Law—*Gunning*, 21 Cal 782; *Barton*, 16 Cal. 238; *Thompson*, 1 B.L.R. O.Cr. 1; *Elmstone*, 7 B.H.C.R. 89. See also Note 31A.

5. Special law:—The expression 'special law' in this section has reference to statutory enactments and not to local family law (e.g., Marumakkattayan law)—*Thillu Amma v Sankunni*, 37 M.L.J. 361, 20 Cr.L.J. 733, 52 I.C. 893. The Coroner's Act is an instance of special law, which is unaffected by the Cr. P. Code—*Jogeshwar Passi*, 31 Cal 1 (6). See also *Mahomed Rajudin*, 16 Bom. 159.

The Evidence Act is a separate statute dealing with an important branch of law, and its provisions are independent of the rules of procedure contained in the Criminal Procedure Code and must have full scope unless it is clearly proved that they have been repealed or altered by another statute—*Rannun v King-Emp.*, A.I.R. 1926 Lah. 88 (89), 7 Lah. 84, 94 I.C. 901, 27 Cr.L.J. 709, 27 P.L.R. 583. It is to the Indian Evidence Act, and not to the Code of Criminal Procedure, that one has to look as to whether the evidence in point is or is not admissible, the more so as there are to be found in the Criminal Procedure Code certain sections, in Chapter XLI entitled "Special Rules of Evidence." If the Legislature had thought it necessary in criminal cases to depart from the general rules laid down in Act No. I of 1872, it is more probable that any such exceptions would be found in the chapter in question—*Misri*, 31 All. 592 (597), 8 Cr.L.J. 26, 3 I.C. 26; *Vellamoonji Goundan v Emp.*, A.I.R. 1932 Mad 431, 55 Mad. 711, 62 M.L.J. 559, 1932 M.W.N. 449, 137 I.C. 863, 1932 Cr.C. 412, 5 M.Cr.C. 174, 33 Cr.L.J. 526, 35 M.L.W. 512, 18 A.I.C.R. 286.

The Evidence Act is a special law within the meaning of sub-section (2) of this section and in the absence of a specific provision to the contrary in the Cr. P. Code nothing in that Code shall affect anything in the Evidence Act—*Faujdar*, A.I.R. 1933 All 440 (442), 55 All. 463, 144 I.C. 1021, 34 Cr.L.J. 875, 1933 A.L.J. 1578, 1933 Cr.C. 746. The Evidence Act deals with the particular subject of evidence including the admissibility of evidence and is a special law within the meaning of the Cr. P. Code. It follows, therefore, that no rules about the relevancy of evidence in the Evidence Act is affected by any provision in the Code of Criminal Procedure unless it is so specifically stated in the latter Code—*Ram Naresh v Emp.*, 40 Cr.L.J. 559 (563), 181 I.C. 616, A.I.R. 1939 All 242, 1939 A.L.J. 107, 1939 A.W.R. (H.C.) 195. See also *Subbiah Tevar*, A.I.R. 1939 Mad 856 (858), 1939 M.Cr.C. 133, 50 M.L.W. 318, (1939) 2 M.L.J. 455, 1939 M.W.N. 1000.

The provisions of the Code of Cr. P. are not abrogated or suspended by the introduction of Martial Law—*In re Kochunni Elaya Nair*, 45 Mad. 14 (18).

6. Local Law:—This Code will not affect any local law, as for instance, Act XXXVII of 1885 which is still in force in Sonthal Parganas. So, an order under that Act sentencing an accused to imprisonment is not open to revision under this Code—*Dular v. Nijabat*, 12 Cal 536. So also, this Code will not apply to proceedings held under the Sind Frontier Regulation (V of 1872 and III of 1892)—*Ghulam Kadir*, 5 S.L.R. 105, 12 Cr.L.J. 568.

The Criminal Procedure Code is applicable to prosecutions under the Calcutta Municipal Act (Bengal III of 1923). See the cases of *Sisir Kumar Mitter v. The Corporation of Calcutta*, 43 C.L.J. 369, 30 C.W.N. 598; *Umesh Chandra Mitter v. The Corporation of Calcutta*, 43 C.L.J. 231; and *Sew Prosad Poddar v. The Corporation of Calcutta*, 9 C.W.N. 18. The point was, however, not argued in those cases; and moreover the Court was considering the proceeding in which the petitioners had been fined under penal provisions of the Calcutta Municipal Act. But in a proceeding before the Municipal Magistrate where the only question is whether or not certain structures are liable to be demolished the provisions of the Criminal Procedure Code do not apply. The owner of the unauthorised structure is not an accused person and as such is not exempted from administration of oath under sec. 342, cl (4) of the Cr. P. Code—*Krishan Doyal Jalan v. The Corporation of Calcutta*, 54 Cal. 532.

7. Special jurisdiction:—The following are instances of special jurisdiction:—The jurisdiction conferred by sec 3 of Madras Act XXIV of 1839 (Vizagapatam Agency Act) regarding the administration of criminal justice in the Vizagapatam Agency Tract—*Budara Janni*, 14 Mad 121; the jurisdiction conferred by secs 20-23, Cattle Trespass Act—*Shama v. Lachu*, 23 Cal. 300; *Budhan v. Issur*, 34 Cal. 926; the jurisdiction conferred by Bombay Village Police Act, VIII of 1867—*Ragho Mahadu*, 19 Bom. 612.

8. Special powers:—*Instances*—Powers conferred on second-class Magistrates by secs. 3 (5) and 56 of the Bombay Abkari Act V of 1878—*Gastadji*, 10 Bom. 181; powers possessed by the High Courts to punish for contempts—*Surendra Nath Banerjee v. Chief Justice*, 10 Cal. 109 (P.C.); powers possessed by the High Courts under sec. 29 of the Letters Patent to transfer criminal cases before itself—*Sitapathi*, 6 Mad. 32; power of superintendence under sec. 15 of the Charter Act—*Lakhraj v. Deb Pershad*, 12 C.W.N. 678

Special Procedure:—For instance, the procedure prescribed by the Criminal Law Amendment Act (XIV of 1908), for the speedy trial of certain offences, and for prohibitions of associations dangerous to public peace.

9. Police of Calcutta, Bombay:—This Code does not apply to the Police in the city of Calcutta, unless expressly made applicable to them—*Madho Dhobi*, 31 Cal 557; *Muhammad Suleman v. Emp.*, 54 Cal. 218 (222); *Makhan Lal Dutta*, (1939) 2 Cal. 429 (431). Section 155, however, applies to the Police of Calcutta and Bombay—*Nilmadhab*, 15 Cal. 596; *Visram Babaji*, 21 Bom 495. Also secs 42, 44, 54, 55, 56, 68, 83, 84, 85, 86, 127, 164, 202, and Col 3 of Schedule II have been specially extended to the Police in the town of Calcutta. Sections 386 and 387 have been, by ratification under the proviso, extended to the Commissioner of Police for the town of Calcutta (see *Calcutta Gazette*, 23rd March, 1904). Secs 42, 44, 68, 84, 85, 86, 127, 164, 202 and Col. 3 of Sch. II apply to the Police of Bombay. But secs. 54, 55, 56 and 83 are no longer applicable to the Police of Bombay under sec. 2 (1) of the City of Bombay Police Act IV of 1902.

This Code applies to the Police, but not to the Commissioner of Police, of Madras. See Madras Act III of 1888.

10. Madras Village Headmen:—No part of this Code applies to Village Headmen who are empowered by Madras Regs. XI of 1816 and IV of 1821 to try petty cases—*Visramutha Pillai*, 2 Weir 1. But secs 528 now applies to Madras Village Headmen. Sections 480 and 482 do not apply to Village Munsiffs—*Venkatasami*, 15 Mad. 131.

This section should not be read to mean that village Magistrates cannot complain

or be tried under this Code; but it only mean that in his official capacity as a village Magistrate, that is, in the proceedings he takes as a village Magistrate, he is not governed by the Cr. P. Code. There is nothing in this Code to prevent him from instituting a complaint himself before a Magistrate—*Mari Mudali*, 19 L.W. 30, 25 Cr L.J. 221, A.I.R. 1924 Mad 730, 76 I.C. 653.

11. Bombay Village Police-officers:—The ancient village system of Police regulated formerly by Reg. IV of 1818 and Reg XII of 1827 and now by Bombay Village Police Act VIII of 1887 remains unaffected by this Code—*Rugho Mahadu*, 19 Bom 612. All that sub-sec. (2) of sec 1, Cr. P. C., means is that the procedure to be followed by the village police officers is not to be governed by the Criminal Procedure Code. It does not mean that the provisions of the Criminal Procedure Code are not to apply in the case of a complaint against a village police officer—*Shankar Sayaji Dalvi*, A.I.R. 1938 Bom 489, 40 Cr L.J. 116, 40 Bom L.R. 1106, 178 I.C. 682.

2. [*Repealed by the Repealing and Amending Act X of 1914*].

3. (1) In every enactment passed before this Code comes into force, in which reference is made to, or to any chapter or section of, the Code of Criminal Procedure, Act XXV of 1861, or Act X of 1872, or Act X of 1882, or to any other enactment hereby repealed, such reference shall, so far as may be practicable, be taken to be made to this Code, or to its corresponding chapter or section.

References to Code of Criminal Procedure and other repealed enactments.

(2) In every enactment passed before this Code comes into force, the expressions "Officer exercising (or 'having') the powers (or 'the full powers') of a Magistrate," "Subordinate Magistrate, first class" and "Subordinate Magistrate, second class," shall respectively be deemed to mean "Magistrate of the first class," "Magistrate of the second class," and "Magistrate of the third class"; the expression "Magistrate of a district" shall be deemed to mean "District Magistrate"; the expression "Magistrate of the district" shall be deemed to mean "District Magistrate"; the expression "Magistrate of Police" shall be deemed to mean "Presidency Magistrate"; and the expression "Joint Sessions Judge" shall mean "Additional Sessions Judge."

Expressions in former Acts.

4. (1) In this Code the following words and expressions have the following meanings unless a different intention appears from the subject or context:—

Definitions.

Section 4 is an interpretation-clause. Its legitimate function is to declare that certain words and expressions used in the Code shall, wherever permissible, not only have the meaning which is generally attached to such words and expressions, but such meaning as is assigned to such words and expressions by the interpretation clause. But by no means it is intended to annex to such words or expressions every incident, which may seem to be attached to them by any other Act of the Legislature—*Brooks v. Barwick*, A.I.R. 1926 Sind 58 (61), 91 I.C. 99.

- (a) "Advocate-General" includes also a Government Advocate, or, where there is no Advocate-General or Government Advocate, such officer as the *Provincial Government* may, from time to time, appoint in this behalf:

In this clause the words "Provincial Government" have been substituted for "Local Government" by sec. 4 of the Government of India (Adaptation of Indian Laws) Order, 1937.

This definition has also been embodied in sec. 2, cl (b) of the Indian Bar Councils Act (Act XXXVIII of 1926). The Advocate-General has pre-audience over all other advocates. He is the *ex-officio* Chairman of the Bar Councils constituted for the High Courts of Judicature at Fort William in Bengal, at Madras and at Bombay. *Vide* sections 8 and 4 of the same Act. For the powers and functions of the Advocate-General see sections 194, 333, 495, 526, cl. (4) and 526A of this Code and section 26 of the Letters Patent. See also Note 610A.

- (b) "bailable offence" means an offence shown as bailable in the second schedule, or which is made bailable by any other law for the time being in force; and "non-bailable offence" means any other offence:
- (c) "charge" includes any head of charge when the charge contains more heads than one:

A charge is the precise formulation of the specific accusation made against a person, who is entitled to know its nature at the earliest stage—*Reilly v. K-E*, 28 Cal. 434 (437) See also Ch XIX of this Code in this connection.

(d) * * * *

- (e) "Clerk of the Crown" includes any officer specially appointed by the Chief Justice to discharge the functions given by this Code to the Clerk of the Crown:

- (f) "cognizable offence" means an offence for, and "cognizable case" means a case in, which a police-officer, within or without the Presidency-towns, may, in accordance with the second schedule, or under any law for the time being in force, arrest without warrant:

12. Cognizable offence:—The words "a Police-officer" in this clause do not mean "any and every Police-officer." That is, an offence is regarded as a cognizable offence, if the offender can be arrested without warrant by *certain* Police-officers, though not by *any and every* Police-officer. If the power of arrest without warrant is limited to any *particular* class of Police-officer, that does not prevent the offence being regarded as a cognizable one—*Deodhar*, 27 Cal. 144; *Abasbhai*, 50 Bom 344, 93 I.C. 967, 27 Cr.L.J. 503, 28 Bom L.R. 272, A.I.R. 1926 Bom. 195; *Maroti v. Emp.*, A.I.R. 1939 Nag. 95 (97), 1939 N.L.J. 101, 40 Cr.L.J. 905, 184 I.C. 231, I.L.R. 1939 Nag. 488. Thus, under the Gambling Act it is not every Police-officer who can arrest without a warrant. It is only the District Superintendent of Police who can so arrest; but still the offence under that Act will be treated as a cognizable offence—*Ibid*.

But the power of arrest referred to in this clause must be an unqualified power, and not a *conditional* power like the one conferred upon the Police by sec. 24, Opium Act, I of 1878, which authorises a Police-officer to arrest without warrant *if* the accused does not furnish the security required by that section. An offence under sec. 9, Opium Act, is not therefore a cognizable offence—*Bahabal v. Tarak Nath*, 24 Cal. 691,

The words "under any law for the time being in force" in sec. 4 (f), Cr. P. Code, are wide enough to include an express or implied provision of any law or enactment and would cover the application of the maxim *qui facit per alium facit per se* (whatever a man may do of himself, he may do by another) and *qui per alium facit per seipsum facere videtur* (he who does an act through another is deemed in law to do it himself) to any provision of any enactment, in order to arrive at the true intention of the enactment—*Ismail Hirji*, A I R 1930 Bom. 49 (51), 21 Bom L.R. 1349, 1930 Cr C 113, 54 Bom 146, 31 Cr.L.J. 633. The words "or under any law for the time being in force" in sec. (4) (f), Cr. P. Code, have reference to such offences which are punishable with imprisonment for not less than three years, but are specified as offences for which the Police may arrest without a warrant, that is, offences which but for the special provision would not under the Cr. P. Code be cognizable offences. Examples of cognizable offences of this nature can be found in the Railways Act (IX of 1890), and sec. 131 of that Act is the section which makes these minor offences cognizable. The fact that no proceedings may be instituted for an offence under sec. 19 (f), Arms Act, without the permission of the District Magistrate, does not make the offence non-cognizable—*Maganlal Bagdi v. Emp.*, 35 Cr.L.J. 1097 (1100), 150 I.C. 623, A.I.R. 1934 Nag. 71, 1934 Cr.C. 276.

The words "a police-officer may arrest" do not mean every or any police-officer, and that provided one finds that by law a superior police-officer may arrest without a warrant then the offence is a cognizable offence. The words in the definition are "may arrest" and not "does arrest" and that consequently the test is not whether in fact the arrest is effected but whether it may be effected. In other words, the actual fact of arrest is irrelevant to the consideration whether a particular offence is a cognizable offence. The offences under sections 4 and 5 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887) are cognizable offences within the meaning of sec. 4, cl. (f), Cr. P. C.—*Emp. v. Abasbhai*, 50 Bom 344 (350), 27 Cr.L.J. 503, 93 I.C. 967, 28 Bom L.R. 272, A I R 1926 Bom 195; *Q-E v. Deodhar Singh*, 27 Cal 144 (150). The correctness of the above view was doubted in *Htwan Htin v. Emp.*, 36 Cr.L.J. 998, 156 I.C. 719, A I R 1935 Rang 181, 13 Rang 130, 1935 Cr.C. 623, where it was held that the offences under secs. 11 and 12 of the Burma Gambling Act (I of 1899) were not cognizable offences either under Cr. P. Code or under the said Act. In *Raghunath v. Emp.*, 33 Cr.L.J. 733, 139 I.C. 281, A I R 1932 Bom. 610, 34 Bom L.R. 901, 1932 Cr.C. 868, the Bombay High Court also held that the offence under sec. 4 of the Bombay Prevention of Gambling Act (V of 1887) was a non-cognizable offence. In *Maroti v. Emp.*, A I R 1939 Nag. 95, 1939 N.L.J. 101, 40 Cr.L.J. 905, 181 I.C. 231, I.L.R. 1939 Nag. 488, it was held that an offence under sec. 34 of the Police Act, 1861, was a cognizable offence.

(g) "Commissioner of Police" includes a Deputy Commissioner of Police:

(h) "complaint" means the allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but it does not include the report of a police-officer:

13. Complaint:—*Who can make a complaint*—The prosecutor in all criminal cases is the crown—*Mahadev Lal v. Dhontaj Maistri*, 12 C.W.N. 750 (751), 7 C.L.J. 375, 7 Cr.L.J. 342. A crime is an offence against society and has little or nothing to do with the rights in the stolen property of individuals. Government act on behalf of organised societies when enforcing a criminal remedy; when Government themselves stand in the position of a private person whose property has been stolen or embezzled, the exercise of the civil right of property by Government does not preclude the criminal remedy—*Emp. v. Sultan Mahmud*, A I R. 1939 Lah. 340 (342), I.L.R. 1939 Lah. 119, 41 P.L.R. 432. A complaint need not necessarily be made by the person injured

but may be made by any person aware of the offence. The rule is that if a general law is broken any person has a right to complain, whether he himself has suffered any particular injury or not—*Ganesh Narayan*, 13 Bom. 600 (602); *Keshav Lal*, 21 Bom. 536; *Dedar Bux v. Shyamapada*, 41 Cal. 1013, 18 C.W.N. 921, 15 Cr.L.J. 546, 24 I.C. 854; *Mahomed Rafiq v. Emp.*, A.I.R. 1931 Sind 116, 25 S.L.R. 9, 1931 Cr.C. 731, 134 I.C. 1001; *Balmukund*, 9 Lah. 678, 29 Cr.L.J. 652 (653); *Fazand Ali v. Hanuman*, 18 All. 465; *Sheo Pratap*, 1930 A.L.J. 1316, 32 Cr.L.J. 306 (508); *Basirulla v. Asadulla*, 33 C.W.N. 576 (577), 30 Cr.L.J. 1013; *Sathakuttia v. Pichai*, 1931 M.W.N. 1316; *Quarishi Sahib v. Begum Sahiba*, 46 Mad. 88; *Emp. v. Ismail Hirji*, A.I.R. 1930 Bom. 49 (51), 54 Bom. 146, 31 Cr.L.J. 633, 124 I.C. 106; *Gajraj v. Emp.*, 37 Cr.L.J. 56, 159 I.C. 306, A.I.R. 1935 All. 938, 1935 Cr.C. 1184, 1935 A.L.J. 1108. A Magistrate is competent to make a complaint as a common informer—*Mehr Singh v. Emp.*, A.I.R. 1933 Lah. 884 (885), 146 I.C. 387, 35 Cr.L.J. 86, 1933 Cr.C. 1178, 34 P.L.R. 1020. An Assistant Police Prosecutor can make a complaint in his private capacity—*Bulomal v. Emp.*, A.I.R. 1933 Sind 393, 146 I.C. 1038, 1933 Cr.C. 1433. This general rule is, however, subject to the exceptions mentioned in secs. 195 to 199A, where certain offences are stated to be complainable only by specified persons—*Gajraj v. Emp.*, 37 Cr.L.J. 56, 159 I.C. 306, A.I.R. 1935 All. 938, 1935 Cr.C. 1184, 1935 A.L.J. 1108. See also Note 1236.

It is not necessary under this clause or under section 190 (a) that the person lodging the complaint must have personal knowledge of the facts constituting the offence—*Sukumar v. Mofizuddin*, 25 C.W.N. 357 (360), 22 Cr.L.J. 455, 61 I.C. 839; *Suresh Chandra*, 1 P.L.T. 531, 21 Cr.L.J. 346, 55 I.C. 652; *Shewak Ram*, 7 S.L.R. 77, 15 Cr.L.J. 369 (370); *Ganesh*, 13 Bom. 600. Therefore, the Public Prosecutor is competent to make a complaint, although he has no personal knowledge of the facts constituting the offence—*Shewak* (supra). In a case like this it is reasonable that the Court before issuing summons should satisfy itself upon proper materials that a case has been made out for issuing summons—*Thakur Prosad v. Emp.*, 10 C.W.N. 1090, 4 Cr.L.J. 217. See Notes in para. 66 (4).

This section does not prescribe that the complaint should be presented in person by the complainant to the Magistrate, and that it may not be posted to him, or that if it is posted it is not a complaint at all—*Chuhermal*, 23 S.L.R. 285, 30 Cr.L.J. 732 (733), 117 I.C. 147, A.I.R. 1929 Sind 132, 1929 Cr.C. 160. Thus, a telegram can amount to a complaint in view of the fact that the definition of a complaint includes an allegation made in writing and does not in itself necessitate the presence of the complainant—*Hidayatullah v. Emp.*, A.I.R. 1936 Pesh. 66.

Essentials of a complaint—The complaint must allege that an offence has been committed; the use of a house as a brothel is not an offence, and a statement to a Magistrate that a certain person has so used his house is not therefore a complaint—*Khari*, 6 S.L.R. 254, 14 Cr.L.J. 320. An application for taking action under sec. 107, in which there is no allegation that an offence has been committed, is not a complaint—*Md. Yusuf v. Abdul*, 52 All. 148, 32 Cr.L.J. 570 (571); *Sarfaraiz*, 7 C.W.N. 947, 32 Cr.L.J. 570 (571). But if the application for action under sec. 107 alleges facts which amount to a substantive offence, the application would amount to a complaint—*Khachho Mal*, 27 Cr.L.J. 405 (406), A.I.R. 1926 All. 358. So also, a petition to institute proceedings under sec. 110 (*Imam Mandal*, 27 Cal. 662; *Ahmad Khan*, 1900 A.W.N. 206; *Muhammad Khan*, 1905 P.R. 42) or under sec. 145 (*Chathu v. Niranjana*, 20 Cal. 729) is not a complaint, because the allegations in support of proceedings under those sections do not amount to an offence. As to what are and what are not offences, see Notes under clause (a), *infra*.

The complaint must be made to a Magistrate. A Police-officer is not a Magistrate; therefore a petition or information sent to such officer is not a complaint—*Ishri v. Bakshi*, 6 All. 96; *Palanvarappa*, 7 Mad. 563; *Kailash*, 30 Cal. 285; *Sutendra v. Rai Mohan*, 30 Cal. 690 (F.B.); *In re Harilal*, 22 Bom. 919. So also, an Agent of the Court of Wards is not a Magistrate—*Jogobundhoo*, 30 Cal. 415. But a Deputy Commissioner

is an *ex-officio* District Magistrate and a petition addressed to him would amount to a complaint—*Shanker v. Manni*, 13 N.L.R. 13, 18 Cr.L.J. 459 (460).

The complaint must be made to a Magistrate with a view to his *taking action under this Code*. A petition alleging that an offence has been committed, but that the petitioner does not desire to prosecute the wrong-doer is not a complaint—*Bhawan Singh v. Haluman*, 6 C.W.N. 926. A mere statement to a Magistrate by way of information without any intention of asking him to take action is not a complaint—*Haider Raja*, 36 All. 222; *Ahmed Husain*, 17 C.W.N. 980, 14 Cr.L.J. 462; *Bansi Lal*, 12 C.W.N. 438; *Rayan Kuti*, 26 Mad. 640. So also, a petition sent by a husband to a Magistrate not with a view to his taking action thereon, but to recover the jewels alleged to have been stolen by his wife, is not a complaint—*In re Rukmani*, 16 Cr.L.J. 466 (Mad). A petition making charges against a person and asking for an order of the Police to warn that person in the first instance is not a complaint—*Purno v. Hurish*, 15 C.W.N. 1051, 12 Cr.L.J. 535. A letter written by the Assistant Collector to the District Magistrate in which the former did not ask that any action should be taken by the Magistrate nor intended that the Magistrate should proceed according to law against the person complained against, but merely 'solicited for orders' (i.e., asked for directions as to how he should proceed) did not amount to a complaint—*Sheosampat*, 40 All. 641, 19 Cr.L.J. 963. A petition addressed to a Magistrate containing an allegation that an offence has been committed, not with the view that the Magistrate should punish the offender, but merely with a view to illustrate the kind of conduct (e.g., oppression of tenants by Zemindar, demand of illegal payments) which the offender was following, and against which the petition is seeking protection, asking the Magistrate in his *executive*, (rather than judicial) capacity to make inquiry and protect the petitioner against a repetition of such conduct, does not amount to a complaint—*Bharat Kishore v. Judhistir*, 9 Pat. 707, AIR 1929 Pat. 473, 10 P.L.T. 779, 30 Cr.L.J. 1056 (1058) (F.B.). A statement made to a Magistrate with the object of inducing him to take action not under this Code, but under sec. 6 of the Bombay Gambling Act IV of 1887 is not a complaint within the meaning of this section—*Hotu*, 8 S.L.R. 66, 15 Cr.L.J. 657.

It cannot be laid down that in no circumstances can a telegram amount to a complaint because a person who sends a telegram cannot be at once examined in accordance with the provisions of sec. 200 Cr.P.C. In view of the fact that the definition of a complaint includes "an allegation made in writing" and does not in itself necessitate the presence of the complainant, such a contention cannot be acceptable. In order to render an allegation a complaint, it must be made 'with a view to a Magistrate taking action under the Criminal Procedure Code'. When there was no prayer in the telegram asking the addressee to take such action and in the absence of such a prayer, there must be clear proof that this was the petitioner's intention before it can be held that he submitted a complaint—*Hidayatullah v. Emp.*, 37 Cr.L.J. 604 (606), 162 I.C. 140, AIR 1936 Pesh. 66, 1936 Cr.C. 222, 8 R.Pesh. 189.

Although it is of the essence of a complaint that the accusation must be made with a view to action being taken under this Code, still an express request to that effect is not necessary. Whether the statement was made with a view to action being taken upon it as upon a complaint, must be determined in the light of the circumstances—*Bansi Pande*, 12 P.L.T. 109, 32 Cr.L.J. 210 (213), AIR 1930 Pat. 550, 1930 Cr.C. 1094.

A complaint need not set out *all* the facts on which the accused is to be charged—*Chidambaram*, 32 Mad. 3 (11); but it must contain a statement of the facts relied on as constituting the offence in ordinary and concise language with as much certainty as the nature of the case will admit. A complaint in which no facts are set out but only the words of the section of the Statute are literally copied, is a colourable compliance with the requirements of the law—*Pulin Behari Das*, 16 C.W.N. 1105, 13 Cr.L.J. 609; *Sukumar v. Mofizuddin*, 25 C.W.N. 357 (360), 22 Cr.L.J. 455.

It is not necessary that the complaint should specifically, and in terms, accuse any particular person of an offence. It is sufficient if it contains a statement of facts which would constitute an offence—*Jagat Chandra*, 26 Cal. 786 (789). The mention of the

name of the accused is not imperatively required under the definition given in this clause—*Shukhadava v. Hamid*, 7 Pat. 561, 10 P.L.T. 14, 29 Cr.L.J. 942 (944), 111 I.C. 862, A.I.R. 1928 Pat. 585; *Baldeo Prasad v. Emp.*, A.I.R. 1933 Pat. 297 (300), 12 Pat. 758, 14 P.L.T. 330, 1933 Cr.C. 789, 145 I.C. 382, 34 Cr.L.J. 942. A Magistrate can take cognizance of offences against accused who are not named in the petition of complaint but are disclosed by the prosecution evidence—*Dedar Buksh v. Symapada*, 41 Cal. 1013, 18 C.W.N. 921, 15 Cr.L.J. 546, 24 I.C. 954. See also *Charu v. Nagendra*, 4 C.W.N. 367, where cognizance was taken on police report.

The complaint need not quote any section of the Indian Penal Code, but must contain a statement of the facts relied on as constituting the offence, and it is for the Magistrate to determine on these facts what offence has *prima facie* been committed, the nature of the charge will be determined by him. All that is necessary for him to see is that the enquiry into the charge is within his competency, and that, in the case of certain offences, the complaint has been made by the proper person—*Mst. Naurati v. The Crown*, 6 Lah. 375 (378), A.I.R. 1925 Lah. 631. See also *Baldeo Prasad v. Emp.* supra.

A complaint, as defined in sec. 4 (h) need not in fact specify any offender or even the section of the law which makes the act or omission punishable; and cognizance is taken under sec. 190 (1) (a) upon receiving a complaint, while charges are framed on the evidence before the trial Court. The evidence may, and not infrequently, does disclose offences other than those originally mentioned or implied, but it cannot be said that cognizance is taken of such new offences under cl. (c), sub-sec. (1), sec. 190, for the double reason that the stage for the application of the sub-section itself is long past and the clause can have no application to the evidence produced in the case. Similar observations apply to cases in which cognizance has been initially taken under cl. (b), upon a police-officer's written report of facts constituting offences. It has in fact been repeatedly held that when a Magistrate has taken cognizance of an offence upon a complaint or upon a police report, any offence that may be disclosed by the evidence may be dealt with at the trial; and that sec. 190 (1) (c) and sec. 191 have no application in such circumstances—*Baldeo Prasad v. Emp.*, A.I.R. 1933 Pat. 297 (300), 14 P.L.T. 330, 1933 Cr.C. 789, 145 I.C. 382, 34 Cr.L.J. 942, 12 Pat. 758. It would not be right to say that merely because the complainant, whether in ignorance or inadvertence, mentions the wrong Act or mentions the wrong section, thereby it must be said that there is no complaint within the meaning of sec. 200, Cr. P. Code. It is true that if such errors occur in the complaint, care must be taken at the proper time to see that the accused is in no way prejudiced. But if the facts are such as to disclose an offence under a particular section, under a particular Act, then existing, then whatever errors there may be in the complaint as regards the number or name of the Act or section, the Magistrate should take cognizance of the complaint for what in substance it is, and although the Magistrate repeats in the summons the mistake that occurred in the complaint itself, that mistake is a mistake which can thereafter be rectified—*Lilaram Ladakmal v. Wadhmal Assudomal*, 40 Cr.L.J. 122 (124), 178 I.C. 648, A.I.R. 1938 Sind 209.

There is no provision in the Cr. P. Code that there should be a list of witnesses along with the complaint—*Banka Lal v. Maiku*, A.I.R. 1933 Oudh 430 (431), 146 I.C. 638, 10 O.W.N. 1033, 1933 Cr.C. 1315, 35 Cr.L.J. 121. But in practice such an omission is viewed with suspicion.

Value of complaint:—To lodge a complaint is not to give evidence upon which a Court can act. The complaint is in the nature of an indictment. Therefore, averments in a complaint must be established and properly proved by evidence and the matter must not be dealt with as if the complaint is something in the nature of a deposition. The complaint cannot be treated as if it had the sanctity of affidavit-evidence. Before any one can be convicted on charges formulated in a complaint all the charges must be fully and properly proved in accordance with the procedure and the law of evidence applicable to criminal charges—*Cotton v. Emp.*, 35 Cr.L.J. 996 (998), 149 I.C. 450, 1934 Cr.C. 861, A.I.R. 1934 Cal. 604.

Limitation :—Rules of limitation are foreign to the administration of criminal justice, and it is only by specific legislation that periods of limitation can be rendered applicable to criminal proceedings—*Q-E. v. Ajudhia Singh*, 10 All 350 (352). The principles on which rules of limitation are framed have no natural application to prosecutions which are, in theory at least, instituted by the Crown. For the greater protection of subjects certain periods are laid down in special laws for prosecutions to be instituted under them—*Q-E. v. Nagesappa*, 20 Bom 543 (547). Delay in lodging complaint, however, raises a suspicion as to its truth unless the delay is sufficiently explained.

A prosecution launched after an inordinate delay (of about 4 years) rouses suspicion in one's mind that this has been done to serve some other end, either of the complainant or of others who are interested in disgracing the accused—*Kali Prasad Singh v. Sirikrishun*, 39 Cr.L.J. 774, 176 I.C. 725, 4 B.R. 755, 11 R.P. 98, A.I.R. 1938 Pat 543.

Court-fees :—For Court-fees payable on a petition of complaint see Sch II, Art. (1), cl. (b) of the Court Fees Act (Act VII of 1870).

A complaint of a public servant (as defined in the Indian Penal Code), a municipal officer or an officer or servant of Railway Company is not chargeable with any Court-fee. *Vide*, sec 19, cl. (xviii) of the Court-fees Act, 1870 (Act VII of 1870).

13A. Joint Complaint :—A joint complaint by two or more persons is not contemplated by the Code. Sec 200 makes this clear, because in taking cognizance of an offence upon complaint, the Magistrate must at once examine the complainant upon oath, and it is obvious that if there are two or more complainants on the same complaint, it is physically impossible to fulfil the provisions of that section. The proper procedure is for each complainant to file a separate complaint—*Sasadhar v. Tegart*, 35 CWN 782 (785), 1931 Cr.C. 846, 33 Cr.L.J. 83, 134 I.C. 1189, A.I.R. 1931 Cal 646. A written complaint signed by two persons is not contemplated by the Code of Criminal Procedure. But, however, invalid it is in form, it is a petition of complaint. In such a case the Magistrate has jurisdiction to examine one of them and proceed to issue process on that examination. Should it be necessary to proceed afterwards on the complaint of the second signatory, there is no bar to such action being taken—*Uzal Khan v. Purna Chandra*, 43 CWN. 527.

14. Instances of complaint :—The following has been held to be complaints—

(1) the petition of a complainant who has withdrawn his case and again asks to be allowed to proceed with the same—*Sarat Chandra v. Aghore Nath*, 4 CWN ccxxi ;

(2) the presentation of a petition by the complainant that his complaint should be inquired into—*Lalji Gope v. Giridhari*, 5 CWN. 106 ;

(3) a petition impugning the correctness of a police report and praying for a trial of the accused—*Jogendra Nath*, 33 Cal. 1, 10 CWN 158, 2 Cr.L.J. 615 ; *Lalji Singh v. Pardip Singh*, 18 Cr.L.J. 754 (Pat) ; *Ramdhari v. Emp.*, 29 Cr.L.J. 660, 110 I.C. 212, 9 P.L.T. 236 ; *Q-E. v. Sham Lal*, 14 Cal. 707 (F.B.) ; *Gangadhar v. Emp.*, 43 Cal. 173 ; so also, a petition impugning the police enquiry and asking the Magistrate to call for a charge-sheet or to give opportunity to the petitioner to prove his case by witnesses present—*Shukhadev v. Hamid*, 7 Pat. 561, 29 Cr.L.J. 942 (944), 111 I.C. 862, A.I.R. 1928 Pat. 585, 10 P.L.T. 14. But where all that the petitioner did was to show cause against his prosecution and he asserted that the case was a true one and that he was perfectly innocent and he never made a complaint against anybody or asked the Magistrate to investigate it, *held* that there was no complaint—*Jamini Kanta v. Bhabanath*, 43 C.W.N. 279. Where no order was passed on such a petition, which is a complaint, it must be regarded as being still pending—*Hamed v. Abdul*, 31 Cr.L.J. 462, 123 I.C. 11, 1929 M.W.N. 503, A.I.R. 1929 Mad 849.

(4) a letter to the Magistrate conveying the information of an offence and asking the Magistrate to take action—*Khetra Mohan*, 17 C.W.N. 448, 14 Cr.L.J. 76 ; *Chhotey*, 1 O.W.N. 108, 25 Cr.L.J. 1147 ;

(5) the submission of a record, by an Assistant Magistrate trying a rent-suit, .

the Collector, who was also the District Magistrate, for starting a case under sec. 193, I P. C. against the plaintiff in the rent-suit—*Sundar Sarup*, 26 All. 514 ;

(6) a *Yadast* sent by a Revenue Officer to a Magistrate charging a certain person with having disobeyed a summons issued by him—*Monu*, 11 Mad. 443 ;

(7) an application by a complainant to have his witness summoned, coupled with his oral allegations, although not on oath nor reduced to writing—*Apurba Krishna*, 35 Cal. 141 ;

(8) proceedings of a Court under sec. 476, Cr. P. C., sending a person to the nearest first-class Magistrate—*Rachappa*, 13 Bom. 109; *Narakka*, 13 Mad. 144; *Iskri Prosad v. Sham Lal*, 7 All. 781; *Arjan*, 31 Cal. 664; *Eranpoli Athan*, 26 Mad. 98; *In re Lakshmidas*, 32 Bom. 184.

(9) a communication by a Revenue Court to the District Magistrate that certain documents tendered in evidence before it were forgeries and that such action might be taken as the Magistrate might deem fit—*Inder Bhan*, 105 P.L.R. 1905, 30 P.R. 1905.

(10) a 'committal sheet' signed by a Superintendent of the Salt Department and sent to the Magistrate (in accordance with departmental rules) and containing *inter alia* a definite request to the Magistrate to summon certain witnesses and to try the accused for the offences set out in the sheet—*Phagun Sahu*, 1 P.L.J. 592, 18 Cr.L.J. 366 ;

(11) where A charged B with house-breaking, and B lodged an information against A for theft of his gun, but the Police reported B's case to be false, whereupon B filed a petition of objection asking the Magistrate to make an investigation and to summon the accused, *held* that the petition of objection filed by B was a 'complaint'—*Sadhu Charan v. Balai Swain*, 3 P.L.J. 346, 19 Cr.L.J. 874 ;

(12) where in the course of an insolvency proceeding the District Judge found that certain transfers made by the insolvent were fraudulent, and the Judge made a report to the District Magistrate asking him to prosecute the transferees, *held* that the report was a complaint—*Mahadeo*, 18 A.L.J. 50, 21 Cr.L.J. 56 ;

(13) where a Magistrate sent a report to the District Magistrate that a certain person had made an alteration in a document filed in his Court and had committed an offence under sec. 477, I. P. C., *held* that the report amounted to a complaint—*Suraj Prasad v. Emp.*, 21 A.L.J. 825, 25 Cr.L.J. 947, A.I.R. 1924 All. 190 ;

(14) where a petition was filed before a Sub-divisional Magistrate alleging that the accused caused a false entry to be made in a Death Register for their future benefit and praying for an enquiry into the matter and for their prosecution, *held* that the petition was a complaint—*Raghunandan Lal v. Emp.*, A.I.R. 1934 Pat. 156, 15 P.L.T. 17.

(15) where a person sent an application to the Hon'ble Premier against police charging them of offences under secs. 161, 347 and 323 I. P. C., and the Hon'ble Premier sent the application to the District Magistrate who forwarded it to the Sub-divisional Magistrate with the order "Please send for the applicant and ask him to make a statement on oath ; if he does so, send on" And the Sub-divisional Magistrate sent for the applicant and took his statement on oath wherein he reiterated what he had said in his application to the Hon'ble Premier, *held* that the statement on oath came under the words "upon information given to a Magistrate" in sec. 250 Cr. P. C., and was a complaint—*Gajadhar v. Emp.*, A.I.R. 1939 Oudh 101, 1939 O.W.N. 125, 1939 O.L.R. 73, 179 I.C. 758, 1939 A.W.R. (C.C.) 43, 11 R.O. 203, 1939 A Cr.C. 26, 1939 O.A. 181.

(16) a charge-sheet filed by the police under sec. 379, I. P. C., setting out facts which constitute the offence under sec. 163, cl. (a) (2), Madras Local Boards Act, would amount a complaint of the offence under the latter section—*Muthuswamy Pillai*, A.I.R. 1939 Mad. 839, 1939 M.W.N. 615, (1939) 2 M.L.J. 39, 1939 M. Cr. C. 190, 41 Cr.L.J. 20, 184 I.C. 471.

(17) a petition to the Magistrate in which a person accused others of having suppressed the finding of treasure trove—*Govindaraja Pillai v. Vanchinatham Pillai*, A.I.R. 1939 Mad. 492, (1939) 1 M.L.J. 561, 184 I.C. 485, 12 R.M. 455, 1939 M.W.N. 318, 49 M.L.W. 540,

15. What are not complaints:—

- (1) statements made in a *deposition*—*Imamkhan*, 14 Bom L.R. 141, 13 Cr L.J. 287 ;
- (2) a letter merely conveying a sanction of the Local Government under sec. 196 authorising the prosecution—*Shamal Khan*, 1890 P.R. 16 ;
- (3) an application for issue of process—*Lalit Mohan*, 38 Cal 559, 15 C.W.N. 98 ;
- (4) a petition for maintenance under sec. 488 of this Code—*Sardaran v. Amir Khan*, 29 P.R. 1905 ; *Hildephonsus v. Malone*, 13 P.R. 1885 ; *Mehr Khan v. Bakhat*, 10 Lah 406, 29 Cr.L.J. 1002 (1003) ; *Tokee Bibi v. Abdul Khan*, 5 Cal 536 ; *Nur Mahomed v. Bismulla*, 16 Cal 781 ; *Venkata v. Paramma*, 11 Mad 199 ; *Rozario v. Ingles*, 18 Bom 468 ;
- (5) an application under sec. 107, Cr. P. C.—*Md. Yusuf*, A.I.R. 1931 All. 53, 1930 A.L.J. 1475, 130 I.C. 630, 32 Cr.L.J. 570, 1931 Cr.C. 125, 53 All 148
- (6) an application asking that a woman should be set at liberty as not a criminal complaint but an application under sec. 552 Cr. P. C.—*Dalpat Rai v. Emp.*, 37 Cr.L.J. 857, 163 I.C. 209, A.I.R. 1936 All. 469, 1936 A.L.J. 592, 1936 Cr.C. 614.

16. Report of a Police Officer:—In *K E v Sada*, 26 Bom. 150 (157), 3 Bom L.R. 586, it was held that although the word 'report' was not defined in the Code, still the Legislature studiously attached to the expression "Police report" a peculiar meaning whenever that expression occurred, that the words "report of a Police officer" in section (4) (h) and the "Police report" in sections 157, 173 and 190 (b) were confined to reports in *cognizable* cases only, and that if the Police officer went beyond his duties and made of his own motion a report of an information of a *non-cognizable* case (e.g., if he laid an information of a non-cognizable offence under sec. 51 of the Bombay District Police Act) it was not a report but an information or rather a 'complaint' within the meaning of section (4) (h). This view was also taken in *Chidambaram*, 32 Mad 3 (10) ; *Ghulam*, 6 Lah L.J. 606, 25 Cr L.J. 1361, A.I.R. 1925 Lah. 237 ; *Harhar*, 23 C.W.N. 481, and *Khushaldas*, 6 S.L.R. 82. The Select Committee of 1916, after considering the above Bombay case, changed the words "Police report" in section 190 (b) into the words "report in writing made by a Police Officer" remarking that the term "police report" in section 190 was not intended to be a technical expression, but was used to cover any report made by a police officer. But the Legislature has not made any amendment in section 4 (h), and hence the words "report of a police officer" in clause 4 (h) should be interpreted to mean only the report of a Police officer in a *cognizable* case ; but any information of a *non-cognizable* offence which a Police-officer may report to a Magistrate would fall within the definition of a *complaint*. Thus, the Bombay High Court holds that the 'report of a police officer' in sec. 4 (h) means a report which a police-officer is authorised to make under sec. 173, and does not include the report of a police-officer in a non-cognizable case. A report of the latter kind amounts to a complaint—*Shivaswami*, 51 Bom 498, 29 Bom L.R. 742, A.I.R. 1927 Bom 440 (442), 28 Cr.L.J. 939. See also *Radhika v. Hamid Ali*, 54 Cal 371, 28 Cr.L.J. 316, A.I.R. 1927 Cal. 405 ; *Shanker Lal v. Emp.*, 28 Cr.L.J. 821, 104 I.C. 437, 9 Lah 280, A.I.R. 1927 Lah. 702, 29 P.L.R. 469 ; *Mallikarjuna Prasadao v. Emp.*, 1933 M.W.N. 876. But a contrary opinion has been expressed by Sir J. G. Woodroffe, who observes : "A police report in a non-cognizable case was treated either as a complaint under sec. 4, cl (h) or as a police report under sec. 190 (1)(b). But now sec. 190, cl (b) has been amended so as to include any report whether in cognizable or non-cognizable cases and therefore the term 'complaint' will exclude both"—Woodroffe's Criminal Procedure, p. 12. This view finds support in—*Public Prosecutor v. Ratnaidu*, 49 Mad. 525 (535), 27 Cr.L.J. 1031, A.I.R. 1926 Mad 865 (F.B.), where Spencer, J., observed : "Mr. Justice Waller was averse to putting a narrow construction on the word 'report' in sec. 190 (1)(b) as including only reports of cognizable offences. We consider the latter view to be more correct" and in many other cases. For a detailed discussion on the point see Note 582 under sec. 190.

When a police officer investigates a non-cognizable case under the orders of a Magistrate, the report which he makes, at the end of his investigation is of

same nature as a report made under sec. 157, and such a report being a police report is not a "complaint," though if a police officer acting without instructions from a Magistrate reports a non-cognizable offence to a Magistrate with a view to the Magistrate taking action, this is a complaint—*Jagdeo Pandey v. N. C. Hill*, 39 Cr.L.J. 776, 176 I.C. 694, A.I.R. 1938 Rang. 257, 1938 Rang.L.R. 150, 11 R.R. 74.

The report of an *Excise officer* (e.g., Sub-Inspector of Excise and Salt) under sec. 74 (4) of the Excise Act is not a report of a Police officer for the purpose of sec. 4 (h), but is a complaint, in as much as it is an allegation, made to a Magistrate in writing with a view to his taking action under the Code, that some person has committed an offence. The report of the Excise officer is deemed to be a report of a police officer only for the purpose of sec. 190 (1) (b), according to the express words of sec. 74 (4) of the Excise Act—*Radhika v. Hamid Ali*, 54 Cal. 371, 28 Cr.L.J. 316.

If, however, a report is made by a Police officer investigating a non-cognizable case, under the orders of a Magistrate having power to try the case, the report falls within the duty of the Police officer, and it is a report, not a complaint—*Sarfaraz*, 11 A.L.J. 332.

(i) "European British subject" means—

- (i) any subject of His Majesty of *European descent in the male line*, born, naturalized or domiciled in the *British Islands or any colony*, or
- (ii) any *subject of His Majesty who is the child or grand-child of any such person by legitimate descent*:

17. Change:—This clause has been amended by sec. 2 of the Criminal Law Amendment Act, XII of 1923 (popularly known as the 'Racial Distinctions Act'). Prior to the present amendment, the definition stood as follows:—"European British subject means (i) any subject of Her Majesty born, naturalised or domiciled in the United Kingdom of Great Britain and Ireland or in any of the European, American or Australian Colonies or possessions of Her Majesty or in the Colony of New Zealand or in the Colony of the Cape of Good Hope or Natal; (ii) any child or grand-child of such person by legitimate descent."

Under the old definition the *place of birth* was the determining factor. "European" meant "born" in Europe. Should a Madras Ayah be taken to London and there give birth to an illegitimate son conceived of a pariah, that son would have been an European British subject. Now, however, this is not so, for the subject must be of *European descent*—Woodroffe, p. 12. "The present amendment has narrowed the definition, so that the number of persons who will be entitled to the privileges conferred by this Code on European British subjects will now be reduced by reason of the fact that they will only be claimable by persons of *European descent in the male line*"—*Statement of Objects and Reasons*, para. 9, of the Criminal Amendment Bill.

In order to sustain the plea of a British-born subject under clauses (i) and (ii), not only the legitimate descent of the accused, but also the nationality of his father or grandfather, as the case may be, must be proved to the satisfaction of the Court—*Turnbull*, 6 M.H.C.R. 7.

The words "born, naturalized or domiciled" should not be interpreted as "born, naturalized and domiciled"; in other words, it is not necessary that the applicant, in order to come under the definition of an European British subject, should, besides an European British subject by birth, also be domiciled at the time in the British Islands or any colony. Therefore, an European British woman who marries a native British Indian husband or an Indian subject of a Native State does not cease to be an European British subject either by reason of her marriage or because of her domicile in the Native State—*In re Bai Asha*, 53 Bom. 149, A.I.R. 1929 Bom. 81 (85), 31 Bom.L.R. 62, 30 Cr.L.J. 772.

See sections 29A, 34A and Chapters XXXIII and XLIV-A which deal with provisions relating to trial of European British subjects.

- (j) "High Court" means, in reference to proceedings against European British subjects, or persons jointly charged with European British subjects, the High Courts of Judicature at Fort William, Madras, Bombay, Allahabad, Patna, Lahore * * * and Nagpur, *the Chief Court of Oudh and the Court of the Judicial Commissioner of Sind*; in other cases "High Court" means the highest Court of criminal appeal or revision for any local area; or, where no such Court is established under any law for the time being in force, such officer as the *Provincial Government* may appoint in this behalf:

18. Change:—The words "and the Court of the Provinces" in this clause have been added by sec. 2 of the Criminal Law Amendment Act (XII of 1923). Before this Amendment, it was held that a Judicial Commissioner's Court could exercise its revisional powers over an European British subject only when the latter waived his privileges under Chapter XXXIII (old) of the Code (*Grant*, 12 Bom 561); otherwise he was under the revisional jurisdiction of the Bombay High Court. See also *Jeremiah v. Johnson*, 45 M.L.J. 800, A.I.R. 1924 Mad 373, 25 Cr.L.J. 231, 1924 M.W.N. 60, 33 M.L.T. 194, 76 IC 695 (following 12 Bom. 561). These cases are no longer of any authority. Under the present law a Judicial Commissioner's Court (at Nagpur) will exercise its revisional jurisdiction over an European British subject under all circumstances in the same way as it will over an Indian accused.

The words "the Chief Court of Oudh" have been added by the Oudh Courts Act (XXXII of 1925), and the Sind Courts Act, 1926.

The words "Lahore, Rangoon and Nagpur, the Chief Court of Oudh and the Court of the Judicial Commissioner of Sind" have been substituted in place of the words "Lahore and Rangoon, the Chief Court of Oudh and the Courts of the Judicial Commissioners of the Central Provinces and Sind" in this clause by the Central Provinces Court (Supplementary) Act, 1935 (Act VIII of 1935) consequent on the establishment of the High Court of Judicature at Nagpur.

In this clause the word "Rangoon" has been omitted and the words "Provincial Government" have been substituted in place of "Governor-General in Council" by the Government of India (Adaptation of Indian Laws) Order, 1937.

Under the Sonthal Parganas Justice Regulation, 1893, the 'High Court' for the purpose of hearing an appeal against an acquittal under sec 417 would be the High Court of Patna; but for the purpose of hearing an application for revision under sec 439 against an order of acquittal, the Commissioner of the Bhagalpur Division would be deemed a 'High Court'.—*Anwar Ali v. Chairman, Deoghar Municipality*, 6 Pat 83, 28 Cr.L.J. 80, A.I.R. 1926 Pat. 449, 99 IC 112, 8 P.L.T. 271.

Section 219 (1) of the Government of India Act, 1935, which enumerates the Courts which shall in relation to British India be deemed to be High Courts for the purposes of that Act, runs as follows:—

The following Courts shall in relation to British India be deemed to be High Courts for the purposes of this Act, that is to say, the High Courts in Calcutta, Madras, Bombay, Allahabad, Lahore and Patna, the Chief Court in Oudh, the Judicial Commissioner's Courts in the Central Provinces and Bihar, in the North-West Frontier Province and in Sind, any other Court in British India constituted or reconstituted under this Chapter as a High Court, and any other comparable Court in British India which His Majesty in Council may declare to be a High Court for the purposes of this Act:

Provided that, if provision has been made before the commencement of Part III of this Act for the establishment of a High Court to replace any Court or Courts mentioned in this sub-section, then as from the establishment of the new Court this section shall have effect as if the new Court were mentioned therein in lieu of the Court or Courts so replaced.

High Court, Original Side.—A single Judge sitting on the Original Side of the High Court is not a High Court within the meaning of this Code—*Kalikinkar v. Dinabandhu*, 32 Cal 379; *Harendra*, 51 Cal 980 (1982), 29 C.W.N. 384; *Sukumar v. Emp.*, A.I.R. 1932 Cal 867, 59 Cal. 1218, 34 Cr.L.J. 107, 140 I.C. 873, 1932 Cr.C. 891.

The internal arrangements of the High Court are dealt with by its Rules and the Code does not decide what functions can be exercised by a single Judge or must be exercised by a Division Bench. It deals with the High Court as one and the definitions of High Court are not intended to do more than to point to the Court itself so as to distinguish it from other Courts—*Girish Chunder*, 34 C.W.N. 13 (28), 50 C.L.J. 408, A.I.R. 1929 Cal 756, 1929 Cr.C. 468 (F.B.).

Proceedings against European British Subjects.—These words in sec. 4 (j), Cr. P. C., mean proceedings against persons who had claimed to be dealt with as European British subjects, and that was the intention of the Legislature; for otherwise the result would be that the definition in sec. 4 (j) would nullify the effect of the substantive provision in sec. 528B, Cr. P. C.—*H. B. Babington*, A.I.R. 1937 Mad. 14 (16), 1936 M.W.N. 1091, 44 M.L.W. 755, 71 M.L.J. 827, 1936 M.Cr.C. 386, 167 I.C. 160, 38 Cr.L.J. 336, 1 I.L.R. 1937 Mad 339. See also Notes under sec. 528B.

(k) "inquiry" includes every inquiry other than a trial conducted under this Code by a Magistrate or Court:

19. Clause (k)—Inquiry.—The word 'inquiry' is meant to include everything done in a case by a Magistrate, whether the case has been *challanned* or not—*Bhallun Singh*, 1897 P.R. 3. A proceeding under Chapter XII is an inquiry—*Lalit Mohun v. Suryakanta*, 28 Cal 709, 5 C.W.N. 749; *Satish v. Rajendra*, 22 Cal 898; *Ali Mahomed v. Tarak Chandra*, 13 C.W.N. 420, 1 I.C. 336, 9 Cr.L.J. 278. A "register case" or a preliminary inquiry into an accusation of an offence triable exclusively by the Court of Session is an inquiry and not a trial—*Palanlandy*, 32 Mad. 218. A proceeding under sec. 176 is an inquiry—*In re Laxminarayan*, 30 Bom.L.R. 1050, 29 Cr.L.J. 1063 (1066).

The word "inquiry" relates to proceedings of *Magistrates* prior to trial, whereas "investigation" is a word confined to proceedings of *police* or persons other than *Magistrates*—*Pedda*, 45 Mad. 230 (233).

The term is not confined to proceedings in which an accused is placed before a Magistrate charged with an offence. Under sec. 159, Cr. P. C., a Magistrate may make a preliminary inquiry in order to ascertain whether an offence has been committed and if so whether any persons should be put upon their trial. It is difficult to see how it can be said that if a Magistrate is instituting an enquiry under sec. 159 into an offence, that offence is not under enquiry—*Motilal Hirralal*, 46 Bom. 61 (66), 22 Cr.L.J. 728. But it is difficult to hold that such inquiry is included within the meaning of the word as used in sec. 337, Cr. P. C.—*Ibid*.

Trial.—The words "try" and "trial" have no fixed or universal meaning, but they are words which must be construed with regard to the particular context in which they are used and with regard to the scheme and purpose of the measure concerned—*Jiban v. Emp.*, 31 Cr.L.J. 684, 144 I.C. 90, 37 C.W.N. 906, A.I.R. 1933 Cal. 551, 1933 Cr.C. 911. The word 'trial' is not defined in the Code. It means according to Wharton's Law Lexicon, "the examination of a case, civil or criminal, before a Judge who has jurisdiction over it, according to the laws of the land"—*In re Ramaswami*, 27 Mad. 510. In the Oxford Dictionary the meanings of the word given under the heading 'Law' are: 1. The examination and determination of a cause by a judicial tribunal; determination of the guilt or innocence of an accused by a Court. 2. The

determination of a person's guilt or innocence, or the righteousness of his case by a combat between the accuser and the accused, etc. It is this idea of the determination of the guilt or innocence of the person who is tried that forms the fundamental conception of the trial that is held in respect of him. When, therefore, some competent authority directs that an accused person shall be tried, the trial that is to take place can end only in one or other of the recognised forms in which the trial can terminate: under the Code of Criminal Procedure such forms are,—conviction, acquittal, discharge, *i.e.*, finding him guilty or not guilty or finding that there is no case against him or that the charge is groundless—*Harihar Sinha v. Emp.*, A.I.R. 1936 Cal. 356 (363), 40 C.W.N. 876, 163 I.C. 9, 1936 Cr.C. 583, 37 Cr.L.J. 758, 63 C.L.J. 307. It means, the proceeding which commences when the case is called on with the Magistrate on the Bench and the accused on the dock, and the representatives for the prosecution and the accused are present in Court for the hearing of the case—*Gomer Sirda*, 25 Cal. 863 (865), 2 C.W.N. 465. Under the definition of "enquiry" under sec 4 (k), combined with sec 252, the inquiry of the case was not deferred till such time as the Magistrate would begin to record evidence, but commenced, not indeed with the lodging of the complaint or even with the issue of process, but with their appearance on such process before the Magistrate to answer the charges—*Pandurang v. Emp.*, 32 Cr.L.J. 1161, 134 I.C. 361, 33 Bom L.R. 668, A.I.R. 1931 Bom 411, 1931 Cr.C. 726. It refers only to trial for offences, and not to miscellaneous matters such as those coming within sec. 145—*Suffaruddin v. Ibrahim*, 3 Cal 754; *Satish v. Rajendra*, 22 Cal. 898 (901). A trial is a judicial proceeding which ends in conviction or acquittal. All other proceedings are mere enquiries which may have various endings according to circumstances—*Hema Singh v. Emp.*, A.I.R. 1929 Pat 644 (646), 9 Pat. 155, 1929 Cr.C. 372; *Haridas v. Saritulla*, 15 Cal 608 (F.B.). Arguments are part of the trial which must be held to include the judgment also—*Neamat Sha v. Hanuman Buksha*, A.I.R. 1931 Cal. 626 (632), 36 C.W.N. 1112, 1931 Cr.C. 810, 134 I.C. 1057, 33 Cr.L.J. 31, 55 C.L.J. 34, 59 Cal. 478. But see *Public Prosecutor v Chockalinga*, A.I.R. 1929 Mad. 201 (202), 118 I.C. 274, 30 Cr.L.J. 908, 52 Mad. 355, where it has been held that the trial, as that word used in the Code, is over before the judgment is pronounced and that the pronouncing of judgment is no part of the trial. The Allahabad High Court has also held that 'trial' does not include judgment—*Bakshi Ram v. Emp.*, 39 Cr.L.J. 345 (347), 173 I.C. 663, A.I.R. 1938 All 102, 1937 A.L.J. 1152, 1937 A.W.R. (H.C.) 1147. The word 'trial' as used in sec. 497 includes appeal—*Madhub Chunder v. Novodeep*, 16 Cal 121. A proceeding under sec. 107 is a trial—*In re Ramaswami*, 27 Mad. 501; *Venkatachinnaya*, 43 Mad. 511 (F.B.), 21 Cr.L.J. 402. For contra see *Binode v. Emp.*, 50 Cal 985 (989), 25 Cr.L.J. 1085, 81 I.C. 909, A.I.R. 1924 Cal. 392.

The proceedings in revision must be treated as a subsequent stage of the case—*Jeremiah v. Johnson*, A.I.R. 1924 Mad 373, 76 I.C. 695, 25 Cr.L.J. 231, 45 M.L.J. 800; *Grant*, 12 Bom. 561; *In re H B Babington*, A.I.R. 1937 Mad 14 (15), 1936 M.W.N. 1091, 44 M.L.W. 755, 71 M.L.J. 827, 1936 M.Cr.C. 386, 167 I.C. 160, 38 Cr.L.J. 336, 11 L.R. 1937 Mad 339. For contra see *Harris v. Peal*, A.I.R. 1920 All. 351, 58 I.C. 351, 21 Cr.L.J. 767, 17 A.L.J. 896 and *H. C. Bolton v. Emp.*, A.I.R. 1933 Cal 240 (241). 1933 Cr.C. 325, 143 I.C. 892, 34 Cr.L.J. 671, 60 Cal. 676.

Trial, when begins:—In a case triable exclusively by a Court of Session, the trial begins only after the charge is framed—*Palaniandy v. Emp.*, 32 Mad. 218. So also, in a warrant case, the trial commences when the accused is called upon to plead to a charge, and until a charge has been framed, there is no trial but only an inquiry—*Manna*, 9 N.L.R. 42, 14 Cr.L.J. 230 (231); *Sreeramulu v. Veerasalingam*, 38 Mad. 585, 15 Cr.L.J. 673; *Narayanadaswami*, 32 Mad. 220 (224, 234) (F.B.); *Haridas v. Saritulla*, 15 Cal. 608 (F.B.); *Painda v. Gulab Khatun*, 40 Cr.L.J. 515, 181 I.C. 49, 11 L.R. 1938 Lah 619, 41 P.L.R. 221, A.I.R. 1939 Lah. 122. In a summons case, however, as it is not necessary to frame a formal charge, the trial may be said to commence when the accused is brought or appears before the Magistrate.

- (l) "investigation" includes all the proceedings under the Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorized by a Magistrate in this behalf:

20. Clause (1)—Investigation:—A Police Inspector who got information that certain persons were carrying on a wagering business, and having satisfied himself, obtained a warrant and effected the arrest of the accused and the seizure of books, articles of gaming, etc., was held to have taken part in the 'investigation' of the case—*Tribhovan Das*, 26 Bom 533.

An inquiry relates to a proceeding held by a Court or a Magistrate while an investigation relates to the steps taken by a police officer or a person other than a Magistrate—*K Hoshide v. Emp.*, 44 C.W.N. 82 (86), A.I.R. 1940 Cal. 97; 41 Cr.L.J. 329, 186 I.C. 486

Investigation by the Calcutta Police or the Custom authorities in the nature of a search for evidence is not even "investigation" as defined in the Code, not being a proceeding under the Code—*K. Hoshide v. Emp.*, 44 C.W.N. 82 (90), A.I.R. 1940 Cal. 97, following *In re Mahomed Tahir*, 36 Bom L.R. 96.

"Criminal Proceedings" in sec 211 I. P. C. include the investigation by a police officer—*Emp. v. Johri*, A.I.R. 1931 All. 269 (271), 1931 A.L.J. 177, 1931 Cr. C. 429, 33 Cr.L.J. 256, 136 I.C. 277.

See also *Asandas v. Khanchand*, A.I.R. 1933 S'nd 240 (243), 1933 Cr.C. 800.

- (m) "judicial proceeding" includes any proceeding in the course of which evidence is or may be legally taken on oath:

21. Clause (m)—Judicial Proceedings, what are?—This definition is not clearly exhaustive—*Bahadur v. Eradatulla*, 14 C.W.N. 799 (806), 12 C.L.J. 45, 11 Cr.L.J. 407, 6 I.C. 801, 37 Cal 642 (S.B.). An inquiry is judicial if the object of it is to determine a jural relation between one person and another, or a group of persons; or between him and the community generally; but, even a judge, acting without such an object in view, is not acting judicially—*Queen-Emp. v. Fujla*, 12 Bom. 36 (42). The words "judicial proceedings", include the whole proceeding from the filing of the complaint until the decision of the Court, and under sec 202, Cr. P. C., an inquiry or investigation may be ordered and such inquiry or investigation is a part of the judicial proceedings. It is on the result of the inquiry or investigation that the Magistrate takes further action either by dismissing the complaint under sec. 203, Cr. P. C., or issuing a process for the appearance of the accused—*Veni Madho Prasad v. M. Wajid Ali*, A.I.R. 1937 All. 90 (93), 1937 A.L.J. 20, 1933 A.W.R. (H.C.) 1205, 1937 All.L.R. 191, 167 I.C. 433, 11 L.R. 1937 All 390.

The following have been held to be judicial proceedings:—

(1) Investigation proceedings under sec. 202 by a Subordinate Magistrate on a complaint which was taken cognizance of by another Magistrate and sent to him for inquiry and report—*Kanchan v. Ram Kishun*, 36 Cal. 72; 2 Cr.L.J. 118; *Veni Madho Prasad v. M. Wajid Ali*, supra. But see Note 22 (15).

(2) Proceedings of a Court holding a preliminary inquiry and directing prosecution under sec. 476 of this Code—*Abdulla*, 37 Cal. 52 (56); *Gopal Barik*, 34 Cal. 42 (47);

(3) an inquiry on an application under sec. 100 to issue a search warrant is a judicial inquiry, and proceedings preliminary to the issue of a search warrant are judicial proceedings—*Abdul Aziz*, 1916 P.R. 34, 17 Cr.L.J. 491 (495), 36 I.C. 171. See also *Godai Shaha v. King-Emp.*, 9 C.W.N. 1030 in this connection;

(4) proceedings under sec. 514—*Q. E. v. Har Chandra*, 25 Cal. 440;

(5) proceedings in which a Magistrate decides as to the fitness of sureties under Chapter VIII—*Mahro*, 2 S.L.R. 11;

(6) proceedings in which the statement of a witness is recorded under sec. 164—*Andal*, 5 S.L.R. 174; *Vishwanath*, 8 Bom.L.R. 589; but a statement recorded by a Magistrate in the course of police investigation under sec. 164 Cr. P. C., is not evidence in a stage of a judicial proceeding within the meaning of Explanation 2 to sec. 193, I. P. C.—*Purshotham Ishwar*, 45 Bom. 834, differing from *Alagu Kone*, 16 Mad. 421; *Parashram Raysing*, 8 Bom. 216 and *Suppon Teven v. Emp.*, 29 Mad 89; see also *Bharma*, 11 Bom. 702 (F.B.);

(7) an inquiry by a Magistrate before issuing an order under sec. 144—*Tirunarasimma*, 19 Mad. 18;

(8) a proceeding under sec. 195, whether of the Original or Appellate Court, and whether granting or refusing or revoking a sanction (now abolished)—*Seshadri*, 20 Mad. 383; *Pampapathi v. Subba Sashtri*, 23 Mad 210; *Sheikh Beari*, 10 Mad. 232; *Kalagava Bapiah*, 27 Mad. 54 (57);

(9) proceedings under sec. 176—*In re Laxminarayan*, 30 Bom.L.R. 1050, 29 Cr.L.J. 1063 (1066), 112 I.C. 567, A.I.R. 1928 Bom. 390;

(10) an investigation by a Magistrate under Chapter XIV—*Suppa Tevan*, 29 Mad. 89;

(11) maintenance proceedings under Chapter XXXVI—*Laraiti v. Ram Dial*, 5 All 224;

(12) proceedings in execution of a decree—*Bahadur v. Eradatulla*, 12 C.L.J. 45, 11 Cr.L.J. 407, 14 C.W.N. 799, 6 I.C. 801, 37 Cal. 642 (S.B.) (overruling *Hara Charan*, 32 Cal 367, *Kanto Ram v. Gobardhan*, 35 Cal 155 and *Jadu Nath v. Jagadish*, 7 C.W.N. 423); *Dakhineshwar v. Harish Chandra*, 10 C.L.J. 450; *Bhola Nath*, 10 C.W.N. 55; *Sheshankarputi*, 10 N.L.R. 177; *Charen*, 1 P.R. 1910;

(13) an inquiry by a Registrar of the Presidency Small Cause Court as to the proper service of summons—*Balchand v. Tarak Nath Sadhu*, 18 C.W.N. 1313, 16 Cr.L.J. 151;

(14) an inquiry by a Collector under the Income Tax Act hearing objections to assessment—*Rup Singh*, 44 P.R. 1905;

(15) an inquiry under the Legal Practitioners Act—*Nallasivam v. Ramalingam*, 22 M.L.J. 402, 18 Cr.L.J. 785; *Subba Chetti*, 6 Mad 252; *Gouri Shankar*, 9 A.L.J. 156;

(16) a proceeding before a Magistrate for recovery of Municipal cesses and taxes under sec. 84 of the Bombay Municipal Act (VI of 1873)—*Municipality of Ahmedabad v. Jumna*, 17 Bom 731;

(17) an inquiry by a Magistrate into the truth of allegations against a subordinate official, contained in a petition presented to a Deputy Commissioner—*Kuna Sah*, 28 All. 89;

(18) proceedings under sec. 8 of the Reformatory Schools Act—*Manaji*, 14 Bom. 381;

(19) mutation proceedings under U P Land Revenue Act (III of 1901)—*Lachman v. Emp.*, A.I.R. 1930 Oudh 58, 5 Luck. 435, 31 Cr.L.J. 679, 124 I.C. 364, 1930 Cr.C. 154, 6 O.W.N. 953;

(20) proceedings under sec. 107, Cr. P. C.—16 P.R. 1897 (Cr.).

(21) proceedings under sec. 110, Cr. P. C.—10 P.R. 1899 (Cr.).

(22) proceeding in which it is or has to be determined whether bail should be taken falls within the definition of a judicial proceeding—*Manikam v. Queen*, 6 Mad. 63 (64), 30 Bom. 523 (535), 8 Bom.L.R. 705, 4 C.L.J. 181, 1 M.L.T. 301 (P.C.).

22. Judicial Proceedings, what are not:—(1) It was formerly held that the proceedings of a Magistrate under sec. 88 investigating claims of third parties to attached property were not judicial proceedings, because the Magistrate had no authority to hold such proceedings—*Sheodihel*, 6 All. 487. But sec. 88 as amended in 1923 provides for an inquiry into such claims by the Magistrate, and such an inquiry is a judicial proceeding.

- (2) An order of Government authorising or sanctioning a prosecution under sec. 196 or 197—*In re Kalagava Bapiiah*, 27 Mad. 54.
- (3) An examination by a Police officer under sec. 161—*Ismail*, 11 Bom 659.
- (4) Proceedings of a District Magistrate under sec. 125 for cancelling a bond for keeping the peace or for good behaviour—*Daya Nath*, 37 Cal. 72.
- (5) A report of an inquiry under sec. 176 into the cause of death of a person under suspicious circumstances—*In re Troilokha Nath*, 3 Cal. 742. For contra see 29 Cr.L.J. 1063 (1065), 112 I.C. 567, 30 Bom L.R. 1050, A.I.R. 1928 Bom. 390.
- (6) Calling for records under sec. 435—*Kuppu*, 7 Mad. 560; *In re Subbaraya*, 15 M.L.J. 489, 2 Weir 601a; *Natchi*, 2 Weir 180 (181); *Sangila*, 25 Mad. 659.
- (7) A departmental inquiry by a Magistrate into a complaint made against a Sub-Magistrate—*Suria Narayana*, 29 Mad 100.
- (8) A departmental inquiry by a District Registrar into a complaint made against a Sub-Registrar—*Mulfat Ali*, 2 C.L.J. 619.
- (9) An inquiry by a Magistrate with a view to ascertain whether a sanction to prosecute (now abolished) should be given or not—*Venkataramana*, 23 Mad. 223.
- (10) A departmental inquiry under sec. 197 of the Bombay Land Revenue Code (Act V of 1897)—*In re Chotalal*, 22 Bom. 936.
- (11) An inquiry by a Deputy Magistrate in pursuance of an order of the District Magistrate calling for inquiry on the report by the Police stating that a complaint lodged with them was false—*Maibat Khan*, 33 Cal. 30.
- (12) An inquiry by a Magistrate on the strength of an information from the Secretariat that a seditious pamphlet was published—*Fattek Ali*, 1894 P.R. 15.
- (13) Proceedings conducted by a person not legally authorised or having no jurisdiction—*Radhika v. Lal Mohan*, 20 Cal 719; *Abdul Majid v. Krishna Lal*, 20 Cal. 724; *eg.*, an inquiry into the professional conduct of a second grade pleader, conducted not by the presiding officer of the Court in which the pleader practises but by the District Judge—*Nallasivam v. Ramalingam*, 32 M.L.J. 402, 18 Cr.L.J. 785.
- (14) Inquiries made by a District Magistrate on receipt of information that a grave crime was being, or was about to be, committed—*Chandrasangji v. Mohansangji*, 30 Bom. 523 (535), (P.C.), 8 Bom L.R. 705, 4 C.L.J. 181, 1 M.L.T. 301.
- (15) A preliminary investigation under sec. 202, Cr. P. C.—*In re Kachi*, 21 M.L.J. 795, 12 Cr.L.J. 323, 1911 M.W.N. 9.
- (16) The reference to the Judge by the Telegraph authorities for verification of a letter and the subsequent action in regard thereto—*Chait Ram*, 6 All. 103.

(n) "non-cognizable offence" means an offence for, and "non-cognizable case" means a case in, which a police officer, within or without a presidency-town, may not arrest without warrant:

(o) "offence" means any act or omission made punishable by any law for the time being in force; it also includes any act in respect of which a complaint may be made under section 20 of the Cattle Trespass Act, 1871:

23. Clause (o)—Offence:—This definition is the same as that given in sec. 3 (37) of the General Clauses Act. The definition in sec. 40, I. P. Code is wider and includes acts committed outside British India. In the Extradition Act the word has a still wider meaning and is not restricted to offences as defined in sec. 41, I. P. Code or in this Code—*Adams*, 26 Mad. 607.

An Ordinance (*eg.*, Ordinance III of 1914) is a 'law for the time being in force' and an infringement of its provision is an offence—*Sher Singh*, 10 P.R. 1916, 17 Cr.L.J. 225 (226).

Civil wrong:—Where an act may be a criminal offence or a mere civil wrong

according to the intention of the person doing the act, the aggrieved party should not be encouraged to go into a Criminal Court unless he is fully prepared to prove that the act is criminal and not a mere civil wrong—*Gulzar*, 50 P.R. 1887.

24. Offences, what are:—(1) Breach of a husband's duty (to maintain his wife) declared by the Magistrate's order, or a disobedience of such order is an offence, because it is attended with a penalty—*In re Shaik Fakruddin*, 9 Bom 40 (45).

(2) Failure to prepare and retain counterfoils of rent receipts as specified in sec. 58 of the Bengal Tenancy Act—*Mohant Ramdas*, 9 C.W.N. 816.

(3) Omission to stamp a share-warrant under sec. 35 of the Indian Companies Act—*Moore*, 20 Cal. 676.

(4) Illegal seizure of cattle mentioned in sec. 20 of the Cattle Trespass Act—*Buddhan Mahto v. Issur Singh*, 34 Cal. 926, 6 Cr.L.J. 363.

(5) Offences under sec. 10 of the Mussalman Wakf Act (XLII of 1923)—*Ali Mahomed v. Emp*, 28 Cr.L.J. 954, 105 I.C. 666, A.I.R. 1928 Sind 43.

25. Offences, what are not:—(1) Neglect to maintain wife or children—*Mehr Khan v. Bakht*, 10 Lah. 406, A.I.R. 1929 Lah. 32, 29 Cr.L.J. 1002 (1003); *In re Ponnammal*, 16 Mad. 234; *Hildephonsus v. Malone*, 13 P.R. 1885.

(2) Inability to give a satisfactory account of oneself, or want of ostensible means of livelihood (sec. 109)—*Buddhu*, 3 N.L.R. 51.

(3) The mere use of a house as a brothel—*Khari*, 6 S.L.R. 254, 14 Cr.L.J. 320. The use of a house as brothel or for habitual prostitution or as a disorderly house is not an offence; but if a Magistrate passes an order under sec. 3 of the Eastern Bengal Disorderly Houses Act (II of 1907) prohibiting the use of the house as brothel, etc., the disobedience to such order is an offence—*Rajani Khemtawali v. Pramatha*, 37 Cal. 287 (290-292).

(4) An application to take proceedings under sec. 107 is not an accusation of an offence—*Imam Mandal*, 27 Cal. 662; *Chathu v. Niranjana*, 20 Cal. 729; *Govind*, 25 Bom. 48. See Notes under sec. 107.

(5) The erection of an unauthorised structure is not an offence under the Calcutta Municipal Act; it is only when an order of demolition of the structure passed by the Municipal Magistrate is disobeyed that the owner of the structure commits an 'offence'—*Krishen Doyal v. Corporation of Calcutta*, 54 Cal. 532, 31 C.W.N. 506 (508), 28 Cr.L.J. 407.

(6) An application made to a Magistrate solely with a view to his taking proceedings under sec. 110, Cr P C, is not an accusation of an offence—*Lakhpai*, 15 All. 365.

(7) The act of a person causing obstruction of a public thoroughfare, which comes within the purview of sec. 133 Cr. P. C., is not an offence—*Srinath Roy v. Ainaddi Halder*, 21 Cal. 395.

(8) Travelling in a train by a passenger without having a proper ticket with him is not an offence under the Railway Act, 1890 (IX of 1890)—*Ram Pal*, 20 All. 95; *Kuloda Prosad Majumdar v. Emp*, 11 C.W.N. 100. See also *Subramania Ayyar*, 20 Mad 385 and *Kutrapa*, 18 Bom 440.

25A. Offence under the Cattle Trespass Act:—Since an offence as defined in this clause includes an "act in respect of which a complaint may be made under sec. 20 of the Cattle Trespass Act," a Magistrate who is generally empowered under the Cr. Pro Code to receive complaints of offences is competent to receive complaints under sec. 20 of the Cattle Trespass Act, and he need not be specially authorised by the District Magistrate to receive complaints under that section—*Dcendayalu v. Ratna*, 50 Mad 841, 52 M.L.J. 251, 28 Cr.L.J. 301, 25 L.W. 282, 100 I.C. 381. See also *Budhan Mahto v. Issur Singh*, 34 Cal 926, 6 Cr.L.J. 363 and *Vishvanath Vishun Joshi*, 54 I.C. 493, 44 Bom. 42, 21 Bom.L.R. 1084, 21 Cr.L.J. 95.

(p) "officer in charge of a police station" includes, when the officer in charge of a police-station is absent

from the station-house or unable from illness or other cause to perform his duties, the police officer present at the station-house who is next in rank to such officer and is above the rank of constable or, when the *Provincial Government* so directs, any other police officer so present:

Amendment:—The words "Provincial Government" have been substituted for the words "Local Government" in this section by sec. 4 of the Government of India (Adaptation of Indian Laws) Order, 1937.

26. Clause (p):—This clause is not applicable to the Police of Calcutta—*Madho Dhobi*, 31 Cal. 557.

The words 'present at the station-house' do not mean physically present at the station-house; therefore, if a person is deputed to be in charge of a police-station, the fact that he was doing duty *within the limits of* the jurisdiction of the Police Station but *outside the station-house*, does not deprive him of his capacity as Station-House officer—*Assan Aliar v Maslamani*, 42 Mad 446, 36 M.L.J. 252, 20 Cr.L.J. 422.

If the Sub-Inspector in charge of the thana is ill, the writer Head Constable who is the officer next in seniority to him can act in his place. Thus, where the Magistrate sent a cognizable case to the Police for investigation and report, and the Sub-Inspector was ill that day, it was the duty of the writer Head Constable who was in charge of the Police-station on that day to investigate the case, although he was not generally empowered to make investigation into cognizable cases—*Bhola Bhagat*, 2 Pat. 379 (384), 4 P.L.T. 521, 24 Cr.L.J. 375. But when there is nothing to show that the officer-in-charge of the police-station was unable to perform his duties as such, an Assistant Sub-Inspector of Police who was investigating a case outside the station-house could not be regarded as the officer-in-charge of the Police station—*Momin*, 30 Cr.L.J. 803, 117 I.C. 601, A.I.R. 1928 Cal 771, Ind. Rul. 1929 Cal. 553

Constable:—By a judicial notification no. 3, dated 31-1-1883, the senior constable present at any police station shall be deemed to be the officer in charge for the time being, during the absence of the officer in charge—*Kuppa Kavundan*, 9 M.L.T. 414, 12 Cr.L.J. 190, 10 I.C. 667.

(q) "place" includes also a house, building, tent, and vessel:

(r) "pleader," used with reference to any proceeding in any Court, means a pleader or a *mukhtar* authorized under any law for the time being in force to practise in such Court, and includes (1) an advocate, a vakil, and an attorney of a High Court so authorized, and (2) any other person appointed with the permission of the Court to act in such proceeding:

27. Clause (r):—Change in the Law:—The definition of 'pleader' has been amended by the Criminal Procedure Code Further Amendment Act (XXXV of 1923). The old definition ran as follows:—

"Pleader used with reference to any proceeding in any Court means a pleader authorised under any law for the time being in force to practise in such Court, and includes (1) an advocate, a vakil and an attorney of a High Court, so authorised, and (2) any *mukhtar* or other person appointed with the permission of the Court to act in such proceeding"

Thus, under the old law, a *mukhtar* fell under the second part of the definition of the word 'pleader'; that is, a *mukhtar* was not entitled *as of right* to practise in

Criminal Courts, but it was necessary for him to obtain *permission of the Court* in each case before he was authorised to practise before Magistrates and Sessions Judges (*In re Anant Ram*, 30 All. 66; *Ishan Chandra*, 38 Cal. 488), though such permission was usually and naturally granted. The mukhtars were placed in the same category as "other persons," i.e., ordinary persons without any training or license. For this reason the mukhtars had a sentimental grievance, and in order to remove it, the definition has been amended by the Amendment Act (XXXV of 1923). This amendment has done away with the necessity of obtaining the permission of the Court, and gives a legal status to mukhtars, placing them on the same footing as pleaders. (See *Gazette of India*, 1923, Part V, pp. 129-131).

Practise.—The word 'practise' does not connote the doing of acts habitually or often, but signifies the performance of even a single act by a person as a professional man, which as a private individual he could not do—*Beni Bahadur*, 26 All. 380. A petition-writer who attends Court all day cannot be said to practise—*Shib Churn v. Ishan Chunder*, 18 W.R. 27. Only persons entitled to appear, plead or act in Court can be said to practise—*Tussudug v. Girhar*, 14 Cal 556 (565).

Mukhtar.—The word refers to such Mukhtars as have obtained a certificate of qualification from the High Court—*In re Anant Ram*, 30 All 66.

License for one district.—A pleader who holds a license to practise in a particular district is not entitled as a matter of right to practise in a Criminal Court of another district, unless he is permitted to practise in the latter Court—*Kimatrai*, 4 S.L.R. 207, 12 Cr.L.J. 118, 9 I.C. 717. It is the duty of a pleader, who appears in a Criminal Court of a district to which his *sanad* does not apply, to inform the Magistrate that he cannot appear as of right, and to apply for a permission under this clause—*Re Clements*, 7 S.L.R. 98, 15 Cr.L.J. 382, 23 I.C. 750.

Other person.—The words 'other person' embrace pure outsiders as well as duly qualified and enrolled mukhtars who have failed to take out their certificates—*Tussudug v. Girhar*, 14 Cal. 556.

The Code entitles a prisoner to authorise any person to be his agent in any Criminal Court—*Ramchandra*, Ratanlal 1; see also *Chandrabhaga*, Ratanlal 206. It is open to the accused to appoint any person (e.g., the manager of his estate) to appear in his stead and plead and do other acts on his behalf; but there must be clearly on record something to show that the person who represents the accused has been *duly appointed* by him (just as an ordinary pleader has to file a vakalatnama), and that the Court has given the requisite *permission* for his appearance in place of the accused—*Dorabshah*, 50 Bom 250, 28 Bom L.R. 102, 27 Cr.L.J. 440 (444), A.I.R. 1926 Bom. 218. A constituted attorney can also appear for the accused—*Jaffar*, A.I.R. 1934 Bom 212, 35 Cr.L.J. 1035, 149 I.C. 1132, 36 Bom L.R. 433, 1934 Cr.C. 759. The prosecuting Inspector can be appointed by the accused to defend them, with the permission of the Court, in a case where the accused are Government officers—*Chote Khan*, 26 N.L.R. 172, 31 Cr.L.J. 419 (420), 1930 Cr.C. 506, 122 I.C. 412, A.I.R. 1930 Nag 150.

The authority which can grant permission to an ordinary person to appear in any case is the *Court in which he appears*; and the District Magistrate cannot debar such persons, by a general order, from appearing in any proceeding in a Criminal Court—*In re Baji Rao*, 29 Bom L.R. 1587, 29 Cr.L.J. 226, A.I.R. 1928 Bom. 33.

Advocates on the Appellate Side do not come within the definition of "pleader" as defined in Cr. P. C. for the purposes of the Sessions Court, because they are not authorised by law for the time being in force to practise in that Court—*In re N. Godinho*, A.I.R. 1934 Bom 70, 35 Bom L.R. 1, 58 Bom. 456, 148 I.C. 664, 1934 Cr.C. 302 (F.B.).

As for the right of Advocates to practise in different Courts, see sec. 14 of the Indian Bar Councils Act, 1926 (XXXVIII of 1926). See also 24 All. 348 (F.B.) in this connection.

- (s) "police station" means any post or place declared generally or specially by the *Provincial Government* to be a police-station, and includes any local area specified by the *Provincial Government* in this behalf:

Amendment:—The words "Provincial Government" have been substituted for the words "Local Government" in this section by sec. 4 of the Government of India (Adaptation of Indian Laws) Order, 1937.

- (t) "Public Prosecutor" means any person appointed under section 492, and includes any person acting under the directions of a Public Prosecutor, and any person conducting a prosecution on behalf of His Majesty in any High Court in the exercise of its original criminal jurisdiction:

28. Clause (t)—Public Prosecutor—The appointment of a Magistrate, who had in the first instance tried the accused, as a Public Prosecutor to conduct an inquiry subsequently directed in the case, is a most improper proceeding—*Kashinath*, 8 BH.C.R. 126.

The complainant may appoint a pleader, and the Public Prosecutor may avail himself of his services; but in doing so, the Public Prosecutor does not deprive himself of the management of the case—*In re Narayan*, 11 BH.C.R. 102

The purpose of a criminal trial is not to support at all costs a theory, but to investigate the offence and to determine the guilt or innocence of the accused, and the duty of a Public Prosecutor is to represent not the police, but the Crown, and his duty should be discharged by him fairly and fearlessly, and with a full sense of the responsibility that attaches to his position. The guilt or innocence of the accused is to be determined by the tribunals appointed by law and not according to the tastes of any one else. It is, therefore, undoubtedly the duty of the Public Prosecutor, in a capital case, to have placed before the trial Court the testimony of all available eye-witnesses. This is no technical rule. It is founded on common sense and is dictated by humanity—*Ram Ranjan v. Emp.*, 42 Cal. 422 (428), 19 C.W.N. 28, 16 Cr.L.J. 170, 27 I.C. 554; *Brahmadeo v. Emp.*, 1920 Pat. H.C.C. 24 (31); *Fateh Chand*, 44 Cal. 477 (509), 24 Cr.L.J. 400, 18 Cr.L.J. 385, 21 C.W.N. 33, 38 I.C. 945 (F.B.).

As to who may be appointed a Public Prosecutor, see sections 492 and 495

- (u) "sub-division" means a sub-division of a district:

- (v) "summons-case" means a case relating to an offence, and not being a "warrant-case": and

If the Court is dealing with a charge of abetment of a specific offence, which offence is a summons case, then the abetment is also a summons case—*Narsinha Narayan Chandur v. Emp.*, AIR. 1931 Bom 199, 33 Bom L.R. 353, 1931 Cr.C. 343, 131 I.C. 472, 32 Cr.L.J. 718, 16 A.I. Cr.R. 338.

- (w) "warrant-case" means a case relating to an offence punishable with death, transportation, or imprisonment for a term exceeding six months.

29. Clause (w):—The term "Sessions case" has not been defined here. This term does not necessarily mean case triable exclusively by the Court of Session, but includes all cases which a Magistrate has committed to a Court of Session, although he might have tried them himself—*Gulabdas*, 11 BH.C.R. 98

A case becomes a "summons case" or "warrant case" according to the nature and measure of punishment which the law attaches to the offence. The terms of

sec. 45 of the C. P. Excise Act (V of 1915) leave no doubt that all offences under secs 34 and 36 of the said Act, which are committed after the conviction of the first offence, have to be tried as a "warrant case"—*Gayaprasad*, 33 Cr.L.J. 573, 138 I.C. 175, A.I.R. 1932 Nag. 111, 28 N.L.R. 18, 1932 Cr.C. 275.

(2) Words which refer to acts done extend also to illegal omission: and

all words and expressions used herein, and defined in the Indian Penal Code, and not hereinbefore defined, shall be deemed to have the meanings respectively attributed to them by the Code.

Words to have same meaning as in Indian Penal Code

30. Thus, the words "force" and "criminal force" used in section 522 must be interpreted according to the definition given in sections 349 and 350 of the Indian Penal Code—*Balram v. Chamru*, 2 P.L.T. 120; *Churaman v. Ramlal*, 25 All 341; *Hari Chand*, 1919 P.R. 16, 20 Cr.L.J. 488, 51 I.C. 472; *Ishan Chandra v. Dena Nath*, 27 Cal 174; *Ram Chandra v. Jityendra*, 25 Cal 434 (439). So also, the definition of the word 'Judge' given in section 19, I. P. Code would apply to the word 'Judge' used in sec 539, Cr P Code—*Ramchandra*, 5 Pat 110, 27 Cr.L.J. 499 (501), A.I.R. 1926 Pat 214

Although sub-section (2) is separated from sub-section (1) by a full stop, still sub-section (2) must be read as qualified by the words "unless a different intention appears from the subject or context" occurring in the beginning of sub section (1)—*Gantapalli v. Gantapalli*, 20 Mad 470 (474) (F B).

5. (1) All offences under the Indian Penal Code shall be investigated, inquired into, tried and otherwise dealt with according to the provisions hereinafter contained.

Trial of offences under Penal Code.

(2) All offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force, regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences.

Trial of offences against other laws

31. **Power of High Court to punish for contempt:**—The power to punish for contempt vested in the High Court by the Common Law of England is not affected by the provisions of this Code. A contempt of the High Court by a libel published out of Court, when the Court is not sitting, is not included in the words 'offences under the Indian Penal Code' or "offences under any other law" in sec. 5 of the Cr. P. Code, though the contempt may include defamation. It is something more than mere defamation and is of a different character which the High Court can deal with by virtue of its superior powers—*Surendra Nath Banerjee v. Chief Justice*, 10 Cal 109 (P.C.); *In re Abdul Hasan*, 48 All 711 (F B), 24 A.L.J. 819, 97 I.C. 108, A.I.R. 1926 All 623; *Muslim Outlook*, 28 Cr.L.J. 727 (F B), 103 I.C. 775, A.I.R. 1927 Jah 610, 9 L.L.J. 455, 29 P.L.R. 294; *Crown v. Sayyad Habib*, 6 Lah. 528 (S B).

"Otherwise dealt with":—To 'otherwise deal with' a case includes the act of transferring a case from one Court to another under sec. 526—*Basdeo v. Badal*, 49 All. 188, 28 Cr.L.J. 94.

31A. **Offence on the high seas:**—The Presidency Magistrate, Bombay, has authority to convict a person for an offence under the Indian Penal Code, the

said offence having been committed in a British ship during her voyage on the high seas. The charge should be framed in reference to the Indian Penal Code, and in case of conviction the punishment should be awarded under that Code—*King-Emperor v. Chief Officer of S.S. "Mushtari,"* 25 Bom. 636. Under sections 684 and 686 of the Merchant Shipping Act (57 & 58 Vict., c. 60) the Original S.d.e of the Calcutta High Court has jurisdiction to try a Native Indian seaman for murder or manslaughter committed on board a British vessel on the high seas when he is brought to Calcutta under custody, notwithstanding that the vessel touched at the intermediate ports in course of the voyage after the commission of the offence. Dissenting from the view expressed above by the Bombay High Court it was further held that the offence should be tried and the charge framed under the English law, but the procedure at the trial and the sentence must be regulated by the law of India—*Salimullah*, 39 Cal. 487, 13 Cr.L.J. 246, 14 I.C. 598. The Presidency Magistrate of Calcutta has jurisdiction to proceed with trial of crewmen charged with having been guilty of rioting and causing grievous hurt while on the high seas, although there was no evidence to show that they were in Calcutta on the day on which the complaint was made and they surrendered themselves to the Court after proclamations were issued—*Legal Remembrancer v. Raisalle*, A.I.R. 1933 Cal 145, 60 Cal 44, 34 Cr.L.J. 631, 143 I.C. 774, 1933 Cr.C. 222. See also Note 4 under the heading "High Seas."

A subject of the State of Junaghad in Kathiawar was arrested in Bombay and accused of committing a serious offence on a ship belonging to a Junaghad subject on the high seas some eighteen miles or thereabouts from the coast of the Kanara District. *Held* that the First Class Magistrate in Kanara had no jurisdiction to deal with the alleged offender—*Punja Guni*, 42 Bom. 234.

32. Clause (2):—Where a special law (e.g., the Bombay Prevention of Gambling Act of 1887) has provided a special procedure for the manner or place of investigating or inquiring into any offence under it, its provisions must prevail, and no provisions of the Criminal Procedure Code can apply. Where, however, the special Act is silent, the Cr. P. C. would be applicable—*Kaitan*, 31 Bom. 438.

Thus, the Gambling Act III of 1867, sec. 5, prescribes a special procedure for searches under that Act, and the provisions of Chapter VII of this Code shall not apply thereto—*Khilinda Ram*, 3 Lah. 359, 23 Cr.L.J. 621. So also, under the Madras Akbari Act (I of 1886), an accused person has the right to a special procedure regulating the course of an investigation and providing for a much more elaborate inquiry than is provided for in the Cr. P. Code; and if a Magistrate takes cognizance of an offence under the Madras Akbari Act, under the proceedings of this Code, the proceedings are not properly instituted—*Kuppuswamy*, 44 M.L.J. 231, 24 Cr.L.J. 335, 17 L.W. 308, 72 I.C. 175, A.I.R. 1923 Mad. 339, where it was observed: "The police have no right to file a charge sheet or otherwise to proceed under Ch. 14, Cr. P. Code, in respect of an offence under the Akbari Act. Ch. 14 is controlled by sec. 5 (2), Cr. P. Code, and this is an offence under a special law which can be investigated and tried only according to the provisions of the law." This ruling is no doubt given with reference to the Madras Akbari Act. But the principle on which that ruling is based equally applies to the provisions of the Bombay Act (V of 1878)—*Mahomed Usman*, A.I.R. 1933 Sind 325 (326), 35 Cr.L.J. 129, 146 I.C. 419, 1933 Cr.C. 1077. Under the Madras Akbari Act the proceedings must be initiated and conducted under the elaborate rules contained in the chapter and sections of the Act. For an offence against the Opium Act (I of 1878) the procedure which is indicated in that Act is to be strictly followed. Complaints by private persons are not provided for in these Acts and must be treated as not properly instituted—*Fernando*, A.I.R. 1929 Mad. 604, 52 Mad. 613, 30 M.L.W. 112, 1929 M.W.N. 507, 57 M.L.J. 214, 30 Cr.L.J. 1011, 119 I.C. 174, 1929 Cr.C. 78. The Madras Salt Act (1889) does not intend a scheme of procedure, or intend anything more than a few special additions to the normal procedure of Cr. P. Code—*Sudarsanam*, A.I.R. 1931 Mad. 769 (770), 61 M.L.J. 127, 31 M.L.W. 211, 133 I.C. 383, 32 Cr.L.J. 1035, 1931 M.W.N. 405, 1931 Cr.C. 1025, 35 Mad. 86.

Where the special law prescribes no special procedure, the procedure of the Cr. P. Code must be followed. So, an offence under sec. 20 of the Calcutta Rent Act must be summarily inquired into under the provisions of Chapter XXII of this Code—*Ishan v. Manmatha*, 37 C.L.J. 298, A.I.R. 1923 Cal. 339. The Cr. P. Code is applicable to trial before a Magistrate of offences under the Bengal Excise Act—*Upendra*, 41 Cal. 694 (702), 18 C.W.N. 485. As no rules have been framed under the Ordinance III of 1914, the provisions of this Code must be followed in the trial of an offence under that Ordinance—*Sher Singh*, 1916 P.R. 10, 34 I.C. 641, 17 Cr.L.J. 225 (226). The provisions of the Cr. P. Code are to apply so far as they are not inconsistent with the Ordinance (II of 1932). In case of conflict the provisions of the Ordinance prevail—*Abdul Majid*, A.I.R. 1933 Cal. 537, 60 Cal. 652, 1933 Cr.C. 893, 145 I.C. 656, 34 Cr.L.J. 1023.

The Cr. P. Code is applicable to a prosecution under the Calcutta Municipal Act—See *Sisir Kumar Mitter v. Corporation of Calcutta*, 30 C.W.N. 598; *Umesh Chandra v. Corporation of Calcutta*, 42 C.L.J. 231; *Sew Prosad v. Corporation of Calcutta*, 9 C.W.N. 18; *Krishen Doyal v. Corporation of Calcutta*, 54 Cal. 532, 31 C.W.N. 506.

The offence under sec. 63 of the Chota Nagpur Tenancy Act (VI of 1908) is an offence not under the I.P.C., but under a different Act. By reason of sec. 5 (2) of the Cr. P. C., it must be investigated into and tried according to the provisions of the Code, because there is nothing in the statute creating the crime dealing with the method in which investigation is to be made and the trial to be held—*Angelo v. Kandan Manjhi*, 41 Cr.L.J. 221 (224).

A simultaneous conviction under the Indian Penal Code as well as under a special law for the same offence is illegal—*Hussun Ali*, 5 N.W.P. 49. It cannot be laid down as a general rule of law that where there is a special law making a particular act an offence and providing penalties for such an offence, the general law must be held to be inapplicable. It is possible that the same act may be an offence under two different Acts, and both may be applicable simultaneously and the offender may be prosecuted and convicted under either Act. It may, however, be conceded that where the offence falls strictly within the provisions of a section of a special Act and does not go beyond it, it would be more appropriate to prosecute the offender and convict him under that special Act, rather than fall back upon a more general law which prescribes a heavier penalty. In such a case it may be assumed that the Legislature in prescribing the smaller penalty has considered recourse to the special law as the proper course—*Jiva Ram*, 33 Cr.L.J. 309 (310), 135 I.C. 571, A.I.R. 1932 All. 69, 1932 Cr.C. 89, 1932 A.L.J. 519.

See also 45 Mad. 14 (18) quoted in Note 5

33. "Enactment":—A rule framed under any act (e.g., Calcutta Rent Act) is not an 'enactment' within the meaning of clause (2) of this section—*Gobardhan v. Doolie Chand*, 48 Cal. 955, 25 C.W.N. 661, 22 Cr.L.J. 351, 33 C.L.J. 551.

PART II.

CONSTITUTION AND POWERS OF CRIMINAL COURTS AND OFFICES.

CHAPTER II.

OF THE CONSTITUTION OF CRIMINAL COURTS AND OFFICES.

A.—Classes of Criminal Courts.

6. Besides the High Courts and the Courts constituted Classes of Criminal Courts. under any law other than this Code for the time being in force, there shall be five classes of Criminal Courts in British India, namely:—

I.—Courts of Session:

II.—Presidency Magistrates:

III.—Magistrates of the first class:

IV.—Magistrates of the second class:

V.—Magistrates of the third class.

33A. High Court:—See Notes under sec. 4, cl. (j) of this Act. Sec. 6, Cr. P. C., says that besides the High Courts there shall be five classes of Criminal Courts in British India. It is obvious that these five Courts are inferior criminal Courts qua the High Court so far as sec. 435, Cr. P. C. is concerned—*Municipal Board, Benares v. Ram Sahai*, A.I.R. 1933 All. 281, 34 Cr.L.J. 1105, 145 I.C. 959, 1933 A.L.J. 469.

Court of Session—Under sec. 9, cl. (3), Cr. P. C., Additional Sessions Judges and Assistant Sessions Judges may be appointed by the Local Government to exercise jurisdiction in Courts of Session.

The High Court exercising Original Criminal Jurisdiction is not a Court of Session within the meaning of the Code of Criminal Procedure. Under sec. 6 of the Cr. P. Code, Courts of Session belong to a class of Courts different from the High Courts—*Harendra Chandra Chakravarty*, 51 Cal 980 (982), A.I.R. 1925 Cal 384, 26 Cr.L.J. 385, 29 C.W.N. 384, 84 I.C. 929; *Sukumar Majumdar v. Emp.*, A.I.R. 1932 Cal. 867, 59 Cal. 1248, 1932 Cr.C. 891, 34 Cr.L.J. 107, 140 I.C. 891.

34. Magistrate:—*Court*:—For the sake of brevity the Code uses the terms "Court" and "Magistrate" generally, if not always, as convertible terms—*Clarke v. Brajendra Kishore Roy Chowdhury*, 39 Cal 953 (966) 16 C.W.N. 865, 13 Cr.L.J. 693, 16 I.C. 501, 16 C.L.J. 231, 10 A.L.J. 193, 14 Bom.L.R. 717, 23 M.L.J. 32, 39 I.A. (163 (P.C.) The term "Magistrate" shall include every person exercising all or any of the powers of a Magistrate under the Code of Criminal Procedure for the time being in force. *Vide* sec. 3, cl. (31) of the General Clauses Act (X of 1897). There is no definition of this term in the Cr. P. C.

A Magistrate as such is not a Court unless he is acting in a judicial capacity—*Clarke v. Brajendra Kishore*, 36 Cal 433. A Magistrate taking cognizance of a case under sec. 145 is a "Criminal Court" within the meaning of the Code. It is a Court which is constituted under sec. 6 of the Act, and bound to administer the law relating to criminal procedure as prescribed by the Code—*Lalit v. Surja*, 28 Cal 700 (713). The Court of a Police Patel is not a Criminal Court within the enunciation contained in this section—*Q.E. v. Ramia*, Ratanlal 317; 4 Bom 417. A village Panchayat

constituted under U. P. Act VI of 1920 is a Criminal Court within the meaning of Chap. II of the Cr. P. Code—*Basdeo v. Badal*, 49 All. 188, 28 Cr.L.J. 94; *Kamalapati*, 48 All. 23, 27 Cr.L.J. 19. Contra—*Sat Narain v. Sarju*, 46 All. 167, 25 Cr.L.J. 1390. But see *Badri Nath v. Sheophaal* in Note 35B.

35. Presidency Magistrate:—The term "Presidency Magistrate" would not be ordinarily included in the words "District Magistrate" or "Magistrate of the first class" because sections 10 and 12 of the Code show that the District Magistrate and Magistrates of the first class are appointed only in districts outside the Presidency-towns—*Chota Singh*, 32 Mad. 303. But the term "Magistrate of the first class" used in sec. 111 of the Emigration Act (XX of 1883) means a Magistrate appointed to exercise the highest magisterial powers, and includes a Presidency Magistrate—*Jeevanti*, 31 Bom. 611; *Haji Shaikh Mahomed*, 32 Bom 10. This section differentiates "Presidency Magistrates" from "Magistrates of the first class," and section 10 defines who a "District Magistrate" is. There is nothing to prevent a Presidency Magistrate from examining a witness within his jurisdiction at some other place than the Court house—*Sremutty Hem Kumari Dasee v. Q. E.*, 1 C.W.N 333, 24 Cal 551.

When the Code itself confers certain powers on an ordinary Presidency Magistrate, any one appointed to be or declared as such, can exercise those powers, unless those powers are restricted or curtailed, at the time of the appointment or declaration. By virtue of sec. 31, Madras City Police Act (III of 1888), the provisions of sec. 523, Cr. P. Code have to be applied as far as practicable, to all property seized or taken charge of by the police. In his capacity as a Presidency Magistrate the Commissioner of Police can exercise the power under sec. 523 of the Code, in the absence of any Government order, stating that he shall not exercise such a power—*Devidan Sowcar v. Janaki Ammal*, A.I.R. 1932 Mad. 428, 1932 M.W.N. 106, 62 M.L.J. 632, 35 M.L.W. 625, 1932 Cr.C. 409, 138 I.C. 126, 33 Cr.L.J. 539.

35A. District Magistrate:—The Code does not recognise any Court other than the 5 classes mentioned in this section. A District Magistrate's Court is, for the purposes of an ordinary criminal trial, the Court of Magistrate of the first class. Therefore when a Magistrate vested with the first class powers began to try a case against the accused while he was officiating as the District Magistrate, he has jurisdiction to continue and conclude the trial even after he ceased to be the District Magistrate—*Syed Sajjad*, 3 A.L.J. 825, 4 Cr.L.J. 140, 1906 A.W.N. 201. A District Magistrate as such is not a Court and is only a first class Magistrate who exercises special powers with which he is invested either by the Cr. P. Code or by the Local Government. His Court is that of a Magistrate, first class, and appeals from the appealable sentence of his Court lie to the Court of Session—*Pilalal v. Emp.*, 30 Cr.L.J. 550, 116 I.C. 77, A.I.R. 1929 Nag 97, 25 N.L.R. 1 (F.B.). So also, the Sub-divisional Magistrate is not entered as being one of the five classes of criminal Courts. Such Magistrate may be counted as a Magistrate of the first (or second) class—*Chhoti v. Khacheru*, 42 All. 649 (654), 18 A.L.J. 758, 21 Cr.L.J. 746, 58 I.C. 250.

The terms "Deputy Magistrate", "General Deputy Magistrate" are unknown to this Code, and should not be used—*Sadananda*, 23 M.L.J. 670, 13 Cr.L.J. 850 (852), 12 M.L.T. 601, 17 I.C. 785.

35B. Constituted under any law:—This section appears to recognize that besides the High Court and the five classes of Criminal Courts constituted by the Code, there may be other Courts constituted under other laws, meaning presumably other Courts having jurisdiction to try criminal offences—*Goberdhane v. Doolichand*, 43 Cal. 955 (982), 33 C.L.J. 551, 25 C.W.N. 661, 22 Cr.L.J. 354, 61 I.C. 220. A Municipal Magistrate appointed to deal with offences against the Calcutta Municipal Act (III of 1923) is a Court constituted under a law other than the Code for the time being in force, and comes within this section—*Ram Gopal v. Corporation of Calcutta*, 52 Cal 962 (969), 29 C.W.N. 898, 90 I.C. 317, A.I.R. 1925 Cal. 1251. But a Panchayat u. Chapter VI of the U. P. Village Panchayat Act (VI of 1920) is not a Court 'con

under any law other than this Code' as defined under this section—*Badri Nath v. Sheopthal*, A.I.R. 1939 Oudh 143 (144), 1939 O.W.N. 231, 1939 O.L.R. 120, 180 I.C. 142, 1939 A.W.R. (C.C.) 54, 40 Cr.L.J. 338, 14 Luck. 592, 11 R.O. 240, 1939 O.A. 259, 1939 A.Cr.C. 44. But see *Basdeo v. Badal* in Note 34.

B.—Territorial Divisions.

7. (1) Every province (excluding the presidency-town) shall be a sessions division, or shall consist of sessions divisions; and every sessions division shall, for the purposes of this Code, be a district, or consist of districts.

Sessions divisions and districts.

(2) The Provincial Government may alter the limits or the number of such divisions and districts.

Power to alter divisions and districts.

(3) The sessions divisions and districts existing when this Code comes into force shall be sessions divisions and districts respectively unless and until they are so altered.

Existing divisions and districts maintained till altered.

(4) Every presidency-town shall, for the purposes of this Code, be deemed to be a district.

Presidency-towns to be deemed districts.

Amendment:—The words "Provincial Government" have been substituted for the words "Local Government" in this section by sec 4 of the Government of India (Adaptation of Indian Laws) Order, 1937.

36. Division, District:—The word 'district' in this section does not mean a revenue district, but a district for the purposes of criminal administration. And a sessions division shall be the equivalent of one such district or a number of such districts. By Notifications nos. 175 and 177 of the Local Government, dated the 22nd June 1921, there have been constituted a Sessions Division of West Tanjore and a Sessions Division of East Tanjore. Before these Notifications there was one Tanjore Sessions Division, and it was also Tanjore District for criminal administration. The Government not having declared that each Sessions Division should consist of more than one district, the effect of the Notification is that we have got East Tanjore Sessions Division and East Tanjore District, as also West Tanjore Sessions Division and West Tanjore District (though for revenue purposes, there is only one District of Tanjore, having only one officer at its head who is the Collector of Tanjore). The notification is not *ultra vires*, having regard to sub-sec. (1) of this section—*Arumuga*, 54 Mad. 943 (F.B.), 61 M.L.J. 265, 32 Cr.L.J. 1095 (1096, 1097), 1931 Cr.C. 937. A district has a different conception from that of a division, though a division may be equivalent to a district. It need not necessarily be so, for it may consist of a number of districts. The conception underlying a division is that a Sessions Judge is presiding over a division (sec. 9); the conception underlying a district is that there is a District Magistrate for each District (sec. 10). So, a Sessions Division is not identical with a district, though territorially one may be equivalent to a District—*Arumuga*, supra.

36A. Local Government may alter, etc.:—This section assumes the existence of Sessions Divisions in every part of British India, but it does not contemplate the creation of such division by the Local Governments, which can only alter the limits or number of such divisions under sub-sec. (2) of this section—*Mangal Tekchand*, 10 Bom 274 (282). The word "district" as used in this section and in other sections of the Code is a district for the purposes of criminal administration. The object of cl (1) of this section is not to enable the Local Government to constitute Sessions Divisions out of

districts but to lay down a rule governing the relation between Sessions Divisions and Districts; that is, a Sessions Division shall not consist of half a district or even one and a half districts, but shall consist of one district or of a plurality of whole districts—*Arumugha Solagan*, A.I.R. 1931 Mad. 697, 54 Mad. 943, 134 I.C. 51, 32 Cr.L.J. 1095, 1931 M.W.N. 161, 34 L.W. 201, 1931 Cr.C. 937, 61 M.L.J. 265 (F.B.).

37. Sessions Division:—*Instances:*—Cachar is a Sessions Division of Assam (see Assam Gazette, 1874, page 3). *Darjeeling* is included within the Dajpore Division. The District and Town of Rangoon are two Sessions Divisions for the purposes of this Code (see Gazette of India, 1784, p. 62). The Ganjam Collectorate consists of two Sessions Divisions, one consisting of the Agency District, and the other of the Non-Agency Tracts—*Sadananda*, 23 M.L.J. 670, 13 Cr.L.J. 850. The Districts of North and South Malabar are two Sessions Divisions in the Malabar District—*Valia Amulu*, 30 Mad. 136, 16 M.L.J. 444, 4 Cr.L.J. 443.

8. (1) The *Provincial Government* may divide any district outside the presidency-towns into sub-divisions, or make any portion of any such district a sub-division, and may alter the limits of any sub-division.

Power to divide districts into sub-divisions

Existing sub-divisions maintained.

under the charge of a Magistrate shall be deemed to have been made under this Code.

Amendment:—The words “Provincial Government” have been substituted for the words “Local Government” in this section by sec. 4 of the Government of India (Adaptation of Indian Laws) Order, 1937.

C.—Courts and Offices outside the presidency-towns.

9. (1) The *Provincial Government* shall establish a Court of Sessions for every sessions division, and appoint a Judge of such Court.

(2) The *Provincial Government* may, by general or special order in the Official Gazette, direct at what place or places the Court of Session shall hold its sitting; but, until such order is made, the Courts of Session shall hold their sittings as herebefore.

(3) The *Provincial Government* may also appoint Additional Sessions Judges and Assistant Sessions Judges to exercise jurisdiction in one or more such Courts.

(4) A Sessions Judge of one sessions division may be appointed by the *Provincial Government* to be also an Additional Sessions Judge of another division, and in such case he may sit for the disposal of cases at such place or places in either division as the *Provincial Government* may direct.

(5) All Courts of Session existing when this Code comes into force shall be deemed to have been established under this Act.

Amendment:—The words “Provincial Government” have been substituted for “Local Government” in this section by sec. 4 of the Government of India (Adaptation of Indian Laws) Order, 1937.

38. Sub-section (1):—The High Court exercising original criminal jurisdiction is not a ‘Court of Session’ within the meaning of this Code. A Court of Session is

established in the *mofussil* in every Sessions Division, and belongs to a class of Courts different from the High Courts—*Harendra*, 51 Cal. 980 (1982), 29 C.W.N. 384, 26 Cr.L.J. 385, A.I.R. 1925 Cal. 384, 84 I.C. 929. See also *Sukumar Majumdar v. Emp.*, A.I.R. 1932 Cal. 867, 59 Cal. 1248, 1932 Cr.C. 891, 34 Cr.L.J. 107, 140 I.C. 891.

Under sec. 20 of the Aden Courts Act (Bom Act II of 1864), the *Resident of Aden* is not a Court of Session, but is a *persona designata* invested with the powers of a Court of Session except as in that Act otherwise provided. The powers of the Court of Session conferred on the Resident are not wholly such as are defined in the Cr. P. Code, but only such as are specially provided in Act II of 1864—*Robert Comlev*, 29 Bom 575, 7 Bom L.R. 104.

Sub-section (2):—If the Local Government directs a particular place of sitting of any Court of Session, the High Court cannot alter the place of sitting; but it can, under sec. 526, change the venue of trial of any case from any one of these places to another, both notified under sec. 9—*Lakshman*, 55 Bom 576, 33 Bom L.R. 675, 32 Cr.L.J. 1147 (1148), A.I.R. 1931 Bom 313, 131 I.C. 347, 1931 Cr.C. 569.

Sub-section (3):—The appointment of an Additional Sessions Judge does not constitute an additional Sessions Court. There can be only one Judge of such Sessions Court. If an Additional Sessions Judge is appointed, he can try only such cases as the Local Government directs or as the Sessions Judge makes over to him—*Kunjan*, 1 M.L.J. 397 (440) (F.B.). There is only one Court of Session, though it consists of a number of Judges (*viz.*, Sessions Judge, Additional Sessions Judge, etc.). It is not correct to speak of the "Court of the Sessions Judge" or the "Court of the Additional Sessions Judge." Therefore, if an offence is committed before the Additional Sessions Judge, the complaint under sec. 476 may be made by the Sessions Judge, because they are Judges of the same Court of Session—*Iffatullah*, 58 Cal. 1117, 35 C.W.N. 400, 32 Cr.L.J. 842 (843), A.I.R. 1931 Cal. 100. But a different view seems to have been taken by Patkar, J., in *Lakshman*, *supra*, where he observes "I think, therefore, that the Additional Sessions Judge and the Assistant Sessions Judge appointed under sec. 9 (3), though exercising jurisdiction as a Sessions Court, are, while exercising their functions in respect of particular cases which have been made over to them, different Courts to the Sessions Judge who has been appointed under sec. 9 (1) Criminal P. C. The Assistant Sessions Judge, the Additional Sessions Judge, and the Sessions Judge exercise co-ordinate or equal jurisdiction of a Sessions Court within the limits of the authority conferred on them by the Code, and are nevertheless different Courts each subordinate to the High Court."

A Sessions Judge has jurisdiction only within his division—*Shanmugam Chetty v. Rennappa Mudaly*, 29 Mad. 137.

10. (1) In every district outside the presidency-towns, the District Magistrate Provincial Government shall appoint a Magistrate of the first class who shall be called the District Magistrate.

(2) The Provincial Government may appoint any Magistrate of the first class to be an Additional District Magistrate * * * and such Additional District Magistrate shall have all or any of the powers of a District Magistrate under this Code or under any other law for the time being in force as the Provincial Government may direct.

(3) For the purposes of sections 192 sub-section (1), 407 sub-section (2), and 528 sub-sections (2) and (3), such Additional District Magistrate shall be deemed to be subordinate to the District Magistrate.

39. Change:—In sub-section (2), the italicised words have been added, and the words "for a period not exceeding six months" have been omitted, by sec. 2 of the Cr. P. Code Amendment Act (XVIII of 1923).

Sub-section (3) has also been newly added by the same Amendment Act. Prior to this amendment, the Code did not define the relation between a District Magistrate and an Additional District Magistrate. Section 12 also did not make an Additional District Magistrate subordinate to a District Magistrate, and therefore the latter had no power under sec. 528 to transfer a case from a Sub-divisional Magistrate to the Additional District Magistrate—*Prakas Chunder*, 34 Cal. 918. This case is no longer good law, because under sub-section (3), newly enacted, the District Magistrate has been expressly empowered to transfer cases under sec. 528 to the Additional District Magistrate.

The words "Provincial Government" have been substituted for the words "Local Government" in this section by sec. 4 of the Government of India (Adaptation of Indian Laws) Order, 1937.

40. District Magistrate:—A District Magistrate is appointed in a district outside the Presidency-towns. Therefore a Presidency Magistrate is not included in the term 'District Magistrate'—*Chota Singh*, 32 Mad 303.

A District Magistrate is subordinate to the Sessions Judge and cannot disregard the order of the latter—*Tun Lin*, 5 L.B.R. 49, 2 I.C. 541, 10 Cr.L.J. 77.

This section directs that a District Magistrate shall be appointed for every district, but it does not say that *one officer* should not be appointed District Magistrate for two districts—*Arumuga*, 54 Mad. 943 32 Cr.L.J. 1095 (1097), 61 M.L.J. 265 (F.B.).

Because the District Magistrate has been invested with certain powers under this section, it does not follow that he has not other powers which are not contemplated by the Criminal Procedure Code. He is in addition the Collector of the district. He is also the District Officer and in those capacities he has to perform many functions which are not covered by the Criminal Procedure Code—*Bejoy Krishna v. Shyam Narain*, A.I.R. 1940 Cal. 30 (31).

District Magistrate and first class Magistrate —Where a trial was commenced by an officiating District Magistrate, and before its close, the officer reverted to his original position as first class Magistrate of the district, in which capacity also he had jurisdiction over the offence, it was held that he had jurisdiction to continue the trial. This Code does not recognise any particular Court as that of the District Magistrate but only Courts of First, Second and Third Class Magistrates—*Syed Sajjad Husain*, 3 A.L.J. 825, 4 Cr.L.J. 140, 1906 A.W.N. 201.

An Additional District Magistrate is invested by the Local Government by virtue of the powers conferred upon it by sec. 10 (2), Cr. P. Code, with the powers of a Court of Revision and is, therefore, competent when disposing of a case by virtue of those powers to make any consequential order as to the disposal of property—*Nagappan v. Ramaram*, 31 Cr.L.J. 1085, 126 I.C. 594, A.I.R. 1930 Mad. 769. But see *Mania Pillai v. Gopalakrishna Iyer*, 1928 M.W.N. 633, where a contrary view seems to have been taken. This view was not approved in *Abdur Rahiman Kully v. Emp.*, *infra*.

There is no difficulty in reading sec. 8, Sarda Act (Child Marriage Restraint Act, XIX of 1929) with sec. 10 (2), Cr. P. C., and holding that an Additional District Magistrate who has been given all the powers of the District Magistrate is empowered to try a case under the Sarda Act also—*Abdur Rahiman Kully v. Emp.*, A.I.R. 1937 Mad 637, (1937) 1 M.L.J. 498, 1937 M.W.N. 321, 45 M.L.W. 435, 1937 M. Cr. C. 114, 169 I.C. 71, 38 Cr.L.J. 664, 1 L.R. 1937 Mad. 1034.

It does not mean that the District Magistrate referred to in sub-sec. (1) is a different functionary from the District Magistrate referred to in sub-sec. (2). In Part 5 of Sch. III, Cr. P. Code, the ordinary powers of a District Magistrate have been specified and those powers include "power to tender pardon to an accomplice at any stage of a case" under sec. 339, Cr. P. C. Consequently sub-sec. (2) of sec. 10 refers to the powers of a District Magistrate evidently using the term in a general sense,

and the mere fact that in sub-sec. (1), the article 'the' has been used before the words "District Magistrate" does not alter the situation in any manner. The Additional District Magistrate is, therefore, in his own right empowered under the law to tender a pardon to the accused—*Amar Singh*, 40 Cr.L.J. 543 (544), 181 I.C. 509, A.I.R. 1938 Lah. 796, 40 P.L.R. 758, I.L.R. 1939 Lah. 38.

11. Whenever, in consequence of the office of a District Magistrate becoming vacant, any officer succeeds temporarily to the chief executive administration of the district, such officer shall, pending the orders of the *Provincial Government*, exercise all the powers and perform all the duties respectively conferred and imposed by this Code on the District Magistrate.

Amendment:—The words "Provincial Government" have been substituted for the words "Local Government" in this section by sec. 4 of the Government of India (Adaptation of Indian Laws) Order, 1937.

40A. An officer absent on casual leave is not treated as absent from duty. While such officer is on casual leave, the next senior officer remains in charge of the current duties. There is no vacancy and no temporary succession within the meaning of this section, when a Sub-divisional Magistrate is temporarily looking after the current duties of a District Magistrate absent on casual leave on account of illness, and when there is no order appointing him to officiate as District Magistrate—*Achhaibar*, 24 O.C. 255, 22 Cr.L.J. 713, 63 I.C. 873.

12. (1) The *Provincial Government* may appoint as many persons as it thinks fit, besides the District Subordinate Magistrates. Magistrate, to be Magistrates of the first, second or third class in any district outside the presidency-towns; and the *Provincial Government*, or the District Magistrate subject to the control of the *Provincial Government*, may, from time to time, define local areas within which such persons may exercise all or any of the powers with which they may respectively be invested under this Code.

(2) Except as otherwise provided by such definition, the jurisdiction and powers of such persons shall extend throughout such district.

Amendment:—The words "Provincial Government" have been substituted for the words "Local Government" in this section by sec. 4 of the Government of India (Adaptation of Indian Laws) Order, 1937.

41. **Magistrate:**—A Cantonment Magistrate is a Magistrate appointed under this section—*Maula Buksh*, 1879 P.R. 1.

42. **Local area:**—Although the expression "local area" includes a sessions division, district or sub-division (*Punardeo v. Ram Sarup*, 2 C.W.N. 577, 25 Cal. 858), still it appears sufficiently clear that the Legislature did not contemplate the exercise of jurisdiction by any Magistrate outside the limits of an area called a 'District' in which he might be appointed by the Local Government—*Shaik Fakhudin*, 9 Bom 40 (45). A Sub-divisional Magistrate who has had his jurisdiction defined within a sub-division or local area in the district by order of the District Magistrate, cannot take cognizance of a matter outside such local area—*Kunj Behari v. Lanua*, 19 A.L.J. 72, 59 I.C. 554, 22 Cr.L.J. 122. But where a notification, appointing a Magistrate,

did not specify any local area within which he was to exercise jurisdiction, but conferred on him power to try "all such cases as might be instituted in his Court," it was held that the notification by necessary implication conferred jurisdiction throughout the province—*Lakshmi Chand*, 24 P.R. 1901, 96 P.L.R. 1901.

But a Magistrate having jurisdiction within a district cannot record a confession in a place *outside British India* (e.g., in a Native State) although the offence in respect of which the confession is made has been committed within that district—*Nahar Singh*, 19 A.L.J. 355, 22 Cr.L.J. 567

43. Jurisdiction extends throughout district:—Unless the powers of a Magistrate have been restricted to a certain local area, he has jurisdiction over the entire district—*Sarat Chandra v. Bipin*, 6 C.W.N. 552, 29 Cal 389; *Hiranand*, 10 C.W.N. 1095 (1098), 4 Cr.L.J. 228; *Achhaibar Singh*, 24 O.C. 255, 63 I.C. 873, 22 Cr.L.J. 713; therefore a Magistrate appointed for a whole district, but put in charge of a particular taluk or sub-division only, is not without jurisdiction, if he inquires into or tries a case in another taluk or sub-division of the same district—*Jamshedji Ratanlal* 177; *Rameshwar*, 1 P.L.T. 632, 55 I.C. 593, 21 Cr.L.J. 321; *Ghulam Hussain v. Sajawal Shah*, A.I.R. 1933 Lah 143, 1933 Cr.C. 241, 34 P.L.R. 365, 142 I.C. 430; *Yaqub v. Appaswami*, 25 Cr.L.J. 556, 81 I.C. 44, A.I.R. 1925 Nag. 140. But a Magistrate to whom the District Magistrate has allotted a particular area can take cognizance of offences committed only in that area—*Kunj Behari Lal v. Lanua*, A.I.R. 1921 All 123, 59 I.C. 554, 19 A.L.J. 72, 22 Cr.L.J. 122; *Khush Chand v. Emp.*, 29 Cr.L.J. 124, 106 I.C. 716, A.I.R. 1927 All 791; *Mahangu Lal v. Emp.*, A.I.R. 1935 Pat. 131, 154 I.C. 873, 1 B.R. 356, 7 R.P. 498, 35 Cr.L.J. 580, 16 P.L.T. 347, 1935 Cr.C. 331; *Syed Ali v. Emp.*, 39 Cr.L.J. 810, 176 I.C. 784, 11 R.N. 79, A.I.R. 1938 Nag. 448. Where the District Magistrate transferred a case under sec. 145, Cr. P. Code from the file of one Sub-divisional Magistrate to the file of another Sub-divisional Magistrate vested with 1st class powers who drew up fresh proceedings under sec. 145 in respect of lands included in the previous proceedings and also other lands not within his sub-division and not included in the previous proceedings, held that he had jurisdiction to do so—*Rameshwar v. Baynath*, 37 Cr.L.J. 55, 159 I.C. 12, A.I.R. 1935 Pat. 436, 16 P.L.T. 576, 1935 Cr.C. 1107, distinguishing *Chellapathi v. Subba*, 32 Mad 211, 114 I.C. 625, A.I.R. 1928 Mad. 123, 30 Cr.L.J. 340, 55 M.L.J. 693, 28 M.L.W. 664, 1928 M.W.N. 921.

A Magistrate stationed at the Sudder of a district has jurisdiction, in the matter of proceedings under sec. 107, in respect of a breach of peace in a sub-division of the district—*Golam Rahaman v. Kalipada*, 36 C.W.N. 796 (797), 33 Cr.L.J. 858, 139 I.C. 850, 59 Cal 1484, 1932 Cr.C. 888, Ind Rul. 1932 Cal 663. A contrary view seems to have been taken in *Syed Ali v. Emp.*, *supra*.

The mere definition of areas cannot be taken as a provision excluding jurisdiction of the rest of the district, for if it did, sub-sec. (2), sec. 12, would be meaningless. The sub-section clearly requires some provision excluding jurisdiction in the rest of the district, which is either express or must be inferred by necessary implication—*Gulabrao Laxmanrao Changude v. Emp.*, 37 Cr.L.J. 514, 162 I.C. 207, A.I.R. 1935 Bom. 409, 37 Bom.L.R. 745, 1935 Cr.C. 1113, dissenting from *Kunj Behari Lal v. Lanua*, *supra*. This view seems to be in agreement with the view taken in *Golam Rahaman v. Kalipada*, *supra*.

44. Effect of transfer:—Since the jurisdiction of a Magistrate extends throughout the district, the transfer of a Magistrate from one local area to another local area in the same district does not oust his jurisdiction over the former area—*Karuppana v. Akobalamatam*, 22 Mad. 47, 2 Weir 430. Cases on the file of one Magistrate in a district do not automatically pass to his successor in the local area, merely because the former has been transferred to another local area in the same district. The former Magistrate can retain the case on his file even after he is transferred

to another local area in the district, and can pass order in the case—*Mithani*, 34 All. 203, 9 A.L.J. 448, 13 Cr.L.J. 203, 14 I.C. 103; *Chhoti v. Khacheru*, 42 All. 649 (654).

But when a Magistrate is transferred to another district, his jurisdiction over the district in which he was originally appointed ceases as soon as he is relieved by his successor, and therefore a judgment passed *after*, though on the same day as, he was relieved by his successor, was held to be without jurisdiction—*Anand Sarup*, 3 All. 563; *Balwant v. Krishen*, 19 All. 114; *Baishnab Charan v. Amin Ali*, 50 Cal. 664, 38 C.L.J. 202, 24 Cr.L.J. 489, 18 Cr.L.J. 10, 36 I.C. 842.

Concurrent jurisdiction:—Where there is a concurrent jurisdiction and one Court has taken up the case, the jurisdiction of the other Court is not ousted by the first Court, taking seizin of the case. Of course where one Court had arrived at a conclusion and delivered a judgment it would be open to the accused to plead *autrefois convict* or *autrefois acquit* but that is a different question altogether from holding that the proceedings in one or other in the Courts are *coram non judge*—*Dhanwantri v. Emp.*, A.I.R. 1933 Lah. 852, 34 P.L.R. 672, 1933 Cr.C. 1108, 35 Cr.L.J. 171.

44A. Magisterial Powers:—No recommendation shall be made for the grant of magisterial powers or of enhanced magisterial powers to, or the withdrawal of any magisterial powers from, any person save after consultation with the District Magistrate of the district in which he is working, or with the Chief Presidency Magistrate, as the case may be. *Vide* sec. 256 of the Government of India Act, 1935 (26 Geo. 5).

13. (1) The Provincial Government may place any Magistrate of the first or second class in charge of a sub-division, and relieve him of the charge as occasion requires.

Power to put Magistrate in charge of sub-division.

(2) Such Magistrate shall be called Sub-divisional Magistrate.

(3) The Provincial Government may delegate its powers under this section to the District Magistrate.

Delegation of powers to District Magistrate.

Amendment:—The words "Provincial Government" have been substituted for the words "Local Government" in this section by sec. 4 of the Government of India (Adaptation of Indian Laws) Order, 1937.

Sub-section (3):—Under sub-sec.(1) of this section the Local Government (now Provincial Government) may place any Magistrate of the first or second class in charge of a Sub-division, and relieve him of the charge as occasion requires, and under sub-sec (3), this power may be delegated to the District Magistrate. It appears that there is a notification of 1873 which was published in the Calcutta Gazette delegating to District Magistrates the powers of the Local Government under sub-sec. (1). It is competent, therefore, for the District Magistrate to appoint any Magistrate of the first or second class as a Sub-divisional Magistrate on a particular date or dates or for a particular period. Thus he may do without relieving the permanent incumbent. When there is a standing order of the District Magistrate that when the S. D. O. is away on tour, the second officer is to carry on the work of his general file, it means that there is an appointment, but that the appointment is limited only to a particular kind of work and a particular occasion. There is nothing in sec. 13 Cr. P. C. to prevent such a limited appointment being made. The fact that the second officer is to transact the business on the general file of the S. D. O., cannot divest him of his jurisdiction as second officer. When so acting, he acts in addition to his own duties as second officer—*Ramkrishna Sinha v. Emp.*, 42 C.W.N. 246 (249), 174 I.C. 513, 39 Cr.L.J. 417, 10 R.C. 693, A.I.R. 1938 Cal. 195.

14. (1) The *Provincial Government* may confer upon any person all or any of the powers conferred or conferrable by or under this Code on a Magistrate of the first, second, or third class in respect to particular cases or to a particular class or particular classes of cases, or in regard to cases generally, in any local area outside the presidency-towns.

(2) Such Magistrates shall be called Special Magistrates, and shall be appointed for such term as the *Provincial Government* may by general or special order direct.

(3) The *Provincial Government* may delegate, with such limitations as it thinks fit, to any officer under its control, the power conferred by sub-section (1).

(4) No powers shall be conferred under this section on any police officer below the grade of Assistant District Superintendent, and no powers shall be conferred on a police officer except so far as may be necessary for preserving the peace, preventing crime, and detecting, apprehending, and detaining offenders in order to their being brought before a Magistrate, and for the performance by the officer of any other duties imposed upon him by any law for the time being in force.

Amendment:—The words "Provincial Government" have been substituted for the words "Local Government" in this section by sec 4 of the Government of India (Adaptation of Indian Laws) Order, 1937 .

45. "Any local area":—The words 'any local area' can be extended to cover, if necessary, a whole province; therefore, where the Local Government, by Notification, appointed a Special Magistrate under this section with all the powers of a first class Magistrate in regard to cases generally 'throughout the Punjab', it was held that the appointment was not *ultra vires*—*Hiralal*, 7 P.R. 1918, 19 Cr L.J. 310, 44 I.C. 326; *Lakhmi Chand*, 24 P.R. 1901.

The connotation of a Special Magistrate under this Code is that he should have (1) specified powers conferrable on a Magistrate by the Local Government; (2) a local area within which to exercise those powers; and (3) jurisdiction to try particular cases or classes of cases generally. Each of the above ingredients enters into the conception of a Special Magistrate, but the last is a variable element and does not necessarily require specific mention. If nothing is said about the cases to be tried, it will be understood that all cases triable by law by a Magistrate invested with the powers of a Special Magistrate may be tried by him. But the powers and the local area must be defined—*Lakhmi Chand*, 24 P.R. 1901, 96 P.L.R. 1901.

Case:—If a Special Magistrate is appointed under sec. 14 to try a particular 'case', against a certain person, the 'case' would cover *all the charges* which are laid against that person—*Jhangur*, 29 Bom L.R. 996, A.I.R. 1927 Bom. 501, 28 Cr L.J. 1012 (1013). The word 'case' is comprehensive enough to include all the offences which come to light during the investigation of the case which the Special Magistrate was originally empowered to try—*Bhat*, 33 Bom L.R. 1192, 33 Cr.L.J. 68 (70), 134 I.C. 1230, A.I.R. 1931 Bom. 517.

Where the Local Government only empowered the Judge to try cases under secs. 121, 121-A, 122 and 395, I. P. C., it cannot be presumed from this that it was intended that an offence under sec. 395, I. P. C., when no murder was committed, was to be tried

under this special procedure—*Nga Aung Pa v. Emp.*, A.I.R. 1933 'Rang.' 116, 34 Cr.L.J. 929, 145 I.C. 251, 1933 Cr.C. 641.

Appeal:—Appeals from the orders of a Special Magistrate would lie to the Sessions Judge within the local limits of whose jurisdiction the Magistrate was in any particular case holding his Court—*Hiralal*, 7 P.R. 1918, 19 Cr.L.J. 310, 44 I.C. 326.

15. (1). The *Provincial Government* may direct any two or more Magistrates in any place outside the Benches of Magistrates. presidency-towns to sit together as a Bench, and may by order invest such Bench with any of the powers conferred or conferrable by or under this Code on a Magistrate of the first, second, or third class, and direct it to exercise such powers in such cases, or such classes of cases only, and within such local limits, as the *Provincial Government* thinks fit.

(2) Except as otherwise provided by any order under this section, every such Bench shall have the Powers exercisable by Bench in absence of special direction. powers conferred by this Code on a Magistrate of the highest class to which any one of its members, who is present taking part in the proceedings as a member of the Bench, belongs, and, as far as practicable shall, for the purposes of this Code, be deemed to be a Magistrate of such class.

See Notes under sec. 350A.

Amendment:—The words "Provincial Government" have been substituted for the words "Local Government" in this section by sec. 4 of the Government of India (Adaptation of Indian Laws) Order, 1937

46. **Powers of Bench:**—Where a case triable by a first class Magistrate was at first tried by a Bench of Magistrates which could exercise first class powers when sitting *together*, but neither of whom was individually invested with first class powers, and at the adjourned hearing only one member of the Bench was present, it was held that he was not competent to try the case alone—*In re Baroda*, 2 C.L.R. 348. An Honorary Magistrate who is a member of a Bench, which exercises powers of third class collectively cannot act *independently* (that is, when not sitting on the Bench), unless he is authorised to act independently—*Nun Sheikh*, 29 Cal. 483, 6 C.W.N. 596.

Where there was a rule framed under this section, that only such cases as could be tried summarily should be transferred to the Bench, and in spite of this rule, a case not triable summarily but within the competency of the Bench was transferred to it, and the Bench tried the case in the regular way, it was held that this contravention of the rule in transferring a case to the Bench which was not triable summarily was cured by the provisions of sec. 529 (f), and the trial was valid—*Nga San*, 11 I.C. 247, 12 Cr.L.J. 383 (Bur.).

An order appointing an Honorary Magistrate for a particular period is wrong; if therefore such Magistrate has been appointed for a particular term of years, the term imposed is *ultra vires* and his jurisdiction to try cases extends even after the expiry of the period, in the absence of a specific order cancelling his appointment—*Tukaram v. Dagdu*, 31 Cr.L.J. 24, 120 I.C. 223, A.I.R. 1930 Nag. 96, 1930 Cr.C. 201.

Where a complaint under sec. 430, I.P.C., was sent to a Bench Court for trial, treating it to be a case regarding an offence under sec. 426, I.P.C., the trial under sec. 426, I.P.C., was held to be not void, though the Bench Court had no jurisdiction to try an offence under sec. 430, I.P.C.—*Picha Kudumban v. Servaikara Thevan*, 32 Cr.L.J. 971, 133 I.C. 4, A.I.R. 1931 Mad. 491, 1931 Cr.C. 558, 1930 M.W.N. 770,

46A. "Sit together":—Reading secs 15 and 16 together it seems that the words "sit together" in sec. 15 must be construed as equivalent to "constitute," so that the Local Government may direct any two or more Magistrates to constitute a Bench, and then they may invest that Bench with special powers, and they may make rules under sec. 16 providing how the Bench is to be constituted for the purpose of conducting trials. Where under sec. 15 the Government directed that ten Magistrates, two having powers of the first class and eight of the second class, should sit together as a Bench and conferred on the said Bench all the powers conferred by the Code on a Magistrate of the first class except certain specified powers, the Bench consisting of three Magistrates, who were individually vested with second class powers, had the powers of a First Class Magistrate and an appeal from their decision lies to the Sessions Judge—*Bhimbai Sitaram*, A.I.R. 1934 Bom 176, 36 Bom L.R. 314, 36 Cr.L.J. 592, 151 I.C. 827, 1934 Cr.C. 664.

16. The Provincial Government may, or subject to the Power to frame rules control of the *Provincial Government*, the for guidance of Benches District Magistrate may, from time to time, make rules consistent with the Code, for the guidance of Magistrates' Benches in any district respecting the following subjects:—

- (a) the classes of cases to be tried;
- (b) the times and places of sitting;
- (c) the constitution of the Bench for conducting trials;
- (d) the mode of settling differences of opinion which may arise between the Magistrates in session.

Amendment:—The words "Provincial Government" have been substituted for the words "Local Government" in this section by sec. 4 of the Government of India (Adaptation of Indian Laws) Order, 1937.

47. Consistent with this Code:—The rules framed under this section must be consistent with this Code. "The Judges have recently had occasion to call for and examine the rules made in each district, and they noticed that in several districts, District Magistrates have exceeded the powers conferred upon them by sec. 16, either by making rules inconsistent with the Code itself, or by adding rules on the subject not mentioned in the section in question, and so not within the powers conferred by it. Care should, therefore, be taken to limit action under the section to the powers conferred by it"—*Punj. Cir.*, No 13-2612 G., of 1890.

48. Classes of cases to be tried:—There is nothing in this Code which prescribes that any particular class of cases should be tried by Honorary Magistrates—*Yagub v. Appaswami*, 25 Cr.L.J. 556, 81 I.C. 44, A.I.R. 1925 Nag 140. But Magistrates should ordinarily not make over cases to Benches which are likely to be of a protracted character—*Bholanath*, 2 Cal. 23. So also, cases involving difficult questions of fact or law should not be directed to be tried by a Bench of Honorary Magistrates—*Varadarajulu*, 47 Mad. 716 (722), 47 M.L.J. 470, 25 Cr.L.J. 1070. There can be no gainsaying the fact that cases, which are likely to be keenly contested and intricate in nature, are, on the whole, likely to be more efficiently disposed of by stipendiary Magistrates than by Honorary Magistrates or at least the accused persons concerned will believe this to be the case—*Pondurang v. Emp.*, 28 Cr.L.J. 893, 105 I.C. 226, 10 N.L.R. 184, A.I.R. 1928 Nag. 21.

Where a Bench Court thinks that a case pending in its file involves intricate questions of fact or of law and should be transferred to some other Court, it should move the matter officially, without leaving it to the parties concerned—*In re Gopal Nair*, 29 Cr.L.J. 123, 106 I.C. 715, A.I.R. 1929 Mad. 403.

Offences under sec. 3 (12) of the Madras Town Nuisances Act (III of 1889) may be tried by Bench Magistrates—24 Cr.L.J. 110, 71 I.C. 233, 45 Mad. 843.

Constitution of Bench—Quorum:—See Notes under sec. 350A.

49. Differences of opinion:—According to the new rule framed in Bengal (see rule 6 of the Bengal Rules, cited below) in case of difference of opinion as to the finding between an even number of Magistrates the case shall be referred back to the District Magistrate or the Sub-divisional officer; and the provisions of sec. 350 shall then apply—*Chand v. Shamsheer*, 19 Cr.L.J. 312, 44 I.C. 328, (Cal.). But in Eastern Bengal and Assam, the old Notification under which the difference of opinion between two Honorary Magistrates forming a Bench is to be settled by the casting vote of one of them, viz., the Chairman, is still in force. See *Utsal*, 18 C.W.N. 394, 14 Cr.L.J. 684, 19 C.L.J. 92, 21 I.C. 1004.

According to the U. P. rules, if there is an irreconcilable difference of opinion among the members of a Bench as to the guilt of the accused, he should be given the benefit of doubt. The Bench cannot refer the case to a District Magistrate; such a reference is irregular and is not justified by any provisions of the Code—*Kashinath v. Shanker*, 16 Cr.L.J. 113, 27 I.C. 177 (All.); *Abdul Aziz*, 15 A.L.J. 237, 18 Cr.L.J. 506.

In a case where the President of the Bench is in a minority as to conviction or acquittal, the judgment should be written by some member of the majority. "Otherwise, as in the present case, we have a conviction based on an acquitting judgment, and we (Court of Revision) are left without any reasons for the conviction which under the provisions of the Cr P Code the Bench is bound to set out. The judgment does not conform to the law and the conviction cannot be upheld"—*Lalamma*, 51 Mad. 338, 54 M.L.J. 709, A.I.R. 1928 Mad. 197, 29 Cr.L.J. 207, A.I.R. 1928 Mad. 197; see also 1928 M.W.N. 31; *In re Dyla Seetharamayya*, 27 Cr.L.J. 90, 91 I.C. 394, 23 M.L.W. 537, A.I.R. 1926 Mad. 354.

The fact that the President of the Bench was among those who thought the accused were not guilty was no reason why on their being found guilty by a majority of the Bench, he should not vote on the question of sentence—*In re Mennakantirosayya*, 28 Cr.L.J. 310, 100 I.C. 534, A.I.R. 1927 Mad. 500.

49A. Rules:—Apart from any prejudice to the accused where a Rule affecting the constitution of the Bench has not been complied with the trial cannot be treated as valid—*Mohidin*, 44 Bom. 400 (403), 22 Bom.L.R. 154, 21 Cr.L.J. 369.

RULES FOR GUIDANCE OF BENCHES.

Bengal Rules.

1. The Bench shall try such cases as its powers enable it to try and it is authorised to try, arising within the local limits following.—

(Here enter local limits.)

or such particular cases as are made over to it by the Magistrate of the district, or any Magistrate empowered to make over cases. It can only entertain of its own motion complaints made in respect of the following classes of offences.—

(Here enter classes of cases.)

2 The Bench shall sit at the place and on the date mentioned below. The Honorary Magistrates will sit in the rotation arranged by the Magistrate of the district or division; but any Magistrate not named may sit, provided he is not personally interested in the case before the Bench.

(Here enter place and ordinary dates of sitting)

3 The Bench may hold one or more adjourned sittings if this be found necessary for the disposal of business or of part-heard cases; but it shall be open to the Bench at the close of its regular sitting either to apply to the District or Subordinate Magistrate to transfer from their file any unheard cases, or to postpone them to next Bench day as may seem most convenient.

4. The Chairman of the Bench for the time being shall be the Magistrate of highest powers, present at a sitting. Where two or more are of equal powers, the Bench may elect its own Chairman, provided always that it shall be in the discretion of the Magistrate of the district to appoint the Chairman for each time of sitting or generally.

5. The Chairman shall maintain order, conduct the proceedings of the Court, and exercise all the functions in that behalf usually exercised by a Magistrate when sitting alone. It shall be open to any member of the Bench to put any question to the witnesses, either direct or through the Chairman, as to the latter may seem advisable, and to suggest any matter for the Chairman's consideration.

6. *Each member for the Bench shall have a voice in deciding as to the admissibility of evidence and in the finding and sentence. In a Bench of three or other uneven number of members, the opinion of the majority shall prevail. When the numbers are even, the opinion of the Chairman shall prevail in all points, except the finding. In the event of disagreement as to the finding, the case shall be referred back to the District Magistrate or to the Sub-Divisional Officer as the case may be.* (Substituted for the old rule 6. Vide *Cal. Gaz.*, 2-5-1906, Part I, p. 980) [See 8 C.W.N. 862 and 10 C.W.N. 642 (F.B.) in this connection]

7. In the trial of ordinary cases, the Chairman shall generally record the evidence and judgment, but such duty may, with his consent, be performed by any one of the colleagues.

In the trial of summary cases, where the Bench has been invested with summary powers, the necessary record shall be prepared by the Chairman or one of his colleagues, or by means of the Clerk of the Court, but in every case the record must be signed by each member of the Bench who is present.

8. [This rule as to the hearing of any part-heard case has been cancelled by Government Notification, June 6th, 1893—*Calcutta Gazette*, 1893, Part I, p. 523]. See *Hardwar v. Khaga*, 20 Cal. 870 which declared this rule to be *ultra vires*. See also 18 Mad. 394.

9. The Bench may refer any point of law for the opinion of the Magistrate of the District or Sub-Division, or of any first class Magistrate appointed by the Magistrate of the district for that purpose, and the Magistrate may certify his opinion thereon.

10. Magistrates should ordinarily not make over cases to Benches which are likely to be of a protracted character. *Calcutta Gazette*, 1899, Part I, p. 1071.

Madras Rules.

1. One or more Special Magistrates appointed for any local area may sit as a Bench, together with any salaried Magistrate whom the District Magistrate shall from time to time nominate for the purpose. The salaried Magistrate shall be the Chairman of the Bench so constituted, and the Bench is hereby invested with the powers of a Magistrate of the third class or such higher powers as are exercisable under the provisions of sub-sec. (2) of sec. 15 of the Code of Criminal Procedure—

- (1) to try summarily offences against the I. P. C., ss 277, 278, 279, 285, 286, 289, 290, 323, 334, 336, 341, 352, 426 and 447;
- (2) to try summarily offences against Municipal Acts and the Conservancy clauses of Police Acts, punishable only with fine or with imprisonment for a term not exceeding one month;
- (3) to try summarily abetments of any of the foregoing offences;
- (4) to try summarily attempts to commit any of the foregoing offences when such attempts are offences;
- (5) to try, in accordance with Chapter XX of the Code of Criminal Procedure, 1898, offences punishable under—
 - (a) sub-section (2) and (3) of s. 112 of the Madras Local Boards Act, 1884;
 - (b) s. 18 of the Madras Registration of Births and Deaths Act, 1899;
 - (c) ss. 5, 6 and 7 of the Madras Towns Nuisances Act, 1889;
 - (d) the Madras Hackney Carriage Act, 1911;

.. Provided that no Bench of Magistrates shall try offences under ss. 426 and 447, I. P. C., including abetments of and attempts to commit, such offences, except with the special sanction of Government :

Provided also that with the approval of the District Magistrate, any three or more Special Magistrates, of whom one is specially designated by the District Magistrate, may sit together as a Bench and shall exercise the powers of a Magistrate of the third class in respect of the offences specified above other than those referred to in the first proviso.

2. The Magistrate specially designated by the District Magistrate shall, if no salaried Magistrate is present, be Chairman of such Bench.

3. All existing rules made by District Magistrates for the guidance of Benches in their several districts as to the times and places of sitting shall continue in force until modified or withdrawn.

4. Differences of opinion shall be settled by the votes of the majority of the Magistrates present, the Chairman having the casting vote.

5. If any person charged with any of the offences specified above is arrested without warrant, and has not been released on bail, he shall be produced for trial before the salaried Magistrate having jurisdiction. If such person has been released on bail, or if process to compel his appearance is issued by the salaried Magistrate having jurisdiction, the bail bond or the process shall require him to appear in accordance with its terms before the Bench of Magistrates having jurisdiction. The District Magistrate or the Sub-divisional Magistrate shall exercise the same powers in regard to withdrawal or reference of cases from Benches as he possesses in the case of Magistrate under s. 528 of the Cr. P. C.

6. Under s 265, Cr. P. C., every Bench of Magistrates is authorised to prepare the record of judgment of the Bench by means of any officer appointed by the Sub-divisional Magistrate.

7 Under s 260 of the said Code, every Bench of Magistrates exercising first class powers is hereby invested with power to try summarily any or all of the offences specified in that section, and every Bench of Magistrates exercising powers of the first or second class is hereby empowered to try summarily all or any of the offences specified in clauses (1) and (2) of Rule 1, *supra*. Government Order No. 1628, Notification, Judicial, 8th October, 1912. See also *Fort St George Gazette*, 1891, Pt 1, pp. 879, 923, and 1095.

8. The Governor in Council is pleased to direct that the term of office of Honorary Magistrates shall be five years.

Bombay Rules.

Rules made by Government of Bombay for the guidance of Benches of Magistrates, "A" and "B" established by Government Notification No 5848 for the area within the limits of the *Poona City and Suburban Municipalities*.—

1. *Class of cases to be tried*.—Except in respect of offences under the Indian Penal Code, Chapters VI, VII, VIII, IX, XV, XXI, XXII, and offences designated in Col. 8, Sch II, of the Criminal Procedure Code, 1882, as triable exclusively by the Court of Session, any such *quorum* of either of the said Benches as shall be constituted as hereinafter provided, may exercise the ordinary powers of a Magistrate of the first class in all cases transferred to the said Bench by or under the order of the Magistrate of the district or by the Sub-divisional Magistrate to whom the said Benches are immediately subordinate

2. *Each Bench to be divided into two sections*.—Each of the said Benches shall be divided into two sections containing four Honorary Magistrates in each

3. *District Magistrate to determine composition of each section*.—The Magistrate of the district shall from time to time determine which of the Honorary Magistrates in each Bench shall belong to each section of such Bench. The constitution of each section should be frequently changed.

4. *Each section to sit separately*.—Each such section shall sit separately, but any stipendiary Magistrate who is a member of the Bench may sit at any time on either section.

5 *Times of sitting* :—Except on Sundays and closed holidays, at least one section of each Bench shall hold a sitting every day between the hours of 10 A M and 5 P M.

6. *Order and days of sitting* .—Not less than ten days before the end of each month, each Bench shall meet and arrange the order in which and the days on which each of its sections shall sit during the following month. The arrangement so made shall be forthwith submitted to the Magistrate of the District for his approval.

Unless the Magistrate of the District communicate his disapproval before the beginning of the month for which it is made, the said arrangement shall hold good for that month. If either Bench fails to make such arrangement, or makes one which the Magistrate of the district disapproves, the Magistrate of the district may himself make an arrangement as aforesaid, which shall be communicated by him to the Bench and shall hold good for the month for which it is made

7. *Places of sitting* .—Each section of each Bench shall hold its sitting at such places as may be from time to time appointed for this purpose by the Magistrates of the district.

8 *Quorum* —In order to form a *quorum*, at least three members shall be present from the beginning to the end of a trial or inquiry as members of the Bench :

Provided that if a stipendiary first class Magistrate be present throughout a trial or inquiry as President, the case may be proceeded with to its conclusion, notwithstanding that a *quorum* may not have been present throughout the proceedings

9. *Stipendiary Magistrate may take part in any proceedings at any time* .—Any stipendiary Magistrate who is a member of the Bench and is present during any part of any proceedings may take part therein as a member

but not give final vote unless present throughout .—Provided that no member of a Bench shall preside or give such vote as is referred to in Rule 15 in any case, who has been absent during any part of the proceedings therein

10 *What members entitled to preside* —Except as provided in Rule 9, the stipendiary Magistrate of highest official rank present, if, he be a first class Magistrate and if his official rank is not inferior to that of a Deputy Collector, shall preside. If there be no such stipendiary Magistrate present, the Honorary Magistrate whose name stands highest of those present, in a list of the Honorary Magistrates prepared from time to time by the District Magistrate, subject to the orders of Government, for this purpose, shall be President.

11 *Members not to preside if unable to attend throughout* —The claim of a member to preside at the trial of or enquiry into any case shall pass to the person next entitled thereto, if the former shall state that he has reason to doubt, whether he will be able to be present throughout the proceedings.

12. *Substitution of President* .—If any President be unable to be present or fail to be present throughout the proceedings such one of the members who have been present throughout such proceedings as is next entitled to preside shall take the place of the President.

13. *Each quorum to proceed with its partly-heard adjourned cases notwithstanding Rule 6* —Notwithstanding any arrangement made as provided in Rule 6, any *quorum* that may have heard part of a case which stands adjourned at the rising of the Court shall proceed with such case till the conclusion of the trial or enquiry, as the case may be, at sittings held either from day to day or, if the case stand adjourned for more than one day, then on the days to which it stands adjourned. In such case the District Magistrate or Sub-divisional Magistrate may, for as long as shall be necessary, set aside or vary any arrangement made under Rule 6

14. *Votes as to question other than final decision* —The votes of all members present at the time being shall be taken to decide

(a) whether any particular evidence should be admitted or recorded ;

(b) whether an adjournment shall be allowed ;

(c) and any other question or order not finally decisive of the case.

15. *Votes as to final decision* :—Except as provided in Rule 9, the votes of the President and of every member present shall be taken to decide :

- (a) whether an accused person shall be convicted, acquitted, discharged or committed to the Court of Session ;
- (b) the sentence to be passed in the case of conviction.
- (c) When a person is accused in the alternative of two or more offences not equally punishable, and a difference of opinion arises between the Magistrates in session, as to which of such offences the accused person is guilty of, the presiding Magistrate shall put to the vote first, the question whether the accused is guilty of the offence for which the law provides the highest punishment, and if the votes decide such question against the accused, the question of his guilt on the minor charge or charges shall be excluded. (*Addition to Rule 15*).
- (d) if a difference of opinion arise between the Magistrates on any other point the questions raised shall be put to the vote by the presiding Magistrate in such order as he may deem most conducive to the furtherance of justice. (*Addition to Rule 15*)

16 *Questions to be decided by a majority of votes* :—All questions shall be decided by a majority of the votes taken, the President having a second or casting vote in all cases of equality of votes. (*Bom. Govt. Gazette, 1885, Part I, p. 1262*).

Rules for other areas:—4. The Bench in session shall ordinarily consist of ten Magistrates but in order to form a quorum at a trial or inquiry, at least three members shall, from the beginning to the end thereof, be present as members of the Bench.

5. If for any cause it is found necessary to adjourn the hearing of a case after the evidence has been partly taken, the trial shall either be completed before the Magistrates before whom it was commenced or shall be held afresh before a different set of Magistrates.

7. No Magistrate, who has been absent during any part of the trial, shall give an opinion or record a vote to the final order of conviction, sentence, acquittal or discharge (*Government Resolution, No. 3447 of 19th May 1916*).

See *Mohidin*, 44 Bom. 400, 22 Bom L R. 154, 21 Cr L J. 369

Rules for U. P.

1. The Bench is authorised to try such cases or classes of cases as the Magistrate of the district may by special or general order from time to time direct.

2 The Bench shall sit on the days hereunder appointed at A.M. It shall not consist of more than three members ; and two of these shall form a *quorum*. The sittings shall be held in the Municipal Office or other Public Office appointed.

3. The Bench may hold one or more adjourned sittings, if this be found necessary, for the disposal of business or of part-heard cases ; provided that if any case is adjourned and the members at the adjourned session are not the same as sat at the first hearing of the case, the provision of s. 350 of the Criminal Procedure Code will be held to apply to the case

4. The Chairman of the Bench for the time being shall be the Magistrate of highest powers present at the sitting. Where all present are of equal powers, the Magistrate of oldest standing shall be the Chairman, provided always that it shall be in the discretion of the Magistrate of the district to appoint the Chairman for each time of sitting, or generally.

5 The Chairman shall conduct the proceedings of the Court and shall exercise all the functions in that behalf usually exercised by a Magistrate when sitting alone. He shall decide upon the admissibility of evidence and maintain order in the Court ; but it shall be open to any member of the Bench to put any question to the parties or witnesses, either direct or through the Chairman, as the latter may deem advisable, and to suggest any matter for the Chairman's consideration,

6. Any recording of evidence, issuing of process or other function exercisable by the Chairman may, with his consent, be exercised by any one of his colleagues.

7. Each member of the Bench shall have a voice in the finding and sentence, which shall be signed by the Chairman and by the members present. In regard to the finding, when the number of members is uneven, the opinion of the majority shall prevail; when the number is even and the members are equally divided, the accused shall get the benefit of the doubt.

In regard to the sentence, the opinion of the majority shall prevail; when the members are equally divided, the Chairman shall have casting vote; when the opinions of members are all different (as in a Full Bench of three members), the opinion of the Chairman shall prevail.

8. No Bench shall take cognizance of any offence committed by any European British subject or Government official. Any such case shall be forwarded to the Magistrate for disposal. Rule 8 above forbids Benches of Honorary Magistrates to take cognizance of any offence committed by any European British subject or Government official; but there is no order which debars the Magistrate from transferring such cases to Benches of Honorary Magistrates for trial. The Government assumes, however, that the Magistrates of Districts will, before exercising this power, carefully consider the circumstances of any such case, especially where Police-officers and Policemen are concerned. See *All Man.*, p. 47.

17. (1) All Magistrates appointed under sections 12, 13

Subordination of Magistrates and Benches to District Magistrate;

and 14, and all Benches constituted under section 15, shall be subordinate to the District Magistrate, and he may, from time to

time, make rules or give special orders consistent with this Code as to the distribution of business among such Magistrates and Benches; and

(2) Every Magistrate (other than a Sub-divisional Magistrate) and every Bench exercising powers

to Sub-divisional Magistrate

in a sub-division shall also be subordinate to the Sub-divisional Magistrate, subject,

however, to the general control of the District Magistrate.

(3) All Assistant Sessions Judges shall be subordinate to

Subordination of Assistant Sessions Judges to Sessions Judge.

the Sessions Judge in whose Court they exercise jurisdiction, and he may, from time to time, make rules consistent with

this Code as to the distribution of business among such Assistant Sessions Judges

(4) The Sessions Judge may also, when he himself is unavoidably absent or incapable of acting, make provision for the disposal of any urgent application by an Additional or Assistant Sessions Judge, or, if there be no Additional or Assistant Judge, by the District Magistrate, and such Judge or Magistrate shall have jurisdiction to deal with any such application.

(5) Neither the District Magistrate nor the Magistrates or Benches appointed or constituted under sections 12, 13, 14 and 15 shall be subordinate to the Sessions Judge except to the extent and in the manner hereinafter expressly provided.

50. Scope:—The District Magistrate's powers under this section relate to the distribution of business among the subordinate Magistrates; this section does not empower a District Magistrate to stay the criminal proceedings pending before a subordinate Magistrate—*Jagannath v. Rajagopalachari*, 12 P.L.T. 671, 33 Cr.L.J. 147 (151), 135 I.C. 513. But see *Nambia v. Sudalamuthu*, 44 M.L.J. 642, 32 M.L.T. 191, 1923 M.W.N. 276, 17 L.W. 570, 25 Cr.L.J. 280, 76 I.C. 872, 25 Cr.L.J. 277, 76 I.C. 869, 1923 M.W.N. 251.

Subordinate:—'Subordinate' means inferior in rank within the meaning of sec. 435—*Priya Gopal*, 9 Bom 100; *Padmanabha*, 8 Mad. 18; *Opendra v. Dukhim*, 12 Cal. 473. All Magistrates and Courts made subordinate to the District Magistrate are 'inferior Criminal Courts' in respect of him within the meaning of sec. 435—*Shamsuddin v. Pir Ala*, 38 P.R. 1885. A Magistrate who is subordinate to a Sub-divisional Magistrate is also subordinate to the District Magistrate—*Thaman Chetti v. Alagiri*, 14 Mad. 399. A covenanted Magistrate of the third class to whom a case is made over by the Sub-divisional Magistrate is subordinate to the Sub-divisional Magistrate—*Kallu*, 4 All 366.

The Court of a subordinate Magistrate in the district is subordinate to that of the District Magistrate both in its judicial as well as executive capacity—*Gur Dayal*, 2 All. 205 (F.B.); and the District Magistrate has power to call for and examine the record of a proceeding before a Sub-divisional Magistrate of the first class—*Laskari*, 7 All. 853 (F.B.).

51. Clause (3):—*Additional Sessions Judge not subordinate to Sessions Judge*:—On a reference to this clause it is seen that the Code itself enacts that Assistant Sessions Judge shall be subordinate to the Sessions Judge; but does not enact for the purposes of this section at any rate that the Additional Sessions Judge shall be subordinate to him. There is a distinction made between the position of an Additional Sessions Judge and that of an Assistant Sessions Judge—*Daulat Ram v. Emp.*, 33 Cr.L.J. 158 (159), 135 I.C. 252, 1931 A.L.J. 591, A.I.R. 1931 All. 435, 1931 Cr.C. 707.

Clause (4):—There is nothing in the Cr. P. Code which gives jurisdiction to the Sessions Judge himself to transfer an appeal from the file of an Additional Sessions Judge to his own file, and even supposing a Sessions Judge has such jurisdiction, there is no provision in the Cr. P. Code by which an Additional Sessions Judge can issue such an order to another Judge of equal jurisdiction to himself—*Daulat Ram v. Emp.*, 33 Cr.L.J. 158 (159), 135 I.C. 252, 1931 A.L.J. 591, A.I.R. 1931 All. 435, 1931 Cr.C. 707. An application within the meaning of this clause must be an application which is recognised by law, that is, a document properly stamped—*Ibid*.

Clause (5)—Magistrates not subordinate to the Sessions Judge:—A Sub-divisional Magistrate is subordinate to the District Magistrate and not to the Sessions Judge—*Maini*, 6 Pat. 39, 28 Cr.L.J. 353, A.I.R. 1927 Pat. 111. Neither the District Magistrate nor the other Magistrates are subordinate to the Sessions Judge except in so far as is expressly provided in the Code (see secs. 123, 193, 195, 408, 431, 436, 437); therefore, an order of the District and Sessions Judge declaring certain persons to be touts and prohibiting them to appear within the precincts of the Court is limited only to his own Court and the Civil Courts subordinate to him, but does not extend to the Courts of Magistrates—*Baru Sahib*, 26 Mad. 596. So also, where Sub-divisional Magistrates (acting as an executive officer and not as a Court) revoked a sanction granted by a Sub-Magistrate, the Sessions Judge had no jurisdiction to set aside the order of the Sub-divisional Magistrate—*Anon*, 2 Weir 19; *Sankaram v. Sakkarappa*, 2 Weir 155.

"*Except. . . hereinafter provided*":—See for instance sec. 435, Explanation, which provides that all Magistrates shall be deemed to be inferior to the Sessions Judge for the purposes of sec. 435 (1) and sec. 437.

52. Delegation of powers by District Magistrate:—Clause (1) of sec. 17 empowers only a District Magistrate to make rules or pass orders as to the

distribution of work. Such power cannot be delegated by a District Magistrate to a Sub-divisional Magistrate or to a senior Honorary Magistrate—*Balkishen v. Sipahilal*, 36 All. 468, 15 Cr.L.J. 584, 12 A.L.J. 803, 25 I.C. 336.

D.—Courts of Presidency Magistrates.

18. (1) The *Provincial Government* shall, from time to time, appoint a sufficient number of persons (hereinafter called Presidency Magistrates) to be Magistrates for each of the presidency-towns, and shall appoint one of such persons to be Chief Presidency Magistrate for each such town.

Appointment of Presidency Magistrates.

(2) The powers of a Presidency Magistrate under this Code shall be exercised by the Chief Presidency Magistrate, or by a salaried Presidency Magistrate, or by any other Presidency Magistrate empowered by the *Provincial Government* to sit singly, or by any Bench of Presidency Magistrates.

(3) *A Presidency Magistrate may be appointed under this section for such a term as the Provincial Government may, by general or special order direct.*

(4) *The Provincial Government may appoint any person to be an Additional Chief Presidency Magistrate, and such Additional Chief Presidency Magistrate shall have all or any of the powers of a Chief Presidency Magistrate under this Code or under any other law for the time being in force, as the Provincial Government may direct.*

Additional Chief Presidency Magistrate.

Change:—Sub-sections (3) and (4) have been added by section 3 of the Cr P. Code Amendment Act (XVIII of 1923) "The Local Government is given power to define the term for which a Presidency Magistrate may be appointed; and provision is made for the appointment of an Additional Chief Presidency Magistrate to meet the contingency of such an officer being needed, which has been actually experienced in Calcutta"—*Statement of Objects and Reasons* (Bill 3 of 1914).

The words "Provincial Government" have been substituted for the words "Local Government" in this section by sec 4 of the Government of India (Adaptation of Indian Laws) Order, 1937

52A. Presidency-towns:—See Note 56.

52B. Powers of the Chief Presidency Magistrate:—See Note 44A.

53. Powers of Presidency Magistrate:—For the purposes of the Emigration Act, a Presidency Magistrate is included in the term 'Magistrate of the First Class' in sec. 111 of that Act—*Jeevanji*, 31 Bom. 611. But a Presidency Magistrate is not a District Magistrate or a Magistrate of the First Class within the meaning of sec. 52 of the Prisons Act, and has no jurisdiction to try offences under that section—*Chota Singh*, 32 Mad 303. A Presidency Magistrate has jurisdiction to charge, convict and punish under the Indian Penal Code a person who has committed an offence on the High Seas on board a British ship—*Chief Officer*, 25 Bom. 635, 3 Bom.L.R. 253. A Presidency Magistrate has jurisdiction to hold a preliminary inquiry into a case (or to try the case himself if it is triable by him) which has been committed to the High Court by the Coroner—*Md. Rajuddin*, 16 Bom. 159; *Jogeshwar*, 31 Cal. 1, 7 C.W.N.

889 (894) ; *Mahomed Rajudin*, 16 Bom. 159. But now the Coroner may also, where the verdict justifies him in so doing, issue his warrant for the apprehension of the person who is found to have caused the death of the deceased person, and send him forthwith to a Magistrate empowered to commit him for trial. *Vide* sec. 26 of the Coroners Act (IV of 1871) as amended by Act IV of 1908.

54. Bench of Magistrates:—This section confers the full powers of a Presidency Magistrate on a Bench of Honorary Presidency Magistrates, and the Bench can therefore take action under sec 106—*J. Hassan v. Yas Kubar*, 7 Bom L.R. 833, 2 Cr.L.J. 770.

55. Sub-section (4)—“any person”:—This is, not necessarily a Presidency Magistrate. “It is not necessary to restrict the appointment of an Additional Chief Presidency Magistrate to persons who are already Presidency Magistrates, and we have therefore substituted the words ‘any person’ for the words ‘any Presidency Magistrate’”—*Report of the Joint Committee* (1922).

All stipendiary as well as non-stipendiary Presidency Magistrates have been declared by the Local Government subordinate to the Chief Presidency Magistrate : *Vide* Notification No 3540 J.D. published in the Calcutta Gazette, 1903, Pt. I, dated 7th October 1903, p. 1321. By clause (4) of this section an Additional Chief Presidency Magistrate has been vested with all the powers of the Chief Presidency Magistrate. A power to send the case to a Subordinate Magistrate under sec. 202 of the Code is one of those powers. An Additional Chief Presidency Magistrate is, therefore, empowered to send a case to a Presidency Magistrate for judicial enquiry and report under sec. 202, Cr. P. Code—*Kanayalai Bengam v. Kanmull Lodha*, AIR 1934 Cal 405, 59 CLJ. 204, 38 C.W.N. 560, 148 IC 691, 61 Cal 467, 35 Cr.L.J. 929, 1934 Cr.C. 549.

19. Any two or more of such persons may (subject to the rules made by the Chief Presidency Magistrate under the powers hereinafter conferred) sit together as a Bench.

20. Every Presidency Magistrate shall exercise jurisdiction in all places within the presidency-town for which he is appointed, and within the limits of the port of such town and of any navigable river or channel leading thereto, as such limits are defined under the law for the time being in force for the regulation of port and port-dues.

56. Local limits of jurisdiction:—Under this section, a Presidency Magistrate, as one appointed for the whole of the Presidency town, has jurisdiction over all offences committed anywhere within the Presidency town. Therefore, the Chief Presidency Magistrate of Bombay has power to try an offence committed at a place within the jurisdiction of a Police Court in another part of the town—*Khodabux*, 28 Bom.L.R. 1066, 27 Cr.L.J. 1213, A.I.R. 1926 Bom 564, 97 IC 973.

Presidency Town.—It means the local limits for the time being of the ordinary original civil jurisdiction of the High Court of Judicature at Fort William, Madras or Bombay as the case may be—Sec. 3 (41), General Clauses Act, X of 1897.

Within the limits of Port.—A Presidency Magistrate of Calcutta has jurisdiction to try an offence committed under sec. 84 of the Calcutta Port Act (III of 1890), outside the limits of Calcutta but within the limits of the port of Calcutta—*Ganpat Rai v. Good*, 47 Cal. 147, 24 C.W.N. 79, 30 CLJ. 252

The Presidency Magistrate of Bombay has jurisdiction over the port of Bombay up to high watermark—*Joomabhai*, Ratanlal 193 (194).

21. (1) Every Chief Presidency Magistrate shall exercise within the local limits of his jurisdiction all the powers conferred on him by this Code or which by any law or rule in force immediately before this Code comes into force are required to be exercised by any Senior or Chief Presidency Magistrate, and may from time to time, with the previous sanction of the *Provincial Government*, make rules consistent with this Code to regulate—

- (a) the conduct and the distribution of business and the practice in the Courts of the Magistrates of the town;
- (b) the times and places at which Benches of Magistrates shall sit;
- (c) the constitution of such Benches;
- (d) the mode of settling differences of opinion which may arise between Magistrates in session; and
- (e) any other matter which could be dealt with by a District Magistrate under his general powers of control over the Magistrates subordinate to him.

(2) The *Provincial Government* may, for the purposes of this Code, declare what Presidency Magistrates *including Additional Chief Presidency Magistrates* are subordinate to the Chief Presidency Magistrate, and may define the extent of their subordination.

Amendment:—The words "Provincial Government" have been substituted for the words "Local Government" in this section by sec 4 of the Government of India (Adaptation of Indian Laws) Order, 1937.

57. Subordination:—In Bombay (and Calcutta) all Presidency Magistrates and Benches are subordinate to the Chief Presidency Magistrate, and the Chief Presidency Magistrate has power to transfer a case from one Presidency Magistrate to another under sec. 528—*Nageshwar*, 1 Bom L.R. 347. But in Madras the Court of the Chief Presidency Magistrate and the Courts of the other Presidency Magistrates are of equal jurisdiction—*Venkateswara*, 35 Mad 739, 10 M.L.T. 518, 12 Cr.L.J. 451, 22 M.L.J. 114, 1911 M.W.N. 50. Under notification G. O. No 168, Judicial, dated 2nd February, 1900, all Presidency Magistrates in Madras are, however, subordinate to the Chief Presidency Magistrate for the purposes of secs 124 (1), 144 (4), 192 and 528 Cr. P. C.

By a Notification No 6787 J, dated 23-10-1923, the Bengal Government has declared the Additional Chief Presidency Magistrate of Calcutta to be subordinate to the Chief Presidency Magistrate. The latter has therefore power under sec. 528 to withdraw a case from the file of a Presidency Magistrate to whom that case was transferred by the Additional Chief Presidency Magistrate for disposal—*Mohini v. Punam Chand*, 51 Cal. 820 (826), 28 C.W.N. 903. See also Note 55.

58. Benches:—Section 18 has conferred on Benches of Magistrates all the powers of a Presidency Magistrate; and the Chief Presidency Magistrate has no power either to confer, restrict or enlarge those powers—*J. Hassan v. Yaskubar*, 7 Bom.L.R. 833, 2 Cr.L.J. 770. Therefore, where a Chief Presidency Magistrate revived a case that had been dismissed by him, and transferred it for trial to a Bench of Magistrates, it was held that the latter had jurisdiction to entertain a preliminary objection as to the jurisdiction of the Chief Presidency Magistrate so to revive and transfer—*Walters v. Ibrahim*, 7 C.W.N. 527.

According to the Rules (rr. 9 and 10) framed by the Bombay Government, if the Bench of Presidency Magistrates is equally divided in opinion, the Chairman shall have a second or casting vote. This holds good even though the Bench consists of only two members. But in such case the dissentient judgment also should form part of the record.—*Fardunji*, 29 Bom L.R. 1470, 28 Cr.L.J. 1025, A.I.R. 1927 Bom. 630, 106 I.C. 209.

RULES.

Calcutta:—The following revised rules have been sanctioned by the Lieutenant-Governor for the guidance of Benches of Magistrates in the town of Calcutta :—

1. The Presidency Magistrates other than the Chief Presidency Magistrate or salaried Presidency Magistrate shall sit in the rotation arranged by the Chief Presidency Magistrate.

2. The Presidency Magistrates other than the Chief Presidency Magistrate or salaried Presidency Magistrate shall take only such business as is made over to them by the general or special order of the Chief Presidency Magistrate.

3. The Presidency Magistrates other than the Chief Presidency Magistrate or salaried Presidency Magistrate shall ordinarily sit from noon to 5 P.M. on the days on which they have been invited to attend by the Chief Presidency Magistrate.

4. A Bench of Presidency Magistrates shall ordinarily be composed of three Presidency Magistrates other than the Chief Presidency Magistrate or salaried Presidency Magistrate sitting together; or of two so sitting when, in the opinion of the Chief Presidency Magistrate, this is necessary.

5. A Bench of Presidency Magistrates may, however, be composed of the Chief Presidency Magistrate or the salaried Presidency Magistrate and two Presidency Magistrates other than the Chief Presidency Magistrate or salaried Presidency Magistrate, or of the Chief Presidency Magistrate or the salaried Presidency Magistrate and one Presidency Magistrate other than the Chief Presidency Magistrate or salaried Presidency Magistrate.

6. Should any Presidency Magistrate other than the Chief Presidency Magistrate or salaried Presidency Magistrate appointed to sit in Bench be unable or fail to be present on the appointed day, the Chief Presidency Magistrate may in his discretion, at any time before the actual sitting of the Court, reform or reconstitute such Bench in such manner as to him seems most convenient for the disposal of business.

7. The Chief Presidency Magistrate and the salaried Presidency Magistrate shall be *ex-officio* members of Benches; the Chief Presidency Magistrate shall, if present, officiate as Chairman of the Bench; the salaried Presidency Magistrate, if sitting, shall, in the absence of the Chief Presidency Magistrate, officiate as Chairman; and in the absence of the Chief Presidency Magistrate or the salaried Presidency Magistrate, the Chief Presidency Magistrate shall nominate the Chairman.

8. Every member of a Bench shall have a voice in the determination of all points arising in cases before them and in the finding and sentence. In a Bench composed of three members, the decision of the majority shall prevail; and in a Bench composed of two members, the decision of the Chairman shall prevail.

[This Rule, in so far as it directs that in a Bench composed of two members, the decision of the Chairman shall prevail, has been held to be inconsistent with the provisions of the Code, as well as arbitrary and not consonant with natural justice—*Wakefield v. Haran*, 8 C.W.N. 862. An analogous rule, *viz.*, Rule 6 under s 16, *supra*, was strongly disapproved of by the majority of the Full Bench in 10 C.W.N. 642, and has since been modified by the Bengal Government.]

9. The Chairman shall ordinarily record the evidence and judgment in cases where a record of evidence and judgment is necessary; but such duty may, with his consent, be performed by any of his colleagues, or the evidence and judgment may be taken down by the Registrar, or the Clerk of the Court, at the dictation of the Chairman.

10. A Bench or a Presidency Magistrate sitting singly may hold one or more adjourned sittings, should it be necessary to do so for the disposal of business or part-heard cases, but such adjournment shall be, as far as possible, *de die in diem*.

11. Any part-heard case may be sent back to the Chief Presidency Magistrate for disposal, should it, in the opinion of the Court, be thought to be a case which should be committed to the Sessions Court for trial.

12. Any case transferred to a Bench or to a Presidency Magistrate other than the Chief Presidency Magistrate or salaried Presidency Magistrate sitting singly remaining unheard at the close of the day may be either adjourned or, on necessity arising, may be sent back for disposal to the Chief Presidency Magistrate.

13. No private business shall be carried on in the Chambers set apart for the Presidency Magistrates other than the Chief Presidency Magistrate or salaried Presidency Magistrate, and no outsiders shall be admitted therein. It will be the duty of the Presidency Magistrates other than the Chief Presidency Magistrate or salaried Presidency Magistrate to report to the Chief Presidency Magistrate any infraction of this rule which may come to their knowledge.

14. It shall be the duty of the Registrar to inform the Chief Presidency Magistrate of any stress of business in the Courts.

15. The Chief Presidency Magistrate may at any time delegate any or all powers conferred on him under these rules to the salaried Presidency Magistrate—*Notification No. 1256 J*, dated 5th March, 1900, *Calcutta Gazette*, 1900, Pt. I, p. 714.

Madras:—(i) The Chief Presidency Magistrate may of his own motion or on the application of any Presidency Magistrate refer any case, or class of cases, triable by a Presidency Magistrate, for trial by a Bench of two or more Magistrates, and may, by his order, appoint the time and place at which such Bench shall sit.

(ii) The Chief Magistrate shall, if present, officiate as Chairman. In his absence the senior Magistrate present shall officiate as Chairman.

(iii) The Chairman shall conduct the proceedings of the Court and exercise all the functions in that behalf usually exercised by a Presidency Magistrate when sitting alone; but it shall be competent to any member of the Bench to put any question to a witness either direct or through the Chairman as the latter may deem advisable, and to suggest any matter for the Chairman's consideration.

(iv) Each member of the Bench shall have a voice in the finding and sentence. In a Bench of three or other uneven number, the opinion of the majority shall prevail. When the numbers are even, the Chairman shall have a casting vote.

(v) In regard to the recording of evidence and the judgment, the proceeding shall be conducted in a manner similar to proceedings before a single Magistrate and subject to the provisions of the Criminal Procedure Code.

(vi) The Bench may hold one or more sittings for the disposal of such cases as may be referred to it, or of part-heard cases. Any part-heard cases postponed to a further sitting of the Bench may be proceeded with if any member of the Bench has been present at the previous hearings in the case but subject to the provisions of sec. 350 of the Criminal Procedure Code—*Fort St. George Gazette*, 1901, Pt. I, p. 1414.

Rules for the guidance of Honorary Presidency Magistrates in Madras—

(1) *Power of trial.*—The Honorary Presidency Magistrates shall sit as Benches to try such cases or classes of cases and to undertake such business as may be made over to them by the general or special order of the Chief Presidency Magistrate.

(2) *Number and sitting hours.*—Each Bench will ordinarily consist of three Magistrates selected by the Chief Presidency Magistrate from the list of those appointed by Government. A Bench will sit in the Magistrate's Court at Egmore and another in the Court at George town from 7-30 to 9-30 A.M. or till the work of the day is over, if earlier, on all days except Sundays and close holidays.

(3) *Sitting to be arranged by Chief Presidency Magistrate. Inability to attend to be notified.*—Not less than ten days before the end of each month the Chief Presidency Magistrate will arrange the order in which and the days on which the Honorary Presidency Magistrates shall sit during the following month and communicate the same to the Honorary Presidency Magistrates concerned. If any Honorary Presidency Magistrate is unable to attend on a day for which he has been named, he shall give timely

notice to the Chief Presidency Magistrate, mentioning, where possible, a substitute who is willing to take his place. The Chief Presidency Magistrate may depute such substitute in his place or make such other arrangements as he thinks fit. If occasion arises, the Chief Presidency Magistrate may alter any arrangement he has made under this rule.

(4) *Salaried Magistrates may sit.*—The Chief Presidency Magistrate or any salaried Presidency Magistrate may, with the permission of the Chief Presidency Magistrate, sit as a member of a Bench of Honorary Presidency Magistrates.

(5) *Quorum.*—In order to form a quorum, at least two Magistrates shall be present from the beginning to the end of a trial or inquiry as members of the Bench, provided that if a salaried Magistrate be present throughout the inquiry or trial a case may be proceeded with to a decision, notwithstanding that a quorum was not present throughout the proceedings. If a Bench is unable to sit for any particular day, the case set down for hearing before it on that day, may be put up before a Stipendiary Magistrate or adjourned to the Bench's next working day, as the Chief Presidency Magistrate may direct.

(6) *Adjournment.*—Any case before a Bench remaining unheard at the close of a sitting may be either adjourned to the next working day or sent back to be disposed of as the Chief Presidency Magistrate directs.

(7) *Chairman.*—The Chief Presidency Magistrate shall, if present, officiate as Chairman of the Bench. In his absence the Stipendiary Presidency Magistrate (if any) present shall officiate as Chairman of the Bench. In the absence of any Stipendiary Presidency Magistrate, the Bench shall, as often as may be necessary, elect a Chairman from among the Magistrates present. If the votes should be equal, the Chief Presidency Magistrate shall decide which Honorary Magistrate shall preside.

(8) *Powers of Chairman.*—The Chairman shall conduct the proceedings of the Court and exercise all the functions in that behalf, usually exercised by a Stipendiary Magistrate when sitting alone. He shall decide upon the admissibility of evidence and maintain order in the Court, but it shall be open to any member of the Bench to put any question to the witness, either direct or through the Chairman, as the latter may deem advisable and to suggest any matter for the Chairman's consideration.

(9) *Taking down evidence.*—The Chairman shall generally record the evidence and judgment in which a record of evidence and judgment is necessary; but such duty may, with his consent, be performed by any one of his colleagues.

(10) *Opinion of majority of members to prevail.*—Each member of the Bench who has been present throughout the proceedings shall have a voice in the finding and sentence. In a Bench of three or other uneven number the opinion of the majority shall prevail; when the numbers are even the Chairman shall have a casting vote.

(11) *Same Bench to hear a case till conclusion.*—Notwithstanding any arrangement made as provided in Rule 3, any quorum that may have heard part of a case which stands adjourned at the rising of the Court, shall proceed with such case till the conclusion of the trial or inquiry, as the case may be, at sittings held, either from day to day, or, if the case stands adjourned for more than one day, then on the days to which it stands adjourned. In such case the Chief Presidency Magistrate may, for as long as shall be necessary, set aside or vary any arrangement made under Rule 3.

(12) *Signing Calendars.*—Every Honorary Presidency Magistrate will sign the daily calendar of the day's proceedings at which he is present.

(13) *Transfer of cases.*—The Chief Presidency Magistrate may at any time transfer for disposal any case, whether part-heard or not, from the file of any Bench to his own file or to the file of any salaried Magistrate or Bench of Honorary Magistrates.

(14) *Delegation of powers.*—The Chief Presidency Magistrate may at any time delegate any of his powers under these rules to any salaried Magistrate subordinate to him.

(15) *Additional Benches.*—These rules shall also apply to any additional Bench of Honorary Presidency Magistrates which the Governor in Council may be pleased to

appoint. See *Notification No. 18, Fort St. George Gazette, Part I, 3rd January, 1911, pp. 7 and 8.*

Bombay:—The following revised rules to regulate the conduct and distribution of business and the practice in the Courts of the Magistrates of the town and Island of Bombay, which have been made by the Chief Presidency Magistrate with the previous sanction of His Excellency the Governor in Council, are hereby published in supersession of the rules published in Government Notification No. 287, dated the 16th January, 1894:—

1. The Magistrate will ordinarily sit in Court for the disposal of business at 11 A.M. Complaints and cases arising in the A, C, H and I Divisions shall ordinarily be heard at the Esplanade Police Court. Complaints and cases arising in the B, D, E, F and G Divisions shall ordinarily be heard at the Mazagon Police Court.

2. The Chief Presidency Magistrate and Third Presidency Magistrate will ordinarily sit at the Esplanade Police Court, and the Second Presidency Magistrate and the Fourth Presidency Magistrate will ordinarily sit at the Mazagon Police Court. In case of emergency any Presidency Magistrate may hold his Court at such place and hour as he may consider best suited to meet the requirements of the police service.

3. In the event of any perrure of work occurring in any Court, or during the casual or other absence of any Magistrate, the Chief Presidency Magistrate shall arrange for the distribution of buisness among the Magistrates

4. All applications for processes, copies, certificates or otherwise shall ordinarily be made to the Magistrates on their first taking their seats on the Bench in the morning. Applications which are shown to involve urgency may be made at any time during the sitting of the Court. The Magistrates will not undertake to entertain any application of any sort at their private residences.

5. Complaints and applications should, as a general rule, be made in writing, with proper stamp affixed. In each complaint the names of the complainant and of the accused parties, and also of the witnesses, and the section of the law alleged to have been infringed should be legibly written, with such particulars of the facts as may be necessary to support the complaint.

6. All applications must be presented in person or by pleader. The Magistrate will not undertake to reply to written communications.

The following fees shall be levied —

(a) Copying fees at 5 annas per folio of 90 words or fraction thereof. Prisoners will be charged 2 annas per folio for copies of proceedings, but will be furnished with a copy of the judgment in cases other than summons cases free of charge.

(b) Inspection fee Re. 1 on each application per day.

(c) Translation fee Re. 1 per folio of 90 words or fraction thereof. Parties not supplying their own paper for copies will be charged $\frac{1}{4}$ anna per sheet of foolscap supplied.

8. The Magistrates at each Court will divide the work between themselves, and any difference of opinion will be decided by the Chief Presidency Magistrate. As a general rule, petty Police cases will be disposed of before others.

9. The Magistrate shall submit such forms, records, reports and returns as may be called for by the Chief Presidency Magistrate.

10. The office hours shall be from 10 A.M. to 5 P.M. The Courts and offices shall be closed on the gazetted Government holidays; but the Chief Presidency Magistrate will arrange for the despatch of urgent business.

11. If in any case there exist special circumstances which in the opinion of any party concerned or interested in such case require a departure from the ordinary procedure prescribed by these rules, such party may bring such special circumstances to the notice of the Chief Presidency Magistrate, who shall thereupon make such order in the matter as he shall think fit.

Note.—An authorized petition-writer is attached to each Court for the purpose of writing at a moderate charge applications and petitions for persons requiring his services—*Bombay Notification No 2536*, dated 19th May, 1904.

For Rules for the guidance of Honorary Presidency Magistrates in Bombay, see G R., J. D. no. 2536 of May 19, 1904, subsequently modified by G R., J. D. No. 3801 of July 29, 1906, and G. R., J D No 1653 of March 28, 1906. Vide *Manual* for use of Honorary Presidency Magistrates of Bombay.

E.—Justices of the Peace.

Justices of the Peace
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22. Every *Provincial Government*, so far as regards the territories subject to its administration, * * *

may, by notification in the official Gazette, appoint such persons resident within British India and not being the subject of any foreign State as it thinks fit, to be justices of the Peace within and for the territories mentioned in such notification..

Change:—In the first para, the words ("other than the towns aforesaid") have been omitted, and in para. 2 the italicised words have been substituted for the words "European British subjects" by sec. 3 of the Criminal Law Amendment Act (XII of 1923). "By omitting section 23, and by assimilating the provisions of sections 22 and 23, this clause has removed the qualification of being an European British subject for being appointed as a Justice of Peace"—*Notes on Clauses* (Criminal Law Amendment Bill).

The words "Provincial Government" have been substituted for the words "Local Government" by sec 4 of the Government of India (Adaptation of Indian Laws) Order, 1937.

59. Powers:—The powers conferred on the Justices of the Peace are the ordinary powers conferred on 1st class Magistrates under sec 36 The power to entertain complaints is not one of such powers—*Loghan v. Romer*, 31 Mad. 343, 12 Cr L.J. 535.

23. [*Repealed by section 4 of the Criminal Law Amendment Act XII of 1923*].

24. [*Repealed by ditto.*]

"Section 24 is incidentally repealed as being spent"—*Notes on Clauses* (Criminal Law Amendment Bill).

25. In virtue of their respective offices, * * * * *
the Judges of the High Courts are Justices of the Peace within and for the whole of British India; Sessions Judges and District Magistrates are Justices of the Peace within and for the whole of the territories administered by the *Provincial Government* under which they are serving; and the Presidency Magistrates are Justices of the Peace within and for the towns of which they are respectively Magistrates.

Amendment:—The words "the Governor-General, Governors, Lieutenant-Governors and Chief Commissioners, the Ordinary Members of the Council of the Governor-

General and" were omitted by the Government of India (Adaptation of Indian Laws) Order, 1937. By sec. 4 of the same Order the words "Provincial Government" were substituted for the words "Local Government", in this section.

26-27. [Omitted by the Government of India (Adaptation of Indian Laws) Order, 1937.]

CHAPTER III.

POWERS OF COURTS.

A.—Description of Offences cognizable by each Court.

28. Subject to other provisions of this Code, any offence under the Indian Penal Code may be tried—

- (a) by the High Court, or
- (b) by the Court of Session, or
- (c) by any other Court by which such offence is shown in the eighth column of the second schedule to be triable.

Illustration.

A is committed to the Sessions Court on a charge of culpable homicide. He may be convicted of voluntarily causing hurt, an offence triable by a Magistrate.

60. Subject to other provisions of this Code:—The Schedule to the Code and sec 28 must obviously be read together, and sec. 28 is subject to the other provisions of this Code, that is, it is subject to sec 30—*In re Prithvinath*, AIR 1938 Nag 56 (57), I.L.R. 1938 Nag 248, 175 IC 935, 39 CrLJ. 660, 11 RN 18, 20 N.L.J. 151; *Danaji*, 27 CrLJ 728, A.I.R. 1926 Nag. 374, 95 IC. 56

61. Power of Court of Session:—The provisions as to the "other Court" indicated in clause (c) do not cut down or restrict the jurisdiction of the High Court or the Sessions Court. This section gives powers to the High Court and the Court of Session to try any offence under the Penal Code even though it is triable by a Magistrate according to the 8th column of the 2nd Schedule of this Code—*Kharga*, 8 All. 665. Therefore, the fact that in a case committed to the Sessions, the Sessions Judge adds a charge of an offence triable exclusively by a Magistrate, does not affect the jurisdiction of the Sessions Judge to try it—*Kharga*, 8 All 665, 1886 A.W.N. 254. There is nothing illegal in a Magistrate committing a person charged with an offence under sec. 147, I. P. C., to the Sessions Court if in his opinion it cannot be adequately punished by him, though the second Schedule of this Code says that the offence is triable by a Magistrate only—*Kayemulla*, 24 Cal 429, 1 C.W.N. 414

But if the offence falls under some other law and that law specifies a particular Court, the *forum* cannot be changed (see sec. 29). Thus, an offence under sec. 9, Opium Act must be tried by a Magistrate; a Sessions Judge has no jurisdiction over the offence and the Magistrate has no power to commit the case to the Sessions—*Schade*, 19 All. 465 (466), 1897 A.W.N. 115.

The illustration shows that in a case committed to the Sessions Court for a more heinous offence, the accused can be convicted of a minor offence triable by a Magistrate.

62. Offences within and beyond jurisdiction:—A Magistrate has a discretion to decide whether a case shall be tried by himself or by the Court of Session when the offence is triable by both the Courts. The High Court will not interfere with such discretion if exercised in a judicial manner—*Hari Moreswar v. Emp*, A.I.R. 1932 Bom. 63, 33 Bom.L.R. 1515, 1932 Cr.C. 87, 56 Bom. 61, 33 Cr.L.J. 262, 136 I.C. 187. When an offence is triable by an inferior tribunal but it also contains an element of aggravation which puts the offence beyond the jurisdiction of that tribunal, the jurisdiction of that tribunal is not necessarily ousted thereby—*Anonymous*, 2 Weir 20 (21). In other words, where the facts disclose an offence within the jurisdiction of the Magistrate, it is a complete fallacy to say that he is not empowered to try the offence, merely because the same facts disclose a more serious offence beyond his jurisdiction. If the case had ended in a conviction it will be not illegal merely because the offence committed really fell under a more serious section and was not one which the Magistrate was competent to try—*Ayyan*, 24 Mad. 675; *Mahajanam v. Kodu*, A.I.R. 1922 Mad. 223, 45 Mad. 29, 30 M.L.T. 95, 66 I.C. 72, 23 Cr.L.J. 232, 41 M.L.J. 398, 14 M.L.W. 247, 1921 M.W.N. 613. Where the facts disclose a major offence (e.g., offence under section 330, I P.C.), triable exclusively by a Court of Session, the Magistrate can convict the accused for a minor offence (e.g., under sections 232, 342 or 348, I P.C.) triable by him which constitutes a component of the major offence—*Dawson*, 2 Rang. 455, 26 Cr.L.J. 1108

But no tribunal can properly clutch jurisdiction by intentionally ignoring facts of aggravation which make the offence really cognizable only by a higher tribunal. Where the accused has himself objected to the jurisdiction it is possible that the High Court would feel itself bound to interfere—*Anonymous*, 2 Weir 21; *In re Maduri*, 12 Mad 54; *Babu Rao*, 4 N.L.R. 18, 17 Cr.L.J. 319; *Gundya*, 13 Bom 502; *Lakhraj v. Crown*, 31 P.R. 1910, 11 Cr.L.J. 639; *Kattuva v. Suppan*, 28 Cr.L.J. 164, 99 I.C. 596, 25 L.W. 86, A.I.R. 1927 Mad 307. The Legislature has decided that certain offences, either because of their serious or difficult nature, should be tried by one of the higher Courts of criminal jurisdiction and thus being so, it is not for a Magistrate to evade those provisions of law by usurping jurisdiction to himself—*Shambhooram*, A.I.R. 1935 Sind 221, 159 I.C. 271, 1935 Cr.C. 1272, 37 Cr.L.J. 80. The only person capable of weighing the respective advantages or disadvantages of trial before different types of tribunals are the accused persons themselves and it is only their opinion which is entitled to any serious consideration—*Netai Chandra*, A.I.R. 1936 Cal 529 (533), 40 C.W.N. 959.

If a Magistrate entirely overlooks some fact which would carry the case beyond his jurisdiction and tries the accused for a lesser offence, he is not held to have acted without jurisdiction. The question whether he has or has not entirely overlooked the circumstances would be one of fact. If, on the other hand, he does not overlook the circumstance, but, after his attention has been drawn to it, he deliberately ignores it, his proceedings would be improper, though not void. If a Magistrate not empowered under sec. 28 and Sch. II of the Cr P. Code tries an offence, it is difficult to see how he acts otherwise than in a private capacity. If he exceeds his power in good faith sec 529 allows him a certain latitude; but that section does not allow him to try an offence which he is not empowered to try. On the contrary, sec 530 definitely avoids such proceedings. Quite apart from the charge whenever facts are proved constituting the aggravated offence, that is the offence which is being tried. It is not as though the analogy of a civil trial were applicable and the Magistrate is restricted to the facts set forth in the plaint issues. In a criminal trial he must be ever ready as the facts are disclosed either to alter the charge under sec. 227 or to refer the case under sec. 345. It may be said that the accused has no real grievance if he has been tried for lesser offences, but such an argument runs counter to the whole intention of the Code—*Kattuva v. Suppan*, 28 Cr.L.J. 164, 99 I.C. 596, 25 L.W. 86, A.I.R. 1927 Mad. 307. A statement by an accused person that the offence committed by him is a more serious one, not triable by the Magistrate, does not deprive the Magistrate jurisdiction

unless the prosecution accept the truth of that statement or the Magistrate is of opinion that it is true—*In re Appu Goundan*, 39 Cr.L.J. 659, 175 I.C. 896, 1938 M.W.N. 592, (1938) 2 M.L.J. 43, 48 M.L.W. 145. The mere fact that in order to make his case more serious a complainant alleges the commission of an offence which could not be tried by a junior Magistrate does not render the proceedings of that Magistrate illegal if he goes on to try the case and decide it holding that the facts disclosed show that it is lesser offence which he is competent to try. But, in any event, it is settled law that in a warrant case the trial does not commence until the charge is framed under sec. 254, Cr. P. C., and there is nothing illegal or invalid in a Magistrate of the Third Class proceeding to enquire into a complaint which was not instituted in his Court but sent to him under secs. 192 or 528 of the Cr. P. C., even if after hearing the prosecution case he has come to the conclusion that a case has been made out which he himself could not try. There is specific provision of the Code in sec. 346, which provides for such cases and the existence of this very provision by itself implies that a Subordinate Magistrate can legally enquire into a serious offence up to the stage at which the question of charge or discharge has to be decided—*Panda v. Gulab Khalun*, 40 Cr.L.J. 515, 181 I.C. 49, A.I.R. 1939 Lah. 122, I.L.R. 1938 Lah. 619, 41 P.L.R. 221. See also 1930 M.W.N. 770 in this connection.

A second class Magistrate came to the conclusion that the case before him was one for trial under sec. 148, I. P. C., and was, therefore, triable by a first class Magistrate and not triable by him. He sent the record to the District Magistrate who ordered him to proceed with the case, as no first class Magistrate was available. He then framed a charge under sec. 147, I. P. C., and convicted the accused. Held that the matter involved was one of jurisdiction and the District Magistrate could not give jurisdiction to the trying Magistrate by such an order because of the fact that at the moment there was no Magistrate with first class powers available. Administratively it might have been inconvenient but administrative inconvenience cannot give jurisdiction to a Magistrate—*Azizur Rahman*, 43 Cr.L.J. 214, 27 Cr.L.J. 545, 93 I.C. 1041. See Note 1406 "Court of competent jurisdiction"

It is a well settled rule that any acquiescence or even consent cannot invest a Court with jurisdiction of which it is not otherwise possessed. Therefore, where the accused was charged under sec. 506, I. P. C., an offence not triable by a Bench of Magistrates with second class powers, the mere fact that no objection was raised to the jurisdiction, did not invest the Bench Magistrates with jurisdiction to try the accused—*Ram Udai*, 33 Cr.L.J. 511, 137 I.C. 625, 9 O.W.N. 319, 1932 Cr.C. 592, A.I.R. 1932 Oudh 251

Under Sch. II to the Cr. P. Code it is provided that the method of trial for offences under sec. 124-A, I. P. C., may be either the Court of Sessions, Chief Presidency Magistrate, District Magistrate or Magistrate of the First Class specially empowered by the Local Government in that behalf. The Magistrate has a discretion to decide in what way the case shall be tried, having regard to the alternatives given by the schedule. The Magistrate must have regard to the importance of the case and to the fact that the maximum penalty under the section is transportation for life, though if he tries the accused himself he cannot give a longer term of imprisonment than two years. He must consider no doubt also whether if he sends the case to the Court of Session there will be Jury or assessors and in that connection he may consider which of the two tribunals, his own Court or the Sessions Court is the more satisfactory tribunal for deciding the case. Though the Magistrate's discretion is subject to review by the High Court, the High Court will not interfere with his discretion except on certain definite grounds—*Hari Moreshwar*, 33 Cr.L.J. 262, 136 I.C. 187, 33 Bom.L.R. 1515, A.I.R. 1932 Bom. 63, 56 Bom. 61, 1932 Cr.C. 87, Ind. Rul. 1932 Bom. 171, commenting on *Krishnaji*, 119 I.C. 666, 53 Bom. 611, 31 Bom.L.R. 602, A.I.R. 1929 Bom. 313, 30 Cr.L.J. 1090, Ind. Rul. 1929 Bom. 538.

Where two or more persons are jointly indicted, and the jurisdiction of the

Magistrate is ousted in the case of one of them, the proper course is to commit all the accused for trial before the Court of Session—*Anonymous*, 1 Weir 448 (449).

A Magistrate is not entitled to decline jurisdiction on the ground that the offence is a petty one ordinarily triable by heads of villages, and to direct the complainant to seek redress from the head of the village—*Anonymous*, 2 Weir 237, 7 M.H.C.R. App. 31. So also, a Magistrate is not entitled to decline to exercise jurisdiction in a case on the ground that it falls under the jurisdiction of ecclesiastical authority, when the act of that authority plainly amounts to an offence. Thus, where the ecclesiastical authority threatened a Roman Catholic that unless he abstained from certain acts (which he was legally entitled to do) he would be ex-communicated, the action of the ecclesiastical authority was illegal and amounted to criminal intimidation and the Criminal Courts had therefore jurisdiction over the offence—*Paul De Cruz*, 8 Mad. 140

29. (1) Subject to the *other provisions of this Code*, any offence under any other law shall, when any Court is mentioned in this behalf in such law, be tried by such Court.

(2) When no Court is so mentioned, it may be tried by the High Court or *subject as aforesaid* by any Court constituted under this Code by which such offence is shown in the eighth column of the second schedule to be triable.

63. "Shall be tried by such Court":—An offence under a special law triable only by a Magistrate invested with special powers cannot be transferred to an ordinary Magistrate or be tried by any other Magistrate—*Deokinandan*, 1886 A.W.N. 289. An offence under sec. 9, Opium Act must be tried by a Magistrate, and not by a Court of Session—*Schade*, 19 All. 465 (466). An offence under Madras Act I of 1868 (e.g., supplying liquor without a license) is triable only by a Magistrate, and not by the Sessions Court or the High Court—*Donoghue*, 5 M.H.C.R. 277. An offence under sec. 16 of the Bombay Village Police Act (VIII of 1867) is triable by Police Patels duly empowered, and not by Taluk Magistrates—*Hanmantla*, Ratanlal 196. An offence under sec. 52, Prisons Act is not triable by a Presidency Magistrate, since he is not a District Magistrate or a First Class Magistrate mentioned therein—*Chota Singh*, 32 Mad 303. An order under sec. 3 (1) of the Defence of India Act (IV of 1915) whereby the Local Government had directed that all persons accused of the offence of committing dacoity on 27th February 1915 at Basti Naurang should be tried by the Commissioners appointed under the provisions of the said Act, ousted the jurisdiction of the regular Courts in respect of the persons accused of the offence specified—*Samaila v. Crown*, 38 P.R. 1917, 42 I.C. 159, 18 Cr.L.J. 927. Under section 83, Registration Act, an offence under sec. 82 of that Act is triable by a Magistrate not inferior to a Magistrate of the second class—*Krishna*, 7 Mad 347. A third Class Magistrate has jurisdiction to try an offence under sec. 68 of the Bombay District Municipal Act (VI of 1873)—*Naran Narsing*, Ratanlal 763. An offence under sec. 20, Calcutta Rent Act, must be tried by the President of the Calcutta Improvement Tribunal, which is the Court mentioned in sec. 20 of that Act—*Ishan v. Manmatha*, 37 C.L.J. 298, A.I.R. 1923 Cal. 339, 71 I.C. 611.

64. When no Court is mentioned:—A Magistrate can try a landlord for an offence under sec. 58 (3) of the Bengal Tenancy Act (failure to prepare and retain counterfoils of rent receipts) in the same way as he would try a summons case, the Act not having specified any particular Magistrate to try such an offence—*Mohunt Ramdas*, 9 C.W.N. 816 (817), 2 Cr.L.J. 532.

As the Mussalman Wakf Act (XLII of 1923) contains no provision regarding the Court by which offences under sec. 10 of the said Act are to be tried, it is triable by

any Magistrate under sec. 29 read with the 8th column of the Second Schedule of the Cr. P. Code—*Ali Mahomed*, 28 Cr.L.J. 954, 105 I.C. 666, A.I.R. 1928 Sind 43.

There is absolutely no conflict between the provisions of sec. 5 and those of sec. 29, Cr. P. C. Section 29 merely empowers the High Court when no Court is mentioned for any offence under any law other than the Indian Penal Code, to try such offences. Section 5 (2), on the other hand, lays down that all offences under any other law shall be investigated, inquired into, tried and otherwise dealt with according to the same provisions, etc. The mere fact that sec. 29 empowers the High Court to try such an offence does not show that the High Court can take cognizance of the offence straight off, try the accused and convict him and punish him without following the procedure laid down in the Code. There are elaborate rules of procedure laid down in the Code regulating trial of accused persons, and it is imperative that they should be followed. Therefore, if the case of an offence due to the contravention of the provisions of sec. 85, Companies Act (VII of 1913), were committed to the High Court under sec. 194 (1), Cr. P. C., or proceedings were started on an application of the Advocate-General under sec. 194 (2), or were transferred to it under sec. 526, Cr. P. C., then the High Court would have jurisdiction to try the accused: but it would not have jurisdiction to try the accused merely on an application under sec. 85, Companies Act—*Harish Chandra v. Kavindra Narain Sinha*, 38 Cr.L.J. 111 (113), 166 I.C. 53, A.I.R. 1936 All. 830, 1936 A.L.J. 1105 (F.B.).

29A. *No Magistrate of the second or third class shall inquire into or try any offence which is punishable otherwise than with fine not exceeding fifty rupees, where the accused is an European British subject who claims to be tried as such.*

Trial of European British subjects by second and third class Magistrates.

This section has been added by sec. 6 of the Criminal Law Amendment Act (XII of 1923) "The Bill does away with all provisions under which a person who may try an European British subject must be a Justice of the Peace. Except in cases punishable with sentences of fine only not exceeding rupees fifty, the Bill provides that European British subjects shall not be triable by second or third class Magistrates, but all first class Magistrates are given power to try European British subjects no matter what their nationality may be"—*Statement of Objects and Reasons*, Para. 8 (i).

See Notes under Chapter XLIV-A.

29B. *Any offence other than one punishable with death or transportation for life, committed by any person who at the date when he appears or is brought before the Court is under the age of fifteen years, may be tried by a District Magistrate or a Chief Presidency Magistrate, or by any Magistrate specially empowered by the Provincial Government to exercise the powers conferred by section 8, sub-section (1), of the Reformatory Schools Act, 1897, or, in any area in which the said Act has been wholly or in part repealed by any other law providing for the custody, trial or punishment of youthful offenders, by any Magistrate empowered by or under such law to exercise all or any of the powers conferred thereby.*

Jurisdiction in the case of juveniles.

Amendment:—This section has been added by sec. 6 of the Cr. P. Code Amendment Act (XVIII of 1923). The reasons for the amendment have been thus stated: "The existing procedure of committal of a Court of Session is lengthy and often involves the prolonged detention of juvenile offenders as undertrial prisoners, although the

offences generally committed by them seldom require to be so severely punished as to necessitate the intervention of a Sessions Court, the sentence or order eventually passed being often incommensurate with the time and energy expended upon a committal and sessions trial. It is therefore proposed that offences of children, unless so serious as to be punishable with death or transportation for life, should be triable by a District Magistrate, a Chief Presidency Magistrate, or by any Magistrate specially empowered to exercise the powers conferred by sec. 8, sub-section (1), of the Reformatory Schools Act, 1897"—*Statement of Objects and Reasons* (1921).

The words "Provincial Government" have been substituted for the words "Local Government" by sec. 4 of the Government of India (Adaptation of Indian Laws) Order, 1937.

64A. Scope of the section:—This section speaks of offences other than those punishable with death or transportation for life. Therefore, an offence under sec. 304, I. P. Code (culpable homicide) committed by a boy of 14 cannot be tried by a Magistrate presiding over the Central Children Court—*Lakhi Sahu*, 36 C.W.N. 164, 33 Cr.L.J. 645 (646), A.I.R. 1932 Cal 487, 59 Cal. 856, 138 I.C. 626, 1932 Cr.C. 479.

This section is in terms clearly permissive. When a juvenile under the age of fifteen years is brought before a Magistrate other than one of those specially referred to in this section, the Magistrate can, if he chooses, either under sec. 9, Reformatory Schools Act, 1897, or under sec. 349, Cr. P. Code, refer the matter to the District Magistrate with a view to the case being tried by a special Magistrate under this section; and the District Magistrate of his own volition can direct any such case to be tried by a Magistrate having special powers. But if neither of those courses is adopted, the trial Magistrate can deal with the case under the regular provisions of the Code. This section enables one of the special Magistrates there referred to to deal with many cases which, apart from this section, could only be tried by a Court of Session. But this section does not invalidate a trial which would be valid apart from the section—*Jalal*, A.I.R. 1931 Bom 211, 35 Cr.L.J. 1033, 149 I.C. 1135, 36 Bom L.R. 435. The words "may be" in this section are permissive. No doubt, the word "may" is sometimes construed as "shall" but obviously its *prima facie* effect is merely permissive and not obligatory. The Magistrate has a discretion under this section. He may deal with the matter under the ordinary provisions of the Code or he may direct that the accused be dealt with under this section. But he is not bound to deal with the case in that way—*Natvarlal*, 32 Cr.L.J. 723, 131 I.C. 476, 33 Bom L.R. 312, A.I.R. 1931 Bom. 193, 1931 Cr.C. 342. Section 8, Reformatory Schools Act, does not enact that a Magistrate cannot try a juvenile offender. It says that certain Magistrates who are not specially empowered may not exercise the power of sending a juvenile offender to a Reformatory School. Section 29B of the Cr. P. C., is also not intended to take away the jurisdiction already conferred on Magistrates under sec. 28 and Col. 8, Sch II, Cr. P. C. It is intended to extend to certain Magistrates the power to try juvenile offenders for certain offences which would otherwise have been triable exclusively by the Court of Session—*Onkar Nath v. Emp.*, A.I.R. 1936 All. 675, 1936 A.W.R. 735, 1936 A.L.J. 957, 1936 Cr.C. 884, 165 I.C. 148, 1936 All.L.R. 863, 37 Cr.L.J. 1073.

The offence under sec. 130, Railways Act should now be tried by superior Magistrates contemplated in sec. 29B, Cr. P. Code—*Wah Mahammad*, A.I.R. 1936 Sind 185 (186), 30 S.L.R. 9, 165 I.C. 642, 38 Cr.L.J. 83, 1936 Cr.C. 971, distinguishing *Dhondya Dudhya*, A.I.R. 1919 Bom 178, 52 I.C. 667, 43 Bom 888, 21 Bom L.R. 768. See also *Jannat*, 29 Cr.L.J. 733, 110 I.C. 589, 29 P.L.R. 536, A.I.R. 1928 Lah. 909, 10 A. I. Cr. R. 499.

30. In the territories respectively administered by the
Provincial Governments of the Punjab
 * * * * Oudh, the Central Provinces,
 Coorg, Assam, Sind, and in those parts of

Offences not punishable with death.

the other provinces in which there are Deputy Commissioners or Assistant Commissioners, the *Provincial Government* may, notwithstanding anything contained in section 29, invest the District Magistrate or any Magistrate of the first class with power to try as a Magistrate all offences not punishable with death.

Amendment:—The words "and Burma" were left out by the Government of India (Adaptation of Indian Laws) Order, 1937.

By sec 4 of the same Order the words "Provincial Governments" have been substituted for the words "Lieutenant-Governors" and the words "Provincial Government" for the words "Local Government", in this section.

65. Object of Section:—The object of conferring special powers on District Magistrates is to accelerate proceedings at the trial by avoiding the delay consequent on commitment to the Sessions Court which sits only at considerable intervals. It is also intended to afford relief to those who have to attend as witnesses in the Court—*Amir Khan*, 7 C.W.N. 457 (460); *In re Pruthivmath*, A.I.R. 1938 Nag 56 (58), 20 N.L.J. 151.

Section 30 must be read as qualifying or controlling the provisions of sec. 28 which in its turn makes reference to column 8 of the Second Schedule—*Danaji*, 27 Cr.L.J. 728, 95 I.C. 56, A.I.R. 1926 Nag 374; *In re Pruthivmath*, supra.

Magistrate must purport to act under this section—A first class Magistrate who is simply described on the heading of his judgment as invested with the powers under this section, but not purporting to act under such powers, cannot exercise those powers in passing the sentence—*Mahu*, 7 Cr.L.J. 461.

66. Powers of District Magistrate:—This section speaks of "all offences not punishable with death" and must include those that would normally go to the Sessions Court—*In re Pruthivmath*, supra. As a general rule, the cases which a District Magistrate should refrain from trying under his higher powers, are those in which a sentence more severe than a District Magistrate can inflict under sec 34 appears to be called for if the offence be established, and secondly, those cases in which the issues are so complex or the difficulty of ascertaining the true facts or of correctly applying the law to them so considerable as to make a trial before a Sessions Judge more appropriate than a trial before a District Magistrate—*Saw Kadu*, L.B.R. (1893-1900) 219.

In the exercise of special powers under this section, a District Magistrate has no power to try cases summarily—*Fazlu*, 1879 P.R. 25.

A District Magistrate empowered under this section cannot try an offence punishable with death (e.g., murder) and find the accused guilty of culpable homicide not amounting to murder on the ground that the case falls within one of the exceptions mentioned in sec 300, I.P.C.—*Gurdit Singh*, 3 P.R. 1891; *Shamra*, 27 Cr.L.J. 846, A.I.R. 1926 Lah 575, 95 I.C. 766. He cannot legally try the offence of culpable homicide not amounting to murder punishable under the first part of sec 304, I.P.C., though it is not punishable with death. The reason is, that where there is credible evidence both of murder and of qualified murder, the accused should be committed for trial before a Court which is competent to try both offences once for all and to pronounce a judgment which shall be an effectual bar to a second trial on the same facts—*Mangal Singh*, 1 P.R. 1893. So, where there is sufficient evidence to constitute an offence of murder, a Magistrate exercising special powers under this section should not try the case as on a minor charge—*Paramananda*, 10 Cal. 85. A Magistrate exercising powers under this section can try an offence under sections 302/302B, I.P.C., where murder was not committed in pursuance of the conspiracy so that the offence was not punishable with death—*Hussain*, 25 Cr.L.J. 1241, 82 I.C. 169, A.I.R. 1925 Lah. 157.

67. Deputy Commissioner:—A Magistrate holding an inquiry into a case triable by a Court of Session, cannot make over the case to a Deputy Commissioner

specially empowered under this section to try such cases, because the Deputy Commissioner is a Magistrate and not a Sessions Judge. Such a commitment was held to be illegal and was quashed and the case was ordered to be committed to the Court of Session—*Piran Litta*, 17 P.R. 1873. But in a Calcutta case, the High Court maintained the conviction by the Deputy Commissioner, where it was found that the accused had not been prejudiced by such trial—*Amir Khan*, 7 C.W.N. 457.

Where a Deputy Commissioner tries a case exclusively triable by a Sessions Court, under the powers conferred by this section, he does so as a Magistrate, and if he tenders conditional pardon to one of the accused, he is precluded from trying the case himself—*Paban Singh*, 19 C.W.N. 847, 4 Cr.L.J. 44; *Kishore*, 25 Cr.L.J. 1341, 82 I.C. 573, A.I.R. 1925 Nag 119. The procedure to be followed in such a case is that of a warrant case provided for in Chap. XXI—*Jallo*, 131 P.L.R. 1901.

Once a Magistrate has been specially empowered under sec. 30 by the Local Government, he can necessarily, when acting as a Magistrate, exercise the powers mentioned in sec. 34; he cannot at will divest himself of the powers conferred upon him and he cannot by any action of his own, become a First Class Magistrate not empowered under sec. 30, Cr. P. Code. Far less by an unintentional failure or even by a habitual failure to describe himself as being so empowered, can he divest himself of his powers. He need not mention the existence of his special powers in order to exercise them, or in order to pass any sentence covered by sec. 34, Cr. P. Code—*Nadar Alam Khan*, A.I.R. 1935 Pesh 108, 36 Cr.L.J. 1143, 157 I.C. 211, 1935 Cr.C. 832. For contra see *Mahi*, 17 P.W.R. 1908 Cr.; *Ramchandra*, 34 Cr.L.J. 162, 141 I.C. 574, 1933 Cr.C. 122, 34 Bom.L.R. 1676, A.I.R. 1933 Bom 58 (S.B.); *Sukhdev Raj*, 35 Cr.L.J. 1288, 151 I.C. 265, 1934 Cr.C. 608, A.I.R. 1934 Lah. 361.

68. Appeals:—See sec. 408, proviso (b). Where the Magistrate was acting within his ordinary powers as a Magistrate of the 1st class, and not within the special powers conferred by this section, and appeal would lie to the Court of Session, and not to the High (Chief) Court—*Tulsi Ram*, 1881 P.R. 23. Where, however, it appeared from the sentence awarded that the District Magistrate in trying the particular case has exercised enhanced powers under this section, the appeal would lie to the High Court and not to the Court of Session—*Bahadur*, 8 P.R. 1877; *Jeytumul*, 36 P.R. 1880; *Jai Singh*, 1900 P.L.R. 46; *Batera*, 3 P.R. 1898. If, however, the offence is not one exclusively triable by a Court of Session, and the sentence of imprisonment awarded does not exceed two years, an appeal lies to the Court of Session, and not to the High Court, even though the District Magistrate records that he is exercising his powers under this section—*Nathu*, 10 P.R. 1875. See Note 1107.

69. Revision:—A Sessions Judge is competent under section 437 (now 436) to revise the order of a District Magistrate and order further inquiry, even though the latter was exercising enhanced powers under this section. The District Magistrate acting under this section is inferior to the Sessions Judge within the meaning of sec. 435—*Jalloo*, 15 P.R. 1904, 131 P.L.R. 1904.

B.—Sentences which may be passed by Courts of various Classes.

Sentences which High Courts and Sessions Judges may pass.

31. (1) A High Court may pass any sentence authorised by law.

(2) A Sessions Judge or Additional Sessions Judge may pass any sentence authorised by law; but any sentence of death passed by any such Judge shall be subject to confirmation by the High Court.

(3) An Assistant Sessions Judge may pass any sentence authorised by law, except a sentence of death or of transportation

for a term exceeding seven years, or of imprisonment for a term exceeding seven years.

32. (1) The Courts of Magistrates
 Sentences which Magistrates may pass. may pass the following sentences, namely:—

- | | |
|---|---|
| (a) Courts of Presidency Magistrates and of Magistrates of the first class; | { Imprisonment for a term not exceeding two years, including such solitary confinement as is authorised by law;
Fine not exceeding one thousand rupees;
Whipping. |
| (b) Courts of Magistrates of the second class; | { Imprisonment for a term not exceeding six months, including such solitary confinement as is authorised by law;
Fine not exceeding two hundred rupees. |
| (c) Courts of Magistrates of the third class; | { Imprisonment for a term not exceeding one month;
Fine not exceeding fifty rupees. |

(2) The Court of any Magistrate may pass any lawful sentence, combining any of the sentences which it is authorized by law to pass.

70. Powers and discretions of Judges and Magistrates:—It is an elementary proposition in criminal jurisprudence that sentence in each case should be proportionate to the nature and gravity of the crime. A Magistrate cannot claim a right to inflict a sentence of fine in all cases because he has done so in hundred other cases—some of which were more serious—without any regard to the nature of facts, upon which each case has to be decided. He cannot bring in the aid of prescription in his favour—*Maiku*, A I R 1930 All 279, 31 Cr L J 631, 124 I C 46, 1930 Cr C 447. It is necessary in awarding punishment to exercise some discretion, and to consider the circumstances of each case and the degree of guilt disclosed in awarding punishment—*Kesavaier*, 10 Bur L T 268, 18 Cr L J 489. The theory of deterrent punishment should not be loosely put into practice. Deterrent punishments are necessary only when waves of imitative crime commence to sweep over the State or in time of public tumult, where there is a danger of a wide breach of the peace or security, or where a highly organised association of persons engineer series of offences—*Gossain*, 2 P L T 596, 22 Cr L J 679. See also *Badri*, 17 Cr L J 243 (All).

The question of punishment depends on two considerations: firstly, the public importance of the offence, and the deterrent effect of the punishment; secondly, the desserts of the particular offender—*Badan Singh*, 30 Cr L J. 933 (938), 118 I C. 577, A I R 1928 All. 150, Ind Rul 1929 All 881. Justice should be even-handed. Other things being equal, the same offence should receive the same punishment—*Udharam*, 33 Cr L J. 900 (902), 140 I C. 23, A I R. 1932 Sind 143, 1932 Cr C. 587, Ind Rul. 1932 Sind 170. A sentence of two years' imprisonment on a juvenile offender, when his adult co-accused with three previous convictions is awarded only one year's imprisonment, is improper—*Abul*, 46 Bom 429, 23 Cr L J 93, 23 Bom L R. 1199. The law vests a discretion in the trying Magistrate to pass adequate sentence in each case and it is for him to decide after taking into consideration all the pertinent circumstances of the case, what should be the adequate sentence. No rule of thumb can be laid down by a higher tribunal as a guide for the trying Magistrate in awarding an adequate sentence—*Murido*, 31 Cr L J. 763, 125 I C. 46, A I R. 1930 Sind 58, 1930 Cr C. 122. In determining to what extent in any particular case the punishment should approach to, or recede from, the maximum limit prescribed by the section, the trying Magistrate has to take into account several factors, *inter alia*, the antecedents of the prisoner, whether such antecedents speak well or ill of him, such as his character and state of

life whether good or bad including the previous convictions, if any. The imposing of sentence is, within the wide limits allowed by the law, a matter of discretion; it is not a matter of proof. What these matters are to be, is largely left to practice and to the common sense and knowledge of the world of the Court—*Baksho*, 31 Cr.L.J. 1046 (1051), 126 I.C. 468, A.I.R. 1930 Sind 111, 24 S.L.R. 252. Where the Court awards the maximum sentence provided by the law for an offence, it should record its reasons for doing so—*Harnam Singh v. Emp.*, 27 Cr.L.J. 186, 91 I.C. 1002, A.I.R. 1926 Lah. 239, 2 Lah. Cas 161. In awarding sentence one need not take into consideration the moral indignation which may be felt on looking at the offence committed; all that it is necessary to consider is, what sentence is likely to prevent the offender from committing the offence again and to prevent other persons similarly situated from committing similar offences?—*Mohamed Cassim v. The King*, 39 Cr.L.J. 692 (695), 176 I.C. 150, A.I.R. 1938 Rang. 220. A Magistrate who pronounces a sentence must define precisely the nature of the sentence intended, as well as the period of detention. Generally, the sentence ought to be self-contained, like a decree of a Civil Court, so that the functionary who has to execute it should have nothing to do but to obey the direction given, without making an inquiry on his own account—*Rama*, 24 Mad 13.

There cannot be one law for the rich and one for the poor or rather one for the good family and one for the bad—*Dharam Singh*, 34 Cr.L.J. 180, 141 I.C. 592, Ind. Rul. 1933 Lah 154, 34 P.L.R. 552. The fact that the accused is a man of some education and position and a member of the Legislative Council cannot be urged in his favour as an argument for the infliction of fine only. These considerations cut the other way—*Badan Singh*, 30 Cr.L.J. 933 (939), 118 I.C. 577, A.I.R. 1928 All. 150, Ind. Rul. 1929 All. 881. A man is not entitled to get off with a small sentence, merely because he is a person of high position and one who has done good service for the Government in the past. When such a man falls in this manner everybody looks to see whether it is not true that there is one law for the rich and another for the poor, and a Court cannot lightly reduce the sentence in such a case to one far below that which should have been awarded to an ignorant and poverty-stricken offender who had in the same way fallen victim to temptation—*Qabul Ahmad*, 28 Cr.L.J. 749, 103 I.C. 797, 1 Luck. Cas 220, A.I.R. 1927 Oudh 319. That the accused is a fairly respectable man, and not a hardened litigant are not circumstances of extenuation—*In re Assam Masaliarakath Kunhi Bava*, 30 Cr.L.J. 247, 114 I.C. 234, 1929 M.W.N. 114, A.I.R. 1929 Mad. 226, Ind. Rul. 1929 Mad. 250, 29 M.L.W. 673, 16 M.L.J. 550. But by universal practice the previous character of an accused may be taken into account in awarding sentence—*Khuda Baksh*, 38 Cr.L.J. 24, 165 I.C. 909, A.I.R. 1936 Lah 914, 17 Lah. 284, 38 P.L.R. 630. It is necessary at all times, and not least when respect for the law is being undermined, that, whatever the attitude or the policies of any party, the Courts should in all respects scrupulously hold the scales even, observe the correct procedure and that they should not by sentences themselves still further undermine this respect for the law—*Sakinabai*, A.I.R. 1931 Bom. 70 (73), 55 Bom. 220, 32 Bom.L.R. 1506, 1931 Cr.C. 78, 129 I.C. 346, 32 Cr.L.J. 283.

In awarding punishment for an offence under the Excise Act the Courts should bear in mind that illicit distillation implies a good deal of preparation and results not only in the loss of excise revenue, but also in drunkenness. Judicial experience also shows that the offence often escapes detection, and it is, therefore, necessary to impose a sentence which will have a deterrent effect—*Crown v. Piyara Singh*, 94 I.C. 129, 7 Lah. 32, A.I.R. 1926 Lah. 166, 27 Cr.L.J. 561, 27 P.L.R. 221; *Dharam Sing*, 34 Cr.L.J. 180, 141 I.C. 592, Ind. Rul. 1933 Lah. 154, 34 P.L.R. 552.

The defiance of the processes of law is a serious offence, as they hamper the administration of justice. If allowed to be committed with impunity, the prestige of the Court is lost. Lenient sentences should not be passed in such cases—*Shao Akir v. Emp.*, A.I.R. 1938 Pat. 548, 19 P.L.T. 663, 1938 P.W.N. 813, 178 I.C. 487, 5 B.R. 104. To assault a constable in uniform, purporting to act in the execution of his duty with due moderation, and to declare that the accused did not care for the authority of the

police constable is not a matter which should be treated lightly—*Maroti v. Emp.*, A.I.R. 1939 Nag 95 (97), 1939 N.L.J. 101, I.L.R. 1939 Nag. 488, 184 I.C. 231, 40 Cr.L.J. 905.

The powers of the Magistrate to pass sentence are limited by this section. Even a request by the accused to pass a greater sentence will not empower a Magistrate to pass a sentence which he is not authorised by law to pass—*In re Krishnanand*, 3 B.L.R. App. 50 (52). Even when the accused makes a prayer for an appealable sentence, a Court, in passing it, should inflict such a sentence as the gravity or otherwise of the crime with which the accused has been convicted warrants and merits, irrespective of whether the sentence inflicted will involve a right of appeal or not. A Court should weigh the sentence with reference to the crime committed and the circumstances of the case and not with reference to anything which may happen subsequently—*Yar Muhammad*, A.I.R. 1931 Cal. 448 (450), 58 Cal. 392, 1931 Cr.C. 660, 32 Cr.L.J. 1181, 134 I.C. 536. See also *Anant Singh*, 37 Cr.L.J. 417, 161 I.C. 307, A.I.R. 1936 All. 147, 1936 A.L.J. 209, 1936 Cr.C. 175 and *Maung Saw Han*, A.I.R. 1939 Rang. 69 (70), 40 Cr.L.J. 248, 179 I.C. 716 in Note 1113.

There is no law that says a penalty must always follow a conviction. The maximum penalty for each breach of the law is fixed by it, but there is no minimum, except in a very few special cases—*Sitaram*, 29 Cr.L.J. 506, 109 I.C. 234, 11 N.L.J. 46, A.I.R. 1928 Nag. 188, 24 N.L.R. 110. When the Legislature has laid down a maximum punishment for an offence or a series of offences, it is the duty of the trial Court to apportion punishment in each case after considering all the circumstances having a bearing upon it, and not to shirk its responsibility by imposing the maximum penalty upon every offender—*Kehr Singh*, A.I.R. 1929 Lah. 29, 10 Lah. 524, 30 Cr.L.J. 15, 112 I.C. 783, 30 P.L.R. 638. The sentence passed on a convicted person should not be such as to be open to the criticism that it is an unmitigated exhibition of superior force unredeemed by a tinge of judicial balance—*Badan Singh*, 30 Cr.L.J. 933 (937), 118 I.C. 577, A.I.R. 1928 All. 150, Ind. Rul. 1929 All. 881.

Where an accused person is clearly guilty and has really no defence, but instead of pleading guilty and throwing himself at the mercy of the Court defends himself by throwing mud at witnesses who are persons of standing and honour, he really is deserving of very little consideration—*Sanwal Das v. Emp.*, A.I.R. 1929 Sind 253 (255), 1929 Cr.C. 682.

In awarding sentences in a case of communal riot and dacoity committed while the accused were smarting with indignation against the outrages upon their sacred places every allowance should be made for their feelings and comparative leniency should be shown. At the same time they must be adequately punished, and this fact must be taken into consideration that the persons injured and robbed had no share in desecrating the holy places and were made to suffer for the sins of others—*Daulat v. King-Emp.*, 2 Luck. 264 (267).

When a kind of offence is of common occurrence in a particular area, it should be dealt with severely and deterrent punishment is advisable—*Basa Meah*, A.I.R. 1936 Rang. 70, 37 Cr.L.J. 416, 161 I.C. 90, 1936 Cr.C. 75.

When the accused acted *bona fide* in the beginning but became *particeps criminis* later on, finding himself in a difficult position in which he felt bound to carry on, a severe sentence is not called for—*Mohammad Shafi*, 37 Cr.L.J. 430, 161 I.C. 313, A.I.R. 1936 Lah. 15, 1936 Cr.C. 2.

Where the right of privacy of the accused's household was being invaded, the accused, although he may have transgressed the law, may be liable to a lesser degree of punishment—*Meeratal Singh v. Emp.*, 39 Cr.L.J. 221 (222), 172 I.C. 933, A.I.R. 1938 Pat. 31, 18 P.L.T. 869.

Where the accused was in custody for about ten months, this is a circumstance which the Court is justified in taking into consideration by making an equivalent reduction of sentences—*Ram Babu Jadav v. Emp.*, 39 Cr.L.J. 302 (308), 173 I.C. 418, 18 P.L.T. 964.

It is true that the gravity of the offences of dishonesty is to be judged not only by the pecuniary value involved. However when the offences are numerous, but when they are added up, they do not involve great monetary value, this is a matter for consideration regarding the question of sentences to be passed on the accused—*Mg. Po Kywe v. The King*, 40 Cr.L.J. 621, 182 I.C. 63, A.I.R. 1939 Rang. 152, 1939 Rang. 251.

Before the High Court would interfere in revision on the question of sentence, it should be satisfied that the sentence was so unreasonable and so excessive as to require a reduction—*Murido*, 31 Cr.L.J. 763, 125 I.C. 46, A.I.R. 1930 Sind 58, 1930 Cr.C. 122.

71. Death:—Unless there are extenuating circumstances the person who is found to be guilty of murder should receive the extreme penalty of the law—*Dinabandhu*, 31 Cr.L.J. 737 (741), 124 I.C. 818, A.I.R. 1930 Cal. 199, 1930 Cr.C. 231. See also *Nga Tha Hmwe*, 37 Cr.L.J. 267, 160 I.C. 234, A.I.R. 1935 Rang. 504, 1935 Cr.C. 1300. See also *U Zawana*, 37 Cr.L.J. 418, 161 I.C. 113, A.I.R. 1936 Rang. 60, 1936 Cr.C. 88.

There is no hard and fast rule that because the murderer is of what is called tender age, he must necessarily escape the normal penalty prescribed by the law. Age is no doubt a circumstance to be taken into consideration, but this has got to be taken into consideration along with various other circumstances present on the record and to which attention may be drawn either by the prosecution or by the defence—*Prodyot*, 33 Cr.L.J. 837, 140 I.C. 80, A.I.R. 1933 Cal. 1, 1933 Cr.C. 21 (F.B.); *Ghenu*, 31 Cr.L.J. 81, 120 I.C. 276, A.I.R. 1930 Lah. 50, 1930 Cr.C. 18; *Nga Ba Thin*, A.I.R. 1922 L.B. 34; *Tiri*, A.I.R. 1931 Rang. 171, 9 Rang. 81, 132 I.C. 816, 1931 Cr.C. 667, 32 Cr.L.J. 941. See also *Motilal*, 36 Cr.L.J. 1220 (1226), 157 I.C. 829, A.I.R. 1935 Cal. 526, 39 C.W.N. 199, 1935 Cr.C. 902; *Nga Thein Maung*, 37 Cr.L.J. 290, 160 I.C. 459, A.I.R. 1936 Rang. 46, 1936 Cr.C. 45; *Nga Kan*, A.I.R. 1936 Rang. 71 (74), 37 Cr.L.J. 463, 161 I.C. 574, 1936 Cr.C. 76. The sentence of transportation for life is imposed in cases where there are in the opinion of the Court some extenuating circumstances and it is not necessary in the interests of the public at large that the sentence of death, which is primarily a deterrent sentence, should be inflicted. There is no question of reform of criminals who are sentenced to transportation for life—*Bhagwandin*, 32 Cr.L.J. 83, 128 I.C. 80, 7 O.W.N. 767, Ind. Rul. 1931 Oudh 16, A.I.R. 1931 Oudh 81, 1930 Cr.C. 956. Youth may be a circumstance to be taken into consideration in offences where the accused person is not fully able to understand the nature of his act or has been influenced by older persons but not in a case where a youth deliberately murders a small boy for motive of greed, being prompted to the crime by his own base nature. It is not the intention of the Legislature to reform murderers and the sentence of transportation for life is imposed only where there are some extenuating circumstances and where sentence of death is not necessary in the interests of public at large—*Bhawani*, 34 Cr.L.J. 250, 141 I.C. 747, 9 O.W.N. 1161, A.I.R. 1933 Oudh 52, Ind. Rul. 1933 Oudh 83, 1933 Cr.C. 92. See also *Manohar v. Emp.*, 37 Cr.L.J. 201, 159 I.C. 830, A.I.R. 1935 Pesh. 170, 1935 Cr.C. 1159. For contra see *Thakura Singh*, 30 Cr.L.J. 65, 113 I.C. 177, 10 Lah.L.J. 463, A.I.R. 1929 Lah. 64, Ind. Rul. 1929 Lah. 138. The circumstance that the accused is the only remaining son of the widow and the circumstance that he afterwards displayed considerable remorse, ought not to be taken into consideration in assessing the sentence to be passed in a case under sec. 302, I. P. C. What ought to guide the Court in a question of this character is the state of mind of the accused at the time when the crime was committed—*Mominaddi*, 39 C.W.N. 262. Old age is no doubt a point for consideration, but it is not in itself a sufficient ground for not awarding the death penalty on a conviction for murder—*Sankaran Nayar v. Emp.*, 1937 M.W.N. 728.

Where the accused was in an abnormal mood when he committed murder, though it cannot be said that he was insane or did not know the nature of his actions, there is sufficient reason for not inflicting the extreme sentence—*Nga Po Swa*, 37 Cr.L.J. 435, 161 I.C. 250, A.I.R. 1936 Rang. 113, 1936 Cr.C. 180.

The absence of the proof of premeditation would be a good ground for not passing the sentence of death—*A. Plet*, 37 Cr.L.J. 419, 161 I.C. 297, A.I.R. 1936 Rang. 28,

1936 Cr.C. 32. See also *Nga Bo Thin v. Emp.*, 38 Cr.L.J. 1051, 171 I.C. 285, A.I.R. 1937 Rang. 254, 1937 Rang.L.R. 169, 10 R.Rang. 141. Where the accused intended to kill the father of the child but he unfortunately succeeded in killing the child, and not the father, the ends of justice would be met by a sentence of transportation for life—*Arumuga Tevan v. Emp.*, 1937 M.W.N. 723.

In the case of constructive liability under sec 34, I. P. C., the penalty of death should not be exacted from either of the convicts—*Pakhar Singh*, 31 Cr.L.J. 41 (43), 120 I.C. 180, 11 Lah.L.J. 20, A.I.R. 1929 Lah. 292. A contrary view was, however, taken in *Shafi Khan*, A.I.R. 1929 Pat. 161, 117 I.C. 176, 30 Cr.L.J. 737, 8 Pat. 181. Following this case it is laid down that neither principle nor approved practice can be adduced in favour of the view that a capital sentence should not be passed when the offenders are constructively guilty of murder—*Mosaddi*, A.I.R. 1933 Pat. 100, 13 P.L.T. 702, 11 Pat. 807, 1933 Cr.C. 253, 142 I.C. 841, 34 Cr.L.J. 427. Once it is established that the intention of a number of persons is to make a joint assault, the culpability of those who deliver the assault and those who make the assault possible by beating off a rescue, is the same. In a case of extended liability under sec 149, I. P. C., and in a case where it is doubtful whether death was intended it is not in appropriate to treat all alike and sentence each of the accused to transportation for life. If the evidence is such that it can be reasonably found that all who joined an attack knew that death would be an almost certain result of the attack, for instance when guns were openly carried perhaps death in the case of all would be the appropriate penalty, but where accused persons are saddled with vicarious liability under sec. 149, I. P. C., and in addition intention to cause the actual result achieved cannot be clearly established, the accused should be given the benefit of the lower penalty—*Rahman Samail v. Emp.*, A.I.R. 1939 Lah. 245 (253), I.L.R. 1939 Lah. 77.

In *Benoyendra*, 40 C.W.N. 432 (442), A.I.R. 1936 Cal. 73, the Calcutta High Court reduced the sentences of death to those of transportation for life in view of the circumstantial nature of the evidence, the long delay since the judgment and the possibility of the actual murder being detected.

No man can butcher his wife and escape hanging on the plea that he suspected her of misconduct—*In re Dasan*, 30 Cr.L.J. 630, 116 I.C. 142, 1929 M.W.N. 269, A.I.R. 1929 Mad. 495, Ind. Rul. 1929 Mad. 526, 30 L.W. 229. See also *Sohrai Sao*, A.I.R. 1930 Pat. 247, 124 I.C. 836, 31 Cr.L.J. 721, 9 Pat. 474. Where the accused committed murder because he suspected that his younger brother had been murdered by a person and the murderer had gone unpunished, this was no palliation of, or justification for, the accused's conduct in murdering the father of that person and the sentence of death was proper—*Nga Po U v. Emp.*, 37 Cr.L.J. 297, 160 I.C. 466, A.I.R. 1936 Rang. 38, 1936 Cr.C. 37. A Court must not pass the more severe sentence where circumstances of extenuation exist merely because the consequences of the crime have been more serious than in the ordinary case (i.e., where by the murder of a pregnant woman two lives were sacrificed)—*Nga Saw Maung v. Emp.*, A.I.R. 1937 Rang. 466, 172 I.C. 395, 39 Cr.L.J. 137.

In a case of murder, once the Court is satisfied that the murder has been committed and that the accused person has committed it, the question of sentence must be determined upon the gravity of the offence, irrespective of the circumstances whether the body has not been discovered—*Raggha*, 89 I.C. 903, A.I.R. 1925 All. 627, 26 Cr.L.J. 1431, 23 A.L.J. 821; *Ram Nath*, 93 I.C. 252, A.I.R. 1926 Oudh. 234, 27 Cr.L.J. 460, 1 Luck. 327; *Munda*, 32 Cr.L.J. 493 (495), 130 I.C. 331, A.I.R. 1931 Lah. 25, Ind. Rul. 1931 Lah. 267, 1931 Cr.C. 89. A Judge should not sentence a person accused of murder to transportation for life, instead of sentencing him to death, merely on the ground that the evidence is not strong enough to justify an irrevocable sentence. If the Court has any doubt as to the guilt of the accused it should acquit him—*Sohrai Sao*, A.I.R. 1930 Pat. 247, 124 I.C. 836, 31 Cr.L.J. 721, 9 Pat. 474; *Mosaddi*, A.I.R. 1933 Pat. 100, 13 P.L.T. 702, 11 Pat. 807, 1933 Cr.C. 253, 142 I.C. 841, 34 Cr.L.J. 427; *Gul Zaman v. Emp.*, A.I.R. 1939 Pesh. 47; *Mohsena Khatun v. Emp.*, A.I.R. 1939 Cal.

610, 43 C.W.N. 893; *Muhammad Murid Rind v. Emp.*, 38 Cr.L.J. 953 (1955), 170 I.C. 605, 30 S.L.R. 354, A.I.R. 1937 Sind 239, 10 R.S. 63. The strength of the evidence against the accused is a matter to be considered before but not after conviction. In case of a conviction of murder by assassination the sentence of transportation for life instead of to death on the ground that the evidence is not of a sufficiently convincing character to justify the latter punishment is utterly wrong—*Santokhi*, A.I.R. 1933 Pat. 149, 14 P.L.T. 82, 12 Pat. 241, 142 I.C. 474, 34 Cr.L.J. 349, 1933 Cr.C. 404 (S.B.). But see *Ma Shwe Yi*, 1924 Rang. 179, 81 I.C. 945, 25 Cr.L.J. 1121, 1 Rang. 751 and *Nga Khan*, A.I.R. 1936 Rang. 71 (75), 37 Cr.L.J. 463, 161 I.C. 574, 1936 Cr.C. 76, where it has been laid down that an accused person is entitled to the benefit of reasonable doubt in the matter of sentence as in the matter of conviction. When once the guilt of murder is proved the proper penalty to be is a matter for the discretion of the Judge and it is by no means true to say that merely because there is doubt as to which of several of the attackers inflicted the fatal blow, this is a sufficient ground for withholding the death sentence in the case of any or all of them. On the other hand, it is of course clear that those cases in which once it has been established that one person out of several took a leading part and the others a comparatively subsidiary part, the greater penalty may be inflicted upon the ring-leader and the lesser penalty upon those who took a comparatively subsidiary part—*Tun Khim U v. The King*, 40 Cr.L.J. 49 (51), 178 I.C. 298, A.I.R. 1938 Rang. 331. In cases where many persons are involved, the Court should hesitate to pass sentence of death on all of them and try to discriminate. Infliction of five sentences of death in one and the same case, is apt to fail of the effect which such sentences would otherwise have—*Nibharesh Mondal*, 39 Cr.L.J. 479, 174 I.C. 803, 66 C.L.J. 351, A.I.R. 1938 Cal. 295, 10 R.C. 726.

It is no part of the duty of a Sessions Judge to be influenced by public feeling. His duty is to administer the law. The law says that the proper sentence for murder is death and that whenever a person is convicted of an offence punishable with death, and the Court sentences him to any punishment other than death, the Court shall, in its judgment, state the reasons why the sentence of death was not passed. The state of public feeling is not an admissible reason for refraining from passing the sentence of death. Nor it is permissible to refrain from sentencing the murderers to death merely because their numbers exceeded the numbers of their victims. When four persons have together planned and executed the murder of a single person, each of them must be sentenced to death unless there are some legal reasons for not doing so—*In re Sambangi Lakshumanna*, 40 Cr.L.J. 249 (251), 179 I.C. 682, A.I.R. 1939 Mad. 109, 48 M.L.W. 730, 1938 M.W.N. 1166, (1938) 2 M.L.J. 1028.

Ordinarily Courts refrain from passing the capital sentence on a person who is convicted on an appeal against his acquittal—*Niamat*, 32 Cr.L.J. 51 (56), 127 I.C. 850, 31 P.L.R. 411, A.I.R. 1930 Lah. 409, Ind. Rul. 1931 Lah. 882, 1930 Cr.C. 469.

As a general rule, a sentence of death should not necessarily follow a conviction under sec. 396, I. P. C., and this section differs from sec. 302, I. P. C., in that respect. The rule under sec. 302 is that a sentence of death should follow unless reasons are shown for giving a lesser sentence. No such rule applies to sec. 396, I. P. C.—*Lal Singh v. Emp.*, 40 Cr.L.J. 132 (133), 178 I.C. 694, A.I.R. 1938 All. 625, 1938 A.L.J. 943, 1 I.R. 1938 All. 875.

Where strong language was used on both sides and the accused acted under the impulse of the moment, sentence of death should not have been passed upon him—*Inayat Khan*, 36 Cr.L.J. 1335, 158 I.C. 336, A.I.R. 1935 Lah. 94, 1935 Cr.C. 92, 16 Lah. 589. Where the crime was unpremeditated and committed in hot blood in the course of a dispute, the sentence of death is not called for—*Nga Mye*, 37 Cr.L.J. 181, 159 I.C. 902, A.I.R. 1935 Rang. 427, 1935 Cr.C. 1201. Where an accused commits murder while drunk as a result of provocation, however slight, a sentence of death may be reduced to transportation for life—*Nga Po Than v. The King*, 40 Cr.L.J. 67, 178 I.C. 431, A.I.R. 1938 Rang. 448.

Where the accused murders of young and helpless child, who is his own aunt's daughter, for the sake of her ornaments, nothing short of a sentence of death will satisfy the ends of justice—*Mittayi Ameer Sab v. Emp*, 1938 M.W.N. 34.

The deceased was a person of loose character and while living in her parents' village conceived from a stranger and came to the accused's house in a state of pregnancy. This was naturally resented by the accused who was her husband. She then gave birth to an illegitimate child in his house and he was chafed by his fellow villagers who "congratulated" him on the birth of a son. He then murdered his wife and caused grievous hurt to the illegitimate child. In these circumstances it was held that that was not a case in which the extreme penalty of the law should be imposed on him—*Kartar Singh v. Emp*, 39 Cr.L.J. 769 (771), 176 I.C. 666, A.I.R. 1938 Lah. 556, 40 P.L.R. 854. The accused was a man of 25 years. His conduct in the past was above reproach and he showed a great deal of forbearance in the way he behaved after both his wives left him. He took his second wife back when she returned to him without question, and there was no evidence at all that he ill-treated her in any way. He was a tea garden cooly and was a man of no education and low mentality. He was convicted under sec. 302, I. P. C., for murdering his second wife who again left him. He confessed that he committed the crime as he felt that he could not face his parents, his brothers and his sisters. Held that the ends of justice would be served by imposing the alternative sentence of transportation for life instead of the capital penalty—*Rama Koya*, (1939) 2 Cal. 518. Where a young girl of 15 killed her newly-born baby, a sentence of transportation for life appeared to be wholly inappropriate. In England it is always assumed that a girl who commits such a murder at such a time is hardly responsible for her actions, it being well known that the child-birth produces occasionally peculiar reactions in the mother. The High Court suggested that Government should reduce the sentence of transportation for life to a sentence for a short period—*Tahan v. Emp*, 39 Cr.L.J. 718, 176 I.C. 272, A.I.R. 1938 Lah. 473, 40 P.L.R. 23.

The accused was less than seventeen years old at the time of murder in which her mother and husband were chief actors. Though she failed to earn her pardon as an approver on account of subsequent retraction, her statement led to a successful investigation and to the conviction of the principal criminal. She served a considerable sentence and suffered by reason of the birth of her child in jail. The High Court held that there could not be a stronger case for the exercise of the prerogative of mercy—*Aziz Begum v. Emp*, 39 Cr.L.J. 16 (18), 171 I.C. 951, A.I.R. 1937 Lah. 689, 39 P.L.R. 391.

It is always difficult to assess the penalty when a man dies after being beaten or kicked. As soon as it is found that the offence does not amount to culpable homicide, it is best to leave the death entirely out of account, and look only to the injury—*Shanmuga Kodumban*, 31 Cr.L.J. 477, 123 I.C. 43, 1930 M.W.N. 74. In *Bhusan v. Kanai*, 44 C.L.J. 208 some of the accused charged with an offence under the latter part of sec. 304 read with 149, I.P.C. were dealt with under sec. 562, Cr. P.C., on the ground of their age being below 21 years.

It is desirable to say quite clearly that where a Sessions Judge passes a more lenient sentence in contravention of the rulings of law which are laid down from time to time for the guidance of those dealing with criminal cases, the High Court will interfere and will enhance the sentence. At the same time where there was an absence of pre-meditation, not such as to make it wrong to pass the death sentence, but such as might well have weighed with other authorities in exercising clemency and three months elapsed during which the accused believed that his life would be spared, the sentence of transportation for life passed on the accused should not be enhanced. Legally there may be no justification for not imposing the death penalty. It does not, however, necessarily follow that the High Court must enhance the sentence in revision. It is recognised that a person who has, even wrongly, got the benefit of a lenient sentence at his trial, may sometimes be allowed to benefit by his good fortune, provided the sentence passed is one which is legal—*Nga Bo Thin v. Emp*, A.I.R. 1937 Rang. 254.

(255), 1937 Rang L.R. 169, 171 I.C. 285, 38 Cr.L.J. 1051, following *Mangal Naran*, A.I.R. 1925 Bom. 268, 87 I.C. 424, 26 Cr.L.J. 968, 49 Bom. 450, 27 Bom.L.R. 355 and *In re Gunduthalayan Thalian*, A.I.R. 1930 Mad. 446, 1930 Cr.C. 498, 127 I.C. 290, 31 Cr.L.J. 1193, 53 Mad 585, 58 M.L.J. 490; *Tun Khine U v. The King*, A.I.R. 1938 Rang. 331, 178 I.C. 298, 40 Cr.L.J. 49; *Nga Chit Tin*, A.I.R. 1939 Rang. 225 (238), 40 Cr.L.J. 725, 183 I.C. 145. See also *Gul Zaman v. Emp.*, A.I.R. 1939 Pesh. 47. The power to enhance sentences should be sparingly exercised by the High Court and sentences should be enhanced only in cases where the failure to enhance the sentence would lead to a serious miscarriage of justice. The mere fact that the High Court, had it been trying the case, might have imposed the capital sentence, is not a sufficient reason for enhancement—*Uttam Singh Sochet Singh v. Emp.*, 39 Cr.L.J. 502 (504), 174 I.C. 949, A.I.R. 1938 Lah. 260.

See also Note 1049.

72. Transportation:—A sentence of transportation for life means a sentence of transportation for the whole of the remaining period of the convicted person's natural life—*Nga Tha Byit v. Queen-Emp.*, (1893-1900) L.B.R. 13; *Po Kun v. The King*, A.I.R. 1939 Rang. 124 (126), 1939 Rang L.R. 44. Under sec. 19, I. P. C., it is competent to the Judge to award a sentence of transportation in lieu of a substantive term of imprisonment; but sec. 31, Cr. P. C., does not authorise the award of a sentence of transportation in lieu of the imprisonment awarded in default of payment of fine—*Kunhussa v. Queen*, 5 Mad. 28; *Emp. v. Nuran*, 1880 P.R. 17.

73. Imprisonment:—It is altogether inappropriate to add a fine to a substantial term of imprisonment. It is true that the Code sanctions either a term of imprisonment or a fine or both, and it is left to the discretion of the Court whether to inflict a sentence of imprisonment or a fine or both. But in practice, it can only be in very exceptional circumstances that it is suitable and appropriate to inflict a fine as well as a substantial term of imprisonment. In English practice there is hardly a case in which a substantial term of imprisonment has been inflicted as well as fine. It can only be suitable in cases where the Court thinks that the justice of the case will be met by inflicting a substantial fine, but at the same time thinks that a short term of imprisonment in addition will serve as a salutary lesson to the accused, or in cases where it is desired to compensate the complainant or in cases where the accused has profited financially by his misdeeds—*Islam v. King-Emp.*, 35 C.W.N. 519. Where the Statute lays down that for a certain offence the punishment shall be imprisonment, it means that the offender shall go to jail, and imprisonment till the rising of the Court is a clear evasion of that intention—*In re Assam Masaliarakath Kunhi Eara*, 30 Cr.L.J. 247, 114 I.C. 234, 1929 M.W.N. 114, A.I.R. 1929 Mad 226, Ind Rul 1929 Mad. 250, 29 M.L.W. 673, 56 M.L.J. 550.

The Subordinate Courts should ordinarily avoid passing sentences of imprisonment for short terms, especially on first offenders of immature age—*Tirtha*, 31 Cr.L.J. 1076, 126 I.C. 578, A.I.R. 1930 Lah. 424, 41 P.L.R. 660.

When the value of the articles stolen is trifling, even the previous conviction of the accused would not justify a sentence of 8 years' rigorous imprisonment—*Subba Valayan v. Emp.*, 1937 M.W.N. 552.

It is not illegal to order that rigorous imprisonment and simple imprisonment shall run concurrently—*Sheikh Badai Sahib v. Emp.*, 1937 M.W.N. 1334.

The act of nose-cutting is one which imports deliberate design of a particularly brutal and cruel character and should be adequately punished—*Ismail Umar v. Emp.*, 39 Cr.L.J. 928, 177 I.C. 647, A.I.R. 1938 Bom. 430, 40 Bom.L.R. 832, 11 R.B. 111, following *Abdul Rahiman*, 16 Bom. 580, Rat. Un. Cr.C. 577 and *Bhagwan v. Chhagan*, A.I.R. 1915 Bom. 120, 27 I.C. 552, 16 Cr.L.J. 168, 17 Bom.L.R. 68.

73A. Solitary Confinement:—The punishment of solitary confinement can be awarded only for offences under the Penal Code (see sec. 73, I. P. C.) and not for offences under Special or Local Acts—*Hurnarain*, 20 P.R. 1870; *Manauar*, 4 P.R. 1875.

Thus, a person is not liable to a sentence of solitary confinement, if he is convicted of an offence under sec. 35 of the Excise Act—*Gurdu Singh*, 17 P.R. 1889 or under sec. 48 of the Post Office Act—*Mukh Ram*, 24 P.R. 1879 or under sec. 19 of the Arms Act—*Nazir Singh*, 25 Cr.L.J. 120, A.I.R. 1924 Lah. 667 or under sec. 22 of the Criminal Tribes Act (III of 1911)—*Bidha*, 46 All. 114.

Again, solitary confinement can be awarded only as part of a substantive sentence of imprisonment—*Umar Singh*, 20 P.R. 1869; and not when such imprisonment is awarded in default of payment of fine—*Jita*, 26 P.R. 1873; *Jamdad*, 53 P.R. 1887; or in default of furnishing security—*Kundan*, 36 All. 195. Solitary confinement cannot be awarded in default of payment of fine—*Bunsi*, 9 P.R. 1882.

But it is not illegal to award solitary confinement as part of an imprisonment awarded in lieu of whipping under sec. 395 of this Code—*Gaman*, 14 P.R. 1899; nor is it illegal to impose solitary confinement as part of a sentence in a summary trial under Chap. XXII—*Annu*, 6 All. 83.

74. Sec. 75, I. P. C.:—A Magistrate in passing an enhanced sentence under sec. 75, I. P. C. (for previous conviction) cannot exceed the powers limited by sec. 32 of the Cr. P. Code. Thus, where a person who was convicted of theft was sentenced by a second class Magistrate to undergo six months' rigorous imprisonment, and to further imprisonment for six months under sec. 75, I. P. C., on account of his previous conviction, held that the second class Magistrate had no power to so sentence under sec. 75 as to make the total sentence exceed six months—*Gulab*, Ratanlal 688

The mere fact that a man has been convicted many times, is not in itself sufficient reason for passing a heavy sentence on him for an offence which is trivial in itself—*Maulu*, A.I.R. 1929 Lah. 787, 121 I.C. 419, 1929 Cr.C. 419, 11 Lah. 115, 31 P.L.R. 217, 31 Cr.L.J. 264. When an accused person has had a certain number of previous convictions against him, it is not in accordance with enlightened ideas of the administration of criminal justice to sentence him to transportation for life for the commission of a subsequent offence which is trivial in itself. The previous record of the prisoner is, of course, an element which the Court should take into consideration in substantially increasing punishment for a subsequent offence—*Daya Ram*, A.I.R. 1929 Lah. 768, 30 P.L.R. 530, 30 Cr.L.J. 1082, 119 I.C. 429, 1929 Cr.C. 465.

75. Fine:—In imposing fine, regard is to be had to the nature of the offence and the means of the accused—*Subhan*, 18 P.R. 1878. When a fine is not suited to the nature of the offence and is beyond the means of the offender to pay it, it ought not to be inflicted merely in order that a further period of imprisonment in default should be suffered. If the substantive sentence awardable by the Magistrate is insufficient for the offence, the case should be sent for trial to a Court which can award adequate sentence—*Mohana*, 20 P.R. 1895. Whether a fine is severe or not depends to a large extent on the position and status of the person fined. What would be a severe punishment in one case would be practically none in another—*Jugal*, 33 Cr.L.J. 28, 134 I.C. 1129, 35 C.W.N. 436, A.I.R. 1931 Cal. 633, 1931 Cr.C. 833, Ind. Rul. 1932 Cal. 41.

A fine should not be imposed on an accused person which it is wholly impossible for him to pay without ruining himself and inflicting great hardship on his family. In inflicting a fine the possibility of payment should be borne in mind—*Abdulla*, 71 I.C. 998, 9 Lah.L.J. 271, 24 Cr.L.J. 278, A.I.R. 1924 Lah. 81; *Dip Chand*, 27 Cr.L.J. 480, 93 I.C. 704, 8 Lah.L.J. 113, 27 P.L.R. 199; *Dhanu*, 28 Cr.L.J. 865, 104 I.C. 705, A.I.R. 1928 Pat. 59, 9 Pat.L.T. 217.

No doubt the Court must look to the means of the accused person, his respectability, his standard of living and all similar matters in inflicting a sentence. But because a man may easily pay a fine, is no ground for ordering him to pay the maximum fine fixed by law, irrespective of whether the nature of the offence committed by him demands it or not—*Ganga Sagar*, 31 Cr.L.J. 83 (92), 120 I.C. 435, A.I.R. 1929 All. 919, 1930 A.L.J. 26.

Where a first class Magistrate, who was also vested with the powers of a Special Magistrate, convicted the accused under sec. 4 of the Emergency Powers Ordinance (II of 1932) and sentenced him to pay a fine of Rs. 1,500, signing the order as a first class

(255), 1937 Rang L.R. 169, 171 I.C. 285, 38 Cr.L.J. 1051, following *Mangal Naran*, A.I.R. 1925 Bom. 268, 87 I.C. 424, 26 Cr.L.J. 968, 49 Bom. 450, 27 Bom L.R. 355 and *In re Gunduthalayan Thalian*, A.I.R. 1930 Mad. 446, 1930 Cr.C. 498, 127 I.C. 290, 31 Cr.L.J. 1193, 53 Mad 585, 58 M.L.J. 490; *Tun Khine U v. The King*, A.I.R. 1938 Rang. 331, 178 I.C. 298, 40 Cr.L.J. 49; *Nga Chit Tin*, A.I.R. 1939 Rang 225 (238), 40 Cr.L.J. 725, 183 I.C. 145. See also *Gul Zaman v. Emp.*, A.I.R. 1939 Pesh. 47. The power to enhance sentences should be sparingly exercised by the High Court and sentences should be enhanced only in cases where the failure to enhance the sentence would lead to a serious miscarriage of justice. The mere fact that the High Court, had it been trying the case, might have imposed the capital sentence, is not a sufficient reason for enhancement—*Uttam Singh Sochet Singh v. Emp.*, 39 Cr.L.J. 502 (504), 174 I.C. 949, A.I.R. 1938 Lah. 260

See also Note 1049.

72. Transportation:—A sentence of transportation for life means a sentence of transportation for the whole of the remaining period of the convicted person's natural life—*Nga Tha Byit v. Queen-Emp.*, (1893-1900) L.B.R. 13; *Po Kun v. The King*, A.I.R. 1939 Rang. 124 (126), 1939 Rang.L.R. 44. Under sec. 19, I. P. C., it is competent to the Judge to award a sentence of transportation in lieu of a substantive term of imprisonment; but sec. 31, Cr. P. C., does not authorise the award of a sentence of transportation in lieu of the imprisonment awarded in default of payment of fine—*Kunhussa v. Queen*, 5 Mad. 28; *Emp v. Nuran*, 1880 P.R. 17.

73. Imprisonment:—It is altogether inappropriate to add a fine to a substantial term of imprisonment. It is true that the Code sanctions either a term of imprisonment or a fine or both, and it is left to the discretion of the Court whether to inflict a sentence of imprisonment or a fine or both. But in practice, it can only be in very exceptional circumstances that it is suitable and appropriate to inflict a fine as well as a substantial term of imprisonment. In English practice there is hardly a case in which a substantial term of imprisonment has been inflicted as well as fine. It can only be suitable in cases where the Court thinks that the justice of the case will be met by inflicting a substantial fine, but at the same time thinks that a short term of imprisonment in addition will serve as a salutary lesson to the accused, or in cases where it is desired to compensate the complainant or in cases where the accused has profited financially by his misdeeds—*Islam v. King-Emp.*, 35 C.W.N. 519. Where the Statute lays down that for a certain offence the punishment shall be imprisonment, it means that the offender shall go to jail, and imprisonment, till the rising of the Court is a clear evasion of that intention—*In re Assam Masaliarakath Kunh; Eara*, 30 Cr.L.J. 247, 114 I.C. 234, 1929 M.W.N. 114, A.I.R. 1929 Mad. 226, Ind. Rul. 1929 Mad. 250, 29 M.L.W. 673, 56 M.L.J. 550

The Subordinate Courts should ordinarily avoid passing sentences of imprisonment for short terms, especially on first offenders of immature age—*Tirtha*, 31 Cr.L.J. 1076, 126 I.C. 578, A.I.R. 1930 Lah. 424, 41 P.L.R. 660.

When the value of the articles stolen is trifling, even the previous conviction of the accused would not justify a sentence of 8 years' rigorous imprisonment—*Subba Valayan v. Emp.*, 1937 M.W.N. 552.

It is not illegal to order that rigorous imprisonment and simple imprisonment shall run concurrently—*Sheikh Badai Sahib v. Emp.*, 1937 M.W.N. 1334.

The act of nose-cutting is one which imports deliberate design of a particularly brutal and cruel character and should be adequately punished—*Ismail Umar v. Emp.*, 39 Cr.L.J. 928, 177 I.C. 647, A.I.R. 1938 Bom 430, 40 Bom L.R. 832, 11 R.B. 111, following *Abdul Rahiman*, 16 Bom. 580, Rat. Un Cr.C 577 and *Bhagwan v. Chhagan*, A.I.R. 1915 Bom. 120, 27 I.C. 552, 16 Cr.L.J. 168, 17 Bom L.R. 68.

73A. Solitary Confinement:—The punishment of solitary confinement can be awarded only for offences under the Penal Code (see sec. 73, I. P. C.) and not for offences under Special or Local Acts—*Hurnarain*, 20 P.R. 1870; *Manauwar*, 4 P.R. 1875.

Thus, a person is not liable to a sentence of solitary confinement, if he is convicted of an offence under sec. 35 of the Excise Act—*Gurdit Singh*, 17 P.R. 1889 or under sec. 48 of the Post Office Act—*Mukh Ram*, 24 P.R. 1879 or under sec. 19 of the Arms Act—*Nazir Singh*, 25 Cr.L.J. 120, A.I.R. 1924 Lah. 667 or under sec. 22 of the Criminal Tribes Act (III of 1911)—*Bidha*, 46 All. 111.

Again, solitary confinement can be awarded only as part of a substantive sentence of imprisonment—*Umar Singh*, 20 P.R. 1869; and not when such imprisonment is awarded in default of payment of fine—*Jita*, 26 P.R. 1873; *Jamdad*, 53 P.R. 1887; or in default of furnishing security—*Kundan*, 36 All. 195. Solitary confinement cannot be awarded in default of payment of fine—*Bunsi*, 9 P.R. 1882.

But it is not illegal to award solitary confinement as part of an imprisonment awarded in lieu of whipping under sec. 395 of this Code—*Gaman*, 14 P.R. 1899; nor is it illegal to impose solitary confinement as part of a sentence in a summary trial under Chap. XXII—*Annu*, 6 All. 83.

74. Sec. 75, I. P. C.—A Magistrate in passing an enhanced sentence under sec. 75, I. P. C. (for previous conviction) cannot exceed the powers limited by sec. 32 of the Cr. P. Code. Thus, where a person who was convicted of theft was sentenced by a second class Magistrate to undergo six months' rigorous imprisonment, and to further imprisonment for six months under sec. 75, I. P. C., on account of his previous conviction, *held* that the second class Magistrate had no power to so sentence under sec. 75 as to make the total sentence exceed six months—*Gulab*, Ratanlal 688.

The mere fact that a man has been convicted many times, is not in itself sufficient reason for passing a heavy sentence on him for an offence which is trivial in itself—*Maulu*, A.I.R. 1929 Lah. 787, 121 I.C. 419, 1929 Cr.C. 419, 11 Lah. 115, 31 P.L.R. 217, 31 Cr.L.J. 264. When an accused person has had a certain number of previous convictions against him, it is not in accordance with enlightened ideas of the administration of criminal justice to sentence him to transportation for life for the commission of a subsequent offence which is trivial in itself. The previous record of the prisoner is, of course, an element which the Court should take into consideration in substantially increasing punishment for a subsequent offence—*Daya Ram*, A.I.R. 1929 Lah. 768, 30 P.L.R. 530, 30 Cr.L.J. 1082, 119 I.C. 429, 1929 Cr.C. 465.

75. Fine:—In imposing fine, regard is to be had to the nature of the offence and the means of the accused—*Subhan*, 18 P.R. 1878. When a fine is not suited to the nature of the offence and is beyond the means of the offender to pay it, it ought not to be inflicted merely in order that a further period of imprisonment in default should be suffered. If the substantive sentence awardable by the Magistrate is insufficient for the offence, the case should be sent for trial to a Court which can award adequate sentence—*Mohana*, 20 P.R. 1895. Whether a fine is severe or not depends to a large extent on the position and status of the person fined. What would be a severe punishment in one case would be practically none in another—*Jugal*, 33 Cr.L.J. 28, 134 I.C. 1129, 35 C.W.N. 436, A.I.R. 1931 Cal. 633, 1931 Cr.C. 833, Ind. Rul. 1932 Cal. 41.

A fine should not be imposed on an accused person which it is wholly impossible for him to pay without ruining himself and inflicting great hardship on his family. In inflicting a fine the possibility of payment should be borne in mind—*Abdulla*, 71 I.C. 998, 9 Lah.L.J. 271, 24 Cr.L.J. 278, A.I.R. 1924 Lah. 81; *Dip Chand*, 27 Cr.L.J. 480, 93 I.C. 704, 8 Lah.L.J. 143, 27 P.L.R. 199; *Dhanu*, 28 Cr.L.J. 865, 104 I.C. 705, A.I.R. 1928 Pat. 59, 9 Pat.L.T. 217.

No doubt the Court must look to the means of the accused person, his respectability, his standard of living and all similar matters in inflicting a sentence. But because a man may easily pay a fine, is no ground for ordering him to pay the maximum fine fixed by law, irrespective of whether the nature of the offence committed by him demands it or not—*Ganga Sagar*, 31 Cr.L.J. 88 (92), 120 I.C. 435, A.I.R. 1929 All. 919, 1930 A.L.J. 26.

Where a first class Magistrate, who was also vested with the powers of a Special Magistrate, convicted the accused under sec. 4 of the Emergency Powers Ordinance (II of 1932) and sentenced him to pay a fine of Rs. 1,500, signing the order as a first class

Magistrate, the fine in excess of Rs 1,000 was held to be illegal and was remitted—*Ram Chandra*, A.I.R. 1933 Bom. 58, 34 Bom.L.R. 1676.

An order for payment of daily fine is illegal, in as much as it is an adjudication prospectively in respect of an offence which has not been committed when the order is passed—*Ram Krishna v. Mahendra*, 27 Cal. 565. See also *Husain v. Notified Area of Mahaba*, 49 All. 245; *Kashmiri Lal*, 43 All. 644; *Amir Hasan Khan*, 40 All. 569. There must be proof of a continuing offence before the jurisdiction of a Magistrate to make such an order arises—*Wazir Ahmad*, 24 All 309. Thus, under sec. 580 of the Calcutta Municipal Act (III of 1899) the failure to comply with an order of the Municipality on each subsequent day is a continuing offence, for which a daily fine can be imposed, and no fresh order is necessary to authorise the imposition of the daily fine—*Noni Lal v. Corporation of Calcutta*, 7 C.W.N. 853.

Where fine was imposed because it was represented to the Judge that a friend might pay it, it was held to be rightly imposed although it was contended later on that the accused, being unable to pay fine, would have to stay in jail for a long period.—*Rattan Lal v. Emp*, 38 Cr.L.J. 51, 165 I C 544, 9 R L 265.

Fine under other laws:—Under this Code and the Penal Code a Magistrate has power only to inflict fine up to Rs. 1,000—*In re Abdoor Rahaman*, 7 W.R. 37. But if an offence under any other law, e.g., under sec. 35 of the Companies Act, is proved, the Magistrate is bound to impose a fine of Rs. 500 in respect of each offence of issuing an unstamped share-certificate; and the fact that sec. 32 of this Code gives the Magistrate power to inflict only a fine of Rs 1,000 will not curtail the Magistrate's jurisdiction to impose a fine of more than Rs. 1,000 in a case where more than two unstamped share-certificates have been issued—*Moore*, 20 Cal. 676. So also, under sec. 12 of the Opium Act, the Magistrate can impose any amount of fine in lieu of confiscation, and his power is not limited by sec. 32 of this Code—*Maghan v. Rahim*, 23 Cr.L.J. 747 (Pat).

Joint fine:—A joint fine with terms of imprisonment in default, is plainly open to the objection that it is impossible to say whether either of the convicted persons is liable to suffer the entire term of imprisonment and for what proportion of the default. Such an order cannot be supported—*Safder Khan v. Gaya Municipality*, 39 Cr.L.J. 531, 175 I C. 176, A I R. 1938 Pat. 271. See also Note 84A

Refund of fine:—There is no provision in the Criminal Procedure Code, that on reversal of the sentence of fine the Crown must return the amount to anybody other than the accused, even if the amount had been paid by such other person. The proper assumption to make in such cases is that at the time of the payment of the fine all parties agreed that the money might be treated as the property of the accused—*Hiralal Jindani v. Official Assignee, Madras*, A.I.R. 1937 Mad 191, 1936 M.W.N. 1246, 166 I.C. 344, 1937 M. Cr. C. 6, (1937) 1 M.L.J. 130, 45 M.L.W. 222, 38 Cr.L.J. 199.

76. Whipping:—A second class Magistrate cannot pass a sentence of whipping under this Code, although he was empowered to do so under the old Code of 1872—*Bhagvanta*, 7 Bom. 303.

A sentence of whipping is not appropriate in the case of a person holding a respectable position in life—*Bhagel*, 1907 P.W.R. 9.

Whipping cannot be awarded in default of payment of fine—*Budhu v. Bahu*, 5 P.R. 1866; nor can fine be awarded in addition to whipping—*Thusku*, 6 C.P.L.R. 34.

A sentence of whipping should be imposed when there is an aggravation in the commission of the offence. Whipping should not be added to imprisonment where the hurt caused (in a case of robbery) was very slight and negligible and the accused was a young man and a first offender—*Badri Prasad*, 44 All. 538, 20 A.L.J. 388, 23 Cr.L.J. 274. See also *Udharam*, 33 Cr.L.J. 900, 140 I C. 23, A I R. 1932 Sind 143, 1932 Cr.C. 587, Ind. Rul 1932 Sind 170. Where dacoity is attended with acts of great cruelty, a sentence of whipping may be properly inflicted in addition to a substantive sentence of transportation—*Ram Sahai*, 19 A.L.J. 610, 22 Cr.L.J. 397. Where the accused, after

using violence, committed unnatural offence upon a boy of 12 years, under the most revolting circumstances, a sentence of whipping would be eminently right and proper in addition to a substantive sentence of imprisonment—*Emp. v. Shera*, 37 Cr L J. 474, 161 I.C. 591, A.I.R. 1936 Lah. 256, 1936 Cr.C. 205.

Where a man is deemed to have committed an offence he is, in the eye of law, to be treated as though he had committed the offence and is liable to all the pains and penalties which the commission of the offence may bring upon him. If the commission of an offence makes the man, who commits it, liable to whipping, he must also be regarded as liable to whipping if he is to be deemed to have committed the offence, e.g., under sec. 114, I. P. C., read with the substantive section—*Emp. v. Maung Pu Kai*, A.I.R. 1929 Rang. 203, 7 Rang. 329, 118 I.C. 637, 30 Cr L J. 961, 1929 Cr C. 177.

Rules for whipping:—"The Governor-General in Council observes that the extent to which the punishment of whipping is inflicted in the several provinces is a matter which should, even during ordinary times when the circumstances of the country are normal, be carefully watched by Local Governments and Administrations, in order that any tendency towards an indiscriminate or ill-judged resort to this form of punishment may be promptly checked. This is especially necessary during times of scarcity, when, from causes more or less beyond their own control, the poorer classes of the population are driven to the commission of petty crimes. The policy of largely resorting, during times of agricultural distress, to whipping as a punishment for petty thefts and other offences of a similar nature, may, no doubt, be defended by the argument that it would be impossible at such times to provide accommodation for all offenders in the jails. But if due and timely provision is made for employment of the industrious poor, there need be no excessive resort to punitive measures of this kind; and the Governor-General in Council trusts that if such times should unfortunately recur, the matter will be watched with especial care by the Local Governments and Administrations concerned, and that it may be found possible to distinguish between those members of the criminal classes who take advantage of seasons of public trouble to prey upon their neighbours, and the honest labouring poor who are driven by sheer necessity to grain-pilfering or similar offences. For the former, the punishment should be sharp and effective, and whipping may often be most appropriate. The latter should be considerably dealt with, and put in the way of relief after such punishment of fine or moderate imprisonment as may seem to be appropriate in each case"—*Proceedings of the Government of India, Home Department (Judicial)*, 11th January, 1882.

"The Judges of the Punjab Chief Court have invited the attention of the Criminal Courts to the following points—(1) that persons in respectable position of life should not ordinarily be whipped; (2) that the punishment should be inflicted only in case of false evidence, extortion and forgery under any exceptional circumstances; (3) that whipping, as an additional punishment, should only be ordered when a further deterrent appears to be really called for in the interests of justice; (4) that special care and judgment should be exercised in times of agricultural scarcity and distress"—*Punjab Cir. LXII*, p 280.

76A. Joint actors:—As a general principle of criminal law, all who participate in the commission of an offence are severally responsible, as though the offence had been committed by each of them acting alone. Consequently, although as joint actors in the commission of the crime, they may be jointly tried and convicted, each must be separately punished as if he had committed the offence alone—*Amrita Lal Bose v. Corporation of Calcutta*, 41 Cal. 1025 (1063).

33. (1) The Court of any Magistrate may award such term of imprisonment in default of payment of fine as is authorized by law in case of such default:

Power of Magistrates to sentence to imprisonment in default of fine.

Provided that—

Proviso as to certain cases.

(a) the term is not in excess of the Magistrate's powers under this Code:

(b) in any case decided by a Magistrate where imprisonment has been awarded as part of the substantive sentence, the period of imprisonment awarded in default of payment of the fine shall not exceed one-fourth of the period of imprisonment which such Magistrate is competent to inflict as punishment for the offence otherwise than as imprisonment in default of payment of the fine.

(2) The imprisonment awarded under this section may be in addition to a substantive sentence of imprisonment for the maximum term awardable by the Magistrate under section 32.

77. Imprisonment in default of fine:—The imprisonment in default of payment of fine need not always be proportionate to the amount of fine imposed—*Nga Chin*, 1 Bur. S. R. 483.

Where the sentence is one of *imprisonment and fine*, this section should be read with sec. 65, I. P. Code; and where the sentence is one of *fine only*, it should be read with sec. 67, I. P. Code.

The rule of sec. 262 of Act X of 1882 applies to substantive sentences of imprisonment. In cases of simple imprisonment ordered as a process for enforcement of payment of fine, the general rules of secs 32 and 33 are applicable, and the principle of sec. 67, I. P. C. (read with Act VIII of 1882) is unaffected by Chap. XXII of Act X of 1882—*Emp. v. Osghar Ali*, 6 All 61.

Clause (a) of the proviso applies where the sentence is one of *fine only*, and in such a case the Magistrate may award imprisonment, in default of fine up to the limit of his powers.

Clause (b) applies where the accused is sentenced to imprisonment *as well as fine*, and in such cases, this section does not authorise the Magistrate to pass a sentence of imprisonment in default of payment of fine in excess of the term prescribed by sec. 65, I. P. Code (*i.e.*, one-fourth of the maximum term of imprisonment fixed for the offence)—*Venkatesagadu*, 10 Mad. 165 (F.B.) (overruling 1 Mad. 277); 10 Mad. 166 (Note); See also *Darba*, 1 All. 461.

Sub-section (2) of this section does not apply to cases where the substantive sentence is one of fine only—*Nga Sen*, 1 Bur S R. 486.

Section 113 of the Railway Act (IX of 1890), which directs that on failure to pay on demand excess charge and fare when due, the amount shall on application be recovered by a Magistrate as if it were a fine, does not authorize the Magistrate to impose imprisonment in default. The excess charge and fare referred to in the section is not a fine, though it may be recovered as such—*Kutrapa*, 18 Bom. 440; *Subramania Ayyar*, 20 Mad. 385.

34. The Court of a Magistrate, specially empowered under section 30, may pass any sentence authorised by law, except a sentence of death or of transportation for a term exceeding seven years or of imprisonment for a term exceeding seven years.

Higher powers of certain District Magistrates.

78. Under sec. 34 read with sec. 33, a District Magistrate specially empowered under sec. 30, in trying a case under sec. 471, I. P. C., can pass a sentence of imprisonment for one year and nine months (*i.e.*, one-fourth of 7 years) in default of payment

of fine—*Karam Chand*, 35 P.R. 1885. A Magistrate exercising powers under this section is competent, under sec. 59, I. P. C., to pass a sentence of transportation for seven years instead of awarding a sentence of imprisonment—*In re Bodhoo*, 9 W.R. 6.

It is clear that so far as imprisonment is concerned the period of seven years must not be exceeded, but any sentence authorized by law under sec 32 (2) Cr P. C., is permissible. A sentence of imprisonment may therefore be combined with one of whipping if the offence is punishable with whipping in addition to other punishment to which the offender may be liable under the I. P. C. Therefore a Magistrate who is specially empowered under sec. 30, Cr. P. C., may pass a sentence of whipping in addition to the maximum sentence of seven years' imprisonment for the same offence—*Nga Kyan v. Emp.*, A.I.R. 1937 Rang. 183, 14 Rang. 662, 168 I.C. 975, 38 Cr L.J. 670, 9 R.R. 380.

Sentences which Courts and Magistrates may pass upon European British subjects.

34A. Notwithstanding anything contained in sections 31, 32 and 34—

(a) no Court of Sessions shall pass on any European British subject any sentence other than a sentence of death, penal servitude, or imprisonment with or without fine, or of fine; and

(b) no District Magistrate or other Magistrate of the first class shall pass on any European British subject any sentence other than imprisonment which may extend to two years or fine which may extend to one thousand rupees or both.

This section has been added by section 7 of the Criminal Law Amendment Act XII of 1923. Under the old law, the sentences that could be awarded by Magistrates of the first class, District Magistrate and Court of Session in the case of European British subjects were limited to three months' imprisonment and a fine of Rs 1,000; six months' imprisonment and a fine of Rs 2,000; and one year's imprisonment and unlimited fine, respectively. These restrictions are now removed. "The Bill proposes that so far as sentences of death, penal servitude, or imprisonment with or without fine, or of fine only are concerned, the powers of those officers shall be identical in the case of European British subjects and Indian British subjects, except as regards Magistrates who have been specially empowered under sec 30 of the Code. Such Magistrates will only be able to pass those sentences on European British subjects which could be passed by ordinary first class Magistrates. Such Magistrates will, however, have power to try European British subjects for the same additional offences as they are able to try Indian subjects under their special powers"—*Statement of Objects and Reasons*, Para 8 (iii).

This section further shows that an European British subject shall not be punished with whipping.

Although there is still some privilege as regards the Courts by which a European British subject can be tried, there is practically no privilege with regard to sentence—*Mrs. Rego v. Emp.*, A.I.R. 1933 Nag 136 (146), 143 I.C. 17, 1933 Cr C 610, 34 Cr L.J. 505, 29 N.L.R. 251.

35. (1) When a person is convicted at one trial of two or

more * * * offences, the Court may, subject to the provisions of section 71 of the Indian Penal Code, sentence him, for such offences, to the several punishments prescribed therefor which such Court is competent to inflict; such punishments, when consisting of imprisonment or transportation, to commence the one after the expiration of the other in such order as the Court

Sentence in cases of conviction of several offences at one trial.

may direct, unless the Court directs that such punishments shall run concurrently.

(2) In the case of consecutive sentences, it shall not be necessary for the Court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to inflict on conviction of a single offence, to send the offender for trial before a higher Court:

Provided as follows:—

(a) in no case shall such person be sentenced to imprisonment for a longer period than fourteen years;

(b) if the case is tried by a Magistrate (other than a Magistrate acting under section 34) the aggregate punishment shall not exceed twice the amount of punishment which he is, in the exercise of his ordinary jurisdiction, competent to inflict.

(3) For the purpose of appeal, *the aggregate of consecutive sentences* passed under this section in case of convictions for several offences at one trial shall be deemed to be a single sentence.

Explanation—Separable offences which come within the provisions of section 71 of the Indian Penal Code are not distinct offences within the meaning of this section.

(Omitted)

A breaks into a house with intent to commit theft and steals property therein. A has not committed distinct offences.

(Omitted)

78A. Change:—This section has been amended by sec. 7 of the Cr. P. Code Amendment Act, XVIII of 1923. In sub-sec. (1) the word 'distinct' has been omitted and the italicised words have been added; in sub-sec. (3), the words "aggregate of consecutive" have been substituted for the word "aggregate"; and the *Explanation* and *Illustration* have been omitted.

"The existing Explanation and Illustration to sec. 35 have occasioned considerable misunderstanding. It is, therefore, proposed to omit them and state definitely that sec. 35 must be read subject to sec. 71, I. P. C. It is also declared that aggregate sentences passed under sec. 35 in case of conviction for several offences at one trial shall be deemed to be a single sentence for the purpose of appeal, if they run consecutively."—*Statement of Objects and Reasons* (Bill 3 of 1914).

Section 71, I. P. C. :—Section 71 of the Indian Penal Code provides as follows :—

"Where anything which is an offence is made up of parts any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such offences, unless it be so expressly provided.

"Where anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, or

where several acts, of which one or more than one would by itself or themselves constitute an offence, constitute, when combined, a different offence,

the offender shall not be punished with a more severe punishment than the Court which tries him could award for any one of such offences."

In all other cases (e.g., where the offences are independent of each other), the Court can pass separate sentence for each of the offences, under sec. 35 of the Cr. P. Code.

"Section 35 has been materially altered by the recent amendment of the Code. Under the present Code no reference is made to *distinct* or *separable* offences, and it is not necessary to consider whether the two offences are distinct offences. For the application of sec. 35 we have now only to consider whether the offences are of the nature described in sec. 71, I P. Code, so that the punishment for more than one of the offences is forbidden by that section"—*Kanchan*, 41 C.L.J. 563, 26 Cr.L.J. 1253, 88 I.C. 997; *Hanma Timma*, 30 Bom.L.R. 383, 29 Cr.L.J. 544; *Bhawan Surji*, 37 Cr.L.J. 553 (555), 162 I.C. 283, A.I.R. 1936 Bom. 172, 38 Bom.L.R. 164, 60 Bom. 627 (633), 1936 Cr.C. 364, 8 R.B. 405; *Bajinath Singh Attar Singh v. Emp.*, 40 Cr.L.J. 466, 181 I.C. 45, A.I.R. 1939 Sind 76; *Mi Hlwa*, 12 Rang. 419, 154 I.C. 75, A.I.R. 1934 Rang. 338, 1934 Cr.C. 1248, 36 Cr.L.J. 460, 7 R. Rang. 255; *Nga Paw Din v. The King*, 39 Cr.L.J. 607 (608), 175 I.C. 515, A.I.R. 1938 Rang. 138, 1938 Rang. 63. See also *Piru Rama*, 49 Bom. 916, 27 Cr.L.J. 113, 91 I.C. 689, A.I.R. 1926 Bom. 64; *Pandu Avachut*, A.I.R. 1928 Bom. 141, 108 I.C. 512; *Sothavalu v. Rama Kone*, A.I.R. 1933 Mad. 338, 1933 Cr.C. 441, 142 I.C. 31, 52 Mad. 481; *Malu*, 23 Bom. 706, 1 Bom.L.R. 142 and *Sarat*, 37 C.L.J. 171, 24 Cr.L.J. 851, 74 I.C. 1043, A.I.R. 1923 Cal. 408, have been rendered obsolete by this amendment.

Cases under sec. 71, I. P. C.:—In awarding punishment under sec. 71, I. P. C., in case of convictions for several separable offences, falling within the purview of the section, it is illegal to impose a sentence for each offence—*Nilmony*, 16 Cal. 442; *Keamuddi*, 51 Cal. 79; *Mithoo Sing v. Gopal Lal*, 3 C.W.N. 761; *Bhagwan*, 4 P.R. 191. Thus, the offence of being members of an unlawful assembly with the common object of committing an offence, and the actual commission of that offence, may be considered as separate and distinct offences; but having regard to the provisions of sec. 71, I. P. Code, a person convicted of such offences would not be liable to separate punishment for each offence—*Sarat Chandra*, 37 C.L.J. 171, 24 Cr.L.J. 851, A.I.R. 1923 Cal. 408, following *Bhup Sing*, 8 C.W.N. 305 (rioting and criminal trespass), and *Alim Sheikh v. Shahzada*, 8 C.W.N. 483 (wrongful confinement and rioting). This ruling has been rendered obsolete by the new amendment. Vide *Kanchan*, 41 C.L.J. 563, 26 Cr.L.J. 1253. Such is also the case with *Ramdhal*, 3 C.W.N. 174, *Alim Sheikh v. Shahzada*, 8 C.W.N. 483 and *Amiruddin v. Emp.*, 27 Cr.L.J. 232, 92 I.C. 216, 40 C.L.J. 306, A.I.R. 1925 Cal. 217. Vide *Fattar Bop*, 31 C.W.N. 691. So also, it is improper to pass separate sentences upon the accused both for rioting and theft, when the former offence is but an element of the latter—*Mithoo v. Gopal*, 3 C.W.N. 761. If a person abducts a woman with intent to commit rape, and then actually commits rape, he cannot be awarded separate sentences under secs. 366 and 376, I. P. C. The sentence under sec. 366, I. P. C., will be set aside—*Imam*, A.I.R. 1926 Lah. 212, 27 Cr.L.J. 338. Where an accused is charged under sections 121 and 121A of the I. P. Code in respect of a single speech he will be liable to one punishment only, even if he is convicted of both the offences charged—*Hasrat Mohani*, 24 Bom.L.R. 885, A.I.R. 1922 Bom. 284. The Bombay High Court holds in some other cases that though a Court in awarding punishment under the provisions of sec. 71, I. P. C., should pass one sentence for either of the offences and not a separate one for each offence, still if two sentences are passed and the aggregate of them does not exceed the punishment provided by law for any one of the offences, or the jurisdiction of the Court, it would be an irregularity only and not an illegality—*Malu*, 23 Bom. 706 (F.B.); *Piru Rama*, 49 Bom. 916, 27 Cr.L.J. 113, A.I.R. 1926 Bom. 61; *Bana*, 17 Bom. 260 (F.B.). The Allahabad High Court likewise holds that it is not illegal to pass separate sentences for all the offences, but the amount of punishment should not be heavier than that which the Court can inflict for any one of the offences—*Wazir*, 10 All. 58.

Where the offences are independent of each other, e.g., the offence of house-breaking at night with intent to commit theft (sec. 457, I. P. C.) and the offence of theft of ornaments in a dwelling house (sec. 380, I. P. C.), the case does not fall under sec. 71, I. P. Code, and separate sentences can be passed for the two offences, the one sentence to commence after the expiration of the other—*Kanchan*, 41 C.L.J. 563, 88 I.C. 997, 26 Cr.L.J. 1253, A.I.R. 1925 Cal. 1015; *Bajinath Singh Attar Singh v. Emp.*, I.L.R. 1939 Kar. 378, 40 Cr.L.J. 466, 181 I.C. 45, A.I.R. 1939 Sind 76, 11 R.S. 202; *Shaikh Idris v. Emp.*, 40 Cr.L.J. 751, 181 I.C. 217, A.I.R. 1939 Pat. 349, 1939 P.W.N. 35, 5 B.R. 907, 29 P.L.T. 736, 12 R.P. 121 where it is also laid down that the question is not of much practical importance as in an overwhelmingly large number of cases the punishment provided for any of these two offences will be sufficient and if the Court of Appeal finds that the trial Court has wrongly passed two separate sentences but the sentences taken together are not excessive, they can be consolidated. See also *Ajudhia*, 2 All. 644; *Zar Singh*, 10 All. 146 (In these cases the change in the law has been very fully explained). For contra see *Mt. Champa Pasin v. Emp.*, A.I.R. 1928 Pat. 326, 108 I.C. 81, 29 Cr.L.J. 325. *Q.-E. v. Mahe*, 23 Bom. 706 is no longer good law. So also, the offence of possessing illicit liquor and the offence of possessing apparatus for manufacturing such liquor, are quite distinct offences for which separate sentences can be passed—*Padu*, 52 Bom. 277, 30 Bom.L.R. 378, 29 Cr.L.J. 412. In this case Fawcett, J., has used the word 'distinct' obviously to mean that the case does not fall under sec. 71, I. P. Code. Separate sentences should also be passed for offences under secs. 37 and 30 (d), Excise Act—*Emp. v. M. Hliwa*, A.I.R. 1934 Rang. 338, 36 Cr.L.J. 460, 154 I.C. 75, 12 Rang. 419, 1934 Cr.C. 1248; and under secs. 353 and 225, I. P. Code, as the provisions of sec. 71, I. P. Code do not apply to these offences—*Zarkhan Nurkhan v. Emp.*, A.I.R. 1940 Pesh. 10. So again, consecutive sentences can be imposed where a person is convicted of receiving stolen property under sec. 411, I. P. Code, and of concealing other stolen property under sec. 414, I. P. Code; sec. 71, I. P. Code, does not apply to the case—*Hanna Timma*, 30 Bom.L.R. 383, 29 Cr.L.J. 544, 109 I.C. 368, A.I.R. 1928 Bom. 145. A person who steals a bullock and subsequently kills it for food is, therefore, guilty of both theft and mischief and a separate sentence can be passed for each offence—*Nga Paw Din. v. Emp.*, 39 Cr.L.J. 607, 175 I.C. 515, 1938 Rang.L.R. 63, 10 R.R. 503, A.I.R. 1938 Rang. 138; *Bhawan Surji*, 37 Cr.L.J. 553, 60 Bom. 627, 162 I.C. 283, A.I.R. 1936 Bom. 172, 38 Bom.L.R. 164, 1936 Cr.C. 364, 8 R.B. 405, dissenting from *Ramla Ratanji*, 5 Bom. L.R. 460, *Hussain Buksh v. Emp.*, 3 Pat. 804, A.I.R. 1925 Pat. 34, 84 I.C. 34, 26 Cr.L.J. 277, 7 P.L.T. 36, *Bichuk Ahur v. Anhuck Bhoonea*, 6 W.R. 5 (Cr.), *Genya*, 1877 Rat. Un. Cr. C. 129 and approving *Krishna*, 1889 Rat. Cr. C. 430. The offence of forgery and the offence of using a forged document as genuine are separate offences, and separate sentences may be passed on an accused person who has been convicted at one trial for both—*Sriramulu*, 52 Mad. 532, 56 M.L.J. 554, A.I.R. 1929 Mad. 450. Imposition of separate sentences are illegal where the acts constituting the offences under secs. 354 and 342, I. P. C., form part of the same transaction as constituted the abatement of rape alleged against the same accused—*Champa Pasin*, 29 Cr.L.J. 325 (332), 108 I.C. 81, A.I.R. 1928 Pat. 326. When proved facts in the case established two distinct offences falling under secs. 356 and 376, I. P. C., the accused can be convicted separately for both offences—*Tek Singh*, 29 Cr.L.J. 248, 107 I.C. 388. Separate sentences can be awarded when the accused is convicted of two separate and distinct offences of dacoity—*Nga Po Nyein*, 35 Cr.L.J. 1161, 150 I.C. 747, A.I.R. 1934 Rang. 122, 1934 Cr.C. 715. Acts done in pursuance of the conspiracy cannot be separately punished unless these acts are separately charged and particularized as required by the Code—*Karamalli Gulamalli*, 40 Cr.L.J. 118 (121), A.I.R. 1938 Bom. 481, I.L.R. 1939 Bom. 42, 40 Bom.L.R. 1092. Where the accused's proved connection with the specific offence is only through the general conspiracy and he has already received a sentence of two years' rigorous imprisonment for his part in the general conspiracy, there should be no additional sentence on the cheating charge—*Solomon Ezekiel v. Emp.*, 41 Cr.L.J. 255, 186 I.C. 171, A.I.R. 1939 Cal. 376, 69 C.L.J. 298.

The offence of voluntarily causing hurt or of voluntarily causing grievous hurt obviously can be committed without the commission of the offence of rioting and in like manner, rioting can be committed without commission of the two other mentioned offences. Therefore, there has been a general agreement amongst all the High Courts except that of Lahore that if a person is convicted of rioting and of a substantive offence of hurt of some kind, he can be awarded separate sentences even when the common object of the unlawful assembly is to commit assault—*In re Ponniah Lopes*, 35 Cr.L.J. 1226, 57 Mad 643, 150 I.C. 977, 1934 M.W.N. 8, 39 M.L.W. 566, A.I.R. 1934 Mad. 81, 1934 Cr.C. 684, 66 M.L.J. 572; *Sonthavalau v. Rama Kone*, 34 Cr.L.J. 273, 142 I.C. 31, 56 Mad. 481, 37 M.L.W. 250, Ind. Rul 1933 Mad. 180, 1933 M.W.N. 254, 64 M.L.J. 314, A.I.R. 1933 Mad. 338, 1933 Cr.C. 441; *Mohur Mir*, 16 Cal. 725; *Ram Anugatha Singh*, 18 I.C. 402, 40 Cal. 511, 14 Cr.L.J. 66; *Q-E. v. Bana Punja*, 17 Bom. 260; *Q-E. v. Dungar Singh*, 7 All 29, 1884 A.W.N. 220; *Q-E. v. Ram Sarup*, 7 All 757, 1885 A.W.N. 195 *Piru Rama*, 27 Cr.L.J. 113, 91 I.C. 689, 27 Bom.L.R. 1371, 49 Bom. 916, A.I.R. 1926 Bom. 64; *Fatiar Bap*, 31 C.W.N. 691; *Kapil v. Rabbani*, 41 C.L.J. 471, 26 Cr.L.J. 1297, 89 I.C. 241. The contrary view was taken by the Lahore High Court in *Bishna*, A.I.R. 1922 Lah. 405, 73 I.C. 517, 24 Cr.L.J. 629; *Bhagawan Singh*, 4 P.R. 1901, 52 P.L.R. 1901; *Mangal Singh*, 38 I.C. 756, 31 P.R. 1916 (Cr.), 18 Cr.L.J. 372 and *Manek Chand*, 27 Cr.L.J. 834, 95 I.C. 754, A.I.R. 1926 Lah. 581. The same High Court, however, dissented from the above view in *Ali Akbar*, 30 Cr.L.J. 575, 116 I.C. 216, Ind. Rul 1929 Lah. 472, A.I.R. 1929 Lah. 670, where *Piru Rama*, was followed and *Bhagawan Singh* was dissented from. It was also laid down there that in practice it is undoubtedly better to give a single sentence for all the offences or order the sentences to run concurrently. The Peshwar Court holds that the provisions of sec. 71, I. P. Code, are applicable to the offences under secs. 147 and 353, I. P. Code and as the offences fall within two separate definitions of law they cannot be punished with a more severe punishment than the Court can award for any one of them—*Zarkhan Nurkhan v Emp*, A.I.R. 1940 Pesh 10. The ruling reported in 4 C.W.N. 245 (*Hriday v. Jagananda*) seems no longer to be good law.

Separate sentences passed upon persons for the offences of rioting and hurt of any kind are not legal where it is found that such persons individually did not commit any act which amounted to voluntarily causing hurt, but were guilty of that offence under section 149, I. P. Code—*Nilmony Poddar*, 16 Cal. 442 (F.B.). The amendment of sec 35, Cr P C, in 1923 in no way touches the authority of the Full Bench decision. Now the view expressed above in the Full Bench case has been adopted by the High Courts of Patna and Madras—*Kitabdi*, 35 C.W.N. 184, 32 Cr.L.J. 890, 132 I.C. 247, A.I.R. 1931 Cal 450, 1931 Cr.C. 602; *Boja Singh*, 8 Pat 271, 120 I.C. 311, 31 Cr.L.J. 83, 10 P.L.T. 353, A.I.R. 1929 Pat 263, Ind. Rul 1930 Pat. 23; *Krishna Ayyar*, 49 I.C. 337, 20 Cr.L.J. 145, 24 M.L.T. 96, 1918 M.W.N. 526, 8 M.L.W. 225; *In re Ponniah Lopes*, 35 Cr.L.J. 1226, 150 I.C. 977, 1934 M.W.N. 8, 66 M.L.J. 572, 39 M.L.J. 566, A.I.R. 1934 Mad 388, 1934 Cr.C. 684, 57 Mad 643; *Mekraj Ali Sahib*, A.I.R. 1939 Mad. 787, 184 I.C. 452, 12 R.M. 456, 50 M.L.W. 918, 1939 M.W.N. 609, (1939) 2 M.L.J. 36. See *Kiamuddin Kartkar*, 28 C.W.N. 317, 51 Cal. 79, 81 I.C. 593, A.I.R. 1924 Cal. 771, 25 Cr.L.J. 945, where it was further held that the sentences were illegal, even though they were made to run concurrently. The Bombay High Court took a different view in *Bona Punjab*, 17 Bom. 260, which was confirmed in *Peru Rama*, 91 I.C. 689, 49 Bom. 916, A.I.R. 1926 Bom. 61, 27 Cr.L.J. 113. The Oudh Chief Court followed its previous decisions and the decision of the Bombay High Court in 17 Bom. 260. Vide *Raghubar v King-Emp*, 40 Cr.L.J. 217, 179 I.C. 461, 1939 O.W.N. 27, 1939 A.W.R. (C.C.) 14, following *Maphal Singh v. King-Emp*, 17 O.C. 184, 25 I.C. 633, 1 O.L.J. 328, 15 Cr.C. 625, A.I.R. 1914 Oudh 205 and *Sheo Nath v King-Emp*, 3 O.W.N. 92 (Sup), 97 I.C. 804, 27 Cr.L.J. 1172.

79. Scope of Section:—'Convicted'.—This section applies only to convictions for offences; it does not apply to imprisonment under sec. 123—*Kanki*, 5 Bom. L.R. 26; *Tukaram*, 4 Bom.L.R. 876. Therefore, it is illegal for a Magistrate to direct

under this section that a sentence of imprisonment for an offence should take effect after the expiry of the sentence which the accused may be undergoing for default of furnishing security for good behaviour—*Pichari Anthu*, 16 Cr.L.J. 622, 30 I.C. 446 (Mad.) ; *Joghi*, 31 Mad 515. The order is also illegal under sec. 120.

This section is not restricted to cases where the several punishments are all of the same kind, i.e., all the sentences of imprisonment or all are sentences of transportation. It covers cases of the description where one of the punishments is imprisonment while the other is transportation—*Khokua*, 21 C.W.N. 608, 17 Cr.L.J. 238, 23 C.L.J. 596.

80. One trial:—This section has reference only to the conviction of an accused person of two or more offences at one trial. It does not apply to sentences passed at different trials—*Q. v. Puban*, 7 W.R. 1 ; *In re Daulatbai*, 3 All 305 ; *Thakur*, 1881 A.W.N. 23 ; *Kamal*, 20 C.W.N. 1300 ; *Makbul Husain*, 11 A.L.J. 263 ; *Emperor v. Daulli*, 47 All. 59. Thus, it does not include the case of separate trials held on the same day for separate offences committed by the same accused—*Venkatesadu*, 2 Weir 30. But in *Emp. v. Mahomed Isaf*, 10 I.C. 769, 13 Bom.L.R. 200, 12 Cr.L.J. 24, a Magistrate convicted the accused of two offences of cheating in separate trials concluded on the same day and ordered the sentences to run concurrently. Held that as the two offences in question could have been tried jointly under sec. 234, Cr. P. C., the order was not illegal. Vide *Mahadeo*, 27 Cr.L.J. 807 (811), 95 I.C. 471, A.I.R. 1926 Nag. 426, where the above ruling was quoted with approval. This section has no application whatever when a person is convicted in two or more separate trials, even though in all of them the complainant is the same and the offences are similar and they are concluded on the same date—*Sheo Narain*, 1910 P.L.R. 105, 11 Cr.L.J. 679.

See sec. 397 Cr. P. C.

81. Distinct offences:—By reason of the omission of the word 'distinct' the present section applies to all cases (except those which are covered by sec. 71, I P. Code) whether the offences are distinct or not. In all cases, the Court will be competent to inflict an aggregate punishment in excess of the punishment which it is ordinarily competent to inflict in respect of a single offence.

Owing to this change in the law the ruling in *Dhondi*, 8 Bom.L.R. 850, 4 Cr.L.J. 445, is overruled. In this case it was held that if the offences were not distinct, the trying Magistrate had no jurisdiction to pass enhanced sentence under the provisions of sub-section (2) and proviso (b).

82. "May sentence":—The words 'may sentence' do not mean that the Court must necessarily pass distinct sentences—*Mahomed*, Ratanlal 597 (*per* Jardine, J.). The use of the word *may* shows that this section only permits and does not make it obligatory on Courts to pass separate sentences in one trial—*Nga Kin*, L.B.R. (1872-1892) 261 ; *Ngakyn*, 1 Bur.S.R. 271. This view was dissented from in *Emp. v. Dharamdas*, 31 Cr.L.J. 143, 141 I.C. 280, 26 S.L.R. 416, A.I.R. 1933 Sind 9, Ind. Rul. 1933 Sind 46, 1933 Cr.C. 33 where it was held that in this section the word "may" not only conferred a power but also imposed the duty of putting it in use. The Rangoon High Court took the same view in *Mi Hluwa*, A.I.R. 1934 Rang. 338, 12 Rang. 419, 1934 Cr.C. 1248, 154 I.C. 75 where Ba U. J., observed: "S. 35, Criminal P. C., as it stands, in my opinion, means nothing more or less than this, that in a case where the provisions of sec. 71, Penal Code, do not come into play the Court has no discretion whatever to pass only one sentence for one offence and decline to pass sentences for the other offences of which it may find the accused guilty. Separate sentences must be passed for the several offences of which the Court finds the accused guilty..... If that is not the proper view to be taken of this section, it cannot, in my opinion, be reconciled with secs. 245 and 258." The same view was taken by the High Courts of Bombay and Allahabad in *Reg v. Tukaya*, 1 Bom. 214 ; *Phakeera*, Rat. Un. Cr. C. 369 ; and *Wazir Jan*, 10 All. 58, 1887 A.W.N. 274.

But though it is not illegal to pass one sentence for all the offences, still it is generally the proper course to pass a separate sentence for each offence—*Mahomed*,

Ratanlal 597; *Anonymous*, 4 M.H.C.R. App. 27; because such a course will enable the Appellate Court to know the punishment to be remitted, in case the conviction for one of the offences is set aside—4 M.H.C.R. App. 27. If one aggregate sentence is imposed for all the offences, it is impossible to apportion it to the different offences for which the accused is convicted—*Bahadur*, 14 P.R. 1886. But the passing of one aggregate sentence for the several offences is not an illegality but a mere irregularity; it is not an error or defect in consequence of which the High Court would reverse or alter the sentence—*Vinayak*, 2 B.H.C.R. 391.

On the other hand, if the offences are not separate (e.g., offences under secs. 392 and 75, I. P. C.), the awarding of two separate sentences is illegal—*In re Muthurakla*, 18 M.L.T. 121, 18 Cr.L.J. 611.

83. Consecutive sentences:—If separate sentences are passed for each offence of which an accused stands convicted, the sentences must commence one after the expiry of the other—*Maung Kala*, L.B.R. (1872-1892) 526. Where a man is imprisoned under two warrants, ordering consecutive sentences, the first should be completely executed both in regard to the substantive term of imprisonment as well as the imprisonment in default of fine, before any effect is given to the second warrant—*Anonymous*, Ratanlal 132.

Where the Magistrate passes two separate sentences of imprisonment, but does not specify that they are to run concurrently, they must be held to have been ordered to run consecutively under sec. 35, Cr. P. C.—*Shaikh Idris v. Emp.*, 40 Cr.L.J. 751, 183 I.C. 217, 5 B.R. 907, 20 P.L.T. 736, 12 R.P. 121, 1939 P.W.N. 35, A.I.R. 1939 Pat. 319.

84. Concurrent sentences:—The Court must expressly direct whether the sentences are to run concurrently or consecutively. Omission to determine whether the sentences of imprisonment and transportation (in a case where both sentences have been passed) are to run concurrently or consecutively, makes the sentence defective in form—*Khohua*, 21 C.W.N. 608, 23 Cr.L.J. 596, 17 Cr.L.J. 238, 34 I.C. 651.

It is not illegal to direct a sentence of imprisonment to run concurrently with a sentence of transportation—*Bogi*, 1913 P.R. 21, 15 Cr.L.J. 68, 22 I.C. 420.

The imprisonment referred to in this section is a *substantive* sentence of imprisonment; an order directing that the terms of imprisonment awarded in default of payment of fine shall run concurrently is illegal—*Subrao*, 27 Bom.L.R. 1351, A.I.R. 1926 Bom. 62, 27 Cr.L.J. 111, 91 I.C. 543; *Akidullah*, 15 I.C. 808, 5 S.L.R. 263, 13 Cr.L.J. 536; *Ghulam*, 30 Cr.L.J. 907, 118 I.C. 224 A.I.R. 1929 Sind. 179, Ind. Rul. 1929 Sind. 192; *Shidlingappa*, A.I.R. 1926 Bom. 416, 96 I.C. 270, 28 Bom.L.R. 668, 27 Cr.L.J. 926; *Kanda Moopan*, 38 Cr.L.J. 796, 169 I.C. 607, 10 R.M. 77, 15 M.L.W. 87, 1 I.L.R. (1937) Mad. 362, 1937 M.W.N. 52, A.I.R. 1937 Mad. 400, (1937) 1 M.L.J. 74. See Note 1082.

84A. Joint sentence:—Omission to pass a separate sentence in respect of each separate offence is illegal—*Queen-Empress v. Wazir Jan*, 10 All. 58, 1887 A.W.N. 274; *Queen-Empress v. Phakeera*, Ratanlal 369. This view was modified in recent cases and it was held that it was not illegal to pass one sentence for two offences when there were separate convictions for two distinct offences in the same case, but it was generally the proper course in such a case to pass a separate sentence for each offence—*Queen-Empress v. Mahomed*, Ratanlal 597; *Emp. v. Dharamdas*, 34 Cr.L.J. 143, 141 I.C. 280, 26 S.L.R. 416, A.I.R. 1933 Sind. 9, Ind. Rul. 1933 Sind. 46. The Rangoon High Court agreed with the view of the Allahabad High Court and the Bombay High Court in Ratanlal 369 and held that sentence, even though it may be *joint*, should be passed on conviction for each of the offences charged—*Emp. v. J. H. Hoon*, A.I.R. 1934 Rang. 338, 36 Cr.L.J. 460, 151 I.C. 75, 12 Rang. 419, 1934 Cr.L.J. 1248. Where a Magistrate passed 18 months' rigorous imprisonment on the accused under sec. 326(148, I. P. C.), it was interpreted to mean that the Magistrate passed two separate sentences under each section—*Sohan Ahir*, 25 Cr.L.J. 992, 81 I.C. 640, 22 P.L.J. 272. A.I.R. 1924 All. 492. See also Note 75.

85. Appeal:—An accused who has been sentenced to *concurrent* sentences of imprisonment, no one of which is individually appealable, has no right to aggregate them and appeal against them collectively—*Aziz Shaikh*, 40 Cal. 631, 19 I.C. 510, 17 C.W.N. 825; *Abdul Jabbar*, 25 C.W.N. 613, 66 I.C. 65, 23 Cr.L.J. 225; *Suknandan*, 17 C.L.J. 392, 13 Cr.L.J. 787; *Gur Sahay*, 3 P.L.J. 138, 19 Cr.L.J. 90; *Tulsi Ram*, 35 All. 154. *Contra*—*Abdul Khalik*, 17 C.W.N. 72, 13 Cr.L.J. 877; and *Bepin Behari*, 15 C.W.N. 734, 12 Cr.L.J. 391, 15 C.L.J. 82, 11 I.C. 255, where it was held that concurrent sentences must be aggregated for purposes of appeal, as otherwise there would be no distinction between a concurrent sentence and a single sentence in which no sentence was passed under the second charge. But these two rulings can no longer stand as good law in view of the recent amendment made in sub-section (3) under which only *consecutive* sentences can be aggregated for the purpose of appeal.

86. Proviso (a):—According to proviso (a), fourteen years is the maximum term of imprisonment which can be awarded as an aggregate sentence. Therefore, an aggregate sentence of 20 years' rigorous imprisonment is illegal—8 I.C. 550, *Sheo Narain*, 1910 P.L.R. 105, 11 Cr.L.J. 679. What this proviso aims at is the prohibition of the passing of consecutive sentences in one trial beyond the period of fourteen years. If the sentences given in respect of two or more convictions in one trial are directed to run concurrently instead of consecutively and the period of such concurrent sentences does not exceed fourteen years, the aforesaid provision is in no way infringed—*Nga Mya Gai*, A.I.R. 1937 Rang. 391, 171 I.C. 912, explaining *Sheo Narain*, supra.

The fact that the Magistrate passes the maximum term of imprisonment under this section, is no bar to his awarding further punishment on the same accused for a distinct offence tried separately. Thus, where, a person was charged with two charges of dacoity and one charge of kidnapping, and was tried separately for the dacoity and for the kidnapping, and the Magistrate inflicted a sentence of 14 years for the charges of dacoity, held that this would not disqualify him from passing a further sentence for the offence of kidnapping, although the trial for that offence was contemporaneous with the trial on the dacoity charges and terminated on the same day—*Bahadur*, 14 P.R. 1886.

87. Proviso (b):—Where there are *separate* trials, the Magistrate's power of punishment is not limited to twice the amount which he is competent to pass—*In re Daulatai*, 3 All. 305.

88. Sub-section (3):—*For the purposes of appeal*.—It is only for the purposes of appeal (and for no other purpose, e.g., for the purpose of commutation into transportation) that the consecutive sentences can be treated as one sentence; therefore, two or more sentences cannot be added up so that the aggregate period may be commuted into transportation—*Ootum Mal*, 2 W.R. 1.

For the purposes of appeal, only *consecutive* sentences are allowed to be taken in the aggregate as one sentence—*Hamid*, 32 Cr.L.J. 469, 129 I.C. 731, 1930 A.L.J. 1206, Ind. Rul. 1931 All. 219. This sub-section does not apply to concurrent sentences—*Nga Shwe*, L.B.R. (1900-1902) 57; *Saw Slaing*, U.B.R. (1897-1901) 13; *Sher Muhammad*, 1901 P.R. 25; *Jagadish*, 10 N.L.J. 135, 28 Cr.L.J. 672. See Notes under "Appeal" above.

Only *substantive* sentences can be aggregated under this section; a sentence of imprisonment in default of payment of fine must not be included for the purposes of calculation—1892 P.R., page 22.

This sub-section, which provides that the aggregate of consecutive sentences should for the purposes of appeal be deemed to be a single sentence, refers only to sentences of imprisonment, and not to sentences of fine—*Shidlingappa*, 28 Bom.L.R. 668, 27 Cr.L.J. 926, 96 I.C. 270, A.I.R. 1926 Bom. 416. In this case the Magistrate passed two sentences of fine amounting in the aggregate to Rs. 80 and it was held that an appeal lay.

See Note 1113.

89. Splitting up of offences:—No Magistrate is entitled to split up an offence (over the whole of which he had no jurisdiction) into its component parts

for the purpose of giving himself jurisdiction over a part, thereby depriving the prisoner of the right of appeal—*Abdool Karim*, 4 Cal. 18.

C.—Ordinary and Additional Powers.

36. All District Magistrates, Sub-divisional Magistrates and Magistrates of the first, second and third classes, have the powers hereinafter respectively conferred upon them and specified in the third schedule. Such powers are called their "ordinary powers."

90. Secs. 36 and 107:—Where a person is not sent before the District Magistrate by any other Magistrate under sec. 107 (3), the District Magistrate has no jurisdiction to commit him to custody under sec. 107 (4). Nor can the District Magistrate commit the accused to custody under sec. 36 because this section does not override the provision of sec. 107—*Chidambaran*, 31 Mad. 315, 7 Cr L J. 360, 3 M.L.T. 311.

91. Ordinary powers:—Power to entertain complaints is not one of the ordinary powers of a first class Magistrate—*Loghan v Romer*, 34 Mad 343, 12 Cr.L.J. 535, 12 I.C. 303, 1911 M.W.N. 169, 17 Cr L J 293, 35 I.C. 165, 4 L.W. 405. Among the ordinary powers of a Magistrate of the third class specified in Schedule III is power to issue search warrants—*Clarke v Brojendra Kishore Roy Chowdhury*, 39 Cal. 953 (1964), 16 C.W.N. 863, 13 Cr.L.J. 693, 16 I.C. 501, 16 CLJ. 231, 10 A.L.J. 193, 14 Bom.L.R. 717, 23 M.L.J. 32, 39 I.A. 163 (P.C.).

37. In addition to his ordinary powers, any Sub-divisional Magistrate or any Magistrate of the first, second or third class may be invested by the *Provincial Government* or the District Magistrate, as the case may be, with any powers specified in the fourth schedule as powers with which he may be invested by the *Provincial Government* or the District Magistrate.

Amendment:—The words "Provincial Government" have been substituted for the words "Local Government" in this section by sec. 4 of the Government of India (Adaptation of Indian Laws) Order, 1937.

38. The power conferred on the District Magistrate by section 37 shall be exercised subject to the control of the *Provincial Government*.

Amendment:—The words "Provincial Government" have been substituted for the words "Local Government" in this section by sec. 4 of the Government of India (Adaptation of Indian Laws) Order, 1937.

D.—Conferment, Continuance and Cancellation of Powers.

39. (1) In conferring powers under this Code the *Provincial Government* may, by order, empower persons specially, by name or in virtue of their office, or classes of officials generally by their official titles.

(2) Every such order shall take effect from the date on which it is communicated to the person so empowered.

Amendment:—The words "Provincial Government" have been substituted for the words "Local Government" in this section by sec. 4 of the Government of India (Adaptation of Indian Laws) Order, 1937.

92. A notification cannot grant criminal powers retrospectively. The notification takes effect from the date on which it is communicated to the person empowered—*Gul Mahomed*, A.I.R. 1933 Pesh. 97, 1934 Cr.C. 50, 147 I.C. 757.

Where a Magistrate of the second class begins a trial in that capacity and, previous to his passing the sentence, is empowered as a first class Magistrate, he can inflict a sentence in the latter capacity—*Pershad*, 7 All 414 (F.B.). See also Note 1103.

92A. "Generally" or "specially":—When by a notification of the Government a class of officials is invested with powers to try certain offences, such officials are only "generally" empowered and not specially empowered—*Mahomed Kasim*, 17 M.L.T. 191, 16 Cr.L.J. 268, 28 I.C. 156, 1915 M.W.N. 269, 2 M.L.W. 233. The term "specially" refers to the empowering of a particular official by name or by virtue of his office. Thus, a notification of the Government which empowers second class Magistrates of certain places to try cases under the Opium Act, is a special empowering of the person holding those offices in virtue of their office—*Alaga*, 21 Cr.L.J. 846, A.I.R. 1924 Mad. 256, 74 I.C. 958.

40. Whenever any person holding an office in the service of Government who has been invested with any powers under this Code throughout any local area is appointed to an equal or higher office of the same nature, within a like local area under the same Provincial Government, he shall, unless the Provincial Government otherwise directs, or has otherwise directed, exercise the same powers in the local area in which he is so appointed.

92B. Change:—The word "appointed" has been substituted for 'transferred' by section 8 of the Criminal Procedure Code Amendment Act, XVII of 1923. The object of this amendment is to cover cases of officers going on leave and returning to the same district, and to obviate the necessity of investing them again with their old powers and re-gazetting the same—*Statement of Objects and Reasons* (1914). The amendment will save a great deal of routine work in the Secretariat and in the Government printing press—*Leg. Ass. Debates*, 15-1-23, page 1047.

The words "Provincial Government" have been substituted for the words "Local Government" by sec. 4 of the Government of India (Adaptation of Indian Laws) Order, 1937.

93. Continuance of powers:—When a Tahsildar is invested with the powers of a Magistrate of the first class, while acting as a Deputy Collector, his powers continue so long as he is a Magistrate, until they are withdrawn by a fresh notification, though he is posted in a less responsible post—*In re Hanumanta*, 2 Weir 36. A Sub-Registrar invested with third class powers for trial of certain offences in a certain place is competent to exercise, on his transfer to another place, the powers conferred upon him as Sub-Registrar of the place from which he was transferred, unless the Local Government directed him not to exercise them—*Veeranna*, 15 Mad. 132.

Where a Subordinate Judge is transferred from one place to another, he may or may not be called upon to perform additional duties of a Magistrate. He is not transferred qua Magistrate but qua Subordinate Judge. On transfer, he, to use the words of sec. 40 Cr. P. Code, not "appointed to a post of the same nature" that is to say, a post of a Sub-Judge and Magistrate combined but only to the post of a Sub-Judge. When he is required to perform additional duties of a Magistrate in the place to which he is transferred a fresh notification in that behalf is necessary—*Emp. v. Karimbux*, A.I.R.

1933 Sind 398 (400), 1933 Cr.C. 1438, 146 I.C. 893, 35 Cr.L.J. 187, 6 Ind. Rul. 92, 27 S.L.R. 427.

94. Continuance of trials:—Where a Head Assistant Magistrate having almost completed the trial of a case was appointed to the office of a Deputy Magistrate in another place in the same district, and the case was by order of the District Magistrate brought on to his file to the latter place, it was held that the Magistrate could proceed with the case from the point at which he had arrived as Head Assistant Magistrate, and the trial need not be commenced *de novo*—*Karuppana v. Ahobalamatam*, 2, Weir 430, 22 Mad. 47; 1906 A.W.N. 201; 4 Cr.L.J. 140, 3 A.L.J. 896.

All cases pending on a file of a Magistrate who had been relieved of the charge of a Sub-division, did not necessarily pass automatically into the hands of his successor merely because the former had been transferred to another local area in the same district. Section 12, Cr. P. Code did not lay down any such automatic rule. To hold otherwise, would be to overlook the provision of sec. 40, Cr. P. Code—*Mithani*, 9 A.L.J. 448, 13 Cr.L.J. 203, 14 I.C. 203; *Chhoti v. Khacheru*, 42 All. 649, 18 A.L.J. 758, 21 Cr.L.J. 746, 58 I.C. 250.

But where during a trial the Magistrate is transferred to another district, he cannot continue the trial. See notes under sec. 12.

95. Going on leave:—The Magisterial powers conferred on an officer are kept alive under this section, even though he is absent on leave. (This is now made clear by the present amendment) And so if a Magistrate of the first class takes his leave, and on the expiry of his leave is posted to another district (or posted back to the same district), he does not cease to exercise the powers of a first class Magistrate, and it is not necessary to confer fresh powers on him before he can try an accused as a first class Magistrate—*Pritam*, 31 Cr.L.J. 1051 (1052), 126 I.C. 521, A.I.R. 1930 Lah. 833, 1930 Cr.C. 850. But the case is different if he vacates his office by absenting himself without leave (and thus loses his appointment)—*Bai Harku v. Silaram*, 2 Bom. L.R. 536. Similarly, if a Magistrate *retires* from Government service he ceases to be a Magistrate, and his powers come to an end. Consequently, it is necessary to confer Magisterial powers on him afresh before he can be re-appointed as a Magistrate—*Hamed Haji*, 4 M.L.J. 428, 24 Cr.L.J. 381, A.I.R. 1923 Mad. 598 (599), 1923 M.W.N. 288, 17 L.W. 426, 32 M.L.T. 195, 72 I.C. 381.

Resignation:—An honorary magistrate does not cease to hold his office on his resignation, but only when the resignation is accepted—*Sudarsana Rao v. Christian Pillai*, 45 M.L.J. 798; *President, Taluk Board, Hespel v. Chandrappa*, 45 Mad. 309 (311).

41. (1) The Provincial Government may withdraw all or any of the powers conferred under this Code on any person by it or by any officer subordinate to it.

(2) Any powers conferred by the District Magistrate may be withdrawn by the District Magistrate.

Amendment:—The words "Provincial Government" have been substituted for the words "Local Government" in this section by sec. 4 of the Government of India (Adaptation of Indian Laws) Order, 1937.

PART III.

GENERAL PROVISIONS.

CHAPTER IV.

OF AID AND INFORMATION TO THE MAGISTRATES, THE POLICE AND PERSONS MAKING ARRESTS.

42. Every person is bound to assist a Magistrate or police-officer reasonably demanding his aid, whether within or without the presidency-towns,—

Public when to assist
Magistrates and police.

- (a) in the taking or preventing the escape of any other person whom such Magistrate or police-officer is authorized to arrest;
- (b) in the prevention or suppression of a breach of the peace, or in the prevention of any injury attempted to be committed to any railway, canal, telegraph or public property.

95A. 'Every person':—A police officer charged with the duty of arresting an accused can ask a *chowkidar* to assist him in arresting the accused or preventing his escape—*Manik v. Kenaram*, 6 C.W.N. 337.

96. 'Reasonably':—No person is bound to obey an *unreasonable* order of a Magistrate or Police Officer. Thus, where a Magistrate ordered a landholder to find a clue to a theft within 15 days, it was held that such an order was unreasonable and unwarranted by this section, and the landlord was not bound to perform an act for which the police are appointed and paid. Disobedience by the landlord to such an order is no offence—*Bakshi Ram*, 3 All. 201. Members of the public are bound to assist a police officer reasonably demanding their aid in the taking of any dacoits or suspected dacoits whom that officer is authorised by law to arrest. The law, however, does not intend that the police officers should have a general power of calling upon the members of the public to join them in arresting a number of unknown persons, whose whereabouts are not known. Refusal to assist the police officer in such a quest is not an offence—*Joti Prasad*, 42 All. 314, 18 A.L.J. 169, 21 Cr.L.J. 801, 58 I.C. 673.

97. Aid:—The aid that can be demanded under this section is the personal assistance of the person of whom it is demanded, and not the supply of a contingent of men to assist—*In re Ramia*, 2 Weir 37.

Under this section every person is bound in certain circumstances to assist a Police Officer in the taking or preventing the escape of any person whom the Police Officer is authorized to arrest, but the section contemplates that the Police Officer is himself present to make the arrest. It was never intended that this section should allow the wholesale delegation by the police of their duties. Where, therefore, a Sub-Inspector gives what purported to be a written authority, which in itself contains mis-statements, to a zemindar to arrest a man, whom he states to be a proclaimed offender but who in fact is not so, and relying upon this authority the zemindar's men fall on and beat and bind the man and bring him injured and bound to the Police, the action is illegal and cannot be justified under this section—*Murid Dood*, 38 Cr.L.J. 1101, 171 I.C. 672, A.I.R. 1937 Sind 234, 10 R.S. 116.

97A. Punishment:—Omission to assist under this section is punishable under sec. 187, I. P. C. See *Ambika Prasad v. Emp.*, 33 CrLJ. 736, A.I.R. 1932 All 506, 139 I.C. 106, 1932 Cr.C. 594, Ind. Rul. 1932 All. 527.

43. When a warrant is directed to a person other than a police-officer, any other person may aid in the execution of such warrant, if the person to whom the warrant is directed be near at hand and acting in the execution of the warrant.

44. (1) Every person, whether within or without the presidency-towns, aware of the commission of, or of the intention of any other person to commit, any offence punishable under any of the following sections of the Indian Penal Code (namely), 121, 121A, 122, 123, 124, 124A, 125, 126, 130, 143, 144, 145, 147, 148, 302, 303, 304, 382, 392, 393, 394, 395, 396, 397, 398, 399, 402, 435, 436, 449, 450, 456, 457, 458, 459 and 460, shall, in the absence of reasonable excuse, the burden of proving which shall lie upon the person so aware, forthwith give information to the nearest Magistrate or police-officer of such commission or intention.

(2) For the purposes of this section, the term "offence" includes any act committed at any place out of British India which would constitute an offence if committed in British India.

98. Persons bound:—The words "every person" in this section, and the persons bound to give information under sec 45 (b) regarding the occurrence of sudden or unnatural death, do not exclude the *main offender himself*. Like every other person, the criminal is bound to give information which would convict himself, and in theory he can be punished for omission to give the information, or for giving false information under secs 202 and 203, I P C., or under sec 201 for withholding information to screen himself; but in practice, if he is convicted of the offence itself, no Court will think it worth while to convict him also under secs 201-203, I P. C.—*Chunna Gangappa*, 54 Mad 68, 32 CrLJ 263 (264, 265), 59 MLJ 677, AIR. 1930 Mad 870, 32 MLW 389, 1930 MWN 489, 129 IC 230, 1930 CrC 1126. No doubt under this section it is the duty of every person to make a report to the police of the commission of certain specified offences, but there is no such duty cast upon a citizen, much less upon a police officer, to make such a report when no facts exist. He would certainly not be acting in pursuance of this section if he concocts a purely false story and then makes a report of such a false story, knowing it to be false—*Shiam Lal v Abdul Raof*, AIR 1935 All 538 (541), 1935 ALJ 459, 155 IC 131 (FB)

99. Information:—*Information sent through chowkidar*—Where one of several lambar-dars, to the knowledge to others, directs the chowkidar to report a burglary at the thana, the requirements of this section have been complied with, and the lambar-dar cannot be said to have failed to give information if the chowkidar omits to report it at the thana—*Sher Singh*, 1889 P.R. 5.

The provisions of this section should not be put in force against one who has omitted to give information to the police of an offence having been committed in cases where the police have actually obtained such information from other sources—*Sashi Bhusan Chuckerbutty*, 4 Cal. 623; *Gopal Singh*, 20 Cal. 316; *Pandya Nayak*, 7 Mad. 436, 1 Weir 102. See Note 100.

No duty after information:—When once the information of a crime reaches the police, the object of this section is fulfilled, and no further duty is imposed upon the persons mentioned in this section to give information—*Sada*, Ratanlal 674 (675).

Punishment:—Omission to give information under this section is punishable under secs. 118, 176 and 202, I. P. C. For false information, see secs. 177 and 203, I. P. C. See *Ramasami Gounden v. Emp.*, 27 Mad. 271 (289), in this connection.

Omission to report a plot of waging war against the Crown does not amount to abetment of waging war, unless the accused's intention in omitting to report the plot was with a view to aiding the waging of war—*Goman*, 6 Bur.L.T. 153, 14 Cr.L.J. 610, 21 I.C. 658.

45. (1) Every village headman, village-accountant, village-watchman, village police-officer, owner or

Village-headmen, accountants, land-holders and others bound to report certain matters

occupier of land, and the agent of any such owner or occupier *in charge of the management of that land* and every officer employed in the collection of revenue or rent of land on the part of *the Crown* or the Court of Wards, shall forthwith communicate to the nearest Magistrate or to the officer in charge of the nearest police-station, whichever is the nearer, any information which he may *possess* respecting—

- (a) the permanent or temporary residence of any notorious receiver or vendor of stolen property in any village of which he is headman, accountant, watchman or police-officer, or in which he owns or occupies land, or is agent, or collects revenue or rent;
- (b) the resort to any place within, or the passage through, such village of any person whom he knows, or reasonably suspects, to be a thug, robber, escaped convict or proclaimed offender;
- (c) the commission of, or intention to commit, in or near such village, any non-bailable offence or any offence punishable under section 143, 144, 145, 147 or 148 of the Indian Penal Code;
- (d) the occurrence in or near such village of any sudden or unnatural death or of any death under suspicious circumstances; *or the discovery in or near such village of any corpse or part of a corpse in circumstances which lead to a reasonable suspicion that such a death has occurred, or the disappearance from such village of any person in circumstances which lead to a reasonable suspicion that a non-bailable offence has been committed in respect of such person;*
- (e) the commission of, or intention to commit, at any place out of British India near such village, any act which, if committed in British India, would be an offence punishable under any of the following

sections of the Indian Penal Code, namely, 231, 232, 233, 234, 235, 236, 237, 238, 302, 304, 382, 392, 393, 394, 395, 396, 397, 398, 399, 402, 435, 436, 449, 450, 457, 458, 459, 460, 489A, 489B, 489C and 489D;

(f) any matter likely to affect the maintenance of order or the prevention of crimes or the safety of person or property respecting which the District Magistrate, by general or special order made with the previous sanction of the *Provincial Government*, has directed him to communicate information.

(2) In this section—

(i) "village" includes village-lands; and

(ii) the expression "proclaimed offender" includes any person proclaimed as an offender by any Court or authority established or continued by the *Central Government or the Crown Representative* in any part of India, in respect of any act which, if committed in British India, would be punishable under any of the following sections of the Indian Penal Code, namely, 302, 304, 382, 392, 393, 394, 395, 396, 397, 398, 399, 402, 435, 436, 449, 450, 457, 458, 459 and 460.

(3) Subject to rules in this behalf to be made by the *Provincial Government*, the District Magistrate or Sub-divisional Magistrate may from time to time appoint one or more persons, *with his or their consent, to perform the duties of a village-headman under this section, whether a village-headman has or has not been appointed for that village under any other law.*

Appointment of village headman by District Magistrate or Sub-divisional Magistrate in certain cases for purposes of this section

Change:—The italicised words have been added by section 9 of the Cr P. C. Amendment Act, XVIII of 1923. The reasons are stated below

By the Government of India (Adaptation of Indian Laws) Order, 1937, in sub-section (1) the words "the Crown" have been substituted for "Government"; in clause (ii) of sub-section 2 the words "the Central Government or the Crown Representative" have been substituted for "the Governor-General in Council"; and the words "Provincial Government" have been substituted for the words "Local Government" in cl (f) of sub-section (1) and in sub-section (3).

100. Object of Section:—The object of the law is clearly that the earliest information shall be communicated by those who are in the best position to obtain the same, or who from their connection with the land are in some authority and should accordingly be made responsible for this duty in order that an inquest may be held—*Matuli*, 11 Cal 619 (621). The provisions of this section are not to be worked solely for the purpose of vexation, but for the purpose of ensuring that information be not intentionally withheld by persons whose position renders them liable to give it. Therefore, when information is given to the nearest Magistrate or Police by one of the persons bound to give such information, it is not reasonable that every other person bound to give the information should be prosecuted for not having done so—*Sashi Ehusan*, 4

Cal. 623; *In re Pandya*, 7 Mad. 436; *Gopal*, 20 Cal. 316 (318); *Hari Gopal*, Ratanlal 778 (779). Where the police are already informed of a fact by the Chowkidar, there is no further obligation upon the village headman to report the same information again to the police—*Rampal*, 8 O.L.J. 590, 23 Cr.L.J. 162, 65 I.C. 626; 53 Bom. 184

101. Persons bound:—*Village headman* in Madras means a Village Munsiff or Village Magistrate—*Silvar Chetti*, 32 Mad. 258. In sending his report under this section the Village Munsiff is not acting in his capacity as Magistrate, being there called specifically a Village Headman, nor is he a public servant removable only by or with the sanction of a Local Government—*Pregada Balangu v. Krosuru Kotayya*, A.I.R. 1937 Mad. 578, 45 M.L.W. 697, 1937 M.W.N. 638, 1937 M.Cr.C. 188, 170 I.C. 481, 38 Cr.L.J. 950. A Zaildar is not a village headman within the meaning of this section—*Hari Singh*, 25 P.R. 1894; *Shah Mahammad*, 19 P.R. 1886. Every *mukkaddan* and *Kotwar* in C. P. is bound to give information under this section because they have to perform the duties of a village headman—*Maniharsingh*, 7 N.L.R. 101, 12 Cr.L.J. 441.

The owner or occupier of a house in a village is not the 'owner or occupier of land'. The duty of giving information under this section is cast upon the owner or occupier of land, and not of a house. Where there are houses, it is expected that the place would be populous, and the Police would somehow get the information. But in cases of land in the mofussil there are not always enough policemen available in the locality. Hence, it is necessary that the owner or occupier of the land should give such information to them—*Hiru Satua*, 53 Bom. 184, 30 Bom.L.R. 1570, 30 Cr.L.J. 172, A.I.R. 1929 Bom. 12; *Achutha*, 12 Mad. 92. Residence in a dwelling house belonging to another is not occupation of land—*In re Mudhoo Soodun*, 23 W.R. 60. For the meaning of the word 'land' reference may be made to the case of *Hossem Abdul Rehman & Co. v. Lakhmi Chan*, 49 Bom. 40 (55).

Owner and agent:—The liability of the resident agent arises when the owner is not resident and has no personal knowledge of the fact to be reported. Where the owner has such knowledge, the liability certainly attaches to the owner (and not to the agent)—*Mudhoo Soodun*, 23 W.R. 60. Under the present law the agent is liable only if he is 'in charge of the management of the land'.

These words have been added on the motion of Mr. Agnihotri who observed:—"The word 'agent' should be qualified and made definite in such way that only such agents be made liable to give information under sec. 45 as may be connected with the land or be in charge of the management of the land the occurrence of which is to be reported. The word 'agent' is very comprehensive and vague, for instance there may be agents for various purposes; they may be for the collection of land revenue, they may be for looking after the cultivation of the land, they may be for the construction of buildings on the land or for conducting and defending suits for title of such land and so on; the word may apply even to servants. And to make such agents liable would be to make the term very wide and troublesome; so it is necessary to restrict it only to such persons as are in charge of the management of the land, and who may be in a better position to know about the occurrences on that land"—*Legislative Assembly Debates*, January 16, 1923, page 1114.

A Khazanchi of a Zemindar of a village is not an agent. A dewan may be an agent during the absence of his master, but not a dewan who acts only under the orders of his resident master—*Achiraj*, 4 Cal. 603.

Accused himself:—The persons bound to give information under this section, especially under clause (d) about the occurrence of sudden and unnatural death include the offender himself, i.e. the person who caused the death. See Note 92 under sec. 41.

"Forthwith":—It means "within a reasonable time" (Wharton). The word 'forthwith' must be constructed with reference to the object of the enactment. When a Kulkarni gave information of a suspicious death some 7 or 8 hours after he was aware of the same, held that the information was not given forthwith—*Waman*, Ratanlal 784 (785).

102. Information:—The persons enumerated in this section are bound to report an *information* and not a mere *rumour*—*Lachmi*, 5 P.L.T. 505, 25 Cr.L.J. 972, 81 I.C. 620, A.I.R. 1924 Pat. 181. Where the Zemindar heard of the disappearance of a man from the village and a rumour that he had been murdered, the omission to report such rumour to the police was not an offence—*Bhup Singh*, 1900 A.W.N. 207. But under clause (d) as now amended, the disappearance of a man under suspicious circumstances must be reported.

"Possess":—This word has been substituted for the word 'obtain'. In 1901 the Madras Government found that the word 'obtain' did not cover information obtained by personal observation because the word undoubtedly meant 'obtain by making inquiries'. There was therefore some difficulty in making certain that information obtained by personal observation, such as for example the discovery of a corpse on the ground, came within the scope of the law. Moreover, the deletion of the word was absolutely necessary, because it implied an *obligation* to seek the information. In moving the amendment Mr Pantulu observed "The offending portion of the section is that the landlord would be called upon to give information which he may possibly obtain but which he may not have in his possession. Now if we take away the word 'obtain' and substitute the word 'possess,' it comes to this that the landlord is bound to give only the information which he possesses and not information which he may possibly obtain by making inquiries. If any amendment is carried, it will be incumbent upon the prosecution to show that the accused had that information in his possession, and not merely that he might have obtained it. Therefore, I think that if this amendment is carried, the sting will be taken out of the section"—*Legislative Assembly Debates*, January 16, 1923, page 1116. See also *Lachmi* (supra).

This section does not make it incumbent on the village chowkidar to communicate to the officer in charge of the Police Station any rumour of any occurrence prevailing in the village. It is only an information which he may himself possess that is to be communicated to the officer in charge of the Police Station. It is noteworthy that the amending Act XVIII of 1923 has substituted the word "possess" in place of the word "obtain" in section 45, making thereby only such information which the informant may possess to his own knowledge fit to be communicated to the officer in charge of the Police Station—*Lachmi Singh v Emp*, 25 Cr L J 972 (974), 81 I.C. 620, 5 P.L.T. 505, A.I.R. 1924 Pat. 691.

103. Clause (b):—*Resort to or passage through*—The bringing of a suspected robber under arrest to the village and releasing him there, does not amount to the resorting to or the passage through the village of such robber—*Malik Daud*, 1887 P.R. 30.

Proclaimed offender—These words include persons over and above those to whom the words in their ordinary sense apply—*Narpat*, 1901 A.W.N. 10. The fact that the offender's property has been attached and sold under the provisions of sec 88 of this Code, does not raise any presumption that he is a proclaimed offender. It is on the prosecution to prove that the proclamation was made in the manner prescribed by sec. 87 of this Code—*Pandya Nayak*, 7 Mad 436, 1 Weir 102.

The term "proclaimed offender" as used in this section must be taken not in any technical sense but in its obvious general meaning. If a proclamation has been made in respect of an accused person under sec 87, Cr P C, it is sufficient to constitute him a proclaimed offender under this section. The fact that the proclamation was not made strictly in accordance with the terms of sec 87, Cr P C, does not render such person a proclaimed offender any the less—*Ram Sarup*, 39 Cr L J 154 (157), 172 I.C. 530, 1938 A Cr C. 1, 1938 O L R 8, 1938 O A. 7, 10 R O 182, 1938 O W N. 7, A.I.R. 1938 Oudh 80.

104. Clause (c):—The information to be given to the police under clause (c) is the information of the commission of an *offence*. An information that a certain jewel is missing is not an information that an offence has been committed, and need not be communicated to the police—*Vemi Reddi*, 5 M.L.T. 257, 9 Cr.L.J. 224. This clause

speaks of non-bailable offences; if the offence is a bailable one, the persons enumerated in this section are not bound to give information of it—*Malik Daud*, 30 P.R. 1887; *Sivan Chetti*, 32 Mad. 258.

105. Clause (d)—Occurrence of death:—The duty imposed by this section on a village headman, etc., of giving information as to the occurrence of any sudden or unnatural death is intended to apply only when the death takes place at or near the village of which he is the headman, owner, occupier etc.—*Mudhoosoodun*, 23 W.R. 60.

If a body is found in one's land, the presumption is that the death took place there, and the owner is under an obligation to give information regarding the matter—*Matuki*, 11 Cal. 619. In this case, Mitter, J. (dissenting) was of opinion that there could be no such presumption; it could be equally presumed that the death took place in another village, and the dead body was thence removed to this village. Under clause (d) as now amended, the finding of a corpse must be reported, without reference to the question of presumption as to whether the death took place in the same village or in another village.

If a dead body is found in a stream, it is enough to give rise to a presumption that the death took place under suspicious circumstances, and the person finding it is bound to report it under this section—*Sher Muhammad*, 20 P.R. 1887. When a man fell from a tree and died two days afterwards, held that although the death was 'unnatural' in the ordinary sense of the word, still it would not come within the meaning of the word 'unnatural' as used in sec. 45 (d), so as to require to be reported immediately, unless it occurred fairly soon after the cause—*Domarsing*, 23 Cr.L.J. 345, 66 I.C. 1001, A.I.R. 1922 Nag. 87.

106. Punishment:—For omission to give information under this section, see sec. 176, I. P. C. But omission to give information by persons not enumerated in this section is not an offence—*Bahadur*, 34 P.R. 1882

False information:—A person giving a false information of an offence to a village Magistrate who is bound to pass the information on to the higher authorities under this section, will be guilty of an offence under sec. 211, I. P. C.—*Sivan Chetti*, 32 Mad. 258. It would be otherwise if the offence complained of is one in regard to which the information need not under this section be passed to the higher authorities—*Ibid*.

107. Sub-sec. (3):—Appointment of village headman:—An order of a District Magistrate dismissing a person from the office of a headman of a village under the rules framed under this sub-section, is an executive order and is not subject to revision by the High Court—*Damma*, 29 All. 563, 1907 A.W.N. 16, 5 Cr.L.J. 476

'With his or their consent':—These words were added during the Debate in the Assembly on the motion of Mr. Rangachariar. "My amendment would remove any misconception there may be as to the power of the District Magistrate to appoint persons against their will, and it is for this reason that I have inserted this clause that when they are so appointed it should be with their consent. I know that in the case of enlisting special police, people without their consent are enlisted. This ought not to degenerate into such a provision. It must be a voluntary duty to be performed by people who are given a certain status"—*Legislative Assembly Debates*, January 16, 1923, page 1117.

Bengal rules for the appointment of headmen:—

(1) In all villages in which Bengal Act VI of 1870 has been introduced, the Magistrate of the District may appoint the principal member of the Chowkidari Punchayat or the collecting member, where there is one, to be village headman.

(2) In villages where Bengal Act VI of 1870 has not been introduced, the Magistrate of the District may appoint the principal resident agent of land-owner, or rent-receiver, or his representative, or the principal resident cultivator, to be village headman.

(3) In the case of a principal or collecting member of a Chowkidari Punchayat, a clause shall be added to the appointment under section 3 of the Chowkidari Act

to the effect that he has also been appointed to be village headman under sec. 45 of the Criminal Procedure Code. When a person other than a member of a Chowkidari Panchayat is appointed he shall receive a special *sanad* from the Magistrate

(4) The Magistrate shall keep a register of all persons who have been appointed village headmen, showing their names and father's names and the village for which they are responsible, and shall take measures to effect mutations in that register from time to time when one headman dies and is succeeded by another—*Calcutta Gazette*, 26-12-1894.

(N.B.—These rules are in force in the Patna, Dacca, and Orissa Divisions, excepting the Khurda sub-division in the Puri District).

CHAPTER V.

OF ARREST, ESCAPE AND RETAKING.

A.—Arrest Generally.

46. (1) In making an arrest the police-officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action.

(2) If such person forcibly resists the endeavour to arrest him, or attempts to evade the arrest, such police-officer or other person may use all means necessary to effect the arrest.

(3) Nothing in this section gives a right to cause the death of a person who is not accused of an offence punishable with death or with transportation for life.

108. Warrant:—When a warrant of arrest has been issued, the officer making the arrest must have the warrant in his possession; otherwise the arrest is illegal—*Emp v Amar Nath*, 5 All 318.

109. Arrest:—An arrest is a restraint of the liberty of the person. Unless there is submission, actual contact is necessary to effect it. Where a bailiff met the accused in the street, showed his staff, told him he was under arrest but did not touch him, and the accused instead of going with him walked away and entered a shop, held that the accused was not arrested at all, and could not be convicted of escape from custody—*Aludomal*, 9 S.L.R. 141, 17 Cr.L.J. 87.

An arrest by mere oral declaration is insufficient. The person must be arrested by actual touch of his body—*Harmohanlal*, 30 Cr.L.J. 128, 113 I.C. 288, 11 N.L.J. 259, Ind Rul 1929 Nag. 26. An arrest of a person by a duly authorized officer is accomplished if the officer lawfully touch him; the power of effecting actual capture is not essential—*U. Thive v. A. Kim Fee*, AIR 1930 Rang 131, 7 Rang 598, 12 I.C. 137.

When a person states that he has done certain acts which amount to an offence he accuses himself of committing the offence, and if he makes the statement to a Police Officer, as such, he submits to the custody of the officer within the meaning of clause (1) of this section, and is then in the custody of a Police Officer within the meaning of section 27 of the Evidence Act—*Santokhi*, 34 Cr.L.J. 349 (351), 142 I.C. 474, 1.

P.L.T. 82, 12 Pat. 241, A.I.R. 1933 Pat. 149, 1933 Cr. C. 404, Ind. Rul. 1933 Pat. 139; *Jalla*, 32 Cr.L.J. 650, 131 I.C. 93, 32 P.L.R. 347, A.I.R. 1931 Lah. 278, 1931 Cr. C. 534, Ind. Rul. 1931 Lah. 365; *Legal Remembrancer v. Lalit Mohan*, 62 I.C. 578, 49 Cal. 167, 25 C.W.N. 788, 22 Cr.L.J. 562, A.I.R. 1922 Cal. 342.

A man is entitled to know when a Police is arresting him, under what power he is acting and if the police states that he acts under a certain power which the man knows he has not got, he is entitled to object to such arrest and to escape from custody when he is arrested—*Appasami Mudaliar v. K.-E.*, 47 Mad. 442 (444), 81 I.C. 51, 46 M.L.J. 447, 19 M.L.W. 504, 34 M.L.T. 95, A.I.R. 1924 Mad. 555, 25 Cr.L.J. 563.

The question whether the officer who effected the arrest was acting within or beyond his powers in making the arrests does not affect the question whether the accused were guilty or not guilty of the offence with which they were charged—*Ravalu*, 26 Mad. 124. Where a man is in the country and is charged before a Magistrate with an offence under the Penal Code, it will not avail him to say that he was brought there illegally from a foreign country—*Wheeler*, 29 Cr.L.J. 1089 (1090), 112 I.C. 673, A.I.R. 1928 Sind 161; *Vinayak*, 10 I.C. 956, 35 Bom. 225, 13 Bom.L.R. 296, 12 Cr.L.J. 356. See also *In the matter of Rudolph Stalman*, 15 C.W.N. 1053 (1066), 39 Cal. 164, 14 C.L.J. 375, 12 Cr.L.J. 505, 12 I.C. 273. For a charge of escaping from lawful custody under sec 225-B, I. P. C., the legality of the arrest must be established by the prosecution—*Appasami Mudaliar*, 47 Mad. 442, 81 I.C. 51, 46 M.L.J. 447, 19 M.L.W. 504, 34 M.L.T. 95, A.I.R. 1924 Mad. 555, 25 Cr.L.J. 563. If a constable in effecting an arrest specifies certain power which proves to be wanting, resistance to him or escape from his custody constitutes no offence. To hold that sec 54, Cr. P. C., applies in such cases without any intimation to the accused and without any allegation by the constable in his deposition that he proceeded under the section, would be to nullify several salutary provisions contained in Part B of Chapter VI of the Cr. P. Code, relating to the execution of warrants of arrest—*Kartik*, 33 Cr.L.J. 706, 138 I.C. 844, 13 P.L.T. 135, A.I.R. 1932 Pat. 171, 1932 Cr.C. 347, Ind. Rul. 1932 Pat. 190, where *Kishun*, 98 I.C. 254, 8 P.L.T. 237, 5 Pat. 533, A.I.R. 1926 Pat. 424, 27 Cr.L.J. 1310 and *K.-E. v. Bhola Bhagat*, 72 I.C. 375, 4 P.L.T. 521, 2 Pat. 379, 24 Cr.L.J. 375, 1 Pat.L.R. 248 (Cr.), were distinguished. See also *Monsi Lal*, 48 I.C. 349; *Raja Mia v. Emp.*, 44 C.W.N. 502 and Note 113A.

110. "All means":—Justifiable violence.—The means employed to stop the fugitive should be such as an ordinary prudent man would make use of, who had no intention of doing any serious injury. The wounding of a fugitive thief by a *Chowkidar* in order to effect his arrest, where there was no other means of capturing the thief, was held to be justifiable under the circumstances—*Protap Chowkidar*, 2 W.R. 9. Under clause (3) of this section, an Excise officer pursuing an opium-smuggler has no right to fire at him; where he so fired, and the accused cut the Excise officer on his thigh with a sword, but did not cause a severe wound, held that the act of the officer in firing at the accused was illegal, and the latter exercised his right of private defence in wounding the officer with his sword—*Nga Nan*, 21 Cr.L.J. 97, 54 I.C. 577 (Bur.).

Effect of non-compliance with Ch. V.:—There is no warrant for holding that every trial, which is preceded by a Police investigation, which has failed to comply with Ch. V. of the Cr. P. C., in its entirety, is thereby void—*Joseph v. Emp.*, 26 Cr.L.J. 492 (497), 85 I.C. 236, 3 Bur.L.J. 265, A.I.R. 1925 Rang. 122, 3 Rang. 11.

Punishment for resistance to arrest—see secs 224, 225, 225B, I. P. C.

47. If any person acting under a warrant of arrest, or any police-officer having authority to arrest, has reason to believe that the person to be arrested has entered into, or is within, any place, the person residing in, or being in charge of, such place, shall, on demand of such person acting as aforesaid or such

Search of place entered by person sought to be arrested.

police-officer, allow him free ingress thereto, and afford all reasonable facilities for a search therein.

111. Scope:—This section is not intended to restrict the powers of the Police to enter the place to be searched. On the contrary, it is a provision compelling householders to afford the police facilities in carrying out their duties; and the next section provides that if difficulties are placed in the way of a Police officer, he may use force to obtain ingress—*Romesh Chandra*, 41 Cal. 350 (376), 18 C.W.N. 496, 15 Cr.L.J. 385.

Demand:—No precise words are needed, it is enough to give notice that entry is sought under proper authority. *Russell on Crimes*, p. 745.

48. If ingress to such place cannot be obtained under section 47, it shall be lawful, in any case for a person acting under a warrant and in any case in which a warrant may issue but cannot be obtained without affording the person to be arrested an opportunity of escape, for a police-officer to enter such place and search therein, and in order to effect an entrance into such place, to break open any outer or inner door or window of any house or place, whether that of the person to be arrested or of any other person, if after notification of his authority and purpose, and demand of admittance duly made, he cannot otherwise obtain admittance:

Procedure where ingress not obtainable.

Provided that, if any such place is an apartment in the actual occupancy of a woman (not being the person to be arrested) who, according to custom, does not appear in public, such person, or police-officer shall, before entering such apartment, give notice to such woman that she is at liberty to withdraw and shall afford her every reasonable facility for withdrawing and may then break open the apartment and enter it.

Breaking open
zanana.

112. A Police-officer entering into a building for the purpose of arresting suspected persons will not be liable for trespass—*Clarke v. Brojendra Kishore*, 36 Cal. 433.

49. Any police-officer or other person authorised to make an arrest may break open any outer and inner door or window of any house or place in order to liberate himself or any other person who, having lawfully entered for the purpose of making an arrest, is detained therein.

Power to break open doors and windows for purposes of liberation.

50. The person arrested shall not be subjected to more restraint than is necessary to prevent his escape.

No unnecessary restraint.

For punishment for unnecessary restraint, see sec. 220, I P. C.

51. Whenever a person is arrested by a police-officer under a warrant which does not provide for the taking of bail, or under a warrant which

Search of arrested persons.

provides for the taking of bail but furnish bail, and

whenever a person is arrested private person under a warrant, and to bail, or is unable to furnish bail,

the officer making the arrest or, with a private person, the police-officer to whom the person arrested, may search such person, all articles, other than necessary wearing him.

Under sec 51, Cr. P. Code the police have the power. Considering that a police-officer has the power to arrest necessary that the purpose of the search should always be such as, an incriminating article. The provision is that the custody all articles and seize offensive weapons found upon. This does not mean that he is to shut his eyes to other things take note of anything worthy of attention, such as marks on a witness he may depose to such marks. There is a special women : section 52. These provisions are made in the interest and they are not dependent on the consent of arrested person really done something wrong, consents to his person being searched the police to get, what often would be, the best evidence in the case of search were to be read as subject to the prisoner's consent, and be shut out. Nevertheless, the examination of an arrested person by a doctor, not for the benefit of the prisoner's health, but simply by way of is not provided for by the Code, and in such a case, the doctor may examine the prisoner without his consent. It would be a rule of caution to be noted in the medical report, so that the doctor would be in a position to give consent if called upon to do—*Bhondar*, 54 CLJ. 499 (504), 35 IC. 1053, A.I.R. 1931 Cal. 601, 1931 Cr.C. 753. This case is not the proposition that unless the fact that consent has been obtained in writing, it is to be held that no consent was, in fact, obtained. Oral consent is sufficient—*Hanuman v. King-Emperor*, 36 C.W.N. 1152 (1155), A.I.R. 1932 Cal 723, 60 Cal. 179.

52. Whenever it is necessary to cause a woman

Mode of searching searched, the search shall be made by another woman, with strict regard to women.

53. The officer or other person making any arrest under this Code may take from the person arrested

Power to seize offensive weapons.

any offensive weapons which he has on his person, and shall deliver all weapons taken to the Court or officer before which or whom the officer making the arrest is required by this Code to produce the person arrested.

B.—Arrest without Warrant.

When police may arrest without warrant.

54. (1) Any police-officer may, without an order from a Magistrate and without a warrant, arrest—

- first*, any person who has been concerned in any cognizable offence or against whom a reasonable complaint has been made, or credible information has been received, or reasonable suspicion exists of his having been so concerned;
- secondly*, any person having in his possession without lawful excuse, the burden of proving which excuse shall lie on such person, any implement of house-breaking;
- thirdly*, any person who has been proclaimed as an offender either under this Code or by order of the *Provincial Government*;
- fourthly*, any person in whose possession anything is found which may reasonably be suspected to be stolen property, and who may reasonably be suspected of having committed an offence with reference to such thing;
- fifthly*, any person who obstructs a police-officer while in the execution of his duty, or who has escaped, or attempts to escape, from lawful custody;
- sixthly*, any person reasonably suspected of being a deserter from Her Majesty's Army, Navy or *Air Force*; * * *
- seventhly*, any person who has been concerned in, or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been concerned in, any act committed at any place out of British India, which, if committed in British India, would have been punishable as an offence, and for which he is, under any law relating to extradition or under the Fugitive Offenders Act, 1881, or otherwise, liable to be apprehended or detained in custody in British India;
- eighthly*, any released convict committing a breach of any rule made under section 565, sub-section (3); and
- ninthly*, any person for whose arrest a requisition has been received from another police-officer, provided that the requisition specifies the person to be arrested and the offence or other cause for which the arrest is to be made, and it appears therefrom that the person might lawfully be arrested without a warrant by the officer who issued the requisition.

(2) This section applies also to the police in the town of Calcutta.

Change:—In the fourth clause the word 'and' has been substituted for the word 'or' and the ninth clause has been newly added, by section 10 of the Cr P C, Amendment Act, XVIII of 1923. For reasons, see below.

In the sixth clause the words "or Air Force" have been added by the Repealing and Amending Act, 1927 (X of 1927); and the words "or of belonging to Her Majesty",

Indian Marine Service and being legally absent from that service" have been omitted by the Amending Act, 1934 (Act XXXV of 1934).

In the third clause the words "Provincial Government" have been substituted for the words "Local Government" by sec. 4 of the Government of India (Adaptation of Indian Laws) Order, 1937.

113. Scope:—This section does not give an unqualified power in all cases to any police-officer to arrest, without an authorisation in writing, a person concerned in a cognizable offence. The provisions of this section are limited by those of sec. 56, Cr. P. Code. When a police-officer is acting on his own initiative, or independently in the course of his duty, he can arrest without complying with the formalities mentioned in sec. 56. But where a subordinate police-officer is not acting independently, but is merely deputed by a superior officer to arrest some one concerned in a cognizable offence, a further formality is prescribed in sec. 56, presumably, to prevent abuse of the powers of the police, or to allow the person arrested to know the reason for his arrest and the office of the person arresting him—*Mohammad Ismail*, A.I.R. 1936 Rang. 119, 13 Rang. 754, 37 Cr.L.J. 462, 161 I.C. 459, 1936 Cr.C. 194. See Note 113A

This section gives very wide powers to the police and ought to be rigorously construed—*Sandino*, A.I.R. 1934 Sind 197 (199), 36 Cr.L.J. 332, 152 I.C. 361, 28 S.L.R. 205, 1934 Cr.C. 1407

The object of the Code is to give the widest powers to the police in cognizable cases and the only limitation is the necessary requirement of reasonability and credibility to prevent the misuse of the powers. The Legislature could have confined the power to officers in charge of a police station as is done in section 55, where matters are dealt with which are not offences but has not thought fit to do so. The suggestion that a police-officer who suspects a man of having committed a cognizable offence may arrest but that he may not arrest when a warrant has been issued, has nothing in the language of the section to support it and would enable a man wanted by the police on a charge of murder, for instance, to defy every police-officer except the one who held the warrant—*Ratna Mudali*, 40 Mad. 1028 (1030), 18 Cr.L.J. 709.

113A. Any Police-Officer:—Village Chowkidars are not Police-officers within the meaning of this section—*Kalai v. Kalu*, 27 Cal. 366, 4 C.W.N. 252; *Kalu*, 3 All 60; *Bolai*, 35 Cal. 361; *Purna Chandra v. Emp.*, 41 Cal 17 (19); *Bhagwan*, A.I.R. 1929 All. 935, 52 All. 203, 120 I.C. 205, 31 Cr.L.J. 12, 1929 Cr.C. 663, 1930 A.L.J. 242

The words 'any police-officer' show that where a warrant has been issued for the arrest of certain culprits on a charge of cognizable offence, any police-officer, even though he is not entrusted with the execution of such warrant and has not got the warrant with him, will be justified under this section in making the arrest—*Ratna Mudali*, 40 Mad. 1028, 18 Cr.L.J. 709

The issue of a written order under sec. 56, Cr. P. Code does not limit the power of a Police-officer conferred by this section—*Kishun*, 5 Pat. 533, 27 Cr.L.J. 1310, 98 I.C. 254, 8 P.L.T. 237, A.I.R. 1926 Pat 421 The Rangoon High Court took a different view in *Mohamed Ismail v. Emp.*, 37 Cr.L.J. 462, 161 I.C. 459, A.I.R. 1936 Rang. 119, 1936 Cr.C. 194, 13 Rang. 754, 8 R.Rang. 480 It has been held that sec. 54, Cr. P. C., does not give an unqualified power in all cases to any Police-officer to arrest without an authorisation in writing a person concerned in a cognizable offence. No doubt any officer to whom information of a cognizable offence has been given, or in whose view such an offence has been committed, or who has reasonable ground to suspect a person of such an offence can effect an arrest without a warrant from a Magistrate or any other authorisation from a superior officer, provided that the officer is acting on his own initiative, or independently in the course of his duty. But where a Subordinate Police-Officer is not acting independently, but is merely deputed by a superior officer to arrest some one concerned in a cognizable offence, a further formality is prescribed, presumably, to prevent abuse of the powers of the police, or to allow

the person arrested to know the reason for his arrest and the office of the person arresting him. The provisions of sec. 54, Cr. P. C., are limited by those of sec. 56, Cr. P. C. The Sind Judicial Commissioner's Court preferred the view of the Patna High Court. It has laid down that sec. 56, Cr. P. C., applies to cases where a police-officer is acting not on his own information but on the order of his superior, but where facts exist which do attract the application of sec. 54, Cr. P. C., itself, there appears no reason why a police-officer should not act under that section even if the formalities required by sec. 56, Cr. P. C., are not complied with—*Achar Bilawal v Emp*, A.I.R. 1937 Sind 308 (309), 172 I.C. 149. The Bombay High Court also followed the view of the Patna High Court in preference to the view of the Rangoon High Court in *Keshavlal Hirallal*, 38 Bom.L.R. 971, 166 I.C. 632, A.I.R. 1937 Bom. 56, I.L.R. 1937 Bom. 127, 38 Cr.L.J. 267, 9 R.B. 249, where *Charu Chandra*, 44 Cal. 76, 37 I.C. 57, A.I.R. 1917 Cal. 253, 18 Cr.L.J. 73, 20 C.W.N. 1233 and *Santabir Lama v. Emp*, 63 Cal. 399, 155 I.C. 537, A.I.R. 1935 Cal. 122, 1935 Cr.C. 156, 36 Cr.L.J. 794, 39 C.W.N. 285, 7 R.C. 528, were explained and distinguished. In a very recent case the Patna High Court affirmed its views expressed above—*Jioo Mian v. Emp*, 39 Cr.L.J. 563, 175 I.C. 335, 16 Pat. 763, 1938 P.W.N. 216, 19 Pat.L.T. 247, 4 B.R. 584, 10 R.P. 623, A.I.R. 1938 Pat. 229, where *Keshavlal Hirallal*, supra was relied on and *Kartik Chandra Maity v. King-Emp*, 13 P.L.T. 135, 138 I.C. 844, A.I.R. 1932 Pat. 171, 1932 Cr.C. 347, 33 Cr.L.J. 706, Ind. Rul. 1932 Pat. 190, was distinguished. The Nagpur High Court, however, followed the view of the Rangoon High Court—*Maroti v. Emp*, A.I.R. 1939 Nag. 95 (97), 1939 N.L.J. 101. There is no direct decision of the Calcutta High Court on this point; but see *Raja Mia v. Emp*, 44 C.W.N. 502 (504). See also *Appasami Mudaliar*, quoted in Note 109.

Where a complaint has been made against any person in respect of a cognizable offence, any Police-officer may arrest him without warrant even though the Police-officer be not in his uniform—*Mahadeo*, 21 A.L.J. 791, 25 Cr.L.J. 652.

114. Power of arrest:—The words "may arrest" show that the power of arrest is discretionary. A Police-officer is not always bound to arrest for cognizable offences. If an information of such an offence is brought to him, he ought, if there be circumstances in the case which lead him to suspect the information, to refrain from arresting persons of respectable position and to leave the complainant to go to a Magistrate and convince him that the information justifies the serious step of the issue of a warrant of arrest—*Irappa*, Ratanlal 795 (797). The powers under this section must be cautiously used. This section gives wide powers to a Police-officer to make an arrest without an order from the Magistrate and without warrant only in certain circumstances limited by the provisions contained in this section, and it is necessary in exercising such large powers to be cautious and circumspect—*Charu Chandra*, 44 Cal. 76, 20 C.W.N. 1233, 18 Cr.L.J. 73, 37 I.C. 57, A.I.R. 1917 Cal. 253.

Power to detain:—Authority given to arrest under this section implies authority to detain—*Ramchandra*, Ratanlal 220. But when certain persons were arrested under section 54, Cr. P. Code on suspicion of having been concerned in a dacoity, and afterwards the investigating police-officer reported to the Magistrate that there was no sufficient evidence upon which to charge those persons with participation in the dacoity, the Magistrate ought to discharge those persons and ought not to detain them in order that the police might institute proceeding under sec. 110. If the police believe that those persons were habitual thieves or robbers, they ought to re-arrest them under section 55—*Rahu*, 43 All. 186, 18 A.L.J. 1114.

In no case other than those provided by sections 54, 55 and 57, Cr. P. Code can a Police-officer arrest a person without warrant. The law being jealous of the liberty of the subject has set wholesome bounds to the power of police to arrest without a warrant. The Cr. P. Code being a complete code defining the powers of the police with regard to arrest, it is not open to a Court to travel outside the Code for finding powers either for the police or for private persons to interfere with the liberty of the subject—*Gopal*, 46 Mad. 605 (625), 44 M.L.J. 655, A.I.R. 1923 Mad. 523.

115. Punishment:—A Police-officer arresting a person unjustifiably or otherwise than on a reasonable ground is guilty of an offence under sec 220, I. P. Code.

A person causing obstruction to a Police-officer making an arrest under this section, is guilty of an offence under sec. 225, I. P. C.—*Ratna Mudali*, 40 Mad. 1028, 18 Cr.L.J. 709; *Gopal Singh*, 36 All 6.

116. First Clause—Reasonable complaint or suspicion, credible information:—This clause does not apply to a case of non-cognizable offence—*Raghuni*, 37 Cr.L.J. 318, 160 I.C. 604, 17 P.L.T. 81, A.I.R. 1936 Pat. 249, 1936 Cr.C. 273.

What is a reasonable complaint or suspicion must depend on the circumstances of each particular case, but it must be at least founded on some definite fact tending to throw suspicion on the person arrested, and not a mere vague surmise or information. Still less have the police any power to arrest persons, as they sometimes appear to do, merely on the chance of something being hereafter proved against them—*Behary*, 7 W.R. 3 (5).

A general definition of what constitutes *reasonableness* in a complaint or suspicion and credibility of information cannot be given. Both must depend upon the existence of tangible legal evidence within the cognizance of the Police-officer, and he must judge whether the evidence is sufficient to establish the reasonableness and credibility of the charge, information or suspicion—*Reg. and Ord.*, N. W. P., Sec. 10, para 366 (8); *Bhawoo v. Mulji*, 12 Bom 377. The words 'credible' and 'reasonable' must have reference to the mind of the person receiving the information and such information must afford sufficient materials for the exercise of an independent judgment at the time of making the arrest—*Subodh*, 52 Cal. 319, 29 C.W.N. 98, 26 Cr.L.J. 625.

If a Magistrate after taking the statement of the complainant respecting an offence under section 406, I. P. Code, issues a warrant for the arrest of the accused, there is a 'reasonable complaint' of the accused being concerned in a cognizable offence; consequently a constable who arrests the accused without a warrant is justified in doing so under this section—*Alay Muhammad*, 22 Cr.L.J. 758, A.I.R. 1922 All 457, 21 A.L.J. 791, 64 I.C. 278. If a warrant of arrest is issued against the accused on a charge of a cognizable offence by the Police of any other province, it amounts to a credible information that the accused has committed a cognizable offence—*Gopal Singh*, 36 All. 6, 11 A.L.J. 957.

Where a complaint of a cognizable offence was made to the Magistrate who recorded it under section 200 and directed the police to make investigation and send a report, and the police after making the investigation arrested three persons, it was held that the complaint recorded under sec. 200 was a credible information upon which the police were entitled to arrest under this section, even though the Magistrate had not issued process against the accused—*Bhola Bhagat*, 2 Pat. 379, 4 P.L.T. 521, 24 Cr.L.J. 375. The police can make an arrest under this section on a complaint of a cognizable offence made before them, without a warrant and even when they are not in uniform—*Mahadeo*, 21 A.L.J. 791, 25 Cr.L.J. 652, 81 I.C. 140, A.I.R. 1924 All 201.

117. Fourth Clause:—A formal complaint need not be made in order to authorise a police-officer to arrest under this clause any person found with stolen property—*Gowree Singh*, 8 W.R. 28.

The possession of stolen property must be recent and exclusive—*Ibid*.

The word 'and' has been substituted for 'or'. Under the old law as it stood before 1923, a police-officer could arrest any person in whose possession anything was found which might reasonably be suspected to be stolen property, even though he might come in possession of that property innocently. The effect of the amendment is that the mere possession of stolen property will not empower a police-officer to arrest the person in possession of it but the person must *also* be reasonably suspected of having committed an offence in respect of the thing. See the *Legislative Assembly Debates*, 16th January, 1923, page 1151.

117A. Fifth Clause—Obstruction to Police-Officer:—Where a police constable, after questioning a person carrying bundles of cloth under his arms (suspecting the cloth to be stolen) and receiving unsatisfactory replies, took hold of the pieces of cloth in order to inspect them, but the latter refused to allow the officer to inspect the cloth and scuffled with him, after which the police-officer arrested him, held that the person was legally arrested under the fifth clause of this section, for obstructing a police-officer while acting in the execution of his duty—*Bhoucoo v. Mulji*, 12 Bom 377.

118. Seventh Clause:—*Offence committed out of British India*:—By virtue of this clause the ruling in 19 Bom. 72, is no longer good law. This clause authorises the police in British India to arrest without warrant a British subject committing outside British India any of the offences enumerated in the first Schedule of the Extradition Act—*Huseinally*, 7 Bom LR 463, 2 Cr L.J. 439. An arrest in British India by a police of the Native State of a person suspected to have committed an offence in the Native State is illegal—*Debi*, 29 All 377.

The wording of this clause indicates that the arresting Police-officer has to exercise his own judgment and form his own opinion as to whether he should or should not act, and to enable him to do so he must have the necessary facts before him. A bare assertion of the commission of an offence does not amount to a reasonable suspicion or a credible information, on the basis of which an arrest can be made under this clause. If there is a credible information of the issue of a warrant by the Foreign State, that would justify an action under this section—*Subodh*, 52 Cal 319, 29 CWN. 98, 40 CLJ. 489, 26 Cr.LJ 625, AIR 1925 Cal. 278. The expression "liable to be apprehended", etc., contemplates cases in which there is a *present* liability of apprehension or detention in custody in British India under, the laws of extradition or the Fugitive Offenders Act, or any other law, and not cases in which there may be liability *in future* for apprehension or detention. The issue of some sort of process under the law would create such a liability, though the process may not have arrived and is not available for execution—*Ibid*. See also *Emp v Kalu*, 34 Cr.LJ 679, 144 IC 67, AIR. 1933 Lah. 159, 1933 Cr.C. 301, Ind. Rul. 1933 Lah. 402; *Haramohan Patnaik v. Emp.*, 40 Cr.LJ. 500 (505), 1938 PWN 869, 180 IC 787, AIR 1939 Pat 129, 19 P.L.T. 909, 18 Pat. 121. What is reasonable complaint or suspicion depends on the circumstances of each case but it must be founded on some definite fact or some tangible proof which is sufficient to establish in the mind of a reasonable Police-Officer, the reasonableness or credibility of the charge, information or suspicion. To justify an arrest under this clause there must be in existence, as a fact, as opposed to any belief which may be entertained by any person, a warrant which has been issued under the Extradition Act. Where the only information which the Police had was the warrant issued by the District Magistrate of a Native State, such can hardly be said to be a reasonable complaint or to amount to credible information or to create reasonable suspicion—*Haramohan Patnaik v Emp.*, supra.

A Magistrate has power to grant bail to an accused who has been arrested in pursuance of this clause, and whom the Magistrate has been asked to retain in custody by the District Magistrate of a Native State—*In re Sriam Shambhudajal*, 26 Bom.L.R. 981, 26 Cr.L.J. 948 (949), AIR 1925 Bom 104.

Credible information includes any information which, in the judgment of the officer to whom it is given, appears entitled to credit in the particular instance and which he believes, and it need not be sworn information—*Kada*, 7 P.R. 1882 (Cr.) ; *Debi*, 30 Cr.L.J. 625, 116 IC 455, AIR. 1929 Lah. 720, Ind. Rul. 1929 Lah. 519. There is nothing in this section to suggest that the arresting police-officer is to be the final judge of what is reasonable or credible—*Pramila v. Hopkyns*, AIR. 1932 Cal. 470 (473), 36 CWN. 669, 1932 Cr.C. 460, 138 IC 358, 33 Cr.LJ 609, 59 Cal. 1440. The "reasonable suspicion" and the "credible information" referred to in this section must relate to definite averments which the Police-officer must consider for himself before he acts under this section. The authority which the section confers is personal

and the responsibility is personal also—*Saindino*, 36 Cr.L.J. 332, 152 I.C. 361, A.I.R. 1934 Sind 197, 28 S.L.R. 205, 1934 Cr.C. 1407.

Section 23 of the Extradition Act (XV of 1903) refers to the case of persons arrested under this clause, that is to say, when a person has been arrested not only without warrant but also without an order from a Magistrate. This section is intended to cover those cases where the Police-officer acts on his own responsibility, that is to say, on suspicion or information as based on facts which the Police-officer considered for himself. On the other hand, where the arrest is made in pursuance of an order of a Magistrate, it is the order which must determine the legality or otherwise of the arrest—*Santbir*, 36 Cr.L.J. 794, 155 I.C. 537, A.I.R. 1935 Cal 122, 39 C.W.N. 285, 1932 Cr.C. 156, 62 Cal 399. See also *Charu Chandra*, 44 Cal. 76, 20 C.W.N. 1233, 18 Cr.L.J. 73, 37 I.C. 57, A.I.R. 1917 Cal. 253.

119. Ninth Clause:—The first two lines of this clause have been added on the recommendation of the Select Committee in 1916, and the latter portion on the recommendation of the Joint Committee in 1922. As regards the first two lines the Select Committee of 1916 observed: "The Committee are of opinion that an amendment is required in section 54 to meet the case of a requisition from a police-officer to arrest a man at a distance. We think it is clear that there should be power for an investigating officer to require by telegram the arrest of a person who may, perhaps, have absconded from the place where the investigation was taking place. We, therefore, propose to add a clause at the end of section 54." As regards the rest of the clause the Joint Committee (1922) added: "We agree with those critics who desire that some safeguard should be provided and we have therefore proposed to lay down that the requisition should reveal the offence or other cause for which the arrest is to be made, so that the arresting officer can satisfy himself that the arrest could lawfully have been made without warrant by the officer issuing the requisition."

Before the ninth clause was added, it was held that the 'reasonable suspicion' and 'credible information' in this section must be based upon definite facts which the Police-officer had to consider *for himself* before he could act under this section. He could not delegate his discretion or take shelter under *another person's belief* or judgment. Thus, where a Police-officer arrested the accused on receipt of a letter written by an Inspector of Police in which it was stated that the accused committed offences under secs. 409 and 420, I. P. C., and it appeared that the officer effecting the arrest relied solely on the aforesaid letter and had no personal knowledge of the facts of the case, it was held that the arrest of the accused was not proper—*Charu Chandra*, supra. This ruling is no longer correct in view of this new clause. In cases, however, where clause firstly applies the responsibility is that of the arresting officer himself and the principle laid down in 44 Cal 76 case still holds good. The new clause does not affect the provisions of clause seventhly—*Subodh*, 29 C.W.N. 98 (103), 52 Cal. 318, 40 C.L.J. 489, 26 Cr.L.J. 625.

120. Arrest without warrant under Special Acts:—See Madras Act VII of 1864, Sec. 24; Madras Act I of 1887, Sec. 4; Arms Act (XI of 1878), Sec. 12; Indian Gambling Act (III of 1867), Sec. 13; Railways Act (IX of 1890), Sec. 132; Cantonments Act (Act II of 1924), Sec. 250; Criminal Tribes Act (Act VI of 1924), Secs. 21, 22, 25; Emigration Act (XXI of 1883), Sec. 12; Indian Explosives Act (IV of 1884), Sec. 13; Forest Act (Act VII of 1878), Sec. 63; European Vagrancy Act (Act IX of 1874), Sec. 19; Assam Labour and Emigration Act (VI of 1901), Sec. 195; Bengal Excise Act (VII of 1878), Secs. 40 and 41; Bengal Cruelty to Animals Act (Bengal Act I of 1920), Sec. 26; Punjab Municipal Act (XX of 1891), Secs. 18, 83; Bombay Gambling Act (IV of 1887), Sec. 12A; Rangoon Tramways Act (XXII of 1883), Sec. 19.

Arrest without jurisdiction:—The question whether the officer who effected the arrests was acting within or beyond his powers in making arrests, does not affect the question whether the accused were guilty or not guilty of the offence with which they were charged—*Ravalu*, 26 Mad. 124.

Arrest of vagabonds,
habitual robbers, etc.

55. (1) Any officer in charge of a police-station may, in like manner, arrest or cause to be arrested—

- (a) any person found taking precautions to conceal his presence within the limits of such station under circumstances which afford reason to believe that he is taking such precautions with a view to committing a cognizable offence; or
- (b) any person within the limits of such station who has no ostensible means of subsistence, or who cannot give a satisfactory account of himself; or
- (c) any person who is by repute an habitual robber, house-breaker or thief, or an habitual receiver of stolen property knowing it to be stolen, or who by repute habitually commits extortion or in order to the committing of extortion habitually puts or attempts to put persons in fear of injury.

(2) This section applies also to the police in the town of Calcutta.

121. Object of section:—The powers with which officers in charge of police stations have been armed under the Code for the purpose of restraining bad characters are exceptional powers. They provide very strong remedies and should never be put in force without the greatest deliberation, and except upon convincing evidence. This section was intended for the suppression of habitual bad characters whom an officer in charge of a Police station suddenly finds within his jurisdiction or about whom he has good cause to fear that they will commit serious harm, before there is time to apply to the nearest Magistrate empowered to deal with the case under sec 112—*Doulat Sing*, 14 All. 45.

122. Illegal arrest:—A person against whom proceedings under Chapter VIII were held by the High Court to be illegal, was re-arrested under this section within the Court precincts after giving him ostensible release, and proceedings against him under Chapter VII were renewed. It was held that the re-arrest was illegal and an unlawful exercise of authority, as it was an attempt in another way to do what had been declared by the High Court to be illegal—*Amir Khan*, 1883 A.W.N. 223. Similarly, where the Sessions Judge had passed orders for the immediate release of an accused person who had been prosecuted for dacoity, the action of a Police officer or a Magistrate in re-arresting him under this section and subsequently taking proceedings against him is a grave irregularity and wholly without jurisdiction—*Maiku*, 41 All 483, 17 A.L.J. 458, 20 Cr.L.J. 381.

In order to justify an arrest under clause (c) of this section the prosecution shall have to prove that the man was reputed to be a habitual robber or house-breaker, etc., it is illegal to arrest a person merely on the ground that the police had reason to suspect that he was concerned in several offences—*Appasami*, 47 Mad. 442 (445), 46 M.L.J. 447, 25 Cr.L.J. 563.

123. Section applies to Calcutta Police:—This section is expressly made applicable to the Police of Calcutta. Therefore, an officer in charge of a Police-station in Calcutta may arrest a person, although there is no declaration by Government declaring a thana or police-station in Calcutta to be a police-station within the meaning of this Code—*Madho Dhobi*, 31 Cal. 557.

124. Bail:—When the Police arrest under this section, they are bound to give the person arrested the option of bail, and the bond should not be excessive, but in accordance with the position in life occupied by the person arrested—*Daulat Singh*, 14 All 45 But there is no indication in sec. 55, Cr. P. Code that the police are bound, after arrest, to inform the persons arrested that they are entitled to be released on bail. Nor is it clear that the police are bound to release them on bail any more than persons who had been arrested under sec. 54, Cr. P. Code—*Supdt. & Rem. of Legal Affairs, Bengal v. Jahir Ali*, 63 Cal. 189, 37 Cr.L.J. 1070, 164 I.C. 1007.

125. Clause (a):—Habitual gambler:—Only the persons enumerated here can be arrested under this section. Persons who are suspected of earning their livelihood by unlawful gambling are not liable to arrest by the Police. The proper course is to proceed under sec. 112 of the Code—*Kyaw Dun*, 3 L.B.R. 94, 3 Cr.L.J. 20.

For the meaning of the word 'believe' see *Rango*, 6 Bom 402; *Suraj Prasad*, 118 I.C. 759, 9 O.W.N. 208, A.I.R. 1929 Oudh 213, 30 Cr.L.J. 969; *Gaya*, 32 Cr.L.J. 1184, 134 I.C. 401, 8 O.W.N. 517, Ind Rul. 1931 Oudh 353, where it is laid down that the word 'believe' is much stronger than the word 'suspect' and involves the necessity of showing that the circumstances were such that a reasonable man must have been fully convinced in his mind. These decisions were in connection with sec. 411, I. P. C. See also 1913 M.W.N. 695 For the meaning of the word 'habitual' in clause (3) see *Bhubaneswar*, 6 Pat. 1 (7) quoted under sec. 110, Cr. P. Code.

126. Sections 55 and 110:—This section is independent of Chapter VIII of this Code, although proceedings under that Chapter might follow on arrest under this section as a natural sequence. A police-officer can therefore arrest or cause to be arrested without a warrant or an order of a Magistrate under Chapter VIII, any person who comes under this section, although proceedings under sec. 110 are contemplated against him—*Nepal*, 35 All. 407, 14 Cr.L.J. 618, 11 A.L.J. 596, 21 I.C. 666.

A person who can be dealt with under clauses (d) and (e) of sec. 110 is in most cases a person who would fall within one of the categories given in sec. 55. A Police-officer who intends to proceed against a man under sec. 110 can cause him to be arrested under sec. 55 without a warrant. It is not necessary that all the formalities of Chap. VIII are to be observed before he can be arrested, because it would in many cases render proceedings under Chap. VIII useless. If the Police or the Magistrate who are contemplating taking proceedings under that chapter against desperate and dangerous characters or vagabonds and vagrants, are to allow the suspects to remain free until all the formalities of Chap. VIII have been fulfilled and a regular committal order passed against such persons, it would oftentime happen that the offenders would abscond and the proceedings would be wholly infructuous. The police can, therefore, arrest a suspected criminal under sec. 55 and then proceed against him either for the substantive offence or under Chap. VIII—*Haradaya*, 20 S.L.R. 85, 27 Cr.L.J. 628 (630), A.I.R. 1926 Sind 190.

56. (1) When any officer in charge of a police-station or any police-officer making an investigation under Chapter XIV requires any officer subordinate to him to arrest without a warrant (otherwise than in his presence)

Procedure when police-officer deposes subordinate to arrest without warrant.

any person who may lawfully be arrested without a warrant, he shall deliver to the officer required to make the arrest an order in writing specifying the person to be arrested and the offence or other cause for which the arrest is to be made.

The officer so required shall before making the arrest notify to the person to be arrested the substance of the order and, if so required by such person, shall show him the order.

(2) This section applies also to the police in the town of Calcutta.

Change:—The italicised words have been added by sec. 11, Cr. P. Code Amendment Act (XVIII of 1923). "We consider that a Police-officer making an investigation should, no less than an officer-in-charge of a police-station, have power to depute a subordinate to effect an arrest under the provisions of sec. 56 (1) and we propose an amendment in this sub-section accordingly"—*Report of the Select Committee of 1916.*

The second para of sub-section (1) was added on the motion of Mr. Rangachariar during the debate in the Assembly. See *Legislative Assembly Debates*, January 17, 1923, page 1186.

127. "Officer subordinate":—These words are not limited to a police-officer as in sec 54 or 57. A *chowkidar* is an officer subordinate to an officer-in-charge of a police-station—*Bahubal*, 10 CWN 287, 3 Cr.L.J. 201; *Umrao*, 26 Cr.L.J. 795.

128. In his presence:—If the arrest is made in the presence of the officer-in-charge of the police-station, the arrest is virtually made by him, and no order in writing is necessary; a verbal order is sufficient—*Ehaikh Emoo*, 11 W.R. 20.

129. Order in writing:—The order in writing is an authority to a subordinate officer to make an arrest which the superior Police-officer, if present, could himself make on his own responsibility—*Basant Lal*, 27 Cal 320; 4 CWN 311. The mere writing of the name of the subordinate on the back of the warrant and the signing of that endorsement by the officer in charge of the station does not constitute the warrant an order in writing. But adding the words "arrest the person within named and for the offence within stated" would make it a valid order in writing—*Dalip*, 18 All. 246.

A Sub-Inspector may arrest persons who fall under certain categories given in sec. 55. If he wishes any other police-constable to arrest such person, he must specify the cause for which the arrest is to be made, i.e., he must state within which category as given in sec. 55 the supposed offender falls. If it is intended that the police officer should arrest a man with the view of taking proceedings under sec. 110, it is strictly and specially necessary that he should specify one of the clauses given in sec. 55—*Hardayal*, 20 S.L.R. 85, 27 Cr.L.J. 628 (629), A.I.R. 1926 Sind 190.

Section 80 of the Code applies only to warrants and not to orders in writing mentioned in this section; therefore, it was held that a subordinate officer making an arrest under an order in writing was not bound to notify to the person arrested the authority for and the cause of his arrest—*Basant Lal*, 27 Cal 320 (323). This is no longer good law, because the new second para of this section expressly makes it *obligatory* on the subordinate officer to notify to the person arrested the substance of the *order in writing*, and to show him the order, if called upon to do so. Where the subordinate police officer making an arrest under an order in writing under sec. 56, Cr. P. C., did not say that before making the arrest he notified to the person to be arrested the substance of the order, the provisions of sec. 56, Cr. P. C., had not been complied with and the arrest could not be legally made under that section. Nor was the arrest legal under sec. 54, Cr. P. C., as there was no evidence that the subordinate officer had information or suspicion that the person to be arrested was concerned in a cognizable offence—*Raja Mia v. Emp.*, 44 C.W.N. 502 (504).

But the provisions of section 56 (requiring a constable to notify the substance of the order to the person to be arrested) do not deprive the constable of his statutory power of arrest under sec. 54 without a warrant. If the person to be arrested falls under sec. 54, the mere fact that a command certificate (order in writing) has been given to the constable under sec. 56 is immaterial, as the constable independently of any such command certificate is entitled to make the arrest. The failure of the constable in such a case to notify the substance of the command certificate to the person to be arrested is not illegal—*Kishun Mandar*, 5 Pat. 553, 27 Cr.L.J. 1310 (1311), 8 P.L.T. 237. See Note 113A for a detailed discussion on this point.

No form being specified for this section it is sufficient for the police officer in his requisition to specify sec. 55, Cr. P. Code and by so doing he conveys sufficient information to the person to be arrested. There is no section which lays down that there must be an endorsement of the name of the constables who actually go to make the arrest, on the requisitions—*Rameshwar*, AIR 1934 All 879, 4 A.W.R. 107, 35 Cr L J. 1452, 151 I.C. 834, 1934 Cr C. 1085, 1934 A.L.J. 997.

The subordinate officer making the arrest is not bound on his own initiative to show the accused the order given by the officer-in-charge of the police station, unless he is asked to produce the order—*Umrao*, 26 Cr.L.J. 795 (796), 86 I.C. 427, A.I.R. 1925 Oudh 544.

130. Warrant by a Magistrate:—The issuing of a warrant by a Magistrate for the arrest of a person does not exclude the jurisdiction of the officer in charge of the police-station and prevent him from issuing the order under this section. It might be different if the Magistrate has decided that no warrant should issue and that summons only should issue—*Dalip*, 18 All. 246 (248).

57. (1) When any person, who in the presence of a police-officer has committed or has been accused of committing a non-cognizable offence, refuses, on demand of such officer, to give his name and residence which such officer has reason to believe to be false, he may be arrested by such officer in order that his name or residence may be ascertained.

(2) When the true name and residence of such person have been ascertained, he shall be released on his executing a bond, with or without sureties, to appear before a Magistrate if so required:

Provided that, if such person is not resident in British India, the bond shall be secured by a surety or sureties resident in British India.

(3) Should the true name and residence of such person not be ascertained within twenty-four hours from the time of arrest or should he fail to execute the bond, or, if so required, to furnish sufficient sureties, he shall forthwith be forwarded to the nearest Magistrate having jurisdiction.

131. Refusal to give name and address:—A police constable asked a man not to create any disturbance on the public road. Upon the man's declining to do so, the constable demanded his name and address which were not given. Then the constable arrested and dragged him to the police chowky and detained him there till his name and address was ascertained. It was held that the constable had lawfully exercised the powers conferred by this section—*Goolab Rasul*, 5 Bom L R 597 Where two police-officers arrested without warrant a person who was drunk and creating disturbance in a public street, and confined him in the police station, though one of them knew his name and address, held that the police officers' action was not justified under this section—*Gopal Naidu*, 46 Mad. 605 (625), 24 Cr.L.J. 599, 32 M.L.J. 352, 1923 M.W.N. 425, 73 I.C. 343, AIR. 1923 Mad. 523 (F.B.).

58. A police-officer may, for the purpose of arresting with-

Pursuit of offenders out warrant any person whom he is authorized to arrest under this Chapter, pursue such person into any place in British India,

132. Pursuit in foreign territory:—A Police may in *hot pursuit* follow an offender into an independent Native State; if they arrest him there, they must take him at once to the nearest Police authority of that State; if not in hot pursuit, they should ordinarily apply to the nearest Police authorities of the State and request him to effect the arrest of the fugitive—*C. P. Pol Man.*, p 170. For offences committed in British India arrests made at a railway station in an Indian Independent State are illegal—*Muhammad*, 25 Cal. 20, 24 I.A. 137 (P.C.); *Radha Kishan*, 21 Cr.L.J. 303, 55 I.C. 351, 1 Lah 406.

59. (1) Any private person may arrest any person who, in his view, commits a non-bailable and cognizable offence or any proclaimed offender, and, without unnecessary delay, shall make over any person so arrested to a police-officer, or, in the absence of a police-officer, take such person or *cause him to be taken in custody* to the nearest police-station.

Arrest by private persons. Procedure on such arrest.

(2) If there is reason to believe that such person comes under the provisions of section 54, a police-officer shall re-arrest him.

(3) If there is reason to believe that he has committed a non-cognizable offence, and he refuses on the demand of a police-officer to give his name and residence, or gives a name or residence which such officer has reason to believe to be false, he shall be dealt with under the provisions of section 57. If there is no sufficient reason to believe that he has committed any offence, he shall be at once released.

Change:—The words "or cause him to be taken in custody" have been added by sec 12 of the Cr P Code Amendment Act (XVIII of 1922) This amendment gives effect to the ruling in 29 All 575 cited below

133. Principle:—The principle of this section is that "for the sake of preservation of the peace, any individual who sees it broken may restrain the liberty of him whom he sees breaking it, so long as his conduct shows that the public peace is likely to be endangered by his acts"—*per Parke B in Timothy v Simon*, (1835) 4 L.J. Ex. 81. Thus, if a person is drunk and disorderly and is committing assaults on others, so that his conduct is at that time a grave danger to the public, he may be rightly arrested under this section by a private citizen—*Ramaswamy Ayyar*, 41 Mad 913, 22 Cr.L.J. 412 This decision was upheld in *Gopal*, 46 Mad 605, 44 M.L.J. 655, A.I.R. 1923 Mad 523 (F.B.), but on different grounds.

The section is not happily worded, but the intention of the Legislature appears to have been to restrict the right of arrest by a private individual to cases in which a cognizable and non-bailable offence has been committed in the presence of the person who arrests or causes the arrest of the offender. It is not essential that a private individual, in whose presence a non bailable and cognizable offence is committed, should himself physically arrest the offender. He may cause such offender to be arrested by another person—*Gouri Prosad v. Chartered Bank*, 52 Cal 615 (618), 89 I.C. 642, A.I.R. 1925 Cal. 884. In *Graham v. Henry Gidney*, A.I.R. 1933 Cal. 708 (714), 60 Cal 955, Ameer Ali, J., doubted the correctness of the above view and held that he was not convinced that the only defence to civil trespass was to be found in any section of the Criminal Procedure Code.

134. Scope of Section:—The intention of this section is to prevent arrest by a private person on mere suspicion or information and the power of arrest by

No form being specified for this section it is sufficient for the police officer in his requisition to specify sec. 55, Cr. P. Code and by so doing he conveys sufficient information to the person to be arrested. There is no section which lays down that there must be an endorsement of the name of the constables who actually go to make the arrest, on the requisitions—*Rameshwar*, A I R. 1934 All. 879, 4 A.W.R. 107, 35 Cr.L.J. 1452, 151 I.C. 834, 1934 Cr.C. 1085, 1934 A.L.J. 997.

The subordinate officer making the arrest is not bound on his own initiative to show the accused the order given by the officer-in-charge of the police station, unless he is asked to produce the order—*Umrao*, 26 Cr.L.J. 795 (796), 86 I.C. 427, A I R. 1925 Oudh 544.

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57. (1) When any person, who in the presence of a police-officer has committed or has been accused and residence, of committing a non-cognizable offence, refuses, on demand of such officer, to give his name and residence or gives a name or residence which such officer has reason to believe to be false, he may be arrested by such officer in order that his name or residence may be ascertained.

(2) When the true name and residence of such person have been ascertained, he shall be released on his executing a bond, with or without sureties, to appear before a Magistrate if so required:

Provided that, if such person is not resident in British India, the bond shall be secured by a surety or sureties resident in British India.

(3) Should the true name and residence of such person not be ascertained within twenty-four hours from the time of arrest or should he fail to execute the bond, or, if so required, to furnish sufficient sureties, he shall forthwith be forwarded to the nearest Magistrate having jurisdiction.

131. Refusal to give name and address:—A police constable asked a man not to create any disturbance on the public road. Upon the man's declining to do so, the constable demanded his name and address which were not given. Then the constable arrested and dragged him to the police chowky and detained him there till his name and address was ascertained. It was held that the constable had lawfully exercised the powers conferred by this section—*Goolab Rasul*, 5 Bom L.R. 597. Where two police-officers arrested without warrant a person who was drunk and creating disturbance in a public street, and confined him in the police station, though one of them *knew his name and address*, held that the police officers' action was not justified under this section—*Gopal Naidu*, 46 Mad 605 (625), 24 Cr.L.J. 599, 32 M.L.J. 352, 1923 M.W.N. 425, 73 I.C. 343, A.I.R. 1923 Mad. 523 (F.B.).

58. A police-officer may, for the purpose of arresting without warrant any person whom he is authorized to arrest under this Chapter, pursue such person into any place in British India.

person to the nearest police station—*Cholu*, 33 Cr.L.J. 572, 138 I.C. 95, 13 P.L.T. 321, A.I.R. 1932 Pat. 214, 1932 Cr.C. 495, Ind Rul. 1932 Pat. 171.

‘Take such person to the police-station’:—It is not the intention of the Legislature that the person making the arrest should be bound himself to take the arrested person to the police-station—*Parsiddhan Sing*, 29 All. 575; *Pctadu*, 11 Mad 480. See also *Johri*, 23 All. 266. The directions are sufficiently complied with if the person arresting the accused forwards him in charge of a servant or a village servant—*Ibid*. This is now made clear by the addition of the words “or cause him to be taken.”

A private person making an arrest must either make over the arrested person to a police-officer or take him to the nearest police-station. If he keeps the arrested person in his own custody, he will be guilty of an offence under sec 342, I P. C. (wrongful confinement)—*Anant Prasad*, 8 P.L.T. 201, 27 Cr.L.J. 1378 (1381), 98 I.C. 594. See also *Supdt. & Rembr of Legal Affairs v Bhagnath*, A.I.R. 1934 Cal 610, 38 C.W.N. 854, 35 Cr.L.J. 1367, 151 I.C. 662, 59 C.L.J. 482, 1932 Cr.C. 908, 61 Cal 991.

60. A police-officer making an arrest without warrant shall, without unnecessary delay and subject to the provisions herein contained as to bail, take or send the person arrested before a Magistrate having jurisdiction in the case, or before the officer in charge of a police-station.

Person arrested to be taken before Magistrate or officer in charge of police-station

136. “Send the person”:—On a police-officer arresting a person, the prisoner should not be kept in confinement in any place which the officer might select, but should be sent immediately to the police-station and be placed in the custody of the officer in charge of the station, who is the person entrusted by the Act with the conduct of the enquiry—*Tarnee*, 7 W.R. 3. Where a policeman arrested a thief, but being himself unable to send or take the accused to a Magistrate, *made a report*, upon which the Magistrate issued a warrant, it was held under the circumstances that the accused was legally brought before the Magistrate—*Mahipya*, 5 B.H.C.R. 99.

61. No police-officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate under section 167, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate’s Court.

Person arrested not to be detained more than twenty-four hours

137. Object of section:—The intention of the Legislature, having regard to this section and section 167, is that an accused person should be brought before a Magistrate competent to try or commit, with as little delay as possible—*Engadu*, 11 Mad. 93; *Ponnusami*, 6 Mad 69; *Narendra*, 36 Cal. 166; *Nagendra Nath*, 51 Cal 402 (412), 38 C.L.J. 388, 81 I.C. 220, A.I.R. 1924 Cal. 476. The precautions laid down in sections 60 and 61 seem to be designed to secure that within not more than 24 hours some Magistrate shall have seisin of what is going on and some knowledge of the nature of the charge against the accused, however incomplete the information may be—*Dicarkadas v. Ambalal*, 28 C.W.N. 850, 25 Cr.L.J. 1203, 82 I.C. 131.

Section 61 does not apply to the Calcutta Police, but the detention of an offender by the Deputy Commissioner of Police in Calcutta for an unlimited period is improper—*Panchkari*, 52 Cal. 67, 27 C.W.N. 300, 26 Cr.L.J. 782 (792); and an improper exercise of such power may be corrected by the High Court under the suitable provisions such as sec. 491, Cr. P. Code—*Srilal*, 41 C.L.J. 134, 27 Cr.L.J. 1185 (1185), 97

138. Detention in custody:—Where the accused were not allowed to leave the thana or to go to their homes, *held* that they were detained in custody within the meaning of this section, and the mere fact of there not being a special guard over them would not alter the nature of their position—*Basooram*, 19 W.R. 36.

An approver cannot be detained in the custody of the police—*Ranbir*, A.I.R. 1931 Lah. 480, 33 Cr.L.J. 162, 135 I.C. 192, 1931 Cr.C. 704, 32 P.L.R. 728; *In re Khairati Ram*, A.I.R. 1931 Lah. 476, 32 P.L.R. 493, 132 I.C. 519, 1931 Cr.C. 700, 32 Cr.L.J. 913, 12 Lah. 635; *Kundan Lal v. Emp.*, A.I.R. 1931 Lah. 353, 131 I.C. 625, 32 P.L.R. 423, 1931 Cr.C. 625, 32 Cr.L.J. 785, 12 Lah. 604, 16 A.I.Cr.R. 428.

139. Period of detention:—Although this section gives power to a police-officer to detain an accused person for a period of 24 hours, still in no case is a Police-officer justified in detaining a person for a single hour without bringing him before a Magistrate except upon some reasonable ground justified by all the circumstances of the case, and it is for the police-officer to show that he had reasonable grounds. He is not entitled to detain the accused if he can send the accused to a Magistrate at once—*Suprosunno*, 6 W.R. 88 (89). Even if a person be rightly arrested, it does not rest with the police officer to keep the prisoner in custody where and as long as he pleases. Under no circumstances can he be detained, without the special order of a Magistrate under sec. 167, for more than 24 hours. Unless the special order has been obtained the prisoner must either be discharged or sent on to the Magistrate, and any longer detention is absolutely unlawful—*Tamree*, 7 W.R. 3.

When the 24 hours' detention and the additional time necessary to bring an accused before a Magistrate allowed by sec. 61 and the fifteen days' additional detention allowed by sec. 167 expire, an accused must either be released by the Police under the provisions of sec. 169, security being taken for his appearance before a Magistrate, if and when required, or the accused must, under the provisions of sec. 170, be forwarded under custody to a Magistrate who is empowered to take cognizance of the offence upon a Police report. The Magistrate must either take cognizance if he has before him the Police report (which ordinarily would be a report in the form laid down in sec. 173) which he thinks makes out a *prima facie* case or he must release him—*Bholanath*, 28 C.W.N. 490 (492), 83 I.C. 628, 26 Cr.L.J. 68. The intention of the Legislature, having regard to secs. 61 and 167 and to the requirements of justice generally, is that an accused person should be brought before a Magistrate competent to try, or commit, with as little delay as possible—*Nagendra*, 38 C.L.J. 388 (393).

The law evidently views with disfavour detention in the custody of the police, and even in the case of an accused person such detention can be allowed only in special cases and for reasons to be stated in writing and not as a matter of course whenever it may be asked for by an investigating police officer. The provisions of the law are most useful and necessary, and they should be strictly complied with by the Subordinate Courts—*In re Khairati Ram*, A.I.R. 1931 Lah. 476, 32 P.L.R. 493, 132 I.C. 519, 1931 Cr.C. 700, 32 Cr.L.J. 913, 12 Lah. 635.

The detention mentioned in this section means *continuous* detention. This section does not apply to cases where there has not been a continuous detention for more than 24 hours. Thus, where the accused person was brought to the thana at 3 o'clock in the afternoon and was alleged to go (to get bail) at noon the next day, and was not a prisoner in the thana till his return on the morning of the next day and then he was sent up to the sudder station by the evening, *held* that although the period of detention exceeded 24 hours, there was no *continuous* detention for more than 24 hours and that the detention was not illegal—*In re Indrobeer*, 1 W.R. 5.

Time occupied in journey:—The 24 hours of detention are to be counted up to the time when the accused person leaves the police station on the way to the Magistrate. The time occupied in journey to the Magistrate is not to be counted in the 24 hours, but it is the duty of the Magistrate to see that the time so occupied is reasonable, with reference to the distance to be travelled and other local considerations—*Circular*, Ratanlal 22.

Handcuffs:—In all heinous cases, where a single prisoner is sent in, he should be handcuffed. Where two or more prisoners are sent, they should be handcuffed to each other, two and two. In cases not of heinous nature, the prisoner should not be handcuffed unless violent, and then only by order of the Officer-in-charge of the station not below the rank of Sub-Inspector—*Bengal Police Manual*, p. 398.

62. Officers in charge of police-stations shall report to the District Magistrate, or, if he so directs, to the Sub-divisional Magistrate, the cases of all persons arrested without warrant, within the limits of their respective stations, whether such persons have been admitted to bail or otherwise.

Police to report apprehensions.

The object of sections 62 and 63 is that the Magistrate should promptly exercise authority, if necessary, with regard to all arrests by the Police, and they seem to have been framed with this view that, as no person can be released without the order of a Magistrate except on bail or recognizance, the Magistrate should be responsible as well as the Police, if a person legally arrested remains unnecessarily in custody—*Punjab Cir.*, p 174

63. No person who has been arrested by a police-officer shall be discharged except on his own bond, or on bail, or under the special order of a Magistrate.

Discharge of person apprehended

64. When any offence is committed in the presence of a Magistrate within the local limits of his jurisdiction, he may himself arrest or order any person to arrest the offender, and may thereupon, subject to the provisions herein contained as to bail, commit the offender to custody.

Offence committed in Magistrate's presence.

140. Secs. 64 and 556:—Although this section gives to a Magistrate authority to arrest a person committing an offence in his presence, yet it is clearly not intended to trench upon the general principle embodied in sec 556 of this Code, that no Judge or Magistrate shall try a case in which he is personally interested. Therefore, where a Magistrate, while travelling in a railway carriage, requested the accused who were his fellow passengers to desist from smoking and on their contemptuously refusing to do so, arrested and subsequently tried and convicted them, it was held that the Magistrate was legally and morally disqualified from exercising his judicial functions in relation to the offence imputed—*Venkana, Ratanlal* 339 (340).

The word "offence" used in sec 64, Cr. P. C., is obviously wide enough to include an offence under sec 171-D, I. P. C., and a Magistrate in whose presence such an offence is committed is fully authorized to arrest the offender and to release him on bail, although cognizance of the offence cannot be taken without the complaint as required by sec 196, Cr. P. C.—*Brahma Nand v. Emp.*, AIR 1939 All. 682 (683), 1939 A.L.J. 779, 41 Cr.L.J. 85, 184 I.C. 662

65. Any Magistrate may at any time arrest or direct the arrest, in his presence, within the local limits of his jurisdiction, of any person for whose arrest he is competent at the time and in the circumstances to issue a warrant.

Arrest by or in presence of Magistrate

141. Under the provisions of sec 6 of the Bombay Gambling Act, IV of 1887, a first class Magistrate has power to give authority, under a special warrant, to a Police-officer to make an arrest and search; those provisions must be read subject to the provisions of secs. 65 and 105 of this Code, that is, the Legislature must be presumed to have intended that the Magistrate should have authority to make the arrest and search himself, if necessary—*Fernand*, 31 Bom. 438, 9 Bom.L.R. 695, 6 Cr.L.J. 60

66. If a person in lawful custody escapes or is rescued,
Power, on escape, to pursue and retake. the person from whose custody he escaped or was rescued may immediately pursue and arrest him in any place in British India.

67. The provisions of sections 47, 48, and 49 shall apply to arrests under section 66, although the person making any such arrest is not acting under a warrant and is not a police-officer having authority to arrest.
Provisions of sections 47, 48 and 49 to apply to arrest under section 66.

CHAPTER VI.

OF PROCESS TO COMPEL APPEARANCE.

A.—Summons.

68. (1) Every summons issued by a Court under this Code shall be in writing in duplicate, signed and sealed by the presiding officer of such Court, or by such other officer as the High Court may, from time to time, by rule, direct.
Form of summons.

(2) Such summons shall be served by a police-officer, or, Summons by whom served. subject to such rules as the *Provincial Government* may prescribe in this behalf, by an officer of the Court issuing it or other public servant.

(3) This section applies to the police in the towns of Calcutta and Bombay.

Amendment:—The words "Provincial Government" have been substituted for the words "Local Government" in this section by sec. 4 of the Government of India (Adaptation of Indian Laws) Order, 1937.

142. Scope:—This section is not limited to service of summons against an accused person only, but provides for the issue of every summons under this Code, and a summons to an assessor must comply with the terms of this section—*Sarat Chandra*, 1 C.W.N. cxvi.

Application for summons:—Duty of Court—When an application is made for a process to compel the appearance of witnesses, it is the duty of the Court to pass an order either granting the prayer or refusing it. To make a mere order directing the

petition to be filed is to leave the matter open and is improper—*Bhomas v. Digambar*, 6 C.W.N. 548.

Under the law a verbal prayer for summons on the accused is sufficient—*Muhammad Gul v. Hazi Fazley Rahim*, 33 C.W.N. 446 (449), 56 Cal. 1013

The Code makes no provision for the issue of a summons by a Magistrate requiring a person to appear before a Police-officer—*Jogendra*, 24 Cal 320 (324).

It is not an offence under sec. 174, I. P. C., to disobey a summons by a British Magistrate directing the person summoned to appear before him at a place outside British territory—*Puranga*, 16 Mad 463

143. Form and Contents:—A summons should be clear and specific in its terms as to the title of the Court, the place at which and the day and the time of day when the attendance of the person summoned is required; and it should go on to say that such person is not to leave the Court without permission, and if the case in which he has been summoned is adjourned, without ascertaining the date of the adjournment. If these formalities are not duly observed, a conviction for non-attendance in obedience to the summons cannot be sustained—*Ram Saran*, 5 All 7. Thus, where the summons did not specify the place where the accused or the witnesses were to attend, non-appearance in obedience to such summons was not an offence under sec. 174, I P. C.—*Narasaiya*, 1 Weir 100; *Narayana*, 1 Weir 100; *Anonymous*, 7 M H C R App 14, 1 Weir 81; *Anon*, 1 Weir 81.

Where a defendant was summoned to appear before a Magistrate on a certain date but the summons did not specify the place at which he was to appear, it was held that the Magistrate was not competent to dispose of the case *ex parte* on failure of the person to appear before the Magistrate—*Anon.*, 7 M H C R App 43, 2 Weir 38 (39).

Where an accused was summoned to appear at a Court at 10 A.M. and attended the Court at the appointed time but, finding the Magistrate absent, went away staying for two or three minutes only, it was held that he was bound to wait for a reasonable time in the Court and his staying for two or three minutes only was not a compliance with the order—*Kisan Bapu*, 10 Bom 93, *Sutherland*, 14 W R 20 (Cr).

A summons should contain the name of the father of the person summoned, his caste or tribe and his residence, so as to place his identity beyond all doubt—See *Punj. Cr.*, Vol II, p 151. In a process issued against a person residing in a large town, the description should contain not merely the name and father's name of the person to whom the process is addressed, and the name only of the town in which such person resides, but should give such further particulars regarding the section or street of the town in which such person resides as can be ascertained and will facilitate his identification—*Cal G R & C O*, Ch 1, Rule 19

The summons should also state the particulars of the offence charged. Form I of Sch V says "state shortly the offence charged." This statutory requirement cannot be satisfied by a reference to a general omnibus charge, which may include a variety of charges; the Form should state the place where and the date when the accused is supposed to have committed the offence, as well as the precise nature of the offence—*Rananjai*, 26 A.L.J. 331, 29 Cr.L.J. 357 (359), 108 I C 203, A.I.R. 1928 All. 261; *Maiku Lal*, 38 Cr.L.J. 326, 166 I C. 978, 1937 O.W.N. 283, 1937 O.L.J. 79; *Gajraj Singh v. Emp.*, A.I.R. 1936 All 761, 38 Cr.L.J. 69, 165 I C. 716, 1936 All.L.R. 932, 1936 Cr.C. 1002, 1936 A.L.J. 1011, 1936 A.W.R. 874; *Mohammad Hafiz v. Emp.*, 38 Cr.L.J. 947, 170 I C 476, 1937 O.L.R. 432, 1937 O.W.N. 815, A.I.R. 1937 Oudh 444. A summons issued by a Magisterial Court which does not contain in the form prescribed by Statute (sec. 68, Cr. P. Code, read with the form given in Sch. V of the Code), particulars of the place where, the time when, and the nature of the offence charged, may be disregarded by the person summoned, and proceedings taken thereon, if objected to, must necessarily be invalid—*Lal Chand*, 35 Cr.L.J. 1161, 150 I C. 941, 11 O.W.N. 828, A.I.R. 1934 Oudh 370, 1934 Cr.C. 1156.

Reviewing the rulings quoted above the Oudh Chief Court has held that when an accused has attended Court on a defective summons his trial is not vitiated by

of that defect. An omission in the summons cannot by itself vitiate a trial. The trial can only be vitiated by a defect in the proceedings at the trial by which the accused is prejudiced. The provisions of sec. 537, Cr. P. C., are perfectly clear and applicable. The question whether the accused has been prejudiced or not should be the sole criterion in such cases—*Abdul*, 41 Cr.L.J. 92, 184 I.C. 742, 1939 O.W.N. 960, following *Muhammad Sadiq v. Delhi Electric Supply & Traction Co.*, A.I.R. 1929 Lah. 867, 116 I.C. 889, 30 Cr.L.J. 702, 1929 Cr.C. 601, Ind. Rul. 1929 Lah. 601. See also *H. B. Spiers v. Johiuddin*, 33 Cr.L.J. 549, 138 I.C. 98, A.I.R. 1932 Cal. 461, 36 C.W.N. 246, 59 Cal. 113.

Signing :—Every summons should be signed in full by the officer by whom it is issued with the name of his office or the capacity in which he acts—*Punj Cir*, Vol. II, p. 151. In Bombay a summons may be signed by the clerk of the Court, or where there is no clerk of the Court, by a sheristadar, subject to the order of the presiding Officer of the Court—*Bom. H. C. Cr. Cir.*, p. 10. In Madras, the summons may be signed by the Chief Ministerial Officer—*Mad H. C. Cr. Cir.*, No 1302, dated 29-4-1891.

Signing not by full name but by initials is only an irregularity, and does not affect the validity of the proceedings—Sec. 537, *Illustration* (under the old law). The illustration to sec. 537 has now been omitted by the 1923 Amendment Act, but the law does not seem to have been changed. See also *Janki Prasad*, 8 All 293 and *Banke Behari*, 3 P.L.J. 493, 19 Cr.L.J. 747.

'Sealed' :—A summons which is not sealed is not valid in law, and, therefore, disobedience to a summons not sealed is not an offence—*Narasaiya*, 1 Weir 100; *Abdul Rahim*, 37 M.L.J. 588, 21 Cr.L.J. 800, 55 I.C. 528, A.I.R. 1920 Mad 352, 58 I.C. 528, 10 M.L.W. 554.

By whom served :—Under clause (2) of section 68 of the Criminal Procedure Code, the Lieutenant-Governor of Bengal has declared that the process issued under that Act shall be served by peons appointed under the rules framed by the High Court under sec. 22 of the Court Fees Act, VII of 1870. *Vide* Notification, Government of Bengal, the 11th May 1883; *Calcutta Gazette*, 23 May 1883, p. 426. Similar orders were passed by the Chief Commissioner of Assam; see *Assam Gazette*, 23rd June, 1883, p. 290.

All dafadars and chaukidars shall be public servants for the purposes of sec. 68 (2) of the Code of Criminal Procedure. *Vide* Rule 45, Notification No 2197-P.J., dated the 21st May 1920, made by the Governor of Bengal in Council in exercise of the powers conferred by sub-sec. (1) and clauses (g), (h) and (i) of sub-sec. (2) of sec. 101 of the Bengal Village Self-Government Act, 1919 (Bengal Act V of 1919).

69. (1) The summons shall, if practicable, be served personally on the person summoned, by delivering or tendering to him one of the duplicates of the summons.

Summons how served.

(2) Every person on whom a summons is so served shall, if so required by the serving officer, sign a receipt therefor on the back of the other duplicate.

Signature of receipt for summons.

(3) Service of a summons on an incorporated company or other body corporate may be effected by serving it on the secretary, local manager or other principal officer of the corporation, or by registered post letter addressed to the chief officer of the corporation in British India. In such case the service shall be deemed to have been effected when the letter would arrive in ordinary course of post.

This is the only section which provides for the procedure of service of summons, and every summons (e.g., summons to attend as assessor) under this Code must be served in accordance with the provisions of this section. Any other mode (e.g., sending summons by post or under registered cover) is illegal and not justifiable—*Sarat Chandra*, 1 C.W.N. cxvi.

144. Service how effected:—The mere showing of a summons to the person summoned is not sufficient service. Either the original should be left with the party meant to be served, or should be exhibited to him and a copy of it delivered or tendered to him—*Karsanlal*, 5 B.H.C.R. 20. See also *Kuppan*, 11 Mad. 137, 1 Weir 100.

Tender—Refusal to take or sign:—If, however, the person refuses to take the summons, the mere tendering is sufficient service—*Sittu Padayachi*, 1 Weir 81; *Punamalai*, 5 Mad 99; *Sahadeo*, 40 All 577, 16 A.L.J. 453, 19 Cr.L.J. 746, 46 I.C. 522; *In re Kuppusami*, 28 M.L.J. 504. A refusal to receive a summons is not an offence under section 173, I.P. Code—*Punnamalai*, 5 Mad 199. A mere refusal to sign a receipt for a summons is not an offence under sec. 173 or sec. 180, I.P.C.—*Krishna*, 20 Cal. 358; *In the matter of Bhoobuneshwar*, 3 Cal. 621; *Reg. v. Kalya bin Fakir*, 5 Bom.H.C.R. Cr.C. 34. What is necessary to the service of summons is that the summons should be delivered or tendered; and if the summons is delivered or tendered, then it is served, whether the person signs a receipt for it or not—*Kalya*, 5 B.H.C.R. 34; *Ganga Ram*, 1886 A.W.N. 83.

Under this section, personal service may be made either by delivering or by tendering but the tender must be a real tender of a document which is understood by the person to be served, and he must have voluntarily waived actual delivery and indicated in some way that a tender was sufficient. But if the person to be served runs away and shuts himself in his house, the summons cannot be served on him either by delivery or by tender—*Budhu*, 26 A.L.J. 107, 29 Cr.L.J. 263 (264), A.I.R. 1928 All 118, 107 I.C. 563.

The fact of a *subpoena* being entrusted to a process-server does not give him a general right of entry into any house without obtaining the permission of the owner or person in charge. Such a general power to enter any house at any time is not given by any of the provisions of the Code and would be a serious violation of private rights. The mere fact that the owner asked the process-server to go out of his house would not be an offence—*Kuppuswami v. Kumaraswami*, 39 Mad 561 (564), 16 Cr.L.J. 477, 2 M.L.W. 463, 28 M.L.J. 505, 17 M.L.T. 398, 1915 M.W.N. 365, 29 I.C. 109.

Proof of service—A Magistrate should not accept the written return merely of the serving peon as a sufficient proof of service of his order under cl. (1) of sec. 145, Cr. P. C., when the peon was not examined and there was no affidavit in proof of service—*Jogendra Nath Rai v. Abu Shaikh*, 8 C.W.N. 719.

70. Where the person summoned cannot by the exercise of due diligence be found, the summons may be served by leaving one of the duplicates for him with some adult male member of his family, or, in a presidency town, with his servant residing with him, and the person with whom the summons is so left shall, if so required by the serving officer, sign a receipt therefor on the back of the other duplicate.

145. "Cannot be found":—It must be shown by affidavit of the person entrusted with the service of summons that he made his best endeavours to effect personal service on the accused, and that the accused evaded service or that he could not be found by the exercise of due diligence—*Sundar*, 1882 A.W.N. 170. Where no attempt has been taken to serve the accused personally and there has been want of reasonable diligence in that behalf, a substituted service of summons (e.g., service on the *durwan* or a servant in a Presidency Town) is not valid—*Mon Mohan Pande*, 35

C.W.N. 868 (869), 1932 Cr.C. 10, 33 Cr.L.J. 264, 136 I.C. 135; *Jadho v. Manik*, 6 N.L.J. 63, 23 Cr.L.J. 739.

If the person summoned cannot be found, the summons may be served on an adult male member of his family; the service of summons on the mother of the accused is not warranted by this section—*Sawan Singh*, 26 Cr.L.J. 1393, 89 I.C. 705, A.I.R. 1926 Lah. 50, 2 Lah. Cas. 59. See also Note 368.

Service on servant:—*Outside the Presidency Towns*:—A service of summons on a juror cannot be effected on his servant—*In re Behari Lal*, 1899 A.W.N. 13.

71. If service in the manner mentioned in sections 69 and 70 cannot by the exercise of due diligence be effected, the serving officer shall affix one of the duplicates of the summons to some conspicuous part of the house or homestead in which the person summoned ordinarily resides; and thereupon the summons shall be deemed to have been duly served.

Procedure when service cannot be effected as before provided.

145A. The procedure which is provided by section 71 cannot be made use of unless service in the manner mentioned in sections 68 and 70 cannot be effected by the exercise of due diligence. It is not enough to show that service could not be effected in the manner provided by sec. 69; it must also be shown that the service could not be effected in the manner provided by sec. 70—*Beni Madhub v. Jadu Nath*, 31 C.W.N. 148, 43 C.L.J. 113, 27 Cr.L.J. 715 (716), 94 I.C. 907. See also A.I.R. 1923 Nag. 55, 69 I.C. 627, 23 Cr.L.J. 739.

72. (1) Where the person summoned is in the active service of the *Crown* or of a Railway Company, the Court issuing the summons shall ordinarily send it in duplicate to the head of the office in which such person is employed; and such head shall thereupon cause the summons to be served in manner provided by section 69, and shall return it to the Court under his signature with the endorsement required by that section.

Service on servant of Crown or of Railway Company.

(2) Such signature shall be evidence of due service.

Amendment:—The word "Crown" has been substituted for the word "Government" by the Government of India (Adaptation of Indian Laws) Order, 1937.

Mode of service on Government employees:—See *Cal. G. R. & C. O.*, Ch. I, Rules 14-18; *All. R. & O.*, pages 718; *Punj. Cir.*, Vol. II, pp. 152-153; *Madras Rule No. 8* (G. O., 9th April 1875, No. 823).

146. Scope:—This section requiring service of summons to Government servants to be effected through the heads of their departments, is intended to apply only to summons issued by a Court of Justice and not to summons or orders of police-officers investigating a crime under Chap. XIV of this Code. A summons or notice issued by the police may be served directly on the Government servant, and need not be sent through his departmental superior. Therefore, refusal by an amin (a Government servant) to attend at a police investigation in obedience to a summons directly served on him by the police is an offence punishable under sec. 174, I. P. Code—*Gumparthi Venkataramia*, 18 Cr.L.J. 733 (734), 40 I.C. 733 (Mad.).

Summons to a Sub-Inspector of the Railway Police should be served through the Superintendent of the Railway Police of that district—*Gouri Shankar*, 6 P.L.T. 215, 26 Cr.L.J. 965 (968), 81 I.C. 421, A.I.R. 1925 Pat. 553.

73. When a Court desires that a summons issued by it shall be served at any place outside the local limits of its jurisdiction, it shall ordinarily send such summons in duplicate to a Magistrate within the local limits of whose jurisdiction the person summoned resides or is, to be there served.

Service of summons outside local limits. The Cr. P. Code does not say expressly how a person in England is to be served with summons. In such circumstances the Magistrate may act under the provisions of sec 33 of the Evidence Act—*Nga Ba On*, 28 CrLJ. 861 (862), 104 I.C. 637, A.I.R. 1927 Rang 248, 6 Bur.LJ. 114.

74. (1) When a summons issued by a Court is served outside the local limits of its jurisdiction, and in any case where the officer who has served a summons is not present at the hearing of the case, an affidavit, purporting to be made before a Magistrate, that such summons has been served, and a duplicate of the summons purporting to be endorsed (in manner provided by section 69 or section 70) by the person to whom it was delivered or tendered or with whom it was left, shall be admissible in evidence, and the statements made therein shall be deemed to be correct unless and until the contrary is proved.

(2) The affidavit mentioned in this section may be attached to the duplicate of the summons and returned to the Court.

B.—Warrant of Arrest.

75. (1) Every warrant of arrest issued by a Court under this Code shall be in writing signed by the presiding officer, or, in the case of a Bench of Magistrates, by any member of such Bench; and shall bear the seal of the Court.

(2) Every such warrant shall remain in force until it is cancelled by the Court which issued it, or until it is executed.

147. Grounds for issuing warrants:—A Magistrate should issue a warrant on good and legal grounds. It is essential that he should have a knowledge of the offence having been committed, and that knowledge must be either personal or derived from testimony legally given before him. The report of the Police or any statement which is not on oath and which falls short of actual formal complaint, is not sufficient to give the Magistrate jurisdiction to issue a warrant—*Surendra*, 13 W.R. 27 (31).

148. Warrants:—*Form* :—When any Act does not provide a form of warrant, the form to be used is the ordinary one prescribed by this Code—*Alter Causman*, 18 Bom. 636.

Pardanashin lady :—Until and unless a Magistrate is convinced that there is strong likelihood of the charge being proved, a pardanashin lady of good position should not be ordinarily compelled to appear in person in the first instance—*Prem Kuer v. Mai Shan Nath*, 1908 P.W.R. 20

General warrants:—The issuing of a general warrant, which means a warrant to apprehend all persons committing a particular offence or offences, is illegal—*James Hastings*, 9 B.H.C.R. 151. No general warrant for arrest should ever be issued by a Court of Justice. Every warrant should state as shortly as possible the special matter on which it proceeds. A strict adherence to the forms of warrants of arrest prescribed by the Code will tend to prevent their being granted irregularly and without inquiry as to whether the circumstances justify their issue—*Punj. Cir.*, p. 144.

Conditional warrants:—A warrant which directs that *in the event of* a certain named person not leaving British India forthwith, all officers to whom the warrant is directed are to arrest that person, is invalid—*Alter Kaufman*, 18 Bom. 636. The proper procedure in this case would be, first to issue an order directing the person to leave British India forthwith, which should be duly served upon him; and then, in case of his refusal or neglect to comply with its terms, there should be a further order by the Governor in Council authorising his arrest and detention in jail—*Ibid.*

149. Requisites of a valid warrant:—

(a) It must be in writing.

(b) It must be signed; signing not by full name but by initials is a mere irregularity and does not affect the validity of the warrant or vitiate the arrest—*Bankey Behary*, 3 P.L.J. 493, 19 Cr.L.J. 747; *Abdul Sikdar v. Mathu Singh*, 5 C.W.N. 447; *Janki Prasad*, 8 All. 293. [In *Abdul Gafur*, 23 Cal. 896, it was held that the signing must be by full name. But this does not seem to be correct. See Note 143 under sec. 68.] The signing must be by pen and ink and not by stamp—*Subramania Ayyar*, 6 Mad. 396. The warrant must be signed by the presiding officer of the Court and not by any other Magistrate. A warrant signed not by the Magistrate who took cognizance of the case but by an Honorary Magistrate who lived in the same town, is invalid, and a person resisting or escaping from an arrest made in pursuance of such warrant does not commit an offence under sec. 353, I. P. C.—*Jagpat Koeri*, 2 P.L.J. 487, 18 Cr.L.J. 526, 39 I.C. 494. The Presiding Officer who alone can sign the warrant is not necessarily the officer who has taken cognizance of the offence. He must be the officer who presides in the Court at the time when the warrant comes to be signed and not necessarily the Magistrate who has presided in the Court at the time when cognizance was taken of the offence. Where a Magistrate is appointed by the Government with power to take cognizance of offences and to perform the functions of the Sub-divisional Officer while he was away from the station and signs a warrant issued by the latter, when he is on tour, he is the presiding officer within the meaning of this section and can properly sign the warrant—*Kartick*, A.I.R. 1932 Pat. 175, 34 Cr.L.J. 297, 142 I.C. 192, 13 P.L.T. 167, 1932 Cr.C. 351, distinguishing *Jagpat Koeri's* case.

The fact that it had been the practice for a considerable time for warrants to be signed by the Deputy Nazir cannot make the signing of them by that officer legal when he had not been empowered legally or given any lawful authority to sign such warrants—*Subbaramiah*, A.I.R. 1934 Mad. 206, 66 M.L.J. 408, 1934 Cr.C. 351, 39 M.L.W. 388, 1934 M.W.N. 399, 35 Cr.L.J. 782, 148 I.C. 818.

(c) It must be sealed. An unsealed warrant is void—*In re James Hastings*, 9 B.H.C.R. 151; *Mahajan*, 42 Cal. 708 19 C.W.N. 224, 16 Cr.L.J. 336, 28 I.C. 672; *Alter Kaufman*, 18 Bom. 636. Arrest made under such a warrant is illegal—*Ibid.* A person offering resistance to the execution of such a warrant commits no offence—9 Cal. 424.

(d) The person named in the warrant must be described with sufficient certainty and particularity—*Alter Kaufman*, 18 Bom. 636. The warrant must give particulars of the person to be arrested so as to identify him clearly. A warrant which directs the committal of 'James Hastings,' without giving any further description of him is invalid, since it may lead to the arrest of any person bearing that name—*James Hastings*, 9 B.H.C.R. 151. So also, a warrant containing a wrong description of the accused (e.g., giving a wrong name of his father) is invalid—*Debi Sing*, 28 Cal. 399.

(e) The warrant must specify the offence. Where a warrant was issued for the arrest of a person on a charge of abduction, it was held that since the act with which the

accused was charged did not amount to an offence without a specific intention, the warrant must state the intention with which the offence was committed; otherwise it would be invalid—*Bidhoomookhu v. Scenath*, 15 W.R. 4.

(f) And lastly, the warrant must contain the name and designation of the police-officer or other person who is to execute it. If the name is left blank, the warrant is invalid—*Emp. v. Gaman*, 1913 P.R. 16, 18 I.C. 894, 14 Cr.L.J. 142. A warrant not addressed to a bailiff as required by Form 154 of Schedule V of this Code, or to any other person, is not valid—*Mahammad Balsh*, 1904 P.R. 16.

Language of warrant—A warrant should be written in the language of the District from which it is issued. If sent to another District or Province where a different language is in ordinary use, it should be invariably accompanied by a translation—*Cal. G. R. and C. O.*, p. 3; *Bom. H. C. Cr. Cir.*, p. 10.

Warrant by telegram—A Court should not issue a judicial order or communicate the purport of a warrant or process by telegram—*N. W. P. Reg. and Ord.*, p. 71.

150. 'Shall remain in force'—When the law has not fixed any period limiting the duration of a warrant, the presumption is that it remains valid until it is executed—*Alloomiya*, 28 Bom. 129.

A warrant on which there is an endorsement for bail to be taken for the appearance of the accused on a particular date, does not lapse on the expiry of that date; after that date, only the direction to take bail lapses, but the warrant continues in force until it is cancelled by the Court which issued it, or until it is executed—*Raushan Singh*, 13 C.W.N. 1091, 10 Cr.L.J. 479, 4 I.C. 31.

A warrant of arrest does not become invalid on the expiry of the date fixed for return of the warrant, but remains in force until it is cancelled by the Court or is executed. Therefore, an arrest made after expiry of the date fixed is not illegal—*Binda Ahir*, 7 Pat. 478, 29 Cr.L.J. 1007 (1008), 112 I.C. 223, A.I.R. 1928 Pat. 466.

151. Cancellation of warrant—Apparently under sec. 75 (2), Cr. P. C., a warrant can only be cancelled by the Court issuing it—*Linton v. Emp.*, 28 Cr.L.J. 326 (327), 100 I.C. 710, 28 P.L.R. 103, A.I.R. 1927 Lah. 744. A Magistrate has discretion, on sufficient cause shown, to cancel a warrant and issue summons instead—*Janat*, 1 S.L.R. 69, 8 Cr.L.J. 187; *Prem Koer v. Mai Sham Nath*, 1908 P.W. 20.

Where a warrant is cancelled, it is at an end and cannot be re-issued. Even where a subordinate Magistrate issued warrants for the apprehension of some accused persons for trial and afterwards cancelled the warrants, the District Magistrate had no authority to direct the re-issue of the warrants against the accused—*Guru Charan*, 1 C.W.N. 650.

A warrant is an order addressed to a certain person directing him to arrest the accused and to produce the accused before the Court. The warrant may have a further provision for admitting the accused to bail. But in each case the warrant is an order directed to someone to arrest a certain accused and bring him before the Court, and the person to whom it is addressed may if he is a Magistrate or police officer endorse the warrant to some one serving under him. When a Magistrate writes to the person to whom the order is addressed asking him to return the warrants unexecuted then it is clear that the warrants were cancelled. Sec. 75 (2), Cr. P. C., does not require that there should be any formal order on the record of cancellation—*Jagdish Narain v. Emp.*, A.I.R. 1910 All. 178 (179), 1940 A.L.J. 104.

76. (1) Any Court issuing a warrant for the arrest of any person may in its discretion direct by endorsement on the warrant that, if such person executes a bond with sufficient sure-

Court may direct security to be taken.

ties for his attendance before the Court at a specified time and thereafter until otherwise directed by the Court, the officer to whom the warrant is directed shall take such security and shall release such person from custody.

(2) The endorsement shall state—

(a) the number of sureties;

(b) the amount in which they and the person for whose arrest the warrant is issued, are to be respectively bound; and

(c) the time at which he is to attend before the Court.

(3) Whenever security is taken under this section, the

Recognizance to be officer to whom the warrant is directed shall forwarded. forward the bond to the Court.

152. Scope of section:—In the 1872 Code, there were, instead of the words “for his attendance before a Court” the words “to answer the complaint” which applied only to accused persons—*Anon*, 2 Weir 39. The wording has been changed, and this section now applies to witnesses as well as to accused persons.

152A. Bond:—Under sec 513, the Court or officer may allow a sum of money or G. P. Notes to be deposited in Court in lieu of executing a bond.

A Magistrate should issue a bailable warrant even in non-bailable cases, when the offence charged borders on the technical (e.g., when the head of a mutt is alleged to have committed robbery in respect of property which he admittedly claims to be his) and the accused is a man of position and respectability—*Sivamulu*, (1911) 1 M.W.N. 452, 12 Cr.L.J. 430, 11 I.C. 614.

153. Attendance before a Court:—The Magistrate may issue a warrant of arrest for attendance before himself or some other Court; but he has no power to issue a warrant for the arrest and production of a person, in order that he may give evidence before the Police in an investigation under Chap XIV—*Jogendra*, 24, Cal 320.

153A. Court-fees:—Bail bonds in criminal cases, recognizances to prosecute or give evidence and recognizances for personal appearance or otherwise are not chargeable with any court-fee. *Vide* sec. 19, cl (XV) of the Court-fees Act (VII of 1870). See also Schedule II, Art. 6 of the said Act which provides that bail bond or other instrument of obligation given in pursuance of an order made by a Court or Magistrate under any section of the Code of Criminal Procedure, 1898, or the Code of Civil Procedure 1908, and not otherwise provided for by the Court-Fees Act is chargeable with a Court-fee of eight annas.

77. (1) A warrant of arrest shall ordinarily be directed

to one or more police-officers, and, when Warrant to whom issued by a Presidency Magistrate, shall directed. always be so directed; but any other Court issuing such a warrant may, if its immediate execution is necessary and no police-officer is immediately available, direct it to any other person or persons; and such person or persons shall execute the same.

(2) When a warrant is directed to more officers or persons

Warrant to several than one, it may be executed by all, or by persons. any one or more of them.

154. This section merely directs that a warrant shall be ordinarily directed to one or more Police-officers, but it does not say that the name of that Police-officer should be inserted in the warrant as well as his designation. “It would be extremely difficult to carry on the Police administration of the country if every warrant had to be directed by name to a Police-officer and upon his transfer it were to become incapable of execution till the name of some other officer had been substituted in his place”—

Bankey Behary, 3 P.L.J. 493, 19 Cr.L.J. 747, 46 I.C. 523. See also A.I.R. 1918 Pat. 269, 3 Pat.L.J. 493, 5 Pat.L.W. 117. In *Shankar Dayal*, 25 O.C.111, 24 Cr.L.J. 14, A.I.R. 1922 Oudh 224, 9 O.L.J. 667, 71 I.C. 62, it has been held, however, that a warrant which does not contain the name of the police-officer to whom it was issued and to whom authority to make the arrest was given, is irregular; but it has been conceded that the evidence of the Magistrate who signed the warrant or of the Sub-Inspector who executed it may supply the omission. See also *Emp. v. Gaman*, 18 I.C. 894, 14 Cr.L.J. 142, 1913 P.R. 16. The Rangoon High Court also holds that if a warrant is directed to a police thana without specifying the name of any officer in the station, it is at most a clerical error and does not invalidate the arrest if the accused has not suffered any prejudice—*Ma Kin*, 3 Bur.L.J. 182, 26 Cr.L.J. 845, A.I.R. 1924 Rang 383, 86 I.C. 669.

Warrant by Presidency Magistrate.—A warrant issued by a Presidency Magistrate shall always be directed to Police-officers. Where such a warrant was directed to a person other than a Police-officer, though such officer was immediately available, the High Court severely condemned the procedure—*Syud Hossain*, 8 W.R. 74.

Any other person.—A Magistrate may, under this section, direct a warrant to an unofficial person only when its immediate execution is necessary, and when he cannot immediately obtain the assistance of the Police—*Surendra Nath Roy*, 13 W.R. 27. In the absence of these conditions, a Court is not justified in entrusting a warrant to a private person (e.g., a Forest officer) for execution—*Pasuvathi*, 51 Mad. 873, 29 Cr.L.J. 541 (542), A.I.R. 1928 Mad. 624, 1928 M.W.N. 310.

78. (1) A District Magistrate or Sub-divisional Magistrate may direct a warrant to any landholder, farmer or manager of land within his district or subdivision for the arrest of any escaped convict, proclaimed offender or person who has been accused of a non-bailable offence, and who has eluded pursuit.

(2) Such land-holder, farmer or manager shall acknowledge in writing the receipt of the warrant, and shall execute it if the person for whose arrest it was issued is in, or enters on, his land or farm, or the land under his charge.

(3) When the person against whom such warrant is issued is arrested, he shall be made over with the warrant to the nearest police-officer, who shall cause him to be taken before a Magistrate having jurisdiction in the case, unless security is taken under section 76.

79. A warrant directed to any police-officer may also be executed by any other police-officer whose name is endorsed upon the warrant by the officer to whom it is directed or endorsed.

155. Scope:—This section speaks of a warrant "directed to a police-officer," and has no application to a warrant directed to a private person (e.g., a Forest Officer) under the latter part of sec. 77. Such person cannot endorse the warrant to anybody—*Pasuvathi*, 51 Mad. 873, 29 Cr.L.J. 541, 55 M.L.J. 220, A.I.R. 1928 Mad. 624, 28 M.L.W. 141, 109 I.C. 365, 1928 M.W.N. 310.

Endorsement:—If a warrant directed to a police-officer is executed by another officer without endorsement (e.g., if a warrant addressed to the bailiff of the Court is executed by a naib-nazir and process-server without any endorsement by the bailiff),

the execution is illegal—*Ghasita*, 22 Cr.L.J. 145, 3 Lah.L.J. 346, 59 I.C. 849. The endorsement should be regularly made by *name* to a certain person, in order to authorise him to make the arrest—*Durga Tewari v. Rahman*, 4 C.W.N. 85.

Moreover, the endorsement must be made by the Police-officer to whom the warrant is directed. Where a warrant was directed to a Court Sub-Inspector and the endorsement was made by the Court Head Constable, it was held to be invalid—*Durga Charan*, 27 Cal. 457.

Where one of the endorsements is only by initials but those initials have been identified upon the evidence, the warrant fulfils the requirements of the law. It is desirable, however, that initials should not be allowed in such a case—*Abdul Sikdar v. Mathu Singh*, 5 C.W.N. 447.

It is immaterial whether the authority to the other police-officer to execute the warrant is given by an endorsement on the warrant itself or by a separate piece of paper, e.g., a letter written separately and intimating that the bearer is authorised to execute the warrant. What is essential under this section is the authority in writing. If the authority is delegated and it appears that the authority is there, the requirements of this section are satisfied—*Mangharam*, 25 S.L.R. 117, 32 Cr.L.J. 916 (921), A.I.R. 1931 Sind 89, 1931 Cr.C. 489, 132 I.C. 465. See also *Zarkhan Nurkhan v. Emp.*, A.I.R. 1940 Pesh. 10.

Where the endorsement on the warrant gave the name only but not the designation of the police-officer, it was held that this section required the name to be endorsed and that Form 2, Sch. V, had no bearing on endorsements under this section and would not have the effect of invalidating the arrest—*Kartik*, 1932 Pat. 171, 33 Cr.L.J. 706, 138 I.C. 844, 13 P.L.T. 135, 1932 Cr.C. 347.

- 'Any other Police Officer'.—A process-serving peon is not included in the term 'any other police-officer' in the section—*Durga Charan*, 27 Cal. 457.

156. Warrant under Special Acts:—A special warrant issued under sec. 6 of the Bombay Gambling Act, IV of 1887, cannot be executed by any other officer except the officer therein named—*Mithu*, 3 S.L.R. 56, 10 Cr.L.J. 3, 2 I.C. 371. Similarly, a warrant under sec. 45 of the Bengal Chowkidari Act (VI of 1870, B.C.) can be executed only by the person named therein—*Sheikh Nasur*, 37 Cal. 122, 14 C.W.N. 282, 5 I.C. 409, 11 Cr.L.J. 128. The Burma Gambling Act does not contain any provision for endorsement of the warrant issued under sec. 6 of that Act by the officer to whom it is issued, to another officer—*Po Thuai*, 12 Bur.L.T. 165, 21 Cr.L.J. 79, 54 I.C. 57.

80. The police-officer or other person executing a warrant of arrest shall notify the substance thereof to the person to be arrested, and, if so required, shall show him the warrant.

Notification of substance of warrant.

157. Notify the substance:—Where a Police-officer simply shows the warrant to the accused but does not give an opportunity of reading it, and does not notify its substance to him, the arrest so made is unlawful—*Satis Chandra v. Jadunandan*, 26 Cal. 748; *Abdul Gafur*, 23 Cal. 896. But if the Police-officer shows the warrant to the accused and gives him sufficient opportunity of reading the warrant itself, the omission on the part of the officer to explain the particulars of the warrant, does not invalidate the arrest; because, all that this section requires, is that the accused should have reasonable opportunity of knowing on what charge he is being arrested and before what Court he is to appear, so that he may take steps for arranging for his defence—*Bankey Behary*, 3 P.L.J. 493, 19 Cr.L.J. 747, 46 I.C. 523; *Kartik*, A.I.R. 1932 Pat. 171, 33 Cr.L.J. 706, 138 I.C. 844, 13 P.L.T. 135, 1932 Cr.C. 347. Where a warrant provided for bail, but the constable making the arrest did not give the slightest intimation to the arrested person that bail had been allowed, nor did he ask the prisoner whether he could

give the required bail, *held* that the arrest was illegal—*Shyama Charan*, 16 C.W.N. 549, 13 Cr L.J. 590 (591).

Where directly the constable arrested a woman *i.e.*, touched her in the sense of sec. 46 (1), Cr. P. C., she began to resist and that resistance on her part and on the part of others created such a disturbance that any further communication by the police was for the moment impossible, the police acted correctly in overcoming the resistance and then in showing the warrant, which was issued for the arrest of the woman, and communicating its substance—*Ramjit v. Emp.*, 39 Cr.L.J. 360 (361), 173 I.C. 734, 10 RA 501, 1938 A Cr C 5, 1938 A L.R. 174, 1937 A L.J. 1334, 1938 A.W.R. (H.C.) 17, A I.R. 1938 All. 120.

158. Show the warrant:—This implies that the arresting officer must have the warrant of arrest in his possession at the time of making the arrest, otherwise, it is illegal—*Amar Nath*, 5 All 318; see also *Ganesh Lal*, 27 All 258.

Mere showing is not sufficient. An opportunity should be given to the person to be arrested by showing him the warrant so that he might read it (26 Cal. 748) and see that the person arresting has authority—*Abdul Ghafur*, 23 Cal. 896; *Satish Chandra v. Jadunandan*, 26 Cal. 748, 3 CWN 741; *Anand Lal*, 10 Cal 18; *Tulsiram*, 13 Bom. 168; *Sheikh Nasur*, 37 Cal 122; *Ayaz Husam*, 38 All. 506 (508).

The arresting officer is to show the warrant, *if so required*. It is not necessary that the officer executing the warrant should in the first instance show the warrant. It is sufficient if he should apprise the person to be arrested of the contents of the warrant and show it *if desired*—*Baroda Kanta*, 25 C.W.N. 815, 23 Cr.L.J. 347; *Ramjit v. Emp.*, *supra*.

A recent Calcutta case has laid down that even though the provisions of sec. 80 are not complied with (*i.e.*, substance of warrant is not notified nor warrant shown), still the arrest is legal in this sense that the police-officer may, under sec 46 (2), use all means necessary to effect the arrest, if the person to be arrested forcibly resists the endeavour to arrest—*Darbesh Ali*, 56 Cal 831, 33 CWN 284 (285), 49 CLJ 264, 30 Cr L.J. 703, 116 I.C. 723, A.I.R. 1929 Cal 174

Presumption—In absence of evidence compliance with the provisions of this section will be presumed as there is a presumption that all official acts are properly performed—*Zarkhan Nurkhan v Emp.*, A I R 1940 Pesh 10

81. The police-officer or other person executing a warrant
 Person arrested to be brought before Court without delay
 of arrest shall (subject to the provisions of section 76 as to security), without unnecessary delay, bring the person arrested before the Court before which he is required by law to produce such person.

159. Further detention:—When the arrested person is brought before the Magistrate, the Magistrate cannot lawfully commit him to prison or remand him without sufficient grounds—*Surendra Nath*, 13 W.R. 27. The warrant is exhausted as soon as the person arrested is brought before the Court. If the accused is to be further detained, it must be under some fresh warrant or order, such as an order of remand under sec. 244. The warrant for further detention would be one of commitment directed to some jailor or other person having authority to receive and keep the prisoner—*In re W. Bourke*, 13 W.R. 1, 4 Beng L.R. App. 1.

Arrest of women after child birth:—Women arrested soon after child birth should not ordinarily be removed until they are in a proper condition to travel. They should be allowed to remain under proper charge in the care of their relations or to be sent to the

nearest dispensary and suffered to remain in the dispensary until the officer-in-charge certifies that they are sufficiently recovered—*Bom. H. C. Cr. Civ.*, p. 3.

Where warrant may be executed. **82.** A warrant of arrest may be executed at any place in British India.

160. Arrest outside British India:—Where the accused was arrested by a constable of the Jeypur State, and was afterwards arrested by a British Constable in the Residency of Jeypur, the arrest was held to be made outside British India—*Sheu Bun*, 7 Bur.L.R. 83

The arrest of a person at a Railway Station in a Native State (e.g., the Gwalior State) on a charge of an offence committed in British India is illegal. The Gwalior State has ceded to the British Government jurisdiction over the Railway lands for the administration of civil and criminal justice in connection with the Railway, and not in respect of offences not committed on these lands and having no connection with the Railway administration—*Radha Kishen*, 1 Lah. 406, 21 Cr.L.J. 303. So also, the grant by the Nizam to the British Government of civil and criminal jurisdiction along the line of Hyderabad State Railway, does not justify the arrest of a person on the lands of the State Railway under the warrant of a Magistrate in British India for an offence committed in a British territory and not committed in the Railway nor in any way connected with the administration of the Railway—*Mahammad Yusufuddin*, 25 Cal. 20 (P.C.), 24 I.A. 137.

83. (1) When a warrant is to be executed outside the local limits of the jurisdiction of the Court issuing the same, such Court may, instead of directing such warrant to a police-officer, forward the same by post or otherwise to any Magistrate or District Superintendent of Police or the Commissioner of Police in a presidency-town within the local limits of whose jurisdiction it is to be executed.

(2) The Magistrate or District Superintendent or Commissioner to whom such warrant is so forwarded shall endorse his name thereon, and, if practicable, cause it to be executed in manner hereinbefore provided within the local limits of his jurisdiction.

161. Scope of the Section:—This section contemplates cases where a Magistrate in British India issues a warrant for the arrest of a person in some place in British India outside his jurisdiction. It can have no application to a case where a Magistrate in a Native State issues a warrant for the arrest of a person in British India, even if the Criminal Procedure Code has been adopted by the State authorities. Therefore a Magistrate of a Native State cannot issue a warrant directing the Police or Officials in British India to arrest a person accused of committing a crime within a Native State—*Haramohan Patnaik v. Emp.*, 40 Cr.L.J. 500 (502), 180 I.C. 787, A.I.R. 1939 Pat. 129, 19 P.L.T. 909, 1938 P.W.N. 869, 18 Pat. 121; *Tahilram Khanchand v. Emp.*, A.I.R. 1938 Sind 46, 173 I.C. 322, 39 Cr.L.J. 298, 12 S.L.R. 134, 10 R.S. 203

The provisions of this section read with sec. 5 apply to a warrant issued under the Workmen's Breach of Contract Act. Therefore, a Magistrate cannot refuse to execute within his district a warrant issued by a Magistrate of another district under that Act—*Chatu*, 1898 P.R. 11; *Kattayan*, 20 Mad. 235; *Muthya*, 20 Mad. 457; *Gouri Shankar v. Mata Prosad*, 20 All. 124. That Act has been repealed.

84. (1) When a warrant directed to a police-officer is to be executed beyond the local limits of the jurisdiction of the Court issuing the same, Warrant directed to police-officer for execution outside jurisdiction. he shall ordinarily take it for endorsement either to a Magistrate or to a police-officer not below the rank of an officer in charge of a station, within the local limits of whose jurisdiction the warrant is to be executed.

(2) Such Magistrate or police-officer shall endorse his name thereon and such endorsement shall be sufficient authority to the police-officer to whom the warrant is directed to execute the same within such limits, and the local police shall, if so required, assist such officer in executing such warrant.

(3) Whenever there is reason to believe that the delay occasioned by obtaining the endorsement of the Magistrate or police-officer within the local limits of whose jurisdiction the warrant is to be executed, will prevent such execution, the police-officer to whom it is directed may execute the same without such endorsement in any place beyond the local limits of the jurisdiction of the Court which issued it.

(4) This section applies also to the police in the town of Calcutta.

85. When a warrant of arrest is executed outside the district in which it was issued, the person Procedure on arrest of person against whom warrant issued. arrested shall, unless the Court which issued the warrant is within twenty miles of the place of arrest or is nearer than the Magistrate or District Superintendent of Police or the Commissioner of Police in a presidency-town within the local limits of whose jurisdiction the arrest was made, or unless security is taken under section 76, be taken before such Magistrate or Commissioner or District Superintendent.

86. (1) Such Magistrate or District Superintendent or Commissioner shall, if the person arrested Procedure by Magistrate before whom person arrested is brought. appears to be the person intended by the Court which issued the warrant, direct his removal in custody to such Court:

Provided that, if the offence is bailable, and such person is ready and willing to give bail to the satisfaction of such Magistrate, District Superintendent or Commissioner, or a direction has been endorsed under section 76 on the warrant and such person is ready and willing to give the security required by such direction, the Magistrate, District Superintendent or Commissioner shall take such bail or security, as the case may be, and forward the bond to the Court which issued the warrant.

(2) Nothing in this section shall be deemed to prevent a police-officer from taking security under section 76.

C.—Proclamation and Attachment.

87. (1) If any Court has reason to believe (whether after taking evidence or not) that any person against whom a warrant has been issued by it has absconded or is concealing himself so that such warrant cannot be executed, such Court may publish a written proclamation requiring him to appear at a specified place and at a specified time not less than thirty days from the date of publishing such proclamation.

(2) The proclamation shall be published as follows:—

- (a) it shall be publicly read in some conspicuous place of the town or village in which such person ordinarily resides;
- (b) it shall be affixed to some conspicuous part of the house or homestead in which such person ordinarily resides or to some conspicuous place of such town or village; and
- (c) a copy thereof shall be affixed to some conspicuous part of the Court-house.

(3) A statement in writing by the Court issuing the proclamation to the effect that the proclamation was duly published on a specified day shall be conclusive evidence that the requirements of this section have been complied with, and that the proclamation was published on such day.

162. Scope:—This section read with section 88 shows that even in *summons*-cases and against witnesses, a proclamation may be issued. But to lay a foundation for the issue of a proclamation under this section with an accompanying order for attachment under sec. 88, it is necessary strictly to comply with the provisions of law relating to the issue of a warrant, in a case where a summons is the ordinary mode of enforcing attendance—*Yasin Khan*, 5 N.L.R. 125, 10 Cr.L.J. 306

163. Conditions precedent to proclamation:—The processes of attachment and proclamation are not to issue whenever a warrant fails of its effect. Before issuing a proclamation, the officer sent to serve the warrant must be examined as to the measures adopted by him to serve it. If, on his evidence or in any other manner, the Magistrate is satisfied that the accused is absconding or concealing, then and then only the processes of proclamation and attachment may be issued—*Bishonath*, 3 W.R. 63; *Po Ni*, 3 L.B.R. 116; *Ramkishore*, 19 W.R. 12; *Yasin Khan*, 5 N.L.R. 125, 10 Cr.L.J. 306, 3 I.C. 575.

The previous issue of a warrant against the person whose attendance is required before the Court is a necessary condition. Therefore, if the Court has no authority or jurisdiction to issue a warrant, an order for the issue of proclamation and a subsequent order for attachment are illegal—*Kanwar Singh*, 15 P.R. 1893; *In re Ramjibai*, 14 Bom.L.R. 889, 13 Cr.L.J. 796, 17 I.C. 540.

164. Absconding:—The Magistrate must be satisfied that the accused was *absconding or concealing himself* for the purpose of avoiding the service of the warrant.

The mere fact that the Sub-Inspector *could not find* the accused is not enough under this section—*Shevdyal v. Griban*, 6 W.R. 73 (74) ; *Ram Kishore*, 19 W.R. 12 (13).

The term "abscond" does not necessarily imply change of place. Its etymological and ordinary sense is "to hide oneself", and it matters not if a person departs from his place or remains in it, if he conceals himself. In either case he is said to 'abscond'. Moreover, the term does not apply to the commencement of concealment. If a person having concealed himself before process issues, continues to do so after it is issued, he is said to abscond—*Srinivasa Aiyengar*, 4 Mad. 393.

To be deemed an absconder, one need not be *proclaimed* as such under this section. But an absent person should not be too readily assumed to be an absconder without due inquiry and notice—2 Weir 40

A man who files a petition against an order issuing the warrant and takes steps to procure the order of a superior Court that he should be allowed to remain on bail after such warrant has been issued, cannot be said to be absconding or concealing himself, and a Magistrate is not justified in proceeding under this section—*Qamardin*, 1922 P.L.R. 66, 23 Cr.L.J. 454, 67 I.C. 726, A.I.R. 1922 Lah 475.

165. Mode of publication:—The procedure laid down in this section for the publication of the proclamation seems to indicate that it was the intention of the Legislature that the accused person should have the means of deriving information through his friends or family, or in some other direct way, when the warrant or the direct order to attend cannot be served upon him; and that the Legislature has distinctly determined a sufficient time (30 days) to allow such indirect notice to reach him and for him to attend the Court in consequence of that notice—*Ramkishore*, 19 W.R. 12 (14, 15).

The provisions of sub-sec (2) as to the mode of publishing a proclamation are perfectly clear and explicit in their terms, and failure to comply with the rules will vitiate the subsequent attachment and sale—*Mian Jan v. Abdul*, 27 All 572 Where the provisions of clause (a) were not complied with at all, and although the provisions of clauses (b) and (c) were complied with, the proclamation did not specify a place and a time for the appearance of the absconder, *held* that the proclamation was not made according to law—*Abdullah v. Jitu*, 22 All 216 (218), 1900 A.W.N. 28 ; *Abdul v. Kazim*, 1904 A.W.N. 159 (cited in 27 All. 572 at p 573).

But where the proclamation was made and was read and published in the places where the absconders were most likely to hear of them, but a copy was not affixed to the Court-house, the flaw would in no way prejudice the proceedings, and would be cured by sec 537—*Malli*, 39 P.R. 1917, 18 Cr.L.J. 979

The most important part of the publication is the publishing of the proclamation in the accused's place of residence, and it is from the date of such publication that the 30 days should be counted—*Mala Singh*, 6 P.R. 1917, 17 Cr.L.J. 414 (416), 35 I.C. 974 ; *Subbarayar*, 19 Mad 3

Burden of Proof.—It is on the prosecution to prove that the Proclamation was made in the manner prescribed by this section—*Pandya Nayak*, 7 Mad. 436

166. Thirty days' time:—The period of thirty days is to be counted not from the date of *issuing* the proclamation, but from the 'date of *publishing* such proclamation' *i.e.* from the date of the complete publication by doing all that is required under sub-sec. (2) of this section—*Ram Kishore*, 19 W.R. 12 (14), 10 B.L.R. App. 14 The rules prescribed by this section with regard to time and place are imperative, and if the date fixed for the appearance of the accused is less than 30 days from the date of publishing the proclamation, it is illegal and all subsequent proceedings (attachment and sale) will also be invalid and must be quashed—*Mullan Singh*, 1919 P.R. 32, 21 Cr.L.J. 210, 54 I.C. 994 ; *Subbarayar*, 19 Mad. 3, 1 Weir 86 ; *Subba Naicken*, 17 M.L.J. 438, 6 Cr.L.J. 332

Where the proclamation did not comply with this section in that thirty days were not given to appear as enjoined by it, *held* that the failure to give this notice did not amount to more than an irregularity which can be cured by an application under sec. 537, Cr. P. C., unless the applicant had been prejudiced by the error or omission—*Hans Raj*, 36 Cr.L.J. 457, 153 I.C. 954, 36 P.L.R. 262, 1934 Cr.C. 1391, A.I.R. 1934 Lah. 987, 16 Lah. 466.

167. Disobedience to proclamation:—An accused person against whom a proclamation has been issued must, until he has surrendered, be regarded as in contempt, and the Court will not entertain any application on his behalf. He must appear before the Magistrate and apply to him to be discharged on the ground that the warrant is informal or offer some explanation by way of purging his contempt, and at the same time application may be made for the release of his property. It will then be the duty of the Magistrate to determine judicially whether the warrant was valid, and when he has done so, the person against whom and against whose property the warrant was respectively issued may, if he be so advised, apply for the revision of the proceedings—*Bisheshur*, 2 N.W.P.H.C.R. 441; *Womesh Chandra*, 5 W.R. 71.

168. Statement in writing:—Where there is no endorsement or statement in writing made by the Court validating the proclamation, the proclamation is not made according to law, and the subsequent attachment and sale are invalid—*Mian Jan v. Abdul*, 27 All 572; *Abdulla v. Jitu*, 22 All 216. The Magistrate ought to take particular care to preserve the proclamation, and there must be records in the Court to show that the formalities were strictly observed. Where such records were lost (e.g., where neither the proclamation nor its copy was forthcoming), the High Court set aside the proclamation and attachment, and restored the property of the owner—*Jina Badhar*, 14 Bom.L.R. 163, 13 Cr.L.J. 293 (294), 14 I.C. 757, 1 Bom.Cr.C. 104. See also *Shewdyal v. Griban*, 6 W.R. 73.

The statement in writing should state clearly that the proclamation was duly published, and should also mention the date of publishing the proclamation. Where the validating order merely stated that the proclamation was duly published, but omitted to specify the date of the publication, *held* that it could not be considered as a conclusive evidence that the requirements of sec. 87 had been complied with—*Multan Singh*, 32 P.R. 1919, 21 Cr.L.J. 210, 54 I.C. 994. The provision of sec. 87, cl. (3) is only applicable when a statement in writing by the Court specifies the date on which the proclamation was published. Where this is not done, the recording of such an order will not suffice to take the place of direct evidence of publication and service of the proclamation. *Raghuni*, 37 Cr.L.J. 318, 160 I.C. 604, 17 P.L.T. 81, A.I.R. 1936 Pat. 249, 1936 Cr.C. 273.

Some vague materials on the record merely to show that a proclamation was *perhaps* issued, are insufficient; so also, a vague admission by one of the accused persons that a proclamation of some undescribed sort at some unspecified time issued, has no value—*Jina Badhar*, *supra*.

88. (1) The Court issuing a proclamation under section 87 may at any time order the attachment of any property, moveable or immoveable, or both, belonging to the proclaimed person.

Attachment of property of person absconding.

(2) Such order shall authorize the attachment of any property belonging to such person within the district in which it is made; and it shall authorise the attachment of any property belonging to such person without such district when endorsed by the District Magistrate or Chief Presidency Magistrate within whose district such property is situate.

(3) If the property ordered to be attached is a debt or other moveable property, the attachment under this section shall be made—

- (a) by seizure; or
- (b) by the appointment of a receiver; or
- (c) by an order in writing prohibiting the delivery of such property to the proclaimed person or to any one on his behalf; or
- (d) by all or any two of such methods, as the Court thinks fit.

(4) If the property ordered to be attached is immoveable, the attachment under this section shall, in the case of land paying revenue to *the Provincial Government*, be made through the Collector of the district in which the land is situate, and in all other cases—

- (e) by taking possession; or
- (f) by the appointment of a receiver; or
- (g) by an order in writing prohibiting the payment of rent or delivery of property to the proclaimed person or to any one on his behalf; or
- (h) by all or any two of such methods, as the Court thinks fit.

(5) If the property ordered to be attached consists of live-stock or is of a perishable nature, the Court may, if it thinks it expedient, order immediate sale thereof, and in such case the proceeds of the sale shall abide the order of the Court.

(6) The powers, duties and liabilities of a receiver appointed under this section shall be the same as those of a receiver appointed under Chapter XXXVI of the Code of Civil Procedure, 1882.*

(6A) *If any claim is preferred to, or objection made to the attachment of, any property attached under this section within six months from the date of such attachment, by any person other than the proclaimed person, on the ground that the claimant or objector has an interest in such property and that such interest is not liable to attachment under this section, the claim or objection shall be inquired into, and may be allowed or disallowed in whole or in part:*

Provided that any claim preferred or objection made within the period allowed by this sub-section may, in the event of the death of the claimant or objector, be continued by his legal representative.

* See now Order XL of the Code of Civil Procedure, 1908 (Act V of 1908).

(6B) *Claims or objections under sub-section (6A) may be preferred or made in the Court by which the order of attachment is issued or, if the claim or objection is in respect of property attached under an order endorsed by a District Magistrate or Chief Presidency Magistrate in accordance with the provisions of sub-section (2), in the Court of such Magistrate.*

(6C) *Every such claim or objection shall be inquired into by the Court in which it is preferred or made:*

Provided that, if it is preferred or made in the Court of a District Magistrate or Chief Presidency Magistrate, such Magistrate may make it over for disposal to any Magistrate of the first or second class or to any Presidency Magistrate, as the case may be, subordinate to him.

(6D) *Any person whose claim or objection has been disallowed in whole or in part by an order under sub-section (6A) may, within a period of one year from the date of such order, institute a suit to establish the right which he claims in respect of the property in dispute; but subject to the result of such suit, if any, the order shall be conclusive.*

(6E) *If the proclaimed person appears within the time specified in the proclamation, the Court shall make an order releasing the property from the attachment.*

(7) If the proclaimed person does not appear within the time specified in the proclamation, the property under attachment shall be at the disposal of the *Provincial Government*; but it shall not be sold until the expiration of six months from the date of the attachment and until any claim preferred or objection made under sub-section (6A) has been disposed of under that sub-section, unless it is subject to speedy and natural decay, or the Court considers that the sale would be for the benefit of the owner, in either of which cases the Court may cause it to be sold whenever it thinks fit.

Change:—Sub-sections 6A to 6E, and the italicised words in sub-section (7) have been added by sec. 13 of the Cr. P. C., Amendment Act, XVIII of 1923. The reasons are stated below in proper places.

The words "*Provincial Government*" have been substituted for the word "*Government*" in this section by the Government of India (Adaptation of Indian Laws) Order, 1937.

169. Proclamation and attachment:—Having regard to the words 'at any time,' a Magistrate may issue a simultaneous order of proclamation (under sec 87) and attachment (under this section)—*Bhai Lal*, 29 Cal. 417, 6 C.W.N. 680. Since the object of attachment is to enforce the appearance of the absconder, the attachment must immediately follow the proclamation, and it is unnecessary or even illegal to wait till the time specified in the proclamation has run out and then to order attachment because the proclamation has not been obeyed—*Mulchand*, 6 C.P.L.R. 38. It is true that a warrant under sec. 88, Cr. P. C., cannot be issued unless a proclamation has already been issued under sec. 87, Cr. P. C., but when a warrant under sec. 88 has been issued, it is to be presumed that a proclamation under sec. 87 has already been issued, the presumption of law being that the acts of a Court must be presumed to have been

duly performed—*Shib Charan v. Emp.*, 39 Cr.L.J. 570, 11 L.R. 1938 All. 386, 1938 A.W.R. (H.C.) 124, 1938 A Cr.C. 13, 1938 A.L.J. 137, 174 I.C. 861, 1938 A.L.R. 337, 10 R.A. 634, A.I.R. 1938 All. 220.

An attachment of property under this section is not authorised in a district other than that of the issuing Magistrate except when the order of attachment has been endorsed by the District Magistrate within whose district the property to be attached is situate—*Ganu*, 31 Cr.L.J. 491, 123 I.C. 397, 11 P.L.T. 402, A.I.R. 1930 Pat. 347.

The action of the Police officers, who executed a warrant of attachment under this section, in digging the walls or floors to remove door-frames cannot be held to be technically correct and resistance to it does not amount to an offence under sec. 332, I. P. C.—*Ramji*, 31 Cr.L.J. 937, 125 I.C. 784, A.I.R. 1930 Pat. 387. It is not for the Sub-Inspector of Police or Officers of a Court to demand that they shall not be bound to execute a warrant unless they are satisfied that the Court which issued the warrant was acting properly within its jurisdiction and had a legal right in the circumstances to issue the warrant. All that the officer executing a warrant has to see is that it is on the face of it a legal warrant executed by a person who has authority to issue warrants of that nature. If such a warrant is delivered to an officer of the Court, he is bound to execute it and he is certainly acting in accordance with his duty. If he is attacked while executing the warrant, the person attacking can be convicted under sec. 353, I. P. C.—*Shib Charan v. Emp.*, *supra*.

There are some essential differences between an attachment by a Civil Court in execution of a money decree and an attachment contemplated by this section. When once the property under attachment is declared to be at the disposal of Government under this section, it would be open to the Government to sell the property, or to dispose of the property in any other manner, or to be itself in possession of the property. The position is at the least analogous to the case where a receiver is appointed for the possession and management of immoveable properties. The Government is, therefore, a necessary party to a suit under O 34, r 1, C. P. C., in respect of the attached property—*Alagammal v. Sadasiva Padayachi*, A.I.R. 1930 Mad. 1017, 60 M.L.J. 72, 1930 M.W.N. 1021, 32 M.L.W. 843, 129 I.C. 47.

Where the land is attached under sec. 88, Cr. P. C., and actual possession is taken by posting a constable on the spot, a person removing standing crops from such land is guilty of an offence under sec. 379, I. P. C.—*Bande Ali Sheikh*, (1939) 2 Cal. 419, A.I.R. 1940 Cal. 163, 41 Cr.L.J. 396, 187 I.C. 125.

This section provides a complete Code for the attachment of the property of absconding person, and claims by persons other than the absconder to the property attached but this attachment ceases when the absconder surrenders or is arrested and in any case comes to an end when the subsequent attachment under sec. 386, Cr. P. C., is effected—*Suraj Narain*, A.I.R. 1934 Pat. 181 (182), 15 P.L.T. 57, 13 Pat. 317, 1934 Cr. C. 370, 148 I.C. 321, 35 Cr.L.J. 682.

170. Property:—According to the Madras High Court the undivided interest of a co-parcener of a joint Hindu family, or any portion thereof, can be attached under this section—*Sey of State v. Rangasamy*, 39 Mad. 831 (834) (F.B.), 31 M.L.J. 84, 17 Cr.L.J. 295, 35 I.C. 168 (overruling *Chinnian*, 2 Weir 43); *Umayan*, 2 Weir 43 (Footnote). The Patna High Court took a different view in *Bisi Bihari*, 42 I.C. 781, 18 Cr.L.J. 1037. The Lahore High Court holds that with regard to ancestral lands all that can be attached is the interest of the absconder, but on his death the lands must be released in favour of his heirs—*Shah Muhammad*, A.I.R. 1925 Lah. 629, 7 Lah.L.J. 40, 26 Cr.L.J. 1148, 26 P.L.R. 395, 88 I.C. 460; *Sadhu Singh v. Secretary of State*, 18 P.R. 1908, 156 P.L.R. 1908, 19 P.W.R. 1908; *Niamat Ali v. Secretary of State*, 52 P.R. 1915, 30 I.C. 71.

The unascertained share of a partner in the assets of the partnership which were then in the hands of a Receiver under a winding-up order, was not attachable, such share not being "property belonging to the defendant"—*Abbot v. Abbot*, 5 B.L.R. 382. But the share of a judgment-debtor in partnership with another person who alone was

in possession of the property at the time of attachment was liable to attachment; but the attachment must be by prohibitory order and not by actual seizure—*Thama Singh v Kalidas*, 5 B.L.R. 386.

See also Note 175.

171. Sub-section (6A)—Claims of third parties:—Before the addition of this sub-section by the Amendment Act of 1923, it was held in a number of cases that secs 88 and 89 did not provide for the investigation by a Magistrate of the claims of third parties whose property had been attached as the property of the accused; the remedy of the claimant was by way of a civil suit, as the question was one more for the Civil Court than for the Magistrate—*Sheodihal*, 6 All. 487; *Kissoree Pater*, 7 W.R. 35; *Su We*, 4 L.B.R. 109; *Kandappa Goundan*, 20 Mad. 88; *Gaman*, 8 P.R. 1911. These rulings are now rendered obsolete, and the new sub-section (6A) provides for the investigation by the Magistrate of claims and objections preferred by third parties.

The proviso to the sub-section provides for the continuance of proceedings by the legal representative of a claimant or objector who may die pending the inquiry into his claim or objection

Sub-section (6B):—"We have provided for the case of claims to property in another district from that in which the order of attachment was made"—*Report of the Select Committee of 1916*.

Sub-section (6C):—"The sub-sections which the Bill adds to section 88 imply that the Court which issues an order of attachment or endorses the same under sub-section (2) is to investigate and determine a claim or objection. We think that a limited power to transfer claims and objections for disposal to subordinate Magistrates would be useful, and we have, therefore, provided that the District Magistrate may transfer such cases to Magistrates not below the rank of second class Magistrates, and the Chief Presidency Magistrates may likewise transfer cases to Presidency Magistrates subordinate to them"—*Report of the Joint Committee (1922)*.

172. Sub-section (6D):—"We have provided a period of limitation within which proceedings in a Civil Court to establish a claim which has been disallowed by a Magistrate, must be instituted"—*Report of the Select Committee of 1916 Compare O. XXI, rule 63, C P. Code*.

A civil suit is maintainable by the real owner against the Government and the person at whose instance the criminal proceedings were instituted, to recover possession of the property attached, with mesne profits and damages done to the property while it was at the disposal of the Government—*Secretary of State v. Jagat Mohini*, 28 Cal. 540.

There is nothing in this section which compels a person who claims an interest in the absconder's property to prefer his claim before the Magistrate, issuing the order of attachment. All that the section says is that if any claim is preferred to or objection made to the attachment of any property, such claim or objection shall be inquired into. The right of the aggrieved person to prefer a suit without going to the Magistrate under this section has not been taken away. It is true that it is provided that if a person claiming an interest prefers a claim before the Magistrate and that claim is negatived, he can institute a suit to establish his right in a Civil Court within one year from the date of the Magistrate's order. That however does not mean that an independent suit by that person is not maintainable. So long as the property has not been sold by Government or otherwise disposed of, and so long as Government have continued to remain in possession of the attached property, it would be open to any party claiming an interest in it to obtain a decree of a Civil Court declaring his right in the property, and if he succeeds in obtaining such a decree before Government have finally disposed of the property, the decree would be binding against Government, and the property could be disposed of subject to the rights established under such decree—*Secretary of State v. Ahalyabai Narayan Kulkarni*, A.I.R. 1938 Bom. 321 (323), I.L.R. 1938 Bom. 451, 40 Bom.L.R. 422, 176 I.C. 453,

11 R.B. 41. Sub-section (6D) does not prevent a person from filing a suit to establish his title to attached property without first filing a claim or objection under sub-section (6A)—*Recmah Ezekiel v. Province of Bengal*, (1939) 2 Cal 52 (57), A.I.R. 1939 Cal. 746, 41 Cr.L.J. 134, 185 I.C. 214.

See also Note 176.

173. No revision of order passed on a claim:—It was held in *Sheodihal*, 6 All. 487, *Kissoree Paler*, 7 W.R. 35, *Abdulla v. Jitu*, 22 All. 216, and *Kandappa Goundan*, 20 Mad. 88, that since the Code did not contain any provisions for the investigation of claims of third parties to the attached property, the orders of Magistrates passed on claims of third parties were not 'judicial proceedings' and, therefore, they were not open to revision under secs. 435-439 of the Code.

Under the present law also, though the claim-proceeding held by the Magistrate would be a judicial proceeding, still the Magistrate's order in such a proceeding allowing or disallowing a claim in whole or in part under sub-section (6A) is not liable to revision, because the words "subject to the result of such suit, if any, the order shall be conclusive" show that the order is not liable to be contested in appeal or revision.

Sub-section (6E)—Release of property:—The High Court can interfere in revision with an order passed by a Magistrate under sub-section (6E) refusing to release the property from attachment—*Santa Singh*, 25 Cr.L.J. 82, 76 I.C. 18 (Lah.).

174. Sub-section (7)—Property shall be at the disposal of the Provincial Government:—The mere seizure of property of an absconder by the police does not confer any right on the Government unless and until proceedings are taken under secs 87 and 88 of this Code. Therefore, where the Police seized certain property of an absconder in August 1911 but no proceedings were taken under secs. 87 and 88 until December, an attachment of the property in October 1911 made by a creditor of the absconder in a civil suit would prevail, and the refusal of the Magistrate to hand over the property in obedience to the order of the Civil Court was held to be wrong—*Subramanyam*, 6 L.B.R. 57, 13 Cr.L.J. 568, 15 I.C. 984. The words "shall be at the disposal of Government" do not mean that from the moment the absconder fails to appear on the date fixed, all his right, title and interest in the property immediately pass over to the Government. It has that effect only from the date of attachment. This is evident from the very words of the section, "property under attachment." In other words, while the right and power of Government to attach begin from the time for appearance specified in the proclamation, the exercise of the power must begin with the attachment. Therefore, where the property was attached by the Civil Court prior to the attachment by the Magistrate, the attachment of the Civil Court prevailed—*Narayan v. Govind*, 31 Bom.L.R. 345, 116 I.C. 271, A.I.R. 1929 Bom. 200. But when proceedings have been taken under these sections, and the property has been at the disposal of the Government, no title can be conferred by an attachment and sale subsequently made in execution of a money decree by the Civil Court—*Golam Abed v. Toolseeram*, 9 Cal. 861.

When the property has been declared to be at the disposal of the Government, the title of the accused to the property is put at end to, the Government can re-grant the property (which consists of vatan lands) to some other person; such grant does not confer on the accused any right to institute a suit to recover the property from such person—*Dattaji v. Narayan*, 25 Bom.L.R. 228, A.I.R. 1923 Bom. 198. The possession of the Government is not merely that of an attaching decree-holder nor that of an agent of the absconder; on the other hand, the Government holds the property as against the absconder. It would be open to the Government to sell the property, to dispose of it in any other manner, to be itself in possession of the property or to grant a lease thereof. The position of the Government is analogous to that of a receiver. If the property had been mortgaged by its owner before it was attached by Government, the Government (or in case the property was sold by Government, the purchaser) would be a necessary party to a suit for sale afterwards brought by the mortgagee—*Alagammal*.

v. *Sadasiva*, 60 M.L.J. 72, A.I.R. 1930 Mad. 1017 (1020), 129 I.C. 47; *Bindeswari Prasad v. Lal Mungari Lal*, A.I.R. 1937 Pat. 642, 172 I.C. 198, 10 R.P. 315, 1937 P.W.N. 762, 18 P.L.T. 814. Under the Hindu Law, if a co-parcener takes the property of another deceased co-parcener by survivorship, he takes it with the burden of maintaining the widow and unmarried daughters of the deceased co-parcener. They have got an interest in the property, attached by the Government under this section as the surviving coparcener was absconding after being charged with a criminal offence. Besides, such an interest is not liable to attachment because, although it may not be a legal charge, Government acting under this section are not in the same position as a purchaser for value. The holder of such interest for maintenance amounting as it does to a burden on the property is entitled as a matter of right to ask the Court to create a formal charge, and that being so, it cannot be attached by Government who are only concerned with confiscating the absconder's right, title and interest in the property—*Secretary of State v. Ahalyabai Narayan Kulkarni*, 40 Bom.L.R. 422, A.I.R. 1938 Bom. 321, I.L.R. 1938 Bom. 454, 176 I.C. 453, 11 R.B. 41.

Time :—The law does not lay down any express time when the order of forfeiture should be made; if by mistake it has not been passed before the accused appears, it may be passed after he has appeared, if he does not satisfy the Court that he has not been evading justice—*Bishonath*, 3 W.R. 63. But it has been held in *Ramkishore*, 19 W.R. 12 (14), that if an order of forfeiture has not been made before the person has come in or has been brought in, it ought not to be made at all after he has appeared, because its purpose has been effected by the appearance of the accused.

Power to restore property .—Property which has been declared to be at the disposal of the Government can be restored to its owner only by the Government and not by the Court—*Government of Bengal v. Mir Sarwarjan*, 18 W.R. 33; even the High Court has no power to make any order with respect to that property—*Government of Bengal, Petitioner*, 9 L.B.R. 342.

175. Sale :—Property which is sold is the property of the accused and if the accused has before sale under this section transferred any interest in the property, that interest cannot obviously be sold—*Bindeswari Prasad v. Lal Mungari Lal*, A.I.R. 1937 Pat. 642, 172 I.C. 198, 10 R.P. 315, 1937 P.W.N. 762, 18 P.L.T. 814. So where the land was subject to a lease, the sale should be subject to the right of the lessee to remain in possession until the expiry of the lease—*Ilam Din*, 9 P.R. 1908, 8 Cr.L.J. 260, 3 P.W.R. Cr. 81.

Sale of revenue-paying land should be done by the Collector and the procedure laid down in the C. P. Code for execution sale should be strictly followed. See *Cal G. R. and C. O.*, p. 6.

See also Note 170.

176 Setting aside of sale :—Where the publication of the proclamation was not in accordance with law, and the accused applied in revision to have the sale set aside and to have the purchase-money refunded to the purchasers, held that whatever irregularities there might have been in the publication of the proclamation, when a sale has taken place and the purchasers have acquired some sort of title, it is not open to the High Court in exercising its revisional power to pass an order affecting the title of persons (purchasers) who are strangers to the legal proceedings in which the order is made—*Abdulla v. Jitu*, 22 All. 216. But the Punjab Chief Court held that it was within the revisional powers of that Court to set aside an attachment on the ground of illegality of the proclamation or defect in its publication—*Malli*, 1917 P.R. 39, 18 Cr.L.J. 979; *Multan Singh*, 1919 P.R. 32.

Suit to set aside sale :—The accused can institute a suit in a Civil Court for setting aside the sale and for recovery of his property from the purchaser, if it turns out that the proclamation (and the sale) was a nullity—*Abdul Kazim*, 1904 A.W.N. 159 (cited in 27 All. 572 at p. 574); *Mia Jan v. Abdul*, 27 All. 572. In *Secy. of State v. Loun Karan*, 5 P.L.J. 321 (327), 21 Cr.L.J. 475, 56 I.C. 507, 1 P.L.T. 451; *Mullick*, J.,

has expressed an opinion (*obiter*) that secs 88 and 89 debar an absconder from suing for the recovery of his property. The Lahore High Court is of opinion that the proclaimed person has no right to bring a civil suit for the restoration of the property sold on the ground of irregularity in the proclamation, attachment or sale. But he can get his remedy by invoking the revisional powers of the High Court under sec. 439, or its inherent powers to secure the ends of justice now expressly recognized by sec. 561A—*Deva Singh v Fazal Dad*, 10 Lah 338, A.I.R. 1928 Lah. 562, 111 I.C. 508

See also Note 172.

89. If, within two years from the date of the attachment, any person whose property is or has been at the disposal of the *Provincial Government* under sub-section (7) of section 88, appears voluntarily or is apprehended and brought before the Court by whose order the property was attached or the Court to which such Court is subordinate, and proves to the satisfaction of such Court that he did not abscond or conceal himself for the purpose of avoiding execution of the warrant, and that he had not such notice of the proclamation as to enable him to attend within the time specified therein, such property, or, if the same has been sold, the nett proceeds of the sale, or, if part only thereof has been sold, the nett proceeds of the sale and the residue of the property, shall, after satisfying thereout all costs incurred in consequence of the attachment, be delivered to him.

Amendment:—The words "the Provincial Government" have been substituted for the word "Government" in this section by the Government of India (Adaptation of Indian Laws) Order, 1937

177. Scope:—This section prescribes a remedy where there has been a good and legal publication of proclamation under sec 87, but offers no facility for the contesting of the legality of the proclamation. In the latter case the person aggrieved has his remedy by a civil suit—*Adulla v. Jitu*, 22 All 216 (219), 1900 A.W.N. 28; *Abdul v. Karim*, 1904 A.W.N. 159; *Mala Singh*, 6 P.R. 1917, 17 Cr.L.J. 414 (417), 35 I.C. 974. See also *Hans Raj*, A.I.R. 1934 Lah. 987, 16 Lah. 466, 36 P.L.R. 262, 153 I.C. 954, 1931 Cr.C. 1391

But in two other cases the Punjab Chief Court has held that it cannot be said that the person aggrieved by an illegal attachment has no remedy except by a civil suit, for the Chief Court has revisional powers which it would employ to annul such an attachment—*Malli*, 39 P.R. 1917, 18 Cr.L.J. 979 (disapproving *Mala Singh*, supra); *Multan Singh*, 32 P.R. 1919, 21 Cr.L.J. 210, 57 P.L.R. 1919, 54 I.C. 994

178 "Two years":—An application under sec 89 not made within two years from the date of attachment is not entertainable—*Mala Singh*, 6 P.R. 1917, 17 Cr.L.J. 414, 35 I.C. 974. See also 26 Bom.L.R. 719.

"And proves", etc.:—The phrase "within two years" qualifies not only the word 'appears' but also the word 'proves'; therefore, it is not enough that the accused person appears within two years; it is also necessary that the proof that the accused has not been absconding should be offered within two years—*In re Nilkanth*, 15 Bom.L.R. 175, 14 Cr.L.J. 237, 19 I.C. 333; *Buta Singh*, 27 P.L.R. 823, 27 Cr.L.J. 1025 (1026), 95 I.C. 977, A.I.R. 1926 Lah. 662, 8 Lah.L.J. 608.

In order that the applicant may have the property restored to him, it is necessary for him to show that he had not absconded and that he had not proper notice of the proclamation; it is not sufficient to show merely that he did not abscond—*Buta Singh*.

27 Cr.L.J. 1025 (1026), 27 P.L.R. 825, 96 I.C. 977, A.I.R. 1926 Lah. 662, 8 Lah L.J. 608. See also *Arab Gul*, 38 Cr.L.J. 99, 165 I.C. 602, 9 R.Pesh. 51.

179. Restoration of property:—For the purpose of this section it is not necessary that the absconding accused should himself personally apply for the restoration of the property; the application can be made by any one on his behalf. But it is essential that the absconding accused should appear and prove the facts required, *viz.*, that he did not abscond or conceal himself for the purpose of avoiding the arrest and that he had not notice of the proclamation—*In re Nilkanth*, 15 Bom L.R. 175, 14 Cr.L.J. 237, 19 I.C. 333.

After the sale of the property of an absconding accused, if an application by him for restoration is allowed, all that he can get is the nett sale-proceeds and not the property itself—*Fazaldad*, 24 Cr.L.J. 573, A.I.R. 1924 Lah. 420, 73 I.C. 269.

Where land is attached regarding which no warrant has been issued, the High Court may, in the exercise of its inherent powers to rectify a grave irregularity under the provisions of sec. 530 (a) read with sec. 439, release the property from attachment, where it cannot do so under the strict provisions of sec. 89—*Buta Singh*, 27 P.L.R. 825, 27 Cr.L.J. 1025 (1026).

180. No civil suit:—Where the accused did not appear within two years of the attachment and the property was ordered to be sold, and there was no illegality in the proclamation and sale, no civil action could lie to set aside the sale—*Bhukhooree v. Govt.*, 8 W.R. 207 (civil). See also Note 176

Appeal:—An order refusing restoration of property is appealable; see sec. 405.

D.—Other Rules regarding Processes.

90. A Court may, in any case in which it is empowered by this Code to issue a summons for the appearance of any person other than a juror or assessor, issue, after recording its reasons in writing, a warrant for his arrest—

(a) if, either before the issue of such summons, or after the issue of the same but before the time fixed for his appearance, the Court sees reason to believe that he had absconded or will not obey the summons; or

(b) if at such time he fails to appear and the summons is proved to have been duly served in time to admit of his appearing in accordance therewith, and no reasonable excuse is offered for such failure.

181. Scope:—This section applies to witnesses as well as to the accused. But witnesses brought up under arrest should be dealt with not as criminals but simply as persons arrested on civil process—*Cal. G. R. & C. O.*, p. 7.

This section empowers the Court to issue a warrant only in cases in which it is empowered to issue summons, and not in a case in which it has no power to issue the latter. Therefore, where no case is found against the accused and he is discharged by a Magistrate under sec. 253, it is not in the power of the District Magistrate to issue a warrant for his arrest for a retrial, until the order of discharge is set aside and the case is taken to his own file—*Kanwar Singh*, 15 P.R. 1893.

182. Recording of reasons:—A Magistrate ought not to issue a warrant, either in lieu of or in addition to summons, in a summons case, unless he has previously recorded his reasons for so doing—*Yasin Khan*, 5 N.L.R. 125, 10 Cr.L.J. 306; *Bela Singh*,

1918 P.L.R. 50, 19 Cr.L.J. 443, 44 I.C. 971, 7 P.W.R. 1918 (Cr.). Where an accused person has been let out on his own bond, a warrant issued under this section without recording reasons is illegal. The recording of reasons is a necessary preliminary to the issue of warrant; and omission to do so vitiates the warrant; such omission cannot be overlooked, and cannot be cured by sec. 537—*Kuruthan Ambalam*, 38 Mad. 1088, 33 I.C. 308, 17 Cr.L.J. 132. In *Mahar Singh*, 18 A.L.J. 1149, 22 Cr.L.J. 111, 59 I.C. 415, the omission by the Magistrate to record reasons for the issue of a warrant in the first instance was held by the Allahabad High Court to be a mere irregularity and not an illegality.

The Calcutta High Court also holds that the provisions as regards the recording of reasons are merely directory and *not mandatory*. Therefore, in a case in which the Magistrate had materials before him sufficient to justify the issue of a warrant and to which the Magistrate did apply his judicial discretion, and the warrant was good and valid on the face of it, and the Magistrate stated in the warrant the reasons upon which he relied, the warrant was not invalid by reason of the fact that the Magistrate omitted to record *separately in his order-sheet* the reasons which actuated him in issuing the warrant—*Govt. of Assam v. Sahebulla*, 51 Cal. 1, 38 C.L.J. 77, 75 I.C. 129, A.I.R. 1924 Cal. 1, 27 C.W.N. 857, 24 Cr.L.J. 881 (F.B.), (overruling *Sukhewar Phukan*, 38 Cal. 789). See also *Maingal Singh v. Ghulam Mohammad*, A.I.R. 1939 Lah. 280 (282). Magistrates should record their reasons specifically in writing in the warrant (though not necessarily in the order-sheet) before issuing the warrant, and should not be satisfied with merely signing their names to warrants in the form given in the schedule—51 Cal. 1 (at p. 21).

183. Issue of warrant in the first instance—Grounds:—In the absence of special grounds mentioned in this section, the Court ought to issue a summons—*Yasin*, 5 N.L.R. 125, 10 Cr.L.J. 306; *Po Ni*, 3 L.B.R. 116. Great care should be taken that a warrant which implies personal arrest and restraint never goes forth when a summons to attend would be sufficient for the ends of justice, and any attempt to coerce or restrain a party who has been summoned only should be checked and punished—*Punj. Cir.*, Chap. XLI, p. 144.

A warrant cannot be issued to enforce the attendance of a witness unless the Magistrate is first satisfied that the witness will disobey or has disobeyed the summons served on him—*Sutherland*, 14 W.R. 20; or unless he believes that the witness will not give evidence voluntarily—*In re Bourke*, 13 W.R. 1; or unless it is proved that summons has been duly served, and in spite of it the witness did not appear—*Abdoor Rahman*, 7 W.R. 37; *Po Ni*, 3 L.B.R. 116.

Where in proceedings under sec. 498, I.P.C., the complainant stated on oath that a warrant should be issued for the attendance of the abducted woman, or else the accused would remove the woman from their house, *held* that the Magistrate was justified in issuing a warrant for the arrest of the woman—*Mahar Singh*, 18 A.L.J. 1149, 22 Cr.L.J. 111, 59 I.C. 415.

It is true that a summons should ordinarily issue in the first instance to a person who is alleged to have committed an offence under sec. 323 or an offence under sec. 426 I.P.C., but under sec. 90, Cr. P.C., if the Court finds it necessary in some circumstances to issue a warrant, it may do so—*Lachhmi Narain v. Emp.*, 40 Cr.L.J. 283, 179 I.C. 899, A.I.R. 1939 All. 156, 1938 A.L.J. 1229, 1939 A.W.R. (H.C.) 63.

184. Clause (b):—Proof of service of summons:—A warrant ought not to issue unless due service of summons is proved. But a report by the station-writer that he served the summons is no evidence of service of summons under clause (b) of this section—*Po Ni*, 3 L.B.R. 116.

Bail:—A Magistrate is competent to admit to bail a recalcitrant witness arrested under this section—*H. C. Proceedings*, 2 Weir 39.

There is nothing in this section which says that a warrant issued under it must be accompanied by a direction under sec. 76, Cr. P.C. Whether such a direction is

given or not is entirely in the discretion of the Court. There is nothing in the Code anywhere which says that a warrant issued under this section to a person who is charged with a bailable offence must contain an endorsement under sec. 76—*Lachmi Narain v. Emp*, 40 Cr.L.J. 283, 179 I.C. 899, A.I.R. 1939 All. 156, 1938 A.L.J. 1229, 1939 A.W.R. (H.C.) 63.

91. When any person, for whose appearance or arrest the officer presiding in any Court is empowered to issue a summons or warrant, is present in such Court, such officer may require such person to execute a bond, with or without sureties for his appearance in such Court.

Power to take bond for appearance.

185. Scope:—This section is only applicable to persons who are present in Court and cannot authorise the Magistrates to go to the houses of persons and compel them to execute bonds for appearance in Court—*Ajodhya Prasad v. Municipal Committee, Khurai*, 37 Cr.L.J. 837, 163 I.C. 413, 18 N.L.J. 320, 9 R.N. 1.

Bond by Mukhtar:—A bond by a mukhtar by which he undertook to produce a witness when called upon was held to be sufficient, although no security for appearance had been taken from the witness herself—*Kazim Husain*—1901 A.W.N. 35

Power to lock up:—Even though a Magistrate may suspect that the witness who is present may in future be kept out of the way by the accused, still it will not justify the Magistrate in arresting the witness and placing her in lock-up—*Ibid*.

92. When any person who is bound by any bond taken under this Code to appear before a Court, does not so appear, the officer presiding in such Court may issue a warrant directing that such person be arrested and produced before him.

Arrest on breach of bond for appearance.

186. Scope:—Section 92 has reference to the case of a person who is bound by a bond to appear in Court. It provides for a warrant only in case the person does not appear at the time when he is bound by the bond to appear; but it does not apply to a case where *prior* to the time for appearance, arrest by warrant is sought to be effected. Such a case falls under sec. 90—*Karuthan Ambalam*, 38 Mad. 1088, 17 Cr.L.J. 132, 33 I.C. 308.

93. The provisions contained in this Chapter relating to a summons and warrant, and their issue, service and execution, shall, so far as may be, apply to every summons and every warrant of arrest issued under this Code.

Provisions of this Chapter generally applicable to summonses and warrants of arrest.

CHAPTER VII.

OF PROCESSES TO COMPEL THE PRODUCTION OF DOCUMENT AND OTHER MOVEABLE PROPERTY AND FOR THE DISCOVERY OF PERSONS WRONGFULLY CONFINED.

A.—Summons to produce.

94. (1) Whenever any Court, or in any place beyond the limits of the towns of Calcutta and Bombay, ^{Summons to produce document or other thing.} any officer in charge of a police-station, considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before such Court or officer, such Court may issue a summons, or such officer a written order, to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it, or to produce it, at the time and place stated in the summons or order.

(2) Any person required under this section merely to produce a document or other thing shall be deemed to have complied with the requisition if he causes such document or thing to be produced instead of attending personally to produce the same.

(3) Nothing in this section shall be deemed to affect the Indian Evidence Act, 1872, sections 123 and 124, or to apply to a letter, postcard, telegram or other document or any parcel or thing in the custody of the Postal or Telegraph authorities.

187. **Scope:**—No doubt the language of this section is very wide. If it were to be taken quite literally, it might appear that anything whatever which is capable of being produced, *i.e.*, anything tangible and moveable, might be ordered to be produced if the Court chose to consider its production necessary or desirable for the purposes of any proceeding before it. But no such absolute discretion can be contemplated. The Court's discretion must be exercised judicially. Anything which may reasonably be regarded as forming part of the evidence in the case may, of course, be ordered to be produced, and that is the primary object of these provisions. Some things not necessary for evidentiary purposes may also come within them if there is any direct connexion between the thing and the subject-matter of the proceeding, for instance, if the thing forms part of the proceeds of an offence. There is nothing to prevent an order being made under this section for the production of a thing in anticipation of an order to be made under sec. 517, Cr. P. C., at the conclusion of the trial, and there may be cases in which it is very proper to make such an order. But before doing so, the Court obviously ought to consider the nature of the order which it will be in a position to make under sec. 517, Cr. P. C. It would be futile to order the production of a thing, not required as evidence for the purposes of the inquiry or trial itself, if the only order which the Court can make with respect to it will be that it should be returned to the person producing it.—*In re Lloyds Bank Ltd.*, A.I.R. 1934 Bom. 74 (76), 35 Bom.L.R. 88, 35 Cr.L.J. 1028, 149 I.C. 1005, 58 Bom. 152, A.I.R. 1934 Bom. 199. See also *Nizam of Hyderabad v. Jacob*, 19 Cal. 52 (65), where the question whether the order under this section can be made with a view to or in anticipation of a proceeding under sec. 517, Cr. P. C., was raised but not decided. It was, however, observed that

a proceeding under sec. 517, Cr. P. C., was not wholly independent of, or unconnected with, the enquiry or proceeding referred to in this section.

The general sec. 94, Cr. P. C., would apply to all cases, including summons cases, and it also gives the Magistrate discretion about the production of documents—*Chhotey Miyan v. Emp.*, A.I.R. 1936 Nag. 250, 1936 Cr. C. 1042.

Court:—It was held in *Brojendra Kishore v. Clarke*, 12 C.W.N. 973, *Clarke v. Brojendra Kishore*, 36 Cal. 433, and *In re Harilal*, 22 Bom. 949 that if there were no proceedings pending before a Magistrate, he was not a 'Court' within the meaning of this section, and could not issue an order under sec. 94 or 96. But the Privy Council in the case of *Clarke v. Brojendra Kishore*, 39 Cal. 953 (at p. 966), 13 Cr.L.J. 693, 16 I.C. 501, 39 I.A. 163 (P.C.) has laid down that the words "Court" and "Magistrate" are convertible terms, and that Sch. V, Form VIII contemplates the issue of a search warrant before any proceedings are initiated, and in view of an inquiry to be made.

188. Document:—The word 'document' has not been defined in this Code. For its definition reference may be made to sec. 3 of the General Clauses Act (X of 1897), sec. 3 of the Indian Evidence Act (I of 1872) and sec. 29 of the Indian Penal Code (XLV of 1860).

This section deals with documents forming the subject of a criminal offence as also with documents which are or can be used only as evidence in support of a prosecution—*In re Lakhmidas*, 5 Bom.L.R. 980. The words 'documents or thing' are general and seem to cover any document, the production and inspection of which are necessary or desirable or will serve the ends of justice. When the premises to be searched are those of the accused person, the warrant issued under sec. 96 need not be only for the document or thing in respect of which an alleged offence has been committed—*Municipal Committee, Jhang v. Md. Hayat*, 1914 P.R. 36, 16 Cr.L.J. 225. See also 8 A.L.J. 517. The word 'thing' is specially mentioned in this section and that would not include a configuration of a wall, or the inspection of any place inside a house for purposes of investigation—*Jagannath*, 29 Cr.L.J. 272, 107 I.C. 688, 26 A.L.J. 410, A.I.R. 1928 All. 185. See notes under the heading "Inspection" in Note 191.

The document or thing must be clearly specified; see *Prankhan*, 16 C.W.N. 1078, 13 Cr.L.J. 764, 17 I.C. 76.

The Magistrate has the power to cause production, under this section of the statements made by witnesses at the enquiry—20 M.L.W. 745.

Under this section the accused can call for the original statements made by witnesses to the Inspector of Excise at his enquiry and can use them under sec. 145 of the Indian Evidence Act—*Michael*, 1933 M.W.N. 1270. But where in a case under sec. 34 of the C. P. Excise Act, the trial Court went fully into the question and refused to allow the production of departmental inquiry papers asked for by the accused as being not relevant and the lower Appellate Court found that the discretion was exercised judicially by the Magistrate, the High Court refused to interfere in revision—*Chhotey Miyan v. Emp.*, A.I.R. 1936 Nag. 250, 1936 Cr.C. 1042.

See also Note 502B, last paragraph.

189. Necessary or desirable:—Before the Magistrate can order for the production of any document, he must judicially consider whether the production of the document is necessary or relevant for the purpose of the trial—*Lakhmi Das*, 5 Bom.L.R. 980. The Magistrate cannot call for anything and everything from anybody and everybody. The document or thing called for must have some relation to or connection with the subject matter of the investigation or the inquiry, or throw some light on the proceeding, or some link in the chain of evidence—*Nizam of Hyderabad v. Jacob*, 19 Cal. 52 (64). Before a person can be punished for the non-production of a document, it is necessary to show that its production was material for the decision of the case in which the document was called for—*Damri Ram*, 4 P.L.W. 63, 19 Cr.L.J. 271. A document is a necessary document even though it is necessary as a mere piece of evidence only—*Lakhmi Das*, 5 Bom.L.R. 980. It may be that the thing called for may

turn out to be wholly irrelevant to the inquiry; but so long as it is considered to be necessary or desirable for the purpose of the inquiry, the power is there—*Nizam of Hyderabad v. Jacob*, 19 Cal. 52 (64). Where the keys of a church were in possession of the members of the congregation who were ordered to produce them in Court with a view to give possession of the keys to the party, the Court considered entitled to them, *held* that it would impose an undue strain on the language of this section to hold that the order was legal—*Emp. v. Akarkswami*, 35 Cr.L.J. 991, A.I.R. 1934 Nag. 142.

Whether the documents are necessary for the inquiry is a matter to be decided by the Magistrate at the time of issuing a summons under this section or a search warrant under sec. 96—*Mahomed Jackariah v. Ahamed Mahomed*, 15 Cal. 109. In a murder case, the accused has a right to a copy of the statements made by the witnesses at the inquest inquiry, and if the record of the inquest proceeding is in the Court, the Magistrate has power under this section to call for it to be produced by the Police—*In re Chanlet*, 20 L.W. 745, 26 Cr.L.J. 426, 85 I.C. 42.

190. Person in possession:—The person called upon to produce need not be a party to the proceedings. The Magistrate can order the production of things in the possession of the solicitor—*Nizam v. Jacob*, 19 Cal. 52 (64). When a complainant can, under this section, be ordered by the Court to produce documents belonging to him, his Solicitor or Attorney may also be ordered to produce them if they are in his possession, and this regardless of whether he has a lien upon them or not. In case of lien when the Court has finished with them, they must be returned to the Attorney and not to the complainant—*Allen E. Ker v. Promotha*, 39 C.W.N. 917, 62 Cal. 1037.

Person whether includes 'accused':—The provisions of this section apply to an accused, and it is competent for the Magistrate to issue summons to an *accused* to produce a document or other thing (e.g., a stolen article), the production of which might incriminate him—*Khonda Reddi*, 37 Mad. 112, 13 Cr.L.J. 493, 15 I.C. 493; *Mahomed Jackariah v. Ahmed*, 15 Cal. 109; *Nizam v. Jacob*, 19 Cal. 52. The Magistrate has the power of issuing a search warrant under sec. 96 to obtain documents in the possession of the accused (*Bisser Missar*, 41 Cal. 261, 17 C.W.N. 1209, 14 Cr.L.J. 405, 20 I.C. 229) and the issue of summons is a milder means of attaining the same end—*Khonda Reddi v. Emp.*, 37 Mad. 112. Contra—*Ishwar Chandra*, 12 C.W.N. 1016, 8 Cr.L.J. 224, 8 C.L.J. 320 and *Bajrang Gope*, 38 Cal. 304, 13 C.L.J. 659, 15 C.W.N. 343, where it is held that this section does not refer to stolen articles or to any incriminating document or thing in the possession of an accused person. The law does not empower a Police officer to search an accused's house for anything but the specific article which has been or can be made the subject of summons or warrant to produce. A general search for stolen property is not authorized and the law cannot be got over by using such an expression as "stolen property relevant to the case"—*Prankhang*, 16 C.W.N. 1078, 13 Cr.L.J. 764, 17 I.C. 76.

191. Order for production:—The order for production must be made on sufficient materials. Where a complaint was made against a certain person before the Chief Presidency Magistrate who examined the complainant and directed a local investigation, and an application was made thereafter by the complainant for summons under this section, and was granted by the Court after his further examination thereon, *held* that there were sufficient materials on which an order under this section could properly be made and that it was properly made—*T. R. Pratt*, 47 Cal. 617, 24 C.W.N. 410, 21 Cr.L.J. 577.

Seizure of account books by police:—A Magistrate, on taking cognizance of a complaint under sec. 477, I. P. Code, may issue a summons under this section for the production of account books, or a search warrant under sec. 96, but is not competent to pass an order directing the police to take possession of account books forming the subject of the charge—*Hari Charan v. Girisb*, 38 Cal. 68 (72), 11 Cr.L.J. 525, 7 I.C. 747, 13 C.L.J. 43.

Inspection:—The jurisdiction of the Magistrate to order the production of a document or thing carries with it the jurisdiction to allow the prosecution the right of

inspection. But the Magistrate can order for production in Court: he cannot allow the prosecution to inspect the entries in the account book kept by the accused in his solicitor's office. They must be first produced in Court where they can be inspected—*Lakhmidas*, 5 Bom.L.R. 980. Once the articles are brought before the Court in execution of the search warrant, inspection thereof may be allowed to the complainant—*Mahomed Jackariah v. Ahmed*, 15 Cal. 109; *Ajay Krishna v. S. G. Pose*, 33 C.W.N. 370, 30 Cr.L.J. 705; *Muhammad Rahim*, 36 Cr.L.J. 581 (588), 154 I.C. 762, A.I.R. 1935 Sind 13, 1935 Cr.C. 124. But there is no justification whatever for the suggestion that when a Magistrate makes an order for production under this section which he can do whenever he thinks such an order necessary or desirable for the purposes of the proceedings before him, he thereby commits himself to the proposition that inspection of all the documents production of which is ordered must necessarily follow. Usually inspection should only be given of particular documents shown to be relevant, and not of documents in bulk. The Legislature has endowed the Courts with wide powers of ordering production of documents necessary for the determination of matters before the Court, and for directing inspection of those documents; but it must always be borne in mind that an order directing a person to produce or give inspection of his books in a dispute to which he is not a party involves a serious inroad upon his natural rights as a citizen, and the Courts have always set their faces against anything in the nature of a roving or fishing commission to inspect documents. If the Courts were to make orders for inspection of books merely on an allegation that certain facts are true, the practice would be open to very serious abuse, and the Court might easily become something of a menace to a mercantile community. It is not the practice to allow inspection of banker's books under the Banker's Book's Evidence Act (XVIII of 1891) unless a *prima facie* case is made out for thinking that there is some matter on which the books of the Bank are bound to be relevant—*Central Bank of India v. Shamdasani*, A.I.R. 1938 Bom. 33, 39 Bom.L.R. 1187, I.L.R. 1938 Bom. 31. Section 5 of the Banker's Book's Evidence Act does not prevent the police from inspection of the books of the Bank even without the order of a Court—*A. F. G. Price v. Emp.*, A.I.R. 1937 Lah. 160, 17 Lah. 593, 38 P.L.R. 1042, 167 I.C. 555, 38 Cr.L.J. 435.

See also Note 199.

Putting it in evidence:—On production of a document, the accused has no right to insist upon the prosecution putting it in evidence. The prosecution is entitled to determine whether it is to be put in evidence or not—*Mahomed Jackariah v. Ahmed*, 15 Cal. 109; *Lakhmi Das*, 5 Bom.L.R. 980.

Security for production:—Where a Magistrate thinks that there are articles in a person's possession, the production of which is necessary, he can issue a summons under this section or a search-warrant under sec. 96; there is no section to enable him to demand security from the person for the production of the articles when required, instead of issuing a summons under sec. 91 or a warrant under sec. 96—*Purna Chandra v. Sashi Bhushan*, 7 C.W.N. 522. But after a warrant has been issued against a person for search of certain articles in his premises, if such person offers an undertaking to produce the articles before the Court whenever required, the Magistrate may stay execution of the warrant conditionally on the execution of the bond by such person for production of the articles in Court whenever called upon—*Kishori Mohan v. Hari Das*, 47 Cal. 164, 21 Cr.L.J. 391.

Lien:—The mere fact that the person in possession of the articles has a lien over them, does not affect the power of the Magistrate to order their production—*Nizam of Hyderabad v. Jacob*, 19 Cal. 52 (61); *Allen E. Ker v. Promotho*, 39 C.W.N. 917, 37 Cr.L.J. 825, 163 I.C. 224, 62 Cal. 1037.

Application when can be made:—Under this section any party to an inquiry, trial or other proceeding under the Code may at any stage apply to the Court to call for the production of a document or other thing and is entitled to its production if he satisfies the Court that such production is necessary or desirable for the purposes of such inquiry, trial or other proceeding. Under sec. 257, Cr. P. C., an accused person

is entitled at the particular stage of his trial specified in the section to apply to the Court to call for the production of any document or thing, and the Court shall cause such production unless it considers that application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice. Sections 257 and 94, Cr. P. C., are not antagonistic; they are inter-dependent—*Muhammad Rahim*, 36 Cr.L.J. 581 (587), 154 I.C. 762, A.I.R. 1935 Sind 13, 29 S.L.R. 92, 1935 Cr.C. 124 (F.B.).

191A. Sub-section (3):—Under this section a Court has power, if it considers that the production of any document is necessary, to issue a summons or a written order to the person in whose possession or power such document is, to produce it at the time and place stated. In terms the section would apply to a person who is absent at the time and who is called upon to attend the Court and produce the document in his possession. It is significant that sub-section 3, which contains an exception only, exempts documents which are protected under secs. 123 and 124, Evidence Act, i.e., documents relating to affairs of State and official communications, and not sec. 126, Evidence Act, which applies to professional communications made to legal advisers. Thus, in a criminal case, even the protection under sec. 126 cannot be availed of. The omission to comply with the formality of getting a summons issued, when the person is actually present in the Court room, is a trivial irregularity. The Court has inherent jurisdiction to call upon a person present in the Court room to produce a document which is in his possession at the time. When he is not present in the Court room, a summons has to be issued; but even that is not absolutely necessary, for if the Court is of the opinion that the document may not be produced, a search warrant may be issued instead of a summons—*Ganga Ram v. Habib Ullah*, A.I.R. 1936 All. 212 (214, 215), 1935 A.W.R. 1152, 1935 A.L.J. 1176, 1935 All.L.R. 1140, 159 I.C. 524, 37 Cr.L.J. 113, 1936 Cr.C. 233, 58 All. 364.

This sub-section does not exempt documents protected under sec. 126, Evidence Act, and the production of such documents is incumbent under sec. 162, Evidence Act, notwithstanding any objection which there may be to the production or admissibility. The validity of the objection has to be decided by the Court after production and the dismissal of the application for issue of summons for production is unsustainable—*Public Prosecutor, Madras v. M. S. Menoki*, A.I.R. 1939 Mad 914, 1939 M.Cr.C. 125, 50 M.L.W. 428, (1939) 2 M.L.J. 634, 1939 M.W.N. 1127, 41 Cr.L.J. 186, 185 I.C. 419.

Revision:—The High Court has power to interfere in revision with the Magistrate's order for production of a document or thing, or the Magistrate's order refusing to direct the production, in any case where he has passed such order of production in an improper manner or on improper grounds, or has improperly refused to pass such order—*Nizam v. Jacob*, 19 Cal. 52 (60). See also *Chhotey Miyan v. Emp.*, in Note 188.

Punishment:—Omission to produce the document or thing is punishable under sec. 175, I.P.C. See 5 I.C. 17, 11 Cr.L.J. 20 and 19 Cr.L.J. 217, 43 I.C. 793 in this connection.

95. (1) If any document, parcel or thing in such custody is, in the opinion of any District Magistrate, Chief Presidency Magistrate, High Court or Court of Session, wanted for the purpose of any investigation, inquiry, trial, or other proceeding under this Code, such Magistrate or Court may require the Postal or Telegraph authorities, as the case may be, to deliver such document, parcel or thing to such person as such Magistrate or Court directs.

(2) If any such document, parcel or thing is, in the opinion of any other Magistrate or of any Commissioner of Police or District Superintendent of Police, wanted for any such purpose,

inspection. But the Magistrate can order for production in Court: he cannot allow the prosecution to inspect the entries in the account book kept by the accused in his solicitor's office. They must be first produced in Court where they can be inspected—*Lakshmidas*, 5 Bom.L.R. 980. Once the articles are brought before the Court in execution of the search warrant, inspection thereof may be allowed to the complainant—*Mahomed Jackariah v. Ahmed*, 15 Cal. 109; *Ajay Krishna v. S. G. Bose*, 33 C.W.N. 370, 30 Cr.L.J. 705; *Muhammad Rahim*, 36 Cr.L.J. 581 (588), 154 I.C. 762, A.I.R. 1935 Sind 13, 1935 Cr.C. 124. But there is no justification whatever for the suggestion that when a Magistrate makes an order for production under this section which he can do whenever he thinks such an order necessary or desirable for the purposes of the proceedings before him, he thereby commits himself to the proposition that inspection of all the documents production of which is ordered must necessarily follow. Usually inspection should only be given of particular documents shown to be relevant, and not of documents in bulk. The Legislature has endowed the Courts with wide powers of ordering production of documents necessary for the determination of matters before the Court, and for directing inspection of those documents; but it must always be borne in mind that an order directing a person to produce or give inspection of his books in a dispute to which he is not a party involves a serious inroad upon his natural rights as a citizen, and the Courts have always set their faces against anything in the nature of a roving or fishing commission to inspect documents. If the Courts were to make orders for inspection of books merely on an allegation that certain facts are true, the practice would be open to very serious abuse, and the Court might easily become something of a menace to a mercantile community. It is not the practice to allow inspection of banker's books under the Banker's Book's Evidence Act (XVIII of 1891) unless a *prima facie* case is made out for thinking that there is some matter on which the books of the Bank are bound to be relevant—*Central Bank of India v. Shamdasani*, A.I.R. 1938 Bom. 33, 39 Bom.L.R. 1187, I.L.R. 1938 Bom. 31. Section 5 of the Banker's Book's Evidence Act does not prevent the police from inspection of the books of the Bank even without the order of a Court—*A. F. G. Price v. Emp.*, A.I.R. 1937 Lah. 160, 17 Lah. 593, 38 P.L.R. 1042, 167 I.C. 555, 38 Cr.L.J. 435.

See also Note 199.

Putting it in evidence :—On production of a document, the accused has no right to insist upon the prosecution putting it in evidence. The prosecution is entitled to determine whether it is to be put in evidence or not—*Mahomed Jackariah v. Ahmed*, 15 Cal. 109; *Lakshmi Das*, 5 Bom.L.R. 980.

Security for production :—Where a Magistrate thinks that there are articles in a person's possession, the production of which is necessary, he can issue a summons under this section or a search-warrant under sec. 96; there is no section to enable him to demand security from the person for the production of the articles when required, instead of issuing a summons under sec. 94 or a warrant under sec. 96—*Purna Chandra v. Sashi Bhushan*, 7 C.W.N. 522. But after a warrant has been issued against a person for search of certain articles in his premises, if such person offers an undertaking to produce the articles before the Court whenever required, the Magistrate may stay execution of the warrant conditionally on the execution of the bond by such person for production of the articles in Court whenever called upon—*Kishori Mohan v. Hari Das*, 47 Cal. 164, 21 Cr.L.J. 391.

Lien :—The mere fact that the person in possession of the articles has a lien over them, does not affect the power of the Magistrate to order their production—*Nizam of Hyderabad v. Jacob*, 19 Cal. 52 (61); *Allen E. Ker v. Promotho*, 39 C.W.N. 917, 37 Cr.L.J. 825, 163 I.C. 224, 62 Cal. 1037.

Application when can be made :—Under this section any party to an inquiry, trial or other proceeding under the Code may at any stage apply to the Court to call for the production of a document or other thing and is entitled to its production if he satisfies the Court that such production is necessary or desirable for the purposes of such inquiry, trial or other proceeding. Under sec. 257, Cr. P. C., an accused person

say, not for the search of particular documents or things, is illegal—*M. I. Mamsa v. Emp.*, 38 Cr.L.J. 983 (1984), 170 I.C. 870, A.I.R. 1937 Rang 206, 10 R.Rang. 111, following *V. S. M. Maidcen Brothers v. Eng. Thaung & Co.*, 9 L.B.R. 45, 36 I.C. 591, A.I.R. 1917 L.B.R. 31, 17 Cr.L.J. 543. Where a Magistrate issued a general search warrant without reference to any complaint and proceeded merely on suspicions as regards the nature of the petitioner's business and the assurance given by the Police that a general search was necessary, held that the procedure was unjustifiable in the circumstances and illegal—*Chazi & Co.*, 31 Cr.L.J. 272, 121 I.C. 499, A.I.R. 1929 Lah. 837. But see *General Relief Association, Lahore*, 33 Cr.L.J. 678, 138 I.C. 751, Ind. Rul. 1932 Lah. 534, A.I.R. 1932 Lah. 581, 33 P.L.R. 824, 1932 Cr.C. 809. An order under this section cannot be made to further a police investigation which may or may not result in an inquiry. The Magistrate is to form his own opinion upon the materials placed before him. He is not relieved from his duty by stating that he believed that the officer holding the investigation for the purposes of which the documents or things were required, had formed a correct opinion—*Jagannath*, 24 C.W.N. 405, 21 Cr.L.J. 573, 57 I.C. 93.

The third clause of sec 96 (1), Cr. P. C., has nothing whatsoever to do with an investigation. It does not provide for any step to be taken in aid of an investigation but it provides for something which the Magistrate may do for the purposes of serving an inquiry, trial or other proceeding under the Code. The word "investigation" is omitted in this clause. In sec 94, Cr. P. C., which provided for the issue of summons to produce a document, the words used are "investigation, inquiry, trial or other proceeding". It is clear therefore from this omission of the word "investigation" that the legislature did not provide for action under the third clause of sec. 96 (1) for the purposes of an investigation. A Magistrate who utilises this clause with a view to help in the investigation of an offence does something which the Code does not sanction. He cannot act under this clause unless after consideration he is satisfied that the purposes of an inquiry or trial or other proceeding will be served by a general search. He cannot issue the warrant to help investigation by the police and the Custom authorities. This clause (3) of sec 96 (1) does not empower him to do—*K. Hoshide v. Emp.*, 44 C.W.N. 82 (87), A.I.R. 1940 Cal. 97, 41 Cr.L.J. 329, 186 I.C. 486.

Record :—Although there is no express provision requiring the Magistrate to make a record or keep notes of the examination of the person on whose application he issues the search-warrant, still some record ought to be kept to enable the High Court to form an opinion as regards the materials upon which the Magistrate acted—*Jagannath*, supra.

194. Court :—It means Magistrate. 'Court' and 'Magistrate' are convertible terms, and it is not necessary that the Magistrate in order to issue a search warrant should sit as a Court, or that some proceeding should have been initiated before him—*Clarke v. Brojendra Kishore*, 39 Cal. 953 at p. 966 (P.C.), overruling *Clarke v. Brojendra Kishore*, 36 Cal. 433. See also Notes in paragraph 187.

195. Person :—The word 'person' includes the accused—*Municipal Committee, Jhang v. Muhammad Hayat*, 1914 P.R. 36, 16 Cr.L.J. 225, 27 I.C. 897. A search can be made for a stolen article or incriminating document in the possession of the accused person—*Bissar Misser*, 41 Cal. 261. See Note 190 under sec. 94. See also Notes given in paragraph 190.

196. Who can make the search :—The Magistrate who is competent to issue a search warrant is also competent to conduct the search himself; see sec. 105; *Ganeshi*, 1884 A.W.N. 213; *Clarke v. Brojendra Kishore*, 36 Cal. 433, on appeal, 39 Cal. 953 (P.C.).

197. Only specific articles can be searched for :—The search must be for a specific article or thing and not for stolen property generally—*Bissar Misser*, 41 Cal. 261, 17 C.W.N. 1209. The law does not authorise a search for anything but specified articles which have been or can be made the subject of summons or warrant to produce—*Pram*

inspection. But the Magistrate can order for production in Court: he cannot allow the prosecution to inspect the entries in the account book kept by the accused in his solicitor's office. They must be first produced in Court where they can be inspected—*Lakhmidas*, 5 Bom.L.R. 980. Once the articles are brought before the Court in execution of the search warrant, inspection thereof may be allowed to the complainant—*Mahomed Jackariah v. Ahmed*, 15 Cal. 109; *Ajay Krishna v. S. G. Pose*, 33 C.W.N. 370, 30 Cr.L.J. 705; *Muhammad Rahim*, 36 Cr.L.J. 581 (588), 154 I.C. 762, A.I.R. 1935 Sind 13, 1935 Cr.C. 124. But there is no justification whatever for the suggestion that when a Magistrate makes an order for production under this section which he can do whenever he thinks such an order necessary or desirable for the purposes of the proceedings before him, he thereby commits himself to the proposition that inspection of all the documents production of which is ordered must necessarily follow. Usually inspection should only be given of particular documents shown to be relevant, and not of documents in bulk. The Legislature has endowed the Courts with wide powers of ordering production of documents necessary for the determination of matters before the Court, and for directing inspection of those documents; but it must always be borne in mind that an order directing a person to produce or give inspection of his books in a dispute to which he is not a party involves a serious inroad upon his natural rights as a citizen, and the Courts have always set their faces against anything in the nature of a roving or fishing commission to inspect documents. If the Courts were to make orders for inspection of books merely on an allegation that certain facts are true, the practice would be open to very serious abuse, and the Court might easily become something of a menace to a mercantile community. It is not the practice to allow inspection of banker's books under the Banker's Book's Evidence Act (XVIII of 1891) unless a *prima facie* case is made out for thinking that there is some matter on which the books of the Bank are bound to be relevant—*Central Bank of India v. Shamdasani*, A.I.R. 1938 Bom. 33, 39 Bom.L.R. 1187, 1 I.L.R. 1938 Bom. 31. Section 5 of the Banker's Book's Evidence Act does not prevent the police from inspection of the books of the Bank even without the order of a Court—*A. F. G. Price v. Emp.*, A.I.R. 1937 Lah. 160, 17 Lah. 593, 38 P.L.R. 1042, 167 I.C. 555, 38 Cr.L.J. 435.

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Putting it in evidence :—On production of a document, the accused has no right to insist upon the prosecution putting it in evidence. The prosecution is entitled to determine whether it is to be put in evidence or not—*Mahomed Jackariah v. Ahmed*, 15 Cal. 109; *Lakhmi Das*, 5 Bom.L.R. 980.

Security for production :—Where a Magistrate thinks that there are articles in a person's possession, the production of which is necessary, he can issue a summons under this section or a search-warrant under sec. 96; there is no section to enable him to demand security from the person for the production of the articles when required, instead of issuing a summons under sec. 94 or a warrant under sec. 96—*Purna Chandra v. Sashi Bhushan*, 7 C.W.N. 522. But after a warrant has been issued against a person for search of certain articles in his premises, if such person offers an undertaking to produce the articles before the Court whenever required, the Magistrate may stay execution of the warrant conditionally on the execution of the bond by such person for production of the articles in Court whenever called upon—*Kishori Mohan v. Hari Das*, 47 Cal. 164, 21 Cr.L.J. 391.

Lien :—The mere fact that the person in possession of the articles has a lien over them, does not affect the power of the Magistrate to order their production—*Nizam of Hyderabad v. Jacob*, 19 Cal. 52 (61); *Allen E. Ker v. Promotho*, 39 C.W.N. 917, 37 Cr.L.J. 825, 163 I.C. 224, 62 Cal. 1037.

Application when can be made :—Under this section any party to an inquiry, trial or other proceeding under the Code may at any stage apply to the Court to call for the production of a document or other thing and is entitled to its production if he satisfies the Court that such production is necessary or desirable for the purposes of such inquiry, trial or other proceeding. Under sec. 257, Cr. P. C., an accused person

material the High Court will always interfere. It is undoubtedly the duty of Magistrates to aid to the utmost the authorities engaged in the detection and investigation of crime but such aid must be given in accordance with the provisions laid down by the law. Magistrates should also constantly bear in mind that they have an equally important duty to the public to see that no one is subjected to avoidable hardship and inconvenience and they should take no measures which would cause such hardship and inconvenience unless such measures are imperatively necessary for the purposes of the detection, prevention or punishment of crime—*K. Hoshide v. Emp.*, 44 C.W.N. 82 (88), A.I.R. 1940 Cal. 97, 41 Cr.L.J. 329, 186 I.C. 486

A Magistrate cannot issue a warrant under this section unless there is a proceeding under the Code pending before him, of which he has taken cognizance under sec. 190, Cr. P. C.—*In re Harlal Buch*, 22 Bom. 949. This case must be read subject to the observations of their Lordships of the Privy Council in *Clarke v. Brojendra*, 39 I.A. 163, 16 I.C. 501, 39 Cal. 953, 13 Cr.L.J. 693, 16 C.W.N. 865, 16 C.L.J. 231, 1912 M.W.N. 760, 12 M.L.T. 171, 10 A.L.J. 193, 23 M.L.J. 32, 14 Bom.L.R. 717 (P.C.). Lord Macnaghten, delivering the judgment of their Lordships, has laid down that a warrant may be issued under the third clause of sec. 96 (1) before any proceedings are initiated and "in view of an enquiry about to be made". See also *Rashbehari*, 35 Cal. 1076. The first two clauses of this section relate back to sec. 94, Cr. P. C., but clause (3) apparently does not. It is independent of the provisions of sec. 94. A warrant may, therefore, be issued for the purposes of an inquiry about to be made, provided it is an inquiry under the Code, but not for the purpose of an inquiry either being made or about to be made otherwise than under the Code—*In re Mahomed Tahir*, A.I.R. 1934 Bom. 104, 35 Cr.L.J. 1024, 149 I.C. 1021, 36 Bom.L.R. 96, 1934 Cr.C. 364; *M. I. Mamsa v. Emp.*, 38 Cr.L.J. 983, 170 I.C. 870, A.I.R. 1937 Rang. 206, 10 R.Rang. 111. For a Magistrate to use his powers under clause (3) of sec. 96 (1), Cr. P. C., it is not necessary that there should be an inquiry, trial or other proceeding pending at the time the search warrant is issued. A Magistrate can use his powers under this clause in anticipation of such inquiry or trial—*K. Hoshide v. Emp.*, 44 C.W.N. 82 (87), A.I.R. 1940 Cal. 97, 41 Cr.L.J. 329, 186 I.C. 486

The warrant must be in writing and must contain all matters that the law requires to be stated therein—*Public Prosecutor v. Subramania*, 36 Cr.L.J. 799, 155 I.C. 496, 1934 M.W.N. 1170, 68 M.L.J. 421, 41 M.L.W. 679. A faulty description of the premises by number or locality is not fatal, if the description is nevertheless sufficient to identify the premises named in the warrant—*Emp. v. Krishna*, 6 Bom.L.R. 52, 1 Cr.L.J. 5; *Emp. v. Abasbhai*, 50 Bom. 344, 28 Bom.L.R. 272, A.I.R. 1926 Bom. 195, 27 Cr.L.J. 503, 93 I.C. 967; *Emp. v. Jhunni*, 2 Cr.L.J. 243, 1905 A.W.N. 105, *In re P. R. Subbier*, 154 I.C. 741, 36 Cr.L.J. 566, A.I.R. 1935 Mad. 98, 40 M.L.W. 841, 1935 Cr.C. 151, 1935 M.W.N. 249

This section is applicable to the production of documents or things and has no application to a case where a warrant is issued on the complaint of a husband for the production of his wife who had gone to the house of her father with certain property of his—*Bisu*, 11 C.W.N. 836, 6 C.L.J. 127, 6 Cr.L.J. 38

The breach of a hire-purchase agreement is not a criminal matter at all. The complainant firm have their rights under the contract into which the accused entered with them, and those rights can be enforced in the ordinary way by an action in the Civil Court. The Court will not permit the use of the processes of the Criminal Court in order to enforce a purely civil right to get possession of the bus—*Hrishikesh Ghosh v. R. P. Michael*, 67 C.L.J. 569

Conditions precedent—Duty of Magistrate:—

(a) Before issuing the search warrant the Magistrate must have before him some information or evidence that the document is necessary or desirable for the purpose of inquiry before him—*Moiden Brothers v. Eng. Thang*, 9 L.B.R. 45, 10 Bur.L.T.

(b) The Court issuing the search warrant must have reason to believe the person against whom the search warrant is issued, is not likely to . . .

document or thing in his possession in pursuance of a mere summons or order under sec. 94 or a requisition under sec. 95 (1)—*In re Manekji Sorabji*, 5 Bom L.R. 1032. The issue of a search-warrant is a *judicial* act, and it is the duty of the Magistrate before issuing such warrant to satisfy himself by inquiry that *summons may not have the desired effect*. Where, without such inquiry, the Magistrate issued a search warrant on the mere application of the complainant, the order was *ultra vires*—*Iyavoo Chetty v. Jehangir*, 1917 M.W.N. 494, 6 L.W. 287, 44 I.C. 661, 18 Cr.L.J. 837; *Piyare Lal v. Thakur Dat*, 17 Cr.L.J. 60 (61), 12 P.W.R. 1916, 32 I.C. 652; *Clarke v. Brojendra*, 39 Cal 953 (967) (P.C.).

(c) A search warrant ought to be issued only after judicial inquiry and on proper materials—*Mahomed Jackariah v. Ahmed*, 15 Cal. 109; *In re Harilal*, 22 Bom 949; *Rash Behary*, 12 C.W.N. 1075, 35 Cal. 1076; *Clarke v. Brojendra*, 36 Cal. 433 (476), 13 C.W.N. 458; *Lakmidas*, 5 Bom.L.R. 980 (982). The application on which the search warrant is issued should disclose the offences committed by the accused, but it is not necessary that definite particulars of the offences should be given or that sections of the Penal Code under which the said offences would come should be mentioned. Once the Magistrate takes cognizance of the offence he is quite within his powers to issue search warrants—*Ajoy Krishna v. S. G. Bose*, 33 C.W.N. 369 (370), 30 Cr.L.J. 705, A.I.R. 1929 Cal. 176, 49 C.L.J. 164, 116 I.C. 721. Before ordering a search, the Magistrate would have to take cognizance of the offence by examining the complainant—*Ibid.* Of course, it is not obligatory on a Magistrate to wait until a preliminary inquiry is held and all the witnesses for the prosecution are examined and cross-examined; the Magistrate is entitled to act upon information which he considers credible, provided that there is a complaint before him and the complainant is examined by him on oath or solemn affirmation—*Mahant of Tirupati*, 13 Mad. 18; *Sinagurunatha Pillai*, 1910 M.W.N. 818, 8 M.L.T. 416, 11 Cr.L.J. 535, 7 I.C. 895. If a complaint is laid before a Magistrate, a search-warrant issued on the complaint without examining the complainant is irregular. If the Magistrate is about to issue a search-warrant on the strength of information as distinguished from a complaint, the Court should, if feasible, examine the informant on oath, and if evidence cannot be taken on oath, the Court should act with a due appreciation of the fact that it is taking upon itself the responsibility of issuing, upon the basis of that information, an order of a very serious nature involving the invasion and search of a man's house—*Mulchand*, 8 A.L.J. 517, 12 Cr.L.J. 175, 9 I.C. 991. The statement of a counsel who is appearing for the prosecuting complainant is not information on which a Magistrate is entitled to issue a search-warrant—*Mulchand*, *supra*. A telegram received by the Police is not a good ground for issuing a search warrant—*Hari Lal*, 22 Bom. 919.

The provision of the law requiring the sanction of a Magistrate before the issue of a search-warrant, means that the Magistrate should apply his mind to the facts and ought not to issue a search-warrant simply because a Police-officer asks him to do so. When there is no inquiry or trial or other proceeding under the Code, a general search-warrant cannot be issued under this section. Thus, in the course of an investigation which was being made by a Police-officer appointed by the Government to inquire into the dealings with the Munitions Board, a petition was presented by that officer to the Chief Presidency Magistrate of Calcutta stating that certain offences appeared to have been committed in connection with the dealings with the Munitions Board, and praying for a search-warrant against the firm of one T. R. Pratt. There was nothing in the petition to connect T. R. Pratt with those offences. It was held that there was no material before the Magistrate on which he could decide that a search-warrant should be issued—*T. R. Pratt*, 47 Cal. 597, 55 I.C. 473, 31 C.L.J. 315, 21 Cr.L.J. 313, 21 C.W.N. 403. The issue of a warrant for a general search or inspection can only be done under paragraph 3 of this section and that does not apply where an investigation is in progress and not an inquiry. Therefore when an investigation, and not an inquiry, is proceeding, the issue of search-warrants in general terms, that is to

say, not for the search of particular documents or things, is illegal—*M. I. Mamsa v. Emp.*, 38 Cr.L.J. 983 (1984), 170 I.C. 870, A.I.R. 1937 Rang. 206, 10 R.Rang. 111, following *V. S. M. Moideen Brothers v. Eng. Thaung & Co.*, 9 L.B.R. 45, 36 I.C. 591, A.I.R. 1917 L.B.R. 31, 17 Cr.L.J. 543. Where a Magistrate issued a general search warrant without reference to any complaint and proceeded merely on suspicions as regards the nature of the petitioner's business and the assurance given by the Police that a general search was necessary, held that the procedure was unjustifiable in the circumstances and illegal—*Chazi & Co.*, 31 Cr.L.J. 272, 121 I.C. 499, A.I.R. 1929 Lah. 837. But see *General Relief Association, Lahore*, 33 Cr.L.J. 678, 138 I.C. 751, Ind. Rul. 1932 Lah. 534, A.I.R. 1932 Lah. 581, 33 P.L.R. 824, 1932 Cr.C. 809. An order under this section cannot be made to further a police investigation which may or may not result in an inquiry. The Magistrate is to form his own opinion upon the materials placed before him. He is not relieved from his duty by stating that he believed that the officer holding the investigation for the purposes of which the documents or things were required, had formed a correct opinion—*Jagannath*, 24 C.W.N. 405, 21 Cr.L.J. 573, 57 I.C. 93.

The third clause of sec 96 (1), Cr P C, has nothing whatsoever to do with an investigation. It does not provide for any step to be taken in aid of an investigation but it provides for something which the Magistrate may do for the purposes of serving an inquiry, trial or other proceeding under the Code. The word "investigation" is omitted in this clause. In sec 94, Cr P C., which provided for the issue of summons to produce a document, the words used are "investigation, inquiry, trial or other proceeding". It is clear therefore from this omission of the word "investigation" that the legislature did not provide for action under the third clause of sec 96 (1) for the purposes of an investigation. A Magistrate who utilises this clause with a view to help in the investigation of an offence does something which the Code does not sanction. He cannot act under this clause unless after consideration he is satisfied that the purposes of an inquiry or trial or other proceeding will be served by a general search. He cannot issue the warrant to help investigation by the police and the Custom authorities. This clause (3) of sec 96 (1) does not empower him to do—*K. Hoshide v. Emp.*, 44 C.W.N. 82 (87), A.I.R. 1940 Cal. 97, 41 Cr.L.J. 329, 186 I.C. 486.

Record.—Although there is no express provision requiring the Magistrate to make a record or keep notes of the examination of the person on whose application he issues the search-warrant, still some record ought to be kept to enable the High Court to form an opinion as regards the materials upon which the Magistrate acted—*Jagannath*, supra.

194. Court:—It means Magistrate. 'Court' and 'Magistrate' are convertible terms, and it is not necessary that the Magistrate in order to issue a search warrant should sit as a Court, or that some proceeding should have been initiated before him—*Clarke v. Brojendra Kishore*, 39 Cal. 953 at p. 966 (P.C.), overruling *Clarke v. Brojendra Kishore*, 36 Cal. 433. See also Notes in paragraph 187.

195. Person:—The word 'person' includes the accused—*Municipal Committee, Jhang v. Muhammad Hayat*, 1914 P.R. 36, 16 Cr.L.J. 225, 27 I.C. 897. A search can be made for a stolen article or incriminating document in the possession of the accused person—*Bissar Misser*, 41 Cal. 261. See Note 190 under sec 94. See also Notes given in paragraph 190.

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197. Only specific articles can be searched for:—The search must be for a specific article or thing and not for stolen property generally—*Bissar Misser*, 41 Cal. 261, 17 C.W.N. 1209. The law does not authorise a search for anything but specified articles which have been or can be made the subject of summons or warrant to produce—*Pren*

Khan, 16 C.W.N. 1078, 13 Cr.L.J. 764; *Moideen Brothers v. Eng. Thaung*, 9 L.B.R. 45, 36 I.C. 591, A.I.R. 1917 L.B.R. 31, 17 Cr.L.J. 543; *M. I. Mansa v. Emp.*, 38 Cr.L.J. 983 (1984), 170 I.C. 870, A.I.R. 1937 Rang. 206, 10 R.Rang. 111, quoted in Note 193.

A search ought not to be conducted for *fishing out evidence*. The section contemplates the production of a specified or distinct thing which may be deemed essential for the conduct of the inquiry and the conviction of the accused, and for that purpose a specified house or place may be searched. It does not empower police officers or other underlings to make harassing domiciliary visits to inquire into the private concerns of individuals, and to seize any papers under the bare chance of finding something tending to conviction—*Syad Hossain*, 8 W.R. 74; *Moideen Brothers v. Eng. Thaung*, 9 L.B.R. 45, 17 Cr.L.J. 543, 36 I.C. 591. Therefore, where a Magistrate issued a search warrant for the search and seizure of all letter-books, letters, bills and books of account in a man's house for the purpose of inquiry as to whether he had used or sold articles with a counterfeit trade mark, it was held that the issue of such a search warrant was a gross perversion of the law—*Moideen Brothers v. Eng. Thaung*, 9 L.B.R. 45; *Piyare Lal v. Thakur Dal*, 17 Cr.L.J. 60 (61); 12 P.W.R. 1916. See also Notes given above in paragraph 190.

198. Extent of search:—In taking action under this section, the Court is authorised to go as far as is physically possible in the search. The accused can, perhaps, defeat the Court by concealing or destroying the document or by having it concealed or destroyed, taking, of course, the consequences of such action, just as the accused in the dock can, when questioned under sec. 312, thwart the Court in its search for truth by answering falsely or refusing to answer. But the mere fact that the accused can so defeat or thwart the Court, is no reason for holding that the Court is debarred from going as far as the section specifically allows—*Municipal Committee, Jhang v. Muhammad Hayat*, 1914 P.R. 36, 16 Cr.L.J. 225. The Magistrate has power to issue a search warrant for the production of copies of the infringing books, proofs, plates, printed and set-up matters, together with letters and orders with reference to the book, for the purpose of making an order under sec. 10 of the Copyright Act—*Kishori Mohan v. Hari Das*, 47 Cal. 164, 21 Cr.L.J. 391.

199. Miscellaneous:—*Taking possession*—Power to search given by this section includes also the power to take possession of the document or thing—*Mahomed Jackariah v. Ahmed Mahomed*, 15 Cal. 109; *In re Bhanji*, Ratanlal 677.

Inspection:—When documents and other things seized upon the premises of an accused by virtue of a search warrant are brought before the Court, the Magistrate would have the power to allow the prosecution an inspection thereof. They stand, when they are brought to the Court, precisely in the same position as documents or things found upon the person of a prisoner at the time of his arrest—*Mahomed Jackariah v. Ahmed*, 15 Cal. 109; *Ajoy Krishna v. S. G. Bose*, 33 C.W.N. 369 (370), A.I.R. 1929 Cal. 176, 49 C.L.J. 164, 116 I.C. 721, 30 Cr.L.J. 705; *Lakshmi Das*, 5 Bom.L.R. 980. The word "inspect" must contemplate a step to be taken after the seizure of the documents or things concerned has been effected. In the context in which it occurs it implies a capacity to scrutinize the materials seized for the purposes of an inquiry, trial or other proceedings under the Code. There are no words which limit scrutiny to the purposes of a trial already launched. Indeed when documents or things are involved, the effective prosecution of a criminal trial would generally be impossible unless the prosecution were permitted to examine the documents or things at a very early stage, and it is only reasonable to assume that the legislature was alive to such a consideration—*K. Hoshide v. Emp.*, 41 C.W.N. 82 (92), A.I.R. 1910 Cal. 97, 41 Cr.L.J. 329, 185 I.C. 485, but he is not entitled to examine it all; e.g., in case of account books, the Court should restrict the examination to the particular book or portions of the books relating to the subject matter under inquiry or trial—*Mahomed Jackariah v. Ahmed*, 15 Cal. 109. See also Note 191.

Seizure without search warrant:—An order of the Magistrate to seize certain

account books without issuing a summons under sec. 94 or warrant under this section is illegal—*Hari Charan v. Girish*, 38 Cal. 68

Search warrant when to be executed :—A search warrant should be executed between sunrise and sunset. If for special reason it is executed between sunset and sunrise, such reasons must be reported to the D. S. P. for the information of the Magistrate—*Bengal Police Manual*, 2nd Ed., p. 402

Issue of search warrant must be prompt —Where in a case of criminal trespass and theft, the complainant at the time of applying for process prayed for the issue of a search warrant, but the Magistrate after repeated applications made an order for the issue of warrant more than three weeks after, it was held that although the procedure was not contrary to the actual letter of secs 96 and 98, still it was so dilatory that it could only tend to defeat the very object for which such a warrant was issued—*Bilas v. Ram Gopal*, 22 C.W.N. 719, 19 Cr L.J. 707

Illegality of the warrant :—There is no authority for the proposition that if a search warrant is illegal, then what is found as a result of that search, cannot be put in evidence in a criminal case—*Emp v. Abasbhai*, 27 Cr L.J. 503, 93 I.C. 967, 28 Bom L.R. 272, A.I.R. 1926 Bom 195, 50 Bom 344; *Emp v. Allahabad Khan*, 19 I.C. 332, 35 All 358, 14 Cr L.J. 236, 11 A.L.J. 442 Where the requirements of the law regarding searches have been ignored, it may throw some doubt upon whether the thing which is said to have been found was actually found in the possession of the accused but it has never been held that merely because the search was faulty the thing itself cannot be used in evidence—*M. I. Mamsa v. Emp*, 38 Cr L.J. 983 (1985), 170 I.C. 870, A.I.R. 1937 Rang. 206, 10 R.Rang. 111. When things have been illegally seized and among them there have been found documents or things which incriminate the persons in whose possession they were found, they should not be returned because the warrant was issued on a faulty basis—*M. I. Mamsa v. Emp*, supra, distinguishing *V. S. M. Moideen Brothers v. Eng. Thaung & Co.*, 9 L.B.R. 45, 36 I.C. 591, A.I.R. 1917 L.B.R. 31, 17 Cr L.J. 513 and *Clarke v. Brojendra*, 39 Cal. 953, 16 I.C. 501, 13 Cr L.J. 693, 39 I.A. 1613, 1912 M.W.N. 760, 12 M.L.T. 171, 10 A.L.J. 193, 16 C.L.J. 231, 16 C.W.N. 865, 23 M.L.J. 32, 14 Bom L.R. 717 (P.C.) But see *T. R. Pratt*, 47 Cal. 597, 55 I.C. 473, 31 C.L.J. 345, 21 Cr L.J. 313, 24 C.W.N. 403 and 36 I.C. 591, 9 L.B.R. 45 Any irregularity or illegality in the search can neither vitiate the trial nor affect a conviction—*Emp v. Ali Ahmad Khan*, 46 All. 86, 81 I.C. 615; *Rure Mal*, 31 Cr L.J. 35, 120 I.C. 266, A.I.R. 1929 All 937, 1930 A.L.J. 229 See also *Emp v. Sayeed Ahmed*, 35 All. 575 Where the search is illegal, a person can be convicted if the evidence against him is conclusive—*Emp v. Kutru*, 47 All. 575

Where the warrant was illegal and was treated as a nullity the accused were not deprived of the right of private defence under section 99, I.P. Code—*Biru*, 11 C.W.N. 836, 6 C.L.J. 127, 6 Cr L.J. 38 But an irregularity in making the search cannot give such a right—*Q. E. v. Pukot*, 19 Mad. 349

A warrant which is in form one under sec. 96, Cr P.C., cannot be taken to be under sec. 98, Cr P.C., by the operation of sec. 537, Cr P.C. It does not seem possible to read sec. 537 as giving a legal effect to a defective warrant, as its highest effect is to validate a finding, sentence or order which is defective for an antecedent defect in procedure—*Rash Behari*, 12 C.W.N. 1075 (1079), 35 Cal. 1076, 8 Cr L.J. 235.

200. Stay of execution of warrant on security:—Where the person against whom a search warrant was issued, prays for the stay thereof and offers an undertaking not to sell copies of the infringing book but to produce them before the Court whenever required, the Magistrate has jurisdiction to stay execution of the warrant conditionally on the execution of a bond to produce the copies in Court—*Kishori Mohan v. Hari Das*, 47 Cal. 164, 21 Cr L.J. 391, 55 I.C. 999 (See this case cited in Note under section 94).

97. The Court may, if it thinks fit, specify in the warrant the particular place or part thereof to which only the search or inspection shall extend; and the person charged with the execution of such warrant shall then search or inspect only the place or part so specified.

98. (1) If a District Magistrate, Sub-divisional Magistrate, Presidency Magistrate or Magistrate of the first class, upon information and after such enquiry as he thinks necessary, has reason to believe that any place is used for the deposit or sale of stolen property,

or for the deposit or sale or manufacture of forged documents, false seals or counterfeit stamps or coin, or instruments or materials for counterfeiting coin or stamps or for forging,

or that any forged documents, false seals or counterfeit stamps or coin, or instruments or materials used for counterfeiting coin or stamps or for forging are kept or deposited in any place,

or, if a District Magistrate, Sub-Divisional Magistrate or a Presidency Magistrate, upon information and after such inquiry as he thinks necessary, has reason to believe that any place is used for the deposit, sale, manufacture or production of any obscene object such as is referred to in section 292 of the Indian Penal Code or that any such obscene objects are kept or deposited in any place,

he may by his warrant authorize any police-officer above the rank of a constable—

- (a) to enter, with such assistance as may be required, such place, and
- (b) to search the same in manner specified in the warrant, and
- (c) to take possession of any property, documents, seals, stamps or coins therein found which he reasonably suspects to be stolen, unlawfully obtained, forged, false or counterfeit, and also of any such instruments and materials *or of any such obscene objects as aforesaid*, and
- (d) to convey such property, documents, seals, stamps, coins, instruments or materials *or such obscene objects* before a Magistrate, or to guard the same on the spot until the offender is taken before a Magistrate, or otherwise to dispose thereof in some place of safety, and
- (e) to take into custody and carry before a Magistrate every person found in such place who appears to

have been privy to the deposit, sale or manufacture or keeping of any such property, documents, seals, stamps, coins, instruments or materials or *such obscene objects*, knowing or having reasonable cause to suspect the said property to have been stolen or otherwise unlawfully obtained, or the said documents, seals, stamps, coins, instruments or materials to have been forged, falsified or counterfeited, or the said instruments or materials to have been or to be intended to be used for counterfeiting coin or stamps or for forging, *or the said obscene objects to have been or to be intended to be sold, let to hire, distributed, publicly exhibited, circulated, imported or exported.*

(2) The provisions of this section with respect to—

- (a) counterfeit coin,
- (b) coins suspected to be counterfeit, and
- (c) instruments or materials for counterfeiting coin,

shall, so far as they can be made applicable, apply respectively to—

- (a) pieces of metal made in contravention of the Metal Token Act (I of 1889) or brought into British India in contravention of any notification for the time being in force under section 19 of the Sea Customs Act (VIII of 1878),
- (b) pieces of metal suspected to have been so made or to have been so brought into British India or to be intended to be issued in contravention of the former of those Acts, and
- (c) instruments or materials for making pieces of metal in contravention of that Act.

Change:—The italicised words have been added by the Obscene Publications Act (VIII of 1925).

200A. Secs. 96 and 98:—The Calcutta High Court has made a distinction between secs 96 and 98, and laid down that sec. 96 contemplates the existence of a judicial proceeding in the course of which alone the Magistrate can issue a search warrant, but that sec. 98 does not require a criminal proceeding as a condition precedent to the issue of a search warrant—*Rash Behary*, 35 Cal. 1076, 12 C.W.N. 1075, 8 Cr.L.J. 235. But see *Clarke v. Brojendra Kishore*, 39 Cal 953 (P.C.) which lays down that it is not necessary that there should be any proceeding before the issue of any search warrant. See Note 194.

201. Search without warrant:—If there is no search-warrant under this section, the search is illegal and the occupiers of the house have a legal right of private defence in resisting it—*Bajrangi Gope*, 38 Cal 304 (306), 15 C.W.N. 343, 9 IC. 64, 12 Cr.L.J. 8, 13 CLJ. 639. But a police-officer investigating a charge is entitled to search, without warrant, a house which he suspects to contain ; in such a case his right to search is incidental to his right to investi 43 All. 67 (68), 17 A.L.J. 1047, 20 Cr.L.J. 695.

99. When, in the execution of a search-warrant at any place beyond the local limits of the jurisdiction of the Court which issued the same, any of the things for which search is made are found, such things, together with the list of the same prepared under the provisions hereinafter contained, shall be immediately taken before the Court issuing the warrant, unless such place is nearer to the Magistrate having jurisdiction therein than to such Court, in which case the list and things shall be immediately taken before such Magistrate; and, unless there be good cause to the contrary, such Magistrate shall make an order authorizing them to be taken to such Court.

Power to declare certain publications forfeited, and to issue search warrants for the same.

99A. (1) Where—

- (a) any newspaper, or book as defined in the Press and Registration of Books Act, 1867, or
- (b) any document,

wherever printed, appears to the *Provincial Government* to contain any seditious matter or any matter which promotes or is intended to promote feelings of enmity or hatred between different classes of His Majesty's subjects and maliciously intended to outrage such class by insulting the religion or

that is to say, any matter the publication of which is punishable under section 124A or section 153A or section 295A of the Indian Penal Code, the *Provincial Government* may, by notification in the local official Gazette, stating the grounds of its opinion, declare, every copy of the issue of the newspaper containing such matter, and every copy of such book or other document, to be forfeited to His Majesty, and thereupon any police-officer may seize the same, wherever found in British India, and any Magistrate may by warrant authorize any Police-officer not below the rank of Sub-Inspector to enter upon and search for the same in any premises where any copy of such issue or any such book or other document may be or may be reasonably suspected to be.

(2) In sub-section (1) "document" includes also any painting, drawing or photograph, or other visible representation.

Amendments:—Sections 99A to G have been added by Act XIV of 1922 (Indian Press Law Repeal and Amendment Act).

The words "or Majesty's subjects" have been added by the Cr P C (Third Amendment) Act, XXXVI of 1926. "Section 99A empowers the Local Government to search for and confiscate all copies of newspapers, books or documents which appear to contain seditious matter. There is no provision which enables similar action to be taken against publications calculated to promote feelings of hatred or enmity between different classes of His Majesty's subjects. The publication and circulation of

such documents have the effect of spreading and intensifying feelings of communal bitterness and hatred, and as the law now stands, even if a prosecution is launched under section 153A of the Indian Penal Code, there is no effective power to check circulation. The experience of the last few months has emphasized the importance of amending the law so as to provide this power. The Bill is accordingly intended to bring all documents which offend against sec 153A, I. P. Code, within the scope of the power of forfeiture conferred in respect of seditious documents by sec. 99A of the Code of Criminal Procedure"—*Statement of Objects and Reasons* (Gazette of India, 1926, Part V, p. 139).

Consequential amendments have been made in sections 99B, 99D and 99E below. Further, the words "or which is deliberately . . . that class" have been added by the Criminal Law Amendment Act, 1927 (XXV of 1927).

In clause (b) the words "Provincial Government" have been substituted for the words "Local Government" by sec. 4 of the Government of India (Adaptation of Indian Laws) Order, 1937

202. Seditious matter:—The mere fact that a document is only an advertisement of a forthcoming book is not sufficient to protect it from forfeiture under sec. 99A, if it contains seditious matter; but in considering whether it is seditious or not, the advertisement must be considered on its merits and not in the light of the forthcoming book. The intention of an advertisement of a forthcoming book is primarily merely to further the sale of the book, and although it may be intimately connected with the book and though it may be considered desirable to forfeit all documents connected with and intimately associated with a book that has been found to be seditious, there is no provision of law either under sec. 99A, Cr P C, or under sec 124A, I P. C., to forfeit the advertisement for such reason alone—*Saigal*, 52 All 775, 31 Cr L J 840 (842), 1930 A.L.J 713, 1930 Cr C 625 (F B)

Sec. 153A:—In order to justify the forfeiture of a book under sec 99A on the ground that it contains matter punishable under sec 153A, I P Code, it is necessary for the Government Advocate to satisfy the Court that on the evidence produced by the prosecution a conviction could have been had under sec 153A, I P C—*Lajpat Rai*, 9 Lah 663, 29 P L R. 385, 29 Cr L J 899 (S B)

Intention:—The scope of sec 99A, Cr P C, is wider than that of sec 153A, I P C, because "intention" falls short of "attempt" and has in addition been made an alternative ground (*Per Sulaiman, C J*) When the Government acts under sec 99A and suppresses a publication, it does so in the public interest and it is not concerned with the intention of the author of the publication. The powers given to the Government by sec 99A were clearly for the purpose of enabling the Government to take steps to avoid trouble which such publication might possibly cause (*Per Thom, J.*). *M L C Gupta*, AIR 1936 All 314, 1936 A L J 165, 1936 A W R 227, 1936 All L R. 436, 1936 Cr C 480, 162 I C 507, 37 Cr L J 599, 58 All 849

Section 99A, Cr P C, shows that even if there be no intention of the author to promote and no attempt on his part to promote feelings of enmity or hatred, forfeiture can be ordered if the matter does promote such feelings of enmity or hatred. To make the section applicable, two things are necessary; (1) promotion of feelings of enmity or hatred, and (2) between different classes of the subjects. Everything done which may have a remote bearing on promoting feelings of hatred or enmity would not be an offence. There should either be the intention to promote such feelings or such feelings should be promoted as a result of such publications. Again feelings of enmity and hatred should be aroused between two classes of His Majesty's subjects, that is to say, between two sections of the people which can be classified as two groups opposed to each other. A vague indefinite and nameless body, even though given one name, may not in certain circumstances be considered as a class by itself, particularly if individuals overlap indiscriminately. But it is not necessary that classes should be so distinct and separate as to make it easy to put an individual in one class or the other—*M. L*

Gautam v. Emp., 37 Cr.L.J. 943 (947), 164 I.C. 253, A.I.R. 1936 All. 561, 1936 Cr.C. 739, 1936 A.L.J. 786, 1936 A.L.R. 722, 9 R.A. 135, I.L.R. 1937 All. 69 (S.B.).

The intention of the writer has to be judged not only from the words used in certain parts of the book but from the book taken as a whole—*Iswari Prasad Sharma v. K-E.*, 46 C.L.J. 161 (155), A.I.R. 1927 Cal. 147.

The question as to the intention of the writer must be judged primarily by the language of the book itself, though it is permissible to receive and consider external evidence either to prove or to rebut the meaning ascribed to it in the order of forfeiture. If the language is of a nature calculated to produce feelings of enmity or hatred, the writer must be presumed to intend that which his act was likely to produce—*Kali Charan Sharma v. Emp.*, 29 Cr.L.J. 968 (970), 112 I.C. 56, 49 All. 856, A.I.R. 1927 All. 619 (F.B.).

Where the words naturally, clearly and indubitably have an intention to promote enmity between classes, it must be presumed that the writer intended the natural result of the words employed. The intention is to be collected in most cases from the internal evidence of the words themselves. It is, however, permissible to take into consideration the persons for whom it was written and the state of feeling between the two communities at the time of publication. A compilation consisting of extracts from certain sources may be seditious though the extracts considered in relation to their own proper contents may not in themselves be of a seditious nature. It does not matter that the statements in the book are supported by authority—*Chamupathi v. Emp.*, A.I.R. 1932 Lah. 99, 1932 Cr.C. 119, 13 Lah. 152, 33 P.L.R. 431, following *P. K. Chakravarti v. Emp.*, A.I.R. 1926 Cal. 1133, 97 I.C. 738, 27 Cr.L.J. 1154, 54 Cal. 59, *Bajinath Kedia*, A.I.R. 1925 All. 195, 86 I.C. 55, 26 Cr.L.J. 679, 47 All. 298 and *Kalicharan Sharma*, A.I.R. 1927 All. 619, 49 All. 856, 29 Cr.L.J. 968, 112 I.C. 56.

99B. Any person having any interest in any newspaper, book or other document, in respect of which an order of forfeiture has been made under section 99A, may, within two months from the date of such order, apply to the High Court to set aside such order on the ground that the issue of the newspaper; or the book or other document, in respect of which the order was made, did not contain any seditious or other matter of such a nature as is referred to in sub-section (1) of section 99A.

202A When an application is made to the High Court under this section, the High Court is precluded by sec. 99D from considering any other point than the question whether in fact the matters contained in the Book were seditious or not. The High Court cannot enter into the question as to whether the Government Notification declaring all copies of the book to be forfeited, complied with the requirements of sec. 99A (e.g. whether the grounds of forfeiture were set out in the Notification)—*Bajinath*, 47 All. 298, 23 A.L.J. 1, 26 Cr.L.J. 679, A.I.R. 1925 All. 195, 86 I.C. 55 (F.B.).

When an application is made under sec. 99B to have an order of forfeiture set aside on the ground that the matter published does not fall within the mischief of sec. 153A, I P. Code, it is for the applicant to convince the Court that the order is a wrong order. It does not lie on the Government to establish that the order was justified by law—*Kalicharan*, 49 All. 856, A.I.R. 1927 All. 619, 112 I.C. 56, 29 Cr.L.J. 968 (F.B.). But in *Bajinath's* case the Full Bench were inclined to think that having regard to the framework of sec. 99, the onus is cast upon the Local Government, but added that the question of construction was not free from difficulty, and that the matter was not of any great practical importance. These two views were sought to be reconciled in a third Full Bench of the Allahabad High Court, where it was held that the Bench were in complete agreement with the proposition laid down in *Bajinath's* case that the

question of onus of proof, after both the parties had been fully heard, was of little or no practical importance and considered that it was manifestly most convenient that the Government Advocate should begin and state the case in support of the Local Government's order—*Saigal*, A.I.R. 1930 All. 401, 1930 Cr.C. 625, 125 I.C. 470, 31 Cr.L.J. 840, 52 All. 775, 1930 A.L.J. 713 (F.B.). In a very recent case the same High Court has held that there is nothing in the framework of the section or its language which would suggest that the initial burden of proof is on the Government, and that, therefore, the Crown Counsel must open the case and support the order of the Local Government, and then have the final right of reply. On the other hand, the language clearly indicates that it is the applicant who has to make out a case in his favour—*M. L. C. Gupta*, A.I.R. 1936 All. 314, 1936 A.L.J. 165.

Where during the pendency of a case under sec. 153A, I P. C., the Local Government proscribed the book under sec. 99A, Cr. P. C., and the accused adopted the shorter course under sec. 99B, Cr. P. C., which permitted any person having any interest in a book, in respect of which an order of forfeiture has been made under sec. 99A, Cr. P. C., to apply to the High Court to set aside such order on the ground that the issue of the book, in respect of which the order was made, did not contain any matter which promoted, or was intended to promote, feelings of enmity or hatred between different classes of His Majesty's subjects and the High Court definitely held that the book contained matter which promoted, or was intended to promote, feelings of enmity or hatred between different classes of His Majesty's subjects, the judgment of the High Court was relevant under secs 11 and 13 of the Indian Evidence Act in the trial for the offence under sec 153A, I P. C., and the trial Court was perfectly correct in shutting out all further evidence after the order of the High Court was passed as no Court would be able to decide otherwise—*Kali Charan Sharma v Emp.*, 28 Cr.L.J. 785, 104 I.C. 225, A.I.R. 1927 All. 654, 25 A.L.J. 846, 50 All. 157.

99C. Every such application shall be heard and determined

Hearing by Special Bench. by a Special Bench of the High Court composed of three Judges.

99D. (1) On receipt of the application, the Special Bench shall, if it is not satisfied that the issue of the newspaper, or the book or other document, in respect of which the application

Order of Special Bench setting aside forfeiture has been made, contained seditious or other matter of such a nature as is referred to in sub-section (1) of section 99A, set aside the order of forfeiture.

(2) Where there is a difference of opinion among the Judges forming the Special Bench, the decision shall be in accordance with the opinion of the majority of those Judges.

202B Where the applicant is alleged to have published a series of seditious books, the whole series must be looked to, in order to determine whether the passages contained therein are seditious—*Bajinath*, 47 All. 298, 26 Cr.L.J. 679, 86 I.C. 55, 23 A.L.J. 1, A.I.R. 1925 All. 195. It was also decided in this case that the High Court were precluded by this section from considering any other point than the question whether in fact the matters contained in the document were seditious or not, and came within the mischief aimed at by sec. 124A, I P. C., and that having regard to the framework of the section, the onus was cast upon the Local Government to prove that the publication of the document was seditious.

The meaning of sec. 99D is that if the High Court is left in doubt, after hearing the application, it should set aside the order (although it is contrary to the ordinary practice in an appeal in a civil suit)—*Kali Charan*, 49 All. 856, A.I.R. 1927 All. 7.

Gautam v. Emp, 37 Cr.L.J. 943 (947), 164 I.C. 253, A.I.R. 1936 All. 561, 1936 Cr.C. 739, 1936 A.L.J. 786, 1936 A.L.R. 722, 9 R.A. 135, I.L.R. 1937 All 69 (S.B.).

The intention of the writer has to be judged not only from the words used in certain parts of the book but from the book taken as a whole—*Iswari Prasad Sharma v. K.-E.*, 46 C.L.J. 154 (155), A.I.R. 1927 Cal. 147.

The question as to the intention of the writer must be judged primarily by the language of the book itself, though it is permissible to receive and consider external evidence either to prove or to rebut the meaning ascribed to it in the order of forfeiture. If the language is of a nature calculated to produce feelings of enmity or hatred, the writer must be presumed to intend that which his act was likely to produce—*Kali Charan Sharma v. Emp*, 29 Cr.L.J. 968 (970), 112 I.C. 56, 49 All. 856, A.I.R. 1927 All 649 (F.B.).

Where the words naturally, clearly and indubitably have an intention to promote enmity between classes, it must be presumed that the writer intended the natural result of the words employed. The intention is to be collected in most cases from the internal evidence of the words themselves. It is, however, permissible to take into consideration the persons for whom it was written and the state of feeling between the two communities at the time of publication. A compilation consisting of extracts from certain sources may be seditious though the extracts considered in relation to their own proper contents may not in themselves be of a seditious nature. It does not matter that the statements in the book are supported by authority—*Chamupathi v. Emp*, A.I.R. 1932 Lah 99, 1932 Cr.C. 119, 13 Lah. 152, 33 P.L.R. 431, following *P. K. Chakravarti v. Emp*, A.I.R. 1926 Cal 1133, 97 I.C. 738, 27 Cr.L.J. 1154, 54 Cal. 59, *Bajinath Kedia*, A.I.R. 1925 All. 195, 86 I.C. 55, 26 Cr.L.J. 679, 47 All. 298 and *Kalicharan Sharma*, A.I.R. 1927 All 649, 49 All. 856, 29 Cr.L.J. 968, 112 I.C. 56.

99B. Any person having any interest in any newspaper, book or other document, in respect of which an order of forfeiture has been made under section 99A, may, within two months from the date of such order, apply to the High Court to set aside such order on the ground that the issue of the newspaper, or the book or other document, in respect of which the order was made, did not contain any seditious or other matter of such a nature as is referred to in sub-section (1) of section 99A.

202A When an application is made to the High Court under this section, the High Court is precluded by sec. 99D from considering any other point than the question whether in fact the matters contained in the Book were seditious or not. The High Court cannot enter into the question as to whether the Government Notification declaring all copies of the book to be forfeited, complied with the requirements of sec. 99A (e.g. whether the grounds of forfeiture were set out in the Notification)—*Bajinath*, 47 All. 298, 23 A.L.J. 1, 26 Cr.L.J. 679, A.I.R. 1925 All 195, 86 I.C. 55 (F.B.).

When an application is made under sec. 99B to have an order of forfeiture set aside on the ground that the matter published does not fall within the mischief of sec. 153A, I P. Code, it is for the applicant to convince the Court that the order is a wrong order. It does not lie on the Government to establish that the order was justified by law—*Kalicharan*, 49 All. 856, A.I.R. 1927 All. 649, 112 I.C. 56, 29 Cr.L.J. 968 (F.B.). But in *Bajinath's* case the Full Bench were inclined to think that having regard to the framework of sec. 99, the onus is cast upon the Local Government, but added that the question of construction was not free from difficulty, and that the matter was not of any great practical importance. These two views were sought to be reconciled in a third Full Bench of the Allahabad High Court, where it was held that the Bench were in complete agreement with the proposition laid down in *Bajinath's* case that the

question of onus of proof, after both the parties had been fully heard, was of little or no practical importance and considered that it was manifestly most convenient that the Government Advocate should begin and state the case in support of the Local Government's order—*Saigal*, A.I.R. 1930 All. 401, 1930 Cr.C. 625, 125 I.C. 470, 31 Cr.L.J. 840, 52 All. 775, 1930 A.L.J. 713 (F.B.). In a very recent case the same High Court has held that there is nothing in the framework of the section or its language which would suggest that the initial burden of proof is on the Government, and that, therefore, the Crown Counsel must open the case and support the order of the Local Government, and then have the final right of reply. On the other hand, the language clearly indicates that it is the applicant who has to make out a case in his favour—*M. L. C. Gupta*, A.I.R. 1936 All. 314, 1936 A.L.J. 165.

Where during the pendency of a case under sec 153A, I P C., the Local Government proscribed the book under sec 99A, Cr. P. C., and the accused adopted the shorter course under sec. 99B, Cr. P. C., which permitted any person having any interest in a book, in respect of which an order of forfeiture has been made under sec. 99A, Cr. P. C., to apply to the High Court to set aside such order on the ground that the issue of the book, in respect of which the order was made, did not contain any matter which promoted, or was intended to promote, feelings of enmity or hatred between different classes of His Majesty's subjects and the High Court definitely held that the book contained matter which promoted, or was intended to promote, feelings of enmity or hatred between different classes of His Majesty's subjects, the judgment of the High Court was relevant under secs 11 and 13 of the Indian Evidence Act in the trial for the offence under sec. 153A, I P C., and the trial Court was perfectly correct in shutting out all further evidence after the order of the High Court was passed as no Court would be able to decide otherwise—*Kali Charan Sharma v. Emp*, 28 Cr.L.J. 785, 104 I.C. 225, A.I.R. 1927 All. 654, 25 A.L.J. 846, 50 All. 157.

99C. Every such application shall be heard and determined

Hearing by Special Bench. by a Special Bench of the High Court composed of three Judges.

99D. (1) On receipt of the application, the Special Bench

Order of Seecial Bench setting aside forfeiture.

shall, if it is not satisfied that the issue of the newspaper, or the book or other document, in respect of which the application has been made, contained seditious or other matter of such a nature as is referred to in sub-section (1) of section 99A, set aside the order of forfeiture.

(2) Where there is a difference of opinion among the Judges forming the Special Bench, the decision shall be in accordance with the opinion of the majority of those Judges

202B Where the applicant is alleged to have published a series of seditious books, the whole series must be looked to, in order to determine whether the passages contained therein are seditious—*Bajinath*, 47 All. 298, 26 Cr.L.J. 679, 86 I.C. 55, 23 A.L.J. 1, A.I.R. 1925 All. 195. It was also decided in this case that the High Court were precluded by this section from considering any other point than the question whether in fact the matters contained in the document were seditious or not, and came within the mischief aimed at by sec. 124A, I P C., and that having regard to the framework of the section, the onus was cast upon the Local Government to prove that the publication of the document was seditious.

The meaning of sec. 99D is that if the High Court is left in doubt, after hearing the application, it should set aside the order (although it is contrary to the ordinary practice in an appeal in a civil suit)—*Kali Charan*, 49 All. 856, A.I.R. 1927 All.

(F.B.). Where a passage is open to two interpretations and the matter is in doubt, the High Court would not be satisfied that the matter is objectionable and must, therefore, set aside the order of forfeiture—*M. L. C. Gupta*, A I R. 1936 All. 314, 1936 A.L.J. 165, 1936 A.W.R. 227, 1936 All.L.R. 436, 1936 Cr.C. 480, 162 I.C. 507, 37 Cr L.J. 599, 58 All. 849. See also *Saigal*, A I R. 1930 All. 401, 1930 Cr.C. 625, 125 I.C. 470, 31 Cr L.J. 840, 52 All. 775, 1930 A.L.J. 713 (F.B.).

99E. On the hearing of any such application with reference to any newspaper, any copy of such newspaper may be given in evidence in aid of the proof of the nature or tendency of the words, signs or visible representations contained in such newspaper *in respect of which the order of forfeiture was made.*

99F. Every High Court shall, as soon as conveniently may be, frame rules to regulate the procedure in the case of such application, the amount of the costs thereof and the execution of orders passed thereon, and until such rules are framed, the practice of such Courts in proceedings other than suits and appeals shall apply, so far as may be practicable, to such applications.

Costs:—As regards costs, the practice of the High Court in proceedings other than suits and appeals, *i.e.*, in miscellaneous civil proceedings, must be followed. According to that practice, if a seditious matter published in vernacular is filed by the applicant as an exhibit, he must cause it to be translated by a competent High Court translator. If he fails to do so, the translation may be made by the opposite party (the Local Government) and the costs incurred therefor should be paid by the person to whose action the incurring of those costs was due, *i.e.*, by the applicant—*Saigal*, 52 All 775, 31 Cr L.J. 840 (843, 844), 1930 A L J. 173, 1930 Cr C. 625, 125 I.C. 470 (F.B.).

99G. No order passed or action taken under section 99A shall be called in question in any Court otherwise than in accordance with the provisions of section 99B.

C.—Discovery of Persons wrongfully confined.

100. If any Presidency Magistrate, Magistrate of the first class or Sub-divisional Magistrate has reason to believe that any person is confined under such circumstances that the confinement amounts to an offence, he may issue a search-warrant, and the person to whom such warrant is directed may search for the person so confined; and such search shall be made in accordance therewith and the person, if found, shall be immediately taken before a Magistrate, who shall make such order as in circumstances of the case seems proper.

203 Duty of Magistrate:—When a Magistrate has an application before him containing the allegations mentioned in this section, and asking him to issue a search-warrant, it is incumbent on him to satisfy himself by *holding an inquiry* that

there is foundation for the application. He cannot act merely upon the allegation of the petitioner—*Abdul Aziz*, 1910 P.R. 34, 17 Cr.L.J. 491 (495). But the Patna High Court holds that the Magistrate may issue a warrant under this section merely on the application of the complainant; otherwise, it would necessitate almost in every case that the Magistrate would have to try out the case before he could determine the question whether it was a *bona fide* application. The only question is whether the Magistrate was of the belief that a person had been detained, and he may be of that belief by reason of the petition itself or for any other reason that may be brought before him—*Chepa Mahton*, 30 Cr.L.J. 175, 11 P.L.T. 31, A.I.R. 1928 Pat. 550, 113 I.C. 578.

Search-warrant :—This section applies where a search-warrant has been issued. Where no such warrant was issued, and the person was brought before the Court by the other party of his own accord, this section could not apply—*Chagan v. Hera Lal*, 24 C.W.N. 104 (105), 20 Cr.L.J. 729, 29 C.L.J. 729, 52 I.C. 889.

Arrest of ward :—The powers conferred on a first-class Magistrate under this section may be exercised by a District Judge in arresting a ward removed from the custody of the guardian. See section 25 (3) of the Guardians and Wards Act.

On an application for the recovery of a boy by his adoptive mother from the natural father, the health or safety of the boy in his being allowed to live with his natural parents, should be a paramount consideration for the Court—*Chagan v. Hera Lal*, supra.

Power of Police-officer :—Where a warrant issued under this section directs the police officer to find out the detained person from a particular house, the police officer when endorsing the warrant to another officer cannot authorise that officer to execute the warrant in some other place. Such a direction would amount to altering the warrant itself—*Chepa Mahton*, 30 Cr.L.J. 175, 11 P.L.T. 31, A.I.R. 1928 Pat. 550, 113 I.C. 578.

204. Wrongful confinement :—The Magistrate is not bound to issue a search warrant under this section unless he has reason to believe that the confinement is wrongful, i.e., amounts to an offence. The jurisdiction conferred by this section is not as wide as that conferred by sec. 491—*Muktabai, Ratanlal* 839. Where a boy was taken away by the natural father from the house of the alleged adoptive father, alleging that no adoption had really taken place, and the alleged adoptive father applied for recovery of the boy, held that this section did not apply, as it was doubtful whether the confinement of the boy by the natural father amounted to an offence—*Chagan v. Hera Lal*, 24 C.W.N. 104 (105), 20 Cr.L.J. 729, 29 C.L.J. 729, 52 I.C. 889.

Where the information before the Magistrate was that a woman was living in her mother's house and there was not even a suggestion that she was being detained by her mother against her will, there was no jurisdiction to issue a warrant under this section and the subsequent order directing what amounted to detention in custody of the person arrested under that warrant was clearly also without jurisdiction—*Thakamani Debi v. Nepal Chandra Bhattacharjya*, A.I.R. 1938 Cal. 704, 178 I.C. 405, 40 Cr.L.J. 58, 43 C.W.N. 363.

The words "so confined" in this section should be taken in the context in which they occur, and should be taken to imply "believed to be so confined". This section, which in this respect is not happily worded, lays down that it is for the Magistrate to find whether there are reasons for believing that any person is in wrongful confinement; and if he is so satisfied and issues a search warrant, the police officer to whom the warrant is addressed, has merely to execute it according to its tenor. He must search for the person believed by the Magistrate to be unlawfully detained. The officer charged with the execution of the warrant is not expected to disregard the finding of the Magistrate and to refrain from executing the warrant if he finds that the person in question is not confined so as to make the confinement an offence. All that he is to do is to search for the person in question and to take him to the Magistrate—*Kallan Beg*, A.I.R. 1936 All. 306 (308), 1936 A.L.J. 468, 37 Cr.L.J. 548, 162 I.C. 539, 1935 A.L.R. 425, 8 R.A. 862, 1936 Cr.C. 459.

Complaint against husband :—In the case of a complaint being made against the husband that he was keeping his wife in confinement, a Magistrate cannot make a summary order, but is bound to hear both sides, and after making necessary inquiry he should pass such order as may seem right. If he finds that the confinement amounts to an offence, he should let the wife go and warn the husband against interfering with her except through a Civil Court. If, on the other hand, he arrives at the conclusion that such is not the case, he should advise the wife to go home with her husband, warning the husband at the same time against using any coercion in taking the wife with him—*Sher Sha v. Sakina Begum*, 1910 P.W.R. 29, 11 Cr.L.J. 450, 7 I.C. 354; see also *In the matter of Shoibalini*, 2 C.W.N. cccxxxiii.

205. Form of warrant :—There being no prescribed form of warrant under this section, a Magistrate who has to issue one under this section, may adapt a form under sec. 96 to the provisions of this section by altering the figures, and by drawing up the warrant in terms required by this section—*Mozam Molla*, 45 Cal. 905, 20 Cr.L.J. 47, 28 C.L.J. 47, 48 I.C. 687 (dissenting from *Bisu Haldar*, 11 C.W.N. 836, 6 C.L.J. 127, where it was held that if a warrant was issued purporting to be under sec. 96, while it ought to be under sec. 100, the warrant was illegal).

A form under sec. 98 also may be lawfully used for a warrant under this section with necessary alterations—*Gora Mian v. Abdul Majid*, 39 Cal. 403, 16 C.W.N. 336, 13 Cr.L.J. 186, 13 I.C. 1002.

D.—General Provisions relating to Searches.

101. The provisions of sections 43, 75, 77, 79, 82, 83 and 84 shall, so far as may be, apply to all search-warrants issued under section 96, section 98, *section 99A* or section 100.

Direction, etc., of search-warrants.

The words "section 99A" in this section have been added by Act XIV of 1922 (Indian Press Law Repeal and Amendment Act).

206. Sec. 79—Endorsement :—A search warrant issued under the Gambling Act (III of 1867) is governed by the provisions of this Code, and consequently the search warrant may be endorsed by the Police officer to whom it is originally directed, to another officer of equal rank—*Kashi Nath*, 30 All. 60. This section has no application to warrants issued under sec. 6 of the Burma Gambling Act—*P. Thwai*, 21 Cr.L.J. 9, 54 I.C. 57, 12 Bur.L.T. 165. A search warrant issued under sec. 98 can be endorsed over to any other Police officer of similar rank for execution—*Mithu*, 3 S.L.R. 56, 10 Cr.L.J. 3.

102. (1) Whenever any place liable to search or inspection under this Chapter is closed, any person residing in, or being in charge of, such place shall, on demand of the officer or other person executing the warrant, and on production of the warrant, allow him free ingress thereto, and afford all reasonable facilities for a search therein.

Persons in charge of closed place to allow search.

(2) If ingress into such place cannot be so obtained, the officer or other person executing the warrant may proceed in manner provided by section 48.

(3) Where any person in or about such place is reasonably suspected of concealing about his person any article for which search should be made, such person may be searched. If such person is a woman, the directions of section 52 shall be observed.

Sections 102 and 103, Cr. P. C., do not apply to a search under the Excise Act (Beng Act V of 1909), Chapter IX of which deals with it—*Harbhanjan*, 31 C.W.N. 667 (669), 54 Cal. 601, 102 I.C. 547, 28 Cr.L.J. 579, A.I.R. 1927 Cal. 527.

103. (1) Before making a search under this Chapter, the officer or other person about to make it shall call upon two or more respectable inhabitants of the locality in which the place to be searched is situate to attend and witness the search, and may issue an order in writing to them or any of them so to do.

Search to be made in presence of witnesses

(2) The search shall be made in their presence, and a list of all things seized in the course of such search and of the places in which they are respectively found shall be prepared by such officer or other person and signed by such witnesses; but no person witnessing a search under this section shall be required to attend the Court as a witness of the search unless specially summoned by it.

(3) The occupant of the place searched, or some person in his behalf, shall, in every instance, be permitted to attend during the search, and a copy of the list prepared under this section, signed by the said witnesses, shall be delivered to such occupant or person at his request.

Occupant of place searched may attend.

(4) When any person is searched under section 102, subsection (3), a list of all things taken possession of shall be prepared, and a copy thereof shall be delivered to such person at his request.

(5) Any person who without reasonable cause refuses or neglects to attend and witness a search under this section when called upon to do so by an order in writing delivered or tendered to him, shall be deemed to have committed an offence under section 187 of the Indian Penal Code.

The italicised words have been added by sec 14 of the Criminal Procedure Code Amendment Act (XVIII of 1923). For reasons, see below

Object:—The provisions of this section are enacted for greater certainty and security and not because the statements of certain officers can, under no circumstances, be accepted—*Emp v Ma Thein*, AIR 1936 Rang 15 (17), 37 Cr.L.J. 331, 169 I.C. 816, 1936 Cr.C. 21. In this case the evidence of two Excise officers, which was supported by the documentary evidence, was accepted in preference to the evidence of search-witnesses.

The object of the Legislature in requiring the presence of witnesses of the locality is to guard against possible chicanery on the part of the officers entrusted with search-warrants, a thing incriminating which may be said to have been found and was not introduced by the men—*Abdullah v Emp*, 27 Cr.L.J. 73, 91 I.C. 249, 1 Lah.Cas. 746, 8 I.C. 988, 3 Bur.L.T. 143 in Note 209. The object of that searches are conducted fairly and squarely and that if articles by the police—*Wun Na*, 28 Cr.L.J. 701, 103 I.C. 5

and in order, and that no wrong doing such as 'planting' of articles by the Police in the house searched should take place—*Kwe Haw*, supra; *Wun Nu*, 5 Rang. 291, 28 Cr.L.J. 701 (702); *Balai Ghosh*, 50 C.L.J. 518, 31 Cr.L.J. 667 (669); *Abdullah*, 27 Cr.L.J. 73, 91 I.C. 249, 1 Lah. Cas. 5; and that no false evidence may be fabricated—*Sit Nyein*, 3 Bur.L.T. 143, 11 Cr.L.J. 746, 8 I.C. 988.

It is true that where it could be shown that the witnesses were not respectable or were not persons of the locality, a search has been held not to have been carried out in accordance with law. But where there were several senior officers of police in the police party it may be concluded, in the absence of any suggestion to the contrary, that the witnesses were properly chosen—*Boon Chin*, A.I.R. 1935 Rang 233, 1935 Cr.C. 934, 157 I.C. 798, 36 Cr.L.J. 1228.

A respectable person is a person who would be *impartial* and on whom the owner or occupier of the premises searched can *prima facie* rely—*Ti Ya*, 7 Bur.L.T. 143, 15 Cr.L.J. 441 (446) (F.B.). The word 'respectable' means 'respectable and independent'—*Khan Taw*, 4 Bur.L.T. 91 (F.B.); *Sher Ali*, 23 Cr.L.J. 609 (Lah.), 68 I.C. 833. Respectability does not connote any particular status or wealth or anything of that kind. Any person is entitled to claim respectability provided he is not disreputable in any way, that is, if he is not a thief or a criminal of some kind or a person perhaps of grossly immoral habits. Being a prosecution witness is not sufficient to deprive one of one's title to respectability—*Ashfaq v. Emp.*, 37 Cr.L.J. 1108, 165 I.C. 25, A.I.R. 1936 All 707, 1936 A.L.J. 958, 1936 Cr.C. 893, 1936 A.L.R. 886, 9 R.A. 247. Where one of the witnesses was a *friend of the Sub-Inspector* and lived two miles away, and the other witness lived a mile away, *held* that the search was illegal—*Ma Htway*, 4 Bur.L.J. 2, 26 Cr.L.J. 827, 89 I.C. 475, A.I.R. 1925 Rang. 205. Where both the search witnesses were found on their own admission to have been previously convicted for criminal offences and one of them further admitted that he had a civil suit with the accused, it was held that the search was conducted in a manner which amounted to violation of the law—*Haradhan Maity v. Emp.*, A.I.R. 1938 Cal. 701, 178 I.C. 409, 40 Cr.L.J. 52. A dismissed Constable can hardly be regarded as a respectable man—*Indar Datt*, 32 Cr.L.J. 818 (825), 132 I.C. 185, A.I.R. 1931 Lah. 408, 1931 Cr.C. 648. The mere fact that one of the search witnesses was found nearly half a mile away from the house that was searched, is no ground for suspicion—*Hari Narayan*, 29 Cr.L.J. 49 (56), 106 I.C. 545, 46 C.L.J. 368, A.I.R. 1928 Cal. 27.

A man who has been twice convicted of serious crimes is altogether unsuitable as a search witness—*Ram Chandra*, 36 Cr.L.J. 551, A.I.R. 1935 All. 520, 154 I.C. 635.

If no *respectable* witnesses are available in the locality, evidence to that effect must be given at the trial—*Balai Ghosh*, 50 C.L.J. 518, 31 Cr.L.J. 667 (669), A.I.R. 1930 Cal. 141, 121 I.C. 486, 1930 Cr.C. 141.

210. 'Of the locality':—A person living in a quarter within a part of the place to be searched may reasonably be regarded as an inhabitant 'of the locality', even if a river flows between—*Sit Nyein*, 3 Bur.L.T. 143, 11 Cr.L.J. 746. The word 'locality' does not mean the same quarter of the town as the place to be searched—*Ah Sein*, 4 Bur.L.T. 222, 12 Cr.L.J. 479. Where the witnesses lived in a quarter exactly half a mile west of the house searched in Rangoon, *held* that the witnesses lived within easy reach and in the same locality within the meaning of this section—*As Pok*, 18 Cr.L.J. 1009. But witnesses who live a mile or 2 miles away, are not inhabitants of the locality—*Ma Htway*, 4 Bur.L.J. 2, 26 Cr.L.J. 827. But see *Mast Ram*, *infra*.

It has been held in some cases that the fact that the witnesses are not men 'of the locality' is immaterial if they are 'respectable' men; the important point is that the men called in as witnesses should be persons of some standing, whose word can be believed, and not that they should be persons living within a stone's throw of the house which is to be searched. The stress is on the word 'respectable' and not on the word 'locality'—*Sit Nyein*, 3 Bur.L.T. 143, 11 Cr.L.J. 746, 8 I.C. 988 (989); *Ah Pok*, 18 Cr.L.J. 1009; *Ghandalal*, 36 Cr.L.J. 701, 154 I.C. 1038, 28 S.L.R. 41, A.I.R. 1931 Sind 159, 1931 Cr.C. 1261; *Gopi*, A.I.R. 1932 Pat. 66, 10 Pat. 821, 13 P.L.T. 62, 1932 Cr.C.

99, 136 I.C. 60, 33 Cr.L.J. 233; and failure to call inhabitants of the locality as witnesses does not make a search illegal—*Raman*, 21 Mad. 83; *Satagopacharlu v. Satrugna*, 23 M.L.J. 445, 1912 M.W.N. 1111, 13 Cr.L.J. 763, 17 I.C. 75. The fact that the *panchas* were not local people is an irregularity which could be cured under sec. 537, Cr. P. C.—*Raghunath*, 33 Cr.L.J. 733, 139 I.C. 281, 34 Bom.L.R. 901, 1932 Cr.C. 868, A.I.R. 1932 Bom. 610, Ind. Rul. 1932 Bom. 481. The fact that the witnesses are not persons of the locality does not render the search illegal, specially where the search is conducted and witnessed by responsible and respectable officers in the presence of a Magistrate, and a satisfactory explanation for not inviting the neighbours to witness the search has been furnished—*Abdullah*, 27 Cr.L.J. 73, 91 I.C. 249, 1 Lah. Cas. 5. Thus, where in view of the attitude of the men who had assembled on the scene the police officer did not consider it worth while to call upon any of them to witness the search but asked two other respectable persons who had come with him from another village to act as search-witnesses, held that under these circumstances the failure of the police-officer to secure search witnesses from the locality was no more than an irregularity—*Gopi Mahto*, 10 Pat. 821, 13 P.L.T. 62, 33 Cr.L.J. 233 (234).

If respectable persons cannot be found in the immediate vicinity, it is not illegal to bring witnesses from villages within 3 or 4 miles from the accused's village. The word "locality" is comprehensive enough to include villages within 3 or 4 miles from the village where the search is to be conducted—*Mast Ram*, 8 O.W.N. 128, 32 Cr.L.J. 699 (700), 131 I.C. 441, A.I.R. 1931 Oudh 115, 6 Luck. 472, 1931 Cr.C. 275, Ind. Rul. 1931 Oudh 201; *Mahadeo*, 35 Cr.L.J. 397, 147 I.C. 317, 11 O.W.N. 62, A.I.R. 1931 Oudh 90 (91), 1931 Cr.C. 260, 1934 O.L.R. 108. Where respectable persons can be found in the neighbourhood, and the Police officer making a search takes with him persons whose respectability is questionable or who come from a distant locality, the inference is that he was prompted by a desire to have such witnesses as would be easily persuaded to support any story which he might put forward—*Sadhu*, 36 Cr.L.J. 742, 155 I.C. 406, A.I.R. 1931 All. 374, 1931 Cr.C. 438.

The failure to comply with the provisions regulating searches may cast doubt upon the *bona fides* of the officers conducting the search. But when once the evidence has been believed it is obviously no defence to say that the evidence was obtained in an irregular manner. There is nothing in the law which makes such evidence inadmissible—*Bana Mali Bhattacharyya v. Emp.* (1939) 1 Cal. 210, A.I.R. 1910 Cal. 85.

211. Right of occupant to be present:—The language of sub-section (3) is that the occupant of the place shall be permitted to attend during the search, and it means that he is to be given the option of being present, and not that he is to be allowed to be present only if he demands it. Therefore, when the occupants of the house, who were inside the room searched by the Police, were, after the discovery in their presence of a gun and after search of their persons, arrested and sent out of the room, and the search was continued, it was held that the exclusion of the occupants during the search was not a technical but a substantial violation of the law enunciated in this sub-section—*Ramesh Chandra* 41 Cal. 350 (370, 377), 23 I.C. 986, 18 C.W.N. 496, 15 Cr.L.J. 385. But this case has been dissented from in the very recent case of *Harinarayan*, 46-C.L.J. 368, 106 I.C. 545, A.I.R. 1928 Cal. 27, 29 Cr.L.J. 49 (57), where Cammiae, J., holds that the word "permitted" in this clause cannot be taken to mean that the "occupant shall be present and must be given the option of being present".

The word "occupant" is not intended to cover every person who may happen to be in the place at the time; but it refers back to the person mentioned in sec. 102, i.e. a person residing in or being in charge of the place—*Ramesh Chandra*, 41 Cal. 350 (377), 23 I.C. 986, 18 C.W.N. 496. See also *Bhikur* quoted in Note 215.

212. Search-list:—A search-list prepared under this section is a proper evidence as to the matter contained therein, i.e. the articles found and the place where they were found—*Anon.*, 2 Weir 47. After a search-list has been prepared and signed, it is not proper to make additions thereto subsequently; but such additions will not

and in order, and that no wrong doing such as 'planting' of articles by the Police in the house searched should take place—*Kwe Haw*, supra; *Wun Nu*, 5 Rang. 291, 28 Cr.L.J. 701 (702); *Balai Ghosh*, 50 C.L.J. 518, 31 Cr.L.J. 667 (669); *Abdullah*, 27 Cr.L.J. 73, 91 I.C. 249, 1 Lah. Cas. 5; and that no false evidence may be fabricated—*Sit Nyein*, 3 Bur.L.T. 143, 11 Cr.L.J. 746, 8 I.C. 988.

It is true that where it could be shown that the witnesses were not respectable or were not persons of the locality, a search has been held not to have been carried out in accordance with law. But where there were several senior officers of police in the police party it may be concluded, in the absence of any suggestion to the contrary, that the witnesses were properly chosen—*Boon Chin*, A.I.R. 1935 Rang. 233, 1935 Cr.C. 934, 157 I.C. 798, 36 Cr.L.J. 1228.

A respectable person is a person who would be *impartial* and on whom the owner or occupier of the premises searched can *prima facie* rely—*Ti Ya*, 7 Bur.L.T. 143, 15 Cr.L.J. 441 (446) (F.B.). The word 'respectable' means 'respectable and independent'—*Khan Taw*, 4 Bur.L.T. 91 (F.B.); *Sher Ali*, 23 Cr.L.J. 609 (Lah.), 68 I.C. 833. Respectability does not connote any particular status or wealth or anything of that kind. Any person is entitled to claim respectability provided he is not disreputable in any way, that is, if he is not a thief or a criminal of some kind or a person perhaps of grossly immoral habits. Being a prosecution witness is not sufficient to deprive one of one's title to respectability—*Ashfaq v. Emp.*, 37 Cr.L.J. 1108, 165 I.C. 25, A.I.R. 1936 All. 707, 1936 A.L.J. 958, 1936 Cr.C. 893, 1936 A.L.R. 886, 9 R.A. 247. Where one of the witnesses was a *friend* of the *Sub-Inspector* and lived two miles away, and the other witness lived a mile away, held that the search was illegal—*Ma Htway*, 4 Bur.L.J. 2, 26 Cr.L.J. 827, 89 I.C. 475, A.I.R. 1925 Rang. 205. Where both the search witnesses were found on their own admission to have been previously convicted for criminal offences and one of them further admitted that he had a civil suit with the accused, it was held that the search was conducted in a manner which amounted to violation of the law—*Haradhan Maity v. Emp.*, A.I.R. 1938 Cal. 701, 178 I.C. 409, 40 Cr.L.J. 52. A dismissed Constable can hardly be regarded as a respectable man—*Indar Datt*, 32 Cr.L.J. 818 (825), 132 I.C. 185, A.I.R. 1931 Lah. 408, 1931 Cr.C. 648. The mere fact that one of the search witnesses was found nearly half a mile away from the house that was searched, is no ground for suspicion—*Hari Narayan*, 29 Cr.L.J. 49 (56), 106 I.C. 545, 46 C.L.J. 368, A.I.R. 1928 Cal. 27.

A man who has been twice convicted of serious crimes is altogether unsuitable as a search witness—*Ram Chandra*, 36 Cr.L.J. 551, A.I.R. 1935 All. 520, 154 I.C. 635.

If no *respectable* witnesses are available in the locality, evidence to that effect must be given at the trial—*Balai Ghosh*, 50 C.L.J. 518, 31 Cr.L.J. 667 (669), A.I.R. 1930 Cal. 141, 124 I.C. 486, 1930 Cr.C. 141.

210. 'Of the locality':—A person living in a quarter within a part of the place to be searched may reasonably be regarded as an inhabitant 'of the locality', even if a river flows between—*Sit Nyein*, 3 Bur.L.T. 143, 11 Cr.L.J. 746. The word 'locality' does not mean the same quarter of the town as the place to be searched—*Ah Sein*, 4 Bur.L.T. 222, 12 Cr.L.J. 479. Where the witnesses lived in a quarter exactly half a mile west of the house searched in Rangoon, held that the witnesses lived within easy reach and in the same locality within the meaning of this section—*As Pok*, 18 Cr.L.J. 1009. But witnesses who live a mile or 2 miles away, are not inhabitants of the locality—*Ma Htway*, 4 Bur.L.J. 2, 26 Cr.L.J. 827. But see *Mast Ram*, infra.

It has been held in some cases that the fact that the witnesses are not men 'of the locality' is immaterial if they are 'respectable' men; the important point is that the men called in as witnesses should be persons of some standing, whose word can be believed, and not that they should be persons living within a stone's throw of the house which is to be searched. The stress is on the word 'respectable' and not on the word 'locality'—*Sit Nyein*, 3 Bur.L.T. 143, 11 Cr.L.J. 746, 8 I.C. 988 (989); *Ah Pok*, 18 Cr.L.J. 1009; *Ghandalal*, 36 Cr.L.J. 704, 154 I.C. 1038, 28 S.L.R. 41, A.I.R. 1931 Sind 159, 1931 Cr.C. 1261; *Gopi*, A.I.R. 1932 Pat. 66, 10 Pat. 821, 13 P.L.T. 62, 1932 Cr.C.

99, 136 I.C. 60, 33 Cr.L.J. 233; and failure to call inhabitants of the locality as witnesses does not make a search illegal—*Raman*, 21 Mad 83; *Satagopachariu v. Satrugna*, 23 M.L.J. 445, 1912 M.W.N. 1111, 13 Cr.L.J. 763, 17 I.C. 75. The fact that the *panchas* were not local people is an irregularity which could be cured under sec. 537, Cr. P. C.—*Raghunath*, 33 Cr.L.J. 733, 139 I.C. 281, 34 Bom.L.R. 901, 1932 Cr.C. 868, A.I.R. 1932 Bom 610, Ind Rul 1932 Bom 484. The fact that the witnesses are not persons of the locality does not render the search illegal, specially where the search is conducted and witnessed by responsible and respectable officers in the presence of a Magistrate, and a satisfactory explanation for not inviting the neighbours to witness the search has been furnished—*Abdullah*, 27 Cr.L.J. 73, 91 I.C. 249, 1 Lah. Cas. 5. Thus, where in view of the attitude of the men who had assembled on the scene the police officer did not consider it worth while to call upon any of them to witness the search but asked two other respectable persons who had come with him from another village to act as search witnesses, held that under these circumstances the failure of the police-officer to secure search witnesses from the locality was no more than an irregularity—*Gopi Mahto*, 10 Pat. 821, 13 P.L.T. 62, 33 Cr.L.J. 233 (234).

If respectable persons cannot be found in the immediate vicinity, it is not illegal to bring witnesses from villages within 3 or 4 miles from the accused's village. The word 'locality' is comprehensive enough to include villages within 3 or 4 miles from the village where the search is to be conducted—*Mast Ram*, 8 O.W.N. 128, 32 Cr.L.J. 699 (700), 131 I.C. 441, A.I.R. 1931 Oudh 115, 6 Luck 472, 1931 Cr.C. 275, Ind. Rul 1931 Oudh 201; *Mahadeo*, 35 Cr.L.J. 397, 147 I.C. 317, 11 O.W.N. 62, A.I.R. 1934 Oudh 90 (91), 1934 Cr.C. 260, 1934 O.L.R. 108. Where respectable persons can be found in the neighbourhood, and the Police officer making a search takes with him persons whose respectability is questionable or who come from a distant locality, the inference is that he was prompted by a desire to have such witnesses as would be easily persuaded to support any story which he might put forward—*Sadhu*, 36 Cr.L.J. 742, 155 I.C. 406, A.I.R. 1934 All. 374, 1934 Cr.C. 438.

The failure to comply with the provisions regulating searches may cast doubt upon the *bona fides* of the officers conducting the search. But when once the evidence has been believed it is obviously no defence to say that the evidence was obtained in an irregular manner. There is nothing in the law which makes such evidence inadmissible—*Bana Mahi Bhattacharjya v. Emp.* (1939) 1 Cal 210, A.I.R. 1940 Cal 85.

211. Right of occupant to be present:—The language of sub-section (3) is that the occupant of the place shall be permitted to attend during the search, and it means that he is to be given the option of being present, and not that he is to be allowed to be present only if he demands it. Therefore, when the occupants of the house, who were inside the room searched by the Police, were, after the discovery in their presence of a gun and after search of their persons, arrested and sent out of the room, and the search was continued, it was held that the exclusion of the occupants during the search was not a technical but a substantial violation of the law enunciated in this sub-section—*Ramesh Chandra* 41 Cal. 350 (370, 377), 23 I.C. 986, 18 C.W.N. 496, 15 Cr.L.J. 385. But this case has been dissented from in the very recent case of *Harinarayan*, 46 C.L.J. 368, 106 I.C. 545, A.I.R. 1928 Cal 27, 29 Cr.L.J. 49 (57), where Cammide, J., holds that the word "permitted" in this clause cannot be taken to mean that the "occupant shall be present and must be given the option of being present".

The word "occupant" is not intended to cover every person who may happen to be in the place at the time; but it refers back to the person mentioned in sec. 102, i.e., a person residing in or being in charge of the place—*Ramesh Chandra*, 41 Cal. 350 (377), 23 I.C. 986, 18 C.W.N. 496. See also *Bhikugir* quoted in Note 215.

212. Search-list:—A search-list prepared under this section is a proper evidence as to the matter contained therein, i.e., the articles found and the place where they were found—*Anon*, 2 Weir 47. After a search-list has been prepared and signed, it is not proper to make additions thereto subsequently; but such additions will

invalidate the whole search, nor is the omission of unimportant articles a circumstance invalidating the search—*Htaung*, 7 Bur L.T. 163, 15 Cr.L.J. 523, 24 I.C. 835, 7 L.B.R. 275. It is competent for the Court to receive evidence other than the search-list regarding the things seized in course of the search and the places in which they were found. The provisions of sec. 91 of the Evidence Act do not apply to the case of a search-list prepared under this section—*Solas Naik*, 34 Mad. 349, 11 Cr.L.J. 576, 8 I.C. 178, 8 M.L.T. 451, 21 M.L.J. 281 (F.B.), overruling 2 Weir 515; *Sarabu*, 33 Mad. 413, 9 M.L.T. 135, 11 Cr.L.J. 716, 8 I.C. 809, 2 Weir 776; *Elamathan*, 33 Mad. 416. See also *Bachna* in Note 213.

Non-signing of search-list—Refusal by a witness to sign the search-list is not punishable under sec. 187, I P. Code (intentional omission to assist a public servant in the execution of his duty) because the 'assistance' referred to in sec. 187, I. P. C., must have some direct personal relation to the execution of the duty of the police-officer. The signing of the list is an independent duty cast upon the witness, whereas the word 'assistance' in sec. 187, I. P. C., implies that the party who assists is doing something which in ordinary circumstances the party assisted could do for himself—*Ramaya Naika*, 26 Mad. 419, 1 Weir 136. The amendment of 1923 has made it penal by cl (5) of sec. 103, Cr P C., for a witness to refuse when asked in writing to attend and witness a search. In other words, assisting a search officer by attending and witnessing a search has been made *ejusdem generis* by the Legislature with the kind of assistance referred to in the second part of the section. But again it is the refusal to attend and witness the search that has been made penal and not the signing of the search-list. The effect of the decision of the Madras High Court in *Ramaya Naika* is not in the least touched by the amendment of sub-cl. (5) inserted in 1923 in sec. 103, Cr. P. C.—*Ram Prasad v. Emp.*, 39 Cr.L.J. 796, 17 Pat. 632, 176 I.C. 787, 11 R.P. 107, 4 B.R. 772, 1938 P.W.N. 477, 19 P.L.T. 461, A.I.R. 1938 Pat. 403 (F.B.) (*per* Varma and Manohar Lal, JJ; Chatterji, J., dissenting).

In *Ana Dewa Sing*, 4 L.B.R. 134, 7 Cr.L.J. 411, it has been laid down that unless the search-list is signed by witnesses, the search would not be legal. But a more reasonable view has been taken in *Solas Naik*, 34 Mad. 349 cited above.

213. Duty of prosecution to summon search-witnesses:—The police-officer who made the search may be called as a witness at the trial, but he cannot be deemed to be a satisfactory witness for the purpose of proving the search. It is, therefore, incumbent on the prosecution to call the search witnesses to prove the search—*Balai Ghosh*, 50 C.L.J. 518, 31 Cr.L.J. 667 (669), 124 I.C. 486. The prosecution is in duty bound to call search witnesses at the trial, unless it is of opinion that they would misrepresent facts and would misstate what happened. The fact that the prosecution thought that these persons had formed an opinion unfavourable to the prosecution story regarding the search, is no reason why those persons should not be called by the prosecution, in as much as what these persons would be required to state in their deposition was what they observed and not what they thought—*Munni Sonar*, 2 Cr.L.J. 176, 9 C.W.N. 438. But it has been held in a later case that no duty is cast on the prosecution to put the search witnesses into the witness-box, because sub-section (2) expressly lays down that no person witnessing a search shall be required to attend the Court as a witness unless specially summoned. The reason of this provision is obvious. Many persons would be unwilling to attend searches, if as a matter of course they had to attend Court at the trial of the case, possibly two Courts if the case is committed to the Sessions. The discretion is, therefore, left to the Court to require or not the attendance of witnesses. And evidence of the search ought not to be disbelieved by reason of the fact that some of the search witnesses were not called at the trial—*Hari Narayan*, 46 C.L.J. 368, 106 I.C. 545, 29 Cr.L.J. 49 (57), A.I.R. 1928 Cal. 278, dissenting from *Munni Sonar*, *supra*. See also *Mosaddi*, A.I.R. 1933 Pat. 100, 11 Pat. 807, 112 I.C. 841, 31 Cr.L.J. 427, 13 P.L.T. 702, 1933 Cr.C. 253, where it has been held that the statute lays it upon the prosecution to explain why it desires the search witnesses to be called and does not lay it upon the prosecution to explain why it does not call the

search witnesses. If there were no *respectable* inhabitants in the locality, and persons were called in from the cultivator class to witness the search, all those witnesses must be produced at the trial to prove the search. The calling of one witness only is not proper—*Balai Ghosh*, *supra*. See also *Rustum*, 33 Cr.L.J. 389 (391), 136 I.C. 868, 34 Bom.L.R. 267, A.I.R. 1932 Bom. 181, 1932 Cr.C. 240, Ind. Rul. 1932 Bom. 228.

The mere fact that the search-witnesses have not been examined in the case would not render the search itself illegal. If the list cannot be proved, the contents of the list can be proved by other evidence—*Bachna*, 28 Cr.L.J. 17 (18), A.I.R. 1927 Lah. 149, 99 I.C. 49. See also *Solas Naik* in Note 212.

The search lists and the search witnesses should invariably be produced by the prosecution, and they would be guilty of suppression of material evidence if they did not produce the same. The prosecution can also prove the recovery of the incriminating articles by other evidence as well—*Muhammad Bashir*, 33 Cr.L.J. 943, 140 I.C. 246, 1932 A.L.J. 104, A.I.R. 1932 All. 185, 1932 Cr.C. 201, Ind. Rul. 1932 All. 634.

Sub-section (2) of this section suggests that while the rendering of assistance in making the search is imperative on the persons called upon to assist, they are not compellable by the Inspector to attend the Court to give evidence *without a summons* in that behalf—*In re Ippili Inagatha*, 38 M.L.J. 27, 21 Cr.L.J. 33.

If a police officer conducts a search in company of panchas he may give evidence of that fact. He may say "I searched the premises in company of two independent persons whose names were so and so." But if he desires that the evidence of the panchas is to be used to fortify his own evidence and show that his evidence as to search is correct, then, he must call these panchas. He is not entitled to put in a signed panchnama and rely on that as evidence that the panchas agree with his evidence. Putting in panchanams signed by panchas as part of the evidence of the police officer is worthless, except to corroborate the evidence of that officer that panchas were employed, and to show that the provisions of sec. 103 (1) and (2), Cr.P.C. have been complied with. If the evidence of the panchas is sought to be relied upon, then the panchas must be called and the accused must have an opportunity of cross-examining them. The last words in sec. 103 (2), Cr.P.C., do not negative this right—*R. C. Lam v. Emp.*, A.I.R. 1932 Bom. 181 (183), 34 Bom.L.R. 267, 1932 Cr.C. 240, 136 I.C. 868, 33 Cr.L.J. 389.

214 Refusal to attend and witness search:—See sub-section (5). This clause has been added "to prevent the frustration of searches by the unreasonable refusal of witnesses to attend, which, we understand, is by no means uncommon"—*Report of the Select Committee*, 1916.

This sub-section adds a condition, namely, that *an order in writing must have been tendered* to the person requisitioned to attend the search. See the last line of Sub-section (1). "We accept the proposal of the Bill to penalise an unreasonable refusal or neglect to attend as a search witness, but would make it a condition precedent that the person in question should have been required to attend by an order in writing from the police-officer. In order to make this clear, we have, in addition to the new sub-section (5), made a small amendment at the end of sub-section (1)"—*Report of the Select Committee* of 1916.

See *Local Government v. Namsukh* above under the heading "Scope."

215. Irregular search:—A search is *irregular* if it is conducted in violation of the police rules relating thereto, such as the omission to make at the time a note of the articles found and where found, the permitting of unauthorised persons to go in and out of the place searched, the omission to send up the articles found as soon as possible to the Magistrate, or the exclusion of the occupant of the place during the search. But the effect of such irregularities is only to necessitate a careful scrutiny of the evidence of search, and if in spite of such irregularities it is found that no advantage was taken of them by the public, they have no further effect (*i.e.*, the search does not become *illegal*)—*Ramesh Chandra*, 41 Cal. 350 (358-371), 25 Cr.L.J. 1112, 18 C.W.N.

496; *Muhammad Basir*, 33 Cr.L.J. 943, 140 I.C. 246, 1932 A.L.J. 104, A.I.R. 1932 All 185, 1932 Cr.C. 201, Ind. Rul. 1932 All. 634. See also *Local Government v. Nainsukh Teli*, A.I.R. 1933 Nag 99, 34 Cr.L.J. 721, 144 I.C. 240, 1933 Cr.C. 364, 29 N.L.R. 67. A search is not illegal when there is a failure to call respectable inhabitants of the locality to witness the search—*Satagopalacharlu*, 13 Cr.L.J. 763, 23 M.L.J. 445, 1912 M.W.N. 111, 117 I.C. 75; *Raman*, 21 Mad. 83, 2 Weir 46, 374 and 503; *Abdullah*, 27 Cr.L.J. 73, 91 I.C. 249, 1 Lah. Cas. 5. A search made without the presence of any witness is irregular, but such irregularity does not entitle the occupants of the place to exercise their right of private defence by assaulting the police-officer, when it was not shown that the officer was acting maliciously and otherwise than in good faith—*Pukot Kotu*, 19 Mad. 349. Where the police-officer made a search without a warrant and in the presence of only one witness, and a constable entered the house to be searched by scaling a wall, held that the search was grossly irregular, but the occupants had no right of private defence, and any assault committed by them on the police was punishable under section 323 (though not under sec. 332), I. P. C.—*Mukhtor Ahmed*, 37 All 353, 13 A.L.J. 439. In a later Allahabad case, however, it has been held that a search without witness is absolutely illegal, and the occupant of the house is entitled to exercise his right of private defence by assaulting the police-officer so as to prevent him from entering the house—*Nirmal Singh*, 42 All. 67, 17 A.L.J. 1047, 20 Cr.L.J. 695, 52 I.C. 663. The occupant is also not guilty under sec. 332, I. P. C., when he attempts to enter into his house to be present during search and causes hurt to a Police officer when the latter offers physical resistance to him—*Bhikugir*, 34 Cr.L.J. 439, 142 I.C. 790, 1932 A.L.J. 530, A.I.R. 1932 All 449, 1932 Cr.C. 570.

If for any reason the officer making the search is unable to get two or more respectable inhabitants of the locality, and a search is effected in the presence of one or more men available at the time, leading to the discovery of an excisable article, the accused who is found in possession of that article can all the same be convicted under the Excise Act, if the Court is satisfied from the evidence that an offence has been committed. The irregularity in the search would not mitigate the offence or operate as a bar to the conviction of the accused—*Abdul Hafiz*, 24 A.L.J. 173, A.I.R. 1926 All 188, 27 Cr.L.J. 265; *Emp. v. Bachcha*, 36 Cr.L.J. 362, 153 I.C. 742, A.I.R. 1934 All. 873, 1934 Cr.C. 1082, 57 All. 256. See also *Bana Mali Bhattacharyya v. Emp.*, (1939) 1 Cal. 210, A.I.R. 1940 Cal. 85. The conviction cannot be set aside merely because the search did not comply with the provisions of this section. Persons who make a search illegally render themselves liable to be sued for damages, but their illegal action does not affect the question whether the person whose house was legally searched has committed an offence—*Maung San*, 7 Rang. 771, 31 Cr.L.J. 303 (305), (dissenting from *Mo Htway*, 4 Bur.L.J. 2, 26 Cr.L.J. 827); *Mi Hauk*, 4 I.B.R. 121, 7 Cr.L.J. 87; *Solai Naik*, 34 Mad. 349, 8 I.C. 178, 8 M.L.T. 451, 21 M.L.J. 281, 11 Cr.L.J. 576, 1910 M.W.N. 677; *Chwa Hun Htwe*, 34 Cr.L.J. 652, 143 I.C. 824, 11 Rang. 107, A.I.R. 1933 Rang. 146, 1933 Cr.C. 736, Ind. Rul. 1933 Rang. 77; *Ali Ahmad Khan*, 46 All. 86, A.I.R. 1924 All. 214; *Rute Mal*, A.I.R. 1929 All. 937 (939), 120 I.C. 266, 31 Cr.L.J. 35, 1930 A.L.J. 229, 1929 Cr.C. 665. So also, the mere fact that the witnesses were not present throughout the search and did not witness every detail of it, would not be enough in itself to justify the setting aside of the conviction. But a conviction cannot be sustained where the failure to comply with the provisions of this section has left the evidence in an unsatisfactory condition, so that there is a reasonable doubt as to whether the article found was really in the possession of the accused—*Dinkar Nhanu*, 51 Bom. 471, 32 Bom.L.R. 344, 31 Cr.L.J. 927 (931), A.I.R. 1930 Bom. 169, 125 I.C. 713, 1930 Cr.C. 515, Ind. Rul. 1930 Bom. 377.

What would otherwise be relevant does not become irrelevant because it was discovered in the course of a search in which the provisions of the Code were disregarded—*Barindra*, 37 Cal. 467 (500), 11 Cr.L.J. 453, 14 C.W.N. 1114, 7 I.C. 359.

215A. Proof:—When there are several search lists in each of which several items of property are mentioned the prosecution ought to prove their case with regard

to the different items severally, and the different items of property or different groups thereof mentioned in a search list ought to be separately and consecutively numbered either by letters or figures or by some other distinguished marks and the same numbering should be followed while recording the evidence of witnesses relating to the searches to which those search lists refer. If that procedure is adopted there will be no difficulty on the part of the Court in appreciating the evidence that is adduced in respect of the searches—*Rafiqueuddin Ahmad*, 39 C.W.N. 368, 36 Cr.L.J. 808, 155 I.C. 687, 1935 Cr.C. 241, A.I.R. 1935 Cal 184 (187), 62 Cal 572.

E.—Miscellaneous.

104. Any Court may, if it thinks fit, impound any document or thing produced before it under this Code.

Power to impound document, etc., produced.

216. 'Before it':—A Magistrate can impound a document produced in a case pending before him, and not before any other Magistrate subordinate to him—*Byas Hardeo Das*, 1 A.L.J. 607, 1 Cr.L.J. 1060.

Jurisdiction:—Where a Magistrate had no jurisdiction to summon a person to produce his account books, this section does not apply so as to justify his sending the books out of his jurisdiction—*Permanand, Ratanlal* 880.

Procedure:—A note upon the document or thing impounded or attached to it should be made and signed by the presiding officer and it should not be allowed to pass out of the custody of the Court except by his written order—*All. H. C. Bk. Cir.*, p. 6.

105. Any Magistrate may direct a search to be made in his presence of any place for the search of which he is competent to issue a search-warrant.

Magistrate may direct search in his presence.

217. When the Magistrate is competent to issue a search warrant, then instead of issuing such a warrant he can direct the search to be made in his presence—*Clarke v. Brojendra Kishore*, 36 Cal 514, 13 C.W.N. 458, 9 C.L.J. 298; *Ganeshi*, 1884 A.W.N. 213.

It seems clear from sections 36, 96 and 105 and Schedule III that a Magistrate is authorised by the Cr. P. Code to direct a search to be made in his presence if he considers it advisable to do so—*Clarke v. Brojendra*, 39 Cal. 953 (1965), 39 I.A. 163, 16 I.C. 501, 13 Cr.L.J. 693, 16 C.W.N. 865, 16 C.L.J. 231, 1912 M.W.N. 760, 12 M.L.T. 171, 23 M.L.J. 32, 14 Bom.L.R. 717 (P.C.).

A Magistrate in directing a general search in view of an enquiry under the Code of Criminal Procedure is acting in the discharge of his judicial functions and may appeal for protection to the Act No. XVIII of 1850—*Clarke v. Brojendra*, *supra*.

The special provision in sec. 6 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887) is subject to the general provisions of secs. 65 and 105 of this Code—*Fernad*, 31 Bom 138 (415), 9 Bom.L.R. 695, 6 Cr.L.J. 60.

495; *Muhammad Basir*, 33 Cr.L.J. 913, 140 I.C. 216, 1932 A.L.J. 104, A.I.R. 1932 All. 185, 1932 Cr.C. 201, Ind. Rul. 1932 All. 634. See also *Local Government v. Nainsukh Teli*, A.I.R. 1933 Nag. 99, 31 Cr.L.J. 721, 144 I.C. 210, 1933 Cr.C. 361, 29 N.L.R. 67. A search is not illegal when there is a failure to call respectable inhabitants of the locality to witness the search—*Satagopalachari*, 13 Cr.L.J. 763, 23 M.L.J. 415, 1912 M.W.N. 111, 117 I.C. 75; *Raman*, 21 Mad. 83, 2 Weir 46, 371 and 503; *Abdullah*, 27 Cr.L.J. 73, 91 I.C. 219, 1 Lah. Cas. 5. A search made without the presence of any witness is irregular, but such irregularity does not entitle the occupants of the place to exercise their right of private defence by assaulting the police-officer, when it was not shown that the officer was acting maliciously and otherwise than in good faith—*Pukot Kotu*, 19 Mad. 349. Where the police-officer made a search without a warrant and in the presence of only one witness, and a constable entered the house to be searched by scaling a wall, held that the search was grossly irregular, but the occupants had no right of private defence, and any assault committed by them on the police was punishable under section 323 (though not under sec. 332), I. P. C.—*Mukhtor Ahmed*, 37 All. 353, 13 A.L.J. 439. In a later Allahabad case, however, it has been held that a search without witness is absolutely illegal, and the occupant of the house is entitled to exercise his right of private defence by assaulting the police-officer so as to prevent him from entering the house—*Nirmal Singh*, 42 All. 67, 17 A.L.J. 1047, 20 Cr.L.J. 693, 52 I.C. 663. The occupant is also not guilty under sec. 332, I. P. C., when he attempts to enter into his house to be present during search and causes hurt to a Police officer when the latter offers physical resistance to him—*Bhikugur*, 34 Cr.L.J. 439, 142 I.C. 790, 1932 A.L.J. 530, A.I.R. 1932 All. 449, 1932 Cr.C. 570.

If for any reason the officer making the search is unable to get two or more respectable inhabitants of the locality, and a search is effected in the presence of one or more men available at the time, leading to the discovery of an excisable article, the accused who is found in possession of that article can all the same be convicted under the Excise Act, if the Court is satisfied from the evidence that an offence has been committed. The irregularity in the search would not mitigate the offence or operate as a bar to the conviction of the accused—*Abdul Hafiz*, 21 A.L.J. 173, A.I.R. 1926 All. 188, 27 Cr.L.J. 265; *Emp. v. Bachcha*, 36 Cr.L.J. 362, 153 I.C. 742, A.I.R. 1931 All. 873, 1931 Cr.C. 1082, 57 All. 256. See also *Bana Mali Bhattacharyya v. Emp.*, (1939) 1 Cal. 210, A.I.R. 1910 Cal. 85. The conviction cannot be set aside merely because the search did not comply with the provisions of this section. Persons who make a search illegally render themselves liable to be sued for damages, but their illegal action does not affect the question whether the person whose house was legally searched has committed an offence—*Maung San*, 7 Rang. 771, 31 Cr.L.J. 303 (305), (dissenting from *Mo Htway*, 4 Bur.L.J. 2, 26 Cr.L.J. 827); *Mi Hauk*, 4 I.B.R. 121, 7 Cr.L.J. 87; *Solai Naik*, 31 Mad. 319, 8 I.C. 178, 8 M.L.T. 451, 21 M.L.J. 281, 11 Cr.L.J. 576, 1910 M.W.N. 677; *Chica Hun Htue*, 31 Cr.L.J. 652, 113 I.C. 821, 11 Rang. 107, A.I.R. 1933 Rang. 146, 1933 Cr.C. 736, Ind. Rul. 1933 Rang. 77; *Ali Ahmad Khan*, 46 All. 86, A.I.R. 1924 All. 214; *Rure Mal*, A.I.R. 1929 All. 937 (939), 120 I.C. 266, 31 Cr.L.J. 35, 1930 A.L.J. 229, 1929 Cr.C. 665. So also, the mere fact that the witnesses were not present throughout the search and did not witness every detail of it, would not be enough in itself to justify the setting aside of the conviction. But a conviction cannot be sustained where the failure to comply with the provisions of this section has left the evidence in an unsatisfactory condition, so that there is a reasonable doubt as to whether the article found was really in the possession of the accused—*Dinkar Nhamu*, 54 Bom. 471, 32 Bom.L.R. 344, 31 Cr.L.J. 927 (931), A.I.R. 1930 Bom. 169, 125 I.C. 713, 1930 Cr.C. 515, Ind. Rul. 1930 Bom. 377.

What would otherwise be relevant does not become irrelevant because it was discovered in the course of a search in which the provisions of the Code were disregarded—*Barindra*, 37 Cal. 467 (500), 11 Cr.L.J. 453, 11 C.W.N. 1114, 7 I.C. 359.

215A. Proof:—When there are several search lists in each of which several items of property are mentioned the prosecution ought to prove their case with regard

to the different items severally, and the different items of property or different groups thereof mentioned in a search list ought to be separately and consecutively numbered either by letters or figures or by some other distinguished marks and the same numbering should be followed while recording the evidence of witnesses relating to the searches to which those search lists refer. If that procedure is adopted there will be no difficulty on the part of the Court in appreciating the evidence that is adduced in respect of the searches—*Rafiqueuddin Ahmad*, 39 CWN 368, 36 Cr L J 808, 155 I C 687, 1935 Cr C. 241, A I R 1935 Cal 184 (187), 62 Cal. 572

E.—Miscellaneous.

Power to impound
document, etc., produced

104. Any Court may, if it thinks fit, impound any document or thing produced before it under this Code.

216. 'Before it':—A Magistrate can impound a document produced in a case pending before him, and not before any other Magistrate subordinate to him—*Byas Hardeo Das*, 1 A L J 607, 1 Cr L J 1060

Jurisdiction:—Where a Magistrate had no jurisdiction to summon a person to produce his account books, this section does not apply so as to justify his sending the books out of his jurisdiction—*Permanand*, Ratanlal 880

Procedure:—A note upon the document or thing impounded or attached to it should be made and signed by the presiding officer and it should not be allowed to pass out of the custody of the Court except by his written order—*All H C. Bk Cir*, p. 6.

105. Any Magistrate may direct a search to be made in his presence of any place for the search of which he is competent to issue a search-warrant.

Magistrate may direct
search in his presence

217. When the Magistrate is competent to issue a search warrant, then instead of issuing such a warrant he can direct the search to be made in his presence—*Clarke v Brojendra Kishore*, 36 Cal 514, 13 CWN 458, 9 CLJ 298; *Ganeshi*, 1884 A.W.N. 213

It seems clear from sections 36, 96 and 105 and Schedule III that a Magistrate is authorised by the Cr P Code to direct a search to be made in his presence if he considers it advisable to do so—*Clarke v Brojendra*, 39 Cal 953 (965), 39 I A. 163, 16 I C. 501, 13 Cr L J 693, 16 CWN 865, 16 CLJ 231, 1912 MWN 760, 12 MLT. 171, 23 MLJ 32, 14 Bom LR 717 (P C)

A Magistrate in directing a general search in view of an enquiry under the Code of Criminal Procedure is acting in the discharge of his judicial functions and may appeal for protection to the Act No XVIII of 1850—*Clarke v Brojendra*, supra

The special provision in s.c. 6 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887) is subject to the general provisions of secs. 65 and 105 of this Code—*Fernad*, 31 Bom 438 (445), 9 Bom LR 695, 6 Cr L J 60

PART IV.

PREVENTION OF OFFENCES.

CHAPTER VIII.

OF SECURITY FOR KEEPING THE PEACE AND FOR GOOD BEHAVIOUR.

A.—Security for keeping the Peace on Conviction.

106. (1) Whenever any person accused of rioting, assault or other offence involving a breach of the peace, or of abetting the same, or of assembling armed men or of taking other unlawful measures with the evident intention of committing the same, or any person accused of committing criminal intimidation, is convicted of such offence before a High Court, a Court of Session or the Court of a Presidency Magistrate, a District Magistrate, a Sub-divisional Magistrate or a Magistrate of the first class,

and such Court is of opinion that it is necessary to require such person to execute a bond for keeping the peace.

such Court may, at the time of passing sentence on such person, order him to execute a bond for a sum proportionate to his means, with or without sureties, for keeping the peace during such period, not exceeding three years, as it thinks fit to fix.

(2) If the conviction is set aside on appeal or otherwise, the bond so executed shall become void.

(3) An order under this section may also be made by an Appellate Court *including a Court hearing appeals under section 407* or by the High Court when exercising its powers of revision.

106. (1) Whenever any person accused of offence punishable under Chapter VIII of the Indian Penal Code, other than an offence punishable under section 143, section 149, section 153A or section 154 thereof, or of assault or other offence involving a breach of the peace, or of abetting the same, * * or any person accused of committing criminal intimidation, is convicted of such offence before a High Court, a Court of Session or the Court of a Presidency Magistrate, a District Magistrate, a Sub-divisional Magistrate or a Magistrate of the first class,

and such Court is of opinion that it is necessary to require such person to execute a bond for keeping the peace, _____

Change:—The words “or of assembling committing the same” in the old sub-section (1) have been omitted, and the italicised words have been added, by sec 15 of the Cr. P. C. Amendment Act (XVIII of 1923). The reasons are stated below in their proper places.

218. Object of this Chapter:—The object of this Chapter is the *prevention* and not the *punishment* of offences, and its provisions are aimed at persons who are a danger to the public by reason of the commission by them of certain offences—*Vaman Sakharam*, 11 Bom LR 743; *Murli*, 1885 P.R. 53; *Hari Telang*, 27 Cal. 781 (781). This Chapter gives a certain amount of discretion to the Magistrates, and the High Court must always be slow to interfere with that discretion unless there is an error of law—*Raoji*, 6 Bom LR 34; *Umbica Prosad*, 1 CLR 268. But the Magistrate should exercise this preventive jurisdiction under this Chapter with cautious discrimination and watchful care, and see that the administration of this branch of criminal law does not become harsh and oppressive—*Nga On*, LBR (1893-1900) 223.

219. Offences under Ch. VIII, I. P. C.:—The words “or of assembling armed men or of taking other unlawful measures with the evident intention of committing the same” which occurred in the old section have now been omitted, because these offences are covered by Chapter VIII of the Indian Penal Code, and specific mention of them is unnecessary. The offence of assembling armed men is an offence under Chapter VIII of the I P Code; therefore, this section applies where armed men were assembled with the intention of committing a breach of the peace and an order for beating men was given, although no breach of the peace actually took place because the assembly did not go so far—*Srikant v Lakhani*, 5 C.W.N. 250. So also, the offence of being an armed member of an assembly (sec 144, I P. C.) or joining such assembly after it has been commanded to disperse (sec 145, I P. C.) is an offence under Chapter VIII of the I P Code and brings an accused under this section. The case of *Yar Mahammad*, 1890 PR 3, in which the contrary view was held is no longer good law.

A security can be demanded on a conviction for an offence under sec 147, I P C.—*Maharaj Singh*, 20 Cr L.J. 760 (Nag), or on a conviction for rioting—*Marimuthu*, 33 MLT 315, 17 L.W. 577. See also Note 221A.

The amendment to sec 106 by the Act XVIII of 1923 has made an order under sec 106 impossible where the only section under which the accused are convicted is a section of the Penal Code which is read with sec 149. The amendment is not very happily worded for it speaks of an offence punishable under sec 149. Now no offence is punishable under sec 149 alone there must be some substantive offence charged to be read with sec 149. The meaning clearly seems to be that the section has no application to cases where a person has been convicted of a substantive offence read with sec 149, I P C. The principle underlying might well be that where a person is made constructively liable for an offence by calling in the aid of the provisions of sec. 149, it is not proper to take action against him under sec 106, Cr P Code—*Chhedi Singh*, 85 IC 42, 3 Pat 870, AIR 1925 Pat 117, 26 Cr L.J. 426, 6 PLT 330; *Saun Pande*, 35 Cr L.J. 1159, 150 IC 915, AIR 1934 Oudh 279, 1934 Cr C 775, 11 OWN 992. But the Madras High Court has held that where the conviction of the accused persons was under sec 147 and secs. 324, 325 and 342 read with sec 149, I P Code the view that sec. 106, Cr P C., is inapplicable to the case is untenable—*Mekraj Ali Sahib*, AIR 1939 Mad 787, 184, IC 452, 12 RM 456, 50 MLW. 918, 1939 MWN. 609, (1939) 2 MLJ 36. See also Note 221A.

220. “Other offence involving a breach of the Peace”:—(a) *Allahabad High Court*—The word “involve” connotes the inclusion, not only of a necessary, but also of a probable feature, circumstance, antecedent condition or consequence. The object of the section is to prevent breaches of peace taking place and not merely to follow up breaches of the peace which have taken place. That is, an offence “involving a breach of the peace” does not mean only an offence which necessarily

involves a breach of the peace or of which a breach of the peace forms an ingredient, but includes an offence such as the removal of a landmark (punishable under sec. 448, I. P. C.) which, as a matter of common experience, is often followed by serious riots and loss of life. Therefore, where the evidence shows that the accused were prepared to commit the act of removal of a landmark by a breach of peace, and were only prevented from doing so by the other side running away, *held* that the offence came within the terms "involving a breach of the peace"—*Manik Lal*, 33 All. 771 (dissenting from 30 Cal. 93, 30 Cal. 336, 35 Cal. 315 and 29 Mad. 190). So also, upon a conviction of criminal trespass, where the intention of the trespass is to commit a breach of the peace, an order under sec. 106 may lawfully be passed. Thus, where the accused came armed with lathies to assault the complainant and aimed a blow at him which missed, whereupon the complainant took refuge in his house, but the accused pushed the door open and assaulted the complainant inside the house, *held* that a breach of the peace was a necessary ingredient of the offence committed by the accused (criminal trespass with intent to cause hurt, sec. 452, I. P. C.) and an order for security was proper—*Dharam Raj*, 42 All. 345, 18 A.L.J. 300, 21 Cr.L.J. 388. Using abusive language and being generally disorderly at a Railway station, amounts to a breach of the peace—*Raja Ram*, A.I.R. 1936 All. 140, 37 Cr.L.J. 385, 160 I.C. 1088, 1936 A.L.J. 82, 1936 Cr.C. 139.

(b) *Bombay High Court*—The phrase "other offences including a breach of the peace" includes offences which are offences because a breach of the peace is likely to occur—*Emp v Sayad Yacoob*, 43 Bom. 554, 21 Bom.L.R. 270 (dissenting from 30 Cal. 366 and 26 Mad. 469).

(c) *Calcutta High Court*—Having regard to the object underlying this section which is prevention of offences, a wider interpretation should be put on the clause "offences involving a breach of the peace" and it must be held that this clause includes not only offences of which a breach of the peace is a necessary ingredient and in which a breach of the peace has actually occurred but includes also cases of offences in which an evident intention to commit a breach of the peace is expressly found—*Abdul Gafur v. Mohammad Mirza*, 33 Cr.L.J. 82, 134 I.C. 1187, A.I.R. 1931 Cal. 645, 35 C.W.N. 1150, Ind. Rul. 1932 Cal. 67, 1931 Cr.C. 845, 59 Cal. 659, following *Abdul Ali Chowdhury*, 34 I.C. 961, 43 Cal. 671, 17 Cr.L.J. 241, 20 C.W.N. 197, 23 C.L.J. 108 and *Jag Lal Gir v Jagmohan Pal*, 26 Cal. 576. See also *Rafatulla v. Rajek*, 132 I.C. 96, A.I.R. 1930 Cal. 646, 1930 Cr.C. 1068, 32 Cr.L.J. 828, 34 C.W.N. 988, Ind. Rul. 1931 Cal. 528. A contrary view was, however, taken in *Asoka*, 129 I.C. 413, A.I.R. 1930 Cal. 802, 1930 Cr.C. 1087, 34 C.W.N. 651, 32 Cr.L.J. 459, Ind. Rul. 1931 Cal. 189, following *Arun*, 30 Cal. 366; see also 30 Cal. 93 and 35 Cal. 315.

The case of *Abdul Gafur v. Mohammad Mirza*, supra, was not followed in *Ankulal Saha v. Sadhan Chandra Mandal*, A.I.R. 1939 Cal. 484, 43 C.W.N. 867, 40 Cr.L.J. 836, 183 I.C. 672, 1 I.R. (1939) 2 Cal. 261, 69 C.L.J. 565, 12 R.C. 177, where Henderson, J., observed: "Now I am bound to say that in a matter of this kind I should expect the words 'other offences involving a breach of the peace' to refer to the actual definition of an offence in the substantive law, that is to say, the commission or intention to commit a breach of the peace must be one of the elements which would go to make up the offence. Supposing a man were convicted of defamation and there was a finding of fact that he intended to commit a breach of the peace, it could hardly be said that defamation is an offence involving a breach of the peace."

(d) *Lahore High Court*:—The words "offence involves a breach of the peace" mean an offence in which a breach of the peace is an ingredient and not merely an offence provoking or likely to lead to a breach of the peace. Where, therefore, the conviction was not for an offence of criminal intimidation but for an offence under sec. 279, I. P. C., an order under this section was illegal—*Abdulla v. Crown*, 2 Lah. 279, 22 Cr.L.J. 709, 63 I.C. 869 following 30 Cal. 366. Such was the case where the conviction was only under sec. 452, I. P. C.—*Santosh*, 27 Cr.L.J. 571, 94 I.C. 139,

A.I.R. 1926 Lah. 675 See also *Hayat Khan*, A.I.R. 1932 Lah. 435, 13 Lah. 336, 33 P.L.R. 588, 1932 Cr.C. 581, 139 I.C. 127, 33 Cr.L.J. 746.

(e) *Madras High Court*—The words “involving a breach of the peace” in this section, require that a breach of the peace should be an ingredient of the offence proved, and before the section can be put into force there must be a finding that a breach of the peace has occurred—*Muthiah Chetti*, 29 Mad 190, 3 Cr.L.J. 461, following *Baidya Nath v Nibaran*, 30 Cal 93 and *Kannockraran*, 26 Mad 469. The words “other offence” in this section are those *ejusdem generis* with the offences against public tranquillity and of assault which are mentioned in the section. Under this section offence must involve a breach of the peace. It applies when the offence amounts to or constitutes a breach of the peace, in other words, when breach of the peace is a component part or an ingredient of the offence. The facts constituting an offence must be looked at for determining whether the offence comes within the section or not. Wrongful confinement *per se* is not an offence involving a breach of the peace. Where the offender using violence seizes another, ties his hand and is convicted under sec. 342, I P.C., the offence as proved does involve a breach of the peace—*Kuppa Reddiar*, 47 Mad 846, 81 I.C. 920, 20 M.L.W. 481, A.I.R. 1924 Mad 808, 25 Cr.L.J. 1096, 47 M.L.J. 232 dissenting from *In re Thurmal Reddy*, 30 M.L.T. 348, 76 I.C. 966, A.I.R. 1932 Mad 133, 25 Cr.L.J. 294.

(f) *Nagpur Judicial Commissioner's Court*—This Court seems to have followed the view expressed by the Allahabad High Court in *Emp v Manik*, 11 I.C. 589, 33 All 771, 8 A.L.J. 925, 12 Cr.L.J. 405. Vide *Nanka v. Kanhayalal*, 25 Cr.L.J. 71, 75 I.C. 983, A.I.R. 1924 Nag. 118.

(g) *Oudh Chief Court*—This Court adopted the narrower view of the meaning of the words, “offence involving a breach of the peace,” that was taken at Calcutta, Madras and Lahore in preference to the wider interpretation that found favour at Allahabad and Bombay—*Lodha Ram*, 33 Cr.L.J. 193, 135 I.C. 691, A.I.R. 1932 Oudh 33, 8 O.W.N. 1286, 1932 Cr.C. 65, 7 Luck 573; *Bans Gopal v Emp.*, A.I.R. 1939 Oudh 45, 1938 O.W.N. 1361, 1939 O.L.R. 19, 1939 A.W.R. (C.C.) 11, 40 Cr.L.J. 183, 179 I.C. 269, 14 Luck 360, 11 R.O. 156. The view of the Calcutta High Court was, however, changed in *Abdul Gafur v Muhammad Mirza*, quoted above which was again not followed in the recent case of *Anukul Saha v Sadhan Chandra Mandal*, *supra*.

(h) *Patna High Court*—This Court followed the view of the Allahabad High Court in *Emp v. Manik*, quoted above. *Lal Mohammad*, A.I.R. 1931 Pat 337, 131 I.C. 539, 32 Cr.L.J. 739, 12 P.L.T. 556, 1931 Cr.C. 785. Where the incidents which form the transaction for which the offenders have been convicted under secs. 143 and 379, I P.C., do in themselves come within the terms of sec. 106, Cr.P.C., that is to say, to form an unlawful assembly and by means of that unlawful assembly to overawe and intimidate other persons, preventing them from doing what they are legally entitled to do and compelling them to abandon their property which they are entitled to keep, does actually amount to a breach of the peace of a serious nature, an order under sec. 106, Cr.P.C., is legal—*Ibid*.

(i) *Rangoon High Court*.—The words “involving a breach of the peace” and the expression “breach of the peace” itself have been the subject of numerous and conflicting decisions. The words themselves are vague and susceptible of more than one interpretation. The matter has been dealt with in four old rulings of the Chief Court of Lower Burma and of the Court of the Judicial Commissioner, Upper Burma, all under the Code of 1898. In 1 L.B.R. 262, (*Crown v Wei Taung*) the question was considered whether a person convicted of an offence under sec. 504, I.P. Code could be ordered to keep the peace under this section. It has been held that such an offence may, but does not necessarily, involve a breach of the peace and that even if a breach of the peace occurs, it is not the person accused under sec. 504, I.P. Code who is guilty of it. This ruling was briefly followed in 2 L.B.R. 125 (*King-Emp v Ma Hla Bon*) a case where a bond had been ordered on a conviction under sec. 291,

I. P. Code. It has been laid down there that obscene abuse does not necessarily involve a breach of the peace. In 1 U.B.R. 4, 1 Cr.L.J. 555 (*King-Emp. v. Ni Kun Ya*) an offence under sec. 291, I. P. Code has been discriminated from one under sec. 504, I. P. Code and it has been held that uttering obscene abuse in a public place to the annoyance of others could amount to a breach of the peace if there was a finding to that effect. The public peace could be broken by angry words as well as by blows or deeds. An older ruling (1893-1900) L.B.R. 50 (*Queen-Emp. v. Nga So Pe*) to the opposite effect was not referred to. In a very recent case it has been held that the words "involving a breach of the peace" denote offences where either a breach of the peace was a necessary ingredient in the offence committed, or where a breach of the peace has actually been committed during the course of the commission of the offence of one party or the other. The mere use of abusive language in a public place is not of itself a breach of the peace, though of course it is likely to lead to one. It is not one of the offences affecting the public tranquillity mentioned in this section. The section itself provides for cases where threatening words amount to criminal intimidation, or where threatening gestures amount to an assault. The words "breach of the public peace" have not only in popular usage but in law, the significance of a disturbance of the peace by something more than mere abusive or obscene words, that is to say, by resort, if not to actual violence, to threats of it. In other words, the word 'peace' is used as a synonym for security rather than for tranquillity. Therefore where an accused person is convicted of an offence under sec. 291, I. P. Code an order under this section cannot be made unless there is a finding that active criminal intimidation or assault, etc., have actually occurred in consequence of the obscene abuse—*Maung Kyi Nyo*, A.I.R. 1910 Rang. 50, 41 Cr.L.J. 421, 187 I.C. 149. The words "offences involving a breach of the peace" mean offences in which a breach of the peace is an ingredient and not offences provoking or likely to lead to a breach of the peace—*Maung Po Aung v. The King*, A.I.R. 1940 Rang. 95 (96), 41 Cr.L.J. 495, 187 I.C. 609, following *Arun*, 30 Cal. 366.

(j) *Sind Judicial Commissioner's Court*.—This Court has not clearly decided this point but disposed of the case where it arose, on the wider interpretation of these words—*Haroon v. Sumri*, 33 Cr.L.J. 713, 139 I.C. 130, A.I.R. 1932 Sind 87, 26 S.L.R. 18, 1932 Cr.C. 383, Ind. Rul. 1932 Sind 98.

There is, therefore, a conflict of opinion on this point. The view of the Allahabad and Bombay High Courts.

221. Findings:—(a) When a person is convicted of offences which do not, in themselves and apart from any other incidents, come within the terms of this section, it is incumbent on the Magistrate to record a clear finding with respect to the facts which, in his opinion, makes the section applicable to the case—*Baidya Nath v. Nibaran*, 30 Cal. 93. Unless the offence is one which necessarily involves a breach of the peace there must be an express finding by the Court that the offence did in fact involve a breach of the peace—*Rafatulla v. Rajek*, 31 C.W.N. 988, 32 Cr.L.J. 828, 132 I.C. 96, A.I.R. 1930 Cal. 646; *Abdul Gafur v. Muhammad Mirza*, 35 C.W.N. 1150, 33 Cr.L.J. 82, 131 I.C. 1187, A.I.R. 1931 Cal. 645, 59 Cal. 659, 1931 Cr.C. 845, Ind. Rul. 1932 Cal. 67; *Jib Lal v. Jagmohan*, 26 Cal. 576; *Sheo Bhajan v. Moswai*, 27 Cal. 983; *Abdul Ali*, 43 Cal. 671, 23 Cr.L.J. 108, 20 C.W.N. 197, 17 Cr.L.J. 211, 31 I.C. 951; *Haroon v. Sumri*, 33 Cr.L.J. 713, 139 I.C. 130, A.I.R. 1932 Sind 87; 26 S.L.R. 18, 1932 Cr.C. 383, Ind. Rul. 1932 Sind 98; *Rajaram v. Gotinda*, 25 Cr.L.J. 1064, 81 I.C. 888, A.I.R. 1925 Nag. 36; *Bans Gopal v. Emp.*, A.I.R. 1939 Oudh 45, 1938 O.W.N. 1361, 1939 O.L.R. 19, 1939 A.W.R. (C.C.) 11, 40 Cr.L.J. 183, 179 I.C. 269.

(b) *Section 323, I. P. C.*:—Where the accused is convicted under sec. 323, I. P. C., (hurt) he cannot be bound down to keep the peace merely on the ground that the parties were on bad terms. There must be a further finding that a breach of the peace was involved in the occurrence—*Md. Rahim*, 89 I.C. 1025, 23 A.L.J. 1053, 26 Cr.L.J. 1157, A.I.R. 1925 All 111; *Emp. v. Atma Ram*, 99 I.C. 120, 49 All. 131, 28 Cr.L.J. 88, A.I.R. 1927 All 157. These two cases were dissented from in *Nazir-ud-din*, 31

Cr.L.J. 859, 144 I.C. 954, A.I.R. 1933 All. 609, 1933 A.L.J. 1315, 1933 Cr.C. 981, where the following principles of law were enunciated. By the words "assault or other offence involving a breach of the peace" the Legislature clearly intended to convey that the offence of assault did involve a breach of the peace, and a fortiori the offence of actually causing hurt to a person must also involve a breach of the peace. It is not necessary that the public should be assaulted or hurt, or that the offence should take place in public. The offence itself is a breach of the peace whether it takes place in a private room or in the open street. There is no justification for the view that a breach of the peace necessarily means a breach of the public peace. It follows that the offences of assault and of causing hurt necessarily involve a breach of the peace. Consequently, if a Magistrate finds that an offence of causing hurt has been committed, it is not necessary for him to come to a separate finding that a breach of the peace was involved. See also *Abdulla v. Crown*, 63 I.C. 869, 2 Lah. 279, 22 Cr.L.J. 709; *K.E. v. Ramani*, 99 I.C. 353, A.I.R. 1927 Oudh 101, 3 O.W.N. 11 (Sup.), 28 Cr.L.J. 144, dissenting from *Dubri*, 71 I.C. 691, 8 O.L.J. 318, 24 Cr.L.J. 227 and *Durga*, 72 I.C. 955, A.I.R. 1923 Oudh 37, 24 Cr.L.J. 421; *Hayat Khan*, 33 Cr.L.J. 746, 139 I.C. 127, A.I.R. 1932 Lah. 435, 13 Lah. 336, 33 P.L.R. 588, 1932 Cr.C. 581, Ind. Rul. 1932 Lah. 554; *Emp. v. Jafar*, 46 All. 105, 25 Cr.L.J. 906, 81 I.C. 412, A.I.R. 1924 All. 306; *Surajpal v. Kamta*, 35 Cr.L.J. 281, 146 I.C. 918, 10 O.W.N. 1228. Though in all ordinary cases of conviction under sec. 323, I. P. C., there is a conviction for an offence involving a breach of the peace, still the desirability of taking security must depend upon how far the circumstances indicate that a breach of the peace is likely to occur—*Mewa Lal*, 51 All. 540, 30 Cr.L.J. 686 (837), 115 I.C. 789, A.I.R. 1929 All. 349, Ind. Rul. 1929 All. 613, 1929 A.L.J. 340. Where the offence of hurt was committed under such circumstances that it clearly implies the use of violence and a breach of the peace (e.g., assaulting a prosecution witness in a public place), the order for security was not improper—*Ramastwami Thevan*, 21 Cr.L.J. 455, 41 M.L.J. 485.

(c) *Section 504, I. P. C.*:—An offence punishable under sec. 504, I. P. C., does not necessarily involve a breach of the peace. It involves only an intention to prove a breach of the "public peace," or knowledge that the provocation given is likely to cause a breach of the "public peace." Such an offence cannot be said to be one "involving a breach of the peace" and if a conviction takes place under sec. 504, I. P. C., and no other section, an order under sec. 106, Cr. P. C., cannot properly be made—*Lodha Ram*, 33 Cr.L.J. 193, 135 I.C. 691, 8 C.W.N. 1286, A.I.R. 1932 Oudh 33, 7 Luck 573, 1932 Cr.C. 65, Ind. Rul. 1932 Oudh 51. A contrary view was, however, taken by the Bombay High Court in *Emp. v. Sayad Yacob*, 43 Bom. 554, 21 Bom.L.R. 270. Where the Court not only finds the accused guilty under sec. 504, I. P. C., but clearly holds in addition that the accused had the intention to break the peace, an order under sec. 106, Cr. P. C., is legal—*Abdul Gafur v. Mahmud Mirza*, 33 Cr.L.J. 82, 131 I.C. 1187, 35 C.W.N. 1150, A.I.R. 1931 Cal. 615, 59 Cal. 659, 1931 Cr.C. 845, Ind. Rul. 1932 Cal. 67. See also Note 230.

(d) *Appellate Court*:—Where an Appellate Court in affirming a conviction for theft, thought proper to add to his judgment an order under sec. 106, Cr. P. C., binding the accused to keep the peace, without an express finding that the accused committed an offence within the terms of sec. 106, the order under sec. 106, Cr. P. C., is without jurisdiction. The fact that there was evidence on record, which if accepted, would have shown that such an offence had been committed, was not enough to justify the order—*Kinoo Sheik*, 6 C.W.N. 678, 29 Cal. 393. See also *Thirumal Reddy*, 25 Cr.L.J. 294, 76 I.C. 966, 30 M.L.T. 348, A.I.R. 1923 Mad. 133.

221A. Offences involving no breach of the peace:—(a) Merely being a member of an unlawful assembly (sec. 143, I. P. C.)—*Abdulla*, 2 Lah. 279; *Jib Lal v. Jagmohan*, 26 Cal. 576; *Raj Narain v. Bhagabat*, 35 Cal. 315; *Kannaokaran*, 26 Mad. 469; *Shro Bhajan v. Mesawi*, 27 Cal. 983; *Abdul Ali*, 43 Cal. 671, 20 C.W.N. 197; an offence under sec. 143, I. P. C., is now expressly excluded from this section by the

present amendment; where a person is made constructively liable for an offence by calling in the aid of the provisions of sec. 149, I. P. C., it is not proper to take action under this section—*Saun Pande v. Emp.*, A.I.R. 1934 Oudh 279, 1934 Cr.C. 775, 150 I.C. 945, 35 Cr.L.J. 1159, 11 O.W.N. 992; *Manni Lal v. Emp.*, A.I.R. 1938 Oudh 95, 173 I.C. 386, 1938 O.A. 158, 1938 A. Cr. C. 14, 10 R.O. 222, 39 Cr.L.J. 341, 1938 O.W.N. 218, 1939 O.L.R. 117; but such an order can properly be made if he is convicted under secs. 147 and 323, I. P. C., both of which involve a breach of the peace—*Manni Lal v. Emp.*, supra; see also Note 219;

(b) criminal trespass with intent to have illicit intercourse with the complainant's wife—*Subal v. Ramkanai*, 25 Cal. 628; it is not correct to say that an order under sec. 105, Cr. P. C., might follow a conviction under sec. 452, I. P. C.—*Jung Bahadur Misir v. Mahadeo Shaw*, A.I.R. 1939 Cal. 320, 40 Cr.L.J. 721, 182 I.C. 850, 12 R.C. 112;

(c) *theft or mischief*—*Kannookaran*, 26 Mad. 469; *Ram Roop v. King-Emp.*, 40 Cr.L.J. 138, 178 I.C. 665, 1938 A.W.R. (C.C.) 126, A.I.R. 1939 Oudh 38, 1938 O.W.N. 1127, 1938 O.L.R. 509, 1938 O.A. 906 *Ram Charan v. Umesh*, 1 C.W.N. 186; *Muniram*, Ratanlal 622. The offence under sec. 426, I. P. Code does not involve a breach of the peace and the order under this section cannot be sustained in case of a conviction under that section—*Maddukuri Subba Rao*, A.I.R. 1940 Mad. 55, 1939 M. Cr. C. 9, 1939 M.W.N. 1012, (1939) 2 M.L.J. 750, 50 M.L.W. 511, 41 Cr.L.J. 235, 185 I.C. 753. But see *Rafatulla v. Ranjit*, quoted in Note 221;

(d) house trespass with intent to commit theft—*Morali*, 4 L.B.R. 277; house-trespass after preparation to commit hurt, assault, etc. (sec. 452, I. P. C.)—*Santosh*, 27 Cr.L.J. 571 (Lah.);

(e) robbery—*Muthurakka*, 18 M.L.T. 121, 16 Cr.L.J. 611;

(f) offence under sec. 297, I. P. C.—*Abdulla*, 2 Lah. 279;

(g) wrongful confinement—*Md. Afzal*, 24 Cr.L.J. 271 (Lah.); but if the accused is found to have violently seized another person, tied his hands and wrongfully confined him in an open garden, then it amounts to an offence involving a breach of the peace—*Kuppa Reddiar*, 47 Mad. 846 (849), 47 M.L.J. 232, 25 Cr.L.J. 1096;

(h) defamation (even though the person defamed was provoked to commit a breach of the peace)—*Syad Yacoob*, 43 Bom. 554 (557), 21 Bom.L.R. 270; see *Ankulal Saha v. Sadhan Chandra Mandal* in Note 220;

(i) attempt to seduce married women and behaving indecently and immodestly towards them—*Arun*, 30 Cal. 366;

(j) an offence under sec. 3 (12) of the Madras Towns Nuisance Act (III of 1889). *Appachi Goundan*, 1937 M. Cr. C. 316. For contra see *District Magistrate of Coimbatore v. Dasappa Naicken*, 1933 M.W.N. 548 and *Balian*, 40 Cr.L.J. 165, 179 I.C. 169, 1938 M.W.N. 588, (1938) 2 M.L.J. 152, 48 M.L.W. 138, A.I.R. 1938 Mad. 795.

222. "Convicted of such offences":—This section refers only to parties convicted of rioting, assault, etc. Therefore, where a person was acquitted of a charge of unlawful assembly and trespass, etc., the Magistrate would be in error in demanding security from him on the same evidence—*Diloo Singh v. Ootin Singh*, 22 W.R. 9. So also, where the Magistrate only found that the accused threatened to beat the complainant, but did not convict the accused for assault or criminal intimidation, an order under this section was illegal—*Subal v. Ramkanai*, 25 Cal. 628. The conviction must be for an offence specified in this section. Therefore, where the accused was charged with criminal intimidation, but was convicted of theft or unlawful assembly (sec. 143, I. P. C.) an order under this section was not legal—*Kishore Sarkar*, 8 C.W.N. 517; *Raj Narain v. Bhagabat*, 35 Cal. 315; *Abdulla*, 2 Lah. 279 (280), 22 Cr.L.J. 709.

Summary trial.—An order under this section may be made even if the conviction takes place in a summary trial, provided the Magistrate has jurisdiction—*Meghu*, 7 O.C. 338; *Lachman*, 1886 A.W.N. 181.

223. Magistrate empowered:—Since section 18 confers full powers of a Presidency Magistrate on an Honorary Presidency Magistrate, the latter can take action

under this section—*Hassan v. Yas Kubar*, 7 Bom L R 833, 2 Cr L J. 770. If any Bench of Magistrates has first class powers, the Bench is competent to pass an order under this section—See sec. 15 (2). A Sub-Divisional Magistrate is expressly mentioned in this section; such a Magistrate, even though he is a Magistrate of the second class, can pass an order binding over a person to keep the peace for a period exceeding six months. The fact that the order carries with it an alternative sentence of imprisonment in case the security is not furnished, which will be beyond his ordinary powers under sec. 32, cannot have the effect of limiting the powers conferred on him under this section. Such powers are independent of his powers in the matter of passing substantive sentences of imprisonment—*Raja Singh*, 37 A L J 230, 13 A L J. 268, 16 Cr L J 350, 28 I C 734.

224. "At the time of passing sentence":—The order for security is to be made *at the time* of passing the sentence. Where a second class Magistrate convicted a person for assault and sentenced him to a fine, but ordered the sentence to be in abeyance pending the order of the District Magistrate for binding over the person, and the District Magistrate ordered the accused to furnish security, *held* that the order of the District Magistrate was bad in law—*Nura*, 22 P R 1901. If a Magistrate of the 2nd or 3rd class is of opinion that the accused should be bound down under this section, he must refer the whole case to a superior Magistrate under section 349, without passing any sentence himself—*Rahimuddi*, 35 Cal 1093. The second or third class Magistrate when referring a case under sec. 349 cannot even *convict* the accused. Section 106 contemplates that before an order requiring security can be passed under it, the accused shall have been convicted by a Magistrate who is not inferior to a Magistrate of the first class. Reading sections 106 and 349 together, it follows that the conviction and order under section 106 must be passed by one and the same officer, and when a second or third class Magistrate refers a case to a superior Magistrate for an order under sec. 106, the conviction and sentence must be passed by the superior Magistrate and not by the Magistrate of the 2nd or 3rd class. Therefore, where a third class Magistrate *convicted* the accused and then submitted the case to the District Magistrate with a recommendation that the accused should be bound over to keep the peace, and the District Magistrate ordered security under this section, the order was *ultra vires* and illegal—*Mahmudi v. Ali Sheikh*, 21 Cal 622.

A second-class Magistrate ought not to pass *any* sentence at all, if he refers the case to a superior Magistrate for an order under sec. 106. Where a second class Magistrate convicting the accused under secs. 147 and 325, I P C., sentenced him under sec. 147, I P C., but passed no sentence under sec. 325, I P C., and forwarded the proceedings to the Sub divisional Magistrate in order that the accused should be bound down under sec. 106 of this Code, *held* that the action of the 2nd class Magistrate was wrong. If he thought that the binding down was necessary, he should have forwarded the whole case to the Sub-divisional Magistrate, without passing *any part* of the sentences (i.e., the sentence under sec. 147, I P C.) himself—*Rahimuddi*, 35 Cal 1093.

An order for recognizance or for security, under this section must be passed at the time of deciding the original case. If no such order is then made, the only procedure open to the Magistrate is to take subsequent proceedings under section 107—*Ram Adin* 21 A L J 839, 25 Cr L J 965.

An appellate Court can pass an order for security on confirmation of the sentence passed by the original Court. If the appellate Court sets aside the sentence passed by the original Court, but passes no sentence itself, and makes an order for security, the order is illegal—*Nura*, 1901 P R 22; *Bhaskar* 3 B H C R 1.

225. Order for security:—An order under this section can only be made in the presence of the accused. An order made at the instance of the prosecutor, behind the back of the accused, is bad in law—*Bhaskar* 3 B H C R. 1. The security ordered under this section must be for *keeping the peace*. An order for furnishing security for *good behaviour* under this section is bad in law—*Mahabir*, 16 A L J 280, 19 Cr L J

439. The security must be in *addition* to an award of punishment; therefore, a Magistrate cannot order security *in lieu* of other punishment—*Nura*, 1901 P.R. 22.

Who can be bound down:—Only the accused person can be asked to give security, but not the complainant (in a case under sec. 323, I. P. C.). If the Magistrate considers it necessary to demand security from the complainant, he must record a separate proceeding and give the complainant an opportunity to be heard under secs 117 and 118—*Kallu*, 1902 P.R. 3. The Magistrate is not competent to take security from a witness for the defence on the ground that his evidence in the trial proved that he was one of the rioters—*Kadar Khan*, 5 Mad 380.

'Proportionate to his means'—The provision for taking security being a preventive measure intended to preserve future good conduct, it should not be made an instrument of punishment by demanding excessive security disproportionate to the means of the person and thus making him undergo further imprisonment—*Rama*, 16 Bom 372; *Kala Chand*, 6 Cal. 14; *Wasya*, 1901 P.R. 28; *Ali*, 1900 P.R. 17; *Ram Singh*, 1883 P.R. 1; *Jayava*, 1890 P.R. 30; *Raza Ali*, 23 All 80. See Note 293 under sec. 118.

226. Cases when order should not be made:—Perhaps, it was not contemplated that an order to furnish security under this section would be coupled with a non-appealable sentence. It should rarely, if ever, be necessary to do this, and it should certainly not be done until it has been ascertained that the accused is able to furnish security—*Emp v. Nga Tun Lu*, A.I.R. 1935 Rang. 363, 13 Rang 287. An order for security should not be made when a sentence of transportation or imprisonment for a long time is passed—*Kyaw Wa*, 8 L.B.R. 34, 2 I.C. 531, 10 Cr.L.J. 69; or when such an order would prevent the party bound down from exercising his lawful right—*Nanda Kumar*, 11 C.W.N. 1128 (1132), 6 Cr.L.J. 321. Thus, where upon the complainant trying to take possession of the land in the possession of the accused, the latter used more force than was necessary to prevent the complainant from taking possession, and the accused was punished for rioting, it was held that he should not be bound down under this section as such order would have the effect of preventing him from resisting any further attempt by the complainant to take possession of his land—*Nahar*, 11 C.W.N. 840 (841), 6 Cr.L.J. 40. In *Bepin v. Pranakul*, 11 C.W.N. 176 (177), it has been held that if it is necessary, in order to prevent a breach of the peace, to bind down the party entitled to possession, and if the effect of such order is to prevent him from taking possession of the property, it is desirable that the other party should also be bound down under sec. 107.

It is ordinarily objectionable, when the accused is convicted only of some petty offences under the Madras Towns Nuisance Act (III of 1884), that he should also be bound over for a considerable time under this section, for this binding over would involve a far more serious punishment than the main sentence. Those guilty of disorderly and riotous conduct are usually poor men who may not be able to find security, in which case they would be liable to be imprisoned for a substantial period. This section should, therefore, be very sparingly invoked where the offence committed is a petty one—*Balian*, 40 Cr.L.J. 165, 179 I.C. 169, 1938 M.W.N. 588, (1938) 2 M.L.J. 152, 48 M.L.W. 138, A.I.R. 1938 Mad. 795.

227. Sub-section (3)—Power of Appellate Court to direct security:—The words "including a Court hearing appeals under sec. 407" (added in this sub-section by the Amendment Act of 1923) show that an Appellate Court can direct security even though the original Court (e.g., a 2nd or 3rd class Magistrate) was not empowered to pass order. "It has been held in some cases that an Appellate Court cannot pass an order under sub-section (3) unless the person convicted has been sentenced by a Court not inferior to that of a first class Magistrate. This result does not appear to have been intended, and it is proposed to remove the restriction"—*Statement of Objects and Reasons* (1914). This amendment gives effect to the following rulings: *Solai Gounden*, 37 Mad. 153; *Doraisami*, 30 Mad. 182; *Dharam Das*, 33 All. 48; *Bhansingh*, 33 Bom. 33; *Talak Rai*, 43 All. 372; *Bachan*, 2 P.L.J. 21; *Hasan Beg*, 25 Cr.L.J. 657, 81 I.C. 145, 19 N.L.R. 154, A.I.R. 1921 Nag. 49.

In view of this Amendment, certain Calcutta and Punjab decisions (which it is unnecessary to cite) are rendered obsolete

There is nothing in sub-section (3) to limit the *time* when the order can be made by the Appellate Court. That Court has power to order a bond, even after disposal of the appeal and confirmation of the sentence passed by the trial Court—*Hussein Gulam*, 30 Bom L.R. 373, 29 Cr L J 502 (503). An Appellate Court can require the accused to furnish security even after the working out of the substantive punishment passed by the original Court, and such an order would not amount to an enhancement of punishment under sec. 423 (1) (b)—*Miran*, 1905 P.R. 21; *Maharaj Singh*, 20 Cr L J. 760 (Nag).

An Appellate Court can cancel an order of security passed by the original Court, while upholding the sentence—*Abdul v Amiran*, 30 Cal 101. But if the conviction and sentence are cancelled by the Appellate Court, the order of security is also cancelled *ipso facto* under sub-section (2), and it is not competent to the Appellate Court to order the security to be continued—*Chajju Mal*, 1895 A.W.N. 141

A Court of Appeal, while passing an order under this section which was not passed by the Trial Court, need not issue notice on the appellant to show cause why such an order should not be passed—*Ram Adhin*, 25 Cr L J 965, 81 IC 613, 21 A.L.J. 839, A.I.R. 1924 All 230. But see *Jai Singh*, 27 Cr L J 1112, 97 IC 424, A.I.R. 1927 Pat. 37. But in *Dewan Singh*, 37 Cr L J 63, 159 IC 246, 16 P.L.T. 793, A.I.R. 1936 Pat. 36, the view expressed in *Ram Adhin's* case was adopted

228. Revision:—This section gives a discretion to the Magistrate to pass an order for security, and the High Court is reluctant to interfere upon a mere question of discretion, unless the order is on the face of it such an improper exercise of discretion as to require interference—*Dharam Raj*, 42 All 345 (346), 18 A.L.J. 300, 21 Cr L J 288. The High Court in revision set aside an order under sec 106, where the findings did not sufficiently and clearly show that the acts for which the accused were convicted necessarily involved a breach of the peace—*Abdul Ali*, 43 Cal 671, 20 C.W.N. 197, 17 Cr L J. 241.

Appeal:—No sentence which would not otherwise be liable to appeal shall be appealable merely on the ground that the person convicted is ordered to find security to keep the peace, *vide* sec 415, Cr P C. There is no general provision in the Code for allowing an appeal from an order of imprisonment in default of furnishing security under sec. 123, Cr P C—*Emp v Nga Tun Lu*, A.I.R. 1935 Rang 363, 13 Rang 287

228A. Court-fee:—Under sec 35 of the Court-fees Act, VII of 1870, the Governor-General in Council has been pleased to remit fees chargeable on security-bonds for the keeping of the peace by, or good behaviour of, persons other than the tenants. (*Vide* Notification No 4650, dated the 10th September, 1889, published in the Gazette of India, 1889, Part I, p 506)

B.—Security for keeping the Peace in other Cases and Security for Good Behaviour

7. (1) Whenever a Presidency Magistrate, District Magistrate, Sub-divisional Magistrate or Magistrate of the first class is informed that any person is likely to commit a breach of the peace, or to disturb the public tranquillity, or to do any wrongful act which is likely to probably occasion a breach of the peace or disturb the public tranquillity, the Magistrate, if in his opinion there is sufficient ground for proceeding, may, in manner hereinafter provided, require such person to show cause why he should not

be ordered to execute a bond, with or without sureties, for keeping the peace for such period not exceeding one year as the Magistrate thinks fit to fix.

(2) Proceedings shall not be taken under this section unless either the person informed against or the place where the breach of the peace or disturbance is apprehended, is within the local limits of such Magistrate's jurisdiction, and no proceeding shall be taken before any Magistrate, other than a Chief Presidency or District Magistrate, unless both the person informed against and the place where the breach of the peace or disturbance is apprehended, are within the local limits of the Magistrate's jurisdiction.

(3) When any Magistrate not empowered to proceed under sub-section (1) has reason to believe that any person is likely to commit a breach of the peace or disturb the public tranquillity or to do any wrongful act that may probably occasion a breach of the peace or disturb the public tranquillity, and that such breach of the peace or disturbance cannot be prevented otherwise than by detaining such person in custody, such Magistrate may, after recording his reasons, issue a warrant for his arrest (if he is not already in custody or before the Court), and may send him before a Magistrate empowered to deal with the case, together with a copy of his reasons.

(4) A Magistrate before whom a person is sent under this section may in his discretion detain such person in custody until the completion of the inquiry hereinafter prescribed

(4) A Magistrate before whom a person is sent under sub-section (3) may in his discretion detain such person in custody *pending further action by himself under this Chapter.*

Change:—This section has been amended by sec. 16 of the Cr P. Code Amendment Act (XVIII of 1923).

The words "*if in his opinion there is sufficient ground for proceeding*" have been added with the object of preventing the Magistrate from proceeding upon any and every information. The words "*is informed*" in this section are too wide and the amendment, therefore, makes it incumbent on Magistrates to be satisfied, by some sort of inquiry, whether private or public, or by taking evidence whether in camera or in open Court, about the correctness and veracity of that information before they take any action. See the *Legislative Assembly Debates*, January 18, 1923, pp 1246-1254.

"We also recommend an amendment of section 107 (4), as we think that the powers conferred by the sub-section as it stands are unnecessarily wide. We think that it will be sufficient that the Magistrate should have power to detain the accused in custody '*pending further action by himself under this Chapter,*' and we have made this change."
—*Report of the Select Committee of 1916.*

229. Object of section:—The intention of this section is preventive and not penal—*Mahabir Gope v. Samratih Singh*, A.I.R. 1910 Pat. 252, 1910 P.W.N. 52. The object of this section is the prevention and not the punishment of offences.

It is intended, not to punish persons for anything that they have done in the *past*, but to prevent them from doing in the *future* something that may probably occasion a breach of the peace. Therefore, where offences *have been* committed the proper procedure is to institute regular trials for those offences, under the Penal Code, and not to take proceedings under this section—*Srikanta*, 1 C.L.J. 616, 2 Cr.L.J. 554, 9 C.W.N. 898; *Jiwan Singh*, 124 I.C. 706 AIR 1930 All. 408, 1930 Cr.C. 565, 1930 A.L.J. 866, Ind. Rul. 1930 All. 562, 52 All. 593, 31 Cr.L.J. 710; *Shadi Lal*, 12 Lah. 457, 32 Cr.L.J. 1207 (1210), 134 I.C. 585, A.I.R. 1931 Lah. 191, 32 P.L.R. 138, 1931 Cr.C. 311, Ind. Rul. 1931 Lah. 969; *Sett Sukhlal Karnani*, 39 Cr.L.J. 992, 178 I.C. 52, A.I.R. 1938 Cal. 583, 66 C.L.J. 564; *Babu Ram*, AIR 1932 Lah. 101 (103), 1932 Cr.C. 121, 33 P.L.R. 370. See also *Maruthapali Goundar*, AIR. 1937 Mad. 356, 1937 M.W.N. 48, 169 I.C. 97, 9 R.M. 685, 38 Cr.L.J. 699, 45 M.L.W. 308.

Proceedings under this section are proceedings for the preservation of the peace and not for the preservation of morals—*Om Radhe v. Emp.*, A.I.R. 1939 Sind 238 (240), 183 I.C. 460, 40 Cr.L.J. 803, 12 R.S. 55

Before a person is called upon to show cause why he should not execute a bond, it must be established, (a) that he is likely to commit a breach of the peace or disturb the public tranquillity or (b) to do any wrongful act that may probably occasion a breach of the peace or disturb the public tranquillity. It is the individual who is contemplated in the section and it is the individual act that must be brought home to him. The only case in which a person can be punished for the wrongs done by others is where he abets or instigates the offence. Failing that, no person in the world can be visited with any penalty for acts done by others on whom he has no control, and for whose conduct he cannot be held responsible. A person who holds a respectable position in the community and wields an enormous influence with its members, cannot be proceeded against under this section for acts done by the members of his community unless it is shown that he himself is likely to commit a breach of the peace or disturb the public tranquillity or to do any wrongful act that may probably occasion the breach of the peace or disturb the public tranquillity—*Mr. Abdul Qayum*, AIR. 1939 Lah. 363, 41 P.L.R. 318, 40 Cr.L.J. 901, 184 I.C. 279, I.L.R. 1939 Lah. 554, 12 R.L. 196

230. Information:—The information must be of a *clear* and definite kind, directly affecting the person against whom process is issued, and should disclose tangible facts and details, so that it may afford notice to such person of what he is to come forward to meet—*Jai Prakash*, 6 All. 26; *Prankrishna*, 8 C.W.N. 180; *Ainuddin*, 24 Cr.L.J. 230 (Cal.) When a Magistrate receives verbal communication from certain persons, he should make inquiry into the truth of the matter before he proceeds to take action thereupon. He cannot draw up proceedings under this section upon vague and general statements which do not amount to any direct accusation or allegation—*Grant*, 2 P.L.T. 669, 22 Cr.L.J. 745; *Nutanund*, 3 Lah.L.J. 480. The Oudh Chief Court, however, holds that there is nothing in this section which specifies what the nature of the information should be. Undoubtedly, a prudent Magistrate would not take action, unless the information gave sufficient details against the person in question; but there is nothing in this section laying down any *quantum* of information as a necessary condition for the Magistrate to take action. If he receives information of the barest kind to the effect that a certain person is a habitual thief, it is within his powers to take action under this chapter, and the legality of his action cannot be questioned—*Ram Ghulam*, 2 Luck. 157, 23 Cr.L.J. 744, AIR. 1927 Oudh 306

A Magistrate ought not to act under this section upon a statement by a private person not made on oath or solemn affirmation—*Jianji*, 6 B.H.C.R. 1; *Chamrao v. Kashi*, 8 W.R. 85; or upon hearsay evidence—*Mohan*, 21 Cr.L.J. 560 (Nag.); or upon conversation out of Court with persons, however, respectable—*Bahua*, 6 All. 132; or upon personal knowledge of certain facts which he obtains from sources outside the record—*Mathura*, 14 A.L.J. 769, 17 Cr.L.J. 484. But in acting under secs. 107, 108, 109, or sec. 110 of the Code the Magistrate does not, so long as he does not record

an order in writing in accordance with sec. 112 of the Code calling upon any person to show cause, act judicially. In those sections complete discretion is given to the Magistrate either to act or not to act on the information received by him. The discretion to issue a notice under sec. 112 in pursuance of an information received by him is absolute and uncontrolled by any conditions whatsoever. It is nowhere provided that the information contemplated by those sections must be information gathered from legal evidence, nor is there any provision as to the source from which the information may be received. The information may be conveyed to the Magistrate by a private individual or by an Officer of the Police. But in either case he is given a discretion to issue or not to issue a notice to the person against whom he has received the information to show cause why he should not furnish security for keeping the peace or to be of good behaviour—*Laxmi Narain*, 34 Cr.L.J. 42 (44), 140 I.C. 536, A.I.R. 1932 All. 670, 1932 A.L.J. 880, 1932 Cr.C. 822, 54 All. 1036, Ind. Rul. 1932 All. 668. The information which leads to action under sec. 107 may be of the most varied kind. It may be oral, sworn or not sworn, and need not be in writing. It may be from any source, official or unofficial, formal or informal. It may be derived from the Magistrate's own knowledge. He is not bound to disclose the source or the nature of the information received—*Anantapadmabhabhai*, A.I.R. 1930 Mad. 975 (976), 54 Mad. 422, 1930 M.W.N. 1100, 32 M.L.W. 784, 59 M.L.J. 914, 129 I.C. 70, 1930 Cr.C. 1191, 32 Cr.L.J. 217.

A police report is in itself a sufficient information on which a Magistrate may issue a summons, but it is in no sense evidence upon which he can determine under sec. 118 whether it is necessary to take a bond to keep the peace or for good behaviour—*Behari v. Mahomed*, 12 W.R. 60; *Brindaban*, 10 W.R. 41. A report of a subordinate Magistrate is credible information to authorise a Magistrate to pass a preliminary order under this section—*Jai Prakash*, 6 All. 26 (F.B.); but if unsupported by other evidence, it cannot form a sufficient ground for final adjudication under sec. 118—*Jivanji*, 6 B.H.C.R. 1; *Dalpatram*, 5 B.H.C.R. 105.

Where on the basis of a police report the Magistrate issued warning notices on both parties, it cannot be said that he, by issuing the warning order, became functus officio and could not pass an order for drawing up proceedings under this section against one party on the basis of the same police report because there is no provision in the Criminal Procedure Code whereby such warning order can be passed by him—*Abdul Mannaf v. Mahammad Nurulla Chaudhury*, A.I.R. 1929 Cal. 506, 31 Cr.L.J. 58, 120 I.C. 256.

But the Magistrate is not entitled to initiate proceedings upon facts and information which had already been the subject of inquiry under sec. 107, or in connection with charges under the Penal Code brought against the same persons, and which had ended in favour of the accused. Thus, where there has been a number of cases and proceedings going on for a long time between the parties, and in all these cases the persons accused of the offences were either discharged or acquitted and the proceedings under sec. 107 fell through, the Magistrate cannot initiate fresh proceedings under sec. 107 upon the same facts and information—*Konda Reddy*, 41 Mad. 246, 41 I.C. 990, 18 Cr.L.J. 878. See also *Satwaji*, 1933 M.W.N. 915; *Kutti Goundan*, A.I.R. 1925 Mad. 189 and *Rangaswami*, A.I.R. 1929 Mad. 842 (844), 118 I.C. 504, 30 Cr.L.J. 931, 2 M. Cr. C. 287, 1929 Cr.C. 610.

Inquiry:—Apart from the provisions of sec. 202, Cr. P. C., a Magistrate proceeding under Chap. VIII has the right to call for a report from the police before issuing a notice under sec. 112, Cr. P. C.—*Sanjivi Reddy v. Koneri Reddy*, 93 I.C. 8, 49 Mad. 315, 23 M.L.W. 327, 50 M.L.J. 460, A.I.R. 1926 Mad. 521; *Laxmi Narain*, 34 Cr.L.J. 42, 140 I.C. 536, A.I.R. 1932 All. 670, 1932 A.L.J. 880, 1932 Cr.C. 882, 54 All. 1036, Ind. Rul. 1932 All. 668; *Egambera Mudali v. Murugappa Chetti*, 2 Weir 51. For contra see *Hari Singh v. Jagta*, 111 I.C. 450, 29 Cr.L.J. 866, A.I.R. 1928 Lah. 691, 29 P.L.R. 666. There is nothing in the Code which forbids a Magistrate before whom information has been lodged for taking proceedings under this section, to refer

the matter to the police for preliminary enquiry and the contrary view taken in *Hari Singh v. Jagta*, supra, cannot be supported either on principle or authority—*Ismail v. Jagat Singh*, 40 Cr.L.J. 193, 179 I.C. 353, AIR 1938 Lah 861, 40 P.L.R. 579, 11 R. 1938 Lah. 640. Apart from the provisions of sec. 203, Cr. P. C., if a Magistrate is satisfied in the case of an application under sec. 107, Cr. P. C., after making an inquiry himself or through some other agency that the apprehension of a breach of the peace complained of does not exist, he need not make an order under sec. 112, Cr. P. C., and must refuse the application—*Shams-ud-din v. Ram Dayal*, 25 Cr L J 89, 76 I.C. 25, AIR 1924 Lah. 630.

231. "Likely to commit breach of the peace":—The information regarding past acts alone would not be enough to justify an order requiring a person to show cause why he should not be directed to furnish security for keeping the peace. Something more is necessary, viz., the likelihood of the commission in the near future of a particular breach of the peace or a wrongful act likely to lead to a breach of the peace—*Maruthapali Goundar*, AIR 1937 Mad 356, 1937 M.W.N. 48, 169 I.C. 97, 9 R.M. 685, 38 Cr L J 699, 45 M.L.W. 308; *Kumarappa Chettiar*, AIR 1938 Mad 213, 1937 M.W.N. 1072, 1937 M. Cr. C. 314. The information must contain evidence of some specific conduct on the part of the accused from which a reasonable and immediate inference can be drawn that the accused is likely to commit a breach of the peace, and it is only on information of this character that the Magistrate should initiate proceedings under this section—*Shadi Lal*, 12 Lah 457, AIR 1931 Lah. 191, 1931 Cr.C. 311, 134 I.C. 585, 32 P.L.R. 138, 32 Cr L J 1207 (1209); *Shimbu*, 21 P.R. 1888. Following the principle it was held that it was not sufficient to justify action against a person under this section when he caused mental excitement, without anything more, to a crowd, which was in an excited mood, by raising certain objectionable shouts—*Suraj Prakash*, 32 Cr L J 693, 131 I.C. 205, AIR 1931 Lah. 184, 1931 Cr.C. 304, Ind Rul 1931 Lah 445. The mere finding that the accused is a bad character and that it is not right in any way to leave him without a guarantee, is wholly insufficient to justify an order under this section—*Shimbu*, 21 P.R. 1888. Where the evidence on the record disclosed reliable statements that persons who were ordered to furnish security to keep the peace were men who had shown by their acts and general behaviour that their object was to disturb the public tranquillity (e.g., by wounding the religious feelings of the Muhammadans of a certain locality) it was held that the Magistrate was justified in making such order—*Chuni Lal*, 14 A.L.J. 430, 17 Cr L J 301.

The information must shew that there is a strong and reasonable probability of a breach of the peace and not merely a *bare possibility*—*Abdul Haq* 20 W.R. 57; *Malik Sultan v. Bano*, 1903 P.L.R. 115, *Chanbasawa* 6 Bom.L.R. 862. The act likely to cause a breach of the peace must be an impending one and not one likely to happen at some future time; it must be shewn to be in contemplation at the time of the information given; and the fact that a person has done a wrongful act in the past should not give rise to the inference that he is likely to do the same again—*Skutaram*, 6 Bom.L.R. 663, *Basdeo*, 26 All 190; *Shadi Lal*, supra; *Zaffar Beg*, AIR 1927 Pat 231, 103 I.C. 607, 28 Cr L J 719, 8 P.L.T. 370, *Mid Abdul Qayum*, AIR 1939 Lah 363, 41 P.L.R. 318, 40 Cr L J 901, 184 I.C. 279, 11 R. 1939 Lah 551, 12 R.L. 196. The act of which information is given and in respect of which security is required must be an act which is shown to be in contemplation at the time of the information given and not merely one a repetition of which may be expected or apprehended from past misconduct of the kind without anything further—*Maruthapali Goundar*, AIR 1937 Mad. 356, 1937 M.W.N. 48, 45 M.L.W. 308, 1937 M. Cr. C. 95, 169 I.C. 97, 38 Cr.L.J. 699, 9 R.M. 685, following *Queen v. Keder Khan*, 5 Mad. 380, 2 Weir 49. What must be proved in order to justify an order under this section is that the persons complained against are likely to break the peace in future. Mere proof of certain acts of violence in the past is not sufficient—*Kumarappa Chettiar*, AIR 1938 Mad 213, 1937 M.W.N. 1072, 1937 M. Cr. C. 314. The mere existence

of enmity between two persons or factions is no ground for instituting proceedings under this section against one or both the parties. In order to bring a case within this section it must be established that a breach of the peace is imminent—*Parman Ram*, 29 Cr.L.J. 417, 108 I.C. 517, A.I.R. 1928 Lah 243, 10 Lah L.J. 72, 29 P.L.R. 434. Thus, the mere fact that certain persons had made preparation for disturbing the specific tranquillity on the occasion of the last *Muharram* festival would afford no ground, after the festival has passed without the public tranquillity having been disturbed, for inferring that they would be likely to commit a breach of the peace or disturb the public tranquillity at the next *Muharram*, and would not be a sufficient ground for binding them over—*Basdeo*, 26 All 190; *Zulfakar*, A.I.R. 1927 Pat. 231, 8 P.L.T. 370, 103 I.C. 607, 28 Cr.L.J. 719. But security should be taken in a case where, though the occasion on which the ill-feeling between the parties (Hindus and Mussalmans) first came to a head, had passed without any actual disturbances, there still remained the probability of a recurrence of it in the near future, in fact at any moment—*Ayodha Prasad*, 8 A.L.J. 1080, 12 Cr.L.J. 493. All those cases referred to apprehensions of a breach of the peace arising out of religious differences between Hindu and Mahomedan communities. The decisions seem to have proceeded on their own facts and as pointed out by Das, J., in *Zulfakar*, *supra*, no hard and fast rule can be laid down in cases of this nature. It often happens that religious enthusiasm though acute at a particular moment subsides and no danger of breach of the peace remains. But the principle that to support an order for security it is incumbent on the Crown to show not only that there was a likelihood of a breach of the peace at some time past, but that this likelihood continued to the present date, does not apply to cases where claims are to immovable property and there is no indication that the party of the accused are likely to abandon their claims or to give up the intention of using violence in support of them—*Mahabir Gope v. Samrathi Singh*, A.I.R. 1940 Pat 252 (253), 1940 P.W.N. 52.

Under this section, it is sufficient to prove that there was some act committed by the accused from which there was a *danger* of a breach of the peace; it is not necessary to prove that the accused were guilty of some *overt* act towards a breach of the peace. An overt act causing a breach of the peace would be a substantive offence to be dealt with under the Indian Penal Code—*Jwan Singh*, 52 All 593, 1930 A.L.J. 866, 31 Cr.L.J. 710. For contrary view see *Joti Sarup*, 27 Cr.L.J. 1002, 96 I.C. 858, A.I.R. 1926 Lah 689, in which *Lachmi Singh*, 59 I.C. 374, 1 P.L.T. 681, 12 Cr.L.J. 86 and *Mohammad Yakub*, 6 I.C. 454, 32 All 571, 11 Cr.L.J. 355, 7 A.L.J. 644 were followed.

232. "Wrongful acts that may occasion breach of the peace":—

A person is liable to be dealt with under sec. 107 not only when he himself is likely to commit a breach of the peace, but also where for any wrongful act on his part other persons may do things which would probably occasion a breach of the peace—*Satindra Nath Sen*, 32 C.W.N. 477, 29 Cr.L.J. 844, 47 C.L.J. 441, 111 I.C. 396.

There are two distinct sets of circumstances in which a Magistrate may take action under sec. 107; *first*, where it appears that a person is likely himself to commit a breach of the peace or to disturb the public tranquillity, that is to say, by a direct act, *e.g.*, by committing an assault; and *secondly*, where a person may be the indirect cause of a breach of the peace or the disturbance of the public tranquillity by doing a certain act; but in the latter case the Magistrate may only take action where the act anticipated is a *wrongful act*. This section does not authorise action against a person who is expected to do an act which may cause a breach of the peace or disturb the public tranquillity unless that act is *wrongful*; and the mere fact that the doing of a lawful act by certain persons may lead to the commission of a breach of the peace by other persons, does not authorise the Magistrate to take action against the persons intending to do the lawful act, unless they are themselves likely to commit a breach of the peace or to disturb the public tranquillity—*Nga Ti v. Maung Kyaw*, 11 Bur L.T. 59, 18 Cr.L.J. 512; *Muhammad Yakub*, 32 All 571 (575), 6 I.C. 451,

11 Cr.L.J. 355, 7 A.L.J. 649; *Shadi Lal*, 12 Lah 457, AIR. 1931 Lah. 191, 134 I.C. 585, 32 P.L.R. 138, 32 Cr.L.J. 1207 (1209); *Khazan*, 7 Lah. 482, 27 Cr.L.J. 1063, 97 I.C. 39, AIR. 1926 Lah. 683, 27 P.L.R. 810; *Md. Abdul Qayum*, AIR. 1939 Lah 363, I.L.R. 1939 Lah. 554, 12 R.L. 196, 41 P.L.R. 318, 41 Cr.L.J. 901, 184 I.C. 279; *Babu Ram*, AIR. 1932 Lah. 101 (103), 1932 Cr.C. 121, 33 P.L.R. 370; *Desikachari*, AIR 1915 Mad 81, 25 I.C. 989, 15 Cr.L.J. 661; *Dindyal Mozumdar*, 34 Cal 935, 11 C.W.N. 1002, 6 Cr.L.J. 230. "Wrongful act" must mean some act wrongful according to some law. This section cannot be intended to authorize a Magistrate to take action to prevent lawful acts which may result in a breach of the peace because of the wrongful or unlawful acts of others. Clearly, the purpose of the section is to allow the law-abiding to follow their lawful avocations in peace and to prevent the law-breakers from committing wrongful acts. This section is intended to be applied against the wrong-doers and not also against the wronged. It was never the intention of the section that the wrong-doers and the wronged should be classed together as wrong-doers and made the subjects of a common complaint and common action. The collection or the acquiescing of collection of women for the purpose of religious instruction, discourse or songs, the meeting together of men and women for a joint satsang or meeting is no offence under the law nor is the education of children. The provisions of Chap VIII, Cr. P. C., are not intended and are not appropriate for the purpose of dealing with such a case—*Jasoda Lekhrao v. Emp.*, AIR 1939 Sind 167 (169), 40 Cr.L.J. 703, 182 I.C. 698, I.L.R. 1939 Kar 662, 12 RS 31.

Threats of violence are sufficient to indicate an intention to commit a breach of the peace and justify an order under this section—*Surya Kanta*, 31 Cal 350; *Kallu*, 27 All 92. So also, illegal collection of tolls accompanied with acts of violence and threats of violence in case of non-payment of tolls—*Bepin Behari*, 21 Cr.L.J. 651 (Cal); an abetment by instigation of the offence of voluntarily causing hurt in a public place is a wrongful act justifying an order under this section—*Barnes*, 23 Cr.L.J. 391 (Nag).

If disturbance is anticipated regarding holding of rival *hats*, the proper procedure would be to act under this section. See Note 373.

The words 'wrongful act' mean an act forbidden or declared to be penal or wrongful by the criminal law, and not a mere improper act. The killing of a dedicated bull for the sake of his meat is not a 'wrongful' act—*Pir Ali*, 21 Cr.L.J. 453, 56 I.C. 437, AIR. 1920 Pat 550. See also *Romesh Chunder Sanjal v. Hiru Mondal*, 17 Cal. 852.

Under certain limitations the slaughtering of kine by Muhammadans is not illegal. It is the legal right of every person to make such use of his own property as he may think fit, provided that in so doing he does not cause real injury to others or offend against the law, even though he may thereby hurt the susceptibilities of others. The right of Muhammadans to slaughter kine is one to which they are entitled irrespective of custom, and it is only when they abuse the right that its exercise can be interfered with—*Shahbaz Khan v. Umrao Puri*, 30 All 181 (187). The fact that a Mahomedan in the exercise of his legal right to kill cows may perhaps give offence to his Hindu neighbours and induce them to commit a breach of the peace is no ground for binding over Mahomedans. Where, therefore, two cows were sacrificed so quietly and secretly in a mosque and in a private house that the Hindus did not know of them until the report was made, the Mahomedans concerned were held to be not liable to be bound down—*Mahomed Yaqub v. Emp.*, 32 All 571, 6 I.C. 454, 11 Cr.L.J. 355, 7 A.L.J. 649. But where a cow was sacrificed within sight of the *abads* of a village in an open space and under a pipal tree near a public thoroughfare within sight of the non-Muslim inhabitants, although there was a slaughter-house in the neighbourhood which was not availed of, with the deliberate intention of wounding the religious feelings of the non-Muslim inhabitants, the act was certainly a wrongful act provoking a breach of the peace—*Ibrahim v. Emp.*, AIR 1937 Lah. 717, 39 P.L.R. 179, 171 I.C. 950.

If there is a dispute between the parties regarding the performance of *Puja* of an Idol leading to a breach of the peace, proceedings may be drawn up under this section—*Surendra v. Shoshi*, 42 C.L.J. 127 (130), 52 Cal. 959, 92 I.C. 223, A.I.R. 1926 Cal. 437, 27 Cr.L.J. 239

The blowing of a conch in connection with ceremonial acts of worship in accordance with established usage, in a place fixed for the occasional or periodical performance of such ceremonies or worship, will not as a rule be a wrongful act, even though there may be persons within hearing of the sound who find their religious feelings hurt in consequence. Where the Hindus commenced to perform ceremonies involving the blowing of a conch in a place in no way set apart for the purpose, and where no such ceremonies had hitherto been performed, and they did it with the deliberate intention of triumphing over, insulting and wounding the religious feelings of their Muhammadan neighbours, their acts were wrongful and this section applied—*Emp v. Murl Singh*, 33 All. 775, 13 I.C. 922, 13 Cr.L.J. 170. See also *Ibrahim v. Emp*, supra. The fact that a person does a lawful act in a lawful manner and if by so doing he has injured the susceptibilities of a person of a different faith, would not in itself be sufficient to warrant proceedings against him under this section—*Nihal Chand*, 120 I.C. 427, A.I.R. 1929 Lah. 138, 31 Cr.L.J. 75; Ind. Rul 1930 Lah. 59; *Babu Ram*, 34 Cr.L.J. 478, 142 I.C. 796 A.I.R. 1932 Lah. 101, 1932 Cr.C. 121, 33 P.L.R. 370, Ind. Rul. 1933 Lah. 301.

The following are not 'wrongful acts' under this section:—

(a) Singing of ballads in open streets, although leading to an obstruction in the street by crowds collecting to hear the same is not a wrongful act—*Ghulam Nabi*, 1889 P.R. 13;

(b) the grant of leases to tenants by the owner who is entitled to possession but is wrongfully kept out of possession, and the taking of possession by the lessee peacefully and without using violence, are not wrongful acts—*Driver*, 25 Cal. 708;

(c) use of the word 'Amen' in a loud voice in prayers in a mosque—*Khuda Baksh*, 1902 P.R. 15; *Ramzan*, 7 All. 461; *Ataulla v. Azimulla*, 12 All 494; *Jangu v. Amanulla*, 13 All 419; *Abdur Rahman*, 8 O.L.J. 282, 22 Cr.L.J. 590, 62 I.C. 830;

(d) stopping the services of village barber and washerman being rendered to the complainant—*Sk. Jinaut v. Sk. Rhusen*, 7 C.W.N. 32; see also *Kashiram Hazari v. Asaram*, A.I.R. 1929 Nag 328, 31 Cr.L.J. 20, 1929 Cr.C. 532, 120 I.C. 215;

(e) the opening of a cattle market by persons on their own land not far from an already existing cattle market—*Mahu*, 16 A.L.J. 279, 19 Cr.L.J. 437;

(f) mere use of idle threats and bombast—*Chinnathambi*, 9 M.L.T. 271, 12 Cr.L.J. 104;

(g) *Sahukar's* threat to get the *Zamindars* imprisoned as they would not pay their debts, for debtors can be imprisoned in execution of decrees—*Ram Kishen*, 33 Cr.L.J. 915, 140 I.C. 91, Ind. Rul. 1932 Lah. 684, 33 P.L.R. 935, A.I.R. 1933 Lah. 36, 1933 Cr.C. 116;

(h) drawing water from the public well by *chamars* inspite of opposition—*Khazan Chand*, 97 I.C. 39, A.I.R. 1926 Lah 683, 27 Cr.L.J. 1063, 7 Lah 482, 27 P.L.R. 810.

(i) boycotting servants of zamindar by tenants when they did nothing from which it might be apprehended that they were likely to cause a breach of the peace—19 I.C. 334, 14 Cr.L.J. 238.

The Magistrate should have tangible evidence that some definite wrongful act is contemplated, which act, if committed, is likely to occasion a breach of the peace; therefore, the fact that the accused had attempted to get up false cases and that he would probably continue to do so, is not a ground of action under this section—*Badhaua*, 64 P.R. 1887. So also, merely being on bad terms with others (*Balajee*, 7 C.P.L.R. 9) or being a quarrelsome, head-strong and contumacious person (*Shimbhu*, 21 P.R. 1888) is neither a definite wrongful act, nor an act likely to cause a breach of the peace. So also, the mere fact that enmity exists between two parties does not entitle the

Magistrate to bind down either party—*Sher Khan*, 12 Cr L J 186, 1911 P L R. 126; *Narendra*, 1 A L J. 418; *Parman*, 29 P L R 434, 29 Cr L J. 417.

233. Acts which amount to an exercise of lawful rights are not to be treated as wrongful acts necessitating an order under this section—*Din Dayal*, 34 Cal 935; *Bepin*, 21 Cr L J. 651 (Cal). The preventive jurisdiction of a Magistrate under this section must be exercised with caution. Where its exercise may undoubtedly lead to the infringement of an undoubted civil right, where an obligation which the law of the country imposes, becomes incapable of being enforced owing to the exercise of such a jurisdiction, and where the breach of the peace apprehended by the Magistrate is a likely result of the enforcement of his legal right by a party in a legal way and the illegal denial of the corresponding obligation by the other party, the Magistrate ought not to bind down the party who has the legal right in him—*Din Dayal*, 34 Cal 935 (938); *Nga Ti v Maung Kyaw*, 11 Bur L T. 59, 18 Cr L J 512; *Thaker Singh*, 8 Lah 98, 27 P L R 599, 27 Cr L J. 1094.

If a person considers himself entitled to get immediate possession of lands and goes there to take possession, then his action is perfectly lawful and in a case of this nature it would not be right to take action against him under sec. 107, Cr P Code. But, on the other hand, if with a view to take possession, he goes to the lands taking with him an armed body of men, and threatens the tenants and forces them to pay rent to him, the Magistrate is certainly within his jurisdiction to take proceedings against him under this section—*Nisar Husain*, 35 Cr L J 809, 148 IC 899, 11 OWN 501, A I R 1934 Oudh 148, 1934 Cr C 575 A I R 1934 Oudh 179, 9 Luck 651.

Where the act which a person intends to commit, is lawful in itself, there is no reason for demanding security from him under sec. 107, even though his act is likely to induce his opponents to commit a breach of the peace. In such a case, it would be more reasonable to take proceedings against those who are expected to commit the breach of the peace and offer violence to law-abiding citizens—*Khazan Chand*, 7 Lah 482, 27 P L R 810, 27 Cr L J 1063. Thus, it is not unlawful for a *chamar* to draw water from a public well, and he cannot be called upon to give security simply because his act of drawing water from the well is objected to by certain persons and is likely to lead to a breach of the peace—*Khazan Chand* (supra). The right of protection of lawful possession is a lawful right which may properly be exercised not only to resist any lawful attempt to interfere with the possession but also to defend oneself, if it becomes necessary in the process. Where, therefore, the lawful possession of the accused had more than once been threatened by a show of armed force, and he had collected a body of men armed with *lathis* and posted them on the property to resist any violence or interference with his possession, it was held that as the intention was to maintain an existing right, the accused was justified in adopting measures for the defence of his possession, and that as there was no likelihood of a breach of the peace from his side, there was no reason either for punishing him or binding him over in security—*Janki Prasad*, 18 A L J 157, 21 Cr L J 337. Since a joint owner is entitled to improve the joint property, no security can be demanded from him on the ground that his persistence in improving the joint property is likely to lead to a breach of the peace, it being probable that such breach will be committed by his brothers—*Thaker Singh*, 8 Lah 98, 27 L L R 599, 27 Cr L J 1094 (1095). Where a party has the right to take a procession along a particular road, he cannot be bound down under this section because other persons object to his doing so and he insists on taking the procession along that road. The proper course is to bind down the other persons—*Feroze Ali*, 12 C W N 703, 7 Cr L J 504. See also *Nihal Chand*, 120 IC 127, A I R 1929 Lah. 138, 31 Cr L J 75, Ind. Rul. 1930 Lah. 59. But see *Satindra Nath Sen*, 32 C W N. 477, 29 Cr L J 844, 47 C L J 441, 111 IC. 395. See also Note 373A.

Where one of several co-sharer landlords sought to make a measurement of land contrary to the provisions of secs. 90 and 188 of the Bengal Tenancy Act, the other co-sharer landlords would be justified in objecting to the survey, and where no force

was used by them they ought not to be bound down to keep the peace—*Bhabataran v. Bankutesh*, 9 C.W.N. 618. Where there was already a cattle-market and certain persons intended to open another cattle-market on their own land, not far from the old market, and the Magistrate apprehending that there would be a breach of the peace consequent thereon, bound over those persons to keep the peace, the order of the Magistrate was illegal—*Mahu*, 16 A.L.J. 279, 19 Cr.L.J. 437.

But where there are doubts as to the existence of the respective rights and obligations of the parties (*i.e.*, as to who is acting legally in the exercise of his rights and who is not) the proper procedure is to bind down *both parties* (until their rights and obligations have been determined by a proper tribunal), so that the order of the Magistrate may not be detrimental to either—*Dindayal*, 34 Cal. 935 (938); *Musaheb Soudagar v. Nidhi Ram*, 8 P.L.T. 645, 28 Cr.L.J. 605. Where, however, no doubt exists, the party in the wrong should be bound down and prevented from illegally exercising an alleged claim. An attempt to ascertain legal rights of parties should always be made by the Magistrate before he binds down one or the other party under this section—*Din Dayal*, 34 Cal. 935 (938).

234. Dispute relating to immoveable property:—Where there is a dispute relating to possession of immoveable properties, the proper procedure is to take action under sec. 145 and to decide the dispute as to possession once for all so far as the Criminal Courts are concerned—*Raghunath v. Prem Narain*, 12 P.L.T. 535, 32 Cr.L.J. 1014 (1016), Ind. Rul. 1931 Pat. 321, 133 I.C. 161, 1931 Cr.C. 795 A.I.R. 1931 Pat. 347; *Balajit v. Bhoju*, 35 Cal. 117 (119); *Mahadeo v. Bishu*, 25 All. 537; *Baishnab Das*, 12 C.W.N. 606; *Muthia*, 36 Mad. 315 (321); *Driver*, 25 Cal. 798; *Amanat Ali*, 10 P.L.T. 639, 30 Cr.L.J. 492, 115 I.C. 545. But the mere fact that the dispute relates to possession of immoveable property, does not preclude the Magistrate from taking proceeding under sec. 107. The Magistrate has a discretion to proceed under sec. 107 or under sec. 145—*Sheoraj v. Chatter*, 32 Cal. 966 (968); *Abbas v. Emp.*, 39 Cal. 150, 14 C.L.J. 429, 12 Cr.L.J. 569, 12 I.C. 833, 16 C.W.N. 83 (88) (F.B.); *Thakur Pande*, 34 All. 449 (451), 9 A.L.J. 582, 13 Cr.L.J. 526, 15 I.C. 798; *Raghunath v. Prem Narain*, *supra*; *Muthia*, 36 Mad. 315 (320); *Ramacharlur*, 26 Mad. 471 (472). But at the same time it should be borne in mind that if the Magistrate proceeds at all under sec. 107, the proper order is to bind down *both* the parties, so as not to give an unfair advantage to one party as against the other—*Raghunath v. Prem Narain*, *supra*; *Musaheb v. Nidhi Ram*, 102 I.C. 781, A.I.R. 1927 Pat. 314, 8 P.L.T. 645, 28 Cr.L.J. 605; *Baishnab Das*, 12 C.W.N. 606, 7 Cr.L.J. 403; *Amanat Ali*, 10 P.L.T. 639, 30 Cr.L.J. 492, 115 I.C. 545, A.I.R. 1929 Pat. 67. It is not proper to proceed against one of the parties and bind him down, leaving the other party free without determining the question of possession. The proper course is to bind down the party who is proved not to be in possession—*Amanat Ali*, *supra*; *Raghunath v. Prem Narain*, *supra*; *Dolegobind v. Dhanu*, 25 Cal. 559; *Driver*, 25 Cal. 798; *Muthia*, 14 Cr.L.J. 559, 21 I.C. 159, 36 Mad. 315 (320); *Din Muhammad*, 35 Cr.L.J. 963, 148 I.C. 1078 A.I.R. 1934 Pesh. 21, 1934 Cr.C. 522. See also 49 I.C. 612, 63 I.C. 829, 95 I.C. 465 and 7 A.L.J. 1161 (1163).

In the case of a *bona fide* dispute likely to cause a breach of the peace existing between two parties relating to a fishery right, the proper section to proceed under for preventing a breach of the peace is sec. 145, Cr. P. Code and not sec. 107. The words of sec. 145 are mandatory while those of sec. 107 are discretionary—*Balajit v. Bhoju*, 35 Cal. 117, 12 C.W.N. 487, 6 Cr.L.J. 398, 6 C.L.J. 697, following *Dole Govind v. Dhanu*, 25 Cal. 559. The provisions of sec. 145, Cr. P. Code offers the Magistrate the best means of settling the dispute between the two parties. But in view of the Full Bench decision in the case of *Abbas v. Emp.*, it is not open to the High Court to say that the Magistrate must proceed under sec. 145 and not under sec. 107, Cr. P. Code—*Amulya Charen v. Amrita Lal*, 24 C.W.N. 1075 (1076).

If the dispute relating to possession of land is not *bona fide*, *i.e.*, if one party is clearly in possession of property and another party wrongfully and without any claim

to possession seeks to eject him by force from the possession of the land and a breach of the peace is imminent, there cannot be said to be a *bona fide* dispute about possession within the meaning of sec 145, and the Magistrate is justified in taking action under sec. 107—*Rambaran*, 28 All 406; *Lachmi*, 1 P.L.T. 681, 22 Cr.L.J. 86; *Shama Churn*, 6 P.L.T. 766, 26 Cr.L.J. 1562, A.I.R. 1925 Pat 610, 90 IC 442; *Saddique v. Mohd*, 32 Cr.L.J. 208, 129 IC. 85, A.I.R. 1930 Pat 556, 1930 Cr.C 1110, Ind Rul 1931 Pat 69. When one party is clearly in the wrong and threatens to usurp the rights of another, who is in actual possession of the land in dispute, the proper remedy is an order under section 144 or 107, Cr. P. Code. In such a case section 145, Cr P Code has no application as there is no dispute as to the possession of land—*Shebalak Singh v. Kamaruddin Mandal*, 2 Pat 94 (104) (FB), following *Kali Prasad Gope v. Dodhai Gope*, 62 IC 590 and *Nandkishore Sao v. Bikan Singh*, 65 IC. 856. Where one of the parties threatens to use violence to the other party if the latter should go upon the land of which the latter is in possession, an order under sec 107 binding down the former would be proper—*Jafar v. Jaribulla*, 9 CWN 551. If it is probable that the parties to a land dispute will break the King's peace before the decision of the Civil Court can be given, that danger can be guarded against by an order under sec 107 in an appropriate case—*Mallappa*, 28 Bom LR 488, 27 Cr.L.J. 734 (735), 95 IC 62. A Magistrate has discretion when there is an apprehension of a breach of the peace to choose either sec 145 or sec 107. It must be left to his discretion which particular section he chooses. Generally speaking, if the dispute arises immediately after the delivery of possession by the Civil Court and is between the parties to that delivery of possession, the more appropriate step will be to bind down under sec 107 Cr P Code the party who has been dispossessed by the Court. But if the delivery of possession is an old one or the dispute is between a man who has been given possession and a man who was not dispossessed by the Court, a proceeding under sec 145 Cr P Code will be more suitable—*Rajendra Narayan v. Chintamani*, A.I.R. 1939 Pat 151 (152), 1938 PWN 526, 19 PLT 632, 40 Cr.L.J. 339, 180 IC 322.

The High Court should be astute not to interfere with the exercise of his discretion by the District Magistrate in respect of the powers conferred on him by statute, enabling him to ensure the peace of his district, he should exercise in a particular case. He is necessarily in a better position to say which of those powers is called for by the situation confronting him at the crucial moment. It is enough that the action which he is taking is not illegal or definitely improper. The High Court ought not to quash proceedings under sec 107, Cr P C, even if it should be possible to predicate later on (as opposed to initiation months ago) that a proceeding under sec 145, Cr P Code might eventually give better results—*Hanhar*, 36 Cr.L.J. 257, 152 IC 1050, A.I.R. 1934 Pat 463, 1934 Cr.C 1069.

An order under sec 107 is no bar to a subsequent proceeding under Chapter XII—*Bainsab v. Gatmath*, 39 Cal 469, 16 CWN 384, 13 Cr.L.J. 142, 13 IC 830, *Ram Lochun*, 36 All 143, 12 A.L.J. 162; *Nasiruddin v. Gofuruddin*, 21 CWN 160, 18 Cr.L.J. 129, 37 IC 481. Whether, after proceeding under sec 107, it would be proper for a Magistrate to act under sec 145 must depend upon the circumstances of each case as it arises—*Abbas*, 39 Cal 150, 12 IC 833, 16 CWN 83 (88) (FB). Where a Sub-divisional Magistrate has instituted proceedings under Chap VIII, Cr P Code it is open to his successor to order these proceedings to be kept pending and to institute proceedings under Chap XII, which he considers more appropriate to the facts and circumstances of the case as they exist at the time when he makes the order—*Lachmandas Sanualdas v. Sahibdas Budho Chhara*, 37 Cr.L.J. 1035 164 IC 912, A.I.R. 1935 Sind 147, 29 S.L.R. 443. Similarly an order under sec. 145 is no bar to the passing of an order under sec. 107, on the same facts, if the Magistrate is satisfied that notwithstanding the order under sec 145, one of the parties is likely to take the law into his own hands—*Muthia* 36 Mad 315 (321), *Bardi* 21 OC 21, 22 Cr.L.J. 381. But there cannot be simultaneously two proceedings, one under sec.

107 and the other under sec. 145, Cr. P. C., upon the same materials—*Udit Narayan*, 1917 Pat.H.C.C. 216

But it is illegal to institute proceedings under one section and to pass an order under another. Thus, where the Magistrate instituted proceedings under sec. 145, and apprehending a disturbance of the peace, ordered a party to furnish security under sec. 107, it was held that the order was illegal and without jurisdiction—*Sat Deo*, 14 A.L.J. 791, 17 Cr.L.J. 527. Similarly, where a Magistrate proceeded under sec. 107 and concluded the proceedings thereunder but subsequently passed an order under sec. 145, held that the order of the Magistrate was *ultra vires*—*Mahadeo v. Bisu*, 25 All 537 (540); *Sahdeb v. Jumon*, 19 Cr.L.J. 320 (Pat.).

If, owing to a dispute relating to immoveable property, proceedings are taken under sec. 107, instead of under sec. 145, the Magistrate cannot pass an order of *attachment of property* (which order can be passed only under sec. 146)—*Ram Sarup*, A.I.R. 1924 Oudh 345, 25 Cr.L.J. 350; *Emp v. Arakswami*, 35 Cr.L.J. 991, 30 N.L.R. 298, 149 I.C. 429, A.L.R. 1934 Nag. 147, 1934 Cr.C. 571, A.I.R. 1934 Nag. 142.

See Notes 388 and 437.

235. Who can be bound down:—Only the person who is himself likely to cause a breach of the peace (and no other) can be bound down under this section; it is illegal and contrary to the provisions of this section to take recognisance from the person in order to prevent another from committing a breach of the peace—*Ram Coomar v. Rajagopal*, 17 W.R. 54; *Kashi Chandra v. Hur Kishore*, 19 W.R. 47. Thus, the mere fact that a dispute exists between two rival Zemindars, would not justify proceedings being taken against all their officers and servants, unless there are materials to show that they are all likely to commit a breach of the peace. It may be that they are all interested in the dispute between their masters—and in one sense all the members of the Zemindar's family are interested in a dispute relating to a property comprised in the zemindary—but that by itself would be no ground for taking proceedings against them all—*Ainuddin*, 24 Cr.L.J. 230, A.I.R. 1922 Cal. 97, 71 I.C. 694. Where there were old standing feuds between the parties, but the Magistrate finding no evidence against them, discharged them but bound down their servants, held that the order was illegal and without jurisdiction—*Din Dayal*, 23 A.L.J. 300, 26 Cr.L.J. 981, A.I.R. 1925 All. 413. In whatever capacity persons might have done wrongful acts which might probably occasion a breach of the peace or disturb the public tranquillity, they are liable to be proceeded against under this section, and cannot escape the liability for their acts by pleading or showing that they acted as servants in obedience to the orders of their employer and not as individual member of society—*Srikantha*, 9 C.W.N. 898 (909), 2 Cr.L.J. 554. But see *Hari Telang*, 27 Cal. 781, 4 C.W.N. 531.

The mere fact that the patwari threatened to use violence does not justify the Magistrate in starting proceedings against the proprietor and manager on the presumption that the latter must have acquiesced in the action of the patwari—*Grant*, 2 P.L.T. 669, 22 Cr.L.J. 745, 61 I.C. 137. But the master would be liable if he actually acquiesced in the servant's acts. Thus, where the master, a *panda* of Gaya, used to send his servant, always armed with a *lathi*, to the Railway station for procuring pilgrims, and this led to a contest with a rival *panda* resulting in disturbance of the public peace, it was held that this was sufficient to make the master liable under this section. The fact that master himself did not go to the Railway station but always remained in his house, was no bar to the application of this section—*Balalal*, 1 P.L.J. 361, 18 Cr.L.J. 374.

See also Notes 233 and 234.

Joint trial of several persons:—See Note 290 under sec. 117.

Compensation:—See Note 806.

Revival:—See 33 Mad. 85, 36 Mad. 315 in Note 1097.

Transfer:—See Notes 598, 601 and 603.

236. Evidence:—A Magistrate dealing with proceedings under this section must base his judgment upon evidence relevant to the case. He should not rely upon his knowledge of certain facts which he obtains from sources outside the record—*Mathura*, 14 A.L.J. 769, 17 Cr.L.J. 481. Where the order is passed against more persons than one, there must be definite evidence in the case of any and every person that there is a danger of a breach of the peace by him. The mere fact that a collective body of persons are indulging in feelings of hostility against another body of persons is insufficient—*Shambhu*, 38 All 468, 14 A.L.J. 656, 17 Cr.L.J. 400.

Where the trial Court has admitted as evidence of the past conduct of accused and their disposition to use violence santhas or reports made by several of the prosecution witnesses on various dates in the absence of the accused, it is no doubt correct to say that these santhas are not substantive evidence of the matters mentioned in them, but they are admissible under sec. 157, Evidence Act, to corroborate what the witnesses have testified to in Court—*Mahabir Gope v Samratu Singh*, A.I.R. 1940 Pat. 252, 1940 P.W.N. 52.

Defence witness—In a case under this section it has been held that the Magistrate must issue summonses for the attendance of the witnesses for the defence unless he takes the responsibility of recording his ground for refusing the application for any of the reasons specified in sec 257, Cr P C—*Nand Lal*, 32 Cr.L.J. 620, 130 IC 816, A.I.R. 1931 Lah 56, 31 P.L.R. 949, 1931 Cr.C. 120.

Consent of accused to be bound down—The fact of likelihood of a breach of the peace must be established by independent evidence. In the absence of evidence to prove that the accused was likely to commit a breach of the peace, the accused's own statement before the Magistrate that he is willing to give security, would not justify an order being passed under this section—*Jagdat*, 21 Cr.L.J. 176, 51 IC 784 (All.); *Sheodan*, 1915 P.R. 24, 16 Cr.L.J. 784, 31 IC 384 A.I.R. 1915 Lah 82; *Prem Singh*, 1917 P.R. 27, 18 Cr.L.J. 847, 41 IC 671, A.I.R. 1917 Lah 304; *Ujagar*, 10 Lah 155, A.I.R. 1929 Lah 504, 30 Cr.L.J. 839, *Palaniappa Asari*, 34 Mad 139, 6 IC 682, 11 Cr.L.J. 393; *Mulchand*, 26 IC. 653, 37 All 30, 12 A.L.J. 1262, 16 Cr.L.J. 61; *Ram Charan*, 27 Cr.L.J. 370, 92 IC 882, 24 A.L.J. 317 A.I.R. 1926 All 614, *Joti*, 25 Cr.L.J. 710, 81 IC 198, A.I.R. 1925 Lah 135, 20 Cr.L.J. 105; *Prabhudas*, 21 Cr.L.J. 656 (Nag), 57 IC. 672; *Karam*, 23 C.L.J. 175, 65 IC 639 (Lah), *Ram Chandra*, 35 Cal 674, 8 Cr.L.J. 628; *Chandra Sekhar*, 21 Cr.L.J. 59, 54 IC 411 (All). In recent Allahabad cases it has been held (dissenting from the above rulings) that where the persons called upon to furnish security appeared in Court and expressed their willingness to be bound over, whereupon the trial Court took no evidence and passed an order against them, the consent of the accused must be taken to be a plea of guilty and the order for security was rightly passed—*Ghariba*, 46 All 109, 21 A.L.J. 882, 25 Cr.L.J. 750; *Nasir Ahmad*, 50 All 120, 25 A.L.J. 819, 102 IC 897, A.I.R. 1927 All 509, 28 Cr.L.J. 609; *Kishan Narain*, 112 IC 774, 26 A.L.J. 312 Ind. Rul. 1927 P.W. 73, A.I.R. 1928 All 270, 50 All 599, 30 Cr.L.J. 6 (9); *Sadhu* 36 Cr.L.J. 1212, 157 IC 755, A.I.R. 1935 Pesh 116, 1935 Cr.C. 931. The view taken in *Nasir Ahmad* case seems to be sound—32 C.W.N. cvv. But in one case an expression of *guilt* was

to give security amounts to a plea of guilty. Where the accused in their joint written statement clearly admitted that the complainant had apprehension that the accused would commit a breach of the peace and that they were willing to give security and the Magistrate took further precaution and examined each accused separately and asked him if the allegations made by the complainant against him were correct and the reply given by each accused was that he admitted his guilt and was willing to give security and execute a bail bond, this itself was evidence on which a Magistrate could convict. When an accused called upon to give security for keeping the peace, says in terms that no prosecution evidence may be recorded and is willing to give security, it is sufficient proof that this is necessary for keeping the peace that he should execute a bond. The Magistrate had previous information on which he issued notice under sec 107 Cr P. Code and the willingness of the accused to give a bond substantiated that information and proved its truth. This is a full enquiry as laid down in sec 117, cl (2) Cr P Code in the manner directed in Chap XX of the Code—*Dukhi v Emp.*, 38 Cr L J 302, 166 I.C. 850, 1937 O.W.N. 133, 1937 O.L.R. 62, 9 R.O. 341, A.I.R. 1937 Oudh 289, 1937 A.Cr C 31.

See also Notes under para 286

Reference to Sub-Magistrate or to Police:—The power to taking action under sec 107 is a discretionary power, and there is nothing irregular to a Magistrate calling for a report from a subordinate Magistrate before issuing notice under sec. 112, especially if he doubts whether the information before him is reliable—*Egambara v. Murugappa*, 2 Weir 51. It is open to a Magistrate to refer a petition under sec 107 to a police-officer for investigation—*Sanjivi v. Koneri*, 49 Mad 315, 50 M.L.J. 460, A.I.R. 1926 Mad. 521.

237. Sub-section (2)—Local jurisdiction:—In order to give the Magistrate jurisdiction over a person, it is not necessary that such person should permanently or habitually live within his jurisdiction. It is sufficient if at the time when the Magistrate receives information and takes proceedings under this section, the person temporarily resides within his jurisdiction—*Shama Churn v. Katu Mandal*, 1 C.W.N. 129, 24 Cal 314; *Ullah Khan*, 22 Cr L J 109, 59 I.C. 413 (All.). Under the clear wording of the section proceedings cannot be taken against the accused unless they are within the local limits of the Magistrate's jurisdiction. So that it is clear that when proceedings are initiated, it must be shown that the accused were within the jurisdiction of the Magistrate. It would be quite sufficient if they were temporarily present within the jurisdiction at the time the proceedings were taken. Temporary presence merely at the time of occurrence would not give jurisdiction to a Magistrate. But sub-sec. (2) of this section is obviously intended to provide for cases where the accused, although living outside the jurisdiction, is alleged to have come temporarily within the jurisdiction in order to commit offences. In such cases the proper course as to initiating proceedings under this section is that they should be initiated by the District Magistrate—*Hriday Nath Roy v. Emp.*, 41 C.W.N. 1091 A.I.R. 1937 Cal 520, 171 I.C. 335, 66 C.L.J. 177, 38 Cr L J. 1078. See also *Syed Ali v. Emp.*, 39 Cr L J. 810, 176 I.C. 784, 11 R.N. 79, A.I.R. 1938 Nag. 448. The terms of this sub-section do not authorise a Magistrate to bind over a person residing *outside* the limits of his district, concerning whom he has received information that such person is likely to commit a breach of the peace within his district—*Jaiprakash*, 6 All. 26 (F.B.); *Abdul Aziz*, 14 All 49; *Rajendra*, 11 Cal 737; *Dinonath v. Girija*, 12 Cal. 133; *Krishnaji*, 23 Bom. 32; *Mahangu Lal*, 36 Cr L.J. 580, 154 I.C. 873, A.I.R. 1935 Pat 131, 1935 Cr.C. 331. The proper course in such a case is to cause information to be given to the Magistrate within whose district that person resides, in order that proceedings might be taken by that Magistrate—*Rajendra*, 11 Cal. 737; *Pratap Sing*, 35 P.L.R. 341.

A person may be within the limits of Magistrate's jurisdiction and yet he may not have residence within such limits. At the same time to hold that a person 'is' within the local limits of a Magistrate's jurisdiction only because he is present in Court

when the Magistrate draws up his order under sec. 112, Cr. P. C., having appeared in obedience to a summons issued by the Magistrate, is to make the section nugatory—*Hamid Hasan*, 33 Cr.L.J. 230, 136 I.C. 72, 54 All 341, A.I.R. 1932 All. 162, 1932 Cr.C. 172, 1932 A.L.J. 211, Ind. Rul. 1932 All. 120. But even a stay for a day would justify proceedings under this section—*In re S. R. Varadarajulu Naidu*, 35 Cr.L.J. 626, 148 I.C. 226, 39 M.L.W. 215, 6 R.M. 449, A.I.R. 1934 Mad. 255, 66 M.L.J. 420, 1934 M.L.W.N. 404, 1934 Cr.C. 475, following *Krishnaji Pandurang Joglekar*, 23 Bom. 32 (35).

If, however, a Magistrate proceeds under this section against a person not residing within the local limits of his jurisdiction, and no objection is taken in the trial Court to his jurisdiction and no prejudice is caused, the irregularity is cured by sec. 531—*Ram Deo*, 27 Cr.L.J. 1132, 97 I.C. 652, A.I.R. 1926 All 767, 25 A.L.J. 44, 49 All 228.

When a proceeding under this section in the Court of a Sub-divisional Magistrate is transferred to the Court of a first class Magistrate at Sadar, he can include in the proceeding names of persons who were not included by the Sub-divisional Magistrate in the proceeding and who did not reside in the Sadar jurisdiction—*Golam Rahiman v. Kals pada*, 33 Cr.L.J. 858, 139 I.C. 850, 36 C.W.N. 796, A.I.R. 1932 Cal. 861, 1932 Cr.C. 888, 59 Cal 1484, Ind. Rul. 1932 Cal. 663.

Special powers of Chief Presidency and District Magistrate—Sub-section (2) gives special powers to Chief Presidency and District Magistrates to proceed against persons outside jurisdiction. Therefore, where a District Magistrate is satisfied that a breach of the peace is apprehended within the local limits of his district, the fact that the accused is living outside such limits in a Native State does not take away his jurisdiction to pass an order under this section—*Sheo Baran*, 20 A.L.J. 523, 23 Cr.L.J. 396. But the District Magistrate cannot delegate this special power to a subordinate Magistrate. Thus, a Sub-divisional Magistrate cannot, on the direction of a District Magistrate, draw up proceedings under this section against a person residing in another jurisdiction; in such a case the proceedings must take place and be brought to a conclusion before the District Magistrate himself—*Nirbeekar*, 13 C.W.N. 580, 9 Cr.L.J. 148, 1 I.C. 78. A District Magistrate is not competent to make over the initiation of proceedings under this section to a first class Magistrate who has no local jurisdiction over the matter—*Konda Reddy*, 41 Mad 246. But after proceedings have been initiated by a District Magistrate against persons residing outside jurisdiction, he can transfer the proceedings to a subordinate Magistrate otherwise qualified to complete the proceedings. This section only restricts the initiation of the proceedings against persons living outside the jurisdiction of the District Magistrate, but does not prevent him from transferring such proceedings, after initiation to a subordinate Magistrate, though such Magistrate had no local jurisdiction to initiate the proceedings—*Surja Kanta*, 31 Cal. 350, *Munna*, 24 All 151; *Rakhad Mandal*, 27 C.L.J. 314; *Kalia Gourdan*, 59 M.L.J. 887, 32 M.L.W. 320, 1930 M.W.N. 698, 127 I.C. 652, 32 Cr.L.J. 27 (28). But the District Magistrate cannot make over the case to a Magistrate incompetent to try the case, e.g. a 2nd class Magistrate—*Gobind*, 37 All 20, 12 A.L.J. 1136.

European British Subjects—The provisions of section 443 Cr. P. Code are not applicable to proceedings under sec. 107, Cr. P. C.—*Christy v. Christy* A.I.R. 1933 Lah. 1019, 1933 Cr.C. 1556.

239. Sub-section (4):—Power to detain in custody—Only in the special circumstances referred to in clauses (3) and (4) does the law empower the Magistrate to detain a person against whom proceedings have been instituted under this section—*Raghunandan*, 32 Cal 80. Therefore, where an accused was not sent before a District Magistrate by another Magistrate acting under clause (3) so as to bring the case under clause (4), such District Magistrate's order detaining the accused in custody was illegal—*Chidambara*, 31 Mad 315 (F.B.).

240. Bail:—Even when the person has been arrested under clause (3), unless there are special circumstances, he should be admitted to bail. When a Magistrate on

the report of the D. S. P. directed the re-arrest of persons (whom he had previously admitted to bail on their appearance) and remanded them to custody, it was held that the re-arrest and remand were illegal, as none of the special circumstances mentioned in clause (3) existed in the case, and the Magistrate was bound under sec. 496 to release them on bail—*Raghuandan*, 32 Cal. 80. But the Madras High Court holds that the Magistrate may in his discretion detain such persons in custody, according to the clear words of sub-section (4); these words cannot be qualified by sec. 496; that section does not give an absolute right of bail but must be read along with any other provision giving to the Court a special power of detention, and sub-section (4) of this section gives such power—*Narayanaswami*, 36 Mad. 474.

A person proceeded against under sec. 107, Cr. P. C., is entitled as of right to bail. If the Magistrate considers that immediate measures are necessary for the prevention of a breach of the peace during the pendency of the enquiry, he can direct the applicant to execute a bond with or without sureties, for keeping the peace until the completion of the enquiry. If the applicant refuses to execute a bond or fails to furnish security as directed, then he can be kept in custody until the completion of the inquiry—*U Gandama*, 145 I.C. 314, A.I.R. 1933 Rang. 164, 1933 Cr.C. 763, 6 R. Rang. 41, 34 Cr.L.J. 950; *Maung Saw Hlaing*, 34 Cr.L.J. 1195, 146 I.C. 23; A.I.R. 1933 Rang. 165, 1933 Cr.C. 764, 6 Rang. 70. Section 496, Cr. P. Code authorises the Magistrate conducting an enquiry under sec. 117, Cr. P. Code to release the person concerned in the enquiry on bail with or without surety to ensure his attendance in Court—*Karbala Hussain*, 41 Cr.L.J. 155, 185 I.C. 318, 1939 N.L.J. 537, A.I.R. 1940 Nag. 75, I.L.R. 1940 Nag. 61. See also Note 1308.

In the absence of any special form prescribed by law with reference to the preventive sections of the Cr. P. Code there is nothing to suppose that the use of the printed form prescribed under sections 496 and 499 would be illegal and therefore invalid. Where the bond makes it clear what the nature of the proceedings was and in what Court the person concerned in the enquiry was to appear, the surety cannot be heard to say that he was in any way misled by the terms of the bond which he had executed. Having signed the form he must be presumed to know that he had given security for the attendance of the person concerned in the enquiry in the Court—*Karbala Hussain*, *supra*.

As for the powers of the Appellate Court to grant bail, see the notes given below under the heading "Appeal".

Further inquiry:—See Notes 250B, 249 and 295A.

Appeal:—Section 406, Cr. P. C., makes provision for an appeal by a person ordered to give security for keeping the peace or for good behaviour.

In the case of a person against whom an order is made under sec. 118, Cr. P. C., there is no offence and no trial, he is not 'a person convicted on a trial' nor is he 'a convicted person'. Sec. 426, Cr. P. C., has no application to such a case. The Appellate Court cannot, therefore, grant bail to the appellant pending an appeal against the order directing him to execute a bond—*Charan Mahto*, 125 I.C. 792, A.I.R. 1930 Pat. 274, 11 P.L.T. 261, 9 Pat. 131, Ind. Rul. 1930 Pat. 568, 31 Cr.L.J. 958, 1930 Cr.C. 455. No such narrow or restricted meaning should be given to the words "convicted person" in sec. 426, Cr. P. C. It cannot be said that a person against whom an order has been passed under sec. 107, Cr. P. C., has been convicted of an offence. There is, however, no reason to suppose that he cannot be said to have been convicted. Consequently, the Appellate Court has power to suspend the order relating to the furnishing of security. Even supposing sec. 426, Cr. P. C., did not apply, the Appellate Court can pass such an order under sec. 423 (1) (d), Cr. P. C. In view of the provisions of sec. 498, Cr. P. C., the Appellate Court can also grant bail to the appellant in such a case—*Kalkarao*, 33 Cr.L.J. 731, 139 I.C. 141, 1932 A.L.J. 621, Ind. Rul. 1932 All. 523, A.I.R. 1932 All. 680, 54 All. 861, 1932 Cr.C. 856; *Darsu*, A.I.R. 1934 All. 845, 4 A.W.R. 76, 152 I.C. 785, 1934 Cr.C. 1031, 36 Cr.L.J. 177, 57 All. 264; *Emp v. Masuria*, 37 Cr.L.J. 155, A.I.R. 1936 All. 107, 159 I.C. 804.

In a case of an appeal from an order other than an order of acquittal or conviction the Appellate Court can alter or reverse such an order under sec. 423 (1) (c), Cr. P. Code and can make any consequential order that may be just or proper under sec. 423 (1) (d), Cr. P. Code. The Appellate Court cannot order a *de novo* inquiry—*In re Narappa Reddy*, 34 Cr.L.J. 947, 145 I.C. 306, 1933 M.W.N. 241; *Emp. v. Bhagwat Singh*, 48 All 501.

240A. Revision:—See Notes 291 and 295A.

An order of a Magistrate *refusing* to take action under sec. 107 cannot be set aside by the superior Court in revision. The object of this section is rather administrative than judicial. If the Magistrate who is responsible for the administration of a subdivision is not satisfied that there is any need to take proceedings under this chapter, a superior judicial tribunal cannot interfere with the exercise of his discretion—*Ram Lal v. Bankateshar*, 28 O.C. 44, 1 O.W.N. 359, A.I.R. 1925 Oudh 138, 25 Cr.L.J. 1149; *Phani Bhusan v. Kunja*, 25 Cr.L.J. 679, A.I.R. 1925 Cal 262. See also Note 475.

Persons who come to the High Court in revision against an order under sec. 107 should do so with the utmost promptitude, and at any rate within 30 days of the order against which they complain—*Ram Deo*, 27 Cr.L.J. 1132, 49 All 228, 25 A.L.J. 44, A.I.R. 1926 All. 767, 97 I.C. 652.

241. Nature of proceedings under this chapter:—There is no unanimity of opinion among the various Courts as to whether proceedings under this Chapter are of a criminal nature, or as to whether the persons proceeded against under this Chapter are 'accused' persons. In *Wajid Ali*, 41 Cal 719, *Ramaswami*, 27 Mad. 510, *Desikachari*, 39 Mad 539, *Lalit Mohan v. Suryakanta*, 28 Cal 709, *Mathura Prasad*, 3 O.C. 247, and *Md. Niaz v. Jai Ram*, 41 All 503, it is held that proceedings under this chapter are of a criminal nature; therefore, a person who brings a proceeding under sec. 107 from malicious motives is liable to an action for malicious prosecution if the proceeding terminates in favour of the person against whom the allegation is made—*Md. Niaz Khan v. Jai Ram*, 41 All 503, *Churanji v. Dharam Singh*, 43 All 402; whereas in *Ahmed*, 1914 P.R. 5, 15 Cr.L.J. 563, and *Rehmani*, 1916 P.L.R. 78, it has been held that the proceedings under sec. 110 are *not criminal proceedings*, and the Chief Court has no power to direct the transfer of such proceedings under sec. 526 from one Magistrate's Court to another. (But the word 'criminal' has now been omitted from sec. 526).

In the following cases it has been held that persons proceeded against under this chapter are in the position of 'accused' persons—*Hopcroft*, 36 Cal 163; *Mutsaddi*, 21 All. 107; *Gokha Singh v. Chetu*, 1905 P.R. 33; *Ida*, 1900 P.R. 15; *Nakki Lal*, 27 Cal. 656; *Jhojha Singh*, 23 Cal 493; *Mona Puna*, 16 Bom 661, *Venkatachinnaya*, 43 Mad. 511 (F.B.); and further inquiry can be ordered in case of such persons under sec. 437 (now 436)—*Mutsaddi*, 21 All 107; *Fyazuddin*, 24 All 148; *Gokha v. Chetu*, 1905 P.R. 33. (But see sec. 436 as now amended in 1923)

But in *Rameshwar*, 36 All. 262, *Basya*, 5 Bom.L.R. 27, *Raghunandan*, 32 Cal. 80, it has been held that such persons are not accused persons within the meaning of sec. 167; nor are they accused persons within the meaning of sec. 437 (now 436)—*Md. Khan*, 1905 P.R. 42; *Imam Mandai*, 27 Cal 662; *Dayanath*, 33 Cal 8; *Velu v. Chidambara*, 33 Mad 85; *Narain v. Durga*, 1911 P.R. 6. A person bound down under sec. 107 is not "convicted" of an offence—*Bhagwat*, 48 All 501, 27 Cr.L.J. 945; and, therefore, he cannot be released on bail by the Appellate Court under sec. 426 pending an appeal against the order directing him to execute a bond—*Charan Makto*, 9 Pat. 131, 31 Cr.L.J. 958 (959). An application to take proceedings under this chapter is not an accusation of an offence—*Md. Khan*, 1905 P.R. 42, 2 Cr.L.J. 697; *Natha Singh v. Pala Singh*, 1896 P.R. 4; and, therefore, compensation cannot be awarded under sec. 250 to the person against whom proceedings under this chapter have been dropped, such proceedings not being proceedings in a case in which a person is 'accused of an offence'—*In re Govind*, 25 Bom 48; *Crown v. Kaura*, 1902 P.R. 33, *Q-E v. Lakshpat*, 15 All. 365; *Mannu Khan v. Chandi*, 20 A.L.J. 624, 23 Cr.L.J. 474; *Ram Badan v.*

Janki, 45 All. 363, 21 A.L.J. 207, 24 Cr.L.J. 228; *Bindachal v. Lal Behari*, 36 All. 382. A person required to give security for good behaviour is not guilty of an offence; consequently, if such person when being arrested resists apprehension and escapes, he cannot be convicted under sec. 224 or 225, I. P. Code—*Kandhaia*, 7 All. 67 (72). A person called upon to give security is not an *accused* within the meaning of sec. 342 nor is he guilty of any offence; therefore, omission to examine him under that section is not an illegality—*Benode Behari*, 50 Cal 985. Although a person may be *committed to prison* under sec. 123 in default of furnishing security, such imprisonment stands on quite a different footing from a sentence of imprisonment passed on a conviction in respect of an offence—*Charan Mahto*, 9 Pat 131, 31 Cr.L.J. 958 (961), 11 P.L.T. 261, A.I.R. 1930 Pat. 274. The order made under sec. 118, Cr. P. Code is not a conviction for an offence—*Chandra Benode Das*, A.I.R. 1934 Cal 808, 152 I.C. 943, 59 C.L.J. 410, 1934 Cr.C. 1278.

There are certain indications to show that it is not the intention of the Legislature to treat the person proceeded against under this chapter as *accused* persons or as persons guilty of an offence.—First, the Legislature has studiously avoided the use of the word 'accused' in sections 107-126, and has deliberately used such expressions as "the person," "such person," "the person informed against" (sec. 107), "the person called upon to show cause" (sec. 116), etc.; whereas in the chapters relating to inquiries and trials (Chapters XVIII, XX—XXIII) the word "accused" has been used throughout. And during the debate in the Assembly, the Law Member stated that the word 'accused' was really a misnomer in security cases (*Leg Ass Debates*, 18-1-23, p. 1253). Secondly, in the similar case of a proceeding under Chapter XXXVI, the word 'accused' has now been replaced by the words 'any person'. This is significant. Thirdly, in sec. 340, the words "against whom proceedings are instituted under this Code" have now been added in order to make it clear that the words "a person accused of an offence" occurring in that section do not include a person proceeded against under Chapter VIII. Fourthly, in section 436 the words 'person accused of an offence' have been substituted for the words 'accused person'; this shows that the person proceeded against under the present chapter is not a person accused of an offence, and that sec. 436 does not apply to such person.

108. Whenever a Chief Presidency or District Magistrate, or a Presidency Magistrate or Magistrate

Security for good behaviour from persons disseminating seditious matter.

of the first class specially empowered by the *Provincial Government* in this behalf, has information that there is within the limits of

his jurisdiction any person who, within or without such limits, either orally or in writing or *in any other manner, intentionally* disseminates or attempts to disseminate, or in anywise abets the dissemination of,—

- (a) any seditious matter, that is to say, any matter the publication of which is punishable under section 124A of the Indian Penal Code, or
- (b) any matter the publication of which is punishable under section 153A of the Indian Penal Code, or
- (c) any matter concerning a Judge which amounts to criminal intimidation or defamation under the Indian Penal Code,

such Magistrate, *if in his opinion there is sufficient ground for proceeding*, may (in manner hereinafter provided) require

such person to show cause why he should not be ordered to execute a bond, with or without sureties, for his good behaviour for such period, not exceeding one year, as the Magistrate thinks fit to fix.

No proceedings shall be taken under this section against the editor, proprietor, printer or publisher of any publication registered under, *and edited, printed and published* in conformity with, the rules laid down in the Press and Registration of Books Act, 1867 [XXV of 1867] *with reference to any matter contained in such publication*, except by the order or under the authority of the *Provincial Government* or some officer empowered by the *Provincial Government* in this behalf.

Change:—The italicised words have been added by sec. 17 of the Criminal Procedure Code Amendment Act (XVIII of 1923)

'*Or in any other manner*'—“This amendment is to provide for the contingency where the matters covered by sec 108 have been disseminated by other means than either orally or in writing, e.g., by gramophone records”—*Statement of Objects and Reasons*, (1914)

'*Intentionally*'—This word has been added during the debate in the Assembly on the motion of Mr Rangachariar “so that innocent agents may not be proceeded against; for instance, boys who handle newspapers without knowing the contents and such other persons who are merely ignorant tools in the hands of other persons should not be proceeded against”—*Legislative Assembly Debates*, January 18, 1923, page 1279.

'*If proceeding*'—For reason of the addition of these words, see Notes to sec 107, under heading “Change”.

'*And edited*'.—“In view of the recent amendments made in the Press and Registration of Books Act, 1867, regulating the editing of newspapers, we have made a consequential amendment here. We also think that the protection given by the last clause of sec. 108 should only extend to newspapers which are edited, printed and published in conformity with that Act”—*Report of the Select Committee* (1922)

'*With reference publication*'—“This amendment is merely designed to make the intention of the Legislature clearer as regards the proceedings which require sanction prior to their institution”—*Statement of Objects and Reasons* (1914)

The words “Provincial Government” and “by the Provincial Government” have been substituted respectively for “Local Government” and “by the Governor-General in Council” and the words “the Governor-General in Council or” have been omitted by the Government of India (Adaptation of Indian Laws) Order, 1937

Information:—The burden of maintaining public peace and tranquillity has been laid upon Magistrates and the police, and it is only right that they should be allowed wider latitude in carrying out the provisions of these preventive sections than when trying ordinary crimes. The whole object of preventive action would be frustrated if Magistrates were expected to hold elaborate investigations about the accuracy and reliability of these informations. When therefore sec 108, Cr P Code provides that Magistrate may act on information which states that a person of the nature contemplated by that section is within the local limits of his jurisdiction, and it is clear from his order that he has believed the information and acted on it, it is in the last degree undesirable that the High Court should go behind the information, and substitute a conclusion reached after elaborate enquiry and arguments for a discretion which the Magistrate was expected to exercise on the spot as soon as he conveniently could—*Narsingh Prasad v. Emp.*, AIR, 1937 Nag. 70 (72), 19 N.L.J. 183, I.L.R. 1936 Nag 200, 167 I.C. 738, 38 Cr.L.J. 447.

Local Jurisdiction:—When a person proceeded against under this section was not within the local limits of the jurisdiction of the Magistrate when the order was passed, although it was not denied that he ordinarily resided within the jurisdiction of the Magistrate, the order was not illegal because he acted on information which stated that he was within the limits of his jurisdiction. Section 531, Cr. P. Code meets just such a case. It provides, among other things, that no order of any Criminal Court shall be set aside on the ground that the proceedings in the course of which it was passed took place in a wrong district, sub-division or other local area, unless it appears that such error has in fact occasioned a failure of justice—*Narsingh Prasad v. Emp.*, *supra*

A Magistrate proceeded under this section against a person who was not then in his jurisdiction upon information given to him by police and passed a preliminary order under sec. 112, Cr. P. Code. On transfer of the case to another Court, *de novo* trial was started by passing second preliminary order in presence of the accused on the basis of original information. The accused contended that his presence within the jurisdiction of the second Magistrate should be ignored as he appeared and continued to attend in obedience of summons issued by the first Magistrate. *Held* that the second Magistrate had power after the transfer either to continue the proceedings or to start them afresh, that is to hold a *de novo* trial, that there could be no doubt about the accuracy of the information, for the person proceeded against was there before him in Court and that his proceedings were therefore valid—*Narsingh Prasad v. Emp.*, *supra*.

242. Essentials of the section:—In a proceeding under this section it must be shown that the accused was connected with the *dissemination* of the seditious matter. Thus, the mere writing of a seditious matter is not a sufficient ground for proceeding against the author under this section unless it is shown that he was connected with the publication or the subsequent *dissemination thereof*. So also, in the case of a printer, although it must be assumed that by printing the seditious matter he abets the dissemination thereof, still in order to make him liable under this section it must be shown that he had a *knowledge* of the contents of the matter printed, especially in case of a big press which is managed by an independent staff such as manager, clerks and others, where it is not possible for the owner of the press to scrutinize personally every detail of the concern. As regards the publisher, he is liable under this section because as publisher he must be presumed to have knowledge of the contents of the matter and he, therefore, 'disseminated' or at least 'abetted the dissemination of' the matter within the meaning of this section—*Pitre*, 47 Bom 438, 25 Bom L.R. 97, 25 Cr L.J. 150, 76 I.C. 294, A I R 1923 Bom 255.

It is illegal to initiate proceedings under this section against a person where all that is proved against him is the commission of only one particular offence under sec. 153A, I. P. Code, at one particular time, and there is no evidence of his having done so before or of his having an intention of doing so in the immediate future—*Chitanji Lal*, 50 All 851, 30 Cr.L.J. 216 (217), A.I.R. 1928 All 344, 114 I.C. 48, 26 A.L.J. 813; *Chandra Bhan Gupta*, 35 Cr L.J. 562, 147 I.C. 1082, 11 O.W.N. 26, A.I.R. 1934 Oudh 70, 1934 Cr.C. 236, 9 Luck. 344.

The petitioner joined the processions and meetings arranged by the Congress Committee in which seditious outcries were raised. He had, however, had no hand in organising them. *Held* that mere joining the processions could not make him liable to be dealt with under sec. 108, Cr. P. C. This section is one of the preventive sections in the Code, and is intended to be applied to persons who either orally or in writing or in any other manner intentionally disseminate or intend to disseminate or in any way abet the dissemination of seditious matter. This implies that the person concerned is in the habit of intentionally disseminating or intends to disseminate seditious matters, in other words, it must be shown that there is danger of his continuing his seditious activities unless he is prevented from doing so under this section. It may be fair to assume that a person who habitually does something is likely to continue to

do so but then the habitual nature of his activities sought to be prevented, must be clearly proved—*Jagan Nath*, 32 Cr L J 1172 (1174), 134 I.C. 486, AIR 1932 Lah. 7, 1932 Cr C 17, Ind. Rul. 1931 Lah. 934, following *Chiranji Lal*, supra. Where the petitioners are alleged to have engaged in a continuous seditious propaganda and to have organised a branch of an All-India Association known as the Hindustan Sewa Dal, the mere fact that the branch was closed—apparently owing to police searches—would not necessarily show that the petitioners would not have, if left to themselves, resumed their activities. The order under this section was justified in their case—*Ramphul Singh*, A.I.R. 1933 Lah. 236, 1933 Cr C 356, 35 P L R 157.

The principles of law laid down in *Chiranji Lal's* case, which were followed in the above mentioned cases, were dissented from by the Patna High Court in *Gudri Chaudhury*, 33 Cr L J. 711, 100 I.C. 88, 13 P L T. 275, A.I.R. 1932 Pat. 213, 1932 Cr.C. 494, Ind Rul 1932 Pat 195, where Wort, J., observed: "It is quite clear in my judgment that the Legislature has used the words "disseminates or attempts to disseminate" as not referring to the number of acts performed but rather having reference to whether the evidence showed that there was something to show that a repetition of the offence was probable. This, of course, depends on the facts of each case"

The mere fact that sec 108 may have been applicable, does not necessarily make sec. 110 inapplicable—*Monindra*, 23 C.W.N. 193 (197), 28 CLJ 25 (31), 46 Cal. 215 (234).

Proceedings under this section are unjustifiable, where the object of such proceedings is to avoid the trouble and possible refusal of Government to prosecute under sec. 153A, I P Code—*Chiranji Lal*, supra

243. Seditious matter:—The test under this section is whether the person proceeded against has been disseminating seditious matter, and whether there is a fear of the repetition of such offence. In every case it is a question of fact which will have to be determined with reference to the antecedents of the person and other surrounding circumstances—*Vaman*, 11 Bom L R 743, 10 Cr L J 379, 3 I.C. 776. The preaching of *swaraj*, which means nothing more than Home rule under the present Government by constitutional means, does not amount to dissemination of seditious matter and does not, therefore, justify an order under this section—*Venu Bhushan*, 31 Cal 991, 6 CLJ. 699, 11 C.W.N. 1050; *Bal Gangadhar Tilak*, 19 Bom.L.R. 211, 18 Cr.L.J. 567, 39 I.C. 807. It is essential under clause (a) of this section that the matter disseminated must be *seditious*—*Bal Gangadhar Tilak*, supra

Every speech must be read as a whole and a fair construction must be put upon it and more attention should be paid by the Court to the general facts than any isolated words or passages—*Secy. High Court Bar Association*, 33 Cr L J 831 (834), 139 I.C. 696, AIR 1932 Lah. 559, 1932 Cr C 713, Ind Rul 1932 Lah. 606, 33 P L R 911 following *Bal Gangadhar Tilak*, 39 I.C. 807, 19 Bom L R 211, 18 Cr L J 567 and *Prithvi Dass Sharma*, 132 I.C. 889, 12 Lah. 345, AIR 1931 Lah. 283, Ind Rul. 1931 Lah. 713, 32 Cr.L.J. 997, 32 P L R 676. See also *Maniben*, AIR. 1933 Bom. 65 (66), 141 I.C. 780, 34 Cr L J 231, 57 Bom. 253. The interpretation of the speech cannot be treated merely as a question of fact—*Secy. High Court Bar Association*, supra. For the purpose of revision, findings of facts arrived at by the Courts below are not usually interfered with and unless it can be shown that there was no evidence at all against any of the petitioners or at least no evidence which could reasonably be accepted by any Court of law as sufficient to justify an order under sec. 108, Cr P C., the High Court will not interfere—*Ramphul Singh*, AIR 1933 Lah. 236 (238), 1933 Cr.C. 356, 35 P L R 157.

Where there is a series of speeches or lectures on one topic, all delivered within a short period of time, one may be considered for the purpose of throwing light on the real meaning and intent of another, and on the state of mind of the speaker with reference to the object-matter of the speeches. This principle is recognised in illustration (e) to sec. 14 of the Indian Evidence Act—*Chidambaram Pillai*, 32 Mad. 3 (14), 1 I.C. 36, 9 Cr.L.J. 130, following *Q-E. v. Jogendra*, 19 Cal. 35 (46), *Emp v. Phanindra*,

35 Cal. 945 and *Q-E. v. Bal Gangadhar Tilak*, 22 Bom. 112. In an action under this section against a person on the complaint regarding certain speeches punishable under sec. 153A, I. P. Code, the state of mind reflected in the previous speeches would be highly material in determining the speaker's intention in delivering the questioned speeches. The previous speeches are relevant and ought not to be excluded from evidence. They are admissible in evidence under sec. 14, Evidence Act—*Jagannath Prasad v. Emp.*, A.I.R. 1940 Nag 134 (136, 137), 1940 N.L.J. 31, following *Om Prakash v. Emp.*, A.I.R. 1930 Lah 867, 1930 Cr.C. 911, 127 I.C. 209, 31 Cr.L.J. 1182; *Chamupati v. Emp.*, A.I.R. 1932 Lah 99, 1932 Cr.C. 119, 142 I.C. 792, 34 Cr.L.J. 473, 13 Lah. 152, 32 P.L.R. 431 and *Chidambaram Pillai*, supra and dissenting from *Secy., High Court Bar Association*, supra and *Narain Kashinath Vaidya*, A.I.R. 1918 Nag 248, 1 N.L.J. 225.

Under a democratic constitution freedom of speech is a cherished privilege of every citizen but, it must not be overlooked, that freedom is meant to be enjoyed in a manner consistent with the maintenance of peace and order which are the primary conditions of the very life of the body politic. It is therefore incumbent on every speaker, however ardent in the propagation of his political or other views, to bear in mind the obligation which he owes to himself as a citizen. He has therefore to eschew such mode of expression as is likely to inflame human passions which, when aroused in the sphere of communal controversies are proved by experience to result in clashes and broken heads. Freedom unrestrained by discipline spells its own ruin—*Jagannath Prasad v. Emp.*, supra. See also Note 373B.

243A. Amount of Security:—Sec. 108, Cr. P. C., embodies a preventive and not a punitive provision of law. It is not the object of this section to demand an excessive amount as security which leaves the man concerned no option, even if he wanted to furnish security, and practically amounts to sending him to jail under a summary procedure without his having been tried and convicted for an offence—*Secy., High Court Bar Association*, 33 Cr.L.J. 831 (835), 139 I.C. 696, A.I.R. 1932 Lah. 559, 1932 Cr.C. 713, Ind Rul 1932 Lah. 606, 33 P.L.R. 911. See Note 293.

244. Promoting enmity between classes:—To sustain an order under sec. 108, it is not sufficient that the language used was highly offensive to one community; it must also be shown that the accused intended to provoke feelings of hatred or enmity between communities. But it is not necessary that he should have succeeded in provoking such feelings, if deliberate intention to do so can be inferred—*Dhammaloka*, 4 Bur.L.T. 84. In *Sital Prasad*, 43 Cal. 591, 20 C.W.N. 199, 23 C.L.J. 105, 17 Cr.L.J. 254, 34 I.C. 974, on the other hand, it has been held that to justify an order under sec. 108, one has only got to find that the words used in the leaflet or the matters complained of are likely to promote feelings of hatred or enmity, and there is no necessity under this section of finding *intention*, such as would be necessary if the person were placed on his trial under sec. 153A, I. P. C. This decision seems to be no longer correct; because the word "intentionally" has been newly added. See *P. K. Chakravarty*, 54 Cal. 59, 30 C.W.N. 953, 27 Cr.L.J. 1151, 44 C.L.J. 772 ('Forward' Case).

244A. Appeal:—See section 406.

244B. Revision:—Unless it can be shown that there was no evidence at all against any of the petitioners or at least no evidence which could reasonably be accepted by any Court of law as sufficient to justify an order under this section, interference in revision will not be justified—*Ramphal*, A.I.R. 1933 Lah 236 (238), 1933 Cr.C. 356, 35 P.L.R. 157.

109. Whenever a Presidency Magistrate, District Magistrate, Sub-divisional Magistrate or Magistrate of the first class received information—

Security for good behaviour from vagrants and suspected persons.

- (a) that any person is taking precautions to conceal his presence within the local limits of such Magistrate's jurisdiction, and that there is reason to believe that such person is taking such precautions with a view to committing any offence, or
- (b) that there is within such limits a person who has no ostensible means of subsistence, or who cannot give a satisfactory account of himself,

such Magistrate may, in manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond, with sureties, for his good behaviour for such period, not exceeding one year, as the Magistrate thinks fit to fix.

245. Scope and object:—This section provides for taking security, not from persons suspected of a *particular offence*, but from persons lurking within the Magistrate's jurisdiction, who have no ostensible means of subsistence, or cannot give a satisfactory account of themselves—*Bhuja*, Ratanlal 63.

Magistrates are empowered to put in force the provisions of this section whenever they have credible information that the accused has no ostensible means of livelihood or is unable to give a satisfactory account of himself, and is within the local limits of his jurisdiction—*Madho Dhobi*, 31 Cal. 557; *Mahadco*, 6 A.L.J. 253. Honorary Magistrates can act under this section—*Mahadco Dhobi*, 31 Cal. 557, 7 C.W.N. 661.

This section is one restrictive of liberty and must be applied only when strictly applicable—*Ganpati v. Emp.*, 39 Cr.L.J. 807, 176 I.C. 820, 11 R.N. 708, A.I.R. 1938, Nag 465.

An order under this section cannot be made on the ground that it is not safe in the interest of justice to allow the accused unrestricted personal liberty—*Kalipada Das v. Emp.*, 42 C.W.N. 816.

Where a person has already been tried and convicted of an offence under sec. 411, I P. C., he should not be proceeded against also under sec. 109, Cr. P. C., in respect of the very incident, in absence of any other evidence against him—*Lal v. Emp.*, 29 Cr.L.J. 1043, 112 I.C. 467, A.I.R. 1928 Lah. 928.

246. Within the Magistrate's jurisdiction:—The expression "within the local limits of the Magistrate's jurisdiction" is an adverbial clause modifying the word "conceal" and not an adjectival clause qualifying the noun "presence", and on a correct interpretation of the section, if a man is taking precautions anywhere in order to conceal his presence, and that concealing is to be effected within the jurisdiction of the Magistrate, the Magistrate has power to demand security even though the residence of the person within the jurisdiction is well known—*Phuchai*, 50 All. 909, 30 Cr.L.J. 145, A.I.R. 1929 All. 33, 113 I.C. 417, 26 A.L.J. 1257 (F.B.), overruling *Bharon*, 49 All. 240, 25 A.L.J. 94, 27 Cr.L.J. 1116, A.I.R. 1927 All. 50, 97 I.C. 428. In the latter case it was held that the passage 'within the local limits of the Magistrate's jurisdiction' in clause (a) was part of the predicate "to conceal his presence" and the offence contemplated was that of a person probably, although not necessarily, coming from outside the jurisdiction into the Magistrate's jurisdiction for some nefarious purpose and taking precautions to conceal the fact that he was present in that jurisdiction, and that clause (a) was not intended to apply to a habitual resident or a person well known in the neighbourhood trying to conceal himself. This case was followed in *Himayatullah*, 49 All. 844, 25 A.L.J. 679, 28 Cr.L.J. 567 (568), which also must be treated as overruled by the above Full Bench decision.

It is not necessary that the accused person should have a residence within the local limits of the Magistrate's jurisdiction—*Narsimkappa*, 2 Weir 53. The fact that the accused was arrested from a place outside the Magistrate's jurisdiction and that the

- (a) that any person is taking precautions to conceal his presence within the local limits of such Magistrate's jurisdiction, and that there is reason to believe that such person is taking such precautions with a view to committing any offence, or
- (b) that there is within such limits a person who has no ostensible means of subsistence, or who cannot give a satisfactory account of himself,

such Magistrate may, in manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond, with sureties, for his good behaviour for such period, not exceeding one year, as the Magistrate thinks fit to fix.

245. Scope and object:—This section provides for taking security, not from persons suspected of a *particular offence*, but from persons lurking within the Magistrate's jurisdiction, who have no ostensible means of subsistence, or cannot give a satisfactory account of themselves—*Bhujia*, Ratanlal 63.

Magistrates are empowered to put in force the provisions of this section whenever they have credible information that the accused has no ostensible means of livelihood or is unable to give a satisfactory account of himself, and is within the local limits of his jurisdiction—*Madho Dhobi*, 31 Cal 557; *Mahadeo*, 6 A.L.J. 253. Honorary Magistrates can act under this section—*Mahadeo Dhobi*, 31 Cal 557, 7 C.W.N. 661.

This section is one restrictive of liberty and must be applied only when strictly applicable—*Ganpati v. Emp.*, 39 Cr.L.J. 807, 176 I.C. 820, 11 R.N. 708, A.I.R. 1938, Nag. 465.

An order under this section cannot be made on the ground that it is not safe in the interest of justice to allow the accused unrestricted personal liberty—*Kalpada Das v. Emp.*, 42 C.W.N. 816.

Where a person has already been tried and convicted of an offence under sec. 411, I. P. C., he should not be proceeded against also under sec. 109, Cr. P. C., in respect of the very incident, in absence of any other evidence against him—*Lal v. Emp.*, 29 Cr.L.J. 1043, 112 I.C. 467, A.I.R. 1928 Lah. 928.

246. Within the Magistrate's jurisdiction:—The expression "within the local limits of the Magistrate's jurisdiction" is an adverbial clause modifying the word "conceal" and not an adjectival clause qualifying the noun "presence", and on a correct interpretation of the section, if a man is taking precautions anywhere in order to conceal his presence, and that concealing is to be effected within the jurisdiction of the Magistrate, the Magistrate has power to demand security even though the residence of the person within the jurisdiction is well known—*Phuchai*, 50 All 909, 30 Cr.L.J. 145, A.I.R. 1929 All 33, 113 I.C. 417, 26 A.L.J. 1257 (F.B.), overruling *Bhairon*, 49 All. 240, 25 A.L.J. 91, 27 Cr.L.J. 1116, A.I.R. 1927 All. 50, 97 I.C. 428. In the latter case it was held that the passage 'within the local limits of the Magistrate's jurisdiction' in clause (a) was part of the predicate "to conceal his presence" and the offence contemplated was that of a person probably, although not necessarily, coming from outside the jurisdiction into the Magistrate's jurisdiction for some nefarious purpose and taking precautions to conceal the fact that he was present in that jurisdiction, and that clause (a) was not intended to apply to a habitual resident or a person well-known in the neighbourhood trying to conceal himself. This case was followed in *Himayatullah*, 49 All 814, 25 A.L.J. 679, 28 Cr.L.J. 567 (568), which also must be treated as overruled by the above Full Bench decision.

It is not necessary that the accused person should have a residence within the local limits of the Magistrate's jurisdiction—*Narsimkappa*, 2 Weir 53. The fact the accused was arrested from a place outside the Magistrate's jurisdiction an

arrest was illegal would not oust the Magistrate's jurisdiction to proceed under this section—*Madho Dhobi*, 31 Cal. 557, 7 C.W.N. 661 (following *Ravalu*, 26 Mad. 124, 1 Wier 630).

When a person gives a satisfactory account of his presence within the limits of the Magistrate's jurisdiction, he cannot be called upon by such Magistrate to give an account of his presence in any other jurisdiction—*Satis Chandra*, 39 Cal. 456, 16 C.W.N. 499, 13 Cr.L.J. 161, 15 C.L.J. 396, 13 I.C. 913.

247. Concealing presence with a view to commit offence:—This section penalises the taking of precautions to conceal whether these precautions are successful or not—*Ganapati v Emp*, 39 Cr.L.J. 807 (808), 11 R.N. 708, 176 I.C. 820, A.I.R. 1938 Nag. 465

Where a person's presence or residence within the Magistrate's jurisdiction was well-known and there was no attempt to conceal the same, his mere attempt to conceal his presence at a particular spot at a particular time or his inability to give a satisfactory explanation of what he was doing at a particular place at a particular time, does not bring his case within sec. 109, and he cannot be ordered to give security for good behaviour. This section refers to a *continuous* act and does not apply to a case where there is a momentary effort at concealment to avoid detection or arrest. Therefore, the facts that the petitioner who is by profession a *kabiraj* and a dealer in cocoons was found at about midnight in a lane in a town in association with two others who had in their possession house-breaking implements, that on being discovered he fled, that when arrested he remained silent, and that the explanation subsequently offered to the Magistrate of his presence at the time and place in question is false, do not bring the petitioner within provisions of either clause (a) or clause (b) of this section—*Reshu Kaviraj*, 22 C.W.N. 163, 27 C.L.J. 382, A.I.R. 1918 Cal. 887, 41 I.C. 649, 18 Cr.L.J. 825. The petitioners were all proceeding together towards a place along a railway line. The Sub-Inspector questioned them and some of them gave an account of where they were going, and for what reason, which was in some particulars demonstrated to be false, whereupon the story changed. They were then all asked their names and what village they came from, to which they replied with correct information. Three of them gave a confused and shifting explanation of where they were going and others gave replies of an extremely improbable and suspicious nature. One of them had a bottle of kerosene oil, a piece of bamboo and some rags, and the explanation regarding these was said to be shifty, and in certain respects demonstrated to be false. *Held*, following *Reshu Kaviraj's case*, that the petitioners could not be bound down under this section—*Gobra Badia*, A.I.R. 1929 Cal. 729, 50 C.L.J. 181, 1929 Cr.C. 365, 31 Cr.L.J. 408, Ind. Rul 1930 Cal. 231, 122 I.C. 295; *Sheikh Piru*, 26 Cr.L.J. 812, 86 I.C. 666, 41 C.L.J. 142, A.I.R. 1925 Cal. 616. It is an entire mistake to read clause (1) of this section as applying to any person who takes steps to conceal himself, in the sense of concealing his presence in the way in which a criminal conceals his presence when he goes in the dark or by a deserted road, or by some other secret means to commit a crime in his own neighbourhood—*Gagan Chandra*, A.I.R. 1929 Cal. 775, 123 I.C. 747, 31 Cr.L.J. 569, Ind Rul 1930 Cal. 379, 1929 Cr.C. 519, 34 C.W.N. 191, 57 Cal. 919, following *Emp v Bhairon*, 97 I.C. 428, 26 A.L.J. 91, A.I.R. 1927 All. 50, 49 All. 210, 27 Cr.L.J. 1116. See also *Lattu*, 17 A.L.J. 891, 20 Cr.L.J. 572, 52 I.C. 60.

In *Emp v. Phuchai*, A.I.R. 1929 All. 33, 26 A.L.J. 1257, 50 All. 909, 113 I.C. 417, 30 Cr.L.J. 145, the Full Bench of the Allahabad High Court did not accept the narrow construction placed on this section in the cases of *Reshu Kaviraj* and *Sheikh Piru*, *supra*, and overruled the cases of *Emp v. Bhairon*, 49 All. 240, A.I.R. 1927 All. 50, 97 I.C. 428 and *Emp v. Himayatullah*, 49 All. 811, A.I.R. 1927 All. 592, 102 I.C. 503. In *Superintendent and Remembrancer of Legal Affairs, Bengal v. Isabali*, 39 Cr.L.J. 617, 175 I.C. 722, A.I.R. 1938 Cal. 409, I.L.R. (1938) 2 Cal. 221, 42 C.W.N. 588, 11 R.C. 1, Patterson, J., was inclined to agree with the view expressed by the majority of the Judges of the Allahabad Full Bench but Jack, J., preferred the view

adopted by Boys, J., in that case that persons arrested under sec. 55, Cr. P. Code did not necessarily come under sec. 109 (a) but might come under the provisions of sec. 109 (b) and in interpreting sec. 109 (a), the ordinary meaning of the words should be followed. Jack, J., also held that sec. 109 (a) referred to continuous concealment and not to an isolated act of concealment by a person taking precautions to conceal his presence within the jurisdiction of the Magistrate. In order to attract the provisions of clause (a) of this section it is necessary to show that the person concerned was concealing his own presence for the purpose of committing the offence—in other words, that the act which was to help him to commit the offence was the concealment of his own presence or identity and not the impersonation of another. Where, therefore, the applicant who was the son of a blind beggar, represented to a Raja that he was a Maharaj-Kumar of another place, having influence to help the Raja to make a rich marriage and to arrange for loans at low rates of interest, the provisions of clause (a) of this section did not cover the case—*Kanshi Nath*, 35 Cr L.J. 442, 147 I.C. 368, 1933 A.L.J. 1061, A.I.R. 1934 All 45, 56 All 314.

The Patna High Court, however, is of opinion that in order to bring a case under this section it need not be proved that the accused has followed a *continuous* course of conduct in taking precautions to conceal his presence—*Rambirich*, 27 Cr L.J. 1128, 97 I.C. 648, 6 Pat 177, 8 P.L.T. 95, A.I.R. 1926 Pat 569, *Sukhan*, 31 Cr L.J. 1125, 126 I.C. 855, 12 P.L.T. 223, A.I.R. 1930 Pat 497, 1930 Cr C 925, Ind Rul 1930 Pat. 646; *Emp v. Bishi Sahara*, 36 Cr L.J. 846, 155 I.C. 729, A.I.R. 1935 Pat. 69, 1935 Cr C. 139, 15 P.L.T. 836.

The Oudh Chief Court has taken the same view Thomas, J., observed. "In my opinion, it is not necessary, in order to bring a person within the operation of sec. 109, cl (a) of the Code of Criminal Procedure, to show that he has followed a continuous course of conduct in taking precautions to conceal his presence. I think that the wording and intention of sec. 109 of the Code of Criminal Procedure are very plain, otherwise it would be impossible to take action against any person, however bad his character or intention to commit an offence may be, if his attempt at concealment were confined to a solitary instance"—*Manick*, 35 Cr L.J. 1272, 151 I.C. 286, 11 O.W.N. 935, A.I.R. 1934 Oudh 367.

The Nagpur High Court is inclined to the view that there may be concealment even if residence within the local limits is well-known and that no definite rule about continuity of concealment should be laid down, it being a question of fact in each case—*Ganapati v. Emp.* 39 Cr L.J. 807, 11 R.N. 708, 176 I.C. 820, A.I.R. 1938 Nag. 465. The accused was walking along the road and, observing the railway watchman on the alert, he stood still and waited until his attention should be diverted before proceeding on his way. He did not hide behind anything but stood there apparently in the hope that he might be mistaken for an inanimate object or part of a building if the watchman happened to turn his eyes on him. There was no concealment whatever, merely immobility and a hope that the watchman's attention would not be attracted. In any circumstances this cannot be considered as concealing his presence within the meaning of cl (a) of this section—*Ahesanali v. Emp.* 39 Cr L.J. 747 (749), I.L.R. 1938 Nag 597, 176 I.C. 465, 11 R.N. 54, A.I.R. 1938 Nag 303.

Simply avoiding the police by a bad character or taking an unfrequented route is by itself no ground for taking action under this section. It may be that in some cases simply not giving an explanation may not be enough, for instance, an apparently respectable person returning from the house of his mistress very late at night, is using unfrequented streets and avoiding being seen. He cannot come under this section. But, if a man be found by the police with implements of house-breaking lurking near the house of a wealthy man, thereby indicating that he is about to commit burglary there and when challenged by the police he admits the object of his being there, action can be taken against him under this section—*Emp v. Bishi Sahara*, 36 Cr L.J. 846, 155 I.C. 729, A.I.R. 1935 Pat. 69, 1935 Cr C. 139, 15 P.L.T. 836. Where the petitioner, who lived twenty or thirty miles from the place of occurrence, was found hiding in the

mathia on a night, still within the jurisdiction of the same Sub-divisional Magistrate but manifestly taking precautions to conceal the fact that he was still within his jurisdiction by hiding in the *mathia*, avoiding the use of a light and by running away as soon as the police came up to the place, he came within the purview of this section—*Sukhan*, 31 Cr.L.J. 1125, 126 I.C. 855, 12 P.L.T. 223, A.I.R. 1930 Pat. 646.

Where a petitioner was seen coming out of a sugar-cane field at 10 P.M. by two persons who challenged him and he tried to run away but was caught by them at a place near his village, he could not be bound over under this section—*Emp. v. Bishambhar*, 29 Cr.L.J. 864, 111 I.C. 448, 26 A.L.J. 896, A.I.R. 1928 All. 476 (F.B.).

The concealment referred to must be with a view to committing some offence. Therefore, a person cannot be called upon to furnish security under this section in respect of an alleged temporary concealment in his father's house merely to avoid observation of police (owing to a warrant being issued against him) unconnected with any intent to commit an offence or with any previous concealment outside the Magistrate's jurisdiction—*Satis Chandra*, 39 Cal. 456. An old offender attempting, on seeing a constable, to conceal himself to avoid observation, does not bring himself within the mischief of sec. 109—*Sheikh Piru*, 41 C.L.J. 142, 26 Cr.L.J. 842; *Rambirich*, 6 Pat. 177, 8 P.L.T. 95, 27 Cr.L.J. 1128. An attempt to avoid a police patrol does not bring a person within the ambit of this section—*Gandoo*, 27 Cr.L.J. 573, 93 I.C. 141, A.I.R. 1926 Lah. 368. This clause is one which must be used with discretion; and the mere fact that a person was found talking at night with some persons of bad character, is no evidence that he was taking precautions to conceal his presence. There must be some definite attempt at concealment by taking precautions with that object in view, whether it be by disguise or otherwise indicating a desire to hide the fact that the person is present within the local limits of the Magistrate's jurisdiction—*Ram Birich*, 6 Pat. 177, 8 P.L.T. 95, 27 Cr.L.J. 1128.

A person who gives a false name and delivers letters secretly containing incitement to commit crimes or demanding money for the means of committing crimes, comes within the provisions of clause (a)—*Preo Nath*, 15 Cr.L.J. 255 (Cal.), 23 I.C. 207. But where a person on being asked by the police gives a false name and then corrects it, and there is nothing else to show that he was taking precautions to conceal his presence, an action under this section is not justified—*Sheo Prosad*, 21 A.L.J. 847, 25 Cr.L.J. 950, 81 I.C. 598.

248. Want of ostensible means of subsistence:—Mere proof of want of ostensible means of subsistence is not of itself a sufficient reason for passing an order for furnishing security. A Magistrate is bound to consider whether the order is really necessary in order to secure good behaviour, which is a matter for the Magistrate's judicial discretion, and he ought not to send people to jail simply because the opinions of Police witnesses are unfavourable to them—*Kala*, Ratanlal 723 (724).

A proceeding against a man because he has no ostensible means of subsistence is a totally different proceeding from one for being by habit a thief—*Nga Ba Hein*, A.I.R. 1937 Rang. 544.

A young man, out of employment, staying in the house of his father who is a man of substance and able if necessary to support him, cannot be held to be without ostensible means of subsistence within the meaning of this section. Clause (b) is directed only against suspicious strangers lurking within the Magistrate's jurisdiction. The allegation that the accused is connected with anarchist agitation and conspires for the purpose of committing dacoity and other crimes, can, by itself, constitute no ground for a proceeding under sec. 109, but may properly form the basis of a proceeding under sec. 110, Cr. P. Code—*Satis Chandra*, 39 Cal. 456, 16 C.W.N. 499, 13 Cr.L.J. 161, 15 C.L.J. 395, 13 I.C. 913; *Abdul Rashid*, 22 Cr.L.J. 749, 64 I.C. 141 (Lah.). Merely to be penniless or out of work is not an offence. Many an honest man may find himself in either predicament, and in a country where there are workless people but no work houses, persons ought not to be exposed to proceedings under sec. 109 (b) merely because they

cannot give a satisfactory account of the manner in which they are eking out a precarious existence—*Victor*, 43 C.L.J. 202, 53 Cal 345, 30 C.W.N. 380, 27 Cr.L.J. 497. If a person is unable to prove the source of his livelihood, he ought not to be ordered to execute a bond under sec. 109 unless there is reasonable ground for suspecting that he is sustaining himself by some *dishonest* means, for such an order can be made where 'it is necessary for keeping the peace or maintaining good behaviour'—*Ibid*. The accused's explanation that he came to Calcutta 2 months ago and that he worked as a cooly but had no fixed abode, is a satisfactory account of himself. If a cooly could not show any immediate work, it does not mean that he has no ostensible means of livelihood—*Sheikh Piru*, 41 C.L.J. 142, 26 Cr.L.J. 842. So also, the mere fact that a man is doing no work at present and was previously convicted for bad livelihood (*Pooran*, 5 C.W.N. 28; *Sheikh Piru*, 41 C.L.J. 142, 26 Cr.L.J. 842) or the mere fact that he belongs to a wandering tribe (*In re Yerukala*, 2 Weir 53) or to a gang which frequented *melas* and carries on illegal games (*Mahadeo*, 6 A.L.J. 253), or the mere fact that he is a gambler or opium-smoker (1 Bur.S.R. 246) or has no other means of subsistence except through play of ring game which is a game of skill and not an offence under the Gambling Act (*Bangoli*, 40 Cal 702, 17 C.W.N. 883, 20 I.C. 612, 14 Cr.L.J. 452) is not a sufficient ground for requiring him to give security.

249. Cannot give a satisfactory account of himself:—Clause (b) of this section applies not only to vagrants or vagabonds, but also covers suspected persons of any class who cannot give a satisfactory account of themselves—*Narendra*, 13 Cr.L.J. 239, 14 I.C. 431 (Cal). A person who gives a false name or address (*Abdur Rashid*, 22 Cr.L.J. 749, 64 I.C. 141) or gives a false account or cannot give a satisfactory account of his association with persons who are dangerous political conspirators (*Narendra*, 13 Cr.L.J. 239, 14 I.C. 431) is included in this section.

The words "cannot give a satisfactory account of himself" do not mean failure to satisfy the Magistrate that he spends his time or at least his leisure hours in a satisfactory manner; and, therefore, the fact that a person (a municipal peon), whose residence and occupation were well known, was said to prowl about at night in the company of scoundrels and was armed with a lathi and used the lathi, was not a sufficient ground for calling upon him to furnish security—*Sharif Ahmad*, 8 A.L.J. 1097, 12 Cr.L.J. 536, 12 I.C. 304.

The expression "cannot give a satisfactory account of himself" does not include mere inability to account for one's presence at a particular place at a particular time. If a man proves that he is a resident of the neighbourhood, and is a man of substance, he must be said to be able to give a satisfactory account of himself, although he is not able to or does not give any convincing explanation as to why on a particular dark night he was found prowling about in a lonely place—*Phuchai*, 50 All. 959, 30 Cr.L.J. 145 (149) (F.B.). "A satisfactory account of himself" does not necessarily mean that he should give his correct name and address or even the object of his being present at night, but that he should satisfy the authorities by explaining the suspicious circumstances appearing against him—*Emp v Bishi Sahar*, 36 Cr.L.J. 846 (850), 155 I.C. 729, A.I.R. 1935 Pat. 69, 1935 Cr.C. 139, 15 P.L.T. 836, 7 R.P. 611. Where a person is a man of position and a man of substance, the mere fact that he foolishly chose not to give his correct name and very foolishly tried to run away from the police at the time he was arrested, and declined to explain how he happened to be there, are really no reasons for holding that he could not give a satisfactory explanation of himself or for saying that he is a man of no ostensible means of subsistence—*Din Mohammad v Emp*, 37 Cr.L.J. 888, 164 I.C. 105, 1936 O.L.R. 426, 9 R.O. 36, 1936 O.W.N. 752, A.I.R. 1936 Oudh 383, 1936 Cr.C. 979.

The whole object of the second part of clause (b) of this section is to enable Magistrates to take action against suspicious strangers lurking within their jurisdiction. The greatest criminal in the world is not liable to be questioned as to his presence in his own home unless there is some specific outstanding charge against him—*Sa'ish*

mathia on a night, still within the jurisdiction of the same Sub-divisional Magistrate but manifestly taking precautions to conceal the fact that he was still within his jurisdiction by hiding in the *mathia*, avoiding the use of a light and by running away as soon as the police came up to the place, he came within the purview of this section—*Sukhan*, 31 Cr.L.J. 1125, 126 I.C. 855, 12 P.L.T. 223, A.I.R. 1930 Pat. 646.

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249. Cannot give a satisfactory account of himself:—Clause (b) of this section applies not only to vagrants or vagabonds, but also covers suspected persons of any class who cannot give a satisfactory account of themselves—*Narendra*, 13 Cr.L.J. 239, 14 IC. 431 (Cal). A person who gives a false name or address (*Abdur Rashid*, 22 Cr.L.J. 749, 64 IC 141) or gives a false account or cannot give a satisfactory account of his association with persons who are dangerous political conspirators (*Narendra*, 13 Cr.L.J. 239, 14 IC. 431) is included in this section.

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Chandra, 39 Cal. 456, 16 C.W.N. 499, 13 Cr.L.J. 161, 15 C.L.J. 396, 13 I.C. 913; *Sheikh Piru*, 26 Cr.L.J. 842, 86 I.C. 666, 41 C.L.J. 142, A.I.R. 1925 Cal. 616.

Where it was proved that the accused were residents of another district where they had their houses, that they had money with them, that they were dealers in cattle and that they had money in deposit with bankers, it could not be said that they had not been able to give a satisfactory account of themselves. And the mere fact that they were camping in an open ground in a city while on their way home, would not justify the Magistrate in passing an order under this section—*Nanka*, 18 A.L.J. 321, 21 Cr.L.J. 366, 55 I.C. 734.

The word 'satisfactory' means satisfactory in accordance with the known facts that are consistent with the surrounding circumstances. Where an accused was a man known to the police, the mere fact that a jemmy, a bunch of keys, a box of matches and a stock of lac were found near him, or that he was scantily dressed, did not show that he failed to give a satisfactory account of his presence at a particular locality at a precise time—*Himayatullah*, 49 All. 844, 25 A.L.J. 679, 28 Cr.L.J. 567 (568). The expressions, "who has no ostensible means of subsistence" and "who can not give a satisfactory account of himself" are widely different from each other. In practice, they are very often taken as meaning one and the same thing and this leads to a misapplication of the provision of the section. The latter expression does not mean that the person should satisfy the Magistrate how he spends his time, but it means that he has to satisfactorily account for his presence within the limits of the Magistrate's jurisdiction. It means that if a person is present within such limits or is present at a place within such limits to which place he does not belong, and there are circumstances justifying a suspicion that he is there not for an innocent purpose, he has got to explain his presence—*Sheikh Piru*, 26 Cr.L.J. 842, 86 I.C. 666, 41 C.L.J. 142, A.I.R. 1925 Cal. 616. The prosecution must satisfy the Magistrate that the accused is suspected to be living dishonestly because of his failure to give a satisfactory explanation when called upon to account for his presence in the place where he is found, e.g. if he fails to account for being discovered in the company of persons living a dishonest or criminal life, or detected in some place where he has no legal right to be. But the poor and the outcast and the old offenders must somewhere move and have their being, and a person who was passing the time to all outward appearances innocently and in a manner void of suspicion, could not be brought within the ambit of sec. 109 merely because he was unable to prove that he was working for his living—*Victor*, 53 Cal. 345, 30 C.W.N. 380, 27 Cr.L.J. 497, A.I.R. 1926 Cal. 648, 43 C.L.J. 202, 93 I.C. 961.

When a man is called on to give a satisfactory account of himself, the implication necessarily follows that it is not a general account of himself but an account of himself in relation to the circumstances in which he is called on to give such account. Under sec. 55, Cr. P. Code an officer in charge of a police station is empowered to arrest or cause to be arrested *inter alia* any one who cannot give a satisfactory account of himself, and the satisfactory account which is to be given cannot, at the moment when an arrest is impending, be considered to have reference to anything except the circumstances in which he is about to be apprehended. The wording of sec. 109 Cr. P. Code is not otherwise, and it cannot be apprehended that a person can be considered to have given a satisfactory account of himself if, being found with unmistakable burgling instruments in his possession, in the middle of the night, he says that he is a respected house-holder, following an honourable profession in the day time still less can he be said to have given a satisfactory account of himself when, on being accosted, he flings away a bundle of house-breaking implements and runs to his own house by a devious route, and, when forced to open his door to the police, denies that he had left his house that night—*Akesanali v. Emp.*, 39 Cr.L.J. 747 (751), 176 I.C. 465, A.I.R. 1938 Nag. 303, 11 R.N. 54, 11 L.R. 1938 Nag. 597.

At about 10 P.M., when two ladies were engaged in cleansing utensils at the ghat of their tank some one directed a torchlight on them from the eastern bank of the

tank. The ladies thereupon retired to their house and informed the inmates who at once ran to the place with lights. Finding no one there, they proceeded towards a deserted hut in an orchard near the tank and, after a chase, arrested the opposite party who ran out of the hut as they approached. When questioned he said that he was going from N to M and, immediately after correcting himself, said that he was going from M to N and had entered the hut to take rest. He further admitted that he had come there with two other persons for the purpose of committing theft and that his two companions had gone away to select a house for the purpose, leaving him in the hut. He denied that he had any torch with him but admitted that his companions directed a torchlight from the eastern bank of the tank. When the hut was searched, a *Sind-cutter* and a gunny bag were found there. In view of these admissions and in view of the finding of a *Sind-cutter* and the circumstances in which he was arrested, he must be held to have failed to give a satisfactory account of himself and therefore he has rendered himself liable to be called upon under sec 109 (b), Cr. P. Code to execute a bond for good behaviour. Surely, where a man is arrested in extremely suspicious circumstances, and fails to give any reasonable explanation as to how he came to be in that position, he cannot be said to have given a satisfactory account of himself—*Superintendent and Remembrancer of Legal Affairs, Bengal v. Isabali*, 39 Cr.L.J. 647, 175 I.C. 722, I.L.R. (1938) 2 Cal 221, 42 C.W.N. 588, 11 R.C. 1, A.I.R. 1938 Cal 409.

'With sureties':—Compare this expression with the words "with or without sureties" in the preceding sections. The requirement of surety in this section is obligatory and not optional.

250. Evidence:—Mere proof of want of ostensible means of livelihood is not a sufficient reason for passing an order under this section—*Kala, Ratanlal* 723 (724). The Magistrate should take evidence as to the general character of the person charged with bad livelihood, and not convict him on the mere report of the Police officers—*Alum Sheikh*, 5 W.R. 2, *Kala*, supra. The fact that the accused had previously been connected with a criminal conspiracy or might still be in correspondence with criminals, is not relevant under this section, though it might form the basis of a substantive proceeding under sec 110—*Satish Chandra*, 39 Cal. 456.

An order under this section passed more on suspicion than on any good basis of fact must be set aside. Where three respectable residents of Delhi came to Meerut by a night train, and were found on the road between the station and the city near to a place where a burglar's jemmy was found, an order calling upon them to furnish security for good behaviour was illegal—*Ghulam Julani*, 17 A.L.J. 432, 20 Cr.L.J. 401.

Where a person was convicted for an offence under sec 411, I.P.C., he should not be proceeded against also under sec 109, Cr.P.C., in respect of the same incidents where there is no other evidence against him—*Lal*, 29 Cr.L.J. 1013, 112 I.C. 467, A.I.R. 1928 Lah 928.

250A. Forfeiture of bond:—If the bond was forfeited on account of any act of the accused person within the period for which the sureties had bound themselves, they would be liable whether the proceedings were started against him before or after the expiry of the period—*Emp v. Bahadur Singh*, A.I.R. 1932 All 58, 1932 Cr.C. 110, 1932 A.L.J. 112, 33 Cr.L.J. 281, 136 I.C. 373, 54 All 335; *Jeomal*, 27 Cr.L.J. 326 (327), 92 I.C. 742, A.I.R. 1926 Sind 180, 20 S.L.R. 93.

Where a surety offered by a person for good behaviour has once been accepted, a Magistrate has no power subsequently to require fresh security merely because he is dissatisfied with the old security already accepted—*Emp v. Ram Lal*, 1 C.W.N. 394.

A breach of the bond is committed when the accused commits or attempts to commit or abets any offence punishable with imprisonment. The mere fact that he is again found in suspicious circumstances without any means of livelihood or is unable to give a satisfactory explanation of himself, which may justify a fresh proceeding

against him under this section, would not result in the forfeiture of the first bond; because that does not amount to the commission of or attempt to commit or abetment of an offence punishable with imprisonment. At most it might be a preparation for the commission of an offence, but short of an attempt—*Emp. v. Bahadur Singh*, A.I.R. 1932 All. 58, 1932 Cr.C. 110, 1932 A.L.J. 112, 33 Cr.L.J. 281, 136 I.C. 373, 54 All 335.

250B. Appeal:—See sec. 406.

250C. Revision:—The question whether the circumstances are suspicious is mainly a question of fact, and if a Magistrate is satisfied that the circumstances in which a person who is brought before him under sec. 109, Cr. P. Code was found, are not suspicious and that there is no need for him to call upon that person to provide security, it is not the part of the High Court to reverse his order and to demand security a year later on the ground that the circumstances had been suspicious. Section 109, Cr. P. Code is one of the preventive sections which are to be employed by Magistrate for the prevention of crimes, and it must be rarely, if ever, that a High Court will feel called upon to reverse an order of a Magistrate refusing to demand security when he is not entitled to do so by law, and then no doubt there is occasion for the High Court to interfere on the ground that the Magistrate has exceeded his power—*Emp. v. Gyan Singh*, A.I.R. 1934 All. 24, 35 Cr.L.J. 446, 1933 A.L.J. 1201, 147 I.C. 433. The High Court would not go into the merits of a case unless there was something to show that there has been a material departure from the legal principles according to which the case ought to have been dealt with, or if it is asked to go into the facts, it will only do so if something is shown which particularly indicates that it is desirable to enter into those facts—*Emp. v. Sundar*, 35 Cr.L.J. 189, 146 I.C. 831, 1933 A.L.J. 272.

See also paragraphs 276, 291 and 295A in this connection.

110. Whenever a Presidency Magistrate, District Magistrate, Sub-divisional Magistrate or a Magistrate of the first class specially empowered in this behalf by the *Provincial Government* receives information that any person within the local limits of his jurisdiction—

Security for good behaviour from habitual offenders.

- (a) is by habit a robber, house-breaker, thief or *forgery*; or
- (b) is by habit a receiver of stolen property knowing the same to have been stolen; or
- (c) habitually protects or harbours thieves or aids in the concealment or disposal of stolen property; or
- (d) habitually commits or attempts to commit, or *abets the commission of, the offence of kidnapping, abduction* ischief, or any
XII of the
489A, Section
 Indian P 489B, Section 489C, or Section 489D of that Code; or
- (e) habitually commits, or attempts to commit, or abets the commission of, offences involving a breach of the peace; or

(f) is so desperate and dangerous as to render his being at large without security hazardous to the community,

such Magistrate may, in manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond, with sureties, for his good behaviour for such period, not exceeding three years, as the Magistrate thinks fit to fix.

Change:—This section has been amended by sec. 18 of the Cr. P. C. Amendment Act (XVIII of 1923).

The words "Provincial Government" have been substituted for the words "Local Government" by sec. 4 of the Government of India (Adaptation of Indian Laws) Order, 1937.

251. Object and Scope of Section:—The object of this section is to afford protection to the public against a repetition of crimes in which the safety of property is menaced as well as the security of persons is jeopardised—*Nawab*, 2 All. 835; *Manindra*, 46 Cal 215, AIR 1919 Cal 702, 46 IC 152, 19 Cr.L.J. 696, 28 C.L.J. 25, 23 C.W.N. 193; *Rajendra*, 17 C.W.N. 238, 14 Cr.L.J. 5

The object is to prevent crime, and not to obtain money for the Crown—*Q-E v Rahim*, 20 All 206; *Saligram*, 36 Cal. 562.

Again, the object of this section is the prevention and not the punishment of offences, and with that object it authorises the Magistrate to take good and sufficient security for good behaviour. But it is solely for the purpose of securing future good behaviour that the section can be used. Any attempt to use it for the purpose of punishing past offences is wrong and not sanctioned by law—*per Macpherson, J.*, in *Umbica*, 1 C.L.R. 268 (271); *In re Raja Valad*, 10 Bom 174; *Jagat Singh*, 2 Lah.L.J. 237. Therefore, where the accused have committed definite acts of extortion for which they are liable to be prosecuted under the I P Code, an order for furnishing security under this section should not be passed, because such order would seriously prejudice them in their trial for those offences—*Anookool*, 27 Cal 781. But the Allahabad High Court holds that the mere fact that a man is alleged to have committed a substantive offence (for which he ought to be punished under the I P Code) is not an obstacle to the institution of proceedings under sec. 110 of the Criminal Procedure Code—*Chandan*, 52 All 448, 1930 A.L.J. 389, 31 Cr.L.J. 627 (629), AIR 1930 All 274, 1930 Cr.C. 442, 121 IC 40; *Sundar Lal*, AIR 1933 All 676, 1933 A.L.J. 777, 1933 Cr.C. 1188, 146 IC. 900, 35 Cr.L.J. 218 (overruling *Ram Prasad*, 23 A.L.J. 18, 26 Cr.L.J. 746, 86 IC. 282, AIR. 1925 All 250, and *Ram Rup*, 1929 A.L.J. 981, 1929 Cr.C. 449). Evidence going to show that a substantive offence has been committed or evidence which might possibly form the basis of a charge of substantive offence, is not necessarily to be excluded from proceedings under sec. 110, and can form the basis of an order for security—*Budhan*, 47 All 733, 23 A.L.J. 507, 26 Cr.L.J. 1130, AIR. 1925 All 694; followed in *Jai Singh*, 6 Luck 36, 31 Cr.L.J. 1020 (1021); *Lachman*, 28 Cr.L.J. 515, 102 IC 211, AIR. 1927 All 473

Moreover, this section is not intended to afford the police a means of keeping a suspected person under detention until they are able to work out a case against him—*Paimal*, 10 A.L.J. 351, 13 Cr.L.J. 827.

Section 110, Cr. P. Code is intended to deal with persons who cannot readily be brought under the ordinary law and who, for special reasons, cannot be convicted under the Penal Code in respect of the offences said to have been committed by them. There is nothing in the wording of sec. 110 or of any other section of the Code that leads to the inference that sec. 110 can only be used where the parties are strangers to the locality in which the offences are committed. If the persons or the acts which they commit are such as to make it difficult to deal with them under the ordinary provisions of law then sec. 110 can be used—*Shaumugham Asari*, 39 Cr.L.J. 583, 175

I.C. 417, A.I.R. 1938 Mad. 482, 1938 M.W.N. 93, 47 M.L.W. 196, (1938) 1 M.L.J. 178, 10 R.M. 777. This section is obviously not intended for use against merely undisciplined people such as local bosses and faction leaders to clip their wings, to deplete their resources by an expensive inquiry, to humble their pride by treating them as criminal mad men, to advertise publicly their high-handed behaviour. To apply the section to such as these is undoubtedly to abuse it. Conviction by public opinion should only be permitted to take the place of conviction by a Court in rare and exceptional circumstances, as for example, where the advent of a suspicious stranger in a village coincides with a series of crimes and suspicion waxes so strong and is so well justified that it may fairly be allowed to take the place of proof and in such unusual circumstances the section sanctions an experimental use of the security sections. But where a person has lived all his life in a locality and has never even been accused before a Court of law for any crime, far less convicted, there is absolutely no justification for any such experiment or for making any presumption that he is a criminal, not to say a habitual criminal—*Rathnam Pillai*, A.I.R. 1938 Mad. 35 (37), 1937 M.W.N. 1065, 1937 M.Cr.C. 298, (1937) 2 M.L.J. 749, 46 M.L.W. 858, 39 Cr.L.J. 230, 172 I.C. 866.

Where the substance of the information received relates to disputes relating to land, a special provision of the Code, sec. 145, is applicable and that special provision excludes the general provision of sec. 110, Cr. P. Code—*Alisher Dost Muhammad*, A.I.R. 1939 Sind 261, 40 Cr.L.J. 887, 184 I.C. 189, 12 R.S. 91.

252. Application of Section:—This section arms the Magistrate with a powerful means of securing the interest of the community from injury at the hands of hardened offenders of the most dangerous classes. Therefore, the power given by this section should be exercised sparingly and with much discretion by the Magistrate and only in those cases where the evidence is very clear and precise—*Rajendra*, 17 C.W.N. 238, 18 I.C. 149, 16 Cr.L.J. 467, 14 Cr.L.J. 5; *Jagat Singh*, 2 Lah.L.J. 237; *Yaghi*, 1892 P.R. 5; nor, on the other hand, should its exercise be confined only to cases in which positive evidence is forthcoming of the commission of offences—*In re Peddasiva Reddi*, 3 Mad. 238.

This section is preventive and not punitive. Its object is to protect society against persons who are so likely to commit offences that it is not advisable to leave them at large unchecked. It is undesirable to proceed under this section against a person who is trying to reform himself and to live an honest life—*In re Billa Appayya*, 10 M.L.T. 333, 12 Cr.L.J. 328.

These preventive sections are not intended to be used to punish accused persons for offences that have been committed, but to prevent them from committing offences which they are by their nature or habit likely to commit—*Jafar Hussain*, A.I.R. 1933 All. 859, 1933 A.L.J. 883, 1933 Cr.C. 1534, 147 I.C. 551.

Moreover, Magistrates should be cautious in making sure that the provisions intended for securing the peace of the community are not utilized for taking private vengeance under the aegis of a Crown prosecution—*Kali Prasanna*, 38 Cal. 156, 15 C.W.N. 366, 12 Cr.L.J. 161. It is to be feared that this section is often resorted to by the Magistrates for the purpose of ensuring the punishment of the persons suspected but not proved to have committed offences such as theft, etc., and it is notorious that accusations of bad livelihood are constantly made with the object of blackening an enemy's character, and satisfying feelings of spite and hatred. So it is incumbent on the Magistrates to see that this section is not resorted to unnecessarily and to annoy individuals—*Sukha*, 1898 P.R. 4. The Courts must not make use of this section in order to secure a punishment of persons against whom a substantive charge has broken down—*Raja Ram*, 23 O.C. 371, 22 Cr.L.J. 273; *Bhagwat*, 21 O.C. 317, 23 Cr.L.J. 123; *Jai Singh*, 6 Luck. 36, 31 Cr.L.J. 1020 (1021), 126 I.C. 501; *Shyam Lal*, 6 A.L.J. 487, 9 Cr.L.J. 528; *Lachman*, 28 Cr.L.J. 551, 102 I.C. 211, A.I.R. 1927 All. 473; *Bhagat Prasad*, 72 I.C. 1031, 26 O.C. 317, 10 O.L.J. 232, A.I.R. 1921 Oudh 33. An order under section 110 should not be made against a

person immediately after he has been acquitted of an offence, unless a very strong case is made out against him—*Abdulla*, 26 P.L.R. 789, 27 Cr.L.J. 190, A.I.R. 1926 Lah 190, 91 I.C. 1006, 2 Lah Cas 184. When proceedings have been taken under this section against a man soon after a discharge or acquittal from a charge of an offence of which he was suspected, it is always necessary to make it clear that the proceedings have not been taken as a means of punishing in an indirect way a man whom the police suspected to be guilty—*Sham Lal*, supra. The evidence which was regarded as unreliable and insufficient to convict a person on the charge of dacoity, should not be treated as reliable evidence to show that such person is a dangerous and desperate character who ought to be called upon to furnish security for good behaviour—*Parbati*, 35 Cr.L.J. 952 (955), 149 I.C. 408, 6 R.C. 593, A.I.R. 1934 Cal 482, 1934 Cr.C. 690, 61 Cal 588. See also *Kismat Akarda*, 11 C.W.N. 129, 4 Cr.L.J. 464; *Alep*, 11 C.W.N. 413, 5 Cr.L.J. 191; *Jhandu*, 25 Cr.L.J. 45, 75 I.C. 733, A.I.R. 1924 All 1420; *Sital Din*, 25 Cr.L.J. 366, 77 I.C. 302, A.I.R. 1925 Oudh 49; *Gulab Chand*, 17 Cr.L.J. 184, 33 I.C. 824; *Contra* 32 All. 55.

The salutary provisions of this section were enacted by the Legislature with the purpose of protecting society from habitual offenders; they were unquestionably never intended to be applied to coerce landlords, however recalcitrant they might be, to adopt methods of management of their estate, the efficacy of which, very indiscreetly perhaps, they might not appreciate, though pressed upon them with the best of intentions—*Rajendra*, 17 C.W.N. 238 (269), 18 I.C. 149, 16 C.L.J. 467, 14 Cr.L.J. 5. Some tenants, who became refractory, submitted a memorial to His Excellency the Governor of Bengal, against their Zamindar. The memorial was sent down to the Collector for disposal. On being asked by him the Sub-divisional Magistrate reported in detail after examining a large number of witnesses. The substance of his report was that out of six definite allegations made in the memorial four were not established. The remaining two he believed to be true against the Zamindar's servants but held that the Zamindar's responsibility for these acts had not been established. On receipt of the report the District Magistrate drew up proceedings under sections 107 and 110, Cr. P. Code against the Zamindar. Reading the two together the High Court found it impossible to hold that they furnish any material sufficient to justify proceedings either under sec. 107 or under sec. 110, Cr. P. Code—*Najar*, 28 C.W.N. 23, 76 I.C. 429, 38 C.L.J. 198, A.I.R. 1924 Cal 114, 25 Cr.L.J. 189. General and vague allegations of supposed oppressions by a Zamindar spread over a number of years in which there is not a single individual named who is said to have been oppressed nor the place nor the date where and when these incidents took place, cannot justify the drawing up of proceedings against him at the instance of his tenants who complain of such oppressions—*Narendra Nath Jha*, 39 Cr.L.J. 811 (813), 1938 P.W.N. 588, 19 P.L.T. 512, 176 I.C. 849, 4 B.R. 767, 11 R.P. 116, A.I.R. 1938 Pat. 533.

This section has been made applicable to Burma Habitual Offenders Restriction Act by section 4 of that Act, and section 3 of that Act permits an order of restriction to be passed in any case in which security can be required under sec. 110 of this Code—*San Dun*, 2 Rang. 641 (642), A.I.R. 1925 Rang. 112.

An order under this section cannot be used to bring an offender within the ambit of sec. 75, I. P. Code—*Jumo*, A.I.R. 1934 Sind 193, 28 S.L.R. 199.

253. Sections 108 and 110:—The mere fact that section 108 may have been applicable does not necessarily make sec. 110 inapplicable—*Manindra*, 46 Cal. 215 (231), 23 C.W.N. 193, 28 C.L.J. 25, 19 Cr.L.J. 96, 46 I.C. 152, A.I.R. 1919 Cal. 702.

254. Sections 109 and 110:—The two sections overlap each other. They must be carefully worked and great care should be taken not to abuse them. The proceedings taken must clearly specify whether the accusation which the accused is to meet is one under sec. 109 or under sec. 110—*Mad. Pol. Man.*, p. 89. Therefore, where the preliminary order passed by the Magistrate under sec. 112 was not clear in that the accused did not know whether the accusation he had to meet, was under or 110, the order was set aside—*Isvar Chandra*, 11 Cal. 13. An order under

I.C. 417, A.I.R. 1938 Mad 482, 1938 M.W.N. 93, 47 M.L.W. 196, (1938) 1 M.L.J. 178, 10 R.M. 777. This section is obviously not intended for use against merely undisciplined people such as local bosses and faction leaders to clip their wings, to deplete their resources by an expensive inquiry, to humble their pride by treating them as criminal mad men, to advertise publicly their high-handed behaviour. To apply the section to such as these is undoubtedly to abuse it. Conviction by public opinion should only be permitted to take the place of conviction by a Court in rare and exceptional circumstances, as for example, where the advent of a suspicious stranger in a village coincides with a series of crimes and suspicion waves so strong and is so well justified that it may fairly be allowed to take the place of proof and in such unusual circumstances the section sanctions an experimental use of the security sections. But where a person has lived all his life in a locality and has never even been accused before a Court of law for any crime, far less convicted, there is absolutely no justification for any such experiment or for making any presumption that he is a criminal, not to say a habitual criminal—*Rathnam Pillai*, A.I.R. 1938 Mad. 35 (37), 1937 M.W.N. 1065, 1937 M.Cr.C. 298, (1937) 2 M.L.J. 749, 46 M.L.W. 858, 39 Cr.L.J. 230, 172 I.C. 866.

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This section is preventive and not punitive. Its object is to protect society against persons who are so likely to commit offences that it is not advisable to leave them at large unchecked. It is undesirable to proceed under this section against a person who is trying to reform himself and to live an honest life—*In re Billa Appayya*, 10 M.L.T. 333, 12 Cr.L.J. 328.

These preventive sections are not intended to be used to punish accused persons for offences that have been committed, but to prevent them from committing offences which they are by their nature or habit likely to commit—*Jafar Hussain*, A.I.R. 1933 All 859, 1933 A.L.J. 883, 1933 Cr.C. 1534, 147 I.C. 551.

Moreover, Magistrates should be cautious in making sure that the provisions intended for securing the peace of the community are not utilized for taking private vengeance under the ægis of a Crown prosecution—*Kali Prasanna*, 38 Cal. 156, 15 C.W.N. 366, 12 Cr.L.J. 164. It is to be feared that this section is often resorted to by the Magistrates for the purpose of ensuring the punishment of the persons suspected but not proved to have committed offences such as theft, etc., and it is notorious that accusations of bad livelihood are constantly made with the object of blackening an enemy's character, and satisfying feelings of spite and hatred. So it is incumbent on the Magistrates to see that this section is not resorted to unnecessarily and to annoy individuals—*Sukha*, 1898 P.R. 4. The Courts must not make use of this section in order to secure a punishment of persons against whom a substantive charge has broken down—*Raja Ram*, 23 O.C. 371, 22 Cr.L.J. 273; *Bhagwat*, 24 O.C. 317, 23 Cr.L.J. 123; *Jai Singh*, 6 Luck. 36, 31 Cr.L.J. 1020 (1021), 126 I.C. 501; *Shyam Lal*, 6 A.L.J. 487, 9 Cr.L.J. 528; *Lachman*, 28 Cr.L.J. 551, 102 I.C. 211, A.I.R. 1927 All 473; *Bhagat Prasad*, 72 I.C. 1031, 26 O.C. 317, 10 O.L.J. 232, A.I.R. 1924 Oudh 33. An order under section 110 should not be made against a

(647), 22 Cr.L.J. 228 Undoubtedly a prudent Magistrate might not consider information sufficient to cause him to take action under the preventive sections, unless it gave substantial details against the person in question; but there is nothing in the section laying down any quantum of information as a necessary condition for the Magistrate to take action—*Ram Ghulam*, 28 Cr.L.J. 744 (746), 103 I.C. 792, 2 Luck. 157, A.I.R. 1927 Oudh 306.

Source of information.—The language of this section does not place any limit as to the nature of the information or as to the source from which it may be derived—*Mithu*, 27 All 172 (173).

The Magistrate may initiate proceedings on information from any source; the statute does not impose any restriction as to the quarter from which the information may be derived—*Rajendra*, *infra*. The Magistrate is not bound to reveal the source of the information to the person concerned, for the information is not any evidence against the accused; moreover, if a Magistrate is to set out before the accused the names of the persons from whom he receives information and the nature of the information given, very few self-respecting persons would dream of placing any information at the disposal of the Magistrate—*Mithu*, 27 All 172 (173); *Rajendra*, 17 C.W.N. 238, 16 C.L.J. 467, 18 I.C. 149, 14 Cr.L.J. 5

The words "receives information" in this section include information, however obtained. The law does not limit the method in which the Magistrate who is empowered by the Local Government, is to receive the information. He may receive the information through some other Magistrate. Therefore, where the police made a report to the senior Deputy Magistrate that certain persons were in the habit of committing mischief, extortion, and other offences, and that Magistrate forwarded the report to another Magistrate of the first class, *held* that the latter had jurisdiction to institute a proceeding under this section on that report—*Hiranand*, 1 Pat 621, A.I.R. 1922 Pat 586, 24 Cr.L.J. 31, 71 I.C. 79

As to what is or is not credible information, see Notes under sec. 107

The information to be required by a Magistrate may be to some extent of a hearsay and general description, but when the party to whom the order is directed appears in Court in obedience to such order, the inquiry must be conducted on the lines laid down in section 117—*Babua*, 6 All 132

Conversations out of Court with persons, however, respectable, are not legal or proper materials upon which to adopt proceedings under this section—*Babua*, 6 All 132. It is incumbent on Magistrates to exercise the greatest caution and impartiality, and to be careful not to be influenced by outside gossip and vague rumours—*Sukha*, 1898 P.R. 4

Magistrates are not competent to base their orders on their local and *personal knowledge* of the accused and witnesses—*Alimuddin*, 29 Cal. 392; *Wali Md*, 25 Cr.L.J. 808, A.I.R. 1925 Lah 166. No doubt a Magistrate is compelled in the performance of his duties to make private inquiries as to the character of his neighbourhood and as to the person reputed to be of bad character and likely to cause trouble. These inquiries are necessary to an executive officer having to inform himself of the nature of the population committed to his charge, but where it is shown that the Magistrate has allowed the actual information obtained in such inquiries against certain individuals brought before him by process of law, his order would be quashed as being vitiated by the admission of such information—*Ashiq Ali*, 21 A.L.J. 513, 24 Cr.L.J. 593, A.I.R. 1923 All 596. The proper procedure, where it is important to utilize the personal knowledge of a Magistrate, is for the case to be tried by another Magistrate, and for the former Magistrate to give evidence as a witness—*Alimuddin*, 29 Cal. 392, *Nuridin*, 1903 P.R. 27, 1 Cr.L.J. 99

A local inquiry is most appropriate before instituting proceedings under sec. 110, but once the accused are before the Court, the case must be decided on the evidence alone, and not on the basis of the local inquiry. But it is not illegal for a Magistrate

to use his inquiry to confirm the result at which he has arrived on a consideration of the evidence—*Ram Pargat*, 12 O.L.J. 341, 2 O.W.N. 350, 26 Cr.L.J. 1149.

But although the private information possessed by a Magistrate concerning the accused person cannot be used as evidence in the case, yet such information is a form of check which the trial Court may legitimately use in order to test the nature of the evidence with which it has to deal, and negative, for example, a suggestion that the police investigation has been unfair—*Darbari Singh*, 45 All 749 (751).

258. "Within the Magistrate's jurisdiction":—A Magistrate cannot take action under this section against a person who is outside the local limits of his jurisdiction—*Satindia*, 48 C.L.J. 143, 29 Cr.L.J. 842 (843); *Sonardi*, 35 C.W.N. 255 (256), 129 I.C. 688, 52 C.L.J. 415, A.I.R. 1931 Cal. 65, 1931 Cr.C. 64, where it was also held that it was incumbent upon the persons proceeded against to show that they were not within the jurisdiction of the Magistrate; and it is not contemplated by this section that he can issue a warrant, so as to pursue the person concerned into another jurisdiction—*Ketaboi*, 27 Cal. 993 (995); nor is it contemplated that the Police should be at liberty to bring persons from distant places (e.g., from a different district or a different province) outside the Magistrate's jurisdiction to a place within the local limits of his jurisdiction, and then to ask the Magistrate to exercise his jurisdiction in respect of offences committed elsewhere. The jurisdiction given by this section is in terms confined to persons within the limits of the Magistrate's jurisdiction, and certainly cannot have been meant to extend to persons who are within those limits merely because they have been brought there in police custody—*Murli*, 1885 P.R. 43; *Ketaboi*, supra; *Krishnaji*, 23 Bom 32 (35). But if a person has been arrested outside the jurisdiction for an offence committed within the jurisdiction, and the charge of substantive offence fails, the person can be proceeded against under this section—*Manindra*, 46 Cal 215 (235), A.I.R. 1919 Cal. 702, 46 I.C. 152, 19 Cr.L.J. 696, 28 C.L.J. 25, 23 C.W.N. 193.

But it is not necessary that the person should have a permanent residence within the local limits of the Magistrate's jurisdiction. Therefore, persons who ordinarily did not reside within the Magistrate's jurisdiction, but resided within his jurisdiction at the time of taking action could be proceeded against by the Magistrate under this section—*In re Kora Rangan*, 36 Mad 96, 17 I.C. 413, 23 M.L.J. 535, 13 Cr.L.J. 781; *Lakhi Narain*, 23 C.W.N. 100; *Bhola*, 23 Cr.L.J. 86, 20 A.L.J. 49; *In re Ramjibhai*, 14 Bom L.R. 889, 17 I.C. 540, 13 Cr.L.J. 706; *Ghulam Kadir*, 20 S.L.R. 310, 27 Cr.L.J. 1261, A.I.R. 1927 Sind 59. The words "within . . . jurisdiction" do not mean 'residing within the jurisdiction', but only mean literally and physically present within the territorial limits of the Magistrate's jurisdiction at the date of the proceedings—*Sonardi*, 35 C.W.N. 255 (256), 32 Cr.L.J. 425, A.I.R. 1931 Cal. 65, 52 C.L.J. 415. Having regard to the plain language of this section, it is clear that a Magistrate is given power to deal with persons who have a general reputation as bad characters and who happen to be within his jurisdiction, no matter whether they are residents of a place within his jurisdiction or not—*Munna*, 39 All 139, 17 Cr.L.J. 390, 14 A.L.J. 1074, 35 I.C. 822; *Ghulam Hussain*, 38 Cr.L.J. 144, 165 I.C. 648, 17 Lah. 453, 38 P.L.R. 905, 9 R.L. 274, dissenting from *Crown v Kahu*, 12 P.R. 1901, *Ketaboi*, supra and *Kripasindhu*, 1918 M.W.N. 751, 47 I.C. 277, 19 Cr.L.J. 905, 8 M.L.W. 461. The reason is that the most dangerous criminals have no well-known residence anywhere and wander from place to place, and it should be left in the power of the Magistrate to deal with them where the police or the Magistrate could be sure, at any time, of finding them—*Bapoo*, 9 Bom.L.R. 244. In *Durga Halwai*, 43 Cal. 153, 19 C.W.N. 1022, it has been pointed out that in none of the sections 107-110 does the word 'residing' occur, and therefore no residence within the local limits of the Magistrate's jurisdiction is necessary to bring the case under this section; it is sufficient to give the Magistrate jurisdiction if the evil habits were practised and the evil reputation acquired within the local limits of his jurisdiction, i.e., if the various acts of house-breaking and theft were committed at a place within the Magistrate's jurisdiction.

Where the accused had a residential house within the Magistrate's jurisdiction, to which he *occasionally*, if not often, went for the purpose of his business, the Magistrate had jurisdiction over him, provided the accused committed the acts of oppression while he so resided—*Kasi Sundar*, 31 Cal 419.

An order under this section may be made against a person who is in custody in a jail within the local limits of the Magistrate's jurisdiction at the time of the proceeding—*Mamundra*, 46 Cal 215 (235) and *Nga Singh*, 8 LBR 353, 17 Cr.L.J. 88 (overruling 4 LBR. 148). See also *Fateh* in Note 254. This is also evident from the words 'when such person is in custody' occurring in sec 114.

It is incumbent upon the persons proceeded against to show that they were not within the jurisdiction of the Magistrate—*Sonardi*, 35 C.W.N. 255 (257), 32 Cr.L.J. 425, A.I.R. 1931 Cal. 65, 52 C.L.J. 415.

Where a case against a person under sec 110, Cr P C., was transferred by the District Magistrate from the file of a Sub-divisional Magistrate within whose jurisdiction he resided, to another Magistrate in the same district, the latter had jurisdiction to try it—*Gulabrao Luxmanrao Changude v Emp.*, 37 Cr.L.J. 514, 162 I.C. 207, A.I.R. 1935 Bom 409, 37 Bom L.R. 745, 1935 Cr.C. 1113, 8 RB 404.

259. Clause (a)—Habitual thief, etc.:—For the meaning of the words "habit" and "habitually" see Notes 261 and 262. The evidence must be of such a nature as would lead to a reasonable and definite ground for coming to the conclusion that the accused was a *habitual* thief—*Gholam Ali*, 8 C.W.N. 543. There should be proof of specific acts showing that he, to the knowledge of some particular individual, is *by habit* a thief or a dacoit—*Kalai*, 29 Cal 779. Where the evidence merely showed that the accused has been suspected of a *single* act of theft, and kept bad company, it did not amount to his being a robber *by habit*, and an order under this section was not proper—*Ishar Singh*, 1880 P.R. 32. Where a person stated that he was a bad character and that he had been once in jail, but there was no evidence to show that he was a habitual thief, an order under this section was not justified—*Kaka*, 3 Bom L.R. 269.

Mere association with men of bad character is not sufficient to bring a man under this section as being *by habit* a thief, etc., unless the association is to commit theft, etc. So, the fact that a Zemindar had tenants of bad character and he used to lend money and paddy to them does not bring him under this section—*Nikamal*, 6 C.L.J. 711, 6 Cr.L.J. 403. When the charge against the accused is that of being a habitual robber, the fact that the accused gathered bad characters at his house, does not go far enough to make itself relevant. It is necessary to show that these bad characters were robbers or were gathered there for the purpose of robbery or theft—*Budhan*, 47 All 733, 23 A.L.J. 507, 26 Cr.L.J. 1130.

This section does not provide for any person being called upon to furnish security on the ground that he was *by habit* a dacoit and belonged to a gang of dacoits—*Ram Prasad*, 26 Cr.L.J. 746, 86 I.C. 282, 23 A.L.J. 18, A.I.R. 1925 All 250.

See Note 271.

Forger—By reason of the addition of this word in clause (a), the ruling in *Mahjan Mal*, 1900 P.R. 28 (where it was held that a habitual forger did not come under this section) is no longer good law.

260. Clause (c):—*aid in concealment of stolen property*. This clause is designed to meet only the case of professional receivers of stolen property who assist the thief by protecting him from discovery and arrest and by helping him to dispose of such property—*Nga Pu*, 11 Cr.L.J. 790, 7 I.C. 462 (464).

Harbouring thief—The harbouring must be to screen the offender from punishment. A person giving food or shelter or medical assistance to a starving or invalid criminal, from mere motives of humanity and not with the intention of enabling him to escape, does not come within the purview of this section—*Nga Pu* *supra*.

It is not enough to prove that the petitioner helped the accused persons in whom he was interested in one or two cases, but that he is in the habit of protecting thieves as such. *Firangi*, 34 Cr L.J. 643, 143 I.C. 687, A.I.R. 1933 Pat. 189, 1933 Cr.C. 520, Ind. Rul. 1933 Pat. 209, 14 P.L.T. 482.

This clause speaks of harbouring a thief but not of harbouring a dacoit. Harbouring a dacoit is a more serious offence and should be dealt with under the substantive provisions of sec. 216A, I. P. Code, and not under the provisions of sec. 110, Cr. P. Code—*Manni Lal*, 51 All. 459, 30 Cr.L.J. 694 (695), 27 A.L.J. 93, A.I.R. 1928 All. 682.

261. Clause (d):—Habitually committing extortion:—The Legislature must be taken to have used the word "habit" as meaning persistence in doing an act, a fact which is capable of proof by adducing evidence of the commission of a number of similar acts "Habitually" must be taken to mean repeatedly or persistently—*Local Government v. Nanmat Rao*, 25 Cr.L.J. 60 (62), 75 I.C. 764, A.I.R. 1924 Nag. 19. See also Note 262 Section 110 is not applicable to the case of persons who commit acts of extortion not in their individual capacity but as agents of others; e.g., the *burkundazes* in a Zemindary who commit acts of extortion on tenants in the performance of their duties Section 110 is not applicable to them, as it cannot be said that they are in the habit of committing extortion as individual members of the community; because, if it so happens that they cease to be in the employ of the Zemindars, they would no longer commit those acts of extortion in their private capacities. The proper course of dealing with the case is to prosecute them, or their masters under whose orders they act, for specific acts of oppression—*Hari Telang*, 27 Cal. 781 (784), 4 C.W.N. 531 But see *Srikantha*, 9 C.W.N. 898, 2 Cr.L.J. 554 and *Local Government v. Nanmat Rao*, 25 Cr.L.J. 60 (63), 75 I.C. 764, A.I.R. 1924 Nag. 19.

It was formerly held that persons in the habit of bringing false claims by forged entries (*Ganesh*, 1884 P.R. 25) or obtaining decrees by means of forged documents (*Chuni*, 1914 P.R. 21) did not come under this section as they could not be said to be habitually committing extortion. But these rulings are no longer good law in view of the word "forger" added to clause (a) by the Amendment Act of 1923

A person who brings a claim in the Civil Court which he knows to be false commits an offence under sec. 209, I. P. Code but he does not by so doing commit an offence of extortion, if he succeeds in the claim, or an offence of attempting to commit extortion, if he fails in his claim; and he cannot be bound down under this section—*Khushal*, 20 O.C. 129, 18 Cr.L.J. 651; *Bappuji*, 19 Cr.L.J. 885, 47 I.C. 81 (Nag.).

Committing mischief:—This clause applies to persons who habitually commit mischief; where the evidence shows the man to be of an excellent character, one weak and unsupported charge of mischief by fire does not bring him within the purview of this clause—*Hamidooddeen*, 24 W.R. 37.

262. Clause (e):—Offences involving breach of the peace.—See Note 221 under sec. 106.

A Zemindar employing lathuals to threaten his tenants and use force by unyoking their bullocks, and burning their houses for the purpose of compelling the tenants to pay enhanced rents, brought himself within the mischief of this clause—*Kasi Sundar*, 31 Cal. 419. Where a naib is found to have led several riots in the interest of his master and been convicted in several cases and there is evidence that certain lathuals are always employed to help his cause, he comes within the mischief of this clause—*Kali Prasanna*, 38 Cal. 156 (168), 15 C.W.N. 366, 12 Cr.L.J. 164

Where security was taken from the accused, who was found to be addicted to acts of immorality in attempting to seduce married women and behaving indecently and immodestly to them, held that although the actions of the accused were certainly offences under the law and it might be desirable to control them, still the offences were not as "involved a breach of the peace" within the meaning of this section, and the order for security was illegal—*Arun Samanta*, 30 Cal. 366. The words "offences peace" in this clause are to bear the same interpretation as in sec. 106—*Ibid*

(at p 368). So also where the accused had made certain indecent overtures towards boys—*Muhammad Asghar Khan v. Emp.*, 16 Cr.L.J. 582, 30 I.C. 131, A.I.R. 1915 All 352. But sec. 106 Cr. P. Code makes it quite clear that an assault is an offence involving a breach of the peace; and clearly an attempt to rape does involve an assault, force and violence upon the person against whom the offence is committed, and therefore involves a breach of the peace within the meaning of this clause—*Ganti Veera Reddi*, 39 Cr.L.J. 816, 176 I.C. 815, A.I.R. 1938 Mad. 615, 47 M.L.W. 610, 1938 M.W.N. 601, 11 R.M. 177

The allegation that a person is a smuggler does not by itself necessarily lead to the conclusion that he is one of the individuals contemplated by cls. (e) and (f) of this section. The activities which point to a tendency to cause breach of the peace or to violence of character in the person concerned must in addition be definitely proved according to the law of evidence before a person can be asked to furnish security for good behaviour under that portion of the section—*Abdul Karim*, A.I.R. 1935 Pesh. 80 (82), 36 Cr.L.J. 1127, 156 I.C. 659, 1935 Cr.C. 606

The word "habitually" implies frequent practice or use. It implies a tendency or a capacity resulting from the frequent repetition of the same acts—*Maung Po Aung v. The King*, A.I.R. 1940 Rang 95 (96), 41 Cr.L.J. 495, 187 I.C. 609, following *Bhubaneswar Kuer v. Emp.*, A.I.R. 1927 Pat 126, 100 I.C. 967, 28 Cr.L.J. 359, 6 Pat 1, 8 P.L.T. 335, where it has also been laid down that the words "by habit" and "habitually" have been used in sec 110, Cr P Code in the sense of depravity of character as evidenced by the frequent repetition or commission of offences mentioned in the section. See also Note 261.

263. Clause (f):—Desperate and dangerous character—A man of desperate and dangerous character in clause (f) means a man who has a reckless disregard of the safety of the person and of the property of his neighbours—*Manindra*, A.I.R. 1919 Cal 702, 46 Cal 215; 46 I.C. 152, 28 C.L.J. 25, 19 Cr.L.J. 69, 23 C.W.N. 193; *Wahed Ali*, 11 C.W.N. 789, 6 Cr.L.J. 1; *Parbati*, 35 Cr.L.J. 952. Evidence of acts of extortion committed by a person, unless those acts were accompanied by acts causing danger to life and property, is not sufficient to bring the case under this clause—*Wahid Ali*, (supra).

But where it was found that the accused persons were associated for the purpose of spreading disloyal doctrines among school boys and, besides being engaged in preparing the young for the future revolution, were connected with an organisation for the collection of money by dacoity, held that these facts were sufficient to bring the case within this clause—*Manindra*, 46 Cal 215, 23 C.W.N. 193, 19 Cr.L.J. 696, 28 C.L.J. 25

The following persons, though they are undoubtedly persons of bad character, do not come under this clause, as they cannot be called men of 'desperate and dangerous' character—

A person who had been arrested on suspicion of the commission of a dacoity and released—*Kismat*, 11 C.W.N. 129, *Gulab Chand* 17 Cr.L.J. 181 (Oudh); an habitual gambler, especially if he is a man of some means—33 PR 1880 (Cr); a person who is known to be a bad character and is earning his living by prostituting one of his wives—*Yaghi*, 5 PR 1892; a person who had been annoying the neighbours in various ways by knocking at their doors at night or throwing brickbats over their roofs, or who had been annoying respectable women—*Akhoy Kumar*, 5 C.W.N. 219; a person who attempts to seduce married women and behaves indecently and immorally to them—*Arun Samanta*, 30 Cal 366; a person who has been caught while committing adultery—*Ahmad Ali* A.I.R. 1930 Lah 1051 (1054), 129 I.C. 276, 1930 Cr.C. 1227, 32 P.L.R. 92, 32 Cr.L.J. 271 (274); a person who is a nuisance to his neighbours, declines to pay debts, abuses his neighbours, and makes indecent overtures to school-boys who pass by his shop—*Md. Asghar*, 30 I.C. 134 16 Cr.L.J. 582 (All); a person of a violent or turbulent character—*In re Nara* 6 WR 6; a person of a litigious disposition or a person who promotes litigation and is said to have had considerable influence with *patiwans*—*Ishwar Dutt*, 16 A.L.J. 776, 19 Cr.L.J. 731, 45 I.C. 77

Ahmed Ali, (supra). A man, who is quarrelsome, engages in petty assaults with his neighbours and throws bricks into people's houses or on to the streets, does not come within this clause—*Bangi Lal*, 32 Cr.L.J. 1070, 133 I.C. 535, A.I.R. 1931 All 437, 1931 Cr.C. 709, Ind Rul 1931 All. 695. If persons are proved by the evidence to be members of a secret society the purpose of which is to cause a revolution by the use of bombs, pistols and other forms of violence, proceedings can legally be taken against them under this section—*Ajay*, A.I.R. 1933 All 674, 1933 Cr.C. 1186, 146 I.C. 1070; *Satgur*, A.I.R. 1933 All. 674, 1933 A.L.J. 676, 1933 A.L.J. 777, 1933 Cr.C. 1188, 146 I.C. 900, 35 Cr.L.J. 218.

A person, who led local factions responsible for constant threat and bullying, is none the less dangerous to the community because he lives in a house and owns lands and comes within the purview of clauses (e) and (f) of this section—*Mana*, 39 Cr.L.J. 595, 175 I.C. 491, A.I.R. 1938 Mad 448, 47 M.L.W. 139, 1938 M.W.N. 213, 10 RM 783; *Venkataramanayya*, 47 M.L.W. 139.

Where the evidence shows that there is an apprehension of the accused committing a breach of the peace by using violence towards a particular person or persons, he ought not to be bound over under this section. He may be hazardous to the particular person or persons, but cannot be said to be hazardous to the community. He may be proceeded against under section 107 but not under sec 110—*Kallu*, 27 All 92; *Babua*, 6 All. 132.

Evidence, which was regarded as unreliable and insufficient to convict a person of the charge of dacoity, should not be treated as reliable evidence to show that such person is a dangerous and desperate character who ought to be called upon to furnish security for good behaviour—*Gulab Chand*, 3 O.L.J. 43, 17 Cr.L.J. 184.

The applicant, who was not one of those accused in a conspiracy case, had been present in the precincts of the Court and had threatened one of the assessors that if he did not give his opinion in favour of the accused, he would be killed by a pistol or a bomb and made use of other threatening expressions. He was proved to have sent a threatening message to him worded in a similar way. He was a desperate and dangerous character within the meaning of this clause—*Tek Chand*, A.I.R. 1935 All 638, 1935 Cr.C. 643, 36 Cr.L.J. 1142, 157 I.C. 413, 1935 A.L.J. 1069.

'At large':—Persons who have been convicted and whose sentences have not expired are not 'at large' within the meaning of clause (f), and therefore, there is no necessity of taking action against them—*Bhubaneshwar*, 6 Pat 1, 28 Cr.L.J. 359, 8 P.L.T. 335, A.I.R. 1927 Pat 126.

270. Joint trial of several persons:—See Note 290 under sec 117 (5).

The provisions of section 117 (5) as to joint trial cannot properly be applied to proceedings under section 110, when the matter under inquiry is whether a person is a habitual offender. But there can be a joint trial of persons called on to show cause under sec. 110, when there is evidence in the nature of a conspiracy or of acting in concert—*Jogendra*, 25 C.W.N. 334 (335), 22 Cr.L.J. 377; see also *Kalu Mirza*, 37 Cal 91; *Godhan*, 4 P.L.J. 7. The provisions about joint trial are applicable to cases coming under clause (f) as well as cases under clause (a) to (e)—*Jogendra*, (supra). But it is not advisable to take proceedings under this section against several persons jointly, unless such persons are confederates or partners, as against whom all the evidence is equally applicable—*Angnu Singh*, 45 All 109, 20 A.L.J. 881, 24 Cr.L.J. 257, 71 I.C. 865; *Muhammad Ismail*, 25 Cr.L.J. 952, 81 I.C. 600, 21 A.L.J. 841, A.I.R. 1924 All 195. Ordinarily, under this section, every person has to be tried separately for the offences enumerated herein. A joint trial is only permissible when two or more persons have been associated for the purpose of committing the offences mentioned in clauses (a) to (f) of this section. Unless this circumstance is established, a joint trial is illegal and the conviction would be set aside—*Jai Rao*, 3 P.L.T. 538, 23 Cr.L.J. 100. But if in a joint trial the evidence against each is separated and considered distinctly, there is no prejudice and the order will not be upset—*Shamsuddin*, 26 Cr.L.J. 1114, 88 I.C. 282, A.I.R. 1925 Nag 381.

271. Evidence under this section:—In a case under sec. 110, it is the duty of the Magistrate to hold an independent inquiry of the offence, and not to bind down the accused person merely because he agrees to furnish security—*Ram Charan*, 24 A.L.J. 317, 27 Cr.L.J. 370 (371). In a proceeding under this section no final action should be taken and no order having the effect of a conviction against the accused should be passed without formal evidence being recorded—*Prathipati*, 30 Mad 330

The evidence that is required to justify an order under this section is not necessarily evidence that the accused has committed definite criminal offences, but it must be proved by evidence of general repute or otherwise that he comes within the category of one of the clauses (a) to (f)—*Sher Zaman*, 10 P.R. 1899. The mere fact that a man is a bad character does not necessarily make him liable to be called upon to furnish security for good behaviour. There must be satisfactory evidence that he answers to one of the descriptions mentioned in the section—*Babua*, 6 All 132; *Kala Chand*, 6 Cal. 14; *In re Daulat Singh*, 14 All. 45; *In re Karuppanan*, 8 M.L.T. 246, 11 Cr.L.J. 638; *Haku*, 1881 P.R. 12; *Sohan*, 26 Cr.L.J. 1377. The mere fact that a person has a record of several previous convictions, does not satisfy the requirements of this section, and he cannot be ordered to give security on that fact alone—*In re Raja*, 10 Bom 174 (175); *Emp v Nepal*, 13 C.W.N. 318. The mere fact that sixteen years ago the accused had on three occasions been bound over is no ground for considering that he is still a bad character and has not reformed himself, and is not a ground of action under this section against him—*Jagat Singh*, 23 Cr.L.J. 507, *Raghobar*, 36 Cr.L.J. 33, 152 I.C. 120, A.I.R. 1934 All. 735, 1934 Cr.C. 936. The existence of a number of previous convictions of offences, such as theft, is a matter which may and should be taken into consideration as indicating the character and disposition of the accused. But the existence of such convictions is not by itself sufficient to justify ordering the accused to furnish security. Weight must be given to a consideration of the period that has elapsed subsequent to the last of the convictions in order to see whether during that period the accused has apparently shown a disposition to conduct himself properly or whether there are indications that he has during that period continued in his previous course, though he may not have actually brought himself within the clutches of the law—*Emp v Ram Lal*, 30 Cr.L.J. 562 (564), 116 I.C. 25, 51 All 663, A.I.R. 1929 All 273, 1929 A.L.J. 361, Ind. Rul. 1929 All 505. Before a person can be bound over under this or similar sections, it is not necessary that a certain number of previous convictions should have been proved. There is no necessity for this if the evidence that a person is a habitual robber or house-breaker or thief can be proved otherwise. If there are no previous convictions, the quantum of proof necessary would naturally be greater—*Shanmugham Asari*, 39 Cr.L.J. 588 (589), 175 I.C. 417, 10 R.M. 777, A.I.R. 1938 Mad 482, 1938 M.W.N. 93 (1938) 1 M.L.J. 178, 47 M.L.W. 196; *Khuda Bakhsh*, 39 Cr.L.J. 599, 175 I.C. 522, 10 R.L. 732, A.I.R. 1938 Lah 428, 40 P.L.R. 222; *Bachu*, A.I.R. 1936 Oudh 238, 160 I.C. 1039, 1936 Cr.C. 385, 37 Cr.L.J. 390, 1936 O.W.N. 247, 12 Luck. 36, 1936 O.L.R. 126, 8 R.O. 297; *Perne Mailla Rai*, 39 Cr.L.J. 898 (899), 177 I.C. 586, A.I.R. 1938 Mad 591, 1938 M.W.N. 313, 47 M.L.W. 428, I.L.R. 1938 Mad. 720, dissenting from *Rathnam Pillai v Emp*, A.I.R. 1938 Mad 35, 172 I.C. 866, 39 Cr.L.J. 230, (1937) 2 M.L.J. 749, 1937 M.W.N. 1065, 46 M.L.W. 858, 10 R.M. 498.

Instances of specific crimes are admissible in evidence in a proceeding under this section, although they are not supported by evidence of such amount and value as would secure a conviction for a substantive offence—*Jai Singh*, 6 Luck. 36, 31 Cr.L.J. 1020 (1021).

In a trial under this section the Magistrate must act on evidence duly recorded in the presence of the accused, and it is not open to him to take into consideration any information obtained otherwise than from such evidence. He must not act on any thing extraneous to the evidence on the record e.g. an information obtained from local inquiries—*San Dun*, 2 Rang 641 (642). *Ram Pargat*, 26 Cr.L.J. 1149,

88 I.C. 461, 2 O.W.N. 350, 12 O.L.J. 341, A.I.R. 1925 Oudh 441. Personal knowledge ought not to be imported in a judicial pronouncement—*Wali Muhammad*, A.I.R. 1925 Lah. 166, 25 Cr.L.J. 808, 81 I.C. 344; *Alimuddin*, 29 Cal. 392.

Inquiries under this chapter are governed by the ordinary rules of evidence, and evidence which is not admissible under the Evidence Act cannot be admitted in proceedings under sec. 110 of this Code—*Bechai*, 12 A.L.J. 937, 15 Cr.L.J. 705; *Raj Narayan*, 25 A.L.J. 393, 28 Cr.L.J. 502.

Police evidence:—In proceedings under this section, the evidence of official and police witnesses should as far as possible be eschewed. Even if it is not wholly discarded, it should influence his judgment as little as possible. Where the evidence of the police witnesses consists only of rumours and hearsay which they have recorded in their note-books and diaries, it is wholly inadmissible—*In re Ranga Reddi*, 38 M.L.J. 97, 43 Mad. 450; *Kondia*, 31 Cr.L.J. 165, 120 I.C. 734, A.I.R. 1930 Nag 148. Entries in the Thana Village Crime Note Book are in themselves no evidence to support an order under this section—*Pocha*, 22 Cr.L.J. 486 (Cal.) A Magistrate should not act on information not given in evidence but obtained from a perusal of the police diary—*Jhanda*, 25 Cr.L.J. 45, 75 I.C. 733, A.I.R. 1924 All. 142. The history sheets kept by the Police of persons proceeded against under this section cannot be taken into consideration by the Court—*Jogendra*, 21 Cr.L.J. 700, 57 I.C. 940, A.I.R. 1920 Cal. 556; *Jabinuddin*, 20 Cr.L.J. 689 (All.). See *Kudua Bari*, 31 Cr.L.J. 301, 121 I.C. 559, A.I.R. 1930 All. 37, 1930 Cr.C. 53 in this connection. A list of cases in which the accused was suspected of having been concerned is inadmissible in evidence—*Chandi*, 21 O.C. 132, 19 Cr.L.J. 825; *Raghubir*, 10 O.C. 168, 6 Cr.L.J. 256. A police officer is as good a witness as any other person, if he has proved facts which establish that the person concerned is acting in a manner likely to cause breach of the peace or is a dangerous character—*Abdul Karim*, A.I.R. 1935 Pesh. 80, 36 Cr.L.J. 1127, 1935 Cr.C. 606, 156 I.C. 659. See also *Satgur*, A.I.R. 1933 All. 674, 1933 A.L.J. 927, 1933 Cr.C. 1186, 146 I.C. 875, 35 Cr.L.J. 183; *Emp. v. Babu Ram*, 29 Cr.L.J. 92, 106 I.C. 684, A.I.R. 1928 All. 1, 26 A.L.J. 99; *Emp. v. Dipu*, 36 Cr.L.J. 1362, 158 I.C. 424, A.I.R. 1935 All. 850 (where it was also held that Mukhias and Sarpanches were not quasi police).

The question what is a person's reputation is a question of fact. It can be spoken to by any one who knows what his general reputation is. The Police Officer who goes to the place where a particular person lives and who makes enquiries to find out what is reputation is, is perfectly competent to speak in the witness-box about the result of his enquiries. His evidence that the reputation of such and such a person is so and so, is evidence of a fact and it is not to be excluded as mere hearsay evidence. In one sense the evidence of general repute is of course hearsay but it is hearsay of a particular kind which is made admissible in a case under sec. 110 by sec. 117 Cr. P. Code. It is not necessary that the witness who speaks to the general reputation of a person must be resident in the same place. A stranger can find out what the general repute of a person is and he is competent to testify to that fact—*Perne Maila Rai*, 39 Cr.L.J. 898 (899), 177 I.C. 586, A.I.R. 1938 Mad. 591, 1938 M.W.N. 313, 47 M.L.W. 428, 11 R.M. 351.

Mere suspicion is not evidence.—The powers under this section are to be exercised very sparingly and only in those cases where the evidence is very clear and precise. Where, beyond the mere *suspicion* that the accused are habitual thieves, nothing substantial has been established, an action under this section is not justified—*Jagat Singh*, 23 Cr.L.J. 507; *Kurma*, 26 A.L.J. 519, 30 Cr.L.J. 122; *Amyad Ali*, 5 P.L.T. 129, 25 Cr.L.J. 35, 75 I.C. 723. The evidence must be of such a nature as would lead to a reasonable and definite ground for coming to the conclusion that they are habitual thieves—*Golam Ali*, 8 C.W.N. 543 (544). A person ought not to be bound down on the mere statement of witnesses that they suspect the accused to be a thief or a dacoit—*Alep Pramanik*, 11 C.W.N. 413; *Kismat*, 11 C.W.N. 129; *Sohna*, 27 Cr.L.J. 1067, 97 I.C. 43 (Lah.). The fact that he was once convicted of theft, and his house was searched

on several occasions (but no stolen property was found) and he was said to have associated with two or three persons of bad character, does not justify an order under this section—*Kashim*, 1907 P.L.R. 23, 5 Cr L J. 24.

Where the only thing appearing against the accused was that he was on a previous occasion arrested in connection with a dacoity, but the police considered that evidence against him of so little value that he was released under sec 169 without even being placed before the Court, held that this fact was insufficient for binding over the accused under this section—*Jhandoo*, 25 Cr.LJ 45, AIR 1924 All 124; *Sital Din*, 23 Cr.LJ 366, AIR 1925 Oudh 49 But if the evidence in support of the charge under section 110 is antecedent to the charge for the substantive offence (dacoity), and is wholly independent of it, the proceedings under section 110 are not illegal—*Sital Din*, (supra). The Court is not warranted in basing its finding on the evidence gathered from the proceedings in those cases, when the accused was exonerated in respect of the charges laid against him in those proceedings—*Perne Maala Rai*, 39 Cr L J 898 (900), 177 IC 586, AIR. 1938 Mad. 591, 1938 M.W.N. 313, 47 MLW. 428, 11 LR 1938 Mad 720 See also *Rajendra*, 17 C.W.N 238 (268), 11 Cr L J 5, 18 IC 149, 16 CLJ 467 If the prosecution witnesses themselves admit that in all cases in which the person proceeded against was sent up, he was either discharged or acquitted, it cannot be urged that the requirements of sec. 110 Cr P Code are satisfied—*Islam-ud-din*, AIR 1939 Lah 269, 40 Cr L J 753, 183 IC 269, 12 RL 105, 41 PLR 431, 11 LR 1939 Lah 53 An order under sec 110 read with sec 118, Cr P Code cannot be made on vague allegations, otherwise none would be safe Unless the requirements of sec 110 are fulfilled or in other words, a man is proved by habit a robber, house-breaker, thief or forger or by habit a receiver of stolen property, etc., this drastic measure cannot be taken against him—*Idid* Habit has to be proved by an aggregate of acts and it would strain the provisions of the section if it were to be held that a man being suspected mainly by the Police in four thefts after he had been acquitted on a charge of theft amounted to sufficient evidence of habit—*Rahman v Emp*, 29 Cr L J 574, 109 IC 510, 10 Lah L J 317, 10 A.I Cr.R 355 See also Note 252

A witness's "suspicions" and his "allegations" that the accused is a thief, etc., are worth nothing and should not be admitted—*Emp v Ram Lal*, 51 All. 663, AIR 1929 All. 273, 116 IC. 25, 30 Cr L J 562, 1929 A L J 361, Ind Rul 1929 All. 505

Evidence as to mere suspicion on particular isolated occasions is not sufficient evidence at all for the purpose of a case under this section What is necessary to prove under clause (a) is that the man is by habit a thief Evidence can no doubt, be led of his general reputation about the matter and evidence that he was suspected in a particular case by a particular person or by the police of having committed theft. But there must be a large number of such cases before it can be proved on this evidence alone that he is by habit a thief—*Lila*, 32 Cr L J 62 127 IC 860, 1930 Cr C 393, AIR 1930 Lah 345, Ind Rul 1930 Lah 893 But where in a proceeding under this section there was evidence showing that the accused had been suspected of complicity in certain thefts and had been mentioned in each case in the reports made in Police Station at the time of each theft and there was further un rebutted evidence of the residents of the village that he had the general reputation of being a burglar and a thief, an order under this section requiring the accused to execute a bond to be of good behaviour was a proper order—*Emp v Gajodhar*, 9 O W N 1012 141 IC. 251, Ind Rul 1933 Oudh 48, AIR 1933 Oudh 58, 34 Cr L J 160 1933 Cr C 98, *Emp. v Bachchu* 37 Cr L J 390 (393), 160 IC 1039, 1936 O W N 247, AIR 1936 Oudh 238, 1936 O L R 128, 1935 Cr C 285

When the evidence is good and equally balanced on both sides no order for security should be made—*Raham Ali* 11 A L J 461, *Ganga Sagar* 10 A L J 383, 13 Cr L J. 772, *Angnu Singh*, 43 All 109 (113), 20 A L J 881; *Ismad Ali*, AIR. 1930 Lah 1051, 129 IC 276, 1930 Cr C. 1227, 32 P.L.R. 92, 32 Cr L J 271 (273); 4 Lah L J.

531. Thus, where there is a large volume of evidence in favour of the accused which is as good as, if not better than, that of the prosecution, there is no ground for making an order under this section—*Krishna*, supra; *Bahadur*, 27 O.C. 327, 26 Cr.L.J. 530; *Gur Dayal*, 26 Cr.L.J. 99, 83 I.C. 659, A.I.R. 1925 Oudh 277; *Amjad Ali*, 5 P.L.T. 129, 25 Cr.L.J. 35, 75 I.C. 723. But the proper and judicial method of deciding a case is to consider the evidence produced on both sides, regardless of the number of witnesses examined and then to come to conclusion whether the prosecution or the defence established its case—*Emp v. Dipu*, A.I.R. 1935 All. 850. See Note 272.

The burden of proving the bad character of an accused is on the prosecution, and therefore when the evidence on both sides is of an indifferent and interested character, the prosecution must fail—*Nurdin*, 1903 P.R. 27, 1 Cr.L.J. 99; *Sukha*, 1898 P.R. 4.

Evidence of habit—The persons mentioned in this section are those who are habitual criminals, and the habit is to be proved by an aggregate of acts—*Sriram Venkatasami*, 6 M.H.C.R. 120, 1 Weir 452. The word "habitually" must be taken to mean repeatedly or persistently. The word "habit" means persistence in doing an act, a fact which is capable of proof by adducing evidence of the commission of a number of similar acts—*Nanmantrao*, 25 Cr.L.J. 60, 75 I.C. 764, A.I.R. 1924 Nag 19. The words 'by habit' and 'habitually' imply frequent practice or use, and are used in this section in the sense of depravity of character, as evidenced by the frequent repetition or commission of offences mentioned in the section—*Bhubaneswar*, 6 Pat. 1, 8 P.L.T. 335, 28 Cr.L.J. 359. The fact that a person was on only one occasion suspected of theft is no evidence that he is a habitual thief—*Ishar Singh*, 1880 P.R. 32. There must be at least two or more cases against the same individual to show habit—*Bonai*, 15 C.W.N. 461. Where certain tenants formed into a party to compel the Zemindar to settle certain lands with them, and many loots, assaults and murders were committed by them against the Zemindar, but apart from this land dispute, there was nothing on the record to show that the tenants bore any despicable character, or that they were implicated in theft, extortion etc., or that they ever provoked a breach of the peace, held that the tenants could not be said to be habitual offenders within the purview of clauses (a) to (e), but that they were desperate and dangerous characters and proceedings could be taken against them under clause (f)—*Bhubaneshwar*, (supra). Evidence of acts of misconduct committed by a person years ago is admissible as indicating formation of habit. But such evidence, unless supplemented by evidence of misconduct committed by such person within a year or so, cannot justify the making of an order under sec. 118—*Wahid Ali*, 11 C.W.N. 789, 6 Cr.L.J. 1; *Kali Prasanna*, 38 Cal 156 (166), 15 C.W.N. 366, 12 Cr.L.J. 164. The existence of previous convictions is not by itself sufficient to justify an order for furnishing security. Weight must be given to a consideration of the period that has elapsed subsequent to the last of the convictions in order to see whether during that period the accused has apparently shown a disposition to conduct himself properly or has during the period continued his previous course—*Ram Lal*, 51 All. 663, 30 Cr.L.J. 562 (564), 116 I.C. 25, 1929 A.L.J. 361, A.I.R. 1929 All. 273; *Raghubar Dayal*, 36 Cr.L.J. 33 (35), 152 I.C. 120, A.I.R. 1934 All. 735, 1934 Cr.C. 936. The greatest thief is entitled to a *locus penitentiae*, when he has served out his punishment; it is only when he outrages that grace which is extended to him and thereby shows he is unreformed, that the machinery of the Act should be brought into operation, in order to obtain a substantial guarantee for society that he will not commit further depredations upon it—*Nawab*, 2 All. 835 (838). See Note 275.

Proof of previous convictions:—Whenever it is required to prove previous convictions against a man in a proceeding under this chapter, such previous convictions must be proved strictly and in accordance with law; otherwise, no Court can properly take them into consideration—*Sheikh Abdul*, 43 Cal. 1128, 20 C.W.N. 725, 17 Cr.L.J. 185, 33 I.C. 825. A different view seems to have been taken in *Emp v. Bachchu*, 37

Cr L.J. 390 (392), 160 I.C. 1093, 1936 O.W.N. 247, A.I.R. 1936 Oudh 238, 1936 O.L.R. 128, 1936 Cr C. 385, where it has been held that in proceedings under this section it is not necessary for the prosecution to prove a previous conviction of any person in the same formal manner as that required by the provisions of secs 310 and 311, Cr P. C., in respect of offences tried in the Court of Session. See sec. 511.

Previous convictions are not substantive evidence in a case under this section, though they may have an effect in deciding for what length of time the accused is to be bound down—*Emp v Nepal*, 13 C.W.N. 318.

272. Evidence of general repute:—Under sec. 117 (4) the fact that a person is a habitual offender or a desperate and dangerous character may be proved by evidence of general repute

In proceedings under this section if the witnesses have clearly deposed that the accused has the general repute of being an habitual offender, such evidence is admissible under sub-sec (4) of sec 117, Cr P C.—*Emp v Gajodkar*, 9 O.W.N. 1012, 141 I.C. 251, Ind Rul 1933 Oudh 48, A.I.R. 1933 Oudh 58, 34 Cr.L.J. 160, 1933 Cr C. 98; *Emp v. Bachchu*, 37 Cr L.J. 390 (393), 160 I.C. 1039, 1936 O.W.N. 247, A.I.R. 1936 Oudh 238, 1936 O.L.R. 128, 1936 Cr C. 385

Hearsay evidence is evidence of general repute for the purpose of this section, provided there is reasonable foundation for it—*Satgur*, A.I.R. 1933 All 674, 1933 A.L.J. 927, 1933 Cr C. 1186, 146 I.C. 875, 35 Cr L.J. 183

Evidence of reputation, although admissible and even important, has to be accepted with caution as it is very easy to say that a person is of ill-repute, and in the nature of things such evidence is too indefinite to permit of cross-examination. Evidence of reputation is the weakest form of evidence and requires material corroboration by other evidence proving the habits of the persons against whom the police are proceeding—*Shanmugham Asari*, 39 Cr L.J. 588 (589), 175 I.C. 417, A.I.R. 1938 Mad 482, 1938 M.W.N. 93, 47 M.L.W. 196, (1938) 1 M.L.J. 178, 10 R.M. 777. An accused person should not be bound down under sec 110, Cr P Code upon evidence of repute unless such evidence is very strong and almost universal—*Wali Muhammad Khan v. Emp*, A.I.R. 1925 Lah. 166, 81 I.C. 344, 25 Cr L.J. 808

A man's general reputation is the reputation which he bears in the place in which he lives amongst all the townsmen; and if it is proved that a man who lives in a particular place is looked upon by his fellow townsmen, whether they happen to know him or not, as a man of good repute, that is strong evidence that he is a man of good character. On the other hand, if the state of things is that the body of his fellow townsmen who know him look upon him as a dangerous man and a man of bad habits, that is strong evidence that he is a man of bad character—*Rai Isri Prasad*, 23 Cal. 621; *Jogendra*, 25 C.W.N. 331, 22 Cr L.J. 337; *Raghubir*, 10 O.C. 168; *Gokul*, 10 O.C. 132, 6 Cr L.J. 97; *Jagarnath*, 1903 A.W.N. 181; *Keval Kishore*, 29 O.C. 44, 12 O.L.J. 413, 26 Cr L.J. 1283. Reputation of a man's character is the inference or estimate from the sum total of a man's actions and qualities drawn or formed by persons who are acquainted with him or among whom he resides and with whom he is chiefly conversant or the circle in which he moves; it is the prevailing opinion formed by those with whom he associates and who would have the best opportunity of knowing his habits and general behaviour. It is generally understood that the 'place' or 'community' with reference to which reputation evidence is tendered should relate to the neighbourhood where he dwells or moves, but having regard to modern conditions, it is impossible to define "neighbourhood" or "community" with any degree of accuracy—*Perne Mailla Rai*, 39 Cr L.J. 898 (900), 177 I.C. 586, A.I.R. 1938 Mad. 591, 1938 M.W.N. 313, 47 M.L.W. 428, I.L.R. 1938 Mad. 720.

Where in a proceeding under this section, the accused person is able to produce witnesses on his behalf to speak of his good character, the Court ought to pay particular attention to such evidence and to give substantial reason for not believing such evidence, before it makes an order under section 118—*Ramlagan*, 5 P.L.T. 166,

25 Cr.L.J. 985; *Amjad Ali*, 5 P.L.T. 129, 25 Cr.L.J. 35; *Hakim Singh*, 13 A.L.J. 1055.

Nature of the evidence:—Evidence of general repute may be either evidence as to the *general* opinion of the community or the neighbourhood, or the *personal* opinion of the witnesses who are examined. But the opinion need not necessarily be the opinion of the *entire* community, but as least the opinion of a *considerable* number of persons—*Bechai*, 12 A.L.J. 927, 15 Cr.L.J. 705; *In re Ranga Reddi*, 43 Mad 450, 38 M.L.J. 97, 55 I.C. 722, 21 Cr.L.J. 354, 1920 M.W.N. 398; *Kewal Kishore*, 29 O.C. 44, 12 O.L.J. 413, 26 Cr.L.J. 1283.

The persons who testify to the character of the accused must be *respectable* persons who are acquainted with the accused—*Ranga Reddi*, 43 Mad. 450, and should not ordinarily be officials—*Nga Hein*, 8 Bur L.T. 53, 16 Cr.L.J. 553. Thus, when a large body of respectable persons testified to the character of the accused against the evidence of Police-officers, the opinion of the former should be accepted, and an order under this section should not be made—*Soman*, 1910 P.W.R. 37, 11 Cr.L.J. 603; *Kundan*, 9 Lah 133, 28 Cr.L.J. 813, A.I.R. 1928 Lah 49, 104 I.C. 253, 29 P.L.R. 368. The general reputation of a man is that which he bears among his fellow-townsmen and mere suspicion of complicity in this or that offence, is not evidence of general reputation—*Ghulam*, 30 Cr.L.J. 220, 113 I.C. 909, Ind. Rul 1929 Lah. 175. An accused person should not be bound over on the evidence of bad repute where there are respectable persons on his side to clear him of the charge—*Tar Gul*, A.I.R. 1935 Pesh 158. See also Note 271.

General reputation means the opinion of those members of the public who are in a position to know the man's character—*Jai Singh*, 6 Luck 36, 31 Cr.L.J. 1020 (1022). Evidence of accused's own caste fellows and neighbours is certainly the best sort of evidence available—*Gur Baksh*, 12 Cr.L.J. 542 (Oudh). The reputation which the accused is found to have, must necessarily mean the reputation of that person in the neighbourhood, and the persons residing in that locality would be best able to speak to his character—*Ketaboi*, 27 Cal 993 (995). Where the accused who was a Zemindar and money-lender produced a large number of witnesses consisting of his caste-fellows and tenants to depose to his good character, but the Magistrate disbelieved the evidence simply on the ground that the accused by virtue of his position could produce a large number of witnesses, and assigned no other legitimate reason, *held* that the case had not been approached from a proper point of view—*Miharban*, 13 A.L.J. 1046, 16 Cr.L.J. 805. Where witnesses voluntarily come forward as friends or associates or caste-fellows of the accused to give evidence about the good character of the accused, they must not be brushed aside, unless they are discredited as regards their good faith and honesty—*Angnu Singh*, 45 All 109 (113), 24 Cr.L.J. 257, *Rahu*, 43 All 186 (190), 18 A.L.J. 1114; *Kewal Kishore*, 29 O.C. 44, 12 O.L.J. 413, 26 Cr.L.J. 1283; *Babu Ram*, 106 I.C. 684, A.I.R. 1928 All 2, 29 Cr.L.J. 92, 26 A.L.J. 99; *Raghubar*, 36 Cr.L.J. 33, 152 I.C. 120, A.I.R. 1934 All 735, 1934 Cr.C. 936. In fact, when the caste-fellows of the accused voluntarily come forward and say that they regard the accused as the head of their brotherhood and they consider it a slur upon their community that the accused should be treated as a habitual robber or dacoit, it shows the good faith of the witnesses and their honest and emphatic belief that the accused is a respectable person enjoying the confidence of his community. The Magistrate ought not to discredit the evidence of these witnesses—*Rahu*, 43 All. 186 (190), 18 A.L.J. 1114, 22 Cr.L.J. 115, 59 I.C. 547.

But it is not always necessary that the persons who testify to the character of the accused should live in the immediate neighbourhood of the accused—*Wahid Ali*, 11 C.W.N. 789, 6 Cr.L.J. 1. Thus, a series of dacoities having taken place in a certain village, the evidence of general reputation of the accused coming from the people of the village where the dacoities took place, is certainly to be treated as evidence of general repute, although the accused did not live among those people—

Chintamon, 35 Cal 243, 7 C.L.J. 177, 12 C.W.N. 299. It is not right to discard the evidence of witnesses who speak to the reputation of the accused, merely because they are not his immediate neighbours. A man's general reputation in the place in which he lives among the inhabitants of that place, is not always conclusive, because it is quite possible for a cunning rogue to conceal his real character from his immediate neighbours. What the Court has to do is to satisfy itself that the evidence of the witnesses is true; and if it is satisfied on this point, then it is entitled to accept the evidence. Where a witness lives at a considerable distance from the person of whose reputation he speaks, the Court should of course inquire how he came by that knowledge and should take his answer into consideration in framing its estimate of the value of the evidence—*Po Yin*, 2 Rang 686, 4 Bur.L.J. 6, 26 Cr.L.J. 528.

Evidence of association with bad characters against a person proceeded against under this section, is evidence of reputation, but such reputation can only be based upon association with proved bad characters and not with reputed bad characters—*Emperor v Nepal*, 13 C.W.N. 318.

Moreover, the persons testifying to the character of the accused must speak from their *personal knowledge*. A vague and general statement that a man is a habitual offender is not sufficient. Evidence of repute in respect of an accused person must be evidence of persons who are speaking to matters within their own personal knowledge and not from mere *hearsay*—*Rup Singh*, 1 ALJ 616; *Kallu*, 19 ALJ. 39, 22 Cr.L.J. 314; *Angnu Singh*, 45 All 109 (113); *San Dun*, 2 Rang 641 (613); *Deodhar*, 6 PLT 810, 26 Cr.L.J. 738, 86 IC 274. But evidence of repute must necessarily consist largely of hearsay evidence, in this sense that it consists of statements of what persons other than the witness say or believe about the character of the accused—*Kumera*, 51 All 275, 1929 Cr.C. 346 (349).

Mere *rumour* is not repute; evidence of rumour is mere hearsay evidence of a particular fact, evidence of repute is a totally different thing. Rumours in a particular place that a man had done particular acts or has characteristics of a certain kind, are not evidence of general repute—*Isri Prasad*, 23 Cal 621; *Rajendra*, 1 ALJ 611; *Kripasindhu*, 1918 M.W.N. 751, 19 Cr.L.J. 905, *Ramlagan*, 5 PLT 166, 25 Cr.L.J. 985; *Tor Gul*, AIR 1935 Pesh. 158.

The witnesses must give their own opinion, and their statements must not be mere *repetitions* of what other persons said to them about the accused, and when they give their own opinion they may be asked to give the grounds of their opinion and to give names of the persons whom they have heard to speak against the character of the accused—*Bechar*, 12 ALJ 937, 15 Cr.L.J. 705; *Keval Kishore*, 29 OC 44, AIR 1925 Oudh 473, 89 IC 147, 12 OLJ 413, 26 Cr.L.J. 1283; *Angnu Singh*, 45 All 109, 24 Cr.L.J. 257. When evidence is taken as to reputation, the Court cannot and should not exclude the reasons which induced the members of the community to form a bad opinion of the accused person, and if their opinion is based wholly or partly on the belief that the accused person committed a crime which has not been brought home to him, the Court cannot rule out as inadmissible all evidence on which the belief of the witnesses is based—*Jai Singh*, 6 Luck 36, 31 Cr.L.J. 1020 (1021). The evidence must relate to *particular instances* which have come to the knowledge of the witnesses and must be specific. Evidence relating to mere beliefs and opinions without reference to acts or instances which have induced the witnesses to form an opinion, cannot be regarded as evidence of repute. Moreover, it should be the opinion of a considerable number of persons, and must not be the repetition of what certain persons have said to the witnesses—*In re Ranga Reddi*, 43 Mad. 450; *Ramlagan*, 5 PLT 166, 25 Cr.L.J. 985. Where a large number of persons come forward and swear that they believe a man to be of desperate and dangerous character, and there is little or no counter evidence of good character, such evidence will justify a Court in taking action, even if the grounds of belief are indefinite—*Jai Singh*, *supra*. But where as many good witnesses come forward

to state that the man's reputation is good as those who state the contrary, it can hardly be held safely that the man's general reputation is bad, unless there is something to corroborate the evidence of witnesses against him—*Ajmar Singh*, 1898 P.R. 2; *Rajendra Prosad*, 1 A.L.J. 611; *Kundan*, 9 Lah. 133, 28 Cr.L.J. 813; *Jai Singh*, supra.

Mere suspicion, and mere allegations that a person is a man of ill-repute, is not sufficient to base an order under this section—*Sohna*, 27 Cr.L.J. 1067, 97 I.C. 43. Mere suspicion against the accused is not evidence of general repute. Statements of witnesses each of whom says that he suspected the accused to be implicated in this or that isolated offence, do not amount to evidence of general repute—*Bechai*, 12 A.L.J. 937, 15 Cr.L.J. 705; *Amjad Ali*, 5 P.L.T. 129; *Raj Narain*, 25 A.L.J. 393, 28 Cr.L.J. 502; *Kehr Singh*, 9 Lah. 586, A.I.R. 1929 Lah. 41, 109 I.C. 127, 29 P.L.R. 443, 29 Cr.L.J. 479; *Kundan*, 9 Lah. 133, 28 Cr.L.J. 813, 104 I.C. 253, A.I.R. 1928 Lah. 49; *Sohan*, 26 Cr.L.J. 1377, 89 I.C. 513, A.I.R. 1926 Lah. 45. So also, evidence of cases in which the accused was suspected or his house was searched, is not evidence of general repute—*Rahan Ali*, 11 A.L.J. 461, 14 Cr.L.J. 407; *Bechai*, 12 A.L.J. 937, 15 Cr.L.J. 705; *Surendra*, 21 Cr.L.J. 170 (Cal.). Where there is positive evidence for the defence that the accused is a good man, it is not a sufficient reason for casting it aside to say that proof of malice against the accused on the part of the prosecution is wanting—*Surendra*, 21 Cr.L.J. 170 (Cal.). See also *Gur Dayal*, 26 Cr.L.J. 99, 83 I.C. 659, A.I.R. 1925 Oudh 277.

But the existence of suspicion can be material only as corroborating a witness's evidence as to repute—*Jogendra*, 25 C.W.N. 334 (336). An evidence that a person had been suspected and named in a large number of cases extending over a considerable interval, may be very useful corroboration of general evidence against him. Conversely, in a doubtful case, the fact that a person has never been suspected of any offence, may weaken the general evidence of reputation that is given against him—*Raja Ram*, 23 O.C. 371, 22 Cr.L.J. 273.

It cannot be laid down as a general proposition that the fact that a person proceeded against under sec. 110, Cr. P. Code has been acquitted of a charge brought against him of a substantive offence entitles him to have all evidence excluded of the incident which formed the subject of his trial. It is entirely a question of the value of that acquittal. It is perfectly certain that if he was acquitted on the ground that the case was totally false against him, no Magistrate or Judge would think of taking it into consideration against him. On the other hand, if he was only given the benefit of the doubt there is no reason why the incident should not be put in evidence and given whatever value it might be worth. The fact that an accused person has been acquitted of a particular charge may diminish, and will diminish in many cases, and may even destroy wholly, the value of the evidence, but does not render it inadmissible—*Budhan*, 23 A.L.J. 507, 47 All. 733, 26 Cr.L.J. 1130, A.I.R. 1925 All. 694.

Where the police or the Magistrates want to make use of sec. 117 (4), Cr. P. Code the witness should be allowed to depose, if he can in fact give that evidence, that the accused has a general reputation as a habitual thief (or robber, etc., as the case may be), but he should not be allowed to depose that the accused is a bad character or has the reputation of being a bad character. Evidence as to general repute is permitted by law; but it is obviously a type of evidence which requires to be weighed very carefully; and that is the greater reason for being careful that no improper laxity is permitted—*Kurwa*, 26 A.L.J. 519, A.I.R. 1928 All. 357 (358), 9 A.I.Cr.R. 467, 113 I.C. 282, 30 Cr.L.J. 122 (124). A witness should not be allowed to state merely that the accused is a "bad character", because that expression is too vague and susceptible of many different meanings. But when a witness starts by saying that the accused is a "bad character" and immediately explains what he means by that expression by saying that the person habitually commits theft, then there is no ambiguity about his meaning and his deposition is admissible as evidence of general repute—*Kumera*, 51 All. 275, 1929 Cr.C. 346 (348).

A number of similar incidents cease to be isolated facts and become evidence of habit and character. How many facts must be proved to enable the Court to draw a reasonable inference of habit of an accused, cannot be laid down by any hard and fast rule; it depends upon the circumstances of each case. Evidence of general repute and character, which is not admissible when an accused is being tried for the commission of a specific offence, is admissible in a case of this kind and specific instances where reasonable suspicion fell upon the accused, are good evidence to show the basis of bad reputation. Whether from these instances habit and character can be inferred, is a matter to be decided on the facts of the particular case. Reputation is the sum total of the rumours and talks about a man accepted and believed by those who know him well. The evidence of reputation is made up partly of the belief of the deponent and partly of what he heard from others of their beliefs. Distinction between reputation and rumour is well marked, though it may be difficult to say generally where a rumour ends and reputation begins. How many instances build up a reputation and how long it takes for rumours to ripen into reputation, cannot be laid down by any hard and fast rule. The distinction between admissible evidence of reputation and inadmissible hearsay evidence can be stated thus. If the evidence is of those persons who are living in the locality where the reputation is prevailing and where people talk of their beliefs about him and who themselves believe it, it is admissible. But if the evidence is of a man who does not know about the reputation himself but has heard it from others, it will be hearsay. In other words, the evidence of those who know the man and his reputation is admissible. Evidence of those who do not know the man, but have heard of the reputation is not admissible—*Firangi*, 34 Cr L J. 643, 143 IC 687, A.I.R. 1933 Pat. 189, 1933 Cr C 520, Ind Rul 1933 Pat 209.

What weight is to be attached to the evidence of a particular witness must necessarily depend on the fact whether the witness is independent and impartial, whether he is in a position to disclose the source of his knowledge and whether the source of his knowledge is such as to inspire confidence. If the witness merely states that a man is reputed to be an habitual offender and is unable to disclose the source of his knowledge, his evidence is entitled to no weight whatsoever. The reputation of a man means "what is generally said or believed about his character". It follows that the evidence of a witness as to the general repute of a man must necessarily depend on what he has heard about his character from others. It follows that the witness must be able to disclose the name of the person from whom he has derived his knowledge about the general repute of the man and if he is not in a position to do so, then his evidence cannot be treated as evidence of general repute of the man concerned—*Raghubar*, 36 Cr L J 33 (35), 152 IC 120, A.I.R. 1934 All 735, 1934 Cr.C. 936.

273. Duty of the Court to test the evidence:—Evidence of general repute is obviously a type of evidence which requires to be weighed very carefully; and the Court should be careful that no improper laxity is permitted—*Kurwa*, 26 A.L.J. 519, 30 Cr L J 122 (124). Where the evidence for the prosecution is of a vague character, and when a case has to be established merely upon evidence of bad repute, the Court should take into consideration the value and weight of evidence tendered on behalf of the prosecution as compared with that for the defence—*Gur Baksh*, 12 Cr.L.J 542 (Oudh).

The Court (whether original or appellate) must show by its judgment that it has duly weighed and examined the evidence for and against the accused in the case. Where, therefore, in a proceeding started under sec 110 the judgment ran: "It is obvious that if one quarter of the evidence for the prosecution is true—and I see no reason to doubt that it is—the appellant is a most proper person to be bound over under sec 110", held that the judgment was bad and must be set aside and the case sent back for retrial—*Bhansi Dhar*, 4 O.L.J 141, 18 Cr.L.J 649. Where the Appellate Court in a case under this section wrote a judgment of four

lines without giving even an indication of the fact that he had weighed the evidence for and against the accused, *held* that there had not been a proper trial of the case, and that it should be retried—*Sarwan*, 14 A.L.J. 279, 17 Cr.L.J. 167. It must appear, on the face of the judgment, that the case of each accused has been taken into consideration, and reasons should be given, as far as may be necessary, to show that the appellate Court has devoted judicial attention to the case of each accused—*Jamait*, 35 Cal. 138.

Evidence should be tested by its quality rather than by its quantity. When the evidence on the side of the prosecution and the defence is found to be of an *indifferent character*, the prosecution must fail. If the quality of evidence is good on both sides, the case must also fail, if the evidence for the defence over-balances that for the prosecution—*Sukha*, 1898 P.R. 4; *Hari Telang*, 27 Cal. 781; *Raham Ali*, 11 A.L.J. 461, 14 Cr.L.J. 407. Where as many as 10 reliable persons come forward and testify to the good character of the accused, the Magistrate should not reject their evidence and pass an order under this section, merely because the prosecution produces a large number of witnesses—*Bahadur*, 27 O.C. 327, 26 Cr.L.J. 530. On the other hand, the accused is not entitled to be acquitted merely because the defence witnesses are as numerous as or more numerous than the prosecution witnesses; but it is the weight of the evidence and not the number of the witnesses which the Court has to consider—*Kewal Kishore*, 12 O.L.J. 413, 29 O.C. 44, A.I.R. 1925 Oudh 473, 89 I.C. 147, 26 Cr.L.J. 1283; *Gur Din*, 24 O.C. 225, 22 Cr.L.J. 647, 63 I.C. 407.

In cases where proceedings are taken jointly against more persons than one, under sec. 110, the Magistrate is required to come to separate findings as regards each of the persons charged, individually—*Parbati*, 35 Cr.L.J. 952 (1955); *Dhaju*, 34 Cr.L.J. 476, 146 I.C. 931, A.I.R. 1933 Pat. 112, 1933 Cr.C. 261, Ind. Rul. 1933 Pat. 187. See also Note 290.

274. Examination of witnesses:—Neither the prosecution nor the defence, in enquiries under this section, ought to be hampered in any way—*Legal Remembrancer, Bengal v. Jiban Kumar*, A.I.R. 1936 Cal. 292 (293). In a proceeding under this section the Magistrate is bound to examine all the witnesses produced by the accused. Where the trying Magistrate declined to examine on behalf of the defence more than the same number of witnesses as were examined for the prosecution, *held* that it was not open to the trying Magistrate to put such an arbitrary limit on the witnesses whose evidence the defence desired to adduce—*Amirulla*, 22 C.W.N. 408, 20 Cr.L.J. 201. Where witnesses are cited for the defence in proceedings under this section, time and opportunity should be given to have them produced, and then only should order be passed—*Ponthiram*, 38 C.L.J. 285, 25 Cr.L.J. 293, 76 I.C. 965.

But Magistrates should be careful not to allow an unnecessarily large number of witnesses to be examined, which would amount to a scandalous waste of public time and Magisterial energy—*Angnu Singh*, 45 All. 109 (112), 20 A.L.J. 881. In this case the Police produced as many as 76 witnesses to prove the bad character of the accused (which took more than two months to examine them), and the total number of witnesses produced in the case was 402, the examination of which occupied 6 months. The High Court severely condemned the procedure as "monstrous and amounting to something like persecution."

There is no provision in Cr. P. C., by which a Magistrate can arbitrarily limit the number of witnesses for the defence. Section 257, Cr. P. C., which is one of the provisions relating to warrant cases, lays down that a Magistrate may refuse to issue process for the appearance of witnesses, when he considers the application to be for the purpose of vexation or delay or for defeating the ends of justice, but in such a case the grounds for refusing to summon them shall be recorded in writing. Having summoned them, however, he must be presumed to have concluded that they are not being produced by the accused for the purpose of vexation or delay and therefore he should hear them, and in any case he must record his reasons for not

hearing them in writing—*Tek Chand*, A.I.R. 1935 All 638, 1935 Cr.C. 643 So long as the application under sec 257, Cr. P. C., is not made for the purposes of vexation or delay or for defeating the ends of justice, the appellant has a right to recall any witnesses either for the purpose of examination or cross-examination. This is a matter entirely to be left to the discretion of the Magistrate—*Zamin*, 34 Cr.L.J. 468, 142 I.C. 752, A.I.R. 1933 Rang. 29, 1933 Cr.C. 277, Ind. Rul 1933 Rang 52 A Magistrate has no sanction in law to arbitrarily limit the number of witnesses whom the accused wants to examine in his defence. A person, who is called upon to furnish security under sec. 110, Cr. P. C., is entitled, like other accused persons, to have his full say in the matter and there is no warrant in law for calling upon such a person to play the role of a Judge and decide for himself who are his "best witness" and examine only such witnesses in his defence—*Raghubar*, 36 Cr.L.J. 33, 152 I.C. 120, A.I.R. 1934 All. 735, 1934 Cr.C. 936. See also Note 286 in this connection.

Further Inquiry:—See Notes 294 and 295A. Section 436 as now amended does not apply to cases under this chapter, and, therefore, further inquiry cannot be directed in a case of discharge under sec 110

275. Order for security:—The provision of law which requires sureties for the bond is made not with a view to obtain money for the Crown by the forfeiture of recognizances, but to ensure that the particular accused person shall be of a good behaviour for the time mentioned in the order—*Rahim Baksh*, 20 All 206; *In re Raja*, 10 Bom 174 Therefore, an order under this section requiring persons to deposit cash in lieu of entering into a bond for their future good behaviour is bad in law—*Kala Chand*, 6 Cal 14.

Under this section, the Magistrate can pass an order directing the person to *give security* But an order directing that person "must leave the town at once or he will be prosecuted as a bad character" is illegal and *ultra vires*—*Ram Prasad*, 19 A.L.J. 951, 23 Cr.L.J. 122, 65 I.C. 554

An order should not be made under this section, where a previous proceeding against the same accused had resulted in his discharge and only a short interval had elapsed between the previous proceeding and the institution of the present proceedings—*Shakur*, 26 O.C. 242, 24 Cr.L.J. 565

It is illegal for a Magistrate to call upon a person to furnish security soon after the expiry of the term of imprisonment to which he was sentenced for past offences. Before passing such an order, the accused should be questioned as to his means and intention of earning an honest livelihood, and he should not be subjected to penalties unless it is shown that there is no reasonable prospect of his future good behaviour—*In re Raja*, 10 Bom 174 (175)

See Notes 292 and 293

Fresh security after expiry of term of bond—Where a bond for good behaviour expired on the 13th of June 1905, and on the 20th June fresh proceedings were started against him, it was held that the order was illegal in as much as the accused was not given a sufficient opportunity of showing that he was willing to adopt an honest livelihood, and the interval was not long enough to see whether the accused had reformed his course of life or not—*Ranjit*, 28 All 306, 3 A.L.J. 29; *Akbara*, 18 Cr.L.J. 710 (Oudh). Where the accused was imprisoned for one year for failure to furnish security, and several months afterwards fresh proceedings were instituted against him as a result of which he was ordered to execute a bond for good behaviour, it was held that the order was bad, that the accused has not had a sufficient *locus penitentiae*, and that the evil reputation which he had before his imprisonment still followed him and permeated the evidence of many of the witnesses—*Junab Ali*, 31 Cal 783; *K-E v Sheikh Abdul*, 20 C.W.N. 725, 43 Cal. 1128, 17 Cr.L.J. 185, 33 I.C. 825; *Nga Po*, 17 Cr.L.J. 85; *Rajendra*, 17 C.W.N. 238 (268), 16 C.L.J. 467 See Note 271.

See also 4 C.W.N. 121 in Note 292

In cases where there has been a previous order under this section, witnesses ought to make it clear in their evidence that their evidence relates to the reputation of

persons proceeded against subsequently to their release from imprisonment. It would be intolerable that on the same evidence as before suspected persons should continually be sent to jail under this section—*Emp v. Niranjan Singh*, A.I.R. 1933 All. 369, 55 All. 404, 1933 Cr.C. 646, 1933 A.L.J. 203; *Golap Khan*, 22 C.W.N. 1x; *Ram Deo*, 19 C.W.N. 223, 16 Cr.L.J. 312, 28 I.C. 648.

Error in form of bond—When a bond required under sec. 110 was, under a mistake, executed in the form of bonds required to be entered into under section 107, it was held that the bond was void and the error could not be rectified under section 537—*Wadhawa*, 1903 P.R. 32.

Order should state on which clause it is based—On the conclusion of the inquiry, if the Magistrate considers that the accused is a person falling within any of the descriptions stated in this section, he should record a distinct finding of the specific description which he considers proved. If the finding be insufficient, the final order based upon it will be open to reversal. The same will be the case, if the finding be that he is a habitual thief (or dacoit) but the finding is not supported by evidence that the misconduct is habitual—*Punj Circ.*, p. 167. When a person is sought to be proceeded against under this section, it must be made clear to him as to which sub-section he is charged with coming under. Mere assertion that he is a man of criminal tendency or is suspected of having committed crimes is insufficient—*Sohan*, 26 Cr.L.J. 1377, 89 I.C. 513, A.I.R. 1926 Lah. 45, 1 Lah. Cas. 80.

Remand to custody—Where proceedings are instituted under this section the Magistrate can remand the accused person to custody. See Note 526 under sec. 167.

276. Revision—In question arising under sec. 110 and sec. 107, the moment it is shown *prima facie* that there is something which the Courts below have done either in excess of their powers, or by a too summary exercise of their powers, or by misapplying the rules of evidence, or by not giving due effect to the evidence for the defence, an application for revision should be admitted. But the High Court will not generally interfere on the merits except in very exceptional cases, because it is idle to suggest that the High Court, sitting with only the paper-evidence before it, should presume to differ on questions which are purely questions of fact and questions depending on the demeanour of witnesses—*Gayani*, 17 Cr.L.J. 461 (All). The High Court is not a Court of Appeal in cases under sec. 110, and the responsibility of administering that section does not rest upon it. It is only when something appears unsatisfactory and unusual in the proceedings of the lower Court that the High Court will look into the record to examine whether the order under sec. 110 has been properly passed—*Raj Narayan*, 25 A.L.J. 393, 28 Cr.L.J. 502. The High Court is not a Court of Appeal in cases under section 110, and the duty of the High Court is not to weigh the evidence given on behalf of one side or the other, but only to see whether the Court below has approached the consideration of the case in a fair way, having regard to the interest not only of the prosecution but also of the accused—*Miharban*, 13 A.L.J. 1046, 16 Cr.L.J. 805; *Juggut Chunder*, 2 Cal. 110 (112); *Kewal Kishore*, 29 O.C. 44, 12 O.L.J. 413, 26 Cr.L.J. 1283, A.I.R. 1925 Oudh 473, 89 I.C. 147; *Likka*, 35 Cr.L.J. 403, 147 I.C. 388, 11 O.W.N. 84. But at the same time before affirming an order under this section the Court is to be satisfied that the evidence in the case was of a character which made it imperative in the interests of public security to pass an order under this section—*Lachman*, 28 Cr.L.J. 515, 102 I.C. 211, A.I.R. 1927 All. 473; *Alimuddin* alias *Allia*, 82 I.C. 35, 22 A.L.J. 678, A.I.R. 1924 All. 569, 25 Cr.L.J. 1172. The High Court will not interfere on the merits with proceedings under this section, provided that the Lower Court or the Appellate Court shows in its judgment that it has really and not merely nominally considered the evidence on the record—*Shiam Lal*, 6 A.L.J. 487, 9 Cr.L.J. 528. The High Court is not disposed to encourage revision applications in respect of proceedings under this Chapter, because so long as the cases proceed fairly and regularly, the Magistrate is the best tribunal, in fact the only tribunal who can satisfactorily decide them—*Darbari Singh*, 45 All. 749 (751), 24 Cr.L.J. 257. But at the same time the administration of this section has to be very carefully watched;

and where evidence has been misunderstood or ignored, difficulties have not been seen or the rules of evidence have not been followed, and the Judge has reviewed the case in a very perfunctory way without noticing the palpable defects in the evidence, the grounds upon which a man has been bound down require to be carefully scrutinized—*Bisheswar*, 19 A.L.J. 668. If it is established to the satisfaction of the High Court, that the proceedings under sec. 110 are not *bona fide*, and that in substance their continuation would mean an abuse of the statutory provision on the subject, it is not only competent to the High Court but it is its obvious duty to interfere—*Rajendra*, 17 C.W.N. 238, 16 C.L.J. 467, 18 I.C. 149, 14 Cr.L.J. 5; *Nafar*, 28 C.W.N. 23, 38 C.L.J. 198, 25 Cr.L.J. 189, 76 I.C. 429, A.I.R. 1924 Cal. 114; *Satindra*, 48 C.L.J. 143. It is undoubtedly true that Magistrates have complete jurisdiction to initiate proceedings under sec. 110 Cr. P. Code provided that they are satisfied that there are sufficient materials for doing so, but in each case the superior Court will examine, if necessary, the materials upon which the proceedings are based—*Narendra Nath Jha v. Emp.*, 39 Cr.L.J. 811 (813), 176 I.C. 849, 19 P.L.T. 542, 1938 P.W.N. 588, 4 B.R. 767, 11 R.P. 116, A.I.R. 1938 Pat. 533. Though the High Court finds it difficult to interfere with orders under sec. 110, still it has to be satisfied that the evidence is of a character which will reasonably support the interference that it is necessary in the interests of public security to bind down the accused—*Alimuddin*, 22 A.L.J. 678, 25 Cr.L.J. 1172.

If the Courts below approach the consideration of the case in a fair way and subject the evidence both for the prosecution and for the defence to legitimate criticisms the High Court is relieved from the necessity of weighing the evidence in criminal revisions. Where it is clear from the judgments of the Courts below that the evidence has not been fairly considered, it is imperative to examine the evidence with a view to test the accuracy of the decisions of the Courts below—*Raghubar Dayal*, 36 Cr.L.J. 33, 152 I.C. 120, A.I.R. 1934 All. 735, 1934 Cr.C. 936. See also *Nizamaddi*, 23 C.W.N. 488. There can be no doubt that in the case of orders made in a proceeding under this section the revisional jurisdiction of the High Court is as much unfettered as in other cases coming before it, and interference by the High Court would be called for, and justified on a proper case being made out. At the same time the position cannot be overlooked that the question whether it is necessary, in the interest of keeping the peace, to take security from a person, is essentially a question which concerns the Magistrate and the local Police; and it may be said that the power to demand security from suspected persons is a power that is almost as much of an executive as of a judicial nature. The High Court will, therefore, interfere only on very strong and clear grounds which go to show that there has been, in a particular case, a miscarriage of justice—*Parbati Charan*, 35 Cr.L.J. 952, 61 Cal. 588, 149 I.C. 460, 1934 Cr.C. 690, A.I.R. 1934 Cal. 482. See also *Khairatram*, 33 Cr.L.J. 324, 136 I.C. 753, A.I.R. 1932 Sind. 100, 1932 Cr.C. 540, Ind. Rul. 1932 Sind. 49.

Where the bad livelihood proceedings were pending for an unconscionable time mainly due to the fault of the petitioners themselves and according to the Crown a murder took place because the murdered persons were witnesses in the bad livelihood case, the High Court refused to exercise its revisional powers for stay of proceedings under sec. 110, Cr. P. C., and declined to interfere with the direction of the lower Court as regards the dates of the trial of the bad livelihood case—*Girdhar*, 34 Cr.L.J. 1145, 146 I.C. 37, A.I.R. 1933 Pat. 116, 1933 Cr.C. 260.

277. Order under Special Acts:—An order restricting movements under the provisions of sec. 7 of the Punjab Act V of 1918 (Restriction of Habitual Offenders Act) cannot be passed against any person from whom a security has already been taken under sec. 110 of the Cr. P. Code—*Kabir Baksh*, 1 Lah. 100; *Bhana*, 1919 P.I.R. 34.

A double order both under sec. 110 of this Code and under sec. 7 of the Burma Habitual Offenders Restriction Act is illegal, and the order of restriction must be set aside—*Pan Zyaw*, 1 Bur.L.J. 257, 24 Cr.L.J. 735. Where proceedings have been taken under sec. 110 of this Code by the Sub-divisional Magistrate, and a final order has been

passed under sec. 118, the District Magistrate (and he alone) can convert the order into an order of restriction under the Burma Habitual Offenders Restriction Act (II of 1919), where there has been a proper preliminary order under sec. 112 and the District Magistrate has good reasons for the change—*Parsodan*, 2 Rang. 524.

Proceedings under this section against persons who have been registered under sec. 4 of the Criminal Tribes Act (III of 1911) are not illegal. But such proceedings though not illegal are inexpedient, and the fact that the persons proceeded against are already registered under the Criminal Tribes Act may be a factor and an important factor which the Magistrate should take into consideration before he makes any order against them under sec. 110 of this Code—*Ghulam Rasul*, 20 Cr.L.J. 30, 48 I.C. 510 (Cal.). A person who has been registered under the Criminal Tribes Act may be proceeded against under sec. 110 of this Code, if he pursues a career of crime bringing him within some one of the clauses of this section. Each case has to be scrutinized on its merits. If such proceedings appear to be necessary in view of the exigencies of any particular case, evidence of general repute, which is bound to be affected in a large measure by the very fact of the person proceeded against being a member of a criminal tribe, should be, if at all, acted upon with great caution and scrutiny—*Bada Mir*, 54 Cal. 279, 31 C.W.N. 165 (166), 28 Cr.L.J. 106, 44 I.C. 314, A.I.R. 1927 Cal. 213.

277A. Transfer:—Cases under Ch. VIII may be transferred in accordance with the provisions of sec. 192, Cr. P. Code. See Notes 598 in this connection. See also *Gulabrao Laxmanrao Changude v. Emp.*, in Note 258.

A person proceeded against under sec. 107, Cr. P. Code can apply for transfer of the proceedings under sec. 526, Cr. P. Code—*Haji Baqriddi*, 26 A.L.J. 398, 29 Cr.L.J. 448 (449), 108 I.C. 569, A.I.R. 1928 All. 268.

Proceedings under sec. 110, Cr. P. Code cannot be transferred by the High Court to another district—*Emp. v. Mahendra*, 30 All. 47, 27 A.W.N. 268, 7 Cr.L.J. 214; *Amar Singh*, 16 All. 9. This view was dissented from in *Emp. v. Wahid Ali Khan*, 32 All. 642, where Tudball, J., observed. "No doubt, a Magistrate cannot take action under sec. 110 unless the person against whom the action is taken, is one within the local limits of his jurisdiction. But once action has been taken, the inquiry and the final order are made under the powers conferred by sec. 117 and sec. 118 of the Code. Section 526 clearly enables this Court to transfer a criminal case of this description, once it has been properly instituted, to any other Criminal Court of equal or superior jurisdiction (and which otherwise would have no jurisdiction), and the order of this Court will give jurisdiction to the Court to which the case has been so transferred to make an enquiry under sec. 117 and to pass an order under sec. 118. I do not think that the powers of transfer given to this Court by sec. 526 are in any way limited by the terms of sec. 110 or sec. 107 of the Code." This view was followed in *U Gandama*, 145 I.C. 314, A.I.R. 1933 Rang. 164, 1933 Cr.C. 763, 6 Rang. 41, 34 Cr.L.J. 950. As a rule, it would not be at all in accordance with the view of the Calcutta High Court, to transfer any preventive proceeding from one district to another. It must be an extremely exceptional case that could justify the interference of the High Court with the jurisdiction of the Magistrate of the district taking preventive action within his own boundaries and imposing such foreign and extraneous duty on the Magistrate of another district—*Chandi Prosad*, 17 C.W.N. 536, 20 I.C. 142, 14 Cr.L.J. 382. See also *Maung Saw Hlaing*, 34 Cr.L.J. 1195, 146 I.C. 23, A.I.R. 1933 Rang. 165, 1933 Cr.C. 764, where the High Court transferred proceedings under sec. 107, Cr. P. C., to another district.

277B. Confession:—A confession in a dacoity case is admissible against its maker in proceedings under sec. 110, Cr. P. Code. It is clearly inadmissible against the co-accused in such proceedings, the provisions of sec. 30 of the Indian Evidence Act not being applicable in such a case—*Amirulla*, 22 C.W.N. 408, 49 I.C. 649; *Mafizuddin*, 25 C.W.N. 239, 61 I.C. 793, 33 Cr.L.J. 70, 22 Cr.L.J. 441, A.I.R. 1921 Cal. 557. In *Richpal*, 36 Cr.L.J. 198, 57 All. 312, 152 I.C. 881, A.I.R. 1934 All. 927, 1934 Cr.C.

1931 A.L.J. 1170, the Allahabad High Court took a contrary view, holding that sec. 110 of the Indian Evidence Act applied to such a case. See also *Sarju*, 41 All. 231, A.L.J. 147, 20 Cr.L.J. 206, 49 I.C. 654

111. [*Repealed.*]

This section has been repealed by sec. 8 of the Criminal Law Amendment Act of 1923). It ran as follows:—

"111. The provisions of secs. 109 and 110 do not apply to the European British subjects in cases where they may be dealt with under the European Vagrancy Act, 1874" "We consider that sec. 111 should be repealed and that secs. 109 and 110 should apply equally to Europeans and Indians"—*Report of the Racial Distinctions Committee*, 16

112. When a Magistrate acting under section 107, section 108, section 109 or section 110 deems it necessary to require any person to show cause under such section, he shall make an order in writing, setting forth the substance of the information received, the amount of the bond to be executed, the term for which it is to be in force, and the number, character and class of sureties (if any) required.

78. Scope:—The provisions of this section must be complied with by a Magistrate passing a preliminary order under the Burma Habitual Offenders Restriction Act of 1919), and if that order does not set forth the substance of the information received and the term during which the order of restriction shall be in force, the entire order is irregular and order passed therein must be set aside—*Parsadan*, 2 Rang. The information which leads to action under sec. 107 may be of the most varied kind. It may be oral, sworn or not sworn, and need not be in writing. It may be derived from any source, official or unofficial, formal or informal. It may be derived from the Magistrate's own knowledge. He is not bound to disclose the source or the nature of the information received—*In re Mithu Khan*, 27 All. 172, 1904 A.W.N. 206, 1 A.L.J. 685; *Tapadmanabhiah*, 54 Mad. 422, A.I.R. 1930 Mad. 975, 1930 M.W.N. 1100, 32 W. 784, 59 M.L.J. 914, 129 I.C. 70, 32 Cr.L.J. 217, 1930 Cr.C. 1191

79. Order in writing:—Before making an order the Magistrate may hold an inquiry. See Note 230 under the heading "Inquiry." A Magistrate acting under this section has no power to act until he has recorded an order in writing under this section—*Rameshwar*, 36 All. 262, 12 A.L.J. 365. The issue of a warrant under sec. 115 without recording an order under this section is illegal—*Jatoi*, 20 S.L.R. 122, 27 Cr.L.J. 391. So also, where the accused persons were arrested as suspected habitual offenders and the Magistrate fixed a date for the production of evidence with the object of issuing a notice under sec. 112, but on the date fixed, after hearing the prosecution evidence, he at once called upon the accused to enter upon his defence to a charge under sec. 110, *held* that the procedure was illegal and the proceedings must be set aside. It is only after the Magistrate has recorded an order under sec. 112, that the actual hearing can by law take place at all—*Rajbans*, 42 All. 616 (648), 22 Cr.L.J. 228. In *Pragt*, 10 O.C. 365, 7 Cr.L.J. 94, however, it has been held that the provisions of this section are purely directory, and a failure to record the order is a mere irregularity. In *In re Kavatham*, 26 M.L.T. 385, 20 Cr.L.J. 763, it was held that the omission to draw up a proceeding under this section or to serve a copy of the order on the accused under sec. 115 did not vitiate the proceedings, if the order was drawn up later and read out and explained to the accused who appeared in Court in pursuance of a summons.

Where a Magistrate, instead of making an order in writing, wrote the order on the

back of the police report which gave the information, *held* that it was a mere irregularity cured by sec. 537—*Ram Deo*, 27 Cr.L.J. 1132, 97 I.C. 652, A.I.R. 1927 All. 767, 25 A.L.J. 44, 49 All. 228.

Joint order:—Where there are several persons, and the charges against them are not the same, a joint notice to them is undesirable. Each man is entitled to a separate notice and not to have the charges which are going to be made against him confused with the charges that are being made against somebody else—*Ram Lal*, 51 All. 663, 30 Cr.L.J. 562 (564), A.I.R. 1929 All. 273, 116 I.C. 25, 1929 A.L.J. 361.

280. Contents of the order:—

Substance of the information.—It means an abstract of the facts upon which the Magistrate charges the persons proceeded against with being likely to commit a breach of the peace, so as to give them notice of what they have to meet and be prepared to meet it—*Kalia*, 59 M.L.J. 887, 32 Cr.L.J. 27 (29), A.I.R. 1930 Mad 859, 1930 Cr.C. 1033, 127 I.C. 652 Under this section, the substance of the report made to the Magistrate should be clearly disclosed to the accused so that he may be informed of the charges or of the nature of the evidence which he is to rebut. Thus, a notice under sec. 110 must contain something more than a mere reproduction of the clauses of the section. There should be sufficient indication of the time and place of the facts charged and sufficient details which enable the accused to know what facts he is to meet—*Ranga Reddi*, 38 M.L.J. 97, 21 Cr.L.J. 354, 55 I.C. 722, A.I.R. 1920 Mad. 534, 11 M.L.W. 331, 1920 M.W.N. 398, 43 Mad 450; *Kripasindhu*, 19 Cr.L.J. 905, 1918 M.W.N. 751; *Tanwar*, 19 S.L.R. 176, 26 Cr.L.J. 1398; *Santhana Ramaswami*, 1937 M.W.N. 885. The omission to state the substance of the information is a grave and substantial irregularity and if it be shown that the accused has thereby been prejudiced the order of the Court should be set aside. In the absence of such prejudice the proceedings cannot be treated as void *ab initio*—*Alisher Dost Muhammad*, A.I.R. 1939 Sind 261, 40 Cr.L.J. 887, 184 I.C. 189, 12 RS 94. Magistrates should by no means be contented with allowing the officer to fill up a vague lithographed or typed form, but ought to do their best to see that the first order does actually contain the substance of the information, no less and no more. If this is not done, the accused cannot know till he comes to Court precisely what he is charged with, and as no charge is drawn up, he may not know till the final order is passed what his alleged delinquency is—*Sultan*, A.I.R. 1925 Sind 236, 19 S.L.R. 332, 26 Cr.L.J. 767, 86 I.C. 351. A mere assertion in writing by the Magistrate that he has been informed that an offence (e.g., a breach of the peace) is likely to be committed, is not sufficient; the persons proceeded against are entitled to know the nature of the accusation they have to meet and to a reasonable opportunity within which to prepare themselves to meet the accusation and to cite witnesses—*Iswar Chandra*, 11 Cal 13; *Nathu*, 6 All 214; *Ranga Reddi*, supra. The accused is entitled to be told the nature and extent of the information. Therefore, if the substance of the report made to the Magistrate is not clearly disclosed, and the accused is not informed of the charges and of the nature of the evidence that he is to rebut, the proceedings cannot be regarded as legal—*Ranga Reddi*, supra. Where a notice under sec. 107 did not at all state when the threats complained of were uttered, who were the persons who were threatened and when the apprehension of a breach of the peace arose, *held* that the notice was vague and bad in law—*Konda Reddi*, 41 Mad 246, 18 Cr.L.J. 787, A.I.R. 1918 Mad 555, 41 I.C. 990. A notice which is very meagre and does not contain sufficient details regarding the charges brought against the persons, is illegal, and this defect cannot be remedied by any explanation given by the Prosecuting Inspector at the commencement of the trial—*In re Kutti Goundan*, 47 M.L.J. 689, 26 Cr.L.J. 673, 86 I.C. 49, A.I.R. 1925 Mad 189; *Kalia Goundan*, 59 M.L.J. 887, 32 Cr.L.J. 27, 32 M.L.W. 320, 1127 I.C. 652, A.I.R. 1930 Mad. 859. See also *Santhanaramaswami v. Emp.*, 1937 M.W.N.Cr. 189; 2 Weir 49, *Maruthapali Goundar v. Emp.*, A.I.R. 1937 Mad 356, 169 I.C. 97, 38 Cr.L.J. 699, 1937 M.W.N.Cr. 9. After discussing the above mentioned rulings the Full Bench of the Madras High Court has laid down that action taken under sec. 112, Cr. P. Code constitutes a

judicial act and therefore the Magistrate should not act arbitrarily. There must be information of a nature which convinces him that there is a likelihood of a breach of the peace. It is impossible to formulate a hard and fast rule with regard to the nature of the information on which a Magistrate should act. What is reasonably sufficient to satisfy a Magistrate must depend on the particular situation. While there must be something more than the past misconduct of the person proceeded against to justify a notice being served upon him, the Cr. P. Code does not require the information to show the particular act which is in contemplation at the time. The Magistrate must be satisfied that there is a likelihood of a breach of the peace. What will satisfy him must depend on the particular facts of the case—*In re Muthuswami*, AIR 1940 Mad. (25, 26), 50 MLW. 802, 1939 M.W.N. 1209, 185 I.C. 824, 41 Cr.L.J. 238, (1940), 1 MLJ. 11 (F.B.).

Merely informing an accused person that he is suspected to be a habitual thief, is not a sufficient notice, before proceeding under sec 110. There must be something in the nature of the indictment or charge containing substantial particulars indicating the grounds upon which the police have given information to the Magistrate—*Rajbansi*, 18 A.L.J. 678, 42 All 616 (648), 22 Cr.L.J. 228; *Nihal*, 49 All. 5, 24 A.L.J. 900, 28 Cr.L.J. 9, AIR 1926 All 759, 99 I.C. 41. The failure of the Magistrate to record the details of the information which he has received, is not a mere irregularity which would be covered by sec 537, but is an illegality which vitiates the trial—*Nihal*, (supra). The Oudh Chief Court, however, dissents from these two rulings and is of opinion that the 'substance of the information' does not mean anything more than the gist of the information. It is not necessary to state anything more than the particular section or sub-section on which it is proposed to proceed against the accused. In any view, the failure to give the accused the information of the nature of the case against him, is a mere irregularity cured by sec 537—*Ram Ghulam*, 2 Luck 157, 28 Cr.L.J. 744 (746), 103 I.C. 792, AIR 1927 Oudh 306, 6 O.W.N. 1202. The Calcutta High Court likewise holds that the substance of the information means such or so much of the information as would enable the party to know under what clause of sec 110 he is charged or to what particular class of offenders he is said to belong. Where possible, the repetition of the words of the section should be avoided, but the notice is not rendered invalid because of failure to mention the details of the case—*Bhut Nath*, 33 C.W.N. 852, 124 I.C. 71, 31 Cr.L.J. 614, 1929 Cr.C. 387, 57 Cal 503, AIR. 1929 Cal. 739. It is utterly impossible to draw the line or to offer the Magistrates any guiding principle which would assist them in determining how much information is to be given in a case under sec 110. It is sufficient if the particular clause of the charge, or where there are more than one offence named in a charge, the particular offence or offences are given in the notice—*Chandan*, 52 All 448, AIR 1930 All. 274, 1930 Cr.C. 442, 124 I.C. 40, 31 Cr.L.J. 627, 1930 A.L.J. 389. Ordinarily, it is sufficient if that portion of the clause of sec 110 which is applicable to the particular case is specified in the notice, but where the particular clause refers to two or more offences, the particular offence or offences which is more appropriate to the particular case should also be mentioned in the notice. This applies more particularly to clause (d) of sec. 110—*Chandan*, supra. This section does not contemplate that the allegations of fact constituting the information should be embodied in the preliminary order. The section provides for a preliminary order to be passed in proceedings started under secs 107, 108, 109 and 110 and contemplates that the order should contain as much of the information as would be sufficient to enable the party to know under which of the several sections or which part of any one of them he is proceeded against. The preliminary order under this section need not contain more than an indication of the particular offence which is sought to be prevented—*Jagannath Prasad v. Emp.*, AIR 1910 Nag 134 (135), 1940 NLJ 31.

The omission to set forth the substance of the information will not of itself be sufficient to render the proceeding and the final order null and void, unless the accused has been prejudiced by the omission and a failure of justice has been occasioned—*Id*.

Jafar, 3 All. 545; *Abbasu v. Umda*, 8 Cal 724; *Bhagwan*, 1891 A.W.N. 40; *Tanwar*, 19 S.L.R. 176, 26 Cr.L.J. 1398; the omission in the notice to give detailed information as to the nature of the evidence for the prosecution, is not an irregularity sufficient to vitiate the proceedings, especially if the accused had cross-examined at great length the witnesses for the prosecution—*Dohra*, 20 Cr.L.J. 436 (Pat.); or if as a matter of fact the accused had clear notice of the case made against them and had ample time and opportunity to let in evidence—*Jai Singh*, 23 Cr.L.J. 42 (Pat.). According to the Lahore and Rangoon High Courts, an order which does not set forth the substance of the information is illegal and must be set aside—*Ujagar*, 10 Lah. 155, 30 Cr.L.J. 839, 117 I.C. 807, A.I.R. 1929 Lah 504, 1929 Cr.C. 61, 30 P.L.R. 694, Ind. Rul. 1929 Lah 695; *Maung Tunu*, 4 Bur.L.J. 172, 27 Cr.L.J. 318 (319), '92 I.C. 702, A.I.R. 1925 Rang 353. For contra, see *Dayaram*, 27 Cr.L.J. 575, 94 I.C. 143, A.I.R. 1926 Lah 366.

In a proceeding under sec. 107, the Magistrate may give only the substance of the information received, and it is not necessary to specify the definite acts which the accused intends to commit—*Jagui*, 16 A.L.J. 567, 19 Cr.L.J. 876, A.I.R. 1918 All 93, 43 I.C. 72. In proceedings under sec. 110 an order by the Magistrate stating that he has received some reliable information (though not definite) that the accused is a habitual cattle thief and a receiver of stolen goods, is a sufficient compliance with the provisions of this section—*In re Kala*, 1896 A.W.N. 73.

But a Magistrate is not bound to give the source of the information—*In re Mithu*, 27 All 172; *Alimuddin*, 29 Cal. 392. It is also not necessary to give a list of the prosecution witnesses in the order—*Chintamon*, 35 Cal. 243, 12 C.W.N. 299, 7 C.L.J. 177; *Rajendra*, 17 C.W.N. 238 (261), 18 I.C. 149, 16 C.L.J. 467, 14 Cr.L.J. 5.

Section 110 provides six categories of cases within one or more of which the offender's case must come in order that a penalty may be imposed in accordance with that section. When a person is sought to be proceeded against under this section it must be made clear as to which sub-section he is charged with coming under. It is not enough merely to assert that he is a person of criminal tendencies or that he is suspected of having committed certain crimes. The omission to do so is obviously a serious hardship to the accused person, in as much as he receives no notice of the precise case which he is to meet. It is not enough to charge a person generally of having committed an offence under sec. 110, Cr. P. Code without specifically stating under which of the sub-section the case is alleged to fall—*Sohan Singh*, 26 Cr.L.J. 1377, 89 I.C. 513, A.I.R. 1926 Lah 45.

Where in a proceeding under sec. 107, Cr. P. Code the Magistrate has only reproduced the language of the section, without specifying in what way and with reference to what matter a person was likely to commit a breach of the peace and in what way he was likely to do a wrongful act which might occasion a breach of the peace, the proceeding is vague and cannot be supported—*Amanal Ali*, 30 Cr.L.J. 492, 115 I.C. 545, A.I.R. 1929 Pat. 67, 10 P.L.T. 639, Ind. Rul. 1929 Pat 209.

It is doubtful how far an order under this section can properly exceed the information given under sec. 107, Cr. P. Code—*Jasoda Lekhraj v. Emp.*, 40 Cr.L.J. 703 (704), I.L.R. 1939 Kar 662, 182 I.C. 698, 12 R.S. 31, A.I.R. 1939 Sind 167.

Amendment of the order:—If it had been the intention of the Legislature to give Courts power to amend orders under sec. 112, after they had been communicated to the accused, provision would have been made in the Code for such amendment. The provisions which have actually been made, seem impliedly to prohibit any amendment of that kind. In the first place it is necessary not only that the information received should be set out in the order under sec. 112, but also the kind of the bond to be executed, the term for which it is to be enforced and the number, character and class of sureties, if any, required. These latter requirements for an order under sec. 112 seem to indicate that it was not the intention of the Legislature that the Courts should have a more or less free hand in altering the nature of the bond, the class of sureties, the term for which the bond was to be enforced, after evidence had been taken or

during the course of the proceedings. The provision of sec. 118 would be meaningless, if it was open to Court at any time to amend the original order under sec. 112—*Nim*, 34 Cr.L.J. 9, 140 I.C. 170, A.I.R. 1933 Sind 8, 1933 Cr.C. 32, 27 S.L.R. 19, Ind. Rul. 1932 Sind 182. For contra, see *Hyder Khan*, 1933 M.W.N. 551. But where the Magistrate recorded an order calling upon three persons to show cause why they should not be required to furnish security in the sum of Rs 2,000, got a copy of that order duly served on them to appear on a certain date and, on their appearance on the fixed date, passed an entirely fresh order under sec. 112 and carefully read it out to them as was required by sec. 113, it was held that the proceedings were in no way vitiated by the procedure adopted by the Magistrate—*Muhammad Ishaq*, 28 Cr.L.J. 815, 104 I.C. 255, A.I.R. 1927 Lah. 689.

Where a person was not called upon to show cause as being "by habit" a thief and burglar but it was stated in the order drawn up under sec. 112, Cr. P. C., that it appeared to the Magistrate that he was by "general repute" a thief and burglar, it was held that the proceedings were not illegal in as much as it was not shown that he was misled or in any way prejudiced by the terms of the order under sec. 112, Cr. P. C.—*The Deputy Legal Remembrancer v Kadir Muzza*, 17 C.W.N. 331, 13 Cr.L.J. 784, 17 I.C. 416.

There is nothing in the provisions of sec. 109 or of sec. 112, Cr. P. Code which makes it imperative on the part of the Magistrate, after having recited the reasons why the person named is to be called on to execute a bond, to enter the actual section and clause which he considers appropriate. Where the Sessions Judge in appeal has considered that what is set out in the body of the order under sec. 112, Cr. P. Code brings the matter within the terms of clause (a) of sec. 109, Cr. P. Code and not under clause (b), and he has in effect corrected what he considers either to be a misconception of the trying Magistrate or a clerical error and the substance of the accusation which the applicant had to meet has not been altered in any way, there is jurisdiction of the Appellate Court to make the alteration—*Ahesanali v Emp.*, 39 Cr.L.J. 747 (748), 176 I.C. 465, A.I.R. 1938 Nag. 303, 11 R.N. 54, I.L.R. 1938 Nag. 595.

See also Note 292.

Number, character and class of sureties:—The Magistrate in setting forth the number, character and class of sureties, should not place undue and unnecessary difficulties in the way of finding them—*Rahmatulla*, 22 Cr.L.J. 395 (All.) The Magistrate should not impose impossible restrictions, as the provisions of this Chapter are preventive and not penal—*Mad Pahor*, 1 S.L.R. 46, 8 Cr.L.J. 166.

Therefore, a Magistrate has no right to impose a condition requiring the accused to find sureties residing within certain geographical limits (e.g., within one mile or five miles) or residing in a certain locality—*Narain Soobodhee*, 22 W.R. 37; *Tara Sing*, 1880 P.R. 38; *Bhagwan*, 7 A.L.J. 993, 11 Cr.L.J. 536; *Hasimuddin*, 10 A.L.J. 354, 13 Cr.L.J. 831; *Rahunandan*, 20 A.L.J. 520, 23 Cr.L.J. 400; *Mangal*, 6 O.C. 199; or to impose a condition that the sureties must be inhabitants of one village—*Nga Po*, 17 Cr.L.J. 85. In *Nabhu*, 24 All. 471, it has been held that the Magistrate is entitled to prescribe certain geographical limits for the residence of sureties, but it must not be too narrow; and, therefore, where an order was passed by a Magistrate requiring the sureties to be "residing within the Municipality of Mirzapore" the High Court added the words "or in the immediate neighbourhood."

Lastly, as regards the *class of sureties*. Since sec. 112 gives the Magistrate power to define the character and class of sureties, it is open to him to require that they must be *landholders* or persons having a certain pecuniary status—*Rahim*, 20 All. 206, *Jita Natha*, 16 Bom.L.R. 138, 15 Cr.L.J. 268; *Allahbad*, 17 S.L.R. 160; *Jumo*, 16 Cr.L.J. 252, 8 S.L.R. 229; (but see *Wasaya*, 1901 P.R. 28); or that they should be of respectable character and should not be of inferior standing to suspects—*Mad Ibrahim*, 8 S.L.R. 173, 16 Cr.L.J. 100, 27 I.C. 148. But a condition that the sureties must not be *lambardars*,

inamdars and *Chowkidars* (*Kaim Khan*, 1906 P.R. 18) or that they must not be related to the accused (*Narain*, 22 W.R. 37) or that they must not come from *Kaharati* and must not be *Kunbi* by caste (*Yesu*, 1 Bom L.R. 520) is too restrictive and illegal.

See Notes under sec. 122.

Copy:—A person against whom a Magistrate has drawn up an order under sec. 112, Cr. P. C., asking him to show cause why he should not be bound down to keep the peace under sec. 107, Cr. P. C., is not entitled to obtain a copy of the written information given by the police on which the order is based—*Anantapadmanabhiah*, A.I.R. 1930 Mad 975, 54 Mad 422, 1930 M.W.N. 1100, 32 M.L.W. 784, 59 M.L.J. 914, 129 I.C. 70, 1930 Cr.C. 1191, 32 Cr.L.J. 217.

Revision:—The High Court has powers under sec. 439 read with sec. 423 (1) (c) and sec. 561A, Cr. P. Code to set aside the Magistrate's order under sec. 112, Cr. P. Code and to quash proceedings—*Jasoda Lekhray v. Emp.*, A.I.R. 1939 Sind 167 (170), I.L.R. 1939 Kar 662, 182 I.C. 698, 12 R.S. 31, 40 Cr.L.J. 703. The High Court has undoubtedly power to quash proceedings where the notice issued does not comply with the requirements of sec. 112, but before doing so, it must be satisfied that there has been a failure to comply. It must be remembered that the issue of the notice is merely a preliminary step and no order can be passed under sec. 107, Cr. P. Code unless the inquiry which follows the issue of the notice shows that the laying of the information was justified. The High Court can always interfere when the inquiry has not been held in accordance with the law or a wrong conclusion has been arrived at—*In re Muthuswami*, 41 Cr.L.J. 238 (241), 185 I.C. 824, A.I.R. 1940 Mad. 23, 50 M.L.W. 802, 1939 M.W.N. 1209, (1940) 1 M.L.J. 11 (F.B.).

113. If the person in respect of whom such order is made is present in Court, it shall be read over to him or, if he so desires, the substance thereof shall be explained to him.

Procedure in respect of person present in Court.

'Is present in Court':—Even if persons are illegally arrested and brought into Court, the Magistrate is justified in treating the persons as present in Court and may proceed to initiate proceedings—*Ghullam Husain*, 12 Cr.L.J. 533, 12 I.C. 301 (Bom.). The record must show conclusively that the order was read out to the person proceeded against—*Din Dayal*, 28 Cr.L.J. 8, 99 I.C. 40, A.I.R. 1927 All 146

114. If such person is not present in Court, the Magistrate shall issue a summons requiring him to appear, or, when such person is in custody, a warrant directing the officer in whose custody he is, to bring him before the Court:

Summons or warrant in case of person not so present.

Provided that, whenever it appears to such Magistrate, upon the report of a police-officer or upon other information (the substance of which report or information shall be recorded by the Magistrate, that there is reason to fear the commission of a breach of the peace, and that such breach of the peace cannot be prevented otherwise than by the immediate arrest of such person, the Magistrate may at any time issue a warrant for his arrest.

281. Issue of Summons:—Summons is necessary only if the accused is not present in Court. If he is present, and the Magistrate records an order calling on him to show cause on a day fixed why he should not furnish security for keeping the peace, it is not necessary to issue a summons to him—*Chowdhury*, 2 B.L.R. App. 28

When a Magistrate issued a notice with reference to sec. 110, but at the time of inquiry passed an order demanding security under section 107, it was held that the Magistrate ought to have issued a fresh notice with reference to sec. 107, to enable the party to know the facts on which the Magistrate intended to proceed against him—*Krishnaswami v. Vanamamalai*, 30 Mad 282.

The notice issued to the accused to appear and show cause must give him sufficient time to produce his evidence. So, where notice was served on the 7th, requiring the accused to appear on the 9th, it was held that sufficient time was not given, and the order for security was set aside—*Cheytt Singh*, 22 W.R. 70.

282. Issue of Warrant:—Before making an order for immediate arrest, the Magistrate must be of opinion that the only way of preventing a breach of the peace is to commit the person to custody, and he must put on record the substance of the Police report or other information by which he is influenced—*Maniruddin*, 5 P.L.T. 95, 24 Cr.L.J. 829, 74 IC 851. To justify an arrest under this section the Magistrate must act upon information that has been on record. It is not enough for him to merely express a belief that such a course is necessary. Not only must he have reason to fear the commission of a breach of the peace, but it must be shown that such breach of the peace cannot be prevented otherwise than by the immediate arrest of such person—*Babua*, 6 All 132. No notice is necessary before arrest—*Chandan*, 52 All. 448, 31 Cr.L.J. 627, 1930 A.L.J. 389, AIR 1930 All 274.

A Magistrate holding an inquiry under sec. 110, Cr. P. C., derives jurisdiction to issue a warrant against a suspect only after he has passed an order under sec. 112, Cr. P. C., and after he has satisfied himself that there is reason to fear the commission of a breach of the peace, and that such breach of the peace cannot be prevented otherwise than by the immediate arrest of the suspect—*Jatoi*, 27 Cr.L.J. 935, 96 IC 391, 20 S.L.R. 122, AIR 1926 Sind 288.

As for arrest without warrant, see 20 S.L.R. 85, cited in Note 126 under sec. 55.

Re-arrest:—The proviso to the section is a provision relating to the circumstances set out in the section and is not a substantive provision by itself. It does not give power to Magistrates to re-arrest a person who has already been let off after executing surety bonds—*Nathan Gope*, 10 P.L.T. 801, 30 Cr.L.J. 809 (811).

It may be doubted whether this proviso empowers a Magistrate to re-arrest a person who has already appeared and been admitted to bail—*Raghunandan*, 32 Cal 80 (83).

283. Bail:—A Magistrate has no jurisdiction to refuse bail to an accused person arrested under a warrant issued under this section—*Faiz Mahomed*, 9 S.L.R. 158, 17 Cr.L.J. 77, 32 IC 669. When a man who is arrested is not accused of a non-bailable offence, no needless impediments should be placed in the way of his being admitted to bail. The intention of the law undoubtedly is that in such cases the man is ordinarily to be at liberty, and it is only if he is unable to furnish such moderate security, if any is required of him, as is suitable for the purpose of securing his appearance before a Court pending inquiry, that he should remain in detention—*Mir Hashamali*, 20 Bom.L.R. 121, 19 Cr.L.J. 329.

284. Person outside jurisdiction:—A Magistrate cannot legally issue a warrant under this section for the arrest of a person who has already left the local limits of his jurisdiction. The person proceeded against must be actually and physically present in the district in which the Magistrate exercises jurisdiction—*In re Ramjiban*, 14 Bom.L.R. 889, 13 Cr.L.J. 796, 17 IC 540. But see *Manindra*, 46 Cal. 215 (236), AIR. 1919 Cal 702, 23 C.W.N. 193, 28 C.L.J. 25, 19 Cr.L.J. 969, 46 IC 152, where it is held that sec. 114 is not limited to arrest within the local limits of the Magistrate's jurisdiction but applies to an accused arrested outside the jurisdiction and brought in custody within the jurisdiction for the purpose of proceeding under this Chapter. See Note 258 under section 110.

115. Every summons or warrant issued under section 114 shall be accompanied by a copy of the order made under section 112 and such copy shall be delivered by the officer serving or executing such summons or warrant to the person served with, or arrested under, the same.

285. Omission to send copy of order:—When the summons was not accompanied by a copy of the order passed under section 112, the whole proceedings were invalid, and the order for security must be set aside—*Subba Naicken*, 6 Cr.L.J. 332, 17 M.L.J. 438; *Abdul Rahaman*, 2 Weir 55. Contra—*Suleman*, 11 Bom.L.R. 740, 10 Cr.L.J. 375, 10 Bom.L.R. 375, and *Narain*, 25 Cr.L.J. 682, 81 I.C. 170, A.I.R. 1925 Nag. 33, where such omission was held to be a mere irregularity, cured by sec. 537. So also, in a recent Allahabad case, where the Magistrate instead of sending a copy of his order with the summons, gave the substance of the information in the summons itself, and the accused were, therefore, informed of what they had to meet, held that the irregularity was cured by sec. 537—*Ram Deo*, 27 Cr.L.J. 1132, 97 I.C. 652, 49 All. 228, 25 A.L.J. 44, A.I.R. 1927 All. 767. See also *In re Kavatham*, 26 M.L.T. 385, 20 Cr.L.J. 763, 53 I.C. 491; *Rameshwar*, 1 P.L.T. 632, 21 Cr.L.J. 321, 55 I.C. 593, and *Bajrao*, 25 Cr.L.J. 132, 76 I.C. 228, A.I.R. 1924 Nag. 166, where it has been held that an order for security is not liable to be set aside, merely because no preliminary order was drawn up and served on the accused, provided that the preliminary order was drawn up later and read and explained to the accused when they were brought into Court in pursuance of summonses.

116. The Magistrate may, if he sees sufficient cause, dispense with the personal attendance of any person called upon to show cause why he should not be ordered to execute a bond for keeping the peace, and may permit him to appear by a pleader.

Power to dispense with personal attendance.

Where the person against whom proceedings were taken lived at a distance and there was no special circumstance making his personal attendance necessary, it would be a very unwise exercise of jurisdiction to require him to appear personally, since the Magistrate could under this section allow him to appear by a pleader—*Dinonath v. Gurja*, 12 Cal. 133.

The words "bond for keeping the peace" imply that this section applies only to a case under sec. 107. *Vide* also 2 Weir 54.

117. (1) When the order under section 112 has been read or explained under section 113 to a person present in Court or when any person appears or is brought before a Magistrate in compliance with, or in execution of, a summons or warrant issued under section 114, the Magistrate shall proceed to inquire into the truth of the information upon which action has been taken, and to take such further evidence as may appear necessary.

Inquiry as to truth of information.

(2) Such inquiry shall be made, as nearly as may be practicable, where the order requires security for keeping the peace, in the manner hereinafter prescribed for conducting trials and recording evidence in summons-cases; and where the order requires security for good behaviour, in the manner hereinafter

prescribed for conducting trials and recording evidence in warrant-cases, except that no charge need be framed.

(3) *Pending the completion of the inquiry under sub-section (1), the Magistrate, if he considers that immediate measures are 'necessary for the prevention of a breach' of the peace or disturbance of the public tranquillity or the 'commission of any offence, or for the public safety, may for reasons to be recorded in writing, direct the person, in respect of whom the order under Section 112 has been made, to execute a bond, with or without sureties, for keeping the peace or maintaining good behaviour until the conclusion of the inquiry, and may detain him in custody until such bond is executed, or, in default of execution, until the inquiry is concluded:*

Provided that—

(a) *no person against whom proceedings are not being taken under section 108, section 109 or section 110 shall be directed to execute a bond for maintaining good behaviour, and*

(b) *the conditions of such bond, whether as to the amount thereof or as to the provision of sureties or the number thereof or the pecuniary extent of their liability shall not be more onerous than those specified in the order under section 112.*

(4) For the purposes of this section the fact that a person is a habitual offender *or is so desperate or dangerous as to render his being at large without security hazardous to the community* may be proved by evidence of general repute or otherwise.

(5) Where two or more persons have been associated together in the matter under inquiry, they may be dealt with in the same or separate inquiries as the Magistrate shall think just.

Change:—Sub-section (3) and the italicised words in sub-section (4) have been added by sec 19 of the Cr P C, Amendment Act (XVIII of 1923). The reasons are stated below. Sub-sections (3) and (4) have been renumbered as (4) and (5).

286. Sub-section (1)—Inquiry into truth of information:—The inquiry provided for by secs 117 and 118 is not strictly limited by the precise terms of the order drawn up under sec 112, Cr P. Code—*The Deputy Legal Remembrancer v. Kadir Mirza*, 17 C.W.N. 331, 13 Cr L J 784, 17 IC 416. But it is hardly possible that a Court could equitably call on a man to prove that he was not a thief, and then without further notice bind him over on the grounds that he was an habitual forger—*Sultan*, 26 Cr L J 767 (768), 19 SLR 332, 86 IC 351, AIR. 1925 Sind 236.

Under this section a Magistrate is bound to inquire into the truth of the information, notwithstanding that the accused admits the allegations against him and consents to furnish security—*Nga Yan Shin*, UBR. (1902-3) 1; *Allahditto*, 19 SLR 101, 26 Cr L J. 1041. Strictly speaking, a plea of guilty in a Criminal Court can only be made in response to a charge made by the Court and an informal admission as to guilt does certainly not amount to a formal plea of guilty and such an admission has not, of course, the same binding effect as a plea of guilty. It has not the same effect

115. Every summons or warrant issued under section 114 shall be accompanied by a copy of the order made under section 112 and such copy shall be delivered by the officer serving or executing such summons or warrant to the person served with, or arrested under, the same.

285. Omission to send copy of order:—When the summons was not accompanied by a copy of the order passed under section 112, the whole proceedings were invalid, and the order for security must be set aside—*Subba Naicken*, 6 Cr.L.J. 332, 17 M.L.J. 438; *Abdul Rahaman*, 2 Weir 55. Contra—*Suleman*, 11 Bom.L.R. 740, 10 Cr.L.J. 375, 10 Bom.L.R. 375, and *Narain*, 25 Cr.L.J. 682, 81 I.C. 170, AIR 1925 Nag 33, where such omission was held to be a mere irregularity, cured by sec 537. So also, in a recent Allahabad case, where the Magistrate instead of sending a copy of his order with the summons, gave the substance of the information in the summons itself, and the accused were, therefore, informed of what they had to meet, held that the irregularity was cured by sec. 537—*Ram Deo*, 27 Cr.L.J. 1132, 97 I.C. 652, 49 All. 228, 25 A.L.J. 44, AIR 1927 All 767. See also *In re Kavatham*, 26 M.L.T. 385, 20 Cr.L.J. 763, 53 I.C. 491; *Rameshwar*, 1 P.L.T. 632, 21 Cr.L.J. 321, 55 I.C. 593, and *Bajirao*, 25 Cr.L.J. 132, 76 I.C. 228, AIR. 1924 Nag. 166, where it has been held that an order for security is not liable to be set aside, merely because no preliminary order was drawn up and served on the accused, provided that the preliminary order was drawn up later and read and explained to the accused when they were brought into Court in pursuance of summonses.

116. The Magistrate may, if he sees sufficient cause, dispense with the personal attendance of any person called upon to show cause why he should not be ordered to execute a bond for keeping the peace, and may permit him to appear by a pleader.

Power to dispense with personal attendance.

Where the person against whom proceedings were taken lived at a distance and there was no special circumstance making his personal attendance necessary, it would be a very unusual exercise of jurisdiction to require him to appear personally, since the Magistrate could under this section allow him to appear by a pleader—*Dinonath v. Girija*, 12 Cal 133

The words "bond for keeping the peace" imply that this section applies only to a case under sec. 107. *Vide* also 2 Weir 54.

117. (1) When the order under section 112 has been read or explained under section 113 to a person present in Court or when any person appears or is brought before a Magistrate in compliance with, or in execution of, a summons or warrant issued under section 114, the Magistrate shall proceed to inquire into the truth of the information upon which action has been taken, and to take such further evidence as may appear necessary.

Inquiry as to truth of information.

(2) Such inquiry shall be made, as nearly as may be practicable, where the order requires security for keeping the peace, in the manner hereinafter prescribed for conducting trials and recording evidence in summons-cases; and where the order requires security for good behaviour, in the manner hereinafter

prescribed for conducting trials and recording evidence in warrant-cases, except that no charge need be framed.

(3) *Pending the completion of the inquiry under sub-section (1), the Magistrate, if he considers that immediate measures are 'necessary for the prevention of a breach' of the peace or disturbance of the public tranquillity or the commission of any offence, or for the public safety, may for reasons to be recorded in writing, direct the person, in respect of whom the order under Section 112 has been made, to execute a bond, with or without sureties, for keeping the peace or maintaining good behaviour until the conclusion of the inquiry, and may detain him in custody until such bond is executed, or, in default of execution, until the inquiry is concluded:*

Provided that—

(a) *no person against whom proceedings are not being taken under section 108, section 109 or section 110 shall be directed to execute a bond for maintaining good behaviour, and*

(b) *the conditions of such bond, whether as to the amount thereof or as to the provision of sureties or the number thereof or the pecuniary extent of their liability shall not be more onerous than those specified in the order under section 112.*

(4) For the purposes of this section the fact that a person is a habitual offender or is so desperate or dangerous as to render his being at large without security hazardous to the community may be proved by evidence of general repute or otherwise.

(5) Where two or more persons have been associated together in the matter under inquiry, they may be dealt with in the same or separate inquiries as the Magistrate shall think just.

Change:—Sub-section (3) and the italicised words in sub-section (4) have been added by sec 19 of the Cr P C, Amendment Act (XVIII of 1923). The reasons are stated below. Sub-sections (3) and (4) have been renumbered as (4) and (5)

286. Sub-section (1)—Inquiry into truth of information:—The inquiry provided for by secs 117 and 118 is not strictly limited by the precise terms of the order drawn up under sec 112, Cr P Code—*The Deputy Legal Remembrancer v Kadir Mirza*, 17 C.W.N 331, 13 Cr L J 784, 17 I C. 416. But it is hardly possible that a Court could equitably call on a man to prove that he was not a thief, and then without further notice bind him over on the grounds that he was an habitual forger—*Sultan*, 26 Cr L J 767 (768), 19 S L R 332, 86 I C 351, A I R 1925 Sind 236.

Under this section a Magistrate is bound to inquire into the truth of the information, notwithstanding that the accused admits the allegations against him and consents to furnish security—*Nga Yan Shin*, UBR (1902-3) 1; *Allahdutto*, 19 S L R. 101, 26 Cr L J 1041. Strictly speaking, a plea of guilty in a Criminal Court can only be made in response to a charge made by the Court and an informal admission as to guilt does certainly not amount to a formal plea of guilty and such an admission has not, of course, the same binding effect as a plea of guilty. It has not the same effect

in fact and it has not the same effect in law. When such an admission is made due to an inducement made by the investigating Police Officer, there is nothing in the law to suggest that, in such circumstances, a Sessions Judge hearing a reference under sec. 123, Cr. P. Code is forbidden to direct that the persons proceeded against under sec. 110, Cr. P. Code should be examined again—*Legal Remembrancer, Bengal v. Jiban Kumar*, A.I.R. 1936 Cal. 292, 37 Cr.L.J. 818, 163 I.C. 228, 1936 Cr.C. 529, 8 R.C. 727. See Note 236 under sec. 107.

It is not competent to a Magistrate to dispense with the inquiry provided for by this section, and to base his order merely on the result of another case recently tried by him—*Mul Chand*, 37 All. 30 (31).

The inquiry to be held under this section is a full judicial inquiry. It must be conducted judicially and becomes a judicial proceeding. All the formalities of a judicial proceeding have to be observed in the inquiry—*Sher Zaman*, 1899 P.R. 10; *Nur Mahomed v. Nil Rutton*, 18 W.R. 2

The Court must act on evidence duly recorded in the presence of the accused person and it is not open to it to take into consideration any information obtained otherwise than from such evidence. This, of course, refers to the final decision in the case, and not to the initiation of the proceedings—*San Dun v. King-Emph.*, 2 Rang. 641 (642).

Summoning witnesses—It is quite clear that the accused person when appearing to show cause must be ready with his evidence. If he has been unable to bring the witnesses with him on account of the shortness of the notice or other reasonable cause, it is his duty, when he appears, to apply at once for summons to the witnesses he proposes to call—*Narayan*, 9 Bom.L.R. 1385; *Chulan v. Sukedad*, 23 W.R. 9. When a Magistrate is of opinion that the expenses for calling witnesses should be charged from parties he should realise the expenses before issuing the summons—*Govind Sahai*, 12 A.L.J. 262, 15 Cr.L.J. 363.

The accused person must be given sufficient time to bring his witnesses and have their evidence recorded. Where the accused has not had this opportunity, the order against him must be set aside—*Keramuddin*, 41 Cal. 806, 15 Cr.L.J. 353, 23 I.C. 721; *Jaloi*, 27 Cr.L.J. 935, 96 I.C. 381, 20 S.L.R. 122, A.I.R. 1926 Sind 288; *Nathu*, 6 All. 214; *Ponthiram*, 38 C.L.J. 285, 25 Cr.L.J. 293.

Defence by Pleader—The person against whom proceedings have been initiated under this Chapter has a right to be defended by a pleader—*Jhosh Singh*, 23 Cal. 493; *Girand*, 25 All. 375. See Notes under sec. 340.

See also Note 274.

287. Further evidence—The words "further evidence" indicate that some evidence may be taken by the Magistrate even before drawing up the preliminary order under sec. 112—*Nga Po*, 2 Cr.L.J. 462 (Bur.).

The Magistrate trying a case is bound by law to hear those witnesses only whose list is sent up by the Police along with the case; and as soon as the witnesses produced in support of the case have been heard, the Magistrate is then to ascertain the names of the persons likely to be acquainted with the facts of the case, and shall summon to give evidence only such of them as he thinks necessary. He is not bound by law to, and should not, save in very exceptional cases, call the other witnesses that the police or any one else from time to time choose to produce—*Govind Sahai*, 12 A.L.J. 262, 15 Cr.L.J. 363.

Evidence, which relates to occurrences which took place after the information mentioned in sec. 110, Cr. P. Code had been received by the Magistrate, is irrelevant to the matter before him—*Jagan*, 36 All. 239 (242), 12 A.L.J. 399, 15 Cr.L.J. 212, 22 I.C. 996.

In a proceeding under this section it is erroneous on the part of the Magistrate to admit fresh evidence for the prosecution after the close of the defence case. No further evidence can be admitted except under sec. 540 for which valid reasons must be recorded—*Ganga Singh*, 10 A.L.J. 383, 13 Cr.L.J. 772.

288. Sub-section (2)—Nature of Procedure:—An inquiry in a proceeding for security to keep the peace must be made in the same way as in a trial of a summons case—*Bidapati*, 25 All 273. If it is tried as a warrant case, the proceedings would be vitiated—*Uttam Chand*, 85 I.C. 46, 26 Cr L.J. 430 (All). The Magistrate must proceed as nearly as practicable in the same way as under sec. 242. He must state to the accused the particulars of the matter against him and ask him if he can show cause why he should not be required to execute bonds. The question 'are you willing to execute the bond?' answered by a statement that the accused would execute a bond, is not a sufficient compliance with the requirements of this section—*Palaniappa*, 34 Mad. 139. See also *Nasir Ahmad*, 28 Cr L.J. 609, 50 All. 120, 102 I.C. 897; A.I.R. 1927 All. 579; *Sadhu*, 1935 Pesh. 116. But sec 242, Cr P. Code does not seem to apply to all to proceedings under sec. 107 Cr. P. Code—*Christy v. Christy*, A.I.R. 1933 Lah 1019 (1020), 1933 Cr.C. 1556, 35 Cr L.J. 505, 147 I.C. 997. In an inquiry under sec. 107, the deposition need not be read over to the witnesses in the presence of the accused. See 52 Cal. 668 cited in Note 1028 under sec. 360. If the complainant is absent, the proper order is one of discharge under sec. 119, but not of acquittal under sec. 247—*Ashrafali v. Nasu Sarkar*, 31 C.W.N. 388, 28 Cr L.J. 479 (480).

The Crown is not bound at the initial stage even to name the witnesses who will support the case by their evidence—*Rajendra*, 17 C.W.N. 238 (261), 16 C.L.J. 467, 18 I.C. 149, 14 Cr L.J. 5.

The procedure applicable to the proceedings under sec. 108, Cr P. Code is that prescribed for warrant cases except that a charge need not be framed: this is clear from sec. 117 (2), Cr P. Code. The prosecution has to establish the truth of the information and the person against whom an order requiring security for good behaviour is sought is entitled to take up the position of keeping quiet and putting the prosecution to the proof of the allegations made against him—*Pitre*, 47 Bom 423 (443), 25 Bom L.R. 97, 25 Cr L.J. 150, 76 I.C. 294, A.I.R. 1923 Bom. 255. An inquiry in a good-behaviour case must be conducted as if it were a warrant case, and the procedure in secs 251-256 must be followed. According to those sections an accused person cannot be called upon to enter on his defence until the prosecution closes its case (sec. 256)—*Ganga Singh*, 10 A.L.J. 383, 13 Cr L.J. 772. The Calcutta and the Punjab High Courts are of opinion that the procedure prescribed for warrant cases is not to be followed strictly but "is as nearly as practicable" to be observed; therefore, the accused cannot invoke the aid of sec. 256 and is not entitled to ask the Court to recall the witnesses who have given evidence against him for further cross-examination—*Ahmed Baksh*, 1916 P.R. 1, 17 Cr L.J. 84; *Chintamon*, 35 Cal. 243; *Bija*, 8 Lah. 265, 28 Cr L.J. 239. See Note 835 under sec. 256.

The words "the manner hereinafter prescribed for conducting trials and recording evidence in warrant cases" in clause (2) of this section are wide enough to cover the special procedure laid down for the trial of summons or warrant cases in Chs. 20 and 21 as well as the general provisions as to inquiries and trials contained in Ch. 24. Therefore, there is no reason why in an enquiry in a case under sec. 110, Cr. P. Code which vitally affects an accused, he should be deprived of the right given to him in provision (a), sec. 350, Cr. P. Code to demand that the witnesses or any of them be re-summoned and re-heard and to ask the Magistrate to see for himself the demeanour of the witnesses and to have a first hand impression of the witnesses and their evidence. The fact whether the inquiry is under secs. 107, 108, 109 or 110, Cr. P. C. makes no difference because sec. 117, clause (2) applies equally to an enquiry under any of these sections—*Mahatab Singh v. Emp.* A.I.R. 1937 All. 423, 1937 A.W.R. (H.C.) 382, 1937 A.L.J. 373, 169 I.C. 833, 1937 A.L.R. 598, 38 Cr L.J. 804, 1937 A.I.C.R. 29, following *J. Venkatchennaya*, A.I.R. 1920 Mad. 337, 55 I.C. 50, 21 Cr L.J. 402, 27 M.L.T. 178, 38 M.L.J. 370, 1920 M.W.N. 280, 43 Mad. 511 (F.B.) *Govinda v. Emp.* 20 N.L.J. 117. See also Notes 1012 and 1015.

Ordinarily the person proceeded against under this Chapter and ordered to give security for good behaviour, is entitled to have his witnesses summoned at Government

expense as in warrant cases unless the Magistrate, for reasons to be recorded, declines to summon all or any of the witnesses named by the person concerned—*Pahlwan*, 33 Cr.L.J. 679, 138 I.C. 765, 33 P.L.R. 742, Ind. Rul. 1932 Lah. 529, A.I.R. 1932 Lah. 577, 1932 Cr.C. 805 See also *Sayyad Habib*, 117 I.C. 667, A.I.R. 1929 Lah. 23, 30 Cr.L.J. 814; *Habib v. Mehdi Hussain*, 108 I.C. 907, 29 Cr.L.J. 459 and *Muhammad Azim v. Muhammad Ji*, 7 P.R. 1898.

'Except that no charge need be framed'.—The reason for this exception is obvious. What is equivalent to a charge has already been framed in the order served upon the accused, in accordance with sec. 112—*Tirlok*, 25 A.L.J. 749, 28 Cr.L.J. 792 (793).

An examination of the persons proceeded against is necessary under sec. 342, Cr. P. Code—*Raghubar Dayal*, 36 Cr.L.J. 33, 152 I.C. 120, A.I.R. 1934 All. 735, 1934 Cr.C. 936 But see, *Binode*, 50 Cal 985, where it has been held that sec. 342, Cr. P. C., does not apply to an inquiry under this section See Note 973 in this connection

Consent of accused to be bound down.—See Note 236.

288A. Sub-section (3)—"This sub-section has been added to enable the Magistrate in emergent cases to take immediate steps to preserve the public peace or for the public safety by taking security pending the detailed inquiry"—*Statement of Objects and Reasons*, (1914).

The object of sec. 117 (3) is to empower the Magistrate to direct the person against whom an order under sec. 112 has been made to execute a bond for keeping the peace or maintaining good behaviour until the conclusion of the enquiry. The power so to direct is made to depend on the Magistrate holding that immediate measures are necessary for any of the following purposes.—

(1) for the prevention of—

(a) a breach of the peace or

(b) disturbance of public tranquillity, or

(c) the commission of any offence; or

(2) for the public safety.

Where, therefore, the ground on which the Magistrate considered that immediate measures were necessary was that he apprehended that the person proceeded against would "prove a danger to the witnesses who are to give evidence against him" at the enquiry, the case falls under clause (c) above and the requirements of this sub-section have been satisfied—*Pir Shah Murad Shah v. Emp.*, 27 Cr.L.J. 1030, 96 I.C. 982, A.I.R. 1926 Sind 276

The Court passing an order under clause (3) of this section must state its reasons in writing for passing the order, *i.e.*, it must state that there was a likelihood of the accused committing a breach of the peace. Where all that the Magistrate said was that the order was passed on account of emergency, *held* that the order was bad and must be set aside—*Sahib Dino*, 21 S.L.R. 93, 28 Cr.L.J. 173, A.I.R. 1927 Sind 148. The only condition precedent that is laid down is that the Magistrate must record his reasons in writing—*Pir Shah Murad Shah v. Emp.*, *supra*.

Where a Magistrate postpones the case after the accused has notified his intention to make a transfer application, he has jurisdiction to pass an order under clause (3) pending the completion of the inquiry—*Sahib Dino* (*supra*); *Baqridi*, 26 A.L.J. 398, 29 Cr.L.J. 448 (449).

An order made under this sub-section is not subject to the provisions of Ch. XXXIX relating to bail. This sub-section has been introduced in the interests of public safety pending an inquiry under secs. 108, 109 and 110; consequently, it is not open to the High Court to reduce the security which the Magistrate orders to be furnished under this clause. At the same time there is nothing to prevent the High Court in the exercise of its inherent powers from considering whether the *interim* security is not too high. But if the High Court reduces the interim security, such reduction does not fetter the discretion of the Magistrate as to the amount of security which he may ultimately demand—*Jagir Singh*, 31 Cr.L.J. 812 (813), 125 I.C. 322, A.I.R. 1930 Lah. 529,

In making an order under this sub-section there should be no restriction that the accused should produce sureties in *moveable property*. The Magistrate should follow the words of sec. 117, and require a bond in the form given in the Schedule; he should not introduce the restrictive words "in moveable property"—*Harihar*, 1932 A.L.J. 157, 33 Cr.L.J. 229 (230), A.I.R. 1932 All 122

289. Sub-section (4)—Evidence of general repute:—See this subject fully discussed in Note 272 under section 110.

Prior to the amendment of this sub section, evidence of general repute was admissible only in those cases where the person was a habitual offender within the meaning of clauses (a) to (e) of sec. 110. It could not be adduced to prove under clause (f) of that section that a man was a desperate and dangerous character—*Indar*, 40 All 372; *Ranga Reddi*, 43 Mad 450; *Kalai*, 29 Cal. 779; *Babu Murtaza*, 9 O.C. 69; *Hurmat*, 2 A.L.J. 174; *Wahid Ali*, 11 C.W.N. 789; *Akhoy*, 5 C.W.N. 249; *Nur Muhammad*, 1917 P.W.R. 8. Those rulings are no longer good law in view of the amendment of sub-section (4) of the present section.

But evidence of general repute is not admissible in a case where a person is called upon to furnish security under sec 107—*Bidyapati*, 25 All 273; *Banarsi Das*, 1888 P.R. 16.

It is not everything that may be proved by evidence of general repute. The ordinary rules of evidence apply, with such modification only as is made by this sub-section. No extension of evidence of general repute beyond the limits prescribed in this sub-section is permissible—*San Dun v King-Emp*, 2 Rang. 641 (642). This sub-section is an exception to the general rule of evidence and like all exceptions to be sparingly used and only in exceptional circumstances. The general rule of law, of course, is that every man is presumed not to be a criminal or an offender until he has been found guilty by a competent Court. Conviction by public opinion should only be permitted to take the place of conviction by a Court in rare and exceptional circumstances, as for example, where the advent of a suspicious stranger in a village coincides with a series of crimes and suspicion waxes so strong and is so well justified that it may fairly be allowed to take the place of proof, and in such unusual circumstances, the section sanctions an experimental use of the security sections. But where a person has lived all his life in a locality and has never even been accused before a Court of law for any crime, far less convicted, there is absolutely no justification for any such experiment or for making any presumption that he is a criminal, not to say a habitual criminal—*Rathnam Pillai*, 39 Cr.L.J. 230 (231), 172 I.C. 866, A.I.R. 1938 Mad 35, 1937 M.W.N. 1065, 1937 M.Cr.C. 298, (1937) 2 M.L.J. 749, 46 M.L.W. 858.

"Or otherwise" —According to the general rule of interpretation the word "otherwise" must be read as meaning something *ejusdem generis* with the particular or particulars alleged above it, e.g., hearsay evidence. It is clear that the intention of the Legislature is that the Magistrate should use very large discretion as to the evidence which he may admit in the proceedings—*Kallu Mal*, 1904 A.W.N. 140; *Emp. v Jaggan*, 36 All 239 (242), 12 A.L.J. 399, 15 Cr.L.J. 212, 22 I.C. 996. The expression 'or otherwise' would include statements made by some of the co-accused amounting to a confession of the actual commission of the offence and incriminating the other accused—*Sarju*, 41 All. 231, 17 A.L.J. 147, 20 Cr.L.J. 206, 49 I.C. 654.

290. Sub-section (5)—Joint trial:—Upon general principles each individual member of the community is, in the absence of exceptional authority conferred by the law to the contrary effect, entitled, when required by the judiciary either to forfeit his liberty or to have that liberty qualified, to insist that his case shall be separately tried. In the eye of the law, each individual citizen is a separate integer or unit of the commonwealth, and his rights of liberty cannot, without express authority in the law, be dealt with jointly with those of a crowd of other persons with whom, far from having a community of interests, he may have incompatibility of interests—*Abdul Kadir*, 9 All 452 (457). The main principles applicable to a

criminal trial regarding joinder of charges and the joint trial of accused persons may well be held to be applicable to inquiries under sec. 107, Cr. P. Code—*Pran Krishna*, 8 C.W.N. 180 (184). Under this section, the persons who had been associated together may be tried jointly. But there must be clear evidence to prove the association—*Deodhari*, 6 P.L.T. 810, 26 Cr.L.J. 738. Where several persons are proceeded against under sec. 110, clause (5) of sec. 117 does not make it a condition precedent to such joint inquiry that the suspects shall be shown to be associated together in the *order itself*. It is a permissive clause which permits a joint inquiry being held where such persons are, as a matter of fact, associated together—*Tanwar*, 19 S.L.R. 176, 26 Cr.L.J. 1398. Where it was clearly established that the accused (who were father and his three sons) were associated together and formed a gang, and the evidence against them was all the same, *held* that the case was one in which the accused could be rightly dealt with together and that any minute inquiry into the complicity of each of the accused individually was not necessary—*Parasulla*, 13 C.W.N. 244. Where the essence of the charge was that the accused formed one gang with one purpose, namely, that of harassing the complainant, and each act spoken to by the witnesses was an act prompted by that common object and directed towards accomplishing it, and the evidence of the common association of all the persons for that one purpose was particularly strong, *held* that they could be jointly tried—*Taranagowd*, 51 Mad. 515, 29 Cr.L.J. 77 (79). If a gang of disorderly persons join together committing acts of violence or criminal intimidation, proceedings against the whole gang in the same case are proper, and it suffices in such cases that some members of the gang committed various acts. It is not necessary that the evidence should establish that on every occasion the whole gang were together. It is sufficient if the evidence establishes that there is a gang of persons joining together to commit such acts as the security-section exists to prevent—*Bakaram*, 23 Cr.L.J. 741 (Nag). Where certain persons serving under a common master were found to have committed certain acts of extortion for the benefit of their master, *held* that although each of the acts alleged was not done by all of them together, yet they were so associated together as to justify a joint inquiry—*Srikanta*, 9 C.W.N. 898, 2 Cr.L.J. 554.

The fact that persons are members of an undivided family would not by itself render each member liable for the misconduct of any other member. The test to be applied is, whether there has been habitual *association* between the persons charged in respect of the misconduct alleged in the complaint—*Kripasindhu*, 1918 M.W.N. 751, 19 Cr.L.J. 905, 47 I.C. 277, 8 M.L.W. 461.

Even where the association of the several accused is established satisfactorily, the Magistrate has a discretion to try the accused jointly or separately—*Hari Telang*, 4 C.W.N. 531, 27 Cal. 781; *Hossein*, 6 Cal. 96; *Jai Gorind*, 15 O.C. 263. See also 19 S.L.R. 176 (181), A.I.R. 1926 Sind. 69. Although there is no legal prohibition in jointly trying a number of persons proceeded against under sec. 107, still it is highly unjust and unfair to proceed against them jointly unless it is apparent that they formed a gang. The case of each has to be considered separately and this is not likely to be effected if the trial is joint—*Muhammed Ismail*, 21 A.L.J. 841, 25 Cr.L.J. 952, 81 I.C. 600, A.I.R. 1924 All. 195.

Association, what is not?—In the absence of any evidence to prove that the persons constituted a gang, the mere fact that they belonged to one tribe and village with a bad name, is not sufficient evidence of association, and, therefore, they cannot be tried jointly in one and the same proceeding—*Mutad*, 1895 P.R. 1. Thus, the fact that the accused persons are close neighbours and had been previously implicated in good many cases together, does not lead to the inference that they were associated together in the particular offence under inquiry, and does not justify a joint trial of them all—*Jogendra*, 21 Cr.L.J. 700 (Cal.).

The word "association" cannot apply to such cases where the offence is purely *personal* to the offender. For instance, the question whether a person is a habitual thief or not is personal to himself and forms a separate matter by itself. So, where four

persons were charged under sec 110 (a) as being thieves by habit, it was held that there was an error in law in trying them all together—*K.E. v. Po Twe*, 4 L.B.R. 46, 6 Cr.L.J. 284. So also, the fact that the accused are desperate and dangerous persons hazardous to the community, is a fact which pertains to each accused separately, and there is no such connection between them in regard to the character which may be deemed as habitual association. Consequently, proceedings should be taken separately against each of the accused persons—*Hari Telang*, 27 Cal. 781 (783), 4 C.W.N. 531; *Kutti Gounden*, 47 M.L.J. 689, 26 Cr.L.J. 673, 86 I.C. 49, 1925 M.W.N. 57, A.I.R. 1925 Mad. 189; *Angnoo Singh*, 71 I.C. 865, 45 All. 109, 20 A.L.J. 881, A.I.R. 1923 All. 35, 24 Cr.L.J. 257; *Jhari Lal*, 65 I.C. 484, 23 Cr.L.J. 100, 3 P.L.T. 538, A.I.R. 1923 Pat. 104. These cases were cases in which joint trial could not properly be held, in as much as the matter under enquiry was whether a person individually was or was not a habitual offender. There can, however, be no doubt that a joint trial could be held, and a joint trial was the proper procedure, in the case of persons acting in concert; persons who are associates and confederates, so as to call into operation the provisions of clause (5) of this section—*Parbati*, 35 Cr.L.J. 952, 61 Cal. 588, 149 I.C. 460, 1934 Cr.C. 690, A.I.R. 1934 Cal. 482. In every case it has to be considered how far the evidence proves association and how far the various persons tried are prejudiced by a joint trial—*Ganti Veera Reddi*, 39 Cr.L.J. 816, 176 I.C. 815, A.I.R. 1938 Mad. 615, 47 M.L.W. 640, 1938 M.W.N. 601.

Again, sub-section (5) does not authorise a Magistrate to deal with persons charged under *separate sections* in one and the same inquiry. Thus, a person called upon to give security under sec 109, and another person called upon to give security under sec 110 cannot be tried together in the same proceeding—*Mehen*, 8 O.C. 91, 2 Cr.L.J. 224.

And lastly, two contending parties opposed to one another and inclined to commit an offence involving a breach of the peace, cannot be said to have been associated together, and a joint trial of such contending parties is illegal. The case against the persons on the one side at least should be tried separately from that against the other side—*Pran Krishna*, 8 C.W.N. 180; *Ganapathi*, 31 Mad. 276, *Kamal*, 11 C.W.N. 472, 5 C.L.J. 231, 5 Cr.L.J. 197; *Har Dutt*, 14 A.L.J. 268, 17 Cr.L.J. 165; *Kishore*, 6 P.L.T. 768, 26 Cr.L.J. 1248, 88 I.C. 864, A.I.R. 1926 Pat. 32. But in 9 All. 452 it has been held that such a joint trial is not *ipso facto* null and void, except where the accused has been prejudiced thereby.

An objection to the joint trial of accused persons ought to be taken at the beginning of the trial, or, at least, at an early stage thereof. This objection is not sufficient to set aside the order when it is taken at the time of argument after examination of witnesses on both sides—*Anjad Ali*, 25 Cr.L.J. 35, 75 I.C. 723, 5 P.L.T. 129, 2 P.L.R. 79 (Cr.), A.I.R. 1924 Pat. 498.

The legality of a joint trial must depend on what is alleged for the prosecution, not on the facts subsequently found to be true. Otherwise in many cases there could be no determination whether the joint trial was legal or not till the result of the case was known, a proposition which has only to be stated to be rejected—*Jogendra*, 25 C.W.N. 334, 61 I.C. 233, 22 Cr.L.J. 377; *Parbati*, 35 Cr.L.J. 952 (951), 61 Cal. 588, 149 I.C. 460, 1934 Cr.C. 690, A.I.R. 1934 Cal. 482. See also *Sundar Lal*, A.I.R. 1933 All. 676 (677), 1933 A.L.J. 777, 1933 Cr.C. 1188, 146 I.C. 900, 35 Cr.L.J. 183; *Chheda Lal*, 34 Cr.L.J. 793, 144 I.C. 577, 10 O.W.N. 233, A.I.R. 1933 Oudh. 195, 1933 Cr.C. 382, Ind. Rul. 1933 Oudh. 269. For contra see 65 I.C. 484, 3 P.L.T. 538, A.I.R. 1923 Pat. 104.

The law requires that when proceedings are taken against more than one person, for a joint trial under sec. 110, Cr. P. Code proof should be given that they were associated together in the matter under enquiry—*Nizamaddi*, 23 C.W.N. 488, 20 Cr.L.J. 551, 51 I.C. 889. There can be no doubt that a joint trial could be held, and a joint trial was the proper procedure, in the case of persons acting in concert; persons who are associates and confederates, so as to call into operation the provision contained in

sec. 117 (5), Cr. P. C. The illegality of a joint trial cannot be given effect to in the absence of proof of any prejudice. In cases where proceedings are taken joint against more persons than one under sec. 110, the Magistrate is required to come to separate finding as regards each of the persons charged individually—*Parbati*, 61 Cal. 588, 149 I.C. 460, 1934 Cr.C. 690, A.I.R. 1934 Cal. 482, 35 Cr.L.J. 952, distinguishing *Hari Tclang*, 27 Cal. 781, 4 C.W.N. 531; *Angnoo Singh*, 71 I.C. 865, 45 All. 109, 20 A.L.J. 881, A.I.R. 1923 All. 35, 24 Cr.L.J. 257; *In re Kutti Goundan*, 86 I.C. 49, 47 M.L.J. 689, 1925 M.W.N. 57, A.I.R. 1925 Mad. 189, 26 Cr.L.J. 673; and *Jhari Lal*, 65 I.C. 484, 23 Cr.L.J. 100, 3 P.L.T. 538, A.I.R. 1923 Pat. 104. See also *Kalu Mirza*, 37 Cal. 91. Even in cases where one and the same proceeding taken by the Magistrate under secs. 107, 112, 117 and 118, Cr. P. Code improperly deals with more than one person, the matter must be considered upon the individual merits of that particular case, and it would, at least, amount to an irregularity, which may or may not be covered by the somewhat broadly worded provisions of sec. 537, Cr. P. Code according to the circumstances of each case—*Abdul Kadir*, 9 All. 452 (459). The Madras High Court has, however, held that such a joinder is not a mere irregularity but an illegality which will vitiate the proceedings—*Ganapathi*, 31 Mad. 276. This view was followed by the Nagpur Court in 5 N.L.R. 65.

In proceedings under sec. 110, Cr. P. C., every accused person proceeded against under that section is entitled to a separate notice and it is not fair to him to have the charges which are going to be made against him confused with the charges that are being made against somebody else—*Emp v. Ram Lal*, 116 I.C. 25, 51 All. 663, A.I.R. 1929 All. 73, 30 Cr.L.J. 562, 1929 A.L.J. 361. But where the applicants were alleged by the prosecution to be members of a gang of habitual thieves and robbers and were always associated jointly in the commission of thefts, burglaries and robberies, it was perfectly right in issuing one order against them under sec. 112, Cr. P. C., calling upon them to show cause why they should not be bound over to be of good behaviour under sec. 110, Cr. P. C.—*Hubdar Ali*, 34 Cr.L.J. 852, 144 I.C. 944, 10 O.W.N. 325, A.I.R. 1933 Oudh. 251, 1933 Cr.C. 557.

Section 117, clause (5) is not specifically limited to proceedings under sec. 107 or sec. 108. It is true that when a person is charged with being a habitual thief, it is *nilhil ad rem* that some other person with whom he may or may not have associated, is also a habitual thief; but when it is alleged that a person is in the habit of committing theft in association with other persons as members of a gang of thieves, the Magistrate is at liberty in his discretion to deal with the case of all such persons in the same enquiry. Of course, in deciding whether an order under sec. 117 (5) should be made or not, the Magistrate must consider whether, if the order is made, one or more of the persons concerned might be prejudiced in his defence—*Rangoo Mean*, 35 Cr.L.J. 1257, 151 I.C. 205, A.I.R. 1934 Rang. 121, 1934 Cr.C. 713, 12 Rang. 169.

All persons who joined in the conspiracy to molest other people and to cause them injuries could, if their common aims and objects were once established, certainly be tried at the same trial under sec. 107, Cr. P. C.—*Bajirao*, 25 Cr.L.J. 132, 76 I.C. 228, A.I.R. 1934 Nag. 166.

A joint inquiry is out of the question when one charge at least is that two persons are so desperate and dangerous as to render their being at large without security hazardous to the community. There certainly can be no such intimate connexion between two individuals in regard to their characters as to render them liable to a joint inquisition—*Rathinam Pillai*, A.I.R. 1938 Mad. 35, 1937 M.W.N. 1065, 1937 M.Cr.C. 298, (1937) 2 M.L.J. 749, 46 M.L.W. 858, 39 Cr.L.J. 230, 172 I.C. 866.

See also Note 270 under sec. 110, Cr. P. Code.

Separate finding and evidence:—Where proceedings are taken jointly against more persons than one under this sub-section, the Magistrate must come to a *separate* finding as regards each of them *individually*—*Ajodhya*, 35 Cal. 929; *Kalu Mirza*, 14 C.W.N. 49, 11 Cr.L.J. 23, 5 I.C. 29, 37 Cal. 91; *Murad*, 1895 P.R. 1; *Brijnandan*, 37 All. 33, 16 Cr.L.J. 46; *Khairo*, 25 Cr.L.J. 1377, 83 I.C. 337, 19 S.L.R. 96; *Ghousbux*, A.I.R.

1937 Sind 26 (27), 167 I.C. 227, 30 S.L.R. 382, 38 Cr.L.J. 363, 9 R.S. 173; and the judgment must show that the Magistrate has considered the case of each individual accused—*Kalu Mirza*, supra. The case of each person is to be considered on its own merits, and it should not be allowed to be mixed up or prejudiced by that of the others—*Nathu*, 6 All 214; *Md. Ismail*, 21 A.L.J. 841, 25 Cr.L.J. 952, 81 I.C. 600, A.L.R. 1924 All. 195; *Dhanoo*, 34 C.W.N. 144, 31 Cr.L.J. 944, 125 I.C. 855, A.I.R. 1930 Cal. 294. Upon general principles every accused person is entitled to insist that his case shall be tried separately from the case of other persons similarly circumstanced—*Abdul Kadir*, 9 All. 452; *Bahadur Shah*, 1910 P.R. 4, 10 Cr.L.J. 591.

An order passed under sec. 118 or sec. 123 (3), Cr. P. Code must be self-contained—*Ghousbux*, supra.

The Magistrate must insist upon definite evidence being given against each person charged—*Jai Govind*, 15 O.C. 263, 13 Cr.L.J. 760. What is evidence against one cannot be treated as evidence against all others, without discriminating between the cases of the various persons implicated—*Abdul Kadir*, 9 All. 452; *Angnu Singh*, 45 All. 109 (111). Thus, where the evidence recorded by the Magistrate has bearing only on 11 out of 26 persons called upon to show cause, his order binding down all the 26 persons is not valid; it is valid only as regards those against whom the evidence is relevant—*Kassim Biswas*, 10 C.L.R. 335.

See also Note 273.

118. (1) If, upon such inquiry, it is proved that it is necessary for keeping the peace or maintaining good behaviour, as the case may be, that the person in respect of whom the inquiry is made should execute a bond, with or without sureties, the Magistrate shall make an order accordingly:

Provided—

first, that no person shall be ordered to give security of a nature different from, or of an amount larger than, or for a period longer than, that specified in the order made under section 112;

secondly, that the amount of every bond shall be fixed with due regard to the circumstances of the case and shall not be excessive;

thirdly, that, when the person in respect of whom the inquiry is made is a minor, the bond shall be executed only by his sureties.

291. "If it is proved, etc."—Evidence:—These words show that an order under this section cannot be made without inquiry and proof—*Gaiba*, Ratanlal 585 (586). The Magistrate must give his reason for finding it proved that security is necessary—*In re Raja*, 10 Bom. 174 (175).

The mere fact that the accused person says that he is willing to give security to keep the peace is not the kind of proof required by this section as condition precedent to the taking of security—*Prem Singh*, 1917 P.R. 27, 18 Cr.L.J. 847; *Sheodan*, 1915 P.R. 21. See Note 236 under sec. 107. When the accused denied the allegations but expressed his willingness to execute a bond, whereupon he was ordered to execute a bond, the order was held to be illegal, in as much as the accused denied every allegation on the basis of which he was considered liable to furnish security, and no evidence was taken to prove those allegations—*Rai Singh*, 20 Cr.L.J. 105; *Kunra*, 25 A.L.J. 519, 30 Cr.L.J. 122 (124).

292. Order for security:—The object of this section is the prevention and not the punishment of offences, and consequently a Magistrate when passing an order in terms of this section, ought not to have any direct intention of inflicting punishment—*Kandhaia*, 7 All. 67 (72). Therefore, a Magistrate ought not to impose arbitrary conditions not essential for the object in view, which it would be impossible for the accused to fulfil, still less impossible conditions. The order must not be tantamount to saying that the prisoner shall not furnish any security at all but must go to jail—*Narain Soobadhee*, 22 W.R. 37.

According to the first proviso to this section, the final order must not be at variance with the preliminary order. Thus, the Magistrate cannot vary the conditional order passed under sec. 112 by imposing further conditions in the final order—*Ramanand*, 11 O.C. 267, 8 Cr.L.J. 344; *Jangi Singh*, 1906 A.W.N. 276, 4 Cr.L.J. 405. So also, it is illegal to require a bond for good behaviour, when the notice was to show cause with respect to keeping the peace—*Driver*, 25 Cal. 798. Similarly, the Magistrate is not competent to demand security with reference to sec. 110, when the preliminary order was with reference to sec. 109—*Nga He*, U.B.R. (1897—1901) 24 (In such a case, the proper course is to institute fresh proceedings—*Ibid.*). So again, the Magistrate is not justified in demanding security for a larger amount than what was communicated to the accused in the preliminary order—*Kishen*, 1907 P.W.R. 11, 5 Cr.L.J. 219; *Isree Pershad*, 18 W.R. 61; *Debi*, 1885 A.W.N. 30; *Sultan*, 26 Cr.L.J. 767, 86 I.C. 351, 19 S.L.R. 332; nor is he justified in demanding sureties when the summons made no mention of sureties at all—*Isree Pershad*, 18 W.R. 61. In cases where heavier security is deemed necessary, the Magistrate ought to issue fresh summons setting forth the intended amount—*Isree Pershad*, 18 W.R. 61; *Md. Ismail*, 1881 A.W.N. 152. See Note 280 under the heading "Amendment of the order."

The Magistrate cannot in the final order direct the accused to give security for a longer period than what was mentioned in the notice under section 112—*Ramchandra*, 26 Mad. 471 (472).

A person against whom an order is passed under this section must be given sufficient time to furnish security. Where the Magistrate ordered the accused to furnish security with four sureties of Rs 3,000 each on the very day, and imprisoned the accused on his failure to do so, *held* that the order was illegal and must be set aside—*Maung Tun*, 4 Bur.L.J. 172, 27 Cr.L.J. 318.

No condition and limitations can be imposed upon persons ordered to give security under this section—*Jhoja Singh*, 24 Cal. 155.

Section 109, Cr. P. C., merely requires a Magistrate to issue a notice and does not empower him to pass the final order. This is done under sec. 118, which in its turn is dependent upon the order passed under sec. 112. All that the final order can contain is a direction to furnish security to be of good behaviour for a period which cannot, in any case, exceed one year, and which must not be beyond that specified in the order under sec. 112. Any order which specifies a period of imprisonment in default is to that extent illegal. The penalty for a failure to furnish security is given in sec. 123 (1), Cr. P. C.—*Rangi*, A.I.R. 1936 Nag. 265, 1936 Cr.C. 1138.

The order under this section, though restricted in its contents by the order under sec. 112, Cr. P. C., is the operative order, and time runs from the order passed under this section, and not from the order passed under sec. 112—*Ghousbux*, A.I.R. 1937 Sind 26 (28), 167 I.C. 227, 38 Cr.L.J. 363, 9 R.S. 173.

Fresh security upon expiry of a previous and existing security:—A security to keep the peace once given is sufficient for that purpose so long as it is in force in respect of every act of the person bound over breaking any of the conditions. A second order to give further security during the continuance of the first one is not contemplated by law; but if upon the expiry of the first order the dispute still exists, a further security may be demanded on fresh proceedings properly taken—*Mahomed Abdul Bari*, 1 C.W.N. 121.

Supplementary order for larger security:—A Magistrate passed a final order directing certain persons to furnish security in certain amounts. A month later he passed another order directing one of the accused to furnish security in a much bigger sum and stating that he had overlooked that this accused had been called upon in the preliminary order to furnish a larger security. It was held that the second order was *ultra vires*. After the Magistrate had finished his case, it was beyond his power to alter the order—*Rajkumar*, 17 A L J. 335, 20 Cr L J. 486, 51 I C. 470

See Note 275

293. Amount of security:—The provisions of Chapter VIII are not intended to punish but to prevent crime and it is not permissible to limit the security or the amount of security to such descriptions that it is perfectly impossible for the accused to furnish them, thus rendering it certain that they will be committed to jail—*Allahdad v Emp*, 26 Cr L J 179 (180), 83 I C. 883, 17 S L R 160, A I R. 1924 Sind 120.

Under proviso (2), in fixing the amount of security, the Magistrate should have due regard to the circumstances of the case, and the security should not be disproportionate to the ability of the accused to furnish it, with reference to his means and station in life—*Rama*, 16 Bom 372; *Nathu*, 6 All 214; *Juggut*, 2 Cal 110 (112); *Ali*, 1900 P R 17, *Jawaya*, 1890 P R 30; *Firal*, 5 S L R 10, 12 Cr L J 110, 9 I C. 651. The Magistrate is the best judge to decide what would be the proper amount of security, which must vary with the danger to be apprehended and the means of the parties. But the Magistrate cannot make an order that is altogether unreasonable—*Juggut Chander*, 2 Cal 110 (111). The amount should be such as to give the accused a fair chance of complying with the conditions of the security, and the Magistrate should not fix an amount for which there is a probability of the accused being unable to find security—*Ali*, 1900 P R 17, *Wasia*, 1901 P R 28; *Barkat*, 1900 P R 24; *Anon*, 2 Weir 52, 4 M H C R App 46; *Dedar*, 2 Cal 384 (385); *Satgur*, A I R 1933 All 674, 1933 A L J 927, 1933 Cr C 1186, 145 I C 875, 35 Cr L J 183; *Satindra*, 32 Cr L J 593 (598), 130 I C 880, A I R 1931 Cal 18, 52 C L J 405, 1931 Cr C 50, Ind Rul 1931 Cal 400. When the accused is unable to give security for the amount required and remains in jail, it is an index that the Magistrate has not exercised a proper discretion in fixing the amount—*Raza Ali*, 23 All 80. See Note 243A

There is no warrant in law for taking separate bonds from the accused and his sureties individually and severally exceeding in the aggregate the amount for which the accused is liable—*Jawaya*, 1890 P R. 30.

Movable property as security —As to the nature of the security the provisions of Cr P C., read with Schedule V, Form XI, show that what in the case of a bond for good behaviour must be given is personal security and the same is by inference the case in respect of a bond to keep the peace. If a surety offers a house or cattle, then this is not the security required because his risk is confined to the house or cattle *Mohammad Baksh*, 25 Cr L J 796, 81 I C 316, 26 O C 284, A I R 1924 Oudh 80

House property as security —The accused was ordered under this section to furnish a bond for Rs. 200 and a respectable surety. Such a surety came forward and offered security in the shape of house property worth Rs 500. The Magistrate rejected the surety. It was held that the surety being respectable and the house being worth Rs 500 should have been accepted, though it was true that under sec. 514 only *movable* property could be attached and sold during the surety's lifetime for the recovery of the penalty—*Nanha*, 16 A L J 503, 19 Cr L J 711; 46 I C. 295. The Magistrate should follow the words of sec. 117, Cr. P C., and not introduce the restrictive words "in moveable property." When sureties are produced, the Magistrate should consider whether, having regard to all the circumstances, they are fit persons to be accepted or not. When they have been accepted, the bond executed by them should be in the form given in the schedule. If the Magistrate has any apprehension that the sureties may part with their properties and be unable to fulfil, he may by way of precaution accept a hypothecation bond from them as a condition precedent to

their being accepted as reliable sureties—*Harihar*, 33 Cr.L.J. 229, 136 I.C. 65, 1932 A.L.J. 157, 1932 Cr.C. 147, A.I.R. 1932 All. 122, Ind. Rul. 1932 All. 113.

See Note 275

293A. Minor:—In the case of a minor the bond shall be executed only by his sureties. See proviso 3. The reason for this proviso is no doubt the incapacity of the minor to contract—*Mipyn*, 4 L.B.R. 12, 6 Cr.L.J. 123.

294. Revision by High Court:—The question whether it is necessary in the interest of keeping the peace to take security from a person, is essentially a question which primarily concerns the Magistrate and the local police. If the District Magistrate considers it unnecessary to take action, the Sessions Judge or High Court will not ordinarily interfere—*Mad Yusuf v. Abdul*, 53 All. 148, 32 Cr.L.J. 570 (571). The power to demand security from suspected persons is a power that is almost as much of an executive as of judicial nature; and the jurisdiction with which the Magistrate is invested with regard to suspected persons is a very large one. Therefore, the High Court will interfere only on the very clearest and strongest grounds which demonstrate that there has been in the particular case a gross miscarriage of justice—*Balmukund*, 23 P.R. 1889.

The High Court sitting in revision would not ordinarily constitute itself as a Court on facts—*Ghousbux*, A.I.R. 1937 Sind 26, 167 I.C. 227, 30 S.L.R. 382, 38 Cr.L.J. 363. But the High Court will interfere in revision where the order is based on no evidence on the record—*Sher Singh v. Hari Singh*, 1912 P.L.R. 195, 13 Cr.L.J. 720; *Sukhdeo*, 14 A.L.J. 215, 17 Cr.L.J. 157; or where the materials on which the order was passed are clearly insufficient to support the order—*Nafar Chandra*, 38 Cr.L.J. 198, 28 C.W.N. 23, 25 Cr.L.J. 189, 76 I.C. 429, A.I.R. 1924 Cal. 114; or where there is nothing on the record to show that an inquiry as required by sec. 117 was held—*Mul Chand*, 37 All. 30, 12 A.L.J. 1262; *Sukhdeo*, 14 A.L.J. 215. It will also interfere where the judgment of the District Judge deciding an appeal under section 110 is a very short one and does not show that evidence was all examined and carefully weighed—*Sarwan*, 14 A.L.J. 279, 17 Cr.L.J. 167; or where the Magistrate disbelieved the evidence produced by the accused without any substantial reason—*Miharban*, 16 Cr.L.J. 805, 13 A.L.J. 1046; *Hakim Singh*, 13 A.L.J. 1055, 16 Cr.L.J. 810; or where the Magistrate has not given due effect to the evidence for the defence—*Gayani*, 17 Cr.L.J. 461 (All.); or where the Lower Appellate Court in hearing the appeal has not taken the trouble to rehear the case—*Ibid*.

The High Court has the power to interfere in revision where the exercise of discretion being required by law, the lower Court exercised no discretion at all or exercised its discretion in a wholly unreasonable and improper manner, e.g., where the Magistrate ordered security to be furnished in an unreasonably large sum out of all proportion to the means of the accused—*In re Juggut*, 2 Cal. 110 (111). The High Court may interfere in revision if there is a material error in any judicial proceeding, i.e., an error resulting in an unjust order for security—*Ibid* (at p. 113). The High Court is always very unwilling to interfere in the case of orders passed under the preventing sections of the Cr. P. Code. These orders are largely of an administrative nature; they are concerned with the maintenance of the public peace and the prevention of the breaches of the public peace for the maintenance of which the District Magistrate is responsible, and the needs of which he, as the responsible officer on the spot, is presumably in the best position to know; but these orders, though largely of an administrative nature, have a legal basis, and if it is clear that an order under sec. 112, Cr. P. C., has no legal basis, and that the District Magistrate has proceeded upon a wrong legal principle applying equally to the wrong-doers as well as to the wronged the wide powers conferred upon him by the law for the restraint of the wrong-doers and for the protection of the wronged, the High Court is bound to interfere—*Jasoda Lekhray v. Emp.*, A.I.R. 1939 Sind 167 (168).

It must be rarely, if ever, that a High Court will feel called upon to reverse an order of a Magistrate refusing to demand security under any of those sections—

Gyan Singh, A.I.R. 1934 All. 24, 1933 A.L.J. 1201; *Ram Lal v Bankateshar*, 25 Cr.L.J. 1149, 81 IC 973, 11 O.L.J. 732, A.I.R. 1925 Oudh 138, 1 O.W.N. 359, 28 O.C. 44. See also Notes 250B, 276 and 295.

Appeal:—See sec. 406 and Notes under it.

119. If, on an inquiry under section 117, it is not proved that it is necessary for keeping the peace or maintaining good behaviour, as the case may be, that the person in respect of whom the inquiry is made should execute a bond, the Magistrate shall make an entry on the record to that effect, and if such person is in custody only for the purposes of the inquiry, shall release him, or, if such person is not in custody, shall discharge him.

295. Absence of the Complainant:—In absence of the complainant or any evidence on his behalf or on behalf of the opposite party in a case under sec. 107, Cr. P. C., the Magistrate must proceed to inquire into the truth of the information and, no evidence having been produced before him, he must hold under this section that it is not proved that the person in respect of whom enquiry is made should execute a bond. Sec. 247, Cr. P. C., is not applicable to a case like this—*Asrafah v Nasu*, 31 C.W.N. 388

295A. Further inquiry:—The word 'discharge' means merely a permission to depart. It does not mean the discharge of an 'accused' person as contemplated by sec. 437 (now sec. 436) so as to enable further proceedings being instituted under that section against the person discharged under this section—*Velu v Chidamabar*, 33 Mad 85. Section 437 (now sec. 436) does not enable a Court to direct further inquiry in a case of discharge of a person against whom security proceedings were instituted under Chapter VIII, because such a person is not an 'accused' within the meaning of that section—*Imam Mandal*, 27 Cal 662; *Dayanth*, 33 Cal 8; *Muhammad Khan*, 1905 P.R. 42; *Roshan Singh*, 46 All 235, 22 A.L.J. 129; *Narain v Durga*, 1911 P.R. 6, 12 Cr.L.J. 232; *Ismail v Nollan*, 1914 U.B.R. 1st Qr 3, 13 Cr.L.J. 531. (But the contrary view has been taken in *Fyazuddin*, 24 All 148; *Kharga*, 36 All 147; *Manna*, 1903 P.R. 24; *Mona Puna*, 16 Bom 661; *Baba Yashwanta*, 35 Bom 401; and *Mutsaddi Lal*, 21 All 107, where it is held that the person proceeded against under this chapter may be said to be an 'accused' person and further inquiry may therefore be directed)

Section 436 as now amended in 1923 clearly applies only to the case of a person accused of an 'offence'; further inquiry cannot therefore be directed against a person discharged under sec. 119, because the person proceeded against under this chapter is not accused of an offence—*Phani v Kunja*, 25 Cr.L.J. 679, 81 IC 167, A.I.R. 1926 Cal 262; *Maung Than*, 2 Rang 30. The only section under which a Sessions Judge or the District Magistrate may take action in such a case is under sec. 438, Cr. P. C., by making a report to the High Court; *Mohammad Yusuf v Abdul Majid*, 32 Cr.L.J. 570, 130 IC 630, A.I.R. 1931 All 53, 53 All 148, 1930 A.L.J. 1485, 1931 Cr.C. 125. The District Magistrate should not append to his letter of reference what appears to be the opinion of the Police Prosecutor describing the order of the trial Magistrate as perverse. If he is of the opinion that the letter of the Police Prosecutor contains material of assistance to the Court he should embody that material in his own letter. He should not permit himself to be associated with criticism by a police officer of an order of the Magistrate—*Ali Muhammad*, A.I.R. 1936 Sind 243, 1936 Cr.C. 1099, 165 IC. 950, 38 Cr.L.J. 117. The proceedings under this chapter should be taken with care and caution only when the public interest compels, and where there is no reason to suppose that the Magistrate is not a careful and responsible Magistrate, who does not know his charge and where he has seen the witnesses and has heard what

they have to say, and he has come to the conclusion that the case against the suspected persons is unworthy of credit, and that the evidence should not be believed, the High Court will not interfere—*Ali Muhammad*, *supra*

The withdrawal of the first charge-sheet under sec. 107, Cr. P. C., is no bar to a second proceeding under the same section—*In re Muthia Moopan*, 36 Mad. 315. When a person proceeded against under sec. 110, Cr. P. C., was tried and released by the Magistrate, he is competent to institute further proceedings under the law on fresh information received—*Imam Mondal*, 27 Cal 662. The rulings cited above within the brackets are no longer good law. See Note 1180 under sec. 436. See also Notes 250B and 294 in this connection.

295B. Discharge:—Under the provisions of this section, after an enquiry has been made whether an order binding a person over to keep the peace should be passed, and it has been found that no such order is necessary, the proper course is to discharge the person concerned. The use of the term "acquittal" is quite inappropriate to a proceeding of this nature—*Bhagat Raj v. Mt. Gurai Dulaiya*, AIR. 1938 All 49 (50), 172 I.C. 643, 1937 A.W.R. 1113, 1937 A.L.J. 1281.

C.—Proceedings in all Cases subsequent to Order to furnish Security.

120. (1) If any person, in respect of whom an order requiring security is made under section 106 or section 118, is, at the time such order is made, sentenced to, or undergoing a sentence of, imprisonment, the period for which such security is required shall commence on the expiration of such sentence.

(2) In other cases such period shall commence on the date of such order, unless the Magistrate, for sufficient reason fixes a later date.

296. "On the expiration of the sentence":—Under this section, a convict undergoing a sentence of imprisonment cannot be obliged to give security, until the imprisonment ends; nor can an order for imprisonment (under sec. 123) in default be made till then—*Appa*, Ratanlal 765; *Rangya*, 4 Bom.L.R. 934; *Kya Wa*, 5 L.B.R. 34, 10 Cr.L.J. 69, 2 I.C. 531; *Jhabdey*, 22 Cr.L.J. 95 (All.). If, the meantime, he is convicted of another offence, and sentenced to a fresh term of imprisonment, the order for security should not be passed until after the expiry of both imprisonments. If, before such expiry, the prisoner gives the required security, the Magistrate cannot pass an order of imprisonment under sec. 123—*Pandu*, Ratanlal 774. Where a person was sentenced on 8th August, 1927 to 12 months' rigorous imprisonment in default of giving security on proceedings initiated under sec. 109, Cr. P. C., and, while undergoing that sentence, was sentenced to three years' rigorous imprisonment under s. 110, Cr. P. C., on 21st December, 1927, he should have been required to give security from 8th August 1928 in view of the provisions of sec. 120, Cr. P. C.—*Fateh*, AIR. 1929 Sind 166, 117 I.C. 777, 30 Cr.L.J. 819, 23 S.L.R. 438, 1929 Cr.C. 335.

The accused was convicted under sec. 147, I. P. C., but was released on bail pending an appeal against the conviction. While he was on bail, proceedings were taken against him under sec. 110 of this Code and he was ordered to furnish security, or in default, to undergo imprisonment. His appeal was afterwards dismissed and the Magistrate ordered that as he was undergoing imprisonment in default of furnishing security, the sentence under sec. 147, I. P. C., would commence after the expiry of the sentence under sec. 110, Cr. P. C. Held that the order was illegal, being in contravention of sub-section (1) of this section—*Jhabdey*, 22 Cr.L.J. 95 (All.), 59 I.C. 383.

Section 120 (1), Cr P. C., refers to orders passed under sec. 106 or sec. 118, Cr. P. C., and is not affected in its operation by the orders of the Sessions Judge passed under sec. 123 (3), Cr. P. C.—*Lashkaro*, A.I.R. 1937 Sind 203, 38 Cr.L.J. 961, 31 S.L.R. 409, 170 I.C. 676, 10 R.S. 71.

When a Magistrate passes an order under sec. 118, Cr. P. C., he should make it clear that by reason of the provisions of sec. 120 (1), Cr. P. C., the period for which security is required should commence not from the date of the order under sec. 118, but from the date of the expiration of the sentence of imprisonment the suspected person is undergoing. When sec. 123 (1), Cr. P. C., is read through carefully it would appear that it was the purpose of the Legislature that if a suspected person when ordered to give security was actually in prison he should remain in prison on the expiration of his sentence if he has not given security, until he gives security or until the period for which he was required to give security has expired. Therefore, it is open to a suspected person, while he is undergoing a sentence, to give security to the Court. Under cl. (4) of sec. 123, Cr P C., security may be tendered to the officer in charge of the jail, but it would not appear from the provisions of the section that it was contemplated that when a suspected person was in prison when the order under sec. 118, Cr P C., against him was passed, he should be released from prison on the expiration of the sentence in order that he might find his sureties. He can, if it is possible for him to do so, furnish security while he is in prison undergoing his sentence of imprisonment. and he can, if he cannot furnish security before the expiration of his sentence, furnish security on the expiration of that sentence or at any time during the period for which he is committed to prison, in default, and his sureties will be accepted or rejected according to the provisions of sec. 122, Cr P. C.—*Hussein Allahdino*, A I R 1937 Sind 204, 31 S L R 412, 171 I C. 61, 38 Cr.L.J 1014, 10 R S. 86.

Sub-section (2):—“Date of such order”.—It means the date of the final order under sec. 118, and not the date of the preliminary order under sec. 112—*Taranagowd*, 51 Mad 515, 29 Cr L J 77 (78); *Ghousbux*, A I R 1937 Sind 26 (28), 167 I C 227, 30 S L R. 382, 38 Cr L J 363

Fixing later date.—The object of this sub-section is to allow a Magistrate to grant time to the accused instead of at once proceeding to order imprisonment as if in default. This is shown by sec. 123 which provides that the security may be given on or before the date on which the period for such security commences—*Md Abdul Bari*, 4 C.W.N 121. The Magistrate has power under this section to postpone the date from which the security should take effect, *i.e.*, to give the accused time within which to furnish it, and if the accused absconds during the extended time, the sureties who were responsible for the accused's attendance would be made liable—*Mustaqimuddin*, 24 A.L.J. 327, 27 Cr L J 377 (378), 92 I C 889, A I R. 1926 All 297.

Where an order is passed on the accused under sec. 118, and then on the request of the accused the Magistrate grants him 12 days' time to furnish the required security, and during this 12 days' time he is convicted and sentenced to imprisonment for an offence committed prior to the date of the order under sec. 118, it is not competent to the Magistrate to fix the date of the expiry of such sentence as the date for computing the period from which such security is to be furnished. The case falls neither under clause (1) nor under clause (2) of this section, and the Magistrate is bound to proceed at once under sec. 123 and order imprisonment of the accused—*Ahmed*, 20 S L R 163, 27 Cr L J 865, 96 I C 113, A I R 1926 Sind 273 (F.B.). An order for security was made under sec. 118 on October 20, but upon the failure of the accused to give security, he was ordered to be imprisoned for one year under sec. 123, on October 29. But between October 20 and October 29, he was convicted of a substantive offence and sentenced to 7 years' rigorous imprisonment. *Held* that under sec. 120 (2) the period of the order under sec. 118 commenced on October 20, and the Magistrate should not have made any order under sec. 123 at all. However, the two sentences were concurrent—*Aba Farid*, 29 Bom L.R. 700, 28 Cr.L.J. 652, 103 I C 198.

The provisions of the two clauses of this section may be thus explained. If on the date of the order passed under sec 118 the suspect is undergoing imprisonment for a substantive offence, the provisions of clause (1) come into operation, and the period of security does not commence till the suspect has served out his substantive sentence of imprisonment. The proper procedure under the circumstances would be that the Magistrate should not pass the order for detention of the suspect under sec. 123 at once but postpone further proceedings under that section, till the suspect has served out the period of sentence for the substantive offence. If on the date of the order under sec 118, the suspect is not undergoing imprisonment for a substantive offence, his case does not fall within the purview of clause (1) of sec. 120. If, on that date, the suspect asks for time to furnish the required security, it is open to the Magistrate to refuse to grant time and to take immediate action under sec. 123. If, however, he grants time and before the expiry of the time the suspect is convicted of a substantive offence, and sentenced to imprisonment, the Magistrate should proceed at once to pass an order under sec. 123, which provides for immediate detention in prison of the suspect till he furnishes the required security. This detention should *ipso facto* run concurrently with the substantive sentence which the accused is undergoing—*Saidu*, 22 S.L.R. 20, 28 Cr.L.J. 431, 101 I.C. 463. The proper procedure under the circumstances would be that indicated in—*Emp. v. Nana Ramji*, 97 I.C. 747, 28 Bom.L.R. 1038, 27 Cr.L.J. 1163, A.I.R. 1926 Bom 545, i.e., the Magistrate should not pass the order for detention of the suspect under sec 123 at once but postpone further proceedings till the suspect has served out the period of sentence for the substantive offence.

The period during which a person was released on bail by the appellate Court must be excluded from the period of one year for which he was required to undergo imprisonment failing the giving of security—*Darsu*, A.I.R. 1934 All 845, 36 Cr.L.J. 177, 152 I.C. 785, 1934 Cr.C. 1031, 4 A.W.R. 76; *Emp. v. Masuria*, 37 Cr.L.J. 155, 159 I.C. 804, 1935 A.L.R. 1200, 8 R.A. 518, 1935 A.L.J. 1337, A.I.R. 1936 All. 107, 1936 Cr.C. 94, 58 All 589. But see *Allahdad v. Emp.*, A.I.R. 1924 Sind 120, 83 I.C. 883, 26 Cr.L.J. 179, 17 S.L.R. 160; *Kadu*, 37 Cr.L.J. 1003, 164 I.C. 576, A.I.R. 1936 Sind 125, 29 S.L.R. 353, 1936 Cr.C. 802, 9 R.S. 49 and *Ghousbux*, A.I.R. 1937 Sind 26 (28), 167 I.C. 227, 30 S.L.R. 382, 38 Cr.L.J. 363, where it has been laid down that the order under sec. 118, Cr. P. Code will not be suspended during the time spent on bail and *a fortiori* it will not be suspended during the time spent in prison if the suspect be not on bail.

On principles similar to those laid down in the above mentioned Allahabad cases it should be held that where the persons, against whom the order to give security was passed, for their own advantage made an application that the order for bonds and sureties be stayed until the decision of the appeal, the time from which the period ran was the date of the order of the Appellate Court—*Abdul Sattar v. Emp.*, A.I.R. 1938 Oudh 195, 1938 O.W.N. 676, 1938 O.L.R. 355, 1938 O.A. 566, 11 R.O. 7, 1938 A.Cr.C. 55, 176 I.C. 948, 39 Cr.L.J. 831.

Fresh security:—A second order requiring further security from the same person to commence on the expiration of the term of security already given, passed during the continuance of the first one, is not a proper order. If at the end of the period the act involving a breach of the peace is still continued, a further security can be demanded on fresh proceedings being properly taken— *Md Abdul Bari*, 4 C.W.N. 121.

121. The bond to be executed by any such person shall bind him to keep the peace or to be of good behaviour, as the case may be, and in the latter case the commission or attempt to commit, or the abetment of, any offence punishable with imprisonment, wherever it may be committed, is a breach of the bond.

Contents of bond.

297. Breach of bond for keeping peace:—A bond for keeping the peace will not be forfeited by the commission of *any offence*. It can be forfeited only by the commission of offences likely in their consequences to cause a breach of the peace. Thus, a conviction for theft (*Taren Chunder*, 18 WR 63), or for wrongful confinement or extortion (*Zearuddin*, 19 W.R. 48) or for abduction (*Broune v. Chandra*, 1906 P.R. 6, 4 Cr L.J. 78) or for a secret attempt to poison a person (*Ahmad Gul*, 1914 PR 22, 15 Cr L.J. 605) will not entail a forfeiture of the bond.

In *Ananthachari v. Ananthachari*, 2 Mad. 169, 2 Weir 663, however, it has been held that it is not necessary that some actually punishable offence should be committed. All that is necessary to show, is that some act was done which was likely in its consequence to provoke a breach of the peace.

A bond to keep the peace may be forfeited on the commission of any act involving a breach of the peace, no matter whether the act is committed against the person at whose charge the original order was framed or against any other person—*Jaha Box*, 15 W.R. 14. It is also immaterial whether the accused committed the act with his own hands or instigated other persons to do it. In either case the bond is forfeited—*Ananthachari*, 2 Mad 169; *Kally*, 11 WR 52.

If some persons (Hindus) are bound down under sec 107 owing to an apprehension of a breach of the peace on account of their interference with the slaughter of cows by the Mahomedans at a particular place, such persons are not debarred from instituting a civil suit to prevent the Mahomedans from slaughtering cows at that place, and the institution of the suit will not amount to a breach of the bond which they were required to furnish. The filing of the civil suit may be extremely provocative to the Mahomedans and may lead to further quarrel and breach of the peace, but it cannot by any stretch of language be called a wrongful act which would entail forfeiture of the bond. The bringing of the civil suit is perfectly legal action, and the Hindus were acting within their rights in doing so—*Sital*, 1 Lah 310, 21 Cr L.J. 702, 57 I.C. 942.

298. Breach of bond for good behaviour:—A bond for good behaviour will be forfeited by the commission of *any offence*. Thus, a conviction for causing grievous hurt (*Sher Sing*, 1915 PR 10, 29 IC 821, AIR 1914 Lah 563, 16 Cr L.J. 549), or a conviction for causing simple hurt (*Abdul Aziz*, 4 Lah 462), or a conviction under sec 452, I.P.C. (*Indar Singh*, 31 Cr L.J. 130, 120 IC 605, AIR 1930 Lah. 227, 1930 CrC 210), or a conviction under the Excise and Opium Acts (*Ghulam Hussain*, 37 Cr L.J. 342, 160 IC 631, AIR 1936 Pesh 16), or a conviction under sec. 13 of the Gambling Act, III of 1867 (*Abdul Hai*, 1906 A.W.N. 13) would amount to a breach of the bond.

But an actual commission or attempt to commit or abetment of an offence is necessary for the forfeiture of the bond. Where a person bound down under sec 109 was found to be in possession of costly clothes, for which he could not account, it was held that the bond should not be forfeited, since there was no proof that he had actually stolen those clothes—*In re Venkataratnam*, 2 Weir 57. The mere fact that a person bound down under sec 109 was again found in possession of himself under suspicious circumstances in a lonely place without any account of livelihood and unable to give a satisfactory account of himself, would not justify forfeiture of the bond, because his act did not amount to commission of an offence to commit or abetment of an offence—*Bahadur*, 1932 A.L.J. 112, 56 IC 222, 31 P. 1932 All 58, 33 Cr L.J. 281 (282). The bond is forfeited by the commission of any offence no matter wherever the offence may be committed. If the offence is committed in one district and the accused is convicted of committing it in another district, the bond is forfeited, and the Magistrate of the former district may proceed against the accused under this section—*Sham Sundar*, 2 BLR AC 111.

The words 'commission of an offence' do not necessarily mean the commission of an offence. Although it is true that a conviction is considered as a commission of an offence.

The provisions of the two clauses of this section may be thus explained. If on the date of the order passed under sec. 118 the suspect is undergoing imprisonment for a substantive offence, the provisions of clause (1) come into operation, and the period of security does not commence till the suspect has served out his substantive sentence of imprisonment. The proper procedure under the circumstances would be that the Magistrate should not pass the order for detention of the suspect under sec. 123 at once but postpone further proceedings under that section, till the suspect has served out the period of sentence for the substantive offence. If on the date of the order under sec. 118, the suspect is not undergoing imprisonment for a substantive offence, his case does not fall within the purview of clause (1) of sec. 120. If, on that date, the suspect asks for time to furnish the required security, it is open to the Magistrate to refuse to grant time and to take immediate action under sec. 123. If, however, he grants time and before the expiry of the time the suspect is convicted of a substantive offence, and sentenced to imprisonment, the Magistrate should proceed at once to pass an order under sec. 123, which provides for immediate detention in prison of the suspect till he furnishes the required security. This detention should *ipso facto* run concurrently with the substantive sentence which the accused is undergoing—*Saidu*, 22 S.L.R. 20, 28 Cr.L.J. 431, 101 I.C. 463. The proper procedure under the circumstances would be that indicated in—*Emp. v. Nana Ramji*, 97 I.C. 747, 28 Bom.L.R. 1038, 27 Cr.L.J. 1163, A.I.R. 1926 Bom. 545, *ie*, the Magistrate should not pass the order for detention of the suspect under sec. 123 at once but postpone further proceedings till the suspect has served out the period of sentence for the substantive offence.

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298. Breach of bond for good behaviour:—A bond for good behaviour will be forfeited by the commission of *any offence*. Thus, a conviction for causing grievous hurt (*Sher Sing*, 1915 P.R. 10, 29 I.C. 821, A.I.R. 1914 Lah 563, 16 Cr.L.J. 549), or a conviction for causing simple hurt (*Abdul Aziz*, 4 Lah 462), or a conviction under sec 452, I.P.C. (*Indar Singh*, 31 Cr.L.J. 130, 120 I.C. 605, A.I.R. 1930 Lah 227, 1930 Cr.C. 240), or a conviction under the Excise and Opium Acts (*Ghulam Hussain*, 37 Cr.L.J. 342, 160 I.C. 631, A.I.R. 1936 Pesh 16), or a conviction under sec 13 of the Gambling Act, III of 1867 (*Abdul Hat*, 1906 A.W.N. 13) would amount to a breach of the bond.

But an actual commission or attempt to commit or abetment of an offence is necessary for the forfeiture of the bond. Where a person bound down under sec. 109 was found to be in possession of costly clothes, for which he could not satisfactorily account, it was held that the bond should not be forfeited, since there was no proof that he had actually stolen those clothes—*In re Venkataratnam*, 2 Weir 57. The mere fact that a person bound down under sec 109 was again found concealing himself under suspicious circumstances in a lonely place without any ostensible means of livelihood and unable to give a satisfactory account of himself, would not justify forfeiture of the bond, because his act did not amount to commission of or attempt to commit or abetment of an offence—*Bahadur* 1932 A.L.J. 112, 54 All 335, A.I.R. 1932 All 58, 33 Cr.L.J. 281 (282). The bond is forfeited by the commission of any offence no matter wherever the offence may be committed. If the bond is entered into in one district and the accused is convicted of committing an assault in another district, the bond is forfeited, and the Magistrate of the former district can proceed against the accused under this section—*Sham Sundar*, 2 B.L.R. A.C. 11.

The words 'commission of an offence' do not necessarily imply a *conviction* for an offence. Although it is true that a conviction is considered necessary to establish

that an offence has been committed, still there is no authority for the extreme view that the commission of an offence cannot be proved otherwise than by a conviction—*Mansur*, 24 Cr.L.J. 588, 73 I.C. 332; *Sheo Jangal*, 50 All. 666, 30 Cr.L.J. 203 (204).

An offence committed in a Native State would amount to a breach of the bond—*Dewa Singh*, 28 P.R. 1910; but see *Bahadur Singh*, 26 P.R. 1918, 19 Cr.L.J. 924, 47 I.C. 440

See also Note 250A.

299. Procedure on breach of bond:—When a person forfeits a bond by being convicted of an offence, the amount of the forfeited bond may be recovered, but he cannot be forthwith imprisoned for the unexpired portion of the term for which security was taken. The Magistrate's remedy is to take fresh proceedings under this Chapter—*Jag Deo*, 28 All 629. A Magistrate is not justified in forfeiting a recognisance under this section without giving the party charged with the breach an opportunity to cross-examine the witnesses upon whose evidence the rule to show cause has been issued—*Nobin*, 4 Cal. 865. If the surety bond is forfeited on account of any act of the accused within the period for which the sureties had bound themselves, the Magistrate may take proceedings against the sureties even after the expiry of the period—*Bahadur*, 1932 A.L.J. 112, 33 Cr.L.J. 281 (282), 54 All. 335, A.I.R. 1932 All. 58.

300. Liability of surety:—See Note 1337 under sec. 514.

It has been held in Punjab that in order to make the surety liable, the conviction of the principal must be for an offence *similar* to that for which security was given. When men stand sureties in respect of sec. 110, it is to be understood that they undertake liability for only such good conduct on the part of the principal as is indicated by the circumstances under which the security was demanded, and not for any conceivable form of offence committed by the principal. Thus, where a person was required to give security for being suspected as a thief and a habitual receiver of stolen property, and a person was accepted as his surety, and the principal offender was subsequently convicted under sec. 326, I. P. C. (grievous hurt), *held* that the surety should not be held liable—*Udham Singh*, 1913 P.R. 15, 14 Cr.L.J. 575. In *Sher Singh*, 29 I.C. 821, 1915 P.R. 10, 16 Cr.L.J. 549, under similar circumstances, the sureties were not altogether exempted, but were ordered to pay a reduced penalty, *viz*, Rs. 500 instead of Rs. 1,000. The Allahabad High Court holds that the surety is liable for any offence committed by the person bound over, and this section makes no reservation that in order to make the surety liable, the offence committed by the person bound over should be *ejusdem generis* with the offence for which he was bound over—*Sheo Jangal*, 50 All. 666, 30 Cr.L.J. 203 (204), 26 A.L.J. 443, A.I.R. 1928 All. 232

A person was put on security for Rs. 1,000 for one year, and two other persons stood sureties for him. That person was afterwards convicted under sec. 323, I. P. C., in which offence he was found to have taken only a minor part. *Held*, under the circumstances, that the order of forfeiture of a reasonable sum of Rs. 50 against the sureties was sufficient, and that they need not be burdened—*Fatta*, 1915 P.R. 6, 16 Cr.L.J. 287.

122. (1) A Magistrate may refuse to accept any surety offered, or may reject any surety previously

Power to reject sureties.

accepted by him or his predecessor under this Chapter, on the ground that such surety

is an unfit person for the purposes of the bond:

Provided that, before so refusing to accept or rejecting any such surety, he shall either himself hold an inquiry on oath into the fitness of the surety or cause such inquiry to be held and a report to be made thereon by a Magistrate subordinate to him,

(2) Such Magistrate shall, before holding the inquiry, give reasonable notice to the surety, and to the person by whom the surety was offered and shall in making the inquiry record the substance of the evidence adduced before him.

(3) If the Magistrate is satisfied after considering the evidence so adduced either before him or before a Magistrate deputed under sub-section (1), and the report of such Magistrate (if any), that the surety is an unfit person for the purposes of the bond, he shall make an order refusing to accept or rejecting, as the case may be, such surety and recording his reasons for so doing:

Provided that, before making an order rejecting any surety who has previously been accepted, the Magistrate shall issue his summons or warrant, as he thinks fit, and cause the person for whom the surety is bound to appear or to be brought before him.

Change:—The whole section has been newly drafted by sec. 20 of the Criminal Procedure Code Amendment Act (XVIII of 1923).

The main changes introduced by this new section are:—(1) rejection of a surety previously accepted; (2) inquiry into the fitness of a surety; and (3) delegation of such inquiry to a subordinate Magistrate. The reasons have been stated below in proper places.

301. Rejection of sureties:—The question as to whether a particular person is fit to stand as surety or not, is a matter for the decision of the Magistrate. The question in every case is one of discretion and the Magistrate's discretion in this matter is not fettered in any way—*In re Jalil*, 13 C.W.N. 80; *Bhawani*, 12 A.L.J. 1004, 16 Cr.L.J. 54, 26 I.C. 616, A.I.R. 1914 All. 489; *Abdul Karim*, 44 Cal. 737, 21 C.W.N. 925. But this discretion to accept or reject a surety must be exercised only after a satisfactory inquiry in accordance with law—*Bhawani*, 12 A.L.J. 1004; *Akbar Ali*, 42 Cal. 706, 19 C.W.N. 220; *Rayan*, 43 Cal. 1024, 20 C.W.N. 1133. The Magistrate can refuse or accept any surety only on valid and reasonable grounds and not on mere conjectures and surmises—*Abdul Khan*, 10 C.W.N. 1027; *Asiruddin*, 41 Cal. 761.

After an order is passed under section 118 demanding sureties, the Magistrate cannot introduce any new qualifications while deciding on the suitability of the sureties, and cannot reject them because they do not answer to those qualifications—*Alladitto*, 26 Cr.L.J. 1011, 87 I.C. 961, A.I.R. 1925 Sind 321, 19 S.L.R. 101.

Sureties ought not to be rejected merely on the strength of reports of the Police—*Jai Gorind*, 15 O.C. 263, 13 Cr.L.J. 760; *Abdul Khan*, 10 C.W.N. 1027; *Tota*, 25 All. 272; *Panchoo*, 29 Cal. 455; *Munshi*, 18 A.L.J. 321, 21 Cr.L.J. 365; *Gopi*, 20 A.L.J. 760, A.I.R. 1922 All. 541, 68 I.C. 35, 23 Cr.L.J. 499; *Sukhai*, A.I.R. 1935 All. 517, 36 Cr.L.J. 1285, 157 I.C. 1049, 1935 Cr.C. 513; *Kaim Khan*, 1906 P.R. 18, 1907 P.L.R. 14, 5 Cr.L.J. 148, 1907 P.W.R. 5; *Kanwal*, 25 Cr.L.J. 91, 76 I.C. 27, A.I.R. 1925 Lah. 672; *Ramdhani*, 36 Cr.L.J. 1473, 158 I.C. 918, A.I.R. 1935 Pat. 421, 16 P.L.T. 478, 1935 Cr.C. 1064; *Zorawar*, 13 A.L.J. 469, 16 Cr.L.J. 445; *Bhawani*, 12 A.L.J. 1004; *Id Ibrahim*, 16 Cr.L.J. 100, 8 S.L.R. 173; or on mere hearsay evidence of general repute—A.I.R. 1922 Oudh 227, 9 O.L.J. 353, 68 I.C. 959. The implicit acceptance of the opinions expressed in police reports without considering the facts upon which such opinions are based, would place all persons ordered to furnish security at the mercy of the police—*In re Abdul Khan*, 10 C.W.N. 1027. The Magistrate may ask the police to report, with a view merely of enabling them to collect and call evidence. But in every case his order must proceed on a consideration of the evidence and not of the police-report—*Mahro*, 2 S.L.R. 11, 10 Cr.L.J. 225; *Jai Gorind*, 15

5, 1931 A.L.J. 1170, the Allahabad High Court took a contrary view, holding that 30 of the Indian Evidence Act applied to such a case. See also *Sarju*, 41 All 231, A.L.J. 147, 20 Cr.L.J. 206, 49 I.C. 654.

111. [*Repealed.*]

This section has been repealed by sec. 8 of the Criminal Law Amendment Act of 1923). It ran as follows —

"111. The provisions of secs. 109 and 110 do not apply to the European British subjects in cases where they may be dealt with under the European Vagrancy Act, 1874." We consider that sec. 111 should be repealed and that secs. 109 and 110 should equally to Europeans and Indians"—*Report of the Racial Distinctions Committee*, 16.

112. When a Magistrate acting under section 107, section 108, section 109 or section 110 deems it order to be made. necessary to require any person to show under such section, he shall make an order in writing, setting forth the substance of the information received, the amount of the bond to be executed, the term for which it is to be in force, and the number, character and class of sureties (if any) required.

78. Scope:—The provisions of this section must be complied with by a Magistrate passing a preliminary order under the Burma Habitual Offenders Restriction Act of 1919), and if that order does not set forth the substance of the information received and the term during which the order of restriction shall be in force, the entire order is irregular and order passed therein must be set aside—*Parsodan*, 2 Rang. The information which leads to action under sec. 107 may be of the most varied kind. It may be oral, sworn or not sworn, and need not be in writing. It may be derived from any source, official or unofficial, formal or informal. It may be derived from the Magistrate's own knowledge. He is not bound to disclose the source or the nature of the information received—*In re Mithu Khan*, 27 All 172, 1904 A.W.N. 206, 1 A.L.J. 685; *Padmanabhaiah*, 54 Mad 422, AIR 1930 Mad 975, 1930 M.W.N. 1100, 32 Cr.L.J. 784, 59 M.L.J. 914, 129 I.C. 70, 32 Cr.L.J. 217, 1930 Cr.C. 1191.

9. Order in writing:—Before making an order the Magistrate may hold an inquiry. See Note 230 under the heading "Inquiry." A Magistrate acting under this section has no power to act until he has recorded an order in writing under this section. *Rameshwar*, 36 All 262, 12 A.L.J. 365. The issue of a warrant under sec. 115 without recording an order under this section is illegal—*Jatoi*, 20 S.L.R. 122, 27 Cr.L.J. 391. So also, where the accused persons were arrested as suspected habitual offenders and the Magistrate fixed a date for the production of evidence with the object of issuing a notice under sec. 112, but on the date fixed, after hearing the prosecution evidence, he at once called upon the accused to enter upon his defence to a charge under sec. 110, held that the procedure was illegal and the proceedings must be set aside. It is only after the Magistrate has recorded an order under sec. 112, that the actual hearing can by law take place at all—*Rajbansi*, 42 All 646 (648), 22 Cr.L.J. 228. In *Pragi*, 10 O.C. 365, 7 Cr.L.J. 94, however, it has been held that the provisions of this section are purely directory, and a failure to record the order is a mere irregularity. In *In re Kavatham*, 26 M.L.T. 385, 20 Cr.L.J. 763, it was held that the omission to draw up a proceeding under this section or to serve a copy of the order on the accused under sec. 115 did not vitiate the proceedings, if the order was drawn up later and read out and explained to the accused who appeared in Court in pursuance of a summons.

passed under sec. 118, the District Magistrate (and he alone) can convert the order into an order of restriction under the Burma Habitual Offenders Restriction Act (II of 1919), where there has been a proper preliminary order under sec. 112 and the District Magistrate has good reasons for the change—*Parsodan*, 2 Rang. 524.

Proceedings under this section against persons who have been registered under sec. 4 of the Criminal Tribes Act (III of 1911) are not illegal. But such proceedings though not illegal are inexpedient, and the fact that the persons proceeded against are already registered under the Criminal Tribes Act may be a factor and an important factor which the Magistrate should take into consideration before he makes any order against them under sec. 110 of this Code—*Ghulam Rasul*, 20 Cr.L.J. 30, 48 I.C. 510 (Cal.). A person who has been registered under the Criminal Tribes Act may be proceeded against under sec. 110 of this Code, if he pursues a career of crime bringing him within some one of the clauses of this section. Each case has to be scrutinized on its merits. If such proceedings appear to be necessary in view of the exigencies of any particular case, evidence of general repute, which is bound to be affected in a large measure by the very fact of the person proceeded against being a member of a criminal tribe, should be, if at all, acted upon with great caution and scrutiny—*Bada Mir*, 54 Cal 279, 31 C.W.N. 165 (166), 28 Cr.L.J. 106, 44 I.C. 314, A.I.R. 1927 Cal. 213.

277A. Transfer:—Cases under Ch VIII may be transferred in accordance with the provisions of sec. 192, Cr. P. Code. See Notes 598 in this connection. See also *Gulabrao Laxmanrao Changude v. Emp.*, in Note 258.

A person proceeded against under sec. 107, Cr. P. Code can apply for transfer of the proceedings under sec. 526, Cr. P. Code—*Haji Baqiridi*, 26 A.L.J. 398, 29 Cr.L.J. 448 (419), 108 I.C. 569, A.I.R. 1928 All. 268.

Proceedings under sec. 110, Cr. P. Code cannot be transferred by the High Court to another district—*Emp v. Mahendra*, 30 All. 47, 27 A.W.N. 268, 7 Cr.L.J. 214; *Amar Singh*, 16 All. 9. This view was dissented from in *Emp. v. Wahid Ali Khan*, 32 All. 612, where Tudball, J., observed: "No doubt, a Magistrate cannot take action under sec. 110 unless the person against whom the action is taken, is one within the local limits of his jurisdiction. But once action has been taken, the inquiry and the final order are made under the powers conferred by sec. 117 and sec. 118 of the Code. Section 526 clearly enables this Court to transfer a criminal case of this description, once it has been properly instituted, to any other Criminal Court of equal or superior jurisdiction (and which otherwise would have no jurisdiction), and the order of this Court will give jurisdiction to the Court to which the case has been so transferred to make an enquiry under sec. 117 and to pass an order under sec. 118. I do not think that the powers of transfer given to this Court by sec. 526 are in any way limited by the terms of sec. 110 or sec. 107 of the Code." This view was followed in *U Gandama*, 145 I.C. 314, A.I.R. 1933 Rang. 164, 1933 Cr.C. 763, 6 Rang. 41, 34 Cr.L.J. 950. As a rule, it would not be at all in accordance with the view of the Calcutta High Court, to transfer any preventive proceeding from one district to another. It must be an extremely exceptional case that could justify the interference of the High Court with the jurisdiction of the Magistrate of the district taking preventive action within his own boundaries and imposing such foreign and extraneous duty on the Magistrate of another district. *Chandi Prosad*, 17 C.W.N. 536, 20 I.C. 142, 14 Cr.L.J. 382. See also *Maung Saw Hlaing* 31 Cr.L.J. 1195, 146 I.C. 23, A.I.R. 1933 Rang. 165, 1933 Cr.C. 764, where the High Court transferred proceedings under sec. 107, Cr. P. C., to another district.

277B. Confession:—A confession in a dacoity case is admissible against its maker in proceedings under sec. 110, Cr. P. Code. It is clearly inadmissible against the co-accused in such proceedings, the provisions of sec. 30 of the Indian Evidence Act not being applicable in such a case—*Amirulla*, 23 C.W.N. 408, 49 I.C. 649; *Mafizuddin*, 25 C.W.N. 239, 61 I.C. 793, 33 Cr.L.J. 70, 22 Cr.L.J. 411, A.I.R. 1921 Cal. 557. In *Rickpel*, 26 Cr.L.J. 198, 57 All. 312, 152 I.C. 881, A.I.R. 1931 All. 927, 1931 Cr.C.

judicial act and therefore the Magistrate should not act arbitrarily. There must be information of a nature which convinces him that there is a likelihood of a breach of the peace. It is impossible to formulate a hard and fast rule with regard to the nature of the information on which a Magistrate should act. What is reasonably sufficient to satisfy a Magistrate must depend on the particular situation. While there must be something more than the past misconduct of the person proceeded against to justify a notice being served upon him, the Cr P Code does not require the information to show the particular act which is in contemplation at the time. The Magistrate must be satisfied that there is a likelihood of a breach of the peace. What will satisfy him must depend on the particular facts of the case—*In re Muthuswami*, AIR 1940 Mad (25, 26), 50 M.L.W. 802, 1939 M.W.N. 1209, 185 I.C. 824, 41 Cr.L.J. 238, (1940), 1 M.L.J. 11 (F.B.).

Merely informing an accused person that he is suspected to be a habitual thief, is not a sufficient notice, before proceeding under sec 110. There must be something in the nature of the indictment or charge containing substantial particulars indicating the grounds upon which the police have given information to the Magistrate—*Rajbansi*, 18 A.L.J. 678, 42 All 646 (648), 22 Cr.L.J. 228; *Nihal*, 49 All 5, 24 A.L.J. 900, 28 Cr.L.J. 9, AIR 1926 All 759, 99 I.C. 41. The failure of the Magistrate to record the details of the information which he has received, is not a mere irregularity which would be covered by sec 537, but is an illegality which vitiates the trial—*Nihal*, (supra). The Oudh Chief Court, however, dissents from these two rulings and is of opinion that the 'substance of the information' does not mean anything more than the gist of the information. It is not necessary to state anything more than the particular section or sub-section on which it is proposed to proceed against the accused. In any view, the failure to give the accused the information of the nature of the case against him, is a mere irregularity cured by sec. 537—*Ram Ghulam*, 2 Luck. 157, 28 Cr.L.J. 744 (746), 103 I.C. 792, AIR 1927 Oudh 306, 6 O.W.N. 1202. The Calcutta High Court likewise holds that the substance of the information means such or so much of the information as would enable the party to know under what clause of sec. 110 he is charged or to what particular class of offenders he is said to belong. Where possible, the repetition of the words of the section should be avoided, but the notice is not rendered invalid because of failure to mention the details of the case—*Bhut Nath*, 33 C.W.N. 852, 124 I.C. 71, 31 Cr.L.J. 614, 1929 Cr.C. 387, 57 Cal 503, A.I.R. 1929 Cal 739. It is utterly impossible to draw the line or to offer the Magistrates any guiding principle which would assist them in determining how much information is to be given in a case under sec. 110. It is sufficient if the particular clause of the charge, or where there are more than one offence named in a charge, the particular offence or offences are given in the notice—*Chandan*, 52 All. 448, AIR. 1930 All. 274, 1930 Cr.C. 442, 124 I.C. 40, 31 Cr.L.J. 627, 1930 A.L.J. 389. Ordinarily, it is sufficient if that portion of the clause of sec. 110 which is applicable to the particular case is specified in the notice, but where the particular clause refers to two or more offences, the particular offence or offences which is more appropriate to the particular case should also be mentioned in the notice. This applies more particularly to clause (d) of sec. 110—*Chandan*, supra. This section does not contemplate that the allegations of fact constituting the information should be embodied in the preliminary order. The section provides for a preliminary order to be passed in proceedings started under secs. 107, 108, 109 and 110 and contemplates that the order should contain as much of the information as would be sufficient to enable the party to know under which of the several sections or which part of any one of them he is proceeded against. The preliminary order under this section need not contain more than an indication of the particular offence which is sought to be prevented—*Jagannath Prasad v. Emp.*, AIR. 1940 Nag. 134 (135), 1940 N.L.J. 31.

The omission to set forth the substance of the information will not of itself be sufficient to render the proceeding and the final order null and void, unless the accused has been prejudiced by the omission and a failure of justice has been occasioned—*Id.*

Jafar, 3 All 515; *Abbasu v. Umda*, 8 Cal 724; *Bhagwan*, 1891 A.W.N. 40; *Tanwar*, 19 S.L.R. 176, 26 Cr.L.J. 1398; the omission in the notice to give detailed information as to the nature of the evidence for the prosecution, is not an irregularity sufficient to vitiate the proceedings, especially if the accused had cross-examined at great length the witnesses for the prosecution—*Dohra*, 20 Cr.L.J. 436 (Pat.); or if as a matter of fact the accused had clear notice of the case made against them and had ample time and opportunity to let in evidence—*Jai Singh*, 23 Cr.L.J. 42 (Pat.). According to the Lahore and Rangoon High Courts, an order which does not set forth the substance of the information is illegal and must be set aside—*Ujagar*, 10 Lah. 155, 30 Cr.L.J. 839, 117 I.C. 807, A.I.R. 1929 Lah. 504, 1929 Cr.C. 61, 30 P.L.R. 694, Ind. Rul. 1929 Lah. 695; *Maung Tunu*, 4 Bur.L.J. 172, 27 Cr.L.J. 318 (319), 92 I.C. 702, A.I.R. 1925 Rang. 353. For contra, see *Dayaram*, 27 Cr.L.J. 575, 94 I.C. 143, A.I.R. 1926 Lah. 366.

In a proceeding under sec. 107, the Magistrate may give only the substance of the information received, and it is not necessary to specify the definite acts which the accused intends to commit—*Jagaji*, 16 A.L.J. 567, 19 Cr.L.J. 876, A.I.R. 1918 All. 93, 13 I.C. 72. In proceedings under sec. 110 an order by the Magistrate stating that he has received some reliable information (though not definite) that the accused is a habitual cattle-thief and a receiver of stolen goods, is a sufficient compliance with the provisions of this section—*In re Kala*, 1896 A.W.N. 73.

But a Magistrate is not bound to give the source of the information—*In re Mithu*, 27 All. 172; *Alimuddin*, 29 Cal. 392. It is also not necessary to give a list of the prosecution witnesses in the order—*Chintamon*, 35 Cal. 243, 12 C.W.N. 299, 7 C.L.J. 177; *Rajendra*, 17 C.W.N. 238 (261), 18 I.C. 149, 16 C.L.J. 467, 14 Cr.L.J. 5.

Section 110 provides six categories of cases within one or more of which the offender's case must come in order that a penalty may be imposed in accordance with that section. When a person is sought to be proceeded against under this section it must be made clear as to which sub-section he is charged with coming under. It is not enough merely to assert that he is a person of criminal tendencies or that he is suspected of having committed certain crimes. The omission to do so is obviously a serious hardship to the accused person, in as much as he receives no notice of the precise case which he is to meet. It is not enough to charge a person generally of having committed an offence under sec. 110, Cr. P. Code without specifically stating under which of the sub-section the case is alleged to fall—*Sohan Singh*, 26 Cr.L.J. 1377, 89 I.C. 513, A.I.R. 1926 Lah. 45.

Where in a proceeding under sec. 107, Cr. P. Code the Magistrate has only reproduced the language of the section, without specifying in what way and with reference to what matter a person was likely to commit a breach of the peace and in what way he was likely to do a wrongful act which might occasion a breach of the peace, the proceeding is vague and cannot be supported—*Amanal Ali*, 30 Cr.L.J. 492, 115 I.C. 545, A.I.R. 1929 Pat. 67, 10 P.L.T. 639, Ind. Rul. 1929 Pat. 209.

It is doubtful how far an order under this section can properly exceed the information given under sec. 107, Cr. P. Code—*Jasoda Lekhraj v. Emp.*, 40 Cr.L.J. 703 (704), I.L.R. 1939 Kar. 662, 182 I.C. 698, 12 R.S. 31, A.I.R. 1939 Sind. 167.

Amendment of the order:—If it had been the intention of the Legislature to give Courts power to amend orders under sec. 112, after they had been communicated to the accused, provision would have been made in the Code for such amendment. The provisions which have actually been made, seem impliedly to prohibit any amendment of that kind. In the first place it is necessary not only that the information received should be set out in the order under sec. 112, but also the kind of the bond to be executed, the term for which it is to be enforced and the number, character and class of sureties, if any, required. These latter requirements for an order under sec. 112 seem to indicate that it was not the intention of the Legislature that the Courts should have a more or less free hand in altering the nature of the bond, the class of sureties, the term for which the bond was to be enforced, after evidence had been taken or

during the course of the proceedings. The provision of sec. 118 would be meaningless, if it was open to Court at any time to amend the original order under sec. 112—*Nim*, 34 Cr.L.J. 9, 140 I.C. 170, A.I.R. 1933 Sind 8, 1933 Cr.C. 32, 27 S.L.R. 19, Ind. Rul. 1932 Sind 182. For contra, see *Hyder Khan*, 1933 M.W.N. 551. But where the Magistrate recorded an order calling upon three persons to show cause why they should not be required to furnish security in the sum of Rs. 2,000, got a copy of that order duly served on them to appear on a certain date and, on their appearance on the fixed date, passed an entirely fresh order under sec. 112 and carefully read it out to them as was required by sec. 113, it was held that the proceedings were in no way vitiated by the procedure adopted by the Magistrate—*Muhammad Ishaq*, 28 Cr.L.J. 815, 104 I.C. 255, A.I.R. 1927 Lah. 689.

Where a person was not called upon to show cause as being "by habit" a thief and burglar but it was stated in the order drawn up under sec. 112, Cr. P. C., that it appeared to the Magistrate that he was by "general repute" a thief and burglar, it was held that the proceedings were not illegal in as much as it was not shown that he was misled or in any way prejudiced by the terms of the order under sec. 112, Cr. P. C.—*The Deputy Legal Remembrancer v. Kadir Mirza*, 17 C.W.N. 331, 13 Cr.L.J. 784, 17 I.C. 416.

There is nothing in the provisions of sec. 109 or of sec. 112, Cr. P. Code which makes it imperative on the part of the Magistrate, after having recited the reasons why the person named is to be called on to execute a bond, to enter the actual section and clause which he considers appropriate. Where the Sessions Judge in appeal has considered that what is set out in the body of the order under sec. 112, Cr. P. Code brings the matter within the terms of clause (a) of sec. 109, Cr. P. Code and not under clause (b), and he has in effect corrected what he considers either to be a misconception of the trying Magistrate or a clerical error and the substance of the accusation which the applicant had to meet has not been altered in any way, there is jurisdiction of the Appellate Court to make the alteration—*Ahesanali v. Emp.*, 39 Cr.L.J. 747 (748), 176 I.C. 465, A.I.R. 1938 Nag. 303, 11 R.N. 54, I.L.R. 1938 Nag. 595.

See also Note 292.

Number, character and class of sureties:—The Magistrate in setting forth the number, character and class of sureties, should not place undue and unnecessary difficulties in the way of finding them—*Rahmatulla*, 22 Cr.L.J. 395 (All.). The Magistrate should not impose impossible restrictions, as the provisions of this Chapter are preventive and not penal—*Md. Pahor*, 1 S.L.R. 46, 8 Cr.L.J. 166.

Therefore, a Magistrate has no right to impose a condition requiring the accused to find sureties residing within certain geographical limits (e.g., within one mile or five miles) or residing in a certain locality—*Narain Soobodhee*, 22 W.R. 37; *Tara Sing*, 1880 P.R. 38; *Bhagwan*, 7 A.L.J. 993, 11 Cr.L.J. 536; *Hasimuddin*, 10 A.L.J. 354, 13 Cr.L.J. 831; *Rahunandan*, 20 A.L.J. 520, 23 Cr.L.J. 400; *Mangal*, 6 O.C. 199; or to impose a condition that the sureties must be inhabitants of one village—*Nga Po*, 17 Cr.L.J. 85. In *Nabhu*, 24 All. 471, it has been held that the Magistrate is entitled to prescribe certain geographical limits for the residence of sureties, but it must not be too narrow; and, therefore, where an order was passed by a Magistrate requiring the sureties to be "residing within the Municipality of Mirzapore" the High Court added the words "or in the immediate neighbourhood."

Lastly, as regards the *class of sureties*. Since sec. 112 gives the Magistrate power to define the character and class of sureties, it is open to him to require that they must be *landholders* or persons having a certain pecuniary status—*Rahim*, 20 All. 206; *Jiva Natha*, 16 Bom.L.R. 138, 15 Cr.L.J. 268; *Allahbad*, 17 S.L.R. 160; *Jumo*, 16 Cr.L.J. 252, 8 S.L.R. 229; (but see *Wasya*, 1901 P.R. 28); or that they should be of respectable character and should not be of inferior standing to suspects—*Md. Ibrahim*, 8 S.L.R. 11, 16 Cr.L.J. 100, 27 I.C. 148. But a condition that the sureties must not be *lambars*

inamdars and *Chowkidars* (*Kaim Khan*, 1906 P.R. 18) or that they must not be related to the accused (*Narain*, 22 W.R. 37) or that they must not come from *Kaharati* and must not be *Kunbi* by caste (*Yesu*, 1 Bom L.R. 520) is too restrictive and illegal.

See Notes under sec. 122.

Copy:—A person against whom a Magistrate has drawn up an order under sec. 112, Cr. P. C., asking him to show cause why he should not be bound down to keep the peace under sec. 107, Cr. P. C., is not entitled to obtain a copy of the written information given by the police on which the order is based—*Anantapadmanabiah*, A.I.R. 1930 Mad. 975, 54 Mad. 422, 1930 M.W.N. 1100, 32 M.L.W. 784, 59 M.L.J. 911, 129 I.C. 70, 1930 Cr.C. 1191, 32 Cr.L.J. 217.

Revision:—The High Court has powers under sec. 439 read with sec. 423 (1) (c) and sec. 561A, Cr. P. Code to set aside the Magistrate's order under sec. 112, Cr. P. Code and to quash proceedings—*Jasoda Lekhtaj v Emp.*, A.I.R. 1939 Sind 167 (170), 1 I.R. 1939 Kar. 662, 182 I.C. 698, 12 RS 31, 40 Cr.L.J. 703. The High Court has undoubtedly power to quash proceedings where the notice issued does not comply with the requirements of sec. 112, but before doing so, it must be satisfied that there has been a failure to comply. It must be remembered that the issue of the notice is merely a preliminary step and no order can be passed under sec. 107, Cr. P. Code unless the inquiry which follows the issue of the notice shows that the laying of the information was justified. The High Court can always interfere when the inquiry has not been held in accordance with the law or a wrong conclusion has been arrived at—*In re Muthuswami*, 41 Cr.L.J. 238 (241), 185 I.C. 824, A.I.R. 1940 Mad. 23, 50 M.L.W. 802, 1939 M.W.N. 1209, (1940) 1 M.L.J. 11 (F.B.).

113. If the person in respect of whom such order is made is present in Court, it shall be read over to him or, if he so desires, the substance thereof shall be explained to him.

Procedure in respect of person present in Court.

'Is present in Court':—Even if persons are illegally arrested and brought into Court, the Magistrate is justified in treating the persons as present in Court and may proceed to initiate proceedings—*Ghulam Husain*, 12 Cr.L.J. 533, 12 I.C. 301 (Bom.). The record must show conclusively that the order was read out to the person proceeded against—*Din Dayal*, 28 Cr.L.J. 8, 99 I.C. 40, A.I.R. 1927 All. 146.

114. If such person is not present in Court, the Magistrate shall issue a summons requiring him to appear, or, when such person is in custody, a warrant directing the officer in whose custody he is, to bring him before the Court:

Summons or warrant in case of person not so present.

Provided that, whenever it appears to such Magistrate, upon the report of a police-officer or upon other information (the substance of which report or information shall be recorded by the Magistrate, that there is reason to fear the commission of a breach of the peace, and that such breach of the peace cannot be prevented otherwise than by the immediate arrest of such person, the Magistrate may at any time issue a warrant for his arrest.

281. Issue of Summons:—Summons is necessary only if the accused is not present in Court. If he is present, and the Magistrate records an order calling on him to show cause on a day fixed why he should not furnish security for keeping the peace, it is not necessary to issue a summons to him—*Choudhury*, 2 B.L.R. App. 28.

When a Magistrate issued a notice with reference to sec. 110, but at the time of inquiry passed an order demanding security under section 107, it was held that the Magistrate ought to have issued a fresh notice with reference to sec. 107, to enable the party to know the facts on which the Magistrate intended to proceed against him—*Krishnaswami v. Vanamamalai*, 30 Mad 282.

The notice issued to the accused to appear and show cause must give him sufficient time to produce his evidence. So, where notice was served on the 7th, requiring the accused to appear on the 9th, it was held that sufficient time was not given, and the order for security was set aside—*Cheyti Singh*, 22 W R. 70.

282. Issue of Warrant:—Before making an order for immediate arrest, the Magistrate must be of opinion that the only way of preventing a breach of the peace is to commit the person to custody, and he must put on record the substance of the Police report or other information by which he is influenced—*Maniruddin*, 5 P.L.T. 95, 24 Cr.L.J. 829, 74 I.C. 861. To justify an arrest under this section the Magistrate must act upon information that has been on record. It is not enough for him to merely express a belief that such a course is necessary. Not only must he have reason to fear the commission of a breach of the peace, but it must be shown that such breach of the peace cannot be prevented otherwise than by the immediate arrest of such person—*Babua*, 6 All 132. No notice is necessary before arrest—*Chandan*, 52 All 448, 31 Cr.L.J. 627, 1930 A.L.J. 389, A.I.R. 1930 All. 274.

A Magistrate holding an inquiry under sec. 110, Cr. P. C., derives jurisdiction to issue a warrant against a suspect only after he has passed an order under sec. 112, Cr. P. C., and after he has satisfied himself that there is reason to fear the commission of a breach of the peace, and that such breach of the peace cannot be prevented otherwise than by the immediate arrest of the suspect—*Jatoi*, 27 Cr.L.J. 935, 96 I.C. 391, 20 S.L.R. 122, A.I.R. 1926 Sind 288.

As for arrest without warrant, see 20 S.L.R. 85, cited in Note 126 under sec. 55.

Re-arrest:—The proviso to the section is a provision relating to the circumstances set out in the section and is not a substantive provision by itself. It does not give power to Magistrates to re-arrest a person who has already been let off after executing surety bonds—*Nathan Gope*, 10 P.L.T. 801, 30 Cr.L.J. 809 (811).

It may be doubted whether this proviso empowers a Magistrate to re-arrest a person who has already appeared and been admitted to bail—*Raghunandan*, 32 Cal. 80 (83).

283. Bail:—A Magistrate has no jurisdiction to refuse bail to an accused person arrested under a warrant issued under this section—*Faiz Mahomed*, 9 S.L.R. 158, 17 Cr.L.J. 77, 32 I.C. 669. When a man who is arrested is not accused of a non-bailable offence, no needless impediments should be placed in the way of his being admitted to bail. The intention of the law undoubtedly is that in such cases the man is ordinarily to be at liberty, and it is only if he is unable to furnish such moderate security, if any is required of him, as is suitable for the purpose of securing his appearance before a Court pending inquiry, that he should remain in detention—*Mir Hashamali*, 20 Bom.L.R. 121, 19 Cr.L.J. 329.

284. Person outside jurisdiction:—A Magistrate cannot legally issue a warrant under this section for the arrest of a person who has already left the local limits of his jurisdiction. The person proceeded against must be actually and physically present in the district in which the Magistrate exercises jurisdiction—*In re Ramjiban*, 14 Bom.L.R. 889, 13 Cr.L.J. 796, 17 I.C. 540. But see *Manindra*, 46 Cal. 215 (236), A.I.R. 1919 Cal. 702, 23 C.W.N. 193, 28 Cr.L.J. 25, 19 Cr.L.J. 969, 46 I.C. 152, where it is held that sec. 114 is not limited to arrest within the local limits of the Magistrate's jurisdiction but applies to an accused arrested outside the jurisdiction and brought in custody within the jurisdiction for the purpose of proceeding under this Chapter. See Note 258 under section 110.

115. Every summons or warrant issued under section 114 shall be accompanied by a copy of the order made under section 112 and such copy shall be delivered by the officer serving or executing such summons or warrant to the person served with, or arrested under, the same.

285. Omission to send copy of order:—When the summons was not accompanied by a copy of the order passed under section 112, the whole proceedings were invalid, and the order for security must be set aside—*Subba Naicken*, 6 Cr.L.J. 332, 17 M.L.J. 438; *Abdul Rahaman*, 2 Weir 55. Contra—*Suleman*, 11 Bom.L.R. 740, 10 Cr.L.J. 375, 10 Bom.L.R. 375, and *Narain*, 25 Cr.L.J. 682, 81 I.C. 170, A.I.R. 1925 Nag. 33, where such omission was held to be a mere irregularity, cured by sec. 537. So also, in a recent Allahabad case, where the Magistrate instead of sending a copy of his order with the summons, gave the substance of the information in the summons itself, and the accused were, therefore, informed of what they had to meet, *held* that the irregularity was cured by sec. 537—*Ram Deo*, 27 Cr.L.J. 1132, 97 I.C. 652, 49 All. 228, 25 A.L.J. 44, A.I.R. 1927 All. 767. See also *In re Kavatham*, 26 M.L.T. 385, 20 Cr.L.J. 763, 53 I.C. 491; *Rameshwar*, 1 P.L.T. 632, 21 Cr.L.J. 321, 55 I.C. 593, and *Bajrao*, 25 Cr.L.J. 132, 76 I.C. 228, A.I.R. 1924 Nag. 166, where it has been held that an order for security is not liable to be set aside, merely because no preliminary order was drawn up and served on the accused, provided that the preliminary order was drawn up later and read and explained to the accused when they were brought into Court in pursuance of summonses.

116. The Magistrate may, if he sees sufficient cause, dispense with the personal attendance of any person called upon to show cause why he should not be ordered to execute a bond for keeping the peace, and may permit him to appear by a pleader.

Where the person against whom proceedings were taken lived at a distance and there was no special circumstance making his personal attendance necessary, it would be a very unwise exercise of jurisdiction to require him to appear personally, since the Magistrate could under this section allow him to appear by a pleader—*Dinonath v. Girja*, 12 Cal. 133.

The words "bond for keeping the peace" imply that this section applies only to a case under sec. 107. *Vide* also 2 Weir 54.

117. (1) When the order under section 112 has been read or explained under section 113 to a person present in Court or when any person appears or is brought before a Magistrate in compliance with, or in execution of, a summons or warrant issued under section 114, the Magistrate shall proceed to inquire into the truth of the information upon which action has been taken, and to take such further evidence as may appear necessary.

(2) Such inquiry shall be made, as nearly as may be practicable, where the order requires security for keeping the peace, in the manner hereinafter prescribed for conducting trials and recording evidence in summons-cases; and where the order requires security for good behaviour, in the manner hereinafter

prescribed for conducting trials and recording evidence in warrant-cases, except that no charge need be framed.

(3) *Pending the completion of the inquiry under sub-section (1), the Magistrate, if he considers that immediate measures are 'necessary for the prevention of a breach' of the peace or disturbance of the public tranquillity or the commission of any offence, or for the public safety, may for reasons to be recorded in writing, direct the person, in respect of whom the order under Section 112 has been made, to execute a bond, with or without sureties, for keeping the peace or maintaining good behaviour until the conclusion of the inquiry, and may detain him in custody until such bond is executed, or, in default of execution, until the inquiry is concluded.*

Provided that—

(a) *no person against whom proceedings are not being taken under section 108, section 109 or section 110 shall be directed to execute a bond for maintaining good behaviour, and*

(b) *the conditions of such bond, whether as to the amount thereof or as to the provision of sureties or the number thereof or the pecuniary extent of their liability shall not be more onerous than those specified in the order under section 112.*

(4) For the purposes of this section the fact that a person is a habitual offender *or is so desperate or dangerous as to render his being at large without security hazardous to the community* may be proved by evidence of general repute or otherwise.

(5) Where two or more persons have been associated together in the matter under inquiry, they may be dealt with in the same or separate inquiries as the Magistrate shall think just.

Change:—Sub-section (3) and the italicised words in sub-section (4) have been added by sec 19 of the Cr P C., Amendment Act (XVIII of 1923). The reasons are stated below. Sub sections (3) and (4) have been renumbered as (4) and (5).

286. Sub-section (1)—Inquiry into truth of information:—The inquiry provided for by secs 117 and 118 is not strictly limited by the precise terms of the order drawn up under sec 112, Cr. P. Code—*The Deputy Legal Remembrancer v. Kadu Mirza*, 17 C.W.N. 331, 13 Cr.L.J. 784, 17 I.C. 416. But it is hardly possible that a Court could equitably call on a man to prove that he was not a thief, and then without further notice bind him over on the grounds that he was an habitual forger—*Sultan*, 26 Cr.L.J. 767 (768), 19 S.L.R. 332, 86 I.C. 351, A.I.R. 1925 Sind 236.

Under this section a Magistrate is bound to inquire into the truth of the information, notwithstanding that the accused admits the allegations against him and consents to furnish security—*Nga Yan Shin*, U.B.R. (1902-3) 1; *Allahditta*, 19 S.L.R. 101, 26 Cr.L.J. 1041. Strictly speaking, a plea of guilty in a Criminal Court can only be made in response to a charge made by the Court and an informal admission as to guilt does certainly not amount to a formal plea of guilty and such an admission has not, of course, the same binding effect as a plea of guilty. It has not the same effect

in fact and it has not the same effect in law. When such an admission is made due to an inducement made by the investigating Police Officer, there is nothing in the law to suggest that, in such circumstances, a Sessions Judge hearing a reference under sec. 123, Cr. P. Code is forbidden to direct that the persons proceeded against under sec. 110, Cr. P. Code should be examined again—*Legal Remembrancer, Bengal v. Jibari Kinnar*, A.I.R. 1936 Cal. 292, 37 Cr.L.J. 818, 163 I.C. 228, 1936 Cr.C. 529, 8 R.C. 727. See Note 236 under sec. 107.

It is not competent to a Magistrate to dispense with the inquiry provided for by this section, and to base his order merely on the result of another case recently tried by him—*Mul Chand*, 37 All. 30 (31).

The inquiry to be held under this section is a full judicial inquiry. It must be conducted judicially and becomes a judicial proceeding. All the formalities of a judicial proceeding have to be observed in the inquiry—*Sher Zaman*, 1899 P.R. 10; *Nur Mohamed v. Nil Rutton*, 18 W.R. 2.

The Court must act on evidence duly recorded in the presence of the accused person and it is not open to it to take into consideration any information obtained otherwise than from such evidence. This, of course, refers to the final decision in the case, and not to the initiation of the proceedings—*San Dun v. King-Emp*, 2 Rang. 641 (642).

Summoning witnesses:—It is quite clear that the accused person when appearing to show cause must be ready with his evidence. If he has been unable to bring the witnesses with him on account of the shortness of the notice or other reasonable cause, it is his duty, when he appears, to apply at once for summons to the witnesses he proposes to call—*Narayan*, 9 Bom L.R. 1383; *Chulan v. Sukedad*, 23 W.R. 9. When a Magistrate is of opinion that the expenses for calling witnesses should be charged from parties he should realise the expenses before issuing the summons—*Govind Sahai*, 12 A.L.J. 262, 15 Cr.L.J. 363.

The accused person must be given sufficient time to bring his witnesses and have their evidence recorded. Where the accused has not had this opportunity, the order against him must be set aside—*Keramuddin*, 41 Cal. 806, 15 Cr.L.J. 353, 23 I.C. 721; *Jatoi*, 27 Cr.L.J. 935, 96 I.C. 381, 20 S.L.R. 122, A.I.R. 1926 Sind 288; *Nathu*, 6 All 214; *Ponthiram*, 38 C.L.J. 285, 25 Cr.L.J. 293.

Defence by Pleader:—The person against whom proceedings have been initiated under this Chapter has a right to be defended by a pleader—*Jhojha Singh*, 23 Cal 493; *Girand*, 25 All. 375. See Notes under sec. 340.

See also Note 274.

287. Further evidence:—The words "further evidence" indicate that some evidence may be taken by the Magistrate even before drawing up the preliminary order under sec. 112—*Nga Po*, 2 Cr.L.J. 462 (Bur.).

The Magistrate trying a case is bound by law to hear those witnesses only whose list is sent up by the Police along with the case; and as soon as the witnesses produced in support of the case have been heard, the Magistrate is then to ascertain the names of the persons likely to be acquainted with the facts of the case, and shall summon to give evidence only such of them as he thinks necessary. He is not bound by law to, and should not, save in very exceptional cases, call the other witnesses that the police or any one else from time to time choose to produce—*Govind Sahai*, 12 A.L.J. 262, 15 Cr.L.J. 363.

Evidence, which relates to occurrences which took place after the information mentioned in sec. 110, Cr. P. Code had been received by the Magistrate, is irrelevant to the matter before him—*Jagan*, 36 All 239 (242), 12 A.L.J. 399, 15 Cr.L.J. 212, 22 I.C. 996.

In a proceeding under this section it is erroneous on the part of the Magistrate to admit fresh evidence for the prosecution after the close of the defence case. No further evidence can be admitted except under sec. 540 for which valid reasons must be recorded—*Ganga Singh*, 10 A.L.J. 383, 13 Cr.L.J. 772.

288. Sub-section (2)—Nature of Procedure:—An inquiry in a proceeding for security to *keep the peace* must be made in the same way as in a trial of a summons case—*Bidapati*, 25 All 273. If it is tried as a warrant case, the proceedings would be vitiated—*Uttam Chand*, 85 I.C. 46, 26 Cr.L.J. 430 (All). The Magistrate must proceed as nearly as practicable in the same way as under sec. 242. He must state to the accused the particulars of the matter against him and ask him if he can show cause why he should not be required to execute bonds. The question 'are you willing to execute the bond?' answered by a statement that the accused would execute a bond, is not a sufficient compliance with the requirements of this section—*Palaniappa*, 34 Mad. 139. See also *Nasir Ahmad*, 28 Cr.L.J. 609, 50 All. 120, 102 I.C. 897; A.I.R. 1927 All. 579; *Sadhu*, 1935 Pesh. 116. But sec. 242, Cr. P. Code does not seem to apply at all to proceedings under sec. 107 Cr. P. Code—*Christy v. Christy*, A.I.R. 1933 Lah. 1019 (1020), 1933 Cr.C. 1556, 35 Cr.L.J. 505, 147 I.C. 997. In an inquiry under sec. 107, the deposition need not be read over to the witnesses in the presence of the accused. See 52 Cal 668 cited in Note 1028 under sec. 360. If the complainant is absent, the proper order is one of discharge under sec. 119, but not of acquittal under sec. 247—*Ashrafali v. Nasu Sarkar*, 31 C.W.N. 388, 28 Cr.L.J. 479 (480).

The Crown is not bound at the initial stage even to name the witnesses who will support the case by their evidence—*Rajendra*, 17 C.W.N. 238 (261), 16 C.L.J. 467, 18 I.C. 149, 14 Cr.L.J. 5.

The procedure applicable to the proceedings under sec. 108, Cr. P. Code is that prescribed for warrant cases except that a charge need not be framed: this is clear from sec. 117 (2), Cr. P. Code. The prosecution has to establish the truth of the information and the person against whom an order requiring security for good behaviour is sought is entitled to take up the position of keeping quiet and putting the prosecution to the proof of the allegations made against him—*Pitre*, 47 Bom 438 (443), 25 Bom.L.R. 97, 25 Cr.L.J. 150, 76 I.C. 294, A.I.R. 1923 Bom. 255. An inquiry in a *good-behaviour* case must be conducted as if it were a warrant case, and the procedure in secs. 251-256 must be followed. According to those sections an accused person cannot be called upon to enter on his defence until the prosecution closes its case (sec. 256)—*Ganga Singh*, 10 A.L.J. 383, 13 Cr.L.J. 772. The Calcutta and the Punjab High Courts are of opinion that the procedure prescribed for warrant cases is not to be followed strictly but "is as nearly as practicable" to be observed; therefore, the accused cannot invoke the aid of sec. 256 and is not entitled to ask the Court to recall the witnesses who have given evidence against him for further cross-examination—*Ahmed Baksh*, 1916 P.R. 1, 17 Cr.L.J. 84; *Chintamon*, 35 Cal. 243; *Bija*, 8 Lah 265, 28 Cr.L.J. 239. See Note 835 under sec. 256.

The words "the manner hereinafter prescribed for conducting trials and recording evidence in warrant cases" in clause (2) of this section are wide enough to cover the special procedure laid down for the trial of summons or warrant cases in Chs. 20 and 21 as well as the general provisions as to inquiries and trials contained in Ch. 24. Therefore, there is no reason why in an enquiry in a case under sec. 110, Cr. P. Code which vitally affects an accused, he should be deprived of the right given to him in provision (a), sec. 350, Cr. P. Code to demand that the witnesses or any of them be re-summoned and re-heard and to ask the Magistrate to see for himself the demeanour of the witnesses and to have a first hand impression of the witnesses and their evidence. The fact whether the inquiry is under secs. 107, 108, 109 or 110, Cr. P. C., makes no difference because sec. 117, clause (2) applies equally to an enquiry under any of these sections—*Mahatab Singh v. Emp.*, A.I.R. 1937 All. 438, 1937 A.W.R. (H.C.) 382, 1937 A.L.J. 373, 169 I.C. 833, 1937 A.L.R. 598, 38 Cr.L.J. 804, 1937 A.I.C.R. 29, following *Y. Venkatchennaya*, A.I.R. 1920 Mad. 337, 56 I.C. 50, 21 Cr.L.J. 402, 27 M.L.T. 178, 38 M.L.J. 370, 1920 M.W.N. 280, 43 Mad. 511 (F.B.); *Govinda v. Emp.*, 20 N.L.J. 117. See also Notes 1012 and 1015.

Ordinarily the person proceeded against under this Chapter and ordered to give security for good behaviour, is entitled to have his witnesses summoned at Government

expense as in warrant cases unless the Magistrate, for reasons to be recorded, declines to summon all or any of the witnesses named by the person concerned—*Pahlwan*, 33 Cr.L.J. 679, 138 I.C. 765, 33 P.L.R. 742, Ind. Rul. 1932 Lah. 529, A.I.R. 1932 Lah. 577, 1932 Cr.C. 805. See also *Sayyad Habib*, 117 I.C. 667, A.I.R. 1929 Lah. 23, 30 Cr.L.J. 814; *Habib v. Mehdi Hussain*, 108 I.C. 907, 29 Cr.L.J. 459 and *Muhammad Azim v. Muhammad Ji*, 7 P.R. 1898.

'Except that no charge need be framed':—The reason for this exception is obvious. What is equivalent to a charge has already been framed in the order served upon the accused, in accordance with sec. 112—*Tirlok*, 25 A.L.J. 749, 28 Cr.L.J. 792 (793).

An examination of the persons proceeded against is necessary under sec. 342, Cr. P. Code—*Raghubar Dayal*, 36 Cr.L.J. 33, 152 I.C. 120, A.I.R. 1934 All. 735, 1934 Cr.C. 936. But see, *Binode*, 50 Cal 985, where it has been held that sec. 342, Cr. P. C., does not apply to an inquiry under this section. See Note 973 in this connection.

Consent of accused to be bound down:—See Note 236.

288A. Sub-section (3)—"This sub-section has been added to enable the Magistrate in emergent cases to take immediate steps to preserve the public peace or for the public safety by taking security pending the detailed inquiry"—*Statement of Objects and Reasons*, (1914).

The object of sec. 117 (3) is to empower the Magistrate to direct the person against whom an order under sec. 112 has been made to execute a bond for keeping the peace or maintaining good behaviour until the conclusion of the enquiry. The power so to direct is made to depend on the Magistrate holding that immediate measures are necessary for any of the following purposes:—

- (1) for the prevention of—
 - (a) a breach of the peace or
 - (b) disturbance of public tranquillity, or
 - (c) the commission of any offence; or
- (2) for the public safety.

Where, therefore, the ground on which the Magistrate considered that immediate measures were necessary was that he apprehended that the person proceeded against would "prove a danger to the witnesses who are to give evidence against him" at the enquiry, the case falls under clause (c) above and the requirements of this sub-section have been satisfied—*Pir Shah Murad Shah v. Emp.*, 27 Cr.L.J. 1030, 96 I.C. 982, A.I.R. 1926 Sind 276.

The Court passing an order under clause (3) of this section must state its reasons in writing for passing the order, i.e., it must state that there was a likelihood of the accused committing a breach of the peace. Where all that the Magistrate said was that the order was passed on account of emergency, held that the order was bad and must be set aside—*Sahib Dino*, 21 S.L.R. 93, 28 Cr.L.J. 173, A.I.R. 1927 Sind 148. The only condition precedent that is laid down is that the Magistrate must record his reasons in writing—*Pir Shah Murad Shah v. Emp.*, supra.

Where a Magistrate postpones the case after the accused has notified his intention to make a transfer application, he has jurisdiction to pass an order under clause (3) pending the completion of the inquiry—*Sahib Dino* (supra); *Baqridi*, 26 A.L.J. 398, 29 Cr.L.J. 448 (449).

An order made under this sub-section is not subject to the provisions of Ch. XXXIX relating to bail. This sub-section has been introduced in the interests of public safety pending an inquiry under secs. 108, 109 and 110; consequently, it is not open to the High Court to reduce the security which the Magistrate orders to be furnished under this clause. At the same time there is nothing to prevent the High Court in the exercise of its inherent powers from considering whether the *interim* security is not too high. But if the High Court reduces the interim security, such reduction does not fetter the discretion of the Magistrate as to the amount of security which he may ultimately demand—*Jagir Singh*, 31 Cr.L.J. 812 (813), 125 I.C. 322, A.I.R. 1930 Lah. 529.

In making an order under this sub-section there should be no restriction that the accused should produce sureties in *moveable property*. The Magistrate should follow the words of sec. 117, and require a bond in the form given in the Schedule; he should not introduce the restrictive words "in moveable property"—*Harihar*, 1932 A.L.J. 157, 33 Cr.L.J. 229 (230), A.I.R. 1932 All. 122.

289. Sub-section (4)—Evidence of general repute:—See this subject fully discussed in Note 272 under section 110.

Prior to the amendment of this sub-section, evidence of general repute was admissible only in those cases where the person was a habitual offender within the meaning of clauses (a) to (e) of sec. 110. It could not be adduced to prove under clause (f) of that section that a man was a desperate and dangerous character—*Indar*, 40 All. 372; *Ranga Reddi*, 43 Mad. 450; *Kalai*, 29 Cal. 779; *Babu Murtaza*, 9 O.C. 69; *Hurmat*, 2 A.L.J. 174; *Wahid Ali*, 11 C.W.N. 789; *Akhoy*, 5 C.W.N. 249; *Nur Muhammad*, 1917 P.W.R. 8. Those rulings are no longer good law in view of the amendment of sub-section (4) of the present section.

But evidence of general repute is not admissible in a case where a person is called upon to furnish security under sec. 107—*Bidyapati*, 25 All. 273; *Banarsi Das*, 1888 P.R. 16.

It is not everything that may be proved by evidence of general repute. The ordinary rules of evidence apply, with such modification only as is made by this sub-section. No extension of evidence of general repute beyond the limits prescribed in this sub-section is permissible—*San Dun v King-Emp*, 2 Rang. 641 (642). This sub-section is an exception to the general rule of evidence and like all exceptions to be sparingly used and only in exceptional circumstances. The general rule of law, of course, is that every man is presumed not to be a criminal or an offender until he has been found guilty by a competent Court. Conviction by public opinion should only be permitted to take the place of conviction by a Court in rare and exceptional circumstances, as for example, where the advent of a suspicious stranger in a village coincides with a series of crimes and suspicion waxes so strong and is so well justified that it may fairly be allowed to take the place of proof, and in such unusual circumstances, the section sanctions an experimental use of the security sections. But where a person has lived all his life in a locality and has never even been accused before a Court of law for any crime, far less convicted, there is absolutely no justification for any such experiment or for making any presumption that he is a criminal, not to say a habitual criminal—*Rathnam Pillai*, 39 Cr.L.J. 230 (231), 172 I.C. 866, A.I.R. 1938 Mad. 35, 1937 M.W.N. 1065, 1937 M.Cr.C. 298, (1937) 2 M.L.J. 749, 46 M.L.W. 858.

"*Or otherwise*"—According to the general rule of interpretation the word "otherwise" must be read as meaning something *ejusdem generis* with the particular or particulars alleged above it, e.g., hearsay evidence. It is clear that the intention of the Legislature is that the Magistrate should use very large discretion as to the evidence which he may admit in the proceedings—*Kallu Mal*, 1904 A.W.N. 140; *Emp v. Jaggan*, 36 All. 239 (242), 12 A.L.J. 399, 15 Cr.L.J. 212, 22 I.C. 996. The expression 'or otherwise' would include statements made by some of the co-accused amounting to a confession of the actual commission of the offence and incriminating the other accused—*Sarju*, 41 All. 231, 17 A.L.J. 147, 20 Cr.L.J. 206, 49 I.C. 654.

290. Sub-section (5)—Joint trial:—Upon general principles each individual member of the community is, in the absence of exceptional authority conferred by the law to the contrary effect, entitled, when required by the judiciary either to forfeit his liberty or to have that liberty qualified, to insist that his case shall be separately tried. In the eye of the law, each individual citizen is a separate integer or unit of the commonwealth, and his rights of liberty cannot, without express authority in the law, be dealt with jointly with those of a crowd of other persons with whom, far from having a community of interests, he may have incompatibility of interests—*Abdul Kadir*, 9 All. 452 (457). The main principles applicable to a

criminal trial regarding joinder of charges and the joint trial of accused persons may well be held to be applicable to inquiries under sec 107, Cr. P. Code—*Pran Krishna*, 8 C.W.N. 180 (184). Under this section, the persons who had been associated together may be tried jointly. But there must be clear evidence to prove the association—*Deodhari*, 6 P.L.T. 810, 26 Cr.L.J. 738. Where several persons are proceeded against under sec. 110, clause (5) of sec. 117 does not make it a condition precedent to such joint inquiry that the suspects shall be shown to be associated together in the *order itself*. It is a permissive clause which permits a joint inquiry being held where such persons are, as a matter of fact, associated together—*Tanwar*, 19 S.L.R. 176, 26 Cr.L.J. 1398. Where it was clearly established that the accused (who were father and his three sons) were associated together and formed a gang, and the evidence against them was all the same, *held* that the case was one in which the accused could be rightly dealt with together and that any minute inquiry into the complicity of each of the accused individually was not necessary—*Parasulla*, 13 C.W.N. 244. Where the essence of the charge was that the accused formed one gang with one purpose, namely, that of harassing the complainant, and each act spoken to by the witnesses was an act prompted by that common object and directed towards accomplishing it, and the evidence of the common association of all the persons for that one purpose was particularly strong, *held* that they could be jointly tried—*Taranagowd*, 51 Mad. 515, 29 Cr.L.J. 77 (79). If a gang of disorderly persons join together committing acts of violence or criminal intimidation, proceedings against the whole gang in the same case are proper, and it suffices in such cases that some members of the gang committed various acts. It is not necessary that the evidence should establish that on every occasion the whole gang were together. It is sufficient if the evidence establishes that there is a gang of persons joining together to commit such acts as the security-section exists to prevent—*Bakaram*, 23 Cr.L.J. 741 (Nag). Where certain persons serving under a common master were found to have committed certain acts of extortion for the benefit of their master, *held* that although each of the acts alleged was not done by all of them together, yet they were so associated together as to justify a joint inquiry—*Srikanta*, 9 C.W.N. 898, 2 Cr.L.J. 554.

The fact that persons are members of an undivided family would not by itself render each member liable for the misconduct of any other member. The test to be applied is, whether there has been habitual *association* between the persons charged in respect of the misconduct alleged in the complaint—*Kripasindhu*, 1918 M.W.N. 751, 19 Cr.L.J. 905, 47 I.C. 277, 8 M.L.W. 461.

Even where the association of the several accused is established satisfactorily, the Magistrate has a discretion to try the accused jointly or separately—*Hari Telang*, 4 C.W.N. 531, 27 Cal. 781; *Hossein*, 6 Cal. 96; *Jai Govind*, 15 O.C. 263. See also 19 S.L.R. 176 (181), A.I.R. 1926 Sind. 69. Although there is no legal prohibition in jointly trying a number of persons proceeded against under sec 107, still it is highly unjust and unfair to proceed against them jointly unless it is apparent that they formed a gang. The case of each has to be considered separately and this is not likely to be effected if the trial is joint—*Muhammed Ismail*, 21 A.L.J. 841, 25 Cr.L.J. 952, 81 I.C. 600, A.I.R. 1924 All. 195.

Association, what is not?—In the absence of any evidence to prove that the persons constituted a gang, the mere fact that they belonged to one tribe and village with a bad name, is not sufficient evidence of association, and, therefore, they cannot be tried jointly in one and the same proceeding—*Murad*, 1895 P.R. 1. Thus, the fact that the accused persons are close neighbours and had been previously implicated in good many cases together, does not lead to the inference that they were associated together in the particular offence under inquiry, and does not justify a joint trial of them all—*Jogendra*, 21 Cr.L.J. 700 (Cal.).

The word "association" cannot apply to such cases where the offence is purely *personal* to the offender. For instance, the question whether a person is a habitual thief or not is personal to himself and forms a separate matter by itself. So, where four

persons were charged under sec. 110 (a) as being thieves by habit, it was held that there was an error in law in trying them all together—*K-E v. Po Twe*, 4 L.B.R. 46, 6 Cr.L.J. 284. So also, the fact that the accused are desperate and dangerous persons hazardous to the community, is a fact which pertains to each accused separately, and there is no such connection between them in regard to the character which may be deemed as habitual association. Consequently, proceedings should be taken separately against each of the accused persons—*Hari Telang*, 27 Cal. 781 (783), 4 C.W.N. 531; *Kutti Gounden*, 47 M.L.J. 689, 26 Cr.L.J. 673, 86 I.C. 49, 1925 M.W.N. 57, A.I.R. 1925 Mad. 189; *Angnoo Singh*, 71 I.C. 865, 45 All. 109, 20 A.L.J. 881, A.I.R. 1923 All. 35, 24 Cr.L.J. 257; *Jhari Lal*, 65 I.C. 484, 23 Cr.L.J. 100, 3 P.L.T. 538, A.I.R. 1923 Pat. 104. These cases were cases in which joint trial could not properly be held, in as much as the matter under enquiry was whether a person individually was or was not a habitual offender. There can, however, be no doubt that a joint trial could be held, and a joint trial was the proper procedure, in the case of persons acting in concert; persons who are associates and confederates, so as to call into operation the provisions of clause (5) of this section—*Parbati*, 35 Cr.L.J. 952, 61 Cal. 588, 149 I.C. 460, 1934 Cr.C. 690, A.I.R. 1934 Cal. 482. In every case it has to be considered how far the evidence proves association and how far the various persons tried are prejudiced by a joint trial—*Ganti Veera Reddi*, 39 Cr.L.J. 816, 176 I.C. 815, A.I.R. 1938 Mad. 615, 47 M.L.W. 640, 1938 M.W.N. 601.

Again, sub-section (5) does not authorise a Magistrate to deal with persons charged under *separate sections* in one and the same inquiry. Thus, a person called upon to give security under sec. 109, and another person called upon to give security under sec. 110 cannot be tried together in the same proceeding—*Mehen*, 8 O.C. 91, 2 Cr.L.J. 224.

And lastly, two contending parties opposed to one another and inclined to commit an offence involving a breach of the peace, cannot be said to have been associated together, and a joint trial of such contending parties is illegal. The case against the persons on the one side at least should be tried separately from that against the other side—*Pran Krishna*, 8 C.W.N. 180; *Ganapathi*, 31 Mad. 276; *Kamal*, 11 C.W.N. 472, 5 C.L.J. 231, 5 Cr.L.J. 197; *Har Dutt*, 14 A.L.J. 268, 17 Cr.L.J. 165; *Kishore*, 6 P.L.T. 768, 26 Cr.L.J. 1248, 88 I.C. 864, A.I.R. 1926 Pat. 32. But in 9 All. 452 it has been held that such a joint trial is not *ipso facto* null and void, except where the accused has been prejudiced thereby.

An objection to the joint trial of accused persons ought to be taken at the beginning of the trial, or, at least, at an early stage thereof. This objection is not sufficient to set aside the order when it is taken at the time of argument after examination of witnesses on both sides—*Amjad Ali*, 25 Cr.L.J. 35, 75 I.C. 723, 5 P.L.T. 129, 2 P.L.R. 79 (Cr.), A.I.R. 1924 Pat. 498.

The legality of a joint trial must depend on what is alleged for the prosecution, not on the facts subsequently found to be true. Otherwise in many cases there could be no determination whether the joint trial was legal or not till the result of the case was known, a proposition which has only to be stated to be rejected—*Jogendra*, 25 C.W.N. 334, 61 I.C. 233, 22 Cr.L.J. 377; *Parbati*, 35 Cr.L.J. 952 (954), 61 Cal. 588, 149 I.C. 460, 1934 Cr.C. 690, A.I.R. 1934 Cal. 482. See also *Sundar Lal*, A.I.R. 1933 All. 676 (677), 1933 A.L.J. 777, 1933 Cr.C. 1188, 146 I.C. 900, 35 Cr.L.J. 183; *Chheda Lal*, 34 Cr.L.J. 793, 144 I.C. 577, 10 O.W.N. 233, A.I.R. 1933 Oudh. 195, 1933 Cr.C. 382, Ind. Rul. 1933 Oudh. 269. For contra see 65 I.C. 484, 3 P.L.T. 538, A.I.R. 1923 Pat. 104.

The law requires that when proceedings are taken against more than one person, for a joint trial under sec. 110, Cr. P. Code proof should be given that they were associated together in the matter under enquiry—*Nizamaddi*, 23 C.W.N. 488, 20 Cr.L.J. 551, 51 I.C. 889. There can be no doubt that a joint trial could be held, and a joint trial was the proper procedure, in the case of persons acting in concert; persons who are associates and confederates, so as to call into operation the provision contained in

sec. 117 (5), Cr. P. C. The illegality of a joint trial cannot be given effect to in the absence of proof of any prejudice. In cases where proceedings are taken joint against more persons than one under sec. 110, the Magistrate is required to come to separate finding as regards each of the persons charged individually—*Parbati*, 61 Cal. 588, 149 I.C. 460, 1934 Cr.C. 690, A.I.R. 1934 Cal. 482, 35 Cr.L.J. 952, distinguishing *Hari Telang*, 27 Cal. 781, 4 C.W.N. 531; *Angnoo Singh*, 71 I.C. 865, 45 All. 109, 20 A.L.J. 881, A.I.R. 1923 All. 35, 24 Cr.L.J. 257; *In re Kutti Goundan*, 86 I.C. 49, 47 M.L.J. 689, 1925 M.W.N. 57, A.I.R. 1925 Mad. 189, 26 Cr.L.J. 673; and *Jhari Lal*, 65 I.C. 484, 23 Cr.L.J. 100, 3 P.L.T. 538, A.I.R. 1923 Pat. 104. See also *Kalu Mirza*, 37 Cal. 91. Even in cases where one and the same proceeding taken by the Magistrate under secs. 107, 112, 117 and 118, Cr. P. Code improperly deals with more than one person, the matter must be considered upon the individual merits of that particular case, and it would, at least, amount to an irregularity, which may or may not be covered by the somewhat broadly worded provisions of sec. 537, Cr. P. Code according to the circumstances of each case—*Abdul Kadir*, 9 All. 452 (459). The Madras High Court has, however, held that such a joinder is not a mere irregularity but an illegality which will vitiate the proceedings—*Ganapathi*, 31 Mad. 276. This view was followed by the Nagpur Court in 5 N.L.R. 65.

In proceedings under sec. 110, Cr. P. C., every accused person proceeded against under that section is entitled to a separate notice and it is not fair to him to have the charges which are going to be made against him confused with the charges that are being made against somebody else—*Emp. v. Ram Lal*, 116 I.C. 25, 51 All. 663, A.I.R. 1929 All. 73, 30 Cr.L.J. 562, 1929 A.L.J. 361. But where the applicants were alleged by the prosecution to be members of a gang of habitual thieves and robbers and were always associated jointly in the commission of thefts, burglaries and robberies, it was perfectly right in issuing one order against them under sec. 112, Cr. P. C., calling upon them to show cause why they should not be bound over to be of good behaviour under sec. 110, Cr. P. C.—*Hubdar Ali*, 34 Cr.L.J. 852, 144 I.C. 944, 10 O.W.N. 325, A.I.R. 1933 Oudh. 251, 1933 Cr.C. 557.

Section 117, clause (5) is not specifically limited to proceedings under sec. 107 or sec. 108. It is true that when a person is charged with being a habitual thief, it is *nilhil ad rem* that some other person with whom he may or may not have associated, is also a habitual thief; but when it is alleged that a person is in the habit of committing theft in association with other persons as members of a gang of thieves, the Magistrate is at liberty in his discretion to deal with the case of all such persons in the same enquiry. Of course, in deciding whether an order under sec. 117 (5) should be made or not, the Magistrate must consider whether, if the order is made, one or more of the persons concerned might be prejudiced in his defence—*Rangoo Mean*, 35 Cr.L.J. 1257, 151 I.C. 205, A.I.R. 1934 Rang. 121, 1934 Cr.C. 713, 12 Rang. 169.

All persons who joined in the conspiracy to molest other people and to cause them injuries could, if their common aims and objects were once established, certainly be tried at the same trial under sec. 107, Cr. P. C.—*Bajirao*, 25 Cr.L.J. 132, 76 I.C. 228, A.I.R. 1934 Nag. 166.

A joint inquiry is out of the question when one charge at least is that two persons are so desperate and dangerous as to render their being at large without security hazardous to the community. There certainly can be no such intimate connexion between two individuals in regard to their characters as to render them liable to a joint inquisition—*Rathinam Pillai*, A.I.R. 1938 Mad. 35, 1937 M.W.N. 1065, 1937 M.Cr.C. 298, (1937) 2 M.L.J. 749, 46 M.L.W. 858, 39 Cr.L.J. 230, 172 I.C. 866.

See also Note 270 under sec. 110, Cr. P. Code.

Separate finding and evidence:—Where proceedings are taken jointly against more persons than one under this sub-section, the Magistrate must come to a *separate finding* as regards each of them *individually*—*Ajodhya*, 35 Cal. 929; *Kalu Mirza*, 14 C.W.N. 49, 11 Cr.L.J. 23, 5 I.C. 29, 37 Cal. 91; *Murad*, 1895 P.R. 1; *Brijnandan*, 37 All. 33, 16 Cr.L.J. 46; *Khairu*, 25 Cr.L.J. 1377, 83 I.C. 337, 19 S.L.R. 96; *Ghousbux*, A.I.R.

1937 Sind 26 (27), 167 I.C. 227, 30 S.L.R. 382, 38 Cr.L.J. 363, 9 R.S. 173; and the judgment must show that the Magistrate has considered the case of each individual accused—*Kalu Mirza*, supra. The case of each person is to be considered on its own merits, and it should not be allowed to be mixed up or prejudiced by that of the others—*Nathu*, 6 All. 214; *Md Ismail*, 21 A.L.J. 841, 25 Cr.L.J. 952, 81 I.C. 600, A.L.R. 1924 All. 195; *Dhanoo*, 34 C.W.N. 144, 31 Cr.L.J. 944, 125 I.C. 855, A.L.R. 1930 Cal. 294. Upon regeral principles every accused person is entitled to insist that his case shall be tried separately from the case of other persons similarly circumstanced—*Abdul Kadir*, 9 All. 452; *Bahadur Shah*, 1910 P.R. 4, 10 Cr.L.J. 591.

An order passed under sec. 118 or sec. 123 (3), Cr. P. Code must be self-contained—*Ghousbux*, supra.

The Magistrate must insist upon definite evidence being given against each person charged—*Jai Govind*, 15 O.C. 263, 13 Cr.L.J. 760. What is evidence against one cannot be treated as evidence against all others, without discriminating between the cases of the various persons implicated—*Abdul Kadir*, 9 All. 452; *Angnu Singh*, 45 All. 109 (111). Thus, where the evidence recorded by the Magistrate has bearing only on 11 out of 26 persons called upon to show cause, his order binding down all the 26 persons is not valid; it is valid only as regards those against whom the evidence is relevant—*Kassim Biswas*, 10 C.L.R. 335.

See also Note 273

118. (1) If, upon such inquiry, it is proved that it is necessary for keeping the peace or maintaining good behaviour, as the case may be, that the person in respect of whom the inquiry is made should execute a bond, with or without sureties, the Magistrate shall make an order accordingly:

Provided—

first, that no person shall be ordered to give security of a nature different from, or of an amount larger than, or for a period longer than, that specified in the order made under section 112;

secondly, that the amount of every bond shall be fixed with due regard to the circumstances of the case and shall not be excessive,

thirdly, that, when the person in respect of whom the inquiry is made is a minor, the bond shall be executed only by his sureties.

291. "If it is proved, etc."—Evidence:—These words show that an order under this section cannot be made without inquiry and proof—*Gaiba*, Ratanlal 585 (586). The Magistrate must give his reason for finding it proved that security is necessary—*In re Raja*, 10 Bom. 174 (175).

The mere fact that the accused person says that he is willing to give security to keep the peace is not the kind of proof required by this section as condition precedent to the taking of security—*Prem Singh*, 1917 P.R. 27, 18 Cr.L.J. 847; *Sheodan*, 1915 P.R. 21. See Note 236 under sec. 107. When the accused denied the allegations but expressed his willingness to execute a bond, whereupon he was ordered to execute a bond, the order was held to be illegal, in as much as the accused denied every allegation on the basis of which he was considered liable to furnish security, and no evidence was taken to prove those allegations—*Rai Singh*, 20 Cr.L.J. 105; *Kurwa*, 26 A.L.J. 519, 30 Cr.L.J. 122 (124).

292. Order for security:—The object of this section is the prevention and not the punishment of offences, and consequently a Magistrate when passing an order in terms of this section, ought not to have any direct intention of inflicting punishment—*Kandhaia*, 7 All 67 (72). Therefore, a Magistrate ought not to impose arbitrary conditions not essential for the object in view, which it would be impossible for the accused to fulfil, still less impossible conditions. The order must not be tantamount to saying that the prisoner shall not furnish any security at all but must go to jail—*Narain Soobadhee*, 22 W.R. 37.

According to the first proviso to this section, the final order must not be at variance with the preliminary order. Thus, the Magistrate cannot vary the conditional order passed under sec 112 by imposing further conditions in the final order—*Ramanand*, 11 O.C. 267, 8 Cr.L.J. 344; *Jangi Singh*, 1906 A.W.N. 276, 4 Cr.L.J. 405. So also, it is illegal to require a bond for good behaviour, when the notice was to show cause with respect to keeping the peace—*Driver*, 25 Cal 798. Similarly, the Magistrate is not competent to demand security with reference to sec. 110, when the preliminary order was with reference to sec. 109—*Nga He*, U.B.R. (1897—1901) 24. (In such a case, the proper course is to institute fresh proceedings—*Ibid.*). So again, the Magistrate is not justified in demanding security for a larger amount than what was communicated to the accused in the preliminary order—*Kishen*, 1907 P.W.R. 11, 5 Cr.L.J. 219; *Isree Pershad*, 18 W.R. 61; *Debi*, 1885 A.W.N. 30; *Sultan*, 26 Cr.L.J. 767, 86 I.C. 351, 19 S.L.R. 332; nor is he justified in demanding sureties when the summons made no mention of sureties at all—*Isree Pershad*, 18 W.R. 61. In cases where heavier security is deemed necessary, the Magistrate ought to issue fresh summons setting forth the intended amount—*Isree Pershad*, 18 W.R. 61; *Md. Ismail*, 1881 A.W.N. 152. See Note 280 under the heading "Amendment of the order."

The Magistrate cannot in the final order direct the accused to give security for a longer period than what was mentioned in the notice under section 112—*Ramchandra*, 26 Mad 471 (472).

A person against whom an order is passed under this section must be given sufficient time to furnish security. Where the Magistrate ordered the accused to furnish security with four sureties of Rs. 3,000 each on the very day, and imprisoned the accused on his failure to do so, held that the order was illegal and must be set aside—*Maung Tun*, 4 Bur L.J. 172, 27 Cr.L.J. 318.

No condition and limitations can be imposed upon persons ordered to give security under this section—*Jhoja Singh*, 24 Cal 155.

Section 109, Cr. P. C., merely requires a Magistrate to issue a notice and does not empower him to pass the final order. This is done under sec. 118, which in its turn is dependent upon the order passed under sec. 112. All that the final order can contain is a direction to furnish security to be of good behaviour for a period which cannot, in any case, exceed one year, and which must not be beyond that specified in the order under sec. 112. Any order which specifies a period of imprisonment in default is to that extent illegal. The penalty for a failure to furnish security is given in sec. 123 (1), Cr. P. C.—*Rangi*, A.I.R. 1936 Nag 265, 1936 Cr.C. 1138.

The order under this section, though restricted in its contents by the order under sec. 112, Cr. P. C., is the operative order, and time runs from the order passed under this section, and not from the order passed under sec. 112—*Ghousbux*, A.I.R. 1937 Sind 26 (28), 167 I.C. 227, 38 Cr.L.J. 363, 9 R.S. 173.

Fresh security upon expiry of a previous and existing security:—A security to keep the peace once given is sufficient for that purpose so long as it is in force in respect of every act of the person bound over breaking any of the conditions. A second order to give further security during the continuance of the first one is not contemplated by law; but if upon the expiry of the first order the dispute still exists, a further security may be demanded on fresh proceedings properly taken—*Mahomed Abdul Bari*, 4 C.W.N. 121.

Supplementary order for larger security—A Magistrate passed a final order directing certain persons to furnish security in certain amounts. A month later he passed another order directing one of the accused to furnish security in a much bigger sum and stating that he had overlooked that this accused had been called upon in the preliminary order to furnish a larger security. It was held that the second order was *ultra vires*. After the Magistrate had finished his case, it was beyond his power to alter the order—*Rajkumar*, 17 A.L.J. 335, 20 Cr.L.J. 486, 51 I.C. 470

See Note 275.

293. Amount of security:—The provisions of Chapter VIII are not intended to punish but to prevent crime and it is not permissible to limit the security or the amount of security to such descriptions that it is perfectly impossible for the accused to furnish them, thus rendering it certain that they will be committed to jail—*Allahdad v Emp.*, 26 Cr.L.J. 179 (180), 83 I.C. 883, 17 S.L.R. 160, A.I.R. 1924 Sind. 120

Under proviso (2), in fixing the amount of security, the Magistrate should have due regard to the circumstances of the case, and the security should not be disproportionate to the ability of the accused to furnish it, with reference to his means and station in life—*Rama*, 16 Bom 372; *Nathu*, 6 All 214; *Juggust*, 2 Cal 110 (112); *Ali*, 1900 P.R. 17; *Jawaya*, 1890 P.R. 30; *Firai*, 5 S.L.R. 10, 12 Cr.L.J. 110, 9 I.C. 651. The Magistrate is the best judge to decide what would be the proper amount of security, which must vary with the danger to be apprehended and the means of the parties. But the Magistrate cannot make an order that is altogether unreasonable—*Juggut Chander*, 2 Cal 110 (111). The amount should be such as to give the accused a fair chance of complying with the conditions of the security, and the Magistrate should not fix an amount for which there is a probability of the accused being unable to find security—*Ali*, 1900 P.R. 17, *Wasia*, 1901 P.R. 28, *Barkat*, 1900 P.R. 24; *Anon.*, 2 Weir 52, 4 M.H.C.R. App 46; *Dedar*, 2 Cal 384 (385); *Satgur*, A.I.R. 1933 All 674, 1933 A.L.J. 927, 1933 Cr.C. 1186, 145 I.C. 875, 35 Cr.L.J. 183; *Satindra*, 32 Cr.L.J. 593 (598), 130 I.C. 880, A.I.R. 1931 Cal 18, 52 C.L.J. 405, 1931 Cr.C. 50, Ind Rul 1931 Cal 400. When the accused is unable to give security for the amount required and remains in jail, it is an index that the Magistrate has not exercised a proper discretion in fixing the amount—*Raza Ali*, 23 All 80. See Note 243A.

There is no warrant in law for taking separate bonds from the accused and his sureties individually and severally exceeding in the aggregate the amount for which the accused is liable—*Jawaya*, 1890 P.R. 30

Moveable property as security—As to the nature of the security the provisions of Cr. P. C., read with Schedule V, Form XI, show that what in the case of a bond for good behaviour must be given is personal security and the same is by inference the case in respect of a bond to keep the peace. If a surety offers a house or cattle, then this is not the security required because his risk is confined to the house or cattle *Mohammad Baksh*, 25 Cr.L.J. 796, 81 I.C. 316, 26 O.C. 284, A.I.R. 1924 Oudh 80.

House property as security—The accused was ordered under this section to furnish a bond for Rs 200 and a respectable surety. Such a surety came forward and offered security in the shape of house property worth Rs 500. The Magistrate rejected the surety. It was held that the surety being respectable and the house being worth Rs 500 should have been accepted, though it was true that under sec 514 only moveable property could be attached and sold during the surety's lifetime for the recovery of the penalty—*Nanha*, 16 A.L.J. 503, 19 Cr.L.J. 711; 46 I.C. 295. The Magistrate should follow the words of sec. 117, Cr. P. C., and not introduce the restrictive words "in moveable property". When sureties are produced, the Magistrate should consider whether, having regard to all the circumstances, they are fit persons to be accepted or not. When they have been accepted, the bond executed by them should be in the form given in the schedule. If the Magistrate has any apprehension that the sureties may part with their properties and be unable to fulfil, he may by way of precaution accept a hypothecation bond from them as a condition precedent to

292. Order for security:—The object of this section is the prevention and not the punishment of offences, and consequently a Magistrate when passing an order in terms of this section, ought not to have any direct intention of inflicting punishment—*Kandhaia*, 7 All 67 (72). Therefore, a Magistrate ought not to impose arbitrary conditions not essential for the object in view, which it would be impossible for the accused to fulfil, still less impossible conditions. The order must not be tantamount to saying that the prisoner shall not furnish any security at all but must go to jail—*Narain Soobadhee*, 22 W.R. 37.

According to the first proviso to this section, the final order must not be at variance with the preliminary order. Thus, the Magistrate cannot vary the conditional order passed under sec. 112 by imposing further conditions in the final order—*Ramanand*, 11 O.C. 267, 8 Cr.L.J. 344; *Jangi Singh*, 1906 A.W.N. 276, 4 Cr.L.J. 405. So also, it is illegal to require a bond for good behaviour, when the notice was to show cause with respect to keeping the peace—*Driver*, 25 Cal. 798. Similarly, the Magistrate is not competent to demand security with reference to sec. 110, when the preliminary order was with reference to sec. 109—*Nga He*, U.B.R. (1897—1901) 24. (In such a case, the proper course is to institute fresh proceedings—*Ibid*). So again, the Magistrate is not justified in demanding security for a larger amount than what was communicated to the accused in the preliminary order—*Kishen*, 1907 P.W.R. 11, 5 Cr.L.J. 219; *Isree Pershad*, 18 W.R. 61; *Debi*, 1885 A.W.N. 30; *Sultan*, 26 Cr.L.J. 767, 86 I.C. 351, 19 S.L.R. 332; nor is he justified in demanding sureties when the summons made no mention of sureties at all—*Isree Pershad*, 18 W.R. 61. In cases where heavier security is deemed necessary, the Magistrate ought to issue fresh summons setting forth the intended amount—*Isree Pershad*, 18 W.R. 61; *Md. Ismail*, 1881 A.W.N. 152. See Note 280 under the heading "Amendment of the order."

The Magistrate cannot in the final order direct the accused to give security for a longer period than what was mentioned in the notice under section 112—*Ramchandra*, 26 Mad. 471 (472).

A person against whom an order is passed under this section must be given sufficient time to furnish security. Where the Magistrate ordered the accused to furnish security with four sureties of Rs 3,000 each on the very day, and imprisoned the accused on his failure to do so, held that the order was illegal and must be set aside—*Maung Tun*, 4 Bur.L.J. 172, 27 Cr.L.J. 318.

No condition and limitations can be imposed upon persons ordered to give security under this section—*Jhoja Singh*, 24 Cal 155.

Section 109, Cr. P. C., merely requires a Magistrate to issue a notice and does not empower him to pass the final order. This is done under sec. 118, which in its turn is dependent upon the order passed under sec. 112. All that the final order can contain is a direction to furnish security to be of good behaviour for a period which cannot, in any case, exceed one year, and which must not be beyond that specified in the order under sec. 112. Any order which specifies a period of imprisonment in default is to that extent illegal. The penalty for a failure to furnish security is given in sec. 123 (1), Cr. P. C.—*Rangi*, A.I.R. 1936 Nag 265, 1936 Cr.C. 1138.

The order under this section, though restricted in its contents by the order under sec. 112, Cr. P. C., is the operative order, and time runs from the order passed under this section, and not from the order passed under sec. 112—*Ghousbux*, A.I.R. 1937 Sind 26 (28), 167 I.C. 227, 38 Cr.L.J. 363, 9 R.S. 173.

Fresh security upon expiry of a previous and existing security:—A security to keep the peace once given is sufficient for that purpose so long as it is in force in respect of every act of the person bound over breaking any of the conditions. A second order to give further security during the continuance of the first one is not contemplated by law; but if upon the expiry of the first order the dispute still exists, a further security may be demanded on fresh proceedings properly taken—*Mahomed Abdul Bari*, 4 C.W.N. 121.

Supplementary order for larger security:—A Magistrate passed a final order directing certain persons to furnish security in certain amounts. A month later he passed another order directing one of the accused to furnish security in a much bigger sum and stating that he had overlooked that this accused had been called upon in the preliminary order to furnish a larger security. It was held that the second order was *ultra vires*. After the Magistrate had finished his case, it was beyond his power to alter the order—*Rajlumar*, 17 ALJ 335, 20 CrLJ 486, 51 IC 470.

See Note 275

293. Amount of security:—The provisions of Chapter VIII are not intended to punish but to prevent crime and it is not permissible to limit the security or the amount of security to such descriptions that it is perfectly impossible for the accused to furnish them, thus rendering it certain that they will be committed to jail—*Allahdad v Emp.*, 26 CrLJ 179 (180), 83 IC 883, 17 SLR 160, AIR 1924 Sind. 120.

Under proviso (2), in fixing the amount of security, the Magistrate should have due regard to the circumstances of the case, and the security should not be disproportionate to the ability of the accused to furnish it, with reference to his means and station in life—*Rama*, 16 Bom 372; *Nathu*, 6 All 214; *Juggust*, 2 Cal 110 (112); *Ali*, 1900 PR 17; *Jawaya*, 1890 PR 30, *Fisal*, 5 SLR 10, 12 CrLJ 110, 9 IC 651. The Magistrate is the best judge to decide what would be the proper amount of security, which must vary with the danger to be apprehended and the means of the parties. But the Magistrate cannot make an order that is altogether unreasonable—*Juggut Chander*, 2 Cal 110 (111). The amount should be such as to give the accused a fair chance of complying with the conditions of the security, and the Magistrate should not fix an amount for which there is a probability of the accused being unable to find security—*Ali*, 1900 PR 17; *Wasia*, 1901 PR 28; *Barkat*, 1900 PR 24; *Anon.*, 2 Weir 52, 4 MHC.R. App 46; *Dedar*, 2 Cal 384 (385); *Satgur*, AIR 1933 All 674, 1933 ALJ 927, 1933 CrC 1186, 145 IC 875, 35 CrLJ 183; *Satindra*, 32 CrLJ 593 (598), 120 IC 880, AIR 1931 Cal 18, 52 CLJ 405, 1931 CrC 50, Ind Rul 1931 Cal 400. When the accused is unable to give security for the amount required and remains in jail, it is an index that the Magistrate has not exercised a proper discretion in fixing the amount—*Raza Ali*, 23 All 80. See Note 243A.

There is no warrant in law for taking separate bonds from the accused and his sureties individually and severally exceeding in the aggregate the amount for which the accused is liable—*Jawaya*, 1890 PR 30.

Movable property as security —As to the nature of the security the provisions of Cr P C, read with Schedule V, Form XI, show that what in the case of a bond for good behaviour must be given is personal security and the same is by inference the case in respect of a bond to keep the peace. If a surety offers a house or cattle, then this is not the security required because his risk is confined to the house or cattle—*Mohammad Baksh*, 25 CrLJ 796, 81 IC 316, 26 OC 284, AIR 1924 Oudh 80.

House property as security —The accused was ordered under this section to furnish a bond for Rs 200 and a respectable surety. Such a surety came forward and offered security in the shape of house property worth Rs 500. The Magistrate rejected the surety. It was held that the surety being respectable and the house being worth Rs 500 should have been accepted, though it was true that under sec 514 only *movable* property could be attached and sold during the surety's lifetime for the recovery of the penalty—*Nanka*, 16 ALJ 503, 19 CrLJ 711; 46 IC 295. The Magistrate should follow the words of sec 117, Cr. P C, and not introduce the restrictive words "in moveable property." When sureties are produced, the Magistrate should consider whether, having regard to all the circumstances, they are fit persons to be accepted or not. When they have been accepted, the bond executed by them should be in the form given in the schedule. If the Magistrate has any apprehension that the sureties may part with their properties and be unable to fulfil, he may by way of precaution accept a hypothecation bond from them as a condition precedent to

their being accepted as reliable sureties—*Harshar*, 33 Cr.L.J. 229, 136 I.C. 65, 1932 A.L.J. 157, 1932 Cr.C. 147, A.I.R. 1932 All 122, Ind Rul. 1932 All 113.

See Note 275.

293A. Minor:—In the case of a minor the bond shall be executed only by his sureties See proviso 3. The reason for this proviso is no doubt the incapacity of the minor to contract—*Mipyn*, 4 L.B.R. 12, 6 Cr.L.J. 123.

294. Revision by High Court:—The question whether it is necessary in the interest of keeping the peace to take security from a person, is essentially a question which primarily concerns the Magistrate and the local police. If the District Magistrate considers it unnecessary to take action, the Sessions Judge or High Court will not ordinarily interfere—*Md. Yusuf v. Abdul*, 53 All. 148, 32 Cr.L.J. 570 (571). The power to demand security from suspected persons is a power that is almost as much of an executive as of judicial nature; and the jurisdiction with which the Magistrate is invested with regard to suspected persons is a very large one. Therefore, the High Court will interfere only on the very clearest and strongest grounds which demonstrate that there has been in the particular case a gross miscarriage of justice—*Balmukund*, 23 P.R. 1889.

The High Court sitting in revision would not ordinarily constitute itself as a Court on facts—*Ghousbux*, A.I.R. 1937 Sind 26, 167 I.C. 227, 30 S.L.R. 382, 38 Cr.L.J. 363. But the High Court will interfere in revision where the order is based on no evidence on the record—*Sher Singh v. Hari Singh*, 1912 P.L.R. 195, 13 Cr.L.J. 720; *Sukhdeo*, 14 A.L.J. 215, 17 Cr.L.J. 157; or where the materials on which the order was passed are clearly insufficient to support the order—*Nafar Chandra*, 38 Cr.L.J. 198, 28 C.W.N. 23, 25 Cr.L.J. 189, 76 I.C. 429, A.I.R. 1924 Cal 114; or where there is nothing on the record to show that an inquiry as required by sec. 117 was held—*Mul Chand*, 37 All. 30, 12 A.L.J. 1262; *Sukhdeo*, 14 A.L.J. 215. It will also interfere where the judgment of the District Judge deciding an appeal under section 110 is a very short one and does not show that evidence was all examined and carefully weighed—*Sarwan*, 14 A.L.J. 279, 17 Cr.L.J. 167; or where the Magistrate disbelieved the evidence produced by the accused without any substantial reason—*Mitharban*, 16 Cr.L.J. 805, 13 A.L.J. 1046; *Hakim Singh*, 13 A.L.J. 1055, 16 Cr.L.J. 810; or where the Magistrate has not given due effect to the evidence for the defence—*Gayani*, 17 Cr.L.J. 461 (All); or where the Lower Appellate Court in hearing the appeal has not taken the trouble to rehear the case—*Ibid*.

The High Court has the power to interfere in revision where the exercise of discretion being required by law, the lower Court exercised no discretion at all or exercised its discretion in a wholly unreasonable and improper manner, e.g., where the Magistrate ordered security to be furnished in an unreasonably large sum out of all proportion to the means of the accused—*In re Juggut*, 2 Cal 110 (111). The High Court may interfere in revision if there is a material error in any judicial proceeding, i.e., an error resulting in an unjust order for security—*Ibid* (at p. 113). The High Court is always very unwilling to interfere in the case of orders passed under the preventing sections of the Cr. P. Code. These orders are largely of an administrative nature; they are concerned with the maintenance of the public peace and the prevention of the breaches of the public peace for the maintenance of which the District Magistrate is responsible, and the needs of which he, as the responsible officer on the spot, is presumably in the best position to know; but these orders, though largely of an administrative nature, have a legal basis, and if it is clear that an order under sec. 112, Cr. P. C., has no legal basis, and that the District Magistrate has proceeded upon a wrong legal principle applying equally to the wrong-doers as well as to the wronged the wide powers conferred upon him by the law for the restraint of the wrong-doers and for the protection of the wronged, the High Court is bound to interfere—*Jasoda Lekhray v. Emp.*, A.I.R. 1939 Sind 167 (168).

It must be rarely, if ever, that a High Court will feel called upon to reverse an order of a Magistrate refusing to demand security under any of those sections—

Gyan Singh, AIR. 1934 All. 24, 1933 A.L.J. 1201; *Ram Lal v. Bankateshar*, 25 Cr.L.J. 1149, 81 IC 973, 11 O.L.J. 732, AIR. 1925 Oudh 138, 1 O.W.N. 359, 28 O.C. 44. See also Notes 250B, 276 and 295.

Appeal:—See sec. 406 and Notes under it.

119. If, on an inquiry under section 117, it is not proved that it is necessary for keeping the peace or maintaining good behaviour, as the case may be, that the person in respect of whom the inquiry is made should execute a bond, the Magistrate shall make an entry on the record to that effect, and if such person is in custody only for the purposes of the inquiry, shall release him, or, if such person is not in custody, shall discharge him.

295. Absence of the Complainant:—In absence of the complainant or any evidence on his behalf or on behalf of the opposite party in a case under sec 107, Cr. P. C., the Magistrate must proceed to inquire into the truth of the information and, no evidence having been produced before him, he must hold under this section that it is not proved that the person in respect of whom enquiry is made should execute a bond. Sec. 247, Cr. P. C., is not applicable to a case like this—*Asrafali v. Nasu*, 31 C.W.N. 388

295A. Further inquiry:—The word 'discharge' means merely a permission to depart. It does not mean the discharge of an 'accused' person as contemplated by sec. 437 (now sec 436) so as to enable further proceedings being instituted under that section against the person discharged under this section—*Velu v. Chidamabar*, 33 Mad 85. Section 437 (now sec 436) does not enable a Court to direct further inquiry in a case of discharge of a person against whom security proceedings were instituted under Chapter VIII, because such a person is not an 'accused' within the meaning of that section—*Imam Mandal*, 27 Cal 662; *Daxanth*, 33 Cal 8, *Muhammad Khan*, 1905 P.R. 42; *Roshan Singh*, 46 All 235, 22 A.L.J. 129; *Narain v. Durga*, 1911 P.R. 6, 12 Cr.L.J. 232; *Ismail v. Nollan*, 1914 U.B.R. 1st Qr. 3, 13 Cr.L.J. 531. (But the contrary view has been taken in *Fayazuddin*, 24 All 148; *Kharga*, 36 All. 147, *Manna*, 1903 P.R. 21, *Mona Puna*, 16 Bom 661; *Baba Yashwanta*, 35 Bom 401; and *Mutsaddi Lal*, 21 All 107, where it is held that the person proceeded against under this chapter may be said to be an 'accused' person and further inquiry may therefore be directed)

Section 436 as now amended in 1923 clearly applies only to the case of a person accused of an 'offence'; further inquiry cannot therefore be directed against a person discharged under sec 119, because the person proceeded against under this chapter is not accused of an offence—*Phani v. Kunja*, 25 Cr.L.J. 679, 81 IC 167, AIR. 1926 Cal 262; *Maung Than*, 2 Rang 30. The only section under which a Sessions Judge or the District Magistrate may take action in such a case is under sec 438, Cr. P. C., by making a report to the High Court; *Mohammad Yusuf v. Abdul Majid*, 32 Cr.L.J. 570, 130 IC 630, AIR. 1931 All 53, 53 All 148, 1930 A.L.J. 1485, 1931 Cr.C. 125. The District Magistrate should not append to his letter of reference what appears to be the opinion of the Police Prosecutor describing the order of the trial Magistrate as perverse. If he is of the opinion that the letter of the Police Prosecutor contains material of assistance to the Court he should embody that material in his own letter. He should not permit himself to be associated with criticism by a police officer of an order of the Magistrate—*Ali Muhammad*, AIR 1936 Sind 243, 1936 Cr.C. 1099, 165 IC 950, 38 Cr.L.J. 117. The proceedings under this chapter should be taken with care and caution only when the public interest compels, and where there is no reason to suppose that the Magistrate is not a careful and responsible Magistrate, who does not know his charge and where he has seen the witnesses and has heard what

they have to say, and he has come to the conclusion that the case against the suspected persons is unworthy of credit, and that the evidence should not be believed, the High Court will not interfere—*Ali Muhammad*, supra.

The withdrawal of the first charge-sheet under sec. 107, Cr. P. C., is no bar to a second proceeding under the same section—*In re Muthia Moopan*, 36 Mad., 315. When a person proceeded against under sec. 110, Cr. P. C., was tried and released by the Magistrate, he is competent to institute further proceedings under the law on fresh information received—*Imam Mondal*, 27 Cal. 662. The rulings cited above within the brackets are no longer good law. See Note 1180 under sec. 436. See also Notes 250B and 294 in this connection.

295B. Discharge:—Under the provisions of this section, after an enquiry has been made whether an order binding a person over to keep the peace should be passed, and it has been found that no such order is necessary, the proper course is to discharge the person concerned. The use of the term "acquittal" is quite inappropriate to a proceeding of this nature—*Bhagat Raj v. Mt. Gurai Dulaiya*, A.I.R. 1938 All. 49 (50), 172 I.C. 643, 1937 A.W.R. 1113, 1937 A.L.J. 1281.

C.—Proceedings in all Cases subsequent to Order to furnish Security.

120. (1) If any person, in respect of whom an order requiring security is made under section 106 or section 118, is, at the time such order is made, sentenced to, or undergoing a sentence of, imprisonment, the period for which such security is required shall commence on the expiration of such sentence.

(2) In other cases such period shall commence on the date of such order, unless the Magistrate, for sufficient reason fixes a later date.

296. "On the expiration of the sentence":—Under this section, a convict undergoing a sentence of imprisonment cannot be obliged to give security, until the imprisonment ends; nor can an order for imprisonment (under sec. 123) in default be made till then—*Appa*, Ratanlal 765; *Rangya*, 4 Bom.L.R. 934; *Kya W'a*, 5 L.B.R. 34, 10 Cr.L.J. 69, 2 I.C. 531; *Jhabdey*, 22 Cr.L.J. 95 (All). If, the meantime, he is convicted of another offence, and sentenced to a fresh term of imprisonment, the order for security should not be passed until after the expiry of both imprisonments. If, before such expiry, the prisoner gives the required security, the Magistrate cannot pass an order of imprisonment under sec. 123—*Pandur*, Ratanlal 774. Where a person was sentenced on 8th August, 1927 to 12 months' rigorous imprisonment in default of giving security on proceedings initiated under sec. 109, Cr. P. C., and, while undergoing that sentence, was sentenced to three years' rigorous imprisonment under s. 110, Cr. P. C., on 21st December, 1927, he should have been required to give security from 8th August 1928 in view of the provisions of sec. 120, Cr. P. C.—*Fateh*, A.I.R. 1929 Sind 166, 117 I.C. 777, 30 Cr.L.J. 819, 23 S.L.R. 438, 1929 Cr.C. 335.

The accused was convicted under sec. 147, I. P. C., but was released on bail pending an appeal against the conviction. While he was on bail, proceedings were taken against him under sec. 110 of this Code and he was ordered to furnish security, or in default, to undergo imprisonment. His appeal was afterwards dismissed and the Magistrate ordered that as he was undergoing imprisonment in default of furnishing security, the sentence under sec. 147, I. P. C., would commence after the expiry of the sentence under sec. 110, Cr. P. C. Held that the order was illegal, being in contravention of sub-section (1) of this section—*Jhabdey*, 22 Cr.L.J. 95 (All.), 59 I.C. 383.

Section 120 (1), Cr. P. C., refers to orders passed under sec. 106 or sec. 118, Cr. P. C., and is not affected in its operation by the orders of the Sessions Judge passed under sec. 123 (3), Cr. P. C.—*Lashkaro*, A.I.R. 1937 Sind 203, 38 Cr.L.J. 961, 31 S.L.R. 409, 170 I.C. 676, 10 R.S. 71.

When a Magistrate passes an order under sec. 118, Cr. P. C., he should make it clear that by reason of the provisions of sec. 120 (1), Cr. P. C., the period for which security is required should commence not from the date of the order under sec. 118, but from the date of the expiration of the sentence of imprisonment the suspected person is undergoing. When sec. 123 (1), Cr. P. C., is read through carefully it would appear that it was the purpose of the Legislature that if a suspected person when ordered to give security was actually in prison he should remain in prison on the expiration of his sentence if he has not given security, until he gives security or until the period for which he was required to give security has expired. Therefore, it is open to a suspected person, while he is undergoing a sentence, to give security to the Court. Under cl. (4) of sec. 123, Cr. P. C., security may be tendered to the officer in charge of the jail, but it would not appear from the provisions of the section that it was contemplated that when a suspected person was in prison when the order under sec. 118, Cr. P. C., against him was passed, he should be released from prison on the expiration of the sentence in order that he might find his sureties. He can, if it is possible for him to do so, furnish security while he is in prison undergoing his sentence of imprisonment, and he can, if he cannot furnish security before the expiration of his sentence, furnish security on the expiration of that sentence or at any time during the period for which he is committed to prison, in default, and his sureties will be accepted or rejected according to the provisions of sec. 122, Cr. P. C.—*Hussein Allahdino*, A.I.R. 1937 Sind 204, 31 S.L.R. 412, 171 I.C. 61, 38 Cr.L.J. 1014, 10 R.S. 86.

Sub-section (2):—"Date of such order"—It means the date of the final order under sec. 118, and not the date of the preliminary order under sec. 112—*Taranagowd*, 51 Mad. 515, 29 Cr.L.J. 77 (78); *Ghousbux*, A.I.R. 1937 Sind 26 (28), 167 I.C. 227, 30 S.L.R. 382, 38 Cr.L.J. 363.

Fixing later date—The object of this sub-section is to allow a Magistrate to grant time to the accused instead of at once proceeding to order imprisonment as if in default. This is shown by sec. 123 which provides that the security may be given on or before the date on which the period for such security commences—*Md Abdul Bari*, 4 C.W.N. 121. The Magistrate has power under this section to postpone the date from which the security should take effect, i.e., to give the accused time within which to furnish it, and if the accused absconds during the extended time, the sureties who were responsible for the accused's attendance would be made liable—*Mustaqimuddin*, 24 A.L.J. 327, 27 Cr.L.J. 377 (378), 92 I.C. 889, A.I.R. 1926 All 297.

Where an order is passed on the accused under sec. 118, and then on the request of the accused the Magistrate grants him 12 days' time to furnish the required security, and during this 12 days' time he is convicted and sentenced to imprisonment for an offence committed prior to the date of the order under sec. 118, it is not competent to the Magistrate to fix the date of the expiry of such sentence as the date for computing the period from which such security is to be furnished. The case falls neither under clause (1) nor under clause (2) of this section, and the Magistrate is bound to proceed at once under sec. 123 and order imprisonment of the accused—*Ahmed*, 20 S.L.R. 163, 27 Cr.L.J. 865, 96 I.C. 113, A.I.R. 1926 Sind 273 (F.B.). An order for security was made under sec. 118 on October 20, but upon the failure of the accused to give security, he was ordered to be imprisoned for one year under sec. 123, on October 29. But between October 20 and October 29, he was convicted of a substantive offence and sentenced to 7 years' rigorous imprisonment. *Held* that under sec. 120 (2) the period of the order under sec. 118 commenced on October 20, and the Magistrate should not have made any order under sec. 123 at all. However, the two sentences were concurrent—*Aba Farid*, 29 Bom.L.R. 700, 28 Cr.L.J. 652, 103 I.C. 198.

that an offence has been committed, still there is no authority for the extreme view that the commission of an offence cannot be proved otherwise than by a conviction—*Mansur*, 24 Cr.L.J. 588, 73 I.C. 332; *Sheo Jangal*, 50 All. 666, 30 Cr.L.J. 203 (204).

An offence committed in a Native State would amount to a breach of the bond—*Dewa Singh*, 28 P.R. 1910; but see *Bahadur Singh*, 26 P.R. 1918, 19 Cr.L.J. 924, 47 I.C. 440.

See also Note 250A.

299. Procedure on breach of bond:—When a person forfeits a bond by being convicted of an offence, the amount of the forfeited bond may be recovered, but he cannot be forthwith imprisoned for the unexpired portion of the term for which security was taken. The Magistrate's remedy is to take fresh proceedings under this Chapter—*Jag Deo*, 28 All 629. A Magistrate is not justified in forfeiting a recognisance under this section without giving the party charged with the breach an opportunity to cross-examine the witnesses upon whose evidence the rule to show cause has been issued—*Nobin*, 4 Cal. 865. If the surety bond is forfeited on account of any act of the accused within the period for which the sureties had bound themselves, the Magistrate may take proceedings against the sureties even after the expiry of the period—*Bahadur*, 1932 A.L.J. 112, 33 Cr.L.J. 281 (282), 54 All 335, A.I.R. 1932 All. 58.

300. Liability of surety:—See Note 1337 under sec. 514.

It has been held in Punjab that in order to make the surety liable, the conviction of the principal must be for an offence *similar* to that for which security was given. When men stand sureties in respect of sec. 110, it is to be understood that they undertake liability for only such good conduct on the part of the principal as is indicated by the circumstances under which the security was demanded, and not for any conceivable form of offence committed by the principal. Thus, where a person was required to give security for being suspected as a thief and a habitual receiver of stolen property, and a person was accepted as his surety, and the principal offender was subsequently convicted under sec. 326, I P. C. (grievous hurt), held that the surety should not be held liable—*Udham Singh*, 1913 P.R. 15, 14 Cr.L.J. 575. In *Sher Singh*, 29 I.C. 821, 1915 P.R. 10, 16 Cr.L.J. 549, under similar circumstances, the sureties were not altogether exempted, but were ordered to pay a reduced penalty, viz, Rs. 500 instead of Rs. 1,000. The Allahabad High Court holds that the surety is liable for any offence committed by the person bound over, and this section makes no reservation that in order to make the surety liable, the offence committed by the person bound over should be *ejusdem generis* with the offence for which he was bound over—*Sheo Jangal*, 50 All. 666, 30 Cr.L.J. 203 (204), 26 A.L.J. 443, A.I.R. 1928 All. 232.

A person was put on security for Rs. 1,000 for one year, and two other persons stood sureties for him. That person was afterwards convicted under sec. 323, I. P. C., in which offence he was found to have taken only a minor part. Held, under the circumstances, that the order of forfeiture of a reasonable sum of Rs. 50 against the sureties was sufficient, and that they need not be burdened—*Fatta*, 1915 P.R. 6, 16 Cr.L.J. 287.

122. (1) A Magistrate may refuse to accept any surety offered, or may reject any surety previously accepted by him or his predecessor under this Chapter, on the ground that such surety is an unfit person for the purposes of the bond:

Power to reject sureties.

Provided that, before so refusing to accept or rejecting any such surety, he shall either himself hold an inquiry on oath into the fitness of the surety or cause such inquiry to be held and a report to be made thereon by a Magistrate subordinate to him,

(2) Such Magistrate shall, before holding the inquiry, give reasonable notice to the surety, and to the person by whom the surety was offered and shall in making the inquiry record the substance of the evidence adduced before him.

(3) If the Magistrate is satisfied after considering the evidence so adduced either before him or before a Magistrate deputed under sub-section (1), and the report of such Magistrate (if any), that the surety is an unfit person for the purposes of the bond, he shall make an order refusing to accept or rejecting, as the case may be, such surety and recording his reasons for so doing:

Provided that, before making an order rejecting any surety who has previously been accepted, the Magistrate shall issue his summons or warrant, as he thinks fit, and cause the person for whom the surety is bound to appear or to be brought before him.

Change:—The whole section has been newly drafted by sec 20 of the Criminal Procedure Code Amendment Act (XVIII of 1923).

The main changes introduced by this new section are:—(1) rejection of a surety previously accepted; (2) inquiry into the fitness of a surety; and (3) delegation of such inquiry to a subordinate Magistrate. The reasons have been stated below in proper places.

301. Rejection of sureties:—The question as to whether a particular person is fit to stand as surety or not, is a matter for the decision of the Magistrate. The question in every case is one of discretion and the Magistrate's discretion in this matter is not fettered in any way—*In re Jahl*, 13 C.W.N. 80; *Bhawani*, 12 A.L.J. 1004, 16 Cr.L.J. 54, 26 I.C. 646, A.I.R. 1914 All. 489; *Abdul Karim*, 44 Cal. 737, 21 C.W.N. 925. But this discretion to accept or reject a surety must be exercised only after a satisfactory inquiry in accordance with law—*Bhawani*, 12 A.L.J. 1004; *Akbar Ali*, 42 Cal. 706, 19 C.W.N. 220; *Rayan*, 43 Cal. 1024, 20 C.W.N. 1133. The Magistrate can refuse or accept any surety only on valid and reasonable grounds and not on mere conjectures and surmises—*Abdul Khan*, 10 C.W.N. 1027; *Asiruddin*, 41 Cal. 764.

After an order is passed under section 118 demanding sureties, the Magistrate cannot introduce any new qualifications while deciding on the suitability of the sureties, and cannot reject them because they do not answer to those qualifications—*Alladitto*, 26 Cr.L.J. 1041, 87 I.C. 961, A.I.R. 1925 Sind 321, 19 S.L.R. 101.

Sureties ought not to be rejected merely on the strength of reports of the Police—*Jai Govind*, 15 O.C. 263, 13 Cr.L.J. 760; *Abdul Khan*, 10 C.W.N. 1027; *Tota*, 25 All. 272; *Panchoo*, 29 Cal. 455; *Munshi*, 18 A.L.J. 324, 21 Cr.L.J. 365; *Gopi*, 20 A.L.J. 760, A.I.R. 1922 All. 541, 68 I.C. 35, 23 Cr.L.J. 499; *Sukhai*, A.I.R. 1935 All. 517, 36 Cr.L.J. 1285, 157 I.C. 1019, 1935 Cr.C. 543; *Kaim Khan*, 1906 P.R. 18, 1907 P.L.R. 14, 5 Cr.L.J. 148, 1907 P.W.R. 5; *Kanwal*, 23 Cr.L.J. 91, 76 I.C. 27, A.I.R. 1925 Lah. 672; *Ramdhani*, 36 Cr.L.J. 1473, 158 I.C. 948, A.I.R. 1935 Pat. 421, 16 P.L.T. 478, 1935 Cr.C. 1064; *Zorawar*, 13 A.L.J. 469, 16 Cr.L.J. 445; *Bhawani*, 12 A.L.J. 1004; *Md Ibrahim*, 16 Cr.L.J. 100, 8 S.L.R. 173; or on mere hearsay evidence of general repute—A.I.R. 1922 Oudh 227, 9 O.L.J. 353, 68 I.C. 959. The implicit acceptance of the opinions expressed in police reports without considering the facts upon which such opinions are based, would place all persons ordered to furnish security at the mercy of the police—*In re Abdul Khan*, 10 C.W.N. 1027. The Magistrate may ask the police to report, with a view merely of enabling them to collect and call evidence. But in every case his order must proceed on a consideration of the evidence and not of the police-report—*Mahro*, 2 S.L.R. 11, 10 Cr.L.J. 225; *Jai Govind*, 15

O.C. 263, 13 Cr.L.J. 760. Where a surety tendered by the accused is reported by the police to be an unreliable person, it is not for the surety to prove that he is of good character, but for the Magistrate, if he doubts it, to decide the matter upon evidence—*Munshi Singh*, 18 A.L.J. 324, 21 Cr.L.J. 365.

Even a Magistrate cannot rely on his personal knowledge in rejecting a surety and dispense with an inquiry—*Piru*, 7 S.L.R. 91, 15 Cr.L.J. 378. When a Magistrate receives private information that the sureties are bad characters, he ought not to reject them on that information alone. He should bring the information to the notice of the sureties and give them an opportunity of controverting it—*Ela Buksh*, 14 C.W.N. 709, 11 Cr.L.J. 243, 6 I.C. 124.

Before the amendment of this section, it was held that if a person had been once accepted as surety, he could *not be rejected subsequently* as an unfit person—*Ram Lal*, 1 C.W.N. 394; *Purya Lal*, 1905 P.R. 16, 2 Cr.L.J. 278. But these decisions are now rendered obsolete by reason of the addition of the words "may reject any surety previously accepted" "We have adopted the suggestion that the provisions of the new section 122 should be elaborated so as to enable a Magistrate to reject a surety previously accepted by him, or his predecessor."—*Report of the Joint Committee* (1922). The proviso to sub-section (3) prescribes a procedure to be followed in such a case.

If the Magistrate is not satisfied with the sureties tendered, he should reject them within a reasonable time so as to give the accused an opportunity of offering fresh sureties—*Maung Tun*, 4 Bur.L.J. 172, 27 Cr.L.J. 318 (319).

302. Test as to fitness:—According to the Allahabad High Court the primary test is whether the surety can exercise proper control over the person who has been bound over—*Sheikh Zikri*, 8 A.L.J. 785. Mere pecuniary fitness is not the only test of his fitness. The object of requiring security for good behaviour is not to obtain money for the Crown by the forfeiture of recognisances but to ensure that the accused should be of good behaviour. It is, therefore, reasonable to expect that the sureties should not be men residing at such a distance as would make it unlikely that they could exercise any control over the accused—*Rahim Baksh*, 20 All. 206, 1898 A.W.N. 21; *Manna*, 15 A.L.J. 848, 18 Cr.L.J. 1039; *Nabhu Khan*, 24 All. 471. And this seems to be the intention of the legislature by reason of the addition of the words "*for the purposes of the bond*"

According to the Bombay High Court, it is sufficient if the sureties are solvent and respectable. It is wrong to attach a condition to a surety for good behaviour, that he should be able to control the accused—*Jiva Natha*, 16 Bom.L.R. 138, 15 Cr.L.J. 268. Therefore, where the sureties offered were solvent and respectable, the mere fact that they lived at some distance from the persons bound over and were not in a position to exercise control over those persons was not a good ground for their non-acceptance—*Jesha Batha*, 44 Bom 385, 21 Cr.L.J. 377, 22 Bom.L.R. 190.

In Calcutta, however, there is a conflict of decisions as to whether the pecuniary or moral fitness is the primary test. In *Abinash*, 4 C.W.N. 797, *Ram Pershad*, 6 C.W.N. 593 and *Adam Sheikh*, 35 Cal. 400 it has been said that the primary test is whether the surety is a person of sufficient substance to warrant his being accepted, and the fact that he cannot supervise or control the person bound down or that he is not a resident of the same village (*Suresh*, 3 C.L.J. 575) is not material. So also, in *Kalu Mirza*, 37 Cal 91 and *Ryan*, 43 Cal 1024, 20 C.W.N. 1133, 24 C.L.J. 51, 18 Cr.L.J. 408, 38 I.C. 968; *Joyal Singh*, A.I.R. 1928 Pat. 374, a failure by the sureties to show that they could exercise proper control over the accused was held to be not a proper ground for their rejection. In *Jafar Ali*, 37 Cal 446, it has been held that the pecuniary test is the primary test, but there may be other objections to be considered, and any such objection must be dealt with in each case as it arises. But in *Asiraddi*, 41 Cal 764, and *Abdul Karim*, 44 Cal. 737, 21 C.W.N. 925, 18 Cr.L.J. 453, 39 I.C. 293 the fact that the sureties would not be able to exercise proper control over the accused

(who was a notorious dacoit) was held to be a proper ground of unfitness of the sureties. The unfitness referred to in this section, though it may not exclude the idea of pecuniary unfitness, is more concerned with the idea of moral unfitness—*Jahl*, 13 C.W.N. 80, 8 Cr.L.J. 388, 4 I.C. 560.

Where the sureties were called on to state in writing what influence they had over the accused persons, and on their failing to do so their security was rejected, the order was not proper—*Kalu Mirza*, 37 Cal. 91 (101).

In Burma it is laid down that the sureties must be persons who are in a position to influence the accused and likely to be able to restrain him—*Nga Hein*, 8 Bur.L.T. 53, 29 I.C. 825.

In Sind, it has been held that it is not in itself a disqualification that a person cannot exercise active physical control over the accused; a man may be satisfactory surety if he is in a position to watch the movements of the accused and to ascertain from time to time how he is behaving—*Md. Ibrahim*, 8 S.L.R. 173, 16 Cr.L.J. 100. But mere solvency of the surety is not the only test of his fitness. The Magistrate has also to consider the question of the ability of the surety to enforce the good conduct of the accused, as relevant to his fitness—*Md. Pahor*, 1 S.L.R. 46, 8 Cr.L.J. 166. In another Sind case, however, it is stated that sureties cannot be rejected on the ground that they will not be able to influence the accused. The most that a Magistrate can reasonably demand is that they should be respectable men, neighbours of the accused, and solvent up to the amount of the security required—*Ahmed*, 1 S.L.R. 14, 9 Cr.L.J. 256.

In Oudh, it has been held that a surety should not be rejected on the mere ground that he lives at a distance from the accused; but inability to control is a good ground—*Md. Baksh*, 26 O.C. 284, 25 Cr.L.J. 796, 81 I.C. 316, A.I.R. 1924 Oudh 80. If the sureties undertake to keep the accused within the area of their observation or to adopt other suitable measures for securing the supervision and control needed to keep him in good behaviour, there can be no inherent objection to their being accepted as sufficient, though they reside at a place 18 miles distant from that of the accused—*Rameshwar*, 10 O.L.J. 299, 24 Cr.L.J. 795, 74 I.C. 539, A.I.R. 1923 Oudh 165.

In Patna, it has been held that the fact that the sureties reside at a distance at which they cannot reasonably be expected to exercise control over the accused, becomes of less importance when the sureties are themselves relations and presumably persons of some standing—*Jugal Singh*, 30 Cr.L.J. 45, 112 I.C. 909, A.I.R. 1928 Pat. 374, Ind. Rul. 1929 Pat. 43, 10 P.L.T. 213. See also *Joyal Singh*, supra.

What are not disqualifications:—The fact that the sureties offered are the relations of the accused, far from being a disqualification, is a circumstance which would be an additional qualification, if the sureties are in other respects suitable. A relation is more likely than any other person to keep an eye on the accused—*Shib Singh*, 25 All. 131; *Abdul Khan*, 10 C.W.N. 1027; *Mahala*, 1914 P.R. 6, *Miro*, 1 S.L.R. 3; *Md. Wasi*, 22 Cr.L.J. 22 (All.).

A Magistrate should not refuse to accept a surety on the ground that he has already stood surety for another man—*Ghisa*, 24 Cr.L.J. 517, 73 I.C. 53, A.I.R. 1924 Oudh 132. So also, a Magistrate cannot reject a surety simply because he is a Wanthanu member.

Politics not a disqualification:—As long as the security is ample, the Court is bound to accept the same without inquiring into the politics of the person standing surety—*Maung Tun*, 4 Bur.L.T. 172, 27 Cr.L.J. 318.

Previous conviction not a disqualification:—The proposed surety is not to be considered as unfit merely by reason of the fact that he was on one occasion convicted of offences—*Raghunath*, 26 All. 189; *Budhu Ahir*, 22 Cr.L.J. 488, 62 I.C. 179, 25 C.W.N. 140; or that he was once challanned in a theft case—*Munshi Singh*, 18 A.L.J. 324, 21 Cr.L.J. 365.

Witness not disqualified:—The fact that the proposed surety has given evidence in favour of the accused in the proceeding which resulted in the order for furnishing

O.C. 263, 13 Cr.L.J. 760. Where a surety tendered by the accused is reported by the police to be an unreliable person, it is not for the surety to prove that he is of good character, but for the Magistrate, if he doubts it, to decide the matter upon evidence—*Munshi Singh*, 18 A.L.J. 324, 21 Cr.L.J. 365.

Even a Magistrate cannot rely on his personal knowledge in rejecting a surety and dispense with an inquiry—*Piru*, 7 S.L.R. 94, 15 Cr.L.J. 378. When a Magistrate receives private information that the sureties are bad characters, he ought not to reject them on that information alone. He should bring the information to the notice of the sureties and give them an opportunity of controverting it—*Ela Buksh*, 14 C.W.N. 709, 11 Cr.L.J. 243, 6 I.C. 124.

Before the amendment of this section, it was held that if a person had been once accepted as surety, he could not be rejected subsequently as an unfit person—*Ram Lal*, 1 C.W.N. 394; *Pirya Lal*, 1905 P.R. 16, 2 Cr.L.J. 278. But these decisions are now rendered obsolete by reason of the addition of the words "may reject any surety previously accepted." "We have adopted the suggestion that the provisions of the new section 122 should be elaborated so as to enable a Magistrate to reject a surety previously accepted by him, or his predecessor."—*Report of the Joint Committee* (1922). The proviso to sub-section (3) prescribes a procedure to be followed in such a case.

If the Magistrate is not satisfied with the sureties tendered, he should reject them within a reasonable time so as to give the accused an opportunity of offering fresh sureties—*Maung Tun*, 4 Bur.L.J. 172, 27 Cr.L.J. 318 (319).

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Where the sureties were called on to state in writing what influence they had over the accused persons, and on their failing to do so their security was rejected, the order was not proper—*Kalu Mirza*, 37 Cal. 91 (101).

In Burma it is laid down that the sureties must be persons who are in a position to influence the accused and likely to be able to restrain him—*Nga Hein*, 8 Bur.L.T. 53, 29 I.C. 825.

In Sind, it has been held that it is not in itself a disqualification that a person cannot exercise active physical control over the accused; a man may be satisfactory surety if he is in a position to watch the movements of the accused and to ascertain from time to time how he is behaving—*Md. Ibrahim*, 8 S.L.R. 173, 16 Cr.L.J. 100. But mere solvency of the surety is not the only test of his fitness. The Magistrate has also to consider the question of the ability of the surety to enforce the good conduct of the accused, as relevant to his fitness—*Md. Pahor*, 1 S.L.R. 46, 8 Cr.L.J. 166. In another Sind case, however, it is stated that sureties cannot be rejected on the ground that they will not be able to influence the accused. The most that a Magistrate can reasonably demand is that they should be respectable men, neighbours of the accused, and solvent up to the amount of the security required—*Ahmed*, 1 S.L.R. 14, 9 Cr.L.J. 256.

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In Patna, it has been held that the fact that the sureties reside at a distance at which they cannot reasonably be expected to exercise control over the accused, becomes of less importance when the sureties are themselves relations and presumably persons of some standing—*Jugal Singh*, 30 Cr.L.J. 45, 112 I.C. 909, A.I.R. 1928 Pat. 374, Ind. Rul. 1929 Pat. 43, 10 P.L.T. 213. See also *Joyal Singh*, supra.

What are not disqualifications:—The fact that the sureties offered are the relations of the accused, far from being a disqualification, is a circumstance which would be an additional qualification, if the sureties are in other respects suitable. A relation is more likely than any other person to keep an eye on the accused—*Shib Singh*, 25 All. 131; *Abdul Khan*, 10 C.W.N. 1027; *Mahala*, 1914 P.R. 6; *Miro*, 1 S.L.R. 3; *Md. Wasi*, 22 Cr.L.J. 22 (All.).

A Magistrate should not refuse to accept a surety on the ground that he has already stood surety for another man—*Ghisa*, 24 Cr.L.J. 517, 73 I.C. 53, A.I.R. 1924 Oudh 132. So also, a Magistrate cannot reject a surety simply because he is a Wanthanu member.

Politics not a disqualification:—As long as the security is ample, the Court is bound to accept the same without inquiring into the politics of the person standing surety—*Mauung Tun*, 4 Bur.L.T. 172, 27 Cr.L.J. 318.

Previous conviction not a disqualification:—The proposed surety is not to be considered as unfit merely by reason of the fact that he was on one occasion convicted of offences—*Raghunath*, 26 All. 189; *Budhu Ahir*, 22 Cr.L.J. 488, 62 I.C. 179, 25 C.W.N. 140; or that he was once challanned in a theft case—*Munshi Singh*, 18 All. 224, 21 Cr.L.J. 365.

Witness not disqualified:—The fact that the proposed surety has given evidence in favour of the accused in the proceeding which resulted in the order for furnishing

security, does not disqualify him from standing as a surety for the accused—*Bairagi*, 15 Cr.L.J. 727 (All.); *Md. Wasi*, 22 Cr.L.J. 22 (All.). So also the fact that the persons offered as sureties helped the accused in his defence, is no ground for rejecting them—*Gobardhun*, 16 A.L.J. 263, 16 Cr.L.J. 441.

See also Note 280 under the heading "Number, character and class of sureties".

303. Inquiry into the fitness of sureties:—The Magistrate should hold an inquiry into the fitness of a surety before accepting or rejecting him—*Akbar Ali*, 42 Cal 706; *Rayan*, 43 Cal. 1024; *Bhawani*, 12 A.L.J. 1004; *Piru*, 7 S.L.R. 94; *Manna*, 15 A.L.J. 848. See also Note 308.

By virtue of the amendment of 1923, the Magistrate can *delegate the inquiry* to a subordinate Magistrate. But under the old law, it was consistently held in a number of decisions that the Magistrate ought himself to make the inquiry into the sufficiency or otherwise of the sureties and that he could not delegate the task to a subordinate officer—*Balwant*, 27 All. 293; *Tota*, 25 All. 272; *Kaim Khan*, 1906 P.R. 18; *Mahala*, 1914 P.R. 6; *Prithi Pal*, 1898 A.W.N. 151. These cases are no longer authoritative. But the Magistrate cannot delegate this task to a Police officer nor act upon the report of that officer; see Note 301 *ante* and *Kanwal*, 25 Cr.L.J. 91, A.I.R. 1924 Lah. 672.

There is nothing to prevent a Magistrate from accepting persons, with whom he is satisfied, as sureties without any sort of enquiry or examination of witnesses on oath. In fact, this procedure is followed almost every day—*Supdt & Rembr., Etc. v. Azizar*, 41 C.W.N. 415 (416), A.I.R. 1937 Cal. 233, 38 Cr.L.J. 635, 168 I.C. 716, 9 R.C. 873.

It is the *Magistrate* alone who is to test the fitness of sureties; there is no provision regulating the testing of sureties by the *Sessions Judge*. Section 406A which gives a right of appeal against the order of rejection of sureties, speaks of orders made by Magistrates only, and there is no mention of any such order made by a Sessions Court. It seems that such an order by a Sessions Judge is not contemplated—*Narendra*, 9 Pat. 741, 31 Cr.L.J. 802 (803).

Evidence.—The Magistrate can refuse or accept any surety only on tangible evidence recorded and considered by him—*Munshi*, 18 A.L.J. 324. He should examine the sureties as to their fitness and take such evidence as the accused may give and base his decision on the evidence so recorded—*Piru*, 7 S.L.R. 94; *Makro*, 2 S.L.R. 11. The inquiry is to be conducted judicially, and the Magistrate has power to call for and record evidence upon oath or affirmation—*Ghulam Mustafa*, 26 All. 371; *Allahdino*, 5 S.L.R. 87. This is now expressly provided in the proviso to sub-section (1). Hearsay evidence of general repute is not admissible against sureties—*Sheopal*, 68 I.C. 959; 23 Cr.L.J. 639.

304. Recording reasons:—The Magistrate in rejecting a surety must record his reasons for doing so in his own writing. From this it seems to follow that the reasons must be carefully considered and tested, which is best done by their being brought to the notice of the persons who are refused as sureties and by their having an opportunity for controverting them—*Ela Buksh*, 14 C.W.N. 709, 11 Cr.L.J. 243, 6 I.C. 124; *Kalu Mirza*, 37 Cal 91; *Jesha Bhatha*, 22 Bom.L.R. 190, 44 Bom. 385. The intention of the Legislature in insisting that a Magistrate should record his reasons is that he should exercise his independent judgment, and should not be guided by the opinions expressed in Police reports without considering the facts upon which such opinions are based—*Abdul Khan*, 10 C.W.N. 1027, 4 Cr.L.J. 169. When a Magistrate failed to record the reasons and in his explanation to the High Court stated that he did not remember the exact circumstances, the order rejecting the sureties was set aside—*Hor Ali*, 13 C.W.N. xxvii.

Appeal:—See section 406A.

305. Interference by High Court:—The question whether a particular person is or is not a fit person to stand as surety is one for the decision of the Magistrate and is left to his discretion which is not fettered in any way—*Jalil*, 13 C.W.N. 80

(81); and the High Court will not lightly interfere—*Bhawani*, 12 A.L.J. 1004; *Bairagi*, 15 Cr.L.J. 727 (All.). But if the discretion has not been judicially exercised, as for instance, where no reasons are given why a surety was rejected (*Hor Ali*, 13 C.W.N. xxvii), the High Court will interfere. See also *Satindra*, 48 C.L.J. 143.

123. (1) If any person ordered to give security under section 106 or section 118 does not give such security on or before the date on which the period for which such security is to be given commences, he shall, except in the case next hereinafter mentioned, be committed to prison, or if he is already in prison, be detained in prison until such period expires or until within such period he gives the security to the Court or Magistrate who made the order requiring it.

(2) When such person has been ordered by a Magistrate to give security for a period exceeding one year, such Magistrate shall, if such person does not give such security as aforesaid, issue a warrant directing him to be detained in prison pending the orders of the Sessions Judge or, if such Magistrate is a Presidency Magistrate, pending the orders of the High Court; and the proceedings shall be laid, as soon as conveniently may be, before such Court.

(3) Such Court, after examining such proceedings and requiring from the Magistrate any further information or evidence which it thinks necessary may pass such order in the case as it thinks fit:

Provided that the period (if any) for which any person is imprisoned for failure to give security shall not exceed three years.

(3A) *If security has been required in the course of the same proceedings from two or more persons in respect of any one of whom the proceedings are referred to the Sessions Judge or the High Court under sub-section (2), such reference shall also include the case of any other of such persons who has been ordered to give security, and the provisions of sub-sections (2) and (3) shall, in that event, apply to the case of such other person also, except that the period (if any) for which he may be imprisoned shall not exceed the period for which he was ordered to give security.*

(3B) *A Sessions Judge may in his discretion transfer any proceedings laid before him under sub-section (2) or sub-section (3A) to an Additional Sessions Judge or Assistant Sessions Judge, and upon such transfer, such Additional Sessions Judge or Assistant Sessions Judge may exercise the powers of a Sessions Judge under this section in respect of such proceedings,*

(4) If the security is tendered to the officer in charge of the jail, he shall forthwith refer the matter to the Court or Magistrate who made the order, and shall await the orders of such Court or Magistrate.

(5) Imprisonment for failure to give security for keeping
Kind of imprisonment. the peace shall be simple.

(6) Imprisonment for failure to give security for good behaviour shall, *where the proceedings have been taken under section 108, be simple, and where the proceedings have been taken under section 109 or section 110 be rigorous or simple as the Court or Magistrate in each case directs.*

Change:—Sub-sections (3A) and (3B) and the italicised words in sub-section (6) have been added by sec. 21 of the Cr. P. C., Amendment Act (XVIII of 1923). Sub-section (6) has been further amended by the Cr. P. Code Second Amendment Act X of 1926. The reasons are stated below.

306. Imprisonment in default of security:—There must be actual failure to give security in order to enable the Magistrate to pass an order under this section. So, an order that the accused shall give security, and in default shall suffer imprisonment, cannot be sustained. This section contemplates that the accused must be separately brought up for sentence if security is not furnished, so that the Court should in its judgment fix a date for the furnishing of security without any order for alternative imprisonment, and then if by that date the accused has not furnished the security, he is to appear and receive sentence.—*Ibraya Rowthen*, 51 Mad. 178, A.I.R. 1927 Mad. 976, 53 M.L.J. 762, 28 Cr.L.J. 1031. Any order which specifies a period of imprisonment in default is to that extent illegal. The penalty for a failure to furnish security is given in sec. 123 (1), Cr. P. Code. The person ordered against must be committed to prison until the period for which he was required to give security expires, or until within such period he furnishes the necessary security. It is evident from this, that no person committed to prison in this way can be detained there if he furnishes the security required of him after his commitment. Consequently, an order stating that he should suffer a period of imprisonment in default is illegal.—*Rangi*, A.I.R. 1936 Nag 265, 1936 Cr.C. 1138. Imprisonment should follow the failure to furnish adequate security, and should not *precede* a finding that the security is inadequate. It is illegal for the Magistrate to send a person to jail pending the receipt of the report from the Revenue and police officers as regards the adequacy of the security.—*Kaim Khan*, 1906 P.R. 18.

A person was ordered to execute a bond for good behaviour for one year and find sureties on 17-12-07, but when he failed to do so, he was, instead of being committed to prison *at once*, given time to find sureties and finally on 24-2-09 he was sentenced to imprisonment for his failure to find sureties; *held* that as the one year had already elapsed from the date of the first order, the order for imprisonment under sec. 123 was illegal.—*Muthu Gounden*, 6 M.L.T. 308, 10 Cr.L.J. 481.

Person already under imprisonment:—If the person against whom an order under this section is passed, is already under imprisonment as a substantive punishment for some offence, the order under this section should not be passed, until *after* the expiry of the term of imprisonment.—*Appa*, Rantanlal 765; *Rangya*, 4 Bom.L.R. 934. A sentence under this section cannot run concurrently with any other sentence of imprisonment which the person is undergoing.—*Chinnaswamy*, 16 Cr.L.J. 272 (Mad.). See section 120.

Subsequent imprisonment—If the accused while undergoing an imprisonment under this section, is convicted of an offence and sentenced to a term of imprisonment,

the sentence for the substantive offence must commence at once, and should not be postponed to take effect after the expiration of the imprisonment awarded under this section—*Tulshya*, Ratanlal 970; *Mulhu Komaran*, 27 Mad. 525; *Joghi*, 31 Mad. 515; *Vishnu*, 37 Bom 178, 13 Cr.L.J. 849; *Diwan Chand*, 1895 P.R. 14; *Kanji*, 5 Bom L.R. 26; *Durga*, 6 Bom L.R. 1098. See Note 1083 under sec. 397.

Period of imprisonment.—The person failing to give security shall be committed to prison 'until such period expires' i.e., the period of imprisonment in default of security should be the same as the period for which security was demanded under sec. 118. It should be neither for a longer nor for a shorter term. Thus, an order requiring security for good behaviour for a period of six months, and in default, awarding rigorous imprisonment for three months is wrong and bad in form—*Ganoo*, Ratanlal 584; *Karimuddin*, 23 All 422; *Emp. v. Khushi Muhammad*, 31 Cr.L.J. 583, 123 I.C. 835, A.I.R. 1930 Lah 49, 1930 Cr.C. 1. If the Magistrate thinks that the term of imprisonment should be shorter, the proper course is to report the matter to the District Magistrate for taking action under section 124 (2)—*Moti*, Ratanlal 668. So also, an order awarding imprisonment in default of security for a period longer than that for which the accused was called upon to give security is illegal—*Syed Ahmed*, 2 Weir 57.

The period of imprisonment must be definite; an order directing the accused to be imprisoned until he gives security is bad—*Maidamdi v. Tanipulla*, 8 Cal 644.

It is illegal to fix an absolute period of imprisonment (e.g., for one year), since the accused is entitled to be released the moment he furnishes the security; the sentence ought to run "for one year or until such date within that year as the required security be furnished"—*Ibraya Rowthan*, 51 Mad 178, 53 M.L.J. 762, 28 Cr.L.J. 1034. See also Notes under sub-sec (2), sec. 120, Cr. P. Code.

The order fixing the term of imprisonment which the accused is to undergo in default of furnishing the security is to be fixed by the Sessions Judge and not by the trial Magistrate—*Mangal Singh*, 28 Cr.L.J. 657, 103 I.C. 193, A.I.R. 1928 Lah. 189 following *Nanku*, 8 I.C. 385, 29 P.R. 1910 Cr., 196 P.L.R. 1910, 11 Cr.L.J. 635; *Emp. v. Jafar*, 1899 A.W.N. 151 and *Emp. v. Jawahir*, 1903 A.W.N. 28. See also *Abdul Karim*, A.I.R. 1935 Pesh 80, 36 Cr.L.J. 1127, 156 I.C. 659, 1935 Cr.C. 606.

307. Sub-section (2):—This sub-section has reference only to the case where default is made in finding security. If the security is given, the section does not apply and no reference to the Court of Session is necessary even though the term of security exceeds one year—*Rai Ishri Pershad v. Q-E*, 23 Cal. 621 (627); *Ram Kishen*, 15 A.L.J. 822, 40 All 39, 19 Cr.L.J. 2, 42 I.C. 914. When a reference under this section is pending in the Court of the Sessions Judge, the petitioners can offer security to the Magistrate when they are able to procure it. That implies that the reference to the Sessions Judge, if not disposed of, would automatically come to an end when security is taken. At the same time it follows that the right of appeal given under sec. 406 Cr. P. Code to the person from whom security is demanded revives once he has given security—*Emp. v. Muhammad Akbar*, 29 Cr.L.J. 236, 107 I.C. 286, A.I.R. 1928 Lah 64.

When a Magistrate passes an order for furnishing security for a period exceeding one year, and default is made, imprisonment for default cannot be awarded by the Magistrate. All that he is empowered to do is to detain the accused pending the order of the Sessions Judge—*Myat Aung*, 4 L.B.R. 135, 7 Cr.L.J. 412; *Mahala*, 1914 P.R. 6; *Sundar*, 21 Cr.L.J. 623 (Lah). Even a Magistrate cannot pass an order of imprisonment, and then send his order for confirmation to the Sessions Judge—*Jafar*, 1899 A.W.N. 151, because the proceedings are sent to the Sessions Judge under this section not for the purpose of confirming the order of the Magistrate but for passing his own order—*Myat Aung*, supra.

A person ordered by a Magistrate to be detained in prison under this clause (say, on 25th February) must be considered as a person undergoing a sentence of

imprisonment and not merely as an undertrial prisoner detained in custody. Therefore, if a Sessions Judge orders him to be imprisoned under sub-section (3) (say, on 22nd March) the period of imprisonment should be taken to commence from the date of the Magistrate's order (25th February) and not from the date of the Sessions Judge's order (22nd March)—*Balak*, 8 O.W.N. 888, 32 Cr.L.J. 1186, 134 I.C. 406, 7 Luck. 219, A.I.R. 1931 Oudh 387.

'*Exceeding one year*'—A Magistrate cannot legally amalgamate sections 109 and 110, and require the execution of two bonds for good behaviour for an aggregate period of 18 months, and in default of the same being furnished, commit the accused to prison for 18 months' rigorous imprisonment. At any rate, in such case the proceedings should be referred to the Sessions Judge under the provisions of sec. 123 (2)—*Balya*, Ratanlal 946.

Reference by Magistrate to High Court:—If the Sessions Judge, on a reference made under this section, refuses to confirm the order of the District Magistrate passed under sec. 118, and discharges the person called upon to furnish security, the Magistrate cannot refer the case to the High Court under sec. 438. It would be contrary to every principle to allow the District Magistrate to report against an order of the Sessions Court to which he is subordinate. If the Magistrate, as the officer, responsible for the peace of his district, is dissatisfied with the order of the Sessions Judge, his proper course is to ask the Public Prosecutor to move the High Court for revision—*Jahandi*, 23 Cal. 249 (250); *Jamna Bai*, 28 All. 91. See also *Khudabux*, A.I.R. 1927 Sind 45, 98 I.C. 101, 21 S.L.R. 48, 27 Cr.L.J. 1253 and *Lashkaro*, A.I.R. 1937 Sind 203, 170 I.C. 676, 31 S.L.R. 409, 38 Cr.L.J. 961.

308. Sub-section (3):—*Procedure on reference*:—On a reference made to him under sub-section (2), the Sessions Judge should give notice to the accused—*Girand*, 25 All 375; *Nakhi Lal*, 27 Cal. 656; *Mangal Singh*, 28 Cr.L.J. 657, 103 I.C. 193, A.I.R. 1928 Lah. 189, and allow him to be defended by a pleader—*Jhojha*, 23 Cal 493; *Nakhi Lal*, 27 Cal 655 (658); *Abinash*, 4 C.W.N. 797; *Amir Bala*, 35 Bom. 271, 13 Bom.L.R. 203, 12 Cr.L.J. 257, 10 I.C. 802; *Sitaram*, 34 Cr.L.J. 813, 144 I.C. 447, 14 P.L.T. 299, A.I.R. 1933 Pat 276, 1933 Cr.C 758, 12 Pat 770. Although the Code has made no provision for giving notice to the accused before disposing a reference under this section, still it is the duty of the Sessions Judge to give such notice; where it was not given, the High Court condemned the procedure as amounting to a denial of justice—*Girand*, *supra*.

This sub-section clearly contemplates a decision by the Sessions Judge on the merits of the order demanding security. It does not authorise him to consider sufficiency of the security offered—*Gagan*, 12 C.W.N. 463, 7 Cr.L.J. 323.

This section gives power to the Sessions Judge to deal with the case on the merits and to pass such orders as the circumstances of the case may require—*Amir Bala*, 35 Bom. 271, 10 I.C. 802, 13 Bom.L.R. 203, 12 Cr.L.J. 257. It is his duty to consider the evidence and to pass an order after doing so and not as a mere matter of course—*Naku*, 1910 P.R. 29, 11 Cr.L.J. 637. Where there are several prisoners, the Judge in writing his order should show that he has considered the case of each individual prisoner. Each prisoner has a right to have his case considered on its own merits, and the order must show that this has not been lost sight of—*Kalu Mirza*, 37 Cal. 91. The Judge must pass his own order (*ie.* a definite order binding over the accused) and not merely confirm the order passed by the Magistrate—*Jafar*, 1899 A.W.N. 151; *Bahadur*, 1 O.W.N. 773, 26 Cr.L.J. 656. Where the order is in reference to section 110, the Sessions Judge, before he confirms the order of the Magistrate, is bound to find a special ground on which the order is passed; and it is not sufficient if he merely finds in general terms that it is for the interests of the community at large that the accused should be bound over to be of good behaviour—*Nakhi Lal*, 27 Cal. 656 (658).

Retrial—This section does not authorise a Sessions Judge to order the rehearing of a case. He can call for further information if he desires it, or he can consider

the evidence on the record and pass such order as he thinks fit—*Narayan*, 25 Cr.L.J. 1112, A.I.R. 1925 Cal. 191. See also *Jhajah*, 24 Cal 155 where it was decided that the Judge must take himself such evidence as he might require. Perhaps in certain fit cases it might be permissible to a Judge to whom a case has been submitted under clause (2), sec. 123, to refer the case to the High Court under sec 438 with a recommendation that the proceedings be quashed and a re-trial ordered. But he cannot himself order a re-trial—*Emp. v. Nim*, 33 Cr.L.J. 898, 139 I.C. 783, A.I.R. 1932 Sind 88, 1932 Cr C 528, 26 S.L.R. 200, Ind. Rul. 1932 Sind 144.

Acceptance of security:—An order under this sub-section is an original order and not an order confirming the order of the Magistrate. Therefore, the Magistrate has no jurisdiction to decide on the fitness of sureties on a bond ordered by the Sessions Court. When the order is of the latter Court, the adequacy of the security should be decided by that Court—*Allahdino*, 5 S.L.R. 87, 12 Cr.L.J. 410, 11 I.C. 594. See also *Lashkar*, A.I.R. 1937 Sind 203, 170 I.C. 676, 31 S.L.R. 409, 38 Cr.L.J. 951. The Calcutta High Court seems to have taken a different view. It is laid down that the clear implication of the provisions of sections 122, 123 and 406A, Cr P. Code taken together, is that the Magistrate is vested with the authority either to accept or reject sureties demandable under sec 110, Cr P Code and it is not open to the Sessions Judge, exercising jurisdiction under this section, to accept or reject the sureties offered. The course open to the Sessions Judge under the law as it stands, is to send the proceedings back to the Magistrate, with his decision on the merits of the case, for taking action under sec 122, Cr P Code—*Parbati*, 35 Cr.L.J. 952 (956), 149 I.C. 408, 6 R.C. 593, A.I.R. 1934 Cal 482, 1934 Cr C 690, 61 Cal 588; *Supdt. & Remembr., Etc v Azizur*, 41 C.W.N. 415, A.I.R. 1937 Cal. 233, 168 I.C. 716, 38 Cr.L.J. 635, 9 R.C. 873. This is also the view of the Patna High Court—*Emp v Narendra*, 31 Cr.L.J. 802, 125 I.C. 156, 1930 Cr C 425, 9 Pat 741, A.I.R. 1930 Pat 217. But the High Court refused to set aside an order of the Sessions Judge accepting some persons as sureties in exercise of his powers under sec 123 Cr P Code as nothing disastrous was likely to happen for such acceptance of sureties, even without holding an enquiry—*Supdt & Remembr., etc v Azizur*, supra.

It is, however, intended that the Magistrate should still take security even though the matter has been referred to the Sessions Judge under sub-section (2) of this section if such security is offered before the Sessions Judge has dealt with the case—*Muhammad Afbar*, 29 Cr.L.J. 236 (237), 107 I.C. 286, A.I.R. 1928 Lah 64, 9 A.I.Cr.R. 490.

Bail—The Sessions Judge can admit the accused to bail. The provisions of section 498 regarding admission to bail are particularly wide, and the Court of Session may in any case direct any person to be admitted to bail. There are no words in section 123 (2) controlling the very wide provisions of section 498. The Sessions Judge has under sec 123 (2) power to revise the order of the Magistrate passed under sec 118, and he may grant bail, just as in the analogous case of an appeal the Appellate Court can release the accused on bail—*Ahmed Ali*, 50 Cal 969, 37 C.L.J. 592, A.I.R. 1923 Cal 723, 24 Cr.L.J. 953; *Mangal Singh*, 28 Cr.L.J. 657, 103 I.C. 193, A.I.R. 1928 Lah 189. See also Note 240.

Imprisonment—Although a Sessions Judge is competent to direct under sub-section (3) that the person be imprisoned for any term not exceeding three years, yet it is advisable that the term should always be the same as the period for which security was ordered to be given—*Karimuddin*, 23 All 422; *Myat Aung*, 4 L.B.R. 135, 7 Cr.L.J. 412.

The imprisonment ordered by the Sessions Judge should begin from the date of the Magistrate's order. Where the Sessions Judge directed that the period of imprisonment ordered by him should commence from the date of his order and not from the date of the Magistrate's order, *held* that the order in fact amounted to an enhancement of sentence and that it was undesirable that the Court should do so without special reasons, though it had the power—*Allahdad*, 17 S.L.R. 160, 26 Cr.L.J. 179,

83 I.C. 883, A.I.R. 1924 Sind 120; *Tula Khan*, 30 All. 334, 1908 A.W.N. 133, 5 A.L.J. 318 (F.B.); *Balak*, 32 Cr.L.J. 1186, 134 I.C. 406, 8 O.W.N. 888, 7 Luck. 219, A.I.R. 1931 Oudh 381, 1931 Cr.C. 819; *Kadu*, 37 Cr.L.J. 1003, 161 I.C. 576, A.I.R. 1936 Sind 125, 29 S.L.R. 353, 1936 Cr.C. 802, 9 R.S. 49.

Sub-section (3A):—"We think that where security has been demanded from two or more persons, some or one of whom may be ordered to give security for more than a year, all the parties from whom security is demanded should be dealt with by the Sessions Judge"—*Report of the Select Committee of 1916*.

"The object of the new sub-section (3A) is to avoid differences of opinion in a single case between the Magistrate and the Sessions Judge . . . in as much as in a single case one accused person may appeal to the District Magistrate, while the case of another accused person will be referred to the Sessions Judge. The Bombay Government have suggested that where the case of one accused has to be referred to the Sessions Judge under section 123, the case of all should be referred, whether they have given security or not. We have adopted this suggestion"—*Report of the Joint Committee (1922)*.

It should be noted in this connection that the provisions of section 406 (which provides for appeals against orders requiring security) have been made inapplicable to a case where proceedings have been laid before a Sessions Judge under this sub-section. See section 406, 2nd proviso, newly enacted in 1923.

309. Sub-section (3B):—"This sub-section definitely provides for the exercise of powers under sec. 123 by an Additional Sessions Judge in proceedings transferred to him"—*Statement of Objects and Reasons (1914)*.

This sub-section overrules *Dayaram*, Ratanlal 830 and confirms *Benode Behari*, 50 Cal 229, 39 C.L.J. 75, 25 Cr.L.J. 573, 27 C.W.N. 996.

310. Sub-section (6):—*Kind of imprisonment*:—Before 1923, imprisonment under all good behaviour cases could be simple or rigorous according to the discretion of the Magistrate. By virtue of the Amendment Act of 1923 imprisonment under sections 108 and 109 was made simple, and imprisonment under sec. 110 could be simple or rigorous.

But the Cr. P. Code Second Amendment Act X of 1926, has given a discretion to Magistrates to award either simple or *rigorous* imprisonment in the case of proceedings under sec. 109, on the ground that "most of the persons against whom proceedings are taken under sec. 109 are men for whom simple imprisonment is quite unsuitable"—*Statement of Objects and Reasons (Gazette of India, 1925, Part V, p. 214)*.

Although the imprisonment in default of furnishing security under sec. 110 may be simple or rigorous, still as that section is essentially a preventive rather than a punitive provision, the imprisonment awarded in ordinary cases should be simple. Imprisonment of a rigorous character should not be awarded automatically as a general practice, but the Magistrate has to exercise his discretion and to decide whether on the facts of each case the imprisonment should be simple or rigorous—*Gandharp Singh*, 42 All 563. In passing a sentence of rigorous imprisonment, the Magistrate should give reason why the imprisonment should be of the severer kind. In the case of a man who has never been convicted of any offence, an order of rigorous imprisonment is unreasonable—*In re Umbica*, 1 C.L.R. 268.

Section 109 Cr. P. Code is a preventive and not a punitive section, and so, in the absence of special reasons, the type of imprisonment should be simple—*Rangi*, A.I.R. 1936 Nag 265, 1936 Cr.C. 1138.

Where a person who has been asked to furnish security for good behaviour fails to do so, the Magistrate has no power to order *solitary confinement*—*Kundan*, 36 All. 495, 12 A.L.J. 823, 15 Cr.L.J. 616. See also 1933 A.L.J. 777.

It is illegal for a Magistrate to pass a sentence of *rigorous* imprisonment in a case under sec. 107—*Uttam Chand*, 26 Cr.L.J. 430, 85 I.C. 46 (All.),

The committal of a person to prison under sec. 123, Cr. P. Code amounts to a sentence of imprisonment within the meaning of sec. 8 of the Madras Borstal Schools Act (V of 1926)—*In re Mala Chengader*, 35 Cr.L.J. 1153, 150 I.C. 796, 1934 M.W.N. 486, 1934 Cr.C. 802, A.I.R. 1934 Mad 457, 40 M.L.W. 63

310A. Judgment:—In a case of reference under this section it is by no means necessary to write a judgment as if it were an appeal—*Allahabad*, 26 Cr.L.J. 179, 83 I.C. 883, 17 S.L.R. 160, A.I.R. 1924 Sind 120. The Sessions Judge is, however, bound to examine the evidence himself and come to an independent finding as to the propriety of the order demanding security and the period for and the amount in which it is to be demanded—*Mangal Singh*, 28 Cr.L.J. 657, 103 I.C. 193, A.I.R. 1928 Lah. 189.

124. (1) Whenever the District Magistrate or a Chief Presidency Magistrate is of opinion that any person imprisoned for failing to give security under this Chapter, * * * may be released without hazard to the community or to any other person, he may order such person to be discharged.

(2) Whenever any person has been imprisoned for failing to give security under this Chapter, the Chief Presidency or District Magistrate may (unless the order has been made by some Court superior to his own) make an order reducing the amount of the security or the number of sureties or the time for which security has been required.

(3) *An order under sub-section (1) may direct the discharge of such person either without conditions or upon any conditions which such person accepts:*

Provided that any condition imposed shall cease to be operative when the period for which such person was ordered to give security has expired.

(4) *The Provincial Government may prescribe the conditions upon which a conditional discharge may be made.*

(5) *If any condition upon which any person has been discharged is, in the opinion of the District Magistrate or Chief Presidency Magistrate by whom the order of discharge was made or of his successor, not fulfilled, he may cancel the same.*

(6) *When a conditional order of discharge has been cancelled under sub-section (5), such person may be arrested by any police-officer without warrant and shall thereupon be produced before the District Magistrate or Chief Presidency Magistrate.*

Unless such person then gives security in accordance with the terms of the original order for the unexpired portion of the term for which he was in the first instance committed or ordered to be detained (such portion being deemed to be a period equal to the period between the date of the breach of the conditions of discharge and the date on which, except for such conditional discharge, he would have been entitled to release), the District

83 I.C. 883, A.I.R. 1924 Sind 120; *Tula Khan*, 30 All. 334, 1908 A.W.N. 133, 5 A.L.J. 318 (F.B.); *Balak*, 32 Cr.L.J. 1186, 134 I.C. 406, 8 O.W.N. 888, 7 Luck. 219, A.I.R. 1931 Oudh 381, 1931 Cr.C. 819; *Kadu*, 37 Cr.L.J. 1003, 164 I.C. 576, A.I.R. 1936 Sind 125, 29 S.L.R. 353, 1936 Cr.C. 802, 9 R.S. 49.

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But the Cr. P. Code Second Amendment Act X of 1926, has given a discretion to Magistrates to award either simple or *rigorous* imprisonment in the case of proceedings under sec. 109, on the ground that "most of the persons against whom proceedings are taken under sec. 109 are men for whom simple imprisonment is quite unsuitable"—*Statement of Objects and Reasons* (Gazette of India, 1925, Part V, p. 214).

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Where a person who has been asked to furnish security for good behaviour fails to do so, the Magistrate has no power to order *solitary confinement*—*Kundan*, 36 All. 495, 12 A.L.J. 823, 15 Cr.L.J. 616. See also 1933 A.L.J. 777.

It is illegal for a Magistrate to pass a sentence of *rigorous* imprisonment in a case under sec. 107—*Uttam Chand*, 26 Cr.L.J. 430, 85 I.C. 46 (All.),

The commitment of a person to prison under sec. 123, Cr. P. Code amounts to a sentence of imprisonment within the meaning of sec. 8 of the Madras Borstal Schools Act (V of 1926)—*In re Mala Chengader*, 35 Cr L.J. 1153, 150 IC 796, 1934 M.W.N. 486, 1934 Cr C. 802, A.I.R. 1934 Mad. 457, 40 M.L.W. 63.

310A. Judgment:—In a case of reference under this section it is by no means necessary to write a judgment as if it were an appeal—*Allahabad*, 26 Cr L.J. 179, 83 IC 883, 17 S.L.R. 160, A.I.R. 1924 Sind 120. The Sessions Judge is, however, bound to examine the evidence himself and come to an independent finding as to the propriety of the order demanding security and the period for and the amount in which it is to be demanded—*Mangal Singh*, 28 Cr L.J. 657, 103 IC. 193, A.I.R. 1928 Lah. 189.

124. (1) Whenever the District Magistrate or a Chief Presidency Magistrate is of opinion that any person imprisoned for failing to give security under this Chapter, * * * may be released without hazard to the community or to any other person, he may order such person to be discharged.

(2) Whenever any person has been imprisoned for failing to give security under this Chapter, the Chief Presidency or District Magistrate may (unless the order has been made by some Court superior to his own) make an order reducing the amount of the security or the number of sureties or the time for which security has been required.

(3) An order under sub-section (1) may direct the discharge of such person either without conditions or upon any conditions which such person accepts.

Provided that any condition imposed shall cease to be operative when the period for which such person was ordered to give security has expired.

(4) The Provincial Government may prescribe the conditions upon which a conditional discharge may be made.

(5) If any condition upon which any person has been discharged is, in the opinion of the District Magistrate or Chief Presidency Magistrate by whom the order of discharge was made or of his successor, not fulfilled, he may cancel the same.

(6) When a conditional order of discharge has been cancelled under sub-section (5), such person may be arrested by any police-officer without warrant and shall thereupon be produced before the District Magistrate or Chief Presidency Magistrate.

Unless such person then gives security in accordance with the terms of the original order for the unexpired portion of the term for which he was in the first instance committed or ordered to be detained (such portion being deemed to be a period equal to the period between the date of the breach of the conditions of discharge and the date on which, except for such conditional discharge, he would have been entitled to release), the District

Magistrate or Chief Presidency Magistrate may remand such person to prison to undergo such unexpired portion.

A person remanded to prison under this sub-section shall, subject to the provisions of section 122, be released at any time on giving security in accordance with the terms of the original order for the unexpired portion aforesaid to the Court or Magistrate by whom such order was made, or to its or his successor.

Change:—Sub-sections (3) to (6) have been added by sec. 22 of the Cr. P. C. Amendment Act (XVIII of 1923) "This amendment is mainly intended to enable persons committed to prison under Chapter VIII of the Code to be sent to Industrial Homes and Settlements of the Salvation Army, or to other similar Homes or Settlements, where it may be possible to reform them and make them accustomed to regular work of a kind which may be useful to them after the expiry of their period of detention. It is proposed to give a District Magistrate or a Chief Presidency Magistrate absolute power to release with or without conditions a person imprisoned for failure to give security, without the intervention of the Court of Session or High Court."—*Statement of Objects and Reasons* (1921).

311. It is entirely within the discretion of the District Magistrate, who as the head of the District, is responsible for the peace thereof, to determine when and under what circumstances he should act under this section—*Chhotia*, 1893 A.W.N. 183

The order passed by a District Magistrate under this section may be of an original or of a revisional character; that is, the Magistrate may release a person either on the ground that by reason of something occurring after the order for security, there is no longer any apprehension of a breach of the peace and the person may be safely released, or on the ground that on the evidence taken by the Subordinate Magistrate there was no apprehension of a breach of the peace, and no order for security should have been made—*Mare Goud*, 37 Mad. 125 (141), 25 M.L.J. 459, 14 Cr.L.J. 546, 21 I.C. 146 (F.B.).

125. The Chief Presidency or District Magistrate may at

Power of District Magistrate to cancel any bond for keeping the peace or for good behaviour.

any time, for sufficient reasons to be recorded in writing, cancel any bond for keeping the peace or for good behaviour executed under this Chapter by order of

any Court in his district not superior to his Court.

312. Scope:—This section empowers the District Magistrate to cancel a bond but does not authorise him to order that the person whose bond is so cancelled should be imprisoned until a fresh security bond is given—*Baldeo Singh v. Jugal Kishore*, 33 All. 624; *Panchu*, 29 Cal 455.

313. Cancellation of bond:—*Ground of cancellation:*—The Allahabad High Court (as well as the Oudh Court) has held that a bond can be cancelled only on the ground that it is no longer necessary—*Banarsi v. Partab Singh*, 35 All 103, 11 A.L.J. 16, 14 Cr.L.J. 63, 18 I.C. 351; *Shankar*, 41 All 651, 17 A.L.J. 147, 20 Cr.L.J. 206, 49 I.C. 654; and that the District Magistrate, in cancelling a bond, is entitled to look only to the circumstances subsequent to the execution of the bond. He can cancel a bond only on the ground that something has supervened since the date of the first Court's order which satisfies the District Magistrate that in view of the facts since come to light there is no longer any necessity to keep the accused person under bond—*Nizamuddin v. Md Ziaul*, 44 All. 614, 20 A.L.J. 521, 23 Cr.L.J. 398, 67 I.C. 350, A.I.R. 1922 All. 191; he can cancel a bond for keeping the peace if there is no ground for thinking that there is any likelihood of a breach of the peace—*Abdar*, 1905

A.W.N. 143. But the District Magistrate is not entitled to look to the circumstances existing at the time of the bond; thus, the fitness or unfitness of the sureties is a matter which can be decided in reference to the circumstances existing at the time of execution of the bond, and the District Magistrate has no power to look to those circumstances and cannot therefore cancel a bond on the ground of unfitness of sureties—*Mahabir*, 8 O.C. 245, 2 Cr.L.J. 507. In other words, the power conferred by this section to cancel a bond is not to be exercised *as in appeal* against an order of security to keep the peace—*Sita Ram*, 39 All 456; *Nizamuddin v Md Ziaul*, 44 All. 614, 23 Cr.L.J. 398; *Ram Din*, 24 Cr.L.J. 204 (Oudh); *Baluani*, 24 Cr.L.J. 616 (Oudh). This section cannot be used by the Magistrate as if he were sitting in appeal and going into the merits of the case. If he thinks that the order is not maintainable on the evidence on record, his duty is not to pass an order under section 125 but to refer the case to the High Court in its revisional side—*Nizamuddin v. Md Ziaul*, 44 All. 614; *Banarsi v. Partab*, 35 All 103; *Shankar*, 41 All 651, 17 A.L.J. 830. Two other Allahabad cases, however, do not support this view. Thus, in *Baldeo Singh v Jugal Kishore*, 33 All 624 (625), it has been held that a District Magistrate can cancel a bond of the accused on the ground that the surety who stood for him was an unfit person. In another Allahabad case, *Lalji*, 40 All 140 (virtually dissenting from 35 All 103) it is laid down that there is nothing in the words of sec. 125 to prevent the District Magistrate from cancelling the bond for reasons other than that it is no longer necessary to keep the accused under their bonds; that the District Magistrate can cancel a bond under sec. 125 on the ground that the accused should not have been bound over; and that the District Magistrate can deal with a case under section 125 as in *revision*, and no reference to the High Court is necessary.

The Patna High Court holds that the only order which a District Magistrate can pass under this section, is an order cancelling the bond directed to be executed by a subordinate Magistrate, on the ground that there is no longer any likelihood of a breach of the peace. The District Magistrate is not an *appellate or revisional authority*, and he has no power to vacate the order of the subordinate Magistrate as *ultra vires* or to quash the proceedings—*Durga Singh v Amar Dayal*, 3 P.L.T. 103, 23 Cr.L.J. 281.

But the Calcutta High Court is of opinion that the District Magistrate can cancel the bond on any sufficient ground, and he is not restricted to the grounds which may have arisen subsequent to the date of execution of the bond. The jurisdiction of the District Magistrate under this section is not merely an original jurisdiction but may be exercised as in appeal or revision. He can cancel the bond on the ground that it should never have been required—*Nabu Sardar*, 34 Cal 1 (F.B.), 11 C.W.N. 25, 4 C.L.J. 428, 4 Cr.L.J. 399 (overruling 32 Cal 948). This decision has been followed by the Punjab, Madras and C.P. Courts. Thus, in *Auditta*, 1908 P.W.R. 12, 7 Cr.L.J. 348, it has been held that the District Magistrate has full discretion to consider the evidence, and can set aside the order of security on the merits. The Madras High Court also holds that the order under sec. 125 may be either of an original or of a revisional character, and the District Magistrate may cancel a bond on any 'sufficient grounds'. There is no reason to qualify or restrict the ordinary meaning of the words used. The District Magistrate can review the evidence and cancel a bond on the ground that the evidence before the Subordinate Magistrate was not sufficient to justify the passing of the order for security—*Mare Goud*, 37 Mad 125, 1913 M.W.N. 715, 25 M.L.J. 459, 14 M.L.T. 328, 14 Cr.L.J. 546, 21 I.C. 116 (F.B.). The same view has been taken in *C. P.*—*Dalli*, 11 N.L.R. 98, 16 Cr.L.J. 555, 29 I.C. 827; *Baines*, 23 Cr.L.J. 394, 67 I.C. 346, A.I.R. 1922 Nag. 180, 6 N.L.J. 274.

The words 'at any time' show that the District Magistrate may cancel the bond at any time however late, even when there is only one day left for the expiration of the period for which the bond has been executed, the delay in obtaining the material on which the bond is cancelled does not invalidate the order of cancellation—*Mare*

Gowd, 37 Mad. 125 (145, 146) (F.B.). But an order for the cancellation of the bond cannot be passed before it has been executed—*Barka v. Janmejoy*, 32 Cal. 948

Right of applicant to be heard:—When a Magistrate is moved to exercise his powers under this section to cancel a bond, the applicant or his pleader should, as a matter of general practice, be heard before the application is rejected—*Sita Ram*, 39 All. 466, 18 Cr.L.J. 630, 15 A.L.J. 469; *Mehr Baksh*, 1914 P.L.R. 53, 15 Cr.L.J. 143.

Effect of cancellation:—Where a bond is cancelled on the ground that it is no longer necessary or that it has been wrongly taken, both the accused and the surety will be discharged from all liability—*Abdur Rahim*, 1905 A.W.N. 143.

314. Transfer of proceedings:—Where the proceedings under sec. 107 instituted in one district were transferred by the order of the High Court to another district, and a 1st class Magistrate of the latter district ordered security to keep the peace, held that it was the District Magistrate of the latter district who had jurisdiction to pass an order under this section for the cancellation of the bond—*Guru Prasanna v. Hari Kumar*, 23 C.W.N. 958, 20 Cr.L.J. 337.

126. (1) Any surety for the peaceful conduct or good behaviour of another person may at any time apply to a Presidency Magistrate, District Magistrate, Sub-divisional Magistrate or Magistrate of the first class to cancel any bond executed under this Chapter within the local limits of his jurisdiction.

(2) On such application being made, the Magistrate shall issue his summons or warrant, as he thinks fit, requiring the person, for whom such surety is bound, to appear or to be brought before him.

Sub-section (3) of this section has been re-numbered as section 126A with certain alterations, by the Criminal Procedure Code Amendment Act (XVIII of 1923). See notes under the next section

315. This section deals with cases in which the surety wishes to withdraw and to have the bond cancelled and it lays down the procedure which is to be adopted when such security becomes useless owing to the withdrawal of the surety—*Mahabir*, 8 O.C. 245, 2 Cr.L.J. 507.

When the effect of an order discharging a surety is to remit the accused to prison for a term exceeding one year, the Magistrate is bound to refer the case to the Sessions Judge (sec. 123)—*Alladino*, 5 S.L.R. 87, 12 Cr.L.J. 410, 11 I.C. 594.

126A. When a person for whose appearance a warrant or summons has been issued under proviso to sub-section (3) of section 122 or under section 126, sub-section (2), appears or is brought before him, the Magistrate shall cancel the bond executed by such person and shall order such person to give, for the unexpired portion of the term of such bond, fresh security of the same description as the original security. Every such order shall, for the purposes of sections 121, 122, 123 and 124, be deemed to be an order made under section 106 or section 118, as the case may be.

Security for unexpired period of bond.

This was originally sub-section (3) of section 126. It has been re-numbered as section 126A with the italicised words added, by sec. 23 of the Criminal Procedure Code Amendment Act (XVIII of 1923). "We think that the procedure set out in sub-sections (2) and (3) of section 126 should apply in the case of a surety subsequently rejected (under sec. 122), and we have added a new clause which makes the necessary amendments in section 126."—*Report of the Joint Committee* (1922).

This section deals with the order passed by a Magistrate on an application by a surety for his discharge and provides *inter alia* that an order passed under that section shall for the purposes of secs 121, 122, 123 and 124 be deemed to be an order under sec. 118. It, however, makes no mention of sec. 120—*Ahmed*, 27 Cr.L.J. 865 (867), 20 S.L.R. 163, 96 I.C. 113, A.I.R. 1926 Sind 273 (F.B.)

CHAPTER IX.

UNLAWFUL ASSEMBLIES.

127. (1) Any Magistrate or officer in charge of a police station may command any unlawful assembly, or any assembly of five or more persons likely to cause a disturbance of the public peace, to disperse; and it shall thereupon be the duty of the members of such assembly to disperse accordingly.

(2) This section applies also to the police in the town of Calcutta.

316. "Officer in charge":—An order directing the dispersal of an assembly passed by an officer (*e.g.*, Deputy Commissioner of Police) superior in rank to the Police Officer is an order by a lawful authority within the meaning of this section—*Emp. v. Tucker*, 7 Bom. 42

The power to disperse an unlawful assembly by force is not given by the Code to any police officer below the rank of an officer in charge of a police station—*Muhammad Yunus*, 50 Cal 318 (323), 25 Cr.L.J. 467, A.I.R. 1923 Cal. 517

317. Unlawful assembly:—An assembly may be for lawful purposes, *e.g.*, a religious procession; but it may excite such opposition as to be likely to cause a breach of the peace. If so, it may be called upon to disperse—*Tucker*, 7 Bom 42; *Murlidhar*, 1887 P.R. 22.

If an order is promulgated by the Superintendent of Police under sec. 30 of the Police Act (V of 1861) prohibiting persons from organising or promoting processions without a license, and that order is disobeyed the procedure to be adopted is as provided by sec 127 of the Cr P Code, *viz.*, to order the procession to disperse—*Harekrishna*, 8 P.L.T. 245, 28 Cr.L.J. 443, 101 I.C. 475

Although it may be conceded that the Police Officer's opinion is relevant and may be of great weight, it is impossible to concede that the Criminal Courts have no jurisdiction to determine the legality of the command—*Yeshwant*, 34 Cr.L.J. 705, A.I.R. 1933 Nag 277, 144 I.C. 232, 1933 Cr.C. 1068, Ind Rul 1933 Nag 215 following *Emp v Tucker*, 7 Bom 42

This section empowered the Sub-inspector to disperse a lawful procession if there was a reasonable apprehension that there would be a riot, it being immaterial whose action would provoke it—*Raghunath*, 85 I.C. 823, 47 All 205, 22 A.L.J. 1049, A.I.R. 1925 All 165, 26 Cr.L.J. 599. This view of law was dissented from in *Yeshwant*, *supra*

The taking out of a procession with music playing is not an unauthorised use of public road, see *Raghunath*, 85 I.C. 823, 47 All 205, 22 A.L.J. 1049, A.I.R. 1925 All. 165, 26 Cr.L.J. 599 and *Janaki Prasad v. Karamat Husain*, 137 I.C. 587, 1931 A.L.J. 624, A.I.R. 1931 All. 674, 53 All. 836. A peaceful and lawful procession cannot be regarded as likely to cause a breach of the peace when it is admitted that not they but some other body of persons is bent on attacking them. Whether an assembly is likely to cause a disturbance of the public peace, has to be judged from its own acts and behaviour. If leading the procession itself is not unlawful or intrinsically calculated to create a riot, the disturbance, if it arises, cannot be attributed to the procession itself but to the manner in which it is conducted. Thus the conduct of the processionists apart from the mere act of moving in procession, is the material element which must weigh for the purpose of putting this section in operation. The reasonable and plain meaning is that when it appears that the behaviour of an assembly of five or more persons is such as to indicate that it would be an active party to the disturbance of public peace, or that it is reasonably calculated to provoke others to a breach of the peace; such an assembly may be ordered to disperse under section 127 Cr. P. Code. That section speaks of an actual unlawful assembly and a potential unlawful assembly. In the case of latter assembly there must be evidence to establish that in the immediate future it would develop into an unlawful assembly animated by the common object of disturbance of the peace or that the natural consequence of the assembly itself is to provoke a disturbance. In every case, it is a question of fact to be determined on the evidence relating to the conduct of the assembly—*Yeshwant*, supra.

Punishment:—Section 127 Cr. P. Code contemplates two kinds of assemblies:—(1) an unlawful assembly within the meaning of sec. 141 I. P. C., (2) an assembly of five or more persons likely to cause a disturbance of public peace. For, disobeying the command to disperse the former kind of assembly is punishable under sec 145 I. P. Code and the latter under sec. 151 I. P. C.—*Yeshwant*, 34 Cr.L.J. 705 (707), A.I.R. 1933 Nag 277, 144 I.C. 232, 1933 Cr.C. 1068, Ind. Rul. 1933 Nag. 215

128. If upon being so commanded, any such assembly does not disperse, or if, without being so commanded, it conducts itself in such a manner as to show a determination not to disperse, any Magistrate or officer in charge of a police station, whether within or without the presidency-towns, may proceed to disperse such assembly by force, and may require the assistance of any male person not being an officer, soldier, sailor or airman, in Her Majesty's Army, Navy or Air Force, or a volunteer enrolled under the Indian Volunteers Act, 1869, and acting as such, for the purposes of dispersing such assembly, and if necessary, arresting and confining the persons who form part of it, in order to disperse such assembly or that they may be punished according to law.

Amendment:—The words "soldier, sailor or airman in His Majesty's Army, Navy or Air force" have been substituted for "or soldier, in Her Majesty's Army" by the Amending Act, 1934 (XXXV of 1934). The Indian Volunteers Act, 1869 (XX of 1869) has since been repealed by the Auxiliary Force Act, 1920 (XLIX of 1920).

318. Scope:—This section, though authorizes arrest in certain cases, has nothing to do with the general power of arrest possessed by a Magistrate and only lays down the circumstances in which an assembly may be legally dispersed by force—*Muneshwar Bux Singh v Emp*, A.I.R. 1939 Oudh 81 (83), 1939 O.W.N. 106, 1939 O.L.R. 71, 1939 R.D. 78, 179 I.C. 644, 1939 A.W.R. (C.C.) 39

Use of fire-arms:—The power of using fire-arms to disperse an unlawful assembly cannot be exercised by any person below the rank of an officer in charge of a police station. An officer-in-charge of a patrol boat, whose powers are no higher than those of an officer-in-charge of an outpost, cannot use fire-arms under this section—*Muhammad Yunus*, 50 Cal. 318 (323), 25 Cr.L.J. 467, A.I.R. 1923 Cal. 517.

The degree of force which may be lawfully used in the suppression of an unlawful assembly depends on the nature of such assembly, for the force used must always be moderated and proportioned to the circumstances of the case and to the end to be obtained. The taking of life can only be justified by the necessity for protecting persons or property against various forms of violence, or by the necessity of dispersing a riotous crowd which is dangerous unless dispersed—*Q.-E. v. Subha Naik*, 21 Mad. 249 (252).

129. If any such assembly cannot be otherwise dispersed, and if it is necessary for the public security that it should be dispersed, the Magistrate of the highest rank who is present may cause it to be dispersed by military force.

130. (1) When a Magistrate determines to disperse any such assembly by military force, he may require any commissioned or non-commissioned officer in command of any soldiers in Her Majesty's Army or of any volunteers enrolled under the Indian Volunteers Act, 1869, to disperse such assembly by military force, and to arrest and confine such persons forming part of it as the Magistrate may direct, or as it may be necessary to arrest and confine in order to disperse the assembly or to have them punished according to law.

(2) Every such officer shall obey such requisition in such manner as he thinks fit, but in so doing he shall use as little force, and do as little injury to person and property, as may be consistent with dispersing the assembly and arresting and detaining such persons.

131. When the public security is manifestly endangered by any such assembly, and when no Magistrate can be communicated with, any commissioned officer of Her Majesty's Army may disperse such assembly by military force, and may arrest and confine any person forming part of it, in order to disperse such assembly or that they may be punished according to law; but if, while he is acting under this section, it becomes practicable for him to communicate with a Magistrate, he shall do so, and shall thenceforward obey the instructions of the Magistrate as to whether he shall or shall not continue such action.

* Now the Auxiliary Force Act, 1920 (XLIX of 1920),

132. No prosecution against any person for any act purporting to be done under this Chapter shall be instituted in any Criminal Court except with the sanction of the *Provincial Government*; and—

- (a) no Magistrate or police officer acting under this Chapter in good faith,
- (b) no officer acting under section 131 in good faith,
- (c) no person doing any act in good faith, in compliance with a requisition under section 128 or section 130, and,
- (d) no inferior officer, or soldier, or volunteer doing any act in obedience to any order which he was bound to obey,

shall be deemed to have thereby committed an offence:

Provided that no such prosecution shall be instituted in any Criminal Court against any officer or soldier in His Majesty's army except with the sanction of the *Central Government*.

Amendment:—The words "Provincial Government" and "Central Government" have been respectively substituted for the words "Local Government" and "Governor General in Council" by section 4 of the Government of India (Adaptation of Indian Laws) Order, 1937.

319. Sanction:—Want of sanction under this section will not be cured by sec. 537—*In re Permal*, 31 Mad. 80, 17 M.L.J. 533.

The power to disperse an unlawful assembly by force is not given by this Code to any Police-officer below the rank of an officer in charge of a police station. The powers of an officer-in-charge of a patrol boat are no higher than those of an officer in charge of an outpost; therefore he has no power to act under this chapter; if he so acts (e.g., fires on an unlawful assembly), his action is illegal and does not fall under sec. 128; and no sanction of the Local Government is necessary for his prosecution for such act—*Muhammad Yunus*, 50 Cal. 318, 324 (Bhawal Shooting case), 25 Cr.L.J. 467, A.I.R. 1923 Cal 517.

Section 79, I P. C., can only be applied when all the facts are known, i.e., when the trial is over; sec. 132, Cr. P. C., can only operate before the trial begins. Protection given by sec. 79 is a protection against conviction, while the protection given by sec. 132 is a protection against trial. It is impossible to hold that these provisions are identical—*M. N. Schamnad v. M. N. Rama Rao*, 34 Cr.L.J. 528, 143 I.C. 115, 1932 M.W.N. 1225, A.I.R. 1933 Mad. 268, 1933 Cr.C. 371, Ind. Rul. 1933 Mad 271.

It cannot be laid down that in order to decide whether a prosecution is barred under sec. 132, Cr. P. Code for want of the sanction of the Local Government only the complaint and the sworn testimony should be referred to—*M. N. Schamnad v. M. N. Rama Rao*, supra.

The principle of the decision in—*Gangaraju v. Kandiboyina Venki*, 118 I.C. 102, A.I.R. 1929 Mad. 659, 1929 Cr.C. 140, 30 Cr.L.J. 864, 52 Mad. 602, 30 M.L.W. 116, 57 M.L.J. 31, Ind. Rul. 1929 Mad. 742, 1929 M.W.N. 387, is equally applicable to sec. 132 Cr. P. Code the terms of which are as wide as if not wider than, those of sec. 197. The policy of the Legislature is to afford adequate protection to public servants, to ensure that they are not prosecuted for anything done by them in the discharge of their official duties without reasonable cause and if sanction is granted, to confer on the Local Government if they choose to exercise it, complete control of the prosecution—*M. N. Schamnad v. M. N. Rama Rao*, supra.

Where the defence was that the accused were acting in the discharge of their duties under sections 127 and 128 Cr. P. Code the jury should be told that if they could not accept the case for the prosecution, they would have next to consider the provisions of secs. 127 and 128 Cr. P. Code and determine whether the accused acted or meant to act under those sections and, on their acceptance of the defence case, it followed that in the absence of the sanction of the Governor-General in Council (or the Local Government as the case may be) the prosecution could not be continued and the accused were entitled to an acquittal—*Abdul Rahim Mir*, 25 C.W.N. 623 (629), 33 C.L.J. 340.

This section is a bar to the prosecution of police-officers purporting to act under Chapter IX of the Cr. P. Code without the sanction of the Local Government. It is not necessary that the accused (*ie*, police-officers) should prove the existence of an unlawful assembly—*Elaya Pillai v. Arulanandan Pillai*, 1937 M.W.N. 1243.

CHAPTER X.

PUBLIC NUISANCES.

133. (1) Whenever a District Magistrate, a Sub-divisional Magistrate or * * * a Magistrate of the first class considers, on receiving a police-report or other information and on taking such evidence (if any), as he thinks fit,

Conditional order for removal of nuisance

that any unlawful obstruction or nuisance should be removed from any way, river or channel which is or may be lawfully used by the public, or from any public place, or

that *the conduct of any trade or occupation, or the keeping of any goods or merchandise, is injurious to the health or physical comfort of the community, and that in consequence such trade or occupation should be prohibited or regulated or such goods or merchandise should be removed or the keeping thereof regulated,* or

that the construction of any building or the disposal of any substance, as likely to occasion conflagration or explosion, should be prevented or stopped, or,

that any building, *tent or structure or any tree* is in such a condition that it is likely to fall and thereby cause injury to persons living or carrying on business in the neighbourhood or passing by, and that in consequence the removal, repair or support of such building, *tent or structure, or the removal or support of such tree,* is necessary, or

that any tank, well or excavation adjacent to any such way or public place should be fenced in such manner as to prevent danger arising to the public, or,

that any dangerous animal should be destroyed, confined or otherwise disposed of,

such Magistrate may make a conditional order requiring the person causing such obstruction or nuisance or carrying on such trade or occupation, or keeping any such goods or merchandise, or owning, possessing or controlling such building, *tent, structure, substance, tank, well or excavation, or owning or possessing such animal or tree*, within a time to be fixed in the order,

to remove such obstruction or nuisance; or

to desist from carrying on, or to remove or regulate in such manner as may be directed, such trade or occupation; or

to remove such goods or merchandise, *or to regulate the keeping thereof in such manner as may be directed*; or

to prevent to stop the *erection* of, or to remove, repair or support, such building, *tent or structure*; or

to remove or support such tree; or

to alter the disposal of such substance; or

to fence such tank, well or excavation, as the case may be; or

to destroy, confine or dispose of such dangerous animal in the manner provided in the said order;

or, if he objects to do,

to appear before himself or some other Magistrate of the first or second class, at a time and place to be fixed by the order, and move to have the order set aside or modified in the manner hereinafter provided.

(2) No order duly made by a Magistrate under this section shall be called in question in any Civil Court.

Explanation.—A “public place” includes also property belonging to the State, camping grounds and grounds left unoccupied for sanitary or recreative purposes.

Change:—The entire section has been newly drafted by sec. 24 of the Criminal Procedure Code Amendment Act (XVIII of 1923). In sub-section (1) the words “when empowered by the Local Government in this behalf” have been omitted: under the previous law, an ordinary Magistrate of the first class could take proceedings under this section only when he was specially empowered by the Local Government: under the present law, all Magistrates of the first class are competent to deal with the case, and no special empowering is necessary. Certain other minor changes have been made in the subsequent paras of this section, as shown by the italicised words.

320. Application of this Chapter:—The provisions of this section should be sparingly used—*Manipur v. Bidhu Bhusan*, 42 Cal. 158, 18 C.W.N. 1086. The provisions of this Chapter should be so worked as not to become themselves a nuisance to the community at large. Although every person is bound to so use his property that it may not work legal damage or harm to his neighbour, yet on the other hand, no one has a right to interfere with the free and full enjoyment by such person of his property, except on clear and absolute proof that such use of it by him is producing such legal damage or harm; and therefore, a lawful and necessary trade (e.g., tanning) ought not to be interfered with unless it is proved to be injurious to the health or physical comfort of the community—*Shadi*, 17 P.R. 1888.

A private person has no right to insist that a Magistrate shall pass orders under sec. 133, Cr. P. C. Whether such orders should be passed is a matter of discretion for

the Magistrate. If he does not choose to interfere, the party aggrieved has his normal remedy in the Civil Court—*Sible Hussain*, AIR 1937 All. 785, 1937 A.W.R. 866, 1937 A.L.J. 903, 1938 A.L.R. 10, 172 I.C. 642, 39 Cr.L.J. 148, 1937 A.Cr.C. 165.

This section deals with the condition of things at the time when the order is made. It is not meant to apply to what may happen at some indefinite time in the future or under quite abnormal circumstances. Therefore, a Magistrate is not competent to order an occupation to be prohibited, or a tree to be cut down or a building to be demolished, merely because at some future time the occupation may become injurious to the health of the neighbourhood, or the tree may cause an obstruction to public thoroughfare or the building may become dangerous to passers-by—*Gokal Chand*, 56 I.C. 446, AIR 1920 Lah. 258, 1 Lah. 163, 21 Cr.L.J. 462; *Gokul*, 22 A.L.J. 436, 26 Cr.L.J. 104; *Rajawqn*, 1890 P.R. 5. This section can have no application to something which may become a nuisance, that is a potential nuisance, but applies only where the nuisance is in existence in a way, river or channel which is or may be lawfully used by the public and which is in existence in a public place—*Shri Ram*, AIR 1935 All. 926, 1935 A.W.R. 1001, 1935 Cr.C. 1140, 1935 A.L.R. 1086, 159 I.C. 198, 37 Cr.L.J. 347; *Kalyan Mul Mathur*, AIR 1936 Pat. 577, 37 Cr.L.J. 1159, 165 I.C. 542, 1936 Cr.C. 948. An order under sec. 137, Cr. P. C., can only be made, where there is an existing obstruction or nuisance and cannot be made in respect of some future nuisance. But where an order under sec. 137 was not made in respect of some future nuisance but was made in respect of the nuisance which existed when the proceedings under sec. 133, Cr. P. C., commenced, the order is legal even when, on the date of its passing, nuisance was not in existence owing to enforcement of an order under sec. 142, Cr. P. C., to obviate or prevent imminent danger or injury pending the determination of the matter—*Rebati Mohan v. Chaital Chandra*, 63 Cr.L.J. 5, 38 Cr.L.J. 173, 166 I.C. 221, AIR 1936 Cal. 692, 1936 Cr.C. 954, 9 R.C. 490.

In all criminal proceedings initiated under this section, the Magistrate should bear in mind that he is supposed to be acting purely in the interests of the public, and should be on his guard against any tendency to use the section as a substitute for litigation in the Civil Courts, in order to obtain settlement of private disputes—*Farzand Ali v. Hakim Ali*, 37 All. 26 (28). Where the alleged obstructions to a public road has been existing for 15 or 16 years, the matter is one to be decided by a Civil Court, and sec. 133 is not intended to be applied in such cases to avoid the necessity of filing a civil suit—*Ghurahu v. Sakalraj*, 24 A.L.J. 112, 27 Cr.L.J. 27 (29), 91 I.C. 59, AIR 1926 All. 157; *Baisakhi Ram*, AIR 1930 Lah. 361, 1930 Cr.C. 965, 120 I.C. 796, 31 Cr.L.J. 167; *Khair Din v. Wasan*, AIR 1935 Lah. 28, 1935 Cr.C. 19, 159 I.C. 374, 37 Cr.L.J. 70, 8 R.L. 381. Chapter X of the Code deals with "public nuisances" and provides a speedy and summary method for dealing with them, in cases of great emergency and where there is imminent danger to the public interest. The fact that an obstruction has been allowed to stand, without objection, in a public place for many years itself indicates that there is no such emergency or imminent danger to the public interest. The existence of a long-standing obstruction cannot, therefore, without proof of something having recently happened, be considered to be a public nuisance—*Tulsi Ram*, 39 Cr.L.J. 775, 11 R.L. 1939 Lah. 381, 176 I.C. 669, 11 R.L. 225, AIR 1938 Lah. 523, 40 P.L.R. 492; *Consolidation Co-operative Society v. Har Govind*, 40 Cr.L.J. 758, 183 I.C. 292, 12 R.L. 106, AIR 1939 Lah. 276; *Nanumat v. Emp.*, AIR 1939 Lah. 452, 41 P.L.R. 515, 40 Cr.L.J. 933, 184 I.C. 352, 12 R.L. 211. If the road has been recently constructed, the obstruction can be held to be a recent one, even though the trees in dispute have been in existence for a number of years. If, however, the road was constructed several years ago, then it cannot be said that the trees that have stood alongside the road for a number of years constitute a new obstruction—*Consolidation Co-operative Society v. Har Gobind*, supra. But no length of enjoyment can legalize a public nuisance involving actual danger to the health of the community—*Maksood Ali v. President, Union Board, Garhwa*, 40 Cr.L.J. 516, 180 I.C. 852, AIR 1938 Pat. 183, 17 Pat. 669, 20 P.L.T. 288, 5 B.R. 505, 11 R.P. 549, 1939 P.W.N.

95. See also Note 326. See also *Jankari Ram v. Saukhi Panjara*, 108 I.C. 559, 9 P.L.T. 587, A.I.R. 1928 Pat 268. For contra see *Barkhandi*, 32 Cr.L.J. 1234, 31 I.C. 783, A.I.R. 1931 Lah. 159, 1931 Cr.C. 271; 31 C.W.N. 530, 44 C.L.J. 211.

Where the mills have been working for the last ten years and that too under a license from the Municipal Board which is authorised to grant such licences under the U. P. Municipalities Act, it would not be proper to have recourse to the provisions of this Chapter. The proceedings under this Chapter are of a summary nature and intended to enable Magistrates to deal with cases of emergency and not intended to enable a complainant to obtain, by having recourse to this Chapter, relief which he should seek in the Civil Court—*Kedar Nath v. Satish Chandra*, 41 Cr.L.J. 99 (101), 184 I.C. 754, 1939 O.W.N. 966, A.I.R. 1939 Oudh 75, 1939 O.L.R. 653, 1939 A.W.R. (C.C.) 252.

It is very doubtful if the working of the mills as regulated by the previous order of the Magistrate under this section can be described in law as a nuisance for the purposes of fresh proceedings under this Chapter. The working of the mills after that order is under the order of the Criminal Court. Further, the law does not contemplate a continued interference with the carrying on of the trade. Where in such a case a fresh complaint is made, the Magistrate should leave the complainant to move either the Municipal Board or to seek his redress in the Civil Court—*Kedar Nath v. Satish Chandra*, supra.

An order under this section should be passed for removal of a *chabutra* which has been unlawfully erected over a public way. The fact that in the particular case the public may have lot of room to go along the road without needing to walk upon that particular site, has nothing whatever to do with the case—*Sallu Mal*, 32 Cr.L.J. 160, 128 I.C. 604, A.I.R. 1930 All 751, 1930 Cr.C. 1007, Ind. Rul. 1931 All 76. See also *Jagoshau v. Madan*, 28 Cr.L.J. 910, 105 I.C. 238, 6 Pat. 428, 8 P.L.T. 452.

This Chapter does not apply to Presidency Towns as Presidency Magistrates are not empowered to act under this Chapter.

321. Secs. 133 and 144:—Sec. 144 is more *general* and sec. 133 is more *specific*; therefore, nuisances specially provided for in this section are taken out of the general provisions of sec. 144—*Anonymous*, 2 Weir 54; *Huri Mohun*, 10 W.R. 53. But where an order prohibiting a nuisance cannot be made under this section, e.g., an order prohibiting burial in certain places on sanitary grounds, it should be made under the more general sections (143 or 144)—*Anonymous*, 2 Weir 64.

322. Secs. 133 and 147:—Sec. 147 and sec. 133 are entirely independent provisions and neither section can be used to throw any light on the interpretation of the other, the object, scope and language being totally different. If there is any over-lapping, that merely means that in some cases where a public way is concerned, the Magistrate may have alternative procedures open to him. At the same time there is no reason why the restricted operation of sec. 147 as compared with the corresponding previous provision, should of itself enlarge the powers given by sec. 133—*Ram Sagar Mondal v. Alek Naskar*, 26 C.W.N. 442 (454), 49 Cal. 682 (697), A.I.R. 1922 Cal. 59 (F.B.).

Section 133 is not a bar to a proceeding under sec. 147. The fact that sec. 133 expressly provides for an order by the Magistrate directing the removal of an obstruction to a pathway does not necessarily imply that a similar order cannot be passed under sec. 147—*Karuppana v. Kandasami*, 26 M.L.J. 223, 15 Cr.L.J. 362. But when proceedings have been taken under sec. 133, no order can be passed under sec. 147—*Abdool Rackman v. Safar Ali*, 15 C.W.N. 667, 12 Cr.L.J. 43, 9 I.C. 262.

Under sec. 133, Cr. P. C., the Magistrate has power to bring about the removal of an obstruction from any way lawfully used by the public. The existence of this section would explain why mandatory action has not been prescribed under sec. 147, Cr. P. C.—*Usmar Ali v. Emp.*, A.I.R. 1938 Nag. 297, 1938 N.L.J. 139, 175 I.C. 234.

323. Nature of proceedings:—Proceedings under this section are more of the nature of civil than of criminal proceedings, and the person against whom proceed-

ings are taken under this section is not an 'accused' person within the meaning of sec. 342. He can give evidence on his own behalf and may be examined on oath—*Hirananda*, 9 C.W.N. 983. Proceedings under this Chapter are not proceedings in respect of offences, and further inquiry cannot be ordered under sec. 436 if the proceedings are dropped by the Magistrate—*Srinath v. Ainaddi*, 24 Cal 395. But orders passed on proceedings under this chapter are orders passed in a 'criminal trial' for the purpose of sec. 15 of the Letters Patent, and no appeal lies against an order passed by a single Judge of the High Court under sec. 439 revising an order of the Magistrate—*Subbayya v. Ramayya*, 39 Mad 537, 16 Cr.L.J. 349.

It is doubtful if a Magistrate can continue with two proceedings under sec. 133, Cr. P. C., side by side with regard to practically the same subject matter, because the danger is that by this procedure, a Magistrate may get a chance of reviewing an order which he had already passed. This is a procedure which is not contemplated by the Cr. P. C.—*Kalyan Mal Mathur*, AIR, 1936 Pat. 577, 37 Cr.L.J. 1159, 165 IC 542, 1936 Cr.C. 948.

Magistrates empowered:—All first class Magistrates are now authorised to take action under this section, and it is no longer necessary that they should be specially empowered by the Local Government. In the United Provinces and in C. P., the Local Government may invest Municipal Boards with the powers of a District Magistrate to institute proceedings under this section. See sec. 57 of N W P Municipalities Act XV of 1883, and sec. 86 of the C P Municipal Act XVIII of 1889.

Presidency Magistrates are not empowered to act under this chapter. In nuisance cases in Presidency towns, they act under the Penal Code, the Police Acts, the Municipal Acts and other local enactments, dealing with special kinds of nuisances.

Third class Magistrates cannot hold any inquiry under this chapter—*Masaddar v. Ismulla*, 50 CLJ 291, 1929 CrC 660 (661), 57 Cal 666, 34 CWN 228.

Where a first class Magistrate, after hearing some evidence, ordered the opposite party to appear before him and, on their appearance before him, he did not hear the case but sent it for final disposal to a second class Magistrate, the procedure was illegal. According to the section, the original order to the opposite party should have been to appear before himself or the second class Magistrate. After the order to appear before himself was given, he should have proceeded with the case and as far as can be seen from the Code, he had no power at that stage to send it for disposal to another Magistrate—*Umrao Singh v. Kanwar Lal*, 39 Cr.L.J. 603, 175 IC 517, AIR 1938 Lah 323, 10 R.L. 733.

Taking such evidence (if any):—The expression "on taking such evidence, if any, as he thinks fit" does not make it incumbent on the Magistrate to hold an inquiry before making a conditional order under sub-sec. (1) of this section. If a Magistrate were to come to a finding *ex parte* that there was an encroachment on the public road before he made an order for the opposite party to put in a written statement and produce evidence it would be merely, in most cases, a waste of time, and no such procedure is laid down by the section. It is after the parties have appeared before the Magistrate that he makes his enquiry and comes to his finding—*Abdul Shakur*, AIR. 1931 All 257, 130 IC 627, 1930 A.L.J. 1335, 1931 CrC 417, Ind Rul 1931 All 291, 32 Cr.L.J. 565.

324. Unlawful obstruction:—Obstruction to a public road is a nuisance though no practical inconvenience is caused—*Umrao*, 23 All. 84; *Kedar Nath*, 23 All. 159. And it is absolutely irrelevant with what motive an obstruction upon the public highway is caused—*Kedar Nath*, supra. Encroachment upon the public road is an obstruction and a nuisance by itself, even though it may not cause any inconvenience. The question of the sufficient width of the road being left for public use, is no ground for allowing the encroachment or obstruction to continue. The public has a right to use every inch of the public path—*Jagroshan v. Madan*, 6 Pat. 428, 28 Cr.L.J. 910 (911), 8 P.L.T. 452, AIR 1927 Pat. 265. But, where the accused occupied a portion of the

road (by putting up a stall) with the *permission* of the Notified Area authorities, the Magistrate had no power to pass an order under this section—*Mul Chand*, 8 O.W.N. 651, 32 Cr.L.J. 1165, A.I.R. 1931 Oudh 397, 1931 Cr.C 829, Ind. Rul. 1932 Oudh 352.

A dam constructed across a public river which amounts to an obstruction to the river and causes damage to the lower riparian owners, may be ordered to be removed under this section—*Jagannath v. Chandika*, 6 O.L.J. 616, 21 Cr.L.J. 55. Where a cattle market is situated in a congested part of the town, so that owing to the cattle having to be driven through narrow and congested lanes, obstruction and inconvenience are caused to the public, it may be suppressed by an order under this section—*Mahendra*, 22 Cr.L.J. 582 (Cal.).

The obstruction must be *permanent, and not temporary*—*Dewrao*, 6 Bom.L.R. 358; and it must be an *existing* obstruction; a Magistrate cannot make any order as to what should be done in case of *future* obstructions—*Kashi v. Yar Md.*, 21 W.R. 10. See also Note 320. Thus, where a solid and vigorous branch of a tree is 15 feet above the level of a road in a village, it cannot be said that at such a height it causes an obstruction, having regard to the normal traffic, and it cannot be ordered to be cut down, merely because it is likely at some *future* time and under abnormal circumstances to prove an obstruction—*Gokul*, 22 A.L.J. 436, 26 Cr.L.J. 104, A.I.R. 1924 All. 667, 83 I.C. 664. See also *Consolidation Co-operative Society v. Har Gobind*, in Note 320. An owner or occupier of land has no right to allow his trees to overhang his neighbour's lands and he cannot acquire such a right by prescription. A person has a right to abate the nuisance himself and if the neighbour's trees overhang his lands he is entitled to cut the branches away to the line of the boundary and he can do so without notice if he could do so without entering upon the neighbour's lands. An action is certainly open, for either damages or an injunction, where damage has been caused. On the other hand he is not entitled to an action where the damage to his land is merely prospective—*Putraya v. Krishna Gota*, A.I.R. 1935 Mad 31, 67 M.L.J. 442, 40 M.L.W. 639, 152 I.C. 579, 1934 M.W.N. 1188, following *Laksmi Narain v. Tara Prosanna*, 31 Cal. 944, 8 C.W.N. 710; *Hari Krishna v. Shankar Vithal*, 19 Bom 420; *Ram Lal v. Dalgamjan*, 5 All 369, 1883 A.W.N. 58; *Vishnu Jagannath v. Vasudeo Raghunath*, A.I.R. 1918 Bom. 68, 47 I.C. 629, 43 Bom 164 and *Guru Sami v. Jerumal Raja*, A.I.R. 1929 Mad. 815, 122 I.C. 789.

Where a proceeding under this section is instituted against a number of persons for various acts of unlawful obstruction to a public way, it is essential that the order should state accurately with regard to each person the specific obstruction made by him which he is required to remove, unless it is alleged that all the persons are jointly responsible for all the obstructions complained of—*Ramohan*, 44 Cal. 61 (65), 20 C.W.N. 1171, 17 Cr.L.J. 409.

Where on a complaint being made to a Magistrate that a certain person had erected a platform on a public thoroughfare and had thereby obstructed it, the Magistrate ordered that such portion of the platform as might be obstructing the highway should be removed, *held* that the order was vague; the Magistrate ought to have definitely pointed out and marked off how much of the platform should be removed—*Jhau Lal*, 23 A.L.J. 43, 26 Cr.L.J. 731.

Under this section, it is only the power to order the *removal* of an obstruction (e.g., a *bund*) which is given to a Magistrate. There is no provision for the *reconstruction* of a *bund* which has once been removed under this section—*Rahimuddin v. Sher Ali*, 40 C.L.J. 597, 26 Cr.L.J. 517 (518).

325. "Public"—"Public place":—The provisions of this section apply to those cases where the obstruction is caused to a *public* thoroughfare—*In re Chundernath*, 5 Cal. 875; *Jagannath v. Parmeshwar*, 36 All 209; *In re Maharana*, 22 Bom. 988. It is not necessary that the way should be one which is generally used by the public; it is sufficient if the way is one which is or may be lawfully used by the public—*Hriday v. Shib Chandra*, 10 Cr.L.J. 210, 3 I.C. 7 (Cal.); *Churaman*, 12 A.L.J. 1024, 15 Cr.L.J. 724, 26 I.C. 172; *Bens Prasad v. Sarjoo*, 20 Cr.L.J. 556 (Pat.); *Rangi v. B. N. W. Ry.*

4 P.L.T. 402, 24 Cr.L.J. 855, 74 I.C. 1047. The Magistrate is to decide whether it is a public way or place—*Khushi*, 24 Cr.L.J. 457. A railway land is not necessarily a public place—*Rangi v. B. N. W. Ry.*, *supra*.

River or channel:—Where the *urani* (i.e., a tank) is a public *urani*, the water-course carrying the water to it must be held to be a public water-course and any interference with that water-course will fall under this section—*Ramaswami v. Ramanaathan*, 27 Cr.L.J. 105 (106), 91 I.C. 537, 1925 M.W.N. 663, 22 M.L.W. 470, A.I.R. 1926 Mad 165.

In order that action may be taken under this section for the removal of an unlawful obstruction, the way, river or channel where the obstruction is made must be one of public use, and the obstruction must be of that public use. An obstruction which is not caused to the people in general but to a certain number of agriculturists of a particular village using a certain channel, does not fall under this section—*Munna Tewari v. Chandrabali*, 50 All. 871, 26 A.L.J. 1285, 29 Cr.L.J. 661 (662), 110 I.C. 213, A.I.R. 1928 All 627, following *In re Maharana*, 22 Bom. 988; *Harnandan Lal v. Rampalak*, A.I.R. 1939 Pat 460, 18 Pat. 76, 40 Cr.L.J. 837, 184 I.C. 47, 20 P.L.T. 748, 12 R.P. 212, 6 B.R. 6, 18 Pat 76, 1939 P.W.N. 346. The number of persons claiming the right and the nature of right itself will no doubt be the criteria on which conclusions may be arrived. The best criterion will be to see whether the right is vested in such a large number of persons as to make them a community or class. (*Per Mohammad Noor, J.*). A public right does not depend upon the number of individuals who enjoy it. It is, generally speaking, that which must be enjoyed by members of the general unascertained mass of the public: *vide Desai's Dictionary of Legal Terms* and the decision in *Queen-Emp. v. Jasoda Nand*, 20 All. 501, 1898 A.W.N. 141. (*Per Varma, J.*)—*Harnandan Lal v. Rampalak*, *supra*.

Where the public have acquired a right to ford a river at a particular place, obstruction to this public right by erecting a *bund* in the river, which has the effect of rendering it unfordable, is obviously within the purview of this section—*Zaffer Nauab v. Emp.*, 32 Cal 930, 2 Cr.L.J. 762. But a field, which is on a lower level than the adjoining fields and over which surplus water of those adjoining fields used to flow into a tank, even if it could be described as a channel, is not such a channel as had been or could lawfully be used by the public, and action cannot be taken under this section for the removal of any obstruction from it—*Jagannath v. Parmeshwar*, 36 All. 209, 15 Cr.L.J. 229, 23 I.C. 181, A.I.R. 1914 All 213.

An obstruction to a private path (*In re Balaji*, 4 Bom.L.R. 882; *Gouri Shankar v. Bhagalu*, 11 O.L.J. 659, 81 I.C. 942, A.I.R. 1925 Oudh 130, 1 O.W.N. 356, 25 Cr.L.J. 1118), or to a private drain (*Shoodun*, 5 W.R. 58), or to a private channel (*Jagannath v. Parmeshwar*, 36 All. 209) does not come within the purview of this section.

Where a person raised the level of his low-lying land with the result that it prevented the flow of surplus rain water from the adjoining lands causing an overflow into other lands, he cannot be proceeded against under this section—*Corbet v. Sonaula*, A.I.R. 1933 Cal. 150, 34 Cr.L.J. 679, 144 I.C. 75, following *Jagannath v. Parmeshwar*, *supra*. But where the cultivators of two villages were affected, it was held that the case was close to the border line between private and public nuisances and that there was not sufficient reason for interference on revision on this point—*Bharosa*, 34 All. 345, 13 I.C. 999, 9 A.L.J. 355, 13 Cr.L.J. 183.

Where a *bandh* constructed and owned by the owner of a village had the effect of closing the passage of water from that village to a channel situate towards the south-east of the said *bandh* with the result that the fields of another village owned by another party had become water-logged and the crops over a considerable area held by a number of tenants had been entirely destroyed, the erection of the *bandh* amounted to a public nuisance within the meaning of sec 268, I. P. C., so as to justify a Magistrate in passing an order under this section—*Bhagwan Bakhsh Singh v. Emp.*, 28 Cr.L.J. 203, 99 I.C. 939, 4 O.W.N. 75, A.I.R. 1927 Oudh 122, 7 A.I.Cr.R. 440. See also *Jagannath v. Chandika* in Note 324.

Where there is a catchment area in the centre of which there is a water-course which is obstructed and the water which flows into the water-course is attempted to be carried away by the persons proceeded against under this section to their own village tank and the way they do it is by building a *bund* and cutting a new channel and by cutting down a new portion of the old *bund* of the catchment area which has existed for 30 years and more and the effect of which is to make the water falling on the catchment area run away in a direction different from that of the water-course and to prevent it falling into a public *urani* (i.e., a tank), that can be held to be an obstruction to the water-course and the order of the Magistrate directing those persons to restore the embankment of the catchment area to its original condition and to close the newly opened channel and to remove all obstructions caused by them to the free flow of water to the public *urani* is within the scope of this section—*Ramasami v. Ramanathan*, 27 Cr.L.J. 105 (106), 91 I.C. 537, 1925 M.W.N. 663, 22 M.L.W. 470, A.I.R. 1926 Mad. 165.

A latrine which is not built on any public place but on a man's own private land is not a nuisance. If its use leads to a nuisance to the neighbours, the owner may be directed to remove the nuisance and not to remove the latrine itself—*Gauri Shankar*, 26 A.L.J. 86, 29 Cr.L.J. 233, 107 I.C. 242, A.I.R. 1928 All 128; *Shri Ram*, A.I.R. 1935 All. 926, 37 Cr.L.J. 347, 159 I.C. 198, 1935 Cr.C. 1140, 1935 A.W.R. 1004, 1935 A.L.R. 1086. See also Note 331.

If a private right is set up by the defendant, the procedure of the new section 139A will apply.

326. Nuisance:—As to nuisances under the Penal Code, see secs. 268 to 294A, I P.C.

Gaming-house :—Keeping a gaming-house is a nuisance if crowds of disorderly persons flock there and cause annoyance to the public—*Thandavarayudu*, 14 Mad 364.

Burning ghat :—A burning ghat may not itself be a nuisance, but if the ghat or ground is in such an offensive state or if cremation is performed upon it in such a way as to be a source of injury, annoyance or danger to the neighbouring people, it will become a nuisance—*Indra Nath*, 25 Cal 425, 2 C.W.N. 113. See also *Muhammad Mohidin Sait v. The Municipal Commissioners of the City of Madras*, 25 Mad. 118 (130).

Graveyard :—An order prohibiting the use of a graveyard is not such as can be made under this section—*Sheo Saran Lal v. Lal Mohamad Lal*, 12 C.W.N. 70

Privy :—If a privy is allowed to remain in such a condition as to be a nuisance to passers by lawfully using a public place or way, proceedings to cause the nuisance to be abated may be instituted under this section—*In re Balaji*, 4 Bom.L.R. 882; *Gauri Shankar* and *Shri Ram* in Note 325 and Note 331

Slaughtering cattle, though it might be offensive to the prejudice and sentiments of a community, is not a nuisance—*Hadgee Mozhur Ali*, 25 W.R. 72. But see *Maksood Ali v. President, Union Board, Garhwa*, 40 Cr.L.J. 516, 180 I.C. 852, A.I.R. 1938 Pat. 183, 17 Pat. 669, 20 P.L.T. 288, 5 B.R. 505, 11 R.P. 549. See also *Sahabaz Khan v. Umrao Puri*, 30 All. 181 in this connection. The act of a manager of a bone mill in permitting a large stock of bones to remain uncovered in the open air for a long time so as to become rotten and to emit a smell noxious to the neighbouring people or passers-by, constitutes a public nuisance—*Berckefeld*, 34 Cal. 73. A noise which is injurious to the physical comfort of the community is a nuisance—*Krishna Mohan v. A. K. Guha*, 32 C.L.J. 42, 21 Cr.L.J. 669, *Munnalal v. Sridhar Rao*, 36 Cr.L.J. 591, 154 I.C. 365, A.I.R. 1934 Nag 193, 17 N.L.J. 54, 1934 Cr.C. 892. There is no authority for distinguishing the meaning of the word "community" in this section either from the word "public" or the "neighbours". A man cannot carry on a trade or occupation or keep goods or merchandise that is injurious to the health or physical comfort of his neighbour or of the public without becoming liable to an order under sec. 133, Cr. P. Code merely on the ground that there may be some part of the community which is not affected. Under sec. 133 a Magistrate can forbid the applicant

to work the engine of his factory, which makes considerable noise, from 9 P.M. to 5 A.M.—*Raghumandan*, A.I.R. 1931 All. 433, 53 All. 706, 1931 A.L.J. 912, 1931 Cr.C. 705.

A private owner may be guilty of acts done on his private property, if it gives rise to a public nuisance to those living in the neighbourhood. Therefore, the owner of a cremation ground may fairly be held to create a nuisance, if he allows the cremation of bodies upon the ground to be so performed as to annoy or endanger the lives and properties of persons living in the vicinity—*Indra Nath*, 25 Cal. 425, 2 C.W.N. 113.

A nuisance is not legalised by long enjoyment. No prescriptive right can be acquired to commit; maintain or continue a public nuisance involving actual danger to the health of the community.—*Sheikh Mohidin*, 2 Weir 59; *Municipal Commissioners v. Mahomed Ali*, 16 W.R. 6, 7 B.L.R. 499; *Balaji*, 4 Bom.L.R. 882; *Jagroshan v. Madan Pande*, 6 Pat. 428, 28 Cr.L.J. 910 (911). See also Note 320. Thus, an old slaughter-house can be removed, if it becomes offensive to the health of the neighbourhood—*Municipal Commissioners v. Mahomed Ali*, supra.

Cesspool :—Section 133, Cr. P. C., does not permit the removal of a construction of a proposed cesspool on the ground that it may prove a nuisance in the future. Preventive action in respect of an anticipated but non-existent nuisance, is limited to the construction of any building or the disposal of any substance which is likely to occasion conflagration or explosion. Except for this, before any unlawful obstruction or nuisance can be removed, it is necessary that such unlawful obstruction or nuisance should be in existence. A covered cesspool such as was in process of construction is not an obstruction. When completed it may or may not be a nuisance, but it cannot be postulated either by common sense or by the conditions of the Code that it is going to be a public nuisance—*Ambharose v. Sundarlal*, 35 Cr.L.J. 1414, 151 I.C. 754, 17 N.L.J. 158, A.I.R. 1934 Nag. 230, 1934 C.C. 1088. The question whether a cesspool is a public nuisance depends generally speaking upon the circumstances which can best be ascertained by an inspection of the locality—*Rajjoo Lal*, A.I.R. 1934 All. 325, 148 I.C. 615, 1934 Cr.C. 409, 1934 A.L.R. 429, 35 Cr.L.J. 708, 1934 A.L.J. 1179, 4 A.W.R. 1608.

327. Injurious trade or occupation :—The proprietor of a cremation ground who puts his land at the disposal of any one who wishes to cremate a dead body, cannot be said to be carrying on any trade or occupation, merely because he makes his profit by charging a high rent from a tenant who sells wood to the persons coming to cremate a dead body—*Indra Nath*, 25 Cal. 425.

Para 3 deals only with trades which are in themselves injurious to the health or physical comfort of the community, and not with those which are in themselves innocent, but in the course of which the manager or prier commits a public nuisance—*Bariro*, 1888 P.R. 47; *Calcutta Steam Navigation Co.*, 35 C.W.N. 115, 32 Cr.L.J. 235, 58 Cal. 854, A.I.R. 1930 Cal. 757, 1930 Cr.C. 1157, 129 I.C. 106. Thus, keeping a house of public entertainment is not by itself an offensive trade—*Bariro*, supra. In the above Calcutta case (35 C.W.N. 115), Ghose, J., has expressed the opinion that the addition of the words "the conduct of" by the Amendment Act of 1923 has widened the scope of the section; it is no longer confined to trades or occupations which are injurious in themselves, but it also applies to cases of trades which become injurious by reason of the conduct of them. Where the noise of the mill causes discomfort to the residents of the locality, action can be taken under this section—*Munnalal v. Sridhar Rao*, 36 Cr.L.J. 591, 154 I.C. 365, A.I.R. 1934 Nag. 193, 17 N.L.J. 54, 1934 Cr.C. 892.

This section relates to an existing state of affairs and not to the possibility of future results. If an occupation is perfectly innocent at present, the mere fact that it may in future become offensive to the neighbours, is no ground for issuing an order under this section. Thus, where there is no evidence that the occupation of manufacturing bricks is in itself injurious to the health or that the petitioners were so working

Where there is a catchment area in the centre of which there is a water-course which is obstructed and the water which flows into the water-course is attempted to be carried away by the persons proceeded against under this section to their own village tank and the way they do it is by building a *bund* and cutting a new channel and by cutting down a new portion of the old *bund* of the catchment area which has existed for 30 years and more and the effect of which is to make the water falling on the catchment area run away in a direction different from that of the water-course and to prevent it falling into a public *urani* (i.e., a tank), that can be held to be an obstruction to the water-course and the order of the Magistrate directing those persons to restore the embankment of the catchment area to its original condition and to close the newly opened channel and to remove all obstructions caused by them to the free flow of water to the public *urani* is within the scope of this section—*Ramasami v. Ramanathan*, 27 Cr.L.J. 105 (106), 91 I.C. 537, 1925 M.W.N. 663, 22 M.L.W. 470, A.I.R. 1926 Mad. 165.

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Cesspool :—Section 133, Cr. P. C., does not permit the removal of a construction of a proposed cesspool on the ground that it may prove a nuisance in the future. Preventive action in respect of an anticipated but non-existent nuisance, is limited to the construction of any building or the disposal of any substance which is likely to occasion conflagration or explosion. Except for this, before any unlawful obstruction or nuisance can be removed, it is necessary that such unlawful obstruction or nuisance should be in existence. A covered cesspool such as was in process of construction is not an obstruction. When completed it may or may not be a nuisance, but it cannot be postulated either by common sense or by the conditions of the Code that it is going to be a public nuisance—*Ambharose v. Sundarlal*, 35 Cr.L.J. 1414, 151 I.C. 754, 17 N.L.J. 158, A.I.R. 1934 Nag 230, 1934 C.C. 1088. The question whether a cesspool is a public nuisance depends generally speaking upon the circumstances which can best be ascertained by an inspection of the locality—*Rajoo Lal*, A.I.R. 1934 All 325, 148 I.C. 615, 1934 Cr.C. 409, 1934 A.L.R. 429, 35 Cr.L.J. 708, 1934 A.L.J. 1179, 4 A.W.R. 1608.

327. Injurious trade or occupation :—The proprietor of a cremation ground who puts his land at the disposal of any one who wishes to cremate a dead body, cannot be said to be carrying on any trade or occupation, merely because he makes his profit by charging a high rent from a tenant who sells wood to the persons coming to cremate a dead body—*Indra Nath*, 25 Cal 425.

Para 3 deals only with trades which are in themselves injurious to the health or physical comfort of the community, and not with those which are in themselves innocent, but in the course of which the manager or prier commits a public nuisance—*Barro*, 1888 P.R. 47; *Calcutta Steam Navigation Co.*, 35 C.W.N. 115, 32 Cr.L.J. 235, 58 Cal 854, A.I.R. 1930 Cal 757, 1930 Cr.C. 1157, 129 I.C. 106. Thus, keeping a house of public entertainment is not by itself an offensive trade—*Barro*, supra. In the above Calcutta case (35 C.W.N. 115), Ghose, J., has expressed the opinion that the addition of the words “the conduct of” by the Amendment Act of 1923 has widened the scope of the section, it is no longer confined to trades or occupations which are injurious in themselves, but it also applies to cases of trades which become injurious by reason of the conduct of them. Where the noise of the mill causes discomfort to the residents of the locality, action can be taken under this section—*Munnalal v. Sridhar Rao*, 36 Cr.L.J. 591, 154 I.C. 365, A.I.R. 1934 Nag 193, 17 N.L.J. 54, 1934 Cr.C. 892.

This section relates to an existing state of affairs and not to the possibility of future results. If an occupation is perfectly innocent at present, the mere fact that it may in future become offensive to the neighbours, is no ground for issuing an order under this section. Thus, where there is no evidence that the occupation of manufacturing bricks is in itself injurious to the health or that the petitioners were so working

it that the health of any one was being injured, an order under this section can be made *in anticipation* of the occupation being injurious to the health of the community in future—*Gokal Chand*, 1 Lah. 163, 21 Cr.L.J. 462. See also Note 320

The word "community" means public or neighbours. Hence an act which is injurious to the physical comfort of the neighbours must be held to be injurious to the physical comfort of the community—*Raghunandan*, 136 I.C. 621, 33 Cr.L.J. 331, 53 All. 706, 1931 A.L.J. 912, 1931 Cr.C. 705, A.I.R. 1931 All. 433. But where a trade (burning of lime) had been carried on for the last 45 years without any objection being raised by the majority of the public, the Magistrate cannot pass an order under this section on the complaint of a few neighbours who had recently come to the locality and deliberately chosen to reside there—*Lalman v. Bishambar*, 1932 A.L.J. 49, 33 Cr.L.J. 524 (526); A.I.R. 1932 All. 159, 54 All. 359, 137 I.C. 626, 1932 Cr.C. 169, 17 A.I.Cr.R. 156. Where a flour mill caused vibrations to the premises of two neighbours who alone complained of nuisance and there was no evidence whatever to suggest that any similar nuisance or inconvenience was caused to anybody else, this section had no application as any damage or inconvenience that might be caused to their premises by the working of the engine must be regarded as a private nuisance which might perhaps justify civil action on their part—*Rameshwar*, 40 Cr.L.J. 444, 180 I.C. 511, A.I.R. 1939 Bom. 92, 41 Bom.L.R. 84.

In order to bring a trade or occupation within the operation of this section, it must be shown that the interference with public comfort was considerable and a large section of the public was affected injuriously—*Fazal Din*, 1911 P.L.R. 117, 12 Cr.L.J. 146, 9 I.C. 891. The working of rice-husking machines through the whole night in a residential quarter is a public nuisance, being injurious to the comfort of the whole neighbourhood—*Phiraya*, 1904 P.R. 9. A lawful necessary occupation such as tanning ought not to be interfered with unless it is proved that it is injurious to the health of the community—*Shadi*, 1888 P.R. 17. Cultivation of maize, jowars, or *bujree* within a short distance from the town, is not an injurious occupation—*Moti Shah*, 1889 P.R. 39. A person who opens a new market close to an existing market in the village cannot be held to be carrying on a trade or occupation that is injurious to the health or physical comfort of the community; nor does the fact that the people in one market are sometimes forcibly dragged from it to the rival one, giving rise to mutual recrimination and abuse, justify an order under this section—*In re Moidin*, 2 Weir 62; *Moidin v. Abdulla*, 14 M.L.J. 207. But the Magistrate can in such a case take action under sec. 144 (see Note 373).

The discharge, into a river, of an effluent from an industrial factory which might be injurious to the health of the people who use the water in such stream, can be prohibited by an order under this section. But such pollution must be convincingly proved before any order can be passed against the wrong-doer; and it can be proved only after scientific inquiry and cannot be decided merely upon the opinion of the neighbouring villagers—*Deshi Sugar Mill v. Tapsi Kahar*, 8 P.L.T. 302, 28 Cr.L.J. 317, 100 I.C. 541, A.I.R. 1926 Pat. 506.

A prostitute who behaves orderly and quietly and creates no open scandal by riotous living and causes no actual discomfort to the neighbourhood, cannot be removed from her house merely on the ground of her bad character—*Nando Kumaree v. Anund Mohan*, 24 W.R. 68. So also, the mere existence of houses of prostitutes by the roadside or the fact that they ply their trade in their houses, cannot affect the physical comfort of the passers-by—*Basanta*, 5 C.W.N. 566. But where they are on the public road soliciting passers-by, their occupation is certainly injurious to the comfort of the community and may be stopped by an order under this section—*Nur Jan*, 1900 P.R. 2; though for the purposes of the Penal Code such an act does not amount to a public nuisance within the meaning of sec. 268 of that Code—*Nanni*, 22 All. 113.

If a person carries on a trade (e.g., working a lime-kiln) after obtaining a license from the Municipality, the Magistrate has jurisdiction to pass an order under this

section directing him to take precautions so as to prevent his trade from being injurious to the health of the community.' But it is generally inexpedient that a Magistrate should take action in such cases, because such matters are left by the Legislature to the control of the Municipal Boards—*Lalman v Bishambhar*, 1932 A.L.J. 49, 33 Cr.L.J. 524 (525), A.I.R. 1932 All. 159, 54 All. 359, 137 I.C. 626, 1932 Cr.C. 169. See also *Kedar Nath v. Satish Chandra* in Note 320.

Under the old law (before 1923), if a trade or occupation was found to be offensive, the Magistrate had to pass an order *totally prohibiting* it; under the present law, it may be ordered to be *regulated* instead of being totally suppressed.

The Magistrate has no power, while ordering a party to stop the occupation of brick-making, to order him to fill up the pits made by him. The 'removal' of the trade or occupation does not mean the restoration of *status quo* filling up the pits—*Bhagat Ram*, 51 All. 489, 30 Cr.L.J. 561 (562), A.I.R. 1929 All. 114, 1929 A.L.J. 177, 116 I.C. 21. It is evident that under cl. (2) of this section it is only the power to order removal of an obstruction which is given to the Magistrate. There is no provision for reconstruction of a *bundh* which has once been removed under this section—*Rahmaddi v. Sher Ali*, 26 Cr.L.J. 517, 85 I.C. 357, 40 C.L.J. 597, A.I.R. 1925 Cal. 399. See also *Ramaswami v. Ramanathan*, 27 Cr.L.J. 105, 91 I.C. 537, 1925 M.W.N. 663, 22 M.L.W. 470, A.I.R. 1926 Mad 165.

328. Building likely to fall:—There must be proof that the state of the building is dangerous in *præsenti* and not *in future*. That the building might become dangerous by another man altering the adjoining premises in future or undermining the building in question, is not a ground of action under this section—*Rajawan*, 1890 P.R. 5.

Person living, etc., in the neighbourhood —This section is limited to injuries likely to be caused to passers-by or "to persons living or carrying on business in the neighbourhood," i.e., those persons who are living actually in the alleged dangerous building or in the servant's houses in the compound belonging to it, as well as those members of the public whose ordinary avocations may take them to the neighbourhood of the building complained of. Therefore, a Magistrate cannot, under this section, order the owner to repair his house which is standing in its own compound *at a distance* from the public road—*Jasodanand*, 20 All. 501.

329. Fencing a tank:—Where a tank is used as reservoir for water, the Magistrate can order to have it fenced to prevent accidents; but where it is proved to be injurious to the health and comfort of the community, he may treat it as a public nuisance and cause it to be filled by—*In re Bistoo*, 10 W.R. 27.

Filling up excavations:—An order to fill up and bring in to one level with the adjacent land, excavations made for taking mud for the manufacture of bricks, is illegal, as the Magistrate can only order them to be *fenced*, even if they are by the side of a public way—*In re Sulemanji*, 22 Bom. 714. Cf 51 All. 489 cited in Note 327, *ante*.

Clearing of a tank or filling it up:—The Magistrate has jurisdiction to pass an order under this section to remove the nuisance from a tank either by re-excavating or by filling it up or by clearing the water weeds—*Kiran Chandra v. Ramesh*, 27 C.W.N. 459 (461), 72 I.C. 77, A.I.R. 1923 Cal 589, 24 Cr.L.J. 317.

Fencing a well:—Where a well adjoining a road is dangerous to the public as well as to the existence of the road, an order under sec. 133 can direct the construction of such works only as are necessary for the safety of the public and not of works necessary for the safety or improvement of the road—*Aluvala Guruviah*, 31 Mad 280 (282).

330. Procedure to be strictly followed:—Where a Magistrate commences proceedings under sec. 133, he is not at liberty to proceed otherwise than in conformity with the rules laid down in this chapter. He cannot dispose of the case summarily

under sec. 144—*Pitti Singh*, 8 W.R. 37; *Jassian v. Mangladha*, 29 Cr.L.J. 530, 109 I.C. 354, 9 Lah L.J. 522, A.I.R. 1928 Lah. 95.

Taking evidence :—Before passing a conditional order under this section a Magistrate is not bound to take evidence, because the proceedings under this section are entirely *ex parte*; but he should do so before making the order absolute under sec. 137—*Srinath v. Ainaddi*, 24 Cal. 395; *Abdul Shakur*, 130 I.C. 627, 1930 A.L.J. 1935, A.I.R. 1931 All. 257, 1931 Cr.C. 417, Ind. Rul. 1931 All. 291. But see *Consolidation Co-operative Society v. Har Gobind*, A.I.R. 1939 Lah. 276. The report or other information whereon the Magistrates took action before making the conditional order, is no evidence against the opposite party—*Raimohon*, 44 Cal. 61 (64), 20 C.W.N. 1171.

331. Nature of order:—An order under this section is *ex parte*—*Srinath v. Ainaddi*, 24 Cal. 395, 1 C.W.N. 217; *Rai Mohan*, 44 Cal. 61, 20 C.W.N. 1171.

The order should be directed to *particular* individuals, and must not be *general*, except in cases of emergency, to which Chapter XI applies, when they can be addressed to the public generally—*Jokhu*, 8 All. 99 (100).

The order under this section must not be vague; it must be such that the persons to whom it is directed will be able to learn from its contents what they are ordered to do, for the purpose of complying with it—*Kali Mohan v. Nakari*, 11 C.L.J. 114, 11 Cr.L.J. 213, 5 I.C. 722. If the order is *ambiguous* and open to two interpretations, the one most favourable to the accused will be adopted—*Parbutty*, 16 Cal. 9.

The order must be *conditional*, and not absolute. Every order should state the *time* within which and the *place* where the person to whom it is issued may appear and move to have it set aside—*Braja Kanta*, 9 Cal. 637. The Code itself calls the order under sec. 133, Cr. P. C., a conditional order and that under sec. 142, Cr. P. C., an injunction. The forms are entirely different, and the form in which the conditional order is expressed is such as not to amount to an injunction—*Hargovind Dullabh Jiwan v. Kikabhai Rahimatullah*, A.I.R. 1938 Nag. 84 (85), I.L.R. 1938 Nag. 348, 176 I.C. 257, 11 R.N. 45. This section clearly contemplates that in suitable cases the order initially made may be modified and the modified order may be allowed to stand—*Jhan Lal*, 26 Cr.L.J. 731, 86 I.C. 219, 23 A.L.J. 43, A.I.R. 1925 All. 310.

When in a proceeding under this section, instituted against a number of persons, it is alleged that various unlawful obstructions have been caused upon a public way, it is essential that the order should state accurately, with regard to each person, the specific obstruction made by him, which he is required to remove, unless it is alleged that all the persons are jointly responsible for all obstructions mentioned. No person can be called upon under this section to remove an obstruction not caused by himself—*Rai Mohan*, 44 Cal. 61 (65), 17 Cr.L.J. 409, 35 I.C. 969, 20 C.W.N. 1171; *Khem Chand*, 28 Cr.L.J. 1036, 106 I.C. 220, A.I.R. 1928 Lah. 187.

And lastly, the order must be confined to the removal of the *nuisance* only, and should not direct the removal of the *whole thing*; for instance, in the case of a tank, the order should be to fence the tank and not to fill up the tank—*Bistoo*, 10 W.R. 27. If the Magistrate finds a burning *ghat* to be a nuisance, he cannot order the removal of the ghat itself but can order the removal of the nuisance, *i.e.*, he can take such steps as would result in the cremation ceasing to be a nuisance—*Indra Nath*, 25 Cal. 425. In a case where sparks from a forge might set fire to a cotton stored in an adjoining building, the Magistrate cannot order the removal of the forge, but should order its construction in such a way that sparks shall not issue out of it into the open air—*In re Lahanu*, Ratanlal 872. If the branch of a tree is likely to fall on passers-by, the Magistrate should not order the tree to be cut down but may secure the safety of the public by ordering proper support to be given so as to prevent the branch from falling—*Gokul*, 22 A.L.J. 436, 26 Cr.L.J. 104, A.I.R. 1924 All. 667. If the use of a latrine is made in such a way as to be a nuisance to the neighbours, the Magistrate should order the owner to remove the nuisance of the misuse and not to remove the latrine itself—*Gauri Shankar v. Srikrishna*, 26 A.L.J. 86, 29 Cr.L.J. 233,

A.I.R. 1928 All. 128, 107 I.C. 242; *Shri Ram*, A.I.R. 1935 All. 926, 1935 A.W.R. 1004, 1935 Cr.C. 1104, 1935 A.L.R. 1086, 159 I.C. 198, 37 Cr.L.J. 347. But the removal of the latrine may be ordered in a case where it adjoins a well, the water of which the public drink and there is danger of injury to the health of the public—*Mahabir Prasad v. Dhanusdhari Prasad*, A.I.R. 1936 Pat. 409, 163 I.C. 514, 1936 Cr.C. 641, 1936 P.W.N. 358. Where the facts found on proper evidence were that the noise made by the factory engine was such as to be a serious nuisance to the neighbours, meaning thereby a considerable number of people living in the neighbourhood, preventing them from sleeping at night and concentrating on their work during the day, the proper order to make was, not that the factory should be closed, but that the working of the engine should be forbidden between the hours 9 P.M. to 5 A.M.—*Rameshwar*, A.I.R. 1939 Bom. 92 (95), 41 Bom.L.R. 84. See also *Raghunandan Prasad*, A.I.R. 1931 All. 433, 1931 Cr.C. 705, 136 I.C. 621, 33 Cr.L.J. 331, 53 All. 706, 1931 A.L.J. 912. But where the only dispute between the parties was whether the trade which was being carried on by the opposite party should be ordered to be stopped, there was no dispute that it should be regulated in any manner and the opposite party were insisting that they were carrying on their trade in a proper manner and that it was in those circumstances not a nuisance, it is not within the province of a Court of Revision, when the matter has been decided against them, to impose some conditions which the evidence does not justify and to which the minds of the parties were never directed—*Maksood Ali v. President, Union Board, Garhwa*, 40 Cr.L.J. 516 (518), 180 I.C. 852, A.I.R. 1938 Pat. 183, 17 Pat. 669, 20 P.L.T. 288, relying on *Municipal Commissioners of the Suburbs of Calcutta v. Muhammad Ali*, 7 B.L.R. 499, 16 W.R. Cr. 6 and *Municipal Commissioners for the Suburbs of Calcutta v. Amanat Ali*, 7 B.L.R. 516.

An order for the removal of a house which is said to represent an encroachment or obstruction on a public way cannot be supported when there is no finding as to the extent to which the house in question encroaches upon it. The extent of the encroachment should be ascertained by relaying the map on the ground or otherwise and should be definitely specified in the order—*Bhagat v. Ramrup*, 21 C.L.J. 116, 27 I.C. 224; *Jhau Lal*, 26 Cr.L.J. 731, 86 I.C. 219, 23 A.L.J. 43, A.I.R. 1925 All. 310. But where the Magistrate passed an order for removal of the obstruction from a particular settlement *dag*, which was well-defined in the settlement record and, when notice was served upon the opposite party to show cause under this section, he did not object on the ground of vagueness of the notice, the order was not liable to be set aside—*Rajani Kanta v. Ibrahim*, A.I.R. 1929 Cal. 507 (508), 33 C.W.N. 748, 57 Cal. 252.

See also the last paragraph of Note 327.

332. Dropping of proceedings:—If a Magistrate is satisfied that there are no sufficient grounds for taking action under this section, he can drop the proceedings—*Issur Churn v. Kali Churn*, 8 Cal. 883. The High Court will seldom interfere with the exercise of the discretion by the Magistrate, leaving the petitioner to have recourse to his ordinary rights in the Civil Court if he has any cause of action against the opposite party—*Jogendra v. Rakhal*, 14 C.W.N. cxix.

Proceedings once dropped can be revived, if sufficient cause is known—*Ishan Chandra v. Prasanna*, 5 C.W.N. 173.

See also para 345

Further inquiry:—Section 437 (now 436) enables a superior Court to direct further inquiry in case of offences. But proceedings under this chapter are not proceedings in respect of offences, and therefore sec. 437 (now 436) cannot apply. So, if a Magistrate drops proceedings under this section, neither the District Magistrate nor the Sessions Judge can order further inquiry under sec. 437 (now 436)—*Srinath v. Amuddi*, 24 Cal. 395, 1 C.W.N. 217. The proper procedure for the District Magistrate in such a case is to refer the matter to the High Court—*Indra Nath*, 25 Cal. 425, 2 C.W.N. 113; *Prithipal*, 2 O.W.N. 549, 26 Cr.L.J. 1251, 88 I.C. 995.

Fresh proceedings:—There is nothing in the law to prevent the Magistrate drawing up fresh proceedings based on proper materials—*Satish v. Krishna*, 34 C.W.N. 957 (1959), 32 Cr.L.J. 189, 128 I.C. 810, A.I.R. 1931 Cal 2, Ind. Rul. 1931 Cal. 106, 1931 Cr.C. 34.

333. Orders not under this section:—A Magistrate has no jurisdiction under this section to pass the following orders :—

(1) An order regarding the custody and guardianship of children—*Anon.*, 2 Weir 66 (67).

(2) An order directing a person not to cultivate his land—*Dhan Singh*, 1 A.L.J. 615.

(3) An order on a person to lop off branches of a tree of his, which overhung a certain house and might afford facility to thieves—*Hiralal*, 1883 A.W.N. 22.

(4) An order to close a graveyard—*Sheo Saran v. Lal Md.*, 12 C.W.N. 70.

(5) An order prohibiting persons to drink the water of a certain well—*Sheoamber*, 1893 A.W.N. 145.

(6) A general order prohibiting the public to frequent the roads and places of a certain village between certain hours—*Komul Kisto*, 12 C.L.R. 231.

(7) An order calling upon a person to repair a well, and upon his failure to do so, directing him to pay a fine, wherefrom the Magistrate ordered the well to be repaired, is an illegal order—*Tatya, Ratanlal*, 50

334. Civil Suits:—No suit will lie in a Civil Court to set aside an order passed under this section, and the Civil Courts have no jurisdiction to question or set aside such order—*Chandra Seekar*, 12 W.R. 18 (F.B.); *Ujalamoyi v. Chandra* 4 B.L.R. 24. Thus, a Civil Court has no jurisdiction to order a road which has been declared by the Magistrate as a public road to be closed—*Rooke*, 11 W.R. 434 (Civil). But in spite of an order under this section a suit will lie for a declaration under sec. 42 of the Specific Relief Act against any one of the public who claims to use the road as a public road—*Chuni Lal v. Ram Kishan*, 15 Cal. 460 (F.B.); *Gooroo v. Probhoo*, 19 W.R. 426 (Civil); *Mutty Ram v. Mohi Lal*, 6 Cal 291; *Nilkanthappa v. Magistrate*, 6 Bom. 670; *Secretary of State v. Jethabhai Kalidas*, 17 Bom. 293. For contra see *Khodabuksh v. Manglai*, 14 Cal. 60 which was overruled by the Full Bench in *Chuni Lal v. Ram Kishan*, supra.

A Magistrate's order under this section is not a conclusive determination of the question of title; it is, therefore, competent to a Civil Court to try the question whether a land is private property or a public place—*Mutty Ram v. Mohi Lal*, 6 Cal. 291, so also, it is open to the party to bring a declaratory suit against any member of the public who use the road as a public one—*Chuni Lal v. Ram Kishan*, 15 Cal. 460. The suit for a declaration of private right can be brought against persons who initiated proceedings under sec. 133, Cr. P. C., without impleading any other member of the public—*Sheikh Ekbar Ali v. Anu Manjhi*, 14 C.W.N. cxxxix.

Para. 2, sec. 133, Cr. P. C., prevents the Civil Court from questioning the order duly made by a Magistrate under sec. 133 which empowers the Magistrate to pass a conditional order. There is no such bar to the absolute order of a Magistrate being questioned in Civil Court. A similar clause does not appear in sec. 140, Cr. P. C., which deals with an absolute order. The proceedings under sec. 133 are more or less summary and the Magistrate's decision goes so far as to fix upon the party who must go to the Civil Court to get a civil dispute decided—*Dulchand*, A.I.R. 1929 All. 833, 51 All. 1025, 121 I.C. 560, 1929 Cr.C. 358.

To such a suit the Secretary of State cannot properly be made a party—*Chunni Lal v. Ram Kishan*, 15 Cal. 460 (470) (F.B.). Nor can the plaintiff sue the Magistrate personally, for the Magistrate has only acted in the discharge of his legal duty in a judicial character—*Chunni Lal v. Ram Kishan*, 15 Cal. 460 (466), following *Ujalamoyi v. Chandra*, supra and *Meechoo v. Ravenshaw*, 11 Beng.L.R. 9, 19 W.R. 345; *Nilkanthappa v. Magistrate*, 6 Bom. 670. But the public roads being vested by sec. 37 of Bombay

Act V of 1879 in the Government of Bombay, who are thus "interested to deny" the plaintiff's title to the land, the plaintiff (subject to the discretion of the Court) is entitled to a declaration as against the Government (i.e., the Secretary of State for India in Council) of his right to the land under sec. 42 of the Specific Relief Act (I of 1877)—*Secretary of State v. Jethabhai Kalidas*, 17 Bom. 293 (298). See also *Nilkanthappa v. Magistrate*, 6 Bom. 670.

The existence of the Magistrate's order under sec. 133, Cr. P. C., does not of itself shift the onus of proof from the defendant to the plaintiff who is in possession—*Secretary of State v. Jethabhai Kalidas*, 17 Bom. 293 (299).

335. Revision:—The High Court can interfere when there is no evidence or no reasonable evidence on record to justify the Magistrate's finding or where the finding arrived at is perverse or such as no reasonable man could have arrived at on the evidence produced—*Abdul Wahid v. Abdullah*, 45 All. 656 (661). Thus, the High Court will interfere where an attempt has been made to abuse the powers of the Court, that is, where the Magistrate has given a decision regarding matters which properly lie within the cognizance of Civil Courts (as for instance, in a case when a private right has been set up by a party)—*Abdul Wahid v. Abdullah*, 45 All. 656 (657), 21 A.L.J. 529, 74 I.C. 849.

When the High Court has power to confirm the order of the Magistrate, there is no ground for holding that it has not also power to modify that order to such extent as may seem fit—*Manohar*, 30 Cr.L.J. 670 (672), 116 I.C. 786, 1929 A.L.J. 385, A.I.R. 1929 All. 220, Ind. Rul. 1929 All. 610.

But it is not the practice of the High Court to entertain an application in revision unless the party aggrieved had first moved the Sessions Judge under secs. 435 and 438—*Rash Behari v. Phani Bhushan*, 48 Cal. 534, 22 Cr.L.J. 650.

336. Party:—An order under this section, and, any order under the subsequent sections of this chapter is an order against a particular individual. When that individual dies, the order ceases to have any effect and must be considered spent, and the Magistrate would not be entitled to act under sec. 140 (2). If he considers it necessary to issue another order against the successor of the deceased, he must take separate proceedings—*Jugal Kishore*, 26 A.L.J. 405, 29 Cr.L.J. 445 (446), 108 I.C. 565, A.I.R. 1928 All. 300, 9 A.I.Cr.R. 434.

There can be no doubt that an order under sec. 133, Cr. P. C., binds the person against whom the order is passed and nobody else—*Ram Sahai v. Uttama*, 36 Cr.L.J. 144, 152 I.C. 737; *Jugal*, 108 I.C. 565, 26 A.L.J. 405, 29 Cr.L.J. 445, A.I.R. 1928 All. 300.

336A. Costs:—There is no provision in Chapter X of Cr. P. C., for the payment of costs by any party to the proceeding—*Rahimaddi v. Sher Ali*, 26 Cr.L.J. 517, 85 I.C. 357, 40 C.L.J. 597, A.I.R. 1925 Cal. 399.

134. (1) The order shall, if practicable, be served on the person against whom it is made in manner Service or notification of order. herein provided for service of a summons.

(2) If such order cannot be so served, it shall be notified by proclamation, published in such manner as the *Provincial Government* may by rule direct, and a copy thereof shall be stuck up at such place or places as may be fittest for conveying the information to such person.

Amendment:—The words "Provincial Government" have been substituted for "Local Government" by sec. 4 of the Government of India (Adaptation of Indian Laws) Order, 1937.

337. Service of notice:—In case of service of a conditional order under sec. 133, Cr. P. C., the procedure, which is provided by sec. 71, Cr. P. C., cannot be made use of unless service in the manner mentioned in sections 69 and 70 cannot be effected by the exercise of due diligence—*Beni v. Jadu*, 43 C.L.J. 113, 31 C.W.N. 148, A.I.R. 1926 Cal. 1208. If personal service is not practicable, the order may be affixed to the house of the defendant—*Narayan*, 12 Mad. 475 (477). It is not open to resort to the procedure laid down in cl. (2) of this section when no attempt was made to serve the order through any relative as laid down in sec. 70, or by affixing to the petitioner's house as laid down in sec. 71—*Abdul Jabbar*, 36 Cr.L.J. 736, 155 I.C. 416, A.I.R. 1935 Cal. 251, 39 C.W.N. 141, 60 C.L.J. 474, 1935 CrC 333. The terms of this section are directory and ought to be followed; but an omission to follow its provisions is a mere irregularity and does not nullify the order—*Parbutty*, 16 Cal 9; *Abu Hussain Shaikh v. Emp.*, 44 C.W.N. 641 (646), A.I.R. 1940 Cal. 358; *Madan Kishore*, 41 Cr.L.J. 414 (415), 187 I.C. 135, 21 P.L.T. 231. Thus, the non-service of notice does not invalidate the order if the parties admit that they knew of the existence of the notice—*Hochan v. Elliot*, 5 W.R. 4. Where the parties had information of the order, it is immaterial that the mode in which it was brought to their notice was not in strict accordance with the provisions of this section—*Nur Jan*, 1900 P.R. 2; *Khushi Ram*, 4 Lah. 224 (229), 24 Cr.L.J. 457. So, where the persons against whom the order was made were residents of a *Mohalla*, and the order instead of being served on them personally was stuck up in some conspicuous place of the *Mohalla*, and the parties came to know of the order, *held* that the service of the order, though irregular, did not affect its validity—*Khushi Ram*, *supra*. Service of notice on agent is sufficient when it is not shown that the party was kept in ignorance of what was going on—*Emp. v. Ram Bilas*, 30 All. 364.

135. The person against whom such order is made shall—

Person to whom order is addressed to obey or show cause or claim jury.

(a) perform, within the time *and in the manner* specified in the order, the act directed thereby; or

(b) appear in accordance with such order and either show cause against the same, or apply to the Magistrate by whom it was made, to appoint a jury to try whether the same is reasonable and proper.

338. Application to show cause or for jury:—Since the proceeding under sec. 133 is in the first instance entirely *ex parte*, and since the report or other information whereon the Magistrate has taken action before making the conditional order under section 133 is no evidence against the opposite party, it is consequently desirable that reasonable opportunity should be given to the opposite party to show cause as contemplated by this section and to adduce evidence as prescribed by section 137—*Rai Mohan*, 44 Cal. 61 (64), 20 C.W.N. 1171, 35 I.C. 969.

Under this section a party cannot *both show cause and apply for a jury* at the same time; he has the right to adopt only one of the alternatives—*Kishori Lal*, 13 C.W.N. 367, 10 Cr.L.J. 494, 4 I.C. 72; *Jiblal v. Gena*, 24 Cr.L.J. 492, 72 I.C. 956, 4 P.L.T. 15, A.I.R. 1923 Pat. 229. This section gives persons against whom conditional orders have been passed under sec. 133, Cr. P. C., three alternatives: they may carry out the order, or they may appear and show cause against the order, or they may apply to the Magistrate to appoint a jury to try whether the order is reasonable or proper, that is to say, they have the choice of obedience to the order, or the choice of being heard by one tribunal but not by two; they have a choice of being heard by a Magistrate or they have the choice of being heard by a jury. The purpose of the section is clear. They must either obey the order or show cause why the order should not have been made. They can be heard once in their defence but they cannot be

heard twice—*Jethanand v. Shikarpur Municipality*, A.I.R. 1940 Sind 24 (25), I.L.R. 1939 Kar, 179, 41 Cr.L.J. 364, 186 I.C. 723.

The application for the appointment of a jury must be made to the Magistrate by whom the conditional order under sec. 133 was made. Where the defendant appears and demands a jury under sec. 135, the matter must be disposed of by the Magistrate issuing the conditional order, and not by any other Magistrate to whom the case might have been referred for inquiry. If the defendant does not demand a jury but appears and shows cause, the Magistrate who issued the conditional order under sec. 155 may make over the case to any other Magistrate for disposal—*Jagroshan v. Madan Pande*, 6 Pat. 428, 8 P.L.T. 452, 28 Cr.L.J. 910 (911), A.I.R. 1927 Pat. 265, 105 I.C. 238; *Angappa v. Perumal*, 43 Mad. 316, 37 M.L.J. 313, 1919 M.W.N. 696, 20 Cr.L.J. 761, 53 I.C. 489. See also *Manipur v. Bidhu Bhushan*, 26 I.C. 146, 42 Cal. 158, 18 C.W.N. 1086, 15 Cr.L.J. 698. See also Notes 343A and 355.

339. Claim of private right:—If the person against whom an order under sec. 133 is made claims a *private* right of way, the question as to the existence of the private right is to be decided by the Magistrate himself and not to be left to the jury—*Kailash v. Ram Lal*, 26 Cal. 869 (870). See sub-section (3) of sec. 139A.

When a person has applied for a jury and a jury has been appointed, the party cannot set up the plea that he caused the obstruction under a claim of private right to the way—*In re Lachman*, 22 All. 267; *Ram Bilas*, 30 All. 364. This is now made clear by the new section 139A. According to the procedure laid down in that section, as soon as the defendant appears before the Magistrate, the latter shall question him as to whether he claims a private right; even if the defendant applies for a jury, still the Magistrate shall question him whether he has any such claim, before the Magistrate proceeds to appoint a jury; and the defendant, if he has any such claim, will have to state and substantiate it before the Magistrate, and will not be allowed to set up any such claim before the jury.

The application for a jury will operate as a waiver of the plea of a claim of private right. Once a jury is appointed on the application of the person against whom an order has been made under sec. 133, it is not open to him at a later stage to set up a claim of right to the subject of contention and to have his claim determined by the Magistrate before the jury proceed with the matter—*Ah Yway v. Ma Gyi*, 7 Bur.L.T. 23, 15 Cr.L.J. 269, *Abdul Shakur*, 130 I.C. 627, 1930 A.L.J. 1335, A.I.R. 1931 All. 257, 1931 Cr.C. 417, Ind. Rul. 1931 All. 291, 32 Cr.L.J. 565. The Patna and Lahore High Courts took a different view and held that there could not be a waiver of a mandatory provision such as was contemplated by sec. 139A, Cr. P. Code—*Mahadeo Lal v. Hossaini Pandey*, A.I.R. 1930 Pat. 199, 31 Cr.L.J. 53, 120 I.C. 289, Ind. Rul. 1930 Pat. 1; *Hamid Ali*, 32 Cr.L.J. 250, 129 I.C. 222, A.I.R. 1930 Lah. 1046, 1930 Cr.C. 1222, Ind. Rul. 1931 Lah. 158.

Before the Magistrate makes an enquiry under sec. 139A, Cr. P. C., as to whether there is evidence in support of the denial of the existence of a public way, the petitioner need not elect to have the matter fixed by a jury under sec. 135. It is still open to the petitioner to elect to have the matter tried by a jury after it has been decided by the Magistrate that there is no reliable evidence in support of the denial of the existence of the public way—*Shamji Tricumdas v. Rab Moye*, 56 C.L.J. 249, 34 Cr.L.J. 532, 143 I.C. 178, A.I.R. 1933 Cal. 318.

136. If such person does not perform such act or appear and show cause or apply for the appointment of a jury as required by section 135, he shall be liable to the penalty prescribed in that behalf in section 188 of the Indian Penal Code, and the order shall be made absolute.

Consequence of his failing to do so.

340. Object of section:—The provisions of this section are stringent, because the intention is to create facilities for conditional orders, which Magistrates are authorised to pass under this chapter, becoming final without needless delay, and thereby promptly to ensure public safety—*Narayan*, 12 Mad. 475 (478). Therefore, an order under this section must be passed without delay. Where a conditional order passed under section 133 was made absolute four years later, the High Court treated the final order as resting on no conditional order and reversed it—*In re Rangabai*, 23 Bom.L.R. 844, 22 Cr.L.J. 605.

341. Order absolute:—If the person neither performs the act nor appears and shows cause, nor applies for a jury, he can be punished at once, without its being necessary to wait until an order absolute has been passed. The words are “and the order shall be made absolute”—*Bishambar*, 13 All. 577 (579). Where an order has become absolute under this section, it cannot be questioned in any subsequent proceedings even if its legality were not fully established—*Nur Jan*, 1900 P.R. 2. This section conclusively presumes that the conditional order was correctly made, and it is not competent to the party to go behind the order and question its validity in proceedings under sec. 188, I. P. Code—*Narayana*, 12 Mad. 475 (478); *Bishambar*, 13 All. 577 (579). But where the Magistrate makes an order which he had no jurisdiction to pass, the party affected by it can go behind the order—*Jasodanand*, 20 All. 501.

Even though an order has been made absolute under this section by reason of the party not being able to attend on the date fixed, the Magistrate can set aside the *ex parte* order on the appearance of the party. In such a case the Magistrate must proceed to record evidence as provided by sec. 137 and shall then either make the order absolute again or shall drop the proceedings, as the case may be—*Ramsaram v. Ram Lagan*, 19 Cr.L.J. 214, 4 Pat.L.W. 50, 43 I.C. 790. But see *Shahabuddin v. Abdul Kader* in Note 360.

342. No further notice necessary:—Whenever the time fixed in the order under sec. 133 has been allowed by the defendant to pass without compliance with the order or without protest, the liability to punishment attaches at once, and no further notice is necessary under sec. 140—*Aluvala Guruviah*, 31 Mad. 280 (282). See Note 360 under sec. 140.

137. (1) If he appears and shows cause against the order, Procedure where he the Magistrate shall take evidence in the appears to show cause. matter as in a summons-case.

(2) If the Magistrate is satisfied that the order is not reasonable and proper, no further proceedings shall be taken in the case.

(3) If the Magistrate is not so satisfied, the order shall be made absolute.

343. Scope:—An order under this section can only be made, where there is an existing obstruction or nuisance and cannot be made in respect of some future nuisance. But the Magistrate is not precluded from making a final order under this section owing to the fact that he had made an order under sec. 142, Cr. P. C., which was complied with—*Rebati Mohan v. Chattai Chandra*, 63 C.L.J. 5, A.I.R. 1936 Cal. 692, 38 Cr.L.J. 173, 166 I.C. 221, 1936 Cr.C. 954, 9 R.C. 490.

343A. 'Magistrate':—The power to issue a conditional order belongs only to the Magistrate mentioned in the beginning of Sec. 133. The power to appoint a jury also belongs to the Magistrate who made the conditional order (see sec. 135). But the Magistrate who is to hold the inquiry under sec. 137 need not be the Magistrate who made the order under sec. 133; the Magistrate in sec. 137 is the Magistrate before whom the party is ordered to appear (see sec. 133); he may be either the

Magistrate himself who issued the conditional order, or a Magistrate of the first or second class mentioned in the last para of sec. 133 (1). This seems to be the meaning of secs. 133 and 137 read together. Therefore, where a Magistrate issuing a conditional order under sec. 133 required certain persons to appear before a 2nd class Magistrate, the latter can exercise his powers under sec. 137 and can take evidence, confirm the conditional order or stay further proceedings. See *In re Narasimha*, 9 Mad. 201; *Preonath v. Gobordhone*, 25 Cal. 278; *Venkanna*, 2 Weir 61; *Jagroshan v. Madan*, 6 Pat. 428, 8 P.L.T. 452, 28 Cr.L.J. 910, A.I.R. 1927 Pat. 265. See also Notes in paras. 347 and 357A.

344. Taking evidence:—When a party appears to show cause, the Magistrate is bound to take evidence as in a summons case. He cannot make the order absolute without taking evidence—*Jassi*, 20 A.L.J. 692, A.I.R. 1922 All. 335, 25 Cr.L.J. 266; *In re Mahadaji*, 11 Bom. 375; *Bechan*, 47 All 341, A.I.R. 1925 All 614, 26 Cr.L.J. 905; *Sant Sahai v. Lachman Singh*, 9 O.L.J. 64, 23 Cr.L.J. 250; *Attar Singh v. Hari Singh*, 27 P.L.R. 764, 28 Cr.L.J. 60; *Kalyan Mul Mathur*, A.I.R. 1936 Pat. 577, 37 Cr.L.J. 1159, 165 I.C. 542, 1936 Cr.C. 948. Even if the party appears after the time fixed in the order, but before the case is taken up, the Magistrate is bound to hear his objection and take evidence for the order he has to make—*In re Bistoo*, 10 W.R. 27. The absence of the objector at an adjourned hearing after he has once appeared to show cause, will not absolve the Magistrate of his duty of taking some evidence at least before making the order absolute—*In re Ram Singh*, 2 Bom.L.R. 818; *Bechan* (supra). The Magistrate cannot act solely on his own opinion; he is bound to take evidence as the basis of his order which he is to make—*Doraisami v. Sudarsana*, 17 M.L.T. 142, 16 Cr.L.J. 207; *In re Mahadaji*, 11 Bom. 375; *Kolandavela*, 2 Weir 62; *Shadi*, 17 P.R. 1888 (Cr.); *Sita Ram*, 32 P.R. 1917, 41 I.C. 1000, 18 Cr.L.J. 888; *Khair Din v. Wasan*, A.I.R. 1935 Lah. 28. It is illegal for him to make the order absolute solely on the report of a Tahsildar. He must go into the evidence adduced by the defendant and record his findings—*Ismail v. Banda*, 20 A.L.J. 657; 27 Cr.L.J. 864, 95 I.C. 944; *Ran Bahadur v. Bhagwati*, 27 Cr.L.J. 1254, 3 O.W.N. 844; *Abdul Karim*, A.I.R. 1927 All. 381, 49 All 453, 25 A.L.J. 424, 28 Cr.L.J. 294; *Achhru*, 11 Lah. 247, 31 Cr.L.J. 880 (881), 31 P.L.R. 503, A.I.R. 1930 Lah. 662, 125 I.C. 613. The report or information received by the Magistrate before passing the conditional order under sec. 133, is no evidence against the other party (the proceeding under sec. 133 being entirely *ex parte*) and the Magistrate cannot act upon it but is bound to take evidence in the presence of the opposite party—*Srinath v. Ainaddi*, 24 Cal. 395, 1 C.W.N. 217; *Raimohan*, 44 Cal. 61, 20 C.W.N. 1171, 17 Cr.L.J. 409, 35 I.C. 969, A.I.R. 1927 Cal. 207; *Rameshwar*, A.I.R. 1939 Bom. 92, 41 Bom.L.R. 84, 40 Cr.L.J. 444, 180 I.C. 511, 11 R.B. 301. The Magistrate cannot, on perusing the statements of the parties, but without taking any evidence, cancel the order under sec. 133, Cr. P. C.—*Ganga Prosad v. Khatish Chandra*, A.I.R. 1929 Cal. 21, 118 I.C. 863, 30 Cr.L.J. 973. The provisions of sec. 137 (1), Cr. P. C., are imperative and the failure of the Magistrate to follow the same vitiates the entire proceedings—*Tirkha v. Nanak*, 28 Cr.L.J. 291 (292), 49 All 475, 25 A.L.J. 377, A.I.R. 1927 All 350, 100 I.C. 371; *Kishori Lal*, 13 C.W.N. 367 (369), 10 Cr.L.J. 494, 4 I.C. 72; *Upendra v. Rampal*, 10 C.L.J. 482. The provision of clause (1) of this section mandatory and before making the order absolute it is imperative that evidence should be taken as in a summons case. The Magistrate could not, without recording evidence, act on his own opinion—*Jagan Nath*, 28 Cr.L.J. 510, 101 I.C. 894, A.I.R. 1927 All 825, *Khair Din v. Wasan*, A.I.R. 1935 Lah. 28, 37 Cr.L.J. 70, 159 I.C. 374, 1935 Cr.C. 19. Such action on the part of the Magistrate in ignoring the clear provisions of this section amounts to a substantial error and cannot be cured by sec. 537, Cr. P. C.—*Khair Din v. Wasan*, supra, following *Bhura v. Tara*, 49 All 170, 28 Cr.L.J. 159, 25 A.L.J. 155, A.I.R. 1927 All 267, 99 I.C. 415. He also cannot, even with the consent of the parties, refer the matter to a subordinate Magistrate for inquiry and report, and then pass the final order on the basis of that report; he must take the evidence himself—*In re Kariyappa*, 47 Bom. 89,

24 Bom L.R. 807, A.I.R. 1922 Bom. 384; he cannot base his decision upon the information gathered from a personal local inspection, instead of taking evidence, even though the parties agree to abide by his decision—*Upendra v. Rampal*, 10 C.L.J. 482, 11 Cr.L.J. 1, 4 I.C. 436; *Ram Chandra*, 35 Cr.L.J. 1020, 15 P.L.T. 288, 1934 Cr.C. 737, 149 I.C. 839, A.I.R. 1934 Pat. 316; *Doraiswami v. Sudarsana*, 17 M.L.T. 142; *Ramohan*, 20 C.W.N. 1171, 17 Cr.L.J. 409, 35 I.C. 969, 44 Cal. 61 (64); *Kalisaday v. Sidheswar*, 23 C.W.N. 1054, 50 I.C. 658, 20 Cr.L.J. 322; *Biru v. Gokul*, 20 Cr.L.J. 217, 49 I.C. 777 (Pat.); *Mulchand*, 8 O.W.N. 651, 32 Cr.L.J. 1165 (1166), A.I.R. 1931 Oudh 397, 1931 Cr.C. 829, Ind. Rul. 1931 Oudh 352, 132 I.C. 800; *Kanhaiya Lal*, 24 O.C. 267, 22 Cr.L.J. 765, 64 I.C. 285; *Tirkha v. Nanak*, 49 All. 475, 25 A.L.J. 377, A.I.R. 1927 All. 350, 100 I.C. 371, 28 Cr.L.J. 291 (292); *Achhru*, supra; *Ramekwar*, A.I.R. 1939 Bom. 92, 41 Bom L.R. 84, 11 R.B. 301, 40 Cr.L.J. 444, 180 I.C. 511; *Bhoora v. Tara Singh*, A.I.R. 1927 All. 267, 99 I.C. 415, 28 Cr.L.J. 159, 49 All. 270, 25 A.L.J. 155. The correctness of the above view cannot be doubted. The Court is not expected to base its judgment on its own inspection note which may however necessitate no more than technical compliance with law that there should be substantive evidence apart from the inspection note which is merely to aid it in appreciating the evidence before the Court. This being so, the Magistrate should have examined, at least, the complainant—*Rajjo Lal*, A.I.R. 1934 All. 325, 1934 A.L.J. 1179, 1934 Mr.C. 409, 35 Cr.L.J. 708, 148 I.C. 615. This section does not authorise a Magistrate to assume the role of an arbitrator, even though the parties agree to his doing so, and to pass an order after a local inquiry without recording evidence—*Chandra Mandal v. Ram Mandal*, 25 C.L.J. 349, 40 I.C. 738, 21 C.W.N. 926, 18 Cr.L.J. 738; *Upendra v. Rampal*, 10 C.L.J. 482, 11 Cr.L.J. 1, 4 I.C. 436; *Bhoora v. Tara Singh*, supra. Such action on the part of the Magistrate in ignoring the clear provisions of sec. 137 amounts to a substantial error of law (and not a mere error of procedure) and cannot be cured by sec. 537—*Bhoora v. Tara Singh* (supra).

A conditional order under sec. 133 cannot be made absolute without the first party being called upon to adduce evidence in support of his claim, even though the second party does not, after showing cause under sec. 135, appear to give evidence in support of the denial of the right claimed by the first party—*Akhoy v. Lalchand*, 31 C.W.N. 963, 28 Cr.L.J. 859 (860), A.I.R. 1928 Cal. 96, 104 I.C. 635.

Onus:—It is not correct to say that the burden of proof is on the person against whom the conditional order is made. Sec. 137, Cr. P. C., provides that the Magistrate has to take evidence as in the summons case. That means that the complainant has to make out a *prima facie* case, that is to say, he has to produce before the Court legal evidence which would justify a finding that what is complained of amounts to a public nuisance—*Rameshwar*, A.I.R. 1939 Bom. 92 (95), 41 Bom L.R. 84, 40 Cr.L.J. 444, 180 I.C. 511, 11 R.B. 301.

345. Dropping of proceedings:—See Note 332 under sec. 133. The Magistrate cannot make an order dropping the proceedings under sub-section (2) of this section without taking evidence in the matter as directed by sub-section (1)—*Shew Kelaan v. Nayan*, 22 Cr.L.J. 239 (Cal.). Where in a proceeding in respect of an alleged obstruction to a public way, the Magistrate made a conditional order but dropped the proceedings on the opposite party taking the objection that the Court had no jurisdiction to proceed with the inquiry on the ground that the identical way had previously been the subject-matter of an inquiry under sec. 133 by a Court of competent jurisdiction, held that the Magistrate was bound to take evidence as prescribed by sub-section (1) of this section; it was open to the Magistrate after taking evidence to consider whether there was a complete answer to the case against the opposite party or whether the case was one where the parties should be referred to the Civil Court for the determination of a matter which the Magistrate considered he could not decide—*Sarojebasini v. Sripati*, 42 Cal. 702, 16 Cr.L.J. 415, 19 C.W.N. 332.

345A. Sub-section (3):—An order under this sub-section is not like an order under sec. 144, Cr. P. C., which spends itself in 60 days. If the order under

this sub-section is not good on account of nuisance having been already abated, it should not be allowed to remain in force as in case of future proceedings it is apt to be used against the person against whom it is passed—*Kalyan Mal Mathur*, A.I.R. 1936 Pat. 577, 37 Cr.L.J. 1159, 165 I.C. 542, 1936 Cr.C. 948

346. Procedure:—When the accused appears to show cause against the notice the Magistrate ought to take evidence in the matter as in a summons case—*Mul Chand*, A.I.R. 1931 Oudh 397, 8 O.W.N. 651, 32 Cr.L.J. 1165, 1931 Cr.C. 829, Ind. Rul. 1931 Oudh 352, 132 I.C. 800; *Sarojbashini v. Sripati*, supra; *Attar Singh v. Hari Singh*, 28 Cr.L.J. 60, 99 I.C. 92, 8 L.L.J. 557, 27 P.L.R. 764.

As in a summons-case, the complainant shall first begin by calling his witnesses, who may then be cross-examined by the other party. After the complainant has finished, the other party shall let in his evidence—*Hingu*, 31 All. 453, 6 A.L.J. 685 (686), 10 Cr.L.J. 297, 3 I.C. 482. The opposite party is not bound to produce evidence until the party who has set the law in motion has produced his evidence—*Indar*, 11 A.L.J. 931, 15 Cr.L.J. 23, 22 I.C. 167; *In re Dakshinamurthi*, 18 Cr.L.J. 848 (Mad.), 41 I.C. 672; *Raghunandan Saran Das*, 38 Cr.L.J. 29, 3 B.R. 107, 9 R.P. 234, 165 I.C. 942, A.I.R. 1936 Pat. 639, 17 P.L.T. 791, 1936 Cr.C. 1070, 1936 P.W.N. 926. But it is clearly for the person proceeded against to produce evidence in support of his denial of a public right of way in an inquiry under sec. 139A, Cr. P. C.—*Raghunandan Saran Das*, supra.

A party cannot be required to give evidence under sec. 137, Cr. P. C., not until the enquiry under sec. 139A, Cr. P. C., was concluded—*Etray*, 33 C.W.N. 201, 49 C.L.J. 49, A.I.R. 1928 Cal. 879

Before making an enquiry under this section the Magistrate must comply with the provision of sec. 139A and come to a finding whether there was any reliable evidence in support of the denial of the public right—*Dhanonjoy v. Nagendra*, 31 Cr.L.J. 767, 124 I.C. 832, A.I.R. 1930 Cal. 144, 1930 Cr.C. 144. See also *Digambar*, A.I.R. 1933 Pat. 676, 146 I.C. 406, 1933 Cr.C. 1489, 35 Cr.L.J. 54. An order under this section passed without making the inquiry enjoined under sec. 139A (1) cannot stand—*Narsingh v. Rameshwar*, A.I.R. 1936 Pat. 360, 17 P.L.T. 399, 37 Cr.L.J. 846, 1936 Cr.C. 560, 163 I.C. 402, 1936 P.W.N. 332.

When a Magistrate passed a conditional order under sec. 133, and on the day fixed the accused put in a written statement to the effect that no obstruction to the public thoroughfare had been caused, and produced a number of witnesses who deposed to the same effect, but the Magistrate without recording any evidence for the prosecution made the order absolute under this section, it was held that the Magistrate's order was illegal, since he should have proceeded as in a summons-case—*Sia Ram*, 1917 P.R. 32; *Jassi*, 20 A.L.J. 692, 25 Cr.L.J. 266.

The Court is bound at the party's request to compel the attendance of witnesses—*Bhomar v. Digambar*, 6 C.W.N. 548.

Reference to Jury:—Reference to jury is entirely optional with the party against whom the order is made; but if he applies for a jury, he is bound by their verdict. If no reference is made, the order made by the Magistrate under this section will become final—*Khodabuksh v. Monglai*, 14 Cal. 60.

347. Illegal order:—Where a conditional order under sec. 133 was passed without jurisdiction, the subsequent order under this section confirming the conditional order is also illegal—*Jaswant Singh*, Ratanlal 516.

Illegality of procedure can be cured:—Where a Magistrate, instead of taking the evidence himself as provided by this section, sent the case to a subordinate Magistrate for inquiry and report, and then made the order absolute on the basis of that report, held that there was a complete disregard of the imperative provisions of this section. It is not a mere irregularity of procedure but a grave illegality which cannot be cured under sec. 537 even by the consent of the parties—*Kariyappa*, 47 Bom. 89, 24 Bom.L.R. 807, 23 Cr.L.J. 587.

347A. Stay of Proceedings:—After the Magistrate's finding under sec. 139A, Cr. P. C., that there was no reliable evidence in support of the denial of the public right, the applicant instituted a civil suit for a declaration that no such public right existed and made an application to the Magistrate for staying his proceedings till the decision of the civil suit. *Held*, that the procedure under sec. 137, Cr. P. C., should take place and the Magistrate should make a final order under that section without staying proceedings. As the criminal proceeding was first instituted, the proceeding to be stayed would not be the criminal proceeding but it would be the civil suit. The order of the Magistrate can be enforced in accordance with the provisions of sec. 140, Cr. P. C., even if the Civil Court comes to a contrary decision—*Kalika Prosad v. Shiam Kishore*, 35 Cr.L.J. 1445, 151 I.C. 897, 1934 A.L.J. 342, A.I.R. 1934 All. 131, 1934 Cr.C. 189, 4 A.W.R. 561. See also Note 353A.

138. (1) On receiving an application under section 135 to appoint a jury, the Magistrate shall—

Procedure - where he claims jury.

- (a) forthwith appoint a jury consisting of an uneven number of persons not less than five, of whom the foreman and one-half of the remaining members shall be nominated by such Magistrate, and the other members by the applicant;
- (b) summon such foreman and members to attend at such place and time as the Magistrate thinks fit; and
- (c) fix a time within which they are to return their verdict.

(2) The time so fixed may, for good cause shown, be extended by the Magistrate.

348. Section imperative:—This section leaves no discretion to the Magistrate, and he is bound to appoint a jury, when he is asked to do so—*Anon*, 2 Weir 63. Both sections 137 and 138 are imperative in their terms. The Magistrate has no discretion in the matter; he is bound to take the action which those sections lay down—*Kishori Lal*, 13 C.W.N. 367 (369), 10 Cr.L.J. 494, 4 I.C. 72. If he refuses to do so, he acts illegally—*Gaunde Rai*, 1887 P.R. 19; *In re Mothoor*, 2 C.L.R. 509.

349. Appointment of jury:—The Magistrate to whom an application to appoint a jury is made cannot delegate that duty to another Magistrate—*Vithu*, Ratanlal 460.

The word 'forthwith' must be interpreted in a reasonable way; it merely means that the Magistrate shall appoint the jury as soon as he reasonably can. Therefore, where the Magistrate appointed the jury 2 days after and parties applied for a jury, *held* that the terms of this section were substantially complied with, and there was no unreasonable delay—*Khushi Ram*, 4 Lah 224 (229).

The appointment or the cancelment of appointment of a jury must be made in the presence of the parties and not behind their back—*In re Chundernath*, 5 Cal 875.

In nominating the foreman and one-half of the remaining members of the jury, it is the duty of the Magistrate to exercise his own independent judgment and not to accept persons who may be put forward by the complainant—*Upendra v. Khitish*, 23 Cal. 499; *Kalash v. Ram Lal*, 26 Cal 869; *In re Kothari*, 31 Bom L.R. 79, A.I.R. 1929 Bom 79, 117 I.C. 333, 30 Cr.L.J. 785 (786). The following persons should not be appointed as jurors:—(a) Complainant and his witness; because it is plainly against the principles of right and equity that a person should be compelled to submit his case to the arbitration of his adversary—*Brindaban v. Dwarka*, 22 W.R. 47; (b)

Friends and supporters of the complainant—*Farjand Ali v. Hakim Ali*, 37 All. 26, 12 A.L.J. 1241, 26 I.C. 632, 16 Cr.L.J. 40; *Mir Imam*, 1897 P.R. 4 : (c) Nominees of the party interested in upholding the Magistrate's order (i.e., nominees of the complainant)—*Rajah Shatyananda v. Camperdown Pressing Co.*, 21 W.R. 43; *Kaliash v. Ram Lall*, 26 Cal. 869 (870); *Upendra v. Kshitish*, 23 Cal. 499; *In re Kothari*, supra

In case of encroachment of the property of the District Board, a member of the District Board can be nominated by that Board to serve on the jury—*Abdul Shakur*, 1930 A.L.J. 1335, 32 Cr.L.J. 565, 130 I.C. 627, A.I.R. 1931 All. 257, 1931 Cr.C. 417, Ind. Rul. 1931 All. 291.

A Magistrate has no power to veto the appointment of a person nominated by the applicant—*Mir Imam*, 1897 P.R. 4.

The summons to jury should specify the time and place when and where the jurors should attend—*Ram Saran*, 5 All. 7.

350. Jury improperly constituted:—If the Magistrate appoints the foreman of the jury alone, the jury is not a properly constituted one—*Dino Nath v. Hur Gobind*, 16 W.R. 23. Where one of the five jurors remains absent, and the foreman substitutes a juror in the place of the absent one, he acts illegally because he has no such power, and the jury is not legally constituted—*Bhyrub*, 10 C.L.R. 193. If one of the jurors declines to act or remains absent, the Magistrate cannot proceed with the inquiry unless he appoints another juror in his place—*Uma Charan v. Joshein*, 11 Cal. 84.

A jury consisting of less than five persons is not a properly constituted one, and an order based on the verdict of such a party is invalid—*Ajit v. Jamatulla*, 22 Cr.L.J. 511 62 I.C. 335 (Cal.).

The jury is not legally constituted when the Magistrate appoints the entire jury himself, instead of appointing the foreman and half the jury, and leaving the other half to be nominated by the parties—*Khem Chand*, 28 Cr.L.J. 1036, 106 I.C. 220, A.I.R. 1928 Lah. 187.

It is doubtful whether sec. 537, Cr. P. C., can cure the irregularity in respect of the appointment of jury in as much as it is an irregularity which goes to the root of the proceedings—*Mahadeo Lal v. Hossain Pandey*, A.I.R. 1930 Pat. 199, 120 I.C. 289, 31 Cr.L.J. 53, Ind. Rul. 1930 Pat. 1. The irregularity in the appointment of the jury by itself would not be ground for setting aside the proceedings—*Digamber*, A.I.R. 1933 Pat. 676, 146 I.C. 406, 1933 Cr.C. 1489, 35 Cr.L.J. 54.

351. Procedure:—This chapter does not lay down any rules as to the procedure which a jury appointed under this section should adopt in inquiring into a matter submitted to them—*Ram Bilas*, 30 All. 364. The jury is bound to hear the parties and their witnesses. They cannot decide a matter referred to them merely on local inspection without taking evidence—*Kaliash v. Ram Lall*, 26 Cal. 869 (870); *Adhar Chandra v. Ambika*, 6 C.W.N. 886.

352. Verdict after time fixed:—Where a jury appointed under this section had considered the matter referred to them, and the individual members of the jury had given in their opinion to the foreman, but he sent in his report after the time fixed but before a final order was made by the Magistrate, it was held that the Magistrate should act on the verdict of the jury, and should not appoint a second jury—*Sk. Nazumuddy v. Hasim Khan*, 21 W.R. 51.

Extension of time—The power conferred by sub-section (2) for the extension of time for delivery of verdict can be exercised by the Magistrate only and cannot be delegated to the foreman of the jury—*Kedar Nath*, 23 All. 159.

353. Reference to arbitration:—As the dispute under this chapter is of a public nature, in which public interests are involved, the case cannot be referred to arbitrators by agreement of parties—*Rajabalam v. Nawlak*, 2 P.L.T. 6, 22 Cr.L.J. 327; *Ajit Shaikh v. Jamatullah*, 22 Cr.L.J. 511 (Cal.).

353A. Institution of Civil Suit:—The fact that the civil suit has been instituted is no bar to the proceedings and it is within the jurisdiction of the Magistrate

to continue proceedings under sec 138, Cr. P. C.; the civil suit may take a long time, in the meantime it is quite competent to the Magistrate to decide the matter summarily under the Cr. P. C.—*Shamji Tricumdas v. Ram Moyee*, 56 C.L.J. 249, A.I.R. 1933 Cal. 218, 34 Cr.L.J. 532, 143 I.C. 178. See also *Banku*, 58 Cal. 1088, 35 C.W.N. 571, 32 Cr.L.J. 1240, 134 I.C. 918, A.I.R. 1931 Cal. 787, 1931 Cr.C. 1005, Ind. Rul. 1931 Cal. 918 quoted in Note 360 and Note 347A.

139. (1) If the jury or a majority of the jurors find that the order of the Magistrate is reasonable and proper as originally made, or subject to a modification which the Magistrate accepts, the Magistrate shall make the order absolute, subject to such modification (if any).

(2) In other cases, no further proceedings shall be taken under this Chapter.

354. Verdict of the jury:—The jurors are not to give their individual and separate opinions to the Magistrate, but they are to consult together and then express their collective opinion through their foreman—*Khushali Ram*, 18 All. 158. The findings of all the jurors need not agree in every detail; but if all the members agree that the order of the Magistrate, as a whole, is improper, the jurors shall be counted together as unanimously objecting to the order—*Nakari*, 25 W.R. 31. Where one of the five jurors declined to act, and the remaining four being equally divided in opinion, the Magistrate declined to pass any order under sec. 139, and struck off the case, held that the course adopted by the Magistrate was irregular; he should have summoned a fresh jury and commenced the inquiry afresh—*Uma Churn v. Joshein*, 11 Cal. 84.

The only thing which the jury is to consider whether the conditional order passed by the Magistrate under sec. 133 is reasonable and proper. They cannot enter into the question of rights of parties—*In re Chundernath*, 5 Cal. 875; *Mutukdhari v. Hari-madhab*, 9 C.W.N. 72, 31 Cal. 979; *Md Ashrafuddin v. Sh. Karim Baksh*, 18 C.W.N. 1148, 15 Cr.L.J. 515; *Dulalram v. Baishnab*, 10 C.W.N. 845; *Nasaruddi v. Akiluddi*, 3 C.W.N. 345, 3 C.L.J. 360. See Note 359 under sec. 139A.

Verdict of majority:—The 'majority' means a majority of the persons appointed, and a majority of the person attending—*Durga Charan v. Sashi*, 13 Cal. 275. Moreover, all the persons appointed as jurors must act, and the verdict of the majority must be the verdict of the majority of the persons appointed. Therefore, where one juror out of five was all along absent, the Magistrate cannot accept the verdict of the four persons who attended, treating it as the verdict of the majority—*Promotha v. Basanta*, 11 Cr.L.J. 402 (Cal.), 6 I.C. 777. So also, a decision by three out of five, in the absence of the other two is invalid—*Kedar Nath*, 23 All. 159; *Durga Charan v. Sashi*, 13 Cal. 275. So again, a verdict is defective when four out of five jurors were present at the time of the local investigation and one was absent. Such a verdict is illegal and cannot be acted upon, and a fresh jury should be appointed—*Srimati Dasya v. Nibaran*, 24 C.W.N. 928, 21 Cr.L.J. 448, 31 C.L.J. 371, 56 I.C. 260. Where out of five jurors two only saw the place, and the third never visited it, but passed his opinion solely on what had been told him by the other two, it was held that the opinion of the so-called majority was not that of a legal majority—*Petambar v. Nasaruddi*, 25 W.R. 4.

355. Magistrate bound by verdict:—A Magistrate is not at liberty to take only a part of the verdict; he is bound to be guided by their whole decision. If any part of their verdict is ambiguous, he can ask them to express their opinion clearly—*Poholee*, 12 W.R. 28.

If the jury finds the Magistrate's order to be wrong, he is bound by the verdict

and must stop further proceedings. It is only when the jury finds the Magistrate's order to be reasonable and proper that he can proceed to enforce the order—*Ibid*

The Magistrate must accept the verdict in its entirety. If one part of the verdict is erroneous (e.g., if the verdict provides for *reconstruction* of an obstruction) the whole verdict must be rejected. The Magistrate cannot split up the verdict and accept that part of the verdict which is correct, rejecting the portion which is erroneous—*Rahimaddi v. Sher Ali*, 40 C.L.J. 597, 26 Cr.L.J. 517 (518).

Remitting the case to another Magistrate:—In all cases where the counter-petitioner elects to leave the matter to the decision of a jury the case has to be disposed of by the Magistrate who passed the order under sec. 133, Cr. P. C. If the effect of passing an order directing the counter-petitioner to show cause before some other Magistrate is to transfer all further proceedings to such Magistrate, and to divest the Magistrate who passed the order of all jurisdiction, it is difficult to see why the application under section 135, clause (b), Cr. P. C., or the duty of empanelling a jury under sec. 138, Cr. P. C., should be cast on the Magistrate who passed the order, or why the verdict should be submitted to him and not to the other Magistrate. On receipt of the verdict of the jury the Magistrate, who passed the conditional order, is not competent to remit the case for disposal to the other Magistrate before whom the counter-petitioner was asked to show cause in the conditional order. The Magistrate, who passed the conditional order, is alone competent to deal with the case further and must dispose of the case himself. The words "the Magistrate" in sec. 139, clause (1), Cr. P. C., refers to the Magistrate to whom application has to be made under sec. 135, clause (b), Cr. P. C., to empanel a jury and who under sec. 138, Cr. P. C., does so—*Angappa v. Perumal*, 43 Mad. 316 (318), 37 M.L.J. 313, 1919 M.W.N. 696, 20 Cr.L.J. 761, 53 I.C. 489. See also Notes 338 and 343

Reference to High Court:—The decision of the jury appointed under sec. 138 is not a proceeding in a Criminal Court which the District Magistrate can call for and examine and refer to the High Court under sec. 435—*Anon*, Ratanlal 336

139A. (1) *Where an order is made under section 133 for the purpose of preventing obstruction, nuisance or danger to the public in the use of any way, river, channel or place, the Magistrate shall, on the appearance before him of the person against whom the order was made, question him as to whether he denies the existence of any public right in respect of the way, river, channel or place, and, if he does so, the Magistrate shall, before proceeding under section 137 or section 138, inquire into the matter.*

Procedure where existence of public right is denied

(2) *If in such inquiry the Magistrate finds that there is any reliable evidence in support of such denial, he shall stay the proceeding until the matter of the existence of such right has been decided by a competent Civil Court; and, if he finds that there is no such evidence, he shall proceed as laid down in section 137 or section 138, as the case may require.*

(3) *A person who has, on being questioned by the Magistrate under sub-section (1), failed to deny the existence of a public right of the nature therein referred to or who, having made such denial, has failed to adduce reliable evidence in support thereof, shall not in the subsequent proceedings be permitted to*

make any such denial, nor shall any question in respect of the existence of any such public right be inquired into by any jury appointed under section 138.

356. This section has been newly added by sec. 26 of the Criminal Procedure Code Amendment Act (XVIII of 1923).

The procedure which ought to be followed by the Magistrate in case a *bona fide* claim of right is set up by the petitioner, was not laid down in any section of this chapter under the previous law. But a large volume of case law had gathered round this point, which the Legislature has now thought fit to crystallize into a new section.

"The principal question in connection with this clause is whether, as provided in the Bill, questions of title in relation to rights of way and the like should, for the purposes of the Chapter, be finally decided by the Magistrate, or whether the almost uniform decisions of the High Courts, which lay down that the Magistrate must stay proceedings if he is satisfied that the question has been raised *bona fide*, should be followed. We prefer to accept the latter view as laid down in *Manipur Dey v. Bidhu Bhusan Sirkar*, 42 Cal. 158; and we have provided for it, as a special case, in new section 139A"—*Report of the Joint Committee* (1922).

The leading case on this subject is *Manipur Dey v. Bidhu Bhusan Sirkar*, 42 Cal. 158, 18 C.W.N. 1086, 15 Cr.L.J. 693 (referred to in the above Report of the Joint Committee) which has laid down the following important propositions of law: If the party against whom the order is contemplated to be passed under sec. 133 raises a question that the pathway is not a public property in the sense of the provisions of this section, the Magistrate trying the case should be careful not only to decide as to whether the pathway in question is situate on a private land or is for public use, but he should, even when the claim of the objector is not sustained, find whether the claim is *bona fide* or is set up only to oust the jurisdiction of the Court. If the Magistrate finds that the claim which is set up is a mere pretence, he should then proceed to pass a final order and make the rule issued by him absolute. If, however, he finds that the claim, although not substantiated, is not a mere pretence and is not raised to oust the jurisdiction of the Court but that it is raised *bona fide*, he should stay his hand and refer the party to the Civil Court. And if the party within a reasonable time does not have recourse to the Civil Court, the Magistrate may then proceed to make the rule absolute.

Where the defendant does not deny the existence of a public road at the place alleged to have been encroached, but merely denies that he has encroached upon it, this section has no application—*Ghurahu v. Shakal Raj*, 24 A.L.J. 112, 27 Cr.L.J. 27 (29).

Section misplaced:—This section has been wrongly placed. It should really have found place immediately after sec. 135. When a notice has been issued under sec. 133 and been duly served under sec. 134, the person to whom the notice has been issued must then perform the act or appear to show cause why he should not. If he decides to show cause he will also have to decide whether he wants the matter to be tried by a jury, and if he does want it to be so tried he will make the claim. At this stage sec. 139A should have been introduced, for it is provided that upon the party's appearance the Magistrate shall ask him as to whether he denies the existence of any public right in respect of the way, etc. It is only after the question contained in sec. 139A has been decided that the Magistrate will then, if he decides to go on with the case, proceed under sec. 137 to take evidence, or if an application has been made for a jury, he will under sec. 139 proceed to the appointment of the jury—*Raghunandan v. Shew Nandan*, 1932 A.L.J. 339, 33 Cr.L.J. 618 (619), A.I.R. 1932 All. 366, 138 I.C. 556, 1932 Cr.C. 441.

Application of the section:—Where the second party admitted in his written statement that the river which is said to have been obstructed was a public river, but contended that the obstruction which was said to have been put up, was not in the

river and was upon the land which was his *khas* land and not a portion of the river, strictly speaking, sec. 139A did not apply. But the language of the section is so general that in such a case as this the Magistrate should exercise a good discretion in following the direction of the law, but the omission to do it does not necessarily vitiate the entire proceeding. The omission is at the most an irregularity which is cured by sec. 537, Cr. P. C.—*Rajani Kanta v. Ibrahim*, 33 C.W.N. 748, 57 Cal. 252, A.I.R. 1929 Cal. 507. This section is imperative—*Munna Lal*, 27 Cr.L.J. 473 (474), 93 I.C. 697, 24 A.L.J. 361, A.I.R. 1926 All. 390. It is, however, doubtful whether there can be a waiver of a mandatory provision such as is contained in sec. 139A, Cr. P. C.—*Mahadeo Lal v. Hossaini Pandey*, A.I.R. 1930 Pat. 199, 120 I.C. 290, 31 Cr.L.J. 53, Ind. Rul. 1930 Pat. 1. See also *Mt. Ram Kali v. Kripa Shanker*, 55 All. 866, A.I.R. 1933 All. 615, 35 Cr.L.J. 4, 146 I.C. 327, 1933 Cr.C. 987.

Under sec. 139A (2), Cr. P. C., proceedings under Ch. 10, Cr. P. C., are to be taken in two distinct stages. Where obstruction to the use by the public of any way is alleged and denied, the question to be decided at the threshold of the case is whether the denial of the existence of the public right claimed is well founded. It is generally desirable that the Magistrate should record a definite finding in terms of sec. 139A (2), though, if the record otherwise indicates that he did find that the denial of the public right was well founded, the requirements of sec. 139A (2) would be made out. The Court and the parties should distinctly understand when the case enters on the second stage of the proceedings provided by sec. 137, Cr. P. C., so that the evidence not of the preliminary character contemplated by sec. 139 (2), but such as is contemplated by sec. 137 be produced—*Gangadhar*, A.I.R. 1936 All. 150, 37 Cr.L.J. 422, 161 I.C. 309, 1936 A.L.J. 116, 1936 Cr.C. 178. See also *Etra* in Note 346.

The provisions of sec. 139A, Cr. P. C., that an inquiry should be held are intended to protect the rights of a person against whom it is proposed to pass an order under sec. 133, Cr. P. C. They are not intended to enable any person complaining of a construction to compel the Magistrate to hold an inquiry into the rights of the parties concerned—*Sibte Husain*, A.I.R. 1937 All. 785, 1937 A.W.R. 865, 1937 A.L.J. 903, 1938 A.L.R. 10, 172 I.C. 642, 39 Cr.L.J. 148, 1937 A.Cr.C. 165.

357. Bona fide claim:—Before the enactment of this section, the law was that if a person against whom an order was made under sec. 133 to remove an obstruction from a public way, claimed it as a private way, the Magistrate had to determine whether the claim was *bona fide* or not—*Kailash v. Ram Lall*, 26 Cal. 869 (870); *Matukdhar v. Hari Madhav*, 31 Cal. 979; *Manipur Dey v. Bidhu Bhusan*, 42 Cal. 158; *Upendra v. Kshitish*, 23 Cal. 499; *Sk. Imrat v. Amjad*, 2 P.L.J. 67; *Thakur Sao v. Abdul Aziz*, 4 Pat. 783, 27 Cr.L.J. 9; *Khushi Ram*, 4 Lah. 224 (226). It was further held that the question whether the claim set up by the defendant was a *bona fide* one or not was to be decided by the Magistrate himself and could not be left to the jury—*Kailash v. Ram Lall*, 26 Cal. 869 (870); *Matukdhar v. Hari-madhab*, 31 Cal. 979; *Khushi Ram*, supra; *Md. Ashrafuddin v. Sh. Karim Baksh*, 18 C.W.N. 1148, 15 Cr.L.J. 515.

Under the present section, however, the Legislature has very carefully avoided any reference to any consideration of the *bona fides* of the claim set up by the opposite party. The Court has now been directed to consider whether there is any reliable evidence in support of his denial of the public right—*Manohar*, 1929 A.L.J. 385, 116 I.C. 786, 30 Cr.L.J. 670 (671); *Raghunandan v. Shew Nandan*, 1932 A.L.J. 339, 33 Cr.L.J. 618 (619), 138 I.C. 556, A.I.R. 1932 All. 366.

357A. Procedure:—As soon as the accused appears before him, the Magistrate is bound to question him as to whether he denies the existence of any public right in respect of the way, river, etc., and if he does so, the Magistrate shall, before proceeding under sec. 137 or 138, inquire into the matter. It is the duty of the Magistrate to follow the above procedure without waiting for the objection to be raised by the accused, and the Magistrate cannot refuse to inquire into the matter because the objection was not taken until a late stage of the case—*Sk. Sadur v. Sabarali*, 29 C.W.N.

649, 26 Cr.L.J. 1168; *Raghunandan Saran Das*, A.I.R. 1936 Pat. 639, 38 Cr.L.J. 29, 165 I.C. 942, 17 P.L.T. 791, 1936 Cr.C. 107, 3 B.R. 107, 9 R.P. 234. If the existence of a right way is not denied or if there is no reliable evidence in support of the denial, the Magistrate should then proceed to the inquiry under secs. 137 and 138, Cr. P. Code—*Raghunandan Saran Das*, supra. See also *Thakur Sao v. Abdul Aziz*, 4 Pat. 783, A.I.R. 1926 Pat. 170, 91 I.C. 41, 27 Cr.L.J. 9, 7 P.L.T. 136; *Atu Mohammad v. Abdul Rahaman*, 38 Cr.L.J. 1056, 171 I.C. 279, A.I.R. 1937 Lah. 676, 39 P.L.R. 484, 10 L.R. 181; *Manohar Lal v. Emp.*, A.I.R. 1931 Lah. 62, 1931 Cr.C. 142, 130 I.C. 834, 32 Cr.L.J. 621, 32 P.L.R. 11; *Nanumal v. Emp.*, A.I.R. 1939 Lah. 452, 41 P.L.R. 515, 40 Cr.L.J. 933, 184 I.C. 352, 12 R.L. 211; *Mul Chand*, A.I.R. 1931 Oudh 397, 8 O.W.N. 651, 32 Cr.L.J. 1165, 1931 Cr.C. 829, Ind. Rul. 1931 Oudh 352, 132 I.C. 800; *Chunni*, 40 Cr.L.J. 143, 178 I.C. 742, A.I.R. 1938 All. 653, 1938 A.W.R. (H.C.) 640, 1938 A.Cr.C. 105, 1938 A.L.J. 1013. In the last case it was held to be incumbent on the Magistrate to question the opposite party, even when there was nothing in the written statement, which they filed in obedience to the notice to show cause, to show that they denied the existence of a public way. See also Note 339.

When the opposite party denies the existence of the public right, the Magistrate's first duty is to make the inquiry under this section, and until this inquiry is completed, he cannot order the party to adduce evidence under sec. 137—*Etraj Mandal*, 33 C.W.N. 201, 30 Cr.L.J. 622, A.I.R. 1928 Cal. 879; *Rahanaddy v. Hasanali*, 30 C.W.N. 648, 27 Cr.L.J. 878. See also *Narsingh v. Rameshwar*, A.I.R. 1936 Pat. 360, 17 P.L.T. 399, 37 Cr.L.J. 846, 163 I.C. 402, 1936 Cr.C. 560, 1936 P.W.N. 332; *Mahabir Prasad v. Pitamber Prasad*, A.I.R. 1933 Nag. 267, 1933 Cr.C. 1001, 29 N.L.R. 361, 146 I.C. 601, 35 Cr.L.J. 145. If, instead of doing so, he at once proceeds under section 137 to take evidence from the complainant, the trial is vitiated by wrong procedure and the final order is liable to be set aside—*Raghunath*, A.I.R. 1925 All. 311, 28 A.L.J. 187, 86 I.C. 809, 26 Cr.L.J. 873; *Munna Lal*, 24 A.L.J. 361, 27 Cr.L.J. 473; *Manohar*, 32 P.L.R. 11, 32 Cr.L.J. 621 (622), 130 I.C. 834, A.I.R. 1931 Lah. 62, 1931 Cr.C. 142; *Raghunandan v. Shew Nandan*, 1932 A.L.J. 339, 1932 Cr.C. 441, A.I.R. 1932 All. 366, 33 Cr.L.J. 618 (619), 138 I.C. 556; *Govinda Goundan v. Ayi Goundan*, A.I.R. 1939 Mad. 465, 1939 M.Cr.C. 42, 1939 M.W.N. 409, (1939) 1 M.L.J. 649, 49 M.L.W. 476, 40 Cr.L.J. 813, 183 I.C. 567, 1 L.R. 1939 Mad. 1030, 12 R.M. 316. Where the Magistrate neither asked the defendant as to whether he denied the existence of a public right, nor took any evidence, but passed the order on a mere local inspection, held that the order was illegal—*Mulchand*, 8 O.W.N. 651, 32 Cr.L.J. 1165 (1166), 132 I.C. 800, Ind. Rul. 1931 Oudh 352, A.I.R. 1931 Oudh 397, 1931 Cr.C. 829.

If the existence of a public right is denied and there is some reliable evidence in support of the denial, or any question of title or easement is involved, the Magistrate should not proceed to decide those questions but it is incumbent upon him to stay his hand until the matter of the existence of the public right is decided by a competent Civil Court—*Matabbar v. Golam*, 57 Cal. 368, 32 Cr.L.J. 33, 127 I.C. 762, A.I.R. 1930 Cal. 890, 1930 Cr.C. 798; *Sohan Lal*, 9 O.W.N. 115, 33 Cr.L.J. 384, 136 I.C. 836, A.I.R. 1932 Oudh 120, 1932 Cr.C. 193; *Bishnath v. Khurshed*, 9 O.W.N. 141, 33 Cr.L.J. 809 (811), 139 I.C. 737, 1932 Cr.C. 191, A.I.R. 1932 Oudh 118; *Chhedai Lal*, 40 Cr.L.J. 286, A.I.R. 1939 All. 116, 179 I.C. 970, 1938 A.L.J. 1145, 11 R.A. 399, 1939 A.W.R. (H.C.) 841. Instead of staying proceedings under this section the Magistrate cannot proceed to order that each party should produce his evidence, apparently under sec. 137, Cr. P. C.—*Sitaram v. Bodri*, A.I.R. 1935 Pat. 218, 16 P.L.T. 179, 36 Cr.L.J. 1051, 156 I.C. 1006, 1935 Cr.C. 581. If there is no such evidence the Magistrate must proceed under sec. 137 or 138 before making the rule absolute—*Nirsu*, 147 I.C. 804, 1934 Cr.C. 338, 35 Cr.L.J. 488, A.I.R. 1934 Pat. 145, 14 P.L.T. 778; *Chhedai Lal*, supra. It is clearly for the person proceeded against to adduce evidence in support of his denial of a public right of way and the Magistrate ought to make a finding whether the existence of a public right is denied or not, and if it is denied whether there has been produced or not reliable evidence in support of the denial. If the existence of

a right of way is not denied or if there is no reliable evidence in support of the denial, the Magistrate should then proceed to the enquiry under secs. 137 and 138 Cr. P. C.—*Raghunandan Saram Das*, 38 Cr.L.J. 29, 3 B.R. 107, 9 R.P. 234, 165 I.C. 942, A.I.R. 1936 Pat. 639, 17 P.L.T. 791, 1936 Cr.C. 1070, 1936 P.W.N. 926. Proceedings under sec. 139A, Cr. P. C., should be taken before the proceedings under sec. 137, Cr. P. C.—*Ata Mohammad v. Abdul Rahman*, 38 Cr.L.J. 1056, 171 I.C. 279, A.I.R. 1937 Lah. 676, 39 P.L.R. 484, 10 R.L. 181. Where no inquiry was made under this section and the Magistrate made the rule absolute under sec. 137, simply looking into papers filed by both parties, the order was without jurisdiction—*Uma Kanta v. Kalipada*, A.I.R. 1933 Cal. 790, 37 C.W.N. 823, 146 I.C. 558, 1933 Cr.C. 1357, 35 Cr.L.J. 89; *Mt. Ram Kali v. Kripa Shanker*, A.I.R. 1933 All. 615, 1933 Cr.C. 987, 146 I.C. 327, 35 Cr.L.J. 4, 55 All. 862. See also *Hamid Ali*, 32 Cr.L.J. 250, 129 I.C. 222, 1930 Cr.C. 1222, A.I.R. 1930 Lah. 1046 and *Narsingh v. Rameshwar*, supra.

Inquiry by Subordinate Magistrate:—This section contemplates an inquiry by the Magistrate himself who initiated the proceedings under sec. 133, and he cannot depute another Magistrate to make the inquiry and report. The Magistrate has to see whether there is or is not reliable evidence in support of the denial of the existence of the alleged public right, and this is a matter, better determined by the Magistrate if he has heard the evidence himself than if he merely read the report of a subordinate Magistrate—*Masaddar v. Isamullah*, 57 Cal. 666, 34 C.W.N. 228 (229), 50 C.L.J. 291, 1929 Cr.C. 660.

The Magistrate mentioned in sec. 139A, Cr. P. C., must be the Magistrate before whom a person is ordered to appear under the last sentence of sec. 133 (1) Cr. P. C. He need not be a Magistrate with first class or higher powers who took cognizance originally—*Ata Mohammad v. Abdul Rahman*, 38 Cr.L.J. 1056, 171 I.C. 279, A.I.R. 1937 Lah. 676, 39 P.L.R. 484, 10 R.L. 181.

Dispute between Government and private individual:—In case of a dispute between the Government and a private individual as to the right to the ground on which an encroachment is alleged to have been made by the latter by building a wall, a Magistrate should not proceed under this section, until the dispute is settled in a Civil Court—*Jeysang, Ratanlal* 378; *Ram Singh*, 2 Bom.L.R. 818.

357B. Reliable Evidence:—Reliable evidence is evidence of reliable persons. What is really meant is not that the Magistrate should weigh the evidence produced by both sides and then come to the conclusion which he believes or which he prefers, but the Magistrate should take the evidence as it stands and see whether on the face of it, if there was no evidence to the contrary, he could come to the conclusion that the evidence was false and was, therefore, unreliable—*Hari Kishore v. Kanshi Ram*, 29 Cr.L.J. 254, 107 I.C. 485, A.I.R. 1928 Lah. 664. All that the Magistrate has to satisfy himself about is that the evidence put forward is not false. It is possible that the Civil Court may not consider the evidence as sufficient to substantiate the existence of the private road in the land but such a finding can only be delivered by the Civil Court, not by the Magistrate. The Magistrate has simply to satisfy himself that there is no reason to think that the evidence is false. If he finds any reason to enable him to treat the evidence as false, then alone he has power to continue the proceedings. The Magistrate has therefore to consider the evidence solely from the point of view of the person who produces it and find whether the evidence considered *ex parte* is genuine and tends *prima facie* to support the existence of the private right or the non-existence of any public right as urged by the party. If the Magistrate finds that the evidence is reliable it ousts his jurisdiction—*Mahabirprasad v. Pitamberprasad*, A.I.R. 1933 Nag. 267, 1933 Cr.C. 1001, 29 N.L.R. 361, 146 I.C. 601, 35 Cr.L.J. 145. The duty of a Magistrate under this section is merely to see whether the denial of the public right is frivolous or not. If the person who denies that right is able to produce some evidence which *prima facie*, there is no reason to disbelieve, it is not for the Magistrate to examine evidence on the other side by way of rebuttal and

so forth and attempt to arrive at some final decision—*Muhammad Khalil*, 37 Cr.L.J. 343, 160 I.C. 854, 1936 A.L.J. 75, A.I.R. 1936 All. 356. See also *Emp. v. Batuk*, A.I.R. 1936 All. 142, 37 Cr.L.J. 365, 160 I.C. 889, 1936 A.L.J. 76, 1936 Cr.C. 140. Reliable evidence in the sense in which the term is used in sec. 139A, Cr. P. C., means evidence on which it is possible for a competent Court to place reliance. It does not mean evidence which definitely establishes the title to the land because if that was the meaning of the term, it would be unnecessary in any case to refer the matter to the Civil Court at all. It was obviously the intention of the Legislature that questions of title should not be decided in a summary proceeding by a Magistrate in a Criminal Court. Under the provisions of sec. 139A it is his duty merely to see that any claim to a piece of land alleged to be a public place or a public way is not frivolous—*Janardan Sarup*, 38 Cr.L.J. 200, 166 I.C. 376, A.I.R. 1937 All. 12, 1936 A.L.J. 1285, 1937 A.L.R. 28, 9 R.A. 405; *Chhedi Lal*, 40 Cr.L.J. 286, 179 I.C. 970, A.I.R. 1939 All. 116, 1938 A.L.J. 1145; *Chunni*, 40 Cr.L.J. 143, 178 I.C. 742, A.I.R. 1938 All. 653, 1938 A.L.J. 1013. What sec. 139A, Cr. P. C., requires is that a Magistrate should be satisfied that there is reliable evidence in support of the denial of the public right. The moment he finds that, he has to stop his hands and leave the matter for the Civil Court to decide. As to what is reliable evidence, it will depend upon the circumstances of each case. But a good test seems to be this, that if the evidence adduced stands un rebutted the public nature of the right will be demolished—*Harnandan Lal v. Rampalak*, A.I.R. 1939 Pat. 460 (462), 18 Pat. 76, 1939 P.W.N. 346, 40 Cr.L.J. 837, 184 I.C. 47, 20 P.L.T. 748, 6 B.R. 6, 12 R.P. 212. Before the amendment, no doubt, it was permissible and proper for the Magistrate to take evidence on both sides. But now what is to be decided is whether the denial of the public right by the second party is supported by any reliable evidence and if there is any reliable evidence in support of such denial, the Magistrate has no option but to stay his hands and to refer the parties who moved the Magistrate to take action to go to the Civil Court—*Govinda Goundan v. Ayi Goundan*, A.I.R. 1939 Mad. 465, 1939 M.Cr.C. 42, 49 M.L.W. 476, 1939 M.W.N. 409, (1939) 1 M.L.J. 649, 40 Cr.L.J. 813, 183 I.C. 567, 11 L.R. 1939 Mad. 1030, 12 R.M. 316.

The jurisdiction of the Criminal Court is not ousted by the fact that the person proceeded against is the owner of the land, but, at any rate, the fact of the ownership is a very solid fact, and in the majority of cases will undoubtedly provide "reliable evidence" within the meaning of cl. (2) to this section in the absence of very cogent evidence, on the other side—*Mt. Ram Kali v. Kripa Shanker*, A.I.R. 1933 All. 615 (616), 55 All. 866, 35 Cr.L.J. 4, 146 I.C. 327, 1933 Cr.C. 987.

The settlement record, showing that the land alleged to have been encroached upon is the land of the opposite party, is reliable evidence within the meaning of this section—*Debendra v. Chairman, Local Board, Asansol*, 25 Cr.L.J. 1080, 81 I.C. 904, A.I.R. 1925 Cal. 268; *Satish v. Krishna*, 34 C.W.N. 957 (958), 32 Cr.L.J. 189, 128 I.C. 810, A.I.R. 1931 Cal. 2, Ind. Rul. 1931 Cal. 106, 1931 Cr.C. 34; *Sitaram v. Badri*, 36 Cr.L.J. 1051, 156 I.C. 1006, A.I.R. 1935 Pat. 218, 1935 Cr.C. 581, 16 P.L.T. 179; *Nur Ali v. Natha*, 28 Cr.L.J. 247, 99 I.C. 119, A.I.R. 1927 Lah. 745; *Emp. v. Batuk*, supra.

Where the opposite party produced a deed of sale to show that they had acquired a title in the land upon which they had built, the record of a settlement to show that their transferor had a title in the land and two maps to show that the path at one time passed along the edge of their field and outside it, it cannot possibly be said that their denial of the public right of way over the land is frivolous or that it is entirely unsupported by evidence and thus is obviously a matter which can only properly be decided by a competent Civil Court—*Kundan Lal*, 40 Cr.L.J. 375, 180 I.C. 495, A.I.R. 1939 All. 187, 1939 A.W.R. (H.C.) 711, 11 R.A. 465, 1939 A.Cr.C. 31.

The existence of a genuine dispute as to title suitable for decision by the Civil Court is sufficient ground for staying proceedings under this section—*Munna v. Chandrabati*, 29 Cr.L.J. 661, 110 I.C. 213, 26 A.L.J. 1285, A.I.R. 1928 All. 627, 50 All. 871.

The Magistrate should not have disposed of the case himself in face of the fact that the question of title was involved and there appeared to be 'reliable evidence' in support of the second party's title within the meaning of this section—*Sohan Lal*, 33 Cr.L.J. 384, 136 I.C. 839, 9 O.W.N. 115, A.I.R. 1932 Oudh 120, 1932 Cr.C. 193.

See also Note 358

358. Sub-section (2):—The law requires first of all that the party shall appear before the Magistrate and deny the existence of the public right in question, *secondly*, that he shall produce some reliable evidence, and *thirdly*, that such evidence shall be legal evidence and shall support the denial. If these three conditions are satisfied, then the Magistrate's jurisdiction ceases to exist—*Thakur Sao v. Abdul Aziz*, 4 Pat. 783, A.I.R. 1926 Pat 170, 27 Cr.L.J. 9. The Magistrate's jurisdiction is not ousted merely by reason of the defendant raising a *bona fide* claim of right, but he is entitled to proceed with the case, and is not bound to refer the parties to a Civil Court—*Ram Sagar v. Alek Naskar*, 49 Cal 682 (F.B.), 26 C.W.N. 442; *Abdul Wahid v. Abdullah*, 45 All. 656 (660), 21 A.L.J. 529

It is only in cases where the Magistrate finds that there is no reliable evidence in support of the denial that he is empowered by sub-sec (2) of sec. 139A to proceed further in the matter. Without such finding he has no jurisdiction to make the order absolute—*Abul Sayeed v. Damodar Prasad*, 36 Cr.L.J. 588, 154 I.C. 871, 16 P.L.T. 218, A.I.R. 1935 Pat 138, 1935 Cr.C. 335

The inquiry directed to be made under this section is something quite distinct from the inquiry which may have to be held later under sec. 137. The Legislature has laid down nothing as to what form the inquiry shall take. It may be of infinite variety according to the circumstances of the cases. The Magistrate is left an absolute discretion as to how far he will go or upon what materials he will act in considering whether the defendant has a case in support of his denial. But the defendant must produce some *reliable* evidence; it is not because he produces material of some sort that the Court is bound to stay the proceedings—*Manohar*, 1929 A.L.J. 385, A.I.R. 1929 All 202, 30 Cr.L.J. 670 (671, 672). The Magistrate is not entitled to demand that the evidence shall be sufficient to satisfy him that no public right exists. All he has to see is whether there is any *reliable* evidence in support of the denial of the public right—*Ude Singh v. Mohammada*, A.I.R. 1928 Lah. 856, 110 I.C. 330, 30 P.L.R. 687, 10 Lah 151, 29 Cr.L.J. 698 (699). This section only requires evidence and not *proof*, and the only condition is that upon the materials before him, the Magistrate has no reason to think the evidence false. The Magistrate has no jurisdiction to *weigh the evidence* and to determine on which side the balance leans. He has no jurisdiction to inquire into the actual existence of the public right claimed by the petitioners—*Thakur Sao v. Abdul Aziz*, 4 Pat. 783, 27 Cr.L.J. 9. This section does not authorise a Magistrate to look into the question of *title* and decide for himself whether the accused's case is or is not true—*Munna Lal*, 24 A.L.J. 361 (363), A.I.R. 1926 All 390, 93 I.C. 697, 27 Cr.L.J. 473. If the person who alleges that a public path has been obstructed is unable to show that a public pathway exists, the Magistrate is certainly neither required nor entitled to act as if it had been found that a public pathway did exist; and in the absence of evidence of actual dedication, the person defending the case under sec 133 has merely to adduce reliable evidence to show that the use of path by the public has not been sufficiently long to establish a prescriptive right. The fact that the pathway might have been used for 2½ years would not warrant the Magistrate enforcing its use as public path against the wishes of the owner, who is perfectly entitled to close it if he pleases—*Harisadhan v. Teknaram*, 36 Cr.L.J. 367, 153 I.C. 471, 15 P.L.T. 386, A.I.R. 1934 Pat 438, 1934 Cr.C. 948, where *Janki Ram v. Saukhi Panjara*, 108 I.C. 559, 9 P.L.T. 587 was referred to. See also *Pran Nath*, 33 C.W.N. 915, 57 Cal. 526 in this connection. A permissive way can be obstructed at pleasure by the owner or tenant of the land over which it runs—*Durga v. Sashi*, 13 Cal. 275 (278).

The inquiry contemplated by this section is not an elaborate inquiry with regard to the rights of the parties, and the Magistrate must not arrogate to himself the functions

of a Civil Court. He has only to see that the party has produced some evidence in support of his claim, which does not seem to be unreliable, and the Magistrate need not examine all the witnesses produced by the parties—*Satish v. Krishna*, 34 C.W.N. 957 (1959), 32 Cr.L.J. 189, 128 I.C. 810, A.I.R. 1931 Cal. 2, Ind. Rul. 1931 Cal. 106, 1931 Cr.C. 34. It is clearly for the person proceeded against to adduce evidence in support of his denial of a public right of way—*Raghunandan Saran Das*, 38 Cr.L.J. 29, 165 I.C. 942, A.I.R. 1936 Pat. 639, 17 P.L.T. 791, 1936 Cr.C. 1070, 1936 P.W.N. 926. The duty of a Magistrate under this section is merely to see whether the denial of the public right is frivolous or not—*Muhammad Khalil*, A.I.R. 1936 All. 356, 160 I.C. 854, 1936 Cr.C. 420, 37 Cr.L.J. 343, 58 All. 739, 1936 A.L.J. 75, 1936 A.L.R. 168, 8 R.A. 657; *Janardan Sarup*, 166 I.C. 376, A.I.R. 1937 All. 12, 38 Cr.L.J. 200, 1936 A.L.J. 1285, 1937 A.L.R. 28, 9 R.A. 405. In order that the Magistrate may satisfy himself whether there is reliable evidence, he may allow cross examination of the witnesses adduced by the defendant. But the inquiry being of a summary character, it is not intended that the complainant should be required to adduce evidence to contradict the case sought to be made out by the defendant—*Kishorimohan v. Krishnobihari*, 58 Cal. 461, 32 Cr.L.J. 1187, 134 I.C. 574, A.I.R. 1931 Cal. 527, 1931 Cr.C. 679, Ind. Rul. 1931 Cal. 862; *Chunni*, 40 Cr.L.J. 143, 178 I.C. 742, A.I.R. 1938 All. 653, 1938 A.L.J. 1013. The Magistrate cannot allow the complainant to produce definite evidence to the contrary and then proceed to weigh the evidence on both sides, in order to decide finally whether the alleged public right does or does not exist—*Chunni*, supra, following *Muhammad Khalil*, supra and *Janardan Sarup*, supra. See also *Govinda Goundan v. Ayi Goundan*, A.I.R. 1939 Mad. 465 (466), 1939 M.Cr.C. 42, 49 M.L.W. 476, 1939 M.W.N. 409, (1939) 1 M.L.J. 649, 1 I.L.R. 1939 Mad. 1030.

If the Magistrate finds that there is some evidence in support of the party denying the public right, all he has to do is merely to stay the proceedings until the matter is decided by a Civil Court. The Magistrate cannot compel either party to go to the Civil Court—*Rozan*, 52 All. 592, 31 Cr.L.J. 839, 125 I.C. 452, 1930 A.L.J. 815, A.I.R. 1930 All. 658, Ind. Rul. 1930 All. 660; *Manohar*, 1929 A.L.J. 385, Ind. Rul. 1929 All. 610, 30 Cr.L.J. 670 (672), 116 I.C. 786, A.I.R. 1929 All. 220; *Bihari*, 39 Cr.L.J. 791, 176 I.C. 755, 11 R.N. 77, A.I.R. 1938 Nag. 512. The Court is not directed to quash the proceedings altogether but to stay the proceedings. There is no obligation on the Magistrate to force the opposite party or any particular party into Court—*Ram Sahaai v. Uttama*, 36 Cr.L.J. 144, 152 I.C. 737, A.I.R. 1935 All. 79, 4 A.W.R. 959, 1934 All. L.R. 1031; *Hari Chand v. Durga*, 28 Cr.L.J. 363, 100 I.C. 971, A.I.R. 1927 Lah. 227. For contra see *Bram Chetan v. Jasbir*, 30 Cr.L.J. 360, 114 I.C. 782, A.I.R. 1929 Oudh. 85, 5 O.W.N. 1131, Ind. Rul. 1929 Oudh. 190.

If the denial is proved, the Criminal Court stays its hands. Then it will be the business of the other party to bring a civil suit. If he does not bring a civil suit, the denial is established. If he goes to the Civil Court and succeeds, the Magistrate may proceed to pass an order absolute under sec. 140 (1)—*Rozan*, supra.

Where a Magistrate came to the conclusion that the existence of a public pathway had not been established and directed that the proceedings should be dropped under sec. 137 (2), Cr. P. C., it was held that he should have stayed proceedings under sec. 139A, Cr. P. C., until the matter of such right has been decided by a competent Civil Court, but the form which he adopted for this order had the same effect as that of an order under this clause of sec. 139A and there was no necessity for interference on that account—*Harisadhan v. Teknarin*, 36 Cr.L.J. 367, 153 I.C. 471, 15 P.L.T. 386, A.I.R. 1934 Pat. 438, 1934 Cr.C. 984. See also *Debi Dayal v. Manao*, 29 Cr.L.J. 244, 107 I.C. 333, 5 O.W.N. 78, A.I.R. 1927 Oudh. 632.

What has now to be considered is very different from what was necessary to be determined before the amendments of 1923. Under sec. 139A, what has to be seen is whether the denial of public right by the second party is supported by any reliable evidence. If it is, the Magistrate has to stay his hands until the matter of the existence of such right has been decided by a competent Civil Court. Under the law, as it is at

present, it is the party moving for proceedings under sec. 133 or somebody interested in asserting such right, who has got to go to the Civil Court to establish its existence. The Magistrate's order directing the second party to go to the Civil Court is not one which can any longer be made under the law. The Magistrate cannot proceed with the case on the failure of the second party to go to the Civil Court within a reasonable time—*Khusa Mandal v. President, Gopalnagar Union Board*, 38 C.W.N. 391, 59 CLJ 290, 61 Cal. 390, A.I.R. 1934 Cal. 545, 151 I.C. 691, 1934 Cr.C. 785, 35 Cr.L.J. 1374; *Govinda Goundan v. Ayi Goundan*, A.I.R. 1939 Mad. 465, 1939 M.Cr.C. 42, 49 M.L.W. 476, 1939 M.W.N. 409, (1934) 1 M.L.J. 649, I.L.R. 1939 Mad. 1030.

359. Sub-section (3):—Question shall not be inquired into by Jury:
 —The questions as to whether the place is a public way or not, is to be decided by the Magistrate himself and not to be left to the jury. The jury is not competent to decide the question whether there is or is not a public right of way. They can merely find whether the Magistrate's order as originally made is reasonable and proper (sec. 139)—*Kailash v. Ram Lal*, 26 Cal. 859 (870); *Matuk Dhar v. Hari Madhab*, 31 Cal. 979; *Sheikh Imrat v. Sheikh Amjad*, 2 P.L.J. 67; *Khushi Ram*, 4 Lah. 224 (231), 24 Cr.L.J. 457. The case of *Ram Bilas*, 30 All. 364 (where it was held that it was within the competence of the jury to decide as to the validity of an objection that the way alleged to have been obstructed was not a public way) is no longer good law.

140. (1) When an order has been made absolute under section 136, section 137 or section 139, the Magistrate shall give notice of the same to the person against whom the order was made, and shall further require him to perform the act directed by the order within a time to be fixed in the notice, and inform him that in case of disobedience he will be liable to the penalty provided by section 188 of the Indian Penal Code.

(2) If such act is not performed within the time fixed, the Magistrate may cause it to be performed, and may recover the costs of performing it, either by the sale of any building, goods or other property removed by the order, or by the distress and sale of any other moveable property of such person within or without the local limits of such Magistrate's jurisdiction. If such other property is without such limits, the order shall authorise its attachment and sale when endorsed by the Magistrate within the local limits of whose jurisdiction the property to be attached is found.

(3) No suit shall lie in respect of anything done in good faith under this section.

360. No order under this section should be passed without first proceeding under sec. 139A, Cr. P. C.—*Munna Lal*, 27 Cr.L.J. 473 (474), 93 I.C. 697, 24 A.L.J. 361, A.I.R. 1926 All. 390.

It would seem reasonable to infer that "the Magistrate" who is to issue notice under this section is indicated in sec. 137, Cr. P. C.—*In re Narasinha*, 9 Mad. 201 (202). See also Note 343A.

A person who neither complies with the order passed under sec. 133, nor protests against it within the time fixed, can be prosecuted under sec. 136 without further notice being given under this section—*Aluvala v. Guruvich*, 31 Mad. 280 (282);

Bishambar, 13 All. 577. Notice is necessary only when the Magistrate makes an order absolute under sec. 137 or 139. A distinction is made between sec. 136 on the one hand, and secs. 137 and 139 on the other. The two latter sections do not declare the liability to punishment, but only speak of the order being made absolute, and consequently notice is necessary in order to give the defendant an opportunity of complying with the order absolute. But sec. 136 declares that the liability to punishment attaches as soon as the time fixed in the conditional order expires without compliance, and consequently no notice is necessary to give further time for compliance with the order. It is submitted, therefore, that reference to sec. 136 should be omitted from sec. 140.

Sub-section (1) is mandatory; sub-section (2) is merely directory. If the jury reports that the Magistrate's order is reasonable and proper, the Magistrate is bound to make the order absolute (sec. 139) and is bound under sub-section (1) of this section to require the party to carry out the order within a certain time, in spite of the fact that the party has filed a civil suit and obtained a temporary injunction. The Magistrate has no discretion in this matter. But when the second stage contemplated in sub-section (2) is reached, the Magistrate has a discretion and can, after taking into consideration all the circumstances of the case, decide whether he would give the direction referred to in sub-section (2) or whether he thinks it expedient to leave the matter where it is until the conclusion of the civil suit. It is, however, open to the parties to come to the High Court and say that such an order is not expedient and proper. It would have to be shown that the Magistrate in exercising his discretion had not done so judiciously; otherwise the High Court will not set aside the order—*Banku*, 58 Cal. 1088, 35 C.W.N. 571 (572), 32 Cr.L.J. 1240, 134 I.C. 918, A.I.R. 1931 Cal. 787, 1931 Cr.C. 1005, Ind. Rul. 1931 Cal. 918.

Effect of death of the person against whom the order was made:— See *Jugal Kishore* in Note 336.

Cancellation of order by succeeding Magistrate:—If a final order is passed by a Magistrate under this chapter, a succeeding Magistrate cannot go behind the order and question its legality, as if he were sitting in judgment over it as a Court of Appeal. Therefore, if an application is made under this section to the succeeding Magistrate for the enforcement of an order passed by a preceding Magistrate, the former cannot reject the application on the ground that the order passed by his predecessor was an illegal order—*Kiran Chandra v. Ramesh*, 27 C.W.N. 459, 72 I.C. 77, A.I.R. 1923 Cal. 589, 24 Cr.L.J. 317. A Magistrate had no jurisdiction to cancel an order passed by his predecessor for removal of a nuisance under sec. 133, on the ground that one of the parties to the proceedings had not been properly served with notice or on the ground that the nuisance was in existence for a long time—*Shahabuddin v. Abdul Kader*, 31 C.W.N. 530, 44 C.L.J. 211, 28 Cr.L.J. 30, 99 I.C. 62, A.I.R. 1927 Cal. 70. But see *Ramsaran v. Ram Lagan* in Note 341.

Costs:—The question as to from which party or parties the costs for the removal of a nuisance should be recovered, has to be determined upon a consideration of the question as to the parties upon whom the notices in connection with the proceedings were served; it is unjust to make an order for recovery of costs from a party who was not actually served with any notice of the said proceedings—*Shahabuddin v. Abdul Kader*, *supra*.

Sub-sec. (3):—The order of the Magistrate directing refund of deposit is not *ultra vires* and cannot be questioned in the Civil Court—*Seonarain v. Sakhi Chand*, 18 Cr.L.J. 305, 38 I.C. 417.

This section lays down the procedure on order being made absolute and the consequences of disobedience of the order. If a Magistrate causes the act ordered to be performed, then that order cannot be questioned in the Civil Court, and no suit can be maintained in the Civil Court to prevent the Magistrate from carrying his order into effect. Clause (3) of this section says that no suit shall lie in respect of anything done in good faith under this section. It would be mere trifling with the

Act to hold that the Civil Court can give relief to the aggrieved persons against the order of the Magistrate when the Act says that no suit in respect of anything done by him shall lie—*Kedar Nath v. Satish Chandra*, 41 Cr.LJ 99 (100), 184 I.C. 754, 1939 O.W.N. 966, A.I.R. 1939 Oudh 75, 1939 O.L.R. 653

Sec. 188, I. P. C.—A question as to the validity of the final order made in the proceedings under sec. 133, Cr. P. C., cannot be raised at the trial of the accused under sec. 188, I. P. C.—*Supdt v. Khoda Baksha*, 35 Cr.LJ. 778, 148 I.C. 808, 60 Cal 1336, A.I.R. 1934 Cal. 242, 1934 Cr.C. 364

141. If the applicant, by neglect or otherwise, prevents the appointment of the jury, or if from any cause the jury appointed do not return their verdict within the time fixed or within such further time as the Magistrate may in his discretion allow, the Magistrate may pass such order as he thinks fit, and such order shall be executed in the manner provided by section 140.

361. Jury failing to return verdict:—If the jury fails to return a verdict within the time allowed by law, the Magistrate may pass such order as he thinks fit. Therefore, where on the failure of the jury to return a verdict, the Magistrate inspected the spot and called for a report from the police and thereafter confirmed his original order, *held* that the final order was perfectly legal—*Shyamsundar*, 24 A.L.J. 165, A.I.R. 1926 All. 658, 96 I.C. 645, 27 Cr.LJ 981 When the majority of the jurors perversely refuse to return a verdict for fear of displeasing either party, the Magistrate can discharge them and appoint a new jury—*Girwar Lal v Bansidhar*, 44 All. 575, 20 A.L.J. 472, 23 Cr.LJ 276, 66 I.C. 420; A.I.R. 1922 All 297 The verdict of three jurymen out of five, two of them did not express any opinion, and one of whom abstained altogether from the enquiry, cannot be regarded as a finding of the majority of the jurors under sec 139, Cr P. C., on which the Magistrate can act But at the same time the Magistrate is competent to act under sec 141, Cr P C., and pass such orders as he may think fit—*Durgacharan v Sashi*, 13 Cal 275 (279) Where upon failure of the jury to return their verdict, the petitioners appeared before the Magistrate and prayed for appointment of a fresh jury, it was held that the Magistrate ought to have appointed a new jury and should not have made the original order absolute—*Shib Chandra v Hriday*, 12 C.W.N 1047, 8 Cr.LJ 233 Under this section, the Magistrate upon failure of the jury to return a verdict, has a discretion to pass such order as he thinks fit Therefore, where the foreman of the jury simply returned the papers without a verdict, the Magistrate had jurisdiction to make the order absolute—*Jiblal v Gena*, 4 P.L.T. 15, 24 Cr.LJ 492, 72 I.C. 956, A.I.R. 1923 Pat 229. But it is desirable that under such circumstances the Magistrate should inquire into the case and should give the party an opportunity of showing cause and procuring evidence, before he makes the order absolute under this section—*Jiblal v. Gena*, supra; *Ajodhya Tewari*, 4 P.L.T. 13, 73 I.C. 327, A.I.R. 1923 Pat 131, 24 Cr.LJ. 583 But if, upon the failure of the jury to return their verdict, the petitioners did not take any action to move the Magistrate for taking evidence on their behalf, the Magistrate was justified in making the order absolute—*Kishori Lal*, 13 C.W.N 367, 10 Cr.LJ. 494, 4 I.C. 72. There will be cases, as for example where the jury is unable to report within the time fixed for reasons beyond the control of the applicant, where it would be improper for the Court not to hear the applicant and allow him to show cause before the order was made absolute; but where the applicant has been negligent or obstructive and has wilfully abstained from appearing before the jury, which had been appointed at his instance to settle the dispute, there is no obligation whatsoever on the Court to issue notice to him before confirming the provisional order which had been passed under sec. 133—*Pyare Lal v. Dwarka*, 36 Cr.LJ 1472, 158 I.C. 759, 1935 A.L.J. 1089, A.I.R. 1936 All. 65.

In this section the word "discretion" is used in relation to the extension of time within which the jury is to give their verdict. It is not used in relation to the order passed by the Magistrate. It is clear, however, that as the words "the Magistrate may pass such order as he thinks fit" are used, it means of course that the Magistrate has a discretion as to the order he should pass and that discretion means a judicial discretion. The Magistrate cannot under this section pass an arbitrary or capricious or whimsical order, but instead of applying to that order, what we may call the test of inquiry, it would perhaps be better to apply the test of reason. The order passed by the Magistrate under this section must be a reasoned order. It must be such an order as the Court in appeal can uphold, allowing, of course for the fact that orders under this Chapter, as under Ch. 10, are only *quasi-judicial* orders and that the Magistrate on the spot is the better judge of facts than are Judges some hundreds of miles away. There is nevertheless, nothing in the section which can require a Magistrate, after a jury has failed to function, to hold a further inquiry, if he has before him material upon which he can pass a reasonable order under this section. The case is, however, somewhat different when persons in good faith have chosen a trial by jury and, through no fault of their own, their chosen tribunal fails to hear and try their case. They cannot claim, then, they are entitled that their case should be heard by the Magistrate as a summons case under sec. 137 (1), Cr. P. C., but the Magistrate would clearly desire in such circumstances that they should be given an opportunity briefly to state their case—*Jethanand v. Shikarpur Municipality*, A.I.R. 1940 Sind 24 (25), I.L.R. 1939 Kar. 179, 41 Cr L.J. 364, 186 I.C. 723.

142. (1) If a Magistrate making an order under section 133 considers that immediate measures should be taken to prevent imminent danger or injury of a serious kind to the public, he may, whether a jury is to be, or has been, appointed or not, issue such an injunction to the person against whom the order was made, as is required to obviate or prevent such danger or injury pending the determination of the matter.

(2) In default of such person forthwith obeying such injunction, the Magistrate may himself use, or cause to be used, such measures as he thinks fit to obviate such danger or to prevent such injury.

(3) No suit shall lie in respect of anything done in good faith by a Magistrate under this section.

362. Scope:—Sec. 142, Cr. P. C., is not an independent section, but is controlled in its effects by sec. 133, Cr. P. C. A reference to sec. 133, Cr. P. C., shows that the section is confined to certain matters which are specifically mentioned therein and cannot be brought into play to govern or control other matters which are quite extraneous to it. It is nowhere contemplated by sec. 142, Cr. P. C., that it would govern cases where an imminent breach of the peace is apprehended. The "serious injury" or the "imminent danger" contemplated by sec. 142, Cr. P. C., refers to the injury or danger emanating from those things themselves which are specified in sec. 133, Cr. P. C., and consequently sec. 142 is limited in its scope. An order under sec. 142 can, therefore, be passed only if an injury or danger specified in sec. 133, Cr. P. C., is apprehended and not otherwise—*Mirza Mohammad Ashraf*, A.I.R. 1937 Lah. 101, I.L.R. (1937) 18 Lah 303, 39 P.L.R. 863, 171 I.C. 941.

This section intends the order to meet an immediate danger or injury and its object is to prevent that injury pending the determination of the case under sec. 133 or 137, Cr. P. C. The Magistrate not only is not precluded from making a final order

under sec. 137, Cr. P. C., but secs. 133, 137 and 142, Cr. P. C., taken together clearly mean that the Magistrate, in spite of making an order under sec. 142, is intended to proceed with the case and make a final order under sec. 137—*Rebati Mohan v. Chattal Chandra*, 63 C.L.J. 5, 38 Cr.L.J. 173, 166 I.C. 221, A.I.R. 1936 Cal. 692, 1936 Cr.C. 954, 9 R.C. 490.

Where a Magistrate who makes an order under this section, subsequently directs further inquiry to be made, the Magistrate must be held to have abandoned the proceedings under this section, and he should have proceeded under secs. 136 and 137 instead of fining the party under sec. 188, I. P. C.—*Brojendra*, 21 W.R. 86.

No injunction can be issued under this section when the danger has passed away—*Indoobhooshun*, 1 W.R. 8.

143. A District Magistrate or Sub-Divisional Magistrate, or any other Magistrate empowered by the Provincial Government or the District Magistrate in this behalf, may order any person not to repeat or continue a public nuisance, as defined in the Indian Penal Code or any special or local law.

Magistrate may prohibit repetition or continuance of public nuisance.

Amendment:—The words "Provincial Government" have been substituted for "Local Government" by sec. 4 of the Government of India (Adaptation of Indian Laws) Order, 1937.

363. Scope:—Under this section no Magistrate can prohibit what was lawful before the date of his order, and thereby make such an otherwise legal act, committed after the date of the order, punishable as a nuisance under the Indian Penal Code—*Saminadha Pillai*, 19 Mad 464 (469), 6 M.L.J. 181. The object of this section is to give the Magistrate summary powers to issue an order against a person who is repeating or continuing a public nuisance, that is to say, who has repeated an act which has already been forbidden by a competent tribunal. It is not for original use. So the second party, who is alleged to have committed the nuisance, must have the right to set up a defence on the merits and the summary order under this section should not be made without giving him an opportunity of being heard under the other sections of Chap. X of the Cr. P. C.—*Jagadish v. Dhanushdari*, 36 Cr.L.J. 187, 152 I.C. 708, 15 P.L.T. 253, A.I.R. 1934 Pat. 305, 1934 Cr.C. 728; *Joku*, 8 All 99; *Sahabat Ali Mirdha v. Emp.*, 41 C.W.N. 638. The order passed by the Magistrate under this section, without drawing up a proceeding, without taking evidence, and without giving an opportunity to the second party to substantiate their case, is wholly without jurisdiction and illegal. Further the order made by the Magistrate under this section without an adjudication about the existence of the public nuisance as contemplated in the section by a competent Court, is bad in law and illegal—*Jogendra v. Sheikh Anju*, 36 Cr.L.J. 591, 154 I.C. 663, A.I.R. 1935 Cal. 108, 38 C.W.N. 1070, 1935 Cr.C. 102. Sec. 143, Cr. P. C., is obviously only applicable where there has been a preliminary consideration under sec. 133, Cr. P. C., and the Magistrate has passed an order under sec. 133 prohibiting public nuisance. Then if there is any danger of the nuisance being repeated, an order under sec. 143 can be passed. The terms of sec. 143 show that this is what is meant. Where an order under sec. 143 was passed *ex parte*, there having been no opportunity for the accused to show cause against it, the order convicting them for the breach of that order, which is illegal, cannot be maintained—*Sahabat Ali Mirdha v. Emp.*, 41 C.W.N. 638.

This section contemplates the prevention of a repetition, or the continuance of a public nuisance by the party against whom an order under sec. 133, Cr. P. C., has already been passed. There can be no doubt that an order under sec. 133, Cr. P. C., binds the person against whom the order is passed and nobody else. No order can, therefore, be passed under sec. 143, Cr. P. C., against a person who was not a party in

any earlier proceedings when orders under sec. 133, Cr. P. C., were passed—*Ram Sahai v. Uttama*, 36 Cr.L.J. 144, 152 I.C. 737, A.I.R. 1935 All. 79, 1935 A.L.J. 18.

It is true that in order that action can be taken under this section the nuisance must be "a public nuisance, as defined in the Indian Penal Code or any special or local law," but that does not exclude the conclusion that the nuisance, repetition of which may be forbidden under this section must be a nuisance which has been made a subject of action under sec. 133, Cr. P. C., and the following section. In short this section does not apply to "original proceedings," but applies only to subsequent proceedings when a nuisance has been made the subject of inquiry and adjudication under the sections which precede it. It, therefore, follows that this section does not stand alone but is supplementary to the sections which precede it—*Haji Sulleman Yusuf Kumbhar*, A.I.R. 1940 Sind 124, 41 Cr.L.J. 727, 189 I.C. 353.

363A. Revision:—It was formerly held that orders under sec. 143 were not open to revision under *this Code* (though they were open to revision under the Letters Patent) because they were not 'proceedings' within the meaning of sec. 435—*Bisheshur*, 1892 A.W.N. 102. But now by reason of the omission of sub-section (3) of sec. 435 by the Amendment Act of 1923, orders under sec. 143 will henceforth be liable to revision under this Code.

CHAPTER XI.

TEMPORARY ORDERS IN URGENT CASES OF NUISANCE OR APPREHENDED DANGER.

144. (1) In cases where, in the opinion of a District Magistrate, a Chief Presidency Magistrate, Sub-Divisional Magistrate, or of any other *Magistrate not being a Magistrate of the third class specially empowered by the Provincial Government* or the Chief Presidency Magistrate or the District Magistrate to act under this section, *there is sufficient ground for proceeding under this section* and immediate prevention or speedy remedy is desirable,

such Magistrate may, by a written order stating the material facts of the case and served in manner provided by section 134, direct any person to abstain from a certain act or to take certain order with certain property in his possession or under his management, if such Magistrate considers that such direction is likely to prevent or tends to prevent obstruction, annoyance or injury, or risk of obstruction, annoyance or injury to any person lawfully employed, or danger to human life, health or safety, or a disturbance of the public tranquillity, or a riot, or an affray.

(2) An order under this section may, in cases of emergency or in cases where the circumstances do not admit of the serving in due time of a notice upon the person against whom the order is directed, be passed *ex-parte*.

(3) An order under this section may be directed to a particular individual, or to the public generally when frequenting or visiting a particular place.

(4) Any Magistrate may, *either on his own motion or on the application of any person aggrieved*, rescind, or alter any order made under this section by himself or any Magistrate subordinate to him, or by his predecessor in office.

(5) *Where such an application is received, the Magistrate shall afford the applicant an early opportunity of appearing before him either in person or by pleader and showing cause against the order; and, if the Magistrate rejects the application wholly or in part, he shall record in writing his reasons for so doing.*

(6) No order under this section shall remain in force for more than two months from the making thereof, unless in cases of danger to human life, health or safety or a likelihood of a riot or an affray, the *Provincial Government*, by notification in the official Gazette, otherwise directs.

Change:—This section has been amended by sec 27 of the Cr. P. C Amendment Act (XVIII of 1923). The reasons of amendment have been stated below in their proper places

The words "Provincial Government" have been substituted for the words "Local Government" by sec 4 of the Government of India (Adaptation of Indian Laws) Order, 1937.

364. Application of this section:—The power conferred by this section upon a Magistrate is an extraordinary power and the Magistrate should resort to it only when he is satisfied that other powers with which he is entrusted are insufficient. Moreover, the authority of the Magistrate should be exercised in defence of rights rather than in their suppression, in repression of illegal, rather than in interference with lawful acts—*Sundram*, 6 Mad. 203 (221), 2 Weir 77. Even in the case of an order in an emergency under this section, the Magistrate's action should be directed rather against the wrong-doers than the wronged, though the nature of the emergency may make it necessary for a time, in the public interest, to interfere with the lawful exercise of private rights. But, in any case, the authority of Magistrates should be exercised in defence of rights rather than in their suppression, in repression of illegal rather than in interference with lawful acts—*Jasoda Lekhray v Emp.*, AIR. 1939 Sind 167. (169), 40 Cr L J. 703, 182 I.C. 698, I L R. 1939 Kar 662, 12 RS 31. See also *Jafar Husam v Peary Lal*, *infra*. His first duty is to secure to every person the enjoyment of his rights under the law, and by measures of precaution to deter those who seek to invade the rights of others, but if he apprehends that the lawful exercise of right may lead to civil tumult and he doubts whether he has available a sufficient force to repress such tumult or to render it innocuous, regard for the public welfare is allowed to override temporarily the private rights and the Magistrate is authorised to interdict its exercise—*Muthialu v. Bapun*, 2 Mad 140; *Tekait Kunj Behari v Bhiko*, 5 C.W.N 329. The first duty of the Government is the preservation of life and property, and to secure this end power is conferred by this section on its officers to interfere even with the ordinary rights of the members of the community—*Sundram*, 6 Mad 203, 2 Weir 77.

Courts, Civil as well as Criminal, exist for the protection of rights, and therefore the authority of a Magistrate should ordinarily be exercised in defence of rights rather than in their suppression; when an order in suppression of lawful rights has to be made, it ought not to be made unless the Magistrate considers that other action that he is

competent to take is not likely to be effective, and the order, if made, should never be disproportionate to but should always be, as far possible, commensurate with the exigencies of any particular situation—*Sumner v. Jogendra*, 34 Cr.L.J. 334 (337), 142 I.C. 319, Ind. Rul. 1933 Cal. 262, A.I.R. 1933 Cal. 348, 1933 Cr.C. 420; *Thakin Aung Bala v. District Magistrate, Rangoon*, 40 Cr.L.J. 645, 182 I.C. 23, A.I.R. 1939 Rang. 181, 1939 Rang L.R. 294, 11 R.R. 516. Ordinarily a person desiring to do what he is lawfully entitled to do should have the support of those responsible for law and order. Orders under this section are to be directed not against those who desire to do what the law permits them to do, but against those who attempt to prevent the exercise of a legal right—*Jafar Husain v. Peary Lal*, 36 Cr.L.J. 955, 156 I.C. 595, A.I.R. 1935 All. 575. See also *Jasoda Lekhraj v. Emp.*, *supra*. It is only in exceptional circumstances where emergency of the gravest character is made out that a Court would be justified in the exercise of its powers under this section to make an order which would have the effect of interfering with the exercise of the private rights of individuals—*Ganesh v. Lalit*, 35 Cr.L.J. 1252, 151 I.C. 183, 38 C.W.N. 388, 1934 Cr.C. 754, A.I.R. 1934 Cal. 513. To give the Magistrate jurisdiction under this section all that is required is that he shall be of opinion that there is sufficient ground to proceed under this section and that immediate prevention or speedy remedy is desirable and that the direction he proposes to make is likely to prevent or tends to prevent a disturbance of the public tranquillity or a riot or an affray. In such circumstances private rights must give way whatever be the subject matter of dispute: in particular it is immaterial that the dispute relates to land, as the great majority of dangerous disputes do. Given the necessary condition an order cannot be impugned as without jurisdiction merely because it was arbitrary, for instance an order stopping *kurbani* or an order of stopping music before a mosque—*Radhe v. Jairam*, A.I.R. 1929 Pat. 714 (716), 1929 Cr.C. 586, 31 Cr.L.J. 466, 123 I.C. 73.

When a breach of the peace is anticipated action is to be taken against the potential law-breakers and not against the peaceful citizens whom it is expected that the law-breakers will molest—*Khazan Chand*, 28 Cr.L.J. 345, 100 I.C. 825, A.I.R. 1927 Lah. 430, following *Md. Ismail v. Barkat Ali*, 71 I.C. 506, 26 C.W.N. 904, A.I.R. 1922 Cal. 483, 24 Cr.L.J. 154 and *Blong*, 82 I.C. 42, A.I.R. 1924 Pat. 767, 25 Cr.L.J. 1178, 6 P.L.T. 130, 3 Pat.L.R. 41 (Cr.). Where there is a conflict between a public interest and a private right, the former must prevail. And so, although the Hindus may have obtained from a competent Civil Court a declaration of their right to conduct processions with music before mosques, the Magistrate may, in the interest of the public peace, prohibit the Hindu from taking any such procession in any street where there are mosques—*In re Viswanadha Rao*, 51 Mad. 1006, 55 M.L.J. 442, 30 Cr.L.J. 31 (32) (F.B.). An order under sec. 144 may sometimes interfere with the legal rights of individuals, but when such interference is necessary, it is duty of the Magistrate to limit it as much as possible; and for that purpose he should afterwards hold an inquiry into the circumstances and determine whether as a matter of fact the act prohibited as likely to lead to a breach of the peace is within or in excess of the legal rights of the person forbidden to do it. If it is found that a man is doing that which he is legally entitled to do, and that his neighbour chooses to take offence thereat and to create a disturbance in consequence, it is clear that the duty of the Magistrate is not to continue to deprive the first of the exercise of his legal rights, but to restrain the second from illegally interfering with the exercise of legal rights—*Abdool v. Lucky Naram*, 5 Cal. 132 (134, 135); *Ramnad v. Kader*, 62 M.L.J. 392, 33 Cr.L.J. 605 (608), A.I.R. 1932 Mad. 294; *Blong*, 25 Cr.L.J. 1178, 82 I.C. 42, A.I.R. 1924 Pat. 767, 6 P.L.T. 130, 3 Pat.L.R. 41 (Cr.); *F. E. Chrestien v. Carter*, A.I.R. 1939 Pat. 512, 20 P.L.T. 374, 1939 P.W.N. 402, 40 Cr.L.J. 895, 181 I.C. 240, 6 B.R. 30, 12 R.P. 232. It is the obvious duty of the Executive to uphold the civil rights declared by its own Civil Courts. No doubt, the interests of the public peace are paramount, but where the Magistrate is aware that there will probably be a disturbance of the petitioner's civil rights at recurring seasons every year, it is his duty to exhaust every measure

at his disposal to uphold the declared civil rights before he abandons the attempt, and he should resort to sec. 144 only if there is no time or opportunity for any other course. If there is time or opportunity, the Magistrate may bind over those persons who threaten to interfere with the petitioner's civil rights, to keep the peace, or may get down sufficient force to meet the crisis. It is not a proper course to do nothing to meet the crisis, and then call in sec. 144 to tide him over it—*Venkatasubba*, 100 I.C. 709, 25 M.L.W. 375, A.I.R. 1927 Mad. 368, 7 A.I.Cr.R. 531, 52 M.L.J. 298, 28 Cr.L.J. 325 (326); *Venkatasubbayya v. Md Falauddin*, 52 M.L.J. 651, 28 Cr.L.J. 509 (510), 101 I.C. 893, A.I.R. 1927 Mad. 611, 8 A.I.Cr.R. 146.

Moreover, this section was never intended to vest a Magistrate with powers to decide disputes of a civil nature between private individuals and to usurp the functions of a Civil Court. It is not permissible for a Magistrate, under the cover of an order under this section, to dispossess a particular individual of certain property and to deliver possession of it to another—*Hafizuddin v. Laborde*, 50 All. 414, 28 Cr.L.J. 991 (992), 105 I.C. 815, A.I.R. 1928 All. 14, 26 A.L.J. 83.

It cannot be the intention of the law that a Magistrate should compel the owner of property to submit to trespass upon it merely because the trespasser is prepared to use force. The Magistrate should not enforce any use of the private property (e.g. performance of ceremonies upon it) against the person in possession thereof unless it is established either by a decree of a Civil Court or as the result of some enquiry under sec 147, Cr P C, that the persons claiming the right to use it have justification for their claim—*Abdul Majeed v. Emp*, 40 Cr.L.J. 383, 180 I.C. 499, A.I.R. 1939 All 182, 1938 A.W.R. (H.C.) 852.

There is nothing in the section requiring the Magistrate to uphold rights whether constitutional or otherwise; there is nothing in the section requiring the Magistrate to hold a judicial inquiry into the rights of the parties involved. This section is the one single section in Chapter XI and that chapter is headed 'Temporary orders in urgent cases of nuisance or apprehended danger'. Once a Magistrate is of opinion that there is sufficient ground for proceeding under this section, once a Magistrate considers that there is 'apprehended danger' which can only be averted by directing a person or persons to abstain from a certain act which may result in danger to human life or a disturbance of the public tranquillity or a riot or an affray, he is entitled to make an order directing that person or those persons to abstain from such act even though such act was otherwise lawful, even though such person or persons may be acting lawfully in the exercise of a right. This section is intended to provide for an emergency, and it is idle to contend that in an emergency when a riot is apprehended and when there is apprehension of a serious disturbance of the public tranquillity the Magistrate is required to deliberate upon and decide the rights of the parties before acting—*Pir Gul Hassan v Emp*, A.I.R. 1939 Sind 230 (232), 40 Cr.L.J. 823, 183 I.C. 641, 1 I.R. 1939 Kar, 751, 12 R.S. 67.

364A. Clauses (1) and (2)—Order to whom to be addressed:—

A careful perusal of the first two clauses of this section leaves no doubt that they are confined to the case of an individual person or persons to whom a notice may be issued directing them to refrain from a certain act or to take certain order with certain property in their possession or management. Under these two clauses no order can be issued to the general public—*Sat Narain v Emp*, A.I.R. 1939 All 746, 41 Cr.L.J. 121, 185 I.C. 172, 1939 A.L.J. 1061.

365. Magistrate empowered:—Since the power to be exercised under this section is an extraordinary power, the law is careful to confer this power upon those Magistrates alone whose discretion is prominently guaranteed by their responsible position or by selection—*Sundram*, 6 Mad 203. When a Magistrate passes an order under this section, the record should show in clear and unmistakable terms the authority under which he professes to act—*Thudamawara*, 1 Rang. 49, 2 Bur.L.J. 22, 24 Cr.L.J. 727, 74 I.C. 65, A.I.R. 1923 Rang 146.

A Magistrate who is only in charge of the current files of the Court of the Sub-divisional Magistrate, while he is on tour, has jurisdiction to pass final orders under this section. The fact that the Sub-divisional Magistrate has returned from tour on the morning on which the order is passed but where it is not known that he would attend the Court and he does not do so until late, does not invalidate the order—*Abdul Majid v. Nripendra Nath*, 35 Cr.L.J. 881, 38 C.W.N. 556, A.I.R. 1934 Cal 393.

In the Punjab, all Magistrates of 1st and 2nd class have been empowered to act under this section—*Punjab Gazette*, 1883, Part I, p. 52. So also in Upper Burma. In Bombay, Assistant Superintendents of Police have been empowered to act under section 144. See *Bombay Gazette*, 1883, Part I, 396.

By the Amendment Act of 1923, third class Magistrates have been expressly prohibited from being empowered under this section. "We do not think that powers under section 144 should be granted to a Magistrate of the third class, and we have provided for this by a small amendment"—*Report of the Select Committee of 1916*.

366. Conditions precedent:—The first thing which a Magistrate has got to be satisfied about is that there is sufficient ground for proceeding under this section and a immediate prevention or speedy remedy is desirable; and the second element which has got to be established is that the Magistrate should consider that the direction which he is about to give, is one which is likely to prevent or tends to prevent, obstruction, annoyance or injury to any person lawfully employed or danger to human life, health or safety or a disturbance of the public tranquillity or a riot or any affray—*Ganesh v. Lalit*, 35 Cr.L.J. 1252, 151 I.C. 183, 38 C.W.N. 388, 1934 Cr.C. 754, A.I.R. 1934 Cal 513. Before taking action under this section the Magistrate should be of opinion that *immediate prevention* or speedy remedy is necessary, and he should state in the order the materials upon which his opinion as to the urgency of the matter is based—*Karoolal v. Shyam Lal*, 32 Cal. 935; *Hafizuddin*, 50 All. 414, 28 Cr.L.J. 991 (992), 105 I.C. 815, A.I.R. 1928 All. 14, 26 A.L.J. 83; *Motilal*, A.I.R. 1931 Bom. 513, 33 Bom.L.R. 1178, 1931 Cr.C. 945, 134 I.C. 1237, 33 Cr.L.J. 75; *Jokhu*, 8 All. 99 (102). The Magistrate must decide as a matter of fact whether the dispute is likely to lead to a breach of the peace or a disturbance of public tranquillity. Where this essential preliminary to assuming jurisdiction is not found to exist, his order must be deemed to be an order having no legal force and any expression of opinion contained therein must be deemed to be void of legal force or effect—*Vattahara S. J. v. Reverend Koshi*, A.I.R. 1937 Mad 494, 38 Cr.L.J. 892, 170 I.C. 390, 1937 M.Cr.C. 180, 1937 M.W.N. 636, 45 M.L.W. 473. This section is to be applied in cases of urgency, and should not be allowed to take the place of any other provision of law (e.g., sec. 133) which might be more appropriate. And before proceeding under this section, the Magistrate should hold an inquiry and record the urgency of the matter—*Kamini v. Harendra*, 38 Cal. 876. Jurisdiction under this section depends on the urgency of the case, and the mere statement of the Magistrate that he considered the danger to be imminent, is not sufficient to give him jurisdiction if the facts set out by him show that really there was no urgent necessity for taking action—*Chandra Nath v. E. I. Ry.*, 23 C.W.N. 145, 19 Cr.L.J. 951. But where the order purports to have been passed as an emergency measure upon a police report, the Magistrate was the sole and the best judge of the emergency which constrained him to pass the order under this section—*Abdul Samad*, 35 Cr.L.J. 472, 147 I.C. 672, 11 O.W.N. 74, 1934 Cr.C. 257; *Jang Bahadur*, 25 Cr.L.J. 433, 77 I.C. 721. The record of the Magistrate should disclose the existence of an emergency which called for an *ex parte* order under this section or that there was no sufficient time to serve notice on the party affected thereby. But a Magistrate ought not to treat a case as a case of emergency merely because some people threaten to commit a breach of the peace, unless he had no sufficient police or other force at his command to prevent an immediate breach of the peace and unless he is further unable to find out the persons threatening to commit a breach of the peace as to bind them over to keep the peace—*Venkataramana*, 1917

M.W.N. 724, 19 Cr.L.J. 56, 6 M.L.W. 456, 43 I.C. 88, 22 M.L.T. 323. A reasonable connection must be established between the act prohibited and the apprehended danger which, it is feared, will lead to a disturbance of the public tranquillity. The likelihood of such disturbance owing to the act prohibited must be a reasonable and proximate one, and the connection between them must not be speculative or distant. Thus, an order prohibiting the wearing of Gandhi caps is improper, because the connection between the Gandhi caps and the civil disobedience movement which disturbs public tranquillity is only a distant and probable one—*Satyanarayana*, 60 M.L.J. 378, 1931 Cr.C. 332 (335), A.I.R. 1931 Mad 236, 1930 M.W.N. 841, 3 M.Cr.C. 395, 131 I.C. 449, 33 M.L.W. 632, 32 Cr.L.J. 744, 16 A.I.Cr.R. 361.

The word "annoyance" in this section is not restricted to physical annoyance but includes mental annoyance—*Ganesh*, 55 Bom. 322, 32 Cr.L.J. 507 (509), 130 I.C. 396, A.I.R. 1931 Bom. 135, 33 Bom.L.R. 59, Ind. Rul. 1931 Bom 252, 1932 Cr.C. 183

A Subordinate Magistrate passing an order under this section sought to use his own judicial mind on the report of the police, and to come to his own conclusion whether a temporary and urgent order ought to be passed, and should not be guided entirely by the "instructions" issued by the District Magistrate (which are not legally binding on him), though he ought to give due respect to the advice of the District Magistrate—*Govinda v. Perumal*, 38 Mad. 489 (490).

An order under this section must be based upon proper evidence. In the absence of such evidence, the Magistrate cannot pass an order merely on the complaint of one party—*Chandra Kanta*, 20 C.W.N. 981, 17 Cr.L.J. 464. But it cannot be laid down as a general proposition that an order under this section cannot be passed without taking evidence—*Jagrupa v. Chotey Narain*, 37 Cr.L.J. 95 (97), 159 I.C. 455. So also, the Magistrate cannot act upon mere surmise or assumption, or merely on the strength of a Police report without hearing the petitioner or giving him an opportunity of being heard—*Bhyroo*, 11 W.R. 46; *Banu v. Wooma*, 21 W.R. 26. A proceeding under this section is a judicial proceeding, and a Magistrate cannot dispose of such a proceeding by examining witnesses behind the back of the parties and on the strength of a local inspection of which he gave no notice to the parties—*Govinda Ram v. Basantlal*, 7 Pat. 269, 30 Cr.L.J. 302 (304), A.I.R. 1929 Pat. 46.

A Magistrate who is to make an order under this section is not competent to delegate his functions to some other Magistrate; it is, however, competent for him to depute another Magistrate to make an enquiry and submit a report and then to act on the report so submitted after applying his mind to the materials contained therein and coming to his own conclusion as to their sufficiency or otherwise—*Sumner v. Jogendra*, 34 Cr.L.J. 334, 142 I.C. 319, Ind. Rul. 1933 Cal. 262, A.I.R. 1933 Cal 348, 1933 Cr.C. 420

367. Order—Nature and contents:—

Orders under this section are judicial and not administrative—*Belvi*, A.I.R. 1931 Bom. 325 (326), 33 Bom.L.R. 673, 1931 Cr.C. 581, 32 Cr.L.J. 1144, 134 I.C. 344. See also *Muthusami v. Thaugammal*, 53 Mad. 320, 58 M.L.J. 148, 31 Cr.L.J. 324, 121 I.C. 833, A.I.R. 1930 Mad 242, 1930 Cr.C. 273, Ind. Rul. 1930 Mad 241, 31 M.L.W. 16, 1930 M.W.N. 82. See Note 382.

(a) The order must be in writing; the words in the section are 'written order'. There must be a written order directed to the accused and duly promulgated, before he can be prosecuted for disobedience of the order—*Mul Raj*, 1905 P.R. 36. As this section empowers a Magistrate to interfere materially with the liberty of the subject, it is necessary that he should promulgate his order in terms sufficiently clear to enable the public, or persons affected by it, to know exactly what it is which they are prohibited from doing—*Sorab v. Shavaksha Balliwala*, A.I.R. 1935 Bom. 33, 36 Bom.L.R. 1129, 36 Cr.L.J. 547, 154 I.C. 637, 1935 Cr.C. 68, 7 R.B. 359; *Thakin Aung Bala v. District Magistrate of Rangoon*, 40 Cr.L.J. 645, 182 I.C. 23, A.I.R. 1939 Rang. 181, 1939 Rang L.R. 294, 11 R.R. 516.

(b) The order must be an order which is absolute and definite in terms. Section 144, clauses (a) and (b) do not contemplate the passing of a *conditional* order to be made absolute later on. The order for injunction under sec. 144 must be an absolute and definite order and it must be left to the party to apply for rescinding the order by taking recourse to the procedure laid down in sub-secs. 4 and 5 of the said section. An order in the alternative form, directing a person either to refrain from doing certain acts or to show cause against the order of injunction, does not come within the terms of sec. 144—*Emp. v. Bhola Giri Mohunt*, 40 C.W.N. 640, A.I.R. 1936 Cal. 259, 37 Cr.L.J. 696, 162 I.C. 827, 1936 Cr.C. 486, 63 C.L.J. 137, 8 R.C. 662. But see *Balaram Dey v. Pran Ram Chatterjee*, 38 Cr.L.J. 915, 170 I.C. 499, 41 C.W.N. 897, 65 C.L.J. 460, I.L.R. (1937) 2 Cal. 475, 10 R.C. 150, A.I.R. 1937 Cal. 406.

(c) The order must contain a statement of the "material facts" which the Magistrate considers to be the facts of the case, and upon the footing of which he bases his order—*Karoolal v. Shyamlal*, 32 Cal. 935, 9 C.W.N. 864; *Hafizuddin*, 50 All. 414, 28 Cr.L.J. 991 (992), 105 I.C. 815, A.I.R. 1928 All. 14, 26 A.L.J. 83; *Motilal*, A.I.R. 1931 Bom. 513, 33 Bom.L.R. 1178, 134 I.C. 1237, 33 Cr.L.J. 75, 1931 Cr.C. 945. See also *Ardeshtir Phirozshaw Murzban*, A.I.R. 1940 Bom. 42 (43), 41 Bom.L.R. 1253. A mere recital of the fact that in the opinion of the Magistrate there was sufficient ground for proceeding under this section is not enough; the order should state the material facts relating to the case in order to show that there was justification for making the order—*Blong*, 25 Cr.L.J. 1178, A.I.R. 1924 Pat. 767, 82 I.C. 42, 6 P.L.T. 130, 82 I.C. 42, 3 Pat.L.R. 41 (Cr.). The material facts include the circumstances showing why the Magistrate was temporarily unable to prevent a breach of the peace by intending peace-breakers—*Venkataramana*, 22 M.L.T. 323. Where the order did not state the material facts, it was set aside—*Karoolal v. Shyamlal*, 32 Cal. 935, 1 C.L.J. 216, 2 Cr. L.J. 215, 9 C.W.N. 864; *Govinda Chetty*, 27 M.L.J. 628, 14 Cr.L.J. 658; *Thakin Aung Bala v. District Magistrate, Rangoon*, 40 Cr.L.J. 645 (646), 182 I.C. 23, A.I.R. 1939 Rang. 181, 1939 Rang.L.R. 294, 11 R.R. 516.

(d) The order must be *specific and definite* in its terms. An order that the petitioner should not go to a particular village and should not allow any of his servants or relatives or friends to go there, is of the most indefinite character as to time and person—*Golam Md. v. Bhuban*, 2 C.W.N. 422. Similarly, an order directing the petitioners not to commit any act which is likely to induce a breach of the peace, and not to take forcible possession of a village not in their possession, is indefinite and bad in law—*Bibi Kulsam v. Umatul*, 11 C.W.N. 121. When there is reference in the order to customary rule and to customary timings in the matter of taking out *tazias* the order is quite clear and very definite. It is for the party to find out what the customary rules and timings were if they wished to take out *tazias* in the procession—*Emp. v. Nizam Khan*, 35 Cr.L.J. 699, 148 I.C. 518, 11 O.W.N. 384, 9 Luck. 543, A.I.R. 1934 Oudh 162. An order prohibiting a person from holding a *hat* on "next Sunday", with a direction that the order will stand good for 2 months, is meaningless. If an order is not clear and free from ambiguity, it would not be right to prosecute anybody for disobeying it—*Ambika v. Benode*, 36 C.W.N. 248 (249), 33 Cr.L.J. 518, 137 I.C. 816, A.I.R. 1932 Cal. 288, 1932 Cr.C. 214, Ind. Rul. 1932 Cal. 383.

(e) The order must be confined to the *particular act* for which the danger is apprehended; any order prohibiting a course of conduct or an occupation involving a series of acts done at certain intervals and spread over a period of time (e.g., an order prohibiting inoculation) is illegal and must be set aside—*Anonymous*, 2 Weir 67. Moreover, the thing which is prohibited must be clearly stated. It is not proper to leave in doubt as to whether the persons are prohibited from doing a thing or not—*Ganesh*, 55 Bom. 322, 32 Cr.L.J. 507 (509), 130 I.C. 396, A.I.R. 1931 Bom. 135, 33 Bom.L.R. 59, 1931 Cr.C. 183, Ind. Rul. 1931 Bom. 252.

(f) The duration of the order must be *co-extensive with the emergency*, it should not be wider than is necessary to prevent the emergency. The Magistrate cannot issue an order intending to have effect for all time—*Muthialu v. Bapun*, 2 Mad. 140; *In re*

Pedda Chari, 2 Weir 74. Thus, the Magistrate is not competent to pass an order directing that all processions should stop music when passing a certain place of worship at any time, when it is not shown that assemblies are held in the place for the purpose of worship at all hours of the day—*Muthalu v. Bapun*, supra; *Pedda Chari*, supra; *Ramnad v. Kadar*, 62 M.L.J. 392, 33 Cr.L.J. 605 (608).

(g) Except where the order is addressed to the public generally under sub-section (3), the persons against whom the order is directed must be specified. An order addressed to "you and any other persons who are or may be concerned in the project" is too vague, because it is impossible to say who are the persons who are or may be concerned in the project—*Ganesh*, supra.

(h) The terms of the notice must follow the terms of the order in pursuance of which the notice is issued—*Abdul Majid v. Nripendra Nath*, 35 Cr.L.J. 881, 38 C.W.N. 556.

(i) See *Ardeshir Phirozshaw Murzban* in Note 369.

368. Service of order:—The order must be served in the manner provided by sec. 134, i.e., served personally. If it is not served personally, and not brought to the notice of the accused, a conviction under sec. 188, I. P. C., for disobedience of the order is illegal—*Lakshmidas*, 14 Bom 165 (167); *Reg v. Sukar*, Ratanlal 30. It is not necessary to read the direction as to the mode of service as going absolutely to the validity of the order. The terms of sec. 134 and the notification in the Gazette are directory, and ought to be followed, and that it is irregularity when they are not; but it does not follow that the order is a nullity in consequence. When the order was brought to the actual knowledge of the person sought to be affected by it, it is sufficient to bring the case under sec. 188, I. P. C.—*Parbatty*, 16 Cal. 9 (12); *Abu Hussain Shaikh v. Emp.*, 44 C.W.N. 641 (646), AIR 1940 Cal 358. Even if there has been irregularity in the method of promulgation of the order, that in itself would not make it *ultra vires*, so as to prevent the conviction of any person who, being proved to have had knowledge of the order, nevertheless disobeyed it—*Madan Kishore*, AIR 1940 Pat. 446 (447), 21 P.L.T. 231, 187 I.C. 135, 41 Cr.L.J. 414, 1940 P.W.N. 469. It is only if the order cannot be served in the manner provided for service of summons that the publication of a proclamation under sub-sec. (2), sec. 134, may be resorted to—*Abdul Jabbar*, 36 Cr.L.J. 736, 155 I.C. 416, AIR 1935 Cal 251, 39 C.W.N. 141, 60 C.L.J. 474, 1935 Cr.C. 333.

If a person takes the trouble to go to a Magistrate and gets an order upon another person restraining him from doing something, *prima facie* it is very unlikely for him not to take steps so that the other person may know of the restraint imposed upon him—*Aswini*, 32 Cr.L.J. 680, 131 I.C. 271, 53 C.L.J. 64, AIR 1931 Cal 262, Ind. Rul. 1931 Cal 447, 1931 Cr.C. 294.

Where the order which was promulgated to the general public was not the formal order which was drawn up by the Magistrate but was merely an inadequate precis of that order which gave no sufficient information with regard to the acts from which the members of the public had been directed to abstain, the service of such a precis would be insufficient for the purpose of enabling the Court to sustain the conviction of the accused persons under sec. 188, I. P. C., for disobedience of that order—*Abu Hussain Shaikh v. Emp.*, 44 C.W.N. 641 (646), AIR 1940 Cal 358.

369. Abstain from certain act:—The words 'certain act' mean a definite act. An order directing a person not to collect rents from the ryots generally, without mentioning any particular ryots, is not an order to abstain from a 'certain act'—*Abaqeswari v. Sideswari*, 16 Cal. 80; *Ananda v. Carr Stephen*, 19 Cal 127; *Prem Chand v. Dharm Das*, 9 C.W.N. 392; *Prosunna*, 8 C.L.R. 231. See also *Golam v. Ehuban*, 2 C.W.N. 422 and *Bibi Kulsum v. Umatul*, 9 C.W.N. 392. See also *Golam v. Ehuban*, 2 C.W.N. 422 and *Bibi Kulsum v. Umatul*, 11 C.W.N. 121 cited in Note 367 above. But an order directing a person not to interfere with the management of a particular temple or a particular *mutt*, is a direction to abstain from a 'certain act'.

and is a valid order under this section—*Ramanadhan v. Murugappa*, 2 Weir 611, 24 Mad. 45; *Vanamamalai*, 3 Mad 354, 2 Weir 67; *Abbi Reddi*, 18 Mad 402. So also, an order directing the trustee of a Vaishnavite temple to abstain from interfering with the conduct of Adhyapakam service is an order restraining a person from doing a certain act and is valid—*Srinivasathathachariar*, 19 Cr.L.J. 933, 47 I.C. 657 (Mad.).

The Magistrate can pass orders requiring the people to *abstain from* certain acts, i.e., he can pass *negative* orders; this section does not empower him to pass *positive* orders requiring people to do particular things, e.g., an order directing a person to remove himself from the district by the next available train—*Sasmal*, 58 Cal. 1037, 53 C.L.J. 175, 32 Cr.L.J. 592 (593), 130 I.C. 872, 1931 Cr.C. 295, A.I.R. 1931 Cal 263; *Thakin Ba Thoung*, 35 Cr.L.J. 1300, 151 I.C. 211, 12 Rang 283, 1934 Cr.C. 717, A.I.R. 1934 Rang 124. Under this section a Magistrate is entitled to make a restrictive order preventing the opposite party from doing an act; but the section does not enable him to make a mandatory order directing the opposite party to do some act—*Kusum Kumari v. Hem Nalini*, 38 C.W.N. 115, 34 Cr.L.J. 1192, 146 I.C. 169, 6 R.C. 181, A.I.R. 1933 Cal 724, 1933 Cr.C. 1274, 63 Cal 11; *Satish Chandra v. Lokendra Lal*, 39 C.W.N. 1053, 61 C.L.J. 579. Distinguishing the case of *Kusum Kumari v. Hem Nalini*, supra, it has, however, been laid down that by its very terms sec. 144, Cr. P. C., empowers the Magistrate to direct a person to take certain order with certain property in his possession and the Magistrate has, therefore, jurisdiction to direct a person to cut the *bundh* erected by him—*Balaram Dey v. Pran Ram Chatterjee*, 38 Cr.L.J. 915, 170 I.C. 499, 41 C.W.N. 897, 65 C.L.J. 460, I.L.R. (1937) 2 Cal 475, 10 R.C. 150, A.I.R. 1937 Cal. 406. This section not only empowers a Magistrate to direct a person to abstain from a certain act but also empowers a Magistrate to direct a person "to take certain order with property in his possession or under his management," if the Magistrate considers that such direction is likely to prevent, or tends to prevent, amongst other things, a disturbance of the public tranquillity. This part of the section clearly empowers a Magistrate to pass a mandatory order on persons in possession of property if it is necessary in the opinion of the Magistrate that such action should be taken for the purposes enumerated in the section—*Lachmi Narayan Singh v. Nandkishore Singh*, 41 Cr.L.J. 98, 184 I.C. 723, 20 P.L.T. 850, A.I.R. 1940 Pat. 57, 6 B.R. 79. But where a person has rightly or wrongly taken possession of the disputed land and has erected boundary pillars and fence round it, it is difficult to understand how a Criminal Court can start a proceeding under sec. 144, Cr. P. C., with a view to dispossess him from the disputed land. No doubt sec. 144, Cr. P. C., gives a Magistrate the power to pass an order to prevent an immediate breach of peace but that section by its terms does not authorize him to pass any mandatory order. All that the Magistrate can do under that section is to direct any person to abstain from a certain act or to take certain order with certain property in his possession or under his management. In other words, the section empowers a Magistrate to pass a restrictive order. The removal of the fence is not an act which the Magistrate is authorized by the section to direct a person to do—*Bimala Kanta Bagchi v. Sanat Kumar Ghosh*, 40 Cr.L.J. 144, 178 I.C. 945, A.I.R. 1938 Pat. 610, 19 P.L.T. 620.

The Magistrate ought to say in precise and definite language what it is that he is directing a person to abstain from doing by the order made under this section and to say that he is to refrain from doing something which a third party does not approve is not an order which complies with this section—*Ardeshr Phirozshaw Murzban*, A.I.R. 1910 Bom. 42 (44), 41 Bom L.R. 1253.

370. "Take certain order with respect to property":—*Property whether moveable or immovable*:—It has been held in *Goluck Chunder*, 12 W.R. 38 that the power conferred by this section refers only to and is restricted to *immovable* property of the kind set forth in the next Chapter. The Magistrate cannot make an order regarding the custody of money, in respect of which a breach of the peace is likely to take place. See also *Ananda v. Carr Stephen*, 19 Cal. 127 (129) which lays down that this section relates to interference or dealing of some kind with the *land* itself or

something erected or standing on the land. But there is nothing in the section to justify this view.

Property outside jurisdiction :—No order can be made by a Magistrate under this section when the property in respect of which the order is made is situated outside the local limits of his jurisdiction—*Roop Lal v. David*, 2 C.W.N. 572.

371. Orders under this section :—The following orders can be lawfully passed by a Magistrate under this section.—

(a) An order prohibiting burials in certain places on sanitary ground—*Khaja Bhoj*, 2 Weir 64;

(b) An order directing that two rival sects of Muhammadans should enter and worship in a particular mosque only at particular hours—*Abdulla*, 24 Mad. 262;

(c) An order prohibiting a procession on the ground that the Magistrate would not be able to prevent a breach of the peace with the force at his disposal—*Arumuga v. Perumalsuamy*, 15 Cr.L.J. 30 (Mad.);

(d) An order that certain persons should abstain from interfering with the Badves in the performance of their daily puja of the god *Vithoba*, is a valid order, if the Magistrate is of opinion that the interference with the puja is likely to cause annoyance to the worshippers—*In re Vasudeo Apaji*, 4 Bom L R 582;

(e) An order prohibiting a meeting, if owing to the prevalence of ill-feeling between certain persons likely to attend the meeting, a breach of the peace is to be apprehended—*Nga Ts v. Maung Kyaw*, 11 Bur L T 59, 18 Cr L J 512, 39 I C 580, 2 U B R. 157;

(f) An order prohibiting slaughter of any cow or bullock within a specified boundary—*Abdul Gafur*, 27 I C 670, 16 Cr L J 190; see also *Shahbaz Khan v. Umrao Puri*, 30 All 181 and Note 372 (s) in this connection

(g) An order restraining a person from building a wall—*Kusum Kumari v. Hem Nalini*, 38 C W N 115, 34 Cr L J 1192, 146 I C. 169, A I R 1933 Cal 724, 1933 Cr C 1274, 63 Cal 18;

(h) An order prohibiting the wearing of Gandhi caps if it has any reasonable connexion with disturbance of the peace or public tranquillity—*Satyanarayana*, 32 Cr.L.J. 744, 131 I C 449, 1930 M.W.N. 841, A I R 1931 Mad 236, 69 M L J. 378, 33 M L W. 632, 1931 Cr.C. 332, Ind Rul 1931 Mad 513;

(i) An order directing a person to cut the *bundh* erected by him—*Balaram Dey v. Pran Ram Chatterjee*, 38 Cr L J 915, 170 I C 499, 41 C.W.N 897, 65 C L J 460, I.L.R. (1937) 2 Cal. 475, 10 R C 150, A I R 1937 Cal 406; *Lachmi Narayan Singh v. Nandkishore Singh*, 41 Cr L J. 98, 184 I C 723, 20 P L T. 850, 6 B R 79.

372. Improper orders under this section :—A Magistrate is competent to issue an order directing a person to abstain from certain act or to take certain order with certain property; and such an order can be passed under this section, only when the object of the order is to prevent obstruction, annoyance or injury to any person or danger to human life, health or safety, or a disturbance of the public tranquillity or a riot or an affray, and when immediate prevention or speedy remedy is necessary. Therefore, the following orders, not being orders of the above description, are not valid under this section.—

(a) An order directing the ryots to refrain from reaping the crops they have sown, unless they pay the Government rent—*Isab*, 8 C W N 373

(b) An order stopping the erection of an embankment on the ground that the erection may cause loss to the opposite party—*Ram Autar v. Krishnaput*, 13 C.W.N. 188, 4 I C. 577.

(c) An order prohibiting a person to excavate a tank in his own land on the apprehension that the house of the opposite party would go down into the bed of the tank—*Kamini v. Harendra*, 38 Cal 876, 13 Cr L J 126

(d) An order directing the owner of a building which has fallen down on his own land, to re-erect the building—*Rahmatulla*, 17 All 485, 1895 A W N. 96.

(e) An order that prostitutes who had built huts, should remove their huts, because people visiting them will endanger their lives by having to cross a railway line—*In re Direshwar*, 2 C.W.N. 70.

(f) An order directing the removal of an embankment whereby adjacent lands are in danger of being flooded—*Anon*, 5 M.H.C.R App. 19.

(g) An order directing the removal of a dam which obstructs the flood of water through an irrigation channel—*Prayag*, 9 Cal. 103.

(h) An order regulating boat traffic at a certain landing place on the ground that the over-crowding of boats was dangerous to the health of the residents of the town—*Pratap*, 25 Cal. 852, 2 C.W.N. 593.

(i) An order passed with the consent of parties, that certain articles with respect to which there was a dispute, should be removed to the custody of the Court—*Leong Mow v. Tchung*, 12 C.W.N. 1044, 8 Cr.L.J. 230; or an order directing the village Munsiff to take possession of the disputed property—*Baganathi v. Velayee*, (1916) 2 M.W.N. 88, 17 Cr.L.J. 190.

(j) An order directing that certain persons should continue to live in the *haveli* in which they were at the date of the order, and that a police guard should keep watch on the outer door, only allowing certain specified persons to enter the *haveli*—*Faizulnissa v. Faiz Md.*, 1878 P.R. 33.

(k) An order directing a division of crops between two rival landlords—*Umatal v. Nemai*, 32 Cal. 154.

(l) An order forbidding people of either party to read prayers in a mosque, on account of an apprehension of a breach of the peace (there being at the time an ill-feeling between the parties regarding the management of the mosque) is illegal—*Haji Md. Ismail v. Barkat Ali*, 26 C.W.N. 904, 24 Cr.L.J. 154, 71 I.C. 506.

(m) An order directing a party to dig a channel—*Subramania Iyer*, 15 Cr.L.J. 291, 22 I.C. 499.

(n) An order to fill up an excavation—*Kusum Kumari v. Hem Nalini*, 38 C.W.N. 115, 146 I.C. 169, A.I.R. 1933 Cal. 724, 1933 Cr.C. 1274, 34 Cr.L.J. 192, 63 Cal. 1, 6 R.C. 181.

(o) An order to remove a jetty which had been already completed—*Satish Chandra v. Lokendra Lal*, 39 C.W.N. 1053, 61 C.L.J. 579.

(p) An order which prohibited from putting up national flags in private houses—*Sriramamurti*, 32 Cr.L.J. 763, 60 M.L.J. 370, 1931 Cr.C. 362, 131 I.C. 649, 1930 M.W.N. 819, A.I.R. 1931 Mad. 242, 33 M.L.W. 640, Ind. Rul. Mad. 553.

(q) An order forbidding a person who claimed an interest in certain properties from collecting any rent from the rayats on the properties—*Abayeswari v. Sidheswari*, 16 Cal. 80; *Ananda v. Carr Stephen*, 19 Cal. 127; *Prem Chand v. Dharam Das*, 9 C.W.N. 392.

(r) An order directing a person to remove the fence erected on a plot of land in his possession—*Bimala Kanta Bagchi v. Sanat Kumar Ghosh*, 40 Cr.L.J. 144, A.I.R. 1938 Pat. 610, 178 I.C. 945, 19 P.L.T. 620.

(s) An order which is addressed to the general public and is to the effect that nobody shall sacrifice a cow within a radius of a mile from certain villages—*Babu v. Emp.*, 41 Cr.L.J. 228 (230), A.I.R. 1940 Oudh 241, 1940 O.L.R. 43, 185 I.C. 745, 1940 O.W.N. 118. See also Note 371 (f) in this connection.

(t) An order prohibiting a person from collecting rents from tenants on certain lands—*Prem Chand v. Dharamdas*, 9 C.W.N. 392. See Note 369.

Order partly valid and partly invalid :—If part of an order is bad as being vague, it does not make the whole order bad, if the other portion is clearly separable. If a prohibition is directed against A and certain other persons, and the order against those persons is illegal, it may nevertheless be valid as against A—*Ganesh*, 55 Bom. 322, 33 Bom.L.R. 59, 32 Cr.L.J. 507 (510).

373. Orders regarding hats or markets :—A Magistrate may direct one of the two rival *hat*-holders to change the day of his *hat*, so as not to interfere with

the days of the *hat* of the other proprietor, if the Magistrate is of opinion that the holding of two *hats* on the same day will lead to a breach of the peace—*Abbas Ali v. Ilm Meah*, 14 W.R. 46; or he may direct that one of two rival *hat*-holders should not hold his *hat* on the same day as another—*Bykuntha*, 18 W.R. 47; *Nagendra v. Rakhal Das*, 23 C.W.N. 141, 20 Cr.L.J. 113, 49 I.C. 97; *Parameshwar*, 3 P.L.T. 268; or where a new *hat* is established within half a mile of an old one, the Magistrate may order the new *hat*-holder to abstain from holding his *hat* on certain days—*Mitterjeet v. Raj Kumar*, 18 W.R. 22. But the Magistrate cannot direct one of the two *hat*-holders to hold his *hat* on particular days, e.g., Saturdays and Tuesdays only, for though the section empowers the Magistrate to make an order prohibiting a person from holding his *hat* on certain specified days (*viz.*, the days on which the rival *hat* is held), the law does not empower him to direct that *hats* shall be held only on certain days, leaving the party no option to hold his *hat* on some other days on which his rival does not hold his *hat*—*Shyamanand*, 31 Cal. 990, 8 C.W.N. 781. See also *Ambika v. Benode* in Note 367.

A general order prohibiting the holding of *hats* for an indefinite period is illegal—*Bidhu Ranjan v. Ramesh*, 11 C.W.N. 223, 5 Cr.L.J. 43; *Parameshwar*, 3 P.L.T. 268. An order prohibiting certain persons from establishing a *hat* at certain places, and giving a vague direction not to interfere in any way with the trade of another *hat*, is improper—*Satish Chandra*, 11 C.W.N. 79, 4 Cr.L.J. 433. The most appropriate section in cases like this is sec 107, Cr. P. C., by which a Magistrate may bind down parties for a length of time—*Ibid*.

The right to hold a *hat* is a man's lawful right and he has the right to establish the *hat* in the place and on the days most advantageous to him (*Sheeo Chunder v. Suddut Ally*, 4 W.R. 12) provided that no breach of the peace is caused by any dispute between two *hat*-holders. Therefore, an order of a Magistrate directing that one of the two rival *hat*-holders should not hold his *hat* opposite to that of the other but should hold it a mile away is illegal, because such an order would render the *hat* of no use to him—*Shurut Chunder v. Bama Churn*, 4 C.L.R. 410. A general order prohibiting a person absolutely from holding a *hat* within an extensive area is illegal, for a person is entitled to exercise all rights of ownership on his property, and the holding of a *hat* on one's own property is not a wrongful act—*Banwari v. Pranab Krishna*, 26 C.W.N. 663, 35 C.L.J. 397, 24 Cr.L.J. 164, 71 I.C. 516, A.I.R. 1922 Cal 569; *Saligram v. Baijnath*, 35 Cr.L.J. 1057, 150 I.C. 118, 14 P.L.T. 740, A.I.R. 1934 Pat 104, 1934 Cr.C. 198, *Rakhal Das*, 19 C.W.N. 248, 13 Cr.L.J. 511, 15 I.C. 655.

An order can be passed under this section only on the grounds specified in the section, *viz.*, on grounds of apprehended danger, etc. Thus, an order to close a *hat* can be passed on the ground that it was very near to another *hat*, and a breach of the peace was apprehended—*Bholanath v. Komuruddin*, 20 W.R. 53. Thus, where the owner of a market forcibly dragged vendors to the market and otherwise molested the public by conducting passers-by into the market with the object of making them buy there instead of in the adjacent bazar, *held* that the Magistrate was justified in prohibiting the owner from holding the market for a certain period—*Ram Gopal v. Narayandas*, 55 Cal 1077, 32 C.W.N. 613, 29 Cr.L.J. 423 (425), A.I.R. 1928 Cal 446. But an order prohibiting a party from holding a *hat* on a particular day cannot be passed merely on the ground that another party had long been used to hold a *hat* on the adjacent land on the following day—*Bance Madhab v. Wooma Nath*, 21 W.R. 26. Even where there is a likelihood of a breach of the peace, the likelihood must be imminent; a Magistrate cannot restrain the holding of a *hat* merely because there is already a *hat* existing, and the *ulterior consequence* of holding the new *hat* may be a breach of the peace—*Rakhal Das*, 19 C.W.N. 248, 13 Cr.L.J. 511, 15 I.C. 655. See also *Ambika v. Benode* in Note 367. If disturbance is anticipated, the proper procedure would be to act under sec 107—*Benowari v. Pranab Krishna*, 26 C.W.N. 663, 35 C.L.J. 397, 24 Cr.L.J. 164, 71 I.C. 516, A.I.R. 1922 Cal 569; *Bidhu Ranjan v. Ramesh*, 11 C.W.N. 223, 5 Cr.L.J. 43; *Satish*, 11 C.W.N. 79; *Saligram v. Baijnath*, 35 Cr.L.J. 1057, 150 I.C.

118, 14 P.L.T. 740, A.I.R. 1934 Cr.C. 198; *Hanstraj v. Abdul Jabbar*, 36 Cr.L.J. 1268, 157 I.C. 760, 16 P.L.T. 624, A.I.R. 1935 Pat. 461. It is now settled law that a Magistrate, as an emergency measure, has power to stop, by an order under this section, the holding of a *hat*, or the exercise of his rights by a man on his own land. But a man, who holds a *hat* on his own land, is perfectly entitled to do so and that by itself is not a wrongful act. Competition in trade, unless illegal methods are adopted, is not a wrongful act. When a rival business is started in close proximity to a previously established business the person interested in the latter is bound to object to the former and some sort of strained feeling is inevitable. This by itself is no ground for restraining the newcomer from carrying his trade unless he is doing or is likely to do any wrongful act which may lead to a breach of the peace. In such a case the best course is to prohibit the doing of the wrongful act or if necessary, to bind down the wrong-doer under sec 107, Cr. P. C. But an order more or less of a permanent nature is not justified under this section which is meant for speedy remedy—*Rama Barik v. Emp*, A.I.R. 1940 Pat. 185 (186), 41 Cr.L.J. 463, 187 I.C. 511, 1939 P.W.N. 616. See also *Saligram v. Baijnath*, supra.

When a person sold goods at the *hat* simply as a trader he could not be prosecuted for disobedience of an order under this section forbidding holding the *hat*; inasmuch as the words "holding the *hat*" in the order were used in the sense of holding as owner or manager and not as buyers or sellers—*Parbutty*, 16 Cal 9 (13).

In Bengal there is no such thing as a market franchise or the right to hold a market conferred by grant from the Crown, nor can such right be acquired by prescription, and the proprietor of an old *hat* therefore has no monopoly or privilege which is entitled to protection and no immunity from competition—*Sumner v. Jogendra*, 34 Cr.L.J. 334, 142 I.C. 319, Ind. Rul. 1933 Cal. 262, A.I.R. 1933 Cal 348, 1933 Cr.C. 420.

It is open to a Magistrate to make the order in such terms as holding a *hat* at or near a place in order that it may not be possible for the party against whom such an order is made to evade the terms of the order by removing the *hat*, the holding of which is sought to be prevented, to a short distance; at the same time it is perfectly clear that before a notice containing such terms is issued, there must be a proper determination of the question as regards the limits within which the order is to be operative. But where the notice that was issued was couched in terms wider than the terms of the order itself, it becomes illegal—*Abdul Majid v. Nripendra Nath*, 35 Cr.L.J. 881, 38 C.W.N. 556, 148 I.C. 773, A.I.R. 1934 Cal 393, 1934 Cr.C. 534, 6 R.C. 480. See also *Abu Hussain Shaikh v. Emp.*, 44 C.W.N. 641.

373A. Processions with music:—It is, on the one hand, a right recognized by law that an assembly lawfully engaged in the performance of a religious worship or religious ceremonies shall not be disturbed. It is, on the other hand, a right recognized by law that persons may, for a lawful purpose, whether civil or religious, use a common highway by parading it attended by music, so that they do not obstruct the use of it by other persons. If persons passing in procession attended by music pass a place in which others are assembled and engaged in public worship which the music would tend to disturb, it is the duty of the persons composing the procession to refrain from such disturbance; but assemblies for purposes of worship are held scarcely in any place at all hours and generally at appointed hours, and therefore it is unnecessary that there should be a rule that persons should not at any time pass along a high road in the neighbourhood of a recognized place of worship, if attended by music. If indeed the procession be of a religious character, the prohibition of it may be as real an interference with the free exercise of religion as in allowing it to proceed past an assembly engaged in worship attended with such circumstances as to disturb that worship, and if no religious procession is to be allowed to pass a recognised place of worship, whether persons are or are not at the time there assembled and engaged in religious worship, the members of a numerous sect might close every high way to the processions of a sect to which they are opposed by erecting in the neighbourhood of each highway a place of worship—*Muthiala Chetti v. Bapun Saib*, 2 Mad. 140. The first duty of

Government is the preservation of life and property, and, to secure this end, power is conferred on its officers to interfere with even the ordinary rights of members of the community. There is a distinction between rights which have a primary and rights which have a secondary claim to such protection as the Government can afford; and where the Government cannot protect both classes of rights, it may and it ought to abandon the latter to secure the former. In this view, it matters not whether the exercise of the rights of procession is of ancient usage or a novelty; the Government is not bound to deprive some members of the community of the services of the force that is found necessary for the protection of their lives and property to enable others to exercise a right which not only is not indispensable to life or to the security of property, but, creates an excitement which endangers both. In affording special protection to persons assembled for religious worship or religious ceremonies, the law points to congregational rather than private worship, and it may fairly be required of congregations that they should inform the authorities of the hours at which they customarily assemble for worship, in order that the rights of other persons may not be unduly curtailed. An order, prohibiting a private householder from hearing music in his house at any hour of the day or night throughout the year, because the house was adjacent to a place of religious worship, illustrates the intolerance an indiscreet Magistrate may countenance—*Sundram*, 6 Mad 203 (FB). The right to conduct religious processions in the public streets is a right inherent in every person provided he does not thereby invade the rights of property enjoyed by others, or cause a public nuisance or interfere with the ordinary use of the streets by the public, and subject to such directions or prohibitions as may be issued by the Magistrate to prevent obstructions to the thoroughfare or breaches of the public peace. Every member of the public, and every sect, has a right to use the public streets in a lawful manner, and it lies on those who would restrain him in its exercise to show some law or custom having the force of law depriving him of the privilege—*Sadagopachariar v. Rama Rao*, 26 Mad 376. Persons of whatever sect are entitled to conduct religious processions through public streets so that they do not interfere with the ordinary use of such streets by the public and subject to such directions as the Magistrates may lawfully give to prevent obstructions of the thoroughfare or breaches of the public peace—*Saiyid Manzur Hasan v. Saiyid Muhammad Zaman*, 86 IC. 236, AIR 1925 PC 36, 52 IA 61, 47 All 151, 48 MLJ. 23, 21 MLW 239, 6 PLT 115, 23 ALJ. 179, 27 Bom LR 170, 2 O.W.N 53, 29 C.W.N 486, 3 Pat LR. 300 (P.C.), following *Parthasaradi Ayyangar v. Chimna Krishna Ayyangar*, 5 Mad 304 (309); *Jafar Husain v. Pearey Lal*, 36 Cr.LJ 955, 156 IC 595, AIR. 1935 All 575. There can be no doubt that the Adi-Dravidas have a civil right to take a procession along all public streets, just as any other persons may have; whereas the caste residents have no right at all to object. Ordinarily those responsible for law and order should see that persons exercising their rights have the support of the police and the magistracy but cases do of course arise where in the interest of public peace, persons should be prevented from exercising their rights. If the Adi-Dravidas for example are anxious to conduct the procession, not to honour Sri Thiruvalluvar but in order to irritate and annoy the caste residents of the streets, then the Magistrate would be justified in placing some restraint upon their processions; but unless the Magistrate is satisfied that the Adi-Dravidas had no *bona fide* desire to do honour to the saint he should not pass an order under sec 144, Cr. P C, unless he is quite satisfied that there is no other means within his power of preventing a breach of the peace. The fact that the Adi-Dravidas have been exercising restricted rights in the past was rightly taken into account, but it is not in itself a sufficient ground for refusing them protection in the exercise of their full rights—*Shanmuga Pandaram v. K Ponnuswami Iyer*, 39 Cr.LJ 886, 177 IC 436, AIR 1938 Mad. 714, 47 MLW 441, 1938 MWN 606, (1938) 2 MLJ 160, 11 RM 326.

The District Magistrate is undoubtedly the person who is to look after the peace of his district and naturally in cases of sudden emergency it may be necessary to restrict a person from exercising a perfectly lawful right. But it should not be necessary

to prevent that person not only in a particular occasion in the near future but for all time from exercising that right because it would be too much trouble to render him adequate protection against persons who intend to disobey the law. Any interruption of the procession by the Muhammadans so long as it is conducted in accordance with the decree of the Civil Court, which the Hindus obtained, is undoubtedly an infraction of the law and for the Government to state that they are not prepared to prevent the infraction of the law and to restrain law-breakers from interfering with lawful rights is practically to abdicate all authority. Orders under sec. 144, Cr. P. C., are certainly not intended to be used as a means of depriving the citizens of lawful rights which have been declared by competent Courts. Those who obstruct may have, if necessary, to be bound over to keep the peace or it may be necessary to introduce armed force to compel them to do so—*Venkata Subrayya v. Muhammad Falaiddin*, 28 Cr.L.J. 509, 101 I.C. 893, 52 M.L.J. 651, A.I.R. 1927 Mad. 611, 8 A.I.Cr.R. 146. But even when the Hindus obtained from a competent Civil Court a declaration of their right to conduct processions subject to certain limitation, it is not the duty of the authorities who are responsible for the preservation of the public peace to enforce the decree in all circumstances and at all costs—*Viswanatha Rao*, 30 Cr.L.J. 31, 112 I.C. 853, 1928 M.W.N. 615, A.I.R. 1938 Mad. 1049, 55 M.L.J. 442, 28 M.L.W. 406, 51 Mad. 1006, Ind. Rul. 1929 Mad. 71 (F.B.). See also *Pir Gul Hassan v. Emp.*, A.I.R. 1939 Sind 230 (233), I.L.R. 1939 Kar. 751, 183 I.C. 641, 12 R.S. 67, 40 Cr.L.J. 823.

An absolute prohibition of all processions in all streets, secular and religious, without even fixing any time limit during day or night is *prima facie* unreasonable, and if such orders are passed repeatedly without making any sort of enquiry as to the relative rights of the parties, it would be clutching at a more extensive jurisdiction by issuing a permanent injunction restraining the parties from taking processions for a pretty long time and such a course is an indirect evasion by the Magistracy of the law as laid down in sec. 144, Cr. P. C.—*Ramnad v. Kadar*, 33 Cr.L.J. 605, 138 I.C. 354, A.I.R. 1932 Mad. 294, 62 M.L.J. 392, 1932 M.W.N. 144, 35 M.L.W. 366, 1932 Cr.C. 280, Ind. Rul. 1932 Mad. 566.

When a Magistrate has made an order under the Cr. P. Code forbidding a person or body of persons from using a highway for the purposes of processions, such an order invests the person or persons interdicted with a cause of action if they allege it to be an infringement of their legal rights, though such order be in itself *ultra vires* and no special damage be alleged or proved. Similarly, a person or body of persons who claim a right to go in procession along a public highway can bring a declaratory suit to establish that right against a person who threatens to obstruct it without allegation or proof of special damage—*Velan Pakkiri Taragan v. Subbayan Samban*, 42 Mad. 271 (F.B.). This is also the view of the Calcutta High Court—*Mohamed Abdul Hafiz v. Latif Hossain*, 24 Cal. 524. Their Lordships of the Privy Council upheld this view in preference to the contrary view expressed by the Bombay High Court in 2 Bom. 457, 18 Bom. 693 and 34 Bom. 571; *Saiyid Manzur Hasan v. Saiyid Muhammad Zaman*, 29 C.W.N. 486, 86 I.C. 236, A.I.R. 1925 P.C. 36, 52 I.A. 61, 47 All. 151, 48 M.L.J. 23, 21 M.L.W. 239, 6 P.L.T. 115, 23 A.L.J. 179, 27 Bom.L.R. 170, 2 O.W.N. 53, 3 Pat.L.R. 300 (P.C.).

See also Note 233.

373B. Public Speech:—Every man has a right to express his opinions in public and in general he should be entitled to the support of the Police and Magistracy in the expression of those opinions. Provided that these opinions are made with a genuine desire to convince people and not to irritate them, he ought not to be muzzled merely because those who dislike these opinions threaten opposition. Where interference with the right to speak is expected, the opponents should ordinarily be prohibited from interfering and not the reformers from speaking. Occasions do, however, arise when in the interest of peace private rights have to be encroached upon by those responsible for public order. The Police cannot always have a number of men posted wherever persons are expressing opinions which may call upon them to the wrath of the people among

whom they are speaking. This is particularly the case during elections, when public meetings are many and when feelings run high. Where some persons were not prohibited from expressing their opinions altogether but were told only that they should not do so within a furlong of a temple near which a number of orthodox Brahmins live, it is impossible to say that there was no justification at all for the Sub-Magistrate's order. He is in the best position to know how far it is necessary to interfere with the lawful rights of a person or body of persons to express their opinions. As long as a Magistrate bears in mind the fact that normally the Police should protect persons who are exercising their rights, even though the exercise of those rights might be objected to by others, the High Court will not be ready to interfere in revision—*R. S. Srikantha Iyer*, 38 Cr L.J. 582, 1937 M Cr C. 48, 1937 M.W.N. 56, 45 M.L.W. 249, 168 I.C. 720, 9 R.M. 625, A.I.R. 1937 Mad. 311. Every citizen has a right to ventilate his grievances either in public or in private and ask for redress. This right should not be curtailed so long as it is exercised in a lawful manner. It is an illegal assumption of power to issue an order under this section on a pretended apprehension of the danger of the breach of the public peace. The principle on which Magistrates should act in exercising the power under sec 144, Cr P C., is correctly laid down in *Sumner v. Jogendra*, supra (Note 364). *Thakin Aung Bala v District Magistrate, Rangoon*, 40 Cr L.J. 645 (646), 182 I.C. 23, A.I.R. 1939 Rang 181, 1939 Rang L.R. 294, 11 R.R. 516.

See also *Jagannath Prasad v. Emp.*, in Note 243.

373C. Liberty of the Press:—*Prima facie*, in a country which enjoys liberty of the press a person is entitled in his newspaper to publish any news, and make any comments, which he chooses, provided that he does not infringe any provision of law. A Magistrate acting under this section may no doubt restrict that liberty. But he should only do so if the facts clearly make such restriction necessary in the public interest, and he should not impose any restriction which goes beyond the requirements of the case—*Ardeshir Phirozshaw Murzban*, A.I.R. 1940 Bom 42 (43), 41 Bom.L.R. 1253, 41 Cr L.J. 319 (321), 186 I.C. 477.

373D. Effect of order under this section:—An order under this section restraining a certain person from going upon the land of another, should not be treated as a substantive evidence of possession of the latter, in a case of rioting which subsequently takes place in respect of the possession of the land. No importance should be attached to a temporary injunction under this section which is intended only for emergencies. Having regard to the peculiar jurisdiction conferred by this section, no inference can be drawn from it as to the possession of either party—*Gita Prasad*, 5 P.L.T. 656, 25 Cr L.J. 919, A.I.R. 1925 Pat 17, 81 I.C. 535, 3 Pat L.R. 27 (Cr.).

In an order under this section the observation as regards possession of a particular party, is simply an incidental observation in order to enable the Magistrate to make an order under this section. The observation cannot have the force of an order under sec 145, Cr. P C., and is, therefore, of no use in determining the question of actual possession, if the question arises in a subsequent proceeding—*Munni Lal v Gatti*, 26 Cr L.J. 1229 (1231), 88 I.C. 845, 6 P.L.T. 746, A.I.R. 1925 Pat 514; *Jagernath v Ramjas*, A.I.R. 1933 Pat. 584, 146 I.C. 557, 1933 Cr.C. 1345, 35 Cr L.J. 88. For the effect of an order under this section in a subsequent proceeding under sec. 145, Cr. P. C., see *Kishori Lal v Srinath*, 36 Cal. 370 (372), 13 C.W.N. 530, 1 I.C. 817, 9 Cr L.J. 399. The orders under this section can only refer to a point of time when they were passed and assuming that what was stated therein on the question of possession, was anything more than the opinion of the Courts which passed those orders, those orders cannot show who came to be in possession when the statutory period during which these orders remained operative was at an end—*Rani Shashi Mukhi v. Sarat Chandra*, 31 C.W.N. 310 (312). See also *Saddique v Mohid*, 32 Cr L.J. 208, 129 I.C. 85, A.I.R. 1930 Pat. 556, 1930 Cr.C. 1110, Ind Rul 1931 Pat 69 and *Jayanti v Middleton*, 27 Cal 785, 4 C.W.N. 562. Any expression of opinion on the question of possession in favour of one party or the other under sec 144, Cr P. C., is not of a permanent nature. Such an order is passed in summary proceedings and cannot affect the real

rights of the parties on the question of possession—*Sri Bhagwat Lal v. Bachu Pandey*, 41 Cr.L.J. 384, AIR 1940 Pat. 364, 186 I.C. 806 An order under section 144, Cr. P. C., does not establish possession—*Udit Narayan Patwari*, 39 Cr.L.J. 778 (780), 176 I.C. 715, AIR 1938 Pat. 369, 19 P.L.T. 336, 1938 P.W.N. 542, 4 B.R. 750, 11 R.P. 100. Orders in proceedings under sec. 144, Cr. P. C., cannot, of course, be taken as decisive of the rights of either of the parties, but the nature of the proceeding and its conclusion may be referred to when the history of the property is in question—*Jamuna Singh v. Zulmi Singh*, 39 Cr.L.J. 721, 176 I.C. 260, 4 B.R. 690, 11 R.P. 77, AIR 1938 Pat. 455; *Jainuddin Ahmad Sheikh v. Kari Kant Doss*, 1938 P.W.N. 390 Although the order under sec. 144, Cr. P. C., may not be taken for the purpose of establishing the complainant's possession, it is relevant for the purpose of testing the *bona fides* of the accused's claim—*Ramkishun Agarwalla v. Emp.*, 39 Cr.L.J. 361 (362), AIR 1938 Pat. 131. Such an order decides nothing about the respective rights of the parties and may be no more than an interference with private rights required in a temporary emergency—*F. E. Chrestien v. Carter*, AIR 1939 Pat. 512, 20 P.L.T. 374, 1939 P.W.N. 402, 40 Cr.L.J. 895, 184 I.C. 240, 6 B.R. 30, 12 R.P. 232. See also *Vattahara, S. J. v. Reverend Koshi*, *infra*.

The order of the District Magistrate under sec. 144 (4), Cr. P. C., rescinding an order of injunction under sec. 144, Cr. P. C., cannot properly be treated as a license to commit criminal trespass; still less as a license to riot—*Bachu Singh*, 40 Cr.L.J. 337 (338), AIR 1939 Pat. 314.

On a petition presented under sec. 145 (4), Cr. P. C., an order is passed which really does not purport to be passed under sec. 145 or 144, Cr. P. C., and does not in fact purport to be an order passed in the exercise of any jurisdiction conferred on the Magistrate by any section of the Cr. P. Code or any other provision of law. The Magistrate did not decide as a matter of fact whether the dispute was likely to lead to a breach of the peace or a disturbance of public tranquillity. This essential preliminary has not been found to exist and in this state of affairs his order must be deemed to be an order having no legal force, and any expression of opinion contained therein must be deemed to be void of legal force or effect. There is no order which requires to be formally set aside or modified in revision, the order complained of being one which has really no legal force or effect—*Vattathara, S. J. v. Reverend Koshi*, 38 Cr.L.J. 892, 170 I.C. 390, 45 M.L.W. 473, 1937 M.W.N. 637, 10 R.M. 198, AIR 1937 Mad. 494, 1937 M.Cr.C. 180.

374. Order contrary to Civil Court decree:—The Magistrate has no jurisdiction to pass an order the effect of which would be to interfere with the orders of a Civil Court—*In re Rahmatulla*, 17 All 486; *Umatul v. Nemai*, 32 Cal. 154. It is the duty of the Criminal Court to respect the opinions of the Civil Courts, and no order contrary to that of the Civil Court should be passed by a Magistrate under this section when the Civil Court has passed an order of temporary injunction against one party—*Murari v. Aiyasami*, 1922 M.W.N. 612, AIR 1933 Mad. 15, 69 I.C. 369, 23 Cr.L.J. 689. Where the landlords of a certain share in an estate had obtained a decree in a Civil Court for arrears of rent and for ejectment of their tenants, and also obtained possession under the decree, but the Magistrate at the instance of the tenants passed an order prohibiting the landlords from interfering with the possession of the tenants as the landlords were unable to point out the particular lands of which they had obtained possession under the decree, held that the order was illegal, being contrary to the Civil Court decree, as its effect would be to deprive the landlords of the lands to which they were entitled under the decree; held further that it was on the tenants to show what lands they held from the landlords—*Gobinda Sahai v. Sims*, 6 C.W.N. 466. Where a person purchasing some property at a sale in execution of a mortgage-decree is put in possession of the same, a Magistrate is not competent under this section to order the purchaser or any of his subordinates to refrain from entering upon the lands and the properties—*Roop Lal v. David Manook*, 2 C.W.N. 572. See also *Abdul Lal*, 28 C.W.N. 732.

It is the duty of the Criminal Court to give all the help provided by law to the man who has been put in possession of a property by the Civil Court. It would be illegal for a Magistrate to start a proceeding under sec. 145, to try and decide the question of possession between the auction-purchaser, who was given possession of the property by the Civil Court a few days before, and the judgment-debtor who was ousted from it. It is his duty to recognize the delivery of possession given by the Civil Court, give effect to it and forbid any interference with such possession by the judgment-debtor under this section—*Mahabir*, AIR 1934 Pat. 565 (569), 36 Cr.L.J. 146, 152 I.C. 591, 15 P.L.T. 819, 1934 Cr.C. 1218

375. Question of title:—A Magistrate acting under this section has no business to adjudicate upon rights and has no jurisdiction to decide upon any question of title or possession; the only question before him is whether a breach of the peace is imminent and to make an order with the object of preventing a breach of the peace—*Appala Narasimhulu v. Mahant*, 11 M.L.J. 122. In recording an order under this section, the Magistrate should not go beyond the necessities of the case and come to a certain conclusion with regard to the rights of the parties—*Joint Agents v. Chandra Ketu*, 34 Cr.L.J. 717, 144 I.C. 228, AIR 1933 Pat. 185, 1933 Cr.C. 516, 14 P.L.T. 379, Ind. Rul. 1933 Pat. 221. Therefore, a Magistrate's order directing the petitioner to take certain idols into the house of a certain person on the ground that the latter is entitled to them according to long usage, is illegal—*Kamal v. Jatindra*, 8 C.W.N. 376. The propriety of an order whereby the Magistrate assumes the function of the Civil Court and makes an order which practically amounts to an order of ejectment on grounds of title, may certainly be questioned though he may be technically justified by the fact that he records his apprehension of a breach of the peace—*Chhakan Ram v. Raghunath Ram*, 36 Cr.L.J. 474, AIR 1935 Pat. 145, 154 I.C. 184

376. Notice to file statements:—This section does not authorise a Magistrate to issue notice upon the parties for filing written statements before the Court on a fixed date. The issue of such a notice under this section is beyond the jurisdiction of the Magistrate. Such a notice being in effect a notice contemplated by section 145 (1), although professedly issued under sec. 144, the High Court in revision ordered the Magistrate to convert the proceedings under sec. 144 into proceedings under Chapter XII, and to complete the proceedings by following the procedure prescribed by Chapter XII—*Kaniz Amina*, 3 P.L.J. 243, 19 Cr.L.J. 869

377. Sections 144, 145—Dispute relating to immoveable property:—Section 144 is a larger and more general section than sec. 145. An order under sec. 144 can be made under various circumstances including a danger of a breach of the peace arising from disputes as regards possession, sec. 145 is of limited scope and applies only where there is a danger of a breach of the peace due to such dispute. The former section is discretionary, the latter is mandatory. Therefore, where the special condition of sec. 145 is fulfilled, sec. 144 yields to sec. 145, so that when the Magistrate finds that there is a real dispute tending to a breach of the peace, he is bound to institute a proceeding under sec. 145, irrespective of any order that he might have originally made under section 144—*Sheobalak v. Kamaruddin*, 2 Pat. 94 (107), 3 P.L.T. 573, 23 Cr.L.J. 549, 68 I.C. 419, AIR. 1922 Pat. 435 (F.B.); *Govind Ram v. Basantlal*, AIR 1929 Pat. 46 (48), 7 Pat. 269, 30 Cr.L.J. 302, 114 I.C. 466, 11 P.L.T. 134; *Viru Kamu v. Dewandas Jhamandas*, AIR 1940 Sind 158. Section 144 is intended for cases requiring an "immediate prevention or speedy remedy". Section 145 is an ordinary measure of precaution when breach of the peace is "likely"—*Agni Kumar v. Mantazaddin*, 30 Cr.L.J. 69 (76), 56 Cal. 290, 32 C.W.N. 1173, AIR 1928 Cal. 610, 113 I.C. 181, 48 C.L.J. 193 (F.B.). It cannot be said that in every case of dispute regarding land, sec. 144 is inappropriate, and proceedings ought to be had under sec. 107 or sec. 145, Cr.P.C. A Magistrate has jurisdiction to pass an order under sec. 144 in a case where one party not in good faith is merely setting up a pretence of claim and not a *bona fide* dispute, but it cannot be considered to be a good practice habitually to prejudice without evidence, both the merits of the dispute

and the question whether it is *bona fide*. Magistrates are entrusted with wide powers to enable them to discharge their important duty of providing for the prevention of a breach of the peace, but such powers are not intended to be habitually used for the settling of disputed points which call for a decision on evidence—*Jāgrupa v. Chotey*, 37 Cr.L.J. 95 (97), 159 I.C. 455.

Where there is a dispute regarding possession of immoveable property between the rival parties, and a breach of the peace is likely to ensue, the proper procedure to be adopted by the Magistrate is to pass an order in a proceeding under sec. 145 deciding the question of possession on evidence, and not an order in a proceeding under this section—*Parkar v. Ram Khalawan*, 11 C.W.N. 271; *Kaniz Amina*, 3 P.L.J. 243, 74 I.C. 65, A.I.R. 1918 Pat. 663, 19 Cr.L.J. 869, 4 P.L.W. 354; *Inderdeo v. Durga Prasad*, 37 Cr.L.J. 378, 160 I.C. 945, A.I.R. 1936 Pat. 59, 17 P.L.T. 22, 1936 Cr.C. 83; *Gobinda v. Basanti Lal*, 7 Pat. 269, 30 Cr.L.J. 302 (304); *Tarapada*, 1 P.L.T. 72, 55 I.C. 193, 21 Cr.L.J. 241; *Bimala Kanta Bagchi v. Sanat Kumar Ghosh*, 40 Cr.L.J. 144, 178 I.C. 945, 19 P.L.T. 620, A.I.R. 1938 Pat. 610. If there is a dispute regarding possession of land likely to cause a breach of the peace, and requiring a definite decision regarding the possession of land, the normal procedure for the Magistrate to follow is that laid down in sec. 145, Cr. P. C., unless the claim of one party is on the face of it a mere pretence so that it can be said that there is no real dispute. Though a Magistrate's power under sec. 144, Cr. P. C., are very wide the Court must deprecate the habitual and unjustifiable use of sec. 144, Cr. P. C., as a substitute for secs. 107 and 145, Cr. P. C.—*Damon Gope v. Het Narain Singh*, A.I.R. 1940 Pat. 382, 1940 P.W.N. 49. By adopting a procedure under sec. 145, in such a case, the Magistrate puts himself in a position to effectively and conclusively settle the dispute between the parties. Otherwise the dispute might still exist at the end of two months—*Jayanti*, 27 Cal. 785 (787, 788), 4 C.W.N. 62; *Tarapada*, supra; *Bhairo*, infra; *Jhaman v. Thakuri*, 1 P.L.T. 369, 21 Cr.L.J. 625, 57 I.C. 445; *Viru Kamu v. Dewandas Jhamandas*, A.I.R. 1940 Sind 158. Section 144 applies only where possession is either undisputed or clear beyond any shadow of doubt; but where possession relating to immoveable property is disputed, the proper procedure is to take proceedings under sec. 145 which will permanently settle the dispute so far as the Criminal Courts are concerned—*Bhairo*, 57 I.C. 662, 1 P.L.T. 377, 21 Cr.L.J. 646; *Kishori v. Anand*, 31 Cr.L.J. 1005, 126 I.C. 293, 10 P.L.T. 862, A.I.R. 1930 Pat. 162, 1930 Cr.C. 258; *Latifan v. Md. Ibrahim*, 28 Cr.L.J. 1039, 106 I.C. 233; *Gouri Dutt v. Gobind*, 1 P.L.T. 44, 20 Cr.L.J. 829, 53 I.C. 829; *Tarapada*, supra; *Madan v. Ful Chand*, 2 P.L.T. 484, 22 Cr.L.J. 685. This section ought not to be utilised in a dispute regarding the possession of land except against a party whose claim is made in good faith. The correct standpoint from which to view the propriety of order under this section is that of the Magistrate at the time when he passed it and in the light of the materials then before him. The Court will not be acute or critical in respect of them. An order which was proper when made, may at any later date appear in the light of further events or further materials unnecessary and it will then be rescinded from the date at which it so appears—*Radha v. Jairman*, 31 Cr.L.J. 466, 123 I.C. 73, A.I.R. 1929 Pat. 714, 1929 Cr.C. 586.

Section 144 is of general application, and contains nothing which ousts the Magistrate's jurisdiction in case of a *bona fide* dispute as to possession of land. Therefore, where sec. 107 or 145 will meet with the requirements of the case, sec. 144 is not an appropriate remedy, and if it is found that the danger is not so imminent and that it can be otherwise averted, an order under sec. 144 will be without jurisdiction—*Sheobalak v. Kamaruddin*, 2 Pat. 94, 3 P.L.T. 573, 23 Cr.L.J. 549 (F.B.); *Munni Lal v. Gatti*, 6 P.L.T. 746, 26 Cr.L.J. 1229, 88 I.C. 815, A.I.R. 1925 Pat. 514. See *Damon Gope v. Het Narain Singh*, supra.

The hands of the executive should not be tied by the Courts when they have been deliberately left free by the Legislature. On the practical side also it would be manifestly oppressive to subject an unoffending citizen in possession to the harassment now attendant on proceedings under sec. 145, whether an opponent who is merely

attempting to secure possession or is otherwise advancing a thin and untenable claim to possession, is or feigns to be about to occasion a breach of the peace. When a Magistrate finds on the materials before him that there is no *bona fide* dispute as to actual possession but one party is merely trying to get into possession of property which is held by another, he may take action under this section—*Lachman Das v. Ramchhabila*, 30 Cr.L.J. 510, 115 I.C. 683, 10 P.L.T. 542, A.I.R. 1929 Pat. 415, Ind. Rul. 1929 Pat. 235.

It is only where there is a dispute likely to cause a breach of the peace concerning any land or water or boundaries thereof and the dispute requires to be decided on evidence that resort to sec. 145, Cr. P. C., becomes necessary; and it must be remembered that for this purpose the dispute has to be a real dispute and not a mere pretence on behalf of one of the contesting parties. The judicial pronouncements are clear that where there is no such real dispute, orders under sec. 144, Cr. P. C., are not improper. There may even be occasions where an order is first appropriately passed under sec. 144, Cr. P. C., and the proceeding is afterwards converted into one under sec. 145, Cr. P. C., in order to pass an even more appropriate and permanent order. But where there was not a *bona fide* dispute about possession at all and what had happened was that while B was continuing in his possession R was trying to take it by means R called peaceable but which appeared to the Police and the Magistrate to be very likely to lead to breach of the peace, it was not obligatory on the Magistrate to drop the proceeding under sec. 144, Cr. P. C., and to act under sec. 145 Cr. P. C.—*Bhuneshwar Prasad v. Rommoy Roy*, 41 Cr L J 417, A I R 1940 Pat. 492, 187 I.C. 139, 1940 P.W.N. 461. In the case of *bona fide* disputes with regard to possession of land the proper method of dealing with the dispute is by a proceeding under sec. 145, Cr. P. C., and not by a proceeding under sec. 144, Cr. P. Code—*Bhikkali Tewary v. Achaibar Koer*, 41 Cr L J 451, 187 I.C. 349, 21 P.L.T. 326, A.I.R. 1940 Pat. 471, 1940 P.W.N. 465.

Though where there is a *bona fide* dispute of possession between the parties, the Magistrate ought to proceed under sec. 145 and not under sec. 144, the High Court will not interfere with the order under sec. 144 after it has spent its force by reason of the expiry of the two months to which its effect is confined—*Jagernath v. Ramjas*, 35 Cr.L.J. 88, 146 I.C. 557, A.I.R. 1933 Pat. 584, 1933 Cr.C. 1345. See also *Bhuneshwar Prasad v. Rommoy Roy*, *supra*.

The use of sec. 144 is a suitable method of avoiding a breach of the peace, only if it is clear that the claim of the party creating the disturbance is not a claim made in good faith—*Kaniz Amina*, 3 P.L.J. 143, 47 I.C. 65, 4 P.L.W. 354, 19 Cr.L.J. 869. Where it is clear upon the materials before the Magistrate that one of the parties is in possession, and that another person whose claim to possession is a mere pretence, is threatening to interfere with that possession, the Magistrate is bound to maintain the party in possession, and forbid the party who is not in possession by a summary order under sec. 144, if immediate prevention or speedy remedy is desirable. Sometimes it may even be necessary to take action against the party who is actually in possession; but in every case it must be shown that the conditions required by sec. 144 exist. What the Court deprecates is the habitual and unjustified use of sec. 144 as a substitute for sections 107 and 145—*Per Mullick, J.*, in *Sheobalak v. Kamaruddin*, 2 Pat. 94 (101) 23 Cr.L.J. 549 (F.B.); *Ahmed Ali v. Sahed*, 33 C.W.N. 858, 30 Cr.L.J. 1027 (1029). If on the expiry of the injunction under sec. 144, there is any further apprehension of a breach of the peace, the appropriate procedure would be to take proceedings under sec. 145 (but not under sec. 107)—*Abinash v. Lokenath*, 19 Cr.L.J. 367, 44 I.C. 591 (Cal.). See also Note 234 under sec. 107.

The subsistence of an order under sec. 144 does not take away the power of the Court to take proceedings under sec. 145. Therefore, where in a dispute between the trustees of a temple as to the possession and management of the temple and its properties, an order under sec. 144 was passed, and during the subsistence of that order proceedings under sec. 145 were initiated, and pending final orders the properties were attached and

a Receiver was appointed, held that the procedure was not illegal—*Gopala v. Krishna-sudamy*, 27 M.L.T. 234, 21 Cr.L.J. 73, 54 I.C. 473, 11 M.L.W. 459. Where a person simply wants to enforce his right the Criminal Courts ought not to lend him their aid under this section. Therefore, no order should be passed against a trustee in possession under this section on the application of a person who claims to be the trustee appointed by the Madras Hindu Religious Endowment Board—*Vythialinga v. Ramanuja*, 30 Cr.L.J. 1010, 119 I.C. 166, A.I.R. 1929 Mad 845, Ind. Rul 1929 Mad. 918. So also, when proceedings are initiated under sec. 144 with respect to land, the possession with regard to which is honestly disputed, the Magistrate would be acting properly in converting the proceedings into those under sec. 145, and making an order under the latter section—*Nandkishore v. Bikan Singh*, 3 P.L.T. 570, 65 I.C. 856, 23 Cr.L.J. 200; *Sheobalak v. Kamaruddin*, 2 Pat. 94, A.I.R. 1922 Pat. 435, 3 P.L.T. 573, 23 Cr.L.J. 549, 68 I.C. 419 (F.B.) (*per* Jwala Prasad, J.); *Gobind Ram v. Basantilal*, A.I.R. 1929 Pat 46 (48), 7 Pat. 269, 30 Cr.L.J. 302, 114 I.C. 466, 11 P.L.T. 134.

It is true that where one party who is clearly in the wrong threatens to disturb the rights of another who is in actual possession of the land, the provisions of sec. 145 have no application. The proper course when there is a real dispute regarding land is to proceed under sec. 145, since otherwise the effect might be to bind down one of the parties to the dispute, without any adjudication on the question as to which of the two parties is in possession. Where there is a real dispute as to the possession of immoveable property, it will be necessary before proceedings under sec. 107, Cr. P. C., can be properly instituted against any party, to ascertain which of the parties to the dispute is in possession of the land, which can more conveniently be done by proceedings under sec. 145—*Saddique v. Mohid*, 32 Cr.L.J. 208, 129 I.C. 85, A.I.R. 1930 Pat 556, 1930 Cr.C. 1110 following *Shama Charan*, 90 I.C. 442, A.I.R. 1925 Pat. 610, 26 Cr.L.J. 1562, 6 P.L.T. 766. Where the dispute is with regard to the possession of immoveable property a proceeding under sec. 144, Cr. P. C., is a poor substitute for a proceeding under sec. 145 which settles once for all so far as the Criminal Courts are concerned, the question of possession with regard to a particular piece of immoveable property—*Puran v. Ramjhari*, 36 Cr.L.J. 655, A.I.R. 1935 Pat. 224, 1935 Cr.C. 618, 155 I.C. 88. See also *Inderdeo v. Durga Prasad*, A.I.R. 1936 Pat. 59.

It is always enough that the Magistrate adopts any proper method to meet the emergency if there happen to be several methods to choose from; his choice is not to be considered in the light of the fact that at a later stage when the emergency can be viewed on a different basis, another method may be adjudged to have been a more proper or the most or rather the most satisfactory method in the circumstances—*Harihar v. Upendra*, 35 Cr.L.J. 1009, 149 I.C. 959, 13 Pat. 76, A.I.R. 1934 Pat. 308, 1934 Cr.C. 729.

See also Notes 234 and 388.

378. Clause (2)—Ex parte order:—An *ex parte* order can be made only in cases of emergency—*Joyanti v. Middleton*, 4 C.W.N. 562, 27 Cal. 785; *Jokhu*, 8 All. 99; *Mahammadi Molla*, 2 C.W.N. 747; *Abdul Majid v. Nripendra Nath*, A.I.R. 1934 Cal 393 (395), 35 Cr.L.J. 881, 38 C.W.N. 556, 148 I.C. 773, 1934 Cr.C. 534, 6 R.C. 480; or in cases where the circumstances do not admit of the serving in due time of a notice upon the person against whom the order is directed—*Abdul Majid v. Nripendra Nath*, *supra*. Ordinarily, in proceedings under this section, notice should be issued upon the person against whom the order is made, and an opportunity afforded to him to show cause why it should not be passed—*Tirunarasinha*, 19 Mad 18; *Muhammadi Molla*, 2 C.W.N. 747.

In case of *ex parte* orders, the record of the Magistrate should disclose the existence of emergency which called for such *ex parte* orders and should show that there was no sufficient time to serve notice on the party affected thereby—*Venkataramana*, 22 M.L.T. 323, 19 Cr.L.J. 56, 1917 M.W.N. 724, 6 M.L.W. 456, 43 I.C. 88. The record of the Magistrate should indicate with reasonable fullness the materials on which he

concluded that there was an emergency to justify the passing of the *ex-parte* order—*Ibid*.

See *Ramnad v. Kader* in Note 380A.

379. Clause (3)—Order to whom to be addressed:—This sub-section has nothing to do with the nature of the order, but is merely one of the four sub-sections which refer to the manner of promulgation and to the duration of an order under sub-section (1)—*Madan Kishore*, 41 Cr L J 414, 187 I.C. 135, 21 P L T 231. See also *Abdul Karim Shorash*, *infra*. Where a Magistrate issued a proclamation forbidding the cultivators of a certain place to spread night-soil on their fields so as to cause disease, it was held that the order was *ultra vires* and not within the scope of this section, because the order issued by the Magistrate was not directed to the “public generally” but was directed to a portion of the community—*Jokhu*, 8 All 99 (101). The words “public generally” are not restricted to the corporate body pursuing its public avocations but also means the whole number of individuals who in the circumstances cannot be particularly addressed. The proper interpretation of this section is that the order may be directed to a particular individual, but when owing to the number of particular individuals, it is impracticable for the Magistrate to address each of them individually, an order under this section may be issued to the whole number of particular individuals designated as the “public generally”; and such order will have the same effect as a separate order served upon each particular individual, provided, of course, that it has been so promulgated that it has come to his knowledge. Therefore, a general order to the effect that no person should sacrifice or cause to be sacrificed any cow or bullock within a certain specified boundary and period, is a legal order—*Abdul Gaffur*, 18 O C 70, 16 Cr L J 190, 27 I C 670 (671).

“*When frequenting or visiting a particular place*” —The plain meaning of sub-sec. (3), read in the light of sub-sec. (1), is that, in the circumstances set forth in sub-sec. (1), a Magistrate may not only direct an individual to abstain from a certain act or acts but may also issue a similar direction to members of the public generally, provided in the latter case the prohibition is limited to occasions on which the members of the public may frequent or visit a particular place. In other words, it would not be legal to issue a general prohibition to the public to abstain from a certain act but an order to the public generally to abstain from a certain act on the occasions when they happened to visit a particular place would be valid. The language is also sufficiently wide to cover residents in a particular locality but, in either case, it is, of course, essential that the place covered by the order and also the act prohibited should be described with reasonable precision, whether such place be an entire district or a particular street in a town and whatever the nature of the prohibited act may be. The law does not contemplate the prohibition of the frequenting or visiting of the “particular place” to which reference is made in sub-sec (3) but the prohibition of some act on an occasion on which such place is frequented or visited. It would not, therefore, be reasonable to suppose that it could have been the intention of the Legislature to empower a Magistrate by means of an order under sec 144, Cr P C, to restrain the movements of the members of the public before they had occasion to frequent or visit the district over which he had jurisdiction by forbidding them to frequent or visit the district at all. Subject to the above-mentioned qualification, sec. 144, Cr. P C., gives a Magistrate full power to restrain the activities of the public within his jurisdiction by issuing orders of a general nature—*Abu Hussain Shaikh v Emp*, 44 CWN 611 (645), AIR 1910 Cal 358, following *Nagendra v Rakhal Das*, 23 CWN 141 and *Niharendu Dutt Majumdar v Emp*, AIR. 1939 Cal 703, 43 CWN 1061, (1939) 2 Cal. 507, 184 I C 856 and distinguishing *Ashutosh v Haris*, 29 CWN 411 and *Abdul Majid v Nripendra Nath*, 35 Cr L J 881, 38 CWN 556, 148 I C 773, 6 R.C. 480, AIR 1934 Cal 393, 1934 CrC 534. The order may be directed either to a particular person, or to the public generally; but it can be directed to the public generally only when frequenting or visiting a particular place, such for instance, as a market or a park or other place within a specified boundary. There is no power

to direct the public generally *simpliciter*—*Motilal*, 33 Bom.L.R. 1178, 1931 Cr.C. 954, 134 I.C. 1237, Ind Rul. 1932 Bom 21, A.I.R. 1931 Bom 513, 33 Cr.L.J. 75; *Belvi*, Ind. Rul. 1931 Bom. 456, 33 Bom.L.R. 673, 32 Cr.L.J. 1144, 134 I.C. 344, 1931 Cr.C. 581, A.I.R. 1931 Bom. 325; *Ponnappa Aiyangar v. Venamamalai Ramanuja Jeer*, A.I.R. 1920 Mad 847, 53 I.C. 483, 20 Cr.L.J. 755. Where, owing to the prevalence of cholera, the District Magistrate issued a notification in the form of a proclamation forbidding the inhabitants of a city to give caste-dinners, it was held that the order not being directed to a particular person nor to the public *when frequenting a particular place*, but to persons attending caste-feasts which are held in private houses, was illegal—*Lakshmidas*, 14 Bom. 165 (167). The Magistrate has no power to issue an order under this section to the general public prohibiting the printing or publication or circulation of false and alarmist reports, statements or rumours, which have the effect of promoting communal tension and causing fear and alarm to the public, by any written word, in newspapers or in leaflets, or by any other means as no order can be issued to the public generally except when "frequenting or visiting a particular place". This is a clear limitation placed by the law upon the power given to the Magistrate to issue an order to the general public under sec. 144, Cr. P. C., and any order which ignores this limitation must be held to be bad in law—*Sat Narain v. Emp.*, A.I.R. 1939 All 746, 41 Cr.L.J. 121, 185 I.C. 172, 1939 A.L.J. 1061, I.L.R. 1939 All. 934, 1939 A.W.R. (H.C.) 711, 1939 A.Cr.C. 169. Similarly, an order directing all persons in Surat City to abstain from interfering with the destruction of dogs is *ultra vires*, as the Magistrate has power only to direct an order to a particular individual or to the public generally when frequenting or visiting a particular place—*Bhagubhai*, 16 Bom.L.R. 684, 16 Cr.L.J. 98, 27 I.C. 146, A.I.R. 1914 Bom 198. The Calcutta High Court likewise holds that an order which directs the public in general to abstain from attending *hat* is illegal, since it is not until the public attend the *hat* that the order can be binding on them. The order can only be issued to the public generally when frequenting or visiting a particular place—*Asutosh v. Harish*, 29 C.W.N. 411, 26 Cr.L.J. 874, A.I.R. 1925 Cal. 625, 86 I.C. 810; *Abdul Majid v. Nripendra Nath*, 35 Cr.L.J. 881, 38 C.W.N. 556, A.I.R. 1934 Cal 393, 1934 Cr.C. 534, 148 I.C. 773. The words "frequenting ... place" are intended to extend rather than to limit the scope of the order, and mean not only casual or frequent visitors from outside the limits of the locality, but include the residents of the locality as well—*Abdul Gafur*, 18 O.C. 70, 16 Cr.L.J. 190, 27 I.C. 670 (672), A.I.R. 1915 Oudh 188. Sub-section (3) of sec. 144, Cr. P. C., has nothing to do with the nature of the order but is one of four sub-sections which refer to the manner of promulgation and to the duration of an order under sub-sec. (1). When, because of the number of persons to be directed, it is impracticable for the Magistrate to issue notice to each individual he can issue an order to the public generally, including, besides residents, persons who may frequent or visit a particular place and such order will be effective against each individual to whose knowledge it has come—*Abdul Karim Shorash*, A.I.R. 1937 Lah. 80, 17 Lah. 515, 38 P.L.R. 964, 167 I.C. 284, 38 Cr.L.J. 354.

An order directed to the public when frequenting public or private streets in a particular city, is sufficiently definite as to comply with the requirements of this section. People can have no real difficulty in recognising when they are in the streets of a particular town, and it is only when in that situation that people are forbidden to organise or take part in processions—*Sarab*, A.I.R. 1935 Bom 33, 36 Bom.L.R. 1129, 36 Cr.L.J. 547, 154 I.C. 637, 1935 Cr.C. 68, 7 R.B. 359.

The word "public" means a place whether publicly or privately owned, which at the time when the order is passed the public frequent or visit, as, highways or places of public resort, or private houses in which public meetings are held. Therefore, an order prohibiting the residents of a town hoisting national flags is illegal under this section, because the Magistrate has no authority to prevent private persons from hoisting flags in their private houses which are not frequented or visited by the public—*Sriramamurthy*, 131 I.C. 649, 1930 M.W.N. 849, A.I.R. 1931 Mad 242, 33 M.L.W.

640, Ind. Rul. 1931 Mad. 553, 60 M.L.J. 370, 1931 Cr.C. 362 (365), 32 Cr.L.J. 763. The scope of an order passed under sec. 144, Cr. P. C., against the public generally is narrower than that passed against an individual and served personally on him. Although the word "public" has not been used with the expression "particular place" still the law intends not only that the particular place should be specified but also that it should be a place which is frequented or visited by the public—*Babu v. Emp*, 41 Cr.L.J. 228 (230), A.I.R. 1940 Oudh 241, 1940 O.L.R. 43, 185 I.C. 745, 1940 O.W.N. 118. Moreover, the place must be a "particular" place, i.e., a definite or specified place; an order prohibiting a procession within the whole of the municipal limits of a town and all public places within such limits, or in all the streets of a city, is illegal—*Motilal*, A.I.R. 1931 Bom. 513, 134 I.C. 1237, 33 Cr.L.J. 75, 33 Bom.L.R. 1178, 1931 Cr.C. 945 (946); *Belvi*, A.I.R. 1931 Bom. 325, 1931 Cr.C. 581, 134 I.C. 344, 33 Bom.L.R. 673, 32 Cr.L.J. 1144. The words "particular place" should not be confined to a restricted area but should be construed as meaning a well-defined area regarding the boundaries of which the public can be in no doubt. It is necessary that the operation of orders under this section should be kept within the narrowest possible limits, and that the place or locality to which they are applied, should be so clearly defined as to enable the public to know at once what the prohibited area is to obviate the possibility of the people disobeying the order through ignorance of the place to which it is applied—*Vasant B. Khale*, 152 I.C. 701, A.I.R. 1934 Bom. 375, A.I.R. 1934 Cr.C. 1212, 36 Bom.L.R. 753, 36 Cr.L.J. 130, 59 Bom. 27; *Qamar-ud-din*, 36 Cr.L.J. 951, A.I.R. 1935 Lah. 679, 156 I.C. 526, 37 P.L.R. 515. The fact that the order forbade meetings in so large a place as the Lahore District did not make the order illegal although it might have made the order difficult to enforce for one reason or another—*Abdul Karim Shorash*, A.I.R. 1937 Lah. 80, 17 Lah. 515, 38 P.L.R. 964, 167 I.C. 284, 38 Cr.L.J. 354. No distinction should be drawn between a particular place and an area. An order under this section addressed to the public forbidding them to hold meeting in any area within a subdivision is a definite order and it does not contravene the provisions of this section. It is necessary to distinguish carefully between the jurisdiction of the Magistrate to make an order and a possible practical difficulty in showing that it has been disobeyed. It does not follow that because it is difficult for the Crown to secure a conviction, that the order itself was made without jurisdiction—*Niharendu Dutt Majumdar v. Emp*, A.I.R. 1939 Cal. 703, 43 C.W.N. 1061, (1939) 2 Cal. 507, 184 I.C. 856. There is no reason why the limits of the Union Committee, if clearly and specifically defined, should not be considered as describing a particular place—*Madan Kishore*, 41 Cr.L.J. 414 (416), 187 I.C. 135, 21 P.L.T. 231, A.I.R. 1940 Pat. 446, 1940 P.W.N. 469. The expression "a particular place" appears to be sufficiently wide to include the whole district over which a Magistrate may have jurisdiction—*Abu Hussain Shaikh v. Emp*, 44 C.W.N. 641 (645), A.I.R. 1940 Cal. 358, following *Abdul Karim Shorash*, supra.

380. Clause (4)—Rescinding or altering an order:—When an *ex parte* order is made it is clear from the provision of this clause that a party aggrieved might appear before the Magistrate who had made the order *ex parte* and ask him to rescind or alter the order and cl (5) of this section says that where such an application is received the Magistrate shall afford to the applicant an early opportunity of appearing before him, whether in person or by a pleader, and showing cause against the order—*Abdul Majid v. Nripendra Nath*, A.I.R. 1934 Cal. 393 (395), 35 Cr.L.J. 881, 38 C.W.N. 556, 148 I.C. 773, 1934 Cr.C. 534, 6 R.C. 480. A Magistrate who passed an order under this section, without taking evidence, can afterwards cancel the order, if after hearing the evidence he finds that there is no reason to apprehend a breach of the peace—*Mohun Sardar v. Obhoy*, 13 W.R. 72. Application for rescinding or modifying *ex parte* orders under this section should be disposed of as quickly as possible, but it is not illegal to put off an inquiry for a reasonable time within two months—*Satish*, 11 C.W.N. 79, 4 Cr.L.J. 433; *Surendra v. Gostha Behari*, 37 C.W.N. 962. It is not proper for a Magistrate to pass an *ex parte* order under this section and

when its propriety or legality is challenged to postpone the hearing of the matter from time to time until about the termination of the force of the order. Such matters ought to be disposed of quickly in order to avoid unnecessarily encroaching on the civil rights and liberties of the subject—*Banwari v. Prabban Krishna*, 26 C.W.N. 663, 35 C.L.J. 397, 24 Cr.L.J. 164, 71 I.C. 516, A.I.R. 1922 Cal. 569. See also *Mooka Pandaram v. Sinnu Muthiriyar*, A.I.R. 1937 Mad. 167 (169), 38 Cr.L.J. 125, 166 I.C. 77, 1936 M.W.N. 1089, 44 M.L.W. 686, 71 M.L.J. 761, I.L.R. 1937 Mad. 171, 9 R.M. 328.

An order passed under this section by a Joint Magistrate, while acting as a District Magistrate, can be rescinded or altered, after his reversion to the post of Joint Magistrate by the next District Magistrate, and the latter cannot transfer an application for rescission or alteration to the former—*Sudarsanam v. Srinivasachari*, 16 Cr.L.J. 74 (Mad.). But see *Kusum Kumari v. Hem Nalini*, 38 C.W.N. 115 quoted in para 380A. The jurisdiction conferred by sec. 144 (4), Cr. P. C., is neither appellate nor revisional, and that jurisdiction is a special one that can be exercised only if the actual terms of the section are strictly satisfied. Therefore, a Magistrate, who ceased to be in charge of a sub-division, has no power to rescind or alter the order made by a Magistrate subordinate to the Sub-divisional Magistrate though the matter was properly before him on transfer before he became *functus officio*. It is clear from sec. 530 (1), Cr. P. C., that when any Magistrate not empowered by law issues an order under sec. 144, Cr. P. C., his proceedings shall be void. This observation applies with equal force to a case like this—*Serugan Chettiar v. Karuppan Chettiar*, 38 Cr.L.J. 864, 1937 M.W.N. 210, 45 M.L.W. 367, 170 I.C. 193, 10 R.M. 152, A.I.R. 1937 Mad. 487.

The District Magistrate can rescind or alter an order of a subordinate Magistrate not only on the ground that having regard to circumstances which had happened since the passing of the order, the reason for its having been passed does no longer exist so that an alteration or rescission of the order is necessary as a corollary, but he can also (sitting as it were in appeal or revision) reverse the order of the subordinate Magistrate on the ground that it never ought to have been made—*Sheobalak v. Kamaruddin*, 2 Pat. 94 (F.B.), 3 P.L.T. 573, 23 Cr.L.J. 549 (overruling *Cheddi Lal v. Mahabir*, 2 P.L.T. 650, 23 Cr.L.J. 27). It is within the competence of the District Magistrate to rescind any order under this section if the order is wrong and he may also do so when he finds that the order is not required for immediate prevention of a breach of the peace—*Manu Khan v. Sundar Singh*, A.I.R. 1934 Pat. 313, 15 P.L.T. 216. The Madras High Court holds that the jurisdiction conferred by this clause upon a Magistrate to rescind or alter an order made by himself or by any subordinate Magistrate or a predecessor, is neither an appellate nor revisional jurisdiction, but is a special jurisdiction conferred by the statute. Therefore, sec. 439 (5) does not bar a revision petition to the High Court. But the High Court should not encourage direct applications for revision when there is some Magistrate who can alter or rescind the order—*Pitchai v. Md Atham*, 63 M.L.J. 594, 33 Cr.L.J. 826 (827), 139 I.C. 773, 1932 M.W.N. 726, 36 M.L.W. 461, 56 Mad. 149, A.I.R. 1932 Mad. 720.

A District Magistrate in cancelling an order of the subordinate Magistrate is not competent to substitute an order of his own in the nature of an innovation. Thus, where in a case of dispute as regards immoveable property, the subordinate Magistrate started a proceeding under this section, and considering the claims of the second party to be a mere pretence, passed an order against such second party, but the District Magistrate under clause (4) cancelled the Sub-Magistrate's order and substituted an order of his own, prohibiting the first party from cutting crops, it was held that the order of the District Magistrate was in the nature of an innovation and therefore without jurisdiction and must be set aside—*Ganpat*, 3 P.L.T. 287, 19 Cr.L.J. 880, 47 I.C. 76, 4 P.L.W. 357. See also *Ramkrishna v. Qamr-ud-Din*, 29 Cr.L.J. 478, 109 I.C. 126. While it is open to the superior Magistrate to alter the order, he cannot alter the party to be affected by the order. Where a Subordinate Magistrate allows a certain party to perform a certain festival on a certain day, it cannot be prohibited by the superior Magistrate on an application by another party under sec. 144 (4).

Cr. P. C., or, where a Subordinate Magistrate prohibits one party from doing a certain act, the superior Magistrate cannot under sec. 144, Cr. P. C., prohibit the opposite party from doing that act. Jurisdiction is given to him by this sub-section only to alter or rescind the order by which the petitioners before him are said to be aggrieved, and he may remove altogether the grievance complained of or reduce its extent as it were, but he cannot make a new order which would constitute a fresh grievance to a party not before him—*Serugan Chettiar v. Karuppan Chettiar*, 38 Cr.L.J. 864, 1937 M.W.N. 210, 45 M.L.W. 367, 170 I.C. 193, 10 R.M. 152, A.I.R. 1937 Mad 487; *Ramaswami Aiyangar v. Ramaswami Patrachar*, (1938) 2 M.L.J. 509, 1938 M.W.N. 974; *Panchkhesar Kuar v. Madho Singh*, 1938 P.W.N. 709, 19 P.L.T. 796

Although a District Magistrate may rescind or alter an order made by a subordinate Magistrate, still he cannot direct the subordinate Magistrate to initiate proceedings under section 145 instead of under sec. 144; because it is the subordinate Magistrate who has to satisfy himself by the exercise of his own independent judgment and upon proper materials as to the existence of a reasonable apprehension of danger, and the District Magistrate acts illegally in interfering with the discretion by directing him to substitute proceedings under sec. 145 in place of proceedings under sec. 144—*Kailash v. Kunja Bihari*, 24 Cal 391, 1 C.W.N. 393; *Tilok Rai*, 2 P.L.T. 392, 71 I.C. 785; *Cheddil Lal v. Mahabir*, 2 P.L.T. 650, 23 Cr.L.J. 27; *Kedar Nath v. Bijoy*, 33 C.W.N. 723, 1929 Cr.C. 385, A.I.R. 1939 Cal 751. If the District Magistrate is of opinion that proceedings under sec. 144 had been wrongly drawn up and that the right course would be to take action under sec. 145, the proper course for the District Magistrate would be to make a reference to the High Court under sec. 438—*Kedar Nath v. Bijoy*, supra.

It is open to a superior Magistrate to rescind or alter an order passed by a Subordinate Magistrate, even though the Subordinate Magistrate has himself passed an order on a petition to rescind or alter the order—*R. S. Srikanta Iyer*, 38 Cr.L.J. 582, 168 I.C. 720, 1937 M.W.N. 56, 45 M.L.W. 249, 9 R.M. 625, A.I.R. 1937 Mad 311, 1937 M.Cr.C. 48. When an order was passed under sec. 144, Cr. P. C., by a Magistrate subordinate to the Sub-divisional Magistrate, the power of the District Magistrate to entertain an application under sub-sec. (4) of sec. 144 is not lost by reason of the fact that the Sub-divisional Magistrate, who is subordinate to him, had already dealt with an application made under that sub-section to him. But he has no power to suspend the order, pending the hearing of such an application. He cannot also exercise a power of transfer in a case of this kind—*Mooka Pandaram v. Sinnu Muthuriyan*, 38 Cr.L.J. 125 (126), 166 I.C. 77, 1936 M.W.N. 1089, 44 M.L.W. 686, 1936 M.Cr.C. 307, 71 M.L.J. 761, A.I.R. 1937 Mad 167, 11 R.M. 1937 Mad 171, 9 R.M. 328. See also 16 Cr.L.J. 74, 26 I.C. 661. But even assuming that there is no power of transfer, the order of transfer cannot be regarded as void and cannot be set aside merely on that ground in view of sec. 529 (f), Cr. P. C., and also of sec. 531 of the same Code—*Serugan Chettiar v. Karuppan Chettiar*, 38 Cr.L.J. 864, 1937 M.W.N. 210, 45 M.L.W. 367, 170 I.C. 193, 10 R.M. 152, A.I.R. 1937 Mad 487.

Notice :—This section permits any authority which has the power to rescind or alter an order to do so after hearing only the party who applies for it and thus hearing can be completed without delay, and there is no particular reason why there should be a stay or suspension before such hearing. It is not a case in which the other side has to be given notice and has to be heard. In all these cases under this section it is really the liberty of the subject that is affected by the original order and though this interference might be made by the Magistrate at the instance of or when moved by some private individual the superior authority can always rescind or alter the order without hearing the person at whose instance the original order was passed, the only limitation on his power being that he should hear the party who applies for rescission or alteration before declining to do so—*Mooka Pandaram v. Sinnu Muthuriyan*, supra.

Evidence :—The order under this clause is judicial and the Magistrate must keep an open mind and record not necessarily the whole but at least a reasonable portion of the evidence essential for the judicial determination of the objections rather than say

that his opinion could not be changed by any such evidence and refuse to record any evidence—*Belvi*, 32 Cr.L.J. 1144, 134 I.C. 344, 33 Bom.L.R. 673, A.I.R. 1931 Bom. 325, 1931 Cr.C. 581, Ind. Rul. 1931 Bom. 456. When an *ex parte* order is called in question under this clause, the normal procedure should be for evidence to be recorded in the usual way by examination and cross-examination of witnesses in open Court—*Satyanarayan*, 32 Cr.L.J. 744, 131 I.C. 449, 1930 M.W.N. 841, A.I.R. 1931 Mad. 236, 60 M.L.J. 378, 33 M.L.W. 632, 1931 Cr.C. 332, Ind. Rul. 1931 Mad. 513. See also 7 Pat. 269 quoted in para 366.

Intermediate order :—Except orders contemplated by sub-section (4) (i.e., orders of rescission or alteration) no other intermediate order can be made while an order under sec. 144 is still in force. When the High Court has issued a rule in any case, it takes full *seisin* of the case, and it is the High Court alone that can pass *ad interim* orders in the case. The Magistrate against whose order the rule is issued has no such jurisdiction—*Satish Chandra*, 11 C.W.N. 79. See also *Mooka Panduram v. Sinnu Muthuriyan*, *supra* and *Pitchai v. Md. Attham* in Note 382.

Revival of order :—When a Magistrate set aside his order and struck the case off the file, he had no power to revive it without a fresh proceeding—*Bradley v. Jameson*, 8 Cal. 580.

380A. Sub-section (5) :—The provision of this sub-section is mandatory. Where, therefore, without giving an opportunity to the applicant to support his application, the District Magistrate dismissed it summarily, the order cannot stand—*Thakin Aung Bala v. District Magistrate, Rangoon*, 40 Cr.L.J. 645 (647), 182 I.C. 23, A.I.R. 1939 Rang. 181, 1939 Rang.L.R. 294, 11 R.R. 516.

In view of the provisions of sub-sections (4) and (5) it can be stated that the function of the Magistrate does not stop with the passing of the *ex parte* order, under sub-section (1), but it is his duty to give an early opportunity to any person aggrieved by that order to appear and show cause against it, in order to see whether such order has to be rescinded or altered. For such a purpose, he has to consider whether the claims advanced by one or other of the parties are within or in excess of their natural rights and whether any alterations or restrictions to the order already passed are reasonably necessary, in order to obviate undue hardship to any of the parties, and to see that protection is given to the persons who act within the bounds of their legal and natural rights without being molested by the breakers of law—*Ramnad v. Kader*, 62 M.L.J. 392, 33 Cr.L.J. 605 (607), 138 I.C. 354, A.I.R. 1932 Mad 294, 1932 M.W.N. 144, 35 M.L.W. 366, 1932 Cr.C. 280, 5 M Cr.C. 102. See also *Abdul Majid v. Nripendra Nath and Mooka Pandaram v. Sinnu Muthuriyan* in Note 380.

If a Magistrate had power to make an order under cl (1) of this section he has also power to make an order under cl (4), even if he had ceased to exercise the power under cl. (1) in the meantime—*Kusum Kumari v. Hem Nalini*, 38 C.W.N. 115.

381. Clause (6)—Duration of order :—The period of sixty days begins to run from the date on which notices are issued—*Puran v. Ramjhari*, 36 Cr.L.J. 655, 1935 Cr.C. 618, A.I.R. 1935 Pat. 224, 155 I.C. 88; not from the date when it was made absolute—*Thomson*, 13 C.W.N. 195, 11 Cr.L.J. 12, 4 I.C. 590. See also *Bhuneswar Prasad v. Rommoy Roy*, 41 Cr.L.J. 417 (419), A.I.R. 1940 Pat. 492, 187 I.C. 139, 1940 P.W.N. 474. An order under this section is *temporary* and is to remain in force for only two months. An order for *perpetual* injunction passed under this section is beyond the jurisdiction of the Magistrate—*Shcodin*, 10 All. 115; *Bradley v. Jameson*, 8 Cal 580; *Gopi Mohun v. Taramoni*, 5 Cal 7; *In re Meyyaru Ammal*, 1914 M.W.N. 169, 15 Cr.L.J. 145; *Remjit v. Luchman*, 7 C.W.N. 140. Thus, an order prohibiting a landlord from ever holding *kats* on his land on certain days is illegal—*Gopi Mohun v. Taramoni*, 5 Cal. 7. So also, an order that a certain person should abstain from taking any part in the management till another is duly evicted from management, is *ultra vires*—*Ramanadhan v. Murugappa*, 24 Mad 45; so also, an order that no rents should be collected from the tenants by their contending landlords

until their rights have been established by a Civil Court—*Prosonna*, 8 C.L.R. 231; or an order directing a party not to interfere with the land without the order of a competent Court—*Remjit v. Luchman*, 7 C.W.N. 140

Non-specification of time :—An order under this section is not bad merely because it does not state that its operation is confined to two months or some shorter period. Under this sub-section, it will be presumed, in the absence of anything to the contrary, that the direction of the order is limited to the full period of two months—*Ram Nath*, 24 Cal. 897, 6 C.L.J. 186, 11 C.W.N. 942, 6 Cr.L.J. 194; *Ponnappa v. Vanamamalai*, 1919 M.W.N. 872, 53 I.C. 483, 10 M.L.W. 480, 20 Cr.L.J. 755. In another case the Madras High Court has held that an order which is indefinite as to time is to that extent without jurisdiction—*Muthukumaraswami v. Md. Rowther*, 42 M.L.J. 352, 23 Cr.L.J. 401.

Extension of time by successive orders :—A Magistrate cannot by passing successive orders, extend the operation of this section beyond the time limit prescribed by this section—*Satish*, 11 C.W.N. 79, *Bisseswar*, 17 Cr.L.J. 200, 20 C.W.N. 758, 24 C.L.J. 272, 34 I.C. 312; *Ram Gopal v. Narayandas*, 32 C.W.N. 613 (615), 55 Cal. 1077, 47 C.L.J. 452; *Gouri Dutt v. Govind*, 1 P.L.T. 44, 20 Cr.L.J. 829; *Murari v. Ayyasami*, 1922 M.W.N. 612, 23 Cr.L.J. 689, 69 I.C. 369, A.I.R. 1923 Mad. 15. If there is really a very serious danger of a breach of the peace he can take action under section 107—*Rash Behari v. Jagnarain*, 3 P.L.J. 130, 19 Cr.L.J. 365, 44 I.C. 589; *Ganesh v. Nader Ali*, 13 C.W.N. cclxviii. But he cannot, under the shelter of this section, assume a jurisdiction to prohibit persons by a permanent injunction, by arbitrary and successive renewals of orders under this section—*Govinda v. Perumal*, 38 Mad. 489, 16 Cr.L.J. 629, 30 I.C. 453; *Ramnad v. Kader*, 62 M.L.J. 392, 33 Cr.L.J. 605 (608); *Remjit v. Luchman*, 7 C.W.N. 140. The Magistrate cannot extend the time by repeating or confirming the original order—*Thompson*, 13 C.W.N. 195 (196), 11 Cr.L.J. 12, 4 I.C. 590. Nor can the period be extended by drawing up the same order once more and merely adding a large number of persons to whom it is directed. Such a proceeding is an attempt to evade the provisions of this clause and is illegal—*Ashutosh v. Hans Chandra*, 29 C.W.N. 411, 26 Cr.L.J. 874, 86 I.C. 810, A.I.R. 1925 Cal. 625. See also *Inderdeo v. Durga Prasad*, 37 Cr.L.J. 378, 160 I.C. 915, A.I.R. 1936 Pat. 59, 17 P.L.T. 22, 1936 Cr.C. 83. See also *Vedappan v. Perman*, 30 Cr.L.J. 119, 113 I.C. 279, 52 Mad. 69, 55 M.L.J. 621, A.I.R. 1928 Mad. 1108, 28 M.L.W. 506, 1928 M.W.N. 779.

It is not open to a Magistrate by passing repeated orders under sec. 144, Cr. P. C., to avoid the decision of a dispute which may be appropriately dealt with under sec. 145 or sec. 107, Cr. P. C. The power given by sec. 141 is essentially an emergent power which has sometimes to be passed in disregard of private rights. An order of that kind cannot possibly be allowed by repetition to spell more or less permanent interference with private rights. To repeat such an order on the ground of maintaining the *status quo* is to compel the unsuccessful party to resort to the Civil Court even though the Criminal Court may have done nothing to look into the rights of the parties, and further, indirectly to prolong the effect of the original order beyond the period of two months fixed in sub-sec. (6) of the section. Such a use of the section is altogether unwarrantable—*F. E. Chrestien v. Carter*, A.I.R. 1939 Pat. 512, 20 P.L.T. 374, 1939 P.W.N. 402, 40 Cr.L.J. 895, 184 I.C. 240, 6 B.R. 30, 12 R.P. 232; *Bindeshwari Singh v. Raghunandan Mahto*, 41 Cr.L.J. 578, 188 I.C. 330, 21 P.L.T. 413, A.I.R. 1940 Pat. 559, 6 B.R. 648. There is no justification for periodical recourse to sec. 144, Cr. P. C., on the plea of emergency in cases where emergency exists only by reason of neglect of the authorities to take proper order when the facts first came to their notice. In other words what the Court deprecates is the habitual and unjustifiable use of sec. 144, Cr. P. C., as a substitute for secs. 107 and 145, Cr. P. C.—*Viru Kamu v. Devarandas Jhamandas*, A.I.R. 1940 Sind. 158, following *Shebalak v. Kamaruddin*, A.I.R. 1922 Pat. 435, 68 I.C. 149, 23 Cr.L.J. 549, 2 Pat. 94, 3 P.L.T. 573 (F.B.)

Extension of time by Local Government :—The last three lines of this section lay down that the Local Government may extend the order in cases of danger to human

life, etc., and it can extend the order for any length of time. The fact that the heading of this Chapter refers to "temporary orders" does not support the contention that the Local Government has only power to extend the order for a definite and very limited time. The Legislature has not seen fit to limit the time for which the force of the order may be extended by the Local Government, and under the terms of this section it is competent to the Local Government to extend the order so long as the danger which is apprehended continues to exist. Moreover, in extending the order, it is not necessary for the Local Government to state its reasons or even to state the fact of a likelihood of a riot or affray or other danger which it apprehends—*Bhure Mal*, 45 All. 526 (527), 24 Cr.L.J. 689, 73 I.C. 801, A.I.R. 1923 All. 606.

382. Revision:—Sub-section (3) of section 435, which disallowed the powers of revision of the High Court, the Sessions Judge, etc., in respect of proceedings under sec. 144, has now been omitted by the Criminal Procedure Code Amendment Act XVIII of 1923; and the effect of the omission is to overrule all the cases in which it was held that the High Court had no power under secs. 435 and 439 of this Code to interfere in revision with orders under this section. Under the old law, the High Court could revise an order passed under this section, not by virtue of sec. 439 of the Code but by virtue of the powers conferred upon it by sec. 15 of the Charter Act (*Govinda v. Perumal*, 38 Mad. 489; *Bradley v. Jameson*, 8 Cal. 580; *Abayeswari v. Shideswari*, 16 Cal. 80) and this power could be exercised only by the Chartered High Courts and not by non-chartered High Courts, e.g., the Chief Courts or the Judicial Commissioners' Courts. Moreover, under the old law, the High Court could revise an order passed under sec. 144, only when the order was *ultra vires* or without jurisdiction—*Ananda v. Carr Stephen*, 19 Cal. 127; *Roop Lal v. David Monook*, 2 C.W.N. 572; *Isab*, 8 C.W.N. 373; *Partap Chunder*, 25 Cal. 852; *Prayag*, 9 Cal. 103; *Arunachalam v. Ponnuswami*, 42 Mad. 64; *Palaniappa v. Dorasamy*, 18 Mad. 402; *Gopi Mohon v. Taramoni*, 5 Cal. 7. Under the present law, the High Court, both chartered and non-chartered (as also the Sessions Judge, and the District Magistrate), can call for the record of a proceeding under this section; and the order may be revised by the High Court on any ground whatsoever. In a recent Madras case, however, it was said that an order of a Magistrate acting under sec. 144 was merely administrative in character, and was not the order of a Court, and therefore, it was not liable to be revised by the High Court under sec. 435—*Vedappan v. Perinan*, 52 Mad. 69, 55 M.L.J. 621, 30 Cr.L.J. 119, 113 I.C. 279, A.I.R. 1928 Mad. 1108, 28 M.L.W. 506, 1928 M.W.N. 779 (following *Nataraja v. Rangasami*, 47 Mad. 56, 58). But this ruling has been rightly disapproved of in a more recent case—*Muthusami v. Thangammal*, 53 Mad. 320, 58 M.L.J. 148, 31 Cr.L.J. 324 (328), 121 I.C. 833, A.I.R. 1930 Mad. 242, 1930 Cr.C. 273, Ind. Rul. 1930 Mad. 241, 31 M.L.W. 16, 1930 M.W.N. 82 where it was held that the High Court had jurisdiction to interfere in revision with orders passed under this section. See also *Thakin Ba Thoung*, 35 Cr.L.J. 1300, 151 I.C. 211, 12 Rang. 283, 1934 Cr.C. 717, A.I.R. 1934 Rang. 124; *Sumner v. Jogendra*, 34 Cr.L.J. 334 (337), 142 I.C. 319, A.I.R. 1933 Cal. 318, 1933 Cr.C. 420, Ind. Rul. 1933 Cal. 262; *Gebinda Ram v. Basantilal*, 7 Pat. 269, 30 Cr.L.J. 302, A.I.R. 1929 Pat. 46 and Note 367.

The High Court has to consider not merely the legality of the orders but their propriety as well—*Sumner v. Jogendra*, *supra*. The High Court has power to consider under sec. 435, Cr. P. C., whether a Magistrate has jurisdiction to pass an order under this section—*Thakin Ba Thoung*, *supra*.

The High Court does not ordinarily interfere in revision with an order under this section when other remedies are open to the aggrieved party, especially because the High Court is unwilling to reject the opinion of the Magistrate responsible for the peace of his locality that there was an emergency which justified an *ex parte* order—*Venkataramana*, 22 M.L.T. 323, 19 Cr.L.J. 56. See also *Pir Gul Hassan v. Emp.*, A.I.R. 1939 Sind 230 (231), 40 Cr.L.J. 823, 183 I.C. 611. The Magistrate who knows the local conditions is the best Judge as to whether the emergency exists or not, and the High Court does not lightly interfere with the discretion of the Magistrate—

Ganesh, 55 Bom. 322, 33 Bom.L.R. 59, A.I.R. 1931 Bom. 135, 32 Cr.L.J. 507 (509). Where the elements essential to an order under this section are shown to exist upon materials before the Court, the High Court will respect the opinion of the local authorities both as to the gravity of the danger and as to the steps necessary for the maintenance of peace. But if the grounds for action as stated in the order are either unfounded in fact or insufficient in law, or if there is an absence of any near or reasonable connection between the prohibited act and the supposed danger to public tranquillity, then it is the duty of the High Court to interfere in revision—*Sriramamurthi*, 131 I.C. 649, 1930 M.W.N. 849, A.I.R. 1931 Mad. 242, 33 M.L.W. 640, Ind. Rul. 1931 Mad. 553, 60 M.L.J. 370, 1931 Cr.C. 362 (365); *Satyanarayana*, 60 M.L.J. 378, 1931 Cr.C. 332 (335), 32 Cr.L.J. 744; 131 I.C. 449, 1930 M.W.N. 841, A.I.R. 1931 Mad. 236, 33 M.L.W. 632, Ind. Rul. 1931 Mad. 513.

As a Court of Revision the High Court has to consider not merely the legality of the orders but their propriety as well—*Sumner v Jogendra*, supra.

Where an order is passed against a person under this section the proper procedure is to apply under sub sec (4) to the District Magistrate who has power to set aside the prohibitory order. The petitioner is, however, justified in coming direct to the High Court when his application under the said sub-section is adjourned for hearing for over 15 days—*Surendranath v Gostha Behari*, 37 C.W.N. 962. See also *Pitchai v Md Atham* quoted in Note 380, where it was further held that the High Court had power of stay of execution of an order, positive or negative, passed under this section.

While setting aside an order under this section the High Court can, under sec 561A, Cr. P. C., direct the opposite party to redeliver the register and the goods to the applicant who was originally in possession of the same—*Hafizuddin v Laborde*, 50 All. 414, 28 Cr.L.J. 901, 105 I.C. 815, A.I.R. 1928 All. 14, 26 A.L.J. 83. See also *Leong Mow v Tchuun Chun*, 12 C.W.N. 1044, 8 Cr.L.J. 230; *Bhagirathi v Valayee*, 33 I.C. 830, 1916 M.W.N. 88.

The High Court will never reimpose an order under this section which the District Magistrate who is responsible for the peace of the district does not wish and in his discretion has rescinded—*Manu Khan v Sunder Singh* A.I.R. 1934 Pat. 313, 15 P.L.T. 216.

Efflux of time :—The High Court can set aside an order under this section even though two months had expired from the date thereof—*Chandra Nath v E. I. Ry.*, 28 C.L.J. 483, 47 I.C. 803, 23 C.W.N. 145, 19 Cr.L.J. 951; *Bisheshwar*, 20 C.W.N. 758, 34 I.C. 312, 17 Cr.L.J. 200, 24 C.L.J. 272, 34 I.C. 312; *Chandrakanta*, 20 C.W.N. 981, 17 Cr.L.J. 464, 36 I.C. 144; *Dabiruddin*, 31 Cr.L.J. 804, 125 I.C. 273, A.I.R. 1930 Cal. 131, 1930 Cr.C. 131. See also *Thomson*, 13 C.W.N. 195, 4 I.C. 590, where no orders were found to be necessary. But the High Court will not send the matter back to the Magistrate notwithstanding that the order has expired so that he may begin the proceedings again, as regards the petitioners' showing cause against the order—*Dabiruddin*, supra.

The Bombay High Court set aside an order under this section even after the expiry of two months when it was represented that a certain number of persons were convicted and the prosecution of others was contemplated for disobeying the order—*Belvi*, 32 Cr.L.J. 1144, 131 I.C. 344, 33 Bom.L.R. 673, A.I.R. 1931 Bom. 325, 1931 Cr.C. 581, Ind. Rul. 1931 Bom. 456. It is open to the High Court, if it thinks that an order ought never to have been made, to set it aside, although before the action can be taken the order may have ceased to be in operation—*Ardeshir Phiroozshaw Murzban*, A.I.R. 1940 Bom. 42, 41 Bom.L.R. 1253, 41 Cr.L.J. 319 (320), 186 I.C. 477.

In *Gorinda v. Perumal*, 38 Mad. 489 (490), and *Kupper v. Poomalai*, 47 M.L.J. 439, 25 Cr.L.J. 1304, 82 I.C. 472, 1924 M.W.N. 675, A.I.R. 1924 Mad. 896 the Madras High Court declined to set aside the order, as the two months during which the order would remain in force were almost expiring on the date of hearing. In *Muthuswami v. Thangammal*, 53 Mad. 320, 58 M.L.J. 148, 31 Cr.L.J. 324, 121 I.C. 833, A.I.R. 1930

life, etc., and it can extend the order for any length of time. The fact that the heading of this Chapter refers to "temporary orders" does not support the contention that the Local Government has only power to extend the order for a definite and very limited time. The Legislature has not seen fit to limit the time for which the force of the order may be extended by the Local Government, and under the terms of this section it is competent to the Local Government to extend the order so long as the danger which is apprehended continues to exist. Moreover, in extending the order, it is not necessary for the Local Government to state its reasons or even to state the fact of a likelihood of a riot or affray or other danger which it apprehends—*Bhure Mal*, 45 All 526 (527), 24 Cr L.J. 689, 73 I.C. 801, A I.R. 1923 All. 606.

382. Revision:—Sub-section (3) of section 435, which disallowed the powers of revision of the High Court, the Sessions Judge, etc., in respect of proceedings under sec. 144, has now been omitted by the Criminal Procedure Code Amendment Act XVIII of 1923; and the effect of the omission is to overrule all the cases in which it was held that the High Court had no power under secs 435 and 439 of this Code to interfere in revision with orders under this section. Under the old law, the High Court could revise an order passed under this section, not by virtue of sec. 439 of the Code but by virtue of the powers conferred upon it by sec. 15 of the Charter Act (*Govinda v. Perumal*, 38 Mad. 489; *Bradley v. Jameson*, 8 Cal 580; *Abayeswari v. Shidestwari*, 16 Cal. 80) and this power could be exercised only by the Chartered High Courts and not by non-chartered High Courts, e.g., the Chief Courts or the Judicial Commissioners' Courts. Moreover, under the old law, the High Court could revise an order passed under sec. 144, only when the order was *ultra vires* or without jurisdiction—*Ananda v. Carr Stephen*, 19 Cal. 127; *Roop Lal v. David Monook*, 2 C.W.N. 572; *Isab*, 8 C.W.N. 373; *Partap Chunder*, 25 Cal. 852; *Prayag*, 9 Cal. 103; *Arunachalam v. Ponnuswami*, 42 Mad. 64; *Palaniappa v. Dorasamy*, 18 Mad. 402; *Gopi Mohon v. Taramoni*, 5 Cal. 7. Under the present law, the High Court, both chartered and non-chartered (as also the Sessions Judge, and the District Magistrate), can call for the record of a proceeding under this section; and the order may be revised by the High Court on any ground whatsoever. In a recent Madras case, however, it was said that an order of a Magistrate acting under sec. 144 was merely administrative in character, and was not the order of a Court, and therefore, it was not liable to be revised by the High Court under sec. 435—*Vedappan v. Perman*, 52 Mad. 69, 55 M.L.J. 621, 30 Cr L.J. 119, 113 I.C. 279, A I.R. 1928 Mad 1108, 28 M.L.W. 506, 1928 M.W.N. 779 (following *Nataraja v. Rangasami*, 47 Mad 56, 58). But this ruling has been rightly disapproved of in a more recent case—*Muthusami v. Thangammal*, 53 Mad. 320, 58 M.L.J. 148, 31 Cr L.J. 324 (328), 121 I.C. 833, A I.R. 1930 Mad. 212, 1930 Cr C. 273, Ind. Rul 1930 Mad. 211, 31 M.L.W. 16, 1930 M.W.N. 82 where it was held that the High Court had jurisdiction to interfere in revision with orders passed under this section. See also *Thakin Ba Thoung*, 35 Cr.L.J. 1300, 151 I.C. 211, 12 Rang 283, 1934 Cr C. 717, A I.R. 1934 Rang 124; *Sumner v. Jogendra*, 34 Cr.L.J. 334 (337), 142 I.C. 319, A I.R. 1933 Cal 348, 1933 Cr.C. 420, Ind. Rul 1933 Cal 262; *Gobinda Ram v. Basantilal*, 7 Pat. 269, 30 Cr.L.J. 302, A I.R. 1929 Pat. 46 and Note 367.

The High Court has to consider not merely the legality of the orders but their propriety as well—*Sumner v. Jogendra*, *supra*. The High Court has power to consider under sec. 435, Cr. P. C., whether a Magistrate has jurisdiction to pass an order under this section—*Thakin Ba Thoung*, *supra*.

The High Court does not ordinarily interfere in revision with an order under this section when other remedies are open to the aggrieved party, especially because the High Court is unwilling to reject the opinion of the Magistrate responsible for the peace of his locality that there was an emergency which justified an *ex parte* order—*Venkataramana*, 22 M.L.T. 323, 19 Cr L.J. 56. See also *Pir Gul Hassan v. Emp.*, A I.R. 1939 Sind 230 (231), 40 Cr L.J. 823, 183 I.C. 641. The Magistrate who knows the local conditions is the best Judge as to whether the emergency exists or not, and the High Court does not lightly interfere with the discretion of the Magistrate—

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Where an order is passed against a person under this section the proper procedure is to apply under sub-sec (4) to the District Magistrate who has power to set aside the prohibitory order. The petitioner is, however, justified in coming direct to the High Court when his application under the said sub-section is adjourned for hearing for over 15 days—*Surendranath v Gostha Behari*, 37 C.W.N. 962. See also *Pitchai v. Md. Atham* quoted in Note 380, where it was further held that the High Court had power of stay of execution of an order, positive or negative, passed under this section

While setting aside an order under this section the High Court can, under sec. 561A, Cr. P. C., direct the opposite party to redeliver the register and the goods to the applicant who was originally in possession of the same—*Hafizuddin v Laborde*, 50 All 414, 28 Cr.L.J. 901, 105 I.C. 815, AIR, 1928 All 14, 26 A.L.J. 83. See also *Leong Mow v Tchu Chun*, 12 C.W.N. 1014, 8 Cr.L.J. 230; *Bhagirthi v Valayee*, 33 I.C. 830, 1916 M.W.N. 88

The High Court will never reimpose an order under this section which the District Magistrate who is responsible for the peace of the district does not wish and in his discretion has rescinded—*Manu Khan v Sunder Singh*, AIR 1934 Pat 313, 15 P.L.T. 216

Efflux of time—The High Court can set aside an order under this section even though two months had expired from the date thereof—*Chandra Nath v E I Ry*, 28 C.L.J. 483, 47 I.C. 803, 23 C.W.N. 145, 19 Cr.L.J. 951; *Bisheswar*, 20 C.W.N. 758, 34 I.C. 312, 17 Cr.L.J. 200, 24 C.L.J. 272, 34 I.C. 312; *Chandrakanta*, 20 C.W.N. 981, 17 Cr.L.J. 464, 36 I.C. 144; *Dabiruddin*, 31 Cr.L.J. 804, 125 I.C. 273, AIR 1930 Cal 131, 1930 Cr.C. 131. See also *Thomson*, 13 C.W.N. 195, 4 I.C. 590, where no orders were found to be necessary. But the High Court will not send the matter back to the Magistrate notwithstanding that the order has expired so that he may begin the proceedings again, as regards the petitioners' showing cause against the order—*Dabiruddin*, *supra*.

The Bombay High Court set aside an order under this section even after the expiry of two months when it was represented that a certain number of persons were convicted and the prosecution of others was contemplated for disobeying the order—*Belvi*, 32 Cr.L.J. 1144, 134 I.C. 344, 33 Bom L.R. 673, AIR, 1931 Bom. 325, 1931 Cr.C. 581, Ind Rul 1931 Bom. 456. It is open to the High Court, if it thinks that an order ought never to have been made, to set it aside, although before the action can be taken the order may have ceased to be in operation—*Ardeshir Phirozshaw Murzban*, AIR, 1940 Bom 42, 41 Bom.L.R. 1253, 41 Cr.L.J. 319 (320), 186 I.C. 477.

In *Govinda v Perumal*, 38 Mad. 489 (490), and *Kupper v. Poomalai*, 47 M.L.J. 439, 25 Cr.L.J. 1304, 82 I.C. 472, 1924 M.W.N. 675, A.I.R. 1924 Mad 896 the Madras High Court declined to set aside the order, as the two months during which the order would remain in force were almost expiring on the date of hearing. In *Muthuswami v. Thangammal*, 53 Mad 320, 58 M.L.J. 148, 31 Cr.L.J. 324, 121 I.C. 833, A.I.R. 1930

Mad 242, 1930 Cr C 273, Ind. Rul. 1930 Mad 241, 31 M.L.W. 16, 1930 M.W.N. 82, the same High Court dismissed the revisional petition as the order expired before it was presented. For contra see *Muthukumaraswami v. Md. Rowther*, 42 M.L.J. 352, 1922 M.W.N. 177, 23 Cr.L.J. 404, 67 I.C. 500; *R. S. Srikantha Iyer*, 38 Cr.L.J. 582, 1937 M.W.N. 56, 45 M.L.W. 249, 168 I.C. 720, 9 R.M. 625, A.I.R. 1937 Mad. 311; *Shanmuga Pandaram v. K. Ponnuswami Iyer*, 39 Cr.L.J. 886, 177 I.C. 436, A.I.R. 1938 Mad. 714, 47 M.L.W. 441, 1938 M.W.N. 606, (1938) 2 M.L.J. 160, 11 R.M. 326

The Patna High Court will not interfere with an order under this section after it has spent its force by reason of the expiry of the two months to which its effect is confined—*Jagernath v. Ramjas*, A.I.R. 1933 Pat. 584, 146 I.C. 557, 1933 Cr.C. 1345, 35 Cr.L.J. 88; *Muni Lall v. Gatti*, A.I.R. 1925 Pat. 514, 88 I.C. 845, 26 Cr.L.J. 1229, 6 P.L.T. 746, 3 Pat.L.R. 70; *Kishori v. Anand*, 31 Cr.L.J. 1005, 126 I.C. 293, 10 P.L.T. 862, A.I.R. 1930 Pat. 162, 1930 Cr.C. 258; *Chakan Ram v. Raghunath Ram*, 36 Cr.L.J. 474, 1935 Pat. 145, 154 I.C. 184; *Inderdeo v. Durga Prasad*, 37 Cr.L.J. 378 (379), 160 I.C. 945, A.I.R. 1936 Pat. 59, 17 P.L.T. 22, 1936 Cr.C. 83. Where the order spent its force by lapse of time, it is not the usual practice of the Patna High Court to interfere with an order which it was within the powers of the Magistrate to pass, unless for very special reasons—*Hansraj v. Abdul Jabbar*, 36 Cr.L.J. 1268 (1271), 157 I.C. 760, 16 P.L.T. 624, A.I.R. 1935 Pat. 461; *Rama Barik v. Emp.*, A.I.R. 1940 Pat. 185 (187), 1939 P.W.N. 616. See also *Harihar v. Upendra*, 35 Cr.L.J. 1009, 149 I.C. 959, 13 Pat. 76, A.I.R. 1934 Pat. 308, 1934 Cr.C. 729. Where an order under this section purported to decide upon the rights of the parties the High Court is entitled to interfere, even if the order spent itself—*Joint Agents v. Chandra Ketu*, 34 Cr.L.J. 717, 144 I.C. 228, A.I.R. 1933 Pat. 185, 1933 Cr.C. 516, 14 P.L.T. 379, Ind. Rul. 1933 Pat. 221. In certain cases where the High Courts found that the party against whom the order was passed was seriously prejudiced, they interfered with the order under this section even after the expiry of the period of sixty days—*Puram v. Ramjhari*, 36 Cr.L.J. 655, A.I.R. 1935 Pat. 224, 155 I.C. 88. See also *Dhanraj v. Bharat*, 6 P.L.T. 253, 26 Cr.L.J. 260, 84 I.C. 324 and *Saligram v. Baijnath*, 35 Cr.L.J. 1057, 150 I.C. 118, 14 P.L.T. 740, A.I.R. 1934 Pat. 104, 1934 Cr.C. 198; *Jagrupa v. Chotey*, 37 Cr.L.J. 95 (98), 159 I.C. 455; *Panchkesar Kuar v. Madho Singh*, 1938 P.W.N. 709, 19 P.L.T. 796. In the recent case of *Bhuneshwar Prasad v. Rommoy Roy*, 41 Cr.L.J. 417 (419), A.I.R. 1940 Pat. 492, 187 I.C. 139, 1940 P.W.N. 474, the Patna High Court in revision entered into the question of merits of an order under this section although it expired long ago. An order which has been deliberately passed under this section when the Magistrate knew and had been told that he should proceed under sec. 145, Cr. P. C., if necessary, cannot be left alone merely because it is time-expired, for it is impossible to encourage the Magistrate to use his powers in that way—*Bindeshwari Singh v. Raghunandan Mahto*, 41 Cr.L.J. 578, 188 I.C. 330, 21 P.L.T. 413, 6 B.R. 648, A.I.R. 1940 Pat. 559.

The Lahore High Court refused to interfere with an order under this section, which had already expired, but considered its validity in—*Qamar-ud-Din*, 36 Cr.L.J. 951, A.I.R. 1935 Lah. 679, 156 I.C. 526, 37 P.L.R. 515. See also 16 Cr.L.J. 272, 28 I.C. 160. But see *Khazan Chand*, 28 Cr.L.J. 345, 100 I.C. 825, A.I.R. 1927 Lah. 430 where the order was set aside.

Where the order under this section ceased to be in force by efflux of time the High Court should not interfere with it in revision. If the applicants feel aggrieved against that order they have their remedy in the Civil Court by the filing of a declaratory suit—*Abdul Samad*, 35 Cr.L.J. 472, 147 I.C. 672, 11 O.W.N. 74, A.I.R. 1934 Oudh 87, 1934 Cr.C. 257.

Stay of execution:—The High Court has power of stay of execution of an order positive or negative, passed under sec. 141, Cr. P. C.—*Pitchai v. Md. Atham*, A.I.R. 1932 Mad. 720 (721), 63 M.L.J. 591, 33 Cr.L.J. 826, 139 I.C. 773, 1932 M.W.N. 726, 36 M.L.W. 451, 56 Mad. 149. See also Note 380 under the heading "Intermediate order".

Provisions of sub-section (4), if bar:—In some cases the High Court would decline to interfere in revision if no application had been made to the Magistrate. But where part of the order under this section was rescinded by the Magistrate before there was time to make any application to him, the fact that the petitioner did not avail himself of the remedy under sec. 144 (4), Cr. P. C., is no ground for refusal to interfere in revision by the High Court—*Ardeshtur Phirozshaw Murzban*, A.I.R. 1940 Bom. 42, 41 Bom.L.R. 1253, 41 Cr.L.J. 319 (320), 186 I.C. 477. See also *Pitchai v. Md. Altham* in note 380.

383. Reference:—An order under this section not being a judicial proceeding, a District Magistrate cannot refer it to the High Court, but can himself deal with it in his executive capacity—*Anon.*, Ratanlal 129; or the party aggrieved by the order may apply to the District Magistrate to recall the order, and failing him, to the Local Government—*Mad. H. C. Pro.*, 5-12-1879. In view of the deletion of cl. (3), sec. 435 Cr. P. C., by the Cr. P. Code Amendment Act (XVIII of 1923) a reference can now be made to the High Court under sec. 438 Cr. P. C. See *Satish Chandra v. Lokendra*, *infra*, where such a reference was made.

384. Punishment:—See sec. 188, I P. C.

The Magistrate issuing the order under this section cannot himself punish a man for disobeying his order—*Chandra Kanta*, 20 C.W.N. 981, 17 Cr.L.J. 461; *Tatya*, Ratanlal 50; *Brojonath*, 4 C.W.N. 226.

385. Civil suit:—An order under this section is not a bar to the institution of a civil suit by the party on whom the order is made. Therefore, where the plaintiffs and the defendants are owners of adjoining properties and the defendants have obtained an order of the Magistrate under sec. 144 preventing the plaintiffs from erecting certain buildings on their own property, without adjudication of the private rights of the parties, it is open to the plaintiffs to sue the defendants for a declaration that they are entitled to make use of their property and erect building on it as they desire, and for an injunction restraining the defendants from interfering with them in so doing; and the order under section 144, far from being a bar to such suit, would itself furnish the cause of action for the suit—*Baba Sah v. Mahomed Hussain*, 42 M.L.J. 179, 15 L.W. 68, A.I.R. 1922 Mad. 123.

Suit for malicious prosecution:—A suit for damages for malicious prosecution can be based on the institution of proceedings under sec. 144, Cr. P. C., provided that the necessary facts are established. The institution of proceedings under sec. 144, Cr. P. C., may be at the instance of a party to the quarrel which is likely to lead to a breach of the peace; it may be at the instance of some disinterested person or as in great majority of cases, it may be at the instance of the Police or as a result of action *suo motu* by the Magistrate. The action for malicious prosecution as a result of such proceedings would normally be brought only in the case of proceedings brought at the instance of a party to the quarrel, though that need not necessarily be the only ground for such an action. But it should not be thought that any unwarranted attempt to secure a Magistrate's order under sec. 144, Cr. P. C., will justify a suit for malicious prosecution. There must, in order to sustain such a suit, be proof that the defendants moved the Magistrate to take proceedings and that proceedings were taken. It must be shown that the final termination was in favour of the plaintiff. The plaintiff must prove that the institution of the proceedings was malicious and that it was without reasonable and probable cause. Further, it must in all such cases be proved that there was legal damage suffered as a consequence of the institution of these proceedings. In ordinary criminal prosecutions, the damage will be inferred from the very fact of an accusation of a crime involving moral turpitude and necessarily damning the good name of the accused. But when Courts are dealing with *quasi* civil proceedings such as those under sec. 144, Cr. P. C., in order to establish the essential fact of damage, it is not sufficient merely to prove that there was a petition in which an allegation was made of a danger to the public peace by the withholding of a private right—*Narayana*,

Mudali v. Peria Kalathi, 41 Cr.L.J. 677 (678), 188 I.C. 801, A.I.R. 1939 Mad. 783, 49 M.L.W. 664, 1939 M.W.N. 593, (1939) 2 M.L.J. 296.

386. Proceedings, judicial:—Inquiries under this section before an order is issued are judicial proceedings within the meaning of sec. 4 (m); and the Magistrate can take action under sec. 476 if he thinks that false evidence has been given before him in such proceedings—*Tirunarasimhachari*, 19 Mad. 18. (Section 476 as amended in 1923 is no longer limited to *judicial* proceedings, but applies to *any proceeding*) See also *Belvi*, 32 Cr.L.J. 1144, 134 I.C. 344, 33 Bom.L.R. 673, A.I.R. 1931 Bom. 325, 1931 Cr.C. 581, Ind. Rul. 1931 Bom. 456; *Muthuswami v. Thangammal*, 121 I.C. 833, A.I.R. 1930 Mad. 242, 31 M.L.J. 324, 53 Mad. 203.

386A. Disobedience of the order:—Where the offence complained of is disobedience of his own order the Subdivisional Officer has no power to take cognizance of a case under sec. 188 I. P. C. He must make a complaint under sec. 195 Cr. P. C. Section 487 Cr. P. C., prohibits the trial of the case under sec. 188 I. P. C., in these circumstances by the Magistrate—*Satish Chandra v. Lokendra*, 39 C.W.N. 1053, A.I.R. 1935 Cal. 251, 61 C.L.J. 579; *Chandra Kanta*, 20 C.W.N. 981, 17 Cr.L.J. 464, 36 I.C. 144; *Q.-E. v. Abdulla Saheb*, 24 Mad. 262. -

When an order under sec. 144 Cr. P. C., is found to be without jurisdiction, obviously the subsequent order under sec. 188 I. P. C., for its disobedience is also without jurisdiction—*Satish Chandra v. Lokendra*, 39 C.W.N. 1053, 61 C.L.J. 579, A.I.R. 1935 Cal. 251.

An order made under this section cannot operate for more than two months unless Government otherwise directs. When such an order is withdrawn on a particular date, the position is exactly the same as if the original order had been restricted to that date, and it is clear that a person can be charged with committing an offence against the order at the time when it was in operation. The fact that he was tried after the order had ceased to be in operation seems to be entirely irrelevant—*Rajendrasing Ramsing*, A.I.R. 1940 Bom. 195, 42 Bom.L.R. 356, 41 Cr.L.J. 675, 188 I.C. 744.

A Magistrate should not sanction a prosecution (now complaint) under sec. 188 I. P. C., unless he thinks that all the elements necessary for a conviction are present—*Projapat*, 14 C.W.N. 234, 11 Cr.L.J. 49, 5 I.C. 49.

It is the duty of the prosecution in a case under sec. 188, I. P. C., to prove by positive evidence that the accused had knowledge of the order with the disobedience of which he is charged and that a proof of general notification promulgating the order, does not satisfy the requirements of the section—*Abdulla*, 63 I.C. 865, 22 Cr.L.J. 725; *Sheikh Abdul*, 31 C.W.N. 340, A.I.R. 1927 Cal. 306, 100 I.C. 830, 45 C.L.J. 202, 28 Cr.L.J. 350; *Ramdas*, A.I.R. 1927 Cal. 28, 99 I.C. 36, 44 C.L.J. 250, 51 Cal. 152, 28 Cr.L.J. 4; *Niharendu Dutt Majumdar*, A.I.R. 1939 Cal. 703, 43 C.W.N. 1061, (1939) 2 Cal. 507, 181 I.C. 856; *Madan Kishore*, A.I.R. 1940 Pat. 446, 21 P.L.T. 231, 187 I.C. 135, 41 Cr.L.J. 414, 1940 P.W.N. 469. Whether a person has knowledge of the order promulgated must be a matter of evidence. When the order had been promulgated for several weeks, there had been disturbances in the city and notices containing the order had been posted up at various places in the city, it is scarcely conceivable that the applicants had no knowledge of the order passed—*Shander*. The question of knowledge must generally be a matter of inference—*Madan Kishore*, supra.

Where there was nothing to show that the disobedience of an order under sec. 144 Cr. P. C., caused or tended to cause annoyance, injury, obstruction or a riot, the High Court set aside the order sanctioning prosecution under sec. 188 I. P. C.—*Projapat*, 14 C.W.N. 234, 11 Cr.L.J. 49, 5 I.C. 49; *Sujal v. Samiruddin*, 22 C.W.N. 599, 19 Cr.L.J. 739, 46 I.C. 515; *Dabiruddin*, A.I.R. 1930 Cal. 131, 31 Cr.L.J. 804, 125 I.C. 273, 1930 Cr.C. 131. See also 1932 M.W.N. 1073 and *Madan Kishore*, supra. The Oudh Chief Court dissented from the above view, which was also expressed in *Ram Gopal*, 32 Cal. 793, holding that it seemed to go beyond the express provisions of law as embodied in the explanation to sec. 188, I. P. C.—*Niaz Khan*, 35 Cr.L.J. 699, 148 I.C. 518, 11 O.W.N. 381, A.I.R. 1931 Oudh 162.

See also *Ambika v. Benode* in Note 367.

386B. Copy:—A party has a right to know what the information was on which the Magistrate acted under this section in order to show that it was unfounded or insufficient and is entitled to a copy of the said information—*Srirammurthy*, 32 Cr L.J. 763 (764), 131 I.C. 649, 1930 M.W.N. 849, 60 M.L.J. 370, A.I.R. 1931 Mad 242, 33 M.L.W. 640, 1931 Cr.C. 632, Ind Rul 1931 Mad 553.

CHAPTER XII.

DISPUTES AS TO IMMOVEABLE PROPERTY.

In proceedings under this Chapter, the Magistrate should distinctly indicate under what section of the Code he takes proceedings. It should not be left to the higher Courts to speculate to see under what section the order was passed—*Srinivasa v. Raghunathan*, 18 Cr L.J. 295 (Mad.).

145. (1) Whenever a District Magistrate, Sub-Divisional Magistrate or Magistrate of the first class is satisfied from a police-report or other information that a dispute likely to cause a breach of the peace exists concerning any land or water or the boundaries thereof, within the local limits of his jurisdiction, he shall make an order in writing, stating the grounds of his being so satisfied, and requiring the parties concerned in such dispute to attend his Court in person or by pleader, within a time to be fixed by such Magistrate, and to put in written statements of their respective claims as respects the fact of actual possession of the subject of dispute.

(2) For the purposes of this section the expression "land or water" includes buildings, markets, fisheries, crops or other produce of land, and the rents or profits of any such property.

(3) A copy of the order shall be served in manner provided by this Code for the service of a summons upon such person or persons as the Magistrate may direct, and at least one copy shall be published by being affixed to some conspicuous place at or near the subject of dispute.

(4) The Magistrate shall then, without reference to the merits of the claims of any of such parties to a right to possess the subject of dispute, peruse the statements so put in, hear the parties, receive *all such evidence as may be* produced by them respectively, consider the effects of such evidence, take such further evidence (if any) as he thinks necessary, and, if possible, decide whether any and which of the parties was at the date of the order before mentioned in such possession of the said subject:

Procedure where dispute concerning land, etc., is likely to cause breach of peace.

Inquiry as to possession

Provided that, if it appears to the Magistrate that any party has within two months next before the date of such order been forcibly and wrongfully dispossessed, he may treat the party so dispossessed as if he had been in possession at such date:

Provided also, that, if the Magistrate considers the case one of emergency, he may at any time attach the subject of dispute, pending his decision under this section.

(5) Nothing in this section shall preclude any party so required to attend, or any other person interested, from showing that no such dispute as aforesaid exists or has existed; and in such case, the Magistrate shall cancel his said order, and all further proceedings thereon shall be stayed, but, subject to such cancellation, the order of the Magistrate under sub-section (1) shall be final.

(6) If the Magistrate decide that one of the parties was or *should under the first proviso to sub-section*
 Party in possession to retain possession until legally evicted. (4) *be treated as being in* such possession
 of the said subject, he shall issue an order declaring such party to be entitled to possession thereof until evicted therefrom in due course of law and forbidding all disturbance of possession until such eviction, *and when he proceeds under the first proviso to sub-section (4), may restore to possession the party forcibly and wrongfully dispossessed.*

(7) *When any party to any such proceeding dies, the Magistrate may cause the legal representative of the deceased party to be made a party to the proceeding, and shall thereupon continue the inquiry, and if any question arises as to who the legal representative of a deceased party for the purpose of such proceeding is, all persons claiming to be representatives of the deceased party shall be made parties thereto.*

(8) *If the Magistrate is of opinion that any crop or other produce of the property, the subject of dispute in a proceeding under this section pending before him, is subject to speedy and natural decay, he may make an order for the proper custody or sale of such property, and, upon the completion of the inquiry, shall make such order for the disposal of such property, or the sale-proceeds thereof, as he thinks fit.*

(9) *The Magistrate may, if he thinks fit, at any stage of the proceedings under this section, on the application of either party, issue summons to any witness directing him to attend or to produce any document or thing.*

(10) *Nothing in this section shall be deemed to be in derogation of the powers of the Magistrate to proceed under section 107.*

Change:—The amendments as shown by the italicised words have been made by sec. 27 of the Crim. Pro. Code Amendment Act (XVIII of 1923). The reasons have been stated below in proper places

387. Object and scope of section:—Section 145 is intended only to provide a speedy remedy for the prevention of breaches of peace arising out of disputes relating to immoveable property by maintaining one or other of the parties in possession—*Debi Prasad v. Sheodal*, 30 All 41, 4 A.L.J. 705, 6 Cr.L.J. 352; *Tatapada v. Nural Haq*, 32 Cal 1093, 2 C.L.J. 280; *Krishna Kamini v. Abdul*, 30 Cal. 155; *Manindra v. Barada Kanta*, 30 Cal. 112, 6 C.W.N. 417; *Ram Chandra v. Monohar*, 21 Cal 29. The object of this section is to enable a Magistrate to intervene and pass a temporary order in regard to the possession of property in dispute, having effect until the actual right of one of the parties has been determined by a competent Civil Court—*Daulat v. Rameswari*, 26 Cal 625, 3 C.W.N 461; *Kunja Behari v. Khetra*, 29 Cal. 208.

The purpose the legislature had in view is the prevention of a breach of the peace. If that object is not attained by an order purporting to be made under this section, it must be taken to have been without jurisdiction—*Anesh Mollah v. Ejaharuddi*, 5 C.W.N. 428 (431), 28 C.W.N 446. The object of this section is not to provide parties with an opportunity of bringing their civil disputes before a Criminal Court or of manœuvring for position for the purpose of subsequent civil litigation though that is often the effect of such proceedings, but to arm the Magistrate concerned with an additional weapon for maintaining peace within the area for which he is responsible—*Chellapathi v. Subba*, 30 Cr.L.J. 340 (341), 52 Mad 241, 114 I.C 626, 55 M.L.J. 693, 28 M.L.W. 664, 1928 M.W.N. 921, A.I.R. 1928 Mad 1230, Ind. Rul. 1929 Mad 305.

A prohibition of the kind mentioned in sec. 171 of the Indian Companies Act (VII of 1913) is not meant to override an express enactment in sec. 145 Cr. P. C. A Magistrate can, therefore, draw up proceedings under sec. 145 against the Liquidator of a company without obtaining leave of the Court, especially where the Liquidator is equally responsible for the proceedings, and in effect invited the intervention of the Police and the Magisterial proceedings which followed—*S. N. Mukherjee v. Krishna Dassie*, 34 Cr.L.J. 640, 37 C.W.N 932, 1933 Cr.C. 705, A.I.R. 1933 Cal 433, 143 I.C. 795, Ind. Rul. 1933 Cal. 484.

Litigants often resort to section 145 as an easy way of getting possession without the expense, delay and trouble of a civil suit regarding the land in dispute, and Courts should be on guard against an abuse of legal powers—*Ma Ma Gyi*, 2 Bur.L.J. 295, 25 Cr.L.J. 1161. Section 145 is frequently misapplied in practice, and parties try to use the Criminal Courts for the settlement of what are really civil disputes in order to evade the Court-fees of civil cases. This fact should make Magistrates careful not to be induced by the pleaders before them into allowing what is really a civil case to be argued in a Criminal Court with a consequent waste of public time and to the detriment not only of other litigants but also of the Magistrate himself—*In re Mallappa*, 28 Bom.L.R. 488, 27 Cr.L.J. 734 (735). Any person is entitled to use force within limits for the protection of his property against forcible invasion, and also to say that he intends to do so in the event of an apprehended forcible invasion being made. But he has no right to use force for the recovery of his property, and the situation becomes grotesque when he goes to a Magistrate and says he intends to do so and apprehends there will be a fight over the matter, as the party in possession is sure to resist, and asks the Magistrate to prevent it. He must go to a Civil Court to regain possession or get his possession confirmed; obviously the only thing for the Magistrate to do on such an application would be to bind over the applicant to keep the peace. The object of this section is only to prevent a breach of the peace and not to protect or maintain any body in possession. Courts should take action under this section only if there is a report or information of a breach of the peace and the same cannot be obviated without an order under this section—*Phutanja*, 25 Cr.L.J. 1109, 81 I.C. 933, A.I.R.1925 Nag 142.

Pendency of a suit under sec. 9 of the Specific Relief Act (I of 1877) with regard to the property in dispute certainly cannot take away the jurisdiction of the Magistrate to initiate proceedings under this section, if he finds reasonable grounds for apprehending that without such proceedings a breach of the peace may be caused—*Kishori v. Srinath*, 13 C.W.N. 530 (532), 35 Cal. 370, 1 I.C. 817, 9 Cr.L.J. 399. See also Note 443A.

388. Sections 107, 144 and 145:—As to whether a Magistrate should proceed under secs. 107, 144 or 145, in case of disputes relating to immoveable property between the rival parties likely to cause a breach of the peace, see Notes 234 and 377 under secs. 107 and 144, where the subject has been fully discussed.

Whatever force be given to the word "shall" in the first sub-section of sec. 145, Cr. P. C., it need in no way embarrass any Magistrate in exercising his discretion. If he is of opinion that an order under sec. 107, Cr. P. C., will meet the case and proposes to make one he has only to make it to justify himself in holding that the dispute no longer is likely to cause a breach of the peace; he can do this either without taking action under sec. 145, Cr. P. C., or at any stage of proceedings under that section. If he thinks that the case calls for action under sec. 144, Cr. P. C., he can take such action and if he thinks this sufficient to prevent the likelihood of a breach of the peace he can postpone all action under sec. 145, Cr. P. C.—*Agni Kumar v. Mantazaddin*, 32 C.W.N. 1173 (1183), 56 Cal. 290, 48 C.L.J. 193, 30 Cr.L.J. 69, 113 I.C. 181, A.I.R. 1928 Cal. 610 (F.B.). The word "shall" in sec. 145, Cr. P. C., is mandatory, and what is pertinent and permissible in the initial stage of the police report, namely, to prevent a breach of the peace by an urgent order under sec. 144, Cr. P. C., ceases to be so and the mandatory obligation under sec. 145, Cr. P. C., is cast upon the Magistrate by the report of the police disclosing a *bona fide* dispute as to possession of the property to start at once a proceeding under sec. 145, Cr. P. C.—*Gobind Ram v. Basantilal*, A.I.R. 1929 Pat. 46 (48), 7 Pat. 269, 30 Cr.L.J. 302, 114 I.C. 466, 11 P.L.T. 134.

Where a Magistrate initiated proceedings under secs. 144 and at a later stage intimated to the parties who were present in Court his intention to draw up proceedings under sec. 145, held that he was not guilty of any irregularity—*Chadhari v. Raja Ramsingh*, 19 Cr.L.J. 296 (Pat). See also *Gopala v. Krishnasamy*, 54 I.C. 473, 21 Cr.L.J. 73, 11 M.L.W. 459, 27 M.L.T. 234. See Notes 377 and 470A.

See also *Phutania v. Emp.*, in Note 387.

390. "Is satisfied":—Unless the Magistrate is satisfied that there is a likelihood of a breach of the peace, he cannot proceed under this section—*H. V. Low & Co. v. Manindra*, 3 Pat. 809 (814); and he ought not to assume jurisdiction in those cases where the suggested apprehension of a breach of the peace is merely colourable and made to induce to deal with matters properly cognizable by the Civil Courts—*Obhoy Chandra v. Md Sabir*, 10 Cal. 78 (80).

It is impossible to lay down any hard and fast rule so as to specify the sufficiency of the materials upon which a Magistrate ought to be satisfied before he assumes jurisdiction in any particular case. And the High Court will not ordinarily examine whether the grounds upon which the Magistrate was satisfied of the existence of the likelihood of a breach of the peace afford a reasonable foundation for his conclusions—*Kulada v. Danesh*, 33 Cal. 33 (43), dissenting from *Dhanpat v. Chatterpat*, 20 Cal. 513.

In the preliminary order it is not sufficient to refer to a police report as giving information that a dispute likely to cause a breach of the peace exists without stating the Magistrate's satisfaction that the report is correct. The provisions of sub-sec. (1), sec. 145 are clear and must be observed and the making of a preliminary order should not be allowed to lapse into mere routine as if it were the filling up of a printed form—*Munnulal*, A.I.R. 1935 Nag. 78, 17 N.L.J. 231. But where the Magistrate has relied on the police report which is on the record, his reference to that constitutes a sufficient ground—*Sheoprasad Shiram v. Govindram Hardit*, A.I.R. 1940 Nag. 265 (266), 1940 N.L.J. 375.

Power of High Court or Sessions Judge, etc., to direct proceedings—The Magistrate must satisfy himself and use his own discretion as to the necessity of proceedings. Therefore neither the High Court nor the Sessions Judge has power to order a Magistrate to take proceedings under this chapter—*Manindra v. Barada*, 30 Cal 112; *Govinda Chandra*, 20 Cal 520 (526). If the Magistrate is satisfied that there was no likelihood of a breach of the peace, the High Court cannot direct him to be satisfied as to such likelihood and to take proceedings under this section—*H. V. Low & Co v. Manindra Chandra*, 3 Pat. 809 (814). So also, the High Court has no power to direct the revival of proceedings after they have been stayed by the Magistrate—*Manindra v. Barada Kanta*, 30 Cal 112.

Where a Subdivisional Magistrate, having regard to the circumstances of the case, came to the conclusion that proceedings under sec. 144 should be taken, and made an order accordingly, the District Magistrate had no authority to direct the Subdivisional Magistrate to institute proceedings under sec. 145—*Kaliash v. Kunja Behari*, 24 Cal 391, 1 C.W.N. 393. See also Note 380. The question whether proceedings under sec. 145 should or should not be taken is entirely a matter within the Magistrate's own discretion, and a District Magistrate has no authority to direct him to institute the proceedings. But where proceedings were at first instituted under sec. 145 by the Deputy Magistrate in respect of a portion of land, but the District Magistrate directed him to include the whole of the disputed land in the proceedings, and it appeared that the police report and other materials before the Deputy Magistrate disclosed the existence of a dispute concerning the whole of the land, and the Deputy Magistrate thereafter included the entire land in the proceedings, held that the action of the Deputy Magistrate was not improper—*Nrupendra v. Sasadhar*, 34 C.W.N. 82 (85), 31 Cr.L.J. 923, 125 I.C. 750, AIR 1929 Cal 805, 1929 Cr.C. 574, Ind. Rul. 1930 Cal. 622, 50 C.L.J. 287.

Refusal to take action—The only case in which a Magistrate can refuse to take action under sec. 145, Cr. P. C., is when he is not satisfied that there is a danger of a breach of the peace. But where the police reported that there was a danger of a breach of the peace and he never said that there was no such danger, his duty was to proceed under sec. 145 and to issue notices to the parties. The procedure of the Magistrate in considering the evidence given in another case as evidence in the case, even though the other case was pending in his own Court as a Revenue Court, and dismissing the application under sec. 203 Cr. P. C., on the basis of the same, was entirely unauthorized and illegal. Section 203, Cr. P. C., has nothing to do with proceedings under sec. 145, Cr. P. C.—*Subhan*, AIR 1939 Oudh 15, 1938 O.W.N. 1099, 1938 A.W.R. (C.C.) 99, 1938 O.A. 904, 1938 A.Cr.C. 137, 1938 O.L.R. 475, 178 I.C. 252, 40 Cr.L.J. 33. See also *Ram Manorath v. Kaushal* in Note 394.

But where a Subdivisional Magistrate refused to take proceedings under section 145 because in his opinion there was no sufficient ground for such proceedings, the District Magistrate was competent to take such proceedings himself, if he was of a different opinion, and the refusal of the Sub-divisional Magistrate could not operate as a bar to such proceedings—*Baida Nath v. Nibaran*, 29 Cal. 242, 6 C.W.N. 290; *Benoy Chandra v. Kala Chand*, 43 C.L.J. 586, 27 Cr.L.J. 1083 97 I.C. 59, AIR 1926 Cal 1049. See also *B. B. Biswas v. Muchiram Mahata*, in Note 475.

391. Police-report—It is a safe general rule for a Magistrate to refuse to take action at all under this section except on a report from the Police which should not be a mere forwarding of a report made to the Police by one of the parties, even with a record of the enquiry made by a Police Officer in the matter, but a definite statement of opinion by a responsible officer that he apprehends that there will be a disturbance which he cannot prevent himself and he, therefore, desires the exercise of the higher powers of the Magistrate to prevent it. The absence of such a report is an almost conclusive indication of the absence of any likelihood of a breach of the peace, unless the Police Officers concerned are hopelessly inefficient—*Phutania v. Emp.*, 25 Cr.L.J. 1109 (1111), 81 I.C. 933, AIR 1925 Nag 142.

A Police report upon which a Magistrate bases his initial order under this section should contain a statement of the facts from which the Magistrate may be satisfied as to the existence of a likelihood of a breach of the peace. But there is no inflexible rule that the police report must show that the disputing parties are actually assembling men or doing some other specific overt acts—*Kulada Kinkar v. Danesh*, 33 Cal. 33 (42), 10 C.W.N. 257, 2 C.L.J. 271, 2 Cr.L.J. 670. When a Police Report sets out the subject matter of dispute, the cause of dispute, its nature, the apprehension that unless action is taken the breach of the peace will ensue, the report contains sufficient material for the Magistrate to act upon—*Muhammad Araf v. Satramdas Sakhimal*, 37 Cr.L.J. 1030 (1031), 164 I.C. 969, A.I.R. 1936 Sind 143, 9 R.S. 60, 1936 Cr.C. 859. A police report which sets out sufficiently substantial reasons for believing that a dispute likely to cause a breach of the peace relating to a certain land exists, is a good foundation of proceedings under this section—*Dhanput v. Chatterput*, 20 Cal. 513 (517). But a police report which does not state that there was any apprehension of a breach of the peace, is not sufficient to give the Magistrate jurisdiction—*Radha Gobind v. Gossain Mohendra*, 6 C.W.N. 340.

But a Magistrate is no way bound to act on all that is stated in the Police report—*Laldhari v. Sukdeo*, 27 Cal. 892; *Ahmed Ali v. Sabib*, 33 C.W.N. 858, 30 Cr.L.J. 1037, A.I.R. 1929 Cal. 468, 49 C.L.J. 428. He is to exercise his own independent judgment upon the materials placed before him, and to arrive at a conclusion as to whether upon those materials there is a likelihood of a breach of the peace. He would not be justified in acting merely upon an expression of opinion by the police—*Ganga Bishun v. Rajo*, 5 P.L.T. 252, 83 I.C. 693, 26 Cr.L.J. 133, A.I.R. 1924 Pat. 787; *Kulada v. Danesh*, 33 Cal. 33 (42); *Ahmed Ali v. Sabid*, supra; *Ganikhan*, 28 Cr.L.J. 929, 105 I.C. 449, A.I.R. 1928 Nag. 81. Therefore the fact that the police report stated that there was no likelihood of a breach of the peace, would not by itself take away the jurisdiction of the Magistrate to proceed under this section, if upon a consideration of the materials before him and by exercising his own independent judgment he came to the conclusion that there was a likelihood of a breach of the peace—*Ganga Bishun v. Rajo*, supra; *Kulada v. Danesh*, supra. Where the police report showed that the parties disputing over a tank were big Zemindars, and that although there was nothing to show that a breach of the peace was likely to happen, yet such a breach was not impossible, it was held that the Magistrate ought not to proceed upon such report, which was merely an expression of opinion by the Police—*Maharaj Bahadur v. Ranjit Singh*, 11 C.W.N. 835, 6 Cr.L.J. 36; *Surjakanta v. Jogodindra*, 11 C.W.N. 198.

The report of the police officer of the district of F was to the effect that a breach of the peace was likely to take place in consequence of a dispute concerning a piece of water lying partly in the Sub-Division of M within the district of D and partly in the district of F. The report came before the Magistrate of M who thereupon took proceedings under this section in respect of water lying within his jurisdiction. There can be no valid objection to such a proceeding by reason of want of jurisdiction—*Ishan v. Garth*, 6 C.W.N. 378, 29 Cal. 885.

Evidentiary value :—A Police report is not itself evidence, although it may be sufficient to justify a Magistrate in taking action under this section—*In re Bhadreswari*, 16 W.R. 17, 7 B.L.R. 329. The police report and the evidence contained therein about the *factum* of possession is inadmissible in evidence except for the purpose of initiating the proceedings—*Kulbans v. Ram Singh*, 1 P.L.T. 501, 21 Cr.L.J. 735, 58 I.C. 159.

392. "Other information" :—The Magistrate may act on any information and without any formal complaint being made before him. He is not confined to evidence recorded on oath—*In re Kishore Mohun*, 19 W.R. 10. The word "information" does not refer to any particular way in which a Magistrate's attention should be drawn. It is wide enough to cover the knowledge of the Magistrate derived by reading the petition filed by the parties in another proceeding which satisfies him that a breach

of the peace was imminent—*Jhaman v. Thakuri*, 1 P.L.T. 369, 21 Cr.L.J. 625, 57 I.C. 449.

No definition is given to the words "other information", and the omission to use a technical term such as affidavit, evidence, or verified statement, indicates that the widest possible latitude has been allowed in the matter. Therefore, a Magistrate does not act without jurisdiction when he bases his preliminary order under this section on a petition which is signed by the responsible pleaders and the applicant and which sets out, in detail, the history of the dispute and the property, which is the subject matter of dispute, and the particulars about the incidents which are likely to lead to a breach of the peace—*Madho v. Tilak*, 35 Cr.L.J. 1460, 151 I.C. 853, 1934 Cr.C. 893, A.I.R. 1934 Nag. 194. But when the petition contains no information that a dispute likely to cause a breach of the peace exists, such application cannot by any means justify the Magistrate's taking action under this section—*A. Meah v. Steel Brother & Co. Ltd.*, 39 Cr.L.J. 708, 176 I.C. 266, A.I.R. 1938 Rang. 229, 11 R.R. 40. It is impossible to lay down any rule as to the amount of evidence which should satisfy a Magistrate. If a Magistrate believes the statement of one witness to be true, he is at perfect liberty to act upon it for the purpose of passing an order under sec. 145 (1). It is not incumbent upon him to hold a preliminary inquiry himself by examining further witnesses, nor is it necessary for him to call for a report from the police—*Bibi Asghari*, 36 Cr.L.J. 656 (664), 155 I.C. 169, 1935 O.W.N. 454, A.I.R. 1935 Oudh. 316, 1935 O.L.R. 257. See also *U. Pyinnay v. U. Kilatha*, 32 Cr.L.J. 637, A.I.R. 1931 Rang. 51, 1931 Cr.C. 153, Ind. Rul. 1931 Rang. 127; *Ahmad Din v. Juwan*, 27 Cr.L.J. 801, 95 I.C. 465, A.I.R. 1926 Lah. 550.

But a telegram is not a sufficient information—*In re Hari Lal*, 22 Bom. 949 (956); so also a statement made by a witness in the course of a trial that a dispute likely to cause a breach of the peace exists—*Gobin Chandra*, 20 Cal. 520 (525), or a mere petition by an officer in the employ of a party interested in the dispute, that a dispute likely to cause a breach of the peace exists, is not a sufficient basis of proceedings under this section—*Tirumalraja v. Lodd Gobind Dass*, 29 Mad. 561, 16 M.L.J. 419, 5 Cr.L.J. 91. But see 24 Cr.L.J. 304, 72 I.C. 32.

393. Dispute:—The Magistrate's jurisdiction under this section depends upon there being a dispute likely to create a breach of the peace; and when the parties appear before the Magistrate, if they are able to show, or if it otherwise appears to him that there is no dispute, or no such dispute as is likely to induce a breach of the peace, the Magistrate should hold his hands and not proceed further—*Gobind v. Abdul Sayad*, 6 Cal. 835. Thus, when the rights of the parties have been determined by a competent Court, the dispute is at an end, and it is the duty of the Magistrate to maintain the right of the successful party, and the defeated party will not be allowed to invoke the aid of the Magistrate and the police to neutralise the effect of the decree of the competent Civil Court—*Gobind v. Abdul*, 6 Cal. 835; *Daulat v. Rameswar*, 26 Cal. 625; *Sims v. Johurry*, 5 C.W.N. 563; *Kunja Behari v. Khetra Pal*, 29 Cal. 208. See Note 438 *infra*. The proper course for a Magistrate to pursue, if the defeated party does any act that may probably occasion a breach of the peace, is to take action under sec. 107—*Gobind v. Abdul*, 6 Cal. 835; *Amrteshwari v. Darpa Narain*, 7 C.W.N. 558; *Subba Nayak v. Trincall*, 7 Mad. 460.

The term 'dispute' means a reasonable dispute, a *bona fide* dispute, a dispute between parties who have each some semblance of a right or supposed right—*Gobind v. Abdul Sayad*, 6 Cal. 835. In every case in which a Magistrate finds that there is a *bona fide* dispute about land, no matter how erroneous the contention of one or other of the parties may be, he ought to adopt the procedure laid down in sec. 145. But if the Magistrate comes to the conclusion that the defendants are wrongfully and without any *bona fide* claim seeking to eject the other party by force and a breach of the peace is imminent, he is not bound to act under this section but is justified in making an order under sec. 107—*Ram Baran*, 28 All. 406. A Full Bench of the Calcutta High Court had recently laid down that the words "*bona fide*" should not be imported into

A Police report upon which a Magistrate bases his initial order under this section should contain a statement of the facts from which the Magistrate may be satisfied as to the existence of a likelihood of a breach of the peace. But there is no inflexible rule that the police report must show that the disputing parties are actually assembling men or doing some other specific overt acts—*Kulada Kinkar v. Danesh*, 33 Cal. 33 (42), 10 C.W.N. 257, 2 C.L.J. 271, 2 Cr.L.J. 670. When a Police Report sets out the subject matter of dispute, the cause of dispute, its nature, the apprehension that unless action is taken the breach of the peace will ensue, the report contains sufficient material for the Magistrate to act upon—*Muhammad Araf v. Satramdas Sakhmal*, 37 Cr.L.J. 1030 (1031), 164 I.C. 969, A.I.R. 1936 Sind 143, 9 R.S. 60, 1936 Cr.C. 859. A police report which sets out sufficiently substantial reasons for believing that a dispute likely to cause a breach of the peace relating to a certain land exists, is a good foundation of proceedings under this section—*Dhanput v. Chatterput*, 20 Cal. 513 (517). But a police report which does not state that there was any apprehension of a breach of the peace, is not sufficient to give the Magistrate jurisdiction—*Radha Gobind v. Gossain Mohendra*, 6 C.W.N. 340.

But a Magistrate is no way bound to act on all that is stated in the Police report—*Laldhari v. Sukdeo*, 27 Cal 892; *Ahmed Ali v. Sabib*, 33 C.W.N. 858, 30 Cr.L.J. 1027, A.I.R. 1929 Cal. 468, 49 C.L.J. 428. He is to exercise his own independent judgment upon the materials placed before him, and to arrive at a conclusion as to whether upon those materials there is a likelihood of a breach of the peace. He would not be justified in acting merely upon an expression of opinion by the police—*Ganga Bishun v. Rajo*, 5 P.L.T. 252, 83 I.C. 693, 26 Cr.L.J. 133, A.I.R. 1924 Pat. 787; *Kulada v. Danesh*, 33 Cal. 33 (42); *Ahmed Ali v. Sabid*, supra; *Ganikhan*, 28 Cr.L.J. 929, 105 I.C. 449, A.I.R. 1928 Nag. 81. Therefore the fact that the police report stated that there was no likelihood of a breach of the peace, would not by itself take away the jurisdiction of the Magistrate to proceed under this section, if upon a consideration of the materials before him and by exercising his own independent judgment he came to the conclusion that there was a likelihood of a breach of the peace—*Ganga Bishun v. Rajo*, supra; *Kulada v. Danesh*, supra. Where the police report showed that the parties disputing over a tank were big Zemindars, and that although there was nothing to show that a breach of the peace was likely to happen, yet such a breach was not impossible, it was held that the Magistrate ought not to proceed upon such report, which was merely an expression of opinion by the Police—*Maharaj Bahadur v. Ranjit Singh*, 11 C.W.N. 835, 6 Cr.L.J. 36; *Surjakanta v. Jogodindra*, 11 C.W.N. 198.

The report of the police officer of the district of F was to the effect that a breach of the peace was likely to take place in consequence of a dispute concerning a piece of water lying partly in the Sub-Division of M within the district of D and partly in the district of F. The report came before the Magistrate of M who thereupon took proceedings under this section in respect of water lying within his jurisdiction. There can be no valid objection to such a proceeding by reason of want of jurisdiction—*Ishan v. Garth*, 6 C.W.N. 378, 29 Cal. 885.

Evidentiary value :—A Police report is not itself evidence, although it may be sufficient to justify a Magistrate in taking action under this section—*In re Bhadreswari*, 16 W.R. 17, 7 B.L.R. 329. The police report and the evidence contained therein about the *factum* of possession is inadmissible in evidence except for the purpose of initiating the proceedings—*Kulbans v. Ram Singh*, 1 P.L.T. 501, 21 Cr.L.J. 735, 58 I.C. 159.

392. "Other information" :—The Magistrate may act on any information and without any formal complaint being made before him. He is not confined to evidence recorded on oath—*In re Kishoree Mohun*, 19 W.R. 10. The word "information" does not refer to any particular way in which a Magistrate's attention should be drawn. It is wide enough to cover the knowledge of the Magistrate derived by reading the petition filed by the parties in another proceeding which satisfies him that a breach

of the peace was imminent—*Jhaman v. Thakuri*, 1 P.L.T. 369, 21 Cr.L.J. 625, 57 I.C. 449.

No definition is given to the words "other information", and the omission to use a technical term such as affidavit, evidence, or verified statement, indicates that the widest possible latitude has been allowed in the matter. Therefore, a Magistrate does not act without jurisdiction when he bases his preliminary order under this section on a petition which is signed by the responsible pleaders and the applicant and which sets out, in detail, the history of the dispute and the property, which is the subject matter of dispute, and the particulars about the incidents which are likely to lead to a breach of the peace—*Madho v. Tilak*, 35 Cr.L.J. 1460, 151 I.C. 853, 1934 Cr.C. 893, A.I.R. 1934 Nag. 194. But when the petition contains no information that a dispute likely to cause a breach of the peace exists, such application cannot by any means justify the Magistrate's taking action under this section—*A. Meah v. Steel Brother & Co. Ltd.*, 39 Cr.L.J. 708, 176 I.C. 266, A.I.R. 1938 Rang 229, 11 R.R. 40. It is impossible to lay down any rule as to the amount of evidence which should satisfy a Magistrate. If a Magistrate believes the statement of one witness to be true, he is at perfect liberty to act upon it for the purpose of passing an order under sec. 145 (1). It is not incumbent upon him to hold a preliminary inquiry himself by examining further witnesses, nor is it necessary for him to call for a report from the police—*Bibi Asghari*, 36 Cr.L.J. 656 (664), 155 I.C. 169, 1935 O.W.N. 454, A.I.R. 1935 Oudh 316, 1935 O.L.R. 257. See also *U. Pynnja v. U. Kilatha*, 32 Cr.L.J. 637, A.I.R. 1931 Rang 51, 1931 Cr.C. 153, Ind. Rul. 1931 Rang 127; *Ahmad Din v. Juwan*, 27 Cr.L.J. 801, 95 I.C. 465, A.I.R. 1926 Lah. 550.

But a telegram is not a sufficient information—*In re Hari Lal*, 22 Bom. 949 (956); so also a statement made by a witness in the course of a trial that a dispute likely to cause a breach of the peace exists—*Gobin Chandra*, 20 Cal. 520 (525), or a mere petition by an officer in the employ of a party interested in the dispute, that a dispute likely to cause a breach of the peace exists, is not a sufficient basis of proceedings under this section—*Trimalraja v. Lodd Gobind Doss*, 29 Mad. 561, 16 M.L.J. 419, 5 Cr.L.J. 91. But see 24 Cr.L.J. 304, 72 I.C. 32.

393. Dispute:—The Magistrate's jurisdiction under this section depends upon there being a dispute likely to create a breach of the peace; and when the parties appear before the Magistrate, if they are able to show, or if it otherwise appears to him that there is no dispute, or no such dispute as is likely to induce a breach of the peace, the Magistrate should hold his hands and not proceed further—*Gobind v. Abdul Sayad*, 6 Cal. 835. Thus, when the rights of the parties have been determined by a competent Court, the dispute is at an end, and it is the duty of the Magistrate to maintain the right of the successful party, and the defeated party will not be allowed to invoke the aid of the Magistrate and the police to neutralise the effect of the decree of the competent Civil Court—*Gobind v. Abdul*, 6 Cal. 835; *Daulat v. Rameswari*, 26 Cal. 625; *Sims v. Johurry*, 5 C.W.N. 563, *Kunja Behari v. Khetra Pal*, 29 Cal. 208. See Note 438 *infra*. The proper course for a Magistrate to pursue, if the defeated party does any act that may probably occasion a breach of the peace, is to take action under sec. 107—*Gobind v. Abdul*, 6 Cal. 835; *Amriteshwari v. Darpa Narain*, 7 C.W.N. 558; *Subba Nayak v. Trincall*, 7 Mad. 460.

The term 'dispute' means a reasonable dispute, a *bona fide* dispute, a dispute between parties who have each some semblance of a right or supposed right—*Gobind v. Abdul Sayad*, 6 Cal. 835. In every case in which a Magistrate finds that there is a *bona fide* dispute about land, no matter how erroneous the contention of one or other of the parties may be, he ought to adopt the procedure laid down in sec. 145. But if the Magistrate comes to the conclusion that the defendants are wrongfully and without any *bona fide* claim seeking to eject the other party by force and a breach of the peace is imminent, he is not bound to act under this section but is justified in making an order under sec. 107—*Ram Baran*, 28 All. 406. A Full Bench of the Calcutta High Court had recently laid down that the words "*bona fide*" should not be imported into

this section, for if the Magistrate has to decide whether the dispute is *bona fide* or not, it would be to require him to go into the question of the merits or the claims of a party to a right to possess the subject of dispute, which he is forbidden to do by sub-section (4)—*Agni Kumar v. Mantazaddin*, 56 Cal. 290, 48 C.L.J. 193, 32 C.W.N. 1173, 30 Cr.L.J. 69, 113 I.C. 181, A.I.R. 1928 Cal. 610, (F.B.). The likelihood of a breach of the peace is sufficient to give the Magistrate jurisdiction. The weight to be attached to a previous order of a Civil or Criminal Court is a question for the consideration of the Magistrate—*Gaya Prasad v. Ram Sarobeth*, A.I.R. 1934 Pat. 471, 15 P.L.T. 453, 1934 Cr.C. 1064. But see *Dharsingh*, 17 N.L.J. 239. The Magistrate, in spite of delivery of possession by the Civil Court, has jurisdiction to start a case under this section—*Agni Kumar v. Mantazaddin*, supra. See also *Rajendra Narayan v. Chintamani*, A.I.R. 1939 Pat. 151 (152), 1938 P.W.N. 526, 19 P.L.T. 632, 40 Cr.L.J. 339, 180 I.C. 322.

394. Likelihood of breach of peace:—It is essential for a proceeding under this section that the Magistrate should be satisfied, either from a police report or from other information, that there is a *likelihood of a breach of the peace*; the mere fact that there is a dispute concerning land is not sufficient by itself to give him jurisdiction—*Kulada v. Danesh*, 33 Cal. 33 (42), 2 Cr.L.J. 670, 2 C.L.J. 271, 10 C.W.N. 257. This section is enacted in order that the Magistrate may prevent a breach of the peace; the fact that there is a danger of a breach of the peace must be put in the forefront of his proceedings, and he must give the parties notice that it is to prevent a breach of the peace that he is taking action under this section. He has no jurisdiction in a matter of dispute relating to immovable property, which primarily appertains to a Civil Court, unless he is fully satisfied that there is a danger of a breach of the peace—*Hira Lal*, 1932 A.L.J. 1087, 142 I.C. 775, 1933 Cr.C. 165, A.I.R. 1933 All. 96, 34 Cr.L.J. 449. If there is nothing on the record to show that he was satisfied to the existence of a dispute likely to cause a breach of the peace, his action under this section was illegal—*Ganga Prasad v. Narain*, 15 All. 391 (395). The basis of the proceeding is the likelihood of a breach of the peace. Therefore, where in his order directing the issue of a proceeding under this section, the Magistrate was of opinion that there was *no likelihood* of a breach of the peace but that as the dispute was one relating to possession, section 145 was applicable, *held* that the Magistrate acted without jurisdiction—*Sib Narayan v. Satish*, 24 C.W.N. 621, 21 Cr.L.J. 593. Where the Magistrate came to the conclusion from a perusal of the police report that no likelihood of a breach of the peace existed, he acted rightly in refusing to start proceedings under this section—*Ram Manorath v. Kaushal*, 10 O.W.N. 310, 1933 Cr.C. 559 (560), 34 Cr.L.J. 934, 145 I.C. 299, A.I.R. 1933 Oudh 253. See also *Subhan* in Note 390.

What is to be understood by the use of the words "dispute likely to cause a breach of the peace exists," is that the dispute must exist and it should be of such a character as likely to cause a breach of the peace unless proceedings are now taken under sec. 145, Cr. P. C. In other words, proceedings are to be taken under that section in order to avert a breach of the peace which would otherwise take place due to the existence to a dispute between the parties. Therefore, where the police report on which the Magistrate relies does not show that there was any likelihood of a breach of the peace at the time when the proceedings were drawn up by it but it shows that there was a possibility of a collision between the parties at a future time namely, about two months from that date, it was not sufficient to give jurisdiction to the Magistrate to proceed under this section—*Stewart v. Hubert Hughes*, 118 I.C. 892, A.I.R. 1929 Cal. 341, 30 Cr.L.J. 977, 49 C.L.J. 391, 33 C.W.N. 509, Ind. Rul. 1929 Cal. 700. But in the case of *Kulada v. Danesh*, 33 Cal. 33, 10 C.W.N. 257, 2 C.L.J. 271, 2 Cr.L.J. 670 (F.B.), it was decided that the introduction of words such as, "imminent" or "immediate" into the section, giving it a stronger significance than the words used in the section, was not justified. The section requires that there must be a present dispute, and that there must be likelihood of a breach of the peace. That is to say, there must be a present fear, that it is probable that there will be a breach of the

peace owing to the dispute, unless proceedings are taken under the section. Of course that does not mean that orders under this section are to be made when somebody comes and says that he fears that a breach of the peace will occur before they can prevent it. The procedure under this section is intended to deal with conditions in which the parties responsible for law and order have an existing fear that unless steps are taken under the section, a breach of the peace will occur before they can prevent it. Where the words of the police report are that the cultivating season is near at hand and that a breach of the peace is feared, the Magistrate has jurisdiction to take action under this section—*Hari Charan v. Sherali*, 33 Cr L.J. 305, 136 I.C. 475, AIR 1932 Cal. 60, 35 C.W.N. 1003, Ind. Rul. 1932 Cal. 203.

This section does not say that a breach of the peace must be *imminent* and that the opposite party has not sufficient time to go to the proper Court. In fact no case can be made legal under this chapter if it is necessary to prove that it is impossible to have sufficient time to go to the proper Court, because obviously it is as easy to file a plaint in a Civil Court as to file a complaint in a Criminal Court. This chapter is intended to provide a speedy remedy in case of disputes in order that the matter may be settled temporarily, while more lengthy civil proceedings take place—*Todar Mal*, 53 All 215, 32 Cr L.J. 309 (310), 1930 A.L.J. 1439, 124 I.C. 441, 1931 Cr C. 14, A.L.R. 1931 All. 14; *Balram v. Gangoo*, 28 N.L.R. 154, 33 Cr L.J. 937 (938), 140 I.C. 231. (Contra—*Chote Lal*, 25 Cr L.J. 227). The Magistrate must decide in each case whether there is a *likelihood* of a breach of the peace, and it is not enough on the one hand that the breach is *merely probable*, nor is it necessary that it should be *immediate* or '*imminent*' as indicating a higher degree of chance of the event happening than is denoted by the 'likelihood' of it—*Kulada Kinkar v. Danesh*, 33 Cal 33 (45); *Hari Charan v. Sherali*, 35 C.W.N. 1003 (1004), AIR 1932 Cal 60, 33 Cr L.J. 305; *Balmukund*, 1 S.L.R. 50, 8 Cr L.J. 170. (Contra—*Damodar v. Syamanand*, 7 Cal 385, at p. 387). If there be no present danger of a breach of the peace, the fact that a breach may happen at a *future* time will not justify an order under this section—*Stewart v. Hubert*, 33 C.W.N. 509, 30 Cr L.J. 977, 49 C.L.J. 491; *Hari Charan v. Sherali*, supra. A mere finding that the parties are in a contesting mood, without any finding as to the likelihood of a breach of the peace, is insufficient—*Munnu Lal v. Harde Ram*, 29 O.C. 23, 12 O.L.J. 256, 26 Cr L.J. 944. But where the Magistrate found that there was a quarrel, and there was evidence to show that one party wanted to take forcible possession, *held* that there was a likelihood of a breach of the peace—*Munnu*, 8 O.W.N. 1182, 33 Cr L.J. 46 (48), 134 I.C. 120, Ind. Rul. 1931 Oudh 428, AIR 1932 Oudh 21, 1932 Cr C. 53.

There must be a likelihood of a breach of the peace on the date on which the Magistrate draws up proceedings. He cannot take proceedings on the strength of a Police report which is more than three months old, when he has no information that a breach of the peace is likely to occur at the time of his taking action—*Chhedi Lal v. Mahabir*, 2 P.L.T. 650, 23 Cr L.J. 27; *Anadi v. Sukh Chand*, 58 Cal 388, 34 C.W.N. 899 (910), 32 Cr L.J. 398, 129 I.C. 610, AIR 1930 Cal 715, Ind. Rul. 1931 Cal 226, 1930 Cr C. 1115.

Where at the date of the initial order the materials before the Magistrate do not disclose the existence of such dispute as is likely to result in a breach of the peace, the order made by him would be without jurisdiction, and the defect is not remedied even if it appears from the evidence taken in the course of the trial that there was at the date of the initiation of the proceedings, a dispute likely to cause a breach of the peace—*Kali Kissen v. Anund*, 23 Cal 557 (562); *Gobind Chandra*, 20 Cal. 520 (525). But this view has been dissented from in *Kulada v. Danesh*, 33 Cal 33 (45).

The primary object of this section is the preservation of peace. Therefore, if it is found during the proceedings that there is no likelihood of the peace being disturbed, there is no necessity for the Magistrate to continue the proceedings—*Pamshandra v. Manohur*, 21 Cal 29. If the Magistrate, after some inquiry comes to the conclusion that there is no longer any danger of a breach of the peace, or the dispute no longer

exists, he can refuse to draw up a preliminary order—*Moolyamal v. Ali Md.*, 18 S.L.R. 278, 26 Cr.L.J. 1333; *Kamulammal v. Vavu Rowther*, 4 L.W. 57, 17 Cr.L.J. 138. See Notes under sub-section (5).

If the Magistrate is satisfied as to the likelihood of a breach of the peace he has jurisdiction to make an order in writing stating the grounds of his being so satisfied and requiring the parties concerned to put in written statements in respect of the fact of actual possession. There is nothing in the Code which directs the Magistrate in the course of the subsequent enquiry to record evidence on the question whether the dispute is or is not likely to cause a breach of the peace. The absence of such evidence on the record cannot be considered a sufficient reason for interfering with the final order—*Ram Prasad v. Ram Adhar*, 28 Cr.L.J. 847, 104 I.C. 463, 4 O.W.N. 834, A.I.R. 1927 Oudh 359. The law does not require the Magistrate to record an express finding in his judgment (final order) that a breach of the peace was imminent. Such a finding in respect of the existence of a dispute likely to cause a breach of the peace is a matter to be considered in relation to the preliminary order—*Maqimunnissa v. Ahmedunnissa*, 2 O.W.N. 704, 90 I.C. 541, 26 Cr.L.J. 1581; *Chiranjil Lal v. Mahadeo Prasad*, 34 Cr.L.J. 480, A.I.R. 1932 All. 683 (684), 1932 A.L.J. 819, 1932 Cr.C. 938. Where the Magistrate in his preliminary order found that the dispute was likely to cause a breach of the peace, it was not necessary for him to repeat in the final order that such an apprehension existed. The essential requisite to give the Magistrate jurisdiction under sec. 145 is that he should be satisfied that a dispute exists regarding land or water before he makes the preliminary order. Once he is so satisfied, his subsequent action relates to procedure and not jurisdiction and in this respect not liable to be set aside on revision by the High Court—*Guruditta v. Taja*, A.I.R. 1939 Lah. 108 (109), 40 Cr.L.J. 519, 181 I.C. 59, 41 P.L.R. 217, I.L.R. 1938 Lah. 611, following *Kamal Kutty v. Vala, Raja of Chirakkal*, 36 Mad. 275, 17 I.C. 65, 23 M.L.J. 499, 1912 M.W.N. 1154, *Ganga Ram v. Murad Shah*, A.I.R. 1923 Lah. 253, 73 I.C. 519, 24 Cr.L.J. 631, *Ranada Ranjan v. Bharat Chandra*, A.I.R. 1921 Cal. 631, 62 I.C. 180, 22 Cr.L.J. 484, 33 C.L.J. 69, 25 C.W.N. 215; *Sheoprasad Shriram v. Gobindram Hardit*, A.I.R. 1940 Nag. 265 (266), 1940 N.L.J. 375. See also *Ratan v. Tika*, A.I.R. 1939 Lah. 233, 41 P.L.R. 188. Having regard to the provisions of sec. 145 (4), Cr. P. C., it would not appear to be absolutely necessary that in the final order recorded by the Magistrate with regard to the question of possession there should be any further finding on the question of the imminence of a breach of the peace. The finding at the time of the institution of the proceedings is sufficient to give the Court jurisdiction to proceed in connection with this matter—*Gobardhon v. Khirad Chandra*, 44 C.W.N. 427. See Note 424.

395. Subject matter of dispute:—*Land or water*:—This section is not limited to tangible immovable property, but relates to a dispute concerning any "land or water" including intangible rights, and sub-section (2) gives an explanation of the words—*Hurbullabh v. Luckmeswar*, 25 Cal. 188. See Note 406 under sub-section (2), *infra*.

Proceedings under this section cannot be instituted with respect to *moveable* properties—*Hira Lal*, 11 O.L.J. 59, 25 Cr.L.J. 440. Thus, a dispute as regards the offerings made at a temple is a dispute regarding moveable property, and a Magistrate cannot make a declaration that one of the parties is in possession of such offerings—*Gui Ram v. Lal Behary*, 37 Cal. 578; *Ram Saran v. Raghunandan*, 38 Cal. 387; *Sobhag Singh v. Bhaktawar*, 23 N.L.R. 81, 28 Cr.L.J. 637 (688). See Note 466.

Property must be specified:—To bring a case under this section, the property which is the subject of dispute must be capable of being accurately defined—*Surb Narain v. Biri Mohun*, 23 Cal. 80; *Maharaja Suryakanta v. Maharaja Jagadindra*, 5 Cr.L.J. 32, 11 C.W.N. 198; *Sabid Mandul v. Lakshmi*, 7 C.W.N. 599. Therefore, a Magistrate cannot take action in the case of a dispute about an undivided share, because the subject matter of the dispute is uncertain, and the boundaries of the land are undefined—*Mon Mohan v. Rajendra*, 7 C.W.N. 462. See also *Muhammad Ataf v. Satramdas Sakhumal*, A.I.R. 1936 Sind 143, 37 Cr.L.J. 1030, 164 I.C. 969, 1936 Cr.C. 859.

Absence of clear specification of the subject matter of dispute in the proceedings is a serious defect—*Sib Narain v Satish*, 24 C.W.N. 621, 31 C.L.J. 369, 57 I.C. 161, 21 Cr.L.J. 593. But where the parties are not at dispute upon the question as to what the disputed lands are, the real question being which party was entitled to possession under a Civil Court decree, the want of a proper specification of the boundaries of the property does not vitiate the proceedings—*Sims v. Johurry*, 5 C.W.N. 563; *Jhaman v. Thakuri*, 1 P.L.T. 369, 21 Cr.L.J. 625, 57 I.C. 449. Non-specification, in the preliminary order, of the land in regard to which the dispute exists may in certain circumstances vitiate the proceedings. But where as a matter of fact it appears from the evidence on the record that both parties were perfectly well aware of the plots in regard to which action was being taken, it is not necessary to interfere with the Magistrate's order in revision—*Parbhu Dayal*, 25 Cr.L.J. 1139 (1140), 81 I.C. 963, A.I.R. 1925 Oudh 152, following *Iklas Kunwar v. Raghuraj*, 4 I.C. 876, 12 O.C. 400, 11 Cr.L.J. 69. Where the undefined character of the area of the land in question, and the consequent difficulty experienced in settling the exact location of the said land presented an insuperable obstacle in the way of the Magistrate's arriving at a definite conclusion in regard to possession, there is no ground for interfering with the order of the Magistrate—*Jan Mohammad v. Jivan Khan*, 29 Cr.L.J. 861 (862), 111 I.C. 445, A.I.R. 1928 Nag. 325.

An order under this section which does not specify by metes and bounds the lands in dispute may be amended by the Magistrate himself—*Baboo Reddi v Kullappa*, 2 Weir 107. But an order which gives no information as to the subject matter of dispute and which leaves the persons to whom notice is ordered to be issued quite in the dark as to the property in regard to which they have to put forward their respective claims, is not merely defective but invalid and liable to be set aside in revision—*Martin*, 27 Ail. 296, 1904 A.W.N. 234.

Where a Magistrate finds a party in possession of some land which is a part of a larger plot the possession of the whole of which he claimed, the judgment should contain the boundaries of the land to which the order applies—*Osman v. Jamal*, 14 C.W.N. xcviil.

See Note 397A.

396. "Within jurisdiction":—A Magistrate cannot pass orders respecting lands situate outside the local limits of his jurisdiction. Where a *jalkar* was situate partly within and partly without the local limits of his jurisdiction, and proceedings were taken with regard to the *jalkar* as a whole, the proceedings were set aside; and the Magistrate was allowed an option to institute fresh proceedings with regard to such portion of the *jalkar* as came within his jurisdiction—*Korban v. Raja Srinath*, 1 C.L.J. 329, 2 Cr.L.J. 406.

The jurisdiction to make an order under sec. 145 or sec. 146, Cr. P. C., is not personal to the Magistrate who initiates the proceedings. The practice of transferring cases under Ch. XII of the Code by District Magistrates to Magistrates of 1st class subordinate to him is common and there is nothing wrong in it. A Magistrate of the first class holding his Court at the headquarters has local jurisdiction throughout the district—*Ram Kussore v. Dwarka Nath*, 10 C.W.N. 1095 (1098), 4 Cr.L.J. 223.

A District Magistrate cannot transfer a case to a Sub-Divisional Magistrate if the land concerned is not within the local limits of the latter's jurisdiction—*Chellapatti v. Subba*, 52 Mad. 241, 55 M.L.J. 693, 30 Cr.L.J. 340 (341), 114 I.C. 625, 28 M.L.W. 664, 1928 M.W.N. 921, A.I.R. 1928 Mad. 1230, Ind. Rul. 1929 Mad. 305. But where a Magistrate having local jurisdiction has taken the initiary step by passing an order under sub-section (1), he can thereafter transfer the case to a subordinate Magistrate, although the latter has no local jurisdiction in the case—*Arumuga*, 26 Mad. 188, 12 M.L.J. 391, 2 Weir 678; *Satish v. Rajendra*, 22 Cal. 898; *Chellapatti v. Subba*, supra. See *Rameshwar v. Baijnath*, in Note 43, where it was held that the Magistrate to whom a case under sec. 145, Cr. P. C., was transferred, had jurisdiction to draw up fresh proceedings under sec. 145, Cr. P. C., in respect of lands included in .

proceedings and also other lands not within his sub-division and not included in the previous proceedings. See also *Ram Kishore v. Dwarka Nath*, supra.

Where it is uncertain in which of two local areas the land in dispute is situated, proceedings may be taken by a Magistrate having jurisdiction over any of such areas—*Iklas v. Raghuraj*, 12 O.C. 400, 11 Cr.L.J. 69, 4 I.C. 876. See also *Audendra v. Daman Singh*, 16 Cr.L.J. 527, 29 I.C. 513 (All).

A Magistrate of one district has jurisdiction to institute proceedings under sec. 145 on a report drawn up by a police officer of another district in respect of such portions of the land or water as lie within the limits of his (Magistrate's) jurisdiction—*Ishan Chander v. Garth*, 29 Cal. 885, 6 C.W.N. 378.

397. Preliminary order:—This section is intended to provide a speedy remedy for the prevention of breaches of peace arising out of disputes in respect of immoveable property. Sub-sec. (1) does not contemplate any sustained inquiry before the making of the preliminary order. The condition prescribed is that the Magistrate shall be satisfied from a police report or other information as to the necessity for taking action, the whole purpose being to prevent an immediately apprehended breach of the peace. It is in the highest degree absurd for a Magistrate to delay the passing of a preliminary order while he undertakes a prolonged inquiry extending over several hearings. The second proviso to sub-sec. (4) contemplates the making of an emergent order for attaching property in dispute, but as a condition to this there must be in existence an order under sub-sec. (1). Clearly, therefore, delay in the passing of a preliminary order is calculated to frustrate the whole object of this section, including the provision relating to emergent orders—*Muhammad Ali v. Shamsul Haq*, A.I.R. 1910 Sind 33 (37), 41 Cr.L.J. 486, 187 I.C. 636.

The making of a formal order under sub-section (1) is absolutely necessary to the initiation of proceedings under this section—*Nathu Ram*, 15 A.L.J. 270, 18 Cr.L.J. 557; and an omission to make such an order and to draw up a proceeding under sub-sec. (1) will render all subsequent proceedings void—*Banwari v. Hiday*, 32 Cal. 552, 1 C.L.J. 432; *Sukru v. Ram Pergash*, 30 Cal. 443; *Banka Singh v. Gokul*, 49 All. 325, 25 A.L.J. 246, 28 Cr.L.J. 231; *Sis Ram*, 32 Cr.L.J. 139, 128 I.C. 313, A.I.R. 1930 Lah. 895, 12 Lah.L.J. 147, 1930 Cr.C. 991, Ind. Rul. 1931 Lah. 41; *Hakam v. Ralia Ram*, A.I.R. 1924 Lah. 91, 74 I.C. 79, 4 Lah. 66, 24 Cr.L.J. 751; *Md. Hasham v. Md. Jhami*, 20 Cr.L.J. 124 (Oudh); *Manik v. Azimuddin*, 6 C.W.N. 923; *Jamuna v. Mohan*, 2 P.L.T. 724, 23 Cr.L.J. 61; *Chanan Singh v. Emp.*, 39 Cr.L.J. 702, 176 I.C. 124, 40 P.L.R. 20, 11 R.L. 165, A.I.R. 1938 Lah. 345; *Mariyasai Udayan v. Mahamud Azeauddeen*, 37 Cr.L.J. 953, 164 I.C. 689, A.I.R. 1936 Mad. 824, 1936 M.W.N. 647, 44 M.L.W. 305, 71 M.L.J. 305, 9 R.M. 158, 1936 Cr.C. 948. The conduct of the parties in allowing the Magistrate to go on without objection is no doubt reprehensible but it cannot validate an order which is without jurisdiction—*Mariyasai Udayan v. Mahamud Azeauddeen*, supra. But in *Sajad Hussain v. Nanak Chand*, 1917 P.W.R. 22, 18 Cr.L.J. 461 (following *Muhammad Sharaf v. Dhanpat*, 1914 P.W.R. 15, A.I.R. 1914 Lah. 295, 23 I.C. 487, 68 P.L.R. 1914, 15 Cr.L.J. 279) however, it has been held that the omission to record the preliminary order is not a fatal defect, if the Magistrate afterwards in the presence of parties records an order which essentially complies with the requirements of this sub-section. So also, in *Nur Baksh*, 1917 P.W.R. 26, 18 Cr.L.J. 633, it is said that the omission to record a preliminary order in writing or to serve it on the parties, does not invalidate the subsequent proceedings, where the parties appeared before the Magistrate who explained matters to them fully and they evidently understood everything that was requisite. The same view has been taken in *Madan Mohan v. Sheoraj*, 1932 A.L.J. 503, 1932 Cr.C. 558 (559), 34 Cr.L.J. 156 (157), 141 I.C. 131, A.I.R. 1932 All. 446, Ind. Rul. 1933 All. 63. The omission to draw up a preliminary order is a mere irregularity curable by sec. 537, where no objection was taken before the Magistrate and no party was prejudiced—*Mg. Po Lon v. Mg. Ba*, 3 Bur.L.J. 256, A.I.R. 1925 Rang. 111, 84 I.C. 548, 26 Cr.L.J. 324; *Mohan Lal v. Morui*, 34 Cr.L.J. 1138, 145 I.C. 868, 1933 Cr.C. 1449, A.I.R. 1933 Pesh. 88; *Ganga v. Narain*, 15 All. 394 (395); *Kapoor*

Chand v. Suraj, 1933 A.L.J. 188, 34 Cr.L.J. 414 (418), A.I.R. 1933 All. 264, 142 I.C. 537, 1933 Cr.C. 434, 55 All. 301, Ind. Rul. 1933 All. 125 (F.B.); *Ratan v. Tika*, A.I.R. 1939 Lah. 233, 41 P.L.R. 188, 40 Cr.L.J. 784, 183 I.C. 351, virtually overruling *Banka Singh v. Gokul*, 49 All. 325 cited above. As observed by the Privy Council in *Abdul Rahman*, 5 Rang. 53, failure to observe the rules of procedure is a mere irregularity curable by sec. 537, if no failure of justice has been occasioned and the accused has not been prejudiced in any way.

But if no order is recorded, no notice issued, no written statements called for, and no inquiry held, the order would be void and must be set aside—*Mahadeo v. Bisu*, 25 All. 537 (539); *Tara Chand v. Behari Lal*, 1916 P.R. 22, 18 Cr.L.J. 36, A.I.R. 1916 Lah. 378, 36 I.C. 868; *Budhan v. Ram Rakha*, 1915 P.L.R. 169, 30 I.C. 452, A.I.R. 1915 Lah. 232, 16 Cr.L.J. 628; *Banka Singh v. Gokul*, 49 All. 325, 28 Cr.L.J. 231. The Magistrate acts illegally when he does not pass a preliminary order and refuses to hear more than three witnesses on each side—*Lingajja v. Nagayya*, 1932 M.W.N. 320.

An order under this section must state all the particulars necessary to enable the Magistrate to act under this section; otherwise the proceedings are without jurisdiction. It is not sufficient that the Magistrate should have before him a police report, that he should have given orders thereon and that a written order be drawn up according to the terms of this section. It is his duty to draw up an order which in all respects satisfies the requirements of law. The written order should be correct and complete in its terms—*Mohesh v. Narain*, 27 Cal. 981.

Where the Magistrate purported to pass an executive order, but from the form of the order it was evident that it was a thinly disguised order under sec. 145, but no formalities of sec. 145 were observed (*viz.*, no preliminary order was made, no written statement called for), held that the order was passed without jurisdiction and must be set aside—*Harbans v. Md. Syad*, 26 Cr.L.J. 1511, 1925 Pat. 51.

The jurisdiction of a Magistrate to proceed under this section arises from the fact that he has received certain information and that he is satisfied as to the truth of that information. The jurisdiction of the Magistrate does not depend on how he proceeds. There are two things; one is the authority conferred on him to act and the other is how he is to act. If he has jurisdiction, he is not deprived of jurisdiction merely because his procedure is erroneous or defective. The omission on the part of the Magistrate to follow certain directions contained in the Code, although some of these directions may be more important than others, cannot be said to deprive him of jurisdiction—*Kapoor v. Suraj*, A.I.R. 1933 All. 264, 142 I.C. 537, 1933 Cr.C. 434, 55 All. 301, 1933 A.L.J. 188, 34 Cr.L.J. 414 (F.B.).

397A. Proceeding:—It is not necessarily illegal or irregular to combine a large number of plots in a proceeding under sec. 145, Cr.P.C., where the dispute is between a landlord who claims a large number of plots on one side and different sets of tenants who claim different plots on the other. When this is done particular care is required to ensure that the parties are not prejudiced by the amalgamation of a number of plots in one proceeding. In a case like this where a body of tenants rightly or wrongly claim a large area of lands as having been settled with them, there is always the danger that from general evidence conclusions will be drawn in respect of specific lands. It is, therefore, essential for the Magistrate to apply his mind to the case of each individual holding—*Gulab Kuer v. Ganouri Koers*, 40 Cr.L.J. 17, 178 I.C. 333, A.I.R. 1938 Pat. 511, 1938 P.W.N. 149, 5 B.R. 11; *Raja Gope v. Sukan Singh*, A.I.R. 1939 Pat. 353, 1939 P.W.N. 64, 40 Cr.L.J. 749, 183 I.C. 286, 5 B.R. 894, 12 R.P. 120, 20 P.L.T. 145; *Ram Kishun v. Fauzdar Gope*, A.I.R. 1937 Pat. 413, 3 B.R. 659, 170 I.C. 90, 38 Cr.L.J. 842, 10 R.P. 75, 1937 P.W.N. 755, 18 P.L.T. 824.

See Note 422.

398. Statement of grounds:—A Magistrate's order in instituting proceedings under this section ought to set out the grounds on which he is satisfied that a dispute likely to cause a breach of the peace exists—*Jagomohan v. Ramkumar*, 28 Cal. 416;

Dan Pershad v. Ganesh, 11 A.L.J. 696, 14 Cr.L.J. 495; *Khubi v. Darbari*, 2 P.L.T. 267, 22 Cr.L.J. 481; *A. Meah v. Steel Brothers & Co. Ltd.*, 39 Cr.L.J. 708, 176 I.C. 266, A.I.R. 1938 Rang. 229, 11 R.R. 40. Even where the Magistrate acts upon a local inquiry held by himself, he is still bound to state the grounds—*Nityanund v. Paresh Nath*, 32 Cal. 771, 9 C.W.N. 621, 2 Cr.L.J. 342.

Omission to state grounds :—It is the intention of the law, not only that the Magistrate should have sufficient grounds for proceeding under sec. 145, but that he should inform the parties concerned of the grounds on which he is proceeding—*Gobind Chandra*, 20 Cal. 520 (526). Therefore, where the Magistrate omits in the preliminary order to state the grounds for his being satisfied as to the likelihood of a breach of the peace, the final order is without jurisdiction and must be set aside—*Nityanund v. Paresh Nath*, 32 Cal. 771; *Nga Po Tin v. Nga Po Saung*, 1 Rang. 53; *Ma Gyi*, 2 Bur.L.J. 295, 25 Cr.L.J. 1161; *Pandurang*, 24 Bom. 527 (532); *Baliarsimhuni v. Gadagamma*, 33 Cr.L.J. 536, 138 I.C. 68, 1932 M.W.N. 425, 1932 Cr.C. 331, Ind. Rul. 1932 Mad 496, 35 M.L.W. 390, A.I.R. 1932 Mad 368; *Hira Lal*, 1932 A.L.J. 1087, 34 Cr.L.J. 449, A.I.R. 1933 All. 96, 142 I.C. 775, 1933 Cr.C. 165; *Dan Prasad v. Ganesh*, 14 Cr.L.J. 495, 20 I.C. 751; *Banka Singh v. Gokul*, A.I.R. 1927 All. 286, 99 I.C. 1031, 28 Cr.L.J. 231, 49 All. 325. See also *A. Meah v. Steel Brother & Co. Ltd.*, A.I.R. 1938 Rang. 229 (232), 39 Cr.L.J. 708, 176 I.C. 266, 11 R.R. 40. But in some other cases it has been held that failure on the part of the Magistrate to set forth explicitly the grounds of his being satisfied that there is a likelihood of a breach of the peace, will not vitiate the proceedings, if there is otherwise a substantial compliance with the requirements of this section—*Har Prasad v. Pandurang*, 1905 A.W.N. 260; *Har Piari v. Nathe Lal*, 18 A.L.J. 1140; *Iklas Kumwar v. Raghuraj*, 4 I.C. 876, 12 O.C. 400, 11 Cr.L.J. 69; *Babban v. Baldeo*, 4 A.L.J. 91; *Parbhu Dayal*, 25 Cr.L.J. 1139, 81 I.C. 963, A.I.R. 1925 Oudh 152; *Barmha Singh*, 1932 A.L.J. 865, 1932 Cr.C. 936, A.I.R. 1932 All. 681; *Kapoor Chand v. Suraj Prasad*, supra; *Natho Khan*, 26 S.L.R. 353, 1932 Cr.C. 681 (683), 34 Cr.L.J. 215, 141 I.C. 628, A.I.R. 1932 Sind 145; *Md. Sahdshah v. Wahdatshah*, 26 Cr.L.J. 1292, 89 I.C. 156, A.I.R. 1926 Sind 53. Where both parties were fully cognizant of the matter in dispute, and there was in fact a danger of a breach of peace, the Magistrate's omission to state the grounds of his being satisfied as to the existence of the dispute, did not invalidate the proceedings—*Ganga Saran v. Bhagwat*, 32 All 132 (135), 11 Cr.L.J. 141, 7 A.L.J. 53, 5 I.C. 471. A mere omission by the Magistrate to record the source of information will not invalidate the proceedings, where the Magistrate held the inquiry in the presence of the parties, and they were aware of the fact in the course of the inquiry—*Sabid Mondal v. Lakshmi*, 7 C.W.N. 599. Even if the source of information had not been recorded that would be an irregularity curable by sec. 537, Cr. P. C.—*Shcoprasad Shriram v. Govindram Hardit*, A.I.R. 1940 Nag 265 (266), 1940 N.L.J. 375. Once the Magistrate is satisfied that a dispute likely to cause a breach of the peace exists, he has jurisdiction, and his subsequent action must be considered in relation to procedure and not to jurisdiction. It is a mere irregularity in procedure which would be cured by s. 537—*Kamal Kutty v. Udayavarma*, 36 Mad 275, 23 M.L.J. 499, 13 Cr.L.J. 753, 17 I.C. 65, 12 M.L.T. 439, 1912 M.W.N. 1154; *Narsingdas*, 35 Cr.L.J. 1381, 151 I.C. 348, 1934 Cr.C. 490, A.I.R. 1934 Nag. 112; *Bibi Asghari*, 36 Cr.L.J. 656, 155 I.C. 169, 1935 O.W.N. 454, A.I.R. 1935 Oudh 316, 11 Luck. 157, 1935 O.L.R. 257; *Barhma*, 1932 A.L.J. 865, 34 Cr.L.J. 425 (426), 142 I.C. 532, A.I.R. 1932 All 681, 1932 Cr.C. 936, 54 All. 1002, Ind Rul 1933 All. 131. In *In re Chennapudayan*, 30 Mad 548 and *Chockalingam v. Ammalalchi*, 2 Weir 98, the High Court refused to interfere in revision unless either of the parties had been prejudiced by the Magistrate's omission to record the grounds. Where the inquiry has been carried out by the Magistrate with considerable thoroughness, and no injustice has been done to any party as a result of the omission to state the grounds, his order cannot be set aside merely because of such omission—*Maung Pu v. Maung Chit*, 5 Rang 129, 28 Cr.L.J. 623, A.I.R. 1927 Rang 177, 102 I.C. 911.

But in his final order, the Magistrate should sufficiently state his reasons, so that

the High Court in revision may determine whether or not the Magistrate has complied with the provisions of sub-section (4) and directed his mind to the consideration of the evidence—*Bhuban Chandra v. Nibaran*, 49 Cal. 187, A.I.R. 1922 Cal. 382, 62 I.C. 323, 22 Cr.L.J. 499, 25 C.W.N. 887, 34 C.L.J. 125.

Reference to police report.—An initial order made by the Magistrate under sub-sec. (1) is not defective merely because it is not self-contained and does not state in express terms the grounds upon which he is satisfied, when such grounds appear in the police report upon which it is founded and to which it makes reference, and which is incorporated in it—*Khosh Mahomed v. Nazir Mahomed*, 33 Cal 352 (362), 9 C.W.N. 1065, 2 Cr.L.J. 637 (F.B.); *Emp v Munnulal*, A.I.R. 1935 Nag. 78, 17 N.L.J. 231; *Sheoprasad Shriram v. Govindram Hardit*, A.I.R. 1940 Nag 265 (266), 1940 N.L.J. 375; *Goluck Chandra v. Kali Charan*, 13 Cal 175. Where the police report sets out sufficient grounds and is expressly referred to in the initial order by the Magistrate, such an order sufficiently fulfils the requirements of the law—*Khosh Md v Nazir Md*, supra; *Kulada v. Danesh*, 33 Cal 33 (40), 10 C.W.N. 257, 2 Cr.L.J. 271. If the Police report or other information shows that there is a dispute and the Magistrate believes it, and issues the preliminary order, basing his information on such report only, he acquires sufficient jurisdiction to act under this section, and it is not necessary for him to set out any further reasons for his being satisfied as to the existence of such a dispute. His order is final and the High Court will not scrutinise the said reasons—*Krishnappa v. Alamelu*, 5 L.W. 165, 18 Cr.L.J. 23.

399. Parties concerned:—It is the initial duty of the Magistrate in a proceeding under this section to find out what parties are concerned in the dispute that has arisen and he should also determine which parties are in actual possession—*Narayan v Chandrabhaga*, 26 Cr.L.J. 1289 (1291), 89 I.C. 153, A.I.R. 1925 Nag 457. The Magistrate should do his best to ascertain who are the parties concerned in the dispute in a case under sec 145. But his order cannot be pronounced to be vitiated by any error of jurisdiction merely because such inquiry has not been made or carried far enough—*Krishna Kamini v Abdul Jubbar*, 30 Cal 155 (193), 6 C.W.N. 737 (F.B.). It is upon the basis of the information conveyed to him that the Magistrate is in the first instance to select the persons whom he will require to attend his Court for the purpose of laying their claims before him—*Ibid* (at p 196). In a dispute between two sets of *pujaris*, the complaint should specifically name the persons against whom the protection of the law is asked for, for they are to be served with notices to attend the Court and state their case to the Magistrate. And it is also the duty of the Magistrate to ascertain who are the parties concerned—*Pandurang*, 24 Bom 527 (532, 533).

The words "parties concerned" should not be so narrowly construed as to mean only the persons actually disputing but should be extended to persons who are concerned as claiming to be in possession. Had it been intended to confine the proceeding to the actual disputants, the Legislature would have used the words 'parties disputing' instead of the words 'parties concerned'—*per Hill, J.*, in *Krishna Kamini v Abdul Jubbar*, 30 Cal. 155 (F.B.) at p 198. For a person to be concerned in a dispute relating to land, it is not necessary to be actually present near the land or to have notice of the proceeding when taken—*Manmotha v Ganga*, 20 C.W.N. 978, 17 Cr.L.J. 449, 36 I.C. 129. Proceedings under this section are not without jurisdiction merely because some of those persons (*i.e.* persons claiming to be in possession) are not likely to cause a breach of the peace—*Abadi Begam v Mirza Ahmed*, 11 O.L.J. 777, 1 O.W.N. 433, A.I.R. 1925 Oudh 190, 82 I.C. 691. Although a person is not one of the parties to the dispute but is in possession of a part of the land, he is a party to the proceedings and should be asked to file a written statement—*Ram Lakshan v Ram Lakshan*, 26 Cr.L.J. 630, 85 I.C. 918, A.I.R. 1925 Oudh 421, 17 Cr.L.J. 1073. Under this section are not without jurisdiction because some of the parties are interested only with possession of a portion of the lands in dispute—*Narayan v Chandrabhaga*, 26 Cr.L.J. 1289 (1291), 89 I.C. 153, A.I.R. 1925 Nag 457.

It was held in several Calcutta cases that the words 'parties concerned' in this section meant not only the persons who were actually disputing but also the persons interested in or claiming a right to the property in dispute, and the Magistrate was bound to ascertain those persons and to give notice to them all so that the whole matter, so far as his Court was concerned, might be disposed of in one proceeding—*Ram Chandra v. Monohur*, 21 Cal. 29 (32); *Laldhari v. Sukdeo*, 27 Cal. 892 (904); *Gobind Chandra*, 20 Cal. 520 (527); *Ganesh v. Ayubul*, 4 C.W.N. 753; *Mangal v. Naimuddi*, 6 C.W.N. 101. But these cases must be deemed to have been overruled by the Full Bench case of *Krishna Kamini v. Abdul Jabbar*, 6 C.W.N. 737, 30 Cal. 155, in which Prinsep, C.J., referring to the above case, made the following remarks (at pp. 183, 184) :—"The reported cases seem to have proceeded on the ground that proceedings under sec. 145 should be regulated on the same principles as if the Magistrate were trying a civil suit involving a right to possession, and that unless all persons having any possible claim are made parties to those proceedings, they are bad for want of jurisdiction. But the law does not require this, nor is it the object of proceedings under sec. 145 that the Magistrate should deal with the matter before him as if he were acting as a Civil Court. . . . It may be very desirable that such parties (*ie.*, the parties who may be interested in, or may have a claim to the property in dispute) should be heard, so as to avoid a possible injustice by determining in their absence an issue which may affect their rights. But the law nowhere declares that such person is entitled to come into the proceedings and that the refusal of the Magistrate to hear him amounts to a refusal to exercise jurisdiction under the law. The object in view is to prevent a breach of the peace between certain parties found to be in dispute by determining the subject-matter of that dispute, not the determination of actual possession or a right to possession in regard to all persons who may possibly be concerned in such a matter." In the same case, Hill, J., observed (at pp. 195, 196) : "The scope of the inquiry under this section is confined to the fact of actual possession irrespective of the merits of the claim of the parties concerned. A claim merely to a right to possession as distinguished from a claim to be in possession, would be outside the scope of the inquiry. . . . To require the Magistrate to ascertain who are the persons interested in or claiming a right to the property in dispute would be to impose on him in some cases an almost impossible task, and would undoubtedly have the effect of unduly prolonging and greatly embarrassing his proceedings and of depriving them altogether in many instances of their summary character." See also *Bhuneshwar Prasad*, 37 Cr.L.J. 886, 164 I.C. 180, A.I.R. 1936 All 531, 1936 A.L.J. 796, 9 R.A. 119, 1936 Cr.C. 673; *Md. Mahdisha v. Wahdaishah*, 26 Cr.L.J. 1292, 89 I.C. 156, A.I.R. 1926 Sind 53.

The Madras High Court, however, is of opinion (following the old Calcutta cases) that the words 'parties concerned' include persons who are interested in or claim a right to the property in dispute—*Kuppayyar*, 18 Mad. 51; *Nagoji v. Subbarayulu*, 5 L.W. 118, 18 Cr.L.J. 44.

Landlords, tenants :—Where in a dispute concerning the ownership and possession of land between a zemindar as well as his tenants on one side, and another Zeminder as well as his tenants on the other (so that the dispute was of a dual character), the Zeminders were made parties, but the tenants were not, it was held that the presence of the tenants was essentially necessary for the proper and effectual decision of the case, and the omission to join them as parties was illegal and without jurisdiction—*Laldhari v. Sukdeo*, 27 Cal. 892, 4 C.W.N. 613. Where the dispute existed only among the tenants of the rival Zeminders, and the Zeminders not being concerned in the dispute did not move in the matter themselves, the omission to add the Zeminders as parties to the dispute would not vitiate the proceedings—*Manik v. Govind*, 6 C.W.N. 206. See also *Muhammad Araf v. Satramdas Sakhimal*, 37 Cr.L.J. 1030 (1032), 164 I.C. 969, A.I.R. 1936 Sind 143, 9 R.S. 60, 1936 Cr.C. 859. Where the dispute lay between the two rival lessees who were before the Court and who claimed to be in actual possession and there was nothing to show that there was any other

party who also claimed to be in actual possession there was no defect in the proceeding although no notice was served on the co-sharers who leased the disputed plot to them—*Bhuneswar Prasad*, 37 Cr.L.J. 886, 164 I.C. 180, A.I.R. 1936 All. 531, 1936 A.L.J. 796, 9 R.A. 119, 1936 Cr.C. 673. Where the Zeminders on both sides claim possession through their respective tenants, the presence of the rival tenants is necessary and they must be made parties. The order passed in favour of one tenant as against the other is a good and valid order—*Gurudas v. Kedarnath*, 38 Cal 889, 15 C.L.J. 184, 12 Cr.L.J. 408, 11 I.C. 592. The essence of proceedings under this section is the determination of the question who is in possession. No doubt a Magistrate is entitled to rescind a preliminary order under this section if he is satisfied that no likelihood of a breach of the peace exists, but in discharging parties to the proceedings who claim to be in possession on the ground that they claim to be in possession as tenants only under some of the parties and are, therefore, not necessary parties, the Magistrate is acting with great irregularity and in a manner not contemplated in the provisions of the section; he is in fact envisaging a decision on the question who has the right to possession, which is a matter for a Civil Court and not for a Criminal Court at all. To say that tenants in possession are not necessary parties is to preclude persons who claim to be in possession from giving evidence that they are in possession—*Nagarmal Rudmal Agarwal v. Rudmal Gangabisan Agarwal*, 38 Cr.L.J. 395, 167 I.C. 500, 9 R.N. 188, I.L.R. 1937 Nag 288, A.I.R. 1937 Nag 93.

Where the disputed land consisted of several plots of land all held by tenants on a yearly rent of half the produce, and the parties to the proceedings were the *lakhirajdar* and the *patnidar*, the dispute between whom was as to the right to collect rent, and it appeared that as regards some of the plots there was a dispute as to what tenants were in possession, it was held that as regards the plots about which there was a dispute as to what tenants held the lands, the Magistrate should not have passed any order in the absence of the tenants, because they might be very seriously prejudiced by an order in favour of one or other of the parties to those proceedings—*Harj Das v. Abdul*, 19 C.W.N. 959, 16 Cr.L.J. 590.

Section 145, Cr. P. C., equally covers the cases of dispossession of the tenants by their landlords. The question of title does not arise before the Magistrate making an inquiry under sec 145, Cr. P. C. He is concerned with the question of possession in such proceedings—*Mohammad Ali v. Ladha*, A.I.R. 1938 Lah 122, 39 P.L.R. 775, 173 I.C. 352, 39 Cr.L.J. 297.

Agent, Manager or Servant.—The person in possession of land merely as agent or manager is not a party concerned within the meaning of this section—*Brown v. Prithiraj*, 25 Cal 423; *Jhabu v. Rutherford*, 7 C.W.N. 208; *Newaz v. Rambullubh*, 21 Cal. 916 (Note). Where the person in whose favour an order was made under this section regarding a dispute as to the right to dig coal in a certain mouza, was merely the manager of the coal company claiming the property, held that the possession of such person was not one as contemplated by this section, and the order was bad, as the parties really interested were not before the Court—*Behary Lal v. Darby*, 21 Cal. 915. An order passed against servants without their masters being on the record, is one made without jurisdiction—*Nagoji v. Subbarayulu*, 5 L.W. 118, 18 Cr.L.J. 44; *Peare Lal*, A.I.R. 1934 All 853, 1934 Cr.C. 1043, 1934 A.L.J. 630, 4 A.W.R. 896, A.I.R. 1934 All 622, 152 I.C. 500, 36 Cr.L.J. 114. Section 537, Cr. P. C., does not cure the irregularity committed by the Magistrate in omitting to implead the masters by name—*Peare Lal*, supra. But if the actual proprietors are not resident within the jurisdiction of the Magistrate, an order under this section can be made in favour of the person who claims to be in possession as agent or manager of the proprietors—*Dhondai v. Follet*, 31 Cal 48, 7 C.W.N. 825 (F.B.). If both the master and the servant are resident within the Magistrate's jurisdiction, the master must be made a party to the proceedings—*Jubahan v. Bansrup*, 6 C.L.R. 193.

In *Bholanath v. Wood*, 32 Cal 287 and *Chhakauri v. Ishar*, 6 P.L.T. 799, 27 Cr.L.J. 142 (143), 91 I.C. 814, however, it was held that where the Magistrate made

the manager a party to the proceedings instead of the proprietor, who was resident within the Magistrate's jurisdiction, the course adopted by the Magistrate was a mere irregularity or at most an error of law, which did not vitiate the proceedings.

Receiver :—Where the land in dispute is in the possession of a receiver appointed by a Civil Court, his possession is the possession of the Court. Such an officer cannot be described as a party interested in a dispute under section 145. Even if such officer can be so described, there will be no jurisdiction in the Magistrate to make any order on him under this section without the sanction of the Court appointing him—*Dunne v. Chandra Kishore*, 30 Cal. 593, 7 C.W.N. 390. In a dispute between the old and the new tenants of an estate, the receiver who granted new leases to the new tenants and who himself was not in actual possession, was not a proper party to the proceedings—*Chinna Veeranna v. Narayanaswamy*, 9 M.L.T. 502, 12 Cr.L.J. 185, 9 I.C. 1009.

Liquidator :—If the liquidator or his servants are responsible for creating a breach of the peace, proceedings may be instituted against him under this section. Such proceedings cannot be said to be instituted against the company, and consequently the leave of the Company Court under sec. 171, Companies Act is not necessary—*S. N. Mukherjee v. Krishna Dasi*, 37 C.W.N. 932 (934), 34 Cr.L.J. 640, 1933 Cr.C. 705, A.I.R. 1933 Cal. 433, 143 I.C. 795, Ind. Rul. 1933 Cal. 484.

Reversioner :—A person who is the next reversioner to the estate is not a person concerned in the dispute, and is not a necessary party because he has no right to present possession—*Behari Lal*, 24 All 443.

Minor :—A minor who is interested in the dispute is a proper party, but he is not a necessary party as he is not a party likely to cause a breach of the peace. Non-service of notice on the minor does not invalidate the proceedings—*Nandan v. Siaram*, 7 P.L.T. 156, 26 Cr.L.J. 1287, 89 I.C. 151, A.I.R. 1926 Pat. 67.

Community :—Where there is a dispute between two communities, the Magistrate is justified in selecting persons who should represent each community, and after hearing them he should either permit a community to do a certain thing or prevent it from doing it, till a Civil Court has decided upon the rights of the parties—*Nanke v. Jamil-ur-Rahman*, 23 A.L.J. 41, 26 Cr.L.J. 683 (684), 86 I.C. 59, A.I.R. 1925 All 316.

400. Non-joinder of parties :—Questions of misjoinder or non-joinder of parties do not ordinarily go to the jurisdiction. Such questions as whether A ought to have been added as being a person likely to be affected by the proceeding or B omitted as not being concerned in it, or whether C was added at too late a stage, are questions of procedure by which the jurisdiction of the Magistrate is not affected—*Krishna Kamini v. Abdul*, 30 Cal. 155 (200), 6 C.W.N. 737 (F.B.); *Nandan v. Siaram*, 7 P.L.T. 156, 26 Cr.L.J. 1287, 89 I.C. 151, A.I.R. 1926 Pat. 67; *Moiram Bewah v. Mrijan Sarder*, 24 C.W.N. 97, 21 Cr.L.J. 25, 47 Cal. 438. Therefore, proceedings under this section are not without jurisdiction, because some person claiming to have possession of portions of lands in dispute has not been made a party, when he was not one of the parties in the dispute so far as appeared from the information on which the Magistrate acted, and when such person does not appear and raise any objection. And further, proceedings under this section are not without jurisdiction merely because the parties that have been joined are concerned only with possession of portions of the land in dispute—*Krishna Kamini v. Abdul*, 30 Cal. 155, 6 C.W.N. 737 (F.B.); *Sajani Kanta v. Shamsheer Ali*, 24 Cr.L.J. 235, 71 I.C. 699; *Narayan v. Chandrabhaga*, 26 Cr.L.J. 1289, 89 I.C. 153, A.I.R. 1925 Nag. 457.

But non-joinder of persons concerned in a dispute, whose presence is essentially necessary for the purpose of a proper decision of the case, involves a question of jurisdiction, and the High Court has power to set aside an order made in a proceeding in which such persons are not made parties—*Anesh Mollah v. Ejaharuddi*, 28 Cal. 446, 5 C.W.N. 428. In this case the High Court set aside the order of the Magistrate as the Zamindars, who were alleged to be trying to do away with the first party's

possession by means of persons to whom they had given *pottahs*, in other words, the second party, were not impleaded as parties in the proceedings

In a case of co-sharer landlords possession of one is the possession of all and one set is capable of representing the entire body in a proceeding under sec. 145, Cr. P. C.—*Raja Gope v. Sukan Singh*, AIR. 1939 Pat. 353, 1939 P.W.N. 64, 20 P.L.T. 145, 183 I.C. 286, 5 B.R. 894, 12 R.P. 120, 40 Cr.L.J. 749

401. Addition of parties:—It was held in *Protap Narain v. Rajendra Narayan*, 24 Cal 55 (F.B.) that a Magistrate had not power to add parties after the initiation of proceedings under this section, and that if in the course of the proceedings it appeared to the Magistrate that it was absolutely necessary that other persons should be required to attend and he was satisfied that they were concerned in the dispute, the only course open to him was to initiate a *new* proceeding

But this case was decided under sec. 145 of the old Code of 1882, in which sub-section (3) regarding the service and publication of notice did not exist. The opinion of the above Full Bench case cannot now be regarded as binding authority. Sub-section (3) has been enacted not simply for the purpose of regulating the issue and service of notice, but it is also intended to empower the Magistrate, after he has issued the order provided for by sub-section (1) to the persons claiming to be in possession, to bring in any other persons whom from subsequent information it may seem to him proper to have before him—*Krishna Kamini v. Abdul Jubbar*, 30 Cal 155 (197, 199), 6 C.W.N. 737 (F.B.) And the addition of those persons does not put an end to the original proceeding, nor requires the initiation of any fresh proceeding—*Ibid* (at pp 192, 193, 201).

The Magistrate has very wide powers with respect to the persons whom he will bring into the proceeding. He may alter or add to the array of parties either of his own motion or on the application of any one claiming to be concerned in the dispute (*i.e.*, claiming to be in possession). But the Magistrate can add parties at any time *up to the commencement of the inquiry* under sub-section (4). The section contains no provision for the addition of parties *after* the commencement of the inquiry. The power conferred on the Magistrate by sub-section (3) of summoning such persons as he deems proper, and the means prescribed by the same clause for giving publicity to the proceeding, provide a sufficient guarantee that before the actual inquiry is entered upon, all parties really concerned will either have been summoned to attend the proceedings or will have had the opportunity of doing so afforded them if they care to avail themselves of it. It would lead to much inconvenience and delay if any one claiming to be concerned in the dispute is allowed to come in and join in the proceedings *after* the commencement of the inquiry. It would probably be necessary in such a case to start the inquiry afresh, as the party added would have a right to have the evidence taken in his presence, and if several claimants successively were to come in this way, it is evident that the proceeding might be indefinitely prolonged—*per Hill, J.*, in *Krishna Kamini v. Abdul*, 30 Cal 155 (198, 199), 6 C.W.N. 737. The same Judge again remarked in the same case (at p 201) —“If parties are added after the inquiry has begun, I do not think that it would be necessary, in consequence, to initiate fresh proceedings, but evidence previously taken ought, if the parties so added require it, to be again taken in their presence.” See also *Manmotha v. Ganga*, 20 C.W.N. 978 (1981), 17 Cr.L.J. 449, 36 I.C. 129

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A Magistrate has no authority to issue a warrant to compel the attendance of a party in a proceeding under this section—*Kafatulla v. Feruzuddin*, 5 C.W.N. 71 (72).

the manager a party to the proceedings instead of the proprietor, who was resident within the Magistrate's jurisdiction, the course adopted by the Magistrate was a mere irregularity or at most an error of law, which did not vitiate the proceedings.

Receiver :—Where the land in dispute is in the possession of a receiver appointed by a Civil Court, his possession is the possession of the Court. Such an officer cannot be described as a party interested in a dispute under section 145. Even if such officer can be so described, there will be no jurisdiction in the Magistrate to make any order on him under this section without the sanction of the Court appointing him—*Dunne v. Chandra Kishore*, 30 Cal. 593, 7 C.W.N. 390. In a dispute between the old and the new tenants of an estate, the receiver who granted new leases to the new tenants and who himself was not in actual possession, was not a proper party to the proceedings—*Chinna Vectanna v. Narayanaswamy*, 9 M.L.T. 502, 12 Cr.L.J. 185, 9 I.C. 1009.

Liquidator :—If the liquidator or his servants are responsible for creating a breach of the peace, proceedings may be instituted against him under this section. Such proceedings cannot be said to be instituted against the company, and consequently the leave of the Company Court under sec. 171, Companies Act is not necessary—*S. N. Mukherjee v. Krishna Dasi*, 37 C.W.N. 932 (934), 34 Cr.L.J. 640, 1933 Cr.C. 705, A.I.R. 1933 Cal. 433, 143 I.C. 795, Ind. Rul. 1933 Cal. 481.

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possession by means of persons to whom they had given *pottahs*, in other words, the second party, were not impleaded as parties in the proceedings.

In a case of co sharer landlords possession of one is the possession of all and one set is capable of representing the entire body in a proceeding under sec 145, Cr. P. C.—*Raja Gope v Sukan Singh*, AIR. 1939 Pat 353, 1939 P.W.N. 64, 20 P.L.T. 145, 183 I.C. 286, 5 B.R. 894, 12 R.P. 120, 40 Cr.L.J. 749.

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But this case was decided under sec 145 of the old Code of 1882, in which sub-section (3) regarding the service and publication of notice did not exist. The opinion of the above Full Bench case cannot now be regarded as binding authority. Sub-section (3) has been enacted not simply for the purpose of regulating the issue and service of notice, but it is also intended to empower the Magistrate, after he has issued the order provided for by sub-section (1) to the persons claiming to be in possession, to bring in any other persons whom from subsequent information it may seem to him proper to have before him—*Krishna Kamini v Abdul Jubbar*, 30 Cal 155 (197, 199), 6 C.W.N. 737 (F.B.) And the addition of those persons does not put an end to the original proceeding, nor requires the initiation of any fresh proceeding—*Ibid* (at pp 192, 193, 201).

The Magistrate has very wide powers with respect to the persons whom he will bring into the proceeding. He may alter or add to the array of parties either of his own motion or on the application of any one claiming to be concerned in the dispute (i.e., claiming to be in possession). But the Magistrate can add parties at any time *up to the commencement of the inquiry* under sub-section (4). The section contains no provision for the addition of parties *after* the commencement of the inquiry. The power conferred on the Magistrate by sub-section (3) of summoning such persons as he deems proper, and the means prescribed by the same clause for giving publicity to the proceeding, provide a sufficient guarantee that before the actual inquiry is entered upon, all parties really concerned will either have been summoned to attend the proceedings or will have had the opportunity of doing so afforded them if they care to avail themselves of it. It would lead to much inconvenience and delay if any one claiming to be concerned in the dispute is allowed to come in and join in the proceedings *after* the commencement of the inquiry. It would probably be necessary in such a case to start the inquiry afresh, as the party added would have a right to have the evidence taken in his presence, and if several claimants successively were to come in this way, it is evident that the proceeding might be indefinitely prolonged—*per Hill, J.*, in *Krishna Kamini v. Abdul*, 30 Cal. 155 (198, 199), 6 C.W.N. 737. The same Judge again remarked in the same case (at p 201).—"If parties are added *after* the inquiry has begun, I do not think that it would be necessary, in consequence, to initiate fresh proceedings, but evidence previously taken ought, if the parties so added require it, to be again taken in their presence." See also *Manmotha v. Ganga*, 20 C.W.N. 978 (1981), 17 Cr.L.J. 449, 36 I.C. 129.

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402. 'His Court':—This means the Court of the Magistrate who issued the preliminary order. A preliminary order issued by a Magistrate directing the parties to appear before *another* Magistrate is illegal—*Misri v. Narasing*, 2 P.L.T. 186, 22 Cr.L.J. 483.

A Magistrate has no authority to issue a warrant to compel the attendance of a party in a proceeding under this section—*Kafatulla v. Feruzul*, C.W.N. 71 (72).

403. Written statement:—The statement made by a party in a written statement filed under this section ought to be proved like any other statement, and therefore, a Magistrate is not competent to pass an order in favour of a party merely on the strength of his written statement—*Kefatulla v. Feruzuddin*, 5 C.W.N. 71. See also *Najem v. Jamalali*, 12 C.W.N. 771, 8 Cr.L.J. 27. An order based on the written statement of one of the parties, and upon the failure of the other party to file his statement, without some evidence on the part of the party filing the statement in support of it, is without jurisdiction—*Gobind v. Nibaran*, 8 C.W.N. 642.

The Magistrate should take written statements from all parties. The object of this section is to put an end to disputes as to possession. The object cannot be gained until all the contending parties are on the record and an opportunity is given to them to put forward their respective claims—*Raghunath v. Rajkishore*, 5 P.L.T. 458, 25 Cr.L.J. 906, 2 Pat.L.R. 104 (Cr.), A.I.R. 1924 Pat. 509. The mere fact that a party did not put in a written statement, would not take away the jurisdiction of the Magistrate to proceed with the case. It is incumbent on the Magistrate to make the inquiry and to take such evidence as the parties offer, irrespective of the fact that one or other of the parties failed to put in a written statement; he has to take evidence if offered by any of the parties and to decide the case upon such evidence—*Ramjharia v. Piar Koeri*, 4 P.L.T. 308, A.I.R. 1923 Pat. 369, 24 Cr.L.J. 557; *In re Goluck Chunder*, 11 W.R. 9.

Granting time :—Although a Magistrate has a discretion to refuse an application for time to file a written statement—*Gobind v. Nibaran*, 8 C.W.N. 642; *Piziruddin v. Totajannessa*, 14 Cr.L.J. 302, 19 I.C. 958 (Cal.); still he ought to grant time to enable the party to file it. Therefore, where on the day appointed for hearing, the parties although present filed no written statement nor produced any evidence, and the Magistrate refusing to grant time heard the parties and being unable to satisfy himself as to which of them was in possession, attached the property under section 146, it was held that the Magistrate ought to have granted time to allow regular proceedings to be followed—*Sh. Mansar Ali v. Matiullah*, 12 C.W.N. 896. See also *Pedda Giddasani v. Achigadu*, 1938 M.W.N. 824, 178 I.C. 251. But where neither party filed written statements or adduced evidence but both of them applied for time and, an interval of more than two months having elapsed, the Magistrate passed an order under sec. 146, Cr. P. Code, such an order was not without jurisdiction—*Bijoy v. Chandra*, 14 C.W.N. 80.

The very object of the proceeding under this section is to put an end to disputes as to possession of immoveable properties so as to prevent a breach of the peace. This object cannot be gained until all the contending parties are on the record and an opportunity is given to them to put forward their respective claims. The effect of the order of the Magistrate rejecting written statement of a party is that his decision under this section will not be binding upon them. The High Court, therefore, allowed the written statement to be filed in such a case where the Magistrate rejected it—*Raghunath v. Rajkishore*, 25 Cr.L.J. 906, 81 I.C. 442, 5 P.L.T. 458, A.I.R. 1924 Pat. 783.

The parties cannot be called on in proceedings under this section to furnish a statement of their rights—*In re Pandurang*, 25 Bom 179 (185).

404. Actual possession:—The possession contemplated by this section is the actual possession of the subject of dispute. The power or competency of the Magistrate to interfere depends upon the very fact that the possession of the land is in dispute—*Rajendra v. Md. Arzumand*, 9 C.W.N. 887, 2 Cr.L.J. 408, 1 C.L.J. 331. The possession in regard to which the Magistrate's jurisdiction under this section should be exercised must be of a real and tangible character—*Bijoy Nath v. Bengal Coal Co Ltd*, 23 W.R. 45 (48).

Actual possession means actual physical possession; it means the possession of the person who has his feet on the land, who is ploughing it, sowing or growing crops in it, entirely irrespective of whether he has any right or title to possess it. Actual possession

is not the same as a right to possession nor does it mean lawful or legal possession. This is clear from sub-section (4), for the Magistrate is not to determine who has a right to possess—*Ambar Ali v. Piran Ali*, 55 Cal 826, 32 C.W.N. 275 (280), 29 Cr.L.J. 503, 109 I.C. 231, A.I.R. 1928 Cal. 344, 47 C.L.J. 233; *Penumatsa Ranga Razu v. Zamindar, Gazzavaram*, 39 Cr.L.J. 922, 177 I.C. 584, 11 RM 346, 1938 M.W.N. 252, 47 M.L.W. 340, A.I.R. 1938 Mad 654, (1938) 1 M.L.J. 453. It is clear from the provisions of sec 145, cl. (1) and cl. (4) that what the Magistrate is concerned with in proceedings relating to disputes as to immovable property under Chap 12, Cr. P. C., is not the rights to possess the subject-matter of dispute but the actual possession thereof at the date of the order under cl. (1), sec. 145. The expression 'actual possession' is plain and unambiguous and has no reference to any right to possess. In *Agni Kumar Das v. Mantazaddin*, A.I.R. 1928 Cal. 610, 113 I.C. 181, 30 Cr.L.J. 69, 56 Cal 290, 32 C.W.N. 1173, 48 C.L.J. 193, a Full Bench of the Calcutta High Court held that the words 'actual possession' in sub-sec. (1) of sec. 145, Cr. P. Code mean actual physical possession, even though wrongful, e.g., that of a recent trespasser in actual possession at the time of the proceedings under sec 145—*Rahimallah v. Emp.*, A.I.R. 1940 Sind 61 (62), 41 Cr.L.J. 493 (494), 187 I.C. 627. The only point for determination is who was in possession at the time of the preliminary order. It does not matter whether such possession was wrongful or not. Actual possession is all that matters, subject of course to proviso 1, sub-sec. (4), sec. 145, Cr. P. Code—*Abdul Latif v. Mohd Masud Khan*, A.I.R. 1936 Nag 3, 18 N.L.J. 100, 1936 Cr.C. 34. See also *China Tambi v. Virappa*, A.I.R. 1937 Rang 202, 38 Cr.L.J. 805, 169 I.C. 939. It is not the duty of the Court in proceedings under sec. 145 to declare who is entitled to possession, the declaration must be as to who is actually in possession and entitled to remain in possession till a decision is given by a competent Court—*Sabda v. Kushal*, 27 Cr.L.J. 784, 95 I.C. 320, 7 P.L.T. 873. See also *Suraj v. Tullock*, 33 C.W.N. 574, A.I.R. 1929 Cal 632.

By actual possession is meant not merely bodily possession but the possession of a master by his servant, or the possession of a landlord by his immediate tenant, or the possession of the person who has the property in the land by the usufructuary—*Sutherland v. Crowdy*, 18 WR 11 (13).

Whether the possession is on behalf of others or in one's own right is quite irrelevant. This section is concerned solely with the fact of actual possession whether lawful or unlawful, whether in contemplation of law enjoyed by the possessor in his own right or on behalf of others—*Narayana v. Kandasami*, 3 L.W. 164, 16 Cr.L.J. 525; *Taruja v. Asamuddi*, 4 C.W.N. 426.

There is no authority to show that a servant can set up that possession by him for his master or superior is his own possession, or that the master or superior cannot set up that that possession is his own, though exercised for him by the servant—*Perumal v. Tirumalai*, 34 Cr.L.J. 88, 140 I.C. 900, 1932 M.W.N. 1079, Ind. Rul. 1933 Mad 63, 37 M.L.W. 143, A.I.R. 1933 Mad 245, 1933 Cr.C. 344. See also A.I.R. 1923 Mad. 60, 43 M.L.J. 624, 1922 M.W.N. 629, 16 M.L.W. 497 which lays down that the possession of a manager cannot be protected under this section against his master against whom he rebels.

Where the Magistrate restrained both the parties from exercising acts of possession over the disputed property under section 144, Cr. P. Code, and subsequently started proceedings under sec 145, Cr. P. Code, held that no evidence could be offered to show the possession of either party for the period during which the order under sec 144 was in force before the date of the preliminary order under sec 145, cl. (1), and that the Magistrate was consequently obliged to ascertain the possession immediately before the order under sec. 144 and to regard his intervention as an attachment suspending the previous possession whatever it might be, holding at the same time that the former possession continued, and although the lawful exercise of its rights had been forbidden for a time, the possession has never ceased to exist—*Joyanti Kumar v. J. B. Middleton*,

4 C.W.N. 562, 27 Cal. 785. See also *Saddique v. Mohid*, 32 Cr.L.J. 208, 129 I.C. 85, A.I.R. 1930 Pat 556, Ind. Rul. 1931 Pat. 69, 1930 Cr.C. 1110.

Possession of landlord by receiving rent from tenants is actual possession under this section—*Narain Das*, 1884 P.R. 19; *Nobin Chunder v. Jogendranath*, 25 W.R. 18; *Mahesh*, 11 O.L.J. 743, 26 Cr.L.J. 398, 1 O.W.N. 549, A.I.R. 1925 Oudh 251. The fact that the tenants attorn to strangers by payment of rent to them, does not terminate the tenancy so as to put an end to possession of the landlord, and deprive him of his right to have recourse to this section in case of a likelihood of a breach of the peace, and to have his possession of the right to collect rent maintained—*Sarbananda v. Pransankar*, 15 Cal 527 (531). A lambardar who is in management of a village for the benefit of the three co-sharers of the village and who is himself a co-sharer, must be deemed to be in possession under this section—*Ramdai v. Parbati*, 1890 A.W.N. 178. See also A.I.R. 1922 Oudh 199, 23 Cr.L.J. 650.

In a proceeding under this section in respect of a tract of land a portion of which was admittedly in possession of tenants who had attorned to some of the second party, which party included these tenants, the Magistrate declared the possession of the first party in respect of the whole of the disputed property. Held that so far as the lands in the possession of the tenants were concerned, the possession of the first party must be declared through those tenants—*Suraj v. Tullock*, 33 C.W.N. 574, A.I.R. 1929 Cal 632.

The possession contemplated by this section is absolute, *continuing* and not occasional possession. Where the petitioners claim possession of a market stall for only one day in the week, this section is inapplicable—*Nayan Manjari v. Fasley Haq*, 71 I.C. 527, 49 Cal 871, 24 Cr.L.J. 175, A.I.R. 1922 Cal. 502. So also, where one of the parties claimed only the right to worship on the disputed land on only one day in the year and the right to make preparations for the holding of that worship by erecting huts for the purpose of holding *pujah*, held that such right was in the nature of an *easement* and not in the nature of possession, and proceedings under this section could not be taken as this section contemplates absolute continuing possession of either party—*Manik Chandra v. Preo Nath*, 17 C.W.N. 205, 13 Cr.L.J. 789, 17 C.L.J. 397, 17 I.C. 533. But it is not intended that possession must be such as should be exercised every day of the year. Continuity of possession should be understood with reference to the object over which it is exercised. By continuous possession is meant such possession which a party in possession may have occasion to exercise and has exercised and exercises whenever he likes. With respect to lands which are fallow and liable to be submerged possession must be presumed to be with the owner until the contrary is proved. Occasional acts of user of such land by the owner constitute possession for the purpose of this section—*Loke Nath v. Bazil Gani*, 31 C.W.N. 334, 28 Cr.L.J. 343, A.I.R. 1927 Cal. 313.

See also Note 399, paragraph 3.

Wrongful possession :—The words “actual possession” mean actual physical possession even though *wrongful*, e.g., that of a recent trespasser in actual physical possession at the time of the proceedings—*Agni Kumar v. Mantazaddin*, 56 Cal 290, 32 C.W.N. 1173, 30 Cr.L.J. 69, A.I.R. 1928 Cal 610, 113 I.C. 181, 48 C.L.J. 193 (F.B.); *Raj Nandan v. Chhedi Thakur*, A.I.R. 1932 Pat. 185, 1932 Cr.C. 418, 142 I.C. 157, 34 Cr.L.J. 259, 13 P.L.T. 178; *Abdul Lalif v. Mohd. Masud Khan*, A.I.R. 1936 Nag. 3, 1936 Cr.C. 34, 18 N.L.J. 100; *Rahimalishah v. Emp.*, A.I.R. 1940 Sind 61, 41 Cr.L.J. 493, 187 I.C. 627; *Ambar Ali v. Piran Ali*, 55 Cal. 826, 32 C.W.N. 275 (280); *Shriram v. Samirmal*, 24 N.L.R. 148, 29 Cr.L.J. 902 (904), A.I.R. 1928 Nag. 284, 111 I.C. 662. The Magistrate's duty is to determine actual possession and not whether the possession is rightful or wrongful—*In re Sangnbasawa*, 7 Bom.L.R. 18, 2 Cr.L.J. 28; *Sriram v. Samirmal*, 24 N.L.R. 148, 29 Cr.L.J. 902 (903). The possession referred to in this clause is actual possession at the time of the initiation of proceedings and not possession at the date of the Magistrate's order. Therefore, possession, though obtained by wrong-

ful means, but complete at the time of inquiry, is actual possession within the meaning of this section—*Gauhar*, 5 P.R. 1897. See *Sabda v Kusha*, supra.

Origin of possession.—A Magistrate ought to inquire into the question as to who is in actual possession of the property in dispute; he has no concern as to how the party obtained possession, provided that the possession dates more than two months prior to the date of the preliminary order—*Ambler v. Pushong*, 11 Cal 365.

Actual possession, what is not :—Possession by tenant is not possession of landlord in cases where there is a dispute between the tenant and the landlord as to the fact of possession—*Baboo Reddi v. Kullappa*, 2 Weir 107. Also, in case of dispute between two rival zemindars, constructive possession through intermediate holders (e.g., *ticcadars*) to whom the ryots pay rents, is not contemplated by this section—*Thacoor Dayal*, 3 Cal. 320. This section does not contemplate the possession of a superior landlord to whom the occupier of the lands does not pay rent. It contemplates the possession of a landlord by his immediate tenant, i.e., the person who pays rent to him—*Sutherland v Crowdy*, 18 W.R. 11 (13), 9 B.L.R. 229.

The possession contemplated by this section is a real tangible possession; therefore, where a party claims under a document or agreement the right to do certain things over a large extent of territory, the performance of acts under such alleged right in one portion of the ground, is not of itself a sufficient possession in respect of a distant locality—*Bejay Nath v Bengal Coal Co*, 23 W.R. 45 (48). So also, the mere purchase at an execution sale, without delivery of possession, does not amount to possession of the property purchased, and the rights of the purchaser will not be protected by this section—*Ragava Aiyanger v Krtshnasamy*, 31 Mad 416, 8 Cr.L.J. 312. The possession given by Amin in butwara proceedings is simply one of ownership, and not of occupancy, and is not contemplated by this section—*Mackenzie v. Shere Bahadoor*, 4 Cal. 378 (379).

A succession certificate only authorises the holder to collect the debts of the deceased and is no bar to the Magistrate maintaining another party in possession of the lands belonging to the deceased—*Seetaram v. Roy Sheo Golam*, 18 W.R. 34.

Possession of forest land —In a dispute regarding forest land, the right to possession of which was exercised by cutting timber from time to time and removing the timber upon a certain price being paid for, it is necessary to inquire as to who was in undisturbed possession of the land in dispute by felling the trees and removing the same without objection on the occasion immediately preceding the time when the dispute arose, and whichever party be found to have been in possession on that occasion, should be presumed to have possession when the proceedings commenced—*Jagatkishore v Ashanulla*, 16 Cal 281. Where it was found that certain jungle lands were in the *khas* possession of the Zemindar, and the other party without claiming any easement or customary right, cut a few trees and encroached upon a small portion of the jungle, held that such intermittent encroachment did not oust the possession of the Zemindar—*Bhola Nath v Wood*, 32 Cal 287. Cf Sec 147 (2) proviso.

Possession of minerals —In proceedings under sec 145, Cr P C., it is possession that matters and not ownership. In the case of unworked minerals possession follows title and the owner of unworked minerals is in possession of them though he is not actually engaged in working them. He is in a position to work them when he so desires, and he can lease them to others who may work them. If the owner of unworked minerals under a defined area sinks a shaft and begins to work the minerals in that area, he can properly be said to be in actual physical possession of the whole of the minerals in that area. In the same way, if the owner of minerals under a defined area grants to third parties mining leases of the minerals under portions of such area, he exercises acts of ownership over those minerals and he can truly be said to be in possession of the whole of the minerals under that defined area. Others are in possession of the minerals at the places which are actually being worked by them—*Ranchi Zamindari Co. v Pratab Udainath*, A I.R. 1939 Pat 209, 40 Cr.L.J. 631, 18 Pat. 215, 20 P.L.T. 105, 182 I.C. 89, 1939 P.W.N. 72, 5 B.R. 711, 11 R.P. 657.

Permissive possession :—Possession contemplated by this section is possession based on a claim of right to possession. The possession of a person which is merely permissive cannot come within the purview of this section. Thus, the possession of an agent or servant which is permissive cannot give a party to a proceeding a *locus standi* as against his principal or master—*Nritta Gopal v. Chandi Charan*, 10 C.W.N. 1088, 4 Cr.L.J. 215; *Bajirao v. Dabidai*, 27 Cr.L.J. 212, 92 I.C. 164, A.I.R. 1926 Nag. 286. See also *Rahimalishah v. Emp.*, A.I.R. 1940 Sind 61 (62).

405. Joint possession :—If the contesting parties are in joint possession, then it is clear that no order can be made under sec. 145—*Gopala v. Krishnaswamy*, 54 I.C. 473, 21 Cr.L.J. 73, 27 M.L.T. 234, 11 M.L.W. 459; or under sec. 146—*Nand Kishore v. Kalika*, 24 Cr.L.J. 869, 75 I.C. 69, A.I.R. 1923 Pat. 546, 5 P.L.T. 45; *Shanti Prasad v. Emp.*, 1937 O.W.N. 214, 1937 A Cr.C. 37. Section 145 applies only to disputes about actual physical possessions and not to disputes about joint possession—*Wali Muhammad v. Rahamt Ali*, 29 Cr.L.J. 775 (777), 110 I.C. 807, A.I.R. 1928 Lah. 818. Section 145 contemplates a dispute between two parties, each of whom asserts that right to hold *exclusive* possession of the property as against the other and not a dispute between a party claiming to hold *joint* possession with another and the latter contesting such right. Such a dispute nearly always arises out of a claim to hold a specific share in the property, and this obviously is a matter which no Criminal Court can properly deal with. Therefore, where two parties are in joint possession (or entitled to joint possession) of the property in dispute, and one of them tries to evict the other so as to endanger the public peace, this section does not apply, and an order allowing one of the parties to be in possession till evicted by law is bad—*Tarujan v. Asamuddi*, 4 C.W.N. 426 (428); *Krishna v. Radhashyam*, 7 C.W.N. 118; *Dhani Ram v. Bholanath*, 1902 P.R. 23; *Makhan v. Barada*, 11 C.W.N. 512, 5 Cr.L.J. 296; *Shamlal v. Rajendra*, 1 P.L.T. 594, 21 Cr.L.J. 790; *Arjun v. Chandan*, 24 O.C. 167, 22 Cr.L.J. 625. The Patna High Court has taken a contrary view in *Nandkeshwar v. Sita*, 13 P.L.T. 609, 34 Cr.L.J. 115, 140 I.C. 902, A.I.R. 1932 Pat. 366, 12 Pat. 87, Ind. Rul. 1933 Pat. 35, 1932 Cr.C. 899 at p. 901 and *Rajkishore Nargin Singh v. Amirul Hasan*, 19 P.L.T. 211. The above view has also been followed by the Patna High Court in a recent case. It has been there held to be wrong to graft limitations upon the enactments which the Legislature has not placed there and that a case in which one party claims exclusive possession while another party claims to be in joint possession along with them is no less a question of disputed actual possession than if each party claimed exclusive possession of the entire area—*Zafar Ahsan v. Jugeshwar Bux Roy*, 41 Cr.L.J. 171 (172), 185 I.C. 346, A.I.R. 1940 Pat. 135, 1939 P.W.N. 855, following *Nandkeshwar v. Sita*, *supra*. It is true that when it has been found that the contesting parties are actually in joint possession no order should be made under this section. The position is different where one of the parties claims to have and is actually found to have exclusive possession adverse to the other party. The mere fact that the other party sets up a title to joint possession does not then render this section inapplicable—*Sheoprasad Shriram v. Govindram Hardit*, A.I.R. 1940 Nag. 265 (266), 1940 N.L.J. 375. It cannot be said that merely because the parties are brothers and presumably members of a joint Hindu family the Court should not give possession to one as against the other—*Jialal v. Chhangelal*, 28 Cr.L.J. 877, 104 I.C. 717, A.I.R. 1927 Oudh 316, 1 Luck. Cas. 201, 9 A.I.Cr.R. 43. Even in cases covered by joint possession where one party is by some arrangement actually in physical possession of a certain part of the property, the Magistrate would have jurisdiction to decide who was in actual possession of that part. Where there is actual physical possession of definable and demarcated property, action under this section can be taken—*Ramzan*, 35 Cr.L.J. 1384, 151 I.C. 728, A.I.R. 1934 Nag. 196, 1934 Cr.C. 895, 30 N.L.R. 300, A.I.R. 1934 Nag. 257; *Laxman v. Ganu*, A.I.R. 1935 Nag. 44, 17 N.L.J. 216, A.I.R. 1934 Nag. 217. A four-anna share in the annual produce of a mango grove cannot be held to be a specified or demarcated portion of it—*Laxman v. Ganu*, *supra*. A Magistrate has jurisdiction, under sec. 145, in the case of *ijmali* land, where each party claims to be in exclusive possession of specific

portions of the same—*Basanta v. Mahesh*, 40 Cal 982, 17 C.W.N. 944, 14 Cr.L.J. 269, 19 I.C. 541; *Dhani Ram v. Bhola Nath*, 23 P.R. 1902 (Cr.); *Dyawaappa*, 29 I.C. 66; *Mst. Malan v. Makhan Singh*, 2 Lah. 372, A.I.R. 1922 Lah. 348, 66 I.C. 65, 23 Cr.L.J. 225. This section is not intended to regulate the mode of enjoyment, and when the parties are jointly entitled, an order under sec. 145 should not be made—*Surb Narain v. Brij Mohan*, 23 Cal 80. Where the Magistrate passed an order to the effect that one party was in possession throughout the year, while the other was entitled to possession jointly with the former for a portion of that year, *held* that the order was beyond the scope of sec. 145 and was made without jurisdiction. The Magistrate was only authorised to decide which of the parties was in possession; he had jurisdiction only to find possession but not the mode of possession or how the possession was to be exercised—*Rohini Nandan v. Jadunandan*, 30 C.W.N. 873, 97 I.C. 78. The object aimed at by the Legislature is the prevention of a breach of the peace. This can be secured by asking one of the parties to keep away from the property. But where both parties have been in joint possession and are still prepared to commit a breach of the peace by trying to oust one another, it will not be in the interests of the preventive remedy that both should be maintained in possession. It will certainly not help to maintain order and peace. That is the reason why Courts have declined to declare the joint possession of the contending parties—*Mohammad Koolayappa v. Sheikh Abdul*, 27 M.L.J. 169, 15 Cr.L.J. 572. Even in such cases, the Magistrate is not competent to put one of the parties into possession; see *Makhan v. Barada*, *supra*. In a recent Allahabad case it has been held that in such a case the Magistrate should attach the property under sec. 146—*Chiranjiv v. Mahadeo*, 34 Cr.L.J. 480, 143 I.C. 54, Ind. Rul. 1933 All 168, 1932 A.L.J. 819, 1932 Cr.C. 938 (939), A.I.R. 1932 All 683. If there is a likelihood of a breach of the peace, proceedings should be taken to bind over either or both parties to keep the peace under sec. 107, Cr. P. C.—*Shanti Prosad v. Emp.*, 1937 O.W.N. 214, 1937 A.Cr.C. 37. But see *Venkataraman*, A.I.R. 1930 Bom 172, 32 Bom.L.R. 340, 125 I.C. 718, 31 Cr.L.J. 933 where hesitation was made to follow *Makhan v. Barada*, *supra*. Where it was found that the second party was in possession of the disputed land on behalf of the first party as also on behalf of himself, both parties being members of the same family, and the Magistrate declared the second party to be in possession, the order was without jurisdiction—*Kinu Mandal v. Haji Baul*, 23 C.W.N. 1051.

Where a dispute related to a definite plot of land, but the question was whether this plot was included in a piece of land which was in the exclusive possession of one of the parties or in another which was the joint property of both the parties in dispute, *held* that the Magistrate had jurisdiction to proceed under this section—*Mon Mohan v. Rajendra*, 7 C.W.N. 462.

See *Bande Ali Shaikh* in Note 420.

Where the case is one of exclusive possession claimed by each set of landlords through their respective tenants, the Magistrate has jurisdiction to pass an order in favour of one tenant against the other persons setting up their tenancy—*Gurudas v. Kedar Nath*, 38 Cal 889, 12 Cr.L.J. 408, 15 C.L.J. 184. And the fact that there may be a *joint title* to land, does not prevent the application of this section, if the Magistrate finds that possession is with one party—*Baynath v. Street*, 20 C.W.N. 518, A.I.R. 1917 Cal 404, 17 Cr.L.J. 251, 34 I.C. 971; *Malan v. Makhan Singh*, 2 Lah. 372, A.I.R. 1922 Lah. 348, 66 I.C. 65, 23 Cr.L.J. 225. The mere fact that the land is *shamilat* does not preclude the Court from making enquiry and taking proceedings under this section—*Gians*, 38 Cr.L.J. 123, 166 I.C. 71, A.I.R. 1936 Lah. 1015, 38 P.L.R. 332, 9 R.L. 334, 1936 Cr.C. 1118. The only question for the Magistrate is whether either party has actual possession, and if he finds that one party has actual possession of a defined area and the other party has not, he can make an order under this section, irrespective of the fact that the parties may have *joint title* to the land—*Basanta v. Mohesh*, 40 Cal. 982, 17 C.W.N. 944, 14 Cr.L.J. 269.

Generally it is correct to say that this section does not apply to a dispute relating to an undivided share in land or to an undivided share in the produce of the land, because sec. 145, sub-secs. (4) and (6), Cr. P. Code, contemplates that one of the

parties shall be or shall not be put in possession of the subject-matter of the dispute and a party cannot be put in possession of the undivided share of land or its produce. But with land which is owned by a *zamindar* and cultivated by him with his *hais* he must, before division of the produce or *batai*, be deemed to be in possession of the land and of the produce of the land and the *hais* are merely his agents for the cultivation and until the crop is divided between the *zamindar* and the *hais*, it is really the *zamindar* who has custody of the crops and divides them. The position is not altered merely because there is a *jagirdar* who is entitled also to his share because the *jagirdar* in effect takes the place of Government. Therefore, this section applies to a dispute relating to the *batai* share of a *zamindar*—*Muhammad Araf v. Satramdas Sakhimal*, 37 Cr.L.J. 1030 (1031), 164 I.C. 969, A.I.R. 1936 Sind 143, 9 R.S. 60, 1936 Cr.C. 859. See also *Muhammad Ali v. Shamsul Haq*, A.I.R. 1910 Sind 33 (36).

Where it has been declared by a Civil Court that the property is joint and partition has been ordered, no proceedings under this section can be taken until the partition has been effected—*Dharani Kanta v. Girija Kanta*, 8 C.W.N. 485. If the co-sharers have by express or tacit arrangement made a partition between themselves so that each of them is in possession of a specified and demarcated portion of the estate, there is nothing to prevent the application of this section—*Basanta v. Mohesh*, supra. So also, where it was found that each party to the dispute was in possession of separate dwelling rooms in the same house, the Magistrate was competent to pass an order that the separate possession of each party should continue—*In re Krishnasami*, 2 Weir 108.

If the public are declared to be in possession of any piece of land, then both the parties to the dispute are included in that term and the possession therefore is joint possession and the jurisdiction of the Court under sec. 145 is ousted—*Manik v. Preo*, 17 C.W.N. 205, 17 C.L.J. 397, 17 I.C. 533, 13 Cr.L.J. 789.

Debtor property being by nature impartible and inalienable, possession of such property by co-shebaits must always be necessarily joint and as such beyond the scope of an order under this section. Where one of several co-shebaits had been entrusted with the sole management of the debtor estate for convenience, a dispute between him and the other co-shebaits claiming to have joint management with him, is not a fit subject for a proceeding under this section—*Nritta Gopal v. Chandi Charan*, 10 C.W.N. 1088, 4 Cr.L.J. 215.

406. Clause (2)—‘Land or Water’:

Building—Temple:—A dispute relating to possession of a temple comes within the provision of this section—*Sundara v. Vallinakaya*, 2 Weir 110 (111), whether the temple be wholly or partly private property or dedicated to purposes of public worship—*Anon.*, 2 Weir 99 (100). As regards disputes arising between two *pujaris* regarding the right to perform the *puja* in a temple, or regarding the collection of offerings, see Note 466 under sec. 147.

Markets:—A dispute about the exclusive right to collect the entire toll from one partitioned half of the market, may be a subject of proceedings under this section—*Dunne v. Chandra Kishore*, 30 Cal. 593. But where the *benias* and other persons, who come to the market to sell their goods there, appointed a *chaudhuri* of the market, an office which imposed on him certain duties, such as regulating the business of the market and so forth and agreed to remunerate him for his services by allowing him to collect two pice per head of cattle brought into the market laden with articles for sale, a dispute between the *chaudhuri* and the servants of the *zamindar*, who were employed by her to collect her legitimate rents and profits and sought to deprive the *chaudhuri* of this source of his income, should be dealt with under sec. 107 and not under sec. 145, Cr. P. C., as the payment to the *chaudhuri* was purely voluntary on their part and was in no way connected with the ordinary rents and profits of the market and was not a perquisite of the *zamindar*, but was a personal matter between the *banias* and the *chaudhuri* and the dispute did not relate to the “profits” of a market within the meaning of the section—*Ram Lockan*, 36 All 143 (146), 12 A.L.J. 162, 15 Cr.L.J. 27.

Fisheries :—Where there is *bona fide* dispute about a fishery or *jalkar right*, proceedings under this section may be properly instituted—*Balaaji v. Bhoju*, 35 Cal 117, 12 C.W.N. 487, 6 Cr.L.J. 398, 6 C.L.J. 697. See also *Amulya Charan v. Amrita Lal*, 24 C.W.N. 1075 (1076) in Note 234

The subject-matter of a proceeding under sec. 147 may also be fisheries to which one of the parties may have a right apart from any right to the land upon which the fishery stands. The subject-matter of the proceedings under sec. 145, if it relates to fisheries, must relate to the particular local area where the fishery extends. The difference, therefore, is that in the one case, that is in the case of sec. 147, the right may be a prescriptive right or right of easement to use water or land not belonging to the parties but belonging to somebody else, which has to be considered. Where the right claimed by the second party is the right to catch fish in waters upon the land of the first party, it is in the nature of an easement or *profits a prendre* and, therefore, the proceeding clearly comes within the ambit of sec. 147, Cr. P. Code—*Ramroop v. Mano*, 35 Cr.L.J. 481, 147 I.C. 774, AIR 1934 Pat. 86, 1934 Cr.C. 113, 13 Pat. 153, A.L.R. 1934 Pat 179, 15 P.L.T. 147.

Where parties have *joint* rights in a certain fishery and neither of them can be considered as claiming exclusive possession, and a dispute arises with regard to its possession, this section is inapplicable, because joint possession does not come within this section. (See Note 405 above). If what was in dispute was not a share in the fishery but a share in its profits (*i.e.*, either the fish caught or their price when sold) it might have been dealt with under this section—*Bhabanath v. Peary*, 11 C.L.J. 412, 11 Cr.L.J. 370 See Note 466

Alluvial lands.—In the case of alluvial lands (in Bengal) recently reformed, where questions of breach of the peace arise, it is open to the Magistrate to deal with the matter either under the Bengal Alluvial Lands Act (V of 1920) or under the provisions of sec 145 of this Code. This section has not been impliedly repealed by Act V of 1920 in the case of alluvial lands recently formed—*Abdul Jabad v. Mafizuddin*, 29 C.W.N. 783, 25 Cr.L.J. 1107, 81 I.C. 391, AIR 1924 Cal 980.

Crops or other produce —The word 'land' includes crops or other produce of land. But crops mean standing-crops and not crops which have been severed from the land and stored on the thrashing floor—*Ramzan v. Janardhan*, 30 Cal 110, 6 C.W.N. 881; *Basudev v. Mahadeo*, 6 P.L.T. 454, 26 Cr.L.J. 1187; *Ganga Prosad v. Narain*, 15 All 394 (395); *Chaurasi v. Ram Shankar*, 28 All 266; *Relumal v. Pherumal*, 22 S.L.R. 386, 111 I.C. 411, 29 Cr.L.J. 857 (859); *Ram Bhajan*, 25 O.C. 137, 23 Cr.L.J. 650. Crops cut and severed from the land are from their very nature moveable property. To hold that such crops do come within the meaning of sec. 145, cl. (2) would be unduly straining the meaning of "immoveable property" to which alone the provisions of sec. 145, Cr. P. C., are applicable—*Rajindra Lal v. Brich Kurimi*, AIR 1938 Pat 527, 19 P.L.T. 728, 1938 P.W.N. 643, 40 Cr.L.J. 125, 178 I.C. 582 See also *Maung Kau v. Maung Po Tok*, 41 Cr.L.J. 123, 185 I.C. 119, AIR 1939 Rang 388 Contra—*In re Krishnasami*, 2 Weir 108 and *Rahimdin*, 22 S.L.R. 151, 28 Cr.L.J. 989 (990), AIR. 1928 Sind 68, 105 I.C. 813, where it has been held that crops include cut and stored crops and *Munir Ahmed v. Mahmud-ul-Haq*, 1938 A.W.R. (C.C.) 134 where it has been laid down that sec. 145, Cr. P. C., covers a case of dispute relating to removal of crops which had been cut and claimed by both parties on the basis of their possession of some lands. See also 18 Cr.L.J. 756, 2 Pat.L.J. 637, 41 I.C. 132, 2 P.L.W. 54 where it has been laid down that the Magistrate can deal under this section, with crops attached to, or if it is cut and lying on, the land but not when removed from it.

A Magistrate has no jurisdiction to pass an order under this section in respect of an undivided share in the annual produce of a mango grove—*Laxman v. Ganu*, 17 N.L.J. 216, A.L.R. 1934 Nag 217, AIR. 1935 Nag 44 The correct procedure would be an action under sec 107, Cr. P. Code—*Laxman v. Ganu*, *supra*.

Mines :—A dispute as regards mines and minerals and the right to work mines, falls under this section, as mining rights must reasonably be regarded as falling within

the definition of the term 'land' which is intended to cover all profits derivable from land—*Andrew Yule & Co. v. Skone*, 49 I.C. 647, A.I.R. 1919 Pat. 210, 4 P.L.J. 154, 20 Cr.L.J. 199; *Bimala Prosad v. Tata Iron & Steel Co., Ltd.*, A.I.R. 1922 Cal. 83, 71 I.C. 286, 35 C.L.J. 456, 24 Cr.L.J. 108, dissenting from *The Indian Iron and Steel Company v. Banso Gopal*, 32 C.L.J. 54, A.I.R. 1920 Cal. 824, 59 I.C. 403, 22 Cr.L.J. 99 if that case purports to lay down broadly that a license to dig minerals confers no interest or estate in the soil, and that a dispute concerning mining rights is not one which the Magistrate can deal under this section; *Ranchi Zamindari Co. v. Pratab Udainath*, A.I.R. 1939 Pat. 209 (211), 40 Cr.L.J. 631, 18 Pat. 215, 20 P.L.T. 105, 182 I.C. 89, 1939 P.W.N. 72, 5 B.R. 711, 11 R.P. 657. When mica is dug and removed, this section does not apply—*Sunder Malh v. Jhari Lal*, 18 Cr.L.J. 756, 41 I.C. 132, A.I.R. 1917 Pat. 183, 2 Pat.L.J. 637.

Trees severed from the land do not come within the purview of this section, and no order under this section can be made with respect to them—*Sajad Husain v. Nanak Chand*, 1917 P.W.R. 22, 39 I.C. 301, 18 Cr.L.J. 461. But trees growing on the land come within this section, as being 'produce of land.'—*Surjakanta v. Jagadindra*, 11 C.W.N. 198 (201), 5 Cr.L.J. 332; *Ali Mohammad v. Fakiruddi*, 24 C.W.N. 1039 (1045), 48 Cal 522, 32 C.L.J. 270, 22 Cr.L.J. 213, 60 I.C. 325. But lac which is not a part of the tree itself but is a parasitic growth on it, is not a 'produce of land' or 'crop'—*Ali Mahammad v. Fakiruddi*, 24 C.W.N. 1039, 22 Cr.L.J. 131, 59 I.C. 634, A.I.R. 1920 Cal 708, 32 O.L.J. 255. It is true that lac itself would not be immovable property, but it can only be propagated on trees and is so connected with trees that any dispute with regard to it must also involve a dispute with regard to land or right to enter upon that land for the purpose of taking the lac—*Narsingdas*, 30 N.L.R. 311, 35 Cr.L.J. 1381, 151 I.C. 348, 1934 Cr.C. 490, A.I.R. 1934 Nag. 112, dissenting from *Ali Mahammad v. Fakiruddi*, supra. The right to tap a tree is an intangible property and may be the subject of proceedings under this section—*Jiblal*, 3 P.L.J. 316, 19 Cr.L.J. 656, 45 I.C. 484. It would more properly come under sec. 147.

Rents :—A dispute as to collection of rents falls under this section—*Sarbananda v. Pran Sankar*, 15 Cal. 527 (531); *Ramasami v. Danakoti*, 12 Mad. 88; *Abhayessari v. Sidhessari*, 16 Cal 513; *Laldhari v. Sukdeo*, 27 Cal. 892 (903); *Sri Mohan v. Narsing*, 27 Cal 259; *Haridas v. Abdul Hatleb*, 19 C.W.N. 959, 16 Cr.L.J. 590. A right to collect a share of the rent of an undivided property is, however, not a dispute concerning tangible immovable property and sec. 145 does not apply to such a case—*Surb Warain v. Brij Mohun*, 23 Cal. 80.

Where there is no dispute as to the possession of, or extent of share in, a certain immovable property, and the dispute is merely as to who is entitled to collect rents on behalf of all from the tenants, this section does not apply—*Md. Fazil v. Md. Abdul Samad*, 10 O.C. 89, 5 Cr.L.J. 394; *Akaloo v. Mohesh*, 36 Cal. 986; *Ramlochan*, 36 All. 143, 12 A.L.J. 162; i.e., where there is no dispute as to the possession or share of land, a Magistrate cannot under this section determine the method by which the possession of the parties is to be exercised or the method by which the parties in possession are to collect the profits of land—*Akaloo v. Mohesh*, supra. See also A.I.R. 1922 Oudh 199, 69 I.C. 90, 25 O.C. 137 and 16 Cr.L.J. 284, 28 I.C. 332, 1915 M.W.N. 267, 17 M.L.T. 225.

This section applies where the dispute is as regards the collection of rents between joint owners governed by the Mitakshara Law, as for instance, where one of the joint owners dismisses the common manager and claims to collect the rents separately on his behalf—*Sri Mohan v. Narsing*, 27 Cal. 259 (261), 4 C.W.N. 420; *Bhaskari v. Bhaskaram*, 31 Mad 318.

Profits :—The profits must arise out of or emanate from immovable property; therefore fees paid by pilgrims at Gaya at performing Sradh ceremonies cannot be said to arise out of land, and proceedings under this section cannot be instituted in respect of a dispute regarding such fees—*Narayan v. Bugwan*, 3 C.L.J. 137, 3 Cr.L.J. 214. So also, a right to the offerings given by worshippers for the worship of any Deity

cannot be said to be a right of profits issuing out of the temple, but arising out of the Deity, irrespective of the temple building in which the Deity may happen to dwell. A dispute relating to the rights to the offerings only, is a dispute relating to moveable property and is outside the scope of this section—*Ram Saran v. Raghunandan*, 38 Cal. 387, 9 I.C. 6, 16 C.W.N. 574, 13 C.L.J. 445, 12 Cr.L.J. 3; *Guiram v. Lalbehari*, 37 Cal. 578, 14 C.W.N. 611, 11 Cr.L.J. 292; *Rao Sobhag Singh v. Thakur Bakhtawar*, 23 N.L.R. 84, 28 Cr.L.J. 687, 103 I.C. 415, A.I.R. 1927 Nag. 333. So also, a dispute concerning the right to take sandal wood paste, when removed from an idol, does not fall under this section—*In re Pandurang*, 4 Bom.L.R. 438. A dispute with respect to the collection of offerings at a karbala cannot be the subject-matter of a proceeding under this section—*Ghulam Sibtain v. Kaniz Khaton*, 5 P.L.J. 246, 1 P.L.T. 608, 21 Cr.L.J. 572. See Note 466.

A dispute as to the right to collect fees (as mere remuneration for conducting the business of the market) from the sellers of a market, the payment of such fees being purely voluntary on the part of the sellers and being in no way connected with the ordinary rents and profits of the market, and not being a prerequisite of the Zemindar, is not a dispute as to the profits of a market within the meaning of this section—*Ram Lochan*, 36 All 143, 12 A.L.J. 162, 15 Cr.L.J. 27.

Fees called *Khatagari*, *arhat* and *Keals* levied in respect of boats bringing grain and moored in a shallow channel, but dissociated from the ownership of the site, are not included within the expression "land and water" as used in sub-sec. (1) of sec. 145, and explained in sub-sec. (2) of that section. But though sec. 145, Cr. P. C., may not apply, sec. 147, Cr. P. C., will and order passed under sec. 145, Cr. P. C., can be upheld under sec. 147, Cr. P. C.—*Kunjo Mandal v. Sarju Ram Marwari*, A.I.R. 1939 Pat. 206, 1939 P.W.N. 66, 20 P.L.T. 164, 181 I.C. 176, 40 Cr.L.J. 538, 5 B.R. 539, 11 R.P. 573.

Right of ferry—The right to a ferry, i.e., the right to carry passengers and their goods to and fro in a boat across a river, cannot be treated apart from the possession of lands used on either side of the stream for the purpose of landing them. Therefore, a dispute regarding a ferry including the land and the water upon which the right is exercised, comes under this section—*Hurbullubh v. Luchmeswar*, 26 Cal 188, 3 C.W.N. 49. But questions relating to rights to use a ferry come under section 147 and not under this section—*Harbulla v. Bajrang*, 3 C.W.N. 148; and action can more appropriately be taken under sec. 147, Cr. P. C.—*Ch. Gajraj Singh*, A.I.R. 1936 All 320.

A right to a *bund* (i.e., a completed *bund*) should be distinguished from a right to construct a *bund*. In the former case sec. 145 applies; in the latter case sec. 147, as it is a right of user of water—*Sashi Bhusan v. Debendra*, 33 C.W.N. 1004 (1005), 31 Cr.L.J. 94, 125 I.C. 857. When there is an apprehension of a breach of the peace regarding the cutting of the ridge of a pyne, the case falls exactly within the provisions of sec. 147, Cr. P. C.—*Inderdeo v. Durga Prasad*, 37 Cr.L.J. 378, 160 I.C. 945, A.I.R. 1936 Pat. 59, 17 P.L.T. 22, 1936 Cr.C. 83. See also *Ahmed Din v. Jiwam*, 27 Cr.L.J. 801, 95 I.C. 465, A.I.R. 1926 Lah 550 where proceedings under sec. 107, Cr. P. C., against both sides were held to be a proper procedure.

Disputes as regards easements falls more appropriately under sec. 147 than under this section—*Kali Kumar v. Bejoy*, 21 Cr.L.J. 697 (Cal); *Asaram v. Chotu Lal*, 22 Cr.L.J. 768 (Nag). A dispute as regards the right to use a well falls under sec. 147, not under sec. 145—*Nanhe v. Jamil-ur-Rahman*, 23 A.L.J. 41, 26 Cr.L.J. 683 (684).

Proceedings under this section cannot be instituted with respect to moveables—*Hira Lal*, 25 Cr.L.J. 440, 77 I.C. 728, 11 O.L.J. 59, A.I.R. 1924 Oudh 331. See also *Mahadei v. Beni Prasad*, in Note 427.

407. Clause (3)—Service of Notice:—A copy of the order, stating the grounds of the Magistrate's satisfaction must be served on the parties, for it is the intention of the law, not only that the Magistrate should have sufficient grounds for proceedings under this section, but that he should inform the parties concerned of the

grounds on which the proceeding had been instituted—*Gobind Chandra*, 20 Cal 520. The Magistrate ought to satisfy himself that the copy of the order has been duly served on the parties alleging the non-receipt of the notice; and the Magistrate's omission to do so vitiates all subsequent proceedings—*Sripati v. Ram Kumar*, 8 C.W.N. 76. In a proceeding under sec 145, Cr. P. Code where no summons was affixed to the house or served upon the opposite party personally or upon an adult male member of his family, there was no service of any kind upon him. No *ex parte* proceedings are possible in cases where there has been no service. This is itself sufficient to vitiate all the proceedings of the Magistrate—*Tutab Ali Khan v. Shromani Gurdwara*, 34 Cr.L.J. 616, 143 I.C. 477, Ind. Rul 1933 Lah. 356, 1933 Cr.C. 267, A.I.R. 1933 Lah. 145. Service of notice under the second part of sec. 145 (3) does not dispense with ordinary service upon the parties as required by the first part of that sub-section—*ibid*.

When the Court decides to take action, all processes should be served at the expense of the Crown—*Phutania*, 25 Cr.L.J. 1109, 81 I.C. 933, A.I.R. 1925 Nag. 142.

Local service :—The provision regarding the local service of notice was made with the intention of guarding against collusive proceedings as well as to give to any one interested, who may, through an oversight or otherwise, not have received a summons, an opportunity of coming in with his claim and to notify generally to all persons in the locality that a proceeding under this section has been set on foot—*Krishna Kamani v. Abdul*, 30 Cal. 155 (197), 6 C.W.N. 737 (F.B.). As regards the effect of clause (3) on the power of the Magistrate to add parties, see same case cited in Note 401, *ante*.

Notice under section 107 or 147 not sufficient :—Where notice was issued under section 107 to show cause why the accused should not execute a bond for keeping the peace, and the Magistrate when he tried the case recorded an order in the course of which he stated that on the facts the case was one for the application of sec. 145, and not one under sec. 107, and proceeded at once to pass an order under clause (6) of this section, the order was held to be bad—*Sukru v. Ram Pergash*, 30 Cal 443. Similarly, where a Magistrate gave notice under sec. 147 and started proceedings under that section, but no objection being taken, did not decide whether sec. 147 was applicable to the proceedings but passed an order purporting to be under sec. 145, without giving notice of his intention to act under sec. 145, the Magistrate's order was made without jurisdiction—*Subramania v. Sanyasia*, 19 M.L.J. 18, 2 I.C. 310, 5 M.L.T. 103, 9 Cr.L.J. 565. In both these cases the Magistrate ought to have issued fresh notice under sec. 145. See Notes 432 and 470A. But where proceedings under sec. 144, Cr. P. C., were converted into proceedings under sec. 145, Cr. P. C., in presence of the parties who filed their written statements and adduced evidence in support of their case, non-service of fresh notice of proceedings under sec. 145, Cr. P. C., on the parties would not invalidate the Magistrate's action as the parties were cognisant of the case and hotly contested it throughout—19 Cr.L.J. 396, 44 I.C. 748, 4 Pat.L.W. 234.

Proof of service :—Where one of the parties denies the service of the order, the written return of the serving peon is not sufficient proof of the service. The Magistrate should examine the serving peon on this point—*Jogendra v. Abu*, 8 C.W.N. 719.

Non-service of personal notice :—Failure to serve the notice upon the parties concerned is a mere irregularity cured by sec. 537 if the party professing to be aggrieved has full knowledge of the proceedings—*Mg Mauk v. Mg Po*, 3 Rang. 169; *Bidhyadhar v Jagodish*, 7 O.C. 334; *Bhure Khan v. Kakira*, 25 Cr.L.J. 159, 76 I.C. 303, A.I.R. 1924 Nag 171; such omission will not render the proceedings void, if the parties were present and no prejudice was caused—*Debi Prosad v. Sheodat*, 30 All. 41, 4 A.L.J. 705; or if the parties appeared before the Magistrate who explained matters to them fully, and they evidently understood everything that was requisite—*Nur Bakhsh*, 1917 P.W.R. 26, 39 I.C. 1001, 18 Cr.L.J. 633; or if the person did not question the order—*In re Chennapudayan*, 30 Mad 548. But if the party professing to be aggrieved

had no knowledge of the proceedings, the omission to serve notice on him vitiated the trial—*Sego Patel v. Parashram*, 28 Cr.L.J. 418 101 I.C. 450, A.I.R. 1927 Nag. 234. According to the Patna High Court, non-service of the notice is by itself a grave irregularity which vitiates the trial—*Ram Sahai v. Deonandan*, 19 Cr.L.J. 71, 43 I.C. 103, 4 Pat.L.W. 183; *Sheonandan v. Wahidul*, 19 Cr.L.J. 112, 43 I.C. 336, 5 Pat.L.W. 254, 1917 Pat.H.C. 200; but non-service of notice on one member invalidates the proceedings only so far as that member is concerned, and does not invalidate the whole proceedings—*Nandan v. Siaram*, 7 P.L.T. 156, 26 Cr.L.J. 1287. The Lahore High Court has also held that no *ex parte* proceedings are possible in cases where there has been no service. This is itself sufficient to vitiate all the proceedings of the Magistrate—*Turab Ali Khan v. Shromani Gurdwara*, A.I.R. 1933 Lah. 145, 1933 Cr.C. 267, 143 I.C. 477, 34 Cr.L.J. 616, Ind Rul 1933 Lah 356. Where no preliminary order as required by sec. 145 (1) was served on a person nor was he given an opportunity to prove his possession over the subject of the dispute, he cannot be subjected to the final order passed by the Magistrate in the proceedings under sec. 145, Cr. P. Code—*Muqin-un-Nisa v. Ahmad-un-Nisa*, 26 Cr.L.J. 1581, 90 I.C. 541, 36 O.W.N. 704, A.I.R. 1925 Oudh 605. The Bombay High Court set aside the order of the Magistrate where no notice was served on the opposite party—*Pandurang*, 24 Bom. 527 (533).

Where the Magistrate did not serve any notice upon any person, nor did he affix a notice on the property in dispute, nor received a written statement from either party, and passed the order in the absence of one party, the proceedings of the Magistrate were exceedingly irregular and were bad for want of jurisdiction—*Ahmed Chowdhury v. Parbati*, 35 Cal 774, 12 C.W.N. 848, 8 Cr.L.J. 119; *Abdulla v. Gunda*, 7 P.R. 1907, 71 P.L.R. 1908, 6 Cr.L.J. 133; *Basawan v. Tilak*, 4 P.L.T. 723, 24 Cr.L.J. 345.

Setting aside of ex parte order—If the proceedings were heard and an order passed *ex parte* on account of the absence of a party, and that party afterwards appears and alleges non-service of notice and applies for rehearing of the case, the Magistrate cannot reject the application but is bound to re-open the case after satisfying himself as to the truth of such allegation—*Kali Charan v. Abdul Laskar*, 24 C.W.N. 902, 21 Cr.L.J. 848, 32 C.L.J. 14, 58 I.C. 928. See also *Sego Patel v. Parashram*, 28 Cr.L.J. 418, 101 I.C. 450, A.I.R. 1927 Nag. 234.

See Note 446.

Omission of publication of notice—The provisions to the publication of the order in some conspicuous place near the property in dispute, is directory and a matter of procedure only. Omission to publish the notice is not an illegality which deprives the Magistrate of his jurisdiction, and unless it be shown that some one interested has been materially prejudiced by the omission, the High Court will not interfere—*Sukh Lal v. Tara Chand*, 33 Cal 68, 2 C.L.J. 241, 9 C.W.N. 1046, 2 Cr.L.J. 618 (F.B.) (overruling 8 C.W.N. 590 and 9 C.W.N. 909); *Debi Pyasad v. Sheodat*, 30 All 41, 4 A.L.J. 795, 1907 A.W.N. 265, 6 Cr.L.J. 352; *Muhammad Sharif v. Dhanpat*, 1914 P.W.R. 15, 23 I.C. 487, A.I.R. 1914 Lah 295, 15 Cr.L.J. 279; *Sajad Husam v. Nanak Chand*, A.I.R. 1917 Lah 35, 34 I.C. 301, 18 Cr.L.J. 461; *Nur Baksh v. Emp.*, A.I.R. 1917 Lah 35, 39 I.C. 1001, 18 Cr.L.J. 633; *Iklas v. Raghuraj*, 12 O.C. 400, 11 Cr.L.J. 69; *Bhure Khan v. Kakra*, 25 Cr.L.J. 159, 76 I.C. 303, A.I.R. 1924 Nag 171; *Maung Mauk v. Maung Po Yon*, 3 Rang 169, 94 I.C. 708, A.I.R. 1925 Rang 270, 27 Cr.L.J. 660; *Mad Mahdshah v. Wahdalsah*, 26 Cr.L.J. 1292, 89 I.C. 156, A.I.R. 1926 Sind 53; *Parbhu Dayal*, 25 Cr.L.J. 1139, 81 I.C. 963, A.I.R. 1925 Oudh 152; *Basawan v. Tilak*, 24 Cr.L.J. 345, 72 I.C. 345, A.I.R. 1922 Pat 77, 4 P.L.T. 723, 1 P.L.R. 130 Cr.

Where no notice was issued as required by the section and there is no finding that there was a danger of a breach of the peace, the final order must be set aside—*Emp v. Sis Ram*, 32 Cr.L.J. 139, 128 I.C. 313, A.I.R. 1930 Lah 895, Ind. Rul. 1931 Lah 41, 1930 Cr.C. 991, 12 Lah.L.J. 147; *Budhan v. Ram Rakho Mal*, A.I.R. 1915 Lah 232, 16 Cr.L.J. 628, 30 I.C. 452, 169 P.L.R. 1915, *Tara Chand v. Bihari Lal*, 22 P.L.R. 1916, 38 I.C. 868, A.I.R. 1916 Lah 378, 18 Cr.L.J. 36; *Sher Khan v. Faraz*

Ilahi, A.I.R. 1925 Lah. 368, 88 I.C. 601, 26 Cr.L.J. 1177, 26 P.L.R. 187; *Chanan Singh v. Emp.*, 39 Cr.L.J. 702, 176 I.C. 124, 40 P.L.R. 20, 11 R.L. 165, A.I.R. 1938 Lah. 345. In a very recent case the Lahore High Court dissented from the view expressed above and followed the earlier cases mentioned in the previous paragraph, holding that sec. 537, Cr. P. C., cured such defects—*Ratan v. Tika*, A.I.R. 1939 Lah. 233, 41 P.L.R. 188, 40 Cr.L.J. 784, 183 I.C. 351.

Warrant to compel attendance of party:—Under this section, the matter in issue is not the commission of an offence, but the settlement of a dispute, and it is entirely optional with the parties to attend or not; therefore, the issue of a warrant to compel the attendance of any party is illegal—*Kefatulla v. Feruzuddin*, 5 C.W.N. 71.

408. Clause (4)—Inquiry:—Sub-sections (1), (4), (5) and (6) of this section are complementary. Once an order has been passed under sub-sec. (1), it is obligatory for a Magistrate to make the inquiry provided for in sub-sec. (4) subject only to the obligation under sub-sec. (5) to terminate the proceedings in the circumstances therein contemplated. The words of sub-sec. (4), "the Magistrate shall then....." are mandatory. The word 'then' refers to the stage when in compliance with the order under sub-sec. (1) the parties have put in their written statements and attended the Court. Sub-section (5) is emphatic that the order under sub-sec. (1) shall be final subject to the one exception that the Magistrate shall cancel the order and stay all further proceedings if it is shown that no dispute likely to cause breach of the peace exists or has existed. On the completion of the inquiry under sub-sec. (4) a final order under sub-sec. (6) must follow, it being obvious that the holding of the said inquiry is a condition precedent to the making of the order under sub-sec. (6)—*Muhammed Ali v. Shamsul Haq*, A.I.R. 1940 Sind 33 (36), 41 Cr.L.J. 486, 187 I.C. 636.

Inquiry by subordinate Magistrate:—The inquiry contemplated by this section is a personal inquiry to be made by the Magistrate who passed the preliminary order, and not by any one else. He has no jurisdiction, even with the consent of the parties, to make over the inquiry to any other Magistrate—*Hamdul Haque v. Sk. Atait*, 2 P.L.J. 86, 18 Cr.L.J. 145. Therefore, an order under this section based upon the report of a Subordinate Magistrate made after inquiry by such Magistrate is illegal—*Anon*, 4 M.H.C.R. App 200. Though sec. 148 enables a Magistrate acting under this section to depute a Subordinate Magistrate to make a local investigation, he ought not to depute to such Subordinate Magistrate the *whole* investigation under this section, but on the receipt of the report of such Magistrate, should himself take written statements from the parties and receive the evidence produced by them and conclude the investigation—*Anon*, 2 Weir 118; *Baharsimuhuri v. Gadagamma*, 35 L.W. 390, 33 Cr.L.J. 536 (537), 138 I.C. 68, 1932 M.W.N. 425, 1932 Cr.C. 334, Ind Rul. 1932 Mad. 496, A.I.R. 1932 Mad 368. If a Magistrate omits to take evidence as required by clause (4), but refers the case to a Subordinate Magistrate to report thereon, his order based on such evidence alone is made without jurisdiction and must be set aside—*Arumuga v Venkatasubbier*, 31 Mad 82, 17 M.L.J. 535, 3 M.L.T. 108; *Baharsimuhuri v. Gadagamma*, supra. But in another Madras case it has been held that the order based on the report of a Sub-Magistrate is not without jurisdiction. The essential requisite to give jurisdiction to a Magistrate is that he must be satisfied about the existence of a dispute likely to cause a breach of the peace. His subsequent action is a matter of procedure and not of jurisdiction—*Jagannatha v. Venkatagopalakrishna*, 37 M.L.J. 589, 20 Cr.L.J. 773 (dissenting from 31 Mad. 82). See Note 477.

409. Procedure:—"It should be impressed upon Magistrates that the whole object of and only excuse for proceedings under sec. 145 is the prevention of a breach of the peace supposed to be imminent, and that the procedure to be followed in disposing of such cases is that laid down in section 145, sub-section (4) of the Code, which must be strictly observed. It should be the primary aim of the inquiry officer, therefore, to arrive at his decision with the utmost promptitude consistent with an

adequate investigation into the dispute before him, and he should be specially careful not to permit the proceedings to assume the complexion of a civil suit, or in any way to countenance an endeavour on the part of either party to secure any advantage for the purposes of civil litigation."

"The trying Magistrate should be in a position to insist upon the taking up of the case on the date fixed for hearing, and it should not be necessary to grant adjournment after adjournment simply because the parties are not given due notice of the proceedings, or by reason of the proceedings themselves being inaccurate or incomplete. Once the case is commenced, the hearing should be continued *de die in diem* until the Magistrate is in a position to arrive at a decision, but in doing so he must remember that the sole object of his inquiry is to determine, if possible, the fact of actual possession, and that even in the case of an *ex parte* proceeding, there must be some recorded evidence to justify the order passed by him"—*Cal G. R. & C. O.*, pp. 10, 11; *Sastu Sahu v. Nathuni*, 6 P.L.T. 258, 26 Cr.L.J. 105 (106, 107), A.I.R. 1924 Pat. 689, 83 I.C. 665, 3 Pat L.R. 145 (Cr.). Where the dispute has reached a stage so critical that a breach of the peace is immediately to be apprehended and the parties have had opportunity to say they have to say, the refusal of the Magistrate to grant adjournment, does not amount to an irregularity. A case under this section does not admit of procrastination and delay—*Khan*, 26 S.L.R. Cr.C. 681 (683). The idea of this section is that it is a short and summary manner of awarding possession until other cases connected with the subject-matter of the suit are decided. It is sec 145, Cr. P. C., case that has got to be finished quickly in order that there may not be breach of the peace until the other cases whose orders may overrule sec 145 decision, may be brought to a close—*Ma Nyain Mya v Maung Po Htaik*, 30 Cr.L.J. 344 (345), 114 I.C. 677, A.I.R. 1928 Rang. 314, Ind Rul 1929 Rang 69, following *Nga Po Tin v. Nga Po Saung*, 74 I.C. 68, 1 Rang 53, 2 Bur L.J. 32, A.I.R. 1923 Rang. 211, 24 Cr.L.J. 740. In real proceedings under this section it does matter that the Magistrate's order should be passed quickly and it does not matter if the finding in regard to possession is wrong—*Ganpat Kunbi v Dewaji*, 29 Cr.L.J. 676, 110 I.C. 228, 10 A.I.Cr.R. 411. See also *Gaya Prasad v Ram Sarober*, A.I.R. 1934 Pat. 471, 15 P.L.T. 453, 1934 Cr.C. 1064.

The sole procedure in an inquiry under section 145 by a Magistrate is as to who was in actual possession of the land in dispute, and a Magistrate should not deal with such proceeding as if it were a civil suit by framing several issues and trying them—*Kochas v Romesh*, 35 Cal. 795.

It is incumbent on Magistrate to dispose of proceedings under this section as quickly as possible, and therefore, the procedure of a summons case is to be followed and not that of a warrant case—*Moti Singh v. Dhanukdhari*, 24 Cr.L.J. 595, 73 I.C. 339, A.I.R. 1923 Pat 53; see also *Biswanath v Shivanand*, 2 P.L.T. 330, 22 Cr.L.J. 30; *Khubi v Darbari*, 2 P.L.T. 267, 22 Cr.L.J. 481 (482); *Hurendra v Bhobani*, 11 Cal. 762, and *Ram Chandra v. Monohur*, 21 Cal 29, where the procedure of a summons case has been recommended. In another Calcutta case it has been remarked that in cases dealing with taking securities for keeping the peace or for good behaviour as also in cases of public nuisance, the Legislature has expressly provided (see secs 117, 137) that in some specified instances the procedure of a summons case, and in others the procedure of warrant cases shall be followed. The conclusion, therefore, is that neither the procedure prescribed for a summons case nor that of a warrant case is to be followed, as such a protracted investigation would defeat the very object in view, viz., an effective prevention of a breach of the peace. The proceedings under section 145 are intended to be prompt and should be concluded without delay and the Magistrate may adopt a procedure which will best carry out the object of the Legislature—*Tarapada v. Nurul Huq*, 32 Cal 1093, 2 C.L.J. 280, 2 Cr.L.J. 679. The same view is taken in *Suyya Kanta v. Hem Chandra*, 30 Cal 508, 7 C.W.N. 404.

Sine die adjournment.—A Magistrate has jurisdiction to postpone *sine die* a proceeding under sec. 145, Cr. P. Code, especially when he expects that settlement

proceedings will soon commence—*Guru Das v. Weatheral*, 13 C.W.N. 601 (603), 11 Cr.L.J. 7, 4 I.C. 537. But see *Abdul Rauf v. Rahomuddin*, 13 C.W.N. 104, 8 C.L.J. 504, 9 Cr.L.J. 35, 4 I.C. 328

Such parties:—The words "such parties" must be interpreted with reference to the words 'parties concerned in such dispute' in sub-section (1), the effect being to restrict the inquiry to the parties concerned in the dispute, notwithstanding that persons other than those may have been summoned by the Magistrate or may have come in of their own accord on the publication of the copy of the order in the locality—*Krishna Kamini v. Abdul Jabbar*, 30 Cal 155 (198) (F.B.). See also *Babu Ram Pandey v. Shyamdeo Narayan* in Note 429.

410. Question of title:—Chapter XII contemplates an inquiry solely with reference to the fact of actual possession, irrespective of title. The crucial point to be decided in proceedings under this section is as to who is in actual possession of the subject in dispute, and not who is entitled to such possession. This section contemplates a determination of the question of possession without reference to the merits of the respective claims of the disputing parties to a right to possess the subject of dispute—*Tarapada v. Nurul Huq*, 32 Cal. 1093, 2 C.L.J. 280, 2 Cr.L.J. 679; *Arju Mea v. Arman Mea*, 7 C.L.J. 369, 15 Cr.L.J. 470; *In re Pandurang*, 25 Bom. 179 (181, 185); *Amir Hassan v. Qadir Baksh*, 28 P.L.R. 107, 28 Cr.L.J. 328; *Ram Prosad*, 54 I.C. 616, 21 Cr.L.J. 136; *Subda v. Kushal*, 27 Cr.L.J. 784, 7 P.L.T. 873; *Subbarama v. Mariya*, 16 M.L.T. 52, 15 Cr.L.J. 559; *Venkatapathi v. Sanyasiraju*, 35 L.W. 390, 37 Cr.L.J. 536 (537); *Daimulla v. Maharulla*, 27 Cal. 918; *Debendra v. Dhanmani*, 37 C.W.N. 849 (851); *Chochalingam v. Ammalalchi*, 2 Weir 98; *Abdul Wahab*, 27 Cr.L.J. 44 (Oudh); *In re Mallappa*, 28 Bom.L.R. 488, 95 I.C. 62, 27 Cr.L.J. 734 (735); *Gursahai v. Meghu*, 36 Cr.L.J. 513 (515), 154 I.C. 426, A.I.R. 1935 Pat. 83, 16 P.L.T. 19, 1935 Cr.C. 143; *Baliarsimhuni v. Gadagamma*, 33 Cr.L.J. 536, 138 I.C. 68, 1932 M.W.N. 425, 1932 Cr.C. 334, Ind. Rul. 1932 Mad 496, 35 M.L.W. 390, A.I.R. 1932 Mad 368; *Abdul Latif v. Mohd. Masud*, A.I.R. 1936 Nag 3, 1936 Cr.C. 34, 18 N.L.J. 100. Even a trespasser can be maintained in possession—*Subda v. Kushal*, supra. See also *Manickam Pillai v. Meenammal*, 1937 M.W.N. 732. Where a Magistrate in deciding a case under this section refers to the claim of any parties to a right to possess the land in dispute, he exceeds his jurisdiction and his order will be set aside—*Ram Dayal v. Kedarnath*, 6 C.L.J. 182; *Prayag v. Gobind*, 32 Cal 602, 2 Cr.L.J. 552. The reason for the prohibition is that before possession can be awarded merely in virtue of the true title, the true title must be determined and that may involve a difficult enquiry for which a Criminal Court is ill-adapted—*Shaikh Sujaddi Mondal v. F. L. Cork*, 22 C.W.N. 499 (504), 19 Cr.L.J. 681.

Questions of title are of little importance under this section except in so far as they may be available to show who was in actual physical possession of the land at the time when proceedings are taken—*Debendra v. Dhanmoni*, 35 Cr.L.J. 489, 147 I.C. 817, A.I.R. 1934 Cal 95, 37 C.W.N. 849, 1934 Cr.C. 81. Questions of title are irrelevant under this section—*Sunderlal*, 38 Cr.L.J. 375, 167 I.C. 359, A.I.R. 1936 Nag 271, 1936 Cr.C. 1114, 9 R.N. 179, 1 L.R. 1937 Nag 174.

The Magistrate may, if necessary, take and consider evidence of title to enable him to decide the question of actual possession, but proof of title is not proof of actual possession—*Panaganti Parthasarathy v. Pallikapu*, 34 Mad 138, 6 I.C. 398, 910 M.W.N. 400, *Shriram v. Samirmal*, 29 Cr.L.J. 902 (903), 111 I.C. 662, A.I.R. 1928 Nag. 284, 24 N.L.R. 148. Where no sufficient evidence of possession is produced by the parties, the Magistrate may use evidence of title merely to guide and assist his mind in coming to a decision upon the question of possession—*Raja Babu v. Muddun Mohun*, 14 Cal. 169; *Ramesh Chandra v. Mahim Chandra*, 35 C.L.J. 155, A.I.R. 1920 Cal 889, 61 I.C. 174, 22 Cr.L.J. 350; *Ram Sarup v. Darsano*, 1 P.L.T. 387, 21 Cr.L.J. 748, A.I.R. 1920 Pat 499, 58 I.C. 252; *Adaikhan v. Nellakaruppan*, 1922 M.W.N. 12, 23 Cr.L.J. 197, 65 I.C. 853, 15 M.L.W. 62, A.I.R. 1922 Mad 188; *Balbhadhar v. Aditya Prasad*, 6 O.W.N. 17, 114 I.C. 810, A.I.R. 1929 Oudh 82, 30 Cr.L.J. 381, Ind. Rul. 1929 Oudh 202; *Jagdamba*

Devi v. Emp., 38 Cr.L.J. 1107, 171 I.C. 181, 1937 O.L.R. 526, 10 R.O. 95, 1937 A.Cr.C. 151, 1937 O.W.N. 1016, A.I.R. 1937 Oudh 510. The Court, in proceedings under sec. 145, Cr. P. C., can properly consider questions relating to title where such is necessary in order to ascertain who is in possession—*Ranchi Zamindari Co. v. Pratab Udainath*, A.I.R. 1939 Pat. 209 (211), 40 Cr.L.J. 631, 18 Pat. 215, 20 P.L.T. 105, 182 I.C. 89, 1939 P.W.N. 72, 11 R.P. 657, 5 B.R. 711.

But if the Magistrate finds that the evidence of possession on both sides is equally *unreliable*, he cannot rely on the presumption that possession follows title; in such a case he should act under sec. 146. If, however, he finds the evidence on both sides reliable and equally balanced and he is unable to conclude from such evidence which party is in possession, then he is entitled to corroborate the evidence of possession given by one side by the presumption as to possession arising from the title which he finds in that side—*Akshoy v. Brojeswar*, 26 C.W.N. 1000, 24 Cr.L.J. 141, A.I.R. 1923 Cal 303, 71 I.C. 365. But he must use the evidence of title for his limited purpose. Instead of proceeding to decide as to the actual possession he virtually puts aside the consideration of this question and determines the question of title alone, he is doing that which the law has forbidden him to do—*Kali Kristo v. Golam Ali*, 7 Cal. 46. And a decision under this section ought to be based upon evidence of possession and not of title—*Ibid.* Where evidence of possession is available, a Magistrate acts clearly without jurisdiction in deciding the claim of the parties to possession on documentary evidence of title—*Juthen v. Ram Narain*, 18 C.W.N. 700, 15 Cr.L.J. 202; *Srimanavedan v. Parapravan*, 38 M.L.J. 73, 21 Cr.L.J. 46.

411. Perusal of statements:—The Magistrate shall peruse the written statements of both parties. An *ex parte* order made on the written statement of one of the parties and upon the failure of the other party to file one, without some evidence on the side of the party filing the written statement in support of it, is without jurisdiction—*Gobind v. Nibaran*, 8 C.W.N. 642; *Najem v. Jariatali*, 12 C.W.N. 771, 8 Cr.L.J. 27. And the Magistrate fails to exercise jurisdiction if he refuses to grant further time to the parties to file written statements—*Sk Mansar Ali v. Matullah*, 12 C.W.N. 896. See Note 403, *ante*.

412. "Hear the parties":—If a party is absent, the Magistrate can proceed *ex parte*, but he should take some evidence to show that the party who is present is entitled to an order in his favour—*Ram Krista v. Aghore*, 6 C.W.N. 925. The Magistrate has no jurisdiction to found an order upon the mere absence of the other party without recording any evidence at all upon the question of possession—*Chinnaparedigari v. Mala Dasari*, 31 Cr.L.J. 190, 120 I.C. 895, 1929 M.W.N. 708, A.I.R. 1929 Mad 847, 31 M.L.W. 104. Once a Magistrate has found that there is an apprehension of a breach of the peace it is his duty to inquire into the possession of the parties and to pass orders accordingly either under sec. 145 or under sec. 146, Cr. P. C. It becomes unnecessary for him to pass such an order with regard to possession only on his being satisfied either that there is no longer any apprehension of a breach of the peace or that no dispute between the parties exists or has existed. The mere fact that one of the parties was absent on the date fixed does not entitle a Magistrate to dismiss proceedings under sec. 145, Cr. P. C., when there has been a definite finding that there is an apprehension of a breach of the peace. There is no provision in sec. 145, Cr. P. C., which would warrant the dismissal of the case, merely because the complainant failed to attend, and such order of dismissal is *ultra vires*—*Mt Raquma v. Mt Ghiran*, A.I.R. 1940 Oudh 22, 1939 O.W.N. 974, 1939 O.L.R. 651, 184 I.C. 751, 41 Cr.L.J. 96. The Magistrate must hear the *arguments* at the conclusion of the evidence on both sides, just as it is the procedure prescribed in a summons trial; and the refusal of the Magistrate to hear the *arguments* of the parties vitiates the final order—*Dhabari v. Gorakh Prasad*, 46 I.C. 517, 5 P.L.W. 103, 19 Cr.L.J. 741 (Pat.). "Hear the parties" means hear the evidence of the parties and *arguments* of Counsel or Pleaders appearing on their behalf, or *arguments* addressed by themselves, and if the Magistrate refuses to hear *arguments* he is not complying with the provisions of law which are imperative—*Ghulam v. Kaniz*,

57 I.C. 92, 5 P.L.J. 246, 21 Cr.L.J. 572, 1 P.L.T. 608, following *Surendro v. Bhobani*, 11 Cal. 762 (767); *Jitan v. Dukkha*, 1917 Pat. H. C. C. 118

See also *Bogampedda Griddasami v. Bogum Achigadu*, 40 Cr.L.J. 32, 178 I.C. 251, 1938 M.W.N. 824.

413. Receiving evidence:—The Magistrate is bound to examine the parties and receive evidence—*In re Dyawappa*, 17 Bom L.R. 382, 16 Cr.L.J. 434, 29 I.C. 66. An order under this section without taking evidence is invalid and must be set aside—*Lowson v. Kali Charan*, 8 C.W.N. 719 (720); *Tara Chand v. Behari*, 1916 P.R. 22, 18 Cr.L.J. 36; *Fatech Sher Khan*, 1916 P.R. 4, 17 Cr.L.J. 129; *Jhenger v. Bajnath*, 11 A.L.J. 586, 14 Cr.L.J. 277; *Palani v. Kulandavelu*, 43 M.L.J. 716; *Velayudu v. Narayan*, 2 L.W. 1208; *Basawan v. Tilak*, 4 P.L.T. 723; even in an *ex parte* case—*Gobinda v. Nibaran*, 8 C.W.N. 642. A Magistrate will be acting illegally in the exercise of his jurisdiction if instead of taking the evidence tendered by the parties he proceeds to the spot, makes a local inspection and decides the case only on the statements of witnesses picked up by himself—*Khubi v. Darbari*, 2 P.L.T. 267, 22 Cr.L.J. 481 (482); *Lal Behari v. Bejoy*, 10 C.W.N. 181, 3 Cr.L.J. 193; *Sahadal v. Tajuddin*, 46 Cal. 1056, 52 I.C. 608, 23 C.W.N. 750, 20 Cr.L.J. 688; *Srimanavedan v. Parapravan*, 38 M.L.J. 73, 1920 M.W.N. 133, 11 M.L.W. 285, 21 Cr.L.J. 46, 54 I.C. 254; *Gagan v. Karimuddi*, 25 C.W.N. 1007, 23 Cr.L.J. 199; or if he acts merely on a Tahsildar's report without receiving evidence and hearing the parties—*Sardha Prasad*, 13 Cr.L.J. 777, 17 I.C. 409, 10 A.L.J. 456. See also *Piziruddin v. Totajannessa*, 14 Cr.L.J. 302, 19 I.C. 958. An order passed by a Magistrate on the basis of his own knowledge without recording any evidence, and relying solely on the evidence in another case, is invalid—*Raza Husan v. Mehdi Hasan*, 25 O.C. 148, A.I.R. 1922 Oudh 256, 69 I.C. 268, 23 Cr.L.J. 684; *Subhan*, A.I.R. 1939 Oudh 15, 1938 O.W.N. 1099, 1938 A.W.R. (C.C.) 99, 1938 O.A. 404, 1938 A.Cr.C. 137, 1938 O.L.R. 475, 182 I.C. 252, 40 Cr.L.J. 33. So also, an order passed merely on a consideration of the written statements and without taking any evidence, though there were witnesses present in Court, is invalid and must be set aside—*Kalra v. Muneswar*, 34 Cal. 840 (842). Similarly, an order under this section without giving either party an opportunity of adducing oral evidence as to possession, is illegal and liable to be set aside—*Sakhayur v. Alhadi*, 21 C.W.N. 928, 19 Cr.L.J. 108, 27 Cr.L.J. 88, 43 I.C. 332.

The Magistrate must consider both oral and documentary evidence in the cause—*Kailash v. Jai Narain*, 1 P.L.T. 291, 57 I.C. 169, 21 Cr.L.J. 601; *Hanuman v. Sheo Chandra*, 2 P.L.T. 333. The Magistrate must discuss the evidence on which he comes to the conclusion that a certain party is in possession. Mere prominent mention of his inspection and of the fact that in the course of his inspection he found hundreds of people who were in favour of the second party, is not a ground upon which possession may be found in favour of that party—*Abdud Misser v. Satruhan*, 8 P.L.T. 755, 28 Cr.L.J. 603 (604), A.I.R. 1927 Pat. 301, 102 I.C. 779.

The words "receive all such evidence as may be produced" have been substituted for the words "receive the evidence produced". This shows that the Magistrate is now bound to receive all the evidence produced by the parties and has no discretion to refuse any evidence. "In order to meet certain difficulties which have arisen in connection with the words 'receive the evidence produced by them' in sec. 145 (4) we have made an amendment adopting the phrasology of section 244 (1)"—*Report of the Joint Committee* (1922). It is not open to a Magistrate to refuse the evidence tendered to him—*Tirumalraja v. Lodd Gobind Doss*, 29 Mad 561. The Magistrate's act in preventing the objector from producing evidence to prove his case, constitutes a grave irregularity and the Magistrate's order is liable to be set aside—*Dani Ram v. Bhola Nath*, 1902 P.R. 23. The High Court set aside an *ex parte* order in favour of the first party where the second party had no notice of the place of trial in sufficient time to procure the attendance of his witnesses before the Magistrate who had been moving about from place to place and was holding his camp—*Kali v. Abhoy*, 7 C.W.N. 706. The Magistrate is bound to grant adjournment for the production of important evidence; if he

refuses to do so, his order is liable to be set aside—*Biswambhar v. Amiuddin*, 25 C.W.N. 602, 33 C.L.J. 507, 61 I.C. 63, 22 Cr.L.J. 335. But see *Natho Khan*, 34 Cr.L.J. 216, 141 I.C. 628, A.I.R. 1932 Sind 145, 26 S.L.R. 353, 1932 Cr.C. 681, Ind. Rul. 1933 Sind 67 where refusal of an adjournment for filing a sale-deed was justified on the ground that it would be valuable evidence of title but not of possession with which the Magistrate is concerned.

The action of a Magistrate in admitting documents of one party after the close of the case without notice to the other party and without giving them an opportunity to adduce rebutting evidence is illegal—*Ramroop v. Mano*, 35 Cr.L.J. 481, 147 I.C. 774, A.I.R. 1934 Pat. 86, 1934 Cr.C. 113.

A Magistrate cannot decide a case under this section merely on the basis of a decision in the land registration case. He is under a legal obligation in the terms of the section, to receive all such evidence as may be produced by the parties respectively and consider the effect of such evidence, however great may be the weight which he will eventually attach to the decision in the land registration case—*Gaya Prasad v. Ram Sarober*, A.I.R. 1934 Pat. 471, 15 P.L.T. 453, 1934 Cr.C. 1064, 36 Cr.L.J. 624, 155 I.C. 36.

Where in mutation proceedings the Revenue Court, instead of deciding which party was in possession, went into the question of title and held that a party had a better claim, the Magistrate, on production of the order of the Revenue Court, cannot abruptly drop the proceedings under sec. 145, Cr. P. C., release the property from attachment and direct that possession be delivered to the said party in accordance with the terms of the Revenue Court—*Radha Raman v. Emp.*, A.I.R. 1936 All. 177, 1936 All.L.R. 30, 160 I.C. 20, 1936 A.W.R. 125, 1936 A.L.J. 197, 37 Cr.L.J. 215, 1936 Cr.C. 211.

The record must show the ground of rejection of evidence. A general remark in an order that the oral evidence is not reliable, without referring to it and without giving any reason, is not a proper disposal of the case on the evidence—*Lakhpur*, 4 P.L.T. 579, 24 Cr.L.J. 482, 72 I.C. 544.

Order of taking evidence.—It is certainly unusual for the second party to begin his evidence in a case under sec. 145, Cr. P. C. The order in which the evidence ought to be received by the Court is not dealt with in the section at all. Where a Magistrate directed the second party to begin to adduce evidence in the case, the High Court refused to interfere but directed the Magistrate to reconsider the matter again—*Ram Prasad*, 54 I.C. 616, 21 Cr.L.J. 136.

Examination of witnesses.—An order passed without examining the witnesses is without jurisdiction—*Marudanayakam v. Md. Rowthen*, 17 Cr.L.J. 217, 34 I.C. 329 (Mad.); *Nojem v. Jamalali*, 12 C.W.N. 771. So also, an order passed on the evidence of a person who was not a witness of any of the parties is bad—*Jogendra v. Abu*, 8 C.W.N. 719; *Fateh Sher Khan v. Crown*, 1916 P.R. 4, 17 Cr.L.J. 129.

Where the final order is avowedly based on much evidence which was recovered behind the back of a person at a time when he was not a party to the proceedings at all, the order is wholly illegal—*Narayan v. Chandrabhaga*, 26 Cr.L.J. 1289 (1290), 89 I.C. 153, A.I.R. 1929 Nag. 457. It would probably be necessary in such a case to start the enquiry afresh as the party added would have a right to have the evidence taken in his presence—*Krishnakumari v. Abdul Jabbar*, 6 C.W.N. 737 (764), 30 Cal. 155 (F.B.).

Under the old law, the Magistrate was not bound to examine all the witnesses adduced by the parties but could limit the number for good and sufficient reasons. He could refuse to examine a particular witness. He had a discretion in the matter of examining witnesses—*Samir Sheikh v. Jahed Sheikh*, 3 C.L.J. 478, 3 Cr.L.J. 423 (explaining *Manmatha v. Baroda*, 31 Cal. 685); *Abhayessari v. Sidhesari*, 16 Cal. 513; *In re Nathu Mal*, 24 All. 315; *Surya Kanta v. Hem Chandra*, 30 Cal. 508.

The present Amendment of this sub-section, however, makes it obligatory on the Magistrate to examine all the witnesses produced by the parties, and leaves no discretion to him in this matter.

But the Court has undoubted jurisdiction to curtail the number of unnecessary

witnesses upon the ground that their examination will delay and possibly defeat the ends of justice, though he cannot arbitrarily restrict the number of witnesses that a party wishes to examine—*Biswanath v. Shivanand*, 2 P.L.T. 330, 22 Cr.L.J. 430; *Wahidunnissa v. Fichit Lal*, 24 Cr.L.J. 954 (Pat.). See also *Penumatsa Ranga Razu v. Zamindar, Gazzavaram*, 39 Cr.L.J. 922, 177 I.C. 584, 11 R.M. 346, 1938 M.W.N. 252, 47 M.L.W. 340, A.I.R. 1938 Mad. 654, (1938) 1 M.L.J. 453.

Inquiries under Chap. XII, are governed by sec. 356, Cr. P. C. Mere non-compliance with the provisions of this section does not vitiate the proceedings, unless there has been a failure of justice. The defect is cured by sec. 537, Cr. P. C.—*Natho Khan*, 34 Cr.L.J. 216, 141 I.C. 628, A.I.R. 1932 Sind 145, 26 S.L.R. 353, 1932 Cr.C. 681, Ind. Rul. 1933 Sind 67. See Note 1025

Summons to witnesses—See sub-section (9) and Note 436.

Admission by party.—If one of the parties admits that the other is in possession, the Judge is not bound to take any evidence—*Gangadharam v. Sankarappa*, 9 M.L.T. 91, 12 Cr.L.J. 47, 9 I.C. 285. See also *Amriteshwari v. Darpa*, 7 C.W.N. 558 (561). An admission by a party's Mukhtear that his client had no actual possession, is sufficient to dispense with the evidence—*Haro Mohan v. Gobind*, 7 C.W.N. 351 (352). See also *Pratap v. Sunderbans*, 24 Cr.L.J. 279, 3 P.L.T. 623, 71 I.C. 999, A.I.R. 1923 Pat. 76.

Compromise.—Where the parties filed a petition of compromise according to which the land would be in the possession of both sides as stated in the petition, held that the fact that the parties had compromised and that there was no longer any dispute likely to lead to a breach of the peace, ousted the jurisdiction of the Magistrate. He was bound to stay all further proceedings and he should have recorded an order of cancellation. The very fact that they had compromised precluded him from passing an order under sec. 145, cl. (6), Cr. P. C.—*Sadhu v. Mahammad Ali*, 15 C.W.N. 568, 12 Cr.L.J. 32, 9 I.C. 167; *Gangadhar v. Balkrishna*, 31 Cr.L.J. 191, 121 I.C. 47, A.I.R. 1929 Nag. 285.

Withdrawal by a party.—Where the first party after examining some witnesses represented to the Court that he would conduct the case in the Civil Court and gave an undertaking not to enter upon the said land until the matter should have been settled by the Civil Court, the Magistrate could pass an order declaring the second party to be in possession, without taking evidence on behalf of the second party or recording a formal finding as to possession—*Yar Md. v. Hayat Md.*, 18 Cr.L.J. 1024 (Cal.).

Special Oath.—As regards the refusal of one of the parties to take a special oath, the refusal is of course not to be treated as anything conclusive but it is a matter which the Court is entitled to take into consideration along with the other evidence and it is open to the trial Court to draw such inference from this conduct of the party as it thinks fit—*Nandkishore Singh v. Bigan Lohar*, 41 Cr.L.J. 101, A.I.R. 1940 Pat. 113, 184 I.C. 817, 1940 P.W.N. 6, following *Chintaman Bhat v. Shrinivas Bhat*, 22 Bom. 680

Standard of proof.—In a proceeding under this section it would not be proper to set up any absolute standard and to say that evidence not up to this standard will not be acted on by the Court for the purpose of an order under this section. The proceeding under this section can be decided on the balance of evidence and if the Magistrate can see his way to express an opinion that the evidence of one side is superior to the evidence on the other side, then he is entitled to and should, if possible, form a definite opinion on the question of fact who is in possession. An order under sec. 146, Cr. P. C., attaching the property is a desperate remedy for cases in which the Magistrate finds it quite impossible to choose between the conflicting evidence adduced by the two sides. It would be regrettable if it were necessary for the High Court to pass such an order when the first Court has been able to make up its mind in favour of one party. If the Magistrate thinks that the evidence for the first party, weak though it might be, is preferable to the evidence for the second party, it is the Magistrate's duty to give a decision in favour of the first party—*Kandkishore Singh v. Bigan Lohar*, supra.

416. Reference to arbitrators:—This section requires the Magistrate *himself* to receive the evidence adduced by the parties, and on a consideration thereof to come to a decision. The procedure laid down by this section does not contemplate that the question as to who is in actual possession should be delegated, even by consent of parties, to arbitrators—*Banwari v. Hriday*, 32 Cal. 552, 2 Cr.L.J. 347, 1 C.L.J. 432; *Hamidul v. Sheikh Atait*, 2 P.L.J. 86, 18 Cr.L.J. 145; *Jamuna Das v. Hanuman*, 25 C.W.N. 719, 63 I.C. 159, 33 C.L.J. 338, 22 Cr.L.J. 623; *Hari Prasad Tewari v. Sewak Das*, 1917 Pat. H. C. C. 251, 18 Cr.L.J. 685, 40 I.C. 323. But where the parties themselves agreed that the question of possession should be decided by an arbitrator, and the matter was thereupon referred to arbitrator, the Magistrate was bound to take into consideration the finding of fact by the arbitrators as to which party was in actual possession—*Taramoni v. Gyanendra*, 7 C.W.N. 461 (462). So also, where the dispute was referred to arbitration by consent of parties both of whom accepted the award that followed, it was not open to the Magistrate to insist on the production of evidence—*Haladhar v. Bulaki*, 3 P.L.J. 248, 19 Cr.L.J. 266, 44 I.C. 122, 4 P.L.W. 104. Where the parties themselves applied that the matter should be referred to arbitration, and the Magistrate made an order in terms of the award, the parties were not entitled afterwards to object to the course, and the High Court declined to interfere in revision—*Janki v. Kalika Miser*, 6 C.W.N. cix.

In *Uttam Singh v. Jodham Rai*, 3 Pat. 288, 92 I.C. 172, A.I.R. 1924 Pat. 589, 7 P.L.T. 288, 27 Cr.L.J. 220, Foster, J. considered all the above cases and came to the conclusion that a distinction should be drawn between cases in which the reference to arbitration was made for the purpose of deciding *existing and past* possession, and cases in which the reference was made for deciding *future* possession. The scheme of an inquiry under sub-section (4) of sec. 145 is *retrospective* and not prospective; that is, the Magistrate is to consider who was in possession at the *date of the institution* of the proceeding or within two months *prior* thereto, and not who is entitled to possession and will *henceforth* be in possession of the property in dispute. Therefore, if the reference to arbitration is made for the purpose of deciding the question as to who *was* in possession at the date of the institution of the proceedings, such reference is not improper, and the Magistrate can pass an order on the basis of the award of the arbitrators. But if the reference is made for the purpose of deciding *future* possession, and the arbitrators give an award to the effect that the disputed lands will be divided among the parties, the award is prospective, and the Magistrate cannot pass any order on the basis of that award.

In the same case it has also been decided (at p. 294) that if the parties refer the disputes to arbitration, and the arbitrators give an award, it shows that the parties have come to a settlement of their disputes, and that there is no longer any likelihood of a breach of the peace. In such a case the Magistrate should pass an order under sub-section (5) dropping the proceedings, and cannot pass a final order (declaring the possession of the parties in terms of the award) under sub-section (6). See also *Gangadhar v. Balkrishna*, 31 Cr.L.J. 191, 121 I.C. 47, A.I.R. 1929 Nag. 285.

417. Decision as to possession:—The Magistrate must give a decision as to possession. An order merely declaring one of the parties to be in possession, without deciding and giving a finding as to who was in actual possession of the land in dispute on the date of the preliminary order, is one made entirely without jurisdiction and consequently void—*Kochai v. Romesh*, 35 Cal. 795, 12 C.W.N. 773, 8 Cr.L.J. 28; *Penna Subba v. Sinna Subbaya*, 45 M.L.J. 56, 23 Cr.L.J. 670. Where the Magistrate made no attempt to deal with the question of possession but made some general observation in regard to the ownership of the property, and declared the petitioner to be in possession, held that the order was an obvious infringement of the provisions of this section—*Shukulathi v. Gulam Moideen*, 1922 M.W.N. 689, 16 L.W. 338.

Where the trial Court comes to a finding under the first part of sub-sec. (4) of this section in favour of the first party, a further finding on the question of the forcible dispossession of the first party is unnecessary, especially when such dispossession is not, in

fact, a part of the first party's case, but it does not affect the validity of the order of the Magistrate in so far as it contains a finding with regard to the possession of the first party—*Gobardhon v. Khired Chandra*, 44 C.W.N. 427.

If it is difficult for a Magistrate trying a case under this section to come to a conclusion as to the fact of possession, the wise and proper course to be adopted is to pass an order under sec. 146. If in such a case he passes an order under sec. 145, the High Court in revision can alter the order under sec. 145 into one under sec. 146—*Reid v. Richardson*, 14 Cal. 361; *Kattras Coal Co. v. Shiikristo*, 22 Cal. 297.

As to the effect of a previous Civil Court decree regarding possession, see Notes 438 and 439, *post*. If one of the parties had already brought a civil suit against the other for possession, and in that suit he admitted that he was out of possession and claimed to recover possession from the other party, there is no question as to possession for the Magistrate to decide under this section. In such a case proceedings under this section must be dropped—*Amriteshwari v. Darpa*, 7 C.W.N. 558 (561).

That the land is small in area is a neutral consideration and does not help either party and to say that the dispute is one of a civil-nature begs the whole question. If either party has a good case that party will obtain a proper decision from a Civil Court; but till such a decision can be obtained, proceedings under the criminal law are taken to avoid a breach of the peace—*Guruditta v. Taja*, A.I.R. 1939 Lah 108, I.L.R. 1938 Lah. 611, 40 Cr.L.J. 519, 181 I.C. 59, 41 P.L.R. 217.

See also Note 413.

418. Possession at the date of the order:—The question of possession has to be determined with reference to a specified point of time, *viz*, the date of the initial order, or in the case of forcible dispossession, a date within two months next preceding such order—*Tarapada v. Nurul Haq*, 32 Cal. 1093. No question of title can be taken into consideration, nor can any order be passed as regards future possession without reference to the actual possession at the date of the preliminary order—*Gangadhar v. Balkrishna*, 31 Cr.L.J. 191 (193), 121 I.C. 47, A.I.R. 1929 Nag. 285. The rulings in 11 Cal. 365, 12 Cal. 521, 12 Cal. 539, 15 Bom. 152, 18 Mad. 41, 13 All. 362 are no longer good law.

Delivery of possession by the Civil or Revenue Court:—The actual possession of the land in dispute is the only subject for inquiry. The fact of symbolical possession delivered under the C. P. Code has no bearing on the Magisterial inquiry—*Ramalingam v. Raja of Ramnad*, 16 Cr.L.J. 736 (Mad.); *Promoda v. Khetra*, 25 Cr.L.J. 1104 (Cal). Where a party is given symbolical possession of certain lands, and shortly afterwards proceedings under sec. 145 are instituted in respect of the same land, it is incumbent on the Magistrate to go into the fact of actual possession between the two dates and consider the evidence tendered on that question before passing the final order—*Hazari Khan v. Nafar Chandra*, 22 C.W.N. 479, 18 Cr.L.J. 718; *Ambar Ali v. Piran Ali*, 55 Cal. 826, 32 C.W.N. 275, 29 Cr.L.J. 503. Where it was found that notwithstanding the delivery of symbolical possession given to the auction purchasers (second party), the judgment-debtor and his heirs and representatives (first party) had continued all along to be in possession and were in actual possession on the day on which proceedings under this section were instituted, but the Magistrate made his final order in favour of the second party, *held* that the order made in favour of the second party could not be supported, as they were not in actual possession at the date of the order—*Shahabaj v. Bhajahari*, 49 Cal. 177 (180), 24 Cr.L.J. 875. If the successful party in the Civil Court allows the unsuccessful party to get into and retain possession for a sufficiently long period of time, the Magistrate may make a declaration in favour of the unsuccessful party in the civil suit, if he clearly finds possession in his favour—*Agni Kumar v. Mantazaddin*, 56 Cal. 290 (F.B.), 32 C.W.N. 1173, 30 Cr.L.J. 69 (84).

But recent symbolical possession is as good as actual possession. See *Meherali v. Bidyut Baran*, 34 Cr.L.J. 810, 144 I.C. 708, A.I.R. 1933 Cal. 424, 37 C.W.N. 562 (655), 1933 Cr.C. 622. "If, on a given date, the plaintiff has been put in possession

by the Civil Court, however inefficiently or irregularly, then on that date the plaintiff got possession as against the defendant. The defendant's actual possession has been broken as a matter of fact, even if only for a moment. This is as true of symbolical possession as of any other possession, though what happened at the time of delivery may well be important on the question whether the plaintiff continued in possession very long or was ousted in the following week. Still it is an error to hold in such cases that the decree-holder was never in possession or to ignore the delivery to him"—*Per Rankin C.J. in Agni Kumar v. Mantazuddin*, 56 Cal. 290 (310), 32 C.W.N. 1173, 113 I.C. 181, 30 Cr.L.J. 69, 48 CLJ. 193, A.I.R. 1928 Cal. 610, Ind. Rul. 1929 Cal. 82 (F.B.). Once it is established that possession was delivered, that fact proves the possession of the party taking delivery on the date when it was delivered and raises a strong presumption in favour of the continuance of that possession unless the other side can show that subsequently they have succeeded effectively in displacing the holder of it and restoring their own possession. On the other hand, there is no rule of law that a Magistrate is bound to accept the evidence that the Civil Court peon went to the village and actually performed the acts which are required to constitute a delivery of possession—*Dalip v. Rasik*, 35 Cr.L.J. 154, 146 I.C. 631, A.I.R. 1933 Pat. 586, 1933 Cr.C. 1347, following *Agni Kumar v. Mantazuddin*, supra and *Rambarai v. Sagina*, 75 I.C. 363, A.I.R. 1923 Pat. 437, 24 Cr.L.J. 939, 4 P.L.T. 333.

When the bailiff is entrusted with giving possession what he can do is to go to the property and proclaim in the name of the Court that so and so has been dispossessed and so and so has been put in possession of it. This delivery of possession is not symbolical but actual and is as effective against the judgment-debtor as his physical removal from a house. Such a possession may be called formal in the sense that there is no physical ousting of any individual but not symbolical. Even when the delivery of possession is under O. 21, R. 36 or R. 96 of the Civil Procedure Code, i.e., when the property is in possession of some one on behalf of the judgment-debtor who is not liable to be dispossessed under the writ, the service of the writ effectively dispossesses the judgment-debtor and he cannot interfere with the man who has been given possession. Regarding third party, the matter stands on a different footing. If he is rightly or wrongly physically removed from the property (that is, if he is dispossessed) and if he does not take proper remedy in time, he will lose his right. But if the delivery of possession is purely formal in the sense that nobody has been physically ousted but that there has been a proclamation to that effect, he, if actually in possession, cannot be said to have been dispossessed. Now if, however, circumstances show that the decree-holder or auction-purchaser has slept over his right and has allowed that judgment-debtor to regain possession of the property and he is at the time of the proceeding in peaceful possession of it, the matter stands on a quite different footing. But in such cases the Magistrates must take it as an indisputable fact, once delivery of possession is proved, that on the day of delivery of possession the party to whom possession was given was in possession as against the man who was party to that delivery of possession and was bound by the writ. He must start with the presumption that the state of things which existed on that day continued to exist thereafter unless the contrary is established. The judgment-debtor can only succeed if he establishes beyond doubt that he had completely ousted the man who was put in possession by the Court and was in peaceful possession of the property in dispute—*Rajendra Narayan v. Chintamani*, A.I.R. 1939 Pat. 151, 1938 P.W.N. 526, 19 P.L.T. 632, 40 Cr.L.J. 339, 180 I.C. 322.

The Criminal Court ought to hold that if on a given date the plaintiff has been put into possession by the Civil Court then on that date the plaintiff got possession as against the defendant. But where a considerable period elapses between the date of delivery of possession and the date on which possession of the land is disputed, a stale delivery of possession cannot be conclusive as to present possession—*Zafar Ahsan v. Jugeshwar Bux Roy*, 41 Cr.L.J. 171 (172), 185 I.C. 346, A.I.R. 1940 Pat. 135, 1939 P.W.N. 855.

Where in execution of a decree the Civil Court orders delivery of possession of judgment-debtor's property to the decree-holder and the Officer of Court executing the delivery warrant gives effect to the order and since then the decree-holder is in possession, both in fact and in law, of the property in question but the judgment-debtor within two months of the execution of such warrant attempts forcible entry upon the land whereupon the decree-holder files a petition under this section, *held* that in the face of the decree of the Civil Court in favour of the applicants, the order of the Magistrate referring the parties to the Civil Court for the determination of their rights under sec. 146 (1), Cr. P. C., is highly improper. So far as the land is concerned, it is absurd to think that the parties should again fight out in a Civil Court the question as to who is entitled to the possession of the land which the Civil Court has not only decreed in favour of the applicants but which the Civil Court has already enforced by the execution of its delivery warrant. When a decree is *inter partes*, it is immaterial whether the delivery of possession made under that decree is actual or merely symbolical. In an enquiry under this section there is only one conclusion possible for the Magistrate to arrive at with reference to the land, that is, that it was in the possession of the applicants on the date of the order passed under sub-sec. (1). Even assuming that the applicants have been forcibly dispossessed at any time after the execution of the delivery order, the first proviso to sub-sec. (4) will operate in favour of the applicants, as such dispossession must have taken place within two months next before the date of the order under sub-sec. (1)—*Maung Kan v. Maung Po Tok*, 41 Cr.L.J. 123, 185 I.C. 119, A.I.R. 1939 Rang. 388, 1940 Rang.L.R. 157. That would be applicable to possession obtained against the judgment-debtor but not when the party in possession at the time is not the judgment-debtor but one of the decree-holders claiming exclusive title—*Sheoprasad Shriram v. Gobindram Hardit*, A.I.R. 1940 Nag. 265 (267), 1940 N.L.J. 375.

Where the Magistrate found one party to have been in possession a few days before the date of the preliminary order, and confirmed his possession without finding who was in possession on the date of the preliminary order itself, but the interval between the two dates was very short (*viz.* 5 days only), and there was nothing on the record to show that there was any change of possession in that short interval, and the party confirmed in possession had a decree of a Civil Court declaring him entitled to possession, *held* that the order of the Magistrate was valid—*Md Hussain v. Pachayappa*, 42 M.L.J. 147, 23 Cr.L.J. 92. But, where the Magistrate declared possession in favour of the opposite party as evidenced by certain documents of title relating to a period as old as 10 years prior to the proceeding, without taking further evidence, oral or documentary, to see whether that possession continued up to the date of proceeding, the High Court set aside the order as contrary to the provisions of this sub-section—*Juthan v. Ram Narayan*, 18 C.W.N. 700, 15 Cr.L.J. 202.

See Note 438.

Record of rights:—Whatever presumption may be raised by a recently published record-of-rights, it does not in itself establish the *factum* of possession in a proceeding under sec. 145, Cr. P. C.—*Chintamani v. Jagannath*, 19 C.W.N. 123, 16 Cr.L.J. 315, 28 I.C. 651. In deciding a case under this section a Magistrate has jurisdiction to go behind the orders passed in favour of a party under the Bengal Survey Act (V of 1875 B.C.) and under the Bengal Tenancy Act (VII of 1885 B.C.). The Magistrate's order cannot be said to have been made without jurisdiction, because he has not expressly stated that the presumption arising from the entry in the record-of-rights has been rebutted. The finding that the first party are in possession, is in itself a finding of change of relationship since the decision under the Bengal Survey Act and the entry in the record-of-rights—*Syed Sadek v. Sachindra*, 37 C.L.J. 128, 24 Cr.L.J. 569, 73 I.C. 265. But see *Profulla v. Hodding*, cited in Note 438.

Where the record-of-rights and rent receipts granted to the second party related to a period seven years back, the Magistrate was right in refusing to accept them as evidence, when there was a mass of oral evidence given by a large number of witnesses

to show that at the date of the order the possession was with the first party—*Debendra v. Dhanmani*, 37 C.W.N. 849 (851), 35 Cr.L.J. 489, 147 I.C. 817, A.I.R. 1934 Cal 95, 1934 Cr.C. 81. But where a Magistrate discarded a record of rights filed by the first party simply on the ground that it was an old document prepared more than thirty years ago, *held* that the fact that it was prepared more than thirty years ago does not in any way affect the presumption attaching to it in law, that the presumption is no doubt a rebuttable one and that it was open to the Magistrate to find upon the evidence adduced by the second party that the presumption raised by the document had been rebutted—*Ramroop v. Mano*, 35 Cr.L.J. 481, 147 I.C. 774, A.I.R. 1934 Pat. 86, 1934 Cr.C. 113.

The continuity of the right given under the *wajib ul-arz* must be presumed and it is for the other side to establish that such a right had been abandoned—*Fajju v. Sirya*, 38 Cr.L.J. 881, 170 I.C. 392, 10 R.L. 107, 39 P.L.R. 491

Land under water:—Where the Magistrate, finding that owing to the land being under water, there could not be any act of peaceful possession within two months of the date of the proceeding, declared that the possession in the current year was to be presumed in favour of the man who was in possession during the previous years, and made the final order in his favour, it was held that the order was in direct contravention of this section and the Magistrate should have passed an order under sec. 146—*Satyendra v. Krishnadhan*, 20 C.W.N. 1014, 18 Cr.L.J. 80

Joint possession:—See Note 405, *ante*

419. Forcible and wrongful possession:—A perusal of the first proviso to sub-sec (4) of this section together with sub-sec (4) leaves no room for doubt that the procedure prescribed in the proviso is not mandatory and that if a Magistrate chooses to act under sub-sec (4), that is to say, decides the question which of the parties was in possession at the date of the order made under sub sec. (1), it is not necessary to see whether or not any of the parties has been dispossessed within two months next before the date of the order—*Mohammad Nasir v. Duarka Singh*, 39 Cr.L.J. 963 (964), 177 I.C. 974, 1938 O.L.R. 459, 1938 O.A. 778, 1938 O.W.N. 1018, 1938 A.Cr.C. 132, A.I.R. 1939 Oudh 31

The Magistrate is to decide which party was in actual possession on the date of the preliminary order. When there was no dispossession it is not necessary for the Magistrate to decide whether one party was dispossessed by the other—*Natho Khan*, 34 Cr.L.J. 216, 141 I.C. 628, A.I.R. 1932 Sind 145, 26 S.L.R. 353, 1932 Cr.C. 681, Ind. Rul. 1933 Sind 67. The Magistrate's duty is to find peaceful possession. Ouster of a person lawfully in possession by a trespasser, does not confer on the latter any rights which can be recognised under this section. The Magistrate must look to the possession which may be termed peaceful. He must go back to the time when the present dispute originated—*In re Mohesh Chandra*, 4 Cal. 417. The recent occupation of a trespasser is not a possession which a Magistrate can direct the party to retain under this section. The possession is still with the person ousted by the trespasser, and an order directing him to have possession and the trespasser to be dispossessed, is the proper order to be made—*Ram Singh v. Dalla*, 1876 P.R. 8. But where the Magistrate finds that on the date when the proceedings under this section were instituted and for more than two months preceding that date, the members of the first party have been and are in possession, although the members of the second party obtained delivery of possession of the property through Court a year ago, *held* that the Magistrate should pass his order in favour of the first party—*Shahabaj v. Bhajahari*, 49 Cal. 177 (181), 24 Cr.L.J. 875. Section 145, Cr.P.C., gives protection of law even to a squatter unless his possession commenced within two months of the filing of a petition under the section—*Manickam Pillai v. Meenammal*, 1937 M.W.N. 732.

When the Railway authorities establish a case under sec. 122, Railways Act, entitling them to eject the person asserting possession over a well in the railway premises, the person ejected cannot be said to have been forcibly and wrongfully dispossessed and

therefore the Magistrate is justified in passing order under sec. 145 (6), Cr. P. C., declaring the Railway authorities entitled to possession of the well—*Hotchand Ramchand v. Emp.*, A.I.R. 1940 Sind 167 (168).

Two months:—This proviso lays down that if a party has been dispossessed within two months before the date of passing the preliminary order, that party should be maintained in possession. But if through delay in the action of the Magistrate the preliminary order is not passed within two months of the date of dispossession, the dispossessor should not have the benefit of the delay. The proviso should be interpreted reasonably and not literally—*Srinivasa v. Dasaratha*, 52 Mad. 66, 30 Cr.L.J. 144, 28 M.L.W. 504, 1928 M.W.N. 794, Ind. Rul. 1929 Mad. 118, 56 M.L.J. 33, 113 I.C. 336, A.I.R. 1929 Mad. 198. See also *Dhummun Singh v. Baleshwar Prasad*, 35 Cr.L.J. 91, 146 I.C. 551, 1933 Cr.C. 1363, A.I.R. 1933 Pat. 601; *Chinchilada v. Chintalaswami*, 28 Cr.L.J. 782, 104 I.C. 110, 8 A.I.Cr.R. 574, A.I.R. 1927 Mad. 816; *Ammanna Sastri v. Sitaramayya*, 1939 M.W.N. 336, 49 M.L.W. 473. The Nagpur Court dissents from this view and holds that words of the proviso must be construed literally, and that the date from which the period of 2 months is to be computed, is the date of the order and not the date of the complaint—*Parashram*, 26 N.L.R. 377, 1931 Cr.C. 222 (223), Ind. Rul. 1931 Nag. 57, A.I.R. 1931 Nag. 38, 130 I.C. 153, 32 Cr.L.J. 476; *Nago v. Atmaram*, 27 Cr.L.J. 68, 91 I.C. 244, A.I.R. 1926 Nag. 371. There is no provision allowing for extension of the period of two months laid down in this section, whatever the cause of delay may be. The proviso to sub-sec (4) of this section is only permissive and not a mandatory one. The Magistrate may treat the party forcibly and wrongfully dispossessed within two months as if he had been in possession. The main order is to be based on possession at the date of the preliminary order and the words used with reference to it are positive—*Sunderlal*, 38 Cr.L.J. 375, 167 I.C. 359, A.I.R. 1936 Nag. 271, 1936 Cr.C. 1114, 9 R.N. 179, 11 L.R. 1937 Nag. 174. This view of the Nagpur Court has also been adopted by the Oudh Chief Court, the Lahore and the Allahabad High Courts and the Sind Judicial Commissioner's Court—*Baij Nath*, A.I.R. 1929 Oudh 526, 124 I.C. 363, 31 Cr.L.J. 678, 5 Luck. 440; *Meharban v. Bhola*, A.I.R. 1935 All. 35, 152 I.C. 496, 57 All. 488, 1934 A.L.R. 1007, 1934 A.L.J. 1157, 4 A.W.R. 929, 36 Cr.L.J. 102; *Ghulam Hussain v. Sajawal Shah*, A.I.R. 1933 Lah. 143, 142 I.C. 430, 34 P.L.R. 365, 1933 Cr.C. 241; *Muhammad Ali v. Shamsul Haq*, A.I.R. 1940 Sind 33 (37), 41 Cr.L.J. 486, 187 I.C. 636.

"Forcible" does not mean that actual force or violence should have been used; when the dispossession of a person is effected by a show of criminal force, that person is said to be forcibly dispossessed—*Sith Nath v. Harvey*, 33 C.L.J. 353, 63 I.C. 333, 25 C.W.N. 601, 22 Cr.L.J. 637. If a party, after obtaining the sanction of the Municipality proceeded to dig a tank upon the land in dispute to the exclusion of the other party who was then in possession, held that it was 'forcible' dispossession (though no criminal force was used)—*Manmatha v. Ganga*, 20 C.W.N. 978 (981), 17 Cr.L.J. 449, 36 I.C. 129. The correctness of this decision may be doubted.

The mere ouster of people having no title to the land, by the rightful owner, without using any physical violence, and by removing things which had no right to be on the land, cannot be said to be an unlawful and forcible entry on the land within the meaning of this section, and the persons so ousted cannot be treated to have been in possession—*Collector of Howrah v. Santak*, 44 C.L.J. 593, 28 Cr.L.J. 210, 99 I.C. 1010. Where a landlord resumes possession of an abandoned holding after compliance with the procedure laid down in sec. 87, Bengal Tenancy Act, it cannot be said that he has taken forcible possession of the holding—*Nikunja Behari v. Usabati*, 31 C.W.N. 242, 28 Cr.L.J. 245, 100 I.C. 117.

This sub-section contemplates that the dispossession should be forcible as well as wrongful; the mere wrongful dispossession, without any evidence to show that it was forcible as well, does not come within the purview of this section. The remedy of the party wrongfully dispossessed lies only in the Civil Court—*H. V. Law & Co. v. Manindra*

Chandra, 3 Pat. 809 (813, 814), 26 Cr.L.J. 268; *Ata Husain v. Lalit*, 28 Cr.L.J. 437, 101 I.C. 469 (All).

The words "wrongfully dispossessed" mean dispossessed without due warrant of law, or dispossessed otherwise than in due course of law, even though the dispossessor be the rightful owner—*Bai Jiba v. Chandulal*, 27 Bom.L.R. 1353, 27 Cr.L.J. 661, 94 I.C. 709, A.I.R. 1926 Bom. 91.

420. Attachment:—See second proviso to clause (4).

Time:—The first step to be taken under sec. 145, Cr. P. C., is to draw up a proceeding in terms of sub-sec. (1) thereof. It is only after that has been done that the Magistrate acquires jurisdiction to make an order of attachment under the last proviso to sub-sec. (4). Therefore an order of attachment made before the preliminary order and proceedings contemplated under sec. 145 (1), Cr. P. C., is illegal—*Faizur Rahman v. Shaikh Ladley*, 42 C.W.N. 351. See also *Ghulam Hussain v. Sajawal*, A.I.R. 1933 Lah 143 (144), 1933 Cr.C. 241, 34 P.L.R. 365, 142 I.C. 430.

Emergency:—When a Magistrate considers a case to be one of emergency, the matter is one within his discretion and the action taken by him for maintenance of peace cannot be lightly interfered with—*Prem Kaur v. Benarsi Das*, 34 Cr.L.J. 342 (343), 14 Lah. 615, Ind. Rul. 1933 Lah 177, 142 I.C. 207, 34 P.L.R. 368, 1933 Cr.C. 650, A.I.R. 1933 Lah. 409.

Where there is a dispute likely to cause a breach of the peace concerning any land, a Magistrate is empowered to institute a proceeding under sec. 145 (1), Cr. P. C., and also can attach the land under sub-sec. (4) of that section pending his decision, although the land is claimed by one party to be in joint possession of both the parties—*Bande Ali Shaikh*, (1939) 2 Cal. 419, A.I.R. 1940 Cal. 163 (164), 41 Cr.L.J. 396, 187 I.C. 125.

Mode of attachment—A mere restraint on alienation would generally be of no use in preventing a breach of peace which is the primary object of proceedings under this section. The Code of Criminal Procedure certainly does not contemplate prohibitory order as the only mode of attachment under sec. 88 of the Code, e.g., it is laid down that attachment may be made by taking possession or by appointment of a Receiver, or by a prohibitory order restraining payment of rent, delivery of possession etc. These are recognised modes of attachment and in the absence of any restriction in the section itself, there seems to be no good reason why one or the other method should not be adopted, as may be considered appropriate for the object in view—*Gopala v. Krishnaswamy*, 21 Cr.L.J. 73, 54 I.C. 473, 11 M.L.W. 459, 27 M.L.T. 234; *Prem Kaur v. Benarsi Das*, supra, where the view taken in *Mewa Lal*, 44 I.C. 41, 3 P.L.J. 147, 4 P.L.W. 359, 19 Cr.L.J. 249 was dissented from.

Under this section a Magistrate has no power to restrain the parties from entering the disputed property (i.e., *Kyaung*) and its compound until further orders. He has powers to attach it. But to attach the property is not the same thing as ordering both parties to vacate it—*U Pymnya v. U Wilatha*, 32 Cr.L.J. 637, 131 I.C. 63, Ind. Rul. 1931 Rang 127, 1931 Cr.C. 153, A.I.R. 1931 Rang 51.

Power is given to a Magistrate for the purpose of preserving the peace, and only for that purpose, to attach the disputed property. An order of attachment cannot be passed for the mere purpose of avoiding a future litigation in respect of the right to the present produce of the land in dispute—*Atma Singh v. Harnam*, 7 Lah. 136, 27 P.L.R. 311, 27 Cr.L.J. 761.

The order for attachment would remain in force only pending the Magistrate's decision, and not until a decree or order of the Civil Court is obtained—*Farid v. Piru*, 8 S.L.R. 207, 16 Cr.L.J. 235; *Guru Das v. W'catheral*, 13 C.W.N. 601 (603), 11 Cr.L.J. 7, 4 I.C. 537. The order of attachment will remain in force even when the case is adjourned *sine die*—*Guru Das v. W'catheral*, supra. But the attachment would continue pending the decision of the Magistrate himself under sec. 145, and not the decision in any other case that might be pending before any other Magistrate or any other Court—*Faizur Rahman v. Sheikh Ludley*, 42 C.W.N. 351 (352).

Where a land was attached under this section and the crops standing on the land were sold and the sale proceeds kept in deposit in the Court, but the preliminary order was afterwards cancelled by the Magistrate on the ground that there was no immediate danger of a breach of the peace, the Magistrate could order the sale-proceeds to be restored to the persons who raised the crops—*Suryanarayana v. Ankineed*, 47 Mad. 713 (715), 46 M.L.J. 565, 25 Cr.L.J. 978; *Mahalakshmi v. Subbarayadu*, 17 L.W. 429, 24 Cr.L.J. 783; or he could order the money to be kept in deposit in the Court, until one party or the other obtained an order in his favour—*Suryanarayana v. Ankineed*, 47 Mad. 713 (715); *Changa Reddi v. Ramasamy*, 16 Cr.L.J. 104 (Mad.). An order confirming the attachment and directing the parties to seek redress in a Civil or competent Court, after dropping the proceedings, is without jurisdiction. If the Magistrate thinks it unnecessary to hold an enquiry or continue the proceedings, he ought to set aside the attachment and pass orders as to the disposal of the property in the custody of the Court—*Lakshmana Rao v. Satyanarayana*, 1937 M.W.N. 55. See also Note 435.

Moveable property:—This section does not authorise the Magistrate to attach moveables—*Q-E v. Ramchandra*, Ratanlal 891; *Gopala v. Krishnaswamy*, 27 M.L.T. 234, 21 Cr.L.J. 73, 11 M.L.W. 459, 54 I.C. 473; *Arjun v. Chandan*, 24 O.C. 167, 22 Cr.L.J. 625; *Gajraj*, 20 A.L.J. 906, 24 Cr.L.J. 85, 71 I.C. 213, A.I.R. 1922 All 528.

The attachment of shop goods is illegal under this section—*Dhani Ram v. Bhola Nath*, 23 P.R. 1902. But where the dispute relates not to the mere building or structure itself but also to the valuable property inside, e.g., valuable machinery, goods, etc., on the premises, the Magistrate has powers to attach such moveable property also in the case of emergency under this section—*Prem Kaur v. Benarsi Das*, 34 Cr.L.J. 342 (344), 14 Lah. 615, Ind. Rui 1933 Lah. 177, 142 I.C. 207, 34 P.L.R. 368, 1933 Cr.C. 650, A.I.R. 1933 Lah. 409. See *Rambhari*, 16 Cr.L.J. 224, 27 I.C. 848 where a shop together with goods therein was attached. Once a house is attached the Court is deemed to be in possession of it and neither party can enter it or go into the premises appurtenant to it to remove any moveable property which may be on those premises—*Nuranjan Lal*, 37 Cr.L.J. 346, 160 I.C. 870, A.I.R. 1936 All. 141, 1936 A.L.J. 83, 1936 Cr.C. 140. See also *Kochunny v. Manarikaram*, 1912 M.W.N. 540, 13 Cr.L.J. 222, 14 I.C. 318, where forest together with elephants therein was attached; and *Bharat v. Ramchandra*, 18 Cr.L.J. 287, 38 I.C. 319, 1 Pat.L.J. 356. But see *Gajraj*, supra and *Mahadevi v. Beni Prasad*, 42 All. 214, 18 A.L.J. 242, where a different view was taken.

Where land is attached under sec. 145 (4), Cr. P. C., the land must be taken to include the crops—*Bande Ali Shakh*, (1939) 2 Cal. 419, A.I.R. 1940 Cal. 163, 41 Cr.L.J. 396, 187 I.C. 125.

Possession.—The object of proceedings under sec. 145, Cr. P. C., being to determine which party was in possession at the date of the proceedings and to declare such party to be entitled to retain possession, the possession of the Court during attachment in the course of those proceedings should enure for the benefit of such party in whose favour such a declaration is made. The object of an attachment under sec. 146, Cr. P. C., is to hold the property in anticipation of an action in which the right or title to possession is to be declared by a competent Court and the possession of the Court during such attachment should enure for the benefit of party or person in whose favour a competent Court would make such a declaration—*Abinash v. Tarai*, 30 C.W.N. 541 (546), A.I.R. 1926 Cal. 782, 95 I.C. 117; *Rajjabali v. Faku*, 58 Cal. 1070, A.I.R. 1932 Cal. 29 (31), 35 C.W.N. 483, 134 I.C. 906, 1932 Cr.C. 66.

421. Appointment of receiver:—A Magistrate cannot appoint a receiver under the proviso to clause (4) of this section before the commencement of the inquiry. He can do so only under sec. 146, and after the conclusion of the inquiry—*Subhadramma v. Satyam*, 1910 M.W.N. 821, 8 M.L.T. 314, 11 Cr.L.J. 536; *Mewa Lal*, 3 P.L.J. 147, 19 Cr.L.J. 249, 44 I.C. 41, 1917 Pat.H.C.C. 363; *Diwan*, 30 P.L.R. 23, 30 Cr.L.J. 411 (413), A.I.R. 1929 Lah. 223, 10 Lah. 800, 115 I.C. 29; *Ramakrishnam v. Narayana*,

1933 M.W.N. 917; *Dasrath v. Tarachand*, 21 N.L.R. 191, 26 Cr.L.J. 1378 Even though a receiver may not be appointed consequent on an attachment made under the last proviso to sub-sec. 4 of sec. 145, a Magistrate is competent to make suitable arrangements for the custody of the property attached—*Faizur Rahman v. Sheikh Ludley*, 42 C.W.N. 351 (352). The word "attach" merely means to bring under the control of the Court, and the Magistrate is entitled to effect that object in any way which is within his power. Certainly, the appointment of a Receiver with the powers of a Receiver under the Code of Civil Procedure is not one of those ways, because unless that power is expressly given a Magistrate cannot exercise it. It is, however, clear that if the Magistrate's attachment is to be effected, he must put some person into possession of the property—*Maung San U v Maung Lu Gale*, 39 Cr.L.J. 484, 174 I.C. 958, 10 R.R. 451, A.I.R. 1938 Rang 88. Even if a Magistrate appoints a receiver under this section, such receiver will only be an agent or servant of the Magistrate acting under his order. The right to attach (under the second proviso to this clause) carried with it the right to take the necessary steps for the custody and management of the property, and the Magistrate may appoint a receiver for that purpose—*Srinivasa v. Sathayappa*, 13 Cr.L.J. 295, 14 I.C. 759 (Mad.). The power of such receiver will not be the same as that of a receiver appointed under sec. 146. His duty will be simply to take and keep possession of the properties attached and to make an inventory thereof—*Gopala v Krishnaswami*, 27 M.L.T. 234, 21 Cr.L.J. 73, 11 M.L.W. 459. Possession by such receiver amounts to possession on behalf of the party who will eventually succeed. It does not amount to dispossession of any person—*Rajjabali v. Faku*, 58 Cal 1070, 35 C.W.N. 483 (486), 1932 Cr.C. 66, 134 I.C. 906, Ind Rul 1931 Cal 906.

The amount of the receiver's remuneration should be reasonable, and should not in any case exceed the amount of the nett income realised by the receiver—*Yamunabai*, 27 Cr.L.J. 22, 8 N.L.J. 167, 91 I.C. 54, A.I.R. 1925 Nag 462. See also *Maung San U v Maung Lu Gale*, supra.

A receiver can be appointed only by the Magistrate while the inquiry is proceeding and only when he is satisfied that a dispute likely to cause a breach of the peace still exists. The High Court in revision cannot appoint a receiver, because when the matter has come to the High Court the inquiry is already over and there is no longer any likelihood of a breach of the peace, as the Magistrate's order has put one party in possession of the property in dispute—*Marudayya v Shanmugasundara*, 49 M.L.J. 593, 27 Cr.L.J. 126, 1925 M.W.N. 772, 22 M.L.W. 723.

422. Joint Inquiry:—(1) *One dispute as to several plots* —When the dispute is one, the fact that it embraces several distinct parcels of land does not necessitate an independent proceeding in respect of each. His findings should naturally be directed to possession of particular plots, but the fact that he did not take separate proceedings in respect of each plot would not invalidate his entire proceedings—*Krishna Kamini v. Abdul Jabbar*, 30 Cal 155 (185, 220), 6 C.W.N. 737 (F.B.); *Sajani Kanta v Shamsher*, 24 Cr.L.J. 235, 71 I.C. 699 (Cal); especially if it was shown that none of the parties had been precluded from giving any evidence and no party was prejudiced by the Magistrate's action in not taking separate proceedings—*Ishwar Chandra v Ambica*, 5 C.W.N. 455; *Gajadhar v Thakur*, 26 Cr.L.J. 421, 85 I.C. 40, A.I.R. 1923 Pat 515. Although it may be desirable under such circumstances to deal with each dispute relating to each of several plots separately, it is impossible to extend to such proceedings the strict rule of procedure observed in civil actions—*Manik Mandal v Gobinda*, 6 C.W.N. 206. But proceedings under sec. 145, Cr. P. C., with regard to a large mauza may cause a great injustice to the persons in actual occupation—*The Indian Iron and Steel Company v. Banso Gopal*, 32 C.L.J. 54 (63), 59 I.C. 403, A.I.R. 1920 Cal 824, 22 Cr.L.J. 99.

See Note 397A.

(2) *Different disputes as to different subjects* —When there are independent disputes relating to distinct parcels of land, they ought to be dealt with in separate

proceedings—*Krishna Kamini v. Abdul*, 30 Cal. 155 (200) (F.B.). Where the parties are found to be in possession of different and separate pieces of land, e.g., when the dispute is alleged to exist in 230 villages and each village stands on its own footing, the Magistrate should not club together 230 subjects of dispute and treat them as one. He should decide which party is in possession of this or that village, instead of arbitrarily finding that one party was in possession of all the villages—*Trumalraja v. Lodd Gobind Doss*, 29 Mad. 561; *Crown v. Jamal*, 1 S.L.R. 25, 9 Cr.L.J. 265.

(3) *Different claims* :—In a dispute regarding possession of 708 bighas of land belonging to a zemindari, the parties to the dispute were persons interested as tenants under the zemindari on the one side, and on the other side, persons claiming under the same Zemindar to be interested in various portions of the land as their maurasi jote in different quantities and under interests acquired at different times; and the Magistrate tried the case together and passed an order in favour of the former, directing that they as a body should remain in possession until evicted therefrom by order of a Civil Court; *held* that the Magistrate should have distinctly specified which persons were entitled as against which, and to which portion of the land in dispute. The proceedings were set aside—*Kutuhul v. Uma Singh*, 15 Cal. 31.

(4) *Where parties in all cases are not the same* :—Where the parties in several cases under sec. 145 are not the same, the Magistrate is not competent to try all the cases together, although the parties consent to the adoption of such a procedure. Evidence already taken in one case may be accepted in the other cases, but the cases must be tried separately—*Roy Kumar Singh y. Mahadeo*, 4 C.W.N. 748.

423. Sub-section (5)—Addition of parties:—This clause provides for interested parties coming in even if they have not been served with notice—*Bhure Khan v. Fakira*, 25 Cr.L.J. 159 (Nag). Clause (5) does not enable a Magistrate to add parties to the proceeding. It merely enables a stranger to come in and show that no such dispute likely to cause a breach of the peace concerning any land, etc., existed. He does not become, nor can thereby be made, a party to the dispute which, he seeks to show, has never existed—*Janaki Nath*, 3 C.W.N. 329. The "person interested" who is empowered under clause (5) to show that no dispute exists or has existed, does not come in for the purpose of joining in the proceeding but for the purpose of bringing it to an end—*Krishna Kamini v. Abdul Jubbar*, 30 Cal. 155 (199), 6 C.W.N. 737 (F.B.). Where a person applies on the ground that he is interested in the land in dispute as a tenant of a part of the property in dispute, and there is nothing to show that is not the case, he should be allowed to come in and show under clause (5) that there is no dispute—*Haran Mandal v. Mohim Chandra*, 37 Cal. 285, 11 Cr.L.J. 371, 11 C.L.J. 414. But as he does not become a party to the proceedings, no order can be passed under sub-section (6) in favour of such person; and the Magistrate has no jurisdiction to declare any land to be in possession of such person—*Radhamohan v. Naimuddi*, 19 Cr.L.J. 653 (Cal.); *Rasik v. Jagabandhu*, 25 C.W.N. 214, 22 Cr.L.J. 502.

A person not a party to the original proceedings cannot intervene and ask the Court to keep the proceedings pending with a view to enable him to adjudicate his rights when original contesting parties had settled their disputes and there was no likelihood of a breach of the peace—*Chunilal*, 1939 N.L.J. 197.

For further notes on addition of parties, see Note 401, *ante*.

424. Cancellation of preliminary order:—The apprehension of a breach of the peace is the first condition necessary to give the Magistrate jurisdiction under this section, and if it is found that there is no longer any such apprehension, the Magistrate's jurisdiction ceases. He is then bound to cancel the initial order and stay all further proceedings under this clause—*Mad Khandu v. Sadakali*, 38 C.L.J. 284, A.I.R. 1923 Cal. 577, 25 Cr.L.J. 291. If any party or other person interested denies the existence of a dispute, the onus lies on him to show that it did not exist—*Munnu*, 8 O.W.N. 1062, 33 Cr.L.J. 46 (48), 134 I.C. 1018, A.I.R. 1931 Oudh 415, 1931 Cr.C. 994, Ind. Rul. 1931 Oudh 426.

The mere fact that in a prior criminal case between the parties a Magistrate expressed his opinion that one of the parties was in possession, is not conclusive as to possession, and can in no sense be said to have settled the dispute between the parties; and on the basis of such a decision a Court cannot stay the proceedings started under this section—*Abdul Shakur v. Abu Sayeed*, 6 P.L.T. 710, 26 Cr.L.J. 870, 86 IC 806, A.I.R. 1925 Pat. 593.

A Magistrate can cancel his preliminary order only on facts being brought to his notice which are sufficient to satisfy him that no dispute likely to cause a breach of the peace exists; and, therefore, the cancellation of proceedings merely on the ground that one party admits that the other party was in actual possession of the land in dispute, is without jurisdiction and should be set aside—*Tara Charan v. Bengal Coal Co., Ltd.*, 13 C.W.N. 125. The Magistrate can cancel a preliminary order only when the parties are in a position to give *positive* evidence that there is no likelihood of a breach of the peace. The mere absence of a finding by the Magistrate in respect of a likelihood of a breach of the peace is not sufficient—*Ranada Ranjan v. Bharat Chandra*, 25 C.W.N. 215, 22 Cr.L.J. 484, A.I.R. 1921 Cal 631, 62 IC 180, 33 C.L.J. 69. Unless a party is in a position to show to the Magistrate that there is no likelihood of a breach of the peace, the Magistrate's order under sub-section (1) stands (*ibid*). A proceeding under this section was drawn up between two parties. Thereafter a third party was added who claimed the disputed property but asserted that there was no likelihood of a breach of the peace. Subsequently the first and second parties filed a petition of compromise stating that there was no longer any likelihood of a breach of the peace. The Magistrate made his final order in favour of the third party. Held that the flaw in the proceeding appears to be this that there is no evidence of, and nothing in the proceedings showing, the likelihood of a breach of the peace as between the third party and the first two parties or either of them and that therefore the order must be set aside—*Rasik Lal v. Jagabandhu*, 25 C.W.N. 214. The information that there is no likelihood of a breach of the peace need not be confined to what the parties give under sub-section (5). If the Magistrate is satisfied, whatever the source of his information may be, that the likelihood of a breach of the peace does not exist, he can cancel the order passed under sub-section (1) and stay the proceedings—*Mamndra v. Barada Kant*, 30 Cal. 112, 6 C.W.N. 417; *Kamalammal v. Varu Rowther*, 4 L.W. 57, 17 Cr.L.J. 138; *Santok v. Ram Singh*, 2 Lah. 364, 23 Cr.L.J. 292; *Daljit Singh v. Tej Singh*, A.I.R. 1939 Oudh 284 (285), 1939 O.W.N. 891, 1939 O.L.R. 602, 184 IC 290, 40 Cr.L.J. 930, 1939 A.W.R. (C.C.) 203, 12 R.O. 97, 1939 A.C.R. 178, 1939 O.A. 734. The Magistrate's power to drop the proceedings is not limited to the circumstances mentioned in clause (5). He is entitled to drop the proceedings on his own initiative whenever he is satisfied that there is no further likelihood of a breach of the peace, without giving an opportunity to the parties to show by evidence that there is a likelihood of a breach of the peace—*Narasayya v. Venkiah*, 49 Mad. 232, 49 M.L.J. 784, 27 Cr.L.J. 95. But there must be some materials before the Magistrate to show that there is no longer any apprehension of a breach of the peace. He cannot cancel the proceedings merely on the assumption that since a long time has elapsed from the date of the preliminary order there is no longer any likelihood of a breach of the peace—*Sastu v. Nathuni*, 6 P.L.T. 258, 26 Cr.L.J. 105 (108), 53 IC 665. He can drop the proceedings if it appears to him from a police report that the likelihood of a breach of the peace no longer exists. He can so act on a police information and is not bound to take evidence—*Abdur Rahman v. Dmesh*, 33 C.W.N. 399, 31 Cr.L.J. 409, 122 IC 296. A Magistrate will not be acting illegally if he drops the proceedings after being satisfied upon the information given by a third party that the dispute no longer exists—*Suryanarayan v. Ankineed*, 47 Mad. 713 (715), 46 M.L.J. 565, 25 Cr.L.J. 978; *Krishna Kamini v. Abdul*, 30 Cal. 155 (161). And in so dropping the proceedings at the instance of a third party, the Magistrate is not bound to record the evidence of the witness of one of the parties who might have shown by evidence that a dispute still existed. If the Magistrate is able to act on a police report or other information in starting proceedings

under this section there is no reason why he should not be able to stay further proceedings on similar information, without being obliged to record the evidence produced by the parties with the same formality as he would have done if he had gone on with his inquiry instead of dropping it—*Suryanarayan v. Ankineed*, 47 Mad. 713 (715), 25 Cr.L.J. 978.

Section 145, sub-sec. (5), Cr. P. C., applies only to those cases where any of the parties concerned in the dispute or any other person appears before the Magistrate and denies the existence of such dispute, and if this is not the case, sub-sec. (5) does not come into operation at all. Where, after filing written statements, the parties and their witnesses were not present in Court on the date fixed for evidence and the Magistrate dismissed the case and consigned it to the record room, *held* that, in absence of any denial of the existence of the dispute, his order had become final as laid down by sub-sec. (5) and that he could neither dismiss the case for default nor could he cancel the notice under sub-sec. (1), sec. 145, Cr. P. C.—*Sri Chand v. Bashambar Nath*, 38 Cr.L.J. 242, 166 I.C. 580, A.I.R. 1936 Lah. 1012, 1936 Cr.C. 1115, 9 R.L. 393. But sub-secs. (4) and (5) are not exhaustive and are not intended to prevent a Magistrate from terminating proceedings under sec. 145, Cr. P. C., when he is satisfied that the very cause and reason of proceedings under sec. 145, Cr. P. C., has ceased to exist. It does not mean that the Magistrate cannot in fact cancel his order under sub-sec. (1) or terminate the proceedings when, upon other information, or, it may be, on his own information he is satisfied that no dispute likely to cause a breach of the peace exists. Even though the proceedings relate to a breach of the peace, it is desirable that as a certain formality is required in the institution of these proceedings, so they should be terminated by the Magistrate likewise with some formality. And as proceedings are instituted upon some information, so they should be terminated likewise upon some information and that ordinarily it is desirable before a Magistrate terminates proceedings of this sort in the exercise of powers which by necessary implication the section confers, that he should have on record a police report or other information to the effect that no dispute likely to cause a breach of the peace exists. But where the diary shows that the parties attended the Court from time to time, talked about a compromise and then finally stayed away and did nothing for months on end, that might be said to constitute information which would justify a Magistrate in his opinion that no dispute likely to cause a breach of the peace existed any longer and would justify his order terminating proceedings—*Muhammad Ayoob v. Gulzar Mehar*, A.I.R. 1940 Sind 51, I.L.R. 1939 Kar. 775, 187 I.C. 752, 41 Cr.L.J. 507. Sub-section (5) of this section is not exhaustive. A Magistrate, apart from the particular provisions of this section, can at any time for proper reasons terminate the proceedings under this section which are proceedings in an emergency in the interest of the public peace and which are not concerned with private interests and which are designed to preserve and protect public order—*Hotchand Ramchand v. Emp.*, A.I.R. 1940 Sind 167 (168).

When the Magistrate has cancelled his preliminary order and dropped the proceedings, he becomes *functus officio* and has no jurisdiction to direct the delivery of the property or of its sale-proceeds (e.g., where the property is sold, being perishable) to one of the contending parties, or to allow one of the parties to reap the crops to the exclusion of the other. The proper course under these circumstances is to retain the property or its sale-proceeds in Court, until one of the parties obtain an order of a Civil Court—*Narasayya v. Venkiah*, 49 Mad. 232, 49 M.L.J. 784, 27 Cr.L.J. 95; *Chenga v. Ramaswamy*, 16 Cr.L.J. 104, A.I.R. 1915 Mad 588, 27 I.C. 152; *Dasrath v. Tarachand*, 21 N.L.R. 191, A.I.R. 1925 Nag 297, 89 I.C. 514, 26 Cr.L.J. 1378; *Karimuddin v. Namuddin*, 3 Cr.L.J. 466, 3 C.L.J. 573; *Daljit Singh v. Tej Singh*, A.I.R. 1939 Oudh 284 (285), 1939 A.W.R. (C.C.) 203, 12 R.O. 97, 1939 A.Cr.R. 178, 1939 O.W.N. 891, 1939 O.A. 734, 1939 O.L.R. 602, 184 I.C. 290, 40 Cr.L.J. 930. Where the Magistrate drops the proceedings and orders that the property, which has been attached, should be released in favour of one party, the High Court has power, under sec. 561A, Cr. P. C., to pass an order that the attachment shall continue since release from attachment

might result in a conflict between the parties or their servants before action to prevent it could be taken by the authorities—*Daljit Singh v. Tej Singh*, supra.

A Magistrate has jurisdiction to cancel the order of his predecessor—*In re Krishnaswami*, 2 Weir 108. Where a proceeding under sec 145 has been drawn up by a Deputy Magistrate, the District Magistrate can cancel the proceeding after transferring the case to his own file, and on a consideration of the facts and after hearing the objections of the parties—*Tara Charan v Bengal Coal Co., Ltd*, 13 C.W.N. 125, 10 Cr L.J. 125, 4 I.C. 351. But the District Magistrate cannot quash the proceedings merely on the basis of a so-called admission of a party contained in a letter addressed to him, *ibid*.

An order striking off proceedings under this section does not amount to an adjudication of the question of possession for the purpose of sub-section (6)—*Manindra v. Baroda*, 30 Cal 112, 6 C.W.N. 417.

A Magistrate can, after withdrawing the proceedings under this section, start proceedings under sec 10 of the Bengal Alluvial Lands Act, 1920—*Digendra v. Janaki*, 33 C.W.N. 1115 (1117), 57 Cal 607.

425. Clause (6)—Final order:—

Contents.—Whether sections 366 and 367 do or do not apply to proceedings under sec 145, the Magistrate in his final order must give reasons for his decision sufficient to enable the High Court to determine whether he has complied with the terms of sub-section (4) and directed his mind to the consideration of the evidence adduced before him, and whether he has acted with jurisdiction in making his final order. A statement in the final order that the witnesses have been examined, pleaders have been heard on both sides, and oral and documentary evidence on both parties has been considered, is of a stereotyped nature applicable to any and every case and does not enable the High Court to understand what in fact the evidence was or to say that the mind of the trying Magistrate was properly and sufficiently directed to its consideration. Such a final order is bad and the case must be retried—*Bhuban Chandra v Nisaran*, 49 Cal 187 (189), 34 C.L.J. 125, 25 C.W.N. 887, 22 Cr L.J. 499, *Peria Subba v Sinna Subbaya*, 45 M.L.J. 56, 23 Cr L.J. 670, *Mothahar Ali v Eshaque*, 39 C.L.J. 366, 25 Cr L.J. 1115; *Ishan Chandra v. Hriday*, 29 C.W.N. 475, 26 Cr L.J. 915, 41 C.L.J. 357.

The final order should declare which party is in possession and should state that he will continue in possession until evicted therefrom in due course of law, and should forbid all disturbance of such possession. A brief order simply in these terms "I warn the opposite party not to interfere with the possession of the first party in any way" is not one in sufficient compliance with the law—*Khubi v Darbari*, 2 P.L.T. 267, 22 Cr L.J. 481 (482).

The Magistrate should come to a definite finding as to the fact of possession on the date of the preliminary order regarding each item of property when first party claim all the items and these items of property are claimed severally by many persons who compose the second party—*Chockalingam v Negalingam*, 1933 M.W.N. 1260.

Who can pass order.—The jurisdiction to make a final order under this section is not personal to the Magistrate who initiates the proceedings; and a District Magistrate may of his own motion transfer a case under this chapter to another Magistrate of the first class subordinate to him, and the latter can pass the final order—*Ram Kishore v. Dwarka*, 10 C.W.N. 1095; *Satish v Rajendra*, 22 Cal 898 (901).

But where a Magistrate who heard a case under this section handed over his charge to another Magistrate and was transferred to another district, and subsequently delivered the final order in the case, held that as soon as he handed over the charge and was transferred to another district he became *functus officio* and ceased to have any jurisdiction in the case. He therefore acted without jurisdiction in delivering the final order—*Jagatbandhu v Jagabandhu* 38 C.L.J. 201, 25 Cr L.J. 192 (following *Anand Sarup*, 3 A.I. 563).

"Or should be treated as being":—"We think that this sub-section should apply not only to the case of a party in actual possession but also to one who

is to be treated as being in possession under the proviso to sub-section (4), and we have amended sub-section (6) in this sense"—*Report of the Select Committee of 1916.*

426. "May restore to possession," etc.:—"Power has been given to restore to possession a party forcibly and wrongfully dispossessed"—*Statements of Objects and Reasons* (1914). "We think that this is a logical carrying out of the provision contained in the first proviso to sub-section (4)"—*Report of the Select Committee of 1916.*

Prior to this amendment, it was held in several cases that the only order which a Magistrate was competent to pass under this section was one declaring one of the parties to be entitled to possession, but he had no jurisdiction to *deliver possession, or to oust one person and place another in possession of the property*—*Tulsi Ram v. Abrar Ahmad*, 37 All. 654; *Rameshar*, 27 All. 300; *Sheorani v. Baj Nath*, 14 A.L.J. 146, 17 Cr.L.J. 145; *Moore v. Monoranjan*, 12 C.W.N. 696 (699); *Ranendra v. Kishori*, 14 C.W.N. 78, 11 Cr.L.J. 26. These cases are no longer of any authority.

427. Order in respect of joint possession:—Where in a proceeding under sec. 145 in respect of a dispute concerning some land, the Magistrate finds that one party has been in possession of a portion of the land in dispute and the other party is in possession of the rest, and the possession of the one is not likely to interfere with the enjoyment of the possession of the remaining portion by the other, the Magistrate can, in the exercise of his jurisdiction vested in him under this section, maintain both parties in possession of their respective portions, and an order of attachment under sec. 146 is unnecessary—*Kangali Das v. Muti Lal*, 11 C.W.N. 743. Thus, where the Magistrate finds that each party was in possession of separate rooms in the same building, he is competent to pass an order that the separate possession of each party should continue—*Devaji v. Gotha*, 2 Weir 108. Where the component parts of the subject of dispute are quite divisible from each other, it is quite possible to make an order confirming the possession of one of the parties in regard to one of those parts, and it is not competent for the Magistrate to make an order for attachment of the whole property—*Sadar Ali v. Abdul Karim*, 5 C.W.N. 710. If, however, the subject matter of dispute is one and indivisible, the proper order to make is an order of attachment under sec. 146. Thus, in a dispute in respect of a certain colliery, it appeared that the first party was in possession of the building which contained the office where the business of the colliery was conducted and the cash-books and the papers of the business were kept, and the second party was in possession of the pits, wharves and tramway of the colliery. The Magistrate passed an order in favour of the second party considering that party to be in actual possession. It was held that as the subject matter of dispute was indivisible, and as the second party was not in possession of the whole of the colliery, the order of the Magistrate was bad, since its effect would be to place the second party in possession of that portion (*viz.*, the building) which was in the possession of the first party. The proper order of the Magistrate was one under sec. 146 attaching the whole property—*Katras Jheriah Coal Co. v. Sib Krista*, 22 Cal. 297. Similarly, where there was a dispute concerning certain immovable and moveable property, the Magistrate took proceedings under this section and gave possession of the house to one party, except two rooms in which the Magistrate locked up the moveables until the rights of the parties in respect of the moveables were determined by the Civil Court, held that the order was illegal—*Mahadevi v. Beni Prasad*, 42 All. 214, 18 A.L.J. 171, 21 Cr.L.J. 242.

428. Effect of order:—An order under this section is passed as a result of a summary proceeding about the possession of the parties, and the aggrieved party can always have recourse to the Civil Court to establish his right—*Kunj Behari*, A.I.R. 1936 All. 322 (324), 1936 A.L.J. 370. An order under this section does not bar a suit for ejectment, *e.g.*, under the Agra Tenancy Act. The expression "ejection in the due course of law" is equally applicable to ejectment proceedings under Ch. V of the Agra Tenancy Act and to ejectment under a Civil Court decree—*Iqbal Ahmed v. Suraj Balli*, A.I.R. 1925 All. 210, 82 I.C. 651. Although a Magistrate's order under this section

confers no title, the fact of possession remains and the person in possession can only be evicted by a person who can prove a better right to possession himself—*Dinomoni v. Brojo Mohini*, 29 Cal 187, 29 I.A. 24, 8 Sar. 224, 6 C.W.N. 386 (P.C.). Where after the order under sec. 145, Cr. P. C., the unsuccessful party are able on some occasions either surreptitiously or forcibly to cultivate the lands, these would be no more than isolated acts of trespass—and offences punishable under sec. 188, I. P. C., but not acts amounting to the dispossession of the other side and constituting the juridical possession of the offenders unless the other side refrain from asserting their possession for a sufficiently long period and give up the protection of the order under sec. 145, Cr. P. C., in their favour. The possession of the party which succeeds in proceedings under sec. 145, Cr. P. C., cannot be put an end to by the unsuccessful party by mere violence or surreptitious invasion. The whole object of sec. 145, Cr. P. C., is to stop a breach of the peace by deciding which party is to remain on the land and which party is to seek his remedy in the Civil Court. Breaches of the peace will continue, and the object of the Legislature will be frustrated if the party who has, on the finding that he is not in possession, been forbidden to disturb the possession of the successful party until eviction in due course of law, is allowed to interfere with the possession of the successful party and to plead once more that whatever the order might have been, he is still in possession or has been able to regain possession by force, and thus either compel the successful party to go to the Civil Court or to coerce a Magistrate to proceed again under sec. 145, Cr. P. C. This will be a definite encouragement to disobedience of orders under the section—*Ambika Thakur v. Emp.*, A.I.R. 1939 Pat. 611 (618), 18 Pat 544, 1939 P.W.N. 747, 41 Cr.L.J. 191, 185 I.C. 529, 21 P.L.T. 45. The order throws upon the person contending its validity the burden of proving his title. The onus is not upon the person in possession to show that the judgment in his favour is right; it is for his opponent to show that it is wrong, and where and why it is wrong—*Ibid*. The onus is on the plaintiff to show that the person in possession under the order of the Magistrate has no right to possession—*Manindra v. Saradindu*, 23 C.W.N. 593.

The fact that there is an order under this section does not bar the jurisdiction of the Civil Court to appoint a Receiver under O XL, C. P. Code, 1908. The C.P. Code and the powers of the Civil Court under that Code are in no way fettered by an order passed by a Magistrate under this section. The Magistrate's order is only intended to control any period up to the time when the Civil Court takes *seisin* of the matter—*Barkatunnissa v. Abdul Aziz*, 22 All 214.

Suit under sec. 9, Specific Relief Act—An unsuccessful party in a proceeding under this section cannot be said to have been *dispossessed*, and therefore he has no cause of action to bring a suit under sec. 9 of the Specific Relief Act—*Moore v. Monoranjan*, 12 C.W.N. 696, 7 C.L.J. 547. The defendants started proceedings under sec. 147, Cr. P. C., for a right of way over the disputed land. At the date of the proceeding there was no obstruction but during the pendency of the proceeding the plaintiffs fenced the land. The defendants obtained an order under sec. 147 in their favour and removed the fencing for exercising their right of way over the land. Whereupon the plaintiffs instituted a suit under sec. 9 of the Specific Relief Act. *Held*, following *Moore v. Monoranjan*, *supra*, that the suit was not entertainable as the act of the defendants in passing over the land did not amount to dispossession within the meaning of sec. 9 of the Specific Relief Act and that the plaintiffs had not been turned out and they could use the land in any beneficial way they liked provided they did not interfere with the reasonable use of the same by the defendants as a path way—*Jogendra v. Birendra*, A.I.R. 1935 Cal 454, 39 C.W.N. 394, 61 C.L.J. 307. But where the plaintiff was forcibly dispossessed by the defendant before the institution of proceedings under this section, and the trespasser's possession was maintained by the Magistrate, the plaintiff is entitled to sue under sec. 9 of the Specific Relief Act—*Jwala v. Ganga Prasad*, 30 All 331, 5 A.L.J. 297, 1908 A.W.N. 142. Where the dispossession took place long before the order of the Magistrate under sec. 145, Cr. P. C., which merely confirmed the *status*

quo, the order is no bar to a suit under sec. 9 of the Specific Relief Act—*U Kyawa Lu v. U Shwe So*, A.I.R. 1929 Rang. 21, 6 Rang 667, 114 I.C. 293.

Evidentiary value :—Orders of Magistrates under this section are admissible in evidence to show the fact that such orders were made. They are also evidence of the following facts all of which appear from the orders themselves, *viz.*, who the parties in dispute were, what the land in dispute was, and who was declared entitled to retain possession. For this purpose and to this extent such orders are admissible in evidence for and against every one, when the fact of possession at the date of order has to be ascertained. If the order refers to a map, that map is admissible in evidence to render the order intelligible—*Dinomoni v. Brojo Mohini*, 29 Cal. 187, 6 C.W.N. 386, 29 I.A. 24 (P.C.).

As between parties to the proceeding, the order is also admissible as evidence as regards possession before 2 months from the date of the order, because if there had been a dispossession within 2 months before the date of the order, the Magistrate would have made over possession to the person dispossessed—*Jogendra v. Mohima*, 57 Cal. 987, 34 C.W.N. 358 (361), A.I.R. 1930 Cal. 450, 128 I.C. 251.

Where a person claiming to be a tenant under the plaintiff was found to be in possession in a proceeding under this section, the possession of the tenant, although subsequently found to be wrongful, was sufficient to destroy the adverse possession of the defendant against the plaintiff—*Satulal v. Asiraddi*, 38 C.W.N. 743, 61 Cal. 879, A.I.R. 1934 Cal. 641, 59 C.L.J. 362, A.I.R. 1924 Cal. 703.

Where in a proceeding under sec. 145, Cr. P. C., the Magistrate came to a conclusion as to possession in his final order which was, however, set aside in revision by the High Court on other grounds, his conclusion as to possession cannot be accepted in a subsequent case but his order is evidence that possession was then claimed by the complainants who alleged that they had been forcibly dispossessed and brought a complaint—*Debi Singh v. Sisram*, A.I.R. 1939 Lah. 188 (190), 41 P.L.R. 120.

See Note 442

429. Orders which cannot be made under this section:—Where possession is found to be in one party, the Magistrate has no jurisdiction to grant to the other party *permission to cultivate* the lands in dispute pending any suit that might be subsequently brought—*Shub Churn v. Ishen*, 18 W.R. 27. A Magistrate has no jurisdiction to order a *division of crops* on the land between the parties—*Ram Narain v. Kailash*, 8 C.L.J. 242. Nor can he order that a person shall be maintained in possession until he has reaped the crops and then he shall give way to another—*In re Bunwari Lal*, 1 C.L.J. 136.

Where a Magistrate found that the disputed land was in the possession of the second party, and declared that party to be in possession of the land, but directed that two pathways on the land should be made over to the first party, *held* that there was nothing in this section which gave the Magistrate power to pass an order of this kind—*Asit Mohan v. Sarat Chandra*, 17 C.W.N. 793, 20 I.C. 215, 14 Cr.L.J. 391. But the Bombay High Court dissents from this ruling and holds that in proceedings under this section, it is competent to the Magistrate not only to award possession of the land in dispute but also to grant a right of way to one of the parties. If the Magistrate has power to put the petitioners in possession of a certain portion of a land, he is also empowered (under sec. 147, if not under sec. 145) to give them a lesser right, *viz.*, the right to pass over a strip in that land—*In re Amarsang*, 48 Bom. 512 (515), 26 Bom.L.R. 436, 26 Cr.L.J. 772, 86 I.C. 404, A.I.R. 1924 Bom. 452. See also Note 470A.

A Magistrate is not competent to pass an order directing the *method* by which the possession is to be exercised or the agency by which the person in possession is to collect the profits—*Akaloo v. Mohesh Lal*, 36 Cal. 986, 11 Cr.L.J. 28. A direction requiring the party found in possession of the disputed land to restore two old cemeteries to their old state and allow access to Mussalmaus if they should desire to go near the cemetery to invoke the blessing of God is beyond the powers of the

Magistrate—*Balakrishna v. Jalaluddin*, AIR. 1939 Mad 791, 1939 M.Cr.C. 77, (1939) 2 M.L.J. 111, 1939 M.W.N. 737, 50 M.L.W. 338, 41 Cr.L.J. 18, 184 I.C. 451, 12 R.M. 452.

Where there was a danger of the breach of the peace between two contending parties who were served with a notice under this section but a third party, although not served with a notice, appeared and filed a written statement, claiming to be in possession of a part of the disputed property and the Magistrate decided in her favour, ordering that her possession should not be disturbed till evicted by an order of a competent Court. *Held* that the Magistrate fell into an error and exceeded his jurisdiction as he decided questions which were not raised in the notice—*Tej Bhan v. Jagdish Prasad*, AIR. 1936 Oudh 188, 1935 O.W.N. 373, 1936 Cr.C. 325. An order in favour of persons who are not parties to the proceedings is without jurisdiction—*Babu Ram Pandey v. Shyamdeo Narayan*, A.I.R. 1939 Pat. 187, 1938 P.W.N. 810, 179 I.C. 548, 40 Cr.L.J. 220.

430. Supplementary order without notice:—Proceedings under this section were drawn up in respect of certain premises consisting of a *dalán*, a hotel and a privy, and the Magistrate made his final order with regard to the first two. Subsequently, the omission in respect of the privy being brought to his notice by one of the parties, the Magistrate declared that party's possession of it without notice to the other party. It was held that the order in respect of the privy should not have been made without hearing the other party—*Natabar v. Bireswar*, 22 C.W.N. 552, 19 Cr.L.J. 732, 46 I.C. 412.

431. Order in respect of land not covered by proceedings:—In a proceeding under this section, the Magistrate is bound to ascertain and define the land in dispute, and he has no jurisdiction to pass an order in respect of lands which were not covered by the initiatory proceeding—*Amruteshwari v. Darpa Naram*, 7 C.W.N. 558 (561), *Sukhari v. Ram Khelawan*, 4 P.L.T. 372, 24 Cr.L.J. 309, 1 Pat.L.R. 255 (Cr.), AIR. 1923 Pat. 528, 72 I.C. 69; *Kirpal Singh v. Hari Choudhury*, AIR 1939 Pat 565, 1939 P.W.N. 392, 182 I.C. 54, 12 R.P. 5, 5 B.R. 710, 40 Cr.L.J. 629; *Uttam Singh v. Jodhan Rai*, 3 Pat 288 (295), 27 Cr.L.J. 220, *Chaman Singh v. Cook*, 11 C.W.N. xliii. See also *Tej Bhan Singh v. Jagdish Prasad Singh*, 37 Cr.L.J. 1058, 164 I.C. 1120, 1935 O.W.N. 373, AIR 1936 Oudh 188, 1936 Cr.C. 325, 9 R.O. 138.

432. Alteration of proceedings:—If a Magistrate, after having initiated proceedings under sec 145, afterwards finds that the dispute is as regards a right of way over a land, rather than regarding the possession of the land, he can alter the proceedings under sec 145 into proceedings under sec 147 and pass an order under the latter section—*In re Amarsang*, 48 Bom 512 (515), 26 Bom.L.R. 436, AIR 1924 Bom 452, 26 Cr.L.J. 772, 86 I.C. 404; *Anath Bandhu v. Wahid Ali*, 26 Cr.L.J. 558, 85 I.C. 654, AIR. 1925 Cal 1022. See Notes 407 and 470A.

433. Persons bound by the order:—The parties whom the Magistrate has to deal with are not merely the actual parties to, but all persons who may be concerned in, the dispute, the object being to prevent a breach of the peace. Therefore it is not only the actual parties but all parties who may have notice of the proceedings that are bound by the order—*In re Nathubhai*, 11 Bom.L.R. 277, 2 I.C. 513, 11 Cr.L.J. 64. This is borne out by sub-section (3) which lays down that the preliminary order must be published at some conspicuous place at or near the subject of dispute. An order under this section is binding not only on the actual parties but also on persons who, though not made parties, were aware of the proceedings and acted in collusion with the second party—*Satya Charan*, 33 C.W.N. 1002 (1004), AIR. 1930 Cal 63, 1930 Cr.C. 15, Ind Rul 1930 Cal 634, 31 Cr.L.J. 945, 129 I.C. 858. But see *Janaki Nath*, 3 C.W.N. 329 (331) where it has been laid down that one of the first principles on which Courts proceed is that judicial proceedings cannot bind a person who is not a party to them. Once a declaration has been made as regards the possession of a land, it is binding on all persons interested therein. Conse-

quently, it is for the person who disputes that possession, whether he was a party to the proceedings or not, to institute a suit in a Civil Court—*Jainath v. Ramlakhan*, 10 P.L.T. 689, 30 Cr.L.J. 840 (841), 117 I.C. 643, Ind. Rul. 1929 Pat. 451, A.I.R. 1929 Pat. 505; *Raghunandan Pandey v. Kishin Mohan Singh*, 10 P.L.T. 685, 77 I.C. 1005, A.I.R. 1922 Pat. 210, 25 Cr.L.J. 541 (542). The same High Court has, however, taken a different view in *Inder Deo Singh v. Kesho Singh*, 39 Cr.L.J. 268, 173 I.C. 107, A.I.R. 1938 Pat. 1, 18 P.L.T. 886, 4 B.R. 211, 10 R.P. 372, 1937 P.W.N. 845. See also *Nepal Chandra v. Prafulla Kumar*, 44 C.W.N. 928.

Where the manager of a joint family has taken proceedings under sec. 145 as the managing member, he and the whole family are bound by the order under it—*Ram Sahai v. Binode Bihari*, 45 All. 306, A.I.R. 1923 All. 151. An order under sec. 145 applies to any body bound by such order or any one claiming under such person. Where proceedings were taken against the plaintiffs' father alone under sec. 145, Cr. P. C., but the plaintiffs, who were the undivided sons of their father, were aware of the proceedings and the property was acquired for the joint family and the plaintiffs' father was in possession as manager on their behalf, held that the plaintiffs, who admittedly had notice of the proceedings, should also be bound by the order passed under sec. 145 Cr. P. C.—*Venkatasommaraju v. Alla-i Varahalaraju*, A.I.R. 1930 Mad 48, Ind. Rul. 1930 Mad 299, 52 Mad. 787, 57 M.L.J. 228, 1929 M.W.N. 518, 30 M.L.W. 201, 122 I.C. 171. See also *Thakurdas v. Narayan*, 38 Cr.L.J. 307 (311), 166 I.C. 709, A.I.R. 1936 Nag. 192, 1936 Cr.C. 805, I.L.R. 1936 Nag. 205, 9 R.N. 144; *Muneshwar Bakhsh Singh v. Gajju Singh*, 39 Cr.L.J. 868, 177 I.C. 247, 1938 O.A. 635, 1938 O.W.N. 828, 1938 O.L.R. 401, 1938 A.Cr.C. 83, 11 R.O. 40.

The Oudh Chief Court and the Lahore High Court are of opinion that orders under this section are not binding on persons who are not made parties to the proceedings. See *Afuqimunnissa v. Ahmedunnissa*, 2 O.W.N. 704, 26 Cr.L.J. 1581; *Mahesh*, 11 O.L.J. 743, 26 Cr.L.J. 398; *Maya Debi v. Divan Chand*, A.I.R. 1935 Lah 115, 1935 Cr.C. 181. See also *Peare Lal*, A.I.R. 1934 All. 853, 1934 Cr.C. 1043, 1934 A.L.J. 650, 4 A.W.R. 896, A.I.R. 1934 All. 622, 152 I.C. 500, 36 Cr.L.J. 114; *Muneshwar Bakhsh Singh v. Gajju Singh*, supra.

An order under this section binds not only the actual parties but their representatives also. It is binding on a purchaser from the person against whom it was made and with knowledge of such order—*Goluck v. Kali Charan*, 13 Cal. 175. It is binding upon all persons who may claim the property through the parties to the proceedings under a title derived subsequent to the order—*Jogendra v. Brojendra*, 23 Cal. 731.

But a person who was merely examined as a witness in the proceeding is not bound by an order under this section—*Kuppayyar*, 18 Mad. 51. See also, *Janoki Nath*, 3 C.W.N. 329.

If a party is declared to be entitled to possession, and the world at large is forbidden to disturb his possession, he would be entitled to take possession and no one would have any right to interfere with his doing so—*Bahawala v. Duni Chand*, 24 Cr.L.J. 461, 72 I.C. 621 (Lah.).

433A. Disobedience of the order:—Where a complaint about the disobedience of an order under sec. 145, is made after a lapse of nine months and the reasons for the delay are given and the Magistrate is satisfied that there has been a disobedience of the order, action should not be refused—*Emp. v. Zahirus Sayed Alvi*, 35 Cr.L.J. 820, 16 N.L.J. 178, 148 I.C. 1014, A.I.R. 1934 Nag. 114, 1934 Cr.C. 492.

434. Duration of the order:—An order of the Magistrate is meant to be only a temporary order and is to be operative until one or other of the parties obtains a determination of his rights in a Civil Court—*Kunya Behari v. Khetra Pal*, 29 Cal. 208 (210). It is intended to control only the period up to the time when the Civil Court takes seisin of the matter and passes such order as may be necessary for the protection of the property—*Barkatunnissa v. Abdul Aziz*, 22 All. 214. This section does not empower a Magistrate to make an order permanently settling the difference of the parties—*Mad. High Court Pro.*, 23-6-1883.

Eviction in due course of law:—An order under this section lasts only until the party in whose favour it is made is evicted in due course of law. A suit for regaining possession is not in all cases necessary; an order of restitution validly made by a Court may be regarded as eviction of the person against whom the order is made—*Rajjabali v. Faku*, 58 Cal 1070, 35 C.W.N. 483 (486), 1932 Cr.C. 66, A.I.R. 1932 Cal. 29, 134 I.C. 906.

See Note 458.

435. Sub-section (7)—Continuation of proceedings:—"The Magistrate has been authorised, on the death of a party, to make his legal representative a party to the proceedings, and if necessary, to decide who such legal representative is"—*Statement of Objects and Reasons* (1914). This clause supersedes the decision in *Bechu v. Debkumari*, 21 Cal. 404, where it was held that a son could not be made a party in place of his deceased father.

Where an order dropping the proceedings under this section is made merely because one of the parties to the proceedings died, the order is *ultra vires* and the proper course for the Magistrate on being informed of the death of one of the parties to the proceedings, is to continue the enquiry after making such substitution as might seem to him to be necessary. Fresh proceedings started thereafter are without jurisdiction and the first proceedings must be held to be still subsisting—*Misl Mirdha v. Abdul Rahim*, 38 C.W.N. 724, 1934 Cr.C. 1209, A.I.R. 1934 Cal 787, 36 Cr.L.J. 303, 153 I.C. 174.

The words "may cause" show that the Magistrate is not bound to continue the proceedings on the death of a party. The provision in clause (7) is intended to keep alive the jurisdiction of the Court where the danger of the peace still exists, inspite of the death of any party to the proceedings. If, however, the dispute no longer exists and the danger has disappeared, the Magistrate has jurisdiction to discontinue the proceedings—*Kamalammal v. Vavu Rowther*, 4 L.W. 57, 17 Cr.L.J. 138, 33 I.C. 314.

Death of Petitioner before High Court—The death of the petitioner (who applied for revision of an order of a District Magistrate) during the pendency of the application for revision in the *High Court*, causes the application to abate. This sub-section only applies to proceedings before a Magistrate—*Krishen Deo v. Hari Singh*, 1919 P.R. 23, 20 Cr.L.J. 720; *Subbaraju v. Ramachandra*, 4 L.W. 440, 17 Cr.L.J. 389, 35 I.C. 821.

Sub-section (8):—"The Magistrate has been empowered to pass necessary orders for the custody or sale of the property in dispute which is subject to speedy and natural decay"—*Statement of Objects and Reasons* (1914). Thus, if the subject-matter of dispute is a crop growing on the land, the Magistrate can cause the crop to be sold by auction and the price placed in deposit, as was done in *Mir Singh v. Makkhan*, 45 All. 404.

If the Magistrate drops the proceedings he cannot pass any orders in favour of either party, as regards the disposal of sale-proceeds of the crops raised on the land in dispute but should keep the same in deposit pending orders of a Civil Court—*Narasayya v. Venkat*, 49 Mad. 232, 49 M.L.J. 784, 27 Cr.L.J. 95. See Notes 420 and 424.

The word "produce" in this sub-section is necessarily confined to what is grown from the ground. It refers also to a finished article or a semi-finished article made from raw material. A sugar mill produces molasses and the molasses can be fairly called the produce of the mill. In the same way a flour mill produces flour and the flour can be considered to be the produce of a flour mill. Where, therefore, proceedings under this section were drawn up in respect of factory building including vats, the molasses in the vats can be treated as the produce of the factory within the meaning of this sub-section. The Magistrate has jurisdiction to pass orders for sale of molasses found in the vats of factory and to order for the disposal of the sale-proceeds on such terms as he thinks fit—*Nihal Chand v. Jai Ram*, A.I.R. 1930 Oudh 165, 5 Luck. 462, 6 O.W.N. 1070, 1930 Cr.C. 257, 31 Cr.L.J. 688, 124 I.C. 441.

436. Sub-section (9):—"We have added this sub-section on the lines of section 244 (2)"—*Report of the Joint Committee* (1922). Even prior to this amend-

ment there were numerous decisions empowering the Magistrate to issue summons to witnesses, which are given below.

Summons to witnesses—If the parties cannot procure the attendance of witnesses, it is the Magistrate's duty to issue summons for their attendance—*Ram Chandra v. Monohur*, 21 Cal 29; *Surya Kanta v. Hem Chandra*, 30 Cal. 508, 7 C.W.N. 404. When an application for the issue of summonses to witnesses is made at a proper time, the Magistrate should not arbitrarily refuse his assistance merely on the ground that the number of witnesses mentioned is large—*Harendra v. Bhowani*, 11 Cal. 762, or on the ground that the application for the issue of summonses is vexatious—*Gajjudd v. Ainuddi*, 18 C.W.N. 94, 22 I.C. 431, 15 Cr.L.J. 79. But it is not *obligatory* on a Magistrate to assist the parties in producing their witnesses, and they cannot claim as a matter of right that processes should be issued by the Court to enable them to bring forward their evidence—*Taropada v. Nurul Haq*, 2 C.L.J. 280, 32 Cal. 1093; *Harendra v. Gvish Chandra*, 38 Cal 24, 7 I.C. 798, 11 Cr.L.J. 530; *Arjun v. Juggar Nath*, 3 P.L.T. 433, 23 Cr.L.J. 275. A Magistrate is not bound to exhaust the processes of the Court in order to enforce the attendance of witnesses that do not appear or cannot be found—*Haripada v. Sanyasi*, 17 C.W.N. 144, 17 C.L.J. 610, 18 I.C. 264, 14 Cr.L.J. 40. *Cf.* the words "may if he thinks fit" in the sub-section. These words, however, have not been taken into account in *Chakrapani*, 52 All. 91, 31 Cr.L.J. 839 (840), 1930 Cr.C. 432, Ind. Rul. 1930 All. 671, A.I.R. 1930 All. 319, 1930 A.L.J. 484, 125 I.C. 463, where it has been ruled that the Magistrate is bound to summon such witnesses as may be mentioned to the Court by either party. In *Chakrapani's* case it was also held that after the amendment in 1923 the ruling, *Taropada v. Nurul Haq*, supra, is no longer good law. The view of law as laid down in *Chakrapani's* case was doubted and was not followed in *Kunj Behari*, 37 Cr.L.J. 694, 162 I.C. 736, 1936 Cr.C. 492, 58 All. 920, 1936 A.L.R. 463, 8 R.A. 892, A.I.R. 1936 All. 322, 1936 A.L.J. 370, where it was held that it could not be said, in view of the wording of sub-sec. (9), sec. 145, that the Magistrate was bound to issue process to compel the attendance of witnesses. The High Court will interfere in revision only where serious and substantial injustice has been done to the applicant for not compelling attendance of his witnesses—*Kunj Behari*, supra. The recent amendment to cl 4 which requires the Magistrate to receive all such evidence as may be produced by the parties and to consider the effect of such evidence, does not mean anything more than that he must receive evidence actually put before him by the parties but does not require him to summon witnesses at the instance of the parties who are unable to bring the witnesses to Court—*A. Meah v. Steel Brothers & Co., Ltd.*, 39 Cr.L.J. 708 (710), 176 I.C. 266, A.I.R. 1938 Rang. 229, 11 R.R. 40.

Where a Magistrate ignoring the evidence as a whole attached the land under sec. 146, Cr. P. C., relying exclusively on the evidence of the Superintendent of Police, was directed by the High Court to pronounce judgment after consideration of the evidence as a whole and was transferred before he could do so, his successor had no obligation upon him to summon any witnesses other than those originally produced by the parties in the proceeding—*Bhupal v. Abdul Hakim*, A.I.R. 1939 Pat. 281, 40 Cr.L.J. 276, 179 I.C. 896, 1939 P.W.N. 155, 5 B.R. 319, 11 R.P. 423.

437. Sub-section (10)—Power to proceed under Sec. 107:—In *Balajit v. Bhoju*, 35 Cal. 117, it has been held that, the word "shall" in sub-section 1 ("he shall make an order in writing", etc.) is mandatory; and therefore where there is a *bona fide* dispute likely to cause a breach of the peace, the Magistrate is bound to proceed under this section, and he has no discretion to act under sec. 107. This decision is no longer authoritative in view of the present sub-section.

There may be cases in which it would be necessary to bind parties under sec. 107, in order to prevent a breach of the peace even though proceedings under sec. 145 had been taken. An order under sec. 145 is no bar to the passing of an order under sec. 107—*In re Muthia*, 36 Mad 315, 14 Cr.L.J. 559; *Bandi*, 24 O.C. 21, 22 Cr.L.J. 384. See Note 234.

Miscellaneous:—

438. Effect of prior decree on a proceeding under this section:—

Where there is a decree of a Civil Court for possession in respect of the disputed land, the duty of a Criminal Court proceeding under this section is to find which party held such Civil Court decree and then to maintain that party in possession. The Magistrate is not competent to ignore the decree of the Civil Court—*Sims v. Johurry*, 5 C.W.N. 563; *Atul Hazra v. Uma Charan*, 20 C.W.N. 796, 17 Cr.L.J. 182; *Md. Husain v. Pachayappa*, 42 M.L.J. 147; *Ram Krishna*, 3 P.L.T. 335, 23 Cr.L.J. 321; *Kedar Nath v. Jaleswar*, 4 P.L.T. 248; *Kunja Behari v. Khetra Pal*, 29 Cal 208 (210). It is the duty of the Magistrate to maintain any order which has been passed by the Civil Court; and therefore to take proceedings which must necessarily have the effect of modifying or cancelling such order or of interfering with the rights of parties determined by a Civil Court, is to assume a jurisdiction that the law does not contemplate—*Doudat v. Rameshwari*, 26 Cal 625 (628), 3 C.W.N. 461; *Sims v. Johurry*, 5 C.W.N. 563; *In re Pandurang*, 24 Bom 527 (533); *Brahmanath v. Sundarnath*, 17 A.L.J. 434, 20 Cr.L.J. 410; *Behari Gir v. Bhubaneshwari*, 1 P.L.T. 9, 5 P.L.J. 104, 21 Cr.L.J. 200; *Abhoy Mandal v. Basu Rai*, 27 C.W.N. 267, 37 C.L.J. 256, 73 IC 53, A.I.R. 1923 Cal 176, 24 Cr.L.J. 517; *Maung Kan v. Maung Po Tok*, 41 Cr.L.J. 123 (124), 185 IC 119, A.I.R. 1939 Rang 388. But see *China Tambi v. Virappa*, 38 Cr.L.J. 805, 169 IC 939, 10 RR 39, A.I.R. 1937 Rang. 202. In a proceeding under this section, the Magistrate has no right to compel a party who has obtained a decree from a Civil Court in respect of the property in dispute to go back to the Civil Court and get something else. The Magistrate has nothing to do but to give effect to the decree of the Civil Court—*Lachmi v. Partab*, 27 Cr.L.J. 43, 91 IC. 75 (Oudh). The allegation that the decree was fraudulent cannot be examined in the Criminal Court. Where the decree was for confirmation of possession, the Criminal Court, in a proceeding under sec 145, Cr P C., will assume that on the date of the decree the decree-holder was in possession and that his possession has continued until the judgment-debtor in the previous suit disturbed that possession, if at all. So far as onus is concerned, it is upon the judgment-debtor to establish that he has entered into possession by some means or other since the date of the decree—*Kishori v. Anand*, 31 Cr.L.J. 1005, 126 IC 293, 10 P.L.T. 862, A.I.R. 1930 Pat. 162, 1930 Cr.C. 258. This view has been dissented from in *Raghunath Singh v. Emp.*, 37 Cr.L.J. 1126, 165 IC 289, A.I.R. 1936 Pat 537, 15 Pat 336, 17 P.L.T. 526, 3 BR 30, 9 RP 165, 1936 Cr.C. 915, where it has been held that the decree for confirmation of possession cannot be regarded as conclusive proof that the decree-holder was in possession on the date of the decree, although in a case under sec 145, Cr P C., since that decree presumably declared title, the presumption that possession followed title might possibly have some force. The Magistrate cannot ignore the decree of the Civil Court on the ground that the Court had no jurisdiction over the property. He cannot go behind the decision of the Civil Court and ignore the decree, even though the Court had no jurisdiction over the land. It is not for the Magistrate to put his own interpretation or construction on the decree or to question the validity of a decree that has not been set aside by a competent Court—*Abhoy Mondal v. Basu Rai*, 27 C.W.N. 267; *Tufani v. Bibi Umatul*, 5 P.L.T. 535, A.I.R. 1923 Pat. 765. Thus, where in execution of a Civil Court decree in a suit in which only one of the members of a Mitakshara family was a party, the whole of the family property was delivered over to the purchaser, it was not competent to a Magistrate acting under this section to declare that the purchaser should be put into possession of fractional share and that the shares of those persons who were not made parties to the suit ought not to have been included in the decree. The Magistrate must find possession according to the decision of the Civil Court, whether it was rightly or wrongly given—*Madholal v. Jaglal*, 6 C.W.N. 841 (843). Where the Civil Court decree has defined the boundaries of a *jalkar* right, the Magistrate in instituting proceedings under this section ought to follow that decree and not to assume that the boundary has not been definitely settled by the Civil Court.

—*Fani Bhusan v. Jamiruddin*, 6 C.W.N. 161 (162). Where a dispute between the parties had been terminated by an order under the provision of secs. 40 and 41 of the Bengal Survey Act, and there had also been an entry in the Record of Rights in accordance with that order, the Magistrate should, in determining the question of possession between the parties in a proceeding under this section, presume that the possession of the land was with the person who had title as determined by the decision under the Survey Act, and which title was further to be presumed from the entry in the Record of Rights—*Prafulla v. Hodding*, 21 C.W.N. 1059, 26 C.L.J. 39, 18 Cr.L.J. 988; *Srinath v. Pravat Chandra*, 18 Cr.L.J. 301 (Cal.). A summary decision under the Bengal Land Registration Act is entitled to the same respect as a Civil Court decree on the question of possession, in a proceeding under this section—*Kulbans v. Ramsidh*, 1 P.L.T. 501, 21 Cr.L.J. 735; *Babu Lal v. Manager, Bettia Estate*, 1 P.L.T. 588, 21 Cr.L.J. 785, 58 I.C. 513. But if in the land-registration proceedings there was no adjudication of possession by the Revenue Courts, and they refused to register the name of a particular party, the Magistrate in a proceeding under this section is bound to determine as to which of the parties is in actual and physical possession of the property in dispute—*Babu Lal v. Manager, Bettia Estate*, *supra*.

It is nowhere laid down that possession given by the Civil Court, even though there be no overt act beyond the actual taking of possession under the orders of the Court, is ineffective to break a previous continued possession on the part of another party. For the purposes of this section a decree-holder has no advantage over anyone else except that he can date his possession from the date when the Civil Court delivered possession to him, but he must maintain that possession as any other person would have to maintain it. His possession might be lawful as against one person and unlawful as against another; but the possession is his—*Hakimkhan*, A.I.R. 1934 Nag. 217, 152 I.C. 28, A.I.R. 1934 Nag. 246, 17 N.L.J. 261, 1934 Cr.C. 988, 36 Cr.L.J. 52. When a Civil Court peon delivers possession to a person under O. XXI, r. 95, C. P. C., he gets actual possession of the property with title. It is the duty of the Criminal Court to respect, maintain and preserve such a possession. It is the duty of the Criminal Court to give all help provided by law to the man who has been put in possession of a property by the Civil Court—*Mahabir*, 36 Cr.L.J. 146 (150), 152 I.C. 591, 1934 Cr.C. 1218, A.I.R. 1934 Pat. 565. See also *Chandeshwar Prasad Narain Singh v. Dwarka Singh*, 38 Cr.L.J. 1096, A.I.R. 1937 Pat. 557, 1937 P.W.N. 571, 171 I.C. 593.

Where delivery of possession is given to a party under sec. 29 of the Bengal Land Revenue Sales Act (Act XI of 1859), the utmost effect of the *dakhaldeshani*, which is formal is that on the day of the *dakhaldeshani* that party must be taken to be in possession of the lands in dispute. But where there was a difference of more than two months between the date of *dhakhaldeshani* and the initiation of the proceedings under sec. 145 and if in the meantime in spite of the *dakhaldeshani* the other party have regained possession and were in peaceful possession when the proceedings started, their possession has to be maintained under sec. 145, Cr. P. C., unless it can be shown that they have obtained that possession within two months of the initiation of the proceedings by force or fraud—*Gursahai v. Meghu*, 36 Cr.L.J. 513 (516), 154 I.C. 426, A.I.R. 1935 Pat. 83, 16 P.L.T. 19, 1934 Cr.C. 143. The effect of delivery of possession under sec. 29 of the Bengal Land Revenue Sales Act (Act XI of 1859) is to place the purchasers in actual possession of the property and is not merely to give them the right to possess.

The effect of the delivery of symbolical possession is to transfer to the purchasers the possession which was in the proprietors—*Meherali v. Bidyut Baran*, 37 C.W.N. 652, 1933 Cr.C. 622, 34 Cr.L.J. 810, 144 I.C. 708, A.I.R. 1933 Cal. 424, following *Syed Golam Barea v. Lala Deoki Nandan*, 6 C.L.J. 472 (484).

Even when delivery of possession was given to one party under O. XXI, r. 95, C. P. C., the Magistrate has jurisdiction to act under sec. 145, Cr. P. C. If he decides that the other party was not dispossessed by the delivery of possession, that decision will still be a decision which he has jurisdiction to make. It may be a decision so grossly erroneous that the High Court would have no option but to interfere in revision,

but the time for such interference is not at the stage when only the preliminary order under this section has been drawn up by the Magistrate—*Raj Nandan v. Chhedi*, 13 P.L.T. 178, 1932 Cr.C. 418, 34 Cr.L.J. 259, 142 I.C. 157, A.I.R. 1932 Pat. 185, Ind. Rul. 1933 Pat. 117.

But every previous decree of a Civil Court or order of a Criminal Court is not necessarily conclusive; the evidentiary value to be attached to such a decree or order must depend upon the circumstances of each particular case—*Kuloda Kinkar v. Danesh*, 33 Cal. 33. No hard and fast rule can be laid down to the effect that a Magistrate in a proceeding under this section must give effect to a prior decision or order of a Civil or Criminal Court. The Magistrate is not bound to maintain the decision blindly. If he finds that after the passing of the decree the possession of the party to whom possession was delivered by the Civil Court, has been disturbed or that the property has changed hands, he has jurisdiction to pass order irrespective of the Civil Court decree—*Parmeshwar v. Kailaspati*, 1 P.L.J. 336, 17 Cr.L.J. 369; *Bhulan v. Kumari*, 5 P.L.T. 69, 25 Cr.L.J. 951; *Kedar Nath v. Jaleswar*, 4 P.L.T. 248, 24 Cr.L.J. 467; *Ram Baran v. Sagina*, 4 P.L.T. 333, 24 Cr.L.J. 939; *Ranj Nandan v. Chhedi*, 13 P.L.T. 178, 1932 Cr.C. 418 (419), 34 Cr.L.J. 259, 142 I.C. 157, A.I.R. 1932 Pat. 185, Ind. Rul. 1933 Pat. 117. So also, it is open to a Magistrate to go behind the order passed in favour of a party under the Survey and Settlement Act and the Bengal Tenancy Act. It is also open to the Magistrate to hold that on the evidence the presumption arising from an entry in the Record of Rights has been rebutted—*Syed Sadek v. Sachindra*, 37 C.L.J. 128, 24 Cr.L.J. 569.

439. In order that the decree of the Civil Court may be binding on the Magistrate, three things are necessary, namely —

(1) *First, the decree must be recent* —It is the duty of the Magistrate to maintain the rights of the parties, when such rights have been declared by a competent Court within a time not remote from that of his taking proceedings under this section—*Doulat v. Rameshwar*, 26 Cal. 625 (628), 3 C.W.N. 461; *Pratap v. Sundarbans*, 24 Cr.L.J. 279, 3 P.L.T. 628, 71 I.C. 999, A.I.R. 1923 Pat. 76; *Parameshwar v. Kailashpati*, 1 P.L.J. 336; *Kedarnath v. Jaleswar*, 4 P.L.T. 248; *Rambaran v. Sagina*, 4 P.L.T. 333. Thus, it is the duty of the Magistrate to have found possession in accordance with the decree of the Civil Court, when a party had been put into possession by that Court eight days prior to the institution of proceedings under this section—*Gulraj v. Sheikh Bhatoo*, 32 Cal. 796, 2 Cr.L.J. 761, or within three months or so—*Kunja Behari v. Khetra Pal*, 29 Cal. 208 (210), 6 C.W.N. 38; *Durganand v. Hiranand*, 25 Cr.L.J. 88, 76 I.C. 24 (Pat.).

But if the decree of a Civil Court is not recent but several years old, it would be unsafe to act on that documentary evidence alone—*Booke Khan*, 5 W.R. 79. A decree which is 23 years old is not conclusive as to the question of possession, because it is not absolutely impossible that the party who obtained the decree 23 years ago should have been subsequently dispossessed—*Lowsen v. Kali Charan*, 8 C.W.N. 719 (720). So also, with the case of a decree 17 years old—*Kuloda Kinkar v. Danesh*, 33 Cal. 33. Even a decree four years old is not sufficiently conclusive and the Magistrate in disregarding that decree would not be acting without jurisdiction—*Matangi Charan v. Lakkan*, 11 C.W.N. ccx.

(2) *Secondly, the decree must have been passed between the same parties*. A decree passed *ex parte* under which only symbolical possession was delivered or one which was not *inter partes* is not binding on a Criminal Court in proceedings under this section—*Pronoda v. Khetra*, 25 Cr.L.J. 1104 (Cal.); *Atul v. Sinnath*, 23 C.W.N. 982, 20 Cr.L.J. 840. But see *Sims v. Johurry*, 5 C.W.N. 563 where it has been laid down that it is not necessary that such decree should be a decree for possession as between the parties to the proceedings under sec. 145, Cr. P. C.

(3) *Thirdly, the decree or order of the Court must give possession* —Possession must have been given to one of the parties either by the decree itself, or by an order

of the Court in execution of the decree (e.g., to an auction-purchaser). See *Guru Das v. Weatheral*, 13 C.W.N. 601 (604), 11 Cr.L.J. 7, 4 I.C. 537.

Where the Civil Court deals only with the question of *proprietaryship* of land, the decree of such Court will not bar a Magistrate from deciding the question of *possession* under this section—*Baldeo v. Raj Ballam*, 2 A.L.J. 274, 2 Cr.L.J. 236; *Shriram v. Samirmal*, 29 Cr.L.J. 902, 111 I.C. 662, A.I.R. 1928 Nag. 284, 24 N.L.R. 148. Under sec. 145, the Magistrate has to make an inquiry as to *possession*, which may be quite contrary to *title* supported by a decree of a Civil Court—*In re Anya Shidiya*, 29 Bom. L.R. 715, 28 Cr.L.J. 578 (579), A.I.R. 1927 Bom. 654. So also, where the suit in which the decree was passed was merely one for *damages*, in which the determination of title was incidentally necessary, but the suit was neither for possession nor for declaration of title, the decree in such suit was not conclusive as to possession and the Magistrate was competent to take proceedings under this section; see *Subbarama v. Mariya*, 1914 M.W.N. 798, 1 L.W. 493, 15 Cr.L.J. 559; *Shriram v. Samirmal*, 24 N.L.R. 148, 29 Cr.L.J. 902 (903); *Baldeo Baksh Singh v. Raj Ballam Singh*, 2 A.L.J. 274, 2 Cr.L.J. 236. So also, where the question of possession was raised by the parties but was neither fought out between them nor decided by the Court, the decree would not bar a proceeding under this section—*Annaswamy v. Multhu Kumara*, 15 Cr.L.J. 663 (Mad.).

There must be actual delivery of possession under the decree or order of the Civil Court. Where merely the sale was confirmed and the sale certificate issued, but there was no delivery of possession, actual or symbolical, to the petitioners, their rights were not protected from proceedings under this section—*Ragava v. Krishnasami*, 31 Mad. 416, 8 Cr.L.J. 312. Thus, where in spite of a formal order for delivery of possession passed under O XXI, r. 35, C.P. Code in favour of a party, the Magistrate found that physical possession did not pass to that party, he was entitled to institute proceedings under section 145—*Raj Nandan v. Chhedi*, 13 P.L.T. 178, 1932 Cr.C. 418 (419). Symbolical possession given to the purchaser would raise the presumption that the purchaser had possession, although it may be that slight evidence would suffice to rebut that presumption—*Raja Babu v. Muddun Mohan*, 14 Cal. 169. It is for the other party to show that they subsequently came into possession by some lawful means—*Chandeshwar Prasad Narayan Singh v. Darka Singh*, 38 Cr.L.J. 1096, 171 I.C. 593, 1937 P.W.N. 571, A.I.R. 1937 Pat. 557, 4 B.R. 41, 10 R.P. 223. So, where it was found that in spite of symbolical possession being given to one party, the other party continued in possession, the Magistrate had to determine who was in actual possession and it was no part of his duty to protect the symbolical possession given by the Civil Court—*Ambar Ali v. Piran Ali*, 55 Cal. 826, 32 C.W.N. 275, 29 Cr.L.J. 503. See Note 418, *ante*.

Where an order (of a Criminal Court) under section 522 of this Code was passed, directing restoration of immoveable property, but possession as a fact was never delivered to the petitioners, such infructuous order would not bar the jurisdiction of the Magistrate in taking proceedings under this section in respect of the same property—*Probhat v. Prosanna*, 18 C.W.N. 1088, 15 Cr.L.J. 700.

See Note 418.

Effect of previous decree on third party :—Where in a proceeding under this section it appeared that the first party had previously brought a suit for rent against some persons (tenants) not parties to the proceeding and purchased the disputed properties at a sale held in execution of an *ex parte* decree obtained therein, and had been put in possession without the knowledge of the second party, and the Magistrate found that the rent suit brought by the landlord against the tenants in possession was not a *bona fide* one and declared the second party to be in possession of the disputed land, it was held that under the circumstances of the case the order of the Magistrate was not erroneous and was not liable to be set aside. Decree of Courts so far as third parties are concerned may have different value in different cases. Where, for instance, there has been a real contest between the parties to a suit, and upon an *adjudication regarding title or possession* a party has been awarded a decree and has been put in possession

in execution of such a decree, it would be conclusive upon any person even though he was not a party to the decree. But cases of *money decrees* followed by sale of property would stand on a different footing. In these cases, the sale in execution only passed the right, title and interest of the judgment-debtor, consequently, there is no adjudication regarding *title* to property, and therefore, it is not conclusive upon a third person as regards possession or title—*Atul v. Srinath*, 23 C.W.N. 982 (1985), 30 C.L.J. 123, 20 Cr.L.J. 840.

In estimating the value of delivery of possession against third parties it is also material to see what is the true nature of the possession said to have been delivered—*Atul v. Srinath*, 23 C.W.N. 982 (1985).

See Note 418.

440. Effect of previous decision of Criminal Courts as to possession:—In proceedings under sec. 145, the Magistrates have always upheld the previous possession given by Civil Courts. But possession given by previous orders of Criminal Courts cannot be treated in the same manner—*Kedar v. Laht*, 2 Cr.L.J. 512, 2 C.L.J. 147. A Magistrate does not act without jurisdiction merely because he does not accept the decision in a previous case of rioting as to possession—*Bhulan v. Kumari*, 5 P.L.T. 69, 25 Cr.L.J. 951; or in a previous case of trespass under sec. 447, I. P. C., as to possession—44 IC 741, 3 UBR 33 (1917), 19 Cr.L.J. 389. A judgment of a Criminal Court in which a person was acquitted and in which it was incidentally found that he was in possession, can only be evidence of the fact there was such a case and that it ended in such acquittal, but the finding on the question of possession which is a ground of such acquittal, can hardly be any evidence in subsequent proceedings between the parties with regard to the property in dispute—*Shashimukhi v. Sarat Chandra*, 31 C.W.N. 201, 45 C.L.J. 537, A.I.R. 1927 Cal. 337, 28 Cr.L.J. 329 (331). Such a decision is not conclusive as to possession and can in no sense be said to have settled the dispute between the parties, so as to put a stop to the trouble and consequent breach of the peace. It can, however, be treated as a piece of evidence of possession *quantum valebat* in the case—*Abdul Shakur v. Abu Sayeed*, 26 Cr.L.J. 870, 86 IC 806, A.I.R. 1925 Pat. 593, 6 P.L.T. 710.

But possession given by a Magistrate in a previous proceeding taken under sec. 145 would be conclusive in a subsequent proceeding freshly instituted under sec. 145 against the same parties, and the Magistrate was not entitled to take any action contrary to the previous decision, unless he found that there had been a change of possession since the decision of the first case—*Jagat Singh v. Sunder Singh*, 27 P.L.R. 630, A.I.R. 1926 Lah. 479, 95 IC 479, 27 Cr.L.J. 815; *Elmuddin v. Umed Ali*, 63 C.L.J. 7, 38 Cr.L.J. 79, 165 IC 878, A.I.R. 1936 Cal. 659, 1936 Cr.C. 881, 9 RC 462. The fact that the Magistrate who disposed of the previous proceedings was a different officer from the Magistrate who passed the order in the latter case, makes not the slightest difference—*U Thi Ha v. Maung Ngai*, 37 Cr.L.J. 92, 159 IC 308, 1935 Cr.C. 1243, A.I.R. 1935 Rang. 447, 13 Rang. 302.

The Magistrate is, however, not bound to make a declaration in favour of the first party on the basis of a previous sec. 145 proceeding in course of which they obtained an order in their favour, when in those proceedings the second party admittedly had no concern. The Magistrate has to come to a decision as to the fact of possession on the evidence before him. He may take into consideration as part of that evidence the fact that the first party obtained a decision in the previous sec. 145 case, but he must also take into consideration the other evidence of possession given by both the parties and come to a decision accordingly—*Nepal Chandra v. Prafulla Kumar*, 44 C.W.N. 928.

The possession which a party obtained from the Civil Court, and the declaration that he was in possession which was subsequently afforded him by a Magistrate under sec. 145, Cr. P. C., continues and is not lost or disturbed merely because the sons of the judgment-debtor trespass on the land and plough it. It cannot be said that, if trespassers obtain possession for a sufficient length of time to sow crops themselves, they have then established a title to remain in possession and are not amenable to

the sanctions of the criminal law—*Thakurdas v. Narayan*, A.I.R. 1936 Nag 192 (196), 38 Cr.L.J. 307, 166 I.C. 709, 1936 Cr.C. 805, I.L.R. 1936 Nag 205, 9 R.N. 144.

But an order made in the previous proceeding under sec. 145, Cr. P. C., does not and cannot legally bar the initiation of a fresh proceeding under the same section, if there be reasonable grounds for such initiation, as contemplated by law, the question to be taken into consideration by a Criminal Court under sec. 145 being the question as to the present possession of the parties concerned—*Haripado v. Dhani Ahamad*, A.I.R. 1935 Cal. 494, 1935 Cr.C. 886, 157 I.C. 674. See Note 444.

See also *Probhat v. Prosanna* in Note 439

441. Suit for damages for improper proceedings:—Where proceedings are initiated under this section by a party who is eventually unsuccessful, it is open to the successful party to sue for damages. The damages in such a case are remote and are sufficiently compensated by any order for costs that might be made in the proceedings—*Ram Das v. Md Faqir*, 20 A.L.J. 205, A.I.R. 1922 All 143. But see *Rani Mina Kumari v. Surendra Narain* in Note 459.

442. Effect of order on subsequent civil suit:—An order under this section does not decide any question of title. Therefore, where a case under section 145 was compromised by the parties, and the Magistrate passed an order in terms of that compromise, it was held that the order simply settled the question of possession but did not determine the question of title, and the parties were not therefore precluded by the order from having recourse to the Civil Court for the determination of that question—*Gopi Das v. Madho Lal*, 45 All 162, 20 A.L.J. 932, A.I.R. 1923 All 77.

The judgment of the Criminal Court under this section is evidence of possession in a subsequent civil suit. But the statements of witnesses in the criminal case cannot be admitted in evidence unless they are examined by the Civil Court and those statements are put to them and duly proved—*Sheikh Barkat Ali v. Basant Nunia*, 21 C.W.N. 175 (177), 39 I.C. 356.

See Note 428

443. Effect of order on a subsequent criminal case:—Although the Magistrate may declare a certain party to be in possession of a certain field, the other party on being subsequently charged under sec. 379, I. P. Code for carrying away the crops of the field may show by adducing evidence that he was in actual possession of the field, in spite of the order under sec. 145 declaring the first party in possession—*Rakhal v. Makhani*, 31 C.W.N. 964, 28 Cr.L.J. 827, A.I.R. 1927 Cal. 701, 104 I.C. 443. But see *Ambika Thakur v. Emp*, A.I.R. 1939 Pat 611 (618), 18 Pat. 544, 1939 P.W.N. 747 where this view of law was not followed.

Limitation for subsequent civil suit:—See Art 47, Indian Limitation Act.

443A. Effect of the pendency of a Civil Suit:—Where during the pendency of proceedings under this section a suit for declaration of title to and possession of the disputed properties is instituted in a Civil Court and the Civil Court appoints a Receiver, held that it would be a sheer waste of public time to allow two parallel proceedings to go on simultaneously, one in the Civil Court, and the other in the Criminal Court and evidence being led by the parties in both cases in support of their possession, that the mere institution of the suit in the Civil Court would not by itself have been sufficient to justify the dropping of proceedings under sec. 145, if there was a danger of a breach of the peace which can best be averted by summary proceedings under sec. 115, but the order of the Civil Court appointing a Receiver removes all such danger and that the only proper course would be to drop the proceedings under sec. 145, in order to avoid unnecessary harassment to the parties and useless waste of time, money and energy. The High Court quashed proceedings in this case in exercise of the inherent powers vested in it under sec 561A, Cr. P. C.—*Makhna v. Kamla Pat*, 36 Cr.L.J. 461, A.I.R. 1935 Oudh 255, 1935 O.W.N. 239, 154 I.C. 121, 1935 O.L.R. 112. See also *Ramchandra v. Shankarrao*, 33 Cr.L.J. 556, 138 I.C. 38, Ind. Rul. 1932 Nag

71, 15 N.L.R. 28, 1932 Cr.C. 433, A.I.R. 1932 Nag 83 where proceedings were drawn up under sec. 147, Cr. P. Code.

When a civil suit is pending for the determination of the rights of the parties it is not proper to start proceedings under sec. 145, Cr. P. C.—*Ali Mohammad v. Fakiruddin*, 24 C.W.N. 1039 (1048), 22 Cr.L.J. 131, 59 I.C. 643, 32 C.L.J. 255. The Criminal Court should not interfere at a time when questions about delivery of possession were pending before the Civil Court—*Rajendra Narayan v. Chintamani*, A.I.R. 1939 Pat 151, 1938 P.W.N. 526, 19 P.L.T. 632. But it is nowhere laid down that a Magistrate has no jurisdiction to proceed under sec. 145 with regard to properties that may be the subject of civil proceedings. Such proceedings certainly cannot take away the jurisdiction of the Magistrate to initiate proceedings under sec. 145, if he finds reasonable grounds for apprehending that without such proceedings a breach of the peace may be caused—*Kishori Lal v. Srimath*, 36 Cal 370 (372), 13 C.W.N. 530, 9 Cr.L.J. 399, 1 I.C. 817.

Where the opponent instituted a suit in the Civil Court and obtained an *interim* injunction against the applicant restraining her from taking possession of the disputed property at the very last moment, *held* that it would be unfair to allow the opponent all the advantage of his forcible and wrongful dispossession, merely because he has, since the Magistrate's findings gone to the Civil Court, almost at the very last minute before the matter came before the High Court for final orders and that the advantage should, under the decision of the Magistrate as finally settled by the High Court, be given to the applicant, and any subsequent civil suit ought to start on the basis of her having obtained that advantage. However, to avoid conflict of judicial decisions the High Court adjourned the case for three weeks during which the *interim* injunction was dissolved by the Civil Court and thereafter directed the Magistrate to restore possession of the disputed property to the applicant—*Bai Jiba v. Chandulal*, 27 Cr.L.J. 661 (665), 94 I.C. 709, 27 Bom.L.R. 1935, A.I.R. 1926 Bom 91.

See also Note 428

444. Fresh proceedings:—If proceedings are cancelled by the Magistrate under clause (5) owing to there being no longer any likelihood of a breach of the peace, it does not preclude him from instituting fresh proceedings, upon a fresh dispute arising between the parties—*Sadhu v. Mahamad*, 15 C.W.N. 568 (569), 12 Cr.L.J. 32, 9 I.C. 167. But the fresh proceedings must be started upon *fresh materials*, and cannot stand upon the basis of the earlier proceedings—*Tarini v. Amulya*, 20 Cal 867; *Manik v. Azimuddin*, 6 C.W.N. 923; *Khubi v. Darbari*, 2 P.L.T. 267, 22 Cr.L.J. 481; *Ghulam Md.*, 3 Lah. 401, 24 Cr.L.J. 160, A.I.R. 1923 Lah 81, 71 I.C. 512. When a party has been declared to be in possession as a result of proceedings under sec. 145, fresh proceedings under the same section cannot be started against him, unless it is shown that the previous order has been duly vacated. But subsequent proceedings can be started and a fresh order made in respect of properties *other than* the one comprised in the first order—*Bajji Lal v. Harakh Singh*, 1 P.L.T. 557, 21 Cr.L.J. 753.

But although fresh proceedings under sec. 145 can be started upon fresh materials, still it is not the proper course for a Magistrate to do so. It is his duty to see the previous order is obeyed and the possession adjudged under that order is not disturbed. If there is a fresh dispute likely to cause a breach of the peace, the Magistrate has ample powers under the law to maintain peace. But if he goes on to start proceedings under sec. 145 afresh, the result will be that the binding effect of an order under sec. 145 would be disregarded and any number of proceedings may be initiated by any disappointed party leading to no result whatsoever—*Arjun v. Hara Sundar*, 27 C.W.N. 171 (173), 24 Cr.L.J. 97, 37 C.L.J. 39, A.I.R. 1923 Cal 95, 71 I.C. 225. See also *Elibuddin v. Umed Ali*, 38 Cr.L.J. 79, 165 I.C. 878, A.I.R. 1936 Cal 659, 1936 Cr.C. 881, 9 R.C. 462, 63 C.L.J. 7. A temporary change in the character of the land cannot nullify the previous order passed with regard to it, so as to entitle a Magistrate to start fresh proceedings—*ibid*. Once proceedings with regard to land have been taken under sec. 145, Cr. P. C., and possession declared, then it is the duty of the Court to uphold that order and not to enter upon any further enquiry under that

section—*Jainath v. Ramlakhan*, 30 Cr.L.J. 840, 117 I.C. 643, 10 P.L.T. 689, AIR 1929 Pat. 505, Ind. Rul. 1929 Pat. 451; *Raghunandan Pandey v. Kishin Mohan Singh*, 10 P.L.T. 685, 77 I.C. 1005, A.I.R. 1922 Pat. 210, 25 Cr.L.J. 541. But actual possession of a person who was no party to a previous proceeding under sec. 145, Cr. P. C., should not be ignored when there is a dispute in fact about the possession and the Magistrate must proceed under this section—*Inder Deo Singh v. Kesho Singh*, 39 Cr.L.J. 268 (272), 173 I.C. 107, 1937 P.W.N. 845, 18 P.L.T. 886, 4 B.R. 211, 10 R.P. 372, A.I.R. 1938 Pat. 1; *Ambika Thakur v. Emp.*, A.I.R. 1939 Pat. 611 (619), 18 Pat. 544, 1939 P.W.N. 747, 41 Cr.L.J. 191 (198), 185 I.C. 529, 21 P.L.T. 45.

See Note 440. See also Note 393.

Power of High Court—The High Court cannot direct the revival of proceedings under sec. 145, when they have been stayed by the Magistrate—*Manindra v. Barada Kanta*, 30 Cal. 112

445. Further Inquiry:—Section 437 (now 436) allows a further inquiry into a complaint, which means under sec. 4 (h) a complaint of an 'offence'; and since sec. 145 is not directed to any offence at all, sec. 436 does not authorise a District Magistrate or Sessions Judge to order a further inquiry into a case under sec. 145—*Chathu v. Niranjan*, 20 Cal. 729. All that he can do in revision is to make a reference to the High Court under sec. 439. Section 436 gives him no power to direct a further enquiry into the matter—*Maung San E v. Maung Mye Du*, 30 Cr.L.J. 709, 117 I.C. 59, AIR 1928 Rang. 292, Ind. Rul. 1929 Rang. 171.

446. Review:—There is no authority for holding that a Magistrate can review a final order passed by himself or by his predecessor under this section—*Parbutty v. Sajjad Ahmad*, 35 Cal. 350, 12 C.W.N. 605, 7 Cr.L.J. 401; *Ram Dulare v. Ajodhya*, 16 O.C. 192, 14 Cr.L.J. 605; *Narayan v. Chandrabhaga*, 26 Cr.L.J. 1289, 89 I.C. 153, AIR 1925 Nag. 457; *Lallan v. Ram Richcha*, 48 All. 258, 24 A.L.J. 227, 27 Cr.L.J. 466; *U Thi Ha v. Maung Ngai*, AIR 1935 Rang. 477, 13 Rang. 302. The remedy of the person aggrieved is to go to the Civil Court—*Lallan v. Ram Richcha* (supra).

See Note 407 under the heading "Setting aside of *ex parte* order".

447. Revision:—Under sub-section (3) of section 435, before it was omitted by the Amendment Act of 1923, proceedings under this Chapter were not liable to revision by any Court, whether by the High Court or by the Sessions Judge or by the District Magistrate; so that the High Court in the exercise of its revisional jurisdiction under section 439 of this Code was not competent to revise an order passed under this Chapter—*Laldhari v. Sukdeo*, 27 Cal. 892; *In re Pandurang*, 25 Bom. 179; *Kamal Kuttly v. Udayvarma*, 36 Mad. 275; *Maharaj Tewari v. Har Charan*, 26 All. 144; *Jhingai v. Ram Partap*, 31 All. 150; *Syeda v. Lal Singh*, 36 All. 233; *Nathu Ram*, 15 A.L.J. 270; *Har Han v. Natha Lal*, 18 A.L.J. 1140; *Ibadulla v. Rahatulla*, 18 O.C. 69, 16 Cr.L.J. 541; *Balmukund v. Crown*, 1 S.L.R. 50; *Farid v. Piru*, 8 S.L.R. 207.

In order to exercise its revisional power in respect of order passed under this Chapter, the High Court had to invoke the aid of sec. 15 of the Charter Act—*Hurbullubh v. Luchmeswar*, 26 Cal. 188; *Laldhari v. Sukdeo*, 27 Cal. 892; *Sukhlal v. Tarachand*, 33 Cal. 68; *Sri Mohan v. Marasingh*, 27 Cal. 259; *Jagamohan v. Ram Kumar*, 28 Cal. 416; *In re Nathu Lal*, 24 All. 315; or sec. 107 of the Government of India Act—*Nathu Ram*, 15 A.L.J. 270, 18 Cr.L.J. 557; *Parameswari v. Kaliashpati*, 1 P.L.J. 336; *Thylae v. Srirangaraya*, 43 M.L.J. 624; *Moiram v. Brijan*, 47 Cal. 438; *Ali Md. v. Piggot*, 48 Cal. 522. But this power could be exercised only by the Chartered High Courts, and not by the non-chartered High Courts, e.g., the Chief Courts and the Judicial Commissioner's Courts.

The only cases in which the High Court could exercise its powers of revision under sec. 439 were those in which the proceedings, though purporting to be proceedings under this Chapter, were not really so; as for instance where there was an initial want of jurisdiction by reason of there being no dispute likely to cause a breach of the peace, or by reason of the Magistrate not being a first class Magistrate, or where the Magis-

trate exceeded his jurisdiction by exercising powers not conferred by this section—*In re Pandurang*, 24 Bom 527; *In re Pandurang*, 25 Bom 179 (186); *Mahadeo v. Basu*, 25 All 537 (538); *Thyalce v. Sriangaraya*, 43 MLJ 624; *Udai Bhan v. Ram Samujh*, 19 O.C. 135, 18 Cr L.J. 100. And unless there was want of jurisdiction on the part of the Magistrate, the High Court could not exercise its power of revision even though the decision of the Magistrate was wrong—*Chintamani v. Jagannath*, 19 C.W.N. 123 (124); *Iklas v. Raghuraj*, 12 O.C. 400, 11 Cr L.J. 69.

Now, by the Amendment Act XVIII of 1923, sub-section (3) of section 435 has been omitted, and the effect of this amendment is to confer on the High Court the power of revision *under this Code* in respect of orders under this Chapter. These orders can now be revised by the High Court not only on the question of *jurisdiction* but also on the ground that they are *illegal* or *erroneous*—*Chhakauri v. Isher Singh*, 6 P.L.T. 799, 27 Cr.L.J. 142; *Chinnappaeddigari v. Mala Dasari*, 31 Cr.L.J. 190, 120 I.C. 895, 1929 M.W.N. 708, AIR 1929 Mad 847, 31 M.L.W. 104; *Raj Nandan v. Chhedi*, 13 P.L.T. 178, 1932 Cr.C. 418 (421), 34 Cr.L.J. 259, 142 I.C. 157, A.I.R. 1932 Pat 185, Ind Rul. 1933 Pat 117.

But though the High Court is invested with powers of revision, still orders passed by a competent Magistrate are not to be lightly interfered with by the High Court except in exceptional cases; *first*, because the object of such orders is to preserve peace, and *secondly*, because the aggrieved party has his remedy by a civil suit—*Krishnappier v. Alamelu*, 5 L.W. 165, 18 Cr.L.J. 23; *In re Lingaraja*, 17 Cr.L.J. 143 (Mad); *Hardeo v. Ram Charitar*, 17 Cr.L.J. 286 (Pat). Proceedings under this chapter are of a special nature, and are such that the Magistrate may be allowed greater liberty in carrying out those provisions than they are allowed in trying ordinary crime, because upon the Magistrate and the police is thrown the burden of maintaining the public peace. In this view, it is undesirable that such orders should be interfered with in revision, unless they are made without jurisdiction and are obviously unreasonable or unjust—*Sudalaimuthu v. Enan*, 16 Cr.L.J. 767 (Mad). Where a Magistrate duly empowered to act under this Chapter takes proper proceedings and passes an order, the High Court has no power to revise the proceedings either under this Code or under sec. 15 of the Charter Act—*Jhنگar v. Ram Pratab*, 31 All 150; or under sec. 107 of the Government of India Act—*Matukdhari v. Jaisari*, 39 All 612, 15 A.L.J. 576; *Sundar Nath*, 40 All 364; *Sakhawat*, 17 A.L.J. 321, 41 All 302. Thus, the High Court as a Court of Revision cannot interfere with the decision of a trial Court on the fact of possession so long as there is evidence in support of the finding—*Abdul Satar v. Udha Lal*, 27 P.L.R. 102, 27 Cr.L.J. 471, 93 I.C. 695. Where the evidence had been fully discussed by the trial Court, any attempt on the part of the High Court to review the evidence and interfere with the decision of the Magistrate, would be to convert an application for revision into an appeal—*Abdul Satar v. Udha Lal*, (supra). It is seldom that the High Court interferes on facts with an order passed under secs. 145 and 146—*Sandi v. Sukhlal*, 35 Cr.L.J. 611, 148 I.C. 198, AIR 1934 Pat 33. See also *Ram Satoop v. Khurram Singh*, 35 Cr.L.J. 1056, 150 I.C. 143, 11 O.W.N. 375, AIR 1934 Oudh 158, 1934 Cr.C. 502. The High Court does not interfere in revision with orders under sec. 145, Cr.P.C., on the merits as a rule—*Babu Ram Pandey v. Shyamdeo Narayan*, 40 Cr.L.J. 220, AIR, 1939 Pat 187, 1938 P.W.N. 810, 179 I.C. 548; *Guruditta v. Taja*, AIR 1939 Lah 108, I.L.R. 1938 Lah 611, 40 Cr.L.J. 519, 181 I.C. 59, 41 P.L.R. 217. Where the decision of the Magistrate is grossly erroneous, the High Court would have no option but to interfere in revision—*Raj Nandan v. Chhedi*, supra.

It is the practice of the Sind Judicial Commissioner's Court that it will not interfere with proceedings of Magistrates under Chap. XII in which sec. 145 comes, merely because the Judges would have exercised their discretion differently upon the facts, because proceedings under this Chapter are proceedings only of a quasi-judicial nature. They are temporary and emergent in their nature, and it is generally conceded that Magistrates on the spot are in a better position to judge of the true state of affairs than Judges in Courts many miles away. But where it is shown that there is a

section—*Jamath v. Ramlakhan*, 30 Cr.L.J. 840, 117 I.C. 643, 10 P.L.T. 689, 1929 Pat. 505, Ind. Rul. 1929 Pat. 451; *Raghubandan Pandey v. Kishin Moha*, 10 P.L.T. 685, 77 I.C. 1005, A.I.R. 1922 Pat. 210, 25 Cr.L.J. 541. But actual po. of a person who was no party to a previous proceeding under sec. 145, Cr. P. should not be ignored when there is a dispute in fact about the possession and the Magistrate must proceed under this section—*Inder Deo Singh v. Kesho Singh*, 3 Cr.L.J. 268 (272), 173 I.C. 107, 1937 P.W.N. 845, 18 P.L.T. 886, 4 B.R. 211, 10 R.P. 372, A.I.R. 1938 Pat. 1; *Ambika Thakur v. Emp.*, A.I.R. 1939 Pat. 611 (619), 18 Pat. 544, 1939 P.W.N. 747, 41 Cr.L.J. 191 (198), 185 I.C. 529, 21 P.L.T. 45.

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It is the practice of the Sind Judicial Commissioner's Court that it will not interfere with proceedings of Magistrates under Chap. XII in which sec. 145 comes, merely because the Judges would have exercised their discretion differently upon the facts, because proceedings under this Chapter are proceedings only of a quasi-judicial nature. They are temporary and emergent in their nature, and it is generally conceded that Magistrates on the spot are in a better position to judge of the true state of affairs than Judges in Courts many miles away. But where it is shown that there is not

upon the record material on which the Magistrate could properly exercise jurisdiction, then the Court will interfere—*Muhammad Araf v. Satramdas Sakhimal*, 37 Cr.L.J. 1030, 164 I.C. 969, A.I.R. 1936 Sind 143, 9 R.S. 60, 1936 Cr.C. 859.

If an illegality more than an irregularity has been committed, the High Court has discretion to refuse to interfere in revision if substantial justice has been done—*Giani*, 38 Cr.L.J. 123, 166 I.C. 71, A.I.R. 1936 Lah. 1015, 38 P.L.R. 332, 9 R.L. 334, 1936 Cr.C. 1118

See also Notes 475 and 478A.

Reference:—The District Magistrate cannot himself set aside the decision of the lower Court passed under sec. 145; he must refer the case to the High Court under sec. 438—*Eseruddi v. Otaruddi*, 88 I.C. 526, 26 Cr.L.J. 1166, A.I.R. 1925 Cal. 1234; *Hiralal*, 11 O.L.J. 59, 25 Cr.L.J. 440, A.I.R. 1924 Oudh 331. Where the order of the Magistrate is illegal, the Sessions Judge should report the case for the orders of the High Court in revision—*Kefatullah v. Feruzuddin*, 5 C.W.N. 71 (72). The referring Courts must always bear in mind the limits which the High Court has, in practice, put upon its own discretion and they should not make a reference where the only objection is to the findings of the Court below upon the merits—*Phakir v. Madar*, 32 Cr.L.J. 1237, 134 I.C. 915, 58 Cal 1081, 35 C.W.N. 374, A.I.R. 1931 Cal. 619, Ind. Rul 1931 Cal 915, 1931 Cr.C. 803. See also *Gomia v. Naukhoo*, 28 Cr.L.J. 901, 105 I.C. 229, A.I.R. 1928 Pat. 88

448. Grounds of interference:—The High Court has the power to interfere where in a proceeding under this section necessary parties were left out or wrong persons were made parties—*Laldhari v. Sukdeo*, 27 Cal 892; or where the Magistrate refused to receive the evidence tendered to him—*Tirumalraja v. Lodd Gobind Doss*, 29 Mad. 561; *Jhengar v. Baijnath*, 11 A.L.J. 586, 14 Cr.L.J. 277; *Kotha Koer v. Muneswar*, 34 Cal. 840 (842); or where the Magistrate's finding of facts as regards possession was perverse and contrary to a mass of un rebutted evidence—*Sarju Prosad*, 27 O.C. 290, 25 Cr.L.J. 1066, 81 I.C. 890; or where no order in writing such as is required by sub-section (1) was recorded by the Magistrate—*Hakam v. Ralia Ram*, 4 Lah. 66; *Md. Hasham v. Md. Jhami*, 20 Cr.L.J. 124; *Bihari v. Chajju*, 1907 A.W.N. 49; *Budhan v. Ram Rakha*, 1915 P.L.R. 169, 16 Cr.L.J. 628; but not where the preliminary order under sec. 145 (1) is not complete—*Dalle v. Kehri Singh*, 39 P.L.R. 503; or where the Magistrate adopted none of the procedure required under this section and passed an order without any reference thereto—*Dewan Chand*, 1899 P.R. 2; *Dhani Ram v. Bhola Nath*, 1902 P.R. 23; *Abdulla v. Gunda*, 1907 P.R. 7; *Budhan v. Ram Rakha*, 1915 P.L.R. 169, 16 Cr.L.J. 628; *Tara Chand v. Behari*, 1916 P.R. 22, 18 Cr.L.J. 36; or where the Magistrate refused to issue process for the attendance of material witnesses—*Surya Kanta v. Hem Chunder*, 30 Cal 508; *Madhab Chandra v. Martin*, 30 Cal 508 (Note); or where no opportunity was given by the Magistrate to the applicant to produce his evidence—2 Cr.L.J. 286n; or where the Magistrate discarded the evidence altogether and based his decision merely upon his local inquiry—*Lal Behari v. Bejoy Sankar*, 10 C.W.N. 181; *Shahadat v. Tajuddin*, 46 Cal 1056; or where the proceedings were initiated by the Magistrate on a vague Police report—*Suryakanta v. Jagadindra*, 11 C.W.N. 198; or where the Magistrate declared possession with a party who had long been out of possession—*Shansar v. Bhayaji*, 20 Cr.L.J. 445 (Nag.); or where the Magistrate passed an order in respect of a property which was not in dispute and declared the property to be in the possession of a person who was not a party to the proceedings—*Radhamohan v. Naimuddi*, 19 Cr.L.J. 653 (Cal.).

449. What the High Court can do in revision:—The High Court, in the exercise of its power of revision, is competent to consider the whole evidence—*Reid v. Richardson*, 14 Cal. 361; and to find out whether there was evidence on which the Magistrate could come to the conclusion which he arrived at—*Raja Babu v. Muddun Mahun*, 14 Cal. 169; and can pass the proper order which the Lower Court ought to have made. Thus, where it is difficult to come to a conclusion as to the fact of posses-

sion, the wise and proper course is to pass an order of attachment under sec. 146; and if in such a case the Magistrate has passed an order under sec. 145, the High Court in revision can alter the order under sec. 145 into one under sec. 146—*Reid v. Richardson*, 14 Cal. 361 (364); *Katras Jheria Coal Co. v. Sibkristo*, 22 Cal. 297; *Satyendra v. Krishnadhane*, 20 C.W.N. 1014, 18 Cr.L.J. 80. The High Court in revision can alter an order of the Magistrate under sec. 145 into an order under sec. 147—*In re Amarsang*, 48 Bom. 512 (515). The High Court has inherent power to give directions as to the disposal of property which was attached and has been dealt with by a subordinate Magistrate in the course of proceedings instituted without jurisdiction under this section—*Ali Muhammad v. Piggott*, 48 Cal. 522, 32 C.L.J. 270, 22 Cr.L.J. 213 (F.B.)

Costs in revision:—See Note 478 under sec. 148

146. (1) If the Magistrate decides that none of the parties was then in such possession, or is unable to satisfy himself as to which of them was then in such possession of the subject of dispute, he may attach it until a competent Court has determined the rights of the parties thereto, or the person entitled to possession thereof;

Provided that the District Magistrate or the Magistrate who has attached the subject of dispute may withdraw the attachment at any time if he is satisfied that there is no longer any likelihood of a breach of the peace in regard to the subject of dispute.

(2) When the Magistrate attaches the subject of dispute, he may, if he thinks fit, and if no receiver of the property, the subject of dispute, has been appointed by any Civil Court, appoint a receiver thereof, who, subject to the control of the Magistrate, shall have all the powers of a receiver appointed under the Code of Civil Procedure:

Provided that, in the event of a receiver of the property, the subject of dispute, being subsequently appointed by the Civil Court, possession shall be made over to him by the receiver appointed by the Magistrate, who shall thereupon be discharged

Change:—The two provisos and the italicised words in sub-section (2) have been added by sec. 29 of the Cr. P. Code Amendment Act (XVIII of 1923). For reasons see below

449A. Object of Section:—A Criminal Court is presumably unacquainted with the conduct of civil proceedings; and so where the Magistrate finds that the nature of the evidence is conflicting or that the fact of possession can be decided only after a proper trial of an issue of possession, the Legislature has provided that the wise and proper course for the Magistrate would be to keep the property under attachment until the Civil Court has determined the rights of the parties, instead of himself coming to a haphazard conclusion as to the fact of possession—*Reid v. Richardson*, 14 Cal. 361 (364)

Scope:—This section merely comes into operation if the Magistrate is unable to satisfy himself as to which of the parties is in possession. The section does not say that the Magistrate has got to write an order so convincing as to make a Revisional Court equally sure that one party is in possession rather than the other—*Brij Pal v. Ram Naresh*, 33 Cr.L.J. 157, 135 I.C. 246, Ind. Rul. 1932 All. 70, 135 I.C. 246, 1932 Cr.C. 294, A.I.R. 1932 All. 325.

450. Conditions precedent:—In order to give jurisdiction for an order under sec. 146, it is necessary that there should be jurisdiction over the proceedings under sec. 145, which again pre-suppose a dispute likely to cause a breach of the peace. If there was no dispute concerning any land, there would be no jurisdiction of a Magistrate to proceed under secs. 145 and 146—*Ballam v. Lal Babu*, 19 Cr.L.J. 105 (Pat.). Section 146 is a continuation of sec. 145, and, therefore, the initiation of proceedings under sec. 145 is preliminary to an order under sec. 146. Where the record showed that the Magistrate made an order under this section without following the procedure prescribed by sec. 145 and without making an order in writing and that there was nothing to show that a dispute likely to cause a breach of the peace existed, the attachment was set aside by the High Court—*Azizuddin*, 2 A.L.J. 149. The legality of an order under sec. 146 depends upon its having been preceded by legal proceedings under sec. 145, and where the whole proceedings under sec. 145 are illegal (e.g., by reason of the Magistrate's failure to comply with the requirements of clause 4 of sec. 145), an order made in the case under sec. 145 cannot stand on a better footing—*Subbarama v. Mariya Pillai*, 1 L.W. 493, 15 Cr.L.J. 559.

451. Magistrate's duty to make inquiry and take evidence:—It is the duty of the Magistrate, before taking proceedings under this section, to take evidence and make inquiry (see clause 4 of sec. 145) in order to ascertain, if possible, who was in possession—*Parsuram v. Shivajatan*, 3 P.L.T. 434, 23 Cr.L.J. 277. Unless and until a Magistrate has made the inquiry contemplated by sec. 145, that is to say, unless he has examined his witnesses and *considered the evidence* produced by the parties, the Magistrate has no jurisdiction to proceed under sec. 146—*Inayatulla v. Amanat*, 1 O.L.J. 242, 15 Cr.L.J. 470; *Shiba Nath v. Ramkishore*, 35 C.L.J. 291, 23 Cr.L.J. 688; *Daulati v. Hedait*, 32 C.W.N. 843; *Ambika v. Wazidali*, 23 C.W.N. 910 (911), 29 C.L.J. 459; *Nilkanth v. Suryabhan*, 24 Cr.L.J. 880, 75 I.C. 80, A.I.R. 1923 Nag. 297; *Khedan v. Hussaini*, 2 P.L.T. 15, 22 Cr.L.J. 323; *Emp. v. Radha Raman*, 37 Cr.L.J. 215 (216), A.I.R. 1936 All. 177, 160 I.C. 20. This section presupposes an enquiry by the Magistrate on the evidence recorded and the object of this section is to give the Magistrate jurisdiction to attach property if, upon the evidence so recorded, he is unable to come to a finding as to who was in possession on the date on which the order under sec. 145, Cr. P. C., was drawn up. Where there is no evidence of any kind, the order attaching the property under this section is without jurisdiction—*Daulatali v. Hedait*, 32 C.W.N. 843 (844), A.I.R. 1928 Cal. 703. See also *Radha Raman v. Emp.*, in Note 453. Where a Magistrate in a proceeding under sec. 145 made an order under sec. 146 on the ground that it was doubtful which of the parties was in actual possession, without judicially considering the important documentary evidence of possession placed before him, it was held that the order must be set aside and the case re-heard by another Magistrate—*Ambika v. Wazidali*, 23 C.W.N. 910, 20 Cr.L.J. 342. Where the Magistrate did not make the slightest attempt to satisfy himself as to the *factum* of possession, and attached the land without taking any evidence and making any local inquiry—*Sheo Balak v. Bhagwat*, 40 Cal. 105, 13 Cr.L.J. 486, 16 C.W.N. 1052, 15 I.C. 486; or where the Magistrate discarded and rejected practically every piece of evidence that might have led to a correct finding as to possession—*Prafulla v. Hodding*, 21 C.W.N. 1059, 26 C.L.J. 39; or where the Magistrate omitted to receive the evidence produced by a party or consider the documents and passed an order of attachment merely on a consideration of the written statements of the parties—*Kotla v. Muneswar*, 34 Cal. 840 (842), 6 Cr.L.J. 452, his order was without jurisdiction. So also, where in a proceeding under sec. 145, the parties appeared on the day of hearing but did not file any written statements nor produced any evidence, and the Magistrate without granting time to the parties for the production of evidence or for filing written statements, said that it was impossible to come to a conclusion as to the fact of possession and passed an order under this section, the order was invalid—*Sk. Mansar Ali v. Majiulla*, 12 C.W.N. 896. But where the parties failed to adduce evidence, even though sufficient time was allowed

to them to do so, the Magistrate could proceed under this section—*Ronendra v. Kishori Lal*, 14 C.W.N. 80, 11 Cr.L.J. 26, 5 I.C. 40; *Bengali Parida v. Banchnanidhi*, A.I.R. 1930 Pat. 29, 30 Cr.L.J. 894, 118 I.C. 326, 10 P.L.T. 867, 1930 Cr.C. 5, 9 Pat. 639.

Effect of prior decree of Civil Court.—Where the petitioner had been put into possession of certain lands in execution of a decree obtained by him in a Civil Court, the Magistrate was not competent to attach the lands under sec 146. It was his duty to have found possession in accordance with the decree—*Gulraj v. Sk. Bhatoo*, 32 Cal. 796, 2 Cr.L.J. 761. See also *Durganand v. Hiramul*, 25 Cr.L.J. 88, 76 I.C. 24, A.I.R. 1924 Pat. 711. Even though the petitioner has not obtained possession of the property in accordance with the Civil Court decree, still when the Civil Court has determined the rights of the parties and has also determined the possession so far as it was in its power to do so, it is not competent for the Magistrate to say that he is unable to determine the question of possession, and to attach the property under sec. 146. The order of attachment is unjustifiable—*Parabhans v. Sheodarshan*, 48 All 397, 24 A.L.J. 399, 27 Cr.L.J. 559. See Note 438 under section 145

452. Inability to decide the fact of possession:—All that sec. 146, Cr. P. C., requires is that the Magistrate should be unable to satisfy himself as to which of the parties was in "such possession," that is, actual possession, of the subject of dispute—*Venkataraman*, A.I.R. 1930 Bom 172 (173), 32 Bom LR 340, 125 I.C. 718, 31 Cr.L.J. 933. The doubt upon which a Magistrate can act under this section must be the result of his inability to determine the question of possession upon the evidence offered by both parties, and not a doubt in his mind entertained without receiving and considering evidence and without inquiry—*Khedan v. Hussaini*, 2 P.L.T. 15, 22 Cr.L.J. 323; *Sheobalak v. Bhagwat*, 40 Cal 105; *Ambica v. Wajidali*, 23 C.W.N. 910 (911). The Magistrate would not be justified in saying that it was not possible to ascertain who was in possession, and in attaching the property, merely because the parties did not appear. He ought to have made some inquiry into the question of possession—*Parasuram v. Shibjatan*, 3 P.L.T. 434, 23 Cr.L.J. 277. In order to show the Magistrate's inability to decide the question of possession, he ought to discuss the evidence in the case, and give reasons for his inability—*Khedan v. Hussaini*, supra; *Munir Ahmed v. Mahmud-ul-Haq*, 1938 A.W.R. (C.C.) 134. Where the order under this section did not show that it was not possible on the evidence to decide as to the fact of possession, but would rather seem to indicate that the Magistrate could not or would not decide whether the witnesses on either side were to be believed, or that the Magistrate did not consider the documentary evidence fairly and judicially for the purpose of arriving at a decision, the order was set aside—*Neelamegan v. Mooroooguppa*, 2 Weir, 110; *Ambica v. Wajidali*, supra. A Magistrate should be extremely reluctant to attach the property in dispute. In cases where the land is jungle or waste, it is quite possible that the Magistrate may be unable to satisfy himself as to the possession of the parties. But where the land is admittedly subject to cultivation year by year and season by season, the Magistrate will be only admitting his own weakness, if he states that he cannot come to a decision. It is his duty to collect information and sift it, and decide the fact of possession—*Ram Bahal v. Rang Bahadur*, 5 P.L.T. 589, 82 I.C. 367, 25 Cr.L.J. 1295, A.I.R. 1924 Pat. 804. See also *Gopammal v. Nallammal*, 1937 M.W.N. 326. The general remark in an order under sec. 146, Cr. P. C., that the oral evidence is not reliable, without referring to it and without giving any reason, is not a disposal of the evidence upon the record. It amounts to a refusal to exercise the jurisdiction vested in a Magistrate by law and is remediable by the High Court in revision—*Lachmi v. Bija*, 63 I.C. 152, 1921 Pat. H. C. C. 110, 2 Pat.L.T. 168, 22 Cr.L.J. 616, *Kaliashbchari v. Jai Narain*, 57 I.C. 169, 1920 Pat. H. C. C. 288, 1 Pat.L.T. 291, 21 Cr.L.J. 601; *Lakhpai*, 24 Cr.L.J. 432, 72 I.C. 544, 1 Pat.L.R. 152 (Cr.), 4 Pat.L.T. 579, A.I.R. 1923 Pat. 588; *Munir Ahmad v. Mahmud-ul-Haq*, 1938 O.W.N. 673, 1938 A.Cr.C. 53, 1938 O.A. 942, 1938 A.W.R. (C.C.) 134. The Magistrate ought to make a reasonable effort to decide

the question as to possession, and ought not to attach the property so long as it is possible for him to decide which of the contesting parties was really in possession of the property, and if he can decide that question in favour of one of the parties, he should give effect to that decision by passing an order under sec. 145 (6)—*Wayezul v. Shobrat*, 4 P.L.T. 441, 24 Cr.L.J. 754. Where there is ample evidence on the point of possession, a Magistrate is not justified in passing an order under this section, though it may be difficult, but not impossible, to decide the question of possession—*Miyakhan v. Mahomed Hanif*, 1939 N.L.J. 213. See also *Akshoy v. Brojeswar* in Note 410.

Nature of possession :—If a party (female) is found to be in actual possession of the property, but the only doubt exists as to the *nature of the possession*, that is, whether her possession is on her own behalf or on behalf of her lunatic husband, such a doubt does not justify a Magistrate in taking action under this section—*In re Juggodeshary*, 3 C.L.R. 94.

Portion of subject of dispute :—If the Magistrate is unable to satisfy himself as to the possession of the whole of a property (fishery) extending over several miles in length, he should ascertain so far as he can the possession of some portion thereof. As regards the portion as to which he is able to say that so and so is in possession he should proceed under sec. 145, and only as to the remainder should he proceed under section 146—*Upendra v. Prasanna*, 20 Cr.L.J. 17 (Cal.). See also *Sadar Ali v. Abdul* in Note 455.

Rights of parties :—The Magistrate can attach the property only when he decides that none of the parties is in possession, or when he cannot satisfy himself as to which of the parties is in possession; but he cannot take action under this section merely because he is unable to satisfy himself as to which of the parties is entitled to possession or has a right to the property. Inability to decide the right to the property cannot justify an order of attachment—*In re Somnath*, 6 Bom.L.R. 723.

'Then' :—i.e., at the date of the preliminary order passed under section 145 (1). See Notes under section 145 (4).

453. When attachment can be made:—This section presupposes an inquiry by the Magistrate on the evidence recorded, and the object of this section is to give the Magistrate jurisdiction to attach the property, if upon the evidence so recorded, he is unable to come to a finding as to who was in possession on the date on which the order under sec. 145, Cr. P. C., was drawn up, and where there is no evidence of any kind on record, the order attaching property is without jurisdiction. A Magistrate cannot say that he is unable to satisfy himself if he has never made the slightest efforts to do so—*Radha Raman v. Emp.*, A.I.R. 1936 All. 177 (178), 1936 All.L.R. 30, 160 I.C. 20, 1936 A.W.R. 125, 1936 A.L.J. 197, 37 Cr.L.J. 215, 1936 Cr.C. 211. See also *Daulatal v. Hedait* in Note 451.

To entitle a Magistrate to make an order of attachment, he must either decide that none of the parties are in actual possession, or that he is unable to satisfy himself as to which of them is in possession. An order of attachment made without one or other of these findings is without jurisdiction—*Nathu Ram*, 15 A.L.J. 270, 18 Cr.L.J. 557 (559). When a Magistrate is in an indecisive state of the mind he should record, as required by sec. 146, Cr. P. C., a finding in express terms to the effect that he is unable to satisfy himself as to which of the two parties was in possession of the subject of dispute, at the date of the preliminary order, and then proceed, in the event of continuance of the apprehension in regard to breach of the peace, to attach property, if it has not already been attached under the second proviso to cl. (4) of sec. 145, Cr. P. C. A failure to record an express finding to this effect and the consequent disregard of the express provisions of cl. (1) of sec. 146, Cr. P. C., are very much to be deprecated—*Jan Mohammad v. Jiran Khan*, 29 Cr.L.J. 861, 111 I.C. 445, A.I.R. 1928 Nag. 325.

Where the Magistrate finds neither the first party nor the second party in possession, but finds that actual possession is with a stranger who does not claim a right to be

in possession, the Magistrate should proceed to attach the property—*Bhagjogin*, 20 Cr.L.J. 215 (Cal.).

When both parties are in possession of the disputed property, no order under this section can be made—*Md. Koolayappa v. Shaik Abdul Khadir*, 27 M.L.J. 169, 15 Cr.L.J. 572, 25 I.C. 324. Where the Magistrate found that both parties were at the time of the order collecting rents from the raiyats, this amounted to a finding that both parties were in possession, and consequently the Magistrate had no jurisdiction to order attachment—*Rajendra v. Mahomed Arzumand*, 9 C.W.N. 887. But the Allahabad High Court is of opinion that where both parties are in joint possession and fighting with each other, it is a case where the Magistrate cannot decide which of them are in exclusive possession. Consequently, he should attach the property under this section—*Chiranjī v. Mahadeo*, 1932 A.L.J. 819, 1932 Cr.C. 938 (939), 34 Cr.L.J. 480. See Note 405.

It is impossible to say that in no case can the fact that one party has been bound down to keep the peace under sec. 107, Cr. P. C., leave the Magistrate any jurisdiction to act under sec. 145, Cr. P. C., when the circumstances so require. The right course for the Magistrate to take would be to try and discover who is in actual possession. If he finds himself unable to do so, he can properly exercise his jurisdiction under this section—*Bainsab v. Gatmath*, 16 C.W.N. 384, 13 I.C. 830, 13 Cr.L.J. 142.

The petitioner applied under sec. 145, Cr. P. C., for an order restoring him to possession of a house as he had been dispossessed by the respondents five days before the date of the petition. The Magistrate held that it was impossible to decide on evidence whether any and which of the parties was at the date of his preliminary order in possession of the house and whether the petitioner has been dispossessed forcibly and wrongfully within two months before the date of his order. He, therefore, ordered the attachment of the property under sec. 146, Cr. P. C. Held that as the respondents were admittedly in possession at the date of the Magistrate's preliminary order, sec. 146 had no application and that if the Magistrate could have held that the petitioner was in possession within two months next before the date of his preliminary order, under sec. 145 (6), he could have restored the possession to the petitioner—*Gurdas v. Narain Das*, 31 Cr.L.J. 1075, 126 I.C. 577, A.I.R. 1930 Lah. 422.

454. Order of attachment:—An order under this section cannot be made in the absence of the parties or *ex parte*; the proper course is to pass the order in the presence of both parties—*Lachmi v. Bhusi*, 19 Cr.L.J. 225, 43 I.C. 817 (Pat.).

A Magistrate in passing an order under this section must give reasons for making the order—*Khedan v. Husain*, 2 P.L.T. 15, 22 Cr.L.J. 323. But the High Court will not interfere merely on the ground that the order is brief and does not state reasons at length. If the High Court is satisfied that the Magistrate has given full consideration to the evidence on the record, it will not interfere—*Kanai v. Hyder Ali*, 37 C.L.J. 127, 21 Cr.L.J. 575. See *Brj Pal v. Ram Naresh* in Note 449A.

Effect of order of attachment:—One of the first principles on which Courts proceed is that judicial proceedings cannot bind a person who is not a party to them. Where, therefore, the Magistrate did not declare that some persons were parties to the proceedings under sec. 145, Cr. P. C., but he left it to them to appear or not to appear, in spite of their protest against being considered as parties and their manifest desire to have it declared that they were no parties, in the face of this order it could not be properly held that those persons were bound by the proceedings and by the final order under sec. 146, Cr. P. C.—*Janaki Nath*, 3 C.W.N. 329 (331).

455. What property can be attached:—In order that an order might be passed under sec. 145 or 146, the subject-matter of the dispute must be determined—*Suryakanta v. Jagadindra*, 11 C.W.N. 198.

The 'subject of dispute' referred to in secs. 145 and 146 must be read as referring to the whole or to any component part or parts of the property in dispute. If the component part in respect of which the dispute exists is *distinct* and *separate* from the

rest, and the Magistrate finds that neither party has shown possession in regard to that portion, he is not bound to attach the whole property but may attach that part only. If, however, the subject-matter in dispute is *indivisible* and must be dealt with as a whole, it must be dealt with in such a way as to make in regard to it one order under this section—*Sadar Ali v. Abdul*, 5 C.W.N. 710 (712, 713); see also *Katras Jheriah Coal Co. v. Shubkrishna*, 22 Cal. 297 cited in Note 427 under sec. 145.

Temple :—To attach a temple does not necessarily mean that the temple must be closed together. When the third parties or the general community are interested in it, it is the duty of the Magistrate, when assuming charge of it in order to preserve the public peace, to make the best arrangements possible to preserve the rights of such third parties or the public, and to have the *pūja* of the temple performed—*Sundara v. Vallinayaka*, 2 Weir 110; *In re Muttusami*, 2 Weir 112.

Moveables :—The Magistrate ordering attachment of immoveable property can take charge of all moveables found inside the immoveable property, although he cannot attach the moveable property by itself. Therefore, where the Magistrate attached a *mulh* and took charge of all the moveables (e.g., cattle, jewellery) that were found by him in the *mulh* at the time of attachment, it was held that the Magistrate acted legally—*Bharat Das v. Ram Chattrar*, 1 P.L.J. 356, 18 Cr.L.J. 287, 38 I.C. 319; *Gokul Nath v. Baram Nath*, 24 A.L.J. 383, 27 Cr.L.J. 429, 93 I.C. 157, A.I.R. 1927 All. 125.

Cultivation of attached land :—A person who cultivates immoveable property which has been attached by a Magistrate under this section commits the offence of criminal trespass and he is liable to be punished under sec. 447, I. P. C.—*Nagoji*, 8 M.L.J. 253. No suit for damages for the loss of profits resulting from the non-cultivation of land owing to an attachment under this section lies against any party—*Ammani v. Sellayi Ammal*, 6 Mad. 426.

456. Powers of Magistrate :—A Magistrate attaching a property under this section has the power to make an order regarding the management of the property. The High Court will not interfere with such order—*Lokenath v. Nedu*, 29 Cal. 382, 6 C.W.N. 469. He can lease the land attached—*Greesh Chunder*, 17 W.R. 38; or after cancelling a lease already granted, can grant a fresh lease—*Lokenath v. Nedu*, 29 Cal. 382, 6 C.W.N. 469. The Magistrate can refuse to hand over the value of the produce of the property to any of the parties to the dispute, but he has no power to treat the profits as *derelict* and as the property of the Government—*Mohar Singh*, 1911 P.L.R. 123, 12 Cr.L.J. 403, 11 I.C. 587.

A Magistrate attaching a property under this section cannot hand over possession of the property to one of the contending parties on failure of the other to institute a suit for possession in the Civil Court—*Ram Kumar v. Thakur Ojha*, 3 P.L.T. 648, 23 Cr.L.J. 562.

457. Possession by Magistrate :—When a Magistrate attaches lands under this section, the possession of the Magistrate must be taken to be a possession on behalf of such of the rival parties as might establish a right to possession by a civil suit—*Beni Prasad v. Shahzada*, 32 Cal. 856. That is, the Magistrate's possession is not adverse to the true owner. The legal possession of the property is said to be in the true owner during the period of attachment—*Rajah of Venkatagiri v. Isakapalli*, 26 Mad. 410; *Panna Lal v. Panchu*, 49 Cal. 544; *Brojendra v. Sarojini*, 20 C.W.N. 481, 22 C.L.J. 283, 31 I.C. 242; *Sarat Chandra v. Bibhabati*, 34 C.L.J. 302, 66 I.C. 433, A.I.R. 1921 Cal. 584; *Chhaganmull v. Amanatulla*, 39 C.L.J. 447. Though an order under this section interferes with physical possession, it does not affect the legal rights of the parties concerned and the property under attachment is held for the person ultimately shown to be entitled to possession—*Shyama Charan v. Surya Kanta*, 15 C.W.N. 168 (168). See also Note 420.

458. Decision of a competent Court :—The attachment is to continue until a competent Court has determined the rights of the parties; and therefore it is the duty of a Magistrate to withdraw the attachment and release the property as soon as it is brought to his notice that a competent Court has determined the rights of the

parties or of the person entitled to possession—*Maharaja of Venkatagiri v. Srinivasa*, 17 M.L.T. 392, 16 Cr.L.J. 481; *Jurauan v. Ram Sarekh*, 12 Pat 261, 14 P.L.T. 113. The Magistrate is bound to abide by the subsequent decision of a competent Civil Court and to withdraw the attachment, even though the suit in the Civil Court was not *inter partes*, (as for instance where the suit was instituted by a third party, and the first party and some members of the second party were not made parties to it)—*Asesh Kumar v. Kishori Mohan*, 39 C.L.J. 353, 25 Cr.L.J. 937. The fact that an appeal has been preferred against the decision of the Civil Court and is pending, is no good reason for the Magistrate to keep the property any longer in attachment—*Abdul Aziz*, 1917 P.W.R. 46, 19 Cr.L.J. 261; *Ramsri v. Sri Kishan*, 46 All. 879, 22 A.L.J. 803, A.I.R. 1924 All. 277; *Maung Tha Zan v. Maung Ba Gale*, 7 Bur.L.T. 293, 15 Cr.L.J. 500.

It is not necessary that there should be a decree in favour of *all* the parties to enable the Magistrate to withdraw an attachment made under this section; and if there is an adjudication by a Civil Court in favour of some at least of the parties, that is sufficient for the purpose of enabling the Magistrate to walk out of the property—*Vithoba v. Narasinga*, 4 L.W. 55, 17 Cr.L.J. 331.

The expression '*competent Court*' means not only a Civil Court, but includes a Survey Court—*Ambler v. Sami Ahmed*, 37 Cal. 331, 11 Cr.L.J. 372, 11 C.L.J. 417, 6 I.C. 545. Where, therefore, lands were attached under sec. 146, Cr. P. C., and subsequently one of the parties obtained an order in his favour from the survey authorities under sec. 41, Bengal Survey Act and applied to have the attachment released in his favour, held that the order of the Collector as to the lands under the Survey Act is a determination by a competent Court of the rights of the person entitled to possession thereof—*Ram Ranbiyaya Prasad v. Ram Prasad*, A.I.R. 1939 Pat 348, 1939 P.W.N. 260, 40 Cr.L.J. 797, 183 I.C. 388, 20 P.L.T. 595, 5 B.R. 906, 12 R.P. 141.

It also includes a Revenue Court. Under the Code of 1882, the words were '*Civil Court*' and so it was held in *Ganga Prasad v. Narain*, 15 All. 394 (395), that this section did not authorise a Magistrate to pass an order of attachment in a dispute between parties, whose rights would have to be determined by a Revenue Court. But this ruling is no longer good law, and the Magistrate can release the property attached and hand it over to one of the parties, as soon as the Revenue Court has given a decision in favour of that party—*Ram Shri v. Kishan*, 46 All. 879 (881), 22 A.L.J. 803, 25 Cr.L.J. 1242; *Surendra v. Bikram*, 25 O.C. 242. But see *Radha Raman v. Emp.*, A.I.R. 1936 All. 177, 1936 All.L.R. 30, 160 I.C. 20, 1936 A.W.R. 125, 1936 A.L.J. 197, 37 Cr.L.J. 215, 1936 Cr.C. 211, where it has been held that it is for the Revenue Court to put the party in possession if its order is enforceable and that the Magistrate has no authority to do so.

But an entry in the Record of Rights cannot be regarded as constituting an adjudication by a competent Court of the rights of parties—*Kutiswar v. Jitendra*, 30 C.W.N. 616, 26 Cr.L.J. 1055 (1056), 87 I.C. 975, A.I.R. 1926 Cal. 316. See also 18 Cr.L.J. 682, 40 I.C. 330, 1 Pat.L.W. 642.

Burden of proof—What is required of the plaintiff who comes to Court after an attachment of lands under sec. 146, Cr. P. C., is to show to the Court that he has got the rights in the lands in dispute and is entitled to possession thereof—*Hargobind Rai v. Keshwa Prasad Singh*, 1924 Pat. H.C.C. 297 (300), A.I.R. 1925 Pat. 168.

See Note 343.

459. Suit—If there was only an order of attachment issued by the Magistrate and even if the Magistrate should actually take possession of the property and even though the Magistrate should appoint a receiver to be in possession of the property, what happens in the eye of the law is that the property is placed in *custodia legis*. It is held in the custody of the Court for the benefit of the person who may eventually and finally succeed in establishing his title to the property. In such cases no party is under an obligation to institute a suit for possession of the property. It is only necessary for the parties to establish their right against the other contending parties and the

Court will give effect to the adjudication by the Court as against the other contending parties—*Alagarswami v. Ramabadra*, A.I.R. 1929 Mad. 38 (41), 111 I.C. 152

Damage suit—A suit to recover damages suffered by the plaintiff by reason of his land having been kept for a year under attachment under an erroneous order under sec. 146, Cr. P. C., would not lie against the defendant upon whose complaint the enquiry leading up to the order was initiated—*Ram Mina Kumari v. Surendra Narain*, 14 C.W.N. 96. See also *Ammani v. Sellani*, 6 Mad. 426.

Limitation :—See Art. 120 of the Indian Limitation Act, 1908. See also Arts. 47, 142 and 144 of the same Act in this connection. See also Note 457.

460. Proviso—Withdrawal of attachment :—“We have introduced a new clause which by an amendment of sec. 146 will enable a District Magistrate to withdraw the attachment of property at any time when he is satisfied that there is no longer any likelihood of a breach of the peace”—*Report of the Joint Committee* (1922).

Once an order under sec. 146 has been passed, it can come to an end only under one of two circumstances, the first being that there is no longer any likelihood of a breach of the peace, in which case the Magistrate is competent to withdraw the order of attachment, and he can do so at any time at which if he is satisfied that there is no longer any likelihood; and secondly, it is competent for a Magistrate to release the property from attachment if a competent Court has determined the rights of the parties to the proceedings or the person entitled to possession—*Kutiswar v. Jitendra*, 26 Cr.L.J. 1055 (1056), 30 C.W.N. 646, 87 I.C. 975, A.I.R. 1926 Cal. 316.

Where the petitioner presented an application to the Magistrate praying for the release of the attached house on the ground that the other claimant had died and that he (the petitioner) was his heir, and the Magistrate refused the application as no judgment of a competent Court declaring the rights of parties was produced, *held* that the Magistrate ought to have granted the application and released the property from attachment, because by the death of the other claimant all likelihood of a breach of the peace had disappeared—*Khushi Ram v. Crown*, 1 Lah. 451. This proviso now expressly provides for the case.

But the Magistrate can cancel the order of attachment under the proviso only on the ground that there is no longer any likelihood of a breach of the peace. He cannot cancel the attachment on any other ground, e.g., on the ground that the attachment is not practicable—*Ram Dulare v. Ajudhya*, 16 O.C. 192, 14 Cr.L.J. 605.

Where the property attached under sec. 146 is released by the Magistrate on being satisfied that there is no longer any likelihood of a breach of the peace, the Magistrate should not simply direct the Receiver to abandon the property without making over the possession or the books of account to any body, and leave the parties to scramble for the estate. This is not the intention of the Legislature. Under this proviso, it is open to the Magistrate to make over the possession to any person he thinks fit, and he must of course exercise a judicial discretion in deciding to whom the possession is to be given. There may also be cases in which it is sufficient for him to make an order withdrawing the attachment and leave some person to take possession, without handing over the possession of the property to any body—*Ali Bahadur*, 2 O.W.N. 868, 26 Cr.L.J. 1629, 90 I.C. 925, A.I.R. 1926 Oudh 146

461. Sub-section (2)—Appointment of Receiver :—A Magistrate is entitled to appoint a receiver under this sub-section only after the termination of the inquiry as to possession conducted under sec. 145 (4). The appointment of a receiver before the completion of the inquiry is without jurisdiction—*Lakshminarayana v. Gnana-prakasa*, 13 Cr.L.J. 536, 15 I.C. 808 (Mad). The passing of an order of attachment does not by itself justify the appointment of a receiver, unless on a subsequent inquiry the appointment of a receiver is found necessary—*Raza Hussain v. Mehdi Hasan*, 25 O.C. 148, 23 Cr.L.J. 684.

A person ought not to be appointed a Receiver who has shown a partiality for one of the parties, and a party to the action should not be appointed unless by consent

or unless there are special circumstances justifying his appointment in preference to others. Thus, a party to the proceeding who was found by the High Court in a previous proceeding to be not in possession of the disputed property, ought not to be appointed a Receiver, because the effect of such appointment would be to place him exactly in the position to which he is not entitled—*Lachmi v. Gajadhar*, 7 Pat. 1, 28 Cr L.J. 776 (777), 9 P.L.T. 109, 104 I.C. 104, A.I.R. 1927 Pat. 393.

A Receiver appointed under this section is entitled, unless some special circumstance is established, not only to the subject matter of the proceedings but also to all accretions to the property, and can give title to a tenant under him—*Madhu v. Sadar Ali*, 14 C.W.N. 681, 11 Cr.L.J. 288, 6 I.C. 177.

But any act done by the Receiver during the period of attachment cannot affect the rights of the party found by the Civil Court to be entitled to possession of the property—*Jurawan v. Ram Sarekh*, 12 Pat. 261, 14 P.L.T. 113, A.I.R. 1933 Pat. 224.

Where a Receiver appointed under this sub-section applied to the Magistrate for permission to grant a lease without stating to whom it was intended that the lease should be granted and, on the very next day after the permission was given, granted the lease to one of the parties to the proceedings under sec 145, Cr P. C. Held that the Receiver was guilty of a very impudent fraud upon the Court and that the Magistrate had every justification in setting aside the lease summarily—*Meyyappa v. Nagamai*, 33 Cr.L.J. 956, A.I.R. 1933 Mad 67, 140 I.C. 281, 1932 M.W.N. 1154, 36 M.L.W. 651, Ind. Rul. 1932 Mad. 834. See also *Srish v. Debendra*, 50 C.L.J. 333 in this connection.

Proviso:—"We recommend the addition of a proviso to sec 146 (2) to meet the case of an overlapping appointment of a Receiver by the Civil Court"—*Report of the Select Committee of 1916*

462. Revision:—By reason of the omission of sub-sec (3) of sec 435 by the Criminal Procedure Code Amendment Act of 1923, orders passed under this section are now liable to revision under this Code. See Note 447 under sec 145.

But the High Court in revision should not lightly interfere with an order that may be passed by a Magistrate for the management of attached properties; but when the order of the Magistrate offends against an elementary rule, founded on the desire of the Courts to place the parties on a footing of absolute equality, the High Court can set aside that order in revision—*Lachmi v. Gajadhar*, 7 Pat. 1, 28 Cr L.J. 776 (778).

463. Review:—An order under this section is in the nature of a judgment and cannot be reviewed by the same Court—*Luchmi v. Bhusi*, 19 Cr L.J. 225, 5 Pat.L.W. 386; *Raj Kumar v. Thakur Ojha*, 3 P.L.T. 648; *Ram Dulare v. Ajudhya*, 16 O.C. 192, 14 Cr.L.J. 605. See sec. 369. When a property is attached under this section, the Magistrate has jurisdiction to release it from attachment, but he has no jurisdiction to review his own order releasing the attached property—*Ballam v. Lal Babu*, 19 Cr L.J. 105 (Pat.).

147. Whenever any such Magistrate is satisfied as aforesaid that a dispute likely to cause a breach of the peace exists concerning the right of use of any land or water (including any right of way or other easement over the same) within the local limits of his jurisdiction, he may inquire into the matter in manner pro-

147. (1) Whenever any District Magistrate, Sub-divisional Magistrate or Magistrate of the first class is satisfied from a police-report, or other information that a dispute likely to cause a breach of the peace exists regarding any alleged right of user of any land or water as explained in section

Dispute concerning easements, etc.

Dispute concerning rights of use of immoveable property, etc.

vided by section 145, and may, if it appears to him that such right exists, make an order permitting such thing to be done, or directing that such thing shall not be done, as the case may be, until the person objecting to such thing being done or claiming that such thing may be done obtains the decision of a competent Court adjudging him to be entitled to prevent the doing of, or to do such things, as the case may be:

Provided that no order shall be passed under this section permitting the doing of anything where the right to do such thing is exercisable at all times of the year, unless such right has been exercised within three months next before the institution of the inquiry, or, where the right is exercisable only at particular seasons or on particular occasions, unless the right has been exercised during the last of such seasons or occasions before such institution.

145, sub-section (2) (*whether such right be claimed as an easement or otherwise*) within the local limits of his jurisdiction, he may make an order in writing stating the grounds of his being so satisfied and requiring the parties concerned in such dispute to attend the Court in person or by pleader within a time to be fixed by such Magistrate and to put in written statements of their respective claims, and shall thereafter inquire into the matter in the manner provided in section 145, and the provisions of that section shall, as far as may be, be applicable in the case of such inquiry.

(2) *If it appears to such Magistrate that such right exists, he may make an order prohibiting any interference with the exercise of such right:*

Provided that no such order shall be made where the right is exercisable at all times of the year, unless such right has been exercised within three months next before the institution of the inquiry, or, where the right is exercisable only at particular seasons or on particular occasions, unless the right has been exercised during the last of such seasons or on the last of such occasions before such institution.

(3) *If it appears to such Magistrate that such right does not exist, he may make an order prohibiting any exercise of the alleged right.*

(4) *An order under this section shall be subject to any sub-*

sequent decision of a Civil Court of competent jurisdiction.

Change:—This section has been redrafted by sec. 30 of the Cr. P. C. Amendment Act (XVIII of 1923); the substantial changes (as shown by the italicised passages) are:—“(1) The definition of the subject-matter in dispute has been modified so as to avoid the difficulties which have been created by decision raising doubts as to the applicability of the section to rights not resembling easements or to rights acquired by contract; (2) the specific reference to rights of way has been omitted, as it has been questioned whether it might not by implication exclude negative easements from the scope of this section; (3) the nature of the orders which a Magistrate may pass (see sub-sections 2 and 3) and their continuance pending the order of a competent Civil Court to the contrary (see sub-section 4) have been clearly defined”—*Statement of Objects and Reasons* (1914). (4) The words “make an order in writing respective claims” have been added in order to bring this section into a line with sec. 145. “Doubts have been expressed as to the procedure to be followed in cases under sec. 147, and we have introduced amendments here to make it clear that the procedure is to be that laid down by section 145”—*Report of the Joint Committee* (1922).

464. Dispute:—The dispute contemplated by this section must at any rate be some substantial dispute necessitating the interference, in some way or other, of the criminal authorities. It would not be sufficient that there should be a mere discussion or verbal altercation between persons claiming rights of the kind described. There must be an actual dispute—*Maharaja of Burdwan v Chairman, Darjeeling Municipality*, 5 Cal. 191. See Note 393 under section 145. If on entering on an inquiry a Magistrate finds that the rights of the parties have been judicially ascertained by a previous decision, he should not enter into any investigation, as he cannot assume that a dispute would be continued on a question which has been set at rest by a judicial decision on the rights of parties—*In re Balkrishna*, 11 Bom. 584 (587); *Anya Shidya*, 29 Bom. L.R. 715, 28 Cr. L.J. 578 (579), 102 I.C. 546.

Police-report—If the Magistrate takes action under this section on the basis of a police-report it is not necessary for him to call on the Police Officer to give evidence as to the correctness of the report—*Todar Mal*, 53 All. 215, 1930 A.L.J. 1437, 32 Cr. L.J. 309.

465. Likelihood of breach of peace:—In order to give jurisdiction to a Magistrate under this section, he must be satisfied from Police reports or other materials that there is an imminent danger of a breach of the peace resulting from a dispute between the parties concerned. Where at the date of initiation of proceedings the materials before the Magistrate did not disclose the fact that there was an imminent danger of a breach of the peace, any evidence that he might have taken later on, in the course of the trial, could not give him a jurisdiction which he did not otherwise possess—*Kali Kissen v. Amund*, 23 Cal. 557 (562). This view, however, has been disapproved of in *Kulada v. Danesh*, 33 Cal. 33 (45). Unless there are special circumstances giving rise to an apprehension of the breach of the peace, there is no jurisdiction to make an order under this section—*Parashram v. Gopal*, 25 Cr. L.J. 353, 77 I.C. 289, AIR 1924 Nag. 291. The mere fact that the Magistrate had, only a few days before the institution of the present proceeding, recorded an order to the effect that no action was necessary to be taken as there was no likelihood of a breach of the peace, would not make the proceeding improper, if the Magistrate had at the date of the proceeding some *fresh materials* before him upon which he was satisfied as to the existence of the likelihood of a breach of the peace—*Dukhi v. Halway*, 23 Cal. 55 (58). For the purpose of initiation of a proceeding under this section, the Magistrate concerned must be satisfied that a dispute likely to cause a breach of the peace exists. If there was no present danger of a breach of the peace, the fact that there was a dispute between the parties which was likely to cause a breach of the peace in the future, will not justify a Mag-

taking action under this section. There should be a present dispute and a present fear of disturbance; and the section will not apply to a state of things indicating that there may be a breach of the peace in future—*Jagabandhu v. Manager, I. J. Mills*, 40 C.W.N. 351, 37 Cr.L.J. 512, 161 I.C. 338.

466. Right to use land or water:—There must not only be a dispute regarding an alleged right of user of any land or water but, under sub-sec. (2), sec. 147, Cr. P. C., it must appear to the Magistrate that such right exists. By 'right' is meant legal right, and the purpose of the section, there can be no doubt, is by an order following a summary inquiry to prohibit interference with the exercise of a legal right. It follows that as the right to fish in the sea cannot form the subject-matter of property, or be enjoyed as an easement so no one can by contract or otherwise relinquish to another his right or any part of it. Accordingly it cannot be held, in the terms of sub-sec. (2) to sec. 147, that such right exists. Hence no order can be passed under this section against any person restraining him from fishing in the sea except in a certain manner—*Sethukaruppan v. Peer Mahammad*, A.I.R. 1935 Mad. 350, 1935 M.W.N. 181, 68 M.L.J. 417, 37 Cr.L.J. 4, 159 I.C. 49, 41 M.L.W. 436, 1935 Cr.C. 447, 58 Mad. 876.

This section applies to disputes as to the right to use any land or water, as distinct from disputes as to title to or possession of the land itself, for which provision is made in sec. 145—*Ram Dulare v. Ajudhya*, 16 O.C. 192, 14 Cr.L.J. 605. Where a party claimed the right to use the land either as a public road or as a pathway, it would seem that sec. 147 is a more appropriate section than sec. 145, Cr. P. C.—*Turab Ali v. Shromani Gurdwara*, 34 Cr.L.J. 616, Ind. Rul 1933 Lah. 356, 1933 Cr.C. 267, A.I.R. 1933 Lah. 145. There is nothing to prevent an alternative claim of this nature being made under sec. 147. A personal easement as well as a public right of way may be inconsistent claims but at the same time either one or the other may be capable of proof—*Hamir v. Suresh*, 27 Cr.L.J. 841, 95 I.C. 761, A.I.R. 1926 Pat. 348.

In a Madras case it was held that the words "land or water" used in this section should be taken in their ordinary significance without the extended meaning given to them by section 145—*Palaniyandi v. Palaniappa*, 17 Cr.L.J. 325 (Mad.). In a Calcutta case also it was held that the word 'land' in this section did not include crop or produce as in sec. 145—*Ali Mohammad v. Fakiruddin*, 24 C.W.N. 1039, 22 Cr.L.J. 131. The present amendment, however, expressly lays down that those words are to have the same meaning as in sec. 145.

Since this section as now amended includes rights claimed as an easement, it applies to rights to the use of land or water belonging to others. See also *Ganpat*, 4 C.W.N. 779. The contrary view taken in *Arunachalam v. Chidambaram*, 29 Mad. 97 is no longer correct.

Right to tola from a 'hat' :—A dispute as regards the right to collect 'tolas' (small perquisites) from a hat on one day every year, is one concerning the right of use of any land within the meaning of this section—*Sarat v. Mobarak*, 21 C.W.N. 439, 24 C.L.J. 437, 18 Cr.L.J. 113, 37 I.C. 465.

Rights arising out of contract :—Prior to the present amendment of this section, it was held that a dispute between a landlord and his tenant regarding the right of the latter to reconstruct a *gola* which had fallen down, was not a matter properly coming within the operation of sec. 147. The settlement of such a dispute involved issues of right which could properly be determined by a Civil Court. The right of use of land contemplated by sec. 147 was one of an entirely different description resembling a right of easement, and not one arising from the terms of a contract between landlord and tenant—*Ganpat*, 4 C.W.N. 779. So also *Arunachalam v. Chidambaram*, 29 Mad. 97, 15 M.L.J. 391, 3 Cr.L.J. 31. But this is no longer law. By reason of the present amendment, the rights arising out of a contract will also fall under this section. See Notes under "Change" above. Before the present amendment, the words of the section were "the right of use of any land and water (including any right of way or other

easement over the same).” The words of the present section (“whether such right be claimed as an easement or otherwise”) are more general.

Right to use of water :—Where it was found that the plaintiff had a right to the flow of water for purposes of irrigation from a certain channel passing through a village of the defendant who obstructed such flow by erecting *bunds*, the Magistrate was competent, under this section, to direct the removal of the obstruction—*Pasupati v. Nandalal*, 5 C.W.N. 67 (70). Where Christians were prevented by Hindus from the lawful exercise of their right to take water from a well, it was held that the Magistrate had jurisdiction under this section to pass an order prohibiting the Hindus from interfering with the exercise of that right—*Hindus v. Christians*, 21 M.L.J. 486, 11 Cr.L.J. 721, 8 I.C. 484, 1911 M.W.N. 44, 9 M.L.T. 209. See also *Fajju v. Sirya*, 38 Cr.L.J. 881, 170 I.C. 392, 10 R.L. 107, 39 P.L.R. 491.

Right to let off water :—The right to let off water by the natural course in which it has always flowed and would always flow, so as to prevent inundation of one's own land, is a natural right of every land-holder to the use and enjoyment of his own land. Where the second party erected a *bund* on the boundary of the first party's village to prevent the flow of such water, the Magistrate had jurisdiction to direct the removal of the *bund*—*Dowlat v. Siva Pershad*, 15 C.L.J. 267, 12 Cr.L.J. 319, 10 I.C. 615 (616). Where a party satisfied the Magistrate that he had a right to have an opening in the *al* for the purpose of passing water and that he exercised the right for several years and also during the last rains when the right was last exercisable, it is clearly the Magistrate's duty to direct the other party to make openings in the *al* within a reasonable time from the passing of the order—*Ambica v. Gur*, 39 Cal 560. But where the Magistrate invented a purely imaginary right which the opposite party never claimed, a right to discharge water over the petitioner's land in any direction he pleased simply because his own property was slightly higher, such right could not be made the basis of any order under this section—*Haradhone Mukerjee v. Brojendra Nath*, A.I.R. 1937 Cal. 513, 171 I.C. 268, 38 Cr.L.J. 1071, 41 C.W.N. 900, 10 R.C. 261. As to *bundh* see Note 406.

Right to fish :—There is nothing in this section which limits its operation only to easement. It applies also to profits *a prendre*, for instance, the right to fish in a *jhal*—*Dukhi v. Halway*, 23 Cal. 55 (59); *Kali Kissen v. Anund*, 23 Cal. 557. See Note 406.

Right to ferry :—A dispute regarding right to use a ferry comes within the scope of this section—*Harbullubh v. Bajrang*, 3 C.W.N. 148. See Note 406.

Right to bury the dead is a right contemplated by this section, and the Magistrate has to see whether the right which is exercisable only on particular occasions or particular seasons was exercised during the last of such seasons or occasions—*Md. Abdul v. Md. Ashroff*, 51 Mad. 522, 29 Cr.L.J. 644 (645), 53 M.L.J. 523, 1927 M.W.N. 789.

Right to worship :—A right to perform the duties of a Pujari in a temple is not a right to the use of any land. It is the worship which is disputed and not the use of land. Therefore, a dispute regarding such a right cannot be the basis of a proceeding under this section—*Gujram v. Lal Behary*, 37 Cal. 578, 14 C.W.N. 611, 12 C.L.J. 22, 11 Cr.L.J. 292, 6 I.C. 182; *Surendra v. Sashi Bhusan*, 52 Cal. 959, 42 C.L.J. 127, 92 I.C. 223, A.I.R. 1926 Cal. 437, 27 Cr.L.J. 239. See also *Manik Chandra v. Prem Nath* in Note 404. But when there is a dispute as to the possession of a temple and the right to perform *pūja* therein the Magistrate can deal with the claim as the right to perform *pūja* is part of the larger relief that is prayed for. If, however, it is not so included in the major relief, it is doubtful whether an application under sec. 147 can lie merely as to the right to perform *pūja* in a certain temple—*Polaniyandi v. Palaniappa*, 34 I.C. 651, A.I.R. 1917 Mad. 840, 17 Cr.L.J. 235, *Perumat v. Tirumalai*, 34 Cr.L.J. 88, 140 I.C. 900, 1932 M.W.N. 1079, Ind. Rul. 1933 Mad. 63, 37 M.L.W. 143, A.I.R. 1933 Mad. 245, 1933 Cr.C. 344. After the amendment of the Cr. P. C., in 1923 no doubt remained as to the provisions of sec. 147 attaching to disputes as regards entry into a temple or mosque or *samadh*—*Daya Ram*, 31 Cr.L.J. 1217, 127 I.C.

1930 Cr.C. 672, Ind. Rul. 1930 All. 886, A.I.R. 1930 All. 452. Where the matters in dispute cannot be adjudicated by a Civil Court (e.g., disputes relating to performance of worship and other religious ceremonies), Magistrates have no jurisdiction to deal with those matters under sec. 147. In such matters, if the Magistrate apprehends that there will be a breach of the peace, he is to adopt the procedure prescribed by Chapter VIII, and to take security—*In re Atmaram*, 14 Bom. 25; *Surendra v. Sashi Bhusan*, supra. But in *Mad. Musaliar v. Kunji*, 11 Mad. 323, 2 Weir 117, *Kader Batcha v. Kader Batcha*, 29 Mad. 237 (238), 4 Cr.L.J. 58, *In re Daneshwar*, 3 Bom.L.R. 416 (418), *Sinnasami v. Palani*, 48 M.L.J. 528, 26 Cr.L.J. 1057, 188 I.C. 2, A.I.R. 1925 Mad. 779, and *Chidambara v. Sengoda*, 27 M.L.J. 587, 25 I.C. 999, A.I.R. 1915 Mad. 84, 15 Cr.L.J. 671, a right to worship in a mosque or to officiate as Kazi therein or to perform a *pūja*, has been held to come within the operation of this section. In a Bombay case, however, it has been held that a dispute regarding the right to perform *pūja* in a certain temple falls under sec. 145—*Pandurang*, 24 Bom 527 (531), 2 Bom.L.R. 84. After discussing all the rulings quoted above Pandurang Row, J., observed "It seems to me that where the dispute is regarding a right which is inseparably connected with the use of any land or building, it must be regarded as being within the purview of sec. 147. It may be that the dispute in actual fact may have more to do with what a man does in the temple after entering into it and not so much with his actual entry into the temple nevertheless where the right regarding which a dispute exists is one which is inseparably connected with the right to enter a building and cannot be dissociated from it, the dispute cannot be said to be not one regarding an alleged right of user of the building. In this particular case it would appear that the dispute was also concerned with the right of possession of a particular room kept locked in the temple in which the *pūja* materials are kept. The possession of this locked room is inseparably connected with the right to worship as *pūjari*, for without these materials which are kept therein it is not possible for any one to perform *pūja* as a *pūjari*. It would, therefore, appear that the present dispute includes a dispute regarding the possession of the locked room in which these paraphernalia of worship are stored. It also appears to me that the policy of the Legislature has been consistently, in the past, to enlarge the jurisdiction of the Magistrate in respect of disputes connected with any kind of user of 'land' in its widest sense, and that it would be inconvenient if disputes which are really inseparably connected with lands or buildings were beyond the jurisdiction of the Magistrate"—*Velappa Goundan v. Ramaswami Goundan*, 39 Cr. L.J. 705 (706), 176 I.C. 127, 47 M.L.W. 305, (1938) 1 M.W.N. 348, 11 R.M. 32, A.I.R. 1938 Mad 537, (1938) 1 M.L.J. 817.

The Magistrate cannot properly pass any order allowing a person to enter upon land, admittedly in possession of another person, and perform ceremonies upon it against that person's wish. In any event, if the Magistrate feels that he ought to do so in the interests of the public peace, it is at least necessary that he should hold some enquiry under sec. 147, Cr. P. C., in order to discover for himself pending any decision by a Civil Court, whether he has any right to the user of the land in the manner in which he desires to use it—*Abdul Majeed v. Emp.*, 40 Cr.L.J. 383, 180 I.C. 499, 1938 A.W.R. (H.C.) 851, A.I.R. 1939 All 182, 1939 A Cr.C. 70, 11 R.A. 470.

A dispute as regards the offerings made in a temple is a dispute as regards moveable property, and therefore does not fall under this section—*Ram Saran v. Raghunandan*, 38 Cal. 387, 13 C.L.J. 446, 16 C.W.N. 574, 12 Cr.L.J. 3, 9 I.C. 6; *Velappa Goundan v. Ramaswami Goundan*, supra. A dispute with regard to collection of offerings at a temple or at a *karbala* cannot by any stretch of reasoning be said to be a dispute concerning land or water and, therefore, a dispute with respect to collection of offerings cannot come within the purview of sec. 145, Cr. P. C.—*Ghulam v. Kaniz*, 57 I.C. 92, 5 P.L.J. 246, 1 P.L.T. 608, 21 Cr.L.J. 572, following *Guram v. Lal Behari*, 6 I.C. 182, 37 Cal. 578, 14 C.W.N. 611, 12 C.L.J. 22, 11 Cr.L.J. 292 and *Ram Saran v. Raghu Nandan*, supra. See Note 406.

Right to use of privy is not a right to the use of land and water, nor is the use

of the privy an easement—*In re Shankar*, 15 Bom L.R. 329, 14 Cr.L.J. 400 (401), 20 I.C. 224.

Right of way :—A Magistrate is competent to order the removal of an obstruction to a right of way caused by the owner of the land, if there be a likelihood of a breach of the peace in consequence of such obstruction—*Lalit Chandra v Tarini*, 5 C.W.N. 335 (336). In a dispute as to the right of way, the Magistrate should decide whether the complainant had been in use and occupation of the road, and if so, for how long and if he finds him to be in possession, should retain him in it, leaving the owner of the land to refer the question of the right to the easement to the Civil Court. The Magistrate should not decide against the complainant because he may have another right of way leading to the same place—*Toylucko Nath*, 2 W.R. 64. Under the Muhammadan law, a Muhammadan cannot say his prayers on the property belonging to another without an express or implied permission of the owner of the property. Therefore, a Muhammadan has no right to say his prayer at a grave situated in land belonging to another which is enclosed by a wall (which negatives any express or implied permission to say prayers on the land), and consequently, he cannot claim a right of way to go over a land belonging to another in order to worship at a grave situated in that land—*Rampratab v. Satif*, 6 P.L.T. 857, 27 Cr L J. 44.

Right to use public way :—The expression "land or water" in this section does not necessarily refer only to private property, but applies to a public street—*Mad Amir Khan v Mahalingam*, 51 Mad. 174, 53 M.L.J. 523, 28 Cr L.J. 948, AIR 1927 Mad 985. The section can be applied even when the right of way claimed is a right to a public path. The terms of this section are wide enough to cover the cases of public as well as private right of way. The Magistrate has therefore jurisdiction to direct a person who has obstructed a public pathway by a fence, not to obstruct such a pathway—*Karuppanna v Kundasami*, 26 M.L.J. 233, 15 Cr L.J. 363, 23 I.C. 730. A right to take a car in procession along a public road to a temple is a right of user of land under this section—*In re Basappa*, 27 Bom L.R. 1058, 26 Cr L.J. 1422, 89 I.C. 846. The Magistrate has jurisdiction under this section to pass order even against the right of passage through a public street. But he ought not to pass such a prohibitory order, unless it is clearly proved that there is a right by custom or by grant or by a Statute in one section of the public to prevent another section of the public from using the public street on particular occasions or for particular purposes, when such use is ordinarily and *prima facie* lawful—*Sudalaimuthu v Enan*, 16 Cr L.J. 767, 31 I.C. 367 (Mad). The Magistrate has jurisdiction to pass an order allowing the Hindus to pass through a public street with a procession and prohibiting the Muhammadans from interfering with the use by the Hindus of the public street, when it is found that the Hindus had used the street and had taken the procession during the previous season—*Mad Amir Khan v Mahalingam*, 51 Mad 174, 53 M.L.J. 523, 28 Cr L.J. 948. When the subject of a dispute is a public highway, a Magistrate has no power to object to the lawful use of it by any class of persons. Except when danger to the public health is occasioned, the conveyance of a corpse along a highway is not an unlawful use of the highway. Therefore, an order that the Hindus should not carry corpses through a street to which the Muhammadans object, is illegal—*In re Narayana*, 7 Mad 49. The right to use a public way for carrying corpses is a natural and ordinary right of citizens, and it is open to question whether section 147 applies to cases of dispute concerning the exercise of such a grant—*Kelandai v. Kalabudda*, 6 M.L.J. 193.

Bund :—Where the petitioners alleged that they had a right to irrigate their lands from a Nala but that the defendants had constructed a bund and thus prevented them from exercising their right and that there was an apprehension of breach of peace, the proper course for the Magistrate to adopt in the case would have been to have placed both sides on security under sec. 107, Cr. P. C., and left them to have their rights settled by the Civil Court, without passing an order directing the

defendants to remove the *bund* under this section—*Ahmad Din v. Jiwan*, 27 Cr.L.J. 801, 95 I.C. 465, A.I.R. 1926 Lah. 550.

The right to lay warps in a street is not a right to possession of land but a right to the use of it such as sec. 147, Cr. P. C., deals with—*Sankara v. Kuthalinga*, 19 Cr.L.J. 977, 47 I.C. 877.

A dispute regarding collection of certain fees called *khutagari*, *arhat* and *keali*, levied in respect of boats bringing grain and moored in a shallow channel, but dissociated from the ownership of the site, comes within the purview of this section—*Kunjo Mandal v. Sarju Ram Marwari*, A.I.R. 1939 Pat. 206, 1939 P.W.N. 66, 20 P.L.T. 164, 181 I.C. 176, 40 Cr.L.J. 538.

467. Easements:—This section is not confined to easements acquired by uninterrupted enjoyment for 20 years provided by sec. 26 of the Limitation Act—*Srimanta v. Indra Narayan*, 13 C.W.N. 859, 10 Cr.L.J. 292. This term includes profits *a pendre*, e.g., a right to fish—*Dukhi v. Halway*, 23 Cal. 55 (59), or a right to moor boats and dry fishing nets on the land of another—*Kalkumar v. Bijoy*, 21 Cr.L.J. 697, 57 I.C. 937 (Cal.).

This section applies to positive as well as to negative easements. See the *Statements of Objects and Reasons* cited under heading "Change", supra.

468. Preliminary order in writing:—This section as now amended requires that the Magistrate must record as under section 145, a preliminary proceeding stating the ground of his being satisfied as to the likelihood of a breach of the peace. The contrary rulings in *Miller v. Rajendra*, 2 C.W.N. 670 and *Chidambara v. Sengoda*, 27 M.L.J. 587, 15 Cr.L.J. 671 are hereby overruled.

The preliminary order under section 147, just as in the case of an order under sec. 145 directing the parties to appear for the inquiry, must direct them to appear before the Magistrate himself who issued the preliminary order. An order directing them to appear before another Magistrate is without jurisdiction, and all proceedings on an inquiry so conducted are invalid—*Misri Chaudhury v. Narasingh*, 2 P.L.T. 186, 22 Cr.L.J. 483.

Interlocutory order:—Where the Magistrate ordered the non-applicant not to interfere in any way with the exercise of the alleged right by the applicant till the final decision of the case. *Held* that since there is no provision under sec. 147, Cr. P. C., for passing such an interlocutory order which in terms is nothing short of the final order, the same was obviously illegal—*Ramchandra v. Shankarrao*, 33 Cr.L.J. 556, 138 I.C. 38, 15 N.L.J. 28, 1933 Cr.C. 433, A.L.R. 1932 Nag. 83, Ind. Rul. 1932 Nag. 71.

The order purporting to be made under sec. 147 (2), Cr. P. C., prohibiting interference with the existing rights pending decision in the matter is not a legal order. Section 147 (2) contemplates a final order made after due enquiry in the manner provided for by that section and does not justify an interlocutory order of that nature. Should it appear to the Magistrate to be necessary to pass an *ad interim* order of any kind he may do so in the manner provided by sec. 145, cl. (4), proviso (2), Cr. P. C.—*Khuda Bux v. Mozharul Haque*, 44 C.W.N. 623, A.I.R. 1940 Cal. 330, 41 Cr.L.J. 728, 89 I.C. 354.

469. Inquiry as under sec. 145:—A case under this section is to be decided by the same procedure and on the same principles as a case under sec. 145—*Ram Saran v. Raghunandan*, 38 Cal. 387 (390). This contemplates the filing of written statements, taking of evidence, and if necessary, local investigation. Therefore, an order under sec. 147 passed on proceedings taken under sec. 133, without any action in accordance with sec. 145, is without jurisdiction—*Abdool v. Sagar Ali*, 15 C.W.N. 667, 12 Cr.L.J. 43, 9 I.C. 262. Where the petitioners set up a right of easement over a road which the opposite party attempted to close, and the Magistrate, instead of following the procedure laid down in this section, went over to the office of the opposite party, examined certain documents and correspondence in respect of the road, and then passed an order declaring the road to belong to the opposite party and forbidding the petitioners to enter upon

the road, held that the procedure was wholly unjustifiable, as he made inquiries in the absence of the petitioners, and without giving them an opportunity of adducing their own evidence and examining witnesses, and passed the order without coming to a distinct finding as to the alleged right of easement set up by the petitioners—*Narendra v. E. I. Ry.*, 5 P.L.T. 419, 25 Cr.L.J. 455, A.I.R. 1924 Pat. 717.

When proceedings are started under sec. 145 on the basis of a police report, but during the trial the Magistrate finds it is a matter falling under sec. 147, he can convert the proceedings into one under that section—*Anath Bandhu v. Wahid Ali*, 25 Cr.L.J. 558 (Cal.); *In re Amarsang*, 48 Bom 512 (515), 26 Bom L.R. 436

Long and protracted inquiry—Question of title—Where a dispute concerning easements is likely to involve a long and complicated inquiry and the presence of a large number of people, the proper course for the Magistrate to follow is to bind down under sec. 107 such of the person as are likely to disturb the peace, instead of embarking upon an inquiry under sec. 147—*Kali Kissen v. Anund*, 23 Cal. 557 (563); *Bathoo v. Domi*, 21 Cal. 727. So also, where the settlement of a dispute involves issues of right which can only be determined by a Civil Court, the proper course for the Magistrate is to proceed under sec. 107—*Ganpat*, 4 C.W.N. 779; *Arunachalam v. Chidambaram*, 29 Mad. 97.

470. Notice to parties:—The inquiry contemplated by this section is a judicial inquiry and the opinion to be formed must be a judicial one formed upon evidence legally before the Magistrate. The evidence before the Magistrate would not be legal, if it were taken behind the back of persons who claimed or denied the right, i.e., if they had not been represented at the inquiry and had no notice of it—*Bathoo Lal v. Domi Lal*, 21 Cal. 727. Where an order was passed under this section without giving notice to the party concerned, the order was without jurisdiction and liable to be set aside—*Crown v. Bhana*, 1909 PR 12, 11 Cr.L.J. 61. Where the proceedings were originally started in respect of a portion of a pathway, but subsequently the Court amended the proceedings by making them applicable to the whole pathway without notice to the party affected, held that the final order was not binding on the party affected—*Janaki v. Monmohan*, 25 Cr.L.J. 674, A.I.R. 1925 Cal. 263, 81 I.C. 162.

Actual notice should be given to all the persons claiming or denying the right; notice to servants of such persons is not equivalent to notice to them—*Bathoo Lal v. Domi Lal*, 21 Cal. 727. The inquiry presumes not that one party only, but that both parties to the dispute, will be afforded an opportunity of appearing and adducing evidence on all the material facts—*In re Alfred Lindsay*, 4 Mad. 121.

470A. Section 145 and sec. 147:—No order can be passed under sec. 147, Cr. P. C., when notice was not issued under that section as required by the section itself but a notice was issued under sec. 145, Cr. P. C.—*Turab Ali Khan v. Shromani Gurdwara*, 34 Cr.L.J. 616, 143 I.C. 477, Ind. Rul. 1933 Lah. 356, 1933 Cr.C. 267, A.I.R. 1933 Lah. 145. The Calcutta, Allahabad, Bombay and Patna High Courts seem to have taken a different view in *Anath v. Wahid Ali*, 26 Cr.L.J. 558, 85 I.C. 654, A.I.R. 1925 Cal. 1022, *Ch. Gajraj*, A.I.R. 1936 All. 320, 37 Cr.L.J. 705, 162 I.C. 760, 1936 Cr.C. 490, 1936 A.L.J. 746, 1936 A.L.R. 472, 8 R.A. 900, *Amarsang Shivasangi*, 26 Cr.L.J. 772, 86 I.C. 404, A.I.R. 1924 Bom. 452, 48 Bom. 512, 26 Bom. L.R. 436 and *Kunjo Mandal v. Sarju Ram Marwari*, A.I.R. 1939 Pat. 206, 1939 P.W.N. 66, 20 P.L.T. 164, 40 Cr.L.J. 538, 181 I.C. 176, 11 R.P. 573, 5 B.R. 539 respectively. Conversely, when a notice was issued under section 147, Criminal Procedure Code and, on objection made by the parties, the Magistrate proceeded with the case and passed a final order under sec. 145, Cr. P. C., without informing the parties about the change and without making an order under sec. 145 (1), Cr. P. C., the Magistrate acted without jurisdiction—*Subramania v. Sannasia*, 5 M.L.T. 103, 19 M.L.J. 18, 9 Cr.L.J. 565, 2 I.C. 310. See Notes 432 and 407. *In Indideo v. Durga Prasad*, 37 Cr.L.J. 378, 160 I.C. 945, 17 P.L.T. 22, 1936 Cr.C. 83, A.I.R. 1936 Pat. 59, the Patna High Court directed that notices issued by the Magistrate under sec. 144,

Cr. P. C., be considered equivalent to notices under sec. 147 (1), following *Kaniz Amina*, A.I.R. 1918 Pat. 663, 47 I.C. 65, 19 Cr.L.J. 869, 3 Pat.L.J. 243, where notices issued under sec. 144, Cr. P. C., were treated by the High Court as equivalent to preliminary notices under sec. 145, cl (1), Cr. P. Code.

471. Parties:—In an inquiry under this section, it is sufficient if persons who claim for themselves the right (e.g., right to fish in a *jhil*), though that right be derived from others, are made parties. It is not necessary that the proprietors (*of the jhil*) should be added as parties—*Dukhi v. Halway*, 23 Cal 55 (59).

A Magistrate is not competent to add parties to a proceeding under sec. 147, after making a preliminary order. An order made after the addition of parties is null and void only as against the added party, but is binding on those to whom it is properly directed—*Pasupati v. Nanda Lal*, 5 C.W.N. 67 (70), 28 Cal. 734. But see *Parasashram v. Gopal*, 25 Cr.L.J. 353, 77 I.C. 289, A.I.R. 1924 Nag. 294 where it has been held to be a mere irregularity which does not vitiate the proceedings.

472. Evidence:—The inquiry contemplated by the section is a judicial inquiry and the opinion of the Magistrate must be a judicial one formed upon evidence legally before him—*Bathoo Lal v. Domi Lal*, 21 Cal. 727. A party against whom proceedings are instituted is entitled to produce evidence to prove that the case does not fall within this section—*Bhana*, 12 P.R. 1909, 11 Cr.L.J. 61, 4 I.C. 860.

An order passed merely on a written statement, without taking any evidence in proof of the allegation contained in the written statement, is bad in law—*Md. Noor v. Bikkhan*, 30 Cal 918, 7 C.W.N. 510. So also, an order passed without giving the parties an opportunity of calling evidence, is one without jurisdiction—*Pilaji v. Darya*, 20 Cr.L.J. 110, 48 I.C. 990 (Nag.). So also *Narendra v. E. I. Ry.*, 5 P.L.T. 419 cited in Note 469 above.

But where the allegation of one party is admitted by the other, no evidence is necessary in addition to the written statement—*Haromohan v. Gobind*, 7 C.W.N. 351.

The action of the Magistrate in admitting documents after the close of the case without notice to the other party and without giving them an opportunity to adduce rebutting evidence is illegal—*Ramroop v. Mano*, 35 Cr.L.J. 481, 147 I.C. 774, A.I.R. 1934 Pat. 86, 1934 Cr.C. 113.

Local inspection:—In a matter under this section, the Magistrate is bound to hear the evidence tendered by the parties. He cannot summarily deal with the case after local inspection—*Ganpat*, 4 C.W.N. 779. A decision of the Magistrate based substantially upon impression obtained as a result of his local inspection, is bad and liable to be set aside. But a decision based on the evidence as well as local inspection (the one corroborating the other) is not illegal—*Muhammad Musa v. Shyam Sundar*, 2 P.L.T. 681, 64 I.C. 131, 22 Cr.L.J. 739. The Magistrate can make a local inspection even prior to taking evidence in the case. But the finding must be based on evidence duly recorded and not merely upon the impressions formed on a local inspection—*Abdul Hamid v. Hasan Raza*, 4 P.L.T. 297, 72 I.C. 951, 24 Cr.L.J. 487. The rule that in criminal cases Courts are justified in making a local inspection only in order to explain the facts appearing in the evidence (*i.e.*, only after hearing the evidence) does not apply to sec. 147. Thus, where the levels and the falls of water are concerned, the Magistrate can make a local inspection even before hearing the evidence in the case—*Dowlat v. Siva*, 15 C.L.J. 267, 12 Cr.L.J. 319, 10 I.C. 615.

473. Proviso—User of right:—In the absence of a finding that the right has been exercised within the periods specified by the proviso to sub-section (2), the final order under this section cannot be maintained—*Sirkawal v. Bhuja Singh*, 5 P.L.T. 457, 25 Cr.L.J. 996. Where a right is exercisable at all times of the year, there must be a finding that the right was exercised within three months—*Guru Prasad v. Lachman*, 14 Cr.L.J. 303 (Cal.); *Bhana*, 12 P.R. 1909, 11 Cr.L.J. 61; *Grant v. Padarath*, 2 P.L.T. 364, 22 Cr.L.J. 463. Where it is proved that the first party have had an uninterrupted use of water of a *nala* for a period of 20 years, which they have enjoyed as an easement

and as of right, and the erection of a *bund* has led to a dispute, there is then a sufficient finding that the right in dispute has been exercised within either of the periods mentioned in the proviso—*Pasupati v Nanda Lal*, 5 C.W.N. 67 (70, 71). Where it is found that the Hindus had used a public street and had taken a procession along that street on a previous season, the Magistrate has jurisdiction to pass an order allowing the Hindus to take the procession on the present season and prohibiting the Muhammadans from interfering with the use by the Hindus of that street—*Amir Khan v Mahalingam*, 51 Mad 174, 53 M.L.J. 523, 28 Cr.L.J. 948 (949). Where the non-exercise of the right on the previous occasion was due to circumstances *beyond the control* of the party claiming the right, e.g., where the non-exercise was due to obstructions caused by the opponents of such party, the proviso to sub-section (2) does not apply, and the Magistrate is not justified in prohibiting the party claiming the right from exercising their right. The proviso obviously contemplates a non-exercise for reasons within the control of the persons claiming the right. Nor is the Magistrate justified in holding under sub-section (3) that the alleged right did not exist at all—in *re Basappa*, 27 Bom.L.R. 1058, 26 Cr.L.J. 1422 (1423), 89 I.C. 846. The Madras High Court dissents from this view and holds that the proviso applies equally well even though the non-exercise was due to circumstances beyond the control of the persons seeking to exercise the right—*Vellayan v Balakrishna*, 1931 M.W.N. 554, 32 Cr.L.J. 972.

The words "on the last of such occasions before such institution" at the end of the proviso mean "the last of such occasions before the institution" on which the right might have been asserted—*Jadubans v. Pandey Bansidhar*, A.I.R. 1934 Pat. 557 (558), 15 P.L.T. 780, 152 I.C. 295, 36 Cr.L.J. 106.

"*Institution of the inquiry*"—The date of the "institution of the inquiry" within the meaning of the proviso, does not refer to the date when the formal proceedings are drawn up under this section. An inquiry is instituted within the three months of the obstruction complained of within the meaning of the proviso, where the Magistrate hears the pleaders of the parties and directs a local inquiry within three months of the date of the obstruction, even though the formal order is drawn up after three months—*Rama Nath v. Saroda*, 44 C.L.J. 214, 28 Cr.L.J. 1, 99 I.C. 33; *Bhagawan v. Mathuri*, 31 Cr.L.J. 791, 125 I.C. 143, A.I.R. 1930 Pat. 349. See also *Daya Ram*, 31 Cr.L.J. 1217, 127 I.C. 422, A.I.R. 1930 All. 452.

The 'inquiry' that is contemplated by the proviso is the inquiry by the Magistrate into the rights of parties, and not an inquiry by the Police into the existence of the likelihood of a breach of the peace. Where in the case of an alleged obstruction of a pathway, proceedings under sec 147 were drawn up by the Magistrate more than three months after the date of the obstruction complained of, the Magistrate had no jurisdiction to proceed under this section. The fact that he ordered a *police inquiry within three months* of the obstruction could not give him jurisdiction—*Ram Chandra v. Aditya*, 53 Cal. 851, 30 C.W.N. 863, 27 Cr.L.J. 1089, A.I.R. 1926 Cal. 1051, 97 I.C. 353; *Sohan v. Jitu*, A.I.R. 1930 Pat. 291, 1930 Cr.C. 608, 122 I.C. 145, 31 Cr.L.J. 361; *Vellayan v. Balakrishna*, 32 Cr.L.J. 972, 133 I.C. 5, Ind. Rul. 1931 Mad. 693, 1931 M.W.N. 554, 1931 Cr.C. 559, A.I.R. 1931 Mad. 495; *Babu Khan v. Raj Kishore*, 20 Cr.L.J. 558, 51 I.C. 846. But it would surely be unreasonable to hold that the applicant is out of time because the Magistrate was unable, notwithstanding the promptness of the applicant in coming to Court, to enter into an inquiry within the period of limitation—*Jadubans v. Pandey Bansidhar*, A.I.R. 1934 Pat. 557, 15 P.L.T. 740, 152 I.C. 295, 36 Cr.L.J. 106. The date of the institution of the enquiry is the date when the likelihood of a breach of the peace was brought to the notice of the Magistrate and not the date when he dismissed the complaint of substantive offences under the Indian Penal Code—*Kinci v. Gobind Prasad*, A.I.R. 1936 Pat. 44, 37 Cr.L.J. 327, 160 I.C. 795, 17 P.L.T. 37, 1936 Cr.C. 69.

474. Nature of order:—The order under this section is a thing to be done or directing that a thing shall not be done. This enables the Magistrate to make a purely *declaratory* order. It only

prevent arbitrary interruption by any person of rights actually enjoyed which have been exercised by the public or by a person or class or persons—*Maharaja of Burdwan v. Chairman, Darjeeling Municipality*, 5 Cal. 194.

The Magistrate must have power to make an order whichever party establishes its right. In this clause, therefore, "if it appears to him that such right exists," the words "such right" must be understood as meaning such right as is claimed by either party. When the Magistrate had found that one of the parties has the right which he claims the enabling clause which follows, "may make an order permitting such thing to be done, or directing that such thing should not be done as the case may be," is clearly intended to give him the power to protect the right so found to exist. The relative words "such thing" have no true antecedent but the sense is not difficult. The protection is to be afforded by some appropriate order of permission or prohibition—*Pyari Mohan v. Harish Chandra*, 23 C.W.N. 956 (958), 49 I.C. 923.

The language of this section has been altered by the Amendment Act of 1923. Under the old section the Magistrate could make an order "permitting such thing to be done or directing that such thing shall not be done" That is, the Magistrate could make an order directing a party to do a *positive act*. Thus, he was competent to make an order for the removal of an obstruction to a right of way, if there was a likelihood of a breach of the peace in consequence of such obstruction—*Lalit Chandra v. Tarini*, 5 C.W.N. 335 (336); or an order for the removal of an obstruction to the right to the flow of water caused by the erection of *bunds*—*Pasupati v. Nandalal*, 5 C.W.N. 67 (70); and the Magistrate could order the removal of an obstruction under this section even though obstruction was caused to a *public path*, in spite of the express provisions of sec. 133—*Karuppanna v. Kandasami*, 26 M.L.J. 233, 15 Cr.L.J. 362; *Sudalaimutha v. Enan*, 16 Cr.L.J. 767 (Mad). In *Ambica Prosad Singh v. Gur Sahay Singh*, 39 Cal 560, it was held that the Magistrate had jurisdiction under this section, on being satisfied that a party had a right to have an opening in an *ail*, for the purpose of draining off the surplus water from his lands and that he had exercised the right for several years, ... to pass an order requiring the opposite party to make the opening within a reasonable time, and, on his failure to do so, directing the police to make the same. Under sub-s. (2) as now amended, the Magistrate can only make an order "*prohibiting any interference with the exercise of such right*." These words do not give the Magistrate any power of directing one of the parties to do a *positive act*, by way of mandatory injunction. The power given by this clause is analogous to the power of a Civil Court to grant a temporary injunction by issuing a *prohibitory* order restraining any person from doing any act which interferes with the right of another. Therefore, where the second party raised a wall on his own land blocking the windows in the house of the first party and thereby shut out light and air from a room in that house, the Magistrate had no power to order the second party to demolish the wall—*Hari Mati v. Hari Dasi*, 41 C.L.J. 568, 26 Cr.L.J. 1265, 88 I.C. 1041, 30 C.W.N. 238 (240), A.I.R. 1925 Cal. 991; *Tarini v. Dwarka*, 35 Cr.L.J. 1093, 150 I.C. 600, 38 C.W.N. 476, A.I.R. 1934 Cal. 556, 1934 Cr.C. 789, not following *Khajir v. Tabrej*, 34 Cr.L.J. 1230, 146 I.C. 223, A.I.R. 1933 Cal. 752, 1933 Cr.C. 1254 where a contrary view seems to have been taken. No mandatory order for removal of a fence can be passed under this section—*Jogendra v. Birendra*, A.I.R. 1935 Cal. 454, 39 C.W.N. 394, 61 C.L.J. 307, following *Hari Mati v. Hari Dasi* and *Tarini v. Dwarka*, *supra*. Where the order directed a person not to obstruct a certain drain and there was added to it an injunction directing him to remove a wall which he had already constructed, held that there is nothing in sec. 147, Cr. P. C., which would entitle the Magistrate to direct him to pull down the wall—*Haradhone Mukerjee v. Brojendra Nath*, 10 R.C. 261, A.I.R. 1937 Cal. 513, 41 C.W.N. 900, 171 I.C. 268, 38 Cr.L.J. 1071. The Magistrate has no power under sec. 147, Cr. P. C., to make an order in the nature of a mandatory injunction directing removal of an obstruction from any way lawfully used by the public. But under sec. 133, Cr. P. C., he has power to bring about the removal—*Usman Ali v. Emp.*, A.I.R. 1938 Nag. 297, 1938 N.L.J. 139, 175 I.C. 234, I.L.R. 1938 Nag. 580, 10 R.N. 440, 39 Cr.L.J. 584. See also Note 322.

The Madras High Court, however, holds that the law has not been altered, and that this section enables a Magistrate to pass an order in the nature of a mandatory injunction; because an order "prohibiting the interference with the exercise of such right", e.g., an order to the effect that A shall not retain any obstruction to the flow of water to the exclusion of the enjoyment of the right of user of B, means the same thing as an order directing A to remove the obstruction which he has put to the flow of water—*Venkana v. Venkata Surya*, 59 M.L.J. 430, 32 Cr.L.J. 215 (217), 129 I.C. 68, Ind. Rul. 1931 Mad. 212, 32 M.L.W. 175, A.I.R. 1930 Mad. 865, 1930 Cr.C. 1121, 1930 M.W.N. 987.

Discussing the rulings quoted above their Lordships of the Calcutta High Court, in a very recent case, have held that they are not prepared to say that the alteration brought about by the amendment of 1923 makes any difference to the power conferred upon Magistrates in matters of this kind. Section 147 (2) does in a proper case cover the power to order a person to do something or, in other words, the power to direct a mandatory injunction. On the analogy of sec. 145, Cr. P. C., the obvious intention of the legislature was to allow the free exercise of the right which had been established in this summary proceeding until the final rights of the contending parties had been ultimately decided in the Civil Court, and it seems to be clear that it would be impossible to give effect to this intention in many cases without issuing some order of a mandatory nature. The language of sub-sec (2) of sec 147 is sufficiently wide to confer a discretion upon the Magistrate as to the nature of the order that he may make in prohibiting any interference with the right of the successful party. Therefore in the case of the obstruction of a sweeper's passage by a fence it is both reasonable and legal to hold that an order prohibiting any interference with the right to use the passage should involve a direction to the effect that the obstruction should be removed—*Badridas v. Sohan Lal*, 44 C.W.N. 368.

Where a right exists, the Magistrate may make an order prohibiting any interference with its exercise. Therefore, the Magistrate may issue an ordinary injunction restraining the first party from interfering with the exercise of the rights to the water which have been declared to be in the second party by preventing them from interfering with the closing of the cutting by which the water is being diverted—*Ram Dhan v. Barhamdeo Lal*, 31 Cr.L.J. 247, 121 I.C. 461, 10 P.L.T. 376, A.I.R. 1929 Pat. 351, 1929 Cr.C. 153. When a right has been given by a Court of competent jurisdiction the removal of any obstruction in the enjoyment of that right amounts to an ancillary order and does not amount to a mandatory order—*ibid*. See also *B B Biswas v Muchiram Mahata*, 40 Cr.L.J. 345, 180 I.C. 332, A.I.R. 1939 Pat. 111, 20 P.L.T. 194.

This section (old) does not enable the Magistrate to order the Police to remove the obstruction. There is no indication in the Code that the Legislature intended the Magistrate to carry out an order under this section through the agency of the Police. This section clearly contemplates orders directed to persons who are parties to the dispute—*Dalmir v. Khodadad*, 36 Cal 923 (926). But see contra—*Dowlat v. Siva*, 15 C.L.J. 267, 12 Cr.L.J. 319, 10 I.C. 615 (616) (which professes to distinguish 36 Cal. 923) and *Ambica v. Gur*, 39 Cal 560. However, these are cases under the old section which has now been substantially altered.

When the Magistrate finds that the disputed road is the private road of the opposite party, the appropriate order to be passed is a declaration that the road is not a public road and a prohibition directed against the petitioners going on the road. An order declaring that the road is in the opposite party's possession and prohibiting all disturbance of such possession until eviction in due course of law is one really under sec. 145 (6) Cr. P. C., and is not a proper order under this section—*Dhansar Coal Co. Ltd. v. Babu Lal Agarwala*, 39 Cr.L.J. 363, 173 I.C. 750, A.I.R. 1938 Pat. 133, 1938 P.W.N. 245, 4 B.R. 329, 19 P.L.T. 323, 10 R.P. 436.

It is not proper to use official means to enable any party to trespass upon land in the possession of another unless it is decided in the exercise of some jurisdiction that the party who wishes to enter upon the land is entitled to do so—*Gurmanj Saran*

v. Radha Swami Sat Sang Sabha, 38 Cr.L.J. 46 (48), 165 I.C. 721, A.I.R. 1936 All. 759, 1936 A.L.J. 1047, 1936 Cr.C. 1000, 1936 A.L.R. 945, 9 R.A. 303

Duration of order:—An order under this section is bad in form, if it contains no restriction of time for which it is to operate. The order must contain the restriction that it is to operate “until the person claiming that such thing may be done obtains the decision of a competent Civil Court adjudging him to be entitled to do such thing”—*In re Atmaram*, 14 Bom 25 (27). See Form XXIV of Sch. V.

Sub-section (4):—An order under this section must be subject to any subsequent decision of a competent Civil Court. It therefore follows that if the matters in dispute are not adjudicable by a Civil Court, this section has no application, and the Magistrate should take proceedings under Ch VIII to prevent a breach of the peace—*Atmaram*, 14 Bom 25 (27, 28). If the matter which is in dispute under this section (e.g., a disputed fishery right) has already been adjudicated upon by a Civil Court, a Magistrate has no jurisdiction to enquire into a claim which is entirely contrary to that Court's decree—*In re Anya Shidya*, 29 Bom L.R. 715, 28 Cr.L.J. 578 (579).

475. Revival of proceedings:—Where during the pendency of proceedings under sec. 147, the parties referred the dispute to arbitration, whereupon the Magistrate made an order to the effect that further proceedings were unnecessary, and they were therefore stayed, but after the arbitration proceedings (which remained pending for one year) became ineffectual, the Magistrate continued the proceedings under sec. 147, *held* that the Magistrate's order staying further proceedings ousted his jurisdiction to continue the proceedings. Moreover, the Magistrate could not revive the proceedings unless he had drawn up fresh proceedings and unless he was satisfied that there was a *fresh* dispute likely to cause a fresh breach of the peace after the arbitration proceedings ceased; and he was not justified in assuming that the causes which originally existed still continued to exist—*Kalananda v. Rameshwar*, 15 C.W.N. 271 (273), 11 Cr.L.J. 729.

Revision:—See Note 447 under sec. 145.

It is not usual for a High Court to interfere with the discretion of the Magistrate unless the order is made without jurisdiction, or if the Magistrate has not followed the procedure laid down—*Parashram v. Gopal*, 25 Cr.L.J. 353, 77 I.C. 289, A.I.R. 1924 Nag 294.

The High Court would not order a Magistrate to initiate proceedings under sec. 147, Cr. P. C., or under any of the preventive sections of the Code when he has refused to take action thereunder. The Magistrate is responsible for the peace of the district and when he says that it is not a proper case under sec. 147, Cr. P. C., and therefore, no action is necessary, it is not competent for the High Court to interfere with such an order—*B. B. Biswas v. Muchiram Mahata*, 40 Cr.L.J. 345, 180 I.C. 332, A.I.R. 1939 Pat. 111, 20 P.L.T. 194.

148. (1) Whenever a local inquiry is necessary for the purposes of this Chapter, any District Magistrate or Sub-divisional Magistrate may depute any Magistrate subordinate to him to make the inquiry, and may furnish him with such written instructions as may seem necessary for his guidance, and may declare by whom the whole or any part of the necessary expenses of the inquiry shall be paid.

(2) The report of the person so deputed may be read as evidence in the case.

(3) When any costs have been incurred by any party to a proceeding under this Chapter for witnesses' or pleaders' fees or both, the Magistrate passing a decision under section 145, section 146 or section 147 may direct by whom such costs shall be paid, whether by such party or by any other party to the proceeding, and whether in whole or in part or proportion. All costs so directed to be paid may be recovered as if they were fines.

Order as to costs.

(3) When any costs have been incurred by any party to a proceeding under this Chapter, * * * * the Magistrate passing a decision under section 145, section 146 or section 147 may direct by whom such costs shall be paid, whether by such party or by any other party to the proceeding, and whether in whole or in part or proportion. *Such costs may include any expenses incurred in respect of witnesses, and of pleaders' fees which the Court may consider reasonable.*

Order as to costs.

Change:—Sub-section (3) has been amended by sec 31 of the Criminal Procedure Code Amendment Act (XVIII of 1923). For reasons see Note 478 below.

476. Local inquiry:—"Local investigations should only be ordered in cases where they are absolutely required by the Courts on subordinate points for a determination of the main issue in the case, for instance, in cases in which it is necessary to ascertain whether particular lands are identical with the lands detailed in documents, and in such cases only. When, however, any fact can be elicited by evidence, that evidence should be heard by the Court itself"—*Cal H. C. Civ No 41 of 166*. The scope of local inquiry is extremely limited. It should be restricted solely to some questions relating to the feature of the property about which the dispute has arisen, and should not be directed to any matter which can be proved before the Magistrate by oral evidence, such as the question of actual possession—*In re Baikunt*, 3 C.L.R. 134; *Lachmi Narain v. Mukhram*, 24 Cr.L.J. 507, 72 I.C. 971 (Pat). The object of local inspection is to understand and appreciate the topography of the land in dispute in order to aid the Magistrate in appreciating the evidence offered by the Court; but the local inspection cannot take the place of legal evidence, much less the result thereof can be used as a basis for the decision—*Ram Ratan v. Tarak Nath*, 25 Cr.L.J. 412, 77 I.C. 492, A.I.R. 1922 Pat. 249. Thus, in a case where the levels and the falls of water are concerned, local inspection is eminently necessary—*Doulat v. Siva*, 15 C.L.J. 267, 12 Cr.L.J. 319, 10 I.C. 615. So also, where rights of irrigation and rights of taking water through particular reservoirs are concerned, a local inspection is immediately necessary—*Abdul Hamid v. Hasan*, 4 P.L.T. 297, 24 Cr.L.J. 487.

The term "local inquiry" in this section contemplates delegation of judicial functions; the mere making a survey of the disputed land and preparing a map thereof do not amount to a local inquiry under this section, because they are not judicial but purely ministerial acts; and such acts can be entrusted to a person other than a Magistrate, e.g., to a pleader Commissioner (or even an amin). The report of such a person cannot be read as evidence under sub-section (2) but he must be called as a witness and examined and cross-examined as to his report—*Chulas Mahto v. Surendra*, 1 Pat. 75, 3 P.L.T. 17, 23 Cr.L.J. 152, 65 I.C. 616.

Who can make the inquiry—The trying Magistrate can himself make the local inquiry. Though as a rule it is better to have the local investigation carried out by some other person, there is nothing in law to prevent the presiding Magistrate from conducting the inquiry himself, provided he records what he saw and does not act upon

hearsay evidence—*Dowlat v. Siva*, 15 C.L.J. 267, 10 I.C. 615 (616); *Abdul Hamid v. Hasan*, 4 P.L.T. 297, 24 Cr.L.J. 487.

This section empowers the presiding Magistrate to depute a subordinate Magistrate to make the inquiry, but the person deputed must be a Magistrate, not a *Kanungoe*—*In re Uma Churn*, 7 C.L.R. 352. If, however, the trying Magistrate deposes a *Kanungoe* to make an inquiry, his report cannot be taken as evidence in the case, like the report of a sub-Magistrate, but the *Kanungoe* (like any other private person who has seen the place) must come into the witness-box and depose on oath as to what he saw—*Achambut v. Sarada*, 12 Cr.L.J. 480 (Cal.).

The deputed Magistrate must make the inquiry himself; he cannot delegate it to some body else—*Jaiwant v. Rama Rao*, 20 Cr.L.J. 107, 48 I.C. 987 (Nag.).

Recording evidence by the deputed Magistrate:—The local inquiry authorised by this section is not merely a local inspection by the sub-Magistrate, but includes the act of examining witnesses and recording evidence by such Magistrate in the course of the inquiry—*Muthuswami v. Kalinga*, 33 M.L.J. 78, 18 Cr.L.J. 715 (716).

477. Report of the deputed Magistrate:—Sub-section (2) provides that the report of the deputed Magistrate may be read as evidence in the case; but it is not necessary to examine such Magistrate on oath as a witness—*Achambut v. Sarada*, 12 Cr.L.J. 480 (Cal.).

When a local inquiry is instituted, and the result reported, such report becomes a part of the proceedings in the case, and the party affected by it is entitled to be acquainted with the result of it and to have an opportunity of rebutting the report, if he thinks necessary so to do—*Jaiwanti v. Rama Rao*, 20 Cr.L.J. 107, 48 I.C. 987 (Nag.); *Mir Dhunoo v. Brown*, 21 W.R. 25. If a Magistrate makes a local inquiry he must make a note of what he saw and must place it on the record so that the parties may be in a position to know what impression the Magistrate has got by the local inquiry. It is possible that the Magistrate may have formed a wrong impression, and if the results of his inspection are recorded, the parties would be in a position to know, if there has been an error, and to remove the wrong impression formed by the Magistrate—*Abdul Hamid v. Hasan*, 4 P.L.T. 297, 24 Cr.L.J. 487.

Decision based on report:—A Magistrate cannot base his decision merely on the report of the subordinate Magistrate, without examining any witnesses—*Pitambar v. Saroda*, 10 A.L.J. 465, 13 Cr.L.J. 777; *Baliarsimhuni v. Godaganma*, 33 Cr.L.J. 536, 138 I.C. 68, 1932 M.W.N. 425, 1932 Cr.C. 334, Ind Rul 1932 Mad. 496, A.I.R. 1932 Mad 368, 35 M.L.W. 390; *Ramratan v. Taraknath*, 25 Cr.L.J. 412 (Pat.). The recording of evidence and the examination of witnesses by the sub-Magistrate do not absolve the trying Magistrate from the duty imposed upon him by sec. 145 (4) of receiving the evidence produced before him by the parties and taking any further evidence he may think necessary—*Muthuswami v. Kalinga*, 33 M.L.J. 78, 18 Cr.L.J. 715 (716). But if the parties neither asked to be heard nor tendered any evidence which the Magistrate refused, held that the Magistrate deciding the case on the basis of the report of the inquiry acted within his jurisdiction—*Pisruddin v. Totajannessa*, 14 Cr.L.J. 302 (303) (Cal.). Where the trying Magistrate based his order on the report of the sub-Magistrate and on the evidence recorded by him during the local inquiry, and both parties were quite content to abide by the result of the sub-Magistrate's inquiry, and no objections were advanced before the trying Magistrate against the sub-Magistrate's finding, and no further evidence was produced by them before the trying Magistrate, it was held that the order of the trying Magistrate was not without jurisdiction and should not be interfered with in revision—*Muthuswami v. Kalinga*, 33 M.L.J. 78, 18 Cr.L.J. 715 (716). Where a Magistrate twice made local inspection and without making any record of the result of his observations he used his conversations at the time of his local inspections in the course of his judgment in substitution of and in order to supplement the evidence recorded by him, held that the Magistrate turned himself into a witness in the case, that he ought to have recorded the result of his local inspections which would have given both parties a chance of challenging the

correctness of his observations and that the order must be set aside—*Ramsundar v. Kesho Prasad*, 25 CrLJ. 545, 81 I.C. 33, A.I.R. 1922 Pat 294. See Note 408

478. Costs:—Before this section was amended by the 1923 Amendment Act, it was held that only costs which a Magistrate could award under this section were those incurred for witnesses or pleaders' fees or both. He could not make an order for any other costs, e.g., costs on account of damage to crops—*Prayyag v. Gobind*, 32 Cal. 602, 9 C.W.N. 862. See also 22 CrLJ 481, 62 I.C. 177, 2 P.L.T. 267. So also, he could not include in the costs the penalty paid by one party on behalf of the other under section 44 (3), Stamp Act in respect of an improperly stamped document produced in evidence in a proceeding under sec 145 of this Code—*Popuri v. Tummalaganta*, 13 M.L.T. 224, 13 Cr.L.J. 297.

An order permitting the withdrawal of proceedings, and more so a final and irrevocable order staying proceedings instituted under sec. 145 after the Magistrate has assumed jurisdiction under that section, is an order falling within the purview of sub sec. (5) of that section, and as such a decision under that section within the meaning of sec. 148. It is, therefore, competent to the Magistrate on making such an order to award costs to a party to the proceedings—*Rehumal v. Pherumal*, 29 CrLJ. 857, 111 I.C. 441, 28 S.L.R. 386, A.I.R. 1928 Sind 193 dissenting from *Narasingha v. Pillana*, 12 CrLJ. 49, 9 I.C. 289, 9 M.L.T. 324

Under the present section as amended, the word "include" shows that the Magistrate is able to award costs other than those incurred for witnesses or pleaders' fees.

The value of the property in dispute cannot, by itself, be taken as a fair test of the costs which should be awarded in a case under sec 145, Cr P. C.—*Kallu v. Bashiruddin*, 32 CrLJ 372, 129 I.C. 269, 1930 A.L.J. 1504, A.I.R. 1931 All 3, Ind. Rul 1931 All. 141, 53 All 172, 1931 Cr.C. 3.

In awarding costs for witnesses and pleaders' fees, the Magistrate should not include additional costs incurred for extra fees and for travelling and other expenses of a like nature incurred for bringing pleaders or counsels from a distance—*Rajendra v. Md. Arzumand*, 9 C.W.N. 887.

Witnesses may be examined locally to avoid expense; but that does not mean that no expense is properly incurred at all so as not to award costs to any party—*Kunjo Mandal v. Sarju Ram Marwar*, A.I.R. 1939 Pat 206, 1939 P.W.N. 66, 20 P.L.T. 164, 40 CrLJ 538, 181 I.C. 176

A Magistrate has jurisdiction to award only the actual costs incurred; and the order must give particulars as to how the Magistrate arrived at the figure; otherwise the order is bad—*Udoy Narain v. Satish*, 14 C.W.N. 1800. There must be materials on the record to show that the Magistrate arrived at the figure as the result of a calculation of the costs incurred by the party. An order arbitrarily awarding a round sum of Rs. 50 or Rs. 100 as costs, where there was nothing on the record to show that the said amount was actually incurred is bad in law and must be set aside—*Jhaman v. Thakuri*, 1 P.L.T. 369, 57 I.C. 449, 21 CrLJ 625; *Hira Mathon v. Raj Kumar*, 3 P.L.T. 484, 23 CrLJ 508; *Khubi v. Darbari*, 2 P.L.T. 267; *Manglu v. Ramdhuni*, 9 P.L.T. 835, 30 CrLJ 252. So, before making an order as to costs, it is necessary and proper that the Magistrate should hold an inquiry as to what expenditure in costs was actually incurred—*Nemdhari v. Ram Tahal*, 17 CrLJ. 348 (Pat.). But it is extremely difficult to prove the exact sum spent in costs in a semi-criminal case such as one under sec. 145, Cr P. C. The Court may very well use its discretion in awarding an amount which it considers reasonable—*Brij Pal v. Ram Naresh*, 33 CrLJ. 157, 135 I.C. 216, 1932 CrC 294, A.I.R. 1932 All 325, Ind. Rul 1932 All. 70.

The Magistrate may direct that the costs of any party are to be paid by any other party to the proceeding, but not by persons who are not parties to the proceeding—*Chet Khan*, 27 CrLJ 21, 91 I.C. 53, A.I.R. 1926 Oudh 269

In a proceeding under sec. 145, Cr. P. C., the Magistrate has discretion to award costs. Where he gave no reason for not exercising that discretion in favour of the

party who was declared to be in actual possession of the land after a lengthy trial, the High Court thought it proper that the party should be given a reasonable amount of costs—*Udhab Chandra Pal v. Sideswar Prasad Singh*, 38 Cr.L.J. 1099, 18 P.L.T. 714, 1937 P.W.N. 636, 171 I.C. 604, A.I.R. 1937 Pat. 559, 4 B.R. 43, 10 R.P. 224.

If the costs are such as could fall within the scope of this section, the High Court will not consider whether they are excessive or deficient—*Bansi v. Syed Mohd. Akbar*, 15 C.W.N. 811, 12 Cr.L.J. 376. If there was anything to show that the Magistrate arrived at the figure as the result of calculation of the costs claimed by the successful party as incurred, the High Court should not interfere. But where there is nothing to show this in the order or in the proceedings, the order as regards costs was made without jurisdiction—*Uday v. Satish*, 14 C.W.N. lxxiii.

The costs will be recoverable as fines. See sec. 547. The words "All costs fines" have been omitted as unnecessary, because a general provision to that effect has been made in sec. 547.

Costs in revision.—The costs referred to in this section are the costs incurred in the magisterial proceedings. Magistrates have power under this section to direct by whom any costs incurred by the parties in proceedings before them under this Chapter are to be paid. So also, the High Court in revision can pass any order which the Magistrate himself could have passed, i.e., the High Court can in revision direct the costs incurred before the Magistrate to be paid by one party to another. But the High Court cannot, in revision of proceedings under Ch. XII, direct the costs incurred before the High Court in revision to be paid by one party to another. Even the award of costs cannot be treated as incidental or consequential to the disposal of a revision petition within the meaning of sec. 423 (1) (d), for it does not necessarily follow from an order passed in revision—*Veerappa v. Avudayammal*, 48 Mad 262, 48 M.L.J. 106, 26 Cr.L.J. 707 (F.B.); *Kapoor v. Suraj*, 1933 A.L.J. 188, A.I.R. 1933 All. 264, 1933 Cr.C. 434, 142 I.C. 537, 55 All. 301, 34 Cr.L.J. 414 (419) (F.B.). The Full Bench of the Rangoon High Court has also laid down that in proceedings under sec. 145, Cr. P. C., where the Magistrate who passed the decision has failed to make any order in regard to the costs of the proceedings under sub-section (3) of this section, the High Court in revision has power to make an order for the payment of the costs of such proceedings—*Ma Mya Khin v. Maung Po Htwa*, 35 Cr.L.J. 1, 145 I.C. 837, A.I.R. 1933 Rang. 288, 11 Rang 361, 1933 Cr.C. 1084 (F.B.).

But the Bombay High Court is of opinion that the High Court can award the costs incurred in the hearing of the revision petition; such power is given by sec. 439 read with sec. 423 (1) (d)—*Bai Jiba v. Chandulal*, 27 Bom.L.R. 1353, 27 Cr.L.J. 661, 94 I.C. 709, A.I.R. 1926 Bom. 91.

Who can order costs.—Only the Magistrate who passes the final order under sec. 145, 146 or 147 can pass an order awarding costs, though the actual assessment may be made by his successor. The successor of the Magistrate who passed the final order cannot award costs. Where the Magistrate making the final order declaring possession left the district, and his successor made an order granting costs, the order as to costs was set aside as made without jurisdiction—*Iklas v. Raja Raghuraj*, 13 O.C. 66, 11 Cr.L.J. 335, 5 I.C. 943.

The Magistrate passing the order as to costs must be the Magistrate passing the decision in the case—*Nagar Chandra v. Siddhartha*, 47 Cal. 974, 24 C.W.N. 672; *Manglu v. Ramdhani*, 9 P.L.T. 835, A.I.R. 1929 Pat. 93, 30 Cr.L.J. 252. But he may or may not be the Magistrate who initiated the proceedings under this chapter. Where the proceedings under this chapter are initiated by one Magistrate, and the final order is passed by another, it is the latter Magistrate who can award costs—*Vythindha v. Mayandi*, 29 Mad. 373.

Time of awarding costs.—An order for costs should ordinarily be made at the time of passing the original order—*Tomijuddi*, 24 Cal. 757; *Iklas v. Raja Raghuraj*, 5 I.C. 943, 13 O.C. 66, 11 Cr.L.J. 335. But there is no hard and fast rule which lays down that an order for costs must necessarily be made at the time the judgment is delivered.

When the circumstances of a case really require it, the disposal of the question of costs may be postponed, and the fact that the award of costs has not been made at the very time of the decision of the case, does not necessarily render the award invalid—*Vythianatha v. Mayandi*, 29 Mad. 373; *Binodasundari v. Kalikrishna*, 22 Cal. 387; *Doulat v. Siva*, 15 C.L.J. 267, 12 Cr.L.J. 319, 10 I.C. 615

If the order awarding costs is not passed at the time of passing the decision in the case, it must be passed *within a reasonable time* after the disposal of the case and in the presence of both parties—*Vythianatha v. Mayandi*, supra; *Nasir v. Siddhartha*, 47 Cal. 974; *Manglu v. Ramdhani*, supra; *Doulat v. Siva*, 15 C.L.J. 267. What is reasonable time must depend upon the circumstances of each case—*Nasir v. Siddhartha*, supra. An order awarding costs made long (three months) after the original order and without giving notice to the parties affected and without allowing them an opportunity to appear and show cause is bad—*Tomijuddi*, 24 Cal. 757; *Palaniandi v. Sammanidi*, 16 L.W. 613, 24 Cr.L.J. 80, 71 I.C. 128, A.I.R. 1923 Mad. 87; *Manglu v. Ramdhani*, supra; *Narain v. Krishnamurthi*, 1938 M.W.N. 1011, 48 M.L.W. 444. But an order awarding costs made two days or even ten days after the passing of the order under sec. 145 (6) is not illegal by reason of the delay—*Kapoor v. Suraj*, 1933 A.L.J. 188, 34 Cr.L.J. 414 (419), A.I.R. 1933 All. 264, 1933 Cr.C. 434, 55 All. 301 (F.B.); *Bansi v. Syed Mohd.*, 11 I.C. 144, 12 Cr.L.J. 376, 15 C.W.N. 811; *Chadhari v. Ramsingh*, 19 Cr.L.J. 390, 44 I.C. 748, 4 P.L.W. 234

478A. Assessment of costs:—*Who can assess costs*—Where the Magistrate who passed the decision under sec. 145 had already awarded the costs, it is not necessary that the costs should be assessed by the same officer who decided the case—*Giridhar v. Ebadulla*, 22 Cal. 384. Another Magistrate (e.g., his successor) has jurisdiction to assess the amount of costs—*Mid Ershad Ali v. Saroda*, 23 Cal. 37 (dissenting from *Bhojal v. Nirban*, 21 Cal. 609); *Giridhar*, 22 Cal. 384; *Bansi v. Syed Mohd.*, 15 C.W.N. 811; *Subbiah v. Chokkalinga*, 27 M.L.J. 613, 15 Cr.L.J. 676; *Dilbasi v. Desrati*, 10 C.W.N. 1030.

Time of assessing costs—An order awarding and assessing costs should be made at the time of the original order—*Tomijuddi*, 24 Cal. 757. This shows that the assessment of costs should be contemporaneous with the order awarding costs. But there is no inflexible rule that the costs must be assessed at the time of passing the decision in the case—*Giridhar v. Ebadulla*, 22 Cal. 384. Once an order as to costs is made, the amount of costs may be subsequently assessed—*Medapati*, 14 M.L.T. 195, 14 Cr.L.J. 570. But the assessment must be made within a reasonable time after the award of costs. An assessment of costs more than two years after the date of the order awarding the costs is bad in law—*Bhojal v. Nirban*, 21 Cal. 609.

Application by legal representative for assessment of costs—Where through the negligence of the Court's officers, the amount of costs was not included in the final order directing payment of costs to the petitioner, and nearly three years after, the legal representative of the petitioner (the petitioner having died in the interval) applied to the Magistrate's successor in office for the costs being assessed, held that the application was sustainable and the applicant was entitled to have the costs assessed although this Code contains no special provision for bringing on record the representatives of the deceased parties—*Subbiah v. Chokkalinga*, 27 M.L.J. 613, 15 Cr.L.J. 676, 1914 M.W.N. 790.

Notice to parties:—If the order for costs is made at the time of passing judgment under sec. 145, 146 or 147, no question arises as to the giving of notice to any party. The Magistrate will decide the question of costs after hearing the arguments of both sides then and there—*Debendra v. Dhanmani*, 37 C.W.N. 849 (851); 35 Cr.L.J. 489, 147 I.C. 817, A.I.R. 1934 Cal. 95, 1934 Cr.C. 81; *Nezamul v. Golam*, 35 Cr.L.J. 478, 147 I.C. 800, A.I.R. 1934 Cal. 80, 37 C.W.N. 852, 1934 Cr.C. 35. But if the Magistrate makes an order of costs not at the time of passing judgment, but on a subsequent day, it is his duty to give notice to the party against whom the order is

made in order that he may have an opportunity of showing cause against the order—*Debendra v. Dhanmani*, supra; *Kapoor v. Suraj*, 1933 A.L.J. 188, 34 Cr.L.J. 414 (419), A.I.R. 1933 All. 264, 1933 Cr.C. 434, 55 All 301 (F.B.); *Dowlat v. Shiva*, 15 C.L.J. 267, 10 I.C. 615 (616), 12 Cr.L.J. 319, 15 C.W.N. 645; *Kali Prasad v. Kali*, 12 C.W.N. ccvii; *Jogdip v. Bikan*, 13 C.W.N. clxxx; *Vythinatha v. Mayandi*, 29 Mad 373. An order awarding and assessing costs without allowing all the parties affected an opportunity to appear and show cause is bad—*Q E v. Tomijuddi*, 24 Cal. 757; *Prakash v. Ram Prasad*, 28 Cal. 302, 5 C.W.N. 291; *Bansi v. Syed Mohd.*, 15 C.W.N. 811; *Dwarka v. Nathuni*, 19 Cr.L.J. 764, 46 I.C. 604 (Pat.).

Even an order setting aside a previous order as to costs cannot be passed without giving notice to the opposite party—*Dubasi v. Deorati*, 10 C.W.N. 1030

Revision:—Orders under this section are now open to revision. See Note 447 under sec. 145. The rulings in *Rajendra v. Md. Arzumand*, 9 C.W.N. 887, 1 C.L.J. 331, 2 Cr.L.J. 408, *Mussummat Gulab v. Trilok Bhagat*, 4 C.W.N. lxxxiii are no longer correct.

With the deletion in 1923 of sub-sec. (3) of sec. 435, Cr. P. C., the High Court has full revisional power over proceedings under sections 145 and 147, Cr. P. C., and though even now the High Court will be slow to interfere with a real exercise of discretion by the lower Courts, there can be no hesitation in interfering in revision when no discretion has been exercised at all, or when, what discretion has been exercised, has been exercised on wrong principles altogether. Therefore the High Court interfered in revision when costs were not allowed to the successful party without sufficient cause—*Kunjo Mandal v. Sarju Ram Marwari*, A.I.R. 1939 Pat. 206, 1939 P.W.N. 66, 20 P.L.T. 164, 181 I.C. 176, 40 Cr.L.J. 538.

See also *Bansi v. Syed Mohd. Akbar* and *Uday v. Satish* in Note 478.

CHAPTER XIII.

PREVENTIVE ACTION OF THE POLICE.

149. Every police-officer may interpose for the purpose of preventing, and shall, to be best of his ability, prevent, the commission of any cognizable offence.

Police to prevent cognizable offences.

478B. Scope:—See *Moni Mohan*, 35 C.W.N. 623 (627), 58 Cal. 1312, 33 Cr.L.J. 138, A.I.R. 1931 Cal. 745, 1931 Cr.C. 1009, 135 I.C. 289 quoted above sec. 154.

This section provides for the prevention of cognizable offences only. Section 23 of the Police Act (V of 1861) appears to give wider powers for the prevention of offences in general—*Nga Kala*, 8 L.B.R. 329, 17 Cr.L.J. 347.

The word 'interpose' in this section connotes the idea of actively intervening and not merely a prohibition by word of mouth. But the word is not wide enough to cover all orders given by police-officers. It was not intended by the Legislature that the police officer would be empowered to pass all sorts of sweeping orders, with the consequence of the disobedience being punishable under sec. 188, I. P. Code. Such wide powers vested in a police officer would interfere unreasonably with the ordinary liberty of private citizens and could not have been contemplated by this section—*Raghunath*, 47 All. 205, 26 Cr.L.J. 599, 85 I.C. 823, 22 A.L.J. 1049, A.I.R. 1925 All. 165.

150. Every police-officer receiving information of a design to commit any cognizable offence shall communicate such information to the police-officer to whom he is subordinate, and to any other officer whose duty it is to prevent or take cognizance of the commission of any such offence.

As to the powers and duties of a police-officer, see secs. 82-85.

151. A police-officer knowing of a design to commit any cognizable offence may arrest, without order from a Magistrate and without a warrant, the person so designing, if it appears to such officer that the commission of the offence cannot be otherwise prevented.

Arrest to prevent such offences.
By sec. 151, a Police Officer may arrest without warrant, if it appears to him that the commission of an offence cannot otherwise be prevented. Should he do so, his subsequent procedure must be regulated by sec. 60—*Bengal Police Manual*, 2nd Edition, p. 374.

Where no emergency for arrest which this section contemplates is shown to have existed, the attempt, to arrest on the part of the police is not only "not strictly justifiable by law," but is illegal. Therefore neither cl (1) nor cl (2), sec 99, I P. C., can afford protection to the police. The accused are entitled to offer resistance to their arrest which is illegal—*Gaman v Emp*, AIR 1930 Lah 348 (349), 121 IC 734, 31 PLR 285, 31 CrLJ 294, 13 AICrR 410, 1930 CrC 396.

152. A police-officer may, of his own authority, interpose to prevent any injury attempted to be committed in his view to any public property, moveable or immovable, or the removal or injury of any public landmark or buoy or other mark used for navigation.

153. (1) Any officer in charge of a police-station may, without a warrant, enter any place within the limits of such station for the purpose of inspecting or searching of any weights or measures or instruments for weighing, used or kept therein, whenever he has reason to believe that there are in such place any weights, measures or instruments for weighing which are false.

(2) If he finds in such place any weights, measures or instruments for weighing which are false, he may seize the same, and shall forthwith give information of such seizure to a Magistrate having jurisdiction.

478C. The section expressly authorises an inspection of the weights and measures by an officer-in-charge of a Police station. In comparing the weights used in the bazar, some reasonable allowance should be made for wear and tear and of the rough and

ready methods of bazar shop-keepers—*Nanak Chand*, 1913 P.R. 20, 15 Cr.L.J. 11, 22 I.C. 155.

This section does not apply to the Police in the towns of Calcutta, Bombay and Madras, because similar provisions have been made in Calcutta by secs. 55 and '56 of the Calcutta Police Act (Bengal Act IV of 1886), in Bombay by sec. 4 of the Bombay City Police Act IV of 1902, and in Madras by sec. 32 of the Madras City Police Act III of 1888

See Act XXXI of 1871 relating to weights and measures of capacity, and the rules framed under sec. 11 of that Act. As to offences relating to weights and measures, see Chapter XIII, I. P. Code.

PART V.

INFORMATION TO THE POLICE AND THEIR POWERS TO INVESTIGATE.

CHAPTER XIV.

This Chapter, except sec 155, does not apply to the Police in the towns of Calcutta and Bombay. Sec 155 only applies to the Police of Calcutta and Bombay—*Q. E. v. Nilmadhab*, 15 Cal. 595; *Q. E. v. Visram Babaji*, 21 Bom. 495 (499); *Plucknett v. Emp.*, A.I.R. 1939 Cal 545 (555), 43 C.W.N. 120, I.L.R. (1939) 1 Cal. 162; *Hoshide v. Emp.*, A.I.R. 1940 Cal 97 (103), 44 C.W.N. 82. For section 164, see Note 509

The distinction between Chap XIII and Chap. XIV of the Code may not be of real importance. These two Chapters cannot be said to be mutually exclusive Chapter XIV constitutes Part V of the Code and deals with "information to the police and their powers to investigate." It prescribes the procedure for investigation But this investigation is not confined to cognizable offences. It may be into non-cognizable offences under sec 155, or into cases of no crime at all, e.g., unnatural deaths as under sec 174. Outside Part V of the Code, a police officer may do many things, for example, he may arrest, take preventive action, disperse an unlawful assembly, and so forth He may do these things while investigating or even without investigating Even "information" may be given by one police officer to another under Chap XIII, sec 150 Thus, it cannot be said that, because a police officer is investigating, therefore, he is not doing anything under any other Chapter or *vice versa* On the contrary, it is quite consistent with human conduct and the natural course of events that preventive action started under Chap. XIII may lapse into investigation under Chap XIV. So far as the beginning of the latter is concerned, it will be marked by a record of a statement which is known as the first information of the offence for the purposes of the procedure—*Moni Mohan*, 35 C.W.N. 623 (627), 58 Cal 1312, 33 Cr.L.J. 138, A.I.R. 1931 Cal 745, 1931 Cr.C. 1009.

154. Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it and the substance thereof shall be entered in a book to be kept by such officer in such form as the *Provincial Government* may prescribe in this behalf.

Amendment:—The words "Provincial Government" have been substituted for the words "Local Government" by sec. 4 of the Government of India (Adaptation of Indian Laws) Order, 1937

479. Scope:—This section enables a Station House Officer to receive and record the information of the commission of a cognizable offence *outside* his station limits, though he has no power under sec. 157 to conduct an investigation in respect of such offence—*Nandamuri*, 1914 M.W.N. 382, 15 Cr.L.J. 622, 25 I.C. 630

480. First information:—The First Information Report is a well-known technical description of a report under this section, giving first information of a

cognizable crime. This is usually made by the complainant or by some one on his behalf. The language is inapplicable to a statement made by the accused—*Subedar*, 25 Cr.L.J. 490, 77 I.C. 890, A.I.R. 1924 All. 207. See also *Moni Mohan*, supra; *Mir Rahman*, 37 Cr.L.J. 225 (226), 159 I.C. 890, A.I.R. 1935 Pesh. 165, 1935 Cr.C. 1156. The Legislature has laid down procedure to be observed in recording first information; but whether that procedure be adopted or not, does not affect the question of admissibility in evidence—*Mir Rahman*, supra. The word "information" in this section means something in the nature of a complaint or accusation, or at least information of a crime, given with the object of putting the police in motion in order to investigate, as distinguished from information obtained by the Police when already investigating a crime. When the information which is first given to the police is of such a vague and indefinite character that it cannot be treated as coming under section 154, so as to make it incumbent upon the officer in charge of the police station to start an investigation, and he may reasonably require more information before doing so, any further information given to him in such circumstances may fall within section 154. In such a case such further information will not fall within section 162. The information referred to in section 154 may come from more than one source, and more than one such information may be recorded at or about the same time under the section; but once the police have taken active steps to investigate, any written statements taken by them fall within section 162 and are inadmissible in evidence—*Gansa Oraon*, 2 Pat. 517, 4 P.L.T. 462, 24 Cr.L.J. 641, 73 I.C. 561, A.I.R. 1923 Pat. 550. This section does not necessarily contemplate that only one information of a crime should be recorded as a First Information Report and that all information given to the Police before investigation is started, may amount to First Information within the meaning of this section. So informations lodged at two different police stations regarding the same offence are both admissible in evidence—*Mir Rahman*, supra. So, where two informations were given by two different persons before two different police officers of the same police station but found at different places before the commencement of the investigation, the latter information cannot be excluded from evidence as it was not a statement made to a Police Officer in the course of investigation but was an independent first information report—*Emp. v. Lalji Rai*, 37 Cr.L.J. 235, 160 I.C. 181, A.I.R. 1936 Pat. 11, 16 P.L.T. 730, 1936 Cr.C. 6; *Aftab Mohd. Khan*, A.I.R. 1940 All. 291 (300), 41 Cr.L.J. 647, 188 I.C. 649, 1940 A.L.J. 206, dissenting from *Moni Mohan*, supra, if an opposite view is to be implied in that decision.

The information referred to in this section is the *first* information of the offence by whomsoever given. The first information is that information which is given to the police first in point of time (on the basis of which the investigation commences) and not that which the police may select and record as first information—*Bhutnath*, 7 C.W.N. 345 (348). Thus, where upon information given by the Chowkidar of an offence, which was duly recorded in the Station Diary, the Sub-Inspector went to the Hospital to see the dying man and took down his dying statement and filed it as the first information, it was held that the statement of the Chowkidar, and not that of the dying man, was the first information of the offence—*Daulat*, 6 C.W.N. 921. Where a person reported to a police officer that he had seen a certain woman with her throat cut, and the officer did not make a record of the fact but subsequently treated an information lodged by the woman's father as the first information in the case, held that the unrecorded information, and not the information given by the woman's father, was in fact the first information—*Chandrika*, 1 Pat. 401, 3 P.L.T. 771, A.I.R. 1922 Pat. 535, 24 Cr.L.J. 127, 71 I.C. 353; *Patil Subba Reddi*, 37 Cr.L.J. 357, 160 I.C. 988, A.I.R. 1936 Mad. 160, 1935 M.W.N. 1197, 43 M.L.W. 261, 1936 Cr.C. 163, distinguishing *Chidambaram*, 55 M.L.J. 231, 110 I.C. 461, A.I.R. 1928 Mad 791, 29 Cr.L.J. 717, 28 M.L.W. 187. The information given by a Chowkidar to the effect that the mother of the accused had told him that the latter had assaulted his younger brother whilst under the influence of drink and that he (the Chowkidar) had seen blood-stains on the younger brother's head, was entered in the Station-Diary but not signed by the

Chowkidar, and the police officer proceeded to the scene of occurrence and there took down the statement of the wife of the accused and took her thumb impression thereon; held that the Chowkidar's information was the first information in the case and that the statement made by the wife of the accused to the investigating officer was not admissible in evidence (sec. 162)—*Gansa Oraon*, supra. A different view seems to have been taken in *Ahman v. Emp.*, A.I.R. 1938 Lah. 787 (789), 40 Cr.L.J. 435, 180 I.C. 507, 40 P.L.R. 697. In that case the Sub-Inspector left the thana before the first information report was recorded. He caused an entry to be made in the daily diary of the thana and in that mentioned the names of some of the culprits alleged to have been given to him by one of the persons alleged to have been assaulted and injured. It was not treated as first information in the case but was held to be a part of the proceedings of the police and therefore inadmissible as evidence for any purpose in Court. Where the Sub-inspector was told by a Head Constable that he heard that there was a shooting case in the marriage house of a Chettiar, entered the substance of this information in the General Diary, then went to enquire into the matter and recorded the statement of a witness which was treated as a first information, held that the Sub-inspector had no information of the commission of a cognizable offence when he went to the house of the deceased as he was merely told that there was a shooting incident which might be due to accident or design and that it was impossible to say that the statement was recorded by the Sub-inspector in the course of an investigation into the offence and was, as such, inadmissible in evidence. The question whether a statement was recorded during investigation or not is a question of fact—*Mylaswami Chetty*, A.I.R. 1939 Mad 66 (68), 1938 M.Cr.C. 110, 1938 M.W.N. 905, (1938) 2 M.L.J. 750, 40 Cr.L.J. 308, 180 I.C. 78.

A statement made by a witness during investigation after the police officer has actually arrived at the scene and himself seen what has happened is not first information—*Chittar Singh*, 47 All 280, 23 A.L.J. 14, 26 Cr.L.J. 554. A statement made by a witness to the police-officer in the course of an investigation under this chapter and recorded under sec 161 cannot be treated as first information under sec 154—*Sultan v. Wellbourne*, 3 Rang 577, 26 Cr.L.J. 1532. The first information is the information given out immediately after the occurrence and reported to the Police and not the information which has been elicited in the course of the investigation. The first information is the basis upon which an investigation under this chapter commences. It is erroneously thought that the information on which an investigation is commenced is not the first information of the offence, and that when in the course of investigation something has been elicited which shows that an offence has been committed a first information can be recorded. This is certainly not what the law contemplates. In nearly every trial it is important that it should be known to the judicial officer what were the facts given out immediately after the occurrence and reported to the police, and the object of a first information is to render him so acquainted—*Bhut Nath*, 7 C.W.N. 345 (347); *Peary Mohan v. Weston*, 16 C.W.N. 145 (177), 13 Cr.L.J. 65, 13 I.C. 721; *Autor Singh*, 17 C.W.N. 1213, 14 Cr.L.J. 642, 21 I.C. 882. The first information is the basis of the case, and whether it be true or false, it at any rate usually represents what was intended by the informant to be the case set up by him at the time. All Criminal Courts should bear in mind the importance of examining, when there appears to be any necessity to do so, the first information of an offence reduced to writing in accordance with this section. In view of the notorious tendency in this country to improve upon the original statement of facts to strengthen the case as it proceeds and sometimes to add to the persons originally named as the offenders, it is of great importance to know what was said first—*C. P. Cr. Cir.*, Part II, No. 9.

At the same time it should be noted that any sort of information which is given first in point of time is not necessarily a "first information." The conditions of a first information are two-fold: first, it must be an information, and secondly, it must relate to a cognizable offence on the face of it and not merely in the light of subsequent events. Thus, a person at first made a statement to the Sub-Inspector of police that "a certain

woman named S. had left her house yesterday night, with ornaments on her person." Next day, the informant made another statement that "S. was searched but could not be found." The Sub-Inspector then began to investigate. Next day, the informant made a statement to the Sub-Inspector that "as S. had not yet returned, I suspect that M. and L. had taken her somewhere, and she *might have been killed* by them for her ornaments." Held that, it was this third statement which was really the "first information" under this section, because it was this statement and not the two previous ones which related to the commission of a cognizable offence—*Moni Mohan*, 58 Cal. 1312, 35 C.W.N. 623 (627, 628), 33 Cr.L.J. 138, A.I.R. 1931 Cal. 745, 1931 Cr.C. 1009. Although the third statement was made at a time when the police-officer had already begun investigation, still it was not an investigation into an offence within the meaning of sec. 162, as no offence was stated before the third statement was made. Therefore, neither the third statement nor the two previous ones are excluded from evidence under sec. 162—*Moni Mohan*, supra.

It cannot be accepted as a proposition of law that because a person of the party of the accused goes first to the police station and says that some of the complainant's party has committed an offence, the real complaint against the accused must be kept off the record save on terms under sec. 162, Cr. P. C. It is a question of fact whether a statement made to a police-officer in the course of an investigation in such cases, comes under sec. 162, or is made by way of complaint to commence an investigation under sec. 154—*Osman Gani*, 31 Cr.L.J. 771, 125 I.C. 111, A.I.R. 1930 Cal. 130, 1930 Cr.C. 130. A counter information cannot come within sec. 162, Cr. P. C.—*Azimaddy*, 28 Cr.L.J. 99 (102), 44 C.L.J. 253, A.I.R. 1927 Cal. 17, 54 Cal. 237, 99 I.C. 227.

Where one night the accused killed his wife by hitting her on the head with a grinding stone, went to the house of one of his neighbours and caused grievous hurt to him with the stone and then went to the house of his sister's husband whom he killed with the stone in the course of an altercation and three separate first information reports were lodged with the police regarding these three incidents, the references in the first information to grievous hurt on one are clearly inadmissible in a trial for the murder of two other people—*Afsaruddi Nesaraddi*, A.I.R. 1939 Cal. 32 (33), 67 C.L.J. 580, 42 C.W.N. 1235, 40 Cr.L.J. 290, 179 I.C. 910.

Where the first information was recorded by a police-officer some hours after he had begun investigation of the case, but there was no previous information recorded and reduced to writing by him, the report falls under this section—*Dargahi*, 52 Cal. 499, 26 Cr.L.J. 1213, 88 I.C. 733, A.I.R. 1925 Cal. 831. But a statement recorded several days after the commencement of the investigation, and after there has been some development, is not only not the first information but has very little or no value at all as the original story, because it can be made to fit into the case as then developed—*Kampu Kuki*, 11 C.W.N. 554, 5 Cr.L.J. 86; *Peary Mohan v. Weston*, 16 C.W.N. 145 (177), 13 Cr.L.J. 65. Even when an information is given orally under sec. 154, Cr. P. C., and a Police Officer does not reduce it to writing, he is doing what he ought not to do and has acted in an irregular way. But it is going too far to say that while investigating the truth or otherwise of the information, he is not carrying on an investigation within the meaning of Chap XIV of the Cr. P. Code. He obviously is, and if he is, sec. 162, Cr. P. C., applies to the statements made by persons examined by him. Where, therefore, a *chowkidar* arrived at the thanah and reported the occurrence to the Sub-Inspector of Police who did not record the statement of the *chowkidar* in writing but recorded the statement of another person, who arrived at the thanah later on, as the first information report, held that the information given by the *chowkidar* was the first information report in the case and that the Sessions Judge was wrong in allowing the later statement to go to the jury—*Sahedali Mirdha v. Emp.*, 38 Cr.L.J. 1067 (1068), 171 I.C. 269, A.I.R. 1937 Cal. 309, I.L.R. (1937) 2 Cal. 308, 10 R.C. 258.

An information given to a village Magistrate which it was his bounden duty to pass on to a Police Station House officer who recorded it, must be considered as having

been given to the latter and recorded as first information under this section, and cannot be regarded as a statement recorded during the course of an investigation under sec. 162—*Venkatarayudu*, 28 Mad. 565. Where a person who was assaulted sent a telegram to the Police complaining of the offence, and the Police Sub-Inspector turned upon the spot and recorded a statement from the complainant, *held* that the telegram was not a first information as it was not reduced to writing on an oral statement nor a writing given to the police signed by the person making the statement. It was the statement subsequently recorded by the Police Sub-Inspector that was the first information—*Chidambaram*, 55 M.L.J. 231, 29 Cr.L.J. 717 (718), A.I.R. 1928 Mad 791, 110 I.C. 461; *Anandayya*, A.I.R. 1915 Mad. 312, 25 I.C. 630, 15 Cr.L.J. 622; *Kachi Hazam v. Seraj Khan*, 1935 Cr.C. 628, 156 I.C. 400, 36 Cr.L.J. 919, A.I.R. 1935 Cal 403, 39 C.W.N. 403; for contra see *Chanan Singh*, A.I.R. 1934 Lah. 413, 35 P.L.R. 363, 1934 Cr.C. 640, 36 Cr.L.J. 97, 152 I.C. 229, 15 Lah 814. This section is not intended to apply to a telephone message—*Meherals*, 32 Cr.L.J. 543, 130 I.C. 378, A.I.R. 1931 Sind 13. But see *Banta Singh*, 31 Cr.L.J. 444, 122 I.C. 491, A.I.R. 1930 Lah. 457.

The words "relating to" do not mean that the information must give details of all the elements of the offence; there need not be complete or satisfactory proof of the offence given at the time; it is sufficient if the information indicates that an offence has been committed—*Moni Mohan*, *supra*

See Notes 500A and 502B.

481. Evidentiary value:—The first information recorded by the police is of considerable value at the trial, because it shows on what materials the investigation commenced and what was the story then told—*Kampu Kuki*, 11 C.W.N. 554, 6 Cr.L.J. 86. In every trial it is important that it should be known to the judicial officer what are the facts given out immediately after the occurrence and reported to the police, and the object of the first information is to render him so acquainted. For that purpose the diary in which the first information was recorded as well as the memorandum, if any, made by the police of what the informant said, is admissible in evidence—*Bhutnath*, 7 C.W.N. 345 (348).

Where there was delay in giving information to the police, the evidence for the prosecution has to be carefully scrutinized—*Bishen Singh*, 27 Cr.L.J. 903, 96 I.C. 215, 8 L.L.J. 296, A.I.R. 1926 Lah 496, 27 P.L.R. 484. After all, delay in making a report to the police is only a suspicious circumstance which puts the Court on its guard and cannot by itself be held to be a reason for rejecting evidence which is otherwise fully entitled to credit—*Radha Kishen*, 40 Cr.L.J. 261 (263), 179 I.C. 880, A.I.R. 1938 Lah 714

It is a misdirection to ask the jury to accept the statement in the First Information in preference to the evidence in the case—*Asfar Sheikh*, 15 C.W.N. 198. The inconsistency of the first information with the theory on which the prosecution is based, is a very weak feature of the case depending entirely upon circumstantial evidence—*Nazir*, 9 C.W.N. 474.

But although the First Information is a document of considerable importance which is in practice always and very rightly produced and proved in criminal trials, yet it is not a piece of substantive evidence and can be used only as a previous statement admissible to corroborate or contradict a statement made by the informant subsequently in Court—*Choghatta*, 27 Cr.L.J. 121 (Lah.); *Autor Singh*, 17 C.W.N. 1213, 14 Cr.L.J. 642; *Sankaralinga*, 53 Mad 590, 58 M.L.J. 397, 31 Cr.L.J. 712; *Chittar*, 47 All. 280, 23 A.L.J. 14, 26 Cr.L.J. 554; *Ibrahim*, 8 Lah 605, 28 Cr.L.J. 983 (985); *Imarat*, 31 Cr.L.J. 7, 120 I.C. 199, A.I.R. 1929 All 916; *Harji*, 45 I.C. 273, 4 P.R. 1918 (Cr.), 19 Cr.L.J. 513, 134 P.L.R. 1918; *Thakar Singh*, 29 Cr.L.J. 277, 107 I.C. 761; *Dharam Singh*, 29 Cr.L.J. 343, 108 I.C. 162, A.I.R. 1928 Lah. 507; *Sheo Karan*, 29 Cr.L.J. 734, 110 I.C. 590, A.I.R. 1928 Lah 923; *Asfar Sheikh*, 15 C.W.N. 198; *Kapur Singh*, 31 Cr.L.J. 475, 123 I.C. 120, 31 P.L.R. 83, A.I.R. 1930 Lah. 450; *Gajadhar*, 7 Luck. 552, 33 Cr.L.J. 381 (382), 137 I.C. 79, 9 O.W.N. 32, 1932 Cr.C. 162, A.I.R. 1932 Oudh 99; *Emp. v. Nga Hiang*, 112 I.C. 466, A.I.R. 1928 Rang 295, 29 Cr.L.J. 1042, 6 Rang. 481; *Nga*

Tun Hlaing, 35 Cr.L.J. 808, 148 I.C. 876, A.I.R. 1934 Rang. 60, 1934 Cr.C. 377; *Md. Ibrahim*, 30 Cr.L.J. 38, 112 I.C. 902, A.I.R. 1929 Nag. 43, Ind. Rul. 1929 Nag. 10; *Waris Khan v. Emp.*, A.I.R. 1940 Oudh 209 (211), 1940 O.W.N. 177. Statements made in these reports are admissible under sec. 155, Ev. Act, to impeach the credit of a witness who made them or under sec. 157, Ev. Act, to corroborate the testimony of the witnesses who made them if the reports were made about the time when the fact took place or before any authority legally competent to investigate the fact. It may be that there are other sections of the Evidence Act under which these statements may in certain circumstances become relevant, but there can be no doubt that they are not substantive evidence in the case and the Courts should be clear about the relevancy of the statements before they use them—*Ram Naresh v. Emp.*, A.I.R. 1939 All. 242 (244), 40 Cr.L.J. 359, 1939 A.L.J. 107, 181 I.C. 646, I.L.R. 1939 All. 377, 1939 A.Cr.C. 36, 1939 A.W.R. (H.C.) 190, 11 R.A. 597. It cannot be used to contradict other witnesses who are unanimous on a particular point. It is inadmissible for the purpose of proving that the facts stated therein are correct. It is never *per se* the statement of the case for the prosecution, and the absence of any accused's name in it is not by itself a sufficient proof of his innocence—*Gajadhar*, *supra*.

The first information report, unless the man who made it dies, is not admissible evidence of any fact which is contained in it: it merely proves that this was the original story which set the police in motion—*The King v. Maung Po Thi*, A.I.R. 1938 Rang. 282 (283), 176 I.C. 683, 39 Cr.L.J. 771.

As the First Information Report can only be used by the prosecution for the purpose of corroborating in the witness-box the person who supplied the information contained in the document, it follows that if the informant himself can only speak from hearsay, the report cannot be used to corroborate such inadmissible evidence of the witness—*Sajan Singh*, 6 Lah. 437, 26 Cr.L.J. 1489.

The mere fact that in the First Information Report the names of the witnesses, who ultimately support the prosecution, are not given, is not a matter which would throw suspicion upon the story for the prosecution—*Chandu*, 29 Cr.L.J. 378, 108 I.C. 370, A.I.R. 1928 Lah. 657. Where all the prosecution witnesses were disbelieved because none of them was mentioned in the first information report and because most of them were not independent and made some statements which were contrary to what was stated before the Committing Magistrate or the Police, none of these factors can always be held to be sufficient to totally discard the evidence of witnesses though they are sufficient to raise a suspicion against the truthfulness of the witnesses and to lead the trying Judge to scrutinize the evidence with caution. If oral evidence of witnesses is corroborated by medical or other reliable evidence, there is no reason why it should not be believed even though the witnesses were not named in the first information report or are not totally independent—*Dildar Khan v. Emp.*, 39 Cr.L.J. 330 (331), 173 I.C. 339, 1938 O.W.N. 184.

Use of the information:—The First Information Report is usually put in by the prosecution which in any ordinary case has a duty to put it in. But, however important First Information Reports may be, they do not prove themselves and have to be tendered under one or other of the provisions of the Evidence Act. The usual course is for the prosecution to call the informant and for the First Information to be tendered as corroboration under sec. 157, but it could also be tendered in a proper case under sec. 32 (1), as a declaration as to the cause of the informant's death, or as part of the informant's conduct (of the *res gestæ* under sec. 8). Theoretically the defence can prove the information to impeach the informant's credit under sec. 155 or to contradict him under sec. 145—*Azimaddy*, 28 Cr.L.J. 99 (102), 44 C.L.J. 253, A.I.R. 1927 Cal. 17, 51 Cal. 237, 99 I.C. 227; *Mahla Singh*, 32 Cr.L.J. 522 (521), 139 I.C. 410, A.I.R. 1931 Lah. 38, Ind. Rul. 1931 Lah. 282, 32 P.L.R. 259, 1931 Cr.C. 102; *Gajjan Singh*, 33 Cr.L.J. 183, 135 I.C. 668, A.I.R. 1931 Lah. 103, 1931 Cr.C. 167, Ind. Rul. 1932 Lah. 124.

The prosecution is bound by practice to produce in Court the First Information Report made to the Police but it is not bound to refrain from leading evidence that the report is not accurate. To hold that the prosecution is tied down tightly to the words of the First Information Report would recognise the recording officer as possessing an authority which in no way belongs to him and would be dangerous—*Raja*, 25 Cr L J. 465, 77 I C. 817, A I R. 1921 Lah. 591. But the presumption is that a first information report represents the actual information given to the police and taken down by them, and if the prosecution wish to imply that the record of the information made by the police is garbled, it should give evidence to that effect—*Sheoprasad v. Emp.*, 39 Cr L J. 917 (1922), 177 I C. 605, 1938 N L J. 250, A I R. 1938 Nag. 394, 1 I R. 1938 Nag. 442.

When the accused lodges the First Information, the confessional statements contained therein are inadmissible in evidence unless they come within the purview of sec. 27 of the Evidence Act. The whole first information is, however, not rendered inadmissible—*Supdt. and Remtr. of Legal Affairs, Bengal v. Lalit Mohan*, 25 C.W.N. 788, 49 Cal. 167, 20 Cr L J. 562, 62 I C. 578, A I R. 1922 Cal 342. The principle in 25 C.W.N. 788 is not applicable in a case where there are no parts of the first information report which can be extracted from the rest and said to be relevant in themselves and admissible as not being incriminatory. Where the first information report forms a single connected story and no part of it has any meaning or significance except in relation to the whole, it would be quite wrong to extract fragments from it in which the accused does not make any self-incriminating statement—*Kommoju Brahman*, A I R. 1940 Pat 163 (167), 1939 P.W.N. 915. See also *Subedar* in Note 480.

Where the victim died before the matter came before the Court, the first information lodged by her was not admissible in evidence as such. It is, however, admissible under sec. 32 (1) of the Evidence Act as it is the statement of a person (since deceased) relating to the circumstances of the transaction which resulted in her death—*Kapur Singh*, 31 Cr L J. 475, 123 I C. 120, 31 P.L.R. 83, A I R. 1930 Lah. 450.

The deceased, being stabbed, was conveyed to the hospital when he made a statement to a Magistrate containing a bare recital of the occurrence. Immediately afterwards the Sub-Inspector recorded a more detailed statement of the deceased. The first information received by the Police was by means of a telephonic message from the hospital. Evidently, therefore, the statement made by the deceased to the Sub-Inspector was not a first information but came within the purview of sec. 32 of the Indian Evidence Act—*Banta Singh*, 31 Cr L J. 414, 122 I C. 491, A I R. 1930 Lah. 457.

"Officer in charge of a police station":—As to the powers of superior police officers under this section, see sec. 551. In the absence of the Sub-Inspector or Head constable, a constable left in charge of a Police station cannot accept any complaint or prepare and submit the first information report of any crime reported to him, unless the Local Government shall have given him powers under sec. 4 (p).

The information which is recorded in the *mofussil* by the Assistant Sub-Inspector of Police cannot be treated as the First Information Report because he is not the Officer-in-charge of the Police Station in fact or within the meaning of the expression as defined in sec. 4, Cr. P. C.—*Momin Talukdar v. Emp.*, 30 Cr L J. 803, 117 I C. 601, A I R. 1928 Cal. 771, Ind Rul 1929 Cal 553.

482. "Shall be reduced to writing":—The object of a first information being to show what was the manner in which the occurrence was related when the case was first started, it should always be carefully and accurately recorded—*Pearry Mohan v. Weston*, 16 C.W.N. 145 (177), 13 Cr L J. 65, 13 I C. 721. The first information must be recorded at once, and it is not proper to wait until it is certain that an offence has been committed; see *Bhutnath*, 7 C.W.N. 345; *Kamru Kuli*, 11 C.W.N. 554. See also *Sahedali Mirdha v. Emp.*, 38 Cr L J. 1067, 171 I C. 269, A I R. 1937 Cal 309, 1 I R. (1937) 2 Cal 308, 10 R C 258. If the information is given orally, it must be recorded in plain and simple language, as nearly as possible in the informant's own words. The use of technical or legal expressions or high flown language or of lengthy and involved

sentences is forbidden—*Ben. Pol. Code*, p. 372. It is of the utmost importance in recording the first information that the actual words of the complainant should be used and not an *Urdu* translation of them. The recorder should take down the complaint as it is made and not merely his own impression of what the complainant meant to say—*Reg. and Ord.*, N. W. P., p. 268.

The conditions as to writing are merely *procedural*. If there is an information relating to the commission of a cognizable offence, it falls under this section and becomes admissible in evidence as such, even though the police-officer may have neglected to record it in accordance with law—*Mani Mohan*, 58 Cal. 1312, 35 C.W.N. 623 (628), 33 Cr.L.J. 138, A.I.R. 1931 Cal. 745, 1931 Cr.C. 1009. It is a very serious thing for a police-officer to record in the first report facts which are not true, and it is still more serious for him to attempt to support the first report by evidence which is not true—*Mahomed Khabar*, 35 Cr.L.J. 736 (740), 148 I.C. 672, A.I.R. 1934 Sind 6, 1934 Cr.C. 91.

Where the Sub-Inspector failed to follow the express provision of this section in omitting to make any entry of the information in the Station Diary, the failure will have an important bearing if the real date of the report be in question. It is, however, not an illegality vitiating the trial—*Hafiz Muhammad*, 32 Cr.L.J. 638, 131 I.C. 17, A.I.R. 1931 Pat. 150, 12 P.L.T. 393, 1931 Cr.C. 390.

Power to question the informant:—If the information whether given orally or presented in writing, be not complete in itself, the Police officer should elicit by interrogation such further information as may be necessary—*Beng. Pol. Code*, p. 372. See also *C. P. Police Manual*, p. 147.

483. "Shall be signed":—The informant's statement when complete should be read over to him and he must sign it. The report should show that this has been done. In "heinous cases" the statement should be read over to the informant in the presence of one or more respectable and uninterested witnesses, who should also be asked to sign it—*Beng. Pol. Code*, p. 372.

Procedure in the case of written informations:—If the information be tendered in writing, it will be endorsed with the date of presentation, and the person tendering should be required to sign it (if he has not already done so). If the written information relates to facts with which the person tendering it is acquainted, and which he is able and willing to state orally, the mere incident that a written report is presented does not make it unnecessary to take down the information from the reporter's own lips. If the person who brings the written information knows nothing of the facts to which it refers, he should be required to state the circumstances under which he brought it—*C. P. Police Manual*, p. 147.

Proof of First Information Report:—Where the first information report was not proved by examining the scribe who wrote it, that was a formal objection and not one that should be advanced on behalf of the prosecution whose document it was. The defence should not be shut out from using the document because the prosecution did not formally prove it—*Sheoprasad v. Emp.*, 39 Cr.L.J. 917 (922), 177 I.C. 605, 1938 N.L.J. 250, A.I.R. 1938 Nag. 391, I.L.R. 1938 Nag. 442.

Diary:—The substance of the information shall be entered in a book, which is called the Station or General Diary, in which are recorded the substance of the information, the names of the complainants and of persons arrested, offences charged, property taken into possession and witnesses examined. See sec. 44 of the Police Act (V of 1851). This Diary is different from the Special Diary (or Case Diary) mentioned in sec. 172.

If the first information is given in writing, omission to make an entry in the Station Diary is not an illegality which would vitiate the trial. The omission would have an important bearing if the date of the report was in question—*Hafiz Muhammad*, 12 P.L.T. 393, 32 Cr.L.J. 638 (639), 131 I.C. 17, A.I.R. 1931 Pat. 150, 1931 Cr.C. 390.

483A. Copy:—The first report is a very valuable document and the accused is entitled to know what was said in that report to connect him with the offence, so

that he may be in a position to protect his interests by cross-examining the prosecution witnesses with reference to additions and alterations in the story which might subsequently be made in evidence. Where, therefore, the accused has been challaned before the Magistrate who has assumed jurisdiction by passing an order under sec. 344, Cr. P. C., but has not yet recorded evidence, he is in error in refusing to grant copies to the accused of the first report. The accused is affected by the order under sec. 344, Cr. P. C., and if the first report forms part of the record of the Magistrate, the accused is entitled to a copy thereof under sec. 548, Cr. P. C. Even if it be assumed that the first report does not form part of the Magistrate's record until such time as it is tendered in evidence and that it is discretionary with the Magistrate to grant or refuse to grant a copy of the first report until it is exhibited, it is an unwise and improper exercise of discretion by the Magistrate to refuse to grant a copy—*Bherumal Khanchand v. Emp.*, A.I.R. 1937 Sind 303, 171 I.C. 993

483B. Court-fee:—Any petition, application, charge or information respecting any offence when presented, made or laid to or before a Police-officer, or to or before the Heads of Villages or the Village Police in the territories respectively subject to the Governors in Council of Madras and Bombay, is not chargeable with any court-fee. *Vide* sec. 19, cl (xvi) of the Court-fees Act, 1870 (VII of 1870).

484. Punishment:—As to punishment for giving false information to the Police, see secs. 182, 203, 211, I. P. C. Even if the information is not reduced to writing under this section, the person giving the false information may be convicted for preferring a false charge under sec. 211, I. P. C.—*Mallappa*, 27 Mad. 127.

A police-officer refusing to enter in the Diary a report made to him concerning the commission of an offence, and making instead an entry totally different from the information given, is punishable under sec. 177, I. P. C.—*Md Ismail Khan*, 20 All 151; he does not render himself liable for damages if he does not perform the duty—89 IC 945, 49 M.L.J. 450

As to punishment for refusal by the person giving information to sign the statement made by him, see sec. 180, I. P. C.

155. (1) When information is given to an officer in charge of a police-station of the commission, within the limits of such station, of a non-cognizable offence, he shall enter in a book to be kept as aforesaid the substance of such information and refer the informant to the Magistrate.

Information in non-cognizable cases.

(2) No police-officer shall investigate a non-cognizable case without the order of a Magistrate of the first or second class having power to try such case or commit the same for trial, or of a Presidency Magistrate.

Investigation into non-cognizable cases.

(3) Any police-officer receiving such order may exercise the same powers in respect of the investigation (except the power to arrest without warrant) as an officer in charge of a police-station may exercise in a cognizable case.

484A. Scope:—This section applies to the Police in the towns of Calcutta and Bombay; see *Nilmadhab*, 15 Cal 595; *Istam Babaji*, 21 Bom. 495

485. Investigation into non-cognizable cases:—Under this section, a police-officer cannot investigate a non-cognizable case and cannot submit a report with reference to it, without the order of a Magistrate. If he receives information of a

non-cognizable offence, he should enter the substance of it in the diary and refer the informant to a Magistrate. If a Police-officer of his own motion, as where he has seen the alleged offence committed, makes a formal report or complaint in respect of a non-cognizable offence, it will amount to a *complaint* within the meaning of sec. 4 (b), for there is no provision by which he can in such a case make a Police report—*Sada*, 26 Bom. 150 (F.B.). Magistrates mentioned in sec. 190 are entitled to take cognizance of non-cognizable offences upon a report made in writing by a Police-officer without examining the officer upon oath—*Public Prosecutor v. Ratnavelu Chetty*, 96 I.C. 983, 49 Mad 525, A.I.R. 1926 Mad 865, 27 Cr.L.J. 1031, 1927 M.W.N. 43, 25 M.L.W. 248, 52 M.L.J. 210 (F.B.); *Ghulam Hossain*, 82 I.C. 753, 1 Lah. Cas. 16, 25 Cr.L.J. 1361, 6 Lah.L.J. 606, A.I.R. 1925 Lah. 237; *Shankar Lal*, 28 Cr.L.J. 821, 104 I.C. 437, A.I.R. 1927 Lah. 702, 9 Lah. 280, 20 P.L.R. 469. But in *Feroja v. Aminuddin*, 16 C.W.N. 1049 (1061), 13 Cr.L.J. 691, 16 I.C. 499 the examination on oath was held to be necessary.

A police-officer is not competent to make an investigation into a non-cognizable offence, but the investigation of a non-cognizable offence would not be illegal, if it is made during the investigation of a cognizable offence—*Shivaswami*, 51 Bom. 498, 29 Bom.L.R. 742, 28 Cr.L.J. 939, A.I.R. 1937 Bom. 440. Irregularities, if any, during the course of preliminary investigation might affect the weight to be attached to the evidence of the complainant, and the witnesses called by him. They would not vitiate the proceedings—*Abdulla Khan*, 34 Cr.L.J. 256 (259), 141 I.C. 879, Ind. Rul. 1933 Sind 79, 1933 Cr.C. 569, A.I.R. 1933 Sind 188. See also *Hafiz Muhammad*, 32 Cr.L.J. 638 (640), 131 I.C. 17, A.I.R. 1931 Pat. 150, 12 P.L.T. 393, 1931 Cr.C. 390. Even though a case of non-cognizable offence was wrongly investigated under Chap. XIV and sent up by the Police, there seems to be no obstacle to its being tried by the Magistrate—*D. D. Dawson v. The King*, 40 Cr.L.J. 799, 183 I.C. 497, A.I.R. 1939 Rang. 273.

A police-officer who has been ordered by a Magistrate to investigate a non-cognizable offence, cannot legally *delegate* the duty of making the investigation to a chief constable—*Kalidas*, Ratanlal 488.

It is incumbent upon a police-officer, who investigates a non-cognizable case under the orders of a Magistrate, to keep the *diary*, for which provision is made in sec. 172—*Hira Lal*, 1918 P.R. 16, 1918 P.L.R. 63, 19 Cr.L.J. 517.

After the investigation is over, it is duty of the Police to submit a report to the Magistrate under sec. 173. Where information was given to the Police of the commission of a non-cognizable offence, and the Magistrate ordered the Police to investigate the case and report, and the Police without submitting any report instituted proceedings against the informants under sec. 211 of the I. P. Code for giving false information, and the accused were convicted, it was held that the conviction was illegal; the police should not be allowed to prosecute without submitting the report of the original case to the Magistrate and without having that case disposed of by the Magistrate—*Appa Ragho*, 17 Bom.L.R. 69, 16 Cr.L.J. 161, 27 I.C. 545. Where immediately after a non-cognizable case had been committed the police sent a report to the Magistrate and asked for a warrant to be issued under sec. 161, I. P. C., and on the same day the Magistrate ordered that a case under sec. 161, I. P. C., may be instituted against the accused, held that the police did not commit any breach of the provisions of this section. Even if there was any irregularity, it did not vitiate the trial—*Bhuneswari*, 8 O.W.N. 503, 32 Cr.L.J. 860 (862), 132 I.C. 234, A.I.R. 1931 Oudh 172, Ind. Rul. 1931 Oudh 250, 1931 Cr.C. 444.

486. Magistrate's power to direct investigation:—In *Jankidas*, 12 Bom. 161, it is laid down that this section is conversant only with the powers of police-officers, but it confers no power or authority on Magistrates to direct a local investigation by the Police or to call for a Police report; Magistrates can do so only under sec. 202 after taking cognizance of the case. But this view is quite unintelligible and renders sub-section (2) meaningless. In *Bishwanath*, 8 Bom.L.R. 589, 4 Cr.L.J. 183, it has been correctly held that a Magistrate has jurisdiction under sub-section (2)

of this section to refer a matter to the police for investigation and report, even without a complaint, and without examining the complainant. So also in *In re Asadulla*, 6 M.L.T. 259, 4 I.C. 1043, 11 Cr.L.J. 159, the Magistrate was held competent to order an investigation without first taking cognizance of the offence under sec. 190.

The District Magistrate acting under clause 2 of this section can order investigation into a case under sec. 194A, I. P. C., although such offence needs for the trial the previous complaint by the Local Government or some officer empowered by the Governor-General in Council in this behalf under sec. 196, Cr. P. C.—*General Relief Association*, 33 Cr.L.J. 678, 138 I.C. 751, A.I.R. 1932 Lah. 581, 33 P.L.R. 824, 1932 Cr.C. 809, Ind. Rul. 1932 Lah. 534.

156. (1) Any officer in charge of a police-station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XV relating to the place of inquiry or trial.

(2) No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.

(3) Any Magistrate empowered under section 190 may order such an investigation as above mentioned.

487. Scope:—The reference to Chap XV in this section does not limit the application of this section to offences only, but the investigation may extend to cases within the scope of section 55—*Bhajan*, 1893 A.W.N. 124

If the third clause of sec. 156 had been intended to provide an alternative procedure to that laid down in sections 200 *et seq.*, it would have found a place in Chap XVI and not in Chap XIV which deals with the procedure and powers of the Police in cases in which information of an offence is given to a police-officer—*Arula Kotiah*, 12 Cr.L.J. 463, 11 I.C. 999, 19 M.L.T. 120, 1911 M.W.N. 74

An Inspector of the C I D has power to investigate into cases to which this section applies his local area being the entire province—*King-Emp. v Nilkanta*, 35 Mad 247 (272). See also *Muthukumaraswami*, 35 Mad 397.

The wording of sec. 156 (3) is wide and the utility of the section would be much diminished if that section were held to apply to only those cases in which a Magistrate takes cognizance on his own knowledge or suspicion—*Ghulam Nabi*, 27 S.L.R. 67, 1933 Cr.C. 334, 34 Cr.L.J. 763, 144 I.C. 409, A.I.R. 1933 Sind 136, Ind Rul 1933 Sind 185.

This section only empowers the Magistrate to direct investigation, and a Court of Session has no power to do so—*Ali*, 1910 P.R. 11

An officer in charge of a police station has power to investigate a matter taking it to be a cognizable case although the charges that are ultimately laid are under non-cognizable sections—*M I Mamsa v Emp.*, A.I.R. 1937 Rang 206 (208), 38 Cr.L.J. 983, 170 I.C. 870, 10 R.R. 111.

Where a girl has been taken away from her husband's place in M and subsequently found in D, the Sub-Inspector at D has jurisdiction to investigate the case by virtue of sec. 156 (1) read with sec. 181 (4), Cr. P. C.—*Kharaiti*, A.I.R. 1933 All. 663, 34 Cr.L.J. 1215, 146 I.C. 199, 1933 A.L.J. 923, 1933 Cr.L.J. 1145, 20 A.I.C.R. 439

If there is a delay in the investigation by the police, it is the duty of the committing Magistrate, and failing him, of the Sessions Judge, to inquire fully into the

circumstances of the delay to consider its bearing on the prosecution story—*Majesty*, 2 Bom.L.R. 1092.

Sub-section (3) of this section does not empower a Magistrate, after he has taken cognizance of a case, to order a police investigation under sec. 156 and to direct the police to submit a report. Section 156 (3) only empowers the Magistrate to order a police inquiry in a case where the Magistrate does not himself issue process at once. When a Magistrate takes cognizance of a complaint under sec. 200, and refers the case to the police for inquiry under sec. 202, it is for him to pass the necessary order on the police report either under sec. 203 or under sec. 204. He cannot direct the police, if they find the case to be established, to submit a charge-sheet. In other words, the Magistrate, after he has acted under Ch. XVI cannot proceed under Ch. XIV—*Isaf Nasya*, 54 Cal. 303, 102 I.C. 545, A.I.R. 1928 Cal 24, 28 Cr.L.J. 577. A similar view is taken in *Nur Mahomed*, 53 Bom. 339, 117 I.C. 329, 31 Bom.L.R. 84, A.I.R. 1929 Bom. 72, 30 Cr.L.J. 781 and *Ulfat Khan*, 29 Cr.L.J. 374, 108 I.C. 333, A.I.R. 1928 Pat. 359. The Cr. P. C., does not contemplate that when the Magistrate has received a formal complaint he need not follow the procedure set out in sec. 200, Cr. P. C., but can straightway send it to the police under sec. 156 (3), Cr. P. C., and then upon issue of B summary, make a complaint of a false charge—*Radhakrishin G. Keswani v. Emp.*, 40 Cr.L.J. 449, 180 I.C. 436, A.I.R. 1939 Sind 78. But the Patna, Madras and Lahore High Courts are of opinion that if a Magistrate, on taking cognizance of an offence, direct the police to investigate under sec. 202, the police can exercise their general power of investigation and arrest—*Bhola Bhagat*, 2 Pat. 379, 72 I.C. 375, A.I.R. 1923 Pat. 547, 24 Cr.L.J. 375, 4 P.L.T. 521 (see this case cited in Note 670 under sec. 202); *Raghunath*, 33 Cr.L.J. 349, 136 I.C. 842, 12 P.L.T. 937, A.I.R. 1932 Pat. 72, 1932 Cr.C. 136; *Ghulam Nabi*, 27 S.L.R. 67, 1933 Cr.C. 334 (336); 34 Cr.L.J. 763, 144 I.C. 409, A.I.R. 1933 Sind 136, Ind. Rul. 1933 Sind 185; *Gopal v. Alagirisami*, 54 Mad. 598, 131 I.C. 176, 33 M.L.W. 460, 1931 M.W.N. 368, 60 M.L.J. 520, A.I.R. 1931 Mad. 770, 1931 Cr.C. 1026, Ind. Rul. 1931 Mad. 512, 32 Cr.L.J. 690; and can submit a charge-sheet and send up the case for trial—*Rashid Ahmad*, 33 P.L.R. 840, 33 Cr.L.J. 737, 139 I.C. 139, A.I.R. 1932 Lah. 579, Ind. Rul. 1932 Lah. 561, 14 Lah. 194, 1932 Cr.C. 807 (809); *Ghulam Nabi*, supra.

Discussing the rulings mentioned above and overruling *Ghulam Nabi*, supra, the Full Bench of the Sind Judicial Commissioner's Court has laid down that it is not competent to the Police when they have been directed by the Magistrate to enquire into a complaint of an offence of which he has taken cognizance, in effect to ignore the Magistrate's direction and to start proceedings of their own. To hold otherwise would be to ignore the purpose and effect of sec. 202, Cr. P. C., and merely to invite a conflict of jurisdictions between the Police and the Magistrate which in the public interest should be avoided. Section 202, Cr. P. C., refers not only to an enquiry but also to an investigation; and sec. 202 (2) confers upon a person other than a Magistrate or a Police Officer all powers conferred upon a Police Officer in charge of a Police Station except the powers of arrest without warrant. Surely this implies that a Police Officer to whom a complaint has been referred for investigation has the power to arrest without warrant under sec. 54, Cr. P. C., and all the powers which may be exercised by a Police Officer in the course of an investigation. The scheme of sec. 202, Cr. P. C., appears to be, that when a complaint is sent to the Police for investigation and report, they are to investigate in precisely the same manner and to arrest in precisely the same way as they would have done if their powers had been first invoked by a first report under sec. 154, Cr. P. C., there being only this difference, that in the one case the Police embody the result of their investigation to the Magistrate in a report which the Magistrate proceeds to consider under sec. 203, Cr. P. C., while in the other case the Police embody the result of their investigation in what is called a *challan* or charge-sheet not occurring in the section, the accused person, in any case, if arrested by the Police, being produced before the Magistrate in the ordinary way—*Bhika Moti*, 39 Cr.L.J. 681, 175 I.C. 899, 11 R.S. 13, A.I.R. 1938 Sind 113 (F.B.).

After a Magistrate issued process he has no power to make a reference to the Police under clause (3) of this section—*Vijayaraghavachari*, 30 Cr.L.J. 326, 114 I.C. 365, A.I.R. 1928 Mad 1268, Ind. Rul. 1929 Mad. 285, following *Arula Kotiah*, 11 I.C. 999, (1911) 2 M.W.N. 74, 10 M.L.T. 120, 12 Cr.L.J. 463.

The mere fact that a private complaint is filed in a Court and the Magistrate takes cognizance of the private complaint, does not and cannot deter the police from enquiring into the offences which have been committed and which come to their knowledge not from the complainant party but on information which they secure in the course of their duty from other persons—*Vijayaraghavachari*, *supra*.

157. (1) If, from information received or otherwise, an officer in charge of a police-station has reason to suspect the commission of an offence which he is empowered under section 156 to investigate, he shall forthwith send a report of the same to a Magistrate empowered to take cognizance of such offence upon a police-report, and shall proceed in person, or shall depute one of his subordinate officers *not being below such rank as the Provincial Government may by general or special order prescribe in this behalf* to proceed to the spot, to investigate the facts and circumstances of the case *and, if necessary, to take measures* for the discovery and arrest of the offender :

Provided as follows :—

(a) when any information as to the commission of any such offence is given against any person by name and the case is not of a serious nature, the officer in charge of a police-station need not proceed in person or depute a subordinate officer to make an investigation on the spot;

(b) if it appear to the officer in charge of a police-station that there is no sufficient ground for entering on an investigation, he shall not investigate the case.

(2) In each of the cases mentioned in clauses (a) and (b) of the proviso to sub-section (1), the officer in charge of the police-station shall state in his said report his reasons for not fully complying with the requirements of that sub-section, *and in the case mentioned in clause (b) such officer shall also forthwith notify to the informant, if any, in such manner as may be prescribed by the Provincial Government, the fact that he will not investigate the case or cause it to be investigated.*

Change:—The italicised words have been added by sec. 32 of the Criminal Procedure Code Amendment Act, XVIII of 1923

"And, if necessary, to take measures".—These words have been substituted for the words "and to take such measures as may be necessary."

Under the old law the taking of measures necessary for the discovery and arrest of the offender was *incumbent* on the police-officer; under the present law, the police-

circumstances of the delay to consider its bearing on the prosecution story—*Majesty*, 2 Bom L.R. 1092.

Sub-section (3) of this section does not empower a Magistrate, *after* he has taken cognizance of a case, to order a police investigation under sec. 156 and to direct the police to submit a report. Section 156 (3) only empowers the Magistrate to order a police inquiry in a case where the Magistrate does not himself issue process at once. When a Magistrate takes cognizance of a complaint under sec. 200, and refers the case to the police for inquiry under sec. 202, it is for him to pass the necessary order on the police report either under sec. 203 or under sec. 204. He cannot direct the police, if they find the case to be established, to submit a charge-sheet. In other words, the Magistrate, after he has acted under Ch. XVI cannot proceed under Ch. XIV—*Isaf Nasya*, 54 Cal. 303, 102 I.C. 545, A.I.R. 1928 Cal. 24, 28 Cr.L.J. 577. A similar view is taken in *Nur Mahomed*, 53 Bom 339, 117 I.C. 329, 31 Bom L.R. 84, A.I.R. 1929 Bom. 72, 30 Cr.L.J. 781 and *Ulfat Khan*, 29 Cr.L.J. 374, 108 I.C. 333, A.I.R. 1928 Pat. 359. The Cr. P. C. does not contemplate that when the Magistrate has received a formal complaint he need not follow the procedure set out in sec. 200, Cr. P. C., but can straightway send it to the police under sec. 156 (3), Cr. P. C., and then upon issue of B summary, make a complaint of a false charge—*Radhakrishin G. Keswani v. Emp.*, 40 Cr.L.J. 449, 180 I.C. 436, A.I.R. 1939 Sind 78. But the Patna, Madras and Lahore High Courts are of opinion that if a Magistrate, on taking cognizance of an offence, direct the police to investigate under sec. 202, the police can exercise their general power of investigation and arrest—*Bhola Bhagat*, 2 Pat. 379, 72 I.C. 375, A.I.R. 1923 Pat. 547, 24 Cr.L.J. 375, 4 P.L.T. 521 (see this case cited in Note 670 under sec. 202); *Raghunath*, 33 Cr.L.J. 349, 136 I.C. 842, 12 P.L.T. 937, A.I.R. 1932 Pat. 72, 1932 Cr.C. 136; *Ghulam Nabi*, 27 S.L.R. 67, 1933 Cr.C. 334 (336); 34 Cr.L.J. 763, 144 I.C. 409, A.I.R. 1933 Sind 136, Ind. Rul. 1933 Sind 185; *Gopal v. Alagirisami*, 54 Mad 598, 131 I.C. 176, 33 M.L.W. 460, 1931 M.W.N. 368, 60 M.L.J. 520, A.I.R. 1931 Mad. 770, 1931 Cr.C. 1026, Ind. Rul. 1931 Mad. 512, 32 Cr.L.J. 690; and can submit a charge-sheet and send up the case for trial—*Rashid Ahmad*, 33 P.L.R. 840, 33 Cr.L.J. 737, 139 I.C. 139, A.I.R. 1932 Lah. 579, Ind. Rul. 1932 Lah. 561, 14 Lah. 194, 1932 Cr.C. 807 (809); *Ghulam Nabi*, supra.

Discussing the rulings mentioned above and overruling *Ghulam Nabi*, supra, the Full Bench of the Sind Judicial Commissioner's Court has laid down that it is not competent to the Police when they have been directed by the Magistrate to enquire into a complaint of an offence of which he has taken cognizance, in effect to ignore the Magistrate's direction and to start proceedings of their own. To hold otherwise would be to ignore the purpose and effect of sec. 202, Cr. P. C., and merely to invite a conflict of jurisdictions between the Police and the Magistrate which in the public interest should be avoided. Section 202, Cr. P. C., refers not only to an enquiry but also to an investigation: and sec. 202 (2) confers upon a person other than a Magistrate or a Police Officer all powers conferred upon a Police Officer in charge of a Police Station except the powers of arrest without warrant. Surely this implies that a Police Officer to whom a complaint has been referred for investigation has the power to arrest without warrant under sec. 54, Cr. P. C., and all the powers which may be exercised by a Police Officer in the course of an investigation. The scheme of sec. 202, Cr. P. C., appears to be, that when a complaint is sent to the Police for investigation and report, they are to investigate in precisely the same manner and to arrest in precisely the same way as they would have done if their powers had been first invoked by a first report under sec. 154, Cr. P. C., there being only this difference, that in the one case the Police embody the result of their investigation to the Magistrate in a report which the Magistrate proceeds to consider under sec. 203, Cr. P. C., while in the other case the Police embody the result of their investigation in what is called a *challan* or charge-sheet not occurring in the section, the accused person, in any case, if arrested by the Police, being produced before the Magistrate in the ordinary way—*Bhika Moti*, 39 Cr.L.J. 631, 175 I.C. 899, 11 R.S. 13, A.I.R. 1938 Sind 113 (F.B.).

158. (1) Every report sent to a Magistrate under section 157 shall, if the *Provincial Government* so directs, be submitted through such superior officer of police as the *Provincial Government*, by general or special order, appoint in that behalf.

(2) Such superior officer may give such instructions to the officer in charge of the Police station as he thinks fit, and shall, after recording such instructions on such report, transmit the same without delay to the Magistrate.

Amendment:—The words "Provincial Government" have been substituted for the words "Local Government" by sec. 4 of the Government of India (Adaptation of Indian Laws) Order, 1937.

159. Such Magistrate, on receiving such report, may direct an investigation or, if he thinks fit, at once proceed, or depute any Magistrate subordinate to him to proceed, to hold a preliminary inquiry into, or otherwise to dispose of, the case in manner provided in this Code.

490. Magistrate's power to hold investigation or inquiry:—An inquiry can be made under this section only on a police report submitted within the terms of section 157, *i.e.*, on a preliminary report made *before* the police investigation or inquiry; but if the report is submitted *after investigation*, the Magistrate is not empowered to act under this section—*Mouli v. Nourangi*, 4 CWN 351 (352); *Sarba Mahton*, 17 CWN, 824 (825). See also *Emp v Abdul Rahman*, 32 All 30.

The inquiry which a Magistrate is competent to hold under this section is a *preliminary inquiry*. Therefore, where a report of the commission of an offence has been made by the police *after full inquiry* into the truth of the information given to them as to the commission of the offence, the Magistrate has no jurisdiction to make any further inquiry into the same offence—*In re Kandhaya Lal*, 1899 A W.N. 87

An inquiry under this section can be made only on the submission of a *police report*, if, however, a *complaint* is made to the Magistrate, he is bound to proceed under sec 200—*Loke Nath v Sanyasi*, 30 Cal 923, 7 CWN. 525. On receipt of the report of the preliminary enquiry under this section the Magistrate should proceed to deal with the case in the same way as he would have dealt with it on receipt of a report from a police officer. He has no jurisdiction to pass an order under sec 203, Cr P. C., in such a case—*Ibid*. Distinguishing this case it was held that the complaint can be dismissed under sec 203, Cr P C—*Arula Kotiah*, 12 Cr L J. 463, 11 IC. 499, 10 M.L.T. 120, 1911 M.W.N. 74

Where a case comes before a first class Magistrate under the provisions of secs 157 and 159, he can depute a Sub-Deputy Magistrate to hold an investigation or a preliminary inquiry. The latter can also, under sec 164 (1), record a statement of a witness made before him in the course of the police investigation—*Harendra*, 40 C.L.J. 313, 26 Cr L J 307 (308), 84 IC. 451, A.I.R 1925 Cal. 161.

The expression "preliminary inquiry" in this section appears to be used in a different sense from its use in section 288, where it refers to inquiries under Ch. XVIII, prior to commitment to the Sessions, which are held after the police investigation is complete, after the charge-sheet is drawn up, and after the accused is forwarded to custody under sec 170 to the Magistrate empowered to take cognizance of the *Pedda*, 45 Mad. 230 (233). The number of investigation is not limited by

when one has been completed another may be begun on fresh information received—*Mohinder*, 33 Cr.L.J. 97, 135 I.C. 209, A.I.R. 1932 Lah. 103, 1932 Cr.C. 123, 33 P.L.R. 891, Ind. Rul. 1932 Lah 81, following *Divakar v. Ramamurthi*, 47 I.C. 273, 35 M.L.J. 127, 19 Cr.L.J. 901.

The mere fact that the enquiry was not held by a particular officer as suggested by the Magistrate, does not make the submission of the charge sheet on the part of the investigating Police, contrary to the provisions of the Cr. P. Code—*Osman v. Haripada*, 37 Cr.L.J. 139, 159 I.C. 660, A.I.R. 1935 Cal. 731, 62 Cal. 469, 1935 Cr.C. 1144.

160. Any police-officer making an investigation under this

Police officer's power to require attendance of witnesses

Chapter may, by order in writing, require the attendance before himself of any person being within the limits of his own or any

adjoining station, who, from the information given or otherwise, appears to be acquainted with the circumstances of the case; and such person shall attend as so required.

492. Order in writing:—The order to attend under this section must be in writing. A person required orally to appear before a police officer as a witness cannot be convicted under section 174, I.P.C., for disobedience of such order—*In re Veerasamy*, 1 Weir 86; *Tukaram*, 48 I.C. 688, 20 Cr.L.J. 48. So also, where a Police Inspector sent a constable to bring two persons for inquiring of them about an offence, and the order was not in writing, the persons need not accompany the constable. If the persons accompanied the constable, they could not be said to have been in lawful custody of the constable, and any person inducing those persons not to accompany the constable could not be held guilty of rescuing them from lawful custody—*Purshotam*, Ratanlal 850.

The absence of an order in writing as required by this section is no doubt an irregularity. It would certainly justify the failure or refusal of the suspects to obey the order, but it can have no effect when the irregularity is waived by them—*Dinanath Ganpat Rai*, A.I.R. 1940 Nag 186 (189), I.L.R. 1940 Nag 232.

493. "Require the attendance":—An officer in charge of a police station may require the attendance of persons whose evidence is necessary, and the persons summoned are bound to obey the order; but in no case can be police compel a witness by force to attend before him—*Tarinee*, 7 W.R. 3; *Purshotam*, Ratanlal 850. A police officer has no power to arrest or to detain even for a single moment any person whose evidence is required for the purpose of investigation—*Tarinee*, 7 W.R. 3.

Security bond to appear:—There is no provision in this Code authorising a police-officer to take security bond for the production of any person before the police; and the Magistrate has, therefore, no power to alter it and impose fresh conditions under it—*In re Chandra Sekhar*, 11 Cal. 77. But see *Kanshi Ram*, 1913 P.R. 22, 14 Cr.L.J. 631, cited under secs. 497 and 499.

494. Who may be required to attend:—**Accused:**—This section applies only to the case of persons who appear to be acquainted with the circumstances of the case, i.e., witnesses or possible witnesses only; an order under this section cannot be made requiring the attendance of an accused person, with a view to his answering the charge made against him. The intention of the Legislature seems to have been only to provide a facility for obtaining evidence and not for procuring the attendance of the accused, who may be arrested at any time if necessary—*Saminatha*, 7 Mad. 274; *Ratan*, 4 Bom.L.R. 644; *Nga Tha*, 4 Rang 72, 27 Cr.L.J. 881. Therefore, where the accused person refused to obey an order under this section, and was, therefore, taken into custody by the police, it was held that the Police was guilty of wrongful confinement, although the police was justified in arresting without warrant upon the original charge made against the accused—*Lakshimigadu*, 2 Weir 121.

This section aims at securing the attendance of persons who would supply the necessary information in regard to the commission of the offence, and who would be examined as witnesses in the enquiry or trial to be held in regard to the said offence. It admits of no reasonable doubt therefore that this section has reference to the persons to be examined as witnesses in the trial or enquiry to be held after the completion of the investigation. As an accused cannot be examined as a witness either for or against himself, he cannot be included in the class of persons referred to in the section—*Gola v. Emp.*, A.I.R. 1929 Nag 17 (20), 24 N.L.R. 158, 114 I.C. 273, 30 Cr.L.J. 258, 12 A.I.Cr.R. 177 (F.B.). But the police officers are fully authorized to require the personal attendance of the suspects during the investigation—*Dinanath Ganpat Rai*, A.I.R. 1940 Nag 186 (189), I.L.B. 1940 Nag. 232.

Woman :—It is an unusual course for the Police to take a number of women away from their village to the police-station on the pretext that they wished to examine them. The examination should be properly conducted at the women's own houses—*Haladhar*, 9 C.W.N. 199 (201), 2 Cr.L.J. 51.

"Shall attend":—If a person fails to attend before a police officer making an investigation under this chapter, he is liable to punishment under section 174, I. P. C.—*Jogendra*, 24 Cal 320, 1 C.W.N. 154. Mere refusal to accept a notice issued under this section does not constitute an offence under sec 173, I. P. C.—*Bahadura*, 27 Cr.L.J. 284, 92 I.C. 460, 24 A.L.J. 215, A.I.R. 1926 All. 304, following *Sahdeo*, 46 I.C. 522, 40 All 577, 16 A.L.J. 453, 19 Cr.L.J. 746.

495. Magistrate's power to interfere or issue warrant:—A Magistrate has no power to issue a warrant for the arrest and production of a person in order that such person may give evidence before the police during an investigation under this chapter—*Jogendra*, 24 Cal 320, 1 C.W.N. 154. He cannot interfere with the exercise of discretion given to a police officer to summon witnesses, though he might offer his suggestion or advise the police officer as to a particular course of action—*In re Sankalchand*, Ratanlal 133.

161. (1) Any police-officer making an investigation under this Chapter or *any police-officer not below such rank as the Provincial Government may, by general or special order, prescribe in this behalf, acting on the requisition of such officer*, may examine orally any person supposed to be acquainted with the facts and circumstances of the case

Examination of witnesses by police

(2) Such person shall be bound to answer all questions relating to such case put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.

Change:—The italicised words have been added by sec. 33 of the Criminal Procedure-Code Amendment Act (XVIII of 1923). This amendment is similar to that made in section 157 (1).

The words "Provincial Government" have been substituted for the words "Local Government" by sec 4 of the Government of India (Adaptation of Indian Laws) Order, 1937..

Scope:—The provisions of this section should not be utilised in any but "*heinous cases.*" Heinous cases include cases triable exclusively by a Court of Session and those cases in which Special Diaries are submitted through the Magistrate either to the Commissioner only or both to the Commissioner and to the Deputy Inspector-General or Inspector-General of Police—*Beng. Pol. Code*, p. 432.

A headman cannot examine witnesses on oath in the course of an inquiry in a criminal case. The statement made to him can be used in the manner provided for in secs. 145 and 147 of the Indian Evidence Act—*Mi Choke*, 34 Cr.L.J. 781, 144 I.C. 369, A.I.R. 1933 Rang. 119, 1933 Cr.C. 644. It is not evident that the inquest report comes under this section—*Rajeswari*, 37 C.W.N. 732 (734), A.I.R. 1933 Cal. 851, 1933 Cr.C. 1478

496. Examination of accused before arrest:—When a police officer has evidence before him, upon which he is bound to arrest a person, he should not preliminary to his arrest, obtain a statement from that person professedly under this section and reduce it to writing—*Jadub Das*, 27 Cal. 295 (299, 302).

497. Statements of witnesses:—*Any person:*—This section empowers certain Police Officers to examine orally "any person" supposed to be acquainted with the facts and the circumstances of the case, and requires such person to answer such questions subject to certain limitations. The marginal note to the section shows that it refers to "examination of witnesses by Police." It would appear that "any person" in this section refers to a witness and not to the person who is accused of the offence. It is quite another matter, if the person who made a statement to the Police in the course of an investigation was not then accused of the offence under investigation but was called as a witness. The object of this section is to obtain evidence to be produced at the trial. Any incriminating statement made by an accused person at an inquiry held under this section would be excluded at the trial under sec. 25 of the Evidence Act, as having been made to a Police Officer, and as such of no material use at the trial—*Umur Duraz Munshi v. Emp.*, 26 Cr.L.J. 778 (780), 86 I.C. 410, A.I.R. 1925 Sind 237. See also *Q.-Emp. v. Jadab Das*, 27 Cal. 295, 4 C.W.N. 129 and *Gola v. Emp.*, A.I.R. 1929 Nag. 17 (20), 24 N.L.R. 158, 114 I.C. 273, 30 Cr.L.J. 258, 12 A.I. Cr.R. 177 (F.B.). See also Note 501A

Not privileged under sec 172:—Where a police-officer making an investigation under this section took statements from the persons who were afterwards called as witnesses, the accused person would be entitled to call for and inspect such documents and cross-examine the witnesses thereon, as such statements would not amount to a portion of the diary referred to in sec. 172—*Bikas*, 16 Cal. 610. A police-officer, by inserting in the special diary statements which can only have been made to him under this section, cannot protect such statements from being used in the way that the law allows, e.g., under secs 145 and 159 of the Evidence Act. *Sheru Sha*, 20 Cal 642. Contra—*Mannu*, 19 All. 390. But under the amended section 162, these statements, whether included in the diary or not, can be used only under the circumstances mentioned in sec. 162.

See Notes 501 and 502C.

Statements not the property of Police:—Depositions of witnesses or confessions taken at a police investigation are not any more the property of the police than the property of prisoners, and there is no prohibition against any person present at the time when depositions are being taken or confessions made, to take down in writing what either a prisoner or a witness says (though, of course, the police cannot allow copies of them to be formally taken). A pleader for the accused can use the statement so taken down for the benefit of his client—*In re Kristo Lal*, 10 Cal. 256 (262, 263).

498. Recording of statements:—Statements made by a witness to a police-officer under this section during an investigation may be reduced to writing. But it is not obligatory on the Police officer to record any statement made to him. He may do so only if he likes—*Uttamchand*, 11 B.H.C.R. 120.

It was held that the statements of witnesses should not be recorded in the Special Diary mentioned in sec. 172—*Dadan Gazi*, 33 Cal. 1023, 10 C.W.N. 890. But it does not now matter whether these statements are recorded in the Special Diary or not, their use being controlled solely by sec. 162 (Woodroffe, p. 178). Cf. the words "whether in a Police diary or otherwise" occurring in sec. 162. See *Mafizaddi*, 31 C.W.N. 910, 45 C.L.J. 561; *Sadhu*, 32 C.W.N. 280.

It is not necessary that the statements of witnesses recorded under this section should be in the form of alternative questions and answers. It is enough if the statement so recorded is substantially an answer to the questions put to the witnesses—*Bhagwantia*, 15 All 11; *Abdur Rahman*, 1896 P.R. 7.

The statements need not be signed by the witnesses; but it is not illegal for a police-officer to obtain the signature of the witnesses to the statements, though he cannot compel them to sign—*Bhagwantia*, 15 All. 11.

499. Privileges of witnesses:—A statement made by a witness in answer to a question put to him by a police-officer in the course of an investigation under this section is privileged, and cannot be made the foundation of a charge of defamation—*Govinda*, 16 Mad. 235 (238); *Ramaswami Mudaliar*, 47 M.L.W. 136, 1938 M.W.N. 217, (1938) 1 M.L.J. 810, nor can he be made liable in an action for damages for any words spoken during such investigation—*Methuram v. Jagannath*, 28 Cal. 794; *Fakir Mahomed v. Fakir Mahomed Nanji*, A.I.R. 1937 Sind 44, 30 S.L.R. 43, 6 R.S. 236, 168 I.C. 643.

Witness not bound to speak the truth—Under the Code of 1882 a witness was bound to answer truly all questions put to him under this section; but the effect of the omission of the word "truly" from the Code of 1898 has been to do away with the legal obligation to speak the truth—*Sankarlinga*, 23 Mad. 544 (546); *Nga Pyn*, 10 Bur.L.T. 259, 18 Cr.L.J. 844 (846). Therefore, witnesses cannot be prosecuted for giving false evidence under this section—*Nga Po*, 9 Bur.L.T. 203, 18 Cr.L.J. 98. The Select Committee (1898) observed:—"It seems to us unfair that a man should be liable to be convicted of giving the false evidence on the strength or by the aid of a statement supposed to have been given to a police-officer, but which is not given on oath, which he has not signed, and which he has had no opportunity of verifying; such statement may be hurriedly taken down as rough notes; the police-officer is not trained in taking evidence, and the notes are often fairer out by another officer. They bear no resemblance to depositions and ought to have no weight as such attached to them. The provisions of sections 202 and 203 of the Penal Code appear to us to afford a sufficient safeguard against the false information."

This change in the law supersedes the following cases decided under the Code of 1882 and earlier Codes—10 Cal 405; 8 Bom 216; 11 Bom 659; 15 All 11, 1896 P.R. 7.

Since a person making a statement under this section cannot be said to "give information" within the meaning of sec 182, I.P.C., he cannot be prosecuted under that section for giving false information if the statement made by him be false—*Mangu*, 1914 P.L.R. 227, 15 Cr.L.J. 650, 25 I.C. 978, 35 P.W.R. 1914 (Cr.), 227 P.L.R. 1914; *Emp v. Nga Aung Po*, 2 Cr.L.J. 474, U.B.R. (1905) Penal Code 13; *Sultan v. Wellbourne*, 26 Cr.L.J. 1532, 90 I.C. 316, 3 Rang 577, 4 Bur.L.J. 261, A.I.R. 1925 Rang 364; *Maung Bo Ni*, A.I.R. 1935 Rang 97; nor under section 211, I.P.C.—*Chinna*, 31 Mad 506; *Kodangi*, 33 Cr.L.J. 173, 135 I.C. 590, 34 M.L.W. 858, 1931 M.W.N. 1138, 61 M.L.J. 860, A.I.R. 1932 Mad 24, 1932 Cr.C. 4, Ind. Rul 1932 Mad. 171.

500. Refusal to answer questions:—Under this section a person answering questions put by a police-officer is not bound to answer truly. Therefore, a refusal to answer such questions is not punishable under sec 179, I.P.C.—*Sankarlinga*, 23 Mad 544 (546); *Gul Hassan*, 1908 P.R. 27; *Mawzanagyi*, 8 Rang 511, 32 Cr.L.J. 201 (202); *Mahmad*, 6 S.L.R. 277, 14 Cr.L.J. 302.

Incriminating questions—Under sub-section (2), a witness is not bound to answer any question put to him by a police-officer, the answer to which would have a tendency to expose him to a criminal charge. Therefore, a person examined under this section by the police with respect to an offence with which he may himself be charged and convicted is not bound to speak the truth, and in such a case a conviction for giving false evidence would be illegal—*Usuphkan*, Ratanlal 619.

162. (1) No statement made by any person to a police-officer in the course of an investigation under this Chapter shall, if taken down in writing, be signed by the person making it, nor shall such writing be used as evidence : Provided that, when any witness is called for the prosecution whose statement has been taken down in writing as aforesaid, the Court shall, on the request of the accused, refer to such writing and may then, if the Court thinks it expedient in the interests of justice, direct that the accused be furnished with a copy thereof : and such statement may be used to impeach the credit of such witness in the manner provided by the Indian Evidence Act, 1872.

Statements to police not to be signed or admitted in evidence.

162. (1) No statement made by any person to a police-officer in the course of an investigation under this Chapter shall, if reduced into writing, be signed by the person making it; *nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose (save as hereinafter provided) at any inquiry or trial in respect of any offence under investigation at the time when such statement was made :*

Statements to police not to be signed; use of such statements in evidence.

Provided that, when any witness is called for the prosecution in *such inquiry or trial* whose statement has been reduced into writing as aforesaid, the Court shall, on the request of the accused, refer to such writing and * * * direct that the accused be furnished with a copy thereof, in order that any part of such statement, if duly proved, may be used to contradict such witness in the manner provided by section 145 of the Indian Evidence Act, 1872. When any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination :

Provided, further, that if the Court is of opinion that any part of any such statement is not relevant to the subject matter of the inquiry or trial, or that its disclosure to the

accused is not essential in the interests of justice, and is inexpedient in the public interests, it shall record such opinion (but not the reasons therefor) and shall exclude such part from the copy of the statement furnished to the accused.

(2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of section 32, clause (1), of the Indian Evidence Act, 1872.

Change:—Sub-section (1) with its provisos has been thoroughly redrafted by sec. 34 of the Cr. P. C. Amendment Act XVIII of 1923.

Legislative history of the section and reasons for the change:—“The amendment of section 162 has been discussed at great length by the Committee. It has been the subject of amendment before, and of constant difficulty in the Courts. We, therefore, propose to recast the section, and we think that a note as to its previous history will be instructive.

“Under the original Code of 1861 (section 145), a Police-officer could examine potential witnesses and reduce their statements to writing, but the *writing* was not to be part of the record or used as evidence. The Code of 1872 maintained the above provisions, merely adding (section 119) that no person when examined by the police should be bound to answer incriminating questions. The only material change made by the Code of 1882 (section 162) was that, instead of the provision that the statement when so reduced to writing should not be used as evidence, it was provided that no statement made by a witness if reduced to writing should be used as evidence *against the accused*, thus making it clear that the provision in question was intended for the benefit of the accused.

“The new section did not lay down in terms that the accused might not use the written record of a witness's statement for the purpose of his defence, and indeed it rather suggested that he was entitled to do so. Accordingly cases occurred in which the accused demanded to see the statements which the police had taken down, in order that he might use, for the purpose of his defence, anything that appeared therein to his advantage, and the Calcutta High Court ruled that he was entitled to do so. The Allahabad High Court, on the other hand, held that the writings in effect formed part of the police-diary and were, therefore, privileged from inspection, and thus was the position which stood to be dealt with when the Amending Act of 1898 was under consideration. There was evidently a good deal to be said on both sides as will appear from the report of the Select Committee (1898) on the Bill which is quoted *in extenso* below.—

“The question involved (namely, whether the accused is entitled to inspect statements taken down by the police under section 161) is full of difficulty. In the first place, it is essential in the interests of public justice that the source of police information should be kept secret. If the names of informers or detectives and the nature of their information be disclosed, the detection of crime would be seriously crippled. In the second place, it is unfair to a witness that his evidence should be discredited on the strength of an alleged statement made to a policeman, which he may have had no opportunity of verifying or correcting. Such statements must necessarily be often taken down hurriedly and may be incorrectly copied out. They are not taken down as depositions or with regard to the rules of evidence, but merely to aid the police in the course of their investigation. But in the third place, it may be most important for the accused

162. (1) No statement made by any person to a police-officer in the course of an investigation under this Chapter shall, if taken down in writing, be signed by the person making it, nor shall such writing be used as evidence: Provided that, when any witness is called for the prosecution whose statement has been taken down in writing as aforesaid, the Court shall, on the request of the accused, refer to such writing and may then, if the Court thinks it expedient in the interests of justice, direct that the accused be furnished with a copy thereof: and such statement may be used to impeach the credit of such witness in the manner provided by the Indian Evidence Act, 1872.

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Provided, further, that if the Court is of opinion that any part of any such statement is not relevant to the subject matter of the inquiry or trial, or that its disclosure to the

accused is not essential in the interests of justice, and is inexpedient in the public interests, it shall record such opinion (but not the reasons therefor) and shall exclude such part from the copy of the statement furnished to the accused.

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“The new section did not lay down in terms that the accused might not use the written record of a witness's statement for the purpose of his defence, and indeed it rather suggested that he was entitled to do so. Accordingly cases occurred in which the accused demanded to see the statements which the police had taken down, in order that he might use, for the purpose of his defence, anything that appeared therein to his advantage, and the Calcutta High Court ruled that he was entitled to do so. The Allahabad High Court, on the other hand, held that the writings in effect formed part of the police-diary and were, therefore, privileged from inspection, and this was the position which stood to be dealt with when the Amending Act of 1898 was under consideration. There was evidently a good deal to be said on both sides as will appear from the report of the Select Committee (1898) on the Bill which is quoted *in extenso* below —

“The question involved (namely, whether the accused is entitled to inspect statements taken down by the police under section 161) is full of difficulty. In the first place, it is essential in the interests of public justice that the source of police information should be kept secret. If the names of informers or detectives and the nature of their information be disclosed, the detection of crime would be seriously crippled. In the second place, it is unfair to a witness that his evidence should be discredited on a policeman, which he may have taken down. Such statements must necessarily be incorrectly copied out. They are not taken down as depositions or with regard to the rules of evidence, but merely to aid the police in the course of their investigation. But in the third place, it may be most important for the accused

to show that a witness called for the prosecution is telling a story substantially different from that which he told when first questioned by the police. We have endeavoured to reconcile these conflicting interests by reverting to the language of the Codes of 1861 and 1872, and adding a proviso compelling the Court, on the application of the accused, to refer to such statements, and then empowering it in its discretion to allow him to have copies of them. We then provide for the mode in which these statements are to be used. It is clear that a witness ought not to have his credit impeached on the strength of a statement alleged to have been made to a policeman, unless and until it is shown that he has made that statement.'

"The result was not altogether a happy one. It will be noticed that the section deals mainly with the *writing* and enacts that it shall not be used in evidence, with a proviso that the Court may in its discretion direct the accused to be furnished with a copy of it—presumably only in order that the accused may know that there is something in the writing which may help his defence—and goes on to say that the statement (*i.e.*, what the witness said to the police officer) may be used in the ordinary course to impeach the credit of the witness, obviously implying that for this purpose it must be duly proved.

"It seems clear that all that the amendment of 1898 intended to effect was to make it clear that the accused had no right to call for or see the record of any statements taken down by the police under section 161, unless the Court thought that in the interests of justice he should be allowed to do so. It did not purport to deal with and has left untouched, the further question whether or not a statement made by a witness under section 161, as apart from the written record of the statement, might be used by the prosecution for the purpose of corroborating one of their witnesses under section 157 of the Evidence Act, and this is at all events one of the principal difficulties with which we have to deal now.

"The re-draft of the section which we propose will make it clear that the statements taken under section 161 (and not merely the written records of such statements) are not to be used in any way or for any purposes except as allowed by the proviso. Having regard to the fact that the making of such statements is compulsory under section 161, and to the way in which, and the circumstances under which, they are usually recorded, we do not think that they are of any corroborative value where the witness merely repeats the same statement in Court, and that they ought not, therefore, to be allowed to be used for the purpose of corroboration under section 157 of the Evidence Act. If the really material fact to the prosecution is that a *statement* was made to the police on a particular date or at a particular place, this fact will, of course, still be provable in the ordinary course, and it will be open to the Courts or to a jury to make any proper deduction from this fact and the action which was taken on it. The amendment will also, we think, make it clear that if the accused wishes to rely on anything in the previous statement of a witness to the police, of which he has been allowed by the Court to have a copy, he will have to prove it in the ordinary way. If the witness admits this in cross-examination, it will, of course, be sufficient; if he denies the contradiction and the police-officer who took it down is called by the prosecution, the previous statement of the witness on the point may be proved by him; if he is not called by the prosecution, the Court would not doubt itself in most cases call him, or if the accused is calling evidence in support of his defence, it may be worth his while to call the Police-officer himself. But it is clear that unless the previous contradictory statement is proved in some way in accordance with law, it ought not to deprecate the witness's statement on oath. It will be observed that under our amendment, if any part of the previous statement of the witness is used for the purpose of cross-examination by the accused, any other part of it may be used by the prosecution within the proper limits of re-examination. This is, we think, the only way in which the previous statement ought to be allowed to be used by the prosecution"—*Report of the Select Committee of 1916.*

See *Bilari Mahton*, 10 Pat 107, 12 P.L.T. 798, 32 Cr.L.J. 797 (800 802), where the distinction between the old section and the new has been elaborately pointed out.

Applicability:—In the Calcutta Police Act (IV of 1866) there is no section corresponding to sec 162, or sec 172, Cr. P. C., which does not apply to the Calcutta Police—*Pancharan Mukherjee v Emp.*, 30 Cr.L.J. 577, 116 I.C. 160, A.I.R. 1929 Cal. 257, 33 C.W.N. 203, Ind. Rul 1929 Cal 448. The Code does not apply to the police in the town of Calcutta unless expressly made applicable to them, and there has been no notification making this section so applicable. See sec 1, sub-sec. (2) of the Code—*Makhan Lal Dutta*, (1939) 2 Cal 429 (431)

This section does not apply to the police in the town of Bombay. The admissibility of a statement made before a Police officer of the Bombay City Police has to be decided with reference to sec 63 of the City of Bombay Police Act (which is identical with the old section 162)—*Wahiduddin*, 54 Bom. 528, 31 Cr.L.J. 1003 (114), A.I.R. 1930 Bom. 158, 32 Bom.L.R. 327, 126 I.C. 333

500A. Object and Scope of section:—The purpose of this section is to amend for the purpose of criminal trials certain sections in the Evidence Act which states what evidence is admissible and inadmissible in certain circumstances—*Sajjad Mirza v. Emp.*, 45 C.L.J. 199 (201), A.I.R. 1927 Cal 372. The purpose of the section is to protect accused persons from being prejudiced by statements made to police officers who by reason of the fact that an investigation is known to be on foot at the time the statement is made, may be in a position to influence the maker of it and, on the other hand, to protect accused persons from the prejudice at the hands of persons who in the knowledge that an investigation has already started, are prepared to tell untruths—*Aftab Mohd Khan*, A.I.R. 1940 All 291 (299), 1940 A.L.J. 206, 41 Cr.L.J. 647, 188 I.C. 649.

This section generally prohibits the use of any statement made to a police-officer as evidence of the matter of the charge. It was intended to recognize the danger of placing implicit confidence to a record more or less imperfectly made by a police-officer who would not necessarily be competent to make an exactly correct record of the statement of a witness with due regard to the provisions of the law of evidence and who might not be entirely free from an inclination to take the statement as being somewhat more definite and precise in a particular direction than the witness had intended it to be—*Isab Mandal*, 28 Cal 348 (351, 352)

The ban of sec. 162 applies only to statements made to a police-officer while he is making an investigation under Chap XIV. If the investigation contemplated by that Chapter is *finished*, then this section cannot be invoked to prohibit any statement made to a police-officer at some time *subsequent to the investigation*. If, on the other hand, statements made to police-officers when preparing a map or holding an identification parade are statements made in the course of an investigation under Chap XIV, then they fall within the scope of the prohibition embodied in sec 162—*Nga Than*, 4 Rang 72, 5 Bur.L.J. 30, 27 Cr.L.J. 881

It was with the object of guarding against a true case being spoilt by an unscrupulous Investigating Police Officer that the provisions of this section were enacted. The Judge should conform to these provisions when the Investigating Police Officer is allowed to be cross-examined by the defence—*Debendra*, 35 Cr.L.J. 904, 149 I.C. 130, A.I.R. 1934 Cal. 458, 1935 Cr.C. 663

In the course of an investigation:—The first information report (sec 154) against an accused is not a statement within the contemplation of sec 162, in as much as it is not made *in the course of an investigation*. Again, sec 154 requires it to be signed, whereas statements under sec 162 are forbidden to be signed, even when recorded in writing—*Azimaddy*, 54 Cal 237, 44 C.L.J. 253, 28 Cr.L.J. 99 (101). Where a person who was assaulted sent a telegram to the Police, and the Police Inspector went to the place and recorded a statement from the complainant, *held* that this statement did not fall under sec. 162, as it was not made to a police officer *in the course of an investigation*.

The Inspector went to the place not to make investigation and collect evidence but to see whether his suspicion that an offence has been committed was justified—*Chidambaram*, 55 M.L.J. 231, 29 Cr.L.J. 717 (718). Statements taken by a C. I. D. Officer in a preliminary inquiry conducted by him against a public officer before the Government sanctioned the prosecution of the latter officer, were not statements falling under this section because they were not made during the course of an investigation; there was no investigation but only a departmental inquiry—*Jehangir*, 29 Bom.L.R. 996, 28 Cr.L.J. 1012 (1014). Where an informant made two statements to the police to the effect that "a woman had gone away from her house with ornaments and that she could not be found", and then the police-officer went to investigate, and on the next day the informant made a third statement that "the woman had not yet returned and that she must have been detained by her companions or killed by them for her ornaments", held that though the third statement was made to the police in the course of an investigation, still it was not an investigation into an offence, because no offence had been mentioned before the third statement was made; the police had only begun a general investigation. The statement did not fall under this section and was not excluded from evidence—*Moni Mohan*, 58 Cal. 1312, 35 C.W.N. 623 (631), 33 Cr.L.J. 138. The words "in the course of" in the context of this section import that the statement must be made as a step in a pending investigation to be used in that investigation. The words "in the course of" do not refer merely to that period of time which elapses between the beginning and the end of the investigation. An investigation starts when the first step towards investigation is taken by the police. Where, therefore, a report is made quite independently of, and in no relation to, any pending investigation and not designed to promote a pending investigation in any way but to start one having no reference at all to the investigation which has in fact begun, it is not possible to say that it is made "in the course of" the investigation of the case—*Aftab Mohd. Khan*, A.I.R. 1940 All. 291 (300), 41 Cr.L.J. 647, 188 I.C. 649, 1940 A.L.J. 206. See Notes 480 and 502B.

Statements made to a police-officer in the course of an investigation under sec. 174, even though it is conducted in the presence of two or more respectable men are nonetheless statements made to a police officer "in the course of an investigation" under this Chapter, within the meaning of sec. 162—*In re Muruthamuthu Kudumban*, 50 Mad 750, 52 M.L.J. 601, 28 Cr.L.J. 463 (464).

This section may be thus explained: The first paragraph provides that no statement made to the police in the course of an investigation shall be admissible at the inquiry or trial. In consequence, no witness may be asked what he said to the Police during the investigation, nor may any Police-officer be asked what a witness said to him during the investigation, nor may any by-stander be questioned as to what he heard another person say to the Police-officer during the investigation. The second paragraph (proviso) lessens the rigidity of the first paragraph to a certain extent. In consequence of this paragraph, when a witness for the prosecution is being examined, if an accused has reason to believe that the statement which the witness is making in Court differs from the statement which he made to the Police, then the accused or his advocate may ask the Court to refer to the record of any statement made by the witness to the police, and if it be found that there is any variation between the two statements, the defence are entitled to a copy of the record of the statements made to the Police. That copy must then be proved, and the witness may be cross-examined on that statement under sec. 145, Evidence Act, and his attention must be drawn to the particular points in which his statement in Court differs from the record of his statement to the police—*Bana Singh*, 6 Rang 137, 29 Cr.L.J. 701 (702).

The provisions of this section are applicable to the trial of a summons case as well as to the trial of a warrant case—*Dinanath Sahay v. Emp.*, A.I.R. 1939 Pat. 174, 40 Cr.L.J. 509, 17 Pat. 622, 20 P.L.T. 70, 1939 P.W.N. 136, 180 I.C. 845, 5 B.R. 501, 11 R.P. 545.

501. Statement:—A statement made by a witness to the Police that he knew nothing about the occurrence, or a statement that he did not say anything to the police

about the occurrence is not a 'statement' within the meaning of sec. 162; otherwise the absence of a statement would be equivalent to a statement—*Aseruddin*, 53 Cal. 980, A.I.R. 1927 Cal 257, 100 I.C. 353, 28 Cr L.J. 273 (274). But it is doubtful if such a statement would not be a statement under sec. 161—*Ibid.* See also *Mahomed Adam Chochan*, 38 Cr L.J. 327, 167 I.C. 43, 9 R.B. 274, 38 Bom L.R. 1185, A.I.R. 1937 Bom. 60.

The 'statement' contemplated by sec. 162 is not a complete statement recording every word uttered by the witness; it may be a mere memorandum of what the witness had said to the police-officer; such a statement is available for the purpose of contradicting the witness—*Mafizuddin*, 31 C.W.N. 940, 28 Cr L.J. 805 (806); *Hamid Khan*, A.I.R. 1933 Nag. 4, 1933 Cr C. 63, 140 I.C. 825, 28 N.L.R. 291, 34 Cr L.J. 127 (129); *Bansidhar*, 53 All. 458, 32 Cr L.J. 562 (563), 130 I.C. 625, 1931 A.L.J. 157, A.I.R. 1931 All. 262, 1931 Cr C. 422, Ind. Rul. 1931 All. 289; *Vishwanath*, A.I.R. 1936 Nag. 249, 1936 Cr C. 1040. The fact that statements made during police investigation were recorded in the diary kept under sec. 172, Cr P. C., would not take them out of the operation of the proviso to sec. 162, Cr P. C. Once a statement made by a witness to a Police Officer is reduced to writing, no matter where, it becomes a statement recorded under sec. 161, Cr P. C.—*Mobarak Ali Shaikh*, 40 Cr L.J. 386, 180 I.C. 516, A.I.R. 1939 Cal. 252, 68 C.L.J. 397, following *Mafizuddin*, supra and *Sadhu Shaikh*, 32 C.W.N. 280, 109 I.C. 355, A.I.R. 1928 Cal. 260, 29 Cr L.J. 531. See also Notes 497 and 502C.

A statement can be made by other means than by words. Therefore, the *gesture* of the accused (which is to all intents and purposes a statement) in pointing out to the Police where the revolver was, is inadmissible in evidence since sec. 162 must be taken as overriding sec. 27 of the Indian Evidence Act—*Nag Kyaing*, 27 Cr L.J. 658, 94 I.C. 706, 3 Rang. 656, A.I.R. 1926 Rang. 112. But see Notes in para 501A in this connection. See also Notes given below under head "Identification"

Joint statement:—A joint statement does not come within the provisions of this section. It is a little difficult to say what a joint statement means. If it means that more than one statement is contained in one document or that a number of statements have been recorded *seriatim* there is no objection to the defence being allowed to see and use the statement of the particular witness in spite of the fact that it is included in a record along with the statements of other persons. If, on the other hand, a joint statement means that the stories told by a number of witnesses have been, so to speak, boiled down by the police-officer into a statement of his own, which is a kind of abstract of the statements made by the several witnesses, the defence has no right to use such a statement—*Karimuddin*, 33 Cr L.J. 725, 139 I.C. 245, A.I.R. 1932 Cal. 375, 36 C.W.N. 106, 1932 Cr C. 318, Ind. Rul. 1932 Cal. 592, following *Banta Singh*, 122 I.C. 491, A.I.R. 1930 Lah. 457, Ind. Rul. 1930 Lah. 363, 31 Cr L.J. 444; *Salik*, A.I.R. 1937 Oudh 201 (203), 1937 O.W.N. 63, 38 Cr L.J. 165, 9 R.O. 295, 166 I.C. 259, 1936 O.L.R. 734. Where the police officer recorded in police diary the statements of 2 or 3 persons jointly at one place, those statements cannot be legally used as statements of any particular prosecution witness for the purpose of contradicting that witness for the simple reason that it is not known how much of any particular joint statement was the individual statement of any particular prosecution witness and how much was not his individual statement—*Salik*, supra. Where what was recorded was not a statement in the ordinary sense, but an abstract of statements made by several witnesses which the Police Officer had boiled down into a statement of his own, the defence would not be entitled to use it in the manner provided by sec. 162, Cr P. C. Where, therefore, the diaries purported to be kept under sec. 172, Cr P. C., do not contain any statement by any witness but are only brief records of what the Investigating Officer saw when he arrived at the spot, and of information which he ascertained as a result of questioning several people, the rule enunciated in *Karimuddin*, supra, applies and the Judge is right in disallowing the questions which the defence pleader desired to put with reference to them—*Mobarak Ali Shaikh*, 40 Cr L.J. 386, 180 I.C. 516, A.I.R. 1939 Cal. 252, 68 C.L.J. 397, 11 R.C. 693.

List of stolen articles:—A list of stolen articles, which is supplied to the investigating police-officer during the course of investigation, is a statement in writing made to a police-officer within the meaning of this section and is inadmissible in evidence—*Fulbash*, A.I.R. 1929 Cal 448, 120 I.C. 458, 1929 Cr.C. 71, 31 Cr.L.J. 127; *Mohsena Khatun v. Emp.*, 43 C.W.N. 893 (895), A.I.R. 1939 Cal. 610. See also *Kalia*, 26 Cr.L.J. 579, 85 I.C. 723, A.I.R. 1925 Cal. 959. This view was followed by the Lahore High Court in *Sucha Singh*, A.I.R. 1932 Lah. 488, 1932 Cr.C. 626. The same High Court, however, took a different view in *Amrit Lal*, A.I.R. 1933 Lah. 987 (990), 1933 Cr.C. 1503, following the view of the Oudh Chief Court which is mentioned below.

Where a list was prepared before the investigation actually began it is not a statement made to a police-officer during the course of investigation. A list of this kind may be regarded as an addition to the first report and this section has no application—*Autar*, 31 Cr.L.J. 1017, 126 I.C. 498, A.I.R. 1931 Oudh 74, 1931 Cr.C. 130, 7 O.W.N. 456, Ind. Rul. 1930 Oudh 370; *Narain*, 32 Cr.L.J. 630, 131 I.C. 72, A.I.R. 1931 Oudh 83, 8 O.W.N. 31, 1931 Cr.C. 211, Ind. Rul. 1931 Oudh 184.

Inquest report:—It is not evident that the inquest report comes under sec. 161, Cr. P. C., but, in any view, the defence is entitled to cross-examine the prosecution witnesses on the basis of the same—*Rajeswari*, 37 C.W.N. 732 (734), A.I.R. 1933 Cal. 861, 1933 Cr.C. 1478. The statements of witnesses incorporated in the inquest report can be made use of under sec. 162, Cr. P. C.—*Banta Singh*, 31 Cr.L.J. 444, 122 I.C. 471, A.I.R. 1930 Lah. 457; *Hans Raj*, A.I.R. 1936 Lah. 341 (344), 16 Lah. 345, 37 P.L.R. 605, 1936 Cr.C. 264, 161 I.C. 900, 37 Cr.L.J. 501. See also Note 543.

As for the right to obtain copies see the rulings given below in para 543.

Map:—The person who makes the map ought not to put upon it anything more than what he sees himself. Particulars derived from witnesses examined on the spot should not be noted on the body of the map, but on a separate sheet of paper annexed to the map as an index thereto, the spots being marked A, B, C, D, etc.—*Abinash*, 81 I.C. 651, A.I.R. 1924 Cal. 1029, 26 Cr.L.J. 350, 28 C.W.N. 995 (997), 52 Cal. 172; *Mafizal Peada*, 29 C.W.N. 812 (815), 89 I.C. 242, A.I.R. 1925 Cal. 909, 26 Cr.L.J. 1298; *Lalji Rai*, 37 Cr.L.J. 235 (239), 160 I.C. 181, A.I.R. 1936 Pat. 11, 1936 Cr.C. 6, 16 P.L.T. 730. The statements which are included in the map not from his personal knowledge but from what he heard from other people at the time of the investigation are inadmissible under sec. 162, Cr. P. C., and is hearsay evidence—*Bhagirath*, 30 C.W.N. 142, 92 I.C. 174, A.I.R. 1926 Cal. 550, 27 Cr.L.J. 222. See also *Kalia*, 26 Cr.L.J. 579, 85 I.C. 723, A.I.R. 1925 Cal. 959.

Where the notes in the index embody statements regarding things said to have happened at the various points referred to, such notes are not properly to be put before the jury and where the index contains such objectionable material, the better course is to have a fresh index prepared with the objectionable material eliminated—*Mayadhar Pathal*, 40 Cr.L.J. 625 (628), 181 I.C. 1001, 20 P.L.T. 420, A.I.R. 1939 Pat. 577 (580), 1939 P.W.N. 300, 18 Pat. 450.

Identification:—The statement, express or implied, which a person must have made by way of identifying the accused at the thanah, is hit by the provisions of this section—*Krishna Chandra*, A.I.R. 1935 Cal. 311, 39 C.W.N. 488, 36 Cr.L.J. 1470, 62 Cal. 918, 158 I.C. 813, 1933 Cr.C. 462. But where the Police Sub-Inspector arrested two accused in the village on the identification of a witness who was allowed to say in Court "I identified the two accused before the Daroga Babu from among 20 men of the village," held that there it was not a statement of the witness which was admitted but the fact that he identified the two accused before the police officer in the village and that the evidence was rightly admitted in the circumstances of the case—*Lala Lalung v. Emp.* A.I.R. 1939 Cal. 176, 40 Cr.L.J. 210, 179 I.C. 612, 42 C.W.N. 620, 68 Cr.L.J. 103, distinguishing *Krishna Chandra*, supra. In a later case where during the course of the investigation the investigating officer held a test identification parade at which two children, prosecution witnesses Nos. 1 and 2, picked out the Petitioner from a number

of other persons, Khundkar, J, observed: "Apart from other objections of a general nature to the practice of permitting test identifications to be conducted by police officers, we have no doubt that in the facts of the present case the identification of the Petitioner by prosecution witnesses Nos 1 and 2 before the investigating officer amounted to statements which are rendered inadmissible by the provisions of sec. 162 of the Code—*Krishna Kahar v Emp*, 41 Cr.L.J 405, 187 I.C. 129, 43 C.W.N. 1117 (1119), (1939) 2 Cal 569, AIR 1940 Cal 182, following *Krishna Chandra*, supra, *Hirendra Nath Saha*, 40 C.L.J 313 (317) and *Keramat Mandal*, 42 C.L.J. 524. The case of *Lala Lalung*, supra, was not discussed in this case. The latest decision on this point is the case of *Bhola Nath Dome v Emp*, 43 C.W.N. 1180. In this case, which was one of rape, a prosecution witness was allowed to say that she had identified the accused before the Daroga and the Judge used it as a fact which would go to show that she was speaking the truth. The statement was held to have been admitted in contravention of the provisions of sec. 162, Cr P C, even though it was made in answer to a question asked in cross-examination. For contra see *Ramadhan Brahmin v. Emp*, 29 Cr.L.J. 963 (965), 112 I.C. 51, A.I.R. 1929 Nag 36.

Davis, J C, in this connection, observed "The most recent case of the Calcutta High Court in ILR (1939) 2 Cal 569 (i.e., *Krishna Kahar v. Emp*, supra) which states generally the principle that evidence of identification tests made during the course of the investigation by the police at which witnesses point out accused persons is inadmissible as statements express or implied, does not discuss the question as to whether a tracker could not say in Court that he recognized on a certain day at a certain place, certain tracks, and that the tracks were of a particular person if he knew him already or of a person at the scene of the crime if he did not know him already. Nor does that case discuss whether a mashir could not say that he recognized the accused in Court as standing seventh or eighth in the line at an identification test, and that the tracks seventh or eighth in a line of tracks were made by the accused in Court because he saw him make them or why a mashirnama could not be referred to by a mashir to refresh his memory or why it should not be made in the ordinary way even with statements made by witnesses if these statements are only admitted at the request of the accused under sec. 162. Identification tests may be most valuable checking upon the evidence of identification given by witnesses in Court and should, in our opinion, not be discontinued"—*Mor Mahomed v Emp*, A.I.R. 1940 Sind 168 (171).

Where during the investigation one of the witnesses accompanied the investigation officer to certain places which she pointed out to him, held that the statements that were made by the witness to the police officer and the fact of pointing out the places to him ought to have been kept back from the jury, as such facts were not brought in evidence on behalf of the defence as provided by sec 162, Cr. P. C.—*Keramat Mandal*, 42 C.L.J. 524 (526). Evidence as to the pointing out of the house as such is not admissible in evidence as conduct of the accused—*Dhumaan Hiranand v. Emp*, AIR. 1937 Sind 251 (254), 31 SLR 494, 171 I.C. 737, following *Hira Gobar*, AIR. 1919 Bom 162, 52 I.C 601, 20 Cr.L.J 681, 21 Bom.L.R. 724. See also *Keramat Mandal*, supra. See also Notes given above under the heading "Statement".

Conduct:—Generally this section shuts out statements written or oral, express or implied, made by witnesses to the police during the course of the investigation; but care must be taken not to press this argument too far, to shut out evidence, not of what a witness said but also of what a witness saw or did. Conduct must be distinguished from speech—*Mor Mahomed v. Emp*, AIR. 1940 Sind 168 (170).

This section is always difficult to apply, but it seems that it would be going beyond the immediate intention of this section to lay down that a police-officer in charge of an investigation is not to be at liberty to explain his conduct by making such a statement as this that "at the time I did so and so I had received no information to such and such an effect." If that were to be laid down on the ground that inferentially it has reference to the statement of a witness before the

police, not only would this section in its intention be much exceeded but it would be practically impossible to do justice at all—*Tota Meah*, A.I.R. 1929 Cal 298, 30 Cr.L.J. 1015, 56 Cal. 1106, 119 I.C. 139. This section does not prevent a police-officer from explaining his conduct by making a statement that he received no information to a certain effect during the investigation—*Mohan Lall*, 32 Cr.L.J. 682, 131 I.C. 276, A.I.R. 1931 Lah. 177, Ind. Rul. 1931 404, 1931 Cr.C. 297. But where the Sub-Inspector of Police was asked in examination-in-chief whether he examined during the course of the investigation any witness on behalf of the accused and he said that he examined two witnesses and both of them stated that they were not present at the occurrence, in anticipation of the evidence which might be given by those persons as defence witnesses, held that it was in direct contravention of this section and it was not justified by any other provision of law which made evidence contradicting possible evidence of a possible witness admissible against the accused—*Bhagirath*, 30 C.W.N. 142.

The accused has no right to insist upon a Police witness referring to his diary to elicit information which is privileged. The contents of the diary are not at the disposal of the defence and cannot be used except strictly in accordance with the provisions of secs. 162 and 172, Cr. P. C. The latter section shows that witness may refresh his memory by reference to them but such use is at the discretion of the witness and the Judge, whose duty it is to ensure that the privilege attaching to them by Statute is strictly enforced—*Mohinder Singh*, 31 Cr.L.J. 97 (105), 135 I.C. 209, Ind. Rul. 1932 Lah. 81, A.I.R. 1932 Lah 103, 1932 Cr.C. 123, 33 P.L.R. 891. The accused is not entitled to see the police diary, but when the statement of a prosecution witness has been reduced into writing in police diary, the accused is entitled to ask the Court to refer to it and is entitled to a copy of it—*Sulaiman*, 6 Rang. 672, 30 Cr.L.J. 538, 115 I.C. 899, A.I.R. 1929 Rang. 87, Ind. Rul. 1929 Rang 31.

Oral statement:—The language of the old section was: "nor shall such writing be used as evidence." And so a distinction was drawn between an oral statement and a written statement, and it was laid down that only written statements were excluded from evidence, but the admission of oral statements was not forbidden—*Nalakanta*, 14 I.C. 849, 22 M.L.J. 490, 1912 M.W.N. 207, 35 Mad. 247, 13 Cr.L.J. 305; *Muthu Kumarasami*, 33 Mad. 397, 13 Cr.L.J. 352. The amended section uses the words "nor shall any such statement or any record thereof be used." That is, the language of the present section is much wider than that of the old section, and excludes any statement (oral as well as written) from being used for any purpose. And the expression "if reduced into writing" is intended only to qualify the verb "shall be signed" and is not a clause descriptive of the word "statement"—*Thimmappa v. Thimmappa*, 51 Mad. 967, 29 Cr.L.J. 1098 (1101), 112 I.C. 682, A.I.R. 1928 Mad. 1028, 55 M.L.J. 351, 28 M.L.W. 314 (F.B.), overruling *In re Venkatasubbiah*, 48 Mad. 640; oral statements no less than written statements come within the purview of sec. 162, Cr. P. C.—*Koganti Appayya*, 40 Cr.L.J. 108 (109), 178 I.C. 616, A.I.R. 1938 Mad. 893, 1938 M.W.N. 825, 48 M.L.W. 322. This is also the view of the Rangoon High Court—*Nga Tha*, 4 Rang. 72, 27 Cr.L.J. 881, 5 Bur.L.J. 30 (F.B.). See also *Bahadur Singh*, 7 Lah. 261, A.I.R. 1926 Lah. 367, 27 Cr.L.J. 803 (805); *Azimaddy*, 54 Cal. 237, 28 Cr.L.J. 99 (102), 44 C.L.J. 253; *Hari*, A.I.R. 1935 Sind 145 (173).

So far as statements not reduced to writing are concerned, there is no reason why statements made to a police officer in the course of an investigation should not, if relevant under the Evidence Act, be used at a trial for an offence not under investigation when they were made, provided that they are not held privileged by the provisions of sec. 123 and 121, Evidence Act—*Baij Nath v. Muhammad Din*, A.I.R. 1936 Cal. 359 (360).

Reduced into writing:—The statements should be made at the time the witnesses are examined, which, of course, is exactly what the law intends. The prevalent practice of writing up these statements at the end of the day from memory or with the aid of rough notes is objectionable, although, of course, there is no harm in that being done as well, provided the original statements are preserved and produced at the time

of trial—*Vishwanath*, A.I.R. 1936 Nag 249, 1936 Cr.C. 1040. See also *Zahid Beg v. Emp.*, 1937 A.L.J. 1253, 1937 A.W.R. 1099.

Where the prosecution case was that the *Fouzdar* had deliberately tampered with the statements of witnesses, that he had been actuated by a desire to save accused from any prosecution, and in furtherance of that desire, had not recorded correctly the statements made to him by the persons whom he was examining, it was essentially a matter for the jury to consider whether that was the correct view of the matter or not. The Judge should not tell the jury in the most emphatic terms that the conduct of the *Fouzdar* had been rather surprising and antagonistic to the prosecution case and therefore it was not safe to place much reliance on the statements taken down by him—*Mahomed Adam Chohan*, 38 Cr.L.J. 327 (329), 167 I.C. 43, 9 R.B. 274, 38 Bom.L.R. 1186, A.I.R. 1937 Bom. 60.

Record:—The word "record" as used in sec. 162, Cr. P. C., means the record of a statement of a witness taken under sec. 161, Cr. P. C.—*Hari*, 36 Cr.L.J. 1161 (1189), 157 I.C. 697, A.I.R. 1935 Sind 145, 28 S.L.R. 397, 1935 Cr.C. 753.

The distinction between a statement and a record thereof is a distinction between the oral statement and the written record in the diary of that oral statement—*Sheo Dayal*, A.I.R. 1933 All. 535 (539), 55 All. 689, 147 I.C. 15, 1933 Cr.C. 870.

Correctness of the record:—There is an initial presumption of accuracy in the case of official records, but in the case of the statements of witnesses recorded in police diaries the burden of rebutting it is not very heavy. Where the witness is a respectable educated man and quite disinterested and the difference between what he did say and what he is recorded as saying is very slight and could easily have been due to a misunderstanding by the police officer recording the statement, his denial of the accuracy of the statement attributed to him by the police officer may be accepted as correct—*Radha Kishen*, A.I.R. 1938 Lah 714 (717), 40 Cr.L.J. 261, 179 I.C. 880.

The Judge should not advise the jury to treat all kinds of statements to the police as of one level of unreliability. If it is the prosecution case that the *Sub-Inspector's* notes in any particular instance are unreliable, that should be brought out in the course of the evidence of the particular officer or it may appear on the face of the notes themselves—*Yusuf Mia v. Emp.*, A.I.R. 1938 Pat. 579 (582), 1938 P.W.N. 727, 5 B.R. 185, 20 P.L.T. 51, 178 I.C. 934, 40 Cr.L.J. 147.

See also *Mahomed Adam Chohan*, quoted in Note 915 (34).

Statement must not be signed:—Statements of witnesses taken in the course of police investigation must not be signed; even if they are signed contrary to the provisions of this section, they do not thereby become statements taken under sec. 154 and do not become admissible as first information. The police by violating the provisions of sec. 162 and thus committing an illegality, cannot make inadmissible statements admissible—*In re Narayana Menon*, A.I.R. 1925 Mad 106, 25 Cr.L.J. 401. No signed statement should be taken from a witness by the Police during investigation—*Bhupal Chandra v. Emp.*, 44 C.W.N. 451 (453). Where the police-officer during the investigation of an offence obtains the signature of certain witnesses to statements made by them and reduced into writing, in contravention of the section, the evidence of such witnesses given at the trial must be rejected. It is not a mere irregularity, curable by sec. 537, but a grave illegality. The policy underlying this section seems to be that witnesses at the trial should be free to make any statement in favour of the accused which they should wish to make, unhampered by anything which they might have said or might have been made to say to the police. The result of the witnesses' signature having been obtained on their statements would be to tie them down to those statements or to give them the impression that they are not free to make a different statement—*Bhureshwari*, 8 O.W.N. 593, 32 Cr.L.J. 860 (862), 6 Luck. 668, 132 I.C. 234, A.I.R. 1931 Oudh 172, 1931 Cr.C. 444, Ind. Rul. 1931 Oudh 250; *Saminullah*, 1938 O.W.N. 1048, 1938 O.A. 797, 1938 A.W.R. (C.C.) 83, 1938 A Cr.C. 123, 1938 O.L.R. 473, 178 I.C. 254, 40 Cr.L.J. 19; *Waris Khan v. Emp.*, A.I.R. 1940 Oudh 209 (210), 1940 O.W.N. 177. There is no

doubt that this is an irregularity which must be taken into account with other elements, if such there be, of objection to the satisfactory character of a trial. It would not by itself be a ground sufficient for quashing a conviction—*Muhammad Panah*, 35 Cr.L.J. 1170 (1174), 150 I.C. 917, A.I.R. 1931 Sind 78, 1934 Cr.C. 732. See also *Abdullah Khan*, 34 Cr.L.J. 256 (258), A.I.R. 1933 Sind 118, 1933 Cr.C. 569, Ind. Rul. 1933 Sind 79.

501A. Statement of accused:—This section refers only to statements of persons examined as witnesses by the police in the course of investigation and not to statements made by *accused* persons as such—*Rannun*, 7 Lah 81, 27 Cr.L.J. 709, 94 I.C. 901, A.I.R. 1926 Lah 88, 27 P.L.R. 583; *Newaz Ali*, 33 C.W.N. 257, 30 Cr.L.J. 916; *Azimuddy*, 54, Cal. 237, 28 Cr.L.J. 99; 99 I.C. 227, 44 C.L.J. 253, A.I.R. 1927 Cal. 17; *Muhammad*, 36 Cr.L.J. 697, 155 I.C. 260, A.I.R. 1934 Lah 695, 1934 Cr.C. 1009, 35 P.L.R. 738; *Adho*, 19 S.L.R. 6, 26 Cr.L.J. 897; *Umer Daraz*, 19 S.L.R. 142, 26 Cr.L.J. 778; *Chuto*, 25 S.L.R. 391, 33 Cr.L.J. 302 (303); *Hussain*, 20 S.L.R. 74, 27 Cr.L.J. 456; *Ganpati*, 6 N.L.R. 180, 12 Cr.L.J. 60; *Rego*, 34 Cr.L.J. 505 (512), 143 I.C. 17, A.I.R. 1933 Nag. 136, Ind. Rul. 1933 Nag. 153, 1933 Cr.C. 610, 29 N.L.R. 251, following *Gola*, 114 I.C. 273, 24 N.L.R. 158, A.I.R. 1929 Nag. 17, 30 Cr.L.J. 258; *Potram*, 26 Cr.L.J. 740, 155 I.C. 258, A.I.R. 1935 Nag. 125. A statement made by an accused person to the police which is not in the nature of a confession, is not inadmissible in evidence—*Sikander*, 1918 P.R. 36, 20 Cr.L.J. 83; *Jogwa Dhanuk*, 5 Pat. 63, 27 Cr.L.J. 484; *Nga Tha*, 4 Rang. 72, 27 Cr.L.J. 881, 96 I.C. 145, A.I.R. 1926 Rang. 116, 5 Bur.L.J. 30; *Sheobalak*, 29 Cr.L.J. 400 (Nag.). But the Madras and Bombay High Courts are of opinion that the words "any person" include a person who subsequently becomes the accused—*Kalesha*, 62 M.L.J. 71, 33 Cr.L.J. 132 (135); *Syamo*, 55 Mad 903, 62 M.L.J. 742, 33 Cr.L.J. 418 (420) (F.B.); *Issuf Mahomed*, 55 Bom. 435, 32 Cr.L.J. 1077, 133 I.C. 748, 33 Bom.L.R. 305, A.I.R. 1931 Bom. 311, 1931 Cr.C. 567; *Sheikh Kalisha*, A.I.R. 1931 Mad. 779, 1931 M.W.N. 715, 34 M.L.W. 388, 1931 Cr.C. 1035. This is also the view of the Oudh Chief Court—*Kanhaiya Lal v. Emp.*, 38 Cr.L.J. 491 (497), 168 I.C. 58, 9 R.O. 432, 1937 O.L.R. 202, 197 A.Cr.C. 80, 1937 O.W.N. 505, A.I.R. 1937 Oudh 331.

The moment the suspected person comes into the hands of the police-officer his movements are restricted and he is no longer at liberty. When such a condition is reached it is nothing less than being in custody of police. This section does not come into operation to exclude the statements made by him before his formal arrest—*Rego*, 34 Cr.L.J. 505 (512), 143 I.C. 17, A.I.R. 1933 Nag. 136, Ind. Rul. 1933 Nag. 153, 1933 Cr.C. 610, 29 N.L.R. 251.

The Legislature did not intend to modify sec. 27 of the Indian Evidence Act, by anything provided in sec. 162, Cr. P. C.—*Emp. v. Faujdar*, 31 Cr.L.J. 875 (877), 144 I.C. 1021, A.I.R. 1933 All. 440, 1933 Cr.C. 746, 55 All. 463, 1933 A.L.J. 1518; *Muhammad*, 36 Cr.L.J. 697, 155 I.C. 260, A.I.R. 1934 Lah 695, 1934 Cr.C. 1009, 35 P.L.R. 738; *Syama Mahapatra*, 55 Mad 903, 137 I.C. 9, 1932 M.W.N. 305, Ind. Rul. 1932 Mad 338, 33 Cr.L.J. 418, 35 M.L.W. 705, 62 M.L.J. 742, A.I.R. 1932 Mad. 391, 1932 Cr.C. 355 (F.B.); *Thimmappa v. Talu Kunta Thimmappa*, 51 Mad 967, 112 I.C. 682, 28 M.L.W. 314, 58 M.L.J. 351, A.I.R. 1928 Mad. 1068, 29 Cr.L.J. 1098, Ind. Rul. 1929 Mad 64; *Mayadhar Potthal*, 40 Cr.L.J. 625, 181 I.C. 1001, 20 P.L.T. 420; *Gola v. Emp.*, A.I.R. 1929 Nag. 17, 24 N.L.R. 158, 114 I.C. 273, 30 Cr.L.J. 258, 12 A.I.Cr.R. 177 (F.B.). A contrary view was taken by the Rangoon High Court in *Emp. v. Nag Kyaing*, 27 Cr.L.J. 658, 94 I.C. 706, 3 Rang. 656, A.I.R. 1926 Rang. 112, where it was held that this section must be taken as overruling sec. 27 of the Indian Evidence Act.

The evidence of the Police that the accused gave a false name and said that he did not know the place of occurrence, should be excluded under sec. 162, Cr. P. C. The statements are also not admissible under sec. 8 of the Indian Evidence Act as explanatory of the accused's conduct—*Krishna Iyer*, A.I.R. 1935 Mad 479 (482), 1935 M.W.N. 82, 36 Cr.L.J. 1107, 157 I.C. 297, 1935 Cr.C. 742.

It is certainly never intended that an accused person when being examined by the Court for the purpose of explaining anything in evidence against him should be confronted with the statement which he made to the police for the purpose of being discredited on account of any contradiction—*Bhagwan Das*, A.I.R. 1935 All. 717 (719), 1935 A.L.J. 385, 155 I.C. 560, 36 Cr.L.J. 773

Section 162, Cr. P. C., applies to an accused person and a statement made to an Excise officer in the course of an investigation under the Bengal Excise Act (V of 1909, B.C.) comes within the provisions of sec 162, Cr. P. C., and, as such, is inadmissible in evidence—*Jogendra*, 40 C.W.N. 29, 36 Cr.L.J. 1366, 158 I.C. 385, 63 Cal. 419, A.I.R. 1935 Cal. 621, 1935 Cr.C. 1044. See also *Issuf Mahomed*, 32 Cr.L.J. 1077, 133 I.C. 748, 33 Bom.L.R. 305, A.I.R. 1931 Bom. 311, 35 Bom. 435, Ind. Rul. 1931 Bom. 396, 1931 Cr.C. 567. But see *Emp. v. Kangali*, 41 Cal. 601, where it has been laid that the law does not say that all statements made to the police by the accused are inadmissible but it excludes only confession made to them. The general rule is subject to that which admits statements leading to discovery, whether such statements amount to a confession or not. Statements exculpating himself and put forward by way of his defence are also admissible notwithstanding that by other evidence it may be shown that such statements are inconsistent with truth. In fact a useful test as to admissibility of statements made to the police is to ascertain the purpose to which they are put by the prosecution. If the prosecution rely on the statements of the accused to the police as being true then they may, and probably in many cases will, be found to amount to confessions. If, on the other hand, the statements of the accused are relied on not because of their truth but because of their falsity, they are admissible. They are in such cases brought forward to show what the defence of the accused is, and that, as the defence is untrue, this is a circumstance tending to prove the guilt of the accused.

It is submitted that *Kangali's* case was not decided with reference to the provisions of sec. 162, Cr. P. C., on the basis of which decision was arrived at in *Jogendra's* case.

See also *Shewakram Issardas v. Emp.*, 40 Cr.L.J. 661, 182 I.C. 464, A.I.R. 1939 Sind 130 and *Pritam Hariomal v. Emp.*, A.I.R. 1939 Sind 185 (189), 40 Cr.L.J. 882, 184 I.C. 145, 1939 Kar. 449.

Thus the majority of the High Courts have held that sec 162, Cr. P. C., has no application to statement made by a person who at the time it is tendered in evidence is an accused person: the minority have held that there is no such limitation. After giving a full consideration to all the reported decisions their Lordships of the Privy Council have come to the conclusion that the words of sec 162, Cr. P. C., lead to the conclusion that the statement is not admissible even when made by the person ultimately accused. In this connection Lord Atkin observed "It is said that to give sec. 162 of the Code the construction contended for would be to repeal sec 27 of the Evidence Act for a statement giving rise to a discovery could not then be proved. It is obvious that the two sections can, in some circumstances, stand together. Section 162 is confined to statements made to a Police Officer in course of an investigation. Section 25 covers a confession made to a Police Officer before any investigation has begun or otherwise not in the course of an investigation. Section 27 seems to be intended to be a proviso to sec. 26 which includes any statement made by a person whilst in custody of the Police and appears to apply to such statements to whomsoever made e.g., to a fellow prisoner, a doctor or a visitor. Such statements are not covered by sec 162. Whether to give to sec. 162 the plain meaning of the words is to leave the statement still inadmissible even though a discovery of fact is made such as is contemplated by sec. 27, it does not seem necessary to decide. In the present case the declarant was not in the custody of the Police, and no alleged discovery, was made in consequence of his statement. The words of sec. 162 are in their Lordships' view plainly wide enough to exclude any confession made to a Police Officer in course of investigation whether a discovery is made or not. They may, therefore, *pro tanto* repeal the provisions of the section which would otherwise apply. If they do not

presumably, it would be on the ground that sec. 27 of the Evidence Act is a "special law within the meaning of sec. 1 (2) of the Code of Criminal Procedure, and that sec. 162 is not a specific provision to the contrary. Their Lordships express no opinion on this topic for whatever be the right view it is necessary to give to sec. 162 the full meaning indicated. It only remains to add that any difficulties to which either the prosecution or the defence may be exposed by the construction now placed on sec. 162 can in nearly every case be avoided by securing that statements and confessions are recorded under sec. 164. In view of their Lordships' decision that the alleged statement was inadmissible by reason of sec. 162, the appellant's contention that it was inadmissible as a confession under sec. 25 of the Evidence Act becomes unnecessary"—*Pakala Narayana Swami v. Emp.*, 40 Cr.L.J. 361, 180 I.C. 1, 43 C.W.N. 473, A.I.R. 1939 P.C. 47, 1939 M.W.N. 185, 1939 O.W.N. 282, 20 P.L.T. 265, 49 M.L.W. 349, 1939 O.L.R. 134, 1939 A.L.J. 298, 18 Pat. 234, 66 I.A. 66, 1939 P.W.N. 205, 20 P.L.T. 265, 69 C.L.J. 273, 41 P.L.R. 272, 5 B.R. 449, 41 Bom L.R. 428, 11 R.P.C. 166, 1 I.R. 1939 Kar. 123 (P.C.), 1939 A.W.R. (P.C.) 35, 1939 A.Cr.C. 49, (1939) 1 M.L.J. 756 (P.C.) on appeal from *Narayanaswamy v. Emp.*, 17 Pat. 15, 1938 P.W.N. 338, 19 P.L.T. 432. See also *Dinanath v. Ganpat Rai*, A.I.R. 1940 Nag. 186 (189), 1 I.R. 1940 Nag. 232. In the absence of a definite pronouncement of the Judicial Committee to the contrary, it is permissible to admit proof of a statement made by an accused person to an investigating officer in the special circumstances provided for in sec. 27 of the Evidence Act—*Emp. v. Mayadhar Pothal*, 40 Cr.L.J. 625, 181 I.C. 1001, A.I.R. 1939 Pat. 577, 1939 P.W.N. 300, 18 Pat. 450, 20 P.L.T. 420. Section 162, Cr. P. C., does not shut out statements which are admissible under sec. 27, Evidence Act. This settled rule has not been abrogated by the abovementioned decision of the Judicial Committee of the Privy Council—*Subbiah Tevar*, 41 Cr.L.J. 41, 184 I.C. 593, A.I.R. 1939 Mad. 856 (857), 1 I.R. 1939 Mad. 947, 1939 M.Cr.C. 133, 50 M.L.W. 318, (1939) 2 M.L.J. 455, 1939 M.W.N. 1000; *Kapa Moranna*, A.I.R. 1939 Mad. 840, 1939 M.Cr.C. 126, 1939 M.W.N. 877, 50 M.L.W. 423, (1939) 2 M.L.J. 635, 41 Cr.L.J. 573. The terms of this section, as amended by Act XVIII of 1923, do not alter the provisions of sec. 27 of the Evidence Act. The provisions of sec. 27 of the Evidence Act are quite independent of this section and the amendment of this section made in 1923 was not intended to abrogate or impair the effect of sec. 27 of the Evidence Act—*Motilal v. Emp.*, 41 Cr.L.J. 158 (161), 185 I.C. 310, A.I.R. 1940 Nag. 66 (68), 1939 N.L.J. 585, following *Gola v. Emp.*, 21 N.L.R. 158, 114 I.C. 273, A.I.R. 1929 Nag. 17, 30 Cr.L.J. 258, Ind. Rul. 1929 Nag. 49 (F.B.). Considering the rulings quoted above the majority of the Full Bench of the Lahore High Court have gone to the length of holding that sec. 27, Evidence Act, is *pro tanto* repealed by sec. 162, Cr. P. C., and evidence of information, whether it amounts to a confession or not, which relates to the fact discovered in consequence of such information must not now be considered admissible in evidence—*Hakam Khuda Yar v. Emp.*, A.I.R. 1940 Lah. 129 (133), 41 Cr.L.J. 591, 188 I.C. 498 (F.B.). This is also the view of the Full Bench of the Allahabad High Court in *Baldeo v. Emp.*, A.I.R. 1940 All. 263, 1940 A.L.J. 241, 41 Cr.L.J. 627, 188 I.C. 562, where Collister, J., observes "It seems to me that if (as I have attempted to do) we carefully examine the language of sec. 162, Cr. P. C., if we consider the express reference to sec. 145 and sec. 32 (1), Evidence Act, and the analogy of sec. 157 of that Act, to whose provisions there is no reference in sec. 162, Cr. P. C., and if we attach due significance to the omission of the Legislature to re-introduce in the present Act the saving proviso in respect to sec. 27, Evidence Act, the logically inescapable conclusion is that sec. 162, Cr. P. C., contains provisions plainly and directly, and therefore specifically, affecting sec. 27, Evidence Act, *quoad* statements made under that section by an accused person to a police-officer in the course of an investigation. In other words, there is a "specific provision to the contrary" within the meaning of sec. 1 (2), Cr. P. C." The effect of this Full Bench decision is to overrule the case of *Faujdar v. Emp.*, A.I.R. 1933 All. 440, 1933 Cr.C. 746, 144 I.C. 1021, 55 All. 463, 1933 A.L.J. 1518, where a contrary view was taken.

A complaint made by the accused at a police station against the complainant that he stabbed him in self-defence is not inadmissible against the accused on a charge to attempt to murder the complainant either because it is a statement under sec. 162, Cr P C., or because it is a confession made to a Police Officer—*Guruswami Tevan*, 40 Cr.L.J. 922, 184 I.C. 336, 12 R.M. 435, 1939 M.W.N. 513, A.I.R. 1939 Mad. 780.

The better and truer test of the admissibility of the statements made by the accused to the Police is whether the statement is incriminating in itself or exculpatory. If the statement is incriminating in itself, an accused will not desire to put it in evidence, if it is exculpatory in itself, but may by relation to the other evidence be made an incriminating statement, then there is much to be said for the argument that it is admissible in evidence, because the accused's use of that statement as an exculpatory statement may well be permitted to prevail to his advantage over the use by the prosecution of that statement as an incriminating statement—*Pritam Hariomal v. Emp.*, 40 Cr.L.J. 882 (886), 184 I.C. 145, I.L.R. 1939 Kar. 449, 12 R.S. 90, A.I.R. 1939 Sind 185. This decision was arrived at before the decision of the Privy Council in *Pakala Narayana Swami v. Emp.*, supra and does not seem to be good law.

Where the Police arrested the accused, took them to the house of the headman and left them there to make a statement to the headman which he recorded in writing and the headman was allowed to give oral evidence of this statement which was also placed on the record though not marked as an exhibit, held that the practice was a discreditable and deplorable one—*Nga Ba Kyaing*, A.I.R. 1936 Rang 131 (133), 37 Cr.L.J. 531, 162 I.C. 6, 1936 Cr.C. 219.

Where the Judge placed before the jury the statements of accused contained in police papers examined by him, for the purpose of corroboration or otherwise of the retracted confessional statements of accused used as evidence in the case, held that the reference to the statements to the police as mentioned by the Judge in his charge to the jury, was in direct contravention of the provisions contained in sec. 162, Cr. P C., and such reference was not permissible under the law—*Kashim Ali v. Emp.*, A.I.R. 1934 Cal 651 (653), 36 Cr.L.J. 70, 152, I.C. 234, 1934 Cr.C. 933, 38 C.W.N. 586.

Statement of approver :—This section covers a statement made by an approver to the police before he was tendered pardon. But even if it does not, such a statement can be used to corroborate or contradict the approver as a previous statement of a witness under the ordinary provisions of the Evidence Act—*Hazara*, 9 Lah. 389, 29 Cr.L.J. 348 (349). Where an accused person makes a statement to the police during investigation and he is about to give evidence in favour of the prosecution under sec. 337, against the other accused, the latter are entitled, under the proviso, to copies of that statement—*Manmohan*, 9 Pat 577, 11 P.L.T. 754, 31 Cr.L.J. 1123 (1125), A.I.R. 1930 Pat 510.

502. Use of statement :—See the first proviso. Under sec. 162, as amended by the Amendment Act XVIII of 1923, statements made by any person to Police-officer in the course of an investigation under Ch. XIV shall not be used for any purpose except to contradict a witness at the request of the accused in the manner provided in the first proviso of the section—*Gahur Howladar*, 30 C.W.N. 503, 27 Cr.L.J. 641.

Under the old section the police-officer who recorded the statement could use it to refresh his memory—*Mannu*, 19 All. 390; *Zakir Husain*, 21 All. 159; *Sitaram*, 11 Bom. 657; *Narayan Raghunath*, 32 Bom. 111 (119) (F.B.), *Jijibhai*, 22 Bom. 596; *Roghuni*, 9 Cal. 455. (Contra—*Dadan Gazi*, 33 Cal. 1023). Under the present law, such use is not permitted.

A statement made by a witness to the police can be used only by the accused, and that also only to contradict the witness; it cannot be used by the prosecution to corroborate the statements of its own witnesses before the Court—*Jijibhai*, 22 Bom. 596; *Kumaramuthu*, 25 M.L.T. 379, 20 Cr.L.J. 354; *Jhari Gope*, 8 Pat. 279, 118 I.C. 130, 10 P.L.T. 460, A.I.R. 1929 Pat. 268, 1929 Cr.C. 21, Ind. Rul. 1929 Pat. 482, 30

Cr.L.J. 858 (860); *Bhulai*, 13 O.C. 7, 11 Cr.L.J. 117; *Jasimuddin*, 35 C.W.N. 164 (168), 32 Cr.L.J. 1245; *Rakha*, 6 Lah 171, 26 P.L.R. 304, 27 Cr.L.J. 438 (439); *Diwan*, 33 P.L.R. 208, 33 Cr.L.J. 637 (639); *Gahur*, 27 Cr.L.J. 641, 94 I.C. 593, 30 C.W.N. 503, A.I.R. 1926 Cal. 793; *Mohan Banjari*, 35 Cr.L.J. 577, 147 I.C. 1122, A.I.R. 1933 Nag. 384, 1933 Cr.C. 1977, 30 N.L.R. 55; *Narayana*, A.I.R. 1933 Mad. 233 (239), 1932 M.W.N. 801, 64 M.L.J. 88, 37 M.L.W. 220, 1933 Cr.C. 389, 56 Mad. 231, 143 I.C. 46, 34 Cr.L.J. 481; *Najibuddin*, A.I.R. 1933 Pat. 589 (593), 14 P.L.T. 543, 1933 Cr.C. 1350, 147 I.C. 142; to show that it was not a wey story in the mouth of the witnesses—*Girdhari Telh*, 41 Cr.L.J. 587 (590). Section 157 of the Evidence Act lays down that in order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact is admissible in evidence; but this general rule is controlled by the special provision of sec. 162, Cr. P. Code—*Rakha*, supra.

The prosecution cannot put in evidence the statements of a *prosecution witness* before the police for the purpose of *contradicting* his evidence in Court which is unfavourable to the prosecution—*Gahur*, supra. Such a statement cannot be used as substantive evidence forming the basis of a conviction—*Ausan Singh*, 33 Cr.L.J. 566, 38 I.C. 159, 9 O.W.N. 437, Ind. Rul. 1932 Oudh 291, 1932 Cr.C. 526, A.I.R. 1932 Oudh 247. But where the Public Prosecutor, in cross-examining certain prosecution witnesses who were declared hostile, asked them questions in the form: "Did you not say to the Police such and such a thing?" "Did you not make such and such a statement to the Police or something like that?" and the answer was always in the negative, *held* that the position created does not constitute an actual infringement of this section, as it is designed to keep out evidence which is not of a free and of a fair nature, but may have been induced by some form of police duress and that it is stretching the principle a very long way to say that the trial and conviction of certain persons must be vitiated because an unsuccessful attempt made by a Government Prosecutor anxious to put his whole case before the Court, so to speak, fringes on a technical breach of this rule—*Delbar Mondal*, 40 C.W.N. 733, 165 I.C. 31, 37 Cr.L.J. 1117, 9 R.C. 362. Where the Judge admitted into evidence two statements made by the complainant to the police but, when dealing with the second statement, he pointed out that it could only be used for the contradiction of the prosecution witness and for no other purpose and he himself acted in strict accordance with that direction to the jury and made no reference to it in elucidating the prosecution case, it cannot be said that the so-called admission of the statement amounted to the reception of inadmissible evidence—*Sk. Idris v. Emp.*, 43 C.W.N. 782.

No oral statement made by any person to a police officer in the course of an investigation under this Chapter and no record of any such oral statement can be used for the purpose of *contradicting a defence witness*—*Ganga*, A.I.R. 1930 Oudh 60, 4 Luck. 726, 6 O.W.N. 1056, 1930 Cr.C. 156, 31 Cr.L.J. 689, 124 I.C. 444. See also *Bhagirathi*, 30 C.W.N. 142. The proviso deals only with the case of witnesses called *for the prosecution*, whose statements have been taken down in writing as aforesaid. And it allows the accused, upon his request, to have access to a copy of the recorded statement, and thereupon to use it for one purpose only, *viz.*, to break down the evidence of the prosecution witnesses already standing against him. On the face of it, the proviso does not cover the case of a witness *for the defence* whose statements may have been recorded by a policeman, nor allows the prosecution to impeach the credit of such a witness by examining him upon any statement he may have made to the police—*Narayan*, 32 Bom.L.R. 111; *Vithu*, 26 Bom.L.R. 965, 26 Cr.L.J. 223 (224), 83 I.C. 1007, A.I.R. 1924 Bom. 510. Where, therefore, after a defence witness, who proved a main plank in the defence case, was examined, the Judge recalled a Police Officer who was a prosecution witness and allowed him to give evidence after consulting his case diary to the effect that no such statement had been made to him during investigation by the defence witness, *held* that no such use of a statement made to a Police Officer during investigation was warranted by the provisions of sec. 162, Cr. P.

Code. As the evidence was used to demolish the most important portion of the defence case, it must also be held that its admission prejudiced the accused to such an extent that the verdict of the jury cannot be upheld—*Ebrahim Mondal v. Emp.*, 40 Cr.L.J. 665, 182, I.C. 405, A.I.R. 1939 Cal. 330, 43 C.W.N. 784, 12 R.C. 61. Such statement cannot be used for corroborating the defence witness—*Nyibuddin*, A.I.R. 1933 Pat. 589 (593), 14 P.L.T. 543.

A witness summoned by the Court at the suggestion of the defence cannot be contradicted with his statements before the police; in as much as the proviso to this section is inapplicable to such a case—*Guruditta*, 28 Cr.L.J. 828, 104 I.C. 444, A.I.R. 1927 Lah. 713. Whether the statement is signed or not, it cannot be used by any party to contradict any one but a prosecution witness. Therefore neither the prosecution nor the defence can contradict a Court witness with reference to his statement before the police—*Bhupal Chandra v. Emp.*, 44 C.W.N. 451 (453).

This section does not prevent the prosecution, after a witness has made a statement, from asking him simply whether he made that statement to the police, or when a witness has made a statement in his deposition, from asking the Sub-Inspector whether in fact the witness had made that statement to him. In doing this, there is no use of the statement recorded by the police during their investigation; the witnesses or the Sub-Inspector are merely asked as to a certain fact—*Gulji Mian*, 4 Pat. 204, 27 Cr.L.J. 524 (526), 93 I.C. 988, A.I.R. 1925 Pat. 450. With due deference it is submitted that this view of law is of doubtful authority. There is, however, nothing in this section to prevent the question being put whether the witness made any statement to the police or he was questioned by the police—*Mohan Banjari*, supra. But the Bombay High Court is of opinion that if the Sub-Inspector is asked as to whether an accused or a witness had said so and so to him during investigation, it amounts to a use of the statement. If the Sub-Inspector answers, 'yes' he is clearly using the statement; if he answers 'no' he is still using the statement to show that it omitted something material—*Issuf Mahomed*, 55 Bom. 435, 33 Bom.L.R. 305, 32 Cr.L.J. 1077 (1079). This seems to be the better view.

Under this section statements made to a police-officer are prohibited from being used for any purpose save as provided in the section; and there is no provision for allowing the Judge to use such statements for confronting the witnesses with them. To use the statements for this purpose is to contravene the provisions of this section. The power conferred on the Judge under sec. 165, Evidence Act, cannot be exercised for the purpose of introducing evidence in contravention of the law. The last para of sec. 2 of the Evidence Act leaves the provisions of Cr.P.C., unaffected—*Keramat*, 27 Cr.L.J. 277, 92 I.C. 453, 42 C.L.J. 528, A.I.R. 1926 Cal. 320; *Rahjaddi*, 35 C.W.N. 317, 58 Cal. 1009, 132 I.C. 159, 32 Cr.L.J. 841, 1931 Cr.C. 253, A.I.R. 1931 Cal. 189.

It is illegal for a Magistrate to use as evidence against the accused the statements made by prosecution witnesses before the police by comparing them with their depositions, and, as a result of that comparison, to convict him—*Laxman*, 9 Bom.L.R. 895, 6 Cr.L.J. 224; *Narayan*, 32 Bom. 111 (118) (F.B.); *Ausan*, 9 O.W.N. 437, 33 Cr.L.J. 566 (567); *Bahawala*, 1886 P.R. 17. See also *Raghunathmal v. Patiram*, A.I.R. 1937 Nag. 394, 172 I.C. 177. Where in the course of a trial, the Magistrate allowed some of the accused to use statements made before the police by the prosecution witnesses, for contradicting those witnesses, without bringing those statements on the record, and the Magistrate referred to those statements to see if the names of the accused were mentioned therein, and convicted those of the accused whose names were mentioned by two or more witnesses before the police, held that the procedure was irregular; but the irregularity was curable by sec. 537, if there had been no failure of justice—*Nurmahomed*, 54 Bom. 934, 32 Bom.L.R. 1279, 32 Cr.L.J. 239 (240). See also *Deo Lal*, 34 Cr.L.J. 918, 145 I.C. 426, A.I.R. 1933 Pat. 440, 14 P.L.T. 396, 1933 Cr.C. 974.

A witness was examined in the Court of the committing Magistrate and was not cross-examined with reference to his statements before the police. He died and his

Cr.L.J. 858 (860); *Bhulai*, 13 O.C. 7, 11 Cr.L.J. 117; *Jasimuddin*, 35 C.W.N. 164 (168), 32 Cr.L.J. 1245; *Rakha*, 6 Lah. 171, 26 P.L.R. 304, 27 Cr.L.J. 438 (439); *Duvan*, 33 P.L.R. 208, 33 Cr.L.J. 637 (639); *Gahur*, 27 Cr.L.J. 641, 91 I.C. 593, 30 C.W.N. 503, A.I.R. 1926 Cal. 793; *Mohan Banjari*, 35 Cr.L.J. 577, 147 I.C. 1122, A.I.R. 1933 Nag. 384, 1933 Cr.C. 1977, 30 N.L.R. 55; *Narayana*, A.I.R. 1933 Mad 233 (239), 1932 M.W.N. 801, 64 M.L.J. 88, 37 M.L.W. 220, 1933 Cr.C. 389, 56 Mad 231, 143 I.C. 46, 34 Cr.L.J. 481; *Najibuddin*, A.I.R. 1933 Pat. 589 (593), 14 P.L.T. 543, 1933 Cr.C. 1350, 147 I.C. 142; to show that it was not a wey story in the mouth of the witnesses—*Girdhari Teh*, 41 Cr.L.J. 587 (590). Section 157 of the Evidence Act lays down that in order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact is admissible in evidence; but this general rule is controlled by the special provision of sec. 162, Cr. P. Code—*Rakha*, supra.

The prosecution cannot put in evidence the statements of a *prosecution witness* before the police for the purpose of *contradicting* his evidence in Court which is unfavourable to the prosecution—*Gahur*, supra. Such a statement cannot be used as substantive evidence forming the basis of a conviction—*Ausan Singh*, 33 Cr.L.J. 566, 38 I.C. 159, 9 O.W.N. 437, Ind. Rul. 1932 Oudh 291, 1932 Cr.C. 526, A.I.R. 1932 Oudh 247. But where the Public Prosecutor, in cross-examining certain prosecution witnesses who were declared hostile, asked them questions in the form: "Did you not say to the Police such and such a thing?" "Did you not make such and such a statement to the Police or something like that?" and the answer was always in the negative, *held* that the position created does not constitute an actual infringement of this section, as it is designed to keep out evidence which is not of a free and of a fair nature, but may have been induced by some form of police duress and that it is stretching the principle a very long way to say that the trial and conviction of certain persons must be vitiated because an unsuccessful attempt made by a Government Prosecutor anxious to put his whole case before the Court, so to speak, fringes on a technical breach of this rule—*Delbar Mondal*, 40 C.W.N. 733, 165 I.C. 31, 37 Cr.L.J. 1117, 9 R.C. 362. Where the Judge admitted into evidence two statements made by the complainant to the police but, when dealing with the second statement, he pointed out that it could only be used for the contradiction of the prosecution witness and for no other purpose and he himself acted in strict accordance with that direction to the jury and made no reference to it in elucidating the prosecution case, it cannot be said that the so-called admission of the statement amounted to the reception of inadmissible evidence—*Sk. Idris v. Emp.*, 43 C.W.N. 782.

No oral statement made by any person to a police officer in the course of an investigation under this Chapter and no record of any such oral statement can be used for the purpose of *contradicting a defence witness*—*Ganga*, A.I.R. 1930 Oudh 60, 4 Luck 726, 6 O.W.N. 1056, 1930 Cr.C. 156, 31 Cr.L.J. 689, 124 I.C. 444. See also *Bhagirathi*, 30 C.W.N. 142. The proviso deals only with the case of witnesses called for the prosecution, whose statements have been taken down in writing as aforesaid. And it allows the accused, upon his request, to have access to a copy of the recorded statement, and thereupon to use it for one purpose only, *viz.*, to break down the evidence of the prosecution witnesses already standing against him. On the face of it, the proviso does not cover the case of a witness for the defence whose statements may have been recorded by a policeman, nor allows the prosecution to impeach the credit of such a witness by examining him upon any statement he may have made to the police—*Narayan*, 32 Bom.L.R. 111; *Vithu*, 26 Bom.L.R. 965, 26 Cr.L.J. 223 (224), 83 I.C. 1007, A.I.R. 1924 Bom 510. Where, therefore, after a defence witness, who proved a main plank in the defence case, was examined, the Judge recalled a Police Officer who was a prosecution witness and allowed him to give evidence after consulting his case diary to the effect that no such statement had been made to him during investigation by the defence witness, *held* that no such use of a statement made to a Police Officer during investigation was warranted by the provisions of sec. 162, Cr. P.

Code. As the evidence was used to demolish the most important portion of the defence case, it must also be held that its admission prejudiced the accused to such an extent that the verdict of the jury cannot be upheld—*Ebrahim Mondal v. Emp.*, 40 Cr.L.J. 665, 182, I.C. 405, A.I.R. 1939 Cal. 330, 43 C.W.N. 781, 12 R.C. 61. Such statement cannot be used for corroborating the defence witness—*Nijbuddin*, A.I.R. 1933 Pat. 589 (593), 14 P.L.T. 543.

A witness summoned by the Court at the suggestion of the defence cannot be contradicted with his statements before the police; in as much as the proviso to this section is inapplicable to such a case—*Guruditta*, 28 Cr.L.J. 828, 104 I.C. 444, A.I.R. 1927 Lah. 713. Whether the statement is signed or not, it cannot be used by any party to contradict any one but a prosecution witness. Therefore neither the prosecution nor the defence can contradict a Court witness with reference to his statement before the police—*Bhupal Chandra v. Emp.*, 44 C.W.N. 451 (453).

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Under this section statements made to a police-officer are prohibited from being used for any purpose save as provided in the section; and there is no provision for allowing the Judge to use such statements for confronting the witnesses with them. To use the statements for this purpose is to contravene the provisions of this section. The power conferred on the Judge under sec. 165, Evidence Act, cannot be exercised for the purpose of introducing evidence in contravention of the law. The last para of sec. 2 of the Evidence Act leaves the provisions of Cr. P. C., unaffected—*Keramati*, 27 Cr.L.J. 277, 92 I.C. 453, 42 C.L.J. 528, A.I.R. 1926 Cal. 320; *Rahjaddi*, 35 C.W.N. 317, 58 Cal. 1009, 132 I.C. 159, 32 Cr.L.J. 841, 1931 Cr.C. 253, A.I.R. 1931 Cal. 189.

It is illegal for a Magistrate to use as evidence against the accused the statements made by prosecution witnesses before the police by comparing them with their depositions, and, as a result of that comparison, to convict him—*Laxman*, 9 Bom.L.R. 895, 6 Cr.L.J. 224; *Narayan*, 32 Bom. 111 (118) (F.B.); *Ausan*, 9 O.W.N. 437, 33 Cr.L.J. 566 (567); *Bahawala*, 1886 P.R. 17. See also *Raghubhmal v. Patiram*, A.I.R. 1937 Nag. 394, 172 I.C. 177. Where in the course of a trial, the Magistrate allowed some of the accused to use statements made before the police by the prosecution witnesses, for contradicting those witnesses, without bringing those statements on the record, and the Magistrate referred to those statements to see if the names of the accused were mentioned therein, and convicted those of the accused whose names were mentioned by two or more witnesses before the police, held that the procedure was irregular; but the irregularity was curable by sec. 537, if there had been no failure of justice—*Nurmahomed*, 54 Bom. 934, 32 Bom.L.R. 1279, 32 Cr.L.J. 239 (240). See also *Deo Lal*, 34 Cr.L.J. 918, 145 I.C. 426, A.I.R. 1933 Pat. 440, 14 P.L.T. 396, 1933 Cr.C. 974.

A witness was examined in the Court of the committing Magistrate and was not cross-examined with reference to his statements before the police. He died and his

evidence was put in before the Court of Sessions; defence prayed for cross-examining the Sub-Inspector in the Court of Sessions with reference to the statements made by that witness before him. The prayer was rightly disallowed as sec. 162 did not apply to such a case—*Azimuddy*, 31 C.W.N. 410, 54 Cal. 237, 38 Cr.L.J. 99, 99 I.C. 227, 44 C.L.J. 253, A.I.R. 1927 Cal. 17. A statement made to the police is not admissible in evidence, although the person who made the statement is dead at the time of the trial—*Sunder Lal v. Emp.*, 40 P.L.R. 421.

According to the recently amended provisions of sec. 162, statements of witnesses recorded by the investigating officer can only be used to assist the accused in particular by showing that a witness who in Court deposes to certain facts has at an earlier stage made statements to the police which are contradictory to the testimony which he gives in Court. They cannot be used in cross-examining the witnesses at large for the purpose of showing that the statements did not corroborate or assist the story as put forward in the first information report—*Badri Chowdhuri*, 6 P.L.T. 620, 27 Cr.L.J. 362 (365), 92 I.C. 874, A.I.R. 1926 Pat. 20.

The statement of a prosecution witness that he mentioned the fact of his recognition of the accused to the investigating officer in the course of investigation is undoubtedly a statement which this section has the effect of excluding—*Nitai Koley v. Emp.*, (1939) 1 Cal. 337.

502A. 'Police Officer':—An excise officer cannot be regarded as a Police officer for the purposes of sec. 162, Cr. P. C. A statement made to him can, therefore, be used for the purpose of contradicting even a defence witness under the provisions of sec. 155 of the Indian Evidence Act—*Keratali*, 35 Cr.L.J. 1178, 150 I.C. 980, A.I.R. 1934 Cal. 616. Without considering the view adopted in this case it has been laid down by the same High Court that it was intended that in making an investigation under the Bengal Excise Act (V of 1909 B.C.), the Excise Sub-Inspector should have the status of a police-officer and, therefore, a statement made to him in the course of an investigation would also be inadmissible under the provisions of sec. 162—*Jogendra*, 40 C.W.N. 29, 36 Cr.L.J. 1366, 158 I.C. 385, 63 Cal. 419, A.I.R. 1935 Cal. 621, 1935 Cr.C. 1044. But the Bengal Excise Act does not give a Custom Officer any powers of investigation and, therefore, a statement made to him does not fall within the mischief of sec. 162 Cr. P. C., and is admissible in evidence—*Ghulam Dastgir Khan v. Emp.*, A.I.R. 1939 Cal. 623, 12 R.C. 244, 41 Cr.L.J. 40, 184 I.C. 581.

502B. 'In the course of an investigation under this Chapter':—The Police when investigating a case under the *preventive* sections of the Cr. P. C., are not acting under this section. Moreover the inquiry under Chap. VIII of the Cr. P. C., is not an enquiry into an offence, and, therefore, this section cannot be used to shut out statements given to the Police by persons who are afterwards called as witnesses—*Hari Singh*, 34 Cr.L.J. 951, 145 I.C. 379, 1933 M.W.N. 720, 38 M.L.W. 393, A.I.R. 1933 Mad. 688, 65 M.L.J. 478, 1933 Cr.C. 1244, 56 Mad. 987. The investigation under this section refers to the commission of either a cognizable or a non-cognizable offence which was under investigation at a time when such statement was made. The investigation made with respect to proceedings under Chap. VIII does not fall within the investigation relating to offences under Chap. XIV, Cr. P. C., and, therefore, this section does not apply to the statement taken in the investigation, if any, made under sec. 51 (1) (b), Bombay District Police Act (Bom. 4 of 1890). An accused can have the benefit of the proviso only if the magisterial inquiry is to establish his guilt or innocence of the offence which was the subject of the investigation and not when the offence investigated is not the *factum probandum* at the trial but only evidence to establish it—*Barjari Framji Bharucha*, 33 Cr.L.J. 797, 139 I.C. 628, 34 Bom.L.R. 258, A.I.R. 1932 Bom. 195, 1932 Cr.C. 200, Ind. Rul. 1932 Bom. 521.

A police investigation begins with the proceedings taken under sec. 154, Cr. P. C., that is the recording of the complaint, and the power to record such a complaint rests in an officer in charge of a police station. Therefore the statements made by the

complainant to constables before lodging information under sec. 154 do not come within the prohibition of this section—*Mazarali*, 34 Cr.L.J. 870 (873), 144 I.C. 895, 35 Bom.L.R. 474, A.I.R. 1933 Bom. 266, 1933 Cr.C. 678, 57 Bom. 400. See also *Moni Mohan*, 35 C.W.N. 623 (631), 58 Cal. 1312, 33 Cr.L.J. 138, A.I.R. 1931 Cal. 745, 1931 Cr.C. 1009. In a case which rose up in the mind of a Police Officer from very shadowy beginnings, the investigation must be held to start from the moment when he formed the opinion that these were grounds for investigating a crime—*Sit Ro Saw v. Emp.*, 37 Cr.L.J. 1137 (1138), 165 I.C. 319, A.I.R. 1936 Rang. 455, 1936 Cr.C. 851, 9 R.Rang. 201. But where a girl was taken away from her husband's place to a different district where a constable took her to the thanah and made a report after which her statement was taken down by the Sub-Inspector, *Held* that the girl's statement was inadmissible in evidence; in as much as the Sub-Inspector could have investigated the case there and it could hardly be denied that in recording the statement of the girl and the statement of the constable the Sub-Inspector was proceeding to collect evidence—*Kharaiti*, 34 Cr.L.J. 1215, 146 I.C. 199, 1933 A.L.J. 923, A.I.R. 1933 All. 665, 1933 Cr.L.J. 1145, 20 A.I.Cr.R. 439.

Statements made to a C I D. officer must be deemed to be statements made in the course of investigations by him—*Koganti Appayya*, 40 Cr.L.J. 108 (109), 178 I.C. 616, 1938 M.W.N. 825, 48 M.L.W. 322, A.I.R. 1938 Mad. 983.

Statements of witnesses made in a departmental inquiry, which was not held under Chap. XIV, Cr. P. C., do not come within the purview of sec. 162 or 172, Cr. P. C. They are also not privileged under sections 123, 124 or 125 of the Indian Evidence Act. The accused are entitled to cross-examine the witnesses under sec. 153 of the Indian Evidence Act on the statements made by them at the departmental enquiry. The Court can cause production of these statements under sec. 94, Cr. P. C., at any stage of the proceedings—*Muhammad Rahim*, 36 Cr.L.J. 581, 154 I.C. 762, A.I.R. 1935 Sind. 13, 1935 Cr.C. 124 (F.B.), following *Harbans*, 16 C.W.N. 431, 13 Cr.L.J. 445, 15 I.C. 101. When the defence called for these statements and they were thereupon produced and inspected and were mostly used for cross-examining witnesses, the prosecution can insist on their admission as evidence in the case under sec. 163 of the Indian Evidence Act—*Government of Bengal v. Santiram Mondal*, 32 Cr.L.J. 10, 127 I.C. 657, A.I.R. 1930 Cal. 370, 58 Cal. 96, 1930 Cr.C. 634, Ind. Rul. 1931 Cal. 865. See also *Jehangir*, 28 Cr.L.J. 1012, 106, I.C. 100, 29 Bom.L.R. 996, A.I.R. 1927 Bom. 501.

See also Notes 188, 191, 480, 500A and 543.

502C. 'Whether in a police diary or otherwise':—What is intended to be recorded under sec. 172, Cr. P. C., is what the Sub-Inspector did—the places where he went, the people he visited, what he saw, etc. No statement can be said to be recorded under that section and so would be a privileged one. It is quite clear now that there is no distinction between a statement recorded under sec. 162, Cr. P. C., and a statement recorded under sec. 172, Cr. P. C., if a police-officer purports to record a statement under the latter section. The object of amending the section is that the police should no longer claim any privilege in respect of any statement on the ground that it is a statement recorded under sec. 172. It is quite immaterial whether the statement is labelled as recorded under sec. 172, Cr. P. C. It is also immaterial whether the statement as recorded is the actual record of the words used by the witness. It is sufficient even if the statement is recorded in the form of a memorandum of what the witness had said to the police officer; it is available for the purpose of contradicting the witness. It is not necessary in order that an accused person may be allowed under sec. 162 to contradict the witness that the statement must contain the very words used by the witness—*Mafizaddi*, 28 Cr.L.J. 805, 104 I.C. 245, 31 C.W.N. 940, 45 C.L.J. 561, A.I.R. 1927 Cal. 644. It is immaterial whether the statements are in *extenso* or are in the form of compressed memoranda and whether they are recorded in the third person or in the first person, provided they are such statements as can be utilized to contradict a witness with his statement in Court in the manner provided by sec. 145, Evidence Act. It is just as possible to contradict a witness on a memorandum as it is on a full

statement and it is generally immaterial for the purpose of contradiction whether or not the statement is in the actual words of the witness. It would be absurd to hold that a police officer by the simple expedient of inserting in his diary a statement of a witness in an oblique or abridged form could protect such statement from being used in the way the law allows—*Hari*, A.I.R. 1935 Sind 145 (175). See also *Jadunandan*, 2 Luck. 605, 28 Cr.L.J. 802 (801), 104 I.C. 242, 4 O.W.N. 699, A.I.R. 1927 Oudh 321; *Bansidhar*, 53 All. 458, 32 Cr.L.J. 562 (563); *Hamid Khan*, 28 N.L.R. 291, 34 Cr.L.J. 127 (129). It matters not whether the statement was made orally or was reduced to writing or whether *in extenso* or in an abridged form it is set out in a Special Diary under sec. 172, or in any other document, or whether it is proposed to adduce oral evidence of the contents of the statement—*Nga Lun Thuang*, 35 Cr.L.J. 1487 (1489), 158 I.C. 784, A.I.R. 1935 Rang. 370, 13 Rang. 570, 1935 Cr.C. 1088 (F.B.). See also Notes 497 and 501.

As to the value of a compressed memoranda see the observations of Agarwala, J. quoted below in Note 503 (d).

502D. 'In respect of any offence under investigation at the time':—

In the course of an investigation of a dacoity case a person made a statement to the Police which was taken down in writing. He was subsequently murdered and the Police officer was also murdered a few days later. In the trial for the murder of the person who made the statement, the statement was put in by the prosecution. *Held* that it was obvious that the inquiry or trial, in which it was sought to use those records as evidence, was not under investigation at the time when those statements were made, that sec. 162, Cr. P. C., had no application to the case and that statements were admissible under sec. 32 (2) of the Indian Evidence Act—*Abdul Aziz*, 34 Cr.L.J. 109, 140 I.C. 578, A.I.R. 1932 All. 442, 1932 A.L.J. 301, 1932 Cr.C. 562, Ind. Rul. 1933 All. 16. But when the statement has not been made in the course of investigating the offence in respect of which the trial is held, neither the main part of sec. 162 nor the proviso has any application. Such a statement is as good evidence as a statement made to any other person—*Kovuru Subbajja v. Peta Veeraya*, 34 Cr.L.J. 137, 141 I.C. 276, 1932 M.W.N. 1074, 36 M.L.W. 759, Ind. Rul. 1933 Mad. 102, A.I.R. 1933 Mad. 65, 56 Mad. 154, 1933 Cr.C. 81, 63 M.L.J. 794. The prohibition in sec. 162, Cr. P. C., against the use of statements made to the Police relates only to the use of them at an enquiry or trial in respect of any offence under investigation at the time when such statement was used. That section does not forbid an accused person to contradict a witness by a previous statement made to the Police in an investigation not made in respect of the offence for which the accused is being tried. So far as statements not reduced to writing are concerned there is no reason why statements made to a Police Officer in the course of an investigation should not, if relevant under the Evidence Act, be used at a trial for an offence not under investigation when they were made, provided that they are not held privileged by the provisions of sec. 123 or 124 of the Evidence Act. But the record of a statement heard by a Police Officer in exercise of the power conferred by sec. 161, Cr. P. C., and recorded either in the diary or separately in the course of investigation proceedings, is an unpublished official record relating to an affair of state, evidence derived from which cannot be produced in a case to which the first proviso to sec. 162, Cr. P. C., is not applicable except with the permission of the officer at the head of the Police Department. If the accused has succeeded in having the original record of the statement produced, notwithstanding objections raised under secs 123, 124 or 125 of the Evidence Act, and the Police Officer has referred to it to refresh his memory under sec. 159, Evidence Act, the provision of sec. 145, Evidence Act will apply. It is not a public document, a copy of which must be given on demand under the provisions of the Indian Evidence Act—*Baij Nath v. Mohammad Din*, A.I.R. 1936 Lah. 359, 17 Lah. 472, 1936 Cr.C. 300, 38 P.L.R. 1040, 166 I.C. 501.

This section lays down that a statement made by a witness to the Police in the course of an investigation into an offence cannot be used against him at an inquiry or trial of the same offence; but there is nothing in this section to prevent the statement being

used against him in a trial of a different offence for which he himself is prosecuted (e.g., offences under secs 192, 193, 211, I P. C.), which offence was not under investigation at the time when the statement was made—*Jogesh v. Surendra*, 35 C.W.N. 838 (840), 1931 Cr.C. 837, 33 Cr.L.J. 60, 134 I.C. 1265, A.I.R. 1931 Cal. 637, Ind. Rul. 1932 Cal. 49. The use of the statement of the accused, in a complaint subsequently made by him under sec. 211, I. P. C., as of that made by any other person who made a statement during the investigation, is governed by the provisions of the Evidence Act. Sec. 162, Cr. P. C., has no application in that case at all—*Shivlal v. Emp.*, 39 Cr.L.J. 68, 20 N.L.J. 280, 172 I.C. 156, 10 R.N. 169, A.I.R. 1938 Naf. 110. But, in a case in which the police investigated a case of theft and lodged a complaint under sec. 182, I. P. C., against the informant, the Patna High Court held that he was entitled to get copies of statements of the prosecution witnesses recorded during the aforesaid investigation, under the provisions of sec. 162, Cr. P. C.—*Dinanath Sahay v. Emp.*, A.I.R. 1939 Pat. 174, 40 Cr.L.J. 509, 17 Pat. 622, 20 P.L.T. 70, 1939 P.W.N. 136, 180 I.C. 845, 5 B.R. 501, 11 R.P. 515. This section does not prohibit the use of statements, made by any person to a police-officer in the course of an investigation under Chap. XIV, in proceedings under sec. 476 of the Code in cases where the alleged offence which is under consideration in the proceedings under sec. 476 was not under investigation at the time when the statements were made—*U. Htin Gyaw*, 28 Cr.L.J. 433 (437), 5 Rang. 26, 101 I.C. 465, 6 Bur.L.J. 32, A.I.R. 1927 Rang. 113.

Where the police refused to challan the accused after investigation and the accused was summoned on a complaint, the provisions of sec. 162, Cr. P. C., apply and the accused can get copies of the statements of the prosecution witnesses to contradict them—*Hari Gore*, 28 Cr.L.J. 14, 99 I.C. 46, 9 N.L.J. 167, A.I.R. 1927 Nag. 14. But see *Jagannath*, A.I.R. 1935 Nag. 23 (24), quoted under Note 503 (a).

503. First Proviso:—The first proviso to this section makes an exception in favour of the accused but it is an exception most jealously circumscribed under the proviso itself. "Any part of such statement" which has been reduced to writing may in certain limited circumstances be used to contradict the witness who made it. The limitations are strict: (1) only the statement of a prosecution witness can be used, and (2) only if it has been reduced to writing; (3) only a part of the statement recorded can be used; (4) such part must be duly proved; (5) it must be a contradiction of the evidence of the witness in Court; (6) it must be used as provided in section 145 of the Evidence Act, that is, it can be used only after the attention of the witness has been drawn to it or to those parts of it which it is intended to use for the purpose of contradiction—*Badri*, 27 Cr.L.J. 362 (368), 6 P.L.T. 620, 92 I.C. 874, A.I.R. 1926 Pat. 20. See also *Mahomed Adam Chohan*, 38 Cr.L.J. 327, 167 I.C. 43, 9 R.B. 274, 38 Bom.L.R. 1186, A.I.R. 1937 Bom. 60.

(a) Right of accused to get copy of statement:—Under the first proviso as it stood before the present amendment, the words 'may if the Court thinks it expedient' (see the old section cited parallel) show that the accused was not entitled, as a matter of right, to obtain access to a copy of the written statement. His right to obtain such copy was left to the discretion of the Court—*Narayan*, 32 Bom. 111; *Nasiruddin*, 16 All. 207 (208). The accused could get a copy only if the Court thought it expedient in the interests of justice to furnish him with such copy—*Dadan Gazi*, 23 Cal. 1023; *In re Thiruvengada*, 26 M.L.J. 182, 15 Cr.L.J. 289.

Under the present law, the words "shall direct" would seem to give the accused a right to obtain the copies. See *Venkatasubbiah*, 48 Mad. 640, A.I.R. 1925 Mad. 579, 85 I.C. 209, 48 M.L.J. 195, 26 Cr.L.J. 721; *Nga Lun*, A.I.R. 1935 Rang. 370 (372), 36 Cr.L.J. 1487, 13 Rang. 570, 158 I.C. 784, 1935 Cr.C. 1088 (F.B.); *Vishwanath*, A.I.R. 1936 Nag. 249, 1936 Cr.C. 1040. (But such right has again been curtailed by the second proviso). Under the amended section 162, it is obligatory on the part of a Judge to give the accused copies of the statements recorded under sec. 161, subject only to the exclusion of irrelevant matters which the public interest requires should not be disclosed—*Madari Sikdar*, 54 Cal. 307, 28 Cr.L.J. 582. The language of this

section is mandatory, and a Court has no power to refuse the application for copies. The fact that the police had not recorded the statements of the prosecution witnesses in full but had only made a memorandum of them is not a sufficient reason for refusing copies. Omission to supply copies is an illegality sufficient to vitiate the proceedings—*Bansidhar*, 53 All 458, 32 Cr.L.J. 562 (563), A.I.R. 1931 All. 262, 1931 A.L.J. 157, 130 I.C. 625, 1931 Cr.C. 422; *Hari Gore*, 28 Cr.L.J. 14, 99 I.C. 46, 9 N.L.R. 167, A.I.R. 1927 Nag 14; *Chedi*, 28 Cr.L.J. 597, 102 I.C. 773, 8 P.L.T. 613, A.I.R. 1927 Pat. 325; *Vishwanath*, A.I.R. 1936 Nag 249, 1936 Cr.C. 1040. The Legislature has given a statutory right to the accused to insist upon his being supplied with the copies of the police statements so that he may be able to show by means of cross-examination that the witnesses are making statements in Court which are directly contradictory to what they stated before the police, and the Courts should be careful to see that the trial of an accused is conducted in the manner so carefully laid down by the Code. The provisions of sec 537, Cr. P. C., cannot be called into aid by the prosecution because unless the statements of the witnesses before the police have been furnished to the accused or have been seen by the Court itself, the High Court is unable to say that the accused has not been prejudiced. Where there is a violation of the plain directions in the statute as to the mode in which the trial of the accused should be conducted the High Court is bound to assume prejudice to the accused—*Dinanath Sahay v. Emp.*, A.I.R. 1939 Pat. 174 (176), 40 Cr.L.J. 509, 17 Pat. 622, 20 P.L.T. 70, 1939 P.W.N. 136, 180 I.C. 845, 5 B.R. 501, 11 R.P. 545. Where counsel for the defence has been deprived of his proper opportunity of effectively cross-examining witnesses called for the prosecution, it is impossible to say that this has not occasioned a failure of justice. It is a failure of justice to deprive an accused of his legal rights, i.e., of defending himself effectively—*Muzaffar Khan v. The Crown*; I.L.R. 1939 Lah 509 (512). The Rangoon High Court took a different view. Where the Judge did not provide the copies of the whole of the statements of the witnesses which were desired by the accused's pleader, did not record his opinion for excluding parts of those statements and did not postpone the cross-examination of the witnesses until the copies had been supplied, held that the errors committed were at the most irregularities falling within the purview of sec 537, Cr. P. C.—*Nga U Khine*, 36 Cr.L.J. 665 (669), 155 I.C. 66, A.I.R. 1935 Rang. 98, 13 Rang 1, 1935 Cr.C. 307. But see *Sulaiman Mohamed Bholat*, 30 Cr.L.J. 538, A.I.R. 1929 Rang 87, 115 I.C. 899, 6 Rang. 672. This is also the view of the Bombay High Court and the Sind Judicial Commissioner's Court—*Nur Mahomed*, A.I.R. 1930 Bom 595, 129 I.C. 156, 54 Bom. 934; *Hari*, A.I.R. 1935 Sind 145 (178), 36 Cr.L.J. 1161, 157 I.C. 697, 28 S.L.R. 397, 1935 Cr.C. 753. See also *Abdullah Khan*, 34 Cr.L.J. 256, 141 I.C. 879, Ind Rul. 1933 Sind 79, A.I.R. 1933 Sind 188, 1933 Cr.C. 569; *Hafiz Muhammad*, 32 Cr.L.J. 638, 131 I.C. 17, A.I.R. 1931 Pat. 150, 12 P.L.T. 393, 1931 Cr.C. 390. See also *Mahadeo v. The King*, 40 C.W.N. 1164 (P.C.).

This section does not authorise the Court to look into the statement in the police diaries for the purpose of finding out whether it is contradictory to the statement made in Court or not, before granting the application for copies. The accused has the right to get the copies and examine the statement for himself to find out whether there are no contradictions—*Jhari Gope*, 8 Pat 279, 30 Cr.L.J. 858 (860), 118 I.C. 130, 10 P.L.T. 460, A.I.R. 1929 Pat 268, 1929 Cr.C. 21, Ind Rul. 1929 Pat. 482; *Usman*, 21 S.L.R. 239, 31 Cr.L.J. 592 (593), 123 I.C. 689, A.I.R. 1930 Sind 153; *Murtiza Khan*, 1934 Cr.C. 569, A.I.R.-1934 Nag 138; *Nek Ram*, 32 Cr.L.J. 370 (371), 129 I.C. 267, Ind Rul. 1931 All 139, A.I.R. 1931 All. 273, 1931 Cr.C. 337.

The stage in an inquiry or trial at which an accused person is entitled to ask for a copy of a statement made by a prosecution witness to the police in the course of the investigation, is the stage when the witness is called for the prosecution; that is, when he is under cross-examination and has already made a statement which the accused wishes to contradict by proof of his former statement to the police. Consequently, the accused is not entitled to the copies before cross-examination is opened at all—*In re Peramasami*, 22 M.L.W. 784, 27 Cr.L.J. 100, 91 I.C. 532, A.I.R.-1926 Mad. 183; *Shaikh*

Usman, 52 Bom 195, 29 Bom.L.R. 1581, A.I.R. 1928 Bom. 23, 29 Cr.L.J. 221 (223). The accused may apply for a copy of the statement of a witness to the police at any time after he has been called, that is, at any time after the witness has entered the witness-box and while he is giving evidence—*Nga U Khine*, 36 Cr.L.J. 665 (668), 155 I.C. 66, A.I.R. 1935 Rang. 98, 13 Rang. 1, 1935 Cr.C. 307. The question whether the right time to apply for copies is when a witness enters the box or when his evidence-in-chief is concluded was left undecided in *Babarali*, 30 Cr.L.J. 580 (582), 116 I.C. 167, A.I.R. 1929 Cal 182, 49 C.L.J. 197, 56 Cal 840, Ind. Rul. 1929 Cal 455. In *Ahmadur Rahman v. Emp.*, 44 C.W.N. 340 (343) it has, however, been laid down that where a statement made by a prosecution witness has been recorded under sec. 162, Cr. P. C., the accused is entitled to demand that a copy of it should be furnished to him, only when the witness is in the witness-box to give his evidence against the accused and is sought to be cross-examined under sec. 145 of the Indian Evidence Act. In a case triable exclusively by the Court of Session the accused can get copies in the Court of the committing Magistrate before he finished the inquiry or in the Court of Sessions during the trial—*Babarali*, supra. See also *Dadan Gazi*, 33 Cal 1023. The accused is entitled as of right, to obtain a copy, not when the witness has been examined, but as soon as he is "called" for the prosecution. There is a difference of opinion on the point of time, i.e., whether copies should be granted when a witness is cited or when he is actually produced in the witness-box; but, at any rate, the law is clear that copies of statement should be granted before the examination commences provided that an application thereof has been made in time—*Murtiza Khan*, 1934 Cr.C. 569, 35 Cr.L.J. 1213, A.I.R. 1934 Nag. 138; *Hari Gore*, 28 Cr.L.J. 14, 99 I.C. 46, 9 N.L.J. 167, A.I.R. 1927 Nag. 24. It is not till the evidence-in-chief of a witness is given that a pleader or advocate can decide what material he will use for cross-examination, and it follows that he is by no means bound to declare his witnesses beforehand, but that, on the other hand, he exercises an undoubted right when he makes his application for the statements made before the police in respect of each separate witness as the need arises—*Brahmayya v. The King*, A.I.R. 1938 Rang. 442 (444), 40 Cr.L.J. 265, 179 I.C. 783. This section does not authorise the granting of copies after the evidence of the witnesses has closed, and there is no use to which such statements can then be put—*Suraj Bali*, 36 Cr.L.J. 65 (66), 56 All. 750, 152 I.C. 249, A.I.R. 1934 All. 340, 1934 Cr.C. 418. This section entitles the accused to a copy of the statement made by a witness to the police in order that it might be used for contradicting the statement made by the witness in Court. But where the witness was discharged without being examined or cross-examined, so that he made no statement in Court, the accused is not entitled to get a copy of that witness's statement to the police—*Wajid Ali*, 7 Pat. 153, 30 Cr.L.J. 273 (275), 114 I.C. 220, A.I.R. 1929 Pat. 34, Ind. Rul. 1929 Pat. 140, 10 P.L.T. 297. It is only at the time of cross-examination and when the cross-examination has laid the foundation for the suggestion that the evidence given by the witness in Court, is contradicted by his statement recorded under section 161, that the accused is entitled to ask the Judge to refer to the writing and grant him copies. Sec. 162 does not impose a duty upon the Judge of granting a copy of the statement recorded under sec. 161 before cross-examination has been opened—*Madari Sikdar*, 102 I.C. 550, A.I.R. 1927 Cal. 514, 28 Cr.L.J. 582, 54 Cal 307. The same High Court did not accept it as a possible interpretation of this section—*Babarali*, supra. But the abovementioned principles of law enunciated in *Madari Sikdar's* case has been quoted with approval in the recent case of *Ahmadur Rahman v. Emp.*, 44 C.W.N. 340 (343). The Court is not competent to direct that the accused be furnished with a copy of the statement unless it contains something which constitutes a contradiction of a statement made by the witness in his deposition at such inquiry or trial. These two circumstances must co-exist before an accused is entitled under this proviso to such copy—*Saadat Ali*, 6 Pat. 329, 28 Cr.L.J. 709 (714), 103 I.C. 597, A.I.R. 1927 Pat. 243, 8 P.L.T. 780. The Patna High Court has, however, held in another case that the accused is entitled to a copy as soon as the witness is produced in Court, and there is nothing in this section which requires that the cross-examination must be opened before the accused is entitled to a copy—*Ram*

Gulan, 29 Cr.L.J. 297 (298), 107 I.C. 817, 9 P.L.T. 92, 7 Pat. 205, A.I.R. 1928 Pat 215 (dissenting from 22 M.L.W. 784, 54 Cal. 307 and 6 Pat. 329). The Allahabad High Court takes the same view in *Tahal Saithwar*, 53 All. 94, 32 Cr.L.J. 578 (579), 130 I.C. 696, A.I.R. 1931 All 34, 1931 Cr.C. 207, 1931 A.L.J. 10, 53 All. 94, Ind Rul. 1931 All. 312, dissenting from *Madari Sikdar*, supra.

Section 162, Cr. P. C., does not require the Court to satisfy itself before granting a copy to the accused that a certain contradiction exists. Subject to the provisions of the second proviso regarding any part of the statement, the Court must grant the copy and it is for the accused's counsel to examine it after it is granted to discover whatever contradictions may exist—*Dastagir*, A.I.R. 1937 Mad. 822, 1937 M.W.N. 730, 46 M.L.W. 323, 171 I.C. 962, I.L.R. 1938 Mad 180, (1937) 2 M.L.J. 402, 1937 M.Cr.C. 267, following *Jhari Gope v. Emp*, A.I.R. 1929 Pat. 268, 1929 Cr.C. 21, 118 I.C. 130, 30 Cr.L.J. 858, 8 Pat. 270, 10 P.L.T. 460 and *Nga Lun Thuang*, A.I.R. 1935 Rang. 370, 1935 Cr.C. 1088, 158 I.C. 784, 36 Cr.L.J. 1487, 13 Rang. 570 (F.B.). See also *Public Prosecutor, Madras v. Vedi*, A.I.R. 1930 Mad 185, 1930 Cr.C. 185, 122 I.C. 463, 31 Cr.L.J. 414, 1929 M.W.N. 885; *Dinanath Sahay v. Emp*, A.I.R. 1939 Pat. 174, 40 Cr.L.J. 509, 17 Pat. 622, 20 P.L.T. 70, 1939 P.W.N. 136, 180 I.C. 845 and the rulings quoted in the previous paragraph.

The cross-examination of the witness must be adjourned until the necessary copy has been given. This is essential, for it would defeat the object of granting a copy of the statement to the accused if he were to be provided with a copy only when cross-examination of the witness had been completed, or almost completed. It will rarely be necessary to exclude any part of the witness's statement to the police under the second proviso to sec. 162, and, therefore, the difficulty that such postponement of cross-examination might cause delay in the trial can usually be obviated by having copies of the police statements in readiness at commencement of the trial, or it would be a sufficient compliance with the law to allow the defence pleader to see the original statement of the witness to the police and to cross-examine thereon while the copy is being prepared—*Nga U Khine*, 36 Cr.L.J. 665 (668), 155 I.C. 66, A.I.R. 1935 Rang. 93, 13 Rang. 1, 1935 Cr.C. 307, following *Saadat Khan*, 28 Cr.L.J. 709, 6 Pat. 329, A.I.R. 1927 Pat. 243, 103 I.C. 597. See also *Babarali*, 116 I.C. 167, A.I.R. 1929 Cal. 182, 30 Cr.L.J. 580, 56 Cal. 840, 49 C.L.J. 197. The above principles of law were also held to be applicable to an inquiry preliminary to commitment to the Court of Session—*Saadat Khan*, supra.

In practice there need be no difficulty in complying with the statute even in a summons case; although it is true that the accused is ordinarily called upon in a summons case immediately to cross-examine the prosecution witnesses as soon as the statement-in-chief of each witness has been recorded; but that procedure is subject to the provisions of sec. 162, Cr. P. C., and assumes that at that time the accused had been provided with the statutory materials which are his undoubted right to possess in order to cross-examine the prosecution witnesses. In such cases it will be convenient and consistent with the requirements of the Code that the witnesses for the prosecution are examined-in-chief on one day and then a very short adjournment is given to the accused during which he can be provided with the copies of the statements of those witnesses who have been examined by the police—*Dinanath Sahay v. Emp.*, A.I.R. 1939 Pat. 174 (177), 40 Cr.L.J. 509, 17 Pat. 622, 20 P.L.T. 70, 1939 P.W.N. 136, 180 I.C. 845.

If the notes of statements of witnesses are in existence, they must be traceable, or at any rate some serious effort should be made to find them, and satisfactory reasons given for their non-discovery. A mere statement by a witness that it will not be possible to trace them is not enough, in the absence of evidence to show what efforts were made to do so. It is for the Court to decide whether they are really traceable or not, and not for a witness. His opinion about the matter is irrelevant—*Vishwanath*, A.I.R. 1936 Nag. 249, 1936 Cr.C. 1040.

Where the accused was furnished with materially inaccurate copies of the statements of a prosecution witness recorded in the police diary, and on discovering the mistake

he applied to have that witness recalled for the purpose of re-cross-examination in order generally to impeach his credit, held that the accused was entitled to do so—*Sadananda v. Ramasray*, 21 Cr.L.J. 289 (Pat.).

Statements in the police diary are ordinarily privileged and cannot be given to outsiders except under sec. 162, Cr. P. C., and that is limited to the case of an accused who is being tried for an offence under investigation at the time when the statement was made. Therefore, the copies of the statement of witnesses recorded in the police diary of another case arising out of the same incident can be rightly refused—*Jagannath*, A.I.R. 1935 Nag. 23 (24); *Baij Nath v. Muhammad Din*, A.I.R. 1936 Lah. 339 (361). The record of a statement heard by a police officer in exercise of the power conferred by this section and recorded either in the diary or separately in the course of investigation proceedings, is an unpublished official record relating to an affair of State evidence from which cannot be produced in a case to which the first proviso to this section is not applicable except with the permission of the officer at the head of the Police Department (sec. 123, Evidence Act)—*Baij Nath v. Muhammad Din*, *supra*. See also last paragraph of Note 502B.

See *Hari Gore*, 28 Cr.L.J. 14, 99 I.C. 46, 9 N.L.J. 167, A.I.R. 1927 Nag. 14, cited in Note 502D.

(b) 'On the request of the accused':—It is clear from the provision of this section that the Judge (or Magistrate) has no authority to look at the police papers unless requested to do so by the accused—*Nga U Khine*, 36 Cr.L.J. 665 (667), 155 I.C. 66, A.I.R. 1935 Rang. 98, 13 Rang. 1, 1935 Cr.C. 307. This view of law was held to be incorrect by the Full Bench of the same High Court in *Emp. v. Nga Lun Thaing*, 36 Cr.L.J. 1487 (1489), 158 I.C. 784, A.I.R. 1935 Rang. 370, 13 Rang. 570, 1935 Cr.C. 1088 (F.B.), where Page, C.J., also laid down "There is no legal obligation imposed upon either the Public Prosecutor or the Court to advise the accused to request the Court to refer to the statement of any witness to the Police under sec. 162, but it must be borne in mind that it is the duty of the Public Prosecutor and any other official who may be conducting a prosecution to prosecute, not to persecute the accused, and that responsibility rests upon him not to allow the Court or jury to place reliance unwillingly upon the evidence of a witness who to his knowledge made a contradictory statement to the Police in the course of the preliminary investigation, and in such circumstances he ought to inform the Court that it might be expedient that the accused should be made aware that he would be entitled to be supplied with a copy of the witness's statement to the police if he made a request to the Court in that behalf. Further, there is nothing in sec. 162 which prevents the Court, if in its discretion it elects to do so, from informing the accused of his right, for the purpose of contradicting the evidence of the witness, to request the Court to refer to the previous statement of the witness to the police and to supply the accused with a copy thereof as provided in the section; or, if the accused makes a request to the Court in that behalf, to prevent the Court from pointing out to the accused, if it chose to do so, any passages in the statement which may appear to be material for the purpose in hand. On the other hand, merely because the Court thinks it well to inform the accused of his rights under the section, it does not follow that it would be prudent for the accused in every case to ask for a copy of the statement, and it is for the accused, and not for the Court, to decide whether the accused should exercise the right given to him under sec. 162." See also *Nga San Ba*, 37 Cr.L.J. 414, 161 I.C. 14, A.I.R. 1936 Rang. 75; 1936 Cr.C. 80.

The procedure prescribed by sec. 162 must be strictly followed. A Court is not justified in admitting a statement made by a person to a police officer, unless the accused or his pleader asks the Court to refer to such record. Section 162 is in this point explicit—*Nga Po*, 4 Rang. 356, 27 Cr.L.J. 1371, 98 I.C. 491, A.I.R. 1927 Rang. 80. See also Note 502, eighth paragraph.

An oral request by the accused is sufficient. This section does not require any written application. Nor should the Magistrate ask the accused any reason for the request, for every Magistrate ought to know that when a statement is required by the

accused, it must be required for the purpose of contradicting a witness—*Ghassoo*, 1930 A.L.J. 606, 31 Cr.L.J. 555 (556), 123 I.C. 685, A.I.R. 1930 All 737.

Section 162, Cr. P. C., entitles an accused person to request a trial Court to refer to a statement previously made by a prosecution witness to a police officer during investigation. The Court when so requested is bound to refer to such statement and is bound to provide a copy of it unless of opinion that it is irrelevant. The onus of moving the Court rests upon the accused, but it is obvious that the accused may not know what a witness has stated to the police and, therefore, may not use his privilege when it might assist him. A Judge is clearly at liberty to adopt a course at his own instance, which he is bound to do if requested by the accused, and a trial Court should refer to previous statements of witnesses, even if not requested by the accused, and if such reference reveals any point materially in favour of the accused, it should not be disregarded but the Court should give a copy to the accused of its own motion in order to prevent a failure of justice—*Sultan Mir*, A.I.R. 1937 Pesh. 10, 166 I.C. 876, 38 Cr.L.J. 347, 1937 Pesh.L.J. 10, 9 R.Pesh. 75.

(c) 'If duly proved':—The words 'if duly proved' in this proviso clearly show that the record of the statement cannot be admitted in evidence straightway, but that the officer before whom the statement was made, should ordinarily be examined as to any alleged statement or omitted statement that is relied upon by the accused for the purpose of contradicting the witness—*Vithu*, 26 Bom.L.R. 965, 26 Cr.L.J. 223 (224), 83 I.C. 1007, A.I.R. 1924 Bom. 510. There is no presumption as to the genuineness of the statements of witnesses entered in the police diaries, and unless they are duly proved, they cannot be used to contradict the evidence given in Court—*Labh Singh*, 26 Cr.L.J. 1153 (1154), 6 Lah. 24, 88 I.C. 513, A.I.R. 1925 Lah. 357; *Rahijaddi*, 58 Cal. 1009, 35 C.W.N. 317 (319), 32 Cr.L.J. 841, 132 I.C. 159, A.I.R. 1931 Cal. 189, 1931 Cr.C. 253, Ind Rul. 1931 Cal 543; *Emp. v Ibrahim*, 28 Cr.L.J. 983 (986), 105 I.C. 807, 8 Lah. 605, 28 P.L.R. 649, A.I.R. 1928 Lah. 17. In every case when a witness is confronted with a portion of his police statement which he repudiates, the Police Officer recording his statement should be questioned specifically with regard to that portion of the statement. The practice of merely asking the Police Officer perfunctorily whether a particular document represents the witness's statement as a whole cannot but be condemned—*Jwan Das Milwa Ram*, 41 Cr.L.J. 174 (175), 185 I.C. 380, A.I.R. 1939 Lah. 521, I.L.R. 1939 Lah. 305. Where the Magistrate referred in his judgment to the statements of some of the witnesses made to the police, which had not been proved, and he also took into consideration the statements made by persons who were not examined at all at the trial either by the prosecution or by the defence, the procedure was irregular, but this irregularity was not a ground of reversal of the conviction—*Devi Das*, 31 Cr.L.J. 343 (345), 10 Lah. 794, 31 P.L.R. 742, 122 I.C. 93, A.I.R. 1930 Lah. 318. Those parts of the statement to the police which are used in cross-examination to contradict the witness must be proved and brought on the record. This can ordinarily be done by the admission of the witness that he made the statement, or by an examination of the police-officer who recorded it. If the latter course is necessary, in order to avoid delay, there can be no objection to allowing cross-examination subject to subsequent proof of the statements—*Nga U Khine*, 36 Cr.L.J. 665 (668), 155 I.C. 66, A.I.R. 1935 Rang. 98, 13 Rang. 1, 1935 Cr.C. 307 following *Madari Sikdar*, 102 I.C. 550, A.I.R. 1927 Cal. 514, 28 Cr.L.J. 582, 54 Cal. 307; *Shivlal v. Emp.*, 39 Cr.L.J. 68, 20 N.L.J. 280, 172 I.C. 156, 10 R.N. 169, A.I.R. 1938 Nag. 110. See also *Mahomed Adam Chohan*, A.I.R. 1937 Bom. 60, 167 I.C. 43, 38 Bom.L.R. 1186, 9 R.B. 274, 38 Cr.L.J. 327. Formal proof prior to the cross examination is, therefore, unnecessary. If the statement, if not admitted, is subsequently not proved, the evidence based on it must of course be disregarded. This principle applies whether the provisions of sec. 162, Cr. P. C., are applicable to the statement sought to be proved or not—*Shivlal v. Emp.*, supra.

What is done in Behar and Bengal is that after the attention of the prosecution witnesses has been drawn to the contradictory statements made by them before the

police, the investigating police officer is asked whether those witnesses did or did not make the particular statements before him. The answer given by the police-officer (which is always checked with reference to what is written in the diaries) is considered quite sufficient to contradict the witness, and neither the original record nor the copy of it furnished to the accused is ever proved or admitted in evidence. This practice which has prevailed for a long time and which has its own advantages should not be disturbed—*Bihari Mahton*, 32 Cr L J 797 (800), 131 I C 801, 10 Pat. 107, A I R. 1931 Pat. 152, Ind. Rul. 1931 Pat. 241, 1931 Cr.C. 392, 12 P.L.T. 798. The correctness of this practice seems to have been questioned in more than one decision of the Lahore High Court.

It is only what is written in the police diaries that can be used under sec 145 of the Evidence Act to contradict the witness, and what the Sub-Inspector of Police stated that a witness said or did not say, is inadmissible. The way to prove those portions of the written statement of a witness, which has been specifically put to him in order to contradict him, is for the accused to mark the passage or passages in the copy from the police diaries given to him and then to ask the writer of the statement to say that it is a true copy—*Dharam Singh*, 29 Cr L J. 343 (345), 108 I C. 162, A I R. 1928 Lah. 507 following *Bahadur Singh*, 95 I C. 467, 7 Lah. 264, 8 Lah L J. 174, A I R. 1926 Lah. 367, 27 Cr L J. 803, 27 P.L.R. 379 and *Labh Singh*, 88 I.C. 513, 6 Lah. 24, A I R. 1925 Lah. 357, 26 Cr L J 1153. See also *Emp. v. Ibrahim*, 28 Cr L J. 983 (986), 105 I.C. 807, 8 Lah. 605, 28 P.L.R. 649, A I R 1928 Lah. 17.

This view of law seems to have been accepted by the Calcutta High Court. In *Jasimuddin*, 35 C.W.N. 164 (168), 32 Cr L.J. 1245 (1248), 134 I.C. 763, A I R. 1931 Cal. 622, 1931 Cr.C. 806, Ind. Rul 1931 Cal. 875, Ghose, J. observed: "If, however, it is desired to clinch the matter before the Sessions Judge and the Jury and to show in an affirmative manner that the witnesses for the prosecution cannot be relied upon, it is obviously the duty of the defence to prove through the investigating police officer when he is in the witness-box the record of the statements made to the police by the witnesses for the prosecution during the stage of investigation. For that purpose it is necessary to get on the record a true copy of what is known as the Case Diary and there are well-known ways of proving the document and of getting the document on the record" Dissenting from the view expressed in *Bihari Mahton's* case the Patna High Court adopted this view of the Calcutta High Court in *Najibuddin*, A I R. 1933 Pat. 589 (595), 14 P.L.T. 543, 1933 Cr.C. 1350, 147 I.C. 142. Commenting on the non-compliance with this procedure, Dunkley, J., of the Rangoon High Court observed: "As soon as a defence pleader asked a witness a question concerning his statement to the police, it was the bounden duty of the learned Sessions Judge to ask the pleader whether he wished to have a copy of that witness's statement to the police supplied to him, or not. If the pleader did not desire a copy of the statement, then all questions concerning the witness's statement to the investigating officer should have been disallowed. If he did desire a copy of the statement, it should have been supplied, and should then have been proved, used for the purpose of cross-examining the witness and brought on the record in the proper way"—*Nga Tha Aye*, A I R. 1935 Rang. 299 (301), 36 Cr L.J. 1380, 158 I.C. 441, 1935 Cr.C. 995.

Under this section the statement of a witness in evidence can only be contradicted by his alleged statement to the police on two conditions, one is that the application for contradiction is made by the accused and the other is that the statement of the police should be proved by a certified copy of the diary—*W. K Wesley v. Emp.*, 40 Cr.L.J. 4 (6), 178 I.C. 183, A I R. 1938 All. 571 (573), 1938 A.W.R. (H.C.) 505, 1938 A Cr.C. 90, 1938 A.L.R. 827.

Where the witnesses were alleging that they had not made the statements alleged and that such statements as they had made had been wilfully altered by the *Fouzdar*, it is more than ever necessary that the actual written statements should be put in—*Mahomed Adam Chohan*, A I R. 1937 Bom. 60, 38 Bom.L.R. 1185, 167 I.C. 43, 38 Cr.L.J. 327 (329), 9 R.B. 274

accused, it must be required for the purpose of contradicting a witness—*Ghassoo*, 1930 A.L.J. 606, 31 Cr.L.J. 555 (556), 123 I.C. 685, A.I.R. 1930 All. 737.

Section 162, Cr. P. C., entitles an accused person to request a trial Court to refer to a statement previously made by a prosecution witness to a police officer during investigation. The Court when so requested is bound to refer to such statement and is bound to provide a copy of it unless of opinion that it is irrelevant. The onus of moving the Court rests upon the accused, but it is obvious that the accused may not know what a witness has stated to the police and, therefore, may not use his privilege when it might assist him. A Judge is clearly at liberty to adopt a course at his own instance, which he is bound to do if requested by the accused, and a trial Court should refer to previous statements of witnesses, even if not requested by the accused, and if such reference reveals any point materially in favour of the accused, it should not be disregarded but the Court should give a copy to the accused of its own motion in order to prevent a failure of justice—*Sultan Mir*, A.I.R. 1937 Pesh. 10, 166 I.C. 876, 38 Cr.L.J. 347, 1937 Pesh L.J. 10, 9 R.Pesh. 75.

(c) 'If duly proved':—The words 'if duly proved' in this proviso clearly show that the record of the statement cannot be admitted in evidence straightway, but that the officer before whom the statement was made, should ordinarily be examined as to any alleged statement or omitted statement that is relied upon by the accused for the purpose of contradicting the witness—*Vithu*, 26 Bom L.R. 965, 26 Cr.L.J. 223 (224), 83 I.C. 1007, A.I.R. 1924 Bom. 510. There is no presumption as to the genuineness of the statements of witnesses entered in the police diaries, and unless they are duly proved, they cannot be used to contradict the evidence given in Court—*Labh Singh*, 26 Cr.L.J. 1153 (1154), 6 Lah. 24, 88 I.C. 513, A.I.R. 1925 Lah. 357; *Rahijaddi*, 58 Cal. 1009, 35 C.W.N. 317 (319), 32 Cr.L.J. 841, 132 I.C. 159, A.I.R. 1931 Cal. 189, 1931 Cr.C. 253, Ind. Rul. 1931 Cal. 543; *Emp. v. Ibrahim*, 28 Cr.L.J. 983 (986), 105 I.C. 807, 8 Lah. 605, 28 P.L.R. 649, A.I.R. 1928 Lah. 17. In every case when a witness is confronted with a portion of his police statement which he repudiates, the Police Officer recording his statement should be questioned specifically with regard to that portion of the statement. The practice of merely asking the Police Officer perfunctorily whether a particular document represents the witness's statement as a whole cannot but be condemned—*Jwan Das Milwa Ram*, 41 Cr.L.J. 174 (175), 185 I.C. 380, A.I.R. 1939 Lah. 521, I.L.R. 1939 Lah. 305. Where the Magistrate referred in his judgment to the statements of some of the witnesses made to the police, which had not been proved, and he also took into consideration the statements made by persons who were not examined at all at the trial either by the prosecution or by the defence, the procedure was irregular, but this irregularity was not a ground of reversal of the conviction—*Devi Das*, 31 Cr.L.J. 343 (345), 10 Lah. 794, 31 P.L.R. 742, 122 I.C. 93, A.I.R. 1930 Lah. 318. Those parts of the statement to the police which are used in cross-examination to contradict the witness must be proved and brought on the record. This can ordinarily be done by the admission of the witness that he made the statement, or by an examination of the police-officer who recorded it. If the latter course is necessary, in order to avoid delay, there can be no objection to allowing cross-examination subject to subsequent proof of the statements—*Nga U Khine*, 36 Cr.L.J. 665 (668), 155 I.C. 66, A.I.R. 1935 Rang. 98, 13 Rang. 1, 1935 Cr.C. 307 following *Madari Sikdar*, 102 I.C. 550, A.I.R. 1927 Cal. 514, 28 Cr.L.J. 582, 54 Cal. 307; *Shivlal v. Emp.*, 39 Cr.L.J. 68, 20 N.L.J. 280, 172 I.C. 156, 10 R.N. 169, A.I.R. 1938 Nag. 110. See also *Mahomed Adam Chohan*, A.I.R. 1937 Bom. 60, 167 I.C. 43, 38 Bom.L.R. 1186, 9 R.B. 274, 38 Cr.L.J. 327. Formal proof prior to the cross-examination is, therefore, unnecessary. If the statement, if not admitted, is subsequently not proved, the evidence based on it must of course be disregarded. This principle applies whether the provisions of sec. 162, Cr. P. C., are applicable to the statement sought to be proved or not—*Shivlal v. Emp.*, supra.

What is done in Behar and Bengal is that after the attention of the prosecution witnesses has been drawn to the contradictory statements made by them before the

police, the investigating police officer is asked whether those witnesses did or did not make the particular statements before him. The answer given by the police-officer (which is always checked with reference to what is written in the diaries) is considered quite sufficient to contradict the witness, and neither the original record nor the copy of it furnished to the accused is ever proved or admitted in evidence. This practice which has prevailed for a long time and which has its own advantages should not be disturbed—*Bihari Mahton*, 32 Cr.L.J. 797 (800), 131 I.C. 801, 10 Pat. 107, A.I.R. 1931 Pat. 152, Ind Rul 1931 Pat 241, 1931 Cr.C. 392, 12 P.L.T. 798. The correctness of this practice seems to have been questioned in more than one decision of the Lahore High Court.

It is only what is written in the police diaries that can be used under sec. 145 of the Evidence Act to contradict the witness, and what the Sub-Inspector of Police stated that a witness said or did not say, is inadmissible. The way to prove those portions of the written statement of a witness, which has been specifically put to him in order to contradict him, is for the accused to mark the passage or passages in the copy from the police diaries given to him and then to ask the writer of the statement to say that it is a true copy—*Dhatam Singh*, 29 Cr.L.J. 343 (345), 108 I.C. 162, A.I.R. 1928 Lah. 507 following *Bahadur Singh*, 95 I.C. 467, 7 Lah. 264, 8 Lah.L.J. 174, A.I.R. 1926 Lah. 367, 27 Cr.L.J. 803, 27 P.L.R. 379 and *Labh Singh*, 88 I.C. 513, 6 Lah. 24, A.I.R. 1925 Lah. 357, 26 Cr.L.J. 1153. See also *Emp. v. Ibrahim*, 28 Cr.L.J. 983 (986), 105 I.C. 807, 8 Lah. 603, 28 P.L.R. 649, A.I.R. 1928 Lah. 17.

This view of law seems to have been accepted by the Calcutta High Court. In *Jasimuddin*, 35 C.W.N. 164 (168), 32 Cr.L.J. 1245 (1248), 134 I.C. 763, A.I.R. 1931 Cal. 622, 1931 Cr.C. 806, Ind Rul. 1931 Cal. 875, Ghose, J. observed: "If, however, it is desired to clinch the matter before the Sessions Judge and the Jury and to show in an affirmative manner that the witnesses for the prosecution cannot be relied upon, it is obviously the duty of the defence to prove through the investigating police officer when he is in the witness-box the record of the statements made to the police by the witnesses for the prosecution during the stage of investigation. For that purpose it is necessary to get on the record a true copy of what is known as the Case Diary and there are well-known ways of proving the document and of getting the document on the record." Dissenting from the view expressed in *Bihari Mahton's* case the Patna High Court adopted this view of the Calcutta High Court in *Najibuddin*, A.I.R. 1933 Pat. 589 (595), 14 P.L.T. 513, 1933 Cr.C. 1350, 147 I.C. 142. Commenting on the non-compliance with this procedure, Dunkley, J., of the Rangoon High Court observed: "As soon as a defence pleader asked a witness a question concerning his statement to the police, it was the bounden duty of the learned Sessions Judge to ask the pleader whether he wished to have a copy of that witness's statement to the police supplied to him, or not. If the pleader did not desire a copy of the statement, then all questions concerning the witness's statement to the investigating officer should have been disallowed. If he did desire a copy of the statement, it should have been supplied, and should then have been proved, used for the purpose of cross-examining the witness and brought on the record in the proper way"—*Nga Tha Aye*, A.I.R. 1935 Rang. 299 (301), 36 Cr.L.J. 1380, 158 I.C. 441, 1935 Cr.C. 995.

Under this section the statement of a witness in evidence can only be contradicted by his alleged statement to the police on two conditions, one is that the application for contradiction is made by the accused and the other is that the statement of the police should be proved by a certified copy of the diary—*W. K. Wesley v. Emp.*, 40 Cr.L.J. 4 (6), 178 I.C. 183, A.I.R. 1938 All. 571 (573), 1938 A.W.R. (H.C.) 505, 1938 A.Cr.C. 90, 1938 A.L.R. 827.

Where the witnesses were alleging that they had not made the statements alleged and that such statements as they had made had been wilfully altered by the *Fouzdar*, it is more than ever necessary that the actual written statements should be put in—*Mahomed Adam Chohan*, A.I.R. 1937 Bom. 60, 38 Bom.L.R. 1185, 167 I.C. 43, 38 Cr.L.J. 327 (329), 9 R.B. 274.

In actual practice the written record of the witness's statement is generally put to him on an undertaking of the prosecution to call the investigating officer to prove the statement, because it is inconvenient to prove each statement separately. So that the general practice is to call the investigating officer at a later stage of the trial and he proves the written statements which have been put to the witnesses—*Mahomed Adam Chohan, supra.*

(d) 'Contradict':—To construe this section as meaning that while any part of the statement of a witness to the police may be used to contradict him, yet if the contradiction consists in this that a statement made at the trial was not made in any part of the statement to the police, such a contradiction cannot be proved, seems to be an artificial construction and cannot be adopted. There is nothing in the language of this section which would lead to such a conclusion—*Iltaf Khan*, 5 Pat. 346, 7 P.L.T. 634, 27 Cr.L.J. 796 (799), 95 I.C. 396, A.I.R. 1926 Pat. 362, dissenting from the *obiter dictum* of Macpherson, J., in *Badri*, 27 Cr.L.J. 362 (369), 92 I.C. 874, 6 P.L.T. 620, A.I.R. 1926 Pat. 20. If it is correct to say that there is nothing in the section to prevent the police officers from being questioned about the statements made by a witness, there cannot be any difficulty in proving omissions by asking the investigating officer whether such statements had been made before him or not without exhibiting the whole of the statement in writing—*Bihari Mahlon*, 32 Cr.L.J. 797 (803), 131 I.C. 801, 10 Pat. 107, A.I.R. 1931 Pat. 152, Ind. Rul. 1931 Pat. 241, 1931 Cr.C. 392, 12 P.L.T. 798. This view of law has been modified by the same High Court in *Najibuddin*, A.I.R. 1933 Pat. 589 (593), 14 P.L.T. 543, 1933 Cr.C. 1350, 147 I.C. 142, where Agarwala, J. observed: "It has long been accepted that a statement to an investigating officer has been 'reduced into writing' even when the officer has not recorded the statement in full, but has merely noted the gist of what was stated to him. The value of such a note for the purpose of contradicting testimony given on oath at a subsequent trial varies with the nature of the testimony and of the officer's note. Ordinarily such a note contains such excerpts from the statement as appear to the officer, at the time, to be important. Further investigation and subsequent developments may, and often do, show that points of great materiality have been omitted. When, therefore, the only record of a witness's statement to the investigating officer is a brief note, it follows that omissions from that note are of practically no value for the purpose of proving that the witness did not state to the officer matters to which he deposes at the trial. As I have already said the value of the officer's note necessarily varies, and, for the purpose of deciding what weight should be given to an omission from the police record, it appears to me to be essential to see what exactly was recorded and therefore the written note should be duly proved as required by the proviso." Entries of statements in the diary are notoriously very condensed and the omission of some detail in the note of a statement is not always a sure indication that such detail was absent from the statement; and certainly a Court should never use such an absence as a contradiction without taking evidence to prove that no such thing was stated—*Deo Lal*, 34 Cr.L.J. 948, 145 I.C. 426, A.I.R. 1933 Pat. 440, 14 P.L.T. 396, 1933 Cr.C. 974.

All omissions are not contradictions. It must be left to the Court in each particular case to decide whether the omission proved amounts to a contradiction or not. Obviously there may be omissions in the previous statement which make it inconsistent with and, therefore, contradictory to the evidence given by the witness in Court—*Mohinder*, 33 Cr.L.J. 97 (105), 33 P.L.R. 891, 135 I.C. 209, Ind. Rul. 1932 Lah. 81, A.I.R. 1932 Lah. 103, 1932 Cr.C. 123, following *Hazara*, 29 Cr.L.J. 348 (349), 108 I.C. 167, 9 Lah. 389, A.I.R. 1928 Lah. 257. But whether a discrepancy or omission is effective to contradict a witness in any particular case depends on the nature of the fact in question as well as the fullness with which the statement has been recorded. An omission may amount to contradiction if the matter omitted was one which the witness would have been expected to mention and the Sub-Inspector to make a note of it in the ordinary course. Every detail is not expected to be noted, but the names of

accused persons are among the most important of such matters which any Sub-Inspector who knows his work would not fail to take down from the lips of the witness—*Yusuf Mia v. Emp.*, A.I.R. 1938 Pat. 579 (582), 1938 P.W.N. 727, 5 B.R. 185, 20 P.L.T. 51, 178 I.C. 934, 40 Cr.L.J. 147 See also Note 915 (18).

Contradiction means the setting of one statement against another and not the setting up of a statement against nothing at all. Sec. 162, Cr. P. C., does not, therefore, permit the use of statements to the police for the purpose of proving omissions. An omission in a vital point is, however, significant and ought to be provable in favour of the accused, although most of the omissions in a statement of the kind which is recorded in the police diary are of no significance whatever—*Sakhawat v. Emp.*, A.I.R. 1937 Nag. 50 (53), 38 Cr.L.J. 330, 167 I.C. 61, 19 N.L.J. 320, I.L.R. 1937 Nag. 277, not following *Mrs M. F. Rego v. Emp.*, A.I.R. 1933 Nag. 136, 1933 Cr.C. 610, 143 I.C. 17, 34 Cr.L.J. 505, 29 N.L.R. 251.

The Madras High Court has taken a different view on this point and has held that a statement made by a witness to the police in an investigation under sec. 162, Cr. P. C., cannot be filed, or exhibited, or, in short, used when the witness is under examination in order to show that while giving evidence the witness has made assertions which he did not make when he was examined by the police. It cannot be used unless an omission from a statement under sec. 162 can be said to be a contradiction of a statement made in the witness-box. It is not permissible to use such statements in order to show "development" of the prosecution case; it is only permissible to use them to prove contradiction—*Ponnusami*, 34 Cr.L.J. 582, 143 I.C. 424, 1933 M.W.N. 90, 37 M.L.W. 441, 64 M.L.J. 519, A.I.R. 1933 Mad. 372, 56 Mad. 475, Ind. Rul. 1933 Mad. 299, 1933 Cr.C. 555.

It is a misdirection to tell the jury "under the law, no evidence can be given before you by the prosecution as to what these witnesses told the police, but the fact remains that the defence which is entitled to bring to your notice any contradiction between the statements there made and the statements made now, has not placed before you any contradictory statement as regards the account of occurrence"—*Ram Lal*, 36 Cr.L.J. 135 (136), 152 I.C. 681, A.I.R. 1934 Cal. 717, 1934 Cr.C. 1102. But see *Sanmon Tiwari v. Emp.*, 38 Cr.L.J. 102, 165 I.C. 761, A.I.R. 1936 Pat. 581, 1936 Cr.C. 952, 3 B.R. 78, 9 R.P. 211.

Effect of contradiction:—The statements to the police are not evidence in themselves. Where they contradict with the evidence of the witnesses given by them in Court, the question for the jury is not whether the statements in Court or the statements to the Police are true. The true question is whether the inconsistency in the statements does not make the evidence in Court unreliable—*Tajali Mian v. Emp.*, 28 Cr.L.J. 843 (845), 104 I.C. 459, A.I.R. 1928 Pat. 31, 9 P.L.T. 57, 7 Pat. 50. It is a misdirection of the Court to tell the jury that they can convict on a statement to the police because a statement to the police of a prosecution witness is not evidence. Sec. 162, Cr. P. C., says that the statement to the police may be used to contradict a witness in the manner provided by sec. 145, Evidence Act. It does not lay down that the effect of the contradiction is to entirely discredit the witness. Nor is such a result stated in sec. 145, Evidence Act. Not only would it be open to the jury to treat the omission as entirely discrediting the witness but it would also be open to the jury to treat the omission as discrediting only the portion of the evidence which was omitted in the statement—*Samuel John v. Emp.*, A.I.R. 1935 All. 935, 1935 A.W.R. 1071, 1935 A.L.J. 1079, 1935 Cr.C. 1181, 160 I.C. 162, 1936 A.I.R. 59. In this connection Holmwood and Sharfuddin, JJ., observed: "The learned Judge nowhere gives his own finding on the truth or falsity of each witness's statement. He relies entirely on the differences in what they say in Court and what they said or are alleged not to have said before the police. We must point out that it is exceedingly dangerous to appeal from evidence judicially recorded under the sanction of cross-examination to alleged statements made to the police, which are not judicially recorded. It is the Judge's duty to make up his mind, while the witness is before him, whether he is a

witness of truth or falsehood and it is only when the Judge sees any reason to distrust his evidence that omissions in a police record can become of any importance"—*Jung Rai v. King-Emp*, 19 C.W.N. 217 (218), 28 I.C. 649. See also *Ausan Singh* in Note 502.

(e) 'In the manner provided by sec. 145 of the Indian Evidence Act':

The provisions of sec. 145, Evidence Act, must be strictly complied with. The proper procedure would be to ask the witness whether he made such and such statement before the police officer. If the witness answers in the affirmative, the previous statement need not be proved. If, however, the witness denies having made the previous statement, or states that he does not remember having made any such statement, the cross-examiner must read out to the witness the relevant portions of the record which are alleged to be contradictory to his statement in Court and give him an opportunity to reconcile the same if he can. It is only when the cross-examiner has done so that the record of the previous statement becomes admissible in evidence for the purpose of contradicting the witness and can be proved in any manner permitted by law—*Gopi Chand*, 31 Cr.L.J. 1071 (1074), 126 I.C. 573, A.I.R. 1930 Lah. 491, 11 Lah. 460; *Mohinder Singh*, 33 Cr.L.J. 97 (104), 33 P.L.R. 891, 135 I.C. 209, Ind. Rul. 1932 Lah. 81, A.I.R. 1932 Lah. 103, 1932 Cr.C. 123; *Najibuddin*, A.I.R. 1933 Pat. 589 (594), 14 P.L.T. 543, 1933 Cr.C. 1350, 147 I.C. 142; *Suraj Bati*, 36 Cr.L.J. 65 (66), 152 I.C. 249, A.I.R. 1934 All. 340, 1934 Cr.C. 418; *Raghuraj*, 36 Cr.L.J. 188, 152 I.C. 873, A.I.R. 1934 All. 956, 1934 Cr.C. 1258; *Ibrahim*, 28 Cr.L.J. 983 (986), 105 I.C. 807, 8 Lah. 605, 28 P.L.R. 649, A.I.R. 1928 Lah. 17; *Sulla*, 35 Cr.L.J. 843 at p. 846 (Oudh); *Nga U Khine*, 36 Cr.L.J. 665 (668), 13 Rang. 1, 155 I.C. 66, 1933 Cr.C. 307, A.I.R. 1935 Rang. 98; *Salik*, 9 R.O. 295, A.I.R. 1937 Oudh 201 (203), 1937 O.W.N. 63, 38 Cr.L.J. 165, 166 I.C. 259, 1936 O.L.R. 734. There is no duty cast upon counsel who wishes to cross-examine a witness by putting to him a previous statement first to prove that statement. Sec. 145 of the Indian Evidence Act has to be read with sec. 162, Cr. P. C., and quite clearly indicates that the attention of a witness is to be called to the previous statement before the writing can be proved. If the witness admits the previous statement, or explains any discrepancy or contradiction, it obviously makes it unnecessary for the statement—thereafter to be proved. On the other hand, if the statement still requires to be proved that can be done later by calling the person before whom the statement was made. The proposition that an illiterate person is immune from the process of law with regard to contradiction by a previous statement has no authority in law, and would nullify almost completely the provisions of sec. 153, Indian Evidence Act, if it were so, as the majority of witnesses in criminal cases in this province are illiterate. It makes not the slightest difference whether the witness is literate or illiterate; attention can be drawn to any portion of a previous statement by reading the statement to the witness; he does not require to read it himself—*Muzaffar Khan v. The Crown*, I.L.R. 1939 Lah. 509 (511). The defence should not be allowed to prove the writing before the attention of the witness is drawn to those parts of the writing which are to be used for the purpose of contradicting her. Where the defence rely on the omission of statements by her, defence should read out the whole of her statements to her and point out to her that the statements in question are not contained in it. The intention is that the witness should be given an opportunity of explaining how it was that those portions were omitted—*Samuel John v. Emp*, A.I.R. 1935 All. 935 (937), 1935 A.W.R. 1071, 1935 A.L.J. 1079, 1935 Cr.C. 1181, 160 I.C. 162, 1936 A.L.R. 59.

Where the trial Judge asked the investigating Police Officer to verify as true copies of the statements recorded by him in the special Police diary and he bodily used those statements for the purpose of contradicting the statements made on oath by the prosecution witnesses without first giving each witness an opportunity of admitting or denying the correctness of the statement recorded by the investigating Police Officer in the special Police diary of the case, the procedure was entirely illegal and all those true copies of statements recorded by the Police Officer in his diary and exhibited in the case were entirely inadmissible in evidence—*Salik*, supra. In every case when a witness is confronted with a portion of his police statement which he repudiates, the police officer

recording his statement should be questioned specifically with regard to that portion of the statement. The practice of merely asking the police officer perfunctorily whether a particular document represents the witness's statement as a whole cannot but be condemned. Whenever a witness denies having made a previous statement it is the obvious duty of the Judge to apply his mind to the question whether he is satisfied that the denial is to be rejected—*Jwan Das Milwa Ram*, A.I.R. 1939 Lah. 521 (522), I.L.R. 1939 Lah. 305.

Re-examination:—It is desirable that when an investigating police officer is being cross-examined as to previous statement made to him by the witness for the prosecution the Court should have the police diary before it and see whether negative answer of the officer really gives a picture of what the witness in fact stated. If not, the fact should be borne in mind and the Court should watch whether the matter is cleared up in re-examination. It is therefore the duty of the Public Prosecutor to see that the negative answer from an investigating officer in respect of the statement of a witness does not create a wrong impression of what the witness stated before the police. He must in these cases bring about other statements to explain the matter referred to in cross-examination. If the Public Prosecutor fails to do so, it is the duty of the Court in fairness to the case and to the witness to bring about facts which will clear up the negative answer. This will be legitimate use of the police diary and one of the modes of taking aid from it in the trial—*Yusuf Mia v. Emp.*, A.I.R. 1938 Pat. 579 (585), 1939 P.W.N. 727, 5 B.R. 185, 20 P.L.T. 51, 178 I.C. 934, 40 Cr.L.J. 147, 178 I.C. 934.

504. Second proviso:—For reasons of the addition of this proviso, see the *Legislative Assembly Debates*, February 14, 1923, pages 2224-2243.

The Court can refuse to grant copies only if the requirements of the second proviso are satisfied; namely, if the Court is of opinion that any part of the statement is irrelevant, or that its disclosure is not essential in the interests of justice, and is inexpedient in the public interests. The application for copies should not be rejected on the mere ground that it might help the defence or that possibly there was no contradiction—*Chedi Prasad*, 8 P.L.T. 613, 28 Cr.L.J. 597, A.I.R. 1927 Pat. 325.

Under the second proviso to the section, the Judge (or Magistrate) should exclude from the copy supplied any part of the statement which in his opinion satisfies one or other of the conditions, viz., (1) that it is irrelevant, or (2) that its disclosure to the accused is both unessential in the interests of justice and inexpedient in the public interest. It should be noticed that there are only two separate and distinct conditions under which a part of the statement can be excluded, and not three. To justify exclusion under the second conclusion mentioned above the two circumstances mentioned therein must exist together in conjunction. If he excludes any part of the statement, the Judge (or Magistrate) must record the opinion on which he bases such exclusion, but not his reasons for the opinion—*Nga U Khine*, 36 Cr.L.J. 665 (668), 155 I.C. 66, A.I.R. 1935 Rang. 98, 13 Rang. 1, 1935 Cr.C. 307. This proviso shows that in all cases a copy of the statement in the diary must be granted. It is only certain portions of that statement which may be excluded in the discretion of the Court. Those portions are portions which are inexpedient in the public interest—*Nek Ram*, 32 Cr.L.J. 370 (371), 129 I.C. 267, Ind. Rul. 1931 All. 139, A.I.R. 1931 All. 273, 1931 Cr.C. 337; *Emp. v. Bansidhar*, A.I.R. 1931 All. 262, 1931 A.L.J. 157, 130 I.C. 625, 1931 Cr.C. 422, 32 Cr.L.J. 562, 53 All. 458. See also Notes in para 503 (a).

504A. Effect of reception of evidence in contravention of this section:—It cannot be seriously contended that admission of inadmissible evidence is fatal to the trial. It must always be a question whether prejudice has been caused, and if not, whether the materials left are sufficient within the meaning of sec. 167 of the Evidence Act—*Nitai Koley v. Emp.*, (1939) 1 Cal. 337; *Harendra v. Emp.*, 40 C.L.J. 313 (318).

There is nothing at all in this section or in the nature of the subject matter dealt with by the section to warrant the belief that the smallest breach of the section is

to be regarded as entirely vitiating any trial. Apart from question of real prejudice it does not seem that it is of any avail in revision for a petitioner merely to show that out of the numerous questions and answers put in the course of the trial one or more of them is contrary to this section—*Sajjad Mirza v. Emp.*, 45 C.L.J. 199 (201), A.I.R. 1927 Cal. 372.

163. (1) No police-officer or other person in authority shall offer to make, or cause to be offered or made, any such inducement, threat or promise as is mentioned in the Indian Evidence Act, 1872, section 24.

No inducement to be offered.

(2) But no police-officer or other person shall prevent, by any caution or otherwise, any person from making in the course of any investigation under this Chapter any statement which he may be disposed to make of his own free will.

506. Person in authority:—This term must not be used in any restricted sense, so as to mean only a person who has control over the prosecution of the accused, but would include a person who had authority to interfere with the matter; and any concern or interest in it would be sufficient to give him that authority—*Navroji*, 9 B.H.C.R. 358.

The following are persons in authority:—Honorary Magistrate—*Ramdhun*, 1 W.R. 24; a Magistrate or Sessions Judge recording a confession—*Asghar*, 2 All. 260; *Uzeer*, 10 Cal. 775; Village Magistrate—*Thandraya*, 26 Mad. 38; *Umrai*, 31 Cr.L.J. 680, 124 I.C. 427, 6 O.W.N. 947; Police Patel—*Rama*, 3 Bom. 12; *Fakira*, 40 Bom. 220; Panchayatdar—*Ganesh*, 50 Cal. 127, 74 I.C. 264, A.I.R. 1923 Cal. 458; *Nazir*, 9 C.W.N. 474, 2 Cr.L.J. 255; President of a Panchayet—*Aushi Bibi*, 20 C.W.N. 512, 33 I.C. 828; *Jesha Bewa*, 11 C.W.N. 904, 6 Cr.L.J. 154; (but see *In re Mulamayandi*, A.I.R. 1924 Mad. 230, 25 Cr.L.J. 269, 45 M.L.J. 845); Prosecutor—*Asutosh*, 26 C.W.N. 54, 23 Cr.L.J. 573; *Smith*, 19 Cr.L.J. 189 (Mad.); even the wife or relations of the prosecutor in some cases—*Smith*, supra; headman of a village—*Nga Kya*, 8 Bur.L.T. 39, 15 Cr.L.J. 681, 26 I.C. 129, 8 L.B.R. 94; Zemundar investigating a crime—*Dabud*, 4 S.L.R. 209, 12 Cr.L.J. 119; a travelling auditor of a Railway Company is a person in authority as regards one of its booking clerks—*Navroji*, 9 B.H.C.R. 358; a Ziladar serving under a big estate—*Taule*, 30 Cr.L.J. 829, 117 I.C. 737, 6 O.W.N. 309, A.I.R. 1929 Oudh 272, 5 Luck. 91, Ind Rul. 1929 Oudh 385; a Ziladar and Honorary Magistrate—*Hashmat Khan*, 36 Cr.L.J. 211 (215), 152 I.C. 998, 1934 Cr.C. 643, A.I.R. 1934 Lah. 417, 7 R.L. 348, 37 P.L.R. 25, 15 Lah. 856; a superior officer (i.e. the investigating Postal Officer)—*Bhagabaticharan Patra*, 34 Cr.L.J. 1187, 145 I.C. 962, A.I.R. 1933 Cal. 644, 60 Cal. 719, 1933 Cr.C. 1054, 6 R.C. 175.

A prominent and influential resident of the village is not a person in authority—*Public Prosecutor v. Venkatamma*, A.I.R. 1932 Mad. 748, 56 Mad. 63, 64 M.L.J. 153, 1932 Cr.C. 923, 36 M.L.W. 798, 33 Cr.L.J. 814, 139 I.C. 725, 1932 M.W.N. 461. So also members of the *panchayat*—*Emp. v. Mohan Lal*, 4 All. 46.

507. Inducement, threat or promise:—Compare sec. 24 of the Evidence Act.

"All oppression and trickery in regard to obtaining confession are to be avoided by the police under pain of the severest penalties, and the practice of employing private individuals to worm out confession from accused persons is strictly prohibited. Nothing so clearly shows want of detective tact, talent and resource and of patent industry in a police-officer as the resort to foul means to obtain confession. The most ignorant and clumsy can make out a case if he can torture the culprit till he tells all about it. True detective talent and sagacity manifest themselves in patient and unrelenting

industry in weaving round the culprit such a network of undoubted facts and damning circumstances gathered from a variety of sources that he cannot escape"—*Mad Pol. Man*, p. 95.

A confession which is the direct outcome of the confessing accused being given to understand that if he confessed there was a reasonable prospect of his receiving a pardon, is irrelevant under section 24 of the Evidence Act. It cannot be used either against the person making the confession or against his co-accused. But where after making such a confession, the accused again makes a statement under sec 364 during the trial, in which after stating that he has now no hope of obtaining a pardon he affirms the confession previously made, such statement is relevant, and may be used against himself—*Tara*, 45 All 633 (639), 21 A.L.J. 585, 24 Cr.L.J. 785.

Instances of inducement, threat, etc.—"I will get you released if you speak the truth"—*Dhurum Dutt*, 8 WR 13; *Hayat*, 1882 P.R. 8; *Kalpershad v. Fatehchand*, 9 W.R. 16; "if you speak the truth, we would speak to the constable and arrange"—*Thandraya*, 26 Mad 38; "You had better tell the truth"—*Uzeer*, 10 Cal. 775; "You had better pay the money than go to jail and it would be better for you to tell the truth"—*Navroji*, 9 B.H.C.R. 358; "Tell me what you know about it; if you will not, I can do nothing for you, and I will send for the constable"—*Mukherji*, U.B.R. (1897-1901) 147; 'If you confess the truth, nothing will happen to you'—*Luckoo*, 5 N.W.P. H.C.R. 86, 'If you confess to the Magistrate, you will get off'—*Ramdhan*, 1 W.R. 24; 'Tell me what happened and I will take steps to get you off'—*Rama*, 3 Bom 12; 'It is of no use to deny it, for there are the man and the boy who will swear that they saw you do it'—*Mukherji*, U.B.R. (1897-1901) 147 "It would be better if you tell the truth"—*Hashmat Khan*, 36 Cr.L.J. 211, 152 I.C. 998, 1934 Cr.C. 643, A.I.R. 1934 Lah 417, 7 R.L. 348, 37 P.L.R. 25, 15 Lah 856.

Where a Zildar took the accused, a boy aged 16 years, to the Police and told him "You are a minor. You will be let off if you tell the truth before the Police just as you have done in our presence" and the Magistrate, before he recorded his confession, told him that he was not to allow any inducement to operate upon the mind in making the confession, such inducement would operate to defeat the confession made under sec 164, Cr. P. C., as it was not likely that the effect of the inducement had thereby been fully removed—*Faiz Ahmad v Emp*, 38 Cr.L.J. 27, 165 I.C. 880, A.I.R. 1936 Lah. 855, 1936 Cr.C. 879, 9 R.L. 313.

What are not inducements, etc.—Exhortation to speak the truth—*Gulab*, 1894 P.R. 9; *Jesha Bewa*, 11 C.W.N. 804; holding out hopes of divine forgiveness—5 M.L.J. 29 (Journal); threatening ex-communication from caste for life—*Ibid*; "I know the whole thing"—*Rango*, 3 Bom.L.R. 404; "Take care, we know more than you think we know"; these words amount only to caution and not to a threat—*Ibid*.

The Committing Magistrate should take immediate steps to have the accused examined by a competent doctor when the accused retracted confession alleging that it was not voluntary but was extorted from him by gross torture by the police as a result of which he sustained a dislocated shoulder and two broken fingers—*Gurdit Singh v. Emp*, A.I.R. 1939 Lah. 66, 41 P.L.R. 290, 181 I.C. 924, I.L.R. 1939 Lah. 216.

Sub-section (2):—There is a grave discrepancy between sec. 163 and sec. 164, Cr. P. C. Under sec. 163, Police Officers and other persons, which would include Magistrates, are prohibited from restraining accused persons from making a confession by coercion or otherwise where he is disposed to make a confession of his own free will. Under sec. 164, cl (3) a Magistrate is ordered to explain to the person making a confession that he is not bound to make a confession and that if he does so it may be used in evidence against him. It seems to be desirable that this discrepancy in the sections should be removed by the Legislature—*Muhammad Bux v. Emp.*, 35 Cr.L.J. 1328 (1329), 151 I.C. 311, 1934 Cr.C. 828, A.I.R. 1934 Sind 103, 7 R.S. 50.

164. (1) *Any Presidency Magistrate, any Magistrate of the first class and any Magistrate of the 2nd class specially empowered in this behalf by the Provincial Government* may, if he is not a police-officer, record any statement or confession made to him in the course of an investigation under this Chapter or at any time afterwards before the commencement of the inquiry or trial.

(2) Such statements shall be recorded in such of the manners hereinafter prescribed for recording evidence as is, in his opinion, best fitted for the circumstances of the case. Such confessions shall be recorded and signed in the manner provided in section 364, and such statements or confessions shall then be forwarded to the Magistrate by whom the case is to be inquired into or tried.

(3) *A Magistrate shall, before recording any such confession, explain to the person making it that he is not bound to make a confession and that if he does so it may be used as evidence against him, and no Magistrate shall record any such confession unless upon questioning the person making it, he has reason to believe that it was made voluntarily; and, when he records any confession, he shall make a memorandum at the foot of such record to the following effect :—*

"I have explained to (name) that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him.

(Signed) A. B.,
Magistrate.

Explanation.—It is not necessary that the Magistrate receiving and recording a confession of statement should be a Magistrate having jurisdiction in the case.

Change:—The italicised words in sub-section (1) have been substituted for "Every Magistrate," and the italicised words in sub-section (3) have been added, by section 35 of the Criminal Procedure Code Amendment Act (XVIII of 1923). The reasons have been thus stated :

"We think that confessions and statements should not be recorded under the section by third class Magistrates at all, or by second class Magistrate unless specially empowered. We consider that a statutory obligation should be laid on a Magistrate acting under the section to warn an accused person about to make a confession that the same may be used against him, and we think that the certificate prescribed by sub-section (3) should record the fact that the warning had been given"—*Report of the Joint Committee (1922).*

The words "Provincial Government" have been substituted for the words "Local Government" by sec. 4 of the Government of India (Adaptation of Indian Laws) Order, 1937,

509. Scope of section:—This section under the old law did not apply to the police in the town of Calcutta. Therefore it did not apply to a statement made by a person in custody to a Magistrate in Calcutta in the course of an investigation made by the Police in the town of Calcutta—*Nilmadhab*, 15 Cal 595 Nor did this section apply to the town of Bombay—*Visram Babaji*, 21 Bom 495

The present section has been made applicable to confessions recorded in Presidency towns, by reason of the reference to Presidency Magistrates at the beginning of the section. But it should be noted that even inspite of this amendment, the application of this section to Presidency towns is extremely limited. Sub-section (2) (a) of sec 1 of this Code expressly lays down that nothing contained in this Code, in the absence of any specific provision to the contrary, shall apply to the police in the town of Calcutta (or Bombay). The only sections in Chap XIV which are applicable to the Police of Calcutta (or Bombay) are sec 155 and sec 156 (3); and sec. 164 so far as Presidency towns are concerned applies only to confessions recorded under those two sections. That is, section 164 applies to confessions made in the course of investigations held by the Calcutta Police only where the police investigation is either an investigation in a non-cognizable case held under the orders of a Presidency Magistrate as contemplated by sec. 155, or is an investigation into a cognizable case held under the orders of a Presidency Magistrate as contemplated by section 156 (3)—*Panch Kari*, 52 Cal. 67, A.I.R. 1925 Cal. 587, 86 I.C. 414, 29 C.W.N. 300, 26 Cr.L.J. 782. The Patna High Court, however, does not accept this narrow interpretation, and holds that a Presidency Magistrate is empowered to record a confession in Calcutta during a police investigation there in any case. The Amendment has been made in 1923 to allow a Presidency Magistrate to record a confession in Calcutta in the course of a police investigation; otherwise, the amendment is altogether meaningless. Section 1 bars the application of the Code to the Police; it does not bar the application of the Code to a Magistrate not being a police-officer—*Nilmadhab*, 96 I.C. 509, A.I.R. 1926 Pat. 279, 5 Pat 171, 27 Cr.L.J. 957. Where an investigation is held outside Calcutta, and a Presidency Magistrate records a confession in Calcutta, this section undoubtedly applies—*Nilmadhab*, supra

This section applies only to statements recorded in investigations under Ch. XIV—*Shafi Ahmed*, 49 Bom 642 (652).

Where an incomplete *chalan* was put into Court by the Police and, after three witnesses had been examined, the Court took the statement of the accused under sec. 342, Cr. P. C., and, on his admission and plea of guilty, committed him inspite of the fact that some weeks later he had retracted, the High Court deprecated the attempt made by the Police to get over the mandatory provisions of law contained in sec. 164, Cr. P. C., and drew an inference that the *confessional statement* had been improperly induced from the mere fact that the Police did not have the confession recorded under sec. 164, Cr. P. C., but took an incomplete *chalan* into Court—*Sullah v. Emp.*, 29 Cr.L.J. 697, 110 I.C. 329, A.I.R. 1928 Lah. 724, 29 P.L.R. 388, 10 Lah.L.J. 311. But where there was no incomplete *chalan* and, although the accused had admittedly come from Police custody that day, he was before the Court for a considerable period and overwhelming evidence for the prosecution was recorded against him before his statement was taken, one cannot say that there is any cogent inference that his confession was in any way improperly induced. It was more likely to have been due to the fact that he had the intelligence to see that he had been caught red-handed and that the evidence which had been given against him in his presence was overwhelming—*Molar v. Emp.*, 40 Cr.L.J. 81, 178 I.C. 572, A.I.R. 1938 Lah. 731.

It is a question whether a confession under this section can be recorded by the Magistrate after the case has been sent up to him for enquiry. There is also no law which authorizes the Magistrate to return the *challan* after he has taken cognizance of the case and fixed a date for its hearing. Where there were indications that the police took back the *challan* as a pretext to enable the Magistrate to record the statement of the accused under this section, it apparently being realized by the prosecuting

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41 Bom.L.R. 428, I.L.R. 1939 Kar. 123 (P.C.), 1939 A.W.R. (P.C.) 35, 1939 A Cr.C. 49, (1939) 1 M.L.J. 756 (P.C.). But their Lordships of the Privy Council do not say that an admission of incriminating facts made by an accused person to a Magistrate under sec. 164, Cr. P. C., or a statement made to the Court during the course of the trial is not admissible in evidence for what it is worth against the person who makes it under secs. 18 to 21, Evidence Act—*Allahwarayo Daryakhan v. Emp.*, A.I.R. 1940 Sind 53 (55), I.L.R. 1939 Kar. 800. See also *Abdul Rahim v. King-Emp.*, 41 C.L.J. 474 and *Ghulam Muhammad Khan v. Emp.*, 86 I.C. 814 (Pat.).

510. Who can record statement or confession:—The power to record statements and confessions under this section is given to Magistrates not being police-officers. Magistrates who are also police-officers (e.g., patels in Bombay) are not competent to record statements or confessions—*Bhimu*, 17 Bom. 485. So also, police-officers having magisterial powers have no power to record statements—*Hurribole*, 1 Cal. 207. Where a Tahsildar, having powers of a Magistrate and being invested by the Local Government with power to take cognizance of offences upon complaint or police-report, was conducting an inquiry on a complaint received, held that he must be deemed to have been doing so as a Magistrate and not as a police-officer—*Gulabu*, 35 All. 260, 11 A.L.J. 286.

A third class Magistrate has no power to record a statement under sec. 164. A statement so recorded by him is not evidence in a stage of judicial proceedings, and if it is considered afterwards before a Magistrate having jurisdiction and holding a preliminary inquiry, it will not furnish an alternative charge of giving false evidence in a judicial proceeding—*Shettappa*, 14 Bom.L.R. 753, 13 Cr.L.J. 709. A dying declaration need not be recorded by a Magistrate having powers to record statements under this section—*Rahman*, 32 Cr.L.J. 1118, 134 I.C. 117, 33 P.L.R. 8, A.I.R. 1932 Lah. 14, 1932 Cr.R. 24, Ind. Rul. 1931 Lah. 885; *Chandgi*, 120 I.C. 274, A.I.R. 1930 Lah. 60, 31 Cr.L.J. 79. An Honorary Magistrate, who is a member of an independent Bench with *third class* powers, cannot record a confession or statement—*Nur Singh*, 29 Cal. 483. The ruling in *Ghinua*, 3 P.L.J. 291, 19 Cr.L.J. 135, in which it was held that an Honorary Magistrate of the third class not empowered to sit singly had nevertheless power to record a confession, is rendered obsolete by the present amendment.

Where a case comes before a first class Magistrate under secs. 157 and 159, he can depute a Sub-Deputy Magistrate to hold an investigation or a preliminary inquiry. The latter can, under the provisions of this section, record a statement of a witness made before him in the course of the police investigation, and therefore, this is admissible as a statement made in the course of an investigation—*Harendra*, 40 C.L.J. 313, 26 Cr.L.J. 307 (308).

A Magistrate who directs the police investigation is not incompetent to record a statement or confession under this section. On the other hand, it is the duty of the Magistrate who directs a police investigation or holds a preliminary inquiry under this Code to record statements under sec. 164; it is his duty to see that the accused confesses voluntarily, and to record his confession truly—*Maisri*, 5 S.L.R. 31, 12 Cr.L.J. 489, 12 I.C. 209. Where there are several accused in a case, one of whom is absconding, a Magistrate who commences the inquiry into the case of the present accused is not debarred from recording the confession of the absconding accused when arrested—*Mohinder*, 33 P.L.R. 891, 33 Cr.L.J. 97 (102), 135 I.C. 209, A.I.R. 1932 Lah. 103, 1932 Cr.C. 123, Ind. Rul. 1932 Lah. 81.

A confession or statement may be recorded by a Magistrate who afterwards conducts the preliminary inquiry or trial—*Barindra*, 37 Cal. 467, 14 C.W.N. 1114, 7 I.C. 359, 11 Cr.L.J. 453. A confession made to a Magistrate and recorded under this section is not inadmissible if the Magistrate thought proper, or if it so happened that he was the only Magistrate, to take the case and commit it to the Sessions Court—*Lal Sheikh*, 3 C.W.N. 387. The decision in *Anuntram*, 5 Cal. 954 is no longer good law.

511. "May record":—The language of this section leaves it optional to the Magistrate to record the confession or not as he thinks fit. He is not bound to record

it even he be clearly of opinion that the person is willing to make a perfectly voluntary confession. If an accused person makes a confession during a police investigation, or before the commencement of the inquiry or trial, then it is open to a Magistrate of any of the classes specified in that section to record the confession, and if he does so, he is bound to record it in the manner laid down in the section. The mere reference to sec. 91, Evidence Act, contained in sec. 533, Cr. P. C., cannot be taken to imply that a Magistrate hearing an oral confession made by an accused person in the course of an investigation is bound to record the confession in the manner laid down in this section. The language of the section is "may record" not "shall record"—*Sidheswar Nath*, 36 Cr.L.J. 45, 152 I.C. 174, 1934 A.L.J. 178, A.I.R. 1934 All 351, 1934 Cr.C. 421; *Feroz*, 1918 P.R. 11; *Maruti*, 21 Bom.L.R. 1065, 21 Cr.L.J. 65, 54 I.C. 465, A.I.R. 1920 Bom 322 (*Per* Hayward, J., Shah, J., contra); *Tangudupalli*, 45 Mad. 230, 42 M.L.J. 37, 23 Cr.L.J. 680. See also *Nga Thein Maung*, A.I.R. 1936 Rang. 350 (352), 37 Cr.L.J. 920, 164 I.C. 162, 1936 Cr.C. 703, 9 R.R. 64. For contra see *Gulabu*, 19 I.C. 307, 35 All. 260, 14 Cr.L.J. 211, 11 A.L.J. 286; *Nathu*, 118 I.C. 46, A.I.R. 1929 All. 855, 30 Cr.L.J. 867, Ind. Rul. 1929 All 814.

It is not obligatory on a Magistrate holding an investigation or preliminary inquiry under sec. 159, Cr. P. C., to record in writing a confession made to him by an accused person and such confession may be proved by the oral testimony of the Magistrate—*Pedda*, 69 I.C. 264, A.I.R. 1932 Mad 40, 45 Mad. 230, 23 Cr.L.J. 680, 14 M.L.W. 542, 1921 M.W.N. 779, 30 M.L.T. 107, 42 M.L.J. 37. A confession or an incriminating statement made in the presence of a Magistrate by an accused person while in police custody, who is not produced before the Magistrate with a view to record his confession, can be proved by oral testimony of the Magistrate when it has not been reduced to writing—*Jag Raj*, 129 I.C. 289, A.I.R. 1930 Lah. 534, 32 Cr.L.J. 290, 1930 Cr.C. 682, Ind. Rul. 1931 Lah. 177; see also *Itwari*, A.I.R. 1933 Oudh 432 (436), 10 O.W.N. 923, 1933 Cr.C. 1317, 147 I.C. 113. But it is not at all fair to avoid the precautions laid down in secs. 164 and 364, Cr. P. C., and endeavour to prove oral confessions made to Magistrates some of whom had no power to record a confession at all. It may be legal—a matter which is somewhat doubtful—but no weight ought to be attached to confession so obtained—*Lal Singh*, A.I.R. 1936 Lah 707 (708), 164 I.C. 373, 1936 Cr.C. 736, 37 Cr.L.J. 910, 38 P.L.R. 881.

Where during the investigation of a criminal case a Magistrate is associated with the investigating officer, and in the presence of such Magistrate the accused points out places alleged to be connected with the crime and make admissions which do not lead to the discovery of any fact and the Magistrate does not record the admissions in accordance with the provisions of sec. 164, Cr. P. C., but makes a memorandum of the conduct and admissions of the accused, the oral evidence of the Magistrate is admissible to prove the admissions of the accused and the Magistrate can refresh his memory when under examination by referring to the memorandum under sec. 157 of the Indian Evidence Act. The fact that the Magistrate is empowered to record the confession of an accused person under sec. 164, Cr. P. C., would not affect the question of the admissibility of such evidence—*Abdulla*, 34 Cr.L.J. 1025, 145 I.C. 467, 34 P.L.R. 612, A.I.R. 1933 Lah 716, 14 Lah 290, 1933 Cr.C. 902 (F.B.); *Mangal Singh*, 36 Cr.L.J. 287 (289), 153 I.C. 121, 35 P.L.R. 349. For contra see *Baghel Singh v. Emp.*, A.I.R. 1929 Lah 794, 31 Cr.L.J. 269, 1929 Cr.C. 426, 121 I.C. 497. The same weight cannot ordinarily be attached to such an oral confession as to one formally recorded with all necessary precautions under sec. 164, Cr. P. C. Confessions intended to be admitted in evidence against persons accused of criminal offences, should ordinarily be recorded with all the precautions and in the manner prescribed by sec. 164, Cr. P. C. If this salutary provision of the law is ignored in favour of an oral confession, the trial Court will be entitled to presume, unless satisfied to the contrary, that the reason for adopting the oral method is that the accused has declined to commit himself to a written confession of the nature contemplated by sec. 164. The result will be that in cases in which it is sought to rely on such an oral confession which has been subsequently

41 Bom.L.R. 423, I.L.R. 1939 Kar. 123 (P.C.), 1939 A.W.R. (P.C.) 35, 1939 A.Cr.C. 49, (1939) 1 M.L.J. 756 (P.C.). But their Lordships of the Privy Council do not say that an admission of incriminating facts made by an accused person to a Magistrate under sec. 164, Cr. P. C., or a statement made to the Court during the course of the trial is not admissible in evidence for what it is worth against the person who makes it under secs. 18 to 21, Evidence Act—*Allahurayo Daryakhan v. Emp.*, A.I.R. 1940 Sind 53 (55), I.L.R. 1939 Kar. 800. See also *Abdul Rahim v. King-Emp.*, 41 C.L.J. 474 and *Ghulam Muhammad Khan v. Emp.*, 86 I.C. 814 (Pat.).

510. Who can record statement or confession:—The power to record statements and confessions under this section is given to Magistrates not being police-officers. Magistrates who are also police-officers (e.g. patels in Bombay) are not competent to record statements or confessions—*Bhinia*, 17 Bom. 485. So also, police-officers having magisterial powers have no power to record statements—*Hurribole*, 1 Cal. 207. Where a Tahsildar, having powers of a Magistrate and being invested by the Local Government with power to take cognizance of offences upon complaint or police-report, was conducting an inquiry on a complaint received, held that he must be deemed to have been doing so as a Magistrate and not as a police-officer—*Gulabu*, 35 All. 260, 11 A.L.J. 286.

A third class Magistrate has no power to record a statement under sec. 164. A statement so recorded by him is not evidence in a stage of judicial proceedings, and if it is considered afterwards before a Magistrate having jurisdiction and holding a preliminary inquiry, it will not furnish an alternative charge of giving false evidence in a judicial proceeding—*Shettappa*, 14 Bom.L.R. 753, 13 Cr.L.J. 709. A dying declaration need not be recorded by a Magistrate having powers to record statements under this section—*Rahman*, 32 Cr.L.J. 1118, 134 I.C. 117, 33 P.L.R. 8, A.I.R. 1932 Lah. 14, 1932 Cr.R. 24, Ind. Rul. 1931 Lah. 885; *Chandgi*, 120 I.C. 274, A.I.R. 1930 Lah. 60, 31 Cr.L.J. 79. An Honorary Magistrate, who is a member of an independent Bench with third class powers, cannot record a confession or statement—*Nur Singh*, 29 Cal. 483. The ruling in *Ghinua*, 3 P.L.J. 291, 19 Cr.L.J. 135, in which it was held that an Honorary Magistrate of the third class not empowered to sit singly had nevertheless power to record a confession, is rendered obsolete by the present amendment.

Where a case comes before a first class Magistrate under secs. 157 and 159, he can depute a Sub-Deputy Magistrate to hold an investigation or a preliminary inquiry. The latter can, under the provisions of this section, record a statement of a witness made before him in the course of the police investigation, and therefore, this is admissible as a statement made in the course of an investigation—*Harendra*, 40 C.L.J. 313, 26 Cr.L.J. 307 (308).

A Magistrate who directs the police investigation is not incompetent to record a statement or confession under this section. On the other hand, it is the duty of the Magistrate who directs a police investigation or holds a preliminary inquiry under this Code to record statements under sec. 164; it is his duty to see that the accused confesses voluntarily, and to record his confession truly—*Maisri*, 5 S.L.R. 31, 12 Cr.L.J. 489, 12 I.C. 209. Where there are several accused in a case, one of whom is absconding, a Magistrate who commences the inquiry into the case of the present accused is not debarred from recording the confession of the absconding accused when arrested—*Mohinder*, 33 P.L.R. 891, 33 Cr.L.J. 97 (102), 135 I.C. 209, A.I.R. 1932 Lah. 103, 1932 Cr.C. 123, Ind. Rul. 1932 Lah. 81.

A confession or statement may be recorded by a Magistrate who afterwards conducts the preliminary inquiry or trial—*Barindra*, 37 Cal. 467, 14 C.W.N. 1114, 7 I.C. 359, 11 Cr.L.J. 453. A confession made to a Magistrate and recorded under this section is not inadmissible if the Magistrate thought proper, or if it so happened that he was the only Magistrate, to take the case and commit it to the Sessions Court—*Lal Sheikh*, 3 C.W.N. 387. The decision in *Anuntam*, 5 Cal. 954 is no longer good law.

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It is not obligatory on a Magistrate holding an investigation or preliminary inquiry under sec. 159, Cr. P. C., to record in writing a confession made to him by an accused person and such confession may be proved by the oral testimony of the Magistrate—*Pedda*, 69 I.C. 264, A.I.R. 1932 Mad 40, 45 Mad. 230, 23 Cr.L.J. 680, 14 M.L.W. 542, 1921 M.W.N. 779, 30 M.L.T. 107, 42 M.L.J. 37. A confession or an incriminating statement made in the presence of a Magistrate by an accused person while in police custody, who is not produced before the Magistrate with a view to record his confession, can be proved by oral testimony of the Magistrate when it has not been reduced to writing—*Jag Raj*, 129 I.C. 289, A.I.R. 1930 Lah. 534, 32 Cr.L.J. 290, 1930 Cr.C. 682, Ind. Rul. 1931 Lah 177; see also *Itwan*, A.I.R. 1933 Oudh 432 (436), 10 O.W.N. 923, 1933 Cr.C. 1317, 147 I.C. 113. But it is not at all fair to avoid the precautions laid down in secs 164 and 364, Cr. P. C., and endeavour to prove oral confessions made to Magistrates some of whom had no power to record a confession at all. It may be legal—a matter which is somewhat doubtful—but no weight ought to be attached to confession so obtained—*Lal Singh*, A.I.R. 1936 Lah 707 (708), 164 I.C. 373, 1936 Cr.C. 736, 37 Cr.L.J. 940, 38 P.L.R. 881.

Where during the investigation of a criminal case a Magistrate is associated with the investigating officer, and in the presence of such Magistrate the accused points out places alleged to be connected with the crime and make admissions which do not lead to the discovery of any fact and the Magistrate does not record the admissions in accordance with the provisions of sec 164, Cr. P. C., but makes a memorandum of the conduct and admissions of the accused, the oral evidence of the Magistrate is admissible to prove the admissions of the accused and the Magistrate can refresh his memory when under examination by referring to the memorandum under sec. 157 of the Indian Evidence Act. The fact that the Magistrate is empowered to record the confession of an accused person under sec 164, Cr. P. C., would not affect the question of the admissibility of such evidence—*Abdulla*, 34 Cr.L.J. 1025, 145 I.C. 467, 34 P.L.R. 612, A.I.R. 1933 Lah 716, 14 Lah. 290, 1933 Cr.C. 902 (F.B.); *Mangal Singh*, 36 Cr.L.J. 287 (289), 153 I.C. 121, 35 P.L.R. 349. For contra see *Baghel Singh v. Emp*, A.I.R. 1929 Lah 794, 31 Cr.L.J. 269, 1929 Cr.C. 426, 121 I.C. 497. The same weight cannot ordinarily be attached to such an oral confession as to one formally recorded with all necessary precautions under sec 164, Cr. P. C. Confessions intended to be admitted in evidence against persons accused of criminal offences, should ordinarily be recorded with all the precautions and in the manner prescribed by sec. 164, Cr. P. C. If this salutary provision of the law is ignored in favour of an oral confession, the trial Court will be entitled to presume, unless satisfied to the contrary, that the reason for adopting the oral method is that the accused has declined to commit himself to a written confession of the nature contemplated by sec. 164. The result will be that in cases in which it is sought to rely on such an oral confession which has been subsequently

retracted very little weight will be given to the oral confession unless there is independent evidence to corroborate the confession in such a way as to establish beyond doubt that the confession is a true statement which really connects the accused with the crime—*Karam Singh*, 37 Cr.L.J. 231 (232), 160 I.C. 111, A.I.R. 1936 Lah. 8, 16 Lah. 454, 37 P.L.R. 745, 1936 Cr.C. 1. See also *Lal Singh*, A.I.R. 1936 Lah. 707 (708), 164 I.C. 373, 1936 Cr.C. 736, 37 Cr.L.J. 940, 38 P.L.R. 881.

The Calcutta High Court took a different view of law and held that the statement of the accused, whether it amounted to confession or not, should be recorded by the Magistrate as provided in sec. 164, Cr. P. C., and that the Magistrate's evidence regarding the unrecorded statement is inadmissible—*Legal Remembrancer v. Lalit Mohan*, 25 C.W.N. 788 (793), 22 Cr.L.J. 562, 49 Cal. 167, A.I.R. 1922 Cal. 342, 62 I.C. 578, following *Rajani*, 8 C.W.N. 22 and *Amiruddin*, 45 Cal. 557 (564), 22 C.W.N. 213 and not following *Bhairab*, 2 C.W.N. 702 (715).

There is thus a conflict of judicial opinion on this point. In a very recent case, after reviewing the rulings of the different High Courts, their Lordships of the Privy Council has held that it can hardly be doubted that a Magistrate would not be obliged to record any confession made to him if, for example, it were that of a self-accusing madman or for any other reason the Magistrate thought it to be incredible or useless for the purpose of justice. Whether a Magistrate records any confession, is a matter of duty and discretion and not of obligation. On the matter of constructions secs 164 and 364 must be looked at and construed together, and it would be an unnatural construction to hold that any other procedure was permitted than that which is laid down with such minute particularity in the sections themselves. Sec. 164 is a section conferring powers on Magistrates and delimiting them. Therefore, a confessional statement not recorded in accordance with the procedure laid down in those sections is inadmissible in evidence and cannot be proved orally by the Magistrate or by the production of the memorandum made by him. Where matter can be made of record and therefore admissible as such, there are the strongest reasons of policy for supposing that the Legislature designed that it should be made available in that form and no other. Sec. 533, Cr. P. C., cannot cure this defect—*Nazir Ahmad v. Emp.*, 40 C.W.N. 1221, 64 C.L.J. 445, 17 Lah. 629, 163 I.C. 881, 38 Bom.L.R. 987, 1936 O.W.N. 505, 1936 M.W.N. 745, 1936 O.L.R. 437, A.I.R. 1936 P.C. 253, 1936 A.L.R. 747, 63 I.A. 372, 9 R.P.C. 57, 1936 A.L.J. 895, 37 Cr.L.J. 897, 17 P.L.T. 594, 1936 Cr.C. 752, 71 M.L.J. 476, 44 M.L.W. 583, 19 N.L.J. 214, 39 P.L.R. 43 (P.C.); *Nahru v. Emp.*, 38 Cr.L.J. 642 (643), I.L.R. 1937 Nag. 268, 9 R.N. 281, 168 I.C. 962, A.I.R. 1937 Nag. 220. See also *Akbar Badr Din v. Emp.*, 39 Cr.L.J. 907 (914), 40 P.L.R. 890, 177 I.C. 617, 11 R.L. 339, A.I.R. 1938 Lah. 594; *Ram Naresh v. Emp.*, 40 Cr.L.J. 559 (563), 181 I.C. 646, A.I.R. 1939 All. 242, 1939 A.L.J. 107, I.L.R. 1939 All. 377; *Harilal v. Emp.*, 41 Cr.L.J. 433 (435), 187 I.C. 203, 1940 N.L.J. 286; *Dinanath Ganpat Rai*, A.I.R. 1940 Nag. 186 (190), I.L.R. 1940 Nag. 232. From *Nazir Ahmad's Case* what is now clear is that in cases where a Magistrate has made no attempt to comply with the requirements of secs. 164 and 364, Cr. P. C., in recording the confession of an accused person, such a confession is not admissible in evidence. Where such an attempt has been made, but there is a formal defect in the procedure thereof, then it will become curable under sec. 533, Cr. P. C. Where, therefore, on being produced before a Magistrate for remand, the accused was asked whether he had anything to say and he replied, "I committed the offence, and I have nothing to say against a remand being granted", and the Magistrate made a note of it on the back of the application for remand without making any attempt to comply with the requirements of secs. 164 and 364, Cr. P. C., the confession was held inadmissible in evidence—*Saw Min*, A.I.R. 1933 Rang. 219, 1939 R.L.R. 97, 40 Cr.L.J. 691, 182 I.C. 705, 12 R.R. 25. But a confession made by the accused to the Magistrate, though not recorded after observing the formalities prescribed by this section, can properly be admitted in evidence if the Magistrate was not investigating the case or any of the facts connected with the case—*Nannamuthu Kannappan*, A.I.R. 1940 Mad. 138, 1939 M.W.N. 1132, 50 M.L.W. 784, 1939 M.Cr.C. 276, 41 Cr.L.J. 322, 186 I.C. 479.

The extra-judicial confession to a Magistrate must be wholly excluded in view of the Privy Council ruling in *Nazir Ahmad v. Emp.*, supra; *Ibrahim v. Emp.*, 38 Cr L J. 583 (585), 39 P.L.R. 419, 168 I.C. 745, 9 R.L. 669, A.I.R. 1937 Lah. 208, I.L.R. 1937 Lah. 794. Though an extra-judicial confession to any ordinary person (other than a police officer) can be proved, such a confession cannot be proved at all if made to a Magistrate, unless the provisions of sec. 164, Cr. P. C., have been complied with; it will not help for a Magistrate to say that he did not intend to act under the provisions of sec. 164, Cr. P. C.—*Kommonju Brahman*, A.I.R. 1940 Pat. 163 (169), 1939 P.W.N. 915, 41 Cr.L.J. 533, 188 I.C. 57, 19 Pat. 301.

This section must be strictly construed. The section enacts that the Magistrate must "record" any statement or confession "Recording" means, and must mean, writing down the confession. It does not mean merely filing it. Further it is to be noted that one of the essential rules is that the Magistrate should draw the attention of the confessing accused to the fact that there are no police present while the confession is being recorded, the reason being that there may be less risk that the confession is made under the influence of the police. If the confession is written down when the accused is under the control of the police and then handed to the Magistrate the reason for insisting upon this precaution is destroyed. The law enacts that a confession should be recorded by a Magistrate himself. When an accused is making an oral confession it is much easier for the Magistrate who records it to make up his mind whether that confession is voluntary or not. The written confession is inadmissible in evidence—*Ram Baran*, 34 Cr L J. 574 (575), 143 I.C. 318, A.I.R. 1933 All 356, 1933 A.L.J. 479, Ind Rul 1933 All 221, 55 All 426, 1933 Cr.C. 629.

512. Statement or Confession:—The word 'statement' means the statement of a witness and does not mean the statement of an accused person. This section does not provide for recording any statement of an accused person other than a confession, the reason is that the section relates to a stage of the case, viz., the Police-investigation stage, at which statements of the accused which are other than voluntary confessions and which are to be elicited by his examination are not intended to be obtained from him—*Bhairab*, 2 C.W.N. 702. In other words, this section provides for the recording of two classes of things, viz., (1) the statement of a person who appears before the Magistrate as a witness, and (2) the confession of a person accused of an offence—*Malka*, 2 Bom. 643; *Andal*, 5 S.L.R. 174, 13 Cr L J. 33. The Punjab Chief Court has however held that the distinction that is made in this section is between statements that are confessions and statements that are not; and not between persons by whom statements of either character are made; and this distinction is made merely to prescribe the different modes of recording (sub-sec 2); and that it is nowhere expressed or implied in this section that the statement of an accused person cannot be recorded unless it is a confession—*Lalu*, 1893 P.R. 2. The Calcutta High Court also has recently laid down that the word 'statement' is not limited to a statement made by a witness; a statement made by an accused and not amounting to a confession, is a statement within the meaning of this section—*Abdul Rahim*, 88 I.C. 1055, A.I.R. 1926 Cal. 926, 41 C.L.J. 474, 26 Cr L J. 1279. See also *Legal Remembrancer v. Lalit Mohan*, 49 Cal. 167, 25 C.W.N. 788 (dissenting from 2 C.W.N. 702 above) where it is laid down that under this section there can be no distinction between a statement made by an accused and a confession made by him, and that a statement made by an accused that he had committed a murder must be recorded as provided by this section. The Patna High Court is also of opinion that this section contemplates a statement made by an accused person before a Magistrate, which is not a confession but is wholly of an exculpatory nature—*Golam Md.*, 4 Pat. 327, 6 P.L.T. 593, 26 Cr L J. 878. The statement is certainly evidence of conduct—*Lalu Dusadh*, 29 Cr L J. 106 (111), 106 I.C. 698, 6 Pat. 747, A.I.R. 1928 Pat. 162, 9 A.I.Cr.R. 379. It is clearly not the function of the Magistrate, when he is to record statements under this section, to reduce to writing what the persons placed before him say only if they make statements which the police expect them to make and otherwise to make no note of anything

which they say—*Nazir*, 34 Cr.L.J. 489 (493), 143 I.C. 67, 1932 A.L.J. 1125, A.I.R. 1933 All. 31, 55 All. 91, Ind. Rul. 1933 All. 170, 1933 Cr.C. 42.

In recording a statement under sec. 164, Cr. P. C., a Magistrate is empowered to administer to the deponent an oath or solemn affirmation and the statement so recorded can form the subject of an alternative charge under the perjury sections of the Indian Penal Code. So on a person being offered a pardon under sec. 337, Cr. P. C., and, on his acceptance of that pardon, being placed before a Magistrate in order that his statement may be recorded, that Magistrate has the power to administer an oath or solemn affirmation to him—*Parmanand*, 34 Cr.L.J. 469, A.I.R. 1933 Lah. 321, 1933 Cr.C. 564, 142 I.C. 776, 14 Lah. 507, 34 P.L.R. 421; *Amar Singh*, A.I.R. 1933 Lah. 796 (799), 40 Cr.L.J. 513, 181 I.C. 509, 40 P.L.R. 758, I.L.R. 1939 Lah. 38.

512A. Statement of a witness:—A statement made by a witness under sec. 164, Cr. P. C., can be used for the purpose of cross-examining him and discrediting his evidence in the Sessions Court. The statement is, however, not substantive evidence—*Harnam*, A.I.R. 1935 Bom. 26, 36 Bom.L.R. 1117; *Karuppana Pillai*, 28 Cr.L.J. 279, 100 I.C. 359, A.I.R. 1927 Mad. 1112. A statement made under this section behind the back of the accused cannot be properly used as evidence against him. The only object in recording such statement is to obtain a hold over the witness—*Puttu*, 27 I.C. 195, 17 O.C. 363, 16 Cr.L.J. 132, 1 O.L.J. 753; *Manni*, 32 Cr.L.J. 48, 127 I.C. 878; 7 O.W.N. 736, A.I.R. 1930 Oudh 406, Ind. Rul. 1930 Oudh 494, 6 Luck. 210, 1930 Cr.C. 946. A statement of a witness obtained under this section always raises a suspicion that it has not been voluntarily made. The section is not intended to enable the Police to obtain a statement from some person and as it were to put a seal on that statement by sending in that person to a Magistrate practically under custody, to be examined before the judicial inquiry or trial, and, therefore, compromised in his evidence when judicial proceedings are regularly taken—*Manu Chik*, 39 Cr.L.J. 635 (639), 175 I.C. 716, A.I.R. 1933 Pat. 290, following *Jadub Das*, 27 Cal. 295 (300), 4 C.W.N. 129.

It is hardly desirable that witnesses should be pinned down by statements under sec. 164, Cr. P. Code. The Sessions Judge should not admit them under sec. 288, Cr. P. C., without making proper enquiry. The very fact that such statements are recorded under sec. 164 leads to a presumption on the showing of the prosecution itself that the witnesses are weak. At the same time sec. 164 is not confined to confessions of the accused. If then the Police take the risk, and their action is not outside the law, it is difficult to see how the Courts can prevent or discourage their so doing—*Jehangir Ardeshir Cama*, 28 Cr.L.J. 1012 (1015), 106 I.C. 100, 29 Bom.L.R. 996, A.I.R. 1927 Bom. 501, 8 A.L.Cr.R. 324.

A statement by a witness recorded by a Magistrate under this section is admissible in evidence to corroborate the statement made by that witness before the committing Magistrate from which the witness resiled in Sessions Court—*Velliah Kone*, 45 Mad. 766; *Manarali*, 60 Cal. 1339, 147 I.C. 1203, A.I.R. 1934 Cal. 124, 37 C.W.N. 1066 (1068), 58 C.L.J. 66, 1934 Cr.C. 169, 35 Cr.L.J. 567; *Mathura Tewari*, 8 Pat. 625, 120 I.C. 37, A.I.R. 1929 Pat. 343, 1929 Cr.C. 155, 30 Cr.L.J. 1136, 10 P.L.T. 177, Ind. Rul. 1929 Pat. 677; *Emp. v. Lalji Rai*, 37 Cr.L.J. 235 (238), 160 I.C. 181, A.I.R. 1936 Pat. 11, 1936 Cr.C. 6, 16 P.L.T. 730. See Note 898. The provision contained in sec. 145 of the Indian Evidence Act relates to cross-examination as to previous statements in writing, but does not militate in any way against such previous statements being used by way of corroboration of statements put in under sec. 288, Cr. P. C., which are substantive evidence in the case before the Court of Sessions. The statements under sec. 164, Cr. P. C., are admissible in evidence although they were not put in strictly under sec. 145 of the Indian Evidence Act—*Manarali*, supra. But see *Mahomed Khan*, 32 Cr.L.J. 172 (173), 128 I.C. 673, A.I.R. 1930 Sind 308, 1930 Cr.C. 1145, Ind. Rul. 1931 Sind 1.

It is not necessary to call the Magistrate to prove that the witnesses to be cross-examined are the persons who made statements which were recorded under sec. 164, Cr. P. Code. The records of such statements are presumed to be genuine (see sec. 80

Evidence Act) and the fact that the person who made a statement under sec. 164, Cr. P. C., is the person in Court can be proved by the Police Officer who had the statement recorded—*Sadulla v. Emp.*, 39 Cr.L.J. 864, 177 I.C. 32, 40 P.L.R. 752, 11 R.L. 276, A.I.R. 1938 Lah. 477.

Approver:—Once the approver has accepted a tender of pardon he stands on the same footing as any other witness with the exception that he is liable to forfeit his tender of pardon if he does not comply with the conditions on which the tender was made. There is no legal bar to his examination like any other witness under this section—*Emp. v. Hussaina*, A.I.R. 1933 Lah. 868, 1933 Cr.C. 1113, 146 I.C. 461, 35 Cr.L.J. 111, following *Emp. v. Parmanand*, 34 Cr.L.J. 469, A.I.R. 1933 Lah. 321, 1933 Cr.C. 564, Ind. Rul. 1933 Lah. 303, 34 P.L.R. 421, 14 Lah. 507 and A.I.R. 1924 Lah. 90, and dissenting from *Emp. v. Nga Bo Gyi*, A.I.R. 1925 Rang. 286, 89 I.C. 708, 26 Cr.L.J. 1936, 3 Rang. 224. See also *Amar Singh*, A.I.R. 1938 Lah. 796 (799), 40 P.L.R. 758 and *Horilal v. Emp.*, 41 Cr.L.J. 433 (436, 437), 187 I.C. 203, 1940 N.L.J. 286 in Note 963A.

Confessions made by the approvers are not substantive evidence, but may be used only for the purpose of contradicting or corroborating their depositions in Court—*Nitai Chandra Jana v. Emp.*, 38 Cr.L.J. 852 (864), 170 I.C. 201, A.I.R. 1937 Cal. 433, 10 R.C. 98 (S.B.).

Copy:—An accused is undoubtedly entitled to inspect statements of prosecution witnesses recorded under this section. Such statements can be used by the prosecution for the purpose of corroborating the witness. They can likewise be used by the defence for the purpose of contradicting such witness. A Magistrate should direct copies of the statements under this section to be given to the accused on payment by them of the usual fees and in any case should allow the Advocate for the defence to inspect those statements—*Bashir-ud-Din*, 33 Cr.L.J. 752, 139 I.C. 330, A.I.R. 1932 All. 327, 1932 Cr.C. 306, Ind. Rul. 1932 All. 554; *Ghulam Nabi*, 30 Cr.L.J. 760, 117 I.C. 377, A.I.R. 1929 Lah. 429, Ind. Rul. 1929 Lah. 649, *Hari Chand*, 32 Cr.L.J. 253, 129 I.C. 193, A.I.R. 1931 Lah. 59, 1931 Cr.C. 139, Ind. Rul. 1931 Lah. 129, where it was also held that the proposition, that a statement recorded by a Magistrate under sec. 164, Cr. P. C., could not be seen by the accused until after the witness concerned had been examined-in-chief, could not be accepted. There can be no doubt that these statements are public documents within the meaning of sec. 74, Evidence Act. That being so, the accused is entitled to copies of these documents, even when the Magistrate has not recorded evidence—*Bherumal Khanchand v. Emp.*, A.I.R. 1937 Sind. 303, 171 I.C. 993.

It is plain from the provisions of sec. 164 (2), Cr. P. C., that a record of a statement made under that section forms part of the proceedings before the Court at the subsequent trial. It is an elementary principle of natural justice which needs no authority that an accused person shall have free access at any time during the trial to all records which are before the Court. The Judge should not decline to allow the pleaders for the defence to see the records of statements under sec. 164, Cr. P. C., or to cross-examine the witnesses thereon—*Brahmayya v. The King*, 40 Cr.L.J. 265 (268), 179 I.C. 783, A.I.R. 1938 Rang. 442.

513. At what stage can confession be recorded:—A statement or confession must be recorded in the course of an investigation under this chapter or at any time afterwards, but before the commencement of the inquiry or trial. Therefore, where the Magistrate recorded confessions before he took cognizance of the case and before the examination of the prosecution witnesses began, it was held that the confessions were duly recorded under this section—*Barindra*, 37 Cal. 467. This section refers to a confession or statement recorded during an inquiry before the Police and not during an inquiry by the Magistrate. Therefore, where during an inquiry under section 202, the Magistrate recorded a statement made by a person against whom the complaint was filed, it was held that the statement did not fall under this section.

Such a statement was not admissible against the accused without further proof—*Sat Naram*, 32 Cal 1085 (1089). A confession can be recorded only when, in the course of a police enquiry under Chap. XIV, it is discovered that a certain person who has been definitely charged with a certain particular offence is willing to make an incriminating statement in respect of that offence. Where no police investigation was pending against the accused and he was produced on the allegation that he was in the habit of committing forgeries and was willing to make a statement to that effect, without even a written complaint, his confession cannot be legally recorded for the purpose of discovering from it grounds for subsequently bringing a specific charge of forgery in respect of a particular document—*Sheo Prasad*, 36 Cr.L.J. 927, A.I.R. 1935 Oudh 416, 1935 O.W.N. 722, 156 I.C. 231; *Hari Krishna*, 36 Cr.L.J. 1007 (1011), A.I.R. 1935 Oudh 477, 156 I.C. 819, 1935 O.W.N. 781, 1935 O.L.R. 441. A Magistrate should not record a confession under this section after the case has been sent up to him for enquiry, although the *challan* was taken back as incomplete—*Pahlwan*, 31 Cr.L.J. 533, 123 I.C. 540, A.I.R. 1930 Lah. 454. Where the Magistrate commenced an enquiry against one accused, and then an absconding accused was arrested and his confession recorded, but the prosecution asked for an adjournment to carry on an investigation (by the police) into the truth of the confession, whereupon the Magistrate thought it proper to have the inquiry carried on by another Magistrate, and the proceedings were taken *de novo* by another Magistrate who committed the accused for trial, *held* that though the confession was recorded after the inquiry was commenced in respect of another accused, still so far as the confessing accused was concerned, it was recorded before any inquiry was commenced into *his* case; moreover, it was recorded at a time when investigation had not ceased, because *further investigation* was necessary (by the police) into the truth of the confession. The confession was therefore properly recorded—*Mihinder*, 33 P.L.R. 891, 33 Cr.L.J. 97 (101, 102).

514. Procedure:—A Magistrate should not, before recording a confession, look into a police report to see what the accused had stated to the police—*Jogjiban*, 13 C.W.N. 861, 10 Cr.L.J. 125.

The Magistrate should not hold out any inducement. Where after the prisoner had made a new confessional statement, he was told by the Magistrate that if he stated all that he knew, he would then be examined as an approver and witness, it was held that the conduct of the Magistrate was highly improper—*In re Kosa Govindan*, 2 Weir 137. See also *Tara*, 45 All. 633 cited under sec. 163. But unless this inducement was *actually* held out to the accused by the Magistrate or by some person in authority, the mere fact that the accused was *under an impression* that if he confessed he would be made an approver, would not make the confession bad. The mere thought in the mind of the accused would not affect the admissibility of the confession—*Nilmadhab*, 5 Pat. 171, 27 Cr.L.J. 957.

The Magistrate must not put any question to the accused tending to incriminate him—*In re Rayappan*, 2 Weir 136.

The Government rules, salutary as they are, are intended for the guidance of Magistrates but they have not the effect of law and the mere omission of compliance in any particular respect is not *per se* sufficient to rule out the confession, if there has been no breach of the provision of this section, which lays down the law on the subject and if there are grounds sufficient to satisfy the Court and to induce it to believe that the confession is voluntary—*Nikbar*, 34 Cr.L.J. 838 (840), 144 I.C. 769, A.I.R. 1933 Oudh 299, 10 O.W.N. 642, 1933 Cr.C. 669. But see *Daulat Ram*, A.I.R. 1933 Oudh 315 (318), 8 Luck 518, 35 Cr.L.J. 10, 146 I.C. 465, 1933 Cr.C. 698, 10 O.W.N. 466. See also Note 517.

A statement cannot be said to be properly recorded under this section if a police-officer is present at the time and is allowed to put questions to the accused—*Indarsain*, 21 Cr.L.J. 418 (Lah.); *Jogjiban*, 12 C.W.N. 861, 10 Cr.L.J. 125. "It is not proper to allow the police-officer who brought the prisoner to be present while the confession is

being recorded by a Muharrir and to suggest questions to be put to the confessing prisoner"—*Cal. G. R. & C. O.*, page 8; *Ramanand*, 1885 A.W.N. 221.

There is no warrant or justification for the intervention of a third party (e.g. police-officer or another Magistrate) as the questioner, directly or indirectly, of a confessing prisoner—*Jogiban*, *supra*.

The Magistrate should not hand over the accused to the investigating officer who was in attendance outside his room and record his confession after he had been with the police officer for a few minutes. A confession taken by a Magistrate in jail with a police officer in the next room and subsequently retracted, could not acted upon unless supported by very good corroboration—*Indra*, 32 Cr.L.J. 818, 132 I.C. 185, A.I.R. 1931 Lah. 408, Ind Rul 1931 Lah 537, 1931 Cr.C. 648, following *Sheikh Sohali*, 5 I.C. 773, 11 C.L.J. 723, 11 Cr.L.J. 247.

Confessions should be recorded in open Court in the day time. It is improper to record the confession at 9 P.M. on a winter night within the *thana* compound. If the Court is then closed owing to holidays, some other place should be selected—*Ranbir*, 33 P.L.R. 241, 33 Cr.L.J. 242 (250); *Jahana*, A.I.R. 1937 Lah. 98 (99), 38 P.L.R. 791, 166 I.C. 1003, 38 Cr.L.J. 338; *Amar Singh*, A.I.R. 1937 Lah. 746, 39 P.L.R. 453, 173 I.C. 105; *Kishan Chand Kewal Ram*, 39 Cr.L.J. 448 (451), 174 I.C. 449, 10 R.Pesh. 64, A.I.R. 1938 Pesh. 5. A Magistrate acts improperly in recording the confession at a late hour in night (*viz.*, at 11-30 P.M.) after the accused had been subjected to interrogation by a police-officer for 3 or 4 hours, and had broken down under the continued questioning—*Pramatha*, 30 C.L.J. 503, 21 Cr.L.J. 266. But, of course, the fact of the confession being recorded late at night, is by itself not a sufficient proof against its voluntariness—*Abdul Salim*, 49 Cal. 573 (598). The Patna, Lahore and Rangoon High Courts hold that the Code does not contain any provision that the confession must be recorded in open Court; and therefore a Magistrate does not act illegally if he brings the accused to his house and records the confession there—*Nilmadhab*, 5 Pat. 171, 27 Cr.L.J. 957; *Ghulam*, 36 Cr.L.J. 683, 155 I.C. 265, 35 P.L.R. 746, A.I.R. 1934 Lah. 675, 1934 Cr.C. 1001; *Maung Tha Ka Do*, 37 Cr.L.J. 280 (282), 160 I.C. 292, A.I.R. 1935 Rang. 491, 1935 Cr.C. 1266.

If the confession is a lengthy one, and cannot be finished in one day, the Magistrate is competent to record the confession piece-meal from day to day. But in such a case the Magistrate should not, during the period of confession, return the accused to the custody of the police at night—*Nilmadhab*, 5 Pat. 171, 27 Cr.L.J. 957. See *Panchkauri* in Note 516.

Power to administer oath—The person making a statement under this section is a witness within the meaning of sec. 5 of the Oaths Act, and therefore one to whom oath might be administered, and a charge of perjury can be framed under sec. 193, I. P. C., against the person making a false statement on oath under this section—*Alagu*, 16 Mad. 421 (423); *Tasaddak*, 1908 A.W.N. 73; *Suppu Tevan*, 29 Mad. 89 (90); *Parmanand*, 142 I.C. 776, Ind Rul 1933 Lah. 303, A.I.R. 1933 Lah. 321, 34 P.L.R. 421, 1933 Cr.C. 564, 14 Lah. 507, 34 Cr.L.J. 469, *Abdul Gam*, 32 Cr.L.J. 985, 133 I.C. 55, A.I.R. 1931 Lah. 763, 1931 Cr.C. 1067, Ind. Rul 1931 Lah. 727. But see *Contra*—*Hari Charan*, 27 Cal. 455 (457); *Lalu*, 1893 P.R. 2 (*per* Plowden, J at p. 28); *Motilal*, 45 Bom. 61, 64 I.C. 40, 23 Bom.L.R. 884, 22 Cr.L.J. 728, A.I.R. 1922 Bom. 138.

515. Retracted confession:—It cannot be laid down as an inflexible rule that a confession made and subsequently retracted by a prisoner, cannot be accepted as evidence of his guilt without independent corroborative evidence. The weight to be attached to such a confession must depend on the circumstances under which the confession was originally made and the circumstances under which it was retracted including the reasons given by the prisoner for its retraction. It is unsafe for a Court to rely on and act on a confession which has been retracted unless after a consideration of the whole of the evidence in the case, the Court is in a position to come to the unhesitating conclusion that the confession is true, that is to say, usually

Such a statement was not admissible against the accused without further proof—*Sat Naram*, 32 Cal. 1085 (1089). A confession can be recorded only when, in the course of a police enquiry under Chap. XIV, it is discovered that a certain person who has been definitely charged with a certain particular offence is willing to make an incriminating statement in respect of that offence. Where no police investigation was pending against the accused and he was produced on the allegation that he was in the habit of committing forgeries and was willing to make a statement to that effect, without even a written complaint, his confession cannot be legally recorded for the purpose of discovering from it grounds for subsequently bringing a specific charge of forgery in respect of a particular document—*Sheo Prasad*, 36 Cr.L.J. 927, A.I.R. 1935 Oudh 416, 1935 O.W.N. 722, 156 I.C. 231; *Hari Krishna*, 36 Cr.L.J. 1007 (1011), A.I.R. 1935 Oudh 477, 156 I.C. 819, 1935 O.W.N. 781, 1935 O.L.R. 441. A Magistrate should not record a confession under this section after the case has been sent up to him for enquiry, although the *challan* was taken back as incomplete—*Pahlwan*, 31 Cr.L.J. 533, 123 I.C. 540, A.I.R. 1930 Lah. 454. Where the Magistrate commenced an enquiry against one accused, and then an absconding accused was arrested and his confession recorded, but the prosecution asked for an adjournment to carry on an investigation (by the police) into the truth of the confession, whereupon the Magistrate thought it proper to have the inquiry carried on by another Magistrate, and the proceedings were taken *de novo* by another Magistrate who committed the accused for trial, held that though the confession was recorded after the inquiry was commenced in respect of another accused, still so far as the confessing accused was concerned, it was recorded before any inquiry was commenced into his case; moreover, it was recorded at a time when investigation had not ceased, because further investigation was necessary (by the police) into the truth of the confession. The confession was therefore properly recorded—*Mishnder*, 33 P.L.R. 891, 33 Cr.L.J. 97 (101, 102).

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515. Retracted confession:—It cannot be laid down as an inflexible rule that a confession made and subsequently retracted by a prisoner, cannot be accepted as evidence of his guilt without independent corroborative evidence. The weight to be attached to such a confession must depend on the circumstances under which the confession was originally made and the circumstances under which it was retracted including the reasons given by the prisoner for its retraction. It is unsafe for a Court to rely on and act on a confession which has been retracted unless after a consideration of the whole of the evidence in the case, the Court is in a position to come to the unhesitating conclusion that the confession is true, that is to say, usually

unless the confession is corroborated by credible independent evidence. A retracted confession should carry practically no weight as against a person other than its maker—*Biseswar*, 26 C.W.N. 1010 (1014), 24 Cr.L.J. 145, 71 I.C. 497, A.I.R. 1923 Cal. 217. See also *Krishna*, 34 Cr.L.J. 896, 145 I.C. 133, 35 Bom.L.R. 371, A.I.R. 1933 Bom. 23, 1933 Cr.C. 653; *Ghirrao*, 34 Cr.L.J. 1009 (1013), 145 I.C. 470, A.I.R. 1933 Oudh 265, 1933 Cr.C. 592, 10 O.W.N. 1108; *Housabai*, A.I.R. 1932 Bom. 553 (556), 34 Bom.L.R. 1240, 1932 Cr.C. 785, 140 I.C. 740, 56 Bom. 542, 34 Cr.L.J. 73; *Ituari*, A.I.R. 1933 Oudh 432, 10 O.W.N. 923, 1933 Cr.C. 1317, 147 I.C. 113; *Jahanjiri*, 35 Cr.L.J. 1180 (1204), A.I.R. 1935 Lah. 230, 150 I.C. 1056; *Nahnun*, 35 Cr.L.J. 1390, 151 I.C. 716, 36 P.L.R. 2, A.I.R. 1934 Lah. 716, 1934 Cr.C. 1025; *Shyam Lal*, 36 Cr.L.J. 1086. See also *Manji*, A.I.R. 1936 All. 388, *Kalijiban*, 37 Cr.L.J. 775, 163 I.C. 41, 63 C.L.J. 232, 1936 Cr.C. 532, A.I.R. 1936 Cal. 316 (319), 63 Cal. 1053 and *Emp. v. Gostho Sardar*, A.I.R. 1936 Cal. 407 (408), 1936 Cr.C. 670, 165 I.C. 438, 37 Cr.L.J. 1149. See also *Ramelu*, 39 P.L.R. 815. The Court is entitled to read and look at a confession although it is retracted but it should not give the same credence to it that it should have done if it had not been retracted—*Emp. v. Bhawani*, A.I.R. 1935 Cal. 561 (566), 39 C.W.N. 334, 62 Cal. 433 (S.B.). See also *Purnendu Sekher Guha*, 63 C.L.J. 232. An accused person can lawfully be convicted on his own confession even when it has later been retracted if the Court is satisfied of its truth—*Nga Po Aung*, 38 Cr.L.J. 948 (949), 170 I.C. 645, 10 R.R. 101, A.I.R. 1937 Rang. 264. As a rule of prudence a retracted confession should not be the basis of a conviction unless it is substantially corroborated by independent evidence. The object for looking for corroboration is to find out how far the confession is true and whether it can be acted upon for the purposes of a conviction. The best test is whether the story as set forth in the confession is consistent, natural and plausible—*Manu Chik*, 39 Cr.L.J. 635 (637), 175 I.C. 716, A.I.R. 1938 Pat. 290. If a confession is made and is not withdrawn, that may furnish the strongest possible evidence of guilt of an accused, because unless there is something to raise a different inference what a man says about his own actions and his own intentions, must be even more potent evidence against him than what others may say as to that man's intentions. Therefore, normally a confession of guilt is the most conclusive evidence which one can have. But if that confession is "retracted", to use the word which has almost become a word of art, then it is certainly desirable, if not absolutely necessary, that there should be some corroboration of what the accused has said about himself even in respect of his own actions. But an accused person cannot get rid of a statement merely by saying that he retracts it. He cannot get rid of it by saying that he withdraws it—*Purnananda Das Gupta v. Emp.*, A.I.R. 1939 Cal. 65 (74), 68 C.L.J. 206, 179 I.C. 506, I.L.R. (1939) 1 Cal. 1, 40 Cr.L.J. 199. It is now well settled that a confession, though retracted, is admissible against the person making it, provided that the Court is satisfied that it was voluntarily made—*Maroti Jago v. Emp.*, A.I.R. 1940 Nag. 230, 1940 N.L.J. 210, 188 I.C. 146, 41 Cr.L.J. 553.

When a conviction is sought to be based on the confession of a co-accused together with corroborative evidence, there is no rule that such corroborative evidence cannot be used unless it is sufficient, if believed, itself to support a conviction. It is a rule of prudence, if not of law, that against a co-accused a confession can carry no weight unless it is substantially corroborated by good evidence from other sources—*Sadasibo*, A.I.R. 1939 Pat. 35 (38), 1938 P.W.N. 754, 19 P.L.T. 801, 178 I.C. 103, 39 Cr.L.J. 997, 18 Pat. 82. A conviction on the confession of a co-accused alone would be bad in law—*Lalit Mohan*, 38 Cal. 559 (588), 10 I.C. 582, 12 Cr.L.J. 286, 15 C.W.N. 593; *Nitai Chandra v. Emp.*, A.I.R. 1937 Cal. 433 (445), 38 Cr.L.J. 852, 170 I.C. 201, 10 R.C. 98. When the substantive evidence is not sufficient to establish a *prima facie* case against the accused, it is not permissible to use the confession of a co-accused under sec. 30, Evidence Act, as if it were itself substantive evidence, which it is not. If there is relevant evidence bearing on the accused's complicity in a particular crime the confession of a co-accused may be taken into consideration to lend assurance to

it. It can in no case be used to fill up the gap in the prosecution evidence—*Maroti Jago v. Emp.*, *supra*.

A confession cannot be used against the co-accused where it is of an exculpatory nature and subsequently retracted—*Ramsidh Rai*, 39 Cr.L.J. 725 (727), 176 I.C. 530, 11 R.P. 79, 4 B.R. 724, A.I.R. 1938 Pat. 352; *Bhadeswar Sardar v. Emp.*, 29 Cr.L.J. 527 (528), 109 I.C. 351, 47 C.L.J. 526, 32 C.W.N. 731, A.I.R. 1928 Cal. 416, 10 A.I.Cr.R. 219, following *Gauraj*, 2 All. 444 (446), 4 Ind. Jur. 581, 1 Ind. Dec. (N.S.) 851; *Abdul v. King-Emp.*, 41 C.L.J. 474 (478); *Abdul Jalil Khan v. Emp.*, A.I.R. 1930 All. 746; *C. E. Ring*, 120 I.C. 340, 53 Bom. 479, 31 Bom.L.R. 545, 1929 Cr.C. 114, 31 Cr.L.J. 65, A.I.R. 1929 Bom. 296; *Shamlal v. Emp.*, 120 I.C. 210, 31 Cr.L.J. 15, 13 A.I.Cr.R. 157, 1929 Cr.C. 673, A.I.R. 1929 Nag. 350; *Kunja Subudhi v. Emp.*, 116 I.C. 770, 8 Pat. 289, 10 P.L.T. 549, 30 Cr.L.J. 675, 1929 Cr.C. 62, 13 A.I.Cr.R. 143, A.I.R. 1929 Pat. 275; *Wahid Bux v. Emp.*, 120 I.C. 81, 1929 Cr.C. 678, 30 Cr.L.J. 1121, A.I.R. 1929 Sind. 250; *Diwan Dhimar v. Emp.*, 91 I.C. 1002, 9 N.L.J. 80, 27 Cr.L.J. 186, A.I.R. 1926 Nag. 229. The law does not go so far as to require that the confession should claim for its maker the leading part in the crime—*Sadasiba*, A.I.R. 1939 Pat. 35 (37), 1938 P.W.N. 754, 19 P.L.T. 801, 178 I.C. 130, 39 Cr.L.J. 997, 18 Pat. 82. But it can be admitted against its maker—*Abdul v. King-Emp.*, *supra*; *Ghulam Muhammad Khan v. Emp.*, 86 I.C. 814 (Pat.); *Diwan Dhimar v. Emp.*, *supra*.

The evidence of an accomplice cannot corroborate a retracted confession—*Ramani*, A.I.R. 1930 Cal. 146, 1933 Cr.C. 223, 143 I.C. 797, 34 Cr.L.J. 638. See also *Latafat*, 33 C.W.N. 58 (60).

One confession cannot corroborate another confession—*Takanath*, 10 C.W.N. xvi.

Evidence brought in under sec. 283, Cr. P. C., cannot be accepted as proper corroboration of a confession made to a Magistrate and retracted at the Sessions trial—*Jadub Das*, 27 Cal. 295 (307), 4 C.W.N. 129.

A retracted confession can be used to contradict the approver who turns hostile, but it is not substantive evidence and cannot be used to contradict the co-accused's confession—*Baliram Singh v. Emp.*, A.I.R. 1939 Nag. 295 (300), 1939 N.L.J. 442, 184 I.C. 274.

In cases where the sole evidence against the accused is that of a retracted confession, if such a confession is relied on, it must be relied on as a whole and not only in part—*Durjan v. Emp.*, 31 Cr.L.J. 300, 121 I.C. 550, A.I.R. 1930 All. 192, 1930 Cr.C. 84. Where there is no other evidence to show affirmatively that any portion of the exculpatory element in the confession is false, the Court must accept or reject the confession as a whole and cannot accept only the inculpatory element while rejecting the exculpatory element as inherently incredible—*Balmakund v. Emp.*, 52 All. 1011, 129 I.C. 258, A.I.R. 1931 All. 1, 1931 Cr.C. 1, 32 Cr.L.J. 362, 1930 A.L.J. 1481, Ind. Rul. 1931 All. 130, L.R. 12 All. 33 (Cr.) (F.B.); *Sher Gul v. Emp.*, 36 Cr.L.J. 966, 156 I.C. 529, 7 R.L. 918, 37 P.L.R. 492, A.I.R. 1935 Lah. 671, 1935 Cr.C. 1001; *Kala Mohammad Akbar v. Emp.*, 41 Cr.L.J. 150, A.I.R. 1939 Lah. 534 (535), 185 I.C. 274. The confession made by an accused person is a document which should be taken into consideration with the utmost possible care. It is not right for the Court to put reliance on a portion of the statement made by the accused person which would implicate him in the commission of a crime and to disregard another portion simply because it would go against the prosecution story—*Abdul Subhan v. Emp.*, A.I.R. 1940 All. 46 (51), 1939 A.L.J. 966, 41 Cr.L.J. 258, 186 I.C. 192. See also *Jadeo v. Emp.*, 38 I.C. 740, 18 Cr.L.J. 356, 15 A.L.J. 15. This would evidently show that where there is evidence to show that any portion of the exculpatory statement is inherently improbable, the Court is at liberty to reject that portion of the statement which appears to it to be so improbable and to act only upon that part of the statement which is inculpatory—*Ghulam Nabi v. Emp.*, 40 Cr.L.J. 185, 179 I.C. 237, A.I.R. 1938 Lah. 850, 40 P.L.R. 265. See also *Nihal Singh v. Emp.*, 41 Cr.L.J. 576, 183 I.C. 326, A.I. 1940 Lah. 157 (158), 42 P.L.R. 1; *Deeyam Chinnayya*, 41 Cr.L.J. 461 (462), 187 I.C. 481, 1940 M.W.N. 169. Where there is no other evidence then the confession

unless the confession is corroborated by credible independent evidence. A retracted confession should carry practically no weight as against a person other than its maker—*Biswar*, 26 C.W.N. 1010 (1014), 24 Cr.L.J. 145, 71 I.C. 497, A.I.R. 1923 Cal. 217. See also *Krishna*, 34 Cr.L.J. 896, 145 I.C. 133, 35 Bom.L.R. 371, A.I.R. 1933 Bom. 23, 1933 Cr.C. 653; *Ghirrao*, 34 Cr.L.J. 1009 (1013), 145 I.C. 470, A.I.R. 1933 Oudh 265, 1933 Cr.C. 592, 10 O.W.N. 1108; *Housabai*, A.I.R. 1932 Bom. 553 (556), 34 Bom.L.R. 1240, 1932 Cr.C. 785, 140 I.C. 740, 56 Bom. 542, 34 Cr.L.J. 73; *Iltwar*, A.I.R. 1933 Oudh 432, 10 O.W.N. 923, 1933 Cr.C. 1317, 147 I.C. 113; *Jahanjiri*, 35 Cr.L.J. 1180 (1204), A.I.R. 1935 Lah. 230, 150 I.C. 1056; *Nahnun*, 35 Cr.L.J. 1390, 151 I.C. 716, 36 P.L.R. 2, A.I.R. 1934 Lah. 716, 1934 Cr.C. 1025; *Shyam Lal*, 36 Cr.L.J. 1086. See also *Manji*, A.I.R. 1936 All. 388, *Kalijiban*, 37 Cr.L.J. 775, 163 I.C. 41, 63 C.L.J. 232, 1936 Cr.C. 532, A.I.R. 1936 Cal. 316 (319), 63 Cal. 1053 and *Emp. v. Gostho Sardar*, A.I.R. 1936 Cal. 407 (408), 1936 Cr.C. 670, 165 I.C. 438, 37 Cr.L.J. 1149. See also *Ramelu*, 39 P.L.R. 815. The Court is entitled to read and look at a confession although it is retracted but it should not give the same credence to it that it should have done if it had not been retracted—*Emp. v. Bhawan*, A.I.R. 1935 Cal. 561 (566), 39 C.W.N. 334, 62 Cal. 433 (S.B.). See also *Purnendu Sekher Guha*, 63 C.L.J. 232. An accused person can lawfully be convicted on his own confession even when it has later been retracted if the Court is satisfied of its truth—*Nga Po Aung*, 38 Cr.L.J. 948 (949), 170 I.C. 645, 10 R.R. 101, A.I.R. 1937 Rang. 264. As a rule of prudence a retracted confession should not be the basis of a conviction unless it is substantially corroborated by independent evidence. The object for looking for corroboration is to find out how far the confession is true and whether it can be acted upon for the purposes of a conviction. The best test is whether the story as set forth in the confession is consistent, natural and plausible—*Manu Chik*, 39 Cr.L.J. 635 (637), 175 I.C. 716, A.I.R. 1938 Pat. 290. If a confession is made and is not withdrawn, that may furnish the strongest possible evidence of guilt of an accused, because unless there is something to raise a different inference what a man says about his own actions and his own intentions, must be even more potent evidence against him than what others may say as to that man's intentions. Therefore, normally a confession of guilt is the most conclusive evidence which one can have. But if that confession is "retracted", to use the word which has almost become a word of art, then it is certainly desirable, if not absolutely necessary, that there should be some corroboration of what the accused has said about himself even in respect of his own actions. But an accused person cannot get rid of a statement merely by saying that he retracts it. He cannot get rid of it by saying that he withdraws it—*Purnananda Das Gupta v. Emp.*, A.I.R. 1939 Cal. 65 (74), 68 C.L.J. 206, 179 I.C. 506, I.L.R. (1939) 1 Cal. 1, 40 Cr.L.J. 199. It is now well settled that a confession, though retracted, is admissible against the person making it, provided that the Court is satisfied that it was voluntarily made—*Maroti Jago v. Emp.*, A.I.R. 1940 Nag. 230, 1940 N.L.J. 210, 188 I.C. 146, 41 Cr.L.J. 553.

When a conviction is sought to be based on the confession of a co-accused together with corroborative evidence, there is no rule that such corroborative evidence cannot be used unless it is sufficient, if believed, itself to support a conviction. It is a rule of prudence, if not of law, that against a co-accused a confession can carry no weight unless it is substantially corroborated by good evidence from other sources—*Sadasibo*, A.I.R. 1939 Pat. 35 (38), 1938 P.W.N. 754, 19 P.L.T. 801, 178 I.C. 103, 39 Cr.L.J. 997, 18 Pat. 82. A conviction on the confession of a co-accused alone would be bad in law—*Lalit Mohan*, 38 Cal. 559 (588), 10 I.C. 582, 12 Cr.L.J. 286, 15 C.W.N. 593; *Nitai Chandra v. Emp.*, A.I.R. 1937 Cal. 433 (445), 38 Cr.L.J. 852, 170 I.C. 201, 10 R.C. 98. When the substantive evidence is not sufficient to establish a *prima facie* case against the accused, it is not permissible to use the confession of a co-accused under sec. 30, Evidence Act, as if it were itself substantive evidence, which it is not. If there is relevant evidence bearing on the accused's complicity in a particular crime the confession of a co-accused may be taken into consideration to lend assurance to

it. It can in no case be used to fill up the gap in the prosecution evidence—*Maroti Jago v. Emp.*, supra.

A confession cannot be used against the co-accused where it is of an exculpatory nature and subsequently retracted—*Ramsidh Rai*, 39 Cr.L.J. 725 (727), 176 I.C. 530, 11 R.P. 79, 4 B.R. 724, A.I.R. 1938 Pat. 352; *Bhadreswar Sardar v. Emp.*, 29 Cr.L.J. 527 (528), 109 I.C. 351, 47 C.L.J. 526, 32 C.W.N. 731, A.I.R. 1928 Cal. 416, 10 A.I.Cr.R. 219, following *Gauraj*, 2 All. 444 (446), 4 Ind. Jur. 581, 1 Ind. Dec. (NS) 851; *Abdul v. King-Emp.*, 41 C.L.J. 474 (478); *Abdul Jalil Khan v. Emp.*, A.I.R. 1930 All. 746; *C. E. Ring*, 120 I.C. 340, 53 Bom. 479, 31 Bom.L.R. 545, 1929 Cr.C. 114, 31 Cr.L.J. 65, A.I.R. 1929 Bom. 296; *Shamlal v. Emp.*, 120 I.C. 210, 31 Cr.L.J. 15, 13 A.I.Cr.R. 157, 1929 Cr.C. 673, A.I.R. 1929 Nag. 350; *Kunja Subudhi v. Emp.*, 116 I.C. 770, 8 Pat. 289, 10 P.L.T. 549, 30 Cr.L.J. 675, 1929 Cr.C. 62, 13 A.I.Cr.R. 143, A.I.R. 1929 Pat. 275; *Wahid Bux v. Emp.*, 120 I.C. 81, 1929 Cr.C. 678, 30 Cr.L.J. 1121, A.I.R. 1929 Sind. 250; *Dewan Dhimar v. Emp.*, 91 I.C. 1002, 9 N.L.J. 80, 27 Cr.L.J. 186, A.I.R. 1926 Nag. 229. The law does not go so far as to require that the confession should claim for its maker the leading part in the crime—*Sadasibo*, A.I.R. 1939 Pat. 35 (37), 1938 P.W.N. 754, 19 P.L.T. 801, 178 I.C. 130, 39 Cr.L.J. 997, 18 Pat. 82. But it can be admitted against its maker—*Abdul v. King-Emp.*, supra; *Ghulam Muhammad Khan v. Emp.*, 86 I.C. 814 (Pat.); *Dewan Dhimar v. Emp.*, supra.

The evidence of an accomplice cannot corroborate a retracted confession—*Ramani*, A.I.R. 1930 Cal. 146, 1933 Cr.C. 223, 143 I.C. 797, 34 Cr.L.J. 638. See also *Latafat*, 33 C.W.N. 58 (60).

One confession cannot corroborate another confession—*Takanath*, 10 C.W.N. xvi.

Evidence brought in under sec 288, Cr P C, cannot be accepted as proper corroboration of a confession made to a Magistrate and retracted at the Sessions trial—*Jadub Das*, 27 Cal. 295 (307), 4 C.W.N. 129.

A retracted confession can be used to contradict the approver who turns hostile, but it is not substantive evidence and cannot be used to contradict the co-accused's confession—*Baliram Singh v. Emp.*, A.I.R. 1939 Nag. 295 (300), 1939 N.L.J. 442, 184 I.C. 274.

In cases where the sole evidence against the accused is that of a retracted confession, if such a confession is relied on, it must be relied on as a whole and not only in part—*Durjan v. Emp.*, 31 Cr.L.J. 300, 121 I.C. 550, A.I.R. 1930 All. 192, 1930 Cr.C. 84. Where there is no other evidence to show affirmatively that any portion of the exculpatory element in the confession is false, the Court must accept or reject the confession as a whole and cannot accept only the inculpatory element while rejecting the exculpatory element as inherently incredible—*Balmakund v. Emp.*, 52 All. 1011, 129 I.C. 258, A.I.R. 1931 All. 1, 1931 Cr.C. 1, 32 Cr.L.J. 362, 1930 A.L.J. 1481, Ind. Rul. 1931 All. 130, L.R. 12 All. 33 (Cr.) (F.B.); *Sher Gul v. Emp.*, 36 Cr.L.J. 966, 156 I.C. 529, 7 R.L. 918, 37 P.L.R. 492, A.I.R. 1935 Lah. 671, 1935 Cr.C. 1001; *Kala Mohammad Akbar v. Emp.*, 41 Cr.L.J. 150, A.I.R. 1939 Lah. 534 (535), 185 I.C. 274. The confession made by an accused person is a document which should be taken into consideration with the utmost possible care. It is not right for the Court to put reliance on a portion of the statement made by the accused person which would implicate him in the commission of a crime and to disregard another portion simply because it would go against the prosecution story—*Abdul Subhan v. Emp.*, A.I.R. 1940 All. 46 (51), 1939 A.L.J. 966, 41 Cr.L.J. 258, 186 I.C. 192. See also *Jadeo v. Emp.*, 38 I.C. 740, 18 Cr.L.J. 356, 15 A.L.J. 15. Thus would evidently show that where there is evidence to show that any portion of the exculpatory statement is inherently improbable, the Court is at liberty to reject that portion of the statement which appears to it to be so improbable and to act only upon that part of the statement which is inculpatory—*Ghulam Nabi v. Emp.*, 40 Cr.L.J. 185, 179 I.C. 237, A.I.R. 1938 Lah. 850, 40 P.L.R. 265. See also *Nihal Singh v. Emp.*, 41 Cr.L.J. 576, 188 I.C. 326, A.I.R. 1940 Lah. 157 (158), 42 P.L.R. 1; *Deyyam Chinnayya*, 41 Cr.L.J. 461 (462), 187 I.C. 481, 1940 M.W.N. 169. Where there is no other evidence then the confession

is to be rejected or accepted as a whole; when there is other evidence whereby the truth or falsity of a part of the confession could be tested, the Court will test the truth or falsity of the confession by that other evidence and will use its discretion and will accept that part of the confession which it believes to be true and reject that part which it believes to be false. Where, however, there is no other evidence as to certain facts to which the accused in his confession testifies and which are in his favour the Court will accept those facts as true if it accepts the confession and draw from them the proper inferences in favour of the accused—*Noukar Mouldino v. Emp*, 38 Cr.L.J. 968 (971), 170 I.C. 827, A.I.R. 1937 Sind 312, 10 R.S. 73. By evidence is meant not only direct evidence but circumstantial evidence. A Judge must not leave out of his consideration when considering the truth or falsity of a confession or its parts, those probabilities and those presumptions which may properly arise from the other evidence on record, regard being had to the common course of natural events and human conduct to which sec. 114, Evidence Act refers—*Jado Rahim v. Emp*, 40 Cr.L.J. 93, 178 I.C. 520, A.I.R. 1938 Sind 202. The Patna High Court has gone further and held that there is no justification for a rule of law that in the absence of other evidence the whole of a given confession must be accepted as a statement of truth in its entirety. It is true that if an accused person makes a confession, the whole of that confession must be placed before the Court and is receivable in evidence. But there is no rule of law which compels belief in the statement of a witness. The Court, if it comes to the conclusion that the statement in its essential particulars is true, is entirely entitled to disregard the statements which it may hold in the circumstances not to be true—*Itwa Munda*, 39 Cr.L.J. 554 (556), 175 I.C. 300, A.I.R. 1938 Pat. 258, 4 B.R. 568, 10 R.P. 605, 19 P.L.T. 476 (F.B.); *Jate Uraon*, A.I.R. 1940 Pat. 541 (545), 41 Cr.L.J. 472 (476), 6 B.R. 503, 187 I.C. 586, 1540 P.W.N. 446. A Court is not bound in law to accept a confession as a whole. If the Court is satisfied that part of a confession is true and part is false, it can accept such portion as it finds to be true and reject the false portion—*Jate Uraon*, supra.

A retracted confession can be acted upon if it is voluntarily made and is corroborated by other evidence. When the voluntary confession of a prisoner is corroborated by the confession of another prisoner, and the two confessions are strongly corroborated by the mass of evidence which has been recorded in the case, the confession of the former prisoner, even though subsequently retracted, can be made the basis of his conviction—*Nilmadhab*, 5 Pat. 171, 27 Cr.L.J. 957. A retracted confession cannot be given any weight, unless it is well corroborated in material particulars by reliable evidence—*Ramani*, 3 Pat. 872 (879), A.I.R. 1925 Pat. 191, 26 Cr.L.J. 314; *Shambhu*, 54 All. 350, 33 Cr.L.J. 201 (205); *Pharho*, 26 S.L.R. 302, 34 Cr.L.J. 147 (149). But in some other cases it has been laid down that retracted confession, if proved to have been voluntarily made, can be considered along with the other evidence of the case. No binding rule can be laid down such as that a retracted confession must be supported by independent reliable evidence corroborating it in material particulars. The Court should treat the value of a retracted confession as a matter of prudence rather than of law—*Gharya*, 19 Bom. 728; *Gangia*, 23 Bom. 316; *Raman*, 21 Mad. 83; *Jawan*, 1914 P.R. 30; *Indra Chandra*, 2 C.W.N. 637; *Manna Lal*, 27 O.C. 40, A.I.R. 1925 Oudh 1, 25 Cr.L.J. 49. It is not illegal to base a conviction upon the uncorroborated confession of an accused person (subsequently retracted) provided that the Court is satisfied that the confession was voluntary and is true in fact—*Jawan*, 1914 P.R. 30, 15 Cr.L.J. 626. If a Judge believes that a confession, though subsequently withdrawn, contains a true account of the prisoner's crime, the Judge is bound to act, so far as the prisoner is concerned, on the confession which he believed to be true—*Kehri*, 29 All. 434; *Maiku*, 20 All. 133. The weight to be given to such a confession depends upon the circumstances under which it was generally made and the circumstances under which it was retracted, including the reasons given by the prisoner for his retraction—*Sajad Husain*, 1903 P.R. 16; *Raman*, 21 Mad. 83; *Manna Lal*, 27 O.C. 40, 25 Cr.L.J. 49. Thus, where a confession was made under circumstances that indicate

that it was made voluntarily and was true, and though it has been retracted, the reasons given by the accused for retraction are so absurd as to deserve no consideration whatever, the confession must be admitted in evidence—*Arunachela*, 55 Mad 717, 33 Cr L.J. 586 (587). But where a confession was made under police coercion and subsequently withdrawn, it is certainly inadmissible in evidence—*Motijan*, 6 C.W.N 380; *Sriam*, 2 A.L.J. 100, 2 Cr L.J. 59.

Where a confession is retracted, it is the duty of the Court that is called to act upon it, especially in a case of murder, to enquire into all the material points and surrounding circumstances and satisfy itself that the confession cannot but be true—*Durgaya*, 3 Bom.L.R. 441.

The fact that the confessions were retracted and that when they were made, some Policemen were interested in the investigation of the case, is a good ground for not relying upon the confessions specially when the confessions do not agree in material details—*Ramel Singh v. Emp.*, 39 Cr L.J. 290 (292), 173 IC 315, AIR. 1938 Lah. 101, 39 P.L.R. 815, 10 RL 431.

Where in the course of the investigation of an offence, a witness makes a statement of a confessional nature which is recorded by the Magistrate under this section as a statement and not as a confession, and subsequently in the course of preliminary inquiry before the committing Magistrate he retracts that statement, it is admissible in evidence against that witness on a prosecution for perjury—*Maddala Ramanujamma*, 39 Mad. 977.

No doubt extra-judicial confession to the doctor cannot carry the same weight as a confession duly recorded under this section, but it is admissible under sec. 21, Evidence Act—*Kommoju Brahman*, AIR. 1940 Pat. 163 (170), 1939 P.W.N 915.

516. Sub-section (2)—Mode of recording:—The confession is to be recorded in the manner provided by sec 364, i.e., in the form of questions and answers. The Magistrate is bound to record every question that he asks. It is of great importance that this provision of the law should be obeyed, otherwise it may be impossible to tell how far a witness voluntarily deposes to a matter, and how far it was extracted from him by questioning even in the nature of cross-examination. If the confession is not recorded in this manner, the record is defective—*Hasan Ali*, 23 A.L.J. 719, 26 Cr.L.J. 1209. The Magistrate should not put a series of questions. Such procedure is ordinarily to be deprecated. The confessing person should be left to narrate his story as a whole without any unnecessary interference and allowed to give all the details that he remembers and wishes to describe—*Ghena*, 33 Cr.L.J. 414, 137 IC. 95, 33 P.L.R. 16, AIR. 1932 Lah. 180, 1932 CrC 179, Ind. Rul. 1932 Lah. 294. In some other cases it is held that if a confession is recorded not in the form of questions and answers, as required by section 364, but in a narrative form, the defect is not a fatal one, and the confession is admissible in evidence, provided that the accused is not prejudiced by the irregularity. Section 533 would cure the defect—*Fekoo*, 14 Cal 539; *Munahi*, 8 Cal. 616; *Khudiram*, 9 C.L.J. 55; *Deo Dat*, 45 All. 166, 20 A.L.J. 915; *Hasan Ali*, supra.

A confession cannot be excluded from evidence as irrelevant merely because all the provisions of this section were not carefully complied with—*Khtali*, AIR. 1933 Oudh 404 (410), 10 O.W.N 937, 1933 CrC 1277, 146 IC. 905, 35 Cr L.J. 192; *Amrit Lal*, AIR. 1933 Lah. 987 (989), 1933 CrC 1503. For contra see *Allah Dad*, 33 Cr L.J. 377, 137 IC 57, 33 P.L.R. 25, Ind. Rul. 1932 Lah. 281. Non-compliance with the provisions of this section can only be cured if the error or errors committed by the Magistrate in recording the confession has or have not injured the accused as to his defence on the merits—*Daulat Ram*, AIR. 1933 Oudh 315 (318), 8 Luck. 518, 35 Cr L.J. 10, 146 IC 465, 1933 CrC 698, 10 O.W.N 466; *Naubat*, AIR. 1935 All. 653, 1935 CrC. 653.

Where, however, the confession was not recorded in the manner prescribed in section 364, but there was only a gist of the confession in a narrative form, and where

it moreover appeared that the confession was not voluntary, it was held to be inadmissible in evidence—*Garib Hari*, 30 C.W.N. 454, 27 Cr.L.J. 621; *Ramsakhia*, 33 Cr.L.J. 447 (449), 153 I.C. 922, 15 P.L.T. 586, A.I.R. 1934 Pat. 651, 1934-Cr.C. 1322. See Note 1037 under sec. 364.

In *Panchkari*, 52 Cal. 67 (96), A.I.R. 1925 Cal 587, 86 I.C. 414, 26 Cr.L.J. 782, 29 C.W.N. 300, the piecemeal recording of confessions, when the accused was in the interval in police custody, was deprecated. See *Nilmadhab* in Note 514.

Language of record :—See Note 1038 under sec. 364.

Signature :—The object of requiring the signature of an accused person to the record of his confession is probably to furnish a strong test as to whether the confession was voluntary and free, and to afford him a *locus penitentiae*, before the completion of the record, of indicating that the confession was not voluntary or was made under improper influence—*Bai Ratan*, 10 B.H.C.R. 166. The signature is taken as a voucher of the authenticity of the statement and not as an admission of its correctness—*Khudiram*, 9 C.L.J. 55.

If the confession is *not signed* by the accused, parol evidence may be given, under sec. 533 of the terms of the confession, and those terms, if and when proved, may be admitted and used as evidence in the case, if the defect (non-signature) is such that it has not affected the merits of the defence—*Raghu*, 23 Bom. 221. So also, if the accused subsequently signed the confession without objection as soon as the non-signature was noticed, the defect would be cured by sec. 533 by the evidence of the Magistrate as to the authenticity of the statement—*Khudiram*, 9 C.L.J. 55. Where the Magistrate, through an oversight, did not take the signature of the accused, the confession can be admitted in evidence if the Magistrate has been examined and from his evidence it appears that the accused did make the confession and did so voluntarily—*Ba Yin*, 7 Rang. 759, 31 Cr.L.J. 297 (299). Where the accused informed the Magistrate that he was illiterate and, accordingly, his thumb impression was taken on the record of his confession but the accused signed his own signature in the Sessions Judge's Court, the confession can be admitted in evidence when the recording Magistrate gives evidence to prove it—*Arajaddm Molla*, 40 C.W.N. 872 (875).

If the accused is able to write, his thumb-impression will not be sufficient—*Sadananda*, 32 Cal. 550.

The Magistrate must sign the record of confession as well as the memorandum—*Lal Shaikh*, 3 C.W.N. 387.

Forwarded to the Magistrate :—A Magistrate, who records a confession under this section, should avoid handing over the document after completion to the police in charge of the prisoner, but should forward it as required by sub-sec. (2) of this section direct to the Magistrate by whom the case is to be enquired into or tried. But where it is handed over to the police and there was no suggestion that it was tampered with in transit, it was held that there was substantial compliance with the provisions of this section—*Hans Raj*, A.I.R. 1936 Lah. 341 (343), 16 Lah. 345, 37 P.L.R. 605, 37 Cr.L.J. 504, 161 I.C. 900, 1936 Cr.C. 264.

Under this sub-section statements or confessions recorded shall be forwarded to the Magistrate by whom the case is to be tried or inquired into. Where the statement after being recorded was returned either to the witness, or, more probably, to the pleader, the procedure was wholly illegal—*Mohamed Cassim v. Thumby Sahib*, A.I.R. 1940 Rang. 33 (34), 41 Cr.L.J. 392, 187 I.C. 77.

See also Note 1040 under sec. 364

517. Sub-section (3)—Confession must be voluntary:—A confession, in order to be admissible in evidence, must be made voluntarily and without pressure—*Gulabu*, 35 All. 260, 11 A.L.J. 286; *Pisari*, 2 Weir 137. No statement should be recorded under this section unless the person making it, is a free agent and voluntarily agrees to have his statement taken down—*Hira Lal*, 1918 P.R. 16, 19 Cr.L.J. 517. A Magistrate acting under this section must question the accused in order to be affirmatively satisfied

of the voluntariness of the confession, and in case of doubt he ought not to record it or give the certificate—*Basvanta*, 25 Bom. 168; *Neki*, 25 Cr.L.J. 116 (Lah.); *Kesho Singh*, 20 O.C. 136, 18 Cr.L.J. 742 (746). The Magistrate should ascertain whether the confessional statement is made voluntarily, *at the beginning* of the statement and not at the end—*Rayappan*, 2 Weir 136. A Magistrate should not proceed to record a confession, unless he first has reason to believe that the person is about to make it voluntarily, and he should therefore *begin* by enquiring into the point whether the confession is voluntarily made. Where a Magistrate recorded a confession of an accused *without first satisfying himself as to its being voluntary, and then at the end of it put one comprehensive question as to the nature of the confession*, it was held that he had not complied with the provisions of this section—*Appa*, 1 Bom.L.R. 357; *Kandhai*, 1 O.L.J. 407, 15 Cr.L.J. 633. But the omission to comply with the requisites of the Criminal Rules of Practice would not vitiate a confession provided sec. 164, Cr. P. C., is complied with—*Dasi Viraya*, 39 Cr.L.J. 585 (587), 175 I.C. 422, 47 M.L.W. 161, 1938 M.W.N. 90, 10 R.M. 775, A.I.R. 1938 Mad 490, (1938) 1 M.L.J. 289; *Panchcowri*, 52 Cal. 67 (92), A.I.R. 1925 Cal. 587, 86 I.C. 414, 26 Cr.L.J. 782, 29 C.W.N. 300; *Public Prosecutor v. Sarabu Chennayya*, 33 Mad 413. See also *Nikbar* and *Daulat Ram* in Note 514. In *Putin Tanti*, 40 Cal 873 (876), 15 Cr.L.J. 25, 22 I.C. 169, it was held that the fact that the Magistrate instead of asking the accused about the voluntary nature of the confession at the commencement of the confessional statement asked him at the end, was merely a defect of form which did not alter the character of the confession.

It is not desirable that the accused should be sent to jail custody and removed from police influence before they are placed before Magistrate for the recording of their confessions. It is also very necessary in the interests, both of the accused and of the prosecution, that the accused after their confessions have been recorded, should not be sent back to the police custody and that at the time when confessions are recorded they should be assured that they need be under no fear of going back into the custody of the police—*Bhagwan Din*, 35 Cr.L.J. 915 (917), 149 I.C. 195, 11 O.W.N. 444, A.I.R. 1934 Oudh 151, 1934 Cr.C. 495. See also *Abdul Sattar*, 37 Cr.L.J. 493, 161 I.C. 793, 38 P.L.R. 1, 1936 Cr.C. 248, A.I.R. 1936 Lah 278 (279), 17 Lah 460; *Narayan Singh*, 17 Lah 419, A.I.R. 1936 Lah 357, 37 Cr.L.J. 567, 162 I.C. 379, 1936 Cr.C. 298, A.I.R. 1937 Lah 98 (99), 38 P.L.R. 791, 166 I.C. 1003, 38 Cr.L.J. 338, 9 R.L. 458 and *Kishan Chand Kewal Ram v. Emp.*, 39 Cr.L.J. 448 (451), 174 I.C. 449, 10 R.Pesh 64, A.I.R. 1938 Pash. 5. The confessing accused must invariably be sent to the judicial lock-up as soon as possible after confession and on no account be returned to Police custody. If the Police thereafter require the accused for any particular purpose, the instructions lay down clearly that the Police must put in an application stating the purpose for which the accused are required and for that purpose they may be handed over to the Police: there certainly ought to be an interval between the taking of the confession and the handing over of the accused to the Police for any subsequent purpose. Where the accused were handed back to the Police, the Court must look very carefully at the confessions and the surrounding circumstances in order to satisfy itself that the confessions were in fact voluntary—*Surat Singh Buta Singh v. Emp.*, 39 Cr.L.J. 475 (477), 174 I.C. 804, A.I.R. 1938 Lah. 292, 40 P.L.R. 214, I.L.R. (1937) 18 Lah. 740, 10 R.L. 600.

It is not enough for a Magistrate recording the confession of an accused to give him a warning, but it is essential that he should put questions to satisfy himself that the confession was in fact voluntary and the question with its answer must be recorded. It is not enough that the Magistrate was satisfied as to the confession being voluntary, but the Courts before whom the confession is used must have materials on which they can be satisfied that the confession was in fact voluntary. The Magistrate should fill up column 7 of the form for recording confession, which is a column for recording a brief statement of the Magistrate's reason for believing that the statement was voluntarily made—*Ramsidh Rai*, 39 Cr.L.J. 725 (729), 176 I.C. 530, 1939 P.W.N. 559, 11 R.P. 79, 4 B.R. 724, A.I.R. 1938 Pat. 352, following *Bakshan v. Emp.*, 16 Lah. 912, 161 I.C. 339,

A.I.R. 1936 Lah. 247, 1936 Cr.C. 205, 37 Cr.L.J. 432, 37 P.L.R. 869, 8 R.L. 721. The provisions of sec. 164 (3) are mandatory. The Magistrate must act strictly in accordance with the provisions of sec. 164, or not at all. One of the provisions says that no Magistrate shall record any such confession unless, upon questioning the person making it, he has reason to believe that it was made voluntarily. Therefore, the Magistrate must ask the accused questions designed to ascertain and to satisfy himself whether the confession is being made voluntarily or not. It would be going too far to say that the questions must be in any special form, for sec. 164 does not prescribe that; but clearly there must be some question or questions designed to reveal whether the statement is being made voluntarily. To ask a question which can only test the accused's memory of the previous warning is not a compliance with the provisions of this section. The question or questions, whatever the form, must be designed to show whether the accused is making the statement voluntarily—*Kommoju Brahman*, A.I.R. 1940 Pat. 163 (168), 1939 P.W.N. 915, 41 Cr.L.J. 533, 188 I.C. 57, 19 Pat. 301.

Where a confession made on one day was continued the next day, and the Magistrate did not question the accused again, and there was nothing to satisfy himself that the confession made on the second day was voluntary, the part of the confession so made was inadmissible—*Panchkari*, 52 Cal. 67 (86), A.I.R. 1925 Cal. 587, 86 I.C. 414, 26 Cr.L.J. 789, 29 C.W.N. 300.

"It is not desirable that Magistrates should act with deliberation in examining persons brought before them for the purpose of making confession and should, as far as possible, satisfy themselves that the confession is voluntary—and this not merely from the declaration of the accused, but from an attentive observation of his demeanour"—*Cal. G. R. & C. O.*, page 9. Magistrates recording confessions should pay particular attention to paras 852, 853 and 853A of the Manual of Government Orders, Vol. I, S. VI, Judicial (Criminal) Department.

It is the duty of a Magistrate when a person is brought before him under this section whether as an accused or as a proposed witness, to see that the statement made by the person is voluntary. One simple method of securing this, apart from the questions given on the printed form, is to see that the person is left alone and is given half an hour or so to collect his mind before his statement is taken down—*Jahangiri Lal*, A.I.R. 1935 Lah. 230 (244), 150 I.C. 1056, 35 Cr.L.J. 1180.

A confession cannot be held inadmissible merely because it has been retracted or because of allegations as to its having been induced in the absence of evidence to support them—*Ibrahim v. Emp.*, 38 Cr.L.J. 583 (586), 39 P.L.R. 419, 168 I.C. 745, 9 R.L. 669, A.I.R. 1937 Lah. 208, following *Pratap Singh v. Emp.*, 6 Lah. 415, 93 I.C. 978, A.I.R. 1926 Lah. 605, 27 Cr.L.J. 514. When a confession made by the accused is alleged by him to have been obtained by ill-treatment or other improper inducements, the Court should carefully inquire into the truth of such allegations—*Reg v. Kashi Nath*, 8 B.H.C.R. 126; and if the Court sees any ground of exclusion mentioned in sec. 24, Evidence Act (inducement, threat, promise), it may reject the confession, though at the time of record it appeared to be a voluntary confession—*Umar*, 1187 P.R. 51; *Dewan Kahar*, 4 P.L.T. 186. Hope for a pardon alone would not render a confession inadmissible—*Amrit Lal*, A.I.R. 1933 Lah. 987 (989), 1933 Cr.C. 1503; *Nanak Chand*, 32 Cr.L.J. 1036, 133 I.C. 545, 32 P.L.R. 792, A.I.R. 1932 Lah. 73, Ind. Rul. 1931 Lah. 785. But the Court cannot, merely on surmise or conjecture, hold that the confession was produced by inducement, threat or promise. There must be in a confession itself or in the evidence or in the surrounding circumstances something to justify the inference that the confession was really not a voluntary one—*Dewan Kahar*, 4 P.L.T. 186, 24 Cr.L.J. 497, A.I.R. 1923 Pat. 13. The excuse of torture by the police is used so often without any justification time and again that it has become very difficult for any Court to pay serious attention to it and indeed no Court should pay any attention to it unless it is supported by evidence—*Purnananda Das Gupta v. Emp.*, A.I.R. 1939 Cal. 65 (74), 68 C.L.J. 206, 179 I.C. 506, I.L.R. (1939) 1 Cal. 1, 40 Cr.L.J. 199. But when there is an entire absence of spontaneity in a confession, it is clearly a reluctant statement and the Court cannot be

satisfied that the confession was made without inducement of some kind being offered by the police. (*Per Henderson, J.*). If the circumstances are such as to raise a strong suspicion in the mind of the Judge that the confession has been induced by threats or promises of the nature described in sec. 24 of the Evidence Act, then the confession is irrelevant. It is not necessary for the defence to establish conclusively that there was such inducement or threat. It is sufficient if the circumstances afford reasonable grounds for believing that there was such an inducement or threat (*per Sen, J.*)—*Mohsena Khatun*, A.I.R. 1939 Cal. 610, 43 C.W.N. 893, 40 Cr L.J. 880, 184 I.C. 222.

When confessions are alleged to be not voluntary statements but were extorted from the accused by gross torture by the Police, the Magistrate should take immediate steps to have the accused examined by a competent doctor—*Gurdit Singh v. Emp.*, 40 Cr L.J. 614 (616), 181 I.C. 924, A.I.R. 1939 Lah. 66, 41 P.L.R. 290

When it appeared that an accused person was illegally placed in solitary confinement for about a fortnight, that the police had access to him, that pressure was brought to bear upon him through his father, mother and brother, that the desirability of a confession was pressed upon him by the District Magistrate as a means of saving himself and his relatives from threatened pains and penalties, that his father was illegally detained in *hajut* for a long time without any charge, that he (accused) then made a confession which was recorded without legal precautions and in the immediate presence of a police officer who put incriminating questions to the accused and helped in amplifying the confession, *held* that such confession was not voluntary and was not admissible in evidence—*Jogjiban*, 13 C.W.N. 861, 10 Cr L.J. 125. The confession of an accused with fetters on and policemen on either side of him cannot be accepted as free from the influence of the police and must, therefore, be discarded—*Haider v. Emp.*, 39 P.L.R. 663.

When it is found that the man who makes a confession has been kept in police custody in defiance of the rules on the point for a number of days, the Court is entitled to ask the prosecution to explain why the irregularities were committed—*Abdul Subhan v. Emp.*, A.I.R. 1940 All. 46 (51), 1939 A.L.J. 966.

Warning to be given to accused:—Under the present Amendment, the Magistrate should not only question the accused about the voluntariness of the confession, but should also warn him that he is not bound to make any confession, and that if he makes any, it will be used as evidence against him. This amendment overrules *Uzeer*, 10 Cal 775

The exact words of warning, which must be given to a person making a statement in the nature of a confession, are not very material, provided the Magistrate explains, and the person making the statement clearly understands, that he need not make a confession—*Bawa Singh*, 26 Cr L.J. 1458, 89 I.C. 1026, A.I.R. 1925 Lah. 448, 7 Lah L.J. 250. See also *Majhi*, 28 Cr L.J. 807 (809), 101 I.C. 247, A.I.R. 1927 Lah. 682; *Prag*, 32 Cr L.J. 97 (103), 128 I.C. 215, 7 O.W.N. 909, A.I.R. 1930 Oudh 449, Ind. Rul. 1931 Oudh 23, 6 Luck 335, 1930 Cr C 1013. Where the Magistrate did not write down the warnings which he gave to the accused in Bengali but the prosecution actually put the Magistrate into the witness box and gave evidence as to the actual warnings which he gave to the accused, the confession cannot be excluded from evidence—*Arajauddin Molla*, 40 C.W.N. 872 (875). See also *Karrevadu v. Emp.*, 1937 M.W.N. 562

Unless it is proved that the Magistrate explained to him that he need not make any confession and that it might be used against him, the confession is not admissible in evidence—*Bahawala*, 6 Lah. 183, 26 Cr L.J. 1238. See also *Daulat Ram*, 8 Luck. 518, 146 I.C. 465, 10 O.W.N. 466, 1933 Cr C 698. But the Madras High Court holds that if the confession is made voluntarily, the mere fact that the caution was not given does not make the confession inadmissible. Sec. 164 (3) does not pretend to override sec. 29, Evidence Act. Though sec. 164 makes it imperative that the accused person should be cautioned, sec. 29, Evidence Act says that his statement is not inadmissible in evidence merely because the caution has not been given. On a question of the admissibility of a particular piece of evidence, it is the Evidence Act that has to be

looked to, and not sec 164, Cr. P. Code—*Vellamoonji*, 55 Mad 711, 33 Cr.L.J. 526 (527), 137 I.C. 863, A.I.R. 1932 Mad 431, 62 M.L.J. 559, 35 M.L.W. 542, 1932 M.W.N. 449, Ind Rul. 1932 Mad. 459, 1932 Cr.C. 412. But the question is, not whether the omission to give the warning invalidates the confession as being one not recorded in the manner prescribed by law, but whether the omission to give such a warning does not raise a strong suspicion that the confession was not voluntary, a suspicion so strong that when taken in connection with other circumstances it would amount to a fairly strong probability that the confession was the result of an inducement held out to the effect that the accused would be taken as an approver—*Govindu Subbaramayya*, A.I.R. 1937 Mad. 321 (324), 1937 M.W.N. 178, 1937 M.Cr.C. 81, (1937) 1 M.L.J. 750, 45 M.L.W. 93, 169 I.C. 372, 38 Cr.L.J. 753. Where the Magistrate said to the accused that he should think over the matter and state what really happened as otherwise the statement would be used against him, it did not satisfy the rule in sub-sec. (3) of this section—*Perumal Kundumban*, A.I.R. 1940 Mad. 562 (563), 1940 M.W.N. 358, 51 M.L.W. 535, 1940 M.Cr.C. 90. See also *Mohammad Ali*, 35 Cr.L.J. 385 (389), 147 I.C. 300, 1933 A.L.J. 1551 (F.B.). Where the Magistrate omitted from his certificate that the accused had been told that he need not make a confession but made it quite clear in his evidence that he did inform the accused of the fact, the confession was held to be admissible in evidence—*Drummond*, 34 Cr.L.J. 712, 144 I.C. 296, A.I.R. 1933 Lah. 311, 1933 Cr.C. 545, Ind. Rul. 1933 Lah. 434, 34 P.L.R. 702. For contra see *Housabai Bala*, A.I.R. 1932 Bom. 553, 34 Bom.L.R. 1240, 1932 Cr.C. 785, 140 I.C. 740, 56 Bom. 542, 34 Cr.L.J. 73, distinguishing *Rama*, A.I.R. 1929 Bom. 327, 120 I.C. 350. Where the details as to the length of time during which and the places where the accused had been in the custody of the police had not been filled in, the confession was held admissible—*Rama*, supra. See also *Abdul Gani*, 32 Cr.L.J. 985, 133 I.C. 55, A.I.R. 1931 Lah. 763, Ind Rul. 1931 Lah. 727, 1931 Cr.C. 1067. See Note 519.

Where it appeared that the accused thought that he was confessing before a Police-officer and not before a Magistrate, held that the Magistrate did not give proper warning to the accused and the confession was inadmissible—*Prag*, 6 Luck. 335, 32 Cr.L.J. 97 (99). See also *Panchkari*, 52 Cal. 67, 29 C.W.N. 300 (310). But where the accused was not unaware of the fact that he was confessing before a Magistrate, the omission of the Magistrate to inform the accused that he was a Magistrate was not an illegality—*Mohinder*, 33 P.L.R. 891, 33 Cr.L.J. 97 (102).

Where the Magistrate has violated the provisions of sec. 164 (3), Cr. P. C., a retracted confession is inadmissible in evidence—*Ragunandan Prasad v. Emp.*, 1937 O.W.N. 296, 1937 A.Cr.C. 59.

Questions to be put to accused:—The Magistrate must question the accused with a view to discover whether he confesses voluntarily, and this question must be in pursuance of a real endeavour to find out the object of it. This requirement cannot be satisfied by putting a few formal questions—*Panchkari*, 52 Cal. 67, 86 I.C. 414, A.I.R. 1925 Cal 587, 29 C.W.N. 300 (308), 26 Cr.L.J. 782; *Thein Maung*, 4 Cr.L.J. 198; *Sardar Mfiya*, 38 Cr.L.J. 987 (988), 20 N.L.J. 128, 170 I.C. 868, I.L.R. 1937 Nag. 417, 10 R.N. 83, A.I.R. 1937 Nag. 257. A mere direction by the Magistrate to the accused to make the statement voluntarily is not sufficient; the Magistrate must put questions to the accused to find out whether he is making the statement voluntarily. The questions put to the accused must be directed to eliciting facts which will enable the Magistrate to judge of the voluntary character of the confession. This cannot be done by merely repeating some set formulae or by merely asking the accused whether his confession is voluntary—*Panchkari*, supra; *Shambhu*, 51 All 350, 33 Cr.L.J. 201 (204), 135 I.C. 838, A.I.R. 1932 All. 228, 1932 Cr.C. 226, 1932 A.L.J. 162, Ind. Rul. 1932 All 102. No express form of question is prescribed, and the extent to which the accused should be questioned largely depends on the particular facts of each case. It is impossible to lay down any hard and fast rule on the subject. The Magistrate must satisfy himself and take steps to ascertain that the confession was a voluntary one—*Thibu*, 4 P.L.T. 279, 21 Cr.L.J. 649. The Magistrate shall hear the confession first, without

making any record, and shall then put questions to ascertain whether the confession is voluntary, and then if he has reason to believe that it is voluntary, he may record the confession, following the provisions of sec 364. The questioning of the accused before recording a confession is a matter of substance and not of mere form, and if it has been omitted, the omission is a fatal one and cannot be cured by any evidence under sec. 533—*Ranbir*, 33 P.L.R. 241, 33 Cr.L.J. 242 (250); *Ananda v. Parbati*, 3 L.B.R. 173; *Shew Sin*, 3 L.B.R. 213, 4 Cr.L.J. 385; *Farid*, 2 Lah. 325 (328), 65 I.C. 613, 5 P.W.R. 1922 (Cr.), 23 Cr.L.J. 149, A.I.R. 1922 Lah. 237; *Prag*, 6 Luck. 335, 32 Cr.L.J. 97 (100, 103); *Housabai*, 56 Bom. 542, 34 Cr.L.J. 73, 1932 Cr.C. 785 (787). The fact that the Magistrate was satisfied from observation that the accused was making the confession voluntarily, does not dispense with the necessity of questioning the accused. Observation is not same thing as questioning—*Ranbir*, 33 P.L.R. 241, 33 Cr.L.J. 242 (250); *Ram Sarup*, 33 P.L.R. 917, 33 Cr.L.J. 847 (848). Telling and questioning are different things—*Farid*, supra; *Sardar Miya*, supra. But a confession is not inadmissible, because the Magistrate did not ask the accused in so many words whether it was voluntary. All that is required is that the Magistrate should satisfy himself that the confession is voluntary—*Arajaddin Molla*, 40 C.W.N. 872 (876).

Under sec. 164 (3), Cr. P. C., a Magistrate is required before recording a confession to question the person making it in order to satisfy himself that it was made voluntarily. Where the Magistrate failed to observe this important provision of the Code intended to safeguard the voluntary character of the confession and neither the record nor the Magistrate's deposition gave the Court the necessary materials for dealing with the accused's allegations that he was tutored to make the confession and that he confessed at the instance of various Police Officers on the understanding that he would be made an approver, the Court could not rely on such confession—*Ram Babu Jadav v. Emp.*, 39 Cr.L.J. 302 (306), 173 I.C. 418, 4 B.R. 266, 10 R.P. 402, 18 P.L.T. 964, A.I.R. 1938 Pat. 60.

Where the only warning which the Magistrate gave to the accused was that he asked the accused whether he was willing to make a confession, and that if he made a confession it would be used as evidence against him, but he did not put questions to the accused to find out whether the reply which the accused was about to give was a voluntary one, held that there was no compliance with the requirements of law for recording a confession—*Garib Hari*, 30 C.W.N. 454, 27 Cr.L.J. 621; *Panchkari*, supra. No Magistrate shall record any confession, unless upon questioning the person making it, he has reason to believe that it was made voluntarily. It is not sufficient to make use of such stock phrase as 'I am a Magistrate; if you want to make any statement of your own accord, you may do so; do not make any statement which you have been tutored by others to make'. What is meant by the Code is that the Magistrate should ask the accused some such question as "Why are you confessing? Are you sorry for your crime or is it that some one has told you that you will gain something by a confession?" and refuse to proceed with the recording of the confession until he has had a satisfactory answer to his question—*per Roe, J.*, in *Ragho*, 18 Cr.L.J. 721 (Pat.). Where a Magistrate questioned the accused person thus: "It appears that you have committed murder and absconded by escaping from custody; you have now come; what have you to say?" held that the question was extremely improper—*Pisari*, 2 Weir 137.

The Magistrate should pay particular attention to the question, as to why the confession is made, and how the confession came to be made. If nothing but the usual formal questions are put to the accused, he may be easily instructed by any police officer what answers to give to them. Any intelligent Magistrate should be able to ascertain the questions to be put to the confessing accused without having such questions actually suggested to him—*Patey Singh*, 1931 A.L.J. 1000, 32 Cr.L.J. 1052 (1058). It is important to ascertain, why the accused made the confession, the circumstances under which the question of confession first arose, how the accused expressed his willingness to make a confession before the Magistrate—*Nasir*, 1932 A.L.J. 1125, 1933 Cr.C. 42.

In order to ascertain whether the confession is voluntary, the Magistrate is bound to question the accused closely as to his *motive* in making a confession, and if he fails to do so, he has no jurisdiction to motives, though as a rule of prudence it is better that he should do so—*Ragho*, 18 Cr.L.J. 721 (Pat). But in another case of the same High Court, as well as by the Calcutta High Court, it has been held that it is not necessary for the Magistrate to question the accused as to his motives, though as a rule of prudence it is better that he should do so—*Dewan Bahar*, 4 P.L.T. 186, 24 Cr.L.J. 497; *Panchkari*, 52 Cal. 67, 29 C.W.N. 300 (310), 26 Cr.L.J. 728.

It would be going much too far to say that a Magistrate cannot and should not ask a single question of the confessant. He would be justified in putting questions to clear up any matter which is ambiguous on the face of the statement, but he is wholly unjustified in extracting, by questions from the deponent, any facts which the deponent has not spoken to in his Court. Everything must depend on the nature of the questioning and the object of it, and the mere fact that an answer was elicited by a question, does not make the proceedings improper or the statement inadmissible as a confession—*Hasan Ali*, 23 A.L.J. 719, 26 Cr.L.J. 1209 (1211). It is desirable that the Magistrate in recording the confession should put various questions to the accused to enable him to decide whether the confession is a voluntary one or not; but there is nothing in law which lays down that a Magistrate cannot satisfy himself as to the voluntariness of the confession by putting a single question to the accused—*Dewan Kahar*, 4 P.L.T. 186, 24 Cr.L.J. 497. The Magistrate should question the accused in order to eliminate any real ambiguity in the statement, or give him a chance of making his statement intelligible. But he has no right whatever to cross-examine the accused or to endeavour to get particular statements out of him; nor is it a part of his duty to question the accused in detail on matters already within his (Magistrate's) knowledge, and endeavour or reconcile the statement of the accused with that of another—*Abdul Jalil*, 1930 A.L.J. 1105, 32 Cr.L.J. 152 (155) (All); *Kesho Singh*, 20 O.C. 136, 18 Cr.L.J. 742 (747); *Hasan Ali*, supra; *Sheo Prasad*, 36 Cr.L.J. 927 (930), A.I.R. 1935 Oudh 416, 156 I.C. 231, 1935 O.W.N. 722; *Pahlwan*, 31 Cr.L.J. 533, 123 I.C. 540, A.I.R. 1930 Lah 454. That the Magistrate, who recorded the confession, asked the accused to make a detailed statement does not make the statement resulting from that question any the less voluntary. It is a misuse of words to suggest that such a question could be construed as a threat—*Gian Chand v. Emp.*, 38 Cr.L.J. 879, 170 I.C. 5, 18 Lah 481, 10 R.L. 101, 39 P.L.R. 834, A.I.R. 1937 Lah. 399.

The questions put by the Magistrate to ascertain that the confession is voluntary, and the accused's answer thereto, *need not be recorded*. Provided the Magistrate satisfies himself by putting questions and hearing answers that the prisoner is making a voluntary confession, it is unnecessary for him to record the questions and answers—*Ranbir*, 33 P.L.R. 241, 33 Cr.L.J. 242 (250). The omission to record the questions and answers may be cured by sec. 533—*Ibid*. Where, although the actual questions and answers put by the Magistrate to the confessing accused were not recorded, the Magistrate gave evidence as is permitted under sec. 533, Cr. P. C., and he satisfied the Court that questions had been asked and that the usual precautions had been taken by him, secs. 164 and 533 taken together make it clear that confessions are admissible in evidence. The Privy Council ruling, *Nazir Ahmad v. Emp.*, 17 Lah. 629, did not consider the effect of sec. 533, Cr. P. C., and their Lordships themselves said that they expressed no opinion on the question of the operation or scope of sec. 533, Cr. P. C., as it had no bearing on the case which was then under discussion before them. It is not possible to lay down the particular questions in each particular case which ought to be put, but the Magistrate and the High Court have to be satisfied that the confession was in fact voluntary—*Mohammad Din Mehar Din v. Emp.*, A.I.R. 1938 Lah. 200, 18 Lah. 658, 174 I.C. 881, 39 Cr.L.J. 488, 40 P.L.R. 401. But see contra—*Prag*, 6 Luck. 335, 32 Cr.L.J. 97 (100); *Patey Singh*, 1931 A.L.J. 1000, 32 Cr.L.J. 1052 (1058); *Shambhu*, 54 All. 350, 33 Cr.L.J. 201 (204).

Where there is a certificate in accordance with the provisions of sec. 164, cl. (3),

it may be fairly presumed that the Magistrate did his best to assure himself that the statements were voluntary, and if he has felt any suspicion he would have placed it upon record—*Public Prosecutor v. Polasanapalle Nagaraju*, 32 Cr.L.J. 262, 129 I.C. 229, 1930 M.W.N. 550, 59 M.L.J. 114, 32 M.L.W. 285, A.I.R. 1931 Mad. 42, Ind. Rul. 1931 Mad. 229; *Majhi*, 28 Cr.L.J. 807 (809), 104 I.C. 247, A.I.R. 1927 Lah. 682.

In the case of a confession duly recorded under sec. 164, Cr. P. C., the presumption is that the confession was freely made. The burden of showing that a confession recorded under this section is inadmissible lies upon the accused—*Pharko*, A.I.R. 1932 Sind 201 (2037), 26 S.L.R. 302, 1932 Cr.C. 810, 141 I.C. 392. A contrary view was taken by the Oudh Chief Court in *Daulat Ram*, A.I.R. 1933 Oudh 315 (318), 10 O.W.N. 466, 1933 Cr.C. 698, 8 Luck. 518, 146 I.C. 465, 35 Cr.L.J. 10, where it was held "There is a duty cast upon the prosecution to prove affirmatively the voluntary nature of the confession which is sought to be used by the prosecution against the accused."

The Judge cannot leave it to the jury to decide whether a confessional statement is voluntary or not. It is not open to the jury to reject the statement or accept the same in evidence. The Judge is required to decide the question of admissibility of the statement on a decision come to by him that it is voluntary or not; after the Judge's decision on the question of admissibility of the confessional statement depending on its voluntariness, has been given which was binding on the jury as a decision on a question of law, the Judge is required to ask the jury to say whether the confessional statement if it is held to be voluntary is true or not, upon the materials placed before the Court, and so to give their verdict on the question of fact whether the statement is true or not—*Kashim Ali*, A.I.R. 1934 Cal. 650 (652); *Nayeb*, A.I.R. 1934 Cal. 636, 38 C.W.N. 659, 61 Cal. 399; *Baldeo*, A.I.R. 1933 Cal. 187, 1933 Cr.C. 233, 142 I.C. 639, 34 Cr.L.J. 369. The Court of Session or the High Court cannot merely accept the *ipse dixit* of the Deputy Magistrate recording the confession as to its being voluntary. The genuineness and truth of the confession and the fact of its being voluntarily made are matters which are within the exclusive province of the Court of Sessions and of the High Court; and neither the Court of Sessions nor the High Court can blindly accept the ready made opinions of the recording Magistrate on these points without having before it materials from which it could arrive at an independent opinion on these crucial questions on which the fate of the accused hangs—*Prag*, 32 Cr.L.J. 97 (100), 128 I.C. 215, 7 O.W.N. 909, A.I.R. 1930 Oudh 449, Ind. Rul. 1931 Oudh 23, 6 Luck. 335, 1930 Cr.C. 1013.

518. Police custody:—A confession obtained after the accused had been in custody for some time, is always open to grave suspicion—*Gobardhan*, 9 All. 528; *Motijan*, 6 C.W.N. 380. Where the man who makes a confession has been kept in Police custody in defiance of the rules on the point for a number of days, the Court is entitled to ask the prosecution to explain why the irregularities were committed—*Abdul Subhan v. Emp.*, 41 Cr.L.J. 258 (263), 186 I.C. 192, A.I.R. 1940 All. 46, 1939 A.L.J. 966. When a Magistrate records the confession of a person who has been in police custody, he should ascertain and record the period during which the accused had been in custody to satisfy himself whether the confession is voluntary or not—*Narayan*, 25 Bom. 543, 3 Bom.L.R. 122. If a prisoner wishes to make a voluntary statement, the police must produce him at once before a Magistrate and let him do it, whatever be its character. Delay in producing before the Magistrate any prisoner who wishes to have his confession recorded, affects the value of the confession, and such confession cannot safely be regarded as voluntary—*Panchkari*, 52 Cal. 67, 29 C.W.N. 300 (312), A.I.R. 1925 Cal. 587, 86 I.C. 414, 26 Cr.L.J. 782. But where an accused was actually produced before the Magistrate as soon as he was arrested, and was produced before him the next day for recording the confession, held that the confession should not be ignored on the ground that the Magistrate did not ask him how long he was in Police custody—*Drwan Kakar*, 4 P.L.T. 186, 24 Cr.L.J. 497.

The fact and duration of Police custody has a material bearing on the question whether a confession is voluntary or not—*Jogjiban*, 13 C.W.N. 861, 10 Cr.L.J. 125. Where the accused was in the custody of the police for 3 days without any special order of a Magistrate, and after the confession he was again remanded to police custody instead of being sent to the jail lock-up, and the Magistrate who recorded the confession did not remove the fear of police from the mind of the accused, *held* that the confession was not voluntary—*Pancham*, 10 O.W.N. 348, 1933 Cr.C. 379. The Punjab Chief Court holds that even if the accused is in the custody of a police officer when he makes the confession, yet the confession being made before a Magistrate is excluded from being given in evidence by anything contained in sec. 25, Evidence Act, when proved by the evidence of the Magistrate—*Feroz*, 1918 P.R. 11, 19 Cr.L.J. 651 (following *Sher Singh*, 1881 P.R. 21).

Illegal or improper detention by the police has always been held as vitiating a confession, and has in some cases been held to lead to a presumption that there was ill-treatment—*Panchkari*, *supra*. The circumstances under which a confession is made must always be scrutinised with great care and caution and in all cases the period of the detention of the accused in police custody before a confession is made is always an important fact to be carefully considered. But illegal detention does not necessarily vitiate a confession. It is a fact to be carefully considered in every case—*Dhaman Hiranand v. Emp.*, A.I.R. 1937 Sind 251 (253), 31 S.L.R. 494, 171 I.C. 737.

A prisoner in police custody who was brought before a Magistrate to have his confession recorded, did not cease to be in police custody merely because at the time of recording the confession there was no police officer in the room, when it was found that a police officer was waiting outside the room where the confession was being recorded—*Lakshmya*, Ratanlal 855 (856).

Not only in the case of accused, but also in the case of witnesses, who had been in police custody, the Magistrate, before recording their evidence, should have some assurance from them that they had attended voluntarily and were making statements to him voluntarily—*Bhut Nath*, 7 C.W.N. 345 (349).

See also Note 517.

519. Memorandum:—The memorandum is required only in the case of confessions made by the accused. A statement of a witness need not be appended by a memorandum that such statement was made voluntarily—*Jadub*, 27 Cal. 295 (300).

A confession without a memorandum that it is voluntarily made is bad in law and cannot be admitted in evidence—*Daji*, 6 Bom. 288; *Shivya*, 1 Bom. 219; *Radhe Halvi*, 7 C.W.N. 220; and the want of a memorandum can be cured, if at all, only by the Sessions Judge taking evidence during the trial by calling upon the Magistrate to depose that the accused had made the statement—*Noshai*, 5 Cal. 958; *Anga Valayan*, 22 Mad. 15.

If the memorandum omitted to state that the confession was voluntarily made, it was held that the Magistrate omitted to observe a most important provision of this section, and the confession was, therefore, not admissible in evidence—*Kottubadi Narasingha*, 2 Weir 140; *Bharab*, 2 C.W.N. 702 (717); but in some recent cases it has been said that the defect would be cured by sec. 533 if the Magistrate afterwards deposed that he believed that the confession was voluntarily made—*Deo Dal*, 45 All. 166, 20 A.L.J. 915, 24 Cr.L.J. 6; *Jog Raj*, 32 Cr.L.J. 290, 129 I.C. 289, A.I.R. 1930 Lah. 534, 1930 Cr.C. 682, Ind. Rul. 1931 Lah. 177; *Ramai*, 3 Pat. 872 (877), 84 I.C. 458, A.I.R. 1925 Pat. 191, 26 Cr.L.J. 314; *Maksud*, 2 P.L.T. 773, 22 Cr.L.J. 200, 60 I.C. 56. Where the Magistrate does not comply with one of the requirements of this section, namely, that a confession shall not be recorded unless upon questioning the person making it, the Magistrate has reason to believe that it was made voluntarily, this defect cannot be cured under sec. 533, Cr. P. C., because the confession cannot be said to have been duly made, *viz.*, in accordance with law. The record of the confession cannot, therefore, be admitted in evidence under sec. 80, Evidence Act,

The consequence of non-compliance with those provisions is that the record of the confession cannot be admitted in evidence under sec. 80, Evidence Act, without further proof. The admissibility of evidence is governed by the Evidence Act and under sec. 21 of that Act an oral confession by an accused person is relevant, subject to the provisions of secs. 24 to 29. The confession must, however, be proved by the testimony of the Magistrate who heard it. If he did not record it at all he would obviously have to rely on his memory alone. If he did record it, but not in accordance with law and consequently the record is rendered inadmissible under sec. 80, he can still use it to refresh his memory when in the witness-box. The adverse party can then call upon him to produce the document and cross-examine him thereupon. If the confession was read out to the accused and was admitted by him to be correct and was also signed by him, it can, perhaps, be regarded as a confession in writing and can be proved by the prosecution under sec. 21, Evidence Act—*Bhakhshan*, A.I.R. 1936 Lah. 247 (249), 16 Lah. 912, 37 P.L.R. 869, 37 Cr.L.J. 432, 161 I.C. 399, 1936 Cr.C. 205. See also *Rampuri v. Emp.*, 1937 M.W.N. 1325; *Nonkar Mouldedino v. Emp.*, 38 Cr.L.J. 968 (970), 170 I.C. 827, A.I.R. 1937 Sind 212, 31 S.L.R. 460, 10 R.S. 93. This view of law has been considerably shaken, if not overruled, by the decision of the Privy Council in *Nazir Ahmad v. Emp.*, cited in Note 511. When a confession has been reduced to writing but sec. 164, Cr. P. C., has not been fully complied with, sec. 533, Cr. P. C., becomes in terms a "special provision" referred to in sec. 1 (2), Cr. P. C., and prevents the confession being ruled out as entirely incapable of proof—*Nga Thern Maung*, A.I.R. 1936 Rang. 350 (352). Where the Magistrate has made a memorandum that the confession was voluntarily made, it may be presumed that it is a correct record of a voluntary confession. Nevertheless, if it is found that the confession was procured by any inducement, threat or promise, it must be treated as irrelevant—*Dewan Kahar*, 4 P.L.T. 186, 24 Cr.L.J. 497. The memorandum annexed to a record of confession is not a conclusive evidence of the fact that the confession was voluntarily made, so as to preclude the Court of Appeal from inquiring into the nature of the confession to see whether it was voluntary or not—*Jogiban*, 13 C.W.N. 861, 10 Cr.L.J. 125, 2 I.C. 681.

It is most advisable, although the law does not require it, that the Magistrate should record a memorandum of enquiry showing what steps he has taken to fully satisfy himself that an accused person is confessing voluntarily—*Umar Din*, 2 Lah. 129, 23 Cr.L.J. 388.

The memorandum need not be written by the Magistrate himself. If it is written out by a clerk and signed by the Magistrate, the requirements of this section are satisfied—*Tukaram*, 35 Bom.L.R. 231, 34 Cr.L.J. 280, 57 Bom. 336, A.I.R. 1933 Bom. 145, Ind. Rul. 1933 Bom. 261, 1933 Cr.C. 457 (458) (F.B.), overruling *Housabai*, 55 Bom. 542, 1932 Cr.C. 785 (787); *Salu Mangan*, 34 Cr.L.J. 808, Ind. Rul. 1933 Sind 194, 144 I.C. 661, 1933 Cr.C. 530, A.I.R. 1933 Sind 166.

Under this section as now amended, the Magistrate must explain to the accused that he is not to make any confession and that the confession may be used as evidence against him, and the memorandum also should record the fact that the explanation was given. But omission to record the fact that the accused was so warned would not make the confession inadmissible, if the Magistrate who recorded the confession was afterwards examined (sec. 533) and deposed that he gave the required warning to the accused and the accused understood it—*Ramas*, 3 Pat. 872 (877), 26 Cr.L.J. 314; *Amina*, 32 Cr.L.J. 579, 130 I.C. 641, A.I.R. 1931 Lah. 196; *Bawa Singh*, 7 Lah.L.J. 250, 26 P.L.R. 579, 26 Cr.L.J. 1458; *Khemani*, 6 Lah. 58, 26 P.L.R. 346, 26 Cr.L.J. 1074; *Nimadhab*, 5 Pat. 171, 27 Cr.L.J. 957; *Rahamat*, 30 Cr.L.J. 49, 113 I.C. 65, 11 Lah.L.J. 5, Ind. Rul. 1929 Lah. 134; *Bala*, 35 Cr.L.J. 1382, 151 I.C. 745, 1934 Cr.C. 36, A.I.R. 1934 Lah. 18. The Lahore High Court seems to have taken a different view in *Farid*, 65 I.C. 613, 2 Lah. 325, 5 P.W.R. 1922 (Cr.), 23 Cr.L.J. 149, A.I.R. 1922 Lah. 237; *Ranbir*, 136 I.C. 19, 33 P.L.R. 241, 23 Cr.L.J. 242, Ind. Rul. 1932 Lah. 195, A.I.R. 1932 Lah. 204, 1932 Cr.C. 248; *Ram Sarup*, 33 Cr.L.J. 847, 33 P.L.R.

917, Ind. Rul. 1932 Lah. 610, 139 I.C. 694; *Kartar Singh v. Emp.*, 39 Cr.L.J. 769 (770), 176 I.C. 666, A.I.R. 1938 Lah. 556, 40 P.L.R. 854, 11 R.L. 224. The view of the Lahore High Court seems to have been adopted in *Prag*, 32 Cr.L.J. 97 (103), 128 I.C. 215, 7 O.W.N. 909, A.I.R. 1930 Oudh 449, Ind. Rul. 1931 Oudh 23, 6 Luck. 335, 1930 Cr.C. 1013. But if, as a matter of fact, no such explanation was given by the Magistrate to the accused, the defect is not merely one of form but of substance, and sec. 533 cannot cure it—*Partap Singh*, 6 Lah. 415, 7 Lah.L.J. 482, 93 I.C. 978, 2 Lah. Cas. 72, A.I.R. 1925 Lah. 605, 27 Cr.L.J. 514; *Mt. Rao*, 26 P.L.R. 173, 26 Cr.L.J. 1175. If questions had in fact been put, the failure to record them would be curable under sec. 537, Cr. P. C., provided that the error has not injured the accused as to his defence on the merits. If the questions were not put at all, then the confession is not duly made, and sec. 533 would not apply. Prejudice to the accused would arise in this way that if the questions had been put, he might have then pleaded ill-treatment or undue influence, and then confession would not have been recorded at all. The confession in such a case becomes inadmissible in evidence under sec. 164, Cr. P. C., and cannot also be admissible under the other provisions of the Evidence Act, secs. 21 and 29—*Sardar Miya*, 38 Cr.L.J. 987 (988), 20 N.L.J. 128, 170 I.C. 868, I.L.R. 1937 Nag. 417, 10 R.N. 83, A.I.R. 1937 Nag. 257, following *Pratap Singh*, supra, *Muhammad Ali*, 56 All. 302, 147 I.C. 390, 1933 A.L.J. 1551, 6 R.A. 467, 35 Cr.L.J. 385, A.I.R. 1934 All. 81, 1934 Cr.C. 145 and *Nazir Ahmad*, quoted in Note 511. See also *Daulat Ram*, 8 Luck. 518, 146 I.C. 465, 10 O.W.N. 466, 1933 Cr.C. 698, A.I.R. 1933 Oudh 315.

The practice of allowing defects in the formalities in recording confessions to be cured by the application of sec. 533 of the Cr. P. Code has been permitted of late years with considerable frequency in Courts in India, and any omissions on the part of Magistrates recording confessions to comply with the formalities laid down in secs. 164 and 364 of the Code have been allowed to be condoned by the evidence of the Magistrates themselves as witnesses for the prosecution. The practice, and the theory underlying it, is crystallized in a Full Bench judgment of the Allahabad High Court in *Muhammad Ali v. Emp.*, A.I.R. 1934 All. 81, 147 I.C. 390, 1933 A.L.J. 1551, 6 R.A. 467, 35 Cr.L.J. 385, 1934 Cr.C. 145. This practice has now received a check by a very recent ruling of their Lordships of the Privy Council in *Nazir Ahmed v. King-Emperor*, A.I.R. 1936 P.C. 253, 163 I.C. 881, 38 Bom.L.R. 987, 1936 O.W.N. 505, 1936 M.W.N. 745, 1936 O.L.R. 437, 1936 A.L.R. 747, 63 I.A. 372, 9 R.P.C. 57, 1936 A.L.J. 895, 37 Cr.L.J. 897, 40 C.W.N. 1221, 17 P.L.T. 594, 1936 Cr.C. 752, 71 M.L.J. 476, 44 M.L.W. 583, 19 N.L.J. 214, 17 Lah. 629, 64 C.L.J. 445, 39 P.L.R. 43 (P.C.), where the practice is emphatically condemned and by implication, the decision of the Allahabad High Court overruled, as also numerous decisions to the same effect in the Lahore High Court. The evidence of the Magistrate, who recorded the confession, and the recorded confession were accordingly held inadmissible in a case where the record of the confession was not made with due care and formality and the certificate, which is required by sec. 164, Cr. P. C., was not given and the accused's signature was not taken—*Nahru v. Emp.*, 38 Cr.L.J. 642 (643), I.L.R. 1937 Nag. 268, 9 R.N. 281, 168 I.C. 962, A.I.R. 1937 Nag. 220. The Peshawar Judicial Commissioner's Court has disagreed with the view of the Nagpur High Court, holding that omissions and irregularities in recording confessions under sec. 164, Cr. P. C., are condoned by sec. 533, Cr. P. C., provided they do not prejudice the accused. The Privy Council ruling of *Nazir Ahmad v. King-Emp.*, according to it, does not cover a case like this—*Kishan Chan Kewal Ram v. Emp.*, 39 Cr.L.J. 448 (450), 174 I.C. 449, 10 R.Pesh. 64, A.I.R. 1938 Pesh. 5. The same view has also been taken by the Rangoon High Court in *The King v. Saw Min*, A.I.R. 1939 Rang. 219 (223), 40 Cr.L.J. 691, 182 I.C. 705, 1939 R.L.R. 97 and by the Allahabad High Court in *Lal Singh v. Emp.*, 40 Cr.L.J. 132 (137), 178 I.C. 694, A.I.R. 1938 All. 625, 1938 A.L.J. 913, I.L.R. 1938 All. 875 where it was also observed that their Lordships of the Privy Council did not purport in any way to dissent from the Full Bench ruling in *Muhammad Ali v. Emp.*, supra. Where the memorandum is only part of the certificate prescribed by sub-sec. (3) of sec. 164, Cr. P. C., it is impossible to construe

sec. 533, Cr. P. C., so as to render it admissible to give evidence that the statement was duly recorded, i.e., that the statement was voluntarily made and represents what was said—*Baliram Singh v. Emp.*, A.I.R. 1939 Nag 295 (298), 1939 N.L.J. 442, 184 I.C. 274, 40 Cr.L.J. 937, distinguishing *Nahru v. Emp.*, supra. Where the defect is of such a formal nature that it does not affect the merits of the statement made by the accused person, it is precisely to such cases that sec. 533, Cr. P. C., must apply. Failure to do that would render that section altogether nugatory—*Maroti Jago v. Emp.*, A.I.R. 1940 Nag. 230 (231), 1940 N.L.J. 210, 188 I.C. 146, 41 Cr.L.J. 553. By using the provisions of sec. 533, Cr. P. C., a defect of form can be removed, but not a defect of substance. Where the Magistrate is able to say in Court that he had asked the necessary questions but had forgotten to record them, then sec. 533 would be applicable; and sec. 91, Evidence Act, will cause no difficulty since sec. 533 expressly states that it shall not do so. But where the Magistrate does not or cannot supply the defect in the written form with oral evidence, sec. 533 cannot help. Sec. 533 can be used to cure defects of form but not of substance. If no questions were actually asked, sec. 533 will not help; but if the Magistrate's evidence shows that the questions were asked, then that is merely a defect of form and sec. 533 will cure it—*Kommoju Brahman*, A.I.R. 1940 Pat. 163 (169), 1939 P.W.N. 915, 41 Cr.L.J. 533, 188 I.C. 57, 19 Pat. 301. See also Notes 511 and 517.

If the recorded confession contains the memorandum that the Magistrate explained to the accused that he was not bound to make the confession, etc., the presumption will be that the accused was warned at the proper time, i.e., before the confession was recorded. This section does not require that this portion of the memorandum should be written before the confession commences, all that this section requires is that the warning should be given before the confession is recorded—*Tukaram*, 35 Bom.L.R., 234 (F.B.), 1933 Cr.C. 457 (458), 34 Cr.L.J. 555, 134 I.C. 280, 57 Bom. 336, A.I.R. 1933 Bom. 145, Ind. Rul. 1933 Bom. 261; *Majhi*, 28 Cr.L.J. 807, 104 I.C. 247, A.I.R. 1927 Lah. 682.

An English memorandum as required by sec. 364 is not necessary in respect of a confession under this section—*Fekoo*, 14 Cal. 539.

A confession does not become inadmissible in evidence by reason of the fact that the memorandum is attached to the English translation of the confession, and not to the original confession of the accused in vernacular. The English translation is as much a part of the record as the original vernacular—*Tukaram*, supra.

Refusal to make a memorandum—Where a Magistrate who recorded the confession of an accused refused to make the memorandum on the ground that the confession did not seem to be voluntary, it was held that under sec. 533, the confession could be admitted in evidence during the trial when the Magistrate who recorded it proved that it was made voluntarily—*Harbans*, 8 O.C. 395B. Where the Magistrate refused to make a memorandum on the ground that the accused had been in police custody for 5 days before he was produced before him, and that there was a proposal on the part of the police to treat the accused as an approver, but there was no evidence that the proposal was communicated to the accused, it was held that this ground was not a valid ground that the Sessions Judge ought to have proceeded, in the absence of the memorandum, to take evidence under sec. 533 whether the confession was voluntarily made—*Anga Valayan*, 22 Mad. 15.

519A. Weight of confession:—Confessions made to a Magistrate can be divided into five classes (1) Those recorded with all the formalities prescribed by secs. 164 and 364, Cr. P. Code; (2) those imperfectly recorded but where the defect is cured by sec. 533, Cr. P. Code; (3) where the defect is not cured and the confession is proved by the testimony of the Magistrate; (4) where the Magistrate refuses to record the confession of an accused person produced before him for that purpose but hears it; (5) where the accused appears before a Magistrate of his own accord and makes an oral confession. Confessions falling under classes 1 and 2 are recorded under great precautions and should, therefore, obviously carry more weight than those falling under

the remaining classes. A confession under class 3 would be less weighty; because some of the precautions prescribed by law were not observed. A confession under class 4 should have very little weight unless the Magistrate can explain to the entire satisfaction of the Court why he refused to act under secs. 164 and 364, Cr. P. C. The weight to be attached to a confession under class 5 would depend entirely on the circumstances under which it is made. It is impossible to lay down any hard and fast rule as to the amount of weight to be attached to a particular confession. This is a matter for the Court to decide in each case on consideration of the cumulative effect of the entire evidence in the case—*Bakhshan*, A.I.R. 1936 Lah. 247 (251), 16 Lah 912, 161 I.C. 339, 1936 Cr.C. 205, 37 Cr L.J. 432, 8 R.L. 721, 37 P.L.R. 869.

As to the confessions made by the approvers, they are not substantive evidence but may be used only for the purpose of contradicting or corroborating their depositions in Court—*Nitai Chandra Jana v. Emp.*, 38 Cr L.J. 852 (864), 170 I.C. 201, A.I.R. 1937 Cal. 433, 10 R.C. 98.

Verification of confession:—Verification proceedings are not wholly illegal. A verification report cannot be ruled out on the ground that it is inadmissible in evidence when the Magistrate himself is examined as a witness in the case and speaks to the contents of the report made by him. But the statements made by the accused to the verifying Magistrate in the course of the proceedings, if they are not recorded in the manner provided in sec. 164, Cr. P. C., are, however, inadmissible—*Titendra Nath*, A.I.R. 1937 Cal. 99 (110), 169 I.C. 977, 38 Cr.L.J. 818, 10 R.C. 69, following *Amiruddin v. Emp.*, 45 Cal 557, 44 I.C. 321, A.I.R. 1918 Cal. 88, 19 Cr L.J. 305, 22 C.W.N. 213.

Verification proceedings held in connection with the confessions and approver's statements do not add to their value. Such proceedings cannot be regarded as corroboration and are open to criticism in other respects—*Noni Gopal Gupta*, 15 C.W.N. 593 (613). Such a proceeding can very rarely be adopted for any useful purpose. Its real object seems to be to add fictitious weight to a confession recorded after an accused has been for twenty-four hours in Police custody and to embarrass a judicial officer when he has to determine at the trial whether that confession which has been repudiated and denied almost immediately after it was made and on the first opportunity when the prisoners was free from all influences, real or imaginary, from the Police, was voluntarily made and whether it is a true statement of what actually took place. From this point of view the practice is very objectionable—*Radhe Halwai*, 7 C.W.N. 220 (224).

520. Explanation—Magistrate without jurisdiction:—The Explanation of this section lays down that a statement or confession can be recorded by a Magistrate, although he has no jurisdiction in the case. But a Magistrate not having jurisdiction can record the statement of a witness under this section, if the witness appears voluntarily before him, and is not brought before him by the police—*Nuri Sheikh*, 29 Cal. 483. This section will not empower a police-officer to compel a witness to go to a local Magistrate not competent to deal with the case, and to get the statement recorded—*Nana*, Ratanlal 468 (469); *Nuri Sheikh*, 29 Cal. 483. Where the police-officer has reason to believe that the witness is likely to be gained over by the accused, the proper course is to send the accused and the witness to the Magistrate having jurisdiction without delay—*Nuri Sheikh*, 29 Cal. 483.

165. (1) Whenever an officer in charge of a police-station, Search by police-officer or a police-officer making an investigation has reasonable grounds for believing that anything necessary for the purposes of an investigation into any offence which he is authorised to investigate may be found in any place within the limits of the police-station of which he is in

charge, or to which he is attached, and that such thing cannot in his opinion be otherwise obtained without undue delay, such officer may, after recording in writing the grounds of his belief, and specifying in such writing, so far as possible, the thing for which search is to be made, search, or cause search to be made, for such thing in any place within the limits of such station.

(2) A police-officer proceeding under sub-section (1) shall, if practicable, conduct the search in person.

(3) If he is unable to conduct the search in person, and there is no other person competent to make the search present at the time, he may after recording in writing his reasons for so doing require any officer subordinate to him to make the search, and he shall deliver to such subordinate officer an order in writing specifying the place to be searched and, so far as possible, the thing for which search is to be made; and such subordinate officer may thereupon search for such thing in such place.

(4) The provisions of this Code as to search-warrants and the general provisions as to searches contained in section 102 and section 103 shall, so far as may be, apply to a search made under this section.

(5) Copies of any record made under sub-section (1) or sub-section (3) shall forthwith be sent to the nearest Magistrate empowered to take cognizance of the offence and the owner or occupier of the place searched shall on application be furnished with a copy of the same by the Magistrate:

Provided that he shall pay for the same, unless the Magistrate for some special reasons thinks fit to furnish it free of cost.

Change:—This section has been amended by sec 36 of the Cr P C. Amendment Act (XVIII of 1923) For reasons see below

521. Sub-section (1)—General research:—The old section spoke of 'any document or thing' which meant a *specific* document or thing which might be the subject of a summons or order under section 94; that is, it did not authorise a *general* search on the chance that something might be found—*Bajrang Gope*, 38 Cal 304; *Pran Khan*, 16 C.W.N 1078; *Brikhbhan*, 38 All 14, 13 A.L.J. 979; *Diwakar v Ramamusti*, 35 M.L.J. 127, 19 Cr.L.J. 901. The section speaks of a particular document or thing which is necessary to the conduct of an investigation into an offence and does not authorise a general search, e.g. for arms generally—*Clarke v Brojendra Kushore*, 36 Cal 433, or for stolen property generally—*Bisser Misser*, 41 Cal 261; nor is the requirement of this section fulfilled by framing the warrant as one for 'stolen property relevant to the case'—*Pran Khan*, 16 C.W.N 1078, 13 Cr.L.J 764

The provisions of this section are so strict that before entering a house the Investigating officer has to specify in writing the thing for which search is to be made and also the ground of his belief that such a thing would be found in the house which he desires to enter. A promiscuous entry into houses is not permitted to an Investigating officer simply to satisfy himself as to the truth of an allegation made by a complainant or an accused person or a witness. The word 'thing' is specifically mentioned and that would not include a configuration of a wall, or the inspection of any place inside a house for purposes of investigation—*Jagannath*, 29 Cr.L.J 272, 107 I.C. 688, 26

the remaining classes A confession under class 3 would be less weighty; because some of the precautions prescribed by law were not observed. A confession under class 4 should have very little weight unless the Magistrate can explain to the entire satisfaction of the Court why he refused to act under secs 164 and 364, Cr. P. C. The weight to be attached to a confession under class 5 would depend entirely on the circumstances under which it is made. It is impossible to lay down any hard and fast rule as to the amount of weight to be attached to a particular confession. This is a matter for the Court to decide in each case on consideration of the cumulative effect of the entire evidence in the case—*Bakhshan*, A.I.R. 1936 Lah. 247 (251), 16 Lah. 912, 161 I.C. 339, 1936 Cr.C. 205, 37 Cr.L.J. 432, 8 R.L. 721, 37 P.L.R. 869.

As to the confessions made by the approvers, they are not substantive evidence but may be used only for the purpose of contradicting or corroborating their depositions in Court—*Nitai Chandra Jana v. Emp.*, 38 Cr.L.J. 852 (864), 170 I.C. 201, A.I.R. 1937 Cal. 433, 10 R.C. 98.

Verification of confession:—Verification proceedings are not wholly illegal. A verification report cannot be ruled out on the ground that it is inadmissible in evidence when the Magistrate himself is examined as a witness in the case and speaks to the contents of the report made by him. But the statements made by the accused to the verifying Magistrate in the course of the proceedings, if they are not recorded in the manner provided in sec. 164, Cr. P. C., are, however, inadmissible—*Jitendra Nath*, A.I.R. 1937 Cal 99 (110), 169 I.C. 977, 38 Cr.L.J. 818, 10 R.C. 69, following *Amiruddin v. Emp.*, 45 Cal 557, 44 I.C. 321, A.I.R. 1918 Cal. 88, 19 Cr.L.J. 305, 22 C.W.N. 213.

Verification proceedings held in connection with the confessions and approver's statements do not add to their value. Such proceedings cannot be regarded as corroboration and are open to criticism in other respects—*Noni Gopal Gupta*, 15 C.W.N. 593 (613). Such a proceeding can very rarely be adopted for any useful purpose. Its real object seems to be to add fictitious weight to a confession recorded after an accused has been for twenty-four hours in Police custody and to embarrass a judicial officer when he has to determine at the trial whether that confession which has been repudiated and denied almost immediately after it was made and on the first opportunity when the prisoners was free from all influences, real or imaginary, from the Police, was voluntarily made and whether it is a true statement of what actually took place. From this point of view the practice is very objectionable—*Radhe Halwai*, 7 C.W.N. 220 (224).

520. Explanation—Magistrate without jurisdiction:—The Explanation of this section lays down that a statement or confession can be recorded by a Magistrate, although he has no jurisdiction in the case. But a Magistrate not having jurisdiction can record the statement of a witness under this section, if the witness appears voluntarily before him, and is not brought before him by the police—*Nuri Sheikh*, 29 Cal. 483. This section will not empower a police-officer to compel a witness to go to a local Magistrate not competent to deal with the case, and to get the statement recorded—*Nana, Ratanlal* 468 (469); *Nuri Sheikh*, 29 Cal. 483. Where the police-officer has reason to believe that the witness is likely to be gained over by the accused, the proper course is to send the accused and the witness to the Magistrate having jurisdiction without delay—*Nuri Sheikh*, 29 Cal. 483.

165. (1) Whenever an officer in charge of a police-station, Search by police-officer. or a police-officer making an investigation has reasonable grounds for believing that anything necessary for the purposes of an investigation into any offence which he is authorised to investigate may be found in any place within the limits of the police-station of which he is in

charge, or to which he is attached, and that such thing cannot in his opinion be otherwise obtained without undue delay, such officer may, after recording in writing the grounds of his belief, and specifying in such writing, so far as possible, the thing for which search is to be made, search, or cause search to be made, for such thing in any place within the limits of such station.

(2) A police-officer proceeding under sub-section (1) shall, if practicable, conduct the search in person.

(3) If he is unable to conduct the search in person, and there is no other person competent to make the search present at the time, he may after recording in writing his reasons for so doing require any officer subordinate to him to make the search, and he shall deliver to such subordinate officer an order in writing specifying the place to be searched and, so far as possible, the thing for which search is to be made; and such subordinate officer may thereupon search for such thing in such place.

(4) The provisions of this Code as to search-warrants and the general provisions as to searches contained in section 102 and section 103 shall, so far as may be, apply to a search made under this section.

(5) Copies of any record made under sub-section (1) or sub-section (3) shall forthwith be sent to the nearest Magistrate empowered to take cognizance of the offence and the owner or occupier of the place searched shall on application be furnished with a copy of the same by the Magistrate:

Provided that he shall pay for the same, unless the Magistrate for some special reasons thinks fit to furnish it free of cost.

Change:—This section has been amended by sec. 36 of the Cr. P. C., Amendment Act (XVIII of 1923) For reasons see below

521. Sub-section (1)—General research:—The old section spoke of 'any document or thing' which meant a *specific* document or thing which might be the subject of a summons or order under section 94; that is, it did not authorise a *general* search on the chance that something might be found—*Bajrang Gope*, 38 Cal 304; *Pran Khan*, 16 C.W.N. 1078; *Brishbhhan*, 38 All 14, 13 A.L.J. 979; *Divakar v. Ramamurti*, 35 M.L.J. 127, 19 Cr.L.J. 901. The section speaks of a particular document or thing which is necessary to the conduct of an investigation into an offence and does not authorise a general search, e.g. for arms generally—*Clarke v. Brojendra Kishore*, 36 Cal. 433, or for stolen property generally—*Bisser Misser*, 41 Cal. 261; nor is the requirement of this section fulfilled by framing the warrant as one for 'stolen property relevant to the case'—*Pran Khan*, 16 C.W.N. 1078, 13 Cr.L.J. 764.

The provisions of this section are so strict that before entering a house the Investigating officer has to specify in writing the thing for which search is to be made and also the ground of his belief that such a thing would be found in the house which he desires to enter. A promiscuous entry into houses is not permitted to an Investigating officer simply to satisfy himself as to the truth of an allegation made by a complainant or an accused person or a witness. The word 'thing' is specifically mentioned and that would not include a configuration of a wall, or the inspection of any place inside a house for purposes of investigation—*Jagannath*, 29 Cr.L.J. 272, 107 I.C. 688, 26

the remaining classes. A confession under class 3 would be less weighty; because some of the precautions prescribed by law were not observed. A confession under class 4 should have very little weight unless the Magistrate can explain to the entire satisfaction of the Court why he refused to act under secs. 164 and 364, Cr. P. C. The weight to be attached to a confession under class 5 would depend entirely on the circumstances under which it is made. It is impossible to lay down any hard and fast rule as to the amount of weight to be attached to a particular confession. This is a matter for the Court to decide in each case on consideration of the cumulative effect of the entire evidence in the case—*Bakhshan*, A.I.R. 1936 Lah. 247 (251), 16 Lah 912, 161 I.C. 339, 1936 Cr.C. 205, 37 Cr.L.J. 432, 8 R.L. 721, 37 P.L.R. 869.

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Verification of confession:—Verification proceedings are not wholly illegal. A verification report cannot be ruled out on the ground that it is inadmissible in evidence when the Magistrate himself is examined as a witness in the case and speaks to the contents of the report made by him. But the statements made by the accused to the verifying Magistrate in the course of the proceedings, if they are not recorded in the manner provided in sec. 164, Cr. P. C., are, however, inadmissible—*Jitendra Nath*, A.I.R. 1937 Cal. 99 (110), 169 I.C. 977, 38 Cr.L.J. 818, 10 R.C. 69, following *Amiruddin v. Emp.*, 45 Cal 557, 44 I.C. 321, A.I.R. 1918 Cal. 88, 19 Cr.L.J. 305, 22 C.W.N. 213.

Verification proceedings held in connection with the confessions and approver's statements do not add to their value. Such proceedings cannot be regarded as corroboration and are open to criticism in other respects—*Noni Gopal Gupta*, 15 C.W.N. 593 (613). Such a proceeding can very rarely be adopted for any useful purpose. Its real object seems to be to add fictitious weight to a confession recorded after an accused has been for twenty-four hours in Police custody and to embarrass a judicial officer when he has to determine at the trial whether that confession which has been repudiated and denied almost immediately after it was made and on the first opportunity when the prisoners was free from all influences, real or imaginary, from the Police, was voluntarily made and whether it is a true statement of what actually took place. From this point of view the practice is very objectionable—*Radhe Halwai*, 7 C.W.N. 220 (224).

520. Explanation—Magistrate without jurisdiction:—The Explanation of this section lays down that a statement or confession can be recorded by a Magistrate, although he has no jurisdiction in the case. But a Magistrate not having jurisdiction can record the statement of a witness under this section, if the witness appears voluntarily before him, and is not brought before him by the police—*Nuri Sheikh*, 29 Cal. 483. This section will not empower a police-officer to compel a witness to go to a local Magistrate not competent to deal with the case, and to get the statement recorded—*Nana*, Ratanlal 468 (469); *Nuri Sheikh*, 29 Cal. 483. Where the police-officer has reason to believe that the witness is likely to be gained over by the accused, the proper course is to send the accused and the witness to the Magistrate having jurisdiction without delay—*Nuri Sheikh*, 29 Cal. 483.

165. (1) Whenever an officer in charge of a police-station, Search by police-officer, or a police-officer making an investigation has reasonable grounds for believing that anything necessary for the purposes of an investigation into any offence which he is authorised to investigate may be found in any place within the limits of the police-station of which he is in

charge, or to which he is attached, and that such thing cannot in his opinion be otherwise obtained without undue delay, such officer may, after recording in writing the grounds of his belief, and specifying in such writing, so far as possible, the thing for which search is to be made, search, or cause search to be made, for such thing in any place within the limits of such station.

(2) A police-officer proceeding under sub-section (1) shall, if practicable, conduct the search in person.

(3) If he is unable to conduct the search in person, and there is no other person competent to make the search present at the time, he may after recording in writing his reasons for so doing require any officer subordinate to him to make the search, and he shall deliver to such subordinate officer an order in writing specifying the place to be searched and, so far as possible, the thing for which search is to be made; and such subordinate officer may thereupon search for such thing in such place.

(4) The provisions of this Code as to search-warrants and the general provisions as to searches contained in section 102 and section 103 shall, so far as may be, apply to a search made under this section.

(5) Copies of any record made under sub-section (1) or sub-section (3) shall forthwith be sent to the nearest Magistrate empowered to take cognizance of the offence and the owner or occupier of the place searched shall on application be furnished with a copy of the same by the Magistrate:

Provided that he shall pay for the same, unless the Magistrate for some special reasons thinks fit to furnish it free of cost.

Change:—This section has been amended by sec 36 of the Cr P. C., Amendment Act (XVIII of 1923) For reasons see below.

521. Sub-section (1)—General research:—The old section spoke of 'any document or thing' which meant a specific document or thing which might be the subject of a summons or order under section 94; that is, it did not authorise a general search on the chance that something might be found—*Bajrang Gope*, 38 Cal 304; *Pran Khan*, 16 C.W.N 1078; *Brikhbhan*, 38 All 14, 13 A.L.J 979; *Divakar v. Ramamurti*, 35 M.L.J. 127, 19 Cr L.J 901. The section speaks of a particular document or thing which is necessary to the conduct of an investigation into an offence and does not authorise a general search, e.g. for arms generally—*Clarke v. Brojendra Kishore*, 35 Cal 433, or for stolen property generally—*Bisser Misser*, 41 Cal 261; nor is the requirement of this section fulfilled by framing the warrant as one for 'stolen property relevant to the case'—*Pran Khan*, 16 C.W.N 1078, 13 Cr L.J 764.

The provisions of this section are so strict that before entering a house the Investigating officer has to specify in writing the thing for which search is to be made and also the ground of his belief that such a thing would be found in the house which he desires to enter. A promiscuous entry into houses is not permitted to an Investigating officer simply to satisfy himself as to the truth of an allegation made by a complainant or an accused person or a witness. The word 'thing' is specifically mentioned and that would not include a configuration of a wall, or the inspection of any place inside a house for purposes of investigation—*Jagannath*, 29 Cr L.J. 272, 107 I.C. 688, 26

A.L.J. 410, A.I.R. 1928 All. 185. The police-officer is bound to record in writing the grounds of his belief as to the necessity for searching the house of a person and in specifying clearly the article or articles for which the search is to be made—*Sohan Lal*, A.I.R. 1933 Oudh 305 (307), 143 I.C. 467, 1933 Cr.C. 686, 34 Cr.L.J. 568, 10 O.W.N. 678, 20 A.I.Cr.R. 285.

This has now been made clear by the present amendment, by the addition of the words "and specifying in such writing . . . to be made." "It is a vicious thing to allow a police-officer to have power to conduct a general search, without knowing what it is he is going to search for, but merely to see if he can find something incriminating in a person's house. Even the wording of the clause itself ('that such a thing cannot in his opinion be otherwise obtained without undue delay') contemplates that the man himself has some information and that he must know what it is that he is after; and it is necessary that he should record this in writing and forward the record to the Magistrate, so that it will be a check upon irresponsible searches which have frequently disfigured the police administration in various parts of the country"—*Legislative Assembly Debates*, 31st January 1923, p. 1754. Quoted in *Maingal Singh v. Ghulam Mohammad*, A.I.R. 1939 Lah. 280 (282).

Thus, under the amended section it has been held that it does not authorise a search for stolen property generally, but only a search for specified stolen articles. Where a definite list of stolen articles has been given to a police-officer and he searches a house for those articles, he is making a search for specified articles, and his action is perfectly legal—*Paresh v. Jogendra*, 27 Cr.L.J. 1195, 97 I.C. 955, A.I.R. 1927 Cal. 93.

This section is not restricted to a search for what is *stolen* and believed to be stolen property, but it permits a police-officer to make a search of anything necessary for the purposes of an investigation into any offence—*Param Sukh*, 23 A.L.J. 1037, A.I.R. 1926 All. 147, 27 Cr.L.J. 11. There is nothing wrong in the Police investigating all the books and seizing them under the provisions of sec. 165, Cr. P. C.—*General Relief Association, Lahore*, 33 Cr.L.J. 678, 138 I.C. 751, Ind. Rul. 1932 Lah. 534, A.I.R. 1932 Lah. 581, 33 P.L.R. 824, 1932 Cr.C. 809. See also notes under secs. 94 and 96, Cr. P. Code.

Accused house may be searched :—A police-officer is entitled to search the house of a person for specific articles even though the latter is the person *accused* of the crime—*Paresh v. Jogendra*, *supra*.

522. "Within the limits" :—A Station House officer has no power to make a search beyond the local limits of the own circle—*Mir Sha*, 8 S.L.R. 1, 16 Cr.L.J. 15; *Krishna Aiyar*, 24 M.L.T. 96, 20 Cr.L.J. 145. Such a search is illegal and resistance to such search is not an offence—*Madho Sonar*, 13 A.L.J. 691, 16 Cr.L.J. 589. But see sec. 166 (3) which now authorises a Police-officer, under certain circumstances, to make a search within the limits of another police station.

523. Who shall conduct the search :—Sub-section (2) lays down that the officer in charge of a police station or the investigating officer must "conduct the search in person." But this does not mean that the officer must himself make the search, *i.e.*, ransack boxes, examine the room, dig up the floor or otherwise seek for the property. Nor is it necessary that all these processes should take place under his very eye. Therefore where the Inspector remained outside the house, while the actual search was being made inside by two constables, it was held that the search was not illegal. All that the section means is that the officer should go to the spot and exercise a general superintendence over the search, in contradistinction to the cases where he is unable to go to the spot and deputes a subordinate by a written order to conduct the search in his stead—*Sadagopala v. Satrugna*, 23 M.L.J. 415, 13 Cr.L.J. 763, 1912 M.W.N. 1111, (dissenting from 17 M.L.J. 323, 6 Cr.L.J. 105, where a search made by a constable inside the house while the Inspector was seated outside, was held to be illegal as not being conducted in person by the Inspector). Where it is necessary for the Sub-Inspector to search two houses simultaneously, and he searches one of the houses

in person, while the Head Constable searches the other, the procedure is not illegal—*Ujagar*, 9 O.W.N. 313, 33 Cr.L.J. 492 (493), A.I.R. 1932 Oudh 249.

The Magistrate cannot conduct the search. This section speaks of a search made by a Police-officer and not by a Magistrate—*Clarke v. Brojendra*, 36 Cal 433, 13 C.W.N. 458, 2 I.C. 436. The Magistrate can conduct a search only under sec. 105, which section has not been made applicable here.

524. Sub-section (3)—Order in writing:—If the officer cannot himself go to the spot he can depute a subordinate, but the deputation must be by an *order in writing*. A constable making the search without such a written order does not lawfully exercise the power of a public servant, and resistance to such search is not an offence—*Narain*, 7 N.W.P. 209; *Idu Mandal*, 6 C.L.J. 753; *Mir Sha*, 8 S.L.R. 1, 16 Cr.L.J. 15; *Madho Sonar*, 13 A.L.J. 691. An oral order to make a general search for suspicious property is not an order lawfully issued under this section—*Hiralal v. Ramdulare*, A.I.R. 1935 Nag 237 (239), 160 I.C. 306.

Non-recording of reasons:—The police-officer is bound to record in writing the grounds of his belief as to the necessity for searching the house of a person and in specifying clearly the article or articles for which the search is to be made—*Sohan Lal*, A.I.R. 1933 Oudh 305 (307), 143 I.C. 467, 1933 Cr.C. 686, 34 Cr.L.J. 568, 10 O.W.N. 678, 20 A.I.Cr.R. 285. A failure to comply with the requirements of section 165, and especially the failure to comply with the requirements of cl (1) of that section, justifies the conclusion that the police-officer was not acting in good faith within the meaning of sec. 52, I. P. C., and a person would be justified in pushing him and his constable back in order to prevent a search which was not strictly in accordance with the law—*Gopi Mahto*, 33 Cr.L.J. 233 (235), 136 I.C. 60, 10 Pat. 821, A.I.R. 1932 Pat. 66, 13 P.L.T. 44, 1932 Cr.C. 99, Ind. Rul. 1932 Pat. 60. Where, however, the Court is satisfied that the Police-officer was conscientiously acting in the discharge of his duties according to his own lights, there is no room for drawing the inference of dishonesty from the fact that he did not comply with certain procedural portions of sections 165 and 166, Cr. P. C.—*Nangu Bhagat*, A.I.R. 1935 Oudh 270 (271), 11 O.W.N. 485.

Where the matter is very urgent, non-recording of reasons for want of time does not vitiate the proceedings—*Ujagar*, 33 Cr.L.J. 492, 137 I.C. 621, 9 O.W.N. 313, A.I.R. 1932 Oudh 249, Ind. Rul. 1932 Oudh 242, 1932 Cr.C. 590. See also *Asandas v. Khanchand*, A.I.R. 1933 Sind 240 (243), 1933 Cr.C. 800.

The provisions of sec. 165, Cr. P. C., to the effect that before making a search a police-officer should record in writing the grounds of his belief, etc., are directory and not mandatory. The criterion for determining whether the police officers were right or wrong is the state of their minds at the time of making the search—*Maingal Singh v. Ghulam Mohammad*, A.I.R. 1939 Lah 280 (282, 283), 184 I.C. 6, 12 R.L. 154, dissenting from *Hiralal v. Ramdulare*, A.I.R. 1935 Nag 237 (239), 160 I.C. 306 where it has been laid down that sec. 165, Cr. P. C., does not justify the action of the police officers when they do not conform to the procedure laid down therein.

525. Sub-section (4):—Necessity to search warrant—A subordinate police-officer may, however, without a warrant enter a house in search of a person who is charged with having committed a cognizable offence, but he is not empowered to enter a house without a search warrant in search of property—*Venkatarav*, 7 B.H.C.R. 50.

Witnesses to the search—Prior to the present amendment it was held that the failure to call inhabitants of the locality as witnesses to the search, did not make the search illegal, because the provision of sec. 103 did not apply to a search under this section—*Sadagopala v. Satrugna* 23 M.L.J. 445. This ruling is now rendered obsolete by the present sub-section (4) which makes the general provisions of searches under secs. 102 and 103 applicable to searches under this section. But it should be noticed that sub-sec. (4) is not imperative, and that the provisions of secs. 102 and 103 are made applicable only so far as may be. Therefore, the mere fact that in making a search

under sec. 165, the police took two independent witnesses with them, and did not call witnesses from the locality, did not necessarily render the search illegal—*Siam Lal*, 28 Cr.L.J. 652, 103 I.C. 108, A.I.R. 1927 All. 516.

Damages for illegal-search:—A police-officer cannot investigate a non-cognizable case without the order of a Magistrate (sec. 155); nor can he make a search in respect of it, because he can make a search only in those cases which he can investigate. Therefore, a police-officer making a search in a non-cognizable case without being authorised by a Magistrate is liable to be sued for damages—*Bahabal v. Tarak Nath*, 24 Cal. 691. Where a police-officer makes a search for specific stolen property *bona fide*, the person whose premises are searched is not entitled to damages—*Divakar v. Ramamurti*, 35 M.L.J. 127, 19 Cr.L.J. 901. A police-officer not having jurisdiction over the place searched, who takes part in a search conducted by another police-officer authorised by the Code to conduct the search, cannot be said to exceed his jurisdiction and is not liable to damages as one making an illegal search—*Asan v. Masilamani*, 42 Mad. 446, 36 M.L.J. 252, 20 Cr.L.J. 422.

525A. Sub-section (5):—"The object of this amendment is that as soon as a search is made, an immediate report should be made to the nearest Magistrate. The second object is that the person whose house is searched should have copies of the records made under sub-secs. (1) and (3). Sub-sec. (4) as it stands enables the provisions of sec. 103 to apply, that is, the general rules relating to searches are made applicable. Under sec. 103 the occupier of the place where the search was made gets only a list of the articles taken, but what I want him to get is the *reason for the search* which has to be recorded in writing, which has to be sent to the Magistrate, and he gets a copy thereof." See the *Legislative Assembly Debates*, 31st January 1923, p. 1755. Similar amendment has been made in sec. 166 (5) and for the same reasons."

The provisions of this new sub-section, as well as of sub-sec. (5) of sec. 166, are intended as an extra safeguard to protect individuals against general or roving searches. Omission by a police-officer to send forthwith to the nearest Magistrate the copies of the record that he has prepared before undertaking the search, affects the validity of the search, and is a ground for setting aside the conviction of the accused—*Lal Mia*, 93 I.C. 1038, 43 C.L.J. 184, 27 Cr.L.J. 542; *Gopi Mahto*, 10 Pat. 821, 33 Cr.L.J. 233 (235).

An order of refusal by the Magistrate to supply copies of the record to the owner or occupier of the house searched, is subject to revision by the High Court—*Churamani*, 26 A.L.J. 703, 29 Cr.L.J. 663 (664), A.I.R. 1928 All. 402, 110 I.C. 215.

166. (1) An officer in charge of a police-station or a police-officer not being below the rank of sub-inspector making an investigation may require another to issue search warrant.

When officer in charge of police-station may require another to issue search warrant.

station, whether in the same or a different district, to cause a search to be made in any place, in any case in which the former officer might cause such search to be made within the limits of his own station.

(2) Such officer, on being so required, shall proceed according to the provision of section 165, and shall forward the thing found, if any, to the officer at whose request the search was made.

(3) Whenever there is reason to believe that the delay occasioned by requiring an officer in charge of another police-station to cause a search to be made under sub-section (1) might result in evidence of the commission of an offence being concealed or destroyed, it shall be lawful for an officer making an investiga-

tion under this Chapter to search, or cause to be searched, any place in the limits of another police station, in accordance with the provisions of section 165 as if such place were within the limits of his own station.

(4) Any officer conducting a search under sub-section (3) shall forthwith send notice of the search to the officer in charge of the police station within the limits of which such place is situate, and shall also send with such notice a copy of the list (if any) prepared under section 103, and shall also send to the nearest Magistrate empowered to take cognizance of the offence, copies of the records referred to in section 165, sub-sections (1) and (3).

(5) The owner or occupier of the place searched shall, on application, be furnished with a copy of any record sent to the Magistrate under sub-section (4) :

Provided that he shall pay for the same, unless the Magistrate for some special reason thinks fit to furnish it free of cost.

Change:—This section has been amended by sec 37 of the Cr P C. Amendment Act (XVIII of 1923).

"Not being below the rank of Sub-Inspector":—We are inclined to think that the powers conferred by section 166 should not be exercised by a police-officer making an investigation who is below the rank of Sub-Inspector. We realise, however, that there may be administrative difficulties in this connection, and if such difficulties are pointed out by Local Government, we should be prepared to retain this clause unamended"—*Report of the Joint Committee (1922)*

Sub-sections (3), (4):—"These two sub-sections are proposed to be added in order to give power in certain circumstances to an officer in charge of a police station to search or cause to be searched places within the local limits of another police station"—*Statement of Objects and Reasons (1914)* See also *Assan Alliar v Masilamani*, 42 Mad 446

Sub-section (5):—For a similar amendment made in sec 165, see Note 525A under that section. See also the *Legislative Assembly Debates*, 31st January, 1923, page 1757

167. (1) Whenever any person is arrested and detained in custody and it appears that the investigation * * * cannot be completed

Procedure when investigation cannot be completed in twenty-four hours.

within the period of twenty-four hours fixed

by section 61, and there are grounds for believing that the accusation or information is well-founded, the officer in charge of the police-station or the police-officer making the investigation if he is not below the rank of Sub-Inspector shall forthwith transmit to the nearest Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused (* *) to such Magistrate.

(2) The Magistrate to whom an accused person is forward-

ed under this section may, whether he has or has not jurisdiction to try the case, from time to time authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole. If he has not jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction:

Provided that no Magistrate of the third class, and no Magistrate of the second class not specially empowered in this behalf by the Provincial Government, shall authorise detention in the custody of the police.

(3) A Magistrate authorizing under this section detention in the custody of the police shall record his reasons for so doing.

(4) If such order is given by a Magistrate other than the District Magistrate or Sub-divisional Magistrate, he shall forward a copy of his order, with his reasons for making it, to the Magistrate to whom he is immediately subordinate.

Change:—The italicised words in sub-sec. (1) and the proviso to sub-sec. (2) have been inserted by sec. 38 of the Criminal Procedure Code Amendment Act, XVIII of 1923. The reasons are stated below.

The words "Provincial Government" have been substituted for the words "Local Government" by sec. 4 of the Government of India (Adaptation of Indian Laws) Order, 1937.

526. Scope:—Prior to the present amendment the first three lines of this section ran thus:—"Whenever it appears that any investigation under this chapter cannot be completed," etc; *i.e.*, this section applied only to investigation *under this chapter* and gave no authority to a Magistrate to remand an accused person to custody in proceedings under Chapter VIII, in order to enable the police to arrest other persons jointly accused with him—*Basya*, 5 Bom L.R. 27; *Raghunandan*, 32 Cal 80, 8 C.W.N. 779; *Subbarayya*, 39 Mad. 928; *Rameshwar*, 36 All 262. These rulings are no longer good law, because the words "under this chapter" have now been omitted by the Amendment Act of 1923. The same view has been taken by Woodroffe (*Criminal Procedure*, page 188).

'Not below the rank of Sub-Inspector':—In sec. 167, which confers a power to ask for a remand, we would confine the operation to investigating officers not below the rank of Sub-Inspector"—*Report of the Joint Committee* (1922).

This section does not apply to the Calcutta Police—*Muhammad Suleman*, 30 C.W.N. 985 (998) (F.B.).

527. Object of section:—Having regard to the provisions of this section and of sec. 61 and to the requirements of justice, the intention of the Legislature is that the accused person should be brought before the Magistrate competent to try or commit, with as little delay as possible—*Engadu*, 11 Mad. 98, 2 Weir 142. The law does not authorise a police-officer to keep an accused person in his custody for an indefinite period. Section 61 makes it clear that such person shall not be detained for more than 24 hours, in the absence of a special order of a Magistrate under sec. 167, and this section empowers the Magistrate to direct the detention of the accused for not more than 15 days in the whole. The law evidently views with disfavour the detention in the custody of the police, and such detention can be allowed only in special cases and for reasons to be stated in writing, under sub-sec. (3), and not as a matter of course whenever it may be asked for by the investigating police-officer—*In re Khairati Ram*.

12 Lah 635, 32 P.L.R. 493, 32 Cr.L.J. 913 (914), A.I.R. 1931 Lah. 476; *Kundan Lal*, 12 Lah 604, 32 P.L.R. 423, 32 Cr.L.J. 785 (788). The object of requiring an accused to be produced before a Magistrate under this section is to enable the Magistrate to see that remand is necessary and also to enable the accused to make any representation he may wish to make—*Balkrishna*, 12 Lah 435, 33 Cr.L.J. 180 (181).

There is nothing in sec 167, Cr. P. C., which indicates that the order either of detention or of release should be communicated through the Superintendent of Police—*Muhammad Yakub v. Emp.*, 39 Cr.L.J. 971 (973), 177 I.C. 867, A.I.R. 1938 All 534, 1938 A.L.J. 782

Diary:—The diary referred to in this section is the Special Diary mentioned in sec. 172

The diary should contain full and unabridged statements of persons examined by the police, so as to give the Magistrate a satisfactory and complete source of information which would enable him to decide whether or not the accused persons should be detained in custody. This section requires that copies of entries of the diary should be sent to the Magistrate; the object is to prevent the entries in the diary to be subsequently suppressed or tampered with—*Mannu*, 19 All. 390 (399, 405).

528. "Forward the accused to the Magistrate":—Before a Magistrate remands an accused person to police custody, the accused must be produced before him—*Peary Mohan v. Weston*, 16 C.W.N. 145, 13 I.C. 721, 13 Cr.L.J. 65. Where the accused is not brought before the Magistrate, it is illegal for him to remand the prisoner on the application of the police—*Shera*, 1867 P.R. 39

529. Sub-section (2)—Magistrate's power to order detention:—Under this section, a Magistrate, on a mere perusal of the entries in the Police diaries, may from time to time authorise the detention of the accused for a term not exceeding 15 days on the whole. Thereafter he can, under sec. 344 by a warrant, remand the accused for any term not exceeding 15 days at a time, if there is sufficient evidence to suspect that the accused has committed an offence and that further evidence may be obtained by such remand—*Narendra Lal*, 36 Cal 166 (171), 13 C.W.N. 43.

This section authorises the police but not a Magistrate to investigate and to keep an accused person in custody for the purposes of such investigation. A Magistrate has no such power; but if he receives information of an offence, it is open to him to make a report to the police who can then take action under sec. 167—*Anand Behari*, 52 All. 457, 31 Cr.L.J. 998 (999), 1930 A.L.J. 635, A.I.R. 1930 All. 259

An application for remand to police custody must be made personally by the chief Police officer present to the Chief Magisterial officer present, unless this is impossible owing to the absence of one of the officers concerned or through some other exceptional cause—*Peary Mohan v. Weston*, 16 C.W.N. 145, 13 Cr.L.J. 65, 13 I.C. 721.

The power under sec. 167 is given to detain the prisoners in custody while the police make the investigation, and before the inquiry; but the custody mentioned in sec. 344 is quite different and is intended for under-trial prisoners, i.e., when the inquiry or trial has begun or is about to begin—*Engadu*, 11 Mad. 98; *Krishnaji*, 23 Bom. 32 (31); *Nagendra Nath*, 51 Cal. 402 (412), 38 Cr.L.J. 388, 25 Cr.L.J. 732, 81 I.C. 220, A.I.R. 1924 Cal 476. Sec. 167 relates to custody by the police, while sec. 344 contemplates a remand to jail, not to police custody—*Krishnaji*, supra. See also *Muhammad Suleman*, 30 C.W.N. 985 (998), 54 Cal 218. But even under this section the Magistrate can detain the accused in 'such custody as he thinks fit', i.e., he can consider whether he should send the accused to police custody or to judicial lock-up. If the police attempts to put the accused to needless harassments or throw obstacles in the way of his taking advice from legal advisers, the accused may be sent to the judicial lock-up—*Amolak*, 12 Lah. 211, 32 Cr.L.J. 1022 (1923).

In this sub-section there is no special reference to police custody. What is to be regarded is the period of detention under sec. 167 (2), Cr. P. C., and not the nature of the custody. If the Magistrate, having ordered the accused to be detained for a

ed under this section may, whether he has or has not jurisdiction to try the case, from time to time authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole. If he has not jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction:

Provided that no Magistrate of the third class, and no Magistrate of the second class not specially empowered in this behalf by the Provincial Government, shall authorise detention in the custody of the police.

(3) A Magistrate authorizing under this section detention in the custody of the police shall record his reasons for so doing.

(4) If such order is given by a Magistrate other than the District Magistrate or Sub-divisional Magistrate, he shall forward a copy of his order, with his reasons for making it, to the Magistrate to whom he is immediately subordinate.

Change:—The italicised words in sub-sec. (1) and the proviso to sub-sec. (2) have been inserted by sec. 38 of the Criminal Procedure Code Amendment Act, XVIII of 1923. The reasons are stated below.

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'Not below the rank of Sub-Inspector':—In sec. 167, which confers a power to ask for a remand, we would confine the operation to investigating officers not below the rank of Sub-Inspector"—*Report of the Joint Committee* (1922).

This section does not apply to the Calcutta Police—*Muhammad Suleman*, 30 C.W.N. 985 (998) (F.B.).

527. Object of section:—Having regard to the provisions of this section and of sec. 61 and to the requirements of justice, the intention of the Legislature is that the accused person should be brought before the Magistrate competent to try or commit, with as little delay as possible—*Engadu*, 11 Mad. 98, 2 Weir 142. The law does not authorise a police-officer to keep an accused person in his custody for an indefinite period. Section 61 makes it clear that such person shall not be detained for more than 24 hours, in the absence of a special order of a Magistrate under sec. 167, and this section empowers the Magistrate to direct the detention of the accused for not more than 15 days in the whole. The law evidently views with disfavour the detention in the custody of the police, and such detention can be allowed only in special cases and for reasons to be stated in writing, under sub-sec. (3), and not as a matter of course whenever it may be asked for by the investigating police-officer—*In re Khairati Ram*.

12 Lah. 635, 32 P.L.R. 493, 32 Cr.L.J. 913 (914), A.I.R. 1931 Lah. 476; *Kundan Lal*, 12 Lah. 604, 32 P.L.R. 423, 32 Cr.L.J. 785 (788). The object of requiring an accused to be produced before a Magistrate under this section is to enable the Magistrate to see that remand is necessary and also to enable the accused to make any representation he may wish to make—*Balkrishna*, 12 Lah. 435, 33 Cr.L.J. 180 (181).

There is nothing in sec. 167, Cr. P. C., which indicates that the order either of detention or of release should be communicated through the Superintendent of Police—*Muhammad Yakub v. Emp.*, 39 Cr.L.J. 971 (973), 177 I.C. 867, A.I.R. 1938 All. 534, 1938 A.L.J. 782.

Diary:—The diary referred to in this section is the Special Diary mentioned in sec. 172.

The diary should contain full and unabridged statements of persons examined by the police, so as to give the Magistrate a satisfactory and complete source of information which would enable him to decide whether or not the accused persons should be detained in custody. This section requires that copies of entries of the diary should be sent to the Magistrate; the object is to prevent the entries in the diary to be subsequently suppressed or tampered with—*Mannu*, 19 All. 390 (399, 405).

528. "Forward the accused to the Magistrate":—Before a Magistrate remands an accused person to police custody, the accused must be produced before him—*Peary Mohan v. Weston*, 16 C.W.N. 145, 13 I.C. 721, 13 Cr.L.J. 65. Where the accused is not brought before the Magistrate, it is illegal for him to remand the prisoner on the application of the police—*Shera*, 1867 P.R. 39.

529. Sub-section (2)—Magistrate's power to order detention:—Under this section, a Magistrate, on a mere perusal of the entries in the Police diaries, may from time to time authorise the detention of the accused for a term not exceeding 15 days on the whole. Thereafter he can, under sec. 344 by a warrant, remand the accused for any term not exceeding 15 days at a time, if there is sufficient evidence to suspect that the accused has committed an offence and that further evidence may be obtained by such remand—*Narendra Lal*, 36 Cal. 166 (171), 13 C.W.N. 43.

This section authorises the police but not a Magistrate to investigate and to keep an accused person in custody for the purposes of such investigation. A Magistrate has no such power; but if he receives information of an offence, it is open to him to make a report to the police who can then take action under sec. 167—*Anand Behari*, 52 All. 457, 31 Cr.L.J. 998 (999), 1930 A.L.J. 635, A.I.R. 1930 All. 259.

An application for remand to police custody must be made personally by the chief Police officer present to the Chief Magisterial officer present, unless this is impossible owing to the absence of one of the officers concerned or through some other exceptional cause—*Peary Mohan v. Weston*, 16 C.W.N. 145, 13 Cr.L.J. 65, 13 I.C. 721.

The power under sec. 167 is given to detain the prisoners in custody while the police make the investigation, and before the inquiry; but the custody mentioned in sec. 344 is quite different and is intended for under-trial prisoners, i.e., when the inquiry or trial has begun or is about to begin—*Engadu*, 11 Mad. 98; *Krishnaji*, 23 Bom. 32 (34); *Nagendra Nath*, 51 Cal. 402 (412), 38 Cr.L.J. 388, 25 Cr.L.J. 732, 81 I.C. 220, A.I.R. 1924 Cal. 476. Sec. 167 relates to custody by the police, while sec. 344 contemplates a remand to jail, not to police custody—*Krishnaji*, supra. See also *Muhammad Suleman*, 30 C.W.N. 985 (998), 54 Cal. 218. But even under this section the Magistrate can detain the accused in 'such custody as he thinks fit', i.e., he can consider whether he should send the accused to police custody or to judicial lock-up. If the police attempts to put the accused to needless harassments or throw obstacles in the way of his taking advice from legal advisers, the accused may be sent to the judicial lock-up—*Amolak*, 12 Lah. 211, 32 Cr.L.J. 1022 (1923).

In this sub-section there is no special reference to police custody. What is to be regarded is the period of detention under sec. 167 (2), Cr. P. C., and not the nature of the custody. If the Magistrate, having ordered the accused to be detained for a

period of less than fifteen days, think no further detention is necessary and sends him to a Magistrate having jurisdiction under the second part of sec. 167 (2), then the Magistrate to whom the accused is sent cannot himself exercise the powers already exercised by the Magistrate under the first part of sec. 167 (2), even to the extent of ordering a remand to police custody for such time as will bring the period of detention in police custody to fifteen days. Once powers conferred by the first part of sec. 167 (2) have been exercised by a Magistrate and he has taken action under the second part of sec. 167 (2), then the powers under the first part of sec. 167 (2) have been exhausted, and cannot be revived and continued by the Magistrate having jurisdiction to whom the accused is sent under the second part of sec. 167 (2), Cr. P. C. An accused cannot a'sc be in magisterial and police custody at one and the same time, that is to say, he cannot be before a Magistrate in magisterial custody in one case under sec. 344, Cr. P. C., and before a Magistrate in police custody in another case under sec. 167, Cr. P. C.—*Dhaman Hiranand v. Emp.*, A.I.R. 1937 Sind 251, 31 S.L.R. 494, 171 I.C. 737.

Under the proviso to this section newly added, the power of detention is confined to first-class Magistrates and to second-class Magistrates specially empowered. The reason is that the period of detention is just the time which is taken advantage of by inexperienced Magistrates for extorting confessions and other things. Therefore, the power of detention should be given only to experienced Magistrates.

The words "nearest Magistrate" show that the Magistrate granting a remand need not be the Magistrate having jurisdiction to try the case. This latitude is obviously left merely to provide for cases in which it may not be possible to approach such Magistrate owing to distance or other similar difficulties. But in the absence of such difficulties, it is desirable that the Magistrate having jurisdiction should be approached for purposes of remand. The practice of obtaining remands from any Magistrate at the choice of the police is objectionable—*Balkrishna*, 12 Lah. 435, 33 Cr.L.J. 180 (182), 32 P.L.R. 1.

530. Period of detention:—The period for which a Magistrate can authorise the detention of the accused in police custody is under this section, 15 days on the whole—*Krishnaji*, 23 Bom. 32 (34); *Harqulal*, 1902 P.R. 24; *Engadu*, 11 Mad. 98; *Bassooram*, 19 W.R. 36. In ordering further detention when there are good reasons for it, a Magistrate should invariably limit the term as much as possible to what may be necessary for the object in view—*Kampu Kuki*, 11 C.W.N. 554, 6 Cr.L.J. 86; *Jai Singh*, 8 O.W.N. 1240; *Balkrishna*, 12 Lah. 435, 33 Cr.L.J. 180 (182). An order of continuous detention in police custody for 14 days, and then again for a further period of 14 days, without any reasons being recorded by the Magistrate is illegal—*Krishnaji*, supra. After the expiry of the total period of detention allowed under this section any further remand is illegal. The Magistrate should then take proceedings under sec. 344—*Balkrishna*, supra; *Sooba*, 1931 A.L.J. 617, 32 Cr.L.J. 1045 (1047). At the expiration of the maximum period of 15 days' detention of an accused person and the additional time necessary to bring him before a Magistrate allowed under secs. 61 and 167, an accused must either be released by the Police under sec. 169, security for his appearance if and when required being taken, or the Magistrate, empowered in that behalf, must either take cognizance if he has before him a police report (which ordinarily would be a report in the form laid down in sec. 173) which, he thinks, makes out a *prima facie* case or he must release him—*Bholanath*, 28 C.W.N. 490 (492). During the period of detention, the accused is entitled to have interview with his legal advisers. His relatives should also be allowed to supply him with food and clothing—*Amolak*, 12 Lah. 211, 133 I.C. 288, A.I.R. 1932 Lah. 13, 32 P.L.R. 935, 32 Cr.L.J. 1022; *Evans*, 50 Bom. 741 (745), A.I.R. 1926 Bom. 551. An approver cannot be detained in the custody of the police—*Ranbir*, A.I.R. 1931 Lah. 480, 1931 Cr.C. 704, 32 P.L.R. 728, 135 I.C. 192, 33 Cr.L.J. 162; *Khairati Ram*, A.I.R. 1931 Lah. 476, 32 P.L.R. 493, 132 I.C. 519, 1931 Cr.C. 700, 32 Cr.L.J. 913, 12 Lah. 635.

531. Sub-section (3)—Grounds of detention:—Where a Magistrate orders detention in police custody, he must record sufficient reasons—*Krishnaji*, 23 Bom.

32 (34); *Balkrishna*, 12 Lah. 435, AIR 1931 Lah 99, 33 Cr.L.J. 180 (182); *Peary Mohan v. Weston*, 16 C.W.N. 145, 13 Cr.L.J. 65, 13 IC 721; *Daulat Ram*, AIR 1933 Oudh 315 (319), 10 O.W.N. 466, 1933 Cr.C. 698, 8 Luck 518, 146 IC. 465, 35 Cr.L.J. 10. He need not write an elaborate order in remanding an accused person to police custody; he should briefly indicate his reasons for doing so. But if there are sufficient grounds for considering that the accused is concerned in a serious offence and further information has since been obtained during the investigation, the mere omission to record reasons for remanding him to police custody, will not render the custody illegal—*Sunder Singh*, 12 Lah. 16, 32 Cr.L.J. 339 (340), 31 P.L.R. 780, AIR, 1930 Lah 945. Before remanding the accused to custody or before granting a further remand after the expiry of the first, the Magistrate should study the police-diaries, in order to find whether there is any justification for granting the remand—*Balkrishna*, supra; *Mannu*, 19 All 390 (404) (FB). Before he orders the detention of an accused person, he should ascertain how long the accused had been under police surveillance or influence, and in recording the reasons for detention he should note all the information that he is able to obtain on the subject—*Madar*, 1885 A.W.N. 59. He should be guided by the evidence already available and the prospect of getting further evidence as regards the alleged offence—*Sundar Singh*, 12 Lah. 16, 32 Cr.L.J. 339 (341).

The policy of the Legislature as disclosed by the provisions of this section clearly is that the detention in Police custody should be allowed only in special cases and for such limited periods as the necessities of the case might require. Such remands are not to be granted without sufficient cause being shown for the same—*Jai Singh*, 33 Cr.L.J. 287 (293), 136 IC. 321, 8 O.W.N. 1240, AIR. 1932 Oudh 11, 1932 Cr.C. 43, Ind Rul 1932 Oudh 113. Remands to police custody ought not to be granted except in cases of real necessity and even then the period should be fixed with due regard to the reasonable requirements of the case. When a remand to police custody is granted under this section reasons must clearly be stated in the order as required by sub-sec. (3) of this section—*Dhruv Deo*, AIR 1931 Lah 200, 31 P.L.R. 693, 129 IC. 767, 1931 Cr.C. 320, 32 Cr.L.J. 464, 16 AICr.R. 94.

By requiring the Magistrate to record his reasons the law contemplates that the Magistrate should consider whether on the facts placed before him there are good grounds for allowing such detention. There must be at least something to satisfy the Magistrate that the presence of the person arrested would, during the police investigation, assist in some discovery of evidence—*Kamru Kuki*, 11 C.W.N. 554, 6 Cr.L.J. 86. Thus, when the accused had confessed before the Magistrate and had pointed out some of the properties stolen and was waiting to do more, but was unable to do so because the Police were by law unable without a special order to detain him, it was held that an order for detention should be made—*Kamru Kuki*, supra.

An accused person may be remanded if it is likely that further evidence may be obtained; but he cannot be remanded on a mere expectation that time will show his guilt or that further fact would come to light—*Khuda Bakhsh v. Crown*, 1872 P.R. 17; or simply for the purpose of verifying his confession recorded under sec. 164—*Radhe Halwai*, 7 C.W.N. 220; or merely because he is wanted by the police for the purpose of pointing out the places through which he passed on his way to commit a dacoity, or for the purpose of obtaining his identification in the village—*Amir Khan*, 7 C.W.N. 457.

Interview with legal advisers:—See *Amolak Ram*, infra and Note 966.

Supply of food and clothing:—The police should allow the legal advisers of the accused to interview him, and allow the relatives of the accused to supply him food and clothing. A person who is merely arrested on suspicion during the course of police investigation cannot be placed on a worse footing than an unconvicted criminal prisoner to whom such amenities are allowed under the Prisons Act (*vide* secs. 31-33, Prisons Act, 1894). The police would, of course, be fully justified in satisfying themselves that no objectionable articles are supplied. An accused person is entitled to have access to legal advice under reasonable restrictions even when he is in police custody

during the course of an investigation—*Amolah Ram*, A.I.R. 1932 Lah. 13, 12 Lah. 211, 133 I.C. 288, 32 Cr.L.J. 1022, 1932 Cr.C. 23, 32 P.L.R. 935.

168. When any subordinate police-officer has made any investigation under this Chapter, he shall report the result of such investigation to the officer in charge of police-station.

Report of investigation by subordinate police officer.

532. It was formerly held that a report made by a subordinate Police Officer under this section was not a public document within the meaning of sec. 74, Evidence Act, and an accused person was not entitled to a copy of it before trial—*Arumugan*, 20 Mad. 189, 7 M.L.J. 167, 2 Weir 120 (142, 144, 763). But now see sec. 173, subsection (4).

169. If, upon an investigation under this Chapter, it appears to the officer in charge of the police-station or to the police-officer making the investigation, that there is not sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate, such officer shall, if such person is in custody, release him on his executing a bond, with or without sureties, as such officer may direct, to appear, if any when so required, before a Magistrate empowered to take cognizance of the offence on a police-report and to try the accused or commit him for trial.

Release of accused when evidence deficient.

Change:—The italicised words have been added by section 39 of the Cr. P. C. Amendment Act, XVIII of 1923 "In the case of sec. 169, we agree that the power contemplated by the section should be exercisable by investigating officers and we see no reason in this case to restrict the power to officers not below the rank of Sub-Inspector With regard to section 170, however, we consider that the direct responsibility for sending up a case should rest with the officer in charge of the police-station."—*Report of the Joint Committee* (1922).

533. Power of Police Officer:—This section in terms applies only to the case of an accused who has never been forwarded to a Magistrate—*Rahu*, 43 All 186 (189). See also *Hakim Ally* in Note 540A This section is only employed while the case is at the stage of the investigation by the police. There is no need for the Sub-Inspector to take any steps under this section after the accused appeared before the Magistrate, for the question of their admission to bail is one for the Magistrate and not for the Sub-Inspector—*Rahat Husain*, A.I.R. 1933 All 582 (585), 35 Cr.L.J. 208, 146 I.C. 896, 1933 Cr.C. 926

This section does not authorise a police-officer to entertain an application for withdrawal of a complaint. Permitting a complainant to withdraw is a judicial act, the exercise of which is vested in the Magistrate under sec. 248 and 345, and the police have no authority to interfere in such matters—*Anonymous*, Ratanlal 91.

Re-arrest:—The admission to bail by the Police under this section is a purely provisional arrangement; and, therefore, if the Magistrate considers that the evidence does establish a *prima facie* case of a non-bailable offence, the accused should be re-arrested and forwarded to the Magistrate in custody—*Anonymous*, Ratanlal 121.

Where a person is discharged under sec. 169, Cr. P. C., and examined as a prosecution witness it is unfair to launch a prosecution against him—*Chuni Lal*, 34 Cr.L.J. 761, 144 I.C. 380, A.I.R. 1933 All 399, 1933 Cr.C. 682, 1933 A.L.J. 735, Ind. Rul. 1933 All 420, following *Easatulla Mian*, 76 I.C. 1031, A.I.R. 1925 Cal. 104, 25 Cr.L.J. 311.

170. (1) If, upon an investigation under this Chapter, it appears to the officer in charge of the police-station that there is sufficient evidence or reasonable ground as aforesaid, such officer shall forward the accused under custody to a Magistrate empowered to take cognizance of the offence upon a police-report and to try the accused or commit him for trial, or if the offence is bailable and the accused is able to give security, shall take security from him for his appearance before such Magistrate on a day fixed and for his attendance from day to day before such Magistrate until otherwise directed.

(2) When the officer in charge of a police-station forwards an accused person to a Magistrate or takes security for his appearance before such Magistrate under this section, he shall send to such Magistrate any weapon or other article which it may be necessary to produce before him, and shall require the complainant (if any) and so many of the persons who appear to such officer to be acquainted with the circumstances of the case as he may think necessary, to execute a bond, to appear before the Magistrate as thereby directed and prosecute or give evidence (as the case may be) in the matter of the charge against the accused.

(3) If the Court of the District Magistrate or Sub-divisional Magistrate is mentioned in the bond, such Court shall be held to include any Court to which such Magistrate may refer the case for inquiry or trial, provided reasonable notice of such reference is given to such complainant or persons.

(4) * * * * *

(5) The officer in whose presence the bond is executed shall deliver a copy thereof to one of the persons who executed it, and shall then send to the Magistrate the original with his report.

Change:—Sub-section (4) has been omitted by the Cr. P. C. Amendment Act II of 1926, for the following reasons :—Sub-section (4) provides that the day fixed under this section shall be the day whereon the accused person is to appear, if security for his appearance has been taken, or the day on which he may be expected to arrive at the Court of the Magistrate, if he is to be forwarded in custody. This provision requires, for example, that all witnesses shall be bound down to appear before the Magistrate on the date when the accused is expected to arrive at the Court if he is forwarded in custody. It has been found to be inconvenient, and, it is understood, is not frequently followed in practice"—*Statement of Objects and Reasons* (Gazette of India, 1925, Part V, p 214).

534. Scope:—This section applies to non-cognizable offences. The words "investigation under this Chapter" includes investigation into a non-cognizable offence held under sec. 155 (3) under the orders of a Magistrate—*Raghubar Dayal*, 53 All. 407, 32 Cr L.J. 465 (466), A I R 1931 All 263.

The mere fact that a private complaint is filed in a Court and the Magistrate takes cognizance of the private complaint does not and cannot deter the Police from enquiring

during the course of an investigation—*Amolak Ram*, A.I.R. 1932 Lah. 13, 12 Lah. 211, 133 I.C. 288, 32 Cr.L.J. 1022, 1932 Cr.C. 23, 32 P.L.R. 935.

168. When any subordinate police-officer has made any investigation under this Chapter, he shall report the result of such investigation to the officer in charge of police-station.

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532. It was formerly held that a report made by a subordinate Police Officer under this section was not a public document within the meaning of sec 74, Evidence Act, and an accused person was not entitled to a copy of it before trial—*Arumugan*, 20 Mad. 189, 7 M.L.J. 167, 2 Weir 120 (142, 144, 763). But now see sec. 173, sub-section (4).

169. If, upon an investigation under this Chapter, it appears to the officer in charge of the police-station or to the police-officer making the investigation, that there is not sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate, such officer shall, if such person is in custody, release him on his executing a bond, with or without sureties, as such officer may direct, to appear, if any when so required, before a Magistrate empowered to take cognizance of the offence on a police-report and to try the accused or commit him for trial.

Release of accused when evidence deficient.

Change:—The italicised words have been added by section 39 of the Cr. P. C. Amendment Act, XVIII of 1923. "In the case of sec. 169, we agree that the power contemplated by the section should be exercisable by investigating officers and we see no reason in this case to restrict the power to officers not below the rank of Sub-Inspector. With regard to section 170, however, we consider that the direct responsibility for sending up a case should rest with the officer in charge of the police-station"—*Report of the Joint Committee* (1922).

533. Power of Police Officer:—This section in terms applies only to the case of an accused who has never been forwarded to a Magistrate—*Rahu*, 43 All. 186 (189). See also *Hakim Ally* in Note 540A. This section is only employed while the case is at the stage of the investigation by the police. There is no need for the Sub-Inspector to take any steps under this section after the accused appeared before the Magistrate, for the question of their admission to bail is one for the Magistrate and not for the Sub-Inspector—*Rahat Husain*, A.I.R. 1933 All. 582 (585), 35 Cr.L.J. 208, 146 I.C. 896, 1933 Cr.C. 926.

This section does not authorise a police-officer to entertain an application for withdrawal of a complaint. Permitting a complainant to withdraw is a judicial act, the exercise of which is vested in the Magistrate under sec. 248 and 345, and the police have no authority to interfere in such matters—*Anonymous*, Ratanlal 91.

Re-arrest:—The admission to bail by the Police under this section is a purely provisional arrangement; and, therefore, if the Magistrate considers that the evidence does establish a *prima facie* case of a non-bailable offence, the accused should be re-arrested and forwarded to the Magistrate in custody—*Anonymous*, Ratanlal 121.

Where a person is discharged under sec. 169, Cr. P. C., and examined as a prosecution witness it is unfair to launch a prosecution against him—*Chuni Lal*, 34 Cr.L.J. 761, 144 I.C. 380, A.I.R. 1933 All. 399, 1933 Cr.C. 682, 1933 A.L.J. 735, Ind. Rul. 1933 All. 420, following *Easatulla Mian*, 76 I.C. 1031, A.I.R. 1925 Cal. 104, 25 Cr.L.J. 311.

170. (1) If, upon an investigation under this Chapter, it appears to the officer in charge of the police-station that there is sufficient evidence or reasonable ground as aforesaid, such officer shall forward the accused under custody to a Magistrate empowered to take cognizance of the offence upon a police-report and to try the accused or commit him for trial, or if the offence is bailable and the accused is able to give security, shall take security from him for his appearance before such Magistrate on a day fixed and for his attendance from day to day before such Magistrate until otherwise directed.

(2) When the officer in charge of a police-station forwards an accused person to a Magistrate or takes security for his appearance before such Magistrate under this section, he shall send to such Magistrate any weapon or other article which it may be necessary to produce before him, and shall require the complainant (if any) and so many of the persons who appear to such officer to be acquainted with the circumstances of the case as he may think necessary, to execute a bond, to appear before the Magistrate as thereby directed and prosecute or give evidence (as the case may be) in the matter of the charge against the accused.

(3) If the Court of the District Magistrate or Sub-divisional Magistrate is mentioned in the bond, such Court shall be held to include any Court to which such Magistrate may refer the case for inquiry or trial, provided reasonable notice of such reference is given to such complainant or persons

(4) * * * * *

(5) The officer in whose presence the bond is executed shall deliver a copy thereof to one of the persons who executed it, and shall then send to the Magistrate the original with his report.

Change:—Sub-section (4) has been omitted by the Cr. P. C. Amendment Act II of 1926, for the following reasons:—“Sub-section (4) provides that the day fixed under this section shall be the day whereon the accused person is to appear, if security for his appearance has been taken, or the day on which he may be expected to arrive at the Court of the Magistrate, if he is to be forwarded in custody. This provision requires, for example, that all witnesses shall be bound down to appear before the Magistrate on the date when the accused is expected to arrive at the Court if he is forwarded in custody. It has been found to be inconvenient, and, it is understood, is not frequently followed in practice”—*Statement of Objects and Reasons* (Gazette of India, 1925, Part V, p. 214).

534. Scope:—This section applies to non-cognizable offences. The words “investigation under this Chapter” includes investigation into a non-cognizable offence held under sec. 155 (3) under the orders of a Magistrate—*Raghubar Dayal*, 53 All. 407, 32 Cr L.J. 465 (466), A.I.R. 1931 All. 263.

The mere fact that a private complaint is filed in a Court and the Magistrate takes cognizance of the private complaint does not and cannot deter the Police from enquiring

during the course of an investigation—*Amolak Ram*, A.I.R. 1932 Lah. 13, 12 Lah. 211, 133 I.C. 288, 32 Cr.L.J. 1022, 1932 Cr.C. 23, 32 P.L.R. 935.

168. When any subordinate police-officer has made any investigation under this Chapter, he shall report the result of such investigation to the officer in charge of police-station.

Report of investigation by subordinate police officer.

532. It was formerly held that a report made by a subordinate Police Officer under this section was not a public document within the meaning of sec 74, Evidence Act, and an accused person was not entitled to a copy of it before trial—*Arumugan*, 20 Mad. 189, 7 M.L.J. 167, 2 Weir 120 (142, 144, 763). But now see sec. 173, sub-section (4).

169. If, upon an investigation under this Chapter, it appears to the officer in charge of the police-station or to the police-officer making the investigation, that there is not sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate, such officer shall, if such person is in custody, release him on his executing a bond, with or without sureties, as such officer may direct, to appear, if any when so required, before a Magistrate empowered to take cognizance of the offence on a police-report and to try the accused or commit him for trial.

Release of accused when evidence deficient.

Change:—The italicised words have been added by section 39 of the Cr. P. C. Amendment Act, XVIII of 1923. "In the case of sec. 169, we agree that the power contemplated by the section should be exercisable by investigating officers and we see no reason in this case to restrict the power to officers not below the rank of Sub-Inspector. With regard to section 170, however, we consider that the direct responsibility for sending up a case should rest with the officer in charge of the police-station."—*Report of the Joint Committee* (1922).

533. Power of Police Officer:—This section in terms applies only to the case of an accused who has never been forwarded to a Magistrate—*Rahu*, 43 All 186 (189). See also *Hakim Ally* in Note 540A. This section is only employed while the case is at the stage of the investigation by the police. There is no need for the Sub-Inspector to take any steps under this section after the accused appeared before the Magistrate, for the question of their admission to bail is one for the Magistrate and not for the Sub-Inspector—*Rahat Husain*, A.I.R. 1933 All. 582 (585), 35 Cr.L.J. 208, 146 I.C. 896, 1933 Cr.C. 926.

This section does not authorise a police-officer to entertain an application for withdrawal of a complaint. Permitting a complainant to withdraw is a judicial act, the exercise of which is vested in the Magistrate under sec 248 and 345, and the police have no authority to interfere in such matters—*Anonymous*, Ratanlal 91.

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Where a person is discharged under sec 169, Cr. P. C., and examined as a prosecution witness it is unfair to launch a prosecution against him—*Chuni Lal*, 34 Cr.L.J. 761, 144 I.C. 380, A.I.R. 1933 All 399, 1933 Cr.C. 682, 1933 A.L.J. 735, Ind. Rul. 1933 All. 420, following *Easatulla Mian*, 76 I.C. 1031, A.I.R. 1925 Cal. 104, 25 Cr.L.J. 311.

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(2) When the officer in charge of a police-station forwards an accused person to a Magistrate or takes security for his appearance before such Magistrate under this section, he shall send to such Magistrate any weapon or other article which it may be necessary to produce before him, and shall require the complainant (if any) and so many of the persons who appear to such officer to be acquainted with the circumstances of the case as he may think necessary, to execute a bond, to appear before the Magistrate as thereby directed and prosecute or give evidence (as the case may be) in the matter of the charge against the accused.

(3) If the Court of the District Magistrate or Sub-divisional Magistrate is mentioned in the bond, such Court shall be held to include any Court to which such Magistrate may refer the case for inquiry or trial, provided reasonable notice of such reference is given to such complainant or persons.

(4) * * * * *

(5) The officer in whose presence the bond is executed shall deliver a copy thereof to one of the persons who executed it, and shall then send to the Magistrate the original with his report.

Change:—Sub-section (4) has been omitted by the Cr. P. C. Amendment Act II of 1926, for the following reasons :—Sub-section (4) provides that the day fixed under this section shall be the day whereon the accused person is to appear, if security for his appearance has been taken, or the day on which he may be expected to arrive at the Court of the Magistrate, if he is to be forwarded in custody. This provision requires, for example, that all witnesses shall be bound down to appear before the Magistrate on the date when the accused is expected to arrive at the Court if he is forwarded in custody. It has been found to be inconvenient, and, it is understood, is not frequently followed in practice"—*Statement of Objects and Reasons* (Gazette of India, 1925, Part V, p 214).

534. Scope:—This section applies to non-cognizable offences. The words "investigation under this Chapter" includes investigation into a non-cognizable offence held under sec. 155 (3) under the orders of a Magistrate—*Raghubar Dayal*, 53 All 407, 32 Cr L.J. 465 (466), A I R. 1931 All 263

The mere fact that a private complaint is filed in a Court and the Magistrate takes cognizance of the private complaint does not and cannot deter the Police from enquiring

into the offences which have been committed and which come to their knowledge not from the complainant party but on information which they secure in the course of their duty from other persons—*Vijayraghavachari*, 30 Cr.L.J. 326 (328), 114 I.C. 365, A.I.R. 1928 Mad. 1268, Ind. Rul 1929 Mad. 285.

Sufficient evidence or reasonable ground:—It is true that in cases where definite allegations are made by aggrieved persons which they are prepared to support by positive evidence, apparently free from taint, it is generally not the function of the police to play the role of Judges and to pronounce their verdict on the truth or falsehood of those allegations. In such cases they are bound to send up the accused for trial and not to discuss the probabilities or the improbabilities of the case and come to a final decision of their own. But unfortunately in this country, as has been noticed so often, there is a tendency to implicate innocent persons along with the guilty whenever any occasion arises in that respect, and not only the Courts but the investigating officers must proceed cautiously when they are faced with that situation. To restrain them altogether from using their discretion in such cases would prove detrimental to the interests of the public and would lead to unnecessary harassment of persons who had absolutely no hand in the crime. A police officer is in the same position as a Magistrate holding inquiry in cases triable by a Court of Session and there is a string of rulings which lay down that such Magistrate has power to discharge an accused person if the evidence against him is palpably false or legally insufficient and this is in spite of the fact that the function of sifting the truth or falsehood of that evidence is within the competence of the Sessions Judge only—*Jaimal Singh v. Emp.*, A.I.R. 1939 Lah. 523, I.L.R. 1939 Lah. 307, 41 Cr.L.J. 146, 185 I.C. 266, 41 P.L.R. 763.

"Shall forward":—As soon as it appears to the investigating police officer that there is sufficient ground for forwarding the accused, the police officer is bound to forward the accused, and has no option but to do so—*Govinda*, 16 N.L.R. 9, 21 Cr.L.J. 769, 58 I.C. 449.

It is doubtful whether the discretion vested in the investigating officer by the provisions of sec. 170, Cr. P. C., can be controlled by the Superintendent of Police, or so controlled after the discretion has been exercised—*Umesh v. Satish*, 22 C.W.N. 69 (71), 26 Cr.L.J. 208.

Secs. 167, 170, 344:—If after the period of 15 days prescribed by sec. 167, the police wish to detain the accused in custody, they can only proceed by forwarding the accused under sec. 170 to a Magistrate empowered to take cognizance of the case. The Magistrate can then, under sec. 344, remand the accused to custody, if there are reasonable grounds for doing so—*Sooba*, 1931 A.L.J. 617, 32 Cr.L.J. 1045 (1047); *Balkrishna*, 12 Lah. 435, 33 Cr.L.J. 180 (182).

Report not necessary:—When the investigation cannot be completed within the 15 days prescribed by sec. 167, and the accused person is consequently forwarded to a Magistrate under this section, it is not necessary that a report prescribed by sec. 173 should be forwarded at the same time. Such an implication should not be read into sec. 170. Sec. 173 contemplates a case where the investigation *has been completed*; but sec. 170 implies a case where the investigation *is not* complete, but where there is reasonable ground or suspicion to justify the forwarding of the accused to a Magistrate. If the investigation is completed, and the report has been prepared, the accused is forwarded because the case is ready for inquiry or trial; if the investigation is not complete, and the report is not ready, the accused may be forwarded on reasonable ground or suspicion, in order that the Court may remand the accused under sec. 344, if there are reasonable grounds for doing so—*Sooba*, supra.

535. Right of accused to copy of charge-sheet at the beginning of trial:—It was held under the old law that a Magistrate was entitled to refuse to give the accused, at the commencement of the trial, a copy of the Police charge-sheet, containing the whole of the prosecution evidence and extracts from the police diaries—*Venkataratnam* 19 Mad. 14; but this is no longer good law in view of the new sub-sec. (4)

of sec. 173 which now entitles the accused to get a copy of the charge-sheet before trial. See Note 541 under the heading "Sub-section (4)."

Complainants and witnesses not to be required to accompany police officer.

171. No complainant or witness on his way to the Court of the Magistrate shall be required to accompany a police officer,

or shall be subjected to unnecessary restraint or inconvenience, or required to give any security for his appearance other than his own bond :

Complainants and witnesses not to be subjected to restraint.

Provided that, if any complainant or witness refuses to attend or execute a bond as directed in section 170, the officer in charge of the police-station may forward him in custody to the

Recusant complainant or witness may be forwarded in custody.

Magistrate who may detain him in custody until he executes such bond, or until the hearing of the case is completed.

536. Unnecessary restraint:—Where a witness was kept under police surveillance for about four days, it was held that there was no warrant in the law to keep a witness under such unnecessary restraint and that under such circumstances the evidence of the witness could not be accepted as given voluntarily.—*Bajrangi Lall*, 4 C W N 49 (54)

172. (1) Every police-officer making an investigation under this Chapter shall day by day enter his proceedings in the investigation in a diary, setting forth the time at which the information reached him, the time at which he began, and closed his investigation, the place or places visited by him, and a statement of the circumstances ascertained through his investigation.

(2) Any Criminal Court may send for the police-diaries of a case under inquiry or trial in such Court, and may use such diaries, not as evidence in the case, but to aid it in such inquiry or trial. Neither the accused nor his agents shall be entitled to call for such diaries, nor shall he or they be entitled to see them merely because they are referred to by the Court; but if they are used by the police-officer who made them, to refresh his memory, or if the Court uses them for the purpose of contradicting such police-officer, the provisions of the Indian Evidence Act, 1872, section 161 or section 145, as the case may be, shall apply.

537. Scope:—The object of the special diaries under this section (which are commonly called 'case diaries') has been well expressed by Edge, C.J., in *Mannu*, 19 All 300, 1897 A W N 174. "The early stages of investigation which follows on the commission of a crime must necessarily in the vast majority of cases be left to the Police and until the honesty, the capacity, the discretion and judgment of the Police can be thoroughly trusted it is necessary for the protection of the public against criminals, for the vindication of the law and for the protection of those who are charged with having committed a criminal offence that the Magistrate or Judge before whom the case is for investigation or for trial should have the means of ascertaining what was the information, true, false or misleading, which was obtained from day to day b

the police-officer who was investigating the case and what were the lines of investigation upon which the police-officer acted." Quoted with approval in *Peary v. Weston*, 16 C.W.N. 145 (179), 13 Cr.L.J. 65, 13 I.C. 721.

The object of sub-sec. (2) of this section is to enable the Court to direct the Police-officer who is giving his evidence, to refresh his memory from the notes made by him in the course of his investigation of the case, or to question him as to contradictions which may appear between statements so recorded and the evidence he is giving in Court. If used for the latter purpose the provisions of secs 145 and 161 of the Indian Evidence Act shall apply. The Court may also use the diaries in the course of the trial for the purpose of clearing up obscurities in the evidence or brining out relevant facts which the Court thinks are material in the interests of a fair trial. If the statements in question, however, have not been made in evidence in accordance with these statutory provision, no Court has the right to refer to them subsequently for the purpose of coming to a judicial decision upon the case which is under trial or enquiry—*Mohammad v Emp.*, 26 Cr.L.J. 1308 (1314), 89 I.C. 252, A.I.R. 1926 Lah 54, 1 Lah. Cas 193.

This section does not deal with the recording of statements made by the witnesses. What is intended to be recorded under this section is what the Sub-Inspector did, the places where he went, the people he visited, what he saw, etc. No statement can be said to be recorded under this section so as to be a privileged one—*Mafizaddi*, 31 C.W.N 940, 28 Cr.L.J. 805, A.I.R. 1927 Cal. 644; *Hafiz Muhammad*, 12 P.L.T. 393, 32 Cr.L.J. 638 (640), A.I.R. 1931 Pat. 150 This section does not provide for recording statements of witnesses. Any statements of witnesses that are recorded, in whatever form they may be recorded, are recorded under sec. 161, and the accused has the right to ask for a copy of such statements, to use them for the purpose of contradicting the witnesses for the prosecution—*Sadhu Shaikh*, 32 C.W.N 280 (281), 29 Cr.L.J. 581, A.I.R. 1928 Cal. 260.

Entries made in a personal diary kept by a Police Officer, who did not start the investigation of a case and did not take any part in the investigation, do not fall within the purview of this section and are not, therefore, inadmissible in evidence by virtue of the provisions of this section—*Kalia*, 26 Cr.L.J. 579 (581), 85 I.C. 723, A.I.R. 1925 Cal 959.

The provisions of sec 172, Cr. P. C., apply to all Police Officers making an investigation. The Police Officers are required to enter proceedings in a diary from day to day—*Jahangir*, 35 Cr.L.J. 1180 (1208), A.I.R. 1935 Lah 230, 150 I.C. 1056.

This section does not apply to the Calcutta Police—*Panchanan Mukherjee v. Emp.*, 30 Cr.L.J. 577, 116 I.C. 160, A.I.R. 1929 Cal. 257, 33 C.W.N. 203, Ind. Rul 1929 Cal. 448.

Diary:—The diary mentioned in this section is called Special or Case Diary.

Diary to be kept properly—It is incumbent upon a Police-officer who investigates a case under this chapter to keep the diary as provided by this section, and the omission to keep the diary deprives the Court of the very valuable assistance which such diaries can give, if legitimately used—*Hiralal*, 1918 P.R. 16, 19 Cr.L.J. 517. The absence of the diary does not vitiate the trial—*Hafiz Muhammad*, 32 Cr.L.J. 638, 131 I.C. 17, A.I.R. 1931 Pat. 150, 12 P.L.T 393, 1931 Cr C 390

Supervision notes:—It is a mistake to exclude supervision notes from the Police diaries sent to the Courts. The investigation may be (and usually is) in the hands of a Sub-Inspector and the supervision is conducted by superior officers. But the Court which may use the diaries to aid it in the inquiry or trial cannot rightly be left in ignorance of the supervision which necessarily determines the course of the investigation at point after point. Supervision usually involves a fresh questioning of the principal witnesses in the course of what is still the Police investigation of the case. Their exclusion is apt to lead to a miscarriage of justice, if not also to leave a suspicion that something must be wrong with the investigation which it is not desired should

become known to the Courts. The notes cannot, of course, be used as evidence, any more than can the diaries of the Investigating Officer himself; but they usually make these diaries more intelligible and more useful as aids in inquiries and trials—*Manu Chik*, 39 Cr.L.J. 635 (639), 175 I.C. 716, A.I.R. 1938 Pat 290

"Court may send for diaries"—A Sessions Judge should not issue a general order directing the Police diaries, in all cases committed for trial to the Court of Session and in every criminal appeal, to be transmitted to him. He is only authorised to send for the diary of a particular case actually pending before him, if he thinks it necessary in such case to peruse the diary—*Mannu*, 19 All 390 (415), 1897 A.W.N. 174 (F.B.)

538. Use of diary:—

Diary not an evidence in the case.—Police diaries should not be treated as evidence in the case. The Court should not take the statements contained in the diaries as the material which would help it to come to a decision of the case. Should the Court consider that any date, fact, or statement referred to in the Special Diary is or may be material, it cannot legally accept the Diary as evidence, in any sense, of such date, fact or statement, and must in law, before allowing any date, fact, or statement referred to in the Special Diary to influence its mind, have such date, fact, or statement established by legal evidence. It is the Court which is entitled to use the Special Diary for the purpose of seeking for sources and lines of enquiry and for the names of persons who may be in a position to give material evidence—*Mannu*, 19 All 390 (393) (F.B.); *Syed Abdul Rahim v Salhu*, 10 C.W.N. 600, 3 Cr.L.J. 408; *Nga Lun*, A.I.R. 1935 Rang 370 (373), 36 Cr.L.J. 1487, 158 I.C. 784, 13 Rang 570, 1935 Cr.C. 1088 (F.B.) See also *Nga San*, A.I.R. 1936 Rang 75 (76), 37 Cr.L.J. 414, 161 I.C. 14, 1936 Cr.C. 39. The Court should not make a summary of the contents of the diary and make it a part of the judgment, for that would also make the statements contained in the diary virtually a part of the evidence in the case—*Nand Lal*, 1894 A.W.N. 155. The use of the diary as evidence in the case either for or against the accused, is strictly forbidden by sec. 162. Even the consent or desire of the accused cannot legalise the use of the diary as evidence in the case—*Manna Lal*, 27 O.C. 40, A.I.R. 1925 Oudh 1, 25 Cr.L.J. 49

Under sec. 172 a Court referring to such diaries is entitled to use them not as evidence in the case but to aid in such enquiry or trial. The meaning of this is that the Court may on finding some fact noted in the diary take advantage of this in order to put some necessary question to witness in the box so as to elicit in evidence the fact which has been disclosed by the diary—*Deo Lal*, 34 Cr.L.J. 948, 145 I.C. 426, A.I.R. 1933 Pat. 440, 14 P.L.T. 396, 1933 Cr.C. 974. See also *Karan Singh*, 29 Cr.L.J. 76 (29), 106 I.C. 442, A.I.R. 1928 All 25, 26 A.L.J. 92 and *Mohammad v. Emp.*, in Note 537.

The diary cannot be used as evidence of any date, fact or statement contained therein, but can be used only for the purpose of assisting the Court in the inquiry or trial, or as suggesting means of further elucidating the points which need clearing up and which are material for doing justice between Crown and the accused—*Dal Singh*, 44 Cal 876 (888) 39 I.C. 311, A.I.R. 1917 P.C. 25, 18 Cr.L.J. 471, 44 I.A. 137, 13 N.L.R. 100, 15 A.L.J. 475, 1 P.L.W. 661, 19 Bom L.R. 510, 21 C.W.N. 818, 26 C.L.J. 13, 6 M.L.W. 71, 22 M.L.T. 31, 1917 M.W.N. 522, 86 L.J.P. 140, 11 Bur.L.T. 54 (P.C.); *Sanmon Tiwari*, 38 Cr.L.J. 102, 165 I.C. 761, A.I.R. 1936 Pat. 581, 1936 Cr.C. 952; *Jadab*, 27 Cal. 295; *Mannu*, 19 All. 390 (395) (F.B.); or for the purpose of seeking for sources and lines of enquiry and for the names of persons who may be in a position to give material evidence—*Mannu*, supra. Where, after a verdict was given by the jury, the Sessions Judge stated that he would look to the police-diaries before deciding whether he would refer the case under sec. 307, *held* that the Judge's action was not illegal, because he used the diary for the purpose of aiding him in the trial. The trial had not ended with the verdict, for the Judge had still to decide whether he would accept it or refer the case to the High Court—*Rebati Mohan*, 56 Cal 150, 32 C.W.N. 945, 30 Cr.L.J. 435 (437), A.I.R. 1929 Cal. 57.

The diary cannot be used for the purpose of testing the evidence of prosecution witnesses by reading the earlier statements of those witnesses made to the police and entered in the diary—*Dal Singh*, supra. It is at least equally contrary to law to make use of the Police diary for the purpose of corroborating the evidence of prosecution witnesses as given in the Court, especially having regard to sec. 162, Cr. P. Code. Therefore a Magistrate makes an improper use of police diaries when he observes in his judgment "Some discrepancies in the statements of some witnesses examined in Court have been pointed out from what they stated before the investigating officer. I have gone through the case diary. Those discrepancies are not material to facts in issue"—*Sakul Ahir v. Palakdhari Ahir*, 11 P.L.T. 837, 131 I.C. 535, A.I.R. 1931 Pat. 96, 1931 Cr.C. 192, 32 Cr.L.J. 735, Ind. Rul. 1931 Pat. 215; *Sanmon Tiwari v. Emp.*, 38 Cr.L.J. 102, 165 I.C. 761, A.I.R. 1936 Pat. 581, 1936 Cr.C. 952. Such improper admission of evidence will not, in all cases, compel interference by a superior Court—*Sanmon Tiwari v. Emp.*, supra.

The aid which a Court can receive from the entries in such a diary is usually confined to utilising the information given therein as a foundation for questions to be put to the witnesses, and in using the diary the Court should always employ very great caution—*Raja Ram*, 3 O.W.N. 1001, 28 Cr.L.J. 134, A.I.R. 1927 Oudh 64. As observed by Knox, J., in *Nasiruddin*, 16 All. 207 (208): "Statements made to the police during the investigation are recorded by police-officers in the most haphazard manner. Officers conducting an investigation not unnaturally record what seems in their opinion material at that stage and omit many matters equally material, and, it may be, of supreme importance as the case develops. Besides that, in most cases they are not experts of what is and what is not evidence. The statements are recorded hurriedly in the midst of a crowd and confusion, subject to frequent interruptions and suggestions from by-standers. There is no guarantee that they do not contain much more or much less than what the witness has said." These principles should be remembered by the Court when utilizing the record of statements made by a police-officer in the course of an investigation and entered in the diary—*Raja Ram*, supra.

The trying Magistrate has no business whatever to look at the case diary and the appeal should be heard on the evidence adduced and the reasons advanced in the trial Court alone. The conclusion that was reached by the police-officer who made the enquiry is irrelevant for the purpose of the appellate Court's consideration, as is also the fact that persons were called as witnesses for the prosecution who were not examined by the police-officer—*Raghunathmal v. Patiram*, A.I.R. 1937 Nag. 394 (395), 172 I.C. 177.

Use by Police-officer for refreshing memory or by the Court to contradict the Police-officer :—A Criminal Court may permit the Police-officer who made the special diary to look at it for the purpose of refreshing his memory, or may use it for the purpose of showing contradiction between the statements recorded in the diary and the evidence which the police officer is giving in Court. A special diary cannot be used to enable any witness other than the Police-officer who made it, to refresh his memory by looking at it, and it cannot be used to contradict any witness other than such Police officer—*Mannu*, 19 All. 390 (394, 395) (F.B.); *Dal Singh*, 44 Cal. 876 (889) (P.C.), 21 C.W.N. 818, 26 C.L.J. 13, 39 I.C. 311, A.I.R. 1917 P.C. 25, 18 Cr.L.J. 471, 13 N.L.R. 100, 15 A.L.J. 475, 1 P.L.W. 661, 22 M.L.T. 31, 19 Bom.L.R. 510, 6 M.L.W. 71, 1917 M.W.N. 522, 33 M.L.J. 555, 1 Bur.L.T. 54.

Before using the police-diary for the purpose of contradicting the police-officer who made it, the Court must comply with the specific enactment of sec. 145, Evidence Act, and call the attention of the Police-officer to such parts of the diary as are to be used for the purpose of contradicting him; otherwise such an use of the special diary would be illegal. Section 145, Evidence Act, does not either extend or control sec. 172, Cr. P. Code. It is only if the Court uses the diary for contradicting the police-officer that sec. 145, Evidence Act applies, and, in such case it applies for that purpose only, and not for the purpose of enabling a Court or a party to contradict any other witness or to show

it or its contents to any other person—*Mannu*, 19 All 390 (394), 1897 A.W.N. 174 (F.B.).

The accused is not entitled to insist that a Police-officer should refer to the diary to refresh his memory—*Kali Charan*, 8 Cal. 154; *Mohinder*, 33 P.L.R. 891, 33 Cr.L.J. 97 (105), 135 I.C. 209, A.I.R. 1932 Lah. 103, 1932 Cr.C. 123, Ind. Rul. 1932 Lah. 81; nor is the Judge bound to compel the Police-officer to look at the diary to refresh his memory—*Jhubboo*, 8 Cal. 739. Such use is at the discretion of the Judge and of the Police-officer—*Mohinder*, supra. It may be within the right of the Police-officers not to refer to a diary, but the accused is entitled to the benefit of their refusal to refer to the diary and to disclose the source of their information—*Deodhary Pandey*, 26 Cr.L.J. 738 (739), 86 I.C. 274, A.I.R. 1925 Pat. 131, 6 P.L.T. 810. But if a Sub-Inspector does not remember what certain witnesses stated at the investigation, and refuses to refresh his memory from the diaries, the Court should compel him to look into the diaries—*Mohiuddin*, A.I.R. 1924 Pat. 829 (830).

The diary is permitted to be used for the limited purpose of *contradicting* the Police-officer, and not for the purpose of *corroborating* him—*Achhaibat*, 2 P.L.T. 223, 61 I.C. 230, 22 Cr.L.J. 374; *Sakal v. Palakdhari*, 11 P.L.T. 837, 32 Cr.L.J. 735, 131 I.C. 535. But where independently of the police diary wrongly relied upon by the Court below, there was ample legal evidence to corroborate the prosecution case and to sustain the conviction, the High Court in revision condoned the irregularity and refused to interfere—*Achhaibat*, supra. See also *Sanmon Tiwari*, 38 Cr.L.J. 102, 165 I.C. 761, A.I.R. 1936 Pat. 581, 1936 Cr.C. 952, 3 B.R. 78, 9 R.P. 211 and *Dal Singh*, 44 Cal. 876, 39 I.C. 311, A.I.R. 1917 P.C. 25, 18 Cr.L.J. 471, 44 I.A. 137, 13 N.L.R. 100, 15 A.L.J. 475, 1 P.L.W. 661, 19 Bom.L.R. 510, 21 C.W.N. 818, 26 C.L.J. 13, 6 M.L.W. 71, 22 M.L.T. 31, 1917 M.W.N. 522, 86 L.J.P. 140, 11 Bom.L.T. 54 (P.C.). A Magistrate should not refer to any entry in a diary, which is not used by a prosecution witness to refresh his memory, as corroborative of his evidence; but an error of this kind is not a sufficient ground for interference by the High Court, when the Magistrate has found the accused guilty after considering the other evidence in the case—*Cuttialikkutti*, 1 L.W. 229, 15 Cr.L.J. 256.

539. Accused not entitled to see the diary:—If the diary is one of the kind described in this section neither the accused nor his agent is entitled to call for them or to see them unless and until they are used by the Police or by the Court for the purposes described in the section—*Rabindra Nath Singh*, 26 Cr.L.J. 297 (298), 84 I.C. 441, A.I.R. 1925 Pat. 339. The Special Diary, including every entry in it, is absolutely privileged from inspection by the accused or his pleader. The reason is this: if the accused were entitled to inspect the diary, the police-officer making the investigation would omit from the diary all informations which he believed would be injurious to the prosecution. The accused person is entitled to inspect the diary only in certain cases, viz., when the diary is used by the Court for the purpose of enabling the Police-officer who made it to refresh his memory, or when the diary is used for the purpose of contradicting him—*Mannu*, 19 All 390 (399) (F.B.); *Nga Lun*, A.I.R. 1935 Rang. 370 (373), 36 Cr.L.J. 1487, 158 I.C. 784, 1935 Cr.C. 1088, 13 Rang. 570 (F.B.). But even in such a case, the accused is entitled to see only the particular entry used and so much of it as in the opinion of the Court is necessary in that particular matter to the full understanding of the particular entry, and no more—*Mannu*, 19 All. 390 (405) (F.B.); *Lachmi*, 2 Pat. 74. It would be contrary to public policy to allow the accused a wholesale inspection of all the diaries relating to the investigation—*Dharram Vir*, 34 Cr.L.J. 464 (466), 142 I.C. 854, A.I.R. 1933 Lah. 498, 1933 Cr.C. 758, 34 P.L.R. 541, Ind. Rul. 1933 Lah. 283; *Mannu*, 19 All. 390 (399, 405) (F.B.).

540. Contents of the diary—Statements under sec. 161:—Before the Amendment Act of 1923, it was held that statements made to a police-officer by a person whom he was examining under sec. 161 should not be recorded in the special diary—*Dadan Gazi*, 33 Cal. 1023; *Sheru Shah*, 20 Cal. 642. A contrary view was taken in

The diary cannot be used for the purpose of testing the evidence of prosecution witnesses by reading the earlier statements of those witnesses made to the police and entered in the diary—*Dal Singh*, supra. It is at least equally contrary to law to make use of the Police diary for the purpose of corroborating the evidence of prosecution witnesses as given in the Court, especially having regard to sec. 162, Cr. P. Code. Therefore a Magistrate makes an improper use of police diaries when he observes in his judgment "Some discrepancies in the statements of some witnesses examined in Court have been pointed out from what they stated before the investigating officer. I have gone through the case diary Those discrepancies are not material to facts in issue"—*Sakul Ahir v. Palakdhari Ahir*, 11 P.L.T. 837, 131 I.C. 535, A.I.R. 1931 Pat 96, 1931 Cr.C 192, 32 Cr.L.J. 735, Ind. Rul. 1931 Pat. 215; *Sanmon Tiwari v. Emp.*, 38 Cr.L.J. 102, 165 I.C. 761, A.I.R. 1936 Pat. 581, 1936 Cr.C. 952. Such improper admission of evidence will not, in all cases, compel interference by a superior Court—*Sanmon Tiwari v. Emp.*, supra.

The aid which a Court can receive from the entries in such a diary is usually confined to utilising the information given therein as a foundation for questions to be put to the witnesses, and in using the diary the Court should always employ very great caution—*Raja Ram*, 3 O.W.N. 1001, 28 Cr.L.J. 134, A.I.R. 1927 Oudh 64. As observed by Knox, J., in *Nasiruddin*, 16 All. 207 (208): "Statements made to the police during the investigation are recorded by police-officers in the most haphazard manner. Officers conducting an investigation not unnaturally record what seems in their opinion material at that stage and omit many matters equally material, and, it may be, of supreme importance as the case develops. Besides that, in most cases they are not experts of what is and what is not evidence. The statements are recorded hurriedly in the midst of a crowd and confusion, subject to frequent interruptions and suggestions from by-standers. There is no guarantee that they do not contain much more or much less than what the witness has said." These principles should be remembered by the Court when utilizing the record of statements made by a police-officer in the course of an investigation and entered in the diary—*Raja Ram*, supra.

The trying Magistrate has no business whatever to look at the case diary and the appeal should be heard on the evidence adduced and the reasons advanced in the trial Court alone. The conclusion that was reached by the police-officer who made the enquiry is irrelevant for the purpose of the appellate Court's consideration, as is also the fact that persons were called as witnesses for the prosecution who were not examined by the police-officer—*Raghunathmal v. Patiram*, A.I.R. 1937 Nag. 394 (395), 172 I.C. 177.

Use by Police-officer for refreshing memory or by the Court to contradict the Police-officer:—A Criminal Court may permit the Police-officer who made the special diary to look at it for the purpose of refreshing his memory, or may use it for the purpose of showing contradiction between the statements recorded in the diary and the evidence which the police officer is giving in Court. A special diary cannot be used to enable any witness other than the Police-officer who made it, to refresh his memory by looking at it, and it cannot be used to contradict any witness other than such Police officer—*Mannu*, 19 All. 390 (394, 395) (F.B.); *Dal Singh*, 44 Cal 876 (889) (P.C.), 21 C.W.N. 818, 26 C.L.J. 13, 39 I.C. 311, A.I.R. 1917 P.C. 25, 18 Cr.L.J. 471, 13 N.L.R. 100, 15 A.L.J. 475, 1 P.L.W. 661, 22 M.L.T. 31, 19 Bom L.R. 510, 6 M.L.W. 71, 1917 M.W.N. 522, 33 M.L.J. 555, 1 Bur.L.T. 54.

Before using the police-diary for the purpose of contradicting the police-officer who made it, the Court must comply with the specific enactment of sec. 145, Evidence Act, and call the attention of the Police-officer to such parts of the diary as are to be used for the purpose of contradicting him; otherwise such an use of the special diary would be illegal. Section 145, Evidence Act, does not either extend or control sec. 172, Cr. P. Code. It is only if the Court uses the diary for contradicting the police-officer that sec. 145, Evidence Act applies, and, in such case it applies for that purpose only, and not for the purpose of enabling a Court or a party to contradict any other witness or to show

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The accused is not entitled to insist that a Police-officer should refer to the diary to refresh his memory—*Kali Charan*, 8 Cal. 154; *Mohinder*, 33 P.L.R. 891, 33 Cr.L.J. 97 (105), 135 I.C. 209, A.I.R. 1932 Lah. 103, 1932 Cr.C. 123, Ind. Rul. 1932 Lah. 81; nor is the Judge bound to compel the Police-officer to look at the diary to refresh his memory—*Jhubboo*, 8 Cal. 739. Such use is at the discretion of the Judge and of the Police-officer—*Mohinder*, supra. It may be within the right of the Police-officers not to refer to a diary, but the accused is entitled to the benefit of their refusal to refer to the diary and to disclose the source of their information—*Deodhary Pandey*, 26 Cr.L.J. 738 (739), 86 I.C. 274, A.I.R. 1925 Pat. 131, 6 P.L.T. 810. But if a Sub-Inspector does not remember what certain witnesses stated at the investigation, and refuses to refresh his memory from the diaries, the Court should compel him to look into the diaries—*Mohiuddin*, A.I.R. 1924 Pat. 829 (830).

The diary is permitted to be used for the limited purpose of *contradicting* the Police-officer, and not for the purpose of *corroborating* him—*Achhabat*, 2 P.L.T. 223, 61 I.C. 230, 22 Cr.L.J. 374; *Sakal v. Palakdhari*, 11 P.L.T. 837, 32 Cr.L.J. 735, 131 I.C. 535. But where independently of the police diary wrongly relied upon by the Court below, there was ample legal evidence to corroborate the prosecution case and to sustain the conviction, the High Court in revision condoned the irregularity and refused to interfere—*Achhabat*, supra. See also *Sanmon Tiwari*, 38 Cr.L.J. 102, 165 I.C. 761, A.I.R. 1936 Pat. 581, 1936 Cr.C. 952, 3 B.R. 78, 9 R.P. 211 and *Dal Singh*, 44 Cal. 876, 39 I.C. 311, A.I.R. 1917 P.C. 25, 18 Cr.L.J. 471, 44 I.A. 137, 13 N.L.R. 100, 15 A.L.J. 475, 1 P.L.W. 661, 19 Bom.L.R. 510, 21 C.W.N. 818, 26 C.L.J. 13, 6 M.L.W. 71, 22 M.L.T. 31, 1917 M.W.N. 522, 86 L.J.P. 140, 11 Bom.L.T. 54 (P.C.). A Magistrate should not refer to any entry in a diary, which is not used by a prosecution witness to refresh his memory, as corroborative of his evidence; but an error of this kind is not a sufficient ground for interference by the High Court, when the Magistrate has found the accused guilty after considering the other evidence in the case—*Cuttialikutti*, 1 L.W. 229, 15 Cr.L.J. 256.

539. Accused not entitled to see the diary:—If the diary is one of the kind described in this section neither the accused nor his agent is entitled to call for them or to see them unless and until they are used by the Police or by the Court for the purposes described in the section—*Rabindra Nath Singh*, 26 Cr.L.J. 297 (298), 84 I.C. 441, A.I.R. 1925 Pat. 339. The Special Diary, including every entry in it, is absolutely privileged from inspection by the accused or his pleader. The reason is this: if the accused were entitled to inspect the diary, the police-officer making the investigation would omit from the diary all informations which he believed would be injurious to the prosecution. The accused person is entitled to inspect the diary only in certain cases, *viz.*, when the diary is used by the Court for the purpose of enabling the Police-officer who made it to refresh his memory, or when the diary is used for the purpose of contradicting him—*Mannu*, 19 All. 390 (399) (F.B.); *Nga Lun*, A.I.R. 1935 Rang. 370 (373), 36 Cr.L.J. 1487, 158 I.C. 784, 1935 Cr.C. 1088, 13 Rang. 570 (F.B.). But even in such a case, the accused is entitled to see only the particular entry used and so much of it as in the opinion of the Court is necessary in that particular matter to the full understanding of the particular entry, and no more—*Mannu*, 19 All. 390 (405) (F.B.); *Lachmi*, 2 Pat. 74. It would be contrary to public policy to allow the accused a wholesale inspection of all the diaries relating to the investigation—*Dharram Vir*, 34 Cr.L.J. 464 (466), 142 I.C. 854, A.I.R. 1933 Lah. 498, 1933 Cr.C. 758, 34 P.L.R. 541, Ind. Rul. 1933 Lah. 283; *Mannu*, 19 All. 390 (399, 405) (F.B.).

540. Contents of the diary—Statements under sec. 161:—Before the Amendment Act of 1923, it was held that statements made to a police-officer by a person whom he was examining under sec. 161 should not be recorded in the special diary—*Dadan Gazi*, 33 Cal. 1023, *Sheru Shah*, 20 Cal. 642. A contrary view was taken in

Mannu, 19 All. 390 (400) (F.B.). "But now whatever opinion may be held as to whether the Diary is a proper place for statements, the Police cannot by entering the statements in the Special Diary under sec. 172 protect them from the provisions of sec. 162, but they are liable to be produced under conditions laid down in the latter section"—Woodroffe's *Crim. Pro.*, p. 192.

See Notes 497, 501 and 502C.

173. (1) Every investigation under this Chapter shall be completed without unnecessary delay, and, as soon as it is completed, the officer in charge of the police-station shall—

Report of police-officer.

(a) forward, to a Magistrate empowered to take cognizance of the offence on a police-report, a report, in the form prescribed by the *Provincial Government*, setting forth the names of the parties, the nature of the information and the names of the persons who appear to be acquainted with the circumstances of the case, and stating whether the accused (if arrested) has been forwarded in custody, or has been released on his bond, and if so, whether with or without sureties, and

(b) *communicate, in such manner as may be prescribed by the Provincial Government, the action taken by him to the person, if any, by whom the information relating to the commission of the offence was first given.*

(2) Where a superior officer, or police has been appointed under section 158, the report shall, in any cases in which the *Provincial Government* by general or special order so directs, be submitted through that officer, and he may, pending the orders of the Magistrate, direct the officer in charge of the police-station to make further investigation.

(3) Whenever it appears from a report forwarded under this section that the accused has been released on his bond, the Magistrate shall make such order for the discharge of such bond or otherwise as he thinks fit.

(4) *A copy of any report forwarded under this section shall, on application, be furnished to the accused before the commencement of the inquiry or trial:*

Provided that the same shall be paid for unless the Magistrate for some special reason thinks fit to furnish it free of cost.

Change:—Clause (b) and sub-section (4) have been added by sec. 40 of the Cr. P. C. Amendment Act, XVIII of 1923. For reasons of sub-section (4), see below.

The words "*Provincial Government*" have been substituted for the words "*Local Government*" by sec. 4 of the Government of India (Adaptation of Indian Laws) Order, 1937.

540A. Scope:—There are three sections in the Code relating to final reports, viz., 169, 170 and 173. Section 169 relates to cases in which no person is sent up for trial, sec 170 to cases in which some person is sent up, and sec. 173 contains general directions relating to both. The three sections must be read together—*Hakim Ally*, 7 Cr.L.J. 414 (415), 4 LBR 173. The provisions of the Cr P. Code apply, unless there is anything in any enactment for the time being in force regulating the manner of investigating offences connected with Railway accidents to the contrary. This is provided for by sub-sec. (2) of sec. 5, Cr. P. Code. If there is anything contained in the rules under sec. 84 of the Indian Railways Act (IX of 1890) that is opposed to the provisions of sec. 173, Cr P Code, operating, then undoubtedly the provisions of sec 173, Cr. P. Code, must give way; but there is nothing that clearly frustrates the authority of the Police-officer mentioned in sec. 173, Cr P. Code, who has completed his investigation at the time an enquiry under rule 20 framed under sec 84 of the Indian Railways Act (IX of 1890) is commenced or ordered—*Shivbhat Manjunathbhat Hattangadi v. Emp.*, 29 Cr L J 551 (553), 109 IC 487, 30 Bom L.R. 392, A.I.R. 1928 Bom. 162, 52 Bom 238, 10 A I Cr.R. 308.

541. Police report:—The police report referred to in sec. 190, cl. (b) is the report under this section—*Ahmed Khan*, 12 Cr L J 92, 9 IC 492, 5 SLR 1. This case was dissented from in *Mehrab*, 26 Cr L J. 181, 83 IC 885, 17 SLR 150, AIR. 1924 Sind 71 (FB), where it was held that the police report mentioned in sec. 190, cl (b) also included reports other than that mentioned in this section. See Note 582. It is the duty of the Police to make a report in every investigation under this Chapter. Where a person gave information to the Police of the commission of a non-cognizable offence, and the Police obtained the authority of a Magistrate, under sec. 155, to investigate the case, and *without making any report* instituted proceedings against that person under sec 211, I P C, which ended in his conviction, it was held that the conviction was illegal in the absence of a Police report under this section—*Appa Ragho*, 17 Bom L.R. 69, 16 Cr L J 161, 27 IC. 545.

There is no legal limit to the number of investigations which can be held into a crime, and when one has been completed by the submission of a report under this section, another may be begun on further information received—*Divakar v. Ramamurthi*, 35 MLJ 127, 47 IC 273, 19 Cr.L.J. 901; *Mohinder*, 33 PLR. 891, 33 Cr L J. 97 (102). See also *Alt*, *infra*.

The report must set forth the 'nature of the information.' A report which omits to set forth the information is defective, and a Magistrate taking cognizance of a case on such report acts illegally—*Lee v. Adhikary*, 5 IC 553, 37 Cal. 49, 14 C.W.N. 301. The report must be made "in the form prescribed by the Local Government" Where the heading of the form is—"Charge or information, the name of the offence and circumstances connected with it in concise detail and under what section of the Penal Code charge", but in filling up the form the police-officer only set out the sections of the Penal Code but no details or circumstances of any description, *held* that the provisions of this section were not complied with, and the Magistrate could not take cognizance upon such report—*Shivlingappa*, 32 Bom L.R. 782, 31 Cr.L.J 1142 (1143), AIR 1930 Bom 372.

It is sufficient if the Police report contains the names of the parties, the nature of the information and the names of the persons acquainted with the circumstances of the case. The report need not state whether in the opinion of the police the accused are guilty or not—*Mehrab*, 17 SLR. 150, 26 Cr L J. 181.

On receipt of a police report under this section, the Magistrate can take cognizance of the case under sec 190 (b). If, instead of doing so, he proceeds to make over the case to a subordinate Magistrate for enquiry and report as if he has taken cognizance of the case on a complaint, the proceedings of the Magistrate are irregular—*Abdullah*, 40 Cal 854, 17 C.W.N. 1004, 14 Cr L.J. 297, 19 IC. 953.

A Magistrate's order directing a case reported to him by the police under this section to be struck off, is merely an administrative order and not a judicial order.

Consequently he can himself revise his own order and call for a charge-sheet—*Uma Singh*, 12 Pat. 234, 14 P.L.T. 162, A.I.R. 1933 Pat. 242, 1933 Cr.C. 714, 146 I.C. 70, 34 Cr.L.J. 1198, 6 R.P. 237; *Brahm Dev*, 39 Cr.L.J. 646, 175 I.C. 850, 40 P.L.R. 239, A.I.R. 1938 Lah 469, 11 R.L. 1. But see *Mokamiji*, 11 C.W.N. 832, 6 Cr.L.J. 34. The order directing the Police who had put in a referred charge-sheet to put in a charge-sheet, is not a legal order. The Police must be allowed to form their own opinion of a case when submitting their report and a Magistrate cannot ask them to change their opinion merely because he does not agree with them—*Venkata v. Anjanyulu*, 33 Cr.L.J. 785 (786), 139 I.C. 500, 1932 M.W.N. 548, Ind. Rul. 1932 Mad. 733, 36 M.L.W. 788, A.I.R. 1932 Mad. 673, 63 M.L.J. 679, 1932 Cr.C. 831. See also *Shukadeva v. Hamid*, A.I.R. 1928 Pat. 585, 111 I.C. 862, 29 Cr.L.J. 942, 7 Pat. 561. This view, however, does not take into account sec. 190 (1), cl. (c)—*Uma Singh*, supra. As it is not a judicial order, the Sessions Judge cannot review the order and direct further inquiry under sec. 436—*Kamru*, Ratanlal 521 (522). See also *Venkata v. Anjanyulu*, supra.

When an information of the commission of a cognizable offence is conveyed to a Police-officer competent to investigate the same, he must either decline to investigate the case, if he considers that there is no ground to suspect that an offence has been committed, or he must commence an investigation and, if, in the course of his investigation, he finds that there is sufficient evidence to justify the forwarding of the accused to a Magistrate he must send up the case under sec. 170, Cr. P. C., even if the investigation has not been completed. If, on the other hand, the investigation is completed then he must send up the case under sec. 173, and then he has no power to resume investigation. There is no legal sanction for further investigation by a Police-officer if he has sent up the case for trial under sec. 173, especially with a view to find evidence in favour of the accused in order to enable the District Magistrate to decide whether he should direct the Public Prosecutor to withdraw the case—*Emp. v. Ali*, 33 Cr.L.J. 912 (914), 140 I.C. 25, 33 P.L.R. 793, Ind. Rul. 1932 Lah. 675, A.I.R. 1932 Lah. 611, 1932 Cr.C. 917, following *S. N.*, 4 P.R. 1908 (Cr.). It is clear from the words "or otherwise" in cl. (3) of this section that the Magistrate can on such a report order the prosecution of the person who has been released. It appears to be quite clear that the power of the Magistrate to order a prosecution does not depend on the question whether the police have arrested the person who, in Magistrate's opinion, ought to be put on his trial. The Magistrate's powers in this respect are quite as wide under sec. 173 as under sec. 159. It is the part of the daily duty of Township Magistrates to receive both first and final reports of the Police and to pass orders upon them. It would be a mere farce to tell a Magistrate that he has such a duty to perform if he may not correct a mistake made by the police in sending up the wrong person for trial—*Hakim Ally*, 7 Cr.L.J. 414 (415), 4 L.B.R. 137. For the procedure after the submission of a report under this section see *Raghunath*, 33 Cr.L.J. 349 (353), 136 I.C. 842, 12 P.L.T. 937, A.I.R. 1932 Pat. 72, 1932 Cr.C. 136, Ind. Rul. 1932 Pat. 129 in Note 587.

This section lays down that as soon as the investigation is completed, the investigating officer is to send a report to the Magistrate. There can be no justification whatever for the Sub-Inspector to delay his final report on the charge of dacoity until the proceedings under sec. 202, Cr. P. C., before the Magistrate had terminated—*Rahat Husain*, A.I.R. 1933 All. 582 (585), 1933 Cr.C. 926, 146 I.C. 896, 35 Cr.L.J. 208.

This section does not require that an abstract of the evidence to be given by each of the witnesses mentioned, should be entered in the report or charge-sheet—*Balasundaram*, 31 Cr.L.J. 387, 122 I.C. 341, 1929 M.W.N. 504, A.I.R. 1930 Mad. 191, 1930 Cr.C. 191.

Neither in sec. 173, Cr. P. C., nor in the form prescribed by the Local Government, is it provided that the prosecution should produce along with the *challan* all the documents on which reliance is to be placed in the trial or which have to be produced by the witnesses to be tendered for the prosecution. An accused person is consequently not entitled as of right to insist upon the production of any such document before

the case starts. He does not run the risk of being hampered in his defence, as the law clearly entitles him to cross-examine the witnesses even after the charge—*K. L. Gauba v. Emp.*, A.I.R. 1937 Lah 411 (415), I.L.R. (1937) 18 Lah. 114, 39 P.L.R. 613, 170 I.C. 586, 38 Cr.L.J. 955, 10 R.L. 135.

Sub-section (4):—"This amendment relates to the supply to the accused person of a copy of the charge-sheet in the case in which he is being prosecuted. There has been considerable difficulty in this matter on account of the rulings of various Courts that copies of charge-sheets should not be furnished to accused persons. Some Courts went to the length of holding that till the accused brings his defence, a copy of the charge-sheet should not be furnished to him. It has worked a great hardship. The accused has to grope in the dark as to what case he has to meet, who the prosecution witnesses are, and what their evidence is going to be. This amendment is, therefore, very necessary. Before a case begins or the inquiry or trial commences, an accused person ought to be furnished with a copy of the charge on which he is being prosecuted"—*Legislative Assembly Debates*, 31st January, 1923, pages 1763—1764.

Before the enactment of this sub-section, it was held that the report made by a Police-officer under this section not being a public document within the meaning of sec. 74 of the Evidence Act, the accused was not entitled to get a copy of the report before trial—*Arumugam*, 20 Mad 189; *Venkataratnam*, 19 Mad 14. These cases are no longer law.

A report is not necessary when the police forward the accused to a Magistrate under sec. 170, before the investigation is complete; nor is a report necessary before the Magistrate takes action in such a case under sec. 344 by remanding the accused to custody. See *Sooba*, 1931 A.L.J. 617, 32 Cr.L.J. 1045 (1047), cited in Note 534 under sec. 170.

It is an elementary principle of natural justice which needs no authority that an accused person shall have free access at any time during the trial to all the records which are before the Court. The same considerations apply to the refusal to permit reference in cross-examination to the contents of the charge sheet, for, this also forms part of the Committal record—*Brahmayya v. The King*, 40 Cr.L.J. 265 (268), 179 I.C. 783, A.I.R. 1938 Rang. 442. In *Dinanath Sahay v. Emp.*, A.I.R. 1939 Pat. 174, 40 Cr.L.J. 509, 17 Pat. 622, 20 P.L.T. 70, 1939 P.W.N. 136, 180 I.C. 845, the informant who was proceeded against under sec. 182, I. P. C., was held to be entitled to get copies of the final report.

174. (1) The officer in charge of a police-station or some other police-officer specially empowered by the *Provincial Government* in that behalf, on receiving information that a person—

- (a) has committed suicide, or
- (b) has been killed by another, or by an animal, or by machinery, or by an accident, or
- (c) has died under circumstances raising a reasonable suspicion that some other person has committed an offence,

shall immediately give intimation thereof to the nearest Magistrate empowered to hold inquests, and unless otherwise directed by any rule prescribed by the *Provincial Government*, or by any general or special order of the District or Sub-divisional Magistrate, shall proceed to the place where the body of such deceased person is, and there, in the presence of two or more respectable inhabitants of the neighbourhood, shall make an investigation,

and draw up a report of the apparent cause of death, describing such wounds, fractures, bruises and other marks of injury as may be found on the body, and stating in what manner, or by what weapon or instrument (if any), such marks appear to have been inflicted.

(2) The report shall be signed by such police-officer and other persons, or by so many of them as concur therein, and shall be forthwith forwarded to the District Magistrate or the Sub-divisional Magistrate.

(3) When there is any doubt regarding the cause of death, or when for any other reason the police-officer considers it expedient so to do, he shall, subject to such rules as the *Provincial Government* may prescribe in this behalf, forward the body, with a view to its being examined, to the nearest Civil Surgeon, or other qualified medical man appointed in this behalf by the *Provincial Government*, if the state of the weather and the distance admit of its being so forwarded without risk of such putrefaction on the road as would render such examination useless.

(4) In the Presidencies of Fort St. George and Bombay, investigations under this section may be made by the head of the village, who shall then report the result to the nearest Magistrate authorised to hold inquests.

(5) The following Magistrates are empowered to hold inquests, namely, any District Magistrate, Sub-divisional Magistrate or Magistrate of the first class and any Magistrate especially empowered in this behalf by the *Provincial Government* or the District Magistrate.

Change:—In sub-section (5) the words "or Magistrate of the first class" have been newly added by sec. 41 of the Cr. P. C. Amendment Act, XVIII of 1923. By this amendment, all first class Magistrates have been generally empowered to hold inquests.

The words "Provincial Government" have been substituted for the words "Local Government" by sec. 4 of the Government of India (Adaptation of Indian Laws) Order, 1937.

542. Scope:—When the body cannot be found or has been buried, there can be no investigation under sec. 174. This section is intended to apply to cases in which an inquest is necessary, which presupposes that the corpse must be available—*Gul Hasan*, 1908 P.R. 27, 9 Cr.L.J. 105.

Proceedings under this section should be kept more distinct from the proceedings taken on the complaint—*Gulab Khan v. Ghulam*, 28 Cr.L.J. 26, 99 I.C. 58, 8 Lah.L.J. 524, 27 P.L.R. 779, A.I.R. 1927 Lah. 30 See also *Surendra v. Police Sergeant* given below in para. 545.

The procedure under this section is for the purpose of discovering the cause of death and the evidence taken is very short—*Chaman Lal v. Emp.*, 41 Cr.L.J. 639 (612), 188 I.C. 440, A.I.R. 1910 Lah. 210 (214).

543. Report:—The report is different from the final or complete report mentioned in sec. 173. Inquest reports must be written up and completed on the spot where

the inquest over the corpse is being held. Immediately the inquest is closed, the report thereof will be put into a cover and handed over in the presence of the *Panchayeldars* to the constable about to take the corpse to the Medical Officer's station for examination—*Mad. Pol. Man.*, Vol. I, p. 85.

Considering the important nature of the evidence which is generally* supplied by the results of the *post mortem* examination, it is necessary that in such cases the result of the observation, external and internal, should be fully recorded. A *verbatim* report of the statements of witnesses examined at the inquest may often be of great use to the Court in testing the value of evidence subsequently given—*Pachudayan*, 9 M.L.T. 321, 12 Cr.L.J. 124. A medical man may use the *post mortem* report to refresh his memory when giving evidence; but the report itself is not admissible in evidence—*Roghuni*, 9 Cal 455 (451); *Ram Sarup*, 6 C.W.N. 98 (101). The accused is entitled to a copy of the *post mortem* report—*Maruthamutha Kudumban*, 50 Mad. 750, 52 M.L.J. 601, 28 Cr.L.J. 463, 91 I.C. 532, 1927 M.W.N. 392, A.I.R. 1927 Mad 512.

When a Medical officer is not examined at the beginning of a *post mortem* inquiry, a copy of the *post mortem* certificate ought to be given to the accused for the purpose of enabling him to conduct his defence. Similarly, he should be given a copy of the inquest report (excluding statements made therein, which the accused is not entitled to get, under sec 162) when the investigating police-officer is not examined at the beginning of the inquiry—*Maruthamutha Kudumban*, 50 Mad 750, 52 M.L.J. 601, 28 Cr.L.J. 463 (464), 91 I.C. 532, 1927 M.W.N. 392, A.I.R. 1927 Mad 512. The investigation under this section is made by the police-officer, and the statements are, therefore, statements made to a police-officer "in the course of an investigation under this chapter" under sec 162, Cr P. Code. The fact that the inquest is held in the presence of two or more respectable inhabitants does not render the statements taken there any the less statements made to a Police-officer. Such statements are, therefore, not public documents of which accused is entitled to a copy and the procedure which governs the grant of copies of statements under sec 162, Cr P. Code, governs also the grant of copies of statements made at the inquest—*ibid.*, following *Peramasami Naidu*, 22 M.L.W. 784, 91 I.C. 532. See also *Hans Raj v Emp.*, A.I.R. 1936 Lah. 241 (344), 16 Lah 345, 37 P.L.R. 605, 1936 Cr.C. 264, 161 I.C. 900, 37 Cr.L.J. 504 and the Notes under the heading "Inquest Report" in Note 501. There is no objection whatever to the accused being granted a copy of the statements made by witnesses at the inquest inquiry; and if the record of the inquest proceedings is in the custody of the Court, the Magistrate should allow certified copies to be given upon the application made on behalf of the accused. If the inquest report is not in the Court, the Magistrate has power under sec 94, Cr P. C., to call for it to be produced by the police—*Chaulet*, 26 Cr.L.J. 426, 85 I.C. 42, 20 M.L.W. 745, A.I.R. 1925 Mad 424.

Special diary not necessary in all cases:—"The Lieutenant-Governor does not think that special diaries are intended or necessary in all cases of inquiry into unnatural deaths. The report described in sec 174, Cr P. Code is very much the same in character as the special diary of sec 172. If the Police-officer investigating sees reason to suspect crime, the inquiry becomes one under sec. 172 and special diaries become as a matter of course necessary, but in ordinary cases in which the inquiry is made and completed in a few hours, there seems to be no necessity of reporting the facts first in a special diary and then in the report prescribed by sec. 174. When, however, the inquiry is prolonged or lasts for more than one day, the diary should be sent to inform the District Superintendent and Magistrate of what is going on. The Lieutenant-Governor would, therefore, rule that in cases of any complexity or in which the inquiry lasts over one day, or in which a crime is suspected, special diaries should be sent in anticipation of the final report, which will be made under sec 173 if a crime is detected, and under sec 174 if the death is from accident or unnatural causes. It is to be understood that in the Station Diary everything done by the Police will be entered"—*Bengal Police Circular*, 1872, page 107.

175. (1) A police-officer proceeding under section 174 may, by order in writing, summon two or more persons as aforesaid for the purpose of the said investigation, and any other person who appears to be acquainted with the facts of the case. Every person so summoned shall be bound to attend and to answer truly all questions other than questions the answers to which would have a tendency to expose him to a criminal charge, or to a penalty or forfeiture.

(2) If the facts do not disclose a cognizable offence to which section 170 applies, such persons shall not be required by the police-officer to attend a Magistrate's Court.

Punishment:—A person who fails to attend in obedience to the order issued under this section is punishable under sec. 174, I. P. Code.

It should be noticed, however, that the word 'truly' which has been omitted from sec. 161 is still retained under this section, probably through oversight; but as the word has been retained, a person giving false answers to questions put to him is liable to prosecution under sec. 193, I. P. C. If he refuses to answer the questions, he is punishable under sec. 179, I. P. Code.

It should be further noted that the obligation to answer truly all questions attaches only to the persons summoned by the Police-officer. If a person voluntarily comes forward without any summons, and makes false statements, he cannot be prosecuted for perjury—*Id. Hayat*, 23 Cr.L.J. 82, A.I.R. 1922 Lah. 133, 1922 P.W.R. 6, 65 I.C. 434.

544. Record of statement:—The statements of witnesses examined at the inquest should be recorded *verbatim* in the report, as the statements may be of great use to the Court in testing the value of evidence subsequently given—*In re Pachudayan*, 9 M.L.T. 321, 12 Cr.L.J. 124, 9 I.C. 730, 1911 M.W.N. 138.

176. (1) When any person dies while in the custody of the police, the nearest Magistrate empowered to hold inquests shall, and, in any other case mentioned in section 174, clauses (a), (b) and (c) of subsection (1), any Magistrate so empowered may, hold an inquiry into the cause of death either instead of or in addition to the investigation held by the police-officer, and, if he does so, he shall have all the powers in conducting it which he would have in holding an inquiry into an offence. The Magistrate holding such an inquiry shall record the evidence taken by him in connection therewith in any of the manners hereinafter prescribed according to the circumstances of the case.

(2) Whenever such Magistrate considers it expedient to make an examination of the dead body of any person who has been already interred, in order to discover the cause of his death, the Magistrate may cause the body to be disinterred and examined.

545. Object:—This section proceeds on the basis that enquiry into a suspicious death should not depend merely upon the opinion the Police may form, but that there should be a further check by enabling a local Magistrate to hold an independent inquiry—*Laxminarayan*, 30 Bom.L.R. 1050, 29 Cr.L.J. 1063 (1071), A.I.R. 1928 Bom. 390,

112 I.C. 567. The Magistrate is empowered to hold an inquiry into the cause of death, and if he does so, is invested with all the powers which he would have in holding an inquiry into an offence. That would bring the proceedings within the meaning of an 'inquiry' as defined by sec. 4 (1) (k), Cr. P. C., and of a 'judicial proceeding' as defined by sec. 4 (1) (m), Cr. P. Code. Therefore a Magistrate holding judicial proceedings in which it is necessary for him to come to a finding as to the cause of death and as to the person or persons, if anybody, responsible for that death, must be considered to be acting as a 'Court'. When holding an inquiry under this section, he is acting as a Court subordinate to the High Court for the purposes of the Contempt of Courts Act (XII of 1926)—*Advocate-General v. Maung Chit Maung*, 41 Cr.L.J. 470, 187 I.C. 573, A.I.R. 1940 Rang 68.

The inquest held under this section cannot take the place of the inquiry contemplated by sec. 202—*Surendra v. Police Sergeant*, 35 C.W.N. 1032 (1033), 1932 Cr.C. 106, 33 Cr.L.J. 218, 135 I.C. 787. Therefore, if a Magistrate dismisses a complaint under sec. 203, on a consideration of an inquest report, he acts illegally—*Ibid*.

Jurisdiction of Presidency Magistrates—The Presidency Magistrate is not ousted of his jurisdiction to hold a preliminary inquiry into a charge of murder, because the Coroner has held an inquiry into the cause of death and has committed the accused to the High Court under sec. 25 of the Coroner's Act (IV of 1871)—*Id. Rajudin*, 16 Bom. 159; *Jogeshwar*, 31 Cal. 1.

Power to disinter corpses:—A Police officer making an investigation under this section has no power to cause a dead body which has been already interred, to be disinterred in order to examine it. Such power is conferred on a Coroner under sec. 11 of the Coroner's Act (IV of 1871) and on a Magistrate holding an inquest under the present section.

546. Revision:—Proceedings under this section are now liable to revision by the Court under secs. 435 and 439, by reason of the repeal of sub-section (3) of sec. 435 by the Amendment Act of 1923—*Laxminarayan*, 30 Bom.L.R. 1050, 29 Cr.L.J. 1063 (1066), A.I.R. 1928 Bom. 390, 112 I.C. 567.

In an earlier Calcutta case it was held that as there was nothing in this section which required that a Magistrate holding an inquiry under this section was bound to make a report or to come to a finding, the report of the inquiry under this section into the cause of a suspicious death was not a judicial proceeding, and therefore where he sent a report of the result of his inquiry to his executive superior (the District Magistrate) the High Court could not call for it under sec. 435—*Troylokhannath*, 3 Cal. 742 (752, 753), 3 C.L.R. 59. In other words, an inquiry under sec. 176 was a judicial proceeding, but the report of an inquiry under this section was not so, and could not be sent for by the High Court under sec. 435.

PART VI.

PROCEEDINGS IN PROSECUTION.

CHAPTER XV.

OF THE JURISDICTION OF THE CRIMINAL COURTS IN INQUIRIES AND TRIALS.

A—Place of Inquiry or Trial.

177. Every offence shall ordinarily be inquired into and tried by a Court within the local limits of whose jurisdiction it was committed.

Ordinary place of inquiry or trial.

547. General Rule:—All crime is local; the jurisdiction over the crime belongs to the country where the crime is committed—*MacLeod v. Attorney-General*, L.R. (1891) A.C. 458. Crimes in their nature are local, and the jurisdiction of crimes is local—*Rafael v. Verelst*, 2 Blackstone, p. 1058. Crime is purely local, i.e., depends on the law of the place in which it is committed, and not on the nationality of the person who commits it—*Sirdar Gurdayal v. Rajah of Furidkote*, [1894] A.C. 670. See also *Jivandas Savchand*, A.I.R. 1930 Bom. 490 (491), 32 Cr.L.J. 331, 129 I.C. 385, 32 Bom.L.R. 1195, 55 Bom. 59, Ind. Rul. 1931 Bom. 161, 1930 Cr.C. 1026. Therefore, British Indian Courts have no jurisdiction to try offences committed and completed outside the British territory—*Ibrahim*, 1894, P.R. 7; *Ranchhod*, 2 Bom.L.R. 337; *Siddha v. Biligiri*, 7 Mad. 354; *Anonymous*, 6 M.H.C.R. App. 3. As to the jurisdiction of British Indian Courts over offences committed by subjects of the Crown in places outside British India, see sec. 188.

Wheaton in his *Elements of International Law* says:—"The judicial power of every independent state extends to the punishment of all offences against the municipal laws of the state by whomsoever committed within the territory, also to the punishment of all such offences by its subjects wheresoever committed" (Edition 1885, p. 179). To the same effect is *Philimore's International Law*, 3rd Edition, Vol. I, p. 216. According to Mr. Mayne in his *Criminal Law*, 3rd Ed., p. 956, "the jurisdiction of the *mosussil* Courts depends upon the offence having been committed within their local limits. See *Hursee Mahapatro v. Dinobundo Patra*, 7 Cal. 523.—*Ganga*, 34 All. 451 (454), 9 A.L.J. 696, 13 Cr.L.J. 575.

The general principle of international law is that every person who is found within a foreign state is subject to, and is punishable by, its law. The English lawyers base this rule on the principle that a person who enters a state becomes entitled to the protection of its law, and is, therefore, bound to render it obedience. It is, perhaps, sufficient to say, in the words of Baron Pollock, "Otherwise the criminal law could not be administered according to any civilized method" (*Queen v. Gauz*, L.R. 9 Q.B.D. 93 at p. 100). The state to which the accused belongs can only demand that he be fairly tried under the municipal law of the *forum*, provided such law is in conformity with those sanctions of justice which all civilized nations hold in common, and does not contravene some special right acquired by treaty by the country whose aid is invoked. (Taylor's "International Public Law," 1901, page 242)—*Adams v. Emp.*, 26 Mad. 607 (617).

Sections 177 to 185, Cr. P. Code, deal with the venue or the place of the trial of crimes. Sec. 177 reiterates the well-established common law rule referred to in Halsbury's *Laws of England*, Vol. 9, para. 83, that the proper and ordinary venue for

the trial of a crime is the area of jurisdiction in which, on the evidence, the facts occurred and are alleged to constitute the crime. But this rule is subject to several well-recognized exceptions, and some of these exceptions are contained in the subsequent sections of the Code. The common rule referred to above, determines the venue of an offence commenced and completed within the territorial jurisdiction of one and the same Court. But a criminal offence may be commenced within the jurisdiction of one Court and completed within the jurisdiction of another Court. And it stands to reason that such an offence may be tried by either the Court in which it was commenced or the Court in which it was completed. It was so provided in England by sec. 12 of (1826) 7 Geo IV, c. 64—*Mukhi Trathdas v. Jethanand Matvalomal*, 38 Cr L.J. 512 (517), 9 R.S. 222, 31 S.L.R. 123, 168 I.C. 89, A.I.R. 1937 Sind 69 (F.B.).

The doctrine that the law of the country where a crime has been committed governs the nature of the offence and that the Courts of that country alone have jurisdiction to try the offender is a well-established principle of international law. As pointed out by Woodroffe in his Commentary on the Criminal Procedure Code all the sections in Chap. XV are to be read subject to the general rule that an act committed on land outside British territory by a foreigner not being a servant of the King is not an offence triable by the British Courts and that *illus (d)* to sec 179 must be read subject to this general rule—*Gokaldas v. Emp.* 35 Cr L.J. 585 (587), 27 S.L.R. 392, 148 I.C. 135, A.I.R. 1933 Sind 333, 1933 Cr.C. 1130, 6 R.S. 180. See also Note 577.

548. Offence:—This chapter deals with the place of inquiry and trial in respect of offences only; an application under sec. 488 for maintenance is not a complaint of an offence, and the provisions of this section are not applicable to determine the jurisdiction of a Court competent to entertain such application—*Huldephonsus v. Malone*, 1885 P.R. 13; *Bishen Das v. Nanaki*, 1893 P.R. 3. *Contra*—*Bibi Nur v. Shah Walail*, 1883 P.R. 9 and *In re Malcolm De Castro*, 13 All 348, 1891 A.W.N. 115, where it was held that neglect to maintain a wife being an offence punishable under this Code under sec. 488, the place for its trial must be determined by the provisions of this Chapter. But the amendment (1923) of sec. 488 (9) shows that the section does not contemplate any offence.

So also, proceedings under Chapter XII are not proceedings in respect of an offence, and therefore sec. 182 does not apply to a proceeding under sec. 145—*Maharaja Harbulla v. Bajrang Das*, 3 C.W.N. 148; nor does sec. 185 apply to determine jurisdiction in respect of such proceeding—*Rudra Pratap v. Dewan*, 12 A.L.J. 390, 15 Cr L.J. 520.

Similar remarks may also apply to proceedings under Chapters VIII and X.

"Ordinarily":—The word "ordinarily" indicates that this section is a general one and must be read subject to the special provisions of the succeeding sections. Thus, this section must be read subject to the special provisions of sec. 197 (2) which override the general rule contained in this section; and the Local Government may specify any Court for the trial of a public servant, irrespective of the place where the offence was committed—*Maung Ka*, 4 L.B.R. 265, 8 Cr L.J. 70.

Bigamy:—The word "ordinarily" must be taken to mean "except in the case provided hereinafter to the contrary." Therefore, an offence of bigamy can only be tried by the Court within whose jurisdiction the bigamous marriage took place—*Goverdhan*, 29 Cr L.J. 533, 109 I.C. 357, 30 Bom L.R. 387, A.I.R. 1928 Bom. 140, following *Bhagwatia*, 83 I.C. 577, 3 Pat. 417, 26 Cr.L.J. 49, A.I.R. 1925 Pat. 87; *Ramnarayan v. Emp.*, 38 Cr L.J. 769 (773), 11 L.R. 1937 Bom. 244, 39 Bom.L.R. 61, 169 I.C. 526, 10 R.B. 34, A.I.R. 1937 Bom. 186. The offences of bigamy and abetment of bigamy are triable only in the district in which the second marriage or the abetment takes place—*Amir Chand v. Emp.*, 26 Cr L.J. 525, 85 I.C. 365, 6 L.L.J. 422, A.I.R. 1924 Lah. 732.

For the purpose of an offence under sec. 5 of the Child Marriage Restraint Act (XIX of 1929) it is only the marriage that has to be considered. It is quite immaterial where or when or by whom the *Tilak* ceremony was performed. Under this section the offence must ordinarily be tried by a Court within the local limits of whose jurisdiction

the marriage was solemnized—*Matuk Das v. Vinayak*, 35 Cr.L.J. 1175, 150 I.C. 993, 1934 A.L.J. 681, 57 All. 83.

549. Local jurisdiction:—Although this section lays down that every offence must be inquired into and tried by the Court within whose jurisdiction it was committed, still if the offence is inquired into or tried by a Magistrate who has no territorial jurisdiction over the place of offence, it would be at most an irregularity which would be cured by sec. 531 if such commitment or trial has occasioned no failure of justice—*Rayan Kutti*, 26 Mad. 640; *Asst. Sessions Judge v. Ramammal*, 36 Mad. 387; *Doraisamy*, 30 Mad. 94. This section only provides for the ordinary place of inquiry and trial, and there is no difficulty whatsoever in reading it along with sec. 531, Cr. P. C., the result being that a conviction cannot be set aside merely on the ground that the trial has taken place in a wrong district but that the party aggrieved is entitled to have the conviction set aside if he shows that such error has in fact occasioned a failure of justice—*Acharaja Singh*, A.I.R. 1936 Pat. 410, 15 Pat. 418, 17 P.L.T. 543. Where a Magistrate being empowered to commit to the sessions, but having no territorial jurisdiction over the place of offence, commits a case to a Sessions Court which has jurisdiction over the place, the commitment is valid and cannot be quashed under sec. 532, even though the objection to such commitment is taken before the commitment—*Abbi Dedi*, 17 Mad. 402. But no Judge or Magistrate can try to pass an order of committal in respect of an offence committed *outside the Province* altogether. Such a trial or order of committal is illegal and the illegality cannot be cured by sec. 531—*Bhagwatia*, 3 Pat. 417 (422), 26 Cr.L.J. 49. Sec. 531 cures any defect due to want of legal jurisdiction unless there has been a failure of justice by the exercise of such irregular jurisdiction—*Lakhan*, 35 Cr.L.J. 973 (976), 149 I.C. 533, 1934 Cr.C. 587, 11 O.W.N. 534, A.I.R. 1934 Oudh 200.

Commitment to wrong Sessions:—Where a Magistrate commits a case to a Sessions Court other than the one within whose local jurisdiction the offence has been committed, the commitment is merely irregular and would be cured by sec. 531; the High Court will not quash the commitment but will direct the transfer of the case to the Court having jurisdiction—*Thaku*, 8 Bom. 312; *Altaram*, 2 Bom.L.R. 394; *Ram Die*, 18 All. 350; *Wahid Bux*, 1929 Cr.C. 678 (681) (Sind). But the Madras High Court, dissenting from the above cases, and following the Privy Council ruling in *Ledgerd v. Bull*, 9 All. 191, has laid down that a commitment to a Sessions Court having no territorial jurisdiction over the offence, is illegal and must be set aside; and the High Court would not be justified in upholding the commitment and directing the transfer of the case to the proper Sessions Court—*Asst. Sessions Judge v. Ramammal*, 36 Mad. 381 (391), 13 Cr.L.J. 35, 13 I.C. 275, 1912 M.W.N. 3, 22 M.L.J. 141, 10 M.L.T. 563. This is also the view of the Patna High Court—*Bagwatia*, 3 Pat. 417, 26 Cr.L.J. 49, 83 I.C. 577, A.I.R. 1925 Pat. 187; and of the Oudh Court—*Sheo Dayal*, 23 O.C. 87, 57 I.C. 459, 21 Cr.L.J. 635 (following 36 Mad. 387). But where a commitment was made to the High Court Sessions in respect of two offences, one of which was committed within, and the other without, the original jurisdiction of the High Court, held that the High Court could, on the grounds of expediency and convenience, proceed with the trial, the irregularity being cured by sec. 531. Even if the High Court had no jurisdiction on its original side to try the case, an order could be made under sec. 526 directing the trial to take place at the High Court Sessions. And the High Court ordered accordingly—*Ganapathi*, 42 Mad. 791, 37 M.L.J. 60, 20 Cr.L.J. 484, 1919 M.W.N. 808, 51 I.C. 468. See also *Mohanlal Aditram*, 30 Cr.L.J. 191, 113 I.C. 617, 30 Bom.L.R. 1253, A.I.R. 1928 Bom. 475, Ind. Rul. 1929 Bom. 185 where under similar circumstances the High Court directed the withdrawal of the charge which was not committed within the ordinary criminal jurisdiction of the High Court.

When the offence was committed in the local limits of the jurisdiction of the Sessions Court of Howrah, the commitment, if it is to be made by the Central Children Court in Calcutta, should be made not to the High Court Sessions but to the Sessions Court at Howrah—*Lathi Sahu*, 33 Cr.L.J. 645, 138 I.C. 626, A.I.R. 1932 Cal. 487, 33 C.W.N. 161, 1932 Cr.C. 479, 59 Cal. 856, Ind. Rul. 1932 Cal. 479.

550. Holding trial outside British India:—Where an offence has been committed within the local limits of the jurisdiction of a District Magistrate, he cannot try that offence at some place outside British India—*Maneklal*, *Ratanlal* 376.

551. Effect of irregular arrest:—The irregularity of an arrest is not a ground for invalidating all proceedings and trials subsequent to the arrest—*Sobha*, 6 P.R. 1899; *Gobinda*, 1 P.R. 1911, 12 Cr.L.J. 113. Thus, a Magistrate should not acquit an accused merely because the officer who arrested the accused did not belong to the circle in which the arrest was made—*Ravalu*, 26 Mad 124, 1 Weir 630. And so, where the subject of a Native State, who having committed an offence in British India, escaped into the Native State, was arrested by the British police without the intervention of that State, held that the subsequent trial and conviction of the accused were not affected by the irregularity of the arrest—*Sobha*, supra. See also *Vinayak*, 35 Bom 225.

552. Effect of transfer of Territory to Native State:—Where an offence was committed in a place within British territory, but some time after the commitment of the case to the Court of Session and before the commencement of the trial, the place in which the offence was committed ceased to be a British territory and became part of a Native State, it was held that this fact did not oust the jurisdiction of the British Court to try the offence—*Ram Naresb*, 34 All 118, 9 A.L.J. 51; *Ganga*, 34 All. 451, 9 A.L.J. 696, 13 Cr.L.J. 575. Similarly, if, pending an appeal from a conviction, the place where the offence had been committed was transferred to a Native State, it was held that this transfer of territory did not deprive the Court in which the appeal had been filed of its jurisdiction to hear it—*Mahabir*, 33 All 578, 8 A.L.J. 630, 12 Cr.L.J. 401.

Effect of transfer of locality of offence to a different district:—Under sec. 177, Cr. P. C., every offence shall ordinarily be enquired into and tried by a Court within the local limits of whose jurisdiction it was committed. Where the offence was committed within the local jurisdiction of the Magistrate who took cognizance, he was authorized under sec. 177, Cr. P. C., to try the case or to commit it to Sessions. The fact that the locality in which the offence was committed was subsequently transferred to another District did not oust the jurisdiction of the Magistrate. Since he had jurisdiction to take cognizance, he had jurisdiction to commit the case to the Sessions Court. Even if the Committing Magistrate had no territorial jurisdiction at the time of the commitment and it were considered that he had on that account no jurisdiction to make the commitment, such want of jurisdiction would not be a good ground for setting aside the order of commitment in view of the provisions of sec. 531, Cr. P. C.—*Sayeruddin Pramanik*, 40 Cr.L.J. 270, 179 I.C. 805, A.I.R. 1939 Cal. 159, I.L.R. (1938) 2 Cal. 357.

552A. Contempt of Court:—Contempt of Court is not an offence within the ambit of the Penal Code, but nevertheless it conforms to the ordinary rule that the jurisdiction of the Court is determined by the place where the offence is committed and not by the place where the offender may happen to reside—*Rajah v. Witherington*, 35 Cr.L.J. 962, 57 Mad. 831, 66 M.L.J. 650. See also *Moti Lal*, 45 Cal. 169 (173); *L. R. v. Mati Lal*, 41 Cal. 173; *Surendra Nath v. Chief Justice*, 10 Cal. 109.

552B. Jurisdiction when can be questioned:—A point of jurisdiction can be raised at any stage. It can be raised before the Sessions Judge although it was not raised before the Committing Magistrate—*Bhagawatia*, 3 Pat. 417, 26 Cr.L.J. 49 (50), 87 I.C. 577, A.I.R. 1925 Pat. 187; *M. A. Kaleek*, 28 Cr.L.J. 452 (453), 101 I.C. 484, 1927 M.W.N. 221, 52 M.L.J. 511, A.I.R. 1927 Mad 544.

178. Notwithstanding anything contained in section 177, the Provincial Government may direct that any cases or class of cases committed for trial in any district may be tried in any sessions divisions;

Power to order cases to be tried in different sessions divisions.

Provided that such direction is not repugnant to any direction previously issued by the High Court under section 15 of the Indian High Courts Act, 1861, or section 107 of the Government of India Act, 1915, or section 224 of the Government of India Act, 1935, or under this Code, section 526.

Amendment:—The words "Provincial Government" have been substituted for the words "Local Government" and the words "or section 224 of the Government of India Act, 1935" have been inserted after "Act, 1915" by the Government of India (Adaptation of Indian Laws) Order, 1937

553. The Local Government of Burma has no power under this section to transfer a case committed to the Court of the Recorder of Rangoon for trial, to the Court of the Commissioner. But it can transfer a case from the District of Rangoon to the Sessions Judge of Pegu—*Nga Tha*, 10 Cal 642.

179. When a person is accused of the commission of any offence by reason of anything which has been done, and of any consequence which has ensued, such offence may be inquired into or tried by a Court within the local limits of whose jurisdiction any such thing has been done, or any such consequence has ensued.

Illustrations.

(a) A is wounded within the local limits of the jurisdiction of Court X, and dies within the local limits of the jurisdiction of Court Z. The offence of the culpable homicide of A may be inquired into or tried by X or Z.

(b) A is wounded within the local limits of the jurisdiction of Court X, and is, during ten days within the local limits of the jurisdiction of Court Y, and during ten days more within the local limits of the jurisdiction of Court Z, unable in the local limits of the jurisdiction of either Court Y or Court Z to follow his ordinary pursuits. The offence of causing grievous hurt to A may be inquired or tried by X, Y or Z.

(c) A is put in fear of injury within the local limits of the jurisdiction of Court X, and is thereby induced, within the local limits of the jurisdiction of Court Y, to deliver property to the person who put him in fear. The offence of extortion committed on A may be inquired into or tried either by X or Y.

(d) A is wounded in the Native State of Baroda, and dies of his wounds in Poona. The offence of causing A's death may be inquired into and tried in Poona.

554. Scope of section:—This section applies when the act (or omission) is an offence by reason of anything which has been done *and of any consequence* which has ensued. But where the act or (omission) is a complete offence *irrespective of any consequence* which has ensued, this section does not apply, and the offence is to be inquired into and tried only by the Court within whose jurisdiction the act was committed (sec. 177). This section contemplates two things. The first is that the offender has done an act and the second is that a consequence has followed from such act and the offender is being tried for the offence as a result of both the act and the consequence; or in other words, the act done by him does not by itself render him liable for the offence; and that it is the act coupled with the consequence which constitutes the offence and makes him liable for it. That being so, there is hardly any scope for argument

that the consequence referred to in this section does not mean the consequence which is one of the ingredients of the offence—*Mukhi Tirathdas v Jethanand Matvalomal*, 38 Cr.L.J. 512 (518), 9 R.S. 222, 31 S.L.R. 123, 168 I.C. 89, A.I.R. 1937 Sind. 69 (F.B.). The offences contemplated in this section are those which are not complete till a specified consequence has ensued. The consequence must be an essential ingredient of the offence and it must arise within the jurisdiction of the Court trying the offence—*Diwan Singh*, A.I.R. 1936 Nag. 55 (63), 161 I.C. 635, 1936 Cr.C. 367, 36 Cr.L.J. 474. Thus—

Examples :—(a) The offence of falsification of accounts (sec. 477A, I. P. C.) is complete as soon as the accounts are falsified, and any consequence resulting from it is immaterial for the offence. Therefore, it is to be tried only by the Court within whose jurisdiction the accounts were falsified, and not by any other Court—*Swaminathan v. Annamalai*, 4 M.L.T. 481, 9 Cr.L.J. 92.

(b) Where a person who was assaulted by the accused in Baroda had his leg completely broken there and then came to British India where he remained for 2 months in the hospital, it was held that the offence of grievous hurt was complete in Baroda by the fracture of the leg, irrespective of any consequence (*viz.*, the injured man lying in hospital) ensuing in British India; therefore the offence could not be tried in British India—*Sirdar Meru v. Jethabhai*, 8 Bom.L.R. 513, 4 Cr.L.J. 54.

(c) Where a dacoity was committed in a Native State and some stolen property was found concealed by the accused in the British territory, it was held that the offence of dacoity was complete in the Native State irrespective of retaining the stolen property in the British territory, and could not be tried in British India—*Reg v. Lakhyia*, 1 Bom. 50.

(d) Where a woman sold in District A her minor girl to a prostitute, who took the girl to District B, it was held that the offence of selling a minor girl for the purposes of prostitution was complete in District A, and that the possession of the girl in District B was not a consequence completing the offence; the Magistrate of District B had no jurisdiction to try the offence—6 Agra 46.

(e) The offence of infringement of copyright is complete as soon as the book infringing the copyright is printed, and it does not depend for its completion upon any consequence (*e.g.* loss of money to the complainant) such as contemplated by sec. 179. Therefore, the offence is to be inquired into and tried under sec. 177 at the place where the infringing book was printed—*Kalidas v. Karam Chand*, 1916 P.R. 28, 18 Cr.L.J. 353, 38 I.C. 737.

(f) Where a person consigned some goods from District F to District K, and the consignee misappropriated the goods at K, it was held that the consignee could be tried in K and not in F, because the accused was not charged by reason of any consequence or loss which ensued to the consignor at F, but solely by reason of what was alleged to have been done at K—*Nirbhai Ram v. Kallu Ram*, 4 O.C. 376.

(g) Where a complaint was made before a Magistrate at Aligarh that a person had dishonestly and fraudulently, two days after he became insolvent, realised at Calcutta the money due in respect of certain hundies which the complainant purchased, it was held that the offence should be inquired into at Calcutta where the offence (sec. 415, I. P. C.) was committed and not at Aligarh where the loss ensued to the complainant—*Babu Lal v. Ghansham*, 5 A.L.J. 333, 7 Cr.L.J. 394.

(h) Where the offence of kidnapping is committed outside British India, the subsequent act of conveying the kidnapped person to British India is not such a consequence as is contemplated by this section, so as to give jurisdiction to a British Indian Court over the offence committed outside British India—*Bhuta Santal v. Dama Santal*, 20 C.W.N. 62, 17 Cr.L.J. 128; *Jai Mal Singh*, 1901 P.R. 1; *Koochri*, 7 S.L.R. 17, 14 Cr.L.J. 439.

(i) The accused induced the complainant to purchase a barrel at Meerut on the false representation that the barrel contained a certain quantity of spirits. At Agra it was discovered that the quantity was less than what it was represented to contain. It

Provided that such direction is not repugnant to any direction previously issued by the High Court under section 15 of the Indian High Courts Act, 1861, or section 107 of the Government of India Act, 1915, or section 224 of the Government of India Act, 1935, or under this Code, section 526.

Amendment:—The words "Provincial Government" have been substituted for the words "Local Government" and the words "or section 224 of the Government of India Act, 1935" have been inserted after "Act, 1915" by the Government of India (Adaptation of Indian Laws) Order, 1937.

553. The Local Government of Burma has no power under this section to transfer a case committed to the Court of the Recorder of Rangoon for trial, to the Court of the Commissioner. But it can transfer a case from the District of Rangoon to the Sessions Judge of Pegu—*Nga Tha*, 10 Cal. 642.

179. When a person is accused of the commission of any offence by reason of anything which has been done, and of any consequence which has ensued, such offence may be inquired into or tried by a Court within the local limits of whose jurisdiction any such thing has been done, or any such consequence has ensued.

Illustrations.

(a) A is wounded within the local limits of the jurisdiction of Court X, and dies within the local limits of the jurisdiction of Court Z. The offence of the culpable homicide of A may be inquired into or tried by X or Z.

(b) A is wounded within the local limits of the jurisdiction of Court X, and is, during ten days within the local limits of the jurisdiction of Court Y, and during ten days more within the local limits of the jurisdiction of Court Z, unable in the local limits of the jurisdiction of either Court Y or Court Z to follow his ordinary pursuits. The offence of causing grievous hurt to A may be inquired or tried by X, Y or Z.

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554. Scope of section:—This section applies when the act (or omission) is an offence by reason of anything which has been done *and of any consequence* which has ensued. But where the act or (omission) is a complete offence *irrespective of any consequence* which has ensued, this section does not apply, and the offence is to be inquired into and tried only by the Court within whose jurisdiction the act was committed (sec. 177). This section contemplates two things. The first is that the offender has done an act and the second is that a consequence has followed from such act and the offender is being tried for the offence as a result of both the act and the consequence; or in other words, the act done by him does not by itself render him liable for the offence; and that it is the act coupled with the consequence which constitutes the offence and makes him liable for it. That being so, there is hardly any scope for argument

that the consequence referred to in this section does not mean the consequence which is one of the ingredients of the offence—*Mukhi Tirathdas v. Jethanand Matvalomal*, 38 Cr.L.J. 512 (518), 9 R.S. 222, 31 S.L.R. 123, 168 I.C. 89, A.I.R. 1937 Sind. 69 (F.B.). The offences contemplated in this section are those which are not complete till a specified consequence has ensued. The consequence must be an essential ingredient of the offence and it must arise within the jurisdiction of the Court trying the offence—*Diwan Singh*, A.I.R. 1936 Nag. 55 (63), 161 I.C. 635, 1936 Cr.C. 367, 36 Cr.L.J. 474. Thus—

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(b) Where a person who was assaulted by the accused in Baroda had his leg completely broken there and then came to British India where he remained for 2 months in the hospital, it was held that the offence of grievous hurt was complete in Baroda by the fracture of the leg, irrespective of any consequence (*viz.*, the injured man lying in hospital) ensuing in British India: therefore the offence could not be tried in British India—*Sudar Meru v. Jethabhai*, 8 Bom.L.R. 513, 4 Cr.L.J. 54.

(c) Where a dacoity was committed in a Native State and some stolen property was found concealed by the accused in the British territory, it was held that the offence of dacoity was complete in the Native State irrespective of retaining the stolen property in the British territory, and could not be tried in British India—*Reg. v. Lakhya*, 1 Bom. 50.

(d) Where a woman sold in District A her minor girl to a prostitute, who took the girl to District B, it was held that the offence of selling a minor girl for the purposes of prostitution was complete in District A, and that the possession of the girl in District B was not a consequence completing the offence; the Magistrate of District B had no jurisdiction to try the offence—6 Agra 46.

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(h) Where the offence of kidnapping is committed outside British India, the subsequent act of conveying the kidnapped person to British India is not such a consequence as is contemplated by this section, so as to give jurisdiction to a British Indian Court over the offence committed outside British India—*Bhuta Santal v. Dama Santal*, 20 C.W.N. 62, 17 Cr.L.J. 128; *Jai Mal Singh*, 1901 P.R. 1; *Koochri*, 7 S.L.R. 17, 14 Cr.L.J. 439.

(i) The accused induced the complainant to purchase a barrel at Meerut on the false representation that the barrel contained a certain quantity of spirits. At Agra it was discovered that the quantity was less than what it was represented to contain. It

was held that the Agra Court had no jurisdiction, because the offence of fraud had been committed and completed at Meerut, and that the discovery of the fraud at Agra after the delivery of the article was not a 'consequence which has ensued' within the meaning of sec. 179—*Pragdas v. Daulatram*, 13 A.L.J. 1067, 16 Cr.L.J. 825, 31 I.C. 1001.

(j) Where a petition under sec. 21 of the Income Tax Act (1918) was falsely verified at a place in the Tanjore District and was presented in the Ramnad District, held that the offence of false verification was completed in the Tanjore District, and the Ramnad Magistrate had no jurisdiction—*In re Mohideen*, 45 Mad 839, 43 M.L.J. 475, 23 Cr.L.J. 619.

(k) The accused sent from Madras a V. P. parcel to the complainant at Hyderabad in consequence of an order by the complainant for some tea. The complainant paid the V. P. amount, and took delivery of the parcel which on opening was found to contain only saw-dust. Held that the cheating was complete when the money was handed over to the Post Office at Hyderabad, and the subsequent delivery of the money by the Post Office to the accused at Madras was not a necessary ingredient of the offence; sec. 179 did not apply, and the offence being committed wholly at Hyderabad, the Madras Court had no jurisdiction—*Laleep*, 52 M.L.J. 511, 28 Cr.L.J. 452, A.I.R. 1927 Mad. 544. The Bombay High Court dissented from this view and held that the accused could be tried at the place where the V.-P. parcel was posted—*Gafur Karimbux*, 31 Cr.L.J. 1155, 127 I.C. 177, 32 Bom.L.R. 785, A.I.R. 1930 Bom. 358.

The accused at Coonoor gave the telegram for despatch from Tanjore to one J., in order to cheat one P. Assuming that the accused caused the despatch of the telegram at Tanjore, the Tanjore Court had jurisdiction to try the accused for an offence under sec. 420 read with sec. 511, I. P. C.—*Raman Chettiar*, 28 Cr.L.J. 95, 99 I.C. 127, 51 M.L.J. 635, A.I.R. 1927 Mad. 77.

(l) The accused was charged with kidnapping a girl at Bombay and with having abetted the committing of rape on her at Ahmedabad. Held that the Bombay High Court had no jurisdiction to try the accused for the latter offence—*Mohanlal*, 30 Cr.L.J. 191, 113 I.C. 617, 30 Bom.L.R. 1253, A.I.R. 1928 Bom. 475, Ind. Rul 1929 Bom. 185.

(m) In cases under sec. 361, I. P. C., the 'taking' is not a continuing offence but is complete as soon as the person concerned is out of the keeping or control of the guardian. The same applies to enticing also. No doubt enticing in itself may be a continuous process, but enticing from a particular person cannot be so, i.e., it cannot continue after that person's control has ceased. Consequently where the accused entices and takes a married woman in Madras and brings her to Bombay, the Bombay Court has no jurisdiction to try the offence under sec. 498, I. P. C.—*Ramnarayan v. Emp.*, 38 Cr.L.J. 769 (773), 11 L.R. 1937 Bom. 244, 39 Bom.L.R. 61, 169 I.C. 526, 10 R.B. 34, A.I.R. 1937 Bom. 186.

555. Criminal misappropriation and breach of trust:—The offences of criminal misappropriation and breach of trust have been specially provided for in sec. 181 (2), and so it has been held in some cases that the provisions of that section and not of sec. 179 should be applied in determining the place of trial of those offences. That is sec. 179 is controlled by sec. 181 (2)—*Sirihachalam* 21 C.W.N. 573, 18 Cr.L.J. 762, 41 I.C. 138, 44 Cal. 912 (915); *Gunananda v. Santi*, 29 C.W.N. 432 (434), 26 Cr.L.J. 725; *Mehlab Din*, A.I.R. 1924 Lah. 663 (665), 25 Cr.L.J. 410; *Girdhar*, 21 A.L.J. 621, 24 Cr.L.J. 929, A.I.R. 1924 All. 77 (78); *Jivandas*, 55 Bom. 59, 32 Cr.L.J. 331 (334) (F.B.); *Gorkatan*, 1 P.L.T. 200, 21 Cr.L.J. 519, 56 I.C. 175 (177); *Ali Mohamed Kassim*, 9 Rang 338, 32 Cr.L.J. 1120 (1125).

This section has no application to the offence of criminal breach of trust which is governed by sub-sec. (2) of sec. 181, Cr. P. Code—*Huda v. Ali Hussain*, A.I.R. 1940 Cal. 357 (368).

But in numerous other cases, the Courts, instead of following the above rule, have launched upon a discussion as to whether the consequence of wrongful loss caused to the principal by reason of the act of the accused is an essential ingredient of the offences of criminal misappropriation and breach of trust. And this has led to a divergence of

opinion among the High Courts. One view is that the wrongful loss is not an essential part of the crime; the offence does not depend on any consequence which has ensued but only on the act which has been done, and, therefore, section 179 does not apply. The offence is triable at the place where the misappropriation took place (sec. 181). Another view is that the consequence of loss to the principal is a necessary ingredient of the offence, and, therefore, the accused can be tried under this section either at the place where the offence was committed or at the place where loss ensued to the principal. See these two sets of cases cited in Notes 557 and 563, *infra*.

556. Cases where either Court has jurisdiction:—Where an act is an offence by reason of any consequence which ensued, the offence is triable either by the Court within whose jurisdiction the act was committed or by the Court within whose jurisdiction the consequence was ensued. Thus —

(a) Where a petition presented to a person at Lahore contained defamatory statements against another, and was published at Amritsar, it was held that the Amritsar Court had jurisdiction to try the offence of defamation, because the publication at Amritsar completed the offence and was a consequence by reason of which the accused was charged with the offence of defamation—*Mahesh Das*, 1885 P R 41

(b) Where an alleged defamatory letter is written and posted in Madras with a view to its being read at Tinnevely, the offence of defamation is triable either in Madras or in Tinnevely—*Krishnamurti v Parasurama*, 44 M L J 648, 32 M L T 164, 24 Cr.L.J. 309, 72 I.C. 69.

(c) Where A sent goods by Railway from Karachi to Lahore under a false description, the Court at Lahore could under this section try A for the offence of cheating, as the consequence of A's act, *viz.*, the loss of freight to the Railway Company, was an ingredient of the offence and took place at Lahore, the Head quarters of the Railway Company—*Ghulam Ali*, 1900 P.R. 7.

(d) In fulfilment of a contract the accused consigned several tins of groundnut oil at Salem (Madras) to the complainant at Dhulia (Bombay). The tins when opened were found to contain groundnut oil mixed with rock oil. The complainant thereupon filed a complaint of cheating in the Magistrate's Court at Dhulia. Held that the Dhulia Court had jurisdiction for the deception took place at Dhulia where the complainant became the victim of the deceit in consequence of the accused's act—*Jamnadas*, 17 Bom.L.R. 389, 16 Cr.L.J. 433; *Yusuf Ali v Wahajuddin*, 12 A.L.J. 1022, 16 Cr.L.J. 719

(e) Where the accused residing at Lahore recovered money from a Bank at Bombay on a forged draft of the Amritsar Branch of the Punjab National Bank of Lahore, it was held that the Lahore Court had jurisdiction to try the accused for an offence under sec. 420, I. P. C., as the consequence (*viz.*, loss to the P. N. Bank) contemplated by this section ensued at Lahore where the Head Office of the Bank was situated—*Ishar Das*, 108 P.W.R. 18, 8 Cr.L.J. 75

Cheating :—The offence of cheating may be tried either at the place where the cheating was committed (where the accused resided) or at the place where the loss ensued to the complainant, *i.e.*, where the complainant resides or his firm is situated—*Girdhar*, 21 A.L.J. 621, 24 Cr.L.J. 929, A.I.R. 1924 All 77 (78); *Madho v. Gobardhan*, 10 O.W.N. 239, 1933 Cr.C. 425 (431); *Calville v. Kishore*, 26 Cal 746 (747), 3 C.W.N. 598; *Gobindram*, 32 Cr.L.J. 924, 132 I.C. 477, A.I.R. 1931 Sind 94, Ind Rul. 1931 Sind 93, 1931 Cr.C. 491.

The complainant charged the accused before the Criminal Court at Buxar with having cheated him over a cheque given by the accused to the complainant at Gya in part payment for a business. The cheque on presentation in Calcutta was dishonoured by the Bank. Certain correspondence passed between the parties and the complainant alleged that the crucial letter by which, for the first time, he was clearly led to realise that there had been an intention to cheat on the part of the accused was received by him at Buxar. Held that the prosecution could have been initiated either in Buxar, or in Gya, or in Calcutta—*Metcalfe v Watson*, 25 Cr.L.J. 81, 76 I.C. 17, A.I.R. 1924 Pat

was held that the Agra Court had no jurisdiction, because the offence of fraud had been committed and completed at Meerut, and that the discovery of the fraud at Agra after the delivery of the article was not a 'consequence which has ensued' within the meaning of sec. 179—*Pragdas v Daulatram*, 13 A.L.J. 1067, 16 Cr.L.J. 825, 31 I.C. 1001.

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(e) Where the accused residing at Lahore recovered money from a Bank at Bombay on a forged draft of the Amritsar Branch of the Punjab National Bank of Lahore, it was held that the Lahore Court had jurisdiction to try the accused for an offence under sec. 420, I.P.C., as the consequence (*viz*, loss to the P. N. Bank) contemplated by this section ensued at Lahore where the Head Office of the Bank was situated—*Ishar Das*, 108 P.W.R. 18, 8 Cr.L.J. 75.

Cheating.—The offence of cheating may be tried either at the place where the cheating was committed (where the accused resided) or at the place where the loss ensued to the complainant, *i.e.*, where the complainant resides or his firm is situated—*Girdhar*, 21 A.L.J. 621, 24 Cr.L.J. 929, A.I.R. 1924 All 77 (78); *Madho v. Gobardhan*, 10 O.W.N. 239, 1933 Cr.C. 425 (431); *Calville v. Kishore*, 26 Cal 746 (747), 3 C.W.N. 598; *Gobindram*, 32 Cr.L.J. 924, 132 I.C. 477, A.I.R. 1931 Sind 94, Ind. Rul. 1931 Sind 93, 1931 Cr.C. 491.

The complainant charged the accused before the Criminal Court at Buxar with having cheated him over a cheque given by the accused to the complainant at Gya in part payment for a business. The cheque on presentation in Calcutta was dishonoured by the Bank. Certain correspondence passed between the parties and the complainant alleged that the crucial letter by which, for the first time, he was clearly led to realise that there had been an intention to cheat on the part of the accused was received by him at Buxar. Held that the prosecution could have been initiated either in Buxar, or in Gya, or in Calcutta—*Metcalfe v. Watson*, 25 Cr.L.J. 81, 76 I.C. 17, A.I.R. 1924 Pat.

702. See also *Surendra v. Gobardhan*, 34 Cr.L.J. 765, 144 I.C. 566, 10 O.W.N. 239, A.I.R. 1933 Oudh 215, 1933 Cr.C. 425, Ind. Rul. 1933 Oudh 253, 8 Luck. 381.

The accused were charged with attempting to cheat the office-in-charge of the Currency, Bombay, by claiming payment of halves of certain currency notes. The declaration signed in support of the claim was posted in Calcutta. Held that the offence was triable in Calcutta—*Amulya*, 25 Cr.L.J. 184, 76 I.C. 424, A.I.R. 1923 Cal. 401.

The accused owed some money to the complainant who instituted a criminal case against the accused in the Court of a Magistrate at Gujrat under sec. 420, I. P. C., alleging that the accused sent from a place in the Bombay Presidency, a letter addressed to him in Suk Kalan in Gujrat District, and insured for Rs. 400, intending to use the complainant's receipt given to the Post Office as proof of discharge of accused's debt. Held that the Gujrat Court had jurisdiction, under this section if not also under sec. 177, Cr. P. Code, to try this case—*Narain Das v. Prem Chand*, 32 Cr.L.J. 996, 132 I.C. 854, 32 P.I.R. 6, Ind. Rul. 1931 Lah. 704, following *Arura v. Crown*, 20 I.C. 595, 299 P.I.R. 1913, 10 P.R. 1913 (Cr.), 14 Cr.L.J. 436, 30 P.W.R. 1913 (Cr.); *M. A. Haleek*, 101 I.C. 424, 1927 M.W.N. 221, 52 M.L.J. 511, 28 Cr.L.J. 452, A.I.R. 1927 Mad. 544 and *Jamnadas Vasanji*, 29 I.C. 65, 17 Bom.L.R. 389, 16 Cr.L.J. 433.

The accused entered into a contract of purchase at X with a partner of a firm which was situated at Y. The accused was prosecuted for an offence of cheating in respect of the contract in the Court of a Magistrate at Y. Held that it was not the complainant but his firm at Y who were cheated, that the consequences resulting from the deception practised by the accused at X ensued at Y, that sec. 179 applied to this case and that the Court at Y had jurisdiction to try the case—*Emp. v. Alma Ram*, 36 Cr.L.J. 490, 151 I.C. 315, A.I.R. 1934 All. 846, 1934 Cr.C. 1033.

Where the allegations were that the accused cheated the complainant by giving spurious gold pieces in return for money and that the money was paid to the accused at T and the spurious coins were handed over to the complainant at another district, the complainant was cheated and parted with the money at T and the case can be tried by the Sub-divisional Magistrate of T—*Natesa Padayachi*, A.I.R. 1940 Mad. 649, 1940 M.W.N. 391, 51 M.L.W. 522, (1940) 1 M.L.J. 760, 1940 M.Cr.C. 109.

See also Note 554 (i) and (k).

557. Consequence:—In some cases it has been held that the 'consequence' mentioned in this section is the *primary consequence*, and not any secondary consequence of the offence; the primary consequence should be taken into consideration in determining the jurisdiction; thus, where an accused living in Nandyal was appointed agent for the sale of the oil of the complainant living in Madras, and when called on to account the accused failed to do so, held that the offence of criminal breach of trust was triable at Nandyal and not at Madras, because the firm's loss at Nandyal was a primary consequence, and the loss at Madras, the firm's head quarters where the funds were kept, is a secondary one which is not sufficient to attract the operation of this section—*Krishnamachari v. Shaw Wallace & Co.*, 39 Mad 576, 16 Cr.L.J. 491, 29 I.C. 331, 18 M.L.T. 25, 1915 M.W.N. 418, 29 M.L.J. 178. The loss to the principal is not an essential ingredient of the offence of criminal misappropriation. The offence is complete if the conversion is done with the intention of causing wrongful gain to the offender, irrespective of any loss which may ensue to any other person. The offence does not depend on the consequence which has ensued but only on the act which has been done. This section, therefore, does not apply and the offence is triable at the place where the misappropriation took place (section 181) and not where loss ensued to the principal—*Smkhachalam*, 41 Cal 912 (915), 21 C.W.N. 573, 18 Cr.L.J. 762, 11 I.C. 138. The same view is taken in *Gunananda v. Santi*, 26 Cr.L.J. 725, 29 C.W.N. 432 (434); *Rambilas*, 38 Mad. 639 (641), 26 I.C. 136, 16 M.L.T. 505, 1914 M.W.N. 891, 29 M.L.J. 175; *Ali Mohamed Kassim*, 9 Rang 338, 32 Cr.L.J. 1120 (1123); *Ahmad Ebrahim v. A. A. Gunny*, 1 Rang. 56,

A.I.R. 1923 Rang. 209 (210), 21 Cr.L.J. 746; *Abdul v. Ramnawal*, 21 Cr.L.J. 140, 54 I.C. 677 (678) (Bur.); *Maktab Din*, A.I.R. 1924 Lah. 663 (665), 25 Cr.L.J. 410; *Abdul Haq*, 23 Cr.L.J. 743, A.I.R. 1924 Lah. 353 (354); *Banerjee v. Potnis*, 20 N.L.R. 72, A.I.R. 1924 Nag. 252 (264), 25 Cr.L.J. 922; *Diwan Singh*, A.I.R. 1936 Nag. 55 (63), 161 I.C. 633, 1936 Cr.C. 367, 37 Cr.L.J. 474; *Jivandas*, 55 Bom. 59 (F.B.), 37 Cr.L.J. 331 (333), (overruling *Ramratan*, 46 Bom. 641, and *Gafur*, 32 Bom.L.R. 785, 31 Cr.L.J. 1155); *Ganeshi Lal v. Nand Kishore*, 34 All. 487, 10 A.L.J. 45, 13 Cr.L.J. 479, 15 I.C. 319; *Jagannath*, A.I.R. 1931 All. 127. But in several other cases, a wider interpretation has been put on the word "consequence" which has been taken to include such secondary consequence as loss resulting to the employer by criminal breach of trust or failure to account for monies misappropriated, at the head office of the firm; and this section has been held to apply, and the offender has been held to be triable either by the Court of the place where the misappropriation or breach of trust took place, or by the Court of the place where such secondary consequence has ensued (i.e., where the complainant resides or the head-office of the firm is situated) — *Langridge v. Atkins*, 35 All. 29; *Sheo Shankar v. Mohan*, 19 A.L.J. 69; *Rich*, 52 All. 894, 31 Cr.L.J. 865 (distinguishing *Ganeshi Lal v. Nand Kishore*, supra); *Mahadeo*, 32 All. 397, 6 I.C. 563, 7 A.L.J. 319, 11 Cr.L.J. 372; *Uttam Chand*, 1902 P.R. 2; *Lakhmi Chand*, 1901 P.R. 24; *Asst Sessions Judge v. Ramaswami*, 38 Mad. 779; *Abdul Latif v. Abu Md. Kasim*, 26 C.W.N. 175 (176); *Govind*, 22 S.L.R. 404, A.I.R. 1929 Sind. 30, 114 I.C. 99, 30 Cr.L.J. 249; *Md. Rashid Khan*, 27 Cr.L.J. 992 (All.); *O'Brien*, 19 All. 111, 1896 A.W.N. 191; *Brij Lal*, 33 Cr.L.J. 711, 139 I.C. 159, A.I.R. 1932 All. 367, 1932 Cr.C. 403, 1932 A.L.J. 269, Ind. Rul. 1932 All. 531; *Madho Surendra Sahas v. Gobardhan Lal*, A.I.R. 1933 Oudh. 215, 144 I.C. 566, 1933 Cr.C. 423, 34 Cr.L.J. 785, 8 Luck. 381, 10 O.W.N. 239, Ind. Rul. 1933 Oudh. 263; *Trikamji Parmanani Bhatia v. Emp.*, A.I.R. 1933 Nag. 23, 145 I.C. 550, 1933 Cr.C. 75, 6 R.N. 51, 34 Cr.L.J. 1038.

But during recent years the pendulum has very rightly swerved to the former view. All the chartered High Courts are now agreed that 'consequence' is confined to that which is an ingredient of the offence for which an accused person is being tried — *Mukhi Tirathdas v. Jethanand Matvalomal*, 38 Cr.L.J. 512 (520), 9 RS 222, 31 S.L.R. 123, 168 I.C. 89, A.I.R. 1937 Sind. 68 (F.B.), overruling *Gobind*, 22 S.L.R. 404, 114 I.C. 99, A.I.R. 1929 Sind. 30, 30 Cr.L.J. 249. See also *Kashi Ram*, 35 Cr.L.J. 982, 149 I.C. 420, A.I.R. 1934 All. 499 (503), 1934 Cr.C. 596, 1934 A.L.J. 308, 56 All. 1047, 6 R.A. 902 (F.B.); *Jivandas Savchand*, 55 Bom. 59, 129 I.C. 385, A.I.R. 1930 Bom. 490, 32 Bom.L.R. 1195, 32 Cr.L.J. 331, 1930 Cr.C. 1026, Ind. Rul. 1931 Bom. 161 (F.B.); *Gunada v. Satti*, A.I.R. 1925 Cal. 613 (614), 29 C.W.N. 432, 86 I.C. 213, 26 Cr.L.J. 725, 41 C.L.J. 80; *Paul De Flounder v. Emp.*, 59 Cal. 92, 134 I.C. 433, A.I.R. 1931 Cal. 528, 35 C.W.N. 809, 1931 Cr.C. 680, 32 Cr.L.J. 1167, Ind. Rul. 1931 Cal. 817; *Aya Ram v. Gobind Lal*, A.I.R. 1933 All. 559 (560), 144 I.C. 991, 34 Cr.L.J. 902, 1933 Cr.C. 817, 6 R.L. 41; *Sreerama Moorti v. Emp.*, A.I.R. 1935 Mad. 189 (190), 154 I.C. 146, 1934 M.W.N. 1316, 41 M.L.W. 82, 36 Cr.L.J. 467, 68 M.L.J. 211, 1935 Cr.C. 227, 7 R.M. 416; *Ali Mahomed Kasim v. Emp.*, A.I.R. 1931 Rang. 164 (166), 134 I.C. 209, 32 Cr.L.J. 1120, 9 Rang. 338, 1931 Cr.C. 660, Ind. Rul. 1931 Rang. 273; and *Abdul Karim v. Emp.*, A.I.R. 1929 Pat. 640 (642), 117 I.C. 309, 30 Cr.L.J. 765, 10 P.L.T. 161, 1929 Cr.C. 369, Ind. Rul. 1929 Pat. 421.

In *Jivandas Savchand*, 32 Cr.L.J. 331, 129 I.C. 385, 32 Bom.L.R. 1195, A.I.R. 1930 Bom. 490, Ind. Rul. 1931 Bom. 161, 1930 Cr.C. 1026, 55 Bom. 59 (F.B.), Madgavar, J., dealt with the question very lucidly. His Lordship observed: "I agree entirely with the view of the learned Judge that criminal breach of trust is not an offence which counts as one of its factors the loss, which is the usual consequence of the act, and that it is the act itself which in law amounts to the offence, apart from any such consequence; and, therefore, the jurisdiction to try an offence of criminal misappropriation or criminal breach of trust is governed by sec. 181, sub-sec. (2), and not by sec. 179. The only doubt in my mind is as regards the class of cases referred

to in the concluding portion of the judgment where by reason of the secrecy observed by the accused, doubt exists as to the exact manner, point of time or place where the misappropriation and conversion, etc., takes place, all matters within the special knowledge of the accused himself and not of the complainant, who can only judge from any overt act of the accused showing the dishonesty, which is essentially necessary to be proved. In such cases, if and where the accused is under liability to render accounts at a particular time and fails to do so, such failure may be the first overt dishonest act to the complainant's knowledge and the Court within the local limits where such failure takes place may have jurisdiction. But where the offence is completed at one place, the further liability to render account at another place and failure in rendering such false accounts at the second place, does not confer jurisdiction under sec. 179 upon the Magistrate at the latter place since the offence is already completed at the former place."

In a very recent case the Full Bench of the Allahabad High Court has taken a similar view, holding that sec. 179, Cr. P. C., applies where the act done and the consequence following that act must enter into the definition of the offence the commission of which is complained against. But where the offence is complete in itself by reason of the act having been done and the consequence is a mere result of it which was not essential for the completion of the offence, then sec. 179 would not be applicable. In many cases of criminal misappropriation or breach of trust there may be considerable difficulty in ascertaining the exact place, where or the exact point of time when the offence was in fact committed. In cases of such uncertainty sec. 182 would obviously apply. Where it is the duty of an agent not only to return specific goods to his principal, but to account for that and to render account, the offence of misappropriation may not be committed till he has dishonest intention of causing wrongful loss to his master and wrongful gain to himself, and therefore it may not possibly come into existence till ultimately he refuses either to render account or to pay the balance due. This may happen not only at the place where he received money, but at the place where he is employed or his master resides—*Kashi Ram*, 35 Cr.L.J. 982, 56 All. 1047, 149 I.C. 420, A.I.R. 1934 All 499, 1934 Cr.C. 596, 1934 A.L.J. 308 (F.B.).

Following the Full Bench cases quoted above it has been held that the 'consequence' referred to in sec. 179, Cr. P. C., must be a part of the offence with which the accused person is being charged. It is evident that the section can apply only to a case where a person is charged with an offence not only by reason of some act committed by him, but also by reason of some consequence which has ensued from the act. In the absence of any one of these two ingredients, the section would be wholly inapplicable. If the consequence is such that even if it had not taken place the offence would have been complete, sec. 179 would have no application. Where, therefore, K filed a complaint in the Court of a Magistrate at Rajshahi in the province of Bengal charging A with the offence of cheating under sec. 420, I P. C., and A was arrested at Cawnpore by the police in execution of a warrant issued by the Magistrate and A launched a complaint in the Court of a Magistrate at Cawnpore charging K with an offence under sec. 500 I. P. C., upon the allegation that K had deliberately made a false complaint in order to defame him, held that the arrest of A at Cawnpore was not such a consequence as is contemplated by sec. 179, Cr. P. Code, and it could not give the Cawnpore Court any jurisdiction to try the offence of defamation with which A charged K—*Khwaja Mohd Abdul Latif v. Montri Ahmad Abdul Halim*, A.I.R. 1938 All. 632, 1938 A.L.J. 969, 1938 A.W.N. (H.C.) 686, 178 I.C. 713, 1938 A.L.R. 894, 40 Cr.L.J. 128, 1938 A Cr.C. 139.

See Note 563.

Section 179, Cr. P. C., does not come into operation in a charge of conspiracy to cheat as conspirators are not charged with the offence of conspiracy by reason of any consequence which has ensued in pursuance of the conspiracy. Before this section can be invoked it is necessary to show that "the consequence which has ensued" is an

essential ingredient of the offence—*Gokaldas v. Emp.*, A.I.R. 1933 Sind 333 (335), 27 S.L.R. 392, 14 I.C. 135, 35 Cr.L.J. 585, 6 R.S. 180, 1933 Cr.C. 1130. See Note 560.

Offence in Native State:—The Courts in British India have always declined jurisdiction against foreigners for offences committed outside British India, e.g., for theft although the stolen property was found in British India—*Reg. v. Adisagadu*, 1 Mad. 171; *Sunker*, 6 Cal. 307, 7 C.L.R. 411; *Reg. v. Lakha Govind*, 1 Bom. 50; *Abdul Latif*, 10 Bom. 185; *Ranchood Daya*, 2 Bom.L.R. 377; for criminal breach of trust; *Babu Daldi. In re*, 5 Mad. 23; *Henmandas v. Chellaram*, 5 S.L.R. 267, 15 I.C. 836; for being in possession in a Native State of property stolen from India, *Kirpal Singh*, 9 All. 523, 1887 A.W.N. 131; *Moheshwari Prasad Singh*, A.I.R. 1914 Cal. 725, 24 I.C. 915, 15 Cr.L.J. 537; for kidnapping though the person kidnapped is concealed in British India; *Bhute Santal v. Dama Santal*, 17 Cr.L.J. 128, 33 I.C. 304; for instigating the offence of murder outside British India although the offence is committed in British India; *Reg. v. Putai*, 10 B.H.C.R. 356; of abduction in a Native State although the abducted woman was brought by the accused into British India—*Koochra*, 7 S.L.R. 17, 14 Cr.L.J. 439, 20 I.C. 599; *Anandgar*, 7 S.L.R. 128, 15 Cr.L.J. 511, 24 I.C. 599; of conspiracy to cheat a firm in British India when the agreement to commit the offence of cheating was made in a Native State—*Gokaldas v. Emp.*, 27 S.L.R. 392, 14 I.C. 135, A.I.R. 1933 Sind 333, 1933 Cr.C. 1130, 35 Cr.L.J. 585, 6 R.S. 180. See Note 577.

As an offence committed outside British India by a foreigner residing in a foreign country is not an offence punishable under the Indian Penal Code, there is no scope for calling in aid the provision of Cr. P. C. As pointed out by Woodroffe in his Commentary on the Cr. P. C. all the sections in Chap. 15 are to be read subject to the general rule that an act committed on land outside British territory by a foreigner not being a servant of the King, is not an offence triable by the British Courts and that illus. (4) to sec. 179 must be read subject to this general rule. Apart from this it would appear that sec. 179, Cr. P. C., does not come into operation in a charge of conspiracy to cheat as conspirators are not charged with the offence of conspiracy by reason of any consequence which has ensued in pursuance of the conspiracy. Where, therefore, the offence of conspiracy to cheat is committed outside British India, *prima facie*, it cannot be tried for that offence in British India—*Gokaldas*, A.I.R. 1933 Sind 333, 27 S.L.R. 392, 1933 Cr.C. 1130.

Where certain jewels were entrusted by the complainant at Vellore (in British India) to the accused for sale on commission, and the latter converted the jewels to his own use by pledging them at Bangalore city, it was held that the loss to the complainant, which was the consequence, occurred at Vellore, and this was sufficient under this section to give jurisdiction to the British Indian Court—*Asst. Sessions Judge v. Ramaswami*, 38 Mad. 779 (780).

The charge against the accused was that he committed the offence of public nuisance under sec. 290, I. P. C., by arranging a marriage procession with music and by letting off fireworks in the French territory and thereby disturbing the sleep of the people living in the vicinity in the British territory. Held that this section had no application to this case and that the offence was not triable in British India and that, assuming it had application, the provision of sec. 188, Cr. P. C., must be complied with—*Sreeramamurthy*, 36 Cr.L.J. 467, 154 I.C. 146, 41 M.L.W. 82, 1934 M.W.N. 1316, A.I.R. 1935 Mad. 189.

Illustrations:—The illustrations are not exhaustive, and to hold that all the consequences prescribed by the Legislature as conferring jurisdiction are limited to those specified in the illustrations is not justified by the language of the section—*Ishar Das*, 1908 P.W.R. 18, 8 Cr.L.J. 75. The illustration (d) to this section must be applied with certain restriction. The offender in that illustration must be taken to be a subject of the British Government; and a certificate of the Political Agent must be obtained under sec. 188 before he can be tried. If the offender is a subject of the Native State, he cannot be tried by the British Courts. See *Gokaldas v. Emp.* in Note 547.

180. When an act is an offence by reason of its relation to any other act which is also an offence or which would be an offence if the doer were capable of committing an offence, a charge of the first-mentioned offence may be inquired into or tried by a Court within the local limits of whose jurisdiction either act was done.

Place of trial where act is offence by reason of relation to other offence.

Illustrations

(a) A charge of abetment may be inquired into or tried either by the Court within the local limits of whose jurisdiction the abetment was committed, or by the Court within the local limits of whose jurisdiction the offence abetted was committed.

(b) A charge of receiving or retaining stolen goods may be inquired into or tried either by the Court within the local limits of whose jurisdiction the goods were stolen, or by any Court within the local limits of whose jurisdiction any of them were at any time dishonestly received or retained.

(c) A charge of wrongfully concealing a person known to have been kidnapped may be inquired into or tried by the Court within the local limits of whose jurisdiction the wrongful concealing, or by the Court within the local limits of whose jurisdiction the kidnapping, took place.

558. Scope of section—Foreign territory:—The Code extends only to British territory, and the present section assumes the offence therein indicated to have been committed in a local jurisdiction created by the Code. Therefore, where a foreign subject in a foreign territory instigated the commission of an offence which was in consequence committed in British territory, it was held that the instigation not having taken place in any district created by this Code, the instigator was not amenable to the jurisdiction of a British Court—*Pirtai*, 10 B.H.C.R. 356; *Kishen Koer*, 20 P.R. 1878. When a house-breaking took place in a district in British India, and a non-British subject residing in a Native State was found to be in possession of the stolen property, held that that person was not triable by the British Courts—*Md. Hussain*, 2 Lah.L.J. 318, 23 Cr.L.J. 560. The operation of this Code cannot be extended beyond the British territory, so as to give jurisdiction to a British Court to try a non-British subject residing outside British India for the offence of retaining stolen properties, although the theft of those properties might have taken place in British India—*Moheswari*, 18 C.W.N. 1178 (1179), 15 Cr.L.J. 537, 24 I.C. 945; *Kirpal Singh*, 9 All. 523, 1887 A.W.N. 131. If, however, an Indian British subject is found in the Native State in possession of property stolen in British India, he can be tried by a Court in British India under this section, but a certificate of the Political Agent under sec. 188 would be necessary—*Session Judge v. Sundara*, 26 M.L.J. 511, 11 Cr.L.J. 306.

But if the contrary things happen, i.e., if the theft takes place outside British territory, and the stolen property is brought within British India, the offence of retaining stolen property may be tried in British India, although the offence of theft which was committed outside British India cannot be tried here—*Abdul Latif*, 10 Bom. 186 (188); *Lakhva*, 1 Bom. 50; *Sunkur*, 6 Cal. 307. The contrary view in *Moorga Chetty*, 5 Bom. 338 is no longer good law in view of the words "within or without British India" added to sec. 410, I. P. C. by the Penal Code Amendment Act VII of 1882.

559. Abetment:—Where a person residing at C sends a letter to another at G through post inciting him to the commission of an offence, he is guilty of the offence of abetment as soon as the letter is received by and the contents known to the addressee at G and is triable at G, the place where the letter is received—*Sheo Dial*, 16 All. 389 (390), 1891 A.W.N. 135.

Although an abetment of an offence might have taken place outside the territorial jurisdiction of a Magistrate, yet under this section the abettor can be tried by a Magistrate within whose territorial jurisdiction the offence abetted was committed—*Chcnanna*, 1 Weir 155 (156).

Where the abetment of the offence, as well as the offence itself, is committed in N (a place in the province of Bengal) but the abettor has a house in J (a place in the province of Behar), the charge of abetment should be inquired into and tried in N and not in J. A committal order in respect of the charge of abetment passed by a Court in Behar is without jurisdiction and must be quashed. If the abetment is committed both in a place inside the province of Behar, as well as in a place outside that province, it may be inquired into and tried in a Court of Behar—*Bhagwatia*, 3 Pat. 417 (424), 26 Cr.L.J. 49.

See *Mohanlal* in Note 554.

Abetment in British India of offence outside British India:—Where a British subject abets in British India an offence committed outside British India, he may under the amended sec. 108A, I. P. C., be tried in British India—*Baku*, 24 Bom. 287. In view of sec. 108A, I. P. C., the decision in *Ganpatrai*, 19 Bom. 105 is no longer good law.

560. Conspiracy:—The offence of an attempt to murder a person in district R in pursuance of a conspiracy entered into in district M can be inquired into and tried in either of the two districts—*Gurdit Singh*, 24 P.R. 1917, 18 Cr.L.J. 514. But the Calcutta High Court is of opinion that if a conspiracy is entered into in District A and acts are committed in pursuance of that conspiracy in District B, the Magistrate of District A can try the conspiracy but cannot try the accused in the same trial for acts committed outside his district. Even the fact that the offences could have been tried jointly under sec. 239 if committed within his jurisdiction will not give him jurisdiction to try them—*Bissessar*, 28 C.W.N. 975, 26 Cr.L.J. 207 (208), A.I.R. 1924 Cal. 1034.

Where the accused are charged with conspiracy to bring a false return of service in existence within the jurisdiction of the Court of Gya for the purpose of obtaining an *ex parte* decree in the Court of Manbhum, *held* that if there was any conspiracy, it was quite obviously not a conspiracy to obtain an *ex parte* or any decree for that matter but a conspiracy to bring certain evidence into existence and when that evidence was once brought into existence in the form of a service return containing the signature of the peon and of the two witnesses, the offence would appear to have been complete. There is no doubt that the provisions of sec. 179, Cr. P. C., do not apply, in so far as the words "and of any consequence which has ensued" are concerned, where the offence alleged is complete. The conspiracy was complete at Gaya, and, therefore, the Courts at Gya have jurisdiction—*Abdul Karim v. Emp.*, 30 Cr.L.J. 765, 117 I.C. 309, 10 P.L.T. 161, Ind. Rul. 1929 Pat. 421, A.I.R. 1929 Pat. 640.

Where the allegation is that it was in B, where the accused reside that they entered into a conspiracy and that one or two acts of cheating in pursuance of the conspiracy were done within the jurisdiction of P, *held* that the Court at P cannot be clothed with jurisdiction to try the charge of conspiracy merely because the conspiracy and the different acts of cheating might form part of the same transaction and the charges in respect of them might be tried together, that the charge of conspiracy should be laid in the Court at B and that the Court at P can have jurisdiction only in respect of the acts of cheating alleged to have been committed within its jurisdiction—*In re Dani*, A.I.R. 1936 Mad. 317, 1935 M.W.N. 1164, 1935 Cr.C. 496, 37 Cr.L.J. 634, 162 I.C. 504, 1936 Cr.C. 304.

Conspiracy is a substantive offence in itself. It is not given in one of the illustrations to sec. 180, Cr. P. C., as one of the offences which is an offence because of its relation to another offence, such as abetment which would give the Court jurisdiction either where the principal offence or the connected offence was committed, nor can it be brought within the meaning of the section itself. It is not one of the offences named in sec. 181. The gist of the offence of conspiracy lies not in doing that act or effecting the purpose for which the conspiracy is formed nor in attempting to do any of the acts

nor in inducing others to do them, but in the forming of the scheme of agreement between the parties. It is no doubt true that sometimes it is difficult to ascertain the point of time when the alleged agreement is said to have been made, that is to say, the point at which a combination of several persons for a common object becomes unlawful. But the factum of the criminal agreement should not be confounded with its proof. In certain cases it may therefore be difficult for the Courts to decide whether a particular agreement which forms the basis of a criminal charge was made or concluded at a particular time or at a particular place. But it does not follow therefrom that the scope of conspiracy would determine where the conspiracy or part of it occurred. It is not the act done in pursuance of the conspiracy but the place where the conspiracy was formed or made which determines the jurisdiction of the Court and it has been consistently held that in an indictment for conspiracy, the venue should be laid where the conspiracy was and not where the result of such conspiracy was put into execution—*Pursumal Gerimal*, 39 Cr.L.J. 630 (632), 175 I.C. 620, A.I.R. 1938 Sind 108, 10 R.S. 298; *Gokaldas v. Emp.*, 27 S.L.R. 392, 148 I.C. 135, A.I.R. 1933 Sind 333, 1933 Cr.C. 1130, 35 Cr.L.J. 585, 6 R.S. 180. See also *Russel on Crime and Misdemeanours*, Edn. 8, p. 185. See also *Gokaldas v. Emp.*, in Note 557.

181. (1) The offence of being a thug, of being a thug and committing murder, of dacoity with murder, of having belonged to a gang of dacoits, or of having escaped from custody, may be inquired into or tried by a Court, within the local limits of whose jurisdiction the person charged is.

Being a thug or belonging to a gang of dacoits, escape from custody, etc. Criminal misappropriation and criminal breach of trust. breach of trust may be inquired into or tried by a Court within the local limits of whose jurisdiction any part of the property which is the subject of the offence was received or retained by the accused person or the offence was committed.

(3) The offence of *theft or any offence which includes theft or the possession of stolen property*, may be inquired into or tried by a Court within the local limits of whose jurisdiction *such offence was committed or the property stolen* was possessed by the thief or by any person who received or retained the same knowing or having reason to believe it to be stolen.

(4) The offence of kidnapping or abduction may be inquired into or tried by a Court within the local limits of whose jurisdiction the person kidnapped or abducted was kidnapped or abducted or was conveyed or concealed or detained.

560A. Change:—Sub-section (3) has been amended by sec. 42 of the Criminal Procedure Code Amendment Act XVIII of 1923. "We enlarge the enumeration of offences to include the possession of stolen property. This will also cover the case of extortion. See the definition in sec. 410, I. P. C."—*Report of the Select Committee of 1916.*

As a result of this amendment, sec. 181 (3) means that the offence of being in possession of stolen property may be inquired into either at the place where it was

it was found to be dishonestly possessed. This indeed is expressly in (b) to sec. 180. It must be conceded that the language of sub-181 is open to objection. The words 'such offence' are intended to theft, but grammatically these words would mean any offence of property—*Bhima*, 24 A.L.J. 148, 27 Cr.L.J. 21 (22).

of section:—This section does not apply to the case of an offence by a person who is *not* a British subject, *outside British territory*. It is intended to regulate the jurisdiction of Courts in British India, in respect of offences committed in British India, and cannot vary or abrogate the ordinary rule that an offence can be tried in British India for an offence committed outside British India, 28 All. 372 (374). This section only applies as between Courts in British India whose jurisdiction has been limited under sec. 12—*Tribhuan*, 1 A.L.J. 530 (531); *Adwigadu*, 1 Mad. 171 (172).

Dacoity or theft or robbery was committed in a Native State, and the property was found to have been concealed by the accused in British India, the offence of dacoity, or theft or robbery could not be tried by the Courts in British India, although the offence of retaining stolen property could be tried in British India, retaining having taken place in British territory—*Lakhya*, 1 Bom. 10 Bom 185 (188); *Sunkur*, 6 Cal. 307; *Baldewa*, 28 All 372 (374); *Adwigadu*, 1 Mad. 171 (172). When a person escaped from lawful custody in a Native State and came into British India, *held* that the British Court has jurisdiction to try him for an offence under sec. 224, I. P. C., as it was committed in British India—*Juze*, Ratanlal 870 (871). So also, where a criminal offence was committed in a Native State, a Court in British India had no jurisdiction to try him, 5 S.L.R. 266, 13 Cr.L.J. 530 (531). Where the offence of dacoity was committed out of British India, and the minor was brought into British India, the Court had no jurisdiction as the offence was complete out of British India; even the fact that the person kidnapped *was conveyed* to British India would not give the British Court jurisdiction, because the words 'was conveyed' in this section do not import any separate or distinct offence, where the offence was complete previous to such conveying—*Jaimal Singh*, 1 P.R. 1901; *Koochri*, 7 S.L.R. 17, 14 Cr.L.J. 439; *Bhuta Santal v. Dama*, 20 C.W.N. 62 (63), 17 Cr.L.J. 128. The complainant sent a sum of money from Burma to the accused, who was his agent in Japan. The accused misappropriated the money, whereupon the complainant took criminal proceedings in Rangoon. *Held* that the offence of criminal misappropriation was complete when the conversion was done with the intent of causing wrongful gain to the offender, and did not depend on the consequence of wrongful loss which had ensued to the complainant. The conversion having taken place in Japan, the Rangoon Court had no jurisdiction to entertain the complaint—*Ahmad Ebrahim v. A. A. Ganny*, 1 Rang. 56, 24 Cr.L.J. 746.

562. Belonging to a gang of dacoits:—Where a resident of a Native State was arrested in that State and was brought before a Court in British India and charged with the offence of belonging to a gang of dacoits who had committed dacoities within the jurisdiction of that Court, it was held that the Magistrate had jurisdiction over the accused, as the accused was within his district at the time of the charge—*Govinda*, 1911 P.R. 1, 12 Cr.L.J. 113.

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"Is":—The word 'is' at the end of sub-section (1) does not mean 'is of his own accord'. The Magistrate has jurisdiction, whether the accused has come within the local limits of his jurisdiction of his own accord or has been brought there by force (*i.e.* under arrest)—*Govinda*, *supra*.

563. Criminal misappropriation, etc.:—The offences of criminal misappropriation and criminal breach of trust have been specifically provided for in sub-sec. (2) of this section. Consequently, according to the rule of interpretation that a special provision excludes the general, the above offences should be tried by the Courts specified in this section. But this rule has not found favour in some Courts, and the Judges

nor in inducing others to do them, but in the forming of the scheme of agreement between the parties. It is no doubt true that sometimes it is difficult to ascertain the point of time when the alleged agreement is said to have been made, that is to say, the point at which a combination of several persons for a common object becomes unlawful. But the factum of the criminal agreement should not be confounded with its proof. In certain cases it may therefore be difficult for the Courts to decide whether a particular agreement which forms the basis of a criminal charge was made or concluded at a particular time or at a particular place. But it does not follow therefrom that the scope of conspiracy would determine where the conspiracy or part of it occurred. It is not the act done in pursuance of the conspiracy but the place where the conspiracy was formed or made which determines the jurisdiction of the Court and it has been consistently held that in an indictment for conspiracy, the venue should be laid where the conspiracy was and not where the result of such conspiracy was put into execution—*Pursumal Gerimal*, 39 Cr.L.J. 630 (632), 175 I.C. 620, A.I.R. 1938 Sind 108, 10 R.S. 298; *Gokaldas v. Emp.*, 27 S.L.R. 392, 148 I.C. 135, A.I.R. 1933 Sind 333, 1933 Cr.C. 1130, 35 Cr.L.J. 585, 6 R.S. 180. See also *Russel on Crime and Misdemeanours*, Edn. 8, p. 185. See also *Gokaldas v. Emp.*, in Note 557.

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(2) The offence of criminal misappropriation or of criminal breach of trust may be inquired into or tried by a Court within the local limits of whose jurisdiction any part of the property which is the subject of the offence was received or retained by the accused person or the offence was committed.

(3) The offence of *theft* or any offence which includes *theft* or the possession of stolen property, may be inquired into or tried by a Court within the local limits of whose jurisdiction such offence was committed or the property stolen was possessed by the thief or by any person who received or retained the same knowing or having reason to believe it to be stolen.

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As a result of this amendment, sec. 181 (3) means that the offence of being in possession of stolen property may be inquired into either at the place where it was

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Where an offence of dacoity or theft or robbery was committed in a Native State, and property was found to have been concealed by the accused in British India, the offence of dacoity, or theft or robbery could not be tried by a British Court, although the offence of retaining stolen property could be tried in British India, retaining having taken place in British territory—*Lakhya*, 1 Bom. 10 Bom. 18b (188); *Sunkur*, 6 Cal. 307; *Baldewa*, 28 All. 372 (374); *Adirigadu*, 1 Mad. 171 (172). When a person escaped from lawful custody in a Native State and came into British India, *held* that the British Court could try him for an offence under sec. 224, I. P. C., as it was committed in British India—*Juze*, Ratanlal 870 (871). So also, where a criminal committed an offence in a Native State, a Court in British India had no jurisdiction to try him, 5 S.L.R. 266, 13 Cr.L.J. 530 (531). Where the offence of dacoity was committed out of British India, and the minor was brought into British India, *held* that no jurisdiction as the offence was complete out of British India; even the fact that the person kidnapped was conveyed to British India would not give the British Court jurisdiction, because the words 'was conveyed' in this section do not import any separate or distinct offence, where the offence was complete previous to such conveying—*Jaimal Singh*, 1 P.R. 1901; *Koocheri*, 7 S.L.R. 17, 14 Cr.L.J. 439; *Bhuta Santal v. Dama*, 20 C.W.N. 62 (63), 17 Cr.L.J. 128. The complainant sent a sum of money from Burma to the accused, who was his agent in Japan. The accused misappropriated the money, whereupon the complainant took criminal proceedings in Rangoon. *Held* that the offence of criminal misappropriation was complete when the conversion was done with the intent of causing wrongful gain to the offender, and did not depend on the consequence of wrongful loss which had ensued to the complainant. The conversion having taken place in Japan, the Rangoon Court had no jurisdiction to entertain the complaint—*Ahmad Ebrahim v. A. A. Ganny*, 1 Rang. 56, 24 Cr.L.J. 746.

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"Is":—The word 'is' at the end of sub-section (1) does not mean 'is of his own accord'. The Magistrate has jurisdiction, whether the accused has come within the local limits of his jurisdiction of his own accord or has been brought there by force (*i.e.*, under arrest)—*Govinda*, *supra*.

563. Criminal misappropriation, etc.:—The offences of criminal misappropriation and criminal breach of trust have been specifically provided for in sub-sec. (2) of this section. Consequently, according to the rule of interpretation that a special provision excludes the general, the above offences should be tried by the Courts specified in this section. But this rule has not found favour in some Courts, and the Judges

nor in inducing others to do them, but in the forming of the scheme of agreement between the parties. It is no doubt true that sometimes it is difficult to ascertain the point of time when the alleged agreement is said to have been made, that is to say, the point at which a combination of several persons for a common object becomes unlawful. But the factum of the criminal agreement should not be confounded with its proof. In certain cases it may therefore be difficult for the Courts to decide whether a particular agreement which forms the basis of a criminal charge was made or concluded at a particular time or at a particular place. But it does not follow therefrom that the scope of conspiracy would determine where the conspiracy or part of it occurred. It is not the act done in pursuance of the conspiracy but the place where the conspiracy was formed or made which determines the jurisdiction of the Court and it has been consistently held that in an indictment for conspiracy, the venue should be laid where the conspiracy was and not where the result of such conspiracy was put into execution—*Pursumal Gerimal*, 39 Cr.L.J. 630 (632), 175 I.C. 620, A.I.R. 1938 Sind 108, 10 R.S. 298; *Gokaldas v. Emp.*, 27 S.L.R. 392, 148 I.C. 135, A.I.R. 1933 Sind 333, 1933 Cr.C. 1130, 35 Cr.L.J. 585, 6 R.S. 180. See also *Russel on Crime and Misdemeanours*, Edn. 8, p. 185. See also *Gokaldas v. Emp.*, in Note 557.

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Being a thug or belonging to a gang of dacoits, escape from custody, etc.

(2) The offence of criminal misappropriation or of criminal breach of trust may be inquired into or tried by a Court within the local limits of whose jurisdiction any part of the property which is the subject of the offence was received or retained by the accused person or the offence was committed.

Criminal misappropriation and criminal breach of trust.

(3) The offence of theft or any offence which includes theft or the possession of stolen property, may be inquired into or tried by a Court within the local limits of whose jurisdiction such offence was committed or the property stolen was possessed by the thief or by any person who received or retained the same knowing or having reason to believe it to be stolen.

Theft.

(4) The offence of kidnapping or abduction may be inquired into or tried by a Court within the local limits of whose jurisdiction the person kidnapped or abducted was kidnapped or abducted or was conveyed or concealed or detained.

Kidnapping and abduction.

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As a result of this amendment, sec. 181 (3) means that the offence of being in possession of stolen property may be inquired into either at the place where it was

is committed not at the place where the accused withdraws the money, but at the place where he dishonestly appropriates it or converts it to his own use—*Mangal*, 36 Cr.L.J. 112, 152 I.C. 463, 11 O.W.N. 1392. Under this section, the offence of misappropriation or criminal breach of trust may be tried by the Court within whose jurisdiction (a) any part of the property which is the subject of the offence was received or (b) retained by the accused or (c) the offence was committed—*Gunananda v. Santi*, 29 C.W.N. 432 (435), A.I.R. 1925 Cal. 613, 41 C.L.J. 80, 26 Cr.L.J. 725, 86 I.C. 213. In this case Mukherji, J. specified another *forum* of trial, viz., where the accused is under a liability to render accounts at a particular place and fails to do so by reason of his having committed an offence of criminal breach of trust which is alleged against him, the Court within the local limits of whose jurisdiction that place is situated may inquire into and try the offence under the provisions of this section—*Gunananda v. Santi Prakash*, 29 C.W.N. 432 (437), 41 C.L.J. 80, 26 Cr.L.J. 725. This case has been followed in *Yacoub v. Abdul Gunny*, 6 Rang. 380, 29 Cr.L.J. 940 (942), and *Ram Sahai v. Krishna*, 27 Cr.L.J. 900 (901), 7 Lah.L.J. 586. But the Bombay and Rangoon High Courts dissent from this view—*Jiwandas*, 55 Bom 59 (F.B.), 32 Cr.L.J. 331 (335), 42 Bom.L.R. 1195; *Ali Mahomed Kassim*, 9 Rang. 338, 32 Cr.L.J. 1120 (1123), 134 I.C. 209, A.I.R. 1931 Rang. 164, 1931 Cr.C. 660, Ind. Rul. 1931 Rang. 273 (explaining and distinguishing 6 Rang. 380, 29 Cr.L.J. 940, A.I.R. 1928 Rang. 217. The Sind Judicial Commissioner's Court has also accepted the view of the Bombay High Court in *Mukhi Tirathdas v. Jethanand Matvalomal*, 38 Cr.L.J. 512, 9 RS 222, 31 SLR 123, 168 I.C. 89, A.I.R. 1937 Sind 68 (F.B.), where Rupchand, A.J.C., observes "When there is no evidence to prove where the offence was committed, that is to say, to prove where the money was misappropriated or dishonestly used in contravention of the trust, except the non-accounting, in the place where the person charged with the offence ought to have accounted for the same and failed to do so or has accounted falsely, it is open to the Court to presume that the offence was committed at that place. To that extent I am not prepared to quarrel with the decision of the Allahabad High Court, but I am not prepared to divide sec 405 into two parts, the positive and the negative parts, or to hold that if the offence falls under the second part, the offence is committed in a place other than where the money is actually misappropriated or misused; or to hold that the failure to account for the money in terms of the contract amounts to the offence of criminal breach of trust." And even the Calcutta High Court has recently doubted the correctness of that view—*Pascal v. Raj Kishore*, 35 C.W.N. 320 (321), 133 I.C. 703, A.I.R. 1931 Cal. 521, 1931 Cr.C. 673, Ind. Rul. 1931 Cal. 751, 32 Cr.L.J. 1042. In the recent Calcutta case of *Paul de Flonder*, 35 C.W.N. 809 (814, 815), 32 Cr.L.J. 1167, 134 I.C. 433, A.I.R. 1931 Cal. 528, 59 Cal. 92, 1931 Cr.C. 680, Ind. Rul. 1931 Cal. 817, Lort-Williams, J. after reviewing all the above cases has laid down the following proposition: The offence of criminal misappropriation is triable at the place where the property concerned was received or retained by the accused, or where the offence was committed. But it is sometimes difficult to prove exactly where the misappropriation took place, because misappropriation depends upon intention, and it is not always clear where the intention to misappropriate was formed. If there is evidence, apart from the fact of non-accounting, to show where the misappropriation was committed, the venue may be laid either in that place or in the place where the property was received or retained. But if there is no evidence to show where the misappropriation was committed other than the fact of non-accounting, then the venue may be laid in the place where the accused failed to account, because, that is, where the offence was committed within the meaning of sec 181 (2). Where it was not alleged by the complainant that there was misappropriation committed in respect of the sum which formed the subject-matter of the case or any component parts of it at any particular place but the whole of the case as to misappropriation was founded upon the allegation that there was no accounting in respect of the money and account was to be rendered at the Sudder Kutchery in Calcutta. Held that the Presidency Magistrate has jurisdiction to try the *Prokas v. Mohim*, 35 Cr.L.J. 734, A.I.R. 1934 Cal. 392, 148 I.C. 736, 1934 Cr.C. But where the moneys were alleged to have been received in Behar and it was in

again that the alleged omissions to credit them in the firm's books took place, the mere non-accounting in Calcutta will not give the Presidency Magistrate jurisdiction to try the offences of criminal breach of trust and falsification of accounts—*Niwasilal v. Routhmull*, 32 Cr.L.J. 1249, 134 I.C. 929, A.I.R. 1931 Cal. 532, 1931 Cr.C. 684, Ind. Rul. 1931 Cal. 929.

The complainant and the accused were doing business together and the accused managed the business at Lucknow in partnership with the complainant, and on the dissolution of partnership it was agreed that certain sums that were due to the firm should be collected by the accused at Lucknow and remitted to the complainant at Sukkur. *The accused collected the sums due but failed to remit them, and a complaint was made at Sukkur by the complainant against the accused for an offence under sec. 405, I. P. C.* Held that the offence of criminal breach of trust consists in a person dishonestly misappropriating or converting entrusted property to his own use or dishonestly using or disposing of that property in violation of any direction of law or of any legal contract, and that it is the dishonest misappropriation or conversion or user or disposal as the case may be that is the essence of the offence. If money is to be sent to Sukkur which is dishonestly misappropriated or converted or used or disposed of within the meaning of sec. 405, I. P. C., at Lucknow, and is not sent to Sukkur, it cannot be said that it was dishonestly misappropriated or converted or used or disposed of at Sukkur, nor does sec. 43, I. P. C., make any difference to the case. It may be said that the failure to send it to Sukkur is evidence of dishonest misappropriation or conversion or user or disposal at Lucknow, but a jurisdiction is not to be determined by the place where evidence is to be found but by the place where the offence is committed. The failure to send the money was a failure to send from Lucknow because of the offences there committed, so that the omission to receive it at Sukkur is merely proof of the failure to send it from Lucknow and of evidence of the commission there of the offence which presumably preceded the failure to send. The Sukkur Court had, therefore, no jurisdiction to try the case—*Mukhi Tirathdas v. Jethanand Matvalomal*, 38 Cr.L.J. 512 (515), 9 R.S. 222, 31 S.L.R. 123, 168 I.C. 89, A.I.R. 1937 Sind 68 (F.B.).

In view of the specific provisions contained in sec. 181 (2) with regard to the jurisdiction of the Courts to try the offence of criminal breach of trust, a Court within whose jurisdiction the property which is the subject matter of the offence was received or retained has jurisdiction to try such offence, even though the actual offence is committed outside its limits. Even, if the property is received quite properly and innocently at one place and is subsequently dealt with at another place dishonestly by the accused, he can be tried at the place where he received or retained the property—*Laxman*, 51 Bom. 101, 28 Bom.L.R. 1292, 29 Cr.L.J. 44.

K, a resident of Amritsar, gave loan to I, an inhabitant of the district of Lahore. K demanded the loan from I who pleaded discharge and produced the original promissory note with an endorsement on its back in the handwriting of H, also a resident of Amritsar. K instituted a case against H under sec. 379 read with sec. 403, I. P. C., in the Court of Amritsar and a charge under sec. 403, I. P. C., only was framed against H. Held that the Court at Amritsar had jurisdiction to try the case as, when both the complainant and the accused belonged to Amritsar, it would consequently be fair to presume that the promissory note came into the possession of the accused at Amritsar and that, after receiving the amount of the promissory note from I, he retained the money so obtained at Amritsar—*Husain Bakhsh v. Khuda Bakhsh*, A.I.R. 1937 Lah. 85, 39 P.L.R. 868, 171 I.C. 629, 38 Cr.L.J. 1100, 10 R.L. 218, I.L.R. (1937) 18 Lah. 299.

Where the direction of law or the contract requires that the accused should dispose of the property at a particular place, then the Court having jurisdiction at that place will have the jurisdiction to try the offence of the second part of sec. 405, I. P. C., where there is a charge that the accused has failed to comply with the direction of law or the legal contract and has failed to carry out his duty at that place. The first part of sec. 405, I. P. C., will apply where it is known that the accused had dishonestly misappropriated or converted to his own use certain property at a particular place and

the jurisdiction to try the accused will be at the place where that dishonest misappropriation or conversion has taken place. But where it is alleged that the accused has failed to account for the property then the second part of sec. 405, I. P. C., will apply and jurisdiction exists at the place where the property should have been delivered by the accused—*Mohru Lal*, 37 Cr.L.J. 284 (286), 160 I.C. 356, A.I.R. 1936 All. 193, 58 All. 644, 1936 Cr.C. 214, 1936 A.L.R. 107, 8 R.A. 593, 1936 A.L.J. 3; *Brij Kishore v. Chandrika Prasad*, 37 Cr.L.J. 322, A.I.R. 1936 Oudh 329, 160 I.C. 567, 1936 O.L.R. 89, 1936 O.W.N. 212. But there is no authority for the proposition that where there is only a liability to account at a certain place and no duty to deliver any property at that place still the Criminal Court at the place where the accounting is to be done has jurisdiction to try the offence. An agreement to render accounts at a particular place cannot be deemed to include in every case a further agreement to carry any property or money to that place. Where the question of jurisdiction turns upon the allegations made by a party it is not fair to read into them something which they do not express and which may or may not be implied—*Fatch Singh v. Emp.*, A.I.R. 1940 All. 92 (94), 1939 A.L.J. 1060, 1939 A.W.R. (H.C.) 784, 1939 A Cr C 198, 41 Cr.L.J. 325, 186 I.C. 481, I.L.R. 1940 All. 43. The view adopted in the case of *Mohru Lal*, supra, was not followed by the Rangoon High Court in *Vasanji Khimjee v. Kanji Tokersey*, 39 Cr.L.J. 529, 175 I.C. 175, A.I.R. 1938 Rang. 94, 1938 Rang. 1, 10 R.R. 468. It has been laid down in that case that a person might fail to remit the money, or bring it to the place to which he had to bring it, through cause beyond his control. The failure to remit the money or to bring it to the place to which he had to bring it does not necessarily constitute the offence of criminal breach of trust although a person may have to account for money; it is not the failure to account, but the misuse of the money for dishonest purposes, which constitutes the offence. Where, therefore, the complainant alleged that the accused was an employee in the service of the firm at Akyab but was subsequently admitted as a partner and agreed to go to Cochin, receive consignments of rice sent by the firm both from Akyab and Rangoon, sell it there and submit accounts and pay the net cash balance from the business to the firm at Akyab but did not do so and also failed to remit or account for a certain sum of money which he realized on behalf of the firm in a Court of law whilst he was in Cochin, held that the Court at Akyab had no jurisdiction to try the offence because it had not been committed in Akyab. If he had left the money in Cochin then it would appear that he may have committed a breach of trust by so doing and obviously the offence was committed in Cochin. If he took the money somewhere else, it is equally clear that he must have misappropriated the money in Cochin because it was there that he failed to do with the money that which it was required of him to do, namely, send it to be the firm at Akyab, but removed it elsewhere.

Where the accused was entrusted with a railway receipt for goods in one district with instructions to take delivery of the goods at their destination in another district and to sell them in complainant's account, and the accused sold them and misappropriated the sale-proceeds, it was held that the offence was triable by the Court within the jurisdiction of which the goods were sold and the money was received and misappropriated. It was held further that the "property which was the subject of the offence" in this case was not the railway receipt but the money received on sale of the goods—*Kasi Chetty v. Kasi Chetty*, 10 Bur.L.T. 50, 18 Cr.L.J. 645. Where it is alleged that the accused received a number of items on various dates and subsequently embezzled the entire sum or part thereof in his hands, it is open to the complainant and the Magistrate to consolidate all the items which the accused is alleged to have received, and to frame a charge under sec. 222 (2), Cr. P. C., in respect of only one offence, instead of many offences, as would be the case if each item received by him is to be the subject of a separate charge. The combined effect of secs. 222 (2) and 181 (2), Cr. P. C., is that the accused can be tried by a Court within the local limits of whose jurisdiction any part of the property which is the subject of the offence was received by him—*Sundar Lal*, A.I.R. 1932 All. 26, 1932 A.L.J. 160, 33 Cr.L.J. 127, 135 I.C. 228, 1932 Cr.C. 35.

The complainant sent nine entries addressed to the Illustrated Weekly of India Commonsense Cross Word, Bombay, with a postal order for Rs 6 from the post office of Muzaffarnagar. The complainant's case was that the free-entry coupon No. 2 sent by the complainant tallied exactly with correct solution published by the accused but the prize of Rs 25,000 payable to him was never paid. It was further alleged that the complainant sent in scrutiny claim for the re-examination of the solutions sent by him and also Rs. 5, by money order from the post office of Muzaffarnagar, as demanded by the accused. The accused did not send any reply to the inquiries made by the complainant. The complaint was filed in the Court of a Magistrate of the Second Class at Muzaffarnagar, alleging that the accused, who was one of the directors of the Company editing the paper, the Illustrated Weekly of India, by his acts of omission and commission cheated the complainant out of the sum of Rs. 25,000 and further criminally misappropriated the sum of Rs. 6 sent by postal order as entry fee and the sum of Rs. 5 sent by money order as scrutiny fee. *Held* that the delivery of the aforesaid amounts to the accused was as agent of the Illustrated Weekly of India. That being so, it could not be suggested that the accused received the letter containing the postal orders at Muzaffarnagar. The post office was the agent of the addressee and not of the accused. It might be that the accused converted the postal orders to his own use, but the conversion and misappropriation was effected at Bombay and not at Muzaffarnagar. There was yet another reason why the Magistrate at Muzaffarnagar had no territorial jurisdiction. It was conceded that the complainant sent the postal orders to the Illustrated Weekly to be allowed to enter the competition. It followed that the intention of the complainant was that the money should be appropriated by the addressee. If the accused dishonestly and fraudulently misappropriated the money which was the property of the Illustrated Weekly of India, he deprived the addressee of the money and not the complainant. Whatever view might be taken there could not be the least doubt that according to the allegations of the complaint the misappropriation took place at Bombay and not at Muzaffarnagar. The offence of cheating was also committed at Bombay and not at Muzaffarnagar. So the Magistrate at Muzaffarnagar had no territorial jurisdiction to try the case—*G. A. St. George v. Uma Dutt*, A.I.R. 1939 All. 602, 1939 A.L.J. 574, 40 Cr.L.J. 917, 184 I.C. 313, 12 R.A. 217, 1939 A Cr.C. 117, 1939 A.W.R. (H.C.) 570.

The accused as a carrier was entrusted with 225 baskets of parchment coffee at Mysore for delivery at Mangalore. When the consignment was handed over in Mangalore it was found that from 27 bags coffee had been abstracted and tailings of no value substituted. There was no evidence as to where or when the coffee was abstracted. *Held* that the failure to deliver was the only evidence of the misappropriation and it was sufficient evidence of the time and place in the absence of the evidence to the contrary, to establish that there was a disposal in violation of the contract at least at the place of delivery and the Magistrate of Mangalore had, therefore, jurisdiction to try the accused under sec. 407, I. P. C.—*Public Prosecutor v. Pedimonu Beary*, 30 Cr.L.J. 245, 114 I.C. 238, 55 M.L.J. 499, 1928 M.W.N. 791, A.I.R. 1928 Mad. 1136, 28 M.L.W. 843, Ind. Rul. 1929 Mad. 254, 52 Mad. 61.

A contractor at Barisal placed an order for certain goods with the complainant's firm carrying on business in Calcutta. The goods were to be sent to Barisal and it was arranged that the purchase price would be remitted to the complainant's firm by a bank at Barisal. It was alleged that the purchaser deposited this sum with the bank at Barisal and instructed that bank to remit the money to the complainant's firm at Calcutta. The accused who were the Secretary and Managing Director of the bank dishonestly retained the money in contravention of this direction. *Held* that both the entrustment and the breach took place at Barisal and the offence was completed there. It could not be said that any part of the property in question was received or retained elsewhere than in Barisal or that the offence was committed in any other place—*Huda v. Ali Hussain*, A.I.R. 1940 Cal. 367 (368).

- **Sub-section (3):**—The offences of theft and the possession of stolen property cannot be tried by a Magistrate, if neither the offence of theft was committed nor the property possessed within his jurisdiction, even though a conspiracy to commit these offences was entered into in a place within his jurisdiction—*Bisseswar*, 28 C.W.N. 975, 83 I.C. 911, 26 Cr.L.J. 207 (208). This sub-section as amended means that the offence of being in possession of stolen property may be inquired into either in the district where it was stolen or where it was found to be dishonestly possessed. This indeed is expressly stated in Illustration (b) to sec 180, Cr. P. C.—*Emp. v Bhima*, 27 Cr.L.J. 21, 91 I.C. 53, A.I.R. 1926 All. 167, 24 A.L.J. 148; *Zahir Nat*, 35 Cr.L.J. 1092, 150 I.C. 558, A.I.R. 1934 All. 455, 1934 Cr.C. 524.

564. Sub-section (4)—Scope:—This sub-section refers only to cases of kidnapping and abduction, but it does not apply to offences under Chapter XX of the I. P. C., e.g., detaining a married woman for the purpose of illicit intercourse (sec. 498, I. P. C.). Such offence is to be inquired into only in the district where the detention of the woman occurs—*Jaswant*, 51 P.L.R. 1918, 18 Cr.L.J. 438.

Kidnapping:—Sub-section (4) was for the first time added in the Code of 1898. Prior to 1898, it was held that the offence of kidnapping, not being a continuing offence, could be tried only by the Court within the local limits of which the minor was taken out, and not by the Court within whose jurisdiction the minor was confined—*Surja*, 1883 A.W.N. 164; *Prasadi*, 1887 A.W.N. 139; nor by the Court within whose jurisdiction the minor was conveyed—*Budha*, 1883 A.W.N. 67. But these decisions are no longer good law. See also *Ramder*, 18 All. 350, *Ram Sundar*, 19 All. 109, *Tika*, 26 All. 197, *Nema*, 27 Cal. 1041, *Rakhal*, 2 C.W.N. 81, where it has been held that the offence of kidnapping is not a continuing offence but is complete as soon as the minor is taken out of the custody of the lawful guardian. Under the present section, it is not necessary to decide whether the offence is a continuing one; the forum of trial must be decided with reference to the provisions of sub-section (4).

The words 'kidnapping' and 'abduction' do not include an offence of wrongfully confining or keeping in confinement the kidnapped person—*Badlu*, 46 All. 138, 21 A.L.J. 912, 25 Cr.L.J. 552. A girl was kidnapped in the Badaun district by D and B. These men took the girl to a place in Etah district where they met two other men H and A, and the four men then took the girl to Karnal district in the Punjab to the house of one Dallu. Held that the offence committed by D and B (*viz.*, kidnapping, sec. 366, I. P. C.) may be tried in Budaun, Etah, or Karnal; the offence committed by H and A (*viz.*, keeping in confinement a kidnapped person, sec. 368, I. P. C.) should be tried in Etah; and the offence committed by Dallu (sec. 368, I. P. C.) should be tried in Karnal—*Ibid.* But the Oudh Chief Court has held that the offence of wrongfully confining a woman knowing her to be abducted can be tried by the same Court which can try the offence of abduction, *i.e.*, can be tried not only by the Court of the place where the woman was confined but also by the Court of the place from which she was abducted. This is also evident from Illustration (c) to sec. 180—*Parag*, 9 O.W.N. 1181, 1933 Cr.C. 85 (87), 34 Cr.L.J. 220, 141 I.C. 741, A.I.R. 1933 Oudh 45, Ind. Rul. 1933 Oudh 77, dissenting from *Badlu*, *supra*. The offence of abduction has been held to be a continuing one, and where the offence is a continuing one and continues to be committed in more local areas than one, it may be enquired into or tried by a Court having jurisdiction over any such local areas—*Parag*, *supra*.

See also Note 565.

A person kidnapped outside British India and conveyed into British territory cannot be tried by British Courts. See *Bhuta Santal v. Dama Santal*, 20 C.W.N. 62, *Jai Mal Singh*, 1901 P.R. 1 and *Koochri*, 7 S.L.R. 17 cited under Note 561 above.

182. When it is uncertain in which of several local areas an offence was committed, or where an offence is committed partly in one local area and partly in another, or

Place of inquiry or trial where scene of offence is uncertain or not in one district only or where offence is continuing or consists of several acts.

where an offence is a continuing one and continues to be committed in more local areas than one,

or where it consists of several acts done in different local areas,

it may be inquired into or tried by a Court having jurisdiction over any of such local areas.

565. Object of Section:—This section intends to provide for the difficulty which would arise where there is a conflict between the different areas, in order to prevent an accused person from getting off entirely because there may be some doubt as to what particular Magistrate has jurisdiction to try the case.—*Bichitranund v. Bhugbut*, 16 Cal. 667 (676). Where there is an uncertainty as to whether a particular spot where an offence has been committed is situated within one district or another, sec. 182 is applicable and the offence may be tried by the Court of either district.—*Punardco v. Ram Saran*, 25 Cal. 858 (860), 2 C.W.N. 577. Such a case arises where the offence is committed at a place which is the boundary line of two districts, and there is some uncertainty as to which is the true boundary.—*Ibid.* Where the accused who was a travelling agent of a firm, employed to sell goods, sold the goods, and misappropriated some of the money, and it was not possible to say exactly where the various acts of embezzlement took place, it was held that according to the first para of this section the accused was triable either at the place where the firm was situated or at one of the various districts through which the accused travelled.—*Mahadeo*, 32 All. 397, 7 A.L.J. 319, 6 I.C. 563, 11 Cr.L.J. 372; *Anthony D'Mello v. Joseph Mathew Pereira*, 38 Cr.L.J. 977, 171 I.C. 42, 1 I.R. 1937 Bom. 743, 10 R.B. 169, 39 Bom.L.R. 620, A.I.R. 1937 Bom. 371.

If a defamatory letter is posted in Madras with a view to its being read in Tinnevely, the offence of defamation is triable either in Madras or in Tinnevely under sec. 179 or 192.—*Krishnamurthi v. Parasurama*, 44 M.L.J. 648, 24 Cr.L.J. 309. An offence under sec. 134 of the Companies Act, 1913 (default in filing balance sheet), even though the Company is situate outside Calcutta, can be tried by the Presidency Magistrate of Calcutta, because the office of the Registrar of joint stock companies where the balance sheet is to be filed is in Calcutta.—*Debendra v. Registrar of the Joint Stock Companies*, 45 Cal. 486 (490).

Where in a case of uncertainty as to local area, the trying Magistrate was of opinion that the offence was triable in his Court, but the accused moved the District Magistrate, who relying upon the report of a S. D. O., held that the offence should be tried in another Court, and quashed the proceedings taken before the trying Magistrate, held that the District Magistrate ought to have issued notice to the complainant and come to a proper finding of his own on the question of the local jurisdiction, instead of relying solely on the report of the S. D. O.; held further that the District Magistrate could not quash the proceedings but ought to have made a reference to the High Court.—*Kasim Ali v. Md. Tajajal*, 49 C.L.J. 62, 30 Cr.L.J. 401 (402), 115 I.C. 95, A.I.R. 1929 Cal. 204, Ind. Rul. 1929 Cal. 319.

Continuing offence:—If a person has several adulterous sexual intercourses with a woman at several places, the offence committed is not a continuing offence, nor does it consist of 'several acts done in different local areas'—*In re Shankar*, 53 Bom. 69, 113 I.C. 70, 30 Cr.L.J. 51 (55), 30 Bom.L.R. 1435, A.I.R. 1928 Bom. 530. The offence of kidnapping from lawful guardianship is not a continuing offence. As soon as the minor is

actually removed out of the custody of her guardian, the offence is completed. The offence is not continuing as long as the minor is kept out of guardianship. But the offence of *abduction* is a continuing one. A girl is said to be abducted not only when she is first taken from any place, but also when she is removed from one place to another—*Nankua*, 53 All. 140, 1930 A.L.J. 1485, 32 Cr.L.J. 690 (691), 131 I.C. 246, A.I.R. 1931 All. 55, 1931 Cr.C. 127, Ind. Rul. 1931 All. 358, and the offence may be inquired into and tried by a Court having jurisdiction over any of such places—*Parag*, 9 O.W.N. 1181, 1933 Cr.C. 85 (87), 34 Cr.L.J. 220, 141 I.C. 741, A.I.R. 1933 Oudh 45, Ind. Rul. 1933 Oudh 77. But it is submitted that since the offences of kidnapping and abduction have been specially provided for in sec. 181 (4), it is unnecessary to consider whether they are continuing offences within the meaning of sec. 182.

In a case under sec. 182, I. P. C., where the information given to a public servant is contained in a letter posted at one place and delivered at another, the offence is committed partly in one local area and partly in another. Therefore, the Court within whose jurisdiction the letter was posted as well as the Court within whose jurisdiction the letter was received, can try the offence. In any event sec. 531, Cr. P. C., covers a case like this—*Emp v. Naram Das*, A.I.R. 1936 All. 105, 159 I.C. 808, 37 Cr.L.J. 157.

566. Local area:—The words 'local area' mean a local area to which the Code applies, and not a local area in a foreign country or in a portion of the British Empire to which the Code has no application—*Bichitranund v Bhugbut*, 16 Cal 667 (678). Moreover, the expression includes a District and cannot be restricted to mean the spot where the offence has been committed. Therefore, this section applies where the place of the offence is known but it is doubtful to which district the place belongs—*Punardeo v Ram Saran*, 25 Cal 858 (860), 2 C.W.N. 577.

Where the offence consists of several acts committed in different local areas, a Magistrate having no jurisdiction over any of such local areas cannot try the offence, even though the conspiracy to commit the offence was entered into within his jurisdiction—*Bissessar*, 28 C.W.N. 975, 26 Cr.L.J. 207 (208), A.I.R. 1924 Cal. 1034.

183. An offence committed whilst the offender is in the

Offence committed on course of performing a journey or voyage
a journey may be inquired into or tried by a Court
through or into the local limits of whose jurisdiction the offender,
or the person against whom, or the thing in respect of which,
the offence was committed, passed in the course of that journey
or voyage.

567. Object and Scope:—The object of this section is to remove doubts and inconveniences as regards the exact locality in which the offences alleged to have occurred in a journey or voyage had been actually committed or completed—*Malony*, 1 M.H.C.R. 193.

But this section only applies where the offence is committed in British India and not in a *foreign territory*. The word 'journey' does not include a journey in a foreign territory but is confined to a journey within the territories of British India. Where during the course of a journey through foreign territory and British India, the carrier to whom certain goods were entrusted committed criminal breach of trust in respect of those goods, and there was nothing to show that the offence took place during the journey in British India, the offence could not be tried by any Court in British India—*Nadar*, 24 Cr.L.J. 579, 77 I.C. 727, A.I.R. 1923 Lah. 487.

This section only applies if the place of offence is in British India. It would not give jurisdiction to a Court in British India to try an offence committed outside British India merely because the offence was committed in the course of a journey—*Public Prosecutor v. Pedimonu Beary*, 30 Cr.L.J. 245, 114 I.C. 238, 55 M.L.J. 499, 1928 M.W.N. 791, A.I.R. 1928 Mad. 1136, 28 M.L.J. 843, Ind. Rul. 1929 Mad. 254, 52 Mad. 61, following *Bapu Daldi*, 5 Mad. 23, 1 Weir 1,

568. Offence committed in a journey:—Under this section, if a person is accused before a Court of an offence committed during a journey or voyage, he may be tried by that Court if any part of that journey or voyage during which the offence was committed is within the local limits of the Court's jurisdiction—*Malony*, 1 M.H.C.R. 193. And the Courts competent to try the case of an offender in respect of an offence committed on a journey are the Courts through or into the local limits of whose jurisdiction the offender in the course of the journey passed at the time the offence was committed—*Aminulla v. P. M. Guha*, 1 C.L.J. 334, 2 Cr.L.J. 411. Thus, if a theft is committed from a running train, the offence may be said to have been committed during a journey, and it can be inquired into and tried by any Court having jurisdiction over any part of the country through which the train passed during the course of its journey, no matter in whose jurisdiction the offence was committed—*Lazarus*, 24 Cr.L.J. 253, 71 I.C. 797 (Lah.). Where the offence is committed in the course of a railway journey, the accused can be tried at the place of destination, though the offence was actually committed outside the jurisdiction of that Court—*Moulabux*, 25 Cr.L.J. 439, A.I.R. 1925 Sind 177, 77 I.C. 727.

But this section is applicable only when the journey or voyage is *continuous and uninterrupted*. Therefore, where an offence was alleged to have been committed by the accused in the course of a journey from Bombay to Howrah, but in fact took place between Bombay and Allahabad, at which place both the complainant and the accused broke the journey and then proceeded separately by different trains to Howrah, it was held that the journey from Bombay to Howrah not being continuous, the Magistrate at Howrah had no jurisdiction to try the offence—*Piran*, 21 W.R. 66. Where a guard of a train going from Coimbatore to Madras was found drunk and detained at Arkonam on the way, but he broke away, got into train and arrived at Madras, it was held that the journey must be deemed to have been broken at Arkonam, and the offence (of being drunk, under sec. 27 of the Railways Act) could not be tried at Madras—*Malony*, 1 M.H.C.R. 193.

But any *short stoppage* in the course of a journey does not break the journey. Thus, where some articles were missed from a boat during a halt at S, in the course of a journey to C, it was held that the journey would not be deemed to have been broken by the halt at S, and that the offence of theft could be tried at C—*Abdul Ali*, 25 W.R. 45.

569. Voyage on High Seas:—This section applies only to the trial of offences committed in British India. The words 'journey or voyage' do not include a voyage on the High Seas, or in a foreign territory, but are confined only to a voyage or journey within the territories of British India—*Bapu Daldi*, 5 Mad 23 (25), 1 Weir 1.

But in *Ismail*, Ratanlal 181, where the accused and the complainant sailed from Bombay to Honawar, and during the voyage the accused threw a box of the complainant into the sea, it was held that the Magistrate of Honawar, through whose jurisdiction the accused passed during the voyage, had jurisdiction to try the offence of mischief (although it was committed on the High Seas, about 9 miles off from the coast).

569A. Effect of non-compliance:—Sections 177, 179, 180, 181 and 183, Cr. P. C., no doubt, define the Courts which ordinarily have jurisdiction to try offences. They should, however, be read with section 531, Cr. P. C., and the manifest intention of that section is to provide against the contingency of a finding, sentence or order, regularly passed by a Court in the case of an offence committed outside its local area, being set aside when no failure of justice has taken place—*Doraiswamy Mudali*, 30 Mad. 94 (95), 1 M.L.T. 345, 4 Cr.L.J. 253.

184. All offences against the provisions of any law for the

time being in force relating to Railways, Telegraph, Post Office and Arms Act.

time being in force relating to Railways, Telegraph, the Post-Office or Arms and Ammunition may be inquired into or tried

in a Presidency-town, whether the offence is stated to have been committed within such town or not:

Provided that the offender and all the witnesses necessary for his prosecution are to be found within such town.

185. Whenever any doubt arises as to the Court by which any offence should under the preceding provisions of this chapter be inquired into or tried, the High Court, within the local limits of whose appellate criminal jurisdiction the offender actually is, may decide by which Court the offence shall be inquired into or tried.

185. (1) *Whenever a question arises as to which of two or more Courts subordinate to the same High Court ought to inquire into or try any offence, it shall be decided by that High Court.*

(2) *Where two or more Courts not subordinate to the same High Court have taken cognizance of the same offence, the High Court within the local limits of whose appellate criminal jurisdiction the proceedings were first commenced may direct the trial of such offender to be held in any Court subordinate to it, and if it so decides, all other proceedings against such person in respect of such offence shall be discontinued. If such High Court, upon the matter having been brought to its notice, does not so decide, any other High Court, within the local limits of whose appellate criminal jurisdiction such proceedings are pending, may give a like direction, and upon its so doing all other such proceedings shall be discontinued.*

Change:—This section has been re-drafted by sec 43 of the Cr. P. C. Amendment Act XVIII of 1923. For reasons see below. The old section has been divided into two classes Sub-section (1) which follows the language of the old section, is now restricted to cases where the two Courts, whose relative jurisdiction is in question, are subject to the *same* High Court. And the contingency where the two Courts are subject to *different* High Courts is now provided for in sub-section (2), under an entirely new procedure

570. Sub-section (1)—Nature of doubt:—The meaning of the old section was this: Where more Courts than one had jurisdiction under the preceding sections (secs. 177-184) to try an offence, then if a doubt arose as to the Court by which suc

offence should be tried, it must involve a doubt as to the suitability of one Court as compared with another from the point of view of *convenience* and expediency. The High Court could be called upon to give its decision only where the doubt was—"in which of the two Courts it would be more *convenient* to have the case tried?" and not—"which of the two Courts had *jurisdiction* to try the offence?" The words "under the preceding provisions" show that no question of jurisdiction arose under the old section, the doubt being on a matter of convenience only. Therefore, in a case where both the Magistrate at Calcutta and the Magistrate at Karwar had jurisdiction to try the offence, the Calcutta High Court decided that from the point of view of convenience of the parties and their witnesses, the Magistrate at Calcutta should try the case—*Charu Chandra*, 44 Cal. 595 (609,610), 21 C.W.N. 320, 25 C.L.J. 165, 18 Cr.L.J. 81, 37 I.C. 145 (F.B.). This decision overrules *Rapani Benode v. All India Banking Co.*, 41 Cal. 305, 17 C.W.N. 1207, where it was held that the High Court could interfere only when the doubt arose as to which of the two Courts has *jurisdiction* to try the offence, and, therefore, where two Courts were equally competent to try an offence, i.e., where there was no doubt as to *jurisdiction*, the High Court could not interfere merely on the ground of convenience. The cases of *Hiran Kumar v. Mangal*, 17 C.W.N. 761 (764), 14 Cr.L.J. 398, 20 I.C. 222, and *Gurdit Singh*, 24 P.R. 1917, 18 Cr.L.J. 514 (518) took the same view as 44 Cal. 595; the case of *Girdhar*, 21 A.L.J. 621, 24 Cr.L.J. 929, A.I.R. 1924 All. 77 (78) adopted the contrary view.

The words "under the preceding provisions of this chapter" have been omitted by the Amendment Act of 1923, and the effect of the amendment is that the High Court can now be called upon to decide not only the question as to which of two Courts ought to try the offence from the point of view of *convenience*, but also which of the two Courts has *jurisdiction* to try the offence. This view was taken in *Chaichal*, 5 L.B.R. 17, 9 Cr.L.J. 581 (a case decided under the old section).

571. Extra-provincial jurisdiction of High Court:—Where two complaints were filed in respect of the same offence in two different Courts situated in two different provinces, one at Chittagong Court (under the jurisdiction of the Calcutta High Court) and another at Gujranwalla (under the jurisdiction of the Punjab Chief Court), the High Court at Calcutta, being of opinion that it would be more convenient to have the case tried at Chittagong, made an order that the case be transferred from the Gujranwalla Court to the Court at Chittagong—*Hiran Kumar v. Mangal*, 17 C.W.N. 761 (764), 14 Cr.L.J. 398, 20 I.C. 222. A similar order was made in *Gurdit Singh*, 24 P.R. 1917, 18 Cr.L.J. 514. In the Full Bench case of *Charu Chandra*, 44 Cal. 595 (611), 21 C.W.N. 320, 25 C.L.J. 165, 18 Cr.L.J. 81, 37 I.C. 145, the Calcutta High Court did not actually *transfer* the case from an extra-provincial Court, but made a declaration that the case which had been instituted at Karwar (Bombay) should be tried at Calcutta, leaving the prosecution to take the necessary steps accordingly. This was, of course, a transfer by implication. Thus, all the above cases laid down that the High Court had power to make an order of transfer in respect of a case pending in a Court outside its appellate criminal jurisdiction.

But the Madras High Court was of opinion that the High Court had no power to direct the transfer of a case pending before a Magistrate not subject to its appellate jurisdiction—*Mahomed Ghouse v. Nathu*, 40 Mad. 835, 18 Cr.L.J. 148, 37 I.C. 516, 5 M.L.W. 349.

Sub-section (2) has been enacted to remove this conflict of opinion. By adopting the Madras view it practically disallows the High Court to transfer a case from a Court outside its jurisdiction, and lays down a new procedure in case of such contingency. "In view of the conflicting decisions in the Indian Law Reports, 44 Cal. 595, and Indian Law Reports, 40 Mad. 835, it is proposed to make it clear that one High Court has no power, whether by implication or otherwise, to transfer a case to itself from another High Court or *vice versa*, or to decide which of two other High Courts should try a particular case"—*Statement of Objects and Reasons* (1921).

By adopting the simple procedure laid down in this sub-section, the High Court

will be relieved of the cumbrous procedure of a reference to the Governor-General for an order under sec. 527.

Sub-section (2) applies where two Courts have taken cognizance of the same offence, and not where *only* one Court has taken up criminal proceedings in respect of the offence, and the proceedings have been rightly started in that Court—*Parag*, 9 O.W.N. 1181, 1933 Cr.C. 85 (88).

Sections 185 and 527:—The two sections have entirely different scopes. An order under sec. 527 is an *executive* order which may be made without any opportunity being afforded to the accused to be heard. Moreover, an order under sec. 527 contemplates an order for *transfer*, and recourse may possibly be had thereto if an order made by one High Court is disregarded by another High Court—*Charu Chandra*, 44 Cal. 595 (624) (F.B.), 21 C.W.N. 320 (*per* Mookerjee, J.).

186. (1) When a Pr

Power to issue summons or warrant for offence committed beyond local jurisdiction.

trate, he is the *Provincial Government*, a Magistrate of the first class, sees reason to believe that any person within the local limits of his jurisdiction has committed without such limits (whether within or without British India) an offence which cannot, under the provisions of sections 177 to 184 (both inclusive) or any other law for the time being in force, be inquired into or tried within such local limits, but is under some law for the time being in force triable in British India, such Magistrate may inquire into the offence as if it had been committed within such local limits, and compel such person in manner hereinbefore provided to appear before him, and send such person to the Magistrate having jurisdiction to inquire into or try such offence, or if such offence is bailable, take a bond with or without sureties, for his appearance before such Magistrate.

Magistrate's procedure on arrest.

(2) Where there are more Magistrates than one having such jurisdiction and the Magistrate acting under this section cannot satisfy himself as to the Magistrate to or before whom such person should be sent or bound to appear, the case shall be reported for the orders of the High Court.

Amendment:—The words "Provincial Government" have been substituted for the words "Local Government" by sec. 4 of the Government of India (Adaptation of Indian Laws) Order, 1937.

572. "Empowered":—If a Cantonment Magistrate is not empowered under this section, he can decline to exercise jurisdiction. Under such circumstances the District Magistrate can transfer the case to his own Court under sec. 528, and himself make the inquiry requisite under sec. 186—*Ramji*, *Ratanlal* 849. If a Magistrate not empowered under this section acts in good faith, his proceedings will not be set aside for want of jurisdiction, the defect being cured by sec. 529.

Powers of High Court:—Where the facts of a case fall within this section, not only the Magistrate can proceed under this section, but the High Court also has jurisdiction under cl. 29 of the Letters Patent to direct a Magistrate to make a preliminary investigation and, in the event of a *prima facie* case being made out, to commit

the case for trial to the Sessions. But, under ordinary circumstances it will be for the Magistrate to proceed under the *special* provisions of this section, and the High Court will not exercise the *general* powers conferred by the Letters Patent which are to be applied only in extremely exceptional cases—*Oriental Govt. Security Life Assurance Co. Ltd. v. Masilamany*, 2 Weir 146 (147).

573. Issue of warrant from outside jurisdiction:—It is not necessary that the Magistrate issuing the warrant should be present within the local limits of his jurisdiction at the time of issuing it. It is sufficient if he has jurisdiction in the place where the offender is found. Thus, a Magistrate of Ahmedabad District issued from a place in Kathiawar a warrant for the apprehension of a person who was in Ahmedabad for an offence committed in Kathiawar; it was held that the issuing of the warrant from Kathiawar by the Magistrate without being present in the Ahmedabad District in which he had jurisdiction, was not beyond his competency—*Locha Kala*, 1 Bom. 340 (341).

187. (1) If the person has been arrested under a warrant issued under section 186 by a Magistrate other than a Presidency Magistrate or District Magistrate, such Magistrate shall send the person arrested to the District or Sub-divisional Magistrate to whom he is subordinate, unless the Magistrate having jurisdiction to inquire into or try such offence issues his warrant for the arrest of such person, in which case the person arrested shall be delivered to the police-officer executing such warrant or shall be sent to the Magistrate by whom such warrant was issued.

(2) If the offence which the person arrested is alleged or suspected to have committed is one which may be inquired into or tried by any Criminal Court in the same district other than that of the Magistrate acting under section 186, such Magistrate shall send such person to such Court.

574. "Send the person to the District Magistrate":—Where a British Indian subject was arrested in a British district by a first class Magistrate for an offence committed in a Native State, and the Political Agent's certificate (required by sec. 188) was obtained, it was unnecessary to send the accused to the District Magistrate under this section; the Political Agent's certificate gave full power to the first Class Magistrate to hold the preliminary inquiry himself—*Kahandas, Ratanlal* 97 (98).

188. When a Native Indian subject of Her Majesty commits an offence at any place without and beyond the limits of British India, or

when any British subject commits an offence in the territories of any Native Prince or Chief in India, or

when a servant of the Queen (whether a British subject or not) commits an offence in the territories of any Native Prince or Chief in India, or

when any person commits an offence on any ship or aircraft registered in British India wherever it may be,

he may be dealt with in respect of such offence as if it had

Liability of British subjects for offences committed out of British India

been committed at any place within British India at which he may be found:

Provided that *notwithstanding anything in any of the preceding sections of this chapter*, no charge as to any such offence shall be inquired into in British India unless the Political Agent, if there is one, for the territory in which the offence is alleged to have been committed, certifies that, in his opinion, the charge ought to be inquired into in British India; and, where there is no Political Agent, the sanction of the *Provincial Government* shall be required:

Provided, also, that any proceedings taken against any person under this section, which would be a bar to subsequent proceedings against such person for the same offence if such offence had been committed in British India, shall be a bar to further proceedings against him under the *Indian Extradition Act, 1903*, in respect of the same offence in any territory beyond the limits of British India.

Change:—The italicised words in the first proviso have been added by sec. 44 of the Cr. P. C. Amendment Act, XVIII of 1923

In the second proviso, the words "Indian Extradition Act, 1903" have been substituted for the words "Foreign Jurisdiction and Extradition Act, 1879." This is consequential to the repeal of the old Act by the Act of 1903

The words "Provincial Government" have been substituted for the words "Local Government" by sec. 4 of the Government of India (Adaptation of Indian Laws) Order, 1937.

The words "or when any person commits an offence on any ship or aircraft registered in British India wherever it may be," have been inserted after the words "Prince or Chief in India, where they occur for the second time, by sec. 3 of the Offences on Ships and Aircraft Act, 1940 (Act IV of 1940).

Scope:—Under the terms of sec. 188, Cr. P. C., as it stands since the amendment of 1923, a Court in British India cannot try an offence by virtue of the terms of sec. 179, Cr. P. C., merely because part of the consequences have ensued within its jurisdiction if some part of the offence has been committed in a Native State. The section renders the certificate of the Political Agent necessary even in such cases—*Fakhrullah Khan*, AIR 1935 Mad 423, 68 MLJ 415, 41 MLW. 352, 37 Cr LJ. 195, 159 IC 1048, 1935 MWN 325, 1935 Cr C 446

This section refers to crimes committed beyond the limits of British India—*Manabendra*, AIR 1933 All 498 (500), 1933 Cr C 833

A child marriage contracted outside British India is not an offence under the Child Marriage Restraint Act (XIX of 1929) and if it is not an offence under that Act, there is no offence to which sec. 188, Cr. P. C., apply when such child marriage is contracted by British subjects in a foreign territory—*Narayan*, 37 Cr. L. J. 211, 59 Bom. 745, 159 IC 923, AIR 1935 Bom 437, 37 Bom LR 885, 1935 Cr C. 1305. See *Maganti Subba Rao v. Vedullapalli Kamaraju* in Note 579

In a case under sec. 401, I. P. C., the proof of association of the accused outside British India for the purpose of committing crimes is not barred under sec. 188, Cr. P. Code, read with sec. 4, I. P. C., because the Court is not concerned with the trial of a person for an offence committed outside British India, but with the fact that the accused committed offences outside British India, which affords evidence that the accused associated together for the purpose of committing crime—*Arumugam v. Emp.*,

40 Cr.L.J. 355 (356), 180 I.C. 431, A.I.R. 1938 Mad. 858, 1938 M.W.N. 595, 48 M.W.N. 639.

575. This section controls the preceding sections:—Sections 177 to 184 are controlled by the provisions of sec. 188, so that if the offence specified in those sections (177—184) happen to be committed outside British India, those sections would cease to apply, and the special provision of sec. 188 would come in. Thus, to give concrete illustration, where the offence of criminal breach of trust was committed in a Native State by a British subject, then according to sec. 181, independently of sec. 188, such offence could not have been tried by a British Court. But as secs. 177—184 are controlled by sec. 188, the latter section would apply, and would give jurisdiction to a British Court to try the offence, but the certificate of a Political Agent would be absolutely necessary. See *Tribhum*, 5 S.L.R. 266, 13 Cr.L.J. 530 (531). See also *Sup. and Rem. of L. A., Bengal v. Lundur*, 33 Cr.L.J. 267 (269), 136 I.C. 137, Ind. Rul. 1932 Cal. 185, 36 C.W.N. 456, A.I.R. 1932 Cal. 465, 1932 Cr.C. 455, 59 Cal. 1065. So also, where a person was kidnapped in a Native State and conveyed to British territory, sec. 181 would not apply but the case would fall under sec. 188 and a certificate of the Political Agent would be a preliminary requisite of the trial of the offence by a British Court—*Koochri*, 7 S.L.R. 17, 14 Cr.L.J. 439; *Narain*, 41 All. 452 (454), 17 A.L.J. 450, 20 Cr.L.J. 276. Where a British Indian subject is found in a Native State in possession of stolen articles, he can be tried in British India for an offence under sec. 411 or 412, I.P.C., but the certificate of the Political Agent would be necessary—*Sessions Judge v. Sundara*, 21 M.L.J. 441, 11 Cr.L.J. 306, 6 I.C. 308; *Sana Mathur*, 54 Bom. 171, 32 Bom.L.R. 98, 31 Cr.L.J. 833 (835). Even the fact that there is an alternative charge under sec. 379, I.P.C., for theft in British India, will not enable the Magistrate to try the offence under sec. 411, I.P.C. (receiving stolen articles in a Native State) without the Political Agent's certificate—*Sana Mathur*, supra.

But in a Madras case, where the complainant in a place in British India entrusted certain jewels to the accused, a Native Indian subject of His Majesty, for sale on commission, and the latter pledged the jewels in a Native State and converted them to his use, it was held that since the loss of the jewels (which was *consequence* mentioned in sec. 179) occurred to the complainant in British India, this was sufficient under sec. 179 to give jurisdiction to the British Indian Court to try the offence; that secs. 179—184 should not be read subject to sec. 188, and that no certificate of the Political Agent was necessary—*Assistant Sessions Judge v. Ramaswami*, 38 Mad. 779 (780, 783), 26 M.L.T. 235, 15 Cr.L.J. 207, 22 I.C. 991 (doubting *Sessions Judge v. Sundara*, 21 M.L.J. 441, 1910 M.W.N. 143, 11 Cr.L.J. 306). This view of the law was untenable and the words "*notwithstanding anything. . . . Chapter*" have now been added in the proviso to make it clear that sec. 188 controls the preceding sections of this chapter. The Select Committee observe:—"Certain decisions of the Madras High Court seem to make it doubtful whether section 188 is subject to the provisions of secs. 179—184, and we think it is desirable to clear this up. We are not satisfied that this was the intention of section 188, and in our opinion it is safer, when a man is tried in British India in respect of an offence committed in a Native State, to require the Political Agent's certificate in every case. The amendment which we propose will make this clear."—*Report of the Select Committee of 1916*.

576. Illegal arrest:—See Notes 551 under sec. 177. A trial under this section will not be vitiated by reason of the fact that the accused has been brought into British India from a foreign territory under an illegal arrest—*Vinayak Damodar Savarkar*, 35 Bom. 225, 13 Bom.L.R. 296, 12 Cr.L.J. 356.

577. "Native Indian Subject":—This expression means only a Native Indian subject *de jure* and not *de facto*; a person who is not a Native Indian subject *de jure* but who owns some land in British territory and occasionally resides in British India, does not thereby become an Indian subject, amenable to the jurisdiction of a British Indian Court for an offence committed by him in a foreign territory—*Fakir*, 1885 P.R. 1: on appeal from 1883 P.R. 22.

Foreigners:—This section does not apply to an offence committed by a foreigner outside British territory, though he may subsequently be found in British India—*Abdul Latib*, 10 Bom 186 (188). No foreign subject can be tried in British India for an offence committed outside British India—*Baldewa*, 28 All 372 (374), 3 A.L.J. 146, 3 Cr.L.J. 247; *Ibrahim*, 7 P.R. 1894; *Ranchhod*, 2 Bom.L.R. 337; *Fakir*, 22 P.R. 1883; *Roda*, 30 P.R. 1889. Therefore, where the subject of a Native State committed theft in that State, and was subsequently found in British India in possession of the stolen property, the British Indian Court had no jurisdiction to try him for the offence of theft (but had jurisdiction to try him for retaining stolen property, under sec. 411, I P. C.)—*Baldewa*, 28 All. 372 (374), 3 A.L.J. 146, 3 Cr.L.J. 247; *Abdul Latib*, 10 Bom. 186 (188). See Note 557 under the heading "Offence in Native State."

578. Offence:—The word "offence" in this section means an offence punishable under the Indian Penal Code. Thus, the act of giving false evidence before a foreign Court where the oath is administered not under the provisions of the law in force in British India but under the law of that State in relation to proceedings before the Court, is not punishable under section 193 of the Indian Penal Code, and cannot be taken cognizance of by Magistrates of British Indian Courts. So also, the offence of lodging a false complaint in foreign Court is not punishable under the Indian Penal Code, because it cannot be said that a false information was given to a 'public servant' as defined by the Indian Penal Code. Similarly, the act of instituting criminal proceedings and making false charges before a foreign Court does not constitute an offence under sec. 211 of the Indian Penal Code, because the criminal proceedings and false charges contemplated by that section mean proceedings and charges in British India where the Indian Penal Code is in force. Therefore, offences committed in relation to Courts and authorities outside British India do not constitute offences under the Indian Penal Code and cannot be tried by any Court in British India; and a certificate of the Political Agent is out of the question—*In re Rambharathi*, 47 Bom. 907, 25 Bom.L.R. 772, 25 Cr.L.J. 333, 77 I.C. 189.

"May be found":—The word 'found' must be taken to mean not where a person is discovered, but where he is *actually present*, even though under arrest. So, if the accused committed an offence at R (in a Native State), whence he was brought under arrest to Ahmedabad, where he was tried, *held* that he was "found" not at S, but at Ahmedabad, where he was actually present, though under arrest, and the Ahmedabad Court had jurisdiction—*Maganlal*, 6 Bom. 622 (625). For the purposes of criminal jurisdiction an accused person is found wherever he is actually present, whether or not he has been brought there against his will—*Vinayak Damodar Savarkar*, 35 Bom. 225, 10 I.C. 956, 12 Cr.L.J. 356, 13 Bom.L.R. 296; *Zincke*, A.I.R. 1936 Nag. 152 (153), 37 Cr.L.J. 979, 164 I.C. 687, 1936 Cr.C. 707.

579. Scope of proviso:—This proviso is of universal application and is not restricted to Native States only. If the offence is committed in a Native State, the certificate of the Political Agent is necessary; if the Native State has no Political Agent, the sanction of the Local Government is required. And if the offence is committed in a place other than a Native State, *i.e.*, in a foreign territory, the sanction of the Local Government is likewise necessary, *e.g.*, in case of an offence committed in Spain—*Chellaram*, 6 S.L.R. 260, 19 I.C. 954, 14 Cr.L.J. 298; or at Chandernagar—*Sasadhara*, 35 C.W.N. 1082 (1086).

A British Indian subject cannot be convicted for dishonest retention of property in French territory in absence of a certificate of the Political Agent of the said territory—*Narayanawamy Padayachi*, 31 Cr.L.J. 545, 143 I.C. 190, 1932 M.W.N. 1229, A.I.R. 1933 Mad. 461, 1933 Cr.C. 707, Ind Rul 1933 Mad. 281.

Where a dacoity was committed in British India and murder was committed soon after in the Native State, in attempting to carry away stolen property, the British Indian Court had jurisdiction to try the accused under sec. 395, I P. C., without a certificate as required under this section—*Punjab Singh*, A.I.R. 1933 Lah. 977, 35 P.L.R. 51, 1933 Cr.C. 1467, 147 I.C. 2.

The words "or where there is no Political Agent, the sanction of the Local Government shall be required" have been added to the Code in 1898. Under the previous Codes, when the offence was committed in a territory in which there was no Political Agent, no certificate (or sanction) was necessary, as for instance in Goa (*Daya Bhima*, 13 Bom. 147) or Siam (*Abdul Husen*, Ratanlal 773) or Cyprus (*Sarmukh*, 2 All 218).

In the absence of the certificate of the Political Agent or sanction of the Local Government a charge of an offence under the Child Marriage Restraint Act (XIX of 1929) committed in French territory cannot be inquired into in British India. There is nothing to the contrary in that Act—*Maganti Subba Rao v. Vedullapalli Kamaraju*, A.I.R. 1939 Mad 577, 49 M.L.W. 656, 1939 M.W.N. 742, 40 Cr.L.J. 822, 183 I.C. 708. See *Narayan* above under the heading "Scope" under this section.

530. Offences on High Seas:—Section 188 does not apply to offences committed on the High Seas. The proviso to this section refers to offences committed in a "territory" and not to offences committed on the High Seas. Therefore, an offence committed by a Native Indian subject on the sea at a distance of five or six miles from the coast can be tried by a Magistrate of British India without the sanction of the Local Government—*Manuel Philip*, 41 Bom 667, 18 Cr.L.J. 782, A.I.R. 1917 Bom 280, 41 I.C. 158, 19 Bom L.R. 527; *Fernandes*, A.I.R. 1936 Sind 3, 37 Cr.L.J. 314, 160 I.C. 375, 1936 Cr.C. 50. *Po Thaung*, 5 L.B.R. 221, 10 I.C. 705, 12 Cr.L.J. 198. The power to try offences committed on the High seas is conferred on Indian Courts by Stat 23 & 24 Vict., c. 88 (within three miles from the Coast of British India) and Stat 30 & 31 Vict., c. 124, section 11 (beyond the three miles limit). See *Kastya Rama*, 8 B.H.C.R. 63; *Sheik Abdool Rahiman*, 14 Bom. 227.

531. Political Agent:—A British Vice-Consul appointed by the British Government in any part of a foreign territory or colony under the suzerainty of a foreign independent state is not an officer appointed by the British Government, and does not come within the meaning of a Political Agent as used in this section. *Jerandas*, 36 Cr.L.J. 240 (244), 153 I.C. 60, 28 S.L.R. 27, A.I.R. 1934 Sind 96, 1934 Cr.C. 821. His Britannic Majesty's Minister at Kabul is not a Political Agent—*Mahammed Qasin Khan*, 36 Cr.L.J. 430 (431), 153 I.C. 747, A.I.R. 1934 Lah. 827, 1934 Cr.C. 1154.

531A. Certificate of a Political Agent:—The certificate of the Political Agent is the preliminary requisite for the institution of criminal proceedings in a Court of British India for an offence committed outside British India. Want of certificate will invalidate all subsequent proceedings—*Kal'charan*, 24 All 256 (257); *Ram Sundar*, 19 All 109 (110); *Narain*, 41 All. 452 (454); *Baku*, 24 Bom 287; *Sirdar v. Jethabhai*, 8 Bom L.R. 513, 4 Cr.L.J. 54; *Kathaperumal*, 13 Mad 423 (426); *Bapu Daldi*, 5 Mad. 23 (25); *Ram Charan*, 5 Lah. 416 (420), 27 Cr.L.J. 218; *Buta Singh*, 7 Lah 396, 27 Cr.L.J. 1168; *Ram Prasad*, 11 P.L.T. 433, 31 Cr.L.J. 364 (365); *Fazal Rahman*, A.I.R. 1937 Pesh. 52, 170 I.C. 772, 38 Cr.L.J. 1042; *Khawas Habib*, A.I.R. 1940 Pesh. 4 (5), 41 Cr.L.J. 565, 88 I.C. 290. The want of a certificate is not a mere irregularity which can be cured by section 532 by a subsequent production of the certificate—*Kathaperumal*, supra; *Ram Charan*, supra. Even where the Magistrate was himself the Political Agent, the defect would not be cured by any subsequent production of the certificate signed by him—*Kathaperumal*, 13 Mad. 423 (426).

An agreement entered into (under the instructions of the Political Agent), by some members of Native State and some members of the executive authorities of the neighbouring portion of British India, to the effect that for convenience the British Indian Courts might arrest and try British Indian subjects found gambling in the Native State, and *vice versa*, cannot do away with the necessity of obtaining the certificate or sanction required by this section—*Nandu*, 42 All. 89 (90), 17 A.L.J. 1055, 20 Cr.L.J. 700, 52 I.C. 668.

The obtaining of sanction is imperative and the omission to do so vitiates the

trial and the conviction of the accused—*Ram Prasad*, 31 Cr.L.J. 364, 122 I.C. 155, 11 P.L.T. 433, A.I.R. 1930 Pat. 501.

In a sessions case, the certificate of the Political Agent must be obtained before the commencement of the committal proceedings in the Magistrate's Court—*Ruliya Singh*, 7 Lah. 468, 27 Cr.L.J. 942 (944); and the proceedings of a Magistrate committing an accused to the Sessions Court without a certificate under sec. 188 are void and illegal—*Buta Singh*, 7 Lah. 395, 27 P.L.R. 447, 27 Cr.L.J. 1168; *Ram Charan*, supra; *Narain*, supra; *Kathapurmal*, supra; *Ram Sundar*, supra. Where a commitment was made without the certificate, the fact that the certificate existed at the date of the commitment, (i.e., it had been signed by the Political Agent before the date of commitment) could not cure the defect—*Kalicharan*, 21 All. 256 (257). In certain Punjab cases, however, it has been held that the want of a certificate is not a fatal defect invalidating the commitment, but is a mere irregularity curable by sec. 537, if no objection is taken at the trial and no prejudice to the accused has been caused in the defence—*Shamir Khan*, 1888 P.R. 35; *Roda*, 1889 P.R. 30; *Feteih Din*, 1902 P.R. 4 (F.B.); *Mohammad Qasim Khan*, 36 Cr.L.J. 430, 16 Lah. 73, 37 P.L.R. 419, 153 I.C. 747, A.I.R. 1931 Lah. 827, 1934 Cr.C. 1154. Where, however, the defect was observed and objected to by the Sessions Judge, the commitment should be quashed—*Mastana*, 1899 P.R. 11; *Ram Charan*, 5 Lah. 416 (420), 27 Cr.L.J. 218.

The word 'charge' as used in this section means "accusation" and cannot be limited to a formal charge as in a warrant case—*Harnarayan v. Govindram*, 41 Cr.L.J. 645 (646), 188 I.C. 606; 1940 N.L.J. 304, A.I.R. 1940 Nag. 245. The proviso lays down that "no charge shall be inquired into British India unless the Political Agent," etc., and therefore the Bombay High Court holds that there is nothing illegal in obtaining the certificate or sanction after the complaint has been filed and the inquiry has begun or been completed as far as the framing of the charge—*Sakharam*, 12 Bom.L.R. 667, 7 I.C. 934, 11 Cr.L.J. 543; *In re Ram Bharathi*, 47 Bom. 907 (at p. 911), 25 Cr.L.J. 333, 25 Bom.L.R. 772, A.I.R. 1924 Bom. 51, 77 I.C. 189. If the certificate is not produced at the time the proceedings have reached the stage of framing a charge, the Magistrate cannot proceed any further, but it is open to him to give the complainant a reasonable time within which to obtain the certificate, and then to continue the proceedings in the event of such certificate being obtained—*Allibhoy*, 19 S.L.R. 122, 25 Cr.L.J. 620, A.I.R. 1925 Smd. 588, 81 I.C. 108. In another Bombay case, it has even been held that where the certificate was received after the examination of some prosecution witnesses but before the commitment of the case to the Sessions, the commitment was good, and the irregularity, if any, was cured by sec. 537—*Mahamad Buksh*, 8 Bom.L.R. 597, 4 Cr.L.J. 49. There is no reason why cognizance should not be legally taken even though the further progress of the case depends on the production of a certificate—*Harnarayan v. Govindram*, 41 Cr.L.J. 645 (647), 188 I.C. 606, 1940 N.L.J. 304, A.I.R. 1940 Nag. 245.

A document certifying that a case should be tried in British India, and purporting to be signed by the *Under-Secretary* for the Political Agent, is not sufficient; it is necessary that the *Agent* should himself certify. But a certified copy of an order signed by the Agent himself and directing that a certificate should issue under sec. 188 in the particular case sufficiently meets the requirements of this section. If the order bears a date prior to the commencement of committal proceedings in the Magistrate's Court, though the certified copy is produced in the Sessions Court, the commitment is not invalid—*Ruliya Singh*, 7 Lah. 468, 27 P.L.R. 708, 27 Cr.L.J. 942. When a certificate purports to be a certificate of the Political Agent but is signed by another officer "By order," it may be accepted as sufficient evidence of the fact that the Political Agent had certified as required by this section. But when it does not purport to be a certificate of the Political Agent and is signed by another officer for him it cannot be accepted as a sufficient evidence of the same. *Bhaiji Manar*, 35 Cr.L.J. 629, 148 I.C. 268, 35 Bom.L.R. 1177, A.I.R. 1934 Bom. 41, 1934 Cr.C. 203, 58 Bom. 97. But see *Kalicharan*, 24 All. 256, cited above.

Magistrate not confined to the charges in the certificate:—The Magistrate is not

restricted to the charge mentioned in the certificate. The certificate granted by the Political Agent in respect of an offence will cover every charge which the facts declared in the certificate will suffice to sustain—*Krishna Nath*, 33 All. 514, 12 Cr.L.J. 359. An order of committal on a charge which is different from that mentioned in the certificate but based upon the same set of facts, will be perfectly valid—*In re Sessions Judge*, 8 M.L.T. 203, 11 Cr.L.J. 531, 7 I.C. 802.

Effect of the certificate :—The certificate operates and the case may be dealt with as if the offence has been committed in British India, "when any British subject commits an offence in the territories of any Native Prince or Chief in India," that is, whether he is an Indian British subject or a European British subject, his claim to be tried as a European British subject arises after the certificate has been furnished and it has been decided to deal with him as if the offence had been committed in British India—*Zincke*, A.I.R. 1936 Nag. 152 (153), 37 Cr.L.J. 979, 164 I.C. 687, 1936 Cr.C. 707.

Certificate cannot be revoked :—Where the District Magistrate as the Political Agent granted a certificate for the trial of the accused by a Magistrate in British India, it was held that the latter was legally seised of the case, and it was not competent to the Political Agent to recall the certificate and to hand over the accused to the Native State for his trial in that State—*Vazir Saheb*, 14 Bom.L.R. 377, 13 Cr.L.J. 537, 15 I.C. 809.

189. Whenever any such offence as is referred to in section

Power to direct copies of depositions and exhibits to be received in evidence.

188 is being inquired into or tried, the *Provincial Government* may, if it thinks fit, direct that copies of depositions made or exhibits produced before the Political Agent or

a judicial officer in or for the territory in which such offence is alleged to have been committed shall be received as evidence by the Court holding such inquiry or trial in any case in which such Court might issue a commission for taking evidence as to the matters to which such depositions or exhibits relate. .

Amendment:—The words "Provincial Government" have been substituted for "Local Government" by sec. 4 of the Government of India (Adaptation of Indian Laws) Order, 1937.

B. Conditions requisite for Initiation of Proceedings.

190. (1) Except as hereinafter provided, any Presidency

Cognizance of offences by Magistrates.

Magistrate, District Magistrate or Sub-divisional Magistrate, and any other Magistrate specially empowered in this behalf, may take cognizance of any offence—

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a report in writing of such facts made by any police-officer;

(c) upon information received from any person other than a police-officer, or upon his own knowledge or suspicion that such offence has been committed.

(2) The *Provincial Government*, or the District Magistrate

subject to the general or special orders of the *Provincial Government*, may empower any Magistrate to take cognizance under sub-section (1), clause (a) or clause (b), of offences for which he may try or commit for trial.

(3) The *Provincial Government* may empower any Magistrate of the first or second class to take cognizance under sub-section (1), clause (c), of offences for which he may try or commit for trial.

532. Change:—The words "Provincial Government" have been substituted for the words "Local Government" by sec. 4 of the Government of India (Adaptation of Indian Laws) Order, 1937.

The words in clause (b) have been substituted for the words "upon a police report of such facts," by section 45 of the Cr P C Amendment Act, XVIII of 1923. *In Sada*, 25 Bom. 150, 3 Bom L.R. 586 (F.B.), *Bhairab*, 46 Cal 807 (817, 818), *In re Chidambaram*, 32 Mad 3, *Ram Lal*, 1 PLT 73, 55 IC 285, 21 Cr L.J. 269, *Harihar*, 23 C.W.N. 481, and *Ghulam Husain*, 6 Lah L.J. 606, 25 Cr L.J. 1361, it was held that the term *police report* in the old clause was used in a technical sense as meaning the report of the police in a *cognizable* case only, and that since a police-officer had no power to make a report in a non-cognizable case without the order of a Magistrate under sec 155 (2), a police report in such a case was to be treated as a *complaint* under clause (a) and the procedure of sec 200 was to be followed by the Magistrate. Under the present amendment, the wording of clause (b) is quite general, and would empower a Magistrate to take cognizance of a *non-cognizable* offence upon a report in writing by a police-officer, even though such report was made upon investigation without the order of a Magistrate under sec 155 (2)—*Shivaswami*, 51 Bom. 498, 29 Bom L.R. 742, 28 Cr L.J. 939 (941), 105 IC. 459, AIR 1927 Bom 440, (*per Patkar, J.*); *Ratnavelu*, 49 Mad 525, 27 Cr L.J. 1031 (1037), AIR 1926 Mad 865, 96 IC 983, 52 MLJ 210, (F.B.) (overruling *In re Perumal*, 22 LW 209, 26 Cr L.J. 1550); *Babulal*, 37 Cr L.J. 587, 162 IC 308, 19 NLJ 120, AIR 1936 Nag. 86; *Muhammad Hashim v Emp*, AIR 1940 Sind 134 (135) (F.B.). The present amendment lays down that the report of a police-officer in a non-cognizable case is a report under clause (b) all the same, and not a complaint under clause (a), and the Magistrate will not have to follow the procedure of Chapter XVI, *e.g.* to examine the complainant (*i.e.* the police-officer) on oath. See *Bholanath*, 28 C.W.N. 490, 26 Cr L.J. 68, 83 IC 628; *Ratnavelu*, *supra*; *Shankar Lal*, 9 Lah 280, 28 Cr L.J. 821 (822); *Prag Datt*, 51 All 382, 27 A.L.J. 68, AIR 1928 All 765, 111 IC 382, 29 Cr L.J. 938; *Nagendra Nath*, 51 Cal 402 (414); *Mt Lachmi Devi v. Emp*, AIR. 1931 Cal 122 (127), 35 C.W.N. 257, 130 IC. 241, 1931 Cr C 154, 32 Cr L.J. 511, 53 CLJ 461, 58 Cal 971. Even though sec. 4 (h), Cr. P. C., has not been amended, the words in it as it stands, are sufficiently wide to include a report of a non-cognizable offence and the meaning of the phrase in the two secs 190 and 4 (h), although the wording is different, amounts to the same thing. The report of a police-officer whether in a non-cognizable or in a cognizable offence does not amount to a complaint—*Babulal*, 37 Cr L.J. 587, 162 IC 308, AIR. 1936 Nag. 86, 1936 Cr.C. 551, 1 LR. 1936 Nag. 50, 19 NLJ. 120. In the above case of 51 Bom. 498, Fawcett, J., adhered to the old view (following 26 Bom 150, F.B.), *viz.* that a report made by a police-officer in a non-cognizable case without the investigation being ordered by a Magistrate under sec 155 (2), was not a report but a complaint, that the amendment of clause (b) has not changed the law in this respect, and that the Magistrate could not take cognizance of the case upon such report under clause (b) of sec. 190. Even Patkar, J., at the end of his judgment said that he was inclined to treat the report as a complaint. See also *Raghunath*, 34 Bom L.R. 901, 1932 Cr C. 868 (869), 33 Cr L.J. 733 (734), 139 IC. 281, AIR. 1932 Bom. 610, Ind. Rul. 1932 Bom. 484. But so far as

examination of the complainant (sec. 200) is concerned, this view makes no difference, for even if the report be treated as a *complaint* under clause (a) and not as a police report, the examination of the police-officer (complainant) is not necessary, under the new clause (a) of sec. 200. See *Ratnavelu*, supra; and the view of Patkar, J. in 51 Bom. 498, 28 Cr.L.J. 939 (at p. 941).

By virtue of sections 190 (1) (b) and 200 (a), Cr. P. C., Magistrates mentioned in sec. 190 are entitled to take cognizance of even non-cognizable offences upon a report made in writing by a police-officer without examining the officer upon oath—*Ratnavelu*, 49 Mad. 525, A.I.R. 1926 Mad. 865, 27 Cr.L.J. 1031, 1927 M.W.N. 43, 25 M.L.W. 248, 52 M.L.J. 210 (F.B.); *Shankar Lal*, 28 Cr.L.J. 821, 104 I.C. 437, A.I.R. 1929 Lah. 702, 9 Lah. 280, 29 P.L.R. 469; *Prag Datt Tiwari v. Emp.*, A.I.R. 1928 All. 765, 51 All. 382, 1929 A.L.J. 68, 111 I.C. 858, 29 Cr.L.J. 938; *Lal Bihari*, 31 Cr.L.J. 55, 120 I.C. 297, 10 P.L.T. 601, A.I.R. 1929 Pat. 514.

Moreover, before the present amendment, the words 'police report' were used in a technical sense to mean a police report under section 170 or 173, i.e., a report made *after investigation*, and not an information sent by the Police to the Magistrate before making any investigation—*Ahmed Khan*, 5 S.L.R. 1, 12 Cr.L.J. 93, 9 I.C. 492; *Khusaldas*, 6 S.L.R. 82, 13 Cr.L.J. 752; *In re Nagendra Nath*, 51 Cal. 402 (413); *Sada*, 26 Bom. 150 (157). See also *Ghulam Hussain*, 25 Cr.L.J. 1361, 82 I.C. 753, 1 Lah. Cas. 16, 6 L.L.J. 605, A.I.R. 1924 Lah. 237. Under the present amendment the words have been changed altogether and replaced by the non-technical words "report made by any police-officer" which would certainly include a report or information given *before* investigation. Even before the present amendment, it was held in a Sind case that the Police report referred to in this section was not confined to a report under sec. 173 but was wide enough to cover reports under other sections of Chapter XIV (e.g., reports under secs 157 and 168), nor was it confined to reports under Ch. XIV alone—*Mehrab*, 17 S.L.R. 150 (F.B.), 26 Cr.L.J. 181 (183) (dissenting from 5 S.L.R. 1). See *Abdullah Khan*, 34 Cr.L.J. 256, 141 I.C. 879, Ind. Rul. 1933 Sind 79, A.I.R. 1933 Sind 188, 1933 Cr.C. 569. If the police makes a report after investigation into a non-cognizable offence under the order of a Magistrate under sec. 155 (2), the report would fall under clause (b) of this section—*Shivastami*, supra; *Chandri Bawooji*, 49 Bom. 212, 26 Cr.L.J. 441.

533. Magistrate empowered:—Under this section a third class Magistrate can take cognizance of an offence under clauses (a) and (b) only i.e., upon a complaint or a police report—*Sada*, 26 Bom. 150.

The District Magistrate of the Civil and Military Station of Bangalore has jurisdiction to take cognizance of and try offences committed by European British subjects in accordance with the provisions of this Code—*Marchant*, 34 Mad. 346 (348), 9 I.C. 255, 12 Cr.L.J. 42.

If a Magistrate not empowered to take cognizance under cl. (a) or (b) does so under a *bona fide* mistake, his proceedings will not be set aside merely on the ground of his not being empowered. See sec. 529 (e). But proceedings under clause (c) of a Magistrate not empowered to take cognizance under that clause are void. See sec. 530 (k).

If a Magistrate not empowered to take cognizance of offences upon complaint (e.g., a second class Magistrate who is not competent to take cognizance of a murder case) nevertheless takes cognizance of the case, sends the complaint to the police for inquiry, and on receiving the police report, dismisses the complaint as false and prosecutes the complainant under sec. 211, I. P. Code, for making a false complaint, the action of the Magistrate in taking cognizance of the offence may be cured by sec. 529 (e), but the further action of the Magistrate in prosecuting the complainant for making a false complaint cannot be validated by sec. 529 (e)—*Bengali Gope*, 5 Pat. 447, 7 P.L.T. 335, 27 Cr.L.J. 704.

The District Magistrate cannot authorize a second class Magistrate to take cognizance of complaints of offences which the second class Magistrate is not competent to try (e.g., a case of murder). Section 37 and Schedule IV of this Code must be read

with sec. 190; and there is nothing in these provisions to extend the power which the District Magistrate can confer—*Bengali Gope*, supra.

534. Offence:—A Magistrate authorised under this section to take cognizance of an offence upon complaint, can take cognizance of an offence under sec. 20 of the Cattle Trespass Act, even in the absence of a special authorisation in that behalf; because the very definition of the word 'offence' in section 4 clause (o) includes any act in respect of which a complaint may be made under section 20 of the Cattle Trespass Act—*Vistanatha*, 44 Bom. 42, 21 Bom L.R. 1084, 21 Cr.L.J. 95; *Deenadayalu v. Ratna*, 50 Mad. 841, 52 M.L.J. 251, 28 Cr.L.J. 301. See also *Budhan v. Issur*, 34 Cal. 926 (927).

535. "Taking cognizance":—Under this section cognizance is taken of the offence and not necessarily of the individual offenders whose names transpire in the course of the investigation—*Mathura*, 36 Cr.L.J. 641, 155 I.C. 58, A.I.R. 1934 Pat. 467, 15 P.L.T. 438, 1934 Cr.C. 1062. The Magistrates mentioned in sec. 190, sub-sec. (1) are empowered to take cognizance of an offence whether or not the complainant before them charges any particular individuals with having committed the offence. This section does not empower Magistrates to deal with offenders but to take cognizance of offences—*Fatch Mulammad v. Emp.*, A.I.R. 1940 Sind 97 (98). See also *Jugeshwar and Vithu* in Notes 614B and 614C. When a Magistrate has taken cognizance of an offence upon a complaint or upon a police report any offence that may be disclosed by the evidence may be dealt with at the trial; and that sec. 190 (1) (c) and sec. 191 have no application in such circumstances *Baldeo Prasad*, 34 Cr.L.J. 942 (946), 145 I.C. 382, A.I.R. 1933 Pat. 297, 14 P.L.T. 330, 12 Pat. 758, 1933 Cr.C. 789; *Baburao Tatyarao v. Emp.*, 38 Cr.L.J. 9 (11), 165 I.C. 867, A.I.R. 1936 Bom. 379, 38 Bom.L.R. 946, 1936 Cr.C. 924. But see *Rajaratnam Pillai*, 37 Cr.L.J. 501, 161 I.C. 846, 1936 M.W.N. 181, 70 M.L.J. 340, 43 M.L.W. 367, A.I.R. 1936 Mad. 341, 8 R.M. 880, 59 Mad. 442, 1936 Cr.C. 384. A Magistrate can take cognizance of a case either under sec. 190 (1) (a), (b) or (c), or under all three of them if he is invested with powers thereunder—*U Po Yone*, 34 Cr.L.J. 1185, 146 I.C. 196, A.I.R. 1933 Rang. 271, 1933 Cr.C. 1015. The expression "to take cognizance" has not been defined in the Code, and it is difficult to ascertain at what precise stage of the case cognizance is said to be taken. When a District Magistrate, on receipt of a police report, made over the case to another Magistrate for inquiry, and the latter after taking evidence summoned the accused, it was the latter Magistrate (and not the District Magistrate) who really took cognizance of the offence, because he was the first Magistrate who really contemplated taking proceedings against the accused—*Ananta Ram v. Sheikh Altab*, 17 C.W.N. 795 (796), 14 Cr.L.J. 425; *Lachhmi Narain*, 4 Luck. 353, 30 Cr.L.J. 134 (135). The expression "taking cognizance of an offence" in sec. 190 of the Code deals with a matter of a purely technical nature. Cognizance is usually taken upon complaint when process is issued, but no restricted interpretation can be given to that expression in consideration of the character of the action of a Magistrate at any particular stage of the proceeding before him. But from the terms of sec. 190 it is clear that cognizance is taken upon issue of process before evidence is recorded. It is the complaint, therefore, which gives jurisdiction to the Magistrate to try the offence—*Baburao Tatyarao v. Emp.*, supra, following *Mackey*, 53 Cal. 350, 93 I.C. 33, A.I.R. 1926 Cal. 470, 27 Cr.L.J. 385, 30 C.W.N. 276, 43 C.L.J. 310 (F.B.). A Magistrate cannot be said to have taken cognizance of a case under section 107 until he issues notice to the person charged to show cause why he should not be proceeded against under that section. Therefore, where the Police reported the matter to the District Magistrate who ordered the case to be transferred to the file of the Head Quarters Deputy Magistrate, who then issued notice to the accused, held that it was the latter Magistrate and not the District Magistrate who took cognizance of the case—*Konda Reddy*, 41 Mad. 246 (249).

Taking cognizance does not involve any formal action or indeed action of any kind but occurs as soon as a Magistrate applies his mind to the suspected commission of an

offence Where a police report of a dacoity was submitted to the Sub-divisional Officer on the 24th April 1909, and the case was afterwards withdrawn by the District Magistrate to his own file on the 20th January 1910, held that the District Magistrate took cognizance of the case on the 20th January 1910—*Sourindra*, 37 Cal. 412, 11 C.W.N. 512, 11 Cr.L.J. 217. Taking cognizance occurs as soon as the Magistrate reads the complaint and even before he examines the complainant which he is bound to do—*Harnarayan v. Govindram*, 41 Cr.L.J. 645 (647), 188 I.C. 606, 1940 N.L.J. 301. See also *Mathura*, 36 Cr.L.J. 641, 155 I.C. 58, A.I.R. 1934 Pat. 647, 15 P.L.T. 438, 1934 Cr.C. 1062. It would appear that cognizance may be taken by a Magistrate of any matter in respect of which an enquiry or trial may be held under the provisions of the Code of Criminal Procedure and, in taking cognizance of an offence or other case, for example cases under secs 107, 110 or 145 of the Code, a Magistrate merely takes seisin of the matter for the purpose of exercising the specific powers with which he has been invested under the Code in connection with the case in question—*Hafizer Rahaman v. Ainal Hoque*, 44 C.W.N. 1114 (1118).

Where an officer who is also Magistrate holds departmental inquiry and charges are made before him, he cannot be said to have taken cognizance—*Karikowda*, 19 Bom. 51.

In cases where sanction of the Government is necessary, e.g., an offence under sec. 4 (b), Explosive Substances Act, the Magistrate is not competent to take cognizance upon a mere complaint unaccompanied by the requisite sanction—*Lalit Chandra*, 39 Cal 119 (125), 13 Cr.L.J. 433, 15 I.C. 65.

A Magistrate is not debarred from taking cognizance of an offence simply because another Magistrate has already taken cognizance of the same and is in seisin of the case. But since the accused person cannot be tried twice for the same offence, the proper course is for the one Magistrate to transfer his case to the other, and thus a multiplicity of trials can be avoided—*Hari Satya*, 50 Cal. 482, 24 Cr.L.J. 710, 37 C.L.J. 327.

The three alternatives upon which a Magistrate may take proceedings are not mutually exclusive. It is not correct to say that a Magistrate who has taken cognizance of an offence must be held to have done it under some one of the alternatives to the exclusion of the others. And so, a Magistrate who has taken cognizance of an offence upon a complaint is not debarred from proceeding upon a simultaneous police report which has come to him. In such a case it will not be necessary for him to follow the procedure of Ch. XVI and examine the complainant—*Bharat Kishore v. Judhistr*, 9 Pat. 707, 10 P.L.T. 779, 30 Cr.L.J. 1056 (1058) (F.B.).

The provisions of this section are exceedingly wide. There is nothing in the section which prevents a Sub-Divisional Magistrate from taking cognizance of an offence that happens to be reported to him by an officer who presides in a Court of justice—*Tara Singh v. Emp.*, 39 Cr.L.J. 840, 176 I.C. 960, A.I.R. 1938 All. 449, 1938 A.L.J. 528, 11 R.A. 158, 1938 A.L.R. 689, 1938 A.C.R.C. 45, 1938 A.W.R. (H.C.) 361.

586. Clause (a)—Cognizance upon complaint:—For 'complaint' see sec. 4 (h) and notes thereunder.

It is entirely wrong that any Court should accept a complaint which charges two people in the alternative—*Narinjan Dass v. Emp.*, 31 Cr.L.J. 1065 (1066), 126 I.C. 535, A.I.R. 1930 Rang. 51.

"Complaint of facts which constitute offence":—Where a complaint presented to the Magistrate contains the offences with which the accused is charged, the fact that it is defective in not stating all the facts necessary to constitute the offence charged is immaterial—*Sardar Dayal Singh*, 1891 P.R. 8. But where the complaint mentions only the sections of the Penal Code, but no details or circumstances of any description are set out, it cannot be treated as a valid complaint—*Shivilingappa*, 32 Bom.L.R. 782, 31 Cr.L.J. 1142 (1143).

Where the complaint is not a sufficiently specific statement of facts to come within sec. 190 (1) (a), Cr. P. C., the defect is cured under sec. 529, Cr. P. C., which provides

that if any Magistrate not empowered by law to do any of the following things, namely, (e) to take cognizance of an offence under sec. 190, sub-sec. (1) cl. (a) or cl. (b) erroneously in good faith does that thing, his proceedings shall not be set aside merely on the ground of his not being so empowered—*Raghunath*, 33 Cr.L.J. 733 (734), 139 I.C. 281, 34 Bom.L.R. 901, 1932 Cr.C. 868, A.I.R. 1932 Bom. 610, Ind. Rul. 1932 Bom. 484.

Magistrate bound to take cognizance upon complaint.—The use of the term 'may take cognizance of an offence' does not mean that a Magistrate may refuse to take, and is not bound to take, cognizance of an offence on receiving a complaint of facts constituting an offence. The use of those terms does not make it optional with a Magistrate to hear a complaint, but rather refers to the action of the Magistrate in taking cognizance of the offence in either of the specified courses in which the facts constituting the offence may be brought to his notice. He is bound to examine the complainant and can then either issue summons to the accused or order an inquiry under sec. 202 or dismiss the complaint under sec. 203—*Umer Ali v. Safar Ali*, 13 Cal. 334 (335). He is bound, when the circumstances giving him jurisdiction exist, to receive the complaint and deal with it according to law—*In re Jankidas*, 12 Bom. 161 (163); and has no option to refer it to the police under sec. 155 or 156 (3) without taking cognizance of it—*Jankidas*, supra; *In re Arula*, 10 M.L.T. 120, 12 Cr.L.J. 463. It is true that sec. 200, Cr. P. C., does not say in so many words that the Magistrate is bound to take cognizance of a complaint made to him but that is the general interpretation of the section by the High Courts. The word "may" under sec. 190, Cr. P. C., does not mean that Magistrate may refuse to take cognizance of an offence upon a complaint duly made to him. As a Magistrate he is bound to examine the complainant and then either issue summons to the accused or make an inquiry under sec. 202, Cr. P. C., or dismiss the complaint—*Radhakrishnan G. Keswari v. Emp.*, 40 Cr.L.J. 449, 180 I.C. 436, A.I.R. 1939 Sind. 78. When a complaint is made to a Magistrate of a petty offence ordinarily within the cognizance of heads of villages, the Magistrate is bound to take cognizance of it, to proceed under sec. 200 and to dispose of the complaint according to law. The mere fact that the complaint is also cognizable by the head of the village does not entitle the Magistrate to decline to exercise jurisdiction and to direct the complainant to seek redress from the head of the village—*Anonymous*, 2 Weir 237, 7 M.H.C.R. App. 31.

Instances where Magistrate acts under cl. (a) and not under cl. (e).—Where a complaint is made before a Magistrate, he takes cognizance of the case under clause (a) and not under clause (e), even though he may record on the complaint that he acts under clause (e)—*Meshidi v. Rangeon Municipal Committee*, 4 L.B.R. 300; *Rasid*, 9 Bom.L.R. 212, 5 Cr.L.J. 202; *Girdhari Lal*, 1911 P.R. 11; *Jhuna Lal*, 2 P.L.J. 657.

The mere fact that previous to the making of the written complaint the Sub-divisional Magistrate happened to be in the village and the complainant related the story to him orally and he inspected the locality, does not bring the case within the purview of cl. (e) of this section. Section 191, Cr. P. C., has no application to such a case which was taken cognizance on the written complaint under cl. (a)—*Saldeo*, 27 Cr.L.J. 1406, 98 I.C. 718, A.I.R. 1927 All. 101.

Where a complainant charged certain persons with committing a certain offence, and the examination of the complainant revealed an offence different from that mentioned in the complaint, or revealed an additional offence, the Magistrate was competent to take cognizance of the latter offence, and in taking cognizance thereof he acted under clause (a) and not under clause (e), so that sec. 191 did not apply—*Jagat Chandra*, 26 Cal. 786 (789); *Abdul Rahman*, 4 Bur.L.J. 213, 27 Cr.L.J. 669; on appeal, *Abdul Rahman*, 5 Rang. 53 (P.C.), 31 C.W.N. 271, 28 Cr.L.J. 259, 52 M.L.J. 585, 25 A.L.J. 117; *Baldeo Prasad v. Emp.*, A.I.R. 1933 Pat. 297 (298), 12 Pat. 758, 14 P.L.T. 330, 1933 Cr.C. 789, 145 I.C. 382, 34 Cr.L.J. 942.

Similarly, where the complainant charged several persons with having committed an offence, but the Magistrate after examination of the complainant or of some witnesses

found out that *other persons*, not mentioned in the complaint, were concerned in the offence, he was competent to take cognizance in respect of the latter persons also, and in so doing he acted under clause (a) and not under clause (c), so that sec. 191 was not applicable to the case—*Jagat Chandra*, 26 Cal 786 (789); *Qutba*, 1904 P.R. 32; *Imankhan*, 14 Bom L.R. 141; *Dedar Bux v. Shyamapada*, A.I.R. 1914 Cal. 801, 24 I.C. 954, 15 Cr.L.J. 516, 18 C.W.N. 921, 41 Cal. 1013; *Charu Chandra v. Narendra*, 4 C.W.N. 367; *Sri Kishan v. Debi Dayal*, 2 O.W.N. 823, 26 Cr.L.J. 1619, 90 I.C. 915. Section 190, Cr. P. C., refers in terms to "offence" and not "offender," and a Magistrate having taken cognizance of an offence can add co-accused—*Assudomal Ramandas v. Jhamandas Hotchand*, A.I.R. 1940 Sind 100 (102), following *Mehrab v. Emp.*, 17 S.L.R. 150, A.I.R. 1924 Sind 71, 83 I.C. 885, 26 Cr.L.J. 181 (F.B.); *Dedar Bux v. Shyamapada*, supra; and *Fateh Muhammad v. Emp.*, A.I.R. 1940 Sind 97. See also Note 592.

Where a complaint under the Child Marriage Restraint Act (XIX of 1929) made to a District Magistrate was referred by him to a local Magistrate for inquiry, and the latter reported that the complainant also should be prosecuted, and the District Magistrate prosecuted the complainant, *held* that the report of the local Magistrate was a complaint under clause (a) and not an information under clause (c)—*Sukha Sahu*, 13 P.L.T. 791, 34 Cr.L.J. 237 (238), A.I.R. 1933 Pat. 87, 141 I.C. 810, 1933 Cr.C. 211.

An Assistant Police Prosecutor is an officer of the Police, but it is not his business to make report. It is open to a Magistrate to treat the application filed by him as a complaint made by him in his private capacity—*Bulomal*, 35 Cr.L.J. 266, 146 I.C. 1088, A.I.R. 1933 Sind 393, 1933 Cr.C. 1433.

537. Clause (b)—Police Report:—The 'police report' referred to in this clause is the report described in sec. 173, Cr. P. C., i.e., a report made by the Police after they have investigated the case and ascertained the facts and came to a conclusion that there are sufficient grounds to justify forwarding the person reported against to the Magistrate—*Ahmed Khan*, 12 Cr.L.J. 92, 9 I.C. 492, 5 S.L.R. 1. This case was dis-sented from in *Mehrab*, 26 Cr.L.J. 181, 83 I.C. 885, 17 S.L.R. 150, A.I.R. 1924 Sind 71 (F.B.), where it was held that this clause also included reports other than that mentioned in sec. 173, Cr. P. C. See Notes in para 582. The 'police report' mentioned in this section is not limited to a report mentioned in Chap. XIV. Where on an information received by post, a Magistrate sent the case to the police for inquiry and report, and on receiving the report took cognizance of the case, it was held that the action taken by him was based on the police report—*Sarfaraz Khan*, 11 A.L.J. 331, 14 Cr.L.J. 218, 19 I.C. 314.

A police report made after investigation into a *non-cognizable* case under the order of a Magistrate under sec. 155 (2) falls within this clause. See Note 582 above under heading "Change."

A report submitted by a Police-officer under sec. 24 of the Police Act falls under this clause—*Abdul Ali*, 1 P.L.T. 446, 59 I.C. 41 (44). The report of an Excise Sub-Inspector is a Police report for the purposes of this section—*Radhika v. Hamid Ali*, 54 Cal. 371, 28 Cr.L.J. 316, A.I.R. 1927 Cal. 405. A police *challan* is a police report of facts constituting an offence under clause (b) and a Magistrate can take cognizance upon it—*Sundar*, 1901 P.R. 8; *Chet Singh*, 1900 P.R. 22. But a mere suggestion by the police-officer is not a police report, and where a Magistrate issued summons to the accused on the suggestion of a police-officer that the accused injured the crops of the people of the village, it was held that the Magistrate acted illegally, as none of the conditions required by this section had been fulfilled—*Samun*, 1891 P.R. 24. An application of the Prosecuting Inspector for putting a witness on trial is a report within the meaning of this clause—*Chuni Lal*, 34 Cr.L.J. 761, 144 I.C. 380, A.I.R. 1933 All. 399, 1933 Cr.C. 682, 1933 A.L.J. 735, Ind. Rul. 1933 All. 420.

When a report under sec. 173, Cr. P. C., is received by the Magistrate empowered under sec. 190, cl. (b), he takes cognizance of the offence under that section. Even if the accused is not sent up, i.e., not a charge-sheet but a final report is sent, the

Magistrate when he applies his mind to that report takes cognizance of the offence and if he wants to place the accused on trial he can issue his process. This he can only do under sec. 204, Cr. P. C. He can also do the same on perusal of police report submitted to him after the enquiry under sec. 202, Cr. P. C., in case of a complaint. In both cases he will be acting under sec. 204, Cr. P. C.—*Raghunath*, 33 Cr.L.J. 349 (353), 136 I.C. 842, 12 P.L.T. 937, A.I.R. 1932 Pat. 72, 1932 Cr.C. 136, Ind. Rul. 1932 Pat. 129.

The police report must state the facts which constitute the offence, that is, the concrete facts which constitute the alleged offence. Where no facts were stated, the mere assertions made by the police that certain offences had been committed, could not be regarded as compliance with the letter or the spirit of the law—*In re Nagendra*, 51 Cal. 402 (414), 81 I.C. 220, 38 C.L.J. 388, A.I.R. 1924 Cal. 476, 25 Cr.L.J. 732. A prosecution is not legally instituted under sec. 190 (b) when the police report is defective and does not fulfil all the requirements of sec. 173 (e.g., when it does not set forth the nature of the information) and the first information report under sec. 154 is equally defective in this respect—*Lee v Adhikari*, 37 Cal. 49, 5 I.C. 553, 14 C.W.N. 304, 11 Cr.L.J. 145. Where the police report contains only the sections of the Penal Code but no details or circumstances of any description regarding the offence, the report is defective, and a Magistrate cannot take cognizance upon such report—*Shivlingappa*, 32 Bom.L.R. 782, A.I.R. 1930 Bom. 372, 31 Cr.L.J. 1142 (1143). In *Feroja v Amiruddin*, 16 C.W.N. 1049 (1051), it has been remarked that if the police report be defective it is open to the Magistrate to treat it as a complaint, and in that case it will be necessary for him to call upon the Police-officer to appear and substantiate that complaint upon oath. (But it is not now necessary to examine the Police-officer, see cl. (aa) of sec. 200). But if the report does not contain the facts constituting the offence, it cannot be treated as a complaint, for a complaint equally with the report of a police officer must contain the facts which constitute the offence—*Shivlingappa*, supra. But where facts are not actually written out in the document which is called the charge-sheet but are contained in a document annexed to it, that is sufficient compliance with the requirements of sec. 190 (1) (b), Cr. P. C.—*Hemendra Nath Gupta v Emp.*, 32 Cr.L.J. 94 (96), 165 I.C. 956, A.I.R. 1937 Pat. 160, 17 P.L.T. 932, 9 B.R. 114, 9 R.P. 243. If the police charge-sheet contain a certain number of facts, though not a specific statement of all the facts, the Magistrate may take cognizance upon such charge-sheet, the defect being cured by sec. 529 (e)—*Raghunath*, 34 Bom.L.R. 901, 1932 Cr.C. 868 (869).

A Magistrate duly empowered under this section to take cognizance of an offence upon a police report and to try the case cannot refuse to take cognizance on the ground that the gravity of the offence requires severer punishment than he can inflict—*Gema*, Ratanlal 375.

Instances where Magistrate acts under Clause (b) and not under Clause (c):—Where L was charged by the police before the Magistrate, and the Magistrate after examining the investigating officer found that another person S should be joined as an accused person, and issued process against him, it was held that the Magistrate took cognizance of S's offence under clause (b) and not under clause (c), and was not bound to act under sec. 191—*Sarwa*, 9 N.L.R. 63, 14 Cr.L.J. 290. The principle is that when a Magistrate takes cognizance under clause (b) on a police report, he takes cognizance of the offence and not merely of the particular person charged in the report as the offender. He can, therefore, issue process against other persons also who appear to him, on the basis of the report and other materials placed before him when he has taken cognizance of the case, to be concerned in the commission of the offence. When he does so, it is not a case of taking cognizance against such persons under clause (c) of this section—*Mehrab*, 17 S.L.R. 150 (FB), 26 Cr.L.J. 181, overruling 5 S.L.R. 1. Similarly, where the Magistrate issued warrants against persons not named in the complaint or in the first information, but named in a report subsequently made by the police after investigation, it was held that the Magistrate took cognizance of the case

under clause (b) and not under clause (c) of this section—*Rajani Kanto*, 8 C.W.N. 864. Where a Magistrate, while acquitting a certain person sent up by the Police, stated that another person had in his opinion committed the offence, and that the Police should take action against that person, and that person was accordingly sent up and convicted, it was held that the Magistrate acted under clause (b) and not clause (c), and sec. 191 was not applicable—*Kahim Ally*, 4 L.B.R. 137, 7 Cr.L.J. 414. Where an accused person charged by the Police was convicted and the case came up in appeal before a Sub-divisional Magistrate, the latter could try the offender himself under sec. 423 (1)(b) if the offence was one within his ordinary jurisdiction; and in so doing the Sub-divisional Magistrate took cognizance of the case not under clause (c) but under clause (b), as he had before him the police charge-sheet stating all the facts—*Manikka*, 30 Mad. 228, 16 M.L.J. 546. Where after the close of a trial the Magistrate ordered the police to send up a charge-sheet in respect of a witness for the prosecution, which the Police did, and then the Magistrate tried that person and convicted him, *held* that the Magistrate took cognizance of the case under clause (b) and not under clause (c), and sec. 191 did not, therefore, apply to the case—*Gundoo*, 23 Bom.L.R. 842, 22 Cr.L.J. 603, 62 I.C. 875. Where the Magistrate himself ordered that the witness should be put on his trial he did not act under clause (c) of this section and sec. 191 did not apply—*Intaj Khan*, 35 Cr.L.J. 1312, 151 I.C. 406, A.I.R. 1934 Rang. 193, 1934 Cr.C. 887.

There was a Police investigation into a charge under sec. 379, I. P. C., and the Police reported that the charge against the accused appeared to be false. On receipt of the report the Magistrate made an endorsement thereon "False under sec. 379. Action should be taken under sec. 211, Indian Penal Code." As a result of that a complaint was ultimately lodged by the Police with the Magistrate. *Held* that if the Magistrate took cognizance of the case on the endorsement that was made on the Police report, he took cognizance under sub-cl. (b) of sub-sec. (1) of sec. 190, Cr. P. C., that is, upon a Police report, and not upon his knowledge or suspicion under sub-cl. (c) and it was not necessary for the Magistrate to inform the accused under sec. 191, Cr. P. C., that he could be tried, if so desired, by another Magistrate—*Lal Bihari*, 31 Cr.L.J. 55, 120 I.C. 297, 10 P.L.T. 601, A.I.R. 1929 Pat. 514.

588. Clause (c):—Clause (c) deals with cases where there has been neither a formal complaint nor a police report, and independently of these the Magistrate takes the initiative upon information received from any person other than a police-officer or upon his own knowledge or suspicion—*Dedar Bux v. Shyamapada*, 41 Cal 1013 (1020), A.I.R. 1914 Cal 801, 24 I.C. 954, 15 Cr.L.J. 546, 18 C.W.N. 921. This clause applies only to cases where the private individual who is injured or aggrieved or some one on his part does not come forward to make a formal complaint. It is a provision of law for enabling a public official to take care that justice may be vindicated, notwithstanding that the persons individually aggrieved are unwilling or unable to prosecute—*Surendra*, 13 W.R. 27, 5 Beng.L.R. 274.

Where upon the Sub-Registrar refusing to register a deed, the petitioner appealed to the District Registrar (who was also the District Magistrate) under the provisions of the Registration Act, and the District Magistrate finding that the document was a forgery ordered the prosecution of the petitioner for an offence under sec. 471, I. P. C., *held* that although the District Registrar, not being a Civil, Criminal or Revenue Court, could not direct a prosecution under sec. 476 of the Cr. P. Code, still his action must be deemed as one under clause (c) of sec. 190, Cr. P. Code, because in his capacity as District Magistrate he was competent to take cognizance of the offence under this clause, and to transfer the case to a subordinate Magistrate under sec. 191—*Cheta Mahto*, 2 Pat. 459 (463), 4 P.L.T. 727, 21 Cr.L.J. 792.

A Magistrate is entitled under this clause to record and act on the information furnished by the accused himself—*Arunachala*, 33 Cr.L.J. 586, 138 I.C. 240, 55 Mad. 717, A.I.R. 1932 Mad. 500, 1932 Cr.C. 504, Ind. Rul. 1932 Mad. 552, 1932 M.W.N. 644, 62 M.L.J. 680, 35 M.L.W. 607.

The provisions of this clause do not apply to proceedings under sec. 110, Cr. P. C.

and limit by them the wide and unfettered language used in secs. 110 and 112, Cr. P. C.—*Mahomed Ally*, 27 Cr.L.J. 1280, 98 I.C. 128, A.I.R. 1927 Sind 77.

When in the course of a police investigation the Magistrate thinks that a particular person should be put on trial the proper course is to take cognizance of the case against him under cl. (c) of this section without sending the papers to the Superintendent of Police so as to deprive the accused of his right under sec. 191, Cr. P. C.—*Nek Ram*, 32 Cr.L.J. 370, 129 I.C. 267, A.I.R. 1931 All. 273, 1931 Cr.C. 337, Ind. Rul. 1931 All. 139. See also *Muhammad Sadiq v. Emp.*, in Note 593. But where the Sub-divisional Magistrate only acted on information contained in the police diary and the petition filed by the first informant, this latter coming within cl. (a) of sub-sec. (1) of this section and the former within clause (b), clause (c) has no application whatsoever—*Panu Samal v. Emp.*, A.I.R. 1940 Pat. 111, 1939 P.W.N. 803, 41 Cr.L.J. 318, 186 I.C. 435.

Magistrate should state grounds.—It is most desirable that a Magistrate taking cognizance under clause (c) should record the grounds on which he is taking action, and this not only in fairness to the accused who is entitled to know for what reason he is being arrested, but also for his own protection. His omission to do so, however, does not necessarily vitiate the proceedings where the accused has not in any way been prejudiced—*Maung Nyi*, 4 Bur.L.J. 211, 27 Cr.L.J. 413, 93 I.C. 77.

539. Information:—The essential difference between a complaint and an information is that a Magistrate acts on a complaint because the complainant has asked him to act, but a Magistrate acts on information on his own initiative. In the case of a complaint the Magistrate is asked to prosecute the persons named therein, and he has then to decide whether he will accede to the request or not. If he does not, then he may either make an inquiry himself or direct an enquiry or investigation, under sec. 202, or dismiss the complaint under sec. 203, after recording his reasons. But in the case of receiving information he is not asked by any one to issue process, and if he does not choose to act on the information he need not record any reasons or pass any order. In the case of information there is no complainant to examine on oath, as in the case of a complaint—*Sheo Pratap*, 1930 A.L.J. 1316, 32 Cr.L.J. 306 (307), A.I.R. 1930 All. 820, 53 All. 208, 1930 Cr.C. 1204, 129 I.C. 436.

A petition which does not strictly fall within the definition of a complaint may be treated as an information, upon which the Magistrate may take action under this clause—*Sarfaraz*, 7 O.W.N. 947, 32 Cr.L.J. 124 (126), A.I.R. 1930 Oudh 500.

The information need not contain all the allegations necessary to be proved to establish the offence; it is sufficient if enough is alleged to justify the Magistrate in dealing judicially with the matter. What allegations or how much of the information should be recorded by the Magistrate in such case, it is difficult to lay down in general terms; if the recorded information is sufficient to justify the Magistrate in considering that a *prima facie* case has been made out, he can take cognizance under this clause—*Rash Behary*, 35 Cal. 1076, 12 C.W.N. 1075, 8 Cr.L.J. 235.

Where a Deputy Commissioner, as a Collector and as such representing the Court of Wards, received information of an offence, he as Magistrate was not competent to act on the information and to issue warrants, as by such action he was practically making himself a Judge in his own case—*Thakur Pershad*, 10 C.W.N. 775; *Lakhi Narayan*, 37 Cal. 221 (*per* Stephen, J.). But this view does not seem to be correct, for sec. 191 provides a sufficient safeguard and gives the accused a right to have the case transferred to another Magistrate. On this principle the Madras and Rangoon High Courts have held (dissenting from 10 C.W.N. 775) that there can be no objection to a Magistrate taking cognizance of an offence upon information received by him in another capacity, e.g., as President of the District Board—*Sundarasan*, 43 Mad. 709, 32 M.L.J. 219; *Nga Po*, 8 Rang. 246, 31 Cr.L.J. 867 (869). See also the judgment of Carnuff, J., in *Lakhi Narayan*, 37 Cal. 221, 14 C.W.N. 589, 11 Cr.L.J. 514.

The following are held to be 'information' within the meaning of this section:—

(a) An anonymous communication—*In re Hari Narain*, 3 C.W.N. 65; *Bhairon*, 51 All.

377, 30 Cr.L.J. 62 (63); (b) communication through post—*Anon*, 2 Weir 149; *Karim Buksh v. Adil Khan*, 1899 A.W.N. 201; (c) information received from another Magistrate—*Makhan v. Jepson*, 1914 P.L.R. 65, 15 Cr.L.J. 261, 3 C.W.N. cclxii; (d) a letter written to the District Magistrate conveying information of an offence and asking for action to be taken—*Chhotey Maharaj*, 28 O.C. 33, A.I.R. 1925 Oudh 144, 25 Cr.L.J. 1147; (e) information furnished by the accused himself, e.g., a confession made by him to the Magistrate immediately after the offence—*Arunachala*, 55 Mad. 717, 33 Cr.L.J. 586 (587).

Information must be recorded :—A Magistrate taking cognizance upon information under this clause should at least record the information on which he acted, though he may not be obliged to disclose the sources of the information—*Thakur Persad*, 10 C.W.N. 775; *Rash Behary*, 35 Cal. 1076, 12 C.W.N. 1075; but his omission to do so does not necessarily vitiate the proceedings—*Mg Nyi Bu*, 4 Bur.L.J. 211, 27 Cr.L.J. 413.

Information received from witness :—A Magistrate taking cognizance of an offence against a person on evidence given on behalf of another accused person, proceeds under clause (c) of this section—*Raghab*, 3 C.W.N. cclxxix. So also, a Magistrate who takes cognizance of an offence against a witness in a case pending before him, upon the facts disclosed by the evidence of another witness, does so under clause (c) of the present section and not under sec. 351—*Khudi Ram*, 1 C.W.N. 105. *Contra*—*Yas'n Khan*, 5 N.L.R. 113 and *Lalu*, 4 S.L.R. 258, 11 I.C. 583, 12 Cr.L.J. 399, in which under such circumstances it was held that the Magistrate took cognizance against the new accused under sec. 351 and not under clause (c) of sec. 190. See also *Kishan v. Debi Doyal*, 26 Cr.L.J. 1619, 2 O.W.N. 823, 90 I.C. 915. If, however, the Magistrate had already taken cognizance upon a complaint of an offence against some person, and after examination of some witnesses the offences of other persons are revealed, the Magistrate proceeding against the latter does so under clause (a), (since there is a complaint) and not under clause (c)—*Dedar Bux v. Shyamapada*, 41 Cal. 1013, 24 I.C. 954, 18 C.W.N. 921, 15 Cr.L.J. 546. When cognizance is taken against accused persons on the basis of evidence in a case under sec. 109, Cr. P. C., the Magistrate acts under clause (c) of this section—*Malak*, 35 Cr.L.J. 1407, 151 I.C. 792, A.I.R. 1934 Lah. 210, 1934 Cr.C. 445. See also *K. V. Venkata Ramanier* in Note 593.

590. Knowledge :—Knowledge means actual personal knowledge of the Magistrate or knowledge based upon evidence legally placed before him—*Nga Shwe*, 1 L.B.R. 18.

Where a Magistrate issued an order under sec. 144 to stop work in a quarry, and took action for the disobedience of that order, and convicted the accused, it was held that the Magistrate took cognizance of the offence on his own knowledge of the facts under this clause—*Mul Raj*, 1905 P.R. 36, 2 Cr.L.J. 365. So also, where the accused in disobedience of an order given by a Cantonment Magistrate tied his buffaloes in a certain place, and the Magistrate finding the place filthy in consequence sent for the accused and fined him, it was held that the Magistrate took cognizance from his own knowledge under this clause and was debarred from trying the case by virtue of sec. 191—*Abdul Rahim*, 1905 P.R. 8.

A Magistrate who takes part in the initiation of proceedings is not incompetent to take cognizance of the offence, because this clause empowers the Magistrate to take cognizance upon his own 'knowledge'; but, of course, the Magistrate will be debarred under sec. 556 from trying the case—*Oziullah v. Beni Madhab*, 50 Cal. 135. But see *Nga Chit Kyaw v. Emp.*, 26 Cr.L.J. 249, 81 I.C. 249, 3 Bur.L.J. 121, A.I.R. 1924 Rang 352 in Note 1429.

591. Suspicion :—Where a Magistrate has a mere suspicion that an offence has been committed, he should not, as a matter of sound judicial discretion, take cognizance of it until some person aggrieved has complained [clause (a)] or until he has before him a police report [clause (b)] on the subject based on investigation directed to the offence—*Sham Lal*, 14 Cal. 707.

592. Miscellaneous:—

No Limitation :—The general law of limitation is chiefly intended for civil matters and does not apply to criminal prosecutions—*Nageshapa*, 20 Bom 543 (547). But inordinate delay in the filing of the complaint may lead the Court to infer that the prosecution is not a *bona fide* one—*Sher Sing v. Jitendra*, 59 Cal 275, 36 C.W.N. 16 (27).

Complaint in respect of an offence—Cognizance in respect of another :—Where a complainant charges certain persons with committing a certain offence, and the examination of the complainant reveals a different offence from that mentioned in the complaint, or reveals an additional offence, the Magistrate is competent to take cognizance of the latter offence—*Jagat Chandra*, 26 Cal 786 (789). The Magistrate is not bound to adhere to any particular section of the law which may be mentioned by the complainant in his complaint, but may apply any section which he thinks applicable to the case, so long as the parties are not misled and the proper procedure is observed—*Kalidass v. Mohendra*, 12 W.R. 40 (41). See Note 585

Complaint against some persons—Cognizance against others :—Where a complaint is made against some persons and the Magistrate takes cognizance of the offence, it is the duty of the Magistrate to deal with the evidence brought before him, and to see that justice is done in regard to any other person who might be proved by the evidence to be concerned in the offence—*Charu Chandra v. Narendra*, 4 C.W.N. xlv. When once a Magistrate has taken cognizance of an offence, he is competent to take proceedings against all who from the evidence appear to be offenders. His power is not limited only with regard to the persons mentioned in the complaint or Police report—*Bishen Dayal v. Chedi Khan*, 4 C.W.N. 560; *Girdhari Lal*, 21 C.W.N. 950, 18 Cr.L.J. 901; *Nga Chan*, 1 Bur.L.J. 183; *Mehrab*, 17 S.L.R. 150 (F.B.). Cognizance is taken of an offence and not of the individual offenders, and it would ordinarily follow that, once a complaint has been made according to the provisions of the Cr P Code, cognizance can be taken in respect of the offenders named in the complaint and also others who may be shown to have taken part in the transaction, although no complaint has been specifically made against them. Consequently, the absence of the name of a person in the operative part of the complaint will not be sufficient to take away the jurisdiction of the Magistrate to try him—*Vithu*, 38 Cr.L.J. 717, 169 I.C. 74, I.L.R. 1937 Nag 492, 9 R.N. 297. See also 26 Cal. 786; 1901 P.R. 32; 14 Bom.L.R. 141; 41 Cal. 1013 and 4 C.W.N. 367 cited in Note 586 under clause (a); also N.L.R. 65 and 8 C.W.N. 864 cited in Note 587 under clause (b).

191. When a Magistrate takes cognizance of an offence

Transfer or commitment on application of accused.

under sub-section (1), clause (c), of the preceding section, the accused shall, before any evidence is taken, be informed that he is entitled to have the case tried by another Court, and if the accused, or any of the accused if there be more than one, objects to being tried by such Magistrate, the case shall, instead of being tried by such Magistrate, be committed to the Court of Session or transferred to another Magistrate.

593. Principle:—The principle of this section is that no man ought to be a Judge in his own case. If a Magistrate proceeds against a person upon his own personal knowledge, he is interested in the prosecution and thereby he would practically make himself a Judge in his own case and his pre-conceived opinion as to the guilt of the accused person is likely to bias his mind against that person.

When a Magistrate takes cognizance *suo motu* either on his own knowledge or suspicion, or upon information received from some person who will not take the responsibility of setting the law in motion, the law, partly out of regard for the susceptibilities

of the accused, and partly to inspire confidence on the administration of justice, allows the accused the right to claim to be tried before another Magistrate—*Shewak Ram*, 7 S.L.R. 77, 15 Cr.L.J. 369 (370).

A Magistrate taking cognizance of an offence under clause (c) of sec. 190, is bound to comply with the provisions of this section—*Abdul Ali*, 1 P.L.T. 446, 59 I.C. 41. Where on a report being made by a Government official in respect of an offence under sec. 92, Cantonment Code, the Cantonment Magistrate took cognizance of the case and convicted the accused, *held* that the trial and conviction were illegal as the Magistrate should have informed the accused under this section that he was entitled to have the case transferred to another Magistrate—*Anadi Pershad*, 1920 P.L.R. 124, 21 Cr.L.J. 394, 55 I.C. 1002 (1003). When a Magistrate himself institutes criminal proceedings under sec. 476, he is bound to inform the accused that he is entitled to have his case tried by another Court—*Naipal*, 28 O.C. 1, A.I.R. 1924 Oudh 448, 25 Cr.L.J. 1224. Where a matter was brought to the notice of the District Magistrate, and he sent the matter to the S. D. O. for inquiry and report, and the S. D. O. reported that the offence had been committed and decided that a case should be instituted, whereupon the District Magistrate ordered the S. D. O. to try the case, *held* that it was the S. D. O. who had taken cognizance of the case (and not the District Magistrate) and he should have given the accused an opportunity to be tried by a different Magistrate—*Lachhmi Narain*, 4 Luck. 353, 30 Cr.L.J. 134 (135); *Ananta Ram v. Sheikh Altab*, 17 C.W.N. 795 (796), 14 Cr.L.J. 425.

The mere fact that the Magistrate himself arrests the accused and thus takes cognizance under sec. 190, clause (c) does not bring the case within the operation of sec. 556; and so long as the Magistrate complies with the provisions of sec. 191, he is entitled to try the case—*Nga Chit*, 3 Bur.L.J. 121, 26 Cr.L.J. 249.

Where the Magistrate orders the police to investigate and, if any cognizable offence is discovered, to take legal action and the police submits a *chalan* in consequence of such order, no doubt the Magistrate takes cognizance on a police *chalan* under sec. 190 (1)(b), Cr. P. C., but at the same time the action of the Magistrate practically amounts to his taking cognizance under sec. 190 (1)(c), Cr. P. C., necessitating the application of the principle of sec. 191, Cr. P. C. Failure on the part of the Magistrate to comply with the provisions of sec. 191, Cr. P. C., will vitiate the trial in such a case—*Mohammad Sadiq v. Emp.*, A.I.R. 1938 Lah. 19, 173 I.C. 324, 39 Cr.L.J. 299, 10 R.L. 436.

Section 190 (i) (c), Cr. P. C., is concerned with extra-judicial information, knowledge or suspicion and it has nothing to do with knowledge gathered by a Magistrate in open Court from the evidence of witnesses given during a trial. If a Magistrate begins a trial as a summons case and then finds that an offence triable only under warrant case procedure has been committed, he is bound to apply warrant case procedure thenceforward and he is not in any way disqualified from proceeding with the trial—*K. V. Venkata Ramanier*, 39 Cr.L.J. 958, 177 I.C. 814, A.I.R. 1938 Mad. 815, 47 M.L.W. 739, 1938 M.W.N. 589, (1938) 2 M.L.J. 360, I.L.R. 1938 Mad. 814, 11 R.M. 385, dissenting from *Rajaratnam Pillai*, 59 Mad. 442, 161 I.C. 846, A.I.R. 1936 Mad. 341, 1936 Cr.C. 384, 37 Cr.L.J. 501, 70 M.L.J. 340, 1936 M.W.N. 181, 43 M.L.W. 367, 8 R.M. 830 where, in similar circumstances, it has been laid down that it is the bounden duty of the Magistrate to afford the accused person an opportunity of saying whether he wishes to be tried or not to be tried by that Magistrate.

594. Right of accused to have case transferred:—The words "shall be informed that he is entitled" are mandatory, and a Magistrate cannot refuse to comply with them—*Q. E. v. Hawthorne*, 13 All. 345. He is bound to inform the accused of his right to have the case transferred. If he omits to inform the accused of his right, or if in spite of objections taken by the accused, the Magistrate proceeds with the case, the proceedings will be wholly void. It is not a mere irregularity curable by sec. 537—*Hawthorne*, 13 All. 345, 1891 A.W.N. 102; *Chedi*, 28 All. 212; *Mohib Ali*, 3 A.L.J. 691; *Ram Katan*, 19 A.L.J. 138; *Chander Sen*, 21 A.L.J. 89, 24 Cr.L.J. 656; *Mul Raj*, 2 Cr.L.J. 365, 81 P.L.R. 1905 P.R. 36; *Abdul Rahim*, 1905 P.R. 8, 170

P.L.R. 1905; *Sakhia*, 5 N.L.R. 113; *Ghasi*, 1898 P.R. 13; *Sarfaraz Khan*, 11 A.L.J. 331; *Naipal*, 10 O.L.J. 532, 25 Cr.L.J. 1224; *Badha*, 16 P.L.R. 1921, 22 Cr.L.J. 96, A.I.R. 1921 Lah. 235, 59 I.C. 384; *Narain Das*, 27 Cr.L.J. 325 (All); *Sardar*, 35 Cr.L.J. 1308, 151 I.C. 357, 1934 Cr.C. 866, A.I.R. 1934 All. 693; *Malak*, 35 Cr.L.J. 1407, 151 I.C. 792, A.I.R. 1934 Lah. 210, 1934 Cr.C. 445; *Ram Saran Das*, 38 Cr.L.J. 29 (30), 165 I.C. 942, 9 R.P. 234, 17 P.L.T. 791, 1936 Cr.C. 1070, 3 B.R. 107, A.I.R. 1936 Pat. 639; *Arjan Singh v. Emp.*, A.I.R. 1939 Lah. 479 (484), 41 Cr.L.J. 65 (69), 184 I.C. 680.

The accused can waive his right under this section—*Mahomed Shah*, 1 S.L.R. 98. But if a Magistrate omits to inform the accused of his right, the mere silence on the part of the accused is not to be taken as a waiver of his right—*Raghab*, 3 C.W.N. cclxxix. Waiver cannot be implied unless the accused is distinctly told in accordance with the terms of this section—*Chander Sen*, 21 A.L.J. 89, 24 Cr.L.J. 655. The accused may waive his right under this section, but still this waiver will not empower the Magistrate to deal with the case if he is debarred from trying it by another section of this Code (e.g., sec. 556)—*Mahomed Shah*, supra.

Although this section enables the accused to apply for a transfer of the case, still unless the accused exercises that right, the jurisdiction of the Magistrate to try the case is unquestionable. The mere fact that the Magistrate has taken cognizance under sec. 190, clause (c) does not by itself oust his jurisdiction to hear and determine the case—*In re Ganeshi*, 15 All. 192 (194).

595. Nature of the accused's right:—All that the accused is entitled to under this section is to have the case tried by another Court; but he cannot choose or determine for himself by what other particular Court the case is to be tried—*In re Shrinivas*, 7 Bom.L.R. 637, 2 Cr.L.J. 582. And the Magistrate has a discretion, on objection being taken, either to transfer the case to another Magistrate or to commit it to the Sessions. He is not bound to transfer the case to another Magistrate. He may elect to commit the case to the Court of Session—*Karuppana v. Felix*, 22 Mad. 148, 2 Weir 150.

The accused can object only to the trial of the case by that Magistrate, but he cannot object to a preliminary inquiry. This section directs the Magistrate either to transfer the case to another Magistrate or to commit the case to the Sessions. And the commitment involves the holding of a preliminary inquiry. This section empowers the Magistrate to hold a preliminary inquiry even in a case triable by himself; if the case is one triable exclusively by the Sessions Court, the Magistrate is a *fortiori* entitled to hold an inquiry preliminary to commitment—*Abdul Razzak*, 21 All. 109; *Azam Ali*, 20 Cr.L.J. 47, 48 I.C. 687 (Cal.).

But a Magistrate who takes cognizance of a case under sec. 190 (c) cannot, after becoming a District Magistrate, hear an appeal from a conviction in the case (which was tried by another subordinate Magistrate) without following the procedure laid down in sec. 191, as an appeal is a part of the trial of the offence—*Bansi Lal*, 12 C.W.N. 438, 7 Cr.L.J. 224.

Another Court:—This section begins with "when a Magistrate takes cognizance of an offence. . .," and what it means by trial by another Court is made clear by the substantive provision that if the accused objects to being tried by such Magistrate, the case shall be committed to the Court of Session or transferred to another Magistrate. This section does not give the accused the right to be tried by a Court or Magistrate of his choice, but only makes it impossible for the Magistrate who took cognizance under sub-sec. (1), cl. (c) of this section to try the accused except with his consent. Therefore when a Sub-divisional Magistrate takes cognizance of a case under cl. (c), his successor can try it without complying with the requirements of this section—*Panu Samal v. Emp.*, A.I.R. 1940 Pat. 111, 1939 P.W.N. 803, 41 Cr.L.J. 318, 186 I.C. 435.

of the accused, and partly to inspire confidence on the administration of justice, allows the accused the right to claim to be tried before another Magistrate—*Shewak Ram*, 7 S.L.R. 77, 15 Cr.L.J. 369 (370).

A Magistrate taking cognizance of an offence under clause (c) of sec. 190, is bound to comply with the provisions of this section—*Abdul Ali*, 1 P.L.T. 446, 59 I.C. 41. Where on a report being made by a Government official in respect of an offence under sec. 92, Cantonment Code, the Cantonment Magistrate took cognizance of the case and convicted the accused, *held* that the trial and conviction were illegal as the Magistrate should have informed the accused under this section that he was entitled to have the case transferred to another Magistrate—*Anadi Pershad*, 1920 P.L.R. 124, 21 Cr.L.J. 394, 55 I.C. 1002 (1003). When a Magistrate himself institutes criminal proceedings under sec. 476, he is bound to inform the accused that he is entitled to have his case tried by another Court—*Nasipal*, 28 O.C. 1, A.I.R. 1924 Oudh 448, 25 Cr.L.J. 1224. Where a matter was brought to the notice of the District Magistrate, and he sent the matter to the S. D. O., for inquiry and report, and the S. D. O. reported that the offence had been committed and decided that a case should be instituted, whereupon the District Magistrate ordered the S. D. O. to try the case, *held* that it was the S. D. O. who had taken cognizance of the case (and not the District Magistrate) and he should have given the accused an opportunity to be tried by a different Magistrate—*Lachmi Narain*, 4 Luck 353, 30 Cr.L.J. 134 (135); *Ananta Ram v. Sheikh Altab*, 17 C.W.N. 795 (796), 14 Cr.L.J. 425.

The mere fact that the Magistrate himself arrests the accused and thus takes cognizance under sec. 190, clause (c) does not bring the case within the operation of sec. 556; and so long as the Magistrate complies with the provisions of sec. 191, he is entitled to try the case—*Nga Chit*, 3 Bur.L.J. 121, 26 Cr.L.J. 249.

Where the Magistrate orders the police to investigate and, if any cognizable offence is discovered, to take legal action and the police submits a *chalan* in consequence of such order, no doubt the Magistrate takes cognizance on a police *chalan* under sec. 190 (1) (b), Cr. P. C., but at the same time the action of the Magistrate practically amounts to his taking cognizance under sec. 190 (1) (c), Cr. P. C., necessitating the application of the principle of sec. 191, Cr. P. C. Failure on the part of the Magistrate to comply with the provisions of sec. 191, Cr. P. C., will vitiate the trial in such a case—*Mohammad Sadiq v. Emp*, A.I.R. 1938 Lah. 19, 173 I.C. 324, 39 Cr.L.J. 299, 10 R.L. 436.

Section 190 (1) (c), Cr. P. C., is concerned with extra-judicial information, knowledge or suspicion and it has nothing to do with knowledge gathered by a Magistrate in open Court from the evidence of witnesses given during a trial. If a Magistrate begins a trial as a summons case and then finds that an offence triable only under warrant case procedure has been committed, he is bound to apply warrant case procedure thenceforward and he is not in any way disqualified from proceeding with the trial—*K. V. Venkata Ramanier*, 39 Cr.L.J. 958, 177 I.C. 814, A.I.R. 1938 Mad. 815; 47 M.L.W. 739, 1938 M.W.N. 589, (1938) 2 M.L.J. 360, I.L.R. 1938 Mad. 814, 11 R.M. 385, dissenting from *Rajaratnam Pillai*, 59 Mad. 442, 161 I.C. 846, A.I.R. 1936 Mad. 341, 1936 Cr.C. 384, 37 Cr.L.J. 501, 70 M.L.J. 340, 1936 M.W.N. 181, 43 M.L.W. 367, 8 R.M. 880 where, in similar circumstances, it has been laid down that it is the bounden duty of the Magistrate to afford the accused person an opportunity of saying whether he wishes to be tried or not to be tried by that Magistrate.

594. Right of accused to have case transferred:—The words "shall be informed that he is entitled" are mandatory, and a Magistrate cannot refuse to comply with them—*Q. E. v. Hawthorne*, 13 All. 315. He is bound to inform the accused of his right to have the case transferred. If he omits to inform the accused of his right, or if in spite of objections taken by the accused, the Magistrate proceeds with the case, the proceedings will be wholly void. It is not a mere irregularity curable by sec. 537—*Hawthorne*, 13 All. 315, 1891 A.W.N. 102; *Chedi*, 28 All. 212; *Mohib Ali*, 3 A.L.J. 691; *Ram Ratan*, 19 A.L.J. 138; *Chander Sen*, 21 A.L.J. 89, 24 Cr.L.J. 656; *Mul Raj*, 2 Cr.L.J. 365, 84 P.L.R. 1905 P.R. 36; *Abdul Rahim*, 1905 P.R. 8, 170

P.L.R. 1905; *Sakhia*, 5 N.L.R. 113; *Ghasi*, 1898 P.R. 13; *Sarfaraz Khan*, 11 A.L.J. 331; *Naipal*, 10 O.L.J. 532, 25 Cr.L.J. 1224; *Bodha*, 16 P.L.R. 1921, 22 Cr.L.J. 96, A.I.R. 1921 Lah. 235, 59 I.C. 384; *Narain Das*, 27 Cr.L.J. 325 (All); *Sardar*, 35 Cr.L.J. 1308, 151 I.C. 357, 1934 Cr.C. 866, A.I.R. 1934 All. 693; *Malak*, 35 Cr.L.J. 1407, 151 I.C. 792, A.I.R. 1934 Lah. 210, 1934 Cr.C. 445; *Ram Saram Das*, 38 Cr.L.J. 29 (30), 165 I.C. 942, 9 R.P. 234, 17 P.L.T. 791, 1936 Cr.C. 1070, 3 B.R. 107, A.I.R. 1936 Pat. 639; *Arjan Singh v. Emp*, A.I.R. 1939 Lah. 479 (484), 41 Cr.L.J. 65 (69), 184 I.C. 680.

The accused can waive his right under this section—*Mahomed Shah*, 1 S.L.R. 98. But if a Magistrate omits to inform the accused of his right, the mere silence on the part of the accused is not to be taken as a waiver of his right—*Raghab*, 3 C.W.N. cclxxix. Waiver cannot be implied unless the accused is distinctly told in accordance with the terms of this section—*Chander Sen*, 21 A.L.J. 89, 24 Cr.L.J. 655. The accused may waive his right under this section, but still this waiver will not empower the Magistrate to deal with the case if he is debarred from trying it by another section of this Code (e.g., sec. 556)—*Mahomed Shah*, supra.

Although this section enables the accused to apply for a transfer of the case, still unless the accused exercises that right, the jurisdiction of the Magistrate to try the case is unquestionable. The mere fact that the Magistrate has taken cognizance under sec. 190, clause (c) does not by itself oust his jurisdiction to hear and determine the case—*In re Ganeshi*, 15 All. 192 (194).

595. Nature of the accused's right:—All that the accused is entitled to under this section is to have the case tried by another Court; but he cannot choose or determine for himself by what other particular Court the case is to be tried—*In re Shrinivas*, 7 Bom.L.R. 637, 2 Cr.L.J. 582. And the Magistrate has a discretion, on objection being taken, either to transfer the case to another Magistrate or to commit it to the Sessions. He is not bound to transfer the case to another Magistrate. He may elect to commit the case to the Court of Session—*Karuppana v. Felix*, 22 Mad. 148, 2 Weir 150.

The accused can object only to the trial of the case by that Magistrate, but he cannot object to a preliminary inquiry. This section directs the Magistrate either to transfer the case to another Magistrate or to commit the case to the Sessions. And the commitment involves the holding of a preliminary inquiry. This section empowers the Magistrate to hold a preliminary inquiry even in a case triable by himself; if the case is one triable exclusively by the Sessions Court, the Magistrate is *a fortiori* entitled to hold an inquiry preliminary to commitment—*Abdul Razzak*, 21 All. 109; *Azam Ali*, 20 Cr.L.J. 47, 48 I.C. 687 (Cal.).

But a Magistrate who takes cognizance of a case under sec. 190 (c) cannot, after becoming a District Magistrate, hear an appeal from a conviction in the case (which was tried by another subordinate Magistrate) without following the procedure laid down in sec. 191, as an appeal is a part of the trial of the offence—*Bansi Lal*, 12 C.W.N. 438, 7 Cr.L.J. 224.

Another Court:—This section begins with "when a Magistrate takes cognizance of an offence. . . ." and what it means by trial by another Court is made clear by the substantive provision that if the accused objects to being tried by such Magistrate, the case shall be committed to the Court of Session or transferred to another Magistrate. This section does not give the accused the right to be tried by a Court or Magistrate of his choice, but only makes it impossible for the Magistrate who took cognizance under sub-sec. (1), cl. (c) of this section to try the accused except with his consent. Therefore when a Sub-divisional Magistrate takes cognizance of a case under cl. (c), his successor can try it without complying with the requirements of this section—*Panu Samal v. Emp*, A.I.R. 1940 Pat. 111, 1939 P.W.N. 803, 41 Cr.L.J. 318, 186 I.C. 435.

596. When objection is to be taken:—If the accused wants to be tried by another Court, he must express his objection before any evidence is taken—*Murad*, 1894 P.R. 29 (at p. 82).

597. Application of Section to Chapter VIII:—The provisions of secs. 190 and 191 do not apply to proceedings under sec. 110, and a Magistrate who has instituted those proceedings need not inform the person proceeded against that he is entitled to have his case transferred to another Magistrate—*In re Mithu Khan*, 27 All. 172, 1 A.L.J. 685; *Mahomedally*, 20 S.L.R. 291, 27 Cr.L.J. 1280, A.I.R. 1927 Sind 77, 98 I.C. 128. But in *Almuddin*, 29 Cal. 392, 6 C.W.N. 595 and *Godhan*, 4 P.L.J. 7 (9), however, it has been held that the principle of this section, viz., that no man ought to be a judge in his case, applies to proceedings under sec. 110, though they do not relate to offences; therefore, where a Magistrate has initiated proceedings against a person under sec. 110, mainly, if not wholly, upon his own knowledge of the character of that person he is incompetent to proceed with the inquiry under sec. 117.

192. (1) Any Chief Presidency Magistrate, District
 Transfer of cases by Magistrate or Sub-divisional Magistrate
 Magistrates. may transfer any case, of which he has
 taken cognizance, for inquiry or trial, to any Magistrate subordi-
 nate to him.

(2) Any District Magistrate may empower any Magistrate of the first class who has taken cognizance of any case to transfer it for inquiry or trial to any other specified Magistrate in his district who is competent under this Code to try the accused or commit him for trial; and such Magistrate may dispose of the case accordingly.

'May transfer':—The power under this section is optional and not obligatory. As to cases which a Magistrate is disqualified from trying and is bound to transfer, see secs. 487 and 556.

598. Scope of section:—This section deals with the power of the Magistrate to transfer any case; the words 'any case' are not restricted to criminal cases only, but are wide enough to include any case triable by any Criminal Court, e.g., cases under Chap. VIII—*Chintaman*, 35 Cal. 243, 12 C.W.N. 299; *Muona*, 24 All. 151; *Hirananda*, 1 Pat. 621; or cases under Chap. XII—*Satish v. Rajendra*, 22 Cal. 898 (902); *Ram Kissors v. Dwarka*, 10 C.W.N. 1095; *Mahendra v. Rajpati*, 20 A.L.J. 215; *Abdul Hamid v. Hasan*, 4 P.L.T. 297, 24 Cr.L.J. 487. Even if it is held that a case under sec. 145 is not covered by this section, the irregularity in the transfer of such a case will be cured by sec. 529 (f). See *Gurudas v. Gaganendra*, 2 C.L.J. 614, 3 Cr.L.J. 83; *Akbar v. Dami Lal*, 4 C.W.N. 821; *Raj Mohan v. Prosunna*, 5 C.W.N. 686; *Kishori Lal Roy v. Srinath Roy*, 35 Cal. 370 (373), 13 C.W.N. 530, 9 Cr.L.J. 399, 1 I.C. 817. It is, therefore, clear that the Magistrates mentioned in sec. 192 (1), Cr. P. C., have power to transfer cases to Subordinate Magistrates either for the purpose of holding a trial, for example under Chapters XX or XXI of the Code, or for enquiry, for example under Chapters VIII, XII or XVII of the Code—*Hafizur Rahaman v. Amina Hoque*, 44 C.W.N. 1114 (1119).

The word 'case' has not been defined, but reading together sections 192 (1), 190 (a) and 200 (c) it is clear that the term includes a proceeding upon a complaint as soon as the complaint has been received by the Magistrate who takes cognizance of the offence and before he issues any process. A case can, therefore, be transferred under sec. 192 even before a decision to issue process against the accused has been made—*Asaram v. Bhagirathi*, 7 N.L.R. 97, 12 Cr.L.J. 437, 11 I.C. 621.

Under sub-sec. (1), the District Magistrate or Subdivisional Magistrate has power

to transfer a case to any Magistrate subordinate to him (even though the latter be incompetent to try the case on his own initiative); thus, a complaint under sec. 20 of the Cattle Trespass Act can be entertained only by the District Magistrate or a Magistrate specially authorized; but this section will empower such Magistrate to transfer the case, after taking cognizance of it, to any subordinate Magistrate—*Budhan v. Issur Singh*, 34 Cal. 926 (928), 6 Cr.L.J. 363.

But if a first class Magistrate transfers a case under sub-section (2) he can transfer to a Subordinate Magistrate only those cases which the latter is competent to try or commit for trial. See also *Umrao Singh v. Kanwar Lal* in Note 323.

599. "Of which he has taken cognizance":—This section empowers the District Magistrate to transfer to Subordinate Magistrates only those cases of *which he has taken cognizance*. A Magistrate is said to take cognizance of a case under sec. 107 only when (and not before) he issues a notice to the person charged to show cause why he should not be proceeded against under that section. Therefore, where the District Magistrate has not issued any notice to the person charged, that is, where he has not taken cognizance of a case under sec. 107, he cannot transfer the case to a Subordinate Magistrate—*Konda Reddy*, 41 Mad 246, 41 I.C. 990, 18 Cr.L.J. 878. In respect of a case under sec. 145, if a Magistrate receives a petition, examines the petitioner, orders a police inquiry to be made, applies his mind to the police report and comes to the conclusion that there is some basis for the complaint, but cannot proceed with the case any further (e.g., cannot issue notices, etc.) because he is busy otherwise, he must be held to have undoubtedly taken cognizance of the case—*Kapoor Chand v. Suraj*, 1933 A.L.J. 188 (F.B.), 34 Cr.L.J. 414 (416).

This section enables a District Magistrate or Subdivisional Magistrate to transfer only those cases of which he has taken cognizance under the provisions of sec. 190. It has no reference to cases which have already been transferred to his Court from the Court of another Magistrate—*Dara v. Mukat*, 12 A.L.J. 277, 15 Cr.L.J. 357 (358), 23 I.C. 725. In other words, a case which has once been transferred to a District Magistrate or Subdivisional Magistrate for disposal cannot be transferred by him again under sec. 192—*Bashur Husain v. Ali Husain*, 36 All 166, 12 A.L.J. 225, 15 Cr.L.J. 406. Such frequent orders of transfer are also objectionable in view of the trouble they give to parties and their witnesses—*Dara v. Mukat*, *supra*. But where a case had been transferred by the *High Court* under sec. 526 from one District Magistrate to another District Magistrate *with a direction* that the latter should either dispose of the case himself or *transfer it* to some other competent Magistrate in the District, and the latter District Magistrate transferred the case under sec. 192 to an Honorary Magistrate, *held* that he was competent under this section to make the transfer—*Kishen Singh*, 1917 P.R. 30, 18 Cr.L.J. 881 (883), 44 I.C. 993. Even, if *no such direction is given* to a District Magistrate, when a case is transferred to him by the High Court under sec. 526 (from the Court of another District Magistrate) the inference is that he is competent either to try the case himself or to transfer it to some Subordinate Magistrate. In other words, he must be deemed as if he has taken cognizance of the case, and consequently he will be competent to exercise the powers conferred by sec. 192—*Mata Prasad*, 19 All. 249 (250).

Where a trying Magistrate sends up a report to the District Magistrate that an accused before him has committed perjury and altered a document filed in Court, the report amounts to a complaint, and the District Magistrate can take cognizance of the case under sec. 190 (a) and transfer it for trial under sec. 192 to another Magistrate subordinate to him—*Suraj Prasad*, 21 A.L.J. 825; *Sundar Sarup*, 26 All. 514.

The effect of the order of transfer of a case by a Magistrate who had not taken cognizance of the same is undoubtedly a defect of jurisdiction which would not be cured by sec. 537 Cr. P. Code. The order would, however, be rendered valid by cl. (f) of sec. 529, Cr. P. Code—*Ramkrishna Sinha v. Emp.*, 42 C.W.N. 246 (251), 174 I.C. 513, 39 Cr.L.J. 417, 10 R.C. 693, A.I.R. 1933 Cal. 195. See also 21 Cr.L.J. 96, 54 I.C. 496 (Pat.) and Note 598.

600. At which stage case can be transferred:—The Magistrate can transfer the case on taking cognizance of it. A District Magistrate is competent, under sec. 190, to take cognizance without complaint, and to transfer the case to a Subordinate Magistrate without such complaint—*Allahwarayo*, 1 S.L.R. 119. He can transfer the case before any process had been issued to the accused—*Asaram v. Bhagirathi*, 11 I.C. 621, 7 N.L.R. 97, 12 Cr.L.J. 437. He can transfer a case even after summons has been issued against the accused—*In re Azim Sheikh*, 7 C.L.J. 249; *Eqbal*, 20 Cr.L.J. 413 (Pat.). The usual practice throughout Bengal is that the Sub-Divisional Magistrate retains the case in his own file until after the accused summoned by him has appeared, and then transfers it for disposal to a Magistrate subordinate to him. If secs. 192 (1), 202 and 204, Cr. P. C., are read together, it is clearly competent for the Sub-Divisional Magistrate to follow this procedure and to transfer the case as soon as the accused person has appeared or at any time thereafter when the case becomes ready for the inquiry or the trial. It would be equally competent for the Sub-Divisional Magistrate to transfer the case to a Subordinate Magistrate immediately after the complainant had been examined and, having regard to the provisions of sec. 202 of the Code, it would then be for such Subordinate Magistrate to decide whether he would issue process immediately or postpone the issue of such process for the purpose of holding a preliminary investigation under that section for the purpose of ascertaining the truth or falsehood of the complaint. When, however, a case has been transferred under sec. 192 (1), Cr. P. C., it is transferred for all purposes from the file of the superior Magistrate to that of the Subordinate Magistrate, and, thereafter, the superior Magistrate has no jurisdiction to issue any orders connected with the case except such as are contemplated under the provisions of sec. 528 and Chapter XXXII of the Code—*Hafizar Rahaman v. Aminal Hoque*, 44 C.W.N. 1114 (1120).

But a case cannot be transferred under this section after it has been partly tried, e.g., after all the evidence for the prosecution and the defence has been taken—*Radhe*, 12 All. 66. The transfer of a part-heard case, after the framing of the charge and the cross-examination of some of the prosecution witnesses, to another Magistrate for disposal is undesirable. A Magistrate who undertakes a trial and hears the witnesses should, if possible, finish it—*Mazhar Ali*, 50 Cal. 223 (226). It is recognized that the transfer of a part-heard case should be made only in circumstances of an exceptional character, and to transfer a case which has been completely heard on the mere ground that the Magistrate is overworked is an occurrence which is unheard of—*Kisni*, 38 Cr.L.J. 719, 169 I.C. 96, I.L.R. 1937 Nag. 163, 9 R.N. 301, A.I.R. 1937 Nag. 103. But see *Public Prosecutor v. Shanmuga*, 35 Cr.L.J. 1055, 149 I.C. 1155, 1934 M.W.N. 521, 39 M.L.W. 777, A.I.R. 1934 Mad. 435 where a transfer after framing of the charge was held legal.

Where a case was sent back to the District Magistrate for further inquiry by the Additional Sessions Judge with a request that he would transfer it to a Magistrate other than the Magistrate, who had given his opinion, the case was none the less a case which the District Magistrate had taken cognizance and could transfer under this section to a different Magistrate—*Virumal Manghanmal v. Muhammad Khan*, A.I.R. 1936 Sind 146 (147).

For inquiry or trial:—The term "inquiry" in sec. 192 (1), Cr. P. C., is used with special reference to such inquiries as are held in connection with proceedings under Chapters VIII, XII and XVIII of the Code. The inquiry which is contemplated by sec. 202, Cr. P. C., on the other hand, is merely for the limited purpose of ascertaining the truth or falsehood of a complaint in order to enable the Magistrate to decide whether an accused person should be summoned or the complaint against him should be dismissed under sec. 203, Cr. P. C. The plain meaning of sec. 192 (1), Cr. P. C., is that a case which is transferred to a Subordinate Magistrate under that section is transferred to him in order that he may complete the inquiry or trial to be held in connection with the case and take all requisite steps to that end. The holding of an enquiry under sec. 202, Cr. P. C., in a suitable case is merely one of such requisite steps to be taken

by a Magistrate who has taken cognizance of a case or to whom a case may have been transferred for trial under sec. 192 (1), Cr. P. C. It is clear that, a Magistrate who orders an enquiry under sec. 202 of the Code does not transfer the case at all. Ordinarily he merely retains the case on his own file and directs some suitable person to hold an enquiry and send the report to him. It follows, therefore, that an order for an enquiry under sec. 202 of the Code cannot operate as a transfer under sec. 192 (1), Cr. P. C. Another steps requisite to the completion of the trial is the issue of process against the person or persons whom it is intended to prosecute, and the language of sec. 202 of the Code shows that a Subordinate Magistrate to whom a case has been transferred under sec. 102 (1) has the power to issue such process. It, therefore, follows that, when once a case has been validly transferred to a Subordinate Magistrate under sec. 102 (1) of the Code, such Magistrate would have no authority to return the case to the transferring Magistrate in order that the latter might issue process under sec. 204 and his duty would be to complete the trial according to law—*Hafizur Rahman v. Aminul Hoque*, 44 C.W.N. 1114 (1119).

This section empowers a Magistrate to transfer a case for inquiry or trial, but it does not empower him to transfer a case simply for the purpose of considering the report of an investigation under sec. 202, which he has himself ordered. The provisions of secs 192 and 202 do not entitle a Magistrate, after he has proceeded under the latter section, to make an order under the provisions of the former section transferring the case for the purpose of being dealt with under sec. 203 or 204, with a fresh investigation as contemplated by sec. 202—*Mahabir v. Gribala*, 29 C.W.N. 508 (509), 26 Cr.L.J. 990, A.I.R. 1925 Cal. 742, 87 I.C. 526; *Santok Raj Singh v. Gahwar Khan*, A.I.R. 1940 Lah. 61, 41 P.L.R. 807, 41 Cr.L.J. 344, 186 I.C. 595. But see *Kapoor Chand v. Suraj Prasad*, A.I.R. 1933 All. 264 (266), 1933 A.L.J. 188, 142 I.C. 537, 34 Cr.L.J. 414, 1933 Cr.C. 434, 55 All. 301, 19 A.I.Cr.R. 187 (F.B.).

Child Marriage Restraint Act (XIX of 1929):—Section 10, Child Marriage Restraint Act (XIX of 1929), provides that a Court taking cognizance of an offence under that Act should either itself make an enquiry under sec. 202, Cr. P. C., or direct a Magistrate of the First Class subordinate to it to make such enquiry and the transfer of the case to the Sub-Divisional Magistrate for disposal according to law without any such inquiry is illegal—*Sivagami Ammal v. Muthu Iyer*, 40 Cr.L.J. 514, 180 I.C. 902, A.I.R. 1939 Mad. 294, 48 M.L.W. 774, 1938 M.W.N. 1312, (1939) 1 M.L.J. 111.

601. How much of the case is transferred:—Where a police report deals with several persons, but the police send up only some of those persons to the District Magistrate, and the District Magistrate transfers the report and the case to a Subordinate Magistrate for disposal, the effect is that the entire case (i.e., the case against all the persons mentioned in the report, and not merely the case against the persons actually sent up by the police) is transferred to the Subordinate Magistrate. If the Subordinate Magistrate tries the persons sent up by the police, and refuses to issue process against the remaining persons mentioned in the police report, the District Magistrate has no power to issue process against them. The entire case having been transferred to the Subordinate Magistrate, it is he alone and not the District Magistrate to decide whether to issue process against the remaining persons—*Ajab Lal*, 32 Cal. 783 (789), 9 C.W.N. 810, 2 Cr.L.J. 524; *Golapdi*, 27 Cal. 979, 4 C.W.N. 827; *Deonarain*, 12 Pat. 341, 1933 Cr.C. 716 (718), 35 Cr.L.J. 533, 147 I.C. 913, 14 P.L.T. 176, A.I.R. 1933 Pat. 244; *Moul v. Mahabir*, 4 C.W.N. 242. See also *Mathura*, 36 Cr.L.J. 641, 155 I.C. 58, A.I.R. 1934 Pat. 467, 15 P.L.T. 438, 1934 Cr.C. 1062, 7 C.L.J. 249, 7 Cr.L.J. 318. In this class of cases the question arises—whether the entire case has been transferred or not. It is a question of fact, depending on the intention of the transferring Magistrate, and this intention must be gathered from the order itself. Where no reservation is made, it may be concluded that the entire case has been transferred—*Ajab Lal*, 32 Cal. 783 (789); *Azim Sheikh*, 7 C.L.J. 249. There is doubt as to the legality of the piecemeal transfer of a case under sec. 192 (1), Cr. P. C., subject to the authority of a Magistrate who

takes cognizance of an offence on complaint to dismiss the complaint as against some of the persons whom it is sought to prosecute and to leave the case open as against others. But it is clear that, even if such piece-meal transfer is in certain circumstances valid, that portion of the case which has not been transferred must be clearly indicated in the order of transfer recorded by the transferring Magistrate who acts under sec. 192 of the Code. In the absence of a clear indication as to which part of the case is retained on the file of the transferring Magistrate or some further indication to the effect that such Magistrate intended to dismiss the complaint against those accused persons in respect of whom he did not issue process, it must be taken that the whole case had been transferred to the Subordinate Magistrate not only as against the accused persons actually summoned but against all the persons whom the Subordinate Magistrate consider to be implicated in the offence—*Hafizar Rahaman v. Aminal Hoque*, 41 C.W.N. 1114 (1122).

When on a complaint against several persons the Magistrate summons one of them and then transfers the case to a Subordinate Magistrate, the proceedings before the latter are not terminated by the death or acquittal of the person summoned but the case remains to be decided as against the other accused—*Ibid*.

See also *Golam Rahman v. Kali Pada* in Note 603.

602. To whom case can be transferred:—A case can be transferred under this section to the Court of a *subordinate* Magistrate and not to a *superior* Magistrate. So, a third class Magistrate cannot transfer a case to a District Magistrate—*Radhe*, 12 All. 66, 1890 A.W.N. 7.

Under this section a Magistrate of the first class empowered by the District Magistrate has power to transfer a case of which he has taken cognizance for inquiry or trial to another Magistrate in the district who is "competent to try the case or to commit him for trial." From this it is clear that if the Magistrate to whom a case is thus transferred lacks jurisdiction to try the case the order of transfer is bad in law. The case is not covered by sec. 537, Cr. P. C., as a question of jurisdiction is involved and a defect of jurisdiction is not curable by sec. 537, Cr. P. Code. (Vide *Khuda Bakhsh v. Emp.*, A.I.R. 1933 Lah. 1009, 147 I.C. 737, 1933 Cr.C. 1554, 35 Cr.L.J. 514, 35 P.L.R. 289, 6 R.L. 444). *Mathra v. Kamta*, 41 Cr.L.J. 469, 187 I.C. 553, 1910 O.W.N. 351, A.I.R. 1940 Oudh 244, 1940 O.L.R. 215. Where the order of transfer is passed before the examination of witnesses, the Court's jurisdiction to transfer the case to a particular Magistrate must be determined on the allegations made in the complaint and on the complainant's statement in support of the complaint—*ibid*. See also *Raghunandan Prasad v. King-Emp.*, A.I.R. 1925 All. 290, 85 I.C. 730, 47 All. 61, 26 Cr.L.J. 586.

When, in absence of the S. D. O., the Second Officer acted, in addition to his own duties, as the S. D. O., by virtue of an appointment made by the District Magistrate under sec. 13 (3), Cr. P. C., and transferred a case in the file of S. D. O., of which the latter had taken cognizance, to his own file as Second Officer and tried it as such officer, there was undoubtedly a defect of jurisdiction which might, not unreasonably, be said to be outside the scope of sec. 529 (f), Cr. P. C., there being a transfer which the transferring Magistrate could never have been empowered to make, but in the view generally taken by the Calcutta High Court on what was really a matter of procedure the defect would be rendered valid by cl. (f) of sec. 529, Cr. P. Code—*Ramkrishna Sinha v. Emp.*, 42 C.W.N. 246 (250), 174 I.C. 513, 39 Cr.L.J. 417, 10 R.C. 693, A.I.R. 1938 Cal. 195.

The subordination of the Presidency Magistrate to the Chief Presidency Magistrate shall be deemed to be of the same kind and extent as the subordination of Magistrates and Benches to the District Magistrate under sec. 17 (1). The Chief Presidency Magistrate can under sec. 528 withdraw any case from any Presidency Magistrate and refer it for inquiry or trial to any other Presidency Magistrate—*In re Nageswar*, 1 Bom.L.R. 347.

Where a complaint was filed against the accused, who was a District Superintendent of Police and a near relation of the District Magistrate, for certain things that he did while he was a Deputy Commissioner of Police and the District Magistrate transferred the case to a Subordinate Magistrate for trial, *held* that an officer of this rank would be entitled to have a complaint against him tried by a senior Magistrate, and not a subordinate Magistrate, that as a rule it should have been transferred for disposal to a Magistrate who is entirely independent of the District Magistrate and that an order by the District Magistrate transferring such complaint to one of his subordinates for disposal, was, although not illegal, but not proper—*J. W. Atkinson v. S. W. H. Xavier*, A.I.R. 1935 Rang. 242 (243), 37 Cr.L.J. 723, 162 I.C. 988, 1936 Cr.C. 519.

It is open to objection to transfer calendar cases which are triable by a First Class Magistrate to a Second Class Magistrate with a direction to treat them as preliminary register cases, the intention of such transfer being that the cases should be committed to the Sessions Court for trial. Even if they are counter cases to the murder case, the order of the Sub-Divisional Magistrate transferring the calendar cases which are triable by him to the Second Class Magistrate for the purpose of being committed to the Sessions Court is not proper—*Gorrepaty Ramasubbayya*, 39 Cr.L.J. 715, 176 I.C. 182, A.I.R. 1933 Mad. 529, (1938) 1 M.L.J. 403, 47 M.L.W. 486, 1938 M.W.N. 417, 11 R.M. 45.

See also *Painda v. Gulab Khan*, quoted in Notes 62 and 807.

For the purpose of this section, an Additional District Magistrate is subordinate to the District Magistrate, see sec. 10 (3).

A village headman is not a *Magistrate*, and a case cannot be transferred to him—*Maung Gale*, 1 L.B.R. 59.

Under sub-section (2), if a District Magistrate empowers a 1st class Magistrate to transfer a case to some subordinate Magistrate, the District Magistrate *must specify* the Magistrate to whom the case is to be transferred; an order of the District Magistrate empowering a 1st class Magistrate "to try the case himself or to make over the case for trial by *another Magistrate*" without specifying the Magistrate, is wrong. But such erroneous order would be cured by sec. 529 (1)—*Raj Mohun v. Prosunno*, 5 C.W.N. 686 (689).

A Magistrate has no power to send the case to another district himself—*Ramasis v. Bhola*, A.I.R. 1933 Pat. 643, 1933 Cr.C. 1491, 147 I.C. 439.

603. Effect of transfer:—When a District Magistrate has transferred a case for trial to a Deputy Magistrate, the former ceases to have jurisdiction in the case so long as the transfer is in existence, and cannot take any further steps in the matter (e.g., issue warrant), unless the case is withdrawn to his own file under sec. 528—*Golapdi*, 27 Cal. 979, 4 C.W.N. 827; *Amrit Majhi*, 46 Cal. 454, 23 C.W.N. 623, 29 C.L.J. 322, 20 Cr.L.J. 508, 51 I.C. 668; *Deoraram*, 12 Pat. 341, 1933 Cr.C. 716 (718), 147 I.C. 913, 14 P.L.T. 176, A.I.R. 1933 Pat. 244, 6 R.P. 384, 35 Cr.L.J. 533. But see *Chandra Shekhar Prasad*, 36 Cr.L.J. 500 (502), 154 I.C. 387, A.I.R. 1935 Pat. 91, 1935 Cr.C. 146, 1 B.R. 302, 7 R.P. 464. Until the transferring Magistrate withdraws the case from the file of the subordinate Magistrate (to whom the case was transferred) to that of his own Court, he has no power to make any order save an order for further inquiry under sec. 437 (now 436)—*Ajab Lal*, 32 Cal. 783 (790); *Radhaballabh v. Benode Behari*, 30 Cal. 449. In this respect this section differs from sec. 202. Under that section the Magistrate receiving a complaint refers it to a subordinate Magistrate only for inquiry and report, and does not cease to have control over the case. The provisions of secs. 192 and 202 are separate and distinct and powers conferred by one section do not curtail the power conferred by the other—*Amrit Majhi*, 46 Cal. 854. From the above-mentioned cases it follows that if a case has been transferred to a Magistrate under sec. 192 (1), Cr. P. that Magistrate has the same authority to deal with the case which has been transferred to him as regards the issuing of processes and other matters connected with the trial.

as is vested in the superior Magistrate from whom he received the case on transfer—*Hafizur Rahaman v. Amina Hoque*, 44 C.W.N. 1114 (1121).

In a Patna case it has been held that a Magistrate who has transferred a case under sec. 192 to a Subordinate Magistrate cannot recall the case—*Mahari v. Baldeo*, 7 P.L.T. 530, 26 Cr.L.J. 1585 (1587), A.I.R. 1926 Pat. 525, 90 I.C. 657. This view, it is submitted, is not correct. The learned Judge seems to have overlooked the new provisions of sec. 528, sub-section (4).

When a case is, after issue of process, transferred from one Magistrate to another, the latter stands in the shoes of the Magistrate who originally issues the process. Therefore, if the second Magistrate discharges the accused and *suo motu* issues process against another person under sec. 190, clause (c), he cannot be said to be acting without jurisdiction—*Hemendra*, 55 Cal 1274, 30 Cr.L.J. 352, A.I.R. 1929 Cal. 192.

No doubt if a complaint is transferred at the very outset by one Magistrate to another, the latter has power to take action under secs 202 and 203, Cr. P. C., but it is impossible to suppose that the Code contemplates that when one Magistrate has examined witnesses under sec. 202, Cr. P. C., and has believed them, and thereupon transfers the case for trial to a Subordinate Magistrate, that Magistrate should have power to examine those same witnesses over again under sec. 202, Cr. P. C., and then proceed to dismiss the complaint under sec. 203, Cr. P. C.—*Sheo Balak Singh v. Sant Bux Singh*, 37 Cr.L.J. 1128, 165 I.C. 28, 9 R.O. 166, 1936 O.W.N. 1079, A.I.R. 1937 Oudh 81, 1936 O.L.R. 607.

When proceedings under sec. 107, Cr. P. C., were transferred by the District Magistrate from the Court of the Sub-divisional Magistrate to that of another Magistrate at sudder, the latter can draw up proceedings against some additional persons although on the same materials the Sub-divisional Magistrate had not done so—*Golam Rahaman v. Kali Pada*, 36 C.W.N. 796, 59 Cal. 1484, A.I.R. 1932 Cal. 864.

604. Procedure before transfer:—*Notice to parties*:—Before a case is transferred under this section from one subordinate Court to another, the District Magistrate should give notice to the parties of such transfer—*Teacotta v. Ameer Majee*, 8 Cal. 393; *Umrao v. Fakirchand*, 3 All. 749; *In re Saker Naik*, 2 Bom.L.R. 342; *Sadashiv*, 22 Bom. 549. But see *Q-E. v. Kuppmuthu*, 24 Mad. 317.

Examination of complainant:—Under sec. 200, proviso (a), when a complaint is made in writing, the Magistrate is not bound to examine the complainant before transferring the case under this section. See 18 W.R. 18 (Cr.), 9 Beng.L.R. 146.

Order of transfer:—An order of transfer under this section need not be in writing—*Ramkrishna Sinha v. Emp.* 42 C.W.N. 246 (250), 174 I.C. 513, 39 Cr.L.J. 417, 10 R.C. 693, A.I.R. 1938 Cal. 195.

605. Procedure after transfer:—*Examination of complainant*:—If the transferring Magistrate has already examined the complainant, the Magistrate to whom the case is transferred is not bound to examine the complainant again; see sec. 200 (c).

Examination of prosecution witnesses:—Where the transferring Magistrate has examined all the prosecution witnesses, the Magistrate to whom the case is transferred is not bound to examine the witnesses again, but can act upon the deposition of witnesses recorded by the transferring Magistrate, under the provisions of sec. 350. The contrary view taken in *Bashir Khan*, 14 All. 346, *Tota Venkata*, 2 Weir 152 and *Dy. Leg. Rem. v. Upendra*, 12 C.W.N. 140, 6 Cr.L.J. 434 is no longer correct in view of the new sub-section (3) of sec. 350.

606. Transfer by High Court:—In the case of a transfer of a criminal case by the High Court (under sec. 526) from a Court subordinate to the District Magistrate to the District Magistrate's Court, it will be understood that the District Magistrate should try the case himself, unless the High Court has expressed that the District Magistrate shall have the power to transfer the case to a subordinate Court. But when the High Court transfers a case from the Court of one District Magistrate to the Court of another District Magistrate, it will be understood, unless the contrary

is directly expressed, that the Magistrate to whom the transfer is made has power and jurisdiction to apply sec. 192, and to transfer the case to any Magistrate subordinate to him, who may be competent to try it—*Mata Prasad*, 19 All. 249 (251). See also *Kishen Singh*, 1917 P.R. 30, 18 Cr.L.J. 881, cited in Note 599 above.

193. (1) Except as otherwise expressly provided by this Code or by any other law for the time being in force, no Court of Session shall take cognizance of any offence as a Court of original jurisdiction unless the accused has been committed to it by a Magistrate duly empowered in that behalf.

(2) Additional Sessions Judges and Assistant Sessions Judges shall try such cases only as the Local Government by general or special order may direct them to try, or, in the case of Assistant Sessions Judges, as the Sessions Judge of the division, by general or special order, may make over to them for trial.

(2) Additional Sessions Judges and Assistant Sessions Judges shall try such cases only as the *Provincial Government* by general or special order may direct them to try, or * * * as the Sessions Judge of the division, by general or special order, may make over to them for trial.

Change:—The words "Provincial Government" have been substituted for the words "Local Government" by sec 4 of the Government of India (Adaptation of Indian Laws) Order, 1937.

The words "in the case of Assistant Sessions Judges" which occurred in subsection (2) after the words "may direct them to try" have been omitted by sec. 46 of the Criminal Procedure Code Amendment Act, XVIII of 1923 "We propose to omit from section 193 (2) the words in the case of Assistant Sessions Judges" The section, as it stands at present (*i.e.*, before the amendment) makes a distinction between Additional Sessions Judges and Assistant Sessions Judges, only allowing transfers by the Sessions Judge in the case of the latter. Considerable inconvenience has been felt owing to this limitation, which we propose to remedy by the omission of the words referred to above"—*Report of the Select Committee of 1916*. Under the present law, Sessions Judges will be able to make over the cases to *Additional* Sessions Judges as well as to Assistant Sessions Judges

607. Object of this section:—The object of the requirements of a commitment before trial is to secure, in the case of a person charged with grave offence, a preliminary inquiry which would afford him the opportunity of becoming acquainted with the circumstances of the offence imputed to him and enable him to make his defence—*Ram Varma*, 3 Mad. 351, 2 Weir 269. The law contemplates that in the serious cases of which a Court of Session may take cognizance, the accused should have some information of the case he has to answer—*Chinna Vedagiri*, 4 Mad. 227, 2 Weir 584

608. Trial without commitment:—The trial in the Court of Session without a commitment is *ultra vires*—*Ramatesan*, 15 Mad. 352, 2 Weir 153, 376 and 394; *Sharina*, 1884 P.R. 42; *Jagat*, 22 Cal 50. The absence of commitment is a defect of substance and not merely of form, and is not cured by section 537—*Sharina*, *supra*. Even where a Sessions Judge holds that the approver who is giving evidence before him as a witness is not complying with the conditions of pardon, he cannot try him

at once, but can do so only after a proper commitment by a competent Court—*Ramatevan*, 15 Mad. 352; *Jagat Chandra*, 22 Cal. 50.

609. Reference under sec. 123:—*Power of Additional Sessions Judge*:—It was formerly held that a reference to a Court of Session by a Magistrate of a case under section 123 was not a case 'committed' for trial, and the Court of Session disposing of it did not 'try a case' within the meaning of this section. An Additional Sessions Judge empowered by the Government to try all cases which might be committed for trial by the District Magistrate had no jurisdiction to pass an order on such reference—*In re Dayaram*, Ratanlal 830. This decision is no longer good law, because the new sub-section (3B) of sec. 123 added by the Amendment Act of 1923 expressly authorises the Sessions Judge to make over all references under sec. 123 of the Additional or Assistant Sessions Judge. In *Benode Behari*, 50 Cal. 229, 27 C.W.N. 996, 39 C.L.J. 75, A.I.R. 1923 Cal. 649, the word 'cases' under this section was held to include a reference under sec. 123; but such a laboured interpretation is no longer necessary.

610. Assistant Sessions Judge appointed temporarily:—An Assistant Sessions Judge who has been directed by the Government to take over charge of the duties of the Sessions Judge during a temporary vacancy of the office, is not an officer appointed to act as a Sessions Judge, and has no jurisdiction to try any case even as Assistant Sessions Judge, unless it was made over to him by a general or special order under the last para of this section—*Mahadhu*, Ratanlal 500.

Power of Assistant Sessions Judge to hear appeal:—The word 'case' used in sub-section (2) does not include an appeal or other matter, and a Sessions Judge has no power to transfer an appeal filed in his Court to the Court of the Assistant Sessions Judge—*Abdul Razzak*, 37 All. 286, 13 A.L.J. 353, 16 Cr.L.J. 316, 28 I.C. 652. See Note 1110 under sec. 409.

Power of High Court:—Notwithstanding a notification of the Local Government under this section the High Court has power, under sec. 526, Cr. P. C., to direct a transfer of a case to another Court of Sessions—*Lakshman*, 32 Cr.L.J. 1147, 131 I.C. 347, 33 Bom L.R. 675, A.I.R. 1931 Bom. 413, 1931 Cr.C. 728, Ind. Rul. 1931 Bom. 469.

194. (1) The High Court may take cognizance of any offence upon a commitment made to it in manner hereinafter provided.

Cognizance of offences by High Court.

Nothing herein contained shall be deemed to affect the provisions of any Letters Patent granted under the Indian High Courts Act, 1861, or the Government of India Act, 1915, or the Government of India Act, 1935, or any other provisions of this Code.

(2) (a) Notwithstanding anything in this Code contained, the Advocate-General may, with the previous sanction of the Provincial Government, exhibit to the High Court, against persons subject to the jurisdiction of the High Court, informations for all purposes for which Her Majesty's Attorney-General may exhibit informations on behalf of the Crown in the High Court of Justice in England.

(b) Such proceedings may be taken upon every such information as may lawfully be taken in the case of similar informations filed by Her Majesty's Attorney-General so far as the

circumstances of the case and the practice and procedure of the said High Court will admit.

(c) All fines, penalties, forfeitures, debts and sums of money recovered or levied under or by virtue of any such information shall form part of the revenues of the Province.

(d) The High Court may make rules for carrying into effect the provisions of this section.

Amendment:—The words "Provincial Government" have been substituted for "Local Government" and the words "shall form part of the revenues of the Province" for "shall belong to the Government of India" and the word "or the Government of India Act, 1935" have been inserted after "Act, 1915" and the words "the Governor-General in Council or" have been omitted by the Government of India (Adaptation of Indian Laws) Order, 1937.

610A. "Advocate-General" includes a Government Advocate; see section 4 (a).

The High Court of Patna has jurisdiction to try persons against whom the Government Advocate, with the previous sanction of the Local Government, has exhibited an *ex officio* information—*Dwarkanath*, 37 CWN 514 (521) (PC), 34 CrLJ 322 (325), 1933 Cr.C. 442, A.I.R. 1933 P.C. 124, 142 I.C. 335, 57 CLJ. 177, 64 MLJ 466, 37 M.L.W. 584, 1933 M.W.N. 409, 10 OWN 522, 35 BomLR 507, 14 PLT. 305, 1933 ALJ. 645

An *ex officio* information under this section should contain a statement of the charge as certain and detailed as an indictment. An information which does not formulate any criminal charge against any one, and which contains merely the opinion of the executive that an offence has been committed, is defective—*Dwarkanath*, *supra*.

It cannot be contended that the remedy where a Court and not a particular Judge has been defamed should not be by way of proceedings for contempt of Court, but by criminal proceedings at the instance of the Government Advocate under the provisions of sec. 194, Cr. P. Code. The inherent power of the Court to punish for contempt of Court is a power which is essential in the interests of the administration of justice and that power is not restricted in any degree by the provisions in the Cr. P. Code, relating to proceedings which may be instituted with the sanction of the Government where the Courts or His Majesty's Judges have been defamed. Criminal proceedings as well as contempt proceedings lie against a person who has committed contempt of Court by indulging in illegitimate criticism of the conduct of a particular judge and there is no reason in principle for holding that where a Court generally has been defamed proceedings for contempt of Court do not also lie against the delinquent—*An Advocate of Allahabad*, A.I.R. 1935 All 1 (3), 4 AWR. 1155, 1935 Cr.C. 1, 1935 A.L.J. 125, 1935 All.L.R. 271, 154 I.C. 955

In the matter of *Tushar Kanti Ghosh*, 36 CrLJ. 1053 (1082), 156 I.C. 1055, A.I.R. 1935 Cal. 419, 39 C.W.N. 770, 61 CLJ 376, 1935 Cr.C. 795, 8 RC 53, 63 Cal 217, Jack, J., observed: "The only alternative procedure in this country is that under sec. 194 Criminal Procedure Code. This procedure has not, I think, been employed in any High Court in cases of this kind of contempt of the High Court. It depends upon the exhibition of information by the Advocate-General with the previous sanction of the Governor-General in Council or the Local Government, and would, therefore, place the maintenance of regard for the Court entirely in the hands of the Executive. Moreover, in the words of Wills, J., in *Rex v Davies*, (1906) 1 KB at p. 41, it is "too dilatory and too inconvenient to afford any satisfactory remedy." There would be much to be said for the procedure under sec. 194, Criminal Procedure Code, in a case in which there could be any doubt as to the meaning of the words used, and which had therefore better be left to the decision of a jury, but where, as in this case, there is no ambiguity in the words used, the facts are not disputed, and

the accused are thoroughly able and willing to defend themselves in summary procedure, there seems to be no reason why the Court should not adopt it."

195. (1) No Court shall take cognizance—

(a) of any offence punishable under sections 172 to 188 (both inclusive, of the Indian Penal Code, except with the previous sanction, or on the complaint, of the public servant concerned, or of some other public servant, to whom he is subordinate;

(b) of any offence punishable under sections 193, 194, 195, 196, 199, 200, 205, 206, 207, 208, 209, 210, 211 or 228 of the same Code, when such offence is committed in, or in relation to, any proceeding in any Court, except with the previous sanction, or on the complaint, of such Court, or of some other Court to which such Court is subordinate;

(c) of any offence described in section 463 or punishable under section 471, 475, or 476 of the same Code, when such offence has been committed by a party to any proceeding in any Court in respect of a document produced or given in evidence in such proceeding, except with the previous sanction, or on the complaint, of such Court, or of some other Court to which such Court is subordinate.

195. (1) No Court shall take cognizance—

(a) of any offence punishable under sections 172 to 188 of the Indian Penal Code, except * * * on the complaint *in writing* of the public servant concerned or of some other public servant to whom he is subordinate;

(b) of any offence punishable under any of the following sections of the same Code, namely, sections 193, 194, 195, 196, 199, 200, 205, 206, 207, 208, 209, 210, 211 and 228, when such offence *is alleged to have been* committed in, or in relation to, any proceeding in any Court, except * * * on the complaint *in writing* of such Court or of some other Court to which such Court is subordinate; or

(c) of any offence described in section 463 or punishable under section 471, section 475 or section 476 of the same Code, when such offence *is alleged to have been committed* by a party to any proceeding in any Court in respect of a document produced or given in evidence in such proceeding, except * * * on the complaint *in writing* of such Court or of some other Court to which such Court is subordinate.

(2) In clauses (b) and (c) of sub-section (1) the term "Court" means a Civil, Revenue or Criminal Court but does not include a Registrar or Sub-Registrar under the Indian Registration Act, 1877.

(3) *See infra.*

(4) The sanction referred to in this section may be expressed in general terms, and need not name the accused persons; but it shall so far as practicable specify the Court or other place in which, and the occasion on which, the offence was committed.

(5) When sanction is given in respect of any offence referred to in this section, the Court taking cognizance of the case may frame a charge of any other offence so referred to which is disclosed by the facts.

(6) Any sanction given or refused under this section may be revoked or granted by any authority to which the authority giving or refusing it is subordinate; and no sanction shall remain in force for more than six months from the date on which it was given; provided that the High Court may, for good cause shown, extend the time.

(7) For the purposes of this section, every Court shall be deemed to be subordinate only to the Court to which appeals from the former Court ordinarily lie, that is to say:—

(c) Where no appeal lies, such Court shall be deemed to

(2) In clauses (b) and (c) of sub-section (1) the term "Court" *includes* a Civil, Revenue or Criminal Court, but does not include a Registrar or Sub-Registrar under the Indian Registration Act, 1908.

(omitted).

(omitted).

(omitted).

(3) For the purposes of this section, a Court shall be deemed to be subordinate to the Court, to which appeals ordinarily lie from ~~the~~ *appealable decrees or sentences* of such former Court, or in the case of a ~~Civil~~ Court from ~~whose~~ de-

the accused are thoroughly able and willing to defend themselves in summary procedure, there seems to be no reason why the Court should not adopt it."

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(b) of any offence punishable under sections 193, 194, 195, 196, 199, 200, 205, 206, 207, 208, 209, 210, 211 or 228 of the same Code, when such offence is committed in, or in relation to, any proceeding in any Court, except with the previous sanction, or on the complaint, of such Court, or of some other Court to which such Court is subordinate;

(c) of any offence described in section 463 or punishable under section 471, 475, or 476 of the same Code, when such offence has been committed by a party to any proceeding in any Court in respect of a document produced or given in evidence in such proceeding, except with the previous sanction, or on the complaint, of such Court, or of some other Court to which such Court is subordinate.

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(b) of any offence punishable under any of the following sections of the same Code, namely, sections 193, 194, 195, 196, 199, 200, 205, 206, 207, 208, 209, 210, 211 and 228, when such offence *is alleged to have been* committed in, or in relation to, any proceeding in any Court, except * * * on the complaint *in writing* of such Court or of some other Court to which such Court is subordinate;

(c) of any offence described in section 463 or punishable under section 471, section 475 or section 476 of the same Code, when such offence *is alleged to have been committed* by a party to any proceeding in any Court in respect of a document produced or given in evidence in such proceeding, except * * * on the complaint *in writing* of such Court or of some other Court to which such Court is subordinate.

(2) In clauses (b) and (c) of sub-section (1) the term "Court" means a Civil, Revenue or Criminal Court but does not include a Registrar or Sub-Registrar under the Indian Registration Act, 1877.

(3) *See infra.*

(4) The sanction referred to in this section may be expressed in general terms, and need not name the accused persons; but it shall so far as practicable specify the Court or other place in which, and the occasion on which, the offence was committed.

(5) When sanction is given in respect of any offence referred to in this section, the Court taking cognizance of the case may frame a charge of any other offence so referred to which is disclosed by the facts.

(6) Any sanction given or refused under this section may be revoked or granted by any authority to which the authority giving or refusing it is subordinate; and no sanction shall remain in force for more than six months from the date on which it was given; provided that the High Court may, for good cause shown, extend the time.

(7) For the purposes of this section, every Court shall be deemed to be subordinate only to the Court to which appeals from the former Court ordinarily lie, that is to say:—

(c) Where no appeal lies, such Court shall be deemed to

(2) In clauses (b) and (c) of sub-section (1) the term "Court" includes a Civil, Revenue or Criminal Court, but does not include a Registrar or Sub-Registrar under the Indian Registration Act, 1908.

(omitted).

(omitted).

(omitted).

(3) For the purposes of this section, a Court shall be deemed to be subordinate to the Court to which appeals ordinarily lie from the *appealable decrees or sentences* of such former Court, or in the case of a *Civil Court* from whose de-

be subordinate to the principal Court of original jurisdiction within the local limits of whose jurisdiction such first mentioned Court is situate.

(a) Where such appeals lie to more than one Court, the Appellate Court of inferior jurisdiction shall be the Court to which such Court shall be deemed to be subordinate.

(b) Where such appeals lie to a Civil and also to a Revenue Court, such Court shall be deemed to be subordinate to the Civil or Revenue Court according to the nature of the case in connection with which the offence is alleged to have been committed.

(3) The provisions of sub-section (1), with reference to the offences named therein apply also to criminal conspiracies to commit such offences and to the abatement of such offences, and attempts to commit them.

(5) *Where a complaint has been made under sub-section (1), clause (a), by a public servant, any authority to which such public servant is subordinate may order the withdrawal of the complaint, and, if it does so, it shall forward a copy of such order to the Court, and upon receipt thereof by the Court, no further proceedings shall be taken on the complaint.*

Change:—This section has been substantially amended by sec. 47 of the Criminal Procedure Code Amendment Act XVIII of 1923.

The changes introduced by the present Amendment are the following :—

(i) The words "with the previous sanction" have been omitted from clauses (a), (b) and (c) of sub-section (1). Under the old law, a private person could launch a prosecution for the offences referred to in this section, after obtaining the sanction of the Court. Under the present law, by *abolishing sanction altogether*, the right of private individuals to prosecute for the said offences has been taken away. Sub-sections (4), (5) and (6) which dealt with sanction have also been omitted.

(ii) The words "in writing" have been added after the word "complaint", in clauses (a), (b) and (c); and the words "is alleged to have been committed" have been

crees no appeal ordinarily lies, to the principal Court having ordinary original *Civil* jurisdiction within the local limits of whose jurisdiction such *Civil* Court is situate:

Provided that—

(a) where appeals lie to more than one Court, the Appellate Court of inferior jurisdiction shall be the Court to which such Court shall be deemed to be subordinate; and

(b) where appeals lie to a Civil and also to a Revenue Court, such Court shall be deemed to be subordinate to the Civil or Revenue Court according to the nature of the case or *proceeding* in connection with which the offence is alleged to have been committed.

(4) The provisions of sub-section (1), with reference to the offence named therein, apply also to criminal conspiracies to commit such offences and to the abatement of such offences, and attempts to commit them.

- substituted for the words "have been committed" in clauses (b) and (c). For reasons, see Notes 614 and 626 below.

(iii) In sub-section (2) the word 'includes' has been substituted for 'means'.

(iv) Sub-section (3) has been re-numbered as sub-section (4).

(v) Sub-section (7) has been re-numbered as sub-section (3), because that sub-section should come in more properly after the definition of the word "Court" in sub-section (2). The old clause (c) of sub-section (7) has now been incorporated into the body of sub-section (3) with this restriction that it is now confined to Civil Courts only.

(vi) Sub-section (5) is entirely new.

Reasons for the change:—"The provisions of section 195 cause constant and great difficulty, and various amendments have been suggested which we have considered at length. We have no doubt that it will not be possible to remedy the evils which are connected with this section so long as private individuals are allowed to prosecute for offences connected with the administration of justice. In our opinion the only effective way dealing with this section is to allow prosecutions to be launched only by the public servant or by the Court.

"We see no reason why the public servant or the Court should not file a complaint exactly in the same way as a private individual would do in other cases, and our proposals in this connection with this section and the enlargement of section 476 involve the adoption of this principle. In our view section 195 should bar the cognizance by any Court of offences of this nature except upon such complaint, while the procedure to be followed when the Court desires to prosecute should be prescribed by section 476.

"The adoption of this principle will at all events get rid of the objectionable practice of keeping a sanction, which has been granted to a private individual, hanging over the head of the accused person for a period of six months, which is frequently utilised for the various purposes of blackmail. In the case of a complaint by a Court or a public servant we do not think it will be necessary to prescribe any limit of time.

"It will also, in our opinion, be a distinct advantage to get rid altogether of the term 'sanction' in connection with these prosecutions, a result which will be effected by the amendment we propose.

"We recognise that clause (a) of sub-section (1) stands on a somewhat different footing from clauses (b) and (c), but we think there is no reason to retain even in it any reference to a sanction, as prosecution under clause (a) can reasonably be launched in all cases on the direct complaint of a public servant."—*Report of the Select Committee of 1916.*

The object of the amendment is to stop private persons from obtaining sanction as a means of wreaking vengeance and to give the Court concerned full discretion in deciding whether any prosecution is necessary or not—*Abdul Rahman*, 4 Bur.L.J. 213, 27 Cr.L.J. 669.

611. Sanction abolished—Effect of Amendment:—Prior to the amendments sec 195 and sec 476 referred to two different things. Section 195 required a sanction or complaint by the Court for the prosecution of certain offences; sec. 476 gave the Court a quite independent power to direct a prosecution of its own authority and send the case for trial on the merits to a First Class Magistrate. As the Code now stands, both the sanction by a Court and the direct order by a Court directing a prosecution are done away with, and the procedure in all cases is one of complaint by the Court. Section 195 describes the offences in respect of which a complaint is necessary, and sec. 476 prescribes the procedure under which a complaint is to be made. This has modified the situation very materially and there is now strong ground for holding that the Legislature intended sec. 476 to be co-extensive in its scope with clauses (b) and (c) of sec. 195 (1). Clause (a) of sec. 195 is not concerned with Courts, and sec 476 does not refer to it—*Dwarka v. Matund*, 26 Cr.L.J. 1506 (1917), 90 I.C. 290, 24 A.L.J. 122, A.I.R. 1926 All. 21. See also Note 1237.

Since sanction has been abolished by the Amendment Act XVIII of 1923, a sanction granted after the 1st September, 1923 (the date on which the Amendment Act came into operation) is illegal—*In re Gafur*, 26 Bom.L.R. 1235, 26 Cr.L.J. 448. A sanction granted after 1st September 1923 is illegal, even though an application for sanction was made prior to that date. The order granting sanction cannot be treated even as a complaint—*Baldeo Misser*, 51 Cal. 652 (655).

So also, where sanction was granted before the 1st September 1923, but no prosecution was launched by that time, further proceedings cannot be taken after that date on the strength of the sanction. A prosecution can then be started only on a complaint by the Court concerned—*Am v. Ah Yone*, 2 Bur.L.J. 289; *Javahir v. Jaggu*, 6 Lah. 41, A.I.R. 1925 Lah. 350, 26 P.L.R. 152, 26 Cr.L.J. 1163; *Ameraj*, 23 A.L.J. 35, 26 Cr.L.J. 751 (752).

But where a sanction was obtained and the Court had taken cognizance of the offence, before the Amendment Act came into operation, the subsequent amendment of the law did not take away the jurisdiction of the Court to proceed with the trial, and did not necessitate a fresh complaint under the amended provisions—*In re Appasamy*, 49 M.L.J. 276, A.I.R. 1925 Mad. 1122, 27 Cr.L.J. 84; *Muthia Goundan v. Chira*, 1924 M.W.N. 358, 36 Cr.L.J. 142; *Akbar Ali*, 7 Lah. 99, 27 P.L.R. 181, 27 Cr.L.J. 724, A.I.R. 1925 Lah. 131; *Wasudeo*, 27 Cr.L.J. 181, A.I.R. 1927 Nag. 71; *Kural Ram*, 27 Cr.L.J. 560, 93 I.C. 1056, A.I.R. 1926 All. 421.

An application under sub-section (6) of the old section to revoke a sanction granted before the Amendment Act of 1923 is maintainable even after the coming into operation of the Amendment Act of 1923, because the right conferred by sub-section (6) of the old section was not a mere matter of procedure but a substantive right, and such right could not be taken away by any amending Act—*Ramatrishna v. Saha Ammal*, 48 Mad. 620 (F.B.), 49 M.L.J. 223, 27 Cr.L.J. 91 (Practically overruling *Nataraja v. Rangaswamy*, 47 Mad. 384, 46 M.L.J. 274, 25 Cr.L.J. 361; and *Sesha Ayyar*, 19 L.W. 463, 34 M.L.T. 353, 25 Cr.L.J. 702). Similarly, where proceedings under the old section 195 were commenced and the order of the subordinate Judge refusing to sanction a prosecution was passed under the old section, but during the pendency of an application to the District Judge against the order of refusal the new section came into operation, and the District Judge sanctioned the prosecution, held that the case was governed by sec. 6 (e) of the General Clauses Act, and the repeal of the old sec. 195 could not affect any pending investigation in respect of the right which had accrued to the complainant. The District Judge, therefore, did not act illegally in granting the sanction—*Kashmir Lal v. Kishan Dasi*, 25 Cr.L.J. 90, A.I.R. 1924 All. 563.

Clause (b) of sec. 537, Cr. P. C., relating to sanctions is now omitted from the section because it is no longer necessary. The old system of sanctions is now abolished. The Court or officer concerned makes the complaint direct: sec. 195 (1) (a) and (b), Cr. P. Code. When the complaint is made by the Sub-Inspector concerned, with necessary administrative sanction, no judicial sanction is now necessary—*Dharamdas Huvard v. E.P.*, 40 Cr.L.J. 12 (13), 178 I.C. 218, A.I.R. 1938 Sind 213, 11 R.S. 82.

N.B.—It should be noted that many of the cases cited below are cases relating to sanctions, but the principle of those cases applies also to complaints, for under the old law no distinction was made between a sanction and a complaint. The cases noted below are, therefore, cited with certain verbal alterations.

612. Object of section:—The object of this section is to protect persons from being needlessly harassed by rash, baseless or vexatious prosecution at the instance of private individuals for the offences specified—*Perumal v. Perumal*, 39 Mad. 671, *Palanisami v. Ramasami*, 32 M.L.J. 54; to protect persons from criminal prosecutions instituted upon insufficient grounds by persons actuated by malice, ill-will or jealousy of disposition—*Balraj v. United Singh*, 18 All. 206; to prevent innocent persons being put on trial at the instance of persons likely to be moved by motives of revenge and

not protect guilty persons from the penalty of their crimes—*Jugeshwar Singh*, 37 Cr.L.J. 893 (894), A.I.R. 1936 Pat. 346, 15 Pat. 26, 17 P.L.T. 234, 164 I.C. 86, 1936 Cr.C. 539, 2 B.R. 702, 9 R.P. 84; to ensure prosecution only when the Court after due consideration is satisfied that there is a proper case to put a party on his trial—*Tuck Sew v. Hain*, 4 L.B.R. 234; and to save the time of Criminal Courts from being wasted by endless prosecutions without convictions—*Parameshwaran*, 39 Mad 677.

It follows from sec. 4 (g) and sec. 190, Cr. P. C., that the general rule is that any person can set the law in motion by a complaint. Certain exceptions are, however, created by Statutes, for example, secs 195 and 198, Cr. P. C., offences about stamp laws, lotteries etc.—*Bal Mukand*, 29 Cr.L.J. 652, 110 I.C. 108, A.I.R. 1928 Lah 510, 9 Lah. 678, 10 A.I.Cr.R. 474. See also *Ganesh Narayan Salhe*, 13 Bom. 600. Section 195, Cr. P. C., is one of the sections which prohibits a Court from taking cognizance of certain offences unless and until a complaint has been made by some particular authority or person. The other sections dealing with similar matters are secs 196 to 199-A, Cr. P. Code. These sections do not lay down any rule of procedure. They only create a bar and say that unless some requirements has been complied with no Court shall take cognizance of the offences described in those sections—*Kushal Pal*, A.I.R. 1931 All. 443 (445), 32 Cr.L.J. 1105, 134 I.C. 225, 1931 Cr.C. 715, 53 All 804, 1931 A.L.J. 697, Ind. Rul. 1931 All. 801

The scope of this section as regards the making of complaints is not restricted to the Courts detailed in sec 476, Cr P Code—*Hari Charan v Kaushiki Charan*, A.I.R. 1940 Cal. 286 (288), 44 C.W.N. 530

The principle underlying sec 195, Cr P C., is plainly this. Where an act amounts to the offence of contempt of the lawful authority of public servants (sec 172-188, I. P. C.) or to an offence against public justice such as giving false evidence (sec. 193 *et seq* I. P. C.) or to an offence relating to documents actually used in a Court (sec. 471, I. P. C., etc.) private prosecutions are barred absolutely and only the Court in relation to which the offence was committed may initiate proceedings. This salutary rule of law is founded on common sense. The dignity and prestige of Courts of law must be upheld by their presiding officers, and it would never do to leave it to parties aggrieved to achieve in one prosecution gratification of personal revenge and vindication of a Court's honour and prestige. To allow this would be to sacrifice deliberately the dispassionate and impartial calm of tribunals and to allow a Court's prestige to be the sport of personal passions. Where the Court in its discretion has declined to prosecute on the ground that there was not a strong *prima facie* case and that no prosecution at all is far better than a prosecution which is likely to prove abortive, the complainant cannot be allowed to prosecute merely because he feels that he has been personally dishonoured. The refusal of the Court is final. It must mean that there should be no prosecution at all for this alleged offence. The complainant who is animated by a sense of personal grievance, cannot be allowed or trusted to be an impartial Advocate and Deputy of the Court in the role of prosecutor—*K. Ramasawmi Ayyangar v. K. V. Pandurange Mudaliar*, 39, Cr.L.J. 1, 171 I.C. 943, 1937 M.W.N. 1070, (1937) 2 M.L.J. 757, 46 M.L.W. 704

Section 195, though it forms a part of the Code of Cr. Procedure, in reality contains a provision of the substantive law of crimes. It does not deal with the competency of the Courts nor lay down which of several Courts shall in any particular matter have jurisdiction to try the case. It in reality lays down that the offences therein referred to shall not be deemed to be any offence at all, except on the complaint of the persons or the Courts therein specified; it enhances the connotation of those offences and limits the scope of their definition—*Fakir Mahomed*, 21 S.L.R. 1, 27 Cr.L.J. 1105 (1110), A.I.R. 1927 Sind 10.

The requirements of sec. 195 were not abrogated by the Prevention of Intimidation Ordinance (V of 1930)—*Ganesh Vasudeo*, 32 Cr.L.J. 507, 130 I.C. 396, 55 Bom. 322, Ind. Rul. 1931 Bom 252, 33 Bom.L.R. 59, 1931 Cr.C. 183, A.I.R. 1931 Bom. 135;

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as in the case of complaints by ordinary persons. Thus, where a Sub-Inspector drew up what was virtually a complaint and sent it up along with a calendar of witnesses to his immediate superior praying that a case under sec 182, I. P. C., be lodged against the accused and then the superior officer got the documents presented to the Magistrate by the Court Inspector, it was held that there was a sufficient complaint by the Sub-Inspector, although it was not addressed to the Magistrate as required by sec 4 (h) but to his superior officer—*Mehr Chiragh Din*, 4 Lah. 359 (363), 26 Cr L.J. 125, 76 I.C. 169, A.I.R. 1925 Lah 238. So also, where a police officer made a report that a certain person had lodged a false information before him, and recommended that the person might be prosecuted, held that the report virtually amounted to a complaint within the meaning of sec 195—*D'an Singh*, 40 Cal. 360. But see *Baldeo*, 95 I.C. 211, A.I.R. 1926 All 566, 27 Cr L.J. 899 and *Abdul Rahman*, 33 Cr.L.J. 948, 140 I.C. 184, 1932 A.L.J. 155, 1932 Cr.C. 206, A.I.R. 1932 All. 190, Ind. Rul 1932 All 633 where the report of the Police Officer submitted through the Superintendent of Police with his endorsement for necessary action was not held to be a complaint. The same view has also been taken in *Lakhan*, 38 Cr L.J. 57 (66), 165 I.C. 769, A.I.R. 1936 All 788, 1931 A.L.J. 1064, 1936 A.L.R. 950, 9 R.A. 312, 1936 Cr C 1011, I.L.R. 1937 All. 162. But in cases in which a sub-inspector writes through the Superintendent of Police to the Magistrate that an offence has been committed, and therefore action should be taken against the accused person and if the Superintendent of Police forwards this to the Magistrate, then certainly the letter would come within the definition of the word complaint—*Lakhan*, supra.

The words "in writing" have been inserted after the word "complaint" in order to remove the inconvenience which might be felt if it was made incumbent on the public servant to attend the Court and to appear before the Magistrate in order to lodge the complaint. It will be sufficient if he sends a written complaint to the Magistrate. It is for this reason that clause (a) has been added to sec 200, so that it is not incumbent on the Magistrate to examine the public servant (complainant) when taking cognizance of the offence—*Lachmi Singh* 5 P.L.T. 505, A.I.R. 1924 Pat 691, 25 Cr L.J. 972

If an offence under sec 173, I. P. C., is committed before a public servant, the Court shall not take cognizance of the offence without a complaint in writing from the public servant; and it is not open to a Magistrate to ignore the provisions of this clause by the device of instituting the case under another section of the I. P. Code. Hence the Magistrate cannot say he took cognizance of an offence under sec. 225B of the I. P. Code, and that having done so, he was entitled under sec 238 of the Cr P Code to convict the accused under sec 173, I. P. Code which he regarded as a minor offence of the same character as that for which a penalty is provided under sec. 225B, I. P. Code—*Narain Singh*, 47 All 114, 22 A.L.J. 1005, 26 Cr L.J. 446.

Where a Court described his complaint as one under sec. 476 and sec. 195, Cr. P. Code, regarding offences under sec 183, I. P. C., the mere fact that he made reference to sec. 476, Cr. P. C., will not make his complaint any the less one under sec. 195, Cr. P. C., and will not render it illegal in any way—*Jodhi*, 35 Cr L.J. 990, 11 O.W.N. 720, 149 I.C. 377, A.I.R. 1931 Oudh 277, 1934 Cr C 773, A.L.R. 1934 Oudh 212.

Instances of complaints :—Where a Munsiff who heard a suit was of opinion that certain persons should be prosecuted for offences under secs. 193, 463, 471, I. P. C., and directed them to be sent to a Magistrate for inquiry, it was held that the Munsiff's order was a complaint within the meaning of this section—*Ishri Prosad v. Sham Lal*, 7 All. 871 (F.B.). Where a Magistrate ordered the prosecution of a person, and sent the case to another Magistrate for inquiry, it was held that the order must be deemed to be a complaint under sec. 476—*Yendava*, 7 Mad. 189, 2 Weir 585. Where a Civil Judge trying a rent suit was of opinion that a party to the suit had committed perjury, and sent the record to the Collector for starting a case under sec. 193, I. P. C., it was held that the order was a complaint, though it was not an order under sec. 476—*Sundar Sarup*, 26 All. 514. Where a Judge passed an order to the following effect:—"I complain that A filed two false and forged bonds in the Court of Small Causes, etc.,"

Lachmi, 32 Cr.L.J. 511, 130 I.C. 241, 58 Cal. 971, 53 Cr.L.J. 461, Ind. Rul. 1931 Cal. 369, 35 C.W.N. 257, 1931 Cr.C. 154, A.I.R. 1931 Cal. 122.

613. Duty of Court:—A complaint ought not to be made under this section when there is no probability of conviction. It is necessary for the Court before making a complaint, to consider the evidence and to decide as to whether there is a *prima facie* case and any reasonable chance of conviction being obtained—*In re Paree Kunhammad*, 26 Mad. 116; *Chakrapani*, 12 M.L.J. 408; *Palaniappa v. Ramasami*, 32 M.L.J. 54; *Munisami v. Rajaratnam*, 44 M.L.J. 774; *Kali Charan v. Basudeo*, 12 C.W.N. 3, 6 Cr.L.J. 356; *Kusum Sao v. Janak Lal*, 4 P.L.J. 374; *In re Raoji*, 7 Bom.L.R. 732 (per Russel, J.); *Kidha Singh*, 13 A.L.J. 1111; *Mutayya v. Maung Shwe*, 3 Bur.L.T. 152, 11 Cr.L.J. 749; *Khajumal*, 14 S.L.R. 69; *Bhagrathi*, 26 Cr.L.J. 1401; *Sheoshankarpuri*, 10 N.L.R. 177. It would be an abuse of the powers vested in a Court of Justice if complaints were made by it on the principle that though the conviction of the party complained against is a mere possibility, it is desirable that the matter should be threshed out, so that it may be decided whether or not an offence has been committed—*Jodunandan*, 37 Cal. 250.

In making a complaint, the Court must act on its own independent judgment and should not be guided by the opinions of others. It should not act merely on the report of the Police—*Bapu v. Bapu*, 39 Mad. 750 (757); *Sheikh Beari*, 10 Mad. 232 (237).

No one jot or one tittle can be taken away from or added to the plain and express provisions of the Legislature by any decision of the Court; nor can this discretion vested by the section in the Court be crystallized or restricted by any series of cases: it remains free and untrammelled, to be fairly exercised according to the exigencies of each case—*An Attorney*, 41 Cal. 446 (457), 15 Cr.L.J. 49, 22 I.C. 321.

See also Note 1241.

Cognizance:—Where the Court is confronted with a complaint of a private person and not preferred under sec. 476, Cr. P. C., it must refuse to take cognizance. It cannot even examine the complainant upon oath and then note, it is only taking cognizance of the offence not referred to in sec. 195, Cr. P. C., because the examination of the complainant upon oath under sec. 200, Cr. P. C., is after cognizance has been taken—*Sadhuram Chumandas v. Chumandas Budhram*, 38 Cr.L.J. 742 (743), 169 I.C. 112, 9 R.S. 277, A.I.R. 1937 Sind 81. An objection as to the jurisdiction of the Magistrate to try the case on the ground of absence of a complaint as required under this section goes to the root of the case and should not be reserved for consideration till the entire evidence is recorded—*Banalamudi Parandhamappa v. Y. Nagabhusanam*, 49 Cr.L.J. 798, 183 I.C. 268, A.I.R. 1939 Mad. 579, 49 M.L.W. 545.

614. Complaint:—Under the present law, a Court must make a complaint and cannot directly order prosecution—*Ramprasad*, 49 All. 752, 25 A.L.J. 639, 28 Cr.L.J. 543.

If a Court adopts the procedure laid down in sec. 476, and after making the necessary inquiry under that section, sends the case to a first class Magistrate, such action amounts to making a complaint—*Rachappa*, 13 Bom. 109. In order to make a complaint under this section, the Judge or Munsiff will not have to appear before a Magistrate and make a complaint on oath like an ordinary complainant. If he adopts the procedure under sec. 476, that would be sufficient. Section 476 was enacted with the object of avoiding the inconvenience which might be caused if a Munsiff or Subordinate Judge or a Judge were obliged to appear before a Magistrate like a private individual, and make a complaint on oath to lay the foundation of a prosecution—*Ishri Prasad v. Sham Lal*, 7 All. 871 (F.B.).

But it should be noted that sec. 476 refers only to offences 'when committed before the Court' and the ruling in 7 All. 871 must be applied to those cases only. But if the offence is committed before a public servant other than a Court, his proper course is to prepare an ordinary complaint. See *Nga Lu Po*, 10 Cr.L.J. 12 (Bur.).

But even in the case of complaints by public servants, the law is not so stringent

as in the case of complaints by ordinary persons. Thus, where a Sub-Inspector drew up what was virtually a complaint and sent it up along with a calendar of witnesses to his immediate superior praying that a case under sec. 182, I P. C., be lodged against the accused and then the superior officer got the documents presented to the Magistrate by the Court Inspector, it was held that there was a sufficient complaint by the Sub-Inspector, although it was not addressed to the Magistrate as required by sec. 4 (h) but to his superior officer—*Mehr Chiragh Din*, 4 Lah. 359 (363), 26 Cr L.J. 125, 76 I.C. 169, A.I.R. 1925 Lah. 258. So also, where a police officer made a report that a certain person had lodged a false information before him, and recommended that the person might be prosecuted, held that the report virtually amounted to a complaint within the meaning of sec. 195—*D lan Singh*, 40 Cal 360. But see *Baldeo*, 96 I.C. 211, A.I.R. 1926 All 556, 27 Cr L.J. 899 and *Abdul Rahman*, 33 Cr L.J. 948, 140 I.C. 184, 1932 A.L.J. 155, 1932 Cr.C. 206, A.I.R. 1932 All 190, Ind. Rul. 1932 All. 633 where the report of the Police Officer submitted through the Superintendent of Police with his endorsement for necessary action was not held to be a complaint. The same view has also been taken in *Lakhan*, 38 Cr L.J. 57 (66), 165 I.C. 769, A.I.R. 1936 All. 788, 1931 A.L.J. 1064, 1936 A.L.R. 950, 9 R.A. 312, 1936 Cr.C. 1011, I.L.R. 1937 All. 162. But in cases in which a sub-inspector writes through the Superintendent of Police to the Magistrate that an offence has been committed, and therefore action should be taken against the accused person and if the Superintendent of Police forwards this to the Magistrate, then certainly the letter would come within the definition of the word complaint—*Lakhan*, supra.

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If an offence under sec. 173, I P. C., is committed before a public servant, the Court shall not take cognizance of the offence without a complaint in writing from the public servant; and it is not open to a Magistrate to ignore the provisions of this clause by the device of instituting the case under another section of the I P. Code. Hence the Magistrate cannot say he took cognizance of an offence under sec. 225B of the I. P. Code, and that having done so, he was entitled under sec. 238 of the Cr. P. Code to convict the accused under sec. 173, I P. Code which he regarded as a minor offence of the same character as that for which a penalty is provided under sec. 225B, I. P. Code—*Narain Singh*, 47 All. 114, 22 A.L.J. 1005, 26 Cr.L.J. 446.

Where a Court described his complaint as one under sec. 476 and sec. 195, Cr. P. Code, regarding offences under sec. 183, I P. C., the mere fact that he made reference to sec. 476, Cr. P. C., will not make his complaint any the less one under sec. 195, Cr. P. C., and will not render it illegal in any way—*Jodhi*, 35 Cr.L.J. 990, 11 O.W.N. 720, 149 I.C. 377, A.I.R. 1934 Oudh 277, 1934 Cr.C. 773, A.L.R. 1934 Oudh 212.

Instances of complaints —Where a Munsiff who heard a suit was of opinion that certain persons should be prosecuted for offences under secs. 193, 463, 471, I P. C., and directed them to be sent to a Magistrate for inquiry, it was held that the Munsiff's order was a complaint within the meaning of this section—*Ishri Prosad v. Sham Lal*, 7 All. 871 (F.B.). Where a Magistrate ordered the prosecution of a person, and sent the case to another Magistrate for inquiry, it was held that the order must be deemed to be a complaint under sec. 476—*Yendava*, 7 Mad. 189, 2 Weir 585. Where a Civil Judge trying a rent suit was of opinion that a party to the suit had committed perjury, and sent the record to the Collector for starting a case under sec. 193, I. P. C., it was held that the order was a complaint, though it was not an order under sec. 476—*Sundar Sarup*, 26 All. 514. Where a Judge passed an order to the following effect:—"I complain that A filed two false and forged bonds in the Court of Small Causes, etc,"

and sent the papers to the District Magistrate for taking action, it was held that the order of the Judge was a complaint—*Rajaram*, 12 A.L.J. 881, 15 Cr.L.J. 700. Where the Magistrate ordered "Prosecution under sec. 195, Indian Penal Code, is sanctioned. Case to Syed Mohammad Zakir," held that this order could not by any stretch of language be deemed to be a complaint—*Kali Charan*, 35 Cr.L.J. 789, 148 I.C. 784, 11 O.W.N. 473, A.I.R. 1934 Oudh 186, 1934 Cr.C. 582, A.L.R. 1934 Oudh 217. Where a *Kurkamin* made a report of the occurrence to the Tahsildar who sent it to the Subdivisional Magistrate with an endorsement that certain persons might be proceeded against under secs. 184-186, I. P. C.,; held that there was a valid complaint—*Lachman*, 34 Cr.L.J. 614, 143 I.C. 686, 10 O.W.N. 553, A.I.R. 1933 Oudh 281, Ind. Rul. 1933 Oudh 189, 1933 Cr.C. 672. Where the accused removed the property which had been attached in execution of a decree, and on the report of the attaching officer the District Judge, being of opinion that the accused should be prosecuted, ordered the papers to be sent to the Deputy Commissioner, it was held that the order of the District Judge operated as a complaint—*Nihala*, 1904 P.L.R. 3, 1 Cr.L.J. 36. Where a Munsiff being of opinion that a document filed in a case before him had been tampered with, communicated his suspicions to the District Judge who thereupon wrote to the District Magistrate requesting him to take action, it was held that the letter of the District Judge amounted to a complaint—*Debi Prasad*, 35 All. 8, 13 Cr.L.J. 829, 10 A.L.J. 361. Where the District Judge forwarded to the District Magistrate a copy of his judgment, with a letter in which he called attention to his remarks as regards the forgery of a will and requested the latter to take up the matter for judicial investigation, the letter was a sufficient complaint—*In re Aparao*, 20 Bom.L.R. 1018. Where a Magistrate who tried a case sent up a report to the District Magistrate that the accused had made a certain alteration in a document filed in Court and had thus committed an offence, the report amounted to a complaint—*Suraj Prasad*, 21 A.L.J. 825.

The endorsement of the Additional District Judge "write to Additional District Magistrate about the matter and ask him to proceed under sec. 476 of the Criminal Procedure Code" on the petition for making a complaint under sec. 476, is not a valid complaint under that section—*Rajani v. Bistoo*, 46 C.L.J. 40, 28 Cr.L.J. 840.

The Tahsildar, Akola, made the following report to the Sub-divisional Officer:—"The report on the enclosed warrant may kindly be seen. The village Barsitakli is notorious for arrears and unless we help the V. O's in recovery, it will be difficult to recover arrears. The defaulter by his closing the door has done an overt act to obstruct a public servant in discharge of a public function. I, therefore, propose to lodge a complaint under sec. 186, Indian Penal Code, in the Court of Naib-Tahsildar (Mr. Joshi). Submitted to Sub-Divisional Officer for favour of approval as this concerns the general working of the *taluq*." On this the Sub-Divisional Officer endorsed: "A complaint may be lodged under sec. 183, Indian Penal Code," and returned the paper to the Tahsildar, Akola, who then added to it "forwarded to Naib-Tahsildar (Mr. Joshi) for favour of further action." Held that the communication between the Tahsildar, Akola, and the Sub-Divisional Officer did not constitute a complaint in writing made by a public officer to a Court having jurisdiction to try the case and that consequently the Magistrate had no jurisdiction—*Syed Habib v. Emp.*, 39 Cr.L.J. 58, 172 I.C. 51, 10 R.N. 152, A.I.R. 1938 Nag. 106.

Where a police-officer reported to the Sub-Divisional Magistrate that his order under sec. 141, Cr. P. Code had been disobeyed by some persons and suggested that cases under sec. 188, I. P. C., be started against the persons reported against and the Sub-divisional Magistrate sent the reports to the District Magistrate praying that the persons mentioned in the police-officer's report be prosecuted under sec. 188, I. P. C., and the District Magistrate sanctioned the prosecution and made over the cases to a First Class Magistrate for disposal, held that the reports of the Sub-divisional Magistrate showed that they were made with a view to obtaining his permission for the prosecution of the persons concerned and the said reports were in fact not complaints

under sec. 195 (1) (a), Cr. P. Code. The mere fact that the Sub-divisional Magistrate, while giving evidence before the trying Magistrate several months after, called them complaints did not make them complaints—*Babu v. Emp.*, 41 Cr.L.J. 228, AIR. 1940 Oudh 241, 1940 O.L.R. 43, 185 I.C. 745, 1940 O.W.N. 118

See Notes 1236, 1237 and 1248

614A. Want of Complaint:—Under the old clause (b) of section 537, the want of a sanction or any irregularity in the matter of a sanction or in a proceeding under sec. 476 did not stand in the way of a conviction, if it was otherwise sound. After the amendment of 1923, this clause does not any longer find a place in sec. 537. The inference is that want of a regular complaint by a public servant or a Court must be fatal to a prosecution—*Ameraj*, 23 A.L.J. 35, 26 Cr.L.J. 751 (752); *Jaswant*, 25 Cr.L.J. 721, 81 I.C. 209, 1 Lah. Cas. 429, AIR. 1925 Lah. 139, following *Mathura*, 1 Cr.L.J. 1046, 1904 A.W.N. 266; *Girdhari Lal*, 29 O.C. 1, 26 Cr.L.J. 929 (930), 86 I.C. 993, 2 O.W.N. 174, 12 O.L.J. 194, AIR. 1925 Oudh 413; *Janki Prasad*, 27 Cr.L.J. 901, 96 I.C. 213, AIR 1926 All. 700; *Ram Samugh*, 3 O.W.N. 614, 27 Cr.L.J. 969, 1 Luck. 523, 96 I.C. 521, AIR 1926 Oudh 485; *Mohim Chandra*, 56 Cal. 824, 30 Cr.L.J. 658, 33 C.W.N. 285, 49 C.L.J. 342, 116 I.C. 638, AIR. 1929 Cal. 172; *Kavanappa*, 55 Mad. 343, 33 Cr.L.J. 361 (362), 136 I.C. 779, AIR 1932 Mad. 253, 1931 M.W.N. 1314, 35 M.L.W. 180, Ind. Rul. 1932 Mad. 315, 1932 Cr.C. 182, 62 M.L.J. 735; *Montajaddi*, 34 Cr.L.J. 526, 143 I.C. 15, Ind. Rul. 1933 Cal. 342, AIR 1933 Cal. 481, 1933 Cr.C. 754; *Kali Charan*, 35 Cr.L.J. 789, 148 I.C. 784, 11 O.W.N. 473, AIR. 1934 Oudh 186, 1934 Cr.C. 582, AIR 1934 Oudh 217; *Mosafir*, 36 Cr.L.J. 904, AIR. 1935 Pat. 356, 156 I.C. 310, 16 P.L.T. 440; *Ram Bilas*, 45 All. 140, 24 Cr.L.J. 220, AIR. 1923 All. 84, 71 I.C. 684, 20 A.L.J. 904; *Lakhan*, 38 Cr.L.J. 57 (60, 67), 165 I.C. 769, AIR 1936 All. 788, 1936 A.L.J. 1064, 1936 A.L.R. 950, 9 R.A. 312, 1936 Cr.C. 1011, ILR 1937 All. 162; *Ramdin Lal*, 38 Cr.L.J. 97, 165 I.C. 970, AIR 1937 Pat. 176, 18 P.L.T. 91, 3 BR 117, 9 RP 246, following *Subhag Ahir*, 12 P.L.T. 905, 135 I.C. 520, 33 Cr.L.J. 153, Ind. Rul. 1932 Pat. 40, 11 Pat. 155, 1932 Cr.C. 269, AIR. 1932 Pat. 152 and *Barhamdeo Singh*, 9 P.L.T. 151, 105 I.C. 230, 28 Cr.L.J. 902, AIR. 1928 Pat. 102; *Ramdin Lal v. Emp.*, 38 Cr.L.J. 97 (98), 165 I.C. 970, 9 RP. 246, 18 P.L.T. 91, 3 BR 117, AIR 1937 Pat. 176; *Ramchandra Rango v. Emp.*, 40 Cr.L.J. 579 (587), 12 RB 356, 181 I.C. 870, AIR 1939 Bom. 129, 41 Bom.L.R. 98. *Babu v. Emp.*, 41 Cr.L.J. 228, 1940 Oudh 241, 1940 O.L.R. 43, 185 I.C. 745, 1940 O.W.N. 118. Where a statute says that a particular thing shall not be done unless a bar is removed, the statutory prohibition stands, and everything done in contravention of the prohibition is bad—*Ramdin Lal v. Emp.*, supra.

Where the Court has acted without jurisdiction with regard to a part of the trial (i.e., in respect of one of several offences), the whole proceedings are vitiated by the illegality committed—*Ramchandra Rango v. Emp.*, supra. See also Note 647.

Effect of complaint when it is not necessary—Where a complaint under sec. 476, Cr. P. C., is forwarded to the District Magistrate under circumstances in which sec. 476 is inapplicable, the complaint ceases to be a valid complaint. But there is nothing to prevent the District Magistrate from proceeding under cl. (c) of sub-sec. (1) of sec. 190, Cr. P. C., as on information received from any person other than a police officer or of his own knowledge or suspicion—*Govt Advocate, Bihar v. Kumar Singh*, AIR 1938 Pat. 83 (89), 16 Pat. 571, 1937 P.W.N. 937, 19 P.L.T. 51.

614B. Complaint not mentioning all sections under which offences have been committed:—Sections 476 and 195 are intended really to prevent indiscriminate prosecutions under the various sections mentioned therein. Once the bar is removed there is no difference between the cases mentioned in secs. 476 and 195 and any other case, e.g., if a complaint is filed under sec. 471, I. P. C., and it appears that some other offence has also been committed, it is not necessary to have a fresh complaint—*Jamuna v. Laldhari*, AIR. 1934 Pat. 536, 36 Cr.L.J. 26, 152 I.C. 228, 1934 Cr.C. 1191, 15 P.L.T. 684; *Kunhammad*, 1933 M.W.N. 1261; *Hampana Goud*, AIR. 1936 Mad. 280, 1935 M.W.N. 1346, 70 M.L.J. 109, 1936 M.Cr.C. 1, 43 M.L.W. 236, 161

I.C. 196. See also *Abdul Rahman*, 27 Cr.L.J. 669 (672), 94 I.C. 717, 4 Bur.L.J. 213, A.I.R. 1926 Rang. 53 and *Mathura Singh*, A.I.R. 1934 Pat. 467, 1934 Cr.C. 1062, 155 I.C. 58, 15 P.L.T. 438. When a prosecution has been instituted of a kind requiring the previous complaint, sanction or order of a particular authority, then once the proceedings are on foot they will take their course in respect of any offence which the facts disclose—*Sakaldeo Singh*, 38 Cr.L.J. 210 (211), 166 I.C. 345, A.I.R. 1937 Pat. 4, 17 P.L.T. 806, 3 B.R. 162, 9 R.P. 287, 16 Pat. 92; *Dharmumal v. Tenumal*, A.I.R. 1940 Sind 133 (34). What section 195 prohibits is taking cognizance of an offence of a certain class except on a complaint of a Court; but where a Court has complained of an offence specified in this section then cognizance can be and is to be taken of the whole case, that is to say, prosecution will go forward as against all the persons found to be concerned in the offence and also under any sections found applicable to the facts which are the subject-matter of the complaint—*Jugeshwar Singh*, A.I.R. 1936 Pat. 346 (347), 2 B.R. 702, 9 R.P. 84, 15 Pat. 26, 17 P.L.T. 234, 37 Cr.L.J. 893, 164 I.C. 86, 1936 Cr.C. 539; *Vithu*, 38 Cr.L.J. 717, 169 I.C. 74, I.L.R. 1937 Nag. 492, 9 R.N. 297. The mere omission of the section may not be material if upon a reading of the complaint it appears that other charges were also contemplated—*Bhikhari*, A.I.R. 1935 Pat. 561, (563), 15 P.L.T. 523. See also *Yerneni*, 30 Cr.L.J. 370, 114 I.C. 834, 28 M.L.W. 774, A.I.R. 1929 Mad 74, Ind Rul 1929 Mad. 354 and *Ali Ahmad*, 34 Cr.L.J. 39, 140 I.C. 544, A.I.R. 1932 Cal. 545, 55 C.L.J. 336, 1932 Cr.C. 545, Ind. Rul. 1933 Cal. 11. But see *Ram Samujh* quoted in Note 625 and *Kaura Ram v. Emp.*, 38 Cr.L.J. 748, 169 I.C. 44, 9 R.Pesh. 138, A.I.R. 1937 Pesh. 67 where a contrary view was taken.

614C. Complaint not mentioning all the accused:—The Criminal Procedure Code provides for taking cognizance of offences and not of offenders. So a Magistrate who has legally taken cognizance of an offence under sec. 476, Cr. P. C., has jurisdiction to proceed against anyone who might be proved by the evidence to be concerned in that offence, whether he was mentioned in the order under sec. 476, Cr. P. C., or not, even though the Court may have refused to make a complaint against him, on being moved to do so—*Nitai Charan v. Kshetra Nath*, 40 C.W.N. 573, 37 Cr.L.J. 521, 162 I.C. 102, 1936 Cr.C. 289, 8 R.C. 562, 63 Cal. 819, A.I.R. 1936 Cal. 147, following *Eshan Chunder v. Prannath*, 1 Marshall 270, (1863) W.R. 71 (F.B.), 2 Hay, 236 and *Girdhari Lal*, 21 C.W.N. 950, A.I.R. 1917 Cal. 121, 42 I.C. 133, 18 Cr.L.J. 901 and dissenting from *Mahomed Bhakku*, 23 Cal. 532. See also *Jugeshwar and Vithu*, supra and *Assudomal Ramandas v. Jhamandas Hotchand*, A.I.R. 1940 Sind 100 (102).

The procedure for the removal of the bar is provided by sec. 476, Cr. P. C., and sec. 476 is so worded as to make it clear that the procedure therein provided is intended to deal primarily with offences, but with offenders also if they are known and available. Section 476, Cr. P. C., has no reference to jurisdiction. If then in respect of one of the offences enumerated in sec. 195 (1) (b) committed in or in relation to any proceeding in any Court that Court or some Court to which that Court is subordinate has proceeded under sec. 476 and filed a complaint, the bar under sec. 195 is removed; the Magistrate before whom the complaint is lodged takes cognizance of the offence under sec. 190 (1) (a) and thereafter proceeds to inquire into the complaint and to deal with it according to law, using for this purpose all the powers vested in him by the Code of Criminal Procedure. If the offender is named in the complaint the Magistrate will proceed against him. If, on inquiring into the complaint, other persons appear to be involved therein by the evidence recorded by the Magistrate, he is entitled to proceed against those others under the powers conferred upon him by sec. 190 (1) (a) as has been held in *Dedar Buksh v. Svamatada*, A.I.R. 1914 Cal. 801, 24 I.C. 954, 15 Cr.L.J. 546, 41 Cal. 1013, 18 C.W.N. 921 and in *Mekrab v. Emp.*, A.I.R. 1924 Sind 71, 83 I.C. 885, 26 Cr.L.J. 181, 17 S.L.R. 150 (F.B.) and by the Code of Criminal Procedure generally, and section 195 (1) (b) cannot possibly bar him from doing so. In fact sec. 195 (1) (b) ceases to have any application the

moment a Magistrate takes cognizance of one of the offences enumerated therein after the removal of the bar imposed by the Section—*Fatch Muhammad v Emp*, A.I.R. 1940 Sind 97 (98), 41 Cr.L.J. 750, 189 I.C. 586, 1 L.R. 1940 Kar. 287, dissenting from *Ram Bilas v. Lachmi Narain*, 45 All 140, 20 A.L.J. 904, 24 Cr.L.J. 220, 71 I.C. 684, A.I.R. 1923 All. 84

Complaint in the alternative:—It is entirely wrong that an order sanctioning a prosecution of two persons in the alternative should be passed—*Narinjan Dass v. Emp.*, 31 Cr.L.J. 1065 (1066), 126 I.C. 535, A.I.R. 1930 Rang. 51.

614D. Evasion of the provisions of sec. 195:—When upon the facts the commission of several offences is disclosed, some of which require sanction (complaint), and others do not, it is open to the complainant if he so wishes, to proceed in respect of those only which do not require sanction (complaint)—*Supdt., etc., Legal Affairs v. Biscamber*, A.I.R. 1929 Cal. 633 (635), 33 C.W.N. 474, 56 Cal. 1041, 120 I.C. 449, 1929 Cr.C. 401, 31 Cr.L.J. 125; *Raghubar v. Khusehar*, 36 Cr.L.J. 594, 154 I.C. 847, 1935 O.W.N. 370; *Sarbeswar*, 39 C.L.J. 33; *Tarsu Beg v. Muhammad Yar Khan*, 25 Cr.L.J. 688, 81 I.C. 176, 21 A.L.J. 915, A.I.R. 1924 All 296; *Krishna Pillai v. Krishna Konan*, 31 Mad 43, 17 M.L.J. 559, 7 Cr.L.J. 6, 3 M.L.T. 113; *Ghulam Mohammad v. Emp.*, A.I.R. 1937 Lah 802, 39 P.L.R. 1011, 172 I.C. 373, 39 Cr.L.J. 112, 10 R.L. 307. If in course of one transaction a number of offences are committed some requiring sanction for prosecution of some authority or the other and others not requiring such sanction, it is not necessary that the prosecution of those offences which do not require such sanction should depend upon the obtaining of the sanction for prosecution for those offences which required such sanction. The law requires that for the prosecution of a particular offence sanction of the Court should be obtained; but it does not say that if in course of the commission of an offence, which requires sanction for prosecution other offences are committed, the magistracy or the police are helpless in proceeding to prosecute the offender for these latter offences, unless the Court sanctions the prosecution of the former—*Sheo Ahir v Emp*, A.I.R. 1938 Pat 548, 19 P.L.T. 665, 1938 P.W.N. 813, 5 B.R. 104, 178 I.C. 487, 17 Pat. 680, 40 Cr.L.J. 71. But where an offence containing, say ingredients, A, B and C, can only be inquired into upon complaint of the Court concerned by reason of the presence of ingredient C, it is not open to a Criminal Court, upon the same allegation, to entertain a complaint of an offence containing ingredients A and B only, although ingredient C is also clearly present. Thus, where the facts disclosed an offence under sec. 193, I. P. C., committed in relation to a proceeding in Court, no Court shall take cognizance of such an offence otherwise than in the manner prescribed in this section, and it makes no difference that the complaint, evidently to evade that provision, elected to name the offence of forgery in this petition—*Perianna v. Vengu*, 30 Cr.L.J. 322 (325), 114 I.C. 360, Ind Rul 1929 Mad 280, A.I.R. 1929 Mad 21, 28 M.L.W. 687, 1929 M.W.N. 196, 56 M.L.J. 208; *Ravanappa*, 33 Cr.L.J. 361, 136 I.C. 779, A.I.R. 1932 Mad 253, 1931 M.W.N. 1314, 35 M.L.W. 180, Ind Rul 1932 Mad 315, 1932 Cr.C. 182, 55 Mad 343, 62 M.L.J. 735; *Subbava v. Siddhu*, 1933 M.W.N. 722; *Appadurai*, 59 Mad 165, 1936 Cr.C. 85, 8 R.M. 565, 37 Cr.L.J. 159, 159 I.C. 853, 1935 M.W.N. 946, 69 M.L.J. 812, A.I.R. 1936 Mad 89. Parties should not be allowed to evade the provisions of sec. 195 (1) (b), Cr. P. C., by filing a complaint under another provision of the Penal Code if clearly an offence under sec. 193 I. P. C., or any other section mentioned in sec. 195 (1) (b), Cr. P. C., has been committed—*Appadurai*, 59 Mad. 165 (169), 37 Cr.L.J. 159, 159 I.C. 853, 1935 M.W.N. 946, 69 M.L.J. 812, A.I.R. 1936 Mad 89, 1936 Cr.C. 85, 44 M.L.W. 901, following *Ravanappa*, *supra*. When a complaint is made there must be no splitting up of the facts, and the Court is not entitled to disregard some of the facts and try or convict the accused person for an offence which the remaining facts disclose, but the Court must consider the facts as a whole and if these facts disclose an offence for which a special complaint is necessary under the provisions of sec. 195, a Court cannot take cognizance of the case unless that special complaint has been filed—*Muthurelu Kundumbaran*, A.I.R.

Mad. 8 (9), 37 Cr.L.J. 1134, 1936 M.W.N. 641, 1936 M.Cr.C. 258, 71 M.L.J. 485, 44 M.L.M. 631, 165 I.C. 292, 59 Mad. 1083 (1086). See also *Dharmamal v. Teunmal*, A.I.R. 1940 Sind 133. The Courts should not tolerate evasion of the provisions of sec. 195, Cr. P. C., or of the intention of the legislature, but, on the other hand, the Court must be careful not unnecessarily to extend the provisions of a section which restricts the right of a subject to have recourse to the Courts. The principle to be followed in cases of this kind is not whether the complaint discloses other facts which constitute offences for which no complaint of the Court is necessary, as well as facts for which a complaint of the Court is necessary, but whether there is or is not an evasion of the provisions of sec. 195, Cr. P. C., and the test whether there is evasion or not is whether the facts disclose primarily and essentially an offence for which the complaint of the Court is required—*Sadkuram Chimandas v. Chimandas Budhuram*, 38 Cr.L.J. 742 (743), 169 I.C. 112, 9 R.S. 277, A.I.R. 1937 Sind 81; *Sahebrao Baburao*, 38 Cr.L.J. 272, 38 Bom.L.R. 1192, 166 I.C. 731, A.I.R. 1937 Bom. 46, 9 R.B. 252. See also *Ram Nath*, 26 Cr.L.J. 362 (364), 48 I.C. 714, 22 A.L.J. 1106, A.I.R. 1925 All. 230, 47 All. 268. See also Note 616.

A person who having been accused of an offence by another, has been discharged or acquitted, cannot be allowed to evade the provisions of sec. 195, Cr. P. C., by preferring a complaint under sec. 500, I. P. C., when leave has been refused to prosecute under sec. 211, I. P. C., the offence being clearly and essentially an offence under the latter section. The care taken to protect complainants from being harassed by prosecutions for instituting false cases is a clear indication that the Legislature never intended or contemplated that upon refusal of leave to prosecute under sec. 211, a person who has been discharged or acquitted should be allowed to fall back upon section 500. To permit such a course to be taken would render entirely nugatory the salutary provisions of sec. 195, Cr. P. C.—*Profulla v. Harendra*, 44 Cal. 970 (976), 18 Cr.L.J. 377, 21 C.W.N. 253, 25 C.L.J. 445, A.I.R. 1917 Cal. 708, 38 I.C. 761. Even after the amendment of this section in 1923 the Rangoon High Court came to the same conclusion under similar circumstances—*Swee Ing v. Koon Han*, 36 Cr.L.J. 970, 156 I.C. 598, A.I.R. 1935 Rang. 163, 1936 Cr.C. 626, 8 R.Rang. 27. In this case no application was made to the Magistrate for lodging a complaint under sec. 211, I. P. C., nor did he lodge any *suo motu*.

The complainant lodged a complaint under sec. 211, I. P. C., which was dismissed under sec. 203, Cr. P. C. He then instituted a fresh complaint on the same facts, alleging that these facts constitute an offence under sec. 500, I. P. C., held that when the complainant could file a second complaint under sec. 211, I. P. C., he could certainly file a second complaint on the same facts, but instead of alleging an offence under sec. 211, I. P. C., allege an offence under sec. 500, I. P. C.—*U Sein Ywet v. U Maung Fyi*, 35 Cr.L.J. 802, 148 I.C. 845, 1934 Cr.C. 263, A.I.R. 1934 Rang. 40, A.L.R. 1934 Rang. 130. In this case no sanction or authority of any Court was necessary to the filing of the complaint under sec. 211, I. P. Code.

Where it is clear that the publication was to a person in authority and was really intended to give information about some offences with a view to get redress or protection the offence, if any, must be only the furnishing of false information or the making of a false accusation. It cannot be said that the offence of defamation is also committed simply because some part of the information or the accusation may be found to be defamatory and false. Offences of this nature cannot be taken cognizance of by a Magistrate in the absence of a complaint by the public servant concerned or of some authority to whom the public servant is subordinate—*G. N. Subba Rao v. Anna M. Venkatachalapathi Ayyar*, 40 Cr.L.J. 69, 178 I.C. 478, 1938 M.W.N. 871, 48 M.L.W. 320, (1938) 2 M.L.J. 397, A.I.R. 1938 Mad. 904. The accused charged the son-in-law of the complainant with theft of certain documents and records and in the affidavit filed in support of the application for a search warrant and the sworn statement, the accused alleged that some of the articles had been secreted in the house of the complainant. A search warrant was issued and the house of the complainant was searched but nothing

was found. The son-in-law of the complainant was ultimately discharged. The complaint of defamation, which was subsequently lodged by the complainant, was founded on the allegations in the affidavit and sworn statement that some of the articles were secreted in the house of the complainant and those allegations were stated to be false. *Held* that the offence committed would, therefore, fall under sec. 193, I. P. C., which cannot be taken cognizance of without a complainant by the Court and that the parties cannot be allowed to evade the provisions of sec 195 (1)(b), Cr. P. C., by filing a complaint under another provision of the Indian Penal Code—*Shanmugasundaram Pillai v. Manicka Mudaliar*, 40 Cr.L.J. 542, 181 I.C. 86, 49 M.L.W. 102, 1939 M.W.N. 192, A.I.R. 1939 Mad. 368, (1939) 1 M.L.J. 412, 11 R.M. 770. Where the defamatory statement was made in the deposition of the accused as a witness and the finding is that the statement was deliberately false, the offence committed would fall under sec 193, I. P. C., which cannot be taken cognizance of without a complaint by the Court and parties cannot be allowed to evade the provisions of sec 195 (1)(b), Cr. P. C., by filing a complaint under another provision of the Indian Penal Code (*i.e.*, sec 500, I. P. C.)—*Ganapathi Asari v. Kuppuswamy Asari*, 40 Cr.L.J. 757, 183 I.C. 179, A.I.R. 1939 Mad. 493, 1939 M.W.N. 320, 49 M.L.W. 456, (1939) 1 M.L.J. 614, 12 R.M. 250.

Overruling *Swee Ing v. Koon Hau*, *supra*, the Full Bench of the Rangoon High Court has laid down that to sec 499, I. P. C., there are ten exceptions and it would have been quite easy for the Legislature to have inserted an eleventh exception saying that when the defamation is made in a statement to a public servant or in Court proceedings by virtue of which the offence was punishable under sec. 182 or 211, I. P. C., or some other section, then no prosecution under sec 500, I. P. C., would lie. But there is no such extra exception. Consequently, a complaint under sec 500, I. P. C., cannot be dismissed even if the same facts constitute also an offence under sec 182, I. P. C., and no sanction as required by sec. 195, Cr. P. C., is obtained—*U Aung Pe v. The King*, 39 Cr.L.J. 663, 175 I.C. 915, A.I.R. 1938 Rang. 232, 11 R.Rang. 15, 1938 Rang. 404 (F.B.). The same view seems to have been taken by the Calcutta High Court in the recent case of *Guru Prosad Ram Gupta v. Rameswar Marwari*, 39 Cr.L.J. 730, 176 I.C. 572, A.I.R. 1938 Cal. 527, 42 C.W.N. 674, 11 R.C. 127, where it has been laid down that since the Legislature has not chosen to include sec 500, I. P. C., amongst those sections in which prosecution must be initiated by the Court in connection with which the offence has been committed, there is no provision of the law by which the Court can refuse to permit a prosecution under sec 500, I. P. C., where the facts appear to justify such a prosecution. In this case *Profulla v. Harendra*, *supra*, and *Ibrahim v. Emp.*, 111 I.C. 433, 29 Cr.L.J. 849, 11 A.I.Cr.R. 79, were distinguished on the ground that in both those cases sanction to prosecute coming under sec. 195, Cr. P. C., had been refused.

It is undesirable that people should be hampered in their access to the Courts and in getting justice by the fear that if they are unsuccessful they might be prosecuted for defamation and, therefore, all Courts should be careful when a complaint of defamation is filed in respect of proceedings in a Civil Court to see whether the provisions of sec. 209, I. P. C., and of the Cr. P. C., generally have not been evaded—*Gangumal*, 25 Cr.L.J. 941, 86 I.C. 1005, A.I.R. 1925 Sind. 263, 18 S.L.R. 83. The same Court has also laid down that it seems impossible to hold that the litigant who elects to allege that statements made in an affidavit are false and on that allegation to present a complaint under sec. 500, I. P. C., can be regarded as evading the law, even though it might have been open to him to wait until the civil suit had been decided and then to invite the Civil Court to take action against the affidavit, for the offence of perjury—*Kalumal v. Kissumal*, 36 Cr.L.J. 881 (883), 156 I.C. 219, A.I.R. 1935 Sind. 81, 1935 Cr.C. 367. See also *Chotelal v. Phulchand* in Note 616 under the heading "False evidence."

In this case the High Court stayed the proceedings on the complaint of defamation until the disposal of the civil suit. But the purpose of this section is clear. It is to keep within the control of the Courts in the public interests offences committed in relation to their proceedings, and it would be an evasion of the provisions of this

section to allow an aggrieved party, merely by placing the offence under another section, to escape its provisions. Thus, where a person, who had a decree against him and, in satisfaction of the decree, made certain payments in kind to the decree-holders who fraudulently concealed the facts from the Court and obtained further execution of decree and a warrant against him for his arrest, made a complaint under sec. 406, I. P. C., held that the offence was primarily an offence relating to the administration of justice and was not merely a subordinate or ancillary offence, nor was it in any way separable or distinguishable from the offence for which complaint of the Court was required, that the offence, as disclosed, upon the facts was not the offence under sec. 406, I. P. C., but an offence under sec. 210, I. P. C., which could not be taken cognizance of without a complaint of the Civil Court—*Bhimomal v. Jalo*, 9 R.S. 55, A.I.R. 1936 Sind 123, 29 S.L.R. 356, 37 Cr.L.J. 1007, 164 I.C. 797, 1936 Cr.C. 804. The principle upon which the two cases reported in *Gangumal*, supra and *Bhimomal v. Jalo*, supra, have been decided, is that a complainant cannot, by placing his complaint under one section rather than another, evade the provisions of law which provide that offences relating to the administration of justice must be kept within the control of the Court. But where it is a matter of doubt, as in the case of defamatory statements alleged to have been made in the affidavit filed in a civil suit in support of an application for attachment before judgment, whether the facts complained of do constitute one of such offences it cannot be said that the complainant is thereby debarred from placing his complaint under sec. 500, I. P. Code—*Kalumal Mottram v. Mulchand Kimatrai*, 39 Cr.L.J. 736, 176 I.C. 365, A.I.R. 1938 Sind 129, 11 R.S. 1. See *Venkataramanjulu v. Kanniah*, 1933 M.W.N. 1262. See also *Ali Ahmad*, cited in Note 1094, cl. (8).

The provisions of this section cannot be evaded by the device of charging a person with an offence to which this section does not apply and then convicting him of an offence to which it does, upon the ground that such latter offence is a minor offence of the same character—*Sri Narain Singh*, 47 All. 114 (118), 85 I.C. 62, 22 A.L.J. 1005, A.I.R. 1925 All. 129, 26 Cr.L.J. 446; *Babulal*, 37 Cr.L.J. 587 (588), 162 I.C. 308, 19 N.L.J. 120.

615. Sub-section (1)—Subordination of public servants:—The subordination of one public servant to another may arise from express enactment or from the fact that both the public servants belong to the same department, one being superior in rank to another—*Narasimhaya v. Venkatasami*, 18 M.L.J. 584, 8 Cr.L.J. 400.

A constable is subordinate to the Superintendent of Police—*Tarinee v. Bonomali*, 19 W.R. 33. The District Magistrate (in his executive capacity) is at the head of the Police, under sec. 4, Police Act, 1861, and the Police (e.g., the Superintendent of Police) is subordinate to him—*Shib Singh*, 27 All. 292 (293) (dissenting from 27 Cal 452); *Chhote Lal v. Chhedi Lal*, 45 All. 135 (136) (dissenting from 27 Cal. 452); *Shibboo*, 1910 P.R. 6, 11 Cr.L.J. 252. *Contra*—*Ramasory Lal*, 27 Cal. 452 and *Khazan Singh v. Kirpa Singh*, 4 Lah. 130 (132). (In these two cases it has been held that although the police officers in a district are generally subordinate to the District Magistrate, the subordination contemplated by sec. 195 is not such subordination; and that sec. 195 contemplates the subordination of the police officers to some superior officer of Police). A Sub-Inspector of Police in charge of a police station is not subordinate to the Prosecuting Inspector within the meaning of this section—*Mahadeo*, 37 Cr.L.J. 180, 159 I.C. 932, A.I.R. 1935 Nag. 241, 1935 Cr.C. 1252. If the District Magistrate makes the complaint at the request of the police, the complaint is not improper—*Saroda*, 32 Cal. 180.

A Sub-divisional Magistrate passing an order under sec. 144 does so as a public servant and not as a Court. He is subordinate to the District Magistrate and not to the Sessions Judge (sec. 17). Sub-section (3) of sec. 195 does not apply to the case—*Maini Misser*, 6 Pat. 29, 28 Cr.L.J. 353. A commissioner appointed by the Court to examine accounts is a public servant subordinate to the Court which appointed him—*Nana Khanderao*, 29 Bom.L.R. 1476, 28 Cr.L.J. 1021 (1022).

The Secretary of a Municipal Board is subordinate to the Chairman—*In re Seo Prasad*, 1892 A.W.N. 31.

The Registrar of the Small Cause Court is subordinate to the Chief Judge of the Court—*In re Goverdhandas*, 27 Bom. 130.

A bailiff of the Small Cause Court is subordinate to the Judge of the S. C. Court and not to the Additional Judge of that Court. But if after the Judge has issued notice to the accused why they should not be prosecuted for causing obstruction to the bailiff under sec. 186, I. P. Code, the Judge makes over the proceedings to the Additional Judge of the S. C. Court under sec. 8 (2), Prov. S. C. Act, the latter can lodge a complaint against the accused—*Ghulam Mohd*, 32 Cr.L.J. 964, 132 I.C. 842, A.I.R. 1931 Lah. 530 (532).

There can be no doubt that the Civil Court peon is a subordinate of the District Judge—*Ramesh Chandra v. Hari Mohan*, 42 C.W.N. 531.

A Naib-Nazir is subordinate to the Nazir, to the District Judge and probably to the Munsiff who under the order of the District Judge is in charge of the *nazarat* department but he is not subordinate to the Subordinate Judge. So, the Subordinate Judge has no authority to lodge a complaint relating to resistance to the Naib-Nazir in attaching the property of the judgment-debtor in an execution case in his Court. His complaint is inadequate to remove the bar to cognizance of an offence under sec. 186, I. P. C., presented by the provisions of sec. 195 (1) (a)—*Thakur Prasad*, 37 Cr.L.J. 104, 159 I.C. 503, 1936 Cr.C. 103, 16 P.L.T. 808, A.I.R. 1936 Pat. 74. But the position has since been altered by an amendment of Rule 24, at page 16, Vol. I of the Patna High Courts General Rules and Circular Orders (Civil)—*Bayrang Marwari v. Durga Prasad*, A.I.R. 1937 Pat. 31 (32), 1936 P.W.N. 747, 166 I.C. 870, 38 Cr.L.J. 292, 9 R.P. 350, 3 B.R. 226.

A Station House Officer is not subordinate to the Taluk Magistrate—*Velayudam*, 6 Mad. 146. The Police is not subordinate to the Honorary Magistrate—*Baldeo*, 1895 A.W.N. 152; *Tarnee v. Bonomah*, 19 W.R. 33; or to the Township Magistrate—*Mizan*, 1 L.B.R. 101. Neither the Police nor the Sub-Inspector is subordinate to the Sessions Judge—*Reddi Rama Reddi*, 27 M.L.J. 586, 15 Cr.L.J. 612. A village Munsiff or village Magistrate is not subordinate to a Sub-Magistrate—*Narasimhaya v. Venkatasami*, 18 M.L.J. 584 (dissenting from *Periannan*, 4 Mad 241); *Pallikudathan v. Budda Goundan*, 37 Mad 229 (231).

Public servant concerned:—The proper construction of the words "public servant concerned" is the public servant holding for the time being the office held by the public servant to whom the false information was given—*Jot Narain v. Emp.*, A.I.R. 1939 Sind 164, 40 Cr.L.J. 659, 182 I.C. 412, I.L.R. 1939 Kar 556, 12 R.S. 7. The object of sec. 195 (1) (a), Cr. P. C., appears to be that the person best qualified to decide whether a complaint should or should not be made should have a power to make the complaint. Whether a complaint should, or should not be made depends on circumstances existing at the time and it has to be decided whether a complaint should or should not be made and it is therefore the person who is then on the spot who can decide and not the person who originally passed the order who may be in some other district where he cannot possibly say whether a complaint should or should not be made—*Chhedi Singh*, A.I.R. 1939 Oudh 160, 1939 O.L.R. 206, 180 I.C. 769, 40 Cr.L.J. 508, 1939 O.W.N. 337, 1939 A.Cr.C. 68, 1939 O.A. 319, 11 R.O. 260, 1939 A.W.R. (C.C.) 71. Therefore the successor of a public servant can also make a complaint under clause (a) of this section—*Patel*, A.I.R. 1933 Rang. 292, 35 Cr.L.J. 131, 146 I.C. 653, 1933 Cr.C. 1123; *Jot Narain v. Emp.*, supra; *Chhedi Singh*, supra. Section 195 (1) (a), Cr. P. C., does not authorise a superior authority to lodge a complaint under sec. 186, I. P. C., when the public servant concerned has dropped the matter and the aggrieved person is not a public servant—*Madhu Sudhan v. Haridas*, 41 C.W.N. 1011 (1013). The complaint prescribed in sec. 195 (1) (a), Cr. P. C., is a public duty and responsibility, and must not be mistaken for a personal privilege; and there is nothing in the ruling in *Kantir Missir v. Emp.*, A.I.R. 1930 Pat. 98, 1930

Cr.C. 74, 117 I.C. 37, 30 Cr.L.J. 710, 11 P.L.T. 88 against a successor in office of the public servant to whom information was given making the complaint under sec. 182, J. P. Code: see also sec. 18, General Clauses Act (X of 1897), and sec. 559 (1), Cr. P. Code. But what was ruled in that case was that as information had been given to the officer in charge of the police station, junior Sub-Inspector who had investigated the case had no power to make a complaint under sec. 182, I. P. C., as he was not a public servant to whom the information had been given—*Govt. Advocate, Bihar v. Kumar Singh*, A.I.R. 1938 Pat. 83 (88), 16 Pat. 571, 1937 P.W.N. 937, 19 P.L.T. 51.

615A. Clause (a):—Under sec. 195 (1) (a), Cr. P. C., the complaint should be filed by the officer concerned or by some officer to whom he is subordinate and not by an officer who is himself subordinate to him—*Sher Mohammad v. Emp.*, A.I.R. 1940 Lah. 15, 41 Cr.L.J. 368, 186 I.C. 703.

The accused filed an application before the Sub-divisional Magistrate making certain allegations and asking for an order against certain persons under sec. 144, Cr. P. Code. The Magistrate sent the petition to the Police for a report on receipt of which he wrote a long order concluding as follows:—"I come accordingly to the finding that the petitioner's information is false, and I direct that he shall give bail of Rs 200 to answer a charge under sec. 182, Indian Penal Code, before the Second Officer on January 16, 1935." The Second Officer tried and convicted him under sec. 182, I. P. Code. *Held* that in view of sec. 195 (1) (a), cognizance could only be taken on the complaint in writing of the Sub-divisional Magistrate, that there was no such complaint, that cognizance by that Magistrate under sec. 190 (c) upon his own knowledge or suspicion that an offence had been committed, would not be sufficient in law and that the only course open to the Sub-divisional Magistrate in the circumstances was to prefer his complaint to the District Magistrate—*Mosafir*, 36 Cr.L.J. 904, A.I.R. 1935 Pat. 356, 156 I.C. 310, 16 P.L.T. 440. See also *Ram Prasad Dube*, 41 Cr.L.J. 787.

A Sub-divisional Officer has no power to take cognizance of a case under sec. 188, I. P. C., when the offence complained of was disobedience to his own order under sec. 144, Cr. P. Code. He must make a complaint under this section—*Lokendra Lal Pal Choudhury*, 37 Cr.L.J. 936, 164 I.C. 434, 61 C.L.J. 579, 39 C.W.N. 1053; *Veerappa Moopan*, 40 Cr.L.J. 752, 183 I.C. 240, A.I.R. 1939 Mad. 496, 49 M.L.W. 474, 1939 M.W.N. 340, (1939) 1 M.L.J. 573, 12 R.M. 263; *Ram Prasad Dube*, 41 Cr.L.J. 787.

Resistance to Civil Court peons:—The process-server should not make a direct complaint to the Criminal Court in view of the provisions of para 1057 of the Burma Courts Manual, which require a report to the Civil Court concerned, and an enquiry by that Court, and then preferably a complaint by the Court itself under sec. 195 (1) (a), Cr. P. Code. It is only where that is not possible that the Court will direct the process-server to make a complaint, giving him a letter addressed to the Magistrate, informing the Magistrate that the complaint is being made by the direction of the Court, and that the Court has *prima facie* satisfied itself before permitting the complaint to be made—*Maung Po Shern*, 40 Cr.L.J. 845 (846), 183 I.C. 791, 1939 Rang.L.R. 445, 12 R.R. 116, A.I.R. 1939 Rang 320.

The Calcutta High Court has made the following rules:—

When a process-serving peon or other officer in execution or service of any process entrusted to him (e.g., writ of attachment, warrant of arrest, etc.) is resisted or obstructed by the judgment-debtor or any other person; or when property duly attached or the person duly arrested is illegally snatched away from his custody by any of them, he shall immediately send a report to the Court concerned from the place of occurrence. If the Court upon a consideration of the facts disclosed in the process-server's declaration or affidavit (when called for), supplemented, if necessary, by the examination on oath of the process-server or any other person alleged to have been present at the occurrence, is of opinion that a criminal complaint is necessary in the interest of justice, it shall make a complaint accordingly, carefully observing the provisions of sec. 195 (1) (a) and 476 Cr. P. Code. *Vide* clauses (1) and (2) of

paragraph 262 of the Civil Rules and Orders issued by the authority of the Calcutta High Court (Appellate Side), Vol. I.

Where the process-server presented a report of the occurrence on the back of the warrant to the Civil Court, and did not make any allegation either orally or in writing to a Magistrate and the Civil Court merely reported the matter to the Police, *held* that neither that, nor the Police challan, did constitute a complaint which was necessary for taking cognizance of an offence under sec. 186, I. P. C.—*Darkhan*, 29 Cr L.J. 645, 110 I.C. 101, A.I.R. 1928 Lah 827. See also *Ram Singh*, 36 Cr L.J. 714 (716), 155 I.C. 421, 16 P.L.T. 295 (S.B.), in this connection.

Where accused persons are alleged to have obstructed an amin attaching property in execution of a warrant of attachment, no complaint of the Court is necessary for an offence under sec. 186, 379 or 424, I. P. Code—*Rengaswami Thevan v Emp*, 1939 M.W.N. 886.

In execution of a decree some property was attached and was given into the custody of K. Somehow or other there was a scuffle between K on the one hand and the accused on the other. The parties filed complaints against each other in the Criminal Court. K's complaint against the accused was under secs 323, 352 and 504, I. P. C. *Held* that the mere fact that those facts constituted an offence under sec. 188 or sec. 186, I. P. C., does not render the complaint of K illegal. None of the sections on which the complaint was based is referred to in sec 195, Cr P C., and so it was not necessary for the complainant to move the Court which passed the decree to file a complaint against the accused—*Raghubar Dayal Gupta v Khusekar Prasad*, 36 Cr L.J. 594, 154 I.C. 857, 1935 O.W.N. 370, 1935 O.L.R. 206, 7 R.O. 514, A.I.R. 1935 Oudh 331, 1935 Cr C 669.

Section 182, I. P. C., is one of the sections mentioned in this clause. Under this section no cognizance can be taken of an offence under sec 182, I. P. C., except on the complaint in writing of the public servant before whom the false information is given or some other public servant to whom he is subordinate. Where the false information was given to the Superintendent of Police but no complaint in writing was made to the Magistrate either by the Superintendent of Police or by any other officer to whom the Superintendent of Police was subordinate, the trying Magistrate was not the proper complainant under this section in respect of that information, although he tried the case and found the information to be a false one—*Abdul Hakim*, A.I.R. 1932 Cal 511, 59 Cal 334, 1932 Cr C 440, 138 I.C. 551, 33 Cr L.J. 631. Where the accused submitted a petition to the District Magistrate in which they enumerated their grievances from which the villagers under a Union Board were suffering on account of various illegal and unauthorised acts of the President and Secretary of the Union Board and prayed for redress by an enquiry by himself or by the Sub-divisional Officer and the District Magistrate sent the petition for disposal to the Sub-divisional Magistrate who asked the Circle Officer to enquire and report about the allegations, directed the issue of the notice on the accused to show cause why they should not be prosecuted under sec. 182, I. P. C., on receipt of the Circle Officer's report and summoned the accused to stand their trial under sec. 182, I. P. C., without any further enquiry although they appeared and showed cause stating that there had not been a proper enquiry into the allegations and an enquiry might be made by the Sub-divisional Magistrate himself or by the Sub-deputy Magistrate, *held* that the Sub-divisional Magistrate had no jurisdiction to take cognizance of a case under sec. 182, I. P. C., against the accused without a written complaint by the District Magistrate or some other public servant to whom that officer was subordinate and that the Sub-divisional Magistrate should have enquired into the allegations made by accused judicially when they submitted a *naraji* petition against the report of the Circle Officer before taking any action under sec 182, I. P. Code—*N Mukherjee v. Ramkinkar Palit*, 67 C.L.J. 583.

The petitioner made a complaint before the Sub-divisional Magistrate who referred it for inquiry and report by the police. The police reported the case to be maliciously false, recommended the prosecution of the petitioner under sec. 211, I. P. C., and

preferred a complaint of that offence against the petitioner. The Magistrate, however, directed the police to submit a report for prosecution under sec. 182, I. P. C., which was done. Held that this clause was a bar to the complaint by the police of an offence under sec. 182, I. P. C., since he was not the public servant or the superior of such public servant to whom a false information punishable under sec. 182, I. P. C., was given, that if the offence was under sec. 182, I. P. C., no complaint of it could be laid by any person except the Sub-divisional Magistrate himself and that as the complaint was one of the house-trespass, extortion and other offences and properly fell under the provisions of sec. 211, I. P. C., and as it was committed in relation to the Court of the Sub-divisional Magistrate, sec. 195 (1) (b) was a bar to cognizance being taken of it except on the complaint of that Court—*Jokhi v. Mahmud*, 30 Cr.L.J. 545, 115 I.C. 882, 10 P.L.T. 77, A.I.R. 1929 Pat. 92, Ind. Rul. 1929 Pat. 258. See also *Bachalal*, A.I.R. 1936 Pat. 56, 16 P.L.T. 807.

Complaint at the instance of a third party:—When the accused are alleged to have resisted and obstructed a Civil Court peon when he went to their house under the orders of the Court to execute certain writs of attachment, action in such a matter ought not ordinarily be taken at the instance of a third party—*Ramesh Chandra v. Hari Mohan*, 42 C.W.N. 531 (533). See also *Madhu Sudhan v. Haridas*, 44 C.W.N. 1011.

Enquiry:—The law does not require that proceedings with a view to the making of a complaint under sec. 195 (1) (a), Cr. P. C., should be in the form of a public judicial enquiry. Some enquiry before making a complaint is of course desirable, but that enquiry ought to be of a purely administrative character and need not be made in public; nor need the statements of witnesses be recorded on oath—*Ramesh Chandra v. Hari Mohan*, 42 C.W.N. 531 (533).

616. Clause (b):—Section 195 (1) (b), Cr. P. C., does not relate to offences under sec. 211 generally. It relates to offences under sec. 211, I. P. C., when such offence is alleged to have been committed in or in relation to any proceedings in any Court—*Dharamdas Hiranand v. Emp.*, 40 Cr.L.J. 12 (14), A.I.R. 1938 Sind 213, 178 I.C. 218, 11 R.S. 82. Therefore when an offence is not committed in or in relation to any Court, a complaint of such an offence can be made by a private individual—*Raji v. Allaudin M. Samo*, I.L.R. 1939 Kar. 388, 11 R.S. 183, 40 Cr.L.J. 461, 160 I.C. 650, A.I.R. 1939 Sind 65. See also *Bechu Singh v. Tribeni Sah*, 40 Cr.L.J. 157, 179 I.C. 167. The same principle of law seems to apply, in respect of complaints regarding other offences mentioned in sec. 195 (1) (b), Cr. P. Code.

The power of a Court to complain in respect of offences mentioned in clause (b) is not restricted, as under clause (c), to the parties before it—*Syed Khan*, 3 Rang. 303 (F.B.), A.I.R. 1925 Rang. 321, 27 Cr.L.J. 4, 91 I.C. 36. Nothing in this clause confines the power of the Court to persons who are parties to the proceedings. It is clause (c) which confines the power of the Court to parties to the proceedings and there it is in respect of documents and not of oral evidence—*U Kadoe*, A.I.R. 1936 Rang. 369 (372), 37 Cr.L.J. 1008, 164 I.C. 769, 1936 Cr.C. 771. The Court has, therefore, jurisdiction to prosecute a person who causes a false complaint to be lodged, though he was not a party to a proceeding before it—*Kazlar Rahaman*, A.I.R. 1930 Cal. 515, 31 Cr.L.J. 1055, 1930 Cr.C. 859; *Akhla Kulla*, A.I.R. 1930 Cal. 671, 52 Cr.L.J. 149, 1930 Cr.C. 1063, 31 Cr.L.J. 1145, 127 I.C. 65; *Ivor Henry Bridgnell*, 38 Cr.L.J. 1002 (1005), 170 I.C. 891, 10 R.S. 81, A.I.R. 1937 Sind 193. Moreover, it is to the taking cognizance of the offence that sec. 195 (1) (b) and (c), Cr. P. C., refer to; it is the offence, not the offender which is referred to—*Ivor Henry Bridgnell*, supra.

In the case of an offence to which reference is made in sec. 195, clause (b), a Court taking cognizance of such an offence when that offence has been committed in, or in relation to any proceeding in any Court, or a Court taking cognizance of a criminal conspiracy to commit such an offence or of abetment or attempt to commit

such an offence, cannot do so unless sanction has been given not only to the factum but to cover the case of each person who is charged with having committed it—*Ram Bilas v. Lachmi Narain*, 45 All 140 (141), A.I.R. 1923 All. 84, 71 I.C. 684, 24 Cr.L.J. 220, 20 A.L.J. 904. See see Note 614B and 614C.

Where the facts disclose an offence mentioned in this clause (e.g., an offence under sec. 193, I. P. C., committed in relation to a proceeding in Court), no Court can take cognizance of the offence without a complaint by the Court before which the offence was committed, as required by this section, and the complainant cannot evade this condition by electing to name the offence under a different name which does not require a complaint by Court—*Perianna v. Vengu Ayyar*, 56 M.L.J. 203, 30 Cr.L.J. 322 (325); *Ravanappa*, 55 Mad. 343, 33 Cr.L.J. 361 (362); *Prasulla v. Harendra*, 44 Cal 970 (974); *Subramania v. Sivamikanu*, 34 Cr.L.J. 800, 144 I.C. 519, Ind. Rul. 1933 Mad. 424, 37 M.L.W. 547, 1933 Cr.C. 566, 1933 M.W.N. 217, A.I.R. 1933 Mad. 413. For, if this were allowed to be done, the provision of sec. 195 might just as well be wiped out—*Prasulla v. Harendra*, supra.

False evidence:—In making a complaint against a witness for perjury the Court should remember that the statement must be intentionally false in order to justify a prosecution. Moreover, the statement alleged to be false must have a bearing upon the matter in issue. When the question is neither material to the issue in the case nor goes to the credit of the witness, he is not liable to prosecution—*Sheodahn v. Bandhan*, 2 A.L.J. 836, 3 Cr.L.J. 45; *Chatur Jethaji*, 34 Cr.L.J. 33, 104 I.C. 619, 34 Bom.L.R. 1247, A.I.R. 1932 Bom. 551, 1932 Cr.C. 783, Ind. Rul. 1933 Bom. 1; *Ghansamdas*, A.I.R. 1932 Sind 412, 1933 Cr.C. 1545; *Khajumal*, 14 S.L.R. 69; *Maharaja Prosad*, 21 A.L.J. 673, 24 Cr.L.J. 779; *Jagat*, 31 Cr.L.J. 179, 120 I.C. 687, A.I.R. 1930 Lah. 55, 1930 Cr.C. 23; *Monohar*, 28 Cr.L.J. 310, 100 I.C. 531, A.I.R. 1927 Cal. 515. But it is to be noticed that it is not necessary that in a case of giving false evidence before a Court of Justice, the false evidence should always be concerning a question material to the decision of the case before the Court in which the evidence was given. It is sufficient if the false evidence is intentionally given, that is to say, if the person knowing the statements to be false, makes them advisedly and with the intent of deceiving the Court or by leading it to believe that what he stated was true. If the false evidence does not bear directly on the material issue in the case before the Court in which the false statement was made, being only relative or incidental to the matters directly in controversy before the Court, that is a matter which should be taken into consideration in fixing the sentence to be passed on the accused placed on his trial. [See in this connection cases of *Babu Ram*, 25 All 509, 1901 A.W.N. 115, 1 A.L.J. 236, 1 Cr.L.J. 434; *Mahomed Hossain*, 16 W.R. 37; and *Shib Prosad Giri*, 19 W.R. 69] *Jugal Chandra v. Emp.*, 42 C.W.N. 31; *Behari Lal Sud v. Emp.*, 41 Cr.L.J. 204 (205), 185 I.C. 588, A.I.R. 1939 Lah. 529, 41 P.L.R. 652, where it has also been held that a replication filed by a party under Order 6, Rule 5, C. P. C., which is rejected by the Court but placed on record, can be used as a previous statement to contradict the statements made by the petitioner in Court under sec. 145, Evidence Act for the purposes of his prosecution under sec. 193, I. P. Code.

A prosecution for perjury ought not to be made while the principal proceeding in respect of which the perjury is said to have been committed is *pending*. If such a prosecution is to be started, it ought to be started after the principal proceeding has terminated—*In re Vasudev*, 24 Bom.L.R. 1153. However exasperating it may be when a witness resiles from a true statement made in the committing Magistrate's Court, the Sessions Judge should not issue notice to show cause while the proceedings are pending. The witness cannot then be considered a free witness; he is giving evidence under fear and duress and it may not only influence and invalidate his testimony but it may affect the testimony of witnesses who come later. The question of the witness's prosecution for perjury can be considered after—*Samero*, A.I.R. 1936 Sind 140 (141). A complaint for perjury should not be made by the Court in cases where it will have to determine the question by merely weighing the evidence on both sides—*Padarath v. Ratan Singh*,

5 P.L.J. 23, 1 P.L.T. 458, 21 Cr.L.J. 145. A prosecution for perjury in respect of a piece of evidence should not generally be made where the trial Court and the Appellate Court have taken different views as to its credibility—*Hirulal v. Lila Mahton*, 3 P.L.T. 60. It would almost be a judicial scandal if a witness whose evidence was accepted by the Appellate Court is prosecuted by the trial Court for perjury on the strength of the very testimony which had been disbelieved by the Appellate Court—*Appaji Goundan*, A.I.R. 1939 Mad. 779, 1939 M.W.N. 471, 1939 M.Cr.C. 140. The fact that the trial Judge felt himself able to accept the statement of witnesses as true is a point to be taken in their favour when the question of prosecuting these persons for perjury arises, on their being disbelieved by the Appellate Court. Prosecutions for perjury should not be launched unless there is some proof likely at least to satisfy a Court that the statements made by the persons charged are false statements. It is not enough to prove that ordinary village witnesses coming forward in a communal case decided amongst themselves what they were to say and how they were to say it—*Yar Mohamed v. Bansi*, 34 Cr.L.J. 105, 141 I.C. 146, A.I.R. 1932 All. 674, 1932 Gr.C. 826, Ind. Rul. 1933 All. 51. See also *Debi Datt*, 10 I.C. 816, 26 A.L.J. 1327, 29 Cr.L.J. 284, A.I.R. 1928 All. 548. Where two Courts have taken different views of facts, sanction for prosecution should not be granted—*Hira Lal v. Lila*, 65 I.C. 360, A.I.R. 1923 Pat. 102, 3 P.L.T. 342; *Rahamat Ali*, 32 Cr.L.J. 652, 131 I.C. 95, A.I.R. 1931 Lah. 404, 1931 Cr.C. 644, Ind. Rul. 1931 Lah. 367.

A prosecution for offences under secs 193, 467 and 471, I. P. C., in respect of a handnote sued upon may be made even though the suit was compromised after it was heard in part—*Dulloo*, 49 Cal. 551, 23 Cr.L.J. 138.

Prima facie persons who give false evidence which may result in the conviction of an innocent person for murder ought to be tried for offences they have committed. Their relationship to the accused, their age, the circumstances under which they came to give false evidence, are matters to be considered by the Magistrate before whom they will appear—*Maromma*, 34 Cr.L.J. 92, 140 I.C. 756, 1933 M.W.N. 100, 1933 Cr.C. 157, A.I.R. 1933 Mad. 125, Ind. Rul. 1933 Mad. 43. But when the prospects of a conviction are very much more remote it is seldom desirable to launch criminal prosecution lightly against every witness who may be suspected of having departed from the truth in some particular—*Nawalal*, 37 Cr.L.J. 193 (195), 159 I.C. 817, 2 B.R. 112, 8 R.P. 313, A.I.R. 1936 Pat. 162, 1936 Cr.C. 254; *Mahalinga*, A.I.R. 1935 Mad. 1044, 37 Cr.L.J. 15, 158 I.C. 140, 1935 Cr.C. 1287, 69 M.L.J. 783.

In considering the question whether a prosecution for perjury shall or shall not be made, it is a safe rule to give the witness a *locus penitentiae* and an opportunity to correct himself, and if he subsequently corrects his false statement, prosecution is inadvisable—*Hukum Chand*, 29 Cr.L.J. 679, 110 I.C. 231, A.I.R. 1928 Lah. 862, 10 A.I.Cr.R. 518; *In re Pandu*, 19 Bom.L.R. 61, 18 Cr.L.J. 480 (481), 19 I.C. 320; *Maharaj Prosad*, 21 A.L.J. 673, 24 Cr.L.J. 779; *Ghanshamdas*, 35 Cr.L.J. 519 (523), 147 I.C. 1019, A.I.R. 1933 Sind 412, 1933 Cr.C. 1545.

It cannot be held that in the case of a person who alleges that he has been defamed and has not been a party to the proceedings at all, cannot move a Magistrate to entertain a complaint in respect of defamation without moving the Court in which the statement was made to make a complaint under sec. 195, Cr. P. C., in respect of perjury committed before it. No doubt the Courts should be slow to admit complaints of defamation where the circumstances are such that the accusation is really one of perjury in which the Court should be moved to make a complaint. But this will not apply where the party who alleges that he has been injured was not a party to the proceedings at all, and, the complainant is asking for the redress of a personal grievance—*Chotelal v. Phulechand*, 38 Cr.L.J. 775 (776), 169 I.C. 429, 10 R.N. 1, I.L.R. 1937 Nag. 425, 20 N.L.J. 33, A.I.R. 1937 Nag. 138.

Before action can be taken on an application under sec. 476, read with sec. 195, Cr. P. C., against a person for having fabricated evidence by making a false entry there must be some satisfactory evidence that the entry was fabricated for the purpose

of being used in proceedings though actual use is not necessary—*Gopaldas Khetriya v. Jnanendra Nath Dawn*, 40 Cr.L.J. 450 (453), 180 I.C. 586, A.I.R. 1938 Cal. 677.

617. Contradictory statements:—The mere fact that a witness made contradictory statements in the course of a deposition is not a ground of prosecution for giving false evidence; in such a case the Court should consider if the contradiction may possibly be due to some confusion or mistake or some other cause—*Keramat Ali*, 55 Cal. 1312, 30 Cr.L.J. 221 (222), 113 I.C. 842, A.I.R. 1928 Cal. 862. Nor should the Court make a complaint on the mere fact that the witness made two contradictory statements, one before the committing Magistrate and another at the trial before the Sessions Judge. The Court should consider how the contradiction has happened and why the witness in the trial has resiled from his statement made before the committing Magistrate. Where the witness had made false statements before the Committing Magistrate but deposed truly at the trial, the High Court refused to prosecute—*Tripura Shankar*, 37 Cal. 618, 14 C.W.N. 767, 6 I.C. 476, 11 Cr.L.J. 360; *Pandu*, 39 I.C. 320, 18 Cr.L.J. 480, 19 Bom.L.R. 61; *Allah Wasaya*, 112 I.C. 468, 29 Cr.L.J. 1014; *Bajrao*, 34 Cr.L.J. 649, 143 I.C. 747, A.I.R. 1933 Nag. 179, 1933 Cr.C. 693, Ind. Rul. 1933 Nag. 182; *Jani*, 36 Cr.L.J. 10, 152 I.C. 254, A.I.R. 1934 Sind 155, 1935 Cr.C. 1147; *Pragi*, 37 Cr.L.J. 885, 164 I.C. 107, 1936 O.L.R. 429, 9 R.O. 34, 1936 O.W.N. 763, A.I.R. 1936 Oudh 373, 1936 Cr.C. 982. It is in the interests of the Crown as well as in the interests of justice that prosecution witnesses should be free to tell the truth to the Court of Session irrespective of whatever evidence they may have given in the Court of the Committing Magistrate. To compel prosecution witnesses merely to repeat in the Court of Session the evidence they gave before the Committing Magistrate on pain of being prosecuted for an offence of perjury would be to deprive the Court of Session of an opportunity of getting at the true facts of the case and would not be conducive to the interests of justice—*Pragi*, supra.

It should not be laid down as a general rule that a witness is exempt from prosecution with regard to a statement made in the Sessions Court, differing from a previous statement made by him before the Committing Magistrate, even though the subsequent statement is considered to be true. There may be good reasons for not prosecuting the witness in many cases, should the subsequent statement be held to be true, but where it is doubtful which of the two statements is true and where it may be held with some degree of certainty that the subsequent statement is the false one, a complaint for giving false evidence should, as a rule, be made. Other matters, it is true, should of course be considered, such as any compulsion that may have been brought to bear upon the witness in making either of the statements but where no compulsion has been shown, the Court should not refrain from making a complaint except for good reasons—*Local Government v. Jit Singh*, 36 Cr.L.J. 935, A.I.R. 1935 Nag. 145, 156 I.C. 257. Although there is no provision of law that the Magistrate is bound to give an opportunity to the witness to explain the contradictory statements, still the Magistrate may consider the explanation given by the witness and see if the statements are reconcilable—*Kamins Kumar*, 33 C.W.N. 664 (666), 31 Cr.L.J. 373. Before making a complaint, it would be proper to allow the person, against whom the complaint is made, an opportunity to explain the statements fully and to state the circumstances under which they came to be made—*Iqbal v. W'layal*, 17 Cr.L.J. 93 (All.); *Fazal Din*, 3 Lah.L.J. 442; *Surendra*, 35 Cr.L.J. 785, 142 I.C. 866, 1933 A.L.J. 1623, A.I.R. 1934 All. 385, 1934 Cr.C. 464. Unless the two contradictory statements are so absolutely opposed as to exclude the possibility of any hypothesis than that of prisoner's guilt, there can be no conviction upon an alternate charge—*Bhagirathi*, 26 Cr.L.J. 1401 (1404), 89 I.C. 713, A.I.R. 1926 Nag. 141. If he gives an explanation for his contradiction, and says that he did not contradict himself wilfully or out of malice, the Court should consider that explanation before directing prosecution. See *Keramat Ali*, supra. If the explanation given by the accused is unsatisfactory and cannot reconcile the two statements, the Court should make a complaint for his prosecution. Every allowance should be made for forgetful-

ness and for confusion, but in a proper case the Court should take action. It cannot, however, be held that every witness should be allowed one lie and one contradiction, that every witness should be allowed to say one thing and then another and then say it is "a mere contradiction. I cannot be convicted of perjury"—*Gopaldas Khetriya v. Jnanendra Nath Dawn*, 40 Cr.L.J. 450 (452), 180 I.C. 586, A.I.R. 1938 Cal. 677.

A Court should not prosecute merely where there is a discrepancy between a statement made on oath and a statement made under circumstances in which the witness is not bound to state the truth; e.g., where a person made two contradictory statements, one in a petition in which he is not bound to state the truth, and another in a deposition—*In re Chennamma*, 2 Weir 169.

Where a person made two contradictory statements, one before a Magistrate and another before a Subordinate Judge, it is necessary that there should be a proper complaint for prosecution on each branch of the alternative, i.e., one complaint from the Magistrate and another from the Subordinate Judge. The Court to which both Courts are subordinate may properly make the complaint where one Court is not subordinate to the other—*Purshottam*, 45 Bom. 834 (F.B.), 23 Bom.L.R. 1, 22 Cr.L.J. 241. When a person makes one statement in the Committing Magistrate's Court, and contradicts it in the Sessions Court, the Sessions Judge can make a complaint in the alternative that one or other of the statement must be false. Even if in such a case the statement made before the Sessions Court is true, the Sessions Judge's complaint is not illegal, because the false statement made before the Magistrate in the committal stage which eventuates in a trial must be deemed to have been made "in relation to" the trial—*Ganesh Mull*, 61 M.L.J. 914, 1931 Cr.C. 1034 (1035); *Narayanan v. Palaniappa*, 37 I.C. 897, 1917 M.W.N. 141; *Athi Ambalagan*, 33 Cr.L.J. 519, 137 I.C. 761, 55 Mad. 536, Ind. Rul. 1932 Mad 451, 35 M.L.W. 803, 1932 M.W.N. 724, 1932 Cr.C. 469, A.I.R. 1932 Mad 494, 62 M.L.J. 717, not following *Rami Reddi v. Public Prosecutor*, 15 Cr.L.J. 612, 27 M.L.J. 686, 1914 M.W.N. 793, 25 I.C. 527, 27 M.L.J. 586. It is neither advisable nor necessary for the Committing Magistrate to direct his prosecution also—*Athi Ambalagan*, supra. Similarly, a special Tribunal has jurisdiction to make a complaint under this section both as regards the statement in its own Court and the statement before the Magistrate under sec. 164, Cr. P. C.—*Brahm Datt*, A.I.R. 1934 Lah. 981.

Where the alleged false statements were not set out in the order of sanction (now complaint) but were specified in the application for it and also in the charge subsequently framed, held that the accused was not prejudiced by the omission in the sanction—*Rakkhal Chandra*, 36 Cal. 808 (813).

See Note 1241 under the heading "Expedient in the interests of justice".

618. False charge:—Where a Magistrate dismisses a complaint as false, and is of opinion that the complainant ought to be proceeded against under sec. 211, I. P. Code, the proper procedure for him to follow is to make a complaint under sec. 193, Cr. P. Code, and not to hold an inquiry into the case himself under Ch. XVIII and commit the complainant to the Court of Session for trial under sec. 211, I. P. Code—*Ambika*, 5 Pat. 450, 7 P.L.T. 716, 27 Cr.L.J. 987, 96 I.C. 651.

Mere acquittal of the person against whom the charge was made is not sufficient for a prosecution under sec. 211, I. P. C. There must be more than a mere acquittal; there must be a reasonable belief in the mind of the prosecuting Court that there was no foundation whatever for the original charge; there must be a belief that in instituting the criminal proceedings the accused had acted knowingly without belief in the truth of the allegations made by himself and recklessly without caring whether the allegations were true or false—*Kusum v. Janaklal*, 4 P.L.J. 374.

The High Court set aside the order of prosecution under sec. 211, I. P. C. directed by the Appellate Court when trying Magistrate believed the prosecution case and convicted the accused, holding that where one sees split opinions of two different tribunals it may be taken as generally a normal safe guide to suggest that definite

expressions as to the malice of either party are probably somewhat undesirable—*Raghupat*, 66 I.C. 336, A.I.R. 1922 Pat. 160, 3 P.L.T. 93, 23 Cr.L.J. 272, 1922 Pat. H.C.C. 26.

The fact that the complainant fails to prove his case is by itself not sufficient to sanction a prosecution under sec. 211, I.P. Code. It must be established satisfactorily that the complaint was made with intent to cause injury or that it was a false complaint made with the knowledge that it was false—*Bhun Kahar*, 6 P.L.T. 365, 26 Cr.L.J. 141, 83 I.C. 701, A.I.R. 1925 Pat. 329; *Chhedu Upadhya v. Emp.*, A.I.R. 1924 Pat. 379, 72 I.C. 76, 24 Cr.L.J. 316, 4 P.L.T. 703; *Mukti Narayan v. Emp.*, A.I.R. 1940 Pat. 97 (99), 1939 P.W.N. 871, 20 P.L.T. 947.

Undoubtedly it is necessary, in considering an application for an order to prosecute under sec. 476, Cr. P. C., to bear in mind that whereas had the original complainant gone to trial the entire burden of proof would have lain on the complainant, the opposite party will have to carry the whole burden should the complainant be prosecuted under sec. 211, I.P. C., and the ingredients of sec. 211, I.P. C., go a good deal further than the mere absence of proof of the guilt of the person said to have been falsely charged with an offence. The complainant must have falsely charged such person with having committed an offence, that is to say, the person must be innocent. The complainant must have known that there is no just or lawful ground for the proceeding or charge, that is to say, there is no penalty in this section for incautious or negligible acceptance of information which the complainant might have learnt by enquiry to be unreliable. Thirdly, there must have been an intention to cause injury to the person. The last can in some cases be inferred from the relation of the parties when the other two elements are established. As regards the other two ingredients, it is important to remember that there is a difference between suspicion and evidence. The prosecution will have to establish facts irreconcilable with the innocence of the accused. Prosecutions under that section are not to be undertaken lightly. If the complaint in its generality was *bona fide*, the fact that one accused person had been wrongly identified cannot be regarded as a ground for instituting a prosecution under sec. 211, I.P. C.—*Bachu Singh v. Tribeni Sah*, 40 Cr.L.J. 157 (159), 179 I.C. 167.

Where a Magistrate asked a Sub-Inspector of Police to file a complaint against a person who filed a petition of complaint before him, which on inquiry by the Police was found to be false, *held* that the Magistrate's action in asking the Sub-Inspector to file a complaint and in acting upon it was illegal, that the proper authority to file a complaint under sec. 182, I.P. C., was the Magistrate who was the public servant to whom the alleged false complaint was made, that there was no privity between the complainant and the Sub-Inspector who accordingly could not remove the bar under sec. 195 (1)(a), Cr. P. C., to take cognizance of the alleged offence under sec. 182, I.P. C., and that the Magistrate's order to him was not a complaint within the meaning of this section—*Bachalal*, 37 Cr.L.J. 324, 160 I.C. 797, A.I.R. 1936 Pat. 56, 16 P.L.T. 807, 1935 Cr.C. 82.

Before making a complaint for bringing a false case, it is necessary that the case must be judicially determined; the original case must be disposed of according to law and dismissed as false before proceedings can be taken for prosecution for false charge—*Gunnamongy*, 3 C.W.N. 758; *In re Sahiram*, 5 C.W.N. 254; *Munshi Isser*, 14 C.W.N. 765, 11 Cr.L.J. 354; *Sham Lal*, 14 Cal 707 (720); *In re Ningappa*, 48 Bom. 360, 26 Bom.L.R. 183; *Aly Mahomed*, 1912 P.R. 2, 12 Cr.L.J. 539, 12 I.C. 515; *Murugan v. Gutha Rami Naidu*, 28 Cr.L.J. 849, A.I.R. 1927 Mad. 851, 104 I.C. 625, 1927 M.W.N. 691, 39 M.L.T. 103, 26 M.L.W. 405, 53 M.L.J. 455, 9 A.I.Cr.R. 27; *Jokhi v. Mahmud*, 30 Cr.L.J. 545, 115 I.C. 882, 10 P.L.T. 77, A.I.R. 1929 Pat. 92, Ind. Rul. 1929 Pat. 258; *Pampappa Balla Rao Desai*, 28 Bom.L.R. 490, 95 I.C. 68, A.I.R. 1926 Bom. 284, 27 Cr.L.J. 740; *Radhakrishin G. Keswani*, 40 Cr.L.J. 449, 180 I.C. 436, A.I.R. 1939 Sind 78, 11 R. 1939 Kar. 648, 11 RS 178. The Cr. P. Code does not contemplate that when the Magistrate has received a formal complaint he need not follow the procedure set out in sec. 200, Cr. P. C., but can straightway send it to the police under sec. 156 (3),

Cr. P. C., and then upon issue of B summary, make a complaint of a false charge—*Radhakrishin G. Keshwani v. Emp*, supra. If the original case is neither tried out nor dismissed on evidence taken, the prosecution is invalid—*Ram Sarup*, 4 O.C. 127. But in a later Calcutta case it has been said that there is no statutory provision requiring that the original case must be finally disposed of before a prosecution under sec. 211, I. P. C., can commence. If the prosecution is started before the original case is dismissed, it is at most an irregularity curable by sec. 537—*Gangadhar*, 43 Cal 173 (177).

Where the Magistrate, without examining the complainant on oath though he had a formal complaint in writing before him, sent the case direct to the police for investigation under sec. 156 (3), Cr. P. C., and, when it was returned by the Sub-Inspector with a recommendation for a B summary, made a complaint against him under sec. 211, I. P. C., without giving any notice to him of the complaint to be made against him, held that the procedure was not legal and that the complaint must be withdrawn—*Radhakrishin G. Keswani*, 40 Cr.L.J. 499, 180 I.C. 436, A.I.R. 1939 Sind 78.

See also Note 620 under the heading "Opportunity to prove the case".

619. False claim:—Before prosecuting a person under sec. 219, I. P. C., for bringing a false claim, that person should be allowed an opportunity of proving his claim; a prosecution should not be made when that person has been thwarted in his attempt to establish the correctness of his claim by the unwarranted activities of the Police acting as the agent of the other party—*Khairati Ram*, 3 Lah.L.J. 537.

620. False charge made before police:—A complaint by the Court is necessary when the offences referred to in this clause are committed in or in relation to any proceeding in Court; no complaint is necessary when the offence is committed only in police proceedings, e.g., when the informant has made a false charge only to the Police but has not applied to the Magistrate for a judicial investigation thereof (even though the police refers the false charge to the Magistrate)—*Tayebullah*, 43 Cal. 1152 (1155), 20 C.W.N. 1265, 24 C.L.J. 134, 36 I.C. 845; *Ramasami*, 7 Mad. 292 (293); *Karim Baksh*, 1905 P.R. 12, 2 Cr.L.J. 66; *Ganpat*, Ratanlal 704 (705); *Haibat Khan*, 33 Cal 30 (32); *Sheikh Ahmed*, 5 Bur.L.T. 129 (F.B.), 13 Cr.L.J. 578 (579); *Bakshi*, 21 A.L.J. 805; *Bholu v. Punaji*, 23 N.L.R. 136, 28 Cr.L.J. 934 (936); *U Sein Ywet v. U Maung Fyi*, 35 Cr.L.J. 802, 148 I.C. 845, 1934 Cr.C. 236, A.I.R. 1934 Rang. 40; *Muhammada*, 9 Lah 408, 109 I.C. 685, A.I.R. 1928 Lah. 259, 29 Cr.L.J. 605, 29 P.L.R. 515, 10 Lah.L.J. 218, 10 A.I.Cr.R. 313; *Ma E*, 40 Cr.L.J. 432, 180 I.C. 906, A.I.R. 1939 Rang. 148, 11 R.R. 441; even when the Magistrate issued notice to the informant to appear and show cause why his complaint before the police should not be struck off and he did not appear—*Rangastwami*, A.I.R. 1934 Mad. 175, 1933 M.W.N. 873, 39 M.L.W. 204, 66 M.L.J. 253. The mere fact that a Magistrate gives a "B" summary does not bring the offence in relation to which that summary is given within the provision of sec. 195 (1), Cr. P. C., for the giving of a "B" summary is merely an administrative and not a judicial act—*Dharamdas Hiranand v. Emp*, 40 Cr.L.J. 12, 178 I.C. 218, A.I.R. 1938 Sind 213, 11 R.S. 82; *Raji v. Allaudin M. Samo*, 40 Cr.L.J. 461, 180 I.C. 650, A.I.R. 1939 Sind 65, 11 R.S. 183, 1 I.R. 1939 Kar 388. It is not the intention of the Legislature that an offence under sec. 211, I. P. C., can be made the subject of complaint only by Courts or public officers. When an offence under sec. 211, I. P. C., is not committed in or in relation to any Court, a complaint of such an offence can be made by a private individual—*Raji v. Alaudin, M. Samo*, supra. But the Lahore High Court quashed the proceedings even in such a case for want of a complaint by the Court, holding that the words in sec. 195 (b) "in relation to any proceedings in any Court" applied to the case of a false report or a false statement made in an investigation by the police with the intention that there should, in consequence of this, be a trial in the Criminal Court—*Ghulam Rasul*, A.I.R. 1936 Lah. 238. If, however, the informant has not only laid a false charge before the Police (sec. 211, I. P. C.), but has subsequently made a false complaint to the Court based on the same allegations and on the same charges as those contained in the charge made before the Police, and the complaint

is investigated by the Court, a complaint of the Court is necessary under this section for prosecuting the complainant, even in respect of the *false charge made to the police*, because it was an offence committed in relation to a proceeding in Court—*Brown v. Ananda Lal*, 44 Cal. 650 (655), 20 C.W.N. 1347, 36 I.C. 857, 8 Cr.L.J. 25, 25 C.L.J. 59, A.I.R. 1917 Cal. 596; *Samir v. Sajidur*, 53 Cal. 824, 99 I.C. 118, A.I.R. 1927 Cal. 95, 28 Cr.L.J. 86 (87); *Tayebulladah*, 43 Cal. 1152 (1155); *Po Hlaing v. Ba E*, 6 L.B.R. 50, 13 Cr.L.J. 565 (566); *Md Yassin*, 4 Pat. 323, 6 P.L.T. 457, 26 Cr.L.J. 889 (890); *Rambrose*, A.I.R. 1928 Rang. 254, 114 I.C. 685, Ind. Rul. 1929 Rang. 877, 6 Rang. 578, 30 Cr.L.J. 342 (343); *Daroga Gope*, 5 Pat. 33, A.I.R. 1925 Pat. 717, 88 I.C. 1045, 6 P.L.T. 515, 26 Cr.L.J. 1269 (1271); *Chukhermal*, 23 S.L.R. 285, 30 Cr.L.J. 732 (734); *Murugan v. Gutka Rami Naidu*, A.I.R. 1927 Mad. 851, 104 I.C. 625, 1927 M.W.N. 694, 39 M.L.T. 103, 26 M.L.W. 405, 53 M.L.J. 455, 28 Cr.L.J. 849, 9 A.I.Cr.R. 27; *Sarup Singh*, 40 Cr.L.J. 638, 181 I.C. 928, 1939 N.L.J. 210, A.I.R. 1939 Nag. 226, 11 R.N. 494. (Even the fact that the false complaint was not investigated or proceeded with by the Court does not make any difference—*Md. Yasin*, *supra*; *Rambrose*, *supra*; *Chukhermal*, *supra*). The reason is that by making his complaint to the Court the informant has withdrawn the information from the category of mere police-proceedings and has raised it to the category of a proceeding in Court. This necessitates a complaint by the Court if the informant is to be proceeded against in respect of the false charge laid before the police—*Muhammad Yasin*, *supra*—*Cf. Hardwar*, 34 All. 522 cited below. In a more recent case, however, the Allahabad High Court has said that no complaint of the Court is necessary in respect of the false charge made before the police, because the offence of preferring the false charge is complete as soon as it is made before the police, and it cannot be said to have been committed in relation to any proceeding in Court simply because a false complaint is subsequently filed in Court—*Prag Dutt*, 51 All. 382, 27 A.L.J. 68, 29 Cr.L.J. 938 (939), 111 I.C. 858, A.I.R. 1928 All. 765.

A fortiori, where the accused is prosecuted not only in respect of the false charge made before the police *but also* in respect of the false complaint made before the Court, a complaint by the Court is essential for the prosecution—*Dholiah*, 54 Mad. 1018, 61 M.L.J. 770, 32 Cr.L.J. 1215 (1217), Ind. Rul. 1931 Mad. 861, 134 I.C. 813, 32 Cr.L.J. 1215, 1931 M.W.N. 513, 34 M.L.W. 329, 1931 Cr.C. 942, A.I.R. 1931 Mad. 702. In such a case the prosecution will not be allowed to evade the requirement of sec. 195 by proceeding with the minor charge alone (false charge made before the Police), and abandoning the major charge (false complaint made before the Court). The principle is this: where a complaint sets forth certain facts disclosing a minor offence (*e.g.*, offence under sec. 182, I. P. C.) as also a grave offence (*e.g.*, offence under sec. 211, I. P. C., committed before a Court) prosecution should ordinarily be for the graver offence. If in entertaining such a complaint there is a legal bar to taking cognizance of the graver offence by reason of want of a complaint by the Magistrate, the legal consequence should not be allowed to be evaded by confining the case to the minor offence alone and disposing of it accordingly—*Dholiah*, *supra* (following *Perianna v. Vengu Ayyar*, 56 M.L.J. 208, 30 Cr.L.J. 322); *Rambrose*, 6 Rang. 578, 30 Cr.L.J. 342 (343), A.I.R. 1928 Rang. 254, 114 I.C. 685; *Ramchand*, A.I.R. 1929 Sind 115, 115 I.C. 313, 30 Cr.L.J. 399, 23 S.L.R. 225, Ind. Rul. 1929 Sind 73; *Sarup Singh*, 40 Cr.L.J. 638, 181 I.C. 928, 1939 N.L.J. 210, A.I.R. 1939 Nag. 226. See also *Ganga Prasad*, 32 Cr.L.J. 128, 128 I.C. 281, 7 O.W.N. 756, A.I.R. 1930 Oudh 414, Ind. Rul. 1930 Oudh 44, 1930 Cr.C. 954 where *Rambrose*, *supra*, was distinguished on the ground that the offence of dacoity in respect of which report was made at the police station was not tried by the Magistrate. But the Patna High Court holds that though the prosecution cannot proceed in respect of the major offence (sec. 211, I. P. C.) for want of a complaint by the Court, it is open to the Court to convict the accused for the minor offence under sec. 182, I. P. C.—*Daroga Gope*, 5 Pat. 33 (39), 6 P.L.T. 515, 26 Cr.L.J. 1269 (1271, 1272). See also *Ma Paw*, 8 Rang. 499 (505), 32 Cr.L.J. 202 (205), 128 I.C. 836, A.I.R. 1931 Rang. 12, Ind. Rul. 1931 Rang. 52.

If a false charge is made by A before the police against three persons B, C and

Cr. P. C., and then upon issue of B summary, make a complaint of a false charge—*Radhakrishin G. Keshwani v. Emp*, supra. If the original case is neither tried out nor dismissed on evidence taken, the prosecution is invalid—*Ram Sarup*, 4 O.C. 127. But in a later Calcutta case it has been said that there is no statutory provision requiring that the original case must be finally disposed of before a prosecution under sec. 211, I. P. C., can commence. If the prosecution is started before the original case is dismissed, it is at most an irregularity curable by sec. 537—*Gangadhar*, 43 Cal 173 (177).

Where the Magistrate, without examining the complainant on oath though he had a formal complaint in writing before him, sent the case direct to the police for investigation under sec. 156 (3), Cr. P. C., and, when it was returned by the Sub-Inspector with a recommendation for a B summary, made a complaint against him under sec. 211, I. P. C., without giving any notice to him of the complaint to be made against him, held that the procedure was not legal and that the complaint must be withdrawn—*Radhakrishin G. Keswani*, 40 Cr.L.J. 499, 180 I.C. 436, A.I.R. 1939 Sind 78.

See also Note 620 under the heading "Opportunity to prove the case".

619. False claim:—Before prosecuting a person under sec. 219, I. P. C., for bringing a false claim, that person should be allowed an opportunity of proving his claim; a prosecution should not be made when that person has been thwarted in his attempt to establish the correctness of his claim by the unwarranted activities of the Police acting as the agent of the other party—*Khavati Ram*, 3 Lah L.J. 537.

620. False charge made before police:—A complaint by the Court is necessary when the offences referred to in this clause are committed in or in relation to any proceeding in Court; no complaint is necessary when the offence is committed only in police proceedings, e.g., when the informant has made a false charge only to the Police but has not applied to the Magistrate for a judicial investigation thereof (even though the police refers the false charge to the Magistrate)—*Tayebullah*, 43 Cal. 1152 (1155), 20 C.W.N. 1265, 24 C.L.J. 134, 36 I.C. 845; *Ramasami*, 7 Mad. 292 (293); *Karim Baksh*, 1905 P.R. 12, 2 Cr.L.J. 66; *Ganpat*, Ratanlal 704 (705); *Haibat Khan*, 33 Cal 30 (32); *Sheikh Ahmed*, 5 Bur.L.T. 129 (F.B.), 13 Cr.L.J. 578 (579); *Bakshi*, 21 A.L.J. 805; *Bholu v. Punaji*, 23 N.L.R. 136, 28 Cr.L.J. 934 (936); *U Sein Ywet v. U Maung Fyi*, 35 Cr.L.J. 802, 148 I.C. 845, 1934 Cr.C. 236, A.I.R. 1934 Rang. 40; *Muhammada*, 9 Lah. 408, 109 I.C. 685, A.I.R. 1928 Lah. 259, 29 Cr.L.J. 605, 29 P.L.R. 515, 10 Lah.L.J. 218, 10 A.I.Cr.R. 313; *Ma E*, 40 Cr.L.J. 432, 180 I.C. 906, A.I.R. 1939 Rang 148, 11 R.R. 441; even when the Magistrate issued notice to the informant to appear and show cause why his complaint before the police should not be struck off and he did not appear—*Rangaswami*, A.I.R. 1934 Mad 175, 1933 M.W.N. 873, 39 M.L.W. 204, 66 M.L.J. 253. The mere fact that a Magistrate gives a "B" summary does not bring the offence in relation to which that summary is given within the provision of sec. 195 (1), Cr. P. C., for the giving of a "B" summary is merely an administrative and not a judicial act—*Dharamdas Hiranand v. Emp*, 40 Cr.L.J. 12, 178 I.C. 218, A.I.R. 1938 Sind 213, 11 R.S. 82; *Raji v. Allaudin M. Samo*, 40 Cr.L.J. 461, 180 I.C. 650, A.I.R. 1939 Sind 65, 11 R.S. 183, I.L.R. 1939 Kar. 388. It is not the intention of the Legislature that an offence under sec. 211, I. P. C., can be made the subject of complaint only by Courts or public officers. When an offence under sec. 211, I. P. C., is not committed in or in relation to any Court, a complaint of such an offence can be made by a private individual—*Raji v. Alaudin, M. Samo*, supra. But the Lahore High Court quashed the proceedings even in such a case for want of a complaint by the Court, holding that the words in sec. 195 (b) "in relation to any proceedings in any Court" applied to the case of a false report or a false statement made in an investigation by the police with the intention that there should, in consequence of this, be a trial in the Criminal Court—*Ghulam Rasul*, A.I.R. 1936 Lah. 238. If, however, the informant has not only laid a false charge before the Police (sec. 211, I. P. C.), but has subsequently made a false complaint to the Court based on the same allegations and on the same charges as those contained in the charge made before the Police, and the complaint

is investigated by the Court, a complaint of the Court is necessary under this section for prosecuting the complainant, even in respect of the *false charge made to the police*, because it was an offence committed in relation to a proceeding in Court—*Brown v. Ananda Lal*, 44 Cal. 650 (655), 20 C.W.N. 1347, 36 I.C. 857, 8 Cr.L.J. 25, 25 C.L.J. 59, A.I.R. 1917 Cal. 596; *Samir v. Sajidur*, 53 Cal. 824, 99 I.C. 118, A.I.R. 1927 Cal. 95, 23 Cr.L.J. 86 (87); *Tayebuldah*, 43 Cal. 1152 (1155); *Po Hlaing v. Ba E*, 6 L.B.R. 50, 13 Cr.L.J. 565 (566); *Mid. Yassin*, 4 Pat. 323, 6 P.L.T. 457, 26 Cr.L.J. 889 (890); *Rambrose*, A.I.R. 1928 Rang. 254, 114 I.C. 685, Ind. Rul. 1929 Rang. 877, 6 Rang. 578, 30 Cr.L.J. 342 (343); *Daroga Gope*, 5 Pat. 33, A.I.R. 1925 Pat. 717, 88 I.C. 1045, 6 P.L.T. 515, 26 Cr.L.J. 1269 (1271); *Chuhermal*, 23 S.L.R. 285, 30 Cr.L.J. 732 (734); *Murugan v. Gutta Rami Naidu*, A.I.R. 1927 Mad. 851, 104 I.C. 625, 1927 M.W.N. 694, 39 M.L.T. 103, 26 M.L.W. 405, 53 M.L.J. 455, 28 Cr.L.J. 849, 9 A.I.Cr.R. 27; *Sarup Singh*, 40 Cr.L.J. 638, 181 I.C. 928, 1939 N.L.J. 210, A.I.R. 1939 Nag. 226, 11 R.N. 494. (Even the fact that the false complaint was not investigated or proceeded with by the Court does not make any difference—*Mid. Yasin*, supra; *Rambrose*, supra; *Chuhermal*, supra). The reason is that by making his complaint to the Court the informant has withdrawn the information from the category of mere police-proceedings and has raised it to the category of a proceeding in Court. This necessitates a complaint by the Court if the informant is to be proceeded against in respect of the false charge laid before the police—*Muhammad Yasin*, supra—*Cf. Hardwar*, 34 All. 522 cited below. In a more recent case, however, the Allahabad High Court has said that no complaint of the Court is necessary in respect of the false charge made before the police, because the offence of preferring the false charge is complete as soon as it is made before the police, and it cannot be said to have been committed in relation to any proceeding in Court simply because a false complaint is subsequently filed in Court—*Prag Dutt*, 51 All. 382, 27 A.L.J. 68, 29 Cr.L.J. 938 (939), 111 I.C. 858, A.I.R. 1928 All. 765.

A fortiori, where the accused is prosecuted not only in respect of the false charge made before the police *but also* in respect of the false complaint made before the Court, a complaint by the Court is essential for the prosecution—*Dholiah*, 54 Mad. 1018, 61 M.L.J. 770, 32 Cr.L.J. 1215 (1217), Ind. Rul. 1931 Mad. 861, 134 I.C. 813, 32 Cr.L.J. 1215, 1931 M.W.N. 513, 34 M.L.W. 329, 1931 Cr.C. 942, A.I.R. 1931 Mad. 702. In such a case the prosecution will not be allowed to evade the requirement of sec. 195 by proceeding with the minor charge alone (false charge made before the Police), and abandoning the major charge (false complaint made before the Court). The principle is this: where a complaint sets forth certain facts disclosing a minor offence (e.g., offence under sec. 182, I. P. C.) as also a grave offence (e.g., offence under sec. 211, I. P. C., committed before a Court) prosecution should ordinarily be for the graver offence. If in entertaining such a complaint there is a legal bar to taking cognizance of the graver offence by reason of want of a complaint by the Magistrate, the legal consequence should not be allowed to be evaded by confining the case to the minor offence alone and disposing of it accordingly—*Dholiah*, supra (following *Perianna v. Vengu Ayyar*, 56 M.L.J. 208, 30 Cr.L.J. 322); *Rambrose*, 6 Rang. 578, 30 Cr.L.J. 342 (343), A.I.R. 1928 Rang. 254, 114 I.C. 685; *Ramchand*, A.I.R. 1929 Sind 115, 115 I.C. 313, 30 Cr.L.J. 399, 23 S.L.R. 225, Ind. Rul. 1929 Sind 73; *Sarup Singh*, 40 Cr.L.J. 638, 181 I.C. 928, 1939 N.L.J. 210, A.I.R. 1939 Nag. 226. See also *Ganga Prasad*, 32 Cr.L.J. 128, 128 I.C. 284, 7 O.W.N. 756, A.I.R. 1930 Oudh 414, Ind. Rul. 1930 Oudh 44, 1930 Cr.C. 954 where *Rambrose*, supra, was distinguished on the ground that the offence of dacoity in respect of which report was made at the police station was not tried by the Magistrate. But the Patna High Court holds that though the prosecution cannot proceed in respect of the major offence (sec. 211, I. P. C.) for want of a complaint by the Magistrate, it can proceed in respect of the minor offence under sec. 182, I. P. C. (1269 (1271, 1272)).

I.C. 836, A.I.R. 1931 Rang. 12, Ind. Rul. 1931 Rang. 52.

If a false charge is made by A before the police against three persons B, C

D, but the police takes criminal proceedings in Court against B and C but releases D from the charge, and B and C are acquitted by the Court, *held* that a complaint of the Court is necessary for the prosecution of A for making a false charge against B and C, but no complaint is necessary for the prosecution of A for making false charge against D, because there was no *proceeding in Court against D*, he having been released by the police before the case came to Court—*Kashi Ram*, 46 All. 906 (910, 912), 82 I.C. 167, 22 A.L.J. 829, 10 O. & A.L.R. 918, 25 Cr.L.J. 1239, A.I.R. 1924 All 779, dissenting from *Hardwar*, 34 All. 522, 16 I.C. 510, 10 A.L.J. 61, 13 Cr.L.J. 702 in which it was held that under similar circumstances, a complaint of the Court would be necessary for the prosecution of A for making false charge against D, because the charge against D led to the proceeding in Court although D was not charged in Court. The view taken in *Hardwar*, *supra*, was followed in *Guruditta*, 39 I.C. 692, 19 P.R. 1917 (Cr.), 20 P.W.R. 1917 (Cr.), 18 Cr.L.J. 548 which was, however, dissented from in *Muhammada*, 29 Cr.L.J. 605, 9 Lah. 408, 109 I.C. 685, A.I.R. 1928 Lah. 259, 29 P.L.R. 515, 10 Lah.L.J. 218, 10 A.I.Cr.R. 313. The latest decision of the Lahore High Court, which was taken in *Muhammad*, *supra*, is based in *Kanshi Ram*, *supra*. See *Registrar v. Kodangi*, 1930 M.W.N. 1130 in this connection.

But where all that the informant did was to show cause against his prosecution and asserted that the case was a true one and that he was perfectly innocent and he never made a complaint against anybody or asked the Magistrate to investigate it, there was nothing really to justify an argument that complaint of the Magistrate would be necessary for his prosecution as there was no "narazi" petition before the Magistrate in the real sense of the term—*Jamini Kanta v. Bhabanath*, I.L.R. (1939) 1 Cal 318, 12 R.C. 156, 183 I.C. 384, 40 Cr.L.J. 785, A.I.R. 1939 Cal 273, 43 C.W.N. 279. See also *Kangali Molla v. Emp.*, 40 Cr.L.J. 647, 182 I.C. 253, A.I.R. 1939 Cal. 340, I.L.R. (1939) 1 Cal. 322. But see also *Bhagbat Chandra Mandal v. Emp.*, 40 Cr.L.J. 644, 182 I.C. 235, A.I.R. 1939 Cal. 271.

A complicated question arises if the Magistrate takes cognizance of the offence of preferring a false charge before the police, *before the accused repeats the charge in Court*. Thus, the accused lodged an information at a police station that a certain person has committed an offence. The police found the charge to be untrue and preferred a complaint against the accused under secs 182 and 211, I. P. Code. The Magistrate took cognizance of the offence under sec. 182 only. The accused thereupon filed a protest petition in Court stating that the offence of which he had given information to the police was true. The Magistrate then charged the accused under sec. 211, I. P. C., and committed him to the Sessions. *Held*, that so far as sec. 182, I. P. C., was concerned, since the Magistrate had taken cognizance of the offence before the accused had repeated the false charge in Court, the Magistrate was entitled to proceed on the complaint of the police officer, and a complaint of the Court was not necessary under sec. 195 (b), Cr. P. Code. But as regards sec. 211, I. P. C., since the Magistrate took cognizance of the offence after the accused had repeated the charge (by filing the protest petition) in Court, the Magistrate was not entitled to take cognizance of the offence without a complaint by the Court; and the committal and conviction must be set aside—*Subhag Ahir*, 11 Pat. 155, 12 P.L.T. 905, 33 Cr.L.J. 153 (155), Ind. Rul. 1932 Pat. 40, 135 I.C. 520, 1932 Cr.C. 269, A.I.R. 1932 Pat. 152. In cases like this, the question of the date when cognizance is taken by the Magistrate upon complaint of the police (whether before or after the accused repeats his charge before the Court) is always important. If cognizance has been taken of the offence under sec. 211, I. P. C., on the complaint of the police before the informant has by an application to the Magistrate traversed the police report, repeated his charge, and asked for a judicial investigation, sec. 195 (1) (b) does not become applicable; but when no cognizance has been taken by the Magistrate of the offence under sec. 211, the application of the informant, if within the definition of a complaint, does bring sec. 195 (1) (b) into operation—*Ibid*. See also *Daroga*, A.I.R. 1931 Pat. 573, 152 I.C. 817, 36 Cr.L.J. 200, 15 P.L.T. 756, 1931 Cr.C. 1237, where all previous decisions of

the Patna High Court on this point have been discussed. See also *Naga Ba Shein*, 35 Cr.L.J. 1259, 151 I.C. 185, 1934 Cr.C. 182, A.I.R. 1934 Rang 21; *Gonour*, A.I.R. 1930 Pat. 505, 31 Cr.L.J. 1200, 127 I.C. 287, 1930 Cr.C. 533. But see *Samir v. Sajidur*, 53 Cal. 824, 28 Cr.L.J. 86 (87), where the Magistrate took cognizance of the offence of making a false charge before the Police (sec. 211, I. P. C.), before the accused repeated the charge in Court, but still it was held that the offence of making a false charge before the Police required the complaint of the Court. In a very recent case the Calcutta High Court, however, took the view expressed in *Subhag Ahir*, supra, and held that the complaint of the Magistrate was not necessary to the maintainability of the prosecution in a case where the police reported the case to be a false one and prayed for the prosecution of the informant under sec. 211, I. P. C., and the Magistrate actually took cognizance of the case before the informant appeared on the scene and filed a *naraji* petition—*Jamini Kanta v. Bhabanath*, 43 C.W.N. 279, I.L.R. (1939) 1 Cal. 318, 12 R.C. 156, 183 I.C. 384, 40 Cr.L.J. 785, A.I.R. 1939 Cal. 273. See also *Jamuna Dasi* alias *Furu Dasi*, Ref. No. 195/38 decided by the Calcutta High Court on 12.12.38 (Unreported). See also *Dharamdas Hiranand v. Emp.*, A.I.R. 1938 Sind 213, 178 I.C. 218, 40 Cr.L.J. 12 where it has been laid down that sec. 195 (1)(b) does not relate to offences under sec. 211, I. P. C., generally but relates to offences under sec. 211, I. P. C., when such offence is alleged to have been committed in or in relation to any proceedings in any Court. So when "B" summary was given by a Sub-divisional Magistrate as an administrative officer and not as a Court, the giving of a "B" summary cannot be held to have been a proceeding in his Court necessitating his complaint.

Opportunity to prove the case:—A Magistrate is not justified in issuing process under sec. 182, I. P. C., against the accused without inquiring into and disposing of his *naraji* petition pending at the time—*Charles Johns*, A.I.R. 1932 Cal. 550, 36 C.W.N. 794, 1932 Cr.C. 550, 139 I.C. 217, 33 Cr.L.J. 724; *Munshi Isser*, 14 C.W.N. 765; *N. Mukherjee v. Ramkimkar Palit*, 67 C.L.J. 583; *Bhagbat Chandra Mandal v. Emp.*, 40 Cr.L.J. 644, 182 I.C. 235, A.I.R. 1939 Cal. 271; *Kangali Molla v. Emp.*, 40 Cr.L.J. 647, 182 I.C. 253, A.I.R. 1939 Cal. 340, I.L.R. (1939) 1 Cal. 322. Ordinarily a person ought to be given an opportunity to show cause before he is ordered to be prosecuted under sec. 211, I. P. C.—*Sheikh Abdulla*, A.I.R. 1932 Cal. 287, 35 C.W.N. 1210, 1932 Cr.C. 213, 137 I.C. 133, 33 Cr.L.J. 406. In this case the *naraji* petition was filed after process had been issued against the accused under sec. 211, I. P. Code. See also *Lalji v. Girdhari*, 5 C.W.N. 106. But if the Magistrate examines the complainant and his witnesses and comes to the conclusion that the charge is false, he can then proceed under sec. 476, Cr. P. Code. When the case is disposed of by the Magistrate under sec. 253, Cr. P. C., there is nothing before him into which he should make any further enquiry—*Fazlar Rahaman*, 31 Cr.L.J. 1055 (1058), 126 I.C. 553, A.I.R. 1930 Cal. 515. Where a Magistrate dismisses a complaint after holding a preliminary enquiry under sec. 202, Cr. P. C., there is no necessity for him to give opportunity to the complainant to substantiate his case before issue of process against him under sec. 211, I. P. Code—*Mahabir*, 32 Cr.L.J. 1023, 133 I.C. 172, A.I.R. 1931 Pat. 302, 12 P.L.T. 710, Ind. Rul. 1931 Pat. 332, 1931 Cr.C. 723. A Magistrate is wrong in law when he issues a process against a person under secs. 211 and 182, I. P. C., without having dismissed his *naraji* petition which is to be treated as a complaint—*Lachmi*, A.I.R. 1932 Cal. 383, 36 C.W.N. 15, 1932 Cr.C. 312, 33 Cr.L.J. 514, 137 I.C. 849. In all these cases the High Court set aside the order summoning accused in the preliminary stage of the proceedings. Where the *nareji* petition was actually dismissed by the Magistrate under sec. 203, Cr. P. C., it was finished and done with, and there was nothing further to prevent the trial proceeding—*Kangali Molla v. Emp.*, 40 Cr.L.J. 647, 182 I.C. 253, A.I.R. 1939 Cal. 340, I.L.R. (1939) 1 Cal. 322.

It would be a better procedure if the Magistrate gives the accused an opportunity to prove the truth of his case before he is prosecuted under sec. 182, I. P. Code. But there is no provision in the law that before a Magistrate can inquire into a case

D, but the police takes criminal proceedings in Court against B and C but releases D from the charge, and B and C are acquitted by the Court, *held* that a complaint of the Court is necessary for the prosecution of A for making a false charge against B and C, but no complaint is necessary for the prosecution of A for making false charge against D, because there was no *proceeding in Court against D*, he having been released by the police before the case came to Court—*Kashi Ram*, 46 All. 906 (910, 912), 82 I.C. 167, 22 A.L.J. 829, 10 O. & A.L.R. 918, 25 Cr.L.J. 1239, A.I.R. 1924 All. 779, dissenting from *Hardwar*, 34 All. 522, 16 I.C. 510, 10 A.L.J. 61, 13 Cr.L.J. 702 in which it was held that under similar circumstances, a complaint of the Court would be necessary for the prosecution of A for making false charge against D, because the charge against D led to the proceeding in Court although D was not charged in Court. The view taken in *Hardwar*, supra, was followed in *Guruditta*, 39 I.C. 692, 19 P.R. 1917 (Cr.), 20 P.W.R. 1917 (Cr.), 18 Cr.L.J. 548 which was, however, dissented from in *Muhammad*, 29 Cr.L.J. 605, 9 Lah. 408, 109 I.C. 685, A.I.R. 1928 Lah. 259, 29 P.L.R. 515, 10 Lah.L.J. 218, 10 A.I.Cr.R. 313. The latest decision of the Lahore High Court, which was taken in *Muhammad*, supra, is based in *Kanshi Ram*, supra. See *Registrar v. Kodangi*, 1930 M.W.N. 1130 in this connection.

But where all that the informant did was to show cause against his prosecution and asserted that the case was a true one and that he was perfectly innocent and he never made a complaint against anybody or asked the Magistrate to investigate it, there was nothing really to justify an argument that complaint of the Magistrate would be necessary for his prosecution as there was no "narazi" petition before the Magistrate in the real sense of the term—*Jamini Kanta v. Bhabanath*, I.L.R. (1939) 1 Cal. 318, 12 R.C. 156, 183 I.C. 384, 40 Cr.L.J. 785, A.I.R. 1939 Cal. 273, 43 C.W.N. 279. See also *Kangali Molla v. Emp.*, 40 Cr.L.J. 647, 182 I.C. 253, A.I.R. 1939 Cal. 340, I.L.R. (1939) 1 Cal. 322. But see also *Bhagbat Chandra Mandal v. Emp.*, 40 Cr.L.J. 644, 182 I.C. 235, A.I.R. 1939 Cal. 271.

A complicated question arises if the Magistrate takes cognizance of the offence of preferring a false charge before the police, *before the accused repeats the charge in Court*. Thus, the accused lodged an information at a police station that a certain person has committed an offence. The police found the charge to be untrue and preferred a complaint against the accused under secs. 182 and 211, I. P. Code. The Magistrate took cognizance of the offence under sec. 182 only. The accused thereupon filed a protest petition in Court stating that the offence of which he had given information to the police was true. The Magistrate then charged the accused under sec. 211, I. P. C., and committed him to the Sessions. *Held*, that so far as sec. 182, I. P. C., was concerned, since the Magistrate had taken cognizance of the offence before the accused had repeated the false charge in Court, the Magistrate was entitled to proceed on the complaint of the police officer, and a complaint of the Court was not necessary under sec. 195 (b), Cr. P. Code. But as regards sec. 211, I. P. C., since the Magistrate took cognizance of the offence after the accused had repeated the charge (by filing the protest petition) in Court, the Magistrate was not entitled to take cognizance of the offence without a complaint by the Court; and the committal and conviction must be set aside—*Subhag Ahir*, 11 Pat. 155, 12 P.L.T. 905, 33 Cr.L.J. 153 (155), Ind. Rul. 1932 Pat. 40, 135 I.C. 520, 1932 Cr.C. 269, A.I.R. 1932 Pat. 152. In cases like this, the question of the date when cognizance is taken by the Magistrate upon complaint of the police (whether before or after the accused repeats his charge before the Court) is always important. If cognizance has been taken of the offence under sec. 211, I. P. C., on the complaint of the police before the informant has by an application to the Magistrate traversed the police report, repeated his charge, and asked for a judicial investigation, sec. 195 (1) (b) does not become applicable; but when no cognizance has been taken by the Magistrate of the offence under sec. 211, the application of the informant, if within the definition of a complaint, does bring sec. 195 (1) (b) into operation—*Ibid.* See also *Daroga*, A.I.R. 1934 Pat. 573, 152 I.C. 817, 36 Cr.L.J. 200, 15 P.L.T. 756, 1934 Cr.C. 1237, where all previous decisions of

the Patna High Court on this point have been discussed. See also *Naga Ba Skein*, 35 Cr.L.J. 1259, 151 I.C. 185, 1934 Cr.C. 182, A.I.R. 1934 Rang. 21; *Gonour*, A.I.R. 1930 Pat. 505, 31 Cr.L.J. 1200, 127 I.C. 287, 1930 Cr.C. 533. But see *Samir v. Sajdur*, 53 Cal. 824, 28 Cr.L.J. 86 (87), where the Magistrate took cognizance of the offence of making a false charge before the Police (sec. 211, I. P. C.), before the accused repeated the charge in Court, but still it was held that the offence of making a false charge before the Police required the complaint of the Court. In a very recent case the Calcutta High Court, however, took the view expressed in *Subhag Ahir*, supra, and held that the complaint of the Magistrate was not necessary to the maintainability of the prosecution in a case where the police reported the case to be a false one and prayed for the prosecution of the informant under sec. 211, I. P. C., and the Magistrate actually took cognizance of the case before the informant appeared on the scene and filed a *naraji* petition—*Jamuni Kanta v. Bhabanath*, 43 C.W.N. 279, I.L.R. (1939) 1 Cal. 318, 12 R.C. 156, 183 I.C. 384, 40 Cr.L.J. 785, A.I.R. 1939 Cal. 273. See also *Jamuna Das* alias *Furu Das*, Ref. No. 195/38 decided by the Calcutta High Court on 12. 12. 38 (Unreported). See also *Dharamdas Hiranand v. Emp.*, A.I.R. 1938 Sind 213, 178 I.C. 218, 40 Cr.L.J. 12 where it has been laid down that sec. 195 (1)(b) does not relate to offences under sec. 211, I. P. C., generally but relates to offences under sec. 211, I. P. C., when such offence is alleged to have been committed in or in relation to any proceedings in any Court. So when "B" summary was given by a Sub-divisional Magistrate as an administrative officer and not as a Court, the giving of a "B" summary cannot be held to have been a proceeding in his Court necessitating his complaint.

Opportunity to prove the case:—A Magistrate is not justified in issuing process under sec. 182, I. P. C., against the accused without inquiring into and disposing of his *naraji* petition pending at the time—*Charles Johns*, A.I.R. 1932 Cal. 550, 36 C.W.N. 794, 1932 Cr.C. 550, 139 I.C. 217, 33 Cr.L.J. 724; *Munshi Isser*, 14 C.W.N. 765; *N. Mukherjee v. Rankimkar Palit*, 67 CLJ 583; *Bhagbat Chandra Mandal v. Emp.*, 40 Cr.L.J. 644, 182 I.C. 235, A.I.R. 1939 Cal. 271; *Kangali Molla v. Emp.*, 40 Cr.L.J. 647, 182 I.C. 253, A.I.R. 1939 Cal. 340, I.L.R. (1939) 1 Cal. 322. Ordinarily a person ought to be given an opportunity to show cause before he is ordered to be prosecuted under sec. 211, I. P. C.—*Sheikh Abdullah*, A.I.R. 1932 Cal. 287, 35 C.W.N. 1210, 1932 Cr.C. 213, 137 I.C. 133, 33 Cr.L.J. 406. In this case the *naraji* petition was filed after process had been issued against the accused under sec. 211, I. P. Code. See also *Lalji v. Girdhari*, 5 C.W.N. 106. But if the Magistrate examines the complainant and his witnesses and comes to the conclusion that the charge is false, he can then proceed under sec. 476, Cr. P. Code. When the case is disposed of by the Magistrate under sec. 253, Cr. P. C., there is nothing before him into which he should make any further enquiry—*Fazlar Rahaman*, 31 Cr.L.J. 1055 (1058), 126 I.C. 553, A.I.R. 1930 Cal. 515. Where a Magistrate dismisses a complaint after holding a preliminary enquiry under sec. 202, Cr. P. C., there is no necessity for him to give opportunity to the complainant to substantiate his case before issue of process against him under sec. 211, I. P. Code—*Mahabir*, 32 Cr.L.J. 1023, 133 I.C. 172, A.I.R. 1931 Pat. 302, 12 P.L.T. 710, Ind. Rul. 1931 Pat. 332, 1931 Cr.C. 723. A Magistrate is wrong in law when he issues a process against a person under secs. 211 and 182, I. P. C., without having dismissed his *naraji* petition which is to be treated as a complaint—*Lachmi*, A.I.R. 1932 Cal. 383, 36 C.W.N. 15, 1932 Cr.C. 312, 33 Cr.L.J. 514, 137 I.C. 849. In all these cases the High Court set aside the order summoning accused in the preliminary stage of the proceedings. Where the *naraji* petition was actually dismissed by the Magistrate under sec. 203, Cr. P. C., it was finished and done with, and there was nothing further to prevent the trial proceeding—*Kangali Molla v. Emp.*, 40 Cr.L.J. 647, 182 I.C. 253, A.I.R. 1939 Cal. 340, I.L.R. (1939) 1 Cal. 322.

It would be a better procedure if the Magistrate gives the accused an opportunity to prove the truth of his case before he is prosecuted under sec. 182, I. P. Code. But there is no provision in the law that before a Magistrate can inquire into a case

under sec. 182, I. P. C., on the complaint of a police officer, he must give the accused party an opportunity of proving the truth of his case, and that if the accused person is convicted without any preliminary opportunity being given to prove the truth of his case, the conviction is not illegal on that account—*Baharali*, A.I.R. 1931 Cal. 634, 134 I.C. 919, 32 Cr.L.J. 1241, 1931 Cr.C. 834, 58 Cal. 1065; *Nishikanta v. Behari*, A.I.R. 1933 Cal. 532, 37 C.W.N. 368, 60 Cal. 656, 1933 Cr.C. 891, 145 I.C. 660, 34 Cr.L.J. 1059. This view of law was not followed in—*Shekandar*, A.I.R. 1933 Cal. 614, 37 C.W.N. 399, 1933 Cr.C. 1000, 145 I.C. 824, 6 R.C. 163, 34 Cr.L.J. 1077 where the High Court set aside a conviction under sec. 182, I. P. C., as the Magistrate issued warrant against the accused and, when he appeared on receipt of the warrant and filed a *naraji* petition, did not entertain the *naraji* petition and dismissed the complaint, being of opinion that he “will have ample opportunity to adduce evidence to prove his case if it is true when he enters into his defence under sec. 182, I. P. C.” This decision was not followed in *Kangali Molla v. Emp*, 40 Cr.L.J. 647, 182 I.C. 253, A.I.R. 1939 Cal. 340, I.L.R. (1939) 1 Cal. 322, where Henderson, J., observed: “But, with greatest respect to the learned Judge, we are of opinion that the case was wrongly decided. We are unable to see how, when a complaint has been dismissed, it can be made a ground for holding up other proceedings. The learned Judge seems to have been influenced largely, because he thought the accused person would be prejudiced. In our judgment no question of prejudice can arise. If the accused person was dissatisfied with the order dismissing his complaint he could file an application in revision, and possibly get it set aside and a further enquiry ordered. But when he does not do so, no question of prejudice can arise.”

Where the Magistrate examined the petitioner on oath and gave him an opportunity of proving his case but he never appeared and produced any witnesses, it cannot be complained that his petition was not properly disposed of—*Jamini Kanta v. Bhobanath*, 43 C.W.N. 279, I.L.R. (1939) 1 Cal. 318, 12 R.C. 156, 183 I.C. 384, 40 Cr.L.J. 785, A.I.R. 1939 Cal. 273.

See also Note 618.

“Alleged to have been committed”:—These words have been substituted for the simple word “committed” occurring in the old section. See Note 626 under clause (c), *infra*.

621. Proceeding in or in relation to Court:—There must be some *proceeding in a Court*, in relation to which the offence (e.g., fabrication of false evidence) is alleged to have been committed. Where there was no proceeding pending in any Court, but there was simply an investigation being held by the police in a certain matter during the course of which the offence was alleged to have been committed, no complaint is necessary under this section—*Jagat Chandra*, 26 Cal. 786 (790); *Ajaib Singh*, 34 P.R. 1917, 18 Cr.L.J. 893 (894). The proceeding contemplated in sec. 195 (1) (b), Cr. P. C., seems to be a judicial proceeding—*Govt. Advocate, Behar v. Kumar Singh*, A.I.R. 1938 Pat. 83 (89), 16 Pat. 571, 1937 P.W.N. 937, 19 P.L.T. 51.

The words “in relation to” in this clause are very general and are wide enough to cover a proceeding in contemplation before a Criminal Court, though the proceeding may not have begun when the offence was committed but was begun afterwards. Therefore, sanction (complaint) is necessary for the prosecution of a person for abetment of perjury, committed on 10th April, though the main case in which the false evidence was intended to be given was not then commenced but was in contemplation and was commenced on the 15th April—*In re Vasudeo*, 24 Bom.L.R. 1153, 71 I.C. 253, A.I.R. 1923 Bom. 105, 25 Cr.L.J. 171. The words “in relation to any proceedings in any Court” apply to the case of a false report or a false statement made in an investigation by the Police with the intention that there shall in consequence of this be a trial in the Criminal Court—*Ghulam Rasul*, 37 Cr.L.J. 426, 161 I.C. 316, A.I.R. 1936 Lah. 238, 37 P.L.R. 738, 1936 Cr.C. 209, following *Chuhermal*, 30 Cr.L.J. 732, 117 I.C. 147, A.I.R. 1929 Sind 132, 1929 Cr.C. 160, 23 S.L.R. 285. Complaint of the Court is necessary not only where the offence is committed *pendente lite*, but also

where the offence was committed in *anticipation* of a proceeding, and before such proceeding was brought. Thus, the accused (a debtor) made a false endorsement on a promissory note, purporting to record a payment of Rs. 1,500 towards the amount due, and the endorsement was made with the intention that it might appear as evidence of payment in case a suit was brought on the pro-note. This was done in 1912. A suit was brought thereafter in 1913 and the pro-note was filed in that suit as exhibit. Then the creditor filed a complaint in 1914 against the accused under sec. 193, I. P. Code, in respect of the forged endorsement. *Held* that the Magistrate was not competent to take cognizance of the case without a complaint by the Court which heard the suit in which the false endorsement was filed. Although the offence was completed before the suit was brought, still as the accused had the suit in mind when the forged endorsement was made, and as the suit was afterwards instituted, the complaint of the Court in which the suit was brought was essential—*Parameshwaran*, 39 Mad. 677 (683). See also *Subba Reddi v. Swami Reddi*, 1937 M.W.N. 870.

Where there was *no proceeding*, started or pending or disposed of, in which or in relation to which, an offence under sec. 193, I. P. Code is said to have been committed, no complaint is necessary—*Govind Pandurang*, 45 Bom. 668 (671), 22 Bom L.R. 1239, 22 Cr L.J. 49. (In this case the offence was committed in connection with a certain payment made by a judgment-debtor in satisfaction of a decree out of Court, and no execution proceeding was commenced at that time nor was any application pending to certify this payment). See *Mohanraj*, 32 Cr L.J. 391 (393), 32 Bom L.R. 589, 129 I.C. 581, A.I.R. 1930 Bom. 337, 1930 Cr.C. 769, Ind. Rul. 1931 Bom. 181. But in a recent Bombay case, sec. 195 (b) has been analysed as follows:—Four cases may arise under this clause. (1) At the date when the Court takes cognizance of the offence, there may be proceedings pending in a Court, in or in relation to which the offence is committed; in such a case the complaint of the Court is necessary. (2) A second case is where a suit was pending but has been disposed of before any prosecution is launched. This is the normal case in which sec. 193 (b) comes into operation. (3) A third case is where a suit has been started in connection with which the offence was committed under sec. 193, I. P. C., but that suit has been withdrawn before any prosecution is started. In this case also, a complaint of the Court is necessary. (4) Fourthly, where an offence under sec. 193, I. P. C., is committed in respect of proceedings in a Court of law which are contemplated but which in fact are never started. In such a case sec. 195 does not apply, and the Magistrate can take cognizance of it without any complaint by the Court—*Indra Chand*, 56 Bom. 213, 34 Bom L.R. 294, 1932 Cr C 244 (245, 246), Ind. Rul. 1932 Bom. 219, 137 I.C. 134, 33 Cr L.J. 386, A.I.R. 1932 Bom. 185. See also *Ramchandra Rango v. Emp.*, 40 Cr L.J. 579 (587), 181 I.C. 870, A.I.R. 1939 Bom. 129, 41 Bom L.R. 98, 12 R.B. 356.

For the purpose of determining whether a complaint by the Court is necessary, the crucial date is not the date when the offence is committed, but the date when the Magistrate takes cognizance of the offence—*Indra Chand*, *supra*.

This section does not apply where the fabrication of false evidence was made not with the intention of using that evidence in a Court, but only with the intention of influencing the Police in their investigation—*Ismail*, 52 Bom. 385, 30 Bom L.R. 330, 29 Cr L.J. 403 (406), 108 I.C. 501, A.I.R. 1928 Bom. 130, 10 A.I. Cr R. 188.

See also *Gopaldas Khetriya v. Jnanendra Nath Daw* in Note 616.

A false statement made before a Magistrate in the commitment proceedings which end in a trial must be deemed to have been made in relation to the trial, and the trial Court (Sessions Judge) can, therefore, make a complaint in respect of the perjury—*Ganesh Mull*, 61 M.L.J. 914, 1931 Cr C 1034 (1035), 1931 M.W.N. 1061, 34 M.L.W. 377, 134 I.C. 1137, A.I.R. 1931 Mad. 778. See Notes in para. 1243.

622. Court:—A Court is a place where justice is judicially ministered—*Coke on Littleton*, 58, quoted with approval in *Sashi Bhusan v. Fulkhan*, 44 C.W.N. 763.

The word "Court" in this section has a wider meaning than a Court of Justice as defined in the Penal Code. Having regard to the obvious purpose for which this section was enacted, the widest possible meaning should be given to this word, and it will include a tribunal empowered to deal with a particular matter and authorised to receive evidence on that matter in order to come to a determination (e.g., a tribunal formed under the Calcutta Improvement Act)—*Nunda Lal v. Khetra Mohan*, 45 Cal 585; *Raghubans v. Kohil*, 17 Cal 872; *Seadut Ali*, 11 C.W.N. 909; *Bibhuti v. Khem Chand*, 35 Cr.L.J. 946, 149 I.C. 363, A.I.R. 1934 Cal. 457, 1934 Cr.C. 623, 61 Cal. 792, A.I.R. 1934 Cal. 412, 38 C.W.N. 578. The word "Court" in this section does not necessarily mean a tribunal which can administer justice or give final decisions but it means any person or persons authorised to take evidence and to report on a matter referred to them for inquiry, e.g., the Election Commissioners appointed under Election Offences and Inquiries Act (XXXIX of 1920) or Commissioners appointed under the Public Servants Inquiries Act (XXXVII of 1850)—*Bilas Singh*, 47 All. 934, A.I.R. 1925 All. 737 (739); *M. M. Khan*, 12 Lah. 391, 32 Cr.L.J. 1252 (1253).

The word "Court" in sec. 482, Cr. P. C., and also in sec. 195, Cr. P. C., means all the members constituting the particular Court in question and that *sir-panch* more especially when he was not even a member of the Bench which was actually sitting, cannot in law represent the Court for the purpose of making a complaint under sec. 195, Cr. P. C., or hold an enquiry under sec. 482, Cr. P. Code—*Vithal Sonaji Marath*, A.I.R. 1936 Nag. 275, 1936 Cr.C. 1120.

The word "Court" cannot be so construed as to include a Court in a Native State, e.g., Baroda Court—*In re Muljibhai*, 49 Bom. 860, 27 Bom.L.R. 1063, 26 Cr.L.J. 1456.

The expression 'Court' in sec. 195 is of wider scope than the expression 'Civil, Criminal or Revenue Court' in sec. 476. This is indicated by the word 'includes' occurring in sub-section (2) of sec. 195. Section 476 speaks of a Civil, Revenue or Criminal Court; it does not refer to any Court other than such Courts, whereas sec. 195 refers to Courts in general—*Kanahiya Lal v. Bhagwan Das*, 48 All. 60, 89 I.C. 1053, A.I.R. 1926 All. 30, 23 A.L.J. 956, 26 Cr.L.J. 1485; *Bilas Singh*, 47 All. 934, 23 A.L.J. 845, A.I.R. 1925 All. 737 (740), 89 I.C. 630, (*per* Sulaiman, J.; Daniels, J., *contra*); *Babulal v. Kisansao*, 41 Cr.L.J. 376, 186 I.C. 708, 1940 N.L.J. 23. Thus, the Election Commissioners are a 'Court' within the meaning of sec. 195, though they are not a "Civil, Criminal or Revenue Court" under sec. 476. They can make a complaint under sec. 195, but cannot proceed under sec. 476—*Bilas Singh*, *supra*. But the Calcutta High Court holds that although the word used in sub-section (2) of this section is 'includes,' the Court which can make a complaint under this section was restricted to the Courts detailed in sec. 476. Reading sec. 476 together with sec. 195, it is difficult to see what would be the Court contemplated by sec. 195 other than Civil, Revenue or Criminal Courts—*Galstaun v. Banku Behari*, 31 C.W.N. 825 (827), 28 Cr.L.J. 809. An Election Commissioner hearing disputes regarding an election held under the Madras Local Boards Act (XIV of 1920) is a Civil Court within the meaning of this section—*Mahabaleswarappa v. Gopalaswami*, 36 Cr.L.J. 895, 156 I.C. 311, 1935 M.W.N. 152, 41 M.L.W. 503, A.I.R. 1935 Mad. 673, 58 Mad. 954. In this case Mr. Justice Cargenven observed "To summarise the effect of these decisions it would seem that we have to look, not to the source of a tribunal's authority, or to any peculiarity in the method adopted of creating it, (though it is undoubtedly a consideration that it derives its powers mediate or immediately from the Crown) but to the general character of its powers and activities. If it has power to regulate legal rights by the delivery of definitive judgments, and to enforce its orders by legal sanctions, and if its procedure is judicial in character, in such matters as the taking of evidence and the administration of the oath, then it is a Court." These observations were quoted with approval by Edgeley, J., in *Hari Charan v. Kaushiki Charan*, 41 C.W.N. 530 (537), A.I.R. 1910 Cal. 286, 41 Cr.L.J. 662, 186 I.C. 686, where His Lordship observed: "We are prepared to adopt the above summary so far as it goes, but, in our judgment, particular emphasis should also be laid upon what we consider

to be an essential feature of all Courts, viz., that the tribunal in question must be one in which justice is judicially administered, and which is empowered to arrive at an independent judicial decision on legal evidence." See also *Sashi Bhushan v. Fulkhan*, 44 C.W.N. 763.

What are 'Courts' :—A Collector acting in appraisal proceedings under secs 69 and 70 of the Bengal Tenancy Act—*Raghubans v. Kokil*, 17 Cal 872. A Collector holding summary investigation under sec. 14 of the Patni Regulation (VIII of 1819)—*Bighuti v. Khem Chand*, 35 Cr L.J. 946, 149 I.C. 363, A.I.R. 1934 Cal. 457, 1934 Cr.C. 623, 61 Cal. 792, A.I.R. 1934 Cal. 412, 38 C.W.N. 578. A Certificate Officer acting under sec. 6 of Bengal Act I of 1895 (Public Demands Recovery Act)—*Sunder v. Sital*, 28 Cal. 217, (but see *Dwarkanath v. Srigobinda*, A.I.R. 1929 Cal. 130, 112 I.C. 71); a Tahsildar holding an enquiry as to whether a transfer of names in a land register should be made or not is a Court, since he is authorised under Madras Act III of 1869 to receive evidence and to come to a judicial determination as to whether the transfer should be made or not—*Munda*, 24 Mad 121; a village Munsiff trying a case under Regulation IV of 1816—*Venkayya*, 11 Mad 375; a Registrar of the Presidency Small Cause Court of Calcutta is a Court, since he is entitled to decide the question of service of summons, and is entitled to receive evidence in order to come to a finding on that matter—*Balchand v. Taraknath*, 18 C.W.N. 1323, 16 Cr L.J. 151, 27 I.C. 215; the Assistant Registrar of a Co-operative Societies, to whom a dispute touching a debt due to the Society by a member is referred, is a Court—*Subbi Reddi*, 59 M.L.J. 229, 32 Cr L.J. 219 (221); a District Judge determining the validity of election under sec. 22, Bombay District Municipalities Act (III of 1901)—*In re Nanchand*, 37 Bom. 355; an Income Tax Officer—*In re Punamchand*, 38 Bom. 642; *Nataraja*, 36 Mad 72; *Rup Singh*, 1905 P.R. 44; a Divisional Officer hearing appeals under the Income Tax Act—*Nataraja*, 36 Mad 72, 23 M.L.J. 393, 16 I.C. 755, 1912 M.W.N. 1012, 13 Cr L.J. 723, 13 M.L.T. 367; a Magistrate recording a statement or confession under sec. 164, Cr. P. C.—*Har Narain v. Hoshior*, A.I.R. 1935 All 341, 1935 A.L.J. 228, 36 Cr L.J. 1505, 158 I.C. 1118, 1935 Cr.C. 354, 57 All 778; a tribunal constituted under the Calcutta Improvement Act (V of 1911)—*Nundo Lal v. Khetra Mohan*, 45 Cal. 585; a Deputy Commissioner acting under 5 (ii) or 5 (iii) of the Rules made under sec. 240 of the Punjab Municipal Act (III of 1911)—*Karimulla*, 22 Cr L.J. 525 (Lah.); the Commissioners appointed under the Public Servants (Inquiries) Act, XXXVII of 1850 constitute a Court—*M. M. Khan*, 12 Lah. 391, 32 Cr L.J. 1252 (1253), Ind. Rul. 1931 Lah. 1010, 134 I.C. 818, A.I.R. 1931 Lah. 662, 1931 Cr.C. 924. A mukhtarkar holding an enquiry in mutation proceedings is a Revenue Court within the meaning of sec. 195 (1) (c), Cr. P. C., though his proceedings are not judicial proceedings within the meaning of sec. 196, Land Revenue Code (Bombay Act V of 1879)—*Assudomal Ramanadas v. Jhamandas Hotchand*, A.I.R. 1940 Sind 100 (101). A Mamlatdar holding an enquiry relating to Record of Rights, under Chapter XII of the Land Revenue Code (Bombay Act V of 1879), is a Revenue Court within the meaning of sec. 195 (1) (c), Cr. P. Code—*Narayan Ganpaya Havnik*, 39 Bom. 310, A.I.R. 1914 Bom. 232, 27 I.C. 147, 16 Bom. L.R. 678, 16 Cr L.J. 99. The Mamlatdar, that is, the City Survey Officer, is a Court within the meaning of this section—*Ranchappa Yellappa*, A.I.R. 1936 Bom. 221, 38 Bom. L.R. 440, 37 Cr L.J. 814, 163 I.C. 279, 60 Bom. 756, 8 R.B. 445. The Debt Conciliation Board is a Court and has power to pass an order under this section. The Board is, however, neither a Civil nor a Revenue Court and no appeal lies from its order refusing to make a complaint under this section—*Babulal v. Kisansao*, 41 Cr.L.J. 376, 186 I.C. 708, 1940 N.L.J. 23. But see *Hari Charan v. Kaushiki Charan*, 41 C.W.N. 530 (538), 41 Cr L.J. 662, 188 I.C. 686, A.I.R. 1940 Cal. 286 quoted below.

What are not Courts :—A Collector or Deputy Collector acting under the Land Acquisition Act—*Durga Das*, 27 Cal. 820; *Ezra v. Secretary of State*, 30 Cal. 36, 7 C.W.N. 249; *Galstaun v. Banku Behary*, 31 C.W.N. 825; a Collector to whom an application is made to replace a damaged stamp—*Gour Mohan*, 11 W.R. 48; a Commissioner appointed for the examination of a witness—*Seadut Ali*, 11 C.W.N. 909; an

arbitrator appointed by the Court—*Puttiah v. Veerasami*, 17 M.L.J. 420; *Mula Mal v. Chiranjil Lal*, 1914 P.R. 3, 15 Cr.L.J. 358; a Registration Officer—*Gopi Nath v. Kuldip*, 11 Cal 556; *Mulfat*, 10 C.W.N. 222; *Tulasi v. Danalakshmi*, 35 Cr.L.J. 780, 148 I.C. 851, 66 M.L.J. 471, A.I.R. 1934 Mad 316, 39 M.L.W. 693, 57 Mad 682, A.I.R. 1934 Mad. 262, 1934 M.W.N. 609, 1934 Cr.C. 606; a Police Officer examining a person under sec. 161 in the course of an investigation—*Ismail*, 11 Bom. 659; a Police patel—*Itbasapa*, 4 Bom. 476; an Excise Collector—*Mahadeo v. Narayan*, 10 C.W.N. 220; an Assistant Collector holding a departmental inquiry under the Bombay Land Revenue Code into the misconduct of a subordinate—*In re Chotalal*, 22 Bom. 936; a Collector in his administrative (and not judicial) capacity—*Santi Lal*, 42 All. 130; a Certificate Officer acting under B & O Public Demands Recovery Act—*Jharu Lal v. Mohant Madan Das*, 2 Pat. 257; (but see 28 Cal. 217 cited above); a Naib Tahsildar acting in his administrative capacity as Revenue officer and not in his judicial capacity as a Revenue Court—*Lehna Singh*, 1915 P.R. 18; a District Judge in his capacity as District Registrar—*Dina Nath v. Nek Ram*, 21 A.L.J. 88; a Magistrate passing order under section 144 of this Code acts as a public servant and not as a Court—*Nataranjan v. Rangasami*, 44 M.L.J. 328. A Member-in-charge of a Forest Department, Assam, disposing of an appeal in a case relating to that department is not a Court; for though he observed the procedure of a legal tribunal and the parties appeared before him by pleaders, still he was not possessed of the ordinary powers of a Court in the matter of issuing processes and compelling the attendance of witnesses—*Daulatram*, 59 Cal. 1233, 36 C.W.N. 505 (509), 33 Cr.L.J. 685, 55 C.L.J. 349, 1932 Cr.C. 337, A.I.R. 1932 Cal. 390, Ind. Rul. 1932 Cal. 504, 138 I.C. 705. A Manager in dealing with a claim under the Chota Nagpur Encumbered Estates Act (VI of 1876) is not a Court—*Kewal Ram*, 36 Cr.L.J. 1354 (1359), 158 I.C. 324, 16 P.L.T. 693, A.I.R. 1935 Pat. 515, 15 Pat. 69. Debt Settlement Boards under the Bengal Agricultural Debtors Act (VII of 1936) must be regarded as agents of the Local Government vested with certain legal powers for a definite purpose and they cannot be regarded as "Courts" even within the wide meaning with which that expression is used in sec. 195, Cr. P. Code—*Hari Charan v. Kaushiki Charan*, 44 C.W.N. 530 (538), A.I.R. 1940 Cal. 186, 41 Cr.L.J. 662, 183 I.C. 686. The functions of the debt settlement tribunals in the first instance or on appeal, however admirable their purpose, do not come within the wide definition of a 'Court'. They are not Courts: they are what their names indicate, debt settlement tribunals. They are not Courts as defined in sec. 195, Cr. P. Code—*Sashi Bhusan v. Fulkhan*, 44 C.W.N. 763. But see *Babulal v. Kisansao*, 41 Cr.L.J. 376, 186 I.C. 708, 1940 N.L.J. 23, A.I.R. 1940 Nag 181, where it has been held that the Debt Conciliation Board constituted under C. P. Debt Conciliation Act (II of 1933) must be deemed to be a Court and, under sec. 24A of the aforesaid Act, all proceedings under the Act shall be deemed to be judicial proceedings.

623. What Court can make complaint:—The only Courts that can make complaints for prosecution for an offence are those before which the alleged offence was committed, or the Courts to which such Courts are subordinate—*Juggut v. Kashi Chunder*, 6 Cal. 440. Where a plaintiff first instituted a suit in one Court and obtained a decree for a part of this claim, and then presented a fresh claim in another Court in respect of the item disallowed by the first Court, and fraudulently obtained an *ex parte* decree, whereupon the first Court took action under sec. 195, Cr. P. C., and made a complaint in writing under sec. 210, I. P. Code, held that the action could only be taken by the second Court, and not by the first Court, because the institution of the second suit and the obtaining of a decree by fraudulent means could not be held to be an offence committed in relation to proceedings in the first Court—*Kishun*, 6 Lah. 445, 26 P.L.R. 717, 26 Cr.L.J. 1588.

As a general rule, complaints should be made by the Court before which the offence is alleged to have been committed and not by any other Court—*Raja of Venkatagiri*, 6 M.H.C.R. 92; *Nga Aung*, 9 Bur.L.T. 202, 18 Cr.L.J. 97; *Karim Baksh v. Mulchand*, 1879 P.R. 29; *Wajid Ali*, 35 Cr.L.J. 821 (826), 148 I.C. 1075, 8 Luck. 638, 11 O.W.N.

490, A.I.R. 1934 Oudh 344. But a complaint may be made in the first instance by the superior Court, even though no complaint was made by the subordinate Court before which the offence was committed—*Palaniappa v. Annamalai*, 27 Mad 223 (225); see also *Bhadesar v. Kamta*, 35 All 90 (91), 11 A.L.J. 11. The offence of perjury, even though it was committed in the trial Court, may be held to have been committed in relation to the appeal in the Appellate Court, and the latter Court can make a complaint. The offender must be held to have intended that his perjury should not only influence the proceedings in the trial Court, but also subsequent proceedings might take place if either party took the matter to appeal—*Ketki v. Sheo Narain*, 1931 A.L.J. 829, 1931 Cr.C. 1042 (1043), A.I.R. 1931 All 706. Even, the High Court can make a complaint while exercising its powers of revision—*Ponnusami v. Chokalingam*, 25 M.L.J. 593, 14 Cr.L.J. 624; *Palaniappa v. Annamalai*, 27 Mad 223 (226); *Ketki v. Sheo Narain*, supra; and consequently the High Court can direct that its order in the revision case should issue as a complaint to the Magistrate—*Syed Khan v. Nagoor*, 3 Bur.L.J. 141, 26 Cr.L.J. 262. See also Note 617.

Where a case was originally tried by a Bench consisting of two Magistrates but a complaint of an offence under sec. 211, I P. C., was made by the Bench consisting of those two Magistrates and another, held that this was a very technical matter not requiring interference in revision on a ground of this kind—*Banke Lal v. Maiku*, A.I.R. 1933 Oudh 430, 35 Cr.L.J. 121, 146 I.C. 638, 1933 Cr.C. 1315, 10 O.W.N. 1037.

The Court contemplated by this section is the Court before which the offence is committed. Where, therefore, the offence of perjury was committed before the Sessions Court of Ahmedabad, and subsequently a portion of the territory subject to its jurisdiction was placed under the newly constituted Sessions Court of Kaira, held that the new Sessions Judge, though having territorial jurisdiction over the accused, had no power to make a complaint regarding the offence which was committed before the Sessions Court of Ahmedabad—*In re Maneklal*, 28 Bom.L.R. 1296, 28 Cr.L.J. 49. In the case of an attempt to fabricate evidence, the Court which must file the complaint under this section, is the Court which ultimately deals with the case, and in which, the false evidence, if the attempt had succeeded, would have been given. It is not necessary that the Court in which the proceedings were previously pending when the attempt to fabricate was made, should file a complaint under this section—*Hasan Ajam*, 35 Cr.L.J. 848, 148 I.C. 1011, 36 Bom.L.R. 221, A.I.R. 1934 Bom 185. But where the allegations are that the petitioner attempted to suborn evidence and thereby committed an offence under sec. 193 read with sec. 116, I P. C., and that the alleged attempt was during the commitment inquiry and was with reference to the commitment proceedings, the Sub-divisional Magistrate, who held the inquiry, has jurisdiction to make complaint under sec. 476, Cr. P. Code—*Nand Kumar v. Emp.*, A.I.R. 1937 Pat. 534 (536), 1937 P.W.N. 119, 172 I.C. 237.

Transfer of Judge—As a matter of convenience and expediency, the complaint should be made by the Judge who tried the case, if he is present; if he is not present, it may be made by any other Judge of the same Court. Otherwise there would be great inconvenience and inequality of justice, having regard to the frequent absences and transfer of Judges—*Molla Fuzla Karim*, 33 Cal. 193 (197). The complaint may be made by the *successor-in-office* of the Judge who tried the case in which the offence was committed—*Begu Singh*, 34 Cal. 551, 5 Cr.L.J. 398, 5 C.L.J. 508, 11 C.W.N. (F.B.); *Dharamdas v. Sajore*, 11 C.W.N. 119, *Maung Shwe Phe v. Ma Me Hmoka*, 3 Rang 48; *Karim Baksh v. Mulchand*, 1879 P.R. 29; *Behari Lal v. Abdul Qadir*, A.I.R. 1940 Lah. 292 (297). See sec. 559 as now amended. Under this clause, the complaint can be made only by the Court in question before whom the offence is alleged to have been committed, and not the particular public servant concerned who made the inquiry. Therefore, where a Deputy Magistrate dismissed a complaint as false, and was then transferred to another district, the complaint is to be made not by that particular Deputy Magistrate but by the successor of that person in the office of the Deputy Magistrate—*Ram Ajodhya*, 8 P.L.T. 674, 28 Cr.L.J. 643, 103 I.C. 99.

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Where a Deputy Magistrate who had tried the case was transferred from the district, and the complaint was made by the District Magistrate, before whom all cases pending before the Deputy Magistrate was placed, it was held that although the cases pending in the Court of the transferred Magistrate were placed before the District Magistrate either for disposal or for re-distribution among his subordinate Magistrates, still he never became the presiding Judge of the Deputy Magistrate's Court and therefore was not competent to make the complaint—*Mofizuddin v. Basanta*, 16 Cr.L.J. 640 (Cal.). Where there are several Deputy Magistrates at a subdivision and one of them is transferred, and another officer is appointed to the subdivision in general terms and not "in place of" the outgoing officer, the Deputy Magistrate who comes to fill the gap is not the successor-in-office of the outgoing Deputy Magistrate, and the former cannot make a complaint under this section in respect of an offence committed before the latter—*Girish Chandra v. Sarat Chandra*, 42 Cal. 667 (669, 674), following *Mohesh Chandra*, 35 Cal. 457 (460). An abetment of perjury was committed in the course of an inquiry before a committing Magistrate (who was a first class Magistrate). While the proceedings were pending before him, the Magistrate was transferred and was succeeded by a second class Magistrate who had no power to commit. The outgoing Magistrate, therefore, sent the proceedings to the District Magistrate. It was held that the District Magistrate had jurisdiction to make a complaint in respect of the offence, for he was 'such Court' referred to in clause (1) (b) of this section, and was the officer on whom devolved the disposal of committal of cases in the district. It was further held that the Sub-divisional Magistrate also had jurisdiction to make the complaint, because in the ordinary course of events all cases for commitment would go to him, instead of to District Magistrate—*Ramrao*, 42 Bom. 190 (194), 20 Bom.L.R. 117.

Transfer of case :—If a case or proceeding has been before various Courts and an offence is alleged to have been committed in that proceeding or case falling under the various Sections prescribed in sec. 195, Cr. P. C., then all the Courts have jurisdiction to make the complaint though, normally speaking, the proper Court to make the complaint is the Court which finally tried and determined the suit. There is no reason on the plain words of the Section to hold otherwise. It cannot be contended that the offence must be committed in the presence of the Presiding officer of the Court and if a case is transferred from one Court to another, then only that Court in which the acts constituting the offence were committed has jurisdiction to make a complaint. If this was so, the Legislature could have expressed their intention quite clearly and different words would have been used—*Behari Lal v. Abdul Qadir*, A.I.R. 1940 Lah. 292 (297).

Where after issue of process a case is transferred to another Court, it is the Court which tries the case on the merits that can make the complaint and not the Court which merely took cognizance of the case and issued process—*Jeebun Krista v. Benoy Krista*, 6 C.W.N. 35 (36). See also *Putiram v. Mahomed*, 3 C.W.N. 33 (34) and *Tarakeswar*, 27 Cr.L.J. 618, 91 I.C. 600, 53 Cal. 488, A.I.R. 1926 Cal. 788, 30 C.W.N. 504. But where a complaint made before a Deputy Commissioner was *not transferred* but simply made over to a subordinate Magistrate for inquiry and report, and the latter upon inquiry found the complaint to be false, the order for prosecution of the complainant under sec. 182, I. P. C., could not be made by the subordinate Magistrate, because the false complaint was not made to him but to the Deputy Commissioner, and this latter officer was the proper person to direct the prosecution—*Asmatulla*, 4 C.W.N. 366 (367). Where the case is withdrawn to the file of the District Magistrate under sec. 528, Cr. P. C., and is dismissed by him, the District Magistrate can make a complaint—*Amanat Ali*, A.I.R. 1929 Cal. 724, 33 C.W.N. 1058, 122 I.C. 627, 31 Cr.L.J. 430, 1929 Cr.C. 360. If a false complaint made before a Deputy Magistrate who was in charge of the District was made over for investigation not to a subordinate Magistrate but to a Sub-divisional Magistrate, it must be held that the transfer was made not under sec. 202 but under sec. 192, and it was the Sub-divisional Magistrate who had full seisin of the case and who would be competent to direct prosecution

under sec. 211, I. P. Code; the Deputy Magistrate who transferred the case ceased to have any jurisdiction in the case and was incompetent to take any action under sec. 476—*Bhiku*, 39 Cal. 1041 (1046, 1047), 16 C.W.N. 885.

A complaint was made against several persons in the Court of the Sub-divisional Magistrate who transferred the case to the Bench Magistrates for trial of two persons only. The Bench Magistrates ultimately dismissed the complaint. On an application of an accused other than those two who were tried, the Bench Magistrate made a complaint under sec. 476 for the prosecution of the complainant under sec. 211, I. P. C., *held* that the Bench Magistrates had no jurisdiction to make the complaint as the order of transfer was confined to two accused only—*Ramji Lal*, AIR 1931 Oudh 417, 135 I.C. 377, 33 Cr.L.J. 160, 8 O.W.N. 1085, 1931 Cr.C. 1038. But see Note 601.

Court acting in a different capacity—The Collector of a District in deciding a revenue appeal came to the conclusion that a receipt filed in the case was not genuine. He took no steps in the connection as Collector, but acting as the District Magistrate made a complaint. It was held that the act of the District Magistrate was *ultra vires*. He ought to have made a complaint in his capacity as Collector, as the offence was committed before him in that capacity—*Ram Sahai*, 40 All 144 (146), 16 A.L.J. 68, 19 Cr.L.J. 201.

Temporary Court :—The Court of the City Magistrate is not a permanent one with a perpetual succession of Judges, but is only of recent creation and unknown to the Cr. P. Code. If the City Magistrate before whom the offence has been committed is transferred, it is only the Sessions Judge, and not the successor of such Magistrate, who is competent to make the necessary complaint for prosecution—*Jia Lal v. Phogomal*, 138 P.L.R. 1918, 19 Cr.L.J. 917, 47 IC 286 (287). See also *Muhammad Ishaq v. Muqimuddin*, 7 P.R. 1913, 14 Cr.L.J. 178, in case of Sub-Judge's Courts which also are not permanent Courts in Punjab.

Court abolished and re-established—Where by a notification in the Gazette, the Court of the Sub-Magistrate at B was abolished and two years afterwards the said Court was restored with its territorial limits somewhat curtailed, it was held that there was no such continuity as would enable the High Court to hold that the Court that was re-constituted was the same as the one that had ceased to exist; and consequently, the new Court could not make a complaint in respect of an offence committed before the old Court—*Appa Atla*, 16 Cr.L.J. 787 (Mad.).

See also Notes 1239 and 1240.

624. No delegation of power :—The power to make a complaint must be exercised by the Court before which the offence was committed, and cannot be delegated, even to the Public Prosecutor. The filing of a complaint by the Public Prosecutor will not be treated as equivalent to a complaint by the Court—*Gurditta*, 19 P.R. 1917, 18 Cr.L.J. 548 (551).

The Deputy Registrar is the principal officer of the Judicial Branch of the High Court office. In that capacity he has to perform the requisite ministerial work in connection with the judicial business of the High Court. He would therefore be deemed to be an officer appointed to file complaints as contemplated in sec. 195 (1) (b), Cr. P. C. Where the order of the Division Bench directed the complaint to be made, that order, by necessary implication, must be treated as having been addressed to the head of Judicial Branch of the High Court office. The mere fact that the authority is not given in writing is immaterial. In any case the irregularity, if any, cannot in view of sec. 537, Cr. P. C., impair the validity of the decision—*Sheoshanker Dhondbaji Mahar v. Emp.*, 41 Cr.L.J. 697 (698), 188 IC 885, 1910 N.L.J. 165.

625. Scope :—Clause (c), sec. 195, Cr. P. C., applies only to cases where an offence is committed by a party, as such, to a proceeding in any Court in respect of a document which has been produced or given in evidence in such proceeding—*Kushal Pal*, 32 Cr.L.J. 1105 (1116), 134 IC 225, AIR 1931 All. 443, 1931 Cr.C. 715, 53 All. 804, 1931 A.L.J. 697, Ind. Rul. 1931 All. 801.

Clause (c)—Offences under this clause:—*Offences described in sec. 463, I. P. C.* :—The word 'forgery' is used as a general term in sec. 463, I. P. C., and that section is referred to in comprehensive sense in this clause, so as to embrace all species of forgery punishable under the Penal Code, including one under sec. 467, I. P. C.—*Tulja*, 12 Bom. 36; *Teni Shah v. Bolai Shah*, 14 C.W.N. 479; *Khairati Ram v. Malawa Ram*, 5 Lah. 550 (553), 26 Cr.L.J. 537; *Ram Samujh*, 3 O.W.N. 614, 27 Cr.L.J. 969; *Ismail Panju*, 26 Cr.L.J. 1115, 88 I.C. 283, A.I.R. 1925 Nag. 337; or an offence under sec. 468, I. P. C.—*Asst. Sessions Judge v. Ramammal*, 36 Mad. 387; or under sec. 466, I. P. C.—*Anonymous*, Ratanlal 83; *Rachu Behary*, 20 Cr.L.J. 630 (Pat.); or under sec. 465, I. P. C.—*Khairati Ram v. Malawa Ram*, 5 Lah. 550. But it does not include an offence under sec. 474, I. P. C.—*Asrabuddin v. Kalidayal*, 19 C.W.N. 125, 28 I.C. 645, 16 Cr.L.J. 309; *Ibrahim v. Emp.*, 29 Cr.L.J. 849, 111 I.C. 433, 11 A.I.Cr.R. 79. Where, however, the offence committed was really one under sec. 471, I. P. C., it was illegal to reduce the charge to one under sec. 474, I. P. C., and prosecute the accused without a complaint under sec. 476, Cr. P. C.—*Ibrahim v. Emp.*, supra. See also *Guru Prosad Ram Gupta v. Rameswar Marwari*, 39 Cr.L.J. 730, 176 I.C. 572, A.I.R. 1938 Cal. 527, 42 C.W.N. 674, 11 R.C. 127; nor an offence under sec. 477A, I. P. C. (because sec. 477A has no reference to forgery)—*Jethmal*, 25 S.L.R. 471, 23 Cr.L.J. 328 (330), 136 I.C. 766, A.I.R. 1932 Sind 53, 1932 Cr.C. 194, Ind. Rul. 1932 Sind 62; *Balgaunda*, 32 Cr.L.J. 1017 (1020), 55 Bom. 461, Ind. Rul. 1931 Bom. 381, 133 I.C. 269, 33 Bom.L.R. 296, 1931 Cr.C. 561, A.I.R. 1931 Bom. 305.

Since an 'offence described in sec. 463' includes an offence under sec. 467, I. P. Code, it follows that where a prosecution of an accused is ordered only under sec. 471, I. P. Code, without referring to any other section, but he is tried and convicted under secs 471 and 467, I. P. Code, the conviction under the latter section is not sustainable, as there was no complaint in respect of an offence under the section—*Ram Samujh*, 1 Luck. 523, 3 O.W.N. 614, 27 Cr.L.J. 969 (970). But see Note 614B.

A complaint may be made by the Court for prosecuting the plaintiff for bringing a false claim on a forged document, even though the case in which the claim was held to be false was decided by *consent of the parties*—*Ram Narain*, 27 Cr.L.J. 1021 (All.). Cf *Narain Das*, 25 A.L.J. 559, 28 Cr.L.J. 549.

Where the original complaint made by the Court was in respect of abetment by conspiracy, and the Magistrate acting on the facts disclosed in the evidence for the prosecution added a second charge of abetment of forgery in an account book produced before the Insolvency Court in pursuance of the alleged conspiracy, held that a complaint of the Insolvency Court was not necessary, for the second charge was in respect of an act done in pursuance of the conspiracy mentioned in the original complaint. Sec. 235 of the Code also permits a joinder of such charges—*Abdul Rahman*, 4 Bur.L.J. 213, 27 Cr.L.J. 669.

626. "Alleged to have been committed":—These words have been substituted by the Select Committee of 1916 for the word "committed" in deference to the remarks made by Piggot, J., in *Bhauani Das*, 38 All. 169 at page 172; "With regard to the actual wording of the sub-section under consideration it does seem to me to be somewhat lacking in precision. To forbid a Court to take cognizance of an offence committed by a party is open to the criticism that no Court can decide whether an offence was 'committed' or not until after it has taken cognizance. It seems necessary, therefore, to read the word 'committed' as equivalent to the expression 'alleged to have been committed.'" See also *Janardhan v. Baldeo Prasad*, 5 P.L.J. 135 (139).

Prior to the amendment of 1923, the words in clause (b) were "is committed" and in clause (c) were "has been committed." Both these expressions have now been replaced by the words "is alleged to have been committed."

627. Document:—The word 'document' in this section means the original document. Where the original forged document was not produced or given in evidence, but only a registration copy of it was produced in the suit, no complaint by the Court

was necessary for a prosecution under secs. 465 and 467, I. P. C.—*Raja Mustafa*, 8 O.C. 313, 2 Cr.L.J. 653. The words 'produced or given in evidence' in this section refer only to the production of the *original* and not to the production of a *copy*, and this for the very reason that the Court before which a copy of the document is produced is not really in a position to express any opinion about the genuineness of the original—*Girdhari Lal*, 29 O.C. 1, 2 O.W.N. 174, 26 Cr.L.J. 929. But in some other cases it has been said that the producing of a certified *copy* of a forged document with the knowledge that the original was forged, is a user of a forged document (*i.e.*, user of the forged original)—*Mathura Prasad*, 3 O.W.N. 171, 27 Cr.L.J. 402; *Hayat Khan*, 26 S.L.R. 73, 33 Cr.L.J. 452 (453).

628. "Produced or given in evidence":—Complaint by the Court is necessary if the document was *produced* in Court—*Asrabuddin v. Kalidayal*, 19 C.W.N. 125, 16 Cr.L.J. 309, even though it was not given in evidence—*Akhil Chandra*, 22 Cal. 1004; *In re Gopal*, 9 Bom.L.R. 735. The word "or" which intervenes between the word "produced" and the words "given in evidence" shows that it is disjunctive, and that a complaint is necessary not only in cases where the document has been given in evidence, but also in cases where it has been only produced—*Babu Jha*, 9 P.L.T. 800, 30 Cr.L.J. 236 (239). The word "produced" has been added in the Code of 1898, and did not exist in the old Codes, and therefore the decision in *Abdul Khadar v. Meera Sahib*, 15 Mad. 221, (in which it was held that no sanction was necessary unless the document was *given in evidence*) is no longer good law. See also *Gopaldas Khetriya v. Jnandendra Nath Dawn*, 40 Cr.L.J. 450 (453), 180 I.C. 586, A.I.R. 1938 Cal. 677.

The words "in or in relation to any proceeding" occurring in sec. 195 (1)(b), Cr. P. C., has nothing to do with the offence of forgery. Sec. 195 (1)(c), Cr. P. C., only requires the production of a forged document in Court or its being given in evidence—*N. V. L. Narasimha Rao v. Emp.*, 1937 M.W.N. 887.

Complaint by the Court is necessary, if the document is 'produced', *i.e.*, tendered in evidence, although it is not exhibited and marked nor considered by the Court—*Guru Charan v. Gniya*, 29 Cal. 887; *Bansi*, 51 Cal. 469, 26 Cr.L.J. 24 (26). Where a party to a proceeding hands up a document to the Judge who does not take the document on the file, but returns it to the party, the document is 'produced' all the same within the meaning of this clause—*Gulab Chand*, 49 Bom. 799, 27 Bom.L.R. 1039, 27 Cr.L.J. 251. Cf. *Jabbar Ali*, 46 C.L.J. 193, 30 Cr.L.J. 656. The production of an account book before the *munsarim* of the Court is tantamount to its production in the Court, and therefore any offence committed in respect of this account book (*viz.*, offence under secs. 467 and 471, I. P. Code) must be deemed to have been committed in respect of a document produced in Court, although it may be that the book was never called to the Court after it had been shown to the *munsarim* (the case having been decided on the oath of the defendant)—*Rameshwar Lal*, 49 All. 898, 25 A.L.J. 555, 28 Cr.L.J. 668 (670).

This clause equally applies, whether the document was produced or given in evidence in the course of a proceeding by the *party* who is alleged to have committed the offence or by *any one else*—*Bhau Vyankatesh*, 49 Bom. 608 (614), 27 Bom.L.R. 607, 27 Cr.L.J. 69, 91 I.C. 245, A.I.R. 1925 Bom. 433. In other words, two things are necessary under clause (c), *viz.*—(1) the document must be produced or given in evidence in the proceeding (2) the offence must be alleged to have been committed by a party to the proceeding; but it is not necessary that the person who produces the document in Court must be the *offender himself*.

Where a document was not produced in the suit but was disclosed in an affidavit filed therein, and inspection thereof was allowed to the other side, and it was filed in the office of the Translator of the High Court for translation, *held* that these actions did not amount to producing the document in evidence, as it was not *actually produced* in Court, and therefore no complaint of the Court was necessary for prosecution under secs. 465, 467 and 474, I. P. C., in respect of that document—*Munisamy v. Rajaratnam*, 45 Mad. 928, A.I.R. 1923 Mad. 136, 72 I.C. 340, 24 Cr.L.J. 340, 44 M.L.J. 774 (F.B.).

Where in a proceeding under sec. 145 a document comes into Court attached to a police report, prior to the proceeding, the document is not said to be *produced in Court*; and even if it is, neither of the parties to the proceeding is a party to its production; consequently the complaint of the Court is not necessary as a condition precedent to the institution of criminal proceedings against the guilty party upon a charge under sec. 463, I. P. C.—*Janardhan v. Baldeo Prasad*, 5 P.L.J. 135 (138), 21 Cr.L.J. 272, 1 P.L.T. 129.

A document is said to be '*given in evidence*' when it is handed over to the Court although the Court may reject it for insufficiency of stamp or want of registration—*Nagin Das*, Ratanlal 242. An Appellate Court hearing an appeal from the suit in which a forged document was produced can make a complaint, because though the document was not originally *produced* in the Appellate Court, it is nevertheless *given in evidence* in the appeal which is pending in that Court—*Bhadesar v. Kamta*, 35 All. 90 (91).

There is a conflict of opinion as to whether a complaint of the Court is necessary in respect of an offence mentioned in clause (1) (c) when such offence has been committed *prior* to the production of the document in Court. The Bombay High Court holds that where an offence under sec. 471, I. P. C. (using as genuine a forged document) in respect of a document produced in Court has been committed *before* it comes into Court, no complaint of the Court is necessary, the use complained of being *prior* to its production in Court—*Noor Mahomed v. Kaikhosru*, 4 Bom.L.R. 268. This decision was doubted in *Sanjiv Ratnappa*, A.I.R. 1932 Bom. 545, 1932 Cr.C. 777, 142 I.C. 386, 34 Cr.L.J. 357, 34 Bom.L.R. 1090, 56 Bom. 488. The Allahabad High Court also holds that so long as the prosecution is confined to offences connected with a document which have been committed independently of and antecedent to its production in Court, no complaint is required. All that clause (c) prohibits is taking cognizance of an offence described in sec. 463, I. P. C., when such offence has been committed by a party to any proceeding in any Court with respect to a document produced or given in evidence in such proceeding—*Lalta Prasad*, 34 All. 654, 10 A.L.J. 294. This is also the view of a Full Bench of the Allahabad High Court—*Kushal Pal*, 53 All. 804 (F.B.), 1931 A.L.J. 697, 32 Cr.L.J. 1105 (1116). In this case, the word "*party*" has been interpreted to mean a *party as such*; and therefore an offence which has already been committed by a person who does not become a party till 25 years after the commission of the offence, cannot be said to have been committed by a "*party*" and does not require a complaint under this section.

But the Calcutta High Court is of opinion that complaint of the Court is necessary under such circumstances, because the very fact that the document is produced in Court will bring the case within the purview of this section, and it is immaterial that the forgery is alleged to have been committed before the production of the document in Court—*Teni Shah v. Balai Shah*, 14 C.W.N. 479, 11 Cr.L.J. 280; *Nalini Kanto v. Anukul*, 44 Cal 1002, 21 C.W.N. 640, 25 C.L.J. 255, 18 Cr.L.J. 522, 39 I.C. 490. The same view has been taken in two Allahabad cases—*Bhawani*, 38 All. 169, 14 A.L.J. 74, 17 Cr.L.J. 289, 35 I.C. 161, *Kanhaiya v. Bhagwan*, 48 All. 60, 23 A.L.J. 956, 26 Cr.L.J. 1485 (1487), 89 I.C. 1053. The Madras High Court also holds that this section is not limited to cases where the fabrication is committed *pendente lite*, but it extends to cases of fabrication of false evidence *in advance*—*Parameshwaran*, 39 Mad. 677 (679), 31 I.C. 161, 16 Cr.L.J. 721, 18 M.L.T. 322; *Subbi Reddi*, 59 M.L.J. 229, 32 Cr.L.J. 219 (221). See also *Ramadoss v. Yellamanda Reddi*, 1939 M.W.N. 92. The Lahore High Court has also expressed the view that where a document has been produced in Court by a party, the sanction (complaint) of such Court is necessary for his prosecution in respect of an antecedent forgery—*Khairati Ram v. Malawa Ram*, 5 Lah. 550 (552) following *Nalini Kanta v. Anukul*, 41 Cal 1002 and *Teni Shah v. Bolai Shah*, 14 C.W.N. 479. The same view is taken by the Rangoon High Court and Sind Court—*Maung Po Thin v. Ma Ma*, 33 Cr.L.J. 919, 140 I.C. 41, 1932 Cr.C. 702, A.I.R. 1932 Rang. 139, Ind. Rul. 1932 Rang. 208; *Hayat Khan*, 26 S.L.R. 73, 1932 Cr.C. 530, A.I.R. 1932 Sind 90, 137 I.C. 311, Ind. Rul. 1932 Sind 77, 33 Cr.L.J. 452 (451).

Reviewing all the cases mentioned above the Bombay High Court has very recently held that the view taken by the Allahabad High Court in *Bhawani*, 38 All 169, A.L.R. 1916 All. 299, 35 I.C. 161, 14 A.L.J. 74, is correct and that the sanction (i.e., complaint) of the Court would be necessary before a party to the proceedings in which the document was produced can be prosecuted, notwithstanding that the offence alleged was committed before the document came into Court, at a time when the person complained against was not a party to any proceeding in Court—*Rachappa Yellappa*, A.I.R. 1936 Bom. 221 (225), 38 Bom.L.R. 440, 37 Cr.L.J. 814, 163 I.C. 279, 60 Bom. 756, 1936 Cr.C. 627, 8 R.B. 445. Where the document was produced in Court not in connection with any other case, but in a prosecution founded upon it, for the purpose of convicting the accused of an offence in relating to it, no complaint is necessary—*Sanjiv*, 34 Cr.L.J. 357, 142 I.C. 386, 34 Bom.L.R. 1090, A.I.R. 1932 Bom. 545, 56 Bom. 488, 1932 Cr.C. 777, Ind. Rul. 1933 Bom. 237. The purpose of sec. 195, Cr. P. C., is not that one Court should keep check upon another, because if that were so, the Court itself would not be entrusted with the making of a complaint as it is under the provisions of the section. The purpose of the section is to provide, *inter alia*, that an offence of forgery, for instance, shall be enquired into upon a complaint of a Court before which the forged document was produced and not upon the complaint of a private individual. It is the Court before whom the forged document is produced which is to decide whether there should be or should not be an inquiry in the first instance, and it is unreasonable to say that while a Court is entrusted by the Legislature with this discretion and with this power it should not be entitled itself to inquire into an alleged offence committed in relation to proceedings before it, provided no other section of the Criminal Procedure Code bars the way, when that alleged offence is part of the same transaction, with the offence of which the Court has already taken cognizance—*Jashanmal v. Emp.*, A.I.R. 1939 Sind 222, 40 Cr.L.J. 818, 183 I.C. 619, 12 R.S. 64.

But where the Magistrate has already taken cognizance of an offence under sec. 471, I. P. C., using as genuine a forged document, and then the accused brings a suit in the Civil Court on the basis of the document, the Magistrate can proceed with the trial without the complaint of the Civil Court—*Biswambhar*, 56 Cal. 1041, 33 C.W.N. 474 (475), 1929 Cr.C. 401, A.I.R. 1929 Cal. 633, 31 Cr.L.J. 125, 120 I.C. 449 (distinguishing 44 Cal. 1002); *Nanak Chand v. Khwaja Mahmud*, 38 Cr.L.J. 581, 168 I.C. 740, 9 R.L. 672, 38 P.L.R. 1120, A.I.R. 1937 Lah. 238. (In this case cognizance was taken of an offence under sec. 468, I. P. C.). Where the offences were committed long after the proceedings in Court had come to a termination, sec. 195, Cr. P. C., does not operate as a bar to the cognizance of offences and no complaint of the Court is necessary—*Kartick*, A.I.R. 1930 Cal. 278, 51 C.L.J. 51, 127 I.C. 267, 31 Cr.L.J. 1205, 1930 Cr.C. 358.

629. 'Party':—Complaint is necessary if the document is produced or given in evidence by a party to the proceeding. But no complaint is necessary to prosecute a witness in the proceeding since a witness is not a party—*John Martin Sequeira v. Lujya Bai*, 25 Mad. 671; *Chenciah*, 42 Mad. 561, 50 I.C. 987, 36 M.L.J. 296, 9 M.L.W. 349, 20 Cr.L.J. 379; *Mahalinga*, 37 Cr.L.J. 15, 158 I.C. 1040, A.I.R. 1935 Mad. 1044, 1935 Cr.C. 1287, 69 M.L.J. 783; *Probat Ranjan v. Uma Shankar*, 132 I.C. 241, 32 Cr.L.J. 883, 1931 Cr.C. 590, A.I.R. 1931 Cal. 438, Ind. Rul. 1931 Cal. 561, 58 Cal. 727, 35 C.W.N. 98 (101); *Ambar Ali*, A.I.R. 1929 Cal. 539 (541), 1929 Cr.C. 194; *Ram Dilas v. Lachmi Narain*, A.I.R. 1923 All. 84, 71 I.C. 684, 24 Cr.L.J. 220, 45 All. 140, 20 A.L.J. 904; *Krishnarao*, A.I.R. 1935 Nag. 190, 36 Cr.L.J. 1477, 158 I.C. 647, 18 N.L.J. 247, [where a District Registrar was held competent to lodge a complaint under sec. 190 (1)(a) against the vendee, scribe and attesting witnesses of a forged document as none of them was a party to the proceedings in the Criminal Court where the document was produced and whereupon the District Registrar started the inquiry]; *Kondeti*, 26 M.L.J. 220, 15 Cr.L.J. 242, 9 I.C. 577; *Jivan Mal*, 18 Cr.L.J. 544, 1917 P.R. 10; *Debilal v. Dhajadhari*, 15 C.W.N. 565, 12 Cr.L.J. 101; *Ponuscami*, 115 I.C. 481, 28 M.L.W. 769, A.I.R. 1929 Mad. 151, 30 Cr.L.J. 469; *Tulasi v. Danalakshmi*, 35 Cr.L.J. 780, 148 I.C. 851, 66 M.L.J. 71, A.I.R. 1934 Mad. 316, 39 M.L.W. 693, 57 Mad. 682, A.I.R. 1934

Mad. 316, 1934 Cr.C. 606, 1934 M.W.N. 609; nor is a complaint necessary to prosecute the agent of a party—*Chand Mal*, 1879 P.R. 9; *Fatima v. Raman*, 3 Bur.L.T. 108, 12 Cr.L.J. 87; or a counsel—*Ganda*, 29 Cr.L.J. 1061; or the guardian or next friend of the minor plaintiff as he is not a party within the meaning of sec. 195 (1)(c), Cr. P. C.—*Mallappa Tejappa Bidikar*, 38 Cr.L.J. 149, 166 I.C. 270, A.I.R. 1937 Bom. 14, 38 Bom.L.R. 964, 9 R.B. 229; so also, no complaint is necessary to prosecute an abettor if he is not a party—*Ghansham*, 32 All. 74; *Kushal Pal*, 32 Cr.L.J. 1105, 134 I.C. 225, A.I.R. 1931 All. 443, 1931 Cr.C. 715, 53 All. 804, 1931 A.L.J. 693, Ind. Rul. 1931 All. 801; *Bishan Sahai*, 39 Cr.L.J. 38 (40), 171 I.C. 994, I.L.R. 1937 All. 779, 1937 A.W.R. 748, 1937 A.L.J. 1073, 1937 A.Cr.C. 119, A.I.R. 1937 All. 714; *Fakir Singh*, 10 Lah. 442, 30 Cr.L.J. 485 (489); *Bassarmal*, 15 S.L.R. 149, 23 Cr.L.J. 31; *Assudomal v. Isardas*, 35 Cr.L.J. 1251, 151 I.C. 60, 1934 Cr.C. 628, A.I.R. 1934 Sind 78; *Assudomal Ramandas v. Jhamandas Hotchand*, A.I.R. 1940 Sind 100 (101); so also no complaint is necessary to prosecute the Judge before whom the case or proceeding was pending—*Behari Lal v. Abdul Qadir*, A.I.R. 1940 Lah. 292 (297). For contra see *Narayan*, 39 I.C. 688, 10 P.R. 1917 (Cr.), 18 Cr.L.J. 544, not followed in *Fakir Singh*, supra. A claimant in insolvency proceedings is a party to the proceedings and a complaint is necessary for his prosecution in respect of statements contained in an affidavit filed by him before the Official Assignee in support of his claim—*Hajee Mohamed*, 36 M.L.J. 60. In a criminal case the complainant is a party, though the Crown is the prosecutor, and if the complainant produces a forged will as evidence in the criminal case, it must be said that the offence under sec. 467, I. P. C., has been committed by a party to the case—*Kanhaiya v. Bhagwan*, 48 All. 60, 23 A.L.J. 956, 26 Cr.L.J. 1485 (1487); For contra see *Krishnarao*, A.I.R. 1935 Nag. 190. The Sind Court has held that if the offenders are not parties to the proceeding, the Court can take action against them not under secs 195 (c) and 476, but under sec. 190 (c)—*Rahimino*, 22 S.L.R. 201, 28 Cr.L.J. 978 (979), 105 I.C. 802.

Section 195 (1)(c), Cr. P. C., would not apply if the proceedings in Court had terminated so that the accused had only previously been a party to a proceeding, and was no longer a party at the time sec. 195 (1)(c), Cr. P. C., was sought to be applied. The words, "committed by a party to any proceeding in any Court" in sec. 195 (1)(c), Cr. P. C., imply that the proceeding must be pending at the material time. To hold otherwise might lead to rather absurd results. Between the commission of a forgery and the discovery of it a long time may elapse, and in the interval the document may be produced in many proceedings. It might be highly inconvenient to have to obtain a complaint from each of the Courts in respect of proceedings terminated, possibly many years before—*Mallappa Tejappa Bidikar*, supra.

When an offence of forgery is committed by more than one person, one of them only being a party to the proceedings in which the document is produced, no complaint of the Court is necessary for the prosecution of those participants in the forgery who are not parties to the proceedings—*Ponusiwami*, 28 L.W. 769, 30 Cr.L.J. 469; *Anna Ayyar*, 30 Mad. 226. The intervention of the Court is unnecessary for their prosecution—*Tulasi v. Danalakshmi*, A.I.R. 1934 Mad. 316, 35 Cr.L.J. 780, 148 I.C. 851, 63 M.L.J. 471, 57 Mad. 682, 39 M.L.W. 639, 1934 M.W.N. 609, 1934 Cr.C. 606, 6 R.M. 550. The Court has no jurisdiction to complain against those who are not parties to the proceedings—*Ghansham*, A.I.R. 1934 Pesh. 81; *Maung Shew Phe v. Ma Ma Hmoke*, 3 Rang. 48; *Probhat Ranjan v. Ugra Shankar*, supra; *C. T. Guruswamy v. D. K. S. Ebrahim*, 2 Rang. 374, 81 I.C. 439, A.I.R. 1925 Rang. 28, 26 Cr.L.J. 295; *Kushal Pal*, 32 Cr.L.J. 1105 (1115), 131 I.C. 225, A.I.R. 1931 All. 443, 1931 Cr.C. 715, 53 All. 804, 1931 A.L.J. 697, Ind. 1931 All. 801 (F.B.). Contra—*Narayan*, 12 Bom.L.R. 383, 11 Cr.L.J. 368.

This clause lays down that complaint of the Court is necessary to prosecute a party who produced a forged document in that Court. But there is nothing in this section forbidding the Court to make complaint against persons other than the party to the proceeding in the Court who are alleged to have been concerned in the offence—

Balmukand, 9 Lah. 678, 110 I.C. 103, A.I.R. 1928 Lah. 510, 29 Cr.L.J. 652 (655); *Balgaunda*, 32 Cr.L.J. 1017, 133 I.C. 269, 55 Bom. 461, Ind. Rul. 1931 Bom. 381, 33 Bom.L.R. 296, 1931 Cr.C. 561, A.I.R. 1931 Bom. 305; *Shabir Hasan*, 26 A.L.J. 46, 28 Cr.L.J. 986 (987); *Quazi Ejaz Ali Khan v. Emp.*, 66 I.C. 68, 24 O.C. 367, 23 Cr.L.J. 228, A.I.R. 1922 Oudh 220; *Jubasabali v. Ayub Karim Kachhi*, A.I.R. 1927 Nag. 14, 100 I.C. 529, 28 Cr.L.J. 305.

There is thus a conflict of opinion between the various High Courts on this point. The High Courts of Allahabad, Madras, Calcutta and Rangoon are in favour of holding that the Court has no power to make a complaint against persons, who are not parties to a proceeding before it, in respect of any of the offences mentioned in sec. 195 (1) (c), Cr. P. C., whereas the High Courts of Bombay, Lahore and the Judicial Commissioner's Courts at Nagpur and Oudh have taken a different view. After reviewing all the rulings mentioned above the Full Bench of the Nagpur High Court holds that sec. 476, Cr. P. C., does not inhibit the classes of Courts mentioned therein from making a complaint in respect of any of the offences specified in sec. 195 (1) (c), Cr. P. C., against persons not parties to a proceeding before it, in which or in relation to which, the offence was committed—*Abdul Rahim Khan v. Pusiabai*, 40 Cr.L.J. 572, 181 I.C. 751, 18 N.L.J. 348, A.I.R. 1939 Nag. 85 (FB).

A receiver is not a party to the proceedings. The leave of the Civil Court is not a condition precedent to the prosecution of a receiver appointed by it—*Lukmanji v. Valibhai*, 35 Cr.L.J. 1403, 151 I.C. 707, 1934 Cr.C. 1034, A.I.R. 1934 Bom. 306, 36 Bom.L.R. 649, following *Khimchand*, 115 I.C. 387, A.I.R. 1928 Bom. 493, 52 Bom. 898, 30 Bom.L.R. 1273, 30 Cr.L.J. 465 and dissenting from *Santok Chand*, 22 C.W.N. 910, 28 C.L.J. 115, 46 Cal. 432, 29 Cr.L.J. 820, A.I.R. 1929 Cal. 647, 46 I.C. 836.

The guardian or next friend of a minor, who is a party to a suit, is not a party within the meaning of sec. 195 (1) (c), Cr. P. C., and, as such, no complaint by Court is necessary for his prosecution in respect of offences mentioned therein—*Mallappa Tejappa Bidkar*, 38 Cr.L.J. 149, 166 I.C. 270, A.I.R. 1937 Bom. 14, 38 Bom.L.R. 964, 9 R.B. 229, following *Rup Chand v. Dasodha*, 30 All. 55, 1907 A.W.N. 290, *Khodabux v. Budree Narain Singh*, 7 Cal. 137, 8 C.L.R. 306 and *Regina v. Padala Venkatasami*, 3 Mad. 4.

630. Proceeding in Court:—For the meaning of *Court*, see Note 622, *ante*. No complaint is necessary if the offence is not committed in relation to any proceeding in a *Court*. Thus, where a mahal belonging to several co-sharers having been sold under the Public Demands Recovery Act, a surplus was lying in deposit with the Certificate officer, and a mukhtar filed an application to withdraw that deposit, purporting to have been signed by all the co-sharers, but the signatures of two of them were alleged to be forged, *held* that the surplus sale-proceeds not having been entrusted to the Certificate officer in his capacity as a *Court*, no complaint by the Court was necessary for the prosecution of the alleged forgers—*Jharu Lal v. Mahant Madan Das*, 2 Pat. 257.

The qualifying words "in or in relation to a proceeding in Court" which occur in clause (b), as well as in sec. 476, do not occur in clause (c). The omission of these words does not mean that even if the offences mentioned in clause (c) are committed in relation to a proceeding in Court, sec. 476 has no application. The words are left out in clause (c) because the sense produced by these words in clause (b) is perfectly conveyed by the language used in clause (c). The cumulative effect of the words employed, namely, "committed by a party to any proceeding in any Court in respect of a document produced or given in evidence in such proceeding" leaves no doubt that the offences contemplated by the language are necessarily those in reference to or "in relation to" the proceeding in Court—*Rushal Pal*, 53 All. 804, 1931 A.L.J. 697, 32 Cr.L.J. 1105 (1109) (*per* Niamatullah, J.); *Subbarayudu v. Gopaya*, 55 Mad. 531, 32 Cr.L.J. 788 (789).

This clause applies only where the document was produced or given in evidence in an *independent* proceeding unconnected with the offence of forgery. But where the document was produced in Court not in connection with any other case, but in a prosecution

founded upon it, for the purpose of convicting the accused of an offence in relation to it, sec. 195 has no application. Thus, where a Police Sub-Inspector was prosecuted and committed to the Sessions for causing hurt to extort a confession, and in the course of the trial he produced his Case-diary in which he had made a false entry to create evidence in his favour, whereupon the Sessions Judge added a charge under sec. 465, I. P. C., the complaint of the committing Magistrate was not necessary for this charge, as the Judge was himself considering the question of what charge should be framed on this document—*Sanjiv Ratnappa*, 56 Bom. 488, 34 Bom.L.R. 1090, 1932 Cr.C. 777 (778), A.I.R. 1932 Bom. 545.

No complaint is necessary if the offences were committed long after the proceeding in Court had come to a termination—*Kartik Chandra*, 51 C.L.J. 51, 31 Cr.L.J. 1205 (1207); and the fact that the document (in respect of which the offence of forgery was committed) is still in the custody of the Court when the offence was committed after the termination of the proceeding, makes no difference—*Subbarayudu v. Gopayya*, *supra*.

631. Sub-section (3)—Subordination of Courts:—The sub-section applies only to subordination of *Courts* and not to subordination of public servants. And so, where a Magistrate acts as an *executive officer*, his subordination must be determined not with reference to this clause but to sec. 17; i.e., if he is a Sub-Magistrate he is subordinate to the Sub-divisional Magistrate; and if he is a Sub-divisional Magistrate he is subordinate to the District Magistrate and not to the Sessions Judge—*Sankaram v. Sakkarappa*, 2 Weir 155 (156); *Maini Misser*, 6 Pat. 39, 28 Cr.L.J. 353.

But the word 'Court' in this sub-section will apply to a public servant in clause (a) when such public servant is acting as a *Court* and the offence is committed in connection with proceedings in which the public servant concerned is so acting—*Arunachalam v. Ponnusami*, 42 Mad. 64, followed in *Badiuddin*, 47 Bom. 102. Therefore, although a Sub-Magistrate is no doubt a public servant in his capacity of an administrative officer, still if he is acting in his *judicial* capacity, he must be deemed to be a 'Court' and is therefore subordinate to the Court to which an appeal from his order would lie, under the provisions of this sub-section—*Arunachalam v. Ponnusami*, 42 Mad. 64, 35 M.L.J. 454, 20 Cr.L.J. 78. Similarly, a first class Magistrate acting as a public servant is subordinate to the District Magistrate, but if he acts as a *Court*, he must be taken to be subordinate to the Court to which appeals lie from his Court, *viz.*, the Court of the Sessions Judge (and not the District Magistrate)—*Buduiddin*, 47 Bom. 102, 24 Bom.L.R. 810, 23 Cr.L.J. 576.

Every Court shall be deemed to be subordinate to the Court to which appeals from the former will ordinarily lie. Thus—

The District Magistrate is subordinate to the Sessions Judge—*Jiwan Mal v. Beli Ram*, 1917 P.R. 11; *Panchlam*, 42 Mad. 96; *Pilalal*, 30 Cr.L.J. 550, A.I.R. 1929 Nag. 97, 25 N.L.R. 1 (F.B.); *Shankar Dial v. Venables*, 19 All. 121. An appeal from the sentence of an Assistant Sessions Judge, does ordinarily lie to a Court of Sessions even though an Assistant Sessions Judge is a member of that Court—*Nagendra*, 34 Cr.L.J. 628, 143 I.C. 703, A.I.R. 1933 Cal 192, 37 C.W.N. 192, 1933 Cr.C. 213, Ind. Rul. 1933 Cal. 464, 60 Cal. 596. A first class Magistrate is subordinate to the Sessions Judge—*Malu Ram*, 1902 P.R. 7 (overruling *Soba Singh v. Lal Chand*, 1901 P.R. 30); *Aly Md*, 1912 P.R. 2, 12 Cr.L.J. 539; as also to the Additional Sessions Judge (under the provisions of secs 408 and 409 read together)—*Sikandar*, 44 Bom. 877 (880); *Nishi Chandra v. Ramesh Chandra*, 14 Cr.L.J. 195 (Cal.); *Kusum v. Janak Lal* 4 P.L.J. 374. But he is not subordinate to the Assistant Sessions Judge, as the latter has no power to hear appeals—*Sikandar*, 44 Bom. 877 (881). A committing second class Magistrate is subordinate to the Sessions Judge—*Anonymous*, 2 Weir 160. The Assistant Magistrate is subordinate to the Sessions Judge and not to the District Magistrate—*Shankar Dial v. Venables*, 19 All. 121.

The Court of the Tahsildar when dealing with the mutation case is subordinate to

the Court of the Deputy Commissioner—*Sajjad Husan*, A.I.R. 1935 Oudh 113 (114), 1934 O.L.R. 980, 153 I.C. 346, 1935 O.W.N. 28.

A second or third class Magistrate is subordinate to the District Magistrate—*Ram Deni v. Nand Lal*, 30 All. 109 (111); *Pallickudathan v. Buddu*, 47 Mad. 229 (230), 45 M.L.J. 553. It should be noted that the second or third class Magistrate is subordinate only to the District Magistrate but not to any other First Class Magistrate who is empowered under sec. 407 (2) to hear appeals, because an appeal from the 2nd or 3rd class Magistrate *ordinarily* lies under sec. 407 (1) to the District Magistrate, and not to any other 1st class subordinate Magistrate to whom the District Magistrate has delegated under sec. 407 (2) his power to hear appeals from 2nd or 3rd class Magistrate—*Eroma*, 26 Mad. 656, 2 Weir 202 (F B), (overruling *Subbaraya*, 18 Mad. 487); *Subbamma*, 27 Mad. 124 (126); *Mohim Chandra*, 56 Cal. 824, A.I.R. 1929 Cal. 172, 116 I.C. 638, 30 Cr.L.J. 658, 49 C.L.J. 342, 33 C.W.N. 285 (288); *Sadhu Lal v. Ram Churn*, 30 Cal. 394, 7 C.W.N. 114; *Anantharamayya v. Tukkadu*, 41 Mad. 787 (789); *Ahmad Hussain v. Rahman*, 26 O.C. 358, 26 Cr.L.J. 423; *Mt. Jivani*, A.I.R. 1920 Lah. 479, 68 I.C. 412. An Additional District Magistrate has also no power to hear appeals—*Sivasuami v. Perumal*, 1931 M.W.N. 1194. An Additional District Magistrate has no jurisdiction to take any proceeding under sec. 476A, Cr. P. C., or to institute the complaint in respect of the offence committed in the Court of a Second or third class Magistrate—*Ramdin Lal*, 38 Cr.L.J. 97, 165 I.C. 970, A.I.R. 1937 Pat. 176, 18 P.L.T. 91, 3 B.R. 117, 9 R.P. 246; *Nazar Mohammad v. Harnam Singh*, A.I.R. 1938 Lah. 641, 1 L.R. 1938 Lah. 188, 40 Cr.L.J. 140, 40 P.L.R. 951, 178 I.C. 795. If the District Magistrate had directed the Additional District Magistrate to make an enquiry and report to him and had then adopted that report and made the complaint himself, the procedure would have been quite legal—*Nazar Mohanad v. Harnam Singh*, *supra*.

Appeals from the appealable decrees of a Collector sitting as an original Court in suits included in Group A of Sch. 4 of the Agra Tenancy Act (III of 1916) lie only to the District Judge and never to a superior Revenue Court. The Collector is, therefore, subordinate to the District Judge who has jurisdiction to hear appeals from his orders of complaints under sec. 476, Cr. P. C., in matters relating to such suits—*Amanul v. Girdhar*, A.I.R. 1934 All. 886, 150 I.C. 775, 4 A.W.R. 241, 1934 A.L.J. 867, 35 Cr.L.J. 1136.

The Sub-Judge is subordinate to the District Judge. The fact that the particular suit in which the offence was committed involved a claim of over Rs. 5,000 and that an appeal from the decision passed in that suit would lie to the High Court and not to the District Court, is immaterial. An appeal from the Sub-Judge's decree *ordinarily* (i.e., in a majority of cases) lies to the District Judge, and it is only in exceptional cases (involving claims over Rs. 5,000) that the appeal lies to the High Court. The District Judge can therefore make a complaint where the Sub-Judge has refused to do so—*Wadero Abdul v. Sadhuram*, 25 S.L.R. 196, 32 Cr.L.J. 1012 (1013), Ind. Rul. 1931 Sind 104, 133 I.C. 72, A.I.R. 1931 Sind 163; *Lakshman-Sakharam*, 2 Bom. 281; *Anant Ramchandra*, 11 Bom. 438; *Viyyanna v. Bajamma*, 19 Cr.L.J. 261; *Narayanan v. Kadisaya*, 44 M.L.J. 320, 24 Cr.L.J. 337; *Ganesh v. Jittan*, 17 A.L.J. 191; *Hubbar v. Sajjad Ali*, 22 O.C. 189; *Srinivasa*, 1933 M.W.N. 1290. See also *Thakur Prasad*, 37 Cr.L.J. 413, 139 I.C. 503, 16 P.L.T. 808, A.I.R. 1936 Pat. 122; *Fazal Ilahi v. Mohan Lal*, A.I.R. 1922 Lah. 346, 72 I.C. 383, 24 Cr.L.J. 383; *Narotam Das v. Bhagwan Das*, A.I.R. 1939 All. 79 (81), 1938 A.L.J. 1196, 1938 A.W.R. (H.C.) 747. So is the Court of the Judicial Extra Assistant Commissioner subordinate to that of the District Judge for the purposes of this section—*Mt. Umtul Quresh v. Ghulam Hassan*, A.I.R. 1938 Pesh. 83, 1938 Pesh.L.J. 92. Any order passed by the Civil Judge under sec. 476, Cr. P. C., making a complaint for an offence against any person would be appealable to the District Judge and not to the High Court. The fact that the order appealed from has been made in connection with a case under the U. P. Encumbered Estates Act does not take it out of the purview of the above provisions of law. The Special Judge in making a complaint under sec. 476, Cr. P. C., does not pass an order under the U. P.

Encumbered Estates Act which would be appealable to the High Court under sec. 45 of that Act. It is merely an order under sec. 476, Cr. P. C., by a Civil Court and the question of the forum of appeal from that order has to be decided in the light of the provisions of sec. 476B read with sec. 195, Cr. P. C. In accordance with those provisions the appeal would lie in the Court of the District Judge and not to the High Court—*Akbar Husain Khan v. Emp.* 41 Cr.L.J. 227, 185 I.C. 700, A.I.R. 1940 All. 7, 1939 A.L.J. 962, 1939 A.W.R. (H.C.) 783, 1939 A Cr.C. 197, I.L.R. 1939 All. 975.

A Munsiff's Court is subordinate to the District Judge's Court—*Bure Khan*, 1898 P.R. 16; *Munshi v. Gandomal*, 1900 P.R. 25; *Miran v. Belt Ram*, 1916 P.L.R. 67; *Sundar Singh v. Phuman*, 2 Lah.L.J. 415; but not to the Subordinate Judge's Court, although appeals from the Munsiff's Court are generally transferred by the District Judge to the Subordinate Judge—*Ram Chandra v. Tirupulla*, 39 Cal. 774. See also *Hari Mandal v. Keshab*, 40 Cal. 37, 16 C.W.N. 645. But when under the law or by a notification certain appeals from the Munsiff's decrees lie to a first class Subordinate Judge, the Munsiff will be deemed as subordinate not to the District Judge but to the 1st class Subordinate Judge—*Labhu Ram v. Nand Ram*, 1918 P.R. 29, 19 Cr.L.J. 975; *Ramayya v. Sukayya*, 28 M.L.J. 486; *Dina Nath v. Md. Abdulla*, 2 Lah. 57; *Jwala Singh v. Madan Gopal*, 27 Cr.L.J. 75 (Lah.); *Ramchandra*, 8 Pat. 428, 30 Cr.L.J. 834; *Jagrup Shukul*, A.I.R. 1918 All. 332, 42 I.C. 915, 19 Cr.L.J. 4, 40 All. 21, 15 A.L.J. 844; *Shiva Prasad v. Pahlad Singh*, A.I.R. 1935 All. 696, 161 I.C. 322, 58 All. 85, 1935 A.L.J. 943; *Narotam Das v. Bhagwan Das*, A.I.R. 1939 All. 79 (81), 1938 A.L.J. 1196. See also *Lokman v. Halku*, A.I.R. 1934 Nag. 236, 36 Cr.L.J. 851, 155 I.C. 863, 1934 Cr.C. 1089, A.I.R. 1934 Nag. 261 where an appeal from an order of Small Cause Court Judge at Sangor was held to lie in the Court of Additional District Judge at Sangor and not to the District Judge, Jubblepore.

The Deputy Commissioner's Court at Santhal Parganas is subordinate to the Court of the Commissioner of Bhagalpur, and not to the High Court—*Munna Lal v. Padman*, 30 Cal. 916.

A first class Magistrate is not subordinate to the District Magistrate but to the Sessions Judge—*Mithi Lal v. Lareti*, 5 A.L.J. 562, 7 Cr.L.J. 304; *Narotam*, 6 All. 98; *Malu Ram*, 1902 P.R. 7, 44 P.L.R. 1902 (overruling *Soba Singh v. Lal Chand*, 1901 P.R. 30); *Aly Mohd*, 1912 P.R. 2, 12 Cr.L.J. 539; *Badiuddin*, 47 Bom. 102; *Mofizuddin v. Basanta*, 16 Cr.L.J. 640 (Cal.); *Sant Ram v. Dewan Chand*, 24 Cr.L.J. 913.

A single Judge on the Original Side of the High Court is subordinate to the Divisional Bench on the Appellate Side hearing appeals from the judgment of the single Judge—*Munisamy v. Rajaratnam*, 45 Mad. 928 (F.B.); *Abdul Latif v. Haji Tar Mohamed*, 47 Bom. 270; *Ramjan v. Moolji*, 56 Cal. 932, 33 C.W.N. 329 (331), A.I.R. 1929 Cal. 521, 118 I.C. 889, 30 Cr.L.J. 974, 1929 Cr.C. 184.

Where no appeals lie, the original Civil Court will be deemed to be subordinate to the principal Court of original civil jurisdiction. Thus, the Provincial Small Cause Court is subordinate to the District Judge—*Chidda Lal v. Bhajan Lal* 39 All. 657 (F.B.), 42 I.C. 167, A.I.R. 1917 All. 405; *Lokman v. Halku*, A.I.R. 1934 Nag. 236, 1934 Cr.C. 1089, A.L.R. 1934 Nag. 261; *Abdul Ghani v. Ram Mohan*, 36 Cr.L.J. 950, 156 I.C. 593, 1935 A.L.J. 573, A.I.R. 1935 All. 573, 1935 Cr.C. 594, 1935 A.L.R. 594, 8 R.A. 3; *Ram Sarup*, A.I.R. 1935 All. 446, 1935 A.L.J. 476; *Lalji*, 4 P.L.J. 609 (623) (F.B.); *Nibaran v. Akshoy*, 21 C.W.N. 948; *Ram Dayal v. Dwarka*, 20 O.C. 223; *Panchu v. Jumman*, 6 O.W.N. 848, 1929 Cr.C. 589; *Iyavoo v. Thayammal*, 18 Cr.L.J. 977 (Bur.); *Abdul Hussein v. Mohamed Ibrahim*, A.I.R. 1937 Rang. 526. The cases of *Ambica Tewari*, 1 P.L.J. 206, and *Sukhdeo*, 2 P.L.J. 1, in which it was held that this clause did not apply to a Provincial Small Cause Court, have been overruled by *Lalji Tewari*, 4 P.L.J. 609 (F.B.) cited above. A similar opinion (obiter) expressed by Chamier, J., in—*Ajudhia v. Ram Lal*, 34 All. 197 (200, 201) has been disapproved of in 39 All. 657 (F.B.) and 4 P.L.J. 609 (F.B.). But a Provincial Small Cause Court is not subordinate to the High Court—*In re Ram Prasad*, 37 Cal. 13 (22), 4 I.C. 6, 10 Cr.L.J. 454; *Lalji*, supra. The Mamlatdar's Court is subordinate to the District Judge

—*Gurunath v. Narasimha*, 5 Bom.L.R. 206; *Narayan v. Tukaram*, 9 Bom.L.R. 896. The Presidency Small Cause Court is subordinate to the High Court in its Appellate Side. The words "principal Court of original civil jurisdiction," when applied to the High Court, do not mean only the Original Side of the High Court, but apply to the Appellate Side also—*Jamnadas v. Sabapathi*, 36 Mad. 138; *Kalyanjee v. Ram Deen*, 48 Mad. 395, 48 M.L.J. 290, 26 Cr.L.J. 801. The Village Munsiff is subordinate to the District Judge—*Sundar Lal*, 6 A.L.J. 796, 10 Cr.L.J. 437. A Village Panchayet when it is exercising jurisdiction in civil matters is a Civil Court, and is subordinate to the principal Court of original civil jurisdiction, viz., the District Judge, (though in many other respects it is subordinate to the Collector)—*Salig Ram*, 52 All 1018, 32 Cr.L.J. 558 (559), 130 I.C. 488, 1930 A.L.J. 1520, 1931 Cr.C. 200, A.I.R. 1931 All. 141, Ind. Rul. 1931 All. 280; *Charyan*, 35 Cr.L.J. 1050, 149 I.C. 1239, 1934 A.L.J. 339, A.I.R. 1934 All. 216, 1934 Cr.C. 326. See also *Lakshmaniah*, 1933 M.W.N. 1423. It should be noted that the latter part of sub-section (3) is now restricted to civil Courts only, whereas under the old law, it applied to any Court and the words used were "the principal Court of original jurisdiction" which included a Criminal and a Revenue Court; and therefore it was held that in respect of an execution proceeding in a Revenue Court under the Agra Tenancy Act from which no appeal lay, the principal Court of original jurisdiction was not the District Judge but the Collector—*Ajudhia v. Ram Lal*, 34 All 197 (202). See also *Lalji*, 5 P.L.J. 609 (621). The present law has made no provisions for such cases.

632. Clause (a):—Where appeals lie to more than one Court, the Appellate Court of inferior jurisdiction would be the Court to which the original Court must be deemed to be subordinate—*Ram Krishna v. Mohan Lal*, 8 N.L.R. 57, 13 Cr.L.J. 498. Thus, the Subordinate Judge would be held to be inferior to the District Judge and not to the High Court, even though the appeal in the particular instance would lie to the High Court—*Lakshman*, 2 Bom. 481; *Anant Ramchandra*, 11 Bom. 438. So also the Recorder's Court at Rangoon is subordinate to the High Court for the purpose of the execution, though in the particular case the appeal may lie to the Privy Council—*Maduray v. Elderton*, 22 Cal 487.

633. Clause (b):—"Or proceeding":—These words have been added in deference to the opinion expressed by Chamer, J., in *Ajudhia Prosad v. Ram Lal*, 34 All 197 (200). In this case a suit was brought in the Court of the Assistant Collector for arrears of rent exceeding Rs. 100, and in execution proceeding thereof certain false statements were made. The suit being one for rent exceeding Rs. 100 was appealable, but the execution proceeding was not appealable according to the provisions of the Agra Tenancy Act. The question arose—to which Court was the Assistant Collector subordinate and to determine this question it was necessary to decide whether clause (b) or clause (c) of sub-section (7) of the old section was applicable. It was contended that since the 'case' being one for rent exceeding Rs. 100 was appealable (though the execution proceeding was not), clause (b) would apply; but the Judges held that the word 'case' in clause (b) included execution proceedings, and since the execution proceeding in the present case was not appealable, clause (b) could not apply, as that clause applies only where an appeal lies. The case was therefore governed by clause (c) of sub-section (7).

634. Sub-section (4)—Abetment:—A distinction has been drawn between the abetment of an offence mentioned in clause (b) of sub-section (1) and the abetment of an offence mentioned in clause (c). Since clause (c) speaks only of offences committed by a party to the proceeding, it follows that no complaint by Court is necessary in respect of an abetment of an offence mentioned in clause (c), if the abettor was not a party to the proceeding—*Ghansham*, 32 All. 74. See Note 629, ante. But in the case of offences mentioned in clause (b), an abettor cannot be prosecuted without a previous complaint by the Court, even though he was not a party to the proceeding, because no mention is made of a 'party' to the proceeding in clause (b)—*Ram Bilas v. Lachmi Narain*, 45 All. 140.

Under sub-section (4) of this section an "offence" under the Section includes abetments and attempts, so that if a complaint of the Court is necessary in the case of the substantive offences it is also necessary in the case of abetment—*Assudomal Ramandas v. Jhamandas Hotchand*, A.I.R. 1940 Sind 100 (101).

Under this sub-section the previous sanction of the Magistrate is necessary for a prosecution under sec. 193|120B, I. P. Code—*Mathuranath*, 33 Cr.L.J. 657, A.I.R. 1932 Cal. 850, 1932 Cr.C. 881, Ind Rul. 1932 Cal. 561. It would be violating the spirit underlying sec. 196A, Cr. P. C., if a person were allowed to be convicted of an offence under sec. 120B, I. P. C., even though his prosecution under that section is neither sanctioned by the District Magistrate nor was within the contemplation of the officer making the complaint under sec. 476—*Bhikhari*, A.I.R. 1934 Pat. 561 (563), 15 P.L.T. 523.

634A. Sub-section (5)—Withdrawal of complaint:—Sub-section (5) applies only where a complaint has been made by a *public servant*, and not by a Court. Where a Magistrate has made a complaint in respect of an offence under sec. 211, I. P. Code, the complaint is deemed to have been made sub-section (1), clause (b), by a Court and not by a public servant. Consequently, sub-section (5) does not apply, and the District Magistrate has no power to order the withdrawal of the complaint—*Ram Prasad*, 49 All. 752, 25 A.L.J. 639, 28 Cr.L.J. 543. The District Magistrate could direct the withdrawal of the complaint if an appeal had been made to him under sec. 476B.

A Sub-Divisional Magistrate passing an order under sec. 144, Cr. P. Code and making a complaint for the prosecution of the accused under sec. 188, I. P. Code for disobedience to that order, acts as a *public servant* under sub-sec. (1), clause (a) of this section, and not as a Court. Consequently sub-section (3) of this section does not apply. The Sub-Divisional Magistrate is subordinate to the District Magistrate and not to the Sessions Judge (see sec. 17). An application for withdrawal of the complaint under sub-section (5) is to be made to the District Magistrate, and not to the Sessions Judge—*Maini Misser*, 6 Pat. 39, 28 Cr.L.J. 353; *Nagu Servai*, 57 Mad. 1101, A.L.R. 1934 Mad. 544, 67 M.L.J. 195, 35 Cr.L.J. 1134, 150 I.C. 773, 1934 M.W.N. 483, 1934 Cr.C. 799, A.I.R. 1934 Mad. 473, 40 M.L.W. 90. An application for withdrawal of a complaint under this section is not by way of appeal but is one by way of revision. An order of dismissal should not be passed to the applicant's prejudice without his being heard either personally or by pleader—*Nagu Servai*, supra.

No appeal lies against the refusal of a public servant to file a complaint under sec. 188, I. P. Code—*Maruda Pillai v. Narayanaswami Pillai*, 40 Cr.L.J. 568, 181 I.C. 557, A.I.R. 1939 Mad. 336, 1939 M.W.N. 119, 49 M.L.W. 387, 11 R.M. 830. No appeal lies to the District Judge from an order of a Munsiff declining to make a complaint in respect of an offence under sec. 183, I. P. C., which is mentioned in clause (1) (a) of this section—*Bajrang Marwari v. Durga Prasad*, A.I.R. 1937 Pat. 31 (32), 1936 P.W.N. 747, 166 I.C. 870, 38 Cr.L.J. 292, 9 R.P. 350, 3 B.R. 226. But in such a case the District Judge may make a complaint as an administrative order and since the District Judge is apparently entitled, under the provisions of section 195 (1) (a), to make such a complaint, the fact that Subordinate Judge has refused to make a complaint does not appear to affect the matter—*Ramesh Chandra v. Hari Mohan*, 42 C.W.N. 531. A Munsiff refused to make a complaint in respect of an offence under sec. 186, I. P. Code. On appeal the District Judge directed the prosecution. Held that when an Appellate Court in the exercise of its authority under section 195 (1) (a), Cr. P. C., directed the institution of a complaint under sec. 186, I. P. C., the order was not open to appeal—*Yusuf Ali v. Lachmi*, A.I.R. 1931 All. 630, 53 All. 591, 1931 Cr.C. 926, 132 I.C. 419, 1931 A.L.J. 366; or to revision under sec. 115, Cr. P. Code—*Ramesh Chandra v. Hari Mohan*, 42 C.W.N. 531. But the question involved is one which can properly be raised by a Rule to show cause why the order of the Magistrate taking cognizance of the complaint by the Judge should not be

set aside for want of jurisdiction (*Per Patterson, J.*)—*Ramesh Chandra v. Hari Mohan*, supra. See also Note 1257.

The ruling reported in 27 Cr.L.J. 1247, 98 I.C. 63, 3 O.W.N. 757, A.I.R. 1927 Oudh 51 (*Emp. v. Ram Nath*) seems to suggest that the Court making a complaint can request the Magistrate to allow its withdrawal in accordance with the provisions of sec. 248, Cr. P. Code.

Ordinarily the High Court will not entertain a revision against what purports to be no more than a complaint—*Abdul Jalil Khan v. Emp.*, A.I.R. 1936 All 354 (356), 1936 A.L.J. 373, 1936 A.W.R. 210, 1936 Cr.C. 418, 162 I.C. 755, 1936 A.L.R. 468, 37 Cr.L.J. 713.

634B. Miscellaneous:—*Dismissal for default* :—There is no provision in the Cr. P. C., which warrants the Court in rejecting or dismissing the application of the Public Prosecutor because of his failure to appear at the time the application is called on for dismissal. The Court is bound to consider the application on its merits, even though the party who makes it is not there to help the Court—*Gopal Siddeshwar*, 32 Bom. 203 (205).

Review:—The Court has no power to review its order under this section, because the Cr. P. C., contains no provision giving jurisdiction to a Court to review orders passed under it—*Gopal Siddeshwar*, 32 Bom. 203 (204). See also Notes 1248 and 1255A.

Revival of proceedings:—When the public servant concerned withdrew the proceedings originally instituted by him, it is definitely undesirable that they should be revived by a person who was not a public servant—*Madhu Sudan v. Haridas*, 44 C.W.N. 1011 (1013).

Costs:—The powers of the Civil Procedure Code as to costs cannot be imported into a criminal proceeding. The proceeding under sec 195, Cr P C, though taken in a Civil Court, relates to a criminal matter taken under the Cr P. Code and the Court has no power to give costs under sec 195, Cr P Code—*Bholanath v. Purna Chandra*, 25 C.W.N. 661, following *Mahomed Dustagir Sahib v. Mahomed Karimuddin*, 2 Weir 196 and *Bishen Das v. Rahamat Khan*, 5 PR 1915, 28 I.C. 329, 16 Cr.L.J. 281. See also 13 I.C. 99, 13 Cr.L.J. 6; 14 Cr.L.J. 422, 20 I.C. 406; 17 Cr.L.J. 184, 33 I.C. 824.

See Note 1255A.

Malicious prosecution:—Proceedings relating to the granting of sanction under sec 195, Cr P C, come within the meaning of the term "prosecution" for the purposes of a suit for damages for malicious prosecution—*Robindra v. Jogendra*, 33 C.W.N. 79, A.I.R. 1928 Cal. 691, following *Narendra v. Jyotish*, 27 C.W.N. 387, 49 Cal. 1035, 67 I.C. 705. See also *Nagarmull v. Jaharmull*, 35 Cr.L.J. 925, 148 I.C. 1129, 60 Cal. 1022, A.I.R. 1933 Cal 909.

196. No Court shall take cognizance of any offence punishable under Chapter VI or IXA of the Indian Penal Code (except section 127), or punishable under section 108A, or section 153A, or section 294A, or section 295A, or section 505 of the same Code, unless upon complaint made by order of, or under authority from, the Provincial Government, or some officer empowered by the Provincial Government in this behalf.

Amendments:—The words "or IXA" have been added by sec. 3 of Act XXXIX of 1920 (Election Offences and Inquiries Act).

The words "or section 295A" have been added by the Criminal Law Amendment Act, 1927 (XXV of 1927).

The words "the Provincial Government or some officer empowered by the Provincial Government" have been substituted for "the Governor-General in Council, the Local Government or some officer empowered by the Governor-General in Council" by the Government of India (Adaptation of Indian Laws) Order, 1937.

634C. A complaint of an offence under section 171E (falling under Chapter IXA) of the I. P. Code requires a sanction under this section—*Ponnuswamy*, 42 M.L.J. 139, 23 Cr.L.J. 148

A Magistrate has no jurisdiction to inquire into a complaint in respect of a false return of election expenses, unless the complaint is made by order of the Government—*Labh Singh v. Narinjan*, 6 Lah. 188, 26 P.L.R. 379, 26 Cr.L.J. 1234.

635. Object and scope of section:—The object of this section is to prevent unauthorised persons from intruding in matters of State by instituting State prosecutions, and to secure that such prosecution shall only be instituted under the authority of the Government—*Bal Gangadhar Tilak*, 22 Bom. 112 (125).

This section does not control the powers of a Magistrate under the Code, but only prevents a Court from taking cognizance of certain offences without there being a complaint made by order of or under authority from the Governor-General in Council, the Local Government or some officer empowered by the Governor-General in Council in this behalf—*Brahma Nand v. Emp.*, A.I.R. 1939 All. 682 (683), 1939 A.L.J. 779, I.L.R. 1939 All. 924.

636. Complaint:—A complaint which did not set forth the concrete facts relied on as constituting the offences but merely copied out the words of the sections of the Penal Code was held to be defective—*Pulin*, 16 C.W.N. 1105, 13 Cr.L.J. 609, 15 C.L.J. 517. But a complaint is not defective merely because it does not set out the speeches or the dates of the speeches, and the alleged seditious words which are the subject-matter of the charge. Even if it were defective, this is at most an irregularity curable by sec. 537—*Chidambaram*, 32 Mad. 3 (11), 5 M.L.T. 11, 1 I.C. 22, 9 Cr.L.J. 108; *Narayana*, 25 Cr.L.J. 401, 77 I.C. 481, A.I.R. 1925 Mad. 106. It is not necessary that the complaint must consist of allegation made on oath or reduced to writing. An application by the Superintendent, C. I. D., coupled with his oral allegations was a sufficient complaint—*Apurba*, 35 Cal. 141 (151), 7 C.L.J. 49.

A letter of the Local Government according sanction for prosecution of a certain person under sec. 121, I. P. C., is not a complaint, though it may be taken as an authority to make a complaint—*Shamal Khan*, 1890 P.R. 16. The person who signs the letter of authority is not the complainant, and it is not necessary to take his examination under the law. The person who acted with the authority makes the application to the Court for the apprehension of the accused is the complainant and his examination is to be taken—*Apurba Krishna Bose*, 35 Cal. 141, 7 C.L.J. 49 (*Bande Mataram case*).

637. Order or authority:—*Form and contents* :—This section does not prescribe any particular form of order and does not even require the order to be in writing. No special mode is laid down in the Code whereby the order or sanction of Government is to be conveyed to the officer who puts the law in motion—*Bal Gangadhar Tilak*, 22 Bom. 112 (124,150). What the Court has to see is whether the complaint has been made by the order or under the authority of the Government—*Chidambaram*, 32 Mad. 3 (9). A telegram sent by the Government expressly authorising the Public Prosecutor to file a complaint against the accused for an offence under sec. 124A, I. P. C., is a perfectly valid authority—*Varadarajulu Naidu*, 42 Mad. 180 (182).

A sanction under this section should be expressed with sufficient particularity and with strict adherence to the language of the section. The sanction should not be given in the abstract which may float about the world like a bit of thistle-down until it comes in contact with some possible prosecutor—*Apurba Krishna*, 35 Cal. 141 (149, 151). But the sanction need not yet be very particular about its contents, provided its meaning and intention are clear. Where the letter of authority sanctioning prosecution for

sedition did not specify the name of the accused, but simply described as the "printer of the newspaper *Bande Mataram*," and his name was supplied at the commencement of the Police Court proceedings, it was held that this was a sufficient compliance with the section as the accused was sufficiently indicated from the first—*Apurba Krishna*, 35 Cal. 141 (150), 7 C.L.J. 49. A sanction for the prosecution of the accused in the alternative for offences under sec. 121 or under sec. 121A is not defective on the ground that it does not specify with sufficient clearness the section or the offences in respect of which it is given—*Puthen Vectil Kunhi*, 42 M.L.J. 108, 23 Cr.L.J. 203. Where the persons to be prosecuted were named, the offences and the period of their activity specified and the particular sections of the Penal Code set out, the mere circumstance that these persons were not described as the members of the Revolutionary Society the existence of which was sought to be proved at the trial, did not affect the validity of the section—*Pulin Behary Das*, 16 C.W.N. 1105, 13 Cr.L.J. 609, 15 C.L.J. 517, 16 I.C. 257. The section does not lay down any particular form in which the sanction should be accorded; sanction must be deemed sufficient if it names the persons to be prosecuted and specifies sections under which they are alleged to have committed the offence, as also the period of their activity. The sanction is not defective if it does not contain the objectionable utterances for which the accused are prosecuted under sec. 124A, I P. Code—*Kishen Singh*, 25 Cr.L.J. 279, 16 I.C. 871, AIR 1923 Lah. 333. In a prosecution of sedition, if the sanction contains the name of the printer, publisher, editor, etc., of the newspaper, the name of the newspaper, the offence committed and the particular section of the Penal Code, and refers to "certain articles" appearing in the newspaper, the fact that the sanction does not specify the exact article complained of does not make the sanction insufficient or invalid—*Bal Gangadhar Tilak*, 22 Bom 112 (124, 150). The intention of the Legislature is to ensure that no prosecution for an offence specified in sec. 196 should be launched except on a complaint authorised by the Government, and if this intention is given effect to, it is immaterial whether or not all the facts on which the complaint was to be based were stated in the authority with meticulous precision. It is not necessary to set out any fact other than the fact that the accused had committed an offence under a certain section of a certain Act—*Nga Aung*, 2 Bur L.J. 196, 25 Cr.L.J. 193, AIR 1924 Rang 65 (66). Where the sanction contained a misdescription of the newspaper article on which the prosecution was based, and this was rectified by a subsequent sanction filed in the course of the trial, it was held that the petitioner was not prejudiced and the defect was cured by sec. 537—*Apurba*, 35 Cal. 141 (152), 7 C.L.J. 49.

It is not necessary that the actual words of the complaint should be sanctioned—*Varadarajulu*, 42 Mad 180 (182); *Chidambaran*, 32 Mad 3 (9). Where the order of the Government directing the prosecution (for sedition) states the persons to be prosecuted, the sections under which the institution of the criminal proceedings is authorised, and, in general terms, the times when the seditious speeches were delivered, it is not necessary that the actual words of the complaint must be expressly authorised by the Local Government—*Chidambaran*, supra; *Varadarajulu*, 42 Mad. 180 (184).

Where the telegram sent by the Local Government expressly authorised the Public Prosecutor to file a complaint against V, under sec. 124A, I P. C., and to act immediately if the District Magistrate thought it advisable after consulting him, and formally enjoined the District Magistrate to submit the complaint prepared "for issue of supplemental sanction," held that the last sentence must be read apart from the first portion of the telegram and did not limit the authority given, and a complaint filed in pursuance of that telegram but without any supplemental sanction was not illegal. Further, the words "if the District Magistrate thought it advisable after consulting him" do not mean that consultation was essentially necessary before the filing of the complaint—*Varadarajulu Naidu*, 42 Mad. 180 (182).

Where the authority to prosecute was not given to any determinate person, but the order sanctioning the prosecution was communicated to the District Magistrate, the Public Prosecutor and the senior special Judge, and a prosecution was initiated by the

Additional Public Prosecutor, held that the fact that the order of authorisation was not given to any determinate person did not affect the legality of the trial, and that the alleged defect in the order was curable by sec. 537—*Kutty Moopan*, 44 M.L.J. 166; *Apurba*, 35 Cal. 141 (151).

Signature :—The authority under sec. 196 need not, in the case of a Local Government, be signed personally by the Lieutenant-Governor; it is enough, if it is signed by one of his accredited or Gazetted officers (e.g., the Chief Secretary in this case)—*Apurba*, 35 Cal. 141 (152), 7 C.L.J. 49. The sanction must be signed by the Chief Secretary to the Government. An order signed by the Deputy Secretary on behalf of the Chief Secretary is not legal—*Oziulla v. Beni Madhab*, 50 Cal. 135.

Provincial Government :—The sanction must, in order to satisfy the section, have been the act of the Local (now Provincial) Government, and not of a single member of such Government. A telegram conveying sanction of Government purporting to come from the Chief Secretary is not sufficient, because an individual member of Government cannot purport to act in the name of the Government—*Varadarajulu Naidu*, 42 Mad. 885 (890, 896).

Where a sanction was duly given by the *de facto* Local (now Provincial) Government under this section, and no objection was made thereto at the trial, it was not open to the person convicted at the trial to challenge the sanction in appeal before the High Court, on the ground that the Local (now Provincial) Government granting the sanction was not legally constituted and had no authority to sanction the prosecution—*Pulin Behari Das*, 16 C.W.N. 1105 (1113), 13 Cr.L.J. 609, 15 C.L.J. 517, 16 I.C. 257.

In the case of a sanction to prosecute under this section, the Governor is certainly not required to exercise his individual judgment; but that does not mean that in exercising his individual judgment he is acting unlawfully and that his act can be called in question in a Court of Law. There is nothing in the Government of India Act, 1935 (26 Geo 5, Ch 2), which imposed a legal obligation upon His Excellency the Governor to consult his Ministers before sanctioning the prosecution of the accused—*Battiwala*, 39 Cr.L.J. 938 (941), 1938 M.W.N. 529, 48 M.L.W. 170, 177 I.C. 747, A.I.R. 1938 Mad. 758, (1938) 2 M.L.J. 416, 11 R.M. 375.

638. Want of sanction and complaint :—Absence of sanction under this section vitiates the whole proceedings—*Barindra*, 37 Cal. 467 (493). Even a sanction given after the filing of the complaint does not fulfil the requirements of this section—*Varadarajulu Naidu*, 42 Mad. 885 (888), A.I.R. 1920 Mad. 928, 51 I.C. 343, 20 Cr.L.J. 455, 37 M.L.J. 81; *Barindra*, 37 Cal. 467 (492), 11 Cr.L.J. 453, 7 I.C. 359, 14 C.W.N. 1114; *Venkataramiah*, A.I.R. 1938 Mad. 130, 1937 M.W.N. 996, 46 M.L.W. 709, (1937) 2 M.L.J. 862. Where the law clearly says that it is a condition precedent to the prosecution that a sanction shall be obtained from the Local Government, it is not open to any subordinate authority to override the provision of the law by saying that the offence falls under another section of the Penal Code and that no sanction is necessary for the prosecution under that section—*Ram Nath*, 47 All. 268, 22 A.L.J. 1106, A.I.R. 1925 All. 230, 84 I.C. 714, 26 Cr.L.J. 362. For the contrary view see *Maganlal*, 35 Cr.L.J. 1097, 150 I.C. 623, A.I.R. 1934 Nag. 71, 1934 Cr.C. 276, where all the cases on the point were discussed.

But where the accused was prosecuted upon a sanction of the Local Government without a formal complaint, and no objection was taken to the absence or irregularity of the complaint at the trial, the defect did not affect the trial, and the irregularity or insufficiency of the complaint was cured by sec. 537—*Swami Dayal*, 1908 P.R. 8, 7 Cr.L.J. 353; *Pulin Behari*, 16 C.W.N. 1105 (1112).

Defective sanction :—If the sanction is defective in certain particulars, e.g., if the sanction for prosecution under sec. 124A, I. P. Code, only refers to "certain articles" appearing in a newspaper, without specifying those articles, but no objection is taken by the accused as to the irregularity of the sanction during the commitment proceedings, the Judge presiding at the High Court Sessions can, in his discretion under sec. 532,

accept the commitment—*Bal Gangadhar Tilak*, 22 Bom 112 (124, 125), following *Morton*, 9 Bom. 288 (FB). It should be noted that the case of 9 Bom. 288, which was followed in *Tilak's case*, was one relating to sec. 197 and not sec. 196, Jenkins, C.J. (in *Barindra*, 37 Cal. 467, 492), therefore, doubted whether it was correct to follow a case under sec. 197 while giving a decision under sec. 196.

Complaint:—In *Reg. v. Vinayak Detatar*, 8 Bom.H.C.R. 32 (Crown Cases) an order sanctioning prosecution of a highly placed Magistrate directed that the complaint should be filed by a responsible I. C. S. Magistrate specifically named. It was held in that case that it was clear that the Government intended that that particular I. C. S. gentleman should file the complaint and no other, that the Government clearly thought it advisable that this particular gentleman should consider the case against the accused and select such act of his as he deemed suitable and proper for the subject of a charge, and that it was not the intention of the Government that this power of discrimination should be delegated to some other person of a lower rank. But where the order of the Government sanctioning the prosecution for sedition was: "The Deputy Inspector-General of Police, Railways and C. I. D., is requested to depute an officer of the Special Branch, C. I. D., of the rank not lower than that of Inspector of Police, to prefer a complaint in the Court of the District Magistrate of Nellore," and the Superintendent, Special Branch, C. I. D., for the Deputy Inspector-General of Police, Railways and C. I. D., deputed an Inspector of Police, Special Branch, C. I. D., to file the complaint, it cannot be said that the prosecution is not properly filed because the Inspector was not deputed by the Deputy Inspector-General himself. The Government clearly had no intention that any particular officer should file the complaint—*Balluvala*, 39 Cr.L.J. 938, 1938 M.W.N. 529, 48 M.L.W. 170, 177 I.C. 747, A.I.R. 1938 Mad. 758, (1938) 2 M.L.J. 416, 11 R.M. 375.

639. Prosecution for other offences not mentioned in sanction:—

Where an order under section 196 authorised a particular officer to prefer a complaint of "offences under sections 121A, 122, I.P.C., or under any other section of the said Code which may be found applicable to the case" and the Magistrate prosecuted the accused and committed him in respect of an offence under sec. 121, I.P.C., it was held that since the offence under sec. 121 required a sanction under this section, and it was not specifically mentioned in the sanction, the commitment in respect of an offence under sec. 121 was illegal—*Barindra Kumar*, 37 Cal. 467 (491). The reason is that the power and discretion of determining whether cognizance shall be taken in respect of an offence mentioned in this section cannot be delegated by the Local Government to any other body of persons, and if the Magistrate is allowed to prosecute a person for an offence referred to in this section when such offence was not specifically mentioned in the sanction, it means a delegation of power to the Magistrate which cannot be sustained. In the words of Jenkins, C.J.: "The policy of the safeguard contained in sec. 196 is manifest: the maintenance of this control is of the highest importance; and it is beyond the competence of the Local Government to delegate to any other body or person, this controlling power and the discretion which it implies. It would be opposed to the true intentment of sec. 196 for the Local Government by its order to give its legal or other advisers a roving power to determine under what section of the Charter proceedings should be taken, and to abandon to them the discretion and responsibility that properly belongs to itself"—*Barindra Kumar*, 37 Cal. 467 (489, 490, 491), 14 C.W.N. 1114, 11 Cr.L.J. 453. Where sanction is granted by the Local Government for the prosecution of certain persons for an offence in respect of an act which is precisely defined in the order granting the sanction, the order cannot be treated as an authority for a prosecution in respect of an offence which is absolutely distinct and is alleged to have been committed on an occasion different from that specified in the order—*U. Pathada*, 3 Bur.L.J. 178, 26 Cr.L.J. 245 (246). So also, where the Local Government gave sanction to prosecute a person for an offence under sec. 121, I.P. Code, the Court has no power to charge and convict him for an offence under sec. 124A, I.P. Code—*U. Uyan*, 4 Rang. 131, 27 Cr.L.J. 1075. But a sanction

under section 124A authorises a prosecution under secs. 124A and 114, I. P. Code—*Chidambaram*, 32 Mad. 3.

When the letter from a Deputy Secretary to the Government of Bengal sanctioned prosecution for an offence under sec. 4 of the Explosive Substances Act (VI of 1908) read with sec. 120B, I. P. C., for an offence under sec. 436, I. P. C., read with sec. 120B, I. P. C., and for such other offence or offences as may be disclosed in the evidence and the accused was also charged with and tried for an offence under sec. 5 of the Explosive Substances Act, *held* that the conviction under sec. 5 of the Explosive Substances Act was legal—*Madhu*, 37 C.W.N. 934 (936). See also *Nathu Ram*, A.I.R. 1934 All. 982, 4 A.W.R. 672, 1934 A.L.J. 1088, 1934 Cr.C. 1302.

So also, it is not illegal to prosecute without a sanction a person for an offence for which no sanction is necessary; thus, where a person has committed an offence under sec. 122, I. P. C., and by the same act abetted the offence of dacoity; the fact that the Government refused sanction for the former offence would be no bar to his prosecution for the minor offence of abetting dacoity, for which no sanction is necessary—*Anant Puranik*, 25 Bom. 90 (94).

Prosecution for certain classes of criminal conspiracy.

196A. No Court shall take cognizance of the offence of criminal conspiracy punishable under section 120B of the Indian Penal Code,

- (1) in a case where the object of the conspiracy is to commit either an illegal act other than an offence, or a legal act by illegal means, or an offence to which the provisions of section 196 apply, unless upon complaint made by order of, or under authority from, the *Provincial Government* or some officer empowered by the *Provincial Government* in this behalf, or
- (2) in a case where the object of the conspiracy is to commit any non-cognizable offence, or a cognizable offence not punishable with death, transportation or rigorous imprisonment for a term of two years or upwards, unless the *Provincial Government*, or a Chief Presidency Magistrate or District Magistrate empowered in this behalf by the *Provincial Government* has, by order in writing, consented to the initiation of the proceedings:

Provided that where the criminal conspiracy is one to which the provisions of sub-section (4) of section 195 apply, no such consent shall be necessary.

Amendment:—The words “the Provincial Government or some officer empowered by the Provincial Government” and “Provincial Government” have been substituted for “the Governor-General in Council, the Local Government or some officer empowered by the Governor-General in Council” and “Local Government” respectively by the Government of India (Adaptation of Indian Laws) Order, 1937.

640. Scope:—This section applies only to a prosecution for conspiracy punishable under sec. 120B of the Penal Code, and not for abetment by conspiracy punishable under sec. 109 of that Code—*Abdul Salim*, 49 Cal. 573, 26 C.W.N. 680, 34 C.L.J. 279, 23 Cr.L.J. 657, A.I.R. 1922 Cal. 107, 69 I.C. 145; *Abdul Rahman*, 3 Rang. 95, 26 Cr.L.J.

-1329 (1332). This section only prohibits the entertainment of certain kinds of complaints for conspiracy punishable under sec. 120B, I. P. C., without the sanction of Government, but it does not alter the former law, for instance, complaints for the principal offence committed by a co-conspirator in pursuance of the conspiracy or for abetment by him of any such offence committed by one of the other co-conspirators under sec. 109, I. P. Code—*Muhammad Bachal*, 35 Cr.L.J. 812, 148 I.C. 678, A.I.R. 1934 Sind 4, 1934 Cr.C. 89. This section deals only with the case of criminal conspiracy and not with that of abetment of an offence or an attempt to commit that offence—*Bhikari*, A.I.R. 1934 Pat 561 (563), 15 I.C. 282, 13 Pat. 729, 15 P.L.T. 523, 1934 Cr.C. 1215, 36 Cr.L.J. 17. Where there is no allegation of criminal conspiracy in the complaint, nor does the complaint disclose any charge of criminal conspiracy, but the allegation in the plaint merely incidentally involves a charge of conspiracy, no sanction is necessary under this section—*Nune Panakalu v. Ravulu*, 52 Mad. 695, 30 Cr.L.J. 191 (198).

- Where the accused was charged under sec. 404, as well as sec. 404 read with sec. 120B, I. P. Code, but the Magistrate overlooked the fact that the offences under sec. 404 read with sec. 120B required sanction of the Local Government under sec. 196A, Cr. P. Code, and proceeded with the trial without sanction, *held* that the proceedings under sec. 404|120B must be dropped, and the case should proceed only under sec. 404—*Sukumar v. Mofizuddin*, 25 C.W.N. 357 (359), 22 Cr.L.J. 455. But where there were two accused, and one of them was charged and convicted under secs. 384 along with 120B, I. P. C., and the other under secs. 384|114 along with 120B, and no sanction of the Local Government was obtained, *held* that the requirement of sanction could not be evaded by treating the first accused as convicted under sec. 384 only and the second accused as convicted under secs. 384|114 only. The charges requiring sanction and the charges not requiring sanction could not be separated in this way. The convictions must be set aside. But it would be open to the prosecution to proceed afresh against the first accused under section 384, I. P. C., and against the second accused under secs. 384|114, without requiring any sanction—*Nibaran*, 57 Cal. 99, 33 C.W.N. 834 (835, 836), 31 Cr.L.J. 995. Initiating a prosecution under sec. 120B, I. P. C., without the sanction of the authority referred to in sec. 196A, Cr. P. Code, is *ab initio* illegal, and the subsequent addition of charges which do not require such sanction cannot cure the illegality—*Abdul Rahman*, *supra*. If proceedings are taken on a charge of criminal conspiracy punishable under secs. 467 and 471, I. P. Code, without the sanction of the Local Government, and the case proceeds to the stage in the Sessions Court when the opinions of assessors are taken, the whole proceedings from the commitment up to the trial are illegal, and the Sessions Judge cannot pass judgment. The only course is to obtain the sanction of the Local Government, to frame a new complaint, and to recommence the inquiry under Chap. XVIII—*Hari Charan*, 12 Pat. 353, 14 P.L.T. 281, 1933 Cr.C. 755 (757), 34 Cr.L.J. 938, 145 I.C. 368, A.I.R. 1933 Pat. 273.

The proviso lays down that a sanction under this section for prosecution for criminal conspiracy to commit a non-cognizable offence (e.g., fraudulently using as genuine a forged document or dishonestly making a false claim) is not necessary where the Court before which the forged document was used or false claim was made makes a complaint in respect of the offence under sub-section (4) of section 195—*Kali Singh*, 50 Cal. 461, A.I.R. 1924 Cal. 53, 24 Cr.L.J. 949, 75 I.C. 533. But sub-section (4) of sec. 195 relates back to offences specified in clause (c) of that section, and that clause speaks of certain offences committed by a "party to the proceedings." If the offender is not a party to the proceedings, clause (c) and sub-sec. (4) of sec. 195 do not apply, and a sanction of the Local Government is necessary under sec. 196A—*Abdul Rahman*, *supra*; *Nand Lal*, 39 Cr.L.J. 765, 40 P.L.R. 815, 176 I.C. 654, 11 R.L. 211, A.I.R. 1938 Lah. 526.

If the object of the conspiracy is to commit forgery, there can be no prosecution without the sanction of the Local Government. Where, however, the main charge is that of cheating, in which it is not necessary at all to mention forgery as the object

of the conspiracy (the forgery being committed not for his own sake but in order to cheat a person and obtain money from him) the entire charge does not fail in consequence of the elimination of the head of forgery as an object of the conspiracy charged. Where the trial starts for an object of the conspiracy, which is beyond the cognizance of the Court, the omission of one head which is beyond the cognizance of the Court cannot affect the jurisdiction as regards the rest of the charge. The matter would be different, if commitment is made on a charge of committing criminal conspiracy for the purpose of forging documents, and subsequently on discovering that such a charge requires sanction, another object, that of cheating, is substituted—*Bishambhar Nath*, 2 O.W.N. 760, 26 Cr.L.J. 1602 (1604, 1606). If cheating is carried out by means of forgery, it does not follow that the provisions of sec. 196A would apply—*Ibid.* When the object of a criminal conspiracy is to commit a cognizable offence not requiring sanction under this section and the subsidiary object is also to employ all the necessary machinery for the concealment of the said offence, involving commission of non-cognizable offences, sanction under this section is not necessary—*Parti Venkata*, 35 Cr.L.J. 631, A.I.R. 1934 Mad. 88, 1933 M.W.N. 1409, 148 I.C. 281, 39 M.L.W. 91, 66 M.L.J. 193, 1934 Cr.C. 118. The jurisdiction of the Court to take cognizance of an offence of conspiracy under sec. 120B, I. P. C., depends according to the terms of sec. 196A (2), Cr. P. C., upon the object of the conspiracy. If the object is to commit non-cognizable offence, undoubtedly sanction under that section is essential to give jurisdiction to the Court. The object of the conspiracy has to be determined at the initial stage not only by reference to the sections of the penal enactment referred to in the complaint but also upon the facts narrated therein and the evidence tendered before the Magistrate. There is recognizable difference between the object of a conspiracy and the means adopted to realize that object. If they are separable, then, even if the object is sought to be attained by resort to non-cognizable offences, no sanction is necessary. It does not matter if the object is erroneously mixed up with the statement of method of attaining it in the body of the complaint. It is perfectly open to the Magistrate upon the evidence to dissect the facts in order to decide the question of sanction—*Ramchandra Rango Sawkar v. Emp.*, 40 Cr.L.J. 579 (585), 181 I.C. 870, A.I.R. 1939 Bom. 129, 41 Bom.L.R. 98, 12 R.B. 356.

If the sanction is obtained after the arrest of the accused, and after the examination of some prosecution witnesses but before the framing of the charge the requirements of this section are fulfilled. Where proceedings were taken on 14th August in respect of an offence under sec. 9 of the Opium Act, and warrants were issued on 18th August in respect of that offence only, but after the examination of some prosecution witnesses on 25th November, the Excise Superintendent produced an order of Government dated 12th September, and then a charge under sec. 9, Opium Act read with sec. 120B, I. P. Code, was framed on 18th December, *held* that the Magistrate took cognizance in respect of the conspiracy, only when he framed the charge on 18th December, *i.e.* after the date of sanction, and the requirements of sec. 196A, Cr. P. Code were therefore complied with—*Ali Mia*, 54 Cal. 155, 28 Cr.L.J. 466 (467).

The fact that this section has been inserted in the Cr. P. C., shows that the Legislature is anxious that prosecution under sec. 120B, I. P. C., should not be started indiscriminately. It would be violating the spirit underlying this section if a person were allowed to be convicted of an offence under sec. 120B, I. P. C., even though his prosecution under that section is neither sanctioned by the District Magistrate nor was within the contemplation of the officer making the complaint under sec. 476, Cr. P. C.—*Dhikari*, 36 Cr.L.J. 17 (19), 152 I.C. 282, 15 P.L.T. 523, A.I.R. 1934 Pat. 561, 1934 Cr.C. 1215, 13 Pat. 729. But it was with a view to safeguarding citizens against persecution on frivolous charges of criminal conspiracy that sec. 196A, Cr. P. C., was enacted at the same time as sec. 120B, I. P. C., insisting upon the previous approval of Government or of some senior and specially empowered Magistrate before such proceedings can be even initiated. If this safeguard is ignored by Magistrate, they should be suitably admonished. But when a case has been initiated and has ended in

conviction, it is obvious that there never was any innocent person to be protected from persecution. In other words, sec. 196A was designed to safeguard persons from frivolous accusations of criminal conspiracy, not as a loophole of escape for persons committed after full magisterial inquiry on a charge of criminal conspiracy or convicted after full trial of criminal conspiracy—*Venkataramiah*, A.I.R. 1938 Mad 130, 1937 M.W.N. 996, 46 M.L.W. 709, (1937) 2 M.L.J. 862.

When the charge is of criminal conspiracy to commit a cognizable offence which is punishable with death, transportation, or rigorous imprisonment for a term of two years or more, no consent of the Local Government, etc., is necessary—*Ram Das*, 35 Cr.L.J. 1349 (1352), 151 I.C. 442, 1934 A.L.J. 852, A.I.R. 1934 All 61, 1934 Cr.C. 139; *Ramjanam*, A.I.R. 1935 Pat 357, 16 P.L.T. 348, 155 I.C. 866, 36 Cr.L.J. 856; *Mohammad Yakub*, 33 Cr.L.J. 373, 137 I.C. 73, A.I.R. 1932 All 73, 1932 Cr.C. 93, Ind. Rul 1932 All 270.

The offence of being in possession of arms without a license is a cognizable offence and the fact that the sanction of the District Magistrate is necessary to constitute proceedings in respect of a specific offence itself, is no bar to the institution of proceedings in respect of an offence of criminal conspiracy to commit the substantive offence itself—*Maganlal*, 35 Cr.L.J. 1097 (1101), 150 I.C. 623, A.I.R. 1934 Nag 71, 1934 Cr.C. 276.

One cannot compel the prosecution to get charges framed which require sanction—*Chandra Shekhar*, A.I.R. 1935 Pat. 91 (93), following *Abdul Salim*, A.I.R. 1922 Cal. 107, 69 I.C. 145, 49 Cal 573, 26 C.W.N. 680, 34 C.L.J. 279, 23 Cr.L.J. 657. There is no reason why, because the accused might have been charged with an offence for the prosecution of which the sanction of the Government is required, they should not be charged with, and tried for, offences in respect of which no sanction is required—*Abdul Salim*, supra, following *Amrita Lal*, 42 Cal 957 (988), 19 C.W.N. 676.

Where, on examining the complainant, the Magistrate summoned the accused under secs 120B, 193, 182 and 211, I.P.C., examined witnesses, framed charges against the accused under secs. 193/120B, I.P.C., and proposed to draw up a fresh charge against them under sec 193 read with 109, I.P.C., as soon as charges were framed against the accused under sec. 120B read with 193, I.P.C., and the accused presented a petition claiming that as no sanction from Government had been granted in respect of sec. 120B they were entitled to an acquittal, *held* that if the facts disclosed in the evidence show a *prima facie* case only under sec 120B, I.P.C., then clearly the whole proceedings were void *ab initio* having regard to the provisions of sec 195A, Cr. P.C., but if the facts disclosed show a *prima facie* case under sec 109, I.P.C., the proceedings were competent and it made no difference that the Magistrate summoned the accused under the wrong sections. The whole test is not under what sections the accused were summoned but whether the proceedings were competent or not—*Birao Sardar v. Y. C. Ariff*, 26 Cr.L.J. 302, 84 I.C. 446, A.I.R. 1925 Cal. 579.

640A. "Empowered in this behalf by the Local Government":—These words qualify the whole sentence beginning with "a Chief Presidency Magistrate or District Magistrate" and not merely the words "District Magistrate". What the section does is to confer the power on the Local Government, but to enable the Local Government to delegate that power, if they so think fit, to a Chief Presidency Magistrate or to a District Magistrate. If the Local Government do not exercise their power of delegation, then they alone can give consent under the section. The Chief Presidency Magistrate, when not so empowered, has no power to give consent—*Alexander George Gray*, 35 Cr.L.J. 1330 (1331), 151 I.C. 476, 36 Bom.L.R. 320, 1934 Cr.C. 666, A.I.R. 1934 Bom. 183, 58 Bom. 480.

640B. Transfer:—The consent that is necessary for the purpose of cl. (2) of sec. 196A has to be obtained only to ensure that a charge of conspiracy is not launched in respect of a conspiracy which is not of a sufficiently serious nature, or in other words, to save an accused person from unnecessary harassment. To deter-

of the conspiracy (the forgery being committed not for his own sake but in order to cheat a person and obtain money from him) the entire charge does not fail in consequence of the elimination of the head of forgery as an object of the conspiracy charged. Where the trial starts for an object of the conspiracy, which is beyond the cognizance of the Court, the omission of one head which is beyond the cognizance of the Court cannot affect the jurisdiction as regards the rest of the charge. The matter would be different, if commitment is made on a charge of committing criminal conspiracy for the purpose of forging documents, and subsequently on discovering that such a charge requires sanction, another object, that of cheating, is substituted—*Bishambhar Nath*, 2 O.W.N. 760, 26 Cr.L.J. 1602 (1604, 1606). If cheating is carried out by means of forgery, it does not follow that the provisions of sec. 196A would apply—*Ibid.* When the object of a criminal conspiracy is to commit a cognizable offence not requiring sanction under this section and the subsidiary object is also to employ all the necessary machinery for the concealment of the said offence, involving commission of non-cognizable offences, sanction under this section is not necessary—*Parti Venkata*, 35 Cr.L.J. 631, A.I.R. 1934 Mad 88, 1933 M.W.N. 1409, 148 I.C. 281, 39 M.L.W. 91, 66 M.L.J. 193, 1934 Cr.C. 118. The jurisdiction of the Court to take cognizance of an offence of conspiracy under sec. 120B, I. P. C., depends according to the terms of sec. 196A (2), Cr. P. C., upon the object of the conspiracy. If the object is to commit non-cognizable offence, undoubtedly sanction under that section is essential to give jurisdiction to the Court. The object of the conspiracy has to be determined at the initial stage not only by reference to the sections of the penal enactment referred to in the complaint but also upon the facts narrated therein and the evidence tendered before the Magistrate. There is recognizable difference between the object of a conspiracy and the means adopted to realize that object. If they are separable, then, even if the object is sought to be attained by resort to non-cognizable offences, no sanction is necessary. It does not matter if the object is erroneously mixed up with the statement of method of attaining it in the body of the complaint. It is perfectly open to the Magistrate upon the evidence to dissect the facts in order to decide the question of sanction—*Ramchandra Rango Sawkar v. Emp.*, 40 Cr.L.J. 579 (585), 181 I.C. 870, A.I.R. 1939 Bom 129, 41 Bom L.R. 98, 12 R.B. 356.

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640B. Transfer:—The consent that is necessary for the purpose of cl. (2) of sec. 195A has to be obtained only to ensure that a charge of conspiracy is not launched in respect of a conspiracy which is not of a sufficiently serious nature, or in other words, to save an accused person from unnecessary harassment. To deter-

mine whether consent should be given what the Magistrate is to see is not whether allegations made on behalf of the prosecution are true but whether if the allegations are true they would make out a case of such a nature as would require a trial on a charge of conspiracy in the interest of public justice. To hold under such circumstances that the Magistrate, by reason of the fact that he has made the order, has done something which makes it expedient for the ends of justice that the case should not be tried by him, is impossible—*Hiralal*, 35 Cr.L.J. 714, 148 I.C. 558, 6 R.C. 468, A.I.R. 1934 Cal. 391, 1934 Cr.C. 532, 38 C.W.N. 581.

640C. Belated sanction:—When on September 14, the Police put forward a charge upon which the accused were subsequently tried on October 5, and a sanction in due form as required by section 196A was given by the Local Government on October 30, held that this was an unsubstantial technicality which was no ground for interference by the High Court by reason of the non-compliance, strictly speaking, with the provisions of section 196A. The provisions of this section are designed to provide a safeguard against initiation of vexatious prosecution for criminal conspiracies of the kind indicated in the section. The section is certainly not intended to provide a means of escape for persons who have been convicted on charges brought against them, even though those charges relate to the kind of offences indicated in the section. If it can be shown that any one of the accused persons has been prejudiced in his defence by reason of the defect complained of, the matter might be otherwise—*Abdul Rahman*, 36 Cr.L.J. 982 (1986), 156 I.C. 678, 62 Cal. 749, A.I.R. 1935 Cal. 316, 1935 Cr.C. 467; *Ali Mia*, 54 Cal. 155, 28 Cr.L.J. 466 (467); *Venkataramiah*, A.I.R. 1938 Mad. 130, 1937 M.W.N. 996, 46 M.L.W. 709, (1937) 2 M.L.J. 862. But see *Ramjiwan v. Lachmi*, 28 Cr.L.J. 780, 104 I.C. 108, A.I.R. 1927 Nag. 202, 10 N.L.J. 21 and *Jethmal Jeyraj*, 9 Bom. 27 which were cases of offences under the Indian Stamp Act.

When no objection is taken on the ground of sec. 196A, sub-sec. (2), at any stage of the inquiry or trial, the verdict of the jury and a conviction based thereon cannot be held to be illegal merely because the previous consent of the Local Government had not been taken before the prosecution started—*Hanif*, A.I.R. 1932 Cal. 786, 34 Cr.L.J. 56, 140 I.C. 723, 1932 Cr.C. 829.

It is not necessary for the prosecution to obtain the sanction of the Local Government under sec. 7 of the Explosive Substances Act (VI of 1908) while the case is in the stage of an inquiry—*Nathu Ram*, A.I.R. 1934 All. 982, 4 A.W.R. 672, 1934 A.L.J. 1088, 1934 Cr.C. 1302, following *Kallappa*, A.I.R. 1927 Bom. 21, 99 I.C. 37, 28 Cr.L.J. 5, 50 Bom. 695.

640D. Effect of charge without sanction:—Where the trial proceeded almost to a conclusion on the assumption that the charge under sec. 120B|467, I. P. C., had been validly framed, evidence as to conspiracy had been led by the prosecution and been considered by the defence and the charge under sec. 120B|467, I. P. C., was cancelled at the time of argument as it was discovered that no sanction under sec. 196A, Cr. P. C., had been granted, the legal consequence was merely as if the charge under sec. 120B|467, I. P. C., had never been framed. The accused could not be acquitted or convicted of the offence punishable under sec. 120B, I. P. Code. The Public Prosecutor could not withdraw under sec. 494, Cr. P. C., from the prosecution under sec. 120B, I. P. C., because there was no valid prosecution—*Syed Yawar Bakht v. Emp.*, 41 C.W.N. 474 (478), 41 Cr.L.J. 719, 189 I.C. 173.

196B. *In the case of any offence in respect of which the provisions of section 196 or section 196A apply, a District Magistrate or Chief Presidency Magistrate may, notwithstanding anything contained in those sections or in any other part of this Code, order a preliminary investigation by a police-officer not*

Preliminary inquiry in certain cases.

being below the rank of Inspector, in which case such police-officer shall have the powers referred to in section 155, sub-section (3).

This section has been added by sec. 49 of the Criminal Procedure Code Amendment Act (XVIII of 1923).

"This new section is designed to meet the difficulty which arises from the fact that cases under sections 196 and 196A cannot be properly investigated by the Police before complaints are made. Doubts have arisen as to whether investigation can be ordered under section 155 (2) by a Magistrate without his taking cognizance of the case. The new section will provide for preliminary investigation. We recognise that it does not altogether meet the case where the desirability of adding a new charge arises in the Sessions Court. It has been suggested that this difficulty might be met to some extent by substituting the words 'proceed to the trial' for the words 'take cognizance' in section 196 and 196A. But, on the whole, we prefer not to make this change and to leave the sections unaltered"—*Report of the Joint Committee (1922).*

197. (1) When any Judge or any public servant not removable from his office without the sanction of the Government of India or the Local Government, is accused as such judge or public servant of any offence, no Court shall take cognizance of such offence except with the previous sanction of the Government having power to order his removal or of some officer empowered in this behalf by such Government or of some Court or other authority to which such Judge or public servant is subordinate, and whose power to give such sanction has not been limited by such Government.

197. (1) When any person who is a Judge within the meaning of section 19 of the Indian Penal Code, or when any Magistrate, or when any public servant who is not removable from his office save by or with the sanction of a Provincial Government or some higher authority, is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction—

- (a) in the case of a person employed in connection with the affairs of the Federation, of the Governor General exercising his individual judgment; and
- (b) in the case of a person employed in connection with the affairs of a

Province, of the Governor of that Province exercising the individual judgment.

(2) *The Governor General or Governor, as the case may be, exercising his individual judgment, may determine the person by whom, the manner in which, the offence or offences for which, the prosecution of such Judge, Magistrate or public servant is to be conducted, and may specify the Court before which the trial is to be held.*

Power of Government as to prosecution.

(3) *In relation to the period elapsing between the commencement of Part III of the Government of India Act, 1935, and the establishment of the Federation, the references in this section to the Federation and to the Governor General exercising his individual judgment shall be construed as references to the Governor General in Council.*

Change:—The whole of sub-section (1) has been re-drafted by sec. 50 of the Crim. Pro. Code Amendment Act, XVIII of 1923. "It has been pointed out to us that difficulties with regard to section 197 have recently come to light. There are certain public servants who are only removable from office by the Secretary of State, and it is unreasonable that they should obtain no protection under the section. Further, in view of section 2 (2) of the Code, the word "Judge" has to be interpreted according to the definition given in section 19 of the Indian Penal Code, with the result that Magistrates acting in certain capacities under Code, e.g., when holding inquiries, obtained no protection. We have therefore, proposed a re-draft of sub-section (1) of section 197 to meet these difficulties. We have confined the operation of the section to public servants removable by a Local Government or some higher authority and have provided that the sanction required for a prosecution will be the sanction of the Local Government"—*Report of the Joint Committee (1922).*

'While acting... official duty':—These words have been substituted for the words "as such Judge or public servants" occurring in the old section in order to amplify the words and to make the sense clear—*Statement of Objects and Reasons (1914).*

In sub-section (1) the words "Provincial Government" have been substituted for "Local Government" and the words "previous sanction"—

- (a) in the case of a person employed in connection with the affairs of the Federation, of the Governor-General exercising his individual judgment; and
- (b) in the case of a person employed in connection with the affairs of a Province, of the Governor of that Province exercising his individual judgment" for "previous sanction of the Local Government" and in sub-section (2) the words "The Governor-General or Governor, as the case may be, exercising his individual judgment" have been substituted for "Such Government" and sub-section (3) has been added by the Government of India (Adaptation of Indian Laws) Order, 1937.

640E. Object and scope of section:—"The object of this section is to guard against vexatious proceedings against Judges, Magistrates and public servants, and to secure the opinion of superior authority whether it is desirable that there should be a prosecution"—*Woodroffe, (Crim. Pro., p 229).* But it is no part of

British policy to set an official above the common law. If he commutes a common offence, he has no peculiar privilege. But if one of his official acts is alleged to be an offence, the State will not allow him to be prosecuted without its sanction, for the obvious reason that otherwise official action would be beset by private prosecutions. Judges would be charged with defamation, policemen with wrongful restraint, and distrainers with theft—*Kamisetty Raja Rao v Ramaswamy*, 50 Mad 751, 52 M.L.J. 647, 28 Cr.L.J. 539.

If a public servant, purporting to act in the discharge of his official duty, commits an offence in a place outside British India (e.g., Chandernagar), and proceedings are taken under this Code for his prosecution, a sanction of the Local Government under this section would be necessary. But it is doubtful whether the Local Government would give a sanction under this section, as the offence has been committed in a Foreign State. The most convenient course would be to start proceedings either by information laid by the Advocate-General or by an application to the High Court in its Original Jurisdiction for an order to hold an inquiry—*Sasadhar v. Tegart*, 35 C.W.N. 782 (784, 785). The most convenient remedy of the complainants would be to prosecute the offenders in the place (foreign territory) where the offences were committed.—*Ibid.*

It is the status of the accused at the time of the commission of the alleged offence and not his status at the time of the complaint or of the order issuing process which is material for the purpose of this section—*Suganchand v. Seth Naraindas*, A.I.R. 1932 Sind 177, 1932 Cr.C. 792, 34 Cr.L.J. 171, 141 I.C. 530. The protection conferred by this section would be largely illusory if it were open to people to wait until the public servant had ceased to hold that position and then lodge their complaint, for generally there is no question of limitation in criminal proceedings. A public servant who is on the verge of retirement would have no protection whatever. This section, therefore, protects a person who is a public servant at the time of the alleged incident, even if he ceased to be a public servant before the prosecution starts—*S. Y. Patil*, A.I.R. 1937 Nag. 293, 172 I.C. 669. According to the Allahabad High Court this section, however, requires that for the section to apply the accused must be a public servant at both these periods. It is not sufficient that the accused should be a public servant at the time of the offence. The accused must also be a public servant at the time when he is accused, that is at the time when the accusation is made against him either by a complaint or a Police report—*Suraj Narain Chaube v. Emp.* 39 Cr.L.J. 925, 11 L.R. 1938 All. 776, 1938 A.Cr.C. 60, 11 R.A. 201, 177 I.C. 462, 1938 A.L.R. 751, 1938 A.L.J. 649, 1938 A.W.R. (H.C.) 453, A.I.R. 1938 All. 513.

Section 270 of the Government of India Act, 1935—See Note 2A where it has been quoted. There appears to be a fundamental difference between section 270 of the Government of India Act, 1935 and section 197, Cr. P. Code. Section 270 creates a bar to the "institution" of proceedings, that is to say, to the act of a complainant making a complaint or of a police-officer making a report as well as to the act of a Magistrate taking cognizance upon such complaint or report. What is barred by section 197, Cr. P. C., appears to be not the making of a complaint or the submitting of a police report but the act of a Magistrate in taking cognizance of the offence on such complaint or such report or in any other way—*Arjan Singh v. Emp.*, A.I.R. 1939 Lah. 479 (485), 40 Cr.L.J. 65, 184 I.C. 680.

641. Judge:—Section 19 of the Indian Penal Code gives the following definition:—

"The word *Judge* denotes not only every person who is officially designated as a Judge, but also every person who is empowered by law to give, in any legal proceeding, civil or criminal, a definitive judgment, or a judgment which, if confirmed by some other authority, would be definitive; or who is one of a body of persons, which body of persons is empowered by law to give such judgment.

Illustrations:—A Collector exercising jurisdiction under the Tenancy Act; a Magistrate exercising jurisdiction in respect of which he has power to pass sentence,

or to commit for trial; a member of a panchayat who has power to try and determine suits."

A village Magistrate exercising jurisdiction and trying an offender under Regulation IX of 1816 is a Judge within the meaning of this section; but a village Magistrate who is merely preventing an altercation and suppressing a riot (and not trying any offender) is not a Judge—*Kandasami v. Soli Goundan*, 23 Mad. 540. But a Magistrate is now specifically mentioned in the present section. A village Magistrate while entering in his register particulars of a case or complaint filed before him, clearly purports to act as a Judge within the meaning of this section—*Subba Reddi v. Swami Reddi*, 1937 M.W.N. 870. A village Munsiff trying a civil suit and ordering attachment before judgment is acting as a Judge—*Sankaralinga v. Avudai*, 17 Cr.L.J. 394 (Mad.). But in sending his report under sec. 45, Cr. P. C., the Village Munsiff is not acting in his capacity as Magistrate, being there called specifically a Village Headman, nor is he a public servant removable only by or with the sanction of a Local Government—*Pregada Balanagu v. Krosuru Kotayya*, A.I.R. 1937 Mad. 578, 45 M.L.W. 697, 1937 M.W.N. 638, 1937 M.Cr.C. 188, 170 I.C. 481, 38 Cr.L.J. 950. A Magistrate of a Village Panchayet constituted by Madras Act II of 1920 is a Judge—*Ponnusamy*, 42 M.L.J. 139, 23 Cr.L.J. 148. Members of a Village Panchayet Court are judges within the meaning of this section—*Sivaramakrishna v. Seshappa*, 115 I.C. 248, A.I.R. 1929 Mad. 172, 30 Cr.L.J. 396, 52 Mad. 347, 56 M.L.J. 263, 29 M.L.W. 17, 1929 M.W.N. 53; *Lakshmi v. Chinnappa*, 32 Cr.L.J. 969, 133 I.C. 3, A.I.R. 1931 Mad. 492, 1931 Cr.C. 566, 1930 M.W.N. 1109; *Kamla Patel v. Bhagwandas*, 37 Cr.L.J. 294, 160 I.C. 423, 18 N.L.J. 177. The President of a Panchayat Court is also a Judge within the meaning of this section—*Chellaperumal Padayachi v. Velayudha Padayachi*, 1937 M.W.N. 216; *Subbiah v. Ramachariu*, A.I.R. 1939 Mad. 604, 49 M.L.W. 781, 40 Cr.L.J. 853, 184 I.C. 112, (1939) 2 M.L.J. 117.

The amendment of 1923 has widened the scope of the section and now protects the persons referred to in it, not only in respect of offences committed while acting in the particular capacity referred to in the section, but in respect of offence committed while acting, or purporting to act, in the discharge of his official duties also. There can be no doubt that while exercising the functions referred to in Part IV of the Chota Nagpur Encumbered Estates Act (VI of 1876) relating to the settlement of debts, the Manager is a Judge within the meaning of sec. 19, I. P. Code. That being so, sec. 197, Cr. P. C., debars his prosecution on a charge of any of the offences alleged to have been committed by him while acting, or purporting to act, in the discharge of his official duty—*Hemendra Nath Gupta v. Emp.*, 38 Cr.L.J. 94, 165 I.C. 966, A.I.R. 1937 Pat. 160, 17 P.L.T. 932, 3 B.R. 114, 9 R.P. 243.

An Election Officer in removing names from the electoral roll is acting as a Judge within the meaning of sec. 19, I. P. C., and cannot be prosecuted without the sanction of the Local Government under this section—*Hanumantha Rao v. Lakshmajja*, 1937 M.W.N. 740.

A police patel of a village is a Judge within the definition of sec. 19, I. P. C., and therefore comes within the protection afforded to Judges and public servants under this section—*Shankar Sayaji Dalvi*, A.I.R. 1938 Bom. 489, 40 Bom.L.R. 1106, 178 I.C. 682, 40 Cr.L.J. 116.

642. Public servant:—Section 4, sub-section (2) of the Cr. P. C., provides that all words and expressions used in the Cr. P. C., and defined in the I. P. C., but not defined in the Cr. P. C., shall be deemed to have the meaning respectively attributed to them by the I. P. Code. The term "public servant" is not defined in the Cr. P. C., and, therefore, must be deemed to have the same meaning as given in the definition of that term in the I. P. C., (*Vide* section 21, I. P. C.). If, for the purposes of the I. P. C., sec. 59A of the Court of Wards Act (IX of 1879) makes a servant of the Court of Wards a public servant, it would appear to follow that he must also be a public servant within the meaning of the term as used in the Cr. P. Code—*Angelo v. Kandan Manjhi*, 41 Cr.L.J. 221 (223). Any person whether receiving pay

or not, who chooses to take upon himself the duties and responsibilities belonging to the position of a public servant and performs those duties and accepts those responsibilities, and is recognised as filling the position of a public servant, must be regarded as such. A volunteer in Tahsildar's office is a public servant—*Parmeswar*, 8 All 201. So also, a member of the District Board—*Krishna Kant*, 28 O.C. 155, 12 O.L.J. 498, 26 Cr.L.J. 1157; *Rae Bajrang Bahadur*, 9 O.W.N. 875, 1932 Cr.C. 848 (849). The Chairman of a Municipality is a public servant—*Chairman of Municipal Council, Ellore*, 1 Weir 243. The President of a Municipal Committee is a public servant—*U. Maung Gale*, 4 Rang. 128, 27 Cr.L.J. 1088. The President of the Taluka Local Board is a public servant as defined in sec. 21, I. P. C., and sec. 135, Bombay Local Boards Act VI of 1923—*Rudragouda Rachangouda Patel*, 38 Cr.L.J. 654, 168 I.C. 956, 39 Bom.L.R. 70, A.I.R. 1937 Bom. 160, I.L.R. 1937 Bom. 256, 9 R.B. 413. So also a Chairman of a Union Panchayet—*Sk. Abdul Kadir*, 1916 M.W.N. 384, 17 Cr.L.J. 168. So again, a President of a Taluk Board—*Sivasankaram*, 52 Mad. 446, 30 Cr.L.J. 164 (166); *Hidayatullah*, 27 S.L.R. 3, 34 Cr.L.J. 191 (192). The Chairman of a District School Board under the Bombay Presidency Education Act (Bombay IV of 1923) is a public servant—*Nhanesaheb Ahmedsaheb*, 38 Cr.L.J. 16, 165 I.C. 901, A.I.R. 1936 Bom. 453, 38 Bom.L.R. 956, 1936 Cr.C. 1104, I.L.R. 1937 Bom. 78, 9 R.B. 176. A Municipal Commissioner is a public servant—*Bakshi Ram v. Divan*, 1890 P.R. 14; *Kishen v. Girdhari*, A.I.R. 1924 Lah. 310, 23 Cr.L.J. 750; *Jotindra v. Radha*, 36 Cr.L.J. 285, 152 I.C. 1029, 1934 Cr.C. 1193, 15 P.L.T. 507, A.I.R. 1934 Pat. 518; see also illustration to sec. 21, I. P. Code. But a Municipal Secretary is not a public servant; and so, if a Municipal Commissioner acts as the Honorary Secretary of the Municipality, and commits an offence in his capacity as Secretary, no sanction is necessary—*Kishen v. Girdhari*, supra. So also Municipal Engineer—*Jotin v. Radha*, supra. So also clerks of the District Board—*Anwar Ullah*, 35 Cr.L.J. 617, 148 I.C. 218, 1933 A.L.J. 1628, A.I.R. 1934 All. 173, 1934 Cr.C. 229; So also a Karnam—*Erranhi*, A.I.R. 1933 Mad. 270, 34 Cr.L.J. 526, 143 I.C. 102, 1933 Cr.C. 373, 1932 M.W.N. 1075 but he is a public servant when he is acting as the Village Magistrate—*Ibid*. A Receiver appointed by the High Court is not a public servant—*Khim Chand v. Devkaram*, 52 Bom. 898, 30 Cr.L.J. 465, 30 Bom.L.R. 1273, A.I.R. 1928 Bom. 493, 115 I.C. 387; *Lukmanji v. Valibhai*, 35 Cr.L.J. 1403, 151 I.C. 707, 1934 Cr.C. 1038, 36 Bom.L.R. 649, A.I.R. 1934 Bom. 306; *Jnanendra Nath v. Nilmony*, 43 C.W.N. 582, I.L.R. (1939) 1 Cal. 587, A.I.R. 1939 Cal. 701, 41 Cr.L.J. 52, 184 I.C. 603, 12 R.C. 249, distinguishing *Santok Chand v. Emp.*, 46 Cal. 432, 46 I.C. 836, A.I.R. 1919 Cal. 647, 22 C.W.N. 910, 29 Cr.L.J. 820, 28 C.L.J. 115; *Maung Saw Maung v. Ma Me Shwe*, 40 Cr.L.J. 648, 182 I.C. 262, A.I.R. 1939 Rang. 202, 11 R.R. 519, 1939 Rang.L.R. 117; *Nagendra v. Jogendra*, 13 Cr.L.J. 491, 15 I.C. 491. (Absence of leave of the Court which appointed the receiver may not be a bar to jurisdiction, but it is certainly relevant on the question of the propriety or desirability of criminal proceedings when leave was specially asked for and not specifically granted—*Jnanendra Nath v. Nilmony*, supra). A Vatandar Patil is a public servant—*Bhimaji*, 42 Bom. 172 (177). The Chairman of a Co-operative Credit Society is not a public servant—*Shridhar Mahades*, 36 Cr.L.J. 532, 154 I.C. 600, A.I.R. 1935 Bom. 36, 36 Bom.L.R. 1133, 1935 Cr.C. 70.

643. "Not removable from his office, etc.":—The words "not removable from his office" etc., have reference only to the expression "public servant" and not to "Judge." This is now made clear by the wording of the present section. So the sanction of the Government is necessary for the prosecution of any Judge, if a complaint is made against him as Judge, whether he is or is not removable from the office without the sanction of the Government—*Anonymous*, 6 B.H.C.R. App. 21.

The principle is well established that where an authority has a power to sanction the appointment, the persons so appointed cannot be removed without the sanction of that authority. Where, therefore, under the rule a manager of the Court of Wards, whose monthly salary is over Rs. 200, can only be appointed by the Court with the previous sanction of Government, it necessarily follows that he cannot be dismissed

or to commit for trial; a member of a panchayat who has power to try and determine suits."

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A police patel of a village is a Judge within the definition of sec. 19, I. P. C., and therefore comes within the protection afforded to Judges and public servants under this section—*Shankar Sayaji Dalvi*, A.I.R. 1938 Bom. 489, 40 Bom.L.R. 1106, 178 I.C. 682, 40 Cr.L.J. 116.

642. Public servant:—Section 4, sub-section (2) of the Cr. P. C., provides that all words and expressions used in the Cr. P. C., and defined in the I. P. C., but not defined in the Cr. P. C., shall be deemed to have the meaning respectively attributed to them by the I. P. Code. The term "public servant" is not defined in the Cr. P. C., and, therefore, must be deemed to have the same meaning as given in the definition of that term in the I. P. C., (*vide* section 21, I. P. C.). If, for the purposes of the I. P. C., sec. 59A of the Court of Wards Act (IX of 1879) makes a servant of the Court of Wards a public servant, it would appear to follow that he must also be a public servant within the meaning of the term as used in the Cr. P. Code—*Angelo v. Kandan Manjhi*, 41 Cr.L.J. 221 (223). Any person whether receiving pay

or not, who chooses to take upon himself the duties and responsibilities belonging to the position of a public servant and performs those duties and accepts those responsibilities, and is recognised as filling the position of a public servant, must be regarded as such. A volunteer in Tahsildar's office is a public servant—*Parmeshar*, 8 All. 201. So also, a member of the District Board—*Krishna Kant*, 28 O.C. 155, 12 O.L.J. 498, 26 Cr.L.J. 1157; *Rae Bajrang Bahadur*, 9 O.W.N. 875, 1932 Cr.C. 848 (849). The Chairman of a Municipality is a public servant—*Chairman of Municipal Council, Ellore*, 1 Weir 243. The President of a Municipal Committee is a public servant—*U. Maung Gale*, 4 Rang. 128, 27 Cr.L.J. 1088. The President of the Taluka Local Board is a public servant as defined in sec. 21, I. P. C., and sec. 135, Bombay Local Boards Act VI of 1923—*Rudragouda Rachangouda Patel*, 38 Cr.L.J. 654, 168 I.C. 956, 39 Bom L.R. 70, A.I.R. 1937 Bom. 160, I.L.R. 1937 Bom. 256, 9 R.B. 413. So also a Chairman of a Union Panchayet—*Sk. Abdul Kadir*, 1916 M.W.N. 384, 17 Cr.L.J. 168. So again, a President of a Taluk Board—*Sivasankaram*, 52 Mad. 446, 30 Cr.L.J. 164 (166); *Hidayatullah*, 27 S.L.R. 3, 34 Cr.L.J. 191 (192). The Chairman of a District School Board under the Bombay Presidency Education Act (Bombay IV of 1923) is a public servant—*Nhanesaheb Ahmedsaheb*, 38 Cr.L.J. 16, 165 I.C. 901, A.I.R. 1936 Bom. 453, 38 Bom L.R. 956, 1936 Cr.C. 1104, I.L.R. 1937 Bom 78, 9 R.B. 176. A Municipal Commissioner is a public servant—*Bakshi Ram v. Diwan*, 1890 P.R. 14; *Kishen v. Girdhari*, A.I.R. 1924 Lah. 310, 23 Cr.L.J. 750; *Jotindra v. Radha*, 36 Cr.L.J. 285, 152 I.C. 1029, 1934 Cr.C. 1193, 15 P.L.T. 507, A.I.R. 1934 Pat. 548, see also illustration to sec. 21, I. P. Code. But a Municipal Secretary is not a public servant; and so, if a Municipal Commissioner acts as the Honorary Secretary of the Municipality, and commits an offence in his capacity as Secretary, no sanction is necessary—*Kishen v. Girdhari*, supra. So also Municipal Engineer—*Jotin v. Radha*, supra. So also clerks of the District Board—*Anwar Ullah*, 35 Cr.L.J. 617, 148 I.C. 218, 1933 A.L.J. 1628, A.I.R. 1934 All. 173, 1934 Cr.C. 229; So also a Karnam—*Erranhi*, A.I.R. 1933 Mad. 270, 34 Cr.L.J. 526, 143 I.C. 102, 1933 Cr.C. 373, 1932 M.W.N. 1075 but he is a public servant when he is acting as the Village Magistrate—*Ibid*. A Receiver appointed by the High Court is not a public servant—*Khim Chand v. Devkaram*, 52 Bom. 898, 30 Cr.L.J. 465, 30 Bom.L.R. 1273, A.I.R. 1928 Bom. 493, 115 I.C. 387; *Lukmanji v. Valubhai*, 35 Cr.L.J. 1403, 151 I.C. 707, 1934 Cr.C. 1038, 36 Bom L.R. 649, A.I.R. 1934 Bom 306; *Jnanendra Nath v. Nilmony*, 43 C.W.N. 582, I.L.R. (1939) 1 Cal. 587, A.I.R. 1939 Cal. 701, 41 Cr.L.J. 52, 184 I.C. 603, 12 R.C. 249, distinguishing *Santok Chand v. Emp*, 46 Cal. 432, 46 I.C. 836, A.I.R. 1919 Cal. 647, 22 C.W.N. 910, 29 Cr.L.J. 820, 28 CLJ 115; *Maung Saw Maung v. Ma Me Shwe*, 40 Cr.L.J. 648, 182 I.C. 262, A.I.R. 1939 Rang 202, 11 R.R. 519, 1939 Rang L.R. 117; *Nagendra v. Jogendra*, 13 Cr.L.J. 491, 15 I.C. 491. (Absence of leave of the Court which appointed the receiver may not be a bar to jurisdiction, but it is certainly relevant on the question of the propriety or desirability of criminal proceedings when leave was specially asked for and not specifically granted—*Jnanendra Nath v. Nilmony*, supra.) A Vatandar Patil is a public servant—*Bhimaji*, 42 Bom 172 (177). The Chairman of a Co-operative Credit Society is not a public servant—*Shridhar Mahades*, 36 Cr.L.J. 532, 151 I.C. 600, A.I.R. 1935 Bom. 36, 36 Bom L.R. 1133, 1935 Cr.C. 70.

643. "Not removable from his office, etc.":—The words "not removable from his office" etc., have reference only to the expression "public servant" and not to "Judge." This is now made clear by the wording of the present section. So the sanction of the Government is necessary for the prosecution of any Judge, if a complaint is made against him as Judge, whether he is or is not removable from the office without the sanction of the Government—*Anonymous*, 6 B.H.C.R. App. 21

The principle is well established that where an authority has a power to sanction the appointment, the persons so appointed cannot be removed without the sanction of that authority. Where, therefore, under the rule a manager of the Court of Wards, whose monthly salary is over Rs. 200, can only be appointed by the Court with the previous sanction of Government, it necessarily follows that he cannot be dismissed

without the sanction or approval of Government—*Angelo v. Kandan Manjhi*, 41 Cr.L.J. 221 (223).

A Police Patel in Bombay is a public servant removable without the sanction of the Government, and no sanction is necessary in respect of his prosecution—*Bhagwan*, 4 Bom. 357; so also, a Sub-overseer in the Madras Presidency—*Reddy Venkayya*, 12 M.L.T. 251, 13 Cr.L.J. 770, 17 I.C. 402. A Forest Ranger in the C. P. is removable without the sanction of the Local Government—*Kripa Singh*, 23 Cr.L.J. 397 (Nag). But a Revenue Patel is a public servant not removable from his office without the sanction of the Local Government—*Kalu*, A.I.R. 1927 Bom 432, 102 I.C. 342, 29 Bom.L.R. 707, 28 Cr.L.J. 534; so is also an officiating Kulkarni—*Gurushidayya v. Emp.*, A.I.R. 1939 Bom 63, 40 Bom.L.R. 1286, 40 Cr.L.J. 269, 179 I.C. 686, 1 I.R. 1939 Bom. 119, 11 R.B. 287. But a Municipal Chairman Delegate does not fall under this section, because he is removable at the will of the *Chairman*; no sanction is necessary for his prosecution for acts done in his capacity as a Chairman Delegate (though being also Municipal Councillor, he will be protected under this section for acts done in his capacity as Councillor)—*Venkatesalu v. Heeraman*, 22 Weir 225.

The words "not removable . . . Government" cannot be applied to a body corporate such as the Municipal Corporation of Calcutta which cannot be removed or dismissed; and so sanction of the Local Government is necessary for instituting a criminal case against the Municipal Corporation—*Municipal Corporation, Calcutta*, 3 Cal. 758 (761, 762). Those words can be applied only to certain *individual* persons in the service of the Corporation—Ibid.

The elected Chairman of a Municipality is a public servant not removable from his office except with the sanction of the Local Government, under the Bengal Municipal Act—*Ram Narayan v. Parswa Nath*, 56 Cal 227, 32 C.W.N. 1035 (1037); *Kali Prasad Singh v. Srikrishnan*, 39 Cr.L.J. 774, 176 I.C. 725, 4 B.R. 755, 11 R.P. 98, A.I.R. 1938 Pat. 543. So is also a Municipal Commissioner—*Jatindra Nath v. Nadha Krishna*, 15 P.L.T. 507, 152 I.C. 1029, 36 Cr.L.J. 285, A.I.R. 1934 Pat. 548, 1934 Cr.C. 1193; including the Vice-Chairman—*Hiralal Das*, A.I.R. 1939 Cal. 636, 69 C.L.J. 567, (1939) 2 Cal. 321, 40 Cr.L.J. 959, 12 R.C. 219, 184 I.C. 236, but not a Municipal Engineer—*Jatindra Nath v. Radha Krishna*, supra. The functions of the Committee appointed under sec. 21 (1), Bengal Municipal Act (Act XV of 1932 B.C.) are covered by the expression "official duty" in sec. 197, Cr. P. C., and as no person could be appointed to such a Committee unless he was in the first instance a Commissioner, an office from which his removal could be effected only by or with the sanction of the Local Government, sec. 197 operates as a bar to any prosecution of the members of the said Committee for anything done while acting or purporting to act in the discharge of their official duty except with the previous sanction of the Local Government—*Nur Ahmad v. Jogesh*, 36 Cr.L.J. 385 (388), 153 I.C. 657, 39 C.W.N. 20, A.I.R. 1934 Cal. 838, 1934 Cr.C. 1359, 63 Cal. 275. It is impossible to divorce the position of the accused as Vice-Chairman from his position as Commissioner. He was still a Commissioner while acting as Vice-Chairman and, indeed, unless he was a Commissioner, it would be impossible for him to be appointed to that office. In fact however in discharging the duties of that office, the accused was working as a Commissioner. Therefore, even in his capacity as Vice-Chairman, he cannot be prosecuted without the sanction of the Local Government under sec. 197, Cr. P. C.—*Hira Lal Das*, A.I.R. 1939 Cal. 636, 69 C.L.J. 567, 40 Cr.L.J. 959, 184 I.C. 236.

Under Burma Rural Self-Government Act, 1921, members of a District Council are public servants not removable from office save by or with the sanction of the Local Government. But the Secretary of a District Council, though he is a public servant, does not fall within sec. 197, Cr. P. C., as sec. 21 of the said Act shows that the dismissal or removal of a Secretary of a District Council from his post shall be subject to confirmation by the Commissioner—*U Tun Kywe v. The King*, 40 Cr.L.J. 243, 179 I.C. 679, A.I.R. 1939 Rang. 17, 1939 Rang.L.R. 72, 11 R.R. 337.

A member of a non-City Municipality, who is removable by the Commissioner

under sec. 40, U. P. Municipalities Act, cannot be described as a person not removable from his office save by or with the sanction of a Local Government or some higher authority and cannot therefore claim any protection under this section—*Sohan Lal v. Mubarak Ali Khan*, A.I.R. 1939 All. 705, 1939 A.L.J. 610, 41 Cr.L.J. 137, 185 I.C. 224, I.L.R. 1939 All. 868, 1939 A.W.R. (H.C.) 569.

A Deputy Superintendent of Police, who is appointed by the Local Government, comes within the purview of sec. 197 (1), Cr P. C.—*U Ba Hla v Maung Tun Sem*, 28 Cr.L.J. 945, 170 I.C. 516, 10 R.R. 96, A.I.R. 1937 Rang. 312.

The President of Taluka Local Board is a public servant removable from his office by Government and sanction is necessary for his prosecution under this section—*Rudragonda v. Rachan Gonda Patil*, 38 Cr.L.J. 654, 168 I.C. 956, 39 Bom.L.R. 70, A.I.R. 1937 Bom. 160, I.L.R. 1937 Bom. 256, 9 R.B. 413.

The Administrative Officer of a School Board appointed under sec 9 (1) of the Bombay Primary Education Act (IV of 1934 Bom) can be removed from his office without the previous sanction of the Local Government and is not entitled to the benefit of this section—*Shurke*, A.I.R. 1931 Bom. 527, 33 Cr.L.J. 78, 134 I.C. 1240, 1931 Cr.C. 959, 33 Bom.L.R. 1177, Ind Rul 1932 Bom. 24. But the Chairman of a District School Board is a public servant not removable from office save by or with the sanction of Government, so that he cannot be prosecuted for any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty without the previous sanction of the Local Government under sec 197, Cr P. C.—*Nhane-saheb Ahmedsaheb*, 38 Cr.L.J. 16, 165 I.C. 901, A.I.R. 1936 Bom. 453, 38 Bom.L.R. 956, 1936 Cr.C. 1104, I.L.R. 1937 Bom. 78, 9 R.B. 176. A Chairman of a Union Committee who can, under certain circumstances, be removed by the Commissioner, is not a person removable from his office only by the Local Government, and no sanction of the Local Government is necessary for his prosecution—*Mahmad Yasin*, 52 Cal. 431, 29 C.W.N. 650, 26 Cr.L.J. 1178. The Chairman of a Union Panchayet is a public servant not removable from his office without the sanction of the Local Government, even though the power to remove him has been delegated by the Government to the President of the District Board. The delegation of the power of removal means only that the Local Government itself performs that act through the medium of a particular officer (President of the District Board) as the channel through which it is done. It is an ordinary case of *qui facit per alium facit per se*—*Abdul Kadir*, 1916 M.W.N. 384, 17 Cr.L.J. 168 (169), 33 I.C. 648, A.I.R. 1917 Mad. 344; *Narayana*, 1934 M.W.N. 370; *Kyaw Htin v Ah Yoo*, 36 Cr.L.J. 77, 152 I.C. 366, 12 Rang. 530, 1934 Cr.C. 1039, A.I.R. 1934 Rang. 238 (the case of an Excise Sub-Inspector); *Maung Hla Maung*, 36 Cr.L.J. 957, 156 I.C. 574, A.I.R. 1935 Rang. 135, 1935 Cr.C. 627 (the case of a Police-Inspector). But see *Niaz Muhammad v. Emp*, A.I.R. 1939 Sind 148, I.L.R. 1939 Kar. 652, 12 R.S. 18, 40 Cr.L.J. 695, 182 I.C. 513, where it has been laid down that an Inspector of Police is included within the definition of "subordinate ranks" in amended sec 3 (1), Bombay District Police Act, and cannot claim that he is removable from office only with the previous sanction of the Local Government. Where an authority delegates the power to remove a public servant to a subordinate authority, the public servant for the purposes of this section nevertheless continues to be removable by the original authority. Therefore, under the provisions of this section, sanction of the Local Government, which might have delegated its power of removal to a special officer, is necessary to his prosecution—*Newbould*, A.I.R. 1936 Lah. 781 (783), 37 Cr.L.J. 1056, 165 I.C. 61, 1936 Cr.C. 793. Where the power has been delegated the sanction of the Local Government is necessary—*Tun Ya*, 39 Cr.L.J. 614 (617), 175 I.C. 442, A.I.R. 1938 Rang. 181, 1938 Rang.L.R. 104, 10 R.R. 505. But where the delegation of powers was *ultra vires* of the Local Government, which was not the authority empowered to punish (as in the case of a Sub-Inspector of Police in Burma regarding whose appointment the General Police Act confers powers on certain designated officers), the sanction of the Local Government is not required—*Tun Ya*, supra. See also *Pichai v. Balasundara*, 36 Cr.L.J. 1241, 157 I.C. 24, 1935 Cr.C. 619, 53 Mad. 787, A.I.R. 1935 Mad. 442, 41 M.L.W. 558, 1935 M.W.N. 547, 68 M.L.J. 608.

where a police constable and a Sub-Inspector have been held not to be public servants who are not removable from office save by or with the sanction of the Local Government or some higher authority as the former was removable by the District Superintendent of Police and the latter by Deputy Inspector-General, Police. The expression "any public servant who is not removable from his office save by or with the sanction of the Local Government or some higher authority" in this section will not include public servants whom some lower authority has by law or rule or order been empowered to remove—*Magbool Husain v. Emp.*, 41 Cr.L.J. 695 (696), 188 I.C. 846, 1910 O.W.N. 494 (the case of a Sub-Inspector of Police), following *Pichai v. Balasundara*, supra. Where the power to appoint assistant accountants within his district and by implication the power to remove or dismiss them from their office was transferred to the Deputy Commissioner, sanction under this section was not necessary for their prosecution—*Maung Bo Maung*, A.I.R. 1935 Rang. 263, 36 Cr.L.J. 1272, 157 I.C. 1034, 13 Rang. 540, 1935 Cr.C. 964 (F.B.). But the Allahabad High Court is of opinion that where the Local Government has delegated the power of removal of a public servant to some other authority, as for instance, where the Government by a notification has delegated to the Excise Commissioner the power to suspend, remove or dismiss any Excise Inspector, held that the sanction of the Local Government is not necessary for the prosecution of an Excise Inspector—*Jalaluddin*, 48 All. 264, 24 A.L.J. 230, 27 Cr.L.J. 345, 92 I.C. 857, A.I.R. 1926 All. 271 (dissenting from *Abdul Kadir*, supra). In a Lahore case, it has been held that where the accused, a public servant (*viz.*, a Zilladar) was appointed at a time when the powers of appointment and removal of a Zilladar were vested in the Local Government alone, and subsequently the Local Government delegated the power of appointment, suspension and removal of the Zilladars to the Chief Engineer, the prosecution of the Zilladar instituted without the sanction of the Local Government but with the sanction of the Chief Engineer, was illegal. The sanction of the Local Government was necessary under sec. 197—*Lala Khan Chand*, 24 Cr.L.J. 411, A.I.R. 1922 Lah. 337 (338).

In sending his report under sec. 45, Cr. P. C., the Village Munsif is not acting in his capacity as Magistrate, being there called specifically a Village Headman, nor is he a public servant removable only by or with the sanction of a Local Government—*Pregada Balanagu v. Krosuru Kotayya*, 38 Cr.L.J. 950, 170 I.C. 481, 45 M.L.W. 697, A.I.R. 1937 Mad. 578, 1937 M.W.N. 638, 10 R.M. 206.

A distinction should be made between removal from office and ceasing to hold office. Thus, the mere fact that if a President of a Board fails to attend a certain number of meetings he ceases to be a President according to Rules made by Government, does not lead to the conclusion that he is removable from the office without the sanction of the Government. It stands more or less on the same footing as resignation from the office—*Hidayatullah*, 27 S.L.R. 3, 34 Cr.L.J. 191 (194).

644. "Acting in the discharge of official duty":—These words have been substituted for the words "as such Judge or public servant" occurring in the old section; and from a comparison of the old and the new section it seems that the language of the present section has been made simpler. Before the Amendment, the language used in the section was "as such Judge or public servant" and it indicated that the offence charged must involve as one of its elements that it was committed by a person filling that character; and, therefore, where a Magistrate used insulting and defamatory language towards a pleader in the course of a trial, no sanction was held to be necessary for the prosecution of the Magistrate, as the position of his being a Magistrate was not a necessary element in the offence of defamation—*Nando Lal v. N. N. Mitter*, 26 Cal 852, 3 C.W.N. 539. Where a Judge or Magistrate or public servant commits an offence which could be committed by anybody and which entails consequences neither in the way of penalty nor anything else in the least difference from what it would entail if committed by anybody else, sanction is not required under this section for his prosecution. Therefore, where the Chairman of a Union Panchayet was prosecuted for the offence of criminal breach of trust in respect of Union funds,

held that the offence was not one which was committed by him in his capacity of a public servant, and no sanction was necessary for his prosecution—*Abdul Kadir*, 1916 M.W.N. 384, 33 I.C. 648, A.I.R. 1917 Mad. 344, 17 Cr.L.J. 168 (170). But the President of a Panchayet Court cannot be prosecuted without the sanction of the Local Government under this section for criminal breach of trust in respect of a sum of money paid to him as such President—*Chellaperumal Padayachi v. Velayudha Padayachi*, 1937 M.W.N. 216. A public servant guilty of criminal breach of trust was neither "acting nor purporting to act in the discharge of his official duty," for he was acting not as an official but as a thief. No sanction is necessary for his prosecution—*Maung Bo Maung*, 157 I.C. 1034, 1935 Cr.C. 964, 36 Cr.L.J. 1272, 13 Rang 540, 8 R.Rang. 131, A.I.R. 1935 Rang. 263 (265), 13 Rang 540 (F.B.); *Manzur Ali v. Emp.*, A.I.R. 1939 Lah. 1, 179 I.C. 778, 40 Cr.L.J. 252, I.L.R. 1939 Lah. 227, 41 P.L.R. 154; *Gurushidayya*, I.L.R. 1939 Bom. 119, 179 I.C. 686, 11 R.B. 287, 40 Cr.L.J. 269, 40 Bom.L.R. 1286, A.I.R. 1939 Bom. 63. But see *Newbould v. Emp.*, A.I.R. 1936 Lah. 781, 165 I.C. 61, 1936 Cr.C. 793, 37 Cr.L.J. 1056, 38 P.L.R. 1061, 9 R.L. 207; *Dr. Hari Ram Singh v. Emp.*, A.I.R. 1939 F.C. 43, 40 Cr.L.J. 468, 181 I.C. 317; *Arjan Singh v. Emp.*, A.I.R. 1939 Lah. 479. Such is also the case when he is charged with an offence under sec. 411, I.P. Code—*Erranki*, A.I.R. 1933 Mad. 270, 1932 M.W.N. 1075, 1933 Cr.C. 373, 143 I.C. 102, 34 Cr.L.J. 526. Where a Magistrate used abusive language towards another Magistrate while both of them were trying a case as members of a Bench, it was held that no sanction was necessary to prosecute the former, because the offence was not committed as Magistrate, i.e., the fact of his being a Magistrate was not a necessary element of the offence—*Harlekar*, 2 Bom.L.R. 1079. So, also, where the Superintendent of the Gun Carriage Factory in Madras caused timber to be brought within the city of Madras without a license as required by sec. 341 of the Madras Act I of 1884 (City of Madras Municipal Act), held that no sanction was necessary to prosecute him, as the offence was not one which could be committed by a public servant only, nor did it involve as one of its elements that it had been committed by a public servant—*Municipal Commissioners v. Major Bell*, 25 Mad. 15. Where a Union Chairman, while removing an obstruction to a public thoroughfare caused by the complainant, used insulting and abusive language towards the latter, no sanction was held to be necessary for the prosecution of the Chairman, as it could not be said to be part of the function of a Union Chairman to use abusive language in a public street—*Abdul Rahman*, 4 L.W. 556, 17 Cr.L.J. 462. A Magistrate or a judicial officer who was holding a trial could not be said to be acting in a judicial capacity, if he abused or defamed a witness or a legal practitioner before him—*Baishnab Charan v. Sukhomoy*, 25 C.W.N. 957, 22 Cr.L.J. 585.

These cases, though correctly decided under the old Codes, would be of no authority now, as the language of the present section materially differs from the language of the old law. Under the present section it will not be necessary to decide whether the fact of the accused being a Judge or a public servant was a necessary element in the offence or whether the offence was one which could not have been equally committed by a private person. These nice questions would no longer arise; if it is found that the Judge, Magistrate or public servant has committed an act at a time when he was doing an official duty, this will be sufficient to attract the provisions of this section. In other words, the Legislature has now given a greater protection to the officers concerned than it did under the old section. This view has been endorsed by the Madras High Court in *Gangaraju v. Venki*, 52 Mad. 602, 30 Cr.L.J. 864 (865), 118 I.C. 102, A.I.R. 1929 Mad. 659, 30 M.L.W. 116, 57 M.L.J. 31, 1929 M.W.N. 787, Ind. Rul. 1927 Mad. 742, followed by the Sind Court in *Hidayatullah*, 27 S.L.R. 3, 34 Cr.L.J. 191 (195); *Harumal v. Haji Imambux*, 27 S.L.R. 36, 1933 Cr.C. 529; *Abdul Hadi v. Mishra*, 36 Cr.L.J. 1092 (1093), 157 I.C. 120, A.I.R. 1935 Nag. 52, 18 N.L.J. 28, 1935 Cr.C. 270. This is also the view of Sir J. G. Woodroffe (Criminal Procedure, p. 229). The policy of the Legislature is to afford a reasonable protection to the public servants in the discharge of their official function and this policy cannot be defeated by having resort to the view that "At the time of committing the offence the public servant

cannot be said to be discharging public duty—*Kali Prasad Singh v. Sirikrishun*, 39 Cr.L.J. 774, 176 I.C. 725, 4 B.R. 755, 11 R.P. 98, A.I.R. 1938 Pat. 543.

This section has been completely redrafted. The Legislature has now given a greater protection to the officer concerned than it did under the old section. *Ex-hypothesi* the officer concerned should be accused of having committed an offence and the offence is obviously a wrongful act which must *prima facie* be beyond his rights and duties and, therefore, if the safeguard of a sanction is not available to the officer then the protection offered by this section and the wisdom underlying the protection would vanish. All that the Court should see is whether the officer concerned has been accused of having committed the offence complained of when he was acting or purporting to act in the discharge of his official duty. Where the Magistrate was acting or at least purporting to act in the discharge of his official duty and used insulting language to the complainant who was in the witness-box, a sanction for his prosecution was necessary under this section—*Sukhdeo*, 36 Cr.L.J. 331, 153 I.C. 403, A.I.R. 1934 All. 978, 1934 Cr.C. 1302, 57 All. 385. Sanction under this section is also necessary to prosecute a Deputy Magistrate who was engaged in realising taxes, had threatened the defaulters and immediately turned round and, engaging himself with the complainant, took him to task for being near him in a particular manner—*Ram Singh v. Rizvi*, 36 Cr.L.J. 650, 155 I.C. 126, A.I.R. 1935 Pat. 52, 15 P.L.T. 775, 1935 Cr.C. 83, 14 Pat. 299. See also *Mukti Narayan v. Emp*, A.I.R. 1940 Pat. 97 (101), 1939 P.W.N. 871, 20 P.L.T. 947, 41 Cr.L.J. 349, 186 I.C. 627.

But in some other Madras cases it has been held that this section does not apply to any and every offence committed by a public servant while he is in office; the 'acting' refers to the specific action which comprises the offence. An offence arising out of abuse of official position by an act not purporting to be official, does not necessitate sanction under sec. 197. And so, a complaint against the Chairman of a Municipal Council of having threatened a voter with injury to his property with intent to induce such voter to vote for any candidate or to abstain from voting, is not one in respect of which sanction is necessary under sec. 197, in as much as the act complained of is not committed in the discharge of his official duty, although the incident of his official position might have given him the opportunity to do it—*Kamisetty Rama Rao v. Ramaswamy*, 50 Mad. 754, 52 M.L.J. 647, 28 Cr.L.J. 539, 102 I.C. 347, 25 M.L.W. 608, 1927 M.W.N. 423, 38 M.L.T. 338, A.I.R. 1927 Mad. 566 (following 25 Mad. 15 and 1916 M.W.N. 384 cited above); *Nune Panakalu v. Ravulu*, 52 Mad. 695, 30 Cr.L.J. 191 (194), 113 I.C. 625, A.I.R. 1928 Mad. 1158, 57 M.L.J. 331, 1928 M.W.N. 801. The phrase "while acting or purporting to act in the discharge of his official duty" means "doing or purporting to do the sort of act which the law or rules framed under the law allow him to do by virtue of his office." It is only in respect of acts done under colour of his office that a Village Munsif is entitled to and is given protection under the section. His official duty does not permit him to do anything of the nature of causing hurt or applying torture to persons confined by him lawfully or under pretext of law and sanction is not necessary for his prosecution in such a case—*Ganapathy Goundan*, 33 Cr.L.J. 557, 138 I.C. 133, A.I.R. 1932 Mad. 214, 35 M.L.W. 61, 1932 M.W.N. 65, 62 M.L.J. 223, 1932 Cr.C. 156, Ind. Rul. 1932 Mad. 518. If a public servant is actually engaged in the discharge of his duties, or is purporting or pretending to be so engaged, and commits an offence, the sanction of the Local Government is clearly required before a Court can take cognizance thereof. It is not enough for a public servant to be in an official position, which he may abuse, in order to bring him under the section: he must be purporting or pretending to act in pursuance of his official duties. To say that a member of a District Council is acting in purported discharge of his duties when he accepts a bribe in order to influence his decision at a meeting of that body is to display the gravest misapprehension of what those duties could possibly be. It is an independent act committed by one whose position gives him the opportunity to commit it; but it is in no way bound up with the performance of his duties. No sanction is, therefore, necessary for prosecuting him for acceptance

of the bribe—*U Tun Kywe v. The King*, 40 Cr.L.J. 243, 179 I.C. 679, AIR 1939 Rang 17, 1939 Rang.L.R. 72, 11 R.R. 337. Where the charge is taking illegal gratification for the purpose of doing something other than the duty or, in other words, the allegation is that the accused persons have turned their backs on their duty and agreed to keep their backs turned on their duty for an illegal gratification, it cannot be said that they are accused of an offence alleged to have been committed by them while acting or purporting to act in the discharge of their official duties. Sanction under this section is not necessary in such a case—*Khurshed Ahmed v. Amanulla*, 44 C.W.N. 735, AIR. 1940 Cal 405, 71 C.L.J. 475. The Calcutta High Court also holds that in order to make section 197 applicable it is essential that the act constituting the alleged offence should have itself taken place as an official act, or at least under the cloak of what purported to be an official act, i.e., something in the nature of an official character should have attached to the act itself; it is not enough that his capacity of a public servant put him in a position to commit the offence. Therefore, where certain moneys were paid to a Deputy Collector as *selami* for certain *khas mahal* lands, but no settlement was given, and the Deputy Collector misappropriated the moneys, held that this section did not apply—*Amanat*, 33 C.W.N. 1058 (1060), 1929 Cr.C. 360, AIR. 1929 Cal. 724, 122 I.C. 627, 31 Cr.L.J. 430, Ind Rul. 1930 Cal 259. In these cases it has been remarked that the Amendment has not made any change in the policy of the Code nor given any great protection to the public servants, but has simply altered the language to make the sense clear, which was formerly subject to misinterpretation. This view has been recently followed by the Bombay High Court. Thus, a liquidator who misappropriates money coming into his custody as liquidator cannot be said to be acting or purporting to act in the discharge of his official duty—*Gulabmiya*, 32 Bom.L.R. 1134, 32 Cr.L.J. 281 (283), 52 Bom 832, AIR 1930 Bom. 487, 1930 Cr.C. 1023. Where an official Kulkarni collected money on account of land revenue and, instead of sending it to the treasury, used it for his own purposes, sanction of Government was not necessary for his prosecution—*Gurushidayya v. Emp.*, AIR. 1939 Bom 63, 40 Bom.L.R. 1286, 40 Cr.L.J. 269, 179 I.C. 686, distinguishing *Kalu*, AIR 1927 Bom 432, 102 I.C. 342, 28 Cr.L.J. 534, 29 Bom.L.R. 707 and *Rudragonda Rachangonda Patil*, AIR 1937 Bom 160, 168 I.C. 956, 38 Cr.L.J. 654, 11 R. 1937 Bom 256, 39 Bom.L.R. 70 where, in addition to the offence of embezzlement, the accused purported to have done some thing in his official capacity which involved him in the commission of other offences. So also, acts of force, abuse and intimidation committed by police patels in collecting subscriptions authorised by Government are not acts done in the discharge of official duty—*Narayana Janu*, 32 Bom.L.R. 1493, 32 Cr.L.J. 575 (576), 130 I.C. 580, AIR 1931 Bom. 192, Ind Rul 1931 Bom 260, 1931 Cr.C. 225. Where a Kulkarni and Revenue patel forcibly removed an alleged encroachment without making any report to their superior officers for orders for removal of the encroachment, and assaulted the persons who had encroached, held that such abuse of official position by public servants could not be said to be acts done in the discharge of their official duties, and no sanction was necessary—*Hanmant*, 31 Bom.L.R. 789, 31 Cr.L.J. 353 (356), AIR 1929 Bom. 375, 122 I.C. 118, 1929 Cr.C. 322, Ind Rul 1930 Bom 118. Cf *Narayan v. Yeshwant*, 52 Bom 832, 30 Cr.L.J. 278 (F.B.).

According to Nagpur High Court sec 197 applies to acts committed by a public officer although these acts were not part of his public duty. If he committed the act under the cloak of his official position, then he is protected. To hold otherwise would be to narrow down the protection almost to vanishing point—*S. Y. Patil*, AIR. 1937 Nag 293, 172 I.C. 669.

Thus the reported decisions on the application of this section are not by any means uniform. In this connection Varadachariar, J., of the Federal Court observes: "It does not seem to me necessary to review in detail the decisions given under sec. 197 of the Criminal Procedure Code, which may roughly be classified as falling into three groups, so far as they attempted to state something in the nature of a test. In one group of cases, it is insisted that there must be something in the nature of the act complained

of that attaches it to the official character of the person doing it: Cf. *In re Sheikh Abdul Kadir Sahib*, 33 I.C. 648, A.I.R. 1917 Mad. 344, (1916) 1 M.W.N. 384, 17 Cr.L.J. 168; *Raja Rao v Ramaswamy*, 50 Mad 754, 102 I.C. 347, A.I.R. 1927 Mad. 566, 28 Cr.L.J. 539; *Amanat Ali v. Emp.*, A.I.R. 1929 Cal. 724, 122 I.C. 627, 1929 Cr.C. 360, 33 C.W.N. 1058, Ind. Rul. 1930 Cal. 259, 31 Cr.L.J. 430; and *Gurushiddaya*, A.I.R. 1939 Bom 63, 179 I.C. 686, 40 Bom.L.R. 1286, 11 R.B. 257, 40 Cr.L.J. 269. In another group, more stress has been laid on the circumstance that the official character or status of the accused gave him the opportunity to commit the offence. It seems to me that the first is the correct view. In the third group of cases, stress is laid almost exclusively on the fact that it was *at a time when* the accused was engaged in his official duty that the alleged offence was said to have been committed (see *Jujjavarupu Gangaraju v. Kandiboyina Venki*, 52 Mad. 602 (605), 118 I.C. 102, A.I.R. 1929 Mad. 659, 30 Cr.L.J. 864, 57 M.L.J. 31, Ind Rul. 1929 Mad. 742, 1929 M.W.N. 787, 30 M.L.W. 116), quoting from Mitra's Commentary on the Criminal Procedure Code. The use of the expression "while acting", etc., in section 197 of the Criminal Procedure Code (particularly its introduction by way of amendment in 1923) has been held to lend support to this view. While I do not wish to ignore the significance of the time factor, it does not seem to me right to make it the test. To take an illustration suggested in the course of the argument, if a medical officer, while on duty in the hospital, is alleged to have committed rape on one of the patients or to have stolen a jewel from the patient's person, it is difficult to believe that it was the intention of the Legislature that he could not be prosecuted for such offences except with the previous sanction of the Local Government"—*Dr. Hari Ram Singh v. Emp.*, 40 Cr.L.J. 468 (481), A.I.R. 1939 F.C. 43 (56), 1939 M.W.N. 497, 181 I.C. 317, 1939 O.L.R. 366, 1939 P.W.N. 429, 1939 M.Cr.C. 148, 50 M.L.W. 95, 20 P.L.T. 539, (1939) 2 M.L.J. Sup. 23, 41 P.L.R. 680, C.W.N. 1939 F.C. 50.

A Sub-Magistrate took small police force with him for the purpose of preventing a breach of the peace which was apprehended. What he did or is said to have done after reaching the place where the breach of the peace was feared, was done in his official capacity as a Magistrate and in the performance of what he considered to be his duty as a Magistrate. Even if he exceeded his powers and even if he thereby committed any offence, no complaint in respect of any such offence could be entertained by any Court without the sanction of the Local Government—*Rajagopala v. Palaniswami*, A.I.R. 1935 Mad 319, 37 Cr.L.J. 154, 159 I.C. 692, 68 M.L.J. 526, 41 M.L.W. 668, 1935 Cr.C. 382, 1935 M.W.N. 590. Where a village Magistrate uses his authority and position as a public servant to constrain a person to give a bribe, sanction is necessary for his prosecution—*Mangapathi Naidu*, 2 Weir 221. But see *U Tun Kywe v The King*, supra. Where it was part of the duty of an Excise-Sub-Inspector, who could only be appointed and dismissed by the Local Government, to sign certificates in respect of goods imported in bond into Afghanistan and he signed the certificates knowing that the goods to which they referred had never been so imported and was enabled to do this not only by his official position but it was essential to the success of the alleged conspiracy that he should purport to do so in his official capacity and that he should lead the Treasury Officer to believe that he had done so, he purported to act in discharge of his official duty in signing certificates in the manner alleged by the prosecution and could not be prosecuted for doing so without the sanction of the Local Government—*Fazal Rahman*, 38 Cr.L.J. 1042 (1046), 170 I.C. 772, A.I.R. 1937 Pesh. 52, 10 R.Pesh. 23. Where a Judge used defamatory language to a witness during the trial of a suit, a complaint against the Judge could not be entertained without a sanction under this section, as the Judge was then acting in his official capacity—*Ghulam Muhammad*, 9 Mad. 430. It is only where offences are committed by a Judge that the necessity for protection comes in and the protection is limited to cases where the offences are committed while the Judge purports to act in his official capacity though undoubtedly he has outstepped the limits of his duties. Where, therefore, the President of a Panchayat Court, on objection to dictation of judgment to him

by his clerk raised by the complainant in the case before him, is said to have got up from his seat abusing the complainant and slapped him on the cheek twice and, on his protest, unlaced his shoe, took it up in his hand and raised it saying "I will beat you with my shoe" Held that these are acts which must be deemed to have been done when he purported to act in discharge of his official duties, though it is not part of his official duties to abuse or assault, that the circumstances clearly show that throughout the President was acting as a Judge and that therefore the protection which is meant to be given to persons in his position must be available to him—*Subbiah v Ramachariu*, AIR 1939 Mad 604, 49 M.L.W. 781, 40 Cr L.J. 853, 184 IC 112, 1939 M.W.N. 741, (1939) 2 MLJ 117, 12 RM 412 Where the Administrator-General of Bengal was appointed administrator to the estate of a deceased person, and was charged with an offence under the Calcutta Municipal Act for not removing the privy on certain premises belonging to that estate, held that the offence was committed in his private capacity as administrator to the estate of a private person and not in his public capacity as Administrator-General, and no sanction was necessary for his prosecution—*Corporation of Calcutta v. Administrator-General*, 30 Cal 927. If a Magistrate or a Judicial officer, in order to examine a witness, detains him until the time of his re-examination comes or until he makes inquiries as to the failure of the witness to appear before him, his acts are purely judicial, and if any offence is committed by the Magistrate exceeding his powers in doing those acts, it is necessary that there should be a sanction for his prosecution—*Baishnab Charan v Sukhomoy*, 25 CWN 957, 22 Cr L.J. 585. These cases though decided under the old law would still hold good.

The question whether a person committed an act while acting or purporting to act in the discharge of his official duty, is a question of fact Where it was alleged that a member of a Municipal Committee and a Sub-committee, by exercising undue influence on a sub-overseer, stopped him from purchasing bricks of a certain person and compelled him to give his assent to the purchase of bricks from the accused himself, but there was no allegation in the complaint that the accused obtained this advantage to himself, acting or purporting to act as a member of the Municipal Committee, and in fact the suggestion in the complaint was that taking advantage of his position he went *outside* his official duty altogether to obtain the contract himself, held that the sanction of the Local Government was not necessary for his prosecution The case would have been otherwise if the accused in obtaining the contract held himself out to be acting as a member of the Municipal Committee or Sub-committee—*Md Ismail*, 8 Lah 647, 29 Cr L.J. 511 (512), 109 IC 239, AIR 1928 Lah. 72, 29 PLR 69 If an officer conducting an auction sale himself purchases a thing in the name of his servant for his own benefit, it is an act done by him in the discharge of his official duty—*Krishna Kana*, 28 OC 155, 26 Cr L.J. 1157. Where the President of a Municipal Committee received brokerage or commission on goods ordered by the Municipality, held that he could not be prosecuted for that offence without the sanction of the Local Government, as he was acting in the discharge of his duty as public servant—*U. Maung Gale*, 4 Rang 128, 27 Cr L.J. 1088, AIR. 1926 Rang. 171, 97 IC. 64. If a *Mukhtiarkar*, whose duty it is to keep the Government building and office in a sanitary condition, keeps the office and compound in an insanitary condition, he is acting or purporting to act in the discharge of his official duty; and sanction of the Commissioner is necessary for his prosecution under sec. 131, Bombay District Municipal Act—*Karachi Municipality v. Mukhtiarkar*, 24 SLR. 385, 31 Cr L.J. 597 (598). A member of the District Board presenting a petition against a candidate for the chairmanship of the Board, the petition containing some damaging imputations against the character of the candidate, is not acting in the discharge of his official duty as a member of the Board—*Rae Bajrang*, AIR. 1932 Oudh 308, 34 Cr L.J. 253, 141 IC. 819, 9 O.W.N. 875, 1932 Cr C. 848 (851). No sanction is necessary for prosecuting a member of the Nagpur Municipal Committee for having taken a contract from the Committee in partnership with others in violation of law—*Dulloomiya v Tularam*, AIR 1932 Nag. 173, 28 N.L.R. 218, 1932 Cr.C. 908, 34 Cr L.J. 66, 140 IC. 431; *Hazarimal v. Emp.*, AIR. 1910 Nag. 81 (82), 1939 N.L.J. 567, I.L.R. 1940 Nag. 133,

Sanction is necessary under this section for prosecution of an Executive Engineer for words uttered by him in reply to a request to provide with a more liberal supply of water, inasmuch as those words could not have been uttered except in his official capacity—*Harumal v. Imambux*, 34 Cr.L.J. 819, 144 I.C. 477, 27 S.L.R. 36, A.I.R. 1933 Sind 165, 1933 Cr.C. 529.

Where a village Magistrate prepared a false record (in order to provide evidence for use in future) to the effect that a certain person was convicted of theft and sentenced by him to detention for 2 hours, where, as a matter of fact, such person was never convicted or sentenced for any such offence, and that person thereupon made a complaint for the prosecution of the village Magistrate for making the false record, it was held that as the village Magistrate was not bound to make a record, he was not acting "as a Judge" when he made the record; the act was merely *purported* to be done by him as Judge, and no sanction was, therefore, necessary—*Palaniandy v. Arunachellam*, 32 Mad. 255. But the case would now fall under the present section by reason of the words "*purporting to act*" occurring in the section. These words would include not only the cases where the official has jurisdiction to take cognizance of a matter and in professedly exercising that jurisdiction commits an offence or acts *ultra vires*, but also cases where the initial jurisdiction is wanting and a jurisdiction is assumed by an official who in such assumed capacity acts to the prejudice of a person. See *Subbia Pillai*, 1920 M.W.N. 7, 21 Cr.L.J. 223, in which the correct view of the law was taken, though it was decided under the old section. See the recent case of *Sivaramakrishna v. Seshappa*, 52 Mad. 347, 30 Cr.L.J. 369 (399), 115 I.C. 248, A.I.R. 1929 Mad 172, 56 M.L.J. 263, 29 M.L.W. 17, 1929 M.W.N. 53, Ind Rul. 1929 Mad. 408, in which it is laid down that fabrication by a Judge of the records of a suit is an offence committed by him while acting or purporting to act in his official duty.

The accused who was a Sub-divisional Officer of the Public Works Department went to supervise the work which was done by the complainant on a road. The accused got into a boat and, finding that the western bank had collapsed, made certain remarks and gave to the complainant two blows on the left knee. Held that although he had gone to discharge some official duty in connection with earth works, he was not still purporting to act in the discharge of that duty when he got on the boat, lost his temper and assaulted the complainant, that it was no part of the official duty to beat the complainant and that no sanction was necessary in this case for prosecuting him under sec. 323, I. P. Code—*Ganga Prasad v. Brindaban*, A.I.R. 1935 Cal 176, 39 C.W.N. 288, 37 Cr.L.J. 103, 159 I.C. 421.

To say that a public officer when giving evidence in a Court purports to be acting in the discharge of his official duty, would be straining the language used. In giving evidence he does not perform any official duty in connection with his department. He gives evidence because he receives a summons to do so and he is obliged to obey the summons, even though such obedience entails actual neglect of his official duties. No sanction under this section is, therefore, necessary for his prosecution for perjury alleged to have been committed in the course of such evidence—*Supdt. & Rembr., L. A. Bengal v. Jadu*, 44 C.W.N. 596 (597), A.I.R. 1940 Cal. 274, 41 Cr.L.J. 659, 188 I.C. 681, I.L.R. (1940) 1 Cal 590.

Where the allegation is that the Manager of a Court of Wards, whilst acting as agent of the landlord, made illegal demands and thereby committed an offence under sec. 63 of the Chota Nagpur Tenancy Act (VI of 1908), he is accused of an offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty and the accusation is precisely the one contemplated in this section. That being so, previous sanction of the Government is necessary before the Magistrate can take cognizance of the offence—*Angelo v. Kandan Manjhi*, 41 Cr.L.J. 221 (225).

A Government officer, e.g., a Tahsildar, who is appointed by the Chairman of a Municipal Council as a Polling Officer does not, while he is acting as a Polling Officer, act in the discharge of an official duty as Tahsildar. No sanction is necessary for his

prosecution for an offence committed by him while acting as a Polling Officer—*Jagannadhasuami v. Manikyam*, 51 Mad 259, 28 Cr.L.J. 1038 (1039).

See also Note 2A.

645. "Taking cognizance":—This section prohibits *taking cognizance* of an offence committed by the Judge or public servant in his public capacity, without a sanction. But the preliminary examination of the complainant is not "taking cognizance" and, therefore, such examination is not invalid in the absence of sanction—*Narayan-sami, Petitioner*, 7 M.H.C.R. 182 (187); *Satya Charan v. Chairman*, 3 C.W.N. 17 (18). But summoning the accused or taking any evidence against him amounts to taking cognizance and this should not be done until the necessary sanction has been obtained—*Parsham*, 7 B.H.C.R. 61. So also, recording the statement of the complainant and forwarding the same to a subordinate Magistrate for inquiry amounts to taking cognizance; and this cannot be done without sanction—*Bhagurath v. Ali Ahmad*, 8 O.W.N. 157, 32 Cr.L.J. 991 (992). The Magistrate examined the complainant in verification of the complaint and issued warrants against the two accused, one of whom took an objection that the proceedings were illegal for want of proper sanction. The Magistrate then proceeded to obtain the necessary sanction from the Local Government and in due course it was obtained. Then the case was duly transferred to a First Class Magistrate who issued fresh warrants, proceeded to inquire into the case, recorded evidence and committed it to the Sessions Court where it was tried by the Additional Sessions Judge. Held that to satisfy the formal requirements of the law, the First Class Magistrate before recommending the proceedings should have again examined the complainant and verified his complaint instead of merely taking on record the complaint verified by his predecessor but this cannot be regarded as anything but a purely technical irregularity which does not vitiate the proceeding—*Desaibhai Khushalbai*, A.I.R. 1938 Bom. 50 (53), 39 Bom.L.R. 1056.

There can be no question that a preliminary enquiry under sec. 476, Cr. P. C., can be held without the sanction of the Local Government for it does not entail taking cognizance of any offence, and if the enquiry is held before the Local Government is approached, the Local Government will be in a much better position to be able to decide what action to take under sec. 197, Cr. P. Code—*U Ba Hla v. Maung Tun Sein*, 38 Cr.L.J. 945 (947), 170 I.C. 516, 10 R.R. 96, A.I.R. 1937 Rang. 312.

See also Notes 2A and 647.

The question whether a sanction is necessary under this section must be determined with reference to the allegations in the complaint—*Ganga Prasad v. Brindaban*, A.I.R. 1935 Cal. 176, 39 C.W.N. 288. See also Note 2A.

646. Sanction:—*Who can give sanction* :—Under the previous law (*i.e.* before the Amendment of 1923), sanction could be given by the Government or by the officers empowered by the Local Government, or by the Court or the authority to which the Judge or public servant was subordinate. Thus, sanction for prosecution of a Tahsildar could be given by the District Magistrate—*Indar Singh*, 1919 P.R. 4. The President of the Taluk Board could give sanction for the prosecution of the Chairman of a Union Panchayet—*Abdul Kadir*, 1916 M.W.N. 384, 17 Cr.L.J. 168 (171). The Inspector-General of Registration could sanction the prosecution of a Sub-Registrar—*Profulla*, 30 Cal. 905 (908). The Executive Engineer could give sanction for prosecution of an overseer—*Narayan, Ratanlal* 32. These cases are no longer of any authority. Under the present law, sanction can be given only by the Local Government. Under the old law the Local Government could empower an officer (*e.g.* the District Magistrate or Additional District Magistrate), to give sanction. The present section, however, contemplates no such delegation.

Offence must be specified in sanction :—The sanction must be granted with reference to some specific offence, and the authority empowered to grant sanction cannot delegate to another the task of determining which offence the sanction should relate to. Thus, an order passed by the Board of Revenue sanctioning the prosecution of a Deputy Tahsildar for "bribery or other charges as the District Magistrate thinks likely to stand

investigation by a Criminal Court," was held to be invalid because the order ought to have specified what other offences the accused should be charged with, and to leave this matter to the District Magistrate means a delegation of power not intended by the Legislature—*Savariet*, 16 Mad. 468, 3 M.L.J. 227, 2 Weir 220. But where the order granted sanction for an "offence under sec. 161, I. P. C., or any other section of the Code that may be found applicable with respect to the offence briefly described in the schedules hereto annexed," it was held that the order was no delegation, because the order granting sanction had specified the acts committed by the accused, and had also specified the offence and the section of the I. P. C., and it merely left it open to the Court to convict the accused under any other section if in the opinion of the Court some other section of the I. P. C., was more relevant than sec. 161—*Girdhari Lal*, 146 P.L.R. 1911, 12 Cr.L.J. 217, 10 I.C. 156 (159) (distinguishing 16 Mad. 468). Where the sanction did not designate the offence with which the accused was to be charged, but sufficiently set out the facts constituting the offences, held that the sanction was not invalid—*Abdul Khadir*, 1916 M.W.N. 384, 17 Cr.L.J. 168 (172). Where the preamble to the Government resolution in which the sanction is given sets out the whole of the facts, sanction is given for an offence punishable under sec. 477, I. P. C., or such other section or sections of the Code as may be applicable to the facts of the case and the accused is prosecuted under that section and no other section, the sanction is valid—*Desaibhai Khushalbhai*, A.I.R. 1938 Bom. 50 (53), 39 Bom.L.R. 1056. See also *Lakshman Sakharam*, 2 Bom. 481.

Sanction for abetment :—Where a sanction has been granted to prosecute a person for a substantive offence, no fresh sanction is necessary to prosecute him for abetment of that offence, when the conviction for abetment is based on the same facts as those on which the charge for the substantive offence is founded—*Profulla*, 30 Cal 905 (908).

Form of sanction :—The Code does not prescribe any particular form of sanction under this section—*Kalagava*, 27 Mad. 54. Non-specification of the place in which and the occasion on which the offence was committed does not affect the validity of the sanction—*Kalagava*, 27 Mad. 54 (58). The order granting sanction need not specify the offence with the same precision as is necessary in a charge—*Girwardhari Lal*, 13 C.W.N. 1062 (1065); *Jehangir*, 29 Bom.L.R. 996, 28 Cr.L.J. 1012 (1014), A.I.R. 1927 Bom. 501, 106 I.C. 100, 8 A.I.Cr.R. 324. Thus, where the *Kulkarni* and the *Patel* of a village were charged with cheating inasmuch as they conspired to levy extra amounts of money from three persons who come to pay the land assessment, and the sanction was given for prosecution for 'cheating or for such other offence with which it may be necessary to prosecute them in connection with obtaining money from the ryots,' it was held that the sanction was not invalid for vagueness, inasmuch as it had sufficiently designated the offence or offences which might be established in connection with obtaining money from ryots—*Madhav*, 43 Bom. 147, A.I.R. 1918 Bom. 117, 48 I.C. 871, 20 Bom.L.R. 607, 20 Cr.L.J. 71. Where the offence is otherwise properly described and specified, the sanction is not bad merely because a mistake has been committed in specifying the date of the offence by one day (e.g., where the sanction stated the offence to have been committed on 29th February, whereas the correct day was 1st March)—*Jehangir Cama*, 29 Bom.L.R. 996, 28 Cr.L.J. 1012 (1014). A sanction for prosecuting a Municipal Commissioner under sec. 168, I. P. Code, for having interest in contracts with the Municipal Council, is not bad on the ground that it does not specify the particular contracts, when there is nothing to show that the sanction might relate to some contracts other than that for which the accused was prosecuted—*Kalagava*, 27 Mad. 54 (59).

Since the action of the sanctioning authority is more of the nature of executive than of judicial action the sanction need not state any reasons—*Chinna Chendrayya v Subbarayudu*, 1923 M.W.N. 77, 24 Cr.L.J. 116.

There is no provision in this section for a sanction to be addressed to any particular officer. A sanction is an order directing the prosecution of a certain person and in the

ordinary way that order is conveyed to the authorities who are responsible for initiating prosecutions in the locality in question—*Rudra Dat*, 34 Cr L J 1208, 146 I.C. 149, A I R 1933 All. 543, 1933 Cr C. 874, 1933 A L J. 1559, 55 All. 798 There is nothing in the section which requires that the sanction should be addressed to any particular Court or officer or that orders under the second part of the section should necessarily be passed in every case—*Desai bhai Khushal bhai*, A I R. 1938 Bom 50 (54), 39 Bom L.R. 1056.

Notice to accused —A sanction under this section is not void for want of notice to the accused to show cause why it should not be given The giving of such opportunity is entirely at the discretion of the Government—*Kalagava*, 27 Mad 54 (57).

Inquiry by Government before sanction —There is no provision of law empowering the Government or an officer of the Government to hold a judicial inquiry in order to ascertain whether or not he ought to grant sanction under this section; and any inquiry which he may hold for this purpose is merely a departmental inquiry; consequently, no oath can be administered to any person examined in course of such inquiry, nor can such person be prosecuted for giving false evidence therein—*Venkataramanna*, 23 Mad. 223.

The Government granting sanction under sections 196 and 197 acts purely in its executive and not judicial capacity, and the sanction need not be based on legal evidence There is nothing in the significance of the word 'sanction' to import a judicial element into the act of the executive—*Kalagava*, 27 Mad 54 (57).

647. Want of Sanction:—The sanction required by this section must be obtained before any proceedings are taken Proceedings taken without sanction (or before the sanction is obtained) are illegal and without jurisdiction. Even a sanction obtained subsequently will not validate the proceedings—*Morton*, 9 Bom 288 (293); *Bhimaji*, 42 Bom 172 (177), 20 Bom.L.R. 89, 19 Cr L J. 342, 44 I C 454, A I R 1917 Bom 33. See also *Mohammad Mehdi v Emp*, A I R 1934 All 963, 1934 Cr C 1291, 152 I C. 667, 36 Cr.L.J 137, 1934 A L J 965 (F B) The Lahore High Court has taken a different view and has laid down that the object of sanction is that a public servant should not be unduly harassed and that the word "institution" should not be given a very narrow meaning In one sense it is true, a Court takes cognizance of a matter as soon as it makes any order, however formal, but, even if such formal orders are considered to have been made without jurisdiction, this flaw will not affect orders made after the defect has been removed and the Court is properly seised of the case In dealing with all technical objections of procedure the final test is whether or not the accused has in any way been prejudiced by the alleged irregularity. It has been repeatedly held that a sanction under sec. 197, Cr. P. C., can be put in at any stage of the proceedings Where this was done before the actual proceedings, namely the evidence in the case began to be recorded, the accused was in no way prejudiced and the trial was not vitiated—*Manzur Ali v Emp*, A I R. 1939 Lah. 1, 179 I C 778, 40 Cr L J. 252, 12 R L. 631, I L R. 1939 Lah 227, 41 P L R 154. In *Arjan Singh v Emp*, A I R 1939 Lah 479 (486), 41 Cr L J. 65, 184 I C 680 the same view was taken by Blacker, J, who observed "It seems to me therefore to follow from this that if a Magistrate has purported to take cognizance of an offence before the necessary sanction is received, it is only what he has done up till that time is void and cannot be revived This however does not mean that after the sanction has been received he cannot again commence to take valid cognizance. The complaint or police report not being invalidated by the absence of the sanction under this Section is still in legal existence and can form the legal basis for the taking of fresh cognizance under sec. 190. In this view all that is to be seen is whether sec. 537, Criminal Procedure Code, is applicable to the circumstances of the particular case Where for instance the sanction has not been received till after some of the evidence has been recorded and the Magistrate does not record that evidence again he would clearly be basing his judgment partly on evidence which has no legal existence as it was taken at a time when he had no jurisdiction to take it. This would clearly amount to failure of justice

and the irregularity would not be cured by sec. 537. In the present case however, all that he did before the sanction was received was to issue process against the accused and secure their attendance. His acts may well have been void for want of jurisdiction but it cannot be said that his omission to issue fresh process to the accused after the sanction had been received which enabled him to take valid cognizance of the offence has caused any failure of justice. I would therefore have been ready to find in this particular case, had it only required a sanction under sec. 197, that cognizance taken after the sanction had been received was perfectly valid and that the omission of the Magistrate to go back and issue fresh process against the appellants was merely an irregularity curable under sec. 537 of the Code." Tek Chand, J., however took a different view in the same case. See also *Dr. Hari Ram Singh v. Emp.*, A.I.R. 1939 F.C. 43, 181 I.C. 317, 40 Cr.L.J. 468 and Note 2A. Where no sanction has been granted by the Local Government, the Magistrate cannot proceed with the case, merely relying on a Government Resolution and yielding to the wishes of the parties—*Bhimaji*, 42 Bom. 172 (178), 20 Bom.L.R. 89, 19 Cr.L.J. 342, 44 I.C. 454, A.I.R. 1917 Bom. 33; *Kalu Mahadu*, A.I.R. 1927 Bom. 432, 102 I.C. 342, 28 Cr.L.J. 534, 29 Bom.L.R. 707. In the earlier Bombay case (which was a High Court Sessions case), although the proceedings taken by the committing Magistrate were invalid for want of sanction, still as the sanction was obtained after the commitment, and no objection was taken by the accused as to the want of sanction in the commitment proceedings, the Judge presiding at the High Court Sessions, acting under sec. 532, accepted the commitment and proceeded with the trial—*Morton*, 9 Bom. 288 (296). See also *Desaihbhai Khushal-bhai*, A.I.R. 1938 Bom. 50, 39 Bom.L.R. 1056 in Note 645. Where sanction, which is required, has not been obtained, the case should be dismissed under sec. 203, Cr. P. Code—*Kyaw Htin v. Ah Yoo*, 36 Cr.L.J. 77, 152 I.C. 366, 12 Rang. 530, 1934 Cr.C. 1039, A.I.R. 1934 Rang. 238.

If three persons were prosecuted jointly and if one of them raised a valid objection under sec. 197, Cr. P. C., after the trial was carried to a conclusion, the whole trial against all the accused was without jurisdiction as the trial Magistrate was not empowered to take cognizance in it. The proceedings in a joint trial cannot be differentiated into separate proceedings against each accused person—*Fazal Rahman*, 38 Cr.L.J. 1042, 170 I.C. 772, A.I.R. 1937 Pesh. 52, 10 R.Pesh. 23; *Rudragonda Rachangonda Patil*, 38 Cr.L.J. 654, 168 I.C. 956, 39 Bom.L.R. 70, A.I.R. 1937 Bom. 160, I.L.R. 1937 Bom. 256, 9 R.B. 413. See also *Ramchandra Rango v. Emp.*, 40 Cr.L.J. 579 (587), 181 I.C. 870, A.I.R. 1939 Bom. 129, 41 Bom.L.R. 98. Where the Court has acted without jurisdiction with regard to a part of the trial, the whole proceedings are vitiated by the illegality committed and any conviction based on such proceedings cannot stand—*Rudragonda Rachangonda Patil*, supra.

648. Sub-section (2)—Government's direction as to prosecution:—

The Local Government has power under this section to authorise some particular person to prefer charges against a public servant, and when it has limited the manner in which the prosecution is to be launched, the specification be adhered to. And so, where the Government directed that a particular person should prefer a complaint against a public servant, a complaint preferred by a person other than the one specified was illegal, and the result would be the same if the authorised person had delegated the function to some other person—*Vinayak*, 8 B.H.C.R. 32.

Specification of Court:—The power given by sec. 197 (2) overrides the general rule contained in sec. 177 that an offence shall be ordinarily tried by a Court within the local limits of whose jurisdiction it was committed. Where the Local Government sanctioned the prosecution of a person who committed an offence in Upper Burma, and specified a Court in Lower Burma for the trial of such person, it was held that the Court in Lower Burma was competent to take cognizance of the offence and was wrong in holding that it had no power to receive the complaint—*Maung Ka*, 4 L.B.R. 265, 8 Cr.L.J. 70. This shows that the Local Government can specify any Court irrespective of local jurisdiction.

Where the Local Government sanctioned the prosecution of a Sub-Judge and specified the Sessions Court of Tellicherry as the Court which should try the offence and appointed Mr. Irvine as the Officiating Sessions Judge, and subsequently by another order of Government Mr. Irvine was appointed as the Additional Sessions Judge, and he tried the case, it was held that the trial was not invalid, for though Mr. Irvine was appointed as the Additional Sessions Judge still his appointment did not constitute an Additional Sessions Court. His Court was still the Sessions Court of which he was an Additional Sessions Judge, and since an Additional Sessions Judge is competent to try those cases which the Local Government may direct and since Mr. Irvine was directed by the Local Government to try the case when he was first appointed as officiating Sessions Judge, he was competent to try the case—*Kunjan*, 1 M L J 397 (F B)

When the Local Government has specified a particular Court, such specification will supersede all power of transfer conferred on the High Court under sec 526—*Nando Lal v. Mitter*, 25 Cal. 852 (862). See sub-section (7) of sec. 526

649. Revision:—Under the old law, if an offence was committed by an Honorary Magistrate a sanction for his prosecution could be granted by the Chief Presidency Magistrate, and the High Court has power under sec. 15 of the Charter Act (though not under sec. 439 of this Code) to interfere with an order granting or refusing sanction under sec. 197—*Nando Lal v. Mitter*, 25 Cal 852 But under the present law, the power of granting or refusing sanction lies only with the *Local Government*, and the High Court will have no power to interfere even under the Charter Act.

Even under the old law, it was held in a Lahore case that the granting of sanction being an executive rather than a judicial act, the High Court had no power to interfere with the proceeding of a District Judge granting sanction for the prosecution of a Sub-Judge—*Ali Hussain Khan v. Hacharan*, 2 Lah 305, 1922 P L R 35, 23 Cr L J 113

198. No Court shall take cognizance of an offence falling under Chapter XIX or Chapter XXI of the Indian Penal Code or under sections 493 to 496 (both inclusive) of the same Code, except upon a complaint made by some person aggrieved by such offence:

Prosecution for breach of contract, defamation and offences against marriage.

of the Indian Penal Code or under sections 493 to 496 (both inclusive) of the same

Provided that, where the person so aggrieved is a woman who, according to the customs and manners of the country, ought not to be compelled to appear in public, or where such person is under the age of eighteen years or is an idiot or lunatic or is from sickness or infirmity unable to make a complaint, some other person may, with the leave of the Court, make a complaint on his or her behalf.

Chapter XIX (comprising sections 490-492) of the I. P. Code relates to criminal breach of contracts of service Chapter XXI (comprising sections 499-502) relates to Defamation Sec 493—Inducing a woman to believe that she is married to the accused and to cohabit with him. Sec 494—Bigamy. Sec 495—Bigamy with concealment of former marriage Sec. 496—Going through the false marriage ceremony.

Change:—The proviso has been added by sec 51 of the Criminal Procedure Code Amendment Act XVIII of 1923.

650. Magistrate's power to add or alter charge:—When a plaint presented to the Magistrate contained only charges under secs. 352 and 504, I. P. C., but did not contain a charge under sec. 500, I. P. C. (defamation), but that charge was subsequently added by the Magistrate on statements made by the complainant, it was held that the Magistrate could not add the charge of defamation or take cognizance of it,

as there was no formal complaint in respect of it, such as is required by this section—*Deoki Nandan*, 10 All. 39. So also, the Magistrate cannot alter a charge under sec. 501, I. P. C., to one under sec. 500, I. P. C., when there was no formal complaint by the person aggrieved in respect of the latter offence—*Uma Shankar*, 18 P.R. 1889.

But a more liberal view has been taken in the cases noted below. Thus, in a Punjab case, where a complaint was made to the Magistrate under sec. 211, I. P. C., that the accused had made a false charge against him (complaint) of poisoning his daughter-in-law, with a view to injure his reputation, but the Magistrate treated the case as one under sec. 500, I. P. C., and tried it so, it was held that having regard to the substance of the complaint, the Magistrate was competent to alter the complaint under sec. 211, I. P. C., to one under sec. 500, I. P. C., when in fact that complaint was preferred by the aggrieved person—*Nur Aslam*, 24 P.R. 1884. The principle is that a complaint need not state precisely the section of the Penal Code under which the accused shall be charged; it is enough if the complaint lays before the Magistrate the facts which if proved would warrant a commitment under any of the sections referred to in this section—*Alli*, 25 All. 209 (211). A complaint need not quote any section of the Indian Penal Code but must contain a statement of the facts relied on as constituting the offence, and it is for the Magistrate to determine on these facts what offence has *prima facie* been committed; the nature of the charge will be determined by him. All that is necessary for him to see is that the inquiry into the charge is within his competency, and that in the case of certain offences, the complaint has been made by the proper person. Therefore, though the complainant referred specifically to secs. 193 and 211, I. P. C., and did not complain in so many words of having been defamed and did not mention sec. 500, I. P. Code, still if it contained a statement of the facts constituting the offence of defamation and he asked the Court to take action under that section or under any other section which the facts disclosed might justify, the Magistrate was competent to frame a charge of defamation and to try the offence—*Naurat*, 6 Lah. 375, A.I.R. 1925 Lah. 631 (632). Where the husband of a woman who had committed bigamy (sec. 494, I. P. C.) made a complaint alleging facts which seemed to constitute an offence under sec. 498, I. P. C., but in the subsequent inquiry it appeared that an offence under sec. 494, I. P. C., was committed, it was held that the Court could take cognizance of the offence under sec. 494, I. P. C., without a fresh complaint formally preferred under that section—*Alli*, 25 All. 209 (211), 1903 A.W.N. 7. But where a complaint was made by the husband for offences under secs. 363, 342 and 506, I. P. C., but the Magistrate came to the conclusion on evidence, but not from the facts stated by the husband in his complaint or in his deposition in Court, that the facts did not disclose an offence under any one of those sections but disclosed an offence under sec. 494, I. P. C., it was not competent for the Magistrate to force upon the complainant this character of an aggrieved husband which he did not wish to assume—*Gulab*, 39 Cr.L.J. 686, 176 I.C. 98, 11 RS 16, A.I.R. 1938 Sind 141. This section is clearly designed to prevent Magistrates from inquiring on their own motion into a case connected with marriage unless the husband or other person authorised moves them to do so, but when the case is once properly instituted before the Magistrate, he can proceed in respect of any other offence proved or against any other person implicated—*Ujjala*, 1 C.L.R. 523.

Power of Appellate Court to alter charge :—An Appellate Court can under sec. 423 alter a conviction under one section into one under another section, and in doing so it is not bound by such restriction as, for instance, a complaint by the aggrieved person. Thus, it can convert a conviction under sec. 182, I. P. C., into one under sec. 500, I. P. C., notwithstanding that there was no complaint in respect of the latter offence by the aggrieved person as required by this section—*Gur Narain*, 25 All. 534 (536). But in a case falling under the next section, the Oudh Chief Court has held that the Appellate Court cannot alter a conviction of rape into a conviction for adultery, when there was no formal complaint preferred by the husband in respect of the latter offence, as required by sec. 199—*Baji*, 10 O.W.N. 107, 1933 Cr.C. 318 (320).

651. Abetment:—A Magistrate taking cognizance of abetment of the offences mentioned in this section must be deemed to have taken cognizance of the substantive offences, and, therefore, a complaint by the aggrieved person is a condition precedent to the taking cognizance of the abetment—*Jitmal*, 4 P R. 1888. But the Allahabad High Court holds that sec. 198 does not apply to a charge of abetment of the offences mentioned therein. Section 195 provides in express terms that a complaint is needed for a prosecution for the abetment of the offences mentioned therein or for an attempt to commit them. No such provision is contained in sec 198, and it cannot, therefore, be said that the charge of abetment of the offences referred to therein is excluded from cognizance without a complaint by the person aggrieved by such abetment—*Mumtaz*, 21 A.L.J. 155, 27 Cr.L.J. 101, 91 IC 533

652. Person aggrieved:—The general rule is that a complaint may be made by anybody whether he be an aggrieved person or not. But sec 198 modifies the general rule by providing that the offence of defamation, etc., should not be taken cognizance of by any Court except upon a complaint made by the person aggrieved by the defamation, etc.—*Naurati*, 6 Lah 375, AIR 1925 Lah 631 (632).

Defamation —The question as to whether the complainant is the person 'aggrieved' by the offence alleged, within the meaning of this section, is to be determined by the nature of the offence and the special circumstances of each case—*Daem Sardar v. Batu Dhall*, 3 C.L.J. 38 (40, 41), 3 Cr.L.J. 187. In the case of a married woman, it was held in an earlier Punjab case that since under sec 499, I P C, the reputation to be harmed must be the reputation of the very person concerning whom the imputation is made, a husband could not be considered to have been harmed in his reputation by a defamatory statement concerning his wife—*Daood*, 22 P R 1884. But the other High Courts are of opinion that the reputation of the husband is so intimately connected with that of his wife that it would be unreasonable to hold that the defamation of his wife (e.g., imputation of unchastity) would ordinarily be not as hurtful to his feelings as it is to those of his wife. Therefore, the husband is undoubtedly a person aggrieved by the defamation of his wife—*Chellam v. Ramasami*, 14 Mad 379; *Chotalal v. Nathabai*, 25 Bom 151 (FB); *Lachman*, 20 P R 1882; *Appanna v. Akkanna*, 27 M.L.J. 746, 26 Cr.L.J. 521; *Gurdit Singh*, 5 Lah 301, 25 Cr.L.J. 342, AIR 1924 Lah 559. If, however, the husband is a lunatic and the woman is living in the house and under the protection of her father-in-law, any allegation against the daughter-in-law seriously affects the reputation and status in society of the father-in-law, and he is a person aggrieved within the meaning of this section and is competent to institute a complaint—*Daem Sardar v. Batu Dhall*, 3 C.L.J. 38, 3 Cr.L.J. 187. (This is now expressly provided by the new proviso). Where a Hindu lady is living with her father, brother or son, she is a member of that family and her reputation is bound up with the reputation of the person in whose house and under whose charge she is living, and any imputation as to her character will affect as much the relative with whom she is living as herself. Therefore, the brother of a Hindu widow, with whom she has been living, is an aggrieved person in respect of an imputation of unchastity made against the woman—*Thakur Das v. Adhar Chandra*, 32 Cal. 425. Under the proviso newly added by the Amendment Act of 1923, any friend or relative of the female will be able to make the complaint with the leave of the Court. The adopted son is a person aggrieved by the defamation of his adoptive mother—*Surajmal v. Ramnath*, 28 Cr.L.J. 996 (Nag).

Where certain allegations made in a newspaper against A and certain others were true as regards A but untrue as regards the others, it was held that A was not the person aggrieved by the publication of the allegations—*Subraya v. Kader Routhen*, 1914 M.W.N. 351, 15 Cr.L.J. 357.

The complaint in respect of defamation must be made by the person aggrieved and cannot be preferred by his official superior. Thus, where a police officer has been defamed, a complaint by his official superior on the ground that the good name of the police force has been attacked, cannot be entertained—*Gaya*, 26 O.C. 44, 23 Cr.L.J. 641;

A.I.R. 1923 Oudh 4, 69 I.C. 81. Where a newspaper published statements, which were alleged to be defamatory, or specific acts of negligence on the part of the Health Officer and his subordinates, it was held that the President of the Municipality was not a person aggrieved within the meaning of this section merely because he had a control over those officers, and that by the imputation made against his subordinates, his own conduct and administration had not been impugned—*Beauchamp v. Moore*, 26 Mad 43, 12 M.L.J. 413.

It is reasonable to suppose that the intention is that only such person as has directly or indirectly suffered in his reputation by the defamation complained of, can set the machinery of the law Courts into motion. In short, the aggrievement of the complainant should not merely be the one shared by every member of an organized society—*Hossainbhoy Ismailji*, 36 Cr.L.J. 408, 153 I.C. 443, A.I.R. 1934 Sind 188, 1934 Cr.C. 1396. A prosecution by the husband or father for defamation of the wife or daughter, as the case may be, is not permissible unless the conditions laid down by the proviso are complied with. Likewise, where the person defamed is an adult and a male who is neither insane nor idiotic nor incapable of attending Court, owing to sickness or other physical infirmity, no other person may institute a prosecution on his behalf. The mere fact that the feelings of the complainant have been injured in consequence of a defamatory statement made against his religious head affords him no ground under the law to prosecute the accused—*Hosseinbhoy Ismailji*, 36 Cr.L.J. 975, 156 I.C. 567, A.I.R. 1935 Sind 98, 1935 Cr.C. 516.

Death of complainant in defamation:—The death of the complainant, during the course of the criminal proceedings for defamation, necessarily terminates those proceedings—*Ishar Das*, 10 P.R. 1908, 7 Cr.L.J. 290.

Person aggrieved by bigamy:—In the case of an offence of bigamy committed by the wife, the husband is the only person aggrieved by such offence, and he alone can make the complaint. The father of the husband is not the "person aggrieved"—*Lala*, 32 All. 78; so also, the brother of the husband is not the person aggrieved—*Imtiazan*, 25 All. 132; *Bai Rukhmoni*, 10 Bom. 340; *Hanuman*, 11 O.C. 148, 7 Cr.L.J. 457. A hereditary Kathief Levvai (priest) is not an aggrieved person within the meaning of this section so as to entitle him to bring a case under sec. 496, I. P. C.—*Muhammad Lervai*, 32 Cr.L.J. 1116, 134 I.C. 57, 1930 M.W.N. 694, A.I.R. 1931 Mad. 247, 1931 Cr.C. 367, Ind. Rul. 1931 Mad. 809.

Prior to the present amendment, it was held that if the husband of the girl who committed bigamy was a *minor*, his mother was not competent to make a complaint, as she was not the person aggrieved—*In re Sessions Judge*, 2 Weir 231; it was also held that if the husband was a *lunatic*, his brother could not make a complaint on his behalf—*Dy. Leg. Rem. v. Sarna*, 26 Cal. 336. These two cases are now rendered obsolete by the new proviso.

652A. Effect of non-compliance:—Where the Magistrate who took cognizance of the complaint had no jurisdiction by reason of sec. 198, Cr. P. C., to do so, the trial and conviction of the accused must be held to be void in view of the mandatory provisions of sec. 198, Cr. P. Code. Want of objection with regard to jurisdiction in the trial Court cannot confer jurisdiction on the Magistrate who tried the accused—*Jagadish v. Shams Ara Begum*, A.I.R. 1935 Oudh 6, 36 Cr.L.J. 116, 152 I.C. 478, 11 O.W.N. 1389, 1934 O.L.R. 878, 7 R.O. 228, 1935 Cr.C. 11, 10 Luck. 277.

199. No Court shall take cognizance of an offence under

Prosecution for adultery or enticing a married woman.

section 497 or section 498 of the Indian Penal Code, except upon a complaint made by the husband of the woman, or, in his absence, *made with the leave of the Court*, by some person who had care of such woman on his behalf at the time when such offence was committed:

Provided that, where such husband is under the age of eighteen years, or is an idiot or lunatic, or is from sickness or infirmity unable to make a complaint, some other person may, with the leave of the Court, make a complaint on his behalf.

Section 497, I. P. Code—Adultery. Section 496—Enticing or taking away or detaining with criminal intent a married woman

Change:—The italicised words have been added by sec 52 of the Criminal Procedure Code Amendment Act, XVIII of 1923

Object of section:—The restriction imposed in this section (empowering only the husband or the guardian to make the complaint) is not to afford immunity or protection to the offender, but to prevent a person unconnected with the woman from giving publicity to a matter which neither the husband nor the guardian is willing to agitate—*Rathna Padayachi*, 17 Cr L J 363 (364) (Mad)

653. Scope of section:—The only offences referred to in this section are offences under secs. 497 and 498, I P C., but a charge of *house-trespass with intent to commit adultery* with a woman is not contemplated by this section, and such an offence may be inquired into upon complaint made by the woman, without complaint by the husband of the woman, although a prosecution for the offence of adultery must be instituted by the husband alone—*Anonymous*, 1 Weir 531. Where the complainant charged the accused with house-trespass with intent to commit theft, but it appeared and the accused admitted that he committed house trespass with intent to commit adultery with the complainant's wife, he could be convicted of the latter offence, although the complainant had not made a formal complaint for that offence—*Kangla*, 23 All 82 (84). *Contra*—*Anonymous*, 7 M H C R App 5, 1 Weir 531

But where the complainant charged the accused with house-trespass with intent to commit theft but the accused stated that he had gone there to have sexual intercourse with a woman *other than the complainant's wife*, and the accused was convicted for house-trespass with intent to commit adultery, held that the conviction was injudicious, in the absence of a complaint by the husband of that woman—*Harcharan*, 1886 A.W.N. 42

654. Complaint:—The complaint referred to in this section means a complaint as defined in sec 4 (h). A Magistrate is not competent to entertain a case under sec 498, I P C., on the report of a police officer, and in the absence of a complaint by the husband or guardian of the woman alleged to have been enticed away by the accused—*Bhana*, 1910 PR 32, 12 Cr L J 50. Information lodged by the complainant before the police is not a complaint—*Tara Prosad*, 30 Cal 910 (915) (FB), 8 CWN 17; *Arumuga*, 43 M L J 564, 23 Cr L J 592, AIR 1923 Mad 59. But where the Police took up the proceeding, in which the husband appeared as a witness and in his deposition he said that he intended to prosecute the accused and to get him punished, it was held that there was a complaint within the meaning of sec. 4 (h), in as much as he made an allegation before the Magistrate that the offence should be inquired into—*Bhauani*, 38 All 276 (279), 14 A L J 233, 17 Cr L J 72.

If a petition contains an allegation of facts which, if proved by evidence, would constitute a particular offence, then it may be regarded as a complaint of that offence. But the necessary averments must be present—*Ramnarayan v. Emp.*, 38 Cr L J. 769 (774), 11 L R. 1937 Bom 244, 39 Bom L R. 61, 169 I C. 526, 10 R B. 34, A.I.R. 1937 Bom 186

Where a complaint is made of an offence other than the offences mentioned in this section, can the Court convict the accused for an offence mentioned in this section on the strength of certain statements made by the complainant in Court? This has been the subject of conflicting decisions which are cited below

Thus, if the husband brings a complaint of any other offence (rape) and from certain statements in his deposition it appears that an offence mentioned in this section

(adultery) has been committed by the accused, it has been held that no conviction for the latter offence can be sustained, because the husband has not made a formal *complaint* of that offence; the provisions of sec. 238 (3) are strict in this respect. Even the circumstance of the husband appearing as a witness in the case would not be regarded as amounting to the institution of a complaint for adultery—*Kali*, 5 All. 233 (235); *Cheman*, 29 Cal. 415 (416), 6 C.W.N. 677; *Rahmatulla*, 1883 P.R. 10; *Nga Po*, 14 Cr.L.J. 284 (286). Similarly, where the accused was charged with offences under secs 366 and 379, I. P. C., but from statements in the deposition of the complainant (husband of the woman concerned) an offence under sec. 498, I. P. C., was made out, and the Judge convicted him of that offence, it was held that the conviction was illegal in the absence of a formal *complaint* by the husband in respect of that offence; and the statements made by the husband in his deposition could not be said to be a complaint under sec. 4 (h) of this Code—*Imamkhan*, 14 Bom.L.R. 141, 13 Cr.L.J. 287 (288), 14 I.C. 671; *Isap Mahomed*, 31 Bom. 218, 5 Cr.L.J. 164, 9 Bom.L.R. 148; *Ramnarayan v. Emp.*, 38 Cr.L.J. 769 (774), 169 I.C. 526, 39 Bom.L.R. 61, A.I.R. 1937 Bom. 186, I.L.R. 1937 Bom. 244, 10 R.B. 34.

In other words, there must be a *formal complaint of the specific offence* mentioned in this section, and not a complaint of *any offence*. Where a person was charged with kidnapping or with abduction, and the Judge convicted the accused, on the evidence, of an offence under sec. 498, I. P. C., *held* that the conviction was wrong as there was no specific complaint of an offence under sec. 498, I. P. C.—*Banguru Asari*, 27 Mad 61 (62). Where the accused was charged only with the offence of kidnapping a minor girl (complainant's daughter) and theft of jewels, and there was no complaint that the accused's purpose was to have illicit intercourse with the girl (sec. 498, I. P. C.), and even the sworn statement of the complainant did not contain any allegation in respect of that offence, *held* that the Magistrate could not convict the accused of an offence under sec. 498, I. P. C.—*Arunachalam*, 45 M.L.J. 543, 24 Cr.L.J. 837, A.I.R. 1924 Mad. 323. Where a husband charged the accused persons with theft and theft only, they could not be convicted of an offence under sec. 498, I. P. C., as there was no complaint preferred by the husband under this section in respect of the latter offence—*Roda Singh*, 1918 P.R. 2, 19 Cr.L.J. 300. The Court cannot add a charge of an offence referred to in this section without a formal complaint in respect of that charge by the person specified. Where the accused was committed to the Sessions on charges under secs 363 and 366, I. P. C., and at the conclusion of the evidence, to establish these charges the Sessions Court added a charge under sec. 498, I. P. C., and convicted the accused on all the three charges, *held* that the procedure contravened the provisions of sec. 238, as there was no complaint by the husband in respect of the additional charge under sec. 498, I. P. C., and that the conviction must be set aside—*Isap Md.*, 31 Bom. 218 (220). What is intended by this section is that there should be a complaint by the husband followed by this ordinary procedure of enquiry before a Committing Magistrate. Otherwise no charge under this section should be enquired into or should be heard by the Sessions Court—*Abdul Aziz*, 53 C.L.J. 346 (349), 32 Cr.L.J. 1135, 134 I.C. 314, A.I.R. 1931 Cal. 524, 1931 Cr.C. 676, Ind Rul. 1931 Cal. 810. Where the husband's complaint was one not merely of offences involving the use of force but was also a specific complaint of the offence punishable under secs 497 and 498, I. P. C., there was nothing to prevent the addition of charges under the aforesaid sections by the Sessions Judge in the manner indicated in sec. 226 and the following sections of the Cr. P. Code—*Rajani v. Idris*, 34 C.L.J. 51, 48 Cal. 1105, 25 C.W.N. 615, 22 Cr.L.J. 760, 64 I.C. 280.

But a more liberal view has been taken in several cases. Thus, in *Sheikh Mahomed Ratanlal* 584 (585), it was held that the word 'complaint' must be taken as including not only a written complaint but also the *examination* of the complainant, at any rate, prior to the issue of process; therefore, where the written complaint specifically mentioned section 497, I. P. C., only, but did not mention an offence under sec. 498, I. P. C., but the complainant's examination made out such an offence, the Magistrate had jurisdiction to frame a charge under sec. 498, I. P. C., and to try such offence. So also, upon a

complaint in respect of an offence under sec 366, I P. C., a conviction under sec 498, I P. C., could stand, even in the absence of a complaint by the husband, if his evidence was such as to justify the conviction for the latter offence—*Jtra Shekh v. Reazat*, 20 Cal. 483 (486); *Bhavani*, 38 All 276 (279), 17 Cr.L.J. 72. For the purposes of this section the complaint need not specify precisely the section under which the accused is to be charged so long as it sets forth matter which, if proved, would warrant a conviction, and a desire is expressed that the accused be punished for what he has done. If the complaint described in its heading as one under secs 366 and 368 fulfils all the requirements of a complaint under sec 497, and clearly makes an accusation of an offence under that section, then, if the adultery complained of is proved, a conviction under that section will not be illegal on the ground that there has been no complaint as required by sec. 199, Cr. P. C.,—*Sain*, 36 Cr.L.J. 789, 155 I.C. 595, AIR 1934 Lah 945, 36 P.L.R. 204, 1934 Cr.C. 1333, following *Mohan Singh*, 36 Cr.L.J. 404, 153 I.C. 697, AIR 1934 All 472, 1934 Cr.C. 555. In the absence of a complaint under this section no charge under sec. 498, I P. C., can be framed—*Ramjanam*, AIR 1935 Pat 357, 16 P.L.T. 348, 155 I.C. 866, 36 Cr.L.J. 856. Nor can a conviction under sec. 376, I P. C., be converted into one under sec. 497, I P. C., in such a case—*Baji*, 34 Cr.L.J. 496, 143 I.C. 73, 10 OWN 107, AIR 1933 Oudh 163, 1933 Cr.C. 318, Ind Rul 1933 Oudh 153. Where the accused were charged under sec 366A, I P. C., but were convicted under sec. 498, I P. C., without a complaint as required by this section, the conviction was illegal—*Jagdamba*, 34 Cr.L.J. 1227, 145 I.C. 922, AIR 1933 All 626, 1933 Cr.C. 1005, 1933 ALJ 701. Though the offence charged in the complaint made by the husband was one under sec 371, I P. Code, still if the facts set forth in the complaint were sufficient to support a conviction under sec 498, I P. C., the Magistrate had jurisdiction to frame a charge under the latter section—*Puran Ditta*, 23 P.R. 1895. Where the complaint by the husband was under sec 494, I P. C., but the facts disclosed an offence under sec 498, I P. C., a conviction on the latter charge was not illegal, though there was no formal complaint in respect of the latter offence. The complainant need not state precisely the section of the Penal Code under which the accused should be charged. It is sufficient if he lays before the Magistrate facts which would be sufficient to establish an offence under that section. It cannot be said that there was no complaint under that section merely because the husband also alleged certain additional facts which he was unable to prove and which if proved would have amounted to another offence—*Brahma Dat*, 24 O.C. 232, AIR 1921 Oudh 149, 22 Cr.L.J. 742.

655. Who can complain:—The only person who can prefer a complaint of an offence referred to in this section is the husband of the woman. The husband is entitled to make the complaint even though the marriage has been dissolved before the complaint, if the offence was committed before the marriage was dissolved—*Dhanna Singh*, 106 P.L.R. 1919, 23 Cr.L.J. 462, AIR 1922 Lah. 477.

In the absence of the husband, the complaint may be made by any person having the care of the woman. Thus, the mother of the husband, who was in charge of the wife during the absence of the husband, is competent to prefer a complaint of an offence under sec 498, I P. C., against the person who abducts the wife—*Madhub Ali*, 24 Cr.L.J. 780 (Lah.). So also, where at the time of the offence the wife was under the care of her father during the absence of her husband, the father was competent to prefer the complaint under sec. 498, I P. C.—*Rathna*, 17 Cr.L.J. 363 (364) (Mad.). But when the father of the girl with whom she was residing filed a complaint under sec. 498, I P. C., on the allegation that the husband of the girl was ill and so he had to be the complainant and there was nothing on the record in proof of the allegation, held that the complaint was in contravention of this section and the proceedings were without jurisdiction—*Mahendra v. Gopal*, 34 Cr.L.J. 290, 142 I.C. 150, AIR 1933 Cal. 144, 1933 Cr.L.J. 205, Ind Rul. 1933 Cal. 241. Where the husband was alive, but in prison and the wife lived with her father, the husband's brother, who had neither *de facto* nor constructive care of her and did not represent his brother or

hold any authority from him, was not competent to lodge a complaint under secs 497 and 498, I. P. Code—*Rabnawaz Khan*, 37 Cr.L.J. 345, 160 I.C. 726, A.I.R. 1933 Pesh. 32, 1936 Cr.C. 113.

If the prosecution succeeds in making out its case that the complainant had the husband's authority to take care of the wife on his behalf, so that the complainant stood in the place of the husband for the time being, while the husband was residing quite independently in another place, it would be difficult to say that the requirements of sec. 199, Cr. P. C., are not satisfied. But the words 'on his behalf' must be given some meaning. It is not enough that a person should take care of the wife instead of the husband because the husband will not take care of her and there is no one else to do it. Where, therefore, the husband had obviously washed his hands of the wife, for the time being at any rate, and having nowhere else to go she went to her parent's house where her father and brother treated her as though she were still subject to the paternal authority or, to the authority of the senior members of the Hindu joint family, they were acting on their own authority or assumed authority and not by the authority or on behalf of the husband and that being so, the complaint made by the brother was not competent under sec 199, Cr. P. Code—*Ramnarayan v. Emp.*, 38 Cr.L.J. 769 (772), 169 I.C. 526, 39 Bom.L.R. 61, A.I.R. 1937 Bom. 186, I.L.R. 1937 Bom. 244, 10 R.B. 34.

Where the complaint was preferred by the nephew of the husband, when the latter was bed-ridden with paralysis, it was held that the Court could not take cognizance of the offence, as it could not be said that the husband was absent—*Tikiomal*, 3 S.L.R. 15, 1 I.C. 941. But this ruling is no longer correct in view of the words "sickness or infirmity" occurring in the proviso newly added.

It has been held in the above Madras case that the words "in his absence" refer to the original entrustment and not to the time of filing of the complaint. In other words, a complaint may be made by the guardian if the husband was absent at the time of the offence, even though he is present at the time of filing the complaint; and the fact that the husband is present and stands by and is unwilling to complain will not prevent the guardian from making the complaint—*Rathna*, supra.

The complaint may be preferred by any person having the care of the woman, during the absence of the husband, even though the absence be temporary, e.g. for two days. It may sometimes be absolutely necessary that when the husband is away, a complaint should be promptly filed, whether the absence be for two days or more, when there is a probability that unless prompt action is taken the accused may entirely vanish with the woman that he has enticed, and it may not be possible to trace their whereabouts—*Sahibrai*, 27 Cr.L.J. 414, 93 I.C. 78, A.I.R. 1926 Sind 159.

The words "some person who had care of such woman" mean a person who had the care of the woman on her husband's behalf during the latter's absence; such person can make the complaint without any express delegation by the husband to lodge the complaint in his absence. And the Court must grant leave to the complainant. But it is not necessary that the Magistrate must expressly record that leave was granted to the complainant to proceed with the complaint. Where the record shows that the deposition of the complainant was recorded before issuing process, and that the Magistrate interrogated that person and satisfied himself that in the absence of the husband that person was competent to file the proceedings, held that the Magistrate substantially accorded leave to the complainant and the provisions of sec 199 were substantially complied with—*Sahibrai*, 27 Cr.L.J. 414 (415), 93 I.C. 78, A.I.R. 1926 Sind 159.

If the husband be a minor, he can be represented by another in a prosecution for adultery. See the proviso. Thus, if the husband is a minor, the complaint may be lodged by the husband's father; but if at the time of the offence the minor husband was absent (i.e. not living with the wife under the same roof) and the wife was living with her maternal uncle, then the only person who could make the complaint was the

maternal uncle (as having charge of the woman on her husband's behalf) but not the husband's father—*Wallia*, 23 Cr L.J. 613 (Lah).

The husband can, even though he is a minor, make the complaint, and there is nothing in law to prevent him from doing so—*Wallia*, 23 Cr L.J. 613 (Lah). Even the proviso newly enacted will not debar the minor husband himself from lodging the complaint, for the proviso is not a restricting but an enabling provision.

When the wife's father lodged a complaint under sec 498, I. P. C., without the leave of the Court for which an application was made but it was never granted, the proceedings were illegal—*Luqman*, 35 Cr L.J. 1032, 140 IC 1106, A.I.R. 1934 Lah 86, 1934 Cr C 168. Where there is nothing on the record to show that the leave was either asked for or granted or that the requirements of sec. 199, Cr. P. C., were ever present to the Magistrate's mind, a conviction under section 498, I. P. C., on the complaint of a person other than the husband cannot stand. It cannot be regarded merely as an irregularity which can be cured by sec. 537, Cr. P. C.—*Akshoy*, 34 Cr L.J. 1092, 38 C.W.N. 113, A.I.R. 1933 Cal 880, 1933 Cr C 1530, 145 IC 874. When the proceedings show that the Magistrate did accord leave to the complainant, the provision of this section will be deemed to have been complied with although the leave was not expressly recorded—*Shibrai*, 27 Cr L.J. 414, 93 IC 78, A.I.R. 1926 Sind 159.

656. Miscellaneous:—*Death of husband—Effect of*—The law only requires that the prosecution on a charge of adultery should be instituted by the husband. But it cannot be said that the death of the husband after institution of the prosecution but before trial necessarily puts an end to the prosecution, although it is desirable that the charge should be withdrawn by the prosecution on the death of the aggrieved party—*Anonymous*, 2 Weir 235, 4 M.H.C.R. App 55; *Nur Mahomed*, 1 S.L.R. 72, 8 Cr L.J. 190. Where proceedings were dropped during the life time of the husband, it is not open to any person after the husband's death to revive the proceedings—*Rukmani*, 16 Cr L.J. 466 (Mad).

Appellate Court's power to alter charge—The Oudh Chief Court has held that it is not in the power of the Appellate Court to alter a conviction of rape into a conviction of adultery, when there was no formal complaint preferred by the husband before the Magistrate in respect of the latter offence—*Baji*, 10 O.W.N. 107, 1933 Cr C 318 (320). But in a case falling under the preceding section, the Appellate Court converted a conviction under sec 182, I. P. C., into one under sec. 500, I. P. C., although there was no complaint in respect of the latter offence preferred by the aggrieved party—*Gur Nataan*, 25 All 534 (536). See Notes 650 and para 654.

Acquittal for want of proper complaint—Fresh complaint—Where the brother of the husband of the woman instituted a complaint under sec 498, I. P. C., alleging that he had authority from the husband to prefer the complaint, but after taking evidence the Magistrate held that the complainant had no authority and acquitted the accused, and subsequently the husband himself instituted the complaint, it was held that the previous acquittal was no bar to a fresh trial—*Umeruddin*, 31 All 317; *Tskaram*, 17 Bom L.R. 678, 16 Cr L.J. 657.

199A. When in any case falling under section 198 or section

199, the person on whose behalf the complaint is sought to be made is under the age of eighteen years or is a lunatic, and the person applying for leave has not been

Objection by lawful guardian to complaint by person other than person aggrieved

appointed or declared by competent authority to be the guardian of the person of the said minor or lunatic, and the Court is satisfied that there is a guardian so appointed or declared, notice shall be given to such guardian, and the Court shall, before

granting the application, give him a reasonable opportunity of objecting to the granting thereof.

This section has been added by sec. 53 of the Criminal Procedure Code Amendment Act, XVIII of 1923.

"We have added a new section 199A in order to safeguard the rights of a legally appointed guardian"—*Report of the Select Committee of 1916.*

CHAPTER XVI.

OF COMPLAINTS TO MAGISTRATES.

It is most desirable that Magistrates should follow the procedure which is quite clearly laid down in this chapter dealing with complaints to Magistrates—*Balai Lal v. Pasupati*, 21 C.W.N. 127, 17 Cr.L.J. 395.

Magistrates should also be prompt in disposing of complaints under this chapter. They have no right whatever to keep complaints instituted before them without passing orders for several months. Such action is in the highest degree improper and shows want of proper understanding as to what their duties are—*Salimullah v. Brijhan*, 18 Cr.L.J. 271 (All).

200. [* * *] A Magistrate taking cognizance of an offence on complaint shall at once examine the complainant upon oath, and the substance of the examination shall be reduced to writing and shall be signed by the complainant, and also by the Magistrate:

Examination of complainant.

Provided as follows:—

(a) when the complaint is made in writing, nothing herein contained shall be deemed to require a Magistrate to examine the complainant before transferring the case under section 192;

(aa) *when the complaint is made in writing, nothing herein contained shall be deemed to require the examination of a complainant in any case in which the complaint has been made by a Court or by a public servant acting or purporting to act in the discharge of his official duties;*

(b) where the Magistrate is a Presidency Magistrate, such examination may be on oath or not as the Magistrate in each case thinks fit, and *where the complaint is made in writing*, need not be reduced to writing; but the Magistrate may, if he thinks fit, before the matter of the complaint is brought before him, require it to be reduced to writing;

(c) when the case has been transferred under section 192 and the Magistrate so transferring it has already examined the complainant, the Magistrate to whom it is so transferred shall not be bound to re-examine the complainant.

Change:—This section has been amended by sec 54 of the Criminal Procedure Code Amendment Act XVIII of 1923. The words "subject to the provisions of section 476" which occurred at the very beginning of the old section have been omitted, and proviso (aa) has been newly added. "We would add to this clause a provision that in the case of a complaint under sec. 476, the examination of the complainant shall be dispensed with"—*Report of the Select Committee of 1916*

The words "where the complaint is made in writing" have been inserted in proviso (b), by the Criminal Procedure Code Amendment Act, II of 1926. The reason has been thus stated:—"At present a Presidency Magistrate need not record the substance of an examination even if the complaint is not in writing. It is desirable that where there is no complaint in writing the Magistrate should record the examination in writing"—*Statement of Objects and Reasons* (Gazette of India, 1925, Part V, p. 214).

657. Taking cognizance:—A Magistrate is bound to take cognizance of an offence upon complaint; see Note under sec. 190, *arte* "A Magistrate is bound to receive all complaints, whether they may be preferred orally or in writing"—*Cal. G. R. & C. O.*, p. 8.

If a *pardanashin* lady sends a complaint to a Magistrate, he is entitled to take cognizance of it, but before he takes cognizance he must be satisfied that it is her complaint. It is comparatively unimportant by what means the complaint reaches the Magistrate if it is really her complaint—*Abhoyeswari v. Kishori Mohan*, 42 Cal. 19 (23), 18 C.W.N. 1020, 15 Cr.L.J. 348, 23 I.C. 700

When a Magistrate gets the statement of a complainant recorded by the Readers of the Court in open Court, he takes cognizance of the offences mentioned in the complaint under this section, because it is only when the Magistrate takes cognizance of an offence on complaint that he is bound under this section to examine the complainant on oath—*Bhagvath v. Ali Harid*, 32 Cr.L.J. 991, 132 I.C. 783, 8 O.W.N. 157, AIR 1931 Oudh 392, 1931 Cr.C. 824, Ind Rul 1931 Oudh 335, 14 C.L.J. 20

See *Lilaram Ladakmal v. Wadhmal Assudomal* in Note 13.

658. Complaint:—See Notes under sec 4 (h)

It is clear from the wording of sections 200 and 201 that a complaint need not be in writing—*J. R. Das*, 1 Rang 549.

Presentation of complaint.—Since the complainant is to be examined "at once" it follows that ordinarily a complaint must be presented in person and a complaint shall not be accepted which is not signed by the complainant and is not preferred by a person duly authorised to prefer that specific complaint—*Abhoyeswari v. Kishori*, 42 Cal. 19 (23), 15 Cr.L.J. 348, 18 C.W.N. 1020, 23 I.C. 700. But a complaint not presented in person is not bad in law and if a complaint is not so presented, the Magistrate may call upon the complainant to appear before him on a date to be fixed by him, and may examine him on that day—*Chukermal*, 23 S.L.R. 285, 30 Cr.L.J. 732 (733).

See Note 487 where the questions as to whether a complaint can be treated as the first information by the police to whom it may be sent by the Magistrate for investigation and whether the police can, after investigation, submit charge-sheet on the basis of the same, have been discussed

659. Examination of complainant:—The object of requiring the Magistrate to examine the complainant possibly is that the facts constituting the offence may be ascertained when in a written complaint they are not given—*Sukumar v. Mofizuddin*, 25 C.W.N. 357 (360), 22 Cr.L.J. 455. The object of the examination is further to see whether there is a *prima facie* case against the accused, and to prevent the issue of process in cases where the examination of the complainant would show that the complaint was false, frivolous and vexatious and intended merely to harass the accused—*Girdhari Lal*, 1911 P.R. 11, 12 Cr.L.J. 217, 10 I.C. 156. The object of the examination is to find out whether there is any matter which calls for investigation by a Criminal Court—*Baij Nath v. Raja Ram*, 10 A.L.J. 79, 13 Cr.L.J. 704.

The examination of the complainant is not to be a mere form but an intelligent inquiry into the subject-matter of the complaint, carried far enough to enable the Magistrate to exercise his judgment as to whether there is or there is not sufficient ground for proceeding—*Cal G. R. & C. O.*, p. 9.

A Magistrate cannot refuse to take cognizance of an offence on receipt of a complaint, but he is bound to do so and examine the complainant—*Umer Ali v. Safer Ali*, 13 Cal. 334 (335). It is not a proper course for a Magistrate, when a complaint is made before him of an offence of which he can take cognizance, to refer the complainant to a police-officer instead of examining him. Such a course would foster abuses and defeat the purpose of the law, which is to give to persons injured an access to justice independent of the police—*Jankidas*, 12 Bom. 161 (163).

A Magistrate did not examine the complainant completely on the first date. But on a later date when he found the defect in the oral examination he examined her once again and issued process. The Magistrate should have examined the complainant in full on the first day. But his negligence to do so does not amount to an irregularity which vitiates the trial. The procedure, although open to criticism, is not illegal—*Makhan v. Khuki*, 37 C.W.N. 319, A.I.R.-1933 Cal. 552, 1933 Cr.C. 912, 34 Cr.L.J. 1063, 145 I.C. 700.

Mode of examination :—On presentation of a complaint the Magistrate shall examine the complainant on oath; the substance of the examination must be reduced to writing, and must be distinct from the complaint itself. Mere calling upon the complainant to attest the complaint is not a sufficient compliance with this section—*Kesri v. Md Baksh*, 18 All 221. If, however, the complaint is made in writing and written with a great deal of care, and the Magistrate, instead of examining the complainant on oath, asks him to swear to and attest the petition of complaint, this is tantamount to examination of the complainant, and the requirements of this section are substantially complied with—*Murphy*, 9 All 666 (668, 670) (explained in 18 All 221). See also *Mirabai*, 6 Bom.L.R. 662; *Mahomed v. Mahomed*, 26 Cr.L.J. 1101 (Sind). But if the written complaint is obscure and vague, the Magistrate would be bound to examine the complainant at sufficient length for the purpose of clearly ascertaining the allegations on which the complaint is made—*Mirabai*, 6 Bom.L.R. 662. If the Magistrate merely cross-examines the complainant on the depositions recorded by a Sub-Magistrate whom the Magistrate had ordered to make an inquiry under sec. 159, it does not amount to an examination of the complainant required by this section—*Lokenath v. Sanyasi*, 30 Cal. 923 (925).

The substance of the examination of the complainant on oath should be read over to him (following the principle underlying sec. 350), so that the accuracy of the record of the examination may be vouchsafed, particularly, if it is to be used as a basis for a possible prosecution for perjury in future—*Bhagirathi Bai*, 26 Cr.L.J. 1401 (Nag.).

If the complainant is a *pardanashin lady*, she may be examined by commission under sec. 503. The terms of that section are very wide. They refer not only to an inquiry and a trial but to any other proceeding. That section authorises the examination of any witness, and a complainant is certainly a witness—*Abhayesvari v. Kishori Mohan*, 42 Cal. 18 (24). Contra—*Sarb Dayal*, 1896 P.R. 10, where it is laid down that in the preliminary stage of a proceeding the complainant is not a witness but a mere complainant, and cannot be examined by commission. In an Allahabad case, it has been held that although a complainant is certainly a witness, still, where in a case of defamation which gives a civil as well as a criminal remedy, a *pardanashin lady* has chosen to set the criminal law in motion instead of bringing a suit, this fact materially alters her position as a witness, and the Court can require her personal appearance in order to know that the prosecution is *bona fide*, and that it has been instituted by her of her own free will, and not at the instigation of other persons. In such a case the Magistrate should allow her to be examined in a separate room, or make other arrangements to preserve her privacy—*Farid-ud-nissa*, 5 All. 92 (93, 94).

For the procedure to be followed when the written complaint is signed by two persons, see 43 C.W.N 527 quoted in Note 13A.

Signature of Complainant :—If the complaint is in writing, it must be signed by the complainant; a complaint cannot be accepted if it is not signed by him—*Abhoyeswari v. Kishori Mohan*, 42 Cal 19 (23); *Jitan*, 1 P.L.T. 564

The substance of the examination must be signed by the complainant. Unless it is signed, the Magistrate cannot take cognizance of the complaint—*Mahim Chandra*, 3 B.L.R. 67. Such is the vitiating effect of want of signature that a conviction on the alternative charges of making two statements, one in the examination under this section of the accused as a complainant, and the other in his examination subsequently as a witness, both the statements contradicting each other, is bad, if the statement recorded under this section does not bear the signature of the complainant—*Bajoo*, 6 C.W.N. 840. The examination of the complainant being taken on oath and signed by him can be used as a basis for a prosecution for perjury. The evident object of getting the substance of the examination of the complainant signed by him is to make use of it, in case of need, as against the complainant's subsequent deposition as a witness, for starting against him a prosecution for perjury on the ground that the two statements contradict each other—*Bhagirthibai*, 26 Cr.L.J 1401 (Nag).

660. Omission to examine—Effect:—The examination of the complainant is not a mere matter of formality, and when a Magistrate dismisses a complaint without making the examination under sec 200, the order of dismissal is illegal and must be set aside—*Ningappa*, 48 Bom 360 (362), 26 Bom LR 183, 81 IC 608, AIR 1924 Bom 321, 25 Cr.L.J 960; *Janakidas Guru*, 12 Bom 161; *Ganesh Narayan*, 13 Bom. 590 (597); *Mangu Koeri*, 1 P.L.T. 346, 51 IC 465 (468); *Moolchand v. Kessoomal*, 15 S.L.R. 200, *Loke Nath v. Sanyasi*, 30 Cal 923 (926); *Fazlar Rahman v. Abidar Rahaman*, 23 C.W.N 392 (393), *Haladhar*, 9 C.W.N 199; *Satya Charan v. Chairman*, 3 C.W.N 17; *Ramaswami*, 43 M.L.J 710, 23 Cr.L.J 691, AIR 1932 Mad 443 (444). No investigation can be ordered under sec 202 without examining the complainant—*Jitan*, 1 P.L.T. 564; *Mahadeo*, 27 Cal 921 (924); *Budh Nath*, 4 C.W.N 305; *Virabhadrayya v. Vyncherla*, 2 Weir 244; *Ali Muhammad*, 2 PR 1912, 12 Cr.L.J 539. (This is now expressly provided in the proviso to sec 202). No process can be issued against the accused unless and until the Magistrate has examined the complainant—*Abhoyeswari v. Kishori Mohan*, 42 Cal. 19 (23).

But in several cases it has been held that the omission to examine the complainant on oath before issuing process to the accused is a mere irregularity and does not invalidate the conviction where there has been no failure of justice or any prejudice to the accused by reason of such irregularity (sec 537)—*Phagu Shahu*, 1 P.L.J 592 (595); *Bharat v. Judhistr*, 9 Pat 707 (FB), 30 Cr.L.J 1056 (1058); *Heman Gope*, 21 Cr.L.J 779, 1 P.L.T. 349, 58 IC 459 (460), *Bhairab* 46 Cal 807 (818), AIR. 1919 Cal. 433, 53 IC 698, 20 Cr.L.J 794, 29 CLJ 318, 23 C.W.N 484; *Monu*, 11 Mad 443; *Molaiappa*, 55 M.L.J 715, 30 Cr.L.J 432; *Bateshar*, 37 All 628, AIR. 1915 All 417, 30 IC. 653, 16 Cr.L.J 669, 13 A.L.J. 840; *Gopichand*, 1 Rang 517; *Chiragh Din*, AIR 1924 Lah. 258, 76 IC. 189, 25 Cr.L.J 125, 4 Lah. 359 (362); *Muso*, 8 S.L.R 41, 15 Cr.L.J. 649, *Daroga*, 36 Cr.L.J 200 (202), 152 IC 847, AIR. 1934 Pat. 573, 1934 Cr.C 1237, 15 P.L.T. 756; *Anil v. Badam*, AIR 1929 Cal 175, 116 IC. 722, 30 Cr.L.J. 706; *Ram Gir v. Ravisaran*, AIR. 1935 All 883, 156 IC. 948; *Raghunandan*, AIR 1934 Pat. 156, 35 Cr.L.J. 1309, 151 IC. 320, 15 P.L.T. 17; *Baldewa*, 1933 A.L.J 1418, 1933 Cr.C 1415, AIR 1935 All. 816; *Ranjas v. Puruha Municipality*, 37 Cr.L.J, 289, AIR. 1936 Pat. 145, 160 IC. 343; *Devaibhai Khushalbai*, AIR. 1938 Bom. 50 (53), 39 Bom.L.R. 1056; *Tara Singh v. Emp*, 39 Cr.L.J. 840, 176 IC. 960, AIR. 1938 All 449, 1938 A.L.J 528, 11 R.A. 158, 1938 A.L.R 689, 1938 A.Cr.C. 45, 1938 A.W.R. (H.C.) 361. Thus, where the complainants made a complaint to the Police that the accused beat them causing grievous hurt but the police did not send the case, and the complainants applied to the Magistrate, who sent for the police papers and summoned the accused without examining the complainants, it was held that the irregularity did

not vitiate the proceeding—*Bateshar*, 37 All. 628, 13 A.L.J. 840. The omission to examine the complainant under sec. 200 is a mere irregularity and not an illegality. The person prejudiced by such an irregularity is the complainant, and when the case ends in a conviction he has no grievance. The accused cannot in general complain of the irregularity, as the omission to take a sworn statement from the complainant cannot prejudice the accused—*Ambayara v. Panchamuthu*, 19 L.W. 461, 25 Cr.L.J. 730, A.I.R. 1924 Mad 587. But although the omission to examine the complainant may not vitiate the trial if the accused has not been prejudiced by such irregularity and no failure of justice has been occasioned thereby, still the procedure of this section ought to be strictly complied with. It is a valuable safeguard which the Legislature has provided and it must be scrupulously observed, because non-compliance with this provision leads to much confusion and waste of public time—*Heman Gope*, supra; *Bateshar*, supra; *Saheb Tewari*, 20 Cr.L.J. 247 (Pat.).

It is the business of the complainant to be present in Court, if he desires to have his statement taken on oath. In a case where the complainant does not choose to be present, he cannot be heard afterwards to say that the matter should be sent back to the Magistrate for further enquiry—*Ram Prosad*, 29 Cr.L.J. 798, 111 I.C. 126, 48 C.L.J. 90, A.I.R. 1928 Cal. 569.

661. Complaint by Court or public servant:—Under the new proviso (aa), when a complaint is preferred by a Court or public servant, the examination of the complainant may be dispensed with. Thus, where the complainant is a conservancy overseer purporting to act in the discharge of his official duties under the Calcutta Municipal Act, he is a public servant, and it is not necessary to examine him before issuing process—*Nandi v. Corporation of Calcutta*, 34 C.W.N. 449 (450), 32 Cr.L.J. 138, 128 I.C. 335. Where a complaint made before a District Magistrate under the Child Marriage Restraint Act (XIX of 1929) was referred to a local Magistrate for inquiry, and the latter made a report that the complainant also should be prosecuted, held that the report of the local Magistrate amounted to a complaint, and the District Magistrate need not examine him on oath—*Sukha Sahu*, 13 P.L.T. 791, 34 Cr.L.J. 237 (238), 141 I.C. 810, A.I.R. 1933 Pat. 87, 1933 Cr.C. 211, Ind. Rul. 1933 Pat. 81. Even before this amendment, it was held in several cases that the omission to examine the Court or the public servant did not vitiate the proceedings. Thus, where the complainant, who was a bailiff and who was resisted by the accused in the execution of a civil process, was not examined but his report was brought on the record through the Nazir, it was held that the fact of the complainant not being examined would not justify the setting aside of the conviction, because there were other witnesses who gave a full account of the matter—*Muso*, 8 S.L.R. 41, 15 Cr.L.J. 649. Where the complaint in writing and signed was preferred by a responsible public official and was accompanied with a sanction of the Local Government for the prosecution of one of its servants, it was held that the failure by the Magistrate to examine the complainant on oath had not in any way prejudiced the accused or caused a failure or miscarriage of justice—*Girdhari Lal*, 1911 P.R. 11, 12 Cr.L.J. 217, 10 I.C. 156 (158). Where a Sub-Inspector preferred a complaint for the prosecution of a certain person and the Magistrate, without examining the complainant, recorded the evidence, and convicted the person complained against, held that the omission to examine the complainant (Sub-Inspector) was cured by sec. 537 (a)—*Chiragh Din*, 4 Lah 359, 25 Cr.L.J. 125; *Bharrab*, 46 Cal 807 (812). Where the District Judge made a complaint to the District Magistrate by means of a letter, and the Magistrate ordered a police investigation without examining the District Judge on oath in support of his statement in his letter, it was held that the omission to examine the Judge was a mere irregularity curable by sec. 537 (a)—*Aparao*, 20 Bom.L.R. 1018, 20 Cr.L.J. 42. Under the present law, no question of irregularity would arise. See also *Tara Singh v. Emp.*, 39 Cr.L.J. 840, 176 I.C. 960, A.I.R. 1938 All. 449, 1938 A.L.J. 528, 11 R.A. 158, 1938 A.L.R. 689, 1938 A.Cr.C. 45, 1938 A.W.R. (H.C.) 361. If a police officer makes a report in a non-cognizable case, upon investigation without the order of a Magistrate under sec. 155 (2), the report is not a com-

plaint but a police report all the same and falls under clause (b) of sec 190 and not under clause (a), and a Magistrate taking cognizance of the case on the police report is not bound to follow the procedure prescribed by sec 200 (which applies only when the Magistrate takes cognizance on complaint). See Note 582 under sec. 190. Even if the report be treated as a complaint, the new sub-section (aa) of sec 200 relieves the Magistrate from the necessity of examining the police officer on oath—*Ratnavelu*, 49 Mad 525, 27 Cr L.J. 1031 (1037) (F B.), overruling *Perumal*, 22 L.W. 209, 26 Cr L.J. 1550; *Shivasami*, 51 Bom 498, 28 Cr L.J. 939 (941). See also *Kewal Ram*, 36 Cr L.J. 1354 (1359), 158 I.C. 324, 16 PLT 693, AIR 1935 Pat 515; *Prag Datt Tiwari v. Emp*, AIR 1928 All. 765, 111 I.C. 858, 29 Cr L.J. 938, 51 All. 382.

Proviso (b):—A special procedure is prescribed in proviso (b) for Presidency Magistrates. The complainant need not be examined in detail; he may verify the complaint on oath before the Presidency Magistrate, and this will amount to an examination of the complainant—*Velu Nathan*, 35 Mad 606 (607). Even assuming that a more detailed examination is necessary, the omission to do so is a mere irregularity of procedure covered by sec. 537—*Ibid.* The Legislature has given a greater latitude to Presidency Magistrates in the matter of examination of complainants than to Magistrates in the mofussil; perhaps, it considered that they would be officers of greater experience, and therefore, reposed greater confidence in them. When the Magistrate is a Presidency Magistrate, the examination of the complainant need not be reduced to writing; so that when the written complaint does not contain an allegation of facts constituting the offence, and the Magistrate does not reduce the examination to writing, there may be no written record of the facts constituting the offence. But it must be presumed that the Magistrate, before he issued process, had before him an allegation of facts (disclosed by the examination of the complainant) which constituted the offence—*Sukumar v. Mofizuddin*, 25 CWN 357 (360), 22 Cr L.J. 455.

The Municipal Magistrate of Calcutta is a Presidency Magistrate and in cases of complaints to him, he is, as Presidency Magistrate, required to examine the complainant subject to the provisions of this clause—*Ambica v. Corporation of Calcutta*, 30 Cr.L.J. 231, 114 I.C. 82, 32 C.W.N. 1091, 48 C.L.J. 190.

201. (1) If the complaint has been made in writing to a Magistrate who is not competent to take cognizance of the case, he shall return the complaint for presentation to the proper Court with an endorsement to that effect.

Procedure by Magistrate not competent to take cognizance of the case.

(2) If the complaint has not been made in writing, such Magistrate shall direct the complainant to the proper Court.

661A. If a complaint in respect of an offence of murder is presented to a second-class Magistrate, the proper procedure is to return the complaint under sec. 201 for presentation to the proper Court with an endorsement to that effect—*Bengali Gope*, 5 Pat. 447, 27 Cr L.J. 701.

This section does not cover the case of a Magistrate who is entitled to take cognizance of some of the charges named in the complaint, but is not entitled to take cognizance of a charge not named in the complaint, but which could possibly be made out from the allegations in the complaint. He can take cognizance in such a case—*Sirpat*, 32 Cr L.J. 360, 129 I.C. 257, 1930 A.L.J. 1422, AIR. 1931 All. 10, 1931 Cr.C. 10, Ind Rul. 1931 All. 129.

This section refers back to sec. 100, Cr. P. C., and to Part A of Chap. XV. There is a very great difference between the terms 'taking cognizance', 'hearing' and 'trying'. A Third Class Magistrate cannot take cognizance of any complaint, but that does not mean that he cannot hear the case if sent to him for hearing by a Court competent

to do so under either sec. 192 or 528, Cr. P. Code—*Painda v. Gulab Khatun*, 40 Cr.L.J. 515, 181 I.C. 49, I.L.R. 1938 Lah. 619, A.I.R. 1939 Lah. 122, 41 P.L.R. 221.

Magistrates, when verifying complaints, should enquire so far as they can, as to the scene of the offence so as to find out as soon as possible whether the complaint is or is not within their jurisdiction and thus save their own time and the time of the superior Courts—*Ismail Abdul Karim v. Nural Yar Muhammad*, A.I.R. 1937 Sind 31, 166 I.C. 622, 38 Cr.L.J. 291, 9 R.S. 148.

202. (1) If the Chief Presidency Magistrate or any other Presidency Magistrate whom the Local Government may from time to time authorize in this behalf or any Magistrate of the first or second class, is not satisfied as to the truth of a complaint of an offence of which he is authorized to take cognizance, he may, when the complainant has been examined, record his reasons, and may then postpone the issue of process of compelling the attendance of the person complained against, and either inquire into the case himself or direct a previous local investigation to be made by any officer subordinate to such Magistrate, or by a police-officer, or by such other person, not being a Magistrate or police-officer, as he thinks fit, for the purpose of ascertaining the truth or falsehood of the complaint.

(2) If such investigation is made by some person not being a Magistrate or a police-officer, he shall exercise all the powers conferred by this Code on an officer in charge of a police-station, except that he shall not have power to arrest without warrant.

202. (1) *Any Magistrate on receipt of a complaint of an offence of which he is authorised to take cognizance, or which has been transferred to him under section 192, may, if he thinks fit, for reasons to be recorded in writing, postpone the issue of process for compelling the attendance of the person complained against, and either inquire into the case himself or, if he is a Magistrate other than a Magistrate of the third class, direct an inquiry or investigation to be made by any Magistrate subordinate to him, or by a police-officer or by such other person * * * * as he thinks fit, for the purpose of ascertaining the truth or falsehood of the complaint:*

Provided that, save where the complaint has been made by a Court, no such direction shall be made unless the complainant has been examined on oath under the provisions of section 200.

(2) *If any inquiry or investigation under this section is made by a person not being a Magistrate or a police-officer, such person shall exercise all the powers conferred by this Code on an officer in charge of a police-station, except that he shall not have power to arrest without warrant,*

(2A) *Any Magistrate inquiring into a case under this section may, if he thinks fit, take evidence of witnesses on oath.*

(3) This section applies also to the police in the towns of Calcutta and Bombay.

(3) This section applies also to the police in the towns of Calcutta and Bombay.

Change:—This section has been amended by sec. 55 of the Criminal Procedure Code Amendment Act, XVIII of 1923.

The main changes introduced are the following :—

"(1) Third class Magistrates have been given power to make preliminary inquiries personally. (2) Authority to make a preliminary inquiry has been given in *any case* in which the Magistrate thinks fit for reasons to be recorded in writing. The only ground contemplated by the old section was "if the Magistrate is not satisfied as to the truth of the complaint." This is thought to be undesirably narrow. (3) The words 'inquiry or investigation,' have been substituted for the expression 'previous local investigation,' and power is given to take evidence upon oath in the case of such a preliminary inquiry. (4) Presidency Magistrates are enabled to act under this section without special authorisation"—*Statement of Objects and Reasons* (1914)

'Or which has been transferred to him under section 192' —"We have made a small amendment in sec. 202 (1) to cover cases which have been transferred to a Magistrate under sec. 192 as well as cases of which he has taken cognizance himself"—*Report of the Select Committee* (1916).

The present proviso to sub-section (1) has been substituted by the Cr P Code Amendment Act II of 1926 in place of the old proviso which was added by the Amendment Act of 1923, and which ran thus —

"Provided that no such direction shall be made —(a) unless the complainant has been examined on oath under the provisions of sec. 200, or (b) where the complaint has been made by a Court under the provisions of this Code."

Thus, this proviso laid down that a Magistrate receiving a complaint need not direct an inquiry or investigation if the complaint was made by a Court. "This has caused difficulties in the case of a Court complaining under sec. 476 of the Code. Under that section, the Court has only to record a finding that it is expedient that an inquiry should be made into an offence which appears to have been committed, and it seems clear that cases will arise in which an inquiry or investigation should be made before a person is put on his trial. The difficulty was brought to light by the Bombay High Court, and the Local Government; and the other High Courts have all agreed that some provision is required. This clause gives effect to this proposal"—*Statement of Objects and Reasons* (Gazette of India, 1925, Part V, p. 214).

The present proviso lays down by implication that an inquiry or investigation may be directed in any case, including a case of a Court complaining under sec. 476, but that in such a case the examination of the complainant is not necessary before the inquiry or investigation.

662. Scope and application of section:—This chapter deals with the procedure to be followed by a Magistrate upon taking cognizance of an offence upon complaint, i.e., when he takes cognizance under sec. 190, clause (a), and not when he takes cognizance upon a Police report or other information mentioned in clauses (b) and (c) of sec. 190. See *Ranga Chari*, 2 Weir 241 (242). This section applies only to cases where there is a "complaint" as distinguished from a mere information. A Magistrate acting upon second-hand information cannot be said to be acting upon complaint—*Narain*, 1888 P.R. 24. So also, a Magistrate taking cognizance of a case

upon a *police report* cannot proceed under this section and refer the case to a subordinate Magistrate for local investigation—*Abdulla*, 40 Cal. 854; *Sarba Mahton*, 17 C.W.N. 824 (825); *Tiloki*, 2 P.L.T. 220, 22 Cr.L.J. 735. A Magistrate taking cognizance of an offence under sec. 190, cl. (c) cannot direct an inquiry under sec. 202—*Shoukatmal*, 7 S.L.R. 75, 14 Cr.L.J. 600 (601).

An inquiry cannot be directed under this section *before* the Magistrate takes cognizance of an offence—*Shoukatmal*, *supra*.

Under the old section, the inquiry or investigation could be made only in those cases where the Magistrate was not satisfied as to the truth of a complaint—*Jhumuck v. Pathuk*, 27 Cal. 789; *Ranga Chari*, 2 Weir 241 (242); *Mahadeo*, 27 Cal. 921 (924). Under the present section, the Magistrate can direct inquiry or investigation, *if he thinks fit, i.e., on any reasonable ground*. See Notes under "Change" above. Thus, if the complainant is not speaking from personal knowledge, a Magistrate taking cognizance would exercise a wise discretion in making the inquiry under this section—*Sukumar v. Mofizuddin*, 25 C.W.N. 357 (360).

The Magistrate can direct an inquiry or investigation only if he himself thinks fit, but not merely in obedience to the District Magistrate's instructions—*Nga Tha*, (1910) 1 U.B.R. 73, 11 I.C. 249 (250), 12 Cr.L.J. 385.

If the complaint is made against some individuals jointly, the Magistrate has discretion to issue processes against some and postpone issue of processes against the others. The fact that the Magistrate has issued processes against two of the accused persons would not deprive him of his power to make a preliminary enquiry in respect of the offence alleged against the third accused under sec. 202, Cr. P. Code—*Haroon v. Gajadhar Sukhdeo Marwadi*, A.I.R. 1940 Nag. 128, 41 Cr.L.J. 312, 186 I.C. 459, 1940 N.L.J. 43.

This section applies to a complaint of an offence. A petition for maintenance under sec. 488 is not a complaint of an offence; and, therefore, this section is inapplicable to proceedings in maintenance. The Magistrate to whom a maintenance petition is preferred has no power to refer it to a Subordinate Magistrate for inquiry and report, but must inquire into it himself—*Sardaran v. Amir Khan*, 1905 P.R. 29.

This section does not in terms authorise a Magistrate to refer a petition under sec. 107 to a police officer for investigation, as a petition under sec. 107 does not allege the commission of an offence and does not amount to a complaint. But as the Magistrates have control over the police whose assistance they can seek in the discharge of their duties, it is perfectly open to a Magistrate to avail himself of the help of the police apart from sec. 202, and to refer the matter of the petition under sec. 107 to a police officer for investigation—*Sanjivi v. Koneri*, 49 Mad. 315, 50 M.L.J. 460, A.I.R. 1926 Mad 521. See Note 230.

The provisions of secs. 200 to 203 which relate to the procedure to be employed by a Magistrate taking cognizance of an offence do not apply to sec. 552, Cr. P. C., where no offence is alleged—*Thakoredas v. Bhugwandas*, 4 Bom.L.R. 609; *Tulsidas v. Chetandas*, A.I.R. 1933 Nag. 374, 16 N.L.J. 310, 1933 Cr.C. 1573.

If the Magistrate on taking cognizance of an offence under sec. 211, I. P. C., issues notice to the accused to show cause why he should not be prosecuted for making a false charge, and makes over the proceeding to a subordinate Magistrate, the procedure does not strictly fall under sec. 202, but it is not an illegal procedure, because a prosecution for making a false charge should not be commenced until the person who made the charge is offered an opportunity of substantiating the charge—*Bhairab Chandra*, 46 Cal. 807 (813), following *Sham Lal*, 14 Cal. 707 (F.B.).

The Court taking cognizance of an offence under the Child Marriage Restraint Act, 1929 (Act XIX of 1929) shall, unless it dismisses the complaint under sec. 203, Cr. P. C., either itself make an inquiry under sec. 202, Cr. P. C., or direct a Magistrate of the first class subordinate to it to make such inquiry. Vide sec. 10 of that Act. Omission to comply with this mandatory provision of that Act is an illegality which vitiates his action—*Mangal v. Kalu*, 130 I.C. 783, 12 Lah. 383, A.I.R. 1931 Lah. 56,

31 P.L.R. 915, 32 Cr.L.J. 616, 1931 Cr.C. 120, Ind. Rul. 1931 Lah. 351; *Chand Mal Goenka*, 35 Cr.L.J. 1436, 151 I.C. 830, 35 P.L.R. 8, A.I.R. 1934 Lah. 155, 1934 Cr.C. 333, 15 Lah. 63, 7 R.L. 209

It is only in very rare cases that the Court will be justified in throwing out a complaint without giving an opportunity to the complainant to substantiate his allegations, but in certain cases it is the duty of the Court to protect the accused from unnecessary harassment and worry—*G. A. St. George v. Uma Dutt Sharma*, 40 Cr.L.J. 917 (1920), 184 I.C. 313, A.I.R. 1939 All. 602, 1939 A.L.J. 574

663. Recording reasons:—The Magistrate is bound to record his reasons before directing a local investigation—*Baidyanath v. Muspratt*, 14 Cal 141; *Ram Pershad v. Moti*, 11 A.L.J. 754, 14 Cr.L.J. 403; *Madho v. Rashid*, 15 A.L.J. 642, 18 Cr.L.J. 765; *Moraji*, 36 Cr.L.J. 483, 154 I.C. 325, A.I.R. 1935 Bom. 76, 36 Bom.L.R. 1213, 1935 Cr.C. 137; if he refers a case to the police for inquiry without recording any reasons and then on receiving the report from the police, dismisses the complaint under sec. 203, the order of dismissal must be set aside—*Virabhadrayya v. Vryicherla*, 2 Weir 244; *Balai Lal v. Pasupati*, 21 C.W.N. 127 (129), 17 Cr.L.J. 396. If the Magistrate has any doubt as to the truth of the allegations in the petition of complaint as supported by the solemn affirmation of the complainant, he ought to record an order to that effect in the order sheet, so that the superior Courts may be satisfied that the Magistrate had any justification whatsoever in refusing to issue summons to the accused as required by law—*Mukti Narayan v. Emp.*, A.I.R. 1940 Pat. 97 (98), 1939 P.W.N. 871, 20 P.L.T. 947, 41 Cr.L.J. 349, 186 I.C. 627. But in some cases it has been held that omission to record the reasons is at most an irregularity which will be cured by sec. 537 unless it has occasioned a failure of justice—*Anonymous*, 2 Weir 244 (245); *Alagirisami*, 25 Mad 546; *Ram Saran v. Md. Jan Khan*, 7 P.L.T. 36, 26 Cr.L.J. 1394; *Finan*, 55 Bom. 770, 1931 Cr.C. 956 (957); *Dharmadas v. Pulcher*, 32 Cr.L.J. 926, 1931 Cr.C. 731, A.I.R. 1931 Sind. 113, 132 I.C. 479; *Ajoy Krishna v. S. G. Bose*, A.I.R. 1929 Cal. 176 (177), 49 C.L.J. 164, 33 C.W.N. 369, 116 I.C. 721, 30 Cr.L.J. 705.

664. "Postpone the issue of process":—The procedure prescribed by this section can be adopted when no process has been issued to compel the attendance of the accused. A Magistrate who after issue of process directs an inquiry and report acts in contravention of the procedure prescribed by law—*Khurram*, 1896 A.W.N. 140. Once a process has been issued against the accused, the Magistrate cannot exercise his option of holding a preliminary inquiry. He must proceed with the trial—*Gaji v. Jumanshah*, 6 S.L.R. 83, 13 Cr.L.J. 749. Thus, it is illegal to order a preliminary inquiry after the accused has been brought before the Court under a warrant—*Ramkant v. Jadub*, 21 W.R. 44. When a Magistrate has accepted a complaint and issued process upon it and taken evidence for the complainant, he or his successor cannot refer the case to the Police for inquiry and report—*Sadapachariar v. Ragavachariar*, 9 Mad. 282. The Magistrate cannot go back beyond the stage reached by his predecessor. A necessary preliminary to an enquiry under this section is postponement of issue of process. Where that was not done by the first Court, which in fact procured the attendance of the accused, the stage for holding enquiry under this section had passed and would not be revived subsequently—*Qamarali v. Tulsi*, 39 Cr.L.J. 981, 178 I.C. 54, A.I.R. 1938 Nag. 433. Where a subordinate Magistrate has taken cognizance of a case and has issued process, the District Magistrate has no power to interfere and order an inquiry—*Jhumuck v. Pathuk*, 27 Cal. 798. On the other hand, if a Magistrate directs a local inquiry, he cannot issue process before he receives the report of the inquiry—*Krishna Bala v. Nirodabala*, 41 C.L.J. 170, A.I.R. 1925 Cal. 989 (990). But where after the Magistrate had issued processes against two accused persons, one of them appeared and laid a cross-complaint, and then the Magistrate rescinded the order of issue of process and sent forth the cases to a subordinate Magistrate for local inquiry and report, held that the action of the Magistrate was right and proper—*Lalit v. Nani Lal*, 27 C.W.N. 651, 25 Cr.L.J. 464, 39 C.L.J. 329.

Complaints may generally be made by any person aware of the commission of an offence, and not necessarily by the person injured. The person making a complaint need not himself have personal knowledge of the facts constituting the complaint, but before issuing process on such allegations the Magistrate should satisfy himself on proper materials that a case for issue of process has been made out—*S. D. Vardon v. R. Hearsey*, 36 Cr.L.J. 75, 152 I.C. 344, A.I.R. 1934 Rang. 167, 1934 Cr.C. 784.

Counter case:—Section 202, Cr. P. C., gives the Magistrate a discretion to postpone the issue of process in a case till the disposal of the counter-case—*Allahdino*, 34 Cr.L.J. 891, 144 I.C. 943, A.I.R. 1933 Sind 254, 1933 Cr.C. 810. Reading section 344, Cr. P. C., in conjunction with sec. 202, Cr. P. C., it seems that the Magistrate undoubtedly has jurisdiction to postpone his enquiry; and even, apart from this section, the Court must be held to have inherent jurisdiction to make such an order—*Ram Golam v. Sarat*, 31 Cr.L.J. 262, 121 I.C. 414, 49 C.L.J. 388, A.I.R. 1929 Cal. 281.

665. If the accused appears:—This section speaks of postponement of issue of process. If, however, the accused appears of his own accord without a summons he is entitled to require that the complaint shall be proceeded with or dismissed. If no evidence is offered against the accused, he must be formally discharged—*Lakshman*, 25 Bom. 552.

666. Inquiry and investigation:—Under the old section, the inquiry was to be conducted by the Magistrate himself who tried the case; he could not direct the inquiry to be held by a subordinate Magistrate or a police-officer. These persons could only hold a local investigation. See *Haricharan v. Girish Chandra*, 38 Cal. 68 (72); *Gangadhar*, 43 Cal. 173 (176), 20 C.W.N. 63; and if the Magistrate taking cognizance of the case thought it proper to refer the case to some other Magistrate for inquiry (not investigation), he would have to transfer the case to such Magistrate under sec. 192 not for report but for disposal—*Hari Charan v. Girish*, 38 Cal. 68 (73); *Gangadhar*, 43 Cal. 173 (176). The present amendment now empowers the subordinate Magistrate and the police-officer to hold an inquiry as well as an investigation. See also *Amrit Majhi*, 46 Cal. 854 (859), 23 C.W.N. 623, in which the order referring the complaint to a subordinate Magistrate for inquiry and report was held to be legal.

It is entirely in the discretion of the Magistrate whether or not he would send the case to the Police for inquiry and report under this section—*U Po Yone*, 34 Cr.L.J. 1184 (1186), 146 I.C. 196, A.I.R. 1933 Rang. 271, 1933 Cr.C. 1015.

An inquest report made under sec. 176, Cr. P. C., cannot be treated as a report made after an inquiry which is contemplated by this section—*Surendra v. Police Sergeant*, 35 C.W.N. 1032, 1932 Cr.C. 106, 33 Cr.L.J. 218, 135 I.C. 878, A.I.R. 1932 Cal. 121, Ind. Rul. 1932 Cal. 174.

The Magistrate taking cognizance of a case can either direct a subordinate Magistrate to make a local inquiry and report under sec. 202; or he can transfer the case to a subordinate Magistrate under sec. 192 for disposal. But he cannot confuse the two sections by ordering a subordinate Magistrate "to make a local inquiry and then dispose of the case." Such an order is invalid—*Mahomed Imamuddin v. Debendra*, 18 C.W.N. 95 (97). See also *Shco Balak Singh v. Sant Bux Singh* in Note 603.

Where the Magistrate makes the inquiry himself, it is not necessary that he should examine the witnesses or hold an investigation into the case. It is open to the Magistrate to make the inquiry in order to ascertain the truth or falsity of the complaint, in any way he thinks proper. Thus, where an investigation has already been made by the police and witnesses have been examined by the investigating police-officer, the Magistrate can merely look into the police papers for the purpose of ascertaining the truth or falsehood of the complaint. This section does not contemplate any particular form of inquiry; and so if upon looking into the police papers the Magistrate is satisfied that this is not a fit case in which process should issue, he can dismiss the complaint—*Ramanand v. Ali Hassan*, 26 Cr.L.J. 129 (131) (Pat.).

Under this section, the Magistrate has the option of only one of two alternatives,

viz, either to *inquire* into the case himself or to direct a *local investigation*. He cannot have recourse to *both* the alternatives; and if he, after partially inquiring into the case himself, makes an order directing local investigation, the procedure is irregular—*Durga Prosad*, 44 All 550, 20 A.L.J. 355, 23 Cr.L.J. 279. He cannot inquire into the case himself and at the same time order a local investigation by a police-officer—*Madho Gir v. Rashid*, 15 A.L.J. 642, 18 Cr.L.J. 765. So also, he cannot, after a local investigation has been made by the police or by a subordinate Magistrate, proceed to inquire into the case himself—*Ram Pershad v. Moti*, 11 A.L.J. 754, 14 Cr.L.J. 493 (494). Such a procedure will cause much inconvenience and annoyance to witnesses who will have to leave their avocations and attend the police-officer and Court three times over—Ibid. But in a Calcutta case it has been observed that if the Magistrate, on receiving the report of the local investigation held by the police, is dissatisfied with the materials obtained, he can personally make an inquiry or direct a further local investigation—*Hari Charan v. Girish*, 38 Cal 68 (72). In *Madho Gir v. Rashid*, *supra*, the procedure rose to a climax; the Magistrate taking cognizance held an inquiry; he also directed a local investigation by the police; he was then transferred and the new incumbent referred the case to the District Magistrate who then directed the Magistrate to proceed to the spot and hold a full investigation, the result was that there were several investigations held by Magistrates independently of each other. The High Court condemned the procedure.

The police inquiry contemplated by this section cannot take the place of evidence. Therefore when the Magistrate decides to record the evidence himself, he should complete the inquiry and determine upon the evidence adduced how far the complaint is borne out. It is not a proper procedure for the Magistrate to examine some of the witnesses and then direct a police inquiry—*Mahadeo v. Ram Sahai*, 22 O.C. 321, 52 I.C. 888 (889), 20 Cr.L.J. 728.

This section makes no provision for the manner in which the evidence in an inquiry should be recorded. Where the Magistrate had before him the report of the police containing a detailed account of the statements of witnesses examined by the police, and the witnesses repeated the same statements before the Magistrate, the omission on his part to record the depositions of the witnesses was not an error of law—*Tilakdhari v. Misra*, 26 Cr.L.J. 1346 (1347) (Pat.).

An inquiry or investigation under this section is designed to afford the Magistrate an opportunity of either confirming or removing such hesitation as he may feel in respect of issuing process against the accused. The nature of the inquiry varies with the circumstances of each case, and it is certainly not contemplated that it should always be exhaustive. Frequently all that is required is the elucidation of some minor point or the summary determination of the sufficiency of the available evidence, but least of all is the inquiry in a preliminary trial of the accused at which he is entitled to adduce his evidence before process can issue upon him—*Parmanand*, 30 Cr.L.J. 554, 116 I.C. 46, 10 P.L.T. 618, A.I.R. 1930 Pat. 30, Ind. Rul. 1929 Pat. 286.

In an enquiry under this section dilatory and protracted proceeding should be deprecated. It is never intended that such an enquiry should be dragged out for months—*Ajit Nath Das v. Satish Chandra Kayal*, 67 C.L.J. 577 (578), 40 Cr.L.J. 213, 179 I.C. 489, A.I.R. 1939 Cal. 33.

667. Local investigation:—The words "local investigation" occurred in the old section; after the amendment of 1923, these words have been replaced by the simple word "investigation" so that the scope of the investigation has now been extended.

A local investigation can be ordered when there is a quarrel about boundaries or any matter of that kind. Otherwise, the Magistrate taking cognizance should make an inquiry himself—*Baij Nath v. Raja Ram*, 10 A.L.J. 79, 13 Cr.L.J. 704.

But the Patna High Court held that the words "local investigation" are not restricted to the investigation of the physical features only but they mean an inquiry into the truth or falsity of the allegations made in the complaint-petition. The word

"local" is used with a view to hold the investigation in the locality for the convenience of the parties and their witnesses, and also it may in certain cases necessitate an inspection of the place of occurrence, but certainly it is not confined only to the inspection of the locality—*Munshi Mian*, 19 Cr.L.J. 126 (Pat.). Under the present section it is not even necessary to hold the investigation in the *locality*, since the word "local" has been omitted.

668. Who can make the inquiry or investigation:—This section can be applied by a Magistrate in two cases; first, on receipt of a complaint of an offence of which he is authorized to take cognizance; and second, on receipt of a complaint of an offence which has been transferred to him under sec. 192, Cr. P. Code. The first part of this section cannot apply to a transfer, and the second part deals only with a transfer under sec. 192, Cr. P. C., and, therefore, excludes the case of a transfer under sec. 528, Cr. P. Code. Where, therefore, the first Magistrate had examined the complainant and had summoned the accused, who appeared before him, and the second Magistrate, to whom the case was transferred under sec. 528, Cr. P. C., re-examined the complainant, directed a preliminary enquiry and thereafter dismissed the complaint under sec. 203, Cr. P. C., held that it was not open to the second Magistrate to order enquiry under sec. 202 and to dismiss the case under sec. 203, Cr. P. Code—*Qamarali v. Tulsi*, 39 Cr.L.J. 981, 178 I.C. 54, A.I.R. 1938 Nag. 433, 11 R.N. 197.

See also *Sheo Balak Singh v. Sant Bux Singh* in Note 603

If the offence is one triable only by a Court of Session, the local investigation must be directed to some Magistrate who is competent to deal with a case triable by the Court of Session. It should not be directed to a second class Magistrate—*Budhu Nath*, 4 C.W.N. 305. But see *Surjya*, 6 C.W.N. 295, where it has been held that a Magistrate holding a local investigation under this section need not be competent to entertain the complaint which he is asked to investigate.

A local investigation must be directed to a *subordinate* Magistrate. A 1st class Magistrate is not subordinate to the District Magistrate. Both are first class Magistrates, and the latter cannot direct the investigation to be held by the former—*Aly Mohd*, 1912 P.R. 2. A Deputy Magistrate attached to the sub-division is subordinate to the Sub-Divisional Officer—*Munshi Mian*, 19 Cr.L.J. 126 (Pat.). The Sub-Divisional Magistrate is not subordinate to a Deputy Magistrate who is in charge of the district during the absence of the District Magistrate. The Deputy Magistrate cannot therefore make over a case to the Sub-divisional Magistrate for investigation. If the case is made over to the Sub-divisional Magistrate, it will be deemed to have been transferred to him under sec. 192; he will have full seisin of the case and will be entitled to continue the proceeding up to the necessary order of acquittal, conviction or discharge. And the Deputy Magistrate who transferred the case will cease to have jurisdiction in the case—*Bhiku Hossein*, 39 Cal. 1041 (1046, 1047), 18 C.W.N. 885.

The Additional Chief Presidency Magistrate has jurisdiction to make an order sending a complaint to a Presidency Magistrate for enquiry and report in terms of this section. The latter has no power to issue summons on the accused in such a case but his duty is only to make a report to the Additional Chief Presidency Magistrate and it will be for him to deal with the complaint in accordance with law—*Kanayalal v. Kanmull*, 35 Cr.L.J. 729, 148 I.C. 691, A.I.R. 1934 Cal. 405, 59 C.L.J. 201, 38 C.W.N. 560.

It is desirable that the inquiry should be held by some Magistrate who has not been concerned with the case—*Fanindra v. Rahat Ali*, 37 C.W.N. 709 (712). The investigation may be made by any person subordinate to the Magistrate, even though he be a clerk—*Kanchun v. Ram Kishen*, 36 Cal. 72. It is illegal to order the local inquiry to be made by a *pleader* in the nature of a commission in a civil case—*Mohar Khan v. Gayzuddin*, 18 C.W.N. 339 (401).

It is not only irregular but illegal for a Magistrate to whom a complaint is made to call upon the person accused for a report as to the truth or falsity of the charge.

preferred against him—*Harnarain Halwai v. Kariman Ahir*, A.I.R. 1920 Pat. 655, 57 I.C. 285, 21 Cr.L.J. 621, 5 P.L.J. 61, 1 P.L.T. 609, *Mukti Narayan v. Emp.*, A.I.R. 1940 Pat. 97 (100), 1939 P.W.N. 871, 20 P.L.T. 947, 41 Cr.L.J. 349, 186 I.C. 627, distinguishing *Ram Saran Singh v. Mohammad Jan Khan*, A.I.R. 1926 Pat. 34, 89 I.C. 706, 26 Cr.L.J. 1394, 7 P.L.T. 36 and *Mahabir Baitha v. Emp.*, A.I.R. 1931 Pat. 302, 1931 Cr.C. 723, 133 I.C. 172, 32 Cr.L.J. 1023, 12 P.L.T. 710. See also *Baidya Nath v. Muspratt*, 14 Cal. 141.

Investigation by Police:—It is not a proper course to make indiscriminate use of police agency for investigating complaints. The object of law is to give persons who have been injured an access to justice independent of Police, and it is improper for the Magistrate, when a complaint is made to him, to refer the complaint to a Police-officer. Such a course would foster abuses and defeat the purpose of the law—*In re Jankidas*, 12 Bom. 161. These observations apply with greater force when the complaint is not only against an ordinary individual but when it is said that such individual has acted in collusion with a Police-officer. This is a fit case in which the Magistrate should take evidence himself and on such evidence decide for himself whether or not process should issue against the accused, and if he holds, that the case is false he should decide whether proceedings should be taken against the complainant or any of his witnesses—*Mohlamal v. Gianchand*, 35 Cr.L.J. 24, 146 I.C. 263, A.I.R. 1933 Sind 339, 1933 Cr.C. 1136. In petty cases of assault and the like, the Police ought not to be directed to make inquiries, because in petty matters the Police are under a strong temptation of making money out of the complaint. In such matters the proper course for the Magistrate is to take action at once upon the complaint—*Ganesha*, 1894 P.R. 19. "Magistrates are cautioned against the indiscriminate use of Police agency for the purpose of ascertaining matters as to which a Magistrate is bound to form his own opinion upon evidence given in his presence. This caution is specially needful in respect of all cases regarding offences not cognizable by the Police"—*Cal. G. R. & C. O.*, p. 9.

If the complaint is made against a police-officer, it is improper for the Magistrate to call for a report from the police-officer who is himself the accused person—*Baidya Nath v. Muspratt*, 14 Cal. 141, or from some other police-officer—*Jalaluddin v. Md. Khalil*, 1884 A.W.N. 47; *Mewa Lal*, 18 A.L.J. 620, 21 Cr.L.J. 461; or even from a superior police-officer or the District Superintendent of Police (who, as the head of the police, might not be in as impartial a position for discovering the truth as an officer unconnected with the police)—*Haladhar*, 9 C.W.N. 199 (201); *Shama v. Eza*, 19 A.L.J. 731, 21 Cr.L.J. 649, *Jalyindar v. Agha Sabdar*, 29 Cr.L.J. 958, 111 I.C. 878, A.I.R. 1928 Lah. 88. In such cases the inquiry should be held by the Magistrate himself—*Kanappa*, 20 Mad. 387; *Bhiku*, 39 Cal. 1041 (1046); *Maniruddin v. Abdul*, 40 Cal. 41 (44); *Shama v. Eza*, supra; *Mewa Lal*, supra; *Mahadei v. Ram Sahai*, 22 O.C. 321, 52 I.C. 888 (889), 20 Cr.L.J. 728, or entrusted to some subordinate Magistrate—*Haladhar*, supra, preferably a Magistrate of the first class—*Maniruddin v. Abdul*, supra. These authorities however are not based upon any provision of the statute, but upon general ground of policy. The statute still remains and under that statute it is not illegal to send such a complaint for inquiry or investigation by a Police-Officer. Before, therefore, this would be a ground for revision it would have to be found in the words of sec. 435, Cr. P. C., that this particular order was in fact incorrect or improper—*Kaniya Ram v. Chanan Mal*, A.I.R. 1940 Lah. 208 (209), 42 P.L.R. 134, 41 Cr.L.J. 618, 188 I.C. 524.

Where after examination of the complainant under sec. 200 Cr. P. C., the Magistrate, instead of issuing process against the accused or proceeding under sec. 202 Cr. P. C., and directing a Subordinate Magistrate or the Police to make an enquiry into the allegations made by the complainant, directed that the Police should produce the accused before him for the purpose of having an oral
to the truth of the complaint and dismissed the
after making some verbal enquiries from the

from them as
498, I.
the court

held that the procedure was quite irregular and illegal—*Barju Prasad v. Ram Lal*, 35 Cr.L.J. 415, 147 I.C. 387, 11 O.W.N. 34, 1934 Cr.C. 258, A.I.R. 1934 Oudh 88.

The Calcutta High Court holds that a police investigation held under this section under the order of a Magistrate is something different from the investigation referred to in sec. 156 (3). A Magistrate, after he has taken cognizance of a case under sec. 200, cannot order a police inquiry under sec. 156 (3) and direct the police to submit a charge-sheet. That is, a Magistrate, after he has acted under Chapter XVI, cannot proceed under Chap. XIV—*Isaf Nasya*, 54 Cal. 303, 28 Cr.L.J. 557. The Bombay High Court is also of opinion that the police are not entitled, after investigation, to arrest the accused and send him up for trial under a charge-sheet, as if they had taken cognizance of the case under their ordinary powers of investigation. The only action they can take is to make a report—*Nur Mahomed*, 53 Bom 339, 30 Cr.L.J. 781 (782). But see 2 Pat. 379, 34 Mad. 598 and other cases cited in Notes 487 and 670

669. Proviso—Examination of complainant:—Before directing a local investigation, the complainant must be examined either by the Magistrate who receives the complaint or by some other Magistrate to whom the case might have been transferred—*Bai Kashi*, Ratanlal 368. Unless the complainant is duly examined, an inquiry and report under this section cannot be called for, and, if made, are without jurisdiction and cannot form the basis of any further action—*Mahadeo*, 27 Cal 921; *Budh Nath*, 4 C.W.N. 305; *Ningappa*, 48 Bom. 360 (362) 81 I.C. 608, A.I.R. 1924 Bom. 321, 26 Bom.L.R. 183, 25 Cr.L.J. 960; *Bhagwan Das*, 36 Cr.L.J. 860, 58 All 129, A.I.R. 1935 All 745, 155 I.C. 1070; *Jalan*, 1 P.L.T. 564. A complainant challenging the police investigation must be examined on oath before his complaint is dismissed—*Kartick Pathak*, A.I.R. 1921 Pat. 250, 2 P.L.T. 142, and the complainant who was not examined under this section could not be prosecuted in respect of his complaint (if it was false) which was dismissed on a report called for under this section—*Aly Mohd.*, 1912 P.R. 2; *Mahadeo*, 27 Cal. 921; *Ram Sarup*, 4 O.C. 127; *Bhagwan Das*, supra.

670. Power of the investigating officer:—A Magistrate making an order under sec. 202, Cr. P. C., for a preliminary inquiry, does not deprive himself of jurisdiction; he merely postpones the issue of process until the report is received but continues to have jurisdiction. The Magistrate to whom the case is sent under sec. 202 is to submit report and has no power either to issue process or pass any other order. The situation would be entirely different in the case of a transfer under sec. 192 or sec. 528, Cr. P. C., when the Magistrate to whom the case is sent assumes jurisdiction. The Magistrate has therefore jurisdiction to stay the criminal proceedings which were in fact still pending before him—*Rewatmal v. Sajanmal*, 36 Cr.L.J. 94, 152 I.C. 382, A.I.R. 1934 Sind 143, 1934 Cr.C. 1150. See also *Udit Narayan Patwari v. Emp.*, 39 Cr.L.J. 778, 176 I.C. 715, A.I.R. 1938 Pat. 369, 19 P.L.T. 336, 1938 P.W.N. 542, 4 B.R. 750, 11 R.P. 100. A Magistrate conducting a local investigation can exercise all the powers of a Magistrate including the power to administer oath (see the new sub-section 2A) Such a proceeding is a judicial proceeding within the meaning of sec. 476, and the investigating Magistrate can direct the prosecution of the complainant under sec. 476 if the complaint turns out to be false—*Kanchan v. Ram Krishun*, 36 Cal. 72. *Contra* :—*Kachi Madar*, 21 M.L.J. 795, 12 Cr.L.J. 323, where it was held that a preliminary investigation made by a Magistrate under this section was not a judicial proceeding because the depositions made by witnesses in the investigation could not be taken on oath. This ruling is no longer correct.

The inquiry or investigation is not intended to supersede a regular trial but only to ascertain the truth or falsehood of the complaint; therefore if the investigating officer finds that there is some evidence in support of the complainant's case, his function is fulfilled. He need not carry the investigation further by calling upon the accused and examining the witnesses on both sides, in the manner of a regular trial—*Nga Tha*, (1910) U.B.R. 73, 11 I.C. 249 (250).

The hands of the Inquiry Magistrate are not tied in the matter of questioning the witnesses when they are produced under sec. 202, Cr. P. C. It would be dangerous to lay down hard and fast rules as to how far the Magistrate should go in trying to elicit the truth from the witnesses when he is conducting an enquiry behind the back of the accused. It is commendable on the part of the Magistrate to show keenness in finding out the truth or falsity of the case before he gives the accused person the trouble of appearing before him in response to a criminal charge. The anxiety of the trial Magistrate to get at the truth and his intensive cross-examination of the witnesses for that purpose are no grounds in law for directing a further enquiry—*Gul Muhammad v. Habibullah Karim Ullah*, 40 Cr L J 674, 182 I.C. 522, AIR 1939 Pesh. 16, 12 R Pesh. 1.

The Magistrate holding the investigation is not disqualified thereby from afterwards trying the case, when there is nothing to indicate that he initiated or directed the proceedings or took any personal interest in the matter of the complaint presented before him—*Anand v. Basu Meah*, 24 Cal. 167. The fact that the investigating Magistrate expressed an opinion in submitting the report is no bar to his holding the trial—*Mani Madhab v. Rosaraj*, 4 C.W.N. 604. But where a Magistrate took an active part in forwarding the police inquiries and collecting evidence against the accused, he is disqualified from trying the accused—*Sudhana*, 23 Cal 328. So also, where a Magistrate, during a local investigation, himself discovered the evidence of crime, and collected or ascertained the evidence in support of it, and thereafter directed, recommended or invited the institution of criminal proceedings, it is undesirable that he should try the case—*Bhop Singh v. Kermoti*, 8 NLR 1, 13 Cr L.J. 236.

In a Patna case it has been held that if a Magistrate sends a cognizable case to the police to investigate under this section, the police-officer making the investigation can arrest and send up a charge sheet. The Magistrate's order under this section does not debar the police from exercising their general powers of arrest and investigation in regard to the same matter as formed the subject of the complaint. In fact, in such a case, the police would be failing in their duty if they did not arrest an offender against whom a cognizable offence has been made out. Much more so would this be the case where the Magistrate after recording the complaint finds that regular police investigation would be more suitable and intentionally keeps the complaint pending in order that the police may exercise their powers of investigation and arrest independently of the Magistrate—*Bhola Bhagat*, 2 Pat 379 (382, 383), 4 PLT. 521, 24 Cr L.J. 375; followed in *Gopal v. Alagrisami*, 54 Mad 598, 60 MLJ 520, 32 Cr L.J. 690, 131 I.C. 176, 33 MLW 460, 1931 MWN 368, AIR 1931 Mad 770, 1931 Cr C 1026, Ind Rul 1931 Mad 512; *Rashim Ahmad*, 14 Lah 194, 33 P.L.R. 840, 1932 Cr C 807 (809), 139 IC 139, 33 Cr L.J. 737, AIR 1932 Lah 579; *Ghulam Nabi*, 27 SLR 67, 1933 Cr C. 334 (335), 144 IC 409, AIR 1933 Sind 136, 34 Cr L.J. 763, Ind. Rul 1933 Sind 185; *Atmaram*, 35 Cr L.J. 891, 148 I.C. 985, AIR 1934 Sind 20, 1934 Cr.C. 218. But the Calcutta and Bombay High Courts hold the contrary view in *Isaf Nasya*, 54 Cal 303, 28 Cr L.J. 577, and *Mir Mahomed*, 53 Bom. 339, 30 Cr L.J. 781 (782); *Arula Kotiah*, 12 Cr L.J. 463, 11 IC 999, 10 MLT. 120, 1911 MWN. 74. See also Note 487.

671. Position of the accused:—A Magistrate has no jurisdiction to require the presence of the accused at an inquiry or investigation, under sec. 202, into a complaint of which he is empowered to take cognizance under sec. 190 or which has been transferred to him under sec. 192—*Appa Rao v. Janakiammal*, 49 Mad. 918 (F.B.), 51 MLJ. 605, 28 Cr L.J. 129. This section does not contemplate the accused taking part in the inquiry, and there is no necessity to give notice to him—*Dhana Reddy*, 8 Rang 1, 31 Cr L.J. 824 (826). He cannot be called upon to submit any explanation or produce witnesses during the investigation—*Bhiku*, 39 Cal. 1041 (1046). Magistrates are in the habit of giving a person against whom a charge is formulated at least an option to come before him if he so desires at the earliest stage. Such a procedure is entirely unwarranted by the Code. The object of this section is to

prevent accused persons being harassed at all or asked to appear if in the opinion of the Magistrate no *prima facie* case is made out, and the Code never contemplated that at that stage they should be either asked or permitted to state their cases—*Appa Rao v. Janakiammal*, supra. In a proceeding under this section the Magistrate acts illegally in sending for the accused person and calling for a report from him as to the truth or falsity of a charge preferred against him—*Hannarain v. Kariman*, 21 Cr.L.J. 621, 5 P.L.J. 61; *Baidyanath v. Muspratt*, 14 Cal. 141. An accused person is not to be called upon under sec. 202 to appear unless and until the Magistrate has satisfied himself from the complainant and his witnesses that there is a *prima facie* case against him. It is highly irregular for a Magistrate, when a complaint is put in and sworn to, without hearing the complainant's case or his witnesses, to issue notice to the accused to appear and show cause against the issue of process, hear what the accused has to say, examine any witnesses he wishes to have examined and then decide whether the complaint shall be received or not—*Varadarajulu v. Kuppusami*, 49 Mad. 926, 51 M.L.J. 602, 28 Cr.L.J. 113; *Chandicharan v. Manindra*, 27 C.W.N. 196, 24 Cr.L.J. 333; *Sheikh Mectan v. Ramavelu*, 37 Mad. 181 (183). The Bombay High Court holds that the practice of issuing notice to the accused during the inquiry under sec. 202 is undesirable but not illegal. But the Magistrate should not dismiss the complaint upon the mere statement of the accused. The scope of the inquiry under this section is restricted only to the ascertainment of the truth or falsehood of the complaint, *ie.*, whether the material facts alleged by the prosecution are true or false, and the provisions of this section are not intended to allow the accused to make his defence at this stage or to supersede a regular trial—*Finan*, 55 Bom. 770, 1931 Cr.C. 956 (958), A.I.R. 1931 Bom. 521, 33 Bom.L.R. 1177, 134 I.C. 1233, 33 Cr.L.J. 72. In another Bombay case it has been held that the Magistrate may, if he deems it desirable, give opportunity to the accused to appear in the inquiry and state what he has to say about the accusation, and the Magistrate may even accept and consider the documentary evidence which the accused produces—*Vibhan*, 52 Bom. 448, 30 Bom.L.R. 642, 29 Cr.L.J. 975, 112 I.C. 63, A.I.R. 1928 Bom. 290. It is not illegal to call on the person complained against to show cause—*Tukaram Udaram*, 6 Bom.L.R. 91, 1 Cr.L.J. 102. See also *Gobardhan*, 35 Cr.L.J. 1239, 151 I.C. 108, 11 O.W.N. 822; *Dharamdas v. Pilchar*, 32 Cr.L.J. 926, 132 I.C. 479, 1931 Cr.C. 731, A.I.R. 1931 Sind 113. According to the Lahore High Court it is incongruous to call on a person accused of an offence to show cause against process being issued against him when proceedings under this section are in contemplation. At the same time this alone would not induce it to interfere on revision unless there was reason to believe that it had occasioned a miscarriage of justice—*Moti Lal v. Emp.*, 29 Cr.L.J. 39, A.I.R. 1928 Lah. 97, 106 I.C. 455, 9 Lah.L.J. 508, 9 A.I.C.R. 328 and 399. The Patna High Court likewise holds that the general practice of conducting the preliminary inquiry in the presence of the accused or automatically issuing notice to the accused to show cause why he should not be prosecuted, is strongly to be condemned because it is in effect a complete rehearsal of the real trial; but there may be occasional cases in which it may be desirable or even necessary to allow the accused to appear, and there is nothing illegal in such cases in calling the accused to the inquiry and to hear him—*Mahabir*, 12 P.L.T. 710, 32 Cr.L.J. 1023 (1024) (following 52 Bom. 448); *Ram Saran v. Md Jan*, 7 P.L.T. 36, 26 Cr.L.J. 1934. The Calcutta High Court is of opinion that the Magistrate does not act illegally if he examines or questions the accused or his witnesses; but he acts illegally if he examines the accused and hears his pleaders for the purpose of deciding whether he will accept the complainant's story or the accused person's story—*Fanindra v. Rahat Ali*, 37 C.W.N. 708 (711), 143 I.C. 606, 34 Cr.L.J. 604, 57 C.L.J. 259, 1933 Cr.C. 766, A.I.R. 1933 Cal 447, 60 Cal 1051. The Burma Court holds that it is unfair and improper, in the inquiry under sec. 202, to call upon the accused, and to examine the complainant's witnesses in the absence of the accused, and to examine the accused's witnesses in the absence of the complainant—*Nga Tha*, (1910) U.B.R. 73, 11 I.C. 249 (250). But in *S. D. Vardon v. R. Hearsey*, 36 Cr.L.J. 75, 152 I.C. 344, A.I.R. 1934 Rang 167, 1934 Cr.C. 784, it was held that in such enquiries the accused had no right to be present and the

Magistrate must make up his mind from the examination of the complainant and, if necessary, from further examination of his witnesses

A person complained against does not become an 'accused' person or a 'person against whom any proceedings have been instituted' within the meaning of sec. 340, until it has been decided to issue process against him under Chapter XVII; sec. 340, therefore, does not entitle him to be represented by a pleader during the preliminary inquiry held under sec. 202—*Shaikh Chand v. Mahomed Hamji*, 4 N.L.R. 81; *Golaq Jan v. Bholanath*, 38 Cal. 880 (887); or during the proceeding when the Magistrate is considering the report of the local investigation ordered by him—*Balai Lal v. Pasupati*, 21 C.W.N. 127 (129), 17 Cr.L.J. 396 (397), 35 I.C. 828. If he chooses to attend the proceedings he may do so like any other member of the public, but he has no *locus standi* as a party, the purpose of the law being clearly to exclude him until sufficient ground for joining him has been made out by the complainant. Therefore, the Magistrate can refuse him permission to cross-examine the complainant's witnesses—*Shaikh Chand v. Md. Hanif*, 4 N.L.R. 81. The accused has no right to be present when a Magistrate is holding an inquiry under sec. 202. Proceedings under this section are not *inter partes*, but merely to satisfy the Magistrate whether there is or is not any ground for issuing process. Allowing a legal practitioner to attend the proceedings is only as a matter of grace and not of right—*Atmaram v. Topandas*, 20 S.L.R. 43, 27 Cr.L.J. 494. A preliminary inquiry should not be held in the presence of the person complained against and he should not be allowed to cross-examine the complainant's witnesses—*Bhimlal*, 40 Cal. 444, 17 C.W.N. 290; *Navsher v. Hazratulla*, 49 C.L.J. 422; *Ram Manihari v. Raj Kishore*, 19 Cr.L.J. 527 (Pat.). It is extremely illegal for the Magistrate to permit the accused to be represented by lawyers at the preliminary inquiry and to allow them to argue that the complaint should be dismissed—*Fanindra v. Rahat Ali*, 37 C.W.N. 709 (711), 143 I.C. 606, 34 Cr.L.J. 604, 57 C.L.J. 259, 1933 Cr.C. 766, A.I.R. 1933 Cal. 447, 60 Cal. 1051; *J. K. Sinha v. Hemanta*, 33 Cr.L.J. 636, 138 I.C. 639, 35 C.W.N. 674, Ind. Rul. 1932 Cal. 473, A.I.R. 1932 Cal. 697, 1932 Cr.C. 652. But when the complainant has asked for and obtained an order for the seizure of the opposite party's books, and also an order restraining the opposite party from operating on his banking account, that party can appear immediately and ask that such orders be vacated—*J. K. Sinha v. Hemanta*, supra. In *Sheikh Akbar v. Prance*, 12 Cr.L.J. 207 (Cal.), it was held that the accused should be permitted to watch the proceedings, and his pleader should be allowed to act as *amicus curiæ*.

Statements made by the person complained against during an inquiry under this section cannot be regarded as having been recorded under sec. 164 or sec. 364. Such person does not stand in the position of an accused person during the inquiry, and such statements cannot be admitted in evidence against him—*Sat Narain*, 32 Cal. 1085. But admissions made by the parties in proceedings under this section are relevant provided they are duly proved. Statements of witnesses in such proceedings can also be used for the purpose of contradiction or corroboration only after the procedure for proving these statements had been complied with and the provisions of sec. 145 of the Indian Evidence Act had been followed—*Mt. Rahonte v. Mandu*, A.I.R. 1934 Lah. 286.

672. Evidence in the inquiry:—The Magistrate conducting the preliminary inquiry need not confine himself to the evidence of the complainant alone; but he may examine such witnesses as he thinks fit—*In re Kankuchand*, Ratanlal 669. There is nothing in sec. 202 to prevent the investigating officer from making a full inquiry by obtaining information from the complainant and his witnesses, and from the defendant and his witnesses, if any—*Debi Bux v. Jutmal*, 33 Cal. 1282.

673. Submission of report:—The officer who conducted the investigation must submit the report of his investigation to the same Magistrate who had originally ordered him to investigate; he is not authorised to submit it to another Magistrate for the purpose of dismissing the complaint and declaring that no offence had in reality been committed—*Thakur Singh v. Kirpal*, 1918 P.L.R. 53, 19 Cr.L.J. 436.

674. Revision:—The High Court in its revisional jurisdiction will not as a matter of discretion interfere when it is of opinion that if the Magistrate had confined himself to materials which he might legitimately consider the proper order for him to make was an order under sec. 203 dismissing the complaint—*J.K. Sinha v. Hemanta*, supra. If an irregularity in procedure has not resulted in any miscarriage of justice, the High Court will not make an order which can result only in harassment and waste of public time. In a case in which a preliminary inquiry has been made by the Police and the report considered in a perfunctory manner by the Magistrate, the High Court will interfere and insist on the provisions of this section being strictly enforced. But where the inquiry has been carefully made and carefully considered, the High Court will refuse to re-open the matter—*Sheonandan*, 4 P.L.W. 114, 19 Cr.L.J. 263. The High Court will not ordinarily interfere with the details of an inquiry or investigation under this section and particularly will not do so on the ground that it was inadequate—*Parmanand*, 30 Cr.L.J. 554, 116 I.C. 46, 10 P.L.T. 618, A.I.R. 1930 Pat. 30, Ind. Rul. 1929 Pat. 286. It is settled practice that if the Magistrate, having followed the procedure laid down in the Code, has exercised a judicial discretion as to whether he ought to issue process or not, the High Court will respect his decision, and will be slow to disturb the order that he has passed—*Subal Chandra v. Ahadulla*, 53 Cal. 606, 30 C.W.N. 546 (551), 27 Cr.L.J. 788, 44 C.L.J. 144; *Ram Gir v. Ravisaran*, A.I.R. 1935 All. 883, 156 I.C. 948

674A. Copy:—The report of the police under sec. 202, Cr. P. C., is a part of the record and there seems to be no reason to refuse copy—*M. Muthukumara*, 32 Cr. L.J. 689, 131 I.C. 174, 1931 M.W.N. 325, 33 M.L.W. 570, A.I.R. 1931 Mad. 429, 1931 Cr.C. 477, Ind. Rul. 1931 Mad. 510

203. The Magistrate before whom a complaint is made or to whom it has been transferred, may dismiss the complaint, if after examining the complainant, and considering the result of the investigation (if any) made under section 202, there is in his judgment no sufficient ground for proceeding. In such case he shall briefly record his reasons for so doing.

203. The Magistrate before whom a complaint is made or to whom it has been transferred, may dismiss the complaint, if after considering the statement on oath (if any) of the complainant and the result of the investigation or inquiry (if any) under section 202, there is in his judgment no sufficient ground for proceeding. In such case he shall briefly record his reasons for so doing.

This section has been amended by sec. 56 of the Criminal Procedure Code Amendment Act, XVIII of 1923. The word "the investigation or inquiry (if any)" have been substituted recently by the Cr. P. C. Amendment Act II of 1926, for the words "any investigation or inquiry" occurring in the Amendment of 1923. See Note 677 below

675. Dismissal of complaint:—Where on a complaint made against several persons the Magistrate proceeded against only one of them and convicted him, but refused to issue process against the others, held that the order of refusal was to all intents and purposes an order of dismissal of complaint against those persons under sec. 203—*Girish Chandra*, 29 Cal. 457, 6 C.W.N. 638; *Hari Lal*, 20 Cr.L.J. 835 (Pat.). Where, on a complaint being filed, the Magistrate called for a police report, and subsequently on a consideration of that report passed the order "Enter mistake of law" and refused to issue processes, held that the order must be regarded as an order dismissing a complaint—*Shaik Siddik v. Chakuri*, 17 C.W.N. 451, 14 Cr.L.J. 123, 17 C.L.J. 608. When a

Magistrate passes an order under this section, he should say plainly that he dismisses the complaint. The practice of Magistrates passing an order "Notice is discharged" is to be deprecated—*Virbhan*, 52 Bom. 448, 30 Bom L.R. 642, 29 Cr.L.J. 975 (976). There is no provision in sec. 203, Cr. P. C., for the issue of a "C" summary. Where the Magistrate intends to dismiss the complaint under this section but there is no express order that he has done so, then it is a case wherein there should be a further inquiry and the Magistrate should act according to the provisions of Cr. P. C.—*Jeomal Tikamdas v. Emp.*, 40 Cr.L.J. 807, 183 I.C. 449, 12 R.S. 57, A.I.R. 1939 Sind 208, I.L.R. 1939 Kar. 277. When the Magistrate ordered the issue of summary "C", he intends to dismiss the complaint under this section and his order can be taken as such—*Pherumal Lilaram v. Emp.*, 39 Cr.L.J. 966, 177 I.C. 744, 11 R.S. 67, A.I.R. 1938 Sind 192. If the Magistrate, after examining the witnesses, does not believe the story told by the complainant and thinks that the case should be dismissed, he should pass an order of dismissal of complaint under this section; an order submitting the case to the District Magistrate is illegal—*Minal Kanti*, 6 C.W.N. 843 (844); *Fani Bhushan v. Kemp*, 10 C.W.N. 1086, 4 Cr.L.J. 230. Where a Magistrate came to the conclusion that no criminal action would lie, he ought to dismiss the complaint under this section without issuing a search warrant to recover the subject-matter of dispute—*S. R. Bagnall v. Mrs Dean*, 37 Cr.L.J. 991, 164 I.C. 521, 62 C.L.J. 270.

An application under sec. 107 does not fall within the definition of a 'complaint,' and, therefore, sec. 202 does not apply to it; but the Magistrate has inherent power of refusing the application if he is satisfied after making an inquiry that the apprehension of a breach of the peace complained of does not exist—*Shamsuddin v. Ram Dayal*, 25 Cr.L.J. 89, A.I.R. 1924 Lah. 630.

Section 203, Cr. P. C., has nothing to do with proceedings under sec. 145, Cr. P. C.—*Subhan*, A.I.R. 1939 Oudh 15, 1938 O.W.N. 1099, 1938 A.Cr.C. 137, 1938 O.L.R. 475, 40 Cr.L.J. 33, 178 I.C. 252, 1938 A.W.R. (C.C.) 99, 1938 O.A. 904.

A complaint filed under the Merchant and Shipping Act (XXI of 1923) has to be enquired into in accordance with the provision of that Act and it cannot be dismissed under this section—*Jafar Ali v. James Finlay & Co., Ltd.*, 35 Cr.L.J. 25, 146 I.C. 333, A.I.R. 1933 Cal 647, 1933 Cr.C. 1057, 37 C.W.N. 1185, 58 C.L.J. 116.

Where the accused was summoned and appeared when the Magistrate dismissed the complaint, the order of dismissal is under sec. 253 (2) and not under this section which contemplates a case in which the complaint is dismissed without process being issued to the accused—*Bhagwan Das v. Chandra Ban*, 35 Cr.L.J. 418, 147 I.C. 335, A.I.R. 1934 All 51; *Jotindra v. Radha*, A.I.R. 1934 Pat 548, 15 P.L.T. 507; *Jnanendra Nath v. Nilmoney*, 43 C.W.N. 582 (583), I.L.R. (1939) 1 Cal 587.

Dismissal when can be made—This section gives very large powers to the Magistrate to dismiss a complaint without issuing process, but certain conditions are laid down, and those conditions must be strictly fulfilled in making an order under this section. A Magistrate may dismiss a complaint (1) if upon the statement of the complainant reduced to writing under sec. 200 he finds that no offence has been committed; (2) if he distrusts the statement made by the complainant; (3) if he distrusts that statement, but his distrust not being strong enough to warrant him to act upon it, he directs further inquiry as provided by sec. 202 and after considering the result of the investigation he finds that there is no sufficient ground for proceeding—*Baidyanath v. Muspratt*, 14 Cal. 141; *Ganesh Narain*, 13 Bom 600 (603); *Subul Chandra v. Akadulla*, 53 Cal 605, 30 C.W.N. 546, 27 Cr.L.J. 788.

A Magistrate should not dismiss a complaint without hearing the witnesses of the complainant present in Court. The complainant should be given an opportunity of establishing the truth of his allegations by having his witnesses' evidence tested by the Magistrate—*Purosattam v. Ram Das*, 26 Cr.L.J. 561, 85 I.C. 705, A.I.R. 1925 Cal. 1031. A complaint should not be dismissed without giving an opportunity to the complainant to substantiate the charge by adducing evidence—*Mahim v. A. W. Watson*, 30 Cr.L.J. 407, 115 I.C. 35, 55 Cal. 1280, A.I.R. 1929 Cal. 191, Ind. Rul. 1929 Cal. 291. Where

there has been no sufficient inquiry into the complaint and the facts of the case have not been sufficiently investigated there ought to be a further inquiry—*Debendra v. Bhagurathi*, 38 C.L.J. 158, 22 Cr.L.J. 167, A.I.R. 1921 Cal. 552, 76 I.C. 391.

The Magistrate should exercise his own independent judgment when he receives the report of the investigation or inquiry that he has ordered and he does not exercise his independent judgment when he merely accepts without giving reason the opinion of the Police Prosecutor. It is not for the Magistrate to surrender his discretion or his judgment to that of the Police Prosecutor—*Jeomal Tikamdas v. Emp.*, 40 Cr.L.J. 807 (808), 183 I.C. 449, I.L.R. 1939 Kar. 277, 12 R.S. 57, A.I.R. 1939 Sind 208.

There can be no dismissal of complaint under sec. 203, after process has issued. This section refers to cases falling within Chapter XVI where there has been no issue of process. Where the accused has been summoned to answer a charge, there is a proceeding within the meaning of Chapter XVII and the complaint cannot be dismissed under sec. 203—*Budhanbhai, Ratanlal* 544. See also *Bhagwan Das v. Chandra Bhan*, 35 Cr.L.J. 418 (419), 147 I.C. 335, A.I.R. 1931 All. 51. Even an order directing withdrawal of process issued against the accused will not amount to an order of dismissal of complaint—*Panchoo v. Khoosdel*, 12 C.W.N. 68. But see *Lalit Mohan v. Nani Lal* in Note 664.

Who can dismiss complaint :—When a case has been transferred to a subordinate Magistrate and is pending on his file, the District Magistrate has no power to pass an order of dismissal of complaint—*Sheikh Kutab Ali*, 3 C.W.N. 490. The Magistrate who receives the complaint and examines the complainant should himself pass the order dismissing the complaint or issuing summons, as the case may be, and should not send it to the District Magistrate for orders. If there is a direction by the District Magistrate that in particular classes of cases the Magistrate taking cognizance should not pass any order under secs. 203 and 204 but should submit the case to the District Magistrate, such direction is illegal—*Fani Bhushan v. Kemp*, 10 C.W.N. 1086, 4 Cr.L.J. 230. A complaint was originally made before a Deputy Magistrate. The Deputy Magistrate sent the case to the District Magistrate with a view to the District Magistrate transferring it to another Court, but the District Magistrate instead of transferring the case to another Court, examined the record, and came to the conclusion that the complaint was wholly without foundation, and so he dismissed it; held that the District Magistrate was sufficiently seised of the case and the order passed by him was not without jurisdiction—*Govind v. Ram Das*, 25 Cr.L.J. 555, A.I.R. 1924 All. 666.

The village Munsiff is not a recognised tribunal under this Code, and the dismissal of a complaint by a village Munsiff does not fall under this section—*Rama Naidu*, 53 M.L.J. 102, 28 Cr.L.J. 507.

Duty of Magistrate before dismissal :—Before a Magistrate can dismiss a complaint, he must, according to the words of sec. 200, examine the complainant, and consider the result of the investigation (if any) made under sec. 202. In other words, a Magistrate cannot dismiss a complaint without complying with the provisions of law as laid down in secs. 200 and 202. Where there was no previous local investigation ordered under sec. 202 nor any examination of the complainant as directed by sec. 200, the Magistrate has no jurisdiction to dismiss the complaint under this section—*Lokenath v. Sanyasi*, 30 Cal. 923. See also *Jeomal Tikamdas v. Emp.*, 40 Cr.L.J. 807, 183 I.C. 449, I.L.R. 1939 Kar. 277, 12 R.S. 57, A.I.R. 1939 Sind 208.

If a Magistrate holds an inquiry under sec. 202, he should not dismiss the complaint without giving the complainant an opportunity to adduce evidence in support of his case—*Dr. Sandyal v. Kunjeswar*, 16 C.W.N. 143, 13 I.C. 781, 13 Cr.L.J. 125. It is improper for a Magistrate to dismiss a complaint while sitting in his private room, and without giving the complainant or his pleader an opportunity of being heard—*Fani Bhushan v. Kemp*, 10 C.W.N. 1086.

676. Examination of complainant :—By the Amendment Act 1923, the words "after examining the complainant" have been changed into "after considering the

statement on oath (if any) of the complainant." This shows that it is no longer necessary for the Magistrate to *examine* the complainant under this section before he dismisses the complaint. The examination of the complainant is imperative only under sec. 200, when the Magistrate takes cognizance of the complaint.

Once the Magistrate has examined the complainant under sec. 200, it is not obligatory on him to examine the complainant again before dismissal of complaint unless he considers it desirable to do so—*Hashim v Booth*, 25 SLR 468, 33 Cr.L.J. 330 (331), 136 IC 767, AIR. 1932 Sind 58, 1932 Cr.C. 199, Ind. Rul 1932 Sind 63. What the Magistrate is required to do under sec. 203 is to consider the statement on oath of the complainant, which is certainly different from the examination of the complainant; and even this requirement is modified by the words "if any," which show that it is discretionary with the Magistrate.

If the complainant was not examined *at all*, when the Magistrate took cognizance of the case under sec. 200, a dismissal of the complaint without examination of the complainant would be illegal—*Ningappa*, 48 Bom 360 (362); *Ganesh Narayan*, 13 Bom. 590 (597); *Lokenath v Sanyasi*, 30 Cal 923 (926); *Haladhar*, 9 C.W.N. 199 (201).

677. "Investigation or inquiry (if any)":—This section empowers a Magistrate to dismiss the complaint without any investigation under sec. 202, if after examining the complainant he considers there is no sufficient ground for proceeding—*Nawazi v. Jadu Dhaak*, 19 Cr L J 228 (Pat). The Amendment of 1923 contained the words "any investigation or inquiry" and the words 'if any' were omitted. This led to the view that an investigation or inquiry under sec. 202 was compulsory before dismissing a case under sec. 203. Thereafter another amendment was made in 1926 by which the words 'if any' have been restored. "The Calcutta High Court in a recent decision (in the case of *Sush Chandra Bose v. Madan Lal Surena*) has held that under sec. 203 an investigation or an inquiry under sec. 202 is necessary in all cases, because the words 'if any' have been omitted from sec. 203 after the words 'investigation or inquiry'. No such change was intended by the amendment made by Act XVIII of 1923, and the proposed addition is to make this matter clear"—*Statement of Objects and Reasons* (Gazette of India, 1925, Part V, p. 215). See also *Dukhiram v. Jamuna*, 6 P.L.T. 727, 26 Cr L J. 921.

Where an investigation has been ordered under sec. 202, the Magistrate is not bound, after receipt of the report of such investigation, to examine any witnesses or hold any inquiry before he dismisses the complaint. It is sufficient that he takes into consideration the result of the investigation arrived at by the subordinate officer—*Munshi Mian*, 19 Cr L J 126 (Patna). This section does not say that the Magistrate dismissing the complaint must have himself recorded the evidence in the preliminary enquiry—*Virumal Manghanmal v Muhammad Khan*, AIR. 1936 Sind 146 (147), 37 Cr L J. 1086, 164 IC 1020, 30 SLR 217, 1936 Cr.C. 862.

The provisions of Cr P. C., contemplate that the Magistrate should exercise his own independent judgment when he receives the report of the investigation or inquiry that he has ordered and he does not exercise his independent judgment when he merely accepts without giving reasons the opinion of the Police Prosecutor. It is not for the Magistrate to surrender his discretion or his judgment to that of the Police Prosecutor—*Joomal Tikandas*, 40 Cr L J 807, 183 IC. 449, AIR 1939 Sind 208, ILR. 1939 Kar. 277. See also *Pherumal Lalaram v. Emp.*, 39 Cr L.J. 966, 177 I.C. 744, 11 R.S. 67, AIR. 1938 Sind 192.

678. Grounds of dismissal:—A complaint can be dismissed if the Magistrate thinks that there is not a sufficient ground for proceeding. The expression "sufficient ground" in this section points exclusively to the facts which the complainant brings to the knowledge of the Magistrate and to their establishing a *prima facie* case against the accused. In exercising his discretionary power of summary dismissal of a complaint, the Magistrate should not allow himself to be influenced by considerations arising apart from the facts adduced by the complainant in support of the charge, *see* *supra* a.

deration of the motive by which the complainant is actuated. What he has to consider is whether there is a *prima facie* evidence of a criminal offence which in his judgment calls upon the alleged offender to answer—*Ganesh Narayan*, 13 Bom. 590 (598). The decision whether there is sufficient ground must be reached by the exercise of discretion based upon judicial consideration. That the Magistrate considered the probable result of the proceeding undesirable or the motives and conduct of the complainant discreditable, is not a relevant consideration—*Ganga v. Samarapathi*, 38 Mad. 512. In the absence of any finding that the complaint was false or unsustainable on the evidence likely to be available, the passing of an order of dismissal under this section constitutes an irregularity with which the High Court can interfere in revision—*Ganga Reddi v. Samarapathi*, 38 Mad. 512, 25 M.L.J. 510, 14 Cr.L.J. 633. The reasons for dismissing a complaint should be based on inference of facts arising from or disclosed by (1) the complaint, (2) the examination of the complainant, and (3) the investigation, if any, made under sec. 202. This provides a wide field. Anything outside it is extra-judicial and must be discarded—*Mustafa v. Motilal*, 9 Bom L.R. 742, 6 Cr.L.J. 85.

Where all the allegations set out in the complaint and in the examination of the complainant do not constitute an offence, the complaint should be dismissed—*Maung Ba Yone v. Ma Hla Kia*, A.I.R. 1933 Rang. 297, 146 I.C. 402, 1933 Cr.C. 1128, 35 Cr.L.J. 52.

A complaint in respect of a dispute of civil nature ought to be dismissed *in limine*, even when dressed up in criminal garments—*Murugappa Chettiar v. Morangamuthu Raja*, 1937 M.W.N. 1238.

A Magistrate ought to dismiss a complaint where the subordinate Magistrate to whom the case was made over for inquiry and report under sec. 202 held an elaborate inquiry, examined a number of witnesses and submitted a report that there was no case against the accused. In such a case the trying Magistrate acts wrongly in disregarding the report and ordering issue of summons against the accused—*Abdulla*, 40 Cal. 854 (857). See also *Mahabir v. Giribala*, given in Note 600.

What are not proper grounds of dismissal:—If the allegations contained in the complaint disclose a criminal offence, a Magistrate should not dismiss the complaint simply because the case is of a civil nature—*Niratan v. Jogesh*, 23 Cal 983 (986). A complaint cannot be dismissed on the ground that the entertainment of the complaint would encourage hundreds of such complaints and would stir up old religious feelings of animosity between the Hindus and Mussalmans—*Ram Chandra*, Ratanlal 562; or on the ground that a more responsible person ought to have preferred the complaint—*Boddhoo v. Ram Dayal*, 18 W.R. 55; or on the ground that the inquest report made by a different Magistrate does not support the prosecution case—*Surendra v. Police Sergeant*, 35 C.W.N. 1032, 1932 Cr.C. 106, 33 Cr.L.J. 218, 135 I.C. 878; or on the ground that the complainant is a man of low caste, and the alleged offence is theft of a goat which is merely a harm under sec. 95, I. P. C., rather than an offence—*Pochun*, 2 W.R. 35; or on the ground that the complainant is actuated by a malicious feeling and that the alleged offence was committed six years ago and is, therefore, difficult to prove, and that if the act of the accused was held criminal, a large part of the population would go to jail—*Manji*, Ratanlal, 549; *Chamru v. Bharron*, 35 Cr.L.J. 1215, 150 I.C. 1120, A.I.R. 1934 Nag. 135, 1934 Cr.C. 568; or on the ground that the complainant had no personal knowledge of the facts alleged in the complaint (in such a case the Magistrate should allow the complainant to bring forward evidence to prove facts)—*Kankuchand*, Ratanlal 669; or on the ground that the person complained against has been exonerated in a previous departmental inquiry into the facts alleged in the complaint—*Ralia v. Ahsan*, 1887 P.R. 33; or on the ground that the accused will possibly be able to defend himself under some provision of law—*Sheodan Pathak v. Budheshwar Dubey*, 1939 P.W.N. 828. A complaint should not be dismissed on the result of a previously made Police enquiry—*Maung Ko v. Maung Set*, 31 Cr.L.J. 1064, 126 I.C. 534, A.I.R. 1930 Rang. 226. This should not be done without giving the complainant an opportunity of arguing his case on the said police papers and of inducing the Magistrate to examine the prosecution witnesses and deciding for himself how far they were speaking the truth.

—*Manghanmal*, 35 Cr.L.J. 222, 146 I.C. 924, A.I.R. 1933 Sind 395, 1933 Cr.C. 1435, 6 R.S. 102, 28 S.L.R. 1.

679. Recording reasons:—The Magistrate is bound to record his reasons for dismissing the complaint, for if that is not done, it would be impossible for the High Court to consider whether the discretion vested in the Magistrate under this section has been properly exercised or not—*Baidyanath v. Muspratt*, 14 Cal. 141; *Kartik Pathak*, 2 P.L.T. 142, A.I.R. 1921 Pat. 205; *Harnandan v. Atul*, 7 P.L.T. 481, 26 Cr.L.J. 1502. An order of a Magistrate dismissing a complaint under this section without recording reasons for dismissal but merely stating that he agrees with the police report is improper and will be set aside—*Ahmed v. Ameena*, 7 M.L.T. 175, 11 Cr.L.J. 331, 21 M.L.J. 1092, 5 I.C. 926.

The words in this section are "he shall record"; i.e., the provisions of this section are imperative, and a failure to record reasons is a direct disobedience of law and not a mere irregularity—*Maniruddin v. Abdul Rauf*, 40 Cal. 41 (43), 13 Cr.L.J. 482, 15 I.C. 482. Where a Magistrate did not record his reasons for dismissing a complaint, but directed that the complainant should be prosecuted under sec. 211, I. P. Code, held that the order of dismissal was without jurisdiction and altogether bad, that there must be a further inquiry, and there cannot be any proceeding under sec. 211, I. P. Code, until such further inquiry has been made—*Maniruddin v. Abdul Rauf*, supra.

680. Effect of dismissal:—A dismissal of a complaint after hearing the complainant and after considering the result of an investigation ordered under sec. 202 amounts to a legal determination of the complaint, and the complainant can be prosecuted for making a false charge under sec. 211, I. P. C.—*Surya*, 6 C.W.N. 295. Until a complaint is dismissed under this section or is otherwise disposed of, no proceedings can be taken under sec. 211, I. P. C., against the complainant—*Gunamony*, 3 C.W.N. 758, followed in *Gat; Mandal*, 4 C.L.J. 88. Where a complaint has been illegally dismissed (e.g., without examining the complainant), the complainant cannot be prosecuted under sec. 182 or 211, I. P. C., for bringing a false charge—*Ningappa*, 48 Bom. 360 (362), 26 Bom.L.R. 183; *Mahadeo*, 27 Cal. 921; *Aly Mohd*, 1912 P.R. 2; *Ram Sarup*, 4 O.C. 127.

When a complaint has been dismissed under this section, before the issue of process to the accused, no compensation to the accused (sec. 250) can be awarded—*Bhagwan v. Harmukh*, 29 All. 137; *Azam v. Mir Abdulla*, 1897 P.R. 14; *Harphul v. Manku*, 1906 P.R. 3, 4 Cr.L.J. 36. It can be awarded only when the accused being summoned to attend Court is discharged or acquitted, and the complaint is found to be frivolous or vexatious—*Harphul v. Manku*, 1906 P.R. 3.

So also, no suit for malicious prosecution will lie against the complainant when the complaint is dismissed under this section, because there has been no prosecution of the accused. Prosecution commences only after the issue of process, and not where the complaint has been dismissed without any issue of process—*Sheik Meeran Saib v. Ratnavelu*, 25 M.L.J. 1, 21 I.C. 703 (704).

681. Power to rehear complaint or hear fresh complaint:—
(a) *Rehearing of complaint by the same Magistrate:*—A dismissal under this section is a dismissal without a trial; it is, therefore, open to a Magistrate to rehear a complaint which he has dismissed under sec. 203, though the order of dismissal has not been set aside by a higher Court. Neither section 369 nor sec. 403 operates as a bar to such procedure—*Chinna Kaliappa*, 29 Mad. 126 (131, 132, 136) (F.B.); *Jyotindra v. Hemchandra*, 36 Cal. 415 (417), 2 I.C. 293, 9 Cr.L.J. 563, 13 C.W.N. 193; *Allah Ditta v. Karam Baksh*, 12 Lah. 9, 127 I.C. 15, A.I.R. 1930 Lah. 879, 1930 Cr.C. 923, 32 P.L.R. 208, Ind. Rul. 1930 Lah. 815, 31 Cr.L.J. 1180 (1181). Where a Magistrate dismisses a complaint under this section, it is open to him at a later stage to issue summons and revive the proceedings. The fact that in the meanwhile the Sessions Judge has in revision refused to direct further inquiry is immaterial—*Janakdhari*, 8 Pat. 537, 1929 Cr.C. 353, 120 I.C. 632, A.I.R. 1929 Pat. 469, 31 Cr.L.J. 146, 10

P.L.T. 725, Ind. Rul. 1930 Pat. 56; *Jyotindra v. Hemichandra*, 36 Cal. 415 (417), 13 C.W.N. 193, 9 Cr.L.J. 563, 2 I.C. 293, where a complaint, which was dismissed for absence of the complainant's witnesses, under this section, was revived by the Magistrate who dismissed it, even when the District Magistrate refused to direct a further enquiry. In *Idoo*, 40 Cal. 71, 15 I.C. 488, 16 C.W.N. 983 an accused had been discharged in the Sessions Division of the High Court on a *nolle prosequi* entered by the Public Prosecutor. The accused was subsequently placed on his trial on the same facts before a Magistrate. It was held that the Magistrate was wrong in declining jurisdiction which he undoubtedly had to hear the case. See also *Lallain*, cited below in cl. (d) of this Note.

(b) *Entertainment of fresh complaint by the same Magistrate* :—Similarly, where a Magistrate has dismissed a complaint, it is open to him to entertain a *fresh complaint* on the same facts, because there is no difference between entertaining a fresh complaint and rehearing the original complaint—*Chinna Kaliappa*, 29 Mad. 126 (130, 136) (F B), 16 M.L.J. 79, 3 Cr.L.J. 274; *Keymer*, 22 I.C. 145, A.I.R. 1914 All. 179, 15 Cr.L.J. 1, 36 All. 53, 12 A.L.J. 1; *Puran*, 9 All. 85 (88); *Makhatambi v. Hassan Ali*, 1 N.L.R. 18; *Amanat Kadar*, 31 Bom.L.R. 146, 116 I.C. 251, 30 Cr.L.J. 594, Ind. Rul. 1929 Bom. 321, A.I.R. 1929 Bom. 134. If the Magistrate has jurisdiction to entertain the second complaint, he has jurisdiction to transfer it to another Magistrate for trial—*Kunji Lal*, A.I.R. 1935 All. 60 (63), 35 Cr.L.J. 1485, 151 I.C. 714, 4 A.W.R. 252, 1934 A.L.J. 704. It is equally competent to dismiss an application to complain under sec. 476, Cr. P. C., and to re-entertain it—*Kalastri Mudali*, A.I.R. 1932 Mad. 130, 61 M.L.J. 686, 1931 M.W.N. 1048, 34 M.L.W. 629, 1932 Cr.C. 109, 33 Cr.L.J. 272, 136 I.C. 313. The Magistrate can also entertain a second complaint made by a *different person* alleging *different offences*, grounded more or less on the same facts—*Mehrban*, 29 All. 7 (10), 3 A.L.J. 562, 4 Cr.L.J. 59, 1906 A.W.N. 245. But the Calcutta High Court holds in *Kamal Chandra v. Gour Chand*, 24 Cal. 285 (288) that the Magistrate cannot entertain the second complaint until the previous order of discharge is set aside by competent authority (following *Nilratan v. Jogesh*, 23 Cal. 983).

(c) *Rehearing of same complaint by a different Magistrate* :—The Calcutta High Court holds in *Grish Chunder v. Dwarka*, 24 Cal. 528 (532) that when a complaint has been dismissed by a Magistrate, another Magistrate of co-ordinate authority cannot rehear the complaint, sitting as it were on appeal from the order of the first Magistrate. A dismissed complaint cannot be reheard except on an order for further inquiry (under sec. 435).

(d) *Entertainment of a fresh complaint by a different Magistrate* :—When a Magistrate has dismissed a complaint, his *successor or any other Magistrate* can entertain a fresh complaint on the same facts, although the order of dismissal has not been set aside—*Ram Bharos v. Baban*, 36 All. 129 (131), 15 Cr.L.J. 158; *Bipoo*, 2 P.L.J. 34 (35), 18 Cr.L.J. 296; *Sheogovind*, 1 P.L.T. 293, 21 Cr.L.J. 660, 57 I.C. 820; *Mahadco*, 27 Bom.L.R. 352, 26 Cr.L.J. 991 (992), 87 I.C. 527, A.I.R. 1925 Bom. 258. See also *Lallain*, 35 Cr.L.J. 1059, 150 I.C. 376, 1934 A.L.J. 241, A.I.R. 1934 All. 514, 1934 Cr.C. 614 where the previous rulings of the Allahabad High Court have been reviewed. A second complaint is entertainable even though the previous order of dismissal has been confirmed by a superior Court—*Allah Ditta v. Karam Baksh*, *supra*. See also *Mohammad Din v. Hussain*, 36 Cr.L.J. 62, 152 I.C. 155, A.I.R. 1931 Lah. 435, 1934 Cr.C. 698; *U Sein Ywet v. U Maung Fyi*, 35 Cr.L.J. 802, 148 I.C. 845, A.I.R. 1934 Rang. 40, 1934 Cr.C. 263. In a recent Full Bench case the Madras High Court has gone so far as to say that a Magistrate of inferior jurisdiction can entertain a fresh complaint, when a previous complaint has been dismissed by a superior Magistrate—*Ponnuswami*, 55 Mad. 622, 33 Cr.L.J. 454 (455), A.I.R. 1932 Mad. 369, 1931 M.W.N. 1149, 137 I.C. 317, 1932 Cr.C. 353, 62 M.L.J. 469, 35 M.L.W. 478, Ind. Rul. 1932 Mad. 380 (F B). But in *Nilratan v. Jogesh*, 23 Cal. 983 (990), *Adam*, 22 All. 106 (108), *Mahomed Abdul v. Panduranga*, 28 Mad. 255 (256), *Tirathibai v. Sugmbai*, 23 S.L.R. 43, 112 I.C. 681, A.I.R. 1929 Sind 61, 29 Cr.L.J. 1097 (1098), it has been

held that when a Magistrate has dismissed a complaint another Magistrate cannot entertain a fresh complaint on the same facts, so long as the order of dismissal is not set aside by a competent authority. The last case was followed in *Chellomal v. Kewalmal Jeramdas*, A.I.R. 1939 Sind 38, 40 Cr.L.J. 287, 179 I.C. 898. See also *Shah Mahomed*, 28 Cr.L.J. 57, 99 I.C. 89, A.I.R. 1928 Sind 49; *Chandram*, 23 Cr.L.J. 737, A.I.R. 1922 Sind 23, 15 S.L.R. 131, 69 I.C. 625; *Nanda*, 102 I.C. 344, A.I.R. 1927 All. 815, 28 Cr.L.J. 536; *Rama Nand v. Sheri*, 35 Cr.L.J. 1062, 150 I.C. 373, 1934 Cr.C. 150, A.I.R. 1934 All. 87, 56 All. 425, 3 A.W.R. 569, A.I.R. 1934 All. 546.

It should be noted that the Calcutta cases of *Niratan v. Jogesh*, 23 Cal. 983, *Komal v. Gour Chand*, 24 Cal. 286 and *Gurish Chunder v. Dwarka*, 24 Cal. 528 must be deemed as overruled by the Full Bench cases of *Dwarka v. Beni Madhab*, 28 Cal. 652, 5 C.W.N. 457 and *Mir Ahwad v. Md. Askari*, 29 Cal. 726, 5 C.W.N. 633; and the authority of the Madras case *Mahomed Abdul v. Panduranga*, 28 Mad. 255 has been shaken by the Full Bench ruling in *Chinna Kaliappa*, 29 Mad. 126, and must be deemed as overruled by the recent Full Bench decision of *Ponnuswami*, 55 Mad. 622, 1931 M.W.N. 1159.

Discussing the rulings mentioned above the Full Bench of the Sind Judicial Commissioner's Court has laid down that sec. 437, Cr. P. C., is only an enabling section and does not take away by implication the jurisdiction vested in a Magistrate to hear the complaint again. It is, therefore, competent for a Magistrate who dealt with the first complaint, his successor-in-office or another Magistrate of co-ordinate jurisdiction to entertain a second complaint upon a statement of facts which constituted the first complaint which has been dismissed for default under sec. 203, Cr. P. C., or in which the accused have been discharged under sec. 259, Cr. P. C., the order of dismissal or discharge, as the case may be, not having been set aside by a higher Court. When entertaining a second, a Magistrate should keep in mind the default committed in the earlier proceedings, for this default may have a bearing not only upon any subsequent default committed but also upon the merits of the complaint—*Harbai v. Raya Premji*, 40 Cr.L.J. 745, 183 I.C. 283, A.I.R. 1939 Sind 193 (F.B.), overruling *Tnithabai v. Sugmbai*, supra and, by implication, *Chellomal v. Kewalmal Jeramdas*, supra.

The Courts now appear to be practically unanimous in holding that an order dismissing a complaint or discharging an accused person, does not operate as an acquittal under sec. 403, Cr. P. C., and does not bar the taking cognizance of a fresh complaint of the same offence, even though the order of dismissal or discharge has not been set aside in revision by a competent authority—*Dhana Reddy*, A.I.R. 1930 Rang 156 (157), 8 Rang 1, 31 Cr.L.J. 824, 125 I.C. 341, 1930 Cr.C. 588. But although a previous order dismissing the complaint or discharging the accused is no bar to the institution of a fresh case against the same accused still a new complaint in respect of the same offence should not be entertained, unless there are exceptional circumstances, e.g., unless new facts, which could not with reasonable diligence have been brought forward in the previous proceedings, would be adduced, or unless there was some manifest error or manifest miscarriage of justice in the previous proceedings, or unless the previous order was passed on an incomplete record or was manifestly absurd or foolish—*U Shive v. Ma Sem*, 26 Cr.L.J. 284 (Rang); *Dhana Reddy*, 8 Rang 1, 31 Cr.L.J. 824 (826); *Allah Ditta v. Karam Baksh*, 12 Lah. 9, 31 Cr.L.J. 1180 (1181); *Mahomed Din v. Mehtab Din*, 137 I.C. 520, 33 Cr.L.J. 493, 33 P.L.R. 318; *Parsram*, 30 Cr.L.J. 444, 115 I.C. 309, Ind. Rul. 1929 Sind 69; *Chaman Lal*, A.I.R. 1936 Lah. 47, 37 Cr.L.J. 427, 161 I.C. 288, 1936 Cr.C. 63. In the absence of such exceptional circumstances, a second complaint should not be entertained on the same facts, even though it is lodged by a different complainant—*Allah Ditta v. Karam Baksh*, supra.

Where the second complaint is one essentially different from the first complaint, there is no bar to the entertainment of the second complaint and to its being dealt with according to law—*Umar Ahmed v. Emp.*, A.I.R. 1940 Sind 15, 41 Cr.L.J. 248, 186 I.C. 95.

When a complaint has been dismissed by a Magistrate, and the complainant brings

a second complaint on the same facts before another Magistrate, it is the duty of the complainant to inform the second Magistrate that he had previously filed a similar complaint which had been dismissed; because, when the second Court becomes aware that a similar complaint has already been dismissed, it must necessarily exercise greater care in considering how to deal with the case—*Mahadev Laxman*, 27 Bom.L.R. 352, 26 Cr.L.J. 991 (1992). But the second complaint cannot be dismissed merely on the ground that the complainant did not reveal in it the dismissal of his first complaint which he was, in all fairness, bound to do, without following the courses of action prescribed in sections 202 and 203, Cr. P. Code. Where secs. 202 and 203, Cr. P. C., prescribe a course or courses of action, the High Court cannot override the statute by dismissing a complaint when the facts as stated in the complaint disclose an offence, without any preliminary inquiry—*Chin Hone On v. C. Ah Foo*, A.I.R. 1937 Rang. 35.

682. Further Inquiry:—Where a complaint has been dismissed under this section, the High Court or Sessions Judge may direct further inquiry. See sec. 436.

An order for further inquiry directed to a subordinate Court means that the case should be taken up again and that the question of dismissing the complaint or discharging the accused, as the case may be, should be again considered and an appropriate order made as a result of such fresh consideration. The effect of an order dismissing a complaint under sec. 203 is to restore the case to the stage under sec. 202, and the further inquiry directed should be taken up from that point. The accused should not forthwith be summoned without any further inquiry—*Radha*, 28 Cr.L.J. 857, 104 I.C. 633, A.I.R. 1928 Pat. 12; *Sitaram v. Kausila*, 29 Cr.L.J. 572, 109 I.C. 508; *Rambadra*, 29 Cr.L.J. 1059, 112 I.C. 563, A.I.R. 1928 Mad. 1198. A Magistrate has power to dismiss a complaint under sec. 203, Cr. P. C., after making a further inquiry directed by a Superior Court—*Nibaran v. Sital*, 25 C.W.N. 312, 22 Cr.L.J. 528, 62 I.C. 416, distinguishing *Brijkishore v. Gopal*, 11 C.W.N. 316. See Note 1183.

It has been held in some Calcutta cases that if an order of dismissal of complaint or discharge of accused is passed by a *Presidency* Magistrate, the High Court has no power to direct further inquiry under any of the provisions of this Code. Section 436 does not apply to orders of dismissal or discharge passed by a *Presidency* Magistrate; sec. 439 confers on a High Court all the powers of an Appellate Court under sec. 423 but that section does not enable a Court of Appeal to direct that further inquiry be made into a case in which an order of *dismissal* or *discharge* may have been passed, but it confers a power to direct further inquiry only in respect of a case of an appeal from an order of *acquittal*. Hence, it follows that the High Court cannot order further inquiry under this Code after discharge or dismissal of complaint by a *Presidency* Magistrate; but the High Court can do so only under sec. 15 of the Charter Act. And its powers of interference under the Charter Act are very limited. It cannot interfere on the ground of any error of law but only on a ground affecting jurisdiction, i.e., where the subordinate Court refused or failed to exercise jurisdiction or erred in the exercise of its jurisdiction—*Charoobala v. Barendra*, 27 Cal. 126 (129); *Debi Bux v. Jutmal*, 33 Cal. 1282 (1284). The High Court can revise the proceedings of *Presidency* Magistrate, under secs. 435 and 439, read with sec. 423 of this Code, as such Magistrates are under the Appellate jurisdiction of the High Court; and the High Court can set aside an erroneous order of discharge passed by a *Presidency* Magistrate. But the power to order *further inquiry* can be exercised not under this Code but under Clause 28 of the Letters Patent—*Colville v. Kristo Kishore*, 26 Cal. 746 (748). But in a later case it has been laid down that secs. 435 and 439 of this Code confer upon the High Court the power of sending for the records of *Presidency* Magistrates, and of reversing the order of the Magistrates and ordering a further inquiry in a case of dismissal of complaint or discharge of accused—*Malik Pratap v. Khan Mahomed*, 36 Cal. 994 (997); *Dwarka v. Bem Madhab*, 28 Cal. 652 (667) (*per Ghosh, J.*); and the High Court can direct further inquiry, if there are good reasons for doing so, although no question of jurisdiction arises in the case—*Malik Pratap v. Khan Md.*, 36 Cal. 994 (997).

683. Death of complainant—Effect:—As there is no abatement of a criminal case on the death of the complainant, a fresh complaint on the same facts need not be made but the old complaint must be treated as pending and proceeded with to its disposal—*Ramasamiar*, 16 Cr.L.J. 713 (Mad.), 30 I.C. 1001. See also *Madho v. Turab*, 18 C.W.N. 1211, 15 Cr.L.J. 726, 26 I.C. 174.

CHAPTER XVII.

OF THE COMMENCEMENT OF PROCEEDINGS BEFORE MAGISTRATES.

204. (1) If in the opinion of a Magistrate taking cognizance of an offence there is sufficient ground for proceeding, and the case appears to be one in which, according to the fourth column of the second schedule, a summons should issue in the first instance, he shall issue his summons for the attendance of the accused. If the case appears to be one in which, according to that column, a warrant should issue in the first instance, he may issue a warrant, or, if he thinks fit, a summons, for causing the accused to be brought or to appear at a certain time before such Magistrate or (if he has not jurisdiction himself) some other Magistrate having jurisdiction.

(2) Nothing in this section shall be deemed to affect the provisions of section 90.

(3) When by any law for the time being in force any process-fees or other fees are payable, no process shall be issued until the fees are paid, and if such fees are not paid within a reasonable time, the Magistrate may dismiss the complaint.

684. Magistrate taking cognizance:—This section applies not merely where cognizance is taken on a complaint, but also when cognizance is taken on a *police report*, submitted to the Magistrate either under sec. 173 or after an inquiry under sec. 202 made by the police—*Raghunath*, 12 P.L.T. 937, 33 Cr.L.J. 349 (353).

The process is to be issued by the Magistrate who took cognizance of the case, so long as the case is on his file; and the District Magistrate would have no power to pass any order for issue of process unless he removed the case to his own file—*Mrinal Kanti*, 6 C.W.N. 843 (844). See also *Fani Bhusan v. Kemp*, 10 C.W.N. 1086.

Where a Joint Magistrate who took cognizance of a case made over the case to a Deputy Magistrate for disposal, the former ceased to have any control over the case. The case having been transferred to the Deputy Magistrate, that officer alone had jurisdiction to deal with an application for summons, until the case was withdrawn from his cognizance. Therefore, if he refused to issue process as unnecessary, the Joint Magistrate has no jurisdiction to order for its issue—*Ajab Lal*, 32 Cal. 783.

"Offence" :—If the Magistrate has not before him the facts constituting the offence, he cannot issue process for the attendance of the accused—*Durga Das v. Umesh*, 27 Cal. 985 (988). Process can issue only for an offence already committed. It is not competent for the Magistrate to issue process in anticipation of an offence, where there is

no complaint against any one. Such a case is for the interference of the Police and not of the Magistrate—*Fateali, Ratanlal* 90 (91).

A neglect to maintain a wife is not an *offence*; therefore, an application for maintenance under sec. 488 should not be dismissed under sub-section (3) of this section owing to the applicant's failure to comply with an order for the payment of process fees—*Ponnammal*, 16 Mad. 234.

Under section 10 of the Child Marriage Restraint Act, 1929 (Act XIX of 1929) a Court taking cognizance of an offence under that Act is bound to hold a preliminary enquiry under sec. 202, Cr. P. C., before directing issue of process for the attendance of the accused. An omission to comply with this mandatory provision is an illegality which vitiates the trial—*Mangal v. Kalu*, 32 Cr.L.J. 616, 130 I.C. 783, 12 Lah. 383, A.I.R. 1931 Lah. 56, 31 P.L.R. 945, 1931 Cr.C. 120, Ind. Rul. 1931 Lah. 351; *Chand Mal Goenka*, 35 Cr.L.J. 1436, 151 I.C. 830, 35 P.L.R. 8, A.I.R. 1934 Lah. 155, 1934 Cr.C. 333, 15 Lah. 63, 7 R.L. 209.

686. Sufficient ground:—When a man files a complaint and supports it by his oath, rendering himself liable to prosecution and imprisonment if it is false, he is entitled to be believed, unless there is some apparent reason for disbelieving him; and he is entitled to have the persons, against whom he complains, brought before the Court and tried—*Bhim*, 40 Cal. 444 (451). The only condition requisite for the issue of process is that the complainant's deposition must show some sufficient ground for proceeding. Unless the Magistrate is satisfied that there is sufficient ground for proceeding with the complaint or sufficient material to justify the issue of process, he should not issue process—*Jogesh v. Abdul*, 18 Cr.L.J. 626, 39 I.C. 994 (Cal.). Where the complainant who instituted the prosecution had no personal knowledge of the allegations made in the complaint, the Magistrate should satisfy himself upon proper materials that a case had been made out for the issue of process—*Thakur Prasad*, 10 C.W.N. 1090, 4 Cr.L.J. 207; *Chamroo*, 11 C.W.N. 170, 5 Cr.L.J. 13.

It is not necessary that the opinion to the effect, that there is sufficient ground for issuing process within the meaning of this section, should be based on evidence in the case, nor that the reasons for such an opinion should be recorded. The petition of complaint, the sworn statement of the complainant and the report of the enquiring officer are sufficient materials for the purpose of issuing process—*Hafizar Rahaman v. Aimal Hoque*, 44 C.W.N. 1114 (1122).

Under this section, a wide discretion is given to Magistrates with respect to the grant or refusal of process. This discretion should be exercised with caution, and an accused person ought not to be dragged into Court to answer a charge merely because a complaint has been lodged against him. In determining whether process ought to issue, a Magistrate must proceed according to the provisions of the Code, and if he is of opinion upon the materials before him that a *prima facie* case (i.e., sufficient ground for proceeding) has been made out, he ought to issue process; and in such circumstances he is not entitled to refuse to issue process merely because he thinks that it is unlikely that the proceedings will result in a conviction—*Subal Chandra v. Ahadulla*, 53 Cal 606, 30 C.W.N. 546, 27 Cr.L.J. 788, 44 C.L.J. 144. But in a later case the same High Court has said that a Magistrate is not bound to issue process merely because the evidence discloses a *prima facie* case. Even though the evidence discloses a *prima facie* case, there is a discretion left in the hands of the Magistrate who may for good reasons refuse to issue process. He is bound to issue process only when he *believes* that the evidence is sufficient to prove the case against the accused—*Sher Sing v. Jitendra*, 59 Cal 275, 36 C.W.N. 16 (29), 33 Cr.L.J. 3, 134 I.C. 1045, 54 C.L.J. 253, 1931 Cr.C. 759, A.I.R. 1931 Cal 607. If the Magistrate comes to the conclusion that the facts alleged by the complainant disclose an offence, and in his opinion there is no ground for distrusting the complainant, the Magistrate would not be justified in refusing the issue of process merely because some other person has been tried and acquitted upon the same charge and upon the same facts—*Subal Chandra v. Ahadulla*, *supra*.

In exercising the discretion under this section as to whether a process should issue, the Magistrate must be guided by his own independent judgment and not by the judgment of others, e.g., an expression of opinion by the Police—*Rangaswamy v. Sabapathi*, 4 M H C.R. 162.

687. Issue of process:—Proceedings are said to commence under this Chapter when processes are issued against the accused; after the issue of process, a complaint cannot be dismissed under sec 203. See Note 675 under sec 203.

An order directing issue of process is not a judgment within the meaning of sec. 367, and, therefore, a Magistrate making the order of issue of process can rescind the order on sufficient grounds—*Lalit Mohan v. Nani Lal*, 27 C.W.N. 651, 25 Cr L J 464, 39 C.L.J. 329, 77 IC 816, AIR 1934 Cal. 662. In *Lalit Mohan v. Nani Lal* the process issued in the counter-case was cancelled and the case and the counter-case were sent for an inquiry under sec 202, Cr P C. There is nothing either irregular or improper in a Magistrate first issuing process for one and then changing his mind and issuing process for all the accused before taking further evidence—*Alam*, 29 Cr L J. 293, 107 IC. 778, AIR. 1928 Lah. 541. If the Magistrate issues a warrant in a case in which he ought to have issued a summons, he can cancel the warrant and issue summons instead—*Janat*, 1 SLR 69, 8 Cr L J 178; See also *Zali Khan*, 7 SLR. 40, 14 Cr L J. 604 (605).

A Magistrate issuing process on the ground that there seemed to be a *prima facie* case (i.e., sufficient ground for proceeding) against the accused, is not precluded from permitting the withdrawal of the prosecution under sec 494. The mere fact that he has found a *prima facie* case is not tantamount to saying that he has *believed* the case to be true or proved; and, therefore, if on reconsideration of the very same materials, after argument by the parties, he comes to the conclusion that the evidence is not likely to lead to conviction, he can allow the Public Prosecutor to withdraw from the prosecution—*Sher Sing v. Jitendra*, 59 Cal 275, 36 C.W.N. 16 (23), 33 Cr L J 3, 134 IC. 1045, 54 C.L.J. 253, 1931 Cr C 759, AIR 1931 Cal 607.

Where an investigation was ordered under sec 202, Cr. P C, the Magistrate should wait for the result of that investigation. He should not issue summons against the accused as the report had not arrived and because he thought that the case could no longer be kept pending—*Krishna Bala v. Nirod*, 41 C.L.J. 170, AIR 1925 Cal 989.

A notice to the accused in the inquiry held under sec 202 is merely an intimation that a complaint has been made against him, and that the Magistrate intends to take action upon the complaint; it does not amount to a summons to the accused to appear; and the accused cannot be said to have been *prosecuted*. So, if the complaint is dismissed after the inquiry, a suit by the accused against the complainant for damages for malicious prosecution is not entertainable—*Sheik Meeran v. Ratnavelu*, 25 M.L.J. 1, 21 IC. 703 (704).

The officer who signs the warrant must be the officer who presides in the Court at the time when the warrant comes to be signed and not necessarily the Magistrate who presided in the Court when cognizance was taken of the offence or passed the order for issue of the process against the accused—*Kartick*, AIR 1932 Pat. 175, 13 P.L.T. 167, 1932 Cr C. 351.

Refusal to issue process—Where the Police report is true, and the Magistrate has directed the case to be entered as such, he cannot refuse to issue process simply because there is no chance of conviction and no useful purpose would be served by an inquiry: the complainant is entitled to a process against the accused and for the attendance of his witnesses—*Kuldip v. Budhan*, 29 Cal 410; *Fazlar Rahaman v. Abidar*, 23 C.W.N. 392 (393).

When from the examination of the complainant, it appears that there is reason for the issue of process against all the accused, the Magistrate exercises a wrong discretion in issuing process against some of the accused and in refusing to issue process against the others. He must issue process against all—*Bishan Dayal v. Chedi Khan*, 4 C.W.N. 560.

But where two counter complainants preferred complaints before a Magistrate, and

he issued process in one case and postponed the issue of process in the counter case until after the disposal of the first case, *held* that the action of the Magistrate was not illegal—*Lalji v. Naurangi*, 3 P.L.T. 764, 24 Cr.L.J. 120, A.I.R. 1922 Pat. 618; *Ramsarav v. Nikhad*, 26 Cr.L.J. 1179, 88 I.C. 603, 6 P.L.T. 477, 3 Pat L.R. 134 (Cr.), A.I.R. 1925 Pat. 619. See Note 988 under the heading "Counter-cases."

688. Sub-section (3)—Process fee:—An application for maintenance under sec. 488 cannot be dismissed for default to pay process-fee. See *Ponnammal*, 16 Mad. 234 cited in Note 685 above.

This sub-section gives the Magistrate power to dismiss the complaint when the complainant fails to pay any process fees or other fees. The sub-section is, therefore, quite wide enough to include non-payment of witness *batta* for which a case may be dismissed—*Modiboyina Raghavulu v. Oduvu Narasa Reddi*, 38 Cr.L.J. 265, 166 I.C. 639, 9 R.M. 389, 45 M.L.W. 60, 11 L.R. 1937 Mad. 515, A.I.R. 1937 Mad. 222, (1937) 1 M.L.J. 120, 1936 M.W.N. 1381. But if the case is *adjourned* the witnesses should be told to appear on the adjourned date, and the party should not be required to repeatedly summon his witnesses on payment of fresh process-fees. A dismissal of complaint on failure to pay such fees, in such a case, is not proper—*Balmakund v. Nanak Chand*, 1912 P.L.R. 60, 13 Cr.L.J. 176, 3 P.W.R. 1912, 60 P.L.R. 1912, 13 I.C. 928. See also *Amitthammal v. Ratnaswamy*, 1933 M.W.N. 1266.

The Nagpur High Court, however, holds that sub-sec. (3) of sec. 204, Cr. P. C., seems to apply only to the issue of process to the accused at the first instance—*Nirpat Singh*, 1939 N.L.J. 20.

Dismissal of complaint—Fresh complaint:—If a complaint is dismissed under sub-sec. (3) for failure to pay process-fee, the dismissal does not amount to an acquittal, and the complainant is not debarred from filing a fresh complaint before the Magistrate who passed the order of dismissal or before another Magistrate—*Sheorajsai v. Dani*, 27 N.L.R. 13, 32 Cr.L.J. 203 (204), 130 I.C. 825, 1931 Cr.C. 223, A.I.R. 1931 Nag 39. Cf. Note 681 under sec. 203.

688A. Revision:—There can be no doubt whatever that the High Court has the power to interfere at any stage of the case, and when it is brought to its notice that a person has been subjected to harassment of an illegal prosecution, it is its bounden duty to interfere—*Chandi Pershad v. Abdur Rahman*, 22 Cal. 131. On the other hand, it is its duty to allow proceedings in the subordinate Courts to go on and take their natural course, unless there is any exceptional ground for its interference. Without meaning to lay down any hard and fast rule, which it is impossible as it is undesirable to do upon a question like this, it may be said that one safe practical test would be this, namely, that a bare statement of facts of the case without any elaborate argument should be sufficient to convince the High Court that it is a fit one for its interference at an intermediate stage—*Choa Lal v. Anant Pershad*, 25 Cal. 233. It is inadvisable to interfere in a pending case, unless there is some manifest and patent injustice apparent upon the face of the proceedings and calling for prompt redress—*Jagat Chandra*, 26 Cal. 786. There can be little doubt that though the power has to be exercised with great care, the High Court has jurisdiction to interfere at any stage of the proceedings, if it considers that, in the interests of justice, it should do so. No hard and fast rule can be laid down as regards the class of cases in which the High Court will interfere—*Kuppuswami v. Kumaraswami*, 39 Mad. 561 (564). See also *Q.-E. v. Nageshappa*, 20 Bom. 543 and *Hari Charan v. Girish Chandra*, 38 Cal. 68 (74). See also Note 674.

205. (1) Whenever a Magistrate issues a summons, he

Magistrate may dispense with personal attendance of accused.

may, if he sees reason so to do, dispense with the personal attendance of the accused, and permit him to appear by his pleader.

(2) But the Magistrate inquiring into or trying the case, may, in his discretion, at any stage of the proceedings, direct the

personal attendance of the accused, and, if necessary, enforce such attendance in manner hereinbefore provided.

689. Scope of section:—Although this section speaks of issue of summons, it is not confined to *summons cases* only. In a *warrant case* also the Magistrate may in his discretion under sec. 204 issue a summons instead of a warrant and in that case he can dispense with the personal attendance of the accused—*Basumati v. Budram*, 21 Cal 588 (590).

Again, the section applies only where a summons has been issued to the accused; if, however, a warrant is issued to compel his attendance, his personal appearance cannot be dispensed with, unless he is too ill to attend the Court—*Sashi Mukhi v. Asutosh*, 13 C.W.N. cl. In a Patna case, where the accused had been arrested by warrant, the High Court held that it was illegal to dispense with his personal appearance and to allow him to be represented by a pleader even though he was ill—*Abdul Hamid*, 2 Pat. 793, 4 P.L.T. 648, 24 Cr.L.J. 872. Where the accused absconded after the charge had been framed against him, and he was convicted and sentenced in his absence, held that as in this case a warrant had been issued for his arrest in the first instance, the Magistrate could not dispense with his personal attendance—*Sardar*, 1917 P.R. 36, 18 Cr.L.J. 975. The Nagpur Court, however, holds that this section applies to all cases wherever a summons is issued in the first instance. And the fact that the accused (who disobeyed the summons) had to be produced by a warrant of arrest issued subsequently did not disentitle him to claim exemption from personal attendance—*Saji v. Bhimji*, 26 N.L.R. 50, 31 Cr.L.J. 284 (285), dissenting from *Abdul Hamid*, supra.

In sending a summons the Magistrate may either require appearance in person or appearance by pleader and he strikes out whatever words he does not desire to appear in the summons in Sch. V, Form No 1. All that is required in sec 205 (1) is that the Magistrate should consider that a summons is sufficient for the appearance of the accused in the case and if he is of that opinion he may then permit the accused to appear by pleader. If, on the other hand, a Magistrate considers that a warrant is necessary, then the Magistrate considers that there should be an order for some one to arrest the accused and bring the accused before him or admit the accused to bail to appear before him. If that is the opinion of the Magistrate, it is obvious that he will not at the same time dispense with the personal attendance of the accused. No one would hold those two contrary views at the same time. This is all that is implied by the reference to a summons in sec 205. The word "ever" implies different occasions and is in contrast to the words used in the previous sec 204 about issuing a summons in the first instance. In the case of a warrant having been issued and recalled and a summons then having been issued it would appear that sec. 205 will apply by virtue of the word "whenever". Where the accused appear before the Magistrate, it is not necessary for him to issue a summons for their appearance. He has them before him, but he has exactly the same powers as if they have appeared before him in obedience to a summons. In such case it is within his jurisdiction to allow the accused to appear by pleader—*Jagadish Narain v. Emp.*, AIR 1940 All 178 (180), 1940 A.L.J. 104, 41 Cr.L.J. 500, 187 I.C. 682.

690. Pardanashin lady:—If the accused is a pardanashin lady, and the Magistrate has issued summons to her, instead of a warrant, in a warrant case, he should use his discretion under this section by dispensing with her personal attendance and allowing her to appear by a pleader, until he has before him clear, direct and *prima facie* proof of an offence committed by her—*Rahim Bibi*, 6 All 59 (60); *Basumati v. Budram*, 21 Cal 588 (590). In a warrant case, the Magistrate ought to issue a summons in the first instance, instead of a warrant, to a pardanashin lady accused. If he erroneously issues a warrant, instead of a summons, he can, on discovering his mistake, treat the warrant as a summons, and make an order exempting the female accused from personal attendance—*Zali Khan*, 1 S.L.R. 40, 14 Cr.L.J. 604 (605). In some other cases it has been held in similar circumstances, that the Magistrate can cancel the warrant

and issue summons instead, and then dispense with the personal attendance of the female accused—*Janat*, 1 S.L.R. 69, 8 Cr.L.J. 187; *Bachal*, 7 S.L.R. 161, 15 Cr.L.J. 539 (540). See also *Prem Kaur v. Mai Sham*, 20 P.W.R. 1908, 8 Cr.L.J. 454 (455); *Mahomed*, 3 S.L.R. 167, 4 I.C. 1152 (1153). If the accused is a young woman of a fairly respectable class, and there is nothing in particular for which the Magistrate considers her personal attendance necessary, the Magistrate's order compelling her to appear in person is improper—*Saji v. Bhimji*, 26 N.L.R. 50, 31 Cr.L.J. 284 (285). If the accused is a female, the Magistrate should not refuse to excuse her personal attendance merely on his own impression that she is not a *pardah* lady—*Mahomed*, 3 S.L.R. 167, 4 I.C. 1152 (1153); *Mt. Asu*, 32 Cr.L.J. 665, 131 I.C. 137, 1931 Cr.C. 197, A.I.R. 1931 Sind 37; or on the ground that other ladies belonging to the same class who observed *pardah* had appeared in Court out of their own free will—*Tirbeni v. Bhaguati*, 28 Cr.L.J. 94 (All.). In a trial before a Magistrate, she may be permitted to appear by a pleader during the whole trial; in a Sessions case, she may appear by pleader before the committing Magistrate as well as before the Sessions Court; but in either case she will have to appear before the Court to hear the sentence in case of conviction—*Raj Rajeswan*, 17 C.W.N. 1248, 15 Cr.L.J. 281 (283); *Kandamani*, 45 Mad. 359, 52 M.L.J. 337, 23 Cr.L.J. 266. The personal attendance of pardanashin ladies may be dispensed with even at the stage of examination under sec. 342, or pleading (or refusing to plead) to a charge under sec. 255. The pleader who appears for them may answer the examination under sec. 342 or may plead to the charge under sec. 255, on their behalf—*Jamal Khatun*, 6 S.L.R. 206, 14 Cr.L.J. 272. In short, the provisions of sec. 205 should be liberally exercised in a country where so much prejudice exists against the appearance of females in public and where the procedural law is so frequently abused to gratify personal malice—*Mahomed*, *supra*.

691. Appearance by pleader:—In section 205, the word "appear" seems to convey a double meaning seemingly connoting, not merely authority to act and plead but also authority to personate the accused, but there is nothing to show that double meaning was intended by the Legislature. It is necessary that some one should be present at the trial to look after the interests of the accused; and all that sec. 205 provides is that, when the Magistrate sees fit, a person against whom a summons has been issued may be exempted from personal appearance, provided he engages a pleader to attend and see that the proceedings are properly and legally conducted. The law considers that the interests of the accused will be completely safeguarded if his pleader is in attendance—*Hari Narayan*, 29 Cr.L.J. 49 (53), 106 I.C. 545, 46 C.L.J. 368, A.I.R. 1928 Cal. 27. Where, on service of summons the accused did not personally attend but appeared by a pleader, who asked the Magistrate to dispense with the personal attendance of the accused, *held* that such appearance was a valid appearance, and the Magistrate could not prosecute the accused under sec. 174, I. P. C., for non-appearance (disobedience to summons)—*Durga Das v. Umesh Chandra*, 27 Cal. 985 (989), 5 C.W.N. 131. If, in such a case the Magistrate required personal attendance, he should have told the pleader that he required the personal appearance of the accused on a fixed date, and in default, he would issue a warrant of arrest—*Durga Das v. Umesh*, 27 Cal. 985 (988). A Magistrate can, at the time of issuing a summons, direct that the personal attendance of the accused shall be dispensed with. He can also do this after the issue of summons, and if the person summoned does not attend in person but sends a pleader to represent him, the Magistrate can give him the necessary permission under this section—*Dorab Shah*, *infra*.

In a case where the Court has allowed an accused person to appear by a pleader, it must be taken that such appearance involves the performance of all acts that devolve upon the accused in the course of the trial, unless the Magistrate thinks it necessary or desirable that the accused himself should be present for any particular purpose. Therefore, under secs. 242 and 243, the pleader of the accused may make the necessary answers and plead guilty on his behalf—*Dorab Shah*, 50 Bom. 250, 28 Bom.L.R. 102, 27 Cr.J.J. 440. A Court should note upon its record that permission under this section

has been given and should not leave such a point to mere implication. The omission to do this is a mere irregularity, not justifying High Court's interference—*Dorab Shah*, supra. The pleader appearing for the accused may perform all the acts which devolve upon the accused in the course of the trial; thus, he can answer the questions put to him by the Court in his examination under sec. 342; he can plead or refuse to plead to a charge under sec. 255—*Jamal Khatun*, 6 S.L.R. 206, 14 Cr.L.J. 272. Moreover, as an accused is not bound to make any statement in the examination under sec. 342, he can leave it to his pleader to make any statement, and the personal attendance of the accused to the examination under sec. 342 cannot be insisted upon—*Maung Po v. Haka*, 4 Rang. 506, 28 Cr.L.J. 226, A.I.R. 1927 Rang. 73, 99 I.C. 1026; *Dorabshah Bomanji*, 93 I.C. 232, 28 Bom.L.R. 102, 27 Cr.L.J. 440, 50 Bom. 250, A.I.R. 1926 Bom. 218; *Jaffar*, 35 Cr.L.J. 1035, 140 I.C. 1132, 36 Bom.L.R. 433, A.I.R. 1934 Bom. 212.

Although the Magistrate can, under sub-section (2), revoke the permission to appear by pleader and enforce the personal attendance of the accused, still the Magistrate ought not to do so in a trivial case (e.g., a case under the Income Tax Act) and on a trivial ground, e.g., merely on the ground that the accused objects to the case being tried by that Magistrate and wants it to be transferred to some other Magistrate—*Dwijendra*, 38 C.L.J. 9, 24 Cr.L.J. 902, 75 I.C. 150. It is not open for the Sub-divisional Magistrate to cancel the order of a Bench of Magistrates dispensing with the personal attendance of the accused. If the complainant is aggrieved by the order, he can move the Revisional Courts under sections 438 and 439, Cr. P. Code—*Nagoji v. Veeramma*, 1937 M.W.N. 182.

Appearance by other persons—Where the accused having gone to another village was represented by her mother-in-law with the Magistrate's permission, and the Magistrate proceeded with the case and convicted the accused, the conviction was set aside by the High Court, as there was no proper representation of the accused in the case—*Vithi*, Ratanlal 205 (206). But in another case, where the accused being ill could not attend Court and her father-in-law appeared on her behalf, the Magistrate having given permission under sec. 205, the High Court refused to interfere, holding that the father-in-law was a "person appointed by the accused with the permission of the Court to act in the case" within the meaning of sec. 4, cl. (r)—*Chandrabhaga*, Ratanlal 206 (207).

Where an accused person is permitted to appear by pleader, it is open to the accused to appoint a private person to appear in his stead, under sec. 4 (r), and it is equally open to the Court to permit such private person to represent the accused. Where this is allowed, there should be clearly on record something (e.g., power of attorney) to show that the private person who represents the accused has been duly appointed by him, just as an ordinary pleader has to file a *vakalatnama*. The Court should also note on the record that he has given the requisite permission to such person to represent the accused, and should not leave the matter to mere implication. (The omission to record it is, however, a mere irregularity.) Where there is no power of attorney or letter of authority to show that a person has been appointed by an accused person to appear and plead on his behalf, the Court is not entitled to accept a plea of guilty put forward by such person and to convict the accused upon such plea—*Dorabshah* 50 Bom. 250, 28 Bom.L.R. 102, 27 Cr.L.J. 440. An accused person cannot be allowed to appear by another accused person—*Ma Kim*, 3 Bur.L.J. 182, 26 Cr.L.J. 845 (846).

CHAPTER XVIII.

OF INQUIRY INTO CASES TRIABLE BY THE COURT OF SESSION OR HIGH COURT.

692. Object of preliminary inquiry:—The object of the law in requiring an inquiry before a trial in the Court of Session is to prevent the commitment of cases in which there is no reasonable ground for conviction. This provision of law, while it saves the accused persons from the prolonged anxiety of undergoing trials for offences not brought home to them, also saves the time of the Court of Session from being wasted over cases in which the charge is obviously not supported by such evidence as would support a conviction—*Lachman v. Juala*, 5 All. 161 (162). A preliminary inquiry also affords the accused an opportunity of becoming acquainted with the circumstances of the offences imputed to him and enables him to make his defence—*Rama Varma*, 3 Mad. 351.

No accused can be committed to the Sessions without a preliminary inquiry under this chapter—*Bai Mahalaxmi*, 17 Bom L.R. 910, 16 Cr.L.J. 747.

206. (1) [* * * *] Any Presidency Magistrate, District Magistrate, Sub-divisional Magistrate or Magistrate of the first class, or any Magistrate (*not being a Magistrate of the third class*) empowered in this behalf by the *Provincial Government*, may commit any person for trial to the Court of Session or High Court for any offence triable by such Court.

(2) But, save as herein otherwise provided, no person triable by the Court of Session shall be committed for trial to the High Court.

Change:—The words "Subject to the provision of sec. 443" occurring in the old section at the very beginning have been omitted by sec. 9 of the Criminal Law Amendment Act (XII of 1923), because the old sec. 443 which specified the Magistrates competent to inquire into or try a charge against an European British subject has now been repealed and substituted by an entirely new section. See Chapter XXXIII.

The italicised words have been added by sec. 57 of the Criminal Procedure Code Amendment Act (XVIII of 1923). "This amendment is on the same lines as that of sec. 144 (1). We do not think that the powers under this section should be granted to a Magistrate of the third class"—*Report of the Select Committee* (1916).

The words "Provincial Government" have been substituted for "Local Government" by sec. 4 of the Government of India (Adaptation of Indian Laws) Order, 1937.

693. Committal by Magistrate without jurisdiction:—Where the committing Magistrate has authority to commit but has no territorial jurisdiction in the place where the offence is committed, the irregularity will be cured by sec. 531 unless it has occasioned a failure of justice—*Rayan Kuti*, 26 Mad. 640; *Abbi Reddi*, 17 Mad. 402

Committal to wrong sessions:—See Note 549 under sec. 177.

"Empowered":—If a Magistrate is invested with the powers described in sec. 206, i.e., "power to commit for trial," it means that he is empowered to carry into effect all the provisions of Chapter XVIII. In other words, he is not only empowered to commit, but has power to discharge the accused under sec. 209, if there are no sufficient grounds of committing—*Ramsundar v. Nirodam*, 6 All 477 (479).

694. "Offence triable by such Court":—The procedure to be adopted under this chapter is not confined to cases exclusively triable by the Court of Session,

but is also applicable to cases which, in the opinion of the Magistrate concerned, *ought to be tried* by such Court, as for instance, a case under sec. 392, I P. C., which is not exclusively triable by a Court of Session but is also triable by a Presidency Magistrate and a Magistrate of the first class; and the Magistrate does not act illegally if he considers that the case ought to be committed to the sessions and holds an inquiry under this chapter—*Ramsundar v. Nilotam*, 6 All. 477 (479). So also, the Magistrate can commit a case to the sessions, in which he cannot inflict adequate punishment upon the accused, although the case is triable by a Magistrate—*Kayemulla*, 24 Cal 429; *Pema Canchod*, 4 Bom LR 85 (86). See Note 695 under sec. 207.

If the offence is one triable exclusively by the Court of Session, the Magistrate is bound either to discharge the accused or commit him for trial, but he cannot make over the case for trial to a Deputy Commissioner with special powers under sec. 30—*Amir Khan*, 7 C.W.N. 457; nor can he try it himself—*Bhikki*, Ratanlal 953.

Where a Magistrate is inquiring into a case which is triable both by the Court of Session and by himself, he has a discretion to commit the case to the Court of Session or to try it himself—*B. N. Ry. Co v. Makbul*, 7 P.L.T. 434, 27 Cr.L.J. 313. In the course of the trial the Sessions Judge cannot give him any direction in the matter. All he can do is to make a reference to the High Court if he thinks that an interference is necessary—*Supdt. & Remem. of Legal Affairs, Bengal v. Nabin Chandra Hur*, 39 Cr.L.J. 569, 175 I.C. 521, AIR 1938 Cal 416.

It is illegal to commit a summons case to the Sessions (*e.g.*, a case under secs. 352 and 447, I. P. Code)—*Dharam Singh*, 3 ALJ 14, 3 Cr.L.J. 94.

207. The following procedure shall be adopted in inquiries

before Magistrates where the case is triable exclusively by a Court of Session or High Court, or, in the opinion of the Magistrate, ought to be tried by such Court.

Procedure in inquiries preparatory to commitment.

694A. "Shall be adopted":—The accused was convicted in a case which was tried as a warrant case. The appellate Court set aside the conviction, observing that if the Magistrate wished to proceed further he might commit the accused to the Court of Session. Thereupon, the Magistrate, without holding any inquiry under this chapter, committed the accused to the Court of Session. Held that the order of commitment was wrong in law in as much as the Magistrate had not before making that order held an inquiry under this chapter—*Nagendra*, 33 Cr.L.J. 770, 139 I.C. 470, 36 C.W.N. 926, 1932 Cr.C. 636, AIR 1932 Cal 683, Ind. Rul. 1932 Cal 628. But see Note 1144.

695. "Ought to be tried":—Under this section a Magistrate can commit an accused to the Court of Session where the case is triable exclusively by that Court, or where in his opinion the case ought to be tried by the Court of Session. In the latter case he must give reasons for his entertaining that opinion, for the order of commitment is a judicial order—*Deo Narain*, 29 Cr.L.J. 612, 109 I.C. 804, AIR 1928 Pat. 551. See also *Ghousbaksh* in Note 703. The words "ought to be tried" in this section and sec. 347, must be read with sec. 254. A case which ought to be tried by the Court of Session is one which the Magistrate is not competent to try or one in which, in his opinion, adequate punishment cannot be inflicted by him—*Pema*, 4 Bom.L.R. 85 (86); *Abdul Rahiman*, 16 Bom. 580, *Ismail*, 11 S.L.R. 79; *Ducanichand*, 15 Cr.L.J. 644, 8 S.L.R. 23; *Kayemulla*, 24 Cal 429, 1 C.W.N. 414. See also *Jagmohan*, 6 ALJ. 989, 11 CLJ. 54; *Bindeshri*, 41 All 454. If the case is one which he has jurisdiction to dispose of, *i.e.*, if he can inflict adequate punishment, he should not send up the case for trial to the Court of Session—*Ducanichand*, 8 S.L.R. 23, 15 Cr.L.J. 664; *Dharam Singh*, 3 ALJ 14, 3 Cr.L.J. 94; *Allahdad*, 31 Cr.L.J. 596, 123 I.C. 702, AIR 1930 Sind 145. The Court of Session ought not to be overburdened with the weight of cases committed to them by Magistrates, where such Magistrates are themselves competent to decide the cases, and no over-riding reasons exist for committal to the higher Court.

—*Asha Bhatli*, 15 Bom L.R. 998, 14 Cr.L.J. 657 (658). In committing cases not exclusively triable by the Court of Session, Magistrates should exercise a proper discretion and give adequate reasons for making commitment to the Court of Session. Reasons should be such as to show whether the commitment is made in the sound exercise of the discretionary power vested in the Magistrate by law, and if he does not give adequate reasons the commitment may be quashed. The commitment should not be made merely with a view to avoid a conflict of decisions—*Karam Singh*, 31 Cr.L.J. 178, 120 I.C. 677, A.I.R. 1930 Lah. 312, Ind Rul. 1930 Lah. 133. Distinguishing this case it was held that a commitment was proper when some of the offences were triable exclusively by the Court of Session—*Ujagar Singh*, 34 Cr.L.J. 314, 142 I.C. 200, 34 P.L.R. 360, A.I.R. 1933 Lah. 500, 1933 Cr.C. 760, Ind. Rul. 1933 Lah. 174. If the Magistrate can try it himself, he should not commit the case on the sole ground that the accused had been committed in another case—*Hanuman*, 20 Cr.L.J. 97 (Nag.); or on the ground that the case is connected with another case in which he felt bound by law to commit, specially when the connection between the two cases is not of such a character as to embarrass or prejudice the accused, if the present case is tried separately—*Asha Bhatli*, supra. But in *Ali*, 1917 P.R. 13 and *Bhagrathi*, 42 Mad 83 (dissenting from the above cases) it has been held that the incompetency of the Magistrate to try the case or to pass adequate sentence is not the only ground for committal. The Magistrate may commit for any other sufficient reason. Thus, where the Magistrate committed certain persons to the Sessions on charges under sec. 147, I. P. C., not because he could not pass adequate punishment but because other persons on the other side have been committed to the Court of Session on charges under secs. 304, 325, 148 and 149, I. P. C., it was held that the committal was not illegal—*Ali*, 1917 P.R. 13, 18 Cr.L.J. 524. The fact that a case has been committed to the Court of Session is no ground whatsoever for committing the cross-case to the same Court when the offence involved in the cross-case is triable and can be adequately punished by a First Class Magistrate or one exercising enhanced powers under sec. 30, Cr. P. Code—*Nathu*, 33 Cr.L.J. 255, 136 I.C. 272, 32 P.L.R. 856, A.I.R. 1932 Lah. 168, 1932 Cr.C. 154, Ind Rul. 1932 Lah. 224; *Mir Alam*, 35 Cr.L.J. 1459, 151 I.C. 970, 35 P.L.R. 300, 1934 Cr.C. 174, A.I.R. 1934 Lah. 95; *Chinnaswamy*, 1933 M.W.N. 550; *Paladagu Lakshminarayana v. Tadiboyina*, 33 Cr.L.J. 765, 139 I.C. 343, A.I.R. 1932 Mad 502, 1932 M.W.N. 634, 63 M.L.J. 101, 1932 Cr.C. 506, 36 M.L.W. 390, Ind Rul. 1932 Mad 667; *Gorrepaty Ramasubbayya*, 39 Cr.L.J. 715, 176 I.C. 182, 47 M.L.W. 486, 1938 M.W.N. 417, 11 R.M. 45, A.I.R. 1938 Mad. 529, (1938) 1 M.L.J. 403. There is thus a conflict of opinion on this point.

208. (1) The Magistrate shall, when the accused appears or is brought before him, proceed to hear the complainant (if any), and take in manner hereinafter provided all such evidence as may be produced in support of the prosecution or in behalf of the accused, or as may be called for by the Magistrate.
- (2) The accused shall be at liberty to cross-examine the witnesses for the prosecution, and in such case the prosecutor may re-examine them.

(3) If the complainant or officer conducting the prosecution, or the accused, applies to the Magistrate to issue process to compel the attendance of any witness or the production of any document or thing, the Magistrate shall issue such process unless, for reasons to be recorded, he deems it unnecessary to do so.

(4) Nothing in this section shall be deemed to require a Presidency Magistrate to record his reasons.

695A. "Hear the complainant":—It is not the examination of the complainant that is necessary under cl (1) of this section, but only that he shall be heard—*Santiram*, 30 Cr.L.J. 942 (943), A.I.R. 1929 Cal. 229, 118 I.C. 572, Ind. Rul 1929 Cal. 668. The informant in a case which has been investigated by the Police is not necessarily the complainant—*Kasem Molla*, 42 O.L.J. 114, 26 Cr.L.J. 1560, 90 I.C. 440, A.I.R. 1926 Cal. 410.

696. Remand of accused before taking evidence:—A person arrested under a warrant should be brought promptly before the Magistrate, and the Magistrate has then no authority to further detain him in custody or remand him to prison, without sufficient cause—*Abdul Kadir v. Magistrate*, 20 WR 23. If from the absence of the witnesses or from any reasonable cause, it becomes necessary or advisable to defer the inquiry, the Magistrate instead of immediately examining the complainant and his witnesses, as required by this section, may remand the accused person. If there is some evidence available and further evidence is forthcoming, it may be desirable to postpone the inquiry for a short period in order that when commenced it may be continuous. But the fact that there is or may be a great body of evidence forthcoming against the accused, is not a ground of detention for an inordinate period—*Manikam*, 6 Mad 63. Similarly, where there is no evidence at all to begin with, a Magistrate will not be justified in remanding the prisoner, in the expectation that evidence might turn up—*Purna Chandra*, 4 B.L.R. App 1.

697. Taking evidence produced:—In every inquiry into a Sessions case, it is the duty of the committing Magistrate to make a full and careful inquiry and to record the whole evidence in the case. He should do so even when the accused has made a confession, as confessions are in many cases retracted at the trial—*Mahadu*, Ratanlal 842. The Magistrate is bound to take all such evidence as may be produced (1) in support of the prosecution, (2) on behalf of the accused and (3) as may be called for by the Magistrate. If the Magistrate does not take that evidence, he errs, unless he can justify his procedure on the ground that the evidence of such and such witness is obviously irrelevant or that he considers that fact in issue proved one way or the other by the evidence already produced—*Durga Dutt*, 10 A.L.J. 144, 13 Cr.L.J. 433. The prosecutor is bound to produce all evidence in his favour directly bearing on the charge, and to call those witnesses who prove their connection with the transaction in question and are able to give important information, unless the prosecutor has a reasonable belief that they will not speak the truth—*Dhunnoo*, 8 Cal. 121 (124, 125). The prosecutor should not refuse to call or put into the witness box any witness for the prosecution merely because the evidence of such witness might in some respects be favourable to the defence—*Durga*, 16 All 84 (F.B.). The duty of the Public Prosecutor is to represent not the police but the Crown. It is his duty to call all witnesses who can throw any light on the inquiry, whether they support the prosecution theory or the defence theory—*Brahmadeo*, 1 P.L.T. 161, 54 I.C. 241, 21 Cr.L.J. 33. But if the prosecutor is of opinion that a witness is a false witness or is likely to give false testimony, he is not bound to call that witness—*Durga*, 16 All 84; *Stanton*, 14 All. 521; *Bankhandi*, 15 All 6. See Note 893.

If all the witnesses are not called for the prosecution without sufficient cause, the Court may properly draw an inference adverse to the prosecution—*Dhunnoo*, 8 Cal. 121 (125). But no corresponding inference will be drawn against the accused for non-production of his witness. He may rely on the witnesses for the prosecution or call his own witnesses or meet the charge in any other way he chooses—*Dhunnoo*, 8 Cal. 121 (125); *Ashaf Ali*, 21 C.W.N. 1152, 19 Cr.L.J. 81. Whether the defence produces no evidence, and the case has to be decided upon the evidence for the prosecution, it is the committing Magistrate's duty to make some investigation into the truth of the story of

the accused, before he makes an order for commitment. In such a case, if the police does not send up all the material witnesses, it is the duty of the committing Magistrate to call and examine them himself in order to determine which side was speaking the truth—*Ram Pershad*, 26 Cr.L.J. 1589 (1592) (Pat.).

The Magistrate is competent to cross-examine the prosecution witnesses in order to consider whether the witnesses are credible or not—*Bai Mahalaxmi*, 17 Bom.L.R. 910, 16 Cr.L.J. 747.

"All such evidence":—It is not correct to say that the Magistrate has absolutely no option but to hear the entire evidence on both sides, and that he cannot commit the case to the Sessions unless he has done so. The prosecution can place before the Court all the evidence on which they wish to rely, but after evidence has been taken, which is sufficient to make out a *prima facie* case, it is not necessary to call further evidence. Similarly, if there is a mass of evidence tending to prove the same point it is not necessary that all such evidence should be produced in the Magistrate's Court before the charge is framed. Notice of all evidence to be produced in the Sessions Court ought, however, to be given to the accused at the trial, otherwise he would be prejudiced. The mere fact that some evidence is not produced till proceedings in the Court of Session can in no way prejudice the accused if he has notice of it—*Jhabwala*, 34 Cr.L.J. 957 (971), 145 I.C. 481, 1933 A.L.J. 799, A.I.R. 1933 All 690, 1933 Cr.C. 1202. See *Chhedammi*, 36 Cr.L.J. 175, 152 I.C. 428, 11 O.W.N. 308. The Lahore High Court dissented from the view expressed above. Rangi Lal, J. held: "Section 208 itself lays down that the Magistrate is bound to take not only all the evidence produced in support of the prosecution, but also that produced on behalf of the accused and is himself entitled to call for further evidence. The accused cannot be in a position to produce all this evidence until he has heard all the evidence against him. The Magistrate cannot be in a position to call for further evidence until the parties have placed all their evidence before him. It seems to me that the intention of the Legislature is that the Magistrate should make as full an inquiry as possible and not only a summary inquiry before committing a case to the Court of Session"—*Sher Bahadur*, A.I.R. 1934 Lah. 667 (671), 15 Lah. 331, 36 Cr.L.J. 169, 152 I.C. 673, 1934 Cr.C. 990. This view of law seems to have been modified in *Niamat*, 37 Cr.L.J. 742, 162 I.C. 976, A.I.R. 1936 Lah. 533, 17 Lah. 176, 38 P.L.R. 421, 1936 Cr.C. 586 (F.B.), where it has been held that a consideration of sub-sec. (3) of this section appears to show clearly that it is unnecessary to produce all the evidence in the Court of the Committing Magistrate. There are also, no doubt, many cases in which it is desirable that the prosecution should not be compelled to place before the Committing Magistrate's Court every detail of the evidence which they propose to lead in the Sessions Court. But there is no justification in law for abstaining from examining in the Committing Magistrate's Court the principal witnesses for the prosecution without whose evidence the case against the accused cannot be proved—*Nandram*, 36 Cr.L.J. 563 (564), 154 I.C. 455, A.I.R. 1935 Sind 31, 1935 Cr.C. 160, following *Sher Bahadur*, supra; *Raban Lalu Shaikh v. Emp.*, 39 Cr.L.J. 618, 175 I.C. 324, A.I.R. 1938 Sind 97, 10 R.S. 295, 32 S.L.R. 709, distinguishing *Nur Khan v. Emp.*, 24 S.L.R. 96, 120 I.C. 520, A.I.R. 1930 Sind 99, 1930 Cr.C. 282, 31 Cr.L.J. 117, Ind. Rul. 1930 Sind 24. In a recent case a Full Bench of the Allahabad High Court has held that a Magistrate who, under Chap. XVIII, Cr. P. C., is enquiring into a case triable by the Court of Session or High Court, and to whom, before the prosecution evidence is closed, it appears that the case is one which ought to be tried by the Court of Session or High Court, is not empowered under sec. 347, Cr. P. C. (subject to the production of defence witnesses under sec. 212), to commit the accused for such trial without completing the rest of the prosecution evidence, and that he is bound to record the rest of the evidence for the prosecution under sec. 208, Cr. P. C., and then commit—*Asghar*, 37 Cr.L.J. 337 (341), 160 I.C. 856, A.I.R. 1936 All 134, 1935 A.L.J. 1321, 1936 Cr.C. 134 (F.B.).

A Magistrate should not treat a prosecution witness as an accused person and should not record her evidence in jail instead of examining her in open Court or at his

house if he found that more convenient—*Ghirras*, 34 Cr L J. 1009 (1012), 145 I.C. 470, 10 O.W.N. 1108, A.I.R. 1933 Oudh 263, 1933 Cr.C. 592.

Evidence for the accused.—The Magistrate is not empowered to frame a charge or make an order for commitment until he has taken all such evidence as the accused may produce or is prepared to produce before him for hearing—*Ahmadi*, 20 All. 264; *Muhammad Hadi*, 26 All 177 (178); *Jaswant Singh*, 46 All 137, 21 A.L.J. 911, 81 I.C. 112, 25 Cr L.J. 624, A.I.R. 1924 All. 317. The provision in this section to take evidence on behalf of the accused is mandatory. It is essential that the defence evidence if tendered should be considered, because the Magistrate has got the power to cancel the charge if he considers that there are not sufficient grounds for committing the accused. Where the committing Magistrate failed to examine the witnesses named by the accused, held that the commitment must be quashed—*Nga Khaing*, 6 Rang. 531, 30 Cr L.J. 1, 112 I.C. 769, A.I.R. 1928 Rang. 299.

Under Chap XVIII an accused person can offer defence at two stages, *ie*, under sec. 208 (1) as of right and under sec. 212 at the discretion of the Magistrate—*Fazal v. Emp*, A.I.R. 1940 Lah. 389 (390), I.L.R. 1940 Lah. 151.

698. Sub-section (2)—Right of cross-examination:—Under this sub-section the accused has a right to cross examine the witnesses for the prosecution. Refusal by a Magistrate to allow the accused to cross examine the prosecution witnesses during the inquiry, is arbitrary and improper. The depositions of the prosecution witnesses during the inquiry are not to be deemed as “duly taken” under sec 288 if the accused had not an opportunity to cross-examine them, and cannot be treated as evidence at the Sessions trial—*Sagai*, 21 Cal 642.

The procedure of this chapter differs from the procedure of Chap XXI (trial of warrant cases). Under that chapter, cross-examination is allowed only after the frame of charge. See sec 256. But in commitment proceedings, the accused has the right to cross-examine the prosecution witnesses under this section, *before* the proceedings have reached the stage in which it may be necessary to draw up a charge—*Surya Narain*, 5 C.W.N. 110 (112); and the accused has no right to have his cross-examination conducted after the frame of charge—*Baldeo*, 19 O.C. 239, 18 Cr L.J. 105. It is not a proper procedure to refuse to allow cross-examination before a charge is drawn up. The Magistrate may refuse cross examination before frame of charge in proceedings under Chap XXI, but not in proceedings under this chapter—*Durga Dutt*, 10 A.L.J. 144, 13 Cr.L.J. 443 (445). And so, where an application for cross examination was made before the charge was framed and before the Magistrate had decided to commit the case to the Court of Session, he was bound to allow the accused to cross-examine the prosecution witnesses—*Jyotsna Nath*, 51 Cal 442 (445). The proper time for cross-examination of of a witness in an inquiry under this chapter is in the ordinary course immediately after the examination-in-chief of that particular witness. As each witness is examined he should then and there be cross-examined and re-examined and allowed to go home; and it is not a convenient procedure to allow cross-examination to be reserved until after the examination-in-chief of all the prosecution witnesses has been finished—*Durga Dutt*, 10 A.L.J. 144, 13 Cr L.J. 443 (445); *Saadat Mian*, 6 Pat 329, 28 Cr L.J. 709; *Mohamed Kasim*, 14 M.L.T. 532, 15 Cr L.J. 29 (30); *Arnold*, 5 Bur L.T. 239, 13 Cr L.J. 877 (882); *Tambi*, 11 Bur L.T. 144, 19 Cr.L.J. 327. A Magistrate does not act illegally if he asks the accused to cross-examine each prosecution witness after his examination-in-chief, and on the accused's refusal to do so, refuses the accused's prayer for cross-examination after the end of the examination-in-chief of all the prosecution witnesses—*G. V. Raman*, 57 Cal 44, 33 C.W.N. 535, 30 Cr L.J. 1107, 119 I.C. 808, A.I.R. 1929 Cal. 593 (dissenting from *Jogendra v. Motilal*, 39 Cal 885, 16 C.W.N. 1135, where it was held that it was open to the Magistrate to allow cross-examination of the prosecution witnesses even *after* a charge was drawn up). See this last case cited under sec. 213 (2).

But the Magistrate, however, has the discretion to allow the accused to postpone the cross-examination of witnesses in suitable circumstances. Thus, where the accused have applied for copies of statements made by prosecution witnesses to the Police during

the investigation, with a view to cross-examine the witnesses, and the Magistrate has ordered such copies to be furnished under the proviso to sec. 162 (1), the Magistrate is bound to postpone the cross-examination of the witnesses until such copies are furnished to the accused and to afford the accused an opportunity to cross-examine after receiving such copies. Omission to do so constitutes a direct violation of the statutory provisions of sec. 208 (2) and vitiates the commitment—*Saadat Mian*, 6 Pat 329, 28 Cr.L.J. 709 (712), 103 I.C. 597, 8 P.L.T. 780, A.I.R. 1927 Pat. 243; *Nabin Chandra v. Munshi Mander*, 6 Pat. 606, A.I.R. 1927 Pat. 248, 8 P.L.T. 590, 101 I.C. 707.

Where a case was at first begun as a warrant case and the accused had not cross-examined the witnesses, because in a warrant case he could reserve his rights to do so until after the framing of the charge, but after hearing the prosecution evidence the Magistrate came to the conclusion that the case was a Sessions case, and thereupon converted the proceeding into one under this chapter, *held* that the accused had a right to have the witnesses recalled for cross-examination, as he had been prejudiced by the sudden change of procedure—*Dhamarcha*, 19 A.L.J. 463, 23 Cr.L.J. 496. Similarly, where the prosecution started first of all as a warrant case, but the Magistrate then made up his mind that it was a Sessions case and proceeded to deal with the case from the beginning as though it were to end in a commitment, and allowed the defence to reserve cross-examination, but later on he committed the case to the Sessions without giving to the defence the promised opportunity to cross-examine the witnesses and adduce evidence, *held* that the commitment must be quashed—*Nanooram v. Fulchand*, 57 Cal. 945, 32 Cr.L.J. 182 (184), A.I.R. 1930 Cal. 754.

A Magistrate has no power to curtail the cross-examination of witnesses by directing the counsel for the accused not to put more than 6 to 8 questions to each witness—*Durga Dutt*, 10 A.L.J. 144, 13 Cr.L.J. 443 (445). But see *Walidino*, 23 S.L.R. 340, 117 I.C. 773, 30 Cr.L.J. 845, 1929 Cr.C. 337, A.I.R. 1929 Sind 137.

The procedure of this section is to be followed in cases under sec. 347. See sec. 347 as now amended, and Note 1003 thereunder.

699. Sub-section (3)—Summoning witnesses:—Before committing the accused to the Sessions, the Magistrate should, if so required by the accused, compel the attendance of witnesses for the defence. If he commits an accused to the Sessions without examining the witnesses applied for under this section, the order of commitment is invalid—*Muhammad Hadi*, 26 All. 177 (178). But the Magistrate has also a discretion to refuse to issue process, if he thinks it unnecessary to do so. Sub-section (1) contemplates the production of evidence by the prosecution or by the accused without the aid of the Magistrate; sub-sec. (3) contemplates the intervention of the Magistrate to secure the attendance of witnesses; and a Magistrate is not required to record the evidence of witnesses whom, in the exercise of the discretion given by sub-sec. (3) he has deemed it unnecessary to summon. He may refuse process where there has been an inordinate delay in asking for it, e.g., when the accused made the application for process not until the charge was about to be drawn up—*Kangaya*, 36 Mad. 321 (323, 324), 23 M.L.J. 368. The purpose of committal proceedings is not merely to place on record the case for the prosecution, but the purpose of the committal proceedings is to commit to the Court of Session for trial an offence which, after having heard the evidence for the prosecution and for the defence, the Magistrate appears to think, has been committed. But while it is intended that the prosecution should be allowed to adduce all material evidence in support of the prosecution case, so it is intended, to be fair, that the accused shall also be entitled to adduce all material evidence in their defence. It is true that under sec. 208 (3), Cr. P. C., a Magistrate can, for reasons to be recorded, refuse to issue process to compel the attendance of any witness. But it does not mean that the Magistrate shall refuse the application of the accused to call witnesses because these witnesses can be called hereafter in the Court of Session. While it is true that convenience and expedition are factors to be considered in the trial of a case, it must be remembered that beyond even these considerations is the even more important consideration that justice should be done, and the necessity for

expedition should not be allowed to deprive the accused of a reasonable opportunity to call evidence in defence on a charge of an offence of which, at the outset of the proceedings, he had no knowledge he would be called upon to meet—*Jashanmal Gulrajani v. Emp*, A.I.R. 1939 Sind 222 (224), 40 Cr.L.J. 818, 183 I.C. 619, 12 RS 64. But the Magistrate may reject the application for summoning witnesses if it is made on the date fixed for passing the order of commitment—*Sarath*, 42 Cal. 608, 19 C.W.N. 335.

If the Magistrate refuses to issue process he must record his reasons for so doing; if he omits to record reasons, he acts illegally, and the order that is passed subsequently is unsustainable in law—*Kanda Raja v. Sangaraja*, 24 M.L.W. 713, 27 Cr.L.J. 1327, 98 I.C. 399, A.I.R. 1927 Mad 162, 38 M.L.T. 14. If he records his reasons for exercising his discretion in rejecting the application of the accused to summon the defence witnesses, the order of the Magistrate cannot be held to be illegal; and, therefore, the order of commitment cannot be set aside under sec 215, as no point of law arises—*Saadat Mian*, 6 Pat 329, 28 Cr.L.J. 709 (713). See also *Swamunatha v. Kuppuswami* given in Note 712.

But if the Magistrate issues process for the attendance of witnesses, he is bound to examine them and cannot refuse to do so. Therefore, where on the application of the accused the Magistrate summoned witnesses for the defence and consented to make a local inspection, but under a direction from the Sessions Judge committed the accused for trial without examining those witnesses and without making the local inspection, it was held that the direction of the Sessions Judge was an improper interference with the Magistrate's discretion, and that the commitment was illegal and should be set aside—*Mathura*, 1906 A.W.N. 306, 4 Cr.L.J. 452.

A Magistrate is, under this section, bound to take steps for the production of documents wanted by the accused unless he deems it unnecessary to do so—*Golam*, 34 Cr.L.J. 868, 144 I.C. 930, A.I.R. 1933 Cal 181, 1933 Cr.C. 230.

The provisions of this clause must be read subject to the provisions of sec 204 (3). In a private prosecution the complainant is under a legal obligation to pay the process-fees before summons is issued, and the Court has a right to insist upon those fees being paid in advance before issue of process—*Ram Dulari v. Mushtaq*, 3 Luck 363, 29 Cr.L.J. 664.

It is probable that the discretion given to the Magistrate under cl (3) of this section permits of refusal of process to compel the attendance of any witness if process-fees are not paid—*Mg San Nyain*, 27 Cr.L.J. 415, 93 I.C. 79, A.I.R. 1926 Rang 13, 4 Bur.L.J. 187.

209. (1) When the evidence referred to in section 208,

When accused person sub-sections (1) and (3), has been taken,
to be discharged. and he has (if necessary) examined the

accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him, such Magistrate shall, if he finds that there are not sufficient grounds for committing the accused person for trial, record his reasons and discharge him, unless it appears to the Magistrate that such person should be tried before himself or some other Magistrate, in which case he shall proceed accordingly.

(2) Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case, if, for reasons to be recorded by such Magistrate, he considers the charge to be groundless.

700. Examination of the accused:—Cf Note 974 under sec. 342. The object of examining the accused is to enable a Judge to ascertain from time to time,

particularly if the accused is undefended, what explanation he may offer regarding any facts stated by a witness appearing against him, so that these facts should not stand unexplained—*Hussein Buksh*, 6 Cal. 96. But the accused should not be examined for the purpose of making him confess his guilt or admit facts which may go to incriminate him—*Bhairab*, 2 C.W.N. 702; *Rangi*, 10 Mad. 295. He should not be examined for the purpose of filling up gaps in the evidence for the prosecution—*Basanta Kumar*, 26 Cal. 49, nor for the purpose of supplementing the evidence where it is deficient—*Chimbash*, 1 C.L.R. 436. Both under secs. 209 and 342, it is not proper for the Court in examining the accused to seek in any way to entrap him into admission which may fill up gaps in the prosecution case; but the answers given by the accused in answer to straightforward questions put by the Court may no doubt be taken into account under sec. 342 (3) for convicting the accused—*Phurlai*, 9 Pat. 504, 1930 Cr.C. 926 (927). The accused must be examined as an *accused* and not as a *witness*. Where on a complaint against two persons for an offence, the committing Magistrate inquired into the case against one of them and examined the other as a *witness*, the second accused could not be committed to the Sessions in the absence of a preliminary inquiry into his case and without examining him as an accused—*Bai Mahalaxmi*, 17 Bom L.R. 910, 16 Cr.L.J. 747. It is not left to the *discretion* of the committing Magistrate as to whether he should examine the accused or not; he is *bound* to examine the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him. If the Magistrate commits the accused without examination, the commitment is irregular but it ought not to be quashed unless the irregularity has occasioned a failure of justice—*Pandara*, 23 Mad. 636 (637). It cannot be said that the omission to examine the accused in the committing Court is a disregard of an express provision of law and therefore illegal—*Ajhar Mondal*, 39 C.W.N. 289, A.I.R. 1935 Cal. 605, 62 Cal 475, following *Dinn*, 83 I.C. 895 (Sind) and dissenting from *Pandara*, 23 Mad 636.

The accused should not be ordered to file any written statement—*Chinnasami v. Veeriah*, 2 Weir 255 (257); but if he chooses to make any statement the Court should not refuse to allow him to do so—*Abdul Guffoor*, 10 C.L.R. 54. If the Magistrate considers the written statement, it must be taken that he considered the statement as that of the accused's explanation of certain circumstances appearing in the evidence against him—*Chinnasami v. Veeriah*, *supra*.

701. Duty of Magistrate—'Sufficient grounds':—The words "sufficient ground of commitment" are ambiguous, and have led to a difference of opinion among the High Courts as to whether the Magistrate should *weigh the evidence* and decide whether the conviction of the accused is *certain*, or whether the Magistrate should merely see if a *prima facie* case has been made out and there is a *possibility* of conviction.

On the one hand, it has been laid down that in deciding whether there are sufficient grounds for commitment, the Magistrate is to see whether there are credible witnesses to facts which, if believed by a jury, would justify the conviction of the accused, but it is not the duty of the Magistrate to *weigh the evidence*. If he proceeds to weigh the evidence, to accept some statements and reject others, to deal with probabilities or to draw inferences as to knowledge or intention, and to decide whether the guilt of the accused has or has not been conclusively proved, he is in reality dealing with the question of the guilt or innocence of the accused and is usurping the functions of the trial Court. He must not in any way encroach upon the functions of the jury—*National Bank v. Kothandarama*, 14 M.L.T. 200, 14 Cr.L.J. 529; *Akbar Ali v. Raja Bahadur*, 24 A.L.J. 133, 27 Cr.L.J. 2 (4); *Chinnammal v. Konda Reddi*, 28 Cr.L.J. 120, 38 M.L.T. 135. The Magistrate has not to pronounce a definite judgment on the question whether the accused is guilty or innocent. That is a function reserved for the Court of Session. The only question he has to decide is whether there are sufficient grounds for committing the accused for trial, *i.e.* whether there is or is not sufficient legal evidence or reasonable ground of suspicion—*Fattu v. Fattu*, 26 All. 564 (568). The words 'sufficient grounds of commitment' do not mean sufficient grounds of *conviction*, but evidence which is sufficient to put the accused on his trial; and such a case arises when credible witnesses

make statements which if believed would sustain a conviction. The weighing of their testimony with regard to improbabilities and apparent discrepancies is more properly a function of the Court which is to try the case than that of the committing Magistrate—*Namdev*, 11 Bom 372; *Varjuandas*, 27 Bom 84; *Hazara v. Bushen Singh*, 14 P.R. 1908, 8 Cr.L.J. 263. When the Legislature speaks of sufficient grounds for committing for trial, it should not be supposed to have spoken of sufficient grounds of conviction. The intention of the Legislature is to make a distinction between grounds of commitment and grounds of conviction. Satisfactory proof of the guilt of the accused is the ground for conviction. Satisfactory evidence to go to trial must be regarded as the ground for committing for trial. What the inquiring Magistrate has got to try and determine is not whether the case has been made out by the prosecution but only whether there is a case for trial. There is always a case for trial when the evidence is of such a nature that the guilt of the accused can be held to be proved or disproved only as the result of the valuing and the weighing of evidence. But if the evidence be of such a nature that no reasonable person and no tribunal, judge, or jury would ever on the evidence hold the accused guilty, it follows that there is no case for trial, and it is then a case for the inquiring Magistrate to discharge—*Mania Manicka*, 48 Mad 874, 49 M.L.J. 155, 26 Cr.L.J. 1570. What the Magistrate has to consider is not whether the conviction of the accused is reasonably certain, but whether there is evidence on which a conviction is possible in law—*Virjuandas*, 27 Bom. 84. Where the prosecution produced a good deal of direct evidence, it is no function of the Magistrate to weigh the evidence, but he should commit the accused person for trial. It is the duty of the Magistrate to commit when the evidence for the prosecution is sufficient to make out a *prima facie* case against the accused—*Maulu*, 4 Lah 69, 5 Lah.L.J. 276. If the Magistrate finds that there is some evidence against the accused, though there is other evidence on the record which is in his favour, the Magistrate should leave it to the Sessions Judge to decide whether the guilt of the accused has or has not been proved, instead of weighing the evidence and deciding whether the evidence is unreliable or insufficient—*Muhammad Khan*, 33 P.L.R. 1068, 34 Cr.L.J. 39. The test which should be applied to decide whether a committal ought or ought not to be made on the facts is this—assuming that the whole of the evidence telling against the accused is true, is there a case which a Judge at a trial could leave to a jury? If the evidence is such that a Judge would have been bound to rule that there was no evidence on which a jury could convict, then a committal ought not to be made. If there was any evidence which called for an answer, however great the preponderance in favour of the prisoner might be—then the committal was proper—*Sheobux Ram*, 9 C.W.N. 829 (839), 2 Cr.L.J. 534; *Mihu Lal*, A.I.R. 1940 All 396 (397), 1940 A.L.J. 357.

On the other hand, there are some cases in which it has been laid down that a Magistrate is competent to weigh the evidence and to decide whether it is credible or not. The power given to Magistrates under this section extends to weighing of evidence, and the expression "sufficient grounds" must be understood in a wide sense, so as to indicate such evidence as would justify a conviction—*Lachman v. Juala*, 5 All 161 (163). But the same High Court held that it was not a Magistrate making an inquiry into a case triable exclusively by the Court of Session to weigh the evidence or to give the accused the benefit of doubt—*Alopi Din*, A.I.R. 1935 All 366 (368), 157 I.C. 205, 1935 A.L.J. 653, 1935 Cr.C. 384, 36 Cr.L.J. 1103. Notwithstanding direct evidence adduced against the accused, it is not incompetent to a Magistrate to examine the credibility of the evidence to see whether the prosecution case is improbable and the evidence unreliable—*Rash Behari*, 12 C.W.N. 117; *Bai Parbati*, 35 Bom. 163; *Munshi Mander v. Karu*, 6 P.L.T. 146, 25 Cr.L.J. 1089, 81 I.C. 913, A.I.R. 1925 Pat. 279; *Tinkoweri*, 1 P.L.T. 153, 21 Cr.L.J. 328; *Naramban*, 15 L.W. 552, A.I.R. 1922 Mad. 195; *Sultani*, 1909 P.R. 10, 11 Cr.L.J. 18; *Mir Abdulla*, 1910 P.L.R. 215, 11 Cr.L.J. 751. See also *Inoyia v. Harbans*, 34 Cr.L.J. 1201, 146 I.C. 160, A.I.R. 1933 All. 482, 1933 Cr.C. 827, 1933 A.L.J. 1115. The Magistrate has discretion and power to weigh the evidence in order to see whether the case is a fit one for the jury to decide or whether there is no *prima facie* case for the accused to meet—*Thiru Vandaya Trevan*, 42 M.L.J.

49, 23 Cr.L.J. 209, A.I.R. 1922 Mad. 43. It is open to the committing Magistrate to form his opinion with regard to the credibility of the witnesses called before him; but, of course, it is not his duty to closely criticize their evidence—*Tarapada v. Kalipada*, 51 Cal. 849 (852), 28 C.W.N. 587, 83 I.C. 677, 26 Cr.L.J. 117, A.I.R. 1924 Cal. 639; *Fattu v. Fattu*, 26 All 564 (567). Where charges exclusively triable by a Court of Session are brought before a Magistrate and some evidence is offered in support thereof, it is not his duty in all cases to commit the accused to the Sessions. The Magistrate should exercise his discretion, and after weighing the evidence decide whether or not he should try the case himself—*Hari Das*, 37 C.L.J. 34, 24 Cr.L.J. 674, A.I.R. 1923 Cal. 108; *Kalyan Singh*, 21 All 265. It is not the function of the Magistrate to act merely as machines for recording the evidence, and at the end of the record, to automatically commit the accused to the Sessions. It is his duty to sift the evidence and to see whether it is reasonably clear that upon the evidence the accused persons stands a chance of being convicted if committed to the Sessions Court—*Chandrakasa*, 1931 M.W.N. 116. A Magistrate is competent to consider the credibility and weigh the probabilities of the evidence, but in this consideration his discretion is limited, and in a matter of reasonable doubt, he must not rely upon his own opinion; in fact, he must not encroach upon the function of a Court of trial. Furthermore, he must keep before him the question whether there are fair grounds for concluding that the accused is guilty upon the evidence. In other words, where there is a *prima facie* case, upon evidence reasonably credible by a Court of trial, he should commit—*Maung Hnin v. Maung Po*, 4 Rang 471, 28 Cr.L.J. 219 (221). In this case the Judges have also expressed the opinion that it is impossible to lay down any general rule or rules which must be applied in every case and that it is extremely difficult to arrive at a formula which will be of assistance in all circumstances. Each case must be decided upon its own particular facts—*Ibid*. It is the function of the Magistrate conducting the enquiry to weigh the evidence produced before him and not merely to isolate that which is directed against the accused and act upon it without any analysis of the remaining evidence. It is not the correct view that a Magistrate conducting an enquiry into a case triable by a Court of Session should not weigh the evidence produced before him before deciding whether to commit or discharge—a view which appears to be in direct conflict with the mandatory provisions of sec. 209, Cr. P. C.—*Fazal Razak*, A.I.R. 1937 Pesh. 12, 167 I.C. 602, 38 Cr.L.J. 427, 1937 A.I.Cr.R. 115, 1937 Pesh. L.J. 12, 9 R.Pesh. 88.

The question of the duty of a Committing Magistrate, where he has doubts about the real nature of the offence, and the quality of the evidence, is really well-settled, and should cause in the vast majority of cases no difficulty whatever. One may place the classes of cases into three categories. There is the case where the evidence is *prima facie* so clear that nobody can entertain any doubt that the matter ought to be tried. There is, on the other hand, the class of cases where the evidence is so palpably tainted, absurd, incredible and, as it has been described on occasions, groundless, that nobody could doubt that it would be a hardship and unjust to an accused person to allow the matter to go any further. There is the third category, which, of course, provides debatable ground, where the evidence is conflicting, and lays itself open to suspicion, but where, on the other hand, it may be true, and may commend itself to certain tribunals, the Magistrate, even though he may have reason to doubt whether if he were trying the case, he should convict, has no right to substitute his judgment for the final judgment of the Court indicated by law for the trial, and to arrive at a final decision dismissing the case in the way in which he would do if he were the trial Court. If the evidence is balanced, however unevenly in his opinion, then it is a matter which has to be tried, and it is his duty to commit it for trial—*Allah Mahr*, 28 Cr.L.J. 281 (284), 100 I.C. 361, 25 A.L.J. 191, A.I.R. 1927 All 279, 49 All 443; *Inoyia v. Harbans*, 34 Cr.L.J. 1201, 146 I.C. 160, A.I.R. 1933 All 482, 1933 Cr.C. 827, 1933 A.L.J. 1115; *Ishaq*, 38 Cr.L.J. 659, 168 I.C. 958, 1937 A.L.J. 294, 1937 A.W.R. (H.C.) 261, 1937 A.Cr.C. 55, 9 R.A. 687, 1937 A.L.R. 431, A.I.R. 1937 All 373. It is competent to the committing Magistrate at any stage of the preliminary inquiry to discharge the

accused if he considers the charge to be groundless for reasons to be recorded by him. The committing Magistrate is entitled to weigh and appreciate the evidence led on behalf of the prosecution and on behalf of the defence, and if on a consideration of this evidence he is of opinion that there are not sufficient grounds for committing the accused for trial, in other words, there is no case which would fairly justify or sustain a conviction at the trial or no evidence on which any reasonable person can hold the accused to be guilty, then it is his duty to discharge the accused. If after a charge is framed and a list of further witnesses put in by the accused and the Magistrate after examining any such witnesses thinks that there are not sufficient grounds for committing the accused for trial, it is his duty to cancel the charge and discharge the accused. The expression "sufficient grounds" means, when credible witnesses make statements which, if believed, would sustain a conviction—*Ramchandra*, 36 CrLJ. 643 (649), 155 IC 101, AIR. 1935 Bom. 137, 37 BomLR 16, 7 RB 405, 59 Bom 125, 1935 CrC. 288 (FB), distinguishing *Parashram Phika*, 57 Bom 430, 143 IC. 289, AIR 1933 Bom 158, 1933 CrC 470, 34 CrLJ. 564, 35 BomLR 245, Ind Rul 1933 Bom 266. It is the clear duty of the Committing Magistrate to weigh the evidence of the witnesses who appear before him. If he does not, his proceedings are farcical and cross-examination or the examination of defence witnesses might as well be forbidden. He should not, of course, require in cases triable exclusively by the Court of Session, the same high standard of proof for the prosecution which he would require in cases which he can himself finally dispose of. If there merely exists in his mind a reasonable doubt as to the truth or otherwise of the evidence before him, he should commit the accused for trial and leave the Sessions Court to appreciate the evidence for itself. But this is not to say that he is precluded from finding that the prosecution case is false. If that is the only conclusion to which the evidence leads him, he would be failing in his manifest duty if he did not record his finding and discharge the accused. It is an important part of the duty of Committing Courts to prevent false cases and frivolous cases from occupying the time of the Court of Session both in the interests of the accused himself and in the interests of the Court of Session—*Endapalle Ella Reddi*, 38 CrLJ. 703 (705), 169 IC 102, 9 RM 687, 1937 MWN 324, 45 MLW 643. See also *Puttu Mudali v Emp*, 1938 MWN 819, 48 MLW 327. In order to satisfy himself whether he should commit the accused for trial by a Sessions Court the Magistrate is entitled to go into the evidence. His duty is to consider whether a conviction is possible in the case, and in order to come to that conclusion he is entitled to appreciate the evidence. But he must appreciate the evidence from that point of view only, and it is not within his province to consider the evidence merely from the point of view of the probability of a conviction resulting. It may be that a conviction is improbable. But if it is possible for a Court to take such a view of the evidence as to be able to found a conviction upon it, then it is the duty of the Magistrate to commit the accused for trial. If he refuses to commit, the grounds of the refusal should be stated (very generally) that no conviction is possible. The duty of the Sessions Court is to appreciate the evidence from the point of view of the correctness of the Magistrate's order of discharge, in other words, in order to see whether the basis of the Magistrate's of discharge (namely, the impossibility of any conviction resulting) is correct or not—*Akberally Tayaballi v. Alimohamed Abdul Hussain*, AIR. 1939 Bom 372, 41 BomLR. 749, 40 CrLJ. 951, 184 IC 282, 12 RB 159. All Magistrates who have committal powers should clearly understand what the task is which they sit down to do. They are not to try the case, but to prepare for a trial elsewhere. A judgment is not required of him but only a brief statement of the reasons why the case is committed for trial. What is required, is a correct and careful preparation for the trial in the Court of Session: and of such preparation an important part is a well considered charge—*Ghousbux*, AIR 1935 Sind 34 (37), 28 SLR. 304. A Magistrate ought not to take upon himself the responsibility of trying a case which taking a reasonable view of the effect of the depositions must be regarded as involving the trial of the accused for a grave offence or one in which complicated or difficult questions of law or fact arise. The function of a Magistrate is to dispose of petty cases, and he ought to commit to Sessions, cases of a . . .

or serious nature which he is neither by training nor experience qualified to try—*Maung Chit Sein*, 34 Cr.L.J. 187, 141 I.C. 256, 10 Rang 495, A.I.R. 1932 Rang. 193, 1932 Cr.C. 935, Ind. Rul. 1933 Rang. 18.

702. When Magistrate should commit:—(1) Where there is credible evidence which if believed shows that there is a *prima facie* case which ought to be tried at the Sessions, the Magistrate should commit the case to the Sessions and not try it himself—*Munisami*, 15 Mad 39; *Tarapada v. Kalipada*, 51 Cal. 849 (852); *Hazara v. Bishen Singh*, 1908 P.R. 14; *National Bank v. Kothandarama*, 14 M.L.T. 200, 14 Cr.L.J. 529; *Jamal Mahomed v. Moideen*, 1911 M.W.N. 852, 12 Cr.L.J. 20; *Anonymous*, 2 Weir 652 (653); *Namdev*, 11 Bom. 372; *Makhni v. Farzand Ali*, 18 A.L.J. 232, 21 Cr.L.J. 318

(2) Where the question of discharge or commitment becomes a matter of weighing probabilities, the Magistrate ought rather to leave the decision to the Sessions Court, than to order a discharge of the accused on the ground that he ought to have the benefit of doubt—*Fattu v. Fattu*, 26 All 564 (570); *Akbar Ali v. Raja Bahadur*, 24 A.L.J. 133, 27 Cr.L.J. 2; *Allah Mahr*, 49 All 443, 25 A.L.J. 191, 28 Cr.L.J. 281; *Makhni v. Farzand Ali*, 18 A.L.J. 232, 21 Cr.L.J. 318; *Bai Parvati*, 35 Bom. 163; *Namdev*, 11 Bom. 372; *Burjorji*, 30 Bom.L.R. 639; *Nga Hmyin*, 19 Cr.L.J. 102; *Aidas Tekchand v. Saban*, 15 S.L.R. 1, 22 Cr.L.J. 570.

(3) Where a person is charged with a Sessions offence and there is some evidence to support it, the Magistrate ought to commit the accused to the Sessions, and should not disregard the graver charge (considering the prosecution story to be an exaggeration) and convict the accused of other minor offences immediately connected with the graver offence—*Mir Moze Ali*, 23 C.W.N. 1031, 21 Cr.L.J. 10. A Magistrate ought not to take upon himself the responsibility of trying a case which, regarding the effect of the depositions, must be regarded as involving a grave offence or an offence involving complicated questions of law and fact, which the Magistrate is neither by training nor by experience qualified to try—*Maung Chit*, 10 Rang. 495, 1932 Cr.C. 935 (936). In the case of doubt it would be more proper for the Magistrate to commit the case for trial to the Sessions Court which can fully decide and sentence the accused according to its decision on the points involved in the case—*Mangal Singh v. Emp.*, 1 P.R. 1893 (Cr.) (F.B.). But under sec. 209, Cr. P. C., the Magistrate has jurisdiction to decide whether the offence is triable by the Sessions Court or is triable by himself. Where there is nothing to show that the Magistrate snatched at any jurisdiction or perversely held that the offence was one triable by himself in order to minimize the offence, it is more a case of an honest difference of opinion on a subject which is always open to doubt and difference of opinion and the Magistrate cannot be held to have been incompetent to try the case—*Kirpal Singh v. Emp.*, 38 Cr.L.J. 992 (994), 170 I.C. 780, 39 P.L.R. 444, 10 R.L. 148, A.I.R. 1937 Lah. 217.

(4) Where the evidence discloses a circumstance of aggravation which makes the offence one cognizable by a higher Court, it becomes the duty of the Magistrate to use the proper procedure for sending the case to the higher Court and not to try it himself. It is an evasion of law to treat an aggravated offence as an ordinary offence, and thus to introduce a different jurisdiction or a lower scale of punishment—*Gundaya*, 13 Bom 502; *Jamal Mahomed v. Moideen*, 1911 M.W.N. 852, 12 Cr.L.J. 20; *Paramananda*, 10 Cal. 85; *Ayyan*, 24 Mad 675

703. When Magistrate should not commit:—(1) Where no *prima facie* case has been made out—*Munisami*, 15 Mad. 39 (40); *Chinnasami v. Veeriah*, 2 Weir 255; *Maung Chit*, 10 Rang 495, 1932 Cr.C. 935 (936).

(2) When the Magistrate is clearly of opinion that the evidence for the prosecution is on the whole untrustworthy and that there is no reasonable probability of the case ending in a conviction—*Harbans v. Fakir Das*, 7 C.W.N. 77; *Tarapada v. Kalipada*, 51 Cal 849; *Fattu v. Fattu*, 26 All 564 (570); *Bai Parvati*, 35 Bom 163; *Lachman v. Juala*, 5 All 161 (163); *Thirumalai*, 42 M.L.J. 49; *Jamal v. Moideen*, 1911 M.W.N. 852, 12 Cr.L.J. 20; *Naramban* 15 L.W. 552, A.I.R. 1922 Mad 195; *Maulu*, 4 Lah. 69; *Dharam Singh v. Jyoti Prasad*, 37 All. 355; *Md. Abdul v. Baldeo*, 44 All. 57; *Akbar*

Ali v. Raja Bahadur, 24 A.L.J. 133, 27 Cr.L.J. 2; *Ganpat*, 46 All 537 (538), 22 A.L.J. 411; *Tinkowri*, 1 P.L.T. 153, 55 I.C. 600; *Aidas Tekchand v. Saban*, 15 S.L.R. 1, 62 I.C. 586, 22 Cr.L.J. 570; *Nga Hmyin*, 1917 U.B.R. 3rd Qr. 29, 19 Cr.L.J. 102. If the Magistrate is satisfied that the charge is without foundation he is entitled, and indeed it is his duty, to discharge the accused, even though the statements of the prosecution if accepted at their face value might make out a *prima facie* case against the accused—*Ganpat Lal*, 46 All 537 (dissenting from *Chitrang Lal v. Ram Lal*, 1904 A.W.N. 5). Though in case of doubt the Magistrate may be justified in leaving the case for the jury to decide, still if he is convinced that the evidence is false, it is his duty to discharge the accused—*Kasim Ali v. Sarada*, 30 C.W.N. 336, 27 Cr.L.J. 509, 93 I.C. 973, A.I.R. 1926 Cal. 528. But the Magistrate must exercise a proper discretion in ordering the discharge of any person charged with a sessions offence. It is not enough for the Magistrate merely to doubt some portions of the prosecution evidence. He must be satisfied that the prosecution will fail and rightly fail in the Sessions Court—*Chhedda*, 1 O.W.N. 402, 11 O.L.J. 664, 25 Cr.L.J. 1189.

(3) Where no evidence is forthcoming against the accused, owing to the absence of the prosecutor and the witnesses, and the case is not one in which the Magistrate ought to adjourn the inquiry the Magistrate should discharge the accused—*Tuki Mahomed v. Kisto Lal*, 15 W.R. 53.

(4) When the charge is not so serious as to justify a committal, the Magistrate should try the case himself instead of committing it to the Sessions—*Maung Chit*, 10 Rang. 495, 1932 Cr.C. 935 (936); *Ahmed Shah*, 1 S.L.R. 103. But if a Magistrate commits to the Court of Session a case which he himself has jurisdiction to try, he must give his reasons for so doing—*Ghousbaksh*, A.I.R. 1937 Sind 32, 167 I.C. 379, 38 Cr.L.J. 379, 9 R.S. 181, 31 S.L.R. 403; *Sheomangal Pande v. Emp.*, A.I.R. 1940 Oudh 15, 40 Cr.L.J. 903, 184 I.C. 260, 1939 O.L.R. 596, 1939 O.W.N. 868. See also Note 718 (1) and Note 719, (4) and (5).

(5) It cannot be said that nose-cutting cases should, as a matter of course, be committed to the Court of Session for trial, although the Magistrate should always consider whether he ought not to commit—*Ismail Umar v. Emp.*, 39 Cr.L.J. 928, 177 I.C. 647, A.I.R. 1938 Bom. 430, 40 Bom.L.R. 832, 11 R.B. 111.

704. Recording reasons:—A Magistrate discharging an accused person under this section should record his reasons for so doing. But if he omits to record reasons, it cannot be said that the order of discharge is illegal—*Aung Min*, 4 L.B.R. 362, 9 Cr.L.J. 370 (372). In all cases where a Magistrate discharges or commits, he should give his reasons for so doing, and it will be proper for the High Court to consider these reasons when deciding whether he has exercised his discretion correctly—*Maung Htin v. Maung Po*, 4 Rang. 471, 28 Cr.L.J. 219 (223). But the Magistrate is not authorised to write a judgment. All that he is empowered to do is to record reasons for a discharge, if he makes such an order, and to pass the order of discharge—*Hait Ram v. Ganga Sahai*, 40 All 615, 16 A.L.J. 486, 19 Cr.L.J. 706.

706. Sub-section (2)—Discharge at early stage:—Sub-section (2) relieves a Magistrate from the necessity of going on with an inquiry or trial when he is reasonably convinced on what has been already deposed to, that a criminal charge cannot be sustained—*Dhanyibhai v. Pyarji*, Ratanlal 201; *Thirumalai Vandaya*, 42 M.L.J. 49, 23 Cr.L.J. 209. The Magistrate can discharge the accused under this clause only if he considers the charge to be groundless. An order of discharge passed on the ground that no complaint has been made under sec. 195, is illegal. Since the Magistrate has no jurisdiction to take cognizance of the case without a complaint under sec. 195, he has no jurisdiction to pass an order of discharge under sec. 209 (2). Such an order is neither an order of discharge nor one of dismissal of complaint under sec. 203, and cannot be revised by the Sessions Judge under sec. 436. The order of the Magistrate amounts to an order that he declines to proceed with the case for want of jurisdiction—*Subramania v. Swamikannu*, 37 M.L.J. 547, 1933 Cr.C. 566 (569), 34 Cr.L.J. 800,

144 I.C. 519, 1933 M.W.N. 217, A.I.R. 1933 Mad. 413, 1933 Cr.C. 366, Ind. Rul. 1933 Mad 424.

- When a Magistrate refuses to frame a charge under a particular section, it is in substance an order discharging the accused in respect of an offence under that section and is open to revision by the superior Courts under secs. 437 and 439, Cr. P. C.—*Ramrao*, 33 Cr.L.J. 558, 137 I.C. 904, A.I.R. 1932 Nag. 85, 15 N.L.J. 26, Ind. Rul. 1932 Nag. 72, 1932 Cr.C. 435.

"Groundless":—For the meaning of this word see Note 828 under sec. 253

707. Revision of order of discharge:—See secs. 436, 437 and the Notes thereunder. An order of discharge under this section is not a final order, and the offence against an accused person who has been discharged may be further inquired into by a Magistrate upon further evidence if it be forthcoming—*Maung Htin v. Mg. Po*, 4 Rang 471, 28 Cr.L.J. 219 (221). If an order of discharge is passed by a Presidency Magistrate, the High Court can interfere and direct a committal not merely by virtue of the power given by sec. 15 of the Charter Act but also by the powers conferred by sec. 439 of this Code—*Varjivandas*, 27 Bom. 84 (following *Colville v. Krishore*, 26 Cal. 746 and dissenting from *Charoobala v. Barendra*, 27 Cal. 126). Compare Note 682 under sec. 203.

707A. Fresh Complaint:—An accused was discharged under this section and the order of discharge was upheld by the Sessions Judge. The order of the Sessions Court, by which the application made by the Crown for a committal order, was dismissed, is a bar to the entertainment of a fresh complaint, since by accepting the complaint the Magistrate is virtually revising the orders of a Court of superior jurisdiction—*Shah Mahomed*, 28 Cr.L.J. 57, 99 I.C. 89, A.I.R. 1928 Sind 49. But see *Abdul Ghani*, 29 Cal. 412. See also Note 714.

210. (1) When, upon such evidence being taken and such examination (if any) being made, the Magistrate is satisfied that there are sufficient grounds for committing the accused for trial, he shall frame a charge under his hand, declaring with what offence the accused is charged.

(2) As soon as such charge has been framed, it shall be read and explained to the accused, and a copy thereof shall, if he so requires, be given to him free of cost.

Change:—The words "such charge" have been substituted for the words "the charge" by sec. 58 of the Criminal Procedure Code Amendment Act, XVIII of 1923. "We have made this verbal amendment to meet a suggestion of the Bengal Government"—*Report of the Select Committee of 1916*.

708. "Upon such evidence":—See sec. 208. It is illegal to frame a charge or make an order of commitment without taking all the evidence produced by the accused—*Ahmadi*, 20 All. 264. If the case is transferred from the Court of one Magistrate to another, the latter can commit the case to the Sessions, acting upon the evidence recorded by the former—*Nanhua*, 36 All 315, 12 A.L.J. 467, 15 Cr.L.J. 354

709. Sufficient grounds:—See Note 701 under sec. 209. The words "sufficient grounds for committing" mean not merely sufficient allegations as to the essentials of the offence, but such grounds as satisfy the Magistrate as being sufficient to form the basis of a conviction. And a Magistrate can hardly be said to be satisfied that sufficient grounds for committing are supplied by the evidence of witnesses, if he is unable to believe those witnesses. A District Magistrate cannot, therefore, order a Subordinate Magistrate to commit a case unless it appears that the latter had no good reason to

discredit the prosecution witnesses and that their evidence was sufficient in law to form the basis of a conviction—*Rauji*, 9 Bom L.R. 225, 5 Cr.L.J. 213 (215, 216).

The discretion given to a Magistrate to decide whether there are sufficient grounds for commitment is a judicial discretion and must be exercised with care and on some proper ground. If the Magistrate thinks that a case not exclusively triable by the Court of Session must be committed, he must state his grounds in the order of commitment, so as to enable the High Court to judge whether the commitment is a sound exercise of discretionary power. It is an improper exercise of discretion to add a grave charge exclusively triable by a Sessions Court, without sufficient evidence for the mere purpose of committing the case to the Sessions—*Mahammad Khan*, 11 Bom L.R. 18, 9 Cr.L.J. 163.

711. Frame of charge:—See section 226 as to the procedure in case of commitment without any charge or with an erroneous or imperfect charge

The procedure of Chap XVIII differs from the procedure of Chap XXI in the point of time of framing the charge. Under Chap XXI, a charge can be framed long before the witnesses for the accused are examined and the prosecution witnesses are cross-examined; but under this chapter, a Magistrate cannot frame a charge until he has taken all the evidence produced by the complainant and the accused, examined all the witnesses, compelled to appear by process, examined the accused and allowed cross-examination on both sides—*Durga Datt*, 10 A.L.J. 144, 13 Cr.L.J. 443 (444) See also *Suryya Narain*, 5 C.W.N. 110 (111).

The framing of a charge does not amount to an order of commitment, and after the charge is framed the Magistrate does not become *functus officio* in respect of the case. He can amend the charge or can proceed with the case himself; he can consider whether he ought to commit or not—*Venkatesh*, 12 Bom L.R. 521, 11 Cr.L.J. 486. He can even cancel the charge and discharge the accused. See sec 213 (2) and Notes thereunder. But once an order of commitment is passed under sec 213, the Magistrate has no power to proceed any further with the case—*Venkatesh*, *supra*.

After frame of charge under this section, the accused has no right to cross-examine the prosecution witnesses or to examine any further defence witnesses—*Ram Ghulam*, 1931 A.L.J. 587, 32 Cr.L.J. 849 (850).

Though it is true that a framing of a charge under a minor section is tantamount to a discharge of the accused under a more serious section of the same type or family of offences, it is only true if the commission of a more serious offence has been alleged from the start and the Magistrate must visualize or have been invited to visualize the possibility of framing the more serious charge—*Muhammad*, 32 Cr.L.J. 1029, 133 I.C. 638, A.I.R. 1931 Lah 402, 1931 Cr.C. 642, Ind. Rul. 1931 Lah 814.

211. (1) The accused shall be required at once to give in,
 orally or in writing, a list of the persons (if
 List of witnesses for
 defence on trial. any) whom he wishes to be summoned to
 give evidence on his trial.

(2) The Magistrate may, in his discretion, allow the
 accused to give in any further list of wit-
 Further list. nesses at a subsequent time; and, where the
 accused is committed for trial before the High Court, nothing in
 this section shall be deemed to preclude the accused from giving,
 at any time before his trial, to the Clerk of the Crown a further
 list of the persons whom he wishes to be summoned to give
 evidence on such trial.

Scope:—The purpose of this section is merely that the executive authorities should be able to compel the attendance of such witnesses as the accused wished to be summoned

in order that when the trial of the case comes on in the Sessions Court the case may be heard from day to day and no time should be wasted—*Niamat*, 37 Cr.L.J. 742 (744), 162 I.C. 976, A.I.R. 1936 Lah. 533, 17 Lah. 176, 38 P.L.R. 421, 1936 Cr.C. 568 (F.B.).

711. Magistrate's duty to require list:—Where the accused was never informed of the necessity of giving in his list of witnesses at any time or of the fact that he had a right to give in any such list, the provision of this section was not complied with and the accused was not given an opportunity to submit his list of witnesses—*Muhammad Sharif*, 35 Cr.L.J. 616, 148 I.C. 159, A.I.R. 1934 Lah. 23, 1934 Cr.C. 32. The Magistrate is bound under this section to require the accused to give a list of the witnesses he desires to call. It is not enough to put him the question: "Have you any evidence?"; such a question is ambiguous, and might suggest to the accused only an inquiry as to whether he had witnesses ready in Court—*Kondi*, 7 Bom.L.R. 723, 2 Cr.L.J. 601.

Refusal of accused to give list of names of witnesses:—If an accused person, on being called upon under sec. 211, declines to give the list, he cannot compel the Magistrate, after committal, to issue any summons for witnesses on his behalf. He is, of course, entitled to call any witnesses in the Sessions Court, whom he may have in Court, whether or not he has caused such witnesses to be summoned. The Sessions Judge may then in his discretion cause any witnesses to be summoned on the application of the accused during the trial, and is bound to summon them if he considers that their evidence may be material—*Shaikir Ali*, 19 All. 502. The accused is entitled before the committing Magistrate to refuse to disclose the names of the witnesses he wishes to call at the trial (e.g., for fear that they may be tampered with), and the Magistrate cannot force him to disclose their names or the nature of the evidence they would be called upon to give—*Hargovind*, 14 All. 242.

Accused, who has complied with the requirements of this section, and has put in at once his list of defence witnesses, is entitled as of right to have the attendance of those witnesses at Sessions trial enforced in the event of their ignoring, or failing to comply with the summons. When processes have been issued by the Court it is the duty of the Court to enforce them. If the list is not filed at once the Magistrate will have a discretion to allow or not to allow any such application if it is made on any subsequent date. If, however, such an application is made and is allowed, then the application, whether under sub-sec. (1) or sub-sec. (2), will be governed by the same principle—*Kali Bilash*, 31 Cr.L.J. 695, 124 I.C. 513, A.I.R. 1930 Cal. 188, 1930 Cr.C. 145. There is no section which gives an accused person an absolute right to have a witness summoned by the Crown, except under this section which applies to the list of witnesses handed in the Magistrate's Court—*Misri Lal*, 35 Cr.L.J. 591, 147 I.C. 1197, 1934 A.L.J. 67, 3 A.W.R. 241, 1934 Cr.C. 437, A.I.R. 1934 All. 372. Where a list is filed in compliance with the provisions of this section, the accused is as of right entitled to have the witnesses mentioned in the list summoned in the absence of a finding that they or any one of them were included in the list for the purpose of vexation or delay or of defeating the ends of justice—*Kundanlal*, 36 Cr.L.J. 889 (891), 156 I.C. 258, A.I.R. 1935 Sind 69. The Magistrate is perfectly justified, when the matter is brought to his notice, that certain witnesses were cited only for the purpose of causing vexation and delay, in ordering that they should not be compelled to appear in his Court, although he summoned them previously without scrutinising the list—*Saminatha v. Kuppuswami*, 29 Cr.L.J. 725, 110 I.C. 581, A.I.R. 1928 Mad 652.

The power to accept the supplementary list of witnesses in any case is a discretionary power and the discretion of the Magistrate is to be exercised in accordance with sec. 216, Cr. P. C., and subject to the provisos in that section—*Musahru v. Emp.*, A.I.R. 1940 Pat. 355 (358), 21 P.L.T. 13, 1940 P.W.N. 83, 19 Pat. 413.

It is not desirable that the presentation of the list of defence witnesses should be postponed till the last minute when the Code contemplates that it should be done at the time when the charge is framed. But it is undoubtedly the Magistrate's duty to see to the obtaining of the list of defence witnesses. If the accused are not ready with

their list of witnesses at the date of commitment it is convenient for the Magistrate to fix a day perhaps a fortnight hence up to which the list of witnesses will be received so as to prevent the matter escaping the notice of the accused or their legal advisers—*Musahru v Emp*, supra.

Where there is a perfect excuse for not naming the witness who is required to be summoned in the list before the Magistrate, the Sessions Judge ought to exercise his discretion in favour of the accused under sec 291, Cr P. C., and under the inherent jurisdiction of the Court—*Misri Lal*, supra. Where the accused asked to be given summonses to serve themselves and undertook to ask no further adjournment if they fail to serve the witnesses, the Sessions Judge should give them an opportunity to call their witnesses—*Fazal Hussain*, 35 Cr L.J. 1034, 149 I.C. 1046, 1934 Cr C 469, A.I.R. 1934 Lah. 250. It is a fundamental principle of justice that no person shall be condemned unheard and the Courts have always endeavoured to ensure that as far as possible defence witnesses shall be produced and an accused given every chance of establishing his defence—*Kundanlal*, supra. See also *Brijnandan*, A.I.R. 1933 Pat 577, 35 Cr L.J. 85, 146 I.C. 527, 1933 Cr C 1344 cited under sec 219. Although an accused person may not as of right ask the Court to summon his witnesses, if he has not availed himself of the opportunity afforded to him under sec 211, Cr P. C., the Sessions Judge is not justified in refusing to exercise his discretion to summon defence witnesses merely and solely on that ground. He is bound to exercise his discretion in accordance with certain recognized principles and not in a capricious manner. The cause of justice demands that an accused person should have the fullest opportunity to lay his case before a Court which tries him. If an application for summoning witnesses is made at a late stage of the proceedings necessitating an adjournment and is made with the object of delaying the trial or is otherwise not *bona fide*, and if the evidence of witnesses who are sought to be summoned is not material to the case, the order rejecting the application would no doubt be justified—*Hote*, 37 Cr L.J. 108, 159 I.C. 587, A.I.R. 1935 Sind 216.

Where the Magistrate acting under sec 347, Cr P. C., amended the charge and committed the accused to the Court of Sessions, *held* that if the accused wished to produce fresh defence witnesses, whose names did not occur to him when he was asked for a list under sec. 211 (1), Cr P. C., the Magistrate had discretion to summon such fresh witnesses—*Ram Ghulam*, A.I.R. 1931 All 431, 132 I.C. 47, 1931 A.L.J. 587, 1931 Cr.C. 706, 32 Cr L.J. 849, 53 All 692. See also Notes 699 and 906.

212. The Magistrate may, in his discretion, summon and examine any witness named in any list given in to him under section 211.

Power of Magistrate to examine such witnesses

713. Discretion of Magistrate:—This section gives the Magistrate the widest possible discretion to summon and examine any of the witnesses named in any list given under sec. 211, even in cases where the accused has reserved his defence for the Sessions trial. The Magistrate is not bound to record reasons before exercising his powers. And the High Court will not interfere unless it is satisfied that a judicial discretion has not been used—*In re Rudra Singh*, 18 All. 380. The Magistrate is not bound to examine any witness named in the list. He has a *discretion* to summon any witnesses named in the list given to him under sec. 211 after the charge is framed. The accused has no right to have those witnesses summoned and examined—*Saadat Mian*, 6 Pat. 329, 28 Cr L.J. 709 (712); *Kangaya*, 36 Mad 321 (323). See also *Fazal v. Emp*, in Note 697.

If the Magistrate is of opinion that the witnesses were included in the list for the purpose of vexation, delay or of defeating the ends of justice, he ought to proceed under the second proviso of sec. 216—*Rajeswar*, 16 W.R. 14. But a Magistrate should not refuse an application for summons on the ground that the number of witnesses is very large—*Hurendra v. Bhabani*, 11 Cal 672 (766).

The discretion of the Magistrate ought not to be interfered with by the Sessions

Judge. Therefore, where the Magistrate intended to summon some witnesses for the accused and to make a local inspection, but had to commit the case to the Sessions at the discretion of the Sessions Judge, it was held that the Sessions Judge's direction was *ultra vires* as it unduly interfered with the discretion allowed to the Magistrate under sec. 212, and the commitment must be quashed—*Mathura*, 1906 A.W.N. 306, 4 Cr.L.J. 452.

213. (1) When the accused, on being required to give in a list under section 211, has declined to do so, or when he has given in such list and the witnesses (if any) included therein whom the Magistrate desires to examine, have been summoned and examined under section 212, the Magistrate may make an order committing the accused for trial by the High Court or the Court of Session (as the case may be), and (unless the Magistrate is a Presidency Magistrate) shall also record briefly the reasons for such commitment.

(2) If the Magistrate, after hearing the witnesses for the defence, is satisfied that there are not sufficient grounds for committing the accused, he may cancel the charge and discharge the accused.

714. Commitment:—As to when the Magistrate should or should not commit, see Notes 702 and 703 under sec. 209.

Where one of the accused is absent when the proceedings are held in which the order of commitment is made, the order is illegal—*Surjya Narain*, 5 C.W.N. 110 (113); but where the accused was allowed to appear by an agent under sec. 205, a commitment made in the absence of the accused, but in the presence of the agent, is not illegal—*Hurnath*, 2 W.R. 50.

The order of commitment must be an act done by the Magistrate in the exercise of his own judicial discretion. And it is not in the power of the District Magistrate or Sessions Judge to fetter that discretion by any direction or suggestion—*Muniswami*, 15 Mad. 39 (40); *Mathura*, 1906 A.W.N. 306, 4 Cr.L.J. 452.

Commitment after discharge:—Where a Magistrate after examining four witnesses for the prosecution, discharged the accused, but subsequently becoming aware that there was a fifth witness, he cancelled his order of discharge, examined the witness and committed the accused to the Sessions, it was held that as there was nothing to show that the accused had been prejudiced, the commitment was not illegal—*Anonymous*, 7 M.H.C.R. App 40, 2 Weir 258 (259); *Dolegobind*, 5 C.W.N. 169. See also Notes in Note 707A.

Commitment to wrong Sessions:—See Note 549 under sec. 177.

Reasons for commitment:—The Magistrate shall briefly record the reasons for commitment. If a Magistrate commits a case triable by himself, he is bound to record his reasons for commitment, so as to enable the High Court to judge whether the commitment is a sound exercise of discretionary power—*Mad. Khan*, 11 Bom.L.R. 18, 9 Cr.L.J. 163; *Nanji*, 38 Bom. 114; he must specifically state that the case has been committed with a view to the infliction of a heavier sentence than he is competent to inflict—*Kayemulla*, 24 Cal. 429; he must state why the case was not disposed of by himself, and why the maximum punishment which he can impose would not be an adequate punishment for the offence—*Diwani Chand*, 8 S.L.R. 23, 15 Cr.L.J. 664 (665). The High Court has jurisdiction to quash the commitment, if the Magistrate gives no reasons whatever for the commitment—*Nanji*, 38 Bom. 114, 15 Bom.L.R. 999; or gives reasons which are bad in law—*Achaldas*, 28 Bom.L.R. 293, 27 Cr.L.J. 479; *Bhimaji*, 42 Bom. 172, 19 Cr.L.J. 342.

Commitment of some, trial of others :—Where several persons are jointly charged with the same offences, and it is considered necessary to commit one of them to the Sessions, the most convenient course is that all the prisoners should be committed, and not that one person should be committed and the others tried by the Magistrate himself. If, however, the Magistrate adopts the latter course, he does not act illegally—*Kathu Chanchugadu*, 2 Weir 258; *Anonymous*, 1 Weir 448 (449); *Probodh v. Mohim*, 22 Cr L.J. 480, 61 I.C. 1008 (Cal.).

Joint commitment :—Where several persons are jointly charged with having committed an offence, especially in cases of rioting, etc., where there are two hostile parties, each party should be charged and committed for trial separately and not all together, and the trial should also be separate—*Sheikh Bazoo*, 8 W.R. 47. But a commitment is not to be set aside as illegal, because all the accused, who were charged with distinct offences, were jointly committed. There is no section in Ch XVIII which requires a separate inquiry in such cases. The sections of the Code relating to joinder of charges, and the Privy Council ruling in *Subramania Aiyar*, 25 Mad 61, refer to trials only and not to commitments. In such cases the Sessions Judge should frame separate charges and try the accused separately, as if there had been separate commitments—*Govindu*, 25 Mad. 592; *Salamatullah*, 1900 A.W.N. 206; *Sita*, 7 Bom L.R. 457, 2 Cr L.J. 432 (433).

Expression of opinion by the Sessions Judge :—In the case of a commitment under this section it is not open to a Court of Session to express a view that the evidence produced is not sufficient to prove the charge against the accused persons before hearing the evidence produced in the case and thus to prejudice the whole matter—*Afiki Lal*, A.I.R. 1940 All 395 (397), 1940 A.L.J. 357.

715. Sub-section (2)—Scope :—A Magistrate is not bound to commit merely because he has framed a charge. He can cancel the charge if on taking evidence after the charge he finds that no case for commitment has been made out—*Surjya Narain*, 5 C.W.N. 110 (112). But it is not obligatory on the Magistrate to examine defence witnesses with a view to reconsidering the necessity for the charge and for a commitment—*Musahru v. Emp.*, A.I.R. 1940 Pat 355 (359), 21 P.L.T. 13, 1940 P.W.N. 83, 19 Pat 413. Sub-section (2) is intended to provide for cases where the evidence recorded after the charge so changes the aspect of the case as to leave no reasonable doubt that a conviction is not sustainable; but it does not apply where the evidence for the defence merely casts some doubts on the case—*Po Nyan*, 1 L.B.R. 348. If the Magistrate after hearing the defence witnesses comes to the conclusion that their evidence rebuts the evidence produced for the prosecution or renders it so incredible or unreliable that a conviction will not follow, he may act upon his opinion and pass an order of discharge under this sub-section. He is not bound to commit merely because there was some *prima facie* evidence—*Mid Abdul v. Baldeo*, 41 All. 57, 19 A.L.J. 831, 22 Cr L.J. 703; *Akbar Ali v. Raja Bahadur*, 24 A.L.J. 133, 27 Cr L.J. 2. This discretion must, however, be carefully exercised, and whenever there is a possibility that different Courts might take different views of the evidence, the Magistrate, even though he may himself not think the evidence sufficient for a conviction, should leave it to the Sessions Court to pronounce finally upon the matter—*Akbar Ali v. Raja Bahadur*, *supra*.

Where the Magistrate, erroneously following the procedure for warrant cases, drew up the charge at an early stage, before the cross-examination of the prosecution witnesses took place, he could cancel the charge, if after the cross-examination of the prosecution witnesses he found that no case was made out—*Surjya Narain*, 5 C.W.N. 110 (112). The words "witnesses for the defence" in sub-section (2) are wide enough to cover evidence extracted by cross-examination of the prosecution witnesses; and, therefore, it is open to a Magistrate, after he has drawn up a charge, to allow the accused to cross-examine the witnesses for the prosecution, and, as a result, to cancel the charge—*Jogendra v. Matilal*, 39 Cal 885, 16 C.W.N. 1155, 13 Cr L.J. 774. This case has been disapproved of in *Raman*, 57 Cal 44, 33 C.W.N. 535, 1929 Cr.C. 222.

214. * * * * *

This section has been omitted by sec. 10 of the Criminal Law Amendment Act (XII of 1923). It provided that if an European British subject and an Indian subject were jointly accused of an offence triable by a Court of Session, the Magistrate must commit the case to the High Court and not to the Sessions Judge.

215. A commitment once made under section 213 or section 214 by a competent Magistrate or by a Court of Session under section 477 or by a Civil or Revenue Court under section 478, can be quashed by the High Court only, and only on a point of law.

215. A commitment once made under section 213 * * by a competent Magistrate * * or by a Civil or Revenue Court under section 478, can be quashed by the High Court only, and only on a point of law.

Change:—The words "or section 214" occurring in the old section have been omitted by sec. 11 of the Criminal Law Amendment Act, XII of 1923. This is consequential to the repeal of sec. 214. The words "or by a Court... 477" have been omitted by sec. 59 of the Cr. P. C. Amendment Act XVIII of 1923. This is consequential to the repeal of sec. 477.

716. Scope of section:—This section applies only to commitments made under the two sections specified; therefore, an order of commitment under sec. 436 (now sec. 437) cannot be quashed under this section—*Jogeshwar*, 31 Cal. 1; such commitment can be quashed only under the revisional powers of the High Court—*Putki Chand v. Sampatia*, 7 C.W.N. 327; and in that case the High Court can quash the commitment on point of law and not of fact—*Rash Behari*, 12 C.W.N. 117, 6 Cr.L.J. 406; *Tambi*, 12 Bur.L.T. 62, 9 L.B.R. 208, 19 Cr.L.J. 801. Similarly, an order of commitment made by the Sessions Judge under sec. 423 cannot be quashed under this section, but can be dealt with by the High Court under its revisionary powers—*Ng Thet She*, 1 Bur.L.J. 520. But a commitment made under an order of the High Court under sec. 526, clause (iv) can neither be quashed under this section nor under the High Court's revisional powers, as the High Court cannot quash a commitment ordered by itself—*Kalagava*, 27 Mad. 54 (56).

This section does not apply to a commitment which is *ab initio* void, e.g., a commitment made by a Magistrate having no jurisdiction over the offence. No reference to the High Court is necessary to set aside such a commitment—*Alim Mundle*, 11 C.L.R. 55. An illegal commitment, e.g., a commitment in a case falling under sec. 196A without the sanction of the Local Government, need not be set aside by the High Court. In such a case, the Magistrate can entertain a fresh complaint, after the sanction has been obtained, and again proceed with the inquiry under Ch. XVIII—*Hari Charan*, 12 Pat. 353, 14 P.L.T. 281, 1933 Cr.C. 755 (757).

717. Quashing commitment:—This section refers only to a commitment actually made. Where a Sessions Judge under sec. 436 (now sec. 437) set aside a Magistrate's order of discharge, and directed a commitment to be made, the High Court could interfere in its revisional powers, and could consider the facts as well as the question of law involved—*Muthia Chetty*, 30 Mad. 224, 16 M.L.J. 529.

A commitment once made stands, unless quashed by the High Court, and if the High Court is not moved to quash the commitment, the trial of the persons must take place in pursuance thereof. If a trial has already taken place, it serves no purpose to impugn the commitment, and it is futile to contend in appeal or in revision that the commitment was illegal—*Nazir*, 7 Lah.L.J. 423, 26 P.L.R. 767, 27 Cr.L.J. 134.

When commitment cannot be quashed.—A commitment cannot be quashed after the accused has been put on his trial and has pleaded to the charge before the Sessions Judge—*Sagambar*, 12 C.L.R. 120; *Haji*, 1 S.L.R. 6, 9 Cr.L.J. 250; *Arokia Padayachi*, 2 Weir 262; *Kasim Molla*, 42 C.L.J. 114, 26 Cr.L.J. 1560 (1561), 90 I.C. 440, A.I.R. 1926 Cal. 410. An illegality in commitment does not vitiate the trial—*Kasim Molla*, supra. In such a case, the Judge should proceed according to law and dispose of the case, or the Public Prosecutor may, with the consent of the Court withdraw the prosecution under sec. 494—*Arokia*, 2 Weir 262. In *Shubo Behara*, 6 Cal 584, and *Hari Charan*, 12 Pat 353, 1933 Cr.C 755 (757), 34 Cr.L.J. 938, 145 I.C. 368, 14 P.L.T. 281, A.I.R. 1933 Pat 273, however, it has been held that the High Court can quash a commitment at any stage of a criminal proceeding.

'Only by the High Court'—A commitment can be quashed only by the High Court. A Magistrate cannot quash the commitment and discharge the accused even though the complainant wishes to compound the case—*Jangbir*, 4 All. 150. A Sessions Judge cannot set aside the commitment and direct the Magistrate to try the case himself—*Bheema*, 16 M.L.J. 525, 5 Cr.L.J. 99 (100).

The Judicial Commissioner, when sitting in the Sessions division, is not divested of his capacity as a High Court Judge, and he has full power to make an order under sec. 215 even when sitting as a Sessions Judge—*Ullibai*, 17 S.L.R. 188, 26 Cr.L.J. 148.

Where the commitment is made to the High Court (Original Criminal Jurisdiction), the Appellate Criminal Bench of the High Court cannot quash the commitment. In such a case the practice is to apply to the Judge exercising original criminal jurisdiction in the High Court—*Phanindra*, 36 Cal 48. That is, the Judge of the High Court sitting in Sessions has power to quash a commitment made to him by a Magistrate—*Girish Chandra*, 34 C.W.N. 13 (28), 1929 Cr.C 468, 50 C.L.J. 408, A.I.R. 1929 Cal. 756, 57 Cal 1042, 123 I.C. 433, 31 Cr.L.J. 506, Ind. Rul. 1928 Cal 321 (F.B.); *M. J. Mamsa v The King*, 39 Cr.L.J. 470, 174 I.C. 824, 10 R.R. 433, A.I.R. 1938 Rang. 105; *Girish*, 56 Cal 785, 1929 Cr.C 521, A.I.R. 1929 Cal 777, 120 I.C. 813, 31 Cr.L.J. 184. See *Maniram*, 34 Cr.L.J. 14, 140 I.C. 485, A.I.R. 1932 Sind 157, 26 S.L.R. 407, 1932 Cr.C 693, Ind. Rul. 1932 Sind 189. But in *Bhagavathi*, 42 Mad 83 (84), the Madras High Court held that an application to quash such a commitment should be made to the Appellate Side of the High Court and not to a Judge exercising original criminal jurisdiction. A similar opinion was expressed in *Colin M Mackey*, 53 Cal 350, 30 C.W.N. 276, 27 Cr.L.J. 385, 93 I.C. 33, A.I.R. 1926 Cal 470, 43 C.L.J. 310 (F.B.). If an order of commitment is made by the Original civil side of the High Court under sec. 478, an appeal against the order of commitment may be preferred to the Appellate Side of the High Court—*Venkatagiri v N M. Firm*, 43 Mad. 361.

Effect of order quashing commitment—The primary effect of an order quashing the commitment is to supersede any action taken by the Magistrate under sec. 210 and his proceedings subsequent thereto; and it is necessary for the Magistrate to go back to the point at which he took cognizance of the complaint. There is no need for a fresh complaint, but it is necessary for the Magistrate to treat the case as a warrant case and not as a subject matter of an inquiry under Ch. XVIII. The Magistrate is to begin the trial afresh under sec. 252—*Girish Chandra*, 34 C.W.N. 13 (30), A.I.R. 1929 Cal 756, 1929 Cr.C 468, 123 I.C. 433 (F.B.). The effect of quashing of commitment under sec. 215, Cr. P. C., is that the case should start again from the beginning. It must go on from the point at which the Magistrate took cognizance of the complaint. No fresh complaint, however, need be made—*Ghousbaksh*, A.I.R. 1937 Sind 32 (33), 167 I.C. 379, 9 R.S. 181, 38 Cr.L.J. 379, 31 S.L.R. 403. This section empowers the High Court to quash an order of commitment on a point of law, but it does not, in any way, restrict the power of the High Court to pass any subsequent order after the commitment is quashed. The High Court can, therefore, pass an order sending the case back to the Magistrate for trial by himself—*Sher Alam*, A.I.R. 1933 Bom. 494, 35 Bom.L.R. 1062, 1933 Cr.C. 1598, 147 I.C. 879, 35 Cr.L.J. 479.

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717. Quashing commitment:—This section refers only to a commitment actually made. Where a Sessions Judge under sec. 436 (now sec. 437) set aside a Magistrate’s order of discharge, and directed a commitment to be made, the High Court could interfere in its revisional powers, and could consider the facts as well as the question of law involved—*Muthia Chetty*, 30 Mad. 224, 16 M.L.J. 529.

A commitment once made stands, unless quashed by the High Court, and if the High Court is not moved to quash the commitment, the trial of the persons must take place in pursuance thereof. If a trial has already taken place, it serves no purpose to impugn the commitment, and it is futile to contend in appeal or in revision that the commitment was illegal—*Nazir*, 7 Lah.L.J. 423, 26 P.L.R. 767, 27 Cr.L.J. 134.

When commitment cannot be quashed :—A commitment cannot be quashed after the accused has been put on his trial and has pleaded to the charge before the Sessions Judge—*Sagambar*, 12 CLR 120; *Haji*, 1 SLR. 6, 9 CrLJ. 250; *Arokia Padayachi*, 2 Weir 262; *Kasim Molla*, 42 CLJ. 114, 26 CrLJ 1560 (1561), 90 IC. 440, A.I.R. 1926 Cal. 410. An illegality in commitment does not vitiate the trial—*Kasim Molla*, supra. In such a case, the Judge should proceed according to law and dispose of the case, or the Public Prosecutor may, with the consent of the Court withdraw the prosecution under sec. 494—*Arokia*, 2 Weir 262. In *Shibo Behara*, 6 Cal. 584, and *Hari Charan*, 12 Pat. 353, 1933 CrC 755 (757), 34 CrLJ 938, 145 IC 368, 14 P.L.T. 281, A.I.R. 1933 Pat. 273, however, it has been held that the High Court can quash a commitment at any stage of a criminal proceeding.

'Only by the High Court' :—A commitment can be quashed only by the High Court. A Magistrate cannot quash the commitment and discharge the accused even though the complainant wishes to compound the case—*Jangbir*, 4 All 150. A Sessions Judge cannot set aside the commitment and direct the Magistrate to try the case himself—*Bheema*, 16 MLJ 525, 5 CrLJ. 99 (100).

The Judicial Commissioner, when sitting in the Sessions division, is not divested of his capacity as a High Court Judge, and he has full power to make an order under sec. 215 even when sitting as a Sessions Judge—*Uthbai*, 17 SLR. 188, 26 CrLJ. 148.

Where the commitment is made to the High Court (Original Criminal Jurisdiction), the Appellate Criminal Bench of the High Court cannot quash the commitment. In such a case the practice is to apply to the Judge exercising original criminal jurisdiction in the High Court—*Phanindra*, 36 Cal 48. That is, the Judge of the High Court sitting in Sessions has power to quash a commitment made to him by a Magistrate—*Girish Chandra*, 34 CWN 13 (28), 1929 CrC 468, 50 CLJ 408, A.I.R. 1929 Cal 756, 57 Cal 1042, 123 IC 433, 31 CrLJ 506, Ind Rul 1928 Cal 321 (FB); *M. I. Mamsa v. The King*, 39 CrLJ 470, 174 IC 824, 10 RR 433, A.I.R. 1938 Rang 105; *Girish*, 56 Cal 785, 1929 CrC 521, A.I.R. 1929 Cal 777, 120 IC 813, 31 CrLJ. 184. See *Maniram*, 34 CrLJ. 14, 140 IC. 485, A.I.R. 1932 Sind 157, 26 SLR 407, 1932 CrC 693, Ind. Rul 1932 Sind 189. But in *Bhagavathi*, 42 Mad 83 (84), the Madras High Court held that an application to quash such a commitment should be made to the Appellate Side of the High Court and not to a Judge exercising original criminal jurisdiction. A similar opinion was expressed in *Colin M Mackey*, 53 Cal 350, 30 CWN 276, 27 CrLJ 385, 93 IC. 33, A.I.R. 1926 Cal 470, 43 CLJ. 310 (FB). If an order of commitment is made by the Original civil side of the High Court under sec. 478, an appeal against the order of commitment may be preferred to the Appellate Side of the High Court—*Venkatagiri v. N M Firm*, 43 Mad 361.

Effect of order quashing commitment :—The primary effect of an order quashing the commitment is to supersede any action taken by the Magistrate under sec. 210 and his proceedings subsequent thereto; and it is necessary for the Magistrate to go back to the point at which he took cognizance of the complaint. There is no need for a fresh complaint, but it is necessary for the Magistrate to treat the case as a warrant case and not as a subject matter of an inquiry under Ch. XVIII. The Magistrate is to begin the trial afresh under sec. 252—*Girish Chandra*, 34 CWN 13 (30), A.I.R. 1929 Cal. 756, 1929 CrC 468, 123 IC. 433 (FB). The effect of quashing of commitment under sec. 215, Cr. P. C., is that the case should start again from the beginning. It must go on from the point at which the Magistrate took cognizance of the complaint. No fresh complaint, however, need be made—*Ghousbaksh*, A.I.R. 1937 Sind 32 (33), 167 IC. 379, 9 RS 181, 38 CrLJ. 379, 31 SLR. 403. This section empowers the High Court to quash an order of commitment on a point of law, but it does not, in any way, restrict the power of the High Court to pass any subsequent order after the commitment is quashed. The High Court can, therefore, pass an order sending the case back to the Magistrate for trial by himself—*Sher Alam*, A.I.R. 1933 Bom. 494, 35 BomLR. 1062, 1933 CrC. 1598, 147 IC. 879, 35 CrLJ. 479.

214. * * * * *

This section has been omitted by sec. 10 of the Criminal Law Amendment Act (XII of 1923). It provided that if an European British subject and an Indian subject were jointly accused of an offence triable by a Court of Session, the Magistrate must commit the case to the High Court and not to the Sessions Judge.

215. A commitment once made under section 213 or section 214 by a competent Magistrate or by a Court of Session under section 477 or by a Civil or Revenue Court under section 478, can be quashed by the High Court only, and only on a point of law.

215. A commitment once made under section 213 * * by a competent Magistrate * * or by a Civil or Revenue Court under section 478, can be quashed by the High Court only, and only on a point of law.

Change:—The words "or section 214" occurring in the old section have been omitted by sec. 11 of the Criminal Law Amendment Act, XII of 1923. This is consequential to the repeal of sec. 214. The words "or by a Court. . 477" have been omitted by sec. 59 of the Cr P. C. Amendment Act XVIII of 1923. This is consequential to the repeal of sec. 477.

716. Scope of section:—This section applies only to commitments made under the two sections specified; therefore, an order of commitment under sec. 436 (now sec. 437) cannot be quashed under this section—*Jogeshwar*, 31 Cal. 1; such commitment can be quashed only under the revisional powers of the High Court—*Prithi Chand v. Sampatia*, 7 C.W.N. 327; and in that case the High Court can quash the commitment on point of law and not of fact—*Rash Behari*, 12 C.W.N. 117, 6 Cr.L.J. 406; *Tambi*, 12 Bur.L.T. 62, 9 L.B.R. 208, 19 Cr.L.J. 801. Similarly, an order of commitment made by the Sessions Judge under sec. 423 cannot be quashed under this section, but can be dealt with by the High Court under its revisionary powers—*Nga Thet She*, 1 Bur.L.J. 520. But a commitment made under an order of the High Court under sec. 526, clause (iv) can neither be quashed under this section nor under the High Court's revisional powers, as the High Court cannot quash a commitment ordered by itself—*Kalagava*, 27 Mad 54 (56).

This section does not apply to a commitment which is *ab initio* void, e.g., a commitment made by a Magistrate having no jurisdiction over the offence. No reference to the High Court is necessary to set aside such a commitment—*Alim Mundle*, 11 C.L.R. 55. An illegal commitment, e.g., a commitment in a case falling under sec. 196A without the sanction of the Local Government, need not be set aside by the High Court. In such a case, the Magistrate can entertain a fresh complaint, after the sanction has been obtained, and again proceed with the inquiry under Ch XVIII—*Hari Charan*, 12 Pat. 353, 14 P.L.T. 281, 1933 Cr.C. 755 (757).

717. Quashing commitment:—This section refers only to a commitment actually made. Where a Sessions Judge under sec. 436 (now sec. 437) set aside a Magistrate's order of discharge, and directed a commitment to be made, the High Court could interfere in its revisional powers, and could consider the facts as well as the question of law involved—*Mutha Chetty*, 30 Mad. 224, 16 M.L.J. 529.

A commitment once made stands, unless quashed by the High Court, and if the High Court is not moved to quash the commitment, the trial of the persons must take place in pursuance thereof. If a trial has already taken place, it serves no purpose to impugn the commitment, and it is futile to contend in appeal or in revision that the commitment was illegal—*Nazir*, 7 Lah.L.J. 423, 26 P.L.R. 767, 27 Cr.L.J. 134.

When commitment cannot be quashed :—A commitment cannot be quashed after the accused has been put on his trial and has pleaded to the charge before the Sessions Judge—*Sagambar*, 12 C.L.R. 120; *Haji*, 1 S.L.R. 6, 9 Cr.L.J. 250; *Arokia Padayachi*, 2 Weir 262; *Kasim Molla*, 42 C.L.J. 114, 26 Cr.L.J. 1560 (1561), 90 I.C. 450, A.I.R. 1926 Cal. 410. An illegality in commitment does not vitiate the trial—*Kasim Molla*, supra. In such a case, the Judge should proceed according to law and dispose of the case, or the Public Prosecutor may with the consent of the Court withdraw the prosecution under sec. 494—*Arokia*, 2 Weir 262. In *Shibo Bekara*, 6 Cal. 584, and *Hari Charan*, 12 Pat. 353, 1933 Cr.C. 755 (757), 34 Cr.L.J. 938, 145 I.C. 368, 14 P.L.T. 281, A.I.R. 1933 Pat. 273, however, it has been held that the High Court can quash a commitment at any stage of a criminal proceeding.

'Only by the High Court' —A commitment can be quashed only by the High Court. A Magistrate cannot quash the commitment and discharge the accused even though the complainant wishes to compound the case—*Jangbir*, 4 All. 150. A Sessions Judge cannot set aside the commitment and direct the Magistrate to try the case himself—*Dheema*, 16 M.L.J. 525, 5 Cr.L.J. 99 (100).

The Judicial Commissioner, when sitting in the Sessions division, is not divested of his capacity as a High Court Judge, and he has full power to make an order under sec. 215 even when sitting as a Sessions Judge—*Ulibai*, 17 S.L.R. 188, 26 Cr.L.J. 148.

Where the commitment is made to the High Court (Original Criminal Jurisdiction), the Appellate Criminal Bench of the High Court cannot quash the commitment. In such a case the practice is to apply to the Judge exercising original criminal jurisdiction in the High Court—*Phanindra*, 36 Cal. 48. That is, the Judge of the High Court sitting in Sessions has power to quash a commitment made to him by a Magistrate—*Girish Chandra*, 34 C.W.N. 13 (28), 1929 Cr.C. 468, 50 C.L.J. 408, A.I.R. 1929 Cal. 756, 57 Cal. 1042, 123 I.C. 433, 31 Cr.L.J. 506, Ind. Rul. 1928 Cal. 321 (F.B.); *M. I. Mamsa v. The King*, 39 Cr.L.J. 470, 174 I.C. 824, 10 R.R. 433, A.I.R. 1938 Rang. 105; *Girish*, 56 Cal. 785, 1929 Cr.C. 521, A.I.R. 1929 Cal. 777, 120 I.C. 813, 31 Cr.L.J. 184. See *Maniram*, 34 Cr.L.J. 14, 140 I.C. 485, A.I.R. 1932 Sind. 157, 26 S.L.R. 407, 1932 Cr.C. 693, Ind. Rul. 1932 Sind. 189. But in *Bhagavathi*, 42 Mad. 83 (84), the Madras High Court held that an application to quash such a commitment should be made to the Appellate Side of the High Court and not to a Judge exercising original criminal jurisdiction. A similar opinion was expressed in *Colin M. Mackey*, 53 Cal. 350, 30 C.W.N. 276, 27 Cr.L.J. 385, 93 I.C. 33, A.I.R. 1926 Cal. 470, 43 C.L.J. 310 (F.B.). If an order of commitment is made by the Original civil side of the High Court under sec. 478, an appeal against the order of commitment may be preferred to the Appellate Side of the High Court—*Venkatagiri v. N. M. Firm*, 43 Mad. 361.

Effect of order quashing commitment —The primary effect of an order quashing the commitment is to supersede any action taken by the Magistrate under sec. 210 and his proceedings subsequent thereto; and it is necessary for the Magistrate to go back to the point at which he took cognizance of the complaint. There is no need for a fresh complaint, but it is necessary for the Magistrate to treat the case as a warrant case and not as a subject matter of an inquiry under Ch. XVIII. The Magistrate is to begin the trial afresh under sec. 252—*Girish Chandra*, 34 C.W.N. 13 (30), A.I.R. 1929 Cal. 756, 1929 Cr.C. 468, 123 I.C. 433 (F.B.). The effect of quashing of commitment under sec. 215, Cr. P. C., is that the case should start again from the beginning. It must go on from the point at which the Magistrate took cognizance of the complaint. No fresh complaint, however, need be made—*Ghousbaksh*, A.I.R. 1937 Sind. 32 (33), 167 I.C. 379, 9 R.S. 181, 38 Cr.L.J. 379, 31 S.L.R. 403. This section empowers the High Court to quash an order of commitment on a point of law, but it does not, in any way, restrict the power of the High Court to pass any subsequent order after the commitment is quashed. The High Court can, therefore, pass an order sending the case back to the Magistrate for trial by himself—*Sher Alam*, A.I.R. 1933 Bom. 494, 35 Bom.L.R. 1062, 1933 Cr.C. 1598, 147 I.C. 879, 35 Cr.L.J. 479.

The Magistrate cannot question the legality of the order of the High Court quashing the commitment—*Girish Chandra*, supra.

718. Point of law:—The High Court cannot quash a commitment made under secs. 213 and 478 except upon a point of law—*Goda Ram*, 15 A.L.J. 756, 19 Cr.L.J. 224; *Ramaswami Goundan*, 39 Cr.L.J. 894, 177 I.C. 494, 1938 M.W.N. 577, 48 M.L.W. 139, 11 R.M. 330, A.I.R. 1938 Mad. 675, 1938 M.Cr.C. 67; *Rashbehari*, 12 C.W.N. 117, 6 C.L.J. 760, 6 Cr.L.J. 406; *Mishi Lal*, A.I.R. 1940 All. 396 (398). Though an appeal lies under clause 15 of the Letters Patent from an order of commitment made under sec. 478 by a Judge of the High Court in the original civil side, the order cannot be set aside except on a point of law—*Venkatagiri v. N. M. Firm*, 43 Mad. 351.

The High Court can quash a commitment on the following points of law :—

(1) Where the Magistrate who committed the case was competent to try it himself and to inflict adequate punishment for the offence—*Dharam Singh*, 3 A.L.J. 14, 3 Cr.L.J. 94; *Jagmohan*, 6 A.L.J. 989, 11 Cr.L.J. 54; *Utlibai*, 17 S.L.R. 188, 26 Cr.L.J. 148, 83 I.C. 708, A.I.R. 1924 Sind 61; *Allahabad*, 31 Cr.L.J. 596, 123 I.C. 702, A.I.R. 1930 Sind 145, 24 S.L.R. 157; *Kesar*, A.I.R. 1932 Lah. 263, 33 P.L.R. 185, 138 I.C. 701, 1932 Cr.C. 328, 33 Cr.L.J. 680; *Mir Ahmad v. Madan Lal*, A.I.R. 1936 Pesh. 139; *Ghousbaksh*, A.I.R. 1937 Sind 32, 167 I.C. 379, 38 Cr.L.J. 379, 9 R.S. 181, 31 S.L.R. 403; *Waroo*, 39 Cr.L.J. 507, 174 I.C. 920, 10 R.S. 271, A.I.R. 1938 Sind 79. The failure of a Magistrate rightly to exercise his jurisdiction under sec. 347, Cr. P. C., is a question of law on which a commitment wrongly made by him can be quashed under sec. 215, Cr. P. Code. Failure to exercise jurisdiction under sec. 254, Cr. P. C., is as much as the wrongful exercise of jurisdiction under sec. 347, Cr. P. C., a point of law on which a commitment can be quashed—*Ghousbaksh*, supra; *Utlibai*, supra. See also Note 703 (4) and Note 719 (4) and (5).

(2) Where the case was triable exclusively by the Magistrate, and the Session Court had no jurisdiction over it, e.g., a commitment for an offence under the Opium Act (Act I of 1878)—*Schade*, 19 All. 465 (466); or under Madras Act I of 1866—*Donoghue*, 5 M.H.C.R. 277; or under sec. 29 of Police Act V of 1861—*Indrobeer*, 1 W.R. 5.

(3) Where a case triable by the Magistrate has been committed by him merely on the ground of its connection with another case which has been committed to the Sessions—*Asha Bhatthi*, 15 Bom.L.R. 998, 14 Cr.L.J. 657 (658). See Note 695.

(4) When there is absolutely no evidence sufficient to establish an offence and warrant a commitment (absence of evidence being a question of law and not of fact)—*Chandra Kumar*, 2 Cr.L.J. 46, 2 Cr.L.J. 383; *Jagannath*, 3 O.W.N. 308 (Sup), 28 Cr.L.J. 137; *Nga Hmyin*, 19 Cr.L.J. 102, 3 U.B.R. 29; *Tambi*, 9 L.B.R. 208, 19 Cr.L.J. 801; *Jageshwar*, 5 C.W.N. 411; *Narotam*, 6 All. 98; *Ghansham*, 31 P.L.R. 348, 31 Cr.L.J. 814. But see Note 719 (2) below.

(5) Where the commitment was made in the absence of the accused—*Surya Narain*, 5 C.W.N. 110 (113).

(6) Where the commitment was based on evidence recorded in the absence of the accused (i.e., while the accused was not arrested on the charge at all)—*Chinnappan*, 2 Weir 259 (260); *Belli Gowder*, 36 Cr.L.J. 319, 153 I.C. 256, 1934 M.W.N. 1095, A.I.R. 1934 Mad. 691, 1934 Cr.C. 1306.

(7) Where the commitment was made by the Magistrate not in the exercise of his own discretion but at the suggestion of the District Magistrate or Sessions Judge—*Mathura*, 1906 A.W.N. 306, 4 Cr.L.J. 452; *Munisami*, 15 Mad. 39 (40).

(8) Where the commitment was made without examining the witnesses for the defence—*Md. Hadi*, 26 All. 177 (178); *Ahmadi*, 20 All. 264; *Nga Khaing*, 6 Rang. 531, 30 Cr.L.J. 1; *Jhana*, A.I.R. 1934 Lah. 610, 35 P.L.R. 612, 36 Cr.L.J. 410, 153 I.C. 436, 1934 Cr.C. 942; *Kunwar Jaswant Singh*, 46 All. 137.

(9) Where the Magistrate committed the approver who had broken the conditions of pardon tendered to him, along with the other co-accused—*Bhan*, 23 Bom. 493; *Brij*

Narain, 20 All 529; or where such approver was committed before the trial of the other accused was finished—*Sudra*, 14 All 336

(10) Where the Magistrate gave no reasons whatever for the commitment, or gave reasons which are bad in law—*Achaldas*, 28 Bom LR 293, 27 Cr L.J. 479; *Nanji*, 38 Bom. 114, 14 Cr L.J. 609; *Bhimaji*, 42 Bom. 172. The mere fact that the committing Magistrate did not give his reasons for committing the case when there was a (sec 30) Magistrate in the district, cannot make the commitment illegal—*Indoo*, AIR 1934 Lah. 326 See also Note 719 (5).

(11) The fact that the committing Magistrate had no territorial jurisdiction over the offence is a question of law. But the commitment is valid inspite of the want of territorial jurisdiction, unless a failure of justice has in fact been occasioned by such commitment—*Nga Taung*, 7 Bur LT 26, 15 Cr L.J. 270; *Abbi Reddi*, 17 Mad. 402 (403).

(12) Where the committing Magistrate held the inquiry without the certificate of the Political Agent (sec. 188) which was necessary in the case—*Ram Charan*, 5 Lah. 416 (420), 27 Cr L.J. 218; *Narain*, 41 All 452 (454); *Kathaperumal*, 19 Mad. 423 (425); *Ram Sundar*, 19 All 109 (110); *Buta Singh*, 7 Lah 396, 27 Cr L.J. 1168

719. What are not proper grounds for setting aside commitment:—

(1) The High Court cannot set aside a committal merely because the Magistrate made a joint commitment of several accused, instead of making separate commitments—*Govinda*, 26 Mad 592; *Salamatullah*, 1900 A W N 206, *Sita*, 7 Bom L.R. 457, 2 Cr L.J. 432 (433)

(2) A commitment can be quashed only on a point of law and cannot be quashed on the ground that there was no evidence on the committing Magistrate's record to sustain the charge—*Saleman*, 13 Bom LR 201, 10 IC 802, 12 Cr L.J. 256; *Gnish Chandra*, 34 CWN 13 (28), AIR 1929 Cal 756, 1929 Cr C 468, 123 IC 433 (FB); *Maroti*, 36 Cr L.J. 1389, 158 IC 537, 18 NLJ 227, 1935 Cr C 1099, AIR 1935 Nag. 202; *Ismail*, 26 Cr L.J. 1045 (1047), 87 IC 965, AIR 1925 Nag 409, *Hassan Din*, 32 PLR 581, 32 Cr L.J. 867 (868), 132 IC 380, AIR 1931 Lah 467, 1931 Cr C 691, Ind Rul 1931 Lah 572 (dissenting from *Ghansham*, 31 PLR 348, 31 Cr L.J. 814); *Waroo*, 39 Cr L.J. 507, 174 IC 920, AIR 1938 Sind 79, 10 RS 271, *Mithi Lal*, AIR. 1940 All 396 (397), 1940 ALJ 357. In dealing with an application under his section the High Court is not required to appreciate the evidence but it proceeds on the assumption that the facts as stated in committal order will be proved at the trial. All that the High Court is required to apply its mind to, is that assuming that the facts are proved, do they justify the conviction of the accused or not? As so stated the point at issue before the High Court is a point of law pure and simple—*Maniram*, 34 Cr L.J. 14, 140 IC 485, AIR 1932 Sind 157, 26 SLR 407, 1932 Cr C. 693, Ind Rul. 1932 Sind 189. *In re Sessions Judge*, 27 MLJ 593, 15 Cr L.J. 665 (dissenting from 6 All. 98); so also, a commitment cannot be quashed because of doubts as to the credibility of the evidence for the prosecution, if there is in fact some evidence which would justify the Sessions Judge in leaving the question of guilt or innocence to the jury—*Mahomed Moideen*, 1 Rang 526, 25 Cr L.J. 261, 76 IC 821, AIR 1924 Rang 165; *Naval Krishore*, 30 Cr L.J. 519, 115 IC 692, 10 PLT. 101, AIR 1929 Pat 121, Ind. Rul. 1929 Pat 244. A commitment cannot be quashed merely on the ground that the evidence was doubtful. The proper course in such a case would be for the District Magistrate to instruct the Public Prosecutor to withdraw from the prosecution under sec. 494—*Nga Taung*, 7 Bur LT 26, 15 Cr L.J. 270. See also *Maroti*, supra.

There may be cases in which there is no evidence to warrant a commitment; then there may be another class of cases in which commitment is made on no legal evidence at all. In such cases action may be taken under this section. The High Court however will not quash commitments where there is a *prima facie* case against the persons who have been committed to take their trial to a Court of Session. In such cases no legal question arises and so the High Court has no power to quash the commitment. The commitment of the accused therefore cannot be quashed because of the possibility of the Sessions Judge's holding in favour of the accused and against

the prosecution after he has heard the evidence. Under the law a very valuable right has been given to the parties to have their cases under certain sections decided by a Court of Session with the aid of assessors or jury and when the accused persons have been committed to the Court of Session by the committing Court then that commitment cannot possibly be quashed because the Court of Session is of opinion that eventually the prosecution case may not be proved—*Mithi Lal*, A.I.R. 1940 All. 396 (397, 398), 1940 A.L.J. 357.

A commitment cannot be quashed on the ground that the Magistrate committed the case without weighing the evidence himself and deliberately leaving to the Court of Session to decide whether the guilt of the accused had or had not been proved on the evidence on record—*Muhammad Khan*, 34 Cr.L.J. 39, 33 P.L.R. 1068, 140 I.C. 539, A.I.R. 1933 Lah. 39, 1933 Cr.C. 119, Ind. Rul. 1933 Lah. 7. The High Court will not, sitting as a Revisional Court, decide whether the statement of a witness should or should not be believed and will not quash the commitment after such consideration—*Bal Chand*, 49 All. 181.

(3) The fact that some of the accused were committed while other persons who were acting in concert had not yet been arrested is not a ground for setting aside the commitment—*Ramasami*, 7 M.L.T. 187, 11 Cr.L.J. 333.

(4) The High Court cannot interfere when the Magistrate, being of opinion that he cannot adequately punish the accused, exercises his discretion by committing the case to the Sessions—*Baldeo*, 11 A.L.J. 439, 14 Cr.L.J. 304; *Umrai*, A.I.R. 1934 Oudh 185, 1934 O.L.R. 328, 11 O.W.N. 556, 148 I.C. 653. See also Note 703 (4) and Note 718 (1).

(5) The High Court cannot quash a commitment where the Magistrate, though he can inflict the maximum sentence provided for the offence, commits the case, being of opinion that it should for other reasons be tried by a Court of Session—*Bhagvathi*, 42 Mad. 83, 85 M.L.J. 559; *Ghani*, 14 S.L.R. 85, 21 Cr.L.J. 791. The commitment of a case exclusively triable by a Court of Session is legal and cannot be quashed merely because the Committing Magistrate could give sufficient punishment by acting under sec. 30, Cr. P. C.—*Mir Ahmad v. Madan Lal*, A.I.R. 1936 Pesh. 139, 37 Cr.L.J. 852, 163 I.C. 611. See also *Indo*, A.I.R. 1934 Lah. 326, 150 I.C. 769, 36 P.L.R. 218. But see *Asha Bhatti*, 15 Bom.L.R. 998, 14 Cr.L.J. 657 (658), cited under sec. 207.

(6) A commitment will not be quashed on the ground that the committing Magistrate has failed to observe the provisions of sec. 360 in respect of some of the witnesses; in such a case, the trial Court will be directed to recall the witnesses in respect of whom sec. 360 was not complied with, and to comply with those provisions so far as these witnesses are concerned—*Abdur Rahim*, 29 C.W.N. 698, 26 Cr.L.J. 1276. (Any irregularity in following the provisions of sec. 360 will now be cured by the ruling of the Privy Council in *Abdul Rahman*, 5 Rang. 53).

(7) Where there has been a commitment for the trial of charges some of which are triable by a Sessions Court and others triable by a Magistrate, the fact that during the trial the charges for the Sessions offences are withdrawn, is not a ground for setting aside the order of commitment and taking away the accused's right to a trial by jury—*Monmotha*, 31 C.W.N. 144, 28 Cr.L.J. 141.

216. When the accused has given in any list of witnesses

Summons to witnesses for defence when accused is committed.

under section 211 and has been committed, for trial, the Magistrate shall summon such of the witnesses included in the list, as have not appeared before himself, to appear before the Court to which the accused has been committed:

Provided that, where the accused has been committed to the High Court, the Magistrate may, in his discretion, leave such

witnesses to be summoned by the Clerk of the Crown, and such witnesses may be summoned accordingly:

Provided also, that if the Magistrate thinks that any witness is included in the list for the purpose of vexation or delay or of defeating the ends of justice, the Magistrate may require the accused to satisfy him that there are reasonable grounds for believing that the evidence of such witness is material, and, if he is not so satisfied, may refuse to summon the witness (recording his reasons for such refusal), or may, before summoning him, require such sum to be deposited as such Magistrate thinks necessary to defray the expense of obtaining the attendance of the witness and all other proper expenses.

719A. "Shall summon":—Where the accused has made an application for summoning witnesses, the Magistrate must deal with the application and pass an order either granting the prayer of the petition, or refusing it (under the second proviso). He should not simply order the application to be filed—*Bhomar v Digambar*, 6 C.W.N. 548. Where a witness once summoned failed to appear, there being some delay in the service of summons, the Magistrate is bound to make a second attempt (the first attempt being a nominal one) to secure the attendance of the absent witness—*Ruknuddin*, 4 All. 53. It appears from this section as well from sec 217 that the intention of the Legislature is to cast upon the Crown the charge of securing the attendance of witnesses whom the accused intends to examine at the trial. In a warrant case the accused has to summon his own witnesses and see to their attendance. But in a Crown prosecution, when the list is filed before the committing Magistrate, the witnesses named therein must be summoned and made to be present, and if they are not present their attendance has to be secured by some means by the Crown—*Ran Mamud*, 58 Cal 412, 34 C.W.N. 1014 (1016), 32 Cr.L.J. 316; *Muktal Hossein*, 31 Cr.L.J. 1077, 126 I.C. 720, A.I.R. 1930 Cal 362. See also Notes under sec. 211.

720. Second proviso:—The second proviso is not intended to enable the Magistrate to inquire generally into what the defence of the accused is to be, and to consider whether on learning the nature of the defence he is absolutely to abstain from summoning the whole of the witnesses cited by the accused. The meaning of this proviso is that if among the persons named by the accused as witnesses the Magistrate considers that any particular witness is included for the purpose of vexation and delay, he is to exercise his judgment and inquire whether such witness is material—*Rajcoomar*, 3 Cal 573. The Magistrate cannot require the accused person to satisfy him that the evidence of the witnesses to be summoned is material, unless he thinks that the witnesses were included in the list for the purpose of vexation or delay—*Raja of Kantil*, 8 All 668 (671).

Refusal to summon witnesses —The accused is entitled to have the witnesses mentioned in the list summoned and examined, and the only ground on which a Magistrate can refuse summons is when he thinks that the witnesses have been included in the list for the purpose of vexation and delay. If the witnesses named in the list are persons who have already given evidence on a previous occasion, the Magistrate should not refuse to summon those witnesses on the mere assumption that their evidence would not be reliable or material—*Marinagi Reddi*, 2 Weir 263 (264); *Virasami*, 19 Mad. 375 (381). Again, the fact that the accused stated that he did not wish to examine witnesses when the case closed, would be no reason for refusing to summon them to meet fresh evidence which had been taken by the Magistrate after hearing the arguments of the defence—*Deela Mahton v. Sho Dyal*, 6 Cal 714 (715).

The discretion of not summoning any witness named in the list submitted to the Magistrate by the accused vests in the committing Magistrate and not in the Sessions Judge. The latter is not justified in refusing to call any such witness—*Ran Mamud*, 58 Cal. 412, 34 C.W.N. 1014 (1016).

Recording reasons for refusal :—When a Magistrate refuses to summon witnesses, he must record his reasons for such refusal; and the reasons must show that the evidence of such witnesses is not material. The fact that the Magistrate thought that the reasons assigned by the accused for summoning a witness were insufficient, is not a good ground for supposing that the evidence of the witness was not material, and for refusing to summon him—*Raja of Kantit*, 8 All. 668 (671).

See also Notes 699 and 712.

Order to deposit expenses :—Though the Magistrate is competent to refuse to summon witnesses, still he should fix the amount which he considers necessary to defray the cost of the attendance of persons named in the list and intimate his readiness to issue summons on that amount being deposited—*Subbaraya*, 4 M.H.C.R. 81. An order refusing to issue summons should be sparingly passed; and such an order is improper in a case where the accused is unable or unwilling to deposit money and in consequence is convicted without his witness being heard, especially if the case is one in which a severe sentence is inflicted—*Qadu*, 1898 P.R. 7.

This section undoubtedly permits of fees being levied, where the Magistrate thinks necessary, for process-fees, but only if the Magistrate thinks that the witness is included in the list for the purpose of vexation or delay, or of defeating the ends of justice—*Mg San Nyein*, 27 Cr.L.J. 415, 93 I.C. 79, A.I.R. 1926 Rang. 13, 4 Bur.L.J. 187.

217. (1) Complainants and witnesses for the prosecution

Bond of complainants and witnesses. and defence, whose attendance before the Court of Session or High Court is necessary and who appear before the Magistrate, shall execute before him bonds binding themselves to be in attendance when called upon at the Court of Session or High Court to prosecute or to give evidence, as the case may be.

(2) If any complainant or witness refuses to attend before

the Court of Session or High Court, or to execute the bond above directed, the Magistrate may detain him in custody until he executes such bond, or until his attendance at the Court of Session or High Court is required, when the Magistrate shall send him in custody to the Court of Session or High Court, as the case may be.

721. "Whose attendance is necessary":—There is no law which obliges the committing Magistrate to cause the attendance at the Sessions Court of every one of the witnesses examined by him, irrespective of their evidence being material for the prosecution. It is for the Magistrate to judge as to the necessity of the attendance of those witnesses—*Naik Lal*, 1883 A.W.N. 37.

The words "whose attendance before the Court of Session or High Court is necessary and who appear before the Magistrate" indicate that only those witnesses who appear before the Magistrate can be bound down to appear before the Sessions Court. It also clearly shows that witnesses who do not appear before the Magistrate can appear before the Court of Session, the only disadvantage to the prosecution being that they cannot be bound down so to appear—*Niamat*, 37 Cr.L.J. 742 (744), 162 I.C. 976, A.I.R. 1936 Lah. 533, 17 Lah. 176, 38 P.L.R. 421, 1936 Cr.C. 568 (F.B.).

218. (1) When the accused is committed for trial, the Magistrate shall issue an order to such person as may be appointed by the *Provincial Government* in this behalf, notifying the commitment and stating the offence in the same form as the charge, unless the Magistrate is satisfied that such person is already aware of the commitment and the form of the charge;

and shall send the charge, the record of the inquiry and any weapon or other thing which is to be produced in evidence, to the Court of Session or (where the commitment is made to the High Court) to the Clerk of the Crown or other officer appointed in this behalf by the High Court.

(2) When the commitment is made to the High Court and any part of the record is not in English, an English translation of such part shall be forwarded with the record.

Amendment:—The words "Provincial Government" have been substituted for "Local Government" by sec. 4 of the Government of India (Adaptation of Indian Laws) Order, 1937.

219. (1) The Magistrate may, if he thinks fit, summon and examine supplementary witnesses after the commitment and before the commencement of the trial, and bind them over in manner hereinbefore provided to appear and give evidence.

(2) Such examination shall, if possible, be taken in the presence of the accused, and where the Magistrate is not a Presidency Magistrate, a copy of the evidence of such witnesses shall, if the accused so require, be given to him free of cost.

Change:—The italicised words in sub-section (1) have been substituted for the words 'The Magistrate' by s. 60 of the Criminal Procedure Code Amendment Act, XVIII of 1923. This amendment provides that the supplementary witnesses may be examined

219. (1) *The committing Magistrate or, in the absence of such Magistrate, any other Magistrate empowered by or under section 206* may, if he thinks fit, summon and examine supplementary witnesses after the commitment and before the commencement of the trial, and bind them over in manner hereinbefore provided to appear and give evidence.

(2) Such examination shall, if possible, be taken in the presence of the accused, and where the Magistrate is not a Presidency Magistrate, a copy of the evidence of such witnesses shall * * be given to the accused free of cost.

not only by the committing Magistrate, but by another Magistrate in his absence who is empowered to commit for trial.

The words "if the accused so require" occurring in sub-sec. (2) of the old section have been omitted by the same Amendment Act. The accused is now given an absolute right to a copy of the evidence.

722. Scope:—This section provides for cases in which there may be accidental gap in the evidence. In such a case, the Sessions Judge may call additional evidence at the trial under sec. 540 or the committing Magistrate may himself take steps, before the trial, under sec. 219 to supplement the evidence—*Mahabir*, 23 Cr.L.J. 79 (Oudh).

The power of the committing Magistrate to call and examine supplementary witnesses ceases with the commencement of the trial. After the trial has commenced, the Sessions Judge can cause witnesses to be summoned before *himself* or under certain circumstances have them examined by commission. But he cannot direct the committing Magistrate to call additional witnesses and hold an inquiry—*Hassan*, 1888 P.R. 29. If, after receiving the order of commitment, the Sessions Judge, in view of the Magistrate's recorded opinion, thinks that further evidence should be taken, the proper course is to point out to the committing Magistrate that he should summon and examine any supplementary witnesses who can give evidence and bind them over to appear at the trial, and not to send the case to the Magistrate after the conclusion of the trial, and after the opinions of the assessors have been taken—*Awalkhan*, 1892 P.R. 4.

This section provides for the taking of supplementary evidence after commitment but before the trial, and there is no provision that the charge can be altered or a fresh committal order made by the Magistrate of his own motion, after the taking of such evidence. And so, though the additional evidence may be recorded by the committing Magistrate, it forms no part of the record upon which the accused has been, or could have been, committed for trial—*Deogi Reddi Aukamma*, 34 Cr.L.J. 278 (282), 142 I.C. 138, 1932 M.W.N. 1162, Ind. Rul. 1933 Mad. 199, A.I.R. 1933 Mad. 247, 1933 Cr.C. 374, 65 M.L.J. 6, 38 M.L.W. 668.

The complainant is a 'witness' within the meaning of the word in this section and the Magistrate has a discretion to require the complainant as a witness under this section—*Motilal*, A.I.R. 1935 All. 267, 36 Cr.L.J. 446, 153 I.C. 907, 1935 A.L.J. 299.

Where the prosecution was allowed to examine new witnesses under this section long after the commitment and the Magistrate, to whom the accused applied in the first instance for summoning new witnesses to rebut the evidence of these new prosecution witnesses, was satisfied as to the relevancy of their evidence, *held* that the accused should be given an opportunity to examine those defence witnesses in the Court of Session—*Brijnandan*, A.I.R. 1933 Pat. 577, 35 Cr.L.J. 85, 146 I.C. 527, 1933 Cr.C. 1344.

220. Until and during the trial, the Magistrate shall, subject to the provisions of this Code regarding the taking of bail, commit the accused, by warrant, to custody.

Custody of accused pending trial.

CHAPTER XIX.

OF THE CHARGE.

Form of Charges.

221. (1) Every charge under this Code shall state the
Charge to state offence. offence with which the accused is charged.

(2) If the law which creates the offence gives it any specific
Specific name of offence sufficient description. name, the offence may be described in the charge by that name only.

(3) If the law which creates the offence does not give it
How stated where offence has no specific name. any specific name, so much of the definition of the offence must be stated as to give the accused notice of the matter with which he is charged.

(4) The law and section of the law against which the offence is said to have been committed shall be mentioned in the charge.

(5) The fact that the charge is made is equivalent to a statement that every legal condition required by
What implied in charge law to constitute the offence charged was fulfilled in the particular case.

(6) In the presidency-towns the charge shall be written
Language of charge. in English; elsewhere it shall be written either in English or in the language of the Court.

(7) If the accused has been
Previous conviction when to be set out previously convicted of any offence, and it is intended to prove such previous conviction for the purpose of affecting the punishment which the Court is competent to award, the fact, date and place of the previous conviction shall be stated in the charge. If such statement is omitted, the Court may add it at any time before sentence is passed.

(7) If the accused, *having been previously convicted of any offence, is liable, by reason of such previous conviction, to enhanced punishment or to punishment of a different kind, for a subsequent offence,* and it is intended to prove such previous conviction for the purpose of affecting the punishment which the Court may think fit to award for the subsequent offence, the fact, date and place of the previous conviction shall be stated in the charge. If such statement has been omitted, the Court may add it at any time before sentence is passed.

Illustrations.

(a) A is charged with the murder of B. This is equivalent to a statement that A's act fell within the definition of murder given in sections 299 and 300 of the Indian Penal Code; that it did not fall within any of the general exceptions of the same Code; and that it did not fall within any of the five exceptions to section 300, or that, if it did fall within Exception I, one or other of the three provisos to that exception applied to it.

(b) A is charged, under section 326 of the Indian Penal Code, with voluntarily causing grievous hurt to B by means of an instrument for shooting. This is equivalent to a statement that the case was not provided for by section 335 of the Indian Penal Code, and that the general exceptions did not apply to it.

(c) A is accused of murder, cheating, theft, extortion, adultery or criminal intimidation, or using a false property mark. The charge may state that A committed murder, or cheating, or theft, or extortion, or adultery, or criminal intimidation, or that he used a false property mark, without reference to the definitions of those crimes contained in the Indian Penal Code; but the sections under which the offence is punishable must, in each instance, be referred to in the charge.

(d) A is charged, under section 184 of the Indian Penal Code with intentionally obstructing a sale of property offered for sale by the lawful authority of a public servant. The charge should be in those words.

Change:—Sub-section (7) has been amended by sec. 61 of the Cr. P. C. Amendment Act, XVIII of 1923 "There is some doubt whether under section 221 it is permissible to prove a previous conviction if the enhanced punishment which it is sought to award is *not beyond the competence* of the Court; and the amendment directs that in such a case evidence of the previous conviction may be given"—*Statement of Objects and Reasons* (1914).

723. Particulars to be stated in the charge:—The object of these sections is to enable the accused to know the substantive charges which he will have to meet and to be ready for them before the evidence is given—*Ram Chandar*, 17 Cr.L.J. 411, 35 I.C. 971 (All.). It is one of the elementary principles of criminal law that an accused person must know what the precise accusation against him is, before he is called upon to enter on his defence—*Indar Pal*, A.I.R. 1935 Lah. 409 (411), 1936 Cr.C. 389. An accused is entitled to know with accuracy and certainty the exact nature of the charge brought against him. Unless he has this knowledge, he will be prejudiced in his defence, specially in cases where it is sought to implicate him for acts not committed by himself but by others with whom he is in company—*Behari Mahton*, 11 Cal. 106; *Amritlal*, 42 Cal. 957; *Chhakari*, 26 Cr.L.J. 567, 85 I.C. 711, A.I.R. 1926 Cal. 439; *Kedar Nath*, 29 C.W.N. 408, 41 C.L.J. 172, 86 I.C. 705, 26 Cr.L.J. 849. An accused is entitled to be informed with the greatest precision what acts he is said to have committed, and under what section of the Penal Code these acts fall—*Shoo Sankar*, 2 O.W.N. 862, 27 Cr.L.J. 62. A charge is a first notice to the prisoner, of the matter whereof he is accused, and it must convey to him with sufficient clearness and certainty that which the prosecution intended to prove against him and of which he will have to clear himself—*Ram Subheg*, 19 C.W.N. 972 (988), 16 Cr.L.J. 611. Failure to state in any substantial form the nature and particulars of the offence alleged against the accused would in some cases be a fatal defect which would vitiate the whole proceedings. Where an offence charged involved consequences which may be stated in a general form, such as may arise in a case of arson where a man may by one act of arson set fire and destroy several stacks of hays of several persons, no particular is required, the nature of the offence being sufficiently stated by the date, time and place of the setting fire; but extortion or obtaining money from persons by unlawful means involves stating with some approach to

accuracy the approximate amounts alleged to have been obtained from each person and the nature of the extortion used against each person—*Ram Chandar*, 17 Cr L J. 411 (All.).

The essence of a good charge is that it should contain such particulars of the manner in which the alleged offence was committed as will be sufficient to give the accused notice of the matter with which he is charged—*Ghousbux*, A I R. 1935 Sind 34, 28 S L R. 304, 36-Cr.L J. 598, 154 I.C. 915

The existence of aggravating circumstances which go to enhance the punishment must be set out in the charge—*Mukta*, Ratanlal 55 (56).

Abduction and Kidnapping:—Where although the accused was charged with the offence of kidnapping only, the Sessions Judge left it to the jury to convict the accused of the offence of abduction under the same section, namely, sec 366, I. P. C., held that notice of a charge of kidnapping under sec 366, I. P. C., is not a fair, proper or sufficient notice of a charge of abduction and that as it is impossible to say that no prejudice has been caused to the accused in the circumstances of the case, the conviction and sentence should be set aside—*Isu Sheikh*, 31 C.W.N. 171, A I R. 1927 Cal 200, 99 I.C. 937, 44 C.L.J. 584, 28 Cr L J. 201; *Fedu Sheikh*, 32 C.W.N. 1245.

Where the accused has been charged in one head under one charge with kidnapping or abduction, held that they are distinct offences and separate charges should have been drawn up if it was desired to charge him with both offences—*Mafizaddi*, 31 C.W.N. 940 (943), 28 Cr.L.J. 805, 104 I.C. 245, 45 C.L.J. 561, A I R. 1927 Cal. 644. But see *Prafulla*, A I R. 1930 Cal. 209, 1930 Cr.C. 209, 31 Cr.L.J. 903, 57 Cal 1074, 125 I.C. 656, 50 C.L.J. 593, where it has been laid down that one count of charge setting out both the offences in the alternative does not contravene the requirements of the law and does not in the least cause prejudice to the accused. Following *Mafizaddi*, and distinguishing *Prafulla*, it has been laid down that where the prosecution is in some doubt whether the offence disclosed is that of kidnapping or that of abduction, nothing is easier than to frame two charges and take the verdict of the jury upon them both—*Mahomed Ali*, A I R. 1933 Cal 194, 1933 Cr.C. 245, 34 Cr.L.J. 1107, 145 I.C. 925. The view taken in *Isu Sheikh's* case and *Mafizaddi's* case was also followed in *Mozam Dofadar*, A I R. 1933 Cal 563, 144 I.C. 93, 34 Cr.L.J. 682, 1933 Cr.C. 940 and *Jangli Mian*, 35 Cr.L.J. 814, 148 I.C. 791, 15 P.L.T. 228, A I R. 1934 Pat 170, 1934 Cr.C. 367. It is no doubt desirable that an accused should be charged separately on one head for kidnapping and on another for abduction. But the omission in splitting up the whole thing into two parts would not be sufficient for interference, unless it appears that that omission has caused a failure of justice or that the accused was in any way prejudiced thereby—*Ramizulla*, 37 C.W.N. 1071, 35 Cr.L.J. 487, 147 I.C. 828, A I R. 1934 Cal. 85, 1934 Cr.C. 50. The joinder of these two offences in the alternative in the one charge is an irregularity cured by sec 537, Cr. P. C., and not an illegality vitiating the trial—*Rajabuddin*, 37 C.W.N. 1074, 34 Cr.L.J. 1219, 146 I.C. 305, A I R. 1933 Cal 676, 1933 Cr.C. 1158; *Allahrakho*, A I R. 1934 Sind 164 (166), 36 Cr.L.J. 231, 1934 Cr.C. 1266, 152 I.C. 1061. See also *Zamin*, 8 O.W.N. 1325, 136 I.C. 243, A I R. 1932 Oudh 28, 1932 Cr.C. 60, Ind Rul 1932 Oudh 99, 33 Cr.L.J. 275.

It is always wise when a charge is made in respect of the same occurrence both of kidnapping and abducting that two heads should be made. But it is not necessary to go so far as to agree with the observation in *Mafizaddi*, supra, that it is illegal to make the two charges under one head. The point to be seen in each individual case is whether the accused person was prejudiced thereby. When the Judge carefully explained the difference between abduction and kidnapping and the jury fully understood the position and acquitted the accused men of the charge of kidnapping under sec. 366, I. P. C., but convicted them of abduction under sec. 366, I. P. C., the defect of the charge did not prejudice the accused men—*Ebadi Khan v. Emp.*, 39 Cr.L.J. 674 (676), 176 I.C. 104, A I R. 1938 Cal 410, 11 R.C. 36. See also *Nanda Ghosh v. Emp.*, in Note 777.

Abetment:—It is open to the prosecution to charge abetment generally, and then, if the evidence did not establish abetment other than in one particular form, to

rely on this particular form for a conviction. The charge will amount to notice to the accused that they have to meet a case of abetment in one or more of the different ways indicated in sec. 107, I. P. C. It will no doubt be better, having regard to the evidence which the prosecution have at their disposal, to make the charge more specific—*Harendra Kumar Mondal v. Emp.*, 39 Cr.L.J. 395 (396), A.I.R. 1938 Cal. 125 (126), 174 I.C. 36, 66 C.L.J. 196, 10 R.C. 607.

Adultery:—See Note 725.

Arson:—In a case of mischief by fire with intent to cause the destruction of a dwelling-house, the charge should lay the intent as an intent to cause the destruction, not of a house simply, but of a house used as a human dwelling—*Durbarro Pote*, 8 W.R. 30 (Cr.).

Cheating:—In a charge under sec. 420, I. P. C., it would be more proper to put the exact dates upon which the offences were alleged to have been committed. But it is not possible to set aside the conviction on the ground that no clear date than the month is given in the charge, unless it was clearly shown that the omission to give the exact date has materially prejudiced the accused at his trial—*Farzand Ali*, 27 Cr.L.J. 909, 96 I.C. 221, A.I.R. 1926 Pat. 347, 1926 Pat.H.C.C. 207.

See also Note 729.

Lumping of several cases of cheating in one charge should be avoided—*Chandra Narain Jha v. The King-Emp.*, 41 Cr.L.J. 523 (524), A.I.R. 1940 Pat. 603, 6 BR. 554, 187 I.C. 862, 1940 P.W.N. 557. As for its effect see Note 747.

Conspiracy:—In a conspiracy case the accused can be charged with conspiring with persons unknown, but if they are charged with conspiring with persons known then such persons must be named in the charge—*Lalit Mohan*, 15 C.W.N. 98 (99). The plea that the charge is defective in so far as it does not specify the persons who are parties to the conspiracy is sufficiently cured by the provisions of sec. 537, Cr. P. C.—*Haji Samo*, 28 Cr.L.J. 426 (430), 101 I.C. 458, A.I.R. 1927 Sind 161. Under secs. 221 and 222, Cr. P. C., there is no duty on the prosecution to mention fellow conspirators by name in a charge of conspiracy. Where the accused knew perfectly well who his fellow conspirators were and their names are mentioned in the complaint, it cannot seriously be contended that he suffered any prejudice from the fact that their names were not mentioned in the charge—*Manabendra*, A.I.R. 1933 All. 498 (501), 1933 Cr.C. 833, 35 Cr.L.J. 768, 148 I.C. 833.

Where a charge of conspiracy contained the words that the three accused agreed with each other "or" with others unknown to commit a certain offence, it cannot be said on a plain reading of the charge that a conspiracy was charged in the alternative. The word "or" to which so much importance is attached is not used as a disjunctive, meaning that the charge is the one alternative or the other, but it is used merely because the complicity of other persons in the conspiracy was not so certain as that of the three accused. The reason for saying "or others unknown" instead of "and other unknown" is to avoid a possible argument that having charged a conspiracy of which the accused were members along with others, the prosecution could not succeed by merely proving a conspiracy among the three accused. A conspiracy only among the three accused would be distinct conspiracy from one to which the accused and others were parties, and as a conspiracy charge must be proved as laid, the prosecution would naturally not be taking any risks by charging a conspiracy other than the particular one which they might be able to prove. It is impossible to say that the terms in which the charge was actually framed could or did mislead the accused in any way: at no stage were they left in any uncertainty as to what was alleged against them. Even supposing there was any defect, it was not such as would not be sufficiently met by sec. 225 or sec. 537, Cr. P. C.—*Ram Krishna Sinha v. Emp.*, 39 Cr.L.J. 417 (422), 174 I.C. 513, A.I.R. 1938 Cal. 195, 42 C.W.N. 246, 10 R.C. 693.

In cases of criminal conspiracy it would be unreasonable to require the Crown to establish with accuracy when the conspiracy began or ended. These facts are best

known to the conspirators. Defrauding the public by deceitful means is an offence and the allegation in the charge of such an object without specifying the persons defrauded was sufficient to maintain a charge of conspiracy—*Dur Mahomed*, 35 Cr.L.J. 1337 (1339), 151 I.C. 494, 28 S.L.R. 119, 1934 Cr.C. 628, A.I.R. 1934 Sind 57.

There is a distinction between a charge of an offence and a charge of conspiracy to commit such an offence or offences. In the former, particulars are no doubt necessary, and such particulars must be within certain limits as laid down in the Code, but not so in the latter. It is well-settled that in stating the object of a conspiracy, the same certainty is not required as in indictment for the offence conspired to be committed. See Archibald's Criminal Pleading, Edition 29, p. 1419 and the cases cited there: *Reg. v. Ripsal*, (1762) 3 Burr 1320, 1 W Bl. 368; *Reg. v. Blake*, (1884) 6 Q.B. 126, 13 L.J.M.C. 131, 8 Jur. 145; and *Sydsreiff v. Reg.*, (1848) 11 Q.B. 245, 12 Jur. 418. So an indictment charging a conspiracy "by divers false pretences and indirect means to cheat and defraud A of his money was held good"—*Reg. v. Gompertz*, (1847) 9 Q.B. 824, 16 L.J.Q.B. 121, 11 Jur. 204, 2 Cox. C.C. 145, 72 R.R. 458; *Aspinall v. Reg.*, (1887) 2 Q.B.D. 48, 46 L.J.M.C. 145, 36 L.T. 297, 25 W.R. 283, 13 Cox C.C. 563 and *Rex v. Gill*, (1818) 2 Bl. & Ald 204, 20 R.R. 40. *Ram Krishna Sinha v. Emp.*, 39 Cr.L.J. 417 (421), 174 I.C. 513, A.I.R. 1938 Cal 195, 42 C.W.N. 246, 10 R.C. 693.

Where there is a charge of conspiracy a prisoner can be tried of all other offences committed in the course of the conspiracy case even if those offences are more than three—*Bishambhar*, 26 Cr.L.J. 1602 (1606), 90 I.C. 706, 2 O.W.N. 760, A.I.R. 1926 Oudh 161. Accused persons may be charged at one trial with the offence of conspiracy and also with the offences alleged to have been committed in pursuance of the conspiracy because substantive offence of conspiracy and the offences committed in pursuance thereof form one and the same transaction. Such a joint trial is permissible under the provisions of sec 239, Cr. P. C. The fact that an accused person has been acquitted on a conspiracy charge, does not operate to show that the other offences with which he was charged were not part of the same transaction with the other offences charged at the trial, and vitiate the trial. Legality of the joint trial depends on the accusation and not on the result of the trial—*Ram Das*, 35 Cr.L.J. 1349 (1353), 151 I.C. 442, 1934 Cr.C. 130, 1934 A.L.J. 852, A.I.R. 1934 All 61. See also *Gopala Raghunath*, 53 Bom 344, 30 Cr.L.J. 588, 31 Bom.L.R. 148, A.I.R. 1929 Bom 128, 116 I.C. 243; *Mohammad Yakub*, 33 Cr.L.J. 373, 137 I.C. 73, 1932 Cr.C. 93, A.I.R. 1932 All 73, Ind Rul 1932 All 270; *Ramrao*, 33 Cr.L.J. 666, 138 I.C. 708, 34 Bom.L.R. 598, A.I.R. 1932 Bom. 406, 1932 Cr.C. 572, Ind Rul 1932 Bom 423, 56 Bom 304; *Satyanarayan*, 1933 M.W.N. 528; *Kunwar Sen*, 9 O.W.N. 1136, 34 Cr.L.J. 124, 141 I.C. 192, Ind Rul. 1933 Oudh 33, A.I.R. 1933 Oudh 86, 1933 Cr.C. 168, 8 Luck. 286, *Patni v. Venkata*, 35 Cr.L.J. 631, 148 I.C. 281, 1933 M.W.N. 1409, 39 M.L.W. 91, A.I.R. 1934 Mad 88, 66 M.L.J. 193, 1934 Cr.C. 118. There is no illegality in the joinder of a main charge of conspiracy against all the accused persons with minor charges of different overt acts against different of them—*C S Joseph v. Emp.*, 41 C.W.N. 251 (255); *Akhil Bandhu Ray v. Emp.*, 10 R.C. 790, 39 Cr.L.J. 595, 175 I.C. 409, A.I.R. 1938 Cal 258, I.L.R. (1938) 1 Cal 588; *Ram Krishna Sinha v. Emp.*, 39 Cr.L.J. 417 (422), 174 I.C. 513, A.I.R. 1938 Cal. 195, 10 R.C. 693, 42 C.W.N. 246; *Jagadish Prosad Basu v. Emp.*, 40 Cr.L.J. 90, 43 C.W.N. 23, 178 I.C. 575, A.I.R. 1938 Cal. 697; *Dur Mahomed Ghulam Mahomed v. Emp.*, 28 S.L.R. 119, 151 I.C. 494, A.I.R. 1934 Sind 57, 1934 Cr.C. 628, 35 Cr.L.J. 1337, 7 R.S. 55; *Balulal Hotchand*, 39 Cr.L.J. 890 (892), 177 I.C. 346, A.I.R. 1938 Sind 171; *Karamalli Gulamalli*, A.I.R. 1938 Bom. 481 (484), 40 Bom.L.R. 1092, 40 Cr.L.J. 118, 178 I.C. 706, I.L.R. 1939 Bom. 42; *Ramchandra Rango*, 40 Cr.L.J. 579 (590), A.I.R. 1939 Bom. 129, 41 Bom.L.R. 98, 181 I.C. 870; *Tatapada Shastri*, 1918 A.W.R. (H.C.) 467, 1938 A.L.J. 769, 1938 A.Cr.C. 75; *Surajpalsingh*, 39 Cr.L.J. 818 (825), I.L.R. 1938 Nag. 516, 176 I.C. 853, 11 R.N. 81, 1938 N.L.J. 185, A.I.R. 1938 Nag 328. Where there is a conspiracy having one or more objects in view and certain offences are committed in pursuance of such conspiracy, the several offences generally form part of the same transaction within the meaning of that expression as used in sec. 235, Cr. P. C. The principle that where there is a

conspiracy and certain offences are committed in pursuance of such conspiracy, those several offences will generally form part of the same transaction will also apply where the several offences are by different persons. It follows, therefore, that where there is a conspiracy and specific offences are committed in pursuance of such conspiracy, persons who are parties to that conspiracy and concerned in the specific offences can lawfully be tried in one and the same trial—*Rash Behari Shaw v. Emp.*, A.I.R. 1935 Cal. 753 (759), 1936 Cr.C. 1043, 168 I.C. 657, 38 Cr.L.J. 545, 9 R.C. 853, 41 C.W.N. 225. To legalize such a trial it is only necessary to show that there was a *bona fide* accusation of conspiracy embracing all the criminal acts; it is not necessary for the prosecution to establish that in fact there was such a conspiracy. The matter must be looked at as it appeared to the Magistrate when framing charges—*Sanyasi Gain v. Emp.*, 38 Cr.L.J. 1018, 171 I.C. 183, 10 R.C. 235, A.I.R. 1937 Cal. 269. Whatever scope of connotation may be included in the words "the same transaction", it is enough to say that if several persons conspire to commit offences, and commit overt acts in pursuance of the conspiracy (a circumstance which makes the act of one the act of each and all the conspirators) these acts are committed in the course of the same transaction, which embraces the conspiracy and the acts done under it. The common concert and agreement which constitute the conspiracy, serve to unify the acts done in pursuance of it—*Babulal Choukhani v. King-Emp.*, 42 C.W.N. 621 (627), 174 I.C. 1, A.I.R. 1938 P.C. 130, 39 Cr.L.J. 452, 1938 A.L.R. 309, 1938 A.L.J. 382, 4 B.R. 490, 10 R.P.C. 250, 19 P.L.T. 343, (1938) 1 M.L.J. 647, 1938 O.W.N. 416, 1938 O.L.R. 189, 1938 M.W.N. 505, 67 C.L.J. 162 (P.C.). These observations apply to cases where a charge of conspiracy has been formulated, so that the alleged common concert serves to unify the acts done in pursuance of the conspiracy. It is entirely different where the charge is restricted in its scope to abetment by conspiracy to do a specified act. The scope of the enquiry is thereby restricted and not enlarged, so as to embrace all acts and sundry done in pursuance of a general conspiracy to do similar acts extending over not only the period involved in the charge of abetment, but over a much larger period, anterior and subsequent—*Ramchandra Rango v. Emp.*, 40 Cr.L.J. 579 (592), 181 I.C. 870, A.I.R. 1939 Bom. 129, 41 Bom.L.R. 98. See also the rulings cited in Note 757, (5) and (10) and Note 778, (7) and (11). But a conspiracy and acts done in furtherance of its common object have no community with separate acts which may be committed by a conspirator for individual gain. Consequently acts, which are alleged to have been committed individually by the various accused outside the conspiracy and not in pursuance thereof, are not part of the same transaction and cannot form basis of charges triable jointly with the charge of conspiracy—*Bishan Sahai*, A.I.R. 1937 All. 714, 1937 A.W.R. 748, 1937 A.L.J. 1073, I.L.R. 1937 All. 779, 1937 A.L.R. 935, 171 I.C. 994, 1937 A.Cr.C. 119, 39 Cr.L.J. 38. If only a number of unrelated conspiracies were proved, the trial would be found to be bad for misjoinder of parties under sec. 239, Cr. P. C., although *prima facie* on the prosecution case as alleged the joinder was quite legal—*Md. Ismail*, A.I.R. 1936 Nag. 97 (99), 38 Cr.L.J. 106 (108), 165 I.C. 913, 1936 Cr.C. 561, I.L.R. 1936 Nag. 152.

Recitals of specific offences committed in pursuance of the conspiracy are at most a surplusage and may be ignored—*Kishinchand*, A.I.R. 1926 Sind 171, 20 S.L.R. 18; *Mohansingh*, A.I.R. 1930 Sind 164 (167), 1930 Cr.C. 649, 31 Cr.L.J. 949, 126 I.C. 55. There is no objection to acts committed by conspirators in pursuance of a conspiracy being enumerated in a charge of criminal conspiracy. Whether they amount to separate offences or not, the object of the charge is to give reasonable notice to the accused of the accusation which they have to meet. If, in order to prove a criminal conspiracy, evidence is being led of a greater number of culpable acts alleged to have been committed in pursuance of the conspiracy, the more care should be taken to refrain from bewildering the accused or prejudicing them in the eyes of the jury by framing a great number of additional charges against them individually—*Dur Afahomed*, 35 Cr.L.J. 1337 (1340), 151 I.C. 491, 28 S.L.R. 119, 1934 Cr.C. 628, A.I.R. 1934 Sind 57.

There is no obligation on the Crown to specify in the charge the means used by

the conspirators for gaining their unlawful object. The gist of the offence of criminal conspiracy is the agreement itself, and where the object of the agreement is to do an unlawful act and not to do a lawful act by an unlawful means, it is sufficient to specify the unlawful object without specifying the means adopted by all or any of the conspirators to gain that object—*Haji Samo*, 28 Cr.L.J. 426 (428), 101 I.C. 458, A.I.R. 1927 Sind 161. For a charge of conspiracy, only an agreement is sufficient; so it is sufficient to include in the charge the agreement which is alleged to have been arrived at between the conspirators—*Bishambhar*, 26 Cr.L.J. 1602, 2 O.W.N. 760, 90 I.C. 706, A.I.R. 1926 Oudh 161.

There is no authority for the view that before an offence of criminal conspiracy under sec. 120A (1), I. P. C., can be charged, the charge must state in all its details the actual specific acts which the conspirators are alleged to have agreed to do or to cause to be done. It is sufficient to say that the accused have agreed to do or cause to be done an illegal act—*Htin Gyaw*, 29 Cr.L.J. 555 (560), 109 I.C. 491, 6 Rang. 6, A.I.R. 1928 Rang 118.

When separate charges for an offence of conspiracy and substantive offences committed in pursuance of the same conspiracy are framed in the same trial, specific charges for substantive offences need not contain a statement that they were committed in pursuance of the conspiracy. The specific charges are clearly to be read with the conspiracy charge—*Ram Krishna Sinha v. Emp.*, 39 Cr.L.J. 417 (422), 174 I.C. 513, A.I.R. 1938 Cal. 195, 42 C.W.N. 246; *Babulal Chaukhani v. King-Emp.*, 42 C.W.N. 621 (629), 174 I.C. 1, A.I.R. 1938 P.C. 130, 39 Cr.L.J. 452, 1938 A.L.R. 309, 1938 A.L.J. 382, 4 B.R. 490, 10 R.P.C. 250, 19 P.L.T. 343, (1938) 1 M.L.J. 647, 1938 O.W.N. 416, 1938 O.L.R. 189, 1938 M.W.N. 505, 67 C.L.J. 162 (P.C.); *Maung Ba Chit*, 7 Rang 821, 31 Cr.L.J. 387 (390).

The punishment for the offence of conspiracy under sec. 120B, I. P. C., depends upon whether the illegal act has or has not been carried out. In the former case the punishment will be in accordance with sec. 109, I. P. C., i.e., it will be the same as for the offence itself. In the latter case it will be in accordance with sec. 116, I. P. Code. When conspiracy is charged it is always open to the prosecution to charge further that the illegal acts which were the object of the conspiracy have been carried out. Acts done in pursuance of the conspiracy cannot be separately punished unless these acts are separately charged and particularized as required by the Code—*Karamalli Gulamalli*, A.I.R. 1938 Bom. 481 (484), 40 Bom.L.R. 192, 40 Cr.L.J. 118, 178 I.C. 706, I.L.R. 1939 Bom 42.

Where the accused were charged with the offence of conspiracy to commit criminal breach of trust and with committing criminal breach of trust in pursuance of that conspiracy, and in the alternative, upon the same facts, when one of the accused was charged as the principal offender with criminal breach of trust and the others as abettors, the accused should be convicted under one or other of the alternative charges; they should not have been convicted under both—*Balupal Hotchand*, 39 Cr.L.J. 890 (891), 177 I.C. 346, A.I.R. 1938 Sind 171.

Where a conspirator is present at the commission of the offence, he may under the provisions of sec. 114, I. P. C., be deemed to have committed the offence, but if that is the way in which the accused is to be made responsible for the offence, he should be specially charged with such offence as read with the provisions of sec. 114, I. P. C.—*Alimuddin*, 52 Cal. 253 (266), 29 C.W.N. 173, 26 Cr.L.J. 487. See also *Karamalli Gulamalli*, supra.

A person cannot be convicted of the offence of criminal conspiracy without there being a charge under sec. 120B, I. P. Code—*Bhikari*, A.I.R. 1934 Pat. 561 (563), 36 Cr.L.J. 17, 1934 Cr.C. 1215, 13 Pat. 729, 152 I.C. 282, 15 P.L.T. 523. It is a sickening waste of public time that charges of conspiracy which always mean a long trial, however convenient the prosecution may think it is to the success of their case, should be introduced when no sort of proper appraisal of the preliminary prosecution evidence has apparently been adopted by the prosecuting authorities before the case comes to its

actual trial—*Amitava Ghosh*, A.I.R. 1936 Cal. 693, 38 Cr.L.J. 201, 166 I.C. 384, 1936 Cr.C. 954.

Criminal breach of trust or dishonest misappropriation of money:— See Notes under sec. 222, Cr. P. Code.

The wording of sec. 222, Cr. P. C., refers to a single accused; and it must be so, because it is impossible to hold that two persons can be guilty of misappropriation of the same parcel of money. One may be guilty of misappropriating a portion of it or one may be guilty of abetting the other. The misappropriation of the actual money must be the act of a single person, and, therefore, sec. 239, Cr. P. C., has no application, because more than one person could not be charged with the offence of misappropriation of a single sum—*Girwar Narain*, 16 C.W.N. 600 (602), 13 Cr.L.J. 506, 15 I.C. 650. This case was followed by the Rangoon High Court in *K. Meeriah*, A.I.R. 1931 Rang 90, 1931 Cr.C. 378, 132 I.C. 549, 32 Cr.L.J. 930, 8 Rang. 632. But Otter, J. observed: "I wish, however, expressly to guard myself against expressing the opinion that in no case could more than one person be guilty of misappropriating the same sum of money, or that sec. 222 (2) of the Code could never apply to persons jointly charged." Obviously two persons cannot misappropriate the same sum of money independently, but there is no reason why they should not co-operate in doing it. Section 34, I. P. C., would enable two or more persons to be charged jointly with misappropriation of the same sum and it is not necessary to incorporate sec. 34, I. P. C., in the charge—*Baburao Tatyrao*, A.I.R. 1936 Bom 379 (383), 38 Bom L.R. 946, 38 Cr.L.J. 9, 165 I.C. 867, 1936 Cr.C. 924, 9 R.B. 171. Thus, the Bombay High Court has taken a view which is different from that of the Calcutta High Court.

Where nothing was stated in a charge under sec. 405, I. P. C., to indicate which of the several offences mentioned in the section was intended nor was it stated therein who made the alleged entrustment, or who suffered from the alleged breach of trust, the charge was prolix, indefinite and embarrassing—*Abinash Chandra*, 63 Cal. 18 (20), 161 I.C. 280, 37 Cr.L.J. 439.

The charge which does not unfold to the person accused of criminal breach of trust, even approximately, the dates between which he dishonestly converted to his own use the property in question, and leaves that part of the prosecution case in obscurity by referring merely to the date in which the conversion was discovered, must necessarily seriously prejudice the accused in his defence in the trial and is, therefore, bad in law—*Baburao Tatyrao*, A.I.R. 1936 Bom. 379 (383), 38 Bom L.R. 946, 38 Cr.L.J. 9, 165 I.C. 867, 1936 Cr.C. 924, 9 R.B. 171.

Culpable homicide:—Causing of death of each person killed is a separate or different offence, and "distinct" within the meaning of secs. 235 and 233, Cr. P. C.; and under the first part of the latter section a single count of murder of several persons is bad. A separate charge should be framed in respect of each instance of murder when several offences of murder were committed in course of the same transaction—*Alimuddin*, 52 Cal. 253 (264), 29 C.W.N. 173, 26 Cr.L.J. 487. It is undesirable to lump together two separate offences of murder, even when committed by only one accused; under the one head of charge—*Afsaruddin Naseraddi*, 40 Cr.L.J. 290, 179 I.C. 910, 42 C.W.N. 1235, A.I.R. 1939 Cal. 32, 67 Cr.L.J. 580. See also *Raj Bahadur*, 35 Cr.L.J. 1496, 152 I.C. 103, 11 O.W.N. 1309, 1934 Cr.C. 1379, A.I.R. 1934 Oudh 499, where it was laid down that it would have been well, if the Sessions Judge had tried the accused in two separate trials in respect of murder of two persons. Where one night the accused killed his wife by hitting her on the head with a grinding stone, went to the house of a neighbour of his and caused grievous hurt to him with the stone and then went to the house of his sister's husband whom he killed with the stone in the course of an altercation and was put up upon his trial with respect to three separate incidents, two involving charges of murder and one the charge of grievous hurt, held that the joint trial of the two charges of murder and one of grievous hurt cannot be supported as these incidents cannot be contended to form part of the same transaction as according to the prosecution case they occurred at different times and in different places during

the same night and there was no evidence to suggest any connection between them and that the proper procedure to be adopted is to frame two separate charges under sec. 302, I. P. C., against the accused in respect of the deaths of his wife and sister's husband in one trial under the provisions of sec. 234, Cr. P. C., and to hold a separate trial in respect of the offence of grievous hurt—*Afsaruddin Naseraddi*, supra. But see *Ganganna v. Emp.*, 1937 M.W.N. 463 where, under similar circumstances, two murders were held to have been committed in the course of the same transaction. See also *Fauzi*, cited in Note 758 (9). A single head of charge under secs. 302/149, I. P. C., in respect of three persons killed in the same transaction, is illegal. The High Court thought it unsafe to uphold the conviction thereunder without going through all the facts to arrive at new findings for itself—*Azimuddy*, 54 Cal. 237 (248).

A charge of murder should set forth whether the blows inflicted were inflicted with the intention of causing death or they were sufficient in the ordinary course of nature to cause death and were intentionally inflicted. A charge under sec. 302, I. P. C., should follow the language of sec. 300, I. P. C., which contains the definition of murder—*Sheo Shankar*, 27 Cr.L.J. 62, 91 I.C. 238, 2 O.W.N. 862, AIR 1926 Oudh 148.

Where the enquiring Magistrate committed the accused for trial of an offence under sec. 304, I. P. C., but the Sessions Judge altered the section to one under sec. 302, I. P. C., without changing the substance of the charge which remained the same, held that the trial was not a mere irregularity but an illegality not curable by sec. 537, Cr. P. C., and that the substance of the charge was stated in words and the matter was not cured by the mention of sec. 302, I. P. C.—*Satnaram Lal*, AIR 1935 Pat. 431, 16 P.L.T. 526, 36 Cr.L.J. 1506, 158 I.C. 1129, 1935 Cr.C. 1102.

Section 304, I. P. C., is divided into two parts. It is desirable that in the charge under this section so much of the definition of offence should be stated as to give the accused clear notice of the exact matter with which he is charged—*Ditto*, AIR 1935 Sind 23, 28 S.L.R. 295. But see *Nga Tha Aye*, AIR 1935 Rang. 299, where it has been laid down that the question of intention or knowledge should never be mentioned in a charge of homicide.

Dacoity:—Alternative charges under secs. 395 and 457, I. P. C., are not bad in law—*Bikram Ali*, 31 Cr.L.J. 610, 124 I.C. 66, 50 C.L.J. 467, AIR 1930 Cal. 139, 57 Cal. 801, 1930 Cr.C. 139. See also *Gaur Mallu*, cited in Note 725.

Defamation:—The charge should contain the name of the person whose reputation is injuriously affected—Weir, 3rd Edn., 357.

The plea that there was publication but not publication to the person mentioned in the charge is highly technical. The defect in the charge, if any, can be cured by sec. 537, Cr. P. C.—*Tikamdas*, 27 Cr.L.J. 947, 96 I.C. 499, AIR 1927 Sind 58.

The joint trial of more persons than one who are associated together in circulating on different occasions defamatory statements with the common object of injuring the complainant, is not illegal—*Ali Mahomed*, 30 Cr.L.J. 1073 (1074), 119 I.C. 532, AIR 1930 Sind 62, Ind. Rul. 1929 Sind 212. See Notes 725 and 779 (11).

False statements:—It is not proper to frame a single charge in respect of two or three statements alleged to be false. The proper course is that each distinct offence should be the subject of a distinct charge—*Ramdin Lal v. Emp.*, 38 Cr.L.J. 97 (98), 165 I.C. 970, 9 R.P. 246, 3 B.R. 117, 18 P.L.T. 91, AIR 1937 Pat. 176. See Notes 745 and 775.

Falsification of accounts:—A charge of falsification of accounts should specify the particular accounts which have been falsified. A charge containing a vague and general allegation of falsification is irregular—*Matji Lal*, 26 Cal. 560 (563). See Notes 726 and 754.

Forgery:—Where the charge under sec. 467, I. P. C., did not set out the intention of the accused, the charge is vitiated—*Haider Ali*, 17 C.W.N. 354, 14 Cr.L.J. 129.

House Trespass:—A comparison of secs. 456 and 457, I. P. C., would go to show that no specification of the intention is necessary for a conviction under the former section, though it must be proved that the intention was a guilty one. It is only where the charge is under sec. 457 that the intention is to be specifically alleged and proved—*Balmakand v. Ghanasam*, 22 Cal. 391 (403). To sustain a conviction under sec. 456, I. P. C., it is not necessary to specify the criminal intention in the charge; it is sufficient if a guilty intention is proved, such as is contemplated by sec. 441, I. P. C.—*Karali Prasad*, 44 Cal. 358 (364), distinguishing *Jharu*, 16 C.W.N. 696, where it has been laid down that although it is not necessary under sec. 456, I. P. C., to specify any particular offence, when such particular offence is specified under sec. 457, I. P. C., it is incompetent for the Court to convict of house-breaking with some other intent. Though it cannot be laid down as a general rule that in all cases a prosecution for house-trespass with the alleged object of theft must fail if the object is not proved, when a charge has been definitely framed in which theft is alleged, the accused cannot be convicted of house-trespass with some other object without an amendment of the original charge unless the Court is satisfied that he has not been in any way prejudiced in his defence by the omission to amend the charge—*Hajari Sonar*, 26 C.W.N. 344, 24 Cr.L.J. 119, 71 I.C. 247. See also *Mahomed Hossain*, 41 Cal. 743, 18 C.W.N. 1247 and *Lala*, 12 Cr.L.J. 483, 12 I.C. 91, 23 P.W.R. 1911 (Cr.).

A charge under sec. 457, I. P. C., stating that the accused did a particular act in order to commit a particular offence "or any other offence punishable with imprisonment" is improper as the accused should know the specific offence with which he is charged. The defect is, however, cured by sec. 537, Cr. P. Code—*Balaram*, 25 Cr.L.J. 1186, 62 I.C. 50, A.I.R. 1925 Cal. 160. See Note 768.

Hurt:—Where only one charge was framed against the accused in respect of the hurt caused to two persons, *held* that the omission to frame two separate charges was an irregularity cured by sec. 537, Cr. P. Code—*Ram Subheg*, 19 C.W.N. 972, 16 Cr.L.J. 641.

A Magistrate will be well advised if he frames two separate charges for grievous hurt inflicted on one person and for simple hurt inflicted on another. To frame a single charge for these offences is a formal defect curable by sec. 537, Cr. P. Code—*Meudi Lal*, 35 Cr.L.J. 935, 149 I.C. 231, A.I.R. 1934 Oudh 244, 11 O.W.N. 680. A single head of charge alleging offences under secs. 323 and 325, read with sec. 149, I. P. C., and a single head of charge of several offences under sec. 353, I. P. C., the offences mentioned in the two charges having been committed against different persons in the course of the same transaction, are illegal as contravening the provisions of sec. 233, Cr. P. C., and the High Court, to be on the safe side, set aside the convictions on the charges. There was, however, no illegality in maintaining the conviction under the remaining charge which was not open to objection—*Radhanath*, 50 Cal. 94. Two accused were charged jointly under sec. 324, I. P. C., for causing hurt to three different persons with a *dao* and were convicted under that section. The Appellate Court altered the conviction to one under sec. 352, I. P. C., as regards one of the accused for using *lathi* against two of them. *Held* that the irregularity in the charge might have prejudiced the accused in their trial and that they should be tried by a different Magistrate—*Sital Chandra*, 17 C.W.N. 419, 14 Cr.L.J. 212, 19 I.C. 308.

Where the accused is called upon to meet a charge under sec. 353, I. P. C., he cannot, on failure of that charge, be convicted under sec. 352, I. P. C., for assaulting a witness who did not even lodge any complaint—*Akbar Momin*, 6 C.W.N. 202.

Perjury:—In charges of false evidence under sec. 193, I. P. C., it is most important that the accused should know exactly what words or expressions he is charged with having uttered, and in what respect they are supposed to be false—*Dowlut Moonshee*, 8 W.R. 95 (Cr.). In a case of giving false evidence the charge should show the particular matter in respect of which the accused is put upon his trial. An accused is not properly tried upon a charge which merely sets out two long depositions made by him, which are in some respects contradictory to each other, leaving the person

charged to find out for himself in respect of which particular contradiction it is that he is said to have committed the offence of giving false evidence. No more of the accused's depositions ought to be set out, or referred to, than is necessary in order to show the particular contradictions or false statements in respect to which the offence of giving false evidence is charged—*Queen v. Soonder Mohoorree*, 9 W.R. 25 (Cr.). See also *Queen v. Udit Singh*, 25 W.R. 46 (Cr.). A charge under sec. 193, I. P. C., for giving false evidence in answer to certain questions in the course of a deposition, contained the questions and answers but did not specify which answers were alleged to be false. *Held* that the charge was defective—*Oates*, 38 C.L.J. 163, 25 Cr.L.J. 177, A.I.R. 1924 Cal. 104, 76 I.C. 417. It is irregular in a charge of intentionally giving false evidence to put the whole of a long statement bodily to a witness at once—*Isab Mandal*, 28 Cal. 348. Charges of perjury should contain a distinct assertion with regard to each statement intended to be characterised as perjury, that it was made, that it was untrue in fact, and that the accused knew it to be so when he made it; and the investigation of the Court should be directed to each of those points singly—*Queen v. Kalichurn Laharee*, 9 W.R. 54 (Cr.). It is the duty of a Magistrate making a commitment for giving false evidence to set out the precise words recorded, as used by the accused, containing the statement which he undertakes to prove false—*Queen v. Boodhun Ahur*, 17 W.R. 32 (Cr.). Charges of perjury ought to be based strictly upon the exact words which are used by the person who is charged. No evidence which does not profess to give those exact words can alone be a safe foundation for a conviction—*Queen v. Mungal Dass*, 23 W.R. 28 (Cr.). A criminal prosecution cannot go on such a vague charge as "You on or about the 7th day of May 1901 at Leslie gave false evidence in a judicial proceeding, namely, in a case under sec. 133 of the Code, and thereby committed an offence under sec. 193, I. P. C., within my cognizance"—*Hira Nand Ojha*, 10 C.W.N. 1099, 4 C.L.J. 558. A charge of perjury is drawn incorrectly when it charges the accused with having made statements in their depositions "which they knew or had reason to know to be false"—*Dwarkanath*, 34 Cr.L.J. 322 (329), 142 I.C. 335, 37 C.W.N. 514, 37 M.L.W. 584, 1933 M.W.N. 409, 1933 Cr.C. 442, 35 Bom.L.R. 507, 14 P.L.T. 305, 1933 A.L.J. 645, 57 C.L.J. 177, A.I.R. 1933 P.C. 124, 66 M.L.J. 466 (P.C.).

In framing a charge for giving false evidence under sec. 193, I. P. C., the charge should be precise, and where the accused is charged with giving false evidence on three different occasions, each occasion should form the subject of a distinct head in the charge—*Queen v. Fejdar Roy*, 9 W.R. 14. But the making of any number of false statements in the same deposition is one aggregate case of giving false evidence, and charges of false evidence cannot be multiplied according to the number of false statements contained in the deposition—*Rakhai Chandra*, 36 Cal. 808 (814), 9 C.L.J. 690, 10 Cr.L.J. 150, 12 C.W.N. 942, 2 I.C. 697, following 6 Mad.H.C. xxvii. For contra see *Sejmal*, 51 Bom. 310 (328), 29 Bom.L.R. 170, 28 Cr.L.J. 373.

It is wholly incorrect to charge a number of persons jointly with intentionally giving false evidence under sec. 193, I. P. Code. A charge under that section should show what the statement is which the accused persons or any one of them are alleged to have made, and it should disclose the exact date on which the offence charged was committed, and the Court or officer before whom the false evidence was given—*Queen v. Moharaj Misser*, 16 W.R. 47 (Cr.).

As for the joint trial see Note 775. See also Note 763.

Provoking a breach of the peace:—In a case under sec. 504, I. P. Code, where the accused was perfectly aware of the words complained of, for using which he was being tried, the failure of the Magistrate to specifically mention the objectionable words in the charge did not vitiate the trial as the accused was not in any way prejudiced by such omission—*Shankar Lal*, 28 Cr.L.J. 821 (822), 104 I.C. 437, A.I.R. 1927 Lah. 702, 9 Lah. 280, 29 P.L.R. 469.

Publication of Obscene Books:—In a charge for having published an obscene book the particular passages alleged to be obscene should be specified; but omission to do

so is not fatal to the trial if the accused is not prejudiced—*Kailash Chandra*, 36 C.W.N. 985, 33 Cr.L.J. 771, 56 C.L.J. 123, 139 I.C. 461, A.I.R. 1932 Cal. 651, 1932 Cr.C. 608, Ind. Rul. 1932 Cal. 623.

Rioting:—It is not necessary in a charge of rioting to set out the allegation that there were five or more persons actuated by a common object. Rioting is an offence with a specific name and it is sufficient to describe the offence by that name and that name only. Section 222, cl. (2), Cr. P. C., clearly contemplates a case of this description and was enacted to meet a case of this kind. Where a person is charged with rioting it means that prosecution alleges that all the necessary ingredients constituting the offence of rioting are present. It is not necessary for the prosecution to set out what these ingredients are.—*Ram Chandra*, 29 Cr.L.J. 823 (825), 111 I.C. 327, 55 Cal. 879, A.I.R. 1928 Cal. 732. See also *Kudrutulla*, 39 Cal. 781, 13 Cr.L.J. 218, 14 I.C. 314. Where the charge sheet simply charged the accused with rioting and voluntarily causing simple hurt without explaining what rioting meant, the irregularity in the charge sheet was certainly cured by the provisions of sec. 535 or 537, Cr. P. C., as there was no prejudice to the accused all of whom were represented by Counsel.—*Deep Chand*, 36 Cr.L.J. 1260, 157 I.C. 915, A.I.R. 1935 All. 627, 1935 A.L.J. 666, 1935 Cr.C. 641.

In a charge of rioting, the common object of the unlawful assembly should be specified; otherwise the accused cannot be properly convicted of rioting.—*Tafazzul Ahmed*, 26 Cal. 630; *Behari*, 11 Cal. 105; *Paresh Nath*, 33 Cal. 295. The common object should always be stated when a charge is framed under sec. 143, I. P. C., or the connected sections—*Kashi v. Damu*, 25 Cr.L.J. 524, 77 I.C. 988, 27 C.W.N. 28. In all cases in which there is a charge under sec. 147, I. P. C., the common object ought to be stated. But where the common object is not stated and a conviction has been had upon the charge the conviction is not necessarily bad. It is necessary to see whether or not the accused has been misled by the omission and the omission has caused a failure of justice.—*Budhu v. Lachmina*, 9 C.W.N. 599. Failure to specify the common object in a charge under sec. 147, I. P. C., is only an irregularity covered by sec. 537, Cr. P. C.—*Bishnath*, 36 Cr.L.J. 1198, 157 I.C. 378, 1935 O.W.N. 922, A.I.R. 1935 Oudh 488, 1935 O.L.R. 471; *Ghazi-Din*, 9 O.W.N. 1109, 142 I.C. 684, A.I.R. 1933 Oudh 19, 1933 Cr.C. 57, Ind. Rul. 1933 Oudh 127, 34 Cr.L.J. 393. The failure to specify the common object in a charge under sec. 145, I. P. C., would not be fatal to the trial if it can be shown that there was ample evidence on the record to prove what the common object of the assembly was.—*Ramchandra Narayan*, A.I.R. 1931 Bom. 520, 55 Bom. 725, 33 Bom.L.R. 1169, 1931 Cr.C. 952, 134 I.C. 1226, 33 Cr.L.J. 64; *Kudrutulla*, supra. See also the rulings cited in paragraph 2 of Note 730. As a matter of law it is otherwise with a charge under sec. 149, I. P. C. When there is no specific name for the offence, and the fact that any offence is committed, in prosecution of the common object, is of the essence of the case and there could be no conviction for any offence committed with a different common object. It is, therefore, obligatory to set out the common object in a charge under sec. 149, unless it has been already specified in the main charge under sec. 147.—*Kudrutulla*, supra.

Where there are two objects of an unlawful assembly, both the objects must be specified and not one. If the charge against the accused mentions only one common object of an unlawful assembly but the Judge in his charge to jury propounds two different common objects, the trial is illegal and the conviction must be set aside.—*Sabir*, 22 Cal. 276. See also *Allah Dad*, 25 Cr.L.J. 43, 75 I.C. 731, A.I.R. 1924 Lah. 667.

Where the common object of the unlawful assembly is to take possession of some property, the property must be specified in the charge.—*Paresh Nath*, 33 Cal. 295. No doubt, in some cases it is said when there is dispute and uncertainty as to possession of the parties it is better to frame a charge of rioting with the common object of assault; but in all cases the principal and the prominent common object should form the subject of the charge and not the incidental happenings.—*Aklu Mian*, 29 Cr.L.J. 390 (393), 108 I.C. 421, A.I.R. 1928 Pat. 405. It is one thing to say that the common object was

to get possession of the disputed land, it is quite another to say that the common object was to beat apparently for the mere pleasure of beating. It is quite wrong to include those two contradictory cases at the same trial even more so in one charge—*Alkasulla*, A.I.R. 1936 Cal. 429, 40 C.W.N. 1409, 38 Cr.L.J. 68, 165 I.C. 666, 1936 Cr.C. 654, 9 R.C. 444. In a charge of an offence of rioting it is quite sufficient to say that the common object was to assault a person or persons. It is the usual form of charge when the common object is to do violence to some person. It is immaterial whether the offence to commit which there was a common object was assault, simple hurt, or grievous hurt—*Chhauka Dhanuk*, 28 Cr.L.J. 769, 101 I.C. 97, A.I.R. 1927 Pat. 398, 6 Pat. 832, 8 P.L.T. 825

It cannot be laid down as a general proposition of law that a conviction under sec. 147 cannot be supported whenever the common object as stated in the charge is not precisely made out. The question in each individual case is whether the common object established agrees in essential particulars with the common object as stated in the charge. Where the common object, as stated in the charge, was to assault the complainant and his men who were cutting the paddy of their land and thereby to oust them from the land but the common object established upon the evidence was to maintain possession of the land by the accused persons, *held* that the common object, as stated in the charge, was not substantially established and that the conviction under sec. 147, I. P. C., was, therefore, bad—*Silajit Mahlo*, 36 Cal. 865, 13 C.W.N. 853. Where the common object mentioned in a charge under sec. 147, I. P. C., was one of causing hurt to the complainant but the conviction was for causing hurt to another person, *held* that the conviction under sec. 147, I. P. C., was illegal and that secs. 535 and 537 (a) did not apply to such a case—*Sita Ahir*, 40 Cal. 168. Where the accused were convicted of rioting with the common object of assaulting the complainant but it was found that the common object could not be to assault the complainant but to set fire to a house, *held* that the accused were entitled to an acquittal as the charge laid in the case had not been established against them—*Aklu Mian*, 29 Cr.L.J. 390, 108 I.C. 421, A.I.R. 1928 Pat. 405. The Magistrate convicted the accused of rioting, the common object of the unlawful assembly being the forcible taking away of mangoes belonging to the complainant. On appeal the Sessions Judge affirmed the conviction, holding that the common object was not the taking of mangoes but that it was something else. *Held* that as the accused were convicted on a different finding of fact from that to which they were called upon to plead and to defend themselves at the trial they were entitled to an acquittal—*Rahimuddin v. Asgar Ali*, 27 Cal. 990. Where the common object of an unlawful assembly is stated in the charge to have been to cause obstruction to measurement and demarcation of *khas mahal* land, *held*, that if it was not established affirmatively that the land on which the alleged riot took place was in the actual possession of the Government, the charge as laid was not proved—*Panchanan*, 30 C.L.J. 19.

Where the accused were charged with rioting with intent to dispossess the complainant from certain land and were found by the Magistrate guilty of rioting with the same intent but the Sessions Judge, on appeal, thought that the question of possession of the land was not clear and upheld the conviction, holding that they committed rioting with the intention of enforcing their rights or supposed rights to the land, *held* that the difference between the common object charged by the Magistrate and that held by the Judge to have actuated the accused was very slight and that as both common objects raised the same question of law and the accused had not been in any way prejudiced in their defence, the conviction was not bad—*Maniruddin*, 12 C.W.N. 579, 35 Cal. 381, 7 Cr.L.J. 374. Regard being had to the provisions of sec. 225, Cr. P. C., a conviction under sec. 147, I. P. C., is not illegal although the charge against the accused referred to the taking of paddy from the land of B while paddy was actually taken from the land of K who was examined as a witness in the case, as the accused were not in any way prejudiced by the omission in the charge of any reference to K's land to which the Judge referred in his summing up—*Rahamt Ali*, 4 C.W.N. 195.

Where in a prosecution for an offence under sec. 147, I. P. C., the common object charged was by means of criminal force to obtain possession of certain lands which comprised two plots and it was found by the Court that the offence was committed for obtaining possession of one of those plots, *held* that the variance between the common object alleged and that proved was not such as to invalidate the conviction—*Babbon*, 14 C.W.N. 422 (425). The accused were charged under sec. 147, I. P. C., with the common object of abducting the complainant's wife and were convicted under that section. They were also charged under secs. 366 and 498, I. P. C., and were acquitted of those offences. The Sessions Judge directed the jury that, if they found that she was abducted by dragging her by the hand or the hair, then such abduction would amount to offences under secs. 341 and 352, I. P. C. *Held* that the conviction under sec. 147, I. P. C., with the common object of abduction under circumstances constituting the offences under secs. 341 and 352, I. P. C., was legal, as the latter offences were minor offences within sec. 238, Cr. P. C., involved in the charge of rioting as actually framed—*Torap Ali*, 53 Cal. 599.

To comply strictly with the law a Court trying an accused person for an offence which is an offence by force of sec. 149, I. P. C., ought to state, that fact and name that section in the charge—*Thaikkottathil*, 25 Cr.L.J. 212 (214), 76 I.C. 614, 18 M.L.W. 946, 33 M.L.T. 210, 1924 M.W.N. 47, A.I.R. 1924 Mad. 338. See also Note 766.

Sedition:—In a charge of sedition, the actual seditious words need not be set out in the charge if the substance of the words is given—*Ahmed*, 1 S.L.R. 14, 9 Cr.L.J. 256. Even though the substance of the speeches is not given, still if the allegations made by the prosecution are of a simple nature, and the accused is not under a misapprehension as to the nature of the charge, the defect in the charge is not material—*Chint Ram*, 32 P.L.R. 13, 32 Cr.L.J. 1202 (1203), 134 I.C. 580, A.I.R. 1931 Lah. 186, 1931 Cr.C. 206, Ind. Rul. 1931 Lah. 964. See also Note 730.

In cases of sedition the printer and publisher are concerned in the same transaction in regard to the publication of the seditious matter and they may be tried jointly in proper cases—*Shantaram*, A.I.R. 1928 Bom. 139, 30 Bom.L.R. 320, 29 Cr.L.J. 683, 110 I.C. 235.

Stolen property:—Where the charge did not specify the particular articles for the possession of which each of the accused was being prosecuted, the charge was no doubt defective but the defect was covered by sec. 537, Cr. P. C., unless it was shown that the accused were prejudiced on account of this defect in the charge—*Shakur*, 35 Cr.L.J. 1206, 157 I.C. 562, 1935 O.W.N. 911.

Theft:—A charge of theft of electricity in a general form that the accused committed theft between two given dates, when in fact a multiplicity of separate offences committed on particular dates are alleged, is most irregular and regrettable, but the defect does not vitiate the conviction when the specific offences are satisfactorily proved by competent evidence, corroborated in all necessary respects. In addition the irregularity was such as could be, and was cured by secs. 225 and 537, Cr. P. C., by the finding that the accused had not been prejudiced—*Babul Choukhani*, 42 C.W.N. 621 (629), 174 I.C. 1, A.I.R. 1938 P.C. 130, 39 Cr.L.J. 452, 1938 A.L.R. 309, 1938 A.L.J. 382, 4 B.R. 490, 10 R.P.C. 250, 19 P.L.T. 343, (1938) 1 M.L.J. 647, 1938 O.W.N. 416, 1938 O.L.R. 189, 1938 M.W.N. 505, 67 C.L.J. 162 (P.C.).

Unnatural offence:—See Note 725.

Subject matter of offence:—Where the law and the section as well as the words of the section are mentioned in the charge, the subject matter of the offence need not be specified. Thus, where the illegal act charged is the unlawful and malicious possession of explosive substances within the meaning of sec. 4 of the Explosive Substances Act, it is not essential to specify in the charge the explosive substance which the accused had in their possession—*Amrita Lal*, 42 Cal. 957, 19 C.W.N. 676, 16 Cr.L.J. 497, 21 C.L.J. 331, 29 I.C. 513.

Liability of whipping :—Where the accused is liable to be punished under the Whipping Act, the charge must state the liability—*Baidya*, 5 Mad. 158

"Law and section of the law" :—In framing a charge the Court should adhere to the language of the section, as far as practicable—*Amritalal*, supra; *Chhakari*, 26 Cr.L.J. 567, 85 I.C. 711, A.I.R. 1926 Cal 439 It is not sufficient merely to charge the accused in the bare words of a section of the Code; particulars must always be given sufficient to give him notice of the matter with which he is charged—*Rajabuddin*, 37 C.W.N. 1074 (1075), 34 Cr.L.J. 1219, 146 I.C. 305, A.I.R. 1933 Cal 675, 1933 Cr.C. 1158 Where the law and section were mentioned in the charge, and the accused fully understood the nature of the offence with which they were charged, the omission of the words "unlawfully" and "maliciously" and "in British India" occurring in the section was held not so material as to prejudice the accused—*Amritalal*, supra Where the accused knew full well what the charge he would have to meet was, his conviction would not be illegal even if there was any mistake in the number of sections of the Act in as much as the accused cannot be said to have in any way been prejudiced thereby—*H. B. Spiers v. Johiuddin*, Ind Rul. 1932 Cal 419, A.I.R. 1932 Cal. 461, 1932 Cr.C. 451, 33 Cr.L.J. 549, 138 I.C. 98, 36 C.W.N. 246, 59 Cal. 113 But see *Lal Chand*, 35 Cr.L.J. 1161, 11 O.W.N. 828, 1934 Cr.C. 1156, A.I.R. 1934 Oudh 370, 150 I.C. 941.

Section 34, I. P. C., does not create any offence but merely sets out in what circumstances a person can be held liable for an act done by himself and others as if it had been done by him alone It is, therefore, not essential that the words of sec 34 should be incorporated in the charge, although it is desirable that some reference should be made to the common intention alleged against the accused and their confederator. If, however, it is clear that the accused could have been in no doubt as to the nature of the facts alleged against them, then it is immaterial if there is no definite reference in the charge of this common intention, for the accused can have in no wise been misled in their defence—*Nga Tha Htin*, A.I.R. 1935 Rang 304

724. Sub-section (7)—Previous conviction :—The prosecution is bound to prove the previous conviction, and the identity of the accused with the person previously convicted—*Yippaka Daligadu*, 2 Weir 266 Where the fact of previous conviction is not mentioned in the charge, it cannot be used for the purpose of enhancing the sentence—*Annaji*, Ratanlal 70; *Hardar*, 1883 A.W.N. 110, e.g., for the purpose of adding the sentence of whipping to imprisonment—*Anonymous*, 2 Weir 265 (266) and 267 (268) In *Abbulu*, 7 M.L.T. 77, 11 Cr.L.J. 217, 5 I.C. 743, and *Bisakhi*, 1917 P.R. 29, 18 Cr.L.J. 875 (878), however, it is held that the omission to set out the previous conviction in the charge is not a sufficient reason for interfering with the enhanced sentence in appeal or revision, unless there has been a failure of justice by reason of such omission. See sec. 535 Where the accused was at the time lying under sentence of the previous conviction referred to, the omission to mention the particulars of the previous conviction would in no way prejudice the accused and would afford no ground for interfering with the enhanced sentence—*Raghub Ali*, 1881 A.W.N. 32. The omission to state the fact, date and place of previous conviction is not material where the previous conviction was put to the accused and admitted by him before judgment was passed—*Nga Hla*, 8 L.B.R. 461, 18 Cr.L.J. 79, 37 I.C. 63

When a person is charged with previous conviction, it is not sufficient to state that the accused is an 'old offender', as that does not sufficiently bring home to the accused person the particular offence or class of offences which renders him liable to a more severe sentence than would otherwise be imposed—*Yippikka*, 2 Weir 226

The previous conviction must be entered in the charge and the accused should be called on to plead thereto; the mere admission by the accused that he had once been in jail is insufficient to show that he pleaded guilty to the charge of previous conviction—*Govind Sakharani*, 4 Bom.L.R. 177.

In passing an order under sec 565 it is not necessary that the details of the previous conviction should be mentioned in the charge—*Jhargu*, 9 N.L.R. 88, 14 Cr.L.J. 390, 20 I.C. 314 (cited under sec. 565).

Where in a prosecution for an offence under sec. 147, I. P. C.; the common object charged was by means of criminal force to obtain possession of certain lands which comprised two plots and it was found by the Court that the offence was committed for obtaining possession of one of those plots, *held* that the variance between the common object alleged and that proved was not such as to invalidate the conviction—*Babbon*, 14 C.W.N. 422 (425). The accused were charged under sec. 147, I. P. C., with the common object of abducting the complainant's wife and were convicted under that section. They were also charged under secs. 366 and 498, I. P. C., and were acquitted of those offences. The Sessions Judge directed the jury that, if they found that she was abducted by dragging her by the hand or the hair, then such abduction would amount to offences under secs. 341 and 352, I. P. C. *Held* that the conviction under sec. 147, I. P. C., with the common object of abduction under circumstances constituting the offences under secs. 341 and 352, I. P. C., was legal, as the latter offences were minor offences within sec. 238, Cr. P. C., involved in the charge of rioting as actually framed—*Torap Ali*, 53 Cal 599.

To comply strictly with the law a Court trying an accused person for an offence which is an offence by force of sec. 149, I. P. C., ought to state that fact and name that section in the charge—*Thaikkottathil*, 25 Cr.L.J. 212 (214), 76 I.C. 644, 18 M.L.W. 946, 33 M.L.T. 210, 1924 M.W.N. 47, A.I.R. 1924 Mad. 338. See also Note 766

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Subject matter of offence:—Where the law and the section as well as the words of the section are mentioned in the charge, the subject matter of the offence need not be specified. Thus, where the illegal act charged is the unlawful and malicious possession of explosive substances within the meaning of sec. 4 of the Explosive Substances Act, it is not essential to specify in the charge the explosive substance which the accused had in their possession—*Amrita Lal*, 42 Cal. 957, 19 C.W.N. 676, 16 Cr.L.J. 497, 21 C.L.J. 331, 29 I.C. 513.

Liability of whipping :—Where the accused is liable to be punished under the Whipping Act, the charge must state the liability—*Baidya*, 5 Mad. 158.

"Law and section of the law" :—In framing a charge the Court should adhere to the language of the section, as far as practicable—*Amritlal*, supra; *Chhakari*, 26 Cr.L.J. 567, 85 I.C. 711, A.I.R. 1926 Cal 439. It is not sufficient merely to charge the accused in the bare words of a section of the Code: particulars must always be given sufficient to give him notice of the matter with which he is charged—*Rajabuddin*, 37 C.W.N. 1074 (1075), 34 Cr.L.J. 1219, 146 I.C. 305, A.I.R. 1933 Cal. 675, 1933 Cr.C. 1158. Where the law and section were mentioned in the charge, and the accused fully understood the nature of the offence with which they were charged, the omission of the words "unlawfully" and "maliciously" and "in British India" occurring in the section was held not so material as to prejudice the accused—*Amritlal*, supra. Where the accused knew full well what the charge he would have to meet was, his conviction would not be illegal even if there was any mistake in the number of sections of the Act in as much as the accused cannot be said to have in any way been prejudiced thereby—*H. B. Spiers v. Johiuddin*, Ind Rul 1932 Cal. 419, A.I.R. 1932 Cal 461, 1932 Cr.C. 451, 33 Cr.L.J. 549, 138 I.C. 98, 36 C.W.N. 246, 59 Cal. 113. But see *Lal Chand*, 35 Cr.L.J. 1161, 11 O.W.N. 828, 1934 Cr.C. 1156, A.I.R. 1934 Oudh 370, 150 I.C. 941.

Section 34, I. P. C., does not create any offence but merely sets out in what circumstances a person can be held liable for an act done by himself and others as if it had been done by him alone. It is, therefore, not essential that the words of sec. 34 should be incorporated in the charge, although it is desirable that some reference should be made to the common intention alleged against the accused and their confederator. If, however, it is clear that the accused could have been in no doubt as to the nature of the facts alleged against them, then it is immaterial if there is no definite reference in the charge of this common intention, for the accused can have in no wise been misled in their defence—*Nga Tha Htin*, A.I.R. 1935 Rang 304.

724. Sub-section (7)—Previous conviction :—The prosecution is bound to prove the previous conviction, and the identity of the accused with the person previously convicted—*Yippaka Dalgadu*, 2 Weir 266. Where the fact of previous conviction is not mentioned in the charge, it cannot be used for the purpose of enhancing the sentence—*Annaji*, Ratanlal 70, *Haider*, 1883 A.W.N. 110; e.g. for the purpose of adding the sentence of whipping to imprisonment—*Anonymous*, 2 Weir 265 (266) and 267 (268). In *Abbulu*, 7 M.L.T. 77, 11 Cr.L.J. 217, 5 I.C. 743, and *Bisakhi*, 1917 P.R. 29, 18 Cr.L.J. 875 (878), however, it is held that the omission to set out the previous conviction in the charge is not a sufficient reason for interfering with the enhanced sentence in appeal or revision, unless there has been a failure of justice by reason of such omission. See sec 535. Where the accused was at the time lying under sentence of the previous conviction referred to, the omission to mention the particulars of the previous conviction would in no way prejudice the accused and would afford no ground for interfering with the enhanced sentence—*Raghub Ali*, 1881 A.W.N. 32. The omission to state the fact, date and place of previous conviction is not material where the previous conviction was put to the accused and admitted by him before judgment was passed—*Nga Hla*, 8 L.B.R. 461, 18 Cr.L.J. 79, 37 I.C. 63.

When a person is charged with previous conviction, it is not sufficient to state that the accused is an 'old offender', as that does not sufficiently bring home to the accused person the particular offence or class of offences which renders him liable to a more severe sentence than would otherwise be imposed—*Yippikka*, 2 Weir 225.

The previous conviction must be entered in the charge and the accused should be called on to plead thereto; the mere admission by the accused that he had once been in jail is insufficient to show that he pleaded guilty to the charge of previous conviction—*Govind Sakharani*, 4 Bom.L.R. 177.

In passing an order under sec 565 it is not necessary that the details of the previous conviction should be mentioned in the charge—*Jhargu*, 9 N.L.R. 88, 14 Cr.L.J. 390, 20 I.C. 314 (cited under sec. 565).

Where in a prosecution for an offence under sec. 147, I. P. C., the common object charged was by means of criminal force to obtain possession of certain land which comprised two plots and it was found by the Court that the offence was committed for obtaining possession of one of those plots, *held* that the variance between the common object alleged and that proved was not such as to invalidate the conviction—*Babbon*, 14 C.W.N. 422 (425). The accused were charged under sec. 147, I. P. C., with the common object of abducting the complainant's wife and were convicted under that section. They were also charged under secs. 366 and 498, I. P. C., and were acquitted of those offences. The Sessions Judge directed the jury that, if they found that she was abducted by dragging her by the hand or the hair, then such abduction would amount to offences under secs. 341 and 352, I. P. C. *Held* that the conviction under sec. 147, I. P. C., with the common object of abduction under circumstances constituting the offences under secs. 341 and 352, I. P. C., was legal, as the latter offences were minor offences within sec. 238, Cr. P. C., involved in the charge of rioting as actually framed—*Torap Ali*, 53 Cal. 599.

To comply strictly with the law a Court trying an accused person for an offence which is an offence by force of sec. 149, I. P. C., ought to state that fact and name that section in the charge—*Thaikkottathil*, 25 Cr.L.J. 212 (214), 76 I.C. 614, 18 M.L.W. 946, 33 M.L.T. 210, 1924 M.W.N. 47, A.I.R. 1924 Mad. 338. See also Note 766.

Sedition:—In a charge of sedition, the actual seditious words need not be set out in the charge if the substance of the words is given—*Ahmed*, 1 S.L.R. 14, 9 Cr.L.J. 25. Even though the substance of the speeches is not given, still if the allegations made in the prosecution are of a simple nature, and the accused is not under a misapprehension as to the nature of the charge, the defect in the charge is not material—*Chint Ram*, 32 P.L.R. 13, 32 Cr.L.J. 1202 (1203), 134 I.C. 580, A.I.R. 1931 Lah. 186, 1931 Cr. 206, Ind. Rul. 1931 Lah. 964. See also Note 730.

In cases of sedition the printer and publisher are concerned in the same transaction in regard to the publication of the seditious matter and they may be tried jointly in proper cases—*Shantaram*, A.I.R. 1928 Bom. 139, 30 Bom.L.R. 320, 29 Cr.L.J. 6, 110 I.C. 235.

Stolen property:—Where the charge did not specify the particular articles the possession of which each of the accused was being prosecuted, the charge was doubt defective but the defect was covered by sec. 537, Cr. P. C., unless it was shown that the accused were prejudiced on account of this defect in the charge—*Shakur*, Cr.L.J. 1206, 157 I.C. 562, 1935 O.W.N. 911.

Theft:—A charge of theft of electricity in a general form that the accused committed theft between two given dates, when in fact a multiplicity of separate offences committed on particular dates are alleged, is most irregular and regrettable but the defect does not vitiate the conviction when the specific offences are satisfactorily proved by competent evidence, corroborated in all necessary respects. In addition irregularity was such as could be, and was cured by secs. 225 and 537, Cr. P. C., the finding that the accused had not been prejudiced—*Babulal Choukhani*, 42 C.W. 621 (629), 174 I.C. 1, A.I.R. 1938 P.C. 130, 39 Cr.L.J. 452, 1938 A.L.R. 309, 1 A.L.J. 382, 4 B.R. 490, 10 R.P.C. 250, 19 P.L.T. 343, (1938) 1 M.L.J. 647, 1938 O.V. 416, 1938 O.L.R. 189, 1938 M.W.N. 505, 67 C.L.J. 162 (P.C.).

Unnatural offence:—See Note 725.

Subject matter of offence:—Where the law and the section as well as the word in the section are mentioned in the charge, the subject matter of the offence need not be specified. Thus, where the illegal act charged is the unlawful and malicious possession of explosive substances within the meaning of sec. 4 of the Explosive Substances Act, it is not essential to specify in the charge the explosive substance which the accused had in their possession—*Amrita Lal*, 42 Cal. 957, 19 C.W.N. 676, 16 Cr.L.J. 497, 21 C. 331, 20 I.C. 513.

Liability of whipping :—Where the accused is liable to be punished under the Whipping Act, the charge must state the liability—*Baidya*, 5 Mad. 158.

"Law and section of the law" :—In framing a charge the Court should adhere to the language of the section, as far as practicable—*Amritlal*, supra; *Chhakari*, 26 Cr.L.J. 567, 85 IC 711, AIR. 1926 Cal 439. It is not sufficient merely to charge the accused in the bare words of a section of the Code. particulars must always be given sufficient to give him notice of the matter with which he is charged—*Rajabuddin*, 37 C.W.N. 1074 (1075), 34 Cr.L.J. 1219, 146 IC. 305, AIR. 1933 Cal 675, 1933 Cr.C. 1158. Where the law and section were mentioned in the charge, and the accused fully understood the nature of the offence with which they were charged, the omission of the words "unlawfully" and "maliciously" and "in British India" occurring in the section was held not so material as to prejudice the accused—*Amritlal*, supra. Where the accused knew full well what the charge he would have to meet was, his conviction would not be illegal even if there was any mistake in the number of sections of the Act in as much as the accused cannot be said to have in any way been prejudiced thereby—*H. B. Spiers v. Johiuddin*, Ind. Rul. 1932 Cal 419, AIR. 1932 Cal 461, 1932 Cr.C. 451, 33 Cr.L.J. 549, 138 IC. 98, 36 C.W.N. 246, 59 Cal 113. But see *Lal Chand*, 35 Cr.L.J. 1161, 11 O.W.N. 828, 1934 Cr.C. 1156, AIR 1934 Oudh 370, 150 IC. 941.

Section 34, I P. C., does not create any offence but merely sets out in what circumstances a person can be held liable for an act done by himself and others as if it had been done by him alone. It is, therefore, not essential that the words of sec. 34 should be incorporated in the charge, although it is desirable that some reference should be made to the common intention alleged against the accused and their confederator. If, however, it is clear that the accused could have been in no doubt as to the nature of the facts alleged against them, then it is immaterial if there is no definite reference in the charge of this common intention, for the accused can have in no wise been misled in their defence—*Nga Tha Htin*, AIR 1935 Rang 304.

724. Sub-section (7)—Previous conviction :—The prosecution is bound to prove the previous conviction, and the identity of the accused with the person previously convicted—*Yippaka Daligadu*, 2 Weir 266. Where the fact of previous conviction is not mentioned in the charge, it cannot be used for the purpose of enhancing the sentence—*Annaji*, Ratanlal 70; *Hasdar*, 1883 A.W.N. 110; e.g., for the purpose of adding the sentence of whipping to imprisonment—*Anonymous*, 2 Weir 265 (266) and 267 (268). In *Abbulu*, 7 M.L.T. 77, 11 Cr.L.J. 217, 5 IC 743, and *Bisakhi*, 1917 P.R. 29, 18 Cr.L.J. 875 (878), however, it is held that the omission to set out the previous conviction in the charge is not a sufficient reason for interfering with the enhanced sentence in appeal or revision, unless there has been a failure of justice by reason of such omission. See sec 535. Where the accused was at the time lying under sentence of the previous conviction referred to, the omission to mention the particulars of the previous conviction would in no way prejudice the accused and would afford no ground for interfering with the enhanced sentence—*Raghib Ali*, 1881 A.W.N. 32. The omission to state the fact, date and place of previous conviction is not material where the previous conviction was put to the accused and admitted by him before judgment was passed—*Nga Hla*, 8 L.B.R. 461, 18 Cr.L.J. 79, 37 IC 63.

When a person is charged with previous conviction, it is not sufficient to state that the accused is an 'old offender', as that does not sufficiently bring home to the accused person the particular offence or class of offences which renders him liable to a more severe sentence than would otherwise be imposed—*Yippikka*, 2 Weir 226.

The previous conviction must be entered in the charge and the accused should be called on to plead thereto; the mere admission by the accused that he had once been in jail is insufficient to show that he pleaded guilty to the charge of previous conviction—*Govind Sakharani*, 4 Bom.L.R. 177.

In passing an order under sec 565 it is not necessary that the details of the previous conviction should be mentioned in the charge—*Jhargu*, 9 N.L.R. 88, 14 Cr.L.J. 390, 20 IC. 314 (cited under sec. 565).

The enhanced punishment, referred to in this sub-section, relates to infliction of enhanced punishment as provided by sec. 75, I. P. C., as the punishment of a different kind referred to in the same sub-section relates to the provisions of the Whipping Act. The provisions of sec. 75, I. P. C., are not to be brought into action where the sentence intended to be awarded is within the competence of the Court to award under the ordinary provisions of the Code—*Abdul Karim*, 34 Cr.L.J. 1166, 146 I.C. 15, AIR 1933 Nag. 315, 1933 Cr.C. 1313, 29 N.L.R. 300. When enhanced sentences are contemplated under sec. 75, I. P. C., a separate head of charge must be distinctly drawn with this object—*Dungri*, 12 Cr.L.J. 233, 10 I.C. 241, 139 P.L.R. 1911, 40 P.W.R. 1911 (Cr.); *Q.-E. v. Dorasami*, 9 Mad. 284.

222. (1) The charge shall contain such particulars as to Particulars as to time, the time and place of the alleged offence, place and person. and the person (if any) against whom, or the thing (if any) in respect of which, it was committed, as are reasonably sufficient to give the accused notice of the matter with which he is charged.

(2) When the accused is charged with criminal breach of trust or dishonest misappropriation of money, it shall be sufficient to specify the gross sum in respect of which the offence is alleged to have been committed, and the dates between which the offence is alleged to have been committed, without specifying particular items or exact dates, and the charge so framed shall be deemed to be a charge of one offence within the meaning of section 234:

Provided that the time included between the first and last of such dates shall not exceed one year.

725. Particulars as to time, place, etc.:—The charge must contain sufficient particulars as to time, place, person and circumstance, so that the accused may have notice of the matter with which he is charged—*Fakirappa*, 15 Bom. 491. The object of this section is to ensure that the accused may have as full particulars as possible of the accusation made against him—*Rahim Baksha*, 34 C.W.N. 901, 1930 Cr.C. 1117. A charge for house-breaking and theft is bad for vagueness if it does not specify the articles stolen or the name of the person whose house was broken into, and omits to mention one of the places where the offences were committed—*Subbadu*, 28 M.L.J. 381, 16 Cr.L.J. 298. Where the charge did not specify the particular articles for the possession of which each of the accused was being prosecuted, the charge is no doubt defective but the defect is cured by sec. 537, Cr. P. C.—*Shakur*, 36 Cr.L.J. 1206, 157 I.C. 562, 1935 O.W.N. 911, A.I.R. 1935 Oudh 475, 1935 O.L.R. 483. A charge of defamation is defective if it does not set forth the particular occasion on which it was said to have been committed—*Biswanath v. Keshab*, 30 Cal. 402, 7 C.W.N. 74; *Protap*, AIR 1925 Cal. 1121, *Ali Mahomed*, 30 Cr.L.J. 1073 (1075), 119 I.C. 532, A.I.R. 1930 Sind 62, Ind. Rul. 1929 Sind 212. But where the exact words were not given in the charge but were given by the prosecution witnesses, the accused was not prejudiced in any way and the irregularity was covered by sec. 225—*Samrathmal*, A.I.R. 1932 Nag. 158, 1932 Cr.C. 853, 141 I.C. 438, 34 Cr.L.J. 154. Where a charge of dacoity under secs. 395 and 397, I. P. C., did not specify the dates on which the looting took place, held that the conviction must be quashed, as the charge did not give the accused sufficient notice and particulars of what they had to meet—*Gan Mallu*, 49 Mad. 74, 26 Cr.L.J. 1513. The accused was charged with having committed assault on a certain date. He produced evidence of alibi and was convicted of having committed the assault on a different date. Held that this was a material irregularity which prejudiced the accused and that

his conviction was illegal—*Kishori Lal*, 36 Cr.L.J. 282, 153 I.C. 32, 35 P.L.R. 449, A.I.R. 1934 Lah 455, 1934 Cr.C. 703. Where an accused is charged with having beaten the complainant at a particular place at a particular time and the prosecution evidence fails to establish the charge, he cannot on that evidence be convicted of having beaten the complainant at a different place on a different occasion—*Jalal-ud-din*, 25 Cr.L.J. 471, 77 I.C. 823, A.I.R. 1924 Lah 616. Where an offence was committed in two places but only one place was mentioned in the charge, the conviction was not illegal if the accused was not misled in his defence—*Nankhoo Mahton*, A.I.R. 1936 Pat 358. A conviction under sec. 377, Indian Penal Code, is illegal on a charge which does not set forth the time, place or the person with whom the offence was committed, but only states that the accused habitually wore woman's clothes and exhibited physical signs of having committed that offence—*Khairati*, 6 All. 204. In a charge of adultery it is sometimes impossible to specify the particular date or dates on which the sexual intercourse took place; it is sufficient to specify two dates between which the offence is alleged to have been committed—*Bhola Nath*, 51 Cal. 488 (492), 28 C.W.N. 323, 25 Cr.L.J. 997. In cases of criminal conspiracy it would be unreasonable to require the Crown to establish with accuracy when the conspiracy began or ended. These facts are best known to the conspirators. There appears no objection to approximate dates being entered in the charge. Defrauding the public by deceitful means is an offence and the allegation in the charge of such an object without specifying the persons defrauded is sufficient to maintain a charge of conspiracy—*Dur Mahomed*, 35 Cr.L.J. 1337, 151 I.C. 494, 28 S.L.R. 119, A.I.R. 1934 Sind 57, 1934 Cr.C. 628.

726. Sub-section (2):—This sub-section did not exist in the Code of 1882. The ruling in *Ekram Ali*, 2 C.W.N. 341 and *Pursotam*, 24 Cal. 193 decided under the Code of 1882 is no longer good law. As the law stood before, there was great difficulty in convicting where there was a running account and where the prosecution were unable to put their hands on a specified item out of which the particular sum was embezzled. This difficulty has been removed after 1898—*Khurud Kumar*, 29 C.W.N. 54, 40 Cr.L.J. 555, 26 Cr.L.J. 532, 85 I.C. 372. This sub-section was primarily enacted so that persons who showed a deficiency in the accounts with which they were entrusted could be convicted of criminal misappropriation even when it could not be shown that they had misappropriated this or that specific sum—*Shyam Sunder*, A.I.R. 1932 Oudh 145, 6 Luck. 435, 9 O.W.N. 216, 1932 Cr.C. 222, 33 Cr.L.J. 343, 136 I.C. 810. Where the accused has committed three acts of misappropriation within a year, it is sufficient, under the present law to frame only one charge in respect of the offence, mentioning only the *gross sum*; it is not necessary to draw up three charges of misappropriation and to specify the three sums separately—*Raman Behari*, 41 Cal. 725.

The case referred to in sec. 222 (2), Cr. P. C., is a case in which the charge is criminal breach of trust or dishonest misappropriation of money and it does not apply to a case of criminal breach of trust or dishonest misappropriation of goods, and affords no justification for mixing up money and goods or for framing a single charge in respect of the total of the cash said to have been misappropriated and the total value of the goods said to have been misappropriated—*Public Prosecutor v. N. S. Sharma*, A.I.R. 1939 Mad. 575, 1939 M.W.N. 468, 1939 M.Cr.C. 178, (1939) 2 M.L.J. 518, 40 Cr.L.J. 851, 184 I.C. 51, 50 M.L.W. 515.

This sub-section applies only to a charge of criminal breach of trust or misappropriation; it does not apply to a charge of falsification of accounts under sec. 477A, I. P. C.—*Kalka Prosad*, 38 All. 42, 13 A.L.J. 1059, 16 Cr.L.J. 813, 31 I.C. 829; *Matlal*, 26 Cal. 560 (564), 3 C.W.N. 412; *Raman Behari*, 41 Cal. 722 (725), 22 I.C. 729, 15 Cr.L.J. 153, 18 C.W.N. 1152; *Rameshwar*, 34 Cr.L.J. 673, 144 I.C. 94, A.I.R. 1933 Nag. 327, 1933 Cr.C. 1328, Ind. Rul. 1933 Nag. 200; or to a charge of cheating—*Raja Khan*, 1 A.L.J. 599; *Abdur Rahim*, 32 Cr.L.J. 611, 130 I.C. 795, A.I.R. 1931 Pat. 102, 12 P.L.T. 12, 1931 Cr.C. 230, Ind. Rul. 1931 Pat. 204.

This sub-section allows a charge to be framed in respect of the gross sum misappropriated during a period of one year. But this charge can only be joined with the other

charges at the same trial if the offences of misappropriation formed part of the same transaction with the offences of forgery. The same applies to the charges of cheating also—*Shapurji Sorabji*, A.I.R. 1936 Bom. 154 (159), 37 Cr.L.J. 688, 162 I.C. 399, 38 Bom.L.R. 106, 60 Bom. 148, 1936 Cr.C. 338.

Section 222 (2) only dispenses with the particulars which would otherwise be required; but it does not say that the gross sum is to include every act of misappropriation committed within the date specified in the charge. Therefore, where there have been defalcations in respect of different items in the course of a year, the Court can try a man at first in respect of a lump sum consisting of some of the items misappropriated and then subsequently in another trial, try the man in respect of another item misappropriated during the same period. The offence which is the subject of the second trial is not the same which was the subject of the charge in the first trial, and therefore, the second trial is not barred by the provisions of sec. 403—*Nagendra Nath*, 50 Cal. 632, 27 C.W.N. 578 (581); *Kashinath*, 5 I.C. 970, 12 Bom.L.R. 226, 11 Cr.L.J. 337; *Sreemakurti*, 32 Cr.L.J. 223, 129 I.C. 75, A.I.R. 1930 Mad. 978, 59 M.L.J. 854, 1930 M.W.N. 1097, 1930 Cr.C. 1194, 32 M.W.N. 789, Ind. Rul. 1931 Mad. 219; *Brijikan*, 53 All. 411, 129 I.C. 558, 1931 Cr.C. 224, A.I.R. 1931 All. 209, 1931 A.L.J. 98, 32 Cr.L.J. 376 (dissenting from *Appadurai*, 17 Cr.L.J. 30, 32 I.C. 158). But see Note 1092.

Where the real case against A was one of abetment and the case against B was in respect of a part only of the amount charged against the other two, the case does not fall within this sub-section and there is a misjoinder of charges vitiating the trial—*K. Muriah*, 32 Cr.L.J. 930, 132 I.C. 548, 8 Rang. 632, A.I.R. 1932 Rang. 90, Ind. Rul. 1931 Rang. 180, 1931 Cr.C. 378.

727. Mention of gross sum is sufficient:—Under clause (2) of this section in a charge of criminal breach of trust the gross sum in respect of which the offence is alleged to have been committed should be stated as well as the dates between which the offence is alleged to have been committed. It is not necessary to specify particular items or exact dates—*Abdur Rahman*, 28 Cr.L.J. 170, 99 I.C. 602, A.I.R. 1927 Lah. 109. See also *Ramchandra Rango v. Emp.*, 40 Cr.L.J. 579 (587), 181 I.C. 870, A.I.R. 1939 Bom. 129, 41 Bom.L.R. 98. This sub-section is an enabling provision which permits what otherwise would be a large number of separate charges to be joined together for the purpose of convenience. Nowhere, is it prescribed that separate charges in respect of separate amounts misappropriated shall not be resorted to and that if an accused has misappropriated several sums within a year they all should be added together and made into one gross sum and tried as one charge—*Sreemakurti*, 32 Cr.L.J. 223, 129 I.C. 75, 32 M.L.W. 789, 59 M.L.J. 854, A.I.R. 1930 Mad. 978, Ind. Rul. 1931 Mad. 219, 1930 M.W.N. 1097, 1930 Cr.C. 1194. This is an enabling section and it enacts that it is sufficient to specify the aggregate sum without going into details. It dispenses with the necessity of enumeration of various items, but it *does not prohibit* such enumeration—*Datto Hanmant*, 30 Bom. 49, 7 Bom.L.R. 633, 2 Cr.L.J. 518. It is optional with the complainant either to mention the gross sum or to specify all the items misappropriated. And this section does not make compulsory either the one or the other. The complainant may choose to specify all the particular items in addition to mentioning the gross sum, and this will be treated as a mere superfluity but not an illegality—*Samiruddin v. Nibaran*, 31 Cal. 928, 8 C.W.N. 807; *Gulazari Lal*, 24 All. 254; *Rahim Baksha*, 129 I.C. 359, 34 C.W.N. 901 (904), 32 Cr.L.J. 321, A.I.R. 1930 Cal. 717, 1930 Cr.C. 1117, Ind. Rul. 1931 Cal. 167, or the complainant may mention only the gross amount even where the particular items can be specified—*Thomas*, 29 Mad. 558. But although it is sufficient to frame a general charge of the gross amount without specifying particular items, still where the accused is likely to be prejudiced by the vagueness of the charge, the Magistrate should deal with some at least of the items—*Mohammad Shah*, 1907 P.W.R. 16, 6 Cr.L.J. 137 (139).

Though it is sufficient to mention only the gross sum and not necessarily the particular items, still the prosecution must prove what *total sum* the accused has unlawfully

expended or failed to account for in such a way as to leave no doubt that he has been engaged in a criminal misappropriation, and how that total sum is made up. There must be a definite finding of a certain *definite sum* traced to the accused and clearly shown to have been wilfully and unlawfully appropriated to his own use. It is not sufficient to fling into the charge an alleged balance or net profit which the accused, an agent of the complainant, is supposed to have earned, and say that in respect of that net profit he is guilty of misappropriation of every rupee which he cannot produce or explain for—*Mohan Singh*, 42 All 522, 22 Cr.L.J. 84, 18 A.L.J. 633, 59 I.C. 372. In other words, the Allahabad case lays down that an accused cannot be convicted on a charge of criminal misappropriation based on a *general deficiency in accounts*, shown by the difference between the sums actually received by the accused and the sums actually credited. But the Oudh Chief Court is of opinion that it is impossible for the prosecution to allow the money in the hands of an accused person and to prove that he spent a certain specific sum in any particular manner. The prosecution has done its duty when it has proved that the accused has received the money and has failed to show in his master's accounts. Consequently, a charge of misappropriation based on a general deficiency in accounts is valid—*Shiam Sundar*, 6 Luck. 435, 1932 Cr.C. 222 (223, 224) (dissenting from 42 All. 522). The same view is taken in *Vinayak Laxman*, 53 Bom. 119, 30 Cr.L.J. 185 (189), distinguishing the above Allahabad case. See also *Buddhu v. Babu Lal*, 18 All. 116 and *Q.-E. v. Kellie*, 17 All. 153 in this connection.

Where the Magistrate examined the evidence in respect of each item of money embezzled which went to make up the total amount of the sums embezzled as entered in the charge-sheet, *held* that this was a way of examining the facts of the case which was most favourable to the accused, and he certainly cannot complain that he has been in any way prejudiced by the manner in which the evidence against him has been scrutinized—*Krishna Priya*, A.I.R. 1936 Oudh 376, 164 I.C. 302, 1936 O.W.N. 607, 37 Cr.L.J. 941.

728. "Charge so framed . . . charge of one offence":—This section clearly admits the trial of any number of acts of breach of trust committed within the year as amounting only to one offence—*Datto Hamant*, 30 Bom. 49, 7 Bom.L.R. 633, 2 Cr.L.J. 518. A trial involving offences under sec. 406, I. P. C., committed on five different dates is not bad in view of the provisions of sub-section (2) of this section—*Anil v. Badam*, 30 Cr.L.J. 706, 116 I.C. 722, A.I.R. 1929 Cal. 175, Ind. Rul. 1929 Cal. 498. Where a man is charged with criminal breach of trust in respect of various sums of money embezzled from time to time on different occasions, a charge of criminal breach of trust may be framed in respect of the gross sum without specifying the particular items; such a charge is a charge of one offence and not of several offences—*Ibrahim*, 33 All. 36, 7 A.L.J. 897, 11 Cr.L.J. 442. If a person is charged with embezzlement of the *sum total* of different items, and the charge *also specifies the various items* collected and embezzled, the charge is really a charge of one offence and is perfectly valid. It does not contravene the prohibitions contained in sec. 234 by reason of the fact that the items specified exceed three in number—*Gulzar Lal*, 24 All. 254; *Datta*, 30 Bom. 49, *Rahim Baksha*, A.I.R. 1930 Cal. 717, 1930 Cr.C. 117, 34 C.W.N. 901, 32 Cr.L.J. 321. But where the accused is charged with having misappropriated "various sums" without mentioning the sum total or different items, which are six in number, the charge is illegal—*Parey Lal*, A.I.R. 1935 Oudh 273, 154 I.C. 320, 1935 O.W.N. 185, 1935 O.L.R. 157, 36 Cr.L.J. 518. Where a charge of criminal misappropriation consisted of three counts alleging misappropriation on three different occasions and two of these items were made up of three smaller sums of money each, and the accused was convicted on all the three counts, *held* that the trial was really for three offences and not seven, and was not illegal under sec. 234—*Ishaq*, 27 All. 69. Where a person was put upon his trial for embezzlement of three sums in one year, and one charge was drawn up, in which all the three sums and the persons from whom he collected were specified, but he was not charged with *three* offences under sec. 409, I. P. C., but with *one* offence, and was convicted of one offence and sentenced to one term of imprisonment, *held* that

the charge was not illegal as it was in accordance with secs. 234 and 222 (2)—*Sat Narain*, 32 Cal. 1085, 10 C.W.N. 51, 3 Cr.L.J. 138. The accused was charged with having embezzled four sums of money on three specified dates within two months; only one charge was framed in which the amounts and the dates of embezzlement were specified. The Magistrate convicted the accused for embezzlement committed on the three dates, and sentenced him to two years on each count, the sentences to run concurrently. *Held* that the charge was correctly drawn up; and that the Magistrate was not correct in sentencing the accused separately on each of the three counts, but should have passed one sentence, but this irregularity was of no importance as the sentences were to run concurrently—*Prem Narain*, 52 All. 941, 1930 A.L.J. 1130, 32 Cr.L.J. 155 (156, 157). 128 I.C. 595, A.I.R. 1931 All. 267. See also *Ram Kishoon*, 35 Cr.L.J. 876, 148 I.C. 900, 15 P.L.T. 126, A.I.R. 1934 Pat. 232, 1934 Cr.C. 461, where a charge was held to have been correctly drawn up under sec. 222 (2), although it did not set out the total of the money embezzled but specified separately three items of money misappropriated by the accused. But see *Piary Lal*, 36 Cr.L.J. 518, 154 I.C. 320, 1935 O.W.N. 185. Where an accused person is tried on charges of criminal breach of trust in respect of two cheques and also on another charge in respect of a gross sum made up of three distinct items which might have been but were not specified, the trial is in fact not on five distinct charges but is only for three offences (in respect of two cheques *plus* gross sum) and is, therefore, legal under sec. 234—*Thomas*, 29 Mad. 558.

This sub-section enacts that the charge in respect of a gross sum appropriated within one year shall be treated as a charge for *one offence* within the meaning of sec. 234, but it does not follow that the several acts of misappropriation should be deemed as forming *one transaction* within the meaning of sec. 235—*Kasi Viswanathan*, 30 Mad. 328, 5 Cr.L.J. 341. It is not easy and indeed possible to give an exact definition to the word "transaction," but it may be said that it means a group of facts so connected together as to involve certain ideas, namely, unity, continuity and connexion. In order to determine whether a group of facts constituted one transaction it is necessary to ascertain whether they are so connected together as to constitute a whole which can properly be described as a transaction. Where a clerk or cashier sets out to rob his employer, having regard to the fact that sec. 222 (2) provides that he may be charged with having misappropriated the total of whatever sums he may have appropriated in course of one year, it is not unreasonable to say that for the purposes of the section the year's illicit operations can be regarded as one transaction—*Kashiram v. Hurdut Rai*, A.I.R. 1935 Cal. 312 (314), 62 Cal. 808, 39 C.W.N. 703.

See also *Madhusudan v. Emp.*, in Note 751.

'One year':—The time covered by the several acts must not be more than one year; where the charges related to items misappropriated in the course of two years, the conviction was quashed—*Dhanjibhoy v. Kaim Khan*, 14 P.R. 1905, 64 P.L.R. 1905. Thus, where the accused was charged with criminal breach of trust in respect of eight necklaces, committed from February 1922 to January 1924 (*i.e.*, in the course of two years), *held* that the trial was vitiated. Sec. 235 did not apply, as the act of breach of trust in respect of each necklace was a separate transaction—*Raman Lal*, 49 All. 312, 25 A.L.J. 317, 28 Cr.L.J. 171, 99 I.C. 603, A.I.R. 1927 All. 223.

The charge of a lump sum extending over a period of more than one year is in violation of the express provision of the Cr. P. C. and is illegal—*Munnoolal*, A.I.R. 1935 Oudh 241, 1935 O.W.N. 126, 1935 O.L.R. 141, 151 I.C. 258, 36 Cr.L.J. 477; *Dionarain*, 35 Cr.L.J. 693, 148 I.C. 519, A.I.R. 1934 Pat. 132.

It is not enough to show that there was embezzlement at some time before, during, or after the period mentioned in the charge, because the charge is framed under the special provision contained in cl (2) of this section and the proviso thereto, and upon a charge so framed it is at any rate necessary to show an act or acts of embezzlement in respect of the gross sum named or some part of it, committed within the space of the year—*Promotha*, 17 C.W.N. 479 (483), 14 Cr.L.J. 219, 19 I.C. 315.

223. When the nature of the case is such that the particulars mentioned in sections 221 and 222 do not give the accused sufficient notice of the matter with which he is charged, the charge shall also contain such particulars of the manner in which the alleged offence was committed as will be sufficient for that purpose.

Illustrations.

(a) A is accused of the theft of a certain article at a certain time and place. The charge need not set out the manner in which the theft was effected

(b) A is accused of cheating B at a given time and place. The charge must set out the manner in which A cheated B

(c) A is accused of giving false evidence at a given time and place. The charge must set out that portion of the evidence given by A which is alleged to be false.

(d) A is accused of obstructing B, a public servant, in the discharge of his public functions at a given time and place. The charge must set out the manner in which A obstructed B in the discharge of his functions.

(e) A is accused of the murder of B at a given time and place. The charge need not state the manner in which A murdered B.

(f) A is accused of disobeying a direction of the law with intent to save B from punishment. The charge must set out the disobedience charged and the law infringed.

729. The question as to whether further particulars are necessary under this section is a question of discretion in each case—*Kudrutulla*, 39 Cal 781. In a case of cheating, the charge must set out the manner in which the offence was committed. Whether the words of the charge are reasonably sufficient to give the accused notice of the accusation which he has got to meet, depends upon the circumstances of each particular case. The omission to state the manner of cheating is regarded as material or not according as the accused has or has not in fact been misled by the omission and the omission has or has not occasioned a failure of justice [sec 225, Ill (b) and (c)]—*Kedar Nath*, 29 C.W.N 408, 41 C.L.J 172, 26 Cr L.J. 849. Where the manner of the cheating was set out as follows —“By deceiving with false representations and promises as well as by conduct,” held that the expression used was too vague and indefinite to give the accused proper notice of the manner of deceit—*Kedar Nath*, supra.

The word “manner” in this section can fairly be interpreted as including every ingredient by virtue of which the act ceases to become one of mere non-criminal deception and becomes one of “cheating” within the meaning of sec 415, I P. C., and the effect of the deception upon the victim’s body, mind, reputation or property would thus be a part of the “manner” of cheating. But even if this is held to be too wide an interpretation of the word “manner”, the illustration is only an illustration and by analogy if sec. 223, Cr. P. C., demands that the manner shall be set out it must also demand that in the case of cheating the particular consequence by virtue of which the deception becomes an offence should also be set out. When, therefore, a charge under sec 419, I. P. C., was to the effect “I (Magistrate) charge you Gian Singh that you, on or about 7th July 1936 at Lahore Civil Courts cheated by personation by knowingly substituting a certain person for Roshal Lal (deceased) who had before that date died representing to Babu Lal that that person was Roshan Lal, a respondent to the notice Ex Pk,” held that the charge did not make it clear to the accused by virtue of which of the various consequences referred to in sec 415, I. P. C., he must be held liable to the offence of cheating, that the defect in the charge was material and

not curable under sec. 225, Cr. P. C., and that the conviction must be set aside—*Gian Singh v. Emp*, A.I.R. 1938 Lah. 828 (831), 40 Cr.L.J. 371 (374), 180 I.C. 485.

Where the charge contained a bare statement that the accused cheated by receiving a sum under an award and not acting in accordance with the award but it contained no allegation that the accused acted dishonestly or that he deceived the complainant, the charge disclosed no criminal offence and ought to be set aside—*Varumal Lahrumal v. Emp*, 34 Cr.L.J. 1049 (1050), 145 I.C. 617, A.I.R. 1933 Sind 169, 1933 Cr.C. 533, 6 R.S. 36.

A charge of an attempt to cheat must specify the person attempted to be cheated and the manner in which the attempt was made—*Imam Ali*, 8 C.W.N. 278.

See also Note 723 under the heading "Cheating".

224. In every charge words used in describing an offence

Words in charge taken in sense of law under which offence is punishable.

shall be deemed to have been used in the sense attached to them respectively by the law under which such offence is punishable.

729A. Although a word used in a charge under the I. P. Code must be taken to have been used in the sense attached to the word by the I. P. Code, still when a general expression such as "assault" is used, it must not necessarily be taken to have the meaning which it bears in sec. 351, I. P. C., but it also includes any bodily injury or violence to some person, such as hurt or grievous hurt. And so, where the accused were charged with rioting with the common object of committing 'assault', and they were convicted of rioting with the common object of causing hurt, held that there was no error or illegality in the charge, because the word 'assault' denoted hurt, and no alteration of charge was necessary—*Chhanka Dhanuk*, 6 Pat. 832, 28 Cr.L.J. 769 (771).

225. No error in stating either the offence or the particulars

Effect of errors.

required to be stated in the charge, and no omission to state the offence or those particulars, shall be regarded at any stage of the case as material, unless the accused was in fact misled by such error or omission, and it has occasioned a failure of justice.

Illustrations.

(a) A is charged under section 242 of the Indian Penal Code, with "having been in possession of counterfeit coin, having known at the time when he became possessed thereof that such coin was counterfeit," the word "fraudulently" being omitted in the charge. Unless it appears that A was in fact misled by this omission, the error shall not be regarded as material.

(b) A is charged with cheating B, and the manner in which he cheated B is not set out in the charge, or is set out incorrectly. A defends himself, calls witnesses and gives his own account of the transaction. The Court may infer from this that the omission to set out the manner of the cheating is not material.

(c) A is charged with cheating B, and the manner in which he cheated B is not set out in the charge. There were many transactions between A and B, and A had no means of knowing to which of them the charge referred, and offered no defence. The Court may infer from such facts that the omission to set out the manner of the cheating was, in the case, a material error.

(d) A is charged with the murder of Khoda Baksh on the 21st January 1882. In fact the murdered person's name was Haider Baksh,

and the date of the murder was the 20th January 1882. A was never charged with any murder but one and had heard the inquiry before the Magistrate, which referred exclusively to the case of Haider Baksh. The Court may infer from these facts that A was not misled, and that the error in the charge was immaterial.

(e) A was charged with murdering Haider Baksh on the 20th January 1882 and Khoda Baksh (who tried to arrest him for that murder) on the 21st January 1882. When charged for the murder of Haider Baksh, he was tried for the murder of Khoda Baksh. The witnesses present in his defence were witnesses in the case of Haider Baksh. The Court may infer from this that A was misled and that the error was material.

730. Error or omission:—The accused was charged under secs. 304 and 149, I. P. C., for "joining an unlawful assembly knowing that it was likely that force would be used, and in which force was used, and for causing the death of one N by a blow of *lathi* on his head in taking away mangoes from a garden in charge of N." The charge mentioned only one common object, *viz.*, to take away mangoes from a garden. But the Judge in summing up the case propounded two common objects, *viz.*, to take away mangoes and to cause injury to N who was in charge of the mango-trees. It was held that the omission to specify both the objects in the charge was material, in as much as it was difficult to say which of the two common objects had been accepted by the jury; and it might well have been that the jury had accepted that object which was not mentioned in the charge and which the accused had no opportunity of meeting; consequently there had been a failure of justice—*Sabir*, 22 Cal. 276 (285). Where the common object mentioned in a charge of rioting was the forcible taking away of mangoes belonging to the complainant, the accused could not be convicted of rioting committed with an entirely different object—*Rahimuddin v. Asgar Ali*, 27 Cal. 990 (991). When the charge against the accused was that he committed criminal breach of trust in respect of some deeds, but he was convicted of embezzling the amounts obtained by dealing with those deeds, it was held that the charge was materially defective and the conviction must be set aside—*Bisra Das v. Nirodmani*, 12 C.W.N. 577, 7 Cr.L.J. 372.

Where the common object of the unlawful assembly was set out in the complaint and was found by the Magistrate, but was not mentioned in the charge, but it appeared that the accused had been in no way prejudiced by the omission in the charge, *held* that sec. 225 applied and the omission did not vitiate the trial—*Jeshwant*, 28 Bom.L.R. 497, 27 Cr.L.J. 744, following *Basiruddin*, 21 Cal. 827. Where the charge did not mention the common object of the unlawful assembly but there was ample material in the evidence on the record to show that the accused were members of an unlawful assembly and to show what their common object was, *held* that the omission was not a ground for setting aside the conviction—*Basiruddin*, *supra*; *Ghaziuddin*, A.I.R. 1933 Oudh 19, 9 O.W.N. 1109, 1932 Cr.C. 57, 142 I.C. 684, 34 Cr.L.J. 393, 8 Luck. 199. See Note 723. A charge of sedition is not defective if it omits to state the particular passages or particular words used by the accused; it is sufficient if the substance of the words is set out. Even if it is defective, it will be cured by this section—*Tribhuvan*, 33 Bom. 77; *Mylapore Krishnasami*, 32 Mad. 384; *Chidambaram*, 32 Mad. 3 (12); *Chint Ram*, 32 P.L.R. 13, 32 Cr.L.J. 1202 (1203); *Ahmed*, 1 S.L.R. 14, 9 Cr.L.J. 256. In a charge under sec. 420, I. P. C., it is proper to state the exact date of the offence, but when the time of the alleged offence is approximately indicated, the omission to give the date does not affect the legality of the trial—*Farzand*, 27 Cr.L.J. 909 (Pat.). Where in the form of the charge, the word 'or' was by mistake used for 'and' between two charges framed under secs. 221 and 342, I. P. C., and the accused were not prejudiced by the fact that in form the charge was in the alternative whereas in substance two distinct offences were charged, *held* that the conviction of the accused in respect of both the charges was not bad—*Nababali*, 34 C.W.N. 1151, 32 Cr.L.J. 228, A.I.R. 1930 Cal. 708, 53 C.L.J. 54, 129 I.C. 99, 1930 Cr.C. 1108. A mistake in the numbers of the sections does not invalidate the trial, if the accused

knew full well what was the charge he had to meet—*Spiers v. Johiuddin*, 59 Cal. 113, 36 C.W.N. 246 (247), 33 Cr.L.J. 549. The omission of words such as “dishonestly” or “unlawfully”, or “in British India” is not material, and is cured by this section—*Rakhma*, 10 B.H.C.R. 373; *Amritlal*, 42 Cal. 957. So also, the omission of the words “in pursuance of the same conspiracy” is not a very material defect in charges for offences committed in the same transaction—*Maung Ba Chit*, 7 Rang. 821, 31 Cr.L.J. 387 (390).

If the charge is drawn up clumsily or in a somewhat informal manner, but is sufficiently explicit as to give the accused notice of the charge, the irregularity will be cured by this section—*Tribhuvan*, 33 Bom. 77; *Bachchu v. Piyara*, 2 Luck. 430, 4 O.W.N. 341, 28 Cr.L.J. 409 (410).

Test to determine whether error is material :—In determining whether the error or omission has occasioned a failure of justice the Court should have regard to the manner in which the accused has conducted his defence and to the nature of the objection—*Ramji*, 10 Bom. 121. Where the charge did not correctly set out the facts of the case for the prosecution upon which it was founded, but it was clear from the answer which the accused gave to the Court when examined under the provisions of sec. 342 that he understood exactly what the case against him was, *held* that the defect in the framing of the charge did not prejudice the accused in any way—*Gokul*, 29 C.W.N. 483, 26 Cr.L.J. 906. Where the accused did not make any objection to the defect in the form of charge, at the earliest possible occasion, and as a matter of fact no protest was made either in the Appellate Court or in the Revisional Court below, and they knew perfectly well what offences they were charged with, *held* that the irregularity had not occasioned any failure of justice—*Bachchu v. Piyara*, 2 Luck. 430, 4 O.W.N. 341, 28 Cr.L.J. 409; see also *Chidambaram*, 32 Mad. 3 (12, 13). Where the wording of the charge was neither accurate nor clear, but the accused and his counsel understood the real charge, and an objection as to the validity of the charge was raised by the counsel for the first time during arguments, *held* that the defect was not material and was cured by sec. 537—*K. C. V. Reddy*, 8 Rang. 25, 31 Cr.L.J. 793 (796, 797). See also *Ghousbux*, A.I.R. 1935 Sind 34, 28 S.L.R. 304 and *Palani Goundan v. Emp.*, 1937 M.W.N. 1331.

The benefit of doubt as to the particular weapons which the accused carried cannot entitle them to be acquitted altogether of the charge although they are specifically charged with using particular weapons. The accused, though they may not be convicted for a more serious offence in the absence of proof of use of particular weapons, may still be convicted of a lesser offence—*Palani Goundan v. Emp.*, *supra*.

When the charge was framed in clear violation of sec. 234 and the accused was prejudiced in his defence, neither sec. 225 nor sec. 537, Cr. P. C., can cure the defect—*Piarey Lal*, A.I.R. 1935 Oudh 273, 154 I.C. 320, 1935 O.W.N. 785, 1935 O.L.R. 157, 36 Cr.L.J. 518.

Duty of Magistrate :—Where a charge is erroneous as to the intention with which the offence was committed, it is the duty of the Magistrate, before convicting the accused for committing the offence with a different intention, to amend the charge to that effect so as to give notice to the accused of what he is charged with. Thus, where the charge was house-breaking with intention to commit theft, but the Magistrate finding that the intention was criminal intrigue with a woman in the complainant's house, convicted the accused of house-breaking with the latter object, *held* that before convicting the accused for the latter intention, it was the bounden duty of the Magistrate to have given the accused notice of that finding by drawing up a charge clearly stating what it was that he was accused of committing. The conviction was set aside—*Mahomed Hosain*, 41 Cal. 743. But see *Karali Prasad*, 44 Cal. 358 (364), in which it has been held, under the identical circumstances, that it is not necessary for the Magistrate to amend the charge; the accused having been charged with criminal trespass with a guilty intention, it is competent to the Court to convict him of criminal trespass with some other guilty intention, and in such a case the accused is not in fact prejudiced by the conviction.

226. When any person is committed for trial without a charge, or with an imperfect or erroneous charge, the Court, or, in the case of a High Court, the Clerk of the Crown, may frame a charge or add to or otherwise alter the charge, as the case may be, having regard to the rules contained in this Code as to form of charges.

Procedure on commitment without charge or with imperfect charge.

Illustrations

1. A is charged with the murder of C. A charge of abetting the murder of C may be added or substituted

2. A is charged with forging a valuable security under section 467 of the Indian Penal Code. A charge of fabricating false evidence under section 193 may be added.

3. A is charged with receiving stolen property knowing it to be stolen. During the trial it incidentally appears that he has in his possession instruments for the purpose of counterfeiting coin. A charge under section 235 of the Indian Penal Code cannot be added

731. 'Without charge':—These words apply not only to the cases where there is no charge at all, but also to cases in which there is no charge in respect of such offence as the Sessions Judge or Clerk of the Crown may think the accused ought to be tried for—*Appa*, 8 Bom 200

'Frame a charge' .—At the beginning of the trial if the Judge finds that the Magistrate has omitted to frame a charge, he may supply the omission and frame the charge that is made out on the evidence recorded by the Magistrate—*Dodo*, 9 S.L.R. 37, 16 Cr.L.J. 573, 20 I.C. 125.

732. Addition of charge:—If the charge framed by the Magistrate is 'imperfect or erroneous, the Sessions Judge may alter or add to the charge, having regard to the offences disclosed in the evidence recorded by the Magistrate. When a charge is added to or altered under sec 226, the added or altered charge must be for an offence made out by the evidence recorded before the committing Magistrate—*Dodo*, 9 S.L.R. 37, 30 I.C. 125, 16 Cr.L.J. 573 (574); *Mula Singh*, 24 Cr.L.J. 177, 71 I.C. 593; *Deogi Redoli Ankamma*, 34 Cr.L.J. 278, 142 I.C. 139, 1932 M.W.N. 1162, A.I.R. 1933 Mad 247, 1933 Cr.C. 374, 65 M.L.J. 6, 38 M.L.W. 668, Ind. Rul. 1933 Mad. 199. See also *Surat*, 25 Cr.L.J. 1162, 81 I.C. 986, 11 O.L.J. 640, A.I.R. 1925 Oudh 158, 1 O.W.N. 362. But the Sessions Judge cannot go beyond the evidence recorded by the Magistrate. He cannot add or alter a charge upon the evidence recorded by himself at the trial. If he does so, the effect is that he takes cognizance of an offence without any preliminary inquiry under Chap. XVIII and the provisions of sec. 193 of this Code are rendered nugatory. Thus, a charge was drawn up by the Magistrate under sec. 202, I.P.C., and the accused pleaded guilty to the charge in the Sessions Court, and then the Sessions Judge, on the application of the Public Prosecutor, added a charge for an offence under secs. 109 and 201, I.P.C., examined a witness, and then convicted the accused on the added charge also; it was held that the addition of the charge was not merely an error of procedure but an improper assumption of jurisdiction—*Rama Varma*, 3 Mad. 351. See also Notes under sec. 227, under heading "*Power of Sessions Court*".

Again, the Sessions Court can add or alter a charge with reference to the immediate subject of the prosecution and committal, and not with regard to a matter not covered by the indictment. Thus, where a prosecution was instituted by A on a charge under sec. 417, I.P.C., and the Sessions Judge altered the charge into one for an offence under sec. 420, I.P.C., for cheating B, it was held that the procedure was illegal inasmuch as there was no complaint by B, and the prosecution was instituted by a person in respect of a matter with which B was not concerned, and the Magistrate

did not commit the accused with respect to any offence committed against B—*Birendra*, 32 Cal. 22, 8 C.W.N. 784, 1 Cr.L.J. 794. This ruling was approved of in a decision of the Madras High Court reported in *Muthu Goundan*, 21 Cr.L.J. 57, 54 I.C. 409, 1920 M.W.N. 149, 11 M.L.W. 317, 27 M.L.T. 231 and dissented from in *Dodo*, 30 I.C. 125, 16 Cr.L.J. 573, 9 S.L.R. 37 and *Gulzari*, 35 Cr.L.J. 63, 146 I.C. 424, 10 O.W.N. 738, A.I.R. 1933 Oudh 375, 1933 Cr.C. 1092. When the evidence recorded by the committing Magistrate disclosed an offence under sec. 395, I. P. C., the Sessions Judge is justified in framing a charge under that section, despite the fact that the committing Magistrate did not himself believe that evidence—*Gulzari*, supra. Similarly, where the accused was committed to the Sessions for the murder of A, the Sessions Judge could not add a charge for causing grievous hurt to B—*Shah Din*, 1909 P.W.R. 20, 11 Cr.L.J. 131. In *Kharga*, 8 All. 665, however, such a procedure was not treated as an illegality but a mere irregularity, and the High Court refused to interfere because no prejudice was caused to the accused. But where the Magistrate committed the accused H for murder of M, and the accused R for causing grievous hurt to K, and in his order of commitment the Magistrate stated that there was ample evidence to show that H committed murder by causing the death of M and K, and that R in furtherance of the common intention with H committed murder by causing the death of M and K, it was held that the Sessions Judge could properly add charges against both the accused for the murder of K, as the murder of K could be said to be an immediate subject of the prosecution—*Hassenulla*, 28 C.W.N. 561, 26 Cr.L.J. 5 (7), 83 I.C. 485. In a Sind case, however, it has been observed that the added charge need not be clearly related to the original charge. Provided that no prejudice has been caused to the accused, the Sessions Court has power under secs. 226 and 227 to add charges for offences different from those framed by the committing Magistrate. The subsequent sections 228 and 231 do not show that this power is limited in any way. On the contrary, the provisions for adjourning the trial, for directing a new trial (sec. 229), for recalling witnesses (sec. 231), and even for obtaining sanction to the prosecution (sec. 230), indicate very clearly that there need not necessarily be any connection between the added charge and the charge as originally framed—*Dodo*, 9 S.L.R. 37, 16 Cr.L.J. 573 (574).

The Sessions Judge's power to add to a charge is not fettered by the fact that a complaint in respect of it had been previously preferred before the Magistrate and dismissed by him—*Vajiram*, 16 Bom. 414.

Power to expunge a charge:—The Sessions Judge has power to frame, add or alter a charge, but he has no power to expunge a charge duly framed by the committing Magistrate—*Poreshollah*, 7 C.L.R. 143. See also *Sadasibo*, in Note 785.

733. Alteration of charge:—The Sessions Judge should carefully examine the charge-sheet on which the accused has been committed, and if the charge-sheet has been carelessly and badly drawn up by the committing Magistrate, the Judge should make such amendments and alterations as are called for—*Shanker*, 11 A.L.J. 188, 14 Cr.L.J. 116. The Sessions Judge can substitute a charge of abetment for a charge of the substantive offence—*Govind*, 11 B.H.C.R. 278. If the committing Magistrate does not frame a charge with separate heads for each distinct offence, the defect should be corrected by the Sessions Judge—*Shanker*, supra. In a case in which the accused is charged with 45 offences and committed to the Sessions, the proper procedure is to amend the charge and to hold separate trials and not to confine the prosecution to three heads of charges, acquitting the accused of all the rest—*Sreenath*, 8 Cal. 450.

Altering a charge includes the withdrawal of a charge which has been added by the committing Magistrate—*Dwarka Lal v. Mahadeo*, 12 All. 551.

227. (1) Any Court may alter or add to any charge at any time before judgment is pronounced, or, in case of trials before the Court of Session or High Court, before the verdict of the jury is returned or the opinions of the assessors are expressed.

(2) Every such alteration or addition shall be read and explained to the accused.

734. Addition or alteration of charge:—Where a Magistrate summoned the accused under a certain section of the Penal Code, but the evidence disclosed an offence under another section, he could amend the charge—*Birao Sardar v. Ariff*, 26 Cr.L.J. 302 (Cal.). When facts are proved constituting an aggravated offence, the Magistrate must either alter the charge under this section, or refer the case under sec 347—*Kuttuva v. Suppan*, 25 L.W. 86, 28 Cr.L.J. 164 (166).

In amending a charge, the Magistrate should not write over the original charge but should leave it on the file for reference and should write the new charge separately and correctly date it—*Nga Pan*, 8 Bur.L.T. 17, 16 Cr.L.J. 2, 26 I.C. 306.

The Court in substituting one charge for another cannot ignore the preliminary requisites of a charge; thus a charge for rape cannot be altered into a charge for adultery, because the complaint of the husband is a preliminary requisite in the latter offence—*Chemon*, 29 Cal 415; nor can the Court alter a charge of rape and adultery in the alternative—*Kallu*, 5 All. 233. The Sessions Court has no power to inquire into or hear charges under sections 497 and 498, I. P. C., without a previous enquiry before the committing Magistrate—*Abdul Aziz*, 32 Cr.L.J. 1135, 134 I.C. 314, 53 C.L.J. 346, A.I.R. 1931 Cal. 524, 1931 Cr.C. 676, Ind. Rul. 1931 Cal. 810. See Notes under sec. 199.

But the power to add a charge is not limited by the terms of the certificate under section 188. Once a certificate has been obtained, the Court has power to add any charge for any offence disclosed by the facts though not specified in the certificate—*Krishna Nath*, 33 All 514. See Note 581 under sec 188.

Where a prisoner has been extradited for dacoity, the Court may alter the charge of dacoity into a minor charge which is not extraditable, e.g., theft—*Khodu*, 17 Bom. 369.

Power of Sessions Court—Section 226 confers on the Sessions Court the power to add or amend the charges framed by the committing Magistrate, if the added or altered charges are made out by the evidence recorded by the Magistrate, and sec. 227 empowers a Sessions Court to add to or alter the charges framed by itself, if the added or altered charges are made out by the evidence recorded in the Sessions Court—*Dodo*, 9 S.L.R. 37, 30 I.C. 125, 16 Cr.L.J. 573 (574); *Deogi Reddy Ankamma*, 34 Cr.L.J. 278, 142 I.C. 138, 1932 M.W.N. 1162, A.I.R. 1933 Mad. 247, 1933 Cr.C. 374, 65 M.L.J. 6, 38 M.L.J. 668, Ind. Rul. 1933 Mad. 199. But in a later Sind case it has been doubted whether section 227 intended to confer jurisdiction on a Sessions Court to add or substitute a new charge on fresh evidence led or to be led in the Sessions Court for the first time—*Stewart*, 21 S.L.R. 55, 27 Cr.L.J. 1217 (1224).

The Court's powers, as contained in sec. 227, Cr. P. C., to alter a charge are very wide. Any restriction of those powers must inevitably lead to failure of justice. If the Courts' power under sec. 227 can be exercised within certain limits, the provisions of the section would be rendered nugatory. If, therefore, the alteration of the charge leads necessarily to the discharge of the former jury, that result must be implied in the power of the Court to alter the charge. The fact that there has been a challenging of the common jury already empanelled cannot affect the power of the Court to alter the charge. Nor can rule 865 of the High Court Rules (O.S.) operate as a bar to the trial of accused by a special jury upon the altered charge—*Yeshwant Vitlu*, 38 Cr.L.J. 850 (851), 170 I.C. 153, I.L.R. 1937 Bom. 369, 10 R.B. 49, 39 Bom.L.R. 355, A.I.R. 1937 Bom. 260.

Where the Committing Magistrate framed charges of murder against some of the accused and abetment of murder against others but, when the case came on for hearing in the Court of Session, the Judge at the request of the Public Prosecutor jettisoned these charges altogether and substituted for them a charge under sec. 302 read with sec. 120B, I. P. C., with the result that the accused, instead of being tried by a jury, were tried by the Judge himself with the aid of assessors, *held* that it would be

very difficult to say that the accused had been properly tried when they were deprived of a trial by a Jury by a manoeuvre of this kind—*Khidir v. King-Emp.*, 66 C.L.J. 575 (576). See also *Samsundar*, infra.

The accused were committed to the Court of Sessions under sec. 395, I. P. C. The Sessions Judge without assigning any reason amended the charge to one of robbery, thereby, before hearing the evidence, changing the character of the charge altogether. Held that the accused must have been prejudiced by the unauthorized amendment—*Paimullah*, 16 C.W.N. 238, 13 Cr.L.J. 127, 13 I.C. 783.

Amendment must not prejudice accused :—Although this section gives power to the Court to add to or alter a charge, still this power should be exercised with discretion, and it is the duty of the Court to see that the accused is not prejudiced by the addition or alteration of the charges—*Dodo*, 9 S.L.R. 37, 30 I.C. 125, 16 Cr.L.J. 573 (575); *Govindas*, 6 B.H.C.R. 76. Thus, an addition of a grave charge or alteration of a charge at a late stage of the proceedings (e.g., after the close of the defence evidence) would prejudice the accused in his defence and would be illegal—*Madura*, 6 C.W.N. 72; *Isap Mahomed*, 31 Bom. 218. Where during the trial of an accused person upon specific charges in a Court of Session, it was found at the conclusion of the trial that the charges as framed disclosed no offence against the accused, it was illegal and prejudicial to the accused to alter or amend the charges and to convict him on the amended charges without affording him an opportunity of meeting the amended charges. The fact that the accused cross-examined the prosecution witness to prove the unsustainability of the charges as originally framed, is no ground for holding that by substantially altering the charges, the accused was not prejudiced—*Muthu Goundan*, 27 M.L.T. 231, 21 Cr.L.J. 57, 11 M.L.W. 317, 1920 M.W.N. 149, 54 I.C. 409 (411). It is open to a Sessions Judge to add an alternative charge, but it is not a proper exercise of discretion to withdraw the charge (of an offence triable by jury) which the committing Magistrate thought to be proved, and to put the accused under a disadvantage by substituting another charge (of offences triable with assessors) so that he might be deprived of the right of trial by jury—*Samsundar*, 5 Pat. 238, 7 P.L.T. 178, 27 Cr.L.J. 512. See also *Khidir v. King-Emp.*, 66 C.L.J. 575 (576). A Court may alter a charge at any time before judgment is pronounced; but if in certain circumstances such alteration has occasioned a failure of justice, the Appellate or Revisional Court may interfere. No ruling can establish a proposition in law limiting the discretion conferred upon the trial Court by this section and preventing it absolutely from altering the charge at certain stages of the case. A discretion conferred by Statute cannot be whittled by ruling—*Subramania*, 32 Cr.L.J. 756, 131 I.C. 461, 1931 M.W.N. 399, A.I.R. 1931 Mad 439, 1931 Cr.C. 487, Ind. Rul 1931 Mad. 525.

Amendment cannot cure illegality :—An illegal charge cannot be amended or altered, and such amendment will not cure the illegality. Thus, where a charge is drawn up of four offences (committed within one year) it is wholly illegal under sec. 234, and the illegality cannot be cured by striking out one of the offences and convicting the accused for the remaining three—*Manavala Chetty*, 29 Mad 569, 5 Cr.L.J. 94. So also, where a Magistrate at first framed a charge under secs 352 and 504, I. P. Code, but finding that the two distinct offences which were in no way connected with one another could not be tried together, he struck out the charge framed and framed a charge under sec. 504 alone, held that the procedure adopted by the Magistrate was illegal—*Krishna Murthi v. Narayanaswami*, 49 M.L.J. 93, 26 Cr.L.J. 1618.

There is nothing in the wording of sec. 227, Cr. P. C., which limits the operation of that section to mere irregularities or its operation to any particular stage of the case prior to the time that judgment is given or the verdict of the jury is returned. Until that time, it is open to the Court to alter or add to the charge, and the provisions of secs 228, 229, 230 and 231, Cr. P. C., amply provide that the accused shall not be embarrassed or prejudiced by the alteration of the charge. The Magistrate must use a careful and wise discretion and where evidence relating to six charges has gone on the record, whereas there should be evidence only as to three, it may well be the

Magistrate would exercise a wise and just discretion in directing a new trial under the provisions of sec. 229, Cr. P. C., but the trying Court itself has that power and there is no need to refer the case to the High Court—*Mohammad Ismail*, 38 Cr.L.J. 324, A.I.R. 1937 Sind 1, 166 I.C. 845, 9 R.S. 156, 30 S.L.R. 391, not following *Manavala Chetty*, supra

735. Addition or alteration when to be made:—A charge must be amended before the judgment is pronounced. If a charge is defective, e.g., if more than three offences are included in one charge, which is invalid under section 234, the Magistrate cannot remedy the defect by saying in his judgment that he would proceed on only three charges. If he wishes to strike out any of the charges he should do so before concluding the trial, and should give the accused an opportunity of making such defence as he thinks fit; otherwise the trial is vitiated—*Chetty*, 49 Cal 555, 24 Cr.L.J. 86.

Although a charge may be added or altered at any time before the judgment is pronounced, still it is illegal to do so at a late stage of the proceedings, e.g., after the prosecution case has been closed and the defence evidence has been recorded—*Isap Mahomed*, 31 Bom. 218; *Mathura*, 6 C.W.N. 72. See also *Mahanlal Aditram*, 30 Cr.L.J. 191, 113 I.C. 617, 30 Bom.L.R. 1253, A.I.R. 1928 Bom 475, Ind. Rul 1929 Bom. 185. In *Queen-Emp. v. Gordon*, 9 All. 525 the High Court added a charge under sec. 193, I. P. C., when the prosecution case under sections 467 and 471, I. P. C., had concluded and the accused made a statement. See also *Girdhari Lal*, 12 Cr.L.J. 217, 10 I.C. 156.

If the complainant compounds the offence, the Court should acquit the accused upon the presentation of the petition of composition, and has no power to alter the charge already drawn up—*Hasta*, 1914 P.R. 29, 16 Cr.L.J. 81, 26 I.C. 993; *Giyan Singh*, 24 I.C. 948, 15 Cr.L.J. 540.

When the Sessions Judge altered the charge so as to make it one of an offence different in nature from that set out in the original charge, the Court would have no jurisdiction to convict the accused without calling on him to answer the charge and without taking the opinion of the assessors—*Gulab Singh*, A.I.R. 1935 All 458, 36 Cr.L.J. 1294, 158 I.C. 38, 1935 Cr.C. 486, 1935 A.L.J. 843.

In a trial by jury or assessors, the Sessions Court has no power to alter the charge after the delivery of the verdict of the jury or the opinion of the assessors—*Shek Ali*, 5 B.H.C.R. 9; *Harbans*, 1916 P.R. 33, 36 I.C. 134, 17 Cr.L.J. 545. The words "return of verdict" mean the return of the final verdict which the Judge is bound to record—*Appa Subhana*, 8 Bom. 200.

Application for alteration of charge.—An application for alteration of charge must be made immediately after the original charge has been read and explained by the Magistrate—*Abdul Rahaman*, 27 Cal 839; *Karuppa*, 18 Cr.L.J. 346, 38 I.C. 730. If the application is made before the Sessions Court at the commencement of the trial, the Sessions Judge should consider the application at once and not postpone passing his order till the conclusion of the trial—*Vajram*, 16 Bom 414, *Dodo*, 16 Cr.L.J. 573, 30 I.C. 125, 9 S.L.R. 37.

736. Sub-section (2):—An alteration of charge must be read over and explained to the accused. It is not the intention of the Legislature to empower a Court to convict an accused person of an offence of which he has not been told anything. Where a person was summoned to answer a charge under sec. 34, Police Act, but the Magistrate finding that the facts did not prove such offence, convicted him under sec. 279, I. P. C., without his being informed of the alteration of the charge, held that the conviction was illegal—*Dhum Singh*, 23 A.L.J. 436, 88 I.C. 1, 26 Cr.L.J. 1057; *Raghunath*, 24 A.L.J. 168, 27 Cr.L.J. 152, 91 I.C. 888. When a new charge was read aloud to the jury but was not specially explained to the prisoner, and he was not called upon to plead to that charge, but his counsel on being asked did not require a new trial (under sec. 229), it was held that the accused was not prejudiced by the

addition of the new charge, and the omission to explain the new charge did not affect the trial—*Appa Subhana*, 8 Bom. 200.

228. If the charge framed or alteration or addition made under section 226 or section 227 is such that proceeding immediately with the trial is not likely, in the opinion of the Court, to prejudice the accused in his defence or the prosecutor in the conduct of the case, the Court may, in its discretion, after such charge or alteration or addition has been framed or made, proceed with the trial as if the new or altered charge had been the original charge.

237. The addition or alteration of a charge does not open up the trial from the beginning, and the Court may immediately proceed with the trial if it is of opinion that there will be no prejudice to the accused. If the accused has already been examined under sec. 342, before the amendment of the charge and before he has been called upon to enter on his defence, it is not incumbent on the Court to re-examine the accused after the amendment of the charge—*Shamlal*, 1 Pat. 54, 3 P.L.T. 91, 23 Cr.L.J. 146.

229. If the new or altered or added charge is such that proceeding immediately with the trial is likely, in the opinion of the Court, to prejudice the accused or the prosecutor as aforesaid, the Court may either direct a new trial or adjourn the trial for such period as may be necessary.

238. New trial:—The intention of the Legislature is that whenever an amendment of the charge in any way tends to the prejudice of the prisoner, steps should be taken to prevent that consequence, by ordering a new trial or suspending the trial going on, to enable him to make his defence or to examine any material witness or to recall any witness already examined (sec. 231). It is only in the case of charges clearly related to one another that a trial goes on forthwith (sec. 228) after an amendment—*Govind*, 11 B.H.C.R. 27.

Where the original and the altered charges are nearly related to each other (the original charge being one of murder, and the altered charge being one of abetment of murder), and the accused did not object to the amendment, it was held that there was no such material prejudice as would have necessitated a new trial under this section—*Govind*, 11 B.H.C.R. 278. If, however, the amendment of charge would raise different questions of law and would admit of a different line of defence, the accused would be prejudiced and a new trial would be necessary—*Govindas*, 6 B.H.C.R. 76.

In a new trial, the Court would not be justified in referring to the record of the former trial as a whole, but he may refer to such depositions as are especially put in evidence—*Devi Dutt*, 7 C.L.R. 193.

230. If the offence stated in the new or altered or added charge is one for the prosecution of which previous sanction is necessary, the case shall not be proceeded with until such sanction is obtained, unless sanction has been already obtained for a prosecution on the same facts as those on which the new or altered charge is founded.

Stay of proceedings if prosecution of offence in altered charge require previous sanction

739. Sanction for one offence, conviction for another:—The mere fact that the sanctioning authority is of opinion that the facts constitute an offence under one section of the Act is in itself no bar to a conviction of the accused person for another offence under another section, provided, of course, that the facts stated in the order giving sanction are the same as those upon which the conviction is based. In such a case it is not necessary that fresh consent to the trial upon such altered charge would have to be given by the sanctioning authority. Section 230 makes full provision for a case of this kind—*Amar Singh*, 1919 P.R. 31, 21 Cr.L.J. 230, 55 I.C. 102.

Where sanction has been obtained under sec 197 in respect of a substantive offence, it will avail in respect of abetment of such offence, and no fresh sanction is necessary. Therefore where sanction was obtained for the prosecution of a Sub-Registrar for an offence under sec. 468, I. P. C., the trial of the Sub-Registrar for the abetment of that offence founded on the same facts required no further sanction—*Profulla*, 30 Cal 905 (908).

231. Whenever a charge is altered or added to by the Court after the commencement of the trial, the prosecutor and the accused shall be allowed to recall or re-summon, and examine with reference to such alteration or addition, any witness who may have been examined, and also to call any further witness whom the Court may think to be material.

740. Recall of witnesses:—The provisions of sec 231 are peremptory, and therefore when a charge is altered, the Court is bound to recall any witnesses whom the prosecution or the accused desires to recall; the Judge cannot refuse to call them merely because the accused cannot show on what points further cross-examination is necessary—*Chhanka*, 6 Pat 832, 28 Cr.L.J. 769 (771), 104 I.C. 97, A.I.R. 1927 Pat. 398, 8 P.L.T. 825. Under this section the accused has the right to recall the prosecution witnesses after the alteration of the charge, even if that alteration does not affect his defence. The Magistrate has no discretion in the matter, he is bound to recall those witnesses whom the accused wishes to recall—*Ramalinga*, 52 Mad 346, 30 Cr.L.J. 223 (224). And the Magistrate cannot refuse to recall the witnesses on this ground that the alteration is not material—*Nagendranath*, 36 C.W.N. 512 (543), 33 Cr.L.J. 265, Ind. Rul. 1932 Cal 184, 136 I.C. 136, 55 C.L.J. 111, 1932 Cr.C. 478, A.I.R. 1932 Cal 486. When a charge is amended, the accused has a right to recall and cross-examine all the prosecution witnesses. The right is not restricted to the recalling of those witnesses only who have deposed to the subject matter of the amendment in the charge—*Hazara Singh*, 26 Cr.L.J. 1497, A.I.R. 1926 Lah. 60, 90 I.C. 153. Where a charge has been altered, having regard to the provisions of secs. 231 and 257, Cr. P. C., the accused is entitled to have his new witnesses examined, unless for reasons mentioned in section 257 the Magistrate thinks that the application is made for the purpose of vexation or delay or for defeating the ends of justice. The two secs 231 and 257 have to be read together—*Ramalinga v. Ramaswamy*, 31 Cr.L.J. 455, 122 I.C. 785, 57 M.L.J. 478, 1929 M.W.N. 580, 30 M.L.W. 741. Where the Magistrate trying a warrant case at first framed a charge under sec 324, I. P. C., and then at a late stage of the proceedings, altered the charge into one under sec 307, I. P. C. (Sessions offence) without giving the accused an opportunity of re-examining the witnesses for the prosecution and producing his defence in regard thereto, and committed the accused to the Sessions on the charge so altered, held that the procedure of the Magistrate was entirely illegal and likely to prejudice the accused in his trial before the Court of Session—*Mohan Lal*, 22 A.L.J. 239, 25 Cr.L.J. 798, 81 I.C. 318, A.I.R. 1924 All. 665 (666). But *quære*, whether sec. 231 applies to such a case. It really falls under sec 317. Section 231 does not apply where during a trial of a warrant case

addition of the new charge, and the omission to explain the new charge did not affect the trial—*Appa Subhana*, 8 Bom. 200.

228. If the charge framed or alteration or addition made

When trial may proceed immediately after alteration.

under section 226 or section 227 is such that proceeding immediately with the trial is not likely, in the opinion of the Court, to prejudice the accused in his defence or the prosecutor in the conduct of the case, the Court may, in its discretion, after such charge or alteration or addition has been framed or made, proceed with the trial as if the new or altered charge had been the original charge.

237. The addition or alteration of a charge does not open up the trial from the beginning, and the Court may immediately proceed with the trial if it is of opinion that there will be no prejudice to the accused. If the accused has already been examined under sec. 342, before the amendment of the charge and before he has been called upon to enter on his defence, it is not incumbent on the Court to re-examine the accused after the amendment of the charge—*Shamlal*, 1 Pat 54, 3 P.L.T. 91, 23 Cr.L.J. 146.

229. If the new or altered or added charge is such that

When new trial may be directed, or trial suspended.

proceeding immediately with the trial is likely, in the opinion of the Court, to prejudice the accused or the prosecutor as aforesaid, the Court may either direct a new trial or adjourn the trial for such period as may be necessary.

238. New trial:—The intention of the Legislature is that whenever an amendment of the charge in any way tends to the prejudice of the prisoner, steps should be taken to prevent that consequence, by ordering a new trial or suspending the trial going on, to enable him to make his defence or to examine any material witness or to recall any witness already examined (sec. 231). It is only in the case of charges clearly related to one another that a trial goes on forthwith (sec. 228) after an amendment—*Govind*, 11 B.H.C.R. 27.

Where the original and the altered charges are nearly related to each other (the original charge being one of murder, and the altered charge being one of abetment of murder), and the accused did not object to the amendment, it was held that there was no such material prejudice as would have necessitated a new trial under this section—*Govind*, 11 B.H.C.R. 278. If, however, the amendment of charge would raise different questions of law and would admit of a different line of defence, the accused would be prejudiced and a new trial would be necessary—*Govindas*, 6 B.H.C.R. 76.

In a new trial, the Court would not be justified in referring to the record of the former trial as a whole, but he may refer to such depositions as are especially put in evidence—*Devi Dutt*, 7 C.L.R. 193.

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Stay of proceedings if prosecution of offence in altered charge require previous sanction.

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Where sanction has been obtained under sec. 197 in respect of a substantive offence, it will avail in respect of abetment of such offence, and no fresh sanction is necessary. Therefore where sanction was obtained for the prosecution of a Sub-Registrar for an offence under sec. 468, I P. C., the trial of the Sub-Registrar for the abetment of that offence founded on the same facts required no further sanction—*Profulla*, 30 Cal. 905 (908).

231. Whenever a charge is altered or added to by the Court after the commencement of the trial, the prosecutor and the accused shall be allowed to recall or re-summon, and examine with reference to such alteration or addition, any witness who may have been examined, and also to call any further witness whom the Court may think to be material.

740. Recall of witnesses:—The provisions of sec. 231 are peremptory, and therefore when a charge is altered, the Court is bound to recall any witnesses whom the prosecution or the accused desires to recall, the Judge cannot refuse to call them merely because the accused cannot show on what points further cross-examination is necessary—*Chhanka*, 6 Pat 832, 28 Cr L J 769 (771), 104 I C 97, A I R. 1927 Pat. 398, 8 P.L.T. 825. Under this section the accused has the right to recall the prosecution witnesses after the alteration of the charge, even if that alteration does not affect his defence. The Magistrate has no discretion in the matter, he is bound to recall those witnesses whom the accused wishes to recall—*Ramalinga*, 52 Mad 346, 30 Cr L J 223 (224). And the Magistrate cannot refuse to recall the witnesses on this ground that the alteration is not material—*Nagendranath*, 36 C.W.N. 542 (543), 33 Cr L J. 265, Ind Rul. 1932 Cal 184, 136 I C 136, 55 C L J 111, 1932 Cr C 478, A.I.R. 1932 Cal 486. When a charge is amended, the accused has a right to recall and cross-examine all the prosecution witnesses. The right is not restricted to the recalling of those witnesses only who have deposed to the subject matter of the amendment in the charge—*Hazara Singh*, 26 Cr L J. 1497, A I R. 1926 Lah. 60, 90 I.C. 153. Where a charge has been altered, having regard to the provisions of secs. 231 and 257, Cr P. C., the accused is entitled to have his new witnesses examined, unless for reasons mentioned in section 257 the Magistrate thinks that the application is made for the purpose of vexation or delay or for defeating the ends of justice. The two secs 231 and 257 have to be read together—*Ramalinga v. Ramaswamy*, 31 Cr L J 455, 122 I C; 785, 57 M.L.J. 478, 1929 M.W.N. 580, 30 M.L.W. 741. Where the Magistrate trying a warrant case at first framed a charge under sec. 324, I. P. C., and then at a late stage of the proceedings, altered the charge into one under sec. 307, I P. C. (Sessions offence) without giving the accused an opportunity of re-examining the witnesses for the prosecution and producing his defence in regard thereto, and committed the accused to the Sessions on the charge so altered, held that the procedure of the Magistrate was entirely illegal and likely to prejudice the accused in his trial before the Court of Session—*Mohan Lal*, 22 A.L.J. 239, 25 Cr L J 798, 81 I.C. 318, A.I.R. 1924 All. 665 (666). But *quære*, whether sec. 231 applies to such a case. It really falls under sec. 347. Section 231 does not apply where during a trial of a warrant case

the charge is altered into a charge for a Sessions offence, and the trial is converted into an inquiry under Ch. XVIII. Such a case is specifically provided for in sec. 317—*Ram Ghulam*, 1931 A.L.J. 587, 32 Cr.L.J. 849 (850), Ind. Rul 1931 All. 479, 132 I.C. 47, 1931 Cr.C. 706, A.I.R. 1931 All. 431, doubting *Mohan Lal*, supra. But it should be noted that there is no duty laid on the Court to ask the accused whether he wishes to recall or re-summon prosecution or defence witnesses, and so there is no breach of any provisions of sec. 231 if the Court does not so inquire. It is the accused who is to ask the Court to recall the witnesses. And there would be a breach of the provisions of this section if the Court refused the request of the accused to recall or summon witnesses—*Konmal*; 52 All 455, 1930 A.L.J. 572, 32 Cr.L.J. 22 (23).

232. (1) If any Appellate Court, or the High Court in the exercise of its powers of revision or of its powers under Chapter XXVII, is of opinion that any person convicted of an offence was misled in his defence by the absence of a charge or by an error in the charge, it shall direct a new trial to be had upon a charge framed in whatever manner it thinks fit.

(2) If the Court is of opinion that the facts of the case are such that no valid charge could be preferred against the accused in respect of the facts proved, it shall quash the conviction.

Illustration.

A is convicted of an offence under section 196 of the Indian Penal Code upon a charge which omits to state that he knew the evidence, which he corruptly used or attempted to use as true or genuine, was false or fabricated. If the Court thinks it probable that A had such knowledge, and that he was misled in his defence by the omission from the charge of the statement that he had it, it shall direct a new trial upon an amended charge; but if it appears probable from the proceedings that A had no such knowledge, it shall quash the conviction.

741. Scope:—This section lays down that if any person convicted of an offence has been misled in his defence by the absence of a charge or by an error in the charge, a retrial is to be ordered; and this rule applies as well to cases in which the conviction was in compliance with the terms of the law as to cases in which the conviction was irregular—*Mallu Gope*, 10 P.L.T. 875, 30 Cr.L.J. 891 (893), 118 I.C. 323.

Errors in the charge:—If the High Court thinks that in consequence of material errors in a charge, the accused has been misled, it is bound to direct a new trial to be had upon a charge framed in the proper manner—*Harbans*, 1916 P.R. 33, 17 Cr.L.J. 454, 36 I.C. 134. Where the owners of land were charged under sec. 153, I. P. C., for omission to give information of the riot to the thana, but they were convicted for the omission on the part of their agents, and not of themselves, it was held that the error in the charge prejudiced the accused, and a new trial was ordered by the Appellate Court—*Sarat Chandra*, 7 C.W.N. 301. Where the charge framed against the accused was to the effect that they caused hurt under sec. 324, I. P. C., to a certain person by means of a *dao* (a cutting instrument), but in fact there was no case of hurt by *dao*, but a *lathi* was used, and they were convicted under sec. 352, I. P. C., for assault with a *lathi*, it was held that the accused might have been prejudiced in their defence by this error in the charge, and a retrial was ordered—*Sital Chandra*, 17 C.W.N. 419, 14 Cr.L.J. 212 (213), 19 I.C. 308. Where the charge against the accused was under secs. 149 and 304, I. P. C., but the High Court found that the accused ought to have been charged under sec. 147, I. P. C., the High Court

ordered a retrial under a properly framed charge under the latter section—*Sabir*, 22 Cal. 276 (285).

Where the prisoner refused to defend himself and refused to recognize the authority of the Courts, it cannot be said that he was misled in his defence by any error or omission in the charge or that there was any failure of justice under sec. 225 by reason of such error or omission—*Ramendra*, 58 Cal. 1303, 32 Cr.L.J. 844 (847), 35 C.W.N. 716, 132 I.C. 174, 1931 Cr.C. 506, A.I.R. 1931 Cal. 410, Ind. Rul. 1931 Cal. 558. But see *Shailabala*, A.I.R. 1933 All. 678 (685), 1933 A.L.J. 1059, 1933 Cr.C. 1190, 145 I.C. 977, 34 Cr.L.J. 967 (F.B.), where it has been laid down that if the illegality of a conviction is brought to the notice of the High Court there should not be a refusal on its part to interfere merely because the accused concerned is quite content with the order and does not wish to challenge it or because he had no objection to his being prosecuted and convicted.

742. Absence of charge:—Charge for one offence, conviction for another :—

Where an accused person was summoned for offences under secs. 143 and 379, I. P. C., and the trying Magistrate drew up a charge only for an offence under sec. 379 but convicted the accused for an offence under sec. 143, I. P. C., held that the conviction must be set aside. The accused was summoned for two offences, and when the Magistrate framed a charge under sec. 379, the accused had good reason to suppose that the other offence had been dropped by the Magistrate. Under such circumstances the accused was misled in his defence by the absence of a charge under sec. 143, I. P. C., and his conviction for that offence was therefore illegal—*Hossein v. Kalu*, 29 Cal. 481 (482). Where the accused were charged with and convicted of rioting (sec. 147, I. P. C.) and on appeal the Sessions Judge set aside the conviction for rioting, but convicted them for house-trespass and hurt (secs. 448 and 323, I. P. C.), it was held that the latter offences, being distinct and separate offences from rioting, should have formed the subject of separate charges, and the accused had been prejudiced within the meaning of this section by the omission of charges for the latter offences—*Yakub Ali v. Lethu*, 30 Cal. 288 (290). See also *Har Narain*, 18 C.W.N. 1274, 16 Cr.L.J. 42 (43), and *Genu Manjhu*, 18 C.W.N. 1276, 15 Cr.L.J. 704 (705), where the conviction was quashed on similar grounds.

Where the accused was charged for dishonestly using as genuine a forged instrument, but was convicted for defamation, it was held that not only should the conviction be set aside, but also as there was nothing to show that any valid charge could be preferred against the accused for the offence of defamation, no trial could be held (see sub-sec. 2)—*Gobinda Persad v. Garth*, 28 Cal. 63, 5 C.W.N. 819.

The accused persons were placed upon their trial upon charges of mischief under sec. 427, I. P. C., and of rioting under sec. 147, I. P. Code. No substantive charge in respect of the assault upon the Manager was framed against any of them. The trial Court discussed the evidence and came to the conclusion that the accused persons ought to be acquitted of all the charges framed against them. They were, however, convicted of an offence under sec. 323, I. P. C., for having assaulted the Manager. The Appellate Court came to the conclusion that as no charge had been framed under sec. 323, I. P. C., the accused could not but be acquitted. Held that the order of acquittal was bad in law in view of the provisions of sections 232 (1) and 535 (1), Cr. P. C., and that the appeal ought to be reheard in the light of these sections—*Suraj Mull v. Scopujan Singh*, 44 C.W.N. 400.

Joinder of Charges.

233. For every distinct offence of which any person

is accused there shall be a separate charge,
 Separate charges for distinct offences. and every such charge shall be tried separately, except in the cases mentioned in sections 234, 235, 236 and 239.

Illustration.

A is accused of a theft on one occasion, and of causing grievous hurt on another occasion. A must be separately charged and separately tried for the theft and causing grievous hurt.

743. Object of section:—The object of this section is to see that the accused is not bewildered in his defence by having to meet several charges in no way connected with one another—*Ram Subheg*, 19 C.W.N. 972, 16 Cr.L.J. 641 (654). Another object is to see that the mind of the Court is not prejudiced against the prisoner if he were tried in one trial upon different charges resting upon different evidence. It might be difficult for the Court trying him on one of the charges not to be unduly influenced by the evidence against him on the other charges—*Juala Prasad*, 7 All 174; *Ram Subheg*, supra. If in any case the accused are likely to be bewildered in their defence by having to meet many disconnected charges, or the prospect of a fair trial is likely to be endangered by the production of a mass of evidence directed to many matters and tending by its mere accumulation to induce an undue suspicion against the accused, then the propriety of combining the charges may be questioned—*Fakirapa*, 15 Bom 491; *Rasul*, 3 Luck. 664, 5 O.W.N. 612, 29 Cr.L.J. 801 (802).

The general law as to the trial of accused persons is embodied in this section which provides for separate trial of each accused person for every distinct offence, and the exceptions are laid down in secs 234, 235, 236 and 239 which must be strictly construed, so as not to defeat the right of independent trial conferred by the general law—*Tepanidhi*, 5 P.L.J. 11, 1 P.L.T. 180, 21 Cr.L.J. 161.

744. Scope of section:—These sections (233-239) relating to joinder of charges refer to the trial of the accused. The ruling in *Subrahmaniya Aiyar's case*, 25 Mad 61 (cited below) cannot be extended to preliminary inquiries held by Magistrates committing a case to the Sessions, so as to render the commitment itself illegal on the ground of misjoinder of offences or offenders at the preliminary inquiry—*Govinda*, 26 Mad. 592; *Sessions Judge*, 35 M.L.J. 259, 20 Cr.L.J. 514. See Notes under sec. 215. In a warrant case the trial proper does not begin until the accused is charged and called upon to answer. The stage up to then is only an inquiry and not a trial; and therefore where the accused are discharged under sec. 253 (i.e., before frame of charge), no question of illegality of joint trial arises—*Manbodh v. Jhaboolal*, 30 Cr.L.J. 404, 115 I.C. 164, A.I.R. 1929 Nag. 237, Ind. Rul. 1929 Nag. 100.

This section (as well as secs 234, 236 and 239) applies not only to warrant cases, but also to summons cases, although it is not necessary to frame a charge in the latter cases. Therefore, the joint trial and conviction of 19 accused persons for 19 distinct offences in a summons case is contrary to the provisions of sec. 233-239 and is illegal—*San Dun*, 3 L.B.R. 52 (F.B.), 2 Cr.L.J. 739 (741, 744). See also *Amolak*, 34 Cr.L.J. 1175, 146 I.C. 116, 16 N.L.J. 196, A.I.R. 1933 Nag. 368, 1933 Cr.C. 1552. The trial of a person for several distinct offences under the Bengal Excise Act in a summons case is illegal under this section—*Upendra Nath*, 41 Cal. 694 (702), 22 I.C. 425, 19 C.L.J. 53, 15 Cr.L.J. 73, 18 C.W.N. 486. See also *Lakshmana*, 33 Cr.L.J. 589, 138 I.C. 317, 1932 M.W.N. 1157, 1932 Cr.C. 501, 35 M.L.W. 661, A.I.R. 1932 Mad 497, Ind. Rul. 1932 Mad. 553. In summons cases, the intimation prescribed by sec 242 takes the place of a formal charge, and each such charge has to be separately tried—*Manna*, 9 N.L.R. 42, 14 Cr.L.J. 230 (231). This section also applies where the accused is charged with a summons case and a warrant case—*Maung Gale*, 3 L.B.R. 113, 3 Cr.L.J. 350.

Not only does this section apply to original trials, but the Appellate Court is also bound by it; thus, an Appellate Court acting under section 423 (1) (b) and altering the finding cannot act in contravention of the provisions of section 233—*Sahib Singh*, 1905 P.R. 38, 2 Cr.L.J. 694.

Distinct offences:—When two offences are committed and each of these two

offences has no connection with the other, they are distinct offences—*Ram Subheg*, 19 C.W.N. 972, 16 Cr.L.J. 631.

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(5) Offences under sec. 19 (d) of the Indian Arms Act and under sec. 411, I. P. C., are distinct offences which cannot be tried together in one trial, provisions of secs. 234, 235, 236 and 239 being not applicable to a case like this—*Onkar Singh*, 35 Cr.L.J. 1417, 151 I.C. 840, 11 O.W.N. 1206, A.I.R. 1934 Oudh 457, 1934 Cr.C. 1308.

(6) Where the accused was charged with fraudulently or dishonestly using as genuine a forged transit pass-book, specially mentioning three transit passes, held that there should have been a separate charge with regard to each transit pass and it was improper to frame a charge with respect to the whole book specifying three particulars of forgery in it and that this would not be adequate ground for interference as the accused was not misled by the error—*Supdt. and Rembr. of Legal Affairs, Bengal v Daulat Ram*, 59 Cal. 1233, Ind. Rul. 1932 Cal. 504, 138 I.C. 705, 33 Cr.L.J. 685, 36 C.W.N. 505, 55 C.L.J. 349, 1932 Cr.C. 337, A.I.R. 1932 Cal. 390.

(7) The trial of the accused in respect of the offences of his being the author, the editor, the printer and the publisher of the offending article in one trial is illegal as these are distinct offences under sec. 3 (1) of the Indian States (Protection against Disaffection) Act, 1922, and are not so connected together as to form the same transaction—*Diwan Singh*, 36 Cr.L.J. 744 (752), 155 I.C. 197, A.I.R. 1935 Nag 90, 1935 Cr.C. 418.

(8) Swearing a false affidavit and using that false affidavit are distinct offences even though they are parts of the same transaction—*Abdul Hamid*, 37 Cr.L.J. 492, 161 I.C. 763, A.I.R. 1936 Rang. 174, 14 Rang. 24, 1936 Cr.C. 271.

(9) Where the accused were divided into two groups, playing at different places and there is nothing so to connect them as to allow it to be said that they were all engaged in one and the same transaction, the charge discloses against the accused two distinct and separate offences under sec. 12, Bombay Prevention of Gambling Act (IV of 1887) which cannot be tried together in one trial—*Shivalomal*, A.I.R. 1937 Sind 304, 172 I.C. 80, 39 Cr.L.J. 59, 10 RS 135, 32 S.L.R. 30.

(10) No less than six counts of bribery relating to different dates and different persons and six counts of false personation relating to different persons but to different times of the same day are distinct offences which cannot be tried together in one trial—*Appalaswami v Emp.*, 1937 M.W.N. 209.

746. What are not distinct offences:—Offences of the same kind committed on one occasion though consisting of parts are not different offences but are to be treated as constituting one offence, e.g., the making of any number of false statements in the same deposition is one aggregate case of perjury, and charges need not be multiplied according to the number of false statements—*Rakhal Chandra*, 36 Cal 808, 10 Cr.L.J. 150.

The stealing of several bullocks from the same man at the same time is but one offence, and there need not be as many charges as the number of bullocks stolen—*Raghu*, 1881 A.W.N. 154. Theft of two articles belonging to two different persons, committed at one and the same time, constitutes only one offence of theft and not two; and hence two convictions and sentences are not legal—*Krishna Shahaji*, Ratanlal 927; *Bhura*, 26 Cr.L.J. 1495 (Nag.).

Receiving on one occasion various items of stolen property, the result of various thefts is only one offence under sec. 411, I. P. C.—*Irapa*, 3 Bom.L.R. 187. If a person is found in possession of a number of stolen articles, the offence committed by the accused (receiving stolen property) is a single offence and not a number of offences, and it makes no difference whether the articles belong to a single owner or to different owners. But if there were evidence that the accused received the articles at different times or from different thieves, the case would be different—*Sheo Charan*, 45 All. 485 (486), A.I.R. 1923 All. 547, 73 I.C. 520, 24 Cr.L.J. 632; *Ramnath*, 36 Cr.L.J. 342, 153 I.C. 423, A.I.R. 1934 Pat. 483, 13 Pat. 161, A.L.R. 1934 Pat. 273, 1934 Cr.C. 1074, dissenting.

from *Ram Sarup*, 9 C.W.N. 1027, 2 Cr.L.J. 847. A person should not be charged, tried and convicted in two separate trials merely because two bullocks found in his possession belonged to two separate owners, although they were stolen from a grazing ground at the same time—*Nga Po E*, 37 Cr.L.J. 530, 162 I.C. 137, A.I.R. 1936 Rang 94, 1936 Cr.C. 118, following *Nga Po*, (1872-1892) L.B.R. 168. The mere fact that property stolen on two different occasions is found at one and the same time in the possession of an accused is not of itself sufficient to prove that the accused has committed two different offences under sec. 411, I. P. C. (retaining stolen property), as it is quite possible that the property though stolen on two different occasions may have been received from the same thief at the same time—*Makhan*, 15 All 317. So also, the mere fact that the goods stolen from two different persons are found in the possession of the accused, will not be sufficient to try the accused on two separate charges under sec. 411, I. P. Code (receiving stolen property) and to sentence him for each of the charges, unless there is proof that he received at different times or from different thieves. All the goods in the possession of the accused may have been stolen by the same thief and may have been delivered to the accused by him at the same time though stolen on different occasions. If the accused received all these goods at the same time, that would constitute only one offence—*Ishan Muchi*, 15 Cal 511; *Nga Kywet*, 1 L.B.R. 39. Where several items of stolen property were found in the possession of the accused on the same date, held that the accused committed only one offence and in the absence of evidence that the different articles were received at different times, he could not be charged separately for each item of stolen property; consequently, the trial of the accused in respect of some of the stolen articles barred a second trial in respect of the remaining article—*Ganesh Shaha*, 50 Cal 594; *Bishun Singh*, 3 Pat. 503 (519), 5 P.L.T. 319, 25 Cr.L.J. 738, 81 I.C. 226, A.I.R. 1925 Pat 20, 1924 P.H.C.C. 126; *Hayat*, A.I.R. 1928 Lah 637, 110 I.C. 673, 29 P.L.R. 541, 29 Cr.L.J. 737; *Chanan Singh*, 37 Cr.L.J. 752. See also *Ramnath*, supra. For contra see *Dadlomal*, 27 Cr.L.J. 1256, 98 I.C. 104, A.I.R. 1927 Sind 53.

Misappropriation of several books of account in respect of the same estate though on different occasions is but one offence, the several books of account forming one set of books—*Promothanath*, 17 C.W.N. 479, 14 Cr.L.J. 219. So also, misappropriation of several sums of money on several occasions in regard to one individual is one offence—*Jagat Chandra v. Lal Chand*, 5 C.W.N. 332. Theft of a box and a bicycle from one person committed at the same time is one offence—*Bijoy v. Satish*, 21 Cr.L.J. 682 (Cal.).

747. Separate charge:—For every distinct offence there shall be a separate charge. Even though the offences have been committed in the same transactions, there should be a distinct charge for each distinct offence, though they can be tried together under sec. 235—*Gul Mahomed v. Cheharu*, 10 C.W.N. 53, 3 Cr.L.J. 141; *Fattu*, 26 All, 195. One charge framed against two persons for cheating the complainant and two others on three different occasions is bad in law—*Srishi*, 13 C.W.N. 1067, 10 Cr.L.J. 469, 4 I.C. 16. Where the accused was charged in one charge with two attempts to cheat on two different dates, held that there should have been two charges and that the defect cannot be cured by sec. 537, Cr. P. C.—*Ishan Sabarna*, 10 C.W.N. 520. See also the cases cited under heading 'What are distinct offences' above (Note 745). In almost all these cases, it has been held that the framing of one charge in respect of several distinct offences is not merely an irregularity but an illegality, and the conviction on such a charge must be set aside. But where the offences, though distinct, can be tried jointly by virtue of the provisions of secs. 234, 235 and 239, the error in framing one charge instead of separate charges in respect of the several offences is an error in form rather than of substance, and is not an illegality but a mere irregularity covered by sec. 537—*Moharuddi v. Jadunath*, 11 C.W.N. 54, 4 Cr.L.J. 415 (417); *Musai*, 41 Cal. 66 (68); *Ram Subhag*, 19 C.W.N. 972, 16 Cr.L.J. 641 (654); *Radhanath*, 50 Cal. 94; *Ajgar*, 30 Cr.L.J. 799, 48 C.L.J. 138, 117 I.C. 596, A.I.R. 1928 Cal 700, 32 C.W.N. 839 (842). See also *Rasul*, 111 I.C. 305, 5 O.W.N. 612, A.I.R. 1928 Oudh 401, 3 Luck. 664, 29 Cr.L.J. 801. Where offences which ought to have been separately charged are joined together but the specific offences are satisfactorily proved by competent evidence

corroborated in all necessary respects and there is no miscarriage of justice, the irregularity is cured under secs. 225 and 537, Cr. P. C., by the finding that the accused has not been prejudiced—*Babulal Choukhani v. King-Emp.*, A.I.R. 1938 P.C. 130 (135), 65 I.A. 158, 32 S.L.R. 476, 1938 O.L.R. 189, 1938 O.A. 398, 1938 M.W.N. 505, 19 P.L.T. 343, 1938 A.L.R. 309, 10 R.P.C. 250, 4 B.R. 490, 39 Cr.L.J. 452, 67 C.L.J. 161, 40 Bom.L.R. 787, 174 I.C. 1, 42 C.W.N. 621, 1938 A.W.R. (P.C.) 116, 1938 P.W.N. 320, 1938 A.Cr.C. 27, 1938 O.W.N. 416, 1938 A.L.J. 382, (1938) 1 M.L.J. 647 (P.C.); *Balumul Hotchand*, 39 Cr.L.J. 890 (893), 177 I.C. 346, A.I.R. 1938 Sind 171; *Chandra Narain Jha v. The King-Emp.*, 41 Cr.L.J. 523 (525), A.I.R. 1940 Pat. 603, 6 B.R. 564, 187 I.C. 862, 1940 P.W.N. 557. Where the charges under sections 452, 323 and 379, I. P. C., are mentioned together but not only the sections of the I. P. C., but also the alleged charges under those sections are specifically and separately mentioned, the charge-sheet does not contravene the provisions of this section—*Madho Singh v. Emp.*, 41 Cr.L.J. 725 (726), 189 I.C. 258, 1940 O.W.N. 607. In a petty case, the irregularity of the Magistrate in specifying three distinct offences in one head of charge, instead of framing three separate charges, may be excused under sec. 537, where the accused had not been prejudiced—*Bachchu v. Piyara*, 2 Luck. 430, 28 Cr.L.J. 409 (410). See also first paragraph of Note 748 under the heading "Effect of misjoinder of charges".

748. Join trial illegal:—The accused was charged and tried at one trial for several distinct offences extending over more than one year, contrary to the provisions of secs. 233 and 234, and the Full Bench held that the trial was an irregularity curable by sec. 537. But the Privy Council laid down that the disobedience of an express provision of law relating to a mode of trial is not a mere irregularity curable by sec. 537, but an illegality, and that such illegality cannot be made good even if there is enough left upon the indictment upon which a conviction might have been supported—*Subrahmanya Ayyar*, 25 Mad. 61 (P.C.).

Where the Magistrate heard the prosecution against several persons (charged with distinct offences) together and afterwards called upon them to plead separately in defence, it was held that such a trial was in substance a joint trial of all the prisoners, and therefore illegal, and a retrial was ordered—*Paw Tha*, 3 L.B.R. 280, 5 Cr.L.J. 417. So also, where the Magistrate framed distinct charges and numbered them as distinct cases, but when the witnesses came to be cross-examined, he lost sight of the necessity of keeping the two trials separate, and allowed the witnesses to be cross-examined promiscuously in respect of both the charges, it was held that the joint trial offended against the provisions of this section and the illegality could not be cured by sec. 537—*Kudiri Kaya*, 39 Mad. 527, 29 M.L.J. 101, 16 Cr.L.J. 593.

"Except.....Section 234", etc.:—The broad rule enunciated in sec. 233 (*viz.*, that for every distinct offence there should be a separate charge and every charge should be tried separately) is made subject to four exceptions. But a Court cannot and ought not to treat a case as an exception to the general rule, unless it is satisfied that in the case before it the charge should be within one of the four exceptions; and it would be safer if the Magistrate or the Sessions Judge recorded in his charge-sheet or judgment his reasons for treating the case as falling under one of the exceptions—*Shanker*, 11 A.L.J. 188, 14 Cr.L.J. 116 (117).

Effect of error in the charge:—See sections 225 and 537, Cr. P. C., and the Notes thereunder.

Any defect or omission from the charge as actually framed would not be fatal unless it has occasioned a failure of justice—*Muhammad Yakub*, 33 Cr.L.J. 373, Ind. Rul. 1932 All. 270, 137 I.C. 73, 1932 Cr.C. 93, A.I.R. 1932 All. 73. Irregularities in a charge have no effect unless they have prejudiced the accused in their defence—*Baurar Shah*, 37 Cr.L.J. 1039 (1042), 164 I.C. 899, A.I.R. 1936 Pesh. 172.

Effect of misjoinder of charges:—What their Lordships of the Privy Council have decided in *Subrahmanya Ayyar's case* (25 Mad. 61 at p. 97, 28 I.A. 257, 11 M.L.J.

233, 8 Sar 160) is that if the law has expressly provided a particular *mode of trial*, a disobedience of that law vitiates the whole trial. But it is doubtful if the *framing of a charge* is a "mode of trial," but the *joint trial* of charges as to distinct offences would be a mode of trial. And so, the joinder in one charge of two distinct offences in contravention of the provisions of sec 233 is not an "illegality" within the mischief of the rule laid down in the above Privy Council case, but is only an irregularity curable by sec. 537—*Ram Subheg*, 19 C.W.N. 792, 16 Cr.L.J. 641 (654); *Abdul Rahaman*, 4 Bur.L.J. 213, 27 Cr.L.J. 669 (673), 94 I.C. 717, A.I.R. 1926 Rang 53; *Tamezkhan v. Rajjabali*, 31 C.W.N. 337 (339), 45 C.L.J. 591, 28 Cr.L.J. 347, 100 I.C. 827, A.I.R. 1927 Cal. 330; *Farzand Ali*, 27 Cr.L.J. 909, 96 I.C. 221, A.I.R. 1926 Pat. 347, 1936 Pat. H.C.C. 207, distinguishing *Asgar Ali*, noted below. In such a case the defect is one of "duplicitv", not of misjoinder. It is not the mode of trial that is wrong; it is merely the form of the charge. A trial under such a charge is not bad unless the accused has been prejudiced thereby—*Musai Singh*, 41 Cal 66. See also *Mendi Lal*, 35 Cr.L.J. 935, 149 I.C. 231, A.I.R. 1934 Oudh 244, 11 O.W.N. 686; *Bachchu v. Piyara*, 2 Luck. 430, 28 Cr.L.J. 409 (410) and Note 747. A failure to comply with the provisions of this section may or may not be fatal according to the circumstances of the case—*Ramdin Lal*, 38 Cr.L.J. 97 (98), 165 I.C. 970, A.I.R. 1937 Pat 176, 18 P.L.T. 91, 3 B.R. 117, 9 R.P. 246. In a case like this failure to comply with sec 233 would be condoned where the offences are committed in one transaction, where the evidence is identical and where care has been taken to consider each item of charge separately and arrive at a distinct finding regarding each one of the offences charged—*Sachchidanand*, 34 Cr.L.J. 892 (894), 14 P.L.T. 580, 1933 Cr.C. 1030, A.I.R. 1933 Pat 488, 144 I.C. 936; *Ramdin Lal*, supra. In *Supdt and Rembr, Bengal v Daulat Ram*, A.I.R. 1932 Cal 390 (392), 59 Cal. 1233, 36 C.W.N. 505, 1932 Cr.C. 337, 55 C.L.J. 319, 138 I.C. 705, 33 Cr.L.J. 685, Ind. Rul 1932 Cal 504, it has been laid down that this would not be an adequate ground for disturbing the order of conviction, for there is no reason whatever to hold that the accused was misled by the error or that it occasioned any failure of justice. For contra see *Asgar Ali*, 40 Cal 846, 17 C.W.N. 827, 14 Cr.L.J. 449, 20 I.C. 609, where it has been laid down that the joinder of two distinct charges under one charge is an illegality which is fatal to the proceedings. See Note 747.

Section 233, Cr. P. C., is mandatory—*Sita Ahir*, 40 Cal 168 (170). Disregard of the provisions of sec 233, Cr. P. C., is not an irregularity that could be remedied by sec. 537, Cr. P. C., but is altogether illegal—*Ali Mahomed*, 30 Cr.L.J. 1073 (1074), 119 I.C. 532, A.I.R. 1930 Sind 62, Ind. Rul 1929 Sind 212, following *Fattu*, 26 All. 195, 1 Cr.L.J. 346, 1903 A.W.N. 231 and *Paresh Nath*, 33 Cal 295, 2 C.L.J. 516, 3 Cr.L.J. 153; *Dubri Misir*, A.I.R. 1931 Oudh 86, 6 Luck 441, 8 O.W.N. 92, 1931 Cr.C. 214, 130 I.C. 350, 32 Cr.L.J. 540. See also *Thakur Singh v Emp*, A.I.R. 1939 All. 665 (667), 1939 A.L.J. 547. The joint trial of charges as to distinct offences not committed in the course of same transaction is an illegality not curable under sec 537, Cr. P. C.—*Ganno*, 35 Cr.L.J. 1048, 149 I.C. 959, 11 O.W.N. 731. A misjoinder of charges for distinct offences cannot be cured under sec 537, Cr. P. C.—*Ramchandra Rango v. Emp*, 40 Cr.L.J. 579 (588), 181 I.C. 870, A.I.R. 1939 Bom. 129, 41 Bom.L.R. 98. Where a person is charged with two distinct offences in the same trial not covered by any of the exceptions to sec 233, Cr. P. C., that is not a mere irregularity, but it is an illegality which cannot be cured by sec 537, Cr. P. C. The irregularity contemplated by sec. 537 is an irregularity in the procedure and not a substantive error of law or a disregard of the mandatory provisions of the Code—*Krishnaji Anant*, 138 I.C. 520, A.I.R. 1922 Bom. 277, 1932 Cr.C. 389, 33 Cr.L.J. 619, 34 Bom.L.R. 590, Ind. Rul 1932 Bom. 383; *Kalika Prasad*, 31 I.C. 829, 38 All. 42, 16 Cr.L.J. 813; *Abdur Rahim*, 32 Cr.L.J. 611, 130 I.C. 796, A.I.R. 1931 Pat 102, 12 P.L.T. 12, Ind. Rul 1931 Pat. 204, 1931 Cr.C. 230; *Bohra*, 32 Cr.L.J. 1031, 133 I.C. 418, 1931 Cr.C. 1041, 1931 A.L.J. 690, A.I.R. 1931 All 705, Ind. Rul 1931 All. 658, *Raman Behari*, 41 Cal. 722; *Kadiri*, 39 Mad. 527; *Shafi*, 25 Cr.L.J. 964, 81 I.C. 612, 21 A.L.J. 859, A.I.R. 1924 All. 211; *Ruikar*, A.I.R. 1935 Nag 149 (155); *Nga Tha Gyi*, 13 Cr.L.J. 485, 15 I.C. 485, 5

Bur.L.T. 101; *Bahali*, 37 Cr.L.J. 722, 162 I.C. 926, A.I.R. 1936 Lah. 507, 1936 Cr.C. 512, 38 P.L.R. 628; *Kamala Kanta v. Emp.*, 41 C.W.N. 1112; *Ram Kheluan Kahar v. Emp.*, 39 Cr.L.J. 739, 176 I.C. 525, A.I.R. 1938 Cal. 525, 42 C.W.N. 729, 11 R.C. 113. A different view seems to have been taken in the following rulings where stress has been laid upon the question of prejudice to the accused. Thus, it has been held that the illegality with regard to sec. 233 does not necessarily vitiate the trial as a whole—*Dur Mahomed*, 35 Cr.L.J. 1337 (1341), 151 I.C. 494, 28 S.L.R. 119, 1934 Cr.C. 628, A.I.R. 1934 Sind 57, following *Radhanath*, 71 I.C. 120, A.I.R. 1922 Cal. 573, 24 Cr.L.J. 72, 50 Cal 94, 36 C.L.J. 149. See *Raj Bahadur*, 35 Cr.L.J. 1496, 152 I.C. 103, 1934 Cr.C. 1308, 11 O.W.N. 1206, A.I.R. 1934 Oudh 457, where a fresh trial was not ordered as the Counsel of the accused did not desire it and no prejudice resulted to the accused on account of joint trial of two distinct offences of murder, the irregularity being condoned under sec. 537. See also *Narain*, A.I.R. 1936 All. 129 (130); *Bhawani Pathak*, 37 Cr.L.J. 496, 161 I.C. 869, A.I.R. 1936 All. 253, 1936 Cr.C. 237.

Where persons who committed different offences not committed in the course of the same transaction are jointly charged and tried, the trial is illegal. To a case of this nature sec. 537, Cr. P. C., would not apply—*Pattu*, 34 Cr.L.J. 863, 144 I.C. 974, 1933 A.L.J. 1595, A.I.R. 1933 All. 354, 1933 Cr.C. 627; *Muhammadi*, 28 Cr.L.J. 357, 100 I.C. 965, A.I.R. 1927 Lah. 274; *Fasih-ud-Din*, 28 Cr.L.J. 459, 101 I.C. 491, 9 L.L.J. 100, A.I.R. 1927 Lah. 737; *Jethalal*, 29 Bom. 449 (455), 2 Cr.L.J. 480, 7 Bom.L.R. 527; *Meeriah*, A.I.R. 1931 Rang. 90, 8 Rang. 632, 1931 Cr.C. 378, 132 I.C. 548, 32 Cr.L.J. 930; *Tamkin Hiu*, 35 Cr.L.J. 1234, 151 I.C. 99, 36 Bom.L.R. 495, 1934 Cr.C. 946, A.I.R. 1934 Bom. 255; *Gobind Koeri*, 29 Cal. 385, 6 C.W.N. 468. It is, of course, well-settled that the infringement of the provisions of sec. 239 (d), Cr. P. C., would, if made out, constitute an illegality as distinguished from an irregularity, so that the conviction would require to be quashed, and that sec. 537, Cr. P. C., can be of no avail to remedy the defect—*Nathu Chaudhury v. Emp.*, A.I.R. 1940 Pat. 499 (500), 41 Cr.L.J. 452 (453), 6 B.R. 461, 187 I.C. 361, 1940 P.W.N. 454. Where accused persons are charged and tried in the same trial for different offences not committed in the course of the same transaction, the misjoinder renders the trial invalid, being a disregard of an express provision of law as to the mode of trial, and not a mere curable irregularity: *Vide* the well-known ruling of Their Lordships of the Privy Council in *Subramania Iyer v. Emp.*, 25 Mad. 61, 28 I.A. 257, 2 Weir 271, 2 Sar. 160 (P.C.); *S. Pillay v. Shaikh Thumby Sahib*, 41 Cr.L.J. 790, 189 I.C. 705, A.I.R. 1940 Rang. 113.

Section 537 applies to a case of an irregularity in a charge where it has, in fact, not occasioned a failure of justice. Where there is no irregularity in the framing of a charge but the matter goes further and covers an irregularity in a trial which is prohibited by law that section can have no application. When a trial is not warranted by any enactment or rule, such a trial is more than an irregularity and is entirely illegal—*Sewak*, 30 Cr.L.J. 214, 113 I.C. 721, 26 A.L.J. 623, A.I.R. 1928 All. 714. But see *Faiz Alam*, 35 Cr.L.J. 1410, 151 I.C. 816, 1934 Cr.C. 1317, A.I.R. 1934 Pesh. 112 where a different view seems to have been taken as there was no prejudice to the accused and the objection was waived in the trial Court; and *Bhagga*, A.I.R. 1935 Oudh 327, 1935 O.W.N. 408, 1935 O.L.R. 210, 154 I.C. 901, 36 Cr.L.J. 602, where it has been laid down that it is not every breach of any provision in the Cr. P. C., that amounts to an illegality and vitiates the trial and that where the irregularity committed has not occasioned a failure of justice, nor has it prejudiced the accused in his defence on the merits, the whole trial is not illegal and void *ab initio*. Where the misjoinder has not occasioned a failure of justice, the defect or illegality or whatever it may be called, is curable by reason of the provisions of sec. 537, Cr. P. C.—*Mathuri*, 37 Cr.L.J. 794 (803), 163 I.C. 253, A.I.R. 1936 All. 337, 1936 A.L.J. 518, 1936 Cr.C. 401, following the observations of Mukherji, Actg. C.J., in *Kapoor Chand v. Suraj Prasad*, 1933 A.L.J. 188, 142 I.C. 537, A.I.R. 1933 All. 264, 1933 Cr.C. 434, 34 Cr.L.J. 414, 55 All. 301, Ind. Rul. 1933 All. 125 (F.B.); *Bishan Sahai*, 39 Cr.L.J. 38 (45), 171 I.C. 994, A.I.R. 1937 All. 714, 1937 A.W.R. 748, 1937 A.L.J. 1073, I.L.R. 1937 All. 779, 1937 A.L.R. 935,

1937 A.Cr.C. 119 This view seems to have been taken by the Calcutta High Court in *Rash Behari Shaw*, A.I.R. 1936 Cal. 753 (765), 41 C.W.N. 225, 168 I.C. 657, 9 R.C. 853, 38 Cr.L.J. 545, 1936 Cr.C. 1043 and *Sanyasi Gain*, 38 Cr.L.J. 1018, 171 I.C. 183, 10 R.C. 235, A.I.R. 1937 Cal. 269. A joint trial in violation of the express provisions of sec. 239, Cr. P. C., is not illegal or void *ab initio*, if it has not occasioned a failure of justice and has not prejudiced the accused in his defence on the merits—*Wali Jan v. Emp.*, 39 Cr.L.J. 853, 177 I.C. 74, 1938 O.W.N. 748, 11 R.O. 23, 1938 O.L.R. 370, A.I.R. 1938 Oudh 216 See, however, *Jethalal*, supra, where it has been laid down that no consent of the accused or his pleader will cure any want of jurisdiction or any irregularity in the trial which may have affected the result so as to cause a failure of justice See also *Ramraju*, 32 Cr.L.J. 30, 127 I.C. 654, 1930 M.W.N. 377, A.I.R. 1930 Mad. 857, Ind Rul 1930 Mad 1038, 53 Mad 939, 32 M.L.W. 894, 59 M.L.J. 945, 1930 Cr.C. 1033

It makes no difference whether the acts charged are forty-one, fourteen or four, provided they exceed the statutory number and are not covered by the provisions of sec. 234, Cr. P. C., or the following provisions relating to the joinder of charges; the misjoinder of charges is a vital defect in the trial which cannot be cured by the provisions of sec. 537, Cr. P. C. It does not appear that the Board's judgment in *Abdul Rahman v. Emp.*, 54 I.A. 96, 5 Rang 53, 100 I.C. 227, A.I.R. 1927 P.C. 44, 28 Cr.L.J. 259, 31 C.W.N. 271, 25 A.L.J. 117, 1927 M.W.N. 103, 8 P.L.T. 155, 4 O.W.N. 283, 6 Bur.L.J. 65, 52 M.L.J. 585, 29 Bom.L.R. 813, 45 C.L.J. 441 (P.C.), gives any countenance to the argument that *Subramania Aiyar v. King-Emp.*, 28 I.A. 257, 25 Mad. 61, 8 Sar. 160, 3 Bom.L.R. 540, 5 C.W.N. 866, 11 M.L.J. 233, 2 Weir 271 (P.C.), was wrongly decided That decision still binds Courts on the question of the misjoinder of charges—*Chuharmal Nirmaldas v. Emp.*, 39 Cr.L.J. 881 (885), 177 I.C. 280, A.I.R. 1938 Sind 164, 11 R.S. 53.

The question was again considered by Their Lordships of the Privy Council in the recent case of *Babulal Choukhani v. King-Emp.*, A.I.R. 1938 P.C. 130 (132), 65 I.A. 158, 32 S.L.R. 476, 1938 O.L.R. 189, 1938 O.A. 398, 1938 M.W.N. 505, 19 P.L.T. 343, 1938 A.L.R. 309, 10 R.P.C. 250, 4 B.R. 490, 39 Cr.L.J. 452, 67 C.L.J. 161, 40 Bom.L.R. 787, 174 I.C. 1, 42 C.W.N. 621, 1938 A.W.R. (P.C.) 116, 1938 P.W.N. 320, 1938 A.Cr.C. 27, 1938 O.W.N. 416, 1938 A.L.J. 382, (1938) 1 M.L.J. 647 (P.C.), where Lord Wright, J., observed "It has been taken as settled law on all sides throughout these proceedings that the infringement of sec. 239 (d) would, if made out, constitute an illegality, as distinguished from an irregularity, so that the conviction would require to be quashed under the rule stated in 28 I.A. 257 (*i.e.*, *Subramania Aiyar v. King-Emp.*, supra), as contrasted with the result of an irregularity, as to which 54 I.A. 96 (*i.e.*, *Abdul Rahman v. Emp.*, supra) is an authority Their Lordships will assume that this is so, without thinking it here necessary to discuss the precise scope of what was decided in 28 I.A. 257, because in their understanding of sec. 239 (d) that question does not arise."

Where there has been a misjoinder, to quash the charges against the accused would not validate the trial which has proceeded on the wrong lines from the very beginning The whole trial so far is void and the whole proceedings should be set aside—*Dhaneshram*, 27 Cr.L.J. 1099, 97 I.C. 363, A.I.R. 1927 Nag 22 Where the trial is illegal on account of joint trial of two charges, the defect in the trial cannot be cured by the Court acquitting the accused in respect of one of those charges—*Jai Singh*, 19 Cr.L.J. 100, 43 I.C. 324, A.I.R. 1918 Lah 148, 44 P.R. 1917 (Cr.) See also *Dhan Singh*, A.I.R. 1934 Lah 630, A.L.R. 1934 Lah 524, 35 P.L.R. 653, 1934 Cr.C. 965, 36 Cr.L.J. 676, 155 I.C. 163; *Fitzmaurice*, 27 Cr.L.J. 793, 95 I.C. 393, A.I.R. 1926 Lah. 193 and *Choragudi*, 33 Mad. 502 (505).

See Note 754 under the heading "Effect of non-compliance, etc."

748A. When objection as to misjoinder may be taken:—See Explanation, sec. 537, Cr. P. C. If a joint trial is bad it is open to an accused, who has been convicted at such a trial, to take the point at any time even if it was not taken before

in either of the Courts below and there is no obligation on an accused if a joint trial is not permissible to prove prejudice. The trial is either good or bad and if it is bad no question of prejudice arises—*Dalsuk*, 25 Cr.L.J. 807, 81 I.C. 343, A.I.R. 1925 Cal. 248; *Nanda Kumar*, 11 C.W.N. 1128 (1131), where it was held that the illegality could not be cured by the fact that no objection was taken to the procedure adopted either in the first or in the Sessions Court, the illegality having affected the jurisdiction of the Court. See also *Jethalal*, 29 Bom. 449 (455), 2 Cr.L.J. 480, 7 Bom.L.R. 527, *Shyambar Koyal v. King-Emp*, 19 C.L.J. 633; *Asmat v. Emp*, 44 C.W.N. 315., The objection as to the legality of a joint trial may be taken for the first time in appeal—*Venkata*, 1933 M.W.N. 326. There is ample authority for the proposition that an objection with regard to the legality of a trial can be taken in a Court of revision or appeal, even though it was never taken in the Court of first instance at all. In cases of prejudice alleged to have been caused by a certain procedure it is very doubtful whether, when an accused person does take an objection at the earliest possible moment, he can be debarred from raising it subsequently in a Court of appeal or revision merely because he did not come up straightway to the High Court—*C. S. Joseph v. Emp*, 41 C.W.N. 251 (254). The fact that the Counsel of the accused gave consent does not make any difference—*Jethalal*, supra. See also *Ghulam Haider*, A.I.R. 1929 Lah 542, 10 Lah 837, 30 P.L.R. 192, 116 I.C. 329, 30 Cr.L.J. 623, 1929 Cr.C. 85.

749. Counter cases:—It is illegal to try two counter cases between the same parties at one and the same trial, and a conviction at such a trial must be set aside, even though the cross cases were so tried together with the consent of the parties—*Mamsa*, 13 Bur.L.T. 245, 22 Cr.L.J. 707. But a simultaneous trial of two counter cases is not the same thing as a joint trial, and is not prohibited by this section or by sec. 239. In certain cases and under certain circumstances a simultaneous trial may be irregular and improper, but that will not entitle the accused to have the whole trial set aside unless it is clearly shown that the procedure adopted has prejudiced him in his defence—*Dhako*, 1 P.L.T. 498, 21 Cr.L.J. 739. The proper course is to try the case after the other. But both the cases must be tried by one and the same Magistrate. The simultaneous trial of two counter cases in two different Courts over one and the same occurrence is undesirable and unsatisfactory—*Sheikh Samir v. Beni Madhab*, 37 C.L.J. 410; *Judhistir v. Sheik Samir*, 27 C.W.N. 700. See Notes 830A and 1023.

234. (1) When a person is accused of more offences than

Three offences of same kind within year may be charged together. one of the same kind committed within the space of twelve months from the first to the last of such offences, *whether in respect of the same person or not*, he may be charged with, and tried at one trial for, any number of them not exceeding three.

(2) Offences are of the same kind when they are punishable with the same amount of punishment under the same section of the Indian Penal Code or any special or local law:

Provided that, for the purpose of this section an offence punishable under section 379 of the Indian Penal Code shall be deemed to be an offence of the same kind as an offence punishable under section 380 of the said Code, and that an offence punishable under any section of the Indian Penal Code, or of any special or local law, shall be deemed to be an offence of the same kind as an attempt to commit such offence, when such an attempt is an offence.

Change:—The italicised words have been added by sec 62 of the Criminal Proce-

Code Amendment Act, XVIII of 1923. The reasons are stated below under heading "Proviso."

750. Object of section:—Sections 234, 235, etc., are exceptions to the broad and general rule enunciated in sec. 233. The object of these exceptions is to avoid the necessity of the same witnesses giving the same evidence two or three times over in different trials, and to join in one trial those offences with regard to which the evidence would overlap. But even when several criminal acts can be included in the same transaction (sec. 235), no joinder of trials should be permitted which will result in bewildering the accused in his defence—*Gulam*, 1 SLR 73, 8 CrLJ 191 (195). "The reason of the provision (i.e., the provision contained in sec. 234 limiting the number of offences) is obviously in order that the jury may not be prejudiced by the multitude of charges and the inconvenience of the hearing together of a large number of instances of culpability and the consequent embarrassment both to Judges and accused"—*Subrahmanya Ayyar*, 25 Mad 61 (PC). This ruling is in no manner affected by the later Privy Council case—*Abdul Rahaman*, (5 Rang 53, 31 C.W.N. 271, 100 IC 227, AIR 1927 PC 44, 25 ALJ 117, 28 CrLJ 259, 45 CLJ 441) *Viraswami Naidu*, 31 CrLJ 1195, 127 IC 295, AIR 1930 Mad 508.

The provisions of sec. 234, Cr P Code, limiting the number of charges to three are particularly wise and salutary. The object of these provisions is to prevent any risk of the Court being satisfied by anything less than complete proof of the offences charged, and if the attention of the Court is limited to three offences, it is not very likely that it will be satisfied with anything less than full proof. But when a great number of charges are brought against an accused person, it might very often happen that the accused may be convicted not on actual proof of a particular offence, but more on suspicion and reputation owing to the fact that in a great number of cases offences are half-proved against him. It is, therefore, very important that the Magistrates framing charges particularly in offences relating to criminal misappropriation and receiving stolen property should pay attention to this provision of the law—*Hyder*, 20 SLR 3, 27 CrLJ 32.

751. Scope of section:—This section says that trial must be limited to three offences; it does not say that the trial must be limited to three charges. The same offence may be charged under different sections of the I P C, and any number of such charges can be tried in one and the same trial—*Tribhuvan*, 33 Bom 77.

Again, this section simply limits the number of offences that can be charged and tried in one trial. But this does not mean that the prisoner cannot be charged and tried separately in one day for more than three distinct offences of the same kind committed during the year—*Dhanonjoy*, 3 Cal 540.

This section does not permit of three offences being lumped together so as to treated as one offence but merely permits of the trial of the three separate offences at the same trial—*Chetumal*, 36 CrLJ 608 (610), 154 IC 937, AIR 1934 Sind 185, 1934 CrC 1932, 28 SLR 336.

Moreover, this section refers to trial and not to commitment. Where the Magistrate committed the accused to the Sessions on six charges of criminal breach of trust, and three of falsification of accounts, all the offences having been committed within a year, it was held that the order of committal was not illegal but merely irregular, and the irregularity could be cured by the Sessions Judge trying the charges separately—*Krishna Murthi*, (1916) 2 MWN 179, 17 CrLJ 369.

This section evidently refers to different acts done by the same individuals or same set of individuals as against the same complainant or complainants so connected with each other that they may in law be taken to be one person. The section allows a joinder of charges under certain circumstances; such as in cases of cheating, criminal breach of trust or criminal misappropriation and offences of like nature—*Nanda Kumar*, 11 C.W.N. 1128 (1130).

This section contemplates a joint trial for offences committed within one year; if the offences extend over a period exceeding one year, the joint trial of the charges is

illegal. Thus, the joint trial of 41 charges of extortion committed during a period of two years, contravenes the rule of sec. 234 and is illegal—*Subrahmanya Ayyar*, 25 Mad. 61 (P.C.). A charge of several acts of falsification of accounts or theft or breach of trust committed during a period of two years is contrary to the provisions of this section—*Mali Lal*, 26 Cal 560 (563); *Salimullah*, 32 All. 57 (58); *Raman Lal*, 49 All. 312, 28 Cr.L.J. 171 (172).

This section applies, where a person is accused of more offences than one; it does not apply where a person is charged for one offence only, e.g., an offence under sec. 401, I. P. C. (belonging to a gang of persons associated for the purpose of habitually committing theft) and the trial is not therefore illegal if the period over which the association extends exceeds one year—*Kasem Ali*, 47 Cal. 154, 31 C.L.J. 192, 21 Cr.L.J. 386. But see *Kalu Mian*, 32 Cr.L.J. 195, 128 I.C. 816, 34 C.W.N. 959, A.I.R. 1931 Cal. 357, 1931 Cr.C. 384, where a contrary view seems to have been taken.

And lastly, this section refers to offences and not to transactions. It does not provide that all offences committed in a year in three different transactions may be tried in one trial—*Gehmal*, 10 S.L.R. 192, 18 Cr.L.J. 664; *Kasi Viswanathan*, 30 Mad. 328. The operation of the two sections 234 and 235 cannot be combined; and, therefore, a joint trial in respect of two sets of separate and independent transactions in which different offences have been committed, is not permissible. Thus, where two girls were kidnapped on different occasions, and were passed off as girls belonging to a high caste and married to persons who gave money in return, the offences of kidnapping and cheating with respect to each of the girls should not be tried jointly with the other—*Faujdar*, 48 All. 236, 24 A.L.J. 239, 27 Cr.L.J. 143.

The provisions of sec. 234, Cr. P. C., cannot be evaded by the omission to name the offences and sections in the charge where in fact the accused has been charged and convicted of two offences—*Mohanlal Bhanalal v. Emp.*, A.I.R. 1937 Sind 293 (295), 39 Cr.L.J. 123, 172 I.C. 374, 10 R.S. 149, 32 S.L.R. 87.

Sections 222 (2), 234 :—The combined effect of secs. 222 (2) and 234 is this: Where there has been misappropriation in respect of different items of money, the Court can combine some of the items in one lump sum, under sec. 222 (2), and the defalcation of this lump sum will be treated as one offence under sec. 234; then the Court can combine some other items in another lump sum, and the defalcation of this lump sum will constitute another offence; in this way the Court can make out three lump sums, the charge in respect of each lump sum being a charge of a separate offence; and the three charges in respect of the three lump sums will thus be treated as charges of three separate offences (of the same kind). These three separate offences can be tried jointly under sec. 234, but the Court has an option to try them separately; and if the Court at first tried one offence (in respect of one lump sum), it is not debarred by sec. 403 from subsequently trying another offence in respect of another sum—*Kashinath*, 12 Bom.L.R. 226, 11 Cr.L.J. 337; followed in *Nagendra Nath*, 50 Cal. 632, 27 C.W.N. 578 (581).

Where the total amount misappropriated within a period of twelve months is divided into three gross sums made up of separate items and the accused is tried at the same trial on three separate charges of criminal breach of trust in respect of those three gross sums, the trial cannot be held to be bad for misjoinder—*Madhusudan v. Emp.*, 44 C.W.N. 175. See also Note 1092 in this connection.

Sections 234 to 239 :—There is no apparent reason for holding that the four exceptional cases mentioned in secs. 234, 235, 236 and 239 are mutually exclusive. Certainly, there is no more reason for holding that secs. 234 and 235 are mutually exclusive than that one or other of these provisions and either sec. 236 or sec. 239 is mutually exclusive or that sec. 236 and sec. 239 are so. There is no reason why secs. 234 and 235 are not to be recorded as cumulative in their effect in a proper case—*Ramkishoon*, 35 Cr.L.J. 676 (878), 148 I.C. 900, 15 P.L.T. 126, A.I.R. 1931 Pat. 239, 1934 Cr.C. 461. For contra see *Dhaneshram*, 27 Cr.L.J. 1099, 97 I.C. 363, A.I.R. 1927 Nag. 22, where it has been laid down that secs. 234 and 235 must be construed apart and that there is nothing

in the Code which would allow the two to be added together, so to speak, in order to provide for one person on more than three charges, even though some of the charges may have formed one series of acts so connected together as to form the same transaction.

752. Offences committed by several persons:—This section does not apply where several persons committing offences of the same kind are jointly charged; it applies to the trial of one accused only—*Budhai*, 33 Cal 292, 10 C.W.N 32, 3 Cr L.J. 126; *Mahbub Ali*, 12 Cr L.J. 266, 10 I.C. 331, 168 P.L.R. 1911, 37 P.W.R. 1911 (Cr.); *Tulsi*, 1917 P.R. 17, 18 Cr L.J. 282 (283); *Sayad Lal*, 20 Cr L.J. 7 (Nag); *Nga San*, 21 Cr.L.J. 794 (Bur.); *Ram Prasad*, 19 A.L.J. 796, 22 Cr L.J. 657. The trial of several accused committing offences of the same kind is now provided for in clause (c) of sec. 239.

753. Offences of the same kind:—See sub-section (2) for the definition of this expression. Where a person is found in possession of several items of stolen property, he has committed 'offences of the same kind' under sec. 411, I. P. C., and they do not cease to be so merely because the stolen articles are of very diverse character (e.g., stamps, carpets, buckets, padlocks)—*Bishun Singh*, 3 Pat. 503 (509), 5 P.L.T. 319, 25 Cr.L.J. 738.

The following are not offences of the same kind —Adultery and bigamy—*Vithayee*, Ratanlal 4; Falsification of accounts and criminal breach of trust—*Kasi Viswanathan*, 30 Mad 328; Murder and hurt—*Shanker*, 11 A.L.J. 188, 14 Cr L.J. 116 (117); Murder and grievous hurt; *Afsaruddin Naseraddi*, 40 Cr L.J. 290, 179 I.C. 910, A.I.R. 1939 Cal. 32, 67 C.L.J. 580, 42 C.W.N 1235; Forgery and giving false evidence—*Gehmal*, 10 S.L.R. 192, 18 Cr.L.J. 664; Offences under sec. 380, I. P. C., and offences under sec. 457, I P. Code—*Krishnaji Anant*, 138 I.C. 520, A.I.R. 1932 Bom 277, 1932 Cr.C. 389, 33 Cr.L.J. 619, 34 Bom L.R. 590, Ind Rul 1932 Bom 383; Offence under sec. 393 and offence under sec. 394, I P Code—*Ajaib Singh*, 34 Cr L.J. 402, 142 I.C. 820, Ind. Rul. 1933 Lah 275, 1933 Cr.C. 771, 34 P.L.R. 498, A.I.R. 1933 Lah 512 For other examples, see Note 745 in sec. 233, under heading "Distinct offences."

754. Not exceeding three:—Where the accused is charged with committing several offences of the same kind, e.g., several acts of falsification of accounts, the charge should specify the number of acts of falsification (having regard to this section which allows only three such offences to be tried together) A general allegation of falsification of accounts committed between such and such dates is not sufficient—*Mati Lal*, 26 Cal 560 (563). An accused can only be charged and tried at one trial for any number of offences of the same kind not exceeding three Therefore, a trial of 41 charges of extortion is contrary to the provisions of this section, and is not merely an irregularity covered by sec. 537, but is an illegality—*Subrahmanya Ayyar*, 25 Mad 61 (P.C.) It is illegal to try together eight acts of theft or criminal breach of trust, even though one charge has been framed in respect of the eight offences—*Raman Lal*, 49 All 312, 28 Cr.L.J. 171 (172). One charge under sec. 124A, I P C., in respect of one article in a newspaper, one charge under sec. 124A, I P C., in respect of the same article, and a third charge under sec. 124A, I P C., in respect of another article, can be tried together—*Bal Gangadhar Tilak*, 33 Bom. 221.

The accused was charged with using as genuine eleven forged receipts which were put in by him in sets on three occasions, each set with a written statement in three suits pending against him. A charge was framed against him in respect of the using of each set of receipts, and he was tried on these three charges and convicted and sentenced. Held that as the "using" charged was the putting in of each set of documents with the respective written statements in three suits, and as there was nothing to show that any of the document had been used at any other time, there was only one using in respect of each set of documents and that there was, therefore, no valid ground for questioning the conviction—*Q-E. v. Raghunath Das*, 20 Cal 413.

Where the accused committed two separate and distinct offences under secs. 408, I. P. C., and two separate and distinct offences under sec. 420, I P. C., there is a misjoinder of charges, vitiating the trial—*Sera Subramanian*, 32 Cr L.J. 1068, 133 I.C. 489, A.I.R. 1931 Rang. 161, 1931 Cr.C. 657, Ind. Rul. 1931 Rang 265.

The joinder of charges of three offences under sec. 411, I. P. C., and three offences under sec. 414, I. P. C., is bad—*Chetto Kaluar*, 49 Cal. 555. A charge under sec. 411, I. P. C., of having received six specific animals belonging to five specific persons and stolen by the different acts of theft, is illegal and wholly vitiates the trial—*Hyder*, 20 S.L.R. 3, 27 Cr.L.J. 32. If a man is charged with three alternative charges of embezzlement or abetment thereof, the charge is really for six offences and the trial is entirely illegal—*Janeshar*, 51 All. 544, 30 Cr.L.J. 687 (689), 1929 A.L.J. 329, A.I.R. 1929 All. 202, 116 I.C. 789. Three charges of criminal misappropriation (sec. 409, I. P. C.) and a charge under sec. 210, I. P. C., cannot be tried together—*Rajendra*, 22 C.W.N. 596, 19 Cr.L.J. 868, 27 C.L.J. 311, 47 I.C. 64.

Every publication or circulation of a libel constitutes a fresh and distinct act and therefore, a separate offence. Where, therefore, the accused was put on his trial for publishing or circulating the offending article at six different places on six different occasions, the proceedings were entirely void and not merely irregular—*Divan Singh*, 36 Cr.L.J. 744 (752), A.I.R. 1935 Nag. 90, 155 I.C. 197, 1935 Cr.C. 418.

Where the Tax Dāroga of a Municipality realised a certain amount as taxes in respect of four different holdings and was tried under a single charge regarding the entire amount, held that the charge did not contravene the provisions of this section as the amount was realised at the same time and one receipt was originally granted by the accused for the whole amount, though the amount was composed of different sums payable in respect of four different holdings—*Harendra*, 28 Cr.L.J. 469, 101 I.C. 597, 45 C.L.J. 207, A.I.R. 1927 Cal. 409.

Having regard to the provisions of this section there is no misjoinder of charges when an accused is charged under sec. 420, I. P. C., for having cheated three different persons on three different occasions in the course of the same month—*Farzand Ali*, 27 Cr.L.J. 909, 96 I.C. 221, A.I.R. 1926 Pat. 347, 1926 Pat.H.C.C. 207.

Three charges, each comprising offences under clause (a) (iii) and clause (b) (ii) of sec. 103 of the Presidency Towns Insolvency Act (III of 1909) cannot be tried together—*Khimchand*, 35 Cr.L.J. 1477, 151 I.C. 934, 36 Bom.L.R. 639, A.I.R. 1934 Bom. 303, 1934 Cr.C. 1036.

Each evasion of the toll is a separate act. The trial of six such distinct acts committed on six different dates in one trial contravenes the provisions of this section—*Suleman Abba*, A.I.R. 1935 Bom. 24, 36 Bom.L.R. 1124, 36 Cr.L.J. 516, 154 I.C. 556, 1935 Cr.C. 25.

Falsification of accounts :—Every act of falsification of a book or account (sec. 477A, I. P. C.), is a separate offence, and only three such offences (committed within a year) can be charged and tried together—*Mati Lal*, 26 Cal. 560 (563), 3 C.W.N. 412; *Fitzmaurise*, 27 Cr.L.J. 793 (796), 95 I.C. 393, A.I.R. 1926 Lah. 193. See also *Jibon Kristo*, 40 Cal. 318, 20 I.C. 412, 14 Cr.L.J. 428. Where the accused was charged and tried at one trial for five acts of falsification of accounts, the trial was illegal, and a retrial must be held on proper charges—*Salimullah*, 32 All. 57 (58), 4 I.C. 808, 6 A.L.J. 977, 11 Cr.L.J. 53. See also *Fitzmaurise*, supra. Six distinct and separate charges of falsification of six separate and distinct accounts cannot be tried together—*Krishna Lal*, 45 C.L.J. 1, 28 Cr.L.J. 291, A.I.R. 1927 Cal. 946, 100 I.C. 371; *Surendra*, 33 Cr.L.J. 357, 137 I.C. 179, 1932 Cr.C. 320, A.I.R. 1932 Cal. 377, 54 C.L.J. 470, distinguishing *Profulla*, 34 C.W.N. 925, 32 Cr.L.J. 318, 129 I.C. 356, A.I.R. 1931 Cal. 8, Ind. Rul. 1931 Cal. 164, 1931 Cr.C. 40. Three distinct offences of criminal breach of trust and three distinct offences of falsification of accounts though in respect of the same items cannot be tried together—*Manat*, 49 Bom. 892, 27 Bom.L.R. 1343, 27 Cr.L.J. 305, 92 I.C. 689, A.I.R. 1926 Bom. 110; *Kasi Viswanathan*, 30 Mad. 328, 5 Cr.L.J. 341, 17 M.L.J. 141, 2 M.L.T. 177; *Kalka Prasad*, 31 I.C. 829, 38 All. 42, 16 Cr.L.J. 819; *Dubri Misir*, 32 Cr.L.J. 540, 130 I.C. 350, A.I.R. 1931 Oudh 86, 8 O.W.N. 92, 6 Luck. 441, Ind. Rul. 1931 Oudh 158, 1931 Cr.C. 214. A single trial for charges of criminal breach of trust and of falsification of accounts in respect of three items on different dates within

ment and falsification of accounts are not offences of the same kind within the meaning of sec. 234, Cr. P. C., nor are three different acts of embezzlement and falsification of account committed at different times so connected as to form part of the same transaction within the meaning of sec. 235, Cr. P. Code—*Attursing*, 33 Cr.L.J. 650, A.I.R. 1932 Sind 64, 1932 Cr.C. 284, 138 I.C. 618, 26 S.L.R. 191, Ind. Rul. 1932 Sind 87, following *Manant*, supra; *Rameswar*, 34 Cr.L.J. 673, 144 I.C. 94, Ind. Rul. 1933 Nag. 200, A.I.R. 1933 Nag. 327, 1933 Cr.C. 1328; *Mohammad Ismail*, 38 Cr.L.J. 324, 166 I.C. 845, A.I.R. 1937 Sind 1, 9 R.S. 156, 30 S.L.R. 391. Three charges of criminal breach of trust in respect of three items of money and a charge of falsification of accounts in order to conceal the defalcations cannot be legally tried at one and the same trial—*Shujauddin*, 44 All. 540, 23 Cr.L.J. 258, 66 I.C. 322, A.I.R. 1922 All. 214; *Sheo Saran*, 32 All. 219, 5 I.C. 896, 11 Cr.L.J. 285; *Raman Behari*, 41 Cal. 722 (726), 18 C.W.N. 1152, 15 C.L.J. 153, 22 I.C. 729, A.I.R. 1915 Cal. 296. But a series of falsification of accounts made to cover a single act of misappropriation may be laid in one charge under sec. 477A, as it does not constitute offences merely by reason of a plurality of false entries intended to cover the same misappropriation. So also it is permissible to try three acts of misappropriation in one charge. But the *two cannot be combined*, that is, it is not permissible to try three charges of misappropriation and a series of falsification of accounts referring to the three acts of misappropriation—*Raman Behari*, supra; *Shama Shastri*, 44 M.L.J. 67, 24 Cr.L.J. 462, A.I.R. 1922 Mad. 435, 72 I.C. 622, 1922 M.W.N. 476; *Nagendra Nath*, 36 C.W.N. 542 (543), 33 Cr.L.J. 265, 1932 Cr.C. 478, 136 I.C. 136, 55 C.L.J. 111, A.I.R. 1932 Cal. 486. A person may be lawfully tried for one offence of misappropriation joined with a charge of falsification which was carried out as one of the series of acts constituting the transaction by which the misappropriation was effected—*Jiban Kristo*, 40 Cal. 318, 20 I.C. 412, 14 Cr.L.J. 428, *Lalji Bhanji*, 14 Bom.L.R. 306, 15 I.C. 645, 13 Cr.L.J. 501. See also *Kalikummar v. Nawab Ali*, 30 Cr.L.J. 619, 116 I.C. 369, A.I.R. 1929 Cal. 160, Ind. Rul. 1929 Cal. 465. But a charge of criminal breach of trust cannot be legally tried together with one of falsification relating to a distinct act of misappropriation committed in a separate transaction—*Jiban Kristo*, supra. Where several acts of criminal breach of trust and falsification of accounts, some of them unconnected with the rest, were charged against the accused, the trial was illegal—*Nathalal*, 4 Bom.L.R. 433. Where the falsification did not relate to the items involved in the charge of criminal breach of trust but was intended to cover the amount which related to entirely different items, the joint trial in respect of charges of falsification and criminal breach of trust was illegal—*Ramchandra Rango v. Emp.*, 40 Cr.L.J. 579 (589), A.I.R. 1939 Bom. 129, 181 I.C. 870, 41 Bom.L.R. 98, dissenting from the view expressed in *Kashiram v. Hurdut Rai*, infra.

It is clear from the terms of sec. 235 (1), Cr. P. C., that a person may be lawfully tried for one offence of misappropriation joined with a charge of falsification which was carried out as one of the series of acts constituting the transaction by which the misappropriation was effected. Where a clerk or cashier sets out to rob his employer, having regard to the fact that sec. 222 (2), Cr. P. C., provides that he may be charged with having misappropriated the total of whatever sums he may have appropriated in course of any one year, it is not unreasonable to say that for the purposes of the section the year's illicit operations can be regarded as one transaction. He may, therefore, be lawfully tried for one offence of misappropriation of a gross sum as provided in sec. 222 (2), Cr. P. C., together with a charge of falsification which was carried out as one of the series of acts constituting the transaction by which the misappropriation was effected—*Kashiram v. Hurdut Rai*, A.I.R. 1935 Cal. 312, 1935 Cr.C. 463, 39 C.W.N. 703, 156 I.C. 192, 62 Cal. 808. (In this case a joinder of one charge of misappropriation of a gross sum with two charges of falsification which was carried out as part of the series of acts constituting the transaction by which the misappropriation was effected, was held legal). The view of Sir Courtney Terrell, Chief Justice and Mr. Justice Adam in *Michael John*, infra, and of Mr. Justice Mullick

The joinder of charges of three offences under sec. 411, I. P. C., and three offences under sec. 414, I. P. C., is bad—*Chetto Kalwar*, 49 Cal. 555. A charge under sec. 411, I. P. C., of having received six specific animals belonging to five specific persons and stolen by the different acts of theft, is illegal and wholly vitiates the trial—*Hyder*, 20 S.L.R. 3, 27 Cr.L.J. 32. If a man is charged with three alternative charges of embezzlement or abetment thereof, the charge is really for six offences and the trial is entirely illegal—*Janeshar*, 51 All. 544, 30 Cr.L.J. 687 (689), 1929 A.L.J. 329, A.I.R. 1929 All. 202, 116 I.C. 789. Three charges of criminal misappropriation (sec. 409, I. P. C.) and a charge under sec. 210, I. P. C., cannot be tried together—*Rajendra*, 22 C.W.N. 596, 19 Cr.L.J. 868, 27 C.L.J. 311, 47 I.C. 64.

Every publication or circulation of a libel constitutes a fresh and distinct act and therefore, a separate offence. Where, therefore, the accused was put on his trial for publishing or circulating the offending article at six different places on six different occasions, the proceedings were entirely void and not merely irregular—*Dinan Singh*, 36 Cr.L.J. 744 (752), A.I.R. 1935 Nag. 90, 155 I.C. 197, 1935 Cr.C. 418.

Where the Tax Dároga of a Municipality realised a certain amount as taxes in respect of four different holdings and was tried under a single charge regarding the entire amount, held that the charge did not contravene the provisions of this section as the amount was realised at the same time and one receipt was originally granted by the accused for the whole amount, though the amount was composed of different sums payable in respect of four different holdings—*Harendra*, 28 Cr.L.J. 469, 101 I.C. 597, 45 C.L.J. 207, A.I.R. 1927 Cal. 409.

Having regard to the provisions of this section there is no misjoinder of charges when an accused is charged under sec. 420, I. P. C., for having cheated three different persons on three different occasions in the course of the same month—*Fazand Ali*, 27 Cr.L.J. 909, 96 I.C. 221, A.I.R. 1926 Pat. 347, 1926 Pat.H.C.C. 207.

Three charges, each comprising offences under clause (a) (iii) and clause (b) (ii) of sec. 103 of the Presidency Towns Insolvency Act (III of 1909) cannot be tried together—*Khimchand*, 35 Cr.L.J. 1477, 151 I.C. 934, 36 Bom.L.R. 639, A.I.R. 1934 Bom. 303, 1934 Cr.C. 1036.

Each evasion of the toll is a separate act. The trial of six such distinct acts committed on six different dates in one trial contravenes the provisions of this section—*Suleman Abba*, A.I.R. 1935 Bom. 24, 36 Bom.L.R. 1124, 36 Cr.L.J. 516, 154 I.C. 556, 1935 Cr.C. 25.

Falsification of accounts :—Every act of falsification of a book or account (sec. 477A, I. P. C.), is a separate offence, and only three such offences (committed within a year) can be charged and tried together—*Mati Lal*, 26 Cal. 560 (563), 3 C.W.N. 412; *Fitzmaurise*, 27 Cr.L.J. 793 (796), 95 I.C. 393, A.I.R. 1926 Lah. 193. See also *Jahan Kristo*, 40 Cal. 318, 20 I.C. 412, 14 Cr.L.J. 428. Where the accused was charged and tried at one trial for five acts of falsification of accounts, the trial was illegal, and a retrial must be held on proper charges—*Salimullah*, 32 All. 57 (58), 4 I.C. 808, 6 A.L.J. 977, 11 Cr.L.J. 53. See also *Fitzmaurise*, supra. Six distinct and separate charges of falsification of six separate and distinct accounts cannot be tried together—*Krishna Lal*, 45 C.L.J. 1, 28 Cr.L.J. 291, A.I.R. 1927 Cal. 946, 100 I.C. 371; *Surendra*, 33 Cr.L.J. 357, 137 I.C. 179, 1932 Cr.C. 320, A.I.R. 1932 Cal. 377, 54 C.L.J. 470, distinguishing *Profulla*, 34 C.W.N. 925, 32 Cr.L.J. 318, 129 I.C. 356, A.I.R. 1931 Cal. 8, Ind. Rul. 1931 Cal. 164, 1931 Cr.C. 40. Three distinct offences of criminal breach of trust and three distinct offences of falsification of accounts though in respect of the same items cannot be tried together—*Manat*, 49 Bom. 892, 27 Bom.L.R. 1343, 27 Cr.L.J. 305, 92 I.C. 689, A.I.R. 1926 Bom. 110; *Kasi Viswanathan*, 30 Mad. 328, 5 Cr.L.J. 341, 17 M.L.J. 141, 2 M.L.T. 177; *Kalka Prosad*, 31 I.C. 829, 38 All. 42, 16 Cr.L.J. 819; *Dubri Musir*, 32 Cr.L.J. 540, 130 I.C. 350, A.I.R. 1931 Oudh 86, 8 O.W.N. 92, 6 Luck. 441, Ind. Rul. 1931 Oudh 158, 1931 Cr.C. 214. A single trial for charges of criminal breach of trust and of falsification of accounts in respect of three items on different dates within the same space of one year is not permissible under the law. The offences of embezzle-

ment and falsification of accounts are not offences of the same kind within the meaning of sec. 234, Cr. P. C., nor are three different acts of embezzlement and falsification of account committed at different times so connected as to form part of the same transaction within the meaning of sec. 235, Cr. P. Code—*Attursing*, 33 Cr.L.J. 650, A.I.R. 1932 Sind 64, 1932 Cr.C. 284, 138 I.C. 618, 26 S.L.R. 191, Ind. Rul. 1932 Sind 87, following *Manant*, supra; *Rameswar*, 34 Cr.L.J. 673, 144 I.C. 94, Ind. Rul. 1933 Nag. 200, A.I.R. 1933 Nag. 327, 1933 Cr.C. 1328; *Mohammad Ismail*, 38 Cr.L.J. 324, 166 I.C. 845, A.I.R. 1937 Sind 1, 9 RS 156, 30 S.L.R. 391. Three charges of criminal breach of trust in respect of three items of money and a charge of falsification of accounts in order to conceal the defalcations cannot be legally tried at one and the same trial—*Shujauddin*, 44 All. 540, 23 Cr.L.J. 258, 66 I.C. 322, A.I.R. 1922 All 214; *Sheo Saran*, 32 All 219, 5 I.C. 896, 11 Cr.L.J. 285; *Raman Behari*, 41 Cal 722 (726), 18 C.W.N. 1152, 15 C.L.J. 153, 22 I.C. 729, A.I.R. 1915 Cal 296. But a series of falsification of accounts made to cover a single act of misappropriation may be laid in one charge under sec. 477A, as it does not constitute offences merely by reason of a plurality of false entries intended to cover the same misappropriation. So also it is permissible to try three acts of misappropriation in one charge. But the two cannot be combined, that is, it is not permissible to try three charges of misappropriation and a series of falsification of accounts referring to the three acts of misappropriation—*Raman Behari*, supra; *Shama Shastri*, 44 M.L.J. 67, 24 Cr.L.J. 462, A.I.R. 1922 Mad 435, 72 I.C. 622, 1922 M.W.N. 476; *Nagendra Nath*, 36 C.W.N. 542 (543), 33 Cr.L.J. 265, 1932 Cr.C. 478, 136 I.C. 136, 55 C.L.J. 111, A.I.R. 1932 Cal. 486. A person may be lawfully tried for one offence of misappropriation joined with a charge of falsification which was carried out as one of the series of acts constituting the transaction by which the misappropriation was effected—*Jiban Kristo*, 40 Cal 318, 20 I.C. 412, 14 Cr.L.J. 428; *Laly Bhanji*, 14 Bom.L.R. 306, 15 I.C. 645, 13 Cr.L.J. 501. See also *Kalikumar v Nawab Ali*, 30 Cr.L.J. 619, 116 I.C. 369, A.I.R. 1929 Cal 160, Ind. Rul. 1929 Cal 465. But a charge of criminal breach of trust cannot be legally tried together with one of falsification relating to a distinct act of misappropriation committed in a separate transaction—*Jiban Kristo*, supra. Where several acts of criminal breach of trust and falsification of accounts, some of them unconnected with the rest, were charged against the accused, the trial was illegal—*Nathalal*, 4 Bom.L.R. 433. Where the falsification did not relate to the items involved in the charge of criminal breach of trust but was intended to cover the amount which related to entirely different items, the joint trial in respect of charges of falsification and criminal breach of trust was illegal—*Ramchandra Rango v Emp*, 40 Cr.L.J. 579 (589), A.I.R. 1939 Bom. 129, 181 I.C. 870, 41 Bom.L.R. 98, dissenting from the view expressed in *Kashiram v Hurdut Rai*, infra.

It is clear from the terms of sec. 235 (1), Cr. P. C., that a person may be lawfully tried for one offence of misappropriation joined with a charge of falsification which was carried out as one of the series of acts constituting the transaction by which the misappropriation was effected. Where a clerk or cashier sets out to rob his employer, having regard to the fact that sec. 222 (2), Cr. P. C., provides that he may be charged with having misappropriated the total of whatever sums he may have appropriated in course of any one year, it is not unreasonable to say that for the purposes of the section the year's illicit operations can be regarded as one transaction. He may, therefore, be lawfully tried for one offence of misappropriation of a gross sum as provided in sec. 222 (2), Cr. P. C., together with a charge of falsification which was carried out as one of the series of acts constituting the transaction by which the misappropriation was effected—*Kashiram v Hurdut Rai*, A.I.R. 1935 Cal. 312, 1935 Cr.C. 463, 39 C.W.N. 703, 156 I.C. 192, 62 Cal 808. (In this case a joinder of one charge of misappropriation of a gross sum with two charges of falsification which was carried out as part of the series of acts constituting the transaction by which the misappropriation was effected, was held legal). The view of Sir Courtney Terrell, Chief Justice and Mr. Justice Adami in *Michael John*, infra, and of Mr. Justice Mullick

and Mr. Justice Buxton in *Gardiner*, India, was correct with regard to the mere *materiality* test.

The Privy Council has taken a different view in the matter. It has laid down that it is quite lawful to charge a person under sec. 405 I.P.C. with criminal intent of trust in respect of a lump sum of money made up of three different parts and to lay with that a charge of falsification under sec. 454A I.P.C., each of which charges under sec. 454A is united with one of the items of embezzlement under the charge under sec. 405 provided the charges of embezzlement under sec. 405 are linked together into one sum and that linking together also affects the charges of falsification—*Gardiner*, 22 Cr.L.J. 250, 61 I.C. 622, A.I.R. 1926 Pat. 775; *Mahabadi John*, 22 Cr.L.J. 250, 61 I.C. 631, 21 Pat. 452, 22 P.L.T. 595, A.I.R. 1926 Pat. 349, Ind. Pat. 151 Pat. 371, 1926 Cr.C. 757; *Ramsbottom*, 25 Cr.L.J. 375, 145 I.C. 371, 25 P.L.J. 22, 22 Pat. 171, 22 P.L.T. 325, 5 P.P. 925, A.I.R. 1924 Pat. 222, 1924 Cr.C. 451, where the charge under sec. 405 I.P.C. enumerated separately three sums of money without mentioning the gross sum.

Therefore, the High Courts of Calcutta, Bombay, Allahabad, Madras and the Chief Court of Lucknow are unanimous that the trial of three charges of embezzlement and of corresponding charges of falsification of accounts together is illegal. The only Court which has taken the contrary view is the High Court of Patna. The Nagpur Court has also accepted the view of the majority and has laid down that the underlying principle is that although one particular item embezzled and the falsification of accounts relating to that particular item may be considered to be one transaction for the purposes of sec. 225 (1), Cr. P.C., any other item of embezzlement, or more correctly in view of the provisions of sec. 220, Cr. P.C., the particular falsification with respect to another item of embezzlement is not part of the same transaction along with the former one and that the term "same transaction" cannot be used to cover a whole series of acts in pursuance of a conspiracy or by an individual in carrying out a studied policy of fraud. Therefore a number of distinct charges of falsification of account cannot be tried together with the charge of embezzlement comprising the items to which the falsifications relate at one trial. One item of falsification or one series of items connected with one item of embezzlement alone might be tried but no more—*Ramsbottom*, A.I.R. 1925 Nag. 172, 26 Cr.L.J. 1216. The Sind Judicial Commissioner's Court has also taken the same view in *Mohammad Ismail*, A.I.R. 1937 Sind 1, 34 Cr.L.J. 224, 155 I.C. 845, 9 P.S. 155, 30 S.L.R. 391.

Effect of non-compliance with the provisions of this section:—The legal effect of non-compliance with the provisions of this section is not merely an irregularity but an illegality which vitiates the trial—*Francis*, 51 Cr.L.J. 1185, 17 I.C. 255, A.I.R. 1930 Mad. 598; *Kalu Mien*, 22 Cr.L.J. 195, 123 I.C. 815, 34 C.W.N. 579, A.I.R. 1931 Cal. 357, 1931 Cr.C. 384; *Suleman Abba*, A.I.R. 1935 Bom. 24, 26 Bom.L.R. 1124, 35 Cr.L.J. 515, 154 I.C. 555, 1935 Cr.C. 25; *Nga Sen Mya*, 34 Cr.L.J. 1179, 145 I.C. 176, A.I.R. 1923 Rang. 225, 1923 Cr.C. 1172. Where the charge is neither in conformity with sec. 222 nor in conformity with the provisions of sec. 224, Cr. P.C., neither sec. 225 nor sec. 537, Cr. P.C., can cure the defect—*Pierre Lal*, 35 Cr.L.J. 518, 154 I.C. 329, 1935 O.W.N. 185. See also *Ramon Lal*, 49 All. 312, 23 Cr.L.J. 171, 99 I.C. 603, 25 All.J. 217, A.I.R. 1927 All. 223. See Note 748.

Illegality cannot be cured by striking off a charge:—A trial of the accused for four offences is altogether illegal, and the illegality cannot be cured by the Judge striking out one of the charges after the trial has closed—*Manarala*, 29 Mad. 599, 5 Cr.L.J. 49; *Chetto*, 49 Cal. 555, 24 Cr.L.J. 85, 71 I.C. 214; *Filammaric*, 27 Cr.L.J. 793, A.I.R. 1925 Lah. 193, 95 I.C. 393. See also *Dubri Misir*, supra; *Jai Singh*, 19 Cr.L.J. 109, 43 I.C. 324, A.I.R. 1918 Lah. 148, 44 P.R. 1917 (Cr.). Although the Judge has power under sec. 227 to alter a charge before judgment is pronounced, still he cannot cure an illegality—*Manarala*, supra. But the Judge can strike off a charge before the trial begins, as was done in the case of *Bal Gangadhar Teltak*, 33 Bom. 221, 2 I.C. 277, 10 Bom.L.R. 973, 9 Cr.L.J. 225, where in the trial before the

High Court Sessions, four charges were at first framed against the accused, but the Advocate General withdrew one of the charges, and then the trial proceeded on three charges

755. Offences against several persons:—There was a conflict of opinion as to whether this section applied where the offences were committed against several persons. In the following cases it was held that the words 'offences of the same kind' were not limited to offences against the same person; an accused could be charged with and tried at the same trial for offences of the same kind though committed against different persons—*Chhatradhari*, 43 Cal. 13, 19 C.W.N. 557; *Babu Lal*, 2 P.L.J. 209; *Raja Rao*, 20 M.L.T. 234, 17 Cr.L.J. 479; *Bechan*, 38 All. 457; *Jagardeo*, 38 All. 458 (Note); *Shri Bhagwan*, 13 C.W.N. 507; *Dhondi*, Ratanlal 331; *Krushnappa*, 20 Cr.L.J. 71 (Nag); *Nga Po*, 11 L.B.R. 45, 23 Cr.L.J. 740, 69 I.C. 628. But the contrary view was taken in *Nanda Kumar*, 11 C.W.N. 1128, 6 Cr.L.J. 321; *Ali Mahomed*, 13 C.W.N. 418, 9 Cr.L.J. 277 (278).

The present amendment has removed this conflict of opinion by adding the words "whether in respect of the same person or not," which make it clear that an accused person may be charged at one trial with three offences of the same kind though committed against *different persons*. Thus, in a case under the amended section, where an accused person was charged with cheating under sec. 420, I.P. Code, held that there was no misjoinder of charges—*Farzand Ali*, 27 Cr.L.J. 909 (Pat.). See also *Rahim Baksha*, 34 C.W.N. 901 (903), 129 I.C. 359, 32 Cr.L.J. 321, A.I.R. 1930 Cal. 717, 1930 Cr.C. 1117, Ind. Rul. 1931 Cal. 167; *Nga Po Kym*, 23 Cr.L.J. 740, 69 I.C. 628, 11 L.B.R. 45.

Proviso:—This proviso overrules *Rahman v Mobarak*, 20 C.W.N. 672, 17 Cr.L.J. 224, and *Hari Singh*, 20 Cr.L.J. 751 (Nag) where it was held that theft in a building (sec. 380, I.P.C.) and theft of paddy in a field (sec. 379, I.P.C.) were not offences of the same kind. The proviso also lays down specifically that an attempt to commit an offence, where such an attempt is penalised by any law, is of the same kind as the actual offence.

235. (1) If, in one series of acts so connected together as to form the same transaction, more than one offence is committed by the same person, he may be charged with, and tried at one trial for, every such offence.

(2) If the acts alleged constitute an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, the person accused of them may be charged with, and tried at one trial for, each of such offences.

(3) If several acts, of which one or more than one would by itself or themselves constitute an offence, constitute when combined a different offence, the person accused of them may be charged with and tried at one trial for the offence constituted by such acts when combined, and for any offence constituted by any one, or more, of such acts.

(4) Nothing contained in this section shall affect the Indian Penal Code, Section 71.

Illustrations.

to sub-section (1)—

(a) A rescues B, a person in lawful custody, and in so doing causes grievous hurt to C, a constable in whose custody B was. A may be charged with and convicted of offences under sections 225 and 333 of the Indian Penal Code.

(b) A commits house-breaking by day with intent to commit adultery, and commits in the house so entered adultery with B's wife. A may be separately charged with, and convicted of, offences under sections 454 and 497 of the Indian Penal Code.

(c) A entices B, the wife of C, away from C, with intent to commit adultery with B, and then commits adultery with her. A may be separately charged with, and convicted of, offences under sections 498 and 497 of the Indian Penal Code.

(d) A has in his possession several seals, knowing them to be counterfeit and intending to use them for the purpose of committing several forgeries punishable under section 466 of the Indian Penal Code. A may be separately charged with, and convicted of, the possession of each seal under section 473 of the Indian Penal Code.

(e) With intent to cause injury to B, A institutes a criminal proceeding against him, knowing that there is no just or lawful ground for such proceeding; and also falsely accused B of having committed an offence, knowing that there is no just or lawful ground for such charges. A may be separately charged with, and convicted of, two offences under section 211 of the Indian Penal Code.

(f) A, with intent to cause injury to B, falsely accuses him of having committed an offence, knowing that there is no just or lawful ground for such charge. On the trial A gives false evidence against B, intending thereby to cause B to be convicted of a capital offence. A may be separately charged with, and convicted of, offences under sections 211 and 194 of the Indian Penal Code.

(g) A, with six others, commits the offences of rioting, grievous hurt and assaulting a public servant endeavouring in the discharge of his duty as such to suppress the riot. A may be separately charged with, and convicted of, offences under sections 147, 325 and 152 of the Indian Penal Code.

(h) A threatens B, C and D at the same time with injury to their persons with intent to cause alarm to them. A may be separately charged with, and convicted of, each of the three offences under section 506 of the Indian Penal Code.

The separate charges referred to in illustrations (a) to (h) respectively may be tried at the same time.

to sub-section (2)—

(i) A wrongfully strikes B with a cane. A may be separately charged with, and convicted of, offences under sections 352 and 323 of the Indian Penal Code.

(j) Several stolen sacks of corn are made over to A and B, who know they are stolen property, for the purpose of concealing them. A and B thereupon voluntarily assist each other to conceal the sacks at the bottom of a grain pit. A and B may be separately charged with, and convicted of, offences under sections 411 and 414 of the Indian Penal Code.

(k) A exposes her child with the knowledge that she is thereby likely to cause its death. The child dies in consequence of such exposure. A may be separately charged with, and convicted of, offences under sections 317 and 304 of the Indian Penal Code.

(l) A dishonestly uses a forged document as genuine evidence, in order to convict B, a public servant, of an offence under section 167 of the Indian Penal Code. A may be separately charged with, and convicted of, offences under sections 471 (read with 466) and 196 of the same Code.

in sub-section (3)—

(m) A commits robbery on B, and in doing so voluntarily causes hurt to him. A may be separately charged with, and convicted of, offences under sections 323, 392 and 394 of the Indian Penal Code.

755A. Scope:—This section must not be taken as controlled by the words "not exceeding three" occurring in sec 234; there is nothing in this section to warrant the rule that not more than three offences can be combined even if those offences have been committed in the same transaction—*Sanuman*, 19 A.L.J. 392, 22 Cr.L.J. 641. If the offences are committed in the course of the same transaction, a charge is not illegal by reason of its containing more than three offences spread over a period longer than a year—*Gan Mallu*, 49 Mad 74, 48 M.L.J. 308, 26 Cr.L.J. 1513 (1523). The question of applicability of sec 235 arises only where separate offences, that is offences of a different nature, may form part of the same transaction and not where the question of different offences of the same nature is under consideration—*Ramsheshan*, 36 Cr.L.J. 1216 (1218), A.I.R. 1935 Nag 178.

Section 235 (1) and sec 236, Cr. P. C., are mutually exclusive, and if a case is governed by one of them it cannot be governed by the other—*Srirangachariar*, 35 Cr.L.J. 1503, 152 I.C. 154, 40 M.L.W. 586, 67 M.L.J. 583, A.I.R. 1934 Mad. 673, 1934 M.W.N. 994, 1934 Cr.C. 1307. For contra see Note 762.

Joint trials, except where they are clearly authorized by law, do not save time in the long run and further the ends of justice. Where the legality of the joinder of charges is doubtful, the proper course is to hold a trial clearly authorized by the law—*Abdur Rahim*, 32 Cr.L.J. 611 (613), 130 I.C. 796, 12 P.L.T. 12, 1931 Cr.C. 230, A.I.R. 1931 Pat. 102.

The word 'offence' as defined in sec. 4 (a) includes an act in respect of which a complaint may be made under sec. 20, Cattle Trespass Act. Consequently, a joinder of a charge under sec. 504, I.P. Code, with a charge under sec. 20, Cattle Trespass Act, is not illegal, where the two offences form parts of the same transaction—*Deendayalu v. Ratna*, 50 Mad 841, 52 M.L.J. 251, 28 Cr.L.J. 301 (302).

The law is clear that secs 235 and 239, Cr. P. C., which deal with the joinder of charges of different offences and the joint trial of a number of accused persons, are not controlled by the latter part of sec. 233 or by sec. 234, Cr. P. Code. If the offences are committed in the course of the same transaction they may be tried together, although they are more than three in number and extend over a period of more than one year. But there is nothing in sec. 235 or sec. 239 to suggest that they are not governed by sec. 222 or the first part of sec. 233, Cr. P. Code. On the contrary, the Illustrations to sec. 235 make it clear that when different offences are tried together, they must be separately charged—*Karamallu Gulamalli*, 40 Cr.L.J. 118 (121), 178 I.C. 706, A.I.R. 1938 Bom. 481, 40 Bom.L.R. 1092, I.L.R. 1939 Bom. 42. See also *Babulal Choukhani v. King-Emp.*, in Note 778.

756. Same transaction:—The expression "the same transaction" is used in sec. 235 in the same sense in which it is used in sec. 239, Cr. P. Code—*Abdur Rahim*, 32 Cr.L.J. 611, 130 I.C. 796, A.I.R. 1931 Pat. 102, 12 P.L.T. 12, Ind. Rul. 1931 Pat. 204, 1931 Cr.C. 230. "The expression 'same transaction' used in secs. 235 and 239 is an expression which from its very nature is incapable of exact definition, and must have been advisedly used because it had this quality. That during the years since the expression first appeared in the Statute Book, the combined wisdom of all the High Courts in India has failed to definitely fix its meaning, is sufficiently convincing that the task is impossible. The illustrations, however, make sufficiently clear the intention of the Legislature"—*per* Crouch, A.J.C. in *Ghulam*, 1 S.L.R. 73, 8 Cr.L.J. 191 (195). It is

neither necessary nor advisable to attempt to define the expression "same transaction" which the Legislature has left undefined. Each particular case must be tried by common sense and a common knowledge of language—*Ramaraju*, 53 Mad. 937, 32 Cr.L.J. 30 (31), A.I.R. 1930 Mad. 857, 1930 Cr.C. 1033, 127 I.C. 654, 1930 M.W.N. 377, Ind. Rul. 1930 Mad. 1038, 32 M.L.W. 894, 59 M.L.J. 945, following *Choragudi Venkatadri*, 33 Mad. 502, 5 I.C. 847, 20 M.L.J. 220, 1910 M.W.N. 65. The word "transaction" is rather a vague term. It is not defined in the Cr. P. C., and no doubt it was advisedly left undefined. It is not intended to be interpreted in any artificial or technical sense. Common sense and the ordinary use of language must decide whether on the facts of a particular case it is one transaction or several transactions—*Shapurji Sorabji*, 37 Cr.L.J. 688 (690), 162 I.C. 399, A.I.R. 1936 Bom. 154, 38 Bom.L.R. 106, 60 Bom. 148, 1936 Cr.C. 338. It has a wider significance for which a synonym may be found in the word "affair"—*Ramnath*, A.I.R. 1934 Pat. 483 (485), 36 Cr.L.J. 342, 153 I.C. 423, 13 Pat. 161, 1934 A.L.R. 273, 1934 Cr.C. 1074. It is not possible to enunciate any comprehensive formula of universal applicability for the purpose of determining whether two or more acts constitute the same transaction, but circumstances which bear on the determination of the question in any individual case can be indicated by saying that proximity of time, unity or proximity of place, continuity of action and community of purpose or design are the principal criteria for deciding whether certain acts form part of the same transaction or not. The real and substantial test for determination whether several offences were so connected together as to form one transaction, depends upon whether they are related together in point of purpose, or as cause and effect, or as principal and subsidiary acts so as to constitute one continuous action—*Raj Bahadur*, 35 Cr.L.J. 1496 (1499), 152 I.C. 103, 11 O.W.N. 1309, 1934 Cr.C. 1379, A.I.R. 1934 Oudh 499. The expression "the same transaction" suggests not necessarily proximity in time so much as continuity of action and purpose—*Ganesh Prasad*, 32 Cr.L.J. 478, 1931 Cr.C. 148, A.I.R. 1931 Pat. 52, Ind. Rul. 1931 Pat. 173, 130 I.C. 269, following *Datto Hanmant*, 30 Bom. 49, 2 Cr.L.J. 578, 7 Bom.L.R. 633. See also *Balwantsingh*, 4 N.L.R. 71, 8 Cr.L.J. 11; *Hari Raot*, 2 N.L.R. 147, 4 Cr.L.J. 420; *Rego*, A.I.R. 1933 Nag. 136, 1933 Cr.C. 610, 143 I.C. 17, 34 Cr.L.J. 505, 29 N.L.R. 251; *Chhotey Miyani*, A.I.R. 1936 Nag. 250; *Provincial Govt., C. P. & Berar v. Dinanath*, A.I.R. 1939 Nag. 263, 1939 N.L.J. 373. To determine whether or not a series of acts would form parts of the same transaction, the most important points to be considered are whether there was a common purpose and design and continuity of action—*Ali Hussain*, 56 C.L.J. 73 (75). It is for the Court to decide whether in each case there is sufficient continuity of purpose between the acts of jointly tried accused, to justify it in finding that the transaction was in reality a single one, though composed of separate acts by the different accused—*Mezarali*, 34 Cr.L.J. 870 (872), 144 I.C. 985, 35 Bom.L.R. 474, A.I.R. 1933 Bom. 266, 1933 Cr.C. 678, 57 Bom. 400.

The question whether the acts are so connected together as to form part of the same transaction is a question of fact in each particular case—*Tamez Khan v. Rajabali*, 31 C.W.N. 337, 28 Cr.L.J. 347 (348); *Bishan Sahai*, A.I.R. 1937 All. 714 (717), 1937 A.W.R. 748, 1937 A.L.J. 1073, I.L.R. 1937 All. 779, 1937 A.L.R. 935, 171 I.C. 994, 1937 A.Cr.C. 119; *Ghasiram v. Emp.*, 38 Cr.L.J. 542, 168 I.C. 450, 9 R.N. 255, A.I.R. 1937 Nag. 188; and the area of facts covered by the expression 'same transaction' varies with the circumstances of each case—*Ghulam*, 1 S.L.R. 73, 8 Cr.L.J. 191 (200); *Woodward*, 18 S.L.R. 199, 27 Cr.L.J. 257. No comprehensive formula of universal application can be stated to determine whether two or more acts constitute the same transaction, but circumstances which must bear on the determination of the question in an individual case can be indicated; they are: proximity of time, unity or proximity of place, continuity of action and community of purpose or design—*Amrita Lal*, 42 Cal. 957 (983); *Madhab Laxman*, 43 Bom. 147, 20 Bom.L.R. 607; *Kushai Mallik*, 50 Cal. 1004 (1008); *Banga Chandra v. Anando*, 35 C.L.J. 527; *Tamez Khan v. Rajabali*, 31 C.W.N. 337, 28 Cr.L.J. 317 (348), 45 C.L.J. 591, 100 I.C. 965. Those criminal acts which are in English and Indian law regarded as subsidiary to an

offence are included in the 'same transaction' as the offence. If a series of acts are so connected together by proximity of time, community of criminal intention, continuity of action and purpose or such subsidiary acts as would make the co-accused *perceptus criminis* or an accessory after the fact, or by the relation of cause and effect, as to constitute, in the opinion of the Court, one transaction, then the accused may be tried at one trial for every offence committed in such series of acts—*Ghulam*, 1 S.L.R. 73, 8 Cr.L.J. 191 (195, 196); *Lukman*, 21 S.L.R. 107, 27 Cr.L.J. 1233 (1239). But it is not necessary that all these elements should be present to make the several incidents parts of the same transaction. The most essential tests are continuity of action and community of purpose; that is, there should be a continuous operation of acts leading to the same end, and a common purpose should run through all the acts—*Lockley*, 43 Mad. 411 (413); *Gan Mallu*, 49 Mad. 74, 26 Cr.L.J. 1513 (1523); *Choragudi Venkatadri*, 33 Mad. 502; *Virupana*, 28 M.L.J. 397, 16 Cr.L.J. 323; *Ram Subheg*, 19 C.W.N. 972, 16 Cr.L.J. 461; *Datto Hanmant*, 30 Bom. 49; *Pahlad*, 1 Lah. 562; *Pepehidhi*, 5 P.L.J. 11, 21 Cr.L.J. 161; *Krishnasami*, 26 Mad. 125. The real and substantial test for determining whether several offences are so connected together as to form one and the same transaction depends upon whether they are related together in point of purpose, or as cause and effect, or as principal and subsidiary acts, as to constitute one continuous action—*Sherufalli*, 27 Bom. 135; *Sanuman*, 19 A.L.J. 392, 22 Cr.L.J. 641; *Krishna Aiyar*, 8 L.W. 225, 1918 M.W.N. 525; *Hari Raot*, 2 N.L.R. 147, 4 Cr.L.J. 420; *Gunwant*, 13 N.L.R. 35, 18 Cr.L.J. 339 (342); *Nag Lu*, 19 Cr.L.J. 34 (Bur.); *Woodward*, 18 S.L.R. 199, 27 Cr.L.J. 257; *Husainbai*, 20 S.L.R. 74, 27 Cr.L.J. 456. In order that a series of acts be regarded as the same transaction, they must be connected together in some way. The Courts have indicated various tests to be employed to decide whether different acts are parts of the same transaction or not, namely, proximity of time, unity of place, unity or community of purpose or design and continuity of action. Proximity of time is not essential, though it often furnishes good evidence of what unites several acts into one transaction and, as *Illus. (d)* to this section shows, it may often be a very important factor in determining whether different offences of the same kind are to be treated as part of one transaction. The main test must really be continuity of action. It cannot mean merely doing the same thing or similar things continuously or repeatedly, for a recurring series of similar transactions is not according to the ordinary use of language, the same transaction. Continuity of action in the context must mean thus: the following up of some initial act through all its consequences and incidents until the series of acts or group of connected acts comes to an end, either by attainment of the object or by being put an end to or abandoned. If any of those things happens and the whole process is begun over again, it is not the same transaction but a new one, in spite of the fact that the same general purpose may continue—*Shapurji Sorabji*, 37 Cr.L.J. 688 (690), 162 I.C. 399, A.I.R. 1936 Bom. 154, 38 Bom.L.R. 106, 60 Bom. 148, 1936 Cr.C. 338, 8 R.B. 415.

The first element to establish is a "series of acts," which would necessarily imply the acts being "connected together," but this will not be enough it will have to be shown further that the acts "form the same transaction." Mere sequence in time may establish the first element, but not necessarily the other. The expression "so connected together as to form the same transaction" has purposely and wisely been left undefined, but the words must be given a reasonable and rational meaning, and cannot be stretched to include a series of acts which have no relation to each other as cause and effect or as principal and subsidiary, or which are not shown to follow, the one from the other, as a necessary or natural sequel or concomitant. There must be one continuous thread of a common purpose running through the acts to support a joinder of charges in respect thereof. Mere difference in time or place between the commission of one offence and of another will not necessarily import want of such continuity: they may yet be linked together by a community or continuity of purpose, and thus form the same transaction—*Kamala Kanta v. Emp.*, 41 C.W.N. 1112 (1117).

The test for applying sec. 235, Cr. P. C., is to see whether the acts alleged form

a series that can be regarded as one transaction and it is difficult to see how this question can be answered in the negative when the evidence to prove the one offence, is identical with that by which the other is to be established—*Mayadhar Pothal*, 40 Cr.L.J. 625 (627), 181 I.C. 1001, 20 P.L.T. 420, A.I.R. 1939 Pat. 577, 18 Pat. 450, 1939 P.W.N. 300.

The word "transaction" is usually used to include the steps leading to a conclusion or resulting in action, though often transaction emphasizes the fact of something done or brought to a conclusion. To ascertain whether a series of acts are parts of the same transaction, it would be essential to see whether they are linked together to present a continuous whole. The expression "same transaction" as judicially interpreted signifies "related to one another in point of purpose, or as cause and effect, or as principal and subsidiary acts as to denote one continuous and completed action" The idea of completion cannot be divorced from the interpretation of the expression The question is at what stage the act alleged has been done or completed—*Ramchandra Rango v. Emp*, 40 Cr.L.J. 579 (590), 181 I.C. 870, A.I.R. 1939 Bom. 129, 41 Bom.L.R. 98.

The mere fact that two offences are committed at the same time or place is, however, neither necessary nor decisive as an indication of their being so connected as to form the same transaction—*Abdur Rahim*, 32 Cr.L.J. 611, 130 I.C. 796, A.I.R. 1931 Pat. 102, 12 P.L.T. 12, Ind. Rul. 1931 Pat. 204, 1931 Cr.C. 230, following *Krishnasami*, 26 Mad. 125, 2 Weir 295. Nor are offences so regarded merely because they may be inspired by one and the same general object, such as that of deceiving the public or plunder—*Abdur Rahim*, supra, following *Choragudi*, 5 I.C. 847, 33 Mad. 502, 11 Cr.L.J. 258, 1910 M.W.N. 65, 7 M.L.T. 299, 20 M.L.J. 220 and *Ram Narain*, 52 I.C. 481, 20 Cr.L.J. 657, 21 Bom.L.R. 732. So distinct acts of embezzlement committed in the course of several years by the managers of a Company formed with the object of defrauding the public, cannot be said to form part of the same transaction by reason of such general object, for separate acts to form parts of one and the same transaction, the purpose in view must be something particular and definite and where each act is a completed act in itself and accomplishes the original general design of defrauding the public so far as it goes, such acts cannot be tried together under sec. 235 (1)—*Charagudi*, supra. Where the accused, who was a *Chaukidari* Tahsildar of a village, told the villagers that their *chaukidari* assessment had been increased but that if they paid him the excess for one year, he would let the old rate stand, realised various sums of money on this representation from a number of villagers, was charged in respect of no less than 80 acts of cheating and convicted in one trial, held that the acts of cheating were distinct and unconnected, though the motive underlying all the offences was the same, and the joint trial was entirely illegal—*Abdur Rahim*, supra. The distinction between acts committed in pursuance of a conspiracy and acts committed merely in pursuance of a general policy of deception, plunder and the like is that the former may form one transaction but not the latter—*Ram Narain*, supra.

Under sec. 235 (1), Cr. P. C., the transaction itself need not be a criminal transaction. Offences can be committed in the course of a transaction whose aim is perfectly legitimate. The acts must be so related to each other in point of purpose, or as cause and effect, or as principal and subsidiary acts, as to constitute one continuous action. The test to be applied is not so much proximity in time as continuity of action and purpose. Where, however, criminal acts are separated by an interval of time, the length of the interval may be an important indication that such continuity is wanting. It is not necessary that of the offences committed in the course of the same transaction one should be a logical sequence to the others; as for instance when house-breaking is committed with the object of committing adultery and that object is subsequently attained; reiteration of the same offence or the commission of similar offences in the course of the same transaction also brings the case within the section—*Ruikar*, A.I.R. 1935 Nag. 149, 31 N.L.R. 318, 157 I.C. 618, 1935 Cr.C. 834, 36 Cr.L.J. 1153, following *Fakirappa*, 15 Bom. 491; *Harri Raol*, 2 N.L.R. 147, 4 Cr.L.J. 420;

Gunwant, A.I.R. 1916 Nag. 73, 38 I.C. 723, 18 Cr.L.J. 339, 13 N.L.R. 35 and *Rameshwar*, A.I.R. 1933 Nag. 327, 1933 Cr.C. 1328, 144 I.C. 94, 34 Cr.L.J. 673. The expression "same transaction" means a series of acts connected together so as to amount to what human perception regards as a proceeding begun, continued and ended—*Balwant Singh*, 4 N.L.R. 71, 8 Cr.L.J. 11.

When a proposal for the boycott is made by the President of an Association, and shortly afterwards the secretary and a member of that Association take joint action to boycott the person against whom the resolution is directed, the inference is that they are acting in furtherance of a common purpose, or in other words, they are taking part in a conspiracy. Acts done in pursuance of such a conspiracy must be deemed to be parts of the same transaction—*Nga Aung*, 1 Rang. 604, 25 Cr.L.J. 270, A.I.R. 1924 Rang. 98.

Mere proximity of time between two acts does not necessarily constitute them as parts of the same transaction—*Son Daik*, 1 L.B.R. 361; *Nga Tha*, 5 Bur.L.T. 101, 13 Cr.L.J. 485. The test to be applied to find out whether a series of acts forms part of the same transaction is not so much the proximity of time as the community of purpose or progressive action towards a single object—*Monmohan*, 19 C.W.N. 672, 29 I.C. 513, 16 Cr.L.J. 497, 21 C.L.J. 331; *Kushai*, 50 Cal. 1004; *Pahlad*, 1 Lah. 562, 21 Cr.L.J. 626; *Datto Hanmant*, 30 Bom. 49 (54); *Hari Raot*, 2 N.L.R. 147, 4 Cr.L.J. 420; *Gunwant*, 13 N.L.R. 35, 18 Cr.L.J. 339 (342); *Gam Mallu*, 49 Mad. 74, 48 M.L.J. 308, 26 Cr.L.J. 1513 (1523); and a mere interval of time between the commission of one offence and another does not necessarily import want of continuity, though the length of the interval may be an important element in determining the question of the connection between the two—*Sherufali*, 27 Bom. 135, 4 Bom.L.R. 930; *Pahlad*, 1 Lah. 562; *Kushai*, 50 Cal. 1004; *Gam Mallu*, supra; *Varupana*, 28 M.L.J. 397, 16 Cr.L.J. 323. A series of acts separated by intervals are not excluded from the 'same transaction,' if the accused started together for the same goal—*Datto Hanmant*, 30 Bom. 49; *Ganesh Narain*, 14 Bom.L.R. 972, 13 Cr.L.J. 833.

Where two or more acts were committed on different dates, and there was no connection between the two so as to make them the same transaction, a joint trial is illegal—*Shafi*, 21 A.L.J. 859, 25 Cr.L.J. 964, A.I.R. 1924 All. 211. Two acts of theft committed on different occasions, at an interval of 24 hours between the two acts, and in different places are not parts of the same transaction and cannot be tried jointly, e.g., where the accused cut away logs of trees on two days from different parts of a forest, and there was no suggestion that the accused endeavoured to remove a certain number of logs forming a particular batch, and came back next day to remove the remainder of the logs which he could not remove on the previous day—*Tamez Khan v. Rajabali*, 31 C.W.N. 337, 100 I.C. 827, 28 Cr.L.J. 347 (348). A charge under sec. 120B, I.P.C., of being a party to a criminal conspiracy to commit theft can be jointly tried with a charge under sec. 413, I.P.C., of being a habitual receiver of property stolen in pursuance of the conspiracy, but cannot be jointly tried with a charge of being a habitual dealer in property which is stolen in a transaction outside the conspiracy—*Maung Ba Chit*, 7 Rang. 821, 31 Cr.L.J. 387 (390, 391).

757. Instances of 'same transaction':—(1) Theft of a cart from one house, and theft of two bullocks from another house in order to remove the cart—*Hari Raot*, 2 N.L.R. 147, 4 Cr.L.J. 420.

(2) Cheating by false personation, forging a letter to support the false personation, and further cheating on the strength of that forged letter—*Sri Narain*, 11 C.W.N. 715, 5 Cr.L.J. 481 (487). Cheating and perjury—*Abdul Hamid*, 37 Cr.L.J. 492, 161 I.C. 763, A.I.R. 1936 Rang. 174, 14 Rang. 24, 1936 Cr.C. 271.

(3) Receiving some property stolen on a particular occasion, and assisting to conceal some other property stolen on the same occasion—*Mian Jan*, 28 All. 313.

(4) Rioting with a deadly weapon, causing hurt to one person and grievous hurt to another person by a dangerous weapon in the riot—*Dunger Singh*, 7 All. 29; *Katwari*, 39 All. 623, 18 Cr.L.J. 788. An offence under sec. 147, I.P.C., has been made a

substantive offence by the Indian Penal Code, and there is no illegality in the accused being charged under that section in addition to charges under secs 323 and 325, I. P. C.—*Manni Lal v. Emp.*, 39 Cr.L.J. 341, 173 I.C. 386, A.I.R. 1938 Oudh 95, 1938 O.W.N. 218, 1938 O.L.R. 117, 1938 O.A. 158, 1938 A.Cr.C. 14, 10 R.O. 222.

(5) Conspiracy to wage war, and concealing the existence of such conspiracy from the authorities—*Barindra*, 37 Cal. 467, 14 C.W.N. 1114. See Notes 723 and 778.

(6) Dacoity in one place, and the previous murder of a person in another place who had found out the dacoits while they were going to commit the dacoity—*Punya*, 4 Bom L.R. 789.

(7) Wrongful confinement of several persons for extorting money, extortion of money, and further wrongful confinement on a subsequent day for extortion of further amount of money—*Kailash*, 42 Cal. 760, 19 C.W.N. 181, 10 Cr.L.J. 120.

(8) Forgery, abetment of forgery, and use of the forged document in a Civil Court—*Jivram*, 40 Bom. 97, 17 Bom L.R. 881, 16 Cr.L.J. 761, 31 I.C. 361.

(9) Causing grievous hurt (by a police officer) to a person (for extorting confession) who died of the injuries, and making false entries in the official records attributing another cause for the death of that person—*Baiwant*, 14 Bom L.R. 41, 13 Cr.L.J. 137; causing of hurt and wrongful confinement by a police-officer to extort confession, and then making false entries in the Case-diary in order to save himself from the consequences of his acts—*Sanjiv Rainappa*, 55 Bom. 488, 1932 Cr.C. 777 (778), 34 Bom L.R. 1090, A.I.R. 1932 Bom. 545.

(10) Conspiracy to commit an offence, and the commission of that offence in pursuance of the conspiracy—*Amrita Lal*, 42 Cal. 957, 29 I.C. 513, 16 Cr.L.J. 497, 21 C.L.J. 331, 19 C.W.N. 676; *Monmohan*, 19 C.W.N. 672, 16 Cr.L.J. 3, 26 I.C. 307, 21 C.L.J. 195; *Abdul Rahman*, 4 Bur L.J. 213, 27 Cr.L.J. 669 (672), 3 Rang. 95; *Harsha Nath*, 26 I.C. 313, 42 Cal. 1153, 16 Cr.L.J. 9, 21 C.L.J. 201, 19 C.W.N. 706; *Dur Mahomed*, 35 Cr.L.J. 1337 (1340), 151 I.C. 494, 28 S.L.R. 119, 1934 Cr.C. 628, A.I.R. 1934 Sind 57; *Ochhavilal Bhikhabhai*, 35 Cr.L.J. 112, 146 I.C. 587, 35 Bom L.R. 985, A.I.R. 1933 Bom. 447, 1933 Cr.C. 1406. See Notes 723 and 778.

(11) Criminal misappropriation or breach of trust, and falsification of accounts in order to screen the misappropriation—*Jiban Krishna*, 40 Cal. 318, 14 Cr.L.J. 428, 20 I.C. 412; *Mangal Sein*, 11 Lah L.J. 384, 30 Cr.L.J. 958. Thus, where a police-officer, who took charge of certain ornaments of a deceased lady, misappropriated those ornaments and altered the entries in the police diary regarding the ornaments and substituted some fresh pages to show that the ornaments were never placed in his charge, held that he could be tried for offences under secs. 218, 409 and 477A, I. P. C., as they were committed in the same transaction—*Bilas Chandra*, 27 C.W.N. 626, 25 Cr.L.J. 343.

(12) Illegal possession of opium, and illegal possession of cocaine for the purpose of carrying on business of selling contraband—*Nga Lu*, 19 Cr.L.J. 34 (Bur.).

(13) Receipt of stolen property, sale of that property by the accused to his employer for Rs 3,000, out of which the accused misappropriated Rs 1,000 and paid only Rs 2,000 to the person from whom the accused received the stolen property, which act amounts to cheating the employer; here the act of receiving stolen property and the act of cheating form parts of the same transaction—*Lockley*, 43 Mad 411 (413), 21 Cr.L.J. 297, 38 M.L.J. 209.

(14) Possession of stencil plates for the purpose of selling them (sec 486, I. P. C.)—*Sherufali*, 27 Bom. 135.

(15) Kidnapping a minor girl with intent to marry her to somebody (sec. 366, I. P. C.), and cheating somebody by false representation and inducing him to take the girl in marriage and to part with money to consideration of marriage with the girl (sec. 420, I. P. C.)—*Husainbai*, 20 S.L.R. 74, 27 Cr.L.J. 456.

(16) M sent a telegram to America to Mrs. P asking her to send a certain sum of money wording the telegram as though it was despatched by P. Held that M was guilty of three distinct offences, under sec. 468, I. P. C., when he wrote the telegram, under sec. 29, Telegraph Act, when he sent the telegram, and under sec. 420, I. P. C.,

when Mrs P received telegram and sent the money; and these offences were committed in the same transaction—*Mahomed Rafiq*, 25 SLR 9, 1931 CrC. 734 (735), A.I.R. 1931 Sind 116, 134 I.C. 1004, Ind. Rul. 1931 Sind 156.

(17) Where blackmailing was evidently the common purpose in pursuance of which money was realised on two different dates *Held* that the second realisation was in continuation of the action in the first and both were in fulfilment of that common design of blackmailing and were parts of one and the same transaction and that offences regarding both the incidents may be tried together—*Ali Hussain*, 56 CLJ. 73 (75).

(18) The personation of a Police-officer and the acts in that character forming the backbone of a series of frauds which the accused was thereby enabled to commit, are parts of one and the same transaction and can be tried together—*Raj Jagdish v Atma Ram*, 15 C.W.N. 732, 12 CrLJ. 346, 10 I.C. 946

(19) Where the accused were charged with two acts of criminal trespass and house trespass on two successive nights in respect of property over which they asserted right of possession *Held* that the trial in one trial of these offences was legal as these acts were not distinct but were carried out in furtherance of a common purpose—*Maung Kaung Kywe*, A.I.R. 1935 Rang 357, 37 CrLJ. 3, 159 I.C. 57, 1935 CrC. 1081.

(20) A single trial for the offences under sec 353, I. P. C., and sec. 295, U. P. Municipalities Act, is competent—*Chhote Lal*, A.I.R. 1936 All 74, 37 CrLJ. 382, 160 I.C. 1089, 1936 CrC. 100.

(21) When the accused himself had killed a person in order to foist a false case of murder upon his enemies and immediately after committing murder went to prefer a false complaint, it cannot be said that strictly speaking a joint trial held for the two offences under secs 302 and 211, I. P. C., was illegal. It can fairly be contended that the two acts were connected together and formed part of the same transaction. But it is quite obvious that offences of this nature ought not to be tried together. It is obviously very embarrassing to the accused to have to answer a charge of murder at the same time as a charge of wilfully preferring a false complaint of murder. It is also embarrassing to the prosecution and may lead to failure of justice—*Uppara Dodda Narasa*, A.I.R. 1939 Mad 59, 48 MLW 601, 1938 MWN. 1116, (1938) 2 MLJ 771, 1938 MCrC. 331, 40 CrLJ 211, 179 I.C. 518

(22) Where the murder of the deceased and the robbery were parts of the same transaction and were simultaneously done and the alleged stolen property found in the possession of the accused was property stolen in that very robbery done at the time of the murder, there is ample authority in sec 235, Cr P C., and the succeeding sections of the Code for the trial of the accused, at one trial for all the offences under secs. 302, 392 and 411, I. P. C.—*Mayadhar Pothal*, 40 CrLJ 625 (627), 181 I.C. 1001, 20 P.L.T. 420

(23) Where what the prosecution alleged was that the accused having made up his mind to obtain insurance money from the Insurance Company by fraud, had to that end set fire to his shop and after the fire had put in a claim for the money, it is not possible to say that the attempt to cheat was not essentially connected with the arson. In such a case the framing of the two charges under sec 420/511 and 436/34, I. P. C., in the same trial does not amount to a misjoinder—*Ahmadar Rahaman v Emp.*, 44 CWN 340 (343).

758. Acts not forming same transaction:—(1) Kidnapping a boy, and after a day or two, assaulting the boy's mother who came to demand of the boy—*Chakutty*, 26 Mad 451

(2) The accused was entrusted with a sum of money payable to a Railway Company as freight for certain goods to be taken delivery of; he took delivery of the goods from the Railway Company without making payment, and absconded. *Held* that the misappropriation and cheating were not parts of the same transaction—*Parmeshwar*, 13 C.W.N. 1089, 10 CrLJ 476, 4 I.C. 28

(3) Criminal trespass into the house of the complainant, and assault on the complainant on a subsequent day while he was going to inform the Police of the

criminal trespass—*Nga Tha*, 5 Bur.L.T. 101, 13 Cr.L.J. 485; see also *Virupana*, 28 M.L.J. 397, 16 Cr.L.J. 323'. Criminal trespass into the shop of the complainant and rioting when there was no finding when the accused was put into possession by the rioters nor any allegations even that it was the object of the riot forcibly to transfer the possession from the complainant to the accused—*Ganauri Mia*, A.I.R. 1936 Pat. 248, 16 P.L.T. 847.

(4) Abetment of falsification of account-book, fraudulently destroying and secreting other documents and criminal breach of trust, do not constitute same transaction when there is nothing to show that the account-book was falsified in order to conceal the destruction of documents or that the documents were destroyed in order to prevent the falsification of account being detected—*Krishnasami*, 26 Mad. 125.

(5) Cutting and misappropriation of a large number of trees on eight or nine separate occasions at intervals extending over several months—*Raghavendra*, (1911) 2 M.W.N. 467, 12 Cr.L.J. 567.

(6) Criminal misappropriation or breach of trust, and falsification of accounts relating to another distinct act or misappropriation or breach of trust—*Jagatram*, 19 Cr.L.J. 987 (Lah.); *Jiban Kristo*, 40 Cal. 318, 14 Cr.L.J. 428.

(7) Theft of eight necklaces at different periods extending over two years, though from the same person—*Raman Lal*, 49 All. 312, 28 Cr.L.J. 171 (172), 99 I.C. 603, 25 A.L.J. 217, A.I.R. 1927 All. 223.

(8) Forgery of a document, and subsequent presentation of the forged document to a Loan office in order to induce that office to grant a loan, are not parts of the same transaction—*Birendra*, 30 Cal. 822 (829, 830). Forgery and giving the false evidence in respect of service of summons, and false evidence in respect of another summons on a different occasion—*Gehimal*, 10 S.L.R. 192, 18 Cr.L.J. 664.

(9) Five murders committed in one day, three in one village in the forenoon and two in another village in the afternoon, without there being any apparent connection between the two sets of murder—*Fauja*, 17 A.L.J. 614, 20 Cr.L.J. 353. See Note 723 under the heading "Culpable homicide."

(10) Preparation of false balance-sheet by a Company for the year 1912, and preparation of another false balance-sheet for the year 1913 are distinct and separate acts, and cannot be said to form parts of the same transaction—*Ram Narayan*, 21 Bom.L.R. 732, 20 Cr.L.J. 657.

(11) Manufacturing denatured spirit, possessing such spirit without license, bottling it for the purpose of sale, selling similar spirit from time to time, and attempting to render denatured spirit fit for human consumption, do not constitute the same transaction—*Upendra Nath*, 41 Cal. 694 (702), 18 C.W.N. 486.

(12) Offences under secs 406 and 174, I. P. C.—*Dhan Singh*, A.I.R. 1934 Lah. 630, A.I.R. 1934 Lah. 524, 35 P.L.R. 653, 1934 Cr.C. 965, 36 Cr.L.J. 676, 155 I.C. 163.

(13) Offences of murder, robbery and cheating by personation are distinct offences not committed in the course of the same transaction when the charge of cheating was based upon an incident which had taken place about a year previous to the commission of murder and robbery when the accused, who was a Mohammadan, induced the complainant to take him into his service as a cook by masquerading as a Brahmin—*Kamala Kanta v. Emp.*, 41 C.W.N. 1112.

(14) Where two distinct offences of theft in two separate houses were tried at one and the same trial, and the alternative charges under sec. 411, I. P. C., were also in respect of each of those transactions, the trial was not according to law because the charges were wrongly joined—*Boya Lingadu*, 41 Cr.L.J. 581, 188 I.C. 381, A.I.R. 1940 Mad. 509, 1940 M.W.N. 239, 51 M.L.W. 321, (1940) 1 M.L.J. 428, A.I.R. 1940 Mad. 509 (510), 1940 M.Cr.C. 79.

759. Separate trial not illegal:—This is an enabling section, and not imperative. Though it provides for a joint trial of offences committed in the same transaction, yet a separate trial for each of the offences is not illegal—*Ameruddin v. Farid Sarkar*, 8 Cal. 481; *Abdul Hamid*, 6 Pat. 208, 27 Cr.L.J. 1100; *Ram Deoji*, 30 Bom.L.R.

636, 29 Cr.L.J. 981 (1982). And a conviction or acquittal in respect of one of the offences is no bar to the trial of another—*Baldeo*, 3 A.L.J. 2, 3 Cr.L.J. 93. If in any case either the accused are likely to be bewildered in their defence by having to meet many disconnected charges or the prospect of a fair trial is likely to be endangered by the production of a mass of evidence directed to many different matters and tending by its mere accumulation to induce an undue suspicion against the accused, then the propriety of combining the charges may well be questioned—*Q-E. v Fakirapa*, 15 Bom. 491; *Rasul* 111 I.C. 305, 5 O.W.N. 612, A.I.R. 1928 Oudh 401, 3 Luck. 664, 29 Cr.L.J. 801. Where it is likely that the joinder of charges will result in bewildering the accused, such joinder should not be permitted even though the offences were committed in the same transaction—*Gulam*, 1 S.L.R. 73, 8 Cr.L.J. 191 (195); *Alimuddin*, 52 Cal 253, 29 C.W.N. 173, 26 Cr.L.J. 487, 40 C.L.J. 451, A.I.R. 1925 Cal 341, 85 I.C. 231. The words "any number of them" in section 235 must not be construed too literally. The Legislature has not, as in the case of charges falling under section 234 restricted the number of charges which can be tried in one trial but that does not mean that the accused can be bewildered in their defence or prejudiced in the eyes of the jury by having a multitude of accusations hurled against them at one and the same time—*Dur Mahomed*, 35 Cr.L.J. 1337 (1339), 151 I.C. 491, 28 S.L.R. 119, 1934 Cr.C. 628, A.I.R. 1934 Sind 57. In a Calcutta case, where several offences were committed in the same transaction, and a joint trial of several charges was held in the lower Court, the High Court, to be on the safe side, upheld the conviction and sentence on only one of the charges, setting aside the conviction on the other charges—*Radha Nath*, 50 Cal. 95 (99), 36 C.L.J. 149, 24 Cr.L.J. 72, A.I.R. 1932 573, 71 I.C. 120. See also *Dur Mahomed*, supra.

In *Jabanullah*, 33 C.W.N. 365, 57 Cal 1162, 32 Cr.L.J. 111, the High Court condemned the practice of having a long series of charges in a case triable by jury as it is likely to confuse them.

760. Offences requiring complaint of Court:—If, during the course of the same transaction, several offences are committed, some requiring complaint of Court under sec 195, and others not, and the Court refuses to make any complaint in respect of the offences requiring complaint, the accused may be separately charged and tried for those offences for which no complaint is necessary—*Krishna Pillai v Krishna Konun*, 31 Mad. 43 (44). See also Note 614D.

760A. Sub-section (2):—According to sub-sec (2) of sec 235, if the accused committed abetment of an offence under sec 122, I. P. C. (collecting men to loot the treasuries, slaughter the Englishmen, etc., and by the same speech instigated the offence of dacoity (secs 395 and 116, I. P. C.), he could be tried for each of these offences. But the offence under sec 122, I. P. C., required the sanction of the Government under sec 196 of this Code, and if no sanction of the Government was obtained, the accused could be charged with and convicted of the offence of instigation of dacoity (secs 395 and 116, I. P. C.)—*Anant Purask*, 25 Bom. 90 (98). So also, where the act of the accused amounts to an offence under sec 411, I. P. C. (dishonest receipt of stolen property) as also to an offence under sec 414, I. P. C. (concealment or disposal of that property), he can be charged with and convicted of both the offences. See Illustration (7) to this section. And so, a person who might be charged, but is not charged, under sec. 411, I. P. C., can be charged and convicted under sec 414, I. P. C.—*Abdul Gani*, 49 Bom 878, 27 Bom.L.R. 1373, 27 Cr.L.J. 114 (119).

Sub-section (3):—One of the counts in the charge against the accused under trial for waging war (sec. 121, I. P. C.) was that they had committed dacoity under secs. 395 and 397, I. P. Code. This count was struck off as being too vague, and the accused were convicted under sec. 121, I. P. C. Held that the validity of the conviction under sec. 121, I. P. C. was not affected by the striking off of the charge for other offences forming component parts of the offence of waging war, as the acts of dacoity were all merely some of the series of incidents which went to make up the continuing

offences of waging war within the meaning of sec. 235 (3), Cr. P. Code—*Gam Mallu*, 49 Mad 74, 26 Cr.L.J. 1513 (1515).

761. Sub-section (4)—Section 235 shall not affect sec. 71, I. P. C.— (For the text of sec. 71, I. P. C., see Notes under sec. 35, *ante*). Although in cases falling under sec. 235, a joint trial of several offences may be held, still in awarding punishment, Courts are to be guided by the provisions contained in sec. 71, I. P. C. Therefore, where an offence comes within two sections of the I. P. C., the accused may be charged with and tried at one trial for two offences, under sub-sec. (2), but the punishment cannot be cumulative.—*Francis Xavier*, Ratanlal 506; *Wazir Jan*, 10 All. 58. So also, where several acts, each of which would by itself constitute an offence, constitute when combined a different offence, the person accused of them may be charged with and tried at one trial for the comprehensive offence or for any one of the offences, but the whole punishment should not be more severe than the punishment for the gravest offence provided.—*Chandra Kant*, 12 Cal. 495

It should be noted that sec. 71, I. P. C., refers only to cases falling under sub-secs. (2) and (3) of this section and does not apply to cases under sub-sec. (1). Therefore, where offences are committed in the course of the same transaction under sub-sec. (1), the Court is not precluded from passing sentence on every such offence—*Wazir Jan*, 10 All. 58; *Nurichan*, 12 Mad 36; *Loke Nath*, 11 Cal. 349; *Kali Das*, 38 Cal. 453 (457); but a concurrent sentence would be more proper—*Kali Das*, *supra*.

236. If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once; or he may be charged in the alternative with having committed some one of the said offences.

Where it is doubtful what offence has been committed.

Illustrations.

(a) A is accused of an act which may amount to theft or receiving stolen property or criminal breach of trust or cheating. He may be charged with theft, receiving stolen property, criminal breach of trust and cheating, or he may be charged with having committed theft, or receiving stolen property or criminal breach of trust or cheating.

(b) A states on oath before the Magistrate that he saw B hit C with a club. Before the Sessions Court A states on oath that B never hit C. A may be charged in the alternative and convicted of intentionally giving false evidence, although it cannot be proved which of these contradictory statements was false

762. Application of section:—Section 236 applies only to a case in which there is a single act or a series of acts of such a nature that it is doubtful which of several offences is constituted by the criminal act or acts—*Akram Ali*, 18 C.L.J. 574, 15 Cr.L.J. 41 (42), 22 I.C. 185. The section is only applicable when there is a doubt as to which offences has been committed—*Kanhaiya*, 31 Cr.L.J. 716, 124 I.C. 553, A.J.R. 1930 All. 481. This section contemplates a state of facts which constitute a single offence, but where it is doubtful whether the act or acts involved may amount to one or other of several cognate offences—*Croft*, 23 Cal. 174 (177); *Damodar*, 8 Pat. 731, 1929 Cr.C. 413; *Ganesh*, 5 S.L.R. 16, 12 Cr.L.J. 224 (*per Pratt, J.C.*). This section applies only to those rare cases in which the prosecution cannot establish exclusively any one offence—*Mahomed Rafiq*, AIR 1931 Sind 116 (117), 25 S.L.R. 9, Ind. Rul. 1931 Sind 156, 134 I.C. 1004, 1931 Cr.C. 734. This section deals with a transaction which raises a doubt as to the offences that has been committed. There must not be any doubt

as to "the single act or series of acts" which constitute the transaction, that is to say, there must not be any doubt as to the facts. The doubt must be as to the inferences to be deduced from these facts, thus making it "doubtful which of several offences the facts which can be proved will constitute"—*Meher Sheikh*, 59 Cal. 8, A.I.R. 1931 Cal. 414, 35 C.W.N. 945, 32 Cr.L.J. 892, 132 I.C. 254, 1931 Cr.C. 510, Ind. Rul. 1931 Cal. 574, Where it is *not at all doubtful* which of several offences the facts found would constitute, i.e., where there is no doubt which of several offences has been committed by the accused, this section does not apply—*Croft*, supra; *Thakar v. Chatter*, 20 P.R. 1910, 11 Cr.L.J. 420 (421); *Akram Ali*, supra. Thus, where there is no doubt that the offence committed is an offence of causing hurt under sec. 323, I P C., and not an offence under sec. 147, I. P. C., this section has no application—*Genu Manjhi*, 18 C.W.N. 1276, 15 Cr.L.J. 704 (705).

The doubt contemplated by the sections must arise at the time of charge. In order to decide whether such a doubt exists as will attract the provisions therein contained, the Judge must know at that time what facts "can be proved" Therefore, this expression must mean facts about which there is evidence in the hands of this prosecution. Where the evidence is circumstantial, and the decision depends upon the question whether the Court will draw a possible inference, or which of several possible inferences, there exists a doubt within the meaning of this section—*Istahar Khondkar*, 39 C.W.N. 620 (623), 62 Cal. 956, 37 Cr.L.J. 701, 162 I.C. 927, A.I.R. 1936 Cal. 796, 1936 Cr.C. 1132.

Section 236 does not apply where there is any doubt as to the facts, but applies where there is a doubt as to the law applicable to certain set of facts which have been proved—*Po Thin*, 7 Rang. 96, 30 Cr.L.J. 750, 117 I.C. 244, A.I.R. 1929 Rang. 209, 1929 Cr.C. 256, Ind. Rul. 1929 Rang. 180; *Abdul Hamid*, 37 Cr.L.J. 492, 161 I.C. 763, A.I.R. 1936 Rang. 174, 14 Rang. 24, 1936 Cr.C. 271; *Nga Po*, 6 Bur.L.J. 83, A.I.R. 1927 Rang. 254, 28 Cr.L.J. 759, 103 I.C. 839; *Partapa*, 11 PR 1913, 14 Cr.L.J. 664. Section 236, Cr. P. C., is generally regarded as limited in its application it is not intended to be applied to a case where the facts are left in doubt or to enable the Judge to leave the facts in doubt and thus escape that responsibility and duty of making up his mind which the law places on him it applies to a case where the facts are not in doubt, but it is doubtful which provision of the law applies to these facts—*Ghulam Hyder Imam Baksh v. Emp*, A.I.R. 1938 Sind 63, 31 SLR 480, 174 I.C. 497, 39 Cr.L.J. 460, 10 R.S. 254. An alternative charge under this section can be framed only in those cases in which the prosecution cannot establish exclusively any one offence but are able on the facts to exclude the innocence of the accused and to show that the accused must have committed one of two or more offences—*Ganesh*, 5 SLR 16, 12 Cr.L.J. 224 (226), 10 I.C. 168. This section applies only when the facts being ascertained it is doubtful which of two or more offences those facts constitute. If the facts are in doubt or if the ascertained facts are consistent with the innocence of the accused, this section does not apply—*Paul De Flonder*, 35 C.W.N. 809 (811), 32 Cr.L.J. 1167, A.I.R. 1931 Cal. 528, 134 I.C. 433, 1931 Cr.C. 680, Ind. Rul. 1931 Cal. 817; *Khudiram*, 12 C.W.N. 530; *Meher Sheikh*, 35 C.W.N. 945, 132 I.C. 254, 59 Cal. 8, A.I.R. 1931 Cal. 414, 1931 Cr.C. 510, Ind. Rul. 1931 Cal. 574, 32 Cr.L.J. 892, *Baluchami*, 35 Cr.L.J. 76, 146 I.C. 475, 1933 M.W.N. 718, 38 M.L.W. 760. But see *Nga Po Kyone*, 35 Cr.L.J. 41 (42), 146 I.C. 392, A.I.R. 1933 Rang. 236, 1933 Cr.C. 907, 11 Rang. 354, where it has been laid down that, secs. 236 and 237 do not say that they are applicable only when the facts are clear but the law is doubtful. Sections 236 and 237 are merely provisions against the defeat of justice on technical grounds. Where an offence is proved by the evidence, but its legal definition is doubtful or has been incorrectly given in the charge, then sec. 236 or sec. 237 may be resorted to. They really deal with instances which the language of sec. 235 might fail to cover—*Mahadeo Gir*, 9 N.L.R. 26, 14 Cr.L.J. 135.

Therefore this section is applicable where the doubt exists as to whether the accused had committed murder or culpable homicide not amounting to murder, such a doubt being based on facts only—*Khan Muhammad*, 1887 P.R. 11; *Ganesh*, supra. So again,

where the accused was charged under two heads of charge with committing dacoity in each of two adjoining houses, and it was doubtful as to which house he entered, an alternative charge that the accused committed dacoity either in A's house or in B's house is illegal—*Dewji*, Ratanlal 20. Even though the Magistrate frames alternative charges in a case where the facts are in doubt, still he is not entitled, at the conclusion of the trial, to compromise his doubts as to the true facts of the case by convicting in the alternative. He is bound to come to a distinct finding as to the facts, and then only if the law applicable to the facts which he considers to have been proved is doubtful, he may convict in the alternative—*Po Thin*, 7 Rang. 96, 30 Cr.L.J. 750, 1929 Cr.C. 356. See *Babu Ram v. Emp.*, A.I.R. 1937 All. 754, 39 Cr.L.J. 152, 1937 A.L.J. 1214, 172 I.C. 617, 1938 A.L.R. 6, 1937 A.W.R. 885; *Ghulam Hyder Imam Baksh v. Emp.*, A.I.R. 1938 Sind 63, 31 S.L.R. 480, 174 I.C. 497, 39 Cr.L.J. 460. But see *Istahar Khondwar*, 39 C.W.N. 620 (624), 62 Cal. 956, 37 Cr.L.J. 701, 162 I.C. 927, A.I.R. 1936 Cal. 796, 1936 Cr.C. 1132, 8 R.C. 665, where it has been laid down that though an accused may be charged in the alternative under sec. 236, judgment under sec. 237 cannot be passed in the alternative, that is to say, the accused cannot be convicted of two or more offences in the alternative.

If the Magistrate is not able to find for certain that facts exist which justify conviction, he should of course acquit the accused, but where the Magistrate has found that facts do exist which establish that the accused person must have committed some offence, although it is doubtful exactly what that offence was, a conviction for the least serious offence is perfectly good. The most that can be said is that there cannot be an alternative conviction or for that matter an alternative charge where the facts are doubtful but only where the deductions from the facts are doubtful. The accused is certainly not entitled to escape punishment merely because it is not possible to say which of two offences he committed, when it is clear that he is guilty of one of them—*Babu Ram v. Emp.*, supra. See Note 1048.

Sections 236 and 237, Cr. P. C., contemplate cases where at the commencement of the trial there is uncertainty whether the facts which the prosecution expect or undertake to prove, if proved, will constitute offence A or B or C and the uncertainty is resolved at the end of the trial, showing which particular offence out of these was actually committed. In such a case, it is provided that the accused may be charged with any one or more of such offences, but may be finally convicted of one other or others of them though not actually charged. The uncertainty must necessarily be an uncertainty arising out of a postulated set of facts, not an uncertainty regarding the facts which the prosecution may be ultimately able to establish. Section 237, Cr. P. C., does not deal with a case where the evidence falls short of proving the offence which the prosecution had set out to prove; that would be governed by sec. 238, Cr. P. C., if it could be made to apply—*Gotoke Behari Takal v. Emp.*, 39 Cr.L.J. 161 (178), 173 I.C. 65, A.I.R. 1938 Cal. 51, 66 C.L.J. 225, 42 C.W.N. 129, 10 R.C. 411, I.L.R. (1938) 1 Cal. 290.

This section only authorises a charge in the alternative when it is doubtful which of the several offences the facts which can be proved will constitute, and not where there may be a doubt as to the facts which constitute one of the elements of the offence—*Wafader*, 21 Cal. 955; *Nayamulla*, 26 Cr.L.J. 594 (Cal.); *Ganesh*, 5 S.L.R. 16, 10 I.C. 168, 12 Cr.L.J. 221 (227) (*per Pratt*, P.C.).

It is no doubt true that in the circumstances postulated by sec. 236 any number of such charges may be tried at once. But this provision does not do away with the obligation so to state the charge as to give the accused a sufficient notice of the matter which they have to meet—*Allahrakhio*, A.I.R. 1934 Sind 164 (166), 1934 Cr.C. 1266, 152 I.C. 1061, 36 Cr.L.J. 231, 152 I.C. 106.

This section does not apply where the two offences are distinct and separate, the one offence being committed subsequent to the other; thus, the offence of abetment of forgery and the offence of using the forged document (which has been committed subse-

quent to the abetment of forgery) must be separately charged—*Harun Rashid*, 53 Cal. 466, 30 C.W.N. 432, 27 Cr.L.J. 606.

This section provides for *cumulative* as well as for *alternative* charges. A *Cumulative charge* can be framed in case of offences of the same kind but which differ in degree. The difference in degree depends upon some added circumstance of aggravation, e.g., that the thief was the servant of the complainant, or upon some difference in the intention imputed to the accused, as in the case of murder or culpable homicide not amounting to murder. In an *alternative charge*, the circumstance of aggravation or the intention imputed to the accused must not be left in doubt. In other words, an alternative charge cannot be framed in respect of cognate offences when the difference is one of degree, i.e., as to the intention imputed to the accused or as to some circumstance of aggravation. An alternative charge can be framed when the prosecution establishes a *corpus delicti* or the facts which can be proved, and there are certain subsidiary facts which cannot be proved and so it becomes doubtful under which penal provision the *delictum* falls—*Ganesh*, 5 S.L.R. 16, 12 Cr.L.J. 224 (226). Thus, for instance, an alternative charge can be framed in case of theft or dishonest receipt of stolen property; here the fact that the accused is found in possession of stolen property is the *corpus delicti*; whether the accused stole it himself or received it from the thief are subsidiary facts which only affect the question whether his *delictum* falls under sec 379 or 411, I. P. C. Take another instance, an accused may be charged in the alternative with murder or abetment of murder; here the *corpus delicti* are the facts showing the murder and the accused's connivance; whether he did the murder with his own hand or by the hand of another is a subsidiary fact which is left in doubt—*Ganesh*, supra; *Purshottam*, 45 Bom. 834 (861, 862) (F.B.). So also, a charge of murder may be joined in the alternative with a charge of causing evidence of murder to disappear—*Begu*, 6 Lah. 226 (P.C.), 30 C.W.N. 581, 26 Cr.L.J. 1059; *Hanmappa*, 25 Bom.L.R. 231, 25 Cr.L.J. 1349; *Chinna Gangappa*, 54 Mad. 68, 32 Cr.L.J. 263 (265); *Andal*, 18 S.L.R. 185, 26 Cr.L.J. 909; *Bauva Maghmdas*, 4 S.L.R. 474, 11 Cr.L.J. 731 (The contrary view expressed in *Tarap Ali*, 22 Cal. 638; *Partapa*, 11 P.R. 1913, 14 Cr.L.J. 664, and *Samanta*, 20 C.W.N. 166 are overruled by the Privy Council case of *Begu*, supra) See *Rego*, 34 Cr.L.J. 505 (509), 143 I.C. 17, A.I.R. 1933 Nag. 136, Ind. Rul. 1933 Nag. 153, 1933 Cr.C. 610, 29 N.L.R. 251. See also *Swanta*, cited in Note 766. On charges under sec 489A (counterfeiting a currency note) and sec. 410 (cheating by means of a forged currency note), the High Court directed the conviction to be in the alternative—*Hira*, 15 A.L.J. 587, 18 Cr.L.J. 790 (791). An accused may be charged with an offence under sec 395, I. P. C., alternatively with an offence under sec. 457, I. P. C.—*Bikram Ali*, 57 Cal. 801, 31 Cr.L.J. 610, A.I.R. 1930 Cal. 139, 50 C.L.J. 467, 1930 Cr.C. 139, 124 I.C. 66. A charge of kidnapping and abduction in the alternative is not illegal—*Prafulla*, 57 Cal. 1074, 31 Cr.L.J. 903 (905); but it is desirable to frame a separate charge for kidnapping and a separate charge for abduction, specially where the age of the girl is in question—*Ramizullah*, 37 C.W.N. 1071 (1072); *Rajabuddin*, 37 C.W.N. 1074 (1075). See also Note 723 under the heading "Abduction and Kidnapping".

Under this section the offences arise out of a single act or out of a series of acts. This section does not apply to *distinct* offences—*Ganesh*, 5 S.L.R. 16, 12 Cr.L.J. 224 (225). It refers to *cognate* offences, such as theft and criminal breach of trust, and does not relate to offences of so distinct a character as murder and theft—*Narotam*, 1888 A.W.N. 95. An alternative charge should not be framed in respect of such distinct offences as offences under secs 182 and 211, I. P. Code—*Thakar Singh v Chattrar*, 20 P.R. 1910, 11 Cr.L.J. 420 (421).

When illustrations to sec 236, Cr. P. C., are looked for, the first ones that come to mind will generally be those about sections which fall under the same chapter of the Indian Penal Code, but this is not essential and there may be border-line cases where the two offences concerned do fall under different chapters. Wrongful restraint is probably such a border-line case, because, although it is under the chapter dealing with offences to the body, it is not necessary that anything be done directly

to the body at all: it may be by locking a door or by building a wall, or something of that kind. There is, therefore, no necessary obstacle to the application of sec. 236, Cr. P. C., that the two sections involved fall under different chapters of the Code—*Rafi Ram v. Emp.*, 38 Cr.L.J. 989, 170 I.C. 909, A.I.R. 1937 Rang. 250, 10 R.R. 115.

When it is doubtful as to whether the offence was under a certain section of the Penal Code or under a section of any other law (e.g., Post Office Act), the charge should be cumulative. An alternative charge cannot be framed in respect of an offence under the Penal Code and an offence under a special law—*Ganesh*, 5 S.L.R. 16, 12 Cr.L.J. 224 (228), 10 I.C. 168. See also *Nga Shwe*, 4 Rang. 355, 27 Cr.L.J. 1360. But see *Manhari*, 45 Cal. 727, 22 C.W.N. 199, and *Tulsi Telini*, 50 Cal. 564, 24 Cr.L.J. 372, where it has been held that a charge under sec. 380, I. P. C., may be framed alternatively with a charge under sec. 54A of the Calcutta Police Act. The Patna High Court also holds that a charge under sec. 16 of the Motor Vehicles Act may be framed alternatively with a charge under sec. 338, I. P. C.—*Maksuddan*, 2 P.L.T. 31, 22 Cr.L.J. 63, A.I.R. 1921 Pat. 22.

Where the accused may be charged *alternatively* under two sections, it is not illegal to charge him under those sections *cumulatively*. Compare Illustration (a)—*Damodar*, 8 Pat. 731, 1929 Cr.C. 413. Thus, it is not illegal to charge an accused both under secs 380 and 414, I. P. Code—*Damodar*, *supra*. But if charges are framed *cumulatively*, and the framing of charge is illegal, the illegality cannot be cured by saying that if the charges had been framed *alternatively* it would have been valid. Thus, a joinder of charges of three offences under sec. 411, I. P. C., with a charge of three offences under sec. 414, I. P. C., is illegal, because sec. 234 does not allow a joinder of charges of more than three offences; but this illegality cannot be corrected by the argument that if the charges had been framed in the alternative under sec. 236 there would have been no defect in the trial—*Chetto*, 49 Cal. 555, 24 Cr.L.J. 86, 71 I.C. 214, A.I.R. 1922 Cal. 401. Similarly, if charges are framed in the alternative, e.g., with embezzlement or abetment thereof, they must be treated not as one charge but as two different charges, as the accused has to meet two distinct sets of circumstances. When in three separate cases he is charged in the alternative, he has to meet six different sets of circumstances. This would be against the spirit of sec. 233, and would not be covered by sec. 234. The joint trial on these six charges would be illegal—*Janeshar Das*, 51 All. 541, 1929 A.L.J. 329, 30 Cr.L.J. 687 (689).

Alternative charges may be properly run against an accused person on the same set of facts, but alternative charges which include offences which do not arise out of the same set of facts as those with which they are linked, even though tried in the same proceedings, ought to be made clear to the accused before the trial and clearly dealt with in the Judge's final decision—*Jodha*, 27 Cr.L.J. 592, 81 I.C. 80, A.I.R. 1923 All. 285.

Sections 235 and 236—Sections 235 and 236 are not mutually exclusive, but one can supplement the other. It cannot be said that whenever a person is tried for two or more offences committed in the course of the same transaction, sec. 236 must be deemed to have been expunged from the Code. Thus, the accused instigated a boy to commit theft (secs 109 and 379, I. P. C.) and received stolen property from the boy (sec. 411). These offences were undoubtedly committed in the same transaction, and can be charged together under sec. 235 (1). But the offences can also be charged together under sec. 236; and consequently, under the provisions of sec. 237, if the accused is charged only with an offence under sec. 109/379, I. P. C., he can be convicted for an offence under sec. 411, I. P. C.—*Shib Charan*, 53 All. 233, 1931 A.L.J. 1015, 32 Cr.L.J. 1007 (1009), A.I.R. 1931 All. 49, 133 I.C. 140, Ind. Rul. 1931 All. 588, doubting *Janeshar Das*, *supra*; *Kashinath*, 54 All. 337, 33 Cr.L.J. 122 (123), 135 I.C. 225, 1932 A.L.J. 113, 1932 Cr.C. 34, A.I.R. 1932 All. 25, Ind. Rul. 1932 All. 49. For contra see *Srirangachariar* cited in Note 755A.

Charges must be separate—Alternative charges under two sections cannot be combined together in *one head* of charges. If the Magistrate desires to charge the

accused in the alternative, he must frame two separate alternative charges—*Po Thin*, 7 Rang. 96, 30 Cr.L.J. 750, 1929 Cr.C. 356.

763. Contradictory statements:—Illustration (b) shows that contradictory statements constitute the offence of giving false evidence, although it cannot be proved which of the two statements is false.

When a person is charged with making two contradictory statements, one before the Police and another before the Magistrate, two *separate* charges ought to be framed one relating to each statement, and such evidence as is procurable should be adduced to prove the falsity of one or other of the two statements. A conviction on only one charge relating to both the statements is not sustainable—*Kali Vannan*, 2 Weir 299 (300). An *alternative* charge in respect of two contradictory statements can be framed under this section only when it is found impossible to say which of the two statements is false and the two cannot be reconciled—*Muthu Vannan*, 2 Weir 300.

To attract the applicability of this section and justify a charge in the alternative in respect of contradictory statements, it is essential to remember that it is only when the statements constitute a *series of acts* that an alternative charge can be framed under this section. Thus, there is a common relation between a police investigation and a trial; or between a police investigation and a preliminary inquiry before a committing Magistrate; or between a preliminary inquiry before the committing Magistrate and the trial in the Sessions Court; and statements made at these different stages would form a series of acts and an alternative charge of perjury can be framed in respect of these statements—*Purshottam*, 45 Bom. 834 (864, 865), 23 Bom.L.R. 1, 22 Cr.L.J. 241 (F.B.) (overruling *Ningappa*, 18 Bom. 377); *Patraji*, 2 O.W.N. 637, 26 Cr.L.J. 1457; *Saleh Shah*, 27 Cr.L.J. 1195, 82 I.C. 59, 16 S.L.R. 285, A.I.R. 1924 Sind 1 (3). But there is no common relation between a police investigation relating to a murder and a civil suit for possession of the property of the murdered man; statements made at these two proceedings would not fall under the category of "series of acts" consequently, no alternative charge of perjury can be framed in respect of these statements—*Saleh Shah*, *supra*.

If a witness makes a statement and later in the course of the same deposition contradicts it and says it was untrue, the whole deposition amounts to no more than the second statement. He cannot be convicted of perjury in the alternative, in one or other of the two statements, and if the first can be proved to be false he cannot be convicted of more than an attempt to commit perjury. Resort to the expedient of an alternative charge is only justified when it is difficult to establish the falsity of one of the two statements—*Local Government v Gambhir*, 103 I.C. 101, 28 Cr.L.J. 645, 23 N.L.R. 35, A.I.R. 1927 Nag 189. See also Note 723.

Where it is difficult to find which of the two conflicting statements made by the accused, who is admittedly a liar, is true, in the absence of other evidence besides the statement of the accused and there is no charge under sec. 236, Cr. P. C., in the alternative, the conviction cannot be sustained—*Charandas Kanavalal v Emp.*, 40 Cr.L.J. 707, 182 I.C. 914, A.I.R. 1939 Sind 170, 1939 Kar 280, following *Bakshali v Emp.*, 5 S.L.R. 136, 13 I.C. 220, 13 Cr.L.J. 28.

764. Sentence:—When the conviction is in the alternative, the Court should pass the maximum sentence provided for the lesser of the two alternative charges—*Hira*, 15 A.L.J. 587, 18 Cr.L.J. 790 (791).

237 (1) If, in the case mentioned in section 236, the

When a person is charged with one offence, he can be convicted of another.

accused is charged with one offence, and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of that

section, he may be convicted of the offence which he is shown to have committed, although he was not charged with it.

(2) (Omitted).

Illustration.

A is charged with theft. It appears that he committed the offence of criminal breach of trust or that of receiving stolen goods. He may be convicted of criminal breach of trust or of receiving stolen goods (as the case may be), though he was not charged with such offence.

Change:—By Act XVIII of 1923, sub-section (2) has been omitted from this section but has been re-enacted as sub-section (2A) of sec. 238, as it should be more appropriately placed under that section.

765. Scope of section:—Section 237 has to be read with sec. 236. It applies to cases where sec. 236 applies. If the facts of the case do not fall under sec. 236, sec. 237 has got no application—*Genu Manjhi*, 18 C.W.N. 1276, 15 Cr.L.J. 704 (705); *Harun Rashid*, 53 Cal. 466, 30 C.W.N. 432, 27 Cr.L.J. 606; *Akram Ali*, 18 C.L.J. 574, 15 Cr.L.J. 41 (42); *Raghunath*, 24 A.L.J. 168, 27 Cr.L.J. 152; *Thakur v. Chatter*, 20 P.R. 1910, 11 Cr.L.J. 420 (421); *Srirangachariar*, 35 Cr.L.J. 1503, 152 I.C. 154, 40 M.L.W. 586, 67 M.L.J. 583, A.I.R. 1934 Mad 673, 1934 M.W.N. 994, 1934 Cr.C. 1307; *Meher Sheikh*, 35 C.W.N. 945, 32 Cr.L.J. 892, 132 I.C. 254, Ind. Rul. 1931 Cal. 574, 1931 Cr.C. 510, A.I.R. 1931 Cal. 414; *Istahar Khondkar*, 39 C.W.N. 620, 62 Cal. 956, A.I.R. 1936 Cal. 795, 1936 Cr.C. 1132, 37 Cr.L.J. 701, 162 I.C. 927. Thus, sec. 237 does not apply where the facts themselves are in doubt, or where on the facts alleged the offence is not in doubt—*Meher Sheikh*, supra, following *Akram Ali*, supra, *Kali Charan*, 22 I.C. 148, 41 Cal. 537, 15 Cr.L.J. 4, 18 C.L.J. 514, 18 C.W.N. 309; *Bhowanath*, 43 I.C. 618, 19 Cr.L.J. 202, 4 P.L.W. 40 and *Sheoradni*, 54 I.C. 252, 21 Cr.L.J. 44. It is an enabling section which empowers the Court to convict the accused of offences for which no charge has been framed but for which a charge could have been framed under sec. 236—*Bhowanath*, 19 Cr.L.J. 202 (Pat.).

766. Conviction for different offence:—If on the facts found, of which the accused may be taken to have notice, another offence appears to have been committed by him, and if on these facts it seems doubtful as to which offence the accused has committed, he may be convicted, under secs. 236 and 237, of the other offence—*D'bakar v. Saktidhar*, 54 Cal. 476, 31 C.W.N. 527, 28 Cr.L.J. 401. The true test is whether the facts are such as to give the accused notice of the offence for which he is going to be convicted though he was not charged with it, so that he is not prejudiced by the mere absence of a specific charge—*Meher Sheikh*, supra.

Abetment of forgery:—A person charged with the offence of abetment of forgery cannot be convicted of the offence of using a forged document, because the latter offence is a distinct and different offence from the former, and was committed subsequent to it. The abetment of forgery was complete when the document was written and signed; the use of the forged document was a subsequent act, and was a different offence for which the accused should be separately charged—*Harun*, 53 Cal. 266, 27 Cr.L.J. 606, 94 I.C. 270, 30 C.W.N. 432, A.I.R. 1926 Cal. 581.

Attempt to murder:—A person charged with an offence under sec. 307, I. P. C., may be convicted of an offence under sec. 506, I. P. Code—*Sukkirappa*, 1931 M.W.N. 861.

Adultery:—A conviction on a charge under sec. 498, I. P. C., only cannot be altered to a conviction under sec. 366A or 373, I. P. C., as these offences are major offences—*Mehandi*, A.I.R. 1934 Lah. 122, A.I.R. 1934 Lah. 796, 1934 Cr.C. 239, 36 Cr.L.J. 423, 153 I.C. 721.

Conspiracy:—Where five persons are charged under sec. 420/120B, I. P. C., on the allegation that they combined to deceive another and four are given the benefit of doubt, the position of the remaining accused who is found guilty of deception is not affected. The participation of the others being eliminated, he is the only person who was responsible for deception which *ex-hypothesi* did take place. His conviction under sec. 420, I. P. C., although he was charged only under sec. 420/120B, I. P. C., is not vitiated by the fact that four of his co-accused, who were said to have conspired with him, were

acquitted—*Jia Lal*, A.I.R. 1936 All. 357, 1936 A.L.J. 413. See also *Abdul Rahiman Akram Din* in Note 769. But when two persons are charged with conspiracy and one is acquitted, the other cannot be convicted of the same offence—*Osman Sardar*, 39 C.L.J. 256; *Gulab Singh*, 14 A.L.J. 680. But where an accused is charged with conspiracy and with having committed cheating in pursuance of that conspiracy, it is open to the Court to convict him of cheating even though the conspiracy is not proved as the words 'in pursuance of the conspiracy' in the charge of cheating are nothing but words of surplusage—*Satya Narain Mahata v. Emp.*, 29 Cr.L.J. 1022, 55 Cal. 858, 112 I.C. 350, A.I.R. 1928 Cal. 675, 32 C.W.N. 319.

A conspiracy to commit a particular offence or offences having been charged, it would not be open to the prosecution to prove a different conspiracy. Nor can the prosecution, conspiracy failing, ask for a conviction for one or more of the offences alleged to constitute the object of the conspiracy, or for any minor offence. The words "minor offence" have not been defined in the Code and the reported decisions do not lay down a uniform test. Where a conspiracy with two different objects is charged, it is by no means certain that a conspiracy with only one of these objects will be a "minor offence"; each would be a distinct conspiracy by itself involving a distinct agreement as the gist of the offence and not related to the other as principal or subsidiary to it. Nor can it be said that where an offence is alleged to constitute the object of a conspiracy as charged, a conspiracy to commit a minor offence will be a minor offence within the meaning of sec. 238, Cr. P. Code. Much less can it be contended that an offence (or an offence minor to it) alleged to constitute the object of a conspiracy is a minor offence to the offence of conspiracy—*Goloke Behari Takal v. Emp.*, 39 Cr.L.J. 161 (177, 178), 173 I.C. 65, A.I.R. 1938 Cal. 51, 66 C.L.J. 225, 42 C.W.N. 129, 10 R.C. 441, 11 R.L.R. (1938) 1 Cal. 290.

Criminal Breach of Trust—A person charged with criminal breach of trust (sec. 405, I.P.C.) may be convicted of the offence of criminal misappropriation (sec. 403, I.P.C.)—*Dwarkanadas*, 30 Bom.L.R. 1270, 30 Cr.L.J. 329 (330), 111 I.C. 399, A.I.R. 1928 Bom. 521, Ind. Rul. 1929 Bom. 255. See also *Mangal Prasad*, A.I.R. 1935 Oudh 4 (5), 11 O.W.N. 1392, 1934 O.L.R. 859, 152 I.C. 463. A person charged under sec. 409, I.P.C., cannot be convicted under sec. 409, I.P.C., or in the alternative, under sec. 427, I.P.C., when there was no charge under the latter section as mischief is not a minor form of criminal breach of trust—*U Ka Doe*, A.I.R. 1930 Rang. 158, 8 Rang. 13, 1930 Cr.L.J. 590, 125 I.C. 271, 31 Cr.L.J. 799.

Dacoity and robbery—Where the circumstances of a case were such that it was open to the Crown to have charged the accused under secs. 457, 395 or 392 of the I.P. Code, and the accused were charged under sec. 395, but convicted under sec. 457, I.P.C., although there was no fresh charge under the latter section, held that the conviction was not illegal in view of the provisions of secs. 236 and 237, Cr. P. C.—*Mathura*, 2 Luck. 444, 28 Cr.L.J. 460, 101 I.C. 492, 4 O.W.N. 442, A.I.R. 1927 Oudh 195. The accused and certain other persons were charged with an offence under sec. 395 I.P.C., and although it appeared in evidence that the acts of the accused amounted to lurking house-trespass by night after making preparations for assault, and causing grievous hurt in the course of that trespass, yet it did not appear that he was accompanied by the other persons who were put on their trial with him. The accused was convicted under secs. 458 and 459 I.P.C., without charges under those sections. Held that the offences of which the accused was found to be guilty did not differ in nature from the offence with which he had been charged, and it was, therefore, not necessary for the Court to alter the charge, as the provisions of sec. 237, sub-sec. (1), Cr. P. C., clearly covered the case—*Gulab Singh*, A.I.R. 1935 All. 458, 36 Cr.L.J. 1291, 158 I.C. 38, 1935 Cr.C. 486, 1935 A.L.J. 843.

Persons charged with dacoity cannot be convicted of receiving stolen property—*Gopala*, Ratanlal 34. Where if the facts as alleged by the prosecution are established, the accused were clearly guilty of dacoity and not of dishonestly receiving property stolen in a dacoity, they cannot be convicted of the latter offence on a charge of

dacoity—*Istahar Khondkar*, 39 C.W.N. 620 (626), 62 Cal. 956, 37 Cr.L.J. 701, 162 I.C. 927.

Dacoity is an offence against property, whereas sec. 325, I. P. C., is an offence affecting human body. It is, therefore, not open to a Court to charge the accused under sec. 392/397, I. P. C., and to convict them of an offence under sec. 325, I. P. C.—*Rameshwar*, 29 Cr.L.J. 763, 110 I.C. 795, 5 O.W.N. 601, A.I.R. 1928 Oudh 373; or to charge the accused under sec. 395, I. P. C., and to convict them under secs. 448 and 323, I. P. C.—*Meher Sheikh*, 35 C.W.N. 945, 32 Cr.L.J. 892, 132 I.C. 254, 1931 Cr.C. 510, A.I.R. 1931 Cal. 414, Ind. Rul. 1931 Cal. 574. But see *Mutyalu*, 37 Mad. 236, 17 I.C. 51, 13 Cr.L.J. 739, where it was held that when an accused was charged merely for an offence under s. 397, I. P. C., it was open to the jury to convict him under sec. 326, I. P. Code. This view was adopted following—*Queen-Emp v. Anga Valayan*, 22 Mad. 15, *King-Emp v. Krishna*, 24 Mad. 641 and *Pattikadan*, 26 Mad. 243. Similar view was also taken in *Penumatcha*, 35 Cr.L.J. 783, 148 I.C. 844, 1934 M.W.N. 41, 39 M.L.W. 433, A.I.R. 1934 Mad. 311, 66 M.L.J. 653, 47 Mad. 554, A.I.R. 1934 Mad. 1, 1934 Cr.C. 604. See also *Basdeo*, 34 Cr.L.J. 385, 142 I.C. 702, 10 O.W.N. 134, A.I.R. 1933 Oudh 162, 8 Luck. 474, 1933 Cr.C. 317, where the Oudh Chief Court altered a conviction under sec. 395, I. P. C., to one under sec. 323, I. P. C., in appeal.

As the offences under secs 398 and 392, I. P. C., are cognate offences, therefore sec. 237, Cr. P. C., read with sec 236, Cr. P. C., justifies the conviction under sec. 398, I. P. C., being altered to one under sec. 392, I. P. C.—*Chandra Nath*, 33 Cr.L.J. 926 (929), 139 I.C. 742, 9 O.W.N. 152, A.I.R. 1932 Oudh 103, 1932 Cr.C. 166, 7 Luck. 543, Ind. Rul. 1932 Oudh 387. A person charged under sec. 392, I. P. C., may be convicted under sec. 379, I. P. C.—*Narinjan*, 36 Cr.L.J. 244, 152 I.C. 1036, 35 P.L.R. 595. A person charged with robbery under sec. 392, I. P. C., can be convicted of cheating under sec. 420, I. P. Code—*Narinjan*, supra; but not under sec. 183, I. P. Code—*Nachiappa*, 1932 M.W.N. 247. But a person charged with robbery under sec. 392, I. P. C., cannot be convicted under sec. 458, I. P. C., which is a graver offence than one under sec. 392, I. P. Code—*Nga Kaung Nyein*, 13 Cr.L.J. 429, 14 I.C. 973, U.B.R. (1911) 1, 98.

House-trespass:—A person charged under sec. 452, I. P. C., cannot be convicted of an offence under sec. 19, Arms Act, because the latter offence is an offence under a *special Act* and the accused was not charged with it and had no opportunity of meeting it—*Nga Shwe*, 4 Rang. 355, 27 Cr.L.J. 1360, 98 I.C. 480, A.I.R. 1927 Rang 32.

Conviction under sec. 448, I. P. C., can be altered to one under sec. 341, I. P. Code—*Rati Ram v. Emp.*, 38 Cr.L.J. 989, 170 I.C. 909, 10 R.R. 115, A.I.R. 1937 Rang. 250.

A person who was charged only under sec. 457, I. P. C., may be convicted under sec. 411, I. P. Code—*Deorao*, A.I.R. 1932 Nag. 173, 28 N.L.R. 218, 1932 Cr.C. 908, 34 Cr.L.J. 66, 140 I.C. 431, dissenting from *Mula*, A.I.R. 1926 All 33, 90 I.C. 150, 26 Cr.L.J. 1494.

Where the accused was originally charged under sec. 452, I. P. C., but was convicted under sec. 426, I. P. C., the procedure is clearly sanctioned by sec. 238, Cr. P. Code—*Munnay*, 25 Cr.L.J. 1087, 81 I.C. 911, A.I.R. 1925 Oudh 89.

Hurt:—It is not illegal to convict a man of an offence under sec. 452, I. P. C., in a case in which he has been charged under sec. 323, I. P. C., in the light of the wording of secs. 236 and 237, Cr. P. C., but the question which is to be decided in each case is whether the accused has or has not been prejudiced in his trial by the fact that the charge was framed under a wrong section—*Shankar Dayal*, 39 Cr.L.J. 937, 177 I.C. 616, 1938 O.W.N. 960, 1938 O.L.R. 432, 11 R.O. 59, A.I.R. 1938 Oudh 263, 1938 O.A. 740, 1938 A.Cr.C. 100.

Kidnapping and Rape:—In a recent Allahabad case, the High Court altered a conviction of kidnapping into a conviction of rape, under the provisions of this section

—*Abdul*, 1932 A.L.J. 776, 1932 Cr.C. 698 (699), 34 Cr.L.J. 100, 141 I.C. 127, A.I.R. 1932 All. 580.

A person charged with rape (sec 376, I P. C.), cannot be convicted of kidnapping (sec. 366, I. P. C.), since the two offences involve different elements and different questions of facts—*Sakharam*, 8 Bom.L.R. 120, 3 Cr.L.J. 240; *C. C. Sircar*, 3 Rang. 68, 26 Cr.L.J. 1119 (1120), 88 I.C. 287, 4 Bur.L.J. 29, A.I.R. 1925 Rang. 230.

A conviction under sec: 376, I. P. C., cannot be altered into one under sec. 323, I P. C, by the Appellate Court—*Manique*, 34 P.L.R. 787.

When a charge was framed under sec. 368, I. P. C, conviction under sec. 366A, I. P. C, may be made even though no specific charge was framed under that section—*Ganpat*, A.I.R. 1933 Nag. 259, 1933 Cr.C. 930, 29 N.L.R. 365, 35 Cr.L.J. 28, 146 I.C. 332.

See also Note 723 under the heading "Abduction and Kidnapping"

Murder—The two offences (i.e., the offence charged and the offence of which the accused is convicted) must be cognate offences. Sections 236 and 237 refer to cognate offences such as theft and criminal breach of trust, and do not relate to offences of so distinct a nature as murder and theft—*Narotam*, 1888 A.W.N. 95. When the accused was charged with an offence of murder only, they cannot be convicted under sec. 411, I. P. Code—*Daulat Ram*, A.I.R. 1933 Oudh 315 (321), 35 Cr.L.J. 10, 146 I.C. 465, 8 Luck. 518, 1933 Cr.C. 698, 10 O.W.N. 466; or under sec. 385, I. P. Code—*Thakur Singh v. Emp.*, A.I.R. 1939 All. 665 (667), 1939 A.L.J. 547, 40 Cr.L.J. 948, 184 I.C. 409; or under one of the sections dealing with offences against the property—*Wallu*, 27 Cr.L.J. 385, 77 I.C. 433, 4 Lah. 373, 6 L.L.J. 59, A.I.R. 1924 Lah. 109. It is not possible for the appellate Court to alter a conviction under sec. 302 read with sec. 114, I. P. C, to one under sec. 379 read with sec. 511, I P C, when there was an acquittal of a charge under sec. 392, I. P. C., in the original Court—*Paw Tha U*, A.I.R. 1935 Rang. 512.

A person charged with murder (sec 302, I P. C), may be convicted of causing evidence of murder to disappear (sec 201, I. P. C), without any charge in respect of the latter offence, because the accused might have been charged with the two offences in the alternative under sec. 236, Cr. P. C.—*Begu*, 6 Lah. 226, 30 C.W.N. 581, 27 Bom.L.R. 707, 23 A.L.J. 636, 48 M.L.J. 643, 26 Cr.L.J. 1059, 88 I.C. 3, 2 O.W.N. 447, 41 C.L.J. 437, 3 Pat.L.R. 95 (Cr), A.I.R. 1925 P.C. 130, 1925 M.W.N. 418, 7 L.L.J. 324, 52 I.C. 191 (P.C.); *Rannun*, 7 Lah. 84, 27 Cr.L.J. 709, 94 I.C. 901, A.I.R. 1926 Lah. 88, 27 P.L.R. 583; *Umed Sheikh*, 30 C.W.N. 816, 27 Cr.L.J. 1011, 96 I.C. 867, 45 C.L.J. 581; *Durlav*, 59 Cal. 1040, 36 C.W.N. 373, 33 Cr.L.J. 546, A.I.R. 1932 Cal. 297, 1932 Cr.C. 266, 138 I.C. 116, Ind. Rul. 1932 Cal. 417; *Dal Singh*, 29 Cr.L.J. 457 (458), 108 I.C. 905 (Lah). Where the accused were charged under sec. 302/149, I. P. C, they may be convicted under sec. 201, I. P. C.—*Sohan*, 1932 A.L.J. 801, A.I.R. 1933 All. 178, 141 I.C. 116, 54 All. 792, 34 Cr.L.J. 107, 1933 Cr.C. 332; *Nagan v. Emp.*, 1937 M.W.N. 544. As regards *Begu's* case Lord Williams, J., observed: "With great respect for the decision of their Lordships of the Judicial Committee in the case of *Begu*, I think that the decision will require to be reconsidered by them upon some future occasion. The facts which could be proved in that case against each of the accused clearly constituted both offence of murder and an offence under sec 201 of the Indian Penal Code, and, in my opinion, no doubt arose within the meaning of sec. 236, Criminal Procedure Code."

An accused may be tried together both under secs 302 and 201, I. P. C., and may be acquitted under sec 302 and convicted under sec 201, I. P. C.—*Sawanta*, 33 Cr.L.J. 283, 136 I.C. 376, A.I.R. 1932 All. 71, 1932 Cr.C. 91, Ind. Rul. 1932 All. 200; *Durlav*, supra. See also *Mitta Venkatamma*, A.I.R. 1932 Mad. 748, 56 Mad. 63, 1932 M.W.N. 461, 139 I.C. 725, 33 Cr.L.J. 814, 36 M.L.W. 798, 1932 Cr.C. 923, 64 M.L.J. 153. But the addition of the minor charge under sec. 201, I. P. C., with the main charge of murder under sec. 302, I. P. C., would only give the jury an excuse to evade their duty—*Abdul Gafur v. Emp.*, 41 C.W.N. 414.

See also *Uppara Dodda Narasa* in Note 757 where the question of a joint trial of offences under secs. 302 and 211, I. P. C., has been discussed.

A person charged with murder (sec. 302, I. P. C.), can be convicted under sec. 193, I. P. C., of fabricating false evidence in respect of the murder in order to throw off suspicion from himself—*Ismail*, 52 Bom 385, 29 Cr.L.J. 403 (405), 108 I.C. 501, 30 Bom L.R. 330, A.I.R. 1928 Bom. 130. In *Appaya Baslingappa*, 25 Bom L.R. 1318, 25 Cr.L.J. 394, 84 I.C. 938, A.I.R. 1924 Bom. 246, it was held that the Sessions Judge could not convict the accused, who was charged with abetment of murder, of an offence under sec. 201, I. P. C. (causing evidence of murder to disappear). This ruling is no longer good law in view of the Privy Council decision of *Begu*, cited supra. See the observations of Fawcett, J., in *Ismail*, supra. A person charged with murder may be legally convicted under sec. 194, I. P. C. (fabrication of a false charge in order to fasten the guilt on another person), but it is *improper* to do so, because an offence under sec. 194 brings into the field an entirely different set of circumstances which are in no way involved in a charge of murder; especially where no reference was made, during the trial, to the offence under sec. 194, either in the charge-sheet or in the examination of the accused, nor was the accused called upon to plead to a charge under sec. 194—*Qabul*, 1932 A.L.J. 1079, 1933 Cr.C. 41 (42), A.I.R. 1933 All. 30, 34 Cr.L.J. 445, 142 I.C. 803, Ind. Rul. 1933 All. 154. But see *Achhut Rai*, 27 Cr.L.J. 1351, 98 I.C. 471, A.I.R. 1927 All. 75 where it has been held that when a man is charged with an offence under sec. 302, I. P. C., he cannot, without a charge being framed against him, be convicted of an offence under sec. 194, I. P. C.

The Patna High Court maintained a conviction under sec. 302, I. P. C., although the accused were charged under 302 read with sec. 149, I. P. C.—*Rashbehari Lal*, A.I.R. 1932 Pat. 440, 34 Cr.L.J. 83, 140 I.C. 846, 1932 Cr.C. 774.

Where the accused were charged under sec. 302|149, or in the alternative, under sec. 396, I. P. C., their conviction under sec. 304 (2) read with sec. 149, I. P. C., and also under sec. 379, read with sec. 34, I. P. C., is not illegal—*Bawar Shah*, 37 Cr.L.J. 1039 (1042), 164 I.C. 899, A.I.R. 1936 Pesh. 172.

When the enquiring Magistrate committed the accused under sec. 304, I. P. C., but the Sessions Judge altered the charge to one under sec. 302, I. P. C., so far as regards the section itself without making any alteration as regards the substance of the charge, held that the conviction under sec. 302, I. P. C., could not be upheld and that sec. 537, Cr. P. C., did not cure the defect—*Satnarain Lal*, 35 Cr.L.J. 1506, 158 I.C. 1129, A.I.R. 1935 Pat. 431, 16 P.L.T. 526, 1935 Cr.C. 1102.

Rioting and hurt :—A person who is charged under secs. 149 and 325, I. P. C., with having constructively committed the offence of grievous hurt, by being a member of an unlawful assembly, cannot be convicted under sec. 325, I. P. C., of causing grievous hurt with his own hands—*Panchu Das*, 34 Cal 698, 5 Cr.L.J. 427, 11 C.W.N. 666; *Reazuddi*, 16 C.W.N. 1077, 13 Cr.L.J. 502, 15 I.C. 646; *Madan Mandal*, 41 Cal. 662, 15 Cr.L.J. 155, 22 I.C. 731, A.I.R. 1915 Cal. 292. But the Madras High Court is of opinion that if a person is charged with being a member of an unlawful assembly, one of the members of which caused grievous hurt in pursuance of the common object, there is no necessary implication that the particular member (who caused the grievous hurt) is not himself. Consequently if he is charged under secs. 326 and 149, I. P. C., with causing grievous hurt by implication by reason of his being a member of an unlawful assembly, and it is found that he himself caused the grievous hurt he may be convicted under sec. 326, I. P. C., alone of the substantive offence of causing grievous hurt himself—*Theethumalai*, 47 Mad. 745, 47 M.L.J. 221, 25 Cr.L.J. 1297, A.I.R. 1925 Mad. 1, 82 I.C. 463 (F.B.); *Ghousbux*, A.I.R. 1935 Sind 34, 28 S.L.R. 201, 36 Cr.L.J. 598, 151 I.C. 915. See also *Rashbehari Lal*, supra. The accused were convicted by a Magistrate under secs. 326 and 149, I. P. C. The Sessions Judge on appeal found that the element of unlawful common object in the assembly as a whole, which is required to convict the accused under sec. 326 read with sec. 149, was

wanting, but as the petitioners had the common intention to cause grievous hurt, he convicted them under sec. 326 read with sec. 34, I. P. Code, without framing a specific charge under those sections. *Held* that the conviction was not bad—*Bhondu Das*, 7 Pat. 758, 113 I.C. 676, A.I.R. 1929 Pat. 11, 30 Cr.L.J. 205 (208). In this case it was further held that the contrary view taken in *Reazuddi*, supra, must be deemed as overruled by the Privy Council case of *Barendra*, 52 Cal. 197, 29 C.W.N. 181, A.I.R. 1925 P.C. 1, 85 I.C. 47, 52 I.A. 40, 27 Bom.L.R. 148. In *Rama Boyan*, A.I.R. 1934 Mad. 565, 1934 M.W.N. 241 the Madras High Court adopted the view in *Bhondu Das's* case. See Note 770.

Conversely a person, who is charged with a substantive offence, cannot be convicted of that offence read with sec. 149, I. P. C., when sec. 149, I. P. C., was not mentioned in the charge and the accused had no notice of their constructive liability—*Thaikkottathil*, 25 Cr.L.J. 212, 76 I.C. 644, 18 M.L.W. 946, 33 M.L.T. 210, 1924 M.W.N. 47, A.I.R. 1924 Mad. 338, *Govinda*, 1933 M.W.N. 910. But see *Deoji*, 27 Cr.L.J. 830 (832), 95 I.C. 606, A.I.R. 1926 Nag. 459 where a contrary view seems to have been taken.

Although the charge framed against an accused person specifies only the principal section under which he is charged, he may be convicted of the offence with which he is charged read with either sec. 34 or 114, I. P. C., although he has not been so charged—*Mitha*, A.I.R. 1934 Snd. 89 (91), 28 S.L.R. 12, A.L.R. 1934 Snd. 88, 151 I.C. 976, 1934 Cr.C. 748, following *Barendra's* case, supra; *Patilbuva*, A.I.R. 1926 Bom. 512, 57 I.C. 737, 27 Cr.L.J. 1153, 28 Bom.L.R. 1029. See also *Ranchhod*, A.I.R. 1924 Bom. 502, 87 I.C. 600, 49 Bom. 84; *Khuda Dad*, 34 Cr.L.J. 721, 34 P.L.R. 699, 1933 Cr.C. 547, A.I.R. 1933 Lah. 313, 144 I.C. 300, Ind. Rul. 1933 Lah. 437. The omission by the Magistrate to mention sec. 34 in the charge-sheet is cured by the operation of sec. 535, Cr. P. C.—*Nura*, 35 Cr.L.J. 1386, 151 I.C. 741, 1934 Cr.C. 458, A.I.R. 1934 Lah. 227. Conversely if a person is charged with an offence read with sec. 34, I. P. C., he may be convicted of the substantive offence—*Dastardli*, 32 Cr.L.J. 1004, 133 I.C. 190, 58 Cal. 822, Ind. Rul. 1931 Cal. 654, A.I.R. 1931 Cal. 625, 1931 Cr.C. 809.

Offences under secs. 147 and 160, I. P. C., respectively are obviously *ejusdem generis*. Thus being so there is no impropriety whatever in convicting the accused under sec. 160, I. P. C., when they were merely charged under sec. 147, I. P. C.—*Gulabchand*, 28 Cr.L.J. 189, 99 I.C. 861, A.I.R. 1927 Nag. 163, distinguishing *Sreeramulu*, 81 I.C. 42, 47 Mad. 61, 1923 M.W.N. 814, 18 M.L.W. 711, 46 M.L.J. 120, A.I.R. 1924 Mad. 375, 25 Cr.L.J. 554 where a contrary view was taken. See also *Sabir Husan*, 19 A.L.J. 487. An accused cannot be convicted under sec. 160, I. P. C., when he was merely charged under secs. 325 and 323, I. P. C.—*Baluchani*, 35 Cr.L.J. 76, 146 I.C. 475, 1933 M.W.N. 718, 28 M.L.W. 760, 1933 Cr.C. 1520, A.I.R. 1933 Mad. 843, 65 M.L.J. 723.

When the accused was charged and convicted under sec. 147, I. P. C., with the common object of assaulting the Police, it was not legal for the Appellate Court to convict them under sec. 353, I. P. C., while acquitting them under sec. 147, I. P. C.—*Har Naran*, 18 C.W.N. 1274. See also—*Yatubzli v. Lethu Thakur*, 30 Cal. 288.

Theft.—A person charged with theft may be convicted of receiving stolen property, if the evidence shows that the facts proved lead to the inference that the offence, rather than theft, was committed—*Kuppan Anbalam*, 17 M.L.J. 219; *Supdt. & Rem. of Legal Affairs, Bengal v. Raghubal*, 39 C.W.N. 741, 62 Cal. 946. Where a Magistrate framed a charge against the accused under sec. 379, I. P. C., and convicted him under sec. 426, I. P. C., having found that the *Kalai* that was cut and taken away was unripe, the conviction for mischief was fully justified—*Kalachand v. Talu*, 50 C.L.J. 285. The alteration of finding must not be such as to prejudice the accused by making him answer a charge of an entirely different character, necessitating a distinct defence altogether. Thus, where the accused was charged with theft of a tree, he could not be convicted under sec. 143, I. P. C., on the ground that he had gone with his men to the spot armed with lathis, as the defence for the two charges must be distinct, and the accused must be held to have been prejudiced by the alteration of charge—*Dibakar v. Sakridhar*, 54 Cal. 476, 31 C.W.N. 527, 28 Cr.L.J.

404, 101 I.C. 180, A.I.R. 1927 Cal. 520. But a person charged under sec. 380, I. P. C., can be convicted under sec. 54A of the Calcutta Police Act—*Tulsi Telmi*, 50 Cal. 564, 24 Cr.L.J. 372, A.I.R. 1923 Cal. 516.

See also *Bageshwari Ahir*, cited in Note 1208.

When an accused is charged with an offence under sec. 19 (f) of the Arms Act he can be convicted under sec. 19 (f) read with sec. 20 of the same Act—*Yashpal*, 35 Cr.L.J. 573, 147 I.C. 1193, A.I.R. 1933 All. 627, 1933 Cr.C. 1006, 55 All. 681; But see *Bhawani Prosad*, 39 C.W.N. 334 (349). See also *Kifayat Ullah Khan*, cited in Note 1208.

A person charged under sec. 278, I. P. C., may be convicted under sec. 290, I. P. C.—*Shiva Dat*, 3 Luck. 680, 5 O.W.N. 641, 29 Cr.L.J. 893 (894), A.I.R. 1928 Oudh 402, 111 I.C. 573.

A person charged under sec. 295, I. P. C., may be convicted under sec. 297, I. P. C.—*Amir Hassan v. Emp.*, 41 Cr.L.J. 810 (811), 189 I.C. 867, A.I.R. 1940 Pat. 414, 21 P.L.T. 121.

Where a charge brought against the accused originally was under sec. 64A of the Indian Stamp Act (II of 1899), he cannot be convicted under sec. 64B of the same Act—*Maya Shah*, 35 Cr.L.J. 291, 146 I.C. 1055, A.I.R. 1933 Lah. 959, 1933 Cr.C. 1411.

Where the accused is tried on a charge under sec. 4B of the Explosive Substances Act (VI of 1908), he can be convicted under sec. 5 of the same Act, although the sanction that was obtained from the Local Government was only for prosecution of the accused under sec. 4B of the said Act—*Nathu Ram*, 36 Cr.L.J. 266, 153 I.C. 147, A.I.R. 1934 All. 982, 1934 Cr.C. 1302, 1934 A.L.J. 1088, 57 All. 398. See also *Madhu*, 37 C.W.N. 934 (936).

Alteration of charge necessary:—When a person is charged with one offence and is convicted of a different offence, the Court should alter the charge under sec. 227, and the altered charge must be read and explained to the accused under sec. 227 (2). Secs. 227 and 237 go together, and a Court is not empowered to convict an accused of an offence of which he has not been told anything. Unless this is done, the conviction on the altered charge will be set aside—*Dhum Singh*, 23 A.L.J. 436, 26 Cr.L.J. 1057; *Raghunath*, 24 A.L.J. 168, 27 Cr.L.J. 152.

766A. Conviction in the alternative:—See Note 762, paragraphs 4 and 5 and Notes 763 and 764.

766B. Effect of non-compliance with the provisions of this section:—The disregard of an express provision of law as to the mode of trial is not a mere irregularity which could be remedied by sec. 537, Cr. P. C.—*Thakur Singh v. Emp.*, A.I.R. 1939 All. 665 (667), 1939 A.L.J. 547, 1939 A.W.R. (H.C.) 577, 184 I.C. 409, 40 Cr.L.J. 948.

767. Power of Appellate Court:—See sec. 423. An Appellate Court has power to convict the accused of an offence, though he was not charged with and tried for that offence in the original Court—*Lala Ojha*, 26 Cal. 863; *Kalicharan*, 41 Cal. 537, 18 C.W.N. 309; *Jawad Husain*, 2 Luck. 503, 28 Cr.L.J. 673; *Ismail*, 52 Bom. 385, 29 Cr.L.J. 403 (405). And the Appellate Court can do so not only under this section, but also under sec. 423 (b) (2) in case of an appeal from a conviction—*Krishnan*, (1916) 2 M.W.N. 267, 17 Cr.L.J. 384; and under sec. 423 (a) in case of an appeal from an acquittal—*Ismail*, supra. The Appellate Court has jurisdiction to convert a conviction from one under sec. 408, I. P. C., to sec. 403, I. P. C., by virtue of the provisions of sec. 423 read with sec. 237 (1), Cr. P. C.—*Mangal Prosad*, A.I.R. 1935 Oudh 4, 11 O.W.N. 1392, 1934 O.L.R. 859, 152 I.C. 463; or from one of cheating to one of criminal breach of trust—*Jagannath*, 1932 Cr.C. 941, 34 Cr.L.J. 419, 142 I.C. 704, A.I.R. 1933 Pat. 26, Ind. Rul. 1933 Pat. 170; or from one under sec. 181 to one under sec. 193, I. P. C., although the Civil Court launched prosecution under sec. 181, I. P. C.—*Nathu Singh*, A.I.R. 1936 Nag. 263, 1936 Cr.C. 1025.

If the prosecution establishes certain acts constituting an offence, and the trial

Court misapplies the law by charging and convicting an accused person for an offence other than that for which he should have been properly charged, and if notwithstanding such error the accused has by his defence endeavoured to meet the accusation of the commission of these acts, then the Appellate Court may alter the charge or finding and convict him of an offence which those acts properly constitute, *provided the accused is not prejudiced by the alteration in the finding*. Such an error is one of form rather than of substance—*Lala Ojha*, 26 Cal 863, 3 C.W.N 653; *Rat Ram v Emp*, 38 Cr.L.J. 989, 170 I.C. 909, A.I.R. 1937 Rang. 250, 10 R.R. 115. Thus, the accused was convicted by the trial Court for theft of a tree, under sec. 379, I P. C. The lower Appellate Court found that the accused *bona fide* believed the tree to be his own, set aside the conviction for theft but convicted the accused under sec. 143, I. P. C., on the ground that he had gone with his men to the spot armed with *lathis*; held that the conviction by the Appellate Court was illegal, inasmuch as the defence in the two charges must be distinct and the accused must be held to have been prejudiced by the alteration of conviction into one under sec. 143, I P. Code—*Dibakar v. Saktidhar*, 54 Cal 476, 31 C.W.N. 527, 28 Cr L.J. 401; *Jatu Singh v Mahabir Singh*, 27 Cal. 660. See Note 766.

238. (1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved, but the remaining particulars are not proved, he may be convicted of the minor offence, though he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it.

(2A) *When a person is charged with an offence, he may be convicted of an attempt to commit such offence although the attempt is not separately charged.*

(3) Nothing in this section shall be deemed to authorize a conviction of any offence referred to in section 198 or section 199 when no complaint has been made as required by that section.

Illustrations

(a) A is charged, under section 407 of the Indian Penal Code, with criminal breach of trust in respect of property entrusted to him as a carrier. It appears that he did commit criminal breach of trust under section 406 in respect of the property, but that it was not entrusted to him as a carrier. He may be convicted of criminal breach of trust under section 406.

(b) A is charged, under section 325 of the Indian Penal Code, with causing grievous hurt. He proves that he acted on grave and sudden provocation. He may be convicted under section 335 of the Code.

Change:—By section 64 of the Cr P. C Amendment Act (XVIII of 1923) sub-section (2) of sec 237 has been transferred to the present section and re-enacted as sub-sec (2A), it being more appropriate under this section than under sec. 237.

768. Principle of section:—Where an offence consists of several particulars, a combination of some only of which constitutes a complete minor offence, the graver charge gives notice to the accused of all the circumstances going to constitute the minor offence of which he may be convicted. The latter is arrived at by mere subtraction from the former. But when the circumstances constituting the major charge do not,

necessarily and according to the definition of the offence imputed by that charge, constitute the minor offence also, the principle no longer applies, because notice of the former does not necessarily involve notice of all that constitutes the latter—*Chand Nux*, 11 B.H.C.R. 240.

Though a Magistrate has power under this section to convict the accused of a different offence from what he was originally accused of, still this must be done only in cases where the accused is not in any way prejudiced by the conviction on the new charge. The accused person is entitled to know with certainty and accuracy the exact nature of the charge brought against him, and unless he has this knowledge, he must be seriously prejudiced in his defence—*Balkeshwar*, 3 P.L.T. 322, 23 Cr.L.J. 114, A.I.R. 1922 Pat. 5. But where the accused is charged under sec. 457, I. P. C., for criminal trespass with intent to commit theft, it is open to the Magistrate to convict him under sec. 456, I. P. C., for criminal trespass with intent to carry on an intrigue with a woman, and the accused cannot be in any way prejudiced by such conviction, because to sustain a conviction under sec. 456, I. P. C., it is not necessary to specify the criminal intention; it is sufficient if a guilty intention is proved such as is contemplated in sec. 441, I. P. C.—*Karali*, 44 Cal. 358 (364), 17 Cr.L.J. 424, 20 C.W.N. 1075, 35 I.C. 984, A.I.R. 1917 Cal. 824; *Jadab*, 61 I.C. 922, 2 P.L.T. 240, A.I.R. 1921 Pat. 217.

But the Patna High Court holds in a similar case that on a charge of criminal trespass with intent to commit theft the accused cannot be convicted of criminal trespass with intent to commit adultery, because he will be prejudiced by such a conviction—*Balkeshwar*, supra; *Raghu*, 56 I.C. 592, A.I.R. 1920 Pat. 590, 21 Cr.L.J. 496, 1 P.L.T. 221. For contra see *Jadab*, supra. The Calcutta High Court took a similar view in *Mahomed Hosain*, 41 Cal. 743, 18 C.W.N. 1217, 15 Cr.L.J. 190, A.I.R. 1914 Cal. 663, 22 I.C. 766. In a recent case the Patna High Court, following the view expressed in *Karali's* case and *Jadab's* case, held that a person charged under sec. 454, I. P. C., for committing trespass with the intention of committing theft, may be convicted under sec. 447, I. P. C., for trespass committed with the object of committing an offence—*Nihara*, 36 Cr.L.J. 829, 155 I.C. 620, A.I.R. 1935 Pat. 129, 1935 Cr.C. 329.

"Minor offence":—Minor offence is not defined anywhere in the Code and should be understood in its ordinary and not in any technical sense—*Sitanath*, 22 Cal. 1005. It means an offence deserving a lesser degree of punishment.

There is no definition of the expression 'minor offence.' The expression 'major offence' is not used in the section but it is convenient to adopt it in the present context. The test by which an offence is deemed in sec. 238 (1), Cr. P. C., to be major or minor is not the gravity of punishment incurred. The sub-section does not refer to the gravity of punishment at all; it merely refers to the number of particulars constituting the offence. If a number of particulars is needed to constitute the offence, then for the purposes of sec. 238 (1), Cr. P. C., it may be called the major offence. If a combination of some only of such particulars constitutes a complete offence, then that offence is referred to in sec. 238 (1), Cr. P. C., as the minor offence. It is not, however, to be overlooked that sec. 238 (2), Cr. P. C., speaks of the proof of additional facts reducing an offence to a minor offence, and this does not accord with the view that the minor offence must always consist of fewer particulars than the major offence. But this is only a new form that the situation takes—*Abdul Rahuman Akramdin*, 37 Cr.L.J. 753 (756), 162 I.C. 950, A.I.R. 1936 Bom. 193, 38 Bom.L.R. 153, 1936 Cr.C. 573, 60 Bom. 485, 8 R.B. 437.

This section enables a Court to convict a person of a minor offence, although he was charged with a major offence; but it does not enable a Court to do the contrary, i.e. to convict of a major offence when the accused was charged with a minor one—*Durga*, 1 Bom.L.R. 513; *Ngga Po*, 23 Cr.L.J. 710, 69 I.C. 628, 11 L.B.R. 45.

769. Cases under this section:—An offence under sec. 355, I. P. C., can be said to be a minor offence as compared with secs. 366 and 376, I. P. C., and a person charged under secs. 366 and 376 can be convicted of an offence under section 356, even

though he was not charged with it—*Sitanath*, 22 Cal 1006 A person charged with an offence of dacoity can be convicted of theft under this section—*Khoda*, 17 Bom. 359 (372).

Where the graver offence of robbing was not proved, the Magistrate was competent to try the accused for the lesser offence of assault—*Paṭadu*, 7 Mad. 454. A person charged under sec. 302, I. P. C., may be convicted under sec. 304, I. P. C.—*Q-E v. Devji*, 20 Bom 215 Where the accused is charged with offences under secs 304 and 325, I. P. C., he may be convicted under sec. 323, I. P. Code—*Dasarath*, 31 Cal 325 When an accused is charged only under sec. 304, I. P. C., he may be convicted under sec. 325, I. P. C., without altering the original charge under sec. 304, I. P. C., and without adding a specific charge under sec 325, I. P. C.—*Mohammad Nabi*, 35 Cr.L.J. 943 (1951), 149 I.C. 343, A.L.R. 1934 Oudh 165, 11 O.W.N. 693, 1934 Cr.C. 710, A.I.R. 1934 Oudh 251. Where the accused were charged under sec. 302|149, I. P. C., for being liable for murder of a person, they may be convicted under sec 323, I. P. C., for causing hurt to the companion of the deceased in the course of the same transaction although they were not specifically charged under sec 323, I. P. C.—*Jogindar*, A.I.R. 1931 Lah 566, 1931 Cr.C 854 Apart from the question whether a charge of causing grievous hurt with a cutting instrument is or is not a minor offence to an offence under sec. 307, I. P. C., when specific allegation made against the accused was that he caused hurt to the complainant by stabbing him with a knife and it was contained in the charge framed under sec 307, I. P. C., upon which the trial was originally held, there could be no prejudice to the accused by reason of his conviction for the offence of stabbing the complainant with the knife, simply because no formal charge under sec 326, I. P. C., was drawn up—*Sr Idris v Emp*, 43 C.W.N 782 An offence under sec. 211, I. P. C., includes an offence under sec 182, I. P. C., and, therefore, it is competent for the Magistrate to convict under sec 182, though the accused may be charged under sec 211, I. P. Code—*Khubonai*, 8 S.L.R 179, 16 Cr.L.J 104 Where the common object of an unlawful assembly is to commit criminal trespass, a person charged under sec 147, I. P. C., for being a member of an unlawful assembly can be convicted under sec 447, I. P. C., (criminal trespass), because the latter offence is a minor one and included in the former—*Ariff*, 18 C.W.N 992, 15 Cr.L.J. 188, 22 I.C. 764. Where the charge is under sec 430, I. P. Code (mischief by cutting the embankment of a reservoir), the conviction can be under sec 426, I. P. Code (mischief)—*Banamali*, 6 P.L.T. 39, 26 Cr.L.J 682

In the trial of an offence which is triable with the aid of assessors, it is competent to the Sessions Judge to convict the accused of a minor offence though that offence is triable only by a jury—*Changanda*, 45 Bom 619, 22 Cr.L.J 51, 22 Bom.L.R 1241, 59 I.C. 195. Similarly, an accused charged under sec 412, I. P. C. (triable by jury) can be convicted under sec 411, I. P. C. (triable with the aid of assessors) though not separately charged with the latter offence—*Gulabchand*, 27 Bom.L.R. 1416, 27 Cr.L.J. 650, 91 I.C. 602. So also an accused charged under sec. 397, I. P. C. (triable by jury) can be convicted under sec 326 or 323, I. P. C. (triable with the aid of assessors) though not separately charged with the latter offence—*Mutyalu*, 37 Mad 236, 17 I.C. 51, A.I.R. 1914 Mad 425, 13 Cr.L.J 730, *Haria Dholi*, 39 Cr.L.J 156 (158), 172 I.C. 780, A.I.R. 1937 Pat 662, 18 P.L.T 857, 10 R.P. 315, 4 B.R. 165, 1937 P.W.N. 868

A person charged under sec 353, I. P. C., can be convicted under sec 352 or 358, I. P. C., but it is doubtful whether he can be convicted under sec 323, I. P. Code—*Dip Chand*, A.I.R. 1934 All 872, 3 A.W.R. 699, 36 Cr.L.J 765, 155 I.C. 540, 1934 Cr.C. 1031

A person charged with cheating in pursuance of a conspiracy can be convicted of cheating only when the evidence showed that the offence of cheating was committed without conspiracy—*Abdul Rahiman Akramdin* 37 Cr.L.J 753 (755), 162 I.C. 950, A.I.R. 1936 Bom. 193, 38 Bom.L.R. 153, 1936 Cr.C 573 See Note 766 under the heading "Conspiracy."

770. Cases not under this section:—A charge of rape (sec. 376, I. P. C.) cannot be altered into a conviction for kidnapping (sec. 366, I. P. C.), because the two offences involve different elements and different questions of fact, and the latter cannot be said to be minor to or included in the former—*Sakharam*, 8 Bom L.R. 120, 3 Cr.L.J. 240; followed in *C. C. Sirkar*, 3 Rang. 68, 26 Cr.L.J. 1119 (1120), 4 Bur.L.J. 29. Where the accused was charged with murder, a conviction for an offence of kidnapping from lawful guardianship could not be sustained—*Savari Aye*, 2 Weir 302. An offence under sec. 202, I. P. C., is not a minor offence included in the offence under sec. 201, I. P. C., and, therefore, a conviction for the former offence cannot be had where the charge was under the latter section only—*Rino*, 5 S.L.R. 123, 13 Cr.L.J. 18. A person charged with dacoity and riot cannot be convicted for house-trespass, the latter offence not being a part of the former—*Salamut Ali*, 23 W.R. 59. See also *Meher Sheikh* in Note 766. A person charged with dacoity or house-breaking by night cannot be convicted of dishonestly receiving stolen property; because none of the particulars which go to make up the offence of dacoity or house-breaking constitute by themselves the offence of receiving stolen property; and so the latter offence cannot be considered as a minor offence included in the dacoity or house-breaking—*Achpal*, 26 Cr.L.J. 1361, 89 I.C. 449, 1 Lah. Cas. 92, A.I.R. 1926 Lah. 132. But see *Balu*, Ratanlal 293. A person charged with robbery cannot be convicted of house-breaking by night and theft in a dwelling-house, because all the particulars constituting the latter offences are not included in the definition of robbery with which the accused was charged—*Dala*, Ratanlal 211. A person charged with murder cannot be convicted of robbery—*Wallu*, 4 Lah. 373, 25 Cr.L.J. 385.

Rioting and hurt, etc.—Where the accused were charged with rioting, they could not be convicted of criminal trespass and hurt, because none of the latter offences was a necessary ingredient of the offence of rioting and it was not proved that the common object of rioting was criminal trespass or hurt—*Mongalu*, 18 Cr.L.J. 860 (Mad.). A charge of rioting under sec. 149, I. P. C., does not include as a minor offence any specific act of violence by an individual accused so as to authorise a conviction under sec. 352, I. P. Code—*Mallu Gope*, 10 P.L.T. 875, A.I.R. 1929 Pat. 712, 9 Pat. 642, 118 I.C. 323, 1929 Cr.C. 584, 30 Cr.L.J. 891 (892); *Kanta*, 12 Cr.L.J. 82 (Cal.). Where the accused is charged with being a member of an unlawful assembly and with committing grievous hurt by implication (secs. 149 and 325, I. P. C.), he cannot be convicted of the substantive offence of causing grievous hurt under sec. 325 by his individual act; because under no reasonable construction of this section can the substantive offence of causing grievous hurt individually be regarded as minor to or included in the charge under secs. 325 and 149, I. P. C., or causing grievous hurt by implication—*Panchu*, 34 Cal. 698; *Madan Mandal*, 41 Cal. 662; *Dasarath*, 34 Cal. 325; *Reazuddi*, 16 C.W.N. 1077. Where the only charge against the accused persons was one under sec. 304, I. P. C., read with sec. 149, I. P. C., and they were found guilty of an offence punishable under sec. 326, read with sec. 34, I. P. C., the conviction under sec. 326, read with sec. 34, I. P. C., was bad in the absence of a charge under those sections and it would be impossible to say that in such circumstances the accused persons were not misled in their defence—*Kalai Bepari v. Emp.*, 44 C.W.N. 651. Contra—*Theethumalai*, 47 Mad. 746 (F.B.), cited in Note 766 under sec. 237.

771. Sub-section (2A)—Attempt:—Under this sub-section, when an accused is charged with an offence he may be convicted of having attempted to commit that offence although the attempt was not separately charged—*Sadho Lal*, 1 P.L.J. 391, 17 Cr.L.J. 272; *Bilinghurst v. Blackburn*, 27 C.W.N. 821 (851), 25 Cr.L.J. 1313; *Dora'suami*, 48 Mad. 774, 48 M.L.J. 190, 26 Cr.L.J. 755; *Bhikhari*, A.I.R. 1934 Pat. 561 (563), 36 Cr.L.J. 17, 1934 Cr.C. 1215, 13 Pat. 729, 152 I.C. 282, 15 P.L.T. 523; *Sheo Narain*, A.I.R. 1936 Oudh 44, 1935 O.W.N. 1177, 158 I.C. 915, 1935 O.L.R. 630, 37 Cr.L.J. 12.

Abetment:—There is a conflict of opinion as to whether a person charged with a substantive offence can be convicted of abetment of that offence, when he was not charged with the latter offence. In *Padmanabha*, 33 Mad. 261; *Varayal*, 13 Cr.L.J. 223,

14 I.C. 319; *Profulla*, 50 Cal 41 (47); *Sheoraini*, 21 Cr.L.J. 44 (Pat.), 54 I.C. 252; *Darbari*, 22 Cr.L.J. 311, 60 I.C. 999, *Muthu Karakku*, 1922 M.W.N. 182, 23 Cr.L.J. 206; *Raghya*, 81 I.C. 959, 26 Bom L.R. 323, 25 Cr.L.J. 1135; *Hulas*, 44 C.L.J. 216, 28 Cr.L.J. 2; *Mahabir*, 49 All. 120, 27 Cr.L.J. 1118; *Chand Nur*, 11 B.H.C.R. 240; *Ratna*, 1932 M.W.N. 1216 and *Ponnuswami Servai, v. Emp.*, 39 Cr.L.J. 465, 174 I.C. 776, A.I.R. 1938 Mad. 315, 1938 M.W.N. 223, 10 R.N. 742, it has been held that it is improper for a Court to find a man guilty of the abetment of an offence, on a charge of the substantive offence only; because when a man is accused of a substantive offence, he may not be conscious that he will have to meet an imputation of collateral circumstances constituting an abetment of it, which may be quite distinct from the circumstances constituting the substantive offence itself. A charge for the substantive offence as such gives no intimation of a trial to be held for the abetment. But in *Joseph*, 3 Rang 11, 26 Cr.L.J. 492 (498); *Punamchand*, 30 Cr.L.J. 224, 113 I.C. 881, A.I.R. 1930 Nag 145, Ind Rul 1929 Nag 33; *Yeditha*, 23 M.L.J. 772, 13 Cr.L.J. 453; *Samuel John*, A.I.R. 1935 All. 935, 1935 A.L.J. 1079, 36 Cr.L.J. 247, 160 I.C. 163; *Suraj Bhan*, 36 Cr.L.J. 1438, 158 I.C. 618, A.I.R. 1935 Pesh. 67, 1935 Cr.C. 449; *Keher Singh*, 11 P.W.R. 1921, 59 I.C. 913, 22 Cr.L.J. 161, *Bhikari*, supra, and *S. P. Ghosh*, 16 Cr.L.J. 676, 30 I.C. 724 (F.B.), it has been said that if on the facts proved two charges can be framed under the provisions of sec. 236, viz., the commission of the principal offence and the abetment thereof, the accused can be convicted of the offence of abetment, though it was not separately charged against him. The Calcutta High Court observes that it cannot be laid down as a universal rule that a person charged with a substantive offence only cannot be convicted of abetment thereof; the answer depends on the facts of each case, and it must be seen in each case whether or not prejudice has been caused to the accused by such conviction—*Kadira*, 112 I.C. 677, A.I.R. 1928 Cal. 468, 29 Cr.L.J. 1093 (1095); *Debi Prosad*, 59 Cal 1192, 33 Cr.L.J. 720, 139 I.C. 242, 1932 Cr.C. 335, A.I.R. 1932 Cal 455, Ind Rul 1932 Cal 584, 36 C.W.N. 595 (597); *Inanada Charan*, 34 C.W.N. 198, 57 Cal 807, 1929 Cr.C. 595 (596), A.I.R. 1929 Cal 807; *Indar Chand*, 42 Cal 1094 (1133). The same view has been taken in *Khuman*, Ind Rul 1931 Oudh 289, 132 I.C. 529, 1931 Cr.C. 634, A.I.R. 1931 Oudh 274, 8 O.W.N. 755, 32 Cr.L.J. 905 (907, 908) and *Mutha*, A.I.R. 1934 Sind 89 (91), 28 S.L.R. 12, A.L.R. 1934 Sind 88, 151 I.C. 976, 1934 Cr.C. 748.

There would no doubt be cases where abetment is only a minor offence as compared with the substantive offence. But where the facts which would constitute the offence of abetment are quite different from the facts which would constitute the offence of manufacturing counterfeit coin, the Magistrate is not justified in convicting the accused of being an abettor, although he has been charged with being the principal in the manufacture of counterfeit coin—*Dhanpat Rai v. Emp.*, A.I.R. 1940 Lah 112, 42 P.L.R. 12, 41 Cr.L.J. 540, 188 I.C. 64.

An accused may be convicted of a substantive offence though he was charged only with abetment of that offence; see *Lal Chand*, 1912 P.W.R. 17, 13 Cr.L.J. 252, 14 I.C. 604, 44 P.L.R. 1912. See also *Suraj Bhan*, supra. The conversion by the Appellate Court of a conviction from one under secs. 430 and 114 to one under sec. 430 read with sec. 34, I.P.C., is not illegal—*Sambasiva*, 32 Cr.L.J. 753 (755), 131 I.C. 458, 1930 M.W.N. 1041, 1931 Cr.C. 321, A.I.R. 1931 Mad 225, Ind Rul 1931 Mad 522, 35 M.L.W. 98; *Suraj Bhan*, supra.

772. Sub-section (3):—*When minor offence requires complaint*—See sub-section (3). A person charged with one offence cannot be convicted of a minor offence, if the latter offence requires a complaint by a particular person mentioned in secs. 198 and 199. Thus, a prosecution for the offence of adultery requires a complaint by the husband (see sec. 199), and, therefore, a person charged with rape or abduction cannot be convicted of adultery, in the absence of a complaint by the husband—*Kallu*, 5 All. 233 (235); *Cheman*, 29 Cal. 415 (416); *Bongaru Asari*, 27 Mad. 61 (62); *Isap Mahomed*, 31 Bom 218 (220); *Iman Khan*, 14 Bom L.R. 141, 13 Cr.L.J. 287 (288). But see Note 654 under sec. 199.

773. Powers of Appellate Court and High Court:—The powers under this section may be exercised by Appellate Courts; an Appellate Court can alter a conviction for a major offence into a conviction for a minor offence—*Hanuman*, 20 A.L.J. 213, 23 CrLJ 198, A.I.R. 1922 All. 143.

Where the jury acquitted the prisoners of certain offences and found some other facts upon which the jury could have convicted them of some other offence, but did not convict, the High Court has power to convict the prisoners of the latter offence—*Harai Mirdha*, 3 Cal. 189.

What persons may be charged jointly.

239. *The following persons may be charged and tried together, namely:—*

(a) persons accused of the same offence committed in the course of the same transaction;

(b) persons accused of an offence and persons accused of abetment, or of an attempt to commit such offence;

(c) *persons accused of more than one offence of the same kind within the meaning of section 234 committed by them jointly within the period of twelve months;*

(d) persons accused of different offences committed in the course of the same transaction;

(e) *persons accused of an offence which includes theft, extortion, or criminal misappropriation, and persons accused of receiving or retaining, or assisting in the disposal or concealment of, property possession of which is alleged to have been transferred by any such offence committed by the first named persons, or of abetment of or attempting to commit any such last named offence;*

(f) *persons accused of offences under section 411 and 414 of the Indian Penal Code or either of those sections in respect of stolen property the possession of which has been transferred by one offence; and*

(g) *persons accused of any offence under Chapter XII of the Indian Penal Code relating to counterfeit coin, and persons accused of any other offence under the said Chapter relating to the same coin, or of abetment of or attempting to commit any such offence;*

and the provisions contained in the former part of this Chapter shall, so far as may be, apply to all such charges.

Change:—This section has been redrafted by sec. 65 of the Cr. P. Amendment Act, XVIII of 1923. But the actual change brought about by this amendment is the addition of clauses (c), (e), (f) and (g). The illustrations have been repealed by the amendment.

774. Scope and Application:—See *Karamalli Gulamalli* in Note 753A, and *Babulal Choukhani v. King-Emph.* in Note 778. This section lays down certain general principles for the combination of charges in a joint trial of several persons. The object of these principles is to avoid the likelihood of bewildering the accused in their defence by having to meet many disconnected charges and of endangering the prospect

of a fair trial by the production of a mass of evidence directed to many matters tending by its mere accumulation to induce an undue suspicion against the accused persons—*Sanuman*, 19 A.L.J. 392, 22 Cr.L.J. 641. The general principle is that it is always necessary to justify a joint trial and to point out provisions under which it can be held. Separate trial is the rule and the joint trial is the exception and such a joint trial can only be justified if the provisions of sec 239, Cr. P. C., can be applied—*Bhaggan*, 35 Cr.L.J. 602, 154 I.C. 901, 1935 O.W.N. 408, A.I.R. 1935 Oudh 327, 1935 Cr.C. 684, 1935 O.L.R. 210. It is always for the prosecution to justify a joint trial. A separate trial is the rule and a joint trial is the exception—*Durga Prosad*, 20 A.L.J. 981, 24 Cr.L.J. 149, 71 I.C. 501, A.I.R. 1923 All. 126, 45 All 223 (224); *Gancshi Lal*, 24 Cr.L.J. 155, 71 I.C. 507, 20 A.L.J. 967, A.I.R. 1923 All 88.

The clauses of sec. 239, Cr. P. C., are mutually exclusive in the sense that they cannot be added one to another so as to bring some of the persons charged under one clause and some under another and so to put them upon their trial all together at one and the same time, but they are not mutually exclusive in the sense that persons accused of an offence and persons accused of abetment or of an attempt can only be tried at one trial because their case comes under cl (b). Their case might for instance, come under cl (d). Clause (e) refers also to attempts or abetments of offences within the meaning of sec. 234 and sec. 239 (c). It is now amended to include attempt; but if more than one person are to be tried and charged together, their case must be brought within one of the clauses of sec 239, Cr. P. C., before they can be tried together, or the trial is contrary to law—*Chukarmal Nirmaldas v. Emp.*, 39 Cr.L.J. 881 (884), 177 I.C. 280, 11 RS 53, A.I.R. 1938 Sind 164.

Whenever the applicability of sec. 239 is doubtful, it is far better it should not be applied and that accused should be tried separately—*Samullah*, 27 Cr.L.J. 1381 (1383), 98 I.C. 597, 51 M.L.J. 692, 24 M.L.W. 948, A.I.R. 1927 Mad 177, 38 M.L.T. 37; *Nga Htwe*, A.I.R. 1935 Rang 474, 38 Cr.L.J. 183, 166 I.C. 419, 1936 Cr.C. 964, 9 R.Rang 253. But it is wrong to acquit an accused against whom a *prima facie* case has been made out by the prosecution evidence, merely because of this technical difficulty—*Nga Po Htwe*, supra. Joint trials, except where they are clearly authorized by the law, do not save time in the long run and further the ends of justice. Where the legality of a joinder of charges is doubtful, the correct course is to hold trial clearly authorized by the law—*Abdur Rahim*, 32 Cr.L.J. 611, 130 I.C. 796, A.I.R. 1931 Pat. 102, 12 P.L.T. 12, Ind Rul 1931 Pat 204, 1931 Cr.C. 230.

This is the last exception to sec 233 which lays down the general principle that every offence must be charged and tried separately. This is the only section which authorises a joint trial of several persons under the circumstances specified in this section. Except in all cases falling under this section, a joint trial of several accused renders the trial invalid—*Balwant Singh*, 4 N.L.R. 71, 8 Cr.L.J. 11, the trial thus taking place is not a mere irregularity which can be cured by the provisions of sec 537—*Lachchu*, 1 O.L.J. 141, 15 Cr.L.J. 420, or by any waiver or consent of parties or their pleaders—*Hussein Baksh*, 6 Cal. 96. But where the irregularity, if any, in the joint trial of several persons at one and the same trial is not one which in the actual facts of the case caused any prejudice to the accused or by itself entailed any failure of justice, it is no ground for quashing the proceedings, the more so, when no protest or complaint is made by or on behalf of the accused against the course adopted by the Magistrate—*Sanyasi Gain v. Emp.*, 38 Cr.L.J. 1018 (1019), 171 I.C. 183, 10 R.C. 235, A.I.R. 1937 Cal 269, *Rash Behari Shaw v. Emp.*, A.I.R. 1936 Cal 753, 168 I.C. 657, 1936 Cr.C. 1043, 41 C.W.N. 225, 38 Cr.L.J. 545, 9 R.C. 853. Where a person accused of murder is tried jointly with others also for conspiracy to commit atrocities, there is every probability that the jury would be influenced in each case against him by the evidence not strictly relevant to the murder charge introduced by the trial under secs 120B, 395, I. P. Code. The joint trial would prejudice him but not others who are tried for conspiracy only—*ibid*.

This section confers a discretion upon a Magistrate to try persons accused of an

offence before him either jointly or separately. That is clear from the expression "may" which appears in this section. But at the same time it cannot possibly be disputed that the discretion vested in the trying Magistrate is to be exercised by him judicially, and according to certain well established principles. The process of splitting up a case in order to enable the prosecution to examine an accused as a witness against a co-accused person is not a proper exercise of discretion—*Dholimal Karoomal*, 37 Cr.L.J. 716, 162 I.C. 863, A.I.R. 1936 Sind 47, 1936 Cr.C. 319. But see *Karamalli Gulamalli* below under the heading "Case:—Splitting up of." See also Note 1304.

Where each of two persons accused is throwing blame on the other, sec. 239 is not inapplicable to such cases—*Mahbub Ali*, 12 Cr.L.J. 266, 10 I.C. 331, 168 P.L.R. 1911, 37 P.W.R. 1911 (Cr.). But it is no part of the duty of the prosecution to call defence witnesses and if the case is put in such a way that some of the prosecution witnesses are also defence witnesses, then the accused should be tried separately—*Nga Mya Sein v. The King*, A.I.R. 1937 Rang 512, 172 I.C. 868, 39 Cr.L.J. 198, 10 R.R. 284; *Nga Sar Kee v. The King*, A.I.R. 1939 Rang 390, 41 Cr.L.J. 153, 185 I.C. 303. See also *Dalsuk Roy Agarwalla v. Emp.*, 25 Cr.L.J. 807, 81 I.C. 343, A.I.R. 1925 Cal. 248 and *Keshowdas*, 35 Cr.L.J. 205, 146 I.C. 936, A.I.R. 1933 Sind 390, 1933 Cr.C. 1430.

This section applies to trials and not to inquiries. Therefore, in a joint commitment of several accused it is not necessary that the conditions of this section should be fulfilled—*Nelluri Chencia*, 42 Mad. 561, 36 M.L.J. 295, 20 Cr.L.J. 379. The sections of the Cr. P. C., relating to joinder of charges, viz., 233 to 239, refer to trial of the accused. The ruling of the Privy Council in *Subrahmanya Ayyar's* case (25 Mad. 61) cannot be extended to preliminary inquiries held by Magistrate committing a case to the Sessions Court, so as to render the commitment illegal owing to misjoinder of offences or of offenders in the preliminary inquiry—*Govindu*, 26 Mad. 592.

Legality of joint trial depends on the accusation and not on the result of the trial—*Ram Ras*, 35 Cr.L.J. 1349 (1354), 151 I.C. 442, 1934 Cr.C. 130, 1934 A.L.J. 852, A.I.R. 1935 All. 61; *Datto Hanmant*, 2 Cr.L.J. 578, 7 Bom.L.R. 633, 30 Bom. 49 (54); *Baburao Tatyarao*, A.I.R. 1936 Bom. 379, 38 Bom.L.R. 946; *Gopala Raghunath*, A.I.R. 1929 Bom. 128, 53 Bom. 344, 31 Bom.L.R. 148, 30 Cr.L.J. 588, 116 I.C. 243; *Abdul Salim*, 49 Cal. 537; *Abdul Rahaman*, 3 Rang 95 (105); *Mohammad Yakub*, 33 Cr.L.J. 373; *Kali Kumar v. Nawab Ali*, 30 Cr.L.J. 619, 116 I.C. 369, A.I.R. 1929 Cal. 160; *Ramaraju*, 32 Cr.L.J. 30 (31), 127 I.C. 654, 1930 M.W.N. 377, A.I.R. 1930 Mad. 857, Ind. Rul. 1930 Mad. 1038, 53 Mad. 939, 32 M.L.W. 894, 59 M.L.J. 954, 1930 Cr.C. 1033; *Balumul Hotchand*, 39 Cr.L.J. 890 (892), 177 I.C. 346, A.I.R. 1938 Sind 171; *Rash Behari Shaw*, A.I.R. 1936 Cal. 753 (761), 41 C.W.N. 225, 38 Cr.L.J. 545, 168 I.C. 657, 9 R.C. 853, 1936 Cr.C. 1013; *Sanyasi Gain*, 38 Cr.L.J. 1018, 171 I.C. 183, 10 R.C. 235, A.I.R. 1937 Cal. 269; *Abdullah*, 27 Cr.L.J. 193 (195), A.I.R. 1924 All. 233, 92 I.C. 145; *Satya Narain Mahata v. Emp.*, 29 Cr.L.J. 1022 (1024), 55 Cal. 858, 112 I.C. 350, A.I.R. 1928 Cal. 675, 32 C.W.N. 319; *Nathu Chaudhury v. Emp.*, 41 Cr.L.J. 452 (453), A.I.R. 1940 Pat. 499, 6 B.R. 461, 187 I.C. 361, 1940 P.W.N. 454; *Bhagolal v. Emp.*, A.I.R. 1940 Nag. 249 (250), 1940 N.L.J. 309, 189 I.C. 382, 41 Cr.L.J. 734; provided, of course, the accusation is real and not a mere excuse for a joinder of charges that would not be otherwise permissible—*Satyanarayana*, 1933 M.W.N. 528; *Gan Mallu Dora alias Mallaya*, 26 Cr.L.J. 1513, 49 Mad. 74, 90 I.C. 297, A.I.R. 1925 Mad. 690, 48 M.L.J. 308, 1925 M.W.N. 192; *Sanyasi Gain*, supra. The provisions of this section are intended to deal with the position as it exists at the time of charge, and not with the result of the trial—*Supdt. & Rem. of Legal Affairs, Bengal v. Raghulal*, 39 C.W.N. 741 (743), 62 Cal. 946, 37 Cr.L.J. 728, 8 R.C. 675, 162 I.C. 913; *Abdullah*, 27 Cr.L.J. 93.

Section 239, Cr. P. C., admits of the joint trial when more persons than one are accused of different offences committed in the same transaction. It suffices for the purpose of justifying a joint trial that the accusation alleges the offences committed by each accused to have been committed in the same transaction—*Datto Hanmant*, supra. So long as the accusation against all the accused persons is that they carried

out a single scheme by successive acts, the necessary ingredients of a charge regarding the one transaction would be fulfilled, and the fact that the conspiracy was not established, would not vitiate the trial as regards those acts for which the evidence was sufficient for proof—*Gopala Raghunath*, supra. In this connection Lord Wright, J. observes: "To put it more exactly, is it enough if the conspiracy is to be found in the accusation or must it be found in the eventual result of the trial? Is the relevant point of time that of the accusation, or that of the eventual result? For the former view there is an unbroken series of authorities in the Indian Courts, but the matter has not until now come before the Judicial Committee and must now be decided by them. It is a question of principle, or, perhaps more correctly, construction. Their Lordships are of opinion that the view adopted in India is correct, as the High Court have held in the present case. The clause [i.e., sec. 239 (d), Cr. P. Code] deals with three matters, accusation, charge, trial. It says nothing about verdict. The condition is expressed in the words "persons accused of different offences etc." It does not say "rightly accused" or "accused and convicted." It is on the basis of what appears on the face of the accusation that the Court may proceed to charge and try—*Babulal Choukhani v King-Emp.*, AIR 1938 P.C. 130 (133), 65 IA 158, 32 S.L.R. 476, 1938 O.L.R. 189, 1938 O.A. 398, 1938 M.W.N. 505, 19 P.L.T. 343, 1938 A.L.R. 309, 10 R.P.C. 250, 4 B.R. 490, 39 Cr.L.J. 452, 67 C.L.J. 161, 40 Bom.L.R. 787, 42 C.W.N. 621, 1938 A.Cr.C. 27, 1938 O.W.N. 416, 1938 A.L.J. 382, 174 I.C. 1, 1938 A.W.R. (P.C.) 116, I.L.R. (1938) 2 Cal 295, 1938 P.W.N. 320, (1938) 1 M.L.J. 647 (P.C.). The relevant point of time in the proceedings at which the condition as to sameness of transaction must be fulfilled is the time of accusation and not that of the eventual result—*Parmanand v. Emp.*, AIR. 1940 Nag 340 (343), 1940 N.L.J. 459. See also *Provincial Govt., C. P. & Berar v. Dinanath*, AIR. 1939 Nag 263, 1939 N.L.J. 373, 41 Cr.L.J. 27, 184 I.C. 412, I.L.R. 1939 Nag 644.

A Court of Appeal or Revision in dealing with a question of misjoinder must look to the position as it appeared when charges were framed. But it does not follow that a Magistrate must wait till the stage of framing charges before he makes up his mind whether to split a case up. Such a course is most inconvenient, and it should ordinarily be possible for a Magistrate to decide the question of joinder after the case has been opened by the Public Prosecutor—*Akhil Bandhu Ray v. Emp.*, 39 Cr.L.J. 596 (599), 175 I.C. 409, AIR 1938 Cal 258, I.L.R. (1938) 1 Cal 588. See also *Sanyani Gain*, supra.

Where the accused persons are being tried together under sec. 239, it is possible to have an alternative charge against one of those accused persons. There is no necessity to read secs. 239 and 236 in such a way as to produce a different result—*Tota Meah*, 56 Cal 1106, AIR. 1926 Cal 298, 30 Cr.L.J. 1015, 119 I.C. 139.

This section cannot give jurisdiction to a Magistrate who has not jurisdiction under the provisions of any of the sections in Chap. XV of the Cr. P. C.; in other words, the point may be put in this way—If a conspiracy is entered into in District A and acts are committed in pursuance of the conspiracy in District B, the Magistrate of District A can try the conspiracy but cannot try the accused in the same trial for acts committed outside his district—*Bissesswar*, 28 C.W.N. 975, 26 Cr.L.J. 207, 83 I.C. 911. See Note 560.

This section is applicable to inquiries under Chapter VIII. The main principles applicable to a criminal trial regarding joinder of charges and the joint trial of accused persons are also applicable to proceedings under Chapter VIII—*Pran Krishna*, 8 C.W.N. 180 (181); *Bachu Molla v. Sia Ram*, 14 Cal 358; *Hubdar*, 10 O.W.N. 325, 1933 Cr.C. 557, 34 Cr.L.J. 852, 144 I.C. 944, AIR 1933 Oudh 251; *Abdul Kadir*, 9 All. 452. And a joint inquiry of several persons under Ch. VIII may, according to the circumstances of the case, be a mere irregularity curable by sec. 537—*Bachu Molla*, supra; *Abdul Kadir*, supra; or a grave illegality rendering the proceeding invalid—*Pran Krishna*, supra; *Gaiba*, Ratanlal 585 (586). See Note 290.

Again, this section does not apply to trials of cross-cases. The trial of the accused

in the two cross-cases ought to be separate. But a simultaneous trial is not altogether invalid but somewhat irregular—*Sahadeb*, 8 C.W.N. 344; *Chokowri v. Mali*, 13 C.L.R. 275. See Note 749.

If persons can properly be charged and tried together under sec. 239, Cr. P. C., there is nothing to prevent other charges being added against one or more of such persons if the addition of such charges is permissible by the Code—*Maruthi*, 37 Cr.L.J. 794 (800), 163 I.C. 253, A.I.R. 1936 All. 337, 1936 A.L.J. 518, 1936 Cr.C. 401, following *Niranjana*, 1934 A.L.J. 658, 150 I.C. 1140, A.I.R. 1934 All. 811, 1934 Cr.C. 996, 35 Cr.L.J. 1224, *Tota Meah*, 56 Cal. 1106, 119 I.C. 139, A.I.R. 1929 Cal. 298, 30 Cr.L.J. 1015, Ind. Rul. 1929 Cal. 747 and dissenting from *Ram Sahai*, 19 A.L.J. 610, 61 I.C. 525, 22 Cr.L.J. 397 and *Ram Prosad*, 19 A.L.J. 796, 63 I.C. 449, A.I.R. 1921 All. 246, 22 Cr.L.J. 657.

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(b) Consolidation of.—Where, in a case under sec. 401, I. P. C., a number of independent charge-sheets are originally filed against the accused and two Sessions case. However, in considering whether the revision petition should be allowed on that trials and to frame only one charge, but convenient and proper; for, if all the accused are members of one gang, they ought to be tried together in one trial—*Arumugam v. Emp.*, 40 Cr.L.J. 355 (357), A.I.R. 1938 Mad. 858 (861), 1938 M.W.N. 595, 48 M.L.W. 639.

Where there are three cases, those three cases should be kept distinct, evidence let in each case separately, and conclusions drawn on the evidence let in each particular case. However, in considering whether the revision petition should be allowed on the ground, one has to consider whether the petitioners suffered any prejudice by the three cases being clubbed together. In most cases of improper clubbing together of cases, it would undoubtedly be held that the accused had suffered prejudice by being called upon to meet three cases at the same time, but where it was only necessary to produce a few documents and to examine one witness, it could not be said that the petitioners were prejudiced in their defence by such irregular procedure—*Mustafa Sahib*, 39 Cr.L.J. 935, 177 I.C. 737, 1938 M.W.N. 855, (1938) 2 M.L.J. 382, 48 M.L.W. 350, A.I.R. 1938 Mad. 910, 1938 M.Cr.C. 155.

775. Clause (a)—“Persons accused of the same offence”:—The words “same offence” imply that both the accused should have acted in concert or association; and, therefore, where the allegation was that either one or the other committed the crime, this section does not apply and the two accused must be tried separately—*Azinuddin*, 6 Bur.L.T. 191, 7 L.B.R. 68, 14 Cr.L.J. 563. Where it is merely shown that part of the stolen property was found in the possession of one person, and another part was found in the possession of another, it would probably be illegal to try the two men

together; but if the two men were acting *in concert* in retaining and concealing the stolen property and were in *joint control* of the stolen property, their joint trial would not be illegal—*Jadunandan*, 1 P.L.J. 64, 17 Cr.L.J. 234; *Musai Khamat*, 1 P.L.T. 431, 58 I.C. 341 (343), 21 Cr.L.J. 757. Two persons found in possession of stolen properties cannot be tried together on a charge under sec. 411, I. P. C., where there was no suggestion that either or both of them were the original thieves, and the only connecting link between them was that each of them retained some property stolen from the same complainant—*Moosan*, 20 A.L.J. 563, AIR 1922-All. 459. Unless the receiving of stolen property is joint, persons cannot be tried jointly under this section for receiving stolen property, merely because the goods were stolen in one theft, inasmuch as the acts of receiving in such a case by different persons on different occasions at different places are not only different offences but different transactions in themselves—*Balgovind*, 17 Cr.L.J. 477 (All.); *Abdul Majid*, 33 Cal 1256 (1257), 10 C.W.N. 912; *Jiwan*, 19 A.L.J. 815, AIR. 1921 All. 206, 23 Cr.L.J. 409. But see 6 Pat. 583, cited in Note 781 under clause (f) below.

Where two persons were charged with criminal misappropriation with respect to a certain sum of money, *held* that there was a misjoinder of charges because it is impossible to hold that two persons can be guilty of misappropriation of the same parcel of money. The charges against them must be of misappropriation by one accused and abetment by the other. It is also open to the Court to frame the charges against each of them in the alternative, *i.e.*, of misappropriation or of abetment—*Girwar*, 16 C.W.N. 600 (602), 13 Cr.L.J. 506 (507), 15 IC 650; *Meersah*, 8 Rang. 632, 32 Cr.L.J. 930 (932), 1931 Cr.C. 378, AIR 1931 Rang 90, 132 IC 548, Ind. Rul. 1931 Rang 180.

There is nothing in the section specifically stating that as regards one or more of the persons accused, there should be no application to that person or persons of the previous section such as sec. 234. Therefore, where a charge under sec. 411, I. P. C.; was framed against several accused and two other distinct charges under sec. 411; I. P. C., was framed against only one of them, *held* that sec. 239 did not exclude the procedure adopted by the Magistrate and that there was no illegality in the trial—*Nirajan*, 35 Cr.L.J. 1224, 150 IC 1140, 1934 A.L.J. 658, AIR. 1934 All. 811, 1934 Cr.C. 996.

Same transaction—See Note 756 under sec. 235. The word “transaction” must not be interpreted in any special or artificial or conventional or technical way, but as it is ordinarily used by men of education and common sense. If you cannot speak of a series of events as a transaction in the ordinary sense in which that word is used, you cannot try a number of persons together in respect of those events by attributing a special and unusual meaning to the word—*Gan Mallu*, 49 Mad 74, 26 Cr.L.J. 1513 (1521). The usual tests applied to decide whether different acts are parts of the same transaction are proximity of time, unity of place, unity of purpose or design and continuity of action. It is not necessary that all of them should be present to make the several incidents parts of the same transaction. Unity of place and proximity of time are not important tests at all; but the main test is unity of purpose. If the various acts are done in pursuance of a particular end in view and as accessory thereto, they may be treated as parts of the same transaction—*Gan Mallu*, *supra*; *C. Venkataradi*, 33 Mad 502, 11 Cr.L.J. 258. The expression “same transaction” must be understood as including both the immediate cause and effects of an act or event, and also its collocation, or relevant circumstances, the other necessary antecedents of its occurrence, connected with it, at a reasonable distance of time, space, cause and effect—*Ring*, 53 Bom. 479, 1929 Cr.C. 114 (121). For a joint trial under sec. 239, identity of purpose is sufficient. Community of purpose in the sense of conspiracy is not in any way necessary, though if it is present, its presence will be a further element supporting a finding that the offences are committed in the same transaction—*Rafuzzaman v. Chhotey Lal*, *supra*. Where the prosecution case alleges association and community of purpose among the accused, their joint trial is permissible. For sec. 239, Cr. P. C., it is enough if the different offences are committed in the course of the same transaction. The criterion

in the two cross-cases ought to be separate. But a simultaneous trial is not altogether invalid but somewhat irregular—*Sahadeb*, 8 C.W.N. 344; *Chokowri v. Mati*, 13 C.L.R. 275. See Note 749.

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which makes a joint trial allowable is what the prosecution case is, not what the result may be—*Bhagoletal v. Emp.*, A.I.R. 1940 Nag 249 (250), 41 Cr.L.J. 734, 189 I.C. 382, 1940 N.L.J. 309. Six persons were accused of waging war against the King under sec. 121, I. P. Code. The sixth accused joined the party after the 1st and 2nd accused had been arrested. But the party to which the accused belonged continued under the leadership of the same man and *actuated by the same purpose*. Held that the joint trial of the 6th accused with the 1st and 2nd accused was legal—*Gan Mallu*, 49 Mad. 74, 48 M.L.J. 308, 26 Cr.L.J. 1513 (1516, 1522).

Where three acts of misappropriation were committed by three persons, each of which acts was complete in itself and was not dependent on the other, and one person was engaged upon the frauds for a small part of the periods during which the other two persons committed the acts, so that there was no sufficient continuity of action, they could not be tried together—*Meecriah*, 8 Rang 632, 32 Cr.L.J. 930 (934). The joint trial of four prostitutes for breach of the notice issued under sec. 153 of the Punjab Municipal Act is illegal; the four prostitutes lived in four different houses, although the houses were adjoining, and their failure to obey the notice could not be regarded as offences committed in one transaction—*Aisha*, 7 Lah 168, 27 P.L.R. 188, 27 Cr.L.J. 465.

Persons guilty of the offence of giving false evidence in a case can be tried jointly, if there is an identity of purpose between them, or one sustained and continuous plot. Thus, where certain persons were witnesses on the same side in a criminal case and all gave evidence on the same point and to the same effect, to prove the same fact, held that the depositions of all the witnesses were given in the same transaction, so as to make a joint trial of such persons for perjury legal. There was the most obvious identity of purpose, and that is sufficient to constitute the same transaction—*Rafuzzaman v. Chhotey Lal*, 48 All. 325, 24 A.L.J. 472, 27 Cr.L.J. 445 (447), 93 I.C. 237, A.I.R. 1926 All. 324; *Ganesh*, 14 Bom.L.R. 972, 13 Cr.L.J. 833; *Sejmal*, 51 Bom 310, 29 Bom.L.R. 170, 28 Cr.L.J. 373 (377), 100 I.C. 981, A.I.R. 1927 Bom. 177. Where the offence of verifying a false statement was one done jointly by the brothers in pursuance of a common object, it is impossible to hold that these offences were not committed in the course of the same transaction—*Nathusingh*, A.I.R. 1936 Nag. 263, 1936 Cr.C. 1025. But in the absence of any identity of purpose or pre-arrangement, several persons charged with having given false evidence in the same proceeding, should be separately tried—*Anant Ram*, 4 All. 293; *Nathu*, 10 Cal 405; *Kotha Subba Chetti*, 6 Mad. 252; *Krishnarao*, 4 Bom.L.R. 53 (54); the false evidence given by one witness is a *transaction complete in itself* and not connected with false evidence given by another witness, even though in the same case and on the same point—*Alu*, 5 S.L.R. 129, 13 Cr.L.J. 23; *Gunwant*, 13 N.L.R. 35, 18 Cr.L.J. 339 (342), 38 I.C. 723, A.I.R. 1916 Nag 73. See Notes 723 and 745.

The printer and the publisher of a pamphlet alleged to be seditious can be tried jointly for an offence under sec. 124A, I. P. Code, because the printer and the publisher are concerned in the same transaction in regard to the publication of the pamphlet. Even the author, the printer and the publisher may all be tried together, or at any rate the author and the publisher—*Shantaram*, 30 Bom.L.R. 320, 29 Cr.L.J. 683 (684).

776. Clause (b)—Abetment:—Where some of the accused are principal offenders, and the others accomplices, clause (b) of this section permits these all to be tried together in one trial—*Sugaimuthu*, 50 Mad. 274, 27 Cr.L.J. 394. Thus, where a person who had a license for the sale of opium allowed another, who had no such license, to sell it, they could be jointly tried, the offence of the former being an abetment of the offence of the latter—*Chhail Behari*, 1906 P.L.R. 113, 4 Cr.L.J. 178. A licensed vendor is punishable under sec. 50 of the Bengal Excise Act for the acts of the servant; in such a case, the matter is said to be an abettor of the servant by implication, and both may be tried together—*Priya Nath*, 15 C.L.J. 692, 13 Cr.L.J. 255.

If A induces B to cheat, and B attempts to cheat in consequence, A and B may clearly be tried together for abetment and attempt at cheating—*Kali Das*, 38 Cal. 453, 15 C.W.N. 463, 12 Cr.L.J. 106 (107).

Jurisdiction, being the foundation of the charge, is to be imported or understood as present in all the subsequent procedure set out in the Code; and if that is so, it clearly must govern sec. 239. Therefore, in an offence of criminal breach of trust a Magistrate has no jurisdiction to try the abetment and receiving which clearly took place outside his territorial jurisdiction—*Sachidanandam v. Sowmya*, AIR 1929 Mad 839, 52 Mad 991, 57 M.L.J. 518, 30 M.L.W. 501, 1929 M.W.N. 578, 120 I.C. 75, 30 Cr.L.J. 1161, 1929 Cr.C. 487.

777. Clause (c)—Offences of the same kind:—Section 234 applies only to the case of *one* accused committing several offences of the same kind within a year. But where *several* persons committed several offences of the same kind, there was no provision under the old law for the joint trial of those persons, and consequently separate trial was necessary—*Budhai v. Tarap*, 10 C.W.N. 32, 33 Cal 292, 3 Cr.L.J. 126. Thus, it was held that where three dacoities were committed by several dacoits on three different dates and at separate places, the dacoits must be separately charged and tried *for each dacoity as the offences were not committed in the same transaction*—*Ram Prosad*, 19 A.L.J. 796, 22 Cr.L.J. 657. Where several persons looted the linseed crop of the complainant on one day and his tobacco crop on another day, the offences had to be tried separately as they were not parts of the same transaction—*Budhai*, 33 Cal 292, 10 C.W.N. 32, 3 Cr.L.J. 126. These cases are now overruled by this clause. Under the present law, the offences can be tried together, provided that each offence is committed by the accused persons *jointly*; and it is not necessary that all the sets of offences must be committed in the *same transaction*.

Section 239 (c), Cr. P. C., relates back to sec. 234, Cr. P. C., but there is no reason also to suppose that the term "offence" under sec. 239 does not include minor or alternative offences within the meaning of sec. 235 (2) or sec. 236, Cr. P. C., as "offence" under sec. 234 was held to include a minor or alternative offence within the meaning of sec. 235 (2) or 236 by the Bombay High Court in *In re Bal Gangadhar Tilak*, 33 Bom 221, 2 I.C. 277, 10 Bom L.R. 973, 9 Cr.L.J. 226. But whether sec. 234 or sec. 239, Cr. P. C., is to be applied the distinction to be borne in mind to prevent errors is the distinction between offences and transactions, subject to the overriding principle that an accused must not be prejudiced in his trial by a multiplicity of charges. Under cl. (c) of sec. 239, Cr. P. C., three offences of the same kind may be tried at once, but not three transactions of the same kind—*Chuharmal Nirmaldas v. Emp.*, 39 Cr.L.J. 881 (882), 177 I.C. 280, 11 R.S. 53, AIR 1938 Sind 164, following *Gerimal Hemamal v. Emp.*, 10 S.L.R. 192, 40 I.C. 312, AIR. 1917 Sind 40, 18 Cr.L.J. 664.

Where a woman was abducted by K and B, and then rape was committed on the woman at a place D by the two accused persons, and subsequently the woman was taken either by force or by fraud by one of the accused alone to different places, and where he alone committed rape on her, *held* that a joint charge of abduction against both the accused K and B under sec. 366, I. P. C., was justified, that a joint charge under sec. 376, I. P. C., against both of them in respect of the rape which took place at D was also justified, but a joint charge against both the accused of having committed rape at different places was improper and embarrassing—*Keramat*, 42 C.L.J. 524, 27 Cr.L.J. 263, AIR 1926 Cal. 320, 92 I.C. 439. Where four persons broke into the house of the complainant, carried her off and raped her and she was subsequently taken to the house of K and raped there by him and was finally taken to a hut in a field where she was raped by K and others and eventually she was made over to A who took her to his house and there raped her, *held* that the joint trial of all these six persons was illegal as the subsequent acts committed by K and A were not committed in the course of the same transaction and that, even supposing the joint trial was legal, it was in no sense compulsory and the Judge would have been well advised to accept their objection inasmuch as K and A were liable to be prejudiced by the admission of evidence which was quite irrelevant so far as the charges against them were concerned—*Bhola Sardar*, AIR. 1937 Cal 22, 169 I.C. 256, 38 Cr.L.J. 750, 9 R.C. 913.

The prosecution case was that some time in September the complainant travelled

by train from S to B to stay with her sister. In the compartment she met four accused who proposed to take her to her destination. She left the train with them at T and was taken to a house where she met another accused. There all the accused ravished her. Later on they took her to H, where they kept her confined for six weeks while two of them ravished her at intervals. From H she was taken back to T and finally handed over to an accused who kept her confined for about two months. Some accused also habitually had intercourse with her against the order of nature. One day she escaped and met a woman who took her to the Aryya Samaj. She was treated there until she appeared in Court. The time covered is from September 1936 and June 1937. The accused were jointly tried on a series of charges under secs. 342, 376 and 377, I. P. C. Held that neither of these offences was a continuing offence, that it was doubtful if an offence under sec. 376, I. P. C., committed by five persons before the end of September 1936 could rightly be held to be part of the same transaction as an offence under sec. 377, I. P. C., committed by three of them between the end of December 1936 and the end of June 1937 and that the multiplicity of the charges tried together must have operated to the prejudice of the accused—*Ali Hyder v. Emp.*, A.I.R. 1938 Cal. 769, 68 C.L.J. 238, 179 I.C. 960, 40 Cr.L.J. 280, 11 R.C. 637.

A married girl whom the jury found to be under 16 years of age, was due to return to her husband's house after a visit to her father. On the way she passed the house of the first accused. He asked her to come inside on the pretext that his wife wanted her. When she went in, he bolted the door and demanded that she should remain with her. In the night he revashed her. Later on, he took her out and was joined by the other three accused. They took her away, and according to her story, her ornaments were taken off. She was finally brought back and returned by the first accused. All the accused were tried jointly under sec. 366, I. P. C., and some of them were also tried under sec. 346 and sec. 346 read with sec. 109, I. P. C. Held that the whole incident could not be regarded as constituting a single offence and that though it might be said that the whole occurrence was one single transaction, even in that case, separate charges should have been framed for the separate offences which went to make up that transaction—*Nanda Ghosh v. Emp.*, 40 Cr.L.J. 649 (650), 182 I.C. 322, A.I.R. 1939 Cal. 321. See Note 778 (20) and also Note 779, (9) and (18).

Where several persons were accused of the same offence, namely, theft under sec. 380, committed in the course of the same transaction, namely, the first theft and were also accused of more than one offence of the same kind committed by them jointly within the period of 12 months, that is to say, two thefts, each of them being committed by them jointly, they can be tried together under clauses (a) and (b) of this section. If charges were framed against some of them under sec. 380 and against others under sec. 411, I. P. C., these persons could have been tried together upon those charges in respect of these two thefts under the provisions of sec. 239 (c)—*Supdt. & Rem. of Legal Affairs, Bengal v. Raghubal*, 39 C.W.N. 741, 62 Cal. 916, 37 Cr.L.J. 728, 162 I.C. 943.

Offences under secs. 41 (h) and 41 (j) of the Factories Act are offences of the same kind under this clause—*Agarwala*, 13 P.L.T. 252, 33 Cr.L.J. 274 (275), A.I.R. 1932 Pat. 188, 1932 Cr.C. 414, 136 I.C. 289, Ind. Rul. 1932 Pat. 65. The joint trial of two persons for passing counterfeit coins on three different occasions to three persons on the same date is valid under this sub-section—*Kovaganti*, 44 M.L.J. 130, 23 Cr.L.J. 719, A.I.R. 1923 Mad. 181.

778. Clause (d)—Distinct offences committed in the same transaction:—For the meaning of the words 'same transaction' see Note 756 under sec. 235. If more persons other than one are accused of different offences committed in a series of acts so connected as to form one transaction, they may be tried together. Whether or not the series of acts be so clearly connected as to form the same transaction necessarily rests with the Court to decide. The limits are wide, but no joinder of charges or trials should be permitted which will result in bewildering any of the accused in his defence or in causing undue prejudice against him—*Ghulam*, 1 S.L.R. 73, 8 Cr.L.J. 191 (195).

The phrase "same transaction" used in sec 239 (d), Cr. P. C., suggests in particular continuity of action and purpose. Before a joint trial can be held to be permissible or justifiable it must be established that each one of the accused was so connected with the other accused that the act done by one of them may be said to have been done conjointly with the others. The fact that the accused are all servants of the same master and so connected with the same person, does not necessarily involve connection with each other for the purposes of the offences charged. No doubt it may be possible to infer a common purpose in the various acts alleged; but common purpose would not be enough to make offences part of the same transaction, if the offenders act independently.—*Nathu Chaudhury v. Emp.*, 41 Cr.L.J. 452 (453), A.I.R. 1940 Pat. 499, 6 B.R. 461, 187 I.C. 361, 1940 P.W.N. 454.

It is sufficient that the offences were committed in the course of the same transaction. Whether the charge is an alternative one as provided by sec. 236 or is a distinct charge is obviously immaterial.—*Kali Kumar v. Nawab Ali*, 30 Cr.L.J. 619, 116 I.C. 369, A.I.R. 1929 Cal. 160, Ind. Rul. 1929 Cal 465. Therefore, two persons can be jointly tried on three substantive charges and one of them abetting these three offences—*Ibid.*

Section 239, cl (d), Cr. P. C., is expressly an exception from sec 233, Cr. P. C., and enables a plurality of offences to be dealt with in the same trial. But it does not import either expressly or by implication the limitation set out in sec. 234, Cr. P. C., according to which not more than three offences of the same kind committed within the space of 12 months can be tried together or the limitation contained in sec. 235 (1), Cr. P. C., under which more offences than one committed by the same person can only be tried together if they are one series of acts so connected together as to form the same transaction, in which case there is no specific limit of number. Nor is there any limit of number of offences specified in sec. 239 (d). The one and only limitation there is that the accusation should be of offences "committed in the course of the same transaction"—*Babulal Choukhani v. King-Emp.*, A.I.R. 1938 P.C. 130 (133), 65 I.A. 158, 32 S.L.R. 476, 1938 O.L.R. 189, 1938 O.A. 398, 1938 M.W.N. 505, 19 P.L.T. 343, 1938 A.L.R. 309, 10 P.P.C. 250, 4 B.R. 490, 39 Cr.L.J. 452, 67 C.L.J. 161, 40 Bom.L.R. 787, 42 C.W.N. 621, 1938 A.Cr.C. 27, 1938 O.W.N. 416, 1938 A.L.J. 382, 174 I.C. 1, 1938 A.W.R. (P.C.) 116, 1938 P.W.N. 320, (1938) 1 M.L.J. 647 (P.C.). See also Note 783.

The expression 'same transaction' would imply oneness of purpose. If, in the course of some quarrel, arising accidentally among persons who have collected to witness a festival, there happens to be a fight and if some persons inflict injury on others, without any common object, they would be committing different offences of hurt. And if they do not act with any common intention, it cannot be said that they have caused hurt in the course of the 'same transaction' although all the persons committing the offences are there at one and the same place and at the same time. In such a case the joint trial of these persons would be improper.—*Tufail Ahmed*, 23 A.L.J. 5, 26 Cr.L.J. 734. Where the accused were charged with the offences of murder, hurt and grievous hurt, under secs 302, 323 and 325, I. P. C., and all the criminal acts were found to be the outcome of a conspiracy to kill on one day as many members of the deceased's family as could be found, held that the acts were so closely connected by continuity of purpose and progressive action towards a common object that they formed one transaction, and the joint trial of the accused in respect of all the charges was legal.—*Bahadur*, 7 Lah. 254, 27 P.L.R. 379, 27 Cr.L.J. 803 (804).

Where the accused formed themselves into a body with the intention of looting and shooting the deceased and frightening any one who tried to prevent them, and the accused were jointly tried for the offences of murder, attempt to murder, and hurt, held that there was no misjoinder, as the offences were committed in one transaction.—*Ramaraju*, 53 Mad 937, 59 M.L.J. 945, 32 Cr.L.J. 30 (31).

It is also necessary that the accused must be associated together in the perpetration of the acts forming the same transaction from start to finish.—*Jethalal*, 29 Bom. 449, 2 Cr.L.J. 480, 7 Bom L.R. 527; *Datto Hanmant*, 30 Bom. 49 (55); *Kushai*, 50 Cal 1004

(1009), 25 Cr.L.J. 1082; *Tulsi*, 1917 P.R. 17, 18 Cr.L.J. 282. But it is not necessary that all the persons must be charged with all the offences. See Illustrations (b) and (c). In such cases, it is immaterial whether all the members of the party took an active part in each offence—*Ram Prasad*, 20 A.L.J. 926. If the accused started together for the same goal, this suffices to justify the joint trial, even if incidentally some of them have done an act for which the others may not be responsible—*Datto Hanmant*, 30 Bom 49; *Gopal Raghunath*, 53 Bom. 344, 30 Cr.L.J. 588 (589); *Kushai*, 50 Cal. 1004 (1010); *Kalidas*, 38 Cal. 453; *Tepanidhi*, 1 P.L.T. 180, 21 Cr.L.J. 161, 5 L.L.J. 11; *Loganathiyar*, 6 M.L.T. 17, 11 Cr.L.J. 30; *Pragg*, 11 O.L.J. 693, 25 Cr.L.J. 1169. If the accused started together for the same goal, and in the process committed a series of acts, they could be jointly tried for those offences, although the acts were separated by intervals of time—*Ashutosh v. Purna Chandra*, 50 Cal 159 (164). The foundation for the procedure laid down in this section is the association of two persons concurring from start to finish to attain the same end. Community of purpose or design and continuity of action are the essential elements of the connection necessary to link together different acts into one and the same transaction. In such cases the acts alleged to be connected with each other must have been done in pursuance of a particular end in view and as necessary thereto—*Tepanidhi*, 5 P.L.T. 11, 1 P.L.T. 180, 21 Cr.L.J. 161; *Jitan*, 1 P.L.T. 564. Where the accusation against all the accused persons is that they carried out a single scheme by successive acts done at intervals, and there was a complete unity of project, and the whole series of acts were so linked together by one motive and design as to constitute one transaction, a joint trial is not only valid but is demanded in the interests of public time and convenience—*Kushai Malik*, 50 Cal. 1004; *Ganesh*, 14 Bom L.R. 972, 13 Cr.L.J. 833. Thus, where a girl was abducted on a certain night, and thereafter various people concealed her, the offence being a continuing offence, all the persons can be tried together—*Kushai Malik*, 50 Cal. 1004, 25 Cr.L.J. 1082, 81 I.C. 906, A.I.R. 1924 Cal. 389; *Dosa*, 109 I.C. 224, A.I.R. 1928 Lah. 751, 29 Cr.L.J. 496. For contra see *Wawab Khan*, A.I.R. 1929 Lah. 496. In a trial for a charge under sec. 147, I. P. Code, it is not illegal to frame charges under secs. 324 and 325, I. P. C., against particular accused persons, although these offences were committed by them outside the scope of the common object mentioned in the charge under sec. 147, if all the acts with which the accused were charged form one transaction—*Rasul*, 3 Luck. 664, 5 O.W.N. 612, 29 Cr.L.J. 801 (802).

Offences committed by the accused in *different* transactions cannot be tried together. Thus, where D committed the offences of counterfeiting seals, and D, H, K and T subsequently committed the offences of cheating and forgery in pursuance of a conspiracy entered into subsequent to the commission of the offence of counterfeiting seals, the offence of counterfeiting seals committed by D could not be tried jointly with the offences of cheating and forgery committed by D, H, K and T—*Tulsi*, 17 P.R. 1917, 18 Cr.L.J. 282 (283).

Charges need not specify same transaction :—It suffices for the purpose of a joint trial that the accusation alleges the offences committed by each accused to have been committed in the same transaction within the meaning of this section. It is not necessary that the charge should contain a statement as to the transaction being one and the same. It is the tenor of the accusation and not the wording of the charge that must be considered as the test—*Datto Hanmant*, 30 Bom 49, 7 Bom L.R. 633.

Examples of offences committed in the same transaction :—

(1) Criminal breach of trust by one person, and receipt by another of the stolen property (the proceeds of the breach of trust) knowing it to be so—*Balabhai*, 6 Bom L.R. 517. In such a case it is not necessary that the offence of receiving should take place simultaneously with the offence of criminal breach of trust—*Ibid*.

(2) The offence of keeping a gaming house and the offence of playing therein arise out of facts so inseparably connected together as to form one transaction, and therefore the keeper and the players are clearly within the purview of this section as persons accused of different offences committed in the same transaction, and can be tried jointly

—*Khilnda Ram*, 3 Lah. 359, 23 Cr.L.J. 621; *Sheikh Mati*, 9 N.L.R. 68, 14 Cr.L.J. 293; *Darab*, 50 All. 412, 28 Cr.L.J. 1001 (1002), 105 I.C. 825, A.I.R. 1928 All. 20; *Bhana*, 1919 P.R. 6, 20 Cr.L.J. 219; *Nathu Thakur*, 20 Cr.L.J. 768 (Pat.); *Ganeshi Lal*, 20 A.L.J. 967, A.I.R. 1923 All. 88, 24 Cr.L.J. 155. Contra—*Fazal Din*, 1914 P.R. 35, 225 P.L.R. 1915, 16 Cr.L.J. 220, and *Makhan*, 1910 P.W.R. 5, 11 Cr.L.J. 211, where it has been held that the two offences cannot be said to be parts of the same transaction.

(3) If several accused carry out a systematic scheme of criminal breach of trust, by successive acts done at intervals, each accused alternately taking the benefits, the unity of the project constitutes the acts as parts of one transaction, and all the accused can, therefore, be jointly tried—*Datto Hanmant*, 30 Bom. 49, 7 Bom.L.R. 633, 2 Cr.L.J. 578.

(4) Charges of murder against three accused, and an alternative charge against one of them for murder or causing disappearance of evidence of murder can be jointly tried—*Ghulam*, 1 S.L.R. 73, 8 Cr.L.J. 191; *Hannappa*, 25 Bom.L.R. 231, A.I.R. 1923 Bom. 262. See Note 779, (6).

(5) Where several persons were members of a secret society and conspired to wage war to deprive the King of the sovereignty of British India and collected arms and ammunition for that purpose and actually waged war, it was held that the joint trial of all the accused for offences under secs 121, 121A, 122, 123, I. P. C., was legal—*Barindra*, 37 Cal. 467. Charges of conspiracy and offences committed in carrying out the objects of the conspiracy can be tried together. The transaction is not complete as soon as the offence is committed. So long as conspiracy continued, the transaction which began with the forming of the common intention continued and the offences were committed in the course of the same transaction—*Khagendra*, 19 C.W.N. 706, 16 Cr.L.J. 9; *Mohammad*, 33 Cr.L.J. 373 (375), 137 I.C. 73, A.I.R. 1932 All. 73, 1932 Cr.C. 93, Ind. Rul. 1932 All. 270. See Notes 723 and 757.

(6) Where illegal gratification is paid to a person through another, the joint trial of both persons for offences under secs 161 and 162, I. P. C., is valid—*Shrinwas*, 7 Bom.L.R. 637, 2 Cr.L.J. 582.

(7) Cheating by A in respect of a certain sum collected from several persons on a certain date, and cheating by B in respect of another sum collected from some other persons at the same time, at the same place and in pursuance of the same conspiracy, are parts of the same transaction, and A and B may be tried together—*Kailash*, 46 Cal. 712, 29 Cr.L.J. 31. See Note 779 (13). So also, conspiracy and acts of cheating in pursuance of that conspiracy can be tried together—*Abdul Salim*, 49 Cal. 573, 26 C.W.N. 680, 35 C.L.J. 279, 69 I.C. 145, A.I.R. 1922 Cal. 107, 23 Cr.L.J. 657. See Notes 723 and 757, (5) and (10).

(8) Where a gang of dacoits assembled on a highway for robbing passers-by, and in the course of the dacoity several offences were committed by them, held that all these offences were committed in the course of the same transaction. It is immaterial whether all the members of the gang took an active part in each offence—*Ram Prosad*, 20 A.L.J. 926, 24 Cr.L.J. 153, A.I.R. 1923 All. 137. Where the allegation against two sets of persons is that they committed dacoity with murder, they may be tried together—*U Po Yone*, 34 Cr.L.J. 1185, 146 I.C. 196, A.I.R. 1933 Rang. 271, 1933 Cr.C. 1015.

(9) The offence of dacoity, the offence of dishonest possession of stolen property knowing it to have been stolen in the commission of the dacoity, and dishonest reception of such property knowing it to be stolen, from a known dacoit, can be tried together, as all the offences can be said to have been committed in the same transaction—*Durga Prosad*, 45 All. 223, 20 A.L.J. 981, 24 Cr.L.J. 149, 71 I.C. 501, A.I.R. 1923 All. 126. It will now fall under clause (e).

(10) The offence of fabricating false evidence in order to procure the conviction of an innocent person, the offence of instituting a false prosecution against that person, and the offence of giving false evidence in that prosecution in order to secure his conviction,—all these offences can be tried together, as there was one sustained and continuous plot for procuring conviction of an innocent person—*Ganesh*, 14 Bom.L.R. 972, 13 Cr.L.J. 833,

(11) Criminal conspiracy to commit the offences of importing arms and ammunition, murder, attempt to commit murder, grievous hurt, robbery, dacoity, and the commission of those offences in pursuance of the conspiracy (secs 19 and 20, Arms Act, secs. 302, 307, 326, 392, 394, 395, 396, 397, 398, I. P. C., and secs. 120B, and 109, I. P. C.)—*Mukand Singh*, 8 Lah. 230 (P.C.), A.I.R. 1927 P.C. 215, 29 Cr.L.J. 673. Offences under sec. 121A, I. P. Code (conspiring to deprive His Majesty of the sovereignty of British India, conspiring to wage war against the Government, and conspiring to overawe the Government by means of criminal force) and offences under sec. 120B, I. P. Code (conspiring to commit dacoities either accompanied by murder or not accompanied by murder)—*Ram Prasad*, 2 Luck. 631, 29 Cr.L.J. 129 (136). See Notes 723 and 757, (5) and (10).

(12) Where two persons were charged under two separate Acts (sec. 72, Provincial Insolvency Act and sec. 102, Presidency Town Insolvency Act), but the facts alleged against them were the same, *viz.*, that the two accused carried on a joint business and each obtained credit concealing the fact that he was an undischarged insolvent, *held* that the two accused could be tried jointly—*Ganguly v. Watson*, 53 Cal. 929, 27 Cr.L.J. 1269 (1272).

(13) A charge under sec. 45 of the Bombay Abkari Act (V of 1878) can be joined with a charge under sec. 43 (1) (i), read with sec. 47 of the same Act—*Jethanand*, 35 Cr.L.J. 256, 147 I.C. 55, A.I.R. 1933 Sind 255, 1933 Cr.C. 811.

(14) A charge under sec. 395, I. P. C., and a charge under the Arms Act for being in possession of arms at the time the dacoity was committed form parts of the same transaction and can be tried together. But if the possession of arms relates to a different time, the joint trial of these two offences is illegal—*Jai Singh*, 19 Cr.L.J. 100, 43 I.C. 324, A.I.R. 1918 Lah. 148, 44 P.R. 1917 (Cr.).

(15) Two drivers in a motor collision in which several persons were killed, can properly be tried together—*Baliah*, 1931 M.W.N. 556.

(16) Two persons who, finding themselves alone, went in succession and raped a girl, can be tried together as the transaction was essentially single and the separate acts of rape alleged could not have been severally committed unless they had been either tacitly agreed to or reciprocally connived at by each of the accused in his turn—*Mazarali*, 31 Cr.L.J. 870 (872), 144 I.C. 985, 35 Bom L.R. 474, A.I.R. 1933 Bom. 266, 1933 Cr.C. 678, 57 Bom 400.

(17) Where one person is arrested with revolutionary leaflets in one place and another person for distribution of leaflets of the same kind in a different place, there is no objection to introduce a charge under sec. 120B, I. P. C., to justify a joint trial. There is no objection to charge under both secs 117 and 120B, I. P. Code—*Tarapada*, 31 Cr.L.J. 1073, 145 I.C. 814, A.I.R. 1933 Cal. 603, 37 C.W.N. 426, 1933 Cr.C. 967.

(18) Where offences of murder and grievous hurt were committed in the course of the same transaction in furtherance of the common intention, all the persons responsible for causing those injuries could be tried together in one trial under the provisions of sec 239, Cr. P. C.—*Nga Tha Aye*, 36 Cr.L.J. 1380, 158 I.C. 441, A.I.R. 1935 Rang. 299, 1935 Cr.C. 995. Where the accused were jointly tried at one trial for no less than four offences, namely, the offence of riot under sec. 147, I. P. C., the offence of voluntarily causing grievous hurt to a public servant in the discharge of his duty under sec. 333, I. P. C., the offence of murder committed in the course of the riot punishable under sec. 302, I. P. C., read with sec. 149, I. P. C., and the offence of committing dacoity with murder punishable under secs. 395 and 149, I. P. C., *held* that the framing of charges in respect of the four offences committed by the accused in the course of one and the same transaction was justified—*Bishunath*, A.I.R. 1935 Oudh 190 (194), 1935 O.L.R. 78, 1935 O.W.N. 145, 153 I.C. 978, 1935 Cr.C. 279.

(19) Where the accused were charged under sec. 420, I. P. C., *firstly*, in respect of Rs. 15-3-3 collected from 11 persons, and, *secondly*, in respect of Rs. 14-12-0 collected from 11 others on the same day by the same misrepresentation, *held* that under the provisions of secs. 235 and 239 the accused were triable together in respect of all the

raid offences as the misrepresentation was in each case the same and the offences were all committed at one and the same time and place in pursuance of the same conspiracy and in the course of the same transaction—*Kailash*, 29 C.L.J. 31, 20 Cr.L.J. 122, 46 Cal. 712

(20) The joint trial of three persons, two being charged under sec. 366, I. P. C., and one being charged under sec. 368, I. P. C., is not illegal—*Dasa*, A.I.R. 1928 Lah. 751, 109 I.C. 224, 29 Cr.L.J. 496. The same High Court took a contrary view in *Nawab Khan*, A.I.R. 1929 Lah. 496, 1929 Cr.C. 57. Persons who abducted a girl and persons who detained her with the knowledge that she had been abducted, can legally be tried together—*Kushai Malik*, 50 Cal. 1004, 81 I.C. 906, A.I.R. 1924 Cal. 389, 25 Cr.L.J. 1082. In *Mozam Dastadar*, A.I.R. 1933 Cal. 563, 144 I.C. 93, 1933 Cr.C. 940, 34 Cr.L.J. 682, Ind. Rul. 1933 Cal. 499, it was, however, held that the joint trial of an accused charged with an offence under sec. 366, I. P. C., and accused charged under sec. 368, I. P. C., was irregular and prejudicial to the accused and must be set aside. A joint trial for offences under sections 366 and 368, Indian Penal Code, is not illegal where the whole chain of events, beginning with the girl's kidnapping or abduction and ending with her discovery can fairly be regarded as forming one and the same transaction—*Zamin*, 33 Cr.L.J. 275 (276), 136 I.C. 243, 8 O.W.N. 1325, A.I.R. 1932 Oudh 28, 1932 Cr.C. 60, Ind. Rul. 1932 Oudh 99. Where there was obviously a community of interest or purpose between the accused persons and the acts were so closely connected as to form one and the same transaction, such trial is not illegal—*Bhawani Pathak*, 37 Cr.L.J. 496, 161 I.C. 869, A.I.R. 1936 All. 253, 1936 Cr.C. 237. Two persons, charged under sec. 368, I. P. C., for separate acts of concealment in respect of the same girl, cannot be tried together—*Durgamoni Dass v. Emp.*, 43 C.W.N. 196. For a valuable discussion on this point see 44 C.W.N. xi. See also Note 777 and Note 779 (9) and (18).

(21) The offence of illegal possession of a revolver is a continuing one and, therefore, having possession of such a weapon at the time of preparation for dacoity or at the time of taking part in the dacoity would form part of the same transaction, and the facts would certainly bring the two charges under sec. 399, I. P. C., and sec. 19 (f), Arms Act, within the ambit of sec. 239 (d), Cr. P. Code—*Khazan v. Emp.*, A.I.R. 1937 Lah. 793, 39 P.L.R. 1013, 172 I.C. 405, 39 Cr.L.J. 141, 10 R.L. 314.

(22) The legality of a joint trial depends upon whether the whole affair constituted one transaction, and with reference to that, unity of time, place and purpose ought to be looked to. Where the whole affair took place in one village, one incident succeeding another rapidly, and the rioters went from one house to another and finally surrounded the Excise Sub-Inspector and his companions who had gone there to make a raid on certain houses and had to retreat owing to the attack, the joint trial of the accused persons under secs. 148 and 333, I. P. C., or secs. 148 and 149 read with sec. 333, I. P. C., was legal—*Nana Sadoba v. Emp.*, A.I.R. 1938 Nag. 283, 1938 N.L.J. 90, 179 I.C. 317, 40 Cr.L.J. 197.

(23) Where there was unity of criminal behaviour actuated by a common intention on the part of all the accused to extort confession, they would be jointly triable under this section. The unity of criminal behaviour and the common intention prompting it would render all that was done in furtherance of an object as a part of one transaction. The necessity of a joint trial is strengthened if there is the additional element of proximity in time as well—*Provincial Govt. v. C. P. & Bazar v. Dinanath*, A.I.R. 1939 Nag. 263, 1939 N.L.J. 373, 11 L.R. 1939 Nag. 644, 41 Cr.L.J. 27, 184 I.C. 412.

779. Offences not in the same transaction:—(1) In case of rioting, the two opposite factions cannot be said to commit the offence of rioting in the same transaction; the action of each side forming a separate transaction, the two parties must be tried separately—*Hussain Baksh*, 6 C.L.R. 521, 6 Cal. 96; *Chandra Bhuiya*, 20 Cal. 537; *Ala Dya*, 1906 P.R. 5, 4 Cr.L.J. 75 (76); *Bandha Singh*, 1881 A.W.N. 28. But see *Contra—Mangat*, 18 A.L.J. 744, 57 I.C. 82 (83), 21 Cr.L.J. 562. In this case it has been held that in a case of rioting committed in respect of a piece of land, the

common object of both parties is the same, *viz*, taking possession of the land, though it is true that party A wants to take possession for party A, and party B wants to take possession for party B. The common object of both sides being the same, they can be tried together.

(2) Murder and robbery on one occasion and another act of robbery committed a few hours after in another place though close to the scene of the former offences, do not form parts of the same transaction—*Mulua*, 14 All. 502. So also, murder by four men, and grievous hurt by three of them caused upon a person who tried to prevent them from carrying off the dead body some time after the murder, are not offences committed in the same transaction—*Nawab Singh*, 1906 P.R. 10, 4 Cr.L.J. 285.

(3) Dacoities committed on different dates do not form parts of the same transaction—*Datta*, 1882 A.W.N. 180; *Shanmuga*, 8 M.L.T. 286, 11 Cr.L.J. 477. So also, six dacoities committed by a gang of dacoits at various places in the course of one night cannot form parts of one and the same transaction and cannot be tried together in one trial—*Ganna*, 35 Cr.L.J. 1048, 149 I.C. 959, 11 O.W.N. 731, A.I.R. 1934 Oudh 325, 1934 Cr.C. 878. So also, offences under secs. 147 and 325, I. P. C., committed on one date, and offences under secs. 147, 323 and 342, I. P. C., committed on another date, cannot be tried together, as they were committed in different transactions—*Puttoo Lal*, 21 A.L.J. 820, 25 Cr.L.J. 446, A.I.R. 1924 All. 316.

(4) Where a person obtained a promissory note by cheating and on a subsequent date he went with another person and both cashed the note, the two persons could not be charged and tried together for both the offences, since the occurrence of each date formed a distinct transaction by itself—*Hira Lal*, 31 Cal. 1053.

(5) A charge of theft against one person and a charge against another person for rescuing the former from lawful custody cannot be tried together—*Lilukdhari*, 13 C.W.N. 804, 9 Cr.L.J. 147; *Kutti*, 11 Mad. 441. Similarly, one person committing an offence punishable under the Railway Act, and other persons rescuing the former from the custody of the Police while he was arrested, cannot be tried jointly—*Govind Koeri*, 29 Cal. 385, 6 C.W.N. 468. See also (17) below.

(6) The offences of rioting and murder committed by five persons, and the offence of concealing the dead body (of a person killed in the riot) committed by the 5th accused, cannot be tried jointly. The offence of the 5th accused (concealing the dead body) should be tried separately—*Surendra*, 40 C.L.J. 559, 26 Cr.L.J. 467, 85 I.C. 147, A.I.R. 1925 Cal. 413. It is conceivable in some circumstances that the primary offence and the offence of destroying evidence of the primary offence are two unconnected matters, but it cannot possibly be said that they can in no circumstances be parts of the same transaction. Where the incidents are so closely connected in point of time that the acts which resulted in murder and those which resulted in the disposal of the dead body form parts of the same transaction, the two offences can be tried together and there would be no misjoinder of charges—*Mirza Zahid Beg v. Emp.*, A.I.R. 1938 All. 91, 1937 A.W.R. 1099, 1937 A.L.J. 1253, 1938 A.L.R. 180, 173 I.C. 838, 39 Cr.L.J. 364.

(7) A charge against five men of having committed a riot, and a charge against four of them of having committed criminal trespass on a different occasion cannot be tried together in the same trial—*Chandi Singh*, 14 Cal. 395.

(8) Two persons fabricating a *kabuliyat*, and two other persons fabricating another *kabuliyat*, the two sets of persons not having any community of interest, cannot be tried together—*Kazi Safuddin v. Fazl Sheikh*, 21 C.W.N. 756, 18 Cr.L.J. 833, 41 I.C. 657.

(9) Two acts of abduction separate and distinct, though of the same girl, committed by two sets of persons at different dates cannot be tried together—*Esua*, 1 C.L.J. 475, 2 Cr.L.J. 393. Two persons who have abducted a girl cannot be jointly tried with a third person who has taken no part in the abduction but proceeds to cheat, by false representation as to the caste of the girl, another person who buys the girl, there being no community of purpose nor continuity of time—*Mangha Ram*, 31 P.L.R. 811, 32

Cr.L.J. 139, 128 I.C. 313, A.I.R. 1930 Lah. 896, Ind. Rul. 1931 Lah. 41, 1930 Cr.C. 525 and 992. See Note 778 (20). See also *Mozam Dajadar*, in (18) below and Notes 777 and 778 (20).

(10) Where five dacoities were committed at five different places in the same district in the course of a week, but in these dacoities some persons were common and others were not, *held* that the dacoities were not committed in the same transaction merely because they were committed in the same district or because some of the offenders were common, and could not be tried jointly—*Ram Sahas*, 19 A.L.J. 610, 22 Cr.L.J. 397, A.I.R. 1921 All. 408 (409), 61 I.C. 525. See also (3) above.

(11) The author of a defamatory article, who is charged under sec. 500, I. P. C., and the printer of the article, who is charged under sec. 501, I. P. C., cannot be tried together when there is no evidence of conspiracy between them—*Asutosh v. Purna Chandra*, 50 Cal 159, 36 C.L.J. 287, 24 Cr.L.J. 206, 71 I.C. 670. A joint trial is not, however, illegal where the complaint was that the accused had all been acting together with the object of publishing and distributing the notice which was printed by some of them and the trial Court definitely found that the accused were acting together for this purpose—*Parsotam*, 36 Cr.L.J. 1296, 158 I.C. 39, A.I.R. 1935 All. 769, 1934 Cr.C. 822. See *Diwan Singh* in Note 745 and Note 723 under the heading "Defamation".

(12) Murder by one person, and intentional omission by another person (murderer's father) who discovered the murder to give information in respect of the murder, cannot be said to be offences committed in the same transaction. The latter offence cannot even be said to be an abetment of or attempt to commit the former offence under clause (b)—*Ratan Singh*, 19 A.L.J. 915, 23 Cr.L.J. 8, A.I.R. 1921 All. 151.

(13) Misappropriation by one accused of a sum of money collected from one person and misappropriation by another person of another sum of money collected from another person on another occasion, even though committed on the same date—*Tilakdhari*, 6 C.L.J. 757, 6 Cr.L.J. 442 (444). See also *Ganesh Prasad*, 34 Cr.L.J. 215, 141 I.C. 338, 11 Pat. 779, A.I.R. 1933 Pat. 91, 1933 Cr.C. 212. But see Note 778 (7).

(14) The offence of receiving stolen property (sec. 413, I. P. C.), and the offence of belonging to a gang of thieves (sec. 401, I. P. C.)—*Chhajju*, 26 Cr.L.J. 1097, 88 I.C. 185, A.I.R. 1925 Lah. 537. The offence of being a member of a gang of the kind described in sec. 401, I. P. C., and the offence of receiving stolen property from members of the gang on different occasions cannot be said to be committed in the same transaction—*Arjan Das*, 33 Cr.L.J. 584, 138 I.C. 424, 33 P.L.R. 736, A.I.R. 1932 Lah. 486, 1932 Cr.C. 624, Ind. Rul. 1932 Lah. 488.

(15) Harboursing different offenders by different persons not in the course of the same transaction and without any conspiracy between them—*Sewak*, 30 Cr.L.J. 214, 113 I.C. 721, 26 A.L.J. 623, A.I.R. 1928 All. 417.

(16) Offences under secs. 342, 452 and 323, I. P. C., committed by four persons on a particular day and offence committed by another under sec. 323, I. P. C., on the next day, upon the same complaint—*Pattu*, 34 Cr.L.J. 863, 144 I.C. 974, A.I.R. 1933 All. 354, 1933 Cr.C. 627, 1933 A.L.J. 1595.

(17) A thief and his rescuers, who are charged with robbing and hurt, cannot be tried together unless there is evidence to show that the rescuers were in collusion with the thief and stood by with the object of effecting a rescue—*Raghu*, 32 Cr.L.J. 9, 127 I.C. 571, A.I.R. 1930 Pat. 159, 1930 Cr.C. 202, Ind. Rul. 1930 Pat. 715; *Muhammad*, 28 Cr.L.J. 357, 100 I.C. 965, A.I.R. 1927 Lah. 274; *Shyambar Koyal v. King-Emp.*, 19 C.L.J. 633; *Asmat v. Emp.*, 44 C.W.N. 315. See also (5) above. But where the man charged under sec. 224, I. P. C., escaped from lawful custody and the rescuers helped him to escape, the intention of all was to secure the release of the man in lawful custody. So the various acts which brought about the escape from lawful custody formed parts of the same transaction as contemplated by sec. 239 (d), Cr. P. C., and their joint trial was legal—*Ajablal*, 37 Cr.L.J. 240, 160 I.C. 177, A.I.R. 1936 Pat. 20, 16 P.L.T. 748, 1936 Cr.C. 46, 15 Pat. 138, 2 B.R. 177, 8 R.P. 318.

considered to form part of the same transaction—*Tamezkhan v Rajjaba'i*, 31 C.W.N. 337, 45 C.L.J. 591, 28 Cr L.J. 347, 100 IC 827, AIR. 1927 Cal. 330

(25) The offence of the sale of opium without a license is quite dissociable from the offence of importing foreign opium into British India. Opium sold without a license need not necessarily be imported opium, and opium need not necessarily be imported for sale. The offence of the abetment of the importation of opium into British India by one accused can form no part of the transaction in respect of which a charge under sec. 9 (d), of the Opium Act is framed against others for selling half a tola of opium to a bogus purchaser. Consequently these offences are different offences not committed in the course of the same transaction and do not fall within the exception to sec. 233, Cr. P. C., laid down in sec. 239 (d) of the same Code. Hence their joint trial is illegal—*Ghasiram v. Emp.*, 38 Cr L.J. 542, 168 IC 450, 9 RN 255, AIR 1937 Nag 188

(26) If both the owner and the driver of a motor vehicle had committed offences under the Motor Vehicles Act in respect of a single journey, there is no objection to the joint trial of those two, but it is very objectionable that several owners and several drivers should be tried in one trial for several offences committed on different dates—*Kuzikkal Krishnan*, 39 Cr L.J. 861 (862), 177 IC. 314, 1938 M.W.N. 822, 11 RM. 303, 47 MLW. 774, AIR. 1938 Mad. 743, (1938) 1 MLJ. 800.

(27) Where the charge which the accused were called upon to meet in the trial Court was that they were members of an unlawful assembly which had a common unlawful object and that as in the prosecution of that common object, various acts were committed by different individuals among the members of that assembly, all of them were liable by virtue of sec. 149, I P. C., in respect of all the acts committed by the various individuals and they were also charged in respect of individual acts said to have been committed by them which constituted offences under various sections of the Penal Code, such as secs 352, 323, 324 and 325, held that once it was found that the common unlawful object had not been established, it must be held that acts which were alleged to constitute offences under secs 352, 323, 324 and 325, I P C., had nothing in common between them and there would be no justification for a joint trial being held in respect of such acts which were committed not only by different accused but against different persons in different places—*Aranashi Goundan v Palani Madari*, AIR. 1939 Mad 406, 49 MLW 163, 1939 MWN 117, (1939) 1 MLJ 259, 1939 M.CrC 70, 40 Cr L.J. 855, 184 IC 134, 12 RM 413

780. Clause (e)—An offence which includes theft:—An offence which includes theft must mean an offence of which theft is a necessary and essential ingredient. An offence which may be the forerunner of a theft or which may form part of a larger transaction which might involve or include theft, cannot be said to be an offence which includes theft. That being so, persons charged under secs 457 and 460, I P C., are not persons charged with offences which include theft, and consequently, they cannot properly be tried with persons charged with receiving stolen property which was stolen in a theft which was committed as part of the transaction involving the other offences—*Matturi*, 37 Cr L.J. 794 (799), 163 IC 253, AIR 1936 All 337, 1936 ALJ. 518, 1936 Cr C. 401, 58 All 695, 1936 ALR 539, 8 RA 928. But the Lahore High Court has held that sec. 457, I P C., includes theft and a person accused of an offence under sec. 457, I P C., can, by virtue of sec. 239 (e), Cr P C., be legally charged and tried with persons accused of receiving or retaining stolen property—*Nawab*, 38 Cr L.J. 1061, 170 IC 303, AIR. 1937 Lah 463, 1 LR 1937 Lah 62, 39 PLR 278, 10 RL 100, distinguishing *Sultan Ahmad v. Emp.*, 112 IC 584, AIR 1929 Lah 142, 29 Cr L.J. 1080 and holding *Jagga v Emp.*, 51 PR 1905 (Cr), 3 Cr L.J. 76, 165 P.L.R. 1905 as out of date

Under the old law it was held that where A and B were charged with house-breaking by night with intent to commit theft, and C with having received some of the stolen articles on a certain day, and D with having received some other stolen articles on

(18) The joint trial of four accused, who were charged with offences of kidnapping and abduction, with the fifth accused who was charged for abduction only and with the sixth accused who was charged under sec. 368, I. P. C., is illegal—*Mozam Dafadar*, A.I.R. 1933 Cal. 563, 144 I.C. 93, 34 Cr.L.J. 682, 1933 Cr.C. 940. See Note 777 and Note 778 (20) and Note 779 (9).

(19) The joint trial of 19 accused persons, who were merely poachers gathered in the same place at the same time for fishing in prohibited waters and were charged under secs 379 and 447, I. P. C., was illegal as the act of each accused might have been independent of the act of the other and there was nothing to show identity of purpose or common object—*Salimullah*, 50 Mad. 735, 27 Cr.L.J. 1381, 98 I.C. 597, 51 M.L.J. 692, 24 M.L.W. 948, A.I.R. 1927 Mad. 177, 38 M.L.T. 37. Where 13 persons were jointly tried for an offence under sec. 26 (d) of the Indian Forest Act for having illicitly grazed their cattle in the reserved forest, held that there being no evidence on the side of the prosecution to prove that there was any prior consultation or community of purpose amongst the accused, their joint trial was illegal—*Amolak*, 34 Cr.L.J. 1175, 146 I.C. 116, 16 N.L.J. 196, A.I.R. 1933 Nag. 368, 1933 Cr.C. 1552.

(20) Offences of forging a document by one person and its use by another in giving false evidence as to attestation in support of that document, cannot be tried together—*Gunwant*, A.I.R. 1916 Nag. 73, 38 I.C. 723, 18 Cr.L.J. 339, 13 N.L.R. 35. The argument used in this case would certainly be equally applicable if the scribe and the person for whose benefit it was forged and who gave evidence in support of it had been the same person as the forger of the document and its production in Court might be separated by years of time such as would militate against the continuity of purpose—*Raika*, A.I.R. 1935 Nag. 149, (154), 1935 Cr.C. 834, 157 I.C. 618, 31 N.L.R. 38, 36 Cr.L.J. 1153.

(21) Three cases were instituted against the accused at the instance of three different complainants though the cases arose at or about the same time at the same place in a *hat*. The allegations against the accused were that they with others formed members of an unlawful assembly, committed rioting, individually caused hurt to the complainants and scattered and spoiled or took away foreign salt and other articles which the complainant exposed for sale. They were tried together in one trial. Held that such a joint trial was not allowable under the Cr. P. C., as the facts alleged did not form the same transaction and offences of hurt were distinct from each other, though the origin and preparations for the commission of the offences might be the same—*Nanda Kumar*, 11 C.W.N. 1128.

(22) After the Civil Court peons had been obstructed in executing the decree the accused, after consultation, proceeded to the kutchery of the decree-holder in order to beat his son and the tahsildar and beat the to the house of the judgment-debtor where together on various charges regarding both illegal as the second attack was clearly no further intention to obstruct the incidents of the first occurrence took there was then se of which the

(23) Three persons were jointly tried for cheating. The charges against them were that each of them had cheated a different person on a different date. Held that the joint trial was illegal as the three acts of cheating were wholly distinct and not committed in the course of the same transaction—*Karn Singh*, 12 Cr.L.J. 208, 10 I.C. 63, 122 P.L.R. 1911, 28 P.W.R. 1911 (Cr.).

(24) The accused were said to have attacked the complainant and his party on a certain date to deprive them of a large number of logs which they were removing from the forest. It was also alleged that on the next date they took away certain other logs from another part of the forest which also belonged to the complainant. They were charged with being members of an unlawful assembly and of committing theft on both these occasions. Held that the joint trial was illegal as these acts could not be

considered to form part of the same transaction—*Tamezkhan v. Rajjabali*, 31 C.W.N. 237, 45 C.L.J. 591, 28 Cr.L.J. 347, 100 I.C. 827, A.I.R. 1927 Cal 330

(25) The offence of the sale of opium without a license is quite dissociable from the offence of importing foreign opium into British India. Opium sold without a license need not necessarily be imported opium, and opium need not necessarily be imported for sale. The offence of the abetment of the importation of opium into British India by one accused can form no part of the transaction in respect of which a charge under sec. 9 (d), of the Opium Act is framed against others for selling half a tola of opium to a bogus purchaser. Consequently these offences are different offences not committed in the course of the same transaction and do not fall within the exception to sec. 233, Cr. P. C., laid down in sec. 239 (d) of the same Code. Hence their joint trial is illegal—*Ghasiram v. Emp.*, 38 Cr.L.J. 542, 168 I.C. 450, 9 R.N. 255, A.I.R. 1937 Nag 188

(26) If both the owner and the driver of a motor vehicle had committed offences under the Motor Vehicles Act in respect of a single journey, there is no objection to the joint trial of those two, but it is very objectionable that several owners and several drivers should be tried in one trial for several offences committed on different dates—*Kuzikkal Krishnan*, 39 Cr.L.J. 861 (862), 177 I.C. 314, 1938 M.W.N. 822, 11 R.M. 303, 47 M.L.W. 774, A.I.R. 1938 Mad. 743, (1938) 1 M.L.J. 800.

(27) Where the charge which the accused were called upon to meet in the trial Court was that they were members of an unlawful assembly which had a common unlawful object and that as in the prosecution of that common object, various acts were committed by different individuals among the members of that assembly, all of them were liable by virtue of sec. 149, I. P. C., in respect of all the acts committed by the various individuals and they were also charged in respect of individual acts said to have been committed by them which constituted offences under various sections of the Penal Code, such as secs 352, 323, 324 and 325, held that once it was found that the common unlawful object had not been established, it must be held that acts which were alleged to constitute offences under secs 352, 323, 324 and 325, I. P. C., had nothing in common between them and there would be no justification for a joint trial being held in respect of such acts which were committed not only by different accused but against different persons in different places—*Avanashi Goundan v. Palani Madari*, A.I.R. 1939 Mad 406, 49 M.L.W. 163, 1939 M.W.N. 117, (1939) 1 M.L.J. 259, 1939 M.Cr.C. 70, 40 Cr.L.J. 855, 184 I.C. 134, 12 R.M. 413

780. Clause (e)—An offence which includes theft:—An offence which includes theft must mean an offence of which theft is a necessary and essential ingredient. An offence which may be the forerunner of a theft or which may form part of a larger transaction which might involve or include theft, cannot be said to be an offence which includes theft. That being so, persons charged under secs. 457 and 460, I. P. C., are not persons charged with offences which include theft, and consequently, they cannot properly be tried with persons charged with receiving stolen property which was stolen in a theft which was committed as part of the transaction involving the other offences—*Maitkuri*, 37 Cr.L.J. 794 (799), 163 I.C. 253, A.I.R. 1936 All 337, 1936 A.L.J. 518, 1936 Cr.C. 401, 58 All 695, 1936 A.L.R. 539, 8 R.A. 928. But the Lahore High Court has held that sec. 457, I. P. C., includes theft and a person accused of an offence under sec. 457, I. P. C., can, by virtue of sec. 239 (e), Cr. P. C., be legally charged and tried with persons accused of receiving or retaining stolen property—*Nazab*, 38 Cr.L.J. 1061, 170 I.C. 303, A.I.R. 1937 Lah 463, I.L.R. 1937 Lah 62, 39 P.L.R. 278, 10 R.L. 100, distinguishing *Sultan Ahmad v. Emp.*, 112 I.C. 584, A.I.R. 1929 Lah 142, 29 Cr.L.J. 1080 and holding *Jagga v. Emp.*, 51 P.R. 1905 (Cr.), 3 Cr.L.J. 76, 165 P.L.R. 1905 as out of date.

Under the old law it was held that where A and B were charged with house-breaking by night with intent to commit theft, and C with having received some of the stolen articles on a certain day, and D with having received some other stolen articles on

another day, the joint trial of these persons would be illegal—*Girdhari*, 1882 A.W.N. 215. This ruling is now superseded by the new clause (e).

If one person has committed *theft* and another person has *received the stolen property* knowing it to be stolen, they can be tried jointly—*Bhima*, 38 All. 311, 14 A.L.J. 344; *Anwar*, 44 All. 276, 20 A.L.J. 96; *Karu v. Ram Charan*, 28 Cal. 10; *Nga Po*, 4 Bur.L.T. 263, 13 Cr.L.J. 59 (60); and it is not necessary that the receiving should take place simultaneously with the theft—*Anwar*, supra. Even an appreciable interval of time between the two acts which are otherwise connected does not always prevent them from being parts of the same series of connected events and from being tried together—*Nga Nya*, 14 Bur.L.R. 38, 6 Cr.L.J. 28; *Nga Ton Pu*, 2 L.B.R. 19. In *Jethalal*, 29 Bom. 449 and *Ramrattan*, 21 C.W.N. 1111, 19 Cr.L.J. 17, however, it was held that theft and receipt of stolen goods could not be said to be acts committed in the same transaction, because the thief and the receiver of goods were not associated in the series of acts which formed the same transaction from the very start; the one offence took place after the other was completed. In another Calcutta case also it was held that unless the theft and subsequent receipt were committed in pursuance of the same conspiracy, the two offences could not be said to be parts of the same transaction and the offenders could not be tried together—*Ohl Bhusan*, 46 Cal. 741, 23 C.W.N. 463, 29 C.L.J. 212. Under the present clause, however, it is not necessary that the two offences must be committed in the same transaction or in pursuance of the same conspiracy; all that is now required is that one offender should commit theft and the other offender should receive the stolen property.

Two persons accused of an offence ought not to be tried together if the prosecution cases against them are mutually exclusive—*Azimuddin*, 21 I.C. 163, 7 L.B.R. 68, 14 Cr.L.J. 563, 6 Bur.L.T. 191; *Kyaw Dwe*, 74 I.C. 78, A.I.R. 1923 Rang. 67, 24 Cr.L.J. 750. The addition in 1923, subsequent to those decisions, in sub-sec. (e), sec. 239, Cr. P. C., does not appear to make any difference in this respect. Where there was no allegation that one accused was the thief and the other his assistant or receiver but the prosecution case was that either one was the thief or the other was the receiver of stolen property, they should not be jointly tried—*Intaz Khan*, 35 Cr.L.J. 1312, 151 I.C. 406, 1934 Cr.C. 887, A.I.R. 1934 Rang. 193.

Where the accused was charged under secs. 215 and 411, I. P. C., in respect of a mare and was jointly tried with another person who was also charged under sec. 411, I. P. C., in respect of the same mare but there was no evidence whatsoever to show any connection between them, held that the joint trial was illegal and as it was not unlikely that it caused prejudice to the former, a retrial was ordered—*Pirano Lakho*, 35 Cr.L.J. 153, 146 I.C. 649, A.I.R. 1933 Sind. 352, 1933 Cr.C. 1180.

Dacoity, and receiving the property stolen in the dacoity may be tried together under this clause—*Durga Prosad*, 45 All. 223, 20 A.L.J. 981, 24 Cr.L.J. 149, 71 I.C. 501, A.I.R. 1923 All. 126; *Tekri*, A.I.R. 1936 Oudh. 108, 1935 O.L.R. 684, 36 Cr.L.J. 1467, 158 I.C. 913, 1935 O.W.N. 1153.

The offence of belonging to a gang of thieves (sec. 401, I. P. C.), is not an 'offence which includes theft' within the meaning of this clause, because the former offence is committed as soon as a gang of persons associated for the purpose of habitually committing theft is formed, and before any theft is actually committed by them. Therefore, an offence of belonging to a gang of thieves and an offence of receiving stolen property cannot be tried together, under this clause—*Chhajju*, 26 Cr.L.J. 1097, 88 I.C. 185, A.I.R. 1925 Lah. 537. Offences described in secs. 457 and 436, I. P. C., with which a person is jointly charged cannot be tried along with offences under secs. 411 and 414, I. P. C., with which other persons are charged, because sec. 436 does not include theft or extortion, though sec. 457 does—*Sultan Ahmed*, 29 Cr.L.J. 1080, 112 I.C. 584, A.I.R. 1929 Lah. 142.

Where the receiver from the receiver of stolen property was tried with the immediate receiver and the thieves and his defence was conflicting to that of the receiver of the stolen property, held that there was some possibility of prejudice to the receiver

from the receiver of the stolen property in his joint trial with the other accused and that he should be tried in a separate trial from the beginning—*Keshowdas*, 35 Cr.L.J. 205, 146 I.C. 936, A.I.R. 1933 Sind 390, 1933 Cr.C. 1430. In this case the questions as to whether the provisions of sec. 239, cls. (e) and (f) refer to persons who are receivers from receivers and whether they may be jointly tried with the thieves, were left undecided. See also *Dalsuk*, 25 Cr.L.J. 807, 81 I.C. 343, A.I.R. 1925 Cal. 248.

Two accused were charged with three offences of theft committed on three different dates. The third accused was charged under sec. 411, I. P. C., for having received property alleged to have been stolen on one of those dates and the fourth accused was charged under sec. 414, I. P. C., for having voluntarily assisted in disposing of the property alleged to have been stolen on another of those three dates. They were all tried jointly. Held that the trial was clearly illegal and the whole proceedings must be set aside—*Fasih-ud-Din*, 28 Cr.L.J. 459, 101 I.C. 491, 9 L.L.J. 100, A.I.R. 1927 Lah. 737.

There is nothing to prevent charges being added against the thief or receiver in cases where the thief and the receiver are being jointly tried under the provisions of this sub-clause, provided that the addition of such charges against one or other of them is permitted by other sections of the Cr. P. Code—*Mathuri*, 37 Cr.L.J. 794 (801), 163 I.C. 253, A.I.R. 1936 All 337, 1936 A.L.J. 518, 1936 Cr.C. 401.

781. Clause (f):—The object of this clause and the meaning of the words "possession of which has been transferred by one offence" have been thus explained by Mr. Tonkinson during the debate in the Legislative Assembly "Take a concrete example A is a cattle-thief; two cattle are stolen; B is the dishonest receiver to whom A has passed on one of the cattle; C is the dishonest butcher who knows the cattle to have been stolen and assists in their concealment by slaughtering the other. Well, if A is present, A, B and C can all be tried together under clause (e). If A has disappeared, then this is not possible and the provisions of clause (f) are required. The possession of these cattle has been transferred by one offence, the original offence is theft. One person has later committed an offence under sec. 411, I. P. C., and another person has committed an offence under sec. 414, I. P. C. The two cattle were stolen at the same time, that is one offence"—*Legislative Assembly Debates*, 6th February 1923, page 1922. By this clause, the ruling in *Kumudini Kanta*, 28 Cal 104 is rendered obsolete.

If more than one offence of theft has been committed in respect of certain property which could be designated as stolen property within the meaning of sec. 410, I. P. C., then the persons in possession of such stolen property which has been secured by means of the commission of several offences of theft or robbery, etc., cannot be tried jointly under this clause—*Bhaggan*, 36 Cr.L.J. 602, 154 I.C. 901, 1935 O.W.N. 408, A.I.R. 1935 Oudh 327, 1935 O.L.R. 210. But see *Supdt. & Rem. of Legal Affairs, Bengal v. Raghulal*, cited in Note 777.

The only offences mentioned in this clause are offences under secs. 411 and 414, I. P. C.; and the provisions of this clause cannot be extended by analogy to a trial of persons accused of offences other than those specifically mentioned herein. Therefore, the joint trial of two accused both charged under sec. 412, I. P. C., is illegal—*Behari*, 12 O.L.J. 339, 26 Cr.L.J. 1291, 89 I.C. 155.

Receivers of property stolen at one theft can be tried jointly, even though the stolen articles were received by them at different times—*Guljama*, 6 Pat 583, 28 Cr.L.J. 962, 105 I.C. 674, A.I.R. 1928 Pat 38; *Shakur*, 36 Cr.L.J. 1206, 157 I.C. 562, 1935 O.W.N. 911; *Lakha Amra*, 34 Bom.L.R. 301, Ind. Rul. 1932 Bom. 231, 137 I.C. 146, 33 Cr.L.J. 294, A.I.R. 1932 Bom. 201, 1932 Bom. 305 (306). There is an express direction in the Code as to which persons may be tried jointly if this can be done without prejudice and in the absence of any evidence bringing the case under the provisions of sec. 239 (f), Cr. P. C., the Magistrate has no jurisdiction to try those persons jointly. The disregard of an express provision of law as to the mode of trial is not a mere irregularity such as can be remedied by sec. 537, Cr. P. Code. Where, therefore, there is no proof that the stolen articles were the proceeds of the same theft, persons charged with dishonestly receiving and retaining them cannot be jointly tried—*Ram Khelwan Kahar v. Emp.*,

39 Cr.L.J. 739, 176 I.C. 525, A.I.R. 1938 Cal. 525, 42 C.W.N. 729, 11 R.C. 113. But see *Jethalal*, 29 Bom. 449, 2 Cr.L.J. 480, 7 Bom.L.R. 527, 1932 Cr.C. 305 (306). The following cases may arise when stolen property is found in the possession of different receivers; (a) there may be one theft and the several receivers may have received the property jointly, *i.e.*, at one and the same time; (b) there may be one theft and the several receivers may have received the property at different times; (c) there may be two or more thefts and the several receivers may have received the property jointly; (d) there may be two or more thefts and the several receivers may have received the property at different times. Now, in cases (a) and (c) a joint trial is clearly permissible, because the property was received jointly, whether there was one or more than one theft. In case (d), a joint trial is illegal, because there is no community of purpose between the receivers. In case (b) a joint trial is permitted by clause (f) of sec. 239. This clause practically declares that the different acts of receipts are one and the same transaction, if the transfer of possession from the owner to the thief was made by one and the same act (*i.e.*, if the articles were stolen at one theft). The fact that the articles were received by the receivers at different times is immaterial; the words "possession of which has been transferred by one offence" refer to the transfer of possession from the true owner to the thief and not to the transfer of possession from the thief to the receivers"—*per* Mullick, J., in *Guljanja*, *supra*. See Note 746.

Where six cattle were stolen from a grazing ground of which two were found in the accused's possession, he should not be charged, tried and convicted in two separate trials, merely because the two bullocks found in his possession belong to two separate owners—*Nga Po E*, A.I.R. 1936 Rang 94, 37 Cr.L.J. 530, 162 I.C. 137, 1936 Cr.C. 118.

782. Clause (g):—A person who passes counterfeit coins and another who is in possession of them can be tried jointly—*Prasanna*, 31 Cal 1007. A was charged under sec. 240, I. P. C., for uttering a counterfeit coin at Jullundur, B under sec. 243, I. P. C., for being in possession of counterfeit coins at Jullundur knowing them to be counterfeits of King's coin, and C, who was in Delhi, under secs. 240, 243 and 109, I. P. Code. There was no evidence of conspiracy or as to the passing of coins by C. *Held* that under these circumstances the offences for which these three persons were tried together did not form the same transaction and their joint trial was illegal—*Abdul Hamid*, 34 Cr.L.J. 1253, 146 I.C. 261, A.I.R. 1933 Lah. 228, 1933 Cr.C. 348.

783. Separate trial:—A joint trial is not compulsory under this section; the Magistrate has a discretion to proceed jointly or *separately* against the accused persons—*Govinda*, 16 N.L.R. 9, 21 Cr.L.J. 769. Though the offences are committed in the same transaction, still it is a question for the Court in the exercise of its discretion to say whether the accused should be tried together or *separately*—*Charu Chandra*, 38 C.L.J. 309, 25 Cr.L.J. 294, 76 I.C. 966. This section gives a judicial discretion to the Court to try the accused persons jointly or *separately*, and the manner in which the discretion should be exercised must depend upon the facts of each case—*Dwarka*, 19 C.W.N. 121, 16 Cr.L.J. 348. Although a joint trial is allowed under the circumstances specified in this section, still it is the duty of the Magistrate to see that the accused are not prejudiced thereby. No joinder of charges should be allowed if it bewilders any of the accused in his defence or unduly prejudices him—*Ghulam*, 1 S.L.R. 73, 8 Cr.L.J. 191; *Pul'sanki*, 5 Mad. 20; *Alimuddi*, 52 Cal. 253, A.I.R. 1925 Cal 341, 85 I.C. 231, 26 Cr.L.J. 487, 29 C.W.N. 173; *Rash Behari Shaw*, A.I.R. 1936 Cal 753 (759), 41 C.W.N. 225, 1936 Cr.C. 1043. Thus, a number of murders and an offence of arson were committed. Though all the accused were present, there was evidence against some of them only as regards those offences. There was evidence against all the accused together only of conspiracy to commit murder. All the accused were charged with conspiracy, murder and arson, and the jury returned a verdict of guilty against all the accused on all the charges. *Held* that the jury were embarrassed and the accused were prejudiced in their defence—*Alimuddi*, *supra*. If the accused persons have acted independently and have made separate defences, the joint trial is illegal—*Porasu Nayako*, 2 Weir 303 (304).

Whenever the applicability of sec. 239 is doubtful, it is better that the accused should be tried separately.—*Samiullah*, 51 M.L.J. 692, 27 Cr.L.J. 1381

A separate trial is the rule, and joint trial is the exception, and it is for the prosecution to justify a joint trial.—*Durga Prasad*, 45 All 223 (224), 20 A.L.J. 981.

See also Note 774 under the heading "Case."

783A. Last Para—Applicability of section 234 to section 239:—

In several cases it has been held that the words "the former part of this chapter" occurring at the end of this section mean the part prior to the part headed "Joinder of charges," i.e., the part under the heading "Form of charges" (secs 221–232); therefore sec. 234 will not control the provisions of sec. 239.—*Bishambhar*, 2 O.W.N. 760, 90 I.C. 706, 26 Cr.L.J. 1602; *Po Mya*, 7 L.B.R. 272, 16 Cr.L.J. 44. Sections 234 and 239 are mutually exclusive. Section 239 as amended in 1923 contains a special provision in clause (c) that a joint trial is permitted to persons accused of more than one offence of the same kind (within the meaning of sec. 234) committed by them jointly within the period of 12 months. Obviously therefore when more persons than one are tried jointly, reference cannot be made to the provisions of the Code previous to sec. 239 (i.e., secs. 234 to 238). If that had been the intention, it would not have been necessary to state definitely that persons accused of more than one offence of the same kind within the meaning of sec. 234 committed by them jointly within 12 months may be tried together. Section 239 is self-contained and independent; the provisions of this section are to be considered exclusively without the help of secs 234 to 238.—*Janeshwar Das*, 51 All 544, 30 Cr.L.J. 687 (688, 689), 1929 A.L.J. 329, A.I.R. 1929 All. 202, 116 I.C. 789, following *Ram Prasad*, 19 A.L.J. 195, 22 Cr.L.J. 657, and *Sheo Saran*, 32 All 219. See also *Babulal Choukhani v. King-Emp.*, in Note 778. But in *Shanker*, 11 A.L.J. 188, 14 Cr.L.J. 116 (117), it has been held that sec. 239 is governed by secs. 234 and 235. Such a view has also been taken in *Nirajan*, 35 Cr.L.J. 1224, 150 I.C. 1140, 1934 A.L.J. 658, A.I.R. 1934 All. 811. See also Note 751.

240. When a charge containing more heads than one is framed against the same person, and when

Withdrawal of remaining charges on conviction on one of several charges.

a conviction has been had on one or more of them, the complainant, or the officer conducting the prosecution, may, with the consent of the Court, withdraw the remaining charge or charges, or the Court of its own accord may stay the inquiry into, or trial of, such charge or charges. Such withdrawal shall have the effect of an acquittal on such charge or charges, unless the conviction be set aside, in which case the said Court (subject to the order of the Court setting aside the conviction) may proceed with the inquiry into or trial of the charge or charges so withdrawn.

785. Scope of section:—This section applies where the accused is charged under several distinct heads for several distinct offences and not where several formal charges are drawn up against him.—*Amir Chand*, 1889 P.R. 21. Where the offence is one, but several charges are formally drawn up because the offence falls under several definitions (sec. 235 sub-sec. 2) or because there is doubt as to which offence was committed (sec. 236), this section does not apply, and the conviction of the accused on one of the charges necessarily makes the other charges nugatory.

Again, this section applies only to charges framed in the same case, and not to separate charges of distinct offences tried separately; and therefore the prosecution cannot, on conviction of the accused in one case, withdraw a charge against the accused in another case.—*Sadia*, Ratanlal 362; *Gorinda*, Ratanlal 977 (978).

This section applies when a conviction has been on *one or more* of the charges; but if the jury has found the accused guilty of *all the charges*, the Judge cannot convict the accused on one charge and drop the others; but he should convict on all the charges and pass concurrent sentences—*Nadharya*, Ratanlal 288. This case shows that a charge cannot be withdrawn *after the accused has been tried* on it and found guilty.

It is better to have too many charges than too few and once a charge has been framed, it should not be dropped until the conclusion of the trial unless on the face of it, it is wholly inappropriate or the trial is open to attack on the ground of misjoinder or multifariousness of charges. Where several accused persons were committed to the Court of Session, the first five under secs. 449, 396 and 302, I. P. C., the sixth and seventh under sec. 414, I. P. C., and the fourth also under sec. 75, I. P. C., and, when the case came before the Sessions Judge for hearing, he framed a new charge under secs. 302 and 34, I. P. C., against the first five accused, excluded from the trial the charge against the sixth and seventh accused reserving their case for a separate trial and did neither cancel nor take up for trial the charges under secs. 449 and 396, I. P. C., against the first five accused, *held* that the Sessions Judge ought to have recorded some order in respect of these charges and should not have left them in the air. He ought to have given reasons for not trying them; and he was not competent (under sec. 215) to quash the commitment, though he could (under sec. 240) stay the trial of some charges or allow them to be withdrawn on conviction being had on the murder charge: in that case the consequences set forth in sec. 240 would follow in the event of the conviction being set aside—*Sadasibo*, A.I.R. 1939 Pat. 35 (36), 18 Pat. 82, 1938 P.W.N. 754, 19 P.L.T. 801, 178 I.C. 130, 39 Cr.L.J. 997, 11 R.P. 215, 5 B.R. 53.

High Court's power to direct withdrawal :—Where the accused was charged with 10 offences of criminal breach of trust, in respect of 10 small sums, and the Sessions Judge convicted the accused on three only of the charges, the High Court on appeal approved of the Sessions Judge's action, and directed that no further proceedings should be taken against the accused in respect of the other offences—*Basiruddin*, 9 C.L.J. 257, 4 I.C. 48, 10 Cr.L.J. 482. The word 'Court' in this section does not mean only the trial Court, but includes every grade of Court including the Court of Revision. If the complainant withdraws the application for revision, the withdrawal amounts to a withdrawal of the charge, and the accused shall be acquitted—*Ghamandi v. Babu Lal*, 27 A.L.J. 1056, 1929 Cr.C. 491, A.I.R. 1929 All. 899, 119 I.C. 575, 30 Cr.L.J. 1089, 51 All. 977.

CHAPTER XX.

OF THE TRIAL OF SUMMONS-CASES BY MAGISTRATES.

786. This chapter deals only with the trial of summons cases; a warrant case cannot be tried under this chapter. If, however, a warrant case is joined with a summons-case, e.g., where two charges arising out of the same transaction are made against an accused person, one of which is a summons-case and the other a warrant case, the procedure should be as in a warrant case—*Raj Narain v. Lala Zamoli*, 11 Cal. 91; *Sobhanaran*, 39 Mad. 503; *Raghavalu v. Singaram*, 41 Mad. 727. But in such a case if the warrant case is not proved, the Magistrate may proceed with the summons-case according to the procedure laid down in this chapter and not under Chapter XXI—*Papadu*, 7 Mad. 454. See Notes 795 and 820.

Procedure in summons-cases.

241. The following procedure shall be observed by Magistrates in the trial of summons-cases,

242. When the accused appears or is brought before the Magistrate, the particulars of the offence of which he is accused shall be stated to him, and he shall be asked if he has any cause to show why he should not be convicted; but it shall not be necessary to frame a formal charge.

787. Particulars shall be stated to accused:—Omission to state to the accused the particulars of the offence with which he is charged amounts to an illegality vitiating the trial, and not a mere irregularity curable by sec. 537—*Gopal Krishna v. Mati Lal*, 54 Cal. 359, A.I.R. 1927 Cal. 196, 44 C.L.J. 575, 99 I.C. 411, 31 C.W.N. 167, 28 Cr.L.J. 155; *Ashita Ranjan*, 48 C.L.J. 92; *Bhubneshwar Prasad*, infra. But see *Lahani v. Ghosal*, 33 Cr.L.J. 938, 140 I.C. 113, 28 N.L.R. 163, Ind. Rul. 1932 Nag. 134, 1932 Cr.C. 678, A.I.R. 1932 Nag. 127 where it has held that the omission was a mere irregularity cured by secs. 535 and 537, Cr. P. C., when there is no suggestion of any failure of justice having been thereby occasioned. See also *Damdoo v. Harba*, 28 Cr.L.J. 511, 101 I.C. 895, A.I.R. 1927 Nag. 210. Sec. 242 does not say that the Magistrate shall make a record of what he stated to the accused in explaining the offence. It is sufficient if the proceedings show that he had orally explained to the accused what the offence was and asked him to show cause. Section 242 does not expressly state that a note should be made. Where no note was made, it is a mere irregularity, cured by secs. 535 and 537, Cr. P. C.—*Jagannath*, 36 Cr.L.J. 361, 153 I.C. 427, A.I.R. 1934 Nag. 258, 1934 Cr.C. 1297. It is not necessary to record the whole of the conversation that passed between the Magistrate and the accused but there must be some indication in the record as to what has been done. Where from the order sheet it appears that only the second part of this section has been complied with, if at all, that is, the accused was asked if he pleaded guilty to the charge or not and the accused pleaded not guilty and there is nothing in the record to indicate that the substance of the charge was explained to the accused which is required by the first part of this section, there has been no compliance with the provisions of this section although the Magistrate in his explanation says that the particulars of the offence were stated to the accused—*Bhubneshwar Prasad*, A.I.R. 1936 Pat. 501, 38 Cr.L.J. 22, 165 I.C. 844, 17 P.L.T. 609, 1936 Cr.C. 823, 3 B.R. 88, 9 R.P. 223. Where the Magistrate did not explain to the accused the particulars of the offence of which he was accused, but merely told him that he was accused of an offence under sec. 19 of the Burma Village Act, the trial was illegal—*Nga Sein*, (1922) 4 U.B.R. 127, A.I.R. 1923 Rang. 132.

In a summons-case omission to explain the particulars of an offence to the accused under sec. 242, Cr. P. C., and to ask him to show cause at that stage is not (in cases in which the accused is defended and pleads not guilty) an illegality vitiating the trial provided of course that no prejudice can be shown to have been caused to the accused and that the accused has in due course been examined under sec. 342, Cr. P. C. This does not mean that it does not matter whether the provisions of sec. 242 are complied with or not; they ought to be complied with and Magistrates should take care that the record on its face establishes that there has been a full compliance with the law only because no Magistrate can tell what will be the opinion of a superior Court as to whether the accused has been prejudiced by the omission in the particular case—*Sukhdeo Prasad v. Emp.*, A.I.R. 1938 Pat. 55 (57), 16 Pat. 97, 18 P.L.T. 370, 1937 P.W.N. 353, 173 I.C. 189, 39 Cr.L.J. 321, 4 B.R. 240.

Where under sec. 242, Cr. P. C., the particulars of the offence of which the petitioner was accused were thus stated "Cruelty to a milch buffalo by performing *phooka* upon it (by thrusting hand in the private part of the animal) at the time of milking. . . . Ill-treating a she-buffalo by cruelty and mercilessly beating and otherwise ill-treating . . ." and the Magistrate came to the conclusion that it was not proved that the petitioner actually performed *phooka* or otherwise ill-treated the animal but found that

the petitioner was the owner of the animal and that while it was in his possession and under his control *phooka* was performed upon it and convicted him under sec. 6 of the Bengal Cruelty to Animals Act (I of 1920), held that in the interest of justice it is necessary that the accused should be retried for the offence of which he has been convicted and that in that trial the accusation under sec. 242, Cr. P. C., should make it clear that he is called upon to show cause why he should not be convicted by reason of the fact that he is the owner of the animal upon which the *phooka* was performed—*Dargahi Mah v. Emp.*, 44 C.W.N. 398.

788. Charge:—Although it is not necessary to frame a formal charge in a summons-case, still the provisions of sec. 233 as to joinder of charges apply to summons-cases as well; therefore, a joint trial and conviction of several accused for several distinct offences in a summons-case is illegal under sec. 233—*San Dun*, 3 L.B.R. 52, 2 Cr.L.J. 739 (744) (F.B.). See also *Upendra Nath*, 41 Cal. 694 cited in Note 744 under sec. 233. In fact, the concluding words of this section ("it shall not be necessary to frame a formal charge") appear to contemplate that in a summons trial *there is a charge* of an offence, although it is not necessary to embody it in writing in accordance with the provisions of secs 221, 222 and 223—*San Dun*, supra. The intimation to the accused of the particulars of the offence takes the place of a formal charge—*Manna*, 9 N.L.R. 42, 14 Cr.L.J. 230 (231).

Although it is not incumbent upon a Magistrate to frame a charge against an accused in a case which is being tried as a summons-case, it would be proper if the Magistrate actually frames a charge or summarises the ingredients of the offence (and reads them over to the accused before the trial begins) which the accused are required to meet in the case, especially in a prosecution under the Sugar Excise Duty Act (XIV of 1934) which is of a very recent date—*Behari Ram v. Emp.*, 39 Cr.L.J. 610 (612), 19 P.L.T. 415, 1938 P.W.N. 426, 175 I.C. 531, 4 B.R. 602, 10 R.P. 634, A.I.R. 1938 Pat. 440.

When a summons-case is tried jointly with a warrant case, the procedure of a warrant case has to be followed, and a charge has to be drawn up not only for the warrant case but the summons case also. Where, therefore, the accused was summoned for offences under secs 143 and 379, I. P. C., but only a charge for an offence under sec. 379, I. P. C., was drawn up, a conviction under sec. 143 was set aside for the absence of a charge under that section—*Hossein v. Kalu*, 29 Cal. 481 (482).

243. If the accused admits that he has committed the offence of which he is accused, his admission shall be recorded as nearly as possible in the words used by him; and, if he shows no sufficient cause why he should not be convicted, the Magistrate *may* convict him accordingly.

789. Change—Conviction on plea:—The word 'may' has been substituted for the word 'shall,' by sec. 66 of the Cr. P. C. Amendment Act, XVIII of 1923. Under the old law the Magistrate was *bound* to convict the accused if the latter pleaded guilty and if there was nothing to show that the plea was not unreserved or voluntary—*Aslam*, 8 S.L.R. 213, 16 Cr.L.J. 283. If the accused pleaded guilty, the Magistrate was bound to convict him; he had no power to discharge the accused on the ground that his criminal intention was wanting—*Nataraja*, 2 Cr. L.J. 468 (469), U.B.R. 1905 Cr.P.C. 37.

Under the present amendment, the Magistrate is no longer *bound* to convict the accused on his own plea. "This amendment gives the Magistrate a *discretion*, as to convicting an accused who pleads guilty in a summons case, and the Court is thus able to refuse to accept a plea of guilty which it believes to be untrue."—*Statement of Objects and Reasons* (1914).

The Magistrate should not record one admission for a number of accused persons whereas the section requires the words of each as nearly as possible to be recorded—*Tejmal*, 34 Cr.L.J. 67 (68), 140 I.C. 697, 26 S.L.R. 345, A.I.R. 1932 Sind 211, 1932 Cr.C. 902, Ind Rul. 1933 Sind 16

In an ordinary criminal case, especially in a summons case, it is open to a Court to accept and act upon a plea of guilty. It would be contrary to commonsense and to the universal practice if a Court were not to act upon that plea, and a Court cannot be compelled, after a plea of guilty which it is willing to accept, to waste public time over an elaborate inquiry—*Kishan Narain*, 50 All. 599, 30 Cr.L.J. 6 (7).

Sections 243 and 244:—The Court has got discretion to accept the plea of guilty and convict the accused, or not to accept it. If he does not accept the plea, he must satisfy himself that the evidence which he hears (under sec. 244) justifies conviction, or else he should record an order of acquittal. If he hears evidence, and it does not prove the facts of the charge, it is not open to him to go back and accept the plea of guilty and convict the accused. On the other hand, if the Court decides to accept the plea of guilty under sec. 243 and convict, he may call evidence to acquaint himself with the facts to enable him to arrive at a proper conclusion *as to the sentence* to be passed. But this is a different thing from hearing evidence to see whether the accused was guilty or not—*Janardan Kashnath*, 33 Bom.L.R. 340, 32 Cr.L.J. 719 (720), 131 I.C. 473, 1931 Cr.C. 339, A.I.R. 1931 Bom. 195 (F.B.) And so, where it is not clear from the record whether the plea of guilty was accepted by the Court or not, and the Magistrate recorded some evidence, and in the result found the accused guilty and convicted him, there is no doubt that the Magistrate did not accept the plea of guilty, and proceeded under secs 244 and 245—*Ibid* (at p 721)

790. Admission of accused:—Where the accused said that he committed the act on account of ignorance and begged to be excused, *held* that this did not amount to an admission that he had committed an offence, and a conviction based thereon was wrong—*Gulam Raza*, 25 Cr.L.J. 707, A.I.R. 1925 Lah 153, 81 I.C. 195. Admissions of truth of the allegations on which a charge is based cannot legally amount to an admission on the part of accused that he has committed the offence of which he is accused—*Kanhayalal*, 32 Cr.L.J. 1132, 134 I.C. 261, 14 N.L.J. 39, 1931 Cr.C. 452, A.I.R. 1931 Nag. 100

Courts should not be astute to construe technical words inadvertently used by accused persons not trained to the law against them, but should look to the statement as a whole and place a fair and liberal construction on it after giving the benefit of every reasonable doubt to the accused—*Homnaram*, 35 Cr.L.J. 696, 148 I.C. 541, 1934 Cr.C. 272, A.I.R. 1934 Nag 65. See also *Gulabsha*, 17 N.L.J. 250

Where the personal attendance of the accused has been dispensed with and permission has been given to him under sec 205 to appear by *pleader*, the latter can, under secs 242 and 243, make the necessary answers and plead guilty or not guilty on behalf of the accused—*Dorabshah*, 50 Bom 250, 27 Cr.L.J. 440 (see this case cited in Note 691 under sec. 205). But where the personal attendance of the accused has not been dispensed with and he is present in Court, the Magistrate must call upon the accused to say with his own lips whether he admits or denies the truth of the complaint; a plea of guilty made by the pleader on behalf of the accused cannot be acted upon—*Sursing*, 6 Bom.L.R. 861, 1 Cr.L.J. 939, *Municipal Board v Tulshi Ram*, 1 O.W.N. 495, 26 Cr.L.J. 179.

The Legislature requires that the admission shall be recorded *as nearly as possible in the words used by the accused*, because the right of appeal depends upon whether he really pleaded guilty or not—*Md Hanif*, 1889 A.W.N. 81. See also *Ganes v. Cor. of Calcutta*, 34 Cr.L.J. 250, 141 I.C. 834, 36 C.W.N. 182, A.I.R. 1933 Cal. 117, 1933 Cr.C. 144, Ind Rul 1933 Cal 207. Where an accused person makes an exculpatory statement before the framing of a charge, the Magistrate should take down the plea in the form of question and answer, and in the exact words used by the accused in answer to the charge—*Abdul Hosein*, 5 Bom.L.R. 999. Recording one admission for

a number of accused persons is bad. The admission of *each* person should be separately recorded, and in his own words—*Tejmal*, 26 S.L.R. 345, 1932 Cr.C. 902 (903), 140 I.C. 697, A.I.R. 1932 Sind 211.

The admission of the accused should be recorded at once, at the time of the trial, and not afterwards from the rough notes nor from the Magistrate's memory—*Eragadu*, 15 Mad 83.

244. (1) *If the Magistrate does not convict the accused*

Procedure when no *under the preceding section*, or if the such admission is made. accused does not make such admission, the Magistrate shall proceed to hear the complainant (if any), and take all such evidence as may be produced in support of the prosecution, and also to hear the accused and take all such evidence as he produces in his defence:

Provided that the Magistrate shall not be bound to hear any person as complainant in any case in which the complaint has been made by a Court.

(2) The Magistrate may, if he thinks fit, on the application of the complainant or accused, issue process to compel the attendance of any witness or the production of any document or other thing.

(2) The Magistrate may, if he thinks fit, on the application of the complainant or accused, issue a *summons to any witness directing him to attend or to produce any document or other thing.*

(3) The Magistrate may, before summoning any witness on such application, require that his reasonable expenses, incurred in attending for the purposes of the trial, be deposited in Court.

Change:—This section has been amended by section 67 of the Cr. P. C. Amendment Act, XVIII of 1932. The italicised words at the beginning of the section have been added as consequential to the amendment made in sec. 243. The proviso has been introduced "to provide for the case where a complaint has been made by a Court, and we have made a similar amendment in section 252"—*Report of the Joint Committee* (1922). In sub-sec. (2) the word 'summons' has been substituted for 'process'; for reasons see Note 792 below.

791. Magistrate's duty to hear complainant, witnesses, etc.:—

If a Magistrate adopts the procedure prescribed by this section on the footing that there was no admission of guilty on the part of the accused person, the Magistrate is not competent to take a further plea of guilty from the accused person, and relieve himself of the duty of examining the prosecution witnesses—*Lalji Ram*, A.I.R. 1928 Cal 243 (244). If the accused does not admit the offence, the Magistrate is bound to hear the complainant and his witnesses; and he is not competent to acquit the accused without taking the evidence in support of the prosecution—*Kesri v. Muhammad Bakhsh*, 18 All. 221 (223); *Varadarajulu*, A.I.R. 1932 Mad. 25, 1931 Cr.C. 5, 1931 M.W.N. 1050, 35 M.L.W. 140, 33 Cr.L.J. 274, 136 I.C. 314. If the complainant's witnesses have been summoned, the Magistrate is not at liberty to stop the case whenever he likes, but is bound to examine those witnesses: he is not entitled to acquit the accused on a consideration of the complainant's statement alone—*Sinnai Goundan*, 20 Mad 383. If the complainant declines to be examined, it is the duty of the Magistrate to proceed to take the evidence of his other witnesses before dismissing

the complaint, although, in any event, a strong preliminary presumption against the truth of the complainant's case would arise from his continuous refusal to allow himself to be examined. An order of acquittal passed under sec. 245 (1) without so examining the other witnesses is a wrong order—*Damdoo v. Harba*, 28 Cr.L.J. 511 (Nag), 101 I.C. 895.

This section merely says that the Magistrate shall *hear* the complainant; it does say that the complainant is to be *examined*. Non-examination of the complainant does not vitiate the proceedings—*Sarafdi*, 24 C.W.N. 199 (200). But see *Rex v. Krishnan* in Note 822.

Moreover, the Magistrate is bound to hear the accused and his witnesses, *i.e.*, all the witnesses that are produced by the accused. The Magistrate has no discretion in this matter—*Ameer Chand*, 13 W.R. 63. The parties have an undoubted right to examine their witnesses and the Magistrate can curtail the number of witnesses only on the ground that they are unnecessary and that their examination will delay and probably defeat the ends of justice—*Biswanath v. Shivanand*, 2 P.L.T. 330, 61 I.C. 718, 22 Cr.L.J. 430.

There has been no compliance with the provision of sec. 244, Cr. P. C., where the Magistrate has in effect found the accused guilty upon the report of an Honorary Magistrate as to what the accused had told him—*Munshi Mian*, 30 Cr.L.J. 517, 115 I.C. 690, Ind. Rul. 1929 Pat 242, 10 P.L.T. 523, AIR 1929 Pat. 406.

The Magistrate must base his decision on the evidence produced on either side in Court; he cannot rely on statements made to him out of Court—*Sahadeb*, 14 Bom. 572. The Magistrate should not decide a case on the special oath of the complainant at the suggestion of the accused's father—*Tirloki*, 28 Cr.L.J. 301, 100 I.C. 381, AIR 1927 All 742.

Cross-examination—Sec 244 does not contain any express provision for cross-examination. Cross-examination must certainly be allowed at some stage, and as no express provision is made for exercising this right in the trial of summons case, the right is exercisable under sec 244, Cr. P. C.—*Lachmi Narain*, AIR 1931 All. 621 (623), 1931 Cr.C 973, 1932 A.L.J. 5. In summons cases the accused has no right to postpone the cross-examination of any prosecution witness, as in the case of trial of a warrant case. But if the cross-examination was postponed in accordance with the direction of the Magistrate, he is bound to give further opportunity to the accused to cross-examine the witness. Otherwise the evidence of such witness will not be legally admissible—*Parmeshwar*, 3 P.L.T. 347, 23 Cr.L.J. 440, AIR 1922 Pat. 296.

792. Issue of summons:—If the complainant or the accused thinks that any witness is not likely to appear without summons, he should apply beforehand to the Magistrate for summons to enforce his attendance—*Chedee Koongra*, 14 W.R. 76. When such application is made, the Magistrate must either grant or refuse the application; he cannot simply 'file' it—*Bhomar v. Digambar*, 6 C.W.N. 548 (549). No doubt, under this section, the Magistrate has the discretion to refuse to summon defence witnesses but it cannot be held that such an application can be completely ignored—*Vidya Parkash v. Emp.*, AIR 1910 Lah 58, 41 P.L.R. 804, 41 Cr.L.J. 340, 186 I.C. 575.

The Magistrate has a discretion to refuse to summon any of the witnesses named by the accused—*Mangal*, 36 All. 13 (15). Where a complainant mentioned the name of several witnesses but could only produce two of them, the Magistrate could decide the case on the evidence of the two witnesses alone—*Notobar*, 15 W.R. 87; and was not bound to issue summons to the other witnesses—*Anonymous*, 4 M.H.C.R. App 29.

The old sub-section (2) contained the words "process to compel the attendance of any witness". And so, where a summons was already issued to a witness but he did not appear in obedience to the summons, it was held under the old law that the Magistrate was bound to issue further process (warrant or fresh summons) against that witness to *compel* his attendance, and had *no discretion to refuse* to issue further process—*Daulat v. Brinda*, 30 Cal. 121 (122); *Bhomar v. Digambar*, 6 C.W.N. 548.

(550). Those words have now been substituted by the words 'a summons to any witness directing him to attend, etc.' "This, we think, will make section 90 clearly applicable, which is, in our opinion, all that is required"—*Report of the Select Committee* (1916).

Under the present section, evidently the Magistrate cannot *compel* a witness to appear before him, if the witness refuses to appear in obedience to the summons. The Magistrate is not *bound* to issue fresh summons; it is in his *discretion* to issue fresh summons if he likes, but this section does not make it obligatory on him to do so. If the witness does not appear, he may be liable for disobedience of the summons, but the complainant or accused is not entitled to ask the Court as a matter of right to compel the attendance of any witness who does not care to attend in obedience to the summons—*Selvamuthu v. Chinnappan*, 27 Cr.L.J. 76, 91 I.C. 252, A.I.R. 1926 Mad. 361, distinguishing *Daulat v. Brinda*, 30 Cal 121 on the basis of the changes introduced in sub-clause (2) of this section. But the principles laid down in *Daulat v. Brinda* were quoted with approval and were followed in *Ayab Lal Rai v. Bhagawan Sahu*, 34 Cr.L.J. 1203, 146 I.C. 54, 14 P.L.T. 453, 1933 Cr.C. 1038, A.I.R. 1933 Pat. 494 without any discussion of the effect of the changes in sub-sec. (2) and without considering the decision arrived at in *Selvamuthu v. Chinnappan*, *supra*.

The principle of sec. 257, Cr. P. C., applies to a summons case. When the Magistrate summoned prosecution witnesses as defence witnesses, he should allow the defence to cross-examine them who were in Court without dictating the terms upon which the examination of those witnesses should be conducted—*Rameshwar*, 29 Cr.L.J. 308, 107 I.C. 846, A.I.R. 1928 Pat 253.

793. Sub-section (3)—Payment of process fee:—If the complainant fails to deposit fees for summoning witnesses, the Magistrate must deal with the case on such evidence as he may have before him, but should not dismiss the complaint—*Korapulu v. Monappa*, 5 Mad. 160.

If the accused fails to deposit process fees, the Magistrate may refuse to issue summons, but this order of refusal must be sparingly passed; and such order would be improper in a case where the accused is unable or unwilling to deposit the money, and the result is that he is convicted without his witnesses being heard, especially if the case is one in which a severe sentence is passed—*Qadu*, 7 P.R. 1898.

245. (1) If the Magistrate upon taking the evidence referred to in section 244 and such further evidence (if any) as he may, of his own motion, cause to be produced, and (if he thinks fit) examining the accused, finds the accused not guilty, he shall record an order of acquittal.

(2) *Where the Magistrate does not proceed in accordance with the provisions of section 349 or section 562, he shall, if he finds the accused guilty, pass sentence upon him according to law.*

Change:—The italicised words in sub-section (2) have been added by sec. 68 of the Cr. P. C. Amendment Act, XVIII of 1923. This amendment is merely one of drafting. A similar amendment has been made in sec. 258 (2) and sec. 306 (2).

794. Acquittal—Discharge:—A Magistrate who does not find the accused guilty, must record an order of acquittal. No order of *discharge* can be passed under this section—*Amir Khan*, 1900 P.R. 19; *Nataraja*, 2 Cr.L.J. 468 (469). Even if he styles his order as an order of discharge, the discharge will amount to an acquittal, for no other order is contemplated in summons cases. That being so, the Sessions Judge

has no power to take action under sec 437 (now sec 436) against a person alleged to be discharged—*Venkataramayyer*, 8 M.L.T. 78, 11 Cr.L.J. 360, 6 I.C. 385

If, on the contrary, the Magistrate tried a warrant case as a summons case without framing a charge, dismissed the case and passed an order of acquittal, the so-called acquittal would operate as a discharge under sec. 253, so that the District Magistrate could make an order for further inquiry under sec. 437 (now sec 436)—*Jadu*, 1886 A.W.N. 260

Compensation to accused :—When the Magistrate acquits an accused under this section on the ground that the complaint was vexatious, he can under sec 250 direct the complainant to pay compensation to the accused—*Pandu*, 10 Bom 199; *Number v. Ambu*, 5 Mad. 381. Even, if the Magistrate tries a warrant case as a summons case and acquits the accused, he can award compensation.

"Shall pass sentence" —If the Magistrate convicts the accused, he is bound to pass some sentence (at least a nominal one)—*Anonymous*, 2 Weir 305 (306), 4 M.H.C.R. App. 66; *Hanmant*, 2 Bom L.R. 611; but not if the Magistrate proceeds under sec. 349 or 562.

246. A Magistrate may, under section 243 or section 245,

Finding not limited by complaint or summons. convict the accused of any offence triable under this Chapter which from the facts admitted or proved he appears to have committed, whatever may be the nature of the complaint or summons.

795. Scope of section:—This section enables the Magistrate to proceed in regard to any other offence *prima facie* established by the evidence for the prosecution. It is not necessary that the case started by the complainant must be the one which the Court should find proved, before it arrives at a conclusion of the guilt of the accused. The Court is not bound by all the statements of the complainant. Its duty is to find out the truth in the midst of the conflicting evidence—*Somnath*, 14 Bom L.R. 135, 13 Cr.L.J. 300. The rule is, that a Magistrate is not bound to adhere to any particular section which may happen to be mentioned by the complainant in his complaint, but may apply any section of the law which he thinks applicable to the case, so long as the parties are not misled and the proper procedure is observed—*Kalidass v. Mohendra*, 12 W.R. 40 (41). But this section does not mean that the accused in a summons case can be convicted of an offence alleged to have been committed on a date to which no reference has been made in the complaint or summons—*N. K. Sarkar v. Howrah Municipality*, 22 Cr.L.J. 559 (Cal.). When the Magistrate thinks that other offences have been committed, it is not necessary to reopen the trial or to follow the procedure of secs. 243 and 244. Such a procedure would necessitate the rehearing of all the evidence in the same trial and is clearly opposed to the intention of the Legislature—*Dasarath*, 36 Cal 859, 4 I.C. 352; *Mt Nge Soe*, 41 Cr.L.J. 541, 188 I.C. 72, A.I.R. 1940 Rang 109, 1940 Rang 219. See also *Mudoosoodun Sha v. Hari Dass Dass*, 2 W.R. 40 (Cr.), and *Kalidass v. Mohendra*, 12 W.R. 40 (Cr.), 5 Beng L.R. App 82n

This section applies even in the absence of a formal complaint in the first evidence. The evidence of the complainant which evinces a desire on his part that the accused should be proceeded against may be treated as a complaint—*Framji*, 28 Bom L.R. 291, 27 Cr.L.J. 496, 93 I.C. 896.

'Triable under this chapter' means any offence triable under the procedure laid down for the trial of summons cases and although this section does not contain any explicit prohibition of converting the proceedings before a Magistrate for a summons case into a warrant case and of framing a charge against the accused for both an offence triable as a warrant and an offence triable as summons case, it is quite obvious that such prohibition is implied in it and that once a Magistrate has taken cognizance of a summons case, he cannot frame a charge and convict an accused person for anything but an offence triable as a summons case—*Rajaratnam Pillai*, 37 Cr.L.J. 501, 161 I.C.

846, 1936 M.W.N. 181, 70 M.L.J. 340, 43 M.L.W. 367, A.I.R. 1936 Mad. 341, 59 Mad. 442, 1936 Cr.C. 384, 8 R.M. 880. This case has been dissented from in *K. V. Venkata Ramanier*, 39 Cr.L.J. 958, 177 I.C. 814, A.I.R. 1938 Mad. 815, 47 M.L.W. 739, 1938 M.W.N. 589, (1938) 2 M.L.J. 360, I.L.R. 1938 Mad. 814, 11 R.M. 385 where it has been laid down that if a Magistrate begins a trial as a summons case and then finds that an offence triable only under warrant case procedure has been committed, he is bound to apply warrant case procedure thenceforward and he is not in any way disqualified from proceeding with the trial.

247. If the summons has been issued on complaint, and upon the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear, the Magistrate shall, notwithstanding anything hereinbefore contained, acquit the accused, unless for some reason he thinks proper to adjourn the hearing of the case to some other day:

Provided that, where the complainant is a public servant and his personal attendance is not required, the Magistrate may dispense with his attendance, and proceed with the case.

795A. Scope:—The principle underlying this section appears to be that from the first day on which the case is fixed for appearance of the accused and at all subsequent adjourned hearings of the case during which the Court has to take some step or other in the progress of the trial, the presence of the complainant before the Court is insisted on and if he absents himself on any such hearing, his complaint is liable to be dismissed and the accused acquitted unless the Court in its discretion for certain reasons excuses the absence and adjourns the hearing of the case—*Laxmi Prasad*, A.I.R. 1940 Nag. 357 (359), 1940 N.L.J. 399, 190 I.C. 467.

This section does not apply to a case instituted upon a complaint made by a public servant under sec. 195; in such a case the Magistrate cannot dismiss the complaint for default of the complainant to appear—*Ramchandra*, Ratanlal 137 (138). See proviso.

This section applies even when the Magistrate wrongly adopts the warrant case procedure—*Chidambaram v. Ramaswamy*, 1933 M.W.N. 1278.

This section does not apply unless the case is instituted upon a complaint. Under sec. 47 of the U. P. Act II of 1916, it is the Magistrate who takes cognizance of the offence upon information received. So the case is not one instituted on a complaint, and sec. 247 of this Code has no application. Inspite of non-appearance of the complainant, the proceedings must continue—*Basanti v. Maqsood*, 26 Cr.L.J. 170, 83 I.C. 730, A.I.R. 1924 All. 528.

This section does not apply to proceedings under sec. 107, because those proceedings do not amount to a trial of an accused for any offence. Consequently, the non-appearance of the complainant does not enable the Magistrate to acquit the person proceeded against. The proper order to be passed is an order of discharge under sec. 119 on the ground that in the absence of an evidence on behalf of the complainant, it is not proved that the person proceeded against should execute a bond—*Asrafali v. Nasu Sarkar*, 31 C.W.N. 388, 28 Cr.L.J. 479 (480).

This section does not refer to the day upon which the accused appears, but to the day appointed for the appearance of the accused, showing that it is not necessary even that the accused should appear in order to attract the provisions of this section—*Shankar v. Dattatraya*, 53 Bom. 693; *Bhupati v. Amio*, 62 C.L.J. 240 (243), A.I.R. 1935 Cal. 491, 39 C.W.N. 919, 62 Cal. 1119, 36 Cr.L.J. 1238, 157 I.C. 670, 1935 Cr.C. 883.

Where the Magistrate framed a charge against the accused under sec. 427, I. P. C.,

held a local enquiry without any notice to the parties, came to the conclusion that the offence was under sec. 426, I. P. C., evidently upon the basis of the local enquiry, and acquitted the accused under sec. 247, Cr. P. C., because the complainant did not happen to be present on the date on which the Magistrate was to pronounce judgment, the cumulative effect of all these was that the last order, which was an order of acquittal under sec. 247, Cr. P. C., was vitiated and therefore it must be set aside—*Bankim Behari Sen v. Yusuf Mian*, 40 Cr.L.J. 514, 180 I.C. 858, AIR 1939 Pat. 186, 19 P.L.T. 918.

796. 'Does not appear':—The appearance of the complainant's Vakil is not appearance of the complainant within the meaning of this section, unless the Court has dispensed with his personal attendance and has specially allowed him to appear by a pleader—*Ponnaganti v. Kotayyan*, 2 Weir 309; *Nagarambili v. Jagannatha*, 49 Mad 883, 27 Cr.L.J. 988 (1989). See also *Pirag Lal v. Rustam Singh*, 37 Cr.L.J. 1028, 164 I.C. 784, A.I.R. 1936 All. 658, 1936 A.L.J. 954.

Where the complainant went to England it would be unfair to keep the case pending till his return, especially when the case was one under sec. 504, I. P. C.—*Maula Bakhsh v. Marshall*, 27 Cr.L.J. 1022, 96 I.C. 878, AIR 1926 Lah. 628

If the complainant does not appear at the time of hearing, the Court is not bound to wait for the complainant till the Court closes for the day—*Kuttiyali v. Pari Mahai*, 7 Mad. 356. It is not sufficient if the complainant appears at any time during the day; he should be present at the time when the case is called on for hearing—*Nagarambili v. Jagannatha*, supra. The Magistrate is empowered to dismiss the complaint if the complainant does not appear at the time when the case is called on for hearing, even though he appears very shortly after the order of dismissal is passed—*Rangasami v. Narasimhulu*, 7 Mad 213, *Nagarambili v. Jagannatha*, supra. A Court has no right to take up any case after the prescribed Court hours without the consent of the parties—*Gulai*, 29 Cr.L.J. 299, 107 I.C. 827, 9 P.L.T. 344, AIR 1928 Pat. 277

Section 247 allows a discretion and sec 259 requires that a discretion should be exercised. It is not contemplated that the order of acquittal or discharge should be a mere matter of routine and follow automatically upon the absence of the complainant—*Jamnabai*, 35 Cr.L.J. 1139 (1141), 150 I.C. 858, 36 Bom.L.R. 105, AIR 1934 Bom. 130, 1934 Cr.C. 475. There are only two courses open to the Magistrate when the complainant does not attend in person. The more ordinary course is to acquit the accused. The exceptional course is, if he has any particular reason for doing so, to adjourn the hearing of the case to some other day—*Pirag Lal v. Rustam Singh*, 37 Cr.L.J. 1028, 164 I.C. 784, A.I.R. 1936 All. 658, 1936 A.L.J. 954. Although a Magistrate has power to dismiss the complaint for default of the complainant's appearance, he should exercise his power with a reasonable discretion. He should not dismiss the complaint where the non-appearance of the complainant was due to circumstances beyond his control, e.g., a heavy flood which cut off all communications—*Tazoonissa v. Wassil*, 24 W.R. 64; *Madhoo*, 5 W.R. 51; or when the case was transferred from the Magistrate to another, and the complainant was present in the Court premises, but not having had notice of the transfer did not appear before the particular Magistrate who had charge of the case; but appeared in the previous Court—*Ramanath*, 13 C.L.R. 303; *Good v. Gunpat*, 47 Cal 147 (152); *Etim Haji v. Hamid*, 24 C.L.J. 444, 18 Cr.L.J. 104 (105); or where the complainant had been kept out of the way by the action of the accused in getting a constable to arrest him on a false charge—*Sinna Goundan*, 38 Mad 1028; or where the case was called on for hearing on a date not fixed for hearing and the complainant was necessarily absent—*Achambil v. Mahatap*, 42 Cal 365, 18 C.W.N. 1180, 16 Cr.L.J. 148 (149), A.I.R. 1915 Cal. 119, 27 I.C. 212, *Mahadeo*, AIR. 1934 All. 1025, 4 A.W.R. 794, 1934 A.L.J. 1061; or where the complainant was in jail and could not, therefore appear—*Virbhadra*, Ratanlal 59; or where the complainant was exempted from appearance and her counsel missed the motor connection—*Fatima v. Abdul Hamid*, 35 Cr.L.J. 1504, 151 I.C. 1096, AIR. 1934 Lah. 195, 1934 Cr.C. 436; or where the case was taken up not for hearing but for fixing a new date and the complainant was absent—*Jamnabai*,

35 Cr.L.J. 1139, 150 I.C. 858, 36 Bom L.R. 105, A.I.R. 1934 Bom. 130, 1934 Cr.C. 475; *Laxmi Prasad*, A.I.R. 1940 Nag. 357 (359), 1940 N.L.J. 399, 190 I.C. 467; or where the complainant failed to appear at 7 A.M., but his pleader was present and the complainant turned up shortly after 8 A.M., when the case was taken up and dismissed in absence of the complainant—*Ottaru v. Inukotiobiah*, 27 Cr.L.J. 1391, 98 I.C. 607, A.I.R. 1927 Mad. 139. Where the complainant was ordered to appear at 11 A.M., and he appeared, but the Court sat on that day at 2 P.M., and he did not wait, it could not be said that the complainant had failed to appear—*Ahmed v. Meeran*, 25 L.W. 358, 28 Cr.L.J. 208; or where the Magistrate was on circuit, and no intimation was given to the parties of the place where the Magistrate's Court would be held, and consequently the complainant could not appear—*Anonymous*, 2 Weir 307 (308).

Non-appearance on adjourned hearing :—A Magistrate can dismiss a complaint and acquit the accused, not only where the complainant does not appear on the first day of hearing but also where he fails to appear on the date of adjourned hearing—*Latchamana*, 2 Weir 308; or on the date fixed for argument; *Ramjiwan v. Abilakh*, 18 C.W.N. 584, 15 Cr.L.J. 163. But this power of dismissal must be exercised with discretion. Where the complainant has done all that is necessary for him to do to establish his case, a complaint ought not to be dismissed for his non-appearance on an adjourned date, unless his attendance is in the opinion of the Magistrate specially required on that day—*Anonymous*, 2 Weir 306; *Nagayya*, 2 Weir 306.

Again, a Magistrate cannot dismiss a complaint for non-appearance of the complainant on the adjourned date, if the complainant had no knowledge or notice of the date to which the case had stood adjourned—*Nune Panakalu v. Ravulu*, 52 Mad 695, 30 Cr.L.J. 191 (195); or where the Magistrate did not specify the place where the case was to be taken up, but ordered the parties to appear 'either at Aligarh or at Talibnagar'—*Bansidhar*, 1882 A.W.N. 229.

The word "hearing" which is not defined in the Criminal Procedure Code has not been used in the limited technical sense. It does not mean merely an investigation of a controversy. Where, therefore, the complainant did not appear on a date on which two of the accused were bound to appear and the summons of the third accused was awaited, the order of acquittal passed by the Magistrate under this section was not illegal—*Laxmi Prasad*, *supra*.

Where an Additional District Magistrate, on an application made before him under sec. 528, Cr. P. C., called for the records of the case to his file and stayed further proceedings pending in the lower Court but the order was not communicated to the lower Court which ordered acquittal of the accused under this section after the order of stay of further proceedings, the High Court set aside the order and directed a retrial—*Musa Singh v. Gostha Behary*, A.I.R. 1929 Cal. 657, 1929 Cr.C. 327.

Non-appearance on date of argument :—In *Purag Lal v. Rustam Singh*, 37 Cr.L.J. 1028, 164 I.C. 784, A.I.R. 1936 All. 658, 1936 A.L.J. 954, the evidence for the prosecution and the evidence for the defence were taken by the Magistrate and he then fixed a date for the hearing of arguments. On that date the complainant did not appear but he was represented by Counsel. The Magistrate acquitted the accused under this section and the High Court refused to interfere in revision, holding that the Magistrate was perfectly entitled to exercise his discretion in that way. A similar view was also taken in *Ramjiwan v. Abilakh*, 18 C.W.N. 584, 15 Cr.L.J. 163.

Non-appearance on date of judgment :—This section applies to a case of absence of the complainant on the date fixed for his appearance or on the date of adjourned hearing, and does not apply to a case where the complainant is absent on the date fixed for delivery of the judgement. If on such a date the complainant is absent (and the attendance of the complainant on that date was not specially directed by the Magistrate) an order of acquittal of the accused on the ground of absence of the complainant is erroneous—*Girish Chandra v. Bhushan*, 46 Cal. 867, A.I.R. 1919 Cal. 201, 51 I.C. 476, 20 Cr.L.J. 492, 29 C.L.J. 387, 23 C.W.N. 959; *Jangusingh*, 19 N.L.R. 48, A.I.R. 1923 Nag. 158, 71 I.C. 669, 24 Cr.L.J. 205; *Mohiddin v. Mahomia*, 1933 M.W.N. 1271;

Mohammad Hayat v Daulat Khan, A.I.R. 1938 Lah 121, 39 P.L.R. 838, 173 I.C. 306, 39 Cr.L.J. 293, 10 R.L. 433; *Laxmi Prasad*, A.I.R. 1940 Nag. 357 (359), 1940 N.L.J. 399, 190 I.C. 467. See also *Bankim Behari Sen v. Yusuf Mian*, in Note 795A.

797. Order of acquittal:—If the complainant is absent on the day of hearing, the proper order to be passed by the Magistrate under sec. 247 is one of acquittal and not one 'striking off' the complaint—*Dubash*, 10 Bom.L.R. 628, 8 Cr.L.J. 139

Dismissal of the complaint if the complainant is absent and acquittal of the accused is the rule but the Court is given a discretion to adjourn the case for some reason if it thinks fit—*Laxmi Prasad*, supra

The accused is entitled to acquittal if the complainant is absent, and unless the Court thinks proper to adjourn the hearing of the case to some other day. In other words, the right to an order of acquittal accrues to the accused upon two conditions, *firstly*, on the absence of the complainant, and *secondly*, on the Court not adjourning the case. But if on the date of hearing the case is not taken up at all, it cannot be said that the second condition is fulfilled, and the accused is not entitled to acquittal owing to the absence of the complainant on that date—*Rash Behary v Corporation of Calcutta*, 26 Cr.L.J. 1050, 87 I.C. 970, A.I.R. 1926 Cal 102. The absence of the complainant in a summons case cannot result in the acquittal of the accused without the Magistrate passing any order in exercise of that discretion—*Shermull v. Corporation of Calcutta*, 25 Cr.L.J. 492, 77 I.C. 892, A.I.R. 1923 Cal 725

Warrant case:—If in a warrant case the complainant is absent, the Magistrate cannot pass an order of dismissing the complaint for default, because it would amount to an application to a warrant case of the procedure of a summons case—*Ram Coomar v. Ramjee*, 4 C.W.N. 26 (27). See also *Saraj Bati*, A.I.R. 1934 All. 340, 152 I.C. 249, 1934 Cr.C. 418

Where two charges, one on a summons case and another on a warrant case, are jointly tried in one trial and the complainant is absent on the adjourned hearing, the Magistrate ought to make an order of discharge under sec. 259 and not one of acquittal under this section—*Raghavulu v Sngaram*, 41 Mad 727 (729); *Rajnarain v Lala Zamoli*, 11 Cal. 91

But if a summons case is tried under the warrant case procedure, and eventually the Magistrate acquits the accused under sec. 247 on account of the absence of the complainant on an adjourned date of hearing, *held* that the acquittal is legal and proper. Section 247 lays down a general principle that a person charged with a summons-case offence is entitled to an acquittal if the complainant is absent, and there is no reason why this right should be denied to him simply because the Magistrate has adopted a different procedure for the trial of the case—*Venkatarama v. Sundaram*, 44 M.L.J. 119, 24 Cr.L.J. 469, A.I.R. 1923 Mad 439

Further inquiry:—Since an order under this section is one of *acquittal* and not one of discharge, no further inquiry can be directed under sec. 436—*Bindra v. Bhagwanta*, 25 Cr.L.J. 359, 77 I.C. 295, A.I.R. 1925 Oudh 44

Absence of accused:—This section has nothing to do with the presence or absence of the accused. If the complainant is absent, the case must be dismissed and the accused acquitted, even though the latter has disobeyed the summons and is absent—*Purna v. D'ngur*, 17 C.W.N. cliv. If the complainant is absent, the accused must be acquitted and it is immaterial that the summons to the accused had not been served and that the accused was not present when he was acquitted—*Kiran Sarkar*, 5 P.L.T. 15, A.I.R. 1924 Pat. 140, 24 Cr.L.J. 815; *Shankar v. Dattatraya*, 53 Bom. 693, 1929 Cr.C. 436 (437); *Sura'n v. Thutaballi*, 33 Cr.L.J. 579, 138 I.C. 288, 1932 M.W.N. 647, Ind. Rul. 1932 Mad. 546, A.I.R. 1932 Mad 563, 36 M.L.W. 379, 1932 Cr.C. 662, where *Kandappa*, 2 Weir 307, laying down a contrary proposition, was distinguished. If there are two accused, and one is present when the case is dismissed for complainant's default, the order acquitting him terminates the case also against the other accused whose attendance could not be obtained and against whom the trial did not proceed—*Panchu v. Umar*, 4 C.W.N. 346.

Appeal to District Magistrate :—If an order of dismissal is passed under this section, the District Magistrate has no power to set aside the order of acquittal on appeal, because under sec. 417 an appeal against an order of acquittal must be directed by the Government and presented only to the High Court—*Rangasami v. Narasimhulu*, 7 Mad. 213; *Nityananda v. Rakhahari*, 38 C.L.J. 196, 24 Cr.L.J. 716, A.I.R. 1924 Cal. 96.

798. Revival of complaint—Retrial:—The Magistrate has no jurisdiction to restore a case after it has been dismissed for default of appearance of the complainant and the accused has been acquitted, even though good cause is shown for the complainant's non-appearance. An acquittal under this section does not stand on any different footing from an acquittal passed under any other circumstances, and the Magistrate cannot set aside his own order of acquittal—*Lakshminarasimham v. Nailuri Bapanna*, 52 M.L.J. 173, 28 Cr.L.J. 270. The dismissal of a complaint under this section amounts to an acquittal and bars a subsequent trial on a fresh complaint on the same facts (sec. 403), even if good cause is shown for non-appearance of the complainant. The word "tried" in sec. 403 does not necessarily mean tried on the merits; an acquittal under sec. 247 at the initial stage of the case for non-appearance of complainant acts as a bar to further proceedings in the same way as an acquittal after trial on the merits—*Dulla*, 45 All 58 (59); *Shankar v. Dattatraya*, 53 Bom. 693, 1929 Cr.C. 436 (437); *Sinnu Goundan*, 38 Mad 1028, 26 M.L.J. 160; *Gaggilapu*, 34 Mad. 253, 9 I.C. 253, 12 Cr.L.J. 41; *Suraiya Sastri v. Venkata Rao*, 2 Weir 457; *Kedar Nath v. Adhin*, 7 C.W.N. 711; *Panchu v. Umar*, 4 C.W.N. 346; *Ram Mahata*, 2 P.L.T. 170, 61 I.C. 59; *Kiran Sarkar*, 5 P.L.T. 15, 24 Cr.L.J. 815; *Nityananda v. Rakhahari*, 38 C.L.J. 196, A.I.R. 1924 Cal. 96, 24 Cr.L.J. 716; *Abdul Aziz v. Noor Eelahi*, 152 I.C. 156, 1934 Cr.C. 446, 36 Cr.L.J. 29, A.I.R. 1934 Lah. 211; *Bhupati v. Amio*, A.I.R. 1935 Cal. 491, 39 C.W.N. 919, 36 Cr.L.J. 1238, 157 I.C. 670, 1935 Cr.C. 883, 62 Cal. 1119, 62 C.L.J. 240; *Sukum v. Krishna*, 33 C.W.N. 260. Acquittal under this section though not an acquittal on the merits has the force of a complete acquittal for all purposes. A fresh and a separate trial on the same facts would be barred under sec. 403, Cr. P. C. The word "acquittal" under sec. 403 does not necessarily mean an acquittal because of the bar of further proceedings in the same way as an acquittal after trial on the merits—*Laxmi Prasad*, A.I.R. 1940 Nag. 357 (359), 1940 N.L.J. 399, 190 I.C. 467. See also Notes 1088 and 1089. Section 403, Cr. P. C., operates as a bar to the second trial even when in a summons case the procedure of a warrant case is followed and an order of discharge, instead of an order of acquittal, is passed—*Chidambaram v. Ramaswamy*, 1933 M.W.N. 1278. Conversely, when a warrant case is dismissed for default wrongly under sec. 247, instead of under sec. 259, sec. 403 does not bar a second complaint—*Suraj Bali*, A.I.R. 1934 All. 340, 152 I.C. 249, 1934 Cr.C. 418. Even the District Magistrate has no power to order the entertainment of a complaint which was dismissed for default of appearance—*Narayanasami v. Janaki*, 2 Weir 308. He cannot order the entertainment of a fresh complaint for a different offence on the same facts—*Fazar*, 37 C.L.J. 253, 76 I.C. 293, A.I.R. 1923 Cal. 407, 25 Cr.L.J. 149. But see *Saroda v. Satyeswar*, A.I.R. 1935 Cal. 571, 36 Cr.L.J. 1364, 158 I.C. 384, 1935 Cr.C. 979, where a contrary view seems to have been taken. There the facts disclosed several distinct offences but the accused was summoned under sec. 352, I. P. C., and was acquitted under sec. 247, Cr. P. Code. It was held that a fresh complaint lay on the same facts in respect of offences other than an offence under sec. 352, I. P. Code. Even, if the order of acquittal is passed under a misapprehension, still the Magistrate cannot take cognizance of a fresh complaint; if the order is wrong, the complainant can take proper steps by way of revision, but he cannot file a fresh complaint—*Ram Mahata*, supra.

In a Madras case it has been pointed out that the accused who is acquitted under this section owing to the absence of the complainant on the date fixed for hearing is acquitted without trial on the merits; he cannot be said to have been 'tried' within the meaning of sec. 403, and, therefore, an acquittal under this section is not a bar to a second complaint of the offence on the same facts—*Kotayya v. Venkayya*, 40 Mad. 977 (Note), 19 Cr.L.J. 497, dissenting from *Guggilapu*, 34 Mad. 253, 9 I.C. 253, 12 Cr.L.J. 41.

If the Magistrate, through mistake of the Peshkar, takes up a case on a day which is not fixed for its hearing, and the complainant is necessarily absent, an order of acquittal passed on account of the absence of the complainant is a nullity, and is no order at all. The Magistrate can ignore that order and take up the case again on the actual date of hearing—*Achambit v. Mahatap*, 42 Cal 365, 16 Cr.L.J. 148 (149), 18 C.W.N. 1180; *Mahadeo*, 36 Cr.L.J. 328, 153 I.C. 407, A.I.R. 1934 All 1025, 1934 A.L.J. 1041, 1934 Cr.C. 1335. The Madras High Court has taken a different view and has held that it must be taken as the procedural law in the province of Madras that no Subordinate Court can sit in revision upon its own record and decide whether, upon a certain view of the facts, its proceedings should be treated as null. If it is thought that a mistake has been committed the matter must be referred to the High Court—*Ekambara Mudali v. Alamelammal*, A.I.R. 1930 Mad 1001, 1930 M.W.N. 409, 32 M.L.W. 152, 1930 Cr.C. 1055, 53 Mad. 870, 3 M Cr.C. 313, 59 M.L.J. 708, 129 I.C. 628

Fresh process for other offences including the previous one—Where a Magistrate issued process against and summoned the accused persons for one of several offences alleged against them, and acquitted them under this section for default of complainant's appearance, no fresh process should in view of sec 403 (1) be issued against them in respect of *all* the offences alleged against them on the previous occasion, including the one in respect of which they were summoned and acquitted—*Suresh v. Banku*, 2 C.L.J. 622, 3 Cr.L.J. 115.

799. Order of adjournment:—On default of the complainant's appearance the Magistrate has a discretion either to acquit the accused, or to *adjourn the hearing*; if he adjourns the case, especially after he has already granted several adjournments, he can proceed to examine witnesses (for the prosecution and the defence) in the absence of the complainant. Such a procedure is not illegal if the accused is allowed to cross-examine the prosecution witnesses and is not prejudiced and the complainant afterwards examines and cross-examines witnesses—*Sarafji*, 24 C.W.N. 199 (201). But the Lahore High Court observes that this section merely authorises the Magistrate to adjourn the case to enable the complainant to appear, but it does not authorise him to dispense with the presence of the complainant and to proceed to hear the case in the absence of the complainant—*Maula Bakhsh v. Marshall*, 27 Cr.L.J. 1022 (1023), 96 I.C. 878, A.I.R. 1926 Lah. 628.

The Magistrate can adjourn the hearing only when there are sufficient and proper grounds for doing so. The fact that the accused has disobeyed the processes of the Court is no good reason for proceeding with the case—*Purna v. Dingur*, 17 C.W.N. clix, 19 C.W.N. 334, 16 Cr.L.J. 322. But a Magistrate can adjourn the hearing for the purpose of allowing the accused time to secure the attendance of his witnesses—*In re Dinno Roy*, 16 W.R. 21. If the complainant is likely to be absent for a long time, e.g., if he goes to England, the proper order to pass is to acquit the accused, instead of granting an indefinite adjournment—*Maula Bakhsh v. Marshall*, *supra*.

800. Death of complainant:—It is open to doubt whether this section applies where the non-appearance of the complainant is due to his death. But, if on the day fixed for hearing the son of deceased complainant appears and asks the Magistrate to proceed with the case, the Magistrate ought to proceed and should not acquit the accused under this section—*Jitan v. Domoo*, 1 P.L.J. 264, 18 Cr.L.J. 151; *Madhu Chowdhury v. Torab*, 18 C.W.N. 1211; *Mahomed Azam*, 28 Bom.L.R. 288, 27 Cr.L.J. 491; *Anand Rao v. Gadi*, 28 N.L.R. 49, 1932 Cr.C. 372, 33 Cr.L.J. 407, 137 I.C. 91, A.I.R. 1932 Nag. 72, Ind. Ref. 1932 Nag. 50. But see *Purna v. Dingur*, 17 C.W.N. clix, 19 C.W.N. 334 (335), 16 Cr.L.J. 322 and *Appala Naidu*, 51 Mad. 339, 29 Cr.L.J. 257 (258), where it has been held that if the complainant dies pending the trial, the Magistrate should acquit the accused and should not proceed further with the trial; he should not adjourn the case in order to enable the complainant's son to come on the record.

801. Revision:—An acquittal under this section does not stand on any different footing from an acquittal ordered in any other circumstances, and the High Court will

not set aside an acquittal in revision except under very rare circumstances—*Lakshmi-narasinh v. Nalluri*, 52 M.L.J. 173, 28 Cr.L.J. 270. The mere fact that it is an acquittal not on the merits of the case but on the initial stage of the case in the absence of the complainant does not make any difference whatsoever for deciding whether there should be an interference in revision against the order of acquittal. When an accused is acquitted a very valuable and substantial privilege accrues in his favour and it is not proper for a Court to interfere with an acquittal simply because the complainant thinks that the accused has committed the offence and the offence will remain unpunished—*Laxmi Prasad*, A.I.R. 1940 Nag. 357 (360), 1940 N.L.J. 399, 190 I.C. 467. A somewhat contrary view has been taken by the Oudh Court, under certain special circumstances, in the case of *Ram Nidh v. Ram Saran*, 26 O.C. 282, A.I.R. 1924 Oudh 64, 25 Cr.L.J. 794.

The High Court has, in exercise of its powers under sec. 439, Cr. P. C., power to set aside an order of acquittal under this section and to order the case to proceed from the stage which it had reached when the improper order of acquittal was passed—*Soni v. Kishnomal Manghandas*, 40 Cr.L.J. 524, 180 I.C. 989, I.L.R. 1939 Kar. 385, 11 R.S. 198, A.I.R. 1939 Sind 75. But where it cannot be said on the facts of the case that the Magistrate exercised the discretion arbitrarily and not judicially, the High Court should not interfere—*Laxmi Prasad*, supra.

Where an order is passed by the Magistrate acquitting an accused under sec. 247, the order can only be set aside by the High Court. The Magistrate or his successor has no power to revive the proceeding by setting aside the order—*Nityananda v. Rakhahari*, 38 C.L.J. 196, 24 Cr.L.J. 716, A.I.R. 1924 Cal. 96. But if the order of acquittal is a nullity, it need not be set aside by a superior authority. The Magistrate can himself ignore the order and take up the case again—*Achambit v. Mahatap*, 42 Cal. 365 (see this case cited under Note 798).

248. If a complainant, at any time before a final order is passed in any case under this Chapter, satisfies the Magistrate that there are sufficient grounds for permitting him to withdraw his complaint, the Magistrate may permit him to withdraw the same, and shall thereupon acquit the accused.

802. Scope of section:—This section applies only to summons cases, i.e., a withdrawal of complaint is permissible only in summons cases, and not in warrant cases—*Ranchhod*, 37 Bom. 369, 14 Cr.L.J. 77. If the offence charged is a warrant case (and is non-compoundable), the Magistrate must proceed with the inquiry or trial in spite of the application for withdrawal of the complaint, if he finds the elements of an offence in the facts set forth in the complaint—*Ganesh Narayan*, 13 Bom. 600 (603). The Magistrate's order permitting the complainant to withdraw in a non-compoundable warrant case and acquitting the accused is unwarranted by this Code—*Ranchhod*, 37 Bom. 369, 14 Cr.L.J. 77 (78).

It is always open to the prosecution to withdraw a case with the permission of the Court (secs. 248 and 494, Cr. P. Code)—*Mehr Singh*, 35 Cr.L.J. 85, 146 I.C. 387, A.I.R. 1933 Lah. 884, 1933 Cr.C. 1178.

This section is limited in its operation to cases instituted upon complaints in the strict sense. If A gave information to the Police, and the Magistrate took cognizance of the case upon the Police report, there was no complaint within the meaning of sec. 4 (h), and A could not be permitted to withdraw—*Chenchayya*, 23 Mad. 626, 2 Weir 310; *Elias Arz Muhammad*, 41 Cr.L.J. 694, 188 I.C. 870, A.I.R. 1940 Sind 112. This section can have application only when the Magistrate has taken cognizance of a case upon a complaint preferred to him by the person who seeks to withdraw the complaint—*Elias Arz Muhammad*, supra.

Section 537 of the Calcutta Municipal Act (Act III of 1923 B. C.), which authorises the Corporation to withdraw from legal proceedings, must be read subject to sec. 248, Cr. P. Code, which permits the complainant to withdraw his complaint "if there are sufficient grounds for permitting him to withdraw his complaint." It follows, therefore, that before a withdrawal can be permitted under sec. 537 of the Calcutta Municipal Act, there must be sufficient grounds for withdrawal to the satisfaction of the Magistrate—*Sishir Kumar v. Corporation of Calcutta*, 53 Cal 631, 30 C.W.N. 598, 27 Cr.L.J. 984. The failure on the part of the Magistrate to place such grounds on record is not by itself sufficient to justify the High Court's interference with the order—*Abdul Majid v. Arbabshah*, A.I.R. 1933 Sind 357, 35 Cr.L.J. 142, 146 I.C. 542, 1933 Cr.C. 1340.

This section contemplates a withdrawal of the complaint as a whole. Where a complaint against several accused persons is withdrawn as against one of them, this amounts to a withdrawal of the whole complaint in respect of all the accused—*Shyam Bhattari v. Sagar Singh*, 1 P.L.T. 32, 53 I.C. 824 (825), 20 Cr.L.J. 824. The withdrawal of the case absolves not only the accused present but also all the accused—*Amar Ali*, 2 P.L.T. 584, 22 Cr.L.J. 675, 63 I.C. 611. See also *Motilal*, 34 Cr.L.J. 21, 140 I.C. 257, A.I.R. 1932 Cal 122, 36 C.W.N. 163, 1932 Cr.C. 107, Ind. Rul. 1932 Cal 706. Contra—*Rohti Singh v. Makdum*, 9 O.L.J. 54, A.I.R. 1922 Oudh 145, 23 Cr.L.J. 271 and *Anantia*, 5 Lah 239, 81 I.C. 117, 25 Cr.L.J. 629, A.I.R. 1924 Lah 595 (*per* Le Rossignol, J.), where it was held that the withdrawal against some does not amount to a withdrawal against all. It should be noted that this latter view is in consonance with the provisions of sec. 345 (6) (as now amended) under which the composition of an offence with one of the accused does not amount to a composition with all the accused. The Madras High Court has followed the Lahore High Court in *S. I. General Assurance Co. v. Registrar of Life Insurance Co.*, 41 Cr.L.J. 454, 187 I.C. 220, 1940 M.W.N. 104, A.I.R. 1940 Mad 623, 1940 M.Cr.C. 32, 51 M.L.W. 515, where it has been held that there is nothing in sec. 248, Cr. P. C., which involves a withdrawal of the whole complaint merely because the complaint is withdrawn as against some of the accused.

"May permit" —It is discretionary with the Magistrate to permit the complainant to withdraw. The Magistrate can, inspite of the application for withdrawal, proceed with the trial and convict the accused—*Bayan Ali*, 20 C.W.N. 1209, 18 Cr.L.J. 107 (Pat.).

893. Withdrawal of complaint:—Withdrawal and Compromise:—There is a well-marked distinction between a withdrawal of a case under this section and a compromise under sec. 345. Compromise contemplates an arrangement between two parties; withdrawal has no such meaning. A case is said to be compromised if it is withdrawn with the consent of the accused, whereas a case is withdrawn under this section without the consent of the accused. Therefore, when a petition is filed by the complainant praying for striking off the case, the Magistrate should satisfy himself under what section the petition is made. If the case is not being compromised but is being withdrawn without the consent of the accused, the petition is not one under sec. 345 but under this section, and the Magistrate may, inspite of the petition, proceed with the trial and convict the accused. But if a petition is filed for composition (of an offence which is compoundable without leave of Court), the Magistrate is bound to give effect to the compromise and acquit the accused—*Bayan Ali*, 20 C.W.N. 1209, 18 Cr.L.J. 107. See also Note 992 under sec. 345.

Who can withdraw —Only the complainant can withdraw the case. In cases of contempt of the lawful authority of a public servant, the complainant is the public servant whose authority has been resisted, and not the person injured by such resistance; and the former alone can withdraw—*Muse Ali*, 2 Bom 653. Where a Municipal Secretary instituted a complaint, the Municipal Council was not competent to withdraw—*Paramananda v. Karunakara*, 27 M.L.J. 617, 15 Cr.L.J. 299.

When to withdraw:—The complainant can withdraw at any time 'before a final order is passed'. But these words do not refer to a time so early as when no process has been issued to the accused. An order of acquittal passed on an application for

withdrawal preferred before issue of process is unmeaning and of no avail—*Muthia Moopan*, 36 Mad. 315, 14 Cr.L.J. 559.

Magistrate alone can permit withdrawal :—This section does not empower a Police-officer to entertain an application for withdrawal of a complaint. The permission for withdrawal is a judicial act, and the Magistrate alone can do it—*Anonymous*, Ratanlal 91. A petition for withdrawal of a case should be judicially determined by the Magistrate himself, and it is wholly improper for him to refer the matter to the Police for report, and then to act on the report in refusing or allowing withdrawal. The Magistrate should not allow himself to be guided by what the Police thought about the matter—*Azizur Rahman*, 43 C.L.J. 214, 27 Cr.L.J. 394.

Revival of withdrawn complaint .—Where a Deputy Magistrate allowed a complaint to be withdrawn and discharged the accused, the District Magistrate could not revive the case against the accused—*Zuhoorul*, 25 W.R. 64.

But where the complaint was withdrawn, because there was no sanction (the case being one in which a sanction was necessary), and the accused was discharged, the complainant was competent to lodge a fresh complaint after obtaining the necessary sanction, the previous order of discharge not being tantamount to an acquittal—*Samsuddin*, 22 Bom. 711.

249. In any case instituted otherwise than upon complaint, a Presidency Magistrate, a Magistrate of the first class, or with the previous sanction of the District Magistrate, any other Magistrate, may, for reasons to be recorded by him, stop the proceedings at any stage without pronouncing any judgment either of acquittal or conviction, and may thereupon release the accused.

804. Scope :—This section applies where the case is instituted otherwise than upon complaint. If a case is chalaned by the Forest Department, it is not instituted upon complaint, and this section applies—*Achhru*, 9 P.R. 1913, 13 Cr.L.J. 860 (861). This section deals only with *summons* cases instituted otherwise than upon complaints, and is inapplicable to *warrant* cases. Therefore, an order by a Magistrate stopping a warrant case and releasing the accused under this section is illegal; the case will be treated as still *pending* on the file of the Magistrate and can be reopened either by an application by the Crown or *suo motu* by the Magistrate; but it cannot be reopened upon a fresh complaint preferred by a *private* person, the original case being already on the pending file of the Magistrate—*Firangi v. Durga*, 5 Pat. 243, 7 P.L.T. 449, 27 Cr.L.J. 698 (699, 700). In *Achhru*, 9 P.R. 1913, 13 Cr.L.J. 860 (861), the Magistrate stopped proceedings in a warrant case, but the Chief Court took no objection on that ground.

Where upon a report of the Police that one J. has given false information to the Police against certain persons, a Magistrate ordered the prosecution of J. under sec. 182, I P. C., but subsequently upon receipt of another report in another case that the information given by J. was true, he ordered the summons issued for the attendance of J. to be cancelled, it was held that the Magistrate had full power to cancel the summons and stop the proceedings, under this section—*Nathu*, 1 P.L.T. 28, 54 I.C. 888, 21 Cr.L.J. 184.

An order under this section neither amounts to an acquittal nor to a discharge. Since it does not amount to an acquittal (see Explanation to sec. 403) it does not bar further proceedings (retrial) in accordance with law—*Achhru*, 1913 P.R. 9. But since it does not amount to an order of dismissal of complaint or discharge, no order can be passed under sec. 437 (now sec. 436) directing further inquiry—*Ibid.* See also *Sripal*, 33 Cr.L.J. 564, 147 I.C. 1028, A.I.R. 1934 All. 17, 1934 Cr.C. 45.

Frivolous Accusations in Summons and Warrant Cases.

250. (1) If, in any case instituted upon complaint * * *

False, frivolous or vexatious accusations. or upon information given to a police officer or to a Magistrate, *one or more persons is or are* accused before a Magistrate of any offence triable by a Magistrate, and the Magistrate by whom the case is heard discharges or acquits *all or any* of the accused, and is of opinion that the accusation against *them or any of them* was false and either frivolous or vexatious, the Magistrate may, by his order of discharge or acquittal, *if the person upon whose complaint or information the accusation was made is present*, call upon him forthwith to show cause why he should not pay compensation to such accused or to each or any of such accused when there are more than one, or, if such person is not present, direct the issue of a summons to him to appear and show cause as aforesaid.

(2) The Magistrate shall record and consider any cause which such complainant or informant may show, and if he is satisfied that the accusation was false and either frivolous or vexatious, may, for reasons to be recorded, direct that compensation to such amount and not exceeding one hundred rupees or, if the Magistrate is a Magistrate of the third class, not exceeding fifty rupees, as he may determine, be paid by such complainant or informant to the accused or to each or any of them.

(2A) The Magistrate may by the order directing payment of the compensation under sub-section (2) further order that, in default of payment, the person ordered to pay such compensation shall suffer simple imprisonment for a period not exceeding thirty days.

(2B) When any person is imprisoned under sub-section (2A), the provisions of sections 68 and 69 of the Indian Penal Code shall, so far as may be, apply.

(2C) No person who has been directed to pay compensation under this section shall, by reason of such order, be exempted from any civil or criminal liability in respect of the complaint made or information given by him:

Provided that any amount paid to an accused person under this section shall be taken into account in awarding compensation to such person in any subsequent civil suit relating to the same matter.

(3) A complainant or informant who has been ordered under sub-section (2) by a Magistrate of the second or third class to pay compensation, or has been so ordered by any other Magistrate to pay compensation exceeding fifty rupees, may appeal from the order in so far as the order relates to the payment of

the compensation, as if such complainant or informant had been convicted on a trial held by such Magistrate.

(4) Where an order for payment of compensation to an accused person is made in a case which is subject to appeal under sub-section (3), the compensation shall not be paid to him before the period allowed for the presentation of the appeal has elapsed, or, if an appeal is presented, before the appeal has been decided, *and where such order is made in a case which is not so subject to appeal, the compensation shall not be paid before the expiration of one month from the date of the order.*

Change:—The whole section has been redrafted by sec. 69 of the Criminal Procedure Code Amendment Act, XVIII of 1923. The principal changes introduced are the following:—

(1) The word "frivolous or vexatious" have been substituted by the words "*false and either frivolous or vexatious.*"

(2) Under the old law the complainant was *forthwith ordered to pay the compensation*; under the present law the Magistrate will *forthwith call upon him to show cause*, and he shall then consider and record any cause shown and pass such orders as he sees fit. * * * "As the section is worded under the old law, the order to pay compensation is part of the order of discharge or acquittal, and the record and consideration of objections is to precede such order. The procedure now proposed is more logical"—*Statement of Objects and Reasons* (1914). Moreover, the old law did not provide for the case where the complainant was *absent* at the time the judgment was delivered; now, power has been given in such a case to summon him to appear and show cause—*Report of the Joint Committee* (1922).

(3) The limit of compensation has been increased from Rs. 50 to Rs. 100, unless the Magistrate is a Magistrate of the third class. But this increase will not, having regard to the provisions of sec. 404, make orders under sec. 250 appealable where they are not so at present—*Report of the Select Committee* (1916).

(4) Under the old law, the Magistrate could order imprisonment only *after failure* to recover compensation, but he could not award imprisonment in default in the very order directing compensation; under the new sub-sec. (2A), the Magistrate has now been empowered to award such imprisonment in the order itself.

(5) Sub-section (2) of the old section, which provided that compensation should be recoverable as if it were a fine, has been omitted, as it is provided for in sec. 547. The proviso to sub-sec. (2) of the old section has now been re-enacted as sub-sec. (2A) with some alterations. Sub-section (2B) is new.

(6) Sub-section (2C) is new, and the proviso to this sub-section is the same as the old sub-sec. (5).

(7) An appeal will now lie from the order of a first class Magistrate if he awards compensation exceeding fifty rupees. See sub-sec. (3). Under the old law, no appeal lay from the order of a 1st class Magistrate.

(8) Sub-section (4) has been amended to specify the time for payment of compensation where the original case is non-appealable. "The amendment which we propose at the end of sub-sec. (4) is to provide for cases in which, though there cannot be an appeal, the acquittal or discharge of the person to whom compensation has been awarded may be set aside in revision. The period of one month which we have allowed should be ample to admit of an application being made to the superior Court."—*Report of the Select Committee* (1916).

805. Instituted upon complaint, etc.:—For the definition of "complaint" see sec. 4 (h), Cr. P. C., and the Notes under it. The operation of this section is restricted to cases instituted upon complaint or upon information given to a Police Officer

or to a Magistrate. It is clear that it will not apply to a case instituted on a *police report* or an information given by a Police-officer—*Rajewan v. Durga*, 21 Cal. 979; *Saleh*, 33 Cr.L.J. 644, 138 I.C. 635, 26 S.L.R. 299, 1932 Cr.C. 692, A.I.R. 1932 Sind 156, Ind. Rul. 1932 Sind 85. It is inapplicable to the case of a complaint lodged by a Police-officer as such—*Sheobaran v. Nunmonia*, 5 C.W.N. 370; *Ramjewan v. Durga*, 21 Cal. 979; *Syed Bahadur v. Nur Mahomed*, 7 C.W.N. 206; *Sakar Jan*, 22 Bom. 934.

The words in this section cannot be read at large and divorced from the words of sec. 190, Cr. P. C., with which they are closely associated. This section will apply to information given by a police officer if that information can come as a complaint under cl. (a) of sec. 190 (1), Cr. P. C., but this section will not apply to a police report falling under cl. (b)—*Muhammad Hashein v. Emp.*, A.I.R. 1940 Sind 134 (135), 41 Cr.L.J. 788, 189 I.C. 703 (F.B.).

Where a person makes a report at the police-station, and the police thereupon makes an inquiry and sends the case to a Magistrate, the case is said to be instituted upon "information given by that person to a police-officer"—*Jairaj v. Banai*, 23 A.L.J. 1054, 27 Cr.L.J. 35 (36). The ruling in *Ishni v. Bakshi*, 6 All. 96 and *Polo Varapa*, 7 Mad. 563 is no longer correct, because when the cases were decided the words "information given to a police-officer" did not exist in this section. Where a case was instituted by the police upon evidence obtained by them in an inquiry conducted by them; and in that inquiry the statement of the petitioner had been taken along with others, *held* that the case was not instituted upon information given by the petitioner to a police-officer—*Sarijug*, 1 P.L.J. 106 (108), 17 Cr.L.J. 336. But if the case was originally based on information given to a Police-officer under sec. 154, this section applies although the case was ultimately instituted upon a Police report, submitted under sec. 173; and the information may be dealt with under this section—*Jagdani v. Mahadeo*, 14 C.W.N. 326, 11 Cr.L.J. 201.

An Excise officer (e.g., a Sub-Inspector of Excise and Salt) is a Police-officer only for the purpose of sec. 190, and not for the purpose of sec. 250; and, therefore, an information given to an Excise officer is not an "information given to a Police-officer" within the meaning of sec. 250. If an informer gave an information to an Excise officer, and upon that information, the officer made a report to the Magistrate and prosecuted a person for selling liquor without a license, and the prosecution turned out to be false and frivolous, *held* that the case was not instituted upon 'information to a Police officer' (so as to make the informer liable to pay compensation) but was instituted upon 'complaint', the report of the Excise officer to the Magistrate being treated as a complaint; and that officer, being deemed to be the complainant, was liable to pay compensation. Even, if the report be not treated as a complaint, it was information given to a Magistrate by the Excise officer, and in that view also he was liable to pay compensation—*Radhika v. Hamid*, 54 Cal. 371, 28 Cr.L.J. 316.

When a Police-officer makes a report in a *non-cognizable* case, the report amounts to a complaint (because a Police-officer has no power to make a report in a non-cognizable case) and the Magistrate can order him to pay compensation to the accused, if the complaint is false—*Sada*, 26 Bom. 150 (157) (F.B.).

Complaint under Cattle Trespass Act.—This section applies to a case in which a false and frivolous complaint has been made under the Cattle Trespass Act. Under sec. 4 (a) of the Cr. P. Code, 1898, the word "offence" includes an act in respect of which a complaint may be made under sec. 20 of the Cattle Trespass Act. If such complaint is false and frivolous or vexatious, compensation can certainly be awarded. The ruling in 18 All. 353, 13 Cal. 304, 9 Mad. 102 and 9 Mad. 374, is no longer good law, as these cases were decided under the Code of 1882, in which the definition of offence in sec. 4, (a) did not include an act in respect of which a complaint could be made under sec. 20, Cattle Trespass Act.

Complaint to a Village Magistrate.—A complaint of a non-bailable offence to a village Magistrate who is bound by law to report the substance of the information to the Police under sec. 45, (c) is an "information to a Police-officer" within the meaning

of this section; the person who has made the complaint must be deemed to have given information to the police just as effectively as if he went in person to the police-station; and if on such information the Police charges the accused, and the Magistrate finds the charge to be false and vexatious he can order the complainant to pay compensation under this section—*Nachimuthu v. Muthusami*, 39 Mad. 1006 (1008), 27 M.L.J. 37, 15 Cr.L.J. 431 [following *Sessions Judge v. Sivan Chetty*, 32 Mad. 258 (262 (F.B.))]; *Kalipaperumal v. Bavaji*, 45 M.L.J. 255; 24 Cr.L.J. 717, A.I.R. 1924 Mad. 91; *Thanikadavath v. Amman*, 4 L.W. 73, 17 Cr.L.J. 503; *Nadiabba v. Rayachetty*, 32 M.L.J. 78, 18 Cr.L.J. 11 (12). (Contra—*Arulanandham*, 22 Mad. 138, 13 Cr.L.J. 29 and *Thammana*, 25 Mad. 667). If, however, the information preferred to the village Magistrate is one which he is *not bound* by law to report to the Police, the preferring of such information does not amount to information to the Police—*Sessions Judge v. Sivan Chetty*, 32 Mad. 258 (263) (F.B.). It should be noted that the decision in 25 Mad. 667 proceeded not on the question as to whether the village Magistrate was or was not bound to report the information to the Police, but on the ground that the information given to a village Magistrate (i.e., village Headman) is not information given to a "Magistrate."

Case instituted under section 476 :—Where a case is instituted under sec. 476, at the instance of a person, it cannot be said to have been instituted either upon complaint of that person, or upon information given to Police-officer or to a Magistrate—*Kisandas*, 14 Bom.L.R. 1166, 14 Cr.L.J. 1.

806. 'Accused of an offence' :—An institution of proceedings under Chapter VIII is not an accusation of an offence, and this section does not apply if the accusation proves to be false—*Govind*, 25 Bom. 48; *Lakshpat*, 15 All. 365; *Bindhachal v. Lal Behari*, 36 All. 382; *Ram Sukh v. Mahadeo*, 7 A.L.J. 743, 11 Cr.L.J. 446; *Kaura*, 1902 P.R. 33; *Mannu Khan v. Chandi*, 20 A.L.J. 624, A.I.R. 1922 All. 321, 23 Cr.L.J. 474; *Ram Badan v. Janki*, 45 All. 363, 21 A.L.J. 207, 24 Cr.L.J. 228, 71 I.C. 692, A.I.R. 1923 All. 332; *Asa v. Gopal Das*, 33 P.R. 1902, 24 P.L.R. 1902; *Rohel v. Kamra*, A.I.R. 1935 Lah. 29; *Baij Nath v. Kali Charan*, 49 All. 750, 25 A.L.J. 493, 28 Cr.L.J. 604.

Similarly, an application for maintenance under sec. 488 is not a complaint of an offence (the refusal to maintain wife not being an 'offence') and no compensation can be awarded if the application proves to be false—*Ambao v. Baboo*, 6 M.L.T. 261, 11 Cr.L.J. 156.

The use of a house as a brothel is not an offence under sec. 41, Bombay District Police Act, and a complaint as to such use of a house is not a complaint of an offence. No compensation can, therefore, be awarded if the complaint is frivolous or vexatious—*Khairi*, 6 S.L.R. 254, 14 Cr.L.J. 320.

Section 28 of the Bombay Public Conveyance Act provides a summary remedy for the recovery of the legal fare of a public conveyance, and a complaint under that section is not a complaint in respect of an offence within the meaning of this section—*Valli Mitha*, 44 Bom 463 (465).

807. "Triable by a Magistrate" :—This section applies only where the offence is triable by a Magistrate; it does not apply where the offence is triable exclusively by the Court of Session but is inquired into (under Ch. XVIII) by a Magistrate, ending in an order of discharge under section 209—*Poligadu*, 2 Weir 315 (316); *Bavabhai, Ratanlal* 961; *Chhaba*, 19 Bom.L.R. 60, 18 Cr.L.J. 463; *Sarupsonar v. Ram Sundar*, 20 A.L.J. 433, A.I.R. 1922 All. 188, 23 Cr.L.J. 319; *Het Ram v. Ganga*, 40 All. 615 (616), 16 A.L.J. 486, 19 Cr.L.J. 706; *Bansidhar v. Chunnit*, 25 A.L.J. 818, 28 Cr.L.J. 983; *Shama Rao v. Emp.*, 1937 M.W.N. 96. Even, if the Magistrate tries an offence triable by the Court of Session, by virtue of his powers specially conferred upon him under sec. 30 and discharges the accused on account of the charge being vexatious, he cannot award compensation to the accused—*Kadu*, 26 P.R. 1902, 139 P.L.R. 1902; *Shankar*, 1919 P.R. 15, 20 Cr.L.J. 495; *Md. Hayat v. Bhola*, 1919 P.R. 1, 20 Cr.L.J. 141, A.I.R. 1919 Lah. 192, 49 I.C. 173; *Ma E Dak v. Maung Po*, 1 Bur.L.J. 38, A.I.R. 1923 Rang. 15, 23 Cr.L.J. 319, 11 L.B.R. 151, 66 I.C. 513; *Amin Lal*, 11 Lah. 558, 31 Cr.L.J. 1133 (1134). A contrary view has, however, been taken in *Ma Sin v. Maung Maung Lay*,

37 Cr L J. 773, 163 I.C. 163, A.I.R. 1936 Rang. 230, 1936 Cr C. 514. But where the facts in a case showed that the offence was triable by a Court of Session only, but the Magistrate regarding it as a lesser offence triable by him, tried the case and in dismissing the same awarded compensation to the accused, *held* that the procedure was not illegal—*Venkatrayar v. Venkatrayar*, 45 Mad 29 (30), 66 I.C. 72, 23 Cr L J 232, A.I.R. 1922 Mad. 223, 30 M.L.T. 75, 41 M.L.J. 398, 14 M.L.W. 247, 1921 M.W.N. 613; *Hemandas v. Ahmad*, 16 S.L.R. 205, 26 Cr L.J. 265. The question whether the offence is triable by a Magistrate is not to be decided solely by the complaint; the mere fact that the complainant mentions an offence which is triable exclusively by a Court of Session does not take the case out of this section. The proper criterion is the form of proceedings, i.e., whether they are conducted under Ch XVIII or Ch XXI. Where a Magistrate issued summons for offences under secs 307, 147 and 323, I. P. C., but he took no particular notice of the offence under sec. 307 (Sessions offence) and believed himself to be conducting a trial and not an inquiry, an order under sec 250, Cr. P. C., was not illegal—*Shiam Lal v Nand Ram*, 53 All. 461, 32 Cr L J. 670 (672), 131 I.C. 36, 4931 A.L.J. 89, 1931 Cr.C 611, A.I.R. 1931 All 355. Within the meaning of sec. 250, Cr. P. C., "the Magistrate by whom the case is heard" need not be the same Magistrate before whom the case is instituted. It is obvious that the word 'heard' has been deliberately used as it can cover both the inquiry (secs. 252 and 253, Cr. P. C.) and the trial (the rest of Chap XXI) in a warrant case. Therefore, even though the offence alleged in complaint is one triable only by a First or Second Class Magistrate as soon as it is sent to a Third Class Magistrate by the Sub-divisional Magistrate under sec. 192 or sec. 528, Cr. P. C., the inference must be that the latter Court does not consider that a case triable exclusively by the First or Second Class Magistrate has necessarily been made out. The Third Class Magistrate is perfectly competent to deal with an offence which he is competent to try or to take action under sec 346, Cr. P. C. If at that stage he considers that the case is frivolous and vexatious, there is nothing in the language of sec 250, Cr P C., to prevent him from passing an order under that section—*Paanda v Gulab Khatun*, 40 Cr L J 515, 181 I C 49, A I R 1939 Lah 122, I L R. 1938 Lah. 619, 41 P L R. 221. When a complaint has been filed against an accused person for three offences one of which is triable exclusively by the Magistrate and the other two by the Court of Session, and the Magistrate inquires into the case under Chap. XVIII in respect of all the offences and discharges the accused under sec 209, an order for compensation against the complainant cannot be passed merely because one of the offences is triable by a Magistrate—*Hanjhar v Maksur Ali*, 48 All 166, 23 A.L.J. 1056, 37 Cr L J. 6 (7), 91 I C 38, A I R 1926 All 159. See also *Het Ram v. Ganga*, *supra*, where one offence was triable exclusively by the Sessions Court and two other offences by the Magistrate. Where the complainant brings two accusations, one of an offence triable by a Magistrate and the other triable exclusively by the Court of Session, and a Magistrate with powers under sec 30 tries the case and finds both the accusations to be false, he is competent to award compensation only in respect of the offence triable by a Magistrate. But if compensation is awarded for both the offences jointly and it is not possible to split up the amount and assign a portion of it to one accusation and the balance to the other, the order is unenforceable in respect of either accusation on account of uncertainty and must be set aside—*Amin Lal*, 11 Lah 558, 31 Cr L J 1133.

It is immaterial whether the case is triable as a summons case or as a warrant case. This section makes no distinction between either—*Paighambar*, 4 O W N 392, 28 Cr L J 450 (451), 101 I.C. 482.

Summary cases—Compensation may be awarded even if the case is triable summarily—*Basava*, 11 Mad. 142; *Palani v. Krishnappa*, 59 M.L.J. 319, 32 Cr L J 207, 129 I.C. 37.

808. Who can award compensation:—In sub-sec. (1) of sec 250, Cr P C., at least, the only Magistrate who may call upon the complainant to show cause is the Magistrate who heard the case and who discharges or acquits all or any of the accused. The Magistrate in sub-sec. (2) to sec. 250, Cr. P. C., refers to the Magistrate in

sub-sec. (1) and the definite article "the" does not mean the Magistrate who succeeds the Magistrate who heard the case or any other Magistrate—*Muhammad Alan*, A.I.R. 1939 Sind 321, 41 Cr.L.J. 53, 184 I.C. 595 Compensation is to be awarded by the Magistrate who has heard the substantive case and passed the order of acquittal or discharge. The Legislature never intended that one Magistrate should deal with the substantive case and make the order calling upon the complainant to shew cause, and that another Magistrate may pass the order for compensation—*Rajaram v. Panchanan*, 33 C.W.N. 861 (855), 1929 Cr.C. 474. Where part of the evidence was heard by one Magistrate and then the case was made over to another Magistrate under sec. 346, and the latter Magistrate heard the rest of the evidence and decided the case, *held* that the latter Magistrate was competent to order compensation—*Ram Devi v. Govind*, 19 A.L.J. 651, 22 Cr.L.J. 406, 61 I.C. 646 An order under this section can be made by the Magistrate who heard the case *de novo* and discharged the accused, although another Magistrate, who first dealt with the case, had framed a charge—*Dagdu Govindset v. Punja Vedu*, A.I.R. 1937 Bom. 55, 38 Bom.L.R. 1189, 166 I.C. 598, 38 Cr.L.J. 250, 11 R. 1937 Bom. 211, 1937 A.I.Cr.R. 70, 9 R.B. 247. But where a Magistrate who had tried the case and had directed the complainant to show cause why an order for compensation should not be made, was transferred, his successor cannot make an order under this section, because he had heard nothing of the case except the complainant's plea showing cause against the order—*Mahadeo*, 1892 A.W.N. 58 In a case where a Magistrate has called upon the complainant to show cause why he should not pay compensation for having made a false and frivolous or vexatious complaint and has retired in the course of proceedings before a final order was passed, the notice upon the complainant should be discharged because it is only the Magistrate who has heard the case that can pass final order under this section—*Muhammad Alan*, *supra*.

The words "Magistrate by whom the case is heard" show that this section is confined to Courts of Magistrates trying cases in the first instance, and does not include an Appellate Court. Such a Court in setting aside a conviction cannot order the complainant to pay compensation—*Mehi Singh v. Mongal*, 39 Cal. 157, 16 C.W.N. 10, 12 I.C. 297, 12 Cr.L.J. 529, 14 C.L.J. 437 (F.B.) (overruling *Kari Singh v. Tufani*, 14 C.W.N. 212); *Harichand v. Fakir*, 3 Bom.L.R. 841; *Pitambar*, 7 Bom.L.R. 998, 3 Cr.L.J. 88; *Chedi v. Ram Lal*, 46 All. 80, 25 Cr.L.J. 967, A.I.R. 1924 All. 224, 21 A.L.J. 834; *Balli v. Chittan*, 28 All. 625, 3 Cr.L.J. 441, 1906 A.W.N. 145, 3 A.L.J. 382; *Notified Area v. Kerta Ram*, 7 Lah. 152, 27 Cr.L.J. 570. The Full Bench of the Rangoon High Court, however, doubted the decision in *Mehi Singh v. Mangal*, *supra*; *Ma Mya Khin v. Maung Po Htwa*, 35 Cr.L.J. 1, 145 I.C. 837, A.I.R. 1933 Rang. 288, 11 Rang. 361, 1933 Cr.C. 1084 (F.B.) See Note 1150.

It is doubtful whether the High Court has jurisdiction to pass an order for compensation when the matter comes up in revision—*Aminullah*, 26 A.L.J. 328, A.I.R. 1928 All. 95, 29 Cr.L.J. 274 (275). Under sec. 439 read with sec. 423 (1)(d), Cr. P. C. the High Court cannot make an order for compensation even if upon the judgment and even if cause had been shown the High Court were of opinion that an order for compensation should be made—*Muhammad Alan*, *supra*

Section 250, Cr. P. C., provides for the award of compensation by "the Magistrate by whom the case is heard" and to that Magistrate is expressly reserved the power to award compensation under sec. 250 Sec. 423 (1)(d), Cr. P. C. does amplify the powers of appellate Courts but it does not invest an Appellate Court with authority to make any order which might have been made by the Court below. An incidental order under sec. 423 (1)(d) is an order which is liable or likely to follow as a result of the main order. An order awarding compensation to the accused is not liable to follow (and it cannot be likely to follow unless it is liable to do so) an order made by the High Court in the exercise of its appellate or revisional powers, setting aside a conviction and sentence. The High Court has, therefore, no power to award compensation to the accused when setting aside a conviction and sentence in its appellate or revisional jurisdiction—*Maung Khin Maung*, A.I.R. 1910 Rang. 278, 1910 Rang.L.R. 502,

809. "Discharges or acquits the accused":—The word 'heard' shows that the case must proceed as far as hearing. If a complaint is summarily dismissed under sec. 203, without issue of process to the accused, such a dismissal is not an order of discharge or acquittal within the meaning of this section—*Bhagwan v. Harmukh*, 29 All 137, 1905 A.W.N. 306, 4 Cr.L.J. 452; *Azam v. Mir Abdulla*, 1897 P.R. 14; even though the accused was present with a pleader at the inquiry held under sec. 202, compensation cannot be awarded where the case is dismissed under sec. 203—*Harphul v. Manku*, 84 P.L.R. 1906, 3 P.R. 1906, 4 Cr.L.J. 36. Where after the filing of a complaint, the statement of one of the prosecution witnesses was taken and it disclosed that the complaint was false, and thereupon the Magistrate passed an order of compensation under this section, held that the order could not be passed without discharging or acquitting the accused—*Ram Labhaya v. Jagannath*, 30 P.L.R. 361, 30 Cr.L.J. 854 (855).

An order for compensation may be passed where the accused is acquitted under sec. 245—*Salik Ray*, 6 Cal 581; *Number v. Ambu*, 5 Mad 381; *Panddu*, 10 Bom. 199; or under sec. 247 owing to absence of the complainant—*Lal*, 1888 P.R. 14; *Munshi*, 1884 A.W.N. 115; *Hardeo*, 1891 A.W.N. 120; or under sec. 248 upon withdrawal of complaint—*Himmat v. Bakhtawar*, 1883 P.R. 24. But compensation cannot be awarded when the case is compounded under sec. 345. Though the accused is acquitted after compensation, yet it is not such an acquittal as to bring the case within the provisions of this section—*Sangappa*, Ratanlal 957; *Harikisandas*, 10 Bom.L.R. 1056; *Khushali*, 1888 P.R. 19; *Sundar Singh*, 30 P.R. 1910, 11 Cr.L.J. 638.

In order that compensation may be granted, it is necessary that there must be a complete discharge or acquittal. If the accused is charged with more offences than one, he must be discharged or acquitted of *all the offences*; a discharge or acquittal in respect of one of the offences is a partial discharge (showing that the complaint was at any rate partly true) and cannot entitle the accused to compensation—*Mukti v. Jhotu*, 24 Cal. 53; *Muhammad Ali Khan v. Raja Ram*, 40 All 610 (611), 19 Cr.L.J. 670; *Nadar*, 12 S.L.R. 87, 20 Cr.L.J. 106. If there are several accused, and some only of them are acquitted or discharged, the complainant may be ordered to pay compensation only to those who have been discharged or acquitted, but not to the others—*Number v. Ambu*, 5 Mad. 381; *Gohru v. Amira*, 1877 P.R. 15.

810. False and frivolous or vexatious:—Under the old law, if the charge was frivolous or vexatious, this was sufficient to entitle the accused to compensation; and it was not necessary that the charge must be *false* as well. If the charge was false, it was held in some cases that the accused was entitled to compensation, because a false charge was necessarily a vexatious charge though it was not frivolous—*Benimadhab v. Kumud*, 30 Cal 123 (F.B.); *Ponnammal*, 2 Weir 313 (314); *Bindeshri*, 26 All 512; *Bai Asha*, 5 Bom.L.R. 128; *Gopal*, 37 Bom 376, 14 Cr.L.J. 75; *Ismail*, 156 P.L.R. 1903; *Shah Dawood v. Md Ibrahim*, 11 Bur.L.T. 201, 19 Cr.L.J. 172, 43 I.C. 588 (589); *Nga Mya v. Nga Kyan*, 1914 U.B.R. 3 Qr. 31, 16 Cr.L.J. 92 (93); whereas in some other cases it was held that compensation could not be awarded if the case was false, because that would amount to summarily trying a person for an offence under sec. 211, I.P.C.—*Paras v. Bendhi*, 28 Cal 251; *Ram Singh v. Mathura*, 34 All 354 (355); *Asha*, 4 Bom.L.R. 645. Under the present law, the charge *must be false as well as frivolous or vexatious*. It is not sufficient if the charge is *false* only.

"We do not think that the procedure of sec. 250 should be used in every false case unless the case is *also* frivolous or vexatious. In more serious cases it is desirable that the Magistrate should act under section 476 with a view to the institution of a prosecution"—*Report of the Joint Committee* (1922).

The mere fact that a complaint is frivolous or vexatious does not necessarily mean that it must be false. Compensation can be awarded only if the complaint is *false and also* frivolous or vexatious—*Assanmal v. Dilbar*, 19 S.L.R. 66, 26 Cr.L.J. 1295. It is clear from the language of this section that compensation can be awarded thereunder only if "the accusation was false and either frivolous or vexatious." If the accusation

is proved to be false but cannot be regarded to be frivolous or vexatious, the section does not justify the award of compensation. If the accusation is not proved to be false, no compensation can be awarded, however, frivolous or vexatious the conduct of the complainant might have been. A distinction clearly exists between a fact not being proved and being disproved. Where all that can be said is that the complainant failed to prove his allegation, it does not necessarily follow that his allegation was false and that this section applied—*Bechan Prasad v. Jhari*, 37 Cr.L.J. 424, 161 I.C. 49, 1936 A.L.J. 189, A.I.R. 1936 All. 363. It is only when the Magistrate is of opinion that the accusation against the accused was not only false but also either frivolous or vexatious that he can act under this section. The reason is that this section is not to be applied except in cases which are frivolous or vexatious. It is not intended to be applied in serious cases which are to be dealt with under the provisions of sec. 211, I. P. C. It is for this reason that a Magistrate must find that the case is frivolous or vexatious before he has jurisdiction to deal with the matter under this section—*Ma Pu v. Maung Tun Pe*, 41 Cr.L.J. 506, 187 I.C. 744, A.I.R. 1940 Rang. 110.

The word 'vexatious' indicates an accusation merely for the purpose of annoyance—*Benimadhub v. Kumud*, 30 Cal. 123 (F.B.), 6 C.W.N. 799; *Parsi v. Bendhi*, 28 Cal. 251. An accusation cannot be said to be vexatious unless the main intention of the complainant was to cause annoyance to the person accused—*Kouroud*, 11 S.L.R. 55, 18 Cr.L.J. 1005; *Bakaji v. Munkund Singh*, 21 Cr.L.J. 226 (Nag.); *Bhan v. Syed Chand*, 26 Cr.L.J. 1033, 87 I.C. 921, A.I.R. 1926 Rang. 31. If a prosecution is found to be malicious, i.e., brought on account of enmity it is necessarily a vexatious one—*Kashi Prasad*, 24 A.L.J. 161, 27 Cr.L.J. 300; *Sheikh Faiz*, 14 S.L.R. 168, 22 Cr.L.J. 120. A prosecution launched against a person on mere suspicion, when there is no evidence to connect that person with the offence, is false and vexatious—*Dinshahji*, 34 Bom.L.R. 289, 1932 Cr.C. 236 (237), 137 I.C. 129, 33 Cr.L.J. 392, A.I.R. 1932 Bom. 177.

The word 'frivolous' means 'trifling,' 'silly,' or 'without due foundation'—*Jaina v. Santuk*, 21 Cr.L.J. 41 (Nag.). Whether the charge is frivolous or vexatious is a question of fact to be decided by the Magistrate investigating the complaint—*Munisami Mudali*, 2 Weir 319 (320). But the knowledge and intention of the complainant must be looked into. Compensation should not be granted to the accused where the complainant did not know that the complaint was false and it is clear that the intention of the complainant was not to vex or harass the accused—*Kouroud*, 11 S.L.R. 55, 18 Cr.L.J. 1005.

Where the complainant believed his case to be true at first but subsequently after enquires found that his belief had been proved to be untrue, it would be his duty frankly to tell the Court that he had made a mistake, and if he omits to do so it would show unwarrantable malice on his part and he would be liable to pay compensation—*Shaik Dawood v. Md. Ibrahim*, 11 Bur.L.T. 201, 19 Cr.L.J. 172, 43 I.C. 588 (589).

Where a person was charged with theft, but he was proved to have committed the act in the assertion of a *bona fide* claim of right, the accusation of theft is false, within the scope of sec. 250. In law, no distinction can be properly made between a false accusation as to the motive or intention which prompts a man in doing a certain act, and a false accusation as to his act—*Ravishankar v. Savailal*, 28 Bom.L.R. 89, 27 Cr.L.J. 448.

Where a criminal case was started, not really *bona fide*, but with a view to bringing pressure to bear against an opponent in a civil dispute, the Magistrate is abundantly justified in proceeding against the complainant under this section—*Dahyabhai v. Tangania*, 34 Cr.L.J. 878, 144 I.C. 922, A.I.R. 1933 Bom. 233, 35 Bom.L.R. 484, 1933 Cr.C. 656.

811. 'By his order':—Under the old section, the order awarding compensation had to be passed in the order of discharge or acquittal of the accused, and was a part of the order of discharge or acquittal; so that the proceeding calling upon the complainant to show cause why an order of compensation should not be made, had to be taken and

the complainant had to be heard on that aspect of the case, before the Magistrate passed an order of discharge or acquittal. See *Haru Tanti v. Satish*, 38 Cal 302 (303); *Ram Singh v. Mathura*, 34 All. 354 (355). This procedure has been considered by the Legislature as illogical, and consequently the section had been amended. Under the present section, the Magistrate is not bound to award compensation at the time of passing the order of discharge or acquittal; the latter order should only contain an order calling on the complainant to show cause why he should not be ordered to pay compensation.

Under the old law the order of discharge (or acquittal) and the order directing compensation had to be made simultaneously; i.e., the latter order had to be included in the former order; therefore, where the Magistrate at the time of discharging the accused made no order as to compensation, but on a subsequent day ordered that the complainant should pay compensation, the order was held to be illegal, because it was not passed simultaneously with the order of discharge—*Safdar Husam*, 25 All. 315 (316); *Ram Singh v. Mathura*, 34 All. 354 (355); *Narpat Rai*, 57 P.R. 1905, 3 Cr.L.J. 123; *Haru Tanti v. Satish*, 38 Cal 302 (303), 12 Cr.L.J. 6; *Nanheylal v. Ranibahu*, 10 N.L.R. 8, 15 Cr.L.J. 290 (291); *Imamdin*, 1913 P.L.R. 99, 14 Cr.L.J. 48. These cases are no longer correct. Under the present Code, it is not necessary that the order for compensation should be embodied in the order of discharge. The two orders may be passed in separate proceedings. It is only the order calling upon the complainant to show cause which is to be contained in the order of discharge or acquittal. The actual order for compensation is necessarily a subsequent order—*Achru Mal*, 7 Lah. 121, 27 Cr.L.J. 752, A.I.R. 1926 Lah. 298, 95 I.C. 80; *Rangnath*, A.I.R. 1933 Nag. 296, 1933 Cr.C. 1247, 146 I.C. 14, 34 Cr.L.J. 1163, 30 N.L.R. 15; *Saudagar v. Aroor*, 29 Cr.L.J. 680, 110 I.C. 232, 10 A.I.C.R. 430 (Lah.), 10 I.C. 232. This view was also taken in *Lalit v. Kunja*, 18 C.W.N. 702, 15 Cr.L.J. 150 (152); *Ghanumal*, 7 S.L.R. 123, 15 Cr.L.J. 504 (505); *Jugal Kishore v. Abdul*, 1905 A.W.N. 214, 2 Cr.L.J. 523 (524); *Ghurbin v. Khalil*, 36 All. 132 (136); *Dhanu Kodi v. Muthusami*, (1916) 2 M.W.N. 159, 17 Cr.L.J. 314 (315). Although the order calling upon the complainant to show cause must be included in the judgment of acquittal or discharge, still there is no illegality if the order to show cause, though not made a part of the judgment, is passed and signed immediately after the judgment, so that the order can be said to be a part of the same proceeding and a continuation of it (even though the order of acquittal and the order to show cause have two separate numbers)—*Mangal Chand v. Makhan*, 9 Pat. 100, 11 P.L.T. 691, 31 Cr.L.J. 875 (876); *Ghulam v. Vir Bhan*, 28 Cr.L.J. 592, 102 I.C. 560, A.I.R. 1927 Lah. 515; *Jairaj v. Bansi*, 23 A.L.J. 1054, 27 Cr.L.J. 35 (36). This view was also taken in the old case of *Punamchand*, 8 Bom.L.R. 847, 4 Cr.L.J. 423. The case would be otherwise if the proceeding calling upon the complainant to show cause and ordering compensation is started as an independent proceeding separate from the order of discharge. Such a procedure is illegal—*Safdar Husam*, 25 All. 315 (316); *Imam Din*, 99 P.L.R. 1913, 14 Cr.L.J. 48.

A perusal of sec. 250, Cr. P. C., shows that it contemplates two stages—one when the complaint is dismissed and the accused is discharged or acquitted. At this stage if the Magistrate is of opinion that the accusation was false and either frivolous or vexatious he should call upon the complainant to show cause why he should not pay compensation to the accused. The second stage comes when the complainant shows cause against the making of such order. Sub-sec. (2) of sec. 250, Cr. P. C., clearly provides that at this stage if the Magistrate is satisfied that the accusation was false and either frivolous or vexatious, he may "for reasons to be recorded" direct compensation within the limit prescribed under the section to be paid by him to the accused—*Krishna Datt v. Brahma Datt*, 38 Cr.L.J. 191, 166 I.C. 341, 1937 O.L.R. 15, 9 R.O. 306, 1937 O.W.N. 98, A.I.R. 1937 Oudh. 269. Sub-section (1) of sec. 250, Cr. P. C., contemplates that in the order in which the Magistrate discharges or acquits the accused, he may in that very order, call upon the complainant to show cause why he should not pay compensation and, although, strictly speaking, it is correct to say that the Magis-

trate calls upon the complainant to show cause only after he has discharged or acquitted the accused, it is not correct to say that the sub-section contemplates or requires two orders; one the order in which he acquits or discharges the accused; the other, the order in which he calls upon the complainant—if he thinks proper—to show cause why he should not pay compensation. It is true that in that sub-section it is not written "if the Magistrate finds" but it is written "if the Magistrate is of the opinion". But this is a mere verbal difference and should the Magistrate in his order under sub-sec. (1), sec 250, Cr. P. C., say "I find" instead of "I am of the opinion" it cannot be concluded therefrom that he has made up his mind that the complainant should pay the compensation or that he has come to an unalterable decision that the complaint was false and either frivolous or vexatious. It is necessary to emphasise only that before an order is passed under sub-sec. (2) the complainant shall be given an opportunity to show cause and that when an order under sub-sec. (2) is passed, all the conditions laid down in the sub-section are complied with—*Talib Dalwar v. Sujan Saleh*, 38 Cr.L.J. 121 (123), 166 I.C. 33, A.I.R. 1936 Sind 240, 9 R.S. 116, 1936 Cr.C. 1096, 30 S.L.R. 359.

Under sub-sec. (1) and sub-sec. (2) of sec. 250, Cr. P. C., therefore, the law contemplates two different orders, but in practice what often happens is that the order of discharge is not written out until after the Magistrate has given the complainant an opportunity to show cause. Then the Magistrate combines in one order the order of discharge and the order to pay compensation. Strictly speaking, two orders ought to be recorded but, if that is not done, he does not contravene substantially the provisions of the law—*Wahad Ali Akon v. Sarajuddin Ukit*, A.I.R. 1929 Cal 332, 122 I.C. 298, 31 Cr.L.J. 411.

Where there was no opinion expressed by the order of discharge or acquittal that the case was false and either frivolous or vexatious and there was no record of reasons such as is required by sub-sec. (2), sec. 250, Cr. P. C., before the order directing that compensation be paid by the complainant to the accused, the order that compensation be paid is bad and liable to be set aside—*Chidambaram v. Chand Ali*, A.I.R. 1937 Rang. 301, 171 I.C. 71, 38 Cr.L.J. 1013, 10 R.R. 126.

There is no provision in the Code for an application by any accused person, after the order of discharge or acquittal has been passed, for the initiation of compensatory proceedings—*Rangnath*, A.I.R. 1933 Nag 296, 1933 Cr.C. 1247, 146 I.C. 14, 34 Cr.L.J. 1163, 30 N.L.R. 15.

Where there were two accused, and one of them was discharged, and the case against the other was adjourned to a subsequent date when he was acquitted and on the latter date the Magistrate required the complainant to show cause and then ordered him to pay compensation to each of the accused, *held* that the procedure followed was illegal. When the order of discharge was made against the first accused, the case against him was at an end, and in so far as payment of compensation to him was concerned, the order to show cause should have been made along with the order of discharge. The defect was not curable under sec. 537—*Suresh v. Abdul Jabbar*, 29 C.W.N. 127, 26 Cr.L.J. 449. But where several charges are brought against the same accused, and he is at first discharged on one charge and is subsequently acquitted in respect of the other charges, it is not illegal to pass an order of compensation at the time of the acquittal in respect of the latter charges. In fact, in such a case it is better for the Magistrate to take action under sec. 250 not at an intermediate stage of the trial but at the end—*Ravishankar v. Savaial*, 28 Bom.L.R. 89, 27 Cr.L.J. 448.

Notice to show cause :—The Magistrate should give the complainant an opportunity to show cause and raise any objection which he might urge—*Mahadev*, 24 Bom.L.R. 805, 23 Cr.L.J. 574, A.I.R. 1932 Bom. 409; *Pandurang v. Longman*, 3 Bom.L.R. 777; *Akloo v. Nowbat*, 21 Cr.L.J. 751, 1 P.L.T. 558; *In re Appalarasayya*, 44 Mad. 51; *Lalit v. Kunja*, 18 C.W.N. 702, 15 Cr.L.J. 150; *Gulzari Lal v. Ganga Ram*, 9 A.L.J. 170, 13 Cr.L.J. 268; *Sarupsing*, 31 Cr.L.J. 767 (768), 144 I.C. 412, 27 S.L.R. 78. A.I.R. 1933 Sind 226, 1933 Cr.C. 795, Ind Rul 1933 Sind 186; *Ma E Msaing v. The King*, 39 Cr.L.J. 743, 176 I.C. 508, A.I.R. 1938 Rang 217, 11 R.R. 52, 1938 Rang L.R.

163. The contrary view taken in *Panchan*, 45 All 474, is rendered obsolete by the present amendment. Compensation cannot be awarded when the Magistrate disregarded the mandatory provision of this section and did not call on the complainant to show cause why he should not pay compensation—*New Delhi Mun. Com v. Ram Bai*, 37 Cr.L.J. 935, 164 I.C. 368, A.I.R. 1936 Lah 702, 1936 Cr.C. 719. It is imperative on the Magistrate to give the complainant an opportunity to show cause, and he cannot make the order absolute owing to the absence of the complainant—*Mahadev*, supra; *Ghafur v. Laltu*, 1891 A.W.N. 63; *Subans v. Mahabir*, 18 C.W.N. 1277, 15 Cr.L.J. 707; *Gulzar Lal v. Ganga Ram*, 9 A.L.J. 170, 13 Cr.L.J. 258; *Municipal Board, Lucknow v. Abdul Aziz*, 31 Cr.L.J. 44, 140 I.C. 652, 9 O.W.N. 913, Ind. Rul. 1933 Oudh 8, A.I.R. 1933 Oudh 37, 1933 Cr.C. 70. Under the present law, if the complainant is absent, summons to show cause must be issued to him. If this is not done, the order of compensation must be set aside, and the Magistrate should be directed to summon the complainant and give him an opportunity of showing cause before passing an order—*Kalka v. Ranjit*, 24 A.L.J. 170, 27 Cr.L.J. 128. If the complainant is present, he may be directed forthwith to show cause, and in the absence of any special reason, he is not entitled as a matter of right to an adjournment to enable him to consult a pleader and to give a written reply—*Ishwarlal*, 28 Bom.L.R. 98, 27 Cr.L.J. 430.

812. Who can be ordered to pay compensation:—The Magistrate can pass an order under this section against the person upon whose complaint or information an accusation was made. Where a person F made a complaint to a Magistrate, who sent the complaint to the police for inquiry and report, and the police after inquiry submitted a charge-sheet, and the case was found to be false, *held* that if the case be treated as instituted on complaint, then F could be directed to pay compensation; if this case be taken as instituted on the police charge-sheet, then also F would be treated as a person upon whose information given to the Magistrate (the complaint being treated as an information) the case was instituted, and in that view also it was open to the Magistrate to direct F to pay compensation to the accused—*Farduddin*, 24 A.L.J. 221, 27 Cr.L.J. 702 (703). Where a certain person J gave information to S to the effect that a certain constable had committed extortion, intending that a complaint should be made on his behalf to a Magistrate, and the complaint was subsequently dismissed as frivolous and the accused was acquitted, *held* that J was liable to give compensation to the accused. Although the information was conveyed to the Magistrate through S, still as J gave the information with the intention that it should be conveyed to a Magistrate, then clearly J was the 'person upon whose information the accusation was made' within the meaning of sec 250. The mere fact that he utilised S for conveying the information was immaterial—*Bahawal Singh*, 40 All 79 (81), A.I.R. 1918 All 111, 43 I.C. 108, 19 Cr.L.J. 76. If, on the other hand, he had merely in conversation told S about the case without any desire for or view to a prosecution or to the conveyance of the information to the Magistrate, then he would have been hardly liable for the intervention of S who took it upon himself to make a complaint to the Magistrate. In this latter circumstance, it would be S who would be liable to pay compensation—*Ibid*. In a Sind case, where D gave information of an offence to the Police at the instigation of H, and the accusation was found to be false, it was held that H was not liable to pay compensation, because he did not himself give the information to the Police, although he was the instigator. Sec 250 can be applied only against the person who gives the false information, not against the person who merely instigates the giving of false information. Nor can D be ordered to pay compensation unless he knew that the information which he gave was false—*Sumar*, 12 S.L.R. 76, 20 Cr.L.J. 100, A.I.R. 1918 Sind 25, 48 I.C. 990 (981). Where certain persons gave information as witnesses of an offence to a constable, and upon the constable's information to the Sub-Inspector a case was instituted which was afterwards found to be false, *held* that those persons could not be ordered to pay compensation, because they were not the "persons upon whose information the accusation was made" within the meaning of this section. It was the police constable upon whose information to the Sub-Inspector the case was

instituted. This section is a penal one and should be construed strictly. There is no authority for introducing into it words which would extend the liability to pay compensation to individuals other than the actual complainant or other than the person who gives the information on which the case is instituted—*Wali Mahomed*, 13 S.L.R. 166, 21 Cr.L.J. 49, 54 I.C. 401, A.I.R. 1920 Sind 73. These two Sind cases appear to be in conflict with 40 All. 79 cited above.

An order under sec. 250 cannot be passed against the complainant, unless the complainant knew that his information was false. Where a false charge was lodged by the complainant on information supplied to him by another person, but there was no suggestion of any collusion between the complainant and that person, and there was no finding that the complainant knew that the information was false, *held* that the complainant could not be ordered to pay compensation under this section. The object of this section is that compensation should be recoverable from the person responsible for the false accusation—*Kouroud*, 11 S.L.R. 55, 18 Cr.L.J. 1005, A.I.R. 1917 Sind 73, 42 I.C. 733. See also *Faizmahomed v. Emp.*, A.I.R. 1920 Sind 41, 59 I.C. 552, 22 Cr.L.J. 120, 14 S.L.R. 168.

Discussing the rulings quoted above it has been laid down that this section does not appear susceptible of a complete and logical application to all false and frivolous or vexatious cases. It will not apply, for instance, to punish the real complainant as against the formal complainant, but this remedy provided is a summary remedy and does not contemplate an inquiry which might be a long inquiry into a chain of informants to ascertain who is the real as against the formal complainant. Other remedies must be used in such cases—*Muhammad Hashim v. Emp.*, A.I.R. 1940 Sind 134 (136), 41 Cr.L.J. 788, 189 I.C. 703 (F.B.).

Public officers are not exempted from the liability to pay compensation for frivolous and vexatious complaints—*Narasayya v. Ramdas*, 2 Weir 317 (318). Where a Municipal peon, under sanction of the Municipality, charged a certain person for an offence which was found to be false, the order of the Magistrate directing the peon to pay compensation to the accused was held to be legal—*Bhima*, Ratanlal 309.

Where a process-server of a Civil Court merely reported to the Court that he was obstructed by the accused in executing a writ of attachment, and a report was thereupon made by the Court to a Magistrate, who found the case to be false and directed the process-server to pay compensation to the accused, it was held that the order of the Magistrate was wrong, because the process-peon was not a complainant within the meaning of this section. It was the Civil Court (Sub-Judge) which actually made the complaint (but the Sub-Judge having acted judicially was not liable to the penalty provided in this section)—*Keshab Lakshman*, 1 Bom. 175; *Ram Padairath*, 26 All. 183 (184); *Bharut v. Javed Ali*, 20 Cal. 481 (482); *Kishandas*, 14 Bom L.R. 1166, 14 Cr.L.J. 1 (2). Where under an order of the Assistant Superintendent of Police, the Station House officer prepared a charge-sheet against the accused, and it was presented to the Magistrate by a constable, and the Magistrate discharged the accused and ordered the constable to pay compensation for making a vexatious complaint, *held* that the order was illegal, as the constable was not the person upon whose complaint or information the case was instituted—*Subramanya v. Pakia*, 21 M.L.J. 844, 12 Cr.L.J. 482 (following 1 Bom. 175).

A guardian or next-friend preferring a complaint on behalf of the minor is not liable to pay compensation—*Isa v. Ranon*, 83 P.L.R. 1912, 13 Cr.L.J. 136 (137).

Where a person A gave a false evidence, under the order of his superior officer B, that certain persons had committed an offence, but A had no personal knowledge of the offence, and proceedings against the accused were instituted on the basis of that deposition (which was treated as a complaint), *held* that A was liable to pay compensation, even though he had no personal knowledge of the offence and acted under the order of his superior officer. "If he chose to depose to a matter of which he had no personal knowledge, he must take the consequences, and look to his superiors to indemnify him—*Narasayya v. Ramdas*, (1899) 2 Weir 317 (318). But where proceedings were

instituted against the accused upon information given by B, and A who was B's subordinate gave evidence as a witness in the inquiry held in the case by the Magistrate, held that A was not liable to pay compensation—*Khasim v. Ramudu*, 2 Weir 318.

A person preferring a complaint on behalf of another, e.g., a master preferring a complaint on behalf of his servant, cannot be ordered to pay compensation—*Chorbyn v. Ameer Khan*, 24 P.R., 1869. The question whether a servant can be held responsible for an information lodged on behalf of his master is a question of fact and depends on the further question whether the servant is merely the mouthpiece of his master and is merely giving expression to his master's accusation, or whether he joins personally in the accusation himself. In the former case, the servant cannot be held responsible under this section—*Jagdambi v. Mahadeo*, 14 C.W.N. 326 (328), 11 Cr.L.J. 201.

If a complaint is made against one person, and other persons are arrested in the course of the police investigation on clues furnished by the complainant and other persons interested in the case, the complainant is not liable for the accusation made by the "other persons interested in the case," but he is certainly liable for the accusation made by himself in the course of the police investigation and for the arrest of the persons consequent to such accusation—*Jagdambi v. Mahadeo*, 14 C.W.N. 326 (329), 11 Cr.L.J. 201 (202).

The word 'person' includes also a juristic person; according to sec. 3 (59) of the General Clauses Act it includes any company or association, or body of individuals whether incorporated or not. Therefore, a Municipal Committee can be ordered to pay compensation—*Municipal Committee v. Rattan Chand*, 24 Cr.L.J. 463 (Lah.).

813. To whom compensation can be awarded:—Compensation is awardable only to the person who has suffered from the accusation and not to his relatives—*Abdool Rahim v. Mehrab*, 89 P.R. 1856; *Sadoola*, 97 P.R. 1866; *Debi Buksh*, 25 P.R. 1868. Where there are several accused and one of them is discharged on the ground that the complaint against him is vexatious, only he can be awarded compensation but not the others—*Gohra v. Amira*, 1877 P.R. 15; *Number v. Ambu*, 5 Mad. 361. There is no provision in the Cr. P. C., that Government is to be compensated in any way under this section—*Rangnath*, A.I.R. 1933 Nag. 296, 1933 Cr.C. 1247, 146 I.C. 14, 34 Cr.L.J. 1163, 30 N.L.R. 15.

814. Sub-section (2)—Record of objections, reasons, etc.:—The Magistrate before passing an order for compensation must comply with the provisions of sub-sec. (2) of this section; he cannot pass the order, without recording and considering any objection which the complainant may urge—*Mahadev Ram Krishna*, 23 Cr.L.J. 574, A.I.R. 1922 Bom. 409, 24 Bom.L.R. 805; *Pandurang v. Laxman*, 3 Bom.L.R. 777; *Nga Pwe*, 1906 UBR (Cr. P. C.) 51, 5 Cr.L.J. 298; *Akloo v. Nawbat*, 1 P.L.T. 558, 21 Cr.L.J. 751; *Chunni*, 24 O.C. 261, A.I.R. 1921 Oudh. 247; *Deonaram v. Chhatoo*, A.I.R. 1922 Pat. 157, 3 P.L.T. 203, 23 Cr.L.J. 261, *Minhomal*, 8 S.L.R. 25, 25 I.C. 994, 15 Cr.L.J. 666; *Sekh Jonab Ali v. Hira Lal Pasban*, 11 C.W.N. 62 (S.N.); *Ma E Myaing v. The King*, *infra*; if he omits to record the objections, it is more than an irregularity and cannot be cured by sec. 537—*Nga Pwe*, *supra*, *Pir Mahomed v. Yacob*, 30 Cr.L.J. 458, 115 I.C. 334, A.I.R. 1929 Sind. 113, 1929 Cr.C. 107.

Sub-section (2) of sec. 250, Cr. P. C., provides that the Magistrate must not only consider any cause which the complainant may show but must also record such cause. Where the Magistrate does not record any statement made by the complainant as showing cause against his being ordered to pay compensation but the points raised by him are stated in the order, it is not a sufficient compliance. The Magistrate must record the words used by the complainant when showing cause unless of course the complainant chooses to put his reasons in writing. If this was done, and the writing was filed, it would obviously be unnecessary for the Magistrate to record it again, and filing the written submission would in effect be recording the cause shown. Unless this is done, it is such an irregularity that it is not possible for the order for the payment of compensation to stand—*Maung Theung Shwe*, 39 Cr.L.J. 642, 175 I.C.

639, A.I.R. 1938 Rang. 161, 11 R.R. 9. This section does not provide that the complainant's examination shall be recorded like that of an accused person, but if he shows cause verbally, what he says should be written down in the words used by him, in order that a Court of Appeal or revision may know exactly what he really meant or, if he prefers to show cause by filing a written statement, that written statement must be placed on the record and it is only after considering the cause so shown that an order can be passed directing him to pay compensation. Unless and until the directory provisions of this section are complied with, a Magistrate has no power to order payment of compensation and, therefore, the High Court has power to deal with the matter in revision—*Ma E Myaing v. The King*, 39 Cr.L.J. 743, 176 I.C. 508, 11 R.R. 52, A.I.R. 1938 Rang. 247, 1938 Rang.L.R. 163.

The Magistrate is bound to consider the objections raised by the complainant and to record a judgment with reasons. A mere statement that the cause shown is not reasonable is insufficient—*Deonarain v. Chhatoo*, supra.

Moreover, a Magistrate should, in his order awarding compensation, state his reasons why he deems the complaint to be vexatious, and should also state in his judgment the facts of the case with a criticism of the incidents involved in it. Merely saying that the prosecution evidence is unsatisfactory, and that upon the evidence and written statement he considers the case as vexatious, is not sufficient—*Amjad Ali v. Ashruf Ali*, 10 C.W.N. 544, 3 Cr.L.J. 390. Before passing the order it is incumbent on the Magistrate to record a definite finding that the accusation against the accused was false and either frivolous or vexatious—*Ibrahim v. Anant Ram*, 34 Cr.L.J. 80, 140 I.C. 680, 33 P.L.R. 670, A.I.R. 1932 Lah. 554, 1932 Cr.C. 718, Ind. Rul. 1933 Lah. 26. When the accused are discharged, the recording of the reasons for ordering compensation to be paid is almost a condition precedent to the proper exercise of that power; the recording of reasons is in addition to the finding by the Magistrate that the accusation was either frivolous or vexatious. In the absence of record of reasons, the order of compensation is wrong—*Thadiappan v. Veeraperumal*, 21 L.W. 646, A.I.R. 1925 Mad. 1139, 90 I.C. 157, 26 Cr.L.J. 1501; *Saleh*, 33 Cr.L.J. 644, 138 I.C. 635, 26 S.L.R. 299, 1932 Cr.C. 692, A.I.R. 1932 Sind 156, Ind. Rul. 1932 Sind 85; *Baloch*, 25 Cr.L.J. 1038, 6 R.S. 250, 149 I.C. 946, A.I.R. 1934 Sind 18, 1934 Cr.C. 227; *Krishna Datta v. Brahma Datta*, 38 Cr.L.J. 191, 166 I.C. 341, 1937 O.L.R. 15, 9 R.O. 306, 1937 O.W.N. 98, A.I.R. 1937 Oudh 269, 1937 A.Cr.C. 27; *Chidambaram v. Chand Ali*, A.I.R. 1937 Rang. 301, 171 I.C. 71, 38 Cr.L.J. 1013, 10 R.R. 126. The recording of reasons is essential and an omission to do so vitiates the whole proceeding—*Bhagwandin v. Jagdat*, 39 Cr.L.J. 378, 173 I.C. 643, 1938 O.L.R. 132, 1938 O.A. 224, 1938 O.W.N. 288, 1938 A.Cr.C. 26, 10 R.O. 229, A.I.R. 1938 Oudh 99. The object of the legislature in requiring Magistrates to record their reasons in such a case is that the power given under the section should not be used indiscriminately and in order to enable a Court of Appeal or revision to judge the sufficiency of the grounds on which the order is based—*Krishna Datta v. Brahma Datta*, supra; *Thadiappan v. Veeraperumal*, supra; *Bhagwandin v. Jagdat*, supra. But the reasons why the complaint is false and frivolous or vexatious have not got to be recorded under this section and it is beyond the power of the Magistrate to discover why the complainant made a false case. The reasons which have to be recorded are why he directs compensation to be paid—*Ma Siri v. Maung Maung Lay*, 37 Cr.L.J. 773 (775), 163 I.C. 163, A.I.R. 1936 Rang. 230, 1936 Cr.C. 514. The words "for reasons to be recorded" referred to the payment of compensation and not to the finding of the accusation as false and vexatious. The Magistrate cannot be expected, when passing the order under sub-sec. (2), sec. 250, Cr. P. C., to set out at length the evidence in the case, nor can he be expected to exclude from his mind the evidence on record which he should have in mind. He will, of course, ordinarily find it necessary to refer to the evidence; he will record and consider carefully any cause the complainant shows in his defence. Above all, however, he must follow the words of the section—*Talib Daluar v. Sajan Saleh*, 33 Cr.L.J. 121 (123), 166 I.C. 33, A.I.R. 1936 Sind 240, 9 R.S. 116, 1936 Cr.C. 1096, 30 S.L.R. 359.

The Magistrate in directing that compensation should be paid must record his reasons. Where, therefore, the Magistrate has merely said that the written explanation of the complainant was unsatisfactory and has not explained in what way it was unsatisfactory or why he thought that that was a case in which compensation ought to be awarded to the accused, the order of the Magistrate must be held to be invalid—*Ma Pu v. Maung Tun Pe*, 41 Cr.L.J. 506, 187 IC 744, A.I.R. 1940 Rang 110.

When a notice is issued, then the complainant is entitled to show that the complaint was not false and either vexatious or frivolous—*Faruqi v. Municipal Board*, A.I.R. 1933 All. 814, 1933 A.L.J. 1367, 146 IC. 691, 35 Cr.L.J. 175. The complainant may show cause with reference to the evidence already recorded, but he cannot adduce further evidence to prove that the charge was a true one. This section does not require that separate proceedings should be held and fresh evidence taken—*Chiraj Ali*, 1898 A.W.N. 198. But where the Magistrate had discharged the accused in the main case after hearing only some of the witnesses produced by the complainant, the Magistrate, before awarding compensation, ought to hear the remaining witnesses of the complainant—*Appalanarasayya*, 44 Mad 51 (52); *Sya Kjaw*, 3 Bur.L.J. 26, A.I.R. 1924 Rang. 293, 25 Cr.L.J. 1280; *Maruthathal v. Ramaswami*, 1933 M.W.N. 900. It is only after examination of all the evidence the complainant wants to adduce that a Magistrate can come to the conclusion that the case is false and vexatious. Though the Magistrate can discharge the accused at any stage, he is not entitled to order compensation without examining all the complainant's witnesses—*Parthasarathi v. Krishnaswami*, 51 Mad 337, 29 Cr.L.J. 114, 54 M.L.J. 641, A.I.R. 1928 Mad 169, 106 IC 706. The order passed without doing so may not be illegal but is one which is highly undesirable in the interests of justice—*Gul Din v. Abdul Khalik*, A.I.R. 1935 Pesh. 178, 37 Cr.L.J. 298, 160 IC. 364, 1935 Cr.C. 1310. But where the Magistrate took all the evidence that was produced by or on behalf of the complainant and, for sufficient reasons, refused to issue a commission, or to move the District Magistrate for issue of a commission for the examination of a witness in a criminal trial, he has not refused, or omitted, to take the evidence produced in support of the prosecution. In such a case the order of discharge of the accused passed by him is perfectly legal and accordingly there is no legitimate ground of invalidity of the order under sec. 250, Cr. P. Code—*D. K. Nath v. P. K. Nath*, A.I.R. 1937 Rang. 398, 1937 Rang.L.R. 159, 171 IC 921, 10 RR 202, 39 Cr.L.J. 29. The mere fact that a discrepancy occurred between the first two witnesses does not justify the conclusion that the complainant had falsely charged the accused—*Gul Din v. Abdul Khalik*, supra.

815. Amount and nature of compensation:—The loss sustained or the inconvenience undergone by the accused ought to serve as a guide to the Magistrate in awarding compensation—*Sarnam*, 1881 A.W.N. 167. But he cannot impose more than Rs. 50 (now Rs. 100)—*Shankar*, 1919 PR 15, 20 Cr.L.J. 495. If there are more than one accused, the Magistrate can pass an order directing Rs. 100 to be paid to each accused. Under this section, all that is prohibited is that compensation to the accused or to each or any other should not exceed Rs. 100 in amount. The section does not mean that if there are a number of accused persons, the total amount awarded to all of them must not exceed the maximum specified in the section—*Fariduddin*, 24 A.L.J. 221, 27 Cr.L.J. 702 (704).

The compensation is only by way of amends to the accused, and is not a fine; consequently, the amount can not be credited to Government—*Jumna Das v. Ramia*, 1866 PR 102; *Ghoola v. Ameer*, 1869 PR. 1. It is not a fine, but it is in the nature of damages for malicious prosecution though it is made recoverable in a summary way as if it were a fine—*Byravalu*, 26 Mad. 127 (129).

815A. Realisation:—By reason of the provisions of sec. 547, Cr. P. C., money ordered to be paid as compensation under sec. 250, Cr. P. C., is recoverable as if it were a fine; and the methods of recovering a fine are provided for by sec. 385, Cr. P. Code—*Ram Chandra*, 33 Cr.L.J. 958, 140 IC 72, 13 P.L.T. 536, A.I.R. 1932 Pat. 301, 1932 Cr.C. 773, Ind. Rul. 1932 Pat. 290 (F.B.),

639, A.I.R. 1938 Rang. 161, 11 R.R. 9. This section does not provide that the complainant's examination shall be recorded like that of an accused person, but if he shows cause verbally, what he says should be written down in the words used by him, in order that a Court of Appeal or revision may know exactly what he really meant or, if he prefers to show cause by filing a written statement, that written statement must be placed on the record and it is only after considering the cause so shown that an order can be passed directing him to pay compensation. Unless and until the directory provisions of this section are complied with, a Magistrate has no power to order payment of compensation and, therefore, the High Court has power to deal with the matter in revision—*Ma E Myaing v. The King*, 39 Cr.L.J. 743, 176 I.C. 508, 11 R.R. 52, A.I.R. 1938 Rang. 247, 1938 Rang L.R. 163.

The Magistrate is bound to consider the objections raised by the complainant and to record a judgment with reasons. A mere statement that the cause shown is not reasonable is insufficient—*Deonarain v. Chhatoo*, supra.

Moreover, a Magistrate should, in his order awarding compensation, state his reasons why he deems the complaint to be vexatious, and should also state in his judgment the facts of the case with a criticism of the incidents involved in it. Merely saying that the prosecution evidence is unsatisfactory, and that upon the evidence and written statement he considers the case as vexatious, is not sufficient—*Amjad Ali v. Ashruf Ali*, 10 C.W.N. 544, 3 Cr.L.J. 390. Before passing the order it is incumbent on the Magistrate to record a definite finding that the accusation against the accused was false and either frivolous or vexatious—*Ibrahim v. Anant Ram*, 34 Cr.L.J. 80, 140 I.C. 680, 33 P.L.R. 670, A.I.R. 1932 Lah. 554, 1932 Cr.C. 718, Ind. Rul 1933 Lah. 26. When the accused are discharged, the recording of the reasons for ordering compensation to be paid is almost a condition precedent to the proper exercise of that power; the recording of reasons is in addition to the finding by the Magistrate that the accusation was either frivolous or vexatious. In the absence of record of reasons, the order of compensation is wrong—*Thadiappan v. Veeraperumal*, 21 L.W. 646, A.I.R. 1925 Mad. 1139, 90 I.C. 157, 26 Cr.L.J. 1501; *Saleh*, 33 Cr.L.J. 644, 138 I.C. 635, 25 S.L.R. 299, 1932 Cr.C. 692, A.I.R. 1932 Sind 156, Ind. Rul 1932 Sind 85; *Baloch*, 25 Cr.L.J. 1038, 6 R.S. 250, 149 I.C. 946, A.I.R. 1934 Sind 18, 1934 Cr.C. 227; *Krishna Datta v. Brahma Datta*, 38 Cr.L.J. 191, 166 I.C. 341, 1937 O.L.R. 15, 9 R.O. 306, 1937 O.W.N. 98, A.I.R. 1937 Oudh 269, 1937 A.Cr.C. 27; *Chidambaram v. Chand Ali*, A.I.R. 1937 Rang. 301, 171 I.C. 71, 38 Cr.L.J. 1013, 10 R.R. 126. The recording of reasons is essential and an omission to do so vitiates the whole proceeding—*Bhagwandin v. Jagdat*, 39 Cr.L.J. 378, 173 I.C. 643, 1938 O.L.R. 132, 1938 O.A. 224, 1938 O.W.N. 288, 1938 A.Cr.C. 26, 10 R.O. 229, A.I.R. 1938 Oudh 99. The object of the legislature in requiring Magistrates to record their reasons in such a case is that the power given under the section should not be used indiscriminately and in order to enable a Court of Appeal or revision to judge the sufficiency of the grounds on which the order is based—*Krishna Datta v. Brahma Datta*, supra; *Thadiappan v. Veeraperumal*, supra; *Bhagwandin v. Jagdat*, supra. But the reasons why the complaint is false and frivolous or vexatious have not got to be recorded under this section and it is beyond the power of the Magistrate to discover why the complainant made a false case. The reasons which have to be recorded are why he directs compensation to be paid—*Ma Sin v. Maung Maung Lay*, 37 Cr.L.J. 773 (775), 163 I.C. 163, A.I.R. 1936 Rang. 230, 1936 Cr.C. 514. The words "for reasons to be recorded" referred to the payment of compensation and not to the finding of the accusation as false and vexatious. The Magistrate cannot be expected, when passing the order under sub-sec. (2), sec. 250, Cr. P. C., to set out at length the evidence in the case, nor can he be expected to exclude from his mind the evidence on record which he should have in mind. He will, of course, ordinarily find it necessary to refer to the evidence; he will record and consider carefully any cause the complainant shows in his defence. Above all, however, he must follow the words of the section—*Talib Daluicar v. Sajjan Saleh*, 38 Cr.L.J. 121 (123), 166 I.C. 33, A.I.R. 1936 Sind 210, 9 R.S. 116, 1936 Cr.C. 1096, 30 S.L.R. 359.

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When a notice is issued, then the complainant is entitled to show that the complaint was not false and either vexatious or frivolous—*Faruqi v. Municipal Board*, A.I.R. 1933 All. 814, 1933 A.L.J. 1367, 146 I.C. 691, 35 Cr.L.J. 175. The complainant may show cause with reference to the evidence already recorded, but he cannot adduce further evidence to prove that the charge was a true one. This section does not require that separate proceedings should be held and fresh evidence taken—*Chiraj Ali*, 1898 A.W.N. 198. But where the Magistrate had discharged the accused in the main case after hearing only some of the witnesses produced by the complainant, the Magistrate, before awarding compensation, ought to hear the remaining witnesses of the complainant—*Appalanarasayya*, 44 Mad. 51 (52); *Sya Kyau*, 3 Bur.L.J. 26, A.I.R. 1924 Rang. 293, 25 Cr.L.J. 1280; *Maruthathal v. Ramaswami*, 1933 M.W.N. 900. It is only after examination of all the evidence the complainant wants to adduce that a Magistrate can come to the conclusion that the case is false and vexatious. Though the Magistrate can discharge the accused at any stage, he is not entitled to order compensation without examining all the complainant's witnesses—*Parthasarathi v. Krishnaswami*, 51 Mad. 337, 29 Cr.L.J. 114, 54 M.L.J. 641, A.I.R. 1928 Mad. 169, 106 I.C. 706. The order passed without doing so may not be illegal but is one which is highly undesirable in the interests of justice—*Gul Din v. Abdul Khalik*, A.I.R. 1935 Pesh. 178, 37 Cr.L.J. 298, 160 I.C. 364, 1935 Cr.C. 1310. But where the Magistrate took all the evidence that was produced by or on behalf of the complainant and, for sufficient reasons, refused to issue a commission, or to move the District Magistrate for issue of a commission for the examination of a witness in a criminal trial, he has not refused, or omitted, to take the evidence produced in support of the prosecution. In such a case the order of discharge of the accused passed by him is perfectly legal and accordingly there is no legitimate ground of invalidity of the order under sec. 250, Cr. P. Code—*D. K. Nath v. P. K. Nath*, A.I.R. 1937 Rang. 398, 1937 Rang.L.R. 159, 171 I.C. 921, 10 R.R. 202, 39 Cr.L.J. 29. The mere fact that a discrepancy occurred between the first two witnesses does not justify the conclusion that the complainant had falsely charged the accused—*Gul Din v. Abdul Khalik*, supra.

815. Amount and nature of compensation:—The loss sustained or the inconvenience undergone by the accused ought to serve as a guide to the Magistrate in awarding compensation—*Sarnam*, 1881 A.W.N. 167. But he cannot impose more than Rs. 50 (now Rs. 100)—*Shankar*, 1919 P.R. 15, 20 Cr.L.J. 495. If there are more than one accused, the Magistrate can pass an order directing Rs. 100 to be paid to each accused. Under this section, all that is prohibited is that compensation to the accused or to each or any other should not exceed Rs. 100 in amount. The section does not mean that if there are a number of accused persons, the total amount awarded to all of them must not exceed the maximum specified in the section—*Fariduddin*, 24 A.L.J. 221, 27 Cr.L.J. 702 (704).

The compensation is only by way of amends to the accused, and is not a fine; consequently, the amount can not be credited to Government—*Jumna Das v. Ramia*, 1866 P.R. 102; *Ghoola v. Amecr*, 1869 P.R. 1. It is not a fine, but it is in the nature of damages for malicious prosecution though it is made recoverable in a summary way as if it were a fine—*Byravali*, 26 Mad. 127 (129).

815A. Realisation:—By reason of the provisions of sec. 547, Cr. P. C., money ordered to be paid as compensation under sec. 250, Cr. P. C., is recoverable as if it were a fine; and the methods of recovering a fine are provided for by sec. 385, Cr. P. Code—*Ram Chandra*, 33 Cr.L.J. 958, 140 I.C. 72, 13 P.L.T. 536, A.I.R. 1932 Pat. 301, 1932 Cr.C. 773, Ind. Rul. 1932 Pat. 290 (F.B.).

816. Sub-section (2A)—Imprisonment in default of compensation:—If the compensation be not paid, the Magistrate may send the complainant to jail; but before doing so he may act according to the provisions of sec. 388, in order to realise the amount of compensation. The ruling in *Byravalu*, 26 Mad. 127 (129) that before sending the complainant to prison the Magistrate was bound to issue a *warrant* for the levy of the amount by distress, under sec. 388, is no longer good law, in view of the amendment made in sec. 388, which has now superseded the issue of *warrant*.

Since clause (1) specifically provides for the payment of compensation separately to each accused, the term of thirty days' simple imprisonment may be awarded in default of each such separate payment ordered—*Ma Kha*, 3 Rang. 93, 26 Cr.L.J. 821.

Where a complainant has to pay compensation to each of several accused the imprisonment which the Magistrate orders in default of payment should be ordered in respect of default of payment to each of the accused—*Ma Pu v. Maung Tun Pe*, 41 Cr.L.J. 506, 187 I.C. 744, A.I.R. 1940 Rang. 110.

The Magistrate has no power to order that the sentence of imprisonment in default of payment of compensation shall take effect after a term of detention in the Civil jail which had been ordered by a Civil Court under the C. P. Code in another case—*Ma Kha*, *supra*.

Under the old law, an order for imprisonment could be made only on failure to recover the compensation, *i.e.*, it could be made only after there was some attempt to recover the money in the manner provided for recovery of fine, and the attempt failed. Such an order could not be made *alternatively in the order* for payment of compensation—*Ramjeetan v. Durga*, 21 Cal. 979; *Venkathappa*, 2 Weir 320; *Hari*, Ratanlal 611; *Ismail*, 156 P.L.R. 1903, 18 P.R. 1903; *Pinnu*, 18 All. 96; *Manjhli v. Manik Chand*, 19 All. 73; *Dhanukodi v. Muthusami*, (1916) 2 M.W.N. 159, 17 Cr.L.J. 314 (315); *Hamir Chand*, 1902 P.R. 14; *Nga Myo v. Nga Kyan*, 16 Cr.L.J. 92, 1914 U.B.R. 3rd. Qr. 31; *Shib Nath v. Sarat*, 22 Cal. 586; *Parsi v. Bendhi*, 28 Cal. 251; *Priya Nath v. Basanti*, 5 C.W.N. 213; *Lalit Mohan v. Kunja*, 18 C.W.N. 702, 15 Cr.L.J. 150; *Akloo v. Nawbat*, 1 P.L.T. 558, 21 Cr.L.J. 751. Under the new sub-section (2A) the order for imprisonment in the alternative can now be made *in the order* awarding compensation.

817. Sub-section (2C):—This section does not bar civil or criminal proceedings. The object of this section is not to punish the complainant but to award by a summary order some compensation to the person against whom a frivolous or vexatious complaint is brought, leaving it to him to obtain further redress against the complainant by a regular civil suit or criminal prosecution—*Beni Madhab v. Kumud*, 30 Cal 123 (129) (F.B.).

Proceeding under section 476:—The Joint Committee (1922) observe: "In more serious cases it is desirable that the Magistrate should proceed under sec. 476 with a view to the institution of a prosecution."

A Magistrate who passes an order of compensation under this section can subsequently make a complaint (under sec. 476) to prosecute the complainant for preferring a false charge under section 211, I. P. Code—*Adikkhan v. Alagan*, 21 Mad. 237; *Gopala*, 37 Bom. 376, 14 Cr.L.J. 75, 15 Bom.L.R. 49; *Allabux*, 10 S.L.R. 162, 18 Cr.L.J. 414; *Hafiz Khan*, 26 Cr.L.J. 527, 85 I.C. 367, 1 O.W.N. 878, A.I.R. 1925 Oudh 558. Similarly, where the Magistrate makes a complaint for the prosecution of a complainant under section 211, I. P. Code, for bringing a false charge, he is not precluded from passing an order under this section directing the complainant to pay compensation to the accused—*Nanke v. Ghan Saya*, 1907 P.W.R. 30, 7 Cr.L.J. 231; *Mathra Das v. Raja*, 1901 P.R. 18; *Achar v. Pirushah*, 7 S.L.R. 10, 14 Cr.L.J. 437; *Contra—Bachu v. Jagdan*, 26 Cal. 181; *Shib Nath v. Sarat*, 22 Cal 586. But, of course, it is discretionary with the Magistrate to make a complaint under sec. 476 for the prosecution of the complainant or to proceed under this section, and the question whether the discretion has been rightly exercised by the Magistrate depends upon the facts of the particular case. If the false charge is of such a nature that a prosecution is necessary on grounds of public policy, the Magistrate would exercise his discretion

wrongly in awarding compensation instead of making a complaint under sec 476. But if the charge is such that no prosecution is necessary, on grounds of public policy, then the exercise of his discretion in awarding compensation is proper—*Tanni Reddi*, 27 Mad. 59. See also *Laji Hari*, 20 Cr.L.J. 226 (Pat.).

818. Sub-section (3)—Appeal:—Under the old law, no appeal could lie against an order of compensation passed by a 1st class Magistrate—*Buru*, 1 Bom L.R. 350; under the present law, an appeal is allowed from an order of such Magistrate if the compensation awarded exceeds rupees fifty.

Whenever a complainant has been ordered to pay compensation exceeding rupees fifty, he has a right of appeal, whether the amount is awarded to one accused, or is ordered to be distributed among a number of accused persons in sums not exceeding fifty rupees—*Augustine Pereira v. Duming Demello*, 49 Bom 440, 26 Cr.L.J. 480, 26 Bom L.R. 1243. This clause does not limit the right of appeal to cases where the compensation awarded to each individual accused exceeds rupees fifty. Where the total amount directed to be paid to several accused persons exceeds Rs. 50, a right of appeal exists—*Assanmal v. Dilbar*, 19 S.L.R. 66, 26 Cr.L.J. 1295; *Sarab Dial v. Bir Singh*, 9 Lah. 462, 29 Cr.L.J. 430, A.I.R. 1928 Lah 638; *Sumaria*, 24 A.L.J. 167, 27 Cr.L.J. 146, 91 I.C. 882; *Sobhit*, 7 P.L.T. 552, 26 Cr.L.J. 1504, 90 I.C. 160.

In an appeal under this sub-section it is open to the Appellate Court to go into all the facts of the case and after going into those facts to determine whether the case was false and vexatious and whether the order for compensation was right and whether the amount of compensation was suitable—*Surendra v. Basanta*, 35 C.W.N. 1151. But once it has been decided that a case is false and frivolous or vexatious, then it is a matter within the Magistrate's discretion as to whether it is one in which compensation should be given or not and the Appellate Court is not entitled to set aside an order for payment of compensation in such a case save for very cogent reasons. The Appellate Court is not entitled to alter the Magistrate's order because, in its opinion, the accused's defence might not be a true one—*L. R. Abrol v. S. L. Surpaul*, 39 Cr.L.J. 587, 175 I.C. 357, 10 R.R. 488, A.I.R. 1938 Rang 200.

In an appeal from an order under this section the Appellate Court has ample power to take additional evidence—*Seeniah v. Abdul*, A.I.R. 1930 Mad 483, 53 Mad. 688, 1930 Cr.C. 507, 58 M.L.J. 414, 31 M.L.W. 524, 123 I.C. 809, 31 Cr.L.J. 602, 1930 M.W.N. 534.

Notice to accused—Though there is no express provision that notice should go to the accused, still it is desirable that the accused should have notice of the appeal in order that he may have an opportunity of supporting the order passed in his favour—*Palaniappa*, 29 Mad 187; *Venkatarama v. Krishna*, 38 Mad 1091; *Dinshakji*, 34 Bom L.R. 289, 33 Cr.L.J. 392, 137 I.C. 129, A.I.R. 1932 Bom 177, 1932 Cr.C. 236 (237); *Ram Chand v. Jesa Ram*, 25 Cr.L.J. 209, A.I.R. 1924 Lah 675 (676); *Bharasa v. Sukhdeo*, 27 Cr.L.J. 1086, 97 I.C. 62, 53 Cal 989, 43 C.L.J. 583, A.I.R. 1926 Cal. 1054; *Momoon v. Ibrahim*, 20 S.L.R. 41, 27 Cr.L.J. 248. Contra—*Lachman v. Babu*, 34 Cr.L.J. 533, 143 I.C. 86, Ind. Rul. 1933 Lah 310, 34 P.L.R. 442, A.I.R. 1933 Lah. 515, 1933 Cr.C. 816. But absence of notice to the accused will not vitiate the appellate proceedings nor make the appellate order liable to be set aside—*Nagi Reddi v. Basappa*, 33 Mad. 89; *Krishna v. Narayana*, 41 M.L.J. 172, 62 I.C. 823, 22 Cr.L.J. 583; *Rashid Muhammad*, 8 Lah 568, 28 Cr.L.J. 416; *Pena v. Venkatesa*, 33 Cr.L.J. 595, 138 I.C. 385, 1932 M.W.N. 722.

Notice to Crown—It is doubtful whether notice of the appeal should be given to the officer appointed by the Local Government under sec 422, because it is a matter in which the accused is really interested and the Crown is very little interested. But the safer course in such cases is to give notice to that officer under sec. 422—*Palaniappa*, 29 Mad. 187; *Krishna v. Narayana*, supra. Notice to the Crown is a mere formality in an appeal of this description, for there can be very few cases in which the Crown would deem it necessary to oppose the appeal. Omission to send notice to the Crown is not a ground of interference with the Appellate Court's order—*Guruswami v. Tirumurthi*,

27 M.L.J. 629, 15 Cr.L.J. 648; *Peria v. Venkatesa*, 33 Cr.L.J. 596, 138 I.C. 385, 1932 M.W.N. 722.

819. Revision:—A superior Criminal Court has power under sec. 435 to examine an order under sec. 250 in the exercise of its ordinary revisional jurisdiction—*Harris v. Peal*, 17 A.L.J. 896, 58 I.C. 351, 21 Cr.L.J. 767. The High Court in revision can set aside an order of compensation passed by a Magistrate, and can, under sec. 423 (d) read with sec. 439, direct the money to be refunded to the complainant—*Safdar Husain*, 25 All. 315 (316); *Howanna v. Jasu*, 1885 P.R. 12.

Death of party:—If, pending the revision, the complainant (i.e., the party who has been ordered to pay compensation) dies, the revision petition does not abate but may be continued by his legal representatives—*Prem Singh v. Bhola*, 24 P.R. 1908, 9 Cr.L.J. 103.

Where after the passing of the Magistrate's order the accused died, and the complainant applied to the High Court for revision, the High Court refused to pass any order, because no order could be passed to the prejudice of an accused person who being dead could not be served with notice—*Govinda v. Keshavrao, Ratanlal* 634.

CHAPTER XXI.

OF THE TRIAL OF WARRANT-CASES BY MAGISTRATES.

820. Change of procedure:—If a warrant case is tried as a summons case, the procedure is illegal and the conviction is liable to be set aside—*Chinnappayan*, 29 Mad. 372; *Gaya Prasad*, 28 N.L.R. 18, 33 Cr.L.J. 573 (574), 138 I.C. 175. But in *Maluk*, 31 Cr.L.J. 123, 120 I.C. 526, A.I.R. 1930 Sind 53, 1930 Cr.C. 69, it was held to be a mere irregularity, curable by sec. 537, Cr. P. C., unless it actually caused a failure of justice. If in such trial the accused is acquitted under sec. 245, the order of acquittal will at best operate as an order of discharge under sec. 253—*Jadu*, 1886 A.W.N. 260; *Lajja Ram*, 1888 A.W.N. 96.

The fact that a summons instead of a warrant has been issued in a warrant case does not justify the procedure to be as in a summons case—*Nand Lal v. Bhagiratty*, 10 W.R. 31. That a Magistrate has power to change his mind in regard to the exact offences which a complaint discloses before he begins to enquire into the case cannot be denied on general principles. Where, therefore, though the Magistrate had issued summons to the accused for an offence under sec. 426, I. P. C., an offence triable as a summons case, he did not apply sec. 242, Cr. P. C., when the accused was brought before him, but informed him then and there that on reconsideration he held that other offences also were disclosed by the complaint, and proceeded from that moment to apply sec. 252, Cr. P. C., the procedure was not illegal—*Maloi*, A.I.R. 1937 Mad. 944, (1937) 2 M.L.J. 725, 1937 M.W.N. 981, 46 M.L.W. 811, 1937 M.Cr.C. 374, 172 I.C. 496, 39 Cr.L.J. 153.

If a Magistrate begins a trial as a summons case and then finds that an offence triable only under warrant case procedure has been committed, he is bound to apply warrant case procedure thenceforward and he is not in any way disqualified from proceeding with the trial—*K. V. Venkata Ramanier*, 39 Cr.L.J. 958, 177 I.C. 814, A.I.R. 1938 Mad. 815, 47 M.L.W. 739, 1938 M.W.N. 589, (1938) 2 M.L.J. 360, I.L.R. 1938 Mad. 814, 11 R.M. 385, dissenting from *Rajaratanam Pillai*, 59 Mad. 442, 161 I.C. 116, A.I.R. 1936 Mad. 341, 1936 Cr.C. 384, 37 Cr.L.J. 501, 70 M.L.J. 340, 1936 M.W.N. 187, 43 M.L.W. 367, 8 R.M. 820, where a contrary view has been taken and it has also been held that once a Magistrate has taken cognizance of a summons case, he cannot convict an accused person for anything but an offence triable as a summons case.

If a trial is commenced as a warrant case, it must be concluded as a warrant case and not as a summons case; a sudden change of procedure from Ch. XXI to Ch. XX in the midst of trial is illegal—*Munshi Tehi*, 2 P.L.T. 482, 22 Cr.L.J. 683, 63 I.C. 619 (620); *Ganga Saran*, 19 A.L.J. 6, A.I.R. 1921 All 282 (284), 22 Cr.L.J. 146, 59 I.C. 850; *Govind*, 28 Cr.L.J. 227, 99 I.C. 1027, A.I.R. 1927 All 270; *Amirbi*, 34 Cr.L.J. 340, 142 I.C. 393, 1933 Cr.C. 786, A.I.R. 1933 Nag. 192, Ind. Rul 1933 Nag. 114. When the cross-examination of prosecution witnesses was reserved, the defence should be given an opportunity to cross-examine them, even if the charge is reduced to an offence triable as a summons case in the midst of the trial which was commenced as a warrant case—*Devi Dial v. Rattan*, 29 Cr.L.J. 235, 107 I.C. 285, A.I.R. 1928 Lah. 660.

If an offence is triable exclusively as a warrant case, the Magistrate commits an illegality (not merely an irregularity) in splitting up the offence into its component parts in order to enable him to try it as a summons case—*Ganga Saran*, supra.

The question whether a case is triable as a summons case or as a warrant case is to be decided by reference to the *complaint* and the *notices* issued to the accused and also to the *commencement* of the case under certain sections of the Penal Code, and not by reference to the particular sections under which the *conviction* takes place—*Ganga Saran*, supra.

If two charges arising out of the same facts under the same circumstances are framed, one of a summons case and another of a warrant case, the procedure should be as laid down for a warrant case—*Raj Narain v. Tamoli*, 11 Cal. 91; *Sobhanadri*, 39 Mad. 503, 29 I.C. 668, 16 Cr.L.J. 540, 2 M.L.W. 574, 18 M.L.T. 92, 1915 M.W.N. 546; *Maung Gale*, 3 Cr.L.J. 350; *Raghavulu v. Singaram*, 41 Mad. 727 (728), 45 I.C. 517, A.I.R. 1918 Mad. 371, 19 Cr.L.J. 613, 7 M.L.W. 520; *Nga Lun Mg.*, 34 Cr.L.J. 1180, 146 I.C. 173, A.I.R. 1933 Rang. 343, 1933 Cr.C. 1153.

See Notes 786 and 795.

251. The following procedure shall be observed by Magistrates in the trial of warrant cases.

Procedure in warrant-cases.

821. Procedure must be strictly followed:—In trying warrant cases, the procedure of this chapter must be strictly followed. The Magistrate cannot follow a materially different procedure which had grown up by usage in the course of years, however convenient it may be. A trial conducted in such a procedure is more than an irregularity, not curable by sec. 537—*Dosabhai*, 17 Bom.L.R. 490, 16 Cr.L.J. 538. A Presidency Magistrate must follow the procedure laid down in this chapter, subject to the special provisions of sec. 362 as to the mode of taking down the evidence—*Abdul Ratanlal* 539.

During the trial of an author of a book under sec. 153A, I. P. Code, after the evidence of the prosecution witnesses was recorded, the Government proscribed the book under sec. 99A, Cr. P. Code and the accused then applied under sec. 99B to the High Court, but the application was dismissed on the ground that the book contained the matter falling under sec. 153A, I. P. Code. Thereupon, the Magistrate, without following the procedure of warrant cases any further, shut out all cross-examination of the prosecution witnesses and the production of defence witnesses, and convicted the accused under sec. 153A. Held that in view of the order of the High Court the Magistrate was not bound to allow or record any further evidence in the case, and was justified in shutting out all evidence and convicting the accused—*Kalicharan*, 25 A.L.J. 846, 28 Cr.L.J. 785 (786).

252. (1) When the accused appears or is brought before a Magistrate, such Magistrate shall proceed to hear the complaint and take all such evidence as may be produced in connection with the prosecution.

Provided that the Magistrate shall not be bound to hear any person as complainant in any case in which the complaint has been made by a Court.

(2) The Magistrate shall ascertain, from the complainant or otherwise, the names of any persons likely to be acquainted with the facts of the case and to be able to give evidence for the prosecution, and shall summon to give evidence before himself such of them as he thinks necessary.

Change:—The proviso has been added by sec. 70 of the Cr. P. C. Amendment Act XVIII of 1923. A similar change has been made in sec. 244, *q. v.* This amendment follows clause (aa) of sec. 200.

821A. Scope:—The first part of sec. 252, Cr. P. C., refers only to such evidence as is offered on the day when the accused appears or is brought before the Court; it refers only to the initial production of the accused, and it does not refer to every appearance of the accused. That would be opposed to the plain sense of the section, the object of which is that such evidence as is ready and appears against the accused shall be taken directly he appears in Court. If the case is initiated on a *challan*, the accused is produced, and the prosecution witnesses on the day fixed. The prosecution witnesses who have been bound over to appear by the Police are then examined. Undoubtedly, if it is necessary to adjourn the case, such witnesses still come under the category of "such evidence as may be produced in support of the prosecution" as they are produced on the date of hearing; but, where the case is initiated on a complaint, the phrase "such evidence as may be produced in support of the prosecution" refers only to such witnesses as the complainant may bring with him and who have not been summoned by the Court. Where on the day when the accused appears in answer to the summons which has been issued, the complainant appears and he has no witnesses present with him, and the Court neglects to examine the complainant on that day, he fails to comply with the provisions of the first part of sec. 252, Cr. P. C., but that would not vitiate the trial. There is, then, no evidence produced in support of the prosecution, and the next part of sec. 252, Cr. P. C., then comes into play. What the second part of sec. 252, Cr. P. C., authorizes is what is done in every complaint case under another name: the filing of a list of witnesses whom the complainant desires shall be summoned. It follows, then, that the first stage contemplated in the first part of sec. 252, Cr. P. C., has passed and the hearing of any unsummoned witnesses after that date is a matter within the Court's discretion. The fact that the Magistrate summons all the witnesses without making a selection or enquiring from the complainant broadly on the points in respect to which they are to depose does not alter the fact that the acceptance of the list filed by the complainant in its entirety is a compliance with the second part of the section. It is only where a list is unduly long and appears to have been filed vexatiously that the magistracy avail themselves of the power, which the law provides, to scrutinize the list to prevent undue harassment of the accused and an unwarranted prolongation of the trial—*Rahat Ali v. Muhammad Murad*, 39 Cr.L.J. 62 (64), 10 R.N. 161, 172 I.C. 113, A.I.R. 1938 Nag 103.

822. "Is brought before a Magistrate":—It is immaterial if the accused is brought before the Court by illegal arrest. Where a subject of a Native State committing an offence in British territory was arrested in that State by the British Police, without the intervention of the State authorities, held that this illegal arrest would not vitiate his trial in British India—*Sobha*, 1889 P.R. 6; *Nga Po*, 7 Bur.L.R. 66.

'Hear the complainant':—'Hearing a complainant' does not involve his examination on oath, and the trial of a warrant case is not vitiated merely because it did not begin with an examination of the complainant—*Puthen Vettil Kunhi*, 42 M.L.J. 108, 23 Cr.L.J.

203, A.I.R. 1922 Mad 126 (128). Although the section makes it incumbent upon a Magistrate to hear the complainant (if the latter appears in support of the complaint) it does not vitiate a conviction in which the complainant has not been examined—*Khudal Ram*, 35 Cr L J. 1354 (1359), 158 I.C. 324, 16 P.L.T. 693, A.I.R. 1935 Pat 515; *Rahat Ali v. Muhammad Murad*, supra.

823. Taking evidence for the prosecution:—As soon as the accused is brought before the Magistrate he has a right to have the evidence against him recorded at as early a period as possible; and the fact that there is or may be a great body of evidence forthcoming against him is not a good ground for his detention for an inordinate period—*Manikam*; 6 Mad 63.

It is not fair for the prosecution to press a case against a man when the complainant is not a witness—*Rex v. Krishnan*, A.I.R. 1940 Mad 329 (333), 1939 M.W.N. 1213, 1939 M.Cr.C. 289.

The prosecution ought to call only those witnesses who will support the prosecution case and no others. It is a mistake to suppose that the prosecution is bound to call all relevant evidence, and that if any witnesses are not produced the Court should draw the presumption under sec. 114, Illus. (g), Evidence Act. The prosecution is not bound to call any witnesses who are not truthful witnesses. On the other hand, if there are witnesses who are truthful and respectable, and they speak against the prosecution, it is the duty of the prosecution to withdraw the case—*Bhuban Bejoy*, 37 C.W.N. 1098 (1101). See Note 893.

The witnesses must be examined orally. Where the witnesses common to three cases were first examined-in-chief in only one case, and their deposition was recorded by a typewriter in triplicate, one copy being made part of the record in each case, held that the procedure in the other two cases was illegal—*Mazhar Ali*, 50 Cal 223 (226).

If a prosecution witness is examined after the whole of the defence evidence has been taken, the procedure is illegal and vitiates the trial, so that the trial should commence anew from the stage where the prosecution witness should have been examined—*Karam Chand*, 29 P.L.R. 613, 29 Cr L.J. 844.

In a warrant case sufficient evidence to support the charge must be recorded before a charge can be framed and the accused called on to plead. Where this is not done and the accused is convicted merely on his pleading guilty, the conviction is illegal—*Natabar*, 27 C.W.N. 923.

823A. Right of Cross-examination:—The Magistrate should at once give the accused an opportunity to cross-examine the prosecution witnesses, if they should so desire, even though the charge may not be framed—*Ashirbad v. Maju*, 8 C.W.N. 838. But this is not the same thing as saying that the Court must give him an opportunity. No doubt, sec. 256 does not prohibit cross-examination at a previous stage but that is not the same as saying that the accused has any right to cross-examine. Until the stage of the case provided for in sec. 256 is reached the accused has no right to cross-examine. The Magistrate may in his discretion allow him to do so, and probably if the accused request, would allow him to do so but the accused cannot claim as of right to cross-examine until the charge has been framed—*C. A. Mathew*, A.I.R. 1929 Cal 822, 1929 Cr.C. 669, 125 I.C. 281, 31 Cr L.J. 809. See also *Q-E v. Sagal Samba*, 20 Cal. 642 (663).

The Allahabad High Court has taken the same view and has held that although the accused has no absolute right of cross-examination before the framing of the charge, Magistrates would generally be expressing a proper discretion if they did permit some cross-examination at least at that stage—*Lashmi Narain*, A.I.R. 1931 All 621, 1931 Cr.C. 973, 1932 A.L.J. 5, 54 All 121.

In *Lockley*, 43 Mad 411 (415), 55 I.C. 345, A.I.R. 1920 Mad 201, Seshagiri Ayyar, J., in connection with a different matter, remarked: "An accused has the right to cross-examine the witnesses before the charge is framed, he has a right of re-cross-examining the witnesses present in Court after the charge is framed; he has a further right subject to certain conditions of resummoning the prosecution witnesses after entering

upon his defence." In *Varisi Rowther*, 46 Mad. 449 (463), 73 I.C. 163, A.I.R. 1923 Mad. 609, 24 Cr.L.J. 547, Devadoss, J., without discussing this point, observed: "The accused in a warrant case has three opportunities of cross-examining the prosecution witnesses, *once* before the charge is framed, *secondly*, under sec. 256, and *thirdly*, after he has entered on his defence" This point was, however, considered directly by the Madras High Court in *Muthiah Chetty*, A.I.R. 1924 Mad. 735, 19 M.L.W. 391, 81 I.C. 44, 25 Cr.L.J. 556, where Wallace, J., observed: "No Magistrate or Court can refuse to allow an accused person to cross-examine prosecution witnesses, before charge is framed, and the Magistrate's procedure in refusing to allow such cross-examination was most irregular and in contravention of the law. Without going into the large question whether that procedure has rendered illegal the charge framed, on evidence so irregularly taken, I consider that the fairest course to the accused is to cancel the charge and direct that the cross-examination of the witnesses be now permitted"

In the trial of a warrant case the Magistrate is required under the provisions of sec. 252, Cr. P. C., to take all the evidence produced in support of the prosecution. "Evidence," there can be no doubt, includes the examination, cross-examination and re-examination of a witness—*Muhammad Rahim*, 36 Cr.L.J. 581 (587), 154 I.C. 762, A.I.R. 1935 Sind 13, 1935 Cr.C. 124 (F.B.).

The right of immediate cross-examination is inherent and this is a matter so clear that its existence has always been assumed—*Gurudin*, A.I.R. 1935 Nag. 8, 36 Cr.L.J. 578, 154 I.C. 369, 1935 Cr.C. 77.

In *Md. Hussain v. Mirza Fakhruallah*, A.I.R. 1932 Oudh 298, 9 O.W.N. 782, 34 Cr.L.J. 58, 140 I.C. 689, 1932 Cr.C. 838, 8 Luck 138, there has been a difference of opinion on this point. Kisch, J., has held that although a Magistrate would be well advised to allow cross-examination before the charge is framed, until the charge is framed the accused has no absolute right in law to cross-examine the prosecution witnesses. Srivastava, J., has, on other hand, held that there can be no doubt that the evidence recorded under sec. 252 is made use of against the accused when the charge is framed against him and that this cannot be justified unless the accused is allowed the right and opportunity of cross-examining the prosecution witnesses before the charge is framed.

In a warrant case until the stage of the case provided for in sec. 256 is reached the accused has no right to cross-examine. That being so the evidence of a prosecution witness, who gave evidence before the framing of the charge and cannot be produced for cross-examination in certain circumstances mentioned in sec. 33 of the Indian Evidence Act, is not admissible in evidence under the said section—*C. A. Mathews*, A.I.R. 1929 Cal. 822, 1929 Cr.C. 669, 125 I.C. 281. A contrary view has, however been taken in *Gurudin*, A.I.R. 1935 Nag. 8 (11) and *Nga Ba On*, 28 Cr.L.J. 861, 104 I.C. 637, 6 Bur.L.J. 144, A.I.R. 1927 Rang 248.

824. Summoning witnesses:—Sub-section (1) lays down that the Magistrate shall take all such evidence as may be produced in support of the prosecution. This means that the complainant should first of all himself produce what evidence he can, and the Magistrate shall proceed to hear it. The Court is apparently not bound to issue process for such witnesses or to grant time for their production, but if they are produced, he must record their evidence. Next, when the complainant has done all he can without the assistance of the process of the Court, it is then for the Magistrate to ascertain under sub-sec (2), from the complainant or otherwise, the names of other persons likely to be able to give evidence, and he must summon such of those as he thinks necessary, i.e., such of those as he thinks will be of value in assisting the prosecution case—*Menon v. Krishna Nayar*, 49 Mad 978, 51 M.L.J. 328, 27 Cr.L.J. 1123 (1124), 97 I.C. 643, 24 M.L.W. 304, 1926 M.W.N. 730, A.I.R. 1926 Mad 989. See also *Rahat Ali v. Muhammad Murad* in Note 821A. The Magistrate must use his discretion in selecting, out of the list of witnesses, those not to be subjected to inconvenience by unnecessarily summoning them. A Magistrate ought not to send for any person whom the complainant has named in a supplementary list, without considering whether he is a necessary witness. "A witness is not an inanimate being and is not to be moved about

as if he were a stick or stone. He is a living person who has his work to do and whose convenience has to be considered"—*Sitab Singh v. Dalganjan*, 12 A.L.J. 15, 14 Cr.L.J. 682 (683), 21 I.C. 1002, A.I.R. 1914 All. 526. At the same time, the duty of seeing that all evidence essential to the prosecution case is before the Court is thrown upon the Magistrate himself. So, it is not open to a Magistrate to acquit on the ground that the prosecution has failed to produce a necessary witness—*Maiku Lal*, 12 O.L.J. 632, 2 O.W.N. 584, 26 Cr.L.J. 1266, 88 I.C. 1042.

The section does not make it obligatory on the Magistrate to summon all the witnesses whose names are given him by the complainant—*Musahru v. Emp.*, A.I.R. 1940 Pat. 355 (358), 21 P.L.T. 13, 1940 P.W.N. 83, 19 Pat. 413. But the Magistrate cannot arbitrarily refuse to summon the witnesses named by the complainant; it is his duty to issue summons to those persons named by the complainant who are likely to give useful evidence. In order to ascertain the names of necessary witnesses, the Magistrate should put questions to the complainant in proper form. The question to be asked is not whether the complainant has any more witnesses whom he can produce without summons, but whether he can inform the Court of any witnesses who will have to be brought by process. This question is to be asked when the evidence produced in support of the prosecution has been taken, i.e., after the witnesses have been examined, cross-examined and re-examined before the frame of charge—*Menon v. Krishna Nayar*, 4th Mad. 978, 51 M.L.J. 328, 27 Cr.L.J. 1123 (1124), 97 I.C. 643, 24 M.L.W. 304, 1926 M.W.N. 730, A.I.R. 1926 Mad. 989.

It is clearly a grave error on the part of the Magistrate to refuse to summon any witnesses whom the complainant cited even before the stage indicated in sec. 252 (2), Cr. P. C.—*Seth Thakurdas v. Narayan*, A.I.R. 1936 Nag. 192 (197), 9 R.N. 144, 1936 Cr.C. 805, 1 I.R. 1936 Nag. 205, 166 I.C. 709, 38 Cr.L.J. 307.

After the witnesses in support of the prosecution are heard, it is the duty of the Magistrate to see that the prosecutor is not allowed to set the Court on to a roaming inquiry, summoning persons in the hope that something might be elicited which may help his case. The prosecutor must come with his case fully prepared and there is no section in the Code which authorises him to file a fresh list of prosecution witnesses—*Sitab Singh v. Dalganjan*, 12 A.L.J. 15, 14 Cr.L.J. 682 (683), 21 I.C. 1002, A.I.R. 1914 All. 526; *Hajari Tika Lodhi v. Emp.*, A.I.R. 1934 Nag. 156, 150 I.C. 916, 1934 Cr.C. 660, 7 R.N. 30, 35 Cr.L.J. 1163. See also *Gobind Sahai*, 15 Cr.L.J. 363, 12 A.L.J. 15.

Under sec. 252 (2), Cr. P. C., a Magistrate can summon witnesses and take their evidence in order to find out whether an offence has really been committed or not, even when the complainant does not like to proceed with the case—*Nagaswami Naidu v. Ramaswami Naicken*, 1937 M.W.N. 727.

It is not proper for the Magistrate to issue a warrant in the first instance; it is only when the summons is disobeyed that serious measures may be taken—*Kala Singh*, 1907 P.W.R. 22, 6 Cr.L.J. 275.

Process fee and expenses :—There is nothing in this Code which enables a Magistrate to demand from even the complainant the expenses to be incurred by his witnesses, though such a power is conferred by sec. 244 (3) in a summons case—*Bridhichand v. Lakhmichand*, 8 N.L.R. 65, 13 Cr.L.J. 554; *Ghulam Mohiyyud-Din v. Sardara*, 39 Cr.L.J. 624, 175 I.C. 555, 40 P.L.R. 650, 10 R.L. 746, A.I.R. 1938 Lah. 444; *Patni Yogambamma*, 40 Cr.L.J. 566, 181 I.C. 569, A.I.R. 1939 Mad. 265, 1939 M.W.N. 118, 48 M.L.W. 969, 1939 M.Cr.C. 10. The Magistrate is to summon under sec. 252 (2), Cr. P. C., at the expense of Government, such of the complainant's witnesses as he considers to be necessary, even though no *challan* was sent up in the case against the accused by the Police—*Ghulam Mohiyyud-Din v. Sardara*, *supra*. The dismissal of a complaint in a warrant case for non-payment of process fee is illegal—*Palannagan Pitchiradu*, 2 Weir 323. The wording of this section clearly indicates that the issue of summons in such cases is on the initiative of the Magistrate himself, and, consequently, if fees are to be levied, the expenses must fall on the Magistrate's budget and not on the complainant—*Mfg. San Nyein*, 27 Cr.L.J. 415, 93 I.C. 79, A.I.R. 1926 Rang. 13,

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In a warrant case until the stage of the case provided for in sec. 256 is reached the accused has no right to cross-examine. That being so the evidence of a prosecution witness, who gave evidence before the framing of the charge and cannot be produced for cross-examination in certain circumstances mentioned in sec 33 of the Indian Evidence Act, is not admissible in evidence under the said section—*C. A Mathews*, A.I.R. 1929 Cal. 822, 1929 Cr.C. 669, 125 I.C. 281. A contrary view has, however been taken in *Gurudin*, A.I.R. 1935 Nag. 8 (11) and *Nga Ba On*, 28 Cr.L.J. 861, 104 I.C. 637, 6 Bur.L.J. 144, A.I.R. 1927 Rang. 248.

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After the witnesses in support of the prosecution are heard, it is the duty of the Magistrate to see that the prosecutor is not allowed to set the Court on to a roaming inquiry, summoning persons in the hope that something might be elicited which may help his case. The prosecutor must come with his case fully prepared and there is no section in the Code which authorises him to file a fresh list of prosecution witnesses—*Sitab Singh v. Dalganjan*, 12 A.L.J. 15, 14 Cr.L.J. 682 (683), 21 I.C. 1002, A.I.R. 1914 All. 526; *Hajari Tika Lodhi v. Emp.*, A.I.R. 1934 Nag. 156, 150 I.C. 916, 1934 Cr.C. 660, 7 R.N. 30, 35 Cr.L.J. 1163. See also *Gobind Sahai*, 15 Cr.L.J. 363, 12 A.L.J. 15.

Under sec. 252 (2), Cr. P. C., a Magistrate can summon witnesses and take their evidence in order to find out whether an offence has really been committed or not, even when the complainant does not like to proceed with the case—*Nagaswami Naidu v. Ramaswami Naicken*, 1937 M.W.N. 727.

It is not proper for the Magistrate to issue a warrant in the first instance; it is only when the summons is disobeyed that serious measures may be taken—*Kala Singh*, 1907 P.W.R. 22, 6 Cr.L.J. 275.

Process fee and expenses :—There is nothing in this Code which enables a Magistrate to demand from even the complainant the expenses to be incurred by his witnesses, though such a power is conferred by sec. 244 (3) in a summons case—*Bridhichand v. Lakhmichand*, 8 N.L.R. 65, 13 Cr.L.J. 554; *Ghulam Mohiyyud-Din v. Sardara*, 39 Cr.L.J. 624, 175 I.C. 555, 40 P.L.R. 650, 10 R.L. 746, A.I.R. 1938 Lah. 444; *Patri Yogambamma*, 40 Cr.L.J. 566, 181 I.C. 569, A.I.R. 1939 Mad. 265, 1939 M.W.N. 118, 48 M.L.W. 969, 1939 M.Cr.C. 10. The Magistrate is to summon under sec. 252 (2), Cr. P. C., at the expense of Government, such of the complainant's witnesses as he considers to be necessary, even though no *challan* was sent up in the case against the accused by the Police—*Ghulam Mohiyyud-Din v. Sardara*, supra. The dismissal of a complaint in a warrant case for non-payment of process fee is illegal—*Palannagari Pitchavadu*, 2 Weir 323. The wording of this section clearly indicates that the issue of summons in such cases is on the initiative of the Magistrate himself, and, consequently, if fees are to be levied, the expenses must fall on the Magistrate's budget and not on the complainant—*Mg. San Nyein*, 27 Cr.L.J. 415, 93 I.C. 79, A.I.R. 1926 Rang. 13,

upon his defence." In *Varisi Rowther*, 46 Mad. 449 (463), 73 I.C. 163, A.I.R. 1923 Mad. 609, 24 Cr.L.J. 547, Devadoss, J., without discussing this point, observed: "The accused in a warrant case has three opportunities of cross-examining the prosecution witnesses, *once* before the charge is framed, *secondly*, under sec. 256, and *thirdly*, after he has entered on his defence." This point was, however, considered directly by the Madras High Court in *Muthiah Chetty*, A.I.R. 1924 Mad. 735, 19 M.L.W. 391, 81 I.C. 44, 25 Cr.L.J. 556, where Wallace, J., observed: "No Magistrate or Court can refuse to allow an accused person to cross-examine prosecution witnesses, before charge is framed, and the Magistrate's procedure in refusing to allow such cross-examination was most irregular and in contravention of the law. Without going into the large question whether that procedure has rendered illegal the charge framed, on evidence so irregularly taken, I consider that the fairest course to the accused is to cancel the charge and direct that the cross-examination of the witnesses be now permitted."

In the trial of a warrant case the Magistrate is required under the provisions of sec. 252, Cr. P. C., to take all the evidence produced in support of the prosecution. "Evidence," there can be no doubt, includes the examination, cross-examination and re-examination of a witness—*Muhammad Rahim*, 36 Cr.L.J. 581 (587), 154 I.C. 762, A.I.R. 1935 Sind 13, 1935 Cr.C. 124 (F.B.).

The right of immediate cross-examination is inherent and this is a matter so clear that its existence has always been assumed—*Gurudin*, A.I.R. 1935 Nag. 8, 36 Cr.L.J. 578, 154 I.C. 369, 1935 Cr.C. 77.

In *Md. Hussain v. Mirza Fakhrullah*, A.I.R. 1932 Oudh 298, 9 O.W.N. 782, 34 Cr.L.J. 58, 140 I.C. 689, 1932 Cr.C. 838, 8 Luck. 138, there has been a difference of opinion on this point. Kisch, J., has held that although a Magistrate would be well advised to allow cross-examination before the charge is framed, until the charge is framed the accused has no absolute right in law to cross-examine the prosecution witnesses. Srivastava, J., has, on other hand, held that there can be no doubt that the evidence recorded under sec. 252 is made use of against the accused when the charge is framed against him and that this cannot be justified unless the accused is allowed the right and opportunity of cross-examining the prosecution witnesses before the charge is framed.

In a warrant case until the stage of the case provided for in sec. 256 is reached the accused has no right to cross-examine. That being so the evidence of a prosecution witness, who gave evidence before the framing of the charge and cannot be produced for cross-examination in certain circumstances mentioned in sec. 33 of the Indian Evidence Act, is not admissible in evidence under the said section—*C. A. Mathews*, A.I.R. 1929 Cal. 822, 1929 Cr.C. 669, 125 I.C. 281. A contrary view has, however been taken in *Gurudin*, A.I.R. 1935 Nag. 8 (11) and *Nga Ba On*, 28 Cr.L.J. 861, 104 I.C. 637, 6 Bur.L.J. 144, A.I.R. 1927 Rang. 248.

824. Summoning witnesses:—Sub-section (1) lays down that the Magistrate shall take all such evidence as may be produced in support of the prosecution. This means that the complainant should first of all himself produce what evidence he can, and the Magistrate shall proceed to hear it. The Court is apparently not bound to issue process for such witnesses or to grant time for their production, but if they are produced, he must record their evidence. Next, when the complainant has done all he can without the assistance of the process of the Court, it is then for the Magistrate to ascertain under sub-sec. (2), from the complainant or otherwise, the names of other persons likely to be able to give evidence, and he must summon such of those as he thinks necessary, i.e., such of those as he thinks will be of value in assisting the prosecution case—*Menon v. Krishna Nayar*, 49 Mad 978, 51 M.L.J. 328, 27 Cr.L.J. 1123 (1124), 97 I.C. 643, 24 M.L.W. 304, 1926 M.W.N. 730, A.I.R. 1926 Mad. 989. See also *Rahat Ali v. Muhammad Mured* in Note 821A. The Magistrate must use his discretion in selecting, out of the list of witnesses, those not to be subjected to inconvenience by unnecessarily summoning them. A Magistrate ought not to send for any person whom the complainant has named in a supplementary list, without considering whether he is a necessary witness. "A witness is not an inanimate being and is not to be moved about

as if he were a stick or stone. He is a living person who has his work to do and whose convenience has to be considered"—*Sitab Singh v. Dalganjan*, 12 A.L.J. 15, 14 Cr.L.J. 682 (683), 21 I.C. 1002, A.I.R. 1914 All. 526. At the same time, the duty of seeing that all evidence essential to the prosecution case is before the Court is thrown upon the Magistrate himself. So, it is not open to a Magistrate to acquit on the ground that the prosecution has failed to produce a necessary witness—*Maiku Lal*, 12 O.L.J. 632, 2 O.W.N. 584, 26 Cr.L.J. 1266, 88 I.C. 1012.

The section does not make it obligatory on the Magistrate to summon all the witnesses whose names are given him by the complainant—*Musahru v. Emp.*, A.I.R. 1940 Pat 355 (358), 21 P.L.T. 13, 1940 P.W.N. 83, 19 Pat. 413. But the Magistrate cannot arbitrarily refuse to summon the witnesses named by the complainant; it is his duty to issue summons to those persons named by the complainant who are likely to give useful evidence. In order to ascertain the names of necessary witnesses, the Magistrate should put questions to the complainant in proper form. The question to be asked is not whether the complainant has any more witnesses whom he can produce without summons, but whether he can inform the Court of any witnesses who will have to be brought by process. This question is to be asked when the evidence produced in support of the prosecution has been taken, i.e., after the witnesses have been examined, cross-examined and re-examined before the frame of charge—*Menon v. Krishna Nayar*, 4^o Mad. 978, 51 M.L.J. 328, 27 Cr.L.J. 1123 (1124), 97 I.C. 643, 24 M.L.W. 304, 1926 M.W.N. 730, A.I.R. 1926 Mad 989.

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4 Bur.L.J. 187. This case was overruled by the Full Bench of the Rangoon High Court, holding that in a non-cognizable warrant case the Court is not bound to summon witnesses for the prosecution or the defence under the provisions of secs. 252 and 257, Cr. P. C., if the party at whose instance or in whose interest the process is issued does not pay process fees as required by Rules 17 and 18 of the Process Fees Rules under the Burma Process Fees Act, 1910—*Tha Shwe*, 4 Rang. 146.

Production and inspection of documents :—The accused is entitled to inspect all the documents produced by the complainant as evidence against the accused and filed as exhibits, and not merely to get certified copies thereof—*Francis*, 1 Bom.L.R. 433. But so long as no charge has been framed, the accused has no right to ask the Magistrate to pass an order requiring the complainant to produce any documents. The accused's right to call evidence, either witnesses or documents, does not arise until after the charge has been framed under sec. 254. This right is given by sec. 257, and is subject to the limitations enjoined by that section—*Tahilram v. Pitamberdas*, 8 S.L.R. 267, 16 Cr.L.J. 245. In *Muhammad Rahim*, 36 Cr.L.J. 581 (586), 154 I.C. 762, A.I.R. 1935 Sind 13, 1935 Cr.C. 124 (F.B.), *Tahilram's case* was not followed as it appeared that the question at issue in it was decided solely upon the provisions of sec. 257, Cr. P. C., without reference to the provisions of sec. 94. It was held that the Court acting under sec. 94, Cr. P. C., would be justified in calling for the production of documents at the request of the accused at any stage of the trial. See also Notes under sec. 94.

A complainant applied to the Magistrate to summon certain order passed by the Assistant Commissioner of Salt Revenue which was necessary to show that some of the witnesses coming on the side of the accused were interested in the accused as they owned jointly with the accused a match factory. The Magistrate rejected the application for the issue of summons on the ground that the endorsement of the Assistant Commissioner refusing the grant of the certified copy was not filed. Held that the summons was to issue at the cost of the complainant and the refusal of the Magistrate to send for the document was unsupportable—*Balakrishna Nadar*, A.I.R. 1940 Mad. 746, 1940 M.W.N. 387, 1940 M.Cr.C. 97.

253. (1) If, upon taking all the evidence referred to in section 252, and making such examination (if any) of the accused as the Magistrate thinks necessary, he finds that no case against the accused has been made out which, if unrebutted, would warrant his conviction, the Magistrate shall discharge him.

(2) Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case if, for reasons to be recorded by such Magistrate, he considers the charge to be groundless.

825. Procedure :—The procedure prescribed by these sections should be strictly followed. The Magistrate should first take the evidence of the complainant and his witnesses (sec. 252) and if necessary examine the accused (sec. 253) and then apply the law to the criminal acts to find whether there is *prima facie* evidence, then frame charges (sec. 254) and call upon the accused to plead thereto (sec. 255) and enter upon his defence (sec. 256). If the Magistrate after examining the prosecution witnesses (sec. 252), examined the accused and the witnesses for the defence (sec. 256), without having drawn up a charge, and then discharged the accused under sec. 253, the procedure was contrary to law and the accused should be treated as acquitted under sec. 258—*Taba v. Hirba*, 29 P.R. 1883. In *Orilal v. Kalu*, 18 Cr.L.J. 1006 (1007) (Bur.), however, where the Magistrate followed the same procedure as in the Punjab case, it was held that although the procedure adopted was highly irregular and unwarranted, still as

the procedure was in substance that laid down in this chapter, the omission to frame a charge and record a plea would not invalidate the order of discharge, and that sec. 535 (1) would cure the irregularity.

826. Discharge:—Orders which amount to discharge :—Where a warrant case which cannot be compounded, is compounded and the case dismissed, such dismissal amounts only to a discharge—*Devama*, 1 Bom. 64. When, after the issue of process, the Magistrate does not think it proper to proceed any further, the termination of the proceeding amounts to an order of discharge—*Moul Singh v Mahabir*, 4 CWN 242. Where the accused was summoned and appeared when the Magistrate dismissed the complaint, the dismissal was under sec 253 (2) and not under sec 203, Cr. P. C.—*Bhagawan v Chander*, 35 Cr.L.J. 418, 147 I.C. 335, A.I.R. 1934 All 51. When process has once been issued the accused person can only be discharged under sec 253 or sec. 259, Cr. P. C.—*Jotindra v. Radha*, A.I.R. 1934 Pat 548, 15 P.L.T. 507. If a warrant case is tried as a summons case, without framing a charge, and the Magistrate dismisses the case and acquits the accused, the acquittal operates as a discharge—*Jadu*, 1886 A.W.N. 260; *Lajja Ram*, 1888 A.W.N. 96. See also *Muhammad*, given in Note 711.

Order of discharge when improper :—A Magistrate ought not to discharge the accused merely because he was illegally arrested, e.g., where the Police arrested him without warrant in a non-cognizable case—*Sangapa*, Ratanlal 73. So also, a Magistrate should not discharge a person merely because he has no jurisdiction to try the case; in such a case he ought to proceed under sec 346—*Munisami*, 2 Weir 323.

A Magistrate cannot discharge or acquit the accused upon withdrawal of complaint in a warrant case. Such a procedure is allowed in summons cases (sec 248) and not in warrant cases. The Magistrate has to proceed with the trial in spite of the withdrawal of complaint, if he finds the elements of an offence in the facts set forth in the complaint—*Ganesh*, 13 Bom 600 (603); *Ranchhod*, 37 Bom 369, 14 Cr L.J. 77; *Maung Thu v U Po*, 5 Rang 136, 28 Cr L.J. 649 (650). A Magistrate cannot dismiss the complaint and discharge the accused if the complainant is absent, and the case is a warrant case relating to a non-compoundable offence. Such a dismissal amounts to an application to a warrant case of the procedure prescribed by sec 247 in respect of a summons case—*Ram Coomar v Ramjee*, 4 CWN 26; *Alexander v Conners*, 20 CWN 698, 34 I.C. 305, 17 Cr.L.J. 193; *Govinda v Dulali*, 10 Cal 67 (68). But under sec 259, as now amended, the Magistrate can discharge the accused owing to the absence of the complainant, if the offence is non-cognizable, even though it is non-compoundable.

An order of discharge can be made when, according to the words of this section, no case has been made out which if unrebutted would warrant the conviction of the accused; but when there is a body of evidence which if believed would justify a conviction, it is better to draw up a charge and dispose of the case finally, than to discharge the accused—*Radhi v Phulchand*, 1909 P.W.R. 18, 11 Cr L.J. 100. An order of discharge passed without considering the evidence on record is illegal. Where a case is transferred from a Bench of Magistrates, who had already recorded some evidence, to a Deputy Magistrate, the latter is bound to examine the evidence already recorded, and cannot discharge the accused, without considering that evidence, merely because no evidence is produced before him on the day of hearing—*Amodin v Darsan*, 38 Cal 828.

Under sec. 253, Cr. P. C., the Magistrate does not exercise his discretion properly if he discharges the accused clearly on a statement by a prosecution witness of a prior admission of the complainant that the case was a false one. It is better in such cases to hear the whole evidence and to come to whatever conclusion he considers proper and then to take action under sec 250, Cr. P. C., if he thinks it a proper case under that section—*Ram Lubhaya v. Jagan Nath*, 30 Cr L.J. 854, 117 I.C. 883, 30 P.L.R. 361, A.I.R. 1929 Lah. 623, Ind Rul 1929 Lah. 707.

An order of discharge cannot be made after a charge has been framed; such an order is erroneous and would amount to an acquittal under sec. 258—*Nathu*, 14 P.R. 1903. See *Raza Husain*, 36 Cr.L.J. 912 (913), 156 I.C. 186, A.I.R. 1935 All 834, 1935 Cr.C. 980, 1935 A.L.J. 1022, 1935 A.L.R. 548, 7 R.A. 1057.

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Under sec 253, Cr. P. C., the Magistrate does not exercise his discretion properly if he discharges the accused clearly on a statement by a prosecution witness of a prior admission of the complainant that the case was a false one. It is better in such cases to hear the whole evidence and to come to whatever conclusion he considers proper and then to take action under sec 250, Cr. P. C., if he thinks it a proper case under that section—*Ram Lubhaya v Jagan Nath*, 30 Cr L.J 854, 117 I.C. 883, 30 P.L.R. 361, AIR 1929 Lah 623, Ind Rul 1929 Lah. 707.

An order of discharge cannot be made after a charge has been framed; such an order is erroneous and would amount to an acquittal under sec. 258—*Nathu*, 14 P.R. 1903. See *Raza Husain*, 36 Cr L.J. 912 (913), 156 I.C. 186, AIR. 1935 All 834, 1935 A.L.J. 1022, 1935 A.L.R. 548, 7 R.A. 1057.

827. Fresh complaint:—The discharge of an accused person does not amount to an acquittal; therefore a *fresh complaint* can be entertained either by the same Magistrate who passed the order of discharge or by another Magistrate of co-ordinate jurisdiction, and it is not necessary that the previous order of discharge must be set aside before fresh proceedings can be taken—*Dolegobind*, 28 Cal. 211 (215); *Maheshwara*, 31 Mad. 543; *Keymer*, 36 All. 53 (55); *Mir Ahwad v. Md. Askari*, 29 Cal. 726 (732) (F.B.); *Hari Dass v. Saritulla*, 15 Cal. 608 (F.B.); *Dhana Reddy*, 8 Rang. 1, 31 Cr.L.J. 824 (825); *Kiru*, 10 P.R. 1911 (F.B.), 11 I.C. 132 (137), 12 Cr.L.J. 364 (overruling *Jawahir*, 33 P.R. 1894). In this respect there is no distinction between proceedings before Presidency Magistrates and proceedings before moffussil Magistrates—*Mir Ahwad v. Md. Askari*, supra. Thus, where a Bench of Presidency Magistrates discharges an accused, the Chief Presidency Magistrate can entertain fresh proceedings on the same charge upon fresh evidence and commit the accused for trial—*Dolegobind*, supra. Cf. Note 681 under sec. 203.

The power of revival of proceedings is vested in all Magistrates including the Magistrate who discharged the accused. But Magistrates are bound to exercise due discretion, take that discharge into account, and to avoid any such oppressive proceedings as may either expose them to punishment under sec. 219 or 220, I P. C., or to a civil action on the part of the accused—*Bapuda*, Ratanlal 350. No Presidency Magistrate should rehear a case which has been previously disposed of by an order of discharge by another Presidency Magistrate (of co-ordinate jurisdiction), except where there has been a manifest error or miscarriage of justice—*Dolegobind*, 28 Cal. 211 (217). Though there is no absolute bar to an accused person being again put in peril of a fresh trial in respect of the same offence in a case where the first trial has ended in an order of discharge, it is a well-recognized and salutary rule of law that a Magistrate of co-ordinate jurisdiction should not entertain a fresh complaint in respect of the same offence when it is based on facts which are known to the complainant and on evidence which was available when the first trial was held. A departure from this rule is in effect an assumption by the Magistrate of the powers of the Appellate Court, and it is utterly contrary to sound principle—*Alias*, 31 Cr.L.J. 687, 124 I.C. 384, A.I.R. 1929 Sind 242. See also *Rama Nand v. Sheri*, 35 Cr.L.J. 1062, 150 I.C. 373, 1934 Cr.C. 150, A.I.R. 1934 All. 87, 56 All. 425, 3 A.W.R. 569, A.I.R. 1934 All. 546. An order of discharge passed under this section cannot be set aside and prosecution started afresh, unless there are new materials before the Magistrate which were not before him formerly, and unless upon those materials there is a probability of the conviction of the accused persons—*Biso Ram*, 23 Cr.L.J. 236, 66 I.C. 76, A.I.R. 1922 Pat. 372. In instituting a fresh complaint, the Magistrate is bound to proceed in the manner laid down in secs. 200-202, i.e., after examining the complainant, and, if necessary, after a preliminary inquiry or local investigation, to decide whether there is sufficient ground for proceeding. In coming to this decision, he is bound to exercise a proper discretion, and a discretion improperly exercised would be a ground for interference in revision—*Dhana Reddy*, 8 Rang. 1, 31 Cr.L.J. 824 (826).

Where in the first complaint the order of discharge was passed merely because the complainant and his pleader were absent at the appointed hour and the second complaint was filed on the following day, held that the Magistrate exercised due discretion in proceeding to inquire into the merits after presentation of the second complaint—*Amanat Kader*, 30 Cr.L.J. 594, 116 I.C. 251, 31 Bom.L.R. 146, A.I.R. 1929 Bom. 134, Ind. Rul. 1929 Bom. 347.

Further Inquiry:—Under sec. 436, the High Court can direct further inquiry into a case of dismissal of complaint or discharge of accused; but that section makes no mention of Presidency Magistrates; it applies only when such order has been made by a moffussil Magistrate. But on the question whether the High Court can direct further inquiry when an order of discharge has been made by a Presidency Magistrate, there is a divergence of opinion. In some cases it has been stated that the High Court can

interfere and set aside the order under secs. 439 and 436 of the Code and direct further inquiry—*Malik Protap v. Khan Mahomed*, 36 Cal. 994 (1000); *Dwarka Nath v. Beni Madhab*, 28 Cal. 652 (667) (*per* Ghose, J.). But in some other cases it has been held that the High Court can under secs. 435 and 439, read with sec. 423, no doubt revise and set aside an erroneous order of discharge passed by a Presidency Magistrate, but it cannot direct further inquiry, because sec. 423 confers the power to make an order for further inquiry only in case of *acquittal*, but not in case of *discharge* of accused. The power of directing further inquiry in case of an order of discharge passed by a Presidency Magistrate can be exercised by the High Court only under sec. 15 of the Charter Act—*Charoobala v. Barendra*, 27 Cal. 126 (129); *Debi Bux v. Jutmal*, 33 Cal. 1282 (1284); *Colville v. Kristo Kishore*, 26 Cal. 746 (748).

Power of District Magistrate :—Where an accused person has been discharged under this section, the District Magistrate can himself hold a further inquiry or can direct such inquiry to be held by a Subordinate Magistrate (sec. 436)—*Parbhu Lal v. Janki*, 18 Cr.L.J. 706 (All); *Chotu*, 9 All 52; *Balasinnathambi*, 14 Mad. 334; *Narayanaswami*, 32 Mad. 220. See Notes under sec. 436.

828. Sub-section (2)—**At any previous stage of the case**:—When a Magistrate is reasonably convinced, on what has been already deposed that a criminal charge cannot be sustained, sub-sec. (2) of this section relieves him from the necessity of going on with the trial—*Dhanjibhai v. Pyari*, Ratanlal 201. The Magistrate can discharge the accused even before the date fixed for hearing, if upon the materials then before him he is satisfied that the accused cannot possibly be convicted of this offence—*Waason v. Metcalfe*, 25 Cr.L.J. 696, 81 I.C. 184, A.I.R. 1925 Pat. 154. He has power to discharge the accused under this clause, even if no witnesses are examined under sec. 252—*Kunj Behari*, 24 A.L.J. 512, 27 Cr.L.J. 541 (542), 93 I.C. 1037, A.I.R. 1926 All. 461. He can discharge the accused before all the complainant's witnesses have been examined—*Kasinatha v. Shanmugam*, 52 Mad. 987, 31 Cr.L.J. 275 (277), A.I.R. 1929 Mad. 754, 121 I.C. 619, 57 M.L.J. 490, 30 M.L.W. 273, 1929 M.W.N. 575, 1929 Cr.C. 333, 2 M.Cr.C. 215; *Fazlar Rahman*, 31 Cr.L.J. 1055, 58 Cal. 346, 1930 Cr.C. 859, Ind. Rul. 1930 Cal. 745, 126 I.C. 553, A.I.R. 1930 Cal. 515; *Navanna v. Sursetti*, 12 Cr.L.J. 105, 9 I.C. 606, 2 M.W.N. 149, 9 M.L.T. 302. But see *Rakhal v. Monmatha*, 11 C.W.N. 1000. It is illegal to discharge the accused before the examination of the complainant—*Mukunda v. Purusattam*, 31 Cr.L.J. 128, 1929 Cr.C. 95, Ind. Rul. 1930 Cal. 42, 120 I.C. 458, A.I.R. 1929 Cal. 479, 51 C.L.J. 44. But in a suitable case the Magistrate may come to the conclusion that the charge is groundless even before he has heard the complainant under this section. Such a case might well be one in which the Magistrate in issuing process under sec. 204, Cr. P. C., has mistakenly believed that an offence has been disclosed by the complaint and on the matter being brought to his attention when the case comes before him has seen his error and decided that in fact, even if the allegations in the complaint are true, no criminal offence has been disclosed. It cannot, therefore, be held that in no case can the accused be discharged under sec. 253 (2), Cr. P. C., without complainant being heard at all—*Shiv Datta v. B. K. Sood*, A.I.R. 1940 Lah. 40, 41 P.L.R. 702, 41 Cr.L.J. 354, 186 I.C. 635. The words "at any previous stage of the case" are perfectly clear. It is only reasonable that an accused person should be allowed to show at any stage of the proceedings that there is no case against him; for example, he might show that there was something in the nature of a want of sanction which would render the proceedings invalid; in such a case it would be clearly waste of time to examine the complainant's witnesses. Where, therefore, on the date fixed for hearing of the case the Magistrate heard both sides and examined some documents but did not take the evidence of the complainant or any of his witnesses and he discharged the accused, holding that the complainant had deliberately suppressed several facts in his petition of complaint and that the complaint was a thoroughly dishonest one, the order of discharge was legal and within the Magistrate's jurisdiction—*Sundar Das Loghani v. Fardun Rustom Irani*, 40 Cr.L.J. 658, 182 I.C. 411, A.I.R. 1939 Cal. 329, 69 C.L.J. 186, I.L.R. (1939) 1 Cal. 474, following

Fazlar Rahaman, supra, and distinguishing *Mukunda v. Purusattam*, supra. See also *Jnanendra Nath v. Nilmoney*, 43 C.W.N. 582, I.L.R. (1939) 1 Cal. 587, 41 Cr.L.J. 52, 184 I.C. 603, A.I.R. 1939 Cal. 701. The word 'groundless' in this sub-section is not capable of any precise definition. The amount of evidence which would enable a Magistrate to say that a particular charge is groundless is so entirely dependent on circumstances that no general rule or direction is likely to be of any use, except that the Magistrate is required to arrive at his conclusion judiciously and not capriciously. If acting judiciously a Magistrate has come to the conclusion that the charge must fail either because the allegations are false or because they disclose a dispute of a civil nature distorted into a criminal case, or for any other reason, then there is nothing to prevent the Magistrate from discharging the accused before all the prosecution witnesses have been examined—*Kasinatha v. Shanmugam*, supra. But where a complaint *prima facie* discloses an offence, a Magistrate can hold the charge to be groundless and discharge the accused under sub-sec. (2), only when he has at least ascertained from the complainant the nature of the evidence his witnesses are going to give; and he cannot refuse to examine the witnesses cited by the complainant and discharge the accused, without ascertaining from the complainant the nature of the evidence the remaining witnesses are expected to give. If he so ascertains, and then finds that even if that evidence was given the charge would be groundless, it is open to him to discharge the accused on that ground—*Muhammad Sheriff v. Abdul Karim*, 51 Mad 185, 53 M.L.J. 757, 28 Cr.L.J. 995. The Magistrate has no doubt a discretion under this clause to discharge the accused without taking all the evidence that the complainant wishes to produce, if he thinks that the charge is groundless. But this does not mean that he can cut short the proceedings by refusing to summon any of the witnesses which the complainant wants to examine. Moreover, there must be a clear finding that the charge is groundless, before the Magistrate can discharge the accused—*Mektab v. Nathu*, 31 P.L.R. 204, 31 Cr.L.J. 481, A.I.R. 1930 Lah. 461, 1930 Cr.C. 530, 123 I.C. 275. The Magistrate cannot refuse to examine all witnesses summoned on behalf of the prosecution unless he is in a position to discharge the accused without examining others upon the evidence already recorded—*Sivakatacham Pillai v. Emp.*, 1937 M.W.N. 991. The Magistrate is, however, not justified in making up his mind without hearing the evidence of all the witnesses that the complainant desires to place before him. If he discharges the accused after hearing the evidence of only some of the witnesses produced by the complainant, the order of discharge is liable to be set aside—*Louis Ammal Fernando v. Susai Fernando*, 1937 M.W.N. 836.

Recording reasons:—The Legislature does not render the writing of reasons necessary when the Magistrate discharges the accused person under sub-sec. (1) after he has heard all the evidence for the prosecution. It is only when he discharges under sub-sec. (2) without hearing all the evidence that he is bound to record reasons. But even in the former case the Magistrate should record his reasons, having regard to the fact that the order is not final—*Nabi Fakira*, 9 Bom.L.R. 250, 5 Cr.L.J. 255. When a Magistrate discharges the accused under sub-sec. (2), he should explicitly set forth the reasons for considering the charge to be groundless—*Dhanyabhai v. Pyarji*, Ratanlal 201.

The language of the section plainly indicates that a Magistrate should give his reasons at the time he pronounces the order of discharge and if it is the final order in the case, he is bound to give his reasons. The moment he pronounces the final order, he becomes *functus officio* and he is no longer in charge of the case. But where a number of accused is being tried before him and he discharges some of them only without giving reasons therefor in his order of discharge, he has not become *functus officio* and it would be open to him to defer his reasons. Till the charge against the remaining accused is disposed of by a final order, he must be deemed to be in seisin of the whole case and so long as he is in charge thereof, he can always give his reasons in regard to the order of discharge. Even assuming that it is obligatory on him to give his reasons before he pronounces the order of discharge, his omission to do so is only an irregularity which can be cured by sec. 537, Cr. P. C.—*Govindaraj*, 39 Cr.L.J.

335, 173 I.C. 417, 1938 M.W.N. 38, 47 M.L.W. 128, 10 R.M. 583, (1938) 1 M.L.J. 110, A.I.R. 1938 Mad. 396.

254. If, when such evidence and examination have been taken and made, or at any previous stage of the case, the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable under this Chapter, which such Magistrate is competent to try, and which, in his opinion, could be adequately punished by him, he shall frame in writing a charge against the accused.

829. Charge when to be framed:—One of the distinguishing points between a summons case and a warrant case is that in a summons case the accused is called on to plead as soon as he appears, before any evidence is taken, but in a warrant case sufficient evidence to support the charge must be recorded before a charge can be framed and the accused called on to plead. And this must be done even if the warrant case is tried summarily—*Natabar*, 27 C.W.N. 923 (924), 25 Cr.L.J. 1270. It is not necessary that the Magistrate should wait till the whole of the evidence for the prosecution has been taken, before any charge can be framed. Cf. the words "or at any previous stage"; the moment the stage is reached when there is ground for presuming that the accused person has committed an offence, the charge-sheet can be drawn up, before all the prosecution witnesses have been examined—*Mulua v Sheoraj*, 8 A.L.J. 707, 12 Cr.L.J. 471; *Karuthaswami*, 53 Mad. 173, 31 Cr.L.J. 618 (621) (F.B.); *Lachmi Narain*, A.I.R. 1931 All. 621 (623), 1931 Cr.C. 973, 1932 A.L.J. 5, 54 All. 121. The words "at any previous stage" are important. They authorise the Magistrate to frame a charge even after hearing the first witness—*Hassan*, A.I.R. 1936 Pesh. 211, 38 Cr.L.J. 399, 167 I.C. 318, 1936 Cr.C. 1077, 9 R.Pesh. 85.

The section does not require or invite a Magistrate to give his reasons—*Bagomal*, 37 Cr.L.J. 152, 159 I.C. 687, A.I.R. 1935 Sind. 223, 1935 Cr.C. 1312.

It is only when the prosecution has proved all the facts necessary to constitute the offence charged against the accused that a charge should be framed. If the evidence recorded does not lead to any presumption that the accused has committed any offence, but merely raises a doubt, the Magistrate should give the accused the benefit of the doubt by discharging him under sec. 253, and should not proceed to frame a charge—*Mulchand*, 2 P.R. 1906, 3 Cr.L.J. 354.

Where after a charge of an offence had been framed against the accused, the complainant in her deposition further charged him with another offence, and thereupon the Magistrate tried him for both the offences, acquitted him of the former offence and convicted him of the latter one, it was held that the procedure was legal—*Louis*, 3 Bom.L.R. 675. If, when a case is being tried as a warrant case and a charge is drawn up thereof, it is intended to proceed against the accused for an offence triable only as a summons case, that offence should form part of the charge—*Hossein v. Kalu*, 29 Cal. 481.

Examination.—It is not absolutely compulsory for the Magistrate in a warrant case to examine the accused before he framed a charge, provided he does so before the prosecution case has been closed. The non-compliance therewith, where the accused were duly examined at the close of the prosecution case, would clearly amount to a mere irregularity, not vitiating the trial—*Deoji*, 27 Cr.L.J. 850, 95 I.C. 606, A.I.R. 1926 Nag. 459. This section deals with the framing of a charge and says that it may be framed when such evidence (i.e., evidence for the prosecution) and examination (i.e., examination of the accused) have been taken and made, or at any previous stage of the case. One previous stage of the case is when the evidence has been completed and the examination has not been made. The section, therefore, itself makes it allowable

to frame the charge before examining the accused as well as before recording all the evidence—*Bhanwarsingh v. Sukhramsingh*, 41 Cr.L.J. 585 (586).

'Which such Magistrate is competent to try and adequately punish' :—Section 254 is very restrictive, for it provides that the Magistrate shall try an accused person only for an offence which in his opinion can be adequately punished by him. A Magistrate has to exercise his discretion in the matter of every complaint that is brought before him—*Abdul Rahiman*, 16 Bom. 580. Where it was within the competence of the Magistrate to pass an adequate sentence in that case, but the Magistrate committed the case to the Sessions on the ground that as he was a witness in the identification proceedings in the case, he was disqualified from trying it (sec. 556), *held* that the course adopted by the Magistrate was improper; he should have moved the District Magistrate to transfer the case to some other Magistrate—*Ram Jatan*, 21 A.L.J. 420, 25 Cr.L.J. 665, A.I.R. 1924 All. 185.

830. Charge:—A charge under this section should allege all that is necessary to constitute the offence charged, and all that is requisite in order that the accused may have notice of the matter with which he is to be charged. It should not allege positively anything of which the allegation in a positive form is not justified by the materials before the Court—*Sant Singh*, 1889 P.R. 26.

After a charge has been framed and the accused has been called upon to plead thereto, the Magistrate cannot change his mind and commit the accused to the Sessions, because up to the stage of sec. 254 the accused has not had an opportunity of adducing defence evidence, which is essential before commitment—*Lakshminarayana v. Suryanarayana*, 63 M.L.J. 101, 1932 Cr.C. 506. See also sec. 347.

Omission to frame charge.—An omission to frame a charge according to this section would not invalidate an order of acquittal nor would render the acquittal equivalent to a discharge—*Gurdu*, 3 All. 129. See sec. 535. But the Calcutta High Court lays down that it is imperative on the Magistrate to frame a charge; and an omission to do so vitiates the trial—*Mahomed Rafique*, 43 C.L.J. 100, 27 Cr.L.J. 406 (407), 93 I.C. 70. (In the Calcutta case, there was not only an omission to frame the charge, but there was no examination of the accused under sec. 342, although the order-sheet stated that both these were done. The High Court consequently set aside the proceedings).

When a case is being tried as a warrant-case and a charge is drawn up of an offence which is triable as a warrant case, if it is intended to proceed against the accused also for an offence which is triable only as a summons-case, that offence should form a portion of the charge—*Hossain v. Kalu*, 6 C.W.N. 599, 29 Cal. 481; *Mallu Gobe*, 30 Cr.L.J. 891, 118, I.C. 323, Ind. Rul. 1929 Pat. 515, A.I.R. 1929 Pat. 712, 10 P.L.T. 875.

Where the accused was charged for offences under secs. 353, I. P. C. (warrant case) and 186, I. P. C. (summons case), but the Magistrate found during the course of the trial that a conviction under sec. 353 could not be sustained, and thereafter proceeded with the summons case (which did not require a charge) without framing a charge, *held* that the omission to frame a charge did not vitiate the trial. The Magistrate has to frame a charge when there is ground for presuming that an offence "triable under this chapter" has been committed. But as in this case no such offence had been established, it was not necessary to frame a charge—*Ambika Prasad*, 53 All. 206, 32 Cr.L.J. 313 (314), dissenting from *Ganga Saran*, 19 A.L.J. 6, 22 Cr.L.J. 146, 59 I.C. 850. See also *Palani*, 1931 M.W.N. 1319; *Sajan*, 34 Cr.L.J. 1044, 145 I.C. 624, A.I.R. 1933 Sind. 173, 1933 Cr.C. 537.

If the trial is held by a *Presidency* Magistrate, and the case is non-appealable, it is not necessary to frame a charge; see sec. 362 (4). But in an appealable warrant case, the *Presidency* Magistrate is bound to frame a charge in accordance with this section—*Raghubir*, 36 C.W.N. 791 (792), 33 Cr.L.J. 823, 55 C.L.J. 448, 139 I.C. 755; *Mahomed Rafique*, *supra*. But if there had been no failure of justice the omission would not be fatal—*Raghubir*, *supra*.

If the case is tried *summarily* and is non-appealable no charge is required to be

framed. See sec. 263 Even in a summary trial of an *appealable* case, it is doubtful whether a charge is necessary. See Note 870 under sec. 264

Effect of framing a charge :—When a Magistrate has framed a charge against an accused he cannot acquit him without hearing any further evidence for or against either party—*F. D. Bellow v. Mts Parker*, 7 C.W.N. 521.

830A. Cross-cases :—The trial of two cross-cases of rioting and grievous hurt almost simultaneously but separately does not vitiate the trial unless the accused can show some prejudice—*Sahadev Ahir*, 8 C.W.N. 344, 1 Cr.L.J. 199; *Shafayet*, 25 Cr.L.J. 1018, 81 I.C. 794, A.I.R. 1925 Pat. 152; *Dhako*, 58 I.C. 243, 1 P.L.T. 493, 21 Cr.L.J. 973. But in *Garibulla v. Sadar*, 25 Cr.L.J. 941, 81 I.C. 557, 39 C.L.J. 331, A.I.R. 1924 Cal. 813, it was held that the cross-cases arising out of the same incident should not have been heard at one and the same time.

There is no foundation for the view that a Police case is to have precedence over a complaint case arising out of the same incident because it is a Police case. The two cases should be tried simultaneously and contemporaneously, but should be dealt with wholly separately from each other, each on its own merits and upon the facts and circumstances appearing therein; judgments in the two cases shall be pronounced, if possible, after both the trials are over—*Sheikh Bahatar v. Nobadali*, 26 Cr.L.J. 65, 83 I.C. 625, 28 C.W.N. 487, A.I.R. 1924 Cal. 634; *Krishan*, 29 Cr.L.J. 1059, 112 I.C. 563; *Krishan Pannadi*, A.I.R. 1930 Mad. 190, 1930 Cr.C. 190, 31 Cr.L.J. 461, 123 I.C. 10; *Balu*, A.I.R. 1934 Lah. 458, 35 P.L.R. 427; *Ujagar Singh*, A.I.R. 1936 Lah. 356, 37 P.L.R. 80, 1936 Cr.C. 297, 161 I.C. 921, 37 Cr.L.J. 510

The Code is silent with regard to the procedure to be adopted in cross-cases. It should not, therefore, be laid down as an absolute rule of law that a particular course must be adopted. Each case has to be decided according to its requirements. Where the accused wants that his case should be taken up after the case against him has been decided, it is unfair to force a person in the position of an accused to throw himself open to cross-examination by the other side. In such circumstances the case against the accused should be disposed of first and then the case in which the accused is the complainant, should be taken up—*Makhan v. Monindra*, 26 Cr.L.J. 1615, 90 I.C. 719, 42 C.L.J. 83, A.I.R. 1925 Cal. 1260; *Ram Golam v. Sarat*, 31 Cr.L.J. 262, 121 I.C. 414, 49 C.L.J. 388, A.I.R. 1929 Cal. 281. But see *Ram Singh*, 36 Cr.L.J. 714, 155 I.C. 421, 16 P.L.T. 295 and *Rajendra v. Amrita*, A.I.R. 1924 Cal. 529, 24 Cr.L.J. 233, 71 I.C. 697.

There is no provision in the Code for trying two cases at the same time before the same jurors. But sec. 272, Cr.P.C., makes it clear that the same jury may try any number of accused one after the other, subject to the right of the accused to object to the jury or anyone or more of the members of the jury. When there is no objection to the jury by either of the parties, cross-cases may be tried by the same jurors—*Rajatullya v. Khudia*, 32 Cr.L.J. 1233, 134 I.C. 896, 54 C.L.J. 146, A.I.R. 1931 Cal. 709, Ind. Rul. 1931 Cal. 896, 1931 Cr.C. 989. No hard and fast rule can be laid down as regards the procedure in counter-cases. It is sufficient to say that there can be nothing irregular in a Judge trying each case to a conclusion before different assessors and afterwards pronouncing judgment in both so long as he tries the one quite independently of the facts in the other. Should the Judge, however, feel that he is likely to be embarrassed by the adoption of this procedure, he will no doubt get a transfer of the case to the file of another Sessions Judge. What must be made clear is (1) that the trial must be separate, i.e., before different assessors and separate judgments delivered, (2) that the conclusion in each case must be founded on, and only on, the evidence in each case and (3) that if the Judge considers himself unable to detach himself from extraneous consideration a transfer may be necessary to deliver the Judge from embarrassment—*Mounagurusami Naicker*, 34 Cr.L.J. 175, 141 I.C. 539, 37 M.L.W. 101, 64 M.L.J. 150, 1933 M.W.N. 98, Ind. Rul. 1933 Mad. 143, 56 Mad. 159, 1933 Cr.C. 550, A.I.R. 1933 Mad. 367 (F.B.). See also *Maula Khan*, 34 Cr.L.J. 46, 140 I.C. 685, 9 O.W.N. 963, Ind. Rul. 1933 Oudh. 8, A.I.R. 1933 Oudh. 21, where a case was transferred from the file of the Judge who tried and delivered judgment in the counter-case on the ground that

to frame the charge before examining the accused as well as before recording all the evidence—*Bhanwarsingh v. Sukhramsingh*, 41 Cr.L.J. 585 (586).

'Which such Magistrate is competent to try and adequately punish':—Section 254 is very restrictive, for it provides that the Magistrate shall try an accused person only for an offence which in his opinion can be adequately punished by him. A Magistrate has to exercise his discretion in the matter of every complaint that is brought before him—*Abdul Rahiman*, 16 Bom. 580 Where it was within the competence of the Magistrate to pass an adequate sentence in that case, but the Magistrate committed the case to the Sessions on the ground that as he was a witness in the identification proceedings in the case, he was disqualified from trying it (sec. 556), held that the course adopted by the Magistrate was improper; he should have moved the District Magistrate to transfer the case to some other Magistrate—*Ram Jatan*, 21 A.L.J. 420, 25 Cr.L.J. 665, A.I.R. 1924 All. 185.

830. Charge:—A charge under this section should allege all that is necessary to constitute the offence charged, and all that is requisite in order that the accused may have notice of the matter with which he is to be charged. It should not allege positively anything of which the allegation in a positive form is not justified by the materials before the Court—*Sant Singh*, 1889 P.R. 26.

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Omission to frame charge:—An omission to frame a charge according to this section would not invalidate an order of acquittal nor would render the acquittal equivalent to a discharge—*Gurdu*, 3 All. 129 See sec. 535. But the Calcutta High Court lays down that it is imperative on the Magistrate to frame a charge; and an omission to do so vitiates the trial—*Mahomed Rafique*, 43 C.L.J. 100, 27 Cr.L.J. 406 (407), 93 I.C. 70. (In the Calcutta case, there was not only an omission to frame the charge, but there was no examination of the accused under sec. 342, although the order-sheet stated that both these were done. The High Court consequently set aside the proceedings).

When a case is being tried as a warrant-case and a charge is drawn up of an offence which is triable as a warrant case, if it is intended to proceed against the accused also for an offence which is triable only as a summons-case, that offence should form a portion of the charge—*Hossain v. Kalu*, 6 C.W.N. 599, 29 Cal. 481; *Mallu Gope*, 30 Cr.L.J. 891, 118, I.C. 323, Ind. Rul. 1929 Pat. 515, A.I.R. 1929 Pat. 712, 10 P.L.T. 875.

Where the accused was charged for offences under secs. 353, I. P. C. (warrant case) and 186, I. P. C. (summons case), but the Magistrate found during the course of the trial that a conviction under sec. 353 could not be sustained, and thereafter proceeded with the summons case (which did not require a charge) without framing a charge, held that the omission to frame a charge did not vitiate the trial. The Magistrate has to frame a charge when there is ground for presuming that an offence "triable under this chapter" has been committed. But as in this case no such offence had been established, it was not necessary to frame a charge—*Ambika Prasad*, 53 All. 206, 32 Cr.L.J. 313 (314), dissenting from *Ganga Saran*, 19 A.L.J. 6, 22 Cr.L.J. 146, 59 I.C. 850. See also *Palani*, 1931 M.W.N. 1319; *Sajan*, 34 Cr.L.J. 1044, 145 I.C. 624, A.I.R. 1933 Sind 173, 1933 Cr.C. 537.

If the trial is held by a Presidency Magistrate, and the case is non-appealable, it is not necessary to frame a charge; see sec. 362 (4). But in an appealable warrant case, the Presidency Magistrate is bound to frame a charge in accordance with this section—*Raghubir*, 36 C.W.N. 791 (792), 33 Cr.L.J. 823, 55 C.L.J. 448, 139 I.C. 755; *Mahomed Rafique*, supra But if there had been no failure of justice the omission would not be fatal—*Raghubir*, supra

If the case is tried summarily and is non-appealable no charge is required to be

if it was evidence on one record and so mixed up the depositions of the witnesses that it was impossible to say how far the conviction of the accused in each case was based upon what was legal evidence against them, *held*, setting aside the conviction, that the procedure adopted was contrary to the provisions of the Code and was calculated to defeat the very object which the Legislature had in view in directing that the accused in cross-cases should be tried separately—*Sheo Karan*, 29 Cr.L.J. 734, 110 I.C. 590, A.I.R. 1928 Lah. 923. The procedure of treating the prosecution evidence in one case as defence evidence in the other and *vice versa*, even with the consent of the accused and the Government Pleader, is entirely illegal and the convictions and sentences in such cases cannot stand—*Sarju v. K-E*, 1938 O.W.N. 958, A.I.R. 1938 Oudh 219, 39 Cr.L.J. 929, 177 I.C. 559, 1938 O.L.R. 429, 11 R.O. 58; *Maung Pa v. Emp.*, 38 Cr.L.J. 641, 168 I.C. 713, A.I.R. 1937 Rang. 100, 9 R.R. 364, following *H. M. Eusoo v. Emp.*, 11 L.B.R. 73, 64 I.C. 833, A.I.R. 1921 L.B. 51, 23 Cr.L.J. 49 and *M. A. Mamsa v. Emp.*, 13 Bur.L.T. 245, 63 I.C. 867, A.I.R. 1920 L.B. 90, 22 Cr.L.J. 707. Where the Sessions Judge heard two appeals arising out of two cross-cases, acquitted the appellants in one appeal and disposed of the other appeal with reference to his findings in the former appeal, without discussing the evidence in the case, *held* that the procedure was not proper and that the appeal should be remanded to him to be disposed of in accordance with law—*Heta Singh*, 36 Cr.L.J. 1349, A.I.R. 1935 Pat. 494, 158 I.C. 281. But where, although the judgment of the Appellate Court is one continuous document, the decisions in the two cases are quite separate and distinct from each other, none of the findings in one case is based upon the evidence recorded in the other case and the judgment in one case is a self-contained document and is based upon its own oral and documentary evidence, the procedure is not illegal and the accused is not prejudiced thereby—*Lala Panna Lal*, A.I.R. 1936 Lah. 294, 1936 Cr.C. 244, 164 I.C. 809, 37 Cr.L.J. 1033. Ostensibly two separate trials were held in respect of the accused of each party. After the entire evidence against the accused in one case had been recorded by the Sessions Judge, the assessors apparently desired that they would like to hear the evidence in the cross-case before giving their opinion in the case in which the evidence had been recorded. The Sessions Judge thereupon proceeded to record the evidence in the cross-case and then heard the arguments in both the cases, and thereafter recorded the opinion of the assessors. He then wrote one judgment in both the cases, without keeping the evidence recorded in each case separate but making use of the evidence recorded in the cross-cases in arriving at his conclusions about the matter in controversy between the parties in the first case. *Held*, setting aside the conviction, that the manner in which the Sessions Judge dealt with two cases was not warranted by any sanction of law and the trials in those cases were illegal—*Hayat*, 29 Cr.L.J. 232, 107 I.C. 766, A.I.R. 1928 Lah. 380, 10 Lah.L.J. 389, following *Allu*, 75 I.C. 980, 4 Lah. 376, A.I.R. 1924 Lah. 101, 6 Lah.L.J. 103, 25 Cr.L.J. 68. The procedure by which two cross cases, tried separately, are heard by the same set of assessors and decided by the same judgment is not illegal, but the danger is that by adopting this method the Courts are liable to mix up the evidence in the two records. If they do so, the procedure is irregular and it is difficult to hold that the irregularity is one that can be condoned by reason of absence of prejudice to the accused. It is almost inevitable that in such cases there must be prejudice to the accused—*Khair Mohamad v. Emp.*, A.I.R. 1910 Lah. 466 (467). See also *Muthuswami v. Ranganatha*, 1933 M.W.N. 1274 and *Muhammad*, 25 Cr.L.J. 551, 81 I.C. 89, A.I.R. 1925 Lah. 149. Where two cases are tried side by side and the Magistrate disposes of them together, it is generally not possible for him while disposing of one case to refrain from taking impressions from the evidence in the other case. Where the irregularity has not occasioned any failure of justice, nor has it any way prejudiced the accused, the trial is not illegal—*Kanchan*, 35 Cr.L.J. 1415, 151 I.C. 812, A.I.R. 1934 All. 651, 1934 Cr.C. 863. In the trial of cross-cases the Magistrate examined the prosecution witnesses in one case in which no defence witness was examined. He then examined the prosecution witnesses in the cross-case but none of the defence. At the end of that evidence, the pleaders on both sides addressed the Court with

he expressed his view that it would not be possible for him to give a different finding. See also *Jaggan*, 1932 M.W.N. 692, where disadvantages of trial at one and the same time have been pointed out. Where one of the cross-cases was triable exclusively by the Court of Sessions and the other by the Magistrate himself, the Magistrate should try the case himself without committing it to the Court of Session—*Paladugu Lakshminarayan v. Tadiboyina Suryanarayana*, 33 Cr.L.J. 765, 139 I.C. 343, A.I.R. 1932 Mad. 502, 1932 M.W.N. 634, 63 M.L.J. 101, 1932 Cr.C. 506, 36 M.L.W. 390, Ind. Rul. 1932 Mad. 667; *Chinnaswamy*, 1933 M.W.N. 550; *Gorrepaty Ramasubbayya*, 39 Cr.L.J. 715, 176 I.C. 182, 47 M.L.W. 486, 1938 M.W.N. 417, 11 R.M. 45, A.I.R. 1938 Mad. 529, (1938) 1 M.L.J. 403. See Notes 695 and 718 in this connection.

It is desirable that the cross-cases should be tried by one Magistrate—*Judisthir v. Sheikh Samir*, 27 C.W.N. 700. There is no clear law as regards the procedure in counter-cases, a defect which the Legislature ought to remedy. It is a generally recognised rule that such cases should be tried in quick succession by the same Judge, who should not pronounce judgment till the hearing of both cases is finished—*Krishna*, 31 Cr.L.J. 461, 123 I.C. 10, 1929 M.W.N. 883, A.I.R. 1930 Mad. 190, 31 M.L.W. 233, 58 M.L.J. 352, 1930 Cr.C. 190. See also *Periaswami v. Emp.*, 1937 M.W.N. 998. There is nothing contrary to law in a trial being conducted in one Court and an enquiry into an accusation arising out of the same facts in another Court, an accusation which the lower Court has no jurisdiction to consider. It must be manifest, however, that such a procedure is highly inconvenient and where the evidence is bound to be the same, there is a possibility of the two Courts independently arriving at a different estimate of the evidence—*Kanhaiya Lal v. Baijnath*, 34 Cr.L.J. 519, 143 I.C. 77, A.I.R. 1933 Nag. 78, 1933 Cr.C. 315, Ind Rul 1933 Nag 149, 29 N.L.R. 201. See also *Paladugu Lakshminarayan v. Tadiboyina*, supra.

The dictum that the statements of witnesses are not evidence merely because they happen to be the statements of persons who are accused in a counter-case is clearly wrong—*Rahuman Khan Sahib*, A.I.R. 1938 Mad. 403, 1938 M.Cr.C. 70, 47 M.L.W. 149, 1938 M.W.N. 31, dissenting from *Sanna Basya v. Emp.*, 1937 M.W.N. 1196, 1937 M.W.N.Cr. 244. It is intended by Circular No. 52 of the Peshwar Judicial Commissioner's Court that in cross-cases the trial Judge should bring on each record separately the whole story complete by itself and should give findings on the issues involved in that case independently from those which arise in the other. But it is never intended that a part of the story should be admitted in each case and the other part shut out—*Ibrahim v. Emp.*, 39 Cr.L.J. 401, 174 I.C. 137, A.I.R. 1938 Pesh. 10. The Magistrate should not consider the evidence in one case for the purpose of coming to a conclusion in the other—*Garibulla v. Sadar*, 25 Cr.L.J. 941, 81 I.C. 557, 39 C.L.J. 331, A.I.R. 1924 Cal. 813. Where this was done and the accused was prejudiced thereby, the Madras High Court set aside the conviction—*Krishna v. Suryanarayana*, 1933 M.W.N. 243. Where in deciding a case the Magistrate uses evidence given in the counter-case, that alone is sufficient to make it impossible to uphold the conviction—*Mrs. W. Wagh v. Emp.*, A.I.R. 1940 Cal. 59, 41 Cr.L.J. 247, 186 I.C. 67, 12 R.C. 466; *Beni Madho v. Emp.*, 41 Cr.L.J. 816 (817). Technically it is better to keep the evidence in cross-cases entirely distinct, and to deliver two separate judgments. Where no injustice followed from non-compliance with this procedure, the conviction should not be set aside—*Madat Khan*, 100 I.C. 126, 8 Lah. 93, 1927 M.W.N. 68, A.I.R. 1927 P.C. 26, 31 C.W.N. 393, 28 P.L.R. 167, 52 M.L.J. 441, 28 Cr.L.J. 251, 25 M.L.W. 724, 29 Bom.L.R. 781, 45 C.L.J. 408. (In this case although the cross-cases were tried separately the High Court gave one judgment). But the very use of evidence which is not part of the record is by itself proof of prejudice to the accused. The use in a case of evidence produced in another case is not a mere irregularity but an illegality—*Beni Madho v. Emp.*, supra. Where the evidence in the two cases was recorded separately, but the Magistrate with a view to avoid unnecessary repetition, thought it convenient to dispose of them in one judgment in which he treated the evidence in the two cases as

an admission of guilt under that section. An accused person does not plead to a section of a criminal statute. He pleads guilty or not guilty to the facts alleged in the charge, and a plea of guilty amounts only to an admission that he occupied the position as stated in the charge and committed the acts therein specified; but unless the facts averred in the charge amount in law to an offence under a particular section, a plea of guilty cannot amount to an admission of guilt under that section—*Basant*, 7 Lah 359, 27 Cr.L.J. 907.

When an accused person does not formally plead guilty, but throws himself at the mercy of the Court and says that he will not cross-examine any prosecution witnesses or examine any defence witnesses, the Magistrate ought to ask him whether he pleads guilty, and if he does not plead guilty, he should be formally asked to enter on his defence. The Magistrate acts wrongly if in such a case he considers the case as closed and convicts the accused—*Upendra*, 12 C.W.N. 140, 6 Cr.L.J. 434 (436).

Plea of Pleader:—Where the accused is present in Court, his pleader cannot be called upon to plead under this section on behalf of his client, and it is improper for a Magistrate to act upon such plea, though made in the presence and hearing of the accused. It would be more regular in form for the Magistrate to call upon the accused to say with his own lips whether he denies the truth of the complaint—*Sursingh*, 6 Bom.L.R. 861, 1 Cr.L.J. 939. But when the accused has been permitted under sec. 205 to appear by a pleader, the latter may perform all acts which devolve upon the accused in the course of the trial, and he can plead guilty or not guilty under this section—*Jamal*, 6 S.L.R. 206, 14 Cr.L.J. 272; *Dorabshah*, 50 Bom. 250, 27 Cr.L.J. 440.

Record of plea—If the plea is not recorded, the conviction is liable to be set aside—*Gopal Dhanuk*, 7 Cal 96. The Court must record the actual words used; a narrative of what occurred and of the statements made by the prisoners is not a proper record of the plea—*Gopal Dhanuk*, 7 Cal 96. If the statement of the accused is in a foreign language, the Magistrate need not record it in the language in which it is made, but the record must be in the language in which it is interpreted—*Vambile*, 5 Cal 826.

833. Conviction on plea:—If after the charge is framed the accused pleads guilty, the Magistrate can refuse to convict on the plea, and can proceed to take further evidence—*Satya Kinkar*, 25 C.W.N. 212 (213); *Kunwar Sen v. Emp.*, A.I.R. 1933 Oudh 86 (89), 8 Luck 286, 34 Cr.L.J. 124, 1933 Cr.C. 128, 141 I.C. 192, 91 O.W.N. 1135. In a warrant case, although an accused can be convicted on his own plea of guilty, still a conviction should not be made unless there is evidence on the record in support of the prosecution. It is highly improper in a warrant case to convict an accused on his own admission alone without recording any evidence for the prosecution and without framing a formal charge—*Chinnappayar*, 29 Mad 372; *Natabar*, 27 C.W.N. 923 (924), 25 Cr.L.J. 1270.

If the accused pleads "not guilty," but admits some (or even all) of the facts alleged by the prosecution, the proper procedure for the Magistrate is not to convict him on the admission without taking evidence, but to proceed to trial by examining the witnesses and giving an opportunity to the accused to cross-examine the prosecution witnesses and produce his own evidence—*Sonabhai*, 9 Bom.L.R. 1346, 6 Cr.L.J. 434 (425).

In warrant cases it is discretionary with the Magistrate to defer conviction of the accused who pleads guilty and use his confession against other co-accused under sec. 30, Evidence Act—*Arudumyan Guljar Patel v. Emp.*, A.I.R. 1937 Nag. 17 (23), 1 L.R. 1937 Nag. 315, 38 Cr.L.J. 237, 168 I.C. 582 (F.B.)

255A. In a case where a previous conviction is charged under the provisions of section 221,

Procedure in case of previous convictions section (7), and the accused does not admit that he has been previously convicted, if the facts alleged in the charge, the Magistrate may, after he has c

by the *Select Committee of 1916*:—"It may happen that up to the time of a charge being framed the accused is not professionally represented, and it seems reasonable in such a case that he should be given time until the next hearing to engage a pleader and decide what witnesses he will cross-examine."

835. Scope of section:—"This is a section which is frequently ignored by subordinate Courts, though their attention has been drawn to it by many rulings and though the section is in itself quite clear"—*Moola*, 11 P.R. 1914, 16 Cr.L.J. 146.

This section does not apply to security cases. Section 117 lays down that the procedure prescribed for warrant cases is *as nearly as possible* to be followed in cases of security for good behaviour, but it does not follow that that gives a right to the person proceeded against under sec. 110 to further cross-examine the prosecution witnesses under sec. 256 on entering on his defence, when he has *once* cross-examined them before or had the opportunity of cross-examining them before—*Chitamon*, 35 Cal 243 (258), 12 C.W.N. 299, 7 C.L.J. 177; *Karuthasami*, 53 Mad 173, 58 M.L.J. 229, 124 I.C. 1, A.I.R. 1930 Mad. 331, 31 M.L.W. 243, 1930 Cr.C. 323, 1930 M.W.N. 178, 31 Cr.L.J. 618 (622) (F.B.); *Ahmad Baksh*, 1916 P.R. 1, 17 Cr.L.J. 81, 32 I.C. 676, 58 P.W.R. 1915 (Cr.); *Bija*, 8 Lah. 265, 28 Cr.L.J. 239, 99 I.C. 1039, A.I.R. 1927 Lah. 470, 28 P.L.R. 43 (dissenting from *Lanska*, 4 Bur.L.T. 24, 12 Cr.L.J. 89, 9 I.C. 468); *Ajib Singh*, 35 Cr.L.J. 633, 148 I.C. 325, A.I.R. 1934 Lah. 62, 1934 Cr.C. 139; *Nim*, 34 Cr.L.J. 9, 140 I.C. 170, A.I.R. 1933 Sind 8, 1933 Cr.C. 32, 27 S.L.R. 19. In security cases, the order of the Magistrate under sec. 112 is equivalent to a charge. Therefore, the person against whom the order is made is fully aware of what is alleged against him, and as the evidence of the prosecution witnesses is recorded in his presence he has every opportunity of cross-examining them; and this is tantamount to cross-examination after charge. Consequently, there is no reason why he should be allowed the right of a second cross-examination and protract the proceedings unnecessarily—*Zamin*, 142 I.C. 752, A.I.R. 1933 Rang. 29, Ind Rul 1933 Rang. 52, 34 Cr.L.J. 468, 1933 Cr.C. 277 following *Chintaman*, *supra*. The observations of Ayling and Coutts-Trotter, JJ., in *Venkatachinnayya*, 43 Mad. 511, 38 M.L.J. 370, 11 M.L.W. 435, 56 I.C. 50, 1920 M.W.N. 280 (F.B.), supporting the contrary view, were held to be *obiter dicta* in 53 Mad. 173 (F.B.) quoted above.

But though the person proceeded against under sec. 110 is not entitled to a second cross-examination under sec. 256, still he must be given *one* opportunity of cross-examining the prosecution witnesses at some stage of the inquiry. Where no reasonable opportunity was given to such person at any stage of the proceeding to cross-examine the witnesses, he was certainly prejudiced and the order for security must be set aside—*Tulok*, 50 All. 71, 25 A.L.J. 749, 28 Cr.L.J. 792 (794), 101 I.C. 432, A.I.R. 1927 All. 660, followed in *Chandan*, 52 All. 448, 1930 A.L.J. 389, 31 Cr.L.J. 627 (628).

This section does not apply to an *inquiry* into a Sessions case prior to commitment. In such inquiry the accused has no right to cross-examine the prosecution witnesses after the charge is framed—*Baldeo*, 19 O.C. 239, 18 Cr.L.J. 105. See Note 698 under sec. 208.

This section gives an accused person the right to have the witnesses for the prosecution cross-examined after charge has been framed, and that right is not in any way affected by the provisions contained in *Ch. XL* Section 507, which is *one* of the sections contained in the said chapter, provides for the inspection of depositions taken on commission, and it is open to a person accused in a warrant case, to refrain from putting in any interrogatories when the commission is first issued, and to apply at a later stage (*i.e.*, after he has inspected the deposition on commission and after charge has been framed against him), for re-issue of the commission together with his cross-interrogatories—*Dombrian v. Someswar*, A.I.R. 1934 Cal. 693, 61 Cal. 824, 152 I.C. 1005, 59 C.L.J. 377, 38 C.W.N. 673, 1934 Cr.C. 1044. See also *Sukhranddas v. Emp.*, in Note 1324.

836. Cross-examination:—(1) *Before frame of charge (section 252)*:—Although the proper time to recall and cross-examine the witnesses for the prosecution

the said accused under section 255, sub-section (2), or section 258, take evidence in respect of the alleged previous conviction and shall record a finding thereon.

834. This new section has been added by sec. 71 of the Criminal Procedure Code Amendment Act, XVIII of 1923.

"We think that this addition is necessary after sec. 255, to provide for a case where previous conviction is also charged. Definite provision is made for this in the case of trials before a Court of Session (see sec. 310), but it does not seem to have been provided for by the Code in the case of a Magistrate's trial"—*Report of the Select Committee of 1916*. "It was suggested to us that the new sec. 255A is unnecessary on the ground that though a procedure for the proof of previous convictions is necessary in a Sessions Court to prevent the jury or the assessors from being prejudiced by anything they may hear as to the accused's previous record, yet in warrant cases the same considerations do not apply. On the whole, however, we think the new section may serve a useful purpose and we have retained it"—*Report of the Joint Committee of 1922*.

Prior to the enactment of this section it was held that in a trial before a Magistrate, it was not illegal to adduce evidence of a previous conviction before the accused was called upon for his defence, if such procedure did not prejudice the accused—*Delhi Sonar*, 50 Cal. 367. In another case, however, the trial was set aside, because the accused was prejudiced by reason of the Magistrate allowing the proof of previous conviction to go in before the evidence for the defence was gone into—*Galam Hossein*, 10 C.W.N. excv. But these cases are no longer of any authority, because the present section provides that the Magistrate can take evidence of previous conviction only *after he has convicted the accused*.

This section means that the Magistrate should first write out a judgment of conviction without passing sentence. Then, if the accused had denied previous conviction, he should proceed to take evidence to prove it. Where the Magistrate examined a witness to prove the previous conviction, which was 13 years old, before convicting the accused and the accused applied for transfer of the case on that ground, the High Court cancelled the charge under sec. 75, I. P. C., altogether without granting the transfer—*Ishar Singh v. Shama Dusadh*, 38 Cr.L.J. 484, 167 I.C. 881, 17 P.L.T. 627, A.I.R. 1937 Pat. 131, 3 B.R. 379, 9 R.P. 449.

256. (1) If the accused refuses to plead, or does not plead,
or claims to be tried, he shall be required to

Defence.

state, at the commencement of the next hearing of the case or, if the Magistrate for reasons to be recorded in writing so thinks fit, forthwith, whether he wishes to cross-examine any, and, if so, which, of the witnesses for the prosecution whose evidence has been taken. If he says he does so wish, the witnesses named by him shall be re-called and, after cross-examination and re-examination (if any), they shall be discharged. The evidence of any remaining witnesses for the prosecution shall next be taken, and, after cross-examination and re-examination (if any) they also shall be discharged. The accused shall then be called upon to enter upon his defence and produce his evidence.

(2) If the accused puts in any written statement, the Magistrate shall file it with the record.

Change:—The italicised words in sub-section (1) have been added by sec. 72 of the Cr. P. Code Amendment Act, XVIII of 1923. The reasons have been thus stated

question—*Deep Chand*, A.I.R. 1935 All. 627, 1935 A.L.J. 666, 1935 Cr.C. 641, 36 Cr.L.J. 1260, 157 I.C. 915.

The right referred to in this section is absolute and unqualified and is intended to apply only where the witnesses are still before the Court and before they have been discharged from further attendance. Under sec. 257, however, there is a discretion vested in the Court to resubmit the prosecution witnesses already examined; and where a witness has been allowed to depart under sec. 256 on the representation of the accused that he is not required, any further application to re-examine him must be deemed to fall under sec. 257—*Lockley*, 43 Mad. 411, 38 M.L.J. 209, 21 Cr.L.J. 297.

Without actually deciding the question whether the accused has an absolute right to insist that the prosecution witnesses in a warrant case should be cross-examined in the order which the defence Counsel desires, the Calcutta High Court, in the peculiar circumstances of the case, held that if the Magistrate had a discretion in the matter he should exercise it in favour of the accused—*Mfoosa*, 34 Cr.L.J. 347, 142 I.C. 479, A.I.R. 1933 Cal. 189, 37 C.W.N. 288, Ind. Rul. 1933 Cal. 274, 1933 Cr.C. 235. See also *Ibrahim*, 36 Cr.L.J. 41 (43), 152 I.C. 236, A.I.R. 1934 Nag. 209, 1934 Cr.C. 980.

The ideal procedure regarding the examination of the prosecution witnesses is to examine all of them on one day or on two consecutive days, so that all would be present and ready to be cross-examined if the accused exercised his rights under this section. If the witnesses are allowed to go and are then to be recalled, it throws a heavy burden on the complainant and the witnesses which should be avoided as far as possible—*Nirpat Singh*, 1939 N.L.J. 201.

Summary trial:—The provisions of sec. 256 which gives an absolute right to the accused to cross-examine the prosecution witnesses after they had been examined-in-chief, must apply to a summary trial of warrant cases. The Magistrate should allow the accused to cross-examine the prosecution witnesses after all of them had been examined-in-chief—*Tittu*, 1920 Pat.H.C.C. 283, 57 I.C. 454, 21 Cr.L.J. 630, 1 P.L.T. 652. This view of law was also accepted in *Raju Achari*, 28 Cr.L.J. 12, 50 Mad. 740, 99 I.C. 44, 50 Mad. 740, 51 M.L.J. 687, A.I.R. 1927 Mad. 78. The object of Ch. 22 is to shorten the record and the work of the Magistrate in making the record, it is not intended to deprive the accused person of any of the rights under Ch. 20 or 21. In a summary trial the accused is entitled, both in summons and warrant cases (only in the former if the Court thinks fit), to have processes to summon his witnesses; he is equally entitled to have the prosecution witnesses re-called after the explanation, which takes the place of a formal charge, is made and that, in accordance with the procedure prescribed in warrant cases, does not take place until the prosecution has called its witnesses and satisfied the Court that there is sufficient material on which to charge the accused, or, in the case of a summary trial, to ask him to show cause why he should not be convicted on the evidence appearing against him—*Munna v. Emp.*, A.I.R. 1939 Nag. 87, 1939 N.L.J. 7, 1 L.R. 1939 Nag. 457, 40 Cr.L.J. 846, 184 I.C. 44. The Bombay High Court and the Oudh Chief Court have taken a different view and held that in summary trials under sec. 263, when no charge is framed, the accused has no right as such to re-call the witnesses for the prosecution. If the accused even without a charge satisfies the Court that it is necessary or advisable that any particular witness should be re-called, there is no doubt that the Magistrate would consider the application favourably—*Umaji Krishnaji*, 27 Cr.L.J. 431 (432), 93 I.C. 159, A.I.R. 1926 Bom. 226, 28 Bom.L.R. 95; *Gokaran*, 9 O.W.N. 334, 1932 Cr.C. 405 (407), 137 I.C. 684, 33 Cr.L.J. 506, A.I.R. 1932 Oudh 242, 7 Luck. 699.

Section 256, Cr. P. C., applies even in the case of summary trials if the case is a warrant case—*Shudu*, 31 Cr.L.J. 683, 124 I.C. 370, 24 S.L.R. 336, A.I.R. 1930 Sind. 146.

Magistrate's duty to ask:—The word "hearing" is not defined anywhere in the Criminal Procedure Code. The intention of the law is that the Magistrate should adjourn the case, after framing the charge and recording the plea of the accused, to a later date so that the accused may have time to consider whether he wishes further to examine the witnesses for the prosecution. On the adjourned date the accused should

is after the charge is read over to him and before he is called upon to make his defence, still this section does not prohibit such cross-examination (under sec. 252) *before* the charge is framed—*Sagal*, 21 Cal. 642. An opportunity should be given to the accused, if he so desires, to cross-examine the prosecution witnesses even before the charge is framed—*Ashirbad v. Maju*, 8 C.W.N. 838.

(2) *After frame of charge* (sec. 256) :—The fact that the accused has cross-examined the witnesses for the prosecution before the charge is framed, does not deprive him of the right given him by this section of recalling and cross-examining those witnesses after the charge is framed—*Zamuna v. Ram Tahal*, 27 Cal. 370 (372); *Inder v. Brown*, 37 Cal. 236 (238); *Nilkanta*, 20 Cal. 469; *Sagal*, 21 Cal. 642; *Nga Pya*, 14 Cr.L.J. 388, 6 Bur.L.T. 67; *Nasarvanji*, 2 Bom.L.R. 542. In trials of warrant cases it is when a charge-sheet is drawn up, and not before, that the accused is for the first time informed as to the offences that have appeared from the evidence to have been committed by him and hence it is only right that after a charge is framed the accused should in warrant cases be given an opportunity of a further cross-examination expressly directed to the charge, although the prosecution witnesses were already cross-examined before the frame of charge—*Chintaman*, 35 Cal. 243 (258); *Zamin*, 1933 Cr.C. 277, 142 I.C. 752, A.I.R. 1933 Rang. 29, Ind. Rul. 1933 Rang. 52, 34 Cr.L.J. 468. Even when the prosecution witnesses were cross-examined by the accused before frame of charge on the understanding that the accused would not require those witnesses to be recalled for further cross-examination after the charge, still the Magistrate cannot refuse the application of the accused to recall and cross-examine those witnesses after the charge is framed—*Kokul Ghose v. Kasimuddi*, 6 C.W.N. 424. Where the witnesses for the prosecution were cross-examined by the pleader for the accused before the frame of charge, and the pleader then stated that he no longer required their attendance, but after the framing of the charge the pleader for the accused wanted to further cross-examine the witnesses, *held* that under sec. 256, the accused was entitled to do so—*Ramchandra*, 5 Pat. 110, 7 P.L.T. 304, 27 Cr.L.J. 499.

(3) The accused has a third chance of cross-examination under sec. 257. See Note 846 under that section.

837. According to the plain language of this section, the accused has a right to have the witnesses for the prosecution recalled and cross-examined after the frame of charge—*Gopal Sheikh*, 7 C.L.J. 240; *Talluri Venkayya*, 4 Mad. 130; *Titu Sahu*, 1 P.L.T. 652, 57 I.C. 454, 21 Cr.L.J. 630; *Mohan Singh*, 24 Cr.L.J. 371, 1923 P.W.R. 9; and the Magistrate is not justified in refusing to recall the prosecution witnesses for cross-examination, specially when the accused had not cross-examined any witnesses before the frame of charge—*Ramyad*, 5 P.L.J. 94, 21 Cr.L.J. 814. It is the duty of the Magistrate to recall prosecution witnesses for cross-examination if the accused so demands after the charge is framed—*Amin Chand v. King-Emp.*, 12 P.R. 1907 Cr., 32 P.W.R. 1907 Cr., 6 Cr.L.J. 339, 45 P.L.R. 1908. See also *Har Kishan Das v. Emp.*, A.I.R. 1937 All 127, 38 Cr.L.J. 361, 1937 A.L.R. 166, 167 I.C. 236, 1936 A.W.R. 1273, for the meaning of the word "recall". The accused has a right to have the prosecution witnesses recalled for cross-examination after the frame of charge, even though before the frame of charge he had professed to take no part in the trial and had refused to cross-examine the witnesses—*Chint Ram*, 32 P.L.R. 13, 32 Cr.L.J. 1202 (1203), 134 I.C. 580, A.I.R. 1931 Lah. 186, 1931 Cr.C. 306, Ind. Rul. 1931 Lah. 961. Where there are several accused, each of the accused should be given an opportunity to cross-examine. A Magistrate cannot refuse to allow the further cross-examination of the witnesses for the prosecution by one of the accused, on the ground that they had been cross-examined by another—*Lala Ram*, 11 C.W.N. cxi. But where the accused were represented by several different lawyers and one of these lawyers led the cross-examination and others helped him in suggesting questions to be asked, *held* that all the accused had the opportunity to cross-examine the prosecution witnesses and if no questions were asked on behalf of some of the accused the only conclusion that can reasonably be drawn from the circumstances would be that they did not want to ask them any

Inder Rai v. Brown, 37 Cal 236 (238). See also *Arumugam*, (1911) 2 M.W.N. 192, 12 Cr.L.J. 548. Where the charges are complicated and the accused are ignorant persons, they should not be called upon to cross-examine the witnesses immediately after the charge is framed, but a reasonable time should be given to them to get proper legal advice and to engage a pleader before they are called upon to cross-examine the prosecution witnesses—*Rangasami Padayachi*, 16 Cr.L.J. 786. This is now made clear by the addition of the words "at the commencement of the next hearing of the case." This amendment provides that the accused may be asked whether they wish to cross-examine the prosecution witnesses on a date subsequent to that upon which they are called upon to plead to the charge. It is intended to give the accused person an interval of time to think out the lines of their defence before they are called upon to inform the Court how they intend to proceed. Omission of this new procedure is not an irregularity which vitiates the whole trial unless the accused is prejudiced in his evidence. Nevertheless the Legislature has conferred upon an accused person the privilege that ordinarily after being charged with an offence, he shall have a period of not less than twenty-four hours to consider the method in which he will meet the charge, it is difficult to say that he has not been prejudiced if the Magistrate, without assigning any reason for departing from the normal procedure and probably because he overlooked or was unaware of the change in the law has not allowed him that privilege—*Phuman*, 88 I.C. 518, A.I.R. 1925 Lah 339, 7 Lah L.J. 114, 26 P.L.R. 460, 26 Cr.L.J. 1158. It is the intention of the Legislature that sufficient time should be given to the accused to consider whether he wishes to cross-examine any of the prosecution witnesses after the framing of the charge, and it is only in special cases that the Magistrate can require him to state forthwith if he so wishes—*Ram Chandra*, 93 I.C. 963, A.I.R. 1926 Pat 214, 5 Pat 110, 27 Cr.L.J. 499. Where the accused stated that his pleader was absent as he was engaged in another Court, and the accused applied to the Magistrate to adjourn the hearing, but the Magistrate refused the application on the ground that it was his usual practice to proceed forthwith with the cross-examination, held that it was not a cogent or adequate reason for not adjourning the hearing, and the Magistrate committed an illegality which vitiated the trial—*Lakshman*, 53 Bom 578, 1929 Cr.C. 130 (132), A.I.R. 1929 Bom 309, 31 Bom L.R. 593. But where the Magistrate allowed only one day's adjournment after charge was framed, with the result that the defence Counsel did not appear in the case, held that it was by no means incumbent on the Court to give a longer adjournment in the case which was a petty one—*Bhanuarsingh v. Sukhramsingh*, 41 Cr.L.J. 585 (586).

If on the adjourned date the accused is unable to cross-examine the witnesses on the ground that he had not been furnished with copies of their statements, he is entitled to have the witnesses recalled again for cross-examination, or to cite them as his defence witnesses—*Chint Ram*, 32 P.L.R. 13, 32 Cr.L.J. 1202 (1203), 134 I.C. 580, A.I.R. 1931 Lah. 186, 1931 Cr.C. 306, Ind. Rul. 1931 Lah 964.

"*Forthwith*"—*Recording reasons*—Where the accused is represented by a pleader from the outset, he may generally be asked forthwith under this section if he wishes to cross examine, for the simple reason that the accused will not be prejudiced, and it is convenient to arrange a date for the subsequent attendance of the prosecution witnesses before they disperse. If, however, he is asked forthwith, with a view to recalling the witnesses forthwith, fuller reasons will be required, because it is usually convenient for the accused to have an interval in which to study the deposition already on record, and discover materials for the cross-examination of the witnesses. If an accused is not represented by a pleader, reason must be shown for not postponing the question to the next hearing by which time he can have consulted a pleader. Where the accused who was not represented by a pleader was required forthwith to state if he wished to cross-examine, and the Magistrate did not record his reasons, held that this was an illegality vitiating the trial, and not a mere irregularity curable by sec 537—*Raju Achari*, 50 Mad. 740, 51 M.L.J. 687, 28 Cr.L.J. 12 (13); *Ramchandra*, 93 I.C. 963, 5 Pat. 110, A.I.R. 1926 Pat. 214, 27 Cr.L.J. 499. But see *Janardhanam*, 32 Cr.L.J. 221, 129 I.C.

be asked whether he wishes to cross-examine the prosecution witnesses and there is nothing why it should be considered that the proceedings on the adjourned date are not a "hearing" merely because no other action is to be taken on that date—*Bhajja v. Emp.*, A.I.R. 1939 All. 238, 1939 A.L.J. 81, 181 I.C. 537, 40 Cr.L.J. 549, 1939 A.W.R. (H.C.) 1. Under this section, it is the duty of the Magistrate, after a charge has been framed, to require the accused to state whether he desires to cross-examine the prosecution witnesses already examined—*Zamunia v. Ram Tahal*, 27 Cal. 370. Omission on the part of the Magistrate to ask the accused whether he wishes to recall any witnesses for cross-examination will invalidate the conviction (even though the accused had to some extent cross-examined them before frame of charge), and the case will be retried from the point of framing the charge—*Moola*, 1914 P.R. 11, 16 Cr.L.J. 146 (147); *Mohan Singh*, 24 Cr.L.J. 371, A.I.R. 1924 Lah. 215; *Phuman*, 88 I.C. 518, 7 Lah.L.J. 114, A.I.R. 1925 Lah. 339, 26 Cr.L.J. 1158; *Girdhari*, 31 Cr.L.J. 705, 124 I.C. 619, A.I.R. 1930 Nag. 255; *Muthiah*, 33 Cr.L.J. 738, 139 I.C. 203, A.I.R. 1932 Mad. 559, 1932 Cr.C. 589, 1932 M.W.N. 857, Ind. Rul. 1932 Mad. 641, 37 M.L.W. 134; *Raju Achari*, 28 Cr.L.J. 12, 99 I.C. 44, 24 M.L.W. 649, 51 M.L.J. 687, A.I.R. 1927 Mad. 78, 38 M.L.T. 141, 50 Mad. 740; *Nisar Ahmad v. Emp.*, A.I.R. 1939 Pat. 172, 40 Cr.L.J. 419, 180 I.C. 839, 1939 P.W.N. 832, 19 P.L.T. 845. But it has also been laid down that the provisions of sec. 256 are merely directory, and are not provisions relating to the mode of trial, but only lay down a rule of procedure, and, therefore, a non-compliance of these provisions is no more than an irregularity in procedure which can be cured by sec. 537, Cr. P. C.—*Gokaran*, 9 O.W.N. 334, 1932 Cr.C. 405, 137 I.C. 684, 33 Cr.L.J. 506, A.I.R. 1932 Oudh 242, following *Chhajju*, A.I.R. 1927 All. 217, 99 I.C. 1029, 28 Cr.L.J. 229, 49 All. 316 and *Gasiti*, A.I.R. 1926 Lah. 155, 93 I.C. 72, 27 Cr.L.J. 408, 6 Lah. 554. See also *Ghanshamdas*, 35 Cr.L.J. 516, 147 I.C. 802, A.I.R. 1933 Sind 135. The right of cross-examination is a very important right. It will be extremely difficult to say that where the witnesses for the prosecution already examined are not offered for cross-examination after the framing of the charge, the accused has not thereby suffered any substantial injury in the course of the trial. No hard and fast rule can be laid down in this respect because the answer to the question as to whether the accused has been prejudiced will be different according to the varying posture of each case—*Ram Sundar*, 31 Cr.L.J. 14, 120 I.C. 208, A.I.R. 1929 All. 901. In *Munian Chetty*, 16 Cr.L.J. 5 (Mad.), however, where the accused had fully cross-examined the prosecution witnesses before the frame of charge, the omission to ask was held to be a mere irregularity which did not prejudice the accused.

It makes no difference to the accused whether the question is put to him on the date the charge is framed or on the next date when the witnesses for the prosecution are present and when in fact they are cross-examined—*Hafiz Mohd.*, A.I.R. 1936 All. 319, 1936 A.L.J. 274, 1936 A.W.R. (H.C.) 375, 1936 Cr.C. 476, 162 I.C. 758, 1936 A.L.R. 470, 37 Cr.L.J. 710.

It is incumbent on a Magistrate to make a record of the question and answer which are prescribed by sec. 256 (1), Cr. P. C. Moreover, when an answer has been received that the accused desires to cross-examine the witnesses for the prosecution whose evidence has been taken, the section proceeds to say that the witnesses named should be recalled. The use of the word "recall" does not merely mean that the chaprasi should call their names. It means that if the witnesses are not present the Magistrate should issue process to ensure their attendance—*Har Kishan Das v. Emp.*, A.I.R. 1937 All. 127, 38 Cr.L.J. 361, 1937 A.L.R. 166, 167 I.C. 236, 1936 A.W.R. 1273.

Cross-examination on a subsequent date :—A Magistrate cannot insist on the prosecution witnesses being cross-examined by the accused immediately, whether they wish it or not—*Tulok*, 50 All. 71, 25 A.L.J. 749, 28 Cr.L.J. 792. Where the accused were asked at the time of framing the charge whether they would call any of the prosecution witnesses for cross-examination, but they could not at that time make any answer, but on a subsequent day they applied for recalling some prosecution witnesses for cross-examination, held that the accused were entitled to have those witnesses summoned—

witnesses and then frame a charge-sheet before he has examined all those witnesses. If he adopts the latter course and certain witnesses remain from the list who have not been examined then those witnesses are the remaining witnesses under sec 256 (1), Cr. P. C., and the complainant has a right to produce them after the cross-examination of those witnesses who have been previously examined. But if the Magistrate has examined all the witnesses for the prosecution in the list under sec. 252 (2), Cr. P. C., and has then framed a charge-sheet, there are no witnesses remaining who could come under the description in sec. 256 (1), Cr. P. C. Hence, after this stage, the complainant cannot claim to produce an entirely new witness—*Raghubir Sahai v. Wali Husain Khan*, AIR. 1937 All. 189, 38 CrLJ. 394, 167 IC. 522, 1937 A.L.R. 205, 1935 A.L.J. 1115, 1935 A.W.R. (H.C.) 886, not following *Percy Henry Burn*, supra. See also *Hajari Tika Lodhi v. Emp.* and *Sital v. Dalganjan* in Note 824.

The same High Court has, however, laid down that there is no prohibition in law against the admission of relevant and admissible evidence for proving an offence after a certain stage in the trial. It is quite clear that every Court has got inherent power to allow relevant evidence to be produced by any party at any stage of the trial. If such evidence is allowed to be produced by the prosecution all that the accused can urge is that he should be given a full opportunity of rebutting it. Therefore, there is nothing illegal or irregular in the fact that the Magistrate allows certain documents to be produced while the prosecution witnesses are being cross-examined by the defence. Even if it is assumed for the purpose of argument that the admission of the documents at that stage is an irregularity, sec 537, Cr. P. C., would cure it as there is obviously ample opportunity for rebutting the evidence by the defence—*Lala v. Emp.*, 40 CrLJ. 145, 178 IC 894, AIR 1938 All 637, 1938 A.L.J. 1010, 1 LR 1938 All 968, 1937 A.W.R. (H.C.) 638, 1938 A.Cr.C. 103.

840. Expenses:—This section gives the accused an absolute right to recall witnesses for cross-examination at the expenses of the Government, and it is not open to the Magistrate to order the accused to pay costs for recalling those witnesses—*Taqi*, 22 CrLJ 112 (Lah.); *Ram Chandra*, 5 Pat 110, 27 CrLJ. 499, *Radhakishan v. Ramkrishna*, 7 N.L.J. 57, 25 CrLJ. 912; *Amin Chand*, 1907 P.R. 12, 6 CrLJ. 339; *Bridhichand v. Lakhmichand*, 8 N.L.R. 65, 13 CrLJ 554. Where a Magistrate refused to summon a witness for the prosecution except on payment of fees for his attendance, on the ground that the accused had declined to cross-examine that witness when he had the opportunity, held that the refusal was illegal—*Isvar v. Kali Kumar*, 4 C.W.N. 351. Where in order to suit the convenience of the Court or for reasons connected with the discharge of other public business, the witnesses for the prosecution are allowed to leave before the charge has been framed or before the right conferred by sec 256 has been exercised by the accused, they must be required to attend again, and ordinarily any expenses incurred on this score should be paid by the Government. There is nothing in this chapter which enables the Magistrate to demand even from a complainant the expenses to be incurred by his witnesses—*Bridhichand v. Lakhmichand*, 8 N.L.R. 65, 12 CrLJ. 554; *Amrithahammal v. Ratnaswami Padavachi*, 1933 M.W.N. 1266. If, however, the complaint is a private one (e.g., for an offence of using false trade mark) and the prosecution is not carried on by or under the orders or with the sanction of the Government and is bailable, and it does not appear that the prosecution is directly in the interests of public justice, then the complainant may be ordered to pay the expenses of the witnesses. The question as to whether the complainant or the Government should pay the expenses is to be decided by the Magistrate. But in no case can the accused be compelled to pay the expenses of the witnesses for the prosecution whom he wishes to cross-examine under sec 256. Under this section, the right of the accused to cross-examine is absolute—*Radhakishan v. Ramkishan*, 7 N.L.J. 57, 25 CrLJ 912, AIR. 1924 Nag 114; *Ramchandra*, 27 CrLJ. 499, AIR. 1926 Pat. 214, 5 Pat. 110, 93 IC 963. The Lahore High Court has, however, held that if the accused, after the framing of the charge, applies for recall of the prosecution witnesses for further cross-examination, the Magistrate should call those witnesses either at the expense of

74, A.I.R. 1930 Mad. 977, 1930 M.W.N. 985, Ind. Rul. 1931 Mad. 218, 1930 Cr.C. 1193 where *Raju Achari's* case was distinguished and *Nisar Ahmad v. Emp.*, A.I.R. 1939 Pat. 172, 40 Cr.L.J. 419, 180 I.C. 839, 1938 P.W.N. 832, 19 P.L.T. 845 where it has been laid down that the Magistrate's failure to give his reasons in writing does not amount to anything more than an irregularity which is curable under section 537, Cr. P. C. Where the accused take no part in the proceedings of the Court, it will be presumed that the provisions of sec 256 were complied with by the Magistrate, even if there is nothing on the record to show that the accused were specifically asked whether they wished to cross-examine the prosecution witnesses—*Sachchidanand*, 32 Cr.L.J. 330, 129 I.C. 166, 7 O.W.N. 1048, A.I.R. 1931 Oudh 73, Ind. Rul. 1931 Oudh 86, 1931 Cr.C. 129. The Allahabad High Court, however, holds that the failure of the Magistrate to strictly follow these provisions amounts to no more than an irregularity in procedure. Thus, the witnesses for the prosecution were examined on the 10th May, and *cross-examined on the same day*, and the accused also made their statements on the same day. On that day the accused were not represented by counsel. The Magistrate did not record any reasons for requiring the accused to cross-examine the prosecution witnesses on the same day. There was a subsequent hearing on 19th May, on which the accused were represented by counsel, but no application was made on behalf of the accused to resummon the prosecution witnesses, *held* that this showed that the accused had not been prejudiced by having been required by the Magistrate to cross-examine the prosecution witnesses on the 10th May, and consequently, the trial was not illegal, although the Magistrate did not record reasons—*Chhajju*, 49 All. 316, 25 A.L.J. 111, 28 Cr.L.J. 229. The Lahore and Bombay High Courts are also of opinion that omission by the Magistrate to record his reasons for requiring the accused to forthwith cross-examine the prosecution witnesses, does not render the trial illegal, if it has not caused any prejudice to the accused—*Ghasiti*, 6 Lah. 554, 27 Cr.L.J. 408; *Vishram*, 32 Bom.L.R. 596, 31 Cr.L.J. 743.

If summons-case is tried as a warrant case :—Where an inquiry commenced as a warrant case and the accused curtailed their cross-examination of prosecution witnesses under the impression that they would have a further opportunity of cross-examining them, but no offence triable as a warrant case having been disclosed, the Magistrate closed the case and convicted the accused as in a summons case, it was held that it was the duty of the Magistrate to allow the accused an opportunity of completing the cross-examination before disposing of the case—*Appavu*, 16 Cr.L.J. 250 (251) (Mad.).

Similarly, where a Magistrate while trying a summons case and a warrant case in one trial under the warrant-case procedure, dismissed the complaint in respect of the warrant case and proceeded with the complaint in respect of the summons case, and, on being requested by the accused to recall the prosecution witnesses for their further cross-examination, refused to do so, it was held that the refusal was illegal and the accused must certainly have been prejudiced by the same. The privilege conferred by this section is a substantial one, and when denied it is for the prosecution to shew that there was no prejudice—*Sobhanadri*, 39 Mad 503, 16 Cr.L.J. 540.

See Notes 786 and 820.

838. 'Any remaining witnesses':—The words "any remaining witnesses" do not refer only to those witnesses who have been named by the complainant under sec. 252 (2); these words are wide enough to include any witness who according to the prosecution is able to support its case though he has not been summoned, provided he is not sprung upon the defence all on a sudden and sufficient opportunity is given to the accused to prepare for the cross-examination of such witness—*Percy Henry Burn*, 11 Bom.L.R. 1153, 10 Cr.L.J. 530, 4 I.C. 268. See also *Ali Sher v. Mir Mahomed*, 26 Cr.L.J. 958, 87 I.C. 110, A.I.R. 1925 Sind 315, where it has been laid down that where the remaining witnesses are not in attendance the complainant has no right to insist on their examination for whose evidence a postponement would be necessary.

Under sec 252 (2), Cr. P. C., the complainant is required to give in a list of prosecution witnesses. Under sec. 254, Cr. P. C., the Magistrate may examine all those

removed or suspended from practice under clause 8 of the Letters Patent, whereupon one of them proposed to file a written statement, *held* that the proceedings under clause 8 of the Letters Patent were not of a *criminal* nature, that the rules of procedure of a criminal trial such as the filing of a written statement under sec. 256 (2), Cr. P. Code were not applicable to them, and that the respondent's written statement could not, therefore, be received—*Abdul Rashid*, 4 Lah 271.

A written statement filed by the accused cannot take the place of the examination of the accused which is imperative under sec 342 See Notes 980 under sec. 342.

842A. Argument:—A Court is bound to hear arguments, if offered, in every criminal trial or proceeding—*Baij Nath*, 25 Cr.L.J. 1380, 83 I.C. 340, A.I.R. 1925 Oudh 228, 27 O.C. 323 So long as he is not guilty of unnecessary repetition or of irrelevant arguments a Counsel is entitled to present his client's case as he thinks best and it is no ground for a Judge to decline to hear him or to cut short his argument merely because he is expected by Superior Courts to turn out a certain amount of work within a fixed time—*Muhammad Bakish*, 29 Cr.L.J. 279, 107 I.C. 763, A.I.R. 1928 Lah. 319.

The practice of receiving from the pleaders of the parties notes of argument after a case has been heard is most reprehensible and must be discontinued Where there is no indication that after the additional notes of written argument were put in by the prosecution, the defence had an opportunity of replying to the points raised therein, the trial was invalidated—*Jogendra Nath v Rabindra Nath*, 40 C.W.N. 863

257. (1) If the accused, after he has entered upon his defence, applies to the Magistrate to issue any process for compelling the attendance of any witness for the purpose of examination or cross-examination, or the production of any document or other thing, the Magistrate shall issue such process unless he considers that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice. Such ground shall be recorded by him in writing:

Process for compelling production of evidence at instance of accused

Provided that, when the accused has cross-examined or had the opportunity of cross-examining any witness after the charge is framed, the attendance of such witness shall not be compelled under this section, unless the Magistrate is satisfied that it is necessary for the purposes of justice.

(2) The Magistrate may, before summoning any witness on such application, require that his reasonable expenses incurred in attending for the purposes of the trial be deposited in Court.

843. Issue of process:—The language of this section is imperative A Magistrate has no discretion to refuse to issue process to compel the attendance of any witness unless he considers that the application should be refused on the ground specified in this section, *viz.* that the name of that witness has been entered for the purpose of vexation, etc.—*Purshottam*, 26 Bom 418 See also *Bhunsuani*, 32 Cr.L.J. 1176, 131 I.C. 476, 8 O.W.N. 791, A.I.R. 1931 Oudh 386, 1931 Cr.C. 818, Ind. Rul. 1931 Oudh 380 Every witness named in the list must be dealt with individually The Magistrate cannot arbitrarily limit the number of witnesses to be examined—*Purshottam*, *supra* Thus, where the accused put in a list of 72 witnesses, and the Magistrate ordered him to cite only 12 of them, it was held that the Magistrate's order was arbitrary and illegal. He should have based his refusal in regard to any particular witness on the ground mentioned in this section—*Narajana*, 31 Mad 131.

the Government or at the expense of the accused, but he cannot demand the expenses from the complainant—*Faiz Muhammad v. Nabu*, 29 Cr.L.J. 20 (21), 106 I.C. 436, A.I.R. 1928 Lah. 175, 9 A.I.Cr.R. 295; *Abdul Majid v. Mehr Chand*, *infra*.

An order directing the complainant to pay costs to the accused for non-production of the prosecution witnesses for their cross-examination under this section is illegal—*Abdul Majid v. Mehr Chand*, 30 Cr.L.J. 664, 116 I.C. 710, A.I.R. 1929 Lah. 756, Ind. Rul. 1929 Lah. 566, following *Amin Chand*, 12 P.R. 1907 (Cr.), 32 P.W.R. 1907 (Cr.), 6 Cr.L.J. 339, 45 P.L.R. 1908 and *Faiz v. Nabu*, 29 Cr.L.J. 20, A.I.R. 1928 Lah. 175, 106 I.C. 436.

841. Defence:—After the cross-examination is over, the accused should be called upon to enter upon his defence. It is not a proper procedure to call upon the accused to enter upon his defence before he has cross-examined the witnesses for the prosecution—*Bridhichand v. Lakhmichand*, 8 N.L.R. 65, 13 Cr.L.J. 554. It is improper for a Magistrate to require the person accused to summon his witnesses in defence until it has been ascertained whether further cross-examination of the witnesses for the prosecution is necessary—*Bhajja v. Emp.*, A.I.R. 1939 All. 283 (284), 40 Cr.L.J. 549, 1939 A.L.J. 81, 181 I.C. 537. The accused cannot be called upon to produce witnesses until the case for the prosecution has been completed. Sec. 256, Cr. P. C., makes it clear that the accused shall be called upon to enter upon his defence and produce his evidence after the case for the prosecution is over. From the very terms of sec. 342, Cr. P. C., it is also clear that the Court must examine the accused at the end of the case for the prosecution and before he is called upon for his defence. The accused is, therefore, not bound to summon his witnesses or to produce them until he himself has been examined—*Feroze Kazi v. Emp.*, 41 Cr.L.J. 267 (269, 270), A.I.R. 1940 Pat. 295, 186 I.C. 227, 1940 P.W.N. 243. Strictly speaking, the accused cannot be called upon to enter into his defence until all the prosecution witnesses have been exhausted, and till then under the law the Magistrate cannot ask the accused to file the list of his defence witnesses—*Ishar Singh v. Shama Dusaadh*, 38 Cr.L.J. 484 (487), 167 I.C. 881, 17 P.L.T. 627, A.I.R. 1937 Pat. 131, 3 B.R. 379, 9 R.P. 449. Therefore, the Magistrate acts illegally in ordering further cross-examination of the prosecution witnesses and the production of the defence evidence on the same day. He should fix a date for further cross-examination of the prosecution witnesses and when that is done or waived he should give another date to the accused for production of his defence witnesses. He is consequently bound to send for the defence witnesses of the accused under sec. 257, Cr. P. C., and cannot strike out the defence of the accused merely because the accused has not asked him to summon his witnesses for the day on which the accused has to further cross-examine the prosecution witnesses—*Abdul Ghafur v. Emp.*, 41 Cr.L.J. 590, 188 I.C. 419, A.I.R. 1940 Pesh. 9. So also, the practice of examining the witnesses for the prosecution, after the defence is closed, to bolster up the prosecution if it appeared that the evidence was prejudicial, is highly deprecated—*Radhamadhab*, 15 C.W.N. 414 (416).

If the accused is not called upon to enter upon his defence and produce his evidence, the proceedings are liable to be quashed—*Charag Din*, 22 S.L.R. 41, 28 Cr.L.J. 425.

Adjournment for defence:—According to the provisions of secs. 256 and 257, the accused is entitled as a matter of right to ask for an adjournment, after a charge has been framed against him, to enable him to adduce evidence in support of his defence—*Emtaz Ali v. Jagat*, 1 C.W.N. 313 (314). Where a trial is commenced as a warrant case, it should be concluded by the procedure laid down in this chapter for warrant cases; and the Magistrate acts illegally in concluding the trial as a summons case and convicting the accused, without giving him an opportunity to have his witnesses produced by giving him the adjournment asked for—*Munshi Teli*, 2 P.L.T. 482, 22 Cr.L.J. 683, 63 I.C. 619 (620).

842. Sub-section (2)—Written Statement:—Where certain legal practitioners were convicted under sec. 17 (1) of the Criminal Law Amendment Act, XIV of 1908, for being members of an Association called the "National Volunteers' Association" (which was declared by the Government to be an unlawful association), and were

is made for the purpose of vexation or delay, the accused is entitled to have the prosecution witnesses summoned for cross-examination—*Monmohan v. Bankim*, 51 Cal. 1044 (1047), 26 Cr.L.J. 384; *Zamin*, 34 Cr.L.J. 468, 142 I.C. 752, A.I.R. 1937 Rang. 29, 1933 Cr.C. 277, Ind. Rul. 1933 Rang. 52, and the Magistrate cannot refuse to summon the witnesses merely on the ground that the accused had fully cross-examined them or had opportunity of cross-examining them before the framing of charge—*Sreenath*, 4 C.W.N. 241; *Istirar v. Kali Kumar*, 4 C.W.N. 351.

The proviso to sub-sec. (1) is to the effect that when an accused has cross-examined or had the opportunity of cross-examining any witnesses after the charge has been framed, such witnesses shall not ordinarily be summoned, unless the Magistrate is satisfied that it is necessary for the ends of justice. But there is no such restriction on examination of those witnesses, if they are *present* in Court—*Ram Chandra*, 28 N.L.R. 254, 1932 Cr.C. 746, 33 Cr.L.J. 940, 140 I.C. 117, A.I.R. 1932 Nag. 137, Ind. Rul. 1932 Nag. 133. The witnesses shall not ordinarily be re-summoned. The mere fact that it *might have been* possible from a cross-examination of the prosecution witnesses to have extracted from them something which might have been of advantage to the accused, is not a sufficient ground to enable the Magistrate to recall those witnesses; it must appear that there *was* to be obtained from the witnesses sought to be cross-examined, something which would have materially affected the result of the trial. The onus is on the accused to establish that position—*Ajo Mian*, 6 P.L.T. 626, 27 Cr.L.J. 353 (355, 356). Under the proviso, it is for the applicant to satisfy the Magistrate that it is necessary for the ends of justice that his application for compelling the attendance of a witness should be granted. The mere fact that the counsel was ill on the previous occasion and could not cross-examine the witness is not a sufficient ground. It is necessary to show that there were definite matters of importance on which the witness ought to be cross-examined on behalf of the applicant—*Ajo Mian*, *supra*.

"After he has entered upon his defence"—It is only *after* the accused has entered upon his defence that the Magistrate can in his discretion under sec 257 refuse the application of the accused to resummon prosecution witnesses, on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice. The Magistrate cannot refuse the application made by the accused under sec 256 before he enters on his defence—*Zamunia v. Ram Tahal*, 27 Cal 370 (372).

845. Summoning and examination of defence witnesses:—A Magistrate cannot refuse to examine a defence witness who is present in Court, if he is requested by the accused to do so—*Nagar*, 4 Bom.L.R. 461. Though it is competent for a Magistrate to decline to *summon* witnesses for the defence under this section, it is not competent for him to refuse to *examine* the defence witnesses, on the ground that their evidence is unnecessary—*Nanbasappa*, 14 Bom.L.R. 360, 13 Cr.L.J. 423. If a witness is unable to attend the Court owing to illness, and he appears to be an important witness, the Magistrate should ascertain whether it will be possible for that witness to attend the Court within a reasonable time; and if not, then his evidence should be taken on commission—*Jamuna Singh*, 3 Pat 591 (594), 26 Cr.L.J. 1255. Ordinarily it is the duty of the Court to summon defence witnesses unless it finds that the accused is summoning them for the purpose of vexation or delay—*Ishar Singh v. Shama Dussadh*, 38 Cr.L.J. 484 (486), 167 I.C. 881, 17 P.L.T. 627, A.I.R. 1937 Pat. 131, 3 B.R. 379, 9 R.P. 449. Where the Magistrate finds that the accused has given a long list of witnesses to defeat or delay the ends of justice, he may decline to compel their attendance—*Sajad Habib*, 30 Cr.L.J. 814, 117 I.C. 667, A.I.R. 1939 Lah. 23; *Sitab v. Dalganjan*, 12 L.L.J. 15, 14 Cr.L.J. 682 (683). But the Magistrate can refuse to summon them only on the ground that they have been included in the list for the purpose of vexation, delay, etc. He cannot refuse to summon them merely because their number is very large. Nor can he arbitrarily limit the number of witnesses to be summoned for the defence—*Balkrishna*, 51 All. 231, 1932 Cr.C. 150 (151), 33 Cr.L.J. 528, 137 I.C. 686, 1932 A.L.J. 39, A.I.R. 1932 All. 125,

Once the Magistrate has issued summons, he is bound to assist the accused in enforcing the attendance of the witnesses. If the witnesses do not obey the summons, the Magistrate cannot refuse to issue a second summons—*Dhananjay*, 10 Cal. 931; *Gohar*, 1884 P.R. 28; *Sohara*, 1922 P.L.R. 5, 62 I.C. 325, 22 Cr.L.J. 501; *Id. Din*, 1922 P.L.R. 6, 62 I.C. 321, 22 Cr.L.J. 497; *Muhammad Din*, 9 C.W.N. ccxxix; *Amrit Mondal*, 1 P.L.T. 490, 55 I.C. 608; *Rohimuddi*, 35 Cal. 1093; *Ramaswamy v. Ramlinga*, 1932 M.W.N. 1349. The Magistrate, once he has issued processes on the witness, is bound to follow up that process if the defence so desired, and to take all possible steps to secure the attendance of the witness with a view to his examination as a defence witness. The failure to follow the procedure indicated above vitiates the proceedings—*Ramdhan Mondal v. Giridhari Mondal*, 42 C.W.N. 843. It is the duty of the Court to see that the summonses or warrants are duly executed. If the witnesses do not attend, the accused can insist upon the Court to issue further process. Where the witnesses cited by the accused failed to attend, and it appeared that the summonses were not duly executed, but the Magistrate proceeded to give judgment remarking that it was the business of the accused to take suitable steps for bringing his witnesses before the Court, *held* that the conviction of the accused was illegal and must be set aside—*Bijoy*, 19 A.L.J. 945, A.I.R. 1921 All. 142. When once a Court has issued a summons to a witness under this section and the witness fails to appear, it is not justified in dispensing with the evidence of the witness on the ground that at the most he would merely support the accused in his statement—*Sohara*, 1922 P.L.R. 5, 22 Cr.L.J. 501, 62 I.C. 325. When the Magistrate had once issued the process, unless on subsequent scrutiny he finds that under sec. 257 he ought to have refused process, he is obliged to take every step in his power to compel the attendance of the witness subject to the provisions of sub-sec. (2) of sec. 257—*Dwarka*, 32 Cr.L.J. 613, 130 I.C. 799, A.I.R. 1931 Pat. 207, Ind. Rul. 1931 Pat. 207, 12 P.L.J. 372, 1931 Cr.C. 528.

The procedure of this section applies to *summary* trials, and the accused is entitled to have processes issued for compelling the attendance of prosecution witnesses for cross-examination, when he is called upon to enter on his defence, if they have not been cross-examined before—*Nepal*, 22 Cr.L.J. 271 (Cal.), 60 I.C. 671.

Section 257, Cr. P. C., governs the procedure to be followed in a case under sec. 110, Cr. P. Code—*Tek Chand*, A.I.R. 1935 All. 638, 1935 Cr.C. 643.

844. Refusal to summon prosecution witnesses:—An absolute right of cross-examination of the prosecution witness is not conferred by this section. The Magistrate can refuse to allow the accused to recall such witnesses for cross-examination, if he considers that it is made for the purpose of vexation or delay or for defeating the ends of justice. But it lies upon the party who thinks himself aggrieved to show that the ends of justice have been frustrated in consequence of the refusal to recall the prosecution witnesses for cross-examination—*Nilkanta*, 20 Cal. 469.

Where the accused was given an opportunity under sec. 256 to cross-examine the prosecution witnesses, but he refused to do so, leaving no option for the Magistrate but to close the case, and after the case was closed the accused applied to cross-examine the prosecution witnesses, *held* that the accused's attitude was deliberately designed to harass the Court and that the Magistrate would be justified in refusing the application—*Vyasa Rao*, 21 M.L.J. 283 (F.B.); *Khuda Bakhsh*, A.I.R. 1936 Lah. 914, 17 Lah. 284, 33 Cr.L.J. 24, 165 I.C. 909, 9 R.L. 321, 1936 Cr.C. 1023, 38 P.L.R. 630, distinguishing *Chint Ram*, A.I.R. 1931 Lah. 186, 1931 Cr.C. 306, 134 I.C. 580, 32 Cr.L.J. 1202, 32 P.L.R. 13; *Sonu Kurmi v. Emp.*, 39 Cr.L.J. 950, 177 I.C. 697, 11 R.P. 176, 5 B.R. 12, A.I.R. 1939 Pat. 21. Where the witnesses for the prosecution were subjected to a very lengthy and strict cross-examination before the framing of charge, the Magistrate was right in declining to resummon those witnesses, if he was of opinion that the application to resummon the witnesses was made for vexation, etc.—*Gorind*, Ratanlal 930; *Nilkanta*, 20 Cal. 469; *Ramsakal*, 26 Cr.L.J. 1627, 90 I.C. 923, A.I.R. 1926 Pat. 139; *Mohamad*, 35 Cr.L.J. 95, 116 I.C. 560, A.I.R. 1933 Pat. 598, 1933 Cr.C. 1360; but unless the Magistrate considers that the application to resummon the witnesses

is made for the purpose of vexation or delay, the accused is entitled to have the prosecution witnesses summoned for cross-examination—*Monmohan v. Bankim*, 51 Cal. 1044 (1047), 26 Cr.L.J. 384; *Zamin*, 34 Cr.L.J. 468, 142 I.C. 752, A.I.R. 1937 Rang. 29, 1933 Cr.C. 277, Ind. Rul. 1933 Rang. 52, and the Magistrate cannot refuse to summon the witnesses merely on the ground that the accused had fully cross-examined them or had opportunity of cross-examining them before the framing of charge—*Sreenath*, 4 C.W.N. 241; *Istwar v. Kali Kumar*, 4 C.W.N. 351.

The proviso to sub-sec. (1) is to the effect that when an accused has cross-examined or had the opportunity of cross-examining any witnesses after the charge has been framed, such witnesses shall not ordinarily be summoned, unless the Magistrate is satisfied that it is necessary for the ends of justice. But there is no such restriction on examination of those witnesses, if they are present in Court—*Ram Chandra*, 28 N.L.R. 254, 1932 Cr.C. 746, 33 Cr.L.J. 940, 140 I.C. 117, A.I.R. 1932 Nag. 137, Ind. Rul. 1932 Nag. 133. The witnesses shall not ordinarily be re-summoned. The mere fact that it might have been possible from a cross-examination of the prosecution witnesses to have extracted from them something which might have been of advantage to the accused, is not a sufficient ground to enable the Magistrate to recall those witnesses; it must appear that there was to be obtained from the witnesses sought to be cross-examined, something which would have materially affected the result of the trial. The onus is on the accused to establish that position—*Ajo Mian*, 6 P.L.T. 626, 27 Cr.L.J. 353 (355, 356). Under the proviso, it is for the applicant to satisfy the Magistrate that it is necessary for the ends of justice that his application for compelling the attendance of a witness should be granted. The mere fact that the counsel was ill on the previous occasion and could not cross-examine the witness is not a sufficient ground. It is necessary to show that there were definite matters of importance on which the witness ought to be cross-examined on behalf of the applicant—*Ajo Mian*, supra.

"After he has entered upon his defence" —It is only after the accused has entered upon his defence that the Magistrate can in his discretion under sec. 257 refuse the application of the accused to resummon prosecution witnesses, on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice. The Magistrate cannot refuse the application made by the accused under sec. 256 before he enters on his defence—*Zamunia v. Ram Tahal*, 27 Cal. 370 (372).

845. Summoning and examination of defence witnesses:—A Magistrate cannot refuse to examine a defence witness who is present in Court, if he is requested by the accused to do so—*Nagar*, 4 Bom.L.R. 461. Though it is competent for a Magistrate to decline to summon witnesses for the defence under this section, it is not competent for him to refuse to examine the defence witnesses, on the ground that their evidence is unnecessary—*Nanbasappa*, 14 Bom.L.R. 360, 13 Cr.L.J. 423. If a witness is unable to attend the Court owing to illness, and he appears to be an important witness, the Magistrate should ascertain whether it will be possible for that witness to attend the Court within a reasonable time, and if not, then his evidence should be taken on commission—*Jamuna Singh*, 3 Pat. 591 (594), 26 Cr.L.J. 1255. Ordinarily it is the duty of the Court to summon defence witnesses unless it finds that the accused is summoning them for the purpose of vexation or delay—*Ishar Singh v. Shama Dusadh*, 38 Cr.L.J. 484 (486), 167 I.C. 881, 17 P.L.T. 627, A.I.R. 1937 Pat. 131, 3 B.R. 379, 9 R.P. 449. Where the Magistrate finds that the accused has given a long list of witnesses to defeat or delay the ends of justice, he may decline to compel their attendance—*Sayad Habib*, 30 Cr.L.J. 814, 117 I.C. 667, A.I.R. 1939 Lah. 23; *Sitab v. Dalganyan*, 12 L.L.J. 15, 14 Cr.L.J. 682 (683). But the Magistrate can refuse to summon them only on the ground that they have been included in the list for the purpose of vexation, delay, etc. He cannot refuse to summon them merely because their number is very large. Nor can he arbitrarily limit the number of witnesses to be summoned for the defence—*Balkrishna*, 51 All. 231, 1932 Cr.C. 150 (151), 33 Cr.L.J. 528, 137 I.C. 666, 1932 A.L.J. 39, A.I.R. 1932 All. 125,

Ind Rul. 1932 All. 351; *Yusuf*, 27 Cr.L.J. 543, 93 I.C. 1039, A.I.R. 1926 Lah. 451. See also *Joty*, A.I.R. 1934 Lah. 136. It may be that the accused is not able to satisfy the Magistrate that witnesses named by him are definitely going to give evidence which is material in the case, but that does not necessarily show that the application is made for the purpose of defeating the ends of justice—*Suppaya Chettyar v. Karuppaya Pillay*, A.I.R. 1937 Rang. 528 (530). A Magistrate cannot refuse to summon witnesses cited by the accused on the ground that the accused is unable or refuses to pay the costs of the witnesses—*Debi Singh*, 24 Cr.L.J. 831, 5 P.L.T. 112, 74 I.C. 863, A.I.R. 1924 Pat. 142; or on the ground that the Magistrate is of opinion that they will not be able to give any reliable evidence one way or the other (without giving any reason for holding such opinion)—*Arurugam*, 12 Cr.L.J. 548, (1911) 2 M.W.N. 192; or on the ground that they are living at a great distance—*Ayarvali*, 45 M.L.J. 305, 24 Cr.L.J. 840, A.I.R. 1924 Mad. 243, 1923 M.W.N. 758, 18 M.L.W. 899; or merely because the Magistrate thinks that no useful purpose will be served by summoning that witness—*Ganpat*, 24 Cr.L.J. 686 (Lah.). Where, after a case on both sides having been closed, the Magistrate summoned a witness to give evidence, whereupon the accused prayed to have certain witnesses summoned to rebut evidence of the Court witness, held that the Magistrate was bound to summon such witnesses and could not refuse to do so on the ground that the accused has stated at the close of his case that he did not wish to examine any more witnesses—*Deela Mahton v. Sheo Dayal*, 6 Cal. 714.

When an accused has made an application for summoning witnesses the Magistrate must deal with the application and pass an order either granting the prayer or refusing it—*Kundanlal*, 36 Cr.L.J. 889 (890), 156 I.C. 258, A.I.R. 1935 Sind. 69, following *Bhomas v. Digambar*, 6 C.W.N. 548.

If a Magistrate rejects the application for summoning the witnesses, he should specify his reasons for such refusal. If he fails to record the reasons, the conviction and sentence will be set aside—*Sreenath*, 4 C.W.N. 241; *Manmohan v. Bankim*, 51 Cal. 1044 (1047); *Sat Narain*, 3 All. 392; *Debi Singh*, 24 Cr.L.J. 831, 5 P.L.T. 112, 74 I.C. 863, A.I.R. 1924 Pat. 142; *Ram Saran*, Ind. Rul. 1932 Lah. 660; *Purushottam*, 26 Bom. 418; *Narayana*, 31 Mad. 131; *Bakhsha*, 35 Cr.L.J. 396, 147 I.C. 393, A.I.R. 1933 Lah. 1020, 1933 Cr.C. 1557. It is a sufficient record of reasons, if the Magistrate states facts which led him irresistibly to the conclusion that the application was for no other purpose than that of vexation or delay or defeating the ends of justice, although he does not say expressly that the application was made for that purpose—*Wahid Ali*, 11 C.W.N. 789, 6 Cr.L.J. 1. See also *Narayana*, 25 Cr.L.J. 401, 77 I.C. 481, A.I.R. 1925 Mad. 106. Where a Magistrate rejects an application after recording on it "too late", this is a sufficient compliance with this section, though the reason is irregularly recorded—*Kudrutulla*, 39 Cal. 781, 13 Cr.L.J. 218.

Where the Magistrate summoned the defence witnesses he must be presumed to have concluded that they are not being produced by the accused for the purpose of vexation or delay, etc., and, therefore, he should hear them and in any case he must record his reasons for not hearing them in writing—*Tek Chand*, A.I.R. 1935 All. 638, 1933 Cr.C. 643, 36 Cr.L.J. 1142, 157 I.C. 413.

The Magistrate as far as possible should allow the accused to select the order in which the defence witnesses are to appear—*Mirza Jaffar Beg v. Emp.*, A.I.R. 1940 Lah. 351 (356).

A witness cannot refuse to attend the Court when summoned and the rules of the High Court have clearly laid down the fees to which an expert witness is entitled. The Court, therefore, should not hesitate in exercising its powers under the law, however highly placed a witness may be. An accused person should not be burdened with the costs of an expert, if his demand is unreasonable, especially when the Magistrate is empowered to enforce the attendance of the witness and to pay him his reasonable dues—*Parshotam Das*, A.I.R. 1935 Lah. 919, following *Sayad Habib*, A.I.R. 1929 Lah. 23, 117 I.C. 667, 30 Cr.L.J. 811; *Habib v. Mehdi Hussain*, 29 Cr.L.J. 459, 108 I.C. 907 and

Ram Narain, A.I.R. 1932 Lah. 481, 1932 Cr.C. 619, 139 I.C. 508, 33 Cr.L.J. 761, 33 P.L.R. 811. See also *Chauthi Singh v. Emp.*, in Note 818.

See Note 841.

846. Cross-examination:—The accused in a warrant case has three opportunities of cross-examining the prosecution witnesses; once, under sec. 252, before the charge is framed; secondly, under sec. 256 after the charge is framed; and under sec. 257, the accused is given the third opportunity of cross-examining the prosecution witnesses, unless the Magistrate decides that the application for cross-examination is vexatious—*Ramyad*, 5 P.L.J. 91, 21 Cr.L.J. 814; *Varisai*, 46 Mad. 449 (463). Where an application for adjournment to enable the accused to cross-examine the prosecution-witnesses being refused by the Magistrate, the accused cited those witnesses on his own behalf as defence witnesses, and then proceeded to cross-examine them, but was disallowed by the Magistrate, it was held that the mere fact that the accused had been compelled to treat the prosecution witnesses as his own witnesses did not change their character, and that they were really *prosecution* witnesses and summoned under sec. 257 for the purpose of cross-examination, and the Magistrate was wrong in refusing to allow their cross-examination—*Sheo Prakash v. Raulins*, 28 Cal. 594, 1 C.W.N. 19; *Venku Reddi*, 16 L.W. 195, 23 Cr.L.J. 192, A.I.R. 1922 Mad. 32. Once a summons has been issued upon the prosecution witnesses and they are before the Court it does not seem that there is any jurisdiction in the Court to dictate to the accused the terms upon which the examination of the witnesses shall be conducted. If the accused wishes to put questions in cross-examination the Magistrate is bound to allow it—*Rameshwar*, 29 Cr.L.J. 308, 107 I.C. 846, A.I.R. 1928 Pat. 253.

Where the prosecution witnesses could not be cross-examined owing to the defence Counsel being engaged in the Court of Sessions and an application for summoning them for cross-examination under this section was made and refused, *held* that the Magistrate acted hastily and unreasonably in the matter and that the accused should be given an opportunity to cross-examine them—*Chamru*, 33 Cr.L.J. 731, 138 I.C. 700, A.I.R. 1932 Nag. 71, 1932 Cr.C. 345, Ind. Rul. 1932 Nag. 87.

Where an accused first obtained process for the attendance of a witness, but subsequently declined to examine him, whereupon the Court examined him as a Court-witness under sec. 540, it was held that the witness could not be treated as a defence witness, and that the accused had the right to cross-examine him—*Mohendra*, 29 Cal. 387, 6 C.W.N. 550.

An accused may be allowed to cross-examine the witnesses called by his co-accused, when the case of the co-accused is adverse to his case—*Ram Chand v. Hansi*, 21 Cal. 401. When two or more persons are tried on the same indictment and are separately defended, any witness called by one of them may be cross-examined on behalf of others, if he gives any testimony tending to criminate them. The counsel, too, for the other prisoners are entitled in such a case to rely upon his evidence. See Taylor on Evidence, para 1430, quoted with approval in *Chaman Lal v. Emp.*, A.I.R. 1940 Lah. 210 (215), 41 Cr.L.J. 639, 188 I.C. 440.

The accused summoned the complainant to produce certain account books of the firm. The summons clearly stated that the witness was to file certain account books but advantage was taken of this fact after the whole prosecution had been closed to cross-examine the complainant on behalf of the Crown in respect of everything connected with the case and to fill up the gaps in the prosecution evidence. Such an unheard of procedure cannot be too severely condemned—*Kanarya Lal v. Emp.*, 38 Cr.L.J. 491 (497), 168 I.C. 58, 9 R.O. 432, 1937 A.Cr.C. 80, 1937 O.W.N. 505, A.I.R. 1937 Oudh. 331, 1937 O.L.R. 202.

Curtailement of cross-examination:—While it is the duty of every Court to keep the cross-examination of a witness within legitimate bounds it must be careful, in the discharge of that duty, not to exercise too effective a control so as to unduly curtail legitimate cross-examination. Too much interruption by the presiding Judge in the course of the cross-examination of witnesses by the Counsel for the accused has,

more often than not, the result of robbing the cross-examination of its efficacy and, therefore, undue interference in cross-examination must be avoided by the presiding Judge—*Salag Ram v. Emp.*, 38 Cr.L.J. 416 (418), 167 I.C. 515, A.I.R. 1937 All. 171, 1937 A.L.R. 201, 9 R.A. 550. A Judge is and always must be in control of the proceedings in his Court. On the one hand the right of cross-examination must be carefully guarded, and it must be remembered that it may be necessary for an advocate to approach delicately and with caution the point upon which he is seeking to obtain admissions. It may be important that a witness whom he does not consider truthful should not be put on his guard by immediate presentation of the case set up by the opposing side. If questions are couched in too blunt a form he may readily deny them. Hence considerable latitude is desirable since the admissions sought to be elicited may only be forthcoming when the witness, if he is concealing something, is thrown off his guard: and there are cases in which it is necessary to drop a particular issue in the course of cross-examination and to return to it again discreetly at a later stage. On the other hand, the length of cross-examination is by no means the criterion of its excellence, and it is lamentably true that lack of skill in advocacy often leads to a failure to appreciate this fact. When irrelevant topics are pursued at great length, and persistence is shown in going over the same ground again and again in the hope of making the witness appear discrepant, some limit must be placed upon the latitude given. Continued irrelevancies and repetitions are not to be endured indefinitely. If after several warnings an advocate persists in abusing his position in this way, he may be directed to resume his seat, but only when the Judge has enquired what are the material matters on which he still desires to cross-examine and is satisfied that no satisfactory reply has been forthcoming from the advocate and that no legitimate questions by him have been shut out. In any case the Judge should make a note of the submission of any advocate as to further questions which he desires to put or as to any specific question which has been disallowed—*Brahmayya v. The King*, A.I.R. 1933 Rang. 442 (444), 179 I.C. 783, 11 R.R. 347, 40 Cr.L.J. 265.

847. Production of documents:—In a warrant case the accused has no right to call for the production of documents in the possession of the prosecution, until after a charge has been framed and read out to him under secs 254 and 255. This right is given by sec. 257, after a charge has been framed. But the Magistrate should satisfy himself that the documents called for have some bearing on the issues in the case and are relevant, before granting a summons for their production—*Tahilram v. Pitambaras*, 8 S.L.R. 267, 16 Cr.L.J. 245. This view of law was not accepted in *Muhammad Rahim*, 36 Cr.L.J. 581 (586), 151 I.C. 762, A.I.R. 1935 Sind 13, 1935 Cr.C. 124 (F.B.), where it has been laid down that under sec. 91, Cr. P. C., any party to an inquiry, trial, or other proceeding under the Code may at any stage apply to the Court to call for the production of a document or other thing and is entitled to its production if he satisfies that such production is necessary or desirable for the purposes of such inquiry, trial or other proceeding. Under sec. 257, Cr. P. C., an accused person is entitled at the particular stage of his trial specified in the section to apply to the Court to call for the production of any document or thing, and the Court shall cause such production unless it considers that the application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice. Sections 257 and 91, Cr. P. C., are not antagonistic, they are inter-dependent.

See *Kanaiya Lal v. Emp.*, in Note 816.

848. Expenses:—It was held in some cases that the inability or even refusal to pay the expenses would not be an adequate ground for refusing to summon the defence witnesses—*Debi Singh*, 24 Cr.L.J. 831 (Pat.); *Qadu*, 7 P.R. 1898. But the Lahore High Court holds that if the rule laid down in 7 P.R. 1898 is to be literally followed, then sub-sec. (2) of this section would become an entirely dead letter; because one can hardly conceive whether an accused person would willingly deposit the expenses of his witnesses if he knew he had only to express the unwillingness to entitle him to ret his witnesses summoned at the expenses of the Government—*Ganpat*, 24 Cr.L.J. 686 (Lah.). Sub-

section (2) fully empowers a Magistrate to order that the reasonable expenses of a witness shall be deposited by the accused before the witness is summoned. But the Magistrate should only summon so many witnesses at one hearing as he thinks he will be able to examine on that hearing, to save the expenses of parties—*Ganpat*, 24 Cr.L.J. 686 (Lah.).

Medical officers, like other persons, are bound to attend Court on receipt of summons and to give evidence if required by the Court. They cannot refuse to give evidence for reasons which they may consider to be sufficient, but they should represent to the Court as regards fees payable to them. Any dictation of terms on which they would give evidence is unnecessary and should be avoided—*Chauthi Singh v. Emp.*, A.I.R. 1937 All. 768, 1937 A.L.J. 972, 39 Cr.L.J. 113, 172 I.C. 31. See also *Parshotam Das v. Emp.*, *infra*.

As regards the expenses of causing the attendance of the accused's witnesses the general rule in warrant cases is that such costs are usually borne by the Crown (and not by the accused). Any departure from the usual rule must be supported by adequate and cogent reasons—*Habib v. Mehdi Husain*, 29 Cr.L.J. 459 (460), 108 I.C. 907, 10 A.I.Cr.R. 87 (Lah.); *Sayad Habib*, 30 Cr.L.J. 814, 117 I.C. 667, A.I.R. 1929 Lah. 23. Under sub-sec. (1), the Magistrate can refuse to compel the attendance of defence witnesses if he considers that the application to summon them was made for the purpose of vexation, delay, etc. If the Magistrate does not refuse directly he cannot seek to achieve the same result indirectly by saying that he will summon the witnesses if their costs are deposited beforehand by the accused. What the Magistrate should do is to summon those witnesses for the defence whom he considers necessary witnesses, and the expenses are to be borne by the Government—*Sayad Habib*, 30 Cr.L.J. 814 (815), 117 I.C. 667, A.I.R. 1929 Lah. 23; *Ram Naram*, 33 Cr.L.J. 761, 139 I.C. 508, A.I.R. 1932 Lah. 481, 1932 Cr.C. 619, 33 P.L.R. 811, Ind. Rul. 1932 Lah. 581; *Brahma Datt*, Ind. Rul. 1932 Lah. 663; *Parshotam Das v. Emp.*, *infra*, even though the offence is non-cognizable—*Khushi Muhammad v. Abdulla Khan*, 38 Cr.L.J. 941, 170 I.C. 539, 39 P.L.R. 137, 10 R.L. 132, A.I.R. 1937 Lah. 458. A witness cannot refuse to attend the Court when summoned and the rules of the High Court have clearly laid down the fees to which an expert witness is entitled. The High Court, therefore, should not hesitate in exercising its powers under the law, however highly placed a witness may be. An accused person should not be burdened with the costs of an expert, if his demand is reasonable, especially when the Magistrate is empowered to enforce the attendance of the witness and to pay him his reasonable dues—*Parshotam Das v. Emp.*, 38 Cr.L.J. 133, 166 I.C. 128, A.I.R. 1936 Lah. 919, 1936 Cr.C. 1007, 38 P.L.R. 1165, 9 R.L. 340. These rulings have not, however, been followed in *Nanak Chand v. Suraj Parkash*, 40 Cr.L.J. 68, 178 I.C. 468, A.I.R. 1938 Lah. 693, 40 P.L.R. 944, 11 R.L. 460. See Notes under sec. 544 where it has been quoted. Where the defence filed a list of witnesses, and the Magistrate, being of opinion that they were not *bona fide* witnesses, required the accused to deposit the expenses of some of those witnesses, but the accused did not deposit the money, nor took steps for summoning the witnesses, held that the accused could not complain that the Magistrate did not give him an opportunity of having his witnesses examined—*Uma Singh*, 12 Pat. 234, 34 Cr.L.J. 1198, 146 I.C. 70, 14 P.L.T. 162, A.I.R. 1933 Pat. 242, 1933 Cr.C. 714.

The Criminal Procedure Code gives a Magistrate a discretion to pass an order under sec. 257 (2), Cr. P. C., and his discretion is subject to sec. 544, Cr. P. C., and the rules passed by the Local Government under that section, that is a Magistrate cannot pay from Government the expenses of witnesses attending if he is not authorized to do so by the rules of the Local Government. The provision applies not only in summons cases but also in warrant cases. There has been no provision in the Province of Agra that the ordinary procedure in a warrant case is for the Government to bear the costs of the accused's necessary witnesses. The matter is left entirely to the discretion of the Magistrate. In view of the large number of the defence witnesses and of the fact that they come from many parts of the country the Magistrate is perfectly entitled to hold that their expenses cannot reasonably be incurred by Govern-

ment under sec. 544, Cr. P. C., and he is therefore correct in requiring that the expenses should be deposited by the accused prior to the issue of summons in accordance with sec. 257 (2), Cr. P. Code—*Mahtab Singh v. Emp.*, A.I.R. 1939 All. 101, 1938 A.L.J. 1082, 179 I.C. 773, I.L.R. 1939 All. 57, 40 Cr.L.J. 257, 1938 A.W.R. (H.C.) 780.

Although the Magistrate can require the accused to pay the expenses for the attendance of his witnesses, still if he has once allowed the witnesses to be summoned without demanding expenses from the accused, and if by any chance the witnesses summoned for a particular date have not been examined on that date, the Magistrate has no power afterwards to say that on the next date of hearing the witnesses shall not be summoned except on payment of their expenses by the accused—*Kishan Lal*, 22 Cr.L.J. 711 (Lah.), 63 I.C. 871 (872) (Lah.).

A Court ordering a party to deposit the travelling allowance of a witness should state the amount of the travelling allowance to be deposited—*Gourishankar*, 6 P.L.R. 215, 26 Cr.L.J. 965.

Section 257 (2), Cr. P. C., does not provide that the expenses of issuing process shall be deposited in Court—*Mg. San Nyein*, 27 Cr.L.J. 415, 93 I.C. 79, A.I.R. 1926 Rang. 13, 4 Bur.L.J. 187. This case has been overruled by *K-E. v. Tha Shwe*, 4 Rang. 146. See Note 824.

258. (1) If in any case under this Chapter in which a charge has been framed the Magistrate finds the accused not guilty, he shall record an order of acquittal.

Acquittal

(2) Where in any case under this Chapter the Magistrate does not proceed in accordance with the provisions of section 349 or section 562, he shall, if he finds the accused guilty, pass sentence upon him according to law.

Conviction.

Change:—Sub-section (2) has been amended by sec. 73 of the Cr. P. C. Amendment Act, XVIII of 1923. A similar amendment has been made in sec. 245 (2) and sec. 306 (2).

849. Acquittal:—An order of acquittal can be pronounced only where *after a charge* has been drawn up the Magistrate is of opinion that the evidence is insufficient to justify a conviction. An order of acquittal cannot be passed in a case where *no charge* has been framed or before any charge is framed—*Ranchhod*, 37 Bom. 369, 14 Cr.L.J. 77. Section 258 (1), Cr. P. C., must be read in the light of sec. 350, Cr. P. Code. Where a Magistrate ignores all previous proceedings including the charge and orders a *de novo* trial under sec. 350 (1), Cr. P. C., the previous charge does no longer remain in force and any order passed before framing a fresh charge is one of discharge and not of acquittal under this section—*Tukaram*, 37 Cr.L.J. 983, 161 I.C. 744, A.I.R. 1936 Nag. 153, 1936 Cr.C. 708, I.L.R. 1936 Nag. 92, 19 N.L.J. 115. But a contrary view has been taken in *Raza Husain*, 36 Cr.L.J. 912, 156 I.C. 186, 1935 A.L.R. 518, 7 R.A. 1057, A.I.R. 1935 All. 834, 1935 Cr.C. 980, 1935 A.L.J. 1022, following *Chotu*, 9 All. 52 (56) and *Sri Ramulu v. Nalam Krishna Rao*, 25 I.C. 1001, 38 Mad. 585, 1914 M.W.N. 646, 16 M.L.T. 303, 27 M.L.J. 589, 15 Cr.L.J. 673. If a warrant case is tried as a summons case, and no charge is framed, the acquittal amounts to a discharge under sec. 253—*Jadu*, 1886 A.W.N. 260.

After a charge is framed, the Magistrate can pass no other order except that of acquittal or conviction. He cannot pass an order of discharge. Even, if he discharges the accused, the discharge would amount to an acquittal—*Taba v. Hirba*, 1883 P.R. 29; *Sreeramah v. Veerasalingam*, 38 Mad. 585; *Bishambar*, 1 O.W.N. 705. So also, an order of dismissal of complaint would amount to an acquittal—*Jadubar*, 5 C.L.R. 359. If the Magistrate by inadvertence refers to sec. 253 instead of sec. 258, Cr. P. C., the

order does not become any the less an order of acquittal because of that inadvertence, if the whole of the procedure shows that the order must be regarded as one of acquittal and not of discharge—*Raza Husain*, 36 Cr.L.J. 912 (913), AIR. 1935 All. 834, 156 I.C. 186

Where a Magistrate passes an order of acquittal under this section, the Sessions Judge cannot treat it as an order of discharge and direct a commitment of the accused under sec. 436 (now sec. 437)—*Apparaju*, 43 Mad 330, 21 Cr.L.J. 91.

An order of acquittal can be passed in a warrant case only where after the frame of a charge the Magistrate is of opinion that the evidence is insufficient to justify a conviction. It is not competent to a Magistrate to enter an order of acquittal in a warrant case on a private complainant's offering to *withdraw from the prosecution* in a non-compoundable case—*Ranchhod*, 37 Bom 369, 14 Cr.L.J. 77 (78), 15 Bom.L.R. 61, 18 I.C. 413. The acquittal must be based on the finding that the accused is not guilty; the Magistrate cannot acquit the accused merely because the complainant is absent. Where a charge has been framed against the accused and the latter has entered upon his defence and produced some defence witnesses, he cannot be acquitted on account of the absence of the complainant—*Ram Batsh v Jairam*, 27 O.C. 316, 26 Cr.L.J. 264, 1 O.W.N. 613. But where after a charge is framed, the complainant is absent, and it is obvious that the complainant has no desire to proceed with his complaint, the Magistrate should acquit the accused, and not merely discharge him—*Godhan*, 1 O.W.N. 585, 26 Cr.L.J. 400. But see *Nutbehari v. Saroda*, 37 C.W.N. 712 (713), 1933 Cr.C. 494, 34 Cr.L.J. 493, 143 I.C. 83, where an order of acquittal under such circumstances was set aside. See also Note 852 under sec. 259.

The procedure of the Magistrate in directing the accused to be acquitted without writing a judgment is irregular. Whether the irregularity would vitiate the conviction would depend on whether the Court can hold that there had or had not been a failure of justice owing to the irregularity—*Dhondha v Sitaram*, 34 Cr.L.J. 1036, 145 I.C. 664, AIR 1933 All. 660, 1933 A.L.J. 1244, 1933 Cr.C. 1143. See Note 1015.

259. When the proceedings have been instituted upon complaint, and upon any day fixed for the hearing of the case the complainant is absent, and the offence may be lawfully compounded, or is *not a cognisable offence*, the Magistrate may, in his discretion, notwithstanding anything hereinbefore contained, at any time before the charge has been framed, discharge the accused.

Change:—The italicised words have been added by sec. 74 of the Cr. P. C. Amendment Act, XVIII of 1923.

851. Scope of section:—The primary reason of passing the order of discharge is, that the absence of the complainant raises a presumption that the complainant does not wish to proceed with the prosecution—*Harun v Abdul*, 12 Cr.L.J. 184 (Sund). It is not in every warrant case that a Magistrate will be competent to pass an order of discharge on account of the absence of the complainant. The warrant case must fall under this section, i.e., must be *compoundable*—*Gorinda v Dulali*, 10 Cal. 67 (68). But the Magistrate can discharge the accused in any warrant case, (whether compoundable or not), if in consequence of the absence of the complainant, the Magistrate considers the charge to be groundless, under sec. 253 (2)—*Ibid.*

This section does not make it compulsory upon the Magistrate to dismiss a complaint or application. He may in his discretion do so, but if he does not choose to exercise his discretion in that matter there can be no ground for interference in revision—*Banke Lal v. Maiku*, AIR. 1933 Oudh 430, 10 O.W.N. 1037, 1933 Cr.C. 1315, 146 I.C. 638, 35 Cr.L.J. 121. See also *Jamnabai*, 35 Cr.L.J. 1139, 150 I.C. 858, 35 Bom.L.R. 105, AIR 1934 Bom 130.

ment under sec. 544, Cr. P. C., and he is therefore correct in requiring that the expenses should be deposited by the accused prior to the issue of summons in accordance with sec. 257 (2), Cr. P. Code—*Mahtab Singh v. Emp.*, A.I.R. 1939 All. 101, 1938 A.L.J. 1082, 179 I.C. 773, I.L.R. 1939 All. 57, 40 Cr.L.J. 257, 1938 A.W.R. (H.C.) 780.

Although the Magistrate can require the accused to pay the expenses for the attendance of his witnesses, still if he has once allowed the witnesses to be summoned without demanding expenses from the accused, and if by any chance the witnesses summoned for a particular date have not been examined on that date, the Magistrate has no power afterwards to say that on the next date of hearing the witnesses shall not be summoned except on payment of their expenses by the accused—*Kishan Lal*, 22 Cr.L.J. 711 (Lah.), 63 I.C. 871 (872) (Lah.).

A Court ordering a party to deposit the travelling allowance of a witness should state the amount of the travelling allowance to be deposited—*Gourishankar*, 6 P.L.R. 215, 26 Cr.L.J. 965

Section 257 (2), Cr. P. C., does not provide that the expenses of issuing process shall be deposited in Court—*Mg San Nyein*, 27 Cr.L.J. 415, 93 I.C. 79, A.I.R. 1926 Rang. 13, 4 Bur.L.J. 187. This case has been overruled by *K.-E. v. Tha Shwe*, 4 Rang. 146 See Note 824.

258. (1) If in any case under this Chapter in which a charge has been framed the Magistrate finds the accused not guilty, he shall record an order of acquittal.

Acquittal.

(2) Where in any case under this Chapter the Magistrate does not proceed in accordance with the provisions of section 349 or section 562, he shall, if he finds the accused guilty, pass sentence upon him according to law.

Conviction.

Change:—Sub-section (2) has been amended by sec. 73 of the Cr. P. C. Amendment Act, XVIII of 1923. A similar amendment has been made in sec. 245 (2) and sec. 306 (2).

849. Acquittal:—An order of acquittal can be pronounced only where *after a charge* has been drawn up the Magistrate is of opinion that the evidence is insufficient to justify a conviction. An order of acquittal cannot be passed in a case where *no charge* has been framed or before any charge is framed—*Ranckhod*, 37 Bom 369, 14 Cr.L.J. 77. Section 258 (1), Cr. P. C., must be read in the light of sec. 350, Cr. P. Code. Where a Magistrate ignores all previous proceedings including the charge and orders a *de novo* trial under sec. 350 (1), Cr. P. C., the previous charge does no longer remain in force and any order passed before framing a fresh charge is one of discharge and not of acquittal under this section—*Tukaram*, 37 Cr.L.J. 983, 164 I.C. 744, A.I.R. 1936 Nag. 153, 1936 Cr.C. 708, I.L.R. 1936 Nag. 92, 19 N.L.J. 115. But a contrary view has been taken in *Raza Husam*, 36 Cr.L.J. 912, 156 I.C. 126, 1935 A.L.R. 548, 7 R.A. 1057, A.I.R. 1935 All. 831, 1935 Cr.C. 980, 1935 A.L.J. 1022, following *Chotu*, 9 All. 52 (56) and *Sri Ramulu v. Nalam Krishna Row*, 25 I.C. 1001, 38 Mad. 585, 1914 M.W.N. 646, 16 M.L.T. 303, 27 M.L.J. 589, 15 Cr.L.J. 673. If a warrant case is tried as a summons case, and no charge is framed, the acquittal amounts to a discharge under sec. 253—*Jadu*, 1886 A.W.N. 260.

After a charge is framed, the Magistrate can pass no other order except that of acquittal or conviction. He cannot pass an order of discharge. Even, if he discharges the accused, the discharge would amount to an acquittal—*Taba v. Hirba*, 1883 P.R. 29; *Sreeramah v. Veerasalingam*, 38 Mad 585; *Bishambar*, 1 O.W.N. 705. So also, an order of dismissal of complaint would amount to an acquittal—*Jadubar*, 5 C.L.R. 359. If the Magistrate by inadvertence refers to sec. 253 instead of sec. 258, Cr. P. C., the

order does not become any the less an order of acquittal because of that inadvertence, if the whole of the procedure shows that the order must be regarded as one of acquittal and not of discharge—*Raza Husain*, 36 Cr.L.J. 912 (913), AIR 1935 All. 834, 156 IC 186.

Where a Magistrate passes an order of acquittal under this section, the Sessions Judge cannot treat it as an order of discharge and direct a commitment of the accused under sec. 436 (now sec. 437)—*Apparaju*, 43 Mad 330, 21 Cr.L.J. 91.

An order of acquittal can be passed in a warrant case only where after the frame of a charge the Magistrate is of opinion that the evidence is insufficient to justify a conviction. It is not competent to a Magistrate to enter an order of acquittal in a warrant case on a private complainant's offering to *withdraw from the prosecution* in a non-compoundable case—*Ranchhod*, 37 Bom 369, 14 Cr.L.J. 77 (78), 15 Bom.L.R. 61, 18 IC 413. The acquittal must be based on the finding that the accused is not guilty; the Magistrate cannot acquit the accused merely because the complainant is absent. Where a charge has been framed against the accused and the latter has entered upon his defence and produced some defence witnesses, he cannot be acquitted on account of the absence of the complainant—*Ram Baksh v. Jaiaram*, 27 O.C. 316, 26 Cr.L.J. 264, 1 O.W.N. 613. But where after a charge is framed, the complainant is absent, and it is obvious that the complainant has no desire to proceed with his complaint, the Magistrate should acquit the accused, and not merely discharge him—*Godhan*, 1 O.W.N. 586, 26 Cr.L.J. 400. But see *Nutbeham v. Saroda*, 37 C.W.N. 712 (713), 1933 Cr.C. 494, 34 Cr.L.J. 498, 143 IC 83, where an order of acquittal under such circumstances was set aside. See also Note 852 under sec. 259.

The procedure of the Magistrate in directing the accused to be acquitted without writing a judgment is irregular. Whether the irregularity would vitiate the conviction would depend on whether the Court can hold that there had or had not been a failure of justice owing to the irregularity—*Dhondha v. Sitaram*, 34 Cr.L.J. 1036, 145 IC 664, AIR 1933 All 660, 1933 A.L.J. 1244, 1933 Cr.C. 1143. See Note 1015.

259. When the proceedings have been instituted upon complaint, and upon any day fixed for the hearing of the case the complainant is absent, and the offence may be lawfully compounded, or is *not a cognizable offence*, the Magistrate may, in his discretion, notwithstanding anything hereinbefore contained, at any time before the charge has been framed, discharge the accused.

Change:—The italicised words have been added by sec. 74 of the Cr. P. C. Amendment Act, XVIII of 1923.

851. Scope of section:—The primary reason of passing the order of discharge is, that the absence of the complainant raises a presumption that the complainant does not wish to proceed with the prosecution—*Harun v. Abdul*, 12 Cr.L.J. 184 (Sind). It is not in every warrant case that a Magistrate will be competent to pass an order of discharge on account of the absence of the complainant. The warrant case must fall under this section, i.e., must be *compoundable*—*Goinda v. Dulali*, 10 Cal 67 (68). But the Magistrate can discharge the accused in any warrant case, (whether compoundable or not), if in consequence of the absence of the complainant, the Magistrate considers the charge to be groundless, under sec. 253 (2)—*Ibid*.

This section does not make it compulsory upon the Magistrate to dismiss a complaint or application. He may in his discretion do so, but if he does not choose to exercise his discretion in that matter there can be no ground for interference in revision—*Banke Lal v. Maiku*, AIR 1933 Oudh 430, 10 O.W.N. 1037, 1933 Cr.C. 1315, 146 IC 638, 35 Cr.L.J. 121. See also *Jamnabai*, 35 Cr.L.J. 1139, 150 IC 858, 36 Bom.L.R. 105, AIR 1934 Bom. 130.

Under the old law, if the case was not compoundable no order of discharge could be passed—*Yankya*, 13 Bur.L.T. 244, 22 Cr.L.J. 753; *Ramphal*, 17 O.C. 18, 15 Cr.L.J. 230, 23 I.C. 182. Under the present section, however, it is not always necessary that the offence must be compoundable. If the offence is a *non-cognizable* one, though not compoundable, an order of discharge may be passed. But in such a case, *i.e.*, if the offence is non-cognizable but non-compoundable, the Magistrate may in his discretion proceed with the trial, instead of discharging the accused; and the High Court will not ordinarily interfere with that discretion. See *U Mo Gaung v. U. Po*, 6 Rang. 664, 30 Cr.L.J. 345 (346).

In a warrant case the correct section is 259 and not 247. The order under sec. 259 has the effect of discharge and not of acquittal under sec. 403, Cr. P. Code—*Suraj Bali*, A.I.R. 1934 All. 340, 1934 Cr.C. 418, 152 I.C. 249, 36 Cr.L.J. 65, 56 All. 750.

This section does not apply when the case was not instituted upon a complaint (*i.e.*, a police case) and could not be lawfully compounded—*Munnu*, 28 Cr.L.J. 816, 104 I.C. 256, 1 Luck.C. 337, A.I.R. 1927 Oudh 352.

When one of the sections mentioned in the complaint deals with a cognizable and non-compoundable offence, this section does not properly apply—*Alimahomed Joosab v. Kasturchand Balabhai Jhaveri*, 40 Cr.L.J. 346, 180 I.C. 241, A.I.R. 1939 Bom. 89, 41 Bom.L.R. 90; *Moraji*, 36 Bom.L.R. 1213, 154 I.C. 325, A.I.R. 1935 Bom. 76, 1935 Cr.C. 137, 36 Cr.L.J. 483, 59 Bom. 171, 7 R.B. 305.

No withdrawal of complaint is allowed:—This section applies only where the complainant is *absent*, and does not provide for cases in which the complainant wants to *withdraw* the complaint. No withdrawal of complaint is permitted in warrant cases. If, however, in a warrant case, the Magistrate considers that although the charge is not groundless, there is little likelihood of the case being pursued to a successful termination, he can consult the District Magistrate, who would, if possible, instruct the Public Prosecutor under sec. 494 to withdraw the case—*Maung Thu v. U. Po*, 5 Rang. 136, 28 Cr.L.J. 649 (650).

The principle underlying the provisions dealing with non-compoundable or cognizable warrant cases is that, whether instituted on complaint or otherwise, the final responsibility for the conduct of such cases rests with the State, and that where there is a reasonable ground for believing that an offence has been committed, once the machinery of law has been set in motion, the right of arresting its progress rests with the State alone. In such cases, an application for withdrawal of complaint by the complainant is not entertainable—*Maung Thu v. U. Po*, 5 Rang. 136, 28 Cr.L.J. 649 (650). See also *Ranchood*, 37 Bom. 369, 14 Cr.L.J. 77 (78).

852. Absence of complainant:—A slight delay on the part of the complainant in attending the Court, especially where on the day the Court sat earlier than usual, would not be a proper ground of discharge—*Danba*, Ratanlal 988. Absence of complainant owing to his being prevented by floods is not a proper ground of discharge—*Harun v. Abdul*, 12 Cr.L.J. 184, 9 I.C. 1007 (Sind).

The Magistrate can discharge under this section if no charge has been framed. But if a charge has been framed, and complainant is absent this section cannot apply and it is not legal to discharge the accused. The Magistrate should in such circumstances either adjourn the case, or if there are no sufficient grounds for adjourning the case, acquit the accused—*Nazir Husain*, 1931 A.L.J. 3, 1930 Cr.C. 1017, 53 All. 3, A.I.R. 1930 All. 795, 129 I.C. 262. But see *Har Kishan Das v. Emp.*, A.I.R. 1937 All. 127 (129), 38 Cr.L.J. 361, 1937 A.L.R. 166, 167 I.C. 236, 1936 A.W.R. 1273, 9 R.A. 517, where, distinguishing *Nazir Husain*, *supra*, it has been laid down by the same High Court that there is no section which empowers a Magistrate to acquit the accused after charge sheet has been framed in the trial of a warrant case on the ground that the complainant and his witnesses are absent on the date fixed for cross-examination. See also *Rai Singh v. Patia*, 53 I.C. 491, 20 Cr.L.J. 763. The Lahore High Court holds that once a charge has been framed, it is the duty of the trial Court to proceed with the trial, even in the absence of the complainant, and to convict or acquit the accused

on the merits—*Narain v. Mewa Singh*, 22 Cr.L.J. 312 (Lah.); *Nabi Baksh*, 25 Cr.L.J. 87, 76 I.C. 23, A.I.R. 1924 Lah. 627; *Ram Baksh v. Jairam*, 27 O.C. 316, 26 Cr.L.J. 264, 1 O.W.N. 613. Where, after a charge has been framed, both parties are absent, the proper procedure for the Magistrate is to get the accused arrested under a warrant, and then decide whether he is guilty or not, and not to discharge the accused and then direct the taking of proceedings under sec. 514 for forfeiture of his bond—*Godhan*, 1 O.W.N. 586. If, at any stage after a charge has been framed, both parties are absent, the Magistrate can neither discharge the accused under section 259 nor acquit the accused under sec. 258. He should proceed with the trial—*Nutbehari v. Saroda*, 37 C.W.N. 712 (713), 1933 Cr.C. 494, 34 Cr.L.J. 498, 143 I.C. 83. If a case which is taken up by a Bench for summary trial, is, after a charge is orally framed, transferred to a Magistrate who is not empowered to try the case summarily, the second Magistrate cannot under sec. 350 act on the evidence taken and charge framed by the Bench in the summary trial. The proceedings before the second Magistrate will amount to a *de novo* trial. Therefore, if the complainant is absent on the day fixed for hearing, the provisions of sec. 259 will apply, as it will be deemed that no charge has been framed, and the accused will be discharged, and not acquitted, so that a second complaint will not be barred under sec. 403—*Nannier v. Desalter*, 55 Mad 795, 62 M.L.J. 738, 1932 Cr.C. 509, 33 Cr.L.J. 653, A.I.R. 1932 Mad 505, 1932 M.W.N. 244, 35 M.L.W. 760, 138 I.C. 581, Ind. Rul. 1932 Mad. 594.

853. Discharge:—The proper order is one of discharge. An order of "striking off" the case is not a proper order under this section—*Ramphal*, 17 O.C. 18, 15 Cr.L.J. 230, 23 I.C. 182. If a summons case and a warrant case are tried together, the procedure of a warrant case is to be followed, and if the complainant is absent the proper order to be passed is one of discharge under this section in respect of both cases; and not an order of discharge in respect of the warrant case and an order of acquittal under sec. 247 in respect of the summons case—*Raghavulu v. Singaram*, 41 Mad 727 (729), 34 M.L.J. 369, 1918 M.W.N. 827, 19 Cr.L.J. 613, 45 I.C. 517.

The Magistrate has a discretion to discharge the accused. But in exercising this discretion in discharging the accused he should see whether there is a *prima facie* case against the accused; if there is such a case, the Magistrate should convict; if he discharges for the sole reason that the complainant is absent, his order is illegal—*Kura*, 1891 A.W.N. 116; *Harun v. Abdul*, 12 Cr.L.J. 181 (Sind). If the absence of the complainant is due to his death (and the death takes place after a charge has been framed), the Magistrate has a discretion in a proper case to allow the complaint to be continued by a proper and fit complainant, instead of discharging the accused—*Mahomed Azam*, 28 Bom.L.R. 288, 27 Cr.L.J. 491; *Hazara*, 2 Lah. 27; *Narayana Naick*, 54 Mad. 768, 1931 Cr.C. 1028, 61 M.L.J. 125, 1931 M.W.N. 767, A.I.R. 1931 Mad 772, 34 M.L.W. 42, 33 Cr.L.J. 14, 134 I.C. 990. If the complainant dies after he has been examined and cross-examined, so that his evidence can be used under sec. 33, Evidence Act, and the case is non-cognizable but non-compoundable, the Magistrate can, in his discretion, decide to proceed with the trial instead of discharging the accused, and the High Court will not interfere with the discretion—*U Mo Gang v. U Po Sin*, 6 Rang 664, 30 Cr.L.J. 345 (346), A.I.R. 1929 Rang 14, 114 I.C. 681.

854. Fresh complaint:—An order of discharge passed under this section is not a judgment; and the discharge does not amount to an acquittal; therefore, a Magistrate who has passed the order of discharge can re-hear the case or entertain a fresh complaint. Neither sec. 369 nor sec. 403 operates as a bar to such action—*Dwarka v. Beni Madhab*, 28 Cal 652 (658-660) (F.B.); *Chinnathambi v. Gnanaseamy*, 28 Mad. 310; *Raghavulu v. Singaram*, 41 Mad 727 (728); *Balchand v. Chandoomal* 8 S.L.R. 196, 16 Cr.L.J. 174; *Asgar Ali v. Akbar Ali*, 26 Cr.L.J. 1040, 87 I.C. 923, A.I.R. 1925 Nag 432; *Abdul Hakim v. Haji Abdul* 35 Cr.L.J. 170, 146 I.C. 443; *Rambrosad v. Ganpatrao*, 36 Cr.L.J. 57, 152 I.C. 223, A.I.R. 1934 Nag 215, 1934 Cr.C. 986. See also *Nunmer v. Dasalter*, 55 Mad 795; and *Harbai v. Raja Premji*, 40 Cr.L.J. 745, 183 I.C. 283, 1 L.R. 1940 Kar. 74, A.I.R. 1939 Sind 193 (F.B.) which overruled *Tirthabai*.

v. *Sugnibai*, 23 S.L.R. 43, 112 I.C. 681, A.I.R. 1939 Sind 61, 29 Cr.L.J. 1097 and also, by implication, *Chellomal v. Kewalmal Jeramdas*, 40 Cr.L.J. 287, 179 I.C. 898, A.I.R. 1939 Sind 38, 11 R.S. 164, I.L.R. 1939 Kar. 228.

Where the accused is discharged under this section the Magistrate can either entertain a fresh complaint on the same facts or restore the original complaint to his file on a satisfactory cause being shown by the complainant for his absence—*Akula Venkana*, 28 Cr.L.J. 304, 100 I.C. 384, A.I.R. 1927 Mad. 503. But see *Ponnammal v. Salaxi Ammal*, 1933 M.W.N. 1429, where it was held that the Magistrate had no jurisdiction to set aside his own order but had power to entertain a fresh complaint. If a Magistrate discharges an accused under this section because of the non-appearance of the complainant, and subsequently excuses that non-appearance he must proceed *de novo*. None of the evidence recorded in the first case can be carried over to the second case—*Venkatarama v. Soundaraja*, 30 Cr.L.J. 403, 115 I.C. 64, 1929 M.W.N. 184, A.I.R. 1929 Mad. 260, Ind. Rul. 1929 Mad. 384.

Where the accused is discharged under this section and is subsequently summoned on a fresh complaint and the order of discharge is held illegal, the proper procedure is to set aside all the proceedings after the verification of the first complaint—*Morariji Jivraj*, 36 Bom.L.R. 1213, 154 I.C. 325, A.I.R. 1935 Bom. 76, 1935 Cr.C. 137, 36 Cr.L.J. 483, 59 Bom. 171, 7 R.B. 305. Under similar circumstances the same High Court refused to interfere in revision when the effect of the interference would merely be that the evidence which had been recorded would have to be recorded over again, with the consequent waste of time and money—*Alimahomed Joosab v. Kasturchand Balabhai Jhaveri*, 40 Cr.L.J. 346, 180 I.C. 241, A.I.R. 1939 Bom. 89, 41 Bom.L.R. 90.

See also Notes 681, 798 and 827.

Further inquiry:—A District Magistrate can order further inquiry in a case of discharge passed by a subordinate Magistrate if he thinks that the discharge was improper—*Dajiba*, Ratanlal 988. In ordering further inquiry the Court of Revision is not limited to the consideration of the materials which were before the Magistrate, but can consider other relevant facts. Thus, where the Magistrate discharged the accused owing to the absence of the complainant, but the cause of his absence was that he was prevented from appearing by reason of floods, and this fact was not known to the Magistrate when he discharged the accused, the High Court ordered further inquiry—*Harun v. Abdul*, 12 Cr.L.J. 184 (Sind).

CHAPTER XXII.

OF SUMMARY TRIALS.

855. Change of procedure during trial:—There is no section of the Code which expressly sanctions a change of procedure from a regular trial under Chap XXI to a summary trial under Chap XXII, but there is also no section which expressly prohibits such a change. The change of procedure is certainly not contemplated or sanctioned by the Code, but the High Court will regard it as a mere irregularity, which will not vitiate a trial unless it has occasioned a failure of justice. Thus, in a case the Magistrate commenced the trial of the accused in a regular manner under Chap. XXI, but after framing the charge he conducted the trial summarily under Chap. XXII; it was held that this change of procedure was a mere irregularity, and where there was no failure of justice, the High Court would not interfere in revision—*Adoo*, 10 S.L.R. 185, 18 Cr.L.J. 621. So also, where a complaint was made of an offence triable by the Court of Session, and the Magistrate commenced a regular inquiry, but after hearing the evidence and finding that the offence committed was triable summarily, tried it summarily, it was held that the Magistrate had acted *bona fide* in the interests of justice, and the High Court refused to interfere—*Rangamani*, 22 Mad. 459. But in *Gesta*

Behary v. Baistam, 26 C.W.N. 831 (833), 37 C.L.J. 105, 24 Cr.L.J. 157, 71 I.C. 509, it has been held that such a change of procedure in the midst of the trial is not authorised by law and is prejudicial to the accused, and that there should be a retrial before a different Magistrate.

260. (1) Notwithstanding anything
Power to try summarily. contained in this Code,—

- (a) the District Magistrate,
- (b) any Magistrate of the first class specially empowered in this behalf by the *Provincial Government*, and
- (c) any Bench of Magistrates invested with the powers of a Magistrate of the first class and especially empowered in this behalf by the *Provincial Government*,

may, if he or they think fit, try in a summary way all or any of the following offences:—

- (a) offences not punishable with death, transportation or imprisonment for a term exceeding six months;
- (b) offences relating to weights and measures under sections 264, 265 and 266 of the Indian Penal Code;
- (c) hurt, under section 323 of the same Code;
- ✓ (d) theft, under section 379, 380 or 381 of the same Code, where the value of the property stolen does not exceed fifty rupees;
- (e) dishonest misappropriation of property under section 403 of the same Code, where the value of the property misappropriated does not exceed fifty rupees;
- (f) receiving or retaining stolen property under section 411 of the same Code, where the value of such property does not exceed fifty rupees;
- (g) assisting in the concealment or disposal of stolen property, under section 414 of the same Code, where the value of such property does not exceed fifty rupees;
- (h) mischief, under section 427 of the same Code;
- (i) house-trespass, under section 448, and offences under sections 451, 453, 454, 456 and 457 of the same Code;
- (j) insult with intent to provoke a breach of the peace, under section 504, and criminal intimidation, under section 506, of the same Code;
- (k) abetment of any of the foregoing offences;
- (l) an attempt to commit any of the foregoing offences, when such attempt is an offence;
- (m) offences under section 20 of the Cattle Trespass Act, 1871:

Provided that no case in which a Magistrate exercises the special powers conferred by section 34 shall be tried in a summary way.

(2) When in the course of a summary trial it appears to the Magistrate or Bench that the case is one which is of a character which renders it undesirable that it should be tried summarily, the Magistrate or Bench shall recall any witnesses who may have been examined and proceed to re-hear the case in manner provided by this Code.

Amendment:—The words "Provincial Government" have been substituted for "Local Government" in this section by sec. 4 of the Government of India (Adaptation of Indian Laws) Order, 1937.

856. Magistrates empowered:—The District Magistrate of Bangalore has no power to try European British subjects summarily under this section, as his powers are confined to those conferred on him by the Declarations of the Governor-General in Council, and the power to try European British subjects summarily under this section is not included in such powers—*Jeremiah*, 39 Mad. 492, 16 Cr.L.J. 773

Where an Assistant Commissioner of a district who was, before his going to England on furlough, authorised to exercise summary powers in a certain local area, was on his return from furlough posted to another local area as a first class Magistrate, it was held that he had no jurisdiction to exercise summary powers in the latter area—*Pursooram*, 2 Cal. 117. But see sec. 40 as now amended.

Where the accused was summoned by a Magistrate of the Second Class who could not try case summarily, it was not open to the Additional District Magistrate to place the case on his own file and try it summarily—*Bradley*, 33 P.L.R. 177, 1932 Cr.C. 181, 33 Cr.L.J. 108 (109), 135 I.C. 220, A.I.R. 1932 Lah. 188, Ind. Rul. 1932 Lah. 92.

Presidency Magistrates:—The provisions of this chapter do not apply to trial before Presidency Magistrates, as such Magistrates are not mentioned in clauses (a), (b) and (c)—*Abdul Ratanlal* 539.

857. Offences triable summarily:—Whether an offence is to be tried summarily or not is to be determined by the facts stated in the complaint as well as the sworn testimony of the complainant—*Fanindra*, 36 Cal. 67, 12 C.W.N. 1041, 8 Cr.L.J. 227, 1 I.C. 519. The Magistrate is competent to dispose of a case summarily where the facts which are alleged to have taken place disclose an offence triable summarily, and the mere fact that the complainant enumerates sections of the I. P. Code relating to offences not triable summarily, does not affect the jurisdiction of the Magistrate, unless the facts of which he really complains disclose such offences—*Golap Pandey v. Boddam*, 16 Cal. 715. Similarly, when the Magistrate ascertains from the evidence that the facts alleged to have taken place disclose an offence triable summarily, and the aggravating circumstances which render the offence not so triable are mere exaggerations, he can dispose of the case summarily—*Vallabh*, 1 Bom.L.R. 683.

Where a person is charged with a graver offence, the Magistrate ought not to cut down the offence to a less serious one at his own will, in order to give himself jurisdiction to try it summarily—*Mitra Lal*, 51 All. 510, 30 Cr.L.J. 686; *Shro Bhajan v. Mosawi*, 27 Cal. 983 (985); *Bishu Shaik v. Saber*, 6 C.W.N. 713, 29 Cal. 409; *Mamanund v. Kovlash*, 11 Cal. 236; *Chandra Mohan*, 27 C.W.N. 148 (149), 25 Cr.L.J. 528, 77 I.C. 992; *Ghamman*, 1888 P.R. 5; *Mohammad Abdullah*, 35 Cr.L.J. 1091, 150 I.C. 24, A.I.R. 1931 Lah. 243, 1931 Cr.C. 466 following *Sardar Khan*, 5 P.R. 1887 (Cr.); *D'Souza v. Annappa*, 1932 M.W.N. 478; *Sharma*, 6 Bur.L.T. 137, 14 Cr.L.J. 462 (463). A charge of robbery cannot be treated as one of simple hurt for the purpose of trying it summarily—*Barkat Khan*, 21 P.L.R. 1907, 5 Cr.L.J. 21 (22). So also, no Magistrate is entitled to split up an offence into its component parts for the purpose of giving himself

summary jurisdiction, thereby depriving the prisoner of his right of appeal—*Abdool Karim*, 4 Cal. 18

Where neither the complaint nor the evidence adduced in a case under sec. 457, I P. C. (criminal trespass with intent to commit an offence punishable with imprisonment) which is triable summarily, shows the actual offence which the accused intended to commit, and the only finding which could be arrived at is that the accused intended to commit an offence punishable with imprisonment, the conviction of the accused in a summary trial cannot be held to be illegal on the ground that the intention of the accused might have been to commit an offence which cannot be tried summarily—*Madhab Chandra*, 53 Cal. 738, 27 Cr.L.J. 1295. A Magistrate can try a person summarily for offences under secs 143 and 427, I P. C., and the fact that there are major offences suggested against the accused in the complaint, does not debar the Magistrate from having recourse to the summary procedure—*Naubat*, 28 Cr.L.J. 140, 99 I.C. 348, 7 A.I.Cr.C. 130, A.I.R. 1927 All. 136. Where the Police prosecute an accused person for an offence triable summarily and where the Magistrate convicts that accused person of an offence triable summarily, any exaggeration as to the nature of the offence should not have any effect on the jurisdiction—*Sunder Teli*, 32 Cr.L.J. 556, 130 I.C. 484, 1930 A.L.J. 1490, A.I.R. 1931 All. 51, 53 All. 218, 1931 Cr.C. 123, Ind. Rul. 1931 All. 276

Joint charge of summary and non-summary offences—Where an accused person is charged with offences not triable summarily along with offences triable summarily, the Magistrate cannot disregard the former offences, and proceed to try the case summarily—*Ramanand v. Koylash*, 11 Cal. 236; *Ghamman*, 1888 P.R. 5. The Allahabad High Court holds that the mere fact of the complainant charging the accused with summary offences along with non-summary ones will not necessarily oust the summary jurisdiction of the Magistrate. No hard and fast rule can be laid down, much depending on the facts of each individual case. Whether a complaint does or does not afford sufficient grounds for a summary trial or requires a trial under the ordinary procedure is a question which must be left in a great measure to the discretion of the Magistrate—*Jagwan*, 10 All. 55. Where the accused was charged with summary as well as non-summary offences but the Magistrate tried the accused summarily for the offences triable summarily, and ignored the non-summary offence, held that it would have been preferable had the Magistrate proceeded regularly and tried the accused upon both the charges; but as there was no miscarriage of justice in the present case, a retrial need not be ordered—*Kantila*, 31 C.W.N. 583, 28 Cr.L.J. 697, A.I.R. 1927 Cal. 505, 103 I.C. 553.

Summary trial of non-summary offences—Effect—Where a Magistrate deliberately disregards the offence complained of, which is an offence not triable summarily, and tries it summarily, his proceedings are absolutely void under sec. 530 (q). Where a complaint is made for an offence not triable summarily, and process is issued in respect of that offence, a summary trial is illegal and void even though the accused is ultimately convicted of an offence triable summarily—*Ganu*, 52 Bom. 254, 29 Cr.L.J. 492 (493), 109 I.C. 220, 30 Bom.L.R. 371, A.I.R. 1928 Bom. 142, 10 A.I.Cr.R. 191; *Chandra Mohan*, 27 C.W.N. 148 (149), 77 I.C. 992, 25 Cr.L.J. 528; *Tajazal Hoosain v. Hunt*, 34 C.W.N. 556 (557), 1930 Cr.C. 1111, *Kailash v. Joynuddin*, 5 C.W.N. 252, *Ram Narain*, 46 All. 446, 25 Cr.L.J. 806, 81 I.C. 342, A.I.R. 1924 All. 675; *Baluant Singh v. Emp.*, A.I.R. 1939 All. 693, 1939 A.L.J. 783, 41 Cr.L.J. 91, 184 I.C. 712, I.L.R. 1939 All. 931.

858. Instances of summary offences:—(i) Offences under sec. 121, Indian Railways Act—*Bmdeshri*, 1902 A.W.N. 24;

(ii) offences under sec. 65 (a), Stamp Act, for failure to give a receipt—*Navoo Routhen*, 1 Weir 906;

(iii) proceedings under sec. 81, Bombay Act VI of 1873, for recovery of Municipal Taxes—*Municipality of Ahmedabad v. Jumna*, 17 Bom. 731;

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Provided that no case in which a Magistrate exercises the special powers conferred by section 34 shall be tried in a summary way.

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(iv) offences under the Companies Act for not filing the balance sheet with the Registrar of Joint Stock Companies—*Dina Nath*, 35 All. 173;

(v) offences under sec. 49, Bengal Abkari Act, XXI of 1856, the confiscation

provided in that section being merely a consequence of the conviction and not forming part of the punishment—*Baidanath*, 3 Cal. 366;

(vi) violation of rule 8, div. (c), cl. (b) framed under the Criminal Tribes Act (XXVI of 1871) is punishable with a maximum sentence of 6 months' rigorous imprisonment and is triable summarily—*Bihari*, 50 All. 718, 30 Cr.L.J. 214 (215);

(vii) offences under the Child Marriage Restraint Act (XIX of 1929)—*Jwala Prasad*, 35 Cr.L.J. 677, 148 I.C. 351, 1934 Cr.C. 414, A.I.R. 1934 All. 331;

(viii) offences under sec. 22 of the Criminal Tribes Act (VI of 1924)—*Bhari*, 50 All. 718.

Property of value not exceeding fifty rupees :—Where a box containing fifty Rupees was stolen and the price of the box was annas eight, the theft was of property exceeding Rs. 50 in value (*i.e.*, Rs 50-8 annas) and could not be tried summarily—*Buzleh Ali*, 22 W.R. 65. Since a tenant is entitled to the exclusive possession of the whole produce until it is divided under sec. 71 of the Bengal Tenancy Act, his complaint against the landlord for theft for having cut and carried away paddy worth Rs. 88 of which the latter was entitled to one-half, cannot be summarily tried by a Magistrate, as the value of the property in this case must be regarded as Rs. 88 and not Rs 44 only—*Sheikh Habbu v. Sheikh Kariman*, 1 P.L.T. 230, 20 C.W.N. 1212, 17 Cr.L.J. 473 (474).

Before a Magistrate can assume jurisdiction to try the accused in a summary form, he has to satisfy himself that the property in respect of which he is trying the accused is less than Rs. 50 in value. Where he did not direct his mind to this question at all and the record of the trial did not show on its face that the Magistrate had jurisdiction to try the accused summarily the conviction cannot stand—*Brij Nandan*, 25 Cr.L.J. 515, 81 I.C. 33, 6 P.L.T. 114, A.I.R. 1922 Pat. 227.

If more than one offence of receiving or retaining stolen property, is by application of sec. 234, Cr. P. C., tried at one summary trial the value of the property stolen in each case should be taken separately for the purposes of sec. 260, cl. (1) (d). The trial under the summary procedure is legal when the value of property stolen in each case does not exceed fifty rupees but the aggregate value exceeds that amount—*Chetumal*, A.I.R. 1931 Sind 185, 1934 Cr.C. 1392, 36 Cr.L.J. 608, 154 I.C. 937, 28 S.L.R. 336.

859. Offences not triable summarily:—(i) Offences which are punishable with imprisonment for more than six months, *e.g.*, an offence under sec. 60 of the U. P. Excise Act (IV of 1910) which is punishable with imprisonment for one year—*Bhikka*, 28 O.C. 123, 26 Cr.L.J. 800, 86 I.C. 432;

(ii) offences under sec. 6 of Act VII of 1851, for illegal demand of toll—*Uttam Chunder v. Isser Chunder*, 22 W.R. 76;

(iii) offences under the Press and Registration of Books Act (XXV of 1867), *e.g.*, omission to make a declaration required by sec. 4 of that Act—*Bara Narain*, 9 P.R. 1889;

(iv) maintenance proceedings under sec. 488—*Kali Dasi v. Durga*, 20 Cal. 351;

(v) offence under sec. 60 of the U. P. Excise Act (IV of 1900) in respect of excisable articles other than cocaine (punishable with one year's imprisonment)—*Ram Narain*, 46 All. 416; *Bhikka*, 28 O.C. 123, 26 Cr.L.J. 800;

(vi) offence under sec. 9, Opium Act (punishable with one year's imprisonment)—*Nga Sit*, 4 Bur.L.T. 271, 13 Cr.L.J. 58;

(vii) cattle-lifting—*Allahrakhio*, 6 S.L.R. 101, 13 Cr.L.J. 780 (71); in Sind, the offence of cattle-theft is so prevalent and so often goes unpunished that deterrent sentences should be passed, and the offence should not be tried summarily—*Amir Bux*, 28 Cr.L.J. 959, 105 I.C. 671, A.I.R. 1937 Sind 257.

(viii) offences under sec. 224, I. P. Code—*Harian Ali*, 1894 A.W.N. 176;

(ix) offences under sec. 452, I. P. Code—*Sharma*, 6 Bur.L.T. 137, 11 Cr.L.J. 462;

(x) theft of property of value of more than Rs. 50—*Darleh Ali*, 22 W.R. 65; *Dipchand*, 11 N.L.R. 190; *Sheikh Habbu v. Sheikh Kariman*, 1 P.L.J. 230, 17 Cr.L.J. 473; under clause (i) of this section, an offence under sec. 457, I. P. C. (house breaking by night in order to commit theft) is triable summarily; but if the property stolen is worth

more than Rs. 50, a summary trial would be improper—*Dipchand*, 14 N.L.R. 190, 19 Cr.L.J. 1003, 48 I.C. 343;

(xi) offence under sec. 211, I P. Code—*Tofazal Hossain*, 34 C.W.N. 556 (557);

(xii) a summary offence combined with a charge of previous conviction—*Anonymous*, 2 Weir 324; *Bashir*, 30 Cr.L.J. 505 (506), 115 I.C. 614, A.I.R. 1929 All. 267, Ind. Rul. 1929 All 390.

860. When summary trial is undesirable or improper:—A summary trial is undesirable in a case where a large number of correspondence has to be gone into and the case is by no means of a simple character—*Dina Nath*, 35 All. 173; or in a case in which from the nature of the dispute and the plea taken by the accused it is apparent that complicated questions of right and title and production of documentary evidence are involved—*Bhūn Bahadur*, 1 P.L.T. 121, 21 Cr.L.J. 374, 55 I.C. 854; *Parmeshwar*, 3 P.L.T. 347, 23 Cr.L.J. 440, A.I.R. 1932 Pat. 296; *Maung Shewe*, 2 Bur.L.J. 55, 24 Cr.L.J. 929; *Truthdas*, 6 S.L.R. 120, 13 Cr.L.J. 771; or in a case which is hotly contested—*Subramani v. Nachiar*, 1931 M.W.N. 118, 32 Cr.L.J. 689, 131 I.C. 174, 33 M.L.W. 311, 1931 Cr.C. 329, A.I.R. 1931 Mad. 233; or where the accused is a deaf and dumb person—*Deaf and dumb man*, 8 Bom.L.R. 849, 4 Cr.L.J. 444; or where the Magistrate takes cognizance of the case from his own knowledge or suspicion, and holds the trial on inadequate materials—*Hamed*, 3 C.W.N. cccxxx; *Kanhaya Lal*, 1905 P.L.R. 31, 2 Cr.L.J. 187; or where the charge is a serious or complicated one, and the trial goes on for a considerable time and a local inquiry has to be made or a large number of witnesses and accused persons are examined—*Rustomji*, 23 Bom.L.R. 984, 23 Cr.L.J. 21; *Ghasia Mal*, 3 Lah.L.J. 346, 22 Cr.L.J. 145, 59 I.C. 849; *Rahimtulla*, 82 I.C. 914, A.I.R. 1925 Sind 284, 19 S.L.R. 136, 26 Cr.L.J. 1026; *Mohammad Abdullah*, 35 Cr.L.J. 1094, 150 I.C. 24, A.I.R. 1934 Lah. 243, 1934 Cr.C. 466, 15 Lah. 610, 36 P.L.R. 126; *Chimanlal*, 28 Cr.L.J. 537 (539), 102 I.C. 345, 29 Bom.L.R. 710, A.I.R. 1927 Bom. 426. But a summary trial is not improper merely because there is a large number of accused in the case—*Naubat*, 28 Cr.L.J. 140, 7 A.I.Cr.R. 130, A.I.R. 1927 All. 136, 99 I.C. 348; or in a case where the only point of law that is hunted at is that the trespass, if any, was committed not on railway land but on land belonging to the P. W. D.—*M. A. Khan v. Emp.*, A.I.R. 1939 Lah. 467, 1 L.R. 1939 Lah. 221, 41 Cr.L.J. 19, 181 I.C. 458, 41 P.L.R. 743.

A summary trial is also improper in a case where the conviction of the accused may entail further serious consequences (e.g., dismissal from service). Thus, where a Police officer of many years' standing was charged with criminal intimidation with a view to prevent a person from giving evidence against certain grave offenders, and was tried summarily and convicted (which conviction was likely to result in his dismissal from service), held that the Magistrate did not exercise a sound discretion in trying the case summarily and depriving the accused of the privilege of an appeal—*Subramanya Ayyar*, 6 Mad. 396, 2 Weir 328. For this reason a summary trial is inappropriate where Government servants (of whatever rank) or public servants are accused persons—*Bradley*, 33 P.L.R. 177, 1932 Cr.C. 181 (182), Ind. Rul. 1932 Lah. 92, 33 Cr.L.J. 108, 135 I.C. 220, A.I.R. 1932 Lah. 188; *D'Souza v. Annappa*, 1932 M.W.N. 478; *Sohan Singh*, 12 Cr.L.J. 143. See also *Hari Gopal*, Ratanlal 778 (779); *Haman*, Ratanlal 781 (785). But see *Sukhpat*, 26 Cr.L.J. 1452, 92 I.C. 972, A.I.R. 1926 Oudh 63. A summary trial is improper where the accused was already bound down under sec. 109, and the conviction of the accused would entail a forfeiture of the bond. Such a case requires a full hearing and record—*Bashir*, 30 Cr.L.J. 505 (506), 115 I.C. 614, A.I.R. 1929 All. 267, Ind. Rul. 1929 All 390. In a recent Patna case it has been said that if the charge is a simple one, then though the conviction of the accused may him liable to be dismissed from service, still a summary trial is not illegal, the amendment made in sec. 414, Cr. P. C., now gives a more extended right of—*Jagdish*, 30 Cr.L.J. 859, 118 I.C. 312, Ind. Rul. 1929 Pat. 504, A.I.R. 1929 Pat. It cannot be laid down as a broad proposition of law that a Government should not be tried summarily or that generally the summary procedure is

in cases in which Government servants are accused. There may be cases in which, though Government servants are involved, the summary procedure would be more appropriate than an ordinary and protracted trial. It is a question to be determined on the facts of each case whether one mode of trial or the other should be employed—*M. A. Khan v. Emp.*, A.I.R. 1939 Lah. 467, I.L.R. 1939 Lah. 221, 41 Cr.L.J. 19, 184 I.C. 458, 41 P.L.R. 743.

The trial of a warrant case should not be conducted as a summary trial where the prosecution includes evidence given on commission in the Madras Presidency, Bombay and the Punjab. Evidence so recorded militates in its very nature against the object of a trial by summary procedure—*Munna v. Emp.*, A.I.R. 1939 Nag. 87, 1939 N.L.J. 7, I.L.R. 1939 Nag. 457, 40 Cr.L.J. 846, 184 I.C. 44.

261. The Provincial Government may confer on any Bench of Magistrates invested with the powers of a Magistrate of the second or third class, power to try summarily all or any of the following offences:—

- (a) offences against the Indian Penal Code, sections 277, 278, 279, 285, 286, 289, 290, 292, 293, 294, 323, 334, 336, 341, 352, 426, 447 and 504;
- (b) offences against Municipal Acts, and the conservancy clauses of Police Acts which are punishable only with fine or with imprisonment for a term not exceeding one month *with or without fine*;
- (c) abetment of any of the foregoing offences;
- (d) an attempt to commit any of the foregoing offences, when such attempt is an offence.

The italicised words at the end of clauses (a) and (b) have been added by sec. 75 of the Cr. P. C. Amendment Act, XVIII of 1923.

The words "Provincial Government" have been substituted for "Local Government" in this section by sec. 4 of the Government of India (Adaptation of Indian Laws) Order, 1937.

A Bench of Magistrates cannot try summarily any other offence except those mentioned in sec. 260 and this section—*Babheki*, 21 W.R. 12; *Havaldar v. Jagu Mian*, 9 Cal. 96.

The desirability of entrusting the disposal of cases coming under sec. 447, I. P. C., to Bench Courts is doubtful as there seems to be a difficulty felt by Bench Courts in distinguishing between cases of civil trespass and cases of criminal trespass—*Dakhamarri Kannava v. Vadali Venkatesan*, 38 Cr.L.J. 581, 168 I.C. 703, 1937 M.W.N. 323, 9 R.M. 620, 45 M.L.W. 471, A.I.R. 1937 Mad. 480.

262. (1) In trials under this Chapter, the procedure prescribed for summons-cases shall be followed in summons-cases, and the procedure prescribed for warrant-cases shall be followed in warrant-cases, except as hereinafter mentioned.

(2) No sentence of imprisonment for a term exceeding three months shall be passed in the case of any conviction under this Chapter.

861. Procedure:—The scanty procedure laid down in this Chapter should be strictly followed—*Erugadu*, 15 Mad. 83. The responsibility thrown on Magistrates

entrusted with summary powers is very great. Magistrates who are sufficiently alive to the responsibility entrusted to them should take care that the procedure and the record are not made more summary than what the law has laid down—*Mukundi*, 21 All 189 (191); *Damodar*, 3 P.L.T. 499, 23 Cr.L.J. 94. Thus, where the Magistrate without issuing process or making a record of the proceedings and without dismounting from the horse on which he was riding, convicted and fined a man summarily for causing obstruction in a public way, it was held that the procedure adopted by the Magistrate was illegal—*Erugadu*, 15 Mad. 83.

In a summary trial of a warrant case, the Magistrate must adopt the procedure laid down in Chapter XXI (except that he has not to frame a charge and is not bound to record the evidence of the witnesses). Therefore, the provision of sec 256 which gives the accused an absolute right of cross-examination of the prosecution witnesses after they have been examined-in-chief must apply to a summary trial of warrant cases—*Tittu Sahu*, 1 P.L.T. 652, 21 Cr.L.J. 630; *Raju*, 50 Mad 740, 28 Cr.L.J. 12. The accused is entitled to have processes issued compelling the attendance of the prosecution witnesses for cross-examination—*Nepal*, 22 Cr.L.J. 271 (Cal).

In a warrant case tried summarily, the Magistrate ought to grant an adjournment, if desired by the accused, to enable him to summon the witnesses for the defence under sec. 257, unless the Magistrate considers that the application is made for the purpose of vexation or delay—*Ameer Batcha*, 5 L.B.R. 20, 9 Cr.L.J. 583.

862. Sentence:—In a summary case, a sentence of imprisonment for more than three months cannot be awarded; if an adequate sentence cannot be passed, the case should not be tried summarily—*Po Ka*, 4 L.B.R. 338, 9 Cr.L.J. 23. The limit of three months applies only to a substantive sentence; a Magistrate is, therefore, competent to award a sentence of imprisonment in default of fine, in addition to three months' imprisonment—*Asghar Ali*, 6 All 61, 1883 A.W.N. 207.

Fine of any amount may be imposed; there is no limit to the amount of fine awardable in a summary trial—*Dina Nath*, 35 All 173.

Solitary imprisonment can also be awarded as part of the sentence. Section 262 does not interfere with the Court's powers under sec. 73, I.P.C., to order solitary confinement—*Annu Khan*, 6 All 83.

The intention of clause (2) of this section is to restrict the passing of sentences of imprisonment of considerable length in a summary trial from a conviction in which the right of appeal is greatly restricted and the object of the clause would be defeated if it were possible to combine a number of separate charges in one trial and then inflict a sentence of three months' imprisonment on each charge and order such sentences to run consecutively. Under this clause the Magistrate cannot pass more than three months' imprisonment in aggregate—*Nga Po Tay*, 35 Cr.L.J. 1413, 151 I.C. 741, 12 Rang 122, 1934 Cr.C. 575, A.I.R. 1934 Rang 116. But see *Chetumal*, 36 Cr.L.J. 608, 154 I.C. 937, 28 S.L.R. 336, A.I.R. 1934 Sind 185, 1934 Cr.C. 1392, where it has been held that a separate sentence to the extent of three months may be passed for each separate conviction. In a summary trial where reference is made to the District Magistrate or the Subdivisional Magistrate under sec. 349, Cr.P.C., the nature of the trial is not changed thereby and the District Magistrate or Subdivisional Magistrate cannot pass imprisonment for more than three months in view of the provisions of cl. (2) of this section unless he holds a *de novo* trial at full length in accordance with regular procedure—*Gopal*, 33 Cr.L.J. 472, 137 I.C. 208, Ind. Rul. 1932 All 320, A.I.R. 1932 All 507, 1932 Cr.C. 595.

Section 262 (2), Cr.P.C., does not render illegal a sentence of imprisonment in default of payment of fine if otherwise legal merely by reason of the fact that the aggregate of the terms of substantive sentence of imprisonment and of the sentence of imprisonment in default of payment of fine exceeds three months or by reason of the Magistrate having passed a substantive sentence of imprisonment for the maximum term allowed by that section. The limit placed by sec. 262 (2), Cr.P.C., applies

only to a substantive sentence of imprisonment—*Po Hwa*, A.I.R. 1940 Rang. 171, 1940 Rang L.R. 223, 41 Cr.L.J. 768, 189 I.C. 627.

A Magistrate is competent to take security bond under sec. 106, on conviction in a summary trial—*Lachman*, 1886 A.W.N. 181; *Meghu*, 7 O.C. 338, 1 Cr.L.J. 1054.

Compensation:—Compensation may be awarded under section 250 to the accused in a trial held summarily—*Basava*, 11 Mad. 142; *Palani v. Krishnappa*, 59 M.L.J. 319, 32 Cr.L.J. 207 (208). But the requirements of sec. 250 must be satisfied, and the record should contain the reasons for considering the complaint to be false and vexatious. But omission to state reasons is a mere irregularity—*Palani v. Krishnappa*, supra.

263. In cases where no appeal lies, the Magistrate or Bench of Magistrates need not record the evidence of the witnesses or frame a formal charge; but he or they shall enter in such form as the *Provincial Government* may direct the following particulars:—

Record in cases where there is no appeal.

- (a) the serial number;
- (b) the date of the commission of the offence;
- (c) the date of the report or complaint;
- (d) the name of the complainant (if any);
- (e) the name, parentage and residence of the accused;
- (f) the offence complained of and the offence (if any) proved, and in cases coming under clause (d), clause (e), clause (f) or clause (g) of sub-section (1) of section 260, the value of the property in respect of which the offence has been committed;
- (g) the plea of the accused and his examination (if any);
- (h) the finding, and, in the case of a conviction, a brief statement of the reasons therefor;
- (i) the sentence or other final order; and
- (j) the date on which the proceedings terminated.

Amendment:—The words "Provincial Government" have been substituted for "Local Government" in this section by sec. 4 of the Government of India (Adaptation of Indian Laws) Order, 1937

863. Record:—Although the object of a summary procedure is to shorten the course of trial, it is nevertheless incumbent on the Magistrate to put on record sufficient evidence to justify his order—*Aimuddi*, 27 Cal. 450; *Kash Mahomed*, 10 C.W.N. 79, 3 Cr.L.J. 178; *Gopal*, Ratanlal 778. If the particulars required by this section are not clearly given in a judgment in a summary trial convicting the accused, the judgment is defective and the conviction cannot stand—*Ghulam*, 23 Cr.L.J. 161.

The record should be written by the Magistrate himself; there is no provision enabling him to delegate this duty to a clerk—*Subramanya Ayyar*, 6 Mad. 396. The record should be made at the time of the trial and not afterwards. The admission of the accused should also be recorded at once—*Erugadu*, 15 Mad. 83. "District Magistrates should satisfy themselves from time to time by examination of the records of summary trials that the law regarding such trials is properly observed and especially that Magistrates do not exceed their jurisdiction in this regard"—*Cal G. R. & C. O.*, p. 16.

In summary proceedings a certain expedition is intended and indeed is most desirable. But the summary procedure laid down in the Cr. P. C., must not be made

more summary. Section 263, Cr. P. C., lays down the minimum requirements of the law. Moreover, while sec. 263, Cr. P. C., dispenses with the formality of recording evidence, it does not dispense with the necessity of hearing evidence or of following the procedure set out in Chap XXII, Cr. P. C., for summary trials. Nor does it dispense with the necessity of complying with the provisions of sec. 342, Cr. P. C., relating to the examination of the accused after the case for the prosecution is closed. In short, sec. 263, Cr. P. C., merely relieves the Court of the burden of recording evidence—*Choithram Menghraj v. Emp*, 39 Cr L J. 474 (475), 174 I C. 685, A I R. 1938 Sind 70, 10 R S. 259, 32 S L R. 684.

864. Evidence:—In a summary trial of a non appealable case the Magistrate need not record the evidence of witnesses in writing—*Shomeshar*, 2 Cr L J. 336, 1905 A.W.N. 143; *Howard v. Rustomji*, Ratanlal 334. But this does not mean that this section excuses a Magistrate from hearing the evidence of witnesses. If the accused denies the charge, the complainant and his witnesses must be examined, and the case must be decided upon the effect of their evidence, though the evidence need not be recorded—*Jabbar v. Tomiz*, 39 Cal 931, 16 C.W.N. 984; *Choithram Menghraj v. Emp*, supra.

Notes of evidence:—If at the commencement of the trial, the Magistrate is unable to determine whether the proper sentence to be passed should be an appealable one or not, he must make a memorandum of the substance of the evidence of each witness as his examination proceeds. But if he can, at this stage, determine that the sentence will be, in any event non-appealable, he need not record the evidence. If, however, he actually does so, the notes of the evidence form part of the record of the case and cannot be destroyed by him. Where the Magistrate had destroyed such record, the High Court in revison was unable to form an opinion on the propriety of the conviction and set it aside—*Satish Chandra* 48 Cal 280, 32 C L J 451, 22 Cr L J 452, 61 I C 846; *Atma Ram*, 49 All 131, 28 Cr L J 88; *Lal Chand* 26 Cr L J 1454, 89 I C 974, A I R. 1926 Nag 79. But in another case the Allahabad High Court has laid down that the destruction of the notes, whether in appealable or non-appealable cases, does not amount to any illegality. Under section 263, the Magistrate need not record any evidence, and, therefore, need not keep any notes of the evidence, under section 264, the Magistrate has only to record the substance of the evidence. Under these sections, the Magistrate is perfectly free to take notes to assist his recollection or, if he prefers, to take none at all; and whatever notes he makes are his private property which he can destroy if he pleases—*Mantoo*, 49 All 261, 25 A L J 140, 28 Cr L J 97 (per Walsh, J) (dissenting from 48 Cal 280); *Tidpanna*, 35 Cr L J. 841, 148 I C 1005, 58 Bom 298, 36 Bom L R 212, 1934 Cr C 544, A I R. 1934 Bom 157. A distinction should be drawn between 'recording of evidence' and making a few 'notes' of evidence. If he records the evidence formally, he must keep it on record; but if he jots down a few notes, merely for reference, those notes would not be a record of the evidence, and need not and should not be kept on the record—*Ibid* (per Boys, J). This case of *Mantoo* has been followed in *Ismail*, 49 All 562, 25 A L J 316, 28 Cr L J 442. The Oudh Chief Court is of opinion that in non-appealable cases the Code does not require the Magistrate to place upon record the notes of the evidence, and, therefore, where he made notes of the evidence for his own use which he destroyed after the case was disposed of, he committed no irregularity—*Bhawani*, 3 O W N. 946, 99 I C 108, A I R. 1927 Oudh 42, 28 Cr L J 76. See also *Ahmad Jan*, 33 Cr L J. 342, 136 I C. 641, 8 O W N. 1376, A I R. 1932 Oudh 98, Ind Rul 1932 Oudh 129, 1932 Cr C 161, 7 Luck. 498. The Bombay, Rangoon and Madras High Courts and the Sind Court are also of opinion that the rough and incomplete notes prepared by the Magistrate in a summary trial are outside the record, and cannot and should not be transcribed and attached to the record—*Chimanlal*, 29 Bom L R 710, 28 Cr L J. 537; *Nagoor Kenni v. Sithu*, 52 M L J. 32, 28 Cr L J. 138; *Rahimtullah*, 19 S L R 136, 25 Cr L J 1026; *Maung Po Saw*, 36 Cr L J. 892, 156 I C. 183, A I R. 1935 Rang 106, 13 Rang 225, 1935 Cr C. 315. This

only to a substantive sentence of imprisonment—*Po Htwa*, A.I.R. 1940 Rang. 171, 1940 Rang L.R. 223, 41 Cr.L.J. 768, 189 I.C. 627.

A Magistrate is competent to take security bond under sec. 106, on conviction in a summary trial—*Lachman*, 1886 A.W.N. 181; *Meghu*, 7 O.C. 338, 1 Cr.L.J. 1054.

Compensation:—Compensation may be awarded under section 250 to the accused in a trial held summarily—*Basava*, 11 Mad. 142; *Palani v. Krishnappa*, 59 M.L.J. 319, 32 Cr.L.J. 207 (208). But the requirements of sec. 250 must be satisfied, and the record should contain the reasons for considering the complaint to be false and vexatious. But omission to state reasons is a mere irregularity—*Palani v. Krishnappa*, supra.

263. In cases where no appeal lies, the Magistrate or Bench of Magistrates need not record the evidence of the witnesses or frame a formal charge; but he or they shall enter in such form as the *Provincial Government* may direct the following particulars:—

Record in cases where there is no appeal.

- (a) the serial number;
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- (c) the date of the report or complaint;
- (d) the name of the complainant (if any);
- (e) the name, parentage and residence of the accused;
- (f) the offence complained of and the offence (if any) proved, and in cases coming under clause (d), clause (e), clause (f) or clause (g) of sub-section (1) of section 260, the value of the property in respect of which the offence has been committed;
- (g) the plea of the accused and his examination (if any);
- (h) the finding, and, in the case of a conviction, a brief statement of the reasons therefor;
- (i) the sentence or other final order; and
- (j) the date on which the proceedings terminated.

Amendment:—The words "Provincial Government" have been substituted for "Local Government" in this section by sec. 4 of the Government of India (Adaptation of Indian Laws) Order, 1937

863. Record:—Although the object of a summary procedure is to shorten the course of trial, it is nevertheless incumbent on the Magistrate to put on record sufficient evidence to justify his order—*Ainuddi*, 27 Cal. 450; *Kash Mahomed*, 10 C.W.N. 79, 3 Cr.L.J. 178; *Gopal*, Ratanlal 778. If the particulars required by this section are not clearly given in a judgment in a summary trial convicting the accused, the judgment is defective and the conviction cannot stand—*Ghulam*, 23 Cr.L.J. 161.

The record should be written by the Magistrate himself; there is no provision enabling him to delegate this duty to a clerk—*Subramanya Ayyar*, 6 Mad. 396. The record should be made at the time of the trial and not afterwards. The admission of the accused should also be recorded at once—*Erugadu*, 15 Mad. 83. "District Magistrates should satisfy themselves from time to time by examination of the records of summary trials that the law regarding such trials is properly observed and especially that Magistrates do not exceed their jurisdiction in this regard"—*Cal G. R. & C. O.* p. 16.

In summary proceedings a certain expedition is intended and indeed is most desirable. But the summary procedure laid down in the Cr. P. C., must not be made

and do not apply to warrant cases; in the latter cases the examination is imperative—*Mahomed Hosaïn*, 41 Cal. 743; *Parmeshwar*, 3 P.L.T. 347, A.I.R. 1922 Pat. 296, 23 Cr.L.J. 440. Even the plea of the accused cannot take the place of the examination of the accused and render it unnecessary—*Parmeshwar*, supra. But the Sind and Nagpur Courts are of opinion that the examination of the accused is imperative in all summary trials whether of summons or of warrant cases. The words "if any" in this section do not limit the obligation imposed on Courts by sec. 342, or render it inapplicable to summary trials, but merely have reference to those cases in which owing to the admission or plea of accused (sec. 243) or owing to the weakness of the evidence called in support of the prosecution (secs. 245, 253) the accused can either be convicted on his own plea without the taking of evidence or acquitted on the evidence without the examination referred to in sec. 342—*Nabu*, 20 S.L.R. 34, 26 Cr.L.J. 1554, 90 I.C. 434 (F.B.); *Bhagwan*, 22 N.L.R. 65, 27 Cr.L.J. 632. See also *Choithram Menghraj v. Emp.*, in Note 863.

The Magistrate is not required to record a full statement of the examination of the accused. A brief note of the examination is sufficient—*Bhawani*, 3 O.W.N. 946, 28 Cr.L.J. 76, 99 I.C. 108, A.I.R. 1927 Oudh 42.

The examination of the accused is an essential part of the procedure. Such examination need not be taken with all the formalities prescribed by sec. 364, Cr. P. C. That section itself contains a proviso saying that nothing in this section shall be deemed to apply to the examination of an accused person under sec. 263, Cr. P. C. Nevertheless, such an examination there must be and some record of it must be contained in the proceedings—*Devjimal*, 26 Cr.L.J. 1484, 158 I.C. 923, 1935 Cr.C. 1047, A.I.R. 1935 Sind 193. It is the duty of the Magistrate to record not only the plea of the accused, but also his examination, if any. The words "if any" do not imply that it is optional to the Magistrate to examine the accused or not, but merely imply that where the accused has made a statement, particulars of his examination should be noted. The mere fact that the statement of the accused has not been recorded by the Magistrate in a summary trial, would not show either that the accused was never questioned at all or that the omission to record his statement is fatal. Such a defect is at the most a mere irregularity which can be cured under sec. 537, Cr. P. C., unless the defect has in fact occasioned a failure of justice—*Sa Ram*, A.I.R. 1935 All 217, 1935 A.L.J. 257, 158 I.C. 129, 1935 Cr.C. 260, 36 Cr.L.J. 1290, 57 All 660, 1935 A.L.R. 945. See also *Murat*, 29 Cr.L.J. 265, 107 I.C. 592, 26 A.L.J. 109, A.I.R. 1928 All 266. It would be absurd to say that the mere failure to record the examination has resulted in a miscarriage of justice. Where the Magistrate considered the statements of the accused, they cannot possibly have been prejudiced by the mere fact that he did not reduce those statements to writing in the proper column provided in the summary register—*Khan Mohammad v. Emp.*, 41 Cr.L.J. 531, 187 I.C. 769, A.I.R. 1940 Pesh. 11. See Notes 973 and 1012A.

868. Finding:—In summary trials, it is very important that there should be clear findings on question of fact, because it is only through such findings that the Court of Revision can form its own judgment with regard to the legality or otherwise of the proceedings of the trial Court—*Jagmohan*, 24 Cr.L.J. 916 (Oudh), 75 I.C. 292. See also *Baijoo v. Abdul Ahmad Khan*, infra.

If a Magistrate thinks that all that is necessary for him to say by way of judgment is that he sentences an accused to imprisonment or fine, then he is not doing his duty properly. It has to be remembered that cases have to go to the higher Courts when persons are convicted and the Magistrates should understand that it is their duty to write their judgments carefully. They may be concise and they need not be elaborate, but they should show on the face of them that the cases of both parties have been carefully and properly considered. Section 253, cl. (h), Cr. P. C., enjoins that a brief statement of reasons for the order should be given by the Magistrate. It is absolutely necessary that this should be done, otherwise the general public is likely

section does not prevent a Magistrate who tried a case in a summary way from recording evidence; it merely says that he need not, but if it does, it cannot by reason of sec. 264 form part of the record—*Hemandas*, A.I.R. 1936 Sind 40, 37 Cr.L.J. 455, 161 I.C. 267, 1936 Cr.C. 230, following *Nannier v. Desalier*, 55 Mad. 799. However summary a trial may be, the vital evidence against each accused must be recorded—*Bhujbal*, 37 Cr.L.J. 292, 160 I.C. 413, 18 N.L.J. 140.

865. Frame of charge:—This section exempts the Magistrate from framing a charge in case in which no appeal lies—*Natabar*, 27 C.W.N. 923 (924), 25 Cr.L.J. 1270, 82 I.C. 278, A.I.R. 1924 Cal. 63. Although it is not necessary under this section to frame a charge, still the accused must be called upon to answer to the particulars of the offence charged; and the Magistrate must specify the offence complained of in such a way as to give the accused notice of what is charged against him—*Jharu Sheikh*, 16 C.W.N. 696, 13 Cr.L.J. 224, 14 I.C. 320. See also Notes in para. 870.

865A. Clause (b):—Failure of the Magistrate to enter the date of the commission of offence in a prescribed form as required by this clause, in a summary trial, does not vitiate the trial and the defect is cured by sec. 537, Cr. P. C., if such failure has not led to any prejudice or failure of justice—*Mohsin v. Emp*, 41 Cr.L.J. 283, A.I.R. 1940 Pat. 272, 1940 P.W.N. 93, 186 I.C. 312.

866. Particulars of the offence:—See clause (f) The record should show clearly the precise nature of the offence, and should be complete in all particulars—*Madho*, 1882 A.W.N. 59. The facts found by the Magistrate must show what offence has been committed by the accused—*Lalit Mohun v. Chunder Mohan*, 3 C.W.N. 281; *Mahtab*, 1887 P.R. 7; *Sher Singh*, 1889 P.R. 5; *Din Mahomed*, 29 Cr.L.J. 877, 111 I.C. 461, 29 P.L.R. 647, A.I.R. 1929 Lah. 378, 10 Lah. 231. Further, the record, however brief, ought to be sufficient to show the necessary ingredients of the offence of which the accused has been found guilty—*Din Mahomed*, supra; *Kuchi*, 3 L.B.R. 3, 2 Cr.L.J. 375. The offence charged, the offence proved, and the reasons for conviction must be recorded in such a manner as to enable the Revision Court to say aye or no from within the four corners of the record itself whether the offence charged is an offence in point of law, whether the offence proved is an offence in point of law, and whether the reasons for the conviction are good and sufficient—*Kash Mahomed*, 10 C.W.N. 79 (81), 3 Cr.L.J. 178.

Under clause (f) the value of the property must be set forth. The Magistrate ought to direct his mind to the question and satisfy himself that the property in respect of which he was trying the accused was less than Rs. 50 in value. It is not enough that it is ascertainable from the records—*Brij Nandan*, 6 P.L.T. 114, A.I.R. 1922 Pat. 227, 25 Cr.L.J. 545, 81 I.C. 33, following *Abheen Parrida*, 20 W.R. 17 (Cr.). This view has not been followed by the same High Court in a recent case. It has been laid down that where the trying Magistrate did not comply with the requirements of cl (f) of this section but had before him the first information report which disclosed offences of house trespass and theft of grain worth Rs. 5-12-0 under secs 448 and 379, I. P. C., respectively it is impossible to assume that there was a real defect of jurisdiction by reason of the property alleged to have been stolen exceeding Rs. 50 in value, especially when no such suggestion was made below. The mere failure to enter the value in the form does not suffice to raise any question of possible or probable prejudice or failure of justice, the governing factor in sec 537 Cr. P. Code—*Mohsin v. Emp*, 41 Cr.L.J. 283 (284), A.I.R. 1940 Pat. 272, 1940 P.W.N. 93, 186 I.C. 312.

867. Examination and plea of accused:—See clause (g). The plea of the accused must be recorded; omission to record the plea will vitiate the conviction—*Murat Singh*, 26 A.L.J. 109, 107 I.C. 592, 9 A.I.Cr.R. 98, A.I.R. 1928 All. 266, 29 Cr.L.J. 265, *Shib Chandra v. Nanda Ravi*, 9 C.W.N. lxxvi.

In all warrant cases, there must be some examination of accused as laid down in sec. 312. Section 263 does not give the Magistrate any discretion whether he will examine the accused or not. The words "if any" in clause (g) are intended for summons cases

with the provision of cl (h) of this section—*Abdul Rahman*, 35 Cr.L.J. 1464, 15 Lah. 277, 151 I.C. 999, 36 P.L.R. 310, 1934 Cr.C 925, AIR 1934 Lah. 596. Even in a summary trial the statement of reasons for a conviction which the Magistrate is bound to record under sec. 263 (h), Cr P. C., should present a clear statement of the facts constituting the offence and should show that each of the ingredients necessary for a conviction has been considered and held proved by the Magistrate—*Dayaram*, A.I.R. 1935 Sind 144, following *Ram Harakh*, A.I.R. 1915 Sind 53, 30 I.C. 1001, 16 Cr.L.J. 713, 9 S.L.R. 89. Where, in a case under sec 447, I. P. C., the judgment does not state what the evidence is either of the alleged encroachment or trespass or of the intention that lay behind it and it does not give a single reason in support of the finding that the accused are guilty, the judgment does not fulfil the elementary requirements of the law—*Dakkamari Kannayya v. Vadali Venkatesan*, 38 Cr.L.J. 581, 168 I.C. 703, 1937 M.W.N. 323, 9 RM 620, 45 M.L.W. 471, A.I.R. 1937 Mad 480. But if the record submitted under sec. 441, Cr P. C., disclosed sufficient grounds for the Magistrate's decision, the High Court condoned the irregularity, if no failure of justice had occurred—*Derish*, 46 Mad 253 (256). The Bombay High Court holds that the omission to record reasons for conviction on the part of the Bench Magistrate is only an irregularity which can be cured by sec. 537, where there is clear evidence justifying the conviction. It is an omission which does not occasion failure of justice—*Namdeo*, 26 Bom LR 1236, 26 Cr.L.J. 466, 85 I.C. 146, AIR 1925 Bom. 138. See also *Thurman*, 20 L.W. 330, 25 Cr.L.J. 1084.

869A. Revision:—Ordinarily the High Court should not interfere in revision in a case tried summarily in which a relatively small fine has been imposed, but where there has been such confusion in the minds of the Magistrates and the consequence in the mind of the accused as to the offence with which the accused has been tried and charged, it should do so—*Chothram Menghraj v. Emp*, 39 Cr.L.J. 474, 174 I.C. 685, 32 S.L.R. 684, 10 RS 259, AIR 1938 Sind 70

264. (1) In every case tried summarily by a Magistrate or Bench in which an appeal lies, such cases. Record in appealable Magistrate or Bench shall, before passing sentence, record a judgment embodying the substance of the evidence and also the particulars mentioned in section 263.

(2) Such judgment shall be the only record in cases coming within this section

870. Record:—The record of the trial must be made at the time of the trial, and not subsequently prepared, after the close of the trial, from memory or from rough notes—*Eragadu*, 15 Mad 83. The judgment, which is the only record in appealable cases, must be written by the Magistrate himself (see sec. 265). He cannot delegate that duty to a clerk, nor can affix his signature to the record or judgment by a stamp—*Subramanya*, 6 Mad 396

Frame of charge—Where a Magistrate passes an appealable sentence he cannot make his record in the manner prescribed by sec. 263, but must record the evidence and frame a charge. Whereas in non-appealable cases it is stated in so many words in sec. 263 that no charge need be framed, but in sec. 264 which deals with appealable cases there are no words to that effect, this omission when applied with sec. 262 is tantamount to a clear direction that the ordinary procedure in warrant cases is to be followed and a formal charge is to be framed—*Natabar*, 27 C.W.N. 923 (925), 82 I.C. 278, AIR. 1924 Cal 63, 25 Cr.L.J. 1270. But in a more recent case the same High Court has expressed the opinion that there is no provision requiring the framing of a charge in a summary trial, whether in appealable or non-appealable cases. Sec. 264 states that what the record shall consist of, *viz.*, a judgment embodying the substance

to lose faith in the administration of justice—*Dal Chand v. Emp.*, 41 Cr.L.J. 493, 187 I.C. 642, A.I.R. 1940 All. 195, 1940 A.L.J. 154.

869. Reasons for conviction:—In a summary trial sec. 263 (h) and (i), Cr. P. C., require only the reason for the finding to be stated and not the reasons for the sentence—*Provincial Government v. Bhivram*, 41 Cr.L.J. 544, 188 I.C. 80, 1940 N.L.J. 242, A.I.R. 1940 Nag 264.

The Magistrate, in a summary trial must, in recording the reasons for the conviction, state them in such a manner that the High Court may in revision judge whether there were sufficient materials before the Magistrate to justify the conviction—*Murat Singh*, 26 A.L.J. 109, 107 I.C. 592, 9 A.I.Cr.R. 98, A.I.R. 1928 All 266, 29 Cr.L.J. 265; *Lalit v. Chunder*, 3 C.W.N. 281; *Jagan Nath*, 16 O.C. 357, 14 Cr.L.J. 594, 21 I.C. 466; *Punjab Singh*, 6 Cal. 579; *Me Da Li*, 1 L.B.R. 208; *Ahmad Jan*, 7 Luck. 498, 1932 Cr.C. 161, 33 Cr.L.J. 342, 136 I.C. 641, 8 O.W.N. 1376, A.I.R. 1932 Oudh 98, Ind. Rul 1932 Oudh 129; *Damodar*, 3 P.L.T. 499, 23 Cr.L.J. 94; *Janaki v. Raghunath*, 19 Cr.L.J. 719 (Pat.). The Magistrate should set out so much of the reasons that have influenced him as to satisfy the accused that the Magistrate has considered each of the ingredients of the offence necessary in law for the conviction to which the Magistrate has proceeded—*Mukundi*, 21 All. 189 (191); *Brijbasi*, 10 A.L.J. 251, 13 Cr.L.J. 708; *Ram Harakh*, 9 S.L.R. 89, 16 Cr.L.J. 713, A.I.R. 1915 Sind 53, 30 I.C. 1011; *Dayaram Satoomal*, 37 Cr.L.J. 715, 162 I.C. 281, A.I.R. 1935 Sind 144, 1935 Cr.C. 752; *Baijoo v. Abdul Ahmad Khan*, A.I.R. 1939 Oudh 37, 1938 O.A. 915, 14 Luck. 325, 40 Cr.L.J. 141, 178 I.C. 722, 1938 O.L.R. 512, 1938 O.W.N. 1130, 1938 A.W.R. (C.C.) 123; and while this should be recorded with brevity, the brevity should not be such as to tend to obscurity—*Mukundi*, supra, and *Baijoo v. Abdul Ahmad Khan*, supra. These safeguards are essential so that in case of revision the High Court may have sufficient materials on record before it for arriving at the conclusion as to whether the order of the Magistrate is right or wrong—*Baijoo v. Abdul Ahmad Khan*, supra. Thus, a judgment in a single line is not a judgment according to law—*Jankey*, 20 Cr.L.J. 431 (Pat.).

Failure to record a brief statement of reasons is fatal, and the whole proceedings are illegal and liable to be set aside—*Dina Nath v. Jogendra*, 6 C.W.N. 40; *Punjab Singh*, 6 Cal. 579; *Shidgauda*, 18 Bom. 97; *Dervish*, 46 Mad 253; *Magsud*, 1 P.L.T. 716; *Mainjan*, 24 O.C. 293; *Nisarali*, 28 Cr.L.J. 495, 101 I.C. 671, A.I.R. 1927 Nag 250; *Murat*, 29 Cr.L.J. 265, 107 I.C. 592, 26 A.L.J. 109, A.I.R. 1928 All. 266; *Mabub v. Kesavalu*, 1933 M.W.N. 736; *Dakkamarri Kannayya v. Vadali Venkatesan*, 38 Cr.L.J. 581, 168 I.C. 703, 1937 M.W.N. 323, 9 R.M. 620, 45 M.L.W. 471, A.I.R. 1937 Mad 480. Even the defect could not be cured by the Magistrate (Presidency) subsequently submitting the reasons to the High Court when the record was called for under sec. 441—*Dervish Hossain*, 46 Mad. 253; *Haladhar*, 9 C.W.N. lxxv. In summary trial the judgment need not be a very long and detailed one but it is the duty of the Magistrate to give a brief summary of the evidence and a concise statement of the reasons if the trial ends in a conviction. These safeguards are essential so that in case of revision the High Court may have sufficient materials on the record before it for arriving at the conclusion as to whether the order of the Magistrate is right or wrong—*Murli Dhar*, 32 Cr.L.J. 50, 127 I.C. 849, 31 P.L.R. 317 and 576, A.I.R. 1930 Lah. 481, Ind. Rul. 1930 Lah. 881, 1930 Cr.C. 593. Where in acquitting the accused the Magistrate wrote: "That at best is a case in which the accused are entitled to the benefit of doubt, and the accused are, therefore, acquitted" without discussing and not even mentioning the evidence of the prosecution witnesses, the acquittal was illegal and should be set aside *Akbar Ali*, 35 Cr.L.J. 677, 148 I.C. 430, 11 O.W.N. 487, 1934 Cr.C. 585, A.I.R. 1934 Oudh 177. A Magistrate should, in recording his reasons for the conviction in a summary trial under cl. (h) of sec. 263, Cr. P. C., show that there was sufficient material before him to support the conviction and his record, however brief, must state the necessary ingredients of the offence of which the accused has been found guilty. Where the Magistrate merely says: "I believe the prosecution," there has been no compliance

(2) The *Provincial Government* may authorize any Bench of Magistrates empowered to try offences summarily to prepare the aforesaid record or judgment by means of an officer appointed in this behalf by the Court to which such Bench is immediately subordinate, and the record or judgment so prepared shall be signed by each member of such Bench present taking part in the proceedings.

(3) If no such authorization be given, the record prepared by a member of the Bench and signed as aforesaid shall be the proper record.

(4) If the Bench differ in opinion, any dissentient member may write a separate judgment.

Amendment:—The words "Provincial Government" have been substituted for "Local Government" in this section by sec. 4 of the Government of India (Adaptation of Indian Laws) Order, 1937.

871A. Sub-sections (1) and (3):—Sub-section (3) lays down that if the record is prepared by a *member* of the Bench, it shall have to be signed by each member taking part in the proceedings. This clause does not apply to the case of preparation of record or judgment by the *presiding officer* of the Court under sub-sec. (1). If the presiding officer himself prepares the record or judgment, it is sufficient if he alone signs it, and it is not necessary that the other members of the Bench should sign the record or judgment—*Ramakottiah v. Subba Rao*, 52 Mad 237, 55 M.L.J. 576, 29 Cr.L.J. 973 (1974). But the other members must be aware of the contents of the judgment and must approve of the judgment. So, where after the other members of the Bench had left the Court premises, the presiding officer prepared the judgment and delivered it so that those members had no opportunity either to express assent or dissent, *held* that the judgment was not a proper judgment—*Ramakottiah*, *supra*.

The "signing" must be by putting the full name of the Magistrate or Magistrates signing the judgment. Mere putting in of initials makes the judgment defective and the conviction must be set aside—*Brahmanah*, 54 Mad 252, 32 Cr.L.J. 430 (431), 59 M.L.J. 674, 1930 M.W.N. 787, 32 M.L.W. 280, 129 I.C. 633.

CHAPTER XXIII.

OF TRIALS BEFORE HIGH COURTS AND COURTS OF SESSION.

A.—Preliminary.

266. In this Chapter, except in sections 276 and 307, and in Chapter XVIII, the expression "High Court" defined. "*High Court*" means a High Court within the meaning of the Government of India Act, 1935, and includes such other courts as the Provincial Government may by notification in the Official Gazette, declare to be High Courts for the purposes of this Chapter and of Chapter XVIII.

Amendment:—In this section the words "the Court of the Judicial Commissioner of Sind" have been substituted in place of the words "the Courts of the Judicial

of the evidence, and the particulars set out in sec. 263; and in sec. 263 it is not necessary to frame a formal charge. In any case the omission to frame a formal charge under sec. 264 would be cured by sec. 535—*Madhav Chandra*, 53 Cal. 738, 27 Cr.L.J. 1295 (1296), 98 I.C. 191, A.I.R. 1926 Cal. 1202, distinguishing *Natabar*, supra. In *Kallu*, 26 Cr.L.J. 1334, 98 I.C. 310, A.I.R. 1925 Oudh 722 and *Salig Ram*, 7 Lah. 303, 27 Cr.L.J. 639, 94 I.C. 415, T Lah.L.J. 140, A.I.R. 1926 Lah. 301, 27 P.L.R. 265, it is laid down that even in appealable cases it is not necessary to frame a charge; and a similar view has been taken in *Karu*, Ratanlal 768, and *Titu*, 1 P.L.T. 652, 21 Cr.L.J. 630.

871. Substance of evidence:—The Magistrate is not bound to record the substance of every separate depositions, but he is to state generally what is the substance of the witnesses' evidence—*Jamna Prasad*, 6 O.W.N. 45, 30 Cr.L.J. 557, 116 I.C. 57, A.I.R. 1929 Oudh 297. The substance of the evidence is a matter quite distinct from the facts which may be considered as proved by the evidence. It should be recorded in such a way as to enable the Appellate Court to form an opinion whether the evidence is sufficient to support a conviction—*Po Ka*, 9 Cr.L.J. 23, 4 L.B.R. 338; *Murlihar*, 31 P.L.R. 317, 32 Cr.L.J. 50, 127 I.C. 849, A.I.R. 1930 Lah. 481, Ind. Rul. 1930 Lah. 881, 1930 Cr.C. 593. Where the judgment convicting the accused did not embody the substance of the evidence but the Magistrate merely recorded that the prosecution witnesses supported the complainant and that the evidence of the defence witnesses was conflicting and unreliable, held that the judgment was defective and the conviction could not stand—*Salim*, 24 Cr.L.J. 484, A.I.R. 1924 Oudh 167; *Nurudin*, 30 Bom.L.R. 954, 20 Cr.L.J. 1005 (1006), 112 I.C. 221. The Court is not required to record any evidence at all and, therefore, there is no test by which the substantiality of its record can be gauged. It is right to assume that the matter rests with the Court—*Subramania v. Nachiar*, 32 Cr.L.J. 689, 131 I.C. 174, 1931 M.W.N. 118, 33 M.L.W. 311, 1931 Cr.C. 329, Ind. Rul. 1931 Mad. 510, A.I.R. 1931 Mad. 233.

When the substance of the evidence is very imperfectly recorded, the Appellate Court should not quash a conviction on that ground. If the Appellate Court found it impossible to dispose of the appeal because of such defect, it should have required the Lower Court to remedy the defect by properly recording the substance of evidence in a fresh judgment after re-examining the witnesses, if necessary, or to have ordered a retrial with that view—*Karan Singh*, 1 All. 680.

In a summary trial of an appealable case, a Magistrate made rough notes of the evidence which he subsequently copied and placed on the record and destroyed the original notes. It was held that the Magistrate's action was improper, because the destruction of the original notes was tantamount to destroying the original record, with the result that there was no legal evidence on the record which an Appellate Court could go into—*Jagdish*, 1 P.L.T. 63, 21 Cr.L.J. 229, 55 I.C. 101. See also *Satish Chandra*, 48 Cal. 280; *Atma Ram*, 49 All. 131 and *Lal Chand*, 26 Cr.L.J. 1454, 89 I.C. 974, A.I.R. 1926 Nag. 79; as well as the contrary rulings cited in Note 864 under sec. 263.

Sub-section (2):—The Legislature has laid down in this clause that in the case of summary trials the judgment with certain particulars shall be the only record, and therefore the Appellate Court is not justified in travelling outside the record in hearing an appeal from a conviction in a summary trial—*Chocklinga*, 55 M.L.J. 117, 29 Cr.L.J. 625, 109 I.C. 897, A.I.R. 1928 Mad. 597, 28 M.L.W. 394.

265. (1) Records made under section 263 and judgments recorded under section 264 shall be written

Language of record and judgment.

by the presiding officer, either in English or in the language of the Court, or, if the

Court to which such presiding officer is immediately subordinate so direct, in such officer's mother-tongue.

of the evidence, and the particulars set out in sec. 263; and in sec. 263 it is not necessary to frame a formal charge. In any case the omission to frame a formal charge under sec. 264 would be cured by sec. 535—*Madhav Chandra*, 53 Cal. 738, 27 Cr.L.J. 1295 (1296), 98 I.C. 191, A.I.R. 1926 Cal. 1202, distinguishing *Natabar*, supra. In *Kallu*, 26 Cr.L.J. 1334, 98 I.C. 310, A.I.R. 1925 Oudh 722 and *Salig Ram*, 7 Lah. 303, 27 Cr.L.J. 639, 94 I.C. 415, T Lah.L.J. 140, A.I.R. 1926 Lah. 301, 27 P.L.R. 265, it is laid down that even in appealable cases it is not necessary to frame a charge; and a similar view has been taken in *Karu*, Ratanlal 768, and *Titu*, 1 P.L.T. 652, 21 Cr.L.J. 630.

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265. (1) Records made under section 263 and judgments recorded under section 264 shall be written

Language of record and judgment.

by the presiding officer, either in English or in the language of the Court, or, if the

Court to which such presiding officer is immediately subordinate so direct, in such officer's mother-tongue.

not form a body but each acts and expresses his opinion individually and the Judge is to invite the opinion of each separately and record it—*Thurumalai*, 24 Mad. 523; *Shaker*, 14 Bom L.R. 710, 13 Cr.L.J. 677; *Jaisukh*, 43 All 125, 19 A.L.J. 1; *Jairam*, 20 N.L.R. 129, 25 Cr.L.J. 459, 77 I.C. 811, A.I.R. 1924 Nag 287. In a trial held with the aid of assessors, the individual opinion of each assessor is taken, but in a trial by jury, the individual opinions of the members of the jury are never intended to be disclosed—*Abdul Hamid*, 36 Mad. 585, 15 Cr.L.J. 197. But the law makes no distinction as to the procedure between a trial by jury and a trial with aid of assessors, except as to summing up of the case and the manner in which the verdict of the jury and the opinions of the assessors are respectively taken—*Mansing*, 33 Bom. 423

As regards *appeal*, the considerations governing the appeal from the trial held with aid of assessors differ greatly from those governing an appeal from the trial by a jury. In the latter case, the appeal is restricted by the provisions of sec. 423 (2) whereas in the former case the whole case is before the Appellate Court—*Champa*, 29 Cr.L.J. 325 (329), 108 I.C. 81, A.I.R. 1928 Pat 326, 9 A.I.Cr.R. 545

It is clear that a juror stands on a higher footing, speaks with greater authority and takes a larger share in the decisions of a criminal case than does an assessor and it may be taken as axiomatic, therefore, that in the absence of a specific prohibition an objection that could not be upheld regarding a juror would be ruled out in the case of an assessor—*Pahlu*, A.I.R. 1939 Lah 475 (476), 11 L.R. 1939 Lah. 243, 41 Cr.L.J. 55, 184 I.C. 549, 41 P.L.R. 731.

The assessors try nothing and decide nothing they merely assist the Judge. The jury, on the other hand, actually try the matters with which they are entrusted. They are invested with a status akin to that of the Judge himself. The fundamental conception underlying all jury trials is that the jury are there actually to try the case and not merely to aid the Judge in arriving at a conclusion. They are invested with a special status and given special powers and the ultimate responsibility for all decisions within their sphere is meant to be theirs and theirs alone. One important effect of this is that when the trial lasts for more than one day the Judge has to consider under sec. 296 whether the jurors shall be allowed to go to their respective homes or whether they shall be kept together under the charge of an officer of the Court. Sections 298 and 299 define the respective functions of the Judge and jury, and sec 297 directs the Judge to "charge the jury" while sec 300 states that "no person other than a juror shall speak to or hold any communication with" any member of a jury after the charge. Compare this with sec 309 which deals with assessors and the fundamental nature of the difference at once becomes evident. No charge is delivered to them; on the contrary, the Judge is given a discretion "to sum up" the evidence for the prosecution and the defence or not as he thinks fit. It is not obligatory. No question about segregation arises and the Judge "is not bound to conform to the opinion of the assessors." He has not got anything like the same freedom of action in a jury trial. If he agrees with the verdict, then, of course, no difficulty arises but if he disagrees, then his hands are very considerably tied. In the first place, he has no powers of acquittal or conviction or even ordering a fresh trial. He can only 'submit the case' to the High Court. But even this he cannot do merely because he disagrees. He has to be 'clearly of opinion that it is necessary for the ends of justice' to submit the case—*Dattatraya Sadashiv v Emp*, A.I.R. 1940 Nag 17 (19), 186 I.C. 402, 41 Cr.L.J. 289, 11 L.R. 1940 Nag 391 (F B)

269. (1) The Provincial Government may, by order in the official Gazette, direct that the trial of all offences, or of any particular class of offences, before any Court of Session, shall be by jury in any district, and may, revoke or alter such order.

(2) The Provincial Government, by like order, may also

Commissioners of the Central Provinces and Sind" by the Central Provinces Courts (Supplementary) Act (VIII of 1935). This amendment was thought necessary in view of the establishment of the High Court of Judicature at Nagpur.

The words "means a High Court within the meaning of the Government of India Act, 1935, and includes such other courts as the Provincial Government may by notification in the Official Gazette" have been substituted in this section for "means a High Court of Judicature established under the Indian High Courts Act, 1861, or the Government of India Act, 1915, and includes the Chief Court of Oudh, the Court of the Judicial Commissioner of Sind and such other Courts as the Governor-General in Council may, by notification in the Gazette of India" by the Government of India (Adaptation of Indian Laws) Order, 1937.

871B. The Judicial Commissioner (e.g., of Sind) is a High Court only for the purposes of Chapters 18 and 23, but not for the purpose of Ch 31 (Appeal). A Judicial Commissioner holding a sessions trial on the Original Side is to be deemed a Sessions Judge and not a High Court for the purposes of Ch 31, so that an appeal will lie from his decision to the Bench of the Judicial Commissioner's Court—*Khudabux*, 19 S.L.R. 309, 26 Cr L.J. 562.

Trials before High Court to be by jury. **267.** All trials under this Chapter before a High Court shall be by jury;

and, notwithstanding anything herein contained, in all criminal cases transferred to a High Court under this Code or under the Letters Patent of any High Court established under the Indian High Courts Act, 1861, or the Government of India Act, 1915, or the Government of India Act, 1935, the trial may, if the High Court so directs, be by jury.

Amendment:—The words "or the Government of India Act, 1935" have been inserted after "Act, 1915" in this section by the Government of India (Adaptation of Indian Laws) Order, 1937.

Trials before Court of Session to be by jury or with assessors. **268.** All trials before a Court of Session shall be either by jury, or with the aid of assessors.

872. Trials ordinarily with assessors:—In the absence of a Notification under sec 269, a trial in the Court of Session must be with the aid of assessors—*Skilling*, 18 P.R. 1888.

In the Administered Areas in Hyderabad State the discretionary power of dispensing with a jury and aid of assessors is conferred upon the Sessions Judge. The Additional Sessions Judge is, therefore, also entitled to exercise his discretion under sec. 268, Cr P. C., and try cases without jury or aid of assessors—*Fakira v Emp.*, 38 Cr L.J. 498 (499), 167 I.C. 790, 39 P.L.R. 334, 1937 O.L.R. 216, 41 C.W.N. 741, 1937 M.W.N. 546, 9 R.P.C. 231, 1937 A.Cr.C. 74, 3 B.R. 426, 1937 O.W.N. 412, A.I.R. 1937 P.C. 119 (P.C.).

Trial by jury and trial with assessors—Difference:—In a trial by jury, the jury is the real tribunal and is aided by the Judge, and in certain matters directed by the Judge; but in a trial with the aid of assessors, the Judge is the sole tribunal and Judge of law and fact, and the responsibility of the decision rests solely with him, though in the decision of the case he is expected to take into consideration the opinion of each assessor. In a trial by jury, the jury form a tribunal or body with a foreman, and the verdict is the verdict of the body, and when there is no unanimity among the members of the body, the opinion of the majority prevails as the verdict of the body. But in the case of a trial with the aid of assessors, the assessors do

that ground—*Mohim Chander*, 3 Cal. 765. And unless the accused objects to such procedure before the verdict is delivered, he cannot be allowed to object with regard to it subsequently in appeal—*Mansingh*, 33 Bom. 423; *Gulab Chand*, 27 Bom.L.R. 1416, 27 Cr.L.J. 650. The accused were charged under sec. 412, I. P. Code, which was an offence triable by jury, and were tried by jury. The jury however brought in a verdict of guilty under sec. 411, I. P. Code, which was an offence triable with the aid of assessors. It was contended that the jury was wrong in convicting the accused for an offence triable with assessors and that the trial ought to have been held with the jurors as assessors, under sec. 269 (3). Held that sec. 269 (3) did not apply as *no charge was framed* for an offence under sec. 411, I. P. Code. The conviction of the accused under sec. 411, I. P. C., was not illegal, *vide* sec. 238, Cr. P. Code—*Gulab Chand*, *supra*. Where an assessor-case is tried by jury, the Judge cannot treat the verdict of the jury as the opinion of assessors so as to be able to concur with the opinion of the minority, if he disagrees with the opinion of the majority. If the Judge disagrees with the opinion of the majority, he must submit the case to the High Court under sec. 307—*Surja*, 25 Cal. 555.

875. Joint trial of jury-case and assessors-case:—The plain meaning of the language used is that the procedure indicated in sec. 269 (3), Cr. P. C., is applicable when the accused are charged with more than one offence, and when these offences are not all triable by jury. Where no accused person was charged with more than one offence, one was charged with conspiracy to murder, a charge triable by assessors and others were charged with murder, a charge triable by jury, sec. 269 (3), Cr. P. C., was not applicable and the form of the trial with the aid of the jury sitting also as assessors was erroneous—*Ram Govinda Ghose v Emp.*, 39 Cr.L.J. 625 (626), 175 I.C. 529, 10 R.C. 802, 42 C.W.N. 781, A.I.R. 1938 Cal. 364.

Under sub-sec. (3) an accused may be tried simultaneously at one trial by the jury for offences triable by jury, and by the Judge with the aid of the same jurors as assessors for offences triable with the aid of assessors—*Sennimalai*, 2 L.W. 933, 16 Cr.L.J. 717. But in such a trial, the Judge must always preserve a distinction between the two cases (the jury-case and the assessor-case) and must not treat the whole case as a jury-case. He must separately record the verdict of the jury in the jury-case, and must separately record the opinions of the jurors as assessors in the assessor-case. If he disagrees with the verdict of the jury, he must not send the whole case to the High Court but must send only the jury-case under sec. 307, and pass judgment with reference to the assessor-case under sec. 309—*Vyankatsingh*, 9 Bom.L.R. 1057, 7 Cr.L.J. 236; *Kalidas*, 8 Bom.L.R. 599, 4 Cr.L.J. 192; *Kambala Narayana*, 36 M.L.J. 452; *Pachaimuthu*, 55 Mad. 715, 33 Cr.L.J. 533 (534); *Chanbasappa*, 33 Bom.L.R. 1571, 33 Cr.L.J. 172; *Devu*, Ratanlal 600. In such cases it is desirable that the Judge should explain clearly to the jurors the double capacity in which they are acting—*Sivaga*, 2 Weir 334. If in the course of such trial it appears that only one offence was committed, *viz.*, an offence triable with assessors, and the Judge tries the case with the jury and disagrees with the verdict of the jury, he cannot send the case to the High Court under sec. 307, but should pass judgment under sec. 309, because he must treat the case as one triable with the aid of assessors, treating the jurors as assessors—*Anga Valayan*, 22 Mad. 15.

Again, in such joint trial (trial of jury-case and assessor-case) all persons who would serve as jurors in the jury-case must serve as assessors in the assessor-case. Where the Judge after taking the verdict of the jurors in a jury-case, took only the opinions of *two* of them in the assessor-case, it was held that the Judge's procedure was illegal; he should have taken the opinion of *all* the jurors as assessors—*Ramkrishna*, 23 Mad. 598. Similarly, where in such joint trial the Judge selected five gentlemen as jurors in the jury-case, and two of them only as assessors in the assessor-case, it was held that the Judge acted illegally; he ought to have taken ~~all~~ ^{the} five jurors as assessors in the assessor-case—*Pingai*, 21 M.L.J. 520, 12 Cr.L.J. 239.

In such cases at the ~~conclusion~~ ^{close} of the trial the Court ~~of the~~ ^{must} take the opinion of the jury, and then the opinion of the jurors as assessors. At ~~the~~ ^{the} of the jury

declare that, in the case of any district in which the trial of any offence is to be by jury, the trial of such offences shall, if the Judge, on application made to him or of his own motion so directs, be by jurors summoned from a special jury list, and may revoke or alter such order.

(3) When the accused is charged at the same trial with several offences of which some are and some are not triable by jury, he shall be tried by jury for such of those offences as are triable by jury, and by the Court of Session, with the aid of the jurors as assessors, for such of them as are not triable by jury.

Amendment:—The words "Provincial Government" have been substituted for "Local Government" in this section by sec. 4 of the Government of India (Adaptation of Indian Laws) Order, 1937.

873. Scope:—In view of the provisions of this section there can be no doubt that the normal procedure under the Code is trial by assessors, and it is only when the Local Government publish an order in the Gazette that the trial of an offence becomes trial by jury. Such orders may be made or revoked at any time—*Jogueswar Ghosh*, A.I.R. 1936 Cal 527, 40 C.W.N. 1186, 166 I.C. 418, 1936 Cr.C. 137, 38 Cr.L.J. 212, I.L.R. (1937) 1 Cal 306, 65 C.L.J. 351, 9 R.C. 29.

The plain words of sec. 269, Cr. P. C., are that any particular class of offences before a Court of Session may be directed to be tried by a jury. This implies that the offences must be before the Court of Session and cannot derogate from the power otherwise given to prescribe which offences should not come before that Court. Further, this clause speaks of "all or any particular class of offences" and of "any district" and thus gives discretion both as regards the crime and the place of trial. Section 269, Cr. P. C., cannot be read with sec. 29, Cr. P. C., so as to hold that the Local Government may direct that all or any class of offences not punishable with death shall be tried by jury before the Sessions Court, and not by Magistrates invested with power under sec. 30, Cr. P. Code—*Prithvinath*, A.I.R. 1938 Nag. 56 (58), 20 N.L.J. 151, I.L.R. 1938 Nag. 248, 175 I.C. 935, 39 Cr.L.J. 660, 11 R.N. 18.

'Class of offences':—The classes of offences referred to in this section are not restricted to the classification found in the Penal Code, e.g., offences against the State, offences against public tranquillity, etc., or to the classification found in this Code, e.g., bailable offences, cognizable offences, etc. Offences may be classified according to the persons who commit them, or according to the person or property against whom or which they are committed, or in regard to the particular occasion in connection with when they are committed—*Ganapathi*, 23 Mad 632, 2 Weir 331. Where by a Notification the Government directed that in a particular district an offence under sec. 436, I. P. C., was to be tried by jury and not with the aid of assessors, held that an offence under sec. 436 read with sec. 149, I. P. C., should also be tried by jury and not with the aid of assessors, because an offence under sec. 436-149, I. P. C., is not a different offence from an offence under sec. 436, I. P. Code—*Ramsundar*, 5 Pat. 238, 7 P.L.T. 178, 27 Cr.L.J. 512.

Counter case:—It is not proper that the case and the counter-case arising out of the same incident and committed to the Sessions should be tried at one and the same time—*Jaggu Naidu*, 1932 M.W.N. 692. See Notes 830A and 883

874. Trial of jury-case with assessors and vice versa:—If a jury-case is tried with the aid of assessors, and no objection is taken at the trial, the trial will stand good by virtue of sec. 536 (2)—*Ganapathifi*, 23 Mad 632; *Sakhawat v. Emp.*, 33 Cr.L.J. 330, 167 I.C. 61, A.I.R. 1937 Nag. 50, 19 N.L.R. 320, I.L.R. 1937 Nag. 277.

So also, the trial by jury of a case properly triable with assessors is not invalid on

in the districts of the 24-Parganas, Hooghly, Burdwan, Murshidabad, Nadia, Patna and Dacca (*vide* Notification, dated the 27th March 1893, published in the Calcutta Gazette of 1893, Pt. I, p. 252 and Notification No 226-J D., dated the 2nd September 1895, published in the Calcutta Gazette of 1895, Pt. I, p. 867) and Chittagong, Mymensingh, Rajshahi and Jessore (*vide* Notification No 2330-J., dated the 19th April 1897, published in the Calcutta Gazette of the 21st April 1897) and Khulna (*vide* Notification No 3773-J., dated the 15th November 1905, published in the Calcutta Gazette of the 22nd November 1905) that is to say—

Offences defined in the following chapters of the Indian Penal Code, *viz.* :—

Chapter VIII—(Offences against the public tranquillity);

“ XI—(False evidence and offences against public justice);

“ XVI—(Offences affecting the human body);

“ XVII—(Offences against property);

“ XVIII—(Offences relating to documents and to trade or property marks); and

“ XX—(Offences relating to marriage);

and abetments of, and attempts to commit, such offences

The trial of offences in the districts of Bakarganj, Bankura, Birbhum, Bogra, Dinajpur, Faridpur, Maldah, Midnapur, Noakhali, Pabna, Rangpur and Tipperah under Chapters VIII, XI, XII, XVI, XVII, XVIII and XX of the Indian Penal Code and of offences under sec. 52 of the Indian Post Office Act, 1898, shall be by jury (*Vide* Notification No 2505-J, dated the 15th July 1918, published in the Calcutta Gazette of the 17th July 1918, Pt. I, p. 1062)

Any trial commencing before any Court of Sessions in the districts of 24-Parganas, Hooghly, Howrah, Burdwan, Murshidabad, Nadia, Dacca, Chittagong, Mymensingh, Rajshahi, Jessore and Khulna, of offences of the following classes, namely —

(a) offences under Chapter XII (offences relating to coin and Government stamps) of the Indian Penal Code, 1860;

(b) offences under section 52 of the Indian Post Office Act, 1898 (VI of 1898); and

(c) abetments of, and attempts to commit, such offences,

shall be by jury. (*Vide* Notification No 2531-J, dated the 15th July 1918, published in the Calcutta Gazette of the 17th July 1918)

So much of the orders contained in the Notifications, dated the 7th January 1861, and the 13th October 1862 and Notifications No 2360-J, dated the 19th April 1897, No. 3773-J., dated the 15th November 1905, and No 2505-J, dated the 15th July 1918, published in the Calcutta Gazette of the 8th January 1861, the 15th October 1862, the 21st April 1897, the 22nd November 1905 and the 17th July 1918, respectively, as applies to offences under sections 400 and 401, Chapter XVII of the Indian Penal Code, has been revoked (*Vide* Notification No 55-J., dated the 3rd January 1933)

Bengal Government Notification No 3347-J, 22nd September, 1939—In exercise of the power conferred by sub-section (1) of section 269, of the Code of Criminal Procedure, 1898, (Act V of 1898), the Governor is pleased to direct that any trial commencing on and after the 1st January, 1940 before any Court of Session of an offence under Chapter V-A of the Indian Penal Code (Criminal Conspiracy) shall be by jury when it is a conspiracy to commit an offence which is triable by jury. By order of the Governor, A L Blank, Secy to the Govt. of Bengal.

In *Nurul Amin v. Emp.*, 40 Cr L J. 667 (668), 182 I.C. 386, AIR 1939 Cal. 335, ILR (1939) 1 Cal 511, Rau, J., pointed out an anomaly (*sc.* whereas certain offences were triable by jury, a mere conspiracy to commit any one of them was not so triable) resulting from the state of the notifications under this section and suggested some sort of revision of the same. The abovementioned notification seems to have been issued to remove the aforesaid anomaly.

Under sub-sec. (2):—In the districts of the 24-Parganas, Hooghly, Burdwan, Murshidabad, Nadia, Patna, Dacca, Chittagong, Mymensingh, Rajshahi and Jessore

the Court takes their opinion as assessors and then gives its judgment as regards the charge tried with the aid of assessors. It will often happen that the Judge so far as the charge triable by him with the aid of the assessors is concerned, will have to take into consideration the same evidence which has been believed or disbelieved by the jury, and will base a conviction or acquittal on that very evidence. He is not fettered in any manner by the opinion of the jury expressed in respect of the charges triable by the jury, for the simple reason that the charge with which the Judge is dealing was not triable by the jury at all, and so their opinion about the evidence so far as that charge triable by the Judge alone with the aid of the assessors was concerned, is no way binding on the Judge—*Ram Das*, 35 Cr.L.J. 1349 (1354), 151 I.C. 442, 1934 Cr.C. 130, 1934 A.L.J. 852, A.I.R. 1934 All. 61. See also *Mhasku*, A.I.R. 1935 Bom 165, 37 Cr.L.J. 26, 158 I.C. 1090, 37 Bom L.R. 109, 1935 Cr.C. 325.

If the conviction for the offences triable by jury is set aside because of certain defect in the verdict, it does not follow as a necessary consequence of it that the conviction for the other offences for which the accused has been tried with the aid of assessors must also be set aside—*Saldeo*, A.I.R. 1936 Oudh 164, 159 I.C. 919, 1936 O.W.N. 28, 1936 O.L.R. 18, 37 Cr.L.J. 182. But it would certainly be a most extraordinary thing that, if the main part of the case were disbelieved and an order of acquittal passed on the basis of a verdict of not guilty returned by the jury, the accused should be convicted in the same trial, ignoring their verdict as assessors in respect of offences triable with the aid of assessors, on the substratum, if any, which remains, without assigning reasons for such conviction—*Jogneswar Ghosh*, A.I.R. 1936 Cal. 527, 40 C.W.N. 1186, 166 I.C. 418, 1936 Cr.C. 737, 38 Cr.L.J. 212, 1 L.R. (1937) 1 Cal. 306, 65 C.L.J. 351, 9 R.C. 529. See also *Cheru Sheikh*, 40 C.W.N. 1374, where the combined procedure of a trial by jury of some of the charges and a trial with the aid of jurors as assessors of the other charges was deprecated. This is, however, the procedure not merely contemplated, but required by the provisions of sec. 263 (3), Cr. P. C., and an accused may legitimately complain if this procedure is not followed—*Goloke Behari Takal v. Emp.*, 39 Cr.L.J. 161 (169), 173 I.C. 65, A.I.R. 1938 Cal. 51, 66 C.L.J. 225, 42 C.W.N. 129, 10 R.C. 441, 1 L.R. (1938) 1 Cal. 290. But the practice of adding a charge under sec. 120B, I. P. C., in case where it is not necessary with the result that the jurors sit in the same trial as assessors, has been condemned more than once—*Abdul Gafur Kotwal v. Emp.*, 40 Cr.L.J. 101 (102), 178 I.C. 637, A.I.R. 1938 Cal. 658, 1 L.R. (1938) 1 Cal. 636. The High Court has also condemned the practice of withdrawing the charge of substantive offence and substituting a charge of conspiracy as the effect of the alteration in the charges has been to deprive the accused of their right to be tried by a jury—*Benoy Bhusan Chatterjee v. Emp.*, 40 Cr.L.J. 166, 179 I.C. 156, A.I.R. 1938 Cal. 857.

876. Transfer of case from jury-district to non-jury district and vice versa:—The words "trial shall be by jury in any district" mean that the trial shall be by jury if the case is tried in a district in which the notification is in force; they do not mean that the case shall be tried by jury even if it is transferred from a jury-district to a district where jury trial does not prevail. The High Court has power under sec. 526 to transfer a sessions case from a jury-district to a non-jury district, and section 269 does not in any way limit that power; but in such a case the trial in the latter district will be with the aid of assessors—*Jumo*, 10 S.L.R. 154, 18 Cr.L.J. 51, A.I.R. 1917 Sind 42, 37 I.C. 35; *Hari*, A.I.R. 1935 Sind 145 (180), 28 S.L.R. 397, 1935 Cr.C. 753, 157 I.C. 697, 36 Cr.L.J. 1161. But see *Hari*, 39 C.W.N. 929 (933) (P.C.). Similarly, the High Court has power to transfer a case from a non-jury district to a jury-district under section 526 (d) on the ground of convenience of parties; and the High Court cannot refuse to do so on the ground that by such a transfer the accused will get the benefit of a jury trial where previously he had none—*Durga Charan*, 8 C.L.J. 59, 8 Cr.L.J. 131. See Note 1143.

876A. Bengal Notifications under sub-section (1):—The trial of all offences of the following classes shall be by jury before any Court of Session established

in the districts of the 24-Parganas, Hooghly, Burdwan, Murshidabad, Nadia, Patna and Dacca (*vide* Notification, dated the 27th March 1893, published in the Calcutta Gazette of 1893, Pt I, p. 252 and Notification No. 226-J. D, dated the 2nd September 1895, published in the Calcutta Gazette of 1895, Pt. I, p. 857) and Chittagong, Mymensingh, Rajshahi and Jessore (*vide* Notification No. 2350-J., dated the 19th April 1897, published in the Calcutta Gazette of the 21st April 1897) and Khulna (*vide* Notification No 3773-J, dated the 15th November 1905, published in the Calcutta Gazette of the 22nd November 1905) that is to say—

Offences defined in the following chapters of the Indian Penal Code, *viz* :—

Chapter VIII—(Offences against the public tranquillity);

“ XI—(False evidence and offences against public justice);

“ XVI—(Offences affecting the human body);

“ XVII—(Offences against property);

“ XVIII—(Offences relating to documents and to trade or property marks); and

“ XX—(Offences relating to marriage);

and abetments of, and attempts to commit, such offences

The trial of offences in the districts of Bakarganj, Bankura, Birbhum, Bogra, Dinajpur, Faridpur, Maldah, Midnapur, Noakhali, Pabna, Rangpur and Tipperah under Chapters VIII, XI, XII, XVI, XVII, XVIII and XX of the Indian Penal Code and of offences under sec. 52 of the Indian Post Office Act, 1898, shall be by jury (*Vide* Notification No 2505-J, dated the 15th July 1918, published in the Calcutta Gazette of the 17th July 1918, Pt I, p 1062)

Any trial commencing before any Court of Sessions in the districts of 24-Parganas, Hooghly, Howrah, Burdwan, Murshidabad, Nadia, Dacca, Chittagong, Mymensingh, Rajshahi, Jessore and Khulna, of offences of the following classes, namely :—

(a) offences under Chapter XII (offences relating to coin and Government stamps) of the Indian Penal Code, 1860;

(b) offences under section 52 of the Indian Post Office Act, 1898 (VI of 1898); and

(c) abetments of, and attempts to commit, such offences,

shall be by jury. (*Vide* Notification No 2531-J, dated the 15th July 1918, published in the Calcutta Gazette of the 17th July 1918)

So much of the orders contained in the Notifications, dated the 7th January 1861, and the 13th October 1862 and Notifications No 2360-J, dated the 19th April 1897, No 3773-J, dated the 15th November 1905, and No 2505-J, dated the 15th July 1918, published in the Calcutta Gazette of the 8th January 1861, the 15th October 1862, the 21st April 1897, the 22nd November 1905 and the 17th July 1918, respectively, as applies to offences under sections 400 and 401, Chapter XVII of the Indian Penal Code, has been revoked (*Vide* Notification No 55-J., dated the 3rd January 1933)

Bengal Government Notification No 3347-J, 22nd September, 1939—In exercise of the power conferred by sub-section (1) of section 269, of the Code of Criminal Procedure, 1898, (Act V of 1898), the Governor is pleased to direct that any trial commencing on and after the 1st January, 1940 before any Court of Session of an offence under Chapter V-A of the Indian Penal Code (Criminal Conspiracy) shall be by jury when it is a conspiracy to commit an offence which is triable by jury. By order of the Governor, A L Blank, Secy to the Govt of Bengal

In *Nurul Amin v. Emp.*, 40 Cr L.J. 667 (60S), 182 IC 385, AIR 1939 Cal 335, ILR (1939) 1 Cal 511, Rau, J, pointed out an anomaly (i.e., whereas certain offences were triable by jury, a mere conspiracy to commit any one of them was not so triable) resulting from the state of the notifications under this section and suggested some sort of revision of the same. The abovementioned notification seems to have been issued to remove the aforesaid anomaly.

Under sub-sec. (2):—In the districts of the 24-Parganas, Hooghly, Burdwan, Murshidabad, Nadia, Patna, Dacca, Chittagong, Mymensingh, Rajshahi and Jessore

(*Vide* Notification No. 2360-J., dated the 19th April, 1897, published in the Calcutta Gazette of the 21st April 1897) and Khulna (*Vide* Notification No. 3773-J., dated the 15th November 1905, published in the Calcutta Gazette of the 22nd November 1905) and Bakarganj, Bankura, Birbhum, Bogra, Dinajpur, Faridpur, Maldah, Midnapur, Noakhali, Pabna, Rangpur and Tippera (*Vide* Notification No. 2505-J., dated the 15th July 1918, published in the Calcutta Gazette—1918, Pt. I, p. 1062), the trial of offences punishable with death and of any other offences triable by a Jury, shall, if the Judge, on application made to him or of his own motion, so directs, be by jurors summoned from a special jury list.

270. In every trial before a Court of Session the prosecution shall be conducted by a Public Prosecutor.

877. The prosecution shall be conducted by the Public Prosecutor; if the complainant engages a counsel, the Public Prosecutor may always avail himself of the services of such counsel and in doing so he does not deprive himself of the management of the case—*Narayan*, 11 B.H.C.R. 102. An Advocate of the High Court may appear on behalf of the prosecution in the Court of Session and may conduct the prosecution without being specially empowered by the District Magistrate for that purpose—*Cungadhur*, 23 W.R. 14. But it is highly undesirable that the prosecution should be conducted by Police Officers—*Ram Chander*, 13 W.R. 18.

The provisions of this section are merely directory, and omission to appoint a Public Prosecutor is merely an irregularity curable by sec. 537—*Ismail*, 35 P.R. 1887.

B.—Commencement of Proceedings.

271. (1) When the Court is ready to commence the trial, the accused shall appear or be brought before it, and the charge shall be read out in Court and explained to him, and he shall be asked whether he is guilty of the offence charged, or claims to be tried.

(2) If the accused pleads guilty, the plea shall be recorded, and he may be convicted thereon.

878. Charge shall be read and explained:—Where the charge is merely read out to the accused but not explained, the conviction will be quashed, especially in a case of trial for murder—*Aiyaru*, 9 Mad 61; *Trimbaka*, 3 Bom L.R. 489. The charge should be read out and so explained to the accused that the Court is sure that he has understood the nature of the charge thoroughly and it is then only that he should be called upon to plead—*Vaimbilee*, 5 Cal 826; *Gurrapu*, 2 Weir 336; *Jinga*, 2 Weir 339; and the Judge ought to satisfy himself by interrogation of the accused, if necessary, that he fully understands the responsibility which he assumes in making a plea of guilty—*Kesho Singh*, 20 O.C. 136, 18 Cr.L.J. 742.

As regards consolidation of two or more cases committed to the Court of Session, see *Arumugum v. Emp.*, in Note 774.

The charge-sheet to which the accused is called upon to plead is a very important document. It should be drawn up and considered with extreme care and caution, so that the accused may have no doubt whatever as to the offences to which he is called upon to answer, and the Judge of the Appellate Court also may have no doubt upon the matter. Every addition and alteration made in the charge has to be read over and explained to the accused—*Jagdro*, 18 A.L.J. 442, 21 Cr.L.J. 410, 56 I.C. 58.

879. Plea:—If there are two heads of a charge (e.g., if the accused is charged with the offence of culpable homicide or in the alternative with the offence of grievous

hurt) the accused should not be called upon to plead in the alternative but to each of the heads of the charge separately. Where in such a case he pleaded guilty to the second charge only (grievous hurt) and the Judge convicted him on that plea, the conviction was set aside—*Lakshman*, Ratanlal 327.

The accused must himself plead guilty or not guilty; admission by a pleader (especially by a pleader engaged by the Court for the accused and not by the accused himself) is not binding on him—*Sangaya*, 2 Bom L.R. 751. Cf. *Sur Singh*, 6 Bom.L.R. 861, 1 Cr L.J. 939

There is no implication that when an accused in the course of the trial withdraws his claim to be tried and pleads guilty, the Court is not entitled to record the plea and either accept it or continue the trial—*Shyama*, 35 Cr L.J. 1322 (1325), 151 I.C. 393, A.I.R. 1934 Pat. 330, 1934 Cr.C. 722.

880. What is a sufficient plea:—The accused must distinctly and unequivocally admit the guilt; otherwise it is not sufficient. Where the accused instead of pleading guilty made a long rambling statement more or less admitting the guilt, it would be much safer if the Judge recorded a formal plea of 'not guilty' and proceeded to try the accused in the ordinary way—*Deoki*, 5 A.L.J. 157, 7 Cr.L.J. 295. The plea must distinctly admit every fact necessary to constitute the offence. Thus, where in a trial for murder the accused merely admitted that he beat his wife and she died but he did not say whether he had any intention of causing such bodily injury as was likely to cause death, it was held that this was not a sufficient plea of guilty to a charge of culpable homicide, because the intention was absent—*Gurrapu*, 2 Weir 336; *Chinia*, 8 Bom.L.R. 240, 3 Cr L.J. 337; *Sonaoolah*, 25 W.R. 23. Where the plea of guilty is accompanied by qualifying statements, such a plea is not properly speaking a plea of guilty. Thus, where the accused said that he killed his wife, but that he did so under grave provocation (e.g., in consequence of discovering her in an act of adultery), such a statement was not a plea of guilty to a charge of murder—*Netai*, 11 Cal 410. So also, it could not be taken to be a plea of guilty if the prisoner admitted the guilt but said that he had committed the offence under the influence of certain persons mentioned—*Sundar*, 1886 A.W.N. 66; or that he committed the offence because he was subject to epileptic fits—*Mhataraya*, Ratanlal 698, or that he was not in his right mind at the time of committing the act—*Cheit Ram*, 5 N.W.P. 110.

Plea of 'not guilty'—The accused can plead "guilty" under sec 271 or he can claim to be tried under sec 272, or he can refuse to plead which is taken to be the same as claiming to be tried. The plea of 'not guilty' is not recognised by this Code—*Nirmal Kanta*, 41 Cal 1072. If he pleads 'not guilty,' he must be regularly tried.

Record of plea—If the accused pleads guilty, the plea should be recorded. Where no such plea appears on the record, the conviction is bad and must be set aside—*Gopal*, 7 Cal 96; *Deoki*, 5 A.L.J. 157, 7 Cr L.J. 295, *Jagdeo*, 21 Cr L.J. 410, 56 I.C. 58, 18 A.L.J. 442. If the statement is made by the accused in a foreign language, it is not necessary that the plea must be recorded in the words of that language. It should be recorded in the language in which it is conveyed to the Court by the interpreter—*Viamblee*, 5 Cal 826.

The conviction of an accused in his absence is entirely illegal—*Abdullah*, 28 Cr L.J. 971, 105 I.C. 683, 26 P.L.R. 239, A.I.R. 1927 Lah. 870

881. Conviction on plea:—Before a Judge convicts the accused on his plea, he ought to explain the charge to the accused and to satisfy himself by interrogations of the accused, if necessary, that he fully understands the responsibility which he assumes by making a plea of guilty. Having done so, the Judge is then in a position to exercise properly the discretion which the law allows and to put upon record the reasons which guide his discretion in either direction. The course which he intends to presume should not be left in doubt—*Keshab Singh*, 20 O.C. 136, 18 Cr.L.J. 742 (746). See also *Nga Yua*, A.I.R. 1935 Rang 49 (51), 12 Rang 616, 153 I.C. 390.

The plea of guilty is a plea to the charge and does not necessarily amount to a

confession of all the facts alleged—*Supdt. v. Jnanendra*, 49 C.L.J. 432 (434). A plea of guilty is not a confession such as is dealt with in the Indian Evidence Act, in respect of relevance or irrelevance. It is a statement which, if accepted by the Court, amounts to a waiver on the part of the accused of trial in which alone a confession might be utilized in evidence—*Shyama*, 35 Cr.L.J. 1322 (1326), 151 I.C. 393, A.I.R. 1934 Pat. 330, 1934 Cr.C. 722.

Where an accused person pleads guilty to the specific offence with which he is charged, he cannot on such plea be convicted of an offence *other than* that specifically charged—*Anonymous*, 2 Weir 335. Thus, where the prisoner has pleaded guilty to the offence of murder, he can not be convicted of culpable homicide not amounting to murder—*Watu*, 2 S.L.R. 58, 10 Cr.L.J. 5. Where the accused pleaded guilty to a charge of culpable homicide, he could not be convicted of the offence of grievous hurt for which he was not tried—*Raghu*, Ratanlal 413.

Conviction discretionary.—It is discretionary with the Sessions Judge to accept or not the plea of guilty. He may or may not convict the accused on such plea. It is open to the Judge to proceed to try the accused, to go into the evidence and leave the case to the jury, despite a plea of guilty—*Anonymous*, 2 Weir 335; *Shanker*, 24 A.L.J. 318, 27 Cr.L.J. 449; *Gobadur*, 13 W.R. 55 (56); *Chinna*, 23 Mad. 151; *Kesho Singh*, 20 O.C. 136, 18 Cr.L.J. 742 (745); *Hasaruddin*, 30 Cr.L.J. 508, 115 I.C. 582, A.I.R. 1928 Cal. 775, Ind. Rul. 1929 Cal. 406. Where there are several co-accused who are to be tried jointly, and one accused has pleaded guilty, the Judge has a discretion to decide either that the accused be convicted on such plea or that he should be put on his trial in spite of his plea of guilty. The proper procedure to follow in such a case is, that if the Judge convicts the accused on the plea of guilty, he should be removed from the dock, in which case he can be called as a witness against the other accused; or that the Judge should put it on his record that he decides to put the accused on his trial in spite of his plea of guilty—*Kesho Singh*, 20 O.C. 136, 18 Cr.L.J. 742 (746); *Chinna*, 23 Mad. 151.

Where the accused has pleaded guilty to one offence (culpable homicide not amounting to murder on grave and sudden provocation) but there is clear *prima facie* evidence of a different offence (murder) the Judge ought not to convict the accused on his plea, but should proceed to try the case—*Malhari*, Ratanlal 410.

A plea of guilty should not be accepted in capital offences. It is not in accordance with the usual practice to accept a plea of guilty in a case where the natural sequence would be a sentence of death—*Chinia*, 8 Bom.L.R. 240, 3 Cr.L.J. 337; *Pala Singh*, 1905 P.R. 54; *Laxmya*, 19 Bom.L.R. 356. In a case of murder, it has long been the practice of the Court not to accept the plea of guilty, for murder is a mixed question of fact and law, and requires a certain intention or certain knowledge. Unless the Court is perfectly satisfied that the accused knew exactly what was implied by his plea of guilty, and the effect of such plea, the case should be regularly tried—*Chinia*, supra; *Dalli*, 20 A.L.J. 326, 23 Cr.L.J. 283, 66 I.C. 427; *Lahari*, 26 Cr.L.J. 1316, 89 I.C. 260, 23 A.L.J. 587, A.I.R. 1925 All. 647; *Achar*, 36 Cr.L.J. 324, 153 I.C. 288, A.I.R. 1934 Sind 204, 1934 Cr.C. 1410; *Hasaruddin*, 30 Cr.L.J. 508, 115 I.C. 582, A.I.R. 1928 Cal. 775, Ind. Rul. 1929 Cal. 406; *Sukha*, 20 A.L.J. 669; *Bhadu*, 19 All. 119. If the accused pleads guilty to a charge of murder, the Court should not accept the plea without examining the accused in order to find out whether he knows what exactly he is pleading to, and it is extremely desirable that sufficient evidence should be recorded by the Judge so that he may have something before him from which he can ascertain whether the plea is genuine and *bona fide* and whether any extenuating circumstances exist—*Kessim*, 17 S.L.R. 268, 26 Cr.L.J. 177 (178). The Nagpur Court holds that it is not illegal to convict in a murder case on a plea of guilty, and in each case the circumstances must be examined to see whether the plea of guilty is one which should have been acted on. Where the accused is represented by a pleader, and a trial is not claimed, and the accused's answer amounts to a plea of guilty, it is quite legal to convict him on that plea—*Manjoo*, 21 Cr.L.J. 570 (Nag.).

The expression by the Court in sec. 271 and a "Court of Session" in sec. 412 obviously mean the "Judge" only, who, in his discretion, may convict. Once he has exercised his discretion under sec. 271 (2) no consideration can be adduced to show that discretion was not properly exercised so as to affect the provisions of sec. 412—*Shyama*, 35 Cr.L.J. 1322 (1325), 151 I.C. 393, A I R. 1934 Pat. 330, 1934 Cr.C. 722.

882. Charge for one offence, conviction on plea for another:—It is illegal to convict a person of an offence upon his own plea, when there is no formal charge in respect of that offence. Thus, where an accused person was charged with the offence of murder, and the charge was not proved, but the Court convicted her of the offence of concealment of birth which, it considered, was admitted by her in her examination by the Court, it was held that such conviction was illegal. A charge of concealment of birth should have been framed and the accused tried thereon—*Sarwel*, *Ratanlal* 386

Postponement of conviction:—Where an accused person pleads guilty, the Court should record his confession and forthwith convict him thereon. If there are other persons being tried with him, it is illegal for the Court to postpone his conviction, in order that he may technically be said to be tried jointly for the same offence with the other co-accused, and so that any statement in the nature of a confession he may have made, may be considered against the co-accused—*Kheraj*, 30 All 540; *Surjan*, 12 A.L.J. 1239, 16 Cr.L.J. 103; *Sukdeb Tewari*, 13 C.W.N. 552, 9 C.L.J. 291, 10 Cr.L.J. 484 (485), *Mahammad Yusuf*, 32 Cr.L.J. 667, 131 I.C. 142, 58 Cal. 1214, 35 C.W.N. 490, A I R. 1931 Cal. 341, 1931 Cr.C. 403. It is always desirable to pass sentence completely, before calling one accused in a joint trial to give evidence against his co-accused—*Mahammad Yusuf*, supra. After an accused pleaded guilty, the trial may be continued against the other accused persons without convicting him, when it is thought necessary to ascertain the part taken by him in order to assess the punishment; but it is unfair to defer his conviction solely with the view of having his confession considered against those accused persons—*Paltua*, 23 All 53. See also *Amduniyan Guljar Patel v Emb*, A I R 1937 Nag. 17 (23), 11 R 1937 Nag. 315, 38 Cr.L.J. 237, 168 I.C. 582 (F.B.).

272. If the accused refuses to, or does not, plead, or if Refusal to plead or he claims to be tried, the Court shall claim to be tried. proceed to choose jurors or assessors as hereinafter directed and to try the case:

Provided that, subject to the right of objection hereinafter mentioned, the same jury may try, Trial by same jury or assessors of several offenders in succession. or the same assessors may aid in the trial of, as many accused persons successively as the Court thinks fit.

There is an obvious omission in this section; it does not provide for the case where the Judge does not convict the accused on his plea of guilty under section 271 (2). It is suggested that the words "or if the Court does not convict him on his plea of guilty under sub-section (2) of the preceding section" should be added to the second line of this section, just as similar words have been added in sec. 244 (1). *Vide Muhammad Yusuf*, 35 Cr.L.J. 667 (669), 131 I.C. 142, 58 Cal. 1214, 35 C.W.N. 490, A I R 1931 Cal. 341, 1931 Cr.C. 403, where it has been laid down that if the plea of guilty be not accepted there is no provision in the Code for proceeding with the trial, because sec. 272 does not apply when the accused has pleaded guilty.

883. 'If the accused refuses to or does not plead':—The accused cannot be called upon to plead 'not guilty'; such a plea is not recognised by the Code.

The accused may either claim to be tried, or refuse to plead (*i.e.*, remain silent) which is taken to be the same as claiming to be tried—*Nirmal Kanta*, 41 Cal. 1072; *Muhammad Yusuf*, *supra*. If he pleads 'not guilty' the Judge will proceed to try him.

"Same jury may try several persons successively" :—But the term 'successively' is understood that one trial is to follow the other, *i.e.*, on the conclusion of one trial the same jury may proceed to try the accused in the next case. The law does not contemplate that the two trials shall be conducted piece-meal in such a manner that at their conclusion the jury shall be called upon to decide at one and the same time upon two distinct classes of evidence, which, though they may have points in common, require careful discrimination as bearing upon the guilt or innocence of two sets of accused. Such a procedure would put the jury in an embarrassing position—*Hussain*, 6 Cal. 96. There is no provision for trying two cases, specially two cross-cases, being heard at the same time before the same jurors. The proper procedure is to try the one case immediately after the termination of the other, and if there is no objection to the jury by either of the parties, the second case may be tried by the same jurors who tried the first case—*Rajatullya v. Khudia*, 54 C.L.J. 146, 32 Cr.L.J. 1233, 1931 Cr.C. 989, 134 I.C. 896, 32 Cr.L.J. 1233, 54 C.L.J. 146, A.I.R. 1931 Cal. 709. Where the law requires the trial of two accused to be separate, the accused must be tried separately, but it is not necessary that the two trials should be held by separate juries. The accused in the second case is not entitled as of right to be tried by a separate jury; there is nothing illegal in the Judge hearing the second case with the same jury who tried the first case. Such a procedure is provided by the proviso to sec. 272. No doubt the accused in the second case can ask for a second jury, and it would be in the discretion of the Judge to grant or refuse such application. *Prima facie* there would seem to be no more reason why a jury should not try a second case than there is reason why a Sessions Judge should not try two cross-cases of riot—*Rafuzzaman v. Chhotey Lal*, 48 All. 325, 24 A.L.J. 472, 27 Cr.L.J. 445. See also Notes in para 830A.

273. (1) In trials before the High Court, when it appears
Entry on unsustainable to the High Court, at any time before
charges. the commencement of the trial of the
person charged, that any charge or any portion thereof is clearly
unsustainable, the Judge may make on the charge an entry to
that effect.

(2) Such entry shall have the effect of staying proceedings
upon the charge or portion of the charge, as
Effect of entry. the case may be.

884. If the Court is clearly of opinion that no offence has been made out, it is the duty of the Court to stay the proceedings by making an entry as contemplated by this section—*Sukee*, 21 Cal. 97.

Applications under this section should be disposed of by the High Court in its original criminal jurisdiction—*Charoo Chunder*, 9 Cal. 397.

- This section does not apply to cases of illegal commitment. It is only intended to provide short and effective way by which charges which have no merits may be disposed of—*Girish Chunder*, 34 C.W.N. 13 (29), A.I.R. 1929 Cal. 756, 123 I.C. 433, 1929 Cr.C. 468 (F.B.).

Under the Criminal Procedure Code a Court of Sessions has not the power to withdraw a case from the jury on any ground whatsoever—*Jogeshwar*, 5 C.W.N. 411 (413). See also *Maroti*, A.I.R. 1935 Nag 202, 36 Cr.L.J. 1389, 158 I.C. 537, 18 N.L.J. 227, 1935 Cr.C. 1099.

C.—Choosing a Jury.

274. (1) In trials before the High Court
 Number of jury. the jury shall consist of nine persons.

(2) In trials by jury before the Court of Session the jury shall consist of such uneven number, not being less than five or more than nine, as the *Provincial Government*, by order applicable to any particular district or to any particular class of offences in that district, may direct:

Provided that, where any accused person is charged with an offence punishable with death, the jury shall consist of not less than seven persons and, if practicable, of nine persons.

Amendment:—The word 'five' has been substituted for 'three' and the proviso has been added by sec. 13 of the Criminal Law Amendment Act XII of 1923. "In the Sessions Court the number should be any uneven number from five to nine which the Local Government may select. Thus, five should be substituted for three in section 274, as the minimum number of jury in a Session Court. In murder cases, before the Sessions Court, we are of opinion that the number of jury should if practicable be nine"—*Report of the Racial Distinctions Committee*, para 25

The words "Provincial Government" have been substituted for "Local Government" in this section by sec. 4 of the Government of India (Adaptation of Indian Laws) Order, 1937

884A. Number of jurors:—The number fixed by the Local Government must be strictly adhered to. Where the Local Government has fixed the number at five, a trial by a jury consisting of seven members is *ultra vires*—*Booth*, 26 All 211. But where no objection as to the number of jurors was raised at the trial, but was raised for the first time at the hearing of the appeal before the High Court, and there was no allegation that the accused were prejudiced in any way, the High Court refused to entertain the objection—*Bhajo*, 57 Cal 1062, 34 CWN 106 (110); *Supdt v Ajit*, A.I.R. 1932 Cal 750, 1932 CrC 744, 33 CrLJ 869, 140 IC 18

Sections 274 and 326:—The proviso to sec. 274 lays down that if in the Court of Session the accused is charged with an offence punishable with death, the jury shall consist of not less than seven persons, and if practicable, of nine persons. In sec. 326 it is provided that the number of persons summoned to serve on the jury must not be less than double the number required for the trial. A large number of cases have recently cropped up in the Calcutta High Court as to the effect of these two sections read together, and the result of those decisions may be summed up as follows:—

(1) According to the proviso to sec. 274, in a trial of an offence punishable with death, the jury must consist of 9 persons; and before the case can be tried with a jury of 7 persons, it must be shewn that it was not practicable to have jury of 9 persons—*Amir Khan*, 33 CWN 1053 (1054), 31 CrLJ 425, 122 IC 557, Ind Rul. 1930 Cal 253, 51 CLJ 574. The Judge must primarily take into consideration the question whether it is or is not practicable to have a jury of nine persons. He must not assume that seven is the required number—*Benozir*, 34 CWN. 735 (736), 1930 CrC. 1116; *Shakebali Sheikh*, 58 Cal 1272, 35 CWN. 711 (715). Where there is nothing on the record to show otherwise, the High Court ought to proceed on the principle embodied or implied in the phrase "*Omnia rite acta*" that is to say, the High Court ought to proceed upon the assumption that the trial in the Court below took place in full accordance with the requirements of sec. 274, sub-sec. (2) and its proviso and that everything in connection with the empanelling of a jury was done in due form of law—*Benal Pramanik*, 39 CWN. 954 (958), dissenting from *Shakebali's* Case. But it cannot be said that it was impracticable to have a jury of 9 if an

insufficient number of persons have been summoned (under sec. 326) from the jury list. Thus, where only 12 persons were summoned under sec. 326, of whom 8 persons appeared, and consequently 9 persons could not be chosen, and so 7 persons were chosen as jurors, *held* that the jury was not properly constituted, and the trial was illegal—*Serajul Islam*, 55 Cal. 794, 111 I.C. 735, A.I.R. 1928 Cal. 645, 11 A.I.Cr.R. 66, 29 Cr.L.J. 927. So also, where out of the number summoned, only 7 jurors appeared, and all of them were empanelled, *held* that it was not a legally constituted jury—*Shahebbali*, *supra*.

(2) If it is practicable to empanel a jury of 9 persons, it is illegal to choose only 7. Thus, where 14 persons were summoned under sec. 326, of whom 11 attended, so that the Judge could have a jury of 9 persons, but he chose only 7, the jury was illegally constituted, and the trial must be set aside—*Dwarika*, 33 C.W.N. 692 (693). See also *Supdt. v. Benozir Ahmed*, 51 C.L.J. 578, 34 C.W.N. 735 where it did not appear anywhere that it was not practicable to have a jury of nine persons, or that the Judge ever took that question into consideration. But unless there is an indication on the face of the record itself or there is other material before the Court which leads to the conclusion that it was or might have been practicable to have the jury composed of nine jurors rather than seven, one must assume that it was not practicable to have nine jurors—*Emp. v. Benat Paramanik*, 39 C.W.N. 954, 62 Cal. 900, 36 Cr.L.J. 944, 8 R.C. 1, 156 I.C. 481, 1935 Cr.C. 630, A.I.R. 1935 Cal. 407, following *Damuliyia*, 128 I.C. 808, A.I.R. 1931 Cal. 261, 1932 Cr.C. 293, 32 Cr.L.J. 187, 34 C.W.N. 1127 and dissenting from *Shaheb Ali*, 135 I.C. 435, A.I.R. 1931 Cal. 793, 33 Cr.L.J. 129, 58 Cal. 1272, 35 C.W.N. 711, 54 C.L.J. 307, 1931 Cr.C. 1057, Ind. Rul. 1932 Cal. 115. Their Lordships of the Judicial Committee have, very recently, confirmed this view of the Calcutta High Court. In this connection Lord Wright, J., has observed: "There has been some difference of judicial opinion as to true effect of the sec. 274, but the more recent and, in Their Lordships' opinion, better, view is that adopted in *Emperor v. Benat Paramanik*, which is that if the Judge proceeds with seven jurors, it must be assumed in the absence of anything on the record to satisfy the Appeal Court that it was practicable to have more than seven jurors, that sec. 274 had been complied with"—*Akbar v. King-Emp.*, 41 Cr.L.J. 871 (873), 190 I.C. 233, A.I.R. 1940 P.C. 176. This is, however, an *obiter dictum*.

Where the number of jurors present was eight, it cannot be held that it was the duty of the Judge to send his Court Officers to search for jurors in adjacent Sessions Court. In this case, which was one under sec. 302, I.P.C., read with sec. 114, I.P.C., the trial with seven jurors was held legal as there were not nine suitable persons present in Court and it was not practicable for the trial Judge to empanel nine jurors—*Mukunda*, 36 Cr.L.J. 803, 155 I.C. 599, A.I.R. 1934 Cal. 10, 1934 Cr.C. 26, 61 Cal. 190. So also, where 14 persons were summoned, of whom 9 attended, but the Judge empanelled a jury of 7, the jury was not properly constituted and the trial was illegal—*Amir Khan*, 33 C.W.N. 1053 (1054), 51 C.L.J. 574, 31 Cr.L.J. 425, 122 I.C. 557.

(3) The provision in sec. 326 which speaks of summoning not less than double the number required is *not mandatory*. Therefore, in a trial of a murder case, which is to be tried by a jury of 9 persons, if 14 persons are summoned, and 9 attend, and the 9 persons are chosen as jurors, the trial is not vitiated. It is not necessary that 18 persons should be summoned under sec. 326—*Erman Ali*, 57 Cal. 1228, Ind. Rul. 1930 Cal. 860, 34 C.W.N. 296, A.I.R. 1930 Cal. 212, 51 C.L.J. 171, 31 Cr.L.J. 536, 123 I.C. 664 (F.B.), overruling *Munshi Tamizuddin*, 33 C.W.N. 1054, where it was held that it was compulsory to summons 18 persons for the constitution of the jury. The Full Bench decision also overrules *Amir Khan*, 33 C.W.N. 1053, and *Dwarika*, 33 C.W.N. 692, so far as they lay down that 18 persons must be summoned under sec. 326. The above Full Bench case has been followed by the Patna High Court—*Bihari Mahton*, 10 Pat. 107, Ind. Rul. 1931 Pat. 241, 131 I.C. 801, 12 Pat.L.T. 798, A.I.R. 1931 Pat. 152, 1931 Cr.C. 392, 32 Cr.L.J. 797; and also by the Calcutta High Court in *Mukunda*, 36 Cr.L.J. 803, 155 I.C. 599, A.I.R. 1934 Cal. 10, 1934 Cr.C. 26, 61 Cal. 190; and by

the Allahabad High Court in *Lala*, AIR. 1933 All. 941 (945), 1933 A.L.J. 1446, 1933 Cr.C. 1561, 35 Cr.L.J. 668, 148 I.C. 339, 56 All. 210.

Where the trial of one of the accused is vitiated on account of non-compliance with the provisions of this section, the conviction of the other persons who were tried jointly with him should also be set aside—*Shakebali*, 58 Cal. 1272, 35 C.W.N. 711 (716), 1931 Cr.C. 1057, 54 C.L.J. 307, A.I.R. 1931 Cal. 793; *Benozir*, 34 C.W.N. 735 (736), 51 C.L.R. 578.

275. (1) In a trial by jury before the High Court or Court of Session of a person who has been found under the provisions of this Code to be an European or Indian British subject, a majority of the jury shall, if such person before the first juror is called and accepted so requires, consist, in the case of an European British subject, of persons who are Europeans or Americans and, in the case of an Indian British subject, of Indians.

(2) In any such trial by jury of a person who has been found under the provisions of this Code to be an European (other than an European British subject) or an American, a majority of the jury shall, if practicable and if such European or American before the first juror is called and accepted so requires, consist of persons who are Europeans or Americans

This section has been redrafted by sec. 14 of the Criminal Law Amendment Act, XII of 1923 Prior to the amendment, it stood as follows —

"In a trial by jury before the Court of Session of a person not being an European or an American, a majority of the jury shall, if he so desires, consist of persons who are neither Europeans nor Americans"

The reason of the amendment has been thus stated.—"The most difficult question for the Committee to decide is that of trial by the jury of European British subjects. This is the point on which non-official European opinion is most emphatic, namely that it is essential that a mixed jury should remain both in the High Court and in the Sessions Court in all cases which are to be tried by jury under our proposals, subject however, to certain provisions and safeguards, namely —The same law as to the composition of the jury shall apply to Indians as to Europeans, that is to say, the majority of the jury, if an Indian accused so desires, shall consist of persons who are not Europeans or Americans. This is already the law in Sessions Court, and section 275 should be so amended as to make it apply to the High Court also"—*Report of the Racial Distinctions Committee*, para. 25.

835. This section must be read as controlled by the provisions of section 528B. That section lays down that if a person does not claim to be dealt with as an Indian subject before the committing Magistrate, he shall not assert the claim at any subsequent stage of the case. It follows, therefore, that if an Indian subject does not claim to be dealt with as such before the committing Presidency Magistrate, he will not be entitled to claim before the High Court, to be tried by a jury the majority of which must be Indians, according to the provisions of section 275—*Harendra*, 51 Cal. 980 (991), 29 C.W.N. 384, 26 Cr.L.J. 385; *Soomar Abdulla*, 29 Cr.L.J. 721, 110 I.C. 577, 22 S.L.R. 472, A.I.R. 1929 Sind 23. See also *H. W. Scott*, 35 Cr.L.J. 595, 154 I.C. 837, A.I.R. 1935 Rang. 67, 13 Rang. 104, 1935 Cr.C. 167 (F.B.). The same result will happen if the claim to be dealt with as an Indian subject is made before the Presidency Magistrate but is rejected by him—*Harendra*, 51 Cal. 980 (990), 29 C.W.N. 384, 26 Cr.L.J. 385.

A Native Christian is not entitled to say that he must be tried by a Christian jury. But he can, like any other accused, object to the jurors individually—*Bharat Chunder*, 1 W.R. 2.

In a case of abduction of a Hindu girl by Muhammadans the law does not provide for a mixed jury of Hindus and Muhammadans—*Jessarai*, 26 Cr.L.J. 1009 (1010), 87 I.C. 833, 29 C.W.N. 526, A.I.R. 1925 Cal 729.

An Anglo-Indian is not a European within the meaning of this section. Where, therefore, he sat as one of the European jurors required in accordance with the provisions of this section, the trial was not legally constituted and the conviction was illegal—*Guthrie*, 35 Cr.L.J. 827, 148 I.C. 933, 15 P.L.T. 82, A.I.R. 1934 Pat. 200, 1934 Cr.C. 384.

276. The jurors shall be chosen by lot from the persons summoned to act as such in such manner as the High Court may from time to time by rule direct:

Jurors to be chosen by lot.

Provided that—

first, pending the issue under this section of rules for any Court, the practice now prevailing in such Court in respect to the choosing of jurors shall be followed;

Existing practice maintained;

secondly, in case of a deficiency of persons summoned, the number of jurors required may, with the leave of the Court, be chosen from such other persons as may be present;

persons not summoned when eligible;

thirdly, in a trial before any High Court in the town which is the usual place of sitting of such High Court,

trials before special jurors.

- (a) if the accused person is charged with having committed an offence punishable with death, or
- (b) if in any other case a Judge of the High Court so directs,

the jurors shall be chosen from the special jury list hereinafter prescribed; and

fourthly, in any district for which the Provincial Government has declared that the trial of certain offences may be by special jury, the jurors shall, in any case in which the Judge so directs, be chosen from the special jury list prescribed in section 325.

Change:—In the *third* proviso, the words “in a trial...sitting of such High Court” have been substituted for the words “in the Presidency towns,” by sec. 77 of the Cr. P. C. Amendment Act, XVIII of 1923. The object of this amendment is to include those High Courts which are not situated in Presidency Towns, *e.g.*, the High Courts at Allahabad, Lahore, Patna, Rangoon. Similar amendments have been made in sections 315 and 316.

The words “Provincial Government” have been substituted for “Local Government” in this section by sec. 4 of the Government of India (Adaptation of Indian Laws) Order, 1937.

886. ‘Chosen by lot’:—The object of the Legislature in choosing a jury by lot is to render impossible any intentional selection of jurors to try a particular case,

and the accused is entitled to a strict observance of the provisions contained in this section and sec. 279. Irregularities in choosing the jury by lot affect the constitution of the Court, and cannot be cured by sec. 537—*Brojendra*, 7 C.W.N. 188; *Bradshaw*, 33 All. 385, 12 Cr.L.J. 46; *Suba v. Emp.*, A.I.R. 1937 Cal 389, 170 I.C. 237, I.L.R. (1937) 2 Cal. 482, 38 Cr.L.J. 870, 10 R.C. 123; *Shewaram v. Emp.*, A.I.R. 1939 Sind 209 (220), 41 Cr.L.J. 28, 184 I.C. 474. In *Jhubboo*, 8 Cal. 739 and *Anipe Pelladu*, 1917 M.W.N. 1, 18 Cr.L.J. 15 (16), however, where the Judge himself selected the jurors instead of choosing them by lot, it was held that such a procedure was merely irregular and the verdict would not be interfered with if no prejudice was caused to the accused, and no objection was taken by him to such a procedure at the trial. See also *Ram Adhin*, 30 Cr.L.J. 384, 114 I.C. 814, A.I.R. 1929 Oudh 154, 6 O.W.N. 97, Ind. Rul. 1929 Oudh 206 and *Akbar Ali*, 28 Cr.L.J. 881, 8 P.L.T. 800, 7 Pat. 61, 104 I.C. 897, A.I.R. 1928 Pat. 1.

The persons who are to be chosen by lot ought to be selected from the entire number of persons summoned to act as jurors, and the selection ought to be made from one box—*Vithaldas*, 1 Bom. 462. Where one of the Jurymen had not been summoned and was not entitled to sit on the Jury, the Court was not properly constituted and the verdict of the Jury should be treated as a nullity. The verdict, being in accordance with the facts of the case, was however, not set aside—*Irjan*, 28 Cr.L.J. 874, 104 I.C. 714, 46 C.L.J. 241, A.I.R. 1927 Cal 820.

Second proviso :—The second proviso provides that in case of a deficiency of persons summoned, the number of the jurors required, may, with the leave of the Court, be chosen from such other persons as may be present. Where the Judge acts under this proviso and chooses some jurors from the persons present in Court, it is not necessary for him to choose them by lot. The method of choosing by lot applies only to persons summoned as jurymen and not to persons chosen under the second proviso. This is evident from sec. 279 (2)—*Anipe Pelladu*, 1917 M.W.N. 1, 18 Cr.L.J. 15 (16). The words "the jurors shall be chosen by lot" occurring in the first para are not applicable to the second proviso. This proviso does not require that in case of deficiency in the number of persons summoned to act as jurors, the deficient jurors (chosen from bystanders) should be chosen by lot or from among persons who are on the jury list—*Muchu Khan*, 29 C.W.N. 652, 26 Cr.L.J. 819. If the Judge is unable to obtain a panel in the manner provided by the second proviso, his duty is to postpone the trial and to summon jurors under the provisions of sec. 326 (2)—*Brojendra*, 7 C.W.N. 188.

The term "jurors" in this clause is a general term meaning both common and special jurors. This clause is intended to meet an emergency not only in the case of common jurors, but also in the case of special jurors—*Shahebal*, 58 Cal. 1272, 35 C.W.N. 711 (714), 1931 Cr.C. 1057, 54 C.L.J. 307, A.I.R. 1931 Cal. 793, *Manir*, A.I.R. 1933 Cal. 638, 60 Cal. 725, 34 Cr.L.J. 1098, 145 I.C. 889, 1933 Cr.C. 1037; *Shewaram v. Emp.*, A.I.R. 1939 Sind 209 (219), 41 Cr.L.J. 28, 184 I.C. 474.

The second proviso lays down that in the case of a deficiency of persons summoned the number of jurors may be chosen from such other persons as may be present. It does not require that those persons should be on the jury list at all. The *Emperor v. Latifun Bibi*, Jury Reference No. 13 of 1939, decided by Henderson and Latifur Rahman, JJ. on 1st June 1939, referring to *Shahebal*, supra (Unreported Calcutta High Court case.)

The second proviso distinctly lays down that in case of deficiency of persons summoned, other persons must be added to fill up the deficiency. When out of 12 jurors summoned in a case only five attended and those five persons were empanelled as jurors and the Court proceeded to hear and decide the case, held, that the provisions of sec. 276 were not complied with and the trial was vitiated. The proper course for the Judge to follow was to choose some other persons, who were present, as jurors, to add their names to those of the jurors who attended, and from the whole body to choose the necessary quorum by lot to act as the jury in the case—*Bholanath*, 41 C.L.J. 541, 23 Cr.L.J. 194; *Roshan Ali*, 31 C.W.N. 1102 (1107), 28 Cr.L.J. 889; *Bradshaw*, 33 All. 385;

Tajali, 7 Pat. 50, 28 Cr.L.J. 843 (846). The word 'required' in the second proviso does not mean 'required to constitute the quorum for a jury' but it means 'required to make up the minimum number of jurors summoned under sec. 326 to attend'—*Roshan Ali*, supra.

But a contrary view has been taken in the following cases. Thus, where of the persons summoned to act as jurors only five persons appeared and those five persons were appointed jurors, it was held that the procedure followed was not illegal and the trial was not vitiated. It was further held that the provisions of choosing jurors by lot in the first para of this section is applicable only when the persons summoned to act as jurors are present in such number as to make it possible to choose them by lot, but when such number is not present, the Judge is to take the help of the persons present in Court to form the jury, according to the second proviso, without any further drawing of lots. The words "deficiency" and "number of jurors required" in the second proviso mean deficiency in the number of jurors required to make up the jury and not to make up a sufficient number for the purpose of selection by lot—*Rahamat*, 54 Cal 1026, 31 C.W.N. 711 (715) (dissenting from *Bholanath*, supra). The same view has been taken by the Patna High Court in *Akbar Ali*, 7 Pat. 61, A.I.R. 1928 Pat. 1, 104 I.C. 897, 8 P.L.T. 800, 28 Cr.L.J. 881 (882) (following *Muchu Khan*, 29 C.W.N. 652, and dissenting from *Bholanath*, supra).

In the Full Bench case of *Kedar Nath Mahato*, 55 Cal. 371, 32 C.W.N. 221, 29 Cr.L.J. 437, the view taken in *Rahamat*, supra, has been approved, and the contrary view taken in *Bholanath*, 44 C.L.J. 511, 28 Cr.L.J. 194, and *Roshan Ali*, 31 C.W.N. 1102, 28 Cr.L.J. 889 disapproved. The Allahabad High Court has also followed the decision of the Calcutta High Court in *Kedar Nath Mahato's* case—*Lala*, A.I.R. 1933 All. 941, 1933 A.L.J. 1446, 1933 Cr.C. 156, 35 Cr.L.J. 668, 148 I.C. 339. See also *Panch*, A.I.R. 1931 Cal. 178, 34 C.W.N. 1154, 128 I.C. 811, 32 Cr.L.J. 190, 1931 Cr.C. 242 (F.B.).

There is no provision for requisition of jurors from a local school or from anywhere else. The selection will have to be made from jurors attending in obedience to summons and chosen in the manner provided by this section or if there is no such other juror present then any other person present in the Court, whose name is on the list of jurors or whom the Court considers a proper person to serve on the jury may be selected—*Abedali Fakir*, 121 I.C. 560, 31 Cr.L.J. 281, A.I.R. 1929 Cal. 728, 56 Cal. 835, 1929 Cr.C. 364, 33 C.W.N. 722; *Muhammad Sagiruddin*, 30 Cr.L.J. 120, 113 I.C. 280, A.I.R. 1928 Cal. 551, Ind. Rul. 1929 Cal. 123; *Sadarat*, 30 Cr.L.J. 136, 113 I.C. 328, 48 C.L.J. 479, Ind. Rul. 1929 Cal. 125. Requisition of persons from outside the Court to make up the deficiency in the number of jurors to be empanelled is not proper, and as this is an irregularity which affects the constitution of the Court, there must be a retrial—*Suba v. Emp.*, A.I.R. 1937 Cal. 389, 170 I.C. 237, I.L.R. (1937) 2 Cal. 482, 38 Cr.L.J. 870, 10 R.C. 123. Persons even qualified cannot be called from outside the precincts of the Court—*Shevaram v. Emp.*, A.I.R. 1939 Sind 209 (219), 41 Cr.L.J. 28, 184 I.C. 474. The words "persons present" do not necessarily mean persons who are present within the four walls of the room; but they include persons who are within precincts of the Court building either because they have been summoned for other cases or by mere chance—*Israel*, 59 Cal. 1123, 36 C.W.N. 377, 33 Cr.L.J. 694. But this section does not cast a duty upon the trial Judge to send his Court Officers to adjacent Sessions Court to find out men to serve Jurors in his Court—*Mukunda*, 36 Cr.L.J. 803, 155 I.C. 599, A.I.R. 1934 Cal. 10, 1934 Cr.C. 26, 61 Cal. 190. Where one of the jurors selected intimated to the Court that he had heard something about the case and he was discharged and the Sessions Judge summoned certain gentlemen living in the locality and selected another juror by lot to fill the vacancy, held that the procedure was not wrong and that there was no reason to interfere with the verdict of the jury as it was not even contended that any prejudice was caused to the accused—*Kakia Bibi*, 40 C.W.N. 1411.

A deficiency is only apparent after the names of all those summoned and present have been exhausted by the chances of lottery and challenge and secs. 276 and 279 do not appear to contemplate that a deficiency shall be recognized and then obviated by the

summoning of fresh jurors, so that the jury can be summoned and chosen in three instalments—*Shewaram v. Emp.*, A I R 1939 Sind 209 (219), 41 Cr.L.J. 28, 184 I.C. 474.

Where five jurors are required the Court shall summon not less than ten, under sec. 326 (1), Cr. P. C.; if more than 5 attend, 5 jurors shall be chosen by lot from those attending under sec. 276, Cr. P. C.; if only 5 attend those 5 shall form the jury (unless an objection is taken to any one of them) as there is no reason why the drawing of lot should be insisted upon when only the required number is present: see *Rahamat*, supra. If less than the requisite number is present, then the deficiency may be made up by choosing jurors from such other persons as may be present in Court under the second proviso to sec. 276, Cr. P. C. The name of each juror is then called out under sec. 277, Cr. P. C., and the accused is asked if he objects to be tried by such juror. The objections are then decided under sec. 278, Cr. P. C., and under sec. 279 (1), Cr. P. C., the decision is final. If an objection is allowed, the place of such juror shall be supplied by any other juror attending in obedience to a summons and chosen in the manner provided by sec. 276, Cr. P. C., or if there is no such other juror present, then by any other person present in the Court whose name is on the list of jurors or whom the Court considers a proper person to serve on the jury—*Surajpalsingh*, 39 Cr.L.J. 818 (826), I.L.R 1938 Nag 516, 176 I.C. 853, 11 R.N. 81, 1938 N.L.J. 185, A I R 1938 Nag. 328.

Third proviso—In the absence of words in the context to the contrary, "chosen" in Proviso 3 and also in Proviso 4 must mean chosen by lot, as in the substantive part of the section, and that this is the meaning; and the jurors must be summoned and chosen by lot in such manner as the High Court by rules directs—*Shewaram v. Emp.*, A.I.R 1939 Sind 209 (219), 41 Cr.L.J. 28, 184 I.C. 474.

Proviso 3 to sec. 276, Cr. P. C., so far as the Sind Judicial Commissioner's Court is concerned, now refers to that Court in the exercise of its original criminal jurisdiction, and sec. 276 in 266, Cr. P. C., must be read as referring to the section itself and not to the Provisos. It matters not that this jurisdiction is exercised, owing to the peculiar constitution of that Court through a Sessions Court. In a matter which affects the summoning and empanelling of a jury the procedure of a High Court should be followed by that Court exercising its original criminal jurisdiction—*Shewaram v. Emp.*, supra.

886A. Allahabad High Court Rules:—For rules made by the Allahabad High Court, see United Provinces and Oudh Gazette, 1902, Pt II, p. 539.

Calcutta High Court Rules:—In order to nominate a jury for the trial of any prisoner, or other persons to be tried by jury, the Sessions Judge shall cause to be put together, in one box, cards or pieces of paper containing the names of all the persons summoned to attend, except such of the said persons as shall have been excused by the Sessions Judge from serving on that day in consequence of their having served as jurors on the previous day, or for any other cause. Such cards or pieces of paper shall be, as nearly as may be, of equal size, and each shall bear the name of one person summoned to attend. The Sessions Judge shall then, in open Court, draw, or cause to be drawn, out of the said box, one after another, as many of the said cards or pieces of paper as may represent the number of jurors required to try the case. As the name of each juror is drawn it shall be called aloud and upon the juror appearing the prisoner or person to be tried shall be asked if he objects to be tried by such juror. If any of the jurors whose names shall be so drawn shall not appear, or if any be objected to, and the objection be allowed, then such further number shall be drawn as may be necessary to complete the number of jurors required for the case. [Vide page 19, Rule 51, of the General Rules and Circular Orders of the High Court of Judicature at Fort William in Bengal, Appellate Side (Criminal), Vol. I.]

Madras High Court Rules:—See High Court Proceedings, No 1353, dated 11th April, 1883.

Patna High Court Rules:—The rule made by the High Court under this section directs that the names of all the persons summoned to attend, except such as

have been excused from attendance by the Sessions Judge, shall be put into a box, and in open Court as many names as are required to make up the Jury shall be drawn out one after another and if any of the Jurors whose names shall be so drawn shall not appear, or if any be objected to and the objection be allowed, then such further number shall be drawn as may be necessary to complete the number of Jurors required for the case—*Akbar Ali*, 28 Cr.L.J. 881 (885), 104 I.C. 897, 8 P.L.T. 800, A.I.R. 1928 Pat. 1, 7 Pat. 61.

277. (1) As each juror is chosen, his name shall be called aloud, and, upon his appearance, the accused shall be asked if he objects to be tried by such juror.

Names of jurors to be called.

(2) Objection may then be taken to such juror by the accused or by the prosecutor, and the grounds of objection shall be stated:

Objection to jurors.

Provided that, in the High Court, objections without grounds stated shall be allowed to the number of eight on behalf of the Crown and eight on behalf of the person or all the persons charged.

Objection without grounds stated.

886B. Where the Judge, instead of hearing and deciding objections, proceeded to exempt some of the persons present merely on their own representations, the procedure was irregular and the irregularity could not be cured by sec. 537—*Brojendra*, 7 C.W.N. 188.

Where the accused was not given an opportunity of challenging the jurors and stated that he would have objected to being tried by Mahomedan jurors, *held* that the omission was doubtless a serious one but not more serious than that cured by sec. 536 (2) and did not invalidate the conviction—*Illahi Bux*, 13 C.W.N. cxi

278. Any objection taken to a juror on any of the following grounds, if made out to the satisfaction of the Court, shall be allowed:—

Grounds of objection.

- (a) some presumed or actual partiality in the juror;
- (b) some personal grounds, such as alienage, deficiency in the qualification required by any law or rule having the force of law for the time being in force, or being under the age of twenty-one or above the age of sixty years;
- (c) his having by habit or religious vows relinquished all care of worldly affairs;
- (d) his holding any office in or under the Court;
- (e) his executing any duties of police or being entrusted with police duties;
- (f) his having been convicted of any offence which in the opinion of the Court renders him unfit to serve on the jury;
- (g) his inability to understand the language in which the evidence is given, or, when such evidence is interpreted, the language in which it is interpreted;
- (h) any other circumstance which, in the opinion of the Court, renders him improper as a juror.

886C. Clause (a):—An objection to a juror on the ground that there was a litigation pending between the accused's master and the juror's principal must be allowed—*Tajoh*, 7 Pat 50, 28 Cr.L.J. 843 (844), 101 I.C. 459, A.I.R. 1928 Pat 31

Clause (d):—The fact that a person is a clerk in the office of the Magistrate of the district is not sufficient to disqualify him from sitting as a juror—*Rochia*, 7 Cal. 42, 8 C.L.R. 273.

Clause (g):—Where one of the seven jurors did not understand English, the language in which some of the evidence appears to have been given and in which the addresses of Counsel were made and the charge of the Sessions Judge was delivered, the conviction cannot stand. According to ordinary procedure in criminal trials the accused has a right of challenge either peremptory, or for cause; and it may very well be that knowing the alleged defect he stands by and takes his chance of a verdict he is precluded from thereafter taking the objection. But if the cause of objection is in fact unknown to him, there appears to be no reason why the Court in a proper case should not give effect to it—*Ras Behari*, 34 Cr.L.J. 843, 144 I.C. 911, 1933 A.L.J. 893, A.I.R. 1933 P.C. 208, 14 P.L.T. 641, 65 M.L.J. 513, 38 M.L.W. 646, 1933 Cr.C. 1306, 1933 M.W.N. 1025, 35 Bom.L.R. 1087, 12 Pat. 811, 58 C.L.J. 300, 38 C.W.N. 11 (P.C.).

Where the language of the Court is *Hindi* and it has never been doubted that *Hindi* knowing jurors and assessors are competent to take part in the trial of cases in which the evidence, arguments and summing-up are given in *Hindi*, the fact that evidence is taken down in English would not make any difference. There is a provision in sec. 282, Cr. P. C., for the case in which in the course of a trial it appears that any juror is unable to understand the language in which evidence is given, or, when such evidence is interpreted, the language in which it is interpreted; in such a case a new juror has to be added, or the jury has to be discharged and the trial must commence anew. There is no similar provision with regard to assessors; but assuming that the principle applies, the fact that an assessor does not understand English will not invalidate a trial unless there had been a failure to interpret in *Hindi* evidence which had been given in English. Where some of the documents are in English, it may be less convenient to have an assessor who does not know the language of the documents thereby necessitating loss of time in interpreting, etc., but the matter does not go to the competency of the assessor or the lawful constitution of the Court—*Ram Babu Jadav v. Emp.*, 39 Cr.L.J. 302 (305), 173 I.C. 418, 4 B.R. 266, 10 R.P. 402, 18 P.L.T. 964, A.I.R. 1938 Pat 60, distinguishing *Ras Behari*, supra.

Clause (h):—If there are certain documents written in English, and the identity of the handwriting is in issue, objection may be taken to a juryman who does not understand English, and the Court may choose only such jurors as are able to read English—*Mohiuddin*, 51 C.L.J. 352, 1930 Cr.C. 745 (748), 32 Cr.L.J. 455, 129 I.C. 834. If the accused are all Muhammadans charged with the abduction of a Hindu girl, and the jurors are all Hindus, the accused cannot object on the ground that they will not get a fair trial from such jurors, and cannot claim a mixed jury consisting of Hindus and Muhammadans—*Jessarai*, 29 C.W.N. 526, 26 Cr.L.J. 1009 (1010), 87 I.C. 833, A.I.R. 1925 Cal. 729. In this case, it has further been held that the objection has certainly some force, and if a petition for mixed jury would have been made *before the jurors were summoned*, the Judge might have in his discretion made arrangements for a mixed panel—Ibid. See 40 C.W.N. cix in this connection.

Where an objection was taken, presumably on behalf of the accused, that a person was not a European British subject and was so not competent to sit as a juror but the Judge after examining him came to the conclusion that he was a European British subject, the objection that he was not, was an objection under s.c. 278, Cr. P. C., either under cl. (b) or cl. (h), and the decision of the Judge on the point was final under sec. 279 (1), Cr. P. Code—*Surajpalsingh*, 39 Cr.L.J. 818 (826), 11 L.R. 1938 Nag 516, 176 I.C. 853, 11 R.N. 81, 1938 N.L.J. 185, A.I.R. 1938 Nag. 328.

279. (1) Every objection taken to a juror shall be decided by the Court, and such decision shall be recorded and be final.

Decision of objection.

(2) If the objection is allowed, the place of such juror shall be supplied by any other juror attending in obedience to a summons and chosen in manner provided by section 276, or if there is no such other juror present, then by any other person present in the Court whose name is on the list of jurors, or whom the Court considers a proper person to serve on the jury:

Provided that no objection to such juror or other person is taken under section 278 and allowed.

887. Under sub-section (1) the trial Judge has a wide discretion in the matter of accepting or overruling objections to jurors, and his decision is final—*Muchu Khan*, 29 C.W.N. 652, 86 I.C. 457, A.I.R. 1925 Cal. 798, 26 Cr.L.J. 819. If the Court decides that no presumed or actual partiality in the juror has been made out, that decision is absolutely final and cannot be challenged in appeal. If, however, a Court were to find that some presumed or actual partiality in the juror had been made out, but in spite of this finding were to overrule the objection, the decision of the Court overruling the objection might perhaps be challenged in appeal—*Syed Yawar Bakht v. Emp.*, 44 C.W.N. 474 (477), A.I.R. 1940 Cal. 277 (279), 41 Cr.L.J. 719, 189 I.C. 173, I.L.R. (1940) 1 Cal. 531, 71 Cr.L.J. 181.

It is provided in clause (2) that the place of a juror may be taken by any other person present in Court whose name is on the list of jurors or whom the Court considers a proper person to serve on the jury. This shows that the Legislature contemplated the possibility of a person not in the jury list being chosen to serve on the jury in case of an emergency—*Muchu Khan*, supra. Under clause (2) the Court may allow some non-summoned persons present in Court to serve on the jury, where by reason of challenges or other causes such as some of them being excused, no summoned jury is left to take the place of the last challenged juror. In such an eventuality some other person present in Court may be empanelled. But this is to take place only in the exceptional conditions stated and in emergent circumstances—*Roshan Ali*, 31 C.W.N. 1102 (1107), 28 Cr.L.J. 889, 104 I.C. 905. This clause lays down that the place of a juror against whom objection has been allowed may be supplied by a juror attending in obedience to summons and chosen in the manner provided by sec. 276 and failing him, by any other person present in Court whose name is on the list of jurors or whom the Court considers a proper person to serve on the jury. But the vacancy cannot be filled up by a person who is then not present in Court, by requisitioning him from outside the Court, even though his name is on the special jurors' list—*Abedali*, 56 Cal. 835, 33 C.W.N. 722, 1929 Cr.C. 364, A.I.R. 1929 Cal. 728, 121 I.C. 560, 31 Cr.L.J. 281; *Shewaram v. Emp.*, A.I.R. 1939 Sind 209 (220), 41 Cr.L.J. 28, 184 I.C. 474.

280. (1) Where the jurors have been chosen, they shall appoint one of their number to be foreman.

Foreman of jury.

(2) The foreman shall preside in the debates of the jury, deliver the verdict of the jury, and ask any information from the Court that is required by the jury or any of the jurors.

(3) If a majority of the jury do not, within such time as the Judge thinks reasonable, agree in the appointment of a foreman, he shall be appointed by the Court.

281. When the foreman has been appointed, the jurors shall be sworn under the Indian Oaths Act, 1873.

Swearing of jurors.

282. (1) If, in the course of a trial by jury at any time before the return of the verdict, any juror, from any sufficient cause, is prevented from attending throughout the trial, or if any juror absents himself and it is not practicable to enforce his attendance, or if it appears that any juror is unable to understand the language in which the evidence is given or, when such evidence is interpreted, the language in which it is interpreted, a new juror shall be added, or the jury shall be discharged and a new jury chosen.

Procedure when juror ceases to attend, etc.

(2) In each of such cases the trial shall commence anew.

888. Scope of the section:—The Legislature intended to limit this section to cases where a jury had been properly empanelled at the outset and one or more of those casualties which are bound to occur at some time in human lives has in fact occurred. Sub-section (2) of this section also appears to contemplate the addition of a juror after the trial of the case has begun and not before—*Shewaram v. Emp.*, A.I.R. 1939 Sind 209 (220), 41 Cr.L.J. 28, 184 I.C. 474. When the trial of the case has not begun, sec. 276, Proviso 2, would apply—*Ibid.*

"Unable to understand language" :—Where a juror was deaf and blind, he was held to be 'unable to understand the language' of the trial, and was discharged, and the case was tried *de novo*—*Virasami*, 19 Mad. 375. Where one of the seven jurors did not understand English, the language in which some of the evidence appears to have been given and in which the addresses of Counsel were made and the charge of Sessions Judge was delivered, the trial was a mistrial and the convictions could not be sustained. The view that no evidence is admissible after verdict to establish the inability of a juror to understand the proceedings, is erroneous—*Ras Behari Lal*, 34 Cr.L.J. 843, 144 I.C. 911, 1933 A.L.J. 893, A.I.R. 1933 (P.C.) 208, 38 C.W.N. 11, 58 C.L.J. 300, 12 Pat. 811, 1933 M.W.N. 1025, 1933 Cr.C. 1306, 33 M.L.W. 646, 65 M.L.J. 513 (P.C.).

Illness of juror :—Where a juror is prevented from attending throughout the trial by illness, the Judge has a discretion under this section either to postpone the trial to a date on which the juror would be able to attend, or to discharge the jury, or to have another juror. If a juror is going to be able to attend in a very short time, it is a wrong exercise of discretion to discharge the jury—*Manmotha*, 31 C.W.N. 144, 28 Cr.L.J. 141 (143), A.I.R. 1927 Cal. 199.

Absence of witness :—The Judge can discharge the jury owing to the absence of a juror but he cannot do so owing to the absence of a witness—*Putaswamy*, 4 Bom.L.R. 939.

Trial shall commence anew :—Where a juror was discharged and replaced by another and the trial was not commenced anew, but the Judge called the witnesses who had been examined, read out their statements to them which they admitted to be correct and the trial proceeded, it was held that there was no valid trial—*Narain*, 36 All. 481, 16 Cr.L.J. 538, 12 A.L.J. 802, 24 I.C. 946. But the trial which becomes null and void owing to the incompetence of a juror under this section is not null and void for all purposes. Thus, if a witness has given false evidence during such trial, he can be prosecuted under sec. 193, I. P. Code. The nullity of the trial will not affect the liability of the witness for prosecution for perjury—*Virasami*, 19 Mad. 375.

889. Discharge of jury for misconduct:—After the close of the prosecution case, and before the counsel for the accused called his witnesses, the foreman of the

jury informed the Court that they had arrived at an unanimous verdict (which was unfavourable to the prisoner) and did not desire to hear anything more. The Court remarked that the conduct of the jury in anything at such a verdict before hearing the defence evidence was unfair to the accused and against all principles of justice. The counsel for the accused thereupon pressed for the discharge of the jury for such misconduct and for empanelling a fresh jury. But the Standing Counsel remarked that the case was not covered by sec. 282 or sec. 283 (which were the only sections relating to discharge of the jury during the trial) and the jury could not therefore be discharged; but under instructions from the Advocate-General he entered a *nolle prosequi*—*Olu Muhammad*, 7 C.W.N. xxxi. The point was therefore left undecided in that case. But in another case of the same High Court the question arose again, and it has been decided that although section 282 or 283 does not provide for the discharge of the jury for improper conduct during the trial, (as for instance where some of the jury were seen one day associating with the man who was looking after the case for the accused), nor is it specifically provided by any other section, still the Sessions Judge has an *inherent power* to discharge the jury for misconduct. But such power is not to be exercised lightly, nor until the Judge has satisfied himself, by such inquiry as in the circumstances he can adopt, that reasonable grounds for exercising such a power exist—*Rahim Sheikh*, 50 Cal. 872, 37 C.L.J. 595, 73 I.C. 773, A.I.R. 1923 Cal. 724, 24 Cr.L.J. 677; *Rebati Moohan*, 32 C.W.N. 945 (947), 56 Cal. 150, 30 Cr.L.J. 435; *Abdur Rashid*, 56 Cal. 1032, 33 C.W.N. 425, 122 I.C. 194, A.I.R. 1929 Cal. 343, 31 Cr.L.J. 366, Ind. Rul. 1930 Cal. 194; *Bipat Gope v. Emp.*, 38 Cr.L.J. 777 (779), 169 I.C. 495, 16 Pat. 8, 1937 P.W.N. 271, 10 R.P. 19, 3 B.R. 584, A.I.R. 1937 Pat. 369. The inherent power of a Sessions Judge to discharge a jury is not confined to cases of misconduct and plainly extends to cases where the Judge finds reason for doubting the impartiality of the jury. If the impartiality of the foreman of the jury is doubted, all the jurors should be discharged. The Judge should not discharge the foreman only—*Bipat Gope v. Emp.*, *supra*. The High Court can inquire into the validity of the reasons for discharging a jury—*Abdur Rashid*, *supra* and *Bipat Gope v. Emp.*, *supra*. Suspicion in the mind of a Public Prosecutor is not and could never be recognized as a good or valid ground for discharging a jury. Something much more definite and tangible than this is necessary—*Abdul Rashid*, *supra* and *Bipat Gope v. Emp.*, *supra*. In England also, the Judge has the power to discharge the jury for improper conduct, e.g. where one of the jurors had left the box without leave—*Reg v. Ward*, (1867) 10 Cox. C.C. 573.

The discharge of the jury for misconduct is not equivalent to a verdict of acquittal, but the prisoner can be remanded for a fresh trial and a new jury should be empanelled—*Reg. v. Davison*, (1860) 8 Cox. C.C. 360; *Rahim Sheikh*, *supra*. If the jury have misconducted themselves, they may be discharged and a new trial directed with a n established by .. (430, 431), 81 .. 2 I.C. 334, 27 C.W.N. 240, 33 C.L.J. 122, 22 Cr.L.J. 510; *Jesarat*, 26 Cr.L.J. 1009, 87 I.C. 833, 29 C.W.N. 526, A.I.R. 1925 Cal. 729.

If a juror expresses his opinion clearly regarding the guilt or innocence of an accused person before the charge to the jury has been delivered, the Sessions Judge would be well advised in discharging the jury and holding a fresh trial with a fresh jury—*Bideshi*, 37 Cr.L.J. 719, 162 I.C. 705, 1936 O.W.N. 457, A.I.R. 1936 Oudh 258, following *Nazir*, *supra*. But the mere circumstance that a man is betrayed by his friend for having mentioned to him in a conversation that he does not think the prosecution case to be true in the particular case in which he has been serving as a juror, does not seem to be a matter which at the end of the trial can be used as a reason why the trial should begin afresh—*Supdt. v. Ajit*, A.I.R. 1932 Cal. 750, 33 Cr.L.J. 869, 110 I.C. 18, 1932 Cr.C. 744.

If a juror is discharged for misconduct before any hearing of the case takes place

at all, it is necessary for the Judge to discharge the whole jury and empanel a new jury, but he can select another juror from the persons present in Court (sec 276, second proviso)—*Rcbati Mohan*, 56 Cal. 150, 32 C.W.N. 945 (1947).

When the conduct of the jury is taken exception to during the progress of the trial in the Session Court, the Presiding Judge has undoubted jurisdiction to enquire into the same. An enquiry such as is referred to must in the nature of things be a judicial enquiry. In the course of such an enquiry the Sessions Judge is entitled to call upon persons to appear before him, to administer oath to such persons and to require them to give evidence—*Bhuban*, 28 Cr.L.J. 783, 104 I.C. 111, 31 C.W.N. 828, A.I.R. 1927 Cal. 628, 55 Cal. 279. There is no provision in the Code of Criminal Procedure for holding an inquiry into the misconduct of a juror. There is authority for the view that the Sessions' Judge has jurisdiction to hold such an inquiry but it is clear that the question whether the Judge should or should not hold an inquiry is a matter within his discretion. He is not bound by any rule of procedure to hold the inquiry. Where the application submitted to him is vague in its language and is not supported by an affidavit, he does not exercise a wrong discretion in refusing to hold an inquiry into the truth of the allegations—*Bideshi*, supra.

It is entirely for the Judge to determine, and it is entirely within his discretion to determine, whether there is such misconduct on the part of a juror as necessitated a discharge of the jury, and the decision given by the Judge on the question is not open to review. Following the rule recognized in the English Law, the Judge, in India, has also the power to discharge the jury, if necessity arises, before or after the verdict in the absence of any provision to the contrary in the Indian Statute. Where one of the jurors had without the leave of the Court separated from the rest of the jury, and went to say his *Jumma* prayer, *held* that this was sufficient for setting aside the verdict and for ordering a retrial—*Nagen*, 35 Cr.L.J. 941, 149 I.C. 345, 38 C.W.N. 501, A.I.R. 1934 Cal. 428, 1934 Cr.C. 538, 59 C.L.J. 516.

The Criminal Procedure Code cannot be said to be exhaustive in regard to the conditions under which a jury can be discharged. Where the Judge empanelled a common jury to try the accused persons who were committed for trial on a charge under sec. 304, I. P. C., altered the charge later on to one under sec. 302, I. P. C., and discharged the jury as upon the alteration of the charge to one of murder the accused were entitled to be tried by a special jury, *held* that he had the power to discharge the jury and to direct that the trial should take place upon the altered charge with a special jury—*Yeshvant Vithu*, 38 Cr.L.J. 850, 170 I.C. 153, I.L.R. 1937 Bom 369, 39 Bom.L.R. 355, A.I.R. 1937 Bom. 260, 10 R.B. 49.

See also Note 1151.

283. The Judge may also discharge the jury whenever the prisoner becomes incapable of remaining at the bar.

Discharge of jury in case of sickness of prisoner.

D.—Choosing Assessors.

284. When the trial is to be held with the aid of assessors, *not less than three and, if practicable, four* Assessors how chosen. shall be chosen from the persons summoned to act as such.

Change:—The italicised words have been substituted for the words "two or more" by sec. 15 of the Criminal Law Amendment Act, XII of 1923. "We add the further recommendation that in all cases triable with the aid of assessors, there shall be, if possible, four and in any case, not less than three, assessors"—*Report of the Racial Distinctions Committee*, para. 26.

890. Choosing assessors:—This section does not prescribe that the assessors are to be chosen by lot. In fact it does not say that they ought to be chosen in any particular manner. Until the amendment of 1923, the law was "two or more shall be chosen as the Judge thinks fit" and though the words "as the Judge thinks fit" have been omitted from the section as it now stands, it cannot be said that the effect of the amendment is to require the assessors to be chosen in any particular manner. It is not the law that the assessors must be chosen by lot. The use of the word "chosen" does not necessarily imply that there ought to be a selection from a larger number—*Babu Ram Jadav v. Emp.*, 39 Cr.L.J. 302 (304), 173 I.C. 418, 4 B.R. 266, 10 R.P. 402, 18 P.L.T. 964, A.I.R. 1938 Pat. 60. The choice of jurors is by lot, but the choice of assessors is entirely with Judge, who in the exercise of this power should pay every consideration to any reasonable objection raised, although the law does not, as in the case of jurors, provide for objection being taken to an assessor. In the selection of assessors, regard must be had to the nature of the case, to the person tried, and to the public feeling excited. They ought not to be pleaders nor young men fresh from the College and devoid of experience. They ought to be persons of independent conditions in life, men of judgment and experience—*Ram Dutt*, 23 W.R. 35.

Though there is no express provision for objecting to the selection of an assessor, still there is no reason why an objection of presumed or actual partiality should not be allowed, particularly when it is urged at the time of selection of the assessor. The opinions of assessors are of great value both to the Judge who tries the case and to the Superior Courts. It is therefore necessary as an elementary principle that they should be above suspicion. The relationship of landlord and tenant or of master and servant creates an incapacity in a person to sit as an assessor in a case. An objection to an assessor that he is a tenant of the person interested in the prosecution is a valid objection—*Shivadhan*, 3 P.L.T. 32, 22 Cr.L.J. 262, 60 I.C. 662, A.I.R. 1923 Pat. 116.

'From the persons summoned':—The assessors must be chosen from the persons summoned to act as such. The Judge is not competent to select any one to act as an assessor who has not been summoned under sec. 326 or sec. 327. Where out of several persons summoned the Judge selected only one, and he selected two other persons at random from the persons present in Court, it was held that the trial was bad, as it was practically conducted with one assessor only—*Badri*, 1894 A.W.N. 207; *Man Singh*, 35 All. 470, 21 I.C. 891, 11 A.L.J. 930, 14 Cr.L.J. 654; *Balak Singh*, 44 I.C. 587, A.I.R. 1918 Pat. 420, 5 P.L.W. 16, 3 P.L.J. 141, 19 Cr.L.J. 363. Where in the absence of assessors duly summoned, the Judge appointed the Nazir of the Court to act as an assessor, the trial was held to be illegal, as the Nazir was not duly summoned, and in choosing assessors there is no provision corresponding to the second proviso to sec. 276 (in choosing jurors)—*Khub Singh*, 13 O.C. 337, 11 Cr.L.J. 724. But where a person was summoned to serve as an assessor on a particular date in a particular case and he failed to appear in Court on that date but appeared on a subsequent day when another trial had to commence, and he was selected to act as an assessor in that trial, his selection would not be improper—*Chutta*, 17 Cr.L.J. 17 (All.). Section 326, Cr. P. C., lays down the procedure which "shall ordinarily" be followed and is not mandatory. Section 327, Cr. P. C., gives an emergency power to cause jurors or assessors to be summoned when such direction is found to be necessary. Where, therefore, the usual precept was issued to the District Magistrate for summoning assessors in accordance with sec. 326, Cr. P. C., but when the case came up for trial, only three of the assessors summoned were present and the Judge caused a summons to be served on a gentleman who was present in Court and whose name was on the list of persons qualified to serve as assessors and chose these four persons as assessors, the trial was not illegal—*Ram Babu Jadav v. Emp.*, 39 Cr.L.J. 302 (304), 173 I.C. 418, 4 B.R. 266, 10 R.P. 402, 18 P.L.T. 964, A.I.R. 1938 Pat. 60; even when the person, whose name was in the list of assessors and who was present in Court, was chosen without any formal summons having been served upon him the order of the Judge to requisition the services of such a person amounted to summoning him—

Ramsidh Rai, 39 Cr L.J. 725, 176 I.C. 530, 10 R.P. 79, 4 B.R. 724, 1938 P.W.N. 559, A.I.R. 1938 Pat. 352. Jurors were summoned and the trial began as a jury trial, and continued to be regarded as such right down to the day on which arguments were heard. The Judge then passed orders that the jurors would thenceforth be considered as assessors as he came to the conclusion that the case was triable with the aid of assessors and not with the aid of jurors. *Held* that the trial ought to have been held throughout with the aid of assessors chosen from persons summoned to act as such, that there was no lawful trial by a lawfully constituted tribunal and that sec. 536 (1), Cr.P.C., did not apply to the case—*Sheopal*, 34 Cr L.J. 1093, 145 I.C. 803, 10 O.W.N. 619, A.I.R. 1933 Oudh 351, 1933 Cr C 994.

Number of assessors.—Under this section as now amended, there must be at least three assessors. A trial held with less than the required number of assessors is null and void, and the illegality cannot be cured by sec. 537—*Jairam*, 20 N.L.R. 129, 77 I.C. 811, A.I.R. 1924 Nag 287, 25 Cr L.J. 459; *Pragi*, A.I.R. 1924 Oudh 417; *Ram Narain*, 27 O.C. 213, 26 Cr L.J. 359, A.I.R. 1925 Oudh 110, 84 I.C. 711. A trial commencing with the aid of one assessor is not a legal trial, and section 537 cannot cure the defect—*Jairam*, 25 Bom. 694; *Silva*, 15 Bom. 514. If there were two assessors (which was the required number prior to the present amendment) but one of them was deaf and blind, there was properly speaking only one assessor and the trial was invalid—*Babu Lal*, 21 All 106; *Anonymous*, 2 Weir 340.

This section lays down that the number of assessors should be not less than three, and if practicable four. Where four assessors are not chosen, it is right that the Court should give reasons in the order-sheet to explain the impracticability of choosing four. But the trial with three assessors, without the record of these reasons, is not irregular but is still according to law—*Jamal*, 7 P.L.T. 14, 26 Cr L.J. 713, 86 I.C. 153, A.I.R. 1925 Pat. 381.

Trial without assessors.—The trial will be invalid if a portion of the trial which consists in the taking of additional evidence takes place after the discharge of the assessors—*Ram Lal*, 15 All 136.

284A. (1) In a trial with the aid of assessors of a person who has been found under the provisions

Assessors for trial of European and Indian British subjects and others.

of this Code to be an European or Indian British subject, if the European or Indian British subject accused, or, where there are several European British subjects accused or several Indian British subjects accused, all of them jointly, before the first assessor is chosen, so require, all the assessors shall, in the case of European British subjects, be persons who are Europeans or Americans or, in the case of Indian British subjects, be Indians.

(2) In a trial with the aid of assessors of a person who has been found under the provisions of this Code to be an European (other than an European British subject) or an American, all the assessors shall, if practicable and if such European or American before the first assessor is chosen so requires, be persons who are Europeans or Americans.

This section has been added by sec. 16 of the Criminal Law Amendment Act, XII of 1923. Under this section, Indians and Europeans can claim to be tried before their own countrymen as assessors. "In any district in which for any class of offences Indians are normally triable in a Court of Session with the aid of assessors, and in

which no racial considerations are involved, the accused, whether Indian or European, shall be tried with assessors, who, if the accused so claims, shall all be of the nationality of the accused"—*Report of the Racial Distinctions Committee*, para. 26.

Sub-section (2) embodies the old section 460 with certain modifications.

891. The accused, if he intends to avail himself of the provisions of this section must make a claim to the privilege conferred by it; failure to make a claim will amount to waiver—*Ruffe*, 1912 P.R. 6, 13 Cr.L.J. 197.

285. (1) If in the course of a trial with the aid of assessors, at any time before the finding, any assessor is unable to attend, assessor is, from any sufficient cause, prevented from attending throughout the trial, or absents himself, and it is not practicable to enforce his attendance, the trial shall proceed with the aid of the other assessor or assessors.

(2) If all the assessors are prevented from attending, or absent themselves, the proceedings shall be stayed and a new trial shall be held with the aid of fresh assessors.

892. Absence of assessors:—This section contemplates that at least one assessor must attend continuously throughout the trial—*Messuruddin*, 6 C.W.N. 715; *Thirumalai*, 24 Mad 523. Therefore, where in a Sessions trial beginning with three assessors, one of the assessors died at an early stage of the proceedings and later on another assessor became too ill to be present, and the third was absent before the pleader for the defence addressed the Court, it was held that the trial was a nullity—*Muhammad Mahomed Khan*, 13 All. 337.

An assessor who is absent during a part of the trial cannot be allowed to resume his seat as assessor; once he is absent he ceases to occupy the position of an assessor. Where such an assessor was allowed to resume his seat, and the evidence recorded in his absence was read over to him and he gave his opinion just like the other assessors, the procedure was illegal. His opinion ought not to have been taken—*Messuruddin*, 6 C.W.N. 715; *Piso*, Ratanlal 695. In a Madras case, however, such a procedure was held to be merely irregular and not illegal. Though the proper course would have been to proceed with the trial with the aid of the other assessor alone, and to accept his opinion only, still the fact that the absent assessor was allowed to resume his seat and take part in the trial and give his opinion would not vitiate the opinion of another assessor which was validly given. The assessors merely assist the Court but do not form part of the tribunal which decides the case, and the assessors unlike the jury give their opinions separately and not as members of a body—*Thirumalai*, 24 Mad. 523.

If assessor is an interested person:—Where in the course of a trial it is found that one of the assessors is an interested person, and unfit to sit as an assessor, there is no provision of law to meet such a contingency. In such a case, the proper course is to refer the case to the High Court to set aside the order appointing the incompetent assessor and all subsequent proceedings in the trial. Then the Sessions Judge will be asked by the High Court to choose another assessor and proceed with the trial *de novo*—*Thiagaraja*, 1912 M.W.N. 378, 13 Cr.L.J. 473, 15 I.C. 313. Similar procedure was followed in *Lal Singh*, A.I.R. 1933 Lah. 926, 1933 Cr.C. 1385, 15 Lah. 20, 146 I.C. 446, 35 Cr.L.J. 107 where the Judge discovered in the course of the trial that one of the assessors stated that he was determined to help the accused and was not going to allow the accused to be convicted and a retrial was ordered with the help of other assessors. But where at the end of a Sessions trial three of the four assessors expressed the opinion that the case against the accused had not been established, but the fourth held that the accused were guilty, adding that he had personal knowledge about the

matter, this expression of opinion does not necessitate a *de novo* trial with the aid of other assessors. The proper course for the Judge is simply to ignore the opinion of the assessor if he comes to the conclusion that it was improperly expressed, or that he had been improperly influenced by extra-judicial considerations. There is nothing illegal in a Judge acting in that manner—*Pahlu*, A.I.R. 1939 Lah. 475 (479), I.L.R. 1939 Lah 243, 41 Cr.L.J. 55, 184 IC 549, 41 P.L.R. 731.

DD.—Joint Trials.

285A. *In any case in which an European or American is accused jointly with a person not being an European or American, or an Indian British subject is accused jointly with a person not being an Indian, and such European, Indian British Subject or American is committed for trial before a Court of Session, he and such other person may be tried together, but if he requires to be tried in accordance with the provisions of section 275 or section 284A and is so tried, and the other person accused requires to be tried separately, such other person shall be tried separately in accordance with the provisions of this Chapter.*

This section has been newly added by sec. 17 of the Criminal Law Amendment Act, XII of 1923. It provides that in cases in which Indians and Europeans are sought to be tried jointly, they can claim to be tried separately before jurors or assessors who are their own countrymen.

The words "and is so tried" in this section mean "if he is in fact so tried", or "if he is eventually so tried", for unless the European British accused was in fact tried in accordance with the provisions of sec. 275, Cr P. C., the Indian accused's ground for claiming a separate trial would disappear—*Surajpalsingh*, 39 Cr.L.J. 818 (826), 176 IC. 853, 1938 N.L.J. 185, A.I.R. 1938 Nag. 328, I.L.R. 1938 Nag. 516, 11 R.N. 81.

In the Committing Magistrate's Court one of the three accused claimed under sec. 443, Cr. P. C., that he was a European British subject and entitled to be tried as such, and his right to be so tried was conceded by the Crown. When the case came before the Sessions Judge he again put forward his claim to be tried as a European British subject and the other two accused stated that they did not claim an Indian majority in the jury but wished to be tried jointly with the other accused. The Sessions Judge at once decided not to proceed with the case as it was impossible to obtain sufficient European jurors there and referred the case for the order of the High Court though the question of empanelling a jury did not arise until the accused claimed to be tried. The High Court ordered the case to be tried by a Sessions Judge of a different place before whom one of the two accused, who wished previously to be tried jointly with the third accused who claimed to be tried as a European British subject, claimed to be tried separately. The Sessions Judge held that he had already made his choice and must adhere to that choice. An application in revision to the High Court was rejected. On appeal the validity of the order was again contested. Held that the application in revision having been rejected, the order was final and could not be contested in appeal and that the joint trial was legal inasmuch as when the accused was asked before the original Court of Session he did not require to be tried separately—*Surajpalsingh*, *supra*.

E.—Trial to close of cases for Prosecution and Defence.

286. (1) When the jurors or assessors have been chosen, the prosecutor shall open his case by reading from the Indian Penal Code or other law the description of the offence charged, and stating shortly by what evidence he expects to prove the guilt of the accused.

Opening case for prosecution. Examination of witnesses. (2) The prosecutor shall then examine his witnesses.

Trial cannot be postponed:—After the jurors have been chosen, the prosecutor shall open his case, and the trial cannot be postponed to enable the prosecutor to examine a witness by commission—*Jacob*, 19 Cal. 113.

Shall open his case:—It is a rule of universal application that in a criminal trial Counsel for the prosecution, in opening the case to the jury, can only state *all* that it is proposed or intended to prove in the case, so that the jury may see if there is any discrepancy between the opening statements of Counsel and the evidence afterwards adduced in support of them and that it is wholly improper for Counsel for the prosecution to open any matter to the jury in respect whereof no evidence is intended to be or can be adduced at the trial. (*Per Ghose, J.*). So far as criminal cases are concerned, the opening for the prosecution ought always to be confined to matters which are necessary to enable the jury to follow the evidence when it is brought before them. This is not the stage of a case at which doubtful questions of admissibility should be either raised or decided. The opening speech of the Counsel for the prosecution does not afford a proper occasion for the determining of such questions (*per Rankin, C.J.*).—*Padam Prosod*, 50 C.L.J. 106, 33 C.W.N. 1121, 30 Cr.L.J. 993, 119 I.C. 193, 1929 Cr.C. 228, A.I.R. 1929 Cal. 617 (F.B.).

When the prosecution proposes to examine new witnesses, the prosecuting Counsel should always mention in his opening address the names of the new witnesses and the purpose for which they are being called, and the Court should always insist upon this being done—*Dhondiba*, 36 Cr.L.J. 344, 153 I.C. 278, 36 Bom.L.R. 950, A.I.R. 1934 Bom. 487, 1934 Cr.C. 1413. See also *Niamat*, in Note 893 and *Yusuf Mia v. Emp.*, in Note 915 (18).

893. Examination of witnesses:—The prosecutor is bound to call all the witnesses who prove their connection with the transaction in question, and who also must be able to give important information. If such witnesses are not produced without sufficient reason being shown, the Court may properly draw an inference adverse to the prosecution—*Dhurno*, 8 Cal. 121 (125); *Muhammad Yunus*, 50 Cal. 318 (326); *Nayan Mandal*, 34 C.W.N. 170 (173), A.I.R. 1930 Cal. 134; *Nababali*, 34 C.W.N. 1151 (1153), 32 Cr.L.J. 228; *Tulla*, 7 All. 904; *Brahmadeo*, 1 P.L.T. 161, 21 Cr.L.J. 33, 54 I.C. 241; *Jumo*, 3 S.L.R. 200, 11 Cr.L.J. 410. The duty of the prosecution is not to secure a conviction but to assist the Court in arriving at the truth, and for that purpose to place before the Court all the material evidence at its disposal—*Fateh Chand*, 44 Cal. 477, 21 C.W.N. 33 (F.B.); *Amrita Lal*, 42 Cal. 967. The purpose of a criminal trial is not to support, at all costs, a theory, but to investigate the offence and to determine the guilt or innocence of the accused, and the duty of the Public Prosecutor is to represent not the police but the Crown, and this duty should be discharged by him fairly and fearlessly and with a full sense of the responsibility that attaches to his position. The guilt or innocence of the accused is to be determined by the tribunals appointed by law and not according to the tastes of any one else—*Ram Ranjan*, 42 Cal. 422, 19 C.W.N. 28, 16 Cr.L.J. 170, 27 I.C. 554, A.I.R. 1915 Cal. 545. The prosecutor is not free to choose how much evidence he will bring before the Court; he is bound to produce all the evidence in his power directly bearing upon the charge.

It is his duty to call all witnesses who can throw any light on the case, whether they support the prosecution theory or the defence theory—*Brahamadeo*, 1 P.L.T. 161, 54 I.C. 241, 21 Cr.L.J. 33; *Dhunno*, 8 Cal. 121 (124); *Kunja*, 8 Pat. 289, 1929 Cr.C. 62, 10 P.L.T. 549, 116 I.C. 770, A.I.R. 1929 Pat. 275, 30 Cr.L.J. 675; *Mathura*, 8 Pat. 625, 1929 Cr.C. 155, A.I.R. 1929 Pat. 343, 10 P.L.T. 177, 30 Cr.L.J. 1136, 120 I.C. 37. All the persons alleged or known to have knowledge of the facts ought to be brought before the Court and examined. The fact that certain witnesses were examined by the committing Magistrate against the express desire of the police-officer conducting the prosecution is not a ground for not calling them—*Ram Sahai*, 10 Cal. 1070 (1072). All the witnesses who were present at the scene of the crime must be called by the prosecution even if they give contradictory versions, so that the jury may draw their own conclusions from their depositions—*Dhamba*, *Ratanlal* 581; and it is not a sufficient reason not to call such a witness, simply because the opinion he has formed shows an unconscious bias on his part—*Munni*, 9 C.W.N. 438. The prosecutor should not refuse to call and examine any witnesses for the prosecution merely because his evidence may in some respects be favourable to the defence—*Durga*, 16 All. 84 (F.B.).

It is the duty of the prosecution to examine important witnesses who are personally eye-witnesses of the occurrence, and the failure of the Public Prosecutor to do so requires explanation—*Keshwar Gope*, 1 P.L.T. 491, 21 Cr.L.J. 743, 58 I.C. 247. In a capital case, he should place before the Court the testimony of all the available eye-witnesses—*Ram Ranjan*, 42 Cal. 422, 19 C.W.N. 28. All important eye-witnesses of the scene of occurrence should be examined by the prosecution as to the several facts known to them which are relevant to the case, though other witnesses might have spoken to the same facts. *Merely tendering them for cross-examination* without examining them, is a practice which should not be encouraged—*Veera Koravan*, 53 Mad. 69, 30 L.W. 701, 1929 Cr.C. 685 (688). When witnesses, who are independent and are named in the first information report, are not called by the prosecution, the Court is justified in assuming that their evidence would not have supported the prosecution—*Ghulam Rasul v. Emp.*, 39 Cr.L.J. 7, 171 I.C. 906, 10 R.L. 247, 40 P.L.R. 17. But see *Girish Chandra Namdas*, *infra*.

Although it may be in many cases unsafe to expose the source from which information is obtained by the police, still when the evidence of a witness supplying such information is vital, e.g., on the question of identity, such witness must be called, and omission to do so will lead to an inference adverse to the prosecution—*Molla Khan*, 37 C.W.N. 1061 (1064).

But the prosecution is not bound to call any particular witness, when there is reasonable ground for believing that he will not, if called, speak the truth, or to call any witness whom he believes to be false or whose evidence is unnecessary for the trial—*Ramjit*, 2 Pat. 309 (315), 74 I.C. 705, A.I.R. 1923 Pat. 413, 24 Cr.L.J. 801; *Reed*, 69 I.C. 630, A.I.R. 1922 Cal. 461, 23 Cr.L.J. 742, 49 Cal. 277; *Muhammad Yunus*, 50 Cal. 318; *Dhunno*, 8 Cal. 121 (125); *Durga*, 16 All. 84; *Balaram*, 71 I.C. 685, A.I.R. 1922 Cal. 382, 24 Cr.L.J. 221, 49 Cal. 358 (367); *Santon*, 14 All. 521; *Kaimi*, 1916 P.R. 12; *Doraisami*, 45 M.L.J. 846; *Mathura*, 8 Pat. 625, 1929 Cr.C. 155; *Nayan Mandal*, 34 C.W.N. 170 (171). If the Police or Public Prosecutor is of opinion that a witness is likely to give false testimony or that his evidence is unnecessary, he is justified in not sending up or producing that witness, but his absence at the trial ought not to be a reason for disbelieving the other prosecution witnesses if they are otherwise worthy of credit—*Ramjit*, 2 Pat. 309 (314, 315), 24 Cr.L.J. 801, 74 I.C. 705, A.I.R. 1923 Pat. 413.

When the prosecution have produced sufficient evidence and the best evidence it is not always incumbent on them to produce all possible evidence on the less important facts—*Yusuf Mia v. Emp.*, A.I.R. 1938 Pat. 577 (581), 40 Cr.L.J. 147, 178 I.C. 934, 20 P.L.T. 51, 5 B.R. 185, 1938 P.W.N. 727.

Before the prosecution launches any case, they ought to be satisfied of the truth of the case which they are going to place before the Court. Consequently, it is absurd to expect the prosecution to call witnesses who will speak against that case. If the

prosecution find that a number of those who are present will not support the prosecution case, they must make up their minds whether they are truthful witnesses or not. If they come to the conclusion that they are truthful witnesses, they ought to withdraw the prosecution forthwith. If, on the other hand, they come to the conclusion that they are not truthful witnesses, there is no obligation for the prosecution to call them. Practically speaking, therefore, the prosecution ought to call those witnesses who, they think, will support the prosecution case and no others. If the witnesses who are prepared to speak against that case are respectable witnesses who ought to be believed, then the prosecution ought to withdraw the case. It is quite useless to pursue a case and then call a whole series of witnesses who are going to speak against it. On the other hand, if the defence comes to the conclusion that the witnesses are witnesses of truth who ought to have been called, then it is the duty of the defence to call them—*Bhuban Bejoy*, 37 C.W.N. 1098 (1100). See also *Hpa Wa v. Emp.*, 37 Cr.L.J. 234, 160 I.C. 113, A.I.R. 1935 Rang 506, 1935 Cr.C. 1303, 8 R.R. 341. Speaking generally, it cannot be laid down that a prosecution must call witnesses irrespective of considerations of number and reliability, or that a prosecution ought to discharge the functions both of prosecution and defence. If it does so, confusion is very apt to result, and never is it more likely to result than if the prosecution calls witnesses and then proceeds almost automatically to discredit them by cross-examination. Witnesses essential to the unfolding of the narrative on which the prosecution is based, must, of course, be called by the prosecution, whether in the result the effect of their testimony is for or against the case for the prosecution—*Stephen Seneviratne*, 37 Cr.L.J. 963, A.I.R. 1936 P.C. 289 (300), 41 C.W.N. 65, 164 I.C. 545, 9 R.P.C. 83, 44 M.L.W. 661, 1936 Cr.C. 900, 1936 M.W.N. 340, 39 Bom.L.R. 1 (P.C.). Their Lordships of the Privy Council, observing that no rule can be laid down to fetter the discretion of the prosecution to call witnesses which is dependent on the particular circumstance of each case, go on to say that they do not in general approve of the idea that a prosecution must call witnesses irrespective of considerations of number and of reliability, but that witnesses essential to the unfolding of a narrative on which the prosecution is based must of course be called by the prosecution whether in the result the effect of their testimony is for or against the case for the prosecution—*Muktavandas v. Emp.*, 40 Cr.L.J. 393 (396), 180 I.C. 602, A.I.R. 1939 Nag. 13, 1938 N.L.J. 434, I.L.R. 1939 Nag. 109, 11 R.N. 377. The prosecution is not bound to call any particular witness or witnesses when there is reasonable ground for the Public Prosecutor to come to the conclusion and believe that such witness or witnesses, if called, will not speak the truth; nor is it incumbent on the prosecution to call any witness when the Public Prosecutor believes that the evidence of such person is wholly unnecessary for the trial—*Brinchipada Dafadar v. Emp.*, 39 Cr.L.J. 964, 177 I.C. 929, A.I.R. 1938 Cal. 625, 67 C.L.J. 45, 11 R.C. 296. It is not the duty of the prosecution to call as witnesses every one whose statements have been taken by the police but only to call such people as may be likely to give truthful and reliable evidence with regard to the matter in question—*Nga Kyaw Hla v. The King*, 39 Cr.L.J. 248 (250), 173 I.C. 94, A.I.R. 1938 Rang. 45, 10 R.P. 306. But it is the duty of a Public Prosecutor to conduct the case for the Crown fairly; his object should be, not to obtain an unrighteous conviction, but, as representing the Crown, to see that justice is vindicated; and in exercising his discretion as to the witnesses whom he should or should not call, he should bear that in mind. It is his bounden duty to place before the Court for the adjudication of the Court, all the evidence against all the accused persons. Where he asks the permission of the Court not to call the principal witness against the accused on the ground that he does not believe the witness's evidence, he constitutes himself the Judge of the case, that is, coming to a conclusion in regard to the guilt or innocence of the accused. It is for the Judge, and not for the Public Prosecutor, to decide whether the evidence should be believed or not and it is therefore essential that the Public Prosecutor should place the whole of the evidence before the Court—*Nga Sar Kee v. The King*, 41 Cr.L.J. 153 (155), 185 I.C. 303, A.I.R. 1939 Rang. 390. There is no duty upon those who are charged with the preparation of a prosecution case to produce in Court every person

examined by the police. But in a murder case where a witness has given evidence which supports a plea of alibi taken by one of those who have been charged with the murder, the witness ought beyond all doubt to be produced. In no circumstances should the fact of his statement be withheld from the Court. The prosecution authorities have no right to take it upon themselves to decide whether a witness who gives vital evidence of this sort is or is not a reliable witness. That is the function of the Court which the prosecution has no right to usurp—*Neri Singh*, 57 All. 267 (275), A.I.R. 1934 All. 908, 36 Cr.L.J. 152, 152 I.C. 741, 1934 A.L.R. 1033, 1934 Cr.C. 1167, 21 A.J. Cr.R. 212, 4 A.W.R. (H.C.) 5. See also Note 915 (25).

The mere fact that certain persons are mentioned in the first information report as being witnesses of the occurrence does not in itself make it necessary for the prosecution to call any of them, if the prosecution comes to the conclusion that they are not really eye-witnesses and cannot give relevant evidence—*Girish Chandra Namadas*, 58 Cal. 1335, 1932 Cr.C. 103 (104), A.I.R. 1932 Cal. 118, 135 I.C. 443, 33 Cr.L.J. 135. But see *Gulam Rasul v. Emp.*, supra.

There may be some doubt as to the duty of the Public Prosecutor, but there is a duty cast upon the Court to arrive at the truth by all lawful means and one of such is the examination of witnesses of its own accord when for certain obvious reasons neither party is prepared to call witnesses who are known to be in a position to speak to important relevant facts. When the trial Court fails to do this, the Appellate Court should avail itself of the power conferred by sec. 428, Cr. P. Code—*Donald Dixon*, 40 Cr.L.J. 35 (36), 178 I.C. 341, 1938 M.W.N. 817, 48 M.L.W. 363, A.I.R. 1938 Mad. 900; *Nga Kan Chai v. Emp.*, 38 Cr.L.J. 1040, 171 I.C. 129, A.I.R. 1937 Rang. 139, 10 R.R. 133. But see *Hari Lal*, infra and *Ibrahim v. Emp.*, A.I.R. 1935 Pat. 95 (96), 153 I.C. 466, 1935 Cr.C. 208, 36 Cr.L.J. 348, where it has been laid down that the Public Prosecutor is not obliged to examine persons as prosecution witnesses, if he has reason to believe that they would not support the prosecution case. Nor is the Court bound to examine any person as a Court witness, unless, the evidence of such person appears to be essential to the just decision of the case. It would, however, be wholly inappropriate to take these observations as laying down a general proposition with regard to the effect of, and the inference to be drawn or not to be drawn from the absence of relevant witnesses from the witness-box. That is a matter to be considered with reference to the circumstances of each particular case and the facts which the witness, if called, would have been required to prove; and the jury should be asked to consider it in the light of those circumstances and those facts—*Yusuf Mia v. Emp.*, 40 Cr.L.J. 147 (148), 178 I.C. 934, A.I.R. 1938 Pat. 579, 1938 P.W.N. 727, 5 B.R. 185, 20 P.L.T. 51. See also *Bankey Singh v. Dasrath Pandey*, 1938 P.W.N. 681, which was a case instituted on a petition of complaint.

All the witnesses sent up by the committing Magistrate must be examined, and the Sessions Judge is not competent to pick and choose among them. It is the duty of the Court to examine all such witnesses unless it has good and sufficient reason, on the representation of the Public Prosecutor or otherwise, to believe that the witnesses came to the Court house with a pre-determined intention of giving false evidence—*Bankhandi*, 15 All. 6. The prosecution is not bound to put in a witness who was examined before the committing Magistrate, when there is reason to believe that such witness is unreliable. The only duty of the prosecution in such a case is to have in attendance every witness examined before the committing Magistrate, so that the witness may be cross-examined or not by the defence counsel as he chooses—*Stanton*, 14 All. 521; *Kali-prosonno*, 14 Cal. 245. If some of the prosecution witnesses examined before the committing Magistrate are not examined before the Sessions Judge by the Public Prosecutor, still the accused is entitled to have them put into the box for cross-examination—*Nagendra*, 27 C.W.N. 820, 38 C.L.J. 203; *Nayan Mandal*, 34 C.W.N. 170 (171), 31 Cr.L.J. 918, 125 I.C. 746, A.I.R. 1930 Cal. 134, 1930 Cr.C. 134. See also *Marsang*, 11 Bom.L.R. 1162, 10 Cr.L.J. 538 (539), 4 I.C. 273. When a witness has been examined as a witness in the committal Court it is not the duty of the Public Prosecutor to

call him unless it is thought that he can give material information in connexion with the offence charged: nor is it his duty to tender him for cross-examination. If what the Judge says to the Public Prosecutor is in the nature of advice as to how the latter should exercise his discretion, no exception can be taken to it; but if the Judge goes further and instructs the Public Prosecutor not to call witness, this is going too far—*Brahmaya v. The King*, 40 Cr.L.J. 265, 179 I.C. 783, A.I.R. 1938 Rang. 442 (444), following *Nga Aung Gyi v. Emp.*, 14 Rang. 45. When the committal proceedings are finished and it is perfectly plain that certain witnesses, who had been cited as prosecution witnesses and are related to the accused, are going to tell a story quite different from the case put forward by the Crown, the Public Prosecutor should refuse to call them at the Sessions trial—*Nga Ba U v. Emp.*, 39 Cr.L.J. 217 (218), 172 I.C. 926, A.I.R. 1937 Rang. 429, 10 R.R. 289. When the Public Prosecutor does not call a witness examined before the committing Magistrate, on the ground that he will not speak the truth, he should explain to the Court that this is the reason, and should tender him for cross-examination. In the absence of any such explanation or other reasonable grounds apparent on the face of the proceedings, inference unfavourable to the prosecution will be drawn from the non-production of the witness—*Tulla*, 7 All. 904.

The witnesses must be orally examined in Court before the jury; it would be a faulty procedure to dispense with their examination and to read over to the jury the recorded statement of the evidence given by them at a previous hearing of the case. If such a procedure is adopted, the jury would have no opportunity of gauging the value of the testimony of each individual witness by his general demeanour. A witness may show a suspicious hesitancy in answering certain questions put by the counsel for the prosecution or he may show an equally suspicious excess of zeal. But Judge and jury are undoubtedly influenced to a considerable extent by the manner in which a witness gives his evidence-in-chief; and moreover the demeanour of a witness during the examination-in-chief may be of the greatest help to the counsel for the defence in his cross-examination. All these advantages would be lost if a mere record of the evidence is read over, instead of examining the witness—*Lyme*, 4 Lah 382 (386). And so in an English case, Sir John Coleridge has made the following remarks on the impropriety of reading over at the retrial of a case the Judge's note of the evidence given by the witnesses at the previous trial, instead of examining them fully:—"Those of their Lordships who have been used, on motion for new trials, to hear the Judge's note of the evidence read, probably know well by experience how difficult it is to sustain the attention or collect the value of particular parts when that evidence is long . . . But this is not at all. The most careful note must often fail to convey the evidence fully in some of its most important elements, those for which the open and oral examination of the witness in the presence of the prisoner, Judge, and jury is so justly prized. It cannot give the look or manner of the witness; his hesitation, his doubts, his variations of language, his confidence of precipitancy, his calmness or consideration; it cannot give the manner of the prisoner, when that has been important, upon the statement of anything of particular moment. . . . It is in short the dead body of the evidence without its spirit which is supplied when given openly and orally by the ear and eye of those who receive it"—*Attorney-General v. Beland*, (1867) 36 L.J. P.C.C. 51 (57), L.R. 1 P.C. 520 (535).

If the Crown has not called a witness as a Crown witness, and if the Sessions Judge thinks that he is a material witness, it is open to him either to draw an adverse inference against the Crown in not calling the witness or to examine him as a Court witness. But he cannot compel the Crown either to examine him as a Crown witness or to tender him for cross-examination—*Dulo*, 36 Cr.L.J. 869, 155 I.C. 1114, A.I.R. 1935 Sind 60. See also *Hpa Wa v. Emp.*, 37 Cr.L.J. 234, 160 I.C. 113, A.I.R. 1935 Rang. 506, 1935 Cr.C. 1303, 8 R.R. 341.

It is true that it is the duty of the prosecution to produce before the Court all eye-witnesses of the occurrence, but if the Government Pleader takes upon himself the responsibility of not producing certain eye-witnesses, then it is not the duty of the

Appellate Court to fill up the gap in the prosecution evidence by summoning that witness—*Hari Lal*, 36 Cr.L.J. 814 (816), 155 I.C. 753, 1935 O.W.N. 592. But see *Donald Dixon*, *supra*.

There is no rule that every eye-witness ought to be called by the prosecution. No doubt the duty of the prosecution is not to endeavour to obtain a conviction at any cost, but to see that the facts are fairly presented before the Court. But *prima facie* it is for the prosecution to call such witnesses as they think will establish their case. No doubt if the Public Prosecutor knows of a witness who favours the accused, it is his duty either to call the witness himself or to see that the defence is supplied with the name of the witness and given an opportunity of calling him—*Vasudeo*, A.I.R. 1932 Bom. 279 (282), 56 Bom. 434, 34 Bom.L.R. 571, 1932 Cr.C. 391, 138 I.C. 503, 33 Cr.L.J. 613.

Further evidence throwing doubt on the prosecution story:—It is possible that at some stage of the case, the prosecution may have come to know of some further evidence which may possibly throw doubt on the prosecution story which had been put forward as a result of the inquiry made by the investigating officer. When such a situation arises, the most vital question for consideration is as to what is the duty of the prosecution? The proper and fair course is to place the fresh evidence or information before the Court which has to adjudicate the question of guilt or innocence of the accused persons. It is a well established rule of law that it is the bounden duty of the prosecution to place before the trial Court all evidence relating to the case which is at its disposal and then invite a judicial decision. Prosecution takes a grave risk if it takes upon itself the duty of withholding evidence relating to the crime. It is not the function of the prosecution to decide which portion of the evidence is true and which portion is false. This does not mean that where conflicting evidence is produced during an enquiry the prosecution cannot elect to rely on the statements of one set. That power is undoubtedly there. But the duty of the prosecution is that the trial Judge must be informed about the opposite version and then it will be for the Judge to decide whether he should hear the evidence or not. In other words, it is the duty of the prosecution to let the Judge know of the entire evidence at its disposal—*Abdul Subhan v. Emp*, A.I.R. 1940 All. 46 (52), 1939 A.L.J. 966, 41 Cr.L.J. 258, 186 I.C. 192, 1939 A.W.R. (H.C.) 768, 1939 A.Cr.C. 182.

Change of Judge:—A Sessions Judge is not competent to proceed with a Sessions trial from the point where his predecessor has left it and the consent of the accused makes no difference. On a change of the Judge, the trial must begin *de novo*—*Durga Charan*, 8 C.L.J. 59. During a Sessions trial in the High Court a jury was sworn and the Counsel for the Crown had started opening his case when the Judge was taken ill and was succeeded by another Judge under the directions of the Chief Justice. On an objection being taken that the Court, as constituted by the new Judge and a Jury which had been sworn in the presence of his predecessor, had no jurisdiction to try the case; *held* that the Court, as constituted, had such jurisdiction and that the mere fact that the swearing in of the jury and reading out of the charges to the jury took place before another Judge, would at most amount to an irregularity under sec. 537, Cr. P. C., which covers the case of an error, omission or irregularity in the proceedings before or during trial or in any inquiry or other proceedings under this Code—*Dorabji*, 28 Cr.L.J. 402, 101 I.C. 178, 29 Bom.L.R. 204, A.I.R. 1927 Bom. 161.

Where a Judge is succeeded by another, and the latter decides to hold the trial *de novo*, he must examine the witnesses orally again. If the witnesses' depositions in the previous trial are merely exhibited in the second trial, without actually examining them *de novo*, the procedure is illegal; even the fact that the accused consented to such course in order to save cross-examination will not cure the illegality—*Umar Hajee*, 49 Mad. 117.

Defence case:—The prosecution must give positive evidence of the guilt of the accused and cannot depend upon the weakness of his adversary's case. The Court is concerned not so much with the truth or otherwise of the theory suggested by the

accused as with the case for the prosecution. The proof of the case against the prisoners must depend for its support not upon the absence or weakness of explanation on their part, but upon the positive and affirmative evidence of their guilt that is given by the Crown—*Mamfru*, 51 Cal. 418 (425, 426).

Witnesses not examined before the Committing Magistrate:—The prosecution cannot demand, as of right, that any witness not examined in the preliminary inquiry should be called and examined at the trial. But the Court, if it considers necessary, may call and examine him—*Heyfield*, 14 All. 212, 1892 A.W.N. 63. But the mere fact that a witness has not been examined before the committing Magistrate, is no ground for refusing to take the evidence of such witness, if he is a relevant witness. There is nothing in the Code which restricts the examination at the trial only to the witnesses examined before the committing Magistrate. But the prosecutor should, as a matter of justice and fairness to the accused, state in his opening address the name of such witness—*Khan Muhammad*, 1889 P.R. 1; *Dhondiba*, 36 Cr.L.J. 344, 153 I.C. 278, 36 Bom L.R. 950, A.I.R. 1934 Bom. 487, 1934 Cr.C. 1413; *Muhammad Panah*, 35 Cr.L.J. 1170 (1173), 150 I.C. 917, 1934 Cr.C. 732, A.I.R. 1934 Sind 78. The general effect of a consideration of relevant sections of the Code of Criminal Procedure is that the prosecutor is at liberty to examine witnesses in the Sessions Court which he has not produced in the Court of the Committing Magistrate, but that only those witnesses so examined in the Committing Magistrate's Court can be bound down to attend in the Sessions Court. The prosecution in the Sessions Court, if the witnesses are not examined in the Court of the Committing Magistrate, has to depend upon such witnesses being willing to give evidence without being bound down to appear, or upon being able to persuade the Court to act under sec. 540, Cr. P. C., and summon such a witness. In accordance with the practice in the English Courts, a summary of the evidence proposed to be called should be given to the Sessions Court and the accused before trial, if a witness has not been called in the Committing Magistrate's Court. There is no provision in the Cr. P. C., making this course compulsory, but, in fairness to the accused, it should be followed—*Niamat*, 37 Cr.L.J. 742 (745, 746), 162 I.C. 976, A.I.R. 1936 Lah. 533, 17 Lah. 176, 38 P.L.R. 421, 1936 Cr.C. 568 (F.B.).

If the Public Prosecutor produces a new witness at the Sessions trial, and if he is not allowed to examine him as his own witness, then it would be the duty of the Court to examine him as a Court witness. If this were done, then an opportunity of cross-examining must be allowed both to the Prosecutor and to the accused. It will be therefore rather to the advantage of the prosecution that such a witness be examined as a Court witness and to the advantage of the accused that he should be examined in the ordinary way as a witness for the prosecution—*Muhammad Panah*, *supra*.

894. Cross-examination:—As a rule, the cross-examination of a witness should take place after his examination-in-chief, and cannot be postponed. There is no provision of law which authorises the Judge to allow all the prosecution witnesses to be examined at once, and to permit the cross-examination to be reserved for a subsequent date—*Gothuri Venkatappa*, 2 Weir 381. But though the accused is not entitled to such postponement as of right, still there is no reason why the Sessions Judge should refuse an application for such postponement where the application was a reasonable one under the circumstances of the case—*Sadasiv*, 41 Cal. 299, 15 Cr.L.J. 596.

A Sessions Judge is not justified in stopping the cross-examination and turning the witness out of Court because he is of opinion that the witness is not speaking the truth—*Meharban*, 1900 A.W.N. 149.

A Judge is and always must be in control of the proceedings in his Court. On the other hand, the right of cross-examination must be carefully guarded, and it must be remembered that it may be necessary for an advocate to approach delicately and with caution the point upon which he is seeking to obtain admissions. It may be important that a witness whom he does not consider truthful should not be put on his guard by immediate presentation of the case set up by the opposing side. If questions are couched in too blunt a form he may readily deny them. Hence considerable

latitude is desirable since the admissions sought to be elicited may only be forthcoming when the witness, if he is concealing something, is thrown off his guard; and there are cases in which it is necessary to drop a particular issue in the course of cross-examination and to return to it again discreetly at a later stage. On the other hand the length of cross-examination is by no means the criterion of its excellence, and it is lamentably true that lack of skill in advocacy often leads to a failure to appreciate this fact. When irrelevant topics are pursued at great length, and persistence is shown in going over the same ground again and again in the hope of making the witness appear discrepant, some limit must be placed upon the latitude given. Continued irrelevancies and repetitions are not to be endured indefinitely. If after several warnings an advocate persists in abusing his position in this way, he may be directed to resume his seat, but only when the Judge has enquired what are the material matters on which he still desires to cross-examine and is satisfied that no satisfactory reply has been forthcoming from the advocate and that no legitimate questions by him have been shut out. In any case the Judge should make a note of the submission of any advocate as to further questions which he desires to put or as to any specific question which has been disallowed—*Brahmaya v. The King*, A.I.R. 1938 Rang. 442 (444), 40 Cr.L.J. 265, 179 I.C. 783. While it is the duty of every Court to keep the cross-examination of a witness within legitimate bounds it must be careful, in the discharge of that duty, not to exercise too effective a control so as to unduly curtail legitimate cross-examination. Too much interference by the presiding Judge in the course of the cross-examination of witnesses by the Counsel for the accused has, more often than not, the result of robbing the cross-examination of its efficacy and, therefore, undue interference in cross-examination must be avoided by the presiding Judge—*Salay Ram v Emp*, 38 Cr.L.J. 416 (418), 167 I.C. 515, A.I.R. 1937 All. 171, 1937 A.L.R. 201, 9 R.A. 550.

For procedure of trial in cross-cases see Notes in para 830A.

287. The examination of the accused duly recorded by or

Examination of accused before Magistrate to be evidence. before the committing Magistrate shall be tendered by the prosecutor and read as evidence.

895. "*The examination of the accused*"—This section contemplates an examination of the accused, although sec. 209 does not make it imperative on the committing Magistrate to examine the accused—*Sita*, Ratanlal 100 (101). The examination of the accused recorded by the Magistrate should be put in as part of the case for the prosecution, before the accused is called on to enter on his defence—*Anonymous*, 2 Weir 361; *Cal. G. R. & C. O.*, p. 23.

If the conviction is to be based solely on a statement of the accused, it is fair that the statement should be taken in its entirety, unless there is good reason to the contrary—*Kamakka*, 12 Cr.L.J. 142, 9 I.C. 790, 2 M.W.N. 199, 9 M.L.T. 316.

Where the prisoner had made two statements before the Magistrate, the one amounting to a confession of the guilt, and the other to a denial thereof, the trial Court ought to consider both the statements and their relative credibility—*Soobjan*, 10 B.L.R. 332; *Mahabir*, 18 All. 78. If in an examination of the accused some objectionable questions have been asked by the committing Magistrate, such questions and the answers thereto must be omitted, but the whole examination should not be excluded from evidence—*Khudiram*, 9 C.L.J. 55, 3 I.C. 625. Where the accused was examined about a confession which was not admissible in evidence, the questions and answers to them could not be said to be 'duly recorded' as the questions were not such as were allowed by the law to be put; and the answers to these questions were not admissible in evidence against the accused—*Gang Gye*, 4 L.B.R. 244, 8 Cr.L.J. 62.

This section permits a previous statement of the accused to be read as a part of the case for the prosecution only so far as such statement refers to the offence (*i.e.*, the present offence) for which the accused is being tried, and not so far as it relates to a

previous conviction. The portion as to previous conviction cannot be read out to the jury or assessors under sec. 310 until they have given their verdict or opinion—*Tata Ahir*, 5 P.L.J. 705, 22 Cr.L.J. 219, 60 I.C. 331. See also *Ghous Baksh Muhammad Amin v. Emp.*, in Note 945.

The examination of the accused before the committing Magistrate *must* be given in evidence at the trial. It is not optional with the prosecution to put in such statement or not. If it is not tendered by the prosecution, the Judge is bound to call for it—*Rama Tevan*, 15 Mad. 352; *Ameer Chand*, 13 W.R. 63.

The accused, when asked by the committing Magistrate, if he wished to make any statement, said that he did not. The following day he made a statement to the Superintendent of the District Jail and asked that it might be placed on the record. The Superintendent forwarded the statement to the Magistrate who examined the accused with reference to the statement and filed it with the case at the request of the accused. Held that the statement was admissible in evidence under this section—*Chidambaram*, 32 Mad. 3 (15).

"Committing Magistrate" :—The phrase 'committing Magistrate' in secs. 287 and 288 is merely a convenient way of referring to the Magistrate or Magistrates who held the preliminary inquiry on which the committal was made. Where a subordinate Magistrate inquired into a case and discharged the accused, and the District Magistrate acting under sec. 436 (now 437) committed the accused for trial, the examination recorded by the subordinate Magistrate would be the examination recorded by the 'committing Magistrate' within the meaning of this section—*Malinga*, 31 Mad. 40, 7 Cr.L.J. 29. Where the Magistrate, who recorded the statement of the accused, was subsequently transferred and the case was eventually committed to the Court of Sessions by his successor; held that the statement was rightly admitted in evidence under this section in view of sec. 350, Cr. P. Code—*Ghulam*, 7 Lah. 70.

Read as evidence :—Where in the Committing Magistrate's Court the accused made admission, it is evidence under this section—*Mosaheb Dome v. Emp.*, A.I.R. 1940 Pat. 14 (15), 40 Cr.L.J. 833, 183 I.C. 660, 1939 P.W.N. 627.

288. The evidence of a witness duly recorded in the presence of the accused *under Chapter XVIII* may, in the discretion of the presiding Judge, if such witness is produced and examined, be treated as evidence in the case for all purposes *subject to the provisions of the Indian Evidence Act, 1872.*

895A. Change:—The word 'record' has been substituted for 'taken'; the words "under Chapter XVIII" have been substituted for the words "before the committing Magistrate," and the italicised words at the end of the section have been newly added, by section 78 of the Cr. P. C. Amendment, XVIII of 1923. "The words 'under Chapter XVIII' have been used in place of the 'committing Magistrate' to cover the case of evidence recorded by a Magistrate, other than the committing Magistrate, under sec. 219"—*Report of the Select Committee of 1916.* The amendment of the section by substituting the words 'duly recorded in presence of the accused under Chapter XVIII' for the words "duly taken in the presence of the accused before the committing Magistrate" is intended to cover cases where evidence may be recorded by the committing Magistrate but not for the purpose of commitment, as under sec. 219, Cr. P. Code. Besides, there is no special procedure laid down in Ch. XVIII for recording evidence; and any evidence recorded by a Magistrate before commitment, whether recorded with a view to commitment or in the ordinary course of trial, is evidence "recorded in the presence of the accused under Ch. XVIII"—*Abdul Gani*, 53 Cal. 181, 42 C.L.J. 205, A.I.R. 1926 Cal. 235, 90 I.C. 537, 26 Cr.L.J. 1577. See also *Nagendra*, in Note 896, where a contrary view was taken.

896. Object and scope of section:—This section should be applied when there is reason to believe that a witness who is produced before the Court of Session is departing from the evidence, which he gave before the Magistrate in the preliminary inquiry, and consequently it is considered desirable by the Judge to bring the whole statement made before the Magistrate on record as substantive evidence—*Abdul Jalil*, 1930 A.L.J. 1105, 32 Cr.L.J. 152; *Mulu*, 2 All 646.

This section refers only to the evidence of witnesses recorded under Chap. XVIII. It does not contemplate statements made by witnesses before a Police officer or to an investigating Magistrate—*Sankappa*, 31 Mad 127, 7 Cr.L.J. 325; or a statement made by a witness at a search—*Venkat Row*, 36 Mad. 159; or a statement given by a witness before a monigar—*Malaya*, 42 M.L.J. 278, 23 Cr.L.J. 262, A.I.R. 1922 Mad. 303.

Evidence of approver:—Where a conditional pardon was tendered to an accomplice, and he was examined as a witness before the committing Magistrate, his deposition made before the Magistrate may be used as evidence against the accused, even if it is retracted at the Sessions trial—*Soneju*, 21 All 175; *Rama Tevan*, 15 Mad 352; *Bhola Nath v. Emp.*, A.I.R. 1939 All. 557 (572), 1939 A.L.J. 785, 40 Cr.L.J. 856, 184 I.C. 191, 1 L.R. 1939 All. 736. See also *Faqir Singh v. Emp.*, A.I.R. 1939 Lah 429 (431), 41 P.L.R. 333. The reliability of such statement is no doubt injuriously affected by the fact of its being retracted before the Sessions Court, but it does not follow that it is not entitled to any weight or credibility—*Punhu*, 8 S.L.R. 203, 16 Cr.L.J. 233. If the Sessions Judge is of opinion that the statement of an approver made before the committing Magistrate (though retracted at the trial) was a substantially truthful evidence and the record contains ample corroboration of almost all the facts deposed to by him, the Judge can regard the statement as evidence along with the evidence of other witnesses—*Bhikari Pati*, 9 Pat 592, 32 Cr.L.J. 66 (69), 128 I.C. 114, A.I.R. 1930 Pat 545, 11 P.L.T. 787, 1930 Cr.C. 1089, Ind Rul 1931 Pat 2. It is open to the Judge under the provisions of law to hold that the statement made by the approver before the Committing Magistrate is a correct statement and that it should be relied upon in spite of the statements which the approver introduces before him in the Court of Session—*Bhola Nath v. Emp.*, supra.

"Duly recorded in the presence of accused".—A statement made in the absence of the accused cannot be treated as evidence against him under this section—*Pathana*, 3 P.R. 1904; *Alimuddin*, 23 Cal 361; *Gulaba*, 35 All 260, 14 Cr.L.J. 211. So also, where the accused was merely allowed to be present but was not allowed to cross-examine the witnesses before the committing Magistrate, the evidence of such witnesses cannot be said to be duly taken in the presence of the accused, and cannot be treated as evidence under this section. To allow the accused to be present merely to hear such *ex parte* statement of witnesses without allowing him to rebut the statements by cross-examination defeats the real object of the law, for it deprives the accused of any substantial benefit from being present—*Sagal*, 21 Cal 642 (665). The prosecution witnesses were examined by the Committing Magistrate in a hospital where both the deceased and the accused were in-door patients. The accused declined to cross-examine them alleging that he was not in a proper condition to do so or to follow their evidence properly. The prosecution witnesses were, therefore, again tendered for cross-examination when they all went back upon their previous statements and supported the defence version. *Held* that the statements of the witnesses on the first day were duly recorded within the meaning of this section and could legally be treated as evidence in the case—*Muhammad Aslam Khan*, 28 Cr.L.J. 33, 99 I.C. 65, A.I.R. 1926 Lah 590, 27 P.L.R. 469, 9 Lah.L.J. 45.

The accused was convicted in a case which was tried as a warrant case. The appellate Court set aside the conviction, observing that if the Magistrate wished to proceed further he might commit the accused to the Court of Sessions. Thereupon the Magistrate, without holding any enquiry under Chap. XVIII of the Code, committed the accused to the Court of Sessions. *Held* that the accused would not be able to make use of the statements made by the prosecution witnesses at that trial for all purposes

as he might under this section, if there had been an inquiry held according to the provisions of Chap XVIII—*Nagendra*, 33 Cr.L.J. 770, 139 I.C. 470, 36 C.W.N. 926, 1932 Cr.C. 636, A.I.R. 1932 Cal. 683, Ind. Rul. 1932 Cal 628. But see *Abdul Gani* in Note 895A, where a contrary view was taken.

Following *Abdul Gani*, supra, the Lahore High Court has very recently held that provided a Magistrate, in acting under sec. 347, Cr. P. C., commits the accused subject to the safeguards relating to the rights of the accused as provided for in secs 208, 211, 212 and 213, Cr. P. C., any statement recorded by the Magistrate in the presence of the accused prior to the commitment would be the evidence of a witness duly recorded under Chap. XVIII, and may therefore be transferred and treated as substantive evidence in the trial before the Sessions Court—*Fazal v. Emp.*, A.I.R. 1940 Lah. 389 (391), I.L.R. 1940 Lah. 151.

897. "Produced and examined":—The evidence of witnesses given before the committing Magistrate may be used as evidence if the witnesses have been *produced* and *examined* at the trial; a statement made before the committing Magistrate by a person who has since disappeared is inadmissible in evidence, because the witness is not produced and examined before the Sessions Judge—*Ajodhi*, 16 N.L.R. 30, 21 Cr.L.J. 486. See also *Natha Singh*, 35 Cr.L.J. 349 (351), 147 I.C. 234, 35 P.L.R. 75, 1934 Cr.C. 447, A.I.R. 1934 Lah 212. If the witness is incapable of giving his evidence, his deposition before the committing Magistrate can be admitted in evidence under section 33 of the Indian Evidence Act—*Natha Singh*, supra. The witnesses who had given deposition before the committing Magistrate must be *examined* by the Judge, before the former deposition can be treated as evidence. The mere examination of the witness by the Judge as to his making the deposition before the committing Magistrate, is not an examination within the meaning of this section—*Subba*, 9 Mad. 83. Mere producing of the witnesses is not sufficient; they must be produced and *examined*, i.e., examined as witnesses, and not merely *cross-examined* or tendered for cross-examination. Where certain prosecution witnesses who had given evidence before the committing Magistrate were not examined by the Sessions Judge afresh, but their depositions were read out to them, and the accused was allowed to cross-examine them, the procedure was illegal—*Subba*, supra; *Kottagadu*, 1915 M.W.N. 544, 16 Cr.L.J. 615. If a witness who has given an important piece of evidence before the committing Magistrate, is not examined by the Sessions Judge, but is merely tendered for cross-examination, and even in his cross-examination he is asked certain unimportant questions having no bearing upon the story of the offence, the Sessions Judge acts illegally in mentioning to the jury the statement made by that witness before the committing Magistrate, for such a procedure would amount to treating as evidence what has not been put on record as evidence—*Khadem*, 57 Cal. 940, 32 Cr.L.J. 180 (182), 128 I.C. 801, A.I.R. 1930 Cal. 706, Ind Rul. 1931 Cal. 97, 1930 Cr.C. 1106. In this case the deposition in the committing Magistrate's Court was not put in under this section. It was also held that it would have been unfair to have put it under this section in the circumstances of this particular case. This section does not allow the use of the deposition as a substitute for examination at the trial. This section is not exception to sec. 286; it does not dispense with the examination of the witnesses directed by sec. 286—*Subba*, 9 Mad. 83. Further, the statements made by a witness before the committing Magistrate should not be read out to the witness in the trial before the defence has had an opportunity of cross-examining him—*Narain Das*, 3 Lah. 144 (154), 23 Cr.L.J. 513.

Moreover, the deposition of the witness before the committing Magistrate can be used as evidence if the witness is examined at the trial *as a witness*. Where the witness before the committing Magistrate, being found concerned in the offence, was committed to take his trial along with the accused in the case, the deposition in the Magistrate's Court could not be treated as evidence against the accused under this section, he not being a *witness* in the trial—*Shibdayal*, 23 P.R. 1883.

898. Retracted statement:—Where the witnesses made certain statements implicating the accused, before the committing Magistrate, but at the trial before the

Sessions Judge they resiled from those statements and told an altogether different story, *held*, that the statements before the committing Magistrate were not merely relevant for the purpose of contradicting or negating the statements made before the Court of Sessions under sec 155, Evidence Act, but that under sec 288 could also be treated as "evidence in the case," i.e., as *substantive evidence* of all the facts therein deposed to—*Maruti*, 46 Bom. 97, 22 Cr.L.J. 636; *Amir Zaman*, 6 Lah. 199, 26 P.L.R. 361, 26 Cr.L.J. 1245; *Ala Singh*, 29 Cr.L.J. 73, 106 I.C. 585; *Abdul Gani*, 53 Cal 181, 26 Cr.L.J. 1577; *Tulli*, 47 All 276, 26 Cr.L.J. 450; *Rakha*, 6 Lah. 171, 27 Cr.L.J. 438; *Bahadur*, 88 I.C. 7, A.I.R. 1925 Sind 289, 19 S.L.R. 71, 26 Cr.L.J. 1063; *Puran*, A.I.R. 1934 Lah. 743, 15 Lah. 765, 149 I.C. 476, 35 Cr.L.J. 1005, 1934 Cr.C. 1095; *Shankar*, 35 Cr.L.J. 894, 149 I.C. 69, 1934 Cr.C. 673, 11 O.W.N. 636, A.I.R. 1934 Oudh 222; *Samero*, 37 Cr.L.J. 1045, 164 I.C. 1036, A.I.R. 1936 Sind 140. See also *Ram Gobinda Ghosh v. Emp.*, 39 Cr.L.J. 625, 175 I.C. 529, 10 R.C. 802, 42 C.W.N. 781, A.I.R. 1938 Cal 364; *Kataru Chinna Papiiah*, A.I.R. 1940 Mad 136 (137), 1939 M.W.N. 1134, 50 M.L.W. 742, 1939 M.Cr.C. 282, 41 Cr.L.J. 323, 186 I.C. 484. A certain witness made a statement before the committing Magistrate, but resiled from that statement before the Sessions Judge, whereupon his statement made before the committing Magistrate was put in evidence under sec. 288, and in order to corroborate this statement, a statement made by that witness before the Police was proved and put in evidence. *Held* that the statement made before the committing Magistrate was 'testimony' within the meaning of sec. 157 of the Evidence Act, and therefore the prior statement made before the Police was admissible in evidence to corroborate the statement made before the committing Magistrate—*Mam Chand*, 5 Lah. 324 (328), 25 Cr.L.J. 1201. So also, a statement by a witness recorded by a Magistrate under sec. 164 is admissible in evidence to corroborate the statement made by that witness before the committing Magistrate, from which he subsequently resiled in the Sessions Court—*Velliah Kone*, 45 Mad 766, followed in *Manarali*, 37 C.W.N. 1066 (1068), 58 C.L.J. 60, 60 Cal 1339, 147 I.C. 1203, A.I.R. 1934 Cal 124, 1934 Cr.C. 169, 35 Cr.L.J. 567; *Mathura Tewari*, 8 Pat 625, 120 I.C. 37, A.I.R. 1929 Pat 343, 1929 Cr.C. 155, 30 Cr.C. 1136, 10 P.L.T. 177, Ind. Rul. 1929 Pat. 677. So also a statement by a witness recorded by a Magistrate under sec 512, Cr. P. C., may be used to corroborate his statement before the committing Magistrate from which he subsequently resiled in the Court of Sessions—*Lajji Rai*, 37 Cr.L.J. 235 (238), 160 I.C. 181, A.I.R. 1936 Pat 11, 1936 Cr.C. 6, 16 P.L.T. 730. But the admission of the deposition in the committing Magistrate's Court in which witness admitted having made a certain statement when examined under sec 164, Cr. P. C., does not entail the admission of the statement under sec 164 as substantive evidence in the case. It is a statement which can be used simply to contradict the witness and to show that the witness is unreliable with a view to taking his evidence out of the case which otherwise might react unfavourably upon the evidence of other prosecution witnesses—*Karuppana*, 28 Cr.L.J. 279, 100 I.C. 359, A.I.R. 1927 Mad 1112. Where a Sessions Judge, being of opinion that certain prosecution witnesses had been gained over by the accused, allowed their depositions given before the committing Magistrate to be received in evidence, *held* that this section enabled the Court to treat such depositions as substantive evidence in the case at the trial. Such evidence may be used as much in favour of the defence as of the prosecution, and not merely for the purpose of contradicting the witnesses at the Sessions trial—*Dorai Sami*, 24 Mad 414, *Gansa Oraon*, 2 Pat 517, 24 Cr.L.J. 641. See also *Kataru Chinna Papiiah*, supra. Depositions of witnesses taken before the committing Magistrate, and subsequently retracted before the Session Judge, may, in the discretion of the Judge, be admitted in evidence at the trial in the Sessions Court; and when so admitted, they are *on the same footing as any other evidence* on the record—*Dwarka*, 28 All 383; *Mamchand*, 5 Lah 324 (328), 25 Cr.L.J. 1201; *Velliah*, 45 Mad. 766, 43 M.L.J. 222. That is, the evidence recorded by the committing Magistrate, even though retracted in the Sessions Court, may be considered by the jury or by the assessors and the Judge, as part of the material or as substantive evidence upon which the verdict or the finding has to be given—*Umar*, 51 P.R. 1887; *Abdul Gani*, 53 Cal. 181, 42 C.L.J. 205,

A.I.R. 1926 Cal. 235, 90 I.C. 537, 26 Cr.L.J. 1577; *Fazaruddin*, 42 C.L.J. 111, 26 Cr.L.J. 1553, 90 I.C. 433, A.I.R. 1926 Cal. 105; *Basappa*, 86 I.C. 145, A.I.R. 1925 Bom. 266, 26 Cr.L.J. 705. This course is justified when there is a close relationship between the witnesses and the accused—*Krishna*, A.I.R. 1935 Mad. 479 (482), 1935 M.W.N. 82, 1934 M.Cr.C. 378, 1935 Cr.C. 742, 157 I.C. 297, 36 Cr.L.J. 1107. Where the wife of the accused while deposing in the Court of Sessions resiled from her statement before the committing Court which was corroborated by her statement recorded under sec 164, Cr. P. C., the Madras High Court accepted the statement made before the committing Magistrate in preference to the statement before the Court of Sessions and based a conviction of the accused thereon—*Vellai Kone*, A.I.R. 1923 Mad. 20, 72 I.C. 529, 24 Cr.L.J. 417, 43 M.L.J. 222, 45 Mad 766, 16 M.L.W. 239, 1922 M.W.N. 506, 31 M.L.T. 175. But there is nothing in this section which prescribes the *value or weight* to be attached to the evidence. Whether any portion or the whole of the evidence given before the committing Magistrate is entitled to credit, and if so, to such a degree that a conviction may be based upon it wholly or in part, are very important questions for the jury and the assessors, but they are in no way affected by this section—*Umar*, 51 P.R. 1887. It is a matter for the discretion of the Judge whether such evidence should be used in the interests of justice. In many cases it would be extremely dangerous to rely upon such evidence where the witnesses have proved themselves in the Sessions Court altogether unworthy of credit—*Gansa Oraon*, 2 Pat. 517, 24 Cr.L.J. 641. A judgment may be based upon the deposition taken before the committing Magistrate, which has been retracted at the trial, when the Sessions Court can see special reason for believing the original statement to be true either from the statements of the same witnesses before itself or when that statement is to a certain extent corroborated by independent testimony. If there is no such corroborative evidence, it is not proper to base a conviction solely upon the deposition given before the Magistrate—*Jeochi*, 21 All. 111; *Amanulla*, 21 W.R. 49; *Jadub Das*, 27 Cal. 295 (306), 4 C.W.N. 129; *Mamchand*, 5 Lah. 324 (328), 25 Cr.L.J. 1201; *Rangi*, 10 Mad 295 (314); *Bharmappa*, 12 Mad 123; *Nirmal Das*, 22 All 445; *Somadu*, 47 Mad. 232, 25 Cr.L.J. 715; *Pirithi*, 37 P.R. 1917, 18 Cr.L.J. 703; *Nga Nyein*, 11 Rang 4, 1933 Cr.C. 452 (454), 142 I.C. 87, 34 Cr.L.J. 286, A.I.R. 1933 Rang. 57; see also Note 915 (18); especially when there is nothing on the record to show that the witnesses have in fact become hostile or have been won over by the accused—*Pahalwan*, 35 Cr.L.J. 797 (799), 148 I.C. 937, 10 Luck. 1, 11 O.W.N. 508, 1934 Cr.C. 578, A.I.R. 1934 Oudh 182. A conviction based solely on evidence given by the witnesses before the committing Magistrate and retracted by them at the trial is unsustainable—*Sher Dil*, 17 P.R. 1919, 20 Cr.L.J. 792, 53 I.C. 696. The evidence of such a witness is not to be safely relied upon in the absence of corroboration—*Kataru Chinna Papiiah*, A.I.R. 1940 Mad 136 (137), 1939 M.W.N. 1134, 50 M.L.W. 742, 1939 M.Cr.C. 282, 41 Cr.L.J. 323 (324), 186 I.C. 484. If it were permissible to convict an accused person, relying solely upon the evidence given by a witness before the committing Magistrate, the logical consequence would be that the taking of evidence before the Sessions Court might be altogether dispensed with—*Amanulla*, 21 W.R. 49. Evidence given before a committing Magistrate cannot be effectually utilised in support of a conviction unless it is shown by other corroborative evidence that the evidence given before the committing Magistrate should be preferred to and substituted for the evidence given at the trial—*Jehal Teli*, 3 Pat. 781 (794), 6 P.L.T. 53, 26 Cr.L.J. 270; *Lalji Rai*, 37 Cr.L.J. 235 (238), 160 I.C. 181, A.I.R. 1936 Pat. 11, 1936 Cr.C. 6, 16 P.L.T. 730; *Jadub Das*, 27 Cal 295 (306); *Bigna Kumhar*, 27 Cr.L.J. 591, 91 I.C. 258, A.I.R. 1926 Pat 440; *Nebti Mandal*, A.I.R. 1940 Pat. 289 (293), 1940 P.W.N. 73. This view of law was, however, dissented from by the Allahabad High Court in *Raja Ram*, 36 Cr.L.J. 823, 155 I.C. 657, A.I.R. 1935 All. 691, 1935 A.L.J. 668 and by the Lahore High Court in *Narain Singh*, 37 Cr.L.J. 567 (568), 162 I.C. 379, A.I.R. 1936 Lah 357, 17 Lah 419, 38 P.L.R. 820, 1936 Cr.C. 298, where it has been held that there is nothing in this section to show that there need be corroboration of evidence so recorded, that it has like other evidence to be examined with care and to be considered with all the other surrounding circumstances and that

no general law can, therefore, be laid down as to this. The evidence of prosecution witnesses recorded before the committing Magistrate and transferred to the record of the Sessions Court, under the provisions of this section, is on the same footing with all other evidence in the case for all purposes and it is not necessary that there should be 'corroboration of those statement otherwise'—*Parmanand v. Emp.*, A.I.R. 1940 Nag. 340 (347), 1940 N.L.J. 459. A conviction cannot be based upon statements of witnesses made before the committing Magistrate, when they afterwards came forward before the Sessions Judge and gave only circumstantial evidence insufficient to connect the accused with the commission of the crime—*Ghanuara*, 1915 P.W.R. 15, 16 Cr.L.J. 612. A Sessions Judge does not show a proper discretion in allowing a statement made before the committing Magistrate by a witness to be used as evidence under this section, when the witness repudiates it at the Sessions and says that it was given under pressure from the police in the course of the investigation—*Bhut Nath*, 7 C.W.N. 345 (350). In such a case the Judge should make some inquiry by examining the Inspector of Police regarding the restraint and pressure put upon the witness, before admitting such statement as evidence—*Bajragi*, 4 C.W.N. 49 (55); *Jadub Das*, 27 Cal. 295 (300).

Where every one of the witnesses for the prosecution has been demonstrated at the trial to have contradicted the statement that he made before the Committing Magistrate it would not be safe to convict the accused—*Harnam Singh v. Emp.*, 38 Cr.L.J. 765, 169 I.C. 434, 10 R.L. 13, 39 P.L.R. 555, A.I.R. 1937 Lah. 597.

899. "Subject to the provisions of the Evidence Act":—These words do not mean that evidence duly taken before a Magistrate can only be utilized at a trial in a case where the Evidence Act specifically authorises its use. Such a construction is erroneous, because there are only certain sections in the Evidence Act (secs 32, 33, 145, 155, 157) which can in any way be regarded as even remotely dealing with this subject, but none have any direct bearing. There is indeed in the Evidence Act nothing at all which permits or specifically provides for the use of evidence taken before a Magistrate as evidence at a trial. What is really meant by the words is that evidence duly taken before a Magistrate can be used for all purposes in a trial Court so long as the evidence is 'evidence' within the meaning of the Evidence Act, i.e., if the matter contained therein is, according to the rules laid down in the Evidence Act, of evidential value. For instance, hearsay evidence taken before a Magistrate would not be capable of being utilized by a Sessions Judge as of evidential value at the trial. These words may also probably mean that the evidence taken before a Magistrate can only be used at the trial subject to the procedure laid down in the Evidence Act—*Jehal Teli*, 3 Pat. 781 (788-790), 6 P.L.T. 53, 26 Cr.L.J. 270; *Bahadur*, 19 S.L.R. 71, 26 Cr.L.J. 1063.

The words 'for all purposes subject to the provisions of the Evidence Act' do not mean that the evidence given before the committing Magistrate can be used in the Court of Session only for the purpose of corroboration and contradiction in accordance with sections 155 and 157 of the Evidence Act. Such evidence may be acted upon by the Sessions Court precisely as if that evidence has been deposed to before the Sessions Judge. The words merely mean that the law of evidence enacted in the Evidence Act must be complied with. For instance, evidence which had been wrongly admitted by the committing Magistrate, in violation of the provisions of the Evidence Act, cannot be transferred to the file of the Sessions Judge and used at the trial. The amendment is obviously introduced for the purpose of removing any doubts as to the right of the Court to treat the evidence given before the committing Magistrate as *substantive evidence* in the trial, when such evidence has in the discretion of the trial Court been properly brought on that Court's record—*Amir Zaman*, 6 Lah. 199, 26 P.L.R. 361, 26 Cr.L.J. 1245; *Abdul Gani*, 53 Cal. 181, 42 C.L.J. 205, 26 Cr.L.J. 1577; *Basappa*, 27 Bom.L.R. 113, 26 Cr.L.J. 705, 86 I.C. 145, A.I.R. 1925 Bom. 266; *Behari*, 49 All. 251, 27 Cr.L.J. 1365 (1367). The words "subject Evidence Act" mean nothing more than that such statements should not contain matters which would be irrelevant or inadmissible under the Evidence Act—*Behari*, supra. See also *Bahadur*, 26 Cr.L.J. 1063, 88 I.C. 7, 19 S.L.R. 71, A.I.R. 1925 Sind. 289.

accused as with the case for the prosecution. The proof of the case against the prisoners must depend for its support not upon the absence or weakness of explanation on their part, but upon the positive and affirmative evidence of their guilt that is given by the Crown—*Mamfru*, 51 Cal. 418 (425, 426).

Witnesses not examined before the Committing Magistrate:—The prosecution cannot demand, as of right, that any witness not examined in the preliminary inquiry should be called and examined at the trial. But the Court, if it considers necessary, may call and examine him—*Heyfield*, 14 All. 212, 1892 A.W.N. 63. But the mere fact that a witness has not been examined before the committing Magistrate, is no ground for refusing to take the evidence of such witness, if he is a relevant witness. There is nothing in the Code which restricts the examination at the trial only to the witnesses examined before the committing Magistrate. But the prosecutor should, as a matter of justice and fairness to the accused, state in his opening address the name of such witness—*Khan Muhammad*, 1889 P.R. 1; *Dhondiba*, 36 Cr.L.J. 344, 153 I.C. 278, 36 Bom.L.R. 950, A.I.R. 1934 Bom 487, 1934 Cr.C. 1413; *Muhammad Panah*, 35 Cr.L.J. 1170 (1173), 150 I.C. 917, 1934 Cr.C. 732, A.I.R. 1934 Sind 78. The general effect of a consideration of relevant sections of the Code of Criminal Procedure is that the prosecutor is at liberty to examine witnesses in the Sessions Court which he has not produced in the Court of the Committing Magistrate, but that only those witnesses so examined in the Committing Magistrate's Court can be bound down to attend in the Sessions Court. The prosecution in the Sessions Court, if the witnesses are not examined in the Court of the Committing Magistrate, has to depend upon such witnesses being willing to give evidence without being bound down to appear, or upon being able to persuade the Court to act under sec. 540, Cr. P. C., and summon such a witness. In accordance with the practice in the English Courts, a summary of the evidence proposed to be called should be given to the Sessions Court and the accused before trial, if a witness has not been called in the Committing Magistrate's Court. There is no provision in the Cr. P. C., making this course compulsory, but, in fairness to the accused, it should be followed—*Namat*, 37 Cr.L.J. 742 (745, 746), 162 I.C. 976, A.I.R. 1936 Lah. 533, 17 Lah 176, 38 P.L.R. 421, 1936 Cr.C. 568 (F.B.).

If the Public Prosecutor produces a new witness at the Sessions trial, and if he is not allowed to examine him as his own witness, then it would be the duty of the Court to examine him as a Court witness. If this were done, then an opportunity of cross-examining must be allowed both to the Prosecutor and to the accused. It will be therefore rather to the advantage of the prosecution that such a witness be examined as a Court witness and to the advantage of the accused that he should be examined in the ordinary way as a witness for the prosecution—*Muhammad Panah*, *supra*.

894. Cross-examination:—As a rule, the cross-examination of a witness should take place after his examination-in-chief, and cannot be postponed. There is no provision of law which authorises the Judge to allow all the prosecution witnesses to be examined at once, and to permit the cross-examination to be reserved for a subsequent date—*Gothuri Venkatappa*, 2 Weir 381. But though the accused is not entitled to such postponement as of right, still there is no reason why the Sessions Judge should refuse an application for such postponement where the application was a reasonable one under the circumstances of the case—*Sadasiv*, 41 Cal. 299, 15 Cr.L.J. 596.

A Sessions Judge is not justified in stopping the cross-examination and turning the witness out of Court because he is of opinion that the witness is not speaking the truth—*Meharban*, 1900 A.W.N. 149.

A Judge is and always must be in control of the proceedings in his Court. On the other hand, the right of cross-examination must be carefully guarded, and it must be remembered that it may be necessary for an advocate to approach delicately and with caution the point upon which he is seeking to obtain admissions. It may be important that a witness whom he does not consider truthful should not be put on his guard by immediate presentation of the case set up by the opposing side. If questions are couched in too blunt a form he may readily deny them. Hence considerable

no general law can, therefore, be laid down as to this. The evidence of prosecution witnesses recorded before the committing Magistrate and transferred to the record of the Sessions Court, under the provisions of this section, is on the same footing with all other evidence in the case for all purposes and it is not necessary that there should be 'corroboration of those statement otherwise'—*Parmanand v. Emp.*, A.I.R. 1940 Nag 340 (347), 1940 N.L.J. 459. A conviction cannot be based upon statements of witnesses made before the committing Magistrate, when they afterwards came forward before the Sessions Judge and gave only circumstantial evidence insufficient to connect the accused with the commission of the crime—*Ghanwara*, 1915 P.W.R. 15, 16 Cr.L.J. 612. A Sessions Judge does not show a proper discretion in allowing a statement made before the committing Magistrate by a witness to be used as evidence under this section, when the witness repudiates it at the Sessions and says that it was given under pressure from the police in the course of the investigation—*Bhut Nath*, 7 C.W.N. 345 (350). In such a case the Judge should make some inquiry by examining the Inspector of Police regarding the restraint and pressure put upon the witness, before admitting such statement as evidence—*Bajragi*, 4 C.W.N. 49 (55); *Jadub Das*, 27 Cal. 295 (300).

Where every one of the witnesses for the prosecution has been demonstrated at the trial to have contradicted the statement that he made before the Committing Magistrate it would not be safe to convict the accused—*Harnam Singh v. Emp.*, 38 Cr.L.J. 765, 169 I.C. 434, 10 R.L. 13, 39 P.L.R. 555, A.I.R. 1937 Lah 597.

899. "Subject to the provisions of the Evidence Act":—These words do not mean that evidence duly taken before a Magistrate can only be utilized at a trial in a case where the Evidence Act specifically authorises its use. Such a construction is erroneous, because there are only certain sections in the Evidence Act (secs. 32, 33, 145, 155, 157) which can in any way be regarded as even remotely dealing with this subject, but none have any direct bearing. There is indeed in the Evidence Act nothing at all which permits or specifically provides for the use of evidence taken before a Magistrate as evidence at a trial. What is really meant by the words is that evidence duly taken before a Magistrate can be used for all purposes in a trial Court so long as the evidence is 'evidence' within the meaning of the Evidence Act, i.e., if the matter contained therein is, according to the rules laid down in the Evidence Act, of evidential value. For instance, hearsay evidence taken before a Magistrate would not be capable of being utilized by a Sessions Judge as of evidential value at the trial. These words may also probably mean that the evidence taken before a Magistrate can only be used at the trial subject to the procedure laid down in the Evidence Act—*Jehal Teli*, 3 Pat 781 (788-790), 6 P.L.T. 53, 26 Cr.L.J. 270; *Bahadur*, 19 S.L.R. 71, 26 Cr.L.J. 1063.

The words 'for all purposes subject to the provisions of the Evidence Act' do not mean that the evidence given before the committing Magistrate can be used in the Court of Session only for the purpose of corroboration and contradiction in accordance with sections 155 and 157 of the Evidence Act. Such evidence may be acted upon by the Sessions Court precisely as if that evidence has been deposed to before the Sessions Judge. The words merely mean that the law of evidence enacted in the Evidence Act must be complied with. For instance, evidence which had been wrongly admitted by the committing Magistrate, in violation of the provisions of the Evidence Act, cannot be transferred to the file of the Sessions Judge and used at the trial. The amendment is obviously introduced for the purpose of removing any doubts as to the right of the Court to treat the evidence given before the committing Magistrate as *substantive evidence* in the trial, when such evidence has in the discretion of the trial Court been properly brought on that Court's record—*Amir Zaman*, 6 Lah. 199, 26 P.L.R. 361, 26 Cr.L.J. 1245; *Abdul Gani*, 53 Cal 181, 42 C.L.J. 205, 26 Cr.L.J. 1577; *Basappa*, 27 Bom.L.R. 113, 26 Cr.L.J. 705, 86 I.C. 145, A.I.R. 1925 Bom 266; *Behari*, 49 All 251, 27 Cr.L.J. 1365 (1367). The words "subject to the provisions of the Evidence Act" mean nothing more than that such statements should not contain matters which would be irrelevant or inadmissible under the Evidence Act—*Behari*, supra. See also *Bahadur*, 26 Cr.L.J. 1063, 88 I.C. 7, 19 S.L.R. 71, A.I.R. 1925 Sind 289.

A.I.R. 1926 Cal 235, 90 I.C. 537, 26 Cr.L.J. 1577; *Fazaruddin*, 42 C.L.J. 111, 26 Cr.L.J. 1553, 90 I.C. 433, A.I.R. 1926 Cal 105; *Basappa*, 86 I.C. 145, A.I.R. 1925 Bom 266, 26 Cr.L.J. 705. This course is justified when there is a close relationship between the witnesses and the accused—*Krishna*, A.I.R. 1935 Mad 479 (482), 1935 M.W.N. 82, 1934 M.Cr.C. 378, 1935 Cr.C. 742, 157 I.C. 297, 36 Cr.L.J. 1107. Where the wife of the accused while deposing in the Court of Sessions resiled from her statement before the committing Court which was corroborated by her statement recorded under sec 164, Cr P. C., the Madras High Court accepted the statement made before the committing Magistrate in preference to the statement before the Court of Sessions and based a conviction of the accused thereon—*Vellai Kone*, A.I.R. 1923 Mad. 20, 72 I.C. 529, 24 Cr.L.J. 417, 43 M.L.J. 222, 45 Mad. 766, 16 M.L.W. 239, 1922 M.W.N. 506, 31 M.L.T. 175. But there is nothing in this section which prescribes the *value or weight* to be attached to the evidence. Whether any portion or the whole of the evidence given before the committing Magistrate is entitled to credit, and if so, to such a degree that a conviction may be based upon it wholly or in part, are very important questions for the jury and the assessors, but they are in no way affected by this section—*Umar*, 51 P.R. 1887. It is a matter for the discretion of the Judge whether such evidence should be used in the interests of justice. In many cases it would be extremely dangerous to rely upon such evidence where the witnesses have proved themselves in the Sessions Court altogether unworthy of credit—*Gansa Oraon*, 2 Pat. 517, 24 Cr.L.J. 641. A judgment may be based upon the deposition taken before the committing Magistrate, which has been retracted at the trial, when the Sessions Court can see special reason for believing the original statement to be true either from the statements of the same witnesses before itself or when that statement is to a certain extent corroborated by independent testimony. If there is no such corroborative evidence, it is not proper to base a conviction solely upon the deposition given before the Magistrate—*Jeochi*, 21 All 111; *Amanulla*, 21 W.R. 49; *Jadub Das*, 27 Cal. 295 (306), 4 C.W.N. 129; *Mamchand*, 5 Lah. 324 (328), 25 Cr.L.J. 1201; *Rangi*, 10 Mad. 295 (314); *Bharmappa*, 12 Mad. 123; *Nirmal Das*, 22 All 445; *Somadu*, 47 Mad 232, 25 Cr.L.J. 715; *Pirithi*, 37 P.R. 1917, 18 Cr.L.J. 703; *Nga Nyein*, 11 Rang. 4, 1933 Cr.C. 452 (454), 142 I.C. 87, 34 Cr.L.J. 286, A.I.R. 1933 Rang. 57; see also Note 915 (18); especially when there is nothing on the record to show that the witnesses have in fact become hostile or have been won over by the accused—*Pahalwan*, 35 Cr.L.J. 797 (799), 148 I.C. 937, 10 Luck. 1, 11 O.W.N. 508, 1934 Cr.C. 578, A.I.R. 1934 Oudh 182. A conviction based solely on evidence given by the witnesses before the committing Magistrate and retracted by them at the trial is unsustainable—*Sher Dil*, 17 P.R. 1919, 20 Cr.L.J. 792, 53 I.C. 696. The evidence of such a witness is not to be safely relied upon in the absence of corroboration—*Kataru Chinna Pappiah*, A.I.R. 1940 Mad. 136 (137), 1939 M.W.N. 1134, 50 M.L.W. 742, 1939 M.Cr.C. 282, 41 Cr.L.J. 323 (324), 186 I.C. 484. If it were permissible to convict an accused person, relying solely upon the evidence given by a witness before the committing Magistrate, the logical consequence would be that the taking of evidence before the Sessions Court might be altogether dispensed with—*Amanulla*, 21 W.R. 49. Evidence given before a committing Magistrate cannot be effectually utilised in support of a conviction unless it is shown by other corroborative evidence that the evidence given before the committing Magistrate should be preferred to and substituted for the evidence given at the trial—*Jehal Teli*, 3 Pat. 781 (794), 6 P.L.T. 53, 26 Cr.L.J. 270; *Lalji Rai*, 37 Cr.L.J. 235 (238), 160 I.C. 181, A.I.R. 1936 Pat. 11, 1936 Cr.C. 6, 16 P.L.T. 730; *Jadub Das*, 27 Cal. 295 (306); *Bigna Kumhar*, 27 Cr.L.J. 591, 94 I.C. 258, A.I.R. 1926 Pat. 440; *Nebti Mandal*, A.I.R. 1940 Pat. 289 (293), 1940 P.W.N. 73. This view of law was, however, dissented from by the Allahabad High Court in *Raja Ram*, 36 Cr.L.J. 823, 155 I.C. 657, A.I.R. 1935 All. 691, 1935 A.L.J. 668 and by the Lahore High Court in *Narinjan Singh*, 37 Cr.L.J. 567 (568), 162 I.C. 379, A.I.R. 1936 Lah. 357, 17 Lah. 419, 38 P.L.R. 820, 1936 Cr.C. 298, where it has been held that there is nothing in this section to show that there need be corroboration of evidence so recorded, that it has like other evidence to be examined with care and to be considered with all the other surrounding circumstances and that

no general law can, therefore, be laid down as to this. The evidence of prosecution witnesses recorded before the committing Magistrate and transferred to the record of the Sessions Court, under the provisions of this section, is on the same footing with all other evidence in the case for all purposes and it is not necessary that there should be 'corroboration of those statement otherwise'—*Parmanand v Emp*, AIR. 1940 Nag 340 (347), 1940 N.L.J. 459. A conviction cannot be based upon statements of witnesses made before the committing Magistrate, when they afterwards came forward before the Sessions Judge and gave only circumstantial evidence insufficient to connect the accused with the commission of the crime—*Ghanwara*, 1915 P.W.R. 15, 16 Cr.L.J. 612. A Sessions Judge does not show a proper discretion in allowing a statement made before the committing Magistrate by a witness to be used as evidence under this section, when the witness repudiates it at the Sessions and says that it was given under pressure from the police in the course of the investigation—*Bhut Nath*, 7 C.W.N. 345 (350). In such a case the Judge should make some inquiry by examining the Inspector of Police regarding the restraint and pressure put upon the witness, before admitting such statement as evidence—*Bajragi*, 4 C.W.N. 49 (55); *Jadub Das*, 27 Cal. 295 (300).

Where every one of the witnesses for the prosecution has been demonstrated at the trial to have contradicted the statement that he made before the Committing Magistrate it would not be safe to convict the accused—*Harnam Singh v. Emp*, 38 Cr.L.J. 765, 169 I.C. 434, 10 R.L. 13, 39 P.L.R. 555, AIR. 1937 Lah 597.

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The words 'for all purposes subject to the provisions of the Evidence Act' do not mean that the evidence given before the committing Magistrate can be used in the Court of Session only for the purpose of corroboration and contradiction in accordance with sections 155 and 157 of the Evidence Act. Such evidence may be acted upon by the Sessions Court precisely as if that evidence has been deposed to before the Sessions Judge. The words merely mean that the law of evidence enacted in the Evidence Act must be complied with. For instance, evidence which had been wrongly admitted by the committing Magistrate, in violation of the provisions of the Evidence Act, cannot be transferred to the file of the Sessions Judge and used at the trial. The amendment is obviously introduced for the purpose of removing any doubts as to the right of the Court to treat the evidence given before the committing Magistrate as *substantive evidence* in the trial, when such evidence has in the discretion of the trial Court been properly brought on that Court's record—*Amir Zaman*, 6 Lah. 199, 26 P.L.R. 361, 26 Cr.L.J. 1245; *Abdul Gam*, 53 Cal. 181, 42 C.L.J. 205, 26 Cr.L.J. 1577; *Basappa*, 27 Bom.L.R. 113, 26 Cr.L.J. 705, 86 I.C. 145, AIR 1925 Bom. 266; *Behari*, 49 All. 251, 27 Cr.L.J. 1365 (1367). The words "subject Evidence Act" mean nothing more than that such statements should not contain matters which would be irrelevant or inadmissible under the Evidence Act—*Behari*, supra. See also *Bahadur*, 26 Cr.L.J. 1063, 88 I.C. 7, 19 S.L.R. 71, AIR. 1925 Sind 289.

accused as with the case for the prosecution. The proof of the case against the prisoners must depend for its support not upon the absence or weakness of explanation on their part, but upon the positive and affirmative evidence of their guilt that is given by the Crown—*Mamru*, 51 Cal. 418 (425, 426).

Witnesses not examined before the Committing Magistrate:—The prosecution cannot demand, as of right, that any witness not examined in the preliminary inquiry should be called and examined at the trial. But the Court, if it considers necessary, may call and examine him—*Heyfield*, 14 All. 212, 1892 A.W.N. 63. But the mere fact that a witness has not been examined before the committing Magistrate, is no ground for refusing to take the evidence of such witness, if he is a relevant witness. There is nothing in the Code which restricts the examination at the trial only to the witnesses examined before the committing Magistrate. But the prosecutor should, as a matter of justice and fairness to the accused, state in his opening address the name of such witness—*Khan Muhammad*, 1889 P.R. 1; *Dhondiba*, 36 Cr.L.J. 344, 153 I.C. 278, 36 Bom.L.R. 950, A.I.R. 1934 Bom. 487, 1934 Cr.C. 1413; *Muhammad Panah*, 35 Cr.L.J. 1170 (1173), 150 I.C. 917, 1934 Cr.C. 732, A.I.R. 1934 Sind 78. The general effect of a consideration of relevant sections of the Code of Criminal Procedure is that the prosecutor is at liberty to examine witnesses in the Sessions Court which he has not produced in the Court of the Committing Magistrate, but that only those witnesses so examined in the Committing Magistrate's Court can be bound down to attend in the Sessions Court. The prosecution in the Sessions Court, if the witnesses are not examined in the Court of the Committing Magistrate, has to depend upon such witnesses being willing to give evidence without being bound down to appear, or upon being able to persuade the Court to act under sec 540, Cr. P. C., and summon such a witness. In accordance with the practice in the English Courts, a summary of the evidence proposed to be called should be given to the Sessions Court and the accused before trial, if a witness has not been called in the Committing Magistrate's Court. There is no provision in the Cr. P. C., making this course compulsory, but, in fairness to the accused, it should be followed—*Niamat*, 37 Cr.L.J. 742 (745, 746), 162 I.C. 976, A.I.R. 1936 Lah. 533, 17 Lah. 176, 38 P.L.R. 421, 1936 Cr.C. 568 (F.B.).

If the Public Prosecutor produces a new witness at the Sessions trial, and if he is not allowed to examine him as his own witness, then it would be the duty of the Court to examine him as a Court witness. If this were done, then an opportunity of cross-examining must be allowed both to the Prosecutor and to the accused. It will be therefore rather to the advantage of the prosecution that such a witness be examined as a Court witness and to the advantage of the accused that he should be examined in the ordinary way as a witness for the prosecution—*Muhammad Panah*, *supra*.

894. Cross-examination:—As a rule, the cross-examination of a witness should take place after his examination-in-chief, and cannot be postponed. There is no provision of law which authorises the Judge to allow all the prosecution witnesses to be examined at once, and to permit the cross-examination to be reserved for a subsequent date—*Gothuri Venkatappa*, 2 Weir 381. But though the accused is not entitled to such postponement as of right, still there is no reason why the Sessions Judge should refuse an application for such postponement where the application was a reasonable one under the circumstances of the case—*Sadasiv*, 41 Cal. 299, 15 Cr.L.J. 596.

A Sessions Judge is not justified in stopping the cross-examination and turning the witness out of Court because he is of opinion that the witness is not speaking the truth—*Meharban*, 1900 A.W.N. 149.

A Judge is and always must be in control of the proceedings in his Court. On the other hand, the right of cross-examination must be carefully guarded, and it must be remembered that it may be necessary for an advocate to approach delicately and with caution the point upon which he is seeking to obtain admissions. It may be important that a witness whom he does not consider truthful should not be put on his guard by immediate presentation of the case set up by the opposing side. If questions are couched in too blunt a form he may readily deny them. Hence considerable

latitude is desirable since the admissions sought to be elicited may only be forthcoming when the witness, if he is concealing something, is thrown off his guard : and there are cases in which it is necessary to drop a particular issue in the course of cross-examination and to return to it again discreetly at a later stage. On the other hand the length of cross-examination is by no means the criterion of its excellence, and it is lamentably true that lack of skill in advocacy often leads to a failure to appreciate this fact. When irrelevant topics are pursued at great length, and persistence is shown in going over the same ground again and again in the hope of making the witness appear discrepant, some limit must be placed upon the latitude given. Continued irrelevancies and repetitions are not to be endured indefinitely. If after several warnings an advocate persists in abusing his position in this way, he may be directed to resume his seat, but only when the Judge has enquired what are the material matters on which he still desires to cross-examine and is satisfied that no satisfactory reply has been forthcoming from the advocate and that no legitimate questions by him have been shut out. In any case the Judge should make a note of the submission of any advocate as to further questions which he desires to put or as to any specific question which has been disallowed—*Brahmayya v. The King*, A I.R. 1938 Rang 442 (444), 40 Cr L.J. 265, 179 I.C. 783. While it is the duty of every Court to keep the cross-examination of a witness within legitimate bounds it must be careful, in the discharge of that duty, not to exercise too effective a control so as to unduly curtail legitimate cross-examination. Too much interference by the presiding Judge in the course of the cross-examination of witnesses by the Counsel for the accused has, more often than not, the result of robbing the cross-examination of its efficacy and, therefore, undue interference in cross-examination must be avoided by the presiding Judge—*Salay Ram v Emp*, 38 Cr L.J. 416 (418), 167 I.C. 515, A I.R. 1937 All 171, 1937 A L.R. 201, 9 R.A. 550.

For procedure of trial in cross-cases see Notes in para 830A.

287. The examination of the accused duly recorded by or before the committing Magistrate shall be tendered by the prosecutor and read as evidence.

Examination of accused before Magistrate to be evidence.

895. "*The examination of the accused*"—This section contemplates an examination of the accused, although sec. 209 does not make it imperative on the committing Magistrate to examine the accused—*Sita, Ratanlal* 100 (101). The examination of the accused recorded by the Magistrate should be put in as part of the case for the prosecution, before the accused is called on to enter on his defence—*Anonymous*, 2 Weir 361; *Cal. G. R. & C. O.*, p. 23.

If the conviction is to be based solely on a statement of the accused, it is fair that the statement should be taken in its entirety, unless there is good reason to the contrary—*Kamakka*, 12 Cr L.J. 142, 9 I.C. 790, 2 M.W.N. 199, 9 M.L.T. 316.

Where the prisoner had made two statements before the Magistrate, the one amounting to a confession of the guilt, and the other to a denial thereof, the trial Court ought to consider both the statements and their relative credibility—*Soobjan*, 10 B.L.R. 332; *Mahabir*, 18 All 78. If in an examination of the accused some objectionable questions have been asked by the committing Magistrate, such questions and the answers thereto must be omitted, but the whole examination should not be excluded from evidence—*Khudiram*, 9 C.L.J. 55, 3 I.C. 625. Where the accused was examined about a confession which was not admissible in evidence, the questions and answers to them could not be said to be 'duly recorded' as the questions were not such as were allowed by the law to be put; and the answers to these questions were not admissible in evidence against the accused—*Gaung Gye*, 4 L.B.R. 244, 8 Cr L.J. 62.

This section permits a previous statement of the accused to be read as a part of the case for the prosecution only so far as such statement refers to the offence (*i.e.*, the present offence) for which the accused is being tried, and not so far as it relates to a

It cannot be maintained that the deposition, when admitted under sec. 288, Cr. P. C., can only be used for the purpose of cross-examination within the provisions of sec. 153 of the Indian Evidence Act. This contention is clearly untenable in view of the express provisions of sec. 288 of the Code that it is to be treated as evidence in the case for all purposes; the words "subject to the provisions of the Indian Evidence Act, 1872" cannot be read so as to limit the purposes for which it may be used—*Fakira v. Emp.*, 38 Cr.L.J. 498, 167 I.C. 790, 39 P.L.R. 334, 1937 O.L.R. 216, 41 C.W.N. 741, 1937 M.W.N. 546, 9 R.P.C. 231, 1937 A.Cr.C. 74, 3 B.R. 425, 1937 O.W.N. 412, A.I.R. 1937 P.C. 119, 1937 A.L.R. 328, 64 I.A. 148, 46 M.L.W. 134, 39 Bom.L.R. 966, 11 L.R. (1937) Bom. 711, 1937 A.W.R. (P.C. 1128, 1937 A.L.J. 1055, (1937) 2 M.L.J. 323 (P.C.)). See also *Nebti Mandal*, A.I.R. 1940 Pat. 289 (293), 1940 P.W.N. 73.

900. Practice and procedure:—The counsel for the prisoner is not entitled to refer to the deposition for the purpose of contradicting the witness without having drawn the attention of the witness to the alleged contradiction in his deposition, and without having given him an opportunity of explaining it—*Zaukar*, 31 Cal. 142; *Lachmi Lal*, 3 P.L.T. 398, 23 Cr.L.J. 218, A.I.R. 1922 Pat. 40. Before a Judge can use as evidence the deposition given before the Magistrate, he is bound to let his intention, or the possibility that he may do so, be known to the accused and to the prosecution, in order to afford the accused and the prosecution an opportunity for testing such statement by cross-examination or otherwise dealing with such statement as part of the case which may be taken into consideration by the Judge. Otherwise it is impossible for the prosecution or the defence to deal with the matters which may influence the Judge's mind in coming to a decision—*Behari*, 1886 A.W.N. 256; *Musa*, 30 Cr.L.J. 333, 114 I.C. 609, Ind. Rul. 1929 Nag. 81, A.I.R. 1929 Nag. 233.

It is improper for the Judge trying a case to take a witness's deposition bodily from the committing Magistrate's record, and to treat it as evidence before the Court itself—*Dan Sahai*, 7 All. 862; *Jeochi*, 21 All. 111. The Judge is bound to put to the witnesses, whom he proposes to contradict by their previous statement, the whole or such portion of their depositions as he intends to rely upon, so as to afford them an opportunity of explaining their meaning or denying that they had made any such statements and so forth—*Dan Sahai*, 7 All. 862; *Sadar Din*, 10 Lah.L.J. 460, 29 Cr.L.J. 1047 (1048), 112 I.C. 471, A.I.R. 1929 Lah. 111. Depositions given in the lower Court which contradict the statements in the Sessions Court should be put to the witness before they are admitted under sec. 288, Cr. P. Code—*Nanku Mahton*, 32 Cr.L.J. 438 (440), 129 I.C. 666, A.I.R. 1930 Pat. 338, 11 P.L.T. 772, 12 P.L.T. 239, 1930 Cr.C. 710, Ind. Rul. 1930 Pat. 122.

Section 288, Cr. P. C., is not a section to be lightly used. This section is not to be used as a matter of course but in the discretion of the Judge, and the fact that the whole statement is to be brought on the record and used as substantive evidence suggests that the proper occasion to use it is when the Judge is satisfied that the statement made before him is substantially false and the statement before the Committing Magistrate is substantially true. The existence of minor discrepancies between statements made in the Committing Magistrate's Court and the Sessions Court is not sufficient to justify the bringing bodily on to the record of the statement of a witness under sec. 288, Cr. P. Code. The provisions of secs. 145, 151, 155 and 157, Evidence Act, may, in such circumstances, be more appropriately used—*Manghan Khan v. Emp.*, 38 Cr.L.J. 487, 167 I.C. 943, 9 R.S. 213, A.I.R. 1937 Sind 61, 30 S.L.R. 238. See also *Kataru Chinna Papiiah*, 41 Cr.L.J. 323 (325), 186 I.C. 484, A.I.R. 1940 Mad. 136, 1939 M.W.N. 1134, 50 M.L.J. 742, 1939 M.Cr.C. 282.

The depositions before the Magistrate were used during the trial for the purpose of cross-examining the witnesses, and extracts from those depositions were put in evidence, yet because the depositions were not formally tendered as evidence to the Court, they were not included in the record. Held that such formality amounts to absurdity and that if questions are put and extracts included from depositions, during the trial of a case, it must be obvious that the evidence has been admitted by the

latitude is desirable since the admissions sought to be elicited may only be forthcoming when the witness, if he is concealing something, is thrown off his guard: and there are cases in which it is necessary to drop a particular issue in the course of cross-examination and to return to it again discreetly at a later stage. On the other hand the length of cross-examination is by no means the criterion of its excellence, and it is lamentably true that lack of skill in advocacy often leads to a failure to appreciate this fact. When irrelevant topics are pursued at great length, and persistence is shown in going over the same ground again and again in the hope of making the witness appear discrepant, some limit must be placed upon the latitude given. Continued irrelevancies and repetitions are not to be endured indefinitely. If after several warnings an advocate persists in abusing his position in this way, he may be directed to resume his seat, but only when the Judge has enquired what are the material matters on which he still desires to cross-examine and is satisfied that no satisfactory reply has been forthcoming from the advocate and that no legitimate questions by him have been shut out. In any case the Judge should make a note of the submission of any advocate as to further questions which he desires to put or as to any specific question which has been disallowed—*Brahmayya v. The King*, A.I.R. 1938 Rang. 442 (444), 40 Cr.L.J. 265, 179 I.C. 783. While it is the duty of every Court to keep the cross-examination of a witness within legitimate bounds it must be careful, in the discharge of that duty, not to exercise too effective a control so as to unduly curtail legitimate cross-examination. Too much interference by the presiding Judge in the course of the cross-examination of witnesses by the Counsel for the accused has, more often than not, the result of robbing the cross-examination of its efficacy and, therefore, undue interference in cross-examination must be avoided by the presiding Judge—*Salay Ram v. Emp.*, 38 Cr.L.J. 416 (418), 167 I.C. 515, A.I.R. 1937 All. 171, 1937 A.L.R. 201, 9 R.A. 550.

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If the Public Prosecutor produces a new witness at the Sessions trial, and if he is not allowed to examine him as his own witness, then it would be the duty of the Court to examine him as a Court witness. If this were done, then an opportunity of cross-examining must be allowed both to the Prosecutor and to the accused. It will be therefore rather to the advantage of the prosecution that such a witness be examined as a Court witness and to the advantage of the accused that he should be examined in the ordinary way as a witness for the prosecution—*Muhammad Panah*, *supra*.

894. Cross-examination:—As a rule, the cross-examination of a witness should take place after his examination-in-chief, and cannot be postponed. There is no provision of law which authorises the Judge to allow all the prosecution witnesses to be examined at once, and to permit the cross-examination to be reserved for a subsequent date—*Gothuri Venkatappa*, 2 Weir 381. But though the accused is not entitled to such postponement as of right, still there is no reason why the Sessions Judge should refuse an application for such postponement where the application was a reasonable one under the circumstances of the case—*Sadasiv*, 41 Cal 299, 15 Cr.L.J. 596.

A Sessions Judge is not justified in stopping the cross-examination and turning the witness out of Court because he is of opinion that the witness is not speaking the truth—*Meharban*, 1900 A.W.N. 149.

A Judge is and always must be in control of the proceedings in his Court. On the other hand, the right of cross-examination must be carefully guarded, and it must be remembered that it may be necessary for an advocate to approach delicately and with caution the point upon which he is seeking to obtain admissions. It may be important that a witness whom he does not consider truthful should not be put on his guard by immediate presentation of the case set up by the opposing side. If questions are couched in too blunt a form he may readily deny them. Hence considerable

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Examination of accused before Magistrate to be evidence.

895. "The examination of the accused" :—This section contemplates an examination of the accused, although sec. 209 does not make it imperative on the committing Magistrate to examine the accused—*Sita, Ratanlal* 100 (101). The examination of the accused recorded by the Magistrate should be put in as part of the case for the prosecution, before the accused is called on to enter on his defence—*Anonymous*, 2 Weir 361; *Cal. G. R. & C. O.*, p. 23.

If the conviction is to be based solely on a statement of the accused, it is fair that the statement should be taken in its entirety, unless there is good reason to the contrary—*Kamakka*, 12 Cr.L.J. 142, 9 I.C. 790, 2 M.W.N. 199, 9 M.L.T. 316.

Where the prisoner had made two statements before the Magistrate, the one amounting to a confession of the guilt, and the other to a denial thereof, the trial Court ought to consider both the statements and their relative credibility—*Soobjan*, 10 B.L.R. 332; *Mahabir*, 18 All. 78. If in an examination of the accused some objectionable questions have been asked by the committing Magistrate, such questions and the answers thereto must be omitted, but the whole examination should not be excluded from evidence—*Khudiram*, 9 C.L.J. 55, 3 I.C. 625. Where the accused was examined about a confession which was not admissible in evidence, the questions and answers to them could not be said to be 'duly recorded' as the questions were not such as were allowed by the law to be put; and the answers to these questions were not admissible in evidence against the accused—*Gaung Gye*, 4 L.B.R. 244, 8 Cr.L.J. 62.

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Following *Abdul Gani*, supra, the Lahore High Court has very recently held that provided a Magistrate, in acting under sec. 347, Cr. P. C., commits the accused subject to the safeguards relating to the rights of the accused as provided for in secs. 208, 211, 212 and 213, Cr. P. C., any statement recorded by the Magistrate in the presence of the accused prior to the commitment would be the evidence of a witness duly recorded under Chap. XVIII, and may therefore be transferred and treated as substantive evidence in the trial before the Sessions Court—*Fazal v. Emp.*, A.I.R. 1940 Lah. 389 (391), I.L.R. 1940 Lah. 151.

897. "Produced and examined":—The evidence of witnesses given before the committing Magistrate may be used as evidence if the witnesses have been *produced* and *examined* at the trial; a statement made before the committing Magistrate by a person who has since disappeared is inadmissible in evidence, because the witness is not produced and examined before the Sessions Judge—*Ajodhi*, 16 N.L.R. 30, 21 Cr.L.J. 486. See also *Natha Singh*, 35 Cr.L.J. 349 (351), 147 I.C. 234, 35 P.L.R. 75, 1934 Cr.C. 447, A.I.R. 1934 Lah. 212. If the witness is incapable of giving his evidence, his deposition before the committing Magistrate can be admitted in evidence under section 33 of the Indian Evidence Act—*Natha Singh*, supra. The witnesses who had given deposition before the committing Magistrate must be *examined* by the Judge, before the former deposition can be treated as evidence. The mere examination of the witness by the Judge as to his making the deposition before the committing Magistrate, is not an examination within the meaning of this section—*Subba*, 9 Mad. 83. Mere producing of the witnesses is not sufficient; they must be produced and *examined*, i.e., examined as witnesses, and not merely *cross-examined* or tendered for cross-examination. Where certain prosecution witnesses who had given evidence before the committing Magistrate were not examined by the Sessions Judge afresh, but their depositions were read out to them, and the accused was allowed to cross-examine them, the procedure was illegal—*Subba*, supra; *Kottagadu*, 1915 M.W.N. 544, 16 Cr.L.J. 615. If a witness who has given an important piece of evidence before the committing Magistrate, is not examined by the Sessions Judge, but is merely tendered for cross-examination, and even in his cross-examination he is asked certain unimportant questions having no bearing upon the story of the offence, the Sessions Judge acts illegally in mentioning to the jury the statement made by that witness before the committing Magistrate, for such a procedure would amount to treating as evidence what has not been put on record as evidence—*Khadem*, 57 Cal. 940, 32 Cr.L.J. 180 (182), 128 I.C. 801, A.I.R. 1930 Cal. 706, Ind. Rul. 1931 Cal. 97, 1930 Cr.C. 1106. In this case the deposition in the committing Magistrate's Court was not put in under this section. It was also held that it would have been unfair to have put it under this section in the circumstances of this particular case. This section does not allow the use of the deposition as a substitute for examination at the trial. This section is not exception to sec. 286; it does not dispense with the examination of the witnesses directed by sec. 286—*Subba*, 9 Mad. 83. Further, the statements made by a witness before the committing Magistrate should not be read out to the witness in the trial before the defence has had an opportunity of cross-examining him—*Narain Das*, 3 Lah. 144 (154), 23 Cr.L.J. 513.

Moreover, the deposition of the witness before the committing Magistrate can be used as evidence if the witness is examined at the trial *as a witness*. Where the witness before the committing Magistrate, being found concerned in the offence, was committed to take his trial along with the accused in the case, the deposition in the Magistrate's Court could not be treated as evidence against the accused under this section, he not being a *witness* in the trial—*Shibdayal*, 23 P.R. 1883.

898. Retracted statements:—Where the witnesses made certain statements implicating the accused, before the committing Magistrate, but at the trial before the

Sessions Judge they resiled from those statements and told an altogether different story, *held* that the statements before the committing Magistrate were not merely relevant for the purpose of contradicting or negating the statements made before the Court of Sessions under sec 155, Evidence Act, but that under sec 288 could also be treated as "evidence in the case," i.e., as *substantive evidence* of all the facts therein deposed to—*Maruti*, 46 Bom 97, 22 Cr L.J. 636; *Amir Zaman*, 6 Lah. 199, 26 P.L.R. 361, 26 Cr L.J. 1245; *Ala Singh*, 29 Cr L.J. 73, 106 I.C. 585; *Abdul Gani*, 53 Cal 181, 26 Cr L.J. 1577; *Tulli*, 47 All. 276, 26 Cr L.J. 450; *Rakha*, 6 Lah. 171, 27 Cr L.J. 438; *Bahadur*, 88 I.C. 7, A.I.R. 1925 Sind 289, 19 S.L.R. 71, 26 Cr L.J. 1063; *Puran*, A.I.R. 1934 Lah. 743, 15 Lah. 765, 149 I.C. 476, 35 Cr L.J. 1005, 1934 Cr.C. 1095; *Shankar*, 35 Cr L.J. 894, 149 I.C. 69, 1934 Cr.C. 673, 11 O.W.N. 636, A.I.R. 1934 Oudh 222; *Samero*, 37 Cr L.J. 1045, 164 I.C. 1036, A.I.R. 1936 Sind 140. See also *Ram Gobinda Ghosh v. Emp.*, 39 Cr L.J. 625, 175 I.C. 529, 10 R.C. 802, 42 C.W.N. 781, A.I.R. 1938 Cal. 364; *Kataru Chinna Papiiah*, A.I.R. 1940 Mad. 136 (137), 1939 M.W.N. 1134, 50 M.L.W. 742, 1939 M.Cr.C. 282, 41 Cr L.J. 323, 186 I.C. 484. A certain witness made a statement before the committing Magistrate, but resiled from that statement before the Sessions Judge, whereupon his statement made before the committing Magistrate was put in evidence under sec 288, and in order to corroborate this statement, a statement made by that witness before the Police was proved and put in evidence. *Held* that the statement made before the committing Magistrate was 'testimony' within the meaning of sec. 157 of the Evidence Act, and therefore the prior statement made before the Police was admissible in evidence to corroborate the statement made before the committing Magistrate—*Mam Chand*, 5 Lah. 324 (328), 25 Cr L.J. 1201. So also, a statement by a witness recorded by a Magistrate under sec 164 is admissible in evidence to corroborate the statement made by that witness before the committing Magistrate, from which he subsequently resiled in the Sessions Court—*Velliah Kone*, 45 Mad. 766, followed in *Manarali*, 37 C.W.N. 1066 (1068), 58 C.L.J. 60, 60 Cal. 1339, 147 I.C. 1203, A.I.R. 1934 Cal. 124, 1934 Cr.C. 169, 35 Cr L.J. 567; *Mathura Tewari*, 8 Pat. 625, 120 I.C. 37, A.I.R. 1929 Pat. 343, 1929 Cr.C. 155, 30 Cr.C. 1136, 10 P.L.T. 177, Ind. Rul. 1929 Pat. 677. So also a statement by a witness recorded by a Magistrate under sec. 512, Cr. P. C., may be used to corroborate his statement before the committing Magistrate from which he subsequently resiled in the Court of Sessions—*Lalji Rai*, 37 Cr L.J. 235 (238), 160 I.C. 181, A.I.R. 1936 Pat. 11, 1936 Cr.C. 6, 16 P.L.T. 730. But the admission of the deposition in the committing Magistrate's Court in which witness admitted having made a certain statement when examined under sec 164, Cr. P. C., does not entail the admission of the statement under sec. 164 as substantive evidence in the case. It is a statement which can be used simply to contradict the witness and to show that the witness is unreliable with a view to taking his evidence out of the case which otherwise might react unfavourably upon the evidence of other prosecution witnesses—*Karuppana*, 28 Cr L.J. 279, 100 I.C. 359, A.I.R. 1927 Mad. 1112. Where a Sessions Judge, being of opinion that certain prosecution witnesses had been gained over by the accused, allowed their depositions given before the committing Magistrate to be received in evidence, *held* that this section enabled the Court to treat such depositions as substantive evidence in the case at the trial. Such evidence may be used as much in favour of the defence as of the prosecution, and not merely for the purpose of contradicting the witnesses at the Sessions trial—*Dorai Sami*, 24 Mad. 414; *Gansa Oraon*, 2 Pat. 517, 24 Cr L.J. 641. See also *Kataru Chinna Papiiah*, *supra*. Depositions of witnesses taken before the committing Magistrate, and subsequently retracted before the Session Judge, may, in the discretion of the Judge, be admitted in evidence at the trial in the Sessions Court; and when so admitted, they are *on the same footing as any other evidence on the record*—*Duarka*, 28 All. 383; *Mamchand*, 5 Lah. 324 (328), 25 Cr L.J. 1201; *Velliah*, 45 Mad. 766, 43 M.L.J. 222. That is, the evidence recorded by the committing Magistrate, even though retracted in the Sessions Court, may be considered by the jury or by the assessors and the Judge, as part of the material or as substantive evidence upon which the verdict or the finding has to be given—*Umar*, 51 P.R. 1887; *Abdul Gani*, 53 Cal. 181, 42 C.L.J. 205,

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Moreover, the deposition of the witness before the committing Magistrate can be used as evidence if the witness is examined at the trial *as a witness*. Where the witness before the committing Magistrate, being found concerned in the offence, was committed to take his trial along with the accused in the case, the deposition in the Magistrate's Court could not be treated as evidence against the accused under this section, he not being a *witness* in the trial—*Shibdayal*, 23 P.R. 1883.

898. Retracted statement:—Where the witnesses made certain statements implicating the accused, before the committing Magistrate, but at the trial before the

Sessions Judge they resiled from those statements and told an altogether different story, *held* that the statements before the committing Magistrate were not merely relevant for the purpose of contradicting or negating the statements made before the Court of Sessions under sec. 155, Evidence Act, but that under sec. 288 could also be treated as "evidence in the case," i.e., as *substantive evidence* of all the facts therein deposed to—*Maruti*, 46 Bom 97, 22 Cr.L.J. 636; *Amir Zaman*, 6 Lah. 199, 26 P.L.R. 361, 26 Cr.L.J. 1245; *Ala Singh*, 29 Cr.L.J. 73, 106 I.C. 585; *Abdul Gani*, 53 Cal 181, 26 Cr.L.J. 1577; *Tulli*, 47 All 276, 26 Cr.L.J. 450; *Rakha*, 6 Lah 171, 27 Cr.L.J. 438; *Bahadur*, 88 I.C. 7, A.I.R. 1925 Sind 289, 19 S.L.R. 71, 26 Cr.L.J. 1063; *Puran*, A.I.R. 1934 Lah. 743, 15 Lah 765, 149 I.C. 476, 35 Cr.L.J. 1005, 1934 Cr.C. 1095; *Shankar*, 35 Cr.L.J. 894, 149 I.C. 69, 1934 Cr.C. 673, 11 O.W.N. 636, A.I.R. 1934 Oudh 222; *Samero*, 37 Cr.L.J. 1045, 164 I.C. 1036, A.I.R. 1936 Sind 140. See also *Ram Gobinda Ghosh v. Emp.*, 39 Cr.L.J. 625, 175 I.C. 529, 10 R.C. 802, 42 C.W.N. 781, A.I.R. 1938 Cal 364; *Kataru Chinna Papiah*, A.I.R. 1940 Mad 136 (137), 1939 M.W.N. 1134, 50 M.L.W. 742, 1939 M.Cr.C. 282, 41 Cr.L.J. 323, 186 I.C. 484. A certain witness made a statement before the committing Magistrate, but resiled from that statement before the Sessions Judge, whereupon his statement made before the committing Magistrate was put in evidence under sec. 288, and in order to corroborate this statement, a statement made by that witness before the Police was proved and put in evidence. *Held* that the statement made before the committing Magistrate was 'testimony' within the meaning of sec. 157 of the Evidence Act, and therefore the prior statement made before the Police was admissible in evidence to corroborate the statement made before the committing Magistrate—*Mam Chand*, 5 Lah. 324 (328), 25 Cr.L.J. 1201. So also, a statement by a witness recorded by a Magistrate under sec. 164 is admissible in evidence to corroborate the statement made by that witness before the committing Magistrate, from which he subsequently resiled in the Sessions Court—*Velliah Kone*, 45 Mad. 766, followed in *Manarali*, 37 C.W.N. 1066 (1068), 58 C.L.J. 60, 60 Cal 1339, 147 I.C. 1203, A.I.R. 1934 Cal. 124, 1934 Cr.C. 169, 35 Cr.L.J. 567; *Mathura Tewari*, 8 Pat 625, 120 I.C. 37, A.I.R. 1929 Pat. 343, 1929 Cr.C. 155, 30 Cr.C. 1136, 10 P.L.T. 177, Ind. Rul. 1929 Pat. 677. So also a statement by a witness recorded by a Magistrate under sec. 512, Cr. P. C., may be used to corroborate his statement before the committing Magistrate from which he subsequently resiled in the Court of Sessions—*Lalji Rai*, 37 Cr.L.J. 235 (238), 160 I.C. 181, A.I.R. 1936 Pat. 11, 1936 Cr.C. 6, 16 P.L.T. 730. But the admission of the deposition in the committing Magistrate's Court in which witness admitted having made a certain statement when examined under sec. 164, Cr. P. C., does not entail the admission of the statement under sec. 164 as substantive evidence in the case. It is a statement which can be used simply to contradict the witness and to show that the witness is unreliable with a view to taking his evidence out of the case which otherwise might react unfavourably upon the evidence of other prosecution witnesses—*Karuppana*, 28 Cr.L.J. 279, 100 I.C. 359, A.I.R. 1927 Mad. 1112. Where a Sessions Judge, being of opinion that certain prosecution witnesses had been gained over by the accused, allowed their depositions given before the committing Magistrate to be received in evidence, *held* that this section enabled the Court to treat such depositions as substantive evidence in the case at the trial. Such evidence may be used as much in favour of the defence as of the prosecution, and not merely for the purpose of contradicting the witnesses at the Sessions trial—*Dorai Sami*, 24 Mad. 414; *Gansa Oraon*, 2 Pat. 517, 24 Cr.L.J. 641. See also *Kataru Chinna Papiah*, *supra*. Depositions of witnesses taken before the committing Magistrate, and subsequently retracted before the Session Judge, may, in the discretion of the Judge, be admitted in evidence at the trial in the Sessions Court; and when so admitted, they are on the same footing as any other evidence on the record—*Duarka*, 28 All. 383; *Mamchand*, 5 Lah. 324 (328), 25 Cr.L.J. 1201; *Velliah*, 45 Mad. 766, 43 M.L.J. 222. That is, the evidence recorded by the committing Magistrate, even though retracted in the Sessions Court, may be considered by the jury or by the assessors and the Judge, as part of the material or as substantive evidence upon which the verdict or the finding has to be given—*Umar*, 51 P.R. 1887; *Abdul Gani*, 53 Cal 181, 42 C.L.J. -

A.I.R. 1926 Cal. 235, 90 I.C. 537, 26 Cr.L.J. 1577; *Fazaruddin*, 42 C.L.J. 111, 26 Cr.L.J. 1553, 90 I.C. 433, A.I.R. 1926 Cal. 105; *Basappa*, 86 I.C. 145, A.I.R. 1925 Bom 266, 26 Cr.L.J. 705. This course is justified when there is a close relationship between the witnesses and the accused—*Krishna*, A.I.R. 1935 Mad. 479 (482), 1935 M.W.N. 82, 1934 M.Cr.C. 378, 1935 Cr.C. 742, 157 I.C. 297, 36 Cr.L.J. 1107. Where the wife of the accused while deposing in the Court of Sessions resiled from her statement before the committing Court which was corroborated by her statement recorded under sec. 164, Cr. P. C., the Madras High Court accepted the statement made before the committing Magistrate in preference to the statement before the Court of Sessions and based a conviction of the accused thereon—*Vellai Kone*, A.I.R. 1923 Mad. 20, 72 I.C. 529, 24 Cr.L.J. 417, 43 M.L.J. 222, 45 Mad. 766, 16 M.L.W. 239, 1922 M.W.N. 506, 31 M.L.T. 175. But there is nothing in this section which prescribes the *value or weight* to be attached to the evidence. Whether any portion or the whole of the evidence given before the committing Magistrate is entitled to credit, and if so, to such a degree that a conviction may be based upon it wholly or in part, are very important questions for the jury and the assessors, but they are in no way affected by this section—*Umar*, 51 P.R. 1887. It is a matter for the discretion of the Judge whether such evidence should be used in the interests of justice. In many cases it would be extremely dangerous to rely upon such evidence where the witnesses have proved themselves in the Sessions Court altogether unworthy of credit—*Gansa Oraon*, 2 Pat. 517, 24 Cr.L.J. 641. A judgment may be based upon the deposition taken before the committing Magistrate, which has been retracted at the trial, when the Sessions Court can see special reason for believing the original statement to be true either from the statements of the same witnesses before itself or when that statement is to a certain extent corroborated by independent testimony. If there is no such corroborative evidence, it is not proper to base a conviction solely upon the deposition given before the Magistrate—*Jeochi*, 21 All. 111; *Amanulla*, 21 W.R. 49; *Jadub Das*, 27 Cal. 295 (306), 4 C.W.N. 129; *Mamchand*, 5 Lah. 324 (328), 25 Cr.L.J. 1201; *Rangi*, 10 Mad. 295 (314); *Bharmappa*, 12 Mad. 123; *Nirmal Das*, 22 All. 445; *Somadu*, 47 Mad. 232, 25 Cr.L.J. 715; *Pirithi*, 37 P.R. 1917, 18 Cr.L.J. 703; *Nga Nyein*, 11 Rang. 4, 1933 Cr.C. 452 (454), 142 I.C. 87, 34 Cr.L.J. 286, A.I.R. 1933 Rang. 57; see also Note 915 (18); especially when there is nothing on the record to show that the witnesses have in fact become hostile or have been won over by the accused—*Pahalwan*, 35 Cr.L.J. 797 (799), 148 I.C. 937, 10 Luck. 1, 11 O.W.N. 508, 1934 Cr.C. 578, A.I.R. 1934 Oudh 182. A conviction based solely on evidence given by the witnesses before the committing Magistrate and retracted by them at the trial is unsustainable—*Sher Dil*, 17 P.R. 1919, 20 Cr.L.J. 792, 53 I.C. 696. The evidence of such a witness is not to be safely relied upon in the absence of corroboration—*Kataru Chinna Pappiah*, A.I.R. 1940 Mad. 136 (137), 1939 M.W.N. 1134, 50 M.L.W. 742, 1939 M.Cr.C. 282, 41 Cr.L.J. 323 (324), 186 I.C. 484. If it were permissible to convict an accused person, relying solely upon the evidence given by a witness before the committing Magistrate, the logical consequence would be that the taking of evidence before the Sessions Court might be altogether dispensed with—*Amanulla*, 21 W.R. 49. Evidence given before a committing Magistrate cannot be effectually utilised in support of a conviction unless it is shown by other corroborative evidence that the evidence given before the committing Magistrate should be preferred to and substituted for the evidence given at the trial—*Jehal Teli*, 3 Pat. 781 (794), 6 P.L.T. 53, 26 Cr.L.J. 270; *Lalji Rai*, 37 Cr.L.J. 235 (238), 160 I.C. 181, A.I.R. 1936 Pat. 11, 1936 Cr.C. 6, 16 P.L.T. 730; *Jadub Das*, 27 Cal. 295 (306); *Bigna Kumhar*, 27 Cr.L.J. 594, 91 I.C. 258, A.I.R. 1926 Pat. 440; *Nrbti Mandal*, A.I.R. 1940 Pat. 289 (293), 1940 P.W.N. 73. This view of law was, however, dissented from by the Allahabad High Court in *Raja Ram*, 36 Cr.L.J. 823, 155 I.C. 657, A.I.R. 1935 All. 691, 1935 A.L.J. 668 and by the Lahore High Court in *Narain Singh*, 37 Cr.L.J. 567 (568), 162 I.C. 379, A.I.R. 1936 Lah. 357, 17 Lah. 419, 38 P.L.R. 820, 1936 Cr.C. 298, where it has been held that there is nothing in this section to show that there need be corroboration of evidence so recorded, that it has like other evidence to be examined with care and to be considered with all the other surrounding circumstances and that

no general law can, therefore, be laid down as to this. The evidence of prosecution witnesses recorded before the committing Magistrate and transferred to the record of the Sessions Court, under the provisions of this section, is on the same footing with all other evidence in the case for all purposes and it is not necessary that there should be 'corroboration of those statement otherwise'—*Parmanand v Emp.*, A.I.R. 1940 Nag. 340 (347), 1940 N.L.J. 459. A conviction cannot be based upon statements of witnesses made before the committing Magistrate, when they afterwards came forward before the Sessions Judge and gave only circumstantial evidence insufficient to connect the accused with the commission of the crime—*Ghanwara*, 1915 P.W.R. 15, 16 Cr.L.J. 612. A Sessions Judge does not show a proper discretion in allowing a statement made before the committing Magistrate by a witness to be used as evidence under this section, when the witness repudiates it at the Sessions and says that it was given under pressure from the police in the course of the investigation—*Bhut Nath*, 7 C.W.N. 345 (350). In such a case the Judge should make some inquiry by examining the Inspector of Police regarding the restraint and pressure put upon the witness, before admitting such statement as evidence—*Bajragi*, 4 C.W.N. 49 (55); *Jadub Das*, 27 Cal 295 (300).

Where every one of the witnesses for the prosecution has been demonstrated at the trial to have contradicted the statement that he made before the Committing Magistrate it would not be safe to convict the accused—*Harnam Singh v. Emp.*, 38 Cr.L.J. 765, 169 I.C. 434, 10 R.L. 13, 39 P.L.R. 555, A.I.R. 1937 Lah. 597.

899. "Subject to the provisions of the Evidence Act":—These words do not mean that evidence duly taken before a Magistrate can only be utilized at a trial in a case where the Evidence Act specifically authorises its use. Such a construction is erroneous, because there are only certain sections in the Evidence Act (secs 32, 33, 145, 155, 157) which can in any way be regarded as even remotely dealing with this subject, but none have any direct bearing. There is indeed in the Evidence Act nothing at all which permits or specifically provides for the use of evidence taken before a Magistrate as evidence at a trial. What is really meant by the words is that evidence duly taken before a Magistrate can be used for all purposes in a trial Court so long as the evidence is 'evidence' within the meaning of the Evidence Act, i.e., if the matter contained therein is, according to the rules laid down in the Evidence Act, of evidential value. For instance, hearsay evidence taken before a Magistrate would not be capable of being utilized by a Sessions Judge as of evidential value at the trial. These words may also probably mean that the evidence taken before a Magistrate can only be used at the trial subject to the procedure laid down in the Evidence Act—*Jehal Teli*, 3 Pat. 781 (788-790), 6 P.L.T. 53, 26 Cr.L.J. 270; *Bahadur*, 19 S.L.R. 71, 26 Cr.L.J. 1063.

The words 'for all purposes subject to the provisions of the Evidence Act' do not mean that the evidence given before the committing Magistrate can be used in the Court of Session only for the purpose of corroboration and contradiction in accordance with sections 155 and 157 of the Evidence Act. Such evidence may be acted upon by the Sessions Court precisely as if that evidence has been deposed to before the Sessions Judge. The words merely mean that the law of evidence enacted in the Evidence Act must be complied with. For instance, evidence which had been wrongly admitted by the committing Magistrate, in violation of the provisions of the Evidence Act, cannot be transferred to the file of the Sessions Judge and used at the trial. The amendment is obviously introduced for the purpose of removing any doubts as to the right of the Court to treat the evidence given before the committing Magistrate as *substantive evidence* in the trial, when such evidence has in the discretion of the trial Court been properly brought on that Court's record—*Amir Zaman*, 6 Lah. 199, 26 P.L.R. 361, 26 Cr.L.J. 1245; *Abdul Gani*, 53 Cal 181, 42 Cr.L.J. 205, 26 Cr.L.J. 1577; *Basappa*, 27 Bom.L.R. 113, 26 Cr.L.J. 705, 86 I.C. 145, A.I.R. 1925 Bom 266; *Behari*, 49 All. 251, 27 Cr.L.J. 1365 (1367). The words "subject. . . Evidence Act" mean nothing more than that such statements should not contain matters which would be irrelevant or inadmissible under the Evidence Act—*Behari*, supra. See also *Bahadur*, 26 Cr.L.J. 1063, 88 I.C. 7, 19 S.L.R. 71, A.I.R. 1925 Sind 289.

It cannot be maintained that the deposition, when admitted under sec. 288, Cr. P. C., can only be used for the purpose of cross-examination within the provisions of sec. 155 of the Indian Evidence Act. This contention is clearly untenable in view of the express provisions of sec. 288 of the Code that it is to be treated as evidence in the case for all purposes; the words "subject to the provisions of the Indian Evidence Act, 1872" cannot be read so as to limit the purposes for which it may be used—*Fakira v. Emp.*, 38 Cr.L.J. 498, 167 I.C. 790, 39 P.L.R. 334, 1937 O.L.R. 216, 41 C.W.N. 741, 1937 M.W.N. 546, 9 R.P.C. 231, 1937 A Cr.C. 74, 3 B.R. 426, 1937 O.W.N. 412, A.I.R. 1937 P.C. 119, 1937 A.L.R. 328, 64 I.A. 148, 46 M.L.W. 134, 39 Bom.L.R. 966, 1 I.R. (1937) Bom. 711, 1937 A.W.R. (P.C. 1128, 1937 A.L.J. 1055, (1937) 2 M.L.J. 323 (P.C.). See also *Nebti Mandal*, A.I.R. 1940 Pat. 289 (293), 1940 P.W.N. 73.

900. Practice and procedure:—The counsel for the prisoner is not entitled to refer to the deposition for the purpose of contradicting the witness without having drawn the attention of the witness to the alleged contradiction in his deposition, and without having given him an opportunity of explaining it—*Zawar*, 31 Cal 142; *Lachmi Lal*, 3 P.L.T. 398, 23 Cr.L.J. 218, A.I.R. 1922 Pat. 40. Before a Judge can use as evidence the deposition given before the Magistrate, he is bound to let his intention, or the possibility that he may do so, be known to the accused and to the prosecution, in order to afford the accused and the prosecution an opportunity for testing such statement by cross-examination or otherwise dealing with such statement as part of the case which may be taken into consideration by the Judge. Otherwise it is impossible for the prosecution or the defence to deal with the matters which may influence the Judge's mind in coming to a decision—*Behari*, 1886 A.W.N. 256; *Musa*, 30 Cr.L.J. 333, 114 I.C. 609, Ind. Rul. 1929 Nag. 81, A.I.R. 1929 Nag. 233.

It is improper for the Judge trying a case to take a witness's deposition bodily from the committing Magistrate's record, and to treat it as evidence before the Court itself—*Dan Sahai*, 7 All. 862; *Jeochi*, 21 All. 111. The Judge is bound to put to the witnesses, whom he proposes to contradict by their previous statement, the whole or such portion of their depositions as he intends to rely upon, so as to afford them an opportunity of explaining their meaning or denying that they had made any such statements and so forth—*Dan Sahai*, 7 All. 862; *Sadar Din*, 10 Lah.L.J. 460, 29 Cr.L.J. 1047 (1048), 112 I.C. 471, A.I.R. 1929 Lah. 111. Depositions given in the lower Court which contradict the statements in the Sessions Court should be put to the witness before they are admitted under sec. 288, Cr. P. Code—*Nanhu Mahton*, 32 Cr.L.J. 438 (440), 129 I.C. 666, A.I.R. 1930 Pat. 338, 11 P.L.T. 772, 12 P.L.T. 239, 1930 Cr.C. 710, Ind. Rul. 1930 Pat. 122.

Section 288, Cr. P. C., is not a section to be lightly used. This section is not to be used as a matter of course but in the discretion of the Judge, and the fact that the whole statement is to be brought on the record and used as substantive evidence suggests that the proper occasion to use it is when the Judge is satisfied that the statement made before him is substantially false and the statement before the Committing Magistrate is substantially true. The existence of minor discrepancies between statements made in the Committing Magistrate's Court and the Sessions Court is not sufficient to justify the bringing bodily on to the record of the statement of a witness under sec. 288, Cr. P. Code. The provisions of secs. 145, 154, 155 and 157, Evidence Act, may, in such circumstances, be more appropriately used—*Manghan Khan v. Emp.*, 38 Cr.L.J. 487, 167 I.C. 913, 9 R.S. 213, A.I.R. 1937 Sind 61, 30 S.L.R. 238. See also *Kataru Chinna Papiah*, 41 Cr.L.J. 323 (325), 186 I.C. 484, A.I.R. 1910 Mad. 136, 1939 M.W.N. 1134, 50 M.L.J. 742, 1939 M.Cr.C. 282.

The depositions before the Magistrate were used during the trial for the purpose of cross-examining the witnesses, and extracts from those depositions were put in evidence, yet because the depositions were not formally tendered as evidence to the Court, they were not included in the record. *Held* that such formality amounts to absurdity and that if questions are put and extracts included from depositions, during the trial of a case, it must be obvious that the evidence has been admitted by the

Judge and that it must form part of the record, whether, technically speaking, it has properly been tendered or not—*Molla Khan*, 37 C.W.N. 1061 (1063)

Power of High Court:—Where, in an appeal, the High Court was of opinion that the statements made before the committing Magistrate by certain witnesses who were also examined before the Sessions Judge should have been brought upon the record by the exercise of the powers conferred by section 288, it directed the Sessions Judge to take proceedings for the purpose, after giving notice to the accused persons that it was proposed to use those statements against them—*Nagina*, 19 A.L.J. 947, 27 Cr.L.J. 813, 95 I.C. 477.

289. (1) When the examination of the witnesses for the prosecution and the examination (if any) of the accused are concluded, the accused shall be asked whether he means to adduce evidence.

(2) If he says that he does not, the prosecutor may sum up his case; and, if the Court considers that there is no evidence that the accused committed the offence, it may then, in a case tried with the aid of assessors, record a finding, or in a case tried by a jury, direct the jury to return a verdict of not guilty.

(3) If the accused, or any one of several accused, says that he means to adduce evidence, and the Court considers that there is no evidence that the accused committed the offence, the Court may then, in a case tried with the aid of assessors, record a finding, or, in a case tried by a jury, direct the jury to return a verdict of not guilty.

(4) If the accused, or any one of several accused, says that he means to adduce evidence, and the Court considers that there is evidence that he committed the offence, or if, on his saying that he does not mean to adduce evidence, the prosecutor sums up his case and the Court considers that there is evidence that the accused committed the offence, the Court shall call on the accused to enter on his defence.

901. Examination of the accused:—The words "if any" in this section show that although under sec 342 it is imperative on the Judge to examine the accused, still the examination may be dispensed with in some cases, e.g., where the accused has admitted his guilt and had been examined by the committing Magistrate—*Khudiram Bose*, 9 CLJ 55, 3 I.C. 625, 10 Cr.L.J. 325. This section *prima facie* implies the possibility of their being no examination of the accused. But that is up to the stage when he is asked "whether he means to adduce evidence." This section has to be read in conjunction with the provisions of sec. 342 of the Code, which makes it the duty of the Court, for the purpose of enabling the accused to explain any evidence against him, to question him generally on the case "before he is called on for his defence." But the questioning of the accused referred to in the section is not meant to be lengthy cross-examination as regards all evidence produced by the prosecution—*Jhabwala*, 34 Cr.L.J. 967 (972), 145 I.C. 481, A.I.R. 1933 All. 690, 1933 Cr.C. 1202.

There is no provision in the Criminal Procedure Code for the alleged practice allowing an accused person in a Sessions Trial to put in a written statement. The written statement, if put in, cannot be regarded as part of the record of the trial of the accused—*Tarak Nath*, 39 C.W.N. 1309 (1311), 37 Cr.L.J. 30, 159 I.C. 149, A.I.R. 1935 Cal. 687, 1935 Cr.C. 1079, 63 Cal. 481. Written statements filed on behalf of

accused persons are evolved out of the brains of the Counsel for the accused helped by the *paikars* and friends of the accused, and seldom represent the idea of the accused or the facts as known to the accused. Little or no importance should, therefore, be attached to such written statements and all Magistrates and Sessions Judges should sternly discountenance the practice of filing written statements on behalf of accused persons—*Mohammad Anis*, 37 Cr.L.J. 955 (957), 164 I.C. 482, 1936 O.W.N. 691, A.I.R. 1936 Oudh 405, 1936 O.L.R. 459.

Sum up:—The prosecution has a right to sum up under sub-section (2) only when all the accused persons say that they do not mean to adduce evidence. Where one of the accused adduces evidence and the other accused do not, they must all follow one another in their defence under sec. 290—*Sadanand*, 18 Bom. 364.

902. 'No evidence':—Sub-section (2) or (3) applies only where there is no evidence, and would not cover cases where the Court considers that the charge is itself improper—*Dwarka Lal v. Mahadeo*, 12 All 551.

The prosecution has to prove all the facts necessary to constitute the offence charged against the accused. If it fails to do so, then in a sessions case, after the case for the prosecution has been closed, the Court should acquit the accused, where no evidence of any of the links necessary to establish the offence has been adduced by the prosecution—*Jeremiah v. Vas*, 36 Mad 457 (462). Where there is no evidence, the jury should be directed to find a verdict of not guilty; and it is wrong to leave it to the jury to say whether the accused is guilty or not guilty—*Greedhary*, 7 W.R. 39; *Rutton Das*, 16 W.R. 19.

The words 'no evidence' do not mean "no satisfactory, trustworthy or conclusive evidence" If the Court is satisfied that there is not upon the record any evidence which even if it were perfectly true, would amount to legal proof of the offence, then the Court has power, without consulting the assessors, to record a finding of not guilty; but the Sessions Judge has no power merely because he considers the evidence *untrustworthy*, or *unsatisfactory* or *inconclusive*. It is not the intention of the Legislature that the assessors or the jury should give their opinion or verdict in those cases only where the Judge is inclined to consider the evidence for the prosecution to be trustworthy or satisfactory or conclusive—*Munna Lal*, 10 All. 414; *Vajiram*, 16 Bom 414; *Ramchariter Singh*, 8 P.L.T. 691, 28 Cr.L.J. 692 (695), 7 Pat. 15, 103 I.C. 548; *Navala Kishore*, 30 Cr.L.J. 519 (521), 115 I.C. 692, 10 P.L.T. 101, A.I.R. 1929 Pat 121, Ind. Rul 1929 Pat 244; *Rup Narain*, A.I.R. 1931 Pat. 172 (175), 10 Pat. 140, 1931 Cr.C. 460, 132 I.C. 876, 32 Cr.L.J. 975, 12 P.L.T. 746. A Court can acquit the accused under sec. 289 only in a case in which there is no evidence that the accused committed the offence. So, if there is any direct evidence which would establish the offence, the accused must be called upon to enter upon his defence, and the trial should be completely gone through, even though the Sessions Judge himself did not believe the evidence—*Nalli Gonudan*, 2 Weir 382. But see *Labbai Kutti* in Note 918.

The accused must be acquitted under this section if there is no evidence on the prosecution side; and he cannot be convicted on the evidence given against him by the witnesses called by the co-accused in his defence—*Raghava*, 5 M.L.T. 75, 10 Cr.L.J. 68

Direct the jury:—The expression "direct" leaves no room for doubt that the intention of the Legislature was that the jury was bound to accept the opinion of the Judge, whether they agreed with that view or not. The direction of the Judge that there is no evidence that the accused committed an offence is binding on the jury and must be followed by them. In other words, the question of absence of evidence is treated as a question of law and not a mere question of fact—*Qudrat*, A.I.R. 1939 All. 708, 1939 A.L.J. 980, 41 Cr.L.J. 142, 185 I.C. 271, I.L.R. 1939 All. 871.

903. Defence:—It is not a mere formality, but an essential part of the criminal trial, to call upon the accused to enter on his defence; an omission to do so is not a mere irregularity curable by sec. 537—*Imam Ali*, 23 Cal. 252. In *Premgir*, 16 A.L.J. 41, 19 Cr.L.J. 209, 43 I.C. 785, however, the omission to call upon the accused

to enter on his defence was held to be a mere irregularity cured by sec. 537, unless the accused was prejudiced thereby. This view has been followed in—*Thoppa*, 37 Cr.L.J. 45, 159 I.C. 30, 1935 M.W.N. 1091, A.I.R. 1936 Mad. 82.

What clause (4) of this section means is that if the accused calls no witnesses, he or his pleader is to make his final address to the Court—*Thoppa*, supra.

290. The accused or his pleader may then open his case, stating the facts or law on which he intends to rely, and making such comments as he thinks necessary on the evidence for the prosecution. He may then examine his witnesses (if any) and after their cross-examination and re-examination (if any) may sum up his case.

Defence.

904. Examination of defence witnesses:—The accused is at liberty to meet the case in any way he likes. He can, as to the whole or any part of the case against him, rely on the witnesses for the prosecution, or may call fresh evidence himself. No adverse inference will be drawn against him, if he does not produce or examine any witnesses—*Dhunno*, 8 Cal 121; *Hurry Churn*, 10 Cal 140; *Ashraf*, 21 C.W.N. 1152 (*per Huda J.*). But where a *prima facie* case of circumstances making out or tending to support the charge against the accused is established, and he withholds evidence in disproof or explanation available to him and not accessible to the prosecution, an inference unfavourable to the accused may legitimately be drawn—*Ashraf Ali*, 21 C.W.N. 1152 (*per Teunon J.*)

The burden lies on the prosecution to prove beyond all reasonable doubt that the offence was committed by the accused. If the prosecution cannot prove it, the accused is under no obligation to explain how the offence was committed or who committed the offence or by what means—*Jethmal*, Ratanlal 686. When there is no *prima facie* evidence sufficient to convict the accused, he is not under any obligation to explain to the Court his movements at the time of the offence—*Bepm*, 10 Cal 970.

905. Cross-examination:—An accused person must be allowed to cross-examine the witnesses called by another co-accused for his defence, if the case of the latter is adverse to that of the former—*Ram Chand v Hanif*, 21 Cal 401. But the accused cannot cross-examine his own witnesses. Thus, where a prosecution witness was examined before the committing Magistrate but was not called in the Sessions Court, and thereupon the counsel for the defence examined him, he would be treated as a witness for the defence, and the defence counsel was not entitled to cross-examine him, unless it appeared that he was suppressing the truth or was lying or refusing to give information—*Zawar Husen*, 20 All 155.

905A. Sum up:—This section contemplates that, where there are more accused than one, their Counsel should all be heard after the conclusion of the whole of the defence evidence—*Mohinder*, 33 Cr.L.J. 97 (103), 135 I.C. 209, Ind. Rul. 1932 Lah. 81, A.I.R. 1932 Lah. 103, 1932 Cr.C. 123, 33 P.L.R. 891.

291. The accused shall be allowed to examine any witness not previously named by him, if such witness is in attendance; but he shall not, except as provided in sections 211 and 231, be entitled of right to have any witness summoned, other than the witness named in the list delivered to the Magistrate by whom he was committed for trial.

Right of accused as to examination and summoning of witnesses.

906. Summoning of witnesses:—The accused is entitled as a matter of right to secure the attendance of all witnesses named in the list delivered to the

Magistrate and a conviction without summoning and examining the defence witnesses is liable to be set aside—*Mookun*, 12 W.R. 22; *Faizuddin*, 47 Cal. 758. It is ordinarily incumbent on the accused to put in his list of defence witnesses at once, that is to say on the day when the order of commitment is made and that if he does not do so the Magistrate will have a discretion to allow or not to allow any such application if it is made on any subsequent date. If, however, such an application is made and allowed, then the application whether under sub-sec. (1) or sub-sec. (2) of sec. 211 will be governed by the same principle. The discretion having been exercised and summonses on the defence witnesses having been issued the Sessions Judge is bound to enforce the attendance of these witnesses who were in contempt—*Kali Bilash*, 31 Cr.L.J. 695, 124 I.C. 513, A.I.R. 1930 Cal. 188.

If some of the witnesses whose names have been entered in the list given to the committing Magistrate (under sec. 211) fail to appear in the Sessions Court, the Judge ought to summon them, and he cannot refuse to do so on the ground that the application for summons has been made at a late stage of the trial (*viz.*, at a time when the examination of the other defence witnesses has been ended and the case is ready for arguments)—*Faizuddin*, 47 Cal. 758, 24 C.W.N. 527, 21 Cr.L.J. 842. The accused is entitled as of right to have the witnesses named in the list delivered to the committing Magistrate (sec. 211) examined on his behalf, and the Sessions Judge is not justified in refusing to summon any such witness, if he is absent, merely on the ground that it would be inconvenient to adjourn the case in order to secure the attendance of the witness. An accused person has the right to defend himself, and in order to support his defence he is entitled to cite such witnesses as he thinks will help him. Undoubtedly it is very inconvenient to all parties including the jurors to adjourn a case in the midst of a trial, and it is therefore proper that before a case commences the Sessions Judge should ascertain whether the case is ready, *i.e.*, whether the witnesses on both sides are in attendance—*Ram Mamud*, 58 Cal. 412, 34 C.W.N. 1014 (1016), 32 Cr.L.J. 316.

The accused person cannot however require the Sessions Judge, as of right, to summon and examine witnesses *other than those named in the list*—*Boidnath*, 3 W.R. 29. And the Judge's refusal to grant an adjournment to summon a witness not named in the list is not illegal—*Nazir Singh*, 7 Lah.L.J. 428, 26 P.L.R. 767, 27 Cr.L.J. 134, 91 I.C. 806, A.I.R. 1925 Lah. 557. But the Sessions Judge has an inherent power, if he thinks proper to exercise it, to summon those witnesses—*Raja of Kantit*, 8 All. 668.

A Sessions Judge should not refuse to enforce the attendance of certain witnesses for the defence, on the ground that there is ample evidence on the record about the matter; it is for the accused person and not for the Judge to say what amount of evidence it would be proper to place before the jury in order to establish the case for the defence—*Brojendra*, 7 C.W.N. 188.

In a serious case the accused should be allowed an opportunity of adducing such evidence as they chose. If at the examination of the witnesses for the defence the Sessions Judge is of opinion that the statements made by them are not admissible or are not relevant in evidence he can rule them out. He does not exercise a proper discretion in refusing an adjournment for examination of defence witnesses on the ground that those witnesses will not prove relevant matters or any matter admissible in evidence under the law, without allowing the accused to produce their witnesses and then deciding about the relevancy of their evidence—*Mukhtal Hossein*, 31 Cr.L.J. 1077, 126 I.C. 720, A.I.R. 1930 Cal. 362.

An accused person cannot ask as of right that newly named witnesses shall be summoned for his defence, but his prayer would not ordinarily be refused if there were time to secure the attendance of the witnesses before the conclusion of the trial—*Ramsewar*, A.I.R. 1933 Pat. 559, 1933 Cr.C. 1259.

The accused is entitled to have the assistance of the Court in obtaining the attendance of all the persons whose names he gives in at once on being required to do under sec. 211, Cr. P. C. Sec. 211 (2), Cr. P. C., gives the Magistrate a discretion to allow the accused to give in any further list of witnesses at a subsequent time.

There is a departure from the procedure contemplated by the Code when the accused present their list of witnesses not to the Magistrate under sec. 211 (2), Cr. P. C., but to the Sessions Judge and probably the most correct procedure for the Sessions Judge at that time is at once to forward the application to the committing Magistrate for disposal under sec 211 (2), Cr P. Code. Assuming that it is open to the Sessions Judge to deal with the application to summon defence witnesses as the case has already come on his file, then the principles which he ought to follow would be the same as those which the Magistrate should follow. Where the list presented to the Sessions Judge is not a list of witnesses in addition to the number already summoned but is the first list which has been presented to any officer, it would seem in such a case desirable to summon at least some of the witnesses regarding the effect of whose testimony some explanation could be given. When amendments and additions are made to the charges after the commencement of the trial in the Court of Session, the prosecutor and the accused have the right not only to recall and resummon any witness who may have been examined but also to call any further witnesses whom the Court may think to be material. A request to summon a fresh witness can only be refused on the ground that the evidence of the witness is not thought by the Court to be material—*Musahru v. Emp.*, AIR. 1940 Pat. 355 (358, 359), 21 P.L.T. 13, 19 Pat. 413, 1940 P.W.N. 83.

Prosecutor's right of reply. **292.** *The prosecutor shall be entitled to reply—*

- (a) *if the accused or any of the accused adduces any oral evidence; or*
- (b) *with the permission of the Court, on a point of law; or*
- (c) *with the permission of the Court, when any document which does not need to be proved is produced by any accused person after he enters on his defence:*

Provided that, in the case referred to in clause (c) the reply shall, unless the Court otherwise permits, be restricted to comment on the document so produced.

Change:—This section has been redrafted by section 79 of the Cr. P. C. Amendment Act, XVIII of 1923. Prior to this amendment, the section stood as follows :—

"292. If the accused or any of the accused adduces any evidence, the prosecutor shall be entitled to reply."

907. Object and scope of section:—The object of the law in this section is to let each side have an opportunity of commenting on the evidence of the other, and not to give an additional advantage to the prosecution. Therefore, where the defence counsel first said that he meant to adduce evidence, but afterwards informed the Court that he did not mean to call evidence, and did not actually call any witnesses, the Judge should not allow the right of reply—*Hurry Churn*, 10 Cal. 140. In other words, this section makes the right of reply dependent upon the fact of oral evidence having been actually adduced.

908. Adducing of evidence:—The putting in of the depositions of certain prosecution witnesses made before the committing Magistrate and of the statements of the accused made under sec. 162 to a Police constable, forming part of the record sent up by the Magistrate, cannot be said to be adducing evidence by the accused within the meaning of this section. The tender of them as evidence by the accused is merely an

application to the Judge for the exercise of the discretion vested in him by sec. 288—*Stewart*, 31 Cal. 1050.

Documentary evidence put in by accused through prosecution witnesses :—Prior to the amendment of this section, there was a conflict of decisions relating to the question whether the putting in of documentary evidence by the defence during the cross-examination of prosecution witnesses amounted to "adducing of evidence" by the accused and gave the prosecutor a right of reply. In the following cases, it was held that where during the cross-examination of the prosecution witnesses and before the close of the case for the Crown or *before entering upon his defence*, the accused put in some documentary evidence, but did not examine any witnesses for the defence, it did not give a right of reply to the Crown, because so long as the case was in the hands of the prosecution, the putting in of documents could not be said to take the prosecution by surprise, and this is the correct test for determining whether the prosecution should have the right of reply—*Timol*, 10 C.W.N. cclxvii; *Kaliprosonno*, 14 Cal. 245; *Solomon*, 7 Cal. 930 (932); *Sreenath*, 43 Cal. 426; *Greesh Chunder*, 10 Cal. 1024; *Krishnaji Baburao*, 40 Bom. 436. *Abdulali*, 11 Bom.L.R. 177, 9 Cr.L.J. 284 (291); *Berch*, 7 L.B.R. 84, 15 Cr.L.J. 241. In the following cases it was held that the prosecution was entitled to a right of reply even if any documentary evidence was put in by the defence *before* the close of the evidence for the prosecution (e.g., if any document was produced by the defence during the cross-examination of a prosecution witness)—*Hayfield*, 14 All. 212 (216); *Venkatapathi*, 11 Mad. 339; *Moss*, 16 All. 88; *Bhaskar*, 30 Bom. 421; *Manuel*, 4 L.B.R. 5, 6 Cr.L.J. 115.

The conflict between various Courts had been set at rest by the Legislature by using the words "adduces any oral evidence" in the present Act in sec. 292 (a) instead of the words "adduces any evidence" which were used in the previous enactments. The right of reply depends, under the present law, on the accused adducing oral evidence in defence after the close of the prosecution case and the mere fact of their having proved certain documents through a prosecution witness in cross-examination does not deprive them of their right of reply. An erroneous decision as to the right of reply is an irregularity, but by no means so material or substantial as to justify the setting aside of the trial—*Kundar Singh*, 32 Cr.L.J. 944, 132 I.C. 692, 32 P.L.R. 435, A.I.R. 1931 Lah. 534, Ind. Rul. 1931 Lah. 660, 1931 Cr.C. 774.

909. Reply:—Reply means generally to the whole case. Even if one of the accused calls witnesses, and the others do not, the prosecution is entitled to reply not merely on the evidence adduced by one of the accused, but generally on the whole case. It is not the intention of this section that the prosecution is to sum up as to such of the accused as do not call evidence, and to reply only on the evidence adduced by the others—*Sadanand*, 18 Bom. 364.

909A. Argument.—It seems to be plain that any arbitrary and undue curtailment of the parties' right of argument is to be deprecated. But although it cannot be denied that for the proper administration of justice the parties should be allowed a full and unrestricted right of addressing the jury, yet it cannot be overlooked that the summing up of the case by the Judge in his charge to the jury plays a very important part in a jury trial. It is obvious that in those cases where the accused is defended or where he is defended by an incompetent Counsel or is too poor to engage the services of a competent lawyer, his case cannot generally be adequately placed before the jury by means of argument. If, however, in those cases the Judge has properly charged the jury, the mere fact that the case not been adequately argued on behalf of the accused cannot by itself be a good ground for ordering retrial. On the same principle a retrial should not be ordered, unless it can be shown that matters which Counsel would have placed have not been placed before the jury or the charge of the Judge is defective and erroneous in material particulars—*K. K. Ali*, 15 Pat. 817 (840, 841), 38 Cr.L.J. 673 (683), 169 I.C. 48, 18 P.L.T. 535, 9 R.P. 526, 3 B.R. 514, A.I.R. 1937 Pat. 263.

293. (1) Whenever the Court thinks that the jury or

View by jury or assess-
sors.

assessors should view the place in which the offence charged is alleged to have been committed, or any other place in which any other transaction material to the trial is alleged to have occurred, the Court shall make an order to that effect, and the jury or assessors shall be conducted in a body, under the care of an officer of the Court, to such place, which shall be shown to them by a person appointed by the Court.

(2) Such officer shall not, except with the permission of the Court, suffer any other person to speak to, or hold any communication with, any of the jury or assessors, and, unless the Court otherwise directs, they shall, when the view is finished, be immediately conducted back into Court.

This section speaks of the view of the place of offence by jurors and assessors, whereas section 539B relates to the view of the place by Judges and Magistrates

Examination of witness, not permitted.—The assessors can only *view* the scene of the alleged offence, and cannot *examine* any witnesses on the spot; because by sub-section (2) the officer conducting the jurors or assessors to the spot cannot suffer any other person to speak to them—*Chutterdharee*, 5 WR 59.

The juror or assessor form an integral part of the Court. Any proceedings taken by the Judge in the absence of the jurors or assessors are necessarily void and illegal. When the Sessions Judge made local inspection in absence of the assessors, the inspection note made by him must be ruled out, as having been made in contravention of the provisions of the Cr. P Code—*Raj Bahadur*, 35 Cr.LJ 1496 (1499), 152 I.C. 103, 11 O W N 1309.

294. If a juror or assessor is personally acquainted with

When juror or assessor
may be examined.

any relevant fact, it is his duty to inform the Judge that such is the case, whereupon he may be sworn, examined, cross-examined and re-examined in the same manner as any other witness.

See Note 892.

295. If a trial is adjourned, the jury or assessors shall

Jury or assessors to
attend at adjourned sit-
ting.

attend at the adjourned sitting, and at every subsequent sitting, until the conclusion of the trial.

910. When trial should be adjourned:—A Judge is bound to adjourn a case in which a witness summoned for the defence is absent, especially if he is a material witness and the case cannot be satisfactorily decided in his absence—*Ishan*, 15 W.R. 34; *Rajnarain*, 18 WR. 20; *Kali Prosunno*, 23 W.R. 58. But under such circumstances the Judge will not be justified in discharging the jury in the midst of a trial adjourning the case to the next Sessions—*Putaswamy*, 4 Bom.L.R. 939.

296. The High Court may, from time to time, make rules

Locking up jury. as to keeping the jury together during a trial before such Court lasting for more than one day; and subject to such rules, the presiding Judge

may order whether and in what manner the jurors shall be kept together under the charge of an officer of the Court, or whether they shall be allowed to return to their respective homes.

In every case involving the punishment of death or of transportation for life in which the trial lasts for more than one day, the jury should be kept together during the trial by the Sheriff or Deputy Sheriff or such other officers as the presiding Judge appoints for that purpose; and in every other case in which the trial shall last for more than one day, it shall be in the discretion of the presiding Judge whether the jury shall be kept together in manner aforesaid or shall be allowed to return to their respective homes—*Bombay Gazette*, 1875, Part I. p. 653.

F.—Conclusion of Trial in Cases tried by Jury.

297. In cases tried by jury, when the case for the defence and the prosecutor's reply (if any) are concluded, the Court shall proceed to charge the jury, summing up the evidence for the prosecution and defence, and laying down the law by which the jury are to be guided.

911. "When the case.....are concluded" :—This section specially enacts that the Judge shall only charge the jury when the case for the defence and the prosecutor's reply are concluded, i.e., after all the evidence has been taken on both sides, and the counsel of both parties have finished addressing the jury. A Judge who charges the jury and takes verdict as regards some only of the accused, and afterwards hears arguments and takes verdict as regards the remaining accused, will be acting irregularly and contrary to the provision of this section—*Abdul Hameed*, 36 Mad 585, 15 Cr.L.J. 197. All the witnesses on both sides must be examined before the Judge can put the case to the jury. Where after the examination of some of the prosecution witnesses the Judge asked the jury whether they wished to hear any more evidence and they stated they did not believe the evidence and wished to stop the case, and the Judge recorded a verdict of acquittal, it was held that the procedure was wrong. All the remaining witnesses ought to have been examined before any verdict was recorded—*Ramalingam*, 20 Mad. 445. After the witnesses for the prosecution and a certain number of witnesses for the defence had been examined, the foreman of the jury asked if the defence could not cut down the number of witnesses they had summoned; the defence thereupon agreed to dispense with all further witnesses save one. The Judge taking the foreman's intervention as an indication that the jury had decided to acquit, proceeded to charge the jury upon the case as it stood. The jury however found the accused guilty, whereupon the Judge ordered the remaining witnesses for the defence to be examined, and after this was done he again addressed the jury and then the jury again gave their verdict. Held that the procedure was entirely illegal, because all the evidence on both sides must have been concluded before the case could be submitted to the jury. Both the verdicts were therefore null and void—*Lyne*, 4 Lah 382, 25 Cr.L.J. 377, 77 I.C. 425, A.I.R. 1924 Lah. 17.

Where the Judge required the jury to give a finding on one of two questions of fact constituting the proof in the case, before he concluded his charge with reference to the other question of fact, held that the procedure was irregular, if not illegal, and was certainly calculated to embarrass the jury in arriving at a proper verdict as to the character of the offence, if any proved—*Badava Kunhi*, 2 Weir 499 (500). See also *Nasar Darzi*, 33 C.W.N. 451.

Although it is desirable that the Judge should charge the jury immediately after the pleaders on both sides have finished their addresses, while the arguments are fresh in the minds of the jury, still if the Judge has to adjourn the case for a week after the

pleaders' addresses owing to the intervention of holidays and for special duty elsewhere, and then he charges the jury, the charge does not become illegal. Such adjournments are inevitable, and it is not necessary that the pleaders should address the jury again—*Sur Nath*, 50 All. 365, 28 Cr.L.J. 950 (952), 105 I.C. 662, 8 A.I.Cr.R. 342, A.I.R. 1927 All. 721, 25 A.L.J. 1077.

912. Charge to jury:—The form and contents of a charge vary with the circumstances of individual cases, with the nature of the evidence, and with the mode in which the case for the prosecution and the defence is conducted. Generally speaking, it is usual to begin a charge by setting out the offence or offences with which the prisoner is charged, and explaining the law relating to those offences. Then the case for the prosecution and the case for the defence may be referred to, and such comments made on the evidence adduced by the other side as the Sessions Judge may think desirable or useful. Care should be taken to place the defence set up fairly before the jury and to ensure that the jury appreciate the issue or issues which they have to try—*Afiruddi*, 23 C.W.N. 833, 20 Cr.L.J. 661. Some sequence must be adopted by a Judge in charging a jury. Any sort of sequence will do, preferably chronological, but even alphabetical sequence is better than none at all—*Kamiraddi*, 37 C.W.N. 1102 (1103).

To charge the jury at very great length may itself be an obstacle to their arriving at a correct decision. They are laymen and to enable them to come to a correct decision it is necessary that essentials should be clearly brought out and not overwhelmed and obscured by too great mass of detail—*Ardali Afian*, A.I.R. 1933 Pat. 496, 35 Cr.L.J. 56, 146 I.C. 460, 1933 Cr.C. 1061.

The heads of the charge should represent with absolute accuracy the substance of the charge, and be such as to enable the High Court on appeal to see distinctly, whether the case was fairly and properly placed before the jury—*Fanindra Nath*, 36 Cal. 281, 13 C.W.N. 197. It is not only desirable but necessary that the charge should be recorded in an intelligible form and with sufficient fulness to enable the Appellate Court to satisfy itself that all points of law were clearly explained to the jury in reference to the facts and the evidence in the case—*Panchu Das*, 34 Cal. 698, 11 C.W.N. 666; *Biru Mandal*, 25 Cal. 561; *Asanulla*, 39 C.W.N. 924, 36 Cr.L.J. 1246, 157 I.C. 837, A.I.R. 1935 Cal. 534, 62 Cal. 911, 1935 Cr.C. 910. A charge to a jury ought to be delivered extemporaneously, immediately after the conclusion of the final speeches of the lawyers engaged in the trial, or of the evidence, in the absence of such speeches. Obviously, it ought not to be written out before and *in extenso* and equally obviously it is not humanly possible except, perhaps, in isolated and very exceptional cases, to write it out afterwards *in extenso* from memory—*Asanulla*, *supra*.

In addressing the jury the Judge should endeavour to speak in a manner simple and direct. The charge must not be involved, nor should the language be extravagant—*Harendra Pal*, 11 Cr.L.J. 538 (539) (Cal.). He should not use expressions assuming the guilt of the accused, nor should he use slang and colloquial phrases and the interrogative method in charging the jury—*Amiruddin*, 45 Cal. 557, 22 C.W.N. 213. It is not a proper language of addressing the jury, to call certain witnesses as "a contemptible pair of cowards," or as "a precious pair of poltroons" or to describe the evidence of a medical witness as "shilly-shallying evidence of a person who showed a tendency to hedge and play for safety in giving evidence"—*Khijiruddin*, 53 Cal. 372, 27 Cr.L.J. 266 (268), 92 I.C. 442, 42 C.L.J. 504, A.I.R. 1926 Cal. 139.

If a charge is to be delivered in Bengali, and the Sessions Judge is not sufficiently acquainted with that language to prepare the charge in Bengali, it is open to him to obtain such assistance as he requires from the officers of his Court. But it is not desirable that he should resort to the services of the Public Prosecutor for this purpose—*Afiruddi*, 23 C.W.N. 833, 20 Cr.L.J. 661. But where the charge was written by the Judge in English, and he got it translated in the vernacular, and then it was read to the jury by the Government Pleader, *held* that there was no illegality in the procedure—*Sur Nath*, 50 All. 365, 28 Cr.L.J. 950 (952), 105 I.C. 662, 8 A.I.Cr.R. 342, A.I.R. 1927 All. 721, 25 A.L.J. 1077. Where the Judge prepared the charge in

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The heads of the charge should represent with absolute accuracy the substance of the charge, and be such as to enable the High Court on appeal to see distinctly, whether the case was fairly and properly placed before the jury—*Fanindra Nath*, 36 Cal. 281, 13 C.W.N. 197. It is not only desirable but necessary that the charge should be recorded in an intelligible form and with sufficient fulness to enable the Appellate Court to satisfy itself that all points of law were clearly explained to the jury in reference to the facts and the evidence in the case—*Panchu Das*, 34 Cal. 698, 11 C.W.N. 666; *Biru Mandal*, 25 Cal. 561; *Asanulla*, 39 C.W.N. 924, 36 Cr.L.J. 1246, 157 I.C. 837, A.I.R. 1935 Cal. 534, 62 Cal. 911, 1935 Cr.C. 910. A charge to a jury ought to be delivered extemporaneously, immediately after the conclusion of the final speeches of the lawyers engaged in the trial, or of the evidence, in the absence of such speeches. Obviously, it ought not to be written out before and *in extenso* and equally obviously it is not humanly possible except, perhaps, in isolated and very exceptional cases, to write it out afterwards *in extenso* from memory—*Asanulla*, *supra*.

In addressing the jury the Judge should endeavour to speak in a manner simple and direct. The charge must not be involved, nor should the language be extravagant—*Harendra Pal*, 11 Cr.L.J. 538 (539) (Cal.). He should not use expressions assuming the guilt of the accused, nor should he use slang and colloquial phrases and the interrogative method in charging the jury—*Amiruddin*, 45 Cal. 557, 22 C.W.N. 213. It is not a proper language of addressing the jury, to call certain witnesses as "a contemptible pair of cowards," or as "a precious pair of poltroons" or to describe the evidence of a medical witness as "shilly-shallying evidence of a person who showed a tendency to hedge and play for safety in giving evidence"—*Khijiruddin*, 53 Cal. 372, 27 Cr.L.J. 266 (268), 92 I.C. 442, 42 C.L.J. 504, A.I.R. 1926 Cal. 139.

If a charge is to be delivered in Bengali, and the Sessions Judge is not sufficiently acquainted with that language to prepare the charge in Bengali, it is open to him to obtain such assistance as he requires from the officers of his Court. But it is not desirable that he should resort to the services of the Public Prosecutor for this purpose—*Afruddi*, 23 C.W.N. 833, 20 Cr.L.J. 661. But where the charge was written by the Judge in English, and he got it translated in the vernacular, and then it was read to the jury by the Government Pleader, *held* that there was no illegality in the—*Sur Nath*, 50 All. 365, 28 Cr.L.J. 950 (952), 105 I.C. 662, 8 A.I.Cr.R. 342, A.I.R. 1927 All. 721, 25 A.L.J. 1077. Where the Judge prepared the

English and gave it to the peshkar to translate it into Bengali, but the peshkar could not satisfactorily do it, not having sufficient knowledge of English, and then it was arranged that the Public Prosecutor would translate the charge to the jury, the pleader for the defence being told that he could take objection whenever necessary, *held* that under the circumstances the procedure was not illegal—*Dwijapada*, 47 C.L.J. 449, 29 Cr.L.J. 438.

If practicable, the Judge should write out his charge before delivery. But as it is not always possible, he should reduce the charge to writing immediately after charging the jury, so that what he said is fresh in his mind. A delay makes it impossible for an Appellate Court to know whether the written charge was really the charge which was given to the jury—*Jagmohan*, 52 All. 207, 30 Cr.L.J. 1146 (1147); *Rupan Singh*, 4 Pat. 626, 27 Cr.L.J. 49 (53).

913. Summing up of evidence:—The object of a summing up is to enable the Judge to place before the Jury the facts and circumstances of the case both for and against the prosecution so as to help them in arriving at a right decision upon the points which arise in their consideration—*Khijiruddin*, 53 Cal. 372, A.I.R. 1926 Cal. 139, 92 I.C. 442, 42 C.L.J. 504, 27 Cr.L.J. 266 (268); *Bapurao Maroti*, A.I.R. 1940 Nag. 221, 1940 N.L.J. 264, 190 I.C. 283. It is mandatory upon the Judge to charge the jury and in so doing, to sum up the evidence for the prosecution and the defence and to lay down the law. The object of requiring the Judge to sum up the evidence is that he may render such assistance as he can to the jury by pointing out to them the salient evidence for both the prosecution and for the defence. It is not necessary for him to read his notes of the evidence to the jury, though it may often be desirable to read his notes of important parts of the evidence: nor is it necessary for him to go through the whole of the evidence. But he ought to refer to the salient parts of the evidence. It is, no doubt, legitimate for a Judge to ask the jury whether they have a particular piece of evidence in mind, or whether it would help them for him to read his notes on the subject; but the Judge is bound to sum up the evidence, whether or not the jury desire him to do so—*Puttan Hassan*, 37 Cr.L.J. 366, 160 I.C. 1060, A.I.R. 1936 Bom. 52, 38 Bom.L.R. 19, 60 Bom. 599, 1936 Cr.C. 164 (F.B.). In charging the jury on facts it is not sufficient merely to recount and repeat chronologically the evidence as it has been given by the various witnesses. It is necessary to sift and weigh and value the evidence. The final weighing is for the jury but the Judge should see that all essential facts go into the scales of justice and on the proper side of the balance. Further, the facts must be marshalled by the Judge under separate heads as they affect each separate incident in the story—*Nagendra Nath*, A.I.R. 1929 Cal. 742, 1929 Cr.C. 390, 124 I.C. 492, 57 Cal. 740, 31 Cr.L.J. 673, 34 C.W.N. 164 (168); *Hachuni*, 34 C.W.N. 390, 32 Cr.L.J. 33; *Natabur Haldar*, 34 C.W.N. 223, 31 Cr.L.J. 572. The 'summing up' contemplated by this section is a full and distinct statement of the evidence on both sides, with proper advice as to the legal bearing of the evidence and the weight to be attached to it. The Judge must formulate and specify simple issues for consideration and collate the evidence *pro* and *con* bearing upon the issues in order to assist the jury to arrive at the correct decision thereon. Merely summarising the evidence, the examination-in-chief, cross-examination and re-examination of the different witnesses, and putting before the jury all that has been said by the witnesses and lawyers on the two sides and huddling together important facts as well as trivial points without any attempt at discrimination, is not a proper summing up. Such a summing up, instead of aiding the jury, only confuses them—*Jessarat*, 29 C.W.N. 526, 26 Cr.L.J. 1009 (1013), 87 I.C. 833, A.I.R. 1925 Cal. 729. For the purposes of proper and intelligent summing up it is necessary that the Judge should appreciate evidence properly. The expression "summing up the evidence of the prosecution and defence" under this section does not mean that a Judge should give merely a summary of the evidence. He must marshal the evidence so as to bring out the lights and the shades, the probabilities and the improbabilities, so as to give proper assistance to the jury who are required to decide which view of the facts is true—*Ilu*, A.I.R. 1934 Cal. 847 (849), 7 R.C. 378, 36 Cr.L.J. 358, 1934 Cr.C. 1364, 153 I.C. 454; *Enayet Karim*, 62

Cal. 337 (341). Where in summing up the case the Judge did not take up the different issues separately, calling attention to the *pros* and *cons* of the whole evidence bearing on each point but gave a bare summary of the oral evidence, witness by witness and then dealing with the case of each individual accused, stated seriatim, the evidence of different prosecution witnesses against him, this can never be a very satisfactory way of dealing with a case. A cataloguing of the witnesses may be useful in a way, but it can never be a substitute for the marshalling of the evidence, point by point, which is so necessary for presenting to the jury a complete picture with all its lights and its shades—*Golok Behari Takal v Emp*, 39 Cr.L.J. 161 (179), 173 I.C. 65, 1 L.R. (1938) 1 Cal. 290, 10 R.C. 441, 66 C.L.J. 225, 42 C.W.N. 129, AIR 1938 Cal. 51 (*per Biswas, J*). Where the Judge, after stating the case for the prosecution, gave the jury a short summary of the evidence of each witness in numerical order and dealt also with the evidence against each individual accused but failed to marshal the evidence relating to each element of the charge, or to indicate to the jury how far in his opinion each element has been substantiated by the evidence before them, this would not of itself amount to misdirection, but, coupled with the omission and inaccuracies, it may amount to misdirection within the meaning of sec. 423, sub-sec. (2), Cr. P. Code—*Ibid.*, page 167 (*per McNair, J*). It is the duty of the Judge to analyse, to sift and to weigh evidence, to marshal the facts properly and so out of the whole of the evidence that has been given to discover and arrange in some sort of order before the jury the facts which are really material and upon which they should concentrate their attention. In dealing with each individual prisoner he must take the evidence against each one, summarise it, point out clearly to the jury how each prisoner is affected by the evidence which has been given. He must point out the kind of weight which ought to be given to this or that or the other set of facts in order to show to the jury some light and shade in the submission of the facts to them, that some matters are particularly important, some less, and some of little importance. Otherwise it is impossible for the members of the jury to grasp the particular facts which are essential and important and concentrate their attention upon them. The duty of a Judge in these respects is all the more important in a lengthy trial. A mere resume of evidence in such cases is wholly insufficient—*K-E. v. Akbar Sheikh*, 35 C.W.N. 401 (406), 33 Cr.L.J. 486, 137 I.C. 682, AIR. 1932 Cal. 395, 1932 Cr.C. 342, Ind. Rul. 1932 Cal. 360. See also *Asanulla*, 39 C.W.N. 924, 62 Cal. 911, 36 Cr.L.J. 1246, 157 I.C. 837, AIR. 1935 Cal. 534, 1935 Cr.C. 910. It is impracticable to set forth every bit of evidence on either side to the minutest detail and dilate on the minor discrepancies or contradictions occurring in the evidence in the meticulous manner. It is *id est* to stress unduly the multitude of discrepancies and contradictions which are bound to creep into the evidence—*James Dowdall*, 37 Cr.L.J. 607 (609), 162 I.C. 430, AIR. 1936 Nag. 103, 31 N.L.R. 215 (Sup.); *Bafurao Maroti*, AIR. 1940 Nag. 221, 1940 N.L.J. 264, 190 I.C. 283. The omission to mention before the jury some small items of corroborative or discrepant evidence may be comparatively unimportant, particularly in a case where the jury had been addressed by Advocates on each side. But the omission to make it clear to them exactly what they have to decide and how they have to proceed to decide it or the stating of these points in a manner which is positively misleading is a very serious misdirection since it is the business of the Judge to explain clearly to the jury what is the point which they have to decide—*Rajendra Nath Lala*, 38 Cr.L.J. 129 (132), 166 I.C. 91, AIR. 1937 Pat. 191, 18 P.L.T. 210, 3 BR. 124, 9 R.P. 249. No doubt the Judge must point out the important evidence in the case as well as emphasize the points for and against the accused, draw the attention of the jury to the contradictions and discrepancies in the evidence and even express his own opinion as to what conclusion the evidence on particular points leads to, provided he makes it perfectly clear to the jury that they are the final Judges on the questions of the fact. It is not for the Judge to propound new theories which have never been suggested at the Bar and to put them before the jury which would have no other effect than that of confusing them. Of course where he is satisfied that there is no legal evidence against any accused person he is bound to

tell the jury that there is no such evidence and that they should acquit that particular accused—*Bansidhar*, 36 Cr.L.J. 322, 153 I.C. 364, A.I.R. 1934 All. 1032, 1934 A.L.J. 1160, 1934 Cr.C. 1339, 4 A.W.R. 788. See also *Sumera*, 35 Cr.L.J. 688, 148 I.C. 504, 1933 A.L.J. 1634. Whatever the conditions and the difficulties may be in this country Judges, Advocates and Police must realize that in a trial where a man's life is in jeopardy, it is essential to take the greatest possible care to avoid mistakes being made. It is not sufficient for the Judge simply to point out this piece of evidence and that this presumption, and that this bit of law and that. It is his duty to help and guide the jury to a proper conclusion. It is his duty to direct the attention of the jury to essential points. It is his duty to point out to them the weight to be attached to the evidence, and it is his duty to warn them gravely about the responsibility which rests upon their shoulders in a trial of this kind, and to impress upon them that if there is any doubt in their minds, they must give the benefit of that doubt to the accused—*Molla Khan*, 35 Cr.L.J. 601 (604), 148 I.C. 172, 37 C.W.N. 1061, A.I.R. 1934 Cal. 169. Where the charge consists of a long, rambling repetition of the evidence, without any attempt to marshall the facts under appropriate heads, or to assist the jury to sift and weigh the evidence, so that they will be in a position to understand which are the really important parts of the evidence and which are of secondary importance, especially where the Judge has failed altogether to deal with the case of each of the accused separately, that is to say, he has omitted to point out to the jury exactly the evidence against each of the accused separately, although the last words of his charge were that they would consider the case of each accused separately, held that though it cannot be said that there is any actual misdirection of the jury, the Judge has failed almost entirely to give the jury the help and guidance which they are entitled to expect from the Judge and which it is his duty to give and that it is his duty to consider the case of each accused separately and to describe to the jury the evidence against each of the accused—*Nabi Khan*, 62 Cr.L.J. 43 (45), 37 Cr.L.J. 673, 162 I.C. 566, A.I.R. 1936 Cal. 186, 1936 Cr.C. 308. In summing up the evidence, the Judge must be careful that whatever he says to the jury must be true. A Judge is not justified in stating that there is definite evidence against the accused, which as a matter of fact is not on the record—*Nehru Mal*, 2 Luck. 597, 4 O.W.N. 616, 28 Cr.L.J. 683 (684). So also, it would be a misdirection to tell the jury that the approver's evidence against a particular accused has received independent corroboration, when that is in fact not the case—*Raghunath Pande*, 13 P.L.T. 802, 1933 Cr.C. 249, A.I.R. 1933 Pat. 96, 142 I.C. 809, 34 Cr.L.J. 421. A Judge should explain to the jury the issues of facts which the jury has to determine upon the charge on which the accused is being tried, and having made the jury understand these issues, the most convenient way of summing up the case is to present to the jury, as materially and impartially as he can, a summary of the evidence and the considerations and inferences to be drawn from the evidence, and as they appear both on the negative and the affirmative sides of the case—*Enayet Hussain*, 49 All. 209, 28 Cr.L.J. 15. The jurors ordinarily are not men who are used to weighing the evidence and it is therefore necessary that all help should be given to them in the light of the observations made by eminent Judges in decided cases—*Abdul Gani*, 53 Cal 181, A.I.R. 1926 Cal. 235, 90 I.C. 537, 26 Cr.L.J. 1577, 42 C.L.J. 205. But it is not necessary for the Judge, in his charge to the jury, to go into minutest details in the evidence—*Samaruddin*, 40 Cal 367, 13 Cr.L.J. 821. It is impossible for the Judge to state every item of the evidence or to draw the attention of the jury to every fact which has been deposed; but he can, without difficulty, give a summary of the leading points of the evidence and the considerations and inferences to be drawn from them on the one side or on the other—*Enayet Hussain*, 49 All. 209, 28 Cr.L.J. 15, 99 I.C. 47, 6 A.I.Cr. 282, A.I.R. 1926 All. 752, 25 A.L.J. 33; *Jati Mali*, 33 C.W.N. 918, 1929 Cr.C. 477, A.I.R. 1929 Cal. 765. Where, however, various weaknesses in the prosecution evidence are not pointed out and points in favour of the accused are omitted, the conviction cannot be allowed to stand—*Sanyasi Gain v. Emp.*, 33 Cr.L.J. 1018 (1021), 171 I.C. 183, 10 R.C. 235, A.I.R. 1937 Cal. 269. See also *Subba Valayan v. Emp.*,

1937 M.W.N. 552. But where all the main points in the evidence had been carefully placed before the jury, the fact that one or two minor details had not been placed before the jury would not amount to such a misdirection on account of which it could be said that the entire trial was vitiated—*Fajer Ali*, 35 Cr.L.J. 536, 147 I.C. 1043, 57 C.L.J. 583, 1934 Cr.C. 180, A.I.R. 1934 Cal. 142; *Brinchipada Dafadar v. Emp.*, 39 Cr.L.J. 964 (1966), A.I.R. 1938 Cal. 625, 67 C.L.J. 45, 177 I.C. 929, 11 R.C. 296. It is not possible, however, for any Judge to bring all the important facts together in one paragraph for the benefit of the jury. Where there are a large number of important points to be discussed, it is necessary that some of those points should be separated by some considerable time from the other items of the charge—*Thevar Servai*, 39 Cr.L.J. 323 (325), 173 I.C. 450, 1938 M.W.N. 215, 10 R.M. 587, A.I.R. 1938 Mad. 477. In a case where numerous points arise with a greater or less bearing on the main issue, the Judge cannot be expected to place them all before the jury, nor is it fair to criticize every phrase in his summing up—*Abdul Gafur Kotwal v. Emp.*, 40 Cr.L.J. 101 (105), 178 I.C. 637, A.I.R. 1938 Cal. 658, I.L.R. (1938) 1 Cal. 636. But where a charge to the jury did not show what the facts of the case were, what the evidence adduced was, or what the case for the accused was, held that the case was not put to the jury as required by law, or in such a way as to enable them to exercise their functions as jurymen—*Birendra Lal*, 30 Cal. 822 (830). It is the duty of a Judge to place the case before the jury in such a way as to enable them to come to a reasonable and fair conclusion. Where the Judge's charge to the jury is so confusing that the jury received no assistance from it whatsoever, in no part of the charge can one find a connected account of what the case for the prosecution is or what the defence case is and the Judge has mixed up the arguments of the defence with the statement of the case for the prosecution, muddling the whole charge, the unsatisfactory feature of the charge to the jury by itself would be a sufficient ground for setting aside the verdict of the jury—*Mohsena Khatun v. Emp.*, A.I.R. 1939 Cal. 610 (611), 43 C.W.N. 893, 40 Cr.L.J. 880, 184 I.C. 222.

A charge to a jury must be read as a whole. If there are salient propositions in law in it, these will, of course, be the subject of separate analysis. But in a protracted narrative of fact, the determination of which is ultimately left to the jury, it must needs be that the view of the Judge may not coincide with the views of others who look upon the whole proceedings in black type. It would, however, not be in accordance either with usual or with good practice to treat such cases as cases of misdirection, if, upon the general view taken, the case has been fairly left within the jury's province—*Channing Arnold v. King-Emp.*, 41 Cal. 1023 (1062), 18 C.W.N. 785, A.I.R. 1914 P.C. 116, 23 I.C. 661, 15 Cr.L.J. 309, 8 L.B.R. 16, 41 I.A. 149, (P.C.); *Jagadish Dutt v. Emp.*, A.I.R. 1910 Oudh 337 (340), 1940 O.W.N. 481, 1940 O.L.R. 306, 188 I.C. 110, 41 Cr.L.J. 545. In considering whether a Judge has misdirected the jury, the tenor and general effect of the whole summing up should be looked at and if, upon the whole summing up the Court is of opinion that substantially the proper direction has been given to the jury, it will not interfere, though the Judge omitted to direct the jury expressly on some important point—*C. B. Plucknett*, 43 C.W.N. 133 (138), A.I.R. 1939 Cal. 682, I.L.R. (1939) 1 Cal. 187, 41 Cr.L.J. 59, 184 I.C. 614. It is not right or fair to judge by one single sentence but one must not only consider the whole of the passage in which the sentence occurs, but also consider the antecedent passages and the subsequent passages in the summing up. Before one can arrive at any opinion as to whether any particular passage in the summing amounts to a misdirection or not, one must look at and consider the summing up in its entirety—*Ibid.*

It is not in every case when the charge to the jury is open to criticism in matters of detail that the High Court will interfere in appeal. Language may be used too broadly or not happily in its expression; but the essential point for consideration is whether the case against the accused has been fairly brought to their notice which may appropriately guide them in deciding whether the accused is guilty or innocent

—*Yusuf M'a v. Emp*, A.I.R. 1938 Pat. 579 (583), 1938 P.W.N. 727, 5 B.R. 185, 20 P.L.T. 51, 178 I.C. 934, 40 Cr.L.J. 147.

In summing up the case, it is not enough to merely read out the evidence to the jury; the Judge must analyse the evidence and place before the jury all facts which legitimately arise in favour of the accused—*Rajab Ali*, 31 C.W.N. 881, 28 Cr.L.J. 742 (744); *Ram Charittar*, 34 C.W.N. 954, 32 Cr.L.J. 186, 128 I.C. 807, A.I.R. 1931 Cal. 10, Ind. Rul. 1931 Cal. 103, 1931 Cr.C. 42; *Mira*, 6 Bom.L.R. 31; and this he must do, even though the pleader for the accused thought it unnecessary to place much reliance on the defence of the accused—*Sangan*, 17 Cr.L.J. 19 (Mad.); *Golapdi*, 37 C.W.N. 261, 34 Cr.L.J. 1078, 145 I.C. 821, A.I.R. 1933 Cal. 656, 1933 Cr.C. 1102. The charge should deal with the defence evidence if there is such evidence even though it is not urged by the defence pleader—*Bapurao Maroti*, A.I.R. 1940 Nag. 221 (224), 1940 N.L.J. 264, 190 I.C. 283. Where the charge to the jury was entirely one-sided, and the jury were practically told that there was no doubt as to the facts of the case and that there was no use of considering the matter from any point of view other than that presented by the prosecution, held that the charge was entirely defective, and there must be a retrial—*Rajab Ali*, supra; *Tajali Miam*, 7 Pat. 50, 28 Cr.L.J. 843 (846), 104 I.C. 459, A.I.R. 1928 Pat. 31, 9 P.L.T. 57. The Judge is entitled to have regard to the elaboration and skill with which the trial contentions have been placed before the jury by the advocates on both sides, but he cannot omit any matters of prime importance, especially if they favour the accused, merely because they have been elaborately discussed by the advocate—*Malgowda*, 27 Bom. 644; *Munhwesayo*, 3 S.L.R. 102, 11 Cr.L.J. 13; *Fakira*, 40 Bom. 220; *Abdul Aziz*, 35 Cr.L.J. 957, 149 I.C. 447, A.I.R. 1934 Nag. 94, 1934 Cr.C. 377. So also, he cannot omit to draw the attention of the jury to what appears to be a possible defence for the accused, notwithstanding that it has not been suggested by the counsel of the accused—*Upendra Nath Das*, 19 C.W.N. 653, 21 C.L.J. 377, 30 I.C. 113, A.I.R. 1915 Cal. 773, 16 Cr.L.J. 561 (568). But at the same time it would be a most undesirable practice for Judges to put *hypothetical* defences before the jury which were not taken by the accused and which might cause serious prejudice to him—*Upendra Nath Das*, supra. Omission to put the material facts or to put the defence, before the jury is sufficient to cause the High Court to quash the conviction if this Court comes to the conclusion that the verdict of the jury was affected thereby—*Barendra Kumar Ghose*, 28 C.W.N. 170 (199), 81 I.C. 353, A.I.R. 1924 Cal. 257, 25 Cr.L.J. 817, 38 C.L.J. 411; *R. v. Hill*, (1911) 7 Cr. App. 26; *R. v. Wilson*, (1913) 9 Cr. App. Rep. 124; *R. v. Smith*, (1920) 84 J.P. 67. But where the Judge made a reference to the statement made by the accused, the mere omission to draw the attention of the jury to the defence of the accused is not a misdirection and does not vitiate the trial—*Barendra Kumar Ghose*, supra. The Judge is to put everything in favour of the accused before the jury, but he is not bound to do anything more. It is not his business to assume the part of the defence counsel. It is his duty to place the evidence before the jury as he finds it, and it is open to the jury to believe what the witnesses said, and to accept it if they choose to do so—*Samiuddin*, 32 C.W.N. 616 (619), 29 Cr.L.J. 497, 109 I.C. 225, A.I.R. 1928 Cal. 500, 10 A.I.Cr.R. 223.

Where there was no specific defence put forward and the defence really was a denial of the charge coupled with destructive criticism of the prosecution evidence, the Judge did all that could be expected of him when he drew the juror's attention to the discrepancies in the evidence and to the criticism of the evidence advanced by the pleader for the defence. No useful purpose would have been served by his formally charging the jury that the defence was a denial of the prosecution case—*Irail*, 33 Cr.L.J. 694, 138 I.C. 756, A.I.R. 1932 Cal. 536, 36 C.W.N. 377, 55 C.L.J. 132, 1932 Cr.C. 564, 59 Cal. 1123, Ind. Rul. 1932 Cal. 517. It is a well recognised rule of prudence, that in summing up a case before the jury, it is not enough merely to read the evidence to the jury; the Judge must analyse the evidence and place before the jury all facts which legitimately arise in favour of the accused—*Hari*, A.I.R. 1935 Sind 145 (166), 36 Cr.L.J. 1161, 157 I.C. 697, 28 S.L.R. 397, 1935 Cr.C. 753 following

Rajabali, A.I.R. 1927 Cal. 631, 103 I.C. 790, 28 Cr.L.J. 742; *Ram Charitar*, A.I.R. 1931 Cal 10, 1931 Cr.C. 42, 128 I.C. 807, 32 Cr.L.J. 186 and *Mina Gajbar*, 6 Bom.L.R. 31. When the statement of the accused under sec. 342, Cr. P. C., only amounted to an assertion of innocence and an explanation of how he had made the retracted confession, the omission of the Judge to deal specifically with the statement of the accused in the Sessions Court did not cause any harm to the accused when having regard to the language of the Judge, the jury must have throughout appreciated perfectly well what his defence was and the reasons for which he maintained that the jury should disregard his confession—*Baldeo*, 34 Cr.L.J. 369 (371), 142 I.C. 639, A.I.R. 1933 Cal. 187, 1933 Cr.C. 233, Ind. Rul. 1933 Cal 310. Where the defence was substantially put to the jury, a mere omission to refer to this or that circumstance or suggestion is not non-direction, which amounts to misdirection. It is not the function of the Judge to repeat to the jury every argument or suggestion urged on behalf of the defence—*Manar Ali*, 35 Cr.L.J. 567 (570), 147 I.C. 1203, 37 C.W.N. 1066, 58 C.L.J. 66, 60 Cal 1339, A.I.R. 1934 Cal 124, 1934 Cr.C. 169; *Aziz Khan*, 36 Cr.L.J. 612 (614), 154 I.C. 1019, A.I.R. 1935 All. 103, 1935 Cr.C. 89; *Fajer Ali*, 35 Cr.L.J. 536, 147 I.C. 1043, A.I.R. 1934 Cal. 142, 57 C.L.J. 583, 1934 Cr.C. 180. See also *Mangal Singh*, A.I.R. 1931 Oudh 171, 8 O.W.N. 344, 1931 Cr.C. 443, 132 I.C. 232, 32 Cr.L.J. 858; *Ramsarup Singh*, A.I.R. 1930 Pat 513, 1930 Cr.C. 1009, 128 I.C. 121, 32 Cr.L.J. 72, 9 Pat. 606, 11 P.L.T. 867; *Bapurao Maroti*, A.I.R. 1940 Nag 221, 1940 N.L.J. 254. It is quite open to the Judge and indeed it is his duty, to assist the jury with his advice and certainly with his criticism of the arguments on behalf of the defence provided that he warns them that it is their duty to make up their minds and if he states to them that they are not bound by his expressions of opinion—*Hari Lal*, 36 Cr.L.J. 1026 (1029), 156 I.C. 921, A.I.R. 1935 Pat. 263, 14 Pat. 225, 16 P.L.T. 380, 1935 Cr.C. 749. There is no misdirection when the Judge has set out the defence case and discussed the evidence led in support of it at great length, and if his presentation of it was at times coloured by the view he had formed, he at least left every point of any importance whatever to the jury—*Abdul Gafur Kotwal v. Emp.*, 40 Cr.L.J. 101 (103), 178 I.C. 637, A.I.R. 1938 Cal. 658, I.L.R. (1938) 1 Cal 636, following *Barendra Kumar Ghose*, 38 C.L.J. 411, 81 I.C. 353, A.I.R. 1924 Cal. 257, 25 Cr.L.J. 817, 28 C.W.N. 170, where Sir Ashutosh Mukherjee, J., observed: "The impression left on my mind is that, taken as a whole, it is what is sometimes designated as a charge for a conviction. But it cannot fairly be said that the facts were not left to the jury to decide, and that the Judge usurped their function, merely because he gave expression, as he was entitled, to his opinion on the evidence strongly."

Generally speaking, it is desirable and indeed obligatory that a Judge in summing up to the jury should divide up the evidence as it affects each individual accused. Where, however, all the evidence was such that it affected all the accused persons equally or not at all, the omission to divide up the evidence did not constitute misdirection as no injustice could thereby have been caused to any of the accused—*Khoda Bux*, 35 Cr.L.J. 554 (557), 61 Cal. 6, 147 I.C. 1124, A.I.R. 1934 Cal. 105, 37 C.W.N. 1122, 1934 Cr.C. 156. See also *Akabar Sheikh*, supra and *Khijiruddin* in Note 915 (6).

Where a Judge has sought to discount the evidence which went in favour of the accused by considering arguments which seems to have been drawn from the speeches of the Public Prosecutor and which were not based on any evidence before the Court and has dogmatically asserted with regard to certain of the charges made by the defence that they cannot stand and that the jury must not place any faith in them and remarks of that description, held that this is not the proper way to charge the jury and that he must leave the matter to the jury, though he may express his own opinion about it—*Kamiraddi*, 37 C.W.N. 1102 (1104).

It is no misdirection for the Judge to point out that there was nothing shown in cross-examination of the witnesses for the prosecution which would discredit their evidence within the meaning of the Evidence Act—*Shree Kishen*, A.I.R. 1935 All 928,

37 Cr.L.J. 173, 159 I.C. 900 But it is a serious error to tell a jury, in any form of words, that the law in a criminal trial requires them *prima facie* to accept the particular statements of a witness and it is only when the defence have shown good reason to reject his statements that the jury have any option in the matter. A jury cannot be required to make the presumption against an accused person that the particular statements of a particular witness are true still less can it be required to make such a presumption as regards the prosecution witnesses as a body or the prosecution evidence as a whole. The jury should be told that it is their duty to consider carefully and to say whether they are convinced by the prosecution evidence and that, if they are not convinced, there is no law which obliges them to convict. If they do in such a case convict they stand without excuse before the law—*Tazem Ali*, 33 Cr.L.J. 196 (199), 135 I.C. 727, A.I.R. 1931 Cal. 796, 1931 Cr.C. 1060, 58 Cal. 1095, Ind. Rul. 1932 Cal. 135, dissenting from *Ambar Ali*, 117 I.C. 684, 33 C.W.N. 55, A.I.R. 1928 Cal. 769, 48 C.L.J. 473, 30 Cr.L.J. 825. It is a misdirection to tell the jury that there is a presumption in law that a witness who comes to Court and deposes on oath should be believed until there is good reason to disbelieve him. By all means let Judges warn juries against rejecting testimony for no reason whatever, but the less that is heard of legal presumptions in favour of veracity the better—*Saroj Kumar*, 33 Cr.L.J. 854 (857), 139 I.C. 873, A.I.R. 1932 Cal. 474, 55 C.L.J. 439, 1932 Cr.C. 464, 59 Cal. 1361, Ind. Rul. 1932 Cal. 667. If a witness goes into the witness-box and testifies on oath the jury, unless there is something to operate on their minds, may draw an inference—not as a matter of law, but rather as a matter of fact—that he is *prima facie* likely to be speaking the truth, particularly in capital cases—*C. B. Plucknett*, 43 C.W.N. 133 (139), A.I.R. 1939 Cal. 682, I.L.R. (1939) 1 Cal. 187, 41 Cr.L.J. 59, 184 I.C. 614. The main propositions are two: (1) that it is a mis-direction to tell the jury that they must presume that a witness is telling the truth; and (2) that under sec. 114 of the Evidence Act they may presume that a witness is telling the truth. Unless a Court of fact may presume that a witness is telling the truth it would be impossible to carry on the administration of justice under the present system. Unless such a presumption may be drawn, evidence would always have to be given *aliunde* to show that a witness was speaking the truth and the process would have to go on *ad infinitum*. To go further and say that this presumption must be drawn is of course quite a different thing. In every case it will be for the Court of fact to say whether they are prepared to presume that a certain witness is speaking the truth or not. That is really saying no more than that they will decide whether they will believe him or not. It is going too far to suggest that a jury should not disbelieve a witness unless some positive ground is elicited in the course of cross-examination. They may disbelieve him for many reasons—*Shaikh Tarkal v. Emp.*, 43 C.W.N. 695. There was no misdirection when the Judge said that certain witnesses corroborated the prosecution story and at other places he said that certain witnesses supported the prosecution story. When he said this he did not mean to say that those witnesses should necessarily be believed—*Lala*, A.I.R. 1933 All. 941, 1933 A.L.J. 1446, 1933 Cr.C. 1561, 35 Cr.L.J. 668, 148 I.C. 339.

On a charge of murder, if the Judge with all his advantages, forms a definite and strong opinion that the evidence is not sufficient for a conviction, it is dangerous to leave the matter to the jury without a strong indication of the Judge's own opinion, so long as he makes it clear that in spite of that opinion they can, if they chose, disregard it and bring in a verdict of guilty—*Sali Sheikh*, 54 C.L.J. 244 (249), A.I.R. 1931 Cal. 752, 1931 Cr.C. 1016, 134 I.C. 1191.

In difficult and hard swearing cases in which there is undoubtedly common ground that there is strong enmity on either side on the part of the two factions in the village the Judge's duty may be said to be this: If he feels very strongly that the prosecution case is a true one, whilst maintaining his care and his vigilance in presenting all the facts before the jury, he ought to, as much as possible, conceal his feelings. It is no part of a Judge's duty to act as an Assistant Public Prosecutor. But if he feels that

there is something extremely suspicious about the prosecution case, if he finds that the main witness for the prosecution is a person whose testimony should be regarded with the greatest caution, then he ought to show his hand to the jury. He is not a mere judicial automaton, that is worse than useless and waste of public time—*Madan Tilakdas v. Emp.*, 38 Cr.L.J. 767 (768), 169 I.C. 306, 9 R.C. 914, 41 C.W.N. 508, A.I.R. 1937 Cal. 266.

When the Appellate Courts are called upon to say whether or not the Judge has done his duty in addressing the jury on the facts, it must look to his summing up as a whole and see that the case has been fairly laid before them. It is impossible for any Judge to state every item of evidence or to draw the attention of the jury to each and every fact which has been deposed to before them. He has of course to give summary of the leading points of the evidence and the considerations and inferences to be drawn from it on the one side and on the other—*Mangal Singh*, A.I.R. 1931 Oudh 171, 8 O.W.N. 344, 1931 Cr.C. 443, 132 I.C. 232, 32 Cr.L.J. 858. See also *Hossain*, 35 Cr.L.J. 1487, 152 I.C. 40, 59 C.L.J. 396, A.I.R. 1934 Cal. 757, 1934 Cr.C. 1165.

The Judge must be careful not to usurp the functions of the advocate, and should present the evidence of the case to the jury in a dispassionate and impartial manner without expressing any opinion on the reliability of the evidence on either side—*Tanbullah*, 25 C.W.N. 682, 23 Cr.L.J. 244. His charge to the jury must not be of the manner of a speech of the prosecuting counsel—*Khajiruddin*, 53 Cal. 372, 27 Cr.L.J. 265 (268), 24 C.L.J. 504, 92 I.C. 442, A.I.R. 1929 Cal. 139.

In cases of very serious offences, and where the evidence is merely circumstantial, or where the trial has been a prolonged one, the evidence should be read over *in extenso* to the jury (and not merely summed up)—*Fateh Chand*, 5 B.H.C.R. 85; *Fakira Ratanlal* 850.

The law does not expressly require a Judge to formulate, at the conclusion of the delivery of his charge, specific questions for the jurors' reply. Such a practice is however helpful in deciding the legal effect of the Judge's finding, but the formulation of such questions requires great care, and the queries should be confined within the narrowest possible compass—*Rupan Singh*, 4 Pat. 626, 27 Cr.L.J. 49, 91 I.C. 225, A.I.R. 1925 Pat. 797, 7 P.L.T. 239.

914. "Laying down the law":—In order to comply with the provisions of this section the Judge should concisely but lucidly explain to the jury the ingredients of the section under which the accused is being charged and should also explain the meanings of any terms in the section which are not likely to be immediately understood by a layman—*A. M. Mathews v. Emp.*, A.I.R. 1940 Lah. 87, 41 Cr.L.J. 482 (483), 187 I.C. 456.

It is the duty of the Judge to give a direction upon the law to the jury so far as to make them understand the law as bearing upon the facts, and to enable them to decide the point at issue—*Jhubboo*, 8 Cal. 739. It is the duty of the Judge to tell the jury how to apply the law to the facts found by them. The Judge would be wanting in the proper discharge of his duty to the jury if he places the proper facts to the jury without telling them how they should decide the guilt or otherwise of the accused on the law—*Jabanullah*, 34 C.W.N. 365 (367), 57 Cal. 1162, 33 Cr.L.J. 111. Under sec. 297, Cr. P. C., it is the duty of the Judge to explain to the jury all the essential elements of the offences charged against the accused and to give directions on the law so as to make the law clear in relation to the facts of the case and the evidence adduced. Even the mere reading of the sections to the jury does not amount to an explanation of the law. Nor can the Judge rely on the fact that Advocates on both sides had explained the law to the jury. The Judge must lay down the law by which the jury is to be guided. This provision is imperative and it cannot be too emphatically stated that in cases tried with the help of a jury it is the clear duty of the Judge to explain what in law are the essential requisites of an offence and what must be proved to constitute that offence—*Jhina Soma*, A.I.R. 1939 Bom. 457 (459), 41 Bom.L.R. 953, 41 Cr.L.J. 176, 183 I.C. 382, 11 L.R. 1939 Bom. 648. It is quite unnecessary to explain

to the jury, or to lecture the jury upon abstract principles of law or abstract theories of proof. To start off in a charge with long disquisitions on abstract principles is sure to confuse the jury. Obviously though the Judge need not explain to the jury abstract principles of law, he must explain those particular sections of the Indian Penal Code which apply to the particular case which the jury are trying, and he ought to set out in the copy of the charge which is sent up with the record, his explanation in sufficient detail to enable the High Court to ascertain whether he has properly explained the law about the offences with which the accused are charged to the jury—*Garibulla*, 37 C.W.N. 1131, 34 Cr.L.J. 1231, 146 I.C. 237, A.I.R. 1933 Cal. 722, 1933 Cr.C. 1272. Where the Judge says that he explained the sections to the jury, this is not sufficient. He must set down in his charge what, in fact, he said to the jury about the law to enable the Appellate Court to decide whether his statement of the law was correct or not—*Kamiraddi*, 37 C.W.N. 1102 (1104). It is absolutely necessary that the heads of charge should show clearly and distinctly what the exposition of law was—*Madan Tilakdas v. Emp.*, 38 Cr.L.J. 767 (768), 169 I.C. 306, 9 R.C. 914, 41 C.W.N. 508, A.I.R. 1937 Cal. 266. See also *Hafezali*, 32 Cr.L.J. 236, 129 I.C. 109, A.I.R. 1930 Cal. 712, 1930 Cr.C. 1112, Ind. Rul. 1931 Cal. 125. But when none of the sections presented any particular difficulty and the Judge in his charge said that he explained the sections to the jury, the High Court held that the explanation was sufficient—*Hanif*, 34 Cr.L.J. 56, 140 I.C. 723, A.I.R. 1932 Cal. 785, 1933 Cr.C. 829, Ind. Rul. 1933 Cal. 29. Thus, where in a trial for murder, grave and sudden provocation causing loss of power of self-control is suggested for the defence, reducing the offence to culpable homicide, it is the duty of the Judge to explain the distinction between murder and culpable homicide, and the jury as judges of facts have to decide the issue as to sudden provocation—*Dadubhai*, Ratanlal 766 (768). In a charge of rioting, the jury must be told that a rioting can only take place when there is an unlawful assembly consisting of at least five men with one of the common objects mentioned in the I. P. C., and it is essentially necessary to mention what an unlawful assembly is. The jury are not experts in law—*Abdul Sheikh*, 17 Cr.L.J. 92 (Cal.). In a case of robbery, the Judge should explain to the jury that theft becomes robbery only when it is shown that in the course of committing theft and for the purpose of committing theft, violence has been used. In a charge of dacoity, the jury must be told that robbery becomes dacoity when it is committed by not less than five persons, and that if the jury convicts three or four persons, they must convict them of robbery and not of dacoity, and that if the jury convicts them of dacoity, they must be satisfied that other unknown persons not charged in the case must have joined in the act so as to make up the required number of five—*Raman Koravan*, 54 Mad. 588, 32 Cr.L.J. 1212, (1213, 1214), 134 I.C. 801, 1931 M.W.N. 652, 33 M.L.W. 411, 1931 Cr.C. 475, A.I.R. 1931 Mad 427, Ind. Rul 1931 Mad 849; *Golam Aspha*, 33 Cr.L.J. 477, 1932 Cr.C. 264, A.I.R. 1932 Cal 295, 137 I.C. 497, Ind. Rul. 1932 Cal. 336; *Duraisami Naicker*, 60 M.L.J. 691, 32 Cr.L.J. 973. In cases of offences falling under sec. 395, I. P. C., the Judge in his charge to the jury ought to explain to the jurors what are the essential ingredients that go to constitute the offence of robbery as defined in sec. 390, I. P. C., and if he does not do so it is a real and not a mere technical defect. Section 537, Cr. P. C., cannot be made applicable to such a case so as to cure the illegality—*Nawab Ali*, 81 I.C. 953, A.I.R. 1924 Oudh 411, 11 O.L.J. 315, 25 Cr.L.J. 1129; *Jagan*, 35 Cr.L.J. 507, 147 I.C. 976, 11 O.W.N. 200, A.I.R. 1935 Oudh 175, 1935 Cr.C. 298, 1934 O.L.R. 202. In a case of cheating under sec. 420, I. P. C., it is clearly necessary to point out to the jury the difference between a promise which is not intended to be kept at the time it is made and a promise which is intended to be kept at the time it is made but is subsequently broken. In the latter case the offence would not necessarily be one coming under the legal definition of cheating—*A. M. Mathews v. Emp.*, A.I.R. 1940 Lah 87 (88), 41 Cr.L.J. 482, 187 I.C. 456. Mere reference to the sections of the I. P. C., defining offences (*Abbas*, 25 Cal. 736) or mere reading out to the jury the sections of the I. P. C., does not amount to a sufficient explanation of the law—*Sri prasad*, 4 C.W.N. 193. See *Arnuga*, 1933 M.W.N. 320. Nor should the Judge merely give a copy of the Penal Code to the

jury to read and interpret it for themselves, but he must explain the law to them and tell them in a kind of popular language of what offence they are to convict the accused—*Jaspath*, 14 Cal 164; *Wilson*, 30 C.W.N. 693, 27 Cr.L.J. 926. It is the duty of the Judge to explain to the jury the law applicable to the case, and it is the duty of the jury to accept the law as laid down by the Judge without any extraneous aid. If the jury is unable to understand the law fully and clearly, it is the duty of the Judge to explain it to them afresh, but in doing so he cannot place before them the Indian Penal Code or any legal treatise for the purpose of finding out the law. If he does so, he fails in his duty—*Wilson*, supra. It is necessary for a Judge to read the very words of the section itself to the jury, if he purports to give them what the provisions of law are, and then, if necessary, to explain what is the meaning of the section. In a case of murder it is not a proper direction to define murder in one sentence "murder is the intentional killing of another human being with malice or forethought." It is necessary to refer to the sections which relate to culpable homicide, and to direct the jury as to what is culpable homicide and in what circumstances culpable homicide amounts to murder—*Durga Charan*, 26 C.W.N. 1002, 23 Cr.L.J. 557. A Judge should adhere to the words of the particular section of the Penal Code he has to deal with, and not substitute a phraseology of his own—*Nakul*, 13 C.W.N. 754, 11 Cr.L.J. 9. Moreover, it is the duty of the Judge to call the attention of the jury to different elements constituting the offence and to deal with the evidence by which it is proposed to make the accused liable—*Taju Pramanik*, 25 Cal. 711; *Kasimuddin*, 47 Cal. 795, 21 Cr.L.J. 694; *Mari Valayan*, 30 Mad. 44. It is also the duty of the Judge to explain the law as regards abetment—*Hemanta Kumar Pathak*, 47 Cal. 46 (50), 21 Cr.L.J. 775. In complicated cases, the Judge should in his charge to the jury not only explain the law, but should draw their attention to the evidence in the case and explain how they shall apply the law to the particular facts of the case—*Rupan Singh*, 4 Pat. 626, 27 Cr.L.J. 49, 91 I.C. 225, A.I.R. 1925 Pat. 797, 7 P.L.T. 239.

The Judge cannot omit to explain the law on the ground that it has been sufficiently explained by the pleaders on both sides in their addresses to the jury. The responsibility of laying down the law for the guidance of the jury rests entirely with the Judge, and the verdict given by the jury in the absence of any such direction on the law by which they should be guided cannot be accepted as a valid verdict in the case—*Magan Das*, 20 Cal. 379, *Ramprosad*, 26 Cr.L.J. 1090, 88 I.C. 178, A.I.R. 1926 Nag. 53. The Judge's charge is not only for the purpose of stating the law and explaining it to the jury, but also of helping them to find facts. He has to advise the jury as to the logical bearing of the evidence admitted upon the matters to be found by them. He ought to do that to limit the chances of error of the jury—*Afiruddi*, 23 C.W.N. 833, 20 Cr.L.J. 661.

But in explaining the law upon a particular offence the Judge ought not to discourse in all branches and departments of the crime, especially in a case of complicated offence as murder or culpable homicide. To do so is to confuse the jury and possibly to direct their deliberations into channels that have nothing to do with the case. The duty of a Judge is to lay down the law only in so far as it has a bearing on the evidence adduced in the particular case, to simplify the issues fairly and properly before the Court, to direct the minds of the jurors to those issues alone, and not to perplex their minds with considerations that are outside the legitimate scope of the inquiry—*Upendra Nath Das*, A.I.R. 1915 Cal. 773, 30 I.C. 113, 21 C.L.J. 377, 19 C.W.N. 653, 16 Cr.L.J. 561 (566) (F.B.); *Nagendra Nath*, 34 C.W.N. 164 (169), 57 Cal. 740. It is not for the Judge to explain to the jury questions of law which do not arise on the facts or pleadings of the parties—*Adam Ali*, 31 C.W.N. 314, 28 Cr.L.J. 334, 100 I.C. 718, 45 C.L.J. 131, A.I.R. 1927 Cal. 324, 7 A.I.Cr.R. 546. The law should be stated in the shortest and simplest terms, and without reference to the numbers of Acts and sections of which they have never heard. Fine language and lofty homilies, as well as long and abstruse dissertations upon law should be strictly avoided—*Nagendra Nath*, 34 C.W.N. 164 (169), 57 Cal. 740. No rulings or authorities or head notes of cases should be cited from Law Reports by the Judge in his charge

1. The first step in the process of the investigation is the identification of the problem. This involves a thorough review of the available information and a clear definition of the issue at hand.

2. Once the problem is identified, the next step is to gather relevant data. This can be done through various methods, including interviews, observations, and the review of documents.

3. The third step is to analyze the data collected. This involves looking for patterns, trends, and any other information that might be useful in understanding the problem.

4. After the data has been analyzed, the next step is to develop a plan of action. This plan should outline the steps that need to be taken to solve the problem.

5. The final step is to implement the plan. This involves putting the plan into action and monitoring the progress to ensure that the problem is being solved.

[Handwritten notes in German, mostly illegible due to cursive script.]

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A.I.R. 1935 All. 103, 1935 Cr.C. 89 But the usual way of directing the jury is to tell them that they must start with a presumption of the innocence of the accused and that the prosecution must prove their case beyond reasonable doubt—*Tazen Ali*, 33 Cr.L.J. 196, A.I.R. 1931 Cal. 796 (798), 135 I.C. 727, 1931 Cr.C. 1060, 58 Cal. 1095, Ind. Rul. 1932 Cal. 135. The cardinal or basic rule of the administration of criminal justice, according to British notions, is that the prosecution must prove the guilt of the accused, and that the accused need not prove anything. He is entitled to stand on the innocence which the law imputes to him till it is displaced—*Rex v. Krishnan*, A.I.R. 1940 Mad. 329 (335), 1939 M.W.N. 1213, 1939 M.Cr.C. 289. Every accused is entitled to be presumed to be innocent till there is evidence of his guilt; and the presumption ought not to be too easily displaced; and it may be right to have regard to the position in life of the accused in considering whether it is displaced. That is not to say that by reason of wealth, position or age any subject is to be deemed to be immune from the consequences of his actions if in fact they are criminal—*Chandreshwar Prasad v. Arunendra Mohan*, A.I.R. 1936 Pat. 626, 17 P.L.T. 794. While the prosecution must prove the guilt of the prisoner there is no such burden laid on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt; he is not bound to satisfy the jury of his innocence. Where a Judge, although he has rightly put the burden of proof of the guilt of the accused upon the prosecution, has wrongly put the proof of their innocence upon the accused, it amounts to an error of law. Section 106 of the Evidence Act is not a proviso to the rule that the burden of proving the guilt of the accused is upon the prosecution but on the contrary, the section is subject to that rule. The burden of proving a particular fact or a particular defence is a different matter. Even in a case to which section 105 of the Evidence Act applies an accused may rely upon an exception in his defence and fail to prove it and yet be entitled to an acquittal, for the prosecution may have failed to prove all the necessary elements in the offence of which the accused has been charged, or the accused may by his statement, read with the other evidence on record, have raised a reasonable doubt in the mind of the Court and so have entitled himself to an acquittal—*Shewaram v. Emp.*, A.I.R. 1939 Sind 209 (212, 213), 184 I.C. 474, 12 RS 107. See also *Kanakasabai Pillai v. Emp.*, 50 M.L.W. 452, 1939 M.W.N. 883. It is an error on the part of the Judge to direct the jury that the "Prosecution's duty is to prove a *prima facie* case." The prosecution have to do more than that; they must prove the guilt of the accused; there is no principle in the English law whereby if the prosecution has proved a *prima facie* case, the accused must bring evidence in rebuttal or be convicted—*Shewaram v. Emp.*, supra. In a criminal trial the presumption of innocence is always in favour of the accused till he is found guilty, and he is also entitled to the benefit of a reasonable doubt. Even if the defences taken up by the accused in the alternative were inconsistent, that would not necessarily prove that the evidence led on behalf of the prosecution, who must establish the guilt of the accused, should have been believed by the jury—*Jhina Soma*, A.I.R. 1939 Bom 457 (460), 41 Bom.L.R. 965, 41 Cr.L.J. 176, 185 I.C. 382. Even if the version put forward by the defence be wholly untrue, yet the prosecution must establish beyond all reasonable doubt that the case put forward by them is true—*Rambrichh Singh v. Emp.*, 41 Cr.L.J. 114 (120). If the case of the prosecution is false on the whole the accused is entitled to an acquittal whether his defence be true or false—*Gouri Narayan Barua v. Tulbikram Chettri*, 25 C.W.N. 838 (841). See also *Attygalle*, A.I.R. 1936 P.C. 169, 162 I.C. 450, 1936 Cr.C. 623, 1936 M.W.N. 653, 38 Bom.L.R. 700, 44 M.W.N. 86, 1936 A.L.J. 808, 38 P.L.R. 789, 71 M.L.J. 321, 1936 A.W.R. (P.C.) 750, 37 Cr.L.J. 628. For other cases of omission to explain the law, amounting to a misdirection, see *Nagendra Bhakta*, 37 C.W.N. 348; *Mukammad Samiruddin*, 35 Cr.L.J. 1216, 150 I.C. 1122, A.I.R. 1934 Cal. 622, 1934 Cr.C. 907; *Sasen Behari*, 58 Cal. 1051, 35 C.W.N. 425, 32 Cr.L.J. 836, 1931 Cr.C. 248, A.I.R. 1931 Cal. 184, Ind. Rul. 1931 Cal. 529 (S.B.).

(2) Failure to call the attention of the jury to different elements constituting the offence is a misdirection—*Taju Pramanik*, 35 Cal. 711. Thus, where in a case of

murder, the Judge simply asked the jury to find whether the prisoner inflicted the injuries on the deceased, it was held to be a misdirection; the jury ought to have been asked to find as to the *intention* of the accused to cause death or the *knowledge* that he was likely to cause death—*Babya*, 1 Bom.L.R. 784; *Natabar*, 35 Cal. 531. Similarly, where in a case under secs 474 and 475, I. P. C., the Judge told the jury that the only issue which they had to decide was whether the forged documents were in the possession of the accused, ignoring altogether the question of knowledge combined with intention which is so absolutely requisite to justify a conviction under sec. 474, I. P. C., it was held that the Judge had misdirected the jury—*Abaji*, 16 Bom. 165. Where in a case of retaining stolen property, the Judge directed the jury to decide whether the property was stolen and whether it was retained by the accused, without asking them to decide whether the accused *knew* or had reason to believe the property to be stolen, it was held that this amounted to a misdirection—*Balya*, 15 Bom. 369. So also, in a case of receiving property stolen in the commission of a dacoity (sec. 412, I. P. C.), the Judge directed the jury to the effect that if they found that the properties were properly identified as having been the properties stolen at the time of the dacoity, and were found in the accused's possession, they were bound to presume the accused's guilt, but the jury were not properly directed that it was their duty to weigh all the circumstances of the case and consider the accused's explanation and then decide whether or not they should make such a presumption; *held* that this was a serious misdirection—*Satya Charan*, 52 Cal. 223, 26 Cr.L.J. 1155, 88 I.C. 515, A.I.R. 1925 Cal. 666.

(3) Failure to point out to the jury the relevancy or otherwise of a confession made under inducement, and merely telling the jury that if the confession was true it was enough to warrant the conviction of the accused, is a misdirection—*Thandraya*, 26 Mad. 38. See Notes under sec. 298.

(4) Omission to explain to the jury that a retracted confession should have practically no weight against a person other than the maker, and that the very fullest corroboration is necessary, far more than is required for the sworn testimony of an accomplice, is a serious misdirection—*Hemanta Kumar Pathak*, 47 Cal. 56 (52). Where the Sessions Judge directed the jury that the retracted confession of a co-accused is practically of no value against anybody but the confessor, but asked the jury to take into consideration the confession while considering the cases of the other two co-accused individually, *held* that this was a misdirection, as it was likely to prejudice the jury and lead them to give some weight to such statements when they should have disregarded them altogether—*Ibrahim*, 42 C.L.J. 496, 26 Cr.L.J. 1146 (1147), 88 I.C. 458, A.I.R. 1926 Cal. 374.

If a confession is subsequently retracted and it is not corroborated by independent evidence, the Judge should point out to the jury that it is not safe to rely on the retracted confession unless it is corroborated by independent reliable evidence, and an omission to point this out to the jury amounts to a misdirection—*Mahabir*, 18 All. 78; *Asimuddy*, 31 C.W.N. 410, 28 Cr.L.J. 485, 110 I.C. 661, A.I.R. 1927 Cal. 398, 8 A.I.Cr.R. 134; *Cholakel*, 2 Weir 507; *Karreti Venkatasami*, 2 Weir 509; *Sokhan*, 2 Weir 509; *Kashim Ali*, 36 Cr.L.J. 70, 152 I.C. 234, A.I.R. 1934 Cal. 651, 38 C.W.N. 589, 1934 Cr.C. 933. It is not sufficient for the Judge to call the attention of the jury to the necessity of corroboration in material particulars; he must emphasize upon the necessity of corroboration by *untainted and independent* evidence, as distinct from the tainted evidence of an accomplice—*Kashemali*, 36 C.W.N. 874 (876), 140 I.C. 379, Ind. Rul. 1932 Cal. 709. It is a rule of practice not to rely on a retracted confession unless it is corroborated by some evidence to show that the confession is true. As a matter of law it cannot be laid down that a confession made and subsequently retracted by a prisoner cannot be accepted as evidence of his guilt without independent corroborative evidence; and a prisoner may be convicted, on his own confession, without any corroborative evidence and even when a confession has been retracted, if the jury believe that the confession contains a true account of the prisoner's connection with the crime—*Kutub Bux*, A.I.R. 1930 Cal. 633, 57 Cal. 488.

126 I.C. 547, 1930 Cr.C. 969; *Ambica*, 35 C.W.N. 1270. See also *Biseswar*, 26 C.W.N. 1010; *Panchkari*, 29 C.W.N. 300. But the Judge's direction to the effect that the accused might be convicted upon his own statements which had subsequently been retracted, without further corroboration, is not in accordance with the trend of judicial opinions on the point and amounts to a misdirection—*Kashim Ali v. Emp.*, A.I.R. 1934 Cal. 651 (653), 38 C.W.N. 586, 1934 Cr.C. 933, 152 I.C. 234, 36 Cr.L.J. 70. The Madras High Court, however, is of opinion that this is not an absolute rule of law. The question to be put to the jury regarding such confessions is not whether they are corroborated by independent evidence but whether having regard to the circumstances under which they were made and retracted and all the circumstances connected with them, it is more probable that the original confessions are true or the statements retracting them are true. An omission on the part of the Judge to put this question to the jury amounts to a misdirection—*Raman*, 21 Mad. 83.

It is a misdirection for the Judge to tell the jury that while the confessional statement of the accused could not be acted safely against the maker, i.e., the accused who made the confessional statement, the corroboration was to be sought in the evidence of accomplice recorded in the Sessions Court in as much as it is against the elementary rule that where the first statement required corroboration from an independent source, such corroboration could not be sought in the evidence of an accomplice recorded in the Sessions Court—*Ramani*, A.I.R. 1933 Cal. 146, 1933 Cr.C. 223, 143 I.C. 797, 34 Cr.L.J. 638. The confession of one accused cannot be corroborated by the confession of another accused—*Krishna*, 10 C.W.N. xvi.

See Note 515 and other Notes under sec. 164, Cr. P. Code.

(5) A Sessions Judge should caution the jury that although it is not illegal to convict the accused upon the uncorroborated evidence of an accomplice, still it is not the practice of the Court, nor safe or proper to convict on accomplice evidence, unless it is corroborated in material particulars. Omission to state this amounts to a misdirection—*Rebati Mohan*, 32 C.W.N. 945, 56 Cal. 150, 30 Cr.L.J. 435 (439); *Surya Kanta*, 24 C.W.N. 119, 31 Cr.L.J. 20 (FB); *Armuga*, 12 Mad. 196; *Rattan Dhanuk*, 8 Pat. 235, 30 Cr.L.J. 137 (138), 113 I.C. 329, 9 P.L.T. 672, A.I.R. 1928 Pat. 630, *Mohammad Anis*, A.I.R. 1936 Oudh. 405 (407), 37 Cr.L.J. 955 (957), 164 I.C. 482, 1936 O.W.N. 691, 1936 O.L.R. 453; *Mathuri*, A.I.R. 1936 All. 337, 1936 A.W.R. (H.C.), 1, 1936 A.L.J. 518, 1936 Cr.C. 401, 163 I.C. 253, 1936 A.L.R. 539, 37 Cr.L.J. 794, 58 All. 695; *Kartar Singh*, A.I.R. 1936 Lah. 400, 1936 Cr.C. 355; *Khairo v. Emp.*, 38 Cr.L.J. 995 (997), 170 I.C. 922, 31 S.L.R. 470, 10 RS 77, A.I.R. 1937 Sind. 221. But another Calcutta case lays down that an uncorroborated evidence of an accomplice is admissible in law, although it has long been the practice for the Judge to warn the jury of the danger of convicting a prisoner on the uncorroborated testimony of an accomplice. Therefore, it is not a misdirection to tell the jury that a conviction upon the evidence of the approver alone will not be illegal—*Jamaldi*, 51 Cal. 160 (163), following the judgment of Lord Reading, C.J., in *R. v. Baskerville*, [1916] 2 K.B. 658 (665). See also *Ledu Molla*, 52 Cal. 595, 42 C.L.J. 501, 26 Cr.L.J. 1037; *Muthukumar Swami Pillai*, 35 Mad. 397, 13 Cr.L.J. 352 (F.B.); *Nilkanta*, 35 Mad. 247, 22 M.L.J. 490 (SB); *Gobardhan*, 9 All. 528 (per Edge, C.J.); *Hanuman Sahay*, A.I.R. 1936 Pat. 531, 1936 Cr.C. 897, 165 I.C. 554, 38 Cr.L.J. 72.

In a jury trial it is the duty of the Judge to point out to the jury the position in law affecting the evidence of an accomplice and tell them that they may convict, if they choose, on his evidence alone; but that owing to the circumstances in which the evidence is given, it is, generally speaking, very dangerous to act upon it, unless they find corroborative evidence which implicated the accused person. If such a warning has been given and nevertheless the jury choose to convict the accused in the absence of such corroborative evidence, the conviction will not generally be quashed. Where a Judge is sitting without a jury, he must apply the same rule by treating himself as a jury—*Bhiddas*, 35 Cr.L.J. 551 (553), 147 I.C. 1172, A.I.R. 1934 Cal. 114, 37 C.W.N. 934, 1934 Cr.C. 165. See also *Chittya Ranjan*, 34 Cr.L.J. 841, 144 I.C. 879, A.I.R.

1933 Cal 509, 37 C.W.N. 290, 1933 Cr.C. 814; *Haris Chandra*, 34 Cr.L.J. 432, 142 I.C. 896, 1932 A.L.J. 1089, A.I.R. 1933 All. 94, 1933 Cr.C. 120, Ind. Rul 1933 All. 144; *Khadim v. Emp.*, 38 Cr.L.J. 808, A.I.R. 1937 Sind 162, 169 I.C. 716, 31 S.L.R. 82; *Wajid*, A.I.R. 1933 Pat. 500; *Nanhak*, 35 Cr.L.J. 1104, 150 I.C. 687, 15 P.L.T. 264, A.I.R. 1934 Pat. 309, 1934 Cr.C. 730, 13 Pat. 529; *Madhu Sudan*, 37 C.W.N. 934; *Moti Lal Roy*, 37 Cr.L.J. 999 (1002), 164 I.C. 779, 39 C.W.N. 754; *James Dowdall*, 37 Cr.L.J. 607 (611), 162 I.C. 430, A.I.R. 1936 Nag. 103, 31 N.L.R. 215 (Sup.). A direction to the jury to rely upon the evidence of the approver only if after considering the other evidence on the record there is sufficient to corroborate his evidence and to satisfy them that they can rely upon his evidence as the basis of their verdict, is not misdirection—*Khadim v. Emp.*, A.I.R. 1937 Sind 162 (166), 38 Cr.L.J. 808 (812), 169 I.C. 716, 31 S.L.R. 82.

The testimony of the approver ought to be corroborated in material particulars in the matter of circumstances of the crime and also in the matter of identifying the accused with the offence. The corroboration must be independent of the accomplice; and the evidence of one accomplice cannot corroborate the evidence of another: the evidence of either requires corroboration before it can be acted upon. The testimony of a person who may not be an accomplice in a strict sense of the term but a person who in any way helped the commission of the offence for which the accused are tried, or was cognisant of it, and omitted to disclose it for a time, is not a person whose testimony could justify a conviction, except where there is a corroboration—*Hafjuddi*, 35 Cr.L.J. 1357 (1359), 151 I.C. 486, 1934 Cr.C. 1045, 38 C.W.N. 777, A.I.R. 1934 Cal 678 (S.B.). See also *Kashim Ali v. Emp.*, A.I.R. 1934 Cal. 651, 38 C.W.N. 586, 1934 Cr.C. 933, 152 I.C. 234, 36 Cr.L.J. 70. But see *Nirmal Jiban*, 39 C.W.N. 744 (749), 62 Cal. 238, 157 I.C. 387, A.I.R. 1935 Cal. 513, 36 Cr.L.J. 1115, 1935 Cr.C. 889, where the same High Court did not assent to the proposition that in no circumstances can the evidence of an accomplice corroborate the evidence of another. It is for the Judge to determine whether there is any evidence that does corroborate the story of the approver so far as the complicity of the accused is concerned, and it is the duty of the Judge to direct the attention of the jury to those portions of the evidence confirming or corroborating the accomplice's story which do or do not fulfil the requirements referred to above,—namely, the evidence corroborating the accomplice's story in material particulars implicating the accused—*Rebati Mohan*, 56 Cal. 150, 30 Cr.L.J. 435, 32 C.W.N. 945; *Hachuni*, 34 C.W.N. 390 (395); *Golam Asphia*, 33 Cr.L.J. 477, 137 I.C. 497, A.I.R. 1932 Cal. 295, 1932 Cr.C. 264, Ind. Rul 1932 Cal. 336. Where there is no corroboration worth the name, it is the duty of the Judge to direct the jury accordingly and his omission to do so amounts to a misdirection—*Golam Asphia*, supra. Corroboration ought to consist of some circumstance that affects the identity of the person accused—*Ambica*, 35 C.W.N. 1270 (1274); *Khairo v. Emp.*, 38 Cr.L.J. 995 (997), 170 I.C. 922, 31 S.L.R. 470, 10 R.S. 77, A.I.R. 1937 Sind 221. The case of each of the accused must be taken on its merits and independent corroboration must be sought for in every instance. It is not enough to find such corroboration as regards the presence and participation in the crime by several of the accused and then to conclude that the evidence of the accomplices must be true so far as it implicates the rest. The danger in these cases is that while an accomplice may be telling a story which is in the main true they may wickedly implicate persons who took no part in the joint crime, although the story as to the commission of a joint crime by a number of criminals acting in concert may be well established—*Ngo Po Aung*, 38 Cr.L.J. 948, 170 I.C. 645, A.I.R. 1937 Rang. 264, 10 R.R. 101. The evidence of the approver, in the absence of independent evidence, cannot be corroborated by the confession of an accused—*Latafat Hossain*, 33 C.W.N. 58 (60); *Faqir Singh v. Emp.*, A.I.R. 1939 Lah 429 (431), 41 P.L.R. 333, 184 I.C. 219, 40 Cr.L.J. 897. But see *Nirmal Jiban*, 39 C.W.N. 744 (749), 62 Cal. 238, 157 I.C. 387, A.I.R. 1935 Cal. 513, 36 Cr.L.J. 1115, 1935 Cr.C. 889.

An approver does not corroborate himself. A previous statement of an approver is no corroboration of a later statement by the same approver—*Khairo v. Emp.*, supra.

It would amount to misdirection either to omit to give the jury a suitable warning or to tell the jury that an approver's evidence against a particular accused has received independent corroboration when this is not in fact the case—*Raghunath*, 34 Cr.L.J. 421 (424), 143 I.C. 809, 13 P.L.T. 802, A.I.R. 1933 Pat. 96, 1933 Cr.C. 219, Ind. Rul. 1933 Pat. 176.

The evidence is not corroborated merely because the approver tells a probable story. Nor can it be said to be corroborated by mere evidence of motive—*Talayan Thola Balya Maddi Subbanna*, 40 Cr.L.J. 801, 183 I.C. 651, A.I.R. 1939 Mad. 469, 1939 M.W.N. 316, 49 M.L.W. 520

The law on this subject has been comprehensively summarised in *Aung Hla*, 135 I.C. 849, A.I.R. 1931 Rang 235, 1931 Cr.C. 875, 33 Cr.L.J. 205, Ind. Rul 1932 Rang. 65, 9 Rang 404 (427) as follows: (1) an accused person can legally be convicted upon the uncorroborated evidence of an approver; (2) whether an accused should or should not be convicted upon such evidence is left to the prudence and good sense of the tribunal after considering all the circumstances of the case; (3) *prima facie* the evidence of an approver being tainted evidence, is unworthy of credit unless it is corroborated in some material particular tending to show that the accused committed the offences with which he is charged; (4) it is for the Court to determine in the particular circumstances of each case whether the 'matter' before it tending to corroborate the evidence of the approver (which may or may not be evidence strictly so called and as defined in the Evidence Act) is worthy of credence, and is sufficiently reliable to be treated as evidence against the accused, and acted upon; (5) the evidence of an approver may be corroborated by the evidence of another approver, or by the confession of a person who is being tried jointly with the accused for the same offence, implicating both himself and the accused; (6) it is the duty of the Court to scrutinize with care such corroboration as that mentioned in (5) but that whether it is to be treated as evidence against the accused or not is to be determined by the Court, having regard to the circumstances of the case. The Calcutta High Court adopted these propositions of law in *Nirmal Jiban*, 39 C.W.N 744 (749), 62 Cal 238, 157 I.C. 387, A.I.R. 1935 Cal 513, 36 Cr.L.J. 1115, 1935 Cr.C. 889. See also *Maung Tha Ka Do*, 37 Cr.L.J. 280 (283), 160 I.C. 292, A.I.R. 1935 Rang 491, 1935 Cr.C. 1266, *Nga Nyein*, 11 Rang. 4 and *Rattan Dhanuk*, 8 Pat 235. But these cases do not lay down anything more than this that it is not illegal to base a conviction on the uncorroborated testimony of an accomplice. It is also not illegal to base a conviction upon such testimony if it is corroborated by other accomplice evidence. But that is not tantamount to saying that independent corroboration is not necessary, or that the corroboration of one tainted evidence by another tainted evidence is independent corroboration. (*Per Ghosh, J.*) *Bimalkrishna*, 62 Cal 819, 37 Cr.L.J. 840, 163 I.C. 556, 37 C.W.N 761. In this case Henderson, J., however, adhered to the view expressed in *Nirmal Jiban* 62 Cal. 238, 39 C.W.N 744, 157 I.C. 387, A.I.R. 1935 Cal 513, 36 Cr.L.J. 1115, 1935 Cr.C. 889 and followed the law as laid down in *Aung Hla*, supra. But recently Their Lordships of the Privy Council have held that it is well settled that the evidence of an accessory must be corroborated in some material particular not only bearing upon the facts of the crime but upon the accused's implication in it, and further that evidence of one accomplice is not available as corroboration of another—*Mahadco v The King* A.I.R. 1936 P.C. 242 (246), 163 I.C. 681, 9 R.P.C. 51, 44 M.L.W. 253, 1936 A.L.J. 869, 37 Cr.L.J. 914, 1936 M.W.N. 889, 1936 Cr.C. 757, 38 Bom.L.R. 1101, 40 C.W.N 1164 (P.C.); *Nga Po Aung*, 38 Cr.L.J. 948, 170 I.C. 645, A.I.R. 1937 Rang 264, 10 R.R. 101; *Purnanda Das Gupta v Emp.* A.I.R. 1939 Cal 65 (73), 68 C.L.J. 206, 179 I.C. 506, I.L.R. (1939) 1 Cal 1, 40 Cr.L.J. 199. In view of the decision of the Privy Council in *Mahadco v The King* it must now be taken as settled that the evidence of one accomplice cannot be used as independent evidence to corroborate the evidence of another accomplice. A plurality of accomplices might be useful in this way. They have to be considered independently and the Court must, while not losing sight of sec. 114 (b) of the Evidence Act, still be able to rely on the uncorroborated evidence

1933 Cal 509, 37 C.W.N. 290, 1933 Cr.C. 814; *Haris Chandra*, 34 Cr.L.J. 432, 142 I.C. 896, 1932 A.L.J. 1089, A.I.R. 1933 All 94, 1933 Cr.C. 120, Ind. Rul. 1933 All 144; *Khadim v. Emp.*, 38 Cr.L.J. 808, A.I.R. 1937 Sind 162, 169 I.C. 716, 31 S.L.R. 82; *Wajid*, A.I.R. 1933 Pat. 500; *Nanhak*, 35 Cr.L.J. 1104, 150 I.C. 687, 15 P.L.T. 264, A.I.R. 1934 Pat. 309, 1934 Cr.C. 730, 13 Pat. 529; *Madhu Sudan*, 37 C.W.N. 934; *Moti Lal Roy*, 37 Cr.L.J. 999 (1002), 164 I.C. 779, 39 C.W.N. 754; *James Dowdall*, 37 Cr.L.J. 607 (611), 162 I.C. 430, A.I.R. 1936 Nag. 103, 31 N.L.R. 215 (Sup.). A direction to the jury to rely upon the evidence of the approver only if after considering the other evidence on the record there is sufficient to corroborate his evidence and to satisfy them that they can rely upon his evidence as the basis of their verdict, is not misdirection—*Khadim v. Emp.*, A.I.R. 1937 Sind 162 (166), 38 Cr.L.J. 808 (812), 169 I.C. 716, 31 S.L.R. 82.

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An approver does not corroborate himself. A previous statement of an approver is no corroboration of a later statement by the same approver—*Khairo v. Emp.*, supra.

It would amount to misdirection either to omit to give the jury a suitable warning or to tell the jury that an approver's evidence against a particular accused has received independent corroboration when this is not in fact the case—*Raghunath*, 34 Cr.L.J. 421 (424), 143 I.C. 809, 13 P.L.T. 802, AIR 1933 Pat. 96, 1933 Cr.C. 249, Ind. Rul. 1933 Pat. 176.

The evidence is not corroborated merely because the approver tells a probable story. Nor can it be said to be corroborated by mere evidence of motive—*Talayari Thota Balya Maddi Subbanna*, 40 Cr.L.J. 801, 183 I.C. 654, AIR. 1939 Mad 469, 1939 M.W.N. 316, 49 M.L.W. 520.

The law on this subject has been comprehensively summarised in *Aung Hla*, 135 I.C. 849, AIR 1931 Rang 235, 1931 Cr.C. 875, 33 Cr.L.J. 205, Ind. Rul. 1932 Rang. 65, 9 Rang 404 (427) as follows. (1) an accused person can legally be convicted upon the uncorroborated evidence of an approver; (2) whether an accused should or should not be convicted upon such evidence is left to the prudence and good sense of the tribunal after considering all the circumstances of the case; (3) *prima facie* the evidence of an approver being tainted evidence, is unworthy of credit unless it is corroborated in some material particular tending to show that the accused committed the offences with which he is charged; (4) it is for the Court to determine in the particular circumstances of each case whether the 'matter' before it tending to corroborate the evidence of the approver (which may or may not be evidence strictly so called and as defined in the Evidence Act) is worthy of credence, and is sufficiently reliable to be treated as evidence against the accused, and acted upon; (5) the evidence of an approver may be corroborated by the evidence of another approver, or by the confession of a person who is being tried jointly with the accused for the same offence, implicating both himself and the accused; (6) it is the duty of the Court to scrutinize with care such corroboration as that mentioned in (5) but that whether it is to be treated as evidence against the accused or not is to be determined by the Court, having regard to the circumstances of the case. The Calcutta High Court adopted these propositions of law in *Nirmal Jiban*, 39 C.W.N. 744 (749), 62 Cal 238, 157 I.C. 387, AIR 1935 Cal. 513, 36 Cr.L.J. 1115, 1935 Cr.C. 889. See also *Maung Tha Ka Do*, 37 Cr.L.J. 280 (283), 160 I.C. 292, AIR 1935 Rang 491, 1935 Cr.C. 1266, *Nga Nyein*, 11 Rang. 4 and *Rattan Dhanuk*, 8 Pat 235. But these cases do not lay down anything more than this that it is not illegal to base a conviction on the uncorroborated testimony of an accomplice. It is also not illegal to base a conviction upon such testimony if it is corroborated by other accomplice evidence. But that is not tantamount to saying that independent corroboration is not necessary, or that the corroboration of one tainted evidence by another tainted evidence is independent corroboration (*Per Ghosh, J.*) *Bimalkrishna*, 62 Cal 819, 37 Cr.L.J. 840, 163 I.C. 566, 37 C.W.N. 761. In this case Henderson, J., however, adhered to the view expressed in *Nirmal Jiban* 62 Cal 238, 29 C.W.N. 744, 157 I.C. 387, AIR 1935 Cal 513, 36 Cr.L.J. 1115, 1935 Cr.C. 889 and followed the law as laid down in *Aung Hla*, supra. But recently Their Lordships of the Privy Council have held that it is well settled that the evidence of an accessory must be corroborated in some material particular not only bearing upon the facts of the crime but upon the accused's implication in it, and further that evidence of one accomplice is not available as corroboration of another—*Mahadeo v The King* AIR 1935 P.C. 242 (246), 163 I.C. 681, 9 R.P.C. 51, 44 M.L.W. 253, 1935 A.L.J. 809, 37 Cr.L.J. 914, 1936 M.W.N. 889, 1936 Cr.C. 757, 38 Bom.L.R. 1101, 40 C.W.N. 1164 (P.C.); *Nga Po Aung*, 38 Cr.L.J. 948, 170 I.C. 645, AIR 1937 Rang 264, 10 R.R. 101; *Purnanda Das Gupta v Emp.* AIR 1939 Cal 65 (73), 68 C.L.J. 206, 179 I.C. 506, ILR (1939) 1 Cal 1, 40 Cr.L.J. 199. In view of the decision of the Privy Council in *Mahadeo v The King* it must now be taken as settled that the evidence of one accomplice cannot be used as independent evidence to corroborate the evidence of another accomplice. A plurality of accomplices might be useful in this way. They have to be considered independently and the Court might, while not losing sight of sec. 114 (b) of the Evidence Act, still be able to rely on the uncorroborated evidence of

one or more out of a number either on the same or on different points—*Surajpalsingh*, 39 Cr.L.J. 818 (823), 176 I.C. 853, 1938 N.L.J. 185, A.I.R. 1938 Nag. 328, 1 L.R. 1938 Nag. 516, 11 R.N. 81.

It would be wholly unsafe in any case to proceed solely upon the uncorroborated testimony of an accomplice. Taking the two sections of the Evidence Act, namely, sec. 133 and sec. 114 together, it may be safely laid down that the Statute Law of India did not intend to introduce a different rule for the guidance of the Courts from that which may be now taken as the accepted rule of law in England, as explained by Lord Reading, C.J., in *Rex v. Baskerville*, (1916) 2 KB 658, 86 L.J.K.B. 28, 115 L.T. 453, 80 J.P. 446, 60 S.J. 696. The same rule is reaffirmed in *Mahadeo v. The King*, supra. These cases further lay down that the evidence of an accomplice must be corroborated in some material particulars, not only bearing upon the facts of the crime, but upon the accused's implication in it, and further, that evidence of one accomplice is not available as corroboration of another. These rules are equally applicable in India—*Nitai Chandra v. Emp.*, A.I.R. 1937 Cal. 433 (444), 38 Cr.L.J. 852, 170 I.C. 201, 10 R.C. 98. See also *Khadim v. Emp.*, 38 Cr.L.J. 808, A.I.R. 1937 Sind 162, 169 I.C. 716, 31 S.L.R. 82 where it has also been laid down that the corroboration need not be direct evidence that the accused committed the crime and it is sufficient if it is merely circumstantial evidence of the connexion with the crime.

Beyond reiterating the law on the subject, which is to the effect that the statement of the approver must be very thoroughly scrutinized and should not be accepted unless it is corroborated by other independent evidence in the case, no hard and fast rule can be enunciated which will govern all cases. There may be cases in which an approver has made positively false statements in respect of a particular point and yet the evidence produced in a case might go to prove beyond any doubt that in other respects the evidence of the approver was trustworthy and was fully corroborated by the very best evidence produced. It would be wrong in that case to suggest that because the approver has made a wrong statement on a particular point so his evidence should be rejected—*Bhola Nath v. Emp.*, A.I.R. 1939 All 567 (571), 1939 A.L.J. 785, 40 Cr.L.J. 856, 184 I.C. 191.

Where the only substantive evidence against the accused is the statement of the approver before the committing Magistrate, which is not corroborated by him in his evidence before the Sessions Court, it is not a very strong basis for a conviction though undoubtedly legally it could be such—*Faqir Singh v. Emp.*, A.I.R. 1939 Lah. 429 (431), 41 P.L.R. 333, 40 Cr.L.J. 897, 184 I.C. 219.

The evidence of an accomplice, who has been convicted and sentenced and has nothing to gain or lose, deserves greater weight than that of an approver—*Nga Po Aung v. Emp.*, 38 Cr.L.J. 948 (949), 170 I.C. 645, A.I.R. 1937 Rang 264, 10 R.R. 101.

As to confessions made by the approvers, they are not substantive evidence, but may be used only for the purpose of contradicting or corroborating their depositions in Court—*Nitai Chandra v. Emp.*, supra.

The mere fact that the witness did not reveal his knowledge of the intended crime to the proper authorities is not sufficient to make him an accessory or accomplice so as to vitiate his evidence—*Nurul Amin v. Emp.*, 40 Cr.L.J. 667, 182 I.C. 386, A.I.R. 1939 Cal. 335, 1 L.R. (1939) 1 Cal 511. But in a case of theft it is a misdirection not to point out with sufficient force the unsafety of relying on the evidence of a witness who is undoubtedly a receiver of the stolen property and whose position is, therefore, very little different from that of an accomplice—*Kalli Koravan*, 39 Cr.L.J. 580, 175 I.C. 416, A.I.R. 1938 Mad 464, 1938 M.W.N. 96, 47 M.L.W. 158, (1938) 1 M.L.J. 234, 10 R.M. 774, 1938 M.Cr.C. 78.

(6) Where there are several accused persons, and the case as against all of them does not stand on the same footing, and their defences are different, omission by the Judge to ask the jury to consider the case as against each of the accused individually, is a serious misdirection—*Khijruddin*, 53 Cal. 372, 42 C.L.J. 504, 27 Cr.L.J. 266 (274). In his charge to the jury the Judge should deal with the evidence against each accused

separately. Failure to do so is a serious defect—*Nachappa Goundan v. Emp.*, 1937 M.W.N. 737; *Shetaram v. Emp.*, A.I.R. 1939 Sind 209 (214), 41 Cr.L.J. 28, 184 I.C. 474. When there are more than one accused, it is in the first degree essential both that the jury should be asked for a separate finding regarding each of the accused and that the particulars of the evidence affecting each person should be placed in a manner which may enable the jury to distinguish the cases of accused as against whom the evidence is not of the same degree of cogency—*Yusuf Mia v. Emp.*, A.I.R. 1938 Pat. 579 (583), 1938 P.W.N. 727, 5 B.R. 185, 20 P.L.T. 51, 178 I.C. 931, 40 Cr.L.J. 147.

In a case where there is a general charge of conspiracy against a number of accused to commit dacoity, at the same time, a charge against the accused for having committed a dacoity, it is most necessary that the Judge in summing up to the jury should distinguish between what is evidence against each of the accused on the charge of conspiracy, and what is evidence against each of the accused on the charge of having committed the dacoity. That is more than ever necessary where the main evidence against the accused or some of them is that of an approver. When the evidence is not so classified, the jury have been misdirected or, at any rate, not directed in the way that they are entitled to be directed on the question of the evidence as against each of the accused on the charge of dacoity. In such a case depending mainly on the evidence of an approver, it would not be safe or proper to allow the convictions against the accused for dacoity to stand, although a general warning as to the necessity of corroboration may have been given—*Rezak Fakir v. Emp.*, 42 C.W.N. 870 (872).

See also *Abkar Sheikh and Nabi Khan*, cited in Note 913.

(7) When a charge to the jury placed prominently before them all the circumstances that went against the accused, but did not call their attention to any of those that were in favour of the accused, it was held that there was a misdirection sufficient to vitiate the trial—*Rahamat Ali*, 4 C.W.N. 196; *Faktra*, 40 Bom. 220; *Sugaligadu*, 2 Weir 500 (501); *Mammat Ali*, 44 C.L.J. 233, 28 Cr.L.J. 19, 99 I.C. 51. But the fact that every point in favour of the accused has not been put to the jury does not amount to a misdirection. The charge must be judged as a whole and one must see whether judging it as a whole the case for the two sides has been fairly put. It is not necessary for the Sessions Judge to repeat everything that has been said by the pleader for the defence in his speech. But he should draw the attention of the Jury to the more essential items and the strongest argument that has been advanced for the defence. A mere reference to the argument of the pleader is insufficient—*Harcharan*, 34 C.L.J. 512; *Abdul Salim*, 49 Cal. 573. The fact that the address of the defence counsel to the jury is a lengthy one does not excuse the Judge from pointing out important points of the defence argument to the jury—*Peary*, 20 C.W.N. 436, 20 Cr.L.J. 300 (F.B.). A verdict obtained from the jury without placing before them an important piece of evidence in favour of the defence, whatever may have been its real worth, cannot be sustained—*Khijiruddin*, 53 Cal. 372, 42 C.L.J. 504, 27 Cr.L.J. 266 (272).

(8) A Judge's direction to the jury to consider the proof of previous conviction as evidence giving rise to an inference regarding the character of the prisoner amounts to a misdirection—*Roshun*, 5 Cal. 768. See section 310. So also, the omission on the part of the Judge to warn the jury not to take the previous conviction into consideration when deciding on the guilt of the accused, amounts to a misdirection—*Hari Charan*, 27 Cr.L.J. 398, 93 I.C. 46, A.I.R. 1926 Cal. 728.

(9) Omission to tell the jury that if they entertain any reasonable doubt about the guilt of the accused, the accused is entitled to the benefit of the doubt and should be acquitted is a serious misdirection—*Panchu Das*, 34 Cal. 698; *Sugaligadu*, 2 Weir 500 (501); *Mohammad Israil*, 27 A.L.J. 1261, 31 Cr.L.J. 33, 120 I.C. 264, A.I.R. 1930 All. 24, 1930 Cr.C. 40. Where *prima facie* the evidence is more or less equally balanced on both sides, the Judge ought to give the usual direction to the jury that if they have any reasonable doubt in their minds as to guilt of the accused, they should give the accused the benefit of it. Omission to do so amounts to a misdirection—*Jagmohan*, 52 All. 207, 30 Cr.L.J. 1146 (1147), 120 I.C. 114, Ind. Rul. 1930 All. 2, A.I.R.

1930 All. 28, 1930 A.L.J. 486. If, however, the evidence for the prosecution is overwhelming, the omission to give such direction is not a misdirection—*Ibid*. Where, however, the Judge thinks that the evidence is so weak that there are grave doubts as to the guilt of the accused the omission to direct the jury to give the accused benefit of doubt may be a misdirection which may be said to have prejudiced the accused—*Kasimuddin*, 62 Cal. 312, 36 Cr.L.J. 480 (481), 154 I.C. 110, 60 C.L.J. 45, A.I.R. 1935 Cal. 31. See also *Basil*, 34 Cr.L.J. 886, 145 I.C. 209, A.I.R. 1933 P.C. 218, 1933 A.L.J. 1025, 38 M.L.W. 635, 1933 Cr.C. 1302 (P.C.). A direction about reasonable doubt should appear at the end of the charge or in appropriate places, as and when something occurs in the discussion of the evidence which gives rise to it and necessitates its application—*Asanulla*, 39 C.W.N. 924 (928), A.I.R. 1935 Cal. 534, 36 Cr.L.J. 1246, 157 I.C. 837, 1935 Cr.C. 910. But where it is clear that the Judge discussed the question of reasonable doubt when dealing with the law in the case and again at the close of the charge he warned the jury that they were themselves to weigh the evidence and to come to finding on facts on their own judgment, there was no misdirection—*Harold*, 37 Cr.L.J. 17, 158 I.C. 172, 8 R.L. 189.

(10) To enable the prosecution to draw the presumption under sec. 114, Illustration (a), of the Indian Evidence Act, the accused ought to be asked to account for his possession—*Surendra Nath*, 40 C.W.N. 1090 (1092). It is a misdirection to ask the jury to make a positive presumption of guilt against the accused from their possession of stolen property after the theft. Such a presumption may be made but it is a matter for the jury if they will make it or not—*Arumuga Goundan*, 1933 M.W.N. 320. Where in a case of theft, the evidence against the accused was the possession of stolen property 5 years after the occurrence, it was held that the Judge had misdirected the jury by saying: "On this evidence notwithstanding that it is nearly 5 years since the crime occurred, you will decide whether you are satisfied with the prisoner's explanation for his possession of the stolen property." The proper course would be to tell them to consider whether after 5 years it was reasonable to require the prisoner to prove how he came by the goods or whether his story, not being in itself improbable ought not to be accepted—*Ruthonvithil*, 2 Weir 489. Where the prisoner is charged with receiving recently stolen property, when the prosecution has proved the possession by the prisoner, and that the goods had been recently stolen, the jury should be told that they may, not that they must, in the absence of any reasonable explanation, find the prisoner guilty. But if an explanation is given which may be true, it is for the jury to say on the whole evidence whether the accused is guilty or not; that is to say, if the jury think that the explanation may reasonably be true, though, they are not convinced that it is true, the prisoner is entitled to an acquittal, because the Crown has not discharged the onus of proof imposed upon it of satisfying the jury beyond reasonable doubt of the prisoner's guilt. The onus never changes, it always rests on the prosecution (Per Lord Reading, C.J., in 11 Cr. App R. 45 (5))—*Ishtahar Khondkar*, A.I.R. 1936 Cal 796 (800), 39 C.W.N. 620, 62 Cal 956, 162 I.C. 927, 37 Cr.L.J. 701. Where the Judge said to the jury: "If you believe that those ornaments were really lost during the dacoity and were found in the possession of C as alleged at the time, then you can presume, if you do not believe the statement of C, that C is either a dacoit herself or that she received and retained possession of those ornaments with guilty knowledge that those properties were stolen during the commission of a dacoity,"—held that was a misdirection. The proper direction would have been that if they did not think that the account given by C of her possession of those things might reasonably be true, in that case only were they entitled to make the presumption under sec. 114 of the Evidence Act, because even if they were not inclined to believe the statement of C, but still thought that the statement might reasonably be true, they were not entitled to make the presumption against her—*Surendra Nath*, 40 C.W.N. 1090 (1092). See also *Satya Charan*, 52 Cal 223, 26 Cr.L.J. 1155, 88 I.C. 515, A.I.R. 1925 Cal 666. In the case of articles of ordinary kind, which are alleged to be stolen, the Judge must lay sufficient stress on the comparatively unidentifiable

nature of the properties and warn the jury of the danger of accepting the evidence of identification. Failure to do so is a clear non-direction which vitiates the charge—*Subba Valayan v. Emp.*, 1937 M.W.N. 552. The attention of the jury must be sufficiently drawn to the fact that there was an interval of some time between the commission of the robbery and the finding of stolen articles in his possession and to the implications arising therefrom—*Thevar Servai*, 39 Cr.L.J. 323, 173 I.C. 450, 1938 M.W.N. 215, 10 R.M. 587, A.I.R. 1938 Mad 477. When the accused has satisfactorily accounted for his possession, so that the question of the application of sec. 114 of the Evidence Act no longer arises, then it is necessary to show by evidence direct or circumstantial that there was some collusion between the thief and the receiver or that the receiver had real reason to believe that the property which he had purchased was stolen—*Rajendra Nath Laha*, 38 Cr.L.J. 129 (131), 166 I.C. 91, A.I.R. 1937 Pat. 191, 18 P.L.T. 210, 3 B.R. 124, 9 R.P. 249.

See also paragraph (27) below.

(11) Omission to point out to the jury the discrepancies in the evidence of the principal witnesses for the prosecution constitutes a misdirection—*Tenaram*, 33 C.L.J. 180, 22 Cr.L.J. 475; *Durga Charan*, 26 C.W.N. 1002, 23 Cr.L.J. 567. Merely telling the jury that there are material discrepancies in the evidence, without pointing out to them what those discrepancies are, amounts to a misdirection—*Enayet Husain*, 49 All. 209, 28 Cr.L.J. 15, 99 I.C. 47, A.I.Cr.R. 282, A.I.R. 1926 All 752, 25 A.L.J. 33; *Akbar Sheikh*, 35 C.W.N. 404 (407). The Judge's duty would be to refer to any material discrepancy. But there is no failure of justice in the omission of the Judge to deal with minor discrepancies which exist in the evidence—*Puttan Hassan*, 37 Cr.L.J. 366 (368), 160 I.C. 1060, A.I.R. 1936 Bom 52, 38 Bom L.R. 19, 1936 Cr.C. 164 (F.B.). Omission to tell the jury that there was no corroboration of certain prosecution witnesses amounted to misdirection—*Sita Ram*, 8 O.W.N. 1215, 33 Cr.L.J. 167, 135 I.C. 392, A.I.R. 1932 Oudh 23, Ind. Rul. 1932 Oudh 40, 7 Luck. 390, 1935 Cr.C. 55.

(12) If upon the materials placed before the Court by the prosecution and the defence, there was no question of the right of defence of person and property which could possibly arise, it was not necessary for the Judge to explain the law on the subject to the jury to enable them to come to a conclusion on that question—*Fajer Ali*, 35 Cr.L.J. 536, 147 I.C. 1043, A.I.R. 1934 Cal 142, 57 C.L.J. 583, 1934 Cr.C. 180. But see *Gopaldi*, 37 C.W.N. 261, 34 Cr.L.J. 1078, 145 I.C. 821, A.I.R. 1933 Cal 656, 1933 Cr.C. 1102. Failure on the part of the Court to put clearly before the jury the law relating to the right of private defence arising on the admitted and proved facts, and to direct their attention to find as to whether and how far the accused was justified in preventing injury to himself in attacking his opponent, is a serious misdirection—*Aseruddin*, 53 Cal 980, 28 Cr.L.J. 273, 100 I.C. 353, A.I.R. 1927 Cal 257, 7 A.I.Cr.R. 417. Where the accused raised the plea of private defence, and the case for the prosecution was that there was no right of private defence at all, the Judge should simply tell the jury that the question they had to decide was whether or not the right of private defence came into existence and not how far it extended or whether it was exceeded. Moreover, in dealing with the law as to the right of private defence, there are several important points the omission of which would amount to a serious misdirection. Thus, in a murder case, in which the right of private defence is set up, the Judge in explaining sec. 100, I.P.C., which contains a list of six heads of offences should point out those heads which would and those which would not apply to the case they were trying; otherwise the jury would naturally disregard those to which their attention was not specially directed. The Judge should also explain to the jury the provisions of sec. 101, I.P.C., in a case where there is a charge of culpable homicide not amounting to murder as well as the minor charge of causing grievous hurt. The omission on the part of the Judge to explain these points amounts to a misdirection—*Muhammad Yunus*, 50 Cal 318 (325, 326). On a charge under sec. 301, I.P.C., where the defence of the accused is that the deceased came into his house for robbery at midnight and that the accused inflicted wounds on him which

proved fatal, the Judge should expound the law to the jury not only with reference to the right of private defence of person but also with reference to the right of defence of property, and should direct the jury to consider whether the accused had not used more force than was necessary for preventing the deceased from running away with the stolen property. Omission to so charge the jury amounts to a misdirection—*Baseruddi*, 28 C.W.N. 585, 39 C.L.J. 525.

It is not a correct proposition of law to lay down that a person who attempts to enforce a claim of property which he cannot substantiate, thereby creates the position that possession is with another. If the language used by the Judge is open to that construction, it is a misdirection. The direction to the jury should be that if the prosecution story as to the actual use of violence is correct, and if the accused are not in possession, the accused are not entitled to plead any right of defence of property in reply to the charges brought against them. *Contra*, if the jury find that the complainant's party attacked the others, the whole prosecution case fails, irrespective of who is in actual possession. If the jury find that the land is the property of neither party, the legal position is that neither party has any right to use force in defence of property—*Saheb Ali*, 34 Cr L.J. 668, 143 I.C. 899, A.I.R. 1933 Cal. 242, 1933 Cr C. 321, Ind Rul. 1933 Cal. 490. See also *Bagirath Mahto*, 35 Cr L.J. 1367, 151 I.C. 662, A.I.R. 1934 Cal. 610, 38 C.W.N. 854, 1934 Cr C. 908, 59 C.L.J. 482.

(13) The Judge is entitled to tell the jury that when a prisoner is charged with causing hurt to another, the burden of proving that it was done in the exercise of the right of private defence lies on the prisoner—*Afruddi*, 23 C.W.N. 833, 20 Cr L.J. 661. But when the accused has examined witnesses to prove the defence (e.g., the right of private defence) set up by him, it is no longer necessary for the Judge to refer to the law relating to burden of proof (because the accused has discharged that burden); the Judge should simply ask the jury to decide the question of fact on the evidence before them. If in such a case the Judge refers to the provisions of sec. 105 of the Evidence Act, it would mislead the jury and lead them to think that the defence set up by the accused would require a higher standard of proof. This is clearly a misdirection—*Muhammad Yunus*, 50 Cal. 318 (325).

(14) It is a misdirection to suggest to the jury that in capital cases stronger evidence of a higher degree of certainty is required than in other criminal cases—*Lalit Mohan*, 49 Cal. 167.

(15) Omission to caution the jury as regards the weight and efficacy to be given to a dying declaration amounts to a misdirection—*Sashi Kanta*, 34 C.W.N. 792, 32 Cr L.J. 324, 129 I.C. 364, A.I.R. 1930 Cal. 754, Ind Rul. 1931 Cal. 172, 1930 Cr.C. 1154.

(16) Where one of the witnesses for the prosecution is himself suspected of being implicated in the offence, the jury should be directed not to accept his evidence without the most careful scrutiny. Omission to give such a direction amounts to a serious misdirection—*Satya Charan*, 52 Cal. 223, 26 Cr L.J. 1155, A.I.R. 1925 Cal. 666, 88 I.C. 515. See also paragraph (5), *supra*.

(17) The question as to whether the accused was under 12 years of age and incapable of understanding the nature of his act is one for the jury to decide, notwithstanding the fact that no proof may have been adduced on the point; and when the Judge attempts to exclude the consideration of the question from the jury by saying that they should leave that question out of account altogether, it amounts to a misdirection—*Ali Raza*, 28 O.C. 69, 26 Cr L.J. 310, 84 I.C. 454, A.I.R. 1925 Oudh 311.

(18) Where the witnesses who had made certain statements before the committing Magistrate retracted those statements at the trial the Sessions Judge ought to tell the jury that the witnesses should be looked upon with suspicion and that their evidence should be regarded with great caution, and the Judge ought to ask the jury to decide for themselves as to which of the two versions is correct. If, instead of doing so, the Judge expresses his opinion with a certain degree of assertion to the effect that the statements made before the committing Magistrate are true and that the depositions given before him are false, it amounts to a misdirection—*Abdul Gani*, 53 Cal. 181, 42

C.L.J. 205, 26 Cr.L.J. 1577. The Judge in his charge to the jury should emphasize the necessity for very great care and caution on the part of the jury before they decide to act upon a statement of such a character the truth of which is denied in the Sessions Court—*Ram Gobinda Ghose v. Emp.*, 39 Cr.L.J. 625, 175 I.C. 529, 10 R.C. 802, 42 C.W.N. 781, A.I.R. 1938 Cal 364.

The law may be thus stated— (a) If a witness had made a statement before the committing Magistrate and a different statement before the Sessions Judge, and the previous statement has been put in under sec. 288 so as to become evidence for all purposes, the jury may be directed to choose between the two statements, because both statements are evidence of the facts stated therein (b) But in case of *other* previous statements (e.g., statements made before the police), the jury cannot be so directed, because such statement is *not* evidence at all against the accused of the facts stated therein; the proper direction is that before relying on the evidence given by the witness at the trial the jury should take into consideration the fact that he made the previous statement, but that they must not treat the previous statement as being any evidence at all against the accused of the facts therein alleged—*Profulla Kumar*, 58 Cal 1404, 35 C.W.N. 731 (749), 32 Cr.L.J. 768, 53 C.L.J. 427, 131 I.C. 575, 1931 Cr.C. 497, A.I.R. 1931 Cal 401, Ind Rul. 1931 Cal. 463 (F.B.) See also Note 898.

It is not proper for the Judge to invite the jury to treat difference between the statements of a witness before the Committing Magistrate and the Sessions Judge very lightly on the ground that not only investigating police officers but committing Magistrates are also concerned only with making inquiries leading up to the trial before the Sessions Court and are not concerned with making a detailed record of the statements of witnesses. Now it is true that a committing Magistrate is not holding a trial but only an inquiry leading up to a trial; but the fact remains that he is recording evidence just as much as a Sessions Judge himself, and it is his duty to record the evidence fully in order that the accused may have ample notice of the matter with which he is charged and of the evidence by which the prosecutor seeks to prove the case. In fact, if the prosecutor at the trial intends to lead any further evidence of substance beyond what has been adduced in the committing Magistrate's Court it is well recognized that the correct procedure is that he gives the accused notice of this new matter in his opening address at the trial—*Yusuf Mia v. Emp.*, A.I.R. 1938 Pat. 579 (582), 1938 P.W.N. 727, 5 B.R. 185, 20 P.L.T. 51, 178 I.C. 934, 40 Cr.L.J. 147. Omissions are not necessarily contradictions. There are omissions and omissions. Some of them can be overlooked on the grounds approved by Courtney-Terrell, C.J., in *Hari Lal v. Emp.*, 14 Pat. 225, 156 I.C. 921, A.I.R. 1935 Pat. 263, 1935 Cr.C. 749, 36 Cr.L.J. 1026, 16 P.L.T. 380, 8 R.P. 43. But there may be omissions which it will be difficult to hold are due to either the Police or the Magistrate leaving them out because they were simply preparing records preliminary to a trial. The observations of the learned Chief Justice have, to a very large extent, been misunderstood and misapplied. If the defence relies upon certain omissions made by witnesses either before the Police or before the Magistrate, the best course is to draw the attention of the jury to those alleged omissions and then if, in the opinion of the Judge, the omissions are of no consequence and were possibly due to the circumstances approved by the learned Chief Justice, it will be quite open to him to place them before the jury and then leave them to decide whether those omissions considered in the light of the circumstances placed before them are of such consequence as to discredit the testimony of the witness in Court. General observations devoid of facts are likely on some occasions to create an impression in the mind of the jury that every omission in every case is of no consequence whatsoever—*Bulat Gope v. Emp.*, 40 Cr.L.J. 34, 178 I.C. 354, A.I.R. 1938 Pat. 575, 5 B.R. 88, 1938 P.W.N. 693. See also Note 503 under the heading "Contradict."

(19) Where a Judge repeatedly tells the jury that if they are *morally* convinced of the guilt of the accused, their verdict should be that of guilty, it amounts to a misdirection. The jury has to return a verdict of guilty not upon their *moral* belief of a

case but upon the *legal* proof of the facts constituting the offence—*Enayet*, 49 All 209, 28 Cr.L.J. 15, 99 I.C. 47, 6 A.L.Cr.R. 282, A.I.R. 1926 All 752, 25 A.L.J. 33. It is an error on the part of the Judge to direct the jury that the "Prosecution's duty is to prove a *prima facie* case". The prosecution have to do more than that; they must prove the guilt of the accused. There is no principle in the English law whereby if the prosecution has proved a *prima facie* case, the accused must bring in evidence in rebuttal or be convicted—*Shedaram v. Emp.*, A.I.R. 1939 Sind 209 (214), 184 I.C. 474, 12 R.S. 107, 41 Cr.L.J. 28.

(20) It is a misdirection not to explain to the jury the difference between a crime and a civil wrong (e.g., the distinction between a civil and a criminal trespass)—*Madan Mandal*, 41 Cal. 662, 15 Cr.L.J. 155.

(21) The omission on the part of the Judge to explain the main principles to be followed in criminal cases based on circumstantial evidence is a serious defect in the charge to the jury. Those principles are as follows :—(i) the circumstances from which an inference adverse to the accused is sought to be drawn, must be proved beyond all reasonable doubt and must be clearly connected with the fact sought to be inferred therefrom, and (ii) in order to justify an inference of guilt, the circumstances from which such an inference is sought to be drawn must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt—*Jahura*, 32 Cr.L.J. 418 (420), 129 I.C. 677, 52 Cr.L.J. 417, A.I.R. 1931 Cal. 11, 35 C.W.N. 169, 1931 Cr.C. 43. In a case dependent upon circumstantial evidence it is the duty of the Judge to point out very clearly that in the case of circumstantial evidence a conviction is only right and proper, if from the proved circumstances the inference of guilt only can reasonably be drawn, and if from the proved circumstances two inferences can reasonably be drawn, the inference of innocence as well as the inference of guilt, the jury is bound to draw the inference of innocence—*Shewaram v. Emp.*, A.I.R. 1939 Sind 209 (215), 184 I.C. 474, 12 R.S. 107, 41 Cr.L.J. 28. See also *Mendai*, 14 Luck. 635, 1939 A.W.R. (C.C.) 102, 1939 A.Cr.C. 133, 1939 O.L.R. 498, 183 I.C. 307, 1939 O.A. 654, 12 R.O. 23, 40 Cr.L.J. 764, 1939 O.W.N. 700 and *Kanakasabai Pillai v. Emp.*, 50 M.L.W. 452, 1939 M.W.N. 883.

(22) Where the charge is little more than a long rambling statement of the evidence as it came from the mouths of the several witnesses who were called and facts, relevant and irrelevant, important and unimportant, were all mixed up together without any attempt to sift one from the other or to weigh or value the facts deposed to or to discard from consideration those which were absolutely unimportant and irrelevant, the charge was defective and the trial was vitiated on that account—*Jabed*, 32 Cr.L.J. 1138, 134 I.C. 317, 53 C.L.J. 351, 35 C.W.N. 835, Ind. Rul. 1931 Cal. 813.

(23) When the Judge told the jury "under the law, no evidence can be given before you by the prosecution as to what these witnesses told the Police, but the fact remains that the defence which is entitled to bring to your notice any contradiction between the statements then made and the statements made now, has not placed before you any contradictory statement as regards the account of the occurrence," there was a misdirection as the Judge acted in contravention of the provisions of law as contained in sec. 162, Cr. P. Code—*Ram Lal*, 36 Cr.L.J. 135, 152 I.C. 681, A.I.R. 1934 Cal. 717, 1934 Cr.C. 1102. In his charge the Judge told the jury what statements an important prosecution witness had made to the Police, as if all that was substantive evidence, and by reason of those discrepancies the Judge sought to discredit the witness in so far as he did not support the prosecution case. The alleged statements before the Police were not properly put in evidence under sec. 162, Cr. P. Code. Held that the Judge was not entitled to do so and that was a material misdirection, vitiating the trial—*Rajjaddi*, 32 Cr.L.J. 841, 132 I.C. 159, A.I.R. 1931 Cal. 189, 35 C.W.N. 317, Ind. Rul. 1931 Cal. 513, 58 Cal. 1009, 1931 Cr.C. 253.

(24) Where the Crown had by seeking to discredit their own witness said that he was not a witness on whom they relied and he was the only witness on whom the prosecution relied to ask the Court to convict the accused, it was the duty of the Judge to

have directed the jury that there was no evidence and that they should return a verdict of not guilty—*Makbul Khan*, 32 C.W.N. 872, 56 Cal. 145. If a witness is declared to be a hostile witness, so that the party who has called him is allowed to cross-examine him, it shows that by asking for leave to cross-examine that witness, the party admits that he is not a witness of truth and is one whose evidence is not entitled to credit. In such a case the Judge should tell the jury that the evidence of such witness shall be rejected; his omission to do so amounts to a misdirection—*Punchanan Gogai*, 57 Cal. 1266, 34 C.W.N. 526 (529), 31 Cr.L.J. 1207. This view was held to be incorrect by the Full Bench in *Profulla Kumar*, 32 Cr.L.J. 768, 131 I.C. 575, A.I.R. 1931 Cal. 401, 53 C.L.J. 427, 1931 Cr.C. 497, Ind. Rul. 1931 Cal. 463, 35 C.W.N. 731 (748), 58 Cal. 1404 (F.B.). It has been laid down that the fact that a witness is dealt with under sec. 154 of the Evidence Act, even when under that section he is "cross-examined" to credit, in no way warrants a direction to the jury that they are bound in law to place no reliance on his evidence, or that the party who called and cross-examined him can take no advantage from any part of his evidence. There is, moreover, no rule of law that if a jury thinks that a witness has been discredited on one point they may not give credit to him on another. The rule of law is that it is for the jury to say. If the previous statement is the deposition before the committing Magistrate and if it is put in under sec. 288, Cr. P. C., so as to become evidence for all purposes, the jury may in effect be directed to choose between the two statements because both statements are evidence of the facts stated therein. But in other cases, the proper direction to the jury is that before relying on the evidence given by the witness at the trial the jury should take into consideration the fact that he made the previous statement, but that they must not treat the previous statement as being any evidence at all against the prisoner of the facts therein alleged. See also *Sohrai Sao*, A.I.R. 1930 Pat. 247 (251), 11 P.L.T. 148, 9 Pat. 474, 124 I.C. 836, 31 Cr.L.J. 721. When the Judge told the jury that a certain prosecution witness "had been declared hostile to the prosecution and that therefore his evidence should be altogether left out of account in your minds as he is not a witness of truth and is not entitled to credit, being prepared to make different statements at different times," this was clearly a misdirection—*Wahid Ali*, 33 Cr.L.J. 604, 138 I.C. 373, A.I.R. 1932 Cal. 523, 36 C.W.N. 356, 1932 Cr.C. 498, Ind. Rul. 1932 Cal. 454. The correct rule to apply in such cases is that part of the evidence of a witness, who has been guilty of untruth in some material particulars, may be accepted if such part is corroborated by probabilities and other reliable evidence which though insufficient by themselves to establish the guilt of a particular accused nevertheless points to the truth of the statement of the witness directly implicating him. Where the statement of a witness has been clearly proved to be untrue, there is no manner of doubt that the witness is *prima facie* unreliable, and if his evidence is not reinforced by something else, it is highly unsafe to accept it as the basis of conviction. Where, however, the Court considers one part of the evidence of a witness to be not free from doubt, it may well refuse to act upon it without destroying the value of the rest of it, as all that the Court implies in not acting upon one part of the evidence, is that it is not safe to accept it—*Ashiq Ali*, 37 Cr.L.J. 1104 (1106), 165 I.C. 193, A.I.R. 1936 All. 747, 1936 A.L.J. 855.

It is an elementary principle in the administration of criminal justice that want of interest in the prosecution does not by itself stamp the evidence of a witness with truth. The weight which is to be attached to the testimony of a witness depends, in a large measure, upon various considerations, some of which are: that on the face of it his evidence should be so much in consonance with probabilities and consistent with other evidence, and should generally so fit in with the material details of the case for the prosecution as to carry conviction of truth to a prudent mind. If these elements are wanting in the testimony of a witness, however, independent he may appear to be, his evidence should not be relied on in the decision of criminal cases where persuasion of guilt must amount to a moral certainty—*Parwati*, 37 Cr.L.J. 821 (824), 163 I.C. 319, A.I.R. 1936 Nag. 88, 1936 Cr.C. 553.

(25) Where a number of persons who could have given important information were not examined as witnesses for the Crown, the Judge should point out this fact to the jury and direct them that an adverse inference should be drawn against the prosecution. His omission to do so amounts to a misdirection—*Mad. Yunus*, 50 Cal. 318 (326); *Tenaram*, 25 C.W.N. 142, 22 Cr.L.J. 475; *Nababali*, 58 Cal. 580, 53 C.L.J. 54, 34 C.W.N. 1151 (1153); *Dhunnoo*, 8 Cal. 121; *Tajali*, 7 Pat. 50, 28 Cr.L.J. 843 (844), 104 I.C. 459, A.I.R. 1928 Pat. 31, 9 P.L.T. 57; *Sali Sheikh*, A.I.R. 1931 Cal. 752, 1931 Cr.C. 1016, 54 C.L.J. 244, 134 I.C. 1191. The Judge ought to caution the jury that it is *prima facie* the duty of the prosecution, and not of accused, to call all the witnesses available and necessary to prove the case and that if they are not called without sufficient reason being shown, it is proper to draw an inference adverse to the prosecution—*Kameswar Lal*, 34 Cr.L.J. 828, 144 I.C. 872, A.I.R. 1933 Pat. 481, 1933 Cr.C. 1310. Where the Judge told the jury that, if they accepted the contention of the Public Prosecutor that the witnesses, who were named in the first information report, were not called because their evidence was valueless, then they ought not to draw the presumption mentioned in sec. 114 (g) of the Evidence Act, but if, on the other hand, they did not believe his explanation, they were at liberty to draw the presumption if they thought fit, *held* that that was a proper direction because the meaning of the evidence being valueless was that they did not know the facts, that is to say, they were not able to give evidence relevant to the trial—*Girishchandra Namadas*, A.I.R. 1932 Cal. 118 (120), 35 C.W.N. 1151, 58 Cal. 1436, 1932 Cr.C. 105, 33 Cr.L.J. 269, 135 I.C. 140. Where a statement made by a person who has not been examined as a witness has been treated as evidence in the case for the prosecution and the Judge places it before the jury with the warning that they are entitled to draw the presumption that if such person were examined, his deposition would be against the prosecution, there is no misdirection—*Enayet Ali*, A.I.R. 1934 Cal. 557, 38 C.W.N. 446. When the Judge told the jury "that the Public Prosecutor is not obliged to examine persons as prosecution witnesses if he has reason to believe that they would not support the prosecution case. Nor is the Court bound to examine any person as a Court witness unless the witness appeared to be essential to the just decision of the case". *Held* that it would be wholly inappropriate to take those remarks as laying down a general proposition with regard to the effect and the inference to be drawn or not to be drawn from the absence of relevant witnesses from the witness-box. That is a matter to be considered with reference to the circumstances of each particular case and the facts which the witness, if called, would be required to prove; and the jury should be asked to consider it in the light of those circumstances and those facts. He should not invite the jury to assume that the witnesses were gained over. When the prosecution have produced sufficient evidence and the best evidence it is not always incumbent on them to produce all possible evidence on the less important facts—*Yusuf Mia v. Emp.*, A.I.R. 1938 Pat. 579, 1938 P.W.N. 727, 5 B.R. 185, 20 P.L.T. 51, 178 I.C. 934, 40 Cr.L.J. 147. See also Note 893.

(26) The Judge explained secs. 302 and 304 and eventually said this: "If, however, you find he had neither the intention nor the knowledge requisite under sec. 302, consider his liability under sec. 304, I. P. C." He then read and explained that section and continued ("If you hold that he intended to cause the deceased such bodily injury that death would be a possible but not the most probable result you will find him guilty under sec. 304, Part I. Or if you hold that he had no such intention but knew as a reasonable man that death would be a likely consequence of his act you will find him guilty under sec. 304, Part II." *Held* that the Judge's direction was wrong and that the direction would have been quite correct if he had not used the word "possible" but had adhered to the words of the section and had used the word "likely"—*Natabar Haldar*, 34 C.W.N. 223 (226), 31 Cr.L.J. 572, 123 I.C. 751, 50 C.L.J. 476, A.I.R. 1930 Cal. 136, 1930 Cr.C. 136. Where the Judge referred to the two parts of sec. 304 and he proceeded to give the following explanation. "The first part relates to death which is caused without any intention of causing death or causing

such bodily injury as is likely to cause death. The 2nd part relates to death which is caused without any intention to cause death or to cause bodily injury as is likely to cause death, but with the knowledge that such injury may lead to death." *Held* that the explanation is obviously wrong and that the first part applies where there is a guilty intention, and the second part applies where there is no such intention, but there is guilty knowledge—*Ifatulla*, 35 C.W.N. 456 (462), 58 Cal 1138, Ind. Rul 1931 Cal 404, 130 I.C. 884, 1931 Cr.C. 409, A.I.R. 1931 Cal 345, 32 Cr.L.J. 598.

In a case under sec. 302, I. P. C., the Judge stated in his charge to the jury "If you find that the accused was there and inflicted the stab wound, you ought to find him guilty of murder". It was argued that the question of what the intention of the accused was was a matter of fact, and that should have been left to the jury; and in directing the jury to find as a matter of law that if the stab wound was inflicted by the accused they must find him guilty of murder amounted to misdirection. *Held* that there being no evidence of any kind upon which a jury could reasonably have come to the conclusion that the accused had any intention other than the ordinary one deducible from his acts, the Judge in his summing up was under no duty to enter into an irrelevant explanation which may have the effect of misleading the jury—*Nga E Pe*, A.I.R. 1936 Rang 421, 1936 Cr.C. 836, 18 Rang. 716 (F.B.).

(27) Where the Judge told the jury "The law allows you to assume that if stolen property is found in a man's possession, he knows it to be stolen property until he proves the contrary," *held* that that was a serious misdirection. Under sec. 114 (a) of the Evidence Act, the Court may presume that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods, knowing them to be stolen, unless he can account for his possession. If he gives an account of his possession which may reasonably be true, though the jury are not convinced that it is true, and there is no other evidence of his guilty knowledge, the prisoner is entitled to an acquittal. There is no obligation to prove that the property is his. All that he is required to do is to give an account, and that if that account may reasonably be true, though nevertheless the jury may not be convinced that it is true, he must be acquitted, because the Crown have failed to satisfy the onus which always remains upon them to prove his guilty knowledge and never passes to the accused—*Daud Shaikh*, 40 C.W.N. 159 (160), 62 C.L.J. 257. See also *Istahar Khondkar*, 39 C.W.N. 620 (625), A.I.R. 1936 Cal. 796, 162 I.C. 927, 37 Cr.L.J. 701, 62 Cal 956; *Surendra Nath*, 40 C.W.N. 1090 and *Armuga*, 1933 M.W.N. 320. In this charge to the jury the Judge did not mention sec. 411, I. P. C., nor inform the jury that it was open to them either to find on the facts that the accused committed the house-breaking and theft or that they were guilty under sec. 411, I. P. C., or tell them that they might convict them in the alternative. He left them no choice between a conviction under secs. 457 and 380, I. P. C., and an acquittal. The offence under sec. 411, I. P. C., being punishable with a lesser sentence than offences under the two former sections, this was an omission which prejudiced the accused—*Manuthala*, 36 Cr.L.J. 633, 155 I.C. 74, 1934 M.W.N. 1140, 67 M.L.J. 693, A.I.R. 1934 Mad 721, 40 M.L.W. 873, 1934 Cr.C. 1400, 58 Mad. 86. See also paragraph (10) above.

(28) Where the Judge did not charge the jury with respect to the peculiar nature of the test identification, the non-direction must inevitably have misled the jury as to the value of the identification by the witness and consequently their verdict was vitiated—*Kuldip Singh*, 36 Cr.L.J. 28, 152 I.C. 126, A.I.R. 1934 Pat. 537, 1934 Cr.C. 1192. See also *Molla Khan*, 37 C.W.N. 1061 (1064).

(29) In cases of rape it has been the practice for many years, for the Judge to warn the jury not to accept the evidence of the girl unless they find that it is corroborated in some material particular implicating the accused. But he ought to tell them that if, in spite of his warning, they come to the conclusion that they believe the girl and think the accused guilty, then they have the right to convict him on her uncorroborated evidence. In cases of this nature, before a jury are justified in accepting the testimony of the complainant they must be satisfied that she is a witness of

and if they find that she is a person of bad or loose character obviously they will be reluctant to accept her evidence. Where the Judge failed to direct the jury on these material points the conviction and sentence must be set aside—*Surendra*, 35 Cr.L.J. 508, 147 I.C. 999, 62 Cal. 534, A.I.R. 1933 Cal. 833, 1933 Cr.C. 1493, 38 C.W.N. 52; *Nur Ahmed*, 36 Cr.L.J. 795, 155 I.C. 584, A.I.R. 1934 Cal 7, 1934 Cr.C. 23, 38 C.W.N. 108, 62 Cal 527; *Multani Ram v. Emp.*, A.I.R. 1927 Lah. 836, 9 L.L.J. 111, 28 P.L.R. 235. The Judge should point out to the jury that they are entitled, if they please, to convict the accused upon the uncorroborated testimony of the girl, but that it is dangerous to do so in cases dealing with sexual offences such as rape, abduction and similar cases, and that only in exceptional cases should they convict upon the uncorroborated testimony of the girl. The Judge should direct them as to whether there is evidence corroborating her statement, of the kind required by law, that is to say, evidence independent of her own statements. Failure to give such directions amounts to a non-direction which vitiates the trial—*Chamuddin Sardar*, A.I.R. 1936 Cal. 18, 37 Cr.L.J. 359, 160 I.C. 1028, 1936 Cr.C. 110. See also *Abdul Aziz*, 35 Cr.L.J. 957, 149 I.C. 447, A.I.R. 1934 Nag 94, 1934 Cr.C. 377 and *Wahid Ali*, 33 Cr.L.J. 604, 138 I.C. 373, A.I.R. 1932 Cal. 523, 36 C.W.N. 356, 1932 Cr.C. 498, Ind Rul. 1932 Cal. 454; *Sarat Chandra Chakravarty v. Emp.*, 38 Cr.L.J. 931 (932), 170 I.C. 519, 65 C.L.J. 83, 10 R.C. 151, A.I.R. 1937 Cal. 463; *Sachinder Rai v. Emp.*, A.I.R. 1939 Pat 536 (538), 1939 P.W.N. 598, 41 Cr.L.J. 1, 184 I.C. 354, 18 Pat 698, 20 P.L.T. 898. It has been laid down by criminal Judges that charges brought against a man by one of the opposite sex accusing the male having committed a sexual offence should be very carefully presented to the jury and as it has been pointed out both in England and in India, a rule has grown up that Judges, when they charge juries in cases of this kind, ought never to omit delivering a serious caution to the jury with regard to accepting the uncorroborated evidence of a woman to support a sexual charge against an accused person. The way the rule has developed now is that the presiding Judge should tell the jury that they ought to scrutinize the uncorroborated evidence of a woman or girl with the greatest possible care, because it has been found by experience extending over many years that it is often dangerous that a man should be convicted on such uncorroborated testimony. At the same time, it is not for the Judge to substitute his own view of facts entirely and take away from the jury their privilege of being the judges of facts alone; so that now-a-days after giving the warning the Judge generally adds a rider to the effect that nevertheless if after proper scrutiny and considering the caution delivered by the Judge they are satisfied with the uncorroborated evidence, they may accept it—*Sikandar Mian v. Emp.*, 41 C.W.N. 641 (642), A.I.R. 1937 Cal. 321, I.L.R. (1937) 2 Cal. 345; *Amar Singh v. Emp.*, A.I.R. 1935 Lah. 8, 36 Cr.L.J. 428, 153 I.C. 894, 1935 Cr.C. 7, 35 P.L.R. 638. See also *Maung Ba Tin v. Emp.*, 98 I.C. 180, 5 Bur.L.J. 112, 27 Cr.L.J. 1284, A.I.R. 1927 Rang. 67. See also *Kalu Mia v. Emp.*, 44 C.W.N. 622. In *Taser Prantani v. Emp.*, 44 C.W.N. 835 (837), A.I.R. 1940 Cal. 391, 41 Cr.L.J. 841, 190 I.C. 150, 71 C.L.J. 590, Lord-Williams, J., observed: "Time after time this Court has drawn the attention of Judges to the necessity of a careful direction with regard to this point. I need only refer to the cases of *Surendra Nath Das v. Emp.*, 38 C.W.N. 52 and *Nur Ahmed Gazi v. Emp.*, 38 C.W.N. 108. Both these decisions were founded upon the decision in the case of *R. v. Baskerville* which was a judgment by Lord Reading and other Judges and is reported in (1916) 2 K.B. 658. There are other cases referred to in the reports in the Calcutta Weekly Notes. No such direction as has been required by this Court from time after time was given by this Judge and it is quite obvious, therefore, that the convictions cannot be allowed to stand." The Calcutta High Court seems to have modified its view in *Harendra Prosad v. Emp.*, 44 C.W.N. 830, A.I.R. 1940 Cal 461, I.L.R. (1940) 2 Cal. 180, where Bartley, J., commenting on *Surendra Nath Das v. Emp.*, supra, observes: "The proposition of law laid down was that the jury should be warned that it is unsafe to convict on the uncorroborated testimony of a prosecutrix, but that they might still do so, if satisfied that she was telling the truth. The case is not, in my opinion, an authority for the head-note which states that where no such warning is given, the

conviction must be set aside. In this connexion, it may be pointed out that there is no presumption of law which differentiates the evidence of the complainant in a rape case from that of the complainant in the case of any other offence. There can be no assumption, in the absence of evidence, that she is an accomplice." In the same case Sen, J., observes: "In such a case warning to the jury of the kind referred to by the learned Judge would be necessary and I agree that the omission to give the jury such a warning on the facts of that case (*re Surendra Nath Das v. Emp.*, supra) rendered the charge bad. But if the learned Judge was expressing the view that in every case of rape the Judge must direct the jury that they should not convict the accused on the testimony of the prosecution unless it was corroborated in material particulars to the same extent as is required in the case of an accomplice's evidence, then I would most respectfully and emphatically dissent from it. The laying down of such a rule would be tantamount to saying that every prosecutrix in a rape case should be treated as if she were an accomplice so far as her credibility is concerned. Reference was made to certain observations of Judges in England in regard to this matter. The manners, customs and mode of life of women in this country are very different from those of women in England. A rule or practice which appropriately may be of general application there would not necessarily have the same utility or application here. If this be the English rule or practice I do not think that it is desirable in cases of this description to import it without qualification here. The Indian Law of Evidence nowhere suggests such an inflexible rule and conditions here do not, in my opinion, warrant the engraving of such a rule on our system." See also 44 C.W.N. cxvi where the matter has been very lucidly discussed. In the latest case of *Krishna Chandra v. Emp.*, 45 C.W.N. 27 (28), Bartley, J., however, observes "Nor it has been laid down in many cases in this Court that the Judge should direct the jury that it is unsafe in cases of this character to convict one of offences of the nature of kidnapping or abduction or sexual offences on this uncorroborated testimony of the prosecutrix but that he should tell the jury that in spite of the warning if they are satisfied that the girl is telling the truth, they are at liberty to convict him. In this case, however, all that the learned Judge does it to tell the jury that the girl is obviously lying and therefore her evidence is defective. This direction is clearly most inadequate."

In the case of rape, corroboration is required in fact, but not as a matter of law. In Archbold's Criminal Pleadings, 28th Edition, at p 1047, the rule is stated thus: Corroboration of the story of the prosecutrix is not essential, but it is the practice to warn the jury against the danger of acting upon her uncorroborated testimony, particularly where the issue is consent or no consent. See Russell on Crimes, 8th Edition, at p 2138. But where the absence of any caution, such as is usually given in sexual cases, could not have affected the verdict of the jury, it is not a ground on which the conviction should be set aside—*Abdul Gafur Kotwal v. Emp.*, 40 Cr.L.J. 101 (104), 178 I.C. 637, A.I.R. 1938 Cal. 658, I.L.R. (1938) 1 Cal 636. The Rangoon High Court has held that corroboration is not essential even in a case of this nature. The Court is entitled to accept the uncorroborated evidence of a girl but it should be slow in its acceptance of it. It must scrutinize her evidence very carefully and unless her story convinces the Court so much that it does not possibly stand in the need of any corroborative evidence it should not accept her uncorroborated evidence—*U Toe Sein v. The King*, A.I.R. 1939 Rang 128 (130), 180 I.C. 935, 40 Cr.L.J. 525. It is for the jury to decide whether there is corroboration or not—*Kalu Mia v. Emp.*, 44 C.W.N. 622 (623). The Judge should explain to the jury that in order to satisfy themselves whether there is such corroboration they should see whether there is any evidence to prove a fact which would support the inference that the individual accused persons are guilty of some specific charge—*Ali Hyder v. Emp.*, A.I.R. 1938 Cal 769 (771), 68 C.L.J. 238, 40 Cr.L.J. 280 (283), 179 I.C. 960.

What exactly amounts to corroboration of the main evidence in cases of this kind is always a difficult question. It need not be the direct oral evidence of another person. It may be only independent evidence of such a character that it connects the

accused directly or indirectly with the crime that he was said to have committed—*Sikandar Mian v. Emp.*, 41 C.W.N. 641 (643), A.I.R. 1937 Cal. 321 (322), I.L.R. (1937) 2 Cal. 345, following *Rex v. Baskerville*, (1916) 2 K.B. 658, 86 L.J.K. 28, 115 L.T. 453, 80 J.P. 446, 25 Cox C.C. 524, 60 S.J. 696; *Surendra*, supra; *U Toe Sin v. The King*, A.I.R. 1939 Rang. 128 (130), 180 I.C. 936, 40 Cr.L.J. 525. It is clear that the kind of corroboration required by the rule must be independent evidence, that is to say, the evidence of some witness other than the girl herself. If there were any doubt about this, it was made clear in the case of *Job v. Whitehead*, 21 Cr. App. Cas. 23, the headnote of which is that "the witness cannot be corroborated by himself. The Lord Chief Justice Lord Hewart in that case said that, "corroboration should come from another person altogether." Therefore, the evidence of statements made by the girl to others is not the kind of corroboration required by law—*Nur Ahmed*, supra; *U Toe Sein v. The King*, supra; *Chamuddin Sardar*, supra. A previous statement made by the prosecutrix, brought in under sec. 157 of the Evidence Act, cannot possibly be corroboration within the meaning of this rule—*Sikandar Mian v. Emp.*, supra. For contra see *Haid Ali*, supra. The blood found upon the girl's cloth, and the complaint which she made to others, are not corroborative evidence such as is required by the rule because the girl cannot be allowed to corroborate herself. The corroborative evidence must be that of an independent witness—*Surendra*, supra; *Maung Ba Tin v. Emp.*, supra. The fact that the prosecutrix subsequently identified the accused is no corroboration within the meaning of the rule—*Bhola Nath v. Emp.*, 43 C.W.N. 1180. But in a case of rape the statement made by the complainant immediately after the occurrence to another woman is admissible, not as evidence of truth of the charge alleged but as corroborating the credibility of the complainant and as evidence of the consistency of her conduct—*Nga Sun Pu*, 19 Cr.L.J. 155, 43 I.C. 443 (L.B.).

Where in a case of rape the Judge said to the jury "This corroboration need not always come from the lips of a witness, but may also come from circumstances of the case, such as are seen by other witnesses who saw her after the occurrence, by the examination of the doctor, by blood mark in the cloth worn, etc.", held that general observations of this kind can never be of the slightest assistance to the jury. In the particular form in which these observations were embodied, the jury must have supposed that while corroboration was required as to the actual rape, no such corroboration was required as to the identity of the accused—*Bhola Nath v. Emp.*, 43 C.W.N. 1180.

In a charge for rape the Judge directed the jury that because the plea of consent was not taken by the accused they need not determine whether the girl was below 14 or above 14 and they need not determine whether she consented or not. Held that the Judge was entirely mistaken in his position and that he ought to have told the jury that the burden was on the prosecution to prove in addition to the *factum* of sexual intercourse, that the girl was below 14 or else that the accused committed the act against her will or without her consent—*Abdul Khaleque*, 34 Cr.L.J. 1161, 145 I.C. 923, A.I.R. 1933 Cal. 606, 37 C.W.N. 484, 1933 Cr.C. 970.

(30) In a charge for an offence under sec. 366, I. P. C., if the Judge tells the Jury that the fact of previous intimacy with the girl is wholly immaterial, it constitutes misdirection as the accused cannot be convicted of that offence unless it is proved that the girl was leading a life pure from unlawful sexual intercourse at the time when the kidnapping took place—*Shakebali*, 35 Cr.L.J. 307 (310), 147 I.C. 79, A.I.R. 1933 Cal. 718, 1933 Cr.C. 1268. In a case under sec. 366, I. P. C., the Judge told the jury "However the girl being a minor can have no will of her own in law. In law her will is presumed to be the same as her guardian's will. So if her guardian is not privy to the marriage and it was done against her will, according to law, the girl would be considered to have been compelled to marry against her will." This is a clear misdirection in as much as the "will" referred to in the first part of sec. 366, I. P. C., means the will of the girl and certainly does not mean the will of her guardian—*Fulchand*, 33 Cr.L.J. 512, 137 I.C. 819, A.I.R. 1932 Cal. 442, 36 C.W.N. 49, Ind. Rul. 1932 Cal. 382. Upon the question as to the age of the girl, which is a material factor of the

charge under sec. 373, I. P. C., the Judge told the jury that they might appeal to their own experience and apply that experience to the impression that they had formed on seeing the girl for three days, without any caution that such an impression, however, would never be a sure guide. *Held* that there has been a material misdirection vitiating the trial—*Bhola Sardar*, 35 C.W.N. 316. See also *Forhad*, 36 Cr.L.J. 364, 153 I.C. 493, A.I.R. 1934 Cal 766.

In a case under sec. 366, I. P. C., where an allegation is made that two persons have joined in taking or enticing another, the direction should be certainly that the prosecution must prove that the taking or enticing was by the accused persons or either of them. The necessity of examining carefully the evidence against each accused person jointly charged with the particular offences should not be ignored. To say that if the jury was not satisfied that the offence under sec. 366, I. P. C., was made out in the case of both the accused, the alternative was under sec. 366A, I. P. C., is undoubtedly inadequate and misleading. If the intention required by sec. 366, I. P. C., was not proved in the case, then it was the obvious duty of the Judge to say that the jury was bound to acquit them or one of them with regard to whom intention had not been made out. The exception to sec. 351, I. P. C., simply is that the section does not extend to the act of any person who in good faith believes himself or herself to be entitled to the lawful custody of the child. There is no question whatever of any authority to remove the girl from the control of her lawful guardian. Any direction to the contrary is wrong—*Katiani Dasi v. Emp.*, 39 Cr.L.J. 751, 176 I.C. 456, A.I.R. 1938 Cal. 475, 11 R.C. 139.

In an abduction case when the opening words of the charge were "you have before you a simple case of abduction of a young married girl for immoral purposes," the Judge struck the right note in reminding the jury that the issue before them was a plain and simple one although evidence had been given for nearly three weeks and had wandered into by-paths of remotely connected facts and arguments had gone on for three days—*Abdul Gafur Kotwal v. Emp.*, 40 Cr.L.J. 101 (104), 178 I.C. 637, A.I.R. 1938 Cal. 658, 11 R.C. (1938) 1 Cal 636.

In a case under sec. 366, I. P. C., where the father of the girl up to the time of lodging information at the Police Station did not suspect that his daughter had been taken away for the purpose of being forced to illicit intercourse, since she had already been working as a maid servant in the accused's house and the Judge told the jury to consider this explanation, *held* that there was no misdirection—*Hari Mahto*, 37 Cr.L.J. 320, 160 I.C. 675, A.I.R. 1936 Pat. 46, 1936 Cr.C. 70.

In cases of sexual offences like abduction, the Judge should tell the jury that if the girl was immoral it made her story of abduction and deceit less probable and that of her abductor that she had a love affair with him more probable—*Sachinder Rai v. Emp.*, A.I.R. 1939 Pat. 536 (539), 1939 P.W.N. 598, 18 Pat. 698, 184 I.C. 354, 6 B.R. 41, 20 P.L.T. 898, 41 Cr.L.J. 1.

(31) In a case of dacoity the prosecution alleged that the accused was recognised during the commission of the dacoity by some witnesses, who knew them for a long time, in the diffused light from electric torches in their hands. The Judge allowed the jurors to make an experiment with electric torches. *Held* that there was a great irregularity involved in the Judge's allowing the jury to make an experiment in the absence of the accused, by reason of which the jury ultimately brought in their verdict, a verdict which the jurors were not apparently in a position to deliver before the experiment mentioned in the Judge's charge to the jury was allowed to be made—*Sarup Ali*, 35 Cr.L.J. 129, 152 I.C. 661, 38 C.W.N. 1154, A.I.R. 1934 Cal. 744, 1934 Cr.C. 1153, 60 C.L.J. 191.

(32) Where the Judge did not draw the attention of the jurymen to the points that as the charge under sec. 333, I. P. C., stood, only those person who actually caused grievous hurt to the constable could be legally convicted of that offence and that unless the accused were charged under sec. 333, I. P. C., read with sec. 149, I. P. C., the conviction of those accused, who were not proved to have caused any grievous

hurt to the constable, could not be legally sustained, the omission amounted to misdirection and justified the Appellate Court in setting aside the unanimous verdict of the jury and in ordering a fresh trial in respect of that charge—*Lal Behari*, 150 I.C. 509, 11 O.W.N. 831, 1934 Cr.C. 1049, A.I.R. 1934 Oudh 354, 35 Cr.L.J. 1066 (1070).

(33) Where the Judge repeatedly drew the jury's attention to the fact that the accused had failed to give any explanation of facts adduced in evidence against them, *held* that bearing in mind that the onus in proof in criminal cases never shifts to the accused, and that they are under no obligation to prove their innocence or adduce evidence in their defence or to make any statement, the Judge's remarks amounted to misdirection—*Benoyendra*, 40 C.W.N. 432 (441), A.I.R. 1936 Cal 73, 161 I.C. 74, 37 Cr.L.J. 394, 1936 Cr.C. 145, 8 R.C. 472, 63 Cal 929, 64 C.L.J. 154.

(34) Where the prosecution case was that the Fouzdar had deliberately tampered with the statements of witnesses, being actuated by a desire to save an accused from any prosecution and, in furtherance of that desire, had not recorded correctly the statements made to him by the persons whom he examined, there was a serious misdirection on the part of the Judge to tell the jury in the most emphatic terms that the conduct of the Fouzdar had been rather surprising and antagonistic to the prosecution case and, therefore, it was not safe to place much reliance on the statements taken down by him, instead of leaving the question to the jury—*Mahomed Adam Chohan*, A.I.R. 1937 Bom 60 (62), 38 Bom L.R. 1186, 167 I.C. 43, 38 Cr.L.J. 327, 9 R.B. 274.

(35) In a case under sec. 304, I. P. C., the charge was in form and in fact nothing less than a judgment. The Judge had not made any attempt to explain any law to the jury except on the point of private defence, and he had given no explanation of what constituted an offence under sec. 304, I. P. C., or what constituted an offence under section 325, I. P. C. He had summed up the evidence in the manner of a judgment and throughout had given his conclusions and his opinion as definite facts. At the end of the charge he had rendered lip-service to the duties which had been enjoined on him by stating: "I may warn you that you are in no sense bound by my opinion which you may find expressed in summing up the case. You have to judge it yourself, and you must decide and come to your own conclusion" The defence evidence had been summed up in the phrase: "It is difficult to believe if they (*i.e.* the defence witnesses) at all help the defence" without leaving it to the jury to consider whether they should believe the defence evidence or not. *Held* that the whole charge was vitiated by a strong bias in favour of the prosecution and a strong bias against the defence—*Fateh Muhammad v. Emp.*, 38 Cr.L.J. 589, 168 I.C. 741, I.L.R. 1937 Nag. 123, 9 R.N. 264, A.I.R. 1937 Nag 110.

(36) The suggestion of the Judge that if the jury do not believe the defence version, they must automatically accept the prosecution story as true, is not a proper direction. He should explain that both versions may be false, and if the jury are not satisfied that the defence version is true, they are by no means to regard this as helping the prosecution to establish the truth of their version—*Madan Tulakdas v. Emp.*, 38 Cr.L.J. 767 (769), 169 I.C. 306, 9 R.C. 914, 41 C.W.N. 508, A.I.R. 1937 Cal. 266; *Tazem Ali*, 33 Cr.L.J. 196 (200), A.I.R. 1931 Cal. 796, 135 I.C. 727, 1931 Cr.C. 1060, 58 Cal. 1095, Ind. Rul. 1932 Cal. 135. While dealing with a case in which the Sessions Judge addressed the jury at the end of his charge. "Nevertheless if you find that the defence case is a false one, it is certainly an element in favour of the prosecution and against the accused. The falsity of the defence case may have the effect of confirming you in your belief that the prosecution story is true", Cunniffe, J., observed: "I am not prepared to say those words or sentiments of that kind ought ever to be used to a jury. But it is to my mind of paramount necessity that if such language is employed, it should always be accompanied by the legal caution that the onus of proving explicit guilt is upon the prosecution and the prosecution alone"—*Sarat Chandra Chakravarty v. Emp.*, 38 Cr.L.J. 931 (933), 170 I.C. 519, 65 C.L.J. 83, 10 R.C. 151, A.I.R. 1937 Cal. 463. See also *Abdul Gafur Kotwal v. Emp.*, 40 Cr.L.J. 101 (104), 178 I.C. 637, A.I.R. 1938 Cal. 658, I.L.R. (1938) 1 Cal. 636.

(37) Where in a case under secs 302 and 201, I P. C., the Judge deals with the case chiefly from the point of view of the murder charges, puts before the jury various bits of circumstantial evidence and makes his comments upon them but does not put before the jury the case under sec 201, I. P. C., held that after dealing with the murder, the Judge ought to put before the jury the case under sec. 201, I P. C., and then indicate what evidence there is, if any, to establish the various elements in this particular charge—*Abdul Gafur v. Emp.*, 41 C.W.N. 414.

(38) The Judge's exhortation to the jury: "The whole of Karachi is watching you, the whole commercial world is watching you," introduces into the case those extraneous considerations which the Judge should warn the jury to exclude from their minds, and, in view of the nature of the charge, seems to be a clear direction to the jury to convict. It can mean nothing else and it does not leave the jury to come to their own conclusions. The exhortations vitiate the charge—*Shewaram v. Emp.*, A.I.R. 1939 Sind 209 (216), 184 I.C. 474, 12 R.S. 107, 41 Cr.L.J. 28. Similarly, it was a misdirection on the part of the Judge when he addressed the jury: "Gentlemen, I have done This trial is a trial in one sense of the accused: But you must not forget that in another sense we all of us are not less on our trial. The witnesses, the Bar, you and I, we are also on our trial, a trial no less real in that it rests with ourselves to acquit or condemn ourselves"—*Topandas v. Emp.*, A.I.R. 1925 Sind 116, 81 I.C. 249, 25 Cr.L.J. 761.

(39) Where in a case under sec. 477, I. P. C., the Judge told the jury that they were not concerned with the question, whether the document was a genuine document or a registered document, or if it actually created a legal right, held that this was clearly wrong. The offence with which the accused was charged was not that of destroying a document which purported to be a valuable security. The charge was that he did so fraudulently and dishonestly. In deciding whether the action of the accused was either fraudulent or dishonest, that is to say, whether he intended to commit fraud upon anybody or to cause wrongful loss to anybody, it was clearly essential for the jury to decide whether the document in question was a genuine document or a forged one. If it was a forgery, it was of no value to anybody, and no wrongful loss would be caused by its destruction. Similarly, if it was a forgery, no fraud could be committed upon anybody by doing away with it—*Akbar Hossain v. Emp.*, 43 C.W.N. 222.

(40) Where to establish motive the prosecution has to give evidence which tends to show that the accused are of bad character, the Judge should caution the jury and tell them that they are not to draw an adverse inference against the accused from such evidence. Mere evidence that proceedings against the accused were pending under sec. 110, Cr P. C., is not evidence of bad character—*Moseladdi v. Emp.*, A.I.R. 1939 Cal 497 (498), 40 Cr.L.J. 877, 184 I.C. 206.

(41) The omission to caution the jury that a witness, whose testimony before the committing Magistrate has been admitted at the trial before the Court of Session under sec. 33 of the Indian Evidence Act, had not been cross-examined, when the accused had an opportunity to cross-examine him before the committing Magistrate did not amount to misdirection—*Nitai Koley v. Emp.*, (1939) 1 Cal. 337.

(42) The Crown which has considerable facilities at its disposal ought ordinarily, unless for very good reasons, be able to put alleged offenders on their trial within a reasonable time. It is not merely a question of enabling witnesses to have distinct recollection, though that is a very important one, because the greater the lapse of time, the fainter will be the recollection, at least of truthful witnesses who do not imagine or invent, but it becomes more difficult for the accused person to defend himself and all the more difficult if he happens to be an innocent man—*Rex v. Krishnan*, A.I.R. 1940 Mad. 329 (335), 1939 M.W.N. 1213, 1939 M.Cr.C. 289, 190 I.C. 123.

(43) It is not fair for the prosecution to press a case against a man when the complainant is not a witness—*Rex v. Krishnan*, *supra*.

(44) The fact that the accused is a registered member of a criminal tribe under

the Act is like a previous conviction, a matter from which bad character can be inferred and which may affect the sentence. It should be treated in the same way as the fact of a previous conviction by not being disclosed to the jury until after the verdict lest their minds be prejudiced. If in the first information the accused is referred to as "a member of the Criminal Tribes Act," that portion of the information should be excluded when reading it out to the jury—*Moskhab Dome v. Emp.*, 40 Cr.L.J. 833.

916. Effect of misdirection:—See Note 1151. A misdirection does not justify a reversal of the verdict of the jury unless the misdirection has in fact occasioned a failure of justice—*Shyam Sundar*, 25 C.W.N. 558; *Ramdas*, 8 Pat. 344, 117 I.C. 173, 10 P.L.T. 409, A.I.R. 1929 Pat. 313, Ind. Rul. 1929 Pat. 381, 30 Cr.L.J. 721 (723); *Arumuga*, 1933 M.W.N. 320. Unless the misdirection is material, the conviction will not be disturbed in appeal—*Mullimavandi*, 45 M.L.J. 845; *Waladar*, 21 Cal. 955; *Ebadi Khan v. Emp.*, 39 Cr.L.J. 674 (676), 176 I.C. 104, A.I.R. 1938 Cal. 460, 11 R.C. 36. The High Court will not set aside a verdict where it is not erroneous in spite of the misdirection—*Nairaddi*, 32 C.W.N. 572; *Waladar*, 21 Cal. 955. Before the Appellate Court can interfere it must be reasonably satisfied that not only the Judge misdirected the jury but that his misdirection has caused them to come to a conclusion which is in fact wrong—*Saroj Kumar*, 33 Cr.L.J. 854 (858), 139 I.C. 873, 1932 Cr.C. 464, 59 Cal. 1361, A.I.R. 1932 Cal. 474, 55 C.L.J. 459, Ind. Rul. 1932 Cal. 669; *Aziz Khan*, 36 Cr.L.J. 612, 154 I.C. 1019, 1935 Cr.C. 89, A.I.R. 1935 All. 103. See also *Puttam Hassan*, 37 Cr.L.J. 356, 160 I.C. 1060, 60 Bom. 599, A.I.R. 1936 Bom. 52, 38 Bom.L.R. 19, 1936 Cr.C. 164 (F.B.). Sec. 297, Cr. P. C., must be read along with the provisions of sec. 537, Cr. P. C. It is necessary that the misdirection should be such as to occasion a failure of justice, such failure of justice as would vitiate the trial or proceedings. The misdirection causing failure of justice may at times arise in relation to the case for the prosecution; but in the majority of cases the effect of a misdirection to the jury comes up for consideration on the ground that it has prejudicially affected the accused. There is, however, no ground for broadly assuming that if even a mandatory provision of the Code is infringed, the result in all cases must be to vitiate the trial irrespective of whether it has or has not occasioned failure of justice—*Jhina Sama*, A.I.R. 1939 Bom. 457 (459), 41 Bom.L.R. 965, 11 L.R. 1939 Bom. 648, 41 Cr.L.J. 176, 185 I.C. 382. In *Obedali*, 32 Cr.L.J. 421, 129 I.C. 680, 52 C.L.J. 423, A.I.R. 1931 Cal. 65, 1931 Cr.C. 63, the Calcutta High Court set aside the conviction on account of the admission of inadmissible evidence in the charge which might have influenced the jury adversely to the accused.

The power of setting aside convictions and ordering a new trial for any error or defect in the Judge's charge to the jury will be exercised by the High Court only when the Court is satisfied that the accused has been prejudiced by the error or defect or that a failure of justice has been occasioned thereby—*K. K. Ali*, 15 Pat. 817 (836), 28 Cr.L.J. 673 (681), 169 I.C. 48, 18 P.L.T. 535, 9 R.P. 526, 3 B.R. 514, A.I.R. 1937 Pat. 263. It is not for the Appellate Court to adjudicate on the merits of the verdict of the jury. Unless it can find a misdirection or a material non-direction which has vitiated the trial, the jury's verdict ought not to be disturbed—*Ebadi Khan v. Emp.*, 39 Cr.L.J. 674 (676), 176 I.C. 104, A.I.R. 1938 Cal. 460, 11 R.C. 36.

But if the misdirection is of a serious character, e.g., where there is a grave omission on the part of the trial Judge to direct the jury on an important point, it will justify a reversal of the conviction; such a misdirection cannot be made good merely by counsel's calling attention to it at the termination of the summing up—*Padam Prasad*, 33 C.W.N. 1121 (1141), 50 C.L.J. 106, 30 Cr.L.J. 993 (S.B.).

See Notes 1151 and 1152.

917. Non-direction:—Mere non-direction is not necessarily misdirection; those who allege misdirection must show that something wrong was said or that something was said which would make wrong that which was left to be understood—*Eknath*, 1

P.L.J. 317, 17 Cr.L.J. 353; *Tbrath v. N. W. Ry Co.*, (1886) L.R. 11 A.C. 247; *R v Stodder*, (1909) 25 T.L.R. 712; *Barendra*, 38 C.L.J. 411, 81 I.C. 353, A.I.R. 1924 Cal. 257, 25 Cr.L.J. 817, 28 C.W.N. 170 (199); *Fateh Chand*, 44 Cal. 477. Mere non-direction unless it amounts to misdirection is not fatal to the charge—*Bapurao Maroti*, A.I.R. 1940 Nag. 221 (224), 1940 N.L.J. 264. In order to justify the Appellate Court to set aside the verdict of the jury the finding that there are certain omissions or non-direction is not enough. The Court of Appeal must be satisfied on a perusal of the charge and the material evidence in the case that the omissions are so important that it may be reasonably said that they have led to an erroneous verdict—*Kasimuddin*, 36 Cr.L.J. 480 (481), 154 I.C. 110, 60 C.L.J. 45, A.I.R. 1935 Cal. 31.

But the omission by a Judge in his charge to the jury to lay down the law by which the jury are to be guided as required by sec. 297, Cr. P. C., is something more than a misdirection. It is a failure to comply with the express provision of the law, Section 537, Cr. P. C. cannot be made applicable to such a case to cure the illegality—*Nawab Ali*, 81 I.C. 953, A.I.R. 1924 Oudh 411, 11 O.L.J. 315, 25 Cr.L.J. 1129; *Jagan*, 35 Cr.L.J. 507, 147 I.C. 976, 11 O.W.N. 200, A.I.R. 1935 Oudh 175, 1935 Cr.C. 298, 1934 O.L.R. 202. A non-direction is not a misdirection unless the jury has been misled or unless the non-direction is of primary importance—*Champa*, 29 Cr.L.J. 325 (333), 108 I.C. 81, A.I.R. 1928 Pat. 326, 9 A.I.Cr.R. 545. For all practical purposes an omission in a summing up is not an error of law or a 'misdirection' unless it be on a point of substantial importance, or, where the point has been fully dealt with by the defence counsel of prime importance—*Imp v. Minhasaya*, 4 I.C. 597, 11 Cr.L.J. 13 (15), 3 S.L.R. 102; *Sita Ram*, 33 Cr.L.J. 167 (169), 135 I.C. 392, 8 O.W.N. 1215, A.I.R. 1932 Oudh 23, Ind. Rul. 1932 Oudh 40, 7 Luck. 390, 1932 Cr.C. 55. It is only when the non-direction is such that there are grounds for thinking that the jury by reason of it may have been put on the wrong track and made to arrive at a wrong conclusion that such non-direction can amount to a misdirection—*Bajit Mian*, 6 Pat. 817, 29 Cr.L.J. 81 (85), 106 I.C. 673, A.I.R. 1928 Pat. 120, 9 A.I.Cr.R. 221, 9 P.L.T. 191. In a charge of unlawful assembly, the omission to explain clearly to the jury the alleged common object of the unlawful assembly, is not a misdirection but a mere non-direction which will not justify the verdict being set aside, if the prisoner was not prejudiced thereby—*Rahamat Ali*, 4 C.W.N. 196; *Abdul Shesk*, 17 Cr.L.J. 92 (Cal.). Omission to call the attention of the jury to the evidence of defence witnesses whom the High Court considered to be untrustworthy is a mere non-direction and not a misdirection—*Rochia*, 7 Cal. 42.

In a case under sec. 366, I. P. C., the prosecution alleged that the girl was taken away for marriage and the consent of the parents was absolutely immaterial as the girl was found to be of age. But in the whole charge to the jury there was not a word by which the jury was asked to find whether the marriage which the accused intended to perform was going to be without the consent of the girl. This non-direction amounted to a serious misdirection and it occasioned miscarriage of justice—*Rameshwar Singh v. Emp.*, 38 Cr.L.J. 919 (923), 170 I.C. 464, 16 Pat. 413, 1937 P.W.N. 596, 3 B.R. 734, 10 R.P. 128, 18 P.L.T. 607, A.I.R. 1937 Pat. 440.

298. (1) In such cases it is the duty of the Judge—

- (a) to decide all questions of law arising in the course of the trial, and especially all questions as to the relevancy of facts which it is proposed to prove, and the admissibility of evidence or the propriety of questions asked by or on behalf of the parties; and, in his discretion, to prevent the production of inadmissible evidence, whether it is or is not objected to by the parties;

- (b) to decide upon the meaning and construction of all documents given in evidence at the trial;
- (c) to decide upon all matters of fact which it may be necessary to prove in order to enable evidence of particular matters to be given;
- (d) to decide whether any question which arises is for himself or for the jury, and upon this point his decision shall bind the jurors.

(2) The Judge may, if he thinks proper, in the course of his summing up, express to the jury his opinion upon any question of fact, or upon any question of mixed law and fact, relevant to the proceeding.

Illustrations.

(a) It is proposed to prove a statement made by a person not being a witness in the case on the ground that circumstances are proved which render evidence of such statement admissible.

It is for the Judge, and not for the jury, to decide whether the existence of those circumstances has been proved.

(b) It is proposed to give secondary evidence of a document the original of which is alleged to have been lost or destroyed.

It is the duty of the Judge to decide whether the original has been lost or destroyed.

918. Question of law:—Under sec. 298, Cr. P. C., it is the duty of the Judge to decide all questions of law arising in the course of the trial. It is well-established that in every case there is a preliminary question which is one of law, namely, whether there is any evidence on which the jury could properly find the question for the party on whom the onus of proof lies. It is not enough to say that there is some evidence. A scintilla of evidence clearly would not justify the Judge in leaving the case to the jury. There must be some evidence on which they might reasonably and properly conclude the fact to be established. It is the duty of a Judge to make a case for the accused on which he thinks that a verdict of not guilty may be properly returned, though the case has not been suggested by or on behalf of the accused—*Lebbai Kutti*, A.I.R. 1939 Mad. 190 (192), 1938 M.W.N. 582, 1938 M.Cr.C. 212, 40 Cr.L.J. 437, 180 I.C. 605, following *Upendra Nath Das*, A.I.R. 1915 Cal. 773, 30 I.C. 113, 16 Cr.L.J. 561, 21 C.L.J. 377, 19 C.W.N. 653 (F.B.). See also Note 902.

In a charge under sec. 376, I. P. C., the question whether, when the complainant had consented to the act, the offence within the meaning of sec. 375, I. P. C., has been committed, is one of law for the Judge to decide under this section and not a question for the jury—*Madhav Rao*, 19 Bom. 735.

What a Judge says to the jury on a point of law is a binding direction upon the jury—*Nimchand*, 20 W.R. 41. They are not entitled to resort to a commentary on the law during their consultation about the verdict. They should take the law from the Judge—*Bhadmi*, 6 Bom.L.R. 258. If the jury return a verdict according to the direction of the Judge, the High Court will not interfere with the verdict, unless it is manifestly erroneous—*Jacquet*, 11 Cal. 85.

A Judge is in error when he leaves a point of law to be decided by the jury—*Hadi Husain*, 35 Cr.L.J. 502, 147 I.C. 911, 11 O.W.N. 211. See also *Ramjanan*, 36 Cr.L.J. 856, 14 Pat. 717, 155 I.C. 866, 16 P.L.T. 348, A.I.R. 1935 Pat. 357.

919. Admissibility of evidence:—The Judge has to advise the jury as to the logical bearing of the evidence admitted upon the matters to be found by them—

Afruddi, 23 C.W.N. 833. This section expressly lays down that one of the duties of a Judge in a trial held with the jury is to prevent the production of inadmissible evidence, whether it is or is not objected to by the parties. If that is so, the fact that the accused puts forward some particular ground for holding that the evidence is inadmissible would not relieve the Judge of his duty to look into all the circumstances in order to judge whether it is admissible or not—*Panchlauri*, 52 Cal. 67, 29 C.W.N. 300, 26 Cr.L.J. 782. It is for the Judge to decide whether the evidence adduced before him is *admissible* or not; the *credibility* of the evidence is to be left to the jury—*Abbasi*, 25 Cal. 736; *Amiruddin*, 45 Cal. 557, 22 C.W.N. 213, 19 Cr.L.J. 305. Thus, the question as to which documents or evidence the jury are to receive is for the Judge to decide, and the question as to what they are to believe is for the jury—*Lalshing*, Ratanlal 452 (453). The Judge ought not to express any opinion upon the reliability of the evidence for the prosecution or for the defence. He is not entitled to say in a general manner that there is *nothing* in the evidence to support or even to lend a semblance of support to the contentions of the accused—*Tanbulla*, 25 C.W.N. 682.

It is the duty of the Judge to decide the question of admissibility of a document on the argument of the two sides and decide in the way he thinks best. But having admitted it, it is his duty to leave the matter entirely free to the jury as to what weight they would allow to the evidence. The Judge would not be wise in giving his reasons for admitting the document in evidence to the jury. He should merely state that he admits the document and lays it to the jury—*Ebadi Khan v. Emp.*, 39 Cr.L.J. 674, 176 I.C. 104, A.I.R. 1938 Cal. 460, 11 R.C. 36.

In case of accomplice evidence, the Judge should caution the jury that it is not safe to convict an accused upon the approver's evidence unless it is corroborated. Omission to say so will amount to a misdirection—*Arumuga*, 12 Mad. 196; *Surya Kanta*, 24 C.W.N. 119. But see *Jamaldi*, 51 Cal. 160 and other cases cited under Note 915 (5), *ante*. The question as to what is or is not, what amounts or does not amount to corroborative evidence in law is a question of law to be decided by the Judge. It is the duty of the Judge to direct the attention of the jury to those portions of the evidence confirming or corroborating the accomplice's story which do or do not fulfil the requirements of the rule of law that an approver's evidence must be corroborated in material particulars and must be such as to connect the accused with the crime. But the Judge must not tell the jury that such or such witness does in fact corroborate the accused. That is the function of the jury and depends upon whether they believe the witness or not—*Rebati Mohan*, 56 Cal. 150, 32 C.W.N. 945, 30 Cr.L.J. 435 (438, 439), A.I.R. 1929 Cal. 57, Ind. Rul. 1929 Cal. 338. Though an omission to direct the attention of the jury to those portions of the evidence which amount to corroborative evidence in law would only be a non-direction, it is a misdirection if the Judge points out to the jury certain portions of the evidence as fulfilling the requirements above stated, when in fact they do not do so—*Rebati Mohan*, *supra*.

Where the counsel for the prosecution in his opening address referred to a complaint preferred against the accused on an earlier occasion, which had no bearing on the present case except to show that the accused was a man of immoral character, and it appeared that the complaint had not been formally proved in the earlier case, the Judge should caution the jury that the contents of the complaint are not relevant to the matters in issue before them and they should pay no attention to it. His omission to do so amounts to a misdirection—*Padam Prasad*, 33 C.W.N. 1121 (1141), 119 I.C. 193, A.I.R. 1929 Cal. 617, Ind. Rul. 1929 Cal. 753, 50 Cr.L.J. 106, 30 Cr.L.J. 993 (S.B.).

Confessions :—It is for the Judge to decide whether the statements or confessions made to the Magistrate and how much of the confessions made to the police are admissible; leaving it to the jury to decide amounts to a misdirection—*Amiruddin*, 45 Cal. 557. Omission to mention to the jury that a confession made by the accused to the police-officer is inadmissible in evidence is a misdirection—*Someshwar*, 3 P.L.T. 101, 23 Cr.L.J. 91. The Judge must decide whether the confessions are voluntarily made or caused by inducement, threat or promise. It is not for the jury to decide. But once the

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Where the counsel for the prosecution in his opening address referred to a complaint preferred against the accused on an earlier occasion, which had no bearing on the present case except to show that the accused was a man of immoral character, and it appeared that the complaint had not been formally proved in the earlier case, the Judge should caution the jury that the contents of the complaint are not relevant to the matters in issue before them and they should pay no attention to it. His omission to do so amounts to a misdirection—*Padam Prasad*, 33 C.W.N. 1121 (1141), 119 IC 193, A.I.R. 1929 Cal 617, Ind. Rul 1929 Cal 753, 50 Cr.L.J. 106, 30 Cr.L.J. 993 (S.B.).

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confessions are admitted in evidence it is for the jury to determine the weight to be attached to them and whether they are true or false—*Khira Mandal*, 33 C.W.N. 1112 (1113), 57 Cal. 649, 1929 Cr.C. 362; *Kesari*, 11 Bom.L.R. 332, 10 Cr.L.J. 65. But the Judge should charge the jury that the mere confessions of prisoners tried simultaneously with the accused for the same offence, which are in a very qualified manner made operative as evidence by sec. 30 of the Evidence Act, ought to be valued merely as accomplice's testimony, and to be treated as evidence of a peculiarly infirm and defective character requiring careful scrutiny before it can be safely relied on—*Ramdoyal*, 21 W.R. 47. Where a Judge admitted in evidence a confession made before a Police Officer and directed the jury that the confession could and should be used not merely against the maker but also against his co-accused, it was a misdirection—*Amiruddin*, 45 Cal. 557.

A Judge before deciding whether a confession is voluntary or not and whether it ought to be admitted should not tell the jury that the accused had made a confession. It is no good telling the jury first that the accused has made a confession and then sending them out of Court while the question is discussed whether the confession ought to be admitted or not. A great deal of damage may be done by the mere statement that the accused has confessed—*Daud Shaikh*, 62 C.L.J. 257 (258), 40 C.W.N. 159. It is for the Judge to decide for himself whether *prima facie* the confession appears to him to have been induced by threat or promise and for that reason to be inadmissible. It he comes to the conclusion that it is inadmissible he must exclude it from the consideration of the jury. It is not the province of the jury to decide the question of admissibility of evidence—*Baldeo*, 34 Cr.L.J. 369, 142 I.C. 639, A.I.R. 1933 Cal. 187, 1933 Cr.C. 233, Ind. Rul. 1933 Cal 310. A Judge cannot leave it to the jury to decide whether a confessional statement is voluntary or not. It is not open to the jury to reject the statement or accept the same in evidence. The Judge is required to decide the question of admissibility of the statement on a decision come to by him that it was voluntary or not; after the Judge's decision on the question of admissibility of the confessional statement depending on its voluntariness, has been given which is binding on the jury as a decision on a question of law, the Judge is required to ask the jury to say whether the confessional statement, if it was held to be voluntary, is true or not upon the materials before the Court, and so to give their verdict on the question of fact whether the statement was true or not. When these points were not placed before the jury, the jury received no proper direction from the Judge on a very vital question—*Kashim Ali*, 36 Cr.L.J. 70, 152 I.C. 234, A.I.R. 1934 Cal. 651, 38 C.W.N. 589, 1934 Cr.C. 933. If the Judge has to decide the question of voluntariness in its bearing on admissibility, there is no reason why the jury should not consider the question of voluntariness in its bearing on the truth of the confession. To ask the jury to accept the voluntariness of a statement as decided and then to consider its truth quite apart from the question of its voluntariness is to ask them to attain a mental detachment which is unpractical and perhaps impossible. Moreover, such a process of reasoning would be faulty and prejudicial to the accused—*Kasimuddin*, 36 Cr.L.J. 485, 154 I.C. 273, A.I.R. 1934 Cal. 853, 1934 Cr.C. 1368, 39 C.W.N. 27, 62 Cal. 312. Although the Judge has to decide the question of the voluntariness of a confession in its bearing upon admissibility, still after he has admitted it, the jury are entitled and must be allowed to consider for themselves the question of voluntariness in its bearing upon the truth of the confession. To tell the jury that in admitting the confession the Judge had decided that it was voluntary, and that the jury were to take that question as settled and on that basis decide whether the confession was true, and what value was to be attached to it, is a serious misdirection, in as much as it withdraws from the jury an issue of fact relating to the question of truth—*Kishori Kishore*, 36 Cr.L.J. 921 (922), 156 I.C. 396, A.I.R. 1935 Cal. 308, 1935 Cr.C. 459, 39 C.W.N. 986. Whether confessions are voluntarily made or not, is a question of law, to be determined by the Court from the facts, as a condition precedent to their admission. Having been declared competent and admissible, they are before the jury for consideration. The jury have no authority to reject them as incompetent. But the jury are the sole Judges of the

truth and weight to be given to confessions, as they are of any other fact. In weighing the confessions, the jury must take into consideration all the circumstances surrounding them and under which they were made, including those under which the Court declared as a matter of law, they were voluntary. In weighing confessions, the jury necessarily consider those facts upon which their admissibility, as having been voluntarily made, depends. While there is no power in the jury to reject the confessions as being incompetent, there is no power in the Court to control the jury in the weight to be given to facts. The jury may, therefore, in the exercise of their authority, and within their province determine that the confessions are untrue or not entitled to any weight upon the grounds that they were not voluntarily made. The Court passes upon (that is, considers) the facts merely for the purpose of determining their competency and admissibility. The jury pass upon (that is, considers) the same facts, and in connection with other facts, if there are other facts, in determining whether the confessions are true and entitled to any and how much weight. The Court and jury each has a well defined and separate province—*Badan Ali*, 37 Cr.L.J. 1084, 165 I.C. 127, 40 C.W.N. 794, 63 Cal 833, following the case of *Burton v. State*, 107 Ala 108. See also *Bhakta Bhusan*, 63 C.L.J. 142, 40 C.W.N. 668, 63 Cal 1089. When an objection is taken by the accused as to the relevancy or admissibility of his recorded confession on the ground that it was not voluntary, it is the duty of the Judge to decide whether the confession was voluntary or not. In view of the provisions of sec. 80, Evidence Act, a confession duly recorded by the Magistrate with the prescribed certificate appended to it may be presumed to be voluntary and as such admissible, but this admissibility is subject to the restrictions contained in sec. 24, Evidence Act. In order to justify the rejection of a confession, a lesser degree of probability would be necessary, inasmuch as instead of the word "proved," the Legislature has used the word "appear" in sec. 24. Before a Judge places the confession before the jury for their consideration as evidence in the case he should carefully consider all the circumstances disclosed in the evidence and come to a decision whether these circumstances do justify a well-founded conjecture which may be sufficient for excluding it from evidence—*Nayeb Sahana*, 35 Cr.L.J. 1479 (1483), 152 I.C. 44, 38 C.W.N. 659, 61 Cal 399, A.I.R. 1934 Cal. 636, 1934 Cr.C. 929. Where in the Judge's charge to the jury his decision on the question whether the confession was voluntary or not, was not stated, nor did the Judge state to the jury that it was for them to determine whether it was true or not and it was left to the jury to determine whether the confession was or was not voluntarily made, or in other words, whether it was admissible, held that that was an error of law on the part of the Judge and the illegality in the charge in this behalf amounted to a serious misdirection resulting from an omission to give a proper direction according to law, calculated to mislead the jury in arriving at a proper verdict—*Ram Lal*, 36 Cr.L.J. 135, 152 I.C. 681, A.I.R. 1934 Cal. 717, 1934 Cr.C. 1102.

As regards retracted confessions, see Note 915, no (4) under sec. 297. See also Notes under sec. 164.

920. Inadmissible evidence:—It is the duty of the Judge to see that evidence which is not admissible in itself should not be allowed to go in to the prejudice of the accused—*Abbas*, 25 Cal 736; and to see that no improper use of the law is made against the accused and that no improper evidence is given to the jury—*Padam Prasad*, 33 C.W.N. 1121 (1141), 50 C.L.J. 106, 119 I.C. 193, A.I.R. 1929 Cal. 617, Ind. Rul 1929 Cal 753 (S.B.); *R v. Wakefield*, (1799) 27 St. T. 679. Where a document, which is not *per se* admissible, is admitted by the Court, and the accused having sufficient opportunity at the trial omits to take any objection, he cannot afterwards in appeal impeach the verdict of the jury on the ground that the document had been admitted without formal proof. But it is competent to the High Court to consider whether, after excluding the evidence wrongly admitted, the rest of the evidence is sufficient to sustain the verdict—*Ram Bhagwan*, 19 Cr.L.J. 886 (Pat.); *Pakala Narayana Swami v. Emp.*, 43 C.W.N. 473 (482), 40 Cr.L.J. 364, 180 I.C. 1, 1939 O.L.R. 131, 11 R.P.C. 166, 1939 A.L.J. 298, A.I.R. 1939 P.C. 47, 1939 M.W.N. 185,

1939 O.W.N. 282, 20 P.L.T. 265, 49 M.L.W. 349 (P.C.). Where during the trial before a jury the Public Prosecutor read an alleged confession of the accused which not being recorded according to law was inadmissible in evidence, held that the irregularity of allowing it to be read might have influenced the minds of the jury, however carefully the Judge might have endeavoured to remove any impression caused thereby, and that the accused was entitled to a retrial—*Damodar*, 3 P.L.T. 52, 23 Cr.L.J. 141.

If inadmissible evidence has been admitted by the Judge, the High Court will consider whether the evidence improperly admitted is of such a nature that it possibly may have considerably influenced the mind of the jury, and whether it is reasonably certain that the jury would have acted on the unobjectionable evidence if the wrongly admitted evidence had not also been presented to them—*Padam Prasad*, 33 C.W.N. 1121 (1140), 50 C.L.J. 106, 30 Cr.L.J. 993, 119 I.C. 193, A.I.R. 1929 Cal. 617, Ind. Rul. 1929 Cal. 753 (S.B.). See also *Obedali*, 32 Cr.L.J. 421, 129 I.C. 680, 52 C.L.J. 423, A.I.R. 1931 Cal. 65, 1931 Cr.C. 63. But where misreception of a piece of evidence could have had very little weight and no substantial injustice was done, the trial was not vitiated—*Sohrai*, A.I.R. 1930 Pat. 247 (251), 11 P.L.T. 148, 9 Pat. 474, 124 I.C. 836, 31 Cr.L.J. 721. Where the case was rather near the line it would be unsafe to say that the effect of improperly letting in evidence, which in substance went to show that the statements of the accused before the jury were an after-thought, had no effect on the minds of the jury and the verdict of the jury must be set aside—*Issuf Mahomed*, 32 Cr.L.J. 1077, 133 I.C. 748, 33 Bom.L.R. 305, A.I.R. 1931 Bom. 311, 55 Bom. 435, Ind. Rul. 1931 Bom. 396, 1931 Cr.C. 567.

Treating as First Information Report a document which in fact is not such a report and not treating as such a document which is really a First Information Report is a serious error and it is impossible to say that the Jury was not misled on account of such error—*Momin Talukdar v. Emp.*, 30 Cr.L.J. 803, 117 I.C. 601, A.I.R. 1928 Cal. 771, Ind. Rul. 1929 Cal. 553.

921. Clause (c):—It is the Judge to decide upon all matters which it may be necessary to prove in order to enable evidence of particular matters to be given. Thus, where the accused made one confession before the committing Magistrate, and another confession before the Court of Session, retracting the previous confession, and alleged that he was beaten by the Police and the previous confession was caused by inducement offered by the Police, it was held that in order to enable the first confession to be admitted in evidence, the Judge ought to decide whether the confession was induced by illegal promise and whether that inducement still existed or had been effectually dispelled when the Magistrate recorded the confession—*Rupya*, Ratanlal 245 (248).

922. Expression of opinion by Judge:—This section does not lay down any principles on the question of misdirection, but it does lay down what are the duties of the Judge trying a criminal case with the aid of a jury both in the course of the trial and the course of the summing up. A charge to a jury must be read as a whole. If there are salient propositions in law in it, these will, of course, be the subject of separate analysis. But in a protracted narrative of fact, the determination of which is ultimately left to the jury, it must needs be that the view of the Judge may not coincide with the views of others who look upon the whole proceedings in black type. It would, however, not be in accordance either with usual or with good practice to treat such cases as cases of misdirection, if, upon the general view taken, the case has been fairly left within the jury's province—*Jagdish Dutt Shukla v. King-Emp.*, 41 Cr.L.J. 545 (548), 188 I.C. 110, 1940 O.W.N. 481.

Though it is open to a Judge to express his opinion to the jury on any question of fact, still the Judge ought not to express any decided opinion, because the decision of the questions of fact is left entirely to the jury—*Rahamat Ali*, 4 C.W.N. 196. The Judge in his charge to the jury ought not to express his own opinion in terms too dogmatic and unqualified, even though he informs them that they are not bound by any opinion of his—*Osif Molla*, 18 C.W.N. 180, 15 Cr.L.J. 147; *Tajali Mian*, 7 Pat.

50, 28 Cr.L.J. 843 (844), 101 I.C. 459, A.I.R. 1928 Pat. 31, 9 P.L.T. 57; *Topandas*, 25 Cr.L.J. 761, 81 I.C. 249, A.I.R. 1925 Sind 116. The Judge should not impress his own opinion indelibly on the mind of the jury and thus give them no option but to arrive at a decision which he himself arrived at—*Khyruddin*, 53 Cal 372, 92 I.C. 442, A.I.R. 1926 Cal 139, 42 C.L.J. 504, 27 Cr.L.J. 266 (269); *Naibulla*, 43 C.L.J. 488, 96 I.C. 990, A.I.R. 1926 Cal. 996, 27 Cr.L.J. 1038; *Fazaruddin*, 42 C.L.J. 111, 90 I.C. 433, A.I.R. 1926 Cal 105, 26 Cr.L.J. 1553; *Des Raj*, 5 O.W.N. 497, 29 Cr.L.J. 721 (722), 110 I.C. 577, A.I.R. 1928 Oudh 326. If he expresses any opinion, he should also add that it is his own opinion which is not binding on the jury and that the jury is at liberty to draw their own conclusions—*Laxmana*, 2 Weir 385 (386); *Bepin*, 10 Cal. 970; *Topandas*, supra; *Panchu Das*, 34 Cal. 698; *Natabar*, 35 Cal. 531. In a lengthy charge, the trial Judge cannot be expected to pause at every step to assure the jury that matters of fact are matters for them to decide. It is sufficient if the Judge has, not only in the opening portion of his charge, but also several times in the course of it, pointed out the liberty of the jury to draw their own conclusions on questions of fact. And a charge cannot be regarded as defective merely because in dealing with a particular matter at a particular stage, it was not in terms repeated that the jury were entitled to brush aside what might have been suggested as the opinion of the Judge—*Panchu Sheikh*, 34 C.W.N. 1154, 32 Cr.L.J. 190, A.I.R. 1931 Cal 178, 1931 Cr.C. 242, 128 I.C. 811 (F.B.).

In the course of his summing up, the Judge has a right to express his opinion, but it is not necessary that the Judge should, in expressing his opinion, qualify it by the most elaborate safeguards. If a Judge simply states his opinion which the law allows him to state, in such a manner that intelligent jurymen should see for themselves that it is only his opinion and nothing else, it is not necessary for him to add as a safeguard a remark that it is only opinion and that the jury are perfectly at liberty to form their own—*Des Raj*, 5 O.W.N. 497, 29 Cr.L.J. 721 (722), 110 I.C. 577, A.I.R. 1928 Oudh 326. A trial Judge is entitled to express his opinion to a jury freely and emphatically when it seems to him to be necessary to do so provided that he warns the jury that his opinion is in no way binding upon them and that it is the jury's opinion on the facts of the case alone which matters—*Ratnasabapathy v. Public Prosecutor*, A.I.R. 1936 Mad 516 (519), 1936 M.W.N. 459, 59 Mad 904, 37 Cr.L.J. 909, 164 I.C. 243, 44 M.L.W. 155, 71 M.L.J. 231, 1936 Cr.C. 635; *Subba Valayan v. Emp*, 1937 M.W.N. 552; *Madan Tilakdas v. Emp*, 169 I.C. 306, 9 R.C. 914, 38 Cr.L.J. 767, 41 C.W.N. 508, A.I.R. 1937 Cal 266. The Judge should not refrain from expressing his opinion about the facts. Any anxious care on the part of the Judge to avoid suggesting even the faintest suspicion of his own opinion to the jury is, entirely misconceived. A Judge ought to tell a jury what his opinion is, so long as he makes it clear that they are at liberty to regard or disregard it as they please. A charge which avoids any expression of opinion would generally amount to a most colourless and unhelpful direction—*Nagendra-nath*, 34 C.W.N. 164 (169), A.I.R. 1929 Cal. 742, 1929 Cr.C. 390, 124 I.C. 492, 57 Cal. 740, 31 Cr.L.J. 673; *Bapurao Maroti*, A.I.R. 1940 Nag 221 (224), 1940 N.L.J. 264, 190 I.C. 283.

A Judge in charging a jury, does not fulfil his duty if he merely reiterates the evidence given by the witnesses for the prosecution and the defence, and then leaves the jury to decide the case one way or another. It is proper and reasonable that a Judge, when charging a jury at the end of a criminal trial, should direct the jury as to the weight which, in his opinion, ought to be attached to the evidence called at the trial. But of course, charging the jury in connection with the facts of the case the Judge must leave the jury under no misapprehension as to their duty in the matter, namely, that the jury must consider the facts for themselves, and form their own opinion as to the value to be attached to the evidence of the several witnesses, and the proper inference that ought to be drawn from the evidence as a whole—*Scott*, 36 Cr.L.J. 1232, 157 I.C. 821, A.I.R. 1935 Rang. 214, 13 Rang 141, 1935 Cr.C. 847. Where the Judge qualified his observations with the remark that they, the members of the jury, were the sole

Judges of the facts and were not bound to any opinion expressed by him and emphasized this by adding that they were not only at liberty to differ from any opinion expressed by him but that it was their duty as jurymen to give their independent findings, held that there was no misdirection or that the summing up was not unfair although the Judge might have expressed his opinion about evidence in very pronounced terms—*Satdeo*, 37 Cr.L.J. 182 (183), A.I.R. 1936 Oudh 164, 159 I.C. 919, 1936 O.W.N. 28, 1936 O.L.R. 18. See also *Hossain Ali Mir*, 59 C.L.J. 395. The Judge is entitled in the course of his summing up to express his opinion to the jury on any question of fact. But he should not state his own view on important matters of facts in so positive a manner as to lead the jury to believe that it is not open to them to take any other view. If the Judge does so, he takes questions of fact out of the hands of the jury, and thus deprives the accused of the valuable right, given to him by law, to have the questions of fact considered by the jury. A summing up to the jury in which the Judge goes on dictating his own findings on questions of fact, which ought to be left for the decision of the jury, is no summing up at all and a verdict following upon such charge cannot be sustained. While stating the evidence for and against the accused the Judge is entitled to make his own comments as regards each piece of evidence, note discrepancies and inconsistencies in the evidence, and point out generally the way in which it is favourable or unfavourable to the accused. But it is not open to the Judge to tell the jury that any explanation offered by the accused of any fact appearing against him in evidence is incredible without telling the jury plainly, that it is merely his own opinion and that the jury are entitled to draw their own conclusions—*Sumera*, 35 Cr.L.J. 688, 148 I.C. 504, 1933 A.L.J. 1634. See also *Eusuf Ali*, 34 Cr.L.J. 430, 142 I.C. 653, A.I.R. 1933 Cal. 190, 1933 Cr.C. 236, Ind. Rul. 1933 Cal. 312; *Hadi Husain*, 35 Cr.L.J. 502, 147 I.C. 911, 11 O.W.N. 211; *Lala*, 35 Cr.L.J. 668, 148 I.C. 339, 1933 A.L.J. 1446, A.I.R. 1933 All. 941, 1933 Cr.C. 1561; *Hari Lal*, 36 Cr.L.J. 1026, A.I.R. 1935 Pat. 263, 156 I.C. 921, 14 Pat. 225, 16 P.L.T. 380, 1935 Cr.C. 749; *Mangal Singh*, A.I.R. 1931 Oudh 171, 8 O.W.N. 344, 1931 Cr.C. 443, 132 I.C. 232, 32 Cr.L.J. 858; *Hossain*, 35 Cr.L.J. 1487, 152 I.C. 40, 59 C.L.J. 396, A.I.R. 1934 Cal. 757, 1934 Cr.C. 1165. It is not necessary for the Judge on every occasion on which he expressed his opinion on a point of fact to tell the jury that they were sole Judges of questions of fact. If he makes that statement quite clearly to the jury at the end of his charge, that is sufficient—*Shree Kishen*, A.I.R. 1935 All. 928, 37 Cr.L.J. 173, 159 I.C. 900.

The essential test is whether, in his discussion of the evidence on each point, the Judge always leaves it to the jury and does not usurp the jury's functions. The Judge not only may but should let his opinion appear, provided that he leaves the decision fairly to the jury and does not take it out of their hands—*Abdul Gafur Kotwal v. Emp.* 40 Cr.L.J. 101 (103), 178 I.C. 637, 1.L.R. (1938) 1 Cal. 636, A.I.R. 1938 Cal. 658

Duty of jury.

299. It is the duty of the jury—

- (a) to decide which view of the facts is true and then to return the verdict which under such view ought, according to the direction of the Judge, to be returned;
- (b) to determine the meaning of all technical terms (other than terms of law) and words used in an unusual sense which it may be necessary to determine, whether such words occur in documents or not;
- (c) to decide all questions which according to law are to be deemed questions of fact;
- (d) to decide whether general indefinite expressions do or do not apply to particular cases, unless such

expressions refer to legal procedure or unless their meaning is ascertained by law, in either of which cases it is the duty of the Judge to decide their meaning.

Illustrations

(a) A is tried for the murder of B

It is the duty of the Judge to explain to the jury the distinction between murder and culpable homicide, and to tell them under what views of the facts A ought to be convicted of murder, or of culpable homicide, or to be acquitted.

It is the duty of the jury to decide which view of the facts is true and to return a verdict in accordance with the direction of the Judge, whether that direction is right or wrong, and whether they do or do not agree with it.

(b) The question is whether a person entertained a reasonable belief on a particular point—whether work was done with reasonable skill or due diligence.

Each of these is a question for the jury.

923. View of facts:—The jury must take into consideration all the facts alleged for or against the accused, and decide whether the view taken by the prosecution which leads to the conclusion of his guilt, or the view which is set up on his behalf and which would make him innocent, commends itself to their judgment—*Humayun*, 21 W.R. 72 (86).

924. Questions of fact:—It is the duty of the jury and not of the Judge to decide all questions of fact. Where in the summing up, the Judge left no question of fact for the jury to decide but decided all himself, and said expressly that in his opinion it was proved that the accused had committed murder, and the only thing he left to the jury was to say which of the exceptions to sec. 300, I. P. C., applied if the jury held that the offence did not amount to murder, it was held that such a summing up was not in accordance with law, and a new trial should be ordered—*Shamsher*, 9 W.R. 51. But although the jury are the sole judges of facts, still it is the duty of the Judge to help the jury to find facts. He has to advise the jury as to the logical bearing of the evidence admitted upon the matters to be found by them—*Afiruddi*, 23 C.W.N. 833, 20 Cr.L.J. 661.

The following are instances of questions of fact—(1) The question of intent in a case of kidnapping—*Hughes*, 14 All 25; (2) the question as to whether there was free consent, in a case under sec. 376, I. P. C.—*Gopaul*, 1 W.R. 21; (3) the question whether a fact was or was not proved, or what fact was proved—*Sadhu Sheikh*, 4 C.W.N. 576; (4) the question as to the identity of thumb impressions on two or more documents for the purpose of ascertaining whether the thumb impressions are of one and the same person—*Panchu Mandal*, 2 Cr.L.J. 311, 1 CLJ 385; or the question whether the signatures on certain documents are the signature of the accused—*Lalsing*, Ratanlal 452 (453); (5) the question whether a particular witness is to be believed or not—*Kali Singh*, 7 C.L.J. 246; (6) the question whether possession of the stolen property was recent enough to warrant a conviction for the substantive offence of dacoity—*Guzzala Hanuman*, 26 Mad. 467; (7) the question as to whether the accused was under 12 years of age and incapable of understanding the nature of his act—*Ali Raza*, 28 O.C. 69, 26 Cr.L.J. 310, 84 I.C. 454, A.I.R. 1925 Oudh 311; (8) the question whether a confession is true or false is a question of fact to be decided by the jury, and the question whether the confession is voluntary (and therefore admissible) or not is for the Judge to determine. It is not open to the Judge to ask the jury to determine whether the confession is voluntary or not, even though it is a question of fact, for the result would

be that the jury would have had put before them evidence which was inadmissible, and the difficulty of removing the effect of the inadmissible evidence from the jury's mind is obvious—*Khira Mandal*, 33 C.W.N. 1112 (1113), 1929 Cr.C. 362, A.I.R. 1929 Cal. 726.

Illustration (a):—Although Illustration (a) lays down that in a charge of murder the Judge should explain to the jury the distinction between murder and culpable homicide, still where in a trial for murder, a verdict for culpable homicide not amounting to murder could not be properly come to under any aspect of the case before the Court, the Judge is not called upon to explain to the jury the distinction between murder, and culpable homicide—*Nga Mya*, 8 L.B.R. 306, 17 Cr.L.J. 49 (F.B.).

300. In cases tried by jury, after the Judge has finished his charge, the jury may retire to consider their verdict.
Retirement to consider.

Except with the leave of the Court, no person other than a juror shall speak to, or hold any communication with, any member of such jury.

925. After a charge is made to the jury, the jurors should not be allowed to disperse but should at once retire to consider the verdict. Where after the charge, they were allowed to go home and come back some hours later, and then they considered their verdict, held that the trial was vitiated—*Sariman*, 6 P.L.T. 552, 26 Cr.L.J. 861, 86 I.C. 717, A.I.R. 1925 Pat. 595, 3 Pat.L.R. 160 (Cr.). This section requires that during the whole of the period between the time when the jury retire to consider their verdict and the time when their verdict is taken by the Judge, they should all be in their retiring room together. Where the nine jurors retired to consider their verdict, but at 4 P.M. five of them came out of the retiring room and sat in Court, and the remaining four stayed in the room till 4-30 P.M. and then came out and sat in Court, when the Judge proceeded to take the verdict of the jury, held that the accused had not the benefit of the joint consideration and consultation of all the jury before the verdict was returned, and the verdict must consequently be set aside—*Kaseruddin*, 31 Cr.L.J. 1090, 126 I.C. 753, A.I.R. 1930 Cal. 446.

This section which is explicit in its terms, should be strictly observed and it is highly undesirable that a jury in any case should have any communication with anybody (even the Judge) who is not a juror upon the subject-matter of the trial. It is also highly undesirable that a police constable should be stationed anywhere or in any position in which he can hear the deliberations of the jurymen, or that anybody should be in a position where it is possible for him to know the form the deliberations of the jury took or what view any particular juror expressed about the matter—*Banamali*, 44 Cal. 723, 21 C.W.N. 167, 18 Cr.L.J. 311. Where it was proved that after the charge to the jury had been delivered, a person other than a juror spoke to or held communication with a member of the jury without the leave of the Court, it was held that that was sufficient to upset the verdict, and it was not necessary to consider whether the irregularity had in fact prejudiced the accused—*Benimadhub*, 46 Cal. 207, 22 C.W.N. 740, 17 Cr.L.J. 737. The jury are not entitled at any stage during the progress of the trial (whether before or after the charge has been delivered) to talk to or discuss the case with any person connected with the accused—*Bhuban Chandra*, 31 C.W.N. 828, 104 I.C. 111, A.I.R. 1927 Cal. 628, 8 A.I.Cr.R. 319, 55 Cal. 279, 28 Cr.L.J. 783 (784). But where during an adjournment of the Court before the Judge's charge was finished, one of the jurors was seen conversing with strangers but it did not appear that the conversation was about the case, it was held that this was not a sufficient ground for interfering with the verdict of the jury—*Pull Subba*, 10 L.W. 379, 20 Cr.L.J. 790, 53 I.C. 694.

After the conclusion of the evidence and after the conclusion of the address of the

Public Prosecutor, and before the defence had been heard in full and before the Sessions Judge had summed up the case to the jury, one of the jurors, in a room occupied by the clerk of the pleaders, in answer to some questions put to him, intimated that in his opinion the accused was guilty of the charge against him; and the Sessions Judge, although informed of the fact, proceeded with the trial, and took the verdict of the jury; *held* that the verdict must be set aside and there should be a fresh trial before a fresh jury—*Nazir Ali*, 25 C.W.N. 240. After the jury had retired to consider their verdict in a criminal case they saw the Judge in his chamber and asked him for a direction on a point of law. The Judge and the jury then went into the Court-room and the jury in the presence of the pleaders put certain questions to the Judge, and the answers thereto were recorded. *Held* that the mere fact that a question was put by the jury to the Judge, not in open Court but in chamber did not vitiate the trial, but was at best an irregularity—*Bilashchandra*, 27 C.W.N. 626 (628).

301. When the jury have considered their verdict, the foreman shall inform the Judge what is their verdict, or what is the verdict of a majority.

Delivery of verdict.

926. Verdict:—The verdict must be either of "guilty" or "not guilty." A verdict in the form "we give the accused person the benefit of doubt" is not known to law, though jurors sometimes express a verdict of not guilty in that way. The proper verdict in such a case would be a verdict of "not guilty," because this verdict covers every degree of mental condition from mere hesitating doubt as to the guilt of the accused to a complete belief in his innocence—*Panchanan Sarkar*, 37 C.W.N. 341 (343), 1933 Cr.C. 582, 34 Cr.L.J. 608, 143 I.C. 600, A.I.R. 1933 Cal. 404, Ind. Rul. 1933 Cal. 448.

Where the jury brought in a verdict that they agreed with whatever opinion the Judge had formed and, being sent back, came back within 9 minutes and delivered their verdict, *held* that it was clear from the time occupied by the jury in their second deliberation that they did not properly consider the case and did not bring in a genuine verdict and that the case should be re-tried—*Abdul Barik*, 30 Cr.L.J. 54, 113 I.C. 70, 48 C.L.J. 477, A.I.R. 1928 Cal. 827, Ind. Rul. 1929 Cal. 81.

If the accused is charged with a graver offence, the jury may return a verdict of a lesser offence, even though the accused was not charged with the lesser offence—*Pattikadan*, 26 Mad 243. See sec. 238. Thus, on a charge of murder, it is open to the jury to bring in a verdict of culpable homicide not amounting to murder—*Devji Govinji*, 20 Bom. 215. In a charge of dacoity, the jury can acquit the accused of dacoity and return a verdict of guilty as regards the charge of theft involved in that of dacoity—*Chandra*, 10 Bom.L.R. 632 (633), 8 Cr.L.J. 143. The jury can return a verdict for abetment or attempt, though the prisoner was charged with the substantive offence only—*S. P. Ghosh*, 8 Bur.L.T. 247, 16 Cr.L.J. 676; *Subrati*, 13 O.C. 295, 11 Cr.L.J. 630. Where the charge against the accused was under section 149 with section 325. I. P. C., (i.e., being members of an unlawful assembly, and causing grievous hurt by implication) a verdict of guilty of the offence under sec. 325 alone, although it did not form the subject of a separate charge, was legally sustainable—*Mahaddi*, 5 Cal. 871. When a person is charged with several offences arising out of a single act or series of acts, the word 'verdict' means the entire verdict on all the charges and is not confined to a verdict on a particular charge—*Krishna Dhan*, 22 Cal. 377. Where there are several accused, the jury have to give their verdict on the acts against each man severally, and even when several prisoners are jointly tried, the jury can convict one and acquit the others—*Famiruddi Biswas*, 16 C.W.N. 909, 13 Cr.L.J. 715.

By 'verdict' should be understood the collective opinion of the jury as a body, arrived at after mutual consultation and ascertained and announced by the foreman. In case of disagreement among the jury, the individual opinions of the members are intended to be disclosed—*Abdul Hamid*, 36 Mad. 585. If a Judge records the individual opinions of the jurors by name, the procedure is opposed to the f

principle of the scheme of trial by jury—*Jagannath*, 12 O.L.J. 643, 2 O.W.N. 534, 26 Cr.L.J. 1346, 89 I.C. 386, A.I.R. 1925 Oudh 746. It is a dangerous thing for a Court to rely upon anything except the verdict of the jury, or to listen to the deliberation of the jury, or to the statements of *individual* jurymen made to this or that person after they had performed their duty and delivered their verdict—*Banamali*, 44 Cal. 723, 21 C.W.N. 167. Where it was alleged that the verdict of the jury was arrived at by casting lots, whereupon the Judge held an inquiry and examined the individual jurors, *held* that the statements of the jurors as to what happened in the jury-room and as to the mode in which the verdict was arrived at were inadmissible—*Harkumar*, 40 Cal. 693, 17 C.W.N. 787, 14 Cr.L.J. 392.

The statute law in this country has not laid down any particular form in which the jury are to deliver their verdict. Consequently, there is no legal bar in the way of the jury to return their verdict in any way they think fit provided it is complete and exhaustive as to facts in issue which go to make up the charges—*Kasimuddin*, 36 Cr.L.J. 480 (481), 154 I.C. 110, 60 C.L.J. 45, A.I.R. 1935 Cal 31. Where after the delivery of the verdict the jury want to say something more, it is undesirable to stop the jury at such stage of the proceedings, for it may happen that before the verdict is recorded the foreman may make some observations in respect of that verdict which may show the Judge that the jury have not properly understood the case. It would then be the duty of the Judge not to record the verdict, but to re-charge the jury so as to lay the case properly before them—*Narayan*, 30 Cal 485. Where the jury were apparently not able to follow the summing up of the Judge as regards the law bearing on the charges, it is the duty of the Judge, when the foreman told him of it, to explain it to them again—*Palavesa Tevan*, 1911 M.W.N. 190, 12 Cr.L.J. 140.

302. If the jury are not unanimous, the Judge may require them to retire for further consideration. Procedure where jury differ. After such a period as the Judge considers reasonable, the jury may deliver their verdict, although they are not unanimous.

927. Application of section:—Under this section the Sessions Judge can ask the jury, if they are not unanimous, to retire for further consideration, *before* the delivery of verdict, but cannot do so *after* its actual delivery—*Kya Nyun*, 7 L.B.R. 140, 15 Cr.L.J. 678; *Abdul Hamid*, 36 Mad. 585. The Judge may act under this section when he has merely ascertained from the jury in what proportion they are divided in opinion; but when the nature of the actual finding has been disclosed, the Court is debarred from sending the jury back for re-consideration—*Kya Nyun*, *supra*.

928. "If the jury are not unanimous":—A jury may be required to retire for further consideration, only when their verdict is *not unanimous*. A unanimous verdict of the jury, unless it is contrary to law, must be received by the Judge—*Mahaddi*, 5 Cal 871; *Hla Gyi*, 3 L.B.R. 75. If the Sessions Judge disagrees with the unanimous verdict of the jury, the only course open to him is to act under sec. 307—*Kondiba*, 28 Bom. 412.

When the jury are not unanimous, it is open to the Judge to require them to retire for further consideration, giving at the same time further directions on matters of law—*Bhadmia*, 6 Bom L.R. 258. But the Judge is not bound to summon a fresh jury—*Gopaul*, 1 W.R. 41.

303. (1) Unless otherwise ordered by the Court, the jury shall return a verdict on all the charges on which the accused is tried, and the Judge may ask them such questions as are necessary to ascertain what their verdict is.

Verdict to be given on each charge.
Judge may question jury.

Questions and answers
to be recorded.

(2) Such questions and the answers to
them shall be recorded.

929. Verdict on all the charges:—The Judge ought to call upon the jury to return a verdict on each one of the heads of the charges. If the trial is for murder of two persons and the jury return a verdict of guilty, the Sessions Judge should ascertain, whether the verdict relates to the killing of one or other or both—*Berkia, Ratanlal* 746; *Krishna Dhan*, 22 Cal. 377.

In a case where an accused person is charged with both kidnapping and abduction, it is essential to take a separate verdict on each charge. If this is not done, it may become a mere matter of speculation what the decision of the jury really was—*Nanda Ghosh v. Emp.*, 40 Cr.L.J. 649 (651), 182 I.C. 322, A.I.R. 1939 Cal. 321. But where in taking the verdict of the jury the Judge insisted that they should come to a finding whether each of the accused was guilty, under sec. 366, I. P. C., of the offences both of abduction and of kidnapping with the intent specified in the section, it is perfectly clear that there cannot be any such verdict under sec. 366, I. P. C.. It is a complete misunderstanding of the section to ask for a verdict under both heads of kidnapping and of abduction—*Krishna Chandra v. Emp.*, 45 C.W.N. 27.

Where there are more than one accused as well as several charges, it would be a convenient course if the Judge were to take a verdict of the jury upon each charge separately. Thus, in the case the accused were charged under secs. 147, 148, 304, 325 and 326, I. P. C., the Sessions Judge asked the jury the comprehensive question: "I shall want you to give me a verdict in respect of the offences under secs. 147, 148, 304, 325 and 326, I. P. C., for each of the accused" and the jury returned an incomplete verdict, i.e., they gave a verdict only as regards secs. 147 and 148 and expressed no opinion as regards the other charges; and the Sessions Judge had to question the jury again on the other charges. The High Court held the procedure to be faulty, and directed that in such a case the Judge should at first put the question to the jury: "What is your verdict with regard to each of the accused as regards the charge under sec. 147, I. P. C.?" He would then get a clear answer upon this charge. Then he would ask, "What is your verdict with regard to each of the accused as regards the charge under sec. 148?" He would then get a definite answer to that question. Then he would proceed in the same way and ask: "What is your verdict with regard to each of the accused as regards the charge under sec. 304?" and so on. If this procedure is adopted, there would be no difficulty in getting a complete verdict from the jury—*Eran Khan*, 50 Cal. 658 (663), 24 Cr.L.J. 838.

If a Judge charges the jury and takes a verdict as regards some only of the accused, and afterwards hears arguments and takes verdict as regards the remaining accused, he acts contrary to the provisions of this Code—*Abdul Hamid*, 36 Mad. 585.

930. Questioning the jury:—This section provides a suitable procedure where the verdict of the jury is so vague and uncertain that in order to ascertain whether the jury intended to bring in a verdict of guilty or not guilty, it is necessary to ask the supplementary questions—*Darajatulla*, 34 C.W.N. 283 (284), 31 Cr.L.J. 1150, 127 I.C. 79, A.I.R. 1930 Cal. 443. The Judge is entitled to question the jury as to their verdict only where it is ambiguous or incomplete so that it is necessary to ascertain what the verdict really is—*Abdul Hamid*, 36 Mad. 585; *Abdul Hamid*, 32 Cal. 759; *Dada*, 15 Bom. 452; *Wafadar*, 21 Cal. 955; *Devji*, 20 Bom. 215. If the verdict of the jury is incomplete or is not free from ambiguity, the Judge is wrong in accepting such verdict without questioning the jury as to what their verdict really is. Thus, where the jury returned a verdict of 'guilty but not voluntarily' under a charge of *voluntarily* causing grievous hurt, and the Judge accepted the verdict to be one of guilty, and convicted the accused, it was held that the verdict was really one of not guilty, and the Judge was wrong, without further questioning the jury, in treating it as a verdict of 'guilty'—*Khudiram*, 12 C.W.N. 530, 7 Cr.L.J. 362; see also *Chidghan*, 7 C.W.N. 135; *Satdeo*, 37 Cr.L.J. 182, A.I.R. 1936

Oudh 164, 159 I.C. 919, 1936 O.W.N. 28, 1936 O.L.R. 18. So also, where in a case there were several accused, and several charges under secs. 147, 148, 304, 325 and 226, I. P. C., and the jury returned a verdict of guilty under sec. 147 against some of the accused and under sec. 148 against the rest, but gave no verdict on the other charges, *held* that the verdict of the jury was incomplete and it was necessary for the Sessions Judge to put further questions to the jury to ascertain what their verdict was as regards the charges under secs. 304, 325 and 326, I. P. C.—*Eran Khan*, 50 Cal. 658, 24 Cr.L.J. 838; *Ram Prasad*, 26 Cr.L.J. 1090, 88 I.C. 178, A.I.R. 1926 Nag. 53. If the verdict of the jury is confused and unintelligible, it is the duty of the Judge to obtain from them a proper and correct verdict before accepting the verdict given—*Wilson*, 30 C.W.N. 693, 27 Cr.L.J. 926, 96 I.C. 270, 43 C.L.J. 537, A.I.R. 1926 Cal. 895. Thus, at the conclusion of a trial, the jury returned a verdict of culpable homicide not amounting to murder. The Judge questioned them as to which part of sec. 304, I. P. C., their verdict came under. Their answers revealed the fact that they did not at all understand the meaning of the section, whereupon the Judge again explained the law. The jury again retired, considered their verdict and brought in a unanimous verdict of murder. *Held* that the first verdict being incomplete and the result of a misunderstanding of the meaning of murder and culpable homicide, the Judge was right in explaining the law to them; the second verdict was the legal verdict and one acceptable by the Judge—*Nga Tin Gyi*, 4 Rang. 488, 28 Cr.L.J. 213, 99 I.C. 1013, 5 Bur.L.J. 209, A.I.R. 1927 Rang. 68, 7 A.I.Cr.R. 394.

If upon a verdict under sec. 304, I. P. C., being brought in, a Judge thinks that the verdict is not correct but that it should be under sec. 302, I. P. C., and questions the jury to find out whether the question of intention has been duly considered, such questioning would not be warranted either by sec. 303, Cr. P. C., or by Rule 74 (b), Rules and Circular Orders of the High Court, Vol. I (Criminal), page 28. If he disagrees with the verdict under sec. 304, I. P. C., being of opinion that it should be under sec. 302, I. P. C., his proper course would be to make a reference to the High Court under sec. 307, Cr. P. C., and for that purpose it would be open to him to question the jury in order to find out their reasons for the verdict that they brought in. If while trying to get a special verdict as regards the particular part of sec. 304, I. P. C., under which the jury desired to find the prisoner guilty, a Judge comes to be of opinion that the jury have not properly understood the law as to the offence of culpable homicide not amounting to murder, he would be justified in explaining that law to them again and indeed it would be his duty to do so. But such summing up will have to be confined to that offence only and the questions to be put to the jury should be carefully framed to elicit from them their special verdict only. General questions, the effect of which may be to travel outside sec. 304, I. P. C., should be avoided—*Sadek Mondal*, 38 C.W.N. 251 (257), 35 Cr.L.J. 496, 147 I.C. 860, A.I.R. 1934 Cal. 173, 61 Cal. 256, distinguishing *Nga Tin Gyi*, *supra*, on the ground that in that case it was held that the questions that were put were such as could be properly asked. After the jury have considered the verdict and the foreman has informed the Judge what is their verdict or what is the verdict of a majority, the Judge has no jurisdiction to charge the jury afresh. The law contemplates only one charge by the Court and that after the case for the defence and the prosecutor's reply are concluded (*vide* sec. 297, Cr. P. C.), and there is no provision in law entitling the Judge either to re-charge the jury or to argue out the matter with the jurors after the verdict has been delivered. If the party after retiring to consider their verdict inform the Judge that they did not understand the law as explained to them by the Judge, it is no doubt open to the Judge to explain the law again to the jury, but there is no provision in law which authorizes a Judge, in the event of his disagreeing with the verdict of the jury, to charge the jury afresh. Where the verdict of the jury is vague and uncertain, sec. 303, Cr. P. C., authorizes the Judge to put necessary question with a view to ascertain whether they intended to bring in a verdict of guilty or not guilty but, beyond putting questions with a view to ascertain what the verdict of the jury is, the Judge has no jurisdiction to enter into a

discussion of the facts of the case with the jury. If the verdict is general and complete and free from ambiguity, the Judge is not competent to put questions to the jury, nor can he ask the jury to reconsider their verdict. If the Judge disagrees with the verdict he can proceed under sec. 307, Cr. P. C., but he cannot again proceed to charge the jury and ask them to re-consider their verdict—*Dari*, 36 Cr.L.J. 1377 (1379), A.I.R. 1935 All. 1020, 1935 A.W.R. 1137, 158 I.C. 438, 1935 Cr.C. 1254, 1935 A.L.J. 1142.

In a case of rioting, if the verdict of the jury leaves it uncertain what the common object of the assembly is, the Judge ought to ask the jury questions under this section to ascertain the common object. If he does not do so, the verdict is bad in law—*Wafadar*, 21 Cal. 955 (973). Where in a case under sec. 408, I. P. C., the jury returned a verdict of guilty but were not definite as to the amount embezzled, but gave some approximate amount which was a fraction of the amount charged, and where the Judge was inclined to think that a much larger amount than that mentioned by the jury had been misappropriated, *held* that in a case like this, the Judge was entitled to ask the jury such questions as were necessary to ascertain what their verdict was—*Khirode*, 29 C.W.N. 54, 40 C.L.J. 555, 26 Cr.L.J. 532. Where the verdict is general and complete and free from ambiguity, the Judge is not competent to put questions to the jury, but must accept it without question—*Dhunum*, 9 Cal. 53; *Asfar Sheikh*, 15 C.W.N. 198, 11 Cr.L.J. 557; *Dada*, 15 Bom. 452; *Kondiba*, 28 Bom. 412; *Chirkua*, 2 A.L.J. 475; *Ram Naicker*, 22 M.L.J. 355; *Bilas Chandra*, 27 C.W.N. 626 (628). Where the verdict was clear and precise, but for some reason or other the Judge took upon himself to examine the jurors to ascertain whether their verdict was based upon the evidence of one or other of two important witnesses called for the Crown, *held* that the Judge was not permitted by law to ask such questions—*Derajatulla*, 34 C.W.N. 283 (284).

When the jury have delivered a verdict, the Judge cannot ask them to reconsider their verdict. The Judge is only entitled to question the jury to ascertain what their verdict really is—*Abdul Hamid*, 36 Mad 585; *Lyme*, 4 Lah. 382; *Kya Nyun*, 7 L.B.R. 140, 15 Cr.L.J. 678. If he disagrees with their verdict, he should proceed under sec. 307, but he cannot ask them to reconsider their verdict—*Kya Nyun*, *supra*. But the Judge is not obliged to accept an absurd verdict either as a verdict of guilty or as a verdict of not guilty. In such a case he is quite entitled to tell the jury to consider the matter over again. He is not bound to accept and interpret for himself a verdict of an unintelligible character, but he can, if he likes, put questions to the jury, or re-charge the jury on certain specific points and ask them to go and get their heads clear on the subject and give a proper verdict. But it is not a proper procedure for the Judge to cross-examine the jury—*Hamid Ali*, 57 Cal. 61, 1930 Cr.C. 401, 125 I.C. 97, A.I.R. 1930 Cal. 320, 31 Cr.L.J. 761, Ind. Rul. 1930 Cal. 481; *Rafat Sheikh*, 34 Cr.L.J. 1084, 145 I.C. 861, A.I.R. 1933 Cal. 640, 60 Cal. 729, 1933 Cr.C. 1053. Where a verdict is not clear and definite, it is not wrong in sending the case back to the jurors for a clear verdict according to law. The recommendation made by the jurors in their verdict is not a part of the verdict and should not be treated as such—*Vidya Sagar*, A.I.R. 1934 Oudh 34, 10 O.W.N. 1270, 1934 Cr.C. 88, 147 I.C. 689, 1934 O.L.R. 149.

Asking reasons for verdict—This section enables the Judge to ask only such questions as are necessary to ascertain what the verdict is. The Judge can put questions to the jury only if the verdict is ambiguous and there is a doubt in the mind of the Judge as to what the jury mean by the verdict they have given. This section does not mean that the Judge can question the Jury about the reasons why they have given a particular verdict—*Karim Dai*, 35 C.W.N. 407 (408), 1931 Cr.C. 836, A.I.R. 1931 Cal. 636, 134 I.C. 1133; *Kondiba*, 28 Bom. 412; *Bhadma*, 6 Bom.L.R. 258; *Derajatulla*, 34 C.W.N. 283 (284), 31 Cr.L.J. 1150, 127 I.C. 79, A.I.R. 1930 Cal. 443; *Subia Thevan*, 43 Mad 744; *Ali Hyder*, 4 P.L.T. 425, 26 Cr.L.J. 856, 86 I.C. 712, A.I.R. 1923 Pat. 474; *Ram Jag*, 7 Pat. 55, 29 Cr.L.J. 465 (468), 109 I.C. 114, A.I.R. 1928 Pat. 203, 9 P.L.T. 567.

But a reference under sec. 307 does not become invalid by reason of the Sessions Judge having asked the jury questions as to the reason of their verdict—*Subia Thevan*,

in his opinion the accused is innocent, this opinion would not properly be excluded. When a Judge is entitled under the law to make a decision, it is competent to him to give reasons—*Premchand*, 36 Cr.L.J. 1359 (1362), 158 I.C. 365, A.I.R. 1935 Sind 189, 1935 Cr.C. 952.

For the purposes of this section, the Judge of the Judicial Commissioner's Court sitting in Session is a High Court (see sec. 266) and not a Court of Session; consequently, he has no power to disagree with the unanimous verdict of the jury and to refer the case to the High Court under sec. 307—*Mithoo*, 25 Cr.L.J. 428, A.I.R. 1925 Sind 34, 77 I.C. 604.

306. (1) When in a case tried before the Court of Session

Verdict in Court of the Judge does not think it necessary to Session when to prevail. express disagreement with the verdict of the jurors or of a majority of the jurors, he shall give judgment accordingly.

(2) If the accused is acquitted, the Judge shall record judgment of acquittal. If the accused is convicted, the Judge shall, *unless he proceeds in accordance with the provisions of section 562*, pass sentence on him according to law.

The italicised words have been added by sec. 80 of the Cr. P. C. Amendment Act, XVIII of 1923. The amendment is merely verbal, and is the same as that made in secs 245 (2) and 258 (2).

932. When the verdict of the jury has been delivered, the Sessions Judge is bound to say and record whether he agrees with the verdict or not—*Chand Bagdee*, 7 W.R. 6; *Bahar Ali*, 15 W.R. 46. It is not competent to a Sessions Judge, after the jury has returned their verdict and gone away, and in the absence of the accused, to examine some witnesses and then to act on the evidence in determining whether or not he should differ from the jury—*Nangappa*, 7 Bom.L.R. 979, 3 Cr.L.J. 42. If he agrees with and accepts the verdict of the jury (or of the majority) he is bound to deliver judgment according to the verdict; once he agrees with the verdict, he cannot afterwards reconsider it or disagree with it and refer the matter to the High Court—*Mojahur*, 4 C.W.N. 683. It may not infrequently happen that a Judge trying a case with the jury considers that the appreciation of evidence by the jury is incorrect, and that their verdict is wrong, but at the same time it is not so perverse a verdict as to justify a reference to the High Court—*Mhasku*, 37 Cr.L.J. 26 (27), 158 I.C. 1090, A.I.R. 1935 Bom 165, 37 Bom.L.R. 109, 1931 Cr.C. 325. Where the Sessions Judge wrote in his judgment: "There is room for doubt as to whether the accused is guilty; however, I see no reason to differ from the unanimous verdict of the jury on what are questions of fact. Not agreeing with but accepting the verdict of the jury I convict the accused." *Held*, that this method of expression was not desirable. A Sessions Judge is under no obligation whatsoever to have or express his individual opinion upon really disputable questions of fact which are for the jury. If a Judge agrees or disagrees, it is a matter *prima facie* for himself, but if he disagrees with the verdict and is of opinion that it is necessary for the ends of justice to submit the case to the High Court, he is bound to do so (sec. 307). If he is not clearly of opinion that the conviction is wrong so as to make it necessary for the ends of justice to submit the case to the High Court, then it may be said that "the Judge does not think it necessary to express disagreement" (sec. 306), and his opinion being on that view irrelevant, he will be well advised to keep it to himself. The conviction, however, was not illegal—*Ebrahim Molla*, 56 Cal. 473, 33 C.W.N. 371 (373), 70 Cr.L.J. 1020, 1929 Cr.C. 28. The Judge may disagree, and yet not think it necessary to express disagreement, and in such a case sec. 306, Cr. P. C., requires that he shall accept the verdict. The word "disagrees" in sec. 307, Cr. P. C., must, therefore, mean that the Judge thinks it necessary to express disagreement; otherwise, under sec. 306,

Cr. P. C., he shall be bound to give judgment according to the verdict. As to whether he does or does not think it necessary to express disagreement, must obviously be a matter for the Judge himself. It may be that a Judge may think that the jury's appreciation of evidence is wrong and still hold that it is not perverse or unreasonable in that view, though disagreeing in fact, he may not think it necessary to express disagreement. In so refraining from expressing disagreement, he may well be influenced by the consideration that even if he were to make a reference, the High Court was not likely to interfere unless the verdict was shown to be not merely erroneous, but perverse or unreasonable. It would be wrong to say that in so doing the Judge would be acting illegally, as he would be clearly within the terms of sec 306, Cr. P. C.—*Afsar Shaikh v. Emp.*, 38 Cr.L.J. 1075 (1076), 171 I.C. 320, 10 R.C. 263, 41 CWN 1020, A.I.R. 1937 Cal. 540, I.L.R. (1937) 2 Cal. 694.

Where the verdict of the jury is not only inconsistent in itself in view of the evidence but is also clearly against the trend of the Judge's charge, the Judge owes a duty not only to the Appellate Court but also to his own judicial conscience to state some reason or other for accepting the verdict. His failure to give reasons makes it impossible for the appellate Court to regard such acceptance as a judicial act—*Nachappa Goundan v. Emp.*, 1937 M.W.N. 737.

Sentence :—If the Judge accepts the verdict of the jury and convicts the accused, he must pass an adequate sentence for the offence; the fact that he personally entertains some doubt as to the propriety of the verdict should not be a ground for mitigating the sentence. Having accepted the verdict, he is bound to award punishment as if he has agreed with the verdict—*Ramdas*, 8 Pat. 314, 30 Cr.L.J. 721 (724), 117 I.C. 173, 10 P.L.T. 409, A.I.R. 1929 Pat. 313, Ind. Rul. 1929 Pat. 381. See also *Mohsena Khatun v. Emp.*, A.I.R. 1939 Cal. 610 (612), 43 C.W.N. 893, 40 Cr.L.J. 880, 184 I.C. 222.

307. (1) If in any such case the Judge disagrees with the verdict of the jurors, or of a majority of the jurors, on all or any of the charges on which any accused person has been tried, and is clearly of opinion that it is necessary for the ends of justice to submit the case in respect of such accused person to the High Court, he shall submit the case accordingly, recording the grounds of his opinion, and, when the verdict is one of acquittal, stating the offence which he considers to have been committed, and in such case, if the accused is further charged under the provisions of section 310, shall proceed to try him on such charge as if such verdict had been one of conviction.

(2) Whenever the Judge submits a case under this section, he shall not record judgment of acquittal or of conviction on any of the charges on which such accused has been tried, but he may either remand such accused to custody or admit him to bail.

(3) In dealing with the case so submitted the High Court may exercise any of the powers which it may exercise on an appeal, and subject thereto it shall, after considering the entire evidence and after giving due weight to the opinions of the Sessions Judge and the jury, acquit or convict such accused of any offence of which the jury could have convicted him upon the charge framed and placed before it; and, if it convicts him, may

in his opinion the accused is innocent, this opinion would not properly be excluded. When a Judge is entitled under the law to make a decision, it is competent to him to give reasons—*Premchand*, 36 Cr.L.J. 1359 (1362), 158 I.C. 365, A.I.R. 1935 Sind 189, 1935 Cr.C. 952.

For the purposes of this section, the Judge of the Judicial Commissioner's Court sitting in Session is a High Court (see sec. 266) and not a Court of Session; consequently, he has no power to disagree with the unanimous verdict of the jury and to refer the case to the High Court under sec. 307—*Mithoo*, 25 Cr.L.J. 428, A.I.R. 1925 Sind 34, 77 I.C. 604.

306. (1) When in a case tried before the Court of Session the Judge does not think it necessary to express disagreement with the verdict of the jurors or of a majority of the jurors, he shall give judgment accordingly.

(2) If the accused is acquitted, the Judge shall record judgment of acquittal. If the accused is convicted, the Judge shall, *unless he proceeds in accordance with the provisions of section 562*, pass sentence on him according to law.

The italicised words have been added by sec. 80 of the Cr. P. C. Amendment Act, XVIII of 1923. The amendment is merely verbal, and is the same as that made in secs. 245 (2) and 258 (2).

932. When the verdict of the jury has been delivered, the Sessions Judge is bound to say and record whether he agrees with the verdict or not—*Chand Bagdee*, 7 W.R. 6; *Bahar Ali*, 15 W.R. 46. It is not competent to a Sessions Judge, after the jury has returned their verdict and gone away, and in the absence of the accused, to examine some witnesses and then to act on the evidence in determining whether or not he should differ from the jury—*Nangappa*, 7 Bom.L.R. 979, 3 Cr.L.J. 42. If he agrees with and accepts the verdict of the jury (or of the majority) he is bound to deliver judgment according to the verdict; once he agrees with the verdict, he cannot afterwards reconsider it or disagree with it and refer the matter to the High Court—*Mojahur*, 4 C.W.N. 683. It may not infrequently happen that a Judge trying a case with the jury considers that the appreciation of evidence by the jury is incorrect, and that their verdict is wrong, but at the same time it is not so perverse a verdict as to justify a reference to the High Court—*Mhasku*, 37 Cr.L.J. 26 (27), 158 I.C. 1090, A.I.R. 1935 Bom. 165, 37 Bom.L.R. 109, 1934 Cr.C. 325. Where the Sessions Judge wrote in his judgment: "There is room for doubt as to whether the accused is guilty; however, I see no reason to differ from the unanimous verdict of the jury on what are questions of fact. Not agreeing with but accepting the verdict of the jury I convict the accused." *Held*, that this method of expression was not desirable. A Sessions Judge is under no obligation whatsoever to have or express his individual opinion upon really disputable questions of fact which are for the jury. If a Judge agrees or disagrees, it is a matter *prima facie* for himself, but if he disagrees with the verdict and is of opinion that it is necessary for the ends of justice to submit the case to the High Court, he is bound to do so (sec. 307). If he is not clearly of opinion that the conviction is wrong so as to make it necessary for the ends of justice to submit the case to the High Court, then it may be said that "the Judge does not think it necessary to express disagreement" (sec. 306), and his opinion being on that view irrelevant, he will be well advised to keep it to himself. The conviction, however, was not illegal—*Ebrahim Molla*, 56 Cal. 473, 33 C.W.N. 371 (373), 30 Cr.L.J. 1000, 1929 Cr.C. 28. The Judge may disagree, and yet not think it necessary to express disagreement, and in such a case sec. 306, Cr. P. C., requires that he shall accept the verdict. The word "disagrees" in sec. 307, Cr. P. C., must, therefore, mean that the Judge thinks it necessary to express disagreement; otherwise, under sec. 306,

Cr. P. C., he shall be bound to give judgment according to the verdict. As to whether he does or does not think it necessary to express disagreement, must obviously be a matter for the Judge himself. It may be that a Judge may think that the jury's appreciation of evidence is wrong and still hold that it is not perverse or unreasonable. In that view, though disagreeing in fact, he may not think it necessary to express disagreement. In so refraining from expressing disagreement, he may well be influenced by the consideration that even if he were to make a reference, the High Court was not likely to interfere unless the verdict was shown to be not merely erroneous, but perverse or unreasonable. It would be wrong to say that in so doing the Judge would be acting illegally, as he would be clearly within the terms of sec. 306, Cr. P. C.—*Afsar Shaikh v. Emp.*, 38 Cr L J. 1075 (1076), 171 I.C. 320, 10 R.C. 263, 41 C.W.N. 1020, A.I.R. 1937 Cal. 540, I.L.R. (1937) 2 Cal 694.

Where the verdict of the jury is not only inconsistent in itself in view of the evidence but is also clearly against the trend of the Judge's charge, the Judge owes a duty not only to the Appellate Court but also to his own judicial conscience to state some reason or other for accepting the verdict. His failure to give reasons makes it impossible for the appellate Court to regard such acceptance as a judicial act—*Nachappa Goundan v. Emp.*, 1937 M W N. 737

Sentence :—If the Judge accepts the verdict of the jury and convicts the accused, he must pass an adequate sentence for the offence; the fact that he personally entertains some doubt as to the propriety of the verdict should not be a ground for mitigating the sentence. Having accepted the verdict, he is bound to award punishment as if he has agreed with the verdict—*Ramdas*, 8 Pat 314, 30 Cr L J 721 (724), 117 I.C. 173, 10 P.L.T. 409, A.I.R. 1929 Pat 313, Ind Rul 1929 Pat 381. See also *Mohsena Khatun v. Emp.*, A.I.R. 1939 Cal 610 (612), 43 C.W.N. 893, 40 Cr L J 880, 184 I.C. 222.

307. (1) If in any such case the Judge disagrees with the

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verdict of the jurors, or of a majority of the jurors, on all or any of the charges on which any accused person has been tried, and is clearly of opinion that it is necessary for the ends of justice to submit the case in respect of such accused person to the High Court, he shall submit the case accordingly, recording the grounds of his opinion, and, when the verdict is one of acquittal, stating the offence which he considers to have been committed, and in such case, if the accused is further charged under the provisions of section 310, shall proceed to try him on such charge as if such verdict had been one of conviction.

(2) Whenever the Judge submits a case under this section, he shall not record judgment of acquittal or of conviction on any of the charges on which such accused has been tried, but he may either remand such accused to custody or admit him to bail.

(3) In dealing with the case so submitted the High Court may exercise any of the powers which it may exercise on an appeal, and subject thereto it shall, after considering the entire evidence and after giving due weight to the opinions of the Sessions Judge and the jury, acquit or convict such accused of any offence of which the jury could have convicted him upon the charge framed and placed before it; and, if it convicts him, may

in his opinion the accused is innocent, this opinion would not properly be excluded. When a Judge is entitled under the law to make a decision, it is competent to him to give reasons—*Premchand*, 36 Cr.L.J. 1359 (1362), 158 I.C. 365, A.I.R. 1935 Sind 189, 1935 Cr.C. 952.

For the purposes of this section, the Judge of the Judicial Commissioner's Court sitting in Session is a High Court (see sec. 266) and not a Court of Session; consequently, he has no power to disagree with the unanimous verdict of the jury and to refer the case to the High Court under sec. 307—*Mithoo*, 25 Cr.L.J. 428, A.I.R. 1925 Sind 34, 77 I.C. 604.

306. (1) When in a case tried before the Court of Session

Verdict in Court of the Judge does not think it necessary to Session when to prevail. express disagreement with the verdict of the jurors or of a majority of the jurors, he shall give judgment accordingly.

(2) If the accused is acquitted, the Judge shall record judgment of acquittal. If the accused is convicted, the Judge shall, *unless he proceeds in accordance with the provisions of section 562*, pass sentence on him according to law.

The italicised words have been added by sec. 80 of the Cr. P. C. Amendment Act, XVIII of 1923. The amendment is merely verbal, and is the same as that made in secs. 245 (2) and 258 (2).

932. When the verdict of the jury has been delivered, the Sessions Judge is bound to say and record whether he agrees with the verdict or not—*Chand Bagdee*, 7 W.R. 6; *Bahar Ali*, 15 W.R. 46. It is not competent to a Sessions Judge, after the jury has returned their verdict and gone away, and in the absence of the accused, to examine some witnesses and then to act on the evidence in determining whether or not he should differ from the jury—*Nangappa*, 7 Bom.L.R. 979, 3 Cr.L.J. 42. If he agrees with and accepts the verdict of the jury (or of the majority) he is bound to deliver judgment according to the verdict; once he agrees with the verdict, he cannot afterwards reconsider it or disagree with it and refer the matter to the High Court—*Mojahur*, 4 C.W.N. 683. It may not infrequently happen that a Judge trying a case with the jury considers that the appreciation of evidence by the jury is incorrect, and that their verdict is wrong, but at the same time it is not so perverse a verdict as to justify a reference to the High Court—*Mhaslu*, 37 Cr.L.J. 26 (27), 158 I.C. 1090, A.I.R. 1935 Bom 165, 37 Bom.L.R. 109, 1931 Cr.C. 325. Where the Sessions Judge wrote in his judgment: "There is room for doubt as to whether the accused is guilty; however, I see no reason to differ from the unanimous verdict of the jury on what are questions of fact. Not agreeing with but accepting the verdict of the jury I convict the accused." Held, that this method of expression was not desirable. A Sessions Judge is under no obligation whatsoever to have or express his individual opinion upon really disputable questions of fact which are for the jury. If a Judge agrees or disagrees, it is a matter *prima facie* for himself, but if he disagrees with the verdict and is of opinion that it is necessary for the ends of justice to submit the case to the High Court, he is bound to do so (sec. 307). If he is not clearly of opinion that the conviction is wrong so as to make it necessary for the ends of justice to submit the case to the High Court, then it may be said that "the Judge does not think it necessary to express disagreement" (sec. 306), and his opinion being on that view irrelevant, he will be well advised to keep it to himself. The conviction, however, was not illegal—*Ebrahim Molla*, 55 Cal 473, 33 C.W.N. 371 (373), 30 Cr.L.J. 1070, 1929 Cr.C. 28. The Judge may disagree, and yet not think it necessary to express disagreement, and in such a case sec. 306, Cr. P. C., requires that he shall accept the verdict. The word "disagrees" in sec. 307, Cr. P. C., must, therefore, mean that the Judge thinks it necessary to express disagreement; otherwise, under sec. 306,

Cr P. C., he shall be bound to give judgment according to the verdict. As to whether he does or does not think it necessary to express disagreement, must obviously be a matter for the Judge himself. It may be that a Judge may think that the jury's appreciation of evidence is wrong and still hold that it is not perverse or unreasonable: in that view, though disagreeing in fact, he may not think it necessary to express disagreement. In so refraining from expressing disagreement, he may well be influenced by the consideration that even if he were to make a reference, the High Court was not likely to interfere unless the verdict was shown to be not merely erroneous, but perverse or unreasonable. It would be wrong to say that in so doing the Judge would be acting illegally, as he would be clearly within the terms of sec. 306, Cr. P. C.—*Afsar Shaikh v. Emp.*, 38 Cr.L.J. 1075 (1076), 171 I.C. 320, 10 R.C. 263, 41 C.W.N. 1020, A.I.R. 1937 Cal. 540, I.L.R. (1937) 2 Cal. 694.

Where the verdict of the jury is not only inconsistent in itself in view of the evidence but is also clearly against the trend of the Judge's charge, the Judge owes a duty not only to the Appellate Court but also to his own judicial conscience to state some reason or other for accepting the verdict. His failure to give reasons makes it impossible for the appellate Court to regard such acceptance as a judicial act—*Nachappa Goundan v. Emp.*, 1937 M.W.N. 737.

Sentence :—If the Judge accepts the verdict of the jury and convicts the accused, he must pass an adequate sentence for the offence; the fact that he personally entertains some doubt as to the propriety of the verdict should not be a ground for mitigating the sentence. Having accepted the verdict, he is bound to award punishment as if he has agreed with the verdict—*Ramdas*, 8 Pat. 314, 30 Cr.L.J. 721 (724), 117 I.C. 173, 10 P.L.T. 409, A.I.R. 1929 Pat. 313, Ind. Rul. 1929 Pat. 381. See also *Mohsena Khalun v. Emp.*, A.I.R. 1939 Cal. 610 (612), 43 C.W.N. 893, 40 Cr.L.J. 880, 184 I.C. 222.

307. (1) If in any such case the Judge disagrees with the

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verdict of the jurors, or of a majority of the jurors, on all or any of the charges on which any accused person has been tried, and is clearly of opinion that it is necessary for the ends of justice to submit the case in respect of such accused person to the High Court, he shall submit the case accordingly, recording the grounds of his opinion, and, when the verdict is one of acquittal, stating the offence which he considers to have been committed, and in such case, if the accused is further charged under the provisions of section 310, shall proceed to try him on such charge as if such verdict had been one of conviction.

(2) Whenever the Judge submits a case under this section, he shall not record judgment of acquittal or of conviction on any of the charges on which such accused has been tried, but he may either remand such accused to custody or admit him to bail.

(3) In dealing with the case so submitted the High Court may exercise any of the powers which it may exercise on an appeal, and subject thereto it shall, after considering the entire evidence and after giving due weight to the opinions of the Sessions Judge and the jury, acquit or convict such accused of any offence of which the jury could have convicted him upon the charge framed and placed before it; and, if it convicts him, may

pass such sentence as might have been passed by the Court of Session.

Change:—This section has been amended by sec. 81 of the Cr. P. C. Amendment Act, XVIII of 1923. The main changes are the following:—*First*, in sub-section (1) the words "any accused person" and "in respect of such accused person" have been added. "This amendment prescribes that when a Judge accepts the verdict of the jury in respect of some of the accused, but not of others, he need only refer the case of the latter to the High Court"—*Statement of Objects and Reasons* (1914).

Secondly, the italicised words at the end of sub-section (1) have been added "to provide for the case of a person who is also charged with a previous conviction under sec. 310. It seems obvious that if the Judge disagrees with the verdict of the jury on the principal charge, and submits the case to the High Court, it is desirable that the record should be complete. We propose, therefore, to insert at the end of sec. 307 (1) a provision for the trial of the further charge under sec. 307"—*Report of the Select Committee* of 1916 Under the old law, it was held that if a case was referred to the High Court under sec. 307, there was no conviction or acquittal in the Court of Session. It was the High Court which could convict or acquit the accused, and it was only after such conviction by the High Court that the accused could be asked under sec. 310 to plead to a previous conviction—*Kandaswamy*, 30 Mad. 134 Under the present amendment, provision is made for the trial of the charge of previous conviction in the Sessions Court itself.

932A. Object of the section:—The section was passed doubtless to provide a safeguard in jury trials, because the Legislature was not satisfied that a jury could always be relied upon to do their duty—*Bhondar*, A.I.R. 1931 Cal. 601 (603), 1931 Cr.C. 753, 35 C.W.N. 1212, 54 C.L.J. 499, 134 I.C. 1053, 33 Cr.L.J. 11. This section places a powerful weapon in the hands of the Judge in Mufassil, and it is not available to a Judge of the High Court sitting in Sessions to prevent miscarriage of justice on account of a wrong verdict on the part of the jury—*Ilu*, A.I.R. 1934 Cal. 817 (819), 36 Cr.L.J. 358, 1931 Cr.C. 1364, 153 I.C. 451; *Enayet Karim*, 62 Cal. 337 (340).

The power of making references on the part of Judges engaged in criminal work in the districts is one that should be used very sparingly. It is an artificial power which is the creature of statute only. It is most often utilised by Judges, zealous indeed to perform their duties but usually somewhat inexperienced in the principles of criminal procedure. As long as it is the policy of Government of this country to rely on the verdicts of juries in the district, a policy which is supported by both the profession and the public and a policy which is cherished by the accused persons who are brought up for trial, so long must reliance be placed upon the decisions of juries and they must not be disturbed unless it can be shown beyond a peradventure that a perverse verdict has been arrived at, which can be demonstrated clearly from a perusal of the proceedings of the Court—*Abdul Hossain Siddar*, A.I.R. 1936 Cal. 451, 1936 Cr.C. 685, 38 Cr.L.J. 174, 166 I.C. 286, 9 R.C. 490, 66 C.L.J. 560.

933. Scope of section:—*Assessor-case tried with jury:*—Where the accused was charged with offences some of which were triable by jury and others with the aid of assessors, and the Sessions Judge tried the accused with jury for the offences triable by jury, and with the same jurors as assessors for the offences triable with assessors, and differing from them in their verdict and opinion referred both matters to the High Court, it was held that as to the matter triable with assessors, the Judge should not have included it in the reference but should have disposed of it according to law, and should have referred only the jury-case to the High Court—*Kalidas*, 8 Bom.L.R. 599, 4 Cr.L.J. 192; *Vankatsingh*, 9 Bom.L.R. 1057, 7 Cr.L.J. 235; *Devu*, Ratanlal 600; *Kambala Narayan*, 35 M.L.J. 452. The proper procedure for the Sessions Judge is at first to dispose of the charges which are triable with the aid of assessors, under sec. 309, and then to consider whether a reference should be made under sec. 307 in respect of the other charges—*Packaimuthu*, 53 Mad. 715, 35 M.L.W. 671, 62 M.L.J. 571, 33 Cr.L.J.

533 (534), A.I.R. 1932 Mad 512, 137 I.C. 810, Ind. Rul. 1932 Mad 466, 1932 Cr.C. 430; *Lachman*, 7 R.P. 441, 36 Cr.L.J. 469, 154 I.C. 16, 15 P.L.T. 367, A.I.R. 1934 Pat. 424, 1934 Cr.C. 928, distinguishing *Hazari Lal*, 137 I.C. 190, 13 P.L.T. 93, A.I.R. 1932 Pat 156, 1932 Cr.C. 273, 11 Pat. 395, Ind. Rul. 1932 Pat. 146, 33 Cr.L.J. 505; *Chanbasappa*, 33 Bom.L.R. 1571, 33 Cr.L.J. 172, Ind. Rul. 1932 Bom. 111, 135 I.C. 495, 1932 Cr.C. 85, A.I.R. 1932 Bom. 61; *Bojji Deddi*, 39 Cr.L.J. 864, 177 I.C. 288, 1938 M.W.N. 581, 11 R.M. 304, 47 M.L.W. 740, A.I.R. 1938 Mad 686, (1938) 1 M.L.J. 871; *Ganga Ram*, A.I.R. 1940 All 260, 41 Cr.L.J. 676, 188 I.C. 767, 1940 A.L.J. 155. This section is part of a group of sections dealing with trials by jury and when sub-sec. (2) refers to acquittal or conviction on any of the charges on which such accused has been tried, it means any of the charges on which the accused has been tried by jury. It does not include those charges which were not triable by the jury at all, but were triable by the Judge with the aid of the assessors—*Ganga Ram*, supra. However cases tried by Assistant Sessions Judge in which the part tried with the aid of assessors is appealable to the Courts of Session should, if possible, be referred to the High Court in their entirety if an impossible position is to be avoided in dealing with references under sec. 307, Cr. P. C., for the High Court, if it is to exercise its functions properly in a reference, cannot approach the transaction as a whole with its hands tied as to one or more aspects—*Hana Dhobi*, 39 Cr.L.J. 156 (159), 172 I.C. 780, A.I.R. 1937 Pat. 662, 18 P.L.T. 857, 10 R.P. 316, 4 B.R. 165, 1937 P.W.N. 868. See Note 875 under sec. 269. But if the Judge tries the assessor-case with the aid of the jurors as *jurors* and not as assessors, and disagrees with their *verdict* (not opinion), he can refer the case to the High Court—*Jeyiam*, 23 Bom 696; *Surya*, 25 Cal 555; *Bhagwat*, 36 Cr.L.J. 1502, 158 I.C. 1131, A.I.R. 1935 Pat 433, 16 P.L.T. 603, 1935 Cr.C. 1104. If in the case of a joint trial of a jury-case and an assessor-case, it appears that only one offence was committed, *i.e.*, an offence triable with assessors, and the Judge tried the case with the jury and disagrees with their verdict, he cannot refer the case under sec. 307 but should pass judgment under sec. 309, because he must consider the case as one triable with assessors, and treat the jurors as assessors—*Anga Valayan*, 22 Mad 15.

When several persons are tried together in one trial, the Judge cannot refer to the High Court under this section the case of anybody in regard to whom he is in agreement with the verdict of the jury—*Bojji Reddi*, supra.

High Court—Since the 'High Court' in this section does not include a Judicial Commissioner's Court (see sec. 266), a Judge of the Judicial Commissioner's Court of Sind sitting in Sessions has no power to refer a case under this section to the J. C. Court in its High Court jurisdiction—*Mithoo*, 25 Cr.L.J. 428, A.I.R. 1025 Sind 34, 77 I.C. 604; *Jhand*, 22 S.L.R. 349, 29 Cr.L.J. 945, 111 I.C. 865, A.I.R. 1928 Sind 149 (F.B.).

934. Disagreement:—The Judge can refer the case to the High Court if he disagrees with the verdict of the jury. If he once *accepts* the verdict he cannot subsequently reconsider it, and disagreeing with the verdict refer the case to the High Court—*Mojahur*, 4 C.W.N. 683. The disagreement may be on question of law as well as of fact. That is, the Sessions Judge may submit to the High Court a case in which he disagrees with the jury on their finding of facts as well as a case in which he considers that the jury have not followed his directions as to the law—*Konjo*, 20 W.R. 1.

The first condition required by sec. 307, Cr. P. C., for reference is that the Judge should disagree with the verdict, and the second is that he must be clearly of opinion that it is necessary for the ends of justice to refer the case—*Afsar Shaikh v. Emp.*, 38 Cr.L.J. 1075 (1076), 171 I.C. 320, 10 R.C. 263, 41 C.W.N. 1020, A.I.R. 1937 Cal. 540, 11 L.R. (1937) 2 Cal 694.

The mere fact that the Judge entertains some *doubts* about the correctness of the verdict of the jury does not make it obligatory on him to refer the case under sec. 307; see *Saroda Charan*, 41 C.L.J. 320, 87 I.C. 606, A.I.R. 1925 Cal 795, 26 Cr.L.J. 1006; *Bajji Mian*, 6 Pat 817, 29 Cr.L.J. 81 (82), 106 I.C. 673, A.I.R. 1928 Pat. 120, 9 A.I.C.R. 221, 9 P.L.T. 191. So also, the fact that the Judge takes a more lenient view of the facts

the jury took and is disposed to give the accused the benefit of doubt is not a ground on which a reference can be properly based—*Jogi Kar*, A.I.R. 1931 Cal. 15, 129 I.C. 798, 32 Cr.L.J. 452, 57 Cal. 1183, 1931 Cr.C. 47 (49). It is not in every case of doubt nor in every case in which the Judge entertains a view different from that of the jury, that a reference can be made under this section, but the verdict of the jury must be manifestly wrong before such references can be made—*Swarnmoyee*, 41 Cal. 621, 11 Cr.L.J. 660, 21 I.C. 900, A.I.R. 1914 Cal. 65; *Ramdas*, 8 Pat. 344, 30 Cr.L.J. 721 (722); 117 I.C. 173, 10 P.L.T. 409, A.I.R. 1929 Pat. 313, Ind. Rul. 1929 Pat. 381. And in this regard there is no difference between a case where the jury acquits the accused and a case where the jury convicts, and the Judge disagrees with the verdict—*Ramdas*, *supra*. Where the jury misunderstands the law as explained by the Judge and delivers a wrong verdict, the Judge should refer the case to the High Court under this section, and not ask the jury to reconsider their verdict—*Kondiba*, 28 Bom. 412; *Sundaram Ayyar*, 61 M.L.J. 915, 32 Cr.L.J. 1276 (1278), 134 I.C. 986, 34 M.L.W. 380, 1931 M.W.N. 857, A.I.R. 1931 Mad. 775, Ind. Rul. 1931 Mad. 874, 1931 Cr.C. 1031.

A reference should not be made where the disagreement between the Judge and the jury is merely on a technical point of law. Thus, where the Judge considered the offence to be one under sec. 366, I. P. C., but left to the jury to decide whether the offence fell under sec. 363, or sec. 366, I. P. C., and the jury found that the offence was under sec. 363, I. P. C., *held* that there was only a technical difference between the two sections, and the Judge should, in view of his own summing up, have accepted the verdict of the jury, and should not have made a reference to the High Court—*Ali Raza*, 84 I.C. 454, A.I.R. 1925 Oudh 311, 28 O.C. 69, 26 Cr.L.J. 310. Where the jury returned a verdict of guilty under sec. 326, I. P. C., but the Judge thought that the accused committed an offence under sec. 304, Part I, I. P. C., the question whether the accused ought to be convicted under sec. 326 or sec. 304, I. P. C., is in the nature of an academic one, and hardly worth a reference under sec. 307, Cr. P. C., inasmuch as the Court has power under sec. 326, I. P. C., to impose a sentence of transportation for life or rigorous imprisonment for ten years—*Mahomed Adam Chohan*, A.I.R. 1937 Bom. 60 (61), 38 Bom.L.R. 1186, 167 I.C. 43, 38 Cr.L.J. 327, 9 R.B. 274. A Sessions Judge wrote in his judgment: "There is room for no doubt as to whether the accused is really guilty. Not agreeing with but accepting the unanimous verdict of the jury, I convict the accused." *Held* that this method of expression was improper. If the Judge really disagrees with the verdict, i.e., has a settled and considered opinion that the crime has not been proved against the accused, it seems to be clear that it is necessary for the ends of justice to refer the case, and he ought to refer the case. If he does not think this necessary, his "disagreement" cannot be a reality at all, and the less his inconclusive state of mind is exposed, the better—*Ebrahim Molla*, 56 Cal. 473, 33 C.W.N. 371 (373), 30 Cr.L.J. 1036, 119 I.C. 290, A.I.R. 1929 Cal. 415, Ind. Rul. 1929 Cal. 770. See this case cited under sec. 306.

A reference can be made to the High Court only on the ground of disagreement between the Judge and the jury and on *no other grounds*. Where the jury returned a verdict of not guilty, the mere fact that in a similar case upon similar evidence the High Court had convicted some other persons, is no ground for referring the case to the High Court—*Iraya Doddappa*, 6 Bom.L.R. 599, 1 Cr.L.J. 743. A disagreement within the meaning of this section is one of the conditions precedent to a reference. It is very much doubtful whether a Judge is justified in referring a case to the High Court where his quarrel with the jury's verdict is not that the persons who were found guilty should in fact have been found not guilty, but that logically the persons who have been found not guilty should have been found guilty as well—*Makhan Lal*, 31 Cr.L.J. 965 (967), 115 I.C. 365, A.I.R. 1933 Cal. 472, 37 C.W.N. 591, 1933 Cr.C. 752.

In order to determine whether a Judge would refer a case to the High Court under this section he can refer to the Police diaries after the verdict of the jury, under the provisions of sec. 172, Cr. P. C.—*Rubati Mohan*, 32 C.W.N. 915 (917), 56 Cal. 150, 30 Cr.L.J. 435, 115 I.C. 258, A.I.R. 1929 Cal. 57, Ind. Rul. 1929 Cal. 728.

935. "Necessary for the ends of justice":—A case should not be referred to the High Court unless the Judge disagrees so completely with the jury that he considers it necessary for the ends of justice to submit the case. Where such complete dissent is not recorded the verdict of the jury must stand—*Rafuddin*, Ind. Rul 1932 Pat. 259, 11 Pat. 669, 13 P.L.T. 918, 1932 Cr.C. 643 (644), 139 I.C. 885, A.I.R. 1932 Pat. 246, 33 Cr.L.J. 877; *Bhawani Panduji*, 2 Bom. 525; *Devji Govindji*, 20 Bom. 215 (218); *Irya Doddappa*, 6 Bom.L.R. 599, 1 Cr.L.J. 743. This seems to indicate that something more must be in the Judge's mind than a mere disagreement with the jury or a mere feeling that he would himself have come to a different conclusion. That is, he must be of opinion that the verdict was one which reasonable men could not have arrived at on the evidence before them—*Vecrappa*, 51 Mad. 956, 30 Cr.L.J. 317 (321), 114 I.C. 353, 28 M.L.W. 575, 55 M.L.J. 591, A.I.R. 1928 Mad. 1186, 1929 M.W.N. 185, Ind. Rul. 1929 Mad. 273 (F.B.). The necessity of submitting a case for the ends of justice depends upon the gravity of the offence and its prevalence and other considerations of a similar nature—*Panchanan Sarkar*, 37 C.W.N. 341 (343), 34 Cr.L.J. 608, 143 I.C. 600, A.I.R. 1933 Cal. 404, 1933 Cr.C. 582, Ind. Rul. 1933 Cal. 448. This section leaves the referring of a case to the High Court entirely to the discretion of the Judge, for it is only where he disagrees with the verdict of the jury so completely that he considers it necessary for the ends of justice to submit the case to the High Court, that he should do so. This discretion should, however, always be exercised when the Judge thinks that the verdict is not supported by evidence. It is the only way in which the miscarriage of justice by a perverse verdict of a jury can be remedied by the High Court—*Guruvadu*, 13 Mad. 343; *Saroda Charan*, 41 C.L.J. 320, 26 Cr.L.J. 1006, A.I.R. 1925 Cal. 795, 87 I.C. 606. Where the Judge not only disagrees with the verdict of the jury convicting the accused, but on a consideration of all the evidence finds that the prisoner has not been proved to have committed the offence, the Judge has no option but to refer the case under sec. 307, because the Judge cannot in consonance with the ends of justice convict the prisoner in such a case—*Barwick*, 13 Lah. 573, 1932 Cr.C. 426 (429), 33 Cr.L.J. 220, 33 P.L.R. 443, A.I.R. 1932 Lah. 345, Ind. Rul. 1932 Lah. 181, 136 I.C. 5. When the Judge points out to the jury the weak links in the prosecution but they do not consider them, it is proper for the Judge to refer the case to the High Court, because such a reference is really necessary for the ends of justice—*Abdul Rahaman*, 9 C.L.J. 432, 10 Cr.L.J. 57.

When the disagreement between the Judge and the jury is such a complete dissent that the Judge is obviously unable to do justice to the accused by accepting the verdict, there is no option left to him but to refer the case to the High Court, for it is clearly necessary for the ends of justice to do so—*Saroda Charan*, supra; *Barwick*, supra. The mere fact that the Sessions Judge does not agree with the unanimous verdict of the jury does not make it obligatory on him to make a reference. Section 307 clearly gives him a discretion in the matter, and it is only when he is clearly of opinion that it is necessary for the ends of justice to submit the case to the High Court that he shall so submit it. If he is not clearly of that opinion, his failure to submit the case is not a subject for interference by the High Court—*Eran Khan*, 50 Cal. 658, 24 Cr.L.J. 838; *Bajit Mian*, 6 Pat. 817, 29 Cr.L.J. 81, 106 I.C. 673, A.I.R. 1928 Pat. 120, 9 P.L.T. 191. If the Judge does not agree with the verdict of the jury, but still he considers it as a reasonable verdict and accepts it without hesitation, it cannot be said that he has exercised his discretion erroneously in not making a reference to the High Court—*Ramdas*, 117 I.C. 173, A.I.R. 1929 Pat. 313, 1929 Cr.C. 99, 10 P.L.T. 409, 8 Pat. 344, 30 Cr.L.J. 721 (722). It depends entirely upon the opinion of the Sessions Judge whether he considers it necessary for the ends of justice to refer the case to the High Court; and his opinion is final on that point. The High Court cannot direct the Sessions Judge to be of opinion that such reference is necessary for the ends of justice, and to refer the case accordingly or cannot act as though he has, in fact, submitted the case—*Bepin Chandra*, 32 C.W.N. 673 (676), 29 Cr.L.J. 819, 111 I.C. 323, 47 C.L.J. 483, A.I.R. 1928 Cal. 444, 10 A.I.C.R. 501, not following *Saroda Charan*, infra; *Rameshwar Singh v. Emp.*, 38 Cr.L.J. 919

the jury took and is disposed to give the accused the benefit of doubt is not a ground on which a reference can be properly based—*Jogi Kar*, A.I.R. 1931 Cal. 15, 129 I.C. 798, 32 Cr.L.J. 452, 57 Cal. 1183, 1931 Cr.C. 47 (49). It is not in every case of doubt nor in every case in which the Judge entertains a view different from that of the jury, that a reference can be made under this section, but the verdict of the jury must be manifestly wrong before such references can be made—*Suarnomoyee*, 41 Cal. 621, 14 Cr.L.J. 660, 21 I.C. 900, A.I.R. 1911 Cal. 65; *Ramdas*, 8 Pat. 311, 30 Cr.L.J. 721 (722); 117 I.C. 173, 10 P.L.T. 409, A.I.R. 1929 Pat. 313, Ind. Rul. 1929 Pat. 381. And in this regard there is no difference between a case where the jury acquits the accused and a case where the jury convicts, and the Judge disagrees with the verdict—*Ramdas*, *supra*. Where the jury misunderstands the law as explained by the Judge and delivers a wrong verdict, the Judge should refer the case to the High Court under this section, and not ask the jury to reconsider their verdict—*Kondiba*, 28 Bom. 412; *Sundaram Ayyar*, 61 M.L.J. 915, 32 Cr.L.J. 1276 (1278), 131 I.C. 986, 34 M.L.W. 380, 1931 M.W.N. 837, A.I.R. 1931 Mad. 775, Ind. Rul. 1931 Mad. 874, 1931 Cr.C. 1031.

A reference should not be made where the disagreement between the Judge and the jury is merely on a technical point of law. Thus, where the Judge considered the offence to be one under sec. 366, I. P. C., but left to the jury to decide whether the offence fell under sec. 363, or sec. 356, I. P. C., and the jury found that the offence was under sec. 363, I. P. C., *held* that there was only a technical difference between the two sections, and the Judge should, in view of his own summing up, have accepted the verdict of the jury, and should not have made a reference to the High Court—*Ali Raza*, 84 I.C. 454, A.I.R. 1925 Oudh 311, 28 O.C. 69, 26 Cr.L.J. 310. Where the jury returned a verdict of guilty under sec. 326, I. P. C., but the Judge thought that the accused committed an offence under sec. 304, Part I, I. P. C., the question whether the accused ought to be convicted under sec. 326 or sec. 304, I. P. C., is in the nature of an academic one, and hardly worth a reference under sec. 307, Cr. P. C., inasmuch as the Court has power under sec. 326, I. P. C., to impose a sentence of transportation for life or rigorous imprisonment for ten years—*Mahomed Adam Chohan*, A.I.R. 1937 Bom. 60 (61), 38 Bom.L.R. 1186, 167 I.C. 43, 38 Cr.L.J. 327, 9 R.B. 274. A Sessions Judge wrote in his judgment: "There is room for no doubt as to whether the accused is really guilty. Not agreeing with but accepting the unanimous verdict of the jury, I convict the accused." *Held* that this method of expression was improper. If the Judge really disagrees with the verdict, *i.e.*, has a settled and considered opinion that the crime has not been proved against the accused, it seems to be clear that it is necessary for the ends of justice to refer the case, and he ought to refer the case. If he does not think this necessary, his "disagreement" cannot be a reality at all, and the less his inconclusive state of mind is exposed, the better—*Ebrahim Molla*, 56 Cal. 473, 33 C.W.N. 371 (373), 30 Cr.L.J. 1036, 119 I.C. 290, A.I.R. 1929 Cal. 415, Ind. Rul. 1929 Cal. 770. See this case cited under sec. 306.

A reference can be made to the High Court only on the ground of disagreement between the Judge and the jury and on *no other grounds*. Where the jury returned a verdict of not guilty, the mere fact that in a similar case upon similar evidence the High Court had convicted some other persons, is no ground for referring the case to the High Court—*Iraya Doddappa*, 6 Bom.L.R. 599, 1 Cr.L.J. 743. A disagreement within the meaning of this section is one of the conditions precedent to a reference. It is very much doubtful whether a Judge is justified in referring a case to the High Court where his quarrel with the jury's verdict is not that the persons who were found guilty should in fact have been found not guilty, but that logically the persons who have been found not guilty should have been found guilty as well—*Makhan Lal*, 34 Cr.L.J. 965 (967), 145 I.C. 365, A.I.R. 1933 Cal. 472, 37 C.W.N. 591, 1933 Cr.C. 752.

In order to determine whether a Judge would refer a case to the High Court under this section he can refer to the Police diaries after the verdict of the jury, under the provisions of sec. 172, Cr. P. C.—*Rebati Mohan*, 32 C.W.N. 945 (947), 56 Cal. 150, 30 Cr.L.J. 435, 115 I.C. 258, A.I.R. 1929 Cal. 57, Ind. Rul. 1929 Cal. 338.

935. "Necessary for the ends of justice":—A case should not be referred to the High Court unless the Judge disagrees so completely with the jury that he considers it necessary for the ends of justice to submit the case. Where such complete dissent is not recorded the verdict of the jury must stand—*Rafuiddin*, Ind. Rul 1932 Pat 259, 11 Pat 669, 13 P.L.T. 918, 1932 Cr.C. 643 (644), 139 I.C. 885, A.I.R. 1932 Pat. 246, 33 Cr.L.J. 877; *Bhauam Panduji*, 2 Bom 525; *Devji Govindji*, 20 Bom 215 (218); *Irya Doddappa*, 6 Bom L.R. 599, 1 Cr.L.J. 743. This seems to indicate that something more must be in the Judge's mind than a mere disagreement with the jury or a mere feeling that he would himself have come to a different conclusion. That is, he must be of opinion that the verdict was one which reasonable men could not have arrived at on the evidence before them—*Veerappa*, 51 Mad 956, 30 Cr.L.J. 317 (321), 114 I.C. 353, 28 M.L.W. 575, 55 M.L.J. 591, A.I.R. 1928 Mad. 1186, 1929 M.W.N. 185, Ind. Rul. 1929 Mad. 273 (F.B.). The necessity of submitting a case for the ends of justice depends upon the gravity of the offence and its prevalence and other considerations of a similar nature—*Panchanan Sarkar*, 37 C.W.N. 341 (343), 34 Cr.L.J. 608, 143 I.C. 600, A.I.R. 1933 Cal. 404, 1933 Cr.C. 582, Ind. Rul 1933 Cal. 448. This section leaves the referring of a case to the High Court entirely to the discretion of the Judge, for it is only where he disagrees with the verdict of the jury so completely that he considers it necessary for the ends of justice to submit the case to the High Court, that he should do so. This discretion should, however, always be exercised when the Judge thinks that the verdict is not supported by evidence. It is the only way in which the miscarriage of justice by a perverse verdict of a jury can be remedied by the High Court—*Guruvadu*, 13 Mad. 343, *Saroda Charan*, 41 C.L.J. 320, 26 Cr.L.J. 1006, A.I.R. 1925 Cal 795, 87 I.C. 606. Where the Judge not only disagrees with the verdict of the jury convicting the accused, but on a consideration of all the evidence finds that the prisoner has not been proved to have committed the offence, the Judge has no option but to refer the case under sec. 307, because the Judge cannot in consonance with the ends of justice convict the prisoner in such a case—*Barwick*, 13 Lah 573, 1932 Cr.C. 426 (429), 33 Cr.L.J. 220, 33 P.L.R. 443, A.I.R. 1932 Lah 345, Ind. Rul 1932 Lah. 181, 136 I.C. 5. When the Judge points out to the jury the weak links in the prosecution but they do not consider them, it is proper for the Judge to refer the case to the High Court, because such a reference is really necessary for the ends of justice—*Abdul Rahaman*, 9 C.L.J. 432, 10 Cr.L.J. 57.

When the disagreement between the Judge and the jury is such a complete dissent that the Judge is obviously unable to do justice to the accused by accepting the verdict, there is no option left to him but to refer the case to the High Court, for it is clearly necessary for the ends of justice to do so—*Saroda Charan*, supra; *Barwick*, supra. The mere fact that the Sessions Judge does not agree with the unanimous verdict of the jury does not make it obligatory on him to make a reference. Section 307 clearly gives him a discretion in the matter, and it is only when he is clearly of opinion that it is necessary for the ends of justice to submit the case to the High Court that he shall so submit it. If he is not clearly of that opinion, his failure to submit the case is not a subject for interference by the High Court—*Eran Khan*, 50 Cal 658, 24 Cr.L.J. 838; *Bajit Mian*, 6 Pat. 817, 29 Cr.L.J. 81, 106 I.C. 673, A.I.R. 1928 Pat. 120, 9 P.L.T. 191. If the Judge does not agree with the verdict of the jury, but still he considers it as a reasonable verdict and accepts it without hesitation, it cannot be said that he has exercised his discretion erroneously in not making a reference to the High Court—*Ramdas*, 117 I.C. 173, A.I.R. 1929 Pat 313, 1929 Cr.C. 99, 10 P.L.T. 409, 8 Pat. 344, 30 Cr.L.J. 721 (722). It depends entirely upon the opinion of the Sessions Judge whether he considers it necessary for the ends of justice to refer the case to the High Court; and his opinion is final on that point. The High Court cannot direct the Sessions Judge to be of opinion that such reference is necessary for the ends of justice, and to refer the case accordingly or cannot act as though he has, in fact, submitted the case—*Bepin Chandra*, 32 C.W.N. 673 (676), 29 Cr.L.J. 819, 111 I.C. 323, 47 C.L.J. 483, A.I.R. 1928 Cal 444, 10 A.I.C.R. 501, not following *Saroda Charan*, infra; *Rameshwar Singh v. Emp.*, 38 Cr.L.J. 919

(921), 170 I.C. 461, 16 Pat. 413, 1937 P.W.N. 593, 3 B.R. 731, 10 R.P. 123, 18 P.L.T. 607, A.I.R. 1937 Pat. 440; *Afsar Shaikh v. Emp.*, 38 Cr.L.J. 1075, 171 I.C. 320, 10 R.C. 263, 41 C.W.N. 1020, A.I.R. 1937 Cal. 510, I.L.R. (1937) 2 Cal. 691. But in *Manjia v. Emp.*, 38 Cr.L.J. 465, 167 I.C. 802, 9 R.A. 578, 1936 A.W.R. 1281, 1937 A.Cr.C. 11, 1937 A.L.J. 43, I.L.R. 1937 All. 419, 1937 A.L.R. 250, A.I.R. 1937 All. 195 the Allahabad High Court, in exercise of powers under sec. 561A, Cr. P. C., set aside the convictions of the accused and the sentences passed on them and sent the case back to the Court of Additional Sessions Judge to re-admit the case to its original number on the file, and after hearing the arguments consider whether he would express disagreement with the verdict or not, and, if so, make a reference under sec. 307, Cr. P. C., to the High Court or uphold the verdict and convict the accused and pass suitable sentence.

It is no longer the law that before making a reference the Judge must be satisfied that the verdict is perverse. It is sufficient that he should be clearly of opinion that a reference is necessary for the ends of justice—*Ismail*, 23 C.W.N. 747, 19 Cr.L.J. 830, A.I.R. 1919 Cal. 536, 46 I.C. 816; *Saroda Charan*, A.I.R. 1925 Cal. 795, 87 I.C. 606, 41 C.L.J. 320, 26 Cr.L.J. 1066; *Sakhawat v. Emp.*, A.I.R. 1937 Nag. 50 (52), 38 Cr.L.J. 330, 167 I.C. 61, 19 N.L.J. 320, I.L.R. 1931 Nag. 277. It is necessary that the trial Judge should for himself appreciate the evidence and form his own opinion on the case so as to see whether it is necessary for the ends of justice to make a reference against the verdict—*Ilu*, A.I.R. 1934 Cal. 847 (849), 36 Cr.L.J. 358, 1934 Cr.C. 1361, 153 I.C. 451.

Though on the one hand reference should not be made in every case in which the Judge finds himself in disagreement with the jury, on the other, the power of reference is not confined to those cases only in which in the opinion of the Judge the verdict of the jury is entirely perverse. No hard and fast rule can be laid down. The Judge must apply his mind and decide whether the ends of justice demand a reference. No doubt, when a Judge finds himself in disagreement with the jury and has to decide whether a reference should be made, there is a heavy responsibility upon him as is the responsibility of the Magistrate in a case triable by a Court of Session to decide whether the case should or should not be committed. But because the responsibility is great, there is no reason why it should not be undertaken—*Rameshwar Singh v. Emp.*, *supra*.

All that secs. 306 and 307, Cr. P. C., provide is that the Judge should disagree with the verdict of the jury, that is to say, if the jury's verdict is that the accused is guilty or not guilty and the Judge is of a contrary opinion, he can refer the case to the High Court unless he does not think it necessary to express his disagreement. Where a Judge is doubtful and is distinctly of the opinion that the benefit of the doubt should be given to the accused, then certainly he is of the opinion that the verdict of the jury should be that he is not guilty. If, therefore, the jury returns a verdict of guilty, he is disagreeing with the verdict of the jury even though he may not be certain in his own mind of the absolute innocence of the accused and the complete falsity of the complaint. Where the Judge takes an erroneous view of these sections and feels that he has no power to refer the case to the High Court, the accused are prejudiced—*Manjia v. Emp.*, *supra*.

It is not the duty of the Judge to refer to the High Court a case where the jury have found a man guilty on admissible evidence and evidence which in the eyes of the law is sufficient to justify a conviction—*Haris Chandra*, 34 Cr.L.J. 432, 142 I.C. 896, 1932 A.L.J. 1089, A.I.R. 1933 All. 94, 1933 Cr.C. 120, Ind. Rul. 1933 All. 144.

936. Submit the case:—Whether whole case should be referred:—When the Sessions Judge is not prepared to accept the verdict of the jury in its entirety but is prepared to accept it as regards some of the accused, it is not intended that the whole case is to be referred to the High Court. Where the Judge agrees with the jury in respect of a particular accused, the Judge ought to convict or acquit him as the case may be; and it is only with reference to those accused in respect of whom he declines to accept the verdict of the jury that he should make the reference—*Babur Ali*, 42 Cal.

789, 19 C.W.N. 584, 16 Cr.L.J. 321. This is now expressly made clear by the present amendment.

But where the disagreement between the Judge and the jury is as to some of the charges, it is necessary that the whole case (in respect of all the charges) should be referred. It would be illegal for the Sessions Judge to record a judgment in respect of some of the charges in accordance with the verdict which he accepts, and to refer the case in respect of the other charges on which he disagrees with the verdict. See sub-sec. (2). When the accused was tried on several charges, and the Sessions Judge accepted the verdict of the jury and pronounced judgment as to some of the charges and disagreed as to the other charges, and referred the case to the High Court only as to these latter charges, it was held that the reference was illegal, as by this limited form of reference the High Court was precluded from considering the entire evidence on the record, and that the Sessions Judge should have referred the whole case leaving it to the High Court to consider the whole of the evidence that was placed before the jury—*Ananda Charan*, 21 C.W.N. 435, 39 I.C. 695, 18 Cr.L.J. 551; *Nawal Bhari*, 52 All. 881, 32 Cr.L.J. 81, 128 I.C. 2, A.I.R. 1930 All. 489, 1930 A.L.J. 1168, Ind. Rul. 1931 All. 2, 1930 Cr.C. 733; *Hazan Lal*, 11 Pat. 395, 1932 Cr.C. 273 (274), A.I.R. 1932 Pat. 156, 13 P.L.T. 93, 137 I.C. 190, 33 Cr.L.J. 505, Ind. Rul. 1932 Pat. 148; *Ramjanam*, 36 Cr.L.J. 856, 155 I.C. 866, 16 P.L.T. 348, A.I.R. 1935 Pat. 357, 14 Pat. 717; *Bishnu Chandra*, 37 C.W.N. 1180 (1182), 34 Cr.L.J. 918, 145 I.C. 236, A.I.R. 1933 Cal. 665, 1933 Cr.C. 1104.

Recording the grounds of his opinion :—The letter of reference should ordinarily state the case and the verdict of the jury and concisely the ground upon which the Judge differs from that verdict and considers it necessary in the interests of justice to submit the case. A mere criticism of the evidence, and a statement by the Judge that the accused should have been given the benefit of doubt, and that he disagrees with the verdict of the jury because their appreciation of the evidence does not seem to be proper, is not sufficient. These are hardly grounds of reference—*Jogi Kar*, 57 Cal. 1183, 1931 Cr.C. 47 (48), A.I.R. 1931 Cal. 15, 129 I.C. 798, 32 Cr.L.J. 452. In referring the case under this section, the Sessions Judge should state what material portions of the evidence he believes to be true, and his reasons for arriving at his conclusions so as to enable the High Court to appreciate them and to give due weight to them—*Punit*, 3 P.L.T. 413, 23 Cr.L.J. 421, A.I.R. 1922 Pat. 348; *Dyamanaih*, 6 Bom.L.R. 519. Where the Judge merely said that the verdict was against the weight of evidence, and expressed no other opinion in his reference, it was held that he ought to have set out on what portions of the evidence or on what facts the accused should have been convicted—*Bhut Nath*, 7 C.W.N. 345 (347). So also, where the Sessions Judge merely stated in his reference that the verdict of the jury was erroneous and inconsistent and could not be accepted and that if the evidence had been believed all the accused should have been found guilty, held that the reference was not a proper reference, as it did not state the grounds of his opinion. The reference should be so complete and self-contained that it ought not to be necessary to refer to the order sheet—*Taribulla*, 25 C.W.N. 682, 23 Cr.L.J. 244. The order of reference under sec. 307 must be in the nature of a judgment giving a proper summary of the evidence and the reasons for the opinion of the Judge. In making the reference he should in effect show the reasons for his opinion in as clear a manner as he would have done if the case had not been a jury case and he had to write a judgment—*Sheo Din*, 50 All. 540, 29 Cr.L.J. 342, 108 I.C. 159, 9 A.I.R. 146, A.I.R. 1928 All. 622, 26 A.L.J. 296. He should state with some fulness his view of the evidence and the credibility of the more important witnesses, because the High Court has to attach more or less weight to the opinion of the Judge who saw and heard the witnesses—*Chander Krishna*, 10 Bom.L.R. 173.

Reflections on jurors :—The reference of the Sessions Judge should not contain any extra-judicial observations, e.g., any reflections on the conduct of the jurors which are not supported by any material on the record. The 'opinion' of the Sessions Judge is his opinion on the merits of the case and does not include his speculations as to the conduct of jurors. Such an imputation is not fair to the jurors—*Dhananjay*, 51 Cal.

(921), 170 I.C. 461, 16 Pat. 413, 1937 P.W.N. 596, 3 B.R. 734, 10 R.P. 128, 18 P.L.T. 607, A.I.R. 1937 Pat. 440; *Afsar Shaikh v. Emp.*, 38 Cr.L.J. 1075, 171 I.C. 320, 10 R.C. 253, 41 C.W.N. 1020, A.I.R. 1937 Cal. 540, 1 L.R. (1937) 2 Cal. 694. But in *Manjia v. Emp.*, 38 Cr.L.J. 465, 167 I.C. 802, 9 R.A. 578, 1936 A.W.R. 1284, 1937 A.Cr.C. 11, 1937 A.L.J. 43, 1 L.R. 1937 All. 419, 1937 A.L.R. 250, A.I.R. 1937 All. 195 the Allahabad High Court, in exercise of powers under sec. 561A, Cr. P. C., set aside the convictions of the accused and the sentences passed on them and sent the case back to the Court of Additional Sessions Judge to re-admit the case to its original number on the file, and after hearing the arguments consider whether he would express disagreement with the verdict or not, and, if so, make a reference under sec. 307, Cr. P. C., to the High Court or uphold the verdict and convict the accused and pass suitable sentence.

It is no longer the law that before making a reference the Judge must be satisfied that the verdict is *perverse*. It is sufficient that he should be clearly of opinion that a reference is necessary for the ends of justice—*Ismail*, 23 C.W.N. 747, 19 Cr.L.J. 830, A.I.R. 1919 Cal. 536, 46 I.C. 846; *Saroda Charan*, A.I.R. 1925 Cal. 795, 87 I.C. 606, 41 C.L.J. 320, 26 Cr.L.J. 1066; *Sakhawat v. Emp.*, A.I.R. 1937 Nag. 50 (52), 38 Cr.L.J. 330, 167 I.C. 61, 19 N.L.J. 320, 1 L.R. 1931 Nag. 277. It is necessary that the trial Judge should for himself appreciate the evidence and form his own opinion on the case so as to see whether it is necessary for the ends of justice to make a reference against the verdict—*Ilu*, A.I.R. 1934 Cal. 847 (849), 36 Cr.L.J. 358, 1934 Cr.C. 1364, 153 I.C. 454.

Though on the one hand reference should not be made in every case in which the Judge finds himself in disagreement with the jury, on the other, the power of reference is not confined to those cases only in which in the opinion of the Judge the verdict of the jury is entirely *perverse*. No hard and fast rule can be laid down. The Judge must apply his mind and decide whether the ends of justice demand a reference. No doubt, when a Judge finds himself in disagreement with the jury and has to decide whether a reference should be made, there is a heavy responsibility upon him as is the responsibility of the Magistrate in a case triable by a Court of Session to decide whether the case should or should not be committed. But because the responsibility is great, there is no reason why it should not be undertaken—*Rameshwar Singh v. Emp.*, *supra*.

All that secs. 306 and 307, Cr. P. C., provide is that the Judge should disagree with the verdict of the jury, that is to say, if the jury's verdict is that the accused is guilty or not guilty and the Judge is of a contrary opinion, he can refer the case to the High Court unless he does not think it necessary to express his disagreement. Where a Judge is doubtful and is distinctly of the opinion that the benefit of the doubt should be given to the accused, then certainly he is of the opinion that the verdict of the jury should be that he is not guilty. If, therefore, the jury returns a verdict of guilty, he is disagreeing with the verdict of the jury even though he may not be certain in his own mind of the absolute innocence of the accused and the complete falsity of the complaint. Where the Judge takes an erroneous view of these sections and feels that he has no power to refer the case to the High Court, the accused are prejudiced—*Manjia v. Emp.*, *supra*.

It is not the duty of the Judge to refer to the High Court a case where the jury have found a man guilty on admissible evidence and evidence which in the eyes of the law is sufficient to justify a conviction—*Haris Chandra*, 34 Cr.L.J. 432, 142 I.C. 896, 1932 A.L.J. 1089, A.I.R. 1933 All. 94, 1933 Cr.C. 120, Ind. Rul. 1933 All. 144.

936. Submit the case:—Whether whole case should be referred:—When the Sessions Judge is not prepared to accept the verdict of the jury in its entirety but is prepared to accept it as regards *some* of the accused, it is not intended that the *whole* case is to be referred to the High Court. Where the Judge agrees with the jury in respect of a particular accused, the Judge ought to convict or acquit him as the case may be; and it is only with reference to those accused in respect of whom he declines to accept the verdict of the jury that he should make the reference—*Babur Ali*, 42 Cal.

789, 19 C.W.N. 584, 16 Cr.L.J. 321. This is now expressly made clear by the present amendment.

But where the disagreement between the Judge and the jury is as to some of the charges, it is necessary that the whole case (in respect of all the charges) should be referred. It would be illegal for the Sessions Judge to record a judgment in respect of some of the charges in accordance with the verdict which he accepts, and to refer the case in respect of the other charges on which he disagrees with the verdict. See sub-sec. (2). When the accused was tried on several charges, and the Sessions Judge accepted the verdict of the jury and pronounced judgment as to some of the charges and disagreed as to the other charges, and referred the case to the High Court only as to these latter charges, it was held that the reference was illegal, as by this limited form of reference the High Court was precluded from considering the entire evidence on the record, and that the Sessions Judge should have referred the whole case leaving it to the High Court to consider the whole of the evidence that was placed before the jury—*Ananda Charan*, 21 C.W.N. 435, 39 I.C. 695, 18 Cr.L.J. 551; *Nawal Bhari*, 52 All. 881, 32 Cr.L.J. 81, 128 I.C. 2, A.I.R. 1930 All. 489, 1930 A.L.J. 1168, Ind. Rul. 1931 All. 2, 1930 Cr.C. 733; *Hazari Lal*, 11 Pat. 395, 1932 Cr.C. 273 (274), A.I.R. 1932 Pat. 156, 13 P.L.T. 93, 137 I.C. 190, 33 Cr.L.J. 505, Ind. Rul. 1932 Pat. 148; *Ramjanam*, 36 Cr.L.J. 856, 155 I.C. 866, 16 P.L.T. 348, A.I.R. 1935 Pat. 357, 14 Pat. 717; *Bishnu Chandra*, 37 C.W.N. 1180 (1182), 34 Cr.L.J. 918, 145 I.C. 236, A.I.R. 1933 Cal. 665, 1933 Cr.C. 1104.

Recording the grounds of his opinion :—The letter of reference should ordinarily state the case and the verdict of the jury and concisely the ground upon which the Judge differs from that verdict and considers it necessary in the interests of justice to submit the case. A mere criticism of the evidence, and a statement by the Judge that the accused should have been given the benefit of doubt, and that he disagrees with the verdict of the jury because their appreciation of the evidence does not seem to be proper, is not sufficient. These are hardly grounds of reference—*Jogi Kar*, 57 Cal. 1183, 1931 Cr.C. 47 (48), A.I.R. 1931 Cal. 15, 129 I.C. 798, 32 Cr.L.J. 452. In referring the case under this section, the Sessions Judge should state what material portions of the evidence he believes to be true, and his reasons for arriving at his conclusions so as to enable the High Court to appreciate them and to give due weight to them—*Punit*, 3 P.L.T. 413, 23 Cr.L.J. 421, A.I.R. 1922 Pat. 348; *Dyamanaiik*, 6 Bom.L.R. 519. Where the Judge merely said that the verdict was against the weight of evidence, and expressed no other opinion in his reference, it was held that he ought to have set out on what portions of the evidence or on what facts the accused should have been convicted—*Bhut Nath*, 7 C.W.N. 345 (347). So also, where the Sessions Judge merely stated in his reference that the verdict of the jury was erroneous and inconsistent and could not be accepted and that if the evidence had been believed all the accused should have been found guilty, held that the reference was not a proper reference, as it did not state the grounds of his opinion. The reference should be so complete and self-contained that it ought not to be necessary to refer to the order sheet—*Taribulla*, 25 C.W.N. 682, 23 Cr.L.J. 244. The order of reference under sec. 307 must be in the nature of a judgment giving a proper summary of the evidence and the reasons for the opinion of the Judge. In making the reference he should in effect show the reasons for his opinion in as clear a manner as he would have done if the case had not been a jury case and he had to write a judgment—*Sheo Din*, 50 All. 540, 29 Cr.L.J. 342, 108 I.C. 159, 9 A.I.Cr.R. 146, A.I.R. 1928 All. 622, 26 A.L.J. 296. He should state with some fulness his view of the evidence and the credibility of the more important witnesses, because the High Court has to attach more or less weight to the opinion of the Judge who saw and heard the witnesses—*Chander Krishna*, 10 Bom.L.R. 173.

Reflections on jurors :—The reference of the Sessions Judge should not contain any extra-judicial observations, e.g., any reflections on the conduct of the jurors which are not supported by any material on the record. The 'opinion' of the Sessions Judge is his opinion on the merits of the case and does not include his speculations as to the conduct of jurors. Such an imputation is not fair to the jurors—*Dhananjoy*, 51 Cal.

247 (350, 351), 38 C.L.J. 384; *Mamfru*, 51 Cal. 418 (430), 38 C.L.J. 397. It would be most unfortunate if persons of responsibility called upon to discharge the responsible duty of jurors were exposed to the risk of aspersions upon their conduct. If the Judge disagrees with the verdict of the jury, it is open to him to do so and to refer the case to the High Court, but this does not require that he should make reflections upon the conduct of the jurors which are not supported by evidence on the record. Such an imputation is unfair to the jurors, unfair to the Judge himself, unfair to the accused and unfair to the High Court also—*Mamfru*, 51 Cal. 418 (429, 431), 38 C.L.J. 397.

Recording evidence :—The Judge should state in his reference the evidence for the prosecution and for the defence, the facts which in his opinion are proved upon the evidence recorded in the case, and the conclusions to which these facts led him—*Irya*, 6 Bom.L.R. 599, 1 Cr.L.J. 743.

'Stating the offence' :—In case of an acquittal by the jury the Sessions Judge should state in his reference what offence the accused has in his opinion committed, and on what grounds he differs from the jury—*Chander Krishna*, 10 Bom.L.R. 173; *Sahal Roy*, 3 Cal. 623; *Taribulla*, 25 C.W.N. 682, 23 Cr.L.J. 244. But a reference will not be rejected because of omission to state the offence, if the Judge's opinion as to the offence committed appears sufficiently from the body of the letter of reference—*Panchanan Sarkar*, 37 C.W.N. 341 (344), 1933 Cr.C. 582, A.I.R. 1933 Cal. 404, 34 Cr.L.J. 608, 143 I.C. 600, Ind. Rul. 1933 Cal. 448.

937. "Opinion of the jury" :—The 'opinion of the jury' in sub-section (3) means nothing more than the verdict of the jury; it does not mean the reasons on which the verdict is founded—*Annada*, 36 Cal. 629; *Tarapada*, 18 C.W.N. 615; *Dhananjoy*, 51 Cal. 347 (352), 38 C.L.J. 384; *Ali Hyder*, 4 P.L.T. 425, 26 Cr.L.J. 856 (859), 86 I.C. 712, A.I.R. 1923 Pat. 474; *Ramjag*, 7 Pat. 55, 109 I.C. 114, A.I.R. 1928 Pat. 203, 9 P.L.T. 567, 29 Cr.L.J. 466 (468), *Punit*, 3 P.L.T. 413, 23 Cr.L.J. 421, A.I.R. 1922 Pat. 348; *Chellan*, 29 Mad. 91. But the word 'opinions' in sec. 307 (3), Cr. P. C., is wider than the word 'verdict' in sec. 423 (2), Cr. P. C., and it includes not only the final decision of the majority [the sense in which it is used in sec. 423 (2)] but also the opinions of the minority, and where reasons are disclosed, the reasons given whether by an individual jurymen, or by a part of the jury, or by the whole—*Dattatraya Sadashiv v. Emp.*, A.I.R. 1940 Nag. 17 (36), 41 Cr.L.J. 289, 186 I.C. 402. What the Judge has to record in his reference is the conclusion (i.e., verdict) of the jury and not the reasons on which that conclusion is based. And the circumstance that no such reason has been ascertained does not warrant the High Court to decline to go into the evidence and arrive at its own judgment as to the guilt or innocence of the accused—*Chellan*, 29 Mad. 91. But the Judge should do well to take the reasons of the jury for the view taken by them, and to record the reasons, especially where there is some inconsistency in their verdict—*Annada Charan Thakur*, 36 Cal. 629, 13 C.W.N. 757, 9 C.L.J. 638, 10 C.L.J. 32, 2 I.C. 497; *Bhulotan*, 6 P.L.J. 264, 23 Cr.L.J. 11. Even where the jury are unanimous in their verdict, the Judge should ask for specific findings on the particular facts on which he himself relies. This would enable the High Court to understand the particular grounds on which the jury proceeded, and it will then only be necessary to consider the propriety of those grounds—*Pamanna*, 2 Weir 388 (389); *Kankaya*, 22 N.L.R. 42, 27 Cr.L.J. 773, A.I.R. 1926 Nag. 308, 95 I.C. 309; *Balram*, 34 Cr.L.J. 411, 142 I.C. 785, 15 N.L.J. 116, Ind. Rul. 1933 Nag. 145. Where in a trial by jury the case depends entirely on circumstantial evidence, and the jurors are divided in opinion, the Judge should, if he intends to make a reference to the High Court, ascertain from the jurors the reasons for their opinion—*Zohra*, 1 P.L.T. 657, 55 I.C. 294; *Punit*, 3 P.L.T. 413, 23 Cr.L.J. 421, A.I.R. 1922 Pat. 348.

Where the jury found the accused not guilty, and on being asked by the Judge to give reasons for their verdict they said that they gave the benefit of doubt and could give no other reasons; held that by reason of the fact that the jury were unable to give

reasons, it could not be said that the jury had no adequate reasons for returning a verdict of not guilty or that the verdict was wrong; even trained intellects often find it difficult to formulate and put before the Court the reasons for an opinion which they hold or which they wish to propound. The High Court refused to interfere—*Nishi Kanta*, 41 C.L.J. 35, 26 Cr.L.J. 805, 85 I.C. 453, A.I.R. 1925 Cal. 525.

The High Court is not bound to put the opinion of the jury on a higher plane than the opinion of the Judge. Both should be given due weight and as a general rule the opinion of the Sessions Judge, who has weighed and appreciated the evidence and has given reasons for his opinion, should carry more weight than the opinion of the jury, who are laymen unaccustomed to weigh and appreciate the evidence and who give no reasons for their opinion—*Ram Chandra*, 55 Cal. 879, 111 I.C. 327, A.I.R. 1928 Cal. 732, 10 A.I.Cr.R. 456, 29 Cr.L.J. 823 (825); *Ramcharan*, 81 I.C. 305, 11 O.L.J. 210, A.I.R. 1924 Oudh 314, 27 O.C. 29, 25 Cr.L.J. 785; *Tukaram*, 30 Cr.L.J. 310 (Nag.). The High Court is to consider the whole of the evidence and to give due weight to the opinion of the Judge and also to the opinion of the jury—*Suar Gola*, 36 Cr.L.J. 262, 152 I.C. 1021, A.I.R. 1934 Pat. 533, 1934 Cr.C. 1189. But where the verdict depends entirely upon the question whether the witnesses are to be believed or not, weight should ordinarily be attached to the verdict of the jury whose function it is to decide such questions of facts, especially when there is no reason for supposing that the verdict is perverse—*Sitalu*, 34 Cr.L.J. 731, 144 I.C. 246, 14 P.L.T. 217, A.I.R. 1933 Pat. 273, Ind. Rul. 1933 Pat. 227, 1933 Cr.C. 755; *Bhagwat*, 36 Cr.L.J. 1502, 158 I.C. 1131, A.I.R. 1935 Pat. 433, 16 P.L.T. 603, 1935 Cr.C. 1104; *Mhaska*, 37 Cr.L.J. 26, 158 I.C. 1090, 1935 Cr.C. 325, A.I.R. 1935 Bom. 165, 37 Bom.L.R. 109. If persons are put on their trial before juries, on questions of fact the decisions of the jury should always be accepted, unless it is possible to demonstrate that the acquittals have been arrived at perversely—*Sherah*, 63 C.L.J. 140. It cannot be said that simply because there is no reason to be found in the record for disbelieving the evidence of certain witnesses the jury's verdict must be regarded as perverse or unreasonable. The jury are entitled to form and express their own opinion as regards the reliability of witnesses, and one cannot exclude the possibility that they may form an adverse opinion on account of the demeanour of the witnesses or some other cause which does not find any mention in the record. The mere fact that the opinion is one with which the trial Judge does not agree, does not make the Jury's opinion a perverse or unreasonable one—*Boya Lingadu*, 41 Cr.L.J. 581, 188 I.C. 381, A.I.R. 1940 Mad. 509, 1940 M.W.N. 239, 51 M.L.W. 321, (1940) 1 M.L.J. 428, A.I.R. 1940 Mad. 509, 1940 M.Cr.C. 79.

938. When High Court will or will not interfere:—The High Court is generally reluctant to interfere with the unanimous verdict of the jury unless it is manifestly wrong and unless it is necessary to do so in the interests of justice—*Jogi Kar*, 57 Cal. 1183, 1931 Cr.C. 47 (48). Where the unanimous verdict of the jury is absolutely against the weight of evidence on the record and is manifestly perverse, it cannot be sustained—*Abdul Rahim*, 35 Cr.L.J. 1130 (1131), 150 I.C. 845, 11 O.W.N. 905, 1934 Cr.C. 1324, A.I.R. 1934 Oudh 399. The High Court will exercise its discretionary powers with great caution and care. The mere fact that upon a consideration of all the evidence before the Sessions Court, the High Court would have arrived at a conclusion different from that arrived at by the jury, would not justify the High Court in interfering with their unanimous verdict—*Chirkua*, 2 A.L.J. 475, 2 Cr.L.J. 357; *Nritya Gopal*, 38 C.L.J. 1, 24 Cr.L.J. 897; *Panna Lal*, A.I.R. 1924 All. 411, 81 I.C. 86 I.C. 712, A.I.R. 1923 Pat. 474, 26 Cr.L.J. 856; *Syed Zahir*, 7 P.L.T. 367, 27 Cr.L.J. 1011, 97 I.C. 17, A.I.R. 1926 Pat. 566. The High Court upon a reference under this section is reluctant to interfere with the unanimous verdict of a jury; and if that verdict is honest and not unreasonable and can upon the evidence be supported, the High Court will accept the verdict even though it may not wholly agree therewith—*Pramathanath*, 30 C.L.J. 503, 21 Cr.L.J. 256, 55 I.C. 282; *Hara Mohan*, A.I.R. 1927 Cal. 848, 105 I.C. 231, 28 Cr.L.J. 903, 54 Cal. 708, 28 Cr.L.J. 903;

Premnanda, 52 Cal. 987, 29 C.W.N. 738, A.I.R. 1925 Cal. 876, 88 I.C. 1000, 26 Cr.L.J. 1256, 42 C.L.J. 247; *Panna Lal*, 46 All. 265 (268); *Chiranji Lal*, 5 Luck. 720, A.I.R. 1930 Oudh 334, 1930 Cr.C. 524, 124 I.C. 661, 7 O.W.N. 376, 31 Cr.L.J. 719; *Asghar Husain*, 35 Cr.L.J. 33, 146 I.C. 303, 10 O.W.N. 883. Where the case is undoubtedly not free from difficulties, and a great deal could be said on both sides, but it cannot be said that the jury's view was a bad view or an impossible view, the Court is not justified in reversing their verdict—*Chupai*, 35 Cr.L.J. 285, 147 I.C. 53, 10 O.W.N. 971. In a reference it is not sufficient to show that another jury might have formed a different opinion. What the prosecution should show is that no reasonable body of men would have returned the verdict complained of—*Syed Zahir*, 7 P.L.T. 367, 27 Cr.L.J. 1041, 97 I.C. 17, A.I.R. 1926 Pat. 566; *Khudhay*, 48 C.L.J. 541, 30 Cr.L.J. 125. The verdict of a jury has more weight than the opinion of assessors, and should not be set aside unless no sensible man could have arrived at that verdict particularly in the case of a verdict of acquittal—*Vidyasagar*, A.I.R. 1928 Pat. 497, 112 I.C. 363, 9 P.L.T. 683, 8 Pat. 74, 29 Cr.L.J. 1035 (1039). The jurors are entitled to their own view of the case, and the rule of law is not to disturb their verdict unless it be for special reasons and under special circumstances—*Bajit Mian*, 6 Pat. 817, A.I.R. 1928 Pat. 120, 106 I.C. 673, 9 P.L.T. 191, 29 Cr.L.J. 81 (83). Human opinion honestly held may differ on all questions. But the test to be applied to the honesty of such opinion is whether any reasonable man on the materials before him can hold it. The test, therefore, to be applied in estimating the weight of the verdict of the jury is whether the opinion is such as could on the particular facts and evidence of the case have been held by reasonable men, however much the Judge may differ from that view—*Hara Mohan*, 54 Cal. 708, 28 Cr.L.J. 903; *Gulam Kader*, 28 C.W.N. 876, 82 I.C. 356, A.I.R. 1924 Cal. 956, 25 Cr.L.J. 1284; *Nritya Gopal*, 38 C.L.J. 1, 24 Cr.L.J. 897. The jury is clearly made primarily the tribunal to find the facts, and when they have found them in one direction or other, it is not for the High Court to interfere unless the verdict is unreasonable—*Veerappa*, 51 Mad. 956, 30 Cr.L.J. 317 (321), 114 I.C. 353, A.I.R. 1928 Mad. 1186, 28 M.L.W. 575, 55 M.L.J. 591, 1929 M.W.N. 485 (F.B.); *Venkatachala Goundan*, 33 Cr.L.J. 215, 136 I.C. 33, A.I.R. 1932 Mad. 21, 1932 Cr.C. 1; *Madan Gopal*, 32 Cr.L.J. 1028, 133 I.C. 475, 1931 A.L.J. 695, Ind. Rul. 1931 All. 683. The High Court which has not the opportunity to see the witnesses must act with great caution on a reference under this section, and, therefore, it will not ordinarily interfere with the unanimous verdict of the jury, which has been accepted by the Judge with regard to some of the accused—*Akbar*, 51 Cal. 271 (277). If the High Court is to interfere in every case of doubt, or in every case in which the evidence would have warranted a different verdict, then the real trial by jury would be at an end and the verdict of the jury would have no more weight than the opinions of assessors—*Sham Bagdi*, 20 W.R. 73.

It is not the practice of the High Court to interfere with a jury-verdict, if it is in any way a reasonable verdict. But if the verdict is unreasonable and perverse, the High Court has not the slightest hesitation in setting it aside—*Muhammad Hadi Husain*, A.I.R. 1928 Oudh 277, 112 I.C. 103, 5 O.W.N. 281, 3 Luck. 494, 29 Cr.L.J. 983 (985). The High Court will not exercise its vast discretionary powers vested under this section in setting aside the unanimous verdict of a jury, unless it is perverse or patently wrong or may have been induced by an error of the Judge—*Dhunum*, 9 Cal. 53; *Panna Lal*, 46 All. 265 (267), 22 A.L.J. 162; *McCarthy*, 9 All. 420; *Mania Dayal*, 10 Bom. 497; *Dada*, 15 Bom. 452 (461); *Devji Govindji*, 20 Bom. 215 (218); *Walker*, 26 Bom.L.R. 610, A.I.R. 1921 Bom. 450, 83 I.C. 995, 26 Cr.L.J. 211; *Nritya Gopal*, 38 C.L.J. 1; *Jacquet*, 11 Cal. 85; *Asgar*, 22 C.W.N. 811; *Sagermal*, 28 C.W.N. 947, 40 C.L.J. 135; *Hara Mohan*, A.I.R. 1927 Cal. 848, 105 I.C. 231, 28 Cr.L.J. 903, 54 Cal. 708. In disagreeing with the unanimous verdict of the jury the High Court has to consider whether the jurors were entirely unreasonable in the conclusion arrived at by them or whether it was impossible for the jurors to say that the guilt of the accused had been proved. The High Court does not exercise the power vested under

this section in setting aside the verdict of the jury, unless it is perverse or patently wrong, and is convinced that in giving effect to the same it would not meet the ends of justice—*Nibharesh Mandal Mohar Mandal*, 39 Cr.L.J. 479 (480), 174 I.C. 803, A.I.R. 1938 Cal 295, 66 C.L.J. 351, 10 R.C. 726. A High Court will not interfere under this section upon any mere preponderance of evidence, but will only do so when it is satisfied beyond reasonable doubt that the verdict of the jurors or the majority of the jury is so distinctly against the weight of evidence on the record that it may be unhesitatingly described as a perverse verdict or unless it is clearly established that the jurors were wholly led astray in their conclusions upon the case. In a reference under this section the High Court has to form and act upon its view of what the evidence in its opinion proves, but in doing so it will no doubt give due weight to the opinion of the Sessions Judge no less than to the verdict of the jury—*Chheda*, 34 Cr.L.J. 795 (796), 144 I.C. 582, 10 O.W.N. 234, A.I.R. 1933 Oudh 181, 1933 Cr.C. 384, 8 Luck. 439, Ind. Rul. 1933 Oudh 270. The High Court has to give due weight to the opinion of the Sessions Judge and to the opinion (verdict) of the jury. The measures of the relative weight to be attached to these two factors cannot be crystallised into an inflexible formula. The answer must depend upon the circumstances of each case. But the trend of judicial opinion has been in favour of preference of the unanimous verdict of the jury. If the verdict is not unanimous, the weight to be attached to it is necessarily diminished; but if the verdict is unanimous, the High Court should not interfere with it unless it is clearly wrong or perverse or unreasonable, that is, the High Court must come to the conclusion, before it interferes, not merely that it would have come to a different decision from that of the jury, but that no reasonable man could have arrived at that decision—*Dhananjay*, 38 C.L.J. 384, 25 Cr.L.J. 758, 81 I.C. 246, A.I.R. 1924 Cal. 321, 51 Cal. 347 (353); *Jamaldi*, 51 Cal. 160 (165), 28 C.W.N. 536, *Kankaya*, A.I.R. 1926 Nag. 308, 95 I.C. 309, 22 N.L.R. 42, 27 Cr.L.J. 733; *Ramadhan Brahmin v. Emp.*, A.I.R. 1929 Nag. 36, 29 Cr.L.J. 963 (964), 112 I.C. 51; *Madan Mandal*, 41 Cal. 662; *Nashai Sardar*, 56 C.L.J. 19, 1932 Cr.C. 648 (650), Ind. Rul. 1932 Cal. 439, 33 Cr.L.J. 593, 138 I.C. 278, A.I.R. 1932 Cal. 656; *Bas Lali*, 34 Bom.L.R. 896, 33 Cr.L.J. 745, 139 I.C. 272, Ind. Rul. 1932 Bom. 490; *Jhina Soma*, A.I.R. 1939 Bom. 457 (460), 41 Bom.L.R. 965; *Ram Dass*, 137 I.C. 346, Ind. Rul. 1932 Oudh 233, 9 O.W.N. 301, 33 Cr.L.J. 465; *Panna Lal*, 46 All. 265 (267), 22 A.L.J. 162, 25 Cr.L.J. 931; *Nagar Ali*, 56 Cal. 132, A.I.R. 1929 Cal. 287, 116 I.C. 171, 30 Cr.L.J. 584 (585), 32 C.W.N. 952. There are, no doubt, a number of cases in which it has been held that as a matter of practice the High Court will not set aside the unanimous verdict of a jury unless it is perverse or patently wrong. But the trend of more recent cases is to stress the fact that the discretionary powers of the High Court are really untrammelled under sec. 307, Cr. P. C., and that it can exercise all the powers of an Appellate Court and the whole case is open to it—*Dattu Deoman v. Emp.*, A.I.R. 1937 Nag. 33 (35), 38 Cr.L.J. 355, 167 I.C. 241, 9 R.N. 170. The High Court will not interfere on a reference under this section unless that Court is of opinion that the verdict of the jury could not be supported by the evidence on the record—*Govind Singh*, 5 Pat. 573, 98 I.C. 252, A.I.R. 1926 Pat. 525, 8 P.L.T. 133, 27 Cr.L.J. 1308. The High Court will not interfere upon any mere preponderance of evidence, unless it is satisfied beyond reasonable doubt that the verdict is so distinctly against the evidence that it may be termed a perverse verdict—*Pamanna*, 2 Weir 388 (389); *Asgar*, 22 C.W.N. 811, 20 Cr.L.J. 20; *Mofizel*, 29 C.W.N. 842, 89 I.C. 242, A.I.R. 1925 Cal. 909, 26 Cr.L.J. 1298; *Shanoo*, 22 C.W.N. 1028, 20 Cr.L.J. 223; *Chheda*, 10 O.W.N. 234, A.I.R. 1933 Oudh 181, 144 I.C. 582, 34 Cr.L.J. 795, 8 Luck. 439, 1933 Cr.C. 384. It is not the practice of the High Court to interfere in case of acquittal by jury, unless the acquittal stands out as patently bad. If the verdict is patently bad and amazingly perverse, in as much as the jury have overlooked the overwhelming evidence for the prosecution and accepted the slight evidence adduced by the defence, the High Court will interfere—*Maharaj Behari*, A.I.R. 1929 Oudh 86, 108 I.C. 900, 5 O.W.N. 216, 3 Luck. 456, 29 Cr.L.J. 452 (453); *Jukhan*, 27 A.L.J. 509, 119 I.C. 443, A.I.R. 1929 All. 338, Ind. Rul. 1929 All. 1019, 30 Cr.L.J. 1078.

(1079). See also *Monibala Dassi*, 41 C.W.N. 610. If persons are put on their trial before juries, on questions of fact the decisions of the jury should always be accepted, unless it is possible to demonstrate that the acquittals have been arrived at perversely. The Court will be unsympathetic to this type of reference unless it is shown unmistakably that the jury failed to do their duty in considering the evidence brought before them properly—*Sherali Badyakar*, 38 Cr.L.J. 758, 169 IC 342, 63 C.L.J. 140. In cases where there has been a verdict of not guilty it is the practice of the High Court not to reverse the verdict of a jury unless it is perverse or manifestly wrong. On the other hand, where the jury has returned the verdict of guilty, the matter stands on a different footing. It is true that the jury are judges of fact; it is open to them to believe or to disbelieve witnesses. No doubt the verdict of a jury, especially when it is unanimous, should not be lightly displaced. But having regard to the language of sec 307, Cr. P. C., and having regard to the duty which is enjoined upon the High Court and the powers which are conferred upon it thereunder, it cannot be said that, so long as the verdict is not perverse or palpably erroneous, the High Court must act against its own judgment and in the teeth, as it were, of its own appreciation of the evidence must convict a person in respect to whose guilt it entertains grave doubts. It is unreasonable to suppose that after being enjoined with the duty of "considering the entire evidence and giving due weight to the opinions of the Sessions Judge and the jury" the High Court should be thus fettered to the prejudice of the accused. It is the clear duty of the High Court in the interests of justice to reverse the verdict of a jury when it considers that the prosecution has failed to establish the charge and that the verdict of the jury is not sustainable upon the evidence—*Bansi*, 39 Cr.L.J. 559 (561), 1938 A.L.J. 282, I.L.R. 1938 All. 483, 175 IC 130, 1938 A.W.R. (H.C.) 217, 1938 A.Cr.C. 20, 10 R.A. 645, 1938 A.L.R. 281, A.I.R. 1938 All. 227. Section 307 (3), Cr. P. C., imposes upon the High Court in the clearest terms the duty of considering the entire evidence and of giving due weight to opinions of both the Judge and the jury—*Maja Khan*, 66 C.L.J. 500 (510). The High Court has undoubted jurisdiction to disregard the verdict of the jury and to convict the accused if it is of opinion that the verdict of the jury was perverse—*Sri Kishan*, A.I.R. 1935 All. 970, 1935 A.L.J. 1019, 37 Cr.L.J. 135, 159 IC 621, 1935 Cr.C. 1193. On a reference to the High Court to set aside a unanimous verdict of conviction, the High Court will interfere where the prosecution has not adequately proved its case and where the facts are suspicious, and will give the benefit of doubt to the accused—*Yakub*, 30 C.W.N. 859, 98 IC 413, A.I.R. 1926 Cal. 1034, 27 Cr.L.J. 1341. In dealing with a unanimous verdict of acquittal, the High Court will have to consider whether the jury were entirely unreasonable in giving the benefit of doubt to the accused, and whether it was impossible for the jury to arrive at any other reasonable conclusion than that the guilt of the accused had not been brought home to them—*Golam Kadir*, 28 C.W.N. 876, 82 IC 356, A.I.R. 1924 Cal. 956, 25 Cr.L.J. 1284. In references under this section where acquittals are concerned, there is a much greater onus upon the Sessions Judge to convince an appellate Court with extreme particularity than there is when he makes a reference with regard to a conviction. The Judge has absolutely no right to put up to the High Court a report which is intended to substitute his judgment on a pure question of fact, rather than the judgment and opinion of the jury, who was sitting with him—*Gosha Sardar*, 37 Cr.L.J. 1149, 165 IC 438, A.I.R. 1936 Cal. 407, 1936 Cr.C. 670, 9 R.C. 400.

In *Barwick*, 13 Lah. 573, 1932 Cr.C. 426 (430), Ind. Rul. 1932 Lah. 181, 136 IC 5, 33 Cr.L.J. 220, 33 P.L.R. 443, A.I.R. 1932 Lah. 345, the Lahore High Court holds that the High Court cannot refuse to interfere merely because it is not shown that the verdict was perverse or wrong or unreasonable. The same view was taken in the earlier Calcutta decisions of *Lyall*, 29 Cal 128, and *Annada Charan Thakur*, 36 Cal 629. The Patna High Court also takes the same view in *Rafi Mian*, 11 Pat 669, 1932 Cr.C. 643 (644), 33 Cr.L.J. 877, A.I.R. 1932 Pat. 246, 13 P.L.T. 418, 139 IC 885, Ind. Rul. 1932 Pat. 269.

939. Power of High Court:—Section 307, Cr P C, makes no distinction between cases of acquittal and conviction. But in dealing with the weight and volume of evidence the two cases differ, because of the presumption of innocence. Where a jury have convicted the High Court has to see not merely that there is evidence of guilt, but that the evidence is strong enough to preclude any reasonable doubt in the minds of the jury as to the guilt of the accused—*Dagadu*, 34 Cr.L.J. 660, 143 I.C. 495, 35 Bom.L.R. 193, A.I.R. 1933 Bom. 144, 1933 Cr.C. 331, Ind. Rul. 1933 Bom. 276. In case of a reference under this section the High Court is to give weight not only to the opinion of the jury but to that of the Judge as well—*Ncamatulla*, 17 C.W.N. 1077; *Bhullotan*; 23 Cr.L.J. 11, 6 P.L.J. 264; *Mamundra*, 41 Cal. 754; *Lyall*, 29 Cal. 128 (133); *Iswari*, 15 Cal. 259. But although the High Court is bound in dealing with a reference under this section to give due weight to the opinions of the Judge and the jury, still it is not bound in any way by these opinions, and the question whether the decision in the case is to be for acquittal or for conviction is entirely open to the High Court and left open to it to decide after consideration of the evidence and the opinions of the Judge and the jury—*Nanni Kudumban*, 45 M.L.J. 406, 76 I.C. 289, 18 M.L.W. 482, 1923 M.W.N. 695, A.I.R. 1924 Mad. 232, 25 Cr.L.J. 145; *Dada*, 15 Bom. 452; *Annada Charam Thakur*, 36 Cal. 629; *Abdul Rahaman*, 9 C.L.J. 432, 10 Cr.L.J. 57; *Barwick*, 13 Lah. 573, 1932 Cr.C. 426 (429). When once a reference is made to the High Court, the language of the Code does not justify any undue preference being given to the opinion of the jury over that of the Judge. The High Court has to weigh both the opinions and consider the entire evidence on the record just as it would consider in any criminal matter coming before it for decision—*Ramcharan*, 27 O.C. 29, 11 O.L.J. 210, 81 I.C. 305, A.I.R. 1924 Oudh 314, 25 Cr.L.J. 785; *Ramchandra*, 55 Cal. 879, 29 Cr.L.J. 823 (825), 111 I.C. 327, A.I.R. 1928 Cal. 732.

The Bombay High Court has held that the *whole case is open* to the High Court when hearing a reference, and in dealing with the reference the High Court exercises all the powers which it exercises on appeal—*Shankar Balkrishna*, 47 Bom. 31 (32), 24 Bom.L.R. 484, A.I.R. 1922 Bom. 368, 76 I.C. 1035, 25 Cr.L.J. 315. This is also the view of the Nagpur High Court—*Dattu Deomon v. Emp.*, A.I.R. 1937 Nag. 33 (35), 38 Cr.L.J. 355, 167 I.C. 241, 9 R.N. 170; *Sakhawat v. Emp.*, 38 Cr.L.J. 330 (332), A.I.R. 1937 Nag. 50, 167 I.C. 61, I.L.R. 1937 Nag. 277; *Dattatraya Sadashiv v. Emp.*, A.I.R. 1940 Nag. 17 (28), 186 I.C. 402, 41 Cr.L.J. 289, I.L.R. 1940 Nag. 394 (F.B.). The Calcutta High Court is also of this opinion, and therefore where the Judge agreed with the jury on a verdict of not guilty in respect of one of the charges, and disagreed with the jury on a verdict of not guilty in respect of the other charge, and made a reference under section 307 in respect of the latter charge, held that the *whole case* was open to the High Court for consideration and that it could find the accused guilty in respect of the charge on which the Judge had agreed with the jury in the verdict of acquittal—*Dwarika Nath*, 60 Cal. 427, 37 C.W.N. 91 (93), 34 Cr.L.J. 164, 141 I.C. 578, A.I.R. 1933 Cal. 47, Ind. Rul. 1933 Cal. 138, 1933 Cr.C. 61 (distinguishing *Madan Mandal*, 41 Cal. 662 and *Profulla*, 50 Cal. 41). But a Full Bench of the Madras High Court has laid down that on a reference under sec. 307, the whole matter is not re-opened and the High Court cannot try the case as if there had been no trial; but the High Court should only confine itself to the question whether the Judge's view of the verdict is justified by the evidence, and if it is not, to confirm the verdict—*Veerappa*, 51 Mad. 956, 30 Cr.L.J. 317 (321), 114 I.C. 353, 28 M.L.W. 575, 55 M.L.J. 591, A.I.R. 1928 Mad. 1185, 1929 M.W.N. 185, Ind. Rul. 1929 Mad. 273 (F.B.), overruling *Ranni Kadumban*, 45 M.L.J. 406, 76 I.C. 289, 18 M.L.W. 482, 1923 M.W.N. 695, A.I.R. 1924 Mad. 232, 25 Cr.L.J. 145. See also *Venkatachala Goundan*, 33 Cr.L.J. 215, A.I.R. 1932 Mad. 21, 1932 Cr.C. 1, 136 I.C. 33.

The High Court can exercise all the powers of an Appellate Court, and consequently can convert a finding of acquittal into one of conviction. See *Dwarika Nath*, *supra*; and sec. 423 (1) (a).

The words "subject thereto" in sub-section (3) do not mean that the powers of the High Court are subject to the limitations and provisions contained in sec. 423 (2). Therefore it is open to the High Court, on a reference under sec. 307, to reverse the verdict of the jury, even though there has not been any misdirection by the Judge or any misunderstanding by the jury of the law as laid down by the Judge. This section gives the High Court a power to reconsider the entire evidence, and to arrive at an independent conclusion of its own on the question of fact as well as of law in the interests of justice. The High Court, when acting under sec. 307, is clothed with the powers as regards procedure, of a Court of Appeal, if for good reasons it desires to exercise any of them, e.g., a power to release the accused on bail under sec. 426, or to take additional evidence or direct it to be taken under sec. 428—*Shera*, 50 All. 625, 26 A.L.J. 321, 29 Cr.L.J. 353 (356, 357), A.I.R. 1928 All. 207, 108 I.C. 225; *Bansi*, 39 Cr.L.J. 559 (561), 1938 A.L.J. 282, I.L.R. 1938 All. 483, 175 I.C. 130, 1938 A.W.R. (H.C.) 217, 1938 A.Cr.C. 20, 10 R.A. 645, 1938 A.L.R. 381, A.I.R. 1938 All. 227. The High Court is entitled to go into the evidence irrespective of whether there is any misdirection or misunderstanding of the law or not—*Dullu Kuer*, A.I.R. 1910 Pat. 513 (514), 6 B.R. 465, 187 I.C. 387, 41 Cr.L.J. 457, 1940 P.W.N. 466. In cases coming under sec. 307, Cr. P. C., the Judge who hears the evidence is in the first instance of the opinion that the verdict is wrong, and if the Appellate Court is also of the same opinion, it is empowered to set aside the verdict. But when the case comes by way of an appeal under sec. 418, Cr. P. C., where the Judge himself has not differed, the Legislature has provided that there should be no interference by the Appellate Court with the verdict of the jury, unless there has been either a misdirection or misunderstanding mentioned therein—*Manjia v. Emp.*, 38 Cr.L.J. 465 (467), 167 I.C. 802, 9 R.A. 578, 1936 A.W.R. 1284, 1937 A.Cr.C. 11, 1937 A.L.J. 43, I.L.R. 1937 All. 419, 1937 A.L.R. 250, A.I.R. 1937 All. 195. The duty of the High Court is to consider the whole of the evidence, and the opinions of the Sessions Judge and the jury, and thereupon to exercise all the powers of a Court of Appeal. The duty of an Appellate Court, where an appeal is allowed on questions of fact, is to throw upon those, who seek to disturb the verdict of the jury or other first tribunal of fact, the onus of showing that the verdict is wrong. But if the party so seeking succeeds in demonstrating that the verdict is wrong, the Court has full power to reverse the verdict—*Rafi Mian*, 11 Pat. 669, 1932 Cr.C. 643 (647), 33 Cr.L.J. 877, A.I.R. 1932 Pat. 246.

In a reference under this section three possible courses can be taken: the High Court may, having considered the evidence and the opinions and having supplemented this material in any way open to it, (1) agree with the jury's opinion, (2) disagree with the jury's opinion but consider that that opinion is not manifestly perverse, (3) conclude that the jury's opinion is perverse. In the first case put, the High Court will dispose of the case in accordance with the jury's opinion. In the second case put, the High Court will direct a new trial or acquit. In the third case put, the High Court will dispose of the case by acquitting or convicting as the case may be. If the High Court is not absolutely certain that the jury's opinion is wrong but is of opinion that it is wrong the proper course is to accept that opinion, or possibly in certain circumstances to order a new trial. If the High Court inclines to an opinion that the jury is wrong but has no decided opinion one way or the other the right course is to accept the jury's opinion (*Per Stone C.J. and Grille J.*). The majority view is (1) that the High Court can interfere when the verdict of the jury is perverse and (2), that it ought not to do so unless it is perverse. This is placed as a matter of practice and not as one of law. The High Court has, however, power to interfere when the verdict is perverse and that this power is expressly conferred upon it by sec. 307 read with secs. 418 and 423, Cr. P. C., and secondly, that not only ought it not to do so when the verdict, whether of guilty or not guilty is not perverse, but that it has no power to do so under the law. This result follows from the same set of sections—*Dattatraya Sadashiv v. Emp.*, A.I.R. 1940 Nag. 17 (29, 30), 41 Cr.L.J. 289, 186 I.C. 402 (F.B.).

The High Court cannot consider any question on which the Judge and the jury are agreed—*Madan Mandal*, 41 Cal. 662, 15 Cr.L.J. 155. So also, the High Court cannot consider any question on which the Judge had accepted the verdict of the jury, although he did not agree with them—*Prafulla Kumar Majumdar*, 51 Cal. 41. Although the High Court can consider the entire evidence, still it should not ignore the verdict of the jury on a question of fact. Unless there is an astounding reason for it, the verdict of the jury on a question of fact will not be set aside. The mere fact that another view of the evidence might be taken is not enough—*Punit Cham*, 3 P.L.T. 413, 23 Cr.L.J. 421, A.I.R. 1922 Pat. 348.

Retrial:—Under sub-sec. (3), sec. 307, the High Court has ample power in a case, in which there has been no proper or adequate trial, to make an order that the accused persons should be re-tried—*Rafiqueuddin*, 36 Cr.L.J. 808 (813), 155 I.C. 687, A.I.R. 1935 Cal. 184, 39 C.W.N. 368, 1935 Cr.C. 241, 62 Cal. 572, 7 R.C. 606 (F.B.); *Mahomed Adam Chohan*, A.I.R. 1937 Bom. 60 (62), 38 Bom.L.R. 1186, 38 Cr.L.J. 327, 167 I.C. 43, 9 R.B. 274..

Power to convict for offence not charged:—Ordinarily the High Court cannot convict the accused for any offence with which he was not charged—*Madan Mandal*, 41 Cal. 662. But the combined effect of this section read with sec. 238 is that the High Court may, in dealing with a case coming before it under this section, convict an accused for a minor offence, although he was not charged with such offence—*Sitanath*, 22 Cal. 1006. And a Sessions Judge accepting the jury's finding on the grave charges can make a reference to High Court with the object of having some of the accused convicted on minor charges—*Hari*, 37 C.L.J. 34, 24 Cr.L.J. 674, A.I.R. 1923 Cal. 108. But where in a case of offence under sec. 147, I. P. C., the common object assigned in the charge as framed to support the case has not been sustained, the High Court on a reference under sec. 307 of this Code cannot invent another common object in order to support the conviction—*Akbar*, 51 Cal. 271 (275), 25 Cr.L.J. 773, 81 I.C. 261, 38 C.L.J. 379, A.I.R. 1924 Cal. 449.

Jurors acting on private knowledge:—Where jurors were influenced by their private knowledge based on what they had heard outside Court and there were also indications in the course of the trial that they were biased in favour of the prosecution, the verdict could not be sustained—*Dharanidhar*, 35 Cr.L.J. 1311, 151 I.C. 365, 59 C.L.J. 15, 1934 Cr.C. 669, A.I.R. 1934 Cal. 432.

939A. No appeal from High Court:—A High Court in dealing with a reference under this section is not acting in the exercise of its original criminal jurisdiction but only as a Court of reference in a criminal matter—*Horace Lyall*, 29 Cal. 286; and therefore no appeal lies from its judgment passed under this section—*Adveppa*, Ratanlal 691.

939B. Custody of the accused:—It is quite wrong to release persons accused of an offence under sec. 302, I. P. C., on bail even during the pendency of the trial or during the course of the trial, and it is therefore still more wrong that they should be released on bail after they had been convicted of such a serious offence by the unanimous verdict of the jury even though the Sessions Judge disagreed with the verdict of the jury and made up his mind to refer the matter to the High Court. In such circumstances it is desirable that the convicted persons should be held in custody pending the final decision of the High Court—*Benet Pramanick*, A.I.R. 1935 Cal. 407 (412), 36 Cr.L.J. 944, 156 I.C. 481, 39 C.W.N. 954, 1935 Cr.C. 630, 62 Cal. 900.

G.—Re-trial of Accused after Discharge of Jury.

308. Whenever the jury is discharged, the accused shall be detained in custody or on bail (as the case may be), and shall be tried by another jury, unless the Judge considers that he should not be re-tried, in

case the Judge shall make an entry to that effect on the charge, and such entry shall operate as an acquittal.

940. If a jury is discharged in the course of a trial for misconduct, the Judge should hold a fresh trial before another jury newly empanelled—*Rahim Sheikh*, 50 Cal. 827, 37 C.L.J. 595, 24 Cr.L.J. 677, A.I.R. 1923 Cal. 724 (cited under sec. 282).

Where a jury has returned a verdict of not guilty and the Judge disagrees with the jury and discharges them, and then passes an order under sec. 308 making an entry to the effect that no retrial is necessary and that the accused be acquitted, it is not open to the Judge, in making the order under sec. 308, to pass remarks, implying the guilt of the accused (who is a police officer) and suggesting for the consideration of the Police Department that severe departmental action should be taken against him. The accused, being acquitted, is entitled to the benefit of the order of acquittal and all the consequences which it implies—*Ahmad Shah*, 23 S.L.R. 397, 30 Cr.L.J. 877 (878), 118 I.C. 195, Ind. Rul. 1929 Sind 163, A.I.R. 1929 Sind 145.

* This section does not affect the construction of sec. 403. An accused who is re-tried under this section is not '*tried again*' within the meaning of sec. 403 but is being tried on the original indictment and on his original plea of not guilty. Section 403, therefore, does not bar the retrial held under this section—*Nirmal Kanta*, 41 Cal. 1072.

H.—Conclusion of Trial in Cases tried with Assessors.

309. (1) When, in a case tried with the aid of assessors, ^{Delivery of opinions of assessors} the case for the defence and the prosecutor's reply (if any) are concluded, the Court may sum up the evidence for the prosecution and defence, and shall then require each of the assessors to state his opinion orally *on all the charges on which the accused has been tried*, and shall record such opinion, and for that purpose may ask the assessors *such questions as are necessary to ascertain what their opinions are. All such questions and the answers to them shall be recorded.*

(2) The Judge shall then give judgment, but in doing so ^{Judgment.} shall not be bound to conform to the opinions of the assessors.

(3) If the accused is convicted, the Judge shall, *unless he proceeds in accordance with the provisions of section 562*, pass sentence on him according to law.

Change:—This section has been amended by sec. 82 of the Cr. P. C. Amendment Act, XVIII of 1923. "This amendment assimilates the procedure by which assessors give their opinion to that adopted for ascertaining the verdict of the jury, namely, by question and answer"—*Statement of Objects and Reasons* (1914).

941. Summing up:—The object of summing up the evidence is to enable the Sessions Judge, in long and intricate cases, to place the evidence in an intelligible form, so as to assist the assessors in arriving at a reasonable conclusion, and not to give the Judge an opportunity of expressing his opinion in emphatic terms on every single matter put in evidence—*Sadulla Hawladar*, 9 Cal. 875. In summing up the evidence to the assessors the Judge should not, as he may do in charging the jury, *express any opinion* upon any question of facts arising in the case—*Tirumal*, 24 Mad. 523 (536); *Dewan Singh*, 22 Cal. 805. He should not obtrude on the assessors his own opinion on

the worthlessness or otherwise of the evidence, because the assessors might become embarrassed in coming to an independent opinion of their own in the face of the very decided opinion expressed by him—*Shadulla*, 9 Cal. 875. But a discussion and statement of points by a Judge with the assessors with the object of getting the best assistance for the proper adjudication of the case are not improper, as the real object of appointing assessors is to assist the Court—*Ameeruddeen*, 15 W.R. 25. In a case of rioting, where the dispute arises over the possession of a piece of land and the Crown admits the possession of the accused, and the accused themselves urge the plea of private defence, it is the duty of the Sessions Judge to explain to the assessors the legal aspect of the plea put forward by the accused, and to direct their attention to it by putting specific questions to them on the point—*Sunder Baksh*, 3 P.L.J. 653, 19 Cr.L.J. 983.

Record of summing up :—The Sessions Judge should not ask the *public prosecutor* to record the substance of his summing up to the assessors. If the Judge himself is incapable of recording it, he should avail himself of the services of some Court Officer or some independent person—*Shadulla*, 9 Cal. 875.

942. Opinions of assessors :—A trial is altogether bad if the assessors are not asked and are apparently not allowed to give their opinions in the case—*Nazimuddi*, 40 Cal. 163, 13 Cr.L.J. 497. See also *Bhikkari*, A.I.R. 1934 Pat. 561, 15 P.L.T. 523, 1934 Cr.C. 1215, 13 Pat. 729, 152 I.C. 282, 36 Cr.L.J. 17. If a Sessions Judge decides a case without inviting the opinions of the assessors, he virtually holds the trial without the aid of assessors, and his finding or sentence will be without jurisdiction—*Tinmal*, 24 Mad. 523 (535). Even if he considers the evidence untrustworthy or unsatisfactory or inconsistent, he is bound to consult the opinions of the assessors; otherwise he acts without jurisdiction—*Kassa Mal v. Munna Lal*, 10 All. 414. Where in a Sessions trial the accused first pleaded not guilty, but in the course of her examination after the completion of the prosecution evidence, she pleaded guilty, and thereupon the Judge without taking the opinion of the assessors found her guilty and sentenced her, *held* that it was the duty of the Judge to proceed with the trial as provided for by this section and hear the defence and take the opinions of the assessors—*Bai Nani*, 7 Bom.L.R. 731, 2 Cr.L.J. 609.

"The opinions of the assessors should be recorded separately. It is not, in the Court's opinion, sufficient that this record should contain a mere verdict of guilty or not guilty, or proven or not proven; what the Court requires is not only the result arrived at by each assessor sitting on a Sessions trial, but if possible, the reasons by which each assessor arrived at the result—that is, the grounds of his opinion. While avoiding prolixity, a Sessions Judge should be careful to be intelligible and precise in recording such opinions"—*Cal G R & C. O.*, p. 26.

Each of the Assessors :—The opinions of all the assessors should be taken. Where the Judge took the opinions of two only of the assessors, the trial was illegal and not merely irregular—*Rama Krishna*, 26 Mad. 598. The opinion of each assessor is to be recorded in his own words—*Fatu Santal*, 6 P.L.J. 147, 22 Cr.L.J. 417. Each assessor should be required to state his opinion *individually*. The Judge should not receive the *joint* opinion of all the assessors, delivered through one of them—*Hassan Khan*, 41 P.R. 1887. See also *Khewna*, 30 Cr.L.J. 378, 115 I.C. 66, A.I.R. 1929 Lah. 37, Ind. Rul. 1929 Lah. 322, and *Ditta*, A.I.R. 1935 Sind 23, 28 S.L.R. 295, 1935 Cr.C. 118, 154 I.C. 138, 36 Cr.L.J. 504.

The assessors are to give their opinions *orally*, and not in writing, or in the form of a judgment—*Lalit*, 39 Cal. 119 (122), 13 Cr.L.J. 433; *Shadulla*, 9 Cal. 875.

On all the Charges :—This section makes it obligatory on the Sessions Judge to require each of the Assessors to state his opinion orally on all the charges on which the accused has been tried and to record such opinion. The words "on all the charges" have been interpreted to mean that distinct opinion on each charge must be taken and recorded—*Shevanti*, 29 Cr.L.J. 561 (565), 109 I.C. 497, A.I.R. 1928 Nag. 257, following *Queen v. Matam Mal*, 22 W.R. 34 (Cr.). The accused are entitled to have the opinion

of the Assessors recorded on all the charges framed against them, and the failure of the Sessions Judge to comply with the imperative provisions of this section in not having recorded the opinion of the assessors as regards one of the charges, prejudices the accused in their defence on the merits—*Lal Behari*, 150 I.C. 509, 11 O.W.N. 831, 1934 Cr.C. 1049, A.I.R. 1934 Oudh 354, 35 Cr.L.J. 1066 (1070). See also Notes in para 944.

Consultation between assessors :—There is no provision in this Code authorizing a Judge to allow or forbidding him to allow consultation between the assessors. The Judge may allow one assessor to consult his co-assessors before giving his opinion; but a refusal to allow such a course does not amount to any irregularity, because the Judge is entitled to have before him each assessor's individual and independent opinion—*Sennimalai*, 2 L.W. 933, 16 Cr.L.J. 717, 30 I.C. 1005.

Grounds of opinion :—It is very desirable that the assessors should be invited and encouraged by Judges to state briefly the grounds of their opinions as well as the result—*Mahadu*, 2 Bom.L.R. 322; *Fakira*, 2 Bom.L.R. 323. When the opinion formed by the Judge differs from the opinions formed by the assessors, he should always ascertain the grounds of the assessor's opinions—*Minnat*, 3 W.R. 6; *Bushmo*, 3 W.R. 21; *Guranditta*, 1905 P.R. 48, 3 Cr.L.J. 132. According to the Madras High Court, the Judge is not justified in asking an assessor the reasons of his opinion—*Kunnammal Krishnan*, 1931 M.W.N. 1139.

When opinion may be dispensed with :—When there is absolutely no evidence to show that the offence has been committed by the accused, the Judge can abstain from taking the opinions of the assessors—*Anonymous*, 2 Weir 388 (391). See sec. 289. But the Judge cannot do so, simply because he considers the evidence unsatisfactory or untrustworthy—*Kassa Mal v. Munna Lal*, 10 All. 414. When the case is withdrawn by the Public Prosecutor with the consent of the Court, an acquittal should be recorded without taking the opinions of the assessors, or whatever may be their opinions—*Chenbasapa*, Ratanlal 307.

Reconsidering opinion :—After once summing up the case to the assessors and after taking their opinions, the Judge has no power to re-open the matter and press upon the attention of the assessors a part of the accused's confession, in order to induce them to change their opinions—*Tika Ram*, 1886 A.W.N. 22.

Taking fresh evidence after opinion :—When the opinions of the assessors have been taken, the trial is at an end, except for the purpose of giving judgment. The Judge has no legal authority to reopen a trial or recall witnesses, and cause fresh evidence to be summoned, and take a second and third opinion from the assessors—*Hasan*, 1888 P.R. 29; *Ram Lal*, 15 All. 136; *Santa Singh*, 35 Cr.L.J. 1002 (1005), 149 I.C. 442, 35 P.L.R. 390, where the adoption of such a procedure was regarded as a mere irregularity not affecting the case as the accused were not prejudiced in any way. Where, after the assessors had given their opinions and had been discharged, the Judge sitting alone took some further evidence in the case before writing judgment, the trial was held to be illegal and was set aside—*Jaisukh*, 43 All. 25, 22 Cr.L.J. 127. It is the Judge together with the assessors, that constitutes the Court, and not the Judge sitting alone; and all evidence must be recorded by the Judge in the presence of the assessors—*Ibid.* In a trial for murder in which the soundness of the accused's mind was at issue, the Judge, after taking the opinion of the assessors, reserved judgment and had a private interview with the Civil Surgeon as to the state of mind of the accused. It was held that the procedure was extremely illegal. Instead of discussing with the Civil Surgeon out of Court, the Judge ought to have examined him as a witness in the presence of the assessors—*Jai Lal*, 1889 A.W.N. 181.

943. Questions to assessors :—Prior to the present amendment, this section did not expressly authorise the Judge to put any question to the assessors, but it was laid down in some cases that if there was anything obscure in their opinions it was open to the Judge to put them such questions as were necessary to elucidate or supplement their opinions—*Nasimuddi*, 40 Cal. 163; *Ramesh Chandra*, 41 Cal. 350, 18 C.W.N. 496.

This is now expressly provided for by the present section as amended. But the questions can be asked only *after* the delivery of the opinion and not before, and for no other purpose except to clear up any obscurity in the verdict. The Judge cannot put questions to the assessors by way of cross-examination—*Nazimuddi*, *supra*; *Ramesh Chandra*, *supra*.

944. Judgment:—In a trial with assessors it is the duty of the presiding Judge to ascertain the opinion of the assessors after summing-up the evidence to them if he thinks it necessary, and then to deliver a judgment. That judgment must conform to the provisions of sec. 367, Cr. P. C., and must accordingly contain the reasons for the Judge's decision. The section is not complied with if the Judge merely states that he agrees with the opinion of the assessors—*Nirmal Kumar Bhowmik v. Emp.*, 39 Cr.L.J. 835 (836), 177 I.C. 29, 11 R.C. 209, 42 C.W.N. 896, A.I.R. 1938 Cal 551. Where the assessors were unanimously of opinion that the accused were not guilty but the Judge took the remarkable course of convicting the accused on his own view of the facts without giving any reason whatsoever and the evidence was not such that a finding of guilty was the only reasonable or proper finding, the High Court refused to accept the opinion of the Judge as opposed to the unanimous opinion of the jury sitting also as assessors, when no reasons for that opinion were assigned at all—*Jogneswar Ghosh*, 38 Cr.L.J. 212, 166 I.C. 418, A.I.R. 1936 Cal 527, 40 C.W.N. 1186, 1936 Cr.C. 737, I.L.R. (1937) 1 Cal 306, 65 C.L.J. 351, 9 R.C. 529.

In passing judgment the Judge is not bound to conform to the opinions of the assessors. Although the assessors no doubt assist the Judge and regard must be paid to their opinions—*Tirumal*, 24 Mad 523, still it is the Judge who is to decide the case on the facts as well as the law, and he is not bound by the assessor's opinions—*Shanker*, 14 Bom LR 710, 13 Cr.L.J. 677. But the Judge cannot convict the accused for an offence in respect of which the opinions of the assessors were not taken. Thus, the accused was charged with and tried for abetment of murder. The opinion of the assessors was that he was not guilty of the offence charged. The Sessions Judge accepted the opinion, but convicted the accused of causing evidence of murder to disappear under sec. 201, I. P. C. *Held* that it was imperative on the Judge to have taken the opinions of the assessors on the charge relating to sec. 201, I. P. C. The conviction and sentence must be set aside—*Appaya*, 25 Bom.L.R. 1318 (1320), 26 Cr.L.J. 394, 84 I.C. 938, A.I.R. 1924 Bom. 246. But in the recent case of *Ismail*, 52 Bom 385, 29 Cr.L.J. 403 (405), Fawcett, J., has expressed the opinion that the case of *Appaya*, *supra*, must be regarded as overruled by the Privy Council decision in *Begu*, 6 Lah 226, 88 I.C. 3, 48 M.L.J. 643, 2 O.W.N. 447, 41 C.L.J. 437, 3 Pat L.R. 95 (Cr.), A.I.R. 1925 P.C. 130, 23 A.L.J. 636, 1925 M.W.N. 418, 7 Lah L.J. 324, 52 I.A. 191, 30 C.W.N. 581, 26 Cr.L.J. 1059 (P.C.), where their Lordships upheld the action of the Sessions Judge in convicting the accused of an offence under sec. 201, I. P. Code, although he was charged with murder. See also Note 942.

It is acting in an unfair manner towards an accused person when he is once acquitted by a jury properly charged by a Judge, that he then should have to be further loaded with a judgment opposed to the verdict of the jury delivered by the Judge who has been unsuccessful in persuading the jury and a judgment in which the jury in their capacity as assessors also refused to agree with him. It may be legal according to the Criminal Procedure Code but it is not an equitable form of process and it is desirable that the prosecuting authorities in the district would not be encouraged to pursue this form of double prosecution to make things more difficult for the ends of justice—*Cheru Sheikh*, 40 C.W.N. 1374 (1376). See also *Jogneswar Ghosh*, *supra*.

The omission of the Sessions Judge to make any reference to the opinion of the assessors is certainly contrary to the usual practice. It does not, however, vitiate the trial but is merely an omission in the judgment which can be cured by the application of the provisions of sec. 537, Cr. P. C., unless it has occasioned a failure of justice—*Anup Singh*, 35 Cr.L.J. 168, 146 I.C. 677, A.I.R. 1933 Lah. 910, 1933 Cr.C. 1297.

Sentence:—Under sec. 309, Cr. P. C., the Judge is bound to pass a sentence on

each of the charges of which the accused is found by him to be guilty and his refusal to prescribe the punishments in respect of all the charges is, therefore, illegal—*Gul Mahmud Shah v. Emp.*, 40 Cr.L.J. 686, 182 I.C. 572, A.I.R. 1939 Pesh. 23, following *Diwan Singh*, 22 Cal. 805 (809).

Cancellation of trial:—The accused were committed to the Sessions on a certain charge. At the commencement of the trial, two more charges were added. The trial then proceeded up to the point where the assessors' opinions were taken. The Judge reserved judgment but in writing it, he was of opinion that one of the charges was improperly added, and he therefore cancelled that trial and held a fresh trial. It was held that the second trial was invalid, because the trial Judge had no authority to cancel or set aside the trial which had been originally held; and the assessors' opinions having been recorded, he had no option but to give his judgment in accordance with this section—*Nathu*, 17 Bom.L.R. 1074, 16 Cr.L.J. 824.

I.—Procedure in Case of Previous Conviction.

310. *In the case of a trial by a jury or with the aid of assessors, when the accused is charged with an offence and further charged that he is by reason of a previous conviction liable to enhanced punishment or to punishment of a different kind for such subsequent offence, the procedure prescribed by the foregoing provisions of this Chapter shall be modified as follows, namely:—*

- (a) *Such further charge shall not be read out in Court and the accused shall not be asked to plead thereto, nor shall the same be referred to by the prosecution, or any evidence adduced thereon unless and until,*
 - (i) *he has been convicted of the subsequent offence,*
 - or*
 - (ii) *the jury have delivered their verdict, or the opinions of the assessors have been recorded, on the charge of the subsequent offence.*
- (b) *In the case of a trial held with the aid of assessors, the Court may, in its discretion, proceed or refrain from proceeding with the trial of the accused on the charge of the previous conviction.*

Change:—This section has been redrafted by sec. 83 of the Cr. P. C. Amendment Act, XVIII of 1923. The old section stood as follows:—

"310. In the case of trial by jury or with the aid of assessors, where the accused is charged with an offence committed after previous conviction for any offence, the procedure laid down in sections 271, 286, 305, 306 and 309 shall be modified as follows:—

- (a) The part of the charge stating the previous conviction shall not be read out in Court, nor shall the accused be asked whether he had been previously convicted as alleged in the charge, unless and until he has either pleaded guilty to, or been convicted of, the subsequent offence;
- (b) If he pleads guilty to, or is convicted of, the subsequent offence, he shall then be asked whether he has been previously convicted as alleged in the charge;
- (c) If he answers that he has been so previously convicted, the Judge may proceed to pass sentence on him accordingly; but, if he denies that he has been so previously convicted, or refuses to, or does not, answer such question,

the jury or the Court and the assessors (as the case may be) shall then hear evidence concerning such previous conviction, and in such case (where the trial is by jury), it shall not be necessary to swear the jurors again."

It should be noted that clause (b) of the present section is entirely new. This clause has been added in order to avoid the inconvenience which may at present arise in cases tried by assessors whose opinion is not binding on the Judge. Under the amendment, in any trial held with the aid of assessors, the Court is given a discretion to proceed or refrain from proceeding with the trial of the accused on the charge of the previous conviction—*Statement of Objects and Reasons* (1914).

945. Scope and object of section:—This section applies to trial before a Court of Session and not to trials before a Magistrate—*Delhi Sonar*, 50 Cal 367. The law as to the taking of evidence of previous conviction in a trial before a Magistrate has been enacted in the new section 255A.

In a case where it is intended to prove previous convictions for the purpose of enhanced punishment, the trial is in effect divided into two parts, *firstly*, the trial for the subsequent offence and the opinion of the assessors thereon, and *secondly*, if the accused be convicted of that subsequent offence, there is, what amounts to a trial on the charge of previous convictions on account of which the accused is liable to receive enhanced punishment. The second part of the trial, of course, may be very short, but it is nevertheless to be kept as something apart and separate from the first part of the trial in the sense that it shall not be allowed to influence the assessors or jurors in their opinion as to the guilt of the accused for the subsequent offence for which the accused is at first to be tried. Where the statement of the accused in the lower Court relating to the previous convictions and the subsequent offence is treated as a whole and read out at one time to the accused, the procedure is clearly contrary to the provisions of sec. 310, Cr. P. C., and though it is true that under sec. 221 (7), Cr. P. C., the charge must contain details of the previous convictions which it is intended to prove for the purpose of enhanced punishment, that section must be read subject to sec. 310, Cr. P. C., and the accused must not be prejudiced in his trial for the subsequent offence by a recital of his previous convictions. Furthermore, it is necessary that as an accused in order to be convicted of the subsequent offence must also be convicted upon evidence which is legally admissible and which must justify his committal to the Sessions Court, so on a charge of previous convictions, there must be evidence in the Committing Magistrate's Court which must justify the charge based on previous convictions on which the accused is also to be committed to the Court of Session. Before an accused can be questioned about previous convictions, there must be evidence legally admissible upon the record which shows that he has committed these previous offences about which he is examined by the Court; and legally admissible evidence as to previous convictions must fall either within sec. 511, Cr. P. C., or sec. 51, Evidence Act—*Ghous Baksh Muhammad Amin v. Emp.*, 40 Cr. L. J. 770, 183 I.C. 219, A.I.R. 1939 Sind 203, following *Bhurasing v. Emp.*, 29 S.L.R. 121 (157), 158 I.C. 282, A.I.R. 1935 Sind 115, 36 Cr. L. J. 1310 and *Yasin*, *infra*.

The object of this section in prohibiting the proof of previous conviction to be put in until the accused is convicted is to prevent the accused from being prejudiced at the trial—*Maung E Gyi*, 1 Rang 520. Therefore, where in the course of a trial a witness was allowed to say that he had heard that the accused was an old offender, the verdict was set aside, because the improper statement of the witness might have influenced the verdict of the jury—*Jhinguri*, 1890 A.W.N. 12. The provisions of this section are imperative and must be strictly complied with. Where the charge in regard to the previous convictions and the portion of the statement of the accused before the committing Magistrate admitting such previous convictions were read to the assessors before the conclusion of the trial for the present offence, the trial was vitiated—*Teka Ahir*, 22 Cr. L. J. 719, 5 P.L.J. 706; *Raju*, 28 Cr. L. J. 667 (668), 103 I.C. 203, A.I.R. 1927 Lah. 774; *Ghous Baksh Muhammad Amin v. Emp.*, *supra*. A Judge's direction to the jury to consider proof of previous conviction as evidence regarding the character of

prisoner amounts to a misdirection—*Roshun*, 5 Cal 768. It is contrary to the elementary principles of British Criminal Jurisprudence that any evidence of a previous conviction should be allowed to be adduced in the course of a trial, save in a few well-defined and exceptional circumstances—*Parbati*, 58 C.L.J. 1 (7).

946. Previous conviction:—The previous conviction referred to in this section must be a conviction within British India. A conviction outside British India (e.g., in Berar) does not fall within the purview of this section, and cannot be taken into account for the purpose of affecting the punishment on a second conviction in British India. But it is not absolutely improper, however, to take such conviction into consideration—*Lalsingh*, 7 C.P.L.R. 24.

The charge alleging the previous conviction need not show the amount of the former punishment—*Anonymous*, 4 M.H.C.R. App. 11.

If the accused admits that he had been previously convicted, the Judge is justified under this section in passing sentence upon such admission—*Yasin*, 28 Cal. 689; *Subramanian*, 1916 M.W.N. 327, 17 Cr.L.J. 288; especially when the Magistrate passes a sentence which is legal even without proof of the previous conviction—*Subramanian*, supra. But if he does not plead to the charge of previous conviction, it can be proved by the procedure laid down in sec. 311.

946A. Registered member of criminal tribe:—The fact that an accused is a registered member of a criminal tribe under the Act is like a previous conviction, a matter from which bad character can be inferred and which may affect the sentence. It should be treated in the same way as the fact of a previous conviction by not being disclosed to the jury until after the verdict lest their minds should be prejudiced—*Mosakeb Dome v. Emp.*, A.I.R. 1940 Pat. 14 (15), 40 Cr.L.J. 833, 183 I.C. 660, 1939 P.W.N. 627.

311. Notwithstanding anything in the last foregoing section, evidence of the previous conviction may be given at the trial for the subsequent offence, if the fact of the previous conviction is relevant under the provisions of the Indian Evidence Act, 1872.

946B. In a trial of offences under secs 395 and 402, I. P. C., the evidence of previous conviction is not permissible under sec. 54 of the Evidence Act, no evidence having been previously offered of the accused's good character. Nor does sec. 6 or 14 of the Evidence Act justify the admission of such evidence—*Teka Akir*, 5 P.L.J. 706, 22 Cr.L.J. 719.

J.—List of Jurors for High Court, and summoning Jurors for that Court.

312. The High Court may prescribe the number of persons whose names shall be entered at any one time in the special jurors' list:

Provided that no definite number of Europeans or of Americans or of Indians shall be so prescribed.

This section has been redrafted by sec. 18 of the Criminal Law Amendment Act, XII of 1923. "The High Court special jury list should, in our opinion, be revised and it should no longer be limited to 200 Europeans and 200 non-Europeans. It should include all who are qualified, to whatever nationality they may belong. This revision will probably increase the proportion of non-Europeans in the list. This proposal involves

the amendment of sec. 312 of the Code"—*Report of the Racial Distinctions Committee*, para. 25

313. (1) The Clerk of the Crown shall, before the first day of April in each year, and subject to such rules as the High Court from time to time prescribes, prepare—

Lists of common and special jurors

(a) a list of all persons liable to serve as common jurors; and

(b) a list of persons liable to serve as special jurors only.

(2) Regard shall be had, in the preparation of the latter list, to the property, character and education of the persons whose names are entered therein.

(3) No person shall be entitled to have his name entered in the special jurors' list merely because he may have been entered in the special jurors' list for a previous year.

(4) *The Provincial Government may exempt any salaried servant of the Crown from serving as a juror.*

(5) The Clerk of the Crown shall, subject to such rules as Discretion of officer aforesaid, have full discretion to prepare preparing lists. the said list as seems to him to be proper, and there shall be no appeal from or review of his decision.

Amendment:—Sub-section (4) of this section has been substituted by sec. 4 of the Government of India (Adaptation of Indian Laws) Order, 1937, in place of old sub-section (4) which ran as follows:—"The Governor-General in Council or the Local Government in the case of the High Court at Fort William in Bengal, and in the case of other High Courts the Local Government, may exempt any salaried officer of Government from serving as a juror."

The drawing up of the list of special jurors is entirely in the discretion of the Clerk of the Crown and the High Court will not interfere—Sham Chand, 1 Ind Jur. (N.S.) 106.

314. (1) Preliminary lists of persons liable to serve as common jurors and as special jurors, respectively, signed by the Clerk of the Crown, shall be published once in the *Official Gazette* before the fifteenth day of April next after their preparation.

Publication of lists, preliminary and revised.

(2) Revised lists of persons liable to serve as common jurors and special jurors, respectively, signed as aforesaid, shall be published once in the *Official Gazette* before the first day of May next after their preparation.

(3) Copies of the said lists shall be affixed to some conspicuous part of the Court-house.

Amendment:—The words "Official Gazette" have been substituted for "local official Gazette" in this section by sec. 4 of the Government of India (Adaptation of Indian Laws) Order, 1937,

315. (1) Out of the persons named in the revised lists aforesaid, there shall be summoned for each session in the town which is the usual place of sitting of each High Court, as many of those who are liable to serve on special or common juries, respectively, as the Clerk of the Crown considers necessary.

(2) No person shall be summoned more than once in six months unless the number cannot be made up without him.

(3) If, during the continuance of any sessions, it appears that the number of persons so summoned is not sufficient, such number as may be necessary of other persons liable to serve as aforesaid shall be summoned for such sessions.

The words "in the town ... High Court" have been substituted for the words "in each Presidency town." A similar amendment has been made in sec 316 and in the third proviso to section 276.

Neither sec. 315 nor sec. 326 nor sec. 327, Cr. P. C., contemplates the summoning of jurors for a particular case—*Shewram v. Emp.*, A.I.R. 1939 Sind 209 (219), 184 I.C. 474, 41 Cr.L.J. 28.

316. Whenever a High Court has given notice of its intention to hold sitting at any place outside the town which is the usual place of sitting of such High Court for the exercise of its original criminal jurisdiction, the Court of Session at such place shall, subject to any direction which may be given by the High Court, summon a sufficient number of jurors from its own list, in the manner hereinafter prescribed for summoning jurors to the Court of Session.

317. (1) In addition to the persons so summoned as jurors, the said Court of Session shall, if it thinks needful, after communication with the Commanding Officer, cause to be summoned such number of commissioned and non-commissioned officers in Her Majesty's Army or Air Force resident within ten miles of its place of sitting as the Court considers to be necessary to make up the juries required for the trial of persons charged with offences before the High Court as aforesaid.

(2) All officers so summoned shall be liable to serve on such juries notwithstanding anything contained in this Code; but no such officer shall be summoned whom his Commanding Officer desires to have excused on the ground of urgent official duty, or for any other special official reason.

318. Any person summoned under section 315, section 316 or section 317, who, without lawful excuse, fails to attend as required by the summons, or who, having attended, departs without having obtained the

permission of the Judge, or fails to attend after an adjournment of the Court after being ordered to attend, shall be deemed guilty of a contempt and be liable, by order of the Judge, to such fine as he thinks fit; and, in default of payment of such fine, to imprisonment for a term not exceeding six months in the civil jail until the fine is paid:

Provided that the Court may in its discretion remit any fine or imprisonment so imposed.

K.—List of Jurors and Assessors for Court of Session, and summoning Jurors and Assessors for that Court.

319. All male persons between the ages of twenty-one and sixty shall, except as next hereinafter mentioned, be liable to serve as jurors or assessors at any trial held within the district in which they reside, or, if the Local Government, on consideration of local circumstances, has fixed any smaller area in this behalf, within the area so fixed.

946C. Residence in two districts:—A man may obviously reside during the year in more than one district, and a person who in this way possesses more than one place of residence would be ordinarily liable to serve as a juror in each of the districts in which he has his residence. But he would be so liable so long as he was residing in that district. A *prolonged absence* of an assessor from a district exempts him from being an assessor in that district under this section, even though his name appears in the list of assessors in that district—*Mohammad Ejaz*, 12 P.L.T. 209, 32 Cr.L.J. 740 (741), 131 I.C. 540, 1931 Cr.C. 400, A.I.R. 1931 Pat. 160

320. The following persons are exempt from liability to serve as jurors or assessors, namely:—

Exemptions.

- (a) officers in civil employ superior in rank to a District Magistrate;
- (aa) *members of any Legislature in British India;*
- (b) salaried Judges;
- (c) Commissioners and Collectors of Revenue or Customs;
- (d) police-officer and persons engaged in the Preventive Service in the Customs Department;
- (e) persons engaged in the collection of the revenue whom the Collector thinks fit to exempt on the ground of official duty;
- (f) persons actually officiating as priests or ministers of their respective religions;
- (g) persons in Her Majesty's Army, Navy or Air Force, except when, by any law in force for the time being, they are specially made liable to serve as jurors or assessors;
- (h) surgeons and others who openly and constantly practise the medical profession;

- (i) legal practitioners (as defined by the Legal Practitioners' Act, 1879), in actual practice;
- (j) persons employed in the Post-Office and Telegraph Departments;
- (k) persons exempted from personal appearance in Court under the provisions of the Code of Civil Procedure, 1882, sections 640 and 641.*
- (l) other persons exempted by the *Provincial Government* from liability to serve as jurors or assessors.

Change:—Clause (aa) has been added by the Legislative Members Exemption Act XXIII of 1925, on the recommendation of the Reforms Inquiry Committee (contained in para 91 of their Report) that members of the Legislature in India should be exempt from sitting as jurors or assessors in criminal trials—*Statement of Objects and Reasons* (Gazette of India, 1925, Part V, p. 180).

Clause (aa) has been substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, in place of old clause (aa) which ran as follows—"Members of either Chamber of the Indian Legislature and members of a Legislative Council constituted under the Government of India Act."

The words "Provincial Government" have been substituted for "Local Government" in clause (l) of this section by sec. 4 of the Government of India (Adaptation of Indian Laws) Order, 1937.

321. (1) The Sessions Judge, and the Collector of the district or such other officer as the *Provincial Government* appoints in this behalf, shall prepare and make out in alphabetical

Lists of jurors and assessors.

order a list of persons liable to serve as jurors or assessors and qualified in the judgment of the Sessions Judge and Collector or other officer as aforesaid to serve as such, and not likely to be successfully objected to under section 278, clauses (b) to (h), both inclusive.

(2) The list shall contain the name, place of abode and quality of business of every such person; and, if the person is an European or an American, the list shall mention the race to which he belongs.

Amendment:—The words "Provincial Government" have been substituted for "Local Government" in this section by sec. 4 of the Government of India (Adaptation of Indian Laws) Order, 1937.

In selecting jurors and assessors, the Sessions Judge should choose persons of an independent condition in life, men of judgment and experience. They ought not to be pleaders nor young men fresh from the College and devoid of experience—*Q. v. Ram Dutt*, 23 W.R. 35. But persons of high social position, e.g., a hereditary Raja, should not be placed on the list, or if put upon the list, ought not to be summoned to serve as juror or assessor unless it were known that he would be willing to act as such—*In re Bhupinder Bahadur*, 1897 A.W.N. 167.

322. Copies of such list shall be stuck up in the office of the Collector or other officer as aforesaid, and in the court-houses of the District Magis-

Publication of list.

* See now the Civil Procedure Code (Act V of 1908), secs. 132 and 133.

trate and of the District Court, and extracts therefrom in some conspicuous place in the town or towns in or near which the persons named in the extract reside.

323. To every such copy or extract shall be subjoined a notice stating that objections to the list will be heard and determined by the Sessions Judge and Collector or other officer as aforesaid, at the sessions court-house, and at a time to be mentioned in the notice.

324. (1) For the hearing of such objections the Sessions Judge shall sit with the Collector or other officer as aforesaid, and shall, at the time and place mentioned in the notice, revise the list and hear the objections (if any) of persons interested in the amendment thereof, and shall strike out the name of any person not suitable in their judgment to serve as a juror, or as an assessor, or who may establish his right to any exemption from service given by section 320 and insert the name of any person omitted from the list whom they deem qualified for such service.

(2) In the event of a difference of opinion between the Sessions Judge and the Collector or other officer as aforesaid, the name of the proposed juror or assessor shall be omitted from the list.

(3) A copy of the revised list shall be signed by the Sessions Judge and Collector or other officer as aforesaid and sent to the Court of Session.

(4) Any order of the Sessions Judge and Collector or other officer as aforesaid in preparing and revising the list shall be final.

(5) Any exemption not claimed under this section shall be deemed to be waived until the list is next revised.

(6) The list so prepared and revised shall be again revised once in every year.

(7) The list so revised shall be deemed a new list and shall be subject to all the rules hereinbefore contained as to the list originally prepared.

An order restoring the names of certain persons in the jury list from which they were struck off is not a judicial order and cannot be interfered with by the High Court—*Nagendra v. Benamali*, 36 Cr.L.J. 68, 152 I.C. 210, 38 C.W.N. 363, A.I.R. 1934 Cal. 487, 1934 Cr C. 695

325. In the case of any district for which the *Provincial Government* has declared that the trial of certain offences shall, if the Judge so direct, be by special jury, the Sessions Judge and the Collector of such district or other officer as aforesaid shall prepare, in addition to the revised list hereinbefore prescribed, a special list containing

the names of such jurors as are borne on the revised list and are, in the opinion of such Sessions Judge and Collector or other officer as aforesaid, by reason of their possessing superior qualifications in respect of property, character or education, fit persons to serve as special jurors: Provided always that the inclusion of the name of any person in such special list shall not involve the removal of his name from the revised list nor relieve him of his liability to serve as an ordinary juror in cases not tried by special jury.

Amendment:—The words "Provincial Government" have been substituted for "Local Government" in this section by sec. 4 of the Government of India (Adaptation of Indian Laws) Order, 1937.

326. (1) The Sessions Judge shall ordinarily, seven days at least before the day which he may from time to time fix for holding the sessions, send a letter to the District Magistrate requesting him to summon as many persons named in the said revised list or the said special list as seem to the Sessions Judge to be needed for trials by jury and trials with the aid of assessors at the said sessions, the number to be summoned not being less than double the number required for any such trial, *and including, where any accused person is an European or an American, as many Europeans or Americans as may be required for the purpose of choosing jurors or assessors for the trial.*

(2) The names of the persons to be summoned shall be drawn by lot in open Court, excluding those who have served within six months unless the number cannot be made up without them; and the names so drawn shall be specified in the said letter.

(3) *Where the accused requires and is entitled to be tried under the provisions of section 275, there shall be chosen by lot, in the manner prescribed by or under section 276, from the whole number of persons returned the jurors who are to constitute the jury until a jury containing the proper number of Europeans or Europeans and Americans or of Indians, as the case may be, has been obtained:*

Provided that, in any case in which the proper number of Europeans or Americans cannot otherwise be obtained, the Court may, in its discretion for the purpose of constituting the jury, summon any person excluded from the list on the ground of his being exempted under section 320.

(4) *Where under the proviso to sub-section (3), the Court proposes to summon as a juror any person in His Majesty's Army, the provisions of section 317 shall apply in like manner as they apply for the purpose of the summoning of military jurors for a trial under section 316.*

Amendment:—The italicised words have been added by sec. 19 of the Criminal Law Amendment Act, XII of 1923

947. Sections 326 and 327 contemplate as the ordinary or normal procedure that all assessors should be summoned on the first day on which a criminal Session commences, however many trials it may be proposed to hold in the course of that Session—*Chutta*, 17 Cr L.J. 17 (All) Neither sec. 315 nor sec. 326 nor sec. 327, Cr. P. C., contemplates the summoning of jurors for a particular case—*Shewaram v Emp*, A.I.R. 1939 Sind 209 (219), 184 I.C. 474, 41 Cr L.J. 28

The duty of issuing a precept to the District Magistrate to summon jurors and assessors is imposed upon the Sessions Judge himself; it cannot be performed by a Subordinate Judge in temporary charge of the current duties of the Court of Session—*Anonymous*, Ratanlal 148.

Where owing to the fact that only three jurors attended the Court, the Judge summoned jurors from among the residents of the town on the day fixed for the trial, held that the jury as constituted was not a proper jury; the Judge ought to have summoned the jurors after drawing their names by lot from the list of persons to serve on the jury, in accordance with sub-section (2); but instead of doing so, he chose persons specially selected (a thing which the Legislature has taken special pains to render impossible); this was a serious irregularity which could not be cured by sec. 537—*Brojendra*, 7 C.W.N. 183.

'Double the number required':—See 55 Cal. 794, 33 C.W.N. 1053 and other cases cited in Note 881A under sec. 274.

See also Notes under secs. 276 and 284, Cr. P. C.

327. The Court of Session may direct jurors or assessors to be summoned at other periods than the period specified in section 326, when the number of trials before the Court renders the attendance of one set of jurors or assessors for a whole session oppressive or whenever for other reasons such direction is found to be necessary.

328. Every summons to a juror or assessor shall be in writing, and shall require his attendance as a juror or assessor, as the case may be, at a time and place to be therein specified.

329. When any person summoned to serve as a juror or assessor is in the service of *Crown* or of a Railway Company, the Court in which he is so summoned to serve may excuse his attendance if it appears on the representation of the head of the office in which he is employed that he cannot serve as a juror or assessor, as the case may be, without inconvenience to the public.

Amendment:—The word "Crown" has been substituted for "Government" in this section by the Government of India (Adaptation of Indian Laws) Order, 1937.

330. (1) The Court of Session may for reasonable cause excuse any juror or assessor from attendance at any particular session.

(2) The Court of Session may, if it shall think fit, at the

Court may relieve special jurors from liability to serve again as jurors for twelve months.

conclusion of any trial by special jury, direct that the jurors who have served on such jury shall not be summoned to serve again as jurors for a period of twelve months.

331. (1) At each session the said Court shall cause to be made a list of the names of those who have

List of jurors and assessors attending

attended as jurors and assessors at such session.

(2) Such list shall be kept with the list of the jurors and assessors as revised under section 324.

(3) A reference shall be made in the margin of the said revised list to each of the names which are mentioned in the list prepared under this section.

332. (1) Any person summoned to attend as a juror or as an assessor who, without lawful excuse,

Penalty for non-attendance of juror or assessor.

fails to attend as required by the summons, or who, having attended, departs without

having obtained the permission of the Court, or fails to attend after an adjournment of the Court, after being ordered to attend, shall be liable by order of the Court of Session to a fine not exceeding one hundred rupees.

(2) Such fine shall be levied by the District Magistrate by attachment and sale of any moveable property belonging to such juror or assessor within the local limits of the jurisdiction of the Court making the order.

(3) For good cause shown, the Court may remit or reduce any fine so imposed.

(4) In default of recovery of the fine by attachment and sale, such juror or assessor may, by order of the Court of Session, be imprisoned in the civil jail for the term of fifteen days, unless such fine is paid before the end of the said term.

948. Gentlemen on the jury list are under no obligation to notify their change of address to the Court before leaving their usual place of residence, or to make any arrangement for the acceptance of notice and for the giving of information to the Court that he would be unable to attend. Therefore, where summons was served by affixing the duplicate on the door of the dwelling house of a juror, who at the time was living away from home, and had no knowledge of such service, *held* that he was not liable to fine for non-attendance—*Moni Lal*, 6 C.W.N. 887. If an assessor has been absent for a long time from district A, and has gone to reside in district B, so that he may be said to have almost ceased to be a resident of district A, he is not liable to serve as an assessor in that district under sec. 319. Consequently, he cannot be fined under sec. 332 for non-attendance as an assessor in obedience to a summons served in district A of which he had no notice—*Mohammad Ejaz*, 12 P.L.T. 209, 32 Cr.L.J. 740 (741), 131 I.C. 540, A.I.R. 1931 Pat. 160, Ind. Rul. 1931 Pat. 220, 1931 Cr.C. 400.

The summons to a juror or assessor must be served in the manner provided by sec. 69. The issue of summons to a juror or assessor by a registered letter is illegal, and no fine can be imposed for the non-attendance of the juror or assessor in such a case—*Sarat Chandra*, 1 C.W.N. cxvi.

The order of a Sessions Judge under this section fining an assessor is not appealable—*Bisseshur*, 8 W.R. 83.

L.—Special Provisions for High Courts.

333. At any stage of any trial before a High Court under this Code, before the return of the verdict, the Advocate-General may, if he thinks fit, inform the Court on behalf of Her Majesty that he will not further prosecute the defendant upon the charge; and thereupon all proceedings on such charge against the defendant shall be stayed, and he shall be discharged of and from the same. But such discharge shall not amount to an acquittal unless the presiding Judge otherwise directs.

Power of Advocate-General to stay prosecution.

949. Nolle prosequi:—A *nolle prosequi* is usually granted where any improper and vexatious attempts are made to oppress the defendant, as by repeatedly preferring defective indictments for the same supposed offence, or if it is clear that an indictment is not sustainable against the defendant. See Archbold's Criminal Pleadings, 28th Edn., p 127.

After the trial had commenced and the evidence partly gone into, the Judge retired from the case under sec. 556 as he was a share-holder of the prosecution Bank, and the case was adjourned without the jury being discharged. The Chief Justice purporting to act under Cl 13 of the Charter Act appointed another Judge to preside at the trial of the accused. In answer to a question by the Judge, the Standing Counsel intimated that he intended proceeding with the trial from the point where it had been left, whereupon it was contended on behalf of the accused that the presiding Judge could not proceed with the trial as the previous Judge and the jury empanelled before him had still the seisin of the case. The Advocate-General thereupon, in order to get rid of the many difficulties arising out of the case, entered a *nolle prosequi*, and the accused was discharged—*Khagendra*, 2 C.W.N. 481. In a trial before the High Court Sessions, the jury were divided in the proportion of six to three. But the Judge, without ascertaining what the verdict of the majority was, discharged the jury and ordered a retrial. The retrial came before another Judge and another jury, and it was contended on behalf of the accused that as the previous Judge had discharged the jury without ascertaining what their verdict was and whether he agreed or disagreed with the verdict of the majority, the discharge of the jury was illegal and the previous Judge had still the seisin of the case, and no other Judge could try it. As the question was of some difficulty, the Advocate-General entered a *nolle prosequi*, and the Judge discharged the accused—*Jatindra*, 8 C.W.N. xlviii. In another Calcutta case the jury in the first trial returned a unanimous verdict of not guilty on the main charge of murder, and were divided in the proportions of 5 to 4 on other counts. In the second trial on the remaining counts (ordered under sec. 308, Cr. P. C.) the jury returned a verdict of not guilty by a majority of seven to two. The Judge disagreed with the verdict. The accused was brought up again before the learned Judge "to be dealt with according to law." The Advocate-General thereupon appeared and entered a *nolle prosequi*—*Nirmal Kanta Roy*, 41 Cal. 1072. After the close of the case for the prosecution and just as the counsel for the defence was going to call his witnesses, the foreman of the jury suddenly informed the Court that they had come to a unanimous verdict as to the guilt of the

(2) The Court of Session may, if it shall think fit, at the conclusion of any trial by special jury, direct that the jurors who have served on such jury shall not be summoned to serve again as jurors for a period of twelve months.

Court may relieve special jurors from liability to serve again as jurors for twelve months.

331. (1) At each session the said Court shall cause to be made a list of the names of those who have attended as jurors and assessors at such session.

List of jurors and assessors attending.

(2) Such list shall be kept with the list of the jurors and assessors as revised under section 324.

(3) A reference shall be made in the margin of the said revised list to each of the names which are mentioned in the list prepared under this section.

332. (1) Any person summoned to attend as a juror or as an assessor who, without lawful excuse, fails to attend as required by the summons, or who, having attended, departs without having obtained the permission of the Court, or fails to attend after an adjournment of the Court, after being ordered to attend, shall be liable by order of the Court of Session to a fine not exceeding one hundred rupees.

Penalty for non-attendance of juror or assessor.

(2) Such fine shall be levied by the District Magistrate by attachment and sale of any moveable property belonging to such juror or assessor within the local limits of the jurisdiction of the Court making the order.

(3) For good cause shown, the Court may remit or reduce any fine so imposed.

(4) In default of recovery of the fine by attachment and sale, such juror or assessor may, by order of the Court of Session, be imprisoned in the civil jail for the term of fifteen days, unless such fine is paid before the end of the said term.

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accused and did not desire to hear anything more. Upon this, the Counsel for the accused said that it was a misbehaviour on the part of the jury to give a verdict without hearing the evidence for the defence; he, therefore, asked the Court to discharge the jury and to empanel a fresh jury. But the Advocate-General entered a *nolle prosequi*—*Olu Muhammad*, 7 C.W.N. xxxi.

Discharge—Acquittal:—In *Jatindra*, 8 C.W.N. xlviii, the Judge ordered that the discharge amounted to an acquittal, but in *Nirmal Kanta*, 41 Cal. 1072 and *Olu Muhammad*, 7 C.W.N. xxxi, the Judge simply discharged the accused but did not acquit him.

An order of discharge under this section is no bar to fresh proceedings being taken before a competent Magistrate upon complaint or upon a Police report or under sec. 190 (c). In spite of an order of discharge passed under sec. 333, the accused may be sent up for trial upon the same charges, and the order of discharge does not require to be set aside for initiation of fresh proceedings on the same charges—*Sheikh Idoo*, 40 Cal. 71. But in a recent case the same High Court has been of opinion that an order of discharge passed on a *nolle prosequi* entered under this section puts an end to the indictment on which the prisoner is brought before the Court, and he cannot be subsequently proceeded against on the same charge—*Jitendra Nath*, 52 Cal. 590, 89 I.C. 709, A.I.R. 1925 Cal. 902, 26 Cr.L.J. 1397. It is curious that no reference was made in this case to the earlier case of 40 Cal. 71.

Sections 333 and 494, Cr. P. C.:—Neither sec. 215 nor sec. 333 can be resorted to for construing sec. 494. They are not *pari materia*. The power which an Advocate-General entering a *nolle prosequi* in a trial before a High Court, exercises under sec. 333, does not depend on the consent of the Court, which a Public Prosecutor has to obtain when acting under sec. 494, and are indeed rights and privileges of a very different character which the Advocate-General owns by virtue of his appointment—*Giribala v. Mader*, A.I.R. 1932 Cal. 699 (703), 36 C.W.N. 928, 1932 Cr.C. 654, 56 C.L.J. 79, 60 Cal. 233.

334. For the exercise of its original criminal jurisdiction every High Court shall hold sittings on such days and at such convenient intervals as the Chief Justice of such Court from time to time appoints.

335. (1) The High Court shall hold its sittings at the place at which it now holds them or at such other place (if any) as the *Provincial Government* may direct.

(2) But it may, from time to time, * * * * * with the consent of the *Provincial Government*, hold sittings at such other places within the local limits of its appellate jurisdiction as the High Court appoints.

(3) Such officer as the Chief Justice directs shall give notice beforehand in the *Official Gazette* of all sittings intended to be held for the exercise of the original criminal jurisdiction of the High Court.

Amendment:—In sub-section (1) the words "Provincial Government" have been substituted for "Governor-General in Council in the case of the High Court at Fort William, or the Local Government in the case of other High Courts" and in sub-section (2) the words "Provincial Government" have been substituted for "Local Government" and the words "in the case of the High Court at Fort William with the consent

of the Governor-General in Council and in all other cases" have been omitted, and in sub-section (3) the words "Official Gazette" have been substituted for "local official Gazette", by the Government of India (Adaptation of Indian Laws) Order, 1937.

336. (*Repealed.*)

This section which dealt with the place of trial of European British subjects has been repealed by sec. 20 of the Criminal Law Amendment Act, XII of 1923.

CHAPTER XXIV.

GENERAL PROVISIONS AS TO INQUIRIES AND TRIALS.

337. (1) In the case of any offence triable exclusively by the High Court or Court of Session, or any offence punishable with imprisonment which may extend to ten years, or any offence punishable under section 211 of the Indian Penal Code with imprisonment which may extend to seven years, or any offence under any of the following sections of the Indian Penal Code, namely, sections 216A, 369, 401, 435 and 477A, the District Magistrate, a Presidency Magistrate, a Subdivisional Magistrate or any Magistrate of the first class may, at any stage of the investigation or inquiry into, or the trial of the offence, with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to the offence, tender a pardon to such person on condition of his making a full and true disclosure of the whole circumstances within his knowledge relative to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof:

Provided that, where the offence is under inquiry or trial, no Magistrate of the first class other than the District Magistrate shall exercise the power hereby conferred unless he is the Magistrate making the inquiry or holding the trial, and, where the offence is under investigation, no such Magistrate shall exercise the said power unless he is a Magistrate having jurisdiction in a place where the offence might be inquired into or tried and the sanction of the District Magistrate has been obtained to the exercise thereof.

(1A) Every Magistrate * * who tenders a pardon under sub-section (1) shall record his reasons for so doing, and shall, on application made by the accused, furnish him with a copy of such record:

Provided that the accused shall pay for the same unless the Magistrate for some special reason thinks fit to furnish it free of cost.

(2) Every person accepting a tender under this section shall be examined as a witness *in the Court of the Magistrate taking cognizance of the offence and in the subsequent trial, if any.*

(2A) *In every case where a person has accepted a tender of pardon and has been examined under sub-section (2), the Magistrate before whom the proceedings are pending shall, if he is satisfied that there are reasonable grounds for believing that the accused is guilty of an offence, commit him for trial to the Court of Session or High Court, as the case may be.*

(3) Such person *unless he is already on bail shall be detained in custody until the termination of the trial.* * *

Change:—This section has been amended by sec. 86 of the Cr. P. C. Amendment Act (XVIII of 1923). The principal changes are :—

(a) The old section was restricted to offences triable by the High Court or the Court of Session; the new section includes several other offences.

(b) A change has been made as regards the Magistrates who can tender pardon.

(c) The power to tender a pardon should be exercisable during an *investigation* as well as after a magisterial *inquiry* has begun.

950. Scope—Offences:—Where several offences are being inquired together the fact that some of the offences do not fall under this section will not debar the Magistrate from granting pardon in respect of the offences which fall under it. All that this section requires is that the offence in respect of which pardon is tendered must be an offence described herein—*Harumal*, 16 Cr.L.J. 632 (633), 9 S.L.R. 43; *Balmokund*, 1915 P.R. 17, 16 Cr.L.J. 354; *Ismail*, 26 Cr.L.J. 1045, 87 I.C. 965, A.I.R. 1925 Nag. 409.

The words "triable exclusively by the Court of Session" mean an offence shown in the second schedule as so triable. A charge under sec. 395, I. P. C., does not cease to be an offence triable exclusively by a Court of Session, merely because the charge is triable by, and in fact has been tried by, a District Magistrate under sec. 30 of the Code—*Bhallu*, 1897 P.R. 3. So also, a valid pardon, once having been validly given, is not affected by the fact that after the pardon, the Sessions Judge at the trial altered the charges from those framed by the Magistrate to some other offences—*Kouromal*, 23 Cr.L.J. 1057, 19 S.L.R. 183, 81 I.C. 881, A.I.R. 1925 Sind 105.

All that the officer who can grant pardon under the provisions of this section has to see is whether on the information at his disposal there is a *prima facie* case against the person to whom the pardon is going to be tendered for an offence which is exclusively triable by a Court of Session. If that is so, he is competent to grant a pardon. It is no part of the duty of the Magistrate to take upon himself the task of making a thorough and searching inquiry in order to find out whether the offence which has been committed by the person is one which will be triable by the Court of Session or by a Magistrate. There may be cases in which at the time such a person is produced before a Magistrate there may be, according to the information of the Magistrate, a good case which is exclusively triable by the Court of Session. It may eventually, however, turn out after the case has been tried in the Court of Session that on the proved facts the offence committed was not one which was exclusively triable by a Court of Session but could have been triable by a Magistrate. As soon as the Magistrate is informed that the offence is one which according to the investigating authority is exclusively triable by the Court of Session, then his duty is to record the statement after granting pardon to the person put before him—*Bhola Nath v. Emp.*, 40 Cr.L.J. 856 (861), 184 I.C. 191, A.I.R. 1939 All. 567, 1939 A.L.J. 785, 1 I.R. 1939 All. 736.

Accomplice:—An accomplice is a person who is a guilty associate in crime or who sustains such a relation to the criminal act that he could be jointly charged with the

defendant (principal)—*Ramaswami Goundan*, 27 Mad 271, 14 M.L.J. 226, 2 Weir 803; *Govinda Balaji*, A.I.R. 1936 Nag 245, 1936 Cr.C. 1039. Where a witness is not concerned with the commission of the crime for which the accused is charged, he cannot be said to be an accomplice in the crime; as it is well-settled that all accessories before the fact, if they participate in the preparation for the crime are accomplices, but if their preparation is limited to the knowledge that crime is to be committed, they are not accomplices. Whether a person is or is not an accomplice depends upon the fact in each particular case considered in connection with the nature of the crime; and persons to be accomplices must participate in the commission of the same crime as the accused persons in a trial are charged. All persons coming technically within the category of accomplices cannot also be treated on precisely the same footing—*Narain Chandra Biswas*, 63 C.L.J. 191 (195). A person who assists in the concealment of the evidence of the crime (e.g., assists in the removal of blood-stains of the murdered man from the ground) *under compulsion* and not with the intention of assisting in the concealment of the crime or prompting it, is not to be regarded as an accomplice; consequently, the evidence of such person can be accepted like the evidence of any other witness—*Ghulam Hussain*, 33 P.L.R. 269, 33 Cr.L.J. 567 (569), 138 I.C. 223. See Note 956.

Accomplice and spy distinguished:—This section speaks of an "accomplice," or "approver" which means a person who participated in the crime with the accused, but after the commission of the crime, out of fear or repentance sides with the prosecution in order to obtain immunity from punishment. But a person who allies himself with the prosecution *before* the commission of the offence and before he associates with the accused in the preparation of the offence cannot be called an accomplice, the object in such case being not the perpetration of the offence but the detection of it. Where, therefore, certain persons associated with the accused without any criminal intention, with the sole object of entrapping the accused, in order to detect an offence, they cannot be regarded as *participants* in the crime but as mere *spies* or detectives. As such, their evidence is legally admissible without corroboration. At the same time some degree of disfavour attaches to persons playing the role of spy or informer. Their evidence must be carefully scrutinized and the weight to be attached to it must depend upon the character of each individual person—*Bhuneshwari Pershad*, 8 O.W.N. 503, 32 Cr.L.J. 860 (864), 132 I.C. 231, 14 O.L.J. 438, 1931 Cr.C. 444, A.I.R. 1931 Oudh 172; see also *Chaturbhuj Saha*, 38 Cal 96, 8 I.C. 119, 11 Cr.L.J. 560, 15 C.W.N. 171; *Pulin Behari Das*, 16 C.W.N. 1105, 13 Cr.L.J. 609 (663, 664). The act of a detective in supplying marked money for detection of a crime cannot be treated as that of an accomplice—*Q-E v. Javecharam*, 19 Bom 363; *Govinda Balaji Sonar*, *supra*.

950A. Secs. 337 and 494:—Sec. 337 does not suggest the idea that the only method of obtaining the evidence of a co-accused against another is by tendering him a pardon; another way of obtaining his evidence is to withdraw the prosecution against him under sec. 494. Sec. 337 does not govern sec. 494 nor abridges in any way the wide words of sec. 494. Sec. 337 appears in another connection and deals only with granting pardon to an under-trial prisoner in some serious cases. If he satisfies the conditions of pardon, he gets acquitted; if not, he may be tried for the offence. But if a case is withdrawn under sec. 494, he may, if he is discharged, be tried for the offence which he admits in his examination as a witness to have committed; and if he is acquitted, he cannot be retried, even though he refuses to give his evidence for the prosecution—*G. V. Raman*, 56 Cal 1023, 33 C.W.N. 468 (473). Sec. 337, Cr. P. C., which only applies to the offences of a more serious character therein specified, provides safeguards in the interests both of the Crown and the accused. In cases where sec. 337 is available, it is better that the accused should be dealt with under that section. It is, however, far from saying that even where sec. 337 can be applied, it is contrary to law to discharge the approver under sec. 494 (a). It must be remembered that the approver dealt with under sec. 337 gives his testimony with a contingent charge hanging over his head; also that the evidence of an accomplice whether dealt with under sec. 337 or discharged under sec. 494 (a), or acquitted under sec. 494 (b), is the evidence of an

approver, and as such, open to suspicion—*Harihar Sinha*, 37 Cr.L.J. 758 (762), 163 I.C. 9, A.I.R. 1936 Cal. 356, 40 C.W.N. 876, 1936 Cr.C. 583, 63 C.L.J. 307 (F.B.).

See *Faqir Singh v. Emp.*, in Note 957.

951. Pardon:—*When can be tendered* :—Under the old section, a pardon could be tendered only in an inquiry (see the words 'offence under inquiry') but not during an investigation—*Motilal Hiralal*, 46 Bom. 61, 22 Cr.L.J. 728. But the Lahore High Court held that the word 'inquiry' in this section included everything done by the Magistrate whether the case was challanned or not, and therefore pardon could be tendered where the offence was only under investigation by the police—*Sher Muhammad*, 3 Lah. 431. This was also the view in Sind—*Andal*, 5 S.L.R. 174, 13 Cr.L.J. 33. This conflict of opinion has now been removed by the present amendment and under the present section it can be tendered at any stage of the investigation as well.

All this section requires is that there should be investigation in progress regarding the offence. If at the date of the pardon, proceedings were going on against the accused for an offence mentioned in this section, the pardon is perfectly legal, and the approver is a competent witness against the accused—*Ismail Panju*, 26 Cr.L.J. 1115, 88 I.C. 283, A.I.R. 1925 Nag. 337. A pardon may be tendered to a person even after a charge has been framed against him—*Mangu*, 22 Cr.L.J. 255 (Lah.). A pardon can be tendered to an approver during the course of an inquiry even though the principal offender has absconded and the trial cannot, therefore, proceed. In such a case the approver's statement will be recorded under section 512—*Dagdu*, 46 Bom. 120, 22 Cr.L.J. 620. This section does not require that a trial or an inquiry should be in progress at the time pardon is tendered. Therefore, a pardon is not illegal by reason of the fact that at the time when the Magistrate had granted pardon he had adjourned the case under section 526 (8). Although the Magistrate had postponed the investigation or inquiry, he did not become *functus officio*; he had not ceased to be the Magistrate who would be or was investigating or inquiring into the offence. The Magistrate was the only Magistrate who at that time had jurisdiction to inquire into the case—*Bal Chand*, 49 All. 181, 27 Cr.L.J. 1369, 24 A.L.J. 1050.

Who can grant pardon :—See Notes under "Change" above. Where the offence is under investigation, the Magistrate (other than the District Magistrate) tendering pardon must have jurisdiction over the offence. A Magistrate of one district cannot tender pardon to a person implicated in an offence committed in another district and inquired into in the latter district. The pardon so tendered is illegal and cannot be validated by the operation of sec. 529—*Chidda*, 20 All. 40.

Where the offence is under investigation, the Magistrate can grant pardon only with the sanction of the District Magistrate. This sanction should be written sanction; but an oral sanction, though irregular, would be valid—*Sultan Khan*, 5 A.L.J. 691, 8 Cr.L.J. 445 (450).

A Deputy Commissioner trying a case triable exclusively by the Sessions Court, under the powers conferred by sec. 30 can offer a conditional pardon to an accused under this section—*Paban Singh*, 10 C.W.N. 847, 4 Cr.L.J. 44.

When the Legislature used the words 'the District Magistrate' in sec. 337 (1), Cr. P. C., it did not intend to exclude an Additional District Magistrate upon whom the ordinary powers of a District Magistrate had been conferred under sub-sec. (2) of sec. 10, Cr. P. C. By the use of the definite article before "District Magistrate" in sec. 337, Cr. P. C., the Legislature never intended to specify the District Magistrate appointed as such and not the Additional District Magistrate empowered as such. The Additional District Magistrate is not in any way affected by the Proviso to sec. 337 (1), Cr. P. C., and he is in his own right empowered under the law to tender a pardon to the accused—*Amar Singh*, A.I.R. 1938 Lah. 796 (798), 40 Cr.L.J. 543, 181 I.C. 509, 40 P.L.R. 758, 1 I.L.R. 1939 Lah. 38.

Power of Local Government :—The Local Government has no power to offer a conditional pardon to an accused for the purpose of giving evidence against the other accused, under this section—*Paban Singh*, 10 C.W.N. 847, 4 Cr.L.J. 44; *Banu Singh*,

33 Cal. 1353, 10 C.W.N. 962 (A new provision regarding conditional pardon has been inserted in sec. 401, sub-sec. 5A.) But the Local Government as an executive authority, has power to refrain from prosecution *independently* of this section—*Har Prosad*, 45 All. 226 (229), 21 A.L.J. 42. See also *Faqir Singh*, 37 Cr.L.J. 515 (517), 162 I.C. 180, A.I.R. 1936 Lah. 353, 16 Lah. 591, 37 P.L.R. 715, 1936 Cr.C. 294. This section is addressed to certain Courts of Justice, and has nothing to do with the powers of the Local Government in the matter of instituting or refraining from instituting any prosecution. The Local Government can grant pardon even though the case is not triable exclusively by the Court of Session or High Court. It can examine an accomplice as a witness even though no formal tender of pardon has been granted to him. Thus, where the Government of C. P., having before it the case of a Subordinate Judge who was suspected of receiving bribes, issued a notification to the effect that no prosecution would be instituted by the Government against any person who would come forward with evidence that he had paid or offered bribe to the accused (Sub-Judge), and in consequence of the notification two men came forward and gave evidence against the Sub-Judge, *held* that their evidence was admissible on the principle of sub-sec. (2) of this section, although no pardon was formally tendered to them under sec. 337 and although the offence (sec. 161, I. P. C.) was not triable exclusively by a Court of Session or High Court—*Har Prosad*, *supra*.

To whom pardon can be tendered :—Pardon can be tendered to any person who is supposed to be directly or indirectly concerned in, or privy to, the offence. The word "supposed" must be taken as intended to exclude merely the case of a man who has actually been convicted of the crime, and not the case of a man who though admitted to be a party to the crime is unconvicted; therefore, where pardon was tendered to a person who pleaded guilty but was not convicted, it was held that the pardon was properly granted and that his evidence was admissible—*Kallu*, 7 All. 160; *Ghagya*, Ratanlal 750 (762).

It is not necessary that the person to whom a pardon is tendered should himself be charged with an offence triable exclusively by the Court of Session; it is not even necessary that he should be an accused in the case; all that is required by this section is that he should be supposed to have been directly or indirectly concerned in or privy to such an offence with which another person is charged—*Kashim*, 24 Cr.L.J. 566 (Nag.).

Pardon cannot be tendered to a person whose complicity in the crime is not admitted by himself; such a person cannot be considered to be an approver, and his evidence cannot be taken as that of an approver—*Sant Ram*, 24 Cr.L.J. 799.

Condition of pardon :—The only condition on which pardon can be tendered to an accomplice is the only one specified in this section. A tender of pardon on condition that the approver should profess to have been present at the scene of the offence and to have personal knowledge of the circumstances under which the offence was committed (which was not true) is illegal. The accomplice should not be bound over to any particular narration, and in a tender of pardon there should be no temptation offered to deviate from the truth—*Yakub*, Ratanlal 612 (614), following *Winsor*, L.R. 1 Q.B. 312.

Disclosure :—This section requires that the disclosure shall be reduced into writing. If it is made orally, the verbal testimony of the Magistrate to whom it has been made will be sufficient to prove the statement. But, as a rule of caution, the approver's statement should be always reduced to writing, so that no dispute may subsequently arise as to what the exact terms of the statement were—*Ram Nath*, 29 P.L.R. 165, 29 Cr.L.J. 413 (415), 108 I.C. 514, A.I.R. 1928 Lah. 320, 10 A.I. Cr.R. 76, 9 Lah. 608.

The wording of the section leaves no room for doubt that the tender of pardon is to precede the making of full and true disclosure and not to follow it; that is, the true and full disclosure is expected to be made by the approver when he is examined as a witness in the enquiry or trial. This section, itself does not contemplate and authorize the recording of any statement by the accused as a preliminary to the tender of pardon. Although this section does not contemplate recording of any statement by a Magistrate

in the course of the investigation it is quite conceivable that after an accused is granted pardon he ceases to be an accused person and he can be examined as a witness: see *Harumal Parmanand v. Emp.*, 16 Cr.L.J. 632, 30 I.C. 456, 9 S.L.R. 43 and *Faqir Singh v. Crown*, 16 Lah. 594, 162 I.C. 180, A.I.R. 1936 Lah. 353, 37 P.L.R. 715, 1936 Cr.C. 294, 37 Cr.L.J. 515, 8 R.L. 867. When he ceases to be an accused person he may well be examined under sec. 164, Cr. P. C., after administering him oath, as was done in cases reported in *Crown v. Parma Nand*, 14 Lah. 507, 142 I.C. 776, Ind. Rul. 1933 Lah. 303, 34 Cr.L.J. 469, A.I.R. 1933 Lah. 321, 34 P.L.R. 421, 1933 Cr.C. 564, *Ram Nath v. Crown*, 9 Lah. 608, 108 I.C. 514, 29 P.L.R. 165, 29 Cr.L.J. 413, A.I.R. 1928 Lah. 320, 10 A.I.Cr.R. 76 and *Anup Singh v. Emp.*, A.I.R. 1933 Lah. 910, 146 I.C. 677, 1933 Cr.C. 1297, 6 R.L. 265, 35 Cr.L.J. 168.—*Horlal v. Emp.*, 41 Cr.L.J. 433 (435, 436), 187 I.C. 203, 1940 N.L.J. 286.

952. Effect of pardon:—A person who has been granted pardon under this section and who has fulfilled the conditions of pardon must be released, and cannot be re-arrested in respect of the same offence or for any offence inseparably connected with it. Thus, in a dacoity case, an accused was tendered pardon under this section. He made a full statement implicating himself and others, pointed out the place where he had a carbine and ammunition concealed, gave them up to the Police and in all respects complied with the conditions of the pardon. At the close of the case he was released. He was then re-arrested and tried under sec. 20 of the Arms Act in respect of the possession of the carbine and ammunition which he had given up to the Police. Held that the possession of carbine and ammunition being an offence in connection with the matter of the dacoity, and inseparable from his guilt as a dacoit, his prosecution for such an offence, after he had fulfilled the conditions of pardon in the dacoity case, was improper and must be set aside—*Shiam Sundar*, 19 A.L.J. 717, 22 Cr.L.J. 699, 63 I.C. 827.

A pardon tendered to a person in respect of one offence is no bar to his trial and conviction for an entirely different offence—*Sardara*, 46 All. 236 (240), 22 A.L.J. 85, 25 Cr. L.J. 956. But it will bar his trial and conviction in respect of offences which are so closely connected with the offence in respect of which the pardon was tendered that they may be said to be covered by the terms of the pardon—*Ganga Charan*, 11 All. 79. Thus, where the approver who was granted pardon in connection with a case of forgery, made a full and true disclosure of the circumstances of the crime, and in so doing he also related the details of some other earlier offences (e.g., money order fraud) committed by himself and the other accused, which were not relevant to the inquiry, but he made those disclosures under the belief that those earlier offences also fell within the scope of the inquiry, and he was not warned by the Magistrate against making those irrelevant statements, held that the approver should be given the benefit of doubt there might be as to his understanding of the pardon, and that the pardon granted in the forgery case should excuse him from prosecution for the earlier offences (e.g., money order fraud)—*Nilmadhab*, 5 Pat. 171, 27 Cr.L.J. 957 (961), 96 I.C. 509, A.I.R. 1926 Pat. 279. "If the prisoner having been admitted as an accomplice to one felony, be thereby induced to suppose that he has freed himself from the consequences of another felony, the Judge will recommend the indictment for such other felony to be abandoned"—Russell on Crimes (4th Edn.), Vol. 3, p. 597.

Once the approver has accepted a tender of pardon he stands on the same footing as any other witness with the exception that he is liable to forfeit his tender of pardon if he does not comply with the conditions on which the tender was made. There is no legal bar to the examination of any other witness under sec. 164, Cr. P. C., and there is no reason why the examination of the approver under that section should be open to any objection—*Hussaina*, A.I.R. 1933 Lah. 868, 1933 Cr.C. 1113, 35 Cr.L.J. 111, 146 I.C. 461.

953. Sub-section (1A)—Recording reasons:—Although sub-section (1A) requires the Magistrate, who tenders pardon, to record his reasons for so doing, still the recording of the reasons is not a condition precedent to the tender of pardon and its

acceptance by the approver, and the pardon cannot be set aside merely because the reasons are not recorded. Such irregularity does not prejudice the approver—*Shama Charan*, 13 Cr.L.J. 588 (590) (All.); *Sultan Khan*, 5 A.L.J. 691, 8 Cr.L.J. 445 (451). When the facts which led up to the tender of pardon appear on the record, the omission to state the reasons is not an illegality which vitiates the proceedings, but a mere irregularity curable by sec. 537, unless it has occasioned a failure of justice—*Dukhu*, 1929 A.L.J. 227, 30 Cr.L.J. 1157 (1158), 120 I.C. 126, A.I.R. 1929 All. 321, Ind. Rul. 1930 All. 14; *Ananda*, 36 Cal. 629; *Waryam*, 5 Lah.L.J. 408, 25 Cr.L.J. 174, 76 I.C. 398, A.I.R. 1924 Lah. 90; *Faqir Singh v. Emp.*, *infra*, in Note 957; nor even can it be a ground for excluding the approver's evidence as inadmissible—*Banu Singh*, 5 CLJ. 224.

Where a Magistrate tendering pardon states in his order that in order to connect the accused with the offence of murder it is essential to make an approver in the case and that he therefore tenders pardon under sec. 337, Cr. P. C., to the person concerned, it amounts to sufficient compliance with the provisions of sec. 337 (1-A), Cr. P. C., as no clearer reason for tendering pardon can be imagined and the only thing required by law to be done has been amply done—*Amar Singh*, A.I.R. 1938 Lah. 796 (798), 40 Cr.L.J. 513, 181 I.C. 509, 40 P.L.R. 758, 11 L.R. 1939 Lah. 38.

954. Sub-section(2):—Approver as witness:—It is nowhere laid down in the Criminal Procedure Code that the acceptance of pardon should be in writing or that it should be expressed in any other manner; it is to be gathered from the circumstances—*Amar Singh*, *supra*. When an accused person tendered pardon and he accepts it, he ceases to be an accused person, and he can be examined as a witness. It is quite unnecessary in such a case that the prosecution should be formally withdrawn against him under sec. 494—*Harumal*, 9 S.L.R. 43, 16 Cr.L.J. 632 (633). An accused person to whom a pardon is tendered under this section ceases to be an accused from the moment the pardon is accepted and is to be treated as a witness thereafter—*Faqir Singh*, 37 Cr.L.J. 515 (517), 162 I.C. 180, A.I.R. 1936 Lah. 353, 16 Lah. 594, 37 P.L.R. 715, 1935 Cr.C. 294, following *Khairati Ram*, A.I.R. 1931 Lah. 476, 132 I.C. 519, 12 Lah. 635, 1931 Cr.C. 700, 32 Cr.L.J. 913, 32 P.L.R. 493, Ind. Rul. 1931 Lah. 615.

According to clause (2) the approver shall be examined as a witness in the case. The expression "in the case" (see the old section) includes the preliminary inquiry, and does not refer to the trial alone—*Ramaswami*, 24 Mad. 321; *Mallu*, 11 N.L.R. 59, 16 Cr.L.J. 417. This is now made clear by the present amendment of this sub-section.

The amendment of this clause also makes it clear that the approver must be examined both in the Court of the committing Magistrate and in the subsequent trial, and not in the former Court alone. But if the approver when examined before the committing Magistrate resiles from his previous disclosures and says that they were made under police pressure and he is not examined at the subsequent trial, the fact that he was not examined before the Sessions Judge does not bar his trial for the offence in respect of which the pardon had been granted—*Ram Nath*, 29 P.L.R. 165, 29 Cr.L.J. 413 (416), 108 I.C. 514, 9 Lah. 608, A.I.R. 1928 Lah. 320. Whether non-compliance with the provisions of sub-sec. (2) of this section renders trials of the persons against whom the approver's evidence is to be tendered illegal, is a question which was left undecided in this case. The same High Court has decided the question in *Mahla v. Emp.* 31 Cr.L.J. 111, 120 I.C. 489, A.I.R. 1930 Lah. 95, 1930 Cr.C. 111, 120 I.C. 489, 11 Lah. 230, 31 P.L.R. 495 and has held that any person who has accepted a tender of pardon under the provisions of this section must be examined as a witness in the Court of the Committing Magistrate and at the subsequent trial of every person tried for the same offence, provided, of course, that it is physically possible for the Crown to produce the approver. The fact that an approver appears to the Court to be an untrustworthy witness does not absolve the Court from complying with the statutory provisions. The failure to comply with the provisions of sub-sec. (2) of this section is an illegality and not a mere irregularity in procedure and the trial is void as are the proceedings before the Committing Magistrate.

Once a pardon has been tendered and accepted cl (2) of this section renders it obligatory for the prosecution to examine the approver both in the committing Magistrate's Court and in the Sessions Court, should the case be committed. The Legislature has required that the approver, whatever statements he has made in the Court of the committing Magistrate should be examined as a witness in the Sessions trial. The purpose of the direction in sec. 337 (2), Cr. P. C., is the larger purpose of the interests of justice. With the exception of evidence admitted under sec. 288, Cr. P. C., it is upon evidence led in the Sessions Court that the guilt or innocence of the accused is determined, and it is in the Sessions Court that the approver has his main duty to perform—*Shahdino Dhaniparto*, A.I.R. 1940 Sind 114 (116), 41 Cr.L.J. 747, 189 I.C. 452, not following *Nayeb*, *infra*. But if a pardon tendered to an accused person on his undertaking to make a full disclosure is withdrawn by the committing Magistrate on the ground of non-fulfilment of the undertaking, it is not obligatory on the prosecution to examine him before the Sessions Court—*Nayeb*, 38 C.W.N. 659 (662), 35 Cr.L.J. 1479 (1482), 61 Cal. 399, 1934 Cr.C. 929, A.I.R. 1934 Cal 636. See also *Andal*, 5 S.L.R. 174, 13 Cr.L.J. 33.

Where an approver when examined in the preliminary inquiry keeps back material evidence within his knowledge, the Magistrate can withdraw the pardon, and the prosecution is not bound to put him forward as a witness in the sessions trial—*Ramaswami*, 24 Mad 321. A person who has not satisfied the condition of pardon at the commitment, need not be examined at the trial in the Sessions Court; the evidence given by him before the committing Magistrate can be used as evidence in proceedings taken against him—*Nga Po*, 7 Cr.L.J. 245 (Bur.); *Suba*, 1905 P.R. 41. It is not necessary to examine the approver in the Sessions Court if he has shown by his evidence in the Magistrate's Court that he is an untrustworthy witness—*Sashi*, 42 Cal. 856, 19 C.W.N. 295, 16 Cr.L.J. 65. But the Lahore High Court is of opinion that even the fact that the pardon has been withdrawn before the trial in the Sessions Court does not absolve the prosecution from its duty of producing the approver before the Sessions Judge—*Chet Singh*, 31 P.L.R. 1010, 32 Cr.L.J. 1126, 1931 Cr.C. 166, A.I.R. 1931 Lah 102, 134 I.C. 193.

The approver must be examined as a witness at the subsequent trial of every person tried for the same offence; if there are several accused persons and they are tried at different times separately, the approver must be examined as a witness in every one of these trials. It is incorrect to say that the approver's obligation as a witness is concluded as soon as he is examined as a witness at the trial of one such person, and that he need not appear at any subsequent trial of other persons charged with the same offence—*Mahla*, *supra*.

An approver cannot be examined as a witness unless and until he has been discharged by a written order; a mere promise of immunity from prosecution given by the Local Government does not amount to an order of discharge. Unless he is formally discharged, he does not cease to be an accused person and cannot be examined as a witness; and he does not cease to be an accused person by reason of the mere fact that the police did not send him for trial—*Mahandu*, 1 Lah. 102 (dissenting from *Sardar*, 1904 P.R. 21).

A pardon was tendered to and accepted by an accused in the committing Magistrate's Court, but by some mistake his name was still in the category of the accused when the case came before the Sessions Court, and he was placed on the dock along with the other accused. The mistake was soon found out, and the Sessions Judge then removed him from the dock, and he gave evidence in the trial. Held that the approver's evidence was admissible—*Ayub Mandal*, 54 Cal 539, 28 Cr.L.J. 689, 103 I.C. 545, A.I.R. 1927 Cal 680, 8 A.I.Cr.R. 309.

Although sub-sec. (2) of sec. 337, Cr. P. C., contemplates that every person accepting a tender shall be examined as a witness in the Court of the Magistrate taking cognizance of the offence and in the subsequent trial, if any, other Magistrates are also empowered to record the statement of a person to whom pardon has been tendered—

Amar Singh, AIR. 1938 Lah. 796 (799), 40 Cr.L.J. 543, 181 I.C. 509, 40 P.L.R. 758, 11 L.R. 1939 Lah. 38, following *Parmanand*, AIR. 1933 Lah. 321, 1933 Cr.C. 564, 142 I.C. 776, 34 Cr.L.J. 469, 14 Lah. 507, 34 P.L.R. 421.

955. Effect of illegal pardon:—It is illegal for a Magistrate to convert an accused into a witness (approver) except when a pardon has been lawfully granted under sec. 337—*Hanmanta*, 1 Bom. 610. Therefore, where a Magistrate tenders pardon to one of the accused persons in a case not exclusively triable by the Court of Session, and examines him as a witness, the statement made by that accused is irrelevant and inadmissible even as a confession of a co-accused—*Ashgar*, 2 All. 260. Contra—*Subramania Ayyar*, 25 Mad. 61 (68), in which it was held that although the tender of pardon was illegal, he was competent to give evidence as a witness.

It has been pointed out in this Madras case (25 Mad. 61, at pp. 68-69) that the question as to whether an approver, who has been illegally pardoned, can be competent witness, depends upon the further question whether the approver had pleaded guilty or not. If he had not pleaded guilty, and had neither been acquitted nor discharged nor convicted, he cannot be examined as a witness against the other accused. This was the *ratio decidendi* in *Hanmanta*, 1 Bom. 610 and *Ashgar*, 2 All. 260. But when the approver had pleaded guilty (as in 25 Mad. 61), no issue remained to be tried as between him and the Crown; he could not be said to be tried jointly with the other accused; he was not in charge of the jury; his incompetency to give evidence had been removed, and oath could be lawfully administered to him.

956. Conviction based on approver's evidence:—Though a conviction is not illegal because it proceeds on the uncorroborated testimony of an approver (sec. 133, Evidence Act), yet it has now become the universal practice not to convict on the testimony of an accomplice, unless it is corroborated in material particulars—*Kallu*, 7 All. 160, *Ramaswami*, 27 Mad. 271; *Krishnabhat*, 10 Bom. 319; *Srinivas*, 7 Bom.L.R. 959, 3 Cr.L.J. 33; *Maganlal*, 14 Bom. 115; *Yasin*, 28 Cal. 689; *Shabrah*, 1919 P.R. 20, 20 Cr.L.J. 191, 49 I.C. 607; *Madan*, 4 P.L.T. 381, 24 Cr.L.J. 723. The evidence of an approver does not differ from the evidence of any other witness save in one particular respect, namely, that the evidence of an accomplice is regarded *ab initio* as open to grave suspicion. Accordingly, if the suspicion which attaches to the evidence of an accomplice be not removed, that evidence should not be acted upon unless corroborated in some material particular; but if the suspicion attaching to the accomplice's evidence be removed, then that evidence may be acted upon even though uncorroborated, and the guilt of the accused may be established upon that evidence alone—*Rattan Dhanuk*, 8 Pat. 235, 30 Cr.L.J. 137 (138), 113 I.C. 329, 9 P.L.T. 672, AIR. 1928 Pat. 630. The Judge in his charge to the jury should take care to point out that although a conviction based on the uncorroborated testimony of the approver is not illegal, yet it is not the practice of the Court so to convict, and should state also that the evidence of the approver was given on conditional pardon—*Jamir-uddi*, 29 Cal. 782; *Surya Kanta*, 24 C.W.N. 119, 31 C.L.J. 20 (F.B.). If this warning is omitted, a conviction based on such uncorroborated evidence must be set aside—*Rattan Dhanuk*, supra. See *Jamaldi*, 51 Cal. 160, and other cases cited in Note 915 (5) under sec. 297.

The testimony of the approver ought to be corroborated in material particulars in the matter of circumstances of the crime and also in the matter of identifying the accused with the offence. The corroboration must be independent of the accomplice; and the evidence of one accomplice cannot corroborate the evidence of another; the evidence of either requires corroboration before it can be acted upon. So far as the statutory provisions are concerned, there is nothing in law to justify the proposition that evidence of a witness who happens to be cognisant of a crime, or who made no attempt to prevent it, or who did not disclose its commission, should only be relied on to the same extent as that of an accomplice. The real question in such a case is the degree of credit to be attached to the testimony of such a witness; and that depends on all the facts and circumstances of the particular case. It may not be possible to place much reliance

on the evidence coming from persons falling within the description given above, but they are not accomplices, and it leads to confusion of thought to treat them as "practically accomplices" and then apply the rule as to their credibility instead of judging their credibility by a careful consideration of all the particular facts of the case affecting the evidence—*Hafizuddin*, 35 Cr.L.J. 1357 (1359), 151 I.C. 486, 38 C.W.N. 777, A.I.R. 1934 Cal. 678 (S.B.). See also *Narain Chandra Biswas*, 63 C.L.J. 191 (195).

Where the witness says that she helped the accused to dispose of the body only because he threatened to kill if she did not, she would not be accomplice, but whether she was an accomplice or not, it would certainly be unsafe to rely on her evidence unless it is corroborated in some particular as against the accused—*Nanhu*, 37 Cr.L.J. 846, 163 I.C. 460, 18 N.L.J. 327; *Brijpal Singh*, 37 Cr.L.J. 1065 (1067), 165 I.C. 138, 1936 O.W.N. 892. Where a woman was cognizant of the fact that her paramour intended to kill her husband and in spite of this she did not disclose the fact to her husband, she must be regarded as an accomplice. In any case, her testimony cannot carry any higher value than the testimony of an accomplice—*Phulla*, A.I.R. 1936 Lah. 731, 37 Cr.L.J. 978, 164 I.C. 700, 38 P.L.R. 226, 1936 Cr.C. 766.

See Note 950 "Accomplice".

957. Sub-section (2A):—Magistrate cannot try the case :—Sub-section (2A) lays down that the Magistrate tendering the pardon must commit the case to the Sessions; this means that he is not competent to proceed with the trial himself—*Peru*, 2 O.W.N. 464, 26 Cr.L.J. 1216, 88 I.C. 736, A.I.R. 1925 Oudh 472, 12 O.L.J. 542. See also *Public Prosecutor v. Muquarrab*, 34 Cr.L.J. 212, 141 I.C. 881, A.I.R. 1933 Pesh 3, 1933 Cr.C. 145, Ind. Rul. 1933 Pesh. 1. The illegality is not one which can be cured by sec. 537—*Jimun*, 26 Cr.L.J. 549, 85 I.C. 645, A.I.R. 1925 Lah 378. Thus, where in a case of robbery, the Magistrate grants a conditional pardon to an approver and is satisfied that there is a *prima facie* case, he has no jurisdiction to dispose of the case himself but is bound under this provision of this clause to commit the case to the Sessions—*Nga Kin*, 4 Bur.L.J. 11, 86 I.C. 477, A.I.R. 1925 Rang. 207, 26 Cr.L.J. 829. The Magistrate before whom the suspected person is brought face to face, and who attempts to induce him by promise of pardon to make a full and true disclosure, assumes to a certain extent the function of a police-officer and identifies himself with the prosecution, and it is doubtless on that reason that it is considered proper to disqualify him from trying the case—*Batera*, 1898 P.R. 3.

Where offences charged were within sec. 337, Cr. P. C., and the tender of pardon was made by a Magistrate within the terms of the section expressly on condition of the person to whom it was addressed making a full and true disclosure of the whole of the facts (or circumstances) within his knowledge and the persons who accepted the tenders of pardon from the Magistrates, were severally examined before the Magistrate taking cognizance of the offence, the requirements of sub-sec. (2A) of sec. 337, Cr. P. C., then automatically came in force, which are that the accused, if there are reasonable grounds for believing that he is guilty of the offence is to be committed to the Court of Session or High Court. It is merely an irregularity on the part of the Magistrate if he has not recorded his reasons as required by sub-sec. (1A) of sec. 337, Cr. P. C. The right of the accused or the approver cannot be affected because the Magistrate has failed to comply with a requirement imposed for the benefit of the accused. Nor is it material that the Magistrate tendering the pardon did so after consulting the Local Government and with its authority. That is an internal matter of administration, which cannot affect the position of the accused or the approver. The essential fact is that the pardon was tendered to the approver by the Magistrate. It is obvious that the proceedings so taken under sec. 337, Cr. P. C., were different in character from the course which would have been taken under sec. 494, Cr. P. C. This latter section belongs to a different chapter of the Code. Sec. 337 falls under Chap. 24, which deals with general provisions as to inquiries and trials. Sec. 494 falls under Chap. 38, which is headed "of the Public Prosecutor," that is to say, the former section deals with the action of a judicial, the latter with that of an executive officer. Sec. 494 says

nothing about pardons at all. It gives a general executive discretion to withdraw from the prosecution subject to the consent of the Court, which may be determined on many possible grounds, one of which no doubt is that the person in respect of whom the charge is withdrawn may be willing to give evidence. But the whole procedure and the various consequences under sec. 494 differ from those under sec. 337. Where at a later stage in the proceeds, the prosecution seeks to bring themselves under sec. 494, by purporting to take action under it, but it is then too late to change the position either as against the accused or against the approvers. The Local Government may not intend to act under sec. 337, but if their overt acts are such as to be only capable of being referred to that section, their intention not to act under it cannot matter—*Faqir Singh v. Emp.*, AIR. 1938 P.C. 266 (269), 40 Bom.L.R. 1254, 68 C.L.J. 328, 42 C.W.N. 1252, 1938 OLR 405, 1938 A.Cr.C. 69, 19 P.L.T. 717, 176 I.C. 898, 1938 M.W.N. 969, 48 M.L.W. 537, 40 P.L.R. 876, 40 Cr.L.J. 360, I.L.R. 1938 Lah. 628, 11 R.P.C. 81, 1938 A.L.R. 753, 4 B.R. 850, 1938 O.W.N. 809, 1938 P.W.N. 698, 1938 O.A. 672, 1938 A.W.R. (P.C.) 170, (1938) 2 M.L.J. 780 (P.C.), overruling *Faqir Singh v. Emp.*, 37 Cr.L.J. 515, 162 I.C. 180, A.I.R. 1936 Lah. 353, 16 Lah. 594, 37 P.L.R. 715, 1936 Cr.C. 294, 9 R.L. 867, *infra*

A Deputy Commissioner trying a case under the special powers conferred by sec. 30, does so as a Magistrate, and if he tenders pardon to one of the accused, he cannot try the case himself—*Paban Singh*, 10 C.W.N. 847, 3 Cr.L.J. 44; *Kishore*, 25 Cr.L.J. 1341, 82 I.C. 573, A.I.R. 1925 Nag. 119. On consequence, perhaps the most important, is that when a Magistrate has tendered the pardon, the trial must not be by another Magistrate even though he is vested under sec. 30, Cr. P. C., to try such an offence, but by the High Court or Sessions Court—*Faqir Singh v. Emp.*, *supra*.

This sub-section debars only the Magistrate tendering the pardon from trying the case; but a District Magistrate sanctioning the tender of pardon to an approver is not precluded from trying the case—*Akbar*, 1919 P.R. 30, 21 Cr.L.J. 306, 55 I.C. 466.

Where two of the accused were produced before the District Magistrate and were told, under the direction of His Excellency the Governor, that no proceedings would be taken against them provided they made a true statement of facts relating to the case within their knowledge and, after they had accepted the terms, the case against them were withdrawn under sec. 494, Cr. P. C., in the Court of the Special Magistrate and with his permission and they were examined as witnesses on behalf of the prosecution, *held* that, in the circumstances, the case did not fall within the purview of sec. 337, Cr. P. C., and that the accused were not entitled to have it tried by the Court of Session in accordance with the provisions of this sub-section—*Faqir Singh*, 37 Cr.L.J. 515, 162 I.C. 180, A.I.R. 1936 Lah. 353, 16 Lah. 594, 37 P.L.R. 715, 1936 Cr.C. 294. This decision was overruled by the Privy Council in *Faqir Singh v. Emp.*, *supra*.

A Special Magistrate under the Ordinance (II of 1932), tendering pardon to the accomplice, can proceed with the trial of the case himself as the Ordinance is inconsistent with sub sec. (2A) and prevails—*Abdul Majid*, 34 Cr.L.J. 1023, 145 I.C. 656, A.I.R. 1933 Cal. 537, 60 Cal. 652, 1933 Cr.C. 893. Such is also the case with a Special Magistrate under the Bengal Suppression of Terrorist Outrages Act (XII of 1932 B.C.). He can tender pardon to an accused and try the co-accused himself—*Mohammad Saleuddin*, 36 Cr.L.J. 884, 156 I.C. 238, A.I.R. 1935 Cal. 281, 1935 Cr.C. 391, 39 C.W.N. 698; *Harihar Sinha*, 63 C.L.J. 307, 40 C.W.N. 876, 163 I.C. 9, A.I.R. 1936 Cal. 356, 1936 Cr.C. 583 (F.B.).

Approver cannot be committed :—Under sub-sec. (2A) it is clear that when pardon has been granted to an accused, the case of the other accused alone should be committed to the Sessions. *The approver cannot be committed* to the Sessions, for since he has been granted a pardon he cannot be tried. If the Magistrate commits the approver along with the other accused (which Magistrate frequently do under a mistaken view of the law), the Sessions Judge ought to make a reference to the High Court for getting the commitment of the approver quashed. If, however, the Sessions Judge does not

make any such reference, treating the commitment of the approver as if there had been no commitment, the procedure is not illegal but a mere irregularity—*Bhagwandin*, 6 O.W.N. 218, 30 Cr.L.J. 567 (569), 116 I.C. 193, A.I.R. 1929 Oudh 190, Ind. Rul. 1929 Oudh 305, 4 Luck. 679. The approver cannot be committed to the Sessions, but must be detained in custody until the termination of the trial. If he is committed, the commitment will be quashed by the High Court—*Raja Ram*, 1932 A.L.J. 754, 1932 Cr.C. 699 (700), 33 Cr.L.J. 802, 139 I.C. 408, A.I.R. 1932 All 581; *Nana Amrita*, 36 Cr.L.J. 499, 154 I.C. 327, A.I.R. 1935 Bom. 70, 36 Bom.L.R. 1211, 1935 Cr.C. 132; *Peru*, 2 O.W.N. 464, 12 O.L.J. 542, 26 Cr.L.J. 1216.

958. Sub-section (3):—The approver shall be, unless he is on bail, detained until the termination of the trial—*Mg. Po*, 8 L.B.R. 357, 17 Cr.L.J. 391; and nothing can be done against an approver who has not complied with the conditions of pardon, until after the case in the Court of Session has been finished; then his trial should be commenced *de novo*—*Bhan*, 23 Bom. 493. See Note 962 under sec. 339.

The meaning of this sub-section is that the approver shall not be set at large until the judicial proceedings pending against the accused person are finished. It is immaterial for the purpose of this sub-section whether the proceedings are finished by a Magisterial order of discharge (under sec. 209) before trial, or by a Judge's order of acquittal after trial. In the case of the Magisterial discharge, the sub-section will be satisfied if the approver is detained in custody or is let on bail until the order of discharge is made—*Intya*, 37 Bom. 146, 13 Cr.L.J. 842, 17 I.C. 174. This sub-section clearly provides that so far as the trial Court is concerned, the detention in custody of the approver must end with the trial. The Sessions Judge has no authority to order the detention of the approver, in anticipation of any possible orders from the Court of Appeal, until the period fixed by the law of appeal expires or the appeal is heard and determined by the appellate Court—*Sultan Ahmad*, A.I.R. 1935 Cal. 545, 39 C.W.N. 233, 62 Cal. 430, 36 Cr.L.J. 1308, 157 I.C. 1059, 1935 Cr.C. 937. See also Note 962.

The words "detained in custody" mean detention in jail and not detention in police custody. Even in the case of an accused person, detention in police custody is confined within the narrowest limits and hedged in by stringent conditions; see secs. 61 and 167. An approver does not stand in the same category as an accused, but is treated as a witness, and there is no provision of law for detaining a witness in police-custody. A witness, even though he is an approver, should not be placed in a worse position than the accused person—*In re Khawati*, 132 I.C. 519, 1931 Cr.C. 700, A.I.R. 1931 Lah. 476, 12 Lah. 635, 32 P.L.R. 493, 32 Cr.L.J. 913 (915); *Kundan Lal*, 12 Lah. 604, 32 P.L.R. 423, 32 Cr.L.J. 785 (789, 791), 131 I.C. 625, 1931 Cr.C. 625, A.I.R. 1931 Lah. 353; *Ranbir Singh*, 32 P.L.R. 728, 1931 Cr.C. 704, A.I.R. 1931 Lah. 480, 33 Cr.L.J. 162.

This section, which is a special section dealing with approvers, controls sec. 498 (*per Percival, J.C. Contra Rupchand, A.J.C.*) *Mahomed Abdul Majid*, 28 Cr.L.J. 439, 101 I.C. 471, A.I.R. 1927 Sind 173. The provisions of this sub-section apply from the time that the person having accepted a tender under this section has accepted the position of an approver and has become a witness in the case. If he is not on bail the Magistrate is bound by the provision of this sub-section to retain him in custody until the termination of the trial. He has no jurisdiction to release him on bail—*Ali Mahomed*, 33 Cr.L.J. 906, 140 I.C. 153, A.I.R. 1932 Sind 40, Ind. Rul. 1932 Sind 174.

338. At any time after commitment, but before judgment

Power to direct tender is passed, the Court to which the commitment is made may, with the view of obtaining on the trial the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, any such offence, tender or order the committing Magistrate or the District Magistrate to tender, a pardon on the same condition to such person.

959. Who can tender pardon :—After the commitment of the case to the Sessions, either the Court of Session can itself tender pardon, or it can direct the committing Magistrate or the District Magistrate to tender pardon. The Local Government cannot tender a pardon under this or the previous section, but it can withdraw the prosecution under sec. 494—*Banu Singh*, 33 Cal 1353; *Paban Singh*, 10 C.W.N. 847, 4 Cr L.J. 44.

The Sessions Court can direct only the committing Magistrate or the District Magistrate to tender pardon, but it cannot direct a Police Officer to do so—*Fakir Mahomed*, 6 W.R. (Cr. Lct.) 5.

To whom pardon can be tendered :—A pardon can be tendered to an accused provided he is *not yet convicted*. The words "supposed offence" in this section exclude those who have been actually convicted; but a tender of pardon to a person who has pleaded guilty but has not been convicted is not prohibited by this section; and the evidence of such person examined as a witness is admissible—*Kallu*, 7 All. 160; *Bhagya*, Ratanlal 750 (752).

When pardon may be tendered .—Pardon can be tendered at any time 'after commitment and before judgment is pronounced'; but it is extremely improper, though not illegal, to grant pardon at a late stage of the trial after the close of the prosecution and the defence, and after the opinion of the assessors has been given, though judgment has not yet been pronounced—*Hulla*, 1884 A.W.N. 147

339. (1) Where a pardon has been tendered under section 337 or section 338, and the *Public Prosecutor certifies that in his opinion* any person who has accepted such tender has, either by wil-

Commitment of person to whom pardon has been tendered.

fully concealing anything essential or by giving false evidence, not complied with the condition on which the tender was made, *such person* may be tried for the offence in respect of which the pardon was so tendered, or for any other offence of which he appears to have been guilty in connection with the same matter:

Provided that such person shall not be tried jointly with any of the other accused, and that he shall be entitled to plead at such trial that he has complied with the conditions upon which such tender was made; in which case it shall be for the prosecution to prove that such conditions have not been complied with.

(2) The statement made by a person who has accepted a tender of pardon may be given in evidence against him *at such trial*.

(3) No prosecution for the offence of giving false evidence in respect of such statement shall be entertained without the sanction of the High Court.

Change:—The italicised words and the proviso have been added by sec. 87 of the Cr. P. Code Amendment Act (XIII of 1923).

960. Certificate of Public Prosecutor:—"We would make a certificate by the Public Prosecutor as the basis of the prosecution of a person who has accepted a tender of pardon"—*Report of the Joint Committee* (1922). Under the old law, it was the trying Court which had the authority to determine whether the pardon had been forfeited so as to necessitate the trial of the approver—*Mariama*, 1889 P.R. 6; *Dil Bahadur*, 25 Cr L.J. 121, 76 I.C. 185; *Kadu*, 1904 P.R. 31; *Sashi*, 42 Cal. 856; *Kackri*, 7 N.L.R. 65, 10 I.C. 622, 12 Cr L.J. 326. Under the present law, no such determination by the trying Court is necessary, but the certificate of the Public Prosecutor is sufficient.

962. Trial of the approver:—*Commitment or trial along with other accused, illegal*—Sub-section (3) of sec. 337 lays down that the approver shall be detained in custody until the termination of the trial of the other accused persons by the Court of Session. The effect of that section read with this section is that action can be taken against an approver, who has forfeited his pardon, *after* the trial of the other accused in the Court of Session is finished, and then his trial should be commenced *de novo*. If he has forfeited his pardon during the preliminary inquiry, he cannot be committed to the Sessions along with the other accused—*Bhan*, 23 Bom. 493 (494); *Revappa*, 4 Bom L.R. 826; *Ramaswami*, 24 Mad. 321; *Aruna Chellum*, 31 Mad. 272; *Ramatevan*, 15 Mad. 352; *Mohan*, 5 N.L.R. 134, 10 Cr.L.J. 418; *Ramachandrayya v. Emp.*, 1937 M.W.N. 879. Such committal along with other co-accused to the Court of Sessions is a serious illegality vitiating the whole trial—*Ram Lotan*, 128 I.C. 209, 7 O.W.N. 972, 32 Cr.L.J. 91, A.I.R. 1931 Oudh 113, 6 Luck. 386; *Chauhan*, 35 Cr.L.J. 889 (891), 148 I.C. 1192, 11 O.W.N. 765. But see *contra*—*Sashi*, 42 Cal. 856; *Brij Naram*, 20 All. 529; *Budhan*, 29 All. 24; *Bala*, 25 Bom. 675; in these cases it is held that the commitment of the approver along with the other accused is not illegal, though he cannot be *tried* with the other accused.

If the accused has forfeited his pardon during the trial, he cannot be *tried at once* along with the other accused, since he has not been regularly *committed* to the Sessions but has been sent up as a witness—*Sudra*, 14 All. 336; *Mulua*, 14 All. 502; *Sashi*, 42 Cal. 856, 19 C.W.N. 295, 26 I.C. 657, 16 Cr.L.J. 65; *Kushya*, Ratanlal 119; *Chanan*, 1 Lah. 218, 21 Cr.L.J. 518. This is now expressly provided for by the proviso newly added. The contrary view taken in *Sultan*, 5 A.L.J. 691, 8 Cr.L.J. 445 (450) that the trial of the approver along with the other accused is not illegal, is no longer correct. Before the approver can be tried by a Sessions Judge, the Sessions Judge should send him to a competent Magistrate for a regular commitment—*Rama Tevan*, 15 Mad. 352; *Sudra*, 14 All. 336; *Jagat Chandra*, 22 Cal. 50; *Rama Varma*, 3 Mad. 351.

Where one of the accused at first promised to make a clean breast of all the circumstances and was tendered a pardon conditional on his doing so, but before he was treated as an approver and put into the box he made a statement to the Court that he did not want the pardon and that he wished to be tried and that the pardon might be cancelled, whereupon he was tried along with the other accused, *held* that as the pardon though accepted for a time was *rejected* by the accused himself (and not *forfeited*) before it actually took effect, the case did not fall under this section and the so-called pardon was not a bar to the trial of the accused along with the others. The pardon referred to in this section is an accepted pardon; the acceptance must continue in force till the person pardoned actually gives evidence and then if he forfeits his pardon by not making a full and true disclosure, he should be separately tried—*Basireddi Narappa*, 45 M.L.J. 613, 25 Cr.L.J. 210, A.I.R. 1924 Mad. 391, 76 I.C. 642, 1923 M.W.N. 697, 18 M.L.W. 606, 33 M.L.T. 77 and 156, A.I.R. 1924 Mad. 391.

Where the Judge sends up the approver to a Magistrate for commitment, the committing Magistrate must in his commitment order give reasons for holding that the approver has forfeited his pardon—*Po Ket*, 10 Bur.L.T. 46, 8 L.B.R. 447, 17 Cr.L.J. 337.

Detention in custody :—The Sessions Court is not justified, after the close of the trial of the offence with respect to which pardon has been tendered to an approver, in sending the approver in custody to the Magistrate with a view to taking action against him for breach of the conditions of pardon. The approver is entitled to be discharged as soon as the trial closes, and action can be taken against him only by way of re-arrest—*Kothia*, 30 Bom. 611; *Po Ket*, 10 Bur.L.T. 46, 17 Cr.L.J. 337. It is improper to keep the accused in further custody after the termination of the original trial—*Mullu*, 11 N.L.R. 59, 16 Cr.L.J. 417; *Abani Bhushan*, 37 Cal. 845. See also Note 958.

963. Plea of pardon:—See the proviso. The approver is entitled to plead, both before the committing Magistrate and before the Sessions Judge, in bar to his trial, that he has fulfilled the condition on which pardon was tendered to him—*Kothia*, 30 Bom. 611; *Gangua*, 37 All. 331; *Chanan*, 1 Lah. 218, 21 Cr.L.J. 518; *Po Ket*, 10 Bur.L.T.

46, 17 Cr.L.J. 337. The plea should be taken at the commencement of the proceedings before the Magistrate, and it would then be necessary for the Magistrate to consider whether the pardon has been forfeited—*Sashi*, 42 Cal. 856. But the approver is entitled to plead the bar of pardon before the Sessions Judge although he had not done so before the committing Magistrate—*Gangua*, 37 All. 331; *Sashi*, 42 Cal. 856, 19 C.W.N. 295, 16 Cr.L.J. 65, 26 I.C. 657. Even though the committing Magistrate has decided against the approver, it is open to him to plead his pardon again at the trial before the Sessions Judge—*Sashi*, 19 C.W.N. 295, 26 I.C. 657, 16 Cr.L.J. 65, 42 Cal. 856; *Khal*, 39 All. 305; *Po Ket*, 8 L.B.R. 447, 17 Cr.L.J. 337.

The onus is on the prosecution to prove that the approver has forfeited his pardon—*Sashi*, 42 Cal. 856, 19 C.W.N. 295, 26 I.C. 657, 16 Cr.L.J. 65; *Bala*, 25 Bom. 675; *Kothia*, 30 Bom. 611; *Kullen*, 32 Mad. 173; *Khal*, 39 All. 305. When a conditional pardon has been tendered and accepted, there must be good faith on both sides and it is for the Crown to prove that the pardon was forfeited by showing that the accused was guilty of deliberate bad faith. If this question is answered in the negative, no other question arises—*Dip Chand v. Emp.*, 37 Cr.L.J. 79, 159 I.C. 412, A.I.R. 1935 Lah. 799, 37 P.L.R. 336, 1935 Cr.C. 1067, 8 R.L. 391, following *Sohyan v. Emp.*, 1930 M.W.N. 773. See the proviso.

963A. Sub-section (2):—This sub-section lays down that the statement (i.e., the disclosure made by the approver upon which the pardon was granted) is admissible in evidence against him. It is not made under the provisions of sec. 164, Cr. P. C., and that section in no way governs such a statement. This statement is not excluded from evidence by the provisions of sec. 24, Evidence Act. In fact, this clause is an exception of the rule of evidence enacted in sec. 24, Evidence Act, so far as that section excludes a confession made as the result of inducement or promise, because an approver's disclosure is in its very nature always the result of an inducement or promise, i.e., the inducement to confess upon a promise of pardon. But a disclosure extorted by threat or violence or pressure would be ruled out of evidence—*Ram Nath*, 29 P.L.R. 165, 29 Cr.L.J. 413 (415), 9 Lah. 608, A.I.R. 1928 Lah. 320, 108 I.C. 514, following *Sultan Khan*, 5 A.L.J. 691, 8 Cr.L.J. 445 (451). Where the accused himself originally stated that he confessed because he was afraid he might be beaten and got confused and thought that the murder was bound to come out and subsequently the police talked to him about the tender of pardon and he accepted the offer, without any pressure being exerted upon him, held that the statement was admissible under this sub-section—*Anu Singh*, A.I.R. 1933 Lah. 910, 35 Cr.L.J. 168, 146 I.C. 677, 1933 Cr.C. 1297.

Any statement made by an accused person before he receives pardon under sec. 337, Cr. P. C., must, if it is of a confessional nature, be recorded strictly in accordance with the procedure prescribed for the record of confession by secs 164 and 364, Cr. P. C., or the statement of the accused after he has been pardoned may be recorded in his character of a witness under sec 164, Cr. P. C., or his statement may be one which is recorded formally as that of a witness examined in the course of an enquiry or trial. The word "statement" contemplated in sub-sec. (2) of sec. 339, Cr. P. C., appears primarily to refer to a statement made by him as a witness as contemplated in sub-sec. (2) of sec 337, Cr. P. C., in the course of an enquiry or trial. This was the view taken in *The Local Government v. Mullu*, 11 N.L.R. 59, 28 I.C. 993, 16 Cr.L.J. 417. It may also include a statement recorded under sec. 164, Cr. P. C., after the tender of pardon but it can in no case include a confessional statement made by an accused person before the tender of pardon unless it was recorded in accordance with the strict procedure provided for recording confessions. Any confessional statement, therefore, recorded before pardon, would be governed by sec. 164, Cr. P. C., and would be admissible in evidence only if the essential provisions of that section had been followed. In recording a statement after an acceptance of pardon, the Magistrate has the power of administration of oath or solemn affirmation under sec. 164, Cr. P. C. The proper procedure then to be followed by a Magistrate is to record the statement of the approver

immediately after, and not before, tendering pardon. A statement so recorded is clearly admissible in evidence under sec. 339 (2), Cr. P. C.—*Horulal v. Emp.*, 41 Cr.L.J. 433 (436, 437), 187 I.C. 203, 1940 N.L.J. 286, A.I.R. 1940 Nag. 218.

Although under this sub-section the statement of the approver may be admitted in evidence, yet it requires corroboration by existing evidence. It is in the nature of a confession, and when it is withdrawn, it should be regarded in the light of a retracted confession and must be corroborated in material particulars. Before the approver can be convicted, his guilt must be proved with that degree of certainty which the law requires—*Ram Nath*, supra; *Faqir Shah*, 35 Cr.L.J. 1242, 151 I.C. 110, A.I.R. 1934 Pesh. 46, 1934 Cr.C. 882. Where the approver's statement in its general aspect is abundantly corroborated and there can be no doubt of the truth of the story told in it, it alone is sufficient evidence for his conviction when he is placed on trial after forfeiture of his pardon—*Aziz Begum v. Emp.*, 39 Cr.L.J. 16, 171 I.C. 954, A.I.R. 1937 Lah. 689, 39 P.L.R. 394, 10 R.L. 254.

But in *Puran v. Emp.*, A.I.R. 1938 Lah. 135, 30 P.L.R. 930, 173 I.C. 484, 39 Cr.L.J. 335, it has been held that when the accused is given a pardon as an approver and he resiles from his statement in the committing Magistrate's Court when he is in the Sessions Court, his own statement in the committing Magistrate's Court must be treated as a confession and on the confession alone conviction might follow.

964. Sub-section (3):—Prosecution for perjury:—When a pardon has been legally tendered to an accomplice and he breaks the condition of his pardon by making a retracted statement at the trial, proper sanction is necessary for the prosecution on each branch of the alternative charge—*Dala*, 10 Bom. 190. Want of sanction is not a more irregularity but an illegality which vitiates the proceedings—*Sharina*, 1884 P.R. 42; *Natu*, 27 Cal. 137.

Sanction to prosecute should not be given merely on the ground that the approver contradicted himself before the committing Magistrate. A witness who is in any way induced to make a false statement in connection with a capital charge should be allowed every possible *locus penitentiz*—*Bodha*, 11 A.L.J. 964, 15 Cr.L.J. 76. But the granting of *locus penitentiz* is a matter for judicial discretion, according to the circumstances of each particular case—*Dukhu*, 1929 A.L.J. 227, 30 Cr.L.J. 1157 (1158), 120 I.C. 126, A.I.R. 1929 All. 321, Ind. Rul. 1930 All. 14.

It is obvious that if an approver resiles from a previous statement made by him incriminating himself and certain other persons in the Court of the committing Magistrate and makes a statement, in the Court of Sessions, directly contradictory to the one previously made by him, one of his two statements must be false, and as such, he must necessarily be guilty of giving false evidence. But the fact, that the Legislature has prohibited the prosecution of an approver for the offence of giving false evidence without the sanction of the High Court, demonstrates that the mere fact that the two statements are contradictory cannot in every case be a warrant for directing the prosecution of the approver. The cardinal question for consideration is whether the confession and the incriminating statement made by the approver were or were not true. If the circumstances point to the conclusion that the confession and the incriminating statement were not true, the irresistible inference must be, that those statements were put into the mouth of the approver by some one by inducement or by threat and, in such case, it would be opposed to the public policy to prosecute and to punish an approver for the offence of giving false evidence when, as a matter of fact, he did not voluntarily make the incriminating statement. On the other hand, if it appears that the confession and the incriminating statement represented the true statement of facts, and the approver in collusion with the accused resiled from the statement previously made by him, his subsequent statement must be false and in such a case it is not only desirable but expedient to order his prosecution for giving false evidence—*Mathura*, 35 Cr.L.J. 444, 147 I.C. 653, 1933 A.L.J. 1389, A.I.R. 1934 All. 43; *Prabhu*, 38 Cr.L.J. 1079, 171 I.C. 368, 39 P.L.R. 13, A.I.R. 1937 Lah. 551, 10 R.L. 192. Where contradictory statements have been made on different occasions sanction cannot be refused unless there be some-

thing to show that the approver made the statement alleged to be false under undue influence—*Waryam*, 5 Lah L J 408, 25 Cr.L J 174, 76 I.C. 398, A.I.R. 1924 Lah. 90; *Hussaina*, A.I.R. 1933 Lah 868, 1933 Cr.C 1113, 146 I.C. 461, 35 Cr.L.J. 111. If an approver has made contradictory statements but in the latter statement he has reverted to truth, then it is undesirable that he should be prosecuted for perjury by making contradictory statements. When he is being prosecuted for the original offence it is unfair to prosecute him for perjury—*Jairman*, 33 Cr.L.J. 485, 137 I.C. 784, 33 P.L.R. 321, A.I.R. 1932 Lah 307, Ind. Rul 1932 Lah. 350, 1932 Cr.C. 421.

It is not necessary that an approver should be punished for perjury if he can be punished sufficiently for that and the original crime, on a conviction for that original crime. Sanction, therefore, ought to be refused, unless it appears that a conviction for the original crime is unlikely or a prosecution for it is undesirable for any other reason, or that on a conviction for the original crime the sentence that could be passed would be too light to cover both offences. Before sanction can be granted, therefore, it must be shown that there is no intention of prosecuting the approver for the original crime, or that he has already been prosecuted for it and has either been acquitted or has received or is likely to receive a light sentence not sufficient to cover his further crime of perjury—*Gambhir*, 23 N.L.R. 35, 28 Cr.L.J. 645 (646), 103 I.C. 101, A.I.R. 1927 Nag. 189.

An approver was granted conditional pardon under sec. 337; and then instead of being examined under sub-section (2) of sec. 337, he was sent by the D S P. to the committing Magistrate to have his statement recorded. The Magistrate recorded his statement on oath in a miscellaneous proceeding, and the approver then made a statement implicating himself and others in a dacoity. He was then examined as a witness in the committal proceedings of the accused persons, and there he denied all knowledge of the dacoity. The District Magistrate thereupon applied to the High Court for sanction to prosecute him for perjury. *Held* that the preliminary examination on oath was an illegal and unnecessary procedure which could not provide the material for a prosecution for perjury, in case the approver should subsequently refile from his statement. No sanction can be granted on such material. The proper course would have been to proceed with the trial of the approver for dacoity after obtaining the certificate of the Public Prosecutor—*Nga Bo Gye*, 3 Rang 224, 26 Cr.L.J. 1396, 89 I.C. 708, A.I.R. 1925 Rang. 286.

The sanction must be given by the High Court. The object is that the propriety of the prosecution of the approver should be considered and determined independently; such an independent consideration cannot be expected from the Sessions Judge—*Sharina*, 1884 P.R. 42.

An application to the High Court for sanction for prosecution of an approver should be made by motion in open Court and not by a letter of reference—*Manik Chandra*, 24 Cal 492; *Madiga Nallavadu*, 32 Mad 47; *Bulaka*, 1904 P.R. 10, 1 Cr.L.J. 793; *Raja*, 1912 P.L.R. 175, 13 Cr.L.J. 451.

339A. (1) *The Court trying under section 339 a person*

Procedure in trial of who has accepted a tender of pardon
person under sec 339. shall—

- (a) *if the Court is a High Court or Court of Session, before the charge is read out and explained to the accused under section 271, sub-section (1), and*
- (b) *if the Court is the Court of a Magistrate, before the evidence of the witnesses for the prosecution is taken,*

ask the accused whether he pleads that he has complied with the conditions on which the tender of the pardon was made.

(2) *If the accused does so plead, the Court shall record the plea and proceed with the trial, and the jury, or the Court with the aid of the assessors, or the Magistrate, as the case may be, shall, before judgment is passed in the case, find whether or not the accused has complied with the conditions of the pardon, and, if it is found that he has so complied, the Court shall, notwithstanding anything contained in this Code, pass judgment of acquittal.*

965. This section has been newly added by sec. 88 of the Cr. P. C. Amendment Act, XVIII of 1923.

"We consider that it is desirable to lay down some procedure with regard to the plea contemplated by the proviso to sub-section (1) of sec. 339. The Bill contains no indication as to when this plea is to be raised and what is to be the effect of it, and difficulties of procedure may obviously arise with reference to secs 225, 271 (2) and 272. We, therefore, propose a new section to be added after sec. 339"—*Report of the Joint Committee (1922).*

Sections 339A and 340, 341 and 342, Cr. P. C., contain further provisions for the protection of the pardoned person on or in respect of his trial for giving false evidence—*Harthar Sinha v. Emp.*, A.I.R. 1936 Cal 356 (361), 40 C.W.N. 876, 163 I.C. 9, 1936 Cr.C. 583, 37 Cr.L.J. 758, 63 C.L.J. 307 (F.B.).

This section does not apply at all to the case of an approver who has stated that his statement as an approver was completely false. In the very nature of the things it cannot so apply. Where the approver's case is that the statement which he made on a tender of pardon was entirely false, it is impossible to decide whether he is now telling the truth without deciding the whole case and deciding that he was actually an offender. In other words, it would be begging the question. This section clearly applies to a case in which the approver's case is still that he was one of the persons who had committed the offence but that the Public Prosecutor was in error in considering that he had in any way failed to comply with any of the conditions upon which the tender of pardon was made—*Gurdit Singh v. Emp.*, 40 Cr.L.J. 614, 181 I.C. 924, A.I.R. 1939 Lah. 66, 41 P.L.R. 290, I.L.R. 1939 Lah. 216. This section provides that a person by whom a tender of pardon has been accepted, when tried under sec. 339, Cr. P. C., is to be asked whether he pleads that he has complied with the conditions of the pardon, and if it is found that he has, he shall be acquitted—*Faqir Singh v. Emp.*, A.I.R. 1938 P.C. 266 (268), 40 Bom.L.R. 1254, 68 C.L.J. 328, 42 C.W.N. 1252, 1938 O.L.R. 405, 1938 A.Cr.C. 69, 19 P.L.T. 717, 176 I.C. 898, 1938 M.W.N. 969, 48 M.L.W. 537, 40 P.L.R. 876, 40 Cr.L.J. 360, 11 R.P.C. 81, 1938 A.L.R. 753, 4 B.R. 850, 1938 O.W.N. 809, 1938 P.W.N. 698, 1938 O.A. 672, 1938 A.W.R. (P.C.) 170, (1938) 2 M.L.J. 780 (P.C.).

When the approver is put on his trial, the question whether the approver has forfeited his pardon has to be first decided, before his original offence can be tried—*Kothia*, 30 Bom. 611; *Kullan*, 32 Mad. 173; *Sashi*, 42 Cal. 856, 19 C.W.N. 295, 26 I.C. 657, 16 Cr.L.J. 65; *Kanwar*, 1902 P.R. 34; *Mullu*, 11 N.L.R. 59, 16 Cr.L.J. 417; *To Gale*, 7 L.B.R. 1, 14 Cr.L.J. 401; *Po Ket*, 10 Bur.L.T. 46, 17 Cr.L.J. 337. The question whether the pardon has been forfeited is a question of fact for the jury—*Sashi*, supra.

If the approver is tried before a Sessions Judge, it is duty of the Sessions Judge to ask the approver whether he pleads that he has complied with the conditions of the pardon. Where the committing Magistrate asked him whether he pleaded that he had complied with the conditions on which the tender of pardon had been made, but this question was not repeated in the Sessions Court, and no plea was recorded, held that there was a contravention of the imperative provisions of this section, and the trial of the approver must be set aside and a retrial held—*Itwari*, A.I.R. 1929 Oudh 256, 6 O.W.N. 372, 116 I.C. 64, 30 Cr.L.J. 559, following *Ali v. Emp.*, infra. See also *Anup*

Singh, 35 Cr.L.J. 168, 146 I.C. 677, A.I.R. 1933 Lah. 910, 1933 Cr.C. 1297. The Lahore High Court has, however, taken a different view in *Gurdit Singh v. Emp.*, supra. It has been laid down that where the charge has been read out to the accused and he has been made to plead to it before and not after he has been asked to plead whether or not he has complied with the terms of the pardon, it is an irregularity curable under sec. 537, Cr. P. C.

The view expressed in *Itwari*, supra, has been accepted by the Nagpur High Court. It has been laid down that under sec. 339A which was newly added by sec. 88 of the Criminal Procedure (Amendment) Act XVIII of 1923, it is imperative on the Court of Session to ask the accused, before the charge is read out and explained to him under sec. 271 (1), Cr. P. C., whether he pleads that he has complied with the conditions on which the tender of the pardon was made and to record his plea and proceed with the trial, and the assessors should before judgment is passed be called upon to express their opinion on the question whether or not the accused has complied with the conditions of his pardon. If the Court with the aid of the assessors finds that the accused has complied with the conditions of the pardon, it is incumbent on the Court to pass a judgment of acquittal. The failure to perform that duty vitiates the trial. Under the proviso to sub-sec. (1) of sec. 339, Cr. P. C., the accused is entitled to plead, before he is tried for the offence in respect of which the pardon was tendered, that he has complied with the conditions of his pardon, in which case the onus lies on the prosecution to prove that such conditions have not been complied with. It is clear that the trial for the offence in respect of which the pardon was granted can not begin until the requirements of sec. 339A, Cr. P. C., are carried out *in limine*, and the judgment of conviction cannot be delivered unless the Court with the aid of assessors finds that the accused has failed to comply with the conditions of the pardon—*Horilal v. Emp.*, 40 Cr.L.J. 956, A.I.R. 1940 Nag 77, 1939 N.L.J. 497, 184 I.C. 351.

If the approver pleads that he had complied with the conditions of pardon, the Court should come to a clear finding as to whether the accused has or has not complied with the conditions of the pardon, and this finding should be recorded, before he can be properly tried and convicted—*Itwari*, supra; *Jagannath*, 3 O.W.N. 474, 27 Cr.L.J. 768. The approver should be asked not simply whether he has complied with the conditions on which the pardon was granted, but he should be asked whether he pleads that he has complied with the conditions on which the tender of pardon was made; and the record should show that he was so asked. The terms of this section should be clearly explained to him, and it should be made clear to him that he can plead the pardon as a bar to his trial—*Ali*, 5 Lah 379 (381), 26 Cr.L.J. 237, 84 I.C. 61.

340. (1) Any person accused of an offence before a Criminal Court, or against whom proceedings are instituted under this Code in any such Court, may of right be defended by a pleader.

Right of person against whom proceedings are instituted to be defended, and his competency to be a witness.

(2) Any person against whom proceedings are instituted in any such Court under section 107, or under Chapter X, Chapter XI, Chapter XII or Chapter XXXVI or under section 552, may offer himself as a witness in such proceedings.

Change:—This section has been re-drafted by sec. 89 of the Cr. P. C. Amendment Act, XVIII of 1923

"The expression *person accused* in the old section may be read as referring only to persons accused of any offence; it is proposed to make it clear that any person against whom proceedings are instituted under this Code is entitled to be defended by a pleader. It is also laid down that persons against whom proceedings under Chapters X, XI, XII, XXXVI, or under sec. 552 of the Code are pending do not labour under the ordinary

disability of an accused person to be sworn, and that they may be examined as witnesses in such proceedings"—*Statement of Objects and Reasons* (1914).

966. Scope:—It has been stated in some cases that persons against whom proceedings are instituted under Chapters VIII and X are in the position of "accused" persons within the meaning of this section and are entitled to be defended by a pleader—*Jhoja Singh*, 23 Cal. 493; *Ida*, 1900 P.R. 15; *Grand*, 25 All. 375; *Abinash*, 4 C.W.N. 797; *Nakhi Lal*, 27 Cal. 656 (658). The Legislature has now added the words "person against whom proceedings are instituted" which would expressly include persons proceeded against under Chapters VIII and X, and it will no longer be necessary to enter into the much vexed question as to whether such persons are in the position of 'accused' persons. Under the amended section, a person against whom proceedings have been instituted under sec. 110 is entitled as a matter of right to have a reasonable opportunity afforded him of defending himself—*Jatoi*, 20 S.L.R. 122, 27 Cr.L.J. 935, 96 I.C. 391, A.I.R. 1926 Sind 288. Where an inquiry under sec. 476 is started against any person, the Court should hear the pleader appearing on behalf of such person—*Ram Nihore*, 8 A.L.J. 237, 12 Cr.L.J. 231.

But a person against whom no process has been issued is neither an 'accused' person nor a 'person against whom any proceedings have been instituted'; such a person has no right to attend, much less to be represented by a pleader, during a preliminary inquiry held under sec. 202 before issue of process. If he chooses to attend, he may do so like any other member of the public; but he has no *locus standi* as a party—*Shakh Chand v. Mahomed Hanif*, 4 N.L.R. 81, 8 Cr.L.J. 20; *Golap Jan v. Bholanth*, 38 Cal. 880. See also Note.

Section 340 gives the accused person a right to be defended by a pleader, and this right begins from the moment that "any person is accused of an offence before a Criminal Court or proceedings are instituted under this Code in any such Court." An application by the Police for remand under sec. 167 can be held to be a "proceeding" instituted under this Code in a Criminal Court. He is an accused, and appears as such before the Magistrate. Therefore, at least from the moment after the 24 hours of arrest that he appears before the Court, this right begins. His legal advisers can appear, oppose the remand, offer bail, or make any other legal application on his behalf—*Llewellyn Evans*, 50 Bom. 741, 28 Bom. L.R. 1043, 27 Cr.L.J. 1169 (1172). This section gives the accused person a right to be defended by a pleader, and this right necessarily implies a right to previous consultation and advice. Therefore, an accused should have access to legal advice even when he is under police custody under sec. 167 during the course of an investigation. But this right must be subject to legitimate restrictions. Thus, an interview with a legal adviser must be allowed in the presence of a police-officer, though not within his hearing—*Sundar Singh*, 12 Lah. 16, 31 P.L.R. 780, 32 Cr.L.J. 339 (341); see also *Amolak*, 12 Lah. 211, A.I.R. 1932 Lah. 13, 32 Cr.L.J. 1022 (1023); *Balkrishna*, 12 Lah. 435, 33 Cr.L.J. 180 (181), 135 I.C. 602, 32 P.L.R. 1, A.I.R. 1931 Lah. 99, 1931 Cr.C. 163, Ind. Rul. 1932 Lah. 138; *Sudha Sindhu*, 39 C.W.N. 259, 62 Cal. 384, A.I.R. 1935 Cal. 101. These rules cannot be evaded by removing the accused person to a place so that nobody knows where he is and his relations and friends cannot communicate with him and legal assistance cannot be availed of. Nor is it compliance with these rulings that applications made to the Superintendent of Police or to the District Magistrate should be kept pending or delayed until the confession has been secured. The matter is really reduced to a farce if interviews are allowed only after a confession has been recorded—*Jahangir Lal*, A.I.R. 1935 Lah. 230 (244), 150 I.C. 1056, 35 Cr.L.J. 1180. Refusal by the police to allow the prisoner to be interviewed by his legal adviser is not justifiable, but this cannot by itself be a ground for considering the custody to be improper or for setting the accused at liberty—*Sundar Singh*, *supra*.

The Court has jurisdiction to enquire into a complaint by an under-trial prisoner in connection with his treatment in jail. If it is found on enquiry that the action taken by the jail authorities is in conformity with the law, the Court will have no power to interfere. But, if it is found that the action is not warranted by the Prisons Act or the

rules thereunder the Court has powers to pass an appropriate direction in the matter—*Sukh Dev Raj*, 32 Cr.L.J. 988, 132 I.C. 597, 32 P.L.R. 586, Ind. Rul. 1931 Lah. 731, 1931 Cr.C. 850.

967. Right of accused to be defended by pleader:—The accused has a right to choose his own pleader, and the Court is not entitled to tell him to appoint another pleader, because the pleader already engaged does not know how to behave in Court—*James Fitzgerald*, Ratanlal 861 (863). The Court has no power to forbid a duly qualified pleader to appear for the accused—*Dajee*, Ratanlal 25. The accused has a right that the pleader engaged by him must be heard. It is not a question of indulgence but of right. It is an elementary principle of law that no order ought to be made to a man's prejudice without hearing him, and his counsel must be heard before a final opinion is formed by the Court. The Court has no discretion to refuse to hear the counsel—*Iboov*, 1 Cr.L.J. 760, 6 Bom.L.R. 665. If the Court refuses to hear the pleader for the accused, it is not a mere irregularity but an illegality vitiating the trial, and the conviction must be set aside and a retrial held—*Muthukaruppa*, 55 M.L.J. 626, 112 I.C. 586, 28 M.L.W. 656, A.I.R. 1928 Mad 1234, 29 Cr.L.J. 1082. The Court has power to disallow improper questions put by him; if the pleader persists in asking irrelevant questions and wasting the time of the Court, in spite of warning, the Court can take action for contempt; but it cannot ask the pleader to sit down in the middle of cross-examination, and ask the accused to engage another pleader—*James Fitzgerald*, Ratanlal 861 (863). It is the duty of the Magistrate to afford the accused and his friend every opportunity of making his defence and he should not personally interpose in any way between them. It is, therefore, improper for a Magistrate to refuse to allow the pleader engaged by the wife of an accused for his defence to have an interview with him or to appear and sit in Court—*Uksudev*, 1 Bom.L.R. 856. An accused should be given a reasonable opportunity of defending himself. When after the commencement of the trial, an application is made asking time to engage a pleader, the reasonable course for the Magistrate to adopt would be to proceed with the examination-in-chief of the prosecution witnesses and then to allow a reasonable time to the accused to appoint a pleader—*Pita*, 47 All. 147, 26 Cr.L.J. 575, 85 I.C. 719, A.I.R. 1925 All. 285. If the accused's pleader is not heard, the conviction will be set aside—*Munirama*, 5 M.L.T. 290, 9 Cr.L.J. 305.

But a pleader not otherwise authorised to practise in a Court (e.g., a second grade Advocate) has no right to be heard by the Court. But the Magistrate has a discretion to permit him to appear for an accused person. This permission should be given sparingly and only in those cases in which the Magistrate considers that it is for the interests of the accused that it should be given—*W. Calogredy*, 10 Bur.L.T. 117, 18 Cr.L.J. 345.

The District Magistrate directed the Prosecuting Inspector, who was not a member of the Bar, to defend two Government Officials and the trying Magistrate allowed him to appear for the defence. Held that he could appear and defend them and that there was no reason for holding that he was not a person appointed by the accused with the permission of the Court to defend them, though it was desirable that they had made such appointment—*Chotekhan*, A.I.R. 1930 Nag 130, 26 N.L.R. 172, 31 Cr.L.J. 419, 122 I.C. 442, 1930 Cr.C. 506.

Pleader appointed by Court —Those whose duty it is to select lawyers to defend prisoners, who are too poor to instruct lawyers on their own account, at the expenses of the Crown should not treat the selection as a matter of patronage for the benefit of the lawyer so appointed. The selection should be from among young men of marked ability. Frequently persons actually appointed do their work very badly and conspicuous opportunities for cross-examination, and obvious arguments are entirely ignored. In such circumstances also the trial Judge should remember that he has the duty not only to prosecution but to the defence. He has the police diary in front of him and should use his greater experience to cross-examine the witnesses when he sees that the defence lawyer is incompetent—*Darpan Potdarin v. Emp.*, 39 Cr.L.J. 384 (389), 173 I.C. 833, A.I.R. 1938 Pat. 153, 10 R.P. 456, 4 B.R. 342.

The position of a pleader appointed by the Court to defend a prisoner is not the same as that of a pleader whom the accused has authorised to act for him. Any admission made by the former is not binding on the accused—*Sangaya*, 2 Bom L.R. 751. When the Sessions Judge or the Magistrate engages a counsel for the defence of an accused he does so with the express or implied consent of the latter and that no Court has any authority to force upon a prisoner the services of a counsel, if he is unwilling to accept them—*Sukh Dev*, A I R. 1929 Lah. 705 (707), 1929 Cr.C. 351. Where this is done and the accused raises his objection at the earliest opportunity and the result is a trial in which the accused is not free to cross-examine the witnesses or to plead for himself, the whole trial is illegal—*Murid Hussain v. Emp.*, 39 P.L.R. 311.

Private Pleader—Under section 4 (r), an accused person cannot claim as of right to be represented by a private person, but he may be represented by such person with the permission of the Court. But in permitting or disallowing the appearance of private persons as pleaders, a Magistrate should exercise a discretion in each case—*Anonymous*, 2 Weir 400; and a general order that no person will be allowed to practise as a private pleader is illegal—*Krishnamachariar*, 12 M.L.J. 354, 2 Weir 401; *Nagasami*, 31 M.L.T. 458, 1922 M.W.N. 809. But an order excluding any particular individual in any particular case would be within the discretion of the Magistrate and therefore legal—*Krishnamachariar*, supra.

The Advocates on the Appellate Side are not entitled to appear on the Crown Side of the High Court—*N. Gobinho*, A I R. 1934 Bom. 70, 58 Bom. 456, 148 I.C. 664, 1934 Cr.C. 302, 36 Bom L.R. 1.

968. Mukhtars:—Under sec 4 (r), before it was amended in 1923, a Mukhtar could appear only with the permission of the Court—*Anant Ram*, 30 All. 66. But still it was held to be improper for a Magistrate to shut up the defence of the accused merely because he was represented by a Mukhtar; and a general order prohibiting Mukhtars to appear in Sessions Courts was held to be illegal—*Ishan Chandra*, 38 Cal 488. "Magistrates should not, by the indiscriminate exclusion of persons who are invested by law a distinct professional status in criminal trials, deprive parties of legal aid which they can frequently obtain at a moderate cost"—*Cal. G. R. & O.*, p 29; *Ishan Chandra*, supra.

Under sec. 4, cl. (r) as now amended by Act XXXV of 1923, Mukhtars have now been placed on the same footing as pleaders, and are entitled *as of right* to appear in all Criminal Courts without requiring any special permission.

969. Sub-section (2):—A person against whom proceedings are instituted under sec 488 may give evidence on his own behalf, as such person is not an "accused" person and the proceedings are not criminal proceedings—*Nur Mahomed v. Bismella*, 16 Cal. 781; *Bachai v. Jamuna*, 25 Cr.L.J. 1091, 81 I.C. 915, A I R. 1925 Cal. 339. A person against whom proceedings are started under Chapter X may be examined on oath as a witness—*Hirananda*, 9 C.W.N. 983.

Memorandum of argument:—The Court should not receive the memorandum of arguments on behalf of the prosecution, especially without the knowledge of the accused. When this was done, the High Court set aside the conviction solely on this ground—*Mannen Venkaiyya*, 29 Cr.L.J. 929, 111 I.C. 849, 28 M.L.W. 511, 1928 M.W.N. 788, A.I.R. 1928 Mad. 1130, 55 M.L.J. 712. See also Note 842A.

Vakalatnama:—There is no provision either in the Cr P. C. or in the rules of the Patna High Court requiring an Advocate or Vakal of the High Court to file a duly stamped appointment in writing in criminal cases—*Subda*, 27 Cr.L.J. 666, 94 I.C. 714, 7 P.L.T. 524, A.I.R. 1926 Pat. 296. *Vide* also letter No. 5593, dated 12th July 1932, written by the Offg. Secretary to the Government of Bengal, Judicial Department, to the Commissioner of the Presidency Division, in which the position with regard to filing of Vakalatnamas has been stated to be as follows:—

- (1) a pleader or a muktear appearing for an accused person *present in Court* is not required to file any power;
- (2) a Magistrate may refuse to hear a pleader or a muktear wishing to appear

on behalf of an absent accused person, unless he has a power authorising him to appear;

- (3) a pleader or a *mukhtar* has no right to appear for a complainant without the permission of the Magistrate; such permission may be refused if a power is not executed.

See also 31 C.W.N. clxxxv.

341. If the accused, though not insane, cannot be made to understand the proceedings, the Court may proceed with the inquiry or trial; and, in the case of a Court other than a High Court, if such inquiry results in a commitment or if such a trial results in a conviction, the proceedings shall be forwarded to the High Court with a report of the circumstances of the case, and the High Court shall pass thereon such order as it thinks fit.

Procedure where accused does not understand proceedings.

970. Scope of section:—This section is intended to provide for cases where accused is unable to understand the proceedings through deafness, or dumbness, or through ignorance of the language of the country and the want of an interpreter. In such cases the High Court will order the detention of the prisoner during His Majesty's pleasure—*Husen*, 5 Bom. 262; *Hussein*, Ratanlal 151.

This section is inapplicable where the inability to understand the proceeding arises from unsoundness of mind. In such cases the procedure prescribed by Chapter XXXIV should be followed—*Husen*, 5 Bom. 262; *Kasima*, Ratanlal 832. But if after inquiry under that Chapter, it appears that the prisoner is not a lunatic, the Magistrate should proceed under this section—*Adala*, 11 M.L.T. 24, 14 Cr.L.J. 24.

A reference can be made under this section if the accused cannot be made to understand the proceedings. If, however, the deaf mute is intelligent and able to understand the proceedings, e.g., by means of signs, the provisions of this section do not apply and the case should be dealt with as in the ordinary way—*Gunga*, 28 Cr.L.J. 656, 103 I.C. 112, A.I.R. 1927 Lah. 799; *Alla Dia*, 10 Lah. 566, 29 Cr.L.J. 1104, 112 I.C. 688; *Dubi Halwai*, 19 W.R. 37; *Doda Mahadu*, 3 Bom.L.R. 271; *Nga San*, 4 Bur.L.T. 150, 11 I.C. 250, 12 Cr.L.J. 386. In modern practice, want of speech and hearing does not imply want of capacity either in the understanding or in memory, but only a difficulty in the means of communicating knowledge. The law in India certainly does not expressly provide for a sane deaf mute being exempted from punishment. If his mind is sound his inability to hear and speak will not excuse him—*Nga San*, supra. If it be shown that the deaf and dumb person had sufficient intelligence to understand the character of his criminal act, he is liable to punishment—*Deaf and Dumb Accused*, 40 Bom. 598, 18 Cr.L.J. 143; *Russel on Crimes*, Vol. 1, p. 62.

This section clearly applies only to the case of an accused who is deaf and dumb. The proceedings to be forwarded to the High Court are only those relating to an accused person who cannot be made to understand the proceedings though not insane. This section cannot be construed to mean that in a case where there are two accused and one of them though not insane is not able to understand the proceedings, the Magistrate should refer the proceedings of both to the High Court, and the High Court under the provisions of this section would have no jurisdiction to pass any order with regard to the accused who is able to understand the proceedings—*Trimbak Damodar Heilekar*, 39 Cr.L.J. 866, 177 I.C. 444, 11 R.B. 81, 40 Bom.L.R. 495, A.I.R. 1938 Bom. 352.

971. Duty of Magistrate:—Where the accused is deaf and dumb, some means of communication with him should be adopted. The Magistrate should try and get into communication with him with the assistance of his relations; the Magistrate should make enquiry as to whether he has any friends or relatives who were accustomed to communicate with him and the manner in which he is communicated with in the

ordinary affairs of his life—*Deaf and Dumb Man*, 8 Bom L.R. 849, 4 Cr.L.J. 444; *Nga San*, 4 Bur L.T. 150, 12 Cr.L.J. 386; *Samuel*, Ratanlal 696; *Anonymous*, 2 Weir 402. Where the Magistrate omitted to attempt to communicate with the deaf and dumb accused, the conviction was set aside as the accused was certainly prejudiced by such omission—*Anonymous*, 2 Weir 403.

In making a reference under this section the Magistrate should state his view of the conduct of the accused and must take some evidence regarding the previous history and habits of the accused—*Samuel*, Ratanlal 696. The Magistrate should, when making a reference record a finding as to whether the accused is capable of realising the criminal character of the act done by him, or can understand the purpose or nature of the judicial proceedings that have been taken against him—*Gunga*, 30 P.L.R. 597, 30 Cr.L.J. 948, 118 I.C. 642, A.I.R. 1930 Lah. 64, Ind. Rul. 1929 Lah. 802.

Magistrate cannot pass sentence :—The Magistrate can convict the accused, and upon conviction can refer the case to the High Court, but cannot pass sentence—*Anonymous*, 2 Weir 403; *Gahna*, 1889 P.R. 37. If the Magistrate passes sentence upon the accused, the High Court will set aside the sentence and pass such order as it thinks proper—*Gahna*, 1889 P.R. 37.

Summary Trial—Where the accused is a deaf-mute, it is highly inconvenient to conduct the trial summarily even though the offence is summarily triable—*Deaf and Dumb Man*, 8 Bom.L.R. 849, 4 Cr.L.J. 444.

972. Reference to High Court:—Reference can be made under this section to the High Court, if the inquiry or trial results in a committal or conviction—*Trikam*, Ratanlal 180. The Judge should proceed to the end of the trial and then refer the case if a conviction follows—*Anonymous*, 2 Weir 403, and should not refer the case in the midst of the trial before any conviction or committal takes place—*Deaf and Dumb Man*, 4 Bom L.R. 825. Where, during the course of a trial, it appeared that the accused was a deaf and dumb person, and the Magistrate therefore referred the case to the High Court, expressing his opinion that the prisoner was guilty, it was held that the Magistrate ought to have proceeded to the end of the trial convicting the accused, and the mere expression of opinion that the accused was guilty did not amount to a conviction. The High Court returned the case to the Magistrate and directed him to proceed with the trial, and if the same resulted in a conviction to forward the proceedings again to the High Court—*Dumb Man*, Ratanlal 879; *Dumb Man*, Ratanlal 836.

Orders which High Court may pass :—The High Court may treat the proceedings before the Lower Court as amounting to a sufficient trial and pass sentence upon the accused according to the facts established in the case, or may give him a further opportunity of being heard in the matter of the charge—*Bowka*, 22 W.R. 35; or may direct a re-trial if the Magistrate's trial was defective—*Deaf and Dumb Man*, 8 Bom L.R. 849, 4 Cr.L.J. 444; or may, upon a consideration of the tender age of the accused, direct him to be made over to his father to be looked after by him—*Ganga*, 7 N.W.P. 131; or may, in a proper case, discharge the accused with an admonition—*Bowka*, 22 W.R. 35; *Monya*, 4 Bom.L.R. 296. The High Court may, if it is of opinion that the accused was by reason of unsoundness of mind incapable of knowing that what he did was contrary to law, and that no benefit will be likely to result to the accused by his being tried by the Court of Session, direct him to be kept in jail pending the order of the Local Government—*Somir*, 27 Cal 368. In two Punjab cases it has been held that if a deaf and dumb person who is unable to understand the proceedings of the trial, is found guilty, the proper course to be taken is to treat him as a lunatic and to report the case under sec. 471 for the orders of the Local Government—*Gahna*, 1889 P.R. 37, followed in *Dost Muhammad*, 1911 P.R. 13, 12 Cr.L.J. 613, 12 I.C. 989. The Oudh Chief Court followed the same procedure in *Ram Mahonhar*, A.I.R. 1935 Oudh 414, 36 Cr.L.J. 880, 156 I.C. 85, 1935 O.L.R. 403, 1935 O.W.N. 826.

In serious cases, it is the practice of the High Court to refer the matter to the Local Government. In the case of a minor offence the High Court itself can pass an appropriate sentence or discharge the accused—*Rahman*, 1 Lah. 260, 21 Cr.L.J. 621. Where a

deaf and dumb accused was found guilty of attempt to commit suicide, and at the trial he made certain signs indicating his guilt, the High Court affirmed his conviction and sentenced the accused to one day's simple imprisonment—*Kashaba*, 25 Bom L.R. 43, A.I.R. 1923 Bom. 194, 25 Cr.L.J. 660, 81 I.C. 148.

342. (1) For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the Court may, at any stage of any inquiry or trial without previously warning the accused, put such questions to him as the Court considers necessary, and shall, for the purpose aforesaid, question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence.

(2) The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them; but the Court and the jury (if any) may draw such inference from such refusal or answers as it thinks just.

(3) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed.

(4) No oath shall be administered to the accused.

This section makes a departure from the English law, under which it is not permissible for the Court to ask the accused any question except questions incidental to the conduct of the trial, e.g., whether the accused wishes to cross-examine a witness or to give evidence, etc. It is a principle of English law that the whole burden of proving the offence is on the prosecution; the accused can stand by and do nothing; and he is protected from all judicial questioning at the trial. Indian law, however, allows the Court to put questions to the accused, and the answers thereto may be "taken into consideration," whatever that phrase may mean. It was for this reason that Sir James Fitzjames Stephen characterised this section as embarrassing, illogical and hypothetical.

This section is mandatory, but it is not exhaustive—*Shyama Charan*, 35 Cr.L.J. 1322 (1325), 151 I.C. 393, A.I.R. 1934 Pat. 330, 1934 Cr.C. 722.

973. Scope:—There is a conflict of opinion as to whether this section applies to trials of *summons* cases. According to the Bombay, Calcutta, Allahabad, Patna and Lahore High Courts, and the Sind and Nagpur J. C. Courts, the Magistrate is bound in a *summons* case to examine the accused under this section—*Fernandez*, 45 Bom. 672, A.I.R. 1921 Bom. 374, 59 I.C. 129, 22 Bom L.R. 1040, 22 Cr.L.J. 17; *Gulabjan*, 46 Bom 441 (445), 23 Bom L.R. 1203, 23 Cr.L.J. 45; *Beechu Lal*, 54 Cal. 286, 28 Cr.L.J. 297, 100 I.C. 377, 45 C.L.J. 8, A.I.R. 1927 Cal 250; *Gulzari*, 49 Cal. 1075; *Khacho Mal*, 27 Cr.L.J. 405, 93 I.C. 69, A.I.R. 1926 All 358; *Ghulam Rasul*, 6 P.L.J. 174, 2 P.L.T. 390, A.I.R. 1921 Pat. 11, 61 I.C. 715, 22 Cr.L.J. 427; *Raghu*, 1 P.L.T. 241, 21 Cr.L.J. 705; *Parameshwar*, 3 P.L.T. 347, 23 Cr.L.J. 440; *Muhammad Baksh*, 4 Lah L.J. 230, 23 Cr.L.J. 154; *Nabu*, 20 S.L.R. 34, 26 Cr.L.J. 1554 (1555), 90 I.C. 434, A.I.R. 1926 Sind 1 (F.B.); *Bhagwan*, 22 N.L.R. 65; *Paris*, 19 S.L.R. 121. This section applies to *summons* and *warrant* cases—*Sia Ram*, 36 Cr.L.J. 1290, 158 I.C. 129, A.I.R. 1935 All 217, 1935 A.L.J. 257, 1935 Cr.C. 260. See also *Anand Parkash*, 36 Cr.L.J. 401, 153 I.C. 446, 35 P.L.R. 525, A.I.R. 1934 Lah. 631, 1934 Cr.C. 966; *Onkar Singh*, 11 O.W.N. 1206, 151 I.C. 810, 35 Cr.L.J. 1417, A.I.R. 1934 Oudh 457, 1934 Cr.C. 1308; *Kandhai v. Municipal Board, Rae Bareilly*, 39 Cr.L.J. 841, 177 I.C. 56,

11 R.O. 16, 1938 A Cr.C. 82, 1938 O.A. 591, 1938 O.L.R. 365, 1938 O.W.N. 743. But according to the Madras High Court, this section does not apply to trials in summons cases. The use of the expression "before the accused is called on for his defence" in sec. 342 itself as well as in sec. 256 relating to trials in warrant cases and in sec. 289 relating to trials in Sessions cases, and the absence of such expression in the sections relating to trials in summons cases under Chapter XX of the Code, show that the provisions of sec. 342 are not intended to apply to summons cases—*Ponnusamy v. Ramasamy*, 46 Mad 758, 45 M.L.J. 224, 24 Cr.L.J. 833 (F.B.). The Madras view has been recently followed by the Rangoon High Court—*Nga La Gyi*, 9 Rang. 506, 32 Cr.L.J. 1190, 134 I.C. 500, 1931 Cr.C. 884, A.I.R. 1931 Rang. 244 (F.B.).

This section applies to *summary* trials of warrant cases and the accused must be examined in such trials—*Mahomed Husain*, 41 Cal 743, A.I.R. 1914 Cal. 663, 22 I.C. 766, 15 Cr.L.J. 190, 18 C.W.N. 1247; *Parsotin*, 6 Pat. 504, 28 Cr.L.J. 1037; *Balkeshwar*, 3 P.L.T. 322, 23 Cr.L.J. 114; *Parameshwar Lal*, 3 P.L.T. 347, 23 Cr.L.J. 440. According to the Calcutta, Allahabad, Lahore, Nagpur and Bombay High Courts and the Oudh and Sind Courts, this section applies to summary trials of summons cases also, and the examination of the accused in such a trial is imperative—*Moyzuddin*, 33 C.W.N. 947; *Bhagwan*, 22 N.L.R. 65, 27 Cr.L.J. 632; *Nabu*, 20 S.L.R. 34, A.I.R. 1926 Sind 1, 90 I.C. 434, 26 Cr.L.J. 1554; *Sia Ram*, 57 All. 666, 36 Cr.L.J. 1290, 158 I.C. 129, A.I.R. 1935 All. 217, 1935 A.L.J. 257, 1935 Cr.C. 260; *Karam Din*, 35 Cr.L.J. 1394, 151 I.C. 748, 35 P.L.R. 295, 15 Lah 60, A.I.R. 1934 Lah. 96, 1934 Cr.C. 175; *Krishna Shankar*, 36 Cr.L.J. 1303, 158 I.C. 16, 1935 O.W.N. 1042, A.I.R. 1936 Oudh 16, 1935 O.L.R. 557; *Shivalomal*, A.I.R. 1937 Sind 304, 172 I.C. 80, 39 Cr.L.J. 59, 10 RS 135, 32 S.L.R. 30; *Choithram Menghraj v. Emp.*, 39 Cr.L.J. 474 (475), 174 I.C. 685, A.I.R. 1938 Sind 70, 10 RS. 259, 32 S.L.R. 684; *Emp. v. Kondiba Balaji*, A.I.R. 1940 Bom. 314, 42 Bom.L.R. 695. But where, in a summary trial, the accused were actually examined, it would be absurd to say that the mere failure to record the examination has resulted in a miscarriage of justice. When the Magistrate has considered the statements of the accused they cannot possibly be prejudiced by the mere fact that he did not reduce those statements to writing in the proper column provided in the summary register—*Khan Mohd. v. Emp.*, A.I.R. 1940 Pesh. 11. See Notes 867 and 1042A. But according to the Madras High Court, this section does not apply to summary trials of summons cases, as there is no distinction between a summary trial of summons cases and an ordinary trial of summons cases—*Dharma Singh*, 46 Mad. 755 (F.B.).

This section applies even when the accused does not offer to produce defence—*Brij Lal*, 37 Cr.L.J. 408, 160 I.C. 489, 1936 O.W.N. 215.

This section does not apply to an inquiry under sec. 117, because the person called upon to give security is not in the position of an *accused* person within the meaning of sec. 342. Therefore, the omission to examine the person called upon to give security is a mere irregularity curable under sec. 537, and not an illegality vitiating the proceedings—*Benode Behari*, 50 Cal. 985; *Ibrahim*, 34 Cr.L.J. 591 (593), 143 I.C. 351, A.I.R. 1933 Sind 49, 1933 Cr.C. 175, Ind Rul. 1933 Sind 128. But see *Raghubar*, A.I.R. 1934 All. 735 (738) 3 A.W.R. 655. So also, a person proceeded against under sec. 488 is not looked upon as an accused person, and omission to examine him does not vitiate the proceedings. The words "after the witnesses for the prosecution have been examined and before he is called on for his defence" are inappropriate to a proceeding under section 488—*Vithaldas*, 52 Bom. 768, 29 Cr.L.J. 1051 (1052), 30 Bom.L.R. 957, A.I.R. 1928 Bom. 347; *Bachai v. Jamuna*, 25 Cr.L.J. 1091, 81 I.C. 915, A.I.R. 1925 Cal. 339; *Mehr Khan*, 10 Lah. 406, A.I.R. 1929 Lah. 32, 112 I.C. 218, 30 P.L.R. 549, 29 Cr.L.J. 1002 (1003, 1004); *Raspin v. Raspin*, 36 C.W.N. 380 (381), 1932 Cr.C. 480, 138 I.C. 629, 33 Cr.L.J. 640, A.I.R. 1932 Cal. 488; *Ponusami v. Ramasami*, 74 I.C. 945, 45 M.L.J. 224, 46 Mad 758, 1923 M.W.N. 519, 18 M.L.W. 478, 24 Cr.L.J. 833, A.I.R. 1924 Mad. 15 (F.B.); *Shadi Khan v. Gul Begum*, 101 I.C. 606, 28 Cr.L.J. 478, A.I.R. 1927 Lah. 435. But see contra—*Demello v. Demello*,

27 Cr.L.J. 1000 (1001), 96 I.C. 856, A.I.R. 1926 Lah. 667; *Bechu Lal v. The Injured Lady*, 100 I.C. 377, A.I.R. 1927 Cal. 230, 45 C.L.J. 8, 28 Cr.L.J. 294, 51 Cal. 286; *Fernandez v. Emp.*, 59 I.C. 129, 45 Bom. 672, 22 Bom.L.R. 1010, 22 Cr.L.J. 171; *Gulam Rasul v. Emp.*, 61 I.C. 715, 6 P.L.J. 174, 22 Cr.L.J. 427, 2 P.L.T. 390.

Where an accused is examined by the Court before any evidence for the prosecution has been taken and before the commencement of the preliminary enquiry, his examination cannot be said to be under sec. 342, because at that stage there was no evidence for the prosecution recorded against him and no circumstances which he could be called upon to explain. The statement must be taken to have been recorded under sec. 164—*Bahawal*, 6 Lah. 183, 26 P.L.R. 331, 26 Cr.L.J. 1238.

The Sessions Judge is bound to examine the accused even though he has been examined before the committing Magistrate—*Nairamalat*, 14 M.L.W. 418, 23 Cr.L.J. 697; *Raju*, 9 Bom.L.R. 730; *Nga Po*, 4 Rang. 361, 27 Cr.L.J. 1361; *Mohammad Shafi*, 26 Cr.L.J. 1576, 90 I.C. 535, A.I.R. 1926 Oudh. 57. In a case which is triable by a Sessions Court it is the latter Court which tries the accused and calls upon him to enter on his defence and, therefore, it is to that Court that the mandatory provision is applicable. That being so, it cannot be said that the omission to examine the accused in the committing Court is a disregard of an express provision of law and therefore illegal—*Ajhar Mandal*, A.I.R. 1935 Cal. 605, 39 C.W.N. 289, 62 Cal. 475, 36 Cr.L.J. 1310, 157 I.C. 1103, 1935 Cr.C. 1022, following *Dimu*, 26 Cr.L.J. 191, 83 I.C. 895, 16 S.L.R. 201, A.I.R. 1921 Sind. 131.

This section applies only to a case of an original trial, and does not apply where additional evidence is taken by the Magistrate under the direction of an Appellate Court under sec. 428. In such a proceeding it is not necessary to examine the accused about the additional evidence. There might be cases where the accused could properly be questioned by the Magistrate in regard to the additional evidence so taken, but the omission to do so is not an illegality—*Narayan*, 52 Bom. 699, A.I.R. 1928 Bom. 200, 112 I.C. 60, 30 Bom.L.R. 651, 29 Cr.L.J. 972 (973); *Mohiuddin*, 4 Pat. 488, 26 Cr.L.J. 811 (813), 86 I.C. 459, A.I.R. 1925 Pat. 414, 6 P.L.T. 151; *Nathu Singh*, 41 Cr.L.J. 356 (359). This section does not also apply where trial is held *de novo*—*Marudamuthu v. Raghava*, 36 Cr.L.J. 307, 153 I.C. 297, 1934 M.W.N. 1136, 67 M.L.J. 800, 40 M.L.W. 803, A.I.R. 1935 Mad. 22.

974. Object and mode of examination:—In this country it often happens that a prisoner is tried in a language which he understands but indifferently well, and for that reason as well as for other equally grave reasons the intention of the statute is that at a certain stage in the case the Court itself shall put aside all counsels, all pleaders, all witnesses, all representatives, and shall call upon each individual accused with the authority of the Court's own voice to take advantage of the opportunity which then arises to state in his own way anything which he may be desirous of stating—*Pramathanath*, 50 Cal. 518 (522), 27 C.W.N. 389, 24 Cr.L.J. 218.

This section enjoins upon the Court the duty of placing before the accused the circumstances appearing against him in order that the accused may be given an opportunity of explaining them. This is the main object of the section. This section was never intended for the purpose of enabling the accused to give an explanation in the case for the accused in explaining
Ahmad v. Emp., 41 Cal. 250.

The object of this section is to see whether the accused can give an innocent explanation of the facts and for that purpose to examine the accused and ascertain what according to them are the facts and what is the explanation they themselves offer. It is not a question of what explanation the ingenuity of lawyers can invent. Such imaginative suggestions are no substitute for the taking of a statement from the accused himself—*Chandreshwar Prasad Narain Singh v. Arunendra Mohan Ghose*, 38 Cr.L.J. 2

(3), 165 I.C. 931, 9 R.P. 231, 3 B.R. 104, 1936 Cr.C. 1064, 17 P.L.T. 794, A.I.R. 1936 Pat. 626.

The real object of the examination is to enable a Judge to ascertain from time to time from a prisoner, particularly if he is undefended, what explanation he may desire to offer regarding any fact stated by a witness, or after the close of the case, how he can meet what the Judge may consider to be damning evidence against him—*Husein*, 6 Cal 96; *Mazhar Ali*, 50 Cal. 223, 36 C.L.J. 417; *Tani*, 48 I.C. 487, 20 Cr.L.J. 12 (Nag.). And in order that the accused may explain all the facts appearing in the evidence against him, it is necessary that his attention should be directed to all the vital parts of the evidence against him, specially if he is an ignorant person who cannot be expected to know or understand what particular parts of the evidence are or are likely to be considered by the Court to be against him—*Tani*, supra. The Court should not only point out to the accused the circumstances appearing in the evidence which require explanation, but it must, out of fairness to the accused, exercise that power in such a way that the accused may know what points in the opinion of the Court require explanation; and failure or refusal on the part of the accused to give the explanation will entitle the Court to draw an inference against him—*Alimuddi*, 52 Cal. 522, 29 C.W.N. 231, 26 Cr.L.J. 631.

The object of this section is to enable the accused to explain each and every circumstance appearing in the evidence against him; this cannot be done by such a general question as "what have you to say?" or "what is your defence?" The specific point or points which weigh against the accused must be mentioned; for if this is not done, he cannot be reasonably expected to be able to explain those points—*Maung Hman*, 1 Rang 689; *Alimuddi*, 52 Cal. 522, 41 C.L.J. 101, 26 Cr.L.J. 631. Where the Magistrates content themselves by asking the accused a stereotyped question like this, "Have you anything to say? or what is your answer?" this is not a sufficient compliance with the provisions of this section—*Tahsinuddin Akmad v. Emp.*, 44 C.W.N. 396 (398), 41 Cr.L.J. 563, 188 I.C. 288, A.I.R. 1940 Cal. 250. The word "generally" does not limit the nature of the questioning to one or more question of a general nature relating to the case, but it means that the question should relate to the whole case generally and should not be limited to any particular part or parts of it. The word "generally" does not mean that the accused cannot be subjected to a detailed examination by the Court. The law intends that the salient points appearing in the evidence against the accused must be pointed out to him in a succinct form and that he should be asked to explain them if he wished to do so—*Alimuddi*, 52 Cal. 522 (*per* M. N. Mukerjee, J.; Newbould, J. *contra*). The question must be framed in such a way as to enable the accused to know what he is to explain, what are the circumstances which are against him and for which an explanation is needed. A general question as to whether the accused has anything further to say is not a sufficient compliance with the requirements of this section—*Bhokari*, 5 P.L.T. 445, 25 Cr.L.J. 711, A.I.R. 1924 Pat. 971; *Udhao*, 25 Cr.L.J. 417, 77 I.C. 593, A.I.R. 1924 Nag. 301; *Durga Ram*, 6 P.L.T. 33, 26 Cr.L.J. 716. Where a complicated question has been put to each of the accused without reference to the particular position of each as brought out by the evidence against him, it cannot be said that the procedure did not prejudice or might not have prejudiced the accused. The examination of the accused contemplated by this section is one by the Judge direct, without any intervention of counsel. It is not correct to say that when the accused is represented by counsel it is often in his interest that the Judge should formally comply with this section by asking a general question and then leave the accused's counsel to offer explanation on his behalf in the way most favourable and least dangerous to him—*Nana Sadoba v. Emp.*, A.I.R. 1938 Nag. 283 (285), 1938 N.L.J. 90, 179 I.C. 317, 40 Cr.L.J. 197, disagreeing with *Narayana v. Emp.*, A.I.R. 1933 Mad 233, 1933 Cr.C. 289, 143 I.C. 46, 34 Cr.L.J. 481, 56 Mad. 231, 64 M.L.J. 88. The proper method of applying this section is to bring to the attention of the accused specific matters which appear in the evidence against them and merely questioning them generally as to

whether they have anything to say or anything to add to what was said before the committing Magistrate is not a satisfactory method of applying this section—*Shamlal*, 26 Cr.L.J. 572, 85 IC 716, A.I.R. 1925 Cal 980. Where the case is one of complexity it is not sufficient to put a general question whether the accused has anything to say about the charges or the evidence. When a point arises in the evidence against the accused which the Court considers vital, it is the duty of the Judge to call the accused's attention to the point and to ask for an explanation. A conviction based on the accused's failure to explain what he was never asked to explain is bad in law—*Dwarkanath Varma*, 14 P.L.T. 305, 37 C.W.N. 514 (516), 1933 Cr.C. 442, 34 Cr.L.J. 322, 64 M.L.J. 465, 142 IC 355, A.I.R. 1933 P.C. 124, 35 Bom.L.R. 507, Ind. Rul. 1933 P.C. 63, 37 M.L.W. 584, 1933 M.W.N. 409, 10 O.W.N. 522, 57 C.L.J. 177, 1933 A.L.J. 645 (P.C.); *Baliram*, 34 Cr.L.J. 411, 142 IC 785, 15 N.L.J. 116, Ind. Rul. 1933 Nag. 145; *Sohan Lal*, 34 Cr.L.J. 568, 143 IC 467, A.I.R. 1933 Oudh 305, Ind. Rul. 1933 Oudh 174, 1933 Cr.C. 686, 10 O.W.N. 678; *Raghubar*, A.I.R. 1934 All 735 (738), 3 A.W.R. 655; *Klairo v. Emp.*, 38 Cr.L.J. 995 (998), 170 IC 922, 31 S.L.R. 470, 10 R.S. 77, A.I.R. 1937 Sind 221. In a case of circumstantial evidence it is all the more necessary to perform this duty, because the accused cannot be expected to know, when all the evidence against him is of a circumstantial nature and some of it is important while some of it is not, which are the points on which an explanation from him would be necessary to avoid the inference of his guilt—*Kimidi Narasimham*, 37 Cr.L.J. 1074, 164 IC 1017, 1936 M.W.N. 521, A.I.R. 1936 Mad. 629, 1936 Cr.C. 763; *Chinnu*, 37 Cr.L.J. 1107, 165 IC 192, 1936 M.W.N. 183, A.I.R. 1936 Mad 628, 1936 Cr.C. 762; *Sangama Naicker*, A.I.R. 1936 Mad. 715, 1936 M.W.N. 613, 44 M.L.W. 52, 59 Mad. 622, 71 M.L.J. 138, 38 Cr.L.J. 45, 165 IC 743, 1936 Cr.C. 818, 9 R.M. 295, not following *Panchu Choudry*, A.I.R. 1923 Pat. 91, 66 IC 73, 23 Cr.L.J. 233, 3 P.L.T. 649. Every piece of circumstantial evidence tending to incriminate the accused should be pointedly brought to his notice either by the committing Magistrate or in the last resort by the trial Judge in the Court of Session and the answers of the accused to these questions recorded, as far as possible, in his own words by the Court—*Mohammad Anis v. Emp.*, 37 Cr.L.J. 955 (957), 164 IC 482, 1936 O.W.N. 691, 1936 O.L.R. 459, 9 R.O. 81, A.I.R. 1936 Oudh 405, 1936 Cr.C. 1086. The object of an examination under this section is for the purpose of enabling the accused to explain circumstances which appear against him. If the Judge considers that an explanation is necessary regarding an incriminating matter it is his duty to place the matter before the accused and to ask him whether he wishes to give any explanation. It is extremely unfair for a Judge to rely upon a circumstance as being incriminating without giving the accused person any notice of it and without giving him an opportunity of explaining the circumstance—*Jit Lal Bahadur*, A.I.R. 1940 Cal 378 (380), 41 Cr.L.J. 783, 189 IC 700. But where the facts of the case are simple, a general question such as "Have you any statement to make?" may be sufficient—*Banamali*, 6 P.L.T. 39, 26 Cr.L.J. 682.

There is, however, nothing in the judgment of their Lordships of the Privy Council, in *Dwarkanath Varma*, supra, to indicate that every failure to comply strictly with the letter of sec. 342, Cr. P. C., renders the conviction of an accused person illegal. Sec 537, Cr. P. C., has a bearing upon this point. No omission to comply strictly with sec 342 can render a conviction liable to be set aside unless it has in fact occasioned a failure of justice—*Annamalai Mudali*, A.I.R. 1940 Mad. 372 (374), 1940 M.W.N. 93, 51 M.L.W. 206, 1940 M.Cr.C. 33, 1 I.L.R. 1940 Mad. 514, (1940) 2 M.L.J. 69. An omission to put a question necessary by virtue of the provisions of this section is dealt with by sec. 537, Cr. P. C. The question for the Court in every case in which an irregularity of this kind has been committed is whether in fact a failure of justice has been occasioned by reason of the irregularity which has occurred. The consequence of this provision is that the Court must go into the merits of the case before quashing a conviction by reason of such irregularity. It is clear, however, that where the irregularity is such as to deprive an accused person of defending himself upon a point which the trial Judge or the assessors or jury regarded, or may have regarded, as of

serious import, it cannot be said with confidence to have been inseparable from a failure of justice. Where the facts show independently of any irregularity which has taken place that the accused has clearly committed an offence, the irregularity which has occurred will not save him from punishment; but if it is impossible for the Appellate Court to say that the trial Court would have been bound to come to the same conclusion if there had been no irregularity, the conviction ought to be quashed—*U Damapala*, 38 Cr.L.J. 524 (528), 168 I.C. 193, 14 Rang. 666, A.I.R. 1937 Rang. 83, 9 R.R. 340 (F.B.).

Where the confession has been made an integral and substantial part of the prosecution case, the failure of the Judge to question the accused about it is clearly a serious omission not covered by the provisions of sec. 537, Cr. P. C.—*Raban Lalu Shaikh*, 39 Cr.L.J. 618 (620), 175 I.C. 324, A.I.R. 1938 Sind 97, 10 R.S. 296, 32 S.L.R. 709.

When, in examining the accused under this section, nearly two printed pages containing a precis of the evidence against the accused were read out as it were in one breath, and the accused was asked whether he wanted to say anything, the Judge observed the letter of the law and ignored its spirit. This kind of question was one which it was impossible for anyone and least of all for a person accused of murder who had been kept in suspense for 16 months before the trial began, to answer. It was impossible for him to have remembered all the points which he was asked to explain and naturally his answer might not deal with all the points. This is certainly not giving a real opportunity to the accused to explain matters appearing in the evidence against him—*In re Kanakasabai Pillai*, A.I.R. 1940 Mad. 1 (4), 1939 M.W.N. 883, 50 M.L.W. 452, 1939 M.Cr.C. 246, 41 Cr.L.J. 369, 186 I.C. 704.

There is a difference in the wording of the first and the second portions of sub-section (1) of sec. 342, the former being discretionary ('may put questions') and the latter mandatory ('shall question him'). If the Court has put questions to the accused under the first part of sub-section (1), it would be sufficient compliance with the provisions of the second portion if the Court gives to the accused an opportunity, by putting to him one general question (e.g., "Have you got to say anything else?"), to explain the circumstances appearing in the case against him, and in this connection the examination of the accused under the first portion of this sub-section may be usefully looked into—*Nasiruddin*, 4 Pat 459, 6 P.L.T. 588, 26 Cr.L.J. 954.

The examination of the accused under this section is intended to enable the accused to explain any circumstances appearing against him and not to elicit answers calculated to supplement the case for the prosecution and to show that he is guilty—*Rangi*, 10 Mad. 295 (315); *Bhola Nath*, 51 All. 313, 30 Cr.L.J. 101 (105). The object of the examination is not to make the accused confess his guilt or assist the prosecution by admitting facts which may go to incriminate him—*Bhairab*, 2 C.W.N. 702; *Tufani*, 15 C.L.J. 323, 13 Cr.L.J. 283; *Veeran*, 9 Mad. 224. The Court cannot put questions to the accused as to what took place on the occasion, in order to convict him out of his own mouth—*Kamandu*, 10 Mad. 121 (123). Nor is it competent for the Court to examine the accused for the purpose of filling up gaps in the evidence for the prosecution—*Mohideen Abdul Qadir*, 27 Mad. 238 (240); *Jeremiah v. Vas*, 36 Mad. 457, 12 I.C. 961, (1911) 2 M.W.N. 576, 22 M.L.J. 73; *Tahasimuddin Ahmad v. Emp.*, 44 C.W.N. 396 (398), 41 Cr.L.J. 563, 188 I.C. 288, A.I.R. 1940 Cal. 250; *Mohan Singh*, 42 All. 522; *Devi Dayal*, 4 Lah. 55, 73 I.C. 805, A.I.R. 1923 Lah. 225, 24 Cr.L.J. 693; *Annavi*, 39 Mad. 449; *Basanta Kumar*, 26 Cal. 49; *Yasin*, 28 Cal. 689; *Raung Gyi*, 4 L.B.R. 244, 8 Cr.L.J. 62; *Mahadeo*, 22 N.L.R. 1, 27 Cr.L.J. 66; *Hasham*, 37 Cr.L.J. 428, 161 I.C. 344, A.I.R. 1936 Lah. 28, 1936 Cr.C. 11; *Subba Rao v. Venkatachalapathi*, A.I.R. 1938 Mad. 904, 178 I.C. 478, 48 M.L.W. 320, 1938 M.W.N. 871, (1938) 2 M.L.J. 397, 1938 M.Cr.C. 169, 40 Cr.L.J. 69. The examination of the accused for this purpose is contrary to law, and the prosecution cannot be permitted to rely on admissions obtained from the accused in these circumstances—*Subba Rao v. Venkatachalapathi*, supra. Thus, where in a charge of defamation the prosecution is unable to prove that the accused made and published the defamatory matter, it is illegal for the Magistrate to

examine the accused for the purpose of supplying this defect in the prosecution evidence—*Mohideen*, 27 Mad 238; *Devi Dayal*, supra. The object of the examination is to enable the accused to explain the evidence standing against him; but where the prosecution has not let in evidence implicating the accused in the offence with which he is charged, the Magistrate is not entitled to put questions to him under this section, and the answers to such question are inadmissible in evidence against him—*Abibulla Ravuthan*, 39 Mad 770, 30 I.C. 447, A.I.R. 1916 Mad 407, 16 Cr.L.J. 623; *Devi Dayal*, supra; *Veeran*, 9 Mad 224. No doubt the provisions of this section do not entitle a Magistrate or a Judge to question an accused person so as to get from him an admission of facts which are not proved in the evidence. Nevertheless if an accused person does in fact make such an admission, and it is clear that he has not been intimidated and that the admission was made with a full understanding of what he was saying, there is no reason why it should not be taken into account against him in the same way as any other confession made before a Magistrate can be so taken—*Narayanam*, A.I.R. 1935 Rang. 509 (510), 37 Cr.L.J. 328, 160 I.C. 746, 1935 Cr.C. 1295. Where the question put to the accused were straightforward, as for instance, where the accused were asked whether they had committed the offence and what they had to say, the answers given by the accused could be rightly taken into consideration under sub-section (3) for convicting the accused—*Phurlai*, 9 Pat. 504, 1930 Cr.C. 926 (927), A.I.R. 1930 Pat. 498, 11 P.L.T. 706. Sections 164, 342 and 364, Cr. P. C., are not exhaustive and do not limit the generality of sec. 21, Evidence Act, as to the relevancy of admissions—*Nga Thein Maung*, 37 Cr.L.J. 920, 164 I.C. 162, A.I.R. 1936 Rang. 350, 1936 Cr.C. 703, following *Barindra Kumar*, 37 Cal. 467, 7 I.C. 359, 11 Cr.L.J. 453, 14 C.W.N. 1114.

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When an accused person in answer to a general question or even one or two questions gives a reply or replies which show that he is well aware of all the circumstances appearing in evidence against him and their implications, and attempts to explain them, the Sessions Judge may be going beyond his province if he questions him further in detail. He may be open to the criticism of cross-examining the accused, and attempting to elicit contradictory answers. This is more particularly the case when the accused is represented by his own counsel. It is not possible to lay down a more general rule than that it is the duty of the Court to be satisfied either by his statements or by his answers to questions or by both that the accused explains or has an opportunity to explain circumstances from which hostile inferences may be drawn against him—*Annamalai Mudali*, A.I.R. 1940 Mad. 372 (375), 1940 M.W.N. 93, 51 M.L.W. 206, 1940 M.Cr.C. 33, I.L.R. 1940 Mad. 514, (1940) 2 M.L.J. 69, 41 Cr.L.J. 858, 190 I.C. 206. In permitting the Court to examine the accused person from time to time, the law does not contemplate that the examination of the accused person is to be conducted in the manner of cross-examination of an adverse witness by a counsel—*Hussein*, 6 Cal. 96; *Hurry Churn*, 10 Cal. 140, *Alimuddi*, 52 Cal. 522 (*per* Newbould, J.); *Tahasinuddin Ahmad v. Emp.*, 44 C.W.N. 396 (398), 41 Cr.L.J. 563, 188 I.C. 288, A.I.R. 1940 Cal. 250; *Niru Bhagat*, 1 Pat. 630, 24 Cr.L.J. 91; *Faqir Singh*, 10 Lah. 223, 29 Cr.L.J. 769 (770); *Umar Din*, 2 Lah. 129, 23 Cr.L.J. 388; *Panchu*, 3 P.L.T. 649, 23 Cr.L.J. 233; *Yakub*, 5 All. 253; *U Ba Thein*, 8 Rang. 372, 32 Cr.L.J. 23 (25), A.I.R. 1930 Rang. 351, Ind. Rul. 1930 Rang. 410, 127 I.C. 730, 1930 Cr.C. 1179; *Mahadeo*, 22 N.L.R. 1, 27 Cr.L.J. 66, 91 I.C. 212, 8 N.L.J. 190, A.I.R. 1925 Nag. 403. The questioning of the accused referred to in this section is not meant to be lengthy cross-examination as regards all evidence produced by the prosecution—*Jhabwala*, 34 Cr.L.J. 967 (972),

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If the accused declines to make any statement and prefers to be reticent, the Court may still put questions to him, provided the questions are not inquisitorial or of a cross-examining character—*Profulla Kumar*, 57 Cal. 1074, 31 Cr.L.J. 903 (907). But where an accused practically refuses to answer questions, it would be useless for the Court to persist with them—*Ramesham v. Emp.*, A.I.R. 1936 Nag. 147, 1936 Cr.C. 689; *Budhulal v. Emp.*, A.I.R. 1937 Nag. 67, 167 I.C. 155, 9 R.N. 168, 38 Cr.L.J. 354, I.L.R. 1937 Nag. 228; *Nana Sadoba v. Emp.*, 40 Cr.L.J. 197 (198), 179 I.C. 317, A.I.R. 1938 Nag. 283, 1938 N.L.J. 90.

When an accused person in answer to a general question or even one or two questions gives a reply or replies which show that he is well aware of all the circumstances appearing in evidence against him and their implications, and attempts to explain them, the Sessions Judge may be going beyond his province if he questions him further in detail. He may be open to the criticism of cross-examining the accused, and attempting to elicit contradictory answers. This is more particularly the case when the accused is represented by his own counsel. It is not possible to lay down a more general rule than that it is the duty of the Court to be satisfied either by his statements or by his answers to questions or by both that the accused explains or has an opportunity to explain circumstances from which hostile inferences may be drawn against him—*Annamalai Mudali*, A.I.R. 1940 Mad. 372 (375), 1940 M.W.N. 93, 51 M.L.W. 206, 1940 M.Cr.C. 33, I.L.R. 1940 Mad. 514, (1940) 2 M.L.J. 69, 41 Cr.L.J. 858, 190 I.C. 206. In permitting the Court to examine the accused person from time to time, the law does not contemplate that the examination of the accused person is to be conducted in the manner of cross-examination of an adverse witness by a counsel—*Hussein*, 6 Cal. 96; *Hurry Churn*, 10 Cal. 140; *Alimuddi*, 52 Cal. 522 (*per* Newbould, J.); *Tahasinuddin Ahmad v. Emp.*, 44 C.W.N. 396 (398), 41 Cr.L.J. 563, 188 I.C. 288, A.I.R. 1940 Cal. 250; *Niru Bhagat*, 1 Pat. 630, 24 Cr.L.J. 91; *Faqir Singh*, 10 Lah. 223, 29 Cr.L.J. 769 (770); *Umar Din*, 2 Lah. 129, 23 Cr.L.J. 388; *Panchu*, 3 P.L.T. 649, 23 Cr.L.J. 233; *Yakub*, 5 All. 253; *U Ba Thein*, 8 Rang. 372, 32 Cr.L.J. 23 (25), A.I.R. 1930 Rang. 351, Ind. Rul. 1930 Rang. 410, 127 I.C. 730, 1930 Cr.C. 1179; *Mahadeo*, 22 N.L.R. 1, 27 Cr.L.J. 66, 91 I.C. 212, 8 N.L.J. 190, A.I.R. 1925 Nag. 403. The questioning of the accused referred to in this section is not meant to be lengthy cross-examination as regards all evidence produced by the prosecution—*Jhabwala*, 34 Cr.L.J. 967 (972),

145 I.C. 481, 1933 A.L.J. 799, A.I.R. 1933 All. 690, 1933 Cr.C. 1202. The Judge or Magistrate is not to establish a Court of Inquisition, and to force a prisoner to convict himself by making some incriminating admission after a series of searching questions, the exact effect of which he may not comprehend—*Hussein*, 6 Cal. 96; *Anunt*, 6 Bom.L.R. 94, 1 Cr.L.J. 105; *Umar*, 2 Lah. 129, 23 Cr.L.J. 388; *Mohiuddin*, 4 Pat. 488, 6 P.L.T. 154, 26 Cr.L.J. 811 (814); *U Ba Thcin*, supra. It is not necessary, nor is it desirable, to examine the accused in great detail or to force him to disclose his defence so as to enable the prosecution to take advantage of it when the witnesses for the accused are examined—*Nasiruddin*, 4 Pat. 459, 6 P.L.T. 588. Where an accused is undefended, the Magistrate should simply point out to him the elements of the evidence adduced against him, which appear in his own interests to demand his explanation; where the accused is defended by a lawyer, the tribunal should not enter upon a lengthy examination of the accused person, which might easily develop into a recounting of the history of the whole case or into what would be far worse, some sort of cross-examination—*Panchu*, 3 P.L.T. 649, 23 Cr.L.J. 233. But the mere fact that a large number of questions (*viz.*, 55) were asked does not make the examination inquisitorial, where it appeared that the questions were asked not to elicit statements from the accused for the purpose of supplementing the case for the prosecution, but the object of the greater part of the questions was to ascertain whether the accused (who attempted no defence) admitted the facts stated by the witnesses or wished to offer any explanation, and the examination was not made in the nature of cross-examination—*Khudiram*, 9 C.L.J. 55, 3 I.C. 625.

It is a sufficient compliance with this section if the Court asks the accused *generally* whether he wishes to offer an explanation of any of the evidence which has been given against him. And although this section also gives the Court power to put *specific* questions to the accused with regard to any of the evidence adduced for the prosecution, still it is entirely in the discretion of the Judge whether he should, after having put the general question, ask such specific questions on particular points in the evidence—*Narayan*, 26 Bom.L.R. 109, 25 Cr.L.J. 1127, 81 I.C. 951, A.I.R. 1924 Bom. 334.

Joint statement:—If there are several accused, the Magistrate must examine each accused *separately*: if he records the statements of all the accused collectively, the trial is vitiated and the conviction must be set aside—*Ghasiti*, 6 Lah. 554, 27 Cr.L.J. 408; *Balkrishna*, 55 Bom. 356, 32 Cr.L.J. 572, 130 I.C. 577, 33 Bom.L.R. 82, 1931 Cr.C. 180, A.I.R. 1931 Bom. 132; *Chandu*, Ind. Rul. 1932 Lah. 664; *Amanat*, Ind. Rul. 1932 Lah. 653; *Shivalomal*, A.I.R. 1937 Sind. 304, 172 I.C. 80, 39 Cr.L.J. 59, 10 R.S. 135, 32 S.L.R. 30. Where the Magistrate recorded the statements of the several accused separately before the charge, but after the close of the prosecution evidence questioned the accused jointly, and recorded a joint statement, the procedure was illegal—*Girdhari*, 29 P.L.R. 436, 29 Cr.L.J. 469, 109 I.C. 117, 10 A.I.Cr.R. 221, 10 Lah.L.J. 306. When, of two accused persons tried together one has made a statement on a particular point in the case against them, it is not improper for the Magistrate to take another statement from the co-accused under this section—*Satya Narayana*, 55 Cal. 858, 32 C.W.N. 319 (323), 29 Cr.L.J. 1022, A.I.R. 1928 Cal. 675, 112 I.C. 350.

It is the accused himself who should be asked as to whether he would make any statement. Where the *pleader* of the accused persons (and not the accused themselves) was asked if they wished to make any statement, and the pleader stated that they would not do so, *held* that this was not a compliance with sec. 342; the accused themselves should have an opportunity of making their statements directly to the Court and not through the intervention of a pleader—*Messer Bepari*, 29 C.W.N. 939, 26 Cr.L.J. 1032, 87 I.C. 920, A.I.R. 1926 Cal. 430.

975. Examination imperative:—The first portion of this section as to putting questions to the accused is an enabling provision, but the second portion as to the examination of the accused is imperative. The word 'shall' shows that the provisions of the latter part of this section as to the examination of the accused after the close of the prosecution evidence are mandatory and not discretionary only—*Rameshar*, 6

P.L.T. 493, 86 I.C. 991, A.I.R. 1925 Pat 723, 26 Cr.L.J. 927; *Savalaya*, 9 Bom.L.R. 356; *Varisai*, 46 Mad 449 (455) (F.B.); *Ah Foong*, 22 C.W.N. 834, 20 Cr.L.J. 24; *Gulla*, 1918 P.R. 1; *Raghu*, A.I.R. 1920 Pat 471, 58 I.C. 49, 1 P.L.T. 241, 5 P.L.J. 430, 21 Cr.L.J. 705; *Suraj Pandey*, 1 P.L.T. 641, 21 Cr.L.J. 793; *Tani*, 20 Cr.L.J. 12 (Nag). The Sessions Judge is bound to examine the accused even though he has been examined before the committing Magistrate—*Nainamalai*, 14 L.W. 418, 23 Cr.L.J. 697; *Raju*, 9 Bom.L.R. 730; *Nga Po*, 4 Rang. 361, 98 I.C. 484, A.I.R. 1927 Rang. 19, 27 Cr.L.J. 1364; *Mohammad Shafi*, 26 Cr.L.J. 1576 (Oudh). Omission to examine the accused is not merely an error in form but goes deeper into the case and vitiates the whole trial—*Gulabdin*, 46 Bom. 441 (444); *Fernandez*, 45 Bom. 672; *Gangadhar v. Reid*, 25 C.W.N. 609, 23 Cr.L.J. 41; *Haro Nath v. Ala Bux*, 28 C.W.N. 119; *Ramnath*, 2 P.L.T. 549, 22 Cr.L.J. 460; *Fatu Santal*, 6 P.L.T. 147, A.I.R. 1921 Pat. 109, 61 I.C. 705, 2 P.L.T. 288, 22 Cr.L.J. 417; *Parameshwar*, 3 P.L.J. 347, 23 Cr.L.J. 440; *Bay Nath*, 4 P.L.T. 231, 24 Cr.L.J. 311; *Rameshar*, 6 P.L.T. 493, 26 Cr.L.J. 927; *Varisai Rowther*, 46 Mad. 449 (456) (F.B.); *Pramatha*, 50 Cal. 518; *Mazhar Ali*, 50 Cal. 223; *Satish Chandra*, 51 Cal. 924 (929); *Gamadia*, 27 Bom.L.R. 1405, 50 Bom. 34; *Onkar Singh*, 35 Cr.L.J. 1417, 151 I.C. 840, 11 O.W.N. 1206, A.I.R. 1934 Oudh 457, 1934 Cr.C. 1308; *Moharrum Mohammad*, 32 Cr.L.J. 623, 130 I.C. 845; *Nataraja v. Daivasigamani*, 32 Cr.L.J. 757, 1930 M.W.N. 914, 1931 Cr.C. 361, A.I.R. 1931 Mad. 241, 131 I.C. 493, Ind. Rul. 1931 Mad 541; *Varahamma v. Emp.*, 1937 M.W.N. 574; *Mohammad Nawaz v. Emp.*, A.I.R. 1938 Lah. 543, 11 R. 1938 Lah. 603, 176 I.C. 678, 11 R.L. 226, 39 Cr.L.J. 781, 40 P.L.R. 850. The defect is not cured by sec. 537; that is, the non-compliance vitiates the trial even though the accused has not been prejudiced thereby—*Pramatha Nath*, 50 Cal. 518; *Mazhar Ali*, 50 Cal. 223; *Ram Charan*, 7 P.L.T. 259, 89 I.C. 153, A.I.R. 1926 Pat. 29, 26 Cr.L.J. 1289; *Surendra v. Isamaddi*, 51 Cal. 933, 84 I.C. 325, 26 Cr.L.J. 261, A.I.R. 1925 Cal. 480; *Raghu*, 5 P.L.J. 430, 21 Cr.L.J. 705; *Durga Ram*, 6 P.L.T. 33, 26 Cr.L.J. 716; *Nga Po*, 11 Bur.L.T. 134, 18 Cr.L.J. 944; *Hari Krishnaji*, 35 Cr.L.J. 1457 (1459), 151 I.C. 778, A.I.R. 1934 Nag. 213, 1934 Cr.C. 984, A.I.R. 1934 Nag. 255; *Chandu*, Ind. Rul. 1932 Lah. 664; *Anar Gul*, 35 Cr.L.J. 1361, 151 I.C. 501; *Amirbi*, 34 Cr.L.J. 340, 142 I.C. 393, A.I.R. 1933 Nag. 192, 1933 Cr.C. 786, Ind. Rul. 1933 Nag. 114; *Muhammad Din*, 36 Cr.L.J. 407, 153 I.C. 445, 35 P.L.R. 613; *Karna Shanker*, 1935 O.W.N. 1042, 158 I.C. 16, 36 Cr.L.J. 1303, A.I.R. 1936 Oudh 16, 1936 Cr.C. 23, 1935 O.L.R. 557. For contra see *Sia Ram*, 36 Cr.L.J. 1290, 159 I.C. 129, A.I.R. 1935 All. 217, 1935 A.L.J. 257, 1934 Cr.C. 260; *Saiyid Mohiuddin*, 4 Pat. 488, 86 I.C. 459, 6 P.L.T. 151, A.I.R. 1925 Pat. 414, 3 Pat.L.R. 110 (Cr.), 26 Cr.L.J. 811; *Bachchu Lal*, 37 Cr.L.J. 616, 162 I.C. 389, 1936 O.W.N. 480, distinguishing *Karna Shanker*, supra; *Brij Lal*, 37 Cr.L.J. 408, 160 I.C. 489, 1936 O.W.N. 215; *Nana Sadoba v. Emp.*, A.I.R. 1938 Nag. 283 (284), 1938 N.L.J. 90, 179 I.C. 317, 40 Cr.L.J. 197 where it has been laid down that since the publication of the Privy Council ruling in *Abdul Rahman v. Emp.*, A.I.R. 1927 P.C. 44, 100 I.C. 227, 28 Cr.L.J. 259, 51 I.A. 96, 5 Rang. 53 (P.C.), it is now recognized that non-compliance with a mandatory provision of the Code does not necessarily vitiate the proceedings and that the criterion is whether there has been any failure of justice; *Kandhai v. Municipal Board*, *Rae Bareilly*, 39 Cr.L.J. 841, 177 I.C. 56, 11 R.O. 16, 1938 A.Cr.C. 82, 1938 O.A. 591, 1938 O.L.R. 365, 1938 O.W.N. 743. But see *Nga Po Min*, A.I.R. 1932 Rang. 190, 141 I.C. 89, 1932 Cr.C. 932 (F.B.). The illegality cannot be waived even by the consent of the accused or their pleaders—*Gamadia*, 27 Bom.L.R. 1405, 50 Bom. 34, 27 Cr.L.J. 165 (166). The recent view of the Bombay High Court, however, is that if the Court is satisfied that failure to comply with the strict terms of the section has caused no prejudice, the Court should not interfere. There is no reason for holding that the provisions of sec. 537, Cr. P. C., do not cover such a case—*Kondiba Balaji*, A.I.R. 1940 Bom. 314, 42 Bom.L.R. 695.

Failure to comply with the mandatory provisions of this section vitiates the whole trial, and the accused is to be retried—*Saileendra*, 38 C.L.J. 175; *Gangadhar v. Bhangi*, 25 Cr.L.J. 1152, 81 I.C. 976, A.I.R. 1925 Nag. 147; *Sheopal*, 1 O.W.N. 833, 26 Cr.L.J. 655; and the retrial should take place from the stage at which the trying

Magistrate omitted to examine the accused—*Gamadia*, 50 Bom. 34, 27 Cr.L.J. 165 (169); *Motankhan*, 21 S.L.R. 331, 28 Cr.L.J. 417 (418). But where there are many serious defects in the prosecution case, and the chance of conviction seems to be remote, no useful purpose will be served by sending the case back for retrial—*Satish Chandra*, 51 Cal. 924 (927), 39 C.L.J. 411. It is not expedient in the interests of justice that a petty case should be tried *de novo*—*Amir*, 35 Cr.L.J. 1447, 151 I.C. 913, A.I.R. 1934 Lah. 415, 1934 Cr.C. 642; *Tej Ram*, 35 Cr.L.J. 104, 146 I.C. 434, 34 P.L.R. 798, A.I.R. 1933 Lah. 1002. See also *Kundan Lal*, A.I.R. 1934 Lah. 648, 36 Cr.L.J. 468, 153 I.C. 1034, 35 P.L.R. 173, 1934 Cr.C. 972.

It is not a sufficient compliance with this section if the Sessions Judge merely reads over to the accused a statement made by the latter before the committing Magistrate and recorded by that Magistrate under sec. 364—*Fatu Santal*, 6 P.L.J. 147, 22 Cr.L.J. 417.

But an *insufficient* examination of the accused person does not necessarily invalidate the trial if the statements made by the accused indicate that they were not altogether ignorant of some of the salient points appearing in the evidence against them, and endeavoured to explain some of the points—*Alimuddi*, 52 Cal. 522, 29 C.W.N. 231, 26 Cr.L.J. 631. See also *Raghubar*, 36 Cr.L.J. 33 (35), 152 I.C. 120, A.I.R. 1934 All. 735, 1934 Cr.C. 936.

Where the Appellate Court thought that some documents which had been marked as exhibits, had not been proved according to law, that the examination of the accused under this section had not been satisfactory and that the accused should be examined afresh, *held* that in ordering additional evidence to be taken it would be quite proper to direct a further examination of the accused at the same time. The other course is under sec. 423, Cr. P. C., to set aside the conviction and order the accused to be retried by a Court of competent jurisdiction. Such a re-trial if ordered would be a *de novo* trial—*Sri Krishna Prasad Sinha*, 37 Cr.L.J. 906, 164 I.C. 184, A.I.R. 1936 Pat. 438, 17 P.L.T. 444, 1936 Cr.C. 699. See also *Ramchandra Prasad v. Emp.*, 38 Cr.L.J. 657 (658), 168 I.C. 979, 3 B.R. 508, 18 P.L.T. 483, 9 R.P. 522, 1937 P.W.N. 519, A.I.R. 1937 Pat. 246.

The examination of the accused before framing charge is, however, not compulsory. What sec. 342, Cr. P. C., says is that the accused shall be questioned after the witnesses for the prosecution have been examined and before he is called on for his defence. The section also says that the Court may at any stage of the trial question the accused, which means that failure to do so before the other examination is no irregularity—*Bhanwarsingh v. Sukhramsingh*, 41 Cr.L.J. 585 (586), A.I.R. 1940 Nag. 283, 188 I.C. 413, 1940 N.L.J. 410.

976. When examination may be dispensed with:—(1) The examination of the accused is obligatory only in cases where the accused is called on for his defence. If a Magistrate discharges an accused without framing a charge, the non-examination of the accused does not vitiate the proceeding—*Varisal Rowther*, 46 Mad. 449 (461) (F.B.). (2) When the accused has left the case entirely in the hands of his legal adviser, the Judge need not ask the accused to explain any circumstances appearing in evidence against him—*Gandi Talaiya*, 2 Weir 405. (3) Where the accused has been exempted from personal appearance under sec. 205, the Court may also dispense with his examination, and may examine the pleader instead—*Jamal*, 6 S.L.R. 206, 14 Cr.L.J. 272; *Maung Po v. Haka Singh*, 4 Rang. 506, 28 Cr.L.J. 226; *Jaffar*, 35 Cr.L.J. 1035, 149 I.C. 1132, 36 Bom.L.R. 433, A.I.R. 1934 Bom. 212. For contra see *Ishwar Das v. Bhagwan Das*, 35 Cr.L.J. 879, where it has been laid down that the Court should require the personal attendance of the accused for the purpose of making the explanation under this section, even though he was exempted from personal attendance under sec. 205. Where the accused, who was allowed to appear by pleader, himself made no statement and his pleader disclaimed all knowledge of the facts of the case there was no compliance with the provision of this section. This was not an irregularity which could be cured under sec. 537, Cr. P. C., as it was impossible to hold that there was no failure of

justice—*Hikmat Ali*, 35 Cr.L.J. 784, 148 I.C. 885, A.I.R. 1934 All 389, 1934 Cr.C. 465. (4) Since the object of the examination is to enable the accused to explain any circumstances appearing in the evidence against him, it follows that where the accused has admitted his guilt, and has been examined by the committing Magistrate, it is not necessary for the Sessions Judge to examine the accused again—*Khudram*, 9 C.L.J. 55, 3 I.C. 625. (5) The examination of the accused may be dispensed with in those cases in which owing to the admission or plea of the accused (sec 243) or owing to the weakness of the evidence called in support of the prosecution (secs. 245, 253, 289), the accused can either be convicted on his own plea without the taking of evidence or acquitted or discharged on the evidence—*Nabu*, 26 Cr.L.J. 1554 (1555), 20 S.L.R. 34 (F.B.).

977. Time for examination:—The accused is to be examined after the evidence for the prosecution has been recorded. He cannot be examined before any prosecution evidence has been heard or recorded because there is nothing which he can be asked to explain at that stage—*Veeran*, 9 Mad. 224; *Sadayan*, 5 M.L.T. 216; *Bajit*, 1883 A.W.N. 238.

It makes no difference whether the examination takes place before or after the frame of charge, provided that the accused is examined after evidence for the prosecution is completely closed—*Vishram Narayan*, 32 Bom.L.R. 596, 31 Cr.L.J. 743 (745), 124 I.C. 810, A.I.R. 1930 Bom. 241. The general practice is to take the examination before the frame of charge—*Ibid.*, dissenting from the view of Patker, J., in *Genu Gopal*, 31 Bom.L.R. 1134, 31 Cr.L.J. 402, 122 I.C. 424, A.I.R. 1929 Bom. 447.

The accused is to be examined after the evidence for the prosecution has been closed and before he is asked to enter upon his defence—*Bava*, Ratanlal 227; *Raghu Bhumji*, 5 P.L.J. 430, 21 Cr.L.J. 705; *Mazamar Ali*, 50 Cal. 223. It is unfair to the accused and contrary to law to examine the accused before the examination of all the prosecution witnesses is completed—*Ram Harakh*, 1 O.L.J. 238, 15 Cr.L.J. 436; *Rameshwar*, 2 P.L.T. 741, 22 Cr.L.J. 259. Therefore, where the accused was examined after two prosecution witnesses had given evidence, and then another prosecution witness was examined, held that the procedure offended against this section and the conviction must be set aside, and retrial ordered—*Rameswar*, supra; *Balkeshwar*, 3 P.L.T. 322, 23 Cr.L.J. 114; *Gulzari Lal*, 49 Cal. 1075; *Ghaza Ali*, 6 Lah.L.J. 618, 27 Cr.L.J. 87; *Lachhman*, 7 Lah. 564, 27 P.L.R. 427, 27 Cr.L.J. 1007; *Bhau Dharma*, 30 Bom.L.R. 385, 29 Cr.L.J. 535 (536), 109 I.C. 359, A.I.R. 1928 Bom. 140, 10 A.I.Cr.C. 218. But the Allahabad High Court is of opinion that although all the witnesses for the prosecution ought to be examined before the examination of the accused, under the imperative provision of sec. 342, still if the evidence of the witnesses who are examined after the examination of the accused introduces no new matter, the irregularity in procedure does not prejudice the accused, and is curable by sec. 537—*Bechu Chaube*, 45 All. 124, 20 A.L.J. 874, 24 Cr.L.J. 67; *Khacho Mal*, 27 Cr.L.J. 405 (406), 93 I.C. 69, A.I.R. 1926 All. 358; *Jhabbar*, 26 A.L.J. 196, 30 Cr.L.J. 531 (536); *Sudaman*, 40 All. 551. The Patna High Court has also laid down that if the accused is defended, any violation of any rule as to the stage at which he is to be examined, does not make much difference. If he has not been prejudiced, the error ought not to vitiate the trial—*Mohiuddin*, 4 Pat. 488, 26 Cr.L.J. 811 (815), 86 I.C. 459, 6 P.L.T. 154, A.I.R. 1925 Pat. 414.

The accused should be examined before the evidence for the defence is taken. The examination of the accused after all the prosecution witnesses as well as the witnesses for the defence are examined, vitiates the conviction and sentence, and the trial must be taken up again from the close of the prosecution case, and the accused must be examined before he has entered upon his defence—*Surendra v. Isamuddi*, 51 Cal. 933 (934), 84 I.C. 325, A.I.R. 1925 Cal. 480, 26 Cr.L.J. 261; *Ram Charan*, 7 P.L.T. 259, 26 Cr.L.J. 1289. But in a more recent Calcutta case it has been laid down that an examination of the accused after the conclusion of the defence evidence is a mere irregularity curable by sec. 537—*Tamez Khan v. Rajabali*, 31 C.W.N. 337 (338), 28 Cr.L.J. 347 (dissenting from 51 Cal. 933).

Although the Magistrate may under the first part of sub-section (1) examine an accused person before the case for the prosecution is concluded, still this would not absolve the Magistrate from the obligation imposed upon him by the latter part of sub-section (1) to examine the accused after the witnesses for the prosecution have been examined and before he is called on for his defence—*Ramnath*, 2 P.L.T. 549, 22 Cr.L.J. 460; *Moinuddin*, 2 P.L.T. 455, 22 Cr.L.J. 422; *Bhokari*, 5 P.L.T. 445, 25 Cr.L.J. 711; *Hamid Ali v. Sri Kissen*, 28 C.W.N. 118, 24 Cr.L.J. 943

The accused must be examined after the examination, cross-examination and re-examination of all the prosecution witnesses are over. It is not enough that the accused has been examined after the examination-in-chief of the prosecution witnesses and before their cross-examination and re-examination. Until the prosecution witnesses have been cross-examined and re-examined, it cannot be said what the exact case that the accused will have to meet is, and if he is forced to disclose his defence before cross-examination, it might very well be that the prosecution witnesses would be on their guard and the value of the cross-examination destroyed. The provision in sec. 342 is for the benefit of the accused; and to enable him to obtain the full benefit of the section it is clear that he must be examined after the cross-examination and re-examination of the prosecution witnesses are over—*Mitari Singh*, 6 P.L.J. 644 (649), 2 P.L.T. 520, 22 Cr.L.J. 697, 83 I.C. 825, A.I.R. 1922 Pat. 158; *Kashi Paramanik v. Dasu Paramanik*, 27 C.W.N. 28; *Jummon*, 50 Cal. 308; *Mazahar Ali*, 50 Cal. 223; *Gulzari Lal*, 49 Cal. 1075; *Fernandez*, 45 Bom. 672; *Nathu Kasturchand*, 50 Bom. 42, 27 Bom.L.R. 105, 26 Cr.L.J. 690; *Pramatha Nath*, 50 Cal. 518 (523); *Dibakanta v. Gour Gopal*, 50 Cal. 939 (947); *Maria*, 20 N.L.R. 174, 26 Cr.L.J. 971 (F.B.); *Motan Khan*, 21 S.L.R. 331, 28 Cr.L.J. 417; *Kundan Lal*, 36 Cr.L.J. 468, 153 I.C. 1034, 35 P.L.R. 173, A.I.R. 1934 Lah. 648, 1934 Cr.C. 972. Therefore, where after some of the prosecution witnesses were examined-in-chief, the Magistrate examined the accused, and then some more prosecution witnesses were examined, and all the prosecution witnesses were cross-examined, but the accused was not examined again, held that there was no substantial compliance with the provisions of this section—*Sailendra*, 38 C.L.J. 175; *Krishnapa*, 25 Cr.L.J. 713, 81 I.C. 201, A.I.R. 1924 Nag. 51; *Muhammad Sadiq*, 26 P.L.R. 533, 89 I.C. 458, A.I.R. 1926 Lah. 51, 26 Cr.L.J. 1370 (1371); *Muhammad Din*, 36 Cr.L.J. 407, 153 I.C. 445, 35 P.L.R. 613, A.I.R. 1934 Lah. 520. Where the prosecution witnesses are first examined-in-chief, then the accused are examined under this section, and afterwards the prosecution witnesses are cross-examined, the procedure is illegal and the trial is vitiated—*Haronath v. Ala Bux*, 28 C.W.N. 119, 38 C.L.J. 281. Such non-compliance with the provisions of this section is not an irregularity curable by sec. 537—*Ibid.*; *Mazahar Ali*, 50 Cal. 223. Where after the examination of the accused under this section there was not only cross-examination of some of the prosecution witnesses but the investigation officer was examined, held that the accused ought to have been examined further under this section and that there was a great probability of the accused having been prejudiced in consequence of this opportunity not being afforded to him—*Ruhan Dodo*, 34 Cr.L.J. 161, 141 I.C. 529, A.I.R. 1932 Sind. 165, 1932 Cr.C. 743, Ind. Rul. 1933 Sind. 57. See also *Jhandu v. Emp.*, 40 P.L.R. 902. But the Madras High Court holds that the words "after the witnesses for the prosecution have been examined" mean 'when the prosecution has finished calling evidence' and do not include the cross-examination and re-examination of the prosecution witnesses. Therefore, where in a warrant case the accused does not cross-examine the prosecution witnesses after their examination-in-chief, and then the Magistrate examines the accused and frames a charge, and afterwards at a later stage the accused cross-examines the prosecution witnesses and then the prosecution re-examines them, held that the omission to further examine the accused after the cross-examination and re-examination of the prosecution witnesses does not vitiate the trial—*Varisai Rowther*, 46 Mad. 449, 24 Cr.L.J. 517, 73 I.C. 163, 44 M.L.J. 567, 17 M.L.W. 722, 32 M.L.T. 385, 1923 M.W.N. 477, A.I.R. 1923 Mad. 609 (F.B.), (overruling *Maruda Muthu Vannan*, 45 Mad. 820). This view of the Madras Full Bench has

been followed by the Rangoon High Court—*Nga Hla*, 3 Rang 139, 89 I.C. 312, A.I.R. 1925 Rang. 258, 26 Cr.L.J. 1336; *Subbaya Naidu*, 7 Rang 470, A.I.R. 1929 Rang 331, 30 Cr.L.J. 1164, 120 I.C. 230, 1929 Cr.C. 507 (509), by the Allahabad High Court—*Sudaman*, 49 All. 551, 28 Cr.L.J. 399 (400); *Hafiz Mohd Rafiq Ahmad v. Emp.*, 1936 Cr.C. 476, 162 I.C. 758, 37 Cr.L.J. 710, A.I.R. 1936 All 319, 1936 A.L.J. 274, and by the Patna High Court—*Mohiuddin v. Emp.*, 26 Cr.L.J. 811 (813), 4 Pat. 488, 86 I.C. 459, A.I.R. 1925 Pat. 414, 6 P.L.T. 154; *Ramchandra Prasad v. Emp.*, 38 Cr.L.J. 637, 168 I.C. 979, A.I.R. 1937 Pat. 246, 3 B.R. 508, 9 R.P. 522, 18 P.L.T. 483, 1937 P.W.N. 519; *Shrodatt Roy v. Emp.*, A.I.R. 1929 Pat. 64, 110 I.C. 803, 29 Cr.L.J. 771, 10 P.L.T. 429; *Sukhdoo Prasad v. Emp.*, A.I.R. 1938 Pat. 55, 16 Pat. 97, 18 P.L.T. 370, 1937 P.W.N. 353, 173 I.C. 189, 39 Cr.L.J. 321, 4 B.R. 240. See also *Bechu Chauhe*, 45 All. 124, where the witnesses for the prosecution were examined-in-chief and on the same day the accused were questioned under sec. 342, and afterwards the witnesses for the prosecution were cross-examined; the High Court made no objection to the procedure. The Oudh Chief Court also holds that if the accused has been examined before the framing of the charge, the omission to re-examine him after the frame of charge and the cross-examination of the prosecution witnesses does not vitiate the trial, if the cross-examination adds nothing on which it is necessary to further examine the accused—*Brij Behari*, 28 O.C. 130, 12 O.L.J. 182, 2 O.W.N. 327, 26 Cr.L.J. 1301; *Khuman*, 2 O.W.N. 378, 26 Cr.L.J. 1374. Although it is incumbent on the trial Judge to examine the accused under this section after the witnesses for the prosecution have been further cross-examined by him subsequent to the framing of the charge, the conviction shall not be quashed on appeal or revision, except where it is shown that prejudice has occurred in consequence of the omission to do so—*Hassan*, A.I.R. 1936 Pesh. 211. See also *Anargul*, A.I.R. 1934 Pesh. 75, 1934 Cr.C. 1111, 151 I.C. 501, 35 Cr.L.J. 1361; *Gurdas Singh v. Emp.*, A.I.R. 1938 Lah. 832, 40 P.L.R. 589, 179 I.C. 249. But see *Jhandu v. Emp.*, 40 P.L.R. 902, where it has been held that where after further cross-examination of the prosecution witnesses a new witness is called and examined for the prosecution, it is the duty of the trying Magistrate to question the accused again under this section and the omission to do so amounts to an illegality vitiating the entire proceedings.

Where the accused has been examined after the prosecution has finished its evidence under sec. 252, but a new and material matter in support of the prosecution case is elicited in cross-examination or re-examination of the prosecution witnesses under sec. 256, it is desirable that the accused should again be questioned on the case under sec. 342 and asked generally to explain the circumstances. So also, if the accused has already been examined before the framing of the charge, and the prosecution calls fresh evidence after the formulation of the charge, the accused must again be examined under sec. 342 on the termination of that evidence—*Varisai Rowther*, 46 Mad. 449 (457) 24 Cr.L.J. 547, A.I.R. 1923 Mad. 609, 73 I.C. 163, 44 M.L.J. 567 (F.B.); *Vishram Narayan*, 32 Bom.L.R. 596, 31 Cr.L.J. 743 (745); *Nataraja v. Devasingamani*, 32 Cr.L.J. 757, 131 I.C. 493, 1930 M.W.N. 914, A.I.R. 1931 Mad. 241, 1931 Cr.C. 361. But where the accused has been examined by the Magistrate before the charge was framed and after all the prosecution witnesses had been examined and cross-examined at considerable length, and after the charge was framed, most of the witnesses were recalled by the accused (under sec. 256), for a further lengthy cross-examination, it would be unnecessary for the Court to examine the accused again after the further cross-examination, when no fresh circumstances were discovered after the recall and re-cross-examination of the prosecution witnesses—*Byrne*, 4 Lah. 61, 81 I.C. 337, A.I.R. 1924 Lah. 84, 25 Cr.L.J. 801; *Thachroth*, 45 M.L.J. 279, 25 Cr.L.J. 7; *Kazi Karim*, 26 Cr.L.J. 1418, 89 I.C. 842, A.I.R. 1926 Lah. 154; *Nadir*, A.I.R. 1929 Lah. 371, 116 I.C. 455, 30 Cr.L.J. 625; *Pritchard*, 30 Cr.L.J. 18 (22), 112 I.C. 850, A.I.R. 1928 Lah. 382, Ind. Rul. 1929 Lah. 97; *Vishram Narayan*, supra; *Pitani*, 9 O.W.N. 116, 33 Cr.L.J. 811, 139 I.C. 636, A.I.R. 1932 Oudh 1130, 1932 Cr.C. 186. The trial of a warrant case should, according to the recent view of the Lahore High Court, be regarded as comprising not merely two stages, prosecution and defence, but

stages, prosecution, further cross-examination of prosecution witnesses and defence. If this is so, then it is clear that sec. 342, Cr. P. C., does not lay down any particular moment of time but a period of time within which the examination can be held. If the trial of a warrant case were regarded as having only two stages—prosecution and defence—then sec. 342, Cr. P. C., would have to be interpreted as indicating a particular moment of time, namely that intervening between the close of the first stage and the beginning of the second. If however, as it appears to be the correct view, there are three stages, then the examination under sec. 342, Cr. P. C., can be held either immediately after the close of the first stage or immediately before the beginning of the third stage or for the matter of that at any time between these two points—*Mohammad Nawaz v. Emp.*, A.I.R. 1938 Lah. 543 (545), I.L.R. 1938 Lah. 603, 176 I.C. 678, 11 R.L. 226, 39 Cr.L.J. 781, 40 P.L.R. 850, dissenting from *Hafiz Mahommed Rafiq Ahmed v. Emp.*, A.I.R. 1936 All 319, 1936 Cr.C. 476, 162 I.C. 758, 37 Cr.L.J. 710, 1936 A.L.J. 274 and distinguishing *Gian Singh*, A.I.R. 1928 Lah. 230, 111 I.C. 665, 29 Cr.L.J. 905, *Lachman Singh v. Emp.*, A.I.R. 1926 Lah. 551, 96 I.C. 863, 27 Cr.L.J. 1007, 7 Lah. 564, 27 P.L.R. 427, *Girja Nandan Singh v. National Insurance and Banking Co. Ltd.*, A.I.R. 1918 Lah. 302, 44 I.C. 139, 1 P.R. 1918 and *Kundan Lal v. Emp.*, A.I.R. 1934 Lah. 648, 1934 Cr.C. 972, 153 I.C. 1034, 36 Cr.L.J. 468, 35 P.L.R. 173.

The accused was examined after the examination and cross-examination of the prosecution witnesses, and then the Magistrate called upon him to enter upon his defence (sec. 256). Thereupon, the accused applied to the Court for recall of some of the prosecution witnesses for further cross-examination (sec. 257) and the Magistrate granted the application. *Held* that it was not incumbent upon the Magistrate to further examine the accused after the latter had re-cross-examined the prosecution witnesses under sec. 257. After the accused had entered upon his defence, the stage at which he must be examined under sec. 342 had passed—*Obedar Rahaman*, 56 Cal. 1157, 1930 Cr.C. 219 (220), 31 Cr.L.J. 406. Where after arguments had commenced a prosecution witness was recalled and some questions were put to him about a plan and the accused were not examined again under this section, *held* that the fact that the formalities were not gone through asking the accused persons some questions under this section did not vitiate the trial—*Dharani Kanta*, 35 Cr.L.J. 226, 146 I.C. 1051, A.I.R. 1933 Cal. 594, 57 C.L.J. 57, 1933 Cr.C. 958.

Where the Magistrate asked the accused to summon their witnesses before all the witnesses for the prosecution had been examined and to produce them on the day on which some of the prosecution witnesses were to be examined and, on their failure to do so on that date, adjourned the case for arguments and after hearing the arguments fixed a date for delivery of judgment when he examined the accused under this section and delivered the judgment, *held* that the accused were examined at such a late stage that there was a real danger that the Magistrate had made up his mind before he had examined the accused and that due weight was not given to their statements. In these circumstances it was impossible to hold that the omissions, even if they amounted to irregularities, did not seriously prejudice the accused—*Feroze Kazi v. Emp.*, 41 Cr.L.J. 267, A.I.R. 1940 Pat. 295, 186 I.C. 227, 1940 P.W.N. 243.

Where an accused person has been examined under this section after the close of the prosecution case, and the Court examines a person under sec. 540 (whether such person be a prosecution witness or another person), it is not necessary to examine the accused again, especially when the deposition of such person does not disclose any fresh facts, and the accused is in no way prejudiced in not having been examined again—*Prayag Gope*, 3 Pat. 1015 (1017), 5 P.L.T. 571, 82 I.C. 284, A.I.R. 1924 Pat. 764, 25 Cr.L.J. 1276; *Fazal Karim*, 26 Cr.L.J. 1418 (1419), 89 I.C. 842, 1 Lah. Cas. 270, A.I.R. 1926 Lah. 154; *Mahadu*, 30 Bom.L.R. 1086, 29 Cr.L.J. 1057 (1058), 112 I.C. 561, A.I.R. 1928 Bom. 388; *Allah Ditto*, 23 S.L.R. 1, 29 Cr.L.J. 932 (933); *Hidayatullah*, 35 Cr.L.J. 1175, 150 I.C. 906, 28 S.L.R. 106, 1934 Cr.C. 636, A.I.R. 1934 Sind 67; *Ibrahim*, 34 Cr.L.J. 591, 143 I.C. 351, A.I.R. 1933 Sind 49, 1933

Cr.C. 175, Ind. Rul. 1933 Sind 128; *Ramchandra Prasad v Emp.*, 38 Cr.L.J. 657, 168 I.C. 979, A.I.R. 1937 Pat. 246, 3 BR 508, 9 RP 522, 18 P.L.T. 483, 1937 P.W.N. 519; *Gurbakhsh Singh v. Emp.*, 39 Cr.L.J. 856, 177 I.C. 298, A.I.R. 1938 Lah. 631, 11 R.L. 289, 40 P.L.R. 916. The law does not require that the summoning of a witness by the Court should necessitate a further examination of the accused under this section, and, although in some cases when a prosecution witness is recalled and re-examined under sec. 540, Cr. P. C., such procedure should be followed, the procedure does not apply to a witness not previously before the Court called by the Court itself—*Shcoram v. Emp.*, 38 Cr.L.J. 1038 (1060), 171 I.C. 262, 10 R.N. 102, I.L.R. 1937 Nag. 541, A.I.R. 1937 Nag. 285. See also *Kandhai v. Municipal Board, Rae Bareilly*, 39 Cr.L.J. 841, 177 I.C. 56, 11 R.O. 16, 1938 A.Cr.C. 82, 1938 O.A. 591, 1938 O.L.R. 365, 1938 O.W.N. 743. But where the witnesses under sec. 540, Cr. P. C., are examined at the end of the case, the Magistrate would exercise a proper discretion if he records the statements of the accused again after examining those witnesses—*Beni Madho v. Emp.*, 41 Cr.L.J. 816. See, however, *Hooghly-Chinsurah Municipality v. Keshab*, A.I.R. 1932 Cal. 347, 56 C.L.J. 583, 1933 Cr.C. 419, 34 Cr.L.J. 549, 143 I.C. 285 where the non-compliance was held to vitiate the trial.

This section does not make it obligatory to again examine the accused after a charge has been added to or altered, when he has already been examined prior to the addition or alteration of the charge—*Shamial*, 1 Pat. 51, 23 Cr.L.J. 146.

Retrial:—Where a trial was vitiated on the ground that the accused was not examined at the proper stage, a retrial would be ordered, and the retrial should take place *not de novo* but from the stage at which the Magistrate ought to have examined the accused—*Mitarjit*, 6 P.L.J. 644 (649), 22 Cr.L.J. 697; *Pramatha Nath*, 50 Cal. 518 (525), 24 Cr.L.J. 248, 27 C.W.N. 389; *Diba Kanita v. Gour Gopal*, 50 Cal. 939 (948); *Matankhan*, 21 S.L.R. 331, 28 Cr.L.J. 417 (418); *Surendra v. Isamuddin*, 51 Cal. 933 (934); *Ram Charan*, 7 P.L.T. 259, 26 Cr.L.J. 1289; *Muhammad Hoyat Khan*, 29 Cr.L.J. 475 (477), 109 I.C. 123, A.I.R. 1928 Nag. 162, 10 A.I.Cr.R. 242.

De Novo trial:—The omission to examine the accused for a second time during a *de novo* trial is not an illegality which vitiates the trial; at the most, it is only an irregularity to which sec. 537, Cr. P. C., applies—*Marudamuthu v. Raghava*, 36 Cr.L.J. 307, 153 I.C. 297, 1934 M.W.N. 1136, 67 M.L.J. 800, 40 M.L.W. 803, A.I.R. 1935 Mad. 22, 58 Mad. 427. But see *Akhtar*, 29 Cr.L.J. 125, 106 I.C. 717, A.I.R. 1927 Lah. 720.

978. Who can examine:—The Court conducting the trial or inquiry is alone authorised to examine the accused person and the counsel or other person conducting the prosecution should not be allowed to take any part in the examination—*C. P. Cr. Cr.*, Part II, No. 24. Section 342 allows the Court, but not the complainant to put questions to the accused—*Kamandu*, 10 Mad. 121 (123). That is the duty of the Court and it can only be in exceptional circumstances that a Magistrate should find himself obliged to accept any suggestions from the prosecution counsel as to questions to be put under this section—*Hari Krishnaji*, 35 Cr.L.J. 1457, 151 I.C. 778, A.I.R. 1934 Nag. 213, 1934 Cr.C. 984.

A Special Bench constituted under the Criminal Law Amendment Act (XVI of 1908) can examine the accused under this section—*Nagendra Nath*, 19 C.W.N. 923, 21 C.L.J. 396.

Where the Magistrate who has partly tried the case and examined the accused is transferred, and the accused demands a *de novo* trial, the succeeding Magistrate is bound to examine the accused again, and failure on his part to do so vitiates the trial. It is the Magistrate who tries the case and decides it who must examine the accused, and it is not sufficient for his predecessor-in-office to have done so—*Akhtar Mohammad*, 29 Cr.L.J. 125 (126), 106 I.C. 717, A.I.R. 1927 Lah. 720.

979. Improper questions:—It is highly objectionable to put questions to the accused for obtaining explanation in regard to matters which he had previously mentioned in his confession and which he had repudiated as untrue, or for " " :

1934 Cr.C. 1110, 152 I.C. 924; *Gobinda Naidu*, 30 Cr.L.J. 932, 118 I.C. 512, A.I.R. 1929 Mad. 285, 1929 M.W.N. 391, Ind. Rul. 1929 Mad. 832. See also *Shewakram Issardas v. Emp.*, A.I.R. 1939 Sind. 130, 182 I.C. 464, 40 Cr.L.J. 661; *Mahadeo Prasad*, 45 All. 323, 76 I.C. 1025, A.I.R. 1923 All. 322, 25 Cr.L.J. 305, 21 A.L.J. 179; *Marudamuthu Padayachi*, 54 Mad. 788, 134 I.C. 63, A.I.R. 1931 Mad. 820, 61 M.L.J. 358, 34 M.L.W. 162, 1931 M.W.N. 886, 32 Cr.L.J. 1099, Ind. Rul. 1931 Mad. 815 (contra—*Bali Reddi*, 38 Mad. 302, 22 I.C. 157, A.I.R. 1914 Mad. 45, 15 Cr.L.J. 13, 14 M.L.T. 453). Section 30 of the Indian Evidence Act applies only to statements made before and proved at the trial. Section 10 of the Evidence Act refers to things said or done by a conspirator in reference to their common intention. Any statement made by an accused person during the trial can hardly be regarded as a statement by him as a conspirator in reference to the common intention of the persons who were members of the conspiracy. Therefore statements of accused made in the course of the trial under sec. 342, Cr. P. C., are not admissible against the co-accused—*Kunihar Sen v. Emp.*, 34 Cr.L.J. 124 (125), 141 I.C. 192, 9 O.W.N. 1136, Ind. Rul. 1933 Oudh. 33, A.I.R. 1933 Oudh. 86, 1933 Cr.C. 168, 8 Luck. 286. Thus there is divergence of judicial opinion whether a confession made by an accused in the dock, when examined under this section, can be taken into consideration under sec. 30 of the Indian Evidence Act against the other accused persons. In *Motilal v. Emp.*, 41 Cr.L.J. 158 (162), 185 I.C. 310, the Nagpur High Court thought it unnecessary to go into this question for the purpose of deciding the case. Discussing the rulings mentioned above the same High Court has, however, very recently observed: "In his desperate hour of drowning he may not even scruple to drag others with him. Considerations such as this must have presented themselves to the Legislature when it enacted sub-sec. (3) of sec. 342, Cr. P. C. If the statement under sec. 342, Cr. P. C. is not evidence (in the same criminal proceeding) against the accused who makes it, one fails to see how it can be used against his accomplices in the dock. As that sub-section says, it can only be 'considered against him' and on the principle *expressio unius est exclusio alterius* it can only mean 'be considered against him and none else'. It is like an admission made in the pleadings in a civil suit, which binds nobody but the party making it"—*Sumitra v. Crown*, 41 Cr.L.J. 886 (890), 190 I.C. 273, 1940 N.L.J. 343, A.I.R. 1940 Nag. 287. But the Magistrate cannot use the statement of the accused against his co-accused. This is certainly not permissible where the statement is not of a confessional nature. The statements made by the accused under this section are to be considered by the Court and the Court should draw such an inference from the answer of the accused or refusal to answer as it thinks just. The Court in some cases may draw even an inference against the accused from his answer or refusal to answer. But the Court is not entitled to draw any inference against a co-accused from the answer of one accused given in response to questions put to him under the provisions of this section—*Tahasinuddin Ahmad v. Emp.*, 44 C.W.N. 396 (398), 41 Cr.L.J. 563, 188 I.C. 288, A.I.R. 1940 Cal. 250. But if they are tried *separately*, the prohibition would not apply; and an accused can be examined on oath as a witness against his co-accused—*Akhoy Kumar*, 45 Cal. 720, 22 C.W.N. 405, 45 I.C. 999, A.I.R. 1919 Cal. 1021, 19 Cr.L.J. 663, 27 C.L.J. 91; *Chandra Sekhar Prasad*, 36 Cr.L.J. 500 (503), 154 I.C. 387, A.I.R. 1935 Pat. 91, 1935 Cr.C. 146, 1 B.R. 302, 7 R.P. 464; *Muhammad Yusuf*, 58 Cal. 1214, 32 Cr.L.J. 667 (668), 131 I.C. 142, 35 C.W.N. 490, 1931 Cr.C. 405, A.I.R. 1931 Cal. 341; *Banu Singh*, 33 Cal. 1353 (1357); *Durant*, 23 Bom. 213; *Tirbeni*, 20 All. 426; *Joseph*, 3 Rang. 11, 3 Bur.L.J. 265, 26 Cr.L.J. 492 (496). The reason is, that where the trial is separate, the accused in one case is examined in the other case not as an accused person but as a witness, and therefore he can be sworn; otherwise, no man while he stood charged with a criminal offence could possibly be examined as a witness in any criminal trial whatsoever. This is not the intention of the Legislature—*Tirbeni*, 20 All. 426, 1898 A.W.N. 102.

Where in a joint trial of several persons, one accused pleaded guilty and was convicted on his plea, his trial ended then and there and he ceased to be an

and he can be prosecuted in respect of a defamatory matter contained in such statement—*Chawla v. Prithe Lal*, 24 A.L.J. 329, 27 Cr.L.J. 253. The same view is taken by the Bombay High Court—*Est. State v. Urmoo*, 50 Bom. 162, 28 Bom.L.R. 1, 27 Cr.L.J. 423 (F.B.).

932. Sub-section (3):—Sub-section (3) lays down that when an accused person has been examined under this section, the answers given by him may be taken into consideration at the trial and proper inferences drawn therefrom: and even in a subsequent trial for any other offence, they may be used for or against him—*Baldeo*, 6 P.L.J. 241, 22 Cr.L.J. 433. The meaning of the expression 'may be taken into consideration' (which is also used in sec. 30, Evidence Act) is not very clear, but it means at all events that the statement made by the accused person is not to have the force of sworn evidence, and a conviction based on such a statement alone cannot be maintained—*Nirmal*, 22 All. 445; *Akandia*, 15 Bom. 66; *Bhola Nath*, 51 All. 313, 33 Cr.L.J. 101 (112). The Court may take the statement into consideration in order to determine whether the issue of guilt is proved or not, and to that extent it stands practically on the same footing as other evidence, although technically it is not evidence in the case, within the meaning of the Evidence Act, in as much as it is not made on oath—*Abdul Geni*, 49 Bom. 878, 27 Bom.L.R. 1373, 27 Cr.L.J. 114 (120). The words "taken into consideration" are purposely wide. If the statement of the accused person satisfactorily explains the prosecution evidence, there can be no conviction. If the statement as also the defence (if any) do not rebut the prosecution evidence, and the Court feels justified in acting on the latter, it will convict. But, if the prosecution evidence is vague or insufficient, the Court cannot supplement it by selecting, out of the statement of the accused, passages which might corroborate the prosecution evidence and to reject those passages which go to exonerate the accused. The whole statement must be taken into consideration—*Bhola Nath*, 51 All. 313, 30 Cr.L.J. 101 (105). See also *Krishnappa v. Emp.*, 1937 M.W.N. 569 and Note 974.

An admission of incriminating facts made by an accused person to a Magistrate under sec. 164, Cr. P. C., or a statement made to the Court during the course of the trial is admissible in evidence for what it is worth against the person who makes it under secs. 18 to 21, Evidence Act—*Allahgarayo Darykhan v. Emp.*, 41 Cr.L.J. 477 (479), 187 I.C. 576, A.I.R. 1940 Sind 53, I.L.R. 1939 Kar. 800.

Where neither the prosecution nor the accused is able to procure direct evidence, and the case hangs upon circumstantial evidence, the accused's statement must be taken into consideration—*Abdul Geni*, 49 Bom. 878, 27 Bom.L.R. 1373, 27 Cr.L.J. 114 (116).

See also Note 983.

983. Sub-section (4):—No oath can administered to an accused person and therefore he cannot be examined as a witness. Thus, where several accused are tried jointly, one accused cannot be sworn and therefore cannot be examined as a witness against his other co-accused till he is convicted or discharged—*Hanmanta*, 1 Bom. 610; *Asghar Ali*, 2 All. 260; *Akhoy Kumar*, 45 Cal. 720; *Dala Jiva*, 10 Bom. 190; *Alladad*, 1906 P.R. 9; *Nabi Baksh*, 1902 P.R. 12; *Nga Ngwe*, 20 Cr.L.J. 342, U.B.R. (1918) 4th Qr. 115; *Nga Po Min*, 10 Rang. 511, 1932 Cr.C. 932 (933) (F.B.). If several accused are tried jointly, the answers given by one accused cannot be taken into consideration against another accused, under the provisions of this section (but can be taken into consideration under sec. 30, Evidence Act)—*William Cooper*, 51 Bom. 531, 32 Bom.L.R. 747, 31 Cr.L.J. 1137 (1138); *Ganpat v. Emp.*, 134 I.C. 686, A.I.R. 1931 Nag. 169, 1931 Cr.C. 830, 32 Cr.L.J. 1222, 27 N.L.R. 163, Ind. Rul. 1931 Nag. 174; *Dial Singh v. Emp.*, 16 Lah. 651, 161 I.C. 898, A.I.R. 1936 Lah. 337, 37 P.L.R. 806, 8 R.L. 814, 1936 Cr.C. 258, 37 Cr.L.J. 508. Where an accused is being tried jointly with others, any statement made by him before the Court under this section, deprecating his own guilt and seeking to clear himself at the expense of other accused, cannot be taken into consideration under section 30, Evidence Act, or any other provision of the law as against his co-accused. Their conviction cannot be based mainly on his statement under this section and must be set aside—*Jogendra*, A.I.R. 1934 Cal. 724,

1934 Cr.C. 1110, 152 I.C. 924; *Gobinda Naidu*, 30 Cr.L.J. 932, 118 I.C. 512, A.I.R. 1929 Mad 285, 1929 M.W.N. 391, Ind. Rul. 1929 Mad. 832. See also *Shevakram Issardas v. Emp.*, A.I.R. 1939 Sind 130, 182 I.C. 464, 40 Cr.L.J. 661; *Mahadeo Prasad*, 45 All 323, 76 I.C. 1025, A.I.R. 1923 All. 322, 25 Cr.L.J. 305, 21 A.L.J. 179; *Marudamuthu Padayachi*, 54 Mad. 788, 134 I.C. 63, A.I.R. 1931 Mad. 820, 61 M.L.J. 358, 34 M.L.W. 162, 1931 M.W.N. 886, 32 Cr.L.J. 1099, Ind. Rul. 1931 Mad. 815 (contra—*Bali Reddi*, 38 Mad 302, 22 I.C. 157, A.I.R. 1914 Mad 45, 15 Cr.L.J. 13, 11 M.L.T. 453). Section 30 of the Indian Evidence Act applies only to statements made before and proved at the trial. Section 10 of the Evidence Act refers to things said or done by a conspirator in reference to their common intention. Any statement made by an accused person during the trial can hardly be regarded as a statement by him as a conspirator in reference to the common intention of the persons who were members of the conspiracy. Therefore statements of accused made in the course of the trial under sec 342, Cr. P. C., are not admissible against the co-accused—*Kunwar Sen v. Emp.*, 34 Cr.L.J. 124 (125), 141 I.C. 192, 9 O.W.N. 1136, Ind. Rul. 1933 Oudh 33, A.I.R. 1933 Oudh 86, 1933 Cr.C. 168, 8 Luck. 286. Thus there is divergence of judicial opinion whether a confession made by an accused in the dock, when examined under this section, can be taken into consideration under sec. 30 of the Indian Evidence Act against the other accused persons. In *Motilal v. Emp.*, 41 Cr.L.J. 158 (162), 185 I.C. 310, the Nagpur High Court thought it unnecessary to go into this question for the purpose of deciding the case. Discussing the rulings mentioned above the same High Court has, however, very recently observed: "In his desperate hour of drowning he may not even scruple to drag others with him. Considerations such as this must have presented themselves to the Legislature when it enacted sub-sec. (3) of sec 342, Cr. P. C. If the statement under sec. 342, Cr. P. C. is not evidence (in the same criminal proceeding) against the accused who makes it, one fails to see how it can be used against his accomplices in the dock. As that sub-section says, it can only be 'considered against him' and on the principle *expressio unius est exclusio alterius* it can only mean 'be considered against him and none else'. It is like an admission made in the pleadings in a civil suit, which binds nobody but the party making it"—*Sumitra v. Crown*, 41 Cr.L.J. 886 (890), 190 I.C. 273, 1940 N.L.J. 343, A.I.R. 1940 Nag 287. But the Magistrate cannot use the statement of the accused against his co-accused. This is certainly not permissible where the statement is not of a confessional nature. The statements made by the accused under this section are to be considered by the Court and the Court should draw such an inference from the answer of the accused or refusal to answer as it thinks just. The Court in some cases may draw even an inference against the accused from his answer or refusal to answer. But the Court is not entitled to draw any inference against a co-accused from the answer of one accused given in response to questions put to him under the provisions of this section—*Tahasinuddin Akmal v. Emp.*, 44 C.W.N. 396 (398), 41 Cr.L.J. 563, 188 I.C. 288, A.I.R. 1940 Cal 230. But if they are tried separately, the prohibition would not apply; and an accused can be examined on oath as a witness against his co-accused—*Akhoy Kumar*, 45 Cal 731, 22 C.W.N. 405, 45 I.C. 999, A.I.R. 1919 Cal. 1021, 19 Cr.L.J. 663, 27 C.L.J. 57; *Chandrasekhar Prasad*, 36 Cr.L.J. 500 (503), 154 I.C. 387, A.I.R. 1935 Pat. 5, 1935 Cr.C. 146, 1 B.R. 302, 7 R.P. 464; *Muhammad Yusuf*, 58 Cal. 1214, 32 Cr.L.J. 57, 1932 Cr.C. 131 I.C. 142, 35 C.W.N. 490, 1931 Cr.C. 405, A.I.R. 1931 Cal. 341, 30 Cr.L.J. 33, 133 Cal 1353 (1357); *Durant*, 23 Bom 213; *Tirbeni*, 20 All. 426; *Joshi & P. 11, 3 Bur L.J. 265*, 26 Cr.L.J. 492 (496). The reason is, that where the accused is examined as a witness, and therefore he can be sworn; otherwise, no man who is charged with a criminal offence could possibly be examined as a witness—*any witness* whatsoever. This is not the intention of the Legislature—*Tripathi*, 20 All. 500, A.W.N. 102.

Where in a joint trial of several persons, one accused is convicted on his plea, his trial ended then and there and he is not to be

person, even though the Court had deferred passing sentence on him (e.g., where the Court ordered his detention in a reformatory, but said that the period of detention would be fixed later on after receiving medical report as to the age of the accused). He was therefore a competent witness against his other co-accused—*Muhammad Yusuf*, supra. But it is desirable that the Court should pass sentence on him completely, before taking him as a witness, so that he may give evidence with a mind free of all corrupt influence which the fear of impending punishment and the desire to obtain immunity to himself at the expense of the other prisoners might otherwise produce—*Ibid*.

The provision in sub-section (4) that no oath can be administered to the accused has reference only to the statement made by him in answers to questions put to him by the Court under this section. It has no reference to any other act of the accused; and therefore the accused can make an affidavit on oath in support of an application for transfer of the case under sec 526—*Ghulam Muhammad*, 3 Lah. 46, 23 Cr.L.J. 399; *Sadasheo*, 34 Cr.L.J. 1035, 145 I.C. 445, A.I.R. 1933 Nag. 201, 1933 Cr.C. 797, 29 N.L.R. 338; or can file a sworn affidavit in support of a petition for leave to appeal under sec. 449—*Gallagher*, 54 Cal 52, 28 Cr.L.J. 481 (482).

984. "Accused":—The word "accused" in this section means a person over whom the Magistrate or other Court is exercising jurisdiction; therefore a person who has been discharged by the Police without being brought before a Magistrate is not an accused person, and he can give evidence on oath in a trial of his accomplices—*Mona Puna*, 16 Bom. 661; *Aung Min*, 4 L.B.R. 362, 9 Cr.L.J. 370; *Banu*, 4 Cr.L.J. 145, 10 C.W.N. 962, 33 Cal. 1353; *Dawood Kazi*, 50 Bom. 56, 93 I.C. 225, A.I.R. 1926 Bom 144, 27 Cr.L.J. 433, 28 Bom.L.R. 79; *Har Prasad Bhargava*, 45 All. 226, 77 I.C. 961, A.I.R. 1923 All. 91, 25 Cr.L.J. 497, 21 A.L.J. 42; *Keshav*, 36 Cr.L.J. 937, 156 I.C. 392, A.I.R. 1935 Bom 186, 37 Bom.L.R. 179, 1935 Cr.C. 487, 59 Bom. 355, 7 R.B. 511. But the procedure is extraordinary when an accused was examined as a prosecution witness on oath against the other accused although no pardon was offered to her by any Magistrate under sec. 337, nor was any order of discharge under sec. 169 made in respect of her upon an application by the police—*Sohan Lal*, 34 Cr.L.J. 568, 143 I.C. 467, A.I.R. 1933 Oudh 305, 10 O.W.N. 678, 1933 Cr.C. 686, Ind. Rul 1933 Oudh 174. See also Note 1304.

In a case to which sec. 337, Cr. P. C., had no application the prosecution desired to examine one of the accused person as a witness and prayed that his name should be deleted from the charge-sheet and placed on a separate charge-sheet. The Magistrate allowed the prayer and examined him as a prosecution witness. Held that the Magistrate did not act unjudicially in ordering a separate trial and that he was a competent witness—*Karamalli Gulamalli*, 40 Cr.L.J. 118, A.I.R. 1938 Bom. 481, 40 Bom.L.R. 1092, 178 I.C. 706, I.L.R. 1939 Bom 42.

The word "inquiry" used in sec. 342, Cr. P. C., does not include investigation, and the words "accused person" must mean one over whom the Magistrate is exercising jurisdiction. Therefore when the police refrain from prosecuting a person against whom there is adequate evidence to justify his production for inquiry and trial before a Magistrate under sec. 170, Cr. P. C., he must be held to be a competent witness since there is no provision of law which precludes the Court from administering oath to such a person. It is true that he would suffer from the drawback of testifying under a deep shadow of suspicion that his evidence was procured by threat or promise, but that cannot affect his competency although it is bound to detract from his credibility—*Amdumiyar Guljar Patel v. Emp.*, A.I.R. 1937 Nag 17 (23), I.L.R. 1937 Nag 315, 38 Cr.L.J. 237, 166 I.C. 582, 9 R.N. 126 (F.B.). Unless a person is an accused person in the trial this section would not render him incompetent to make any statement on oath—*Sheoshanker Dhondbaji Mahar v. Emp.*, 41 Cr.L.J. 697 (701), 188 I.C. 885, 1910 N.L.J. 165, A.I.R. 1910 Nag. 410 (413).

The term "accused" means a person under trial; a person called upon to show cause under sec. 133 is not an accused person within the meaning of this section, and oath

can be administered to him—*Hanananda*, 2 C.L.J. 149. The parties to a proceeding under sec. 145 are not accused persons and they can be examined on oath—*Mohammad Ayub v. Sarfaraz*, 26 Cr.L.J. 70, 83 I.C. 630, A.I.R. 1925 Oudh 286. A person proceeded against under sec. 488 is not an accused person, and is permitted to give evidence on oath on his own behalf, under sec. 340 (2)—*Vithaldas*, 52 Bom. 768, 29 Cr.L.J. 1501 (1052), 112 I.C. 475, 39 Bom.L.R. 957, A.I.R. 1928 Bom. 347. So also, a person against whom the Public Prosecutor has withdrawn the case can be administered oath and examined as a witness—*Govind*, 18 Bom.L.R. 266, 17 Cr.L.J. 256, A.I.R. 1916 Bom. 229, 34 I.C. 976. An informer is not an accused person and this section does not prevent oath being administered to him—*Mal Singh*, 1887 P.R. 38. A party to a proceeding under sec. 353 of the Calcutta Municipal Act, for the erection of an unauthorised structure, is not accused person, and is not exempt from the administration of oath under sec. 342. The erection of the unauthorised structure is not an offence; it is only when an order for demolition of the structure is disobeyed that the person is said to commit an offence and becomes an accused—*Krishen Doyal v. Corporation of Calcutta*, 54 Cal. 532, 31 C.W.N. 506 (508), 28 Cr.L.J. 407.

Explanation:—Where the party says that the provisions of sec. 342, Cr. P. C., were not complied with but the Magistrate in his explanation says that they were complied with, the Magistrate's explanation must be accepted—*Sadagar*, 49 C.L.J. 261.

343. Except as provided in sections 337 and 338, no influence by means of any promise or threat to induce disclosures or otherwise, shall be used to an accused person to induce him to disclose or withhold any matter within his knowledge.

985. See sec. 24 of the Evidence Act, and compare section 163, *ante*. Where the case against an accused is withdrawn and he is examined as a witness, any inducement offered to such person should be deemed as offered to him as a witness and not as an accused and does not make his evidence inadmissible, though the credit to be attached to such witness is diminished—*Govind*, 18 Bom.L.R. 266, 17 Cr.L.J. 256, 34 I.C. 976; *Mahadeo*, 27 Cr.L.J. 807, 95 I.C. 471, A.I.R. 1926 Nag. 426. For instances of inducement, threat and promise, see Notes under sec. 162.

It is not the duty of the accused person to produce his absconding co-accused persons before the Court. A Court of Justice is not justified in exercising any pressure upon an accused person before it with the object of coercing him to produce persons who are fugitives from justice—*Fakir*, 32 Cr.L.J. 344, 129 I.C. 485, A.I.R. 1930 Lah. 953, Ind. Rul. 1931 Lah. 197, 1930 Cr.C. 1049.

344. (1) If, from the absence of a witness, or any other reasonable cause, it becomes necessary or advisable to postpone the commencement of, or adjourn any inquiry or trial, the Court may, if it thinks fit, by order in writing, stating the reasons therefor, from time to time, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody:

Power to postpone or adjourn proceedings. Remand. Provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time.

(2) Every order made under this section by a Court other

than a High Court shall be in writing signed by the presiding Judge or Magistrate.

Explanation.—If sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence, and it appears likely that further evidence may be obtained by a remand, this is a reasonable cause for a remand.

986. Scope of Section:—This section relates to proceedings in inquiries or trials, and has nothing to do with Police investigations. Sec. 167 contemplates a remand to police-custody, whereas sec. 344 contemplates a remand to jail, not to Police custody—*Krishnaji*, 23 Bom. 32 (34). The custody mentioned in this section is quite different from the custody under section 167. The power to remand under sec. 167 is given to detain prisoners in custody while the police make the investigation, and in a proper case, to commence the inquiry. But the custody under sec. 344 is intended for under-trial prisoners—*Nagendra Nath*, 51 Cal. 402 (412). After the total period of remand allowed under sec. 167 has elapsed, any further remand under that section becomes illegal. The Magistrate can then only take action under sec. 344; but he cannot remand the accused to police custody. He can either detain the accused in the judicial lock-up, or direct his release on bail—*Bal Krishna*, 12 Lah. 435, 33 Cr.L.J. 180 (183), 32 P.L.R. 1, 1931 Cr.C. 163, A.I.R. 1931 Lah. 99. An accused cannot be in magisterial and police custody at one and the same time, that is to say, he cannot be before a Magistrate in magisterial custody in one case under sec. 344, Cr. P. C., and before a Magistrate in police custody in another case under sec. 167, Cr. P. C.—*Dharam Hiranand v. Emp.*, A.I.R. 1937 Sind 251 (253), 31 S.L.R. 494, 171 I.C. 737, 39 Cr.L.J. 10, 10 R.S. 124.

This section is applicable to a case even before the issue of process under sec. 204, and the Magistrate is entitled under sec. 344, if there be a reasonable cause for doing so, to postpone any inquiry or trial and to postpone the issue of process, even if the case be a warrant case—*Ram Saran v. Nikhad Narain*, 6 P.L.T. 477, 26 Cr.L.J. 1179 (1180); *Ram Golam v. Sarat*, 31 Cr.L.J. 262, 121 I.C. 414, 49 C.L.J. 388, A.I.R. 1929 Cal. 281.

Where a Magistrate orders an inquiry under sec. 202, Cr. P. C., he does not deprive himself of jurisdiction and has power under this section to stay the criminal proceedings, which are in fact still pending before him on the application of the accused—*Rewatmal v. Sojanmal*, 1936 Cr.L.J. 94, 152 I.C. 382, A.I.R. 1934 Sind 143, 1934 Cr.C. 1150.

This section enables a Magistrate to postpone or adjourn the inquiry or trial, but does not entitle him to stay further proceedings in a case on his file—*Murugan v. Gutha Rami*, 53 M.L.J. 455, 28 Cr.L.J. 849, 104 I.C. 625, 1927 M.W.N. 694, 39 M.L.T. 103, 26 M.L.W. 405, A.I.R. 1927 Mad. 851, 9 A.I.Cr.R. 7.

This section enables a Magistrate or Judge to postpone or adjourn any inquiry or trial which is being held in his own Court. There is no provision which gives a District Magistrate the power to stay proceedings in a Criminal Court subordinate to him. Such power can be exercised only by the High Court—*Jagannath v. Rajagopalachari*, 12 P.L.T. 671, 1931 Cr.C. 999 (1002), A.I.R. 1931 Pat. 411; *Krishna Row v. Sesha Subramania*, 1923 M.W.N. 251, 25 Cr.L.J. 277, A.I.R. 1923 Mad. 688, 76 I.C. 869. But see contra—*Nambia v. Sudalimuthu*, 44 M.L.J. 642, 25 Cr.L.J. 280, A.I.R. 1923 Mad. 595, which holds that the District Magistrate can exercise such powers under sec. 17.

987. Adjournment:—Although it is the policy of law that a Court should proceed to inquire into and try a case as soon as it takes cognizance of a complaint, still he can postpone the inquiry or trial if in his opinion there are sufficient and reasonable grounds for so doing—*Ram Saran v. Nikhad Narain*, 6 P.L.T. 477, 26 Cr.L.J. 1179 (1180). But adjournments should not be made except upon strong and reasonable grounds. It is most inexpedient for a sessions trial to be adjourned. The trial before a Court of Session should proceed and be dealt with continuously from its inception to

its finish. Occasions may arise when it is necessary to grant adjournments, but such adjournments should be granted only on the strongest possible ground and for the shortest possible period—*Badri Prasad*, 10 A.L.J. 473, 13 Cr.L.J. 861. Magistrates should refrain from granting adjournments save in cases where they are clearly necessitated for the purpose of justice. In a petty criminal case both parties should appear on the first day of hearing, ready for the completion of the entire trial at a single hearing—*Narayana Maharana*, 9 Pat 113, 31 Cr.L.J. 789. Where a trial is adjourned to a particular date, it is not competent for the Magistrate to accelerate the date of hearing against the wishes of the accused or his pleader. The trial should not be concluded nor judgment pronounced without waiting till that date—*Karam Din*, 14 P.R. 1898.

It is discretionary with the Court to adjourn the inquiry or trial. But this discretion is to be exercised only if there is reasonable cause for the adjournment. If the Magistrate does not exercise his discretion judicially in postponing a case, the High Court will interfere and set aside the order, but if the discretion is exercised in a sound and judicial manner, it will not be interfered with—*Ram Saran v. Nikhad*, 6 P.L.T. 477, 26 Cr.L.J. 1179 (1181). If the Magistrate has exercised proper judicial discretion in refusing to adjourn a case, the High Court will not interfere—*Ramiah v. Ramiah*, 50 Mad. 839, 28 Cr.L.J. 812 (813). When a Magistrate is of opinion that a party before him is unnecessarily wasting time and protracting the case, he has a discretion to refuse an adjournment for bringing fresh witnesses—*Ali Sher v. Mir Mohammad*, 26 Cr.L.J. 958, 87 I.C. 110, A.I.R. 1924 Sind 315.

The Magistrate should take some evidence before granting adjournment. On an application for adjournment by the prosecution on the ground that it would not be advisable to proceed with the case in the absence of an accused whose appearance had up to the date of the application not been secured, the Magistrate should, before granting the application, require the production of some evidence. But the omission to do thus, in a case in which the Magistrate had recorded some evidence before the issue of warrant, would not by itself entitle the accused to claim to be discharged—*Billinghurst v. Meek*, 49 Cal. 182, 22 Cr.L.J. 465.

A postponement *sine die* is not in accordance with the provisions of this section. The correct method is for the Court to postpone the case, not *sine die*, but for fixed and definite periods, pending the disposal of the connected case—*Tarachand*, 34 Cr.L.J. 139, A.I.R. 1932 Sind 214, 141 I.C. 179, 1932 Cr.C. 905; *Ramchand*, 115 I.C. 313, 23 S.L.R. 225, A.I.R. 1929 Sind 115, 1929 Cr.C. 106, 30 Cr.L.J. 399; *Dinalshah*, 35 Cr.L.J. 517, 147 I.C. 856, 27 S.L.R. 219, A.I.R. 1933 Sind 358, 1933 Cr.C. 1340.

A criminal case once fixed for a future date may be heard at an earlier date provided due notice is given to the accused or his pleader—*Roatmal v. Sampat*, 29 Cr.L.J. 1092, 112 I.C. 676, 11 N.L.J. 260, A.I.R. 1929 Nag 42.

988. Grounds of adjournment:—The Magistrate may adjourn a trial for the purpose of allowing the accused to secure the attendance of his witnesses—*Dinoo Ray*, 16 W.R. 21; *Totaram*, 11 W.R. 15. The fact that the accused's advocate has gone to another place where he is detained in a lengthy criminal case is a reasonable ground for adjournment—*Esteves*, 4 Bur.L.T. 213, 12 Cr.L.J. 474. The Madras High Court holds that if a person applies for an adjournment owing to the absence of his vakil, the Court may grant an adjournment, but on condition of his paying the costs of the adjournment—*Sannasi Kudumbun v. Sivasubramania*, 40 Mad. 1130, 33 M.L.J. 366. The accused is entitled to have an adjournment of his case so as to enable him to secure the services of a pleader whom he wants to engage for the purpose of cross-examining the prosecution witnesses—*Paras Ram v. Jalal Din*, 4 P.W.R. 1916, 17 Cr.L.J. 7. But in a Sessions case in which a number of witnesses have been summoned, the mere fact that the Counsel for one of the accused has for some reason or other to absent himself is no ground for the adjournment of the case—*Salag Ram v. Emp.*, 38 Cr.L.J. 416 (418), 167 I.C. 515, A.I.R. 1937 All. 171, 1937 A.L.R. 201 9 R.A. 550. A Magistrate is justified in adjourning a case till the disposal of the counter case, where

point of law raised in the former case can be conveniently decided after the disposal of the latter case—*Ram Saran v. Nikhad*, 6 P.L.T. 477, 26 Cr.L.J. 1179. Where the counsel for the accused in a capital case applied for permission to cross-examine the witnesses on the day following as he was not prepared to cross-examine them that day, the Court should grant the application—*Sadasiv*, 41 Cal. 299. According to the provisions of secs. 256 and 257, the accused is entitled as a matter of right to ask for an adjournment, after a charge has been framed against him, to enable him to adduce evidence in support of his defence—*Emtaz Ali v. Jagat*, 1 C.W.N. 313. Where a Magistrate has once issued process for the attendance of a defence witness, he is bound to enforce his attendance and cannot refuse an adjournment which is asked for by the accused in order that the witness's attendance may be secured—*Mihir Lal*, 24 Cr.L.J. 370 (Cal.). The pendency of an appeal against the conviction of the accused in a case is a good ground for adjourning the trial of the same accused in a subsequent case—*Mantra Kamaraju*, 6 M.L.T. 90, 9 Cr.L.J. 495.

What are not good grounds for adjournment :—The Magistrate cannot postpone an inquiry for a reason not contemplated by this section, for instance, his being busy with executive work—*Muthooru v. Heera*, 17 W.R. 55. The fact that the accused wants time to engage an advocate and prepare his defence is not a sufficient cause for adjourning a trial in ordinary cases, though in complicated and difficult cases an adjournment may be granted on that ground—*Taung Bo*, 1 L.B.R. 270. But see *Paras Ram v. Jalal Din*, cited above. A Court is, however, not obliged to pay any attention to a telegram from a pleader asking for adjournment of hearing—*Bhanwarsingh v. Sukhramsingh*, A.I.R. 1910 Nag. 283, 188 I.C. 413, 1940 N.L.J. 410, 41 Cr.L.J. 585, following *Kolhatkar*, 6 N.L.R. 129, 8 I.C. 282. Where a number of persons are accused of having committed an offence, the absence of some of them is not a reasonable cause for adjourning the inquiry into the guilt of the rest who have appeared before the Magistrate—*Nga Tun*, 1 L.B.R. 60. The absence of a co-accused and the desirability of a joint trial are not sufficient reasons for the further postponement of proceedings—*Billinghurst v. Meek*, 49 Cal. 182.

Counter-cases :—Where two counter cases are filed, one on a complaint and the other on a police-challan, and the complainant in one case is the accused in the other, there is no rule of law that the complaint-case should be postponed till the disposal of the police-challan case. The Court should adopt the procedure which will meet the ends of justice. In a Calcutta case the High Court ordered that the two cases must be tried simultaneously but must be dealt with separately from each other, each on its own merits, and the judgments in both the cases should be pronounced after both the trials are finished—*Sheik Bahatar v. Nobadati*, 28 C.W.N. 487, 26 Cr.L.J. 65 (66, 67). In a Patna case where it was found that the main question for decisions in one case could be conveniently decided after the disposal of the counter-case, it was held that the Magistrate had acted rightly in postponing the one case till the disposal of the other—*Ram Saran v. Nikhad Narain*, 6 P.L.T. 477, 26 Cr.L.J. 1179 (1181). See Notes in para 830A.

989. Stay of criminal proceedings pending civil suit :—This section empowers the Criminal Court to adjourn an inquiry or trial for 'any reasonable cause' and the institution of a civil suit between the same parties and in respect of the same property is certainly a reasonable cause for which criminal proceedings should be stayed—*Paras Ram v. Jalal Din*, 4 P.W.R. 1916, 17 Cr.L.J. 7. See also *Ankamma v. Adrikholu*, 18 L.W. 236, 24 Cr.L.J. 640; and *Periasami*, 20 L.W. 514, 35 M.L.T. 99. Ordinarily criminal proceedings should not be started when the same question is also involved in a pending civil litigation. This, however, is not a rule of law but a rule dictated by prudence and its application must depend on the merits of each case—*Lorind Singh*, 31 Cr.L.J. 1053, 126 I.C. 523, A.I.R. 1930 Lah. 802. But there is no hard and fast rule that a criminal case should be stayed pending the disposal of a civil suit in relation to the same subject matter. Each case must be decided upon its own facts—*Gopal Chandra*, 33 C.W.N. 969 (972); *Raj Kumari v. Bama Sundari*, 23 Cal. 610 (620); *Subramanian Chetti*, 2 Weir 415; and the institution of a civil suit is not always a valid

ground for adjourning a criminal prosecution, although the issues and evidence in the two cases are practically the same—*Mathura v. Durga*, 2 Cr.L.J. 798, 2 A.L.J. 747, 1905 A.W.N. 254; *Gopal Chandra*, supra; *Ramiah v. Ramiah*, 50 Mad 839, 28 Cr.L.J. 812; *Brojobashi*, 13 C.W.N. 398, 11 Cr.L.J. 4. But it is highly undesirable that the same dispute should be allowed to be fought out simultaneously in the civil and criminal Courts; and so the criminal proceedings should be stayed pending the decision of the civil suit—*Kanhaiyalal v. Bhagwan*, 48 All. 60, 23 A.L.J. 956, 26 Cr.L.J. 1485 (1488); *Raj Kumari v. Bama Sundari*, supra; *Shri Nama Maharaj*, 16 Bom 729. Although a decision of the Civil Court is not technically binding upon the Criminal Court, still if the Civil Court's decision is in favour of the accused, it creates such a doubt in his guilt that it would almost become impossible for the latter Court not to give him its benefit. Therefore, it is proper for a Criminal Court to adjourn the proceedings till the decision of the civil suit—*Paras Ram v. Jalal Din*, 17 Cr.L.J. 7, 4 P.W.R. 1916. Where the decision of the civil suit, which has been instituted several months before the criminal case, is likely to throw considerable light upon the dispute in the criminal case, the proceedings of the Criminal Court should be stayed pending the decision of the civil suit—*Linton*, 28 P.L.R. 103, 28 Cr.L.J. 326 (327). But where the criminal prosecution does not arise directly out of the proceedings in the Civil Court and the decision in the Civil Court will not necessarily affect the decision of the Criminal Court, it would be unreasonable and speculative to order stay of the proceedings in the Criminal Court on the off-chance that there might be some decision in the Civil Court which might have some bearing on the criminal prosecution—*U Tha Zan v. U. Pyant*, 37 Cr.L.J. 261, 160 I.C. 175, A.I.R. 1935 Rang. 487, 1935 Cr.C. 1264. The test in every case would be whether the accused is likely to be seriously prejudiced by the continuance of the criminal proceedings against him, during the pendency of the civil proceedings—*Jehangir v. Framji*, 30 Bom.L.R. 962, 29 Cr.L.J. 1053 (1056). If the object of prosecuting the criminal proceedings, while a civil suit in relation of the same matter is pending, be in reality to prejudice the trial of the civil suit or to coerce the accused into a compromise of the civil suit on terms to be practically dictated by the complainant, the Magistrate should, as a general rule, postpone the criminal proceedings till the disposal of the civil suit—*Subramanian Chetti*, 2 Weir 415 (416); *Jehangir Pestonji v. Framji*, 30 Bom.L.R. 962, 29 Cr.L.J. 1053 (1056). Indirect motive or coercion by way of pressure on the defendants in the civil suit may lead a Court to stay the criminal proceedings—*Gopal Chandra*, 33 C.W.N. 969 (974). One important test to determine whether the criminal proceedings should be stayed pending the civil suit is whether the criminal prosecution is public or private. If it is public, the Court will not as a rule stay the criminal proceedings; if it is private, there will not be the same reluctance on the part of the Court to interfere with the criminal proceedings—*Jehangir v. Framji*, supra; *Gopal Chandra*, 33 C.W.N. 969 (972); *Raj Kumari v. Bama Sundari*, 23 Cal. 610 (619).

An order staying a criminal trial of the offence of rioting or mischief in which questions of possession will have to be gone into, until a civil suit on a question of title has been disposed of, is not a proper order, because the Civil Court's decision on title will not operate as *res judicata* on any question of possession to be decided by the Criminal Court—*Nambra v. Sudalaimuthu*, 44 M.L.J. 642, 25 Cr.L.J. 280, A.I.R. 1923 Mad. 595 (596). But in cases arising out of a disputed title in which it is difficult to draw the line between a *bona fide* claim and criminal trespass, if the title is already the subject-matter of a civil suit before the institution of criminal proceedings, it may be advisable for the Criminal Court to abide the civil trial—*Ramiah v. Ramiah*, supra.

Though no invariable rule can be laid down, it is ordinarily undesirable to institute criminal proceedings until determination of civil proceedings in which the same issues are involved. It is too well known to need elaboration that criminal proceedings lend themselves to the unscrupulous application of improper pressure with a view to influencing the course of civil proceedings; and beyond that there is the mischief of criminal proceedings being instituted with an imperfect appreciation of the facts

where they have not been ascertained in the more searching investigation of a Civil Court—*J. M. Lucas v. Assignee of Bengal*, 24 C.W.N. 418 (424), A.I.R. 1920 Cal. 624, 21 Cr.L.J. 481, 56 I.C. 577. It is highly undesirable that the same dispute should be allowed to be fought out in two Courts, namely, Criminal and Civil Courts simultaneously—*Khanhaiya Lal v. Bhagwan Das*, 26 Cr.L.J. 1485 (1488), 89 I.C. 1053, 48 All. 60, A.I.R. 1926 All. 30, 23 A.L.J. 956. Undoubtedly the fact that it is a public prosecution and not a private one is a matter which has to be considered. But that only goes to show that the prosecution may be conducted in good faith and it does not carry the matter much further than that. On the other hand, the important question is whether the issues in the criminal case are likely to be included in the issues in the civil suit and whether in that case there is a risk of a conflict of jurisdiction. Where the civil suit is ripe for hearing the ends of justice will not suffer by postponement of the prosecution in the Criminal Court—*Srihsson*, A.I.R. 1935 Cal. 182, 159 I.C. 964, 37 Cr.L.J. 187, 1935 Cr.C. 1217, following *J. M. Lucas v. Assignee of Bengal*, supra, and distinguishing *Gopal Chandra*, 33 C.W.N. 969, A.I.R. 1929 Cal. 563, 1929 Cr.C. 202, 121 I.C. 308; *Jehangir Pestoji v. Framji*, 30 Bom.L.R. 962, 29 Cr.L.J. 1053, 112 I.C. 477 and *Chitrala v. Natu Kula*, A.I.R. 1927 Mad. 778, 104 I.C. 252, 28 Cr.L.J. 812, 50 Mad. 839.

Although, generally speaking, it is not desirable that civil and criminal litigation between the same parties on substantially the same facts should go on simultaneously, the mere fact that a civil case is pending is not by itself a sufficient ground for staying criminal proceedings. The defendant in a civil suit ought not to be allowed to prejudice the trial of such suit by launching and proceeding with a criminal prosecution on the same facts against the plaintiff and his witness. If there are reasons to believe that they had been launched with that object the Court should generally stay criminal proceedings. Conversely, if the Court has reason to believe that a civil suit had been launched with the object of prejudicing criminal proceedings, the Court should not be likely to stay the latter, though the Court should, if necessary, stay the civil suit. In all such cases one of the matters which the Court has to consider is whether the object of the criminal proceedings is to prejudice the trial of the civil suit or to use them as a lever to coerce the accused into a compromise of the civil suit, and in that connection the question whether the criminal complaint or the civil suit was instituted first is always important. The Courts have frequently drawn a distinction between public and private prosecutions and indicated that stronger reasons for staying proceedings should be required in the case of the former than in the case of the latter. But this is not the only test nor is priority in time necessarily conclusive. There is no hard and fast rule in the matter. The Court has to consider the circumstances of each particular case and decide on grounds of justice and expediency whether it is proper that the criminal proceedings should be stayed, or, it may be, that the civil proceedings should be stayed or that both should be allowed to take their course—*Louis Phillip Dias v. Mahadev Barik Raut*, 35 Cr.L.J. 311 (312), 147 I.C. 230, A.I.R. 1933 Bom. 485, 1933 Cr.C. 1589, 58 Bom. 49, 35 Bom.L.R. 1054; *Rewatmal v. Sajanmal*, 36 Cr.L.J. 94, 152 I.C. 382, A.I.R. 1934 Sind 143, 1934 Cr.C. 1150; *Falz Muhammad v. Abbas Jafferati*, 36 Cr.L.J. 1350, 158 I.C. 256, 1935 Cr.C. 950, A.I.R. 1935 Sind 187; *Ramchandra Babaji Gujjar*, 34 Cr.L.J. 900, 145 I.C. 161, 35 Bom.L.R. 384, A.I.R. 1933 Bom. 307, 1933 Cr.C. 891.

When it is not known when the suit instituted will be disposed of and when the judgment is given there may be an appeal and even a second appeal, it is undesirable that the complaint should remain undisposed of till the Civil Court has pronounced on the question of title—*Dinalshah*, 35 Cr.L.J. 517, 147 I.C. 856, 27 S.L.R. 219, A.I.R. 1933 Sind 358, 33 Cr.C. 1340.

When the genuineness of a document, which was the subject of the prosecution, was a question at issue in a civil suit which was brought by the same person who instituted the criminal proceedings, held that the criminal proceedings ought to be stayed because it depended on the prosecutor to have the civil suit determined without delay, and then to take such criminal proceedings as he thought proper—*Shashi Bhusan*, 38 Cal. 106.

Where the complaint and the civil suit were filed by the same person on the same date and the dispute between the parties in the two matters was practically identical, *held* that the Civil Court having full seisin of the matter, it was desirable that the Criminal Court should stay its hands—*Gopeshwar*, 10 C.W.N. ccx.

In *Bakeshar Nath v. Ratan Chand*, 34 Cr.L.J. 96, 141 I.C. 66, Ind. Rul. 1933 Lah. 61, 33 P.L.R. 1045, A.I.R. 1933 Lah. 37, 1933 Cr.C. 117, the Lahore High Court held that the Magistrate was justified in holding that all the prosecution evidence should be recorded before the question of staying the criminal case could be considered. Where a receipt filed in a civil suit was found to be a false one and a complaint was made under sec. 476, Cr. P. C., for prosecution of the party producing it, the same High Court directed the Magistrate to proceed with the hearing of the complaint but not to pass final orders in the case till the civil appeal decided—*Sochet Singh*, 32 Cr.L.J. 584, 130 I.C. 651, Ind. Rul. 1931 Lah. 331, A.I.R. 1931 Lah. 49, 1931 Cr.C. 113, 32 P.L.R. 303. Where a party in a civil suit instituted a criminal case under sec. 500, I. P. C., in respect of certain statements made in an affidavit filed by the other party in the civil suit, *held* that it was highly expedient that the hearing of the complaint should not proceed until the disposal of the suit and of any application which may follow for the prosecution of the other party for perjury—*Katimal v. Kissumal*, A.I.R. 1935 Sind 81, 156 I.C. 219, 35 Cr.L.J. 881, 1935 Cr.C. 367.

Where a civil suit was brought on a handnote and after its institution the complainant presented a complaint to the effect that he had gone to the accused (plaintiff of the suit), but the accused had failed to return the pro-note and therefore he had been cheated, criminal proceedings were stayed by the order of the High Court in order that the Civil Court should first decide on the genuineness of the plea of payment and refusal to return the handnote—*Banambar Chhotra v. Nata Behara*, A.I.R. 1925 Pat. 193, 84 I.C. 350, 26 Cr.L.J. 286, 6 P.L.T. 348. Similarly, where the accused instituted a suit on a handnote against the complainant who, after the service of summons of the civil suit on him, lodged a complaint against the accused on the allegation that the accused had forcibly taken his thumb impression on a blank paper rather less than two months before the date of the complaint, the High Court stayed criminal proceedings pending the disposal of the civil suit—*Molhu Rai v. Emp.*, A.I.R. 1937 Pat. 8, 38 Cr.L.J. 264, 166 I.C. 692, 9 R.P. 336, 3 B.R. 215.

The trial of a case under sec. 212, I. P. C., on the allegation that the accused harboured certain persons accused of certain offences should be stayed until the case relating to the main offences, alleged to have been committed by the persons harboured, is finally disposed of—*Palani Goundan v. Emp.*, 1937 M.W.N. 21.

Who can order stay of proceedings:—There is no provision in the Criminal Procedure Code which gives District Magistrate power to stay proceedings in a Criminal Court subordinate to him—*Jagannath v. Rajagopala Chari*, 33 Cr.L.J. 147 (151), 135 I.C. 513, 12 P.L.T. 671, A.I.R. 1931 Pat. 411, 1931 Cr.C. 999, Ind. Rul. 1932 Pat. 33, following *Krishna v. Seshasubramania*, 76 I.C. 869, 1923 M.W.N. 251, A.I.R. 1923 Mad. 688, 25 Cr.L.J. 277 and dissenting from *Nambia v. Sudalaimuthu*, 76 I.C. 872, 1923 M.W.N. 276, 17 M.L.W. 570, 32 M.L.T. 191, 44 M.L.J. 642, A.I.R. 1923 Mad 595, 25 Cr.L.J. 280.

990. Costs of adjournment:—The words "on such terms as it thinks fit" empower the Criminal Courts to grant an adjournment conditionally on payment of the costs of adjournment—*Sannasi Kudumban v. Sivasubramani*, 40 Mad 1130; *Shuldham*, 1904 P.R. 20; *Raghunandan v. Ramadin*, 2 P.L.W. 218, 19 Cr.L.J. 6. This section clearly entitles a Court to award costs of adjournment to a party who has been put to unnecessary expenses by an adjournment on the application of the other party. A judicious exercise of this power would have the effect of preventing many useless adjournments—*Mathura Prosad v. Basant*, 28 All. 207. Where the accused asks for an adjournment to which he is not entitled, the Court may make an order of adjournment conditionally on his paying the costs of the other side—*Sew Prasad v. Corporation of* 9 C.W.N. 18. No doubt the Criminal Courts are empowered to order an

he asks for adjournment, to pay costs to the complainant, but this power should not be exercised in such a manner as to place obstacle in the way of the accused properly defending himself—*Ishar Singh v. Shama Dusadh*, 38 Cr.L.J. 484 (486), 167 I.C. 881, 17 P.L.T. 627, A.I.R. 1937 Pat. 131, 3 B.R. 379, 9 R.P. 449.

It is improper to direct the accused to pay the costs of adjournment when he applies under sec. 526 for a transfer, because an adjournment is usually granted in such a case and the accused is entitled to it—*Sorabji v. Erachshaw*, 56 Bom. 536, 1932 Cr.C. 598 (601), Ind. Rul. 1932 Bom. 509, 139 I.C. 577, 33 Cr.L.J. 802, 34 Bom.L.R. 1106, A.I.R. 1932 Bom. 470; *Fatta*, 1911 P.W.R. 8; *Abdul Rahiman*, 44 I.C. 342, 19 Cr.L.J. 326, 20 Bom.L.R. 124, 42 Bom. 254; *Salek Chand v. Emp.*, A.I.R. 1936 All. 851, 1936 A.L.J. 1123, 38 Cr.L.J. 142, 166 I.C. 198, 1936 A.L.R. 1015, 1936 Cr.C. 1110, I.L.R. 1937 All. 161, 9 R.A. 369. But it has always been held that sec. 344, Cr. P. C., does justify an order for costs. It was enacted in the year 1932 that nothing contained in sub-sec. 8 or sub-sec. 9 of sec. 526, Cr. P. C., should restrict the powers of a Court under sec. 344; therefore, nothing in those sub-sections can restrict the power of a Court to pass an order for costs under sec. 344. A Court cannot, of course, pass a conditional order of adjournment because it has to pass such an order, but it may, when passing its order for adjournment, direct that the party whose application has necessitated adjournment shall pay costs of the opposite party—*Ram Rakshpal v. Ram Nath*, 39 Cr.L.J. 352, 173 I.C. 385, A.I.R. 1938 All. 112, 1937 A.L.J. 1356, 1938 A.L.R. 133, 10 R.A. 481, I.L.R. 1938 All. 233, 1937 A.W.R. (H.C.) 1226, 1938 A.Cr.C. 4, distinguishing *Salek Chand v. Emp.*, supra, on the ground that it laid down merely that a conditional order for an adjournment under sec. 526 was not justifiable as a Magistrate was bound to adjourn under sub-sec. 8 of that section. It may be noted that the above mentioned cases of the Bombay High Court and the Punjab Chief Court were decided before the amendment of sec. 526 in 1932.

An order requiring the accused to pay the costs of an adjournment is one which is left to the discretion of the Magistrate, and the High Court will not interfere with such an order if not found to be unreasonable—*Sorabji v. Erachshaw*, 56 Bom. 536, 34 Bom.L.R. 1106, A.I.R. 1932 Bom. 470, 139 I.C. 577, 33 Cr.L.J. 802, 1932 Cr.C. 598 (599). An order for costs will be made only in those cases where the circumstances are exceptional and where for some reason or other the ordinary everyday method of conducting criminal cases must be departed from—*Abdul Rahiman*, 42 Bom. 254, 20 Bom.L.R. 124, 19 Cr.L.J. 326, 44 I.C. 342. No order for costs should be made where the adjournment is inevitable and there is no other alternative. Thus, where the accused person being absent, the Court cannot proceed with the case, and is bound to adjourn the hearing, it would be entirely opposed to the spirit of this section if the Magistrate under such circumstances passes orders awarding the costs of adjournment against the accused—*Browne v. Chandra Singh*, 6 P.R. 1906, 4 Cr.L.J. 78; *Beedha*, 20 A.L.J. 280, 23 Cr.L.J. 243; *Gulab v. Inder*, 36 Cr.L.J. 101, 152 I.C. 145, 36 P.L.R. 74, A.I.R. 1934 Lah. 441, 1934 Cr.C. 669. It is competent to a Magistrate to award costs of the adjournment which is granted on the present occasion, but he cannot award the costs of the adjournment which was granted on previous occasions without any conditions—*Sorabji v. Erachshaw*, supra.

This section does not apply to proceedings in appeal, and therefore an Appellate Court's order requiring the appellant, who has applied for an adjournment of the appeal, to pay costs of adjournment is improper and *ultra vires*—*Suraj Bhan*, 29 P.R. 1919, 21 Cr.L.J. 201, 54 I.C. 985; *Rajanna*, 1933 M.W.N. 878.

The provisions of this section do not apply to proceedings in revision. So where in a revision application to set aside an order discharging certain accused persons the Sessions Judge granted an adjournment on condition that the applicant should deposit the fee of the Special Public Prosecutor within a week, held that the order must be set aside—*Jethanand Thakardas v. Tahilram*, A.I.R. 1936 Sind 235, 38 Cr.L.J. 119, 165 I.C. 993, 9 R.S. 115, 30 S.L.R. 357, 1936 Cr.C. 1091.

Who can be ordered to pay costs :—The costs are to be paid by the party applying for the adjournment. Where a criminal case is taken up on a Police charge-sheet filed on information given by a private person and such person engages a Vakil and moves the Court for an adjournment owing to the absence of the Vakil, *held* that an order for costs can be validly made against that person on granting the adjournment prayed for, even though he may not be a complainant under sec. 200, since an informant is a person recognised in the Code as initiating criminal proceedings as much as a complainant acting under sec. 190—*Sannasi Kurumban v Sivasubramania*, 40 Mad. 1130, 33 M.L.J. 366. But where the prosecution is wholly conducted by the Police and the adjournment is asked for only for the convenience of the Police, the complainant cannot be ordered to bear the costs of the adjournment—*Laxman Natha*, 24 Bom.L.R. 380, 23 Cr.L.J. 338, A.I.R. 1922 Bom. 239. If an adjournment takes place for which the complainant is solely to blame, then of course an order can be made that the complainant should pay any costs which may have been incurred by the accused for the adjournment—*Laxman Natha*, *supra*.

The complainant in a proceeding under sec. 107, Cr. P. C., has no duty to accompany the Court process-server to secure service of summons upon the opposite party. The Court cannot award costs against the complainant under this section for his failure to accompany the process-server—*Kazam Khan*, 35 Cr.L.J. 457, 147 I.C. 675, A.I.R. 1933 Lah. 720, 1933 Cr.C. 941.

991. Remand :—From the language of sub-section (1) it appears that where the Magistrate directs a postponement, he has unfettered discretion to remand the accused to custody. But there must be *reasonable cause* for the remand, just as there must be reasonable cause for postponement or adjournment. The Explanation describes only one type of *reasonable cause* for remand, but there may be cases in which there is a *reasonable cause* for a remand where the circumstances are not those set out in the Explanation. Thus, where the accused was arrested in connection with an Arms Conspiracy case, and *in a search his name appeared in certain manuscripts and correspondences, in conjunction with the name of a dangerous revolutionary, with whom he was very intimate, held* that the order remanding him to custody was proper—*Sundar Ram*, 37 C.W.N. 683 (685), 146 I.C. 167, 34 Cr.L.J. 1194, 1933 Cr.C. 1254, A.I.R. 1933 Cal. 752. When the accused is at first brought before a Magistrate and remand is desired, it is not necessary to go fully into the charge; it is ordinarily sufficient to show by the evidence of a Police officer that they believe that the accused is concerned in the commission of an offence; and on such proof the accused will be remanded to custody. If the accused is again brought up after a remand, and further remand is asked for, some direct evidence of the guilt of the accused should be required to justify the Magistrate in ordering for further remand; and with each remand the necessity for the production of evidence of guilt becomes stronger—*Ponnusami*, 6 Mad. 69, *Jamini*, 36 Cal. 174; *Ahmad Ali*, 11 N.L.R. 162, 16 Cr.L.J. 705.

The Explanation says that the Magistrate can remand the accused, if sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence, and it appears likely that further evidence may be obtained by such remand—*Sooda*, 1931 A.L.J. 617, 32 Cr.L.J. 1045 (1049), 133 I.C. 617, 1931 Cr.C. 969, A.I.R. 1931 All. 617; *Narendra Lal Khan*, 36 Cal. 166 (171). Where evidence was available, but it appeared necessary to the Magistrate to defer the examination of witnesses in order that further evidence might be produced, so that the inquiry when commenced might be continuous, *held* that the remand of the accused in such a case was justified—*Manikam*, 6 Mad. 53. But a Magistrate is not justified in postponing an inquiry and remanding the accused when there is no evidence at all which can be the foundation of a charge, and merely on the expectation that after some time on some inquiry being made some evidence may be obtained—*Muthoora v. Heera*, 17 W.R. 55. Where the accused person had already made a confession and had produced an article stolen from a person, and there was ample evidence before the Magistrate, it was held that the

he asks for adjournment, to pay costs to the complainant, but this power should not be exercised in such a manner as to place obstacle in the way of the accused properly defending himself—*Ishar Singh v. Shama Dusatdh*, 38 Cr.L.J. 484 (486), 167 I.C. 881, 17 P.L.T. 627, A.I.R. 1937 Pat. 131, 3 B.R. 379, 9 R.P. 449.

It is improper to direct the accused to pay the costs of adjournment when he applies under sec. 526 for a transfer, because an adjournment is usually granted in such a case and the accused is entitled to it—*Sorabji v. Erachshaw*, 56 Bom. 536, 1932 Cr.C. 598 (601), Ind. Rul. 1932 Bom. 509, 139 I.C. 577, 33 Cr.L.J. 802, 34 Bom.L.R. 1106, A.I.R. 1932 Bom. 470; *Fatta*, 1911 P.W.R. 8; *Abdul Rahiman*, 44 I.C. 342, 19 Cr.L.J. 326, 20 Bom.L.R. 124, 42 Bom. 254; *Salek Chand v. Emp.*, A.I.R. 1936 All. 851, 1936 A.L.J. 1123, 38 Cr.L.J. 142, 166 I.C. 198, 1936 A.L.R. 1015, 1936 Cr.C. 1110, I.L.R. 1937 All. 161, 9 R.A. 369. But it has always been held that sec. 344, Cr. P. C., does justify an order for costs. It was enacted in the year 1932 that nothing contained in sub-sec. 8 or sub-sec. 9 of sec. 526, Cr. P. C., should restrict the powers of a Court under sec. 344; therefore, nothing in those sub-sections can restrict the power of a Court to pass an order for costs under sec. 344. A Court cannot, of course, pass a conditional order of adjournment because it has to pass such an order, but it may, when passing its order for adjournment, direct that the party whose application has necessitated adjournment shall pay costs of the opposite party—*Ram Rakshpal v. Ram Nath*, 39 Cr.L.J. 352, 173 I.C. 385, A.I.R. 1938 All. 112, 1937 A.L.J. 1356, 1938 A.L.R. 133, 10 R.A. 481, I.L.R. 1938 All. 233, 1937 A.W.R. (H.C.) 1226, 1938 A.Cr.C. 4, distinguishing *Salek Chand v. Emp.*, supra, on the ground that it laid down merely that a conditional order for an adjournment under sec. 526 was not justifiable as a Magistrate was bound to adjourn under sub-sec. 8 of that section. It may be noted that the above mentioned cases of the Bombay High Court and the Punjab Chief Court were decided before the amendment of sec. 526 in 1932.

An order requiring the accused to pay the costs of an adjournment is one which is left to the discretion of the Magistrate, and the High Court will not interfere with such an order if not found to be unreasonable—*Sorabji v. Erachshaw*, 56 Bom. 536, 34 Bom.L.R. 1106, A.I.R. 1932 Bom. 470, 139 I.C. 577, 33 Cr.L.J. 802, 1932 Cr.C. 598 (599). An order for costs will be made only in those cases where the circumstances are exceptional and where for some reason or other the ordinary everyday method of conducting criminal cases must be departed from—*Abdul Rahiman*, 42 Bom. 254, 20 Bom.L.R. 124, 19 Cr.L.J. 326, 44 I.C. 342. No order for costs should be made where the adjournment is inevitable and there is no other alternative. Thus, where the accused person being absent, the Court cannot proceed with the case, and is bound to adjourn the hearing, it would be entirely opposed to the spirit of this section if the Magistrate under such circumstances passes orders awarding the costs of adjournment against the accused—*Broune v. Chandra Singh*, 6 P.R. 1906, 4 Cr.L.J. 78; *Beedha*, 20 A.L.J. 280, 23 Cr.L.J. 243; *Gulab v. Inder*, 36 Cr.L.J. 101, 152 I.C. 145, 36 P.L.R. 74, A.I.R. 1931 Lah. 441, 1934 Cr.C. 669. It is competent to a Magistrate to award costs of the adjournment which is granted on the present occasion, but he cannot award the costs of the adjournment which was granted on previous occasions without any conditions—*Sorabji v. Erachshaw*, supra.

This section does not apply to proceedings in appeal, and therefore an Appellate Court's order requiring the appellant, who has applied for an adjournment of the appeal, to pay costs of adjournment is improper and *ultra vires*—*Suraj Bhan*, 29 P.R. 1919, 21 Cr.L.J. 201, 51 I.C. 983; *Rajanna*, 1933 M.W.N. 878.

The provisions of this section do not apply to proceedings in revision. So where in a revision application to set aside an order discharging certain accused persons the Sessions Judge granted an adjournment on condition that the applicant should deposit the fee of the Special Public Prosecutor within a week, held that the order must be set aside—*Jethanand Thavardas v. Tahilram*, A.I.R. 1936 Sind 235, 38 Cr.L.J. 119, 165 I.C. 993, 9 R.S. 115, 30 S.L.R. 357, 1936 Cr.C. 1091.

Who can be ordered to pay costs :—The costs are to be paid by the party applying for the adjournment. Where a criminal case is taken up on a Police charge-sheet filed on information given by a private person and such person engages a Vakil and moves the Court for an adjournment owing to the absence of the Vakil, *held* that an order for costs can be validly made against that person on granting the adjournment prayed for, even though he may not be a complainant under sec 200, since an informant is a person recognised in the Code as initiating criminal proceedings as much as a complainant acting under sec. 190—*Sannasi Kurumban v Sivasubramania*, 40 Mad 1130, 33 M.L.J. 366. But where the prosecution is wholly conducted by the Police and the adjournment is asked for only for the convenience of the Police, the complainant cannot be ordered to bear the costs of the adjournment—*Laxman Natha*, 24 Bom.L.R. 380, 23 Cr.L.J. 338, A.I.R. 1922 Bom. 239. If an adjournment takes place for which the complainant is solely to blame, then of course an order can be made that the complainant should pay any costs which may have been incurred by the accused for the adjournment—*Laxman Natha*, *supra*.

The complainant in a proceeding under sec 107, Cr. P. C., has no duty to accompany the Court process-server to secure service of summons upon the opposite party. The Court cannot award costs against the complainant under this section for his failure to accompany the process-server—*Kazam Khan*, 35 Cr.L.J. 457, 147 I.C. 675, A.I.R. 1933 Lah. 720, 1933 Cr.C. 941.

991. Remand:—From the language of sub-section (1) it appears that where the Magistrate directs a postponement, he has unfettered discretion to remand the accused to custody. But there must be *reasonable cause* for the remand, just as there must be reasonable cause for postponement or adjournment. The Explanation describes only one type of reasonable cause for remand, but there may be cases in which there is a reasonable cause for a remand where the circumstances are not those set out in the Explanation. Thus, where the accused was arrested in connection with an Arms Conspiracy case, and in a search his name appeared in certain manuscripts and correspondences, in conjunction with the name of a dangerous revolutionary, with whom he was very intimate, *held* that the order remanding him to custody was proper—*Sundar Ram*, 37 C.W.N. 683 (685), 146 I.C. 167, 34 Cr.L.J. 1194, 1933 Cr.C. 1254, A.I.R. 1933 Cal 752. When the accused is at first brought before a Magistrate and remand is desired, it is not necessary to go fully into the charge; it is ordinarily sufficient to show by the evidence of a Police officer that they believe that the accused is concerned in the commission of an offence; and on such proof the accused will be remanded to custody. If the accused is again brought up after a remand, and further remand is asked for, some direct evidence of the guilt of the accused should be required to justify the Magistrate in ordering for further remand; and with each remand the necessity for the production of evidence of guilt becomes stronger—*Ponnusami*, 6 Mad. 69; *Jamini*, 36 Cal. 174; *Ahmad Ali*, 11 N.L.R. 162, 16 Cr.L.J. 705.

The Explanation says that the Magistrate can remand the accused, if sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence, and it appears likely that further evidence may be obtained by such remand—*Sooda*, 1931 A.L.J. 617, 32 Cr.L.J. 1045 (1049), 133 I.C. 617, 1931 Cr.C. 969, A.I.R. 1931 All. 617; *Narendra Lal Khan*, 36 Cal 166 (171). Where evidence was available, but it appeared necessary to the Magistrate to defer the examination of witnesses in order that further evidence might be produced, so that the inquiry when commenced might be continuous, *held* that the remand of the accused in such a case was justified—*Manikam*, 6 Mad 53. But a Magistrate is not justified in postponing an inquiry and remanding the accused when there is no evidence at all which can be the foundation of a charge, and merely on the expectation that after some time on some inquiry being made some evidence may be obtained—*Muthoora v. Heera*, 17 W.R. 55. Where the accused person had already made a confession and had produced an article stolen from a person, and there was ample evidence before the Magistrate, it was held that the

remand of the accused in order to get from him a confessional statement is most improper—*Anonymous*, 2 Weir 414.

Remands to custody should not ordinarily be ordered under this section without first recording some evidence to show that good grounds exist for believing that the accused has committed a non-bailable offence—*Ahmed Ali*, 11 N.L.R. 162; if the offence is bailable the accused should be admitted to bail and not remanded to custody—*Raghunandan*, 8 C.W.N. 779.

An order of remand cannot be passed in the absence of the accused. To remand is to re-commit to custody. The commitment requires the presence of the accused; the re-commitment also requires his presence—*Anonymous*, 2 Weir 409.

Remand to police custody :—The Magistrate is to remand an accused person to jail, but not to *Police custody*. See Note 986 above.

Period of detention :—Fifteen days is the longest period for which an accused person may be remanded at a time. See the proviso. An accused person has the right to have the evidence against him recorded as early a period as possible, and the fact that there is or may be a great deal of evidence forthcoming is not a sufficient ground for detention for an inordinate period—*Manikam*, 6 Mad. 63. But it is very difficult for the Court to set down a definite time limit. In one case, detention of six weeks was held to be unreasonably long—*Narendra Lal Khan*, 36 Cal. 166 (172), 13 C.W.N. 43. In another case, a period of seven months was not held to be unreasonably long, judging from the circumstances of the case—*Sooba*, 1931 A.L.J. 617, 32 Cr.L.J. 1045 (1048).

345. (1) The offences punishable under the sections of the Indian Penal Code *specified* in the first two columns of the table next following may be compounded by the persons mentioned in the third column of that table:—

Offence.	Sections of Ind an Penal Code applicable.	Persons by whom offence may be compounded.
Uttering words, etc., with deliberate intent to wound the religious feelings of any person.	298	The person whose religious feelings are intended to be wounded.
Causing hurt	323, 334	The person to whom the hurt is caused
Wrongfully restraining or confining any person.	341, 342	The person restrained or confined.
Assault or use of criminal force	352, 355, 358	The person assaulted or to whom criminal force is used.
Unlawful compulsory labour	374	The person compelled to labour.
Mischief when the only loss or damage caused is loss or damage to a private person.	426, 427	The person to whom the loss or damage is caused.
Criminal trespass	447	The person in possession of the property trespassed upon.
House-trespass	448	
Criminal breach of contract of service.	490, 491, 492	
Adultery	497	The husband of the woman.
Enticing or taking away or detaining with criminal intent a married woman	498	

Offence.	Sections of Indian Penal Code applicable.	Persons by whom offence may be compounded.
Defamation	500	The person defamed.
Printing or engraving matter, knowing it to be defamatory.	501	
Sale of printed or engraved substance containing defamatory matter knowing it to contain such matter	502	
Insult intended to provoke a breach of the peace.	504	The person insulted.
Criminal intimidation, except when the offence is punishable with imprisonment for seven years.	506	The person intimidated.
Act caused by making a person believe that he will be an object of divine displeasure.	508	The person against whom the offence was committed.

(2) The offences punishable under the sections of the Indian Penal Code specified in the first two columns of the table next following may, with the permission of the Court before which any prosecution for such offence is pending, be compounded by the persons mentioned in the third column of that table:—

Offence.	Sections of Indian Penal Code applicable.	Persons by whom offence may be compounded.
Voluntary causing hurt by dangerous weapons or means.	324	The person to whom hurt is caused.
Voluntary causing grievous hurt	325	Ditto.
Voluntary causing grievous hurt on grave and sudden provocation.	335	Ditto.
Causing hurt by doing an act so rashly and negligently as to endanger human life or the personal safety of others.	337	Ditto.
Causing grievous hurt by doing an act so rashly and negligently as to endanger human life or the personal safety of others.	338	Ditto.
Wrongfully confining a person for three days or more.	343	The person confined.
Wrongfully confining a person in secret.	346	Ditto.
Assault or criminal force in attempting wrongfully to confine a person.	357	The person assaulted or to whom the force was used.
Dishonest misappropriation of property.	403	The owner of the property misappropriated.
Cheating	417	The person cheated.
Cheating a person whose interest the offender was bound, by law or by legal contract to protect.	418	Ditto.
	419	Ditto.
	420	Ditto.

Offence.	Sections of Indian Penal Code applicable.	Persons by whom offence may be compounded.
Mischief by injury to work of irrigation by wrongfully diverting water when the only loss or damage caused is loss or damage to a private person	430	The person to whom the loss or damage is caused.
House-trespass to commit an offence (other than theft) punishable with imprisonment.	451	The person in possession of the house trespassed upon.
Using a false trade or property mark.	482	The person to whom loss or injury is caused by such use.
Counterfeiting a trade or property mark used by another.	483	The person whose trade or property mark is counterfeited.
Knowing, selling, or exposing or possessing for sale or for trade or manufacturing purpose goods marked with a counterfeit trade or property mark.	486	Ditto.
Marrying again during the lifetime of a husband or wife.	494	The husband or wife of the person so marrying.
Uttering words or sounds or making gestures or exhibiting any object intending to insult the modesty of a woman or intruding upon the privacy of a woman.	509	The woman whom it is intended to insult or whose privacy is intruded upon.

(3) When any offence is compoundable under this section, the abetment of such offence or an attempt to commit such offence (when such attempt is itself an offence) may be compounded in like manner.

(4) When the person who would otherwise be competent to compound an offence under this section is under the age of eighteen years or is an idiot or lunatic, any person competent to contract on his behalf may, with the permission of the Court, compound such offence.

(5) When the accused has been committed for trial or when he has been convicted and an appeal is pending, no composition for the offence shall be allowed without the leave of the Court to which he is committed, or, as the case may be, before which the appeal is to be heard.

(5A) A High Court acting in the exercise of its powers of revision under section 439 may allow any person to compound any offence which he is competent to compound under this section.

(6) The composition of an offence under this section shall have the effect of an acquittal of the accused with whom the offence has been compounded.

(7) No offence shall be compounded except as provided by this section.

Change:—This section has been amended by sec. 90 of the Cr. P. C. Amendment Act XVIII of 1923.

992. Withdrawal and composition:—A withdrawal (Sec 248) must be by intimation to the Magistrate holding the trial, whereas in many cases composition can be effected without the permission of the Court. A withdrawal is permissible in a summons case, whereas most of the compoundable cases are warrant cases. A withdrawal is the result of act of one party only, namely, the complainant, without the consent of the accused, whereas a composition presupposes an arrangement between both parties and implies a consent of the accused—*Murray*, 21 Cal 103; *Bayan Ali*, 20 C.W.N. 1209. Permission to withdraw can be given only to the complainant, whereas the right to compound an offence does not always belong to the complainant—*Chellum v Ramaswami*, 14 Mad 379. On the withdrawal of the complaint the Magistrate can award compensation to the accused (*Himmat v. Baktawar*, 24 P.R. 1883), but compensation cannot be awarded when a case is compounded—*Khushali*, 19 P.R. 1888.

A Magistrate has the option to permit the complainant to withdraw or not; but if the offence is compoundable without the leave of the Court, and a petition of compromise is put in, the Magistrate is bound to give effect to it. Whether a petition (e.g., a petition praying that the case be struck off the file) is one of withdrawal or compromise is to be judged from the fact whether the accused consented to it or not. Where it appeared that the accused had never consented to the compromise of the case, the petition was not a petition of compromise under this section, but one of withdrawal, and the Magistrate's refusal to permit withdrawal, and the subsequent proceeding resulting in the trial and conviction of the accused were not illegal—*Bayan Ali*, 20 C.W.N. 1209, 18 Cr.L.J. 107.

A Railway guard abused and assaulted a passenger, whereupon the latter made a complaint to the police, who instituted a case against the accused. A few days later, the accused offered an apology to the complainant, who thereupon gave a letter to the accused in which he wrote "Mr. John (the accused) came to me and offered an unconditional apology. I beg to withdraw the case against him." This letter was produced by the accused in Court. The Magistrate treated the letter as a withdrawal and not as a compromise, and as withdrawal could only be made in Court by intimation to the Magistrate, he treated the withdrawal as invalid and proceeded with the trial and convicted the accused—*Held* that the Magistrate was misled by the word 'withdraw' used in the letter; that the case was one of compromise and not of withdrawal, because a withdrawal could be made only by the prosecuting authority (police) in this case, and that the offence having been compounded, the accused must be acquitted—*John*, 45 All 145 (146, 148), 24 Cr.L.J. 758.

993. Requisites of composition:—In order to amount to a composition, the arrangement must be one by which the parties have settled their differences and not a mere arrangement to settle the disputes in future as the result of some action either by themselves or by third parties. Therefore where the parties signed a *muchilika* referring their dispute to arbitrators but no arbitration took place and no award was passed, *held* that the mere signing of the *muchilika* did not amount to a composition of the offence—*Ramalinga v. Varadarajulu*, 49 M.L.J. 544, 22 L.W. 390, 26 Cr.L.J. 1594, 90 I.C. 666, 1925 M.W.N. 753, A.I.R. 1925 Mad. 1211. A mere agreement between the parties to refer the case to arbitration is not a final settlement of the dispute and does not amount to a composition. Where the parties filed a petition of compromise agreeing to be bound by the decision of arbitrators named therein and asked for an adjournment for settlement of their disputes, but after the arbitrators made the award, the complainant refused to abide by that award, *held* that there was no composition and the Magistrate could proceed with the trial—*Shish Chandra v. Abani Nath*, 42 C.L.J. 139, 26 Cr.L.J. 1584, 90 I.C. 544, A.I.R. 1926 Cal. 266.

Although a composition also signifies that the person against whom the offence has been committed has received some gratification (whether of a pecuniary character or

otherwise) as an inducement for his desiring to abstain from a prosecution (*Murray*, 21 Cal 103), still the passing of such consideration or gratification is not absolutely necessary to effect a valid composition—*Hidayat*, 1896 P.R. 9. And it is not necessary that the consideration should be of a monetary character—*Mahomed Kani v. Pattani*, 39 Mad. 946. An apology is a sufficient consideration in cases of defamation or abuse—*John*, 45 All. 145 (146). If the matter is settled by respectable persons and a compromise entered into, the Court is not concerned to inquire into the nature or value of the consideration; and if the complainant considers that his grievance is redressed by the fact of respectable persons intervening, even though he may not have received any money payment or even a direct apology from the accused, the complainant is at full liberty to compound the prosecution—*Lilaram*, 2 S.L.R. 16, 10 Cr.L.J. 228.

To constitute a valid composition, it must appear that the parties were free from influence of any kind, and were fully aware of their respective rights—*Murray*, 21 Cal 103. If the consent of a party is obtained by threat and coercion, there is no valid composition—*Hanmant*, 31 Bom.L.R. 789, 1929 Cr.C. 322 (323), A.I.R. 1929 Bom. 375.

The offence must be compoundable:—Before allowing a composition, it is the duty of the Magistrate to find upon the evidence that a compoundable offence has been committed. If the evidence disclosed a *non-compoundable* offence, the Magistrate, upon a petition of compromise, cannot treat the case as a compoundable one, and allow composition and acquit the accused—*Ranchhod*, 37 Bom. 369; *Asmal*, 4 Bom.L.R. 718; *Guru Prosad v. Ajodhyanath*, 20 Cr.L.J. 552 (Pat.). It is contrary to public policy to compound a non-compoundable offence (*e.g.*, criminal breach of trust) and any agreement to that effect is wholly void in law—*Majibar v. Muktashed*, 40 Cal. 113 (118). The Magistrate has no jurisdiction to allow composition of a non-compoundable offence on the ground that it would be better for the complainant to compromise and that the accused also desires to compromise, and that it is probable that the case might in the end turn out to be a compoundable offence—*Hira Singh*, 11 P.R. 1907, 6 Cr.L.J. 336. The composition of the offence of trespass cannot have the effect of annulling the object of the unlawful assembly and has not the effect in law of compounding the offence of being members of the unlawful assembly whose common object was the commission of the offence of trespass—*Matti Venkanna*, 46 Mad. 257. An acquittal of an offence under sec. 325, I. P. C., constitutes no bar to the subsequent trial of the accused on a charge under sec. 147, I. P. Code. If the circumstances require it, the Magistrate can discharge the accused in respect of the accusation under sec. 147, I. P. Code—*Jaruali*, 26 Cr.L.J. 686, 86 I.C. 62, 26 P.L.R. 35, A.I.R. 1925 Lah. 464.

The question of a case being compoundable or not must be decided with reference to the state of the facts existing at the date of the application to compound. It is not possible for a Court to see what the ultimate result of the case will be—*Rani v. Jawanti*, 26 Cr.L.J. 1428, 89 I.C. 900, A.I.R. 1925 Nag. 395.

994. When offence can be compounded:—A case may be compounded at any time before the sentence is pronounced; therefore, a petition of compromise, filed by the parties when the judgment was actually being written should be accepted—*Aslam*, 45 Cal. 816, 22 C.W.N. 744, 23 C.L.J. 261, 19 Cr.L.J. 752. See also *Muhammad Ali*, 29 Cr.L.J. 1058, 112 I.C. 562.

An offence falling under sub-section (1), *i.e.*, an offence for the composition of which no permission of the Court is necessary, can be compounded even before a charge of the offence is laid in Court by the person injured. An offence is complete when the acts constituting it have been committed, apart from the question whether a charge or complaint has been laid before the Court or not; and there is nothing in this section to suggest that a composition of an offence to be valid must be effected only after the accused is brought before the Court. A composition made to prevent a case coming into Court is just as much a lawful composition under this section as one made after the case has come into Court—*Kumarasami v. Kuppusami*, 41 Mad. 685 (687), 19 Cr.L.J. 359; *Mrs. Torpey*, 49 All. 848, 28 Cr.L.J. 495 (496).

A Magistrate cannot allow composition after the records of the case have been called for by the High Court under sec. 435 with a view to transfer the case. When the records of the case were called for by the High Court, the case was no longer on the file of the Magistrate and his jurisdiction was suspended. But the parties may compound the offence before the Magistrate to whom the case may be transferred by the High Court—*Maruti*, 49 Bom. 533, 27 Bom.L.R. 350, 26 Cr.L.J. 996

995. Proof:—Although the provisions of the Contract Act may not apply, the proof of the arrangement must be similar to that which the Court requires for the proof of any agreement which is in issue—*Murray*, 21 Cal 103. Before a composition can be allowed the Court must be satisfied that the composition is legal and valid in law (*i.e.*, not obtained by threat and coercion by the accused)—*Hanmant*, 31 Cr.L.J. 553, 122 I.C. 118, 31 Bom.L.R. 789, A.I.R. 1929 Bom. 375. The burden of proving that the offence has been validly compounded lies upon the accused—*Murray*, *supra*. Where an accused person alleges that an offence with which he is charged has been compounded, the onus is on him to show that there is a real and valid composition with the person against whom the offence is committed—*Dajaba*, 52 Bom. 512, 29 Bom.L.R. 718, 28 Cr.L.J. 581, 102 I.C. 549, A.I.R. 1927 Bom. 410.

Proof as to factum of composition—In case of an offence falling under sub-sec. (1), *i.e.* an offence compoundable without the permission of Court, if one party alleges that the case has been compromised (outside the Court), and the other resiles from the compromise and denies the same, it is competent to the Court, before which the case is pending, to inquire and take evidence concerning the *factum* of the alleged compromise, and to decide whether a compromise has in fact been arrived at or not; and if it finds that there has been a valid composition, it should pass an order of acquittal—*Mahomed v. Pattani*, 39 Mad. 946; *Kumarasami v. Kuppusami*, 41 Mad. 685 (686). It is the obvious duty of the Magistrate to satisfy himself whether the case was compounded or not; and if the Magistrate finds on inquiry that the case has not been compounded he must proceed with the trial—*Abdul Jabar*, 25 S.L.R. 341, 33 Cr.L.J. 109, 135 I.C. 271, A.I.R. 1932 Sind 7, Ind. Rul. 1932 Sind 31, 1932 Cr.C. 39. It is not possible for any Court to lay down any hard and fast rule as to what the nature and the *quantum* of the inquiry should be. The inquiry should be such as would enable a Court to decide upon the allegation of the compromise—*Mahades*, A.I.R. 1934 All. 1025 (1026), 36 Cr.L.J. 328, 153 I.C. 407, 1934 A.L.J. 1061, 1934 Cr.C. 1335. But in cases of offences covered by sub-section (2) which can be compounded only with the permission of the Court, any compromise arrived at by the parties outside the Court is of no legal effect and cannot be recognized by any Court dealing with the offence. Consequently, the Court is not bound (not competent) to order any inquiry into the *factum* of a compromise alleged by one of the parties and denied by the other—*Naurang v. Kidar Nath*, 9 Lah. 400, 29 Cr.L.J. 585 (587). See Note 998.

996. Magistrate when bound to allow composition:—If the offence falls under sub-sec. (1), it is compoundable irrespective of the permission of the Court, and so if a petition of compromise is put in, the Court is bound to allow composition and cannot refuse to do so—*Ram Gopal*, 1886 A.W.N. 167. In a case of such offence, if the composition is proved, the Magistrate must give effect to it and cannot proceed with the trial—*Mulo*, 6 S.L.R. 284, 14 Cr.L.J. 292. As soon as the parties have arrived at a compromise of an offence falling under sub-sec. (1), the Magistrate has nothing more to do except to record a judgment of acquittal—*Naurang v. Kidar*, 9 Lah. 400, 29 Cr.L.J. 585 (587). He is not at liberty to call upon the parties to adduce further evidence that the case has been compounded—*Ganakrishna*, 16 Bom.L.R. 939, 16 Cr.L.J. 88, 26 I.C. 1000; or to fix a date for verification of the compromise—*Jhangtoo*, A.I.R. 1930 All. 409, 52 All. 254, 1930 A.L.J. 281, 1930 Cr.C. 525, 127 I.C. 420, 31 Cr.L.J. 1215. It is his duty to accept the compromise and to dismiss the case and acquit the accused. He is wrong in ordering the petition to be put up on the record—*Kusum v. Bechu*, 3 C.W.N. 322; *Mahomed Ismail v. Faisuddi*, 3 C.W.N. 548. Where the complainant and the accused are willing to compromise, a composition cannot be refused

on the ground that the master in whose quarrel the servant (complainant) was injured refuses to give his permission—*Lala*, 17 O.C. 92, 15 Cr.L.J. 567.

If a charge is framed in respect of a compoundable offence, and the proper person files a petition of compromise, the Magistrate cannot alter the charge into one of a non-compoundable offence, to prevent composition. He must give effect to the petition and acquit the accused—*Hasta*, 1914 P.R. 29, 16 Cr.L.J. 81 (F.B.). If the offence in respect of which the complaint was made be an offence compoundable without the leave of the Court, and a petition of compromise is made, the Magistrate is bound to give effect to the petition and acquit the accused, even though by mistake he had mentioned a non-compoundable offence in the summons served upon the accused—*Kadir Akram*, 2 P.L.T. 602, 62 I.C. 189, 22 Cr.L.J. 493. Where a person is prosecuted for offences under secs. 323 (compoundable) and 353 (non-compoundable), I. P. Code, and the complainant applies to have the case under sec. 323 struck off, the Magistrate should allow the composition and proceed only in respect of the other offence—*Corrie*, 1884 A.W.N. 256.

If the offence is compoundable, it may be compromised, even though the case has been sent up by the Police—*Nawab Jan*, 10 Cal. 551. See also *John*, 45 All. 145.

997. Who can compound:—An offence can be compounded only by the person specified in this section, although the complaint might have been made by some other person. It is not competent for the complainant in every case to compound an offence. Thus, where A made a complaint for cheating her husband B, it is the person cheated (i.e., B) who can compound the offence, and not A, although the complaint was filed by A. The composition by A will not have the effect of acquitting the accused—*Dajiba*, 51 Bom. 512, 29 Bom.L.R. 718, 28 Cr.L.J. 581 (582), 102 I.C. 549, A.I.R. 1927 Bom. 410. But in a Sind case, where the wife was the person cheated (under sec. 420, I. P. C.), the husband was permitted to compound the case on behalf of his wife—*Mahomed Rafiq*, 25 S.L.R. 9, 1931 Cr.C. 734 (735). In *John*, 45 All. 145, the case was started by the police, but the composition was made by the injured person. The offence of hurt can be compounded only by the person to whom the hurt is caused—*Lala*, 15 A.L.J. 467, 18 Cr.L.J. 729, 40 I.C. 729. The widow or other relations of such person (that person dying in consequence of the hurt) cannot compound—*Gangamma*, 2 Weir 418; *Rahmat*, 37 All. 419, 16 Cr.L.J. 589, 13 A.L.J. 630, 30 I.C. 138; *Ramzan Bachal*, 7 S.L.R. 200, 15 Cr.L.J. 553. Where hurt was caused to three persons, and one of them died subsequently, the remaining two cannot compromise the offence as regards the deceased—*Sultan Singh*, 31 All. 606, 10 Cr.L.J. 473, 6 A.L.J. 882, 4 I.C. 24. In other words, where there are several complaints, one complainant can compound the offence committed against *himself* but not the offence committed against others—*Shib Chandra v. Rabbani*, 27 C.W.N. 168, 24 Cr.L.J. 578, 37 C.L.J. 254, 73 I.C. 322. The offence of wrongful confinement can only be compounded by the person confined. Where, therefore, more than one person was confined and the charge was framed in respect of the confinement of both, there was no jurisdiction in the Court to acquit the accused when only one of them compounded the offence—*Khilawansingh*, A.I.R. 1937 Nag. 72, I.L.R. 1937 Nag. 286, 38 Cr.L.J. 331, 166 I.C. 926, 9 R.N. 154.

The offence of defamation can be compounded only by the person defamed, and not by another person aggrieved by the defamation. Thus, where a charge of defamation for imputing unchastity to a woman is instituted on the complaint of the husband, the husband cannot compound the offence—*Chotala v. Nathagai*, 25 Bom. 151, 2 Bom.L.R. 665. In such a case the wife is the only person who can compound the offence; and she can do so without the consent or even against the will of her husband. But if the defamatory matter was published with the intention of injuring the reputation of both husband and wife, and the husband instituted the complaint, then no one except the husband could compound—*Chellum v. Ramaswami*, 14 Mad. 379, 1 M.L.J. 242, 2 Weir 230. An offence under sec. 498, I. P. C., can be compounded only by the husband of the woman. Though a complaint of that offence may be made by any person having the care of the woman during her husband's absence (sec. 199), still such person cannot compound

the offence, and an acquittal based upon such composition is illegal—*Mahabat*, 4 Lah L J 488; *Harnam v. Sain Das*, 24 Cr.L.J. 120, 71 I.C. 248 (Lah.); *Mr Alam*, 5 Lah.L.J. 183, 23 Cr.L.J. 690, AIR 1922 Lah 177. A charge of criminal trespass can be compounded by the person who is in actual possession of the property trespassed upon; and he (and not the juridical possessor, e.g., the trustee) is the person who can bring the complaint in respect of the offence. "Otherwise, we might have the juridical possessor (e.g., a trustee) prosecuting for criminal trespass, and the actual possessor compounding the offence, a result which could never have been contemplated by the Legislature"—*Tok Gyi*, 8 L.B.R. 425, 17 Cr.L.J. 378 (379).

A minor cannot compound an offence—*Shub Singh*, 1891 P.R. 17; but under sub-section (4) it can be compounded by his guardian with the permission of the Court.

998. Permission of Court:—In respect of the offence mentioned in sub-section (1), no permission of the Court is necessary for compromise, and no petition is therefore required to be presented to the Court for its permission—*Mahomed Kani v Pallani*, 39 Mad. 946; *Ram Gopal*, 1886 A.W.N. 167. But in respect of the offences mentioned in sub-section (2) the permission of the Court is essential before the case can be validly compounded. The operation of the composition is necessarily suspended until the Court sanctions it—*Kumaraswami v. Kuppuswami*, 41 Mad. 685 (687), AIR 1919 Mad. 879, 44 I.C. 583, 19 Cr.L.J. 359, 34 M.L.J. 217. In other words, no effect can be given to a compromise as a plea in bar of conviction in cases covered by clause (2) unless the Court has given its sanction. Without the sanction of the Court, the so-called compromise arrived at between the parties out of Court is of no legal effect and cannot be taken cognizance of by any Court dealing with the offence—*Naurang v. Kidar Nath*, 9 Lah. 400, 29 Cr.L.J. 585 (587). Composition under sec. 345 (1), Cr. P. C., is an act of the parties which requires no permission. Nor is there any language to restrict its completion to any particular time. Under sec. 345 (2), Cr. P. C., there must be a prosecution pending and the permission of the Court must be given. Any act of the parties done before the prosecution has begun and without reference to any Court cannot be a composition under this sub-section, and whatever may be the civil rights to which it may give rise can have no effect on the trial. The Court may refuse to inquire into the factum of composition alleged by one and denied by the other party in such a case under sec. 345 (2), Cr. P. C.—*Ponnuswamy Ayyar*, AIR 1937 Mad 825, 1937 M.W.N. 864, 46 M.L.W. 289, (1937) 2 M.L.J. 383. Any arrangement entered into between the complainant and the accused before the case came into Court at all is ineffective when the offence is compoundable with the permission of the Court under sec. 345 (2), Cr. P. C.—*Harswarup Chaubey v. Emp.*, AIR 1938 Nag 37, 20 N.L.J. 244, 172 I.C. 89, 39 Cr.L.J. 59. Such permission can be granted only by the Court, and not by a police officer, because the granting of permission to withdraw is a *judicial act*—*Anonymous*, Ratanlal 91. The duty of granting the permission is cast upon the Magistrate trying the case, and that duty cannot be assigned either to the District Magistrate or to the police—*Partap Singh*, 31 P.L.R. 121, 1930 Cr.C. 304, AIR 1930 Lah 272, 127 I.C. 712, 32 Cr.L.J. 20, 15 A.I.Cr.R. 216. See also *Subba Rao v. Ahmad Beari*, 1932 M.W.N. 1088; *Dhara Singh*, Ind Rul 1932 Lah. 649; *Sultan*, 35 Cr.L.J. 1372, 151 I.C. 532, 35 P.L.R. 329, AIR 1935 Lah 226.

In case of offences falling under sub-section (2), it is the duty of the Magistrate to decide whether he will or will not allow a compromise and the responsibility rests entirely with him. If the compromise is made at an early stage, and the offence is not so serious that punishment is absolutely necessary, the Magistrate should exercise his discretion in allowing the composition. Where the Magistrate refused to allow composition without sufficient reason, the High Court in revision allowed it—*Sewa Singh*, 1922 P.W.R. 7, AIR 1922 Lah. 138, 23 Cr.L.J. 85, 65 I.C. 437. Before allowing composition of an offence, the Magistrate should take into consideration all the circumstances of the case and should bear in mind that such offence is punishable not only for the satisfaction of the injured person but also to protect society by deterring others from committing similar offences. The degree of prevalence of such offence at any

particular place or time may fitly be considered in determining whether composition should or should not be allowed—*Kanoo Meah*, 1 L.B.R. 349. The Magistrate may refuse to allow composition, if it is arrived at a late stage, and some of the offences are non-compoundable—*Hanmant*, 31 Bom L.R. 789, 1929 Cr.C. 322 (323), A.I.R. 1929 Bom. 375. In cases falling under sub-section (2), if the parties are nearly related to one another and are willing to patch up their quarrels, the Magistrate should not refuse to allow composition—*Aminulla*, 26 C.W.N. 536, 72 I.C. 344, 35 C.L.J. 353, A.I.R. 1922 Cal. 191, 24 Cr.L.J. 355. Where parties are nearly related to one another and succeed in patching up their quarrels, the Magistrate should do what he can to restore peace and good will and should grant permission to compound in such a case—*Bhaiyalal*, 30 Cr.L.J. 960, 118 I.C. 681, A.I.R. 1929 Nag. 278, Ind. Rul. 1929 Nag. 281, following *Aminulla*, supra. In such a case the High Court allowed compromise under sub-cl. (5A) of this section—*Hakam Ali*, 35 Cr.L.J. 579, 147 I.C. 1081, 6 R.L. 482, 35 P.L.R. 257, A.I.R. 1934 Lah. 317, 1934 Cr.C. 519. Where the accused was charged with two offences, of which one was compoundable with the permission of the Court, and the other a non-compoundable offence, and the Magistrate after examining the complainant issued summons in respect of the compoundable offence only, it was not illegal for him to grant permission for compounding the case—*Muhammad Ismail v. Samad*, 20 C.W.N. 946 (947).

The accused was put on his trial on a charge of criminal misappropriation as Secretary of a Co-operative Society. With the permission of the Board of Directors of the Co-operative Society a petition was filed before the Magistrate saying that the matter had been satisfactorily settled out of Court to the benefit of parties and praying for leave to compromise the case. Held that the fact that the accused was a clerk in the *touzi* department of the Collectorate had no bearing upon the question whether the prosecution should proceed or not and that the Magistrate did not soundly exercise his discretion in refusing the leave which was granted by the High Court—*Singheswar v. Ali Hasan*, 31 Cr.L.J. 607, 124 I.C. 95, A.I.R. 1929 Pat. 512, 11 P.L.T. 492.

Under sec. 345 (2), Cr. P. C., an offence may only be compounded with the permission of the Court before which any prosecution for such offence is pending, that is to say, the Court which is in possession of the case. No reference is permitted by any Subordinate Magistrate to a superior Court on the question whether an offence should be compounded or not; it is the Court itself which has to determine the question; *a fortiori* the Court is not permitted to refer the question to any outside agency. The opinion of the police in a matter which the Magistrate is by law bound to dispose of in his judicial capacity is entirely irrelevant. Where the Magistrate seeks the opinion of the police officers, his action is particularly reprehensible in that it is bound to give rise to the impression that Magistrates are influenced in their decisions by the opinion of the police who investigate the cases which are brought before them—*Pratapsingh v. Emp.*, A.I.R. 1937 Nag. 114, 169 I.C. 33, I.L.R. 1937 Nag. 183, 38 Cr.L.J. 689; *Harprasad*, 39 Cr.L.J. 120, 172 I.C. 352, A.I.R. 1938 Nag. 39, 10 R.N. 196. Where, however, after receiving the reply of the police the Magistrate hears arguments on both sides, exercises his own judgment and has not been subservient to the opinion of the police, his action in calling upon the opinion of the police is not illegal—*Harswarup Chaubey v. Emp.*, A.I.R. 1938 Nag. 37, 20 N.L.J. 244, 172 I.C. 89, 39 Cr.L.J. 59. The Magistrate has, however, no right to send the record of the proceedings, which are of a judicial character, before him to the Superintendent of Police for taking his opinion. The proper course for him is to ask the Prosecuting Inspector to take his instructions from the District Magistrate, or may be from the Superintendent of Police, as to the attitude of the Crown towards the proposed compromise—*Dharichhan Singh v. Emp.*, 40 Cr.L.J. 460 (461), 180 I.C. 627, A.I.R. 1939 Pat. 141, 19 P.L.T. 840.

Under sub-section (5), when an appeal is pending in respect of the offence, it is the Appellate Court alone which can allow the composition; and the permission of the Appellate Court is necessary even in respect of offences which are ordinarily compoundable without the sanction of the Court.

A compromise petition filed after the hearing of the appeal is not one which comes within the provisions of sub-sec. (5)—*J. M. Chatterji*, 34 Cr.L.J. 926, 145 I.C. 126, A.I.R. 1933 All. 434, 1933 Cr.C. 740, 1933 A.L.J. 1493.

Where it is found that the accused were acquitted by the trial Court of one of the two offences charged against them, the Appellate Court ought not to refuse to allow composition in respect of the other offence, if it is compoundable, even though the occurrence bore more or less serious aspect—*Titan v. Chintan*, 55 Cal. 1190, 30 Cr.L.J. 484 (485).

Permission by High Court in revision:—The High Court as a Court of Revision can exercise all the powers of an Appellate Court and can grant permission to compound an offence—*Ram Piyari*, 32 All. 153; *Shiboo*, 45 All. 17; *Nidhan*, 1904 P.L.R. 252; *Lalla*, 17 O.C. 92, 15 Cr.L.J. 567. In the following cases it was laid down that an offence could not be allowed to be compounded when the case came before the High Court in Revision, when the High Court was sitting neither as a Court of Original Jurisdiction nor as a Court of Appeal—*Ram Chandra*, 37 All. 127; *Naqi*, 11 A.L.J. 13; *Rambaran*, 42 All. 474; *Harnam*, 1918 P.R. 35, 20 Cr.L.J. 87; *Akhoy Rameshwar*, 43 Cal. 1143, 20 C.W.N. 1071; *Audhi*, 3 P.L.T. 458, 23 Cr.L.J. 80; *Adhar v. Subodh*, 18 C.W.N. 1212; *Sankar Rangayya v. Sankar Ramayya*, 39 Mad. 604. This latter view has now been rendered obsolete by the new sub-section (5A) of this section which expressly gives the High Court the power to allow composition in revision. The High Court may in revision grant permission to compound an offence and acquit the accused, where such permission has been wrongfully withheld by the Appellate Court—*Titan v. Chintan*, 55 Cal. 1190, 30 Cr.L.J. 484 (485), 115 I.C. 528, A.I.R. 1929 Cal. 96, Ind. Rul. 1929 Cal. 384. See also *Kumaran*, 1933 M.W.N. 245. Sub-clause (5A) of this section does not mean that the Court of Revision should accept a compromise in every case where there has been not only a conviction by the first Court but that conviction has been upheld by the Court of Appeal—*Jumo Sher Khan*, 36 Cr.L.J. 210, 152 I.C. 412, 28 S.L.R. 109, A.I.R. 1934 Sind 122, 1934 Cr.C. 963.

Composition on Retrial:—When the accused was charged with and convicted of an offence compoundable without the leave of Court, but on appeal the conviction was set aside and a retrial ordered, and the complainant then offered to compound the case, it was held that it was open to the parties to compound the case in the same manner in which it could be compounded before conviction by the Magistrate, and that no permission of the Court was necessary for the composition—*Umrai v. Makbulan*, 3 A.L.J. 523, 4 Cr.L.J. 35.

Recording reason:—When allowing composition under sub-section (2), the Magistrate should briefly record his reason for granting sanction, so that, if an appeal is preferred, the Appellate Court may be in a position to judge whether the discretion has been properly exercised—*Kanoo Meah*, 1 L.B.R. 349.

999. Compromise cannot be withdrawn:—When the parties have filed a petition of compromise, they cannot afterwards be allowed to withdraw the petition and to insist upon the case being tried—*Mahomed Kani v. Pattani*, 39 Mad. 946, 31 I.C. 819, 2 M.L.W. 1200, 18 M.L.T. 602, 16 Cr.L.J. 803, A.I.R. 1916 Mad. 854; *Kumarasami v. Kuppusami*, 41 Mad. 685 (686), 44 I.C. 583, 34 M.L.J. 217, 7 M.L.W. 274, 23 M.L.T. 240, 19 Cr.L.J. 659, 1918 M.W.N. 493; *Kusum v. Bechu*, 3 C.W.N. 322; *Hem Chandra v. Girindra*, 33 C.L.J. 226; *Jhangtoo*, A.I.R. 1930 All. 409, 52 All. 254, 1930 A.L.J. 281, 1930 Cr.C. 525, 127 I.C. 420, 31 Cr.L.J. 1215, Ind. Rul. 1930 All. 884; *Ram Richpal v. Mata Din*, 25 Cr.L.J. 810, 81 I.C. 346, A.I.R. 1925 Lah. 159. Once a composition has been effected, it must result in immediate acquittal of the accused; it cannot be withdrawn and the Magistrate cannot proceed with the trial—*Madari*, 32 P.L.R. 293, 32 Cr.L.J. 1034, 133 I.C. 448, A.I.R. 1931 Lah. 784, 1931 Cr.C. 642, A.I.R. 1931 Lah. 402. A composition arrived at between the parties is complete as soon as it is made, and the accused is entitled to be acquitted, even though one of the parties later on resiles from the compromise—*Hem Chandra v. Girindra*, 33 C.L.J. 226, 22 Cr.L.J. 301, 60 I.C.

797, A.I.R. 1921 Cal. 403. The Magistrate is in duty bound to order an acquittal on the filing of the compromise petition signed by both parties in Court for an offence for which no leave of the Court is required, and the complainant cannot, by a subsequent withdrawal of the petition before any order is passed on it, insist upon the case being proceeded with—*Dharichhan Singh v. Emp.*, 40 Cr.L.J. 460 (461), 180 I.C. 627, A.I.R. 1939 Pat 141, 19 P.L.T. 840. If it is proved that the parties signed the document and understood its contents, it is incompetent for any party to it to withdraw from it. Since the compromise has the immediate effect of acquittal so as to deprive the Magistrate of his jurisdiction to try the case, the subsequent withdrawal from it by any party can neither affect the acquittal nor revive the jurisdiction of the Magistrate to proceed with the case—*Rambai v. Chandra Kumari Devi*, 41 Cr.L.J. 287 (288), 186 I.C. 370, 1940 N.L.J. 25, A.I.R. 1940 Nag. 181.

Where the petition of compromise was filed at a stage when the case was being tried as one which was compoundable with the permission of the Court and no orders were passed at the time, *held* that the complainant could withdraw her petition for compromise, even when the case was found to be a compoundable one and that the accused was not entitled to an acquittal on the basis of the said petition—*Rani v. Jaiwanti*, 26 Cr.L.J. 1428, 89 I.C. 900, A.I.R. 1925 Nag. 395. Where the complainant alleged that the terms of the compromise had not been carried out and claimed that the case should be revived, *held* that the accused could not be prosecuted any further for the offences which had already been compounded—*Sheikh Basiruddi v. Sheikh Khairat Ali*, 17 C.W.N. 948.

999A. Sub-sec. (5A):—It is clear from the language of sec. 439, Cr. P. C., read with sec. 345 (5A) of the Code that the High Court can in certain circumstances allow a compromise to be recorded in the exercise of its revisional jurisdiction in the case of any proceeding the record of which has been called for by itself or which has been reported for orders or which otherwise comes to its knowledge. The language of sec. 439 is very wide and it does not limit the jurisdiction of the High Court to interfere in revision merely in cases in which the High Court has called for the record of a case on the ground of some alleged illegality or impropriety in the order made by an inferior Criminal Court. The High Court is competent to record the compromise having regard to the provisions of sec. 345 (5A), Cr. P. C., even although there is no impropriety in the order of either of the Courts below and although neither the trial Court nor the Court of the Sessions Judge while they were still in seisin of the case rejected any proposal to the effect that the case should be compromised as one of the objects of the Legislature in enacting sub-sec. (5A) of sec. 345, Cr. P. C., was in suitable circumstances to allow the parties in such cases to compromise their disputes even after the cases in which they were concerned had been heard and determined by the Courts competent to try them. But where the proceedings before the Courts below disclose no irregularity or impropriety the exceptional power which has been conferred upon the High Court by sub-sec. (5A) of sec. 345, Cr. P. C., should not ordinarily be used in a case in which the record indicates that the parties made some attempt to compromise their differences while the matter was still before the trial Court and before that Court passed final orders in the case—*Baburahi Sardar v. Kala Chand Bepari*, A.I.R. 1939 Cal 728, I.L.R. (1939) 1 Cal. 567, 41 Cr.L.J. 125, 185 I.C. 177.

Ordinarily the party who seeks to invoke the jurisdiction of the High Court under sub-sec. (5A) of sec. 345, Cr. P. C., must be the person aggrieved by the offence which has been committed and not an accused person or a person who has been convicted in respect of that offence. In any event it would not be competent for the High Court to allow a compromise to be recorded under sub-sec. (5A) of sec. 345, Cr. P. C., unless the aggrieved persons were actually before the High Court and had expressly recorded their consent to such a compromise being recorded—*Baburahi Sardar v. Kala Chand Bepari*, *supra*.

1000. Sub-section (6):—*Acquittal:*—When the petition of composition is put in, the Magistrate's sole remaining duty is to record a formal order of acquittal and

to set the accused person at liberty—*Hasta*, 29 P.R. 1914, 16 Cr.L.J. 81 (82) (F.B.). The Magistrate is bound to acquit the accused; he acts illegally if he proceeds with the trial and convicts the accused—*Hasta*, *supra*; *Kora Raman v Kandan*, 2 Weir 418; *John*, 45 All 145 (148). Any sentence that he may pass subsequently is illegal, for the composition of an offence has the effect of an acquittal—*Corrie*, 1884 A.W.N. 256.

If an offence which is *non-compoundable* (e.g. house-breaking in order to commit theft) is compromised, and the complainant withdraws the complaint, whereupon the Magistrate discharges the accused, the order of discharge does not amount to an acquittal, and does not prevent the revival of the prosecution—*Devrama*, 1 Bom. 64 (66).

The High Court in revision can set aside an order of acquittal passed on a petition of compromise, if there has been any material irregularity—*Ramzan*, 7 S.L.R. 200, 15 Cr.L.J. 553.

Compensation can be awarded under sec. 250 only when the Magistrate himself acquits the accused after trial. But a composition of an offence has in itself the effect of acquittal and no trial is held, and therefore no compensation can be awarded where the offence is compounded under this section—*Khushali*, 1888 P.R. 19; *Sangappa*, Ratanlal 957. Proceedings under section 250 are inapplicable to a case where the accused person himself has, by an agreement with the prosecutor, arrived at a settlement and been a party to the compounding of the offence—*Harkishandas*, 10 Bom.L.R. 1056, 9 Cr.L.J. 186.

A composition has the effect of an acquittal and not a *discharge*, and is therefore a complete bar to the prosecution of the accused for the same offence—*Mulo*, 6 S.L.R. 284, 14 Cr.L.J. 292; *Harnam*, 1910 P.L.R. 22, 11 Cr.L.J. 366. The Magistrate cannot after composition institute proceedings against the accused under sec. 437 (now sec. 436)—*Unkar*, 1884 A.W.N. 13. A composition has the effect of barring not only a prosecution for the same offence, but also for a cognate offence based on the same facts—*Asmal*, Ratanlal 519, or for an offence involved in the former offence which has been compounded—*Shaikh Basiruddin v Shaikh Khairat Ali*, 17 C.W.N. 948. But the compounding of an original charge is not a conclusive answer to a charge made against the complainant under sec. 211, I P. Code—*Atar Ali*, 11 Cal. 79.

Where there are several accused persons, the composition of an offence with one of them has not the effect of acquittal of *all* the accused persons but only of the particular accused with whom the composition took place—*Muthia Naek*, 41 Mad. 323; *Alibhai*, 45 Bom. 346; *Anantia*, 5 Lah. 239, 81 I.C. 117, A.I.R. 1924 Lah. 595, 25 Cr.L.J. 629; *Ram Krishen*, 1 Lah. 169; *Chandan*, 19 A.L.J. 374, 61 I.C. 209; *Mohna*, 7 Lah. 344, 94 I.C. 144, A.I.R. 1926 Lah. 424, 2 Lah. Cas. 329, 27 P.L.R. 493, 27 Cr.L.J. 576; *Thiimalai v. Elumalai*, 1933 M.W.N. 222. This is now made clear by the words "with whom the offence has been compounded" newly added in sub-sec. (6). In *Calcutta* and *Patna* cases, it was held that if a compoundable offence was committed by a number of persons, and the complainant compounded the offence with only one of them, the effect of such compromise was to compound the complaint not only in respect of the persons with whom it was actually compounded, but also in respect of the other persons; and the composition operated as an acquittal of all the accused—*Chander Kumar*, 7 C.W.N. 176; *Shyam Behari v. Sagar*, 20 Cr.L.J. 824, 52 I.C. 824, 1 P.L.T. 32; *Amar Ali*, 2 P.L.T. 584; *Suraj Kumar*, 4 P.L.T. 107. This view is no longer correct.

Where an accused is charged with *two offences*, and one offence is compounded, the charge for the other offence does not *ipso facto* lapse, and the accused is not necessarily acquitted in respect of that other offence especially if that other offence refers to a distinct and independent transaction—*Kukum Singh*, 1930 A.L.J. 83, 30 Cr.L.J. 1149. See also *Jarnali*, 26 Cr.L.J. 686, 85 I.C. 62, 26 P.L.R. 35, A.I.R. 1925 Lah. 464.

The composition effected under this section would be a complete bar to a civil suit for damages—*Mulo*, 6 S.L.R. 284, 14 Cr.L.J. 292; *Sayamma v. Punamchand*, A.I.R. 1933 Bom. 413, 35 Bom.L.R. 850, 57 Bom. 678, following *Basiruddin v. Khairat Ali*, 14 Cr.L.J. 458, 20 I.C. 618; or to a forfeiture of the bond for keeping the peace.

absence of independent evidence that a breach of the peace was committed as a result of commission of the offence which was compounded—*Chanda Singh v. Emp.*, 41 Cr L.J. 359, 186 I.C. 642, A.I.R. 1940 Lah. 42.

346. (1) If, in the course of an inquiry or a trial before a Magistrate in any district outside the presidency-towns, the evidence appears to him to warrant a presumption that the case is one which should be tried or committed for trial by some other Magistrate in such district, he shall stay proceedings and submit the case, with a brief report explaining its nature, to any Magistrate to whom he is subordinate or to such other Magistrate, having jurisdiction, as the District Magistrate directs.

(2) The Magistrate to whom the case is submitted may, if so empowered, either try the case himself, or refer it to any Magistrate subordinate to him having jurisdiction, or commit the accused for trial.

1001. When Magistrate should proceed under this section:—(1) The application of this section would be necessary if in the course of proceedings before a Magistrate, it should transpire that the offence committed is apparently one which the particular Magistrate is not competent to try, or one in which it appears that he is in some way personally interested (sec. 556) or which he is declared to be otherwise incompetent to deal with (secs 482, 487)—*Prinsep*.

(2) Proof of *previous conviction* against a person accused before a Magistrate will justify his taking action under this section—*Chandra Dallal*, 1894 A.W.N. 200.

(3) When a Magistrate finds that he has no *jurisdiction* to try a case, he should not discharge the accused, but should proceed under this section—*Munisami*, 2 Weir 323. If the offence is within his jurisdiction, he should proceed in the ordinary way, and if it is a Sessions case, commit it to the Sessions; he need not submit the case under this section to a superior Magistrate—*Amir Khan*, 7 C.W.N. 457.

(4) When the evidence discloses *circumstances of aggravation*, which make the offence one cognizable by a superior tribunal, it becomes the duty of the trying Magistrate to use the proper procedure for sending the case to the higher Court—*Gundya*, 13 Bom 502. No tribunal can properly clutch jurisdiction by intentionally ignoring the facts which make the offence really cognizable by a higher tribunal—*Anonymous*, 2 Weir 21 and 2 Weir 421; *Ayyan*, 24 Mad. 675. Thus, where a theft is accompanied with violence, it becomes a case of robbery, which is beyond the jurisdiction of a second-class Magistrate, and such Magistrate cannot ignore the fact of violence and try the case as one of theft only—*Anonymous*, 2 Weir 420 (421).

Framing of charge neither necessary nor illegal:—It is not illegal for a Magistrate of the 2nd or 3rd class to frame a charge, even though at the time of framing the charge he intended to submit the case to a superior Magistrate or to the District Magistrate—*Nga Po*, 1905 U.B.R. (Cr. P. C.) 33, 2 Cr.L.J. 464. On the other hand, if the inferior Magistrate sends the case to the superior Magistrate, without framing a charge, the superior Magistrate cannot send back the case to the inferior Magistrate, with a direction to prepare a charge under a particular section—*Fakira*, Ratanlal 499.

1002. Sub-section (2)—Power of the superior Magistrate:—The superior Magistrate to whom the case is submitted may either try the case himself or refer it to any subordinate Magistrate, or commit the accused for trial. But he has no power to send the case back to the subordinate Magistrate who submitted the case for an order of committal, because the Sub-Magistrate's jurisdiction had ceased when he submitted the case to the superior Magistrate, and he cannot, therefore, reassume

jurisdiction and commit the accused—*Hampanna*, 45 Mad. 846, 23 Cr.L.J. 710. But the correctness of this decision has been doubted by a recent Full Bench which have decided that sub-section (2) is sufficiently wide to embrace a reference back to the Magistrate who originally submitted the case—*Polur Reddi v. Munnusami*, 54 Mad. 16, 59 M.L.J. 308, 31 Cr.L.J. 1010 (1012), 1930 M.W.N. 493, 32 M.L.W. 381, 126 I.C. 495, 1930 Cr.C. 961 (F.B.). But the superior Magistrate cannot send the case back to the Magistrate who submitted the case to him, with a direction to try the case himself, although the latter had no power to try the case—*Bahman*, 27 Cr.L.J. 545, 43 C.L.J. 214, 93 I.C. 1041. If the superior Magistrate tries the case himself, he must try it *de novo*; he cannot convict the accused on the evidence recorded by the Magistrate who submitted the case; he must hear the evidence afresh. Failure to do so vitiates the whole trial; and the fact that the accused did not want the witnesses to be recalled and consented to rely upon the evidence recorded by the submitting Magistrate does not cure the illegality. The special provisions of sec. 350 do not apply where a case is submitted under this section by a subordinate Magistrate to a superior Magistrate—*Muhammad*, 1905 P.L.R. 91, 2 Cr.L.J. 369; *Ambica*, 19 Cr.L.J. 625 (Pat.); *Inayat Husain*, 1905 P.L.R. 106; *Paravada China Venku Naidu*, 17 L.W. 247, 24 Cr.L.J. 413, 72 I.C. 525, A.I.R. 1932 Mad. 327; *Sher Khan*, 34 Cr.L.J. 749, 144 I.C. 231, A.I.R. 1933 Sind 191, 1933 Cr.C. 572, 27 S.L.R. 266, Ind. Rul. 1933 Sind 173; *Budhu*, 47 C.L.J. 122, 29 Cr.L.J. 464, 55 Cal. 65; *Sasthi Gopal Samni v. Haridas Bagdi*, 39 Cr.L.J. 606, 175 I.C. 537, A.I.R. 1938 Cal. 415, 42 C.W.N. 503, 10 R.C. 799. Altogether apart from that the ordinary rule is that the Magistrate, who tries the case, is to record the evidence and, unless an exception is definitely provided for by some statute, that ordinary provision should prevail—*Sasthi Gopal Samni v. Haridas Bagdi*, *supra*. See sub-sec. (2) of sec. 350 and Note 1017.

But if the superior Magistrate, to whom the case is submitted, commits the case to the Sessions, instead of trying it, he need not take the evidence afresh, but can commit the case upon the evidence recorded by the inferior Magistrate—*Kamani v. Fakir*, 12 C.W.N. 136, 6 Cr.L.J. 429; *Sesha*, Ratanlal 472; *Ram Prosad*, 12 N.L.R. 146, 18 Cr.L.J. 57.

347. (1) If in any inquiry before a Magistrate, or in any trial before a Magistrate before signing judgment, it appears to him at any stage of the proceedings that the case is one which ought to be tried by the Court of Session or High Court, and if he is empowered to commit for trial, he shall * * * commit the accused under the provisions hereinbefore contained.

(2) If such Magistrate is not empowered to commit for trial, he shall proceed under section 346.

1003. Change:—The words "stop further proceedings and" have been omitted by sec. 91 of the Cr. P. C. Amendment Act, XVIII of 1923 "This amendment is designed to bring sec. 347 into line with section 208"—*Statement of Objects and Reasons* (1914).

Under the old law, there was a conflict of opinion as to the meaning of the words "stop further proceedings." In *Durant*, Ratanlal 975, *In re Sessions Judge*, 17 M.L.T. 83, 15 Cr.L.J. 704 and *Phanindra*, 36 Cal. 48, 12 C.W.N. 1014, a very restricted meaning was assigned to these words, *viz.*, that as soon as the Magistrate considered that the case was one which ought to be tried by the Court of Session, he should at once stop all proceedings and then and there pass an order of commitment to the Sessions, even though neither the witnesses for the prosecution had been cross-examined nor the defence witnesses examined. In other words, the power of a Magistrate to make commitment

absence of independent evidence that a breach of the peace was committed as a result of commission of the offence which was compounded—*Chanda Singh v. Emp.*, 41 Cr.L.J. 359, 186 I.C. 642, A.I.R. 1940 Lah. 42.

346. (1) If, in the course of an inquiry or a trial before a Magistrate in any district outside the presidency-towns, the evidence appears to him to warrant a presumption that the case is one which should be tried or committed for trial by some other Magistrate in such district, he shall stay proceedings and submit the case, with a brief report explaining its nature, to any Magistrate to whom he is subordinate or to such other Magistrate, having jurisdiction, as the District Magistrate directs.

(2) The Magistrate to whom the case is submitted may, if so empowered, either try the case himself, or refer it to any Magistrate subordinate to him having jurisdiction, or commit the accused for trial.

1001. When Magistrate should proceed under this section:—(1) The application of this section would be necessary if in the course of proceedings before a Magistrate, it should transpire that the offence committed is apparently one which the particular Magistrate is not competent to try, or one in which it appears that he is in some way personally interested (sec. 556) or which he is declared to be otherwise incompetent to deal with (secs. 482, 487)—*Prinsep*.

(2) Proof of *previous conviction* against a person accused before a Magistrate will justify his taking action under this section—*Chandra Dallal*, 1894 A.W.N. 200.

(3) When a Magistrate finds that he has no *jurisdiction* to try a case, he should not discharge the accused, but should proceed under this section—*Munisami*, 2 Weir 323. If the offence is within his jurisdiction, he should proceed in the ordinary way, and if it is a Sessions case, commit it to the Sessions; he need not submit the case under this section to a superior Magistrate—*Amir Khan*, 7 C.W.N. 457.

(4) When the evidence discloses *circumstances of aggravation*, which make the offence one cognizable by a superior tribunal, it becomes the duty of the trying Magistrate to use the proper procedure for sending the case to the higher Court—*Gundya*, 13 Bom. 502. No tribunal can properly clutch jurisdiction by intentionally ignoring the facts which make the offence really cognizable by a higher tribunal—*Anonymous*, 2 Weir 21 and 2 Weir 421; *Ayyan*, 24 Mad 675. Thus, where a theft is accompanied with violence, it becomes a case of robbery, which is beyond the jurisdiction of a second-class Magistrate, and such Magistrate cannot ignore the fact of violence and try the case as one of theft only—*Anonymous*, 2 Weir 420 (421).

Framing of charge neither necessary nor illegal:—It is not illegal for a Magistrate of the 2nd or 3rd class to frame a charge, even though at the time of framing the charge he intended to submit the case to a superior Magistrate or to the District Magistrate—*Nga Po*, 1905 U.B.R. (Cr. P. C.) 33, 2 Cr.L.J. 464. On the other hand, if the inferior Magistrate sends the case to the superior Magistrate, without framing a charge, the superior Magistrate cannot send back the case to the inferior Magistrate, with a direction to prepare a charge under a particular section—*Fakira*, Ratanlal 499.

1002. Sub-section (2)—Power of the superior Magistrate:—The superior Magistrate to whom the case is submitted may either try the case himself or refer it to any subordinate Magistrate, or commit the accused for trial. But he has no power to send the case back to the subordinate Magistrate who submitted the case for an order of committal, because the Sub-Magistrate's jurisdiction had ceased when he submitted the case to the superior Magistrate, and he cannot, therefore, reassume

jurisdiction and commit the accused—*Hampanna*, 45 Mad. 846, 23 Cr.L.J. 710. But the correctness of this decision has been doubted by a recent Full Bench which have decided that sub-section (2) is sufficiently wide to embrace a reference back to the Magistrate who originally submitted the case—*Polur Reddi v. Munnusami*, 54 Mad. 16, 59 M.L.J. 308, 31 Cr.L.J. 1010 (1012), 1930 M.W.N. 493, 32 M.L.W. 381, 126 I.C. 495, 1930 Cr.C. 961 (F.B.). But the superior Magistrate cannot send the case back to the Magistrate who submitted the case to him, with a direction to try the case himself, although the latter had no power to try the case—*Bahman*, 27 Cr.L.J. 545, 43 C.L.J. 214, 93 I.C. 1011. If the superior Magistrate tries the case himself, he must try it *de novo*; he cannot convict the accused on the evidence recorded by the Magistrate who submitted the case; he must hear the evidence afresh. Failure to do so vitiates the whole trial; and the fact that the accused did not want the witnesses to be recalled and consented to rely upon the evidence recorded by the submitting Magistrate does not cure the illegality. The special provisions of sec. 350 do not apply where a case is submitted under this section by a subordinate Magistrate to a superior Magistrate—*Muhammad*, 1905 P.L.R. 91, 2 Cr.L.J. 369; *Ambica*, 19 Cr.L.J. 625 (Pat.); *Inayat Husain*, 1905 P.L.R. 106; *Pararada China Venku Naidu*, 17 L.W. 247, 24 Cr.L.J. 413, 72 I.C. 525, A.I.R. 1932 Mad. 327; *Sher Khan*, 34 Cr.L.J. 749, 144 I.C. 231, A.I.R. 1933 Sind 191, 1933 Cr.C. 572, 27 S.L.R. 266, Ind. Rul. 1933 Sind 173; *Budhu*, 47 C.L.J. 122, 29 Cr.L.J. 464, 55 Cal 65; *Sasthi Gopal Samni v. Haridas Bagdi*, 39 Cr.L.J. 606, 175 I.C. 537, A.I.R. 1938 Cal. 415, 42 C.W.N. 508, 10 R.C. 799. Altogether apart from that the ordinary rule is that the Magistrate, who tries the case, is to record the evidence and, unless an exception is definitely provided for by some statute, that ordinary provision should prevail—*Sasthi Gopal Samni v. Haridas Bagdi*, *supra*. See sub-sec. (2) of sec. 350 and Note 1017.

But if the superior Magistrate, to whom the case is submitted, commits the case to the Sessions, instead of trying it, he need not take the evidence afresh, but can commit the case upon the evidence recorded by the inferior Magistrate—*Kamani v. Fakir*, 12 C.W.N. 136, 6 Cr.L.J. 429; *Sesha, Ratanlal* 472; *Ram Prasad*, 12 N.L.R. 146, 18 Cr.L.J. 57.

347. (1) If in any inquiry before a Magistrate, or in any

trial before a Magistrate before signing judgment, it appears to him at any stage of the proceedings that the case is one which ought to be tried by the Court of Session or High Court, and if he is empowered to commit for trial, he shall * * * commit the accused under the provisions hereinbefore contained.

(2) If such Magistrate is not empowered to commit for trial, he shall proceed under section 346.

1003. Change:—The words "stop further proceedings and" have been omitted by sec 91 of the Cr. P. C. Amendment Act, XVIII of 1923. "This amendment is designed to bring sec. 347 into line with section 208"—*Statement of Objects and Reasons* (1914).

Under the old law, there was a conflict of opinion as to the meaning of the words "stop further proceedings". In *Durant*, Ratanlal 975, *In re Sessions Judge*, 17 M.L.T. 83, 15 Cr.L.J. 704 and *Phanindra*, 36 Cal 48, 12 C.W.N. 1014, a very restricted meaning was assigned to these words, viz, that as soon as the Magistrate considered that the case was one which ought to be tried by the Court of Session, he should at once stop all proceedings and then and there pass an order of commitment to the Sessions, even though neither the witnesses for the prosecution had been cross-examined nor the defence witnesses examined. In other words, the power of a Magistrate to make commitment

under this section was not subject to the provisions of Chapter XVIII, and the Magistrate was not bound to follow the procedure of that Chapter but could commit even though all the evidence on either side had not been taken.

But a more reasonable construction was given to the words "stop further proceedings" in some other cases. Thus, in another Madras case as well as in other cases, the words 'stop further proceedings' were interpreted to mean that the Magistrate should stop proceedings with the case as a trial and should commit the case to the Sessions, and in thus committing he should adopt the procedure laid down in Chapter XVIII. These words did not enable the Magistrate to shorten the proceedings and then and there pass an order of commitment—*Kangayya*, 36 Mad 321 (324); *Channing Arnold*, 6 L.B.R. 129, 13 Cr.L.J. 877 (882), 17 I.C. 877; *Ulli Bai*, 17 S.L.R. 188, 26 Cr.L.J. 148 (F.B.). It was held that the words "under the provisions hereinbefore contained" showed that the Magistrate must make his proceedings conform to the provisions of Chapter XVIII, that sec 347 did not override or dispense with the obligation of following Chapter XVIII, and that before he wrote and signed a committal order, the provisions of that Chapter had to be followed and he could not conform to the mere passing of the committal order under sec 213—*Channing Arnold*, supra. It was not intended by this section to enable the Magistrate to deprive the accused of any of the rights conferred on him by Chapter XVIII—*In re Chinnavan*, 15 Cr.L.J. 366, 23 I.C. 734, A.I.R. 1914 Mad. 643; and an order of commitment made without taking all such evidence as the accused was prepared to produce before the Magistrate was invalid—*Muhammad Hadi*, 26 All 177; *Ahmadi*, 20 All. 264. In a later case the Calcutta High Court also laid down that though the Magistrate decided to commit the case to the Sessions under sec. 347, he was still bound to follow the procedure of Chapter XVIII and allow the accused to cross-examine the prosecution witnesses (sec 208), where the application to cross-examine was made before the charge was framed and before the Magistrate decided to commit the case to the Court of Session—*Jyotsna Nath*, 51 Cal. 442 (445); 26 Cr.L.J. 63, A.I.R. 1924 Cal. 780, 83 I.C. 591; *Damarcha*, 62 I.C. 192, 19 A.L.J. 463, 22 Cr.L.J. 496, A.I.R. 1921 All. 148.

This later view will now prevail as a result of the present amendment which has deleted the above ambiguous words ("stop further proceedings"). Section 347 is now controlled by Chapter XVIII. If before an order of commitment is passed, the accused applies for an opportunity to cross-examine the prosecution witnesses and to examine the defence witnesses, the Magistrate cannot decline to allow the examination or cross-examination, but is bound to follow the provisions of sec. 208—*Bhat*, 33 Bom.L.R. 1192, 1931 Cr.C. 949 (950), 33 Cr.L.J. 68, 134 I.C. 1230, A.I.R. 1931 Bom. 517; *Asghar*, 37 Cr.L.J. 337 (341), 160 I.C. 856, A.I.R. 1936 All. 134, 1936 Cr.C. 134, 1935 A.L.J. 1321 (F.B.). The phrase "under the provisions hereinbefore contained" relates to those provisions in Chapter XVIII which define the procedure to be adopted in the inquiries into cases triable by the Court of Session. So, where the evidence recorded is not read over to each witness in the presence of the accused in accordance with the provisions of sec. 360 read with secs. 207 and 208 of Chapter XVIII, no commitment can be made under sec. 317—*Damodaran*, 52 Mad. 995, 57 M.L.J. 555, 31 Cr.L.J. 273, A.I.R. 1929 Mad. 862, 121 I.C. 618, 1929 Cr.C. 602. If the Magistrate omits to follow the provisions of Chapter XVIII, and the case comes up to the High Court in revision before the order of commitment is made, the High Court will direct the Magistrate to reopen the inquiry *de novo*, irrespective of the question whether the accused has been prejudiced by the omission or not—*Damodaran*, supra. But if the case comes up to the High Court in revision after a committal order has been made, the High Court will not quash the commitment on the ground of omission to follow the procedure of Chapter XVIII, if the omission has not caused any prejudice to the accused—*Chinnavan*, 15 Cr.L.J. 366; *Bhat*, supra; *Fazal v. Emp.*, A.I.R. 1940 Lah. 389, I.L.R. 1940 Lah. 151. But see *Paladugu Lawshminarayan v. Tadiboyina*, 33 Cr.L.J. 765, 139 I.C. 313, A.I.R. 1932 Mad. 502, 1932 M.W.N. 634, 63 M.L.J. 101, 1932 Cr.C. 506, 36 M.L.W. 390, Ind. Rul. 1932 Mad. 667, where the commitment

was quashed for the simple reason that the accused had no opportunity of adducing their defence evidence before committal and *Nagendra*, 33 Cr L.J. 770, 139 I.C. 470, 36 C.W.N. 926, 1932 Cr.C. 636, AIR, 1932 Cal 683, Ind. Rul. 1932 Cal. 628, where a commitment was quashed on the ground that the Magistrate had not before making the order of commitment held an enquiry under Chapter XVIII of the Code.

1003A. Scope:—This section, no doubt authorises a Magistrate at any stage of the trial of a warrant case to commit the accused for trial instead of completing the trial himself. It is clear that the new charge which will then have to be drawn up by the Magistrate will have the effect of cancelling any previous charge framed by him, but this case can only be with respect to the subject-matter of the new charge. So far as this subject-matter is concerned, the previous proceedings before the Magistrate must be regarded as proceedings in an enquiry preliminary to commitment, but this alteration of character cannot be extended to any matter which is not the subject of the new charge. This section does not empower a Magistrate to discharge an accused against whom a charge has been framed. It is only in respect of the offence for which the accused is to be committed to the Court of Session that the proceedings are taken out of Chapter XXI, and the other proceedings of the Magistrate must remain governed by the provisions of that Chapter—*Bishambhar Nath*, 26 Cr L.J. 520, 85 I.C. 360, 1 O.W.N. 705, AIR. 1925 Oudh 547

1004. Procedure:—It is not intended by this section that if the Magistrate finds that an order of commitment is to be made, proceedings under Chap. XVIII are to be commenced *de novo*—*Chinnavan*, 15 Cr L.J. 366 (Mad.); *Illahi Bakhsh*, 2 All. 910; therefore, if the Magistrate has already completed the evidence of the complainant and his witnesses, it is not necessary for him to take that evidence afresh. Only in respect of the remaining proceedings the provisions of Chapter XVIII should be followed—*Illahi Bakhsh*, supra. The Magistrate need not start proceedings *de novo*, but he must not deprive the accused of any right which he might have exercised under Chapter XVIII, if the case had been treated as an inquiry under that chapter from the outset—*Ram Ghulam*, 1931 A.L.J. 587, 32 Cr L.J. 849 (850), 132 I.C. 47, 53 All. 692, 1931 Cr.C. 706, AIR 1931 All. 434, Ind. Rul. 1931 All. 479; *Asghar*, 37 Cr L.J. 337 (339), 160 I.C. 856, AIR 1936 All. 134, 1936 Cr.C. 134, 1935 A.L.J. 1321 (F.B.). If the accused has already cross-examined all the prosecution witnesses and has produced all the defence evidence that he wanted to produce, the proceedings need not be commenced *de novo* from sec 208, and the accused has no further right of cross-examination—*Ram Ghulam*, supra

There is nothing in this section to suggest that where a Magistrate decides to commit under this section he should be required to commence proceedings *de novo* under Chapter XVIII. To lay down any general rule that a Magistrate, if he decides to commit under this section, should invariably commence proceedings *de novo* under Chapter XVIII would lead to intolerable delays in the trial of criminal cases without any compensating advantage to the accused or to the prosecution. What is necessary is that as soon as a Magistrate acting under this section has made up his mind to commit, he should be careful not to prejudice the accused by depriving him of the opportunities provided by sec 208 and sec 212, Cr P C., of offering defence evidence; and always provided that the requirements of secs 208, 211 and 212, Cr P C., as well as the formalities required by sec 213, Cr P C., are carefully observed, there is no reason why a Magistrate should be required to take proceedings *de novo* under Chapter XVIII—*Fazal v Emp.*, AIR 1940 Lah 389 (391), ILR 1940 Lah 151

'Ought to be tried'—See Notes under sec 207 for the meaning of these words. This section is couched in general terms, and gives the Magistrate very wide powers to commit if he is of opinion that the case is one which ought to be tried by the Court of Session. The discretion vested in the Magistrate under this section cannot be limited by the provisions of sec 254; that is, there is no suggestion in this section that the only possible reason for a competent Magistrate to commit a case is that he will not be able to pass a sufficiently severe sentence—*Ishahat*, 3 Rang. 42, 26 Cr L.J. 1329; *Bhagatathi*,

42 Mad 83 (85), 19 Cr.L.J. 997. The Magistrate's powers of committal to the Sessions are not confined to cases where he considers that he cannot give adequate punishment. Other circumstances may be taken into consideration in deciding the question whether a case should be committed to the Sessions, *viz.*, the gravity of the offence, the punishment prescribed for the offence, the section under which the accused is charged, the special difficulties of the case, its public importance, and the wishes of the parties—*Krishnaji*, 53 Bom 611, 1929 Cr.C 124, 30 Cr.L.J. 1090 (1095), 119 I.C. 666; *Bhimaji*, 42 Bom. 172 (178), 19 Cr.L.J. 342, 20 Bom.L.R. 89. If the Magistrate considers, for instance, that a complicated question of law arises or that some connected matter is already before the Court of Session or that the facts are such that a trial with the aid of a jury or with the aid of assessors (who may be chosen from experts in the particular matters involved in the case) would be a satisfactory procedure, the Magistrate should commit the case to the Court of Session under sec. 347—*Bhagavathi*, *supra*. Where the editor of a widely circulated newspaper was charged with the offence of sedition, before the Chief Presidency Magistrate, and he applied for commitment of the case to the High Court Sessions, *held* that the case should be committed under sec. 347; the fact that there was a congestion of work in the High Court Sessions was not a sufficient ground for the Magistrate's refusal to commit—*Krishnaji*, *supra*, distinguished in *Hari Moreswar*, A.I.R. 1932 Bom. 63, 33 Bom.L.R. 1515, 1932 Cr.C. 87, 56 Bom. 61, 33 Cr.L.J. 262, 136 I.C. 187, where the matter was held to be discretionary with the Magistrate.

If in a case some of the accused persons are charged with an offence which ought to be tried by the Court of Session, and the case against the other accused is a summons case which the Magistrate can try and adequately punish, it is not illegal for the Magistrate to commit *all* the accused to the Sessions—*Ghani Yakub*, 14 S.L.R. 85, 21 Cr.L.J. 791.

'*Before signing judgment*':—The commitment can be made if the judgment has not been given or signed. After signing judgment, no Court can alter or review the same. See sec. 369.

Commitment may be made after framing a charge in the trial as originally commenced—*Kudrutoollah*, 3 Cal 495 (497); *Ram Ghulam*, 1931 A.L.J. 587, 32 Cr.L.J. 849 (850).

Quashing:—The concluding words of the section that the Magistrate should "commit the accused under the provisions hereinbefore contained" clearly point to sec. 213 and when applicable to sec. 214, and in the absence of any other provision except sec. 215 for quashing the commitment, it appears that the commitment made under sec. 317 falls none the less within the purview of secs. 213 and 214; and where there is any question of quashing, it can only be done under sec. 215—*Ullibai*, 26 Cr.L.J. 148 (150), 83 I.C. 708, 17 S.L.R. 188, A.I.R. 1924 Sind 61.

348. (1) Whoever, having been convicted of an offence

Trial of persons previously convicted of offences against coinage, stamp-law or property. punishable under Chapter XII or Chapter XVII of the Indian Penal Code with imprisonment for a term of three years or upwards, is again accused of any offence punishable under either of those Chapters with imprisonment for a term of three years or upwards, shall, *if the Magistrate before whom the case is pending is satisfied that there are sufficient grounds for committing the accused*, be committed to the Court of Session or High Court, as the case may be, unless the Magistrate is *competent to try the case and is of opinion that he can himself pass an adequate sentence if the accused is convicted*:

Provided that, if any Magistrate in the district has been invested with powers under section 30, the case may be transferred to him instead of being committed to the Court of Session.

(2) *When any person is committed to the Court of Session or High Court under sub-section (1), any other person accused jointly with him in the same inquiry or trial shall be similarly committed, unless the Magistrate discharges such other person under section 209.*

Change:—The italicised words have been added by sec. 92 of the Criminal Procedure Code Amendment Act, XVIII of 1923.

"If the Magistrate committing the accused"—"This amendment has been made on the lines of sec. 209 (1)"—*Report of the Select Committee (1916).*

"Is competent to try the case":—We have introduced this amendment to make it clear that the section does not empower the Magistrate to pass sentence in a case which he is not competent to try"—*Report of the Joint Committee (1922).*

In the proviso, the words "any Magistrate in the district" have been substituted for the words "the District Magistrate" occurring in the old section. This amendment is merely verbal.

Sub-section (2):—"This clause provides that when any person is committed to the Court of Session under sec 318, any other person accused jointly, whom the Magistrate believes to be guilty, shall be similarly committed. Identical treatment will thus be accorded to all the accused"—*Statement of Objects and Reasons (1914).*

Sections 348 and 349:—If the accused is an old offender, the Magistrate should act under this section, and refer the case to a superior Magistrate under sec. 319—*Dasari Ramudu*, 2 Weir 423. That section (sec 349) does not apply to a case where the accused is an old offender—*Po Thwe*, 4 LBR 282, 2 CrLJ 478. If a Magistrate instead of proceeding under this section erroneously sends up the case under sec 349, it is open to the District Magistrate to take the case on his own file or to transfer it to some other first class Magistrate—*Mari Naicken*, 2 Weir 422.

1005. Procedure:—The Magistrate must first of all determine either as a preliminary matter or at any rate before framing a charge, whether there has been a previous conviction; if a previous conviction is proved, the Magistrate will then have to consider whether in the circumstances of the case his powers enable him to try and pass adequate sentence. If he thinks they do not permit, he should not try but commit the case to the Sessions (but he should not discharge the accused); if they do permit, he may try the case himself. If he commit the case to the Sessions, he ought not to find the accused guilty, but should frame a charge under sec 210, and commit the case for trial under Chapter XVIII—*Kora Sellandhi*, 38 Mad. 552.

Commitment not imperative—The words "unless convicted" did not exist in the Code of 1882 or in the earlier Codes, and, therefore, it was imperative on the Magistrate to commit if a previous conviction was proved, and he could not try the case himself—*Gaudasing*, Ratanlal 704. But the 1893 Code gives a discretion to the Magistrate to try the case himself if he is competent to pass adequate sentence.

1006. Powers of District Magistrate:—Under the proviso to this section, if the District Magistrate is invested with powers under sec 30, the case may be transferred to him instead of being committed to the Sessions. In such a case the District Magistrate need not try the case *de novo*. He can, under sec 350, act on the evidence already recorded by the Magistrate, who transferred the case. See Notes under sub-sec. (3) of sec. 350.

If the District Magistrate considers that the case should be committed to the Sessions, he should himself commit, and not send back the case to the Subordinate

Magistrate with a direction to commit—*Veeranna*, 9 Mad. 377. If the District Magistrate *commits* the case, instead of *trying* it, he can, it seems, act upon the evidence recorded by the Subordinate Magistrate, and need not commence the inquiry *de novo*. See *Shesha*, Ratanlal 472 and *Kamani v. Fakira*, 12 C.W.N. 136 cited in Note 1002 under sec. 346.

349. (1) Whenever a Magistrate of the second or third class, having jurisdiction, is of opinion, after hearing the evidence for the prosecution and the accused, that the accused is guilty, and that he ought to receive a punishment different in kind from, or more severe than, that which such Magistrate is empowered to inflict, or that he ought to be required to execute a bond under section 106, he may record the opinion and submit his proceedings, and forward the accused, to the District Magistrate or Sub-divisional Magistrate to whom he is subordinate.

(1A) *When more accused than one are being tried together and the Magistrate considers it necessary to proceed under sub-section (1) in regard to any of such accused, he shall forward all the accused who are in his opinion guilty to the District Magistrate or Sub-divisional Magistrate.*

(2) The Magistrate to whom the proceedings are submitted may, if he thinks fit, examine the parties and recall and examine any witness who has already given evidence in the case, and may call for and take any further evidence, and shall pass such judgment, sentence or order in the case as he thinks fit, and as is according to law:

Provided that he shall not inflict a punishment more severe than he is empowered to inflict under sections 32 and 33.

Change:—Sub-section (1A) has been added by sec 93 of the Cr. P. C. Amendment Act, XVIII of 1923. This is similar to sub-section (2) of section 348.

1007. Application of section:—The provisions of this section are subject to the express provision of sec 348. Therefore, where the accused is an old offender, a second class Magistrate should commit him to the Sessions under sec. 348, and not submit the case to the superior Magistrate under this section—*Dasari Ramudu*, 2 Weir 423; *Po Thwe*, 4 L.B.R. 282, 8 Cr.L.J. 478.

The procedure prescribed by this section is unsuited to cases tried summarily—*Jalal Khan*, 4 L.B.R. 277, 8 Cr.L.J. 475.

1008. Reference to Superior Magistrate:—*Who can refer:*—Only the second or third class Magistrate can refer. A first class Magistrate is not competent to submit the case under this section—*Q.-E. v. Pershad*, 7 All. 414.

This section does not authorise any Bench of Magistrates to refer a case for higher punishment—*Jalal Khan*, *supra*.

Reference discretionary:—Whether a case ought to be referred to the superior Magistrate or not is within the discretion of the subordinate Magistrate, and the District Magistrate cannot direct the subordinate Magistrate to send up the case under this section. If he so directs, his order is *ultra vires*—*Anonymous*, 2 Weir 427.

To whom case can be referred:—The case can be referred to the District Magistrate or to the Magistrate to whom the referring Magistrate is subordinate, and to no other

Magistrate—*Vinayak*, 38 Bom. 719, 16 Cr.L.J. 273. See also *Rajaram*, 28 Cr.L.J. 489, 101 I.C. 665, A.I.R. 1927 Nag. 209.

When reference can be made :—This section authorises a reference to the superior Magistrate when the subordinate Magistrate considers that the accused should receive a severer sentence than he himself is competent to inflict. If the punishment which the subordinate Magistrate proposed was one which he himself could inflict, the reference was improper and the Magistrate should himself try the case—*Phulla*, 1881 A.W.N. 99. When a case was sent to the District Magistrate not because the referring Magistrate was not competent to pass a severe sentence but on the ground that it was advisable that the matter should be dealt with by the District Magistrate, it was held that the transfer was neither under sec. 349 nor under sec. 192, and, therefore, the conviction made by the District Magistrate was illegal and must be set aside—*Radhe*, 12 All. 66.

Under this section the Magistrate can make a reference to a superior Magistrate if he considers that the accused should receive a severer punishment than he can inflict; it does not apply where the Magistrate thinks that the accused should be dealt with under sec. 562, because an order under sec. 562 directing release upon probation of good conduct is not a punishment—*Baba*, 24 Cr.L.J. 738 (Nag.). But see proviso to sub-sec. (1) of sec. 562.

1009. Powers and duties of referring Magistrate:—If the subordinate Magistrate submits the case to the higher Magistrate for severer punishment, he cannot convict the accused; the conviction and sentence are reserved for the higher Magistrate. The referring Magistrate is only required to state his opinion that the accused is guilty, but he cannot convict—*Mahadu*, Ratanlal 387; *Prayag Gope*, 3 Pat. 1015 (1017), 5 P.L.T. 571, 25 Cr.L.J. 1276. If the subordinate Magistrate not only records his opinion that the accused is guilty (as he is required to do) but also convicts the accused, the conviction will be treated as a mere surplusage or as a legal nullity, and the Magistrate to whom the case is sent can proceed with it without a reference to the High Court for the purpose of having the conviction formally quashed—*Narayan*, 52 Bom. 456, 30 Bom.L.R. 620, 29 Cr.L.J. 904 (905). The referring Magistrate can frame a charge if he likes, and the framing of charge is not illegal—*Po Yin*, 17 Cr.L.J. 201 (Bur.); *Hla Gyi*, 2 L.B.R. 285; *Kondi*, Ratanlal 948.

If the subordinate Magistrate sends the case for the purpose of binding down the accused under sec. 106, the Magistrate should neither convict nor pass sentence himself. The conviction, sentence and the order for security are all to be passed by the superior Magistrate—*Mahmudi Sheikh v. Ali Sheikh*, 21 Cal. 622; *Rohmuddi*, 35 Cal. 1093.

'Forward the accused' —The reason of forwarding the accused is that the accused has a right to be present at the proceedings held before the Magistrate to whom the case is transferred, such proceedings being a continuation of the proceedings before the referring Magistrate—*Gunesh*, 7 W.R. 38. The right exists even though the superior Magistrate does not examine the parties or recall and re-examine the witnesses, and the accused will be at liberty to contend before that Magistrate that there is no sufficient case made out against him, and the Magistrate, if he thinks so, may discharge or acquit him—*Ragha*, 7 B.H.C.R. 31.

Sub-section (1A):—It was held under the old section that where several accused were charged before the subordinate Magistrate, he could convict some of them and send up the others to the superior Magistrate; such a procedure was not improper nor the conviction illegal, but in such a case it was more advisable to forward all the accused to the superior Magistrate instead of convicting some of the accused—*Raghatia*, 2 Weir 128, *Nachian*, 2 Weir 429. The new sub-section (1A) now makes it imperative on the Magistrate, under such circumstances, to forward all the accused to the superior Magistrate. See *Dodo*, 18 S.L.R. 216, 26 Cr.L.J. 1363; *Murugesu*, 29 Cr.L.J. 624, 109 I.C. 816, 1928 M.W.N. 72.

But if there are several accused, and the Magistrate finds only one of them to be guilty, he should not send all the accused to the superior Magistrate, but should acquit

the accused whom he finds not guilty and send that accused alone whom he considers guilty—*Sultan Md.*, 21 A.L.J. 80, 26 Cr.L.J. 1630, 90 I.C. 926, 24 A.L.J. 80, A.I.R. 1926 All 176.

1010. Sub-section (2):—Powers and duties of the Superior Magistrate:—When a case is referred to a superior Magistrate, the whole case is opened up for him to deal with it according to his own discretion—*Bapuda*, Ratanlal 350. In dealing with the case, he should not confine himself to considering whether the decision of the subordinate Magistrate was plainly and manifestly opposed to the evidence, but he should find on the evidence the facts which he considers proved and pass judgment accordingly—*Appaji*, Ratanlal 636; *Anonymous*, 5 M.H.C.R. App. 43. If the superior Magistrate convicts the accused for an aggravated form of the offence, he must commence the trial afresh for such offence and cannot act on the evidence already recorded—*Anonymous*, 2 Weir 21 (22); *Anonymous*, 2 Weir 428. So also, if the offence is one which is beyond the jurisdiction of the subordinate Magistrate to try, the superior Magistrate cannot act upon the evidence already recorded by the subordinate Magistrate—*Sitaram*, 1 Bom.L.R. 27. The Magistrate to whom a case is transferred is competent to pass 'such judgment, sentence or order as he thinks fit'. He is free to deal with the case according to his own discretion, and he can, if he thinks fit, order a commitment to the Court of Session—*Chinnappa*, Ratanlal 945; *Chinnimarigadu*, 1 Mad. 289; *Viranna*, 9 Mad. 377; *Abdul Wahab v. Chandia*, 13 Cal. 305; *Abdulla*, 4 Bom. 240. He has to make up his mind whether the accused are guilty or not and exercise his own independent judgment in the case, and to write a judgment conformable to the requirements of sec. 367. He cannot simply pass sentence on the accused without writing any judgment—*Karupppa*, 1920 M.W.N. 120, 54 I.C. 404, 21 Cr.L.J. 52. It is not sufficient for a superior Magistrate, to whom a case has been referred under sec. 349, Cr. P. C., to accept the finding of the inferior Magistrate making the reference and he should form his own independent judgment and write a judgment according to the provisions of sec. 367, Cr. P. Code—*Lallu Ram v. Emp.*, 39 Cr.L.J. 1005, 178 I.C. 173, 1938 A.Cr.C. 125, 1938 O.W.N. 1051, 1938 O.A. 802, 1938 A.W.R. (C.C.) 87, 1938 O.L.R. 468, 11 R.O. 91, A.I.R. 1939 Oudh 35. See Note 1050A.

If the case was originally tried by the subordinate Magistrate *summarily*, the nature of the trial is not altered by reason of the reference under this section, and the superior Magistrate, if he acts on the evidence recorded by the subordinate Magistrate without hearing the case anew, cannot pass a heavier sentence than what is allowed in a summary trial under sec. 262 (2)—*Gopal*, 1932 Cr.C. 595, 33 Cr.L.J. 472, 137 I.C. 208, A.I.R. 1932 All. 507, 1932 Cr.C. 595, Ind. Rul. 1932 All. 320. But the case would have been otherwise if the superior Magistrate had heard the case *de novo* at full length, in accordance with the regular procedure—*Ibid.*

The superior Magistrate to whom the case is referred has no power to send back the case to the subordinate Magistrate upon any ground whatsoever. He must dispose of it himself by acquitting or convicting the accused or by committing him for trial—*Thakur Dayal*, 26 All. 344; *Chinnappa*, Ratanlal 945; *Dula v. Bhagirat*, 6 C.L.R. 276; and even if the case is sent back to the subordinate Magistrate, the latter cannot take up the case; after he has referred the case his jurisdiction over it ceases, and any order passed by him would be illegal—*Dula v. Bhagirat*, *supra*; *Hava*, 10 Bom. 196. If the superior Magistrate thinks that a commitment to the Sessions is necessary, he himself should make the commitment; he cannot send back the case to the referring Magistrate with a direction to commit the case to the Sessions—*Viranna*, 9 Mad. 377. If, however, the reference is defective, *e.g.*, if the referring Magistrate has omitted to record in writing the statement of the accused as required by section 364, the superior Magistrate can return the case with a direction to supply the defect; and the subordinate Magistrate in such a case is also competent to come to a fresh and different conclusion as to the guilt of the accused and acquit some of them—*Anonymous*, 2 Weir 426.

Moreover, the Magistrate to whom a case is referred cannot refer the case to another Magistrate for inquiry—*Anonymous*, 6 M.H.C.R. App. 2; *Anonymous*, 4 Mad. 23;

Ponnusamy, 36 Mad. 470; *Nga Po*, 1905 U.B.R. (Cr. P. C.) 33, 2 Cr.L.J. 464. A case once referred under this section cannot be referred to another Magistrate for inquiry or trial—*Vinayak*, 38 Bom. 719. Even if the superior Magistrate thinks that the reference by the inferior Magistrate was incorrect or illegal, he can report it for orders under sec. 438, but himself cannot quash the reference and order retrial by another Magistrate—*Jaiind Singh*, 1900 P.R. 14.

The superior Magistrate can act upon the evidence already recorded by the subordinate Magistrate and is not bound to hold a *de novo* trial under sec. 350—*Raghava*, 2 Weir 428 (429). That is now made clear by the amendment made in sub-sec. (2) of sec. 350 which lays down that the section does not apply to proceedings submitted under sec. 349. See *Doda*, 18 S.L.R. 216, 26 Cr.L.J. 4363, 89 I.C. 451, A.I.R. 1926 Sind 48. See *Sasthi Gopal Samui v. Haridas Bagdi*, in Note 1017.

350. (1) Whenever any Magistrate, after having heard and recorded the whole or any part of the evidence in an inquiry or trial, ceases to exercise jurisdiction therein, and is succeeded by another Magistrate who has and who exercises such jurisdiction, the Magistrate so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself; or he may resubmit the witnesses and recommence the inquiry or trial:

Provided as follows:—

- (a) in any trial the accused may, when the second Magistrate commences his proceedings, demand that the witnesses or any of them be re-summoned and reheard;
- (b) the High Court, or in cases tried by Magistrates subordinate to the District Magistrate, the District Magistrate may, whether there be an appeal or not, set aside any conviction passed on evidence not wholly recorded by the Magistrate before whom the conviction was held, if such Court or District Magistrate is of opinion that the accused has been materially prejudiced thereby, and may order a new inquiry or trial.

(2) Nothing in this section applies to cases in which proceedings have been stayed under section 346 or in which proceedings have been submitted to a superior Magistrate under section 349.

(3) When a case is transferred under the provisions of this Code from one Magistrate to another, the former shall be deemed to cease to exercise jurisdiction therein, and to be succeeded by the latter within the meaning of sub-section (1).

Change:—The italicised words have been added by sec. 94 of the Cr. P. C. Amendment Act, XVIII of 1923. The reasons are stated below in their proper places.

1011. Object and scope of section:—The general principle is that a case must be decided by the Magistrate who heard the evidence. But if this principle has to

be strictly observed, it will follow that in every case of transfer, the succeeding Magistrate will have to try from the beginning all cases which have been partly heard by his predecessor-in-office, and there will be endless delay in trials. And this section is obviously intended to meet such cases—*Hardwar v. Khega*, 20 Cal. 870; *Janglal*, 19 Cr.L.J. 657 (Nag.). In view of the frequent changes in the office of Magistrates, the Code provides specially that a Magistrate may pronounce judgment on evidence recorded by his predecessor or on evidence partly recorded by his predecessor and partly by himself—*Tarada*, 3 Mad. 112.

This section applies not only where one Magistrate is succeeded by another but also where the second Magistrate is in his turn succeeded by another Magistrate. The third Magistrate can act on evidence recorded by his two predecessors. This section is not confined to a case where there is only a single occurrence of one Magistrate succeeding another—*Govindan v. Krishnam*, 45 M.L.J. 808, 47 Mad. 245. See also *Moti v. Keshrichand* in Note 1014.

This section gives the succeeding Magistrate jurisdiction to decide the case on evidence recorded by his predecessor, but it cannot give him jurisdiction to deliver a judgment written by his predecessor. Where the Magistrate who heard the evidence and tried the case was transferred to another district, and from that place he sent a written judgment which was pronounced by his successor at the place where the case was tried, held that there was no jurisdiction to do so and the conviction and sentence so passed were illegal and that the accused must be retried—*Baisnab Chandra v. Amin Ali*, 50 Cal. 664, 38 C.L.J. 202, 24 Cr.L.J. 489; *Jagatbandhu v. Jagabandhu*, 38 C.L.J. 201, 25 Cr.L.J. 192, 76 I.C. 432, A.I.R. 1924 Cal. 192, following *Anand Sarup*, 3 All. 563; *Mahomed Rafique*, 43 C.L.J. 100, 27 Cr.L.J. 406. A judgment having been written and signed by the Sessions Judge as an Appellate Court when he had ceased to have jurisdiction in the district is *ultra vires* and illegal and cannot be delivered by his successor—*Jogesh v. Surendra*, 35 C.W.N. 838. But the Allahabad and Madras High Courts and the Oudh Chief Court hold that the succeeding Magistrate can sign and pronounce the judgment written by his predecessor and thus adopt it as his own—*Nur Muhammad Khan*, A.I.R. 1923 All. 276, 71 I.C. 525, 24 Cr.L.J. 173, 21 A.L.J. 137; *Savarimuthu*, 40 Mad 108, 33 I.C. 646, A.I.R. 1917 Mad. 340, 17 Cr.L.J. 166, (1916) 1 M.W.N. 372, 32 M.L.J. 81; *Chandika*, 28 O.C. 109, 11 O.L.J. 775, 25 Cr.L.J. 1075, 81 I.C. 899; *Sankara Pillai*, 18 M.L.J. 197, 7 Cr.L.J. 459; and the accused are not entitled to a *de novo* trial—*Bhogole Chinta Somaija*, 34 Cr.L.J. 117, 141 I.C. 174, 36 M.L.W. 881, Ind Rul. 1933 Mad 84, 1933 M.W.N. 95, A.I.R. 1933 Mad. 251, 1933 Cr.C. 365, following *Public Prosecutor, Madras v. Chockalingam*, 52 Mad. 355, 30 Cr.L.J. 908, 118 I.C. 274, 29 M.L.W. 108, 1929 M.W.N. 60, A.I.R. 1929 Mad. 201.

In virtue of sec. 350, Cr. P. C. it is quite possible that the succeeding Magistrate may take the judgment left by his predecessor and compare it with the evidence recorded in the case and discover that it expresses what he himself would have decided on the case. In that case there is no reason why if there is no demand for a new trial on that part of the accused he should not deliver that judgment as his own. In fact by so doing it becomes his own judgment. The defect in such a case amounts only to an irregularity which can be cured by sec. 537, Cr. P. C. But where the succeeding Magistrate did not sign the judgment himself nor did he date and there was nothing to show that he even read it though probably he pronounced the sentence, delivering it not as his own judgment but as that of his predecessor, the defect in the delivery of judgment went beyond a mere irregularity curable under sec. 537, Cr. P. C. It is not contemplated in the Code that a Magistrate shall deliver any judgment other than his own and if he does so, it is not an irregularity in the form of delivery; it is not delivering judgment at all—*Chinnayar v. Maung Mya Thi*, 40 Cr.L.J. 829, 183 I.C. 216, A.I.R. 1939 Rang. 249, 1939 Rang.L.R. 570.

Where, on the date fixed for arguments, the Magistrate wrote out the judgment in the case convicting the accused and added a sentence at the end of it, "As the accused is not present to-day and I am under orders of transfer, I keep this judgment

on the file and leave this for my successor to pronounce it when the accused appears in Court," and it was contended that the successor in office of that Magistrate could not pronounce an order written by him without giving the accused an opportunity to claim a *de novo* trial, held that the contention was based on sec. 350, Cr. P. C., but there was no applicability of sec. 350 to the case and therefore the objection could not succeed. According to the law as laid down in the Criminal Procedure Code, the case was over as soon as the judgment had been delivered. Once the Magistrate had signed his judgment, he had delivered it within the meaning of sec. 366 (3), Cr. P. C., and the trial was then over. His action in putting it in a closed envelope for somebody else to pronounce was unnecessary and redundant. The trial was completed and all that remained was for judgment to be executed against the accused—*Gian Singh v. Amar Singh*, AIR 1939 Lah 21, ILR 1938 Lah 567, 40 P.L.R. 996, 179 I.C. 990, 40 Cr.L.J. 288. Where the succeeding Magistrate delivered the judgment written by his predecessor, with the note "As I am under order of transfer from this place and it is expected that I will be relieved before the date fixed for announcement of judgment in this case, I leave it to my worthy successor to announce the above judgment on the date fixed for announcement," without adopting it as his own and did not give an opportunity to the accused under this section to have a *de novo* trial, the irregularity, if any, in the case was covered by sec. 537, Cr. P. C.—*Harnam Singh v. Emp.*, AIR 1940 Lah. 289, 42 P.L.R. 240, 41 Cr.L.J. 808, 189 I.C. 826. The Lahore High Court thus preferred to follow the view of the Allahabad and Madras High Courts.

See also Note 1044

1012. Application of section:—This section applies to an enquiry under Chapter VIII; therefore, where a Magistrate holding an inquiry under sec. 107 is transferred after the examination of some prosecution witnesses and is succeeded by another, the person called upon to shew cause why he should not give security may under proviso (a) insist upon the re-summoning and re-examination of those witnesses—*Buroda v. Karimuddin*, 4 C.L.R. 452; *Venkatachinnayya*, 43 Mad 551, 1920 M.W.N. 280, 38 M.L.J. 370, 27 M.L.T. 178, 21 Cr.L.J. 402, 56 I.C. 50 (F.B.); *Baij Nath*, 25 Cr.L.J. 1380, 83 I.C. 340, 27 O.C. 323, AIR 1925 Oudh 228. Whether the inquiry is under secs. 107, 108, 109 or 110, Cr. P. C., makes no difference because sec. 117, cl. (2) applies equally to an enquiry under any of these sections—*Mahatab Singh*, AIR 1937 All 438, 1937 A.W.R. (H.C.) 382, 1937 A.L.J. 373, 169 I.C. 833, 1937 A.L.R. 598, 38 Cr.L.J. 804, 1937 A.I.C.R. 29.

This section is applicable to proceedings under sec. 145. Where in the course of such proceedings one Magistrate is transferred, the succeeding Magistrate can act upon the evidence already recorded—*Ali Mahomed v. Tarak*, 13 C.W.N. 420, 9 Cr.L.J. 278, 1 I.C. 336; *Anu v. Jitu*, 37 Cal 812; even though one of the parties demanded a *de novo* hearing—*Sondi Singh v. Govind Singh*, 5 P.L.T. 237, 25 Cr.L.J. 89, 76 I.C. 25, AIR 1924 Pat. 786, 2 Pat.L.R. 108; *Syed Sadek v. Sachindra*, 37 C.L.J. 128, 24 Cr.L.J. 569, 73 I.C. 265.

This section applies to inquiries preliminary to commitments. The succeeding Magistrate can commit the case to the Sessions on evidence recorded by his predecessor-in-office—*Malinga*, 31 Mad 40; *Nanhuna*, 36 All. 315, 15 Cr.L.J. 354; *Ghulam Jannat*, 7 Lah 70, 27 Cr.L.J. 627. See also *Ashutosh Sen Gupta v. Emp.*, in Note 1015. Where the proceedings are in the nature not of a trial but merely of an enquiry preparatory to commitment the necessity of any provision for a *de novo* trial does not exist. This principle of law applies even when a case, which was originally proceeded with on the footing that it was a trial of a warrant case, but was subsequently converted into an enquiry preparatory to commitment under sec. 349, Cr. P. C., was inquired into by a Magistrate who succeeded another when a part of the evidence had been recorded by the latter—*Panchanan*, 32 Cr.L.J. 243, 129 I.C. 182, AIR 1930 Cal. 666, 1930 Cr.C. 1058, Ind. Rul. 1931 Cal. 134.

This section does not apply to cases tried by Benches of Magistrates—*Damri v. Bhowani*, 23 Cal 194; *Basappa*, 18 Mad 394; *Haridwar v. Khaga*, 20 Cal. 870; *Girdhari*,

2 Lah. 237; *Abdul Ghani*, 1922 P.L.R. 1, 22 Cr.L.J. 511; *Itala*, 9 Bur.L.T. 203, 18 Cr.L.J. 96. Even the new sec. 350A does not apply where one Magistrate of a Bench is replaced by another; that section contemplates cases wherein all the Magistrates constituting the Bench have heard the proceedings throughout. When a case was heard by a Bench consisting of two Magistrates and, on the dissolution of the Bench, it was transferred for trial to one of those two Magistrates, *held* that sec. 350, Cr. P. C., did not in terms apply to a case like this and that the accused could not claim a *de novo* trial—*Abdul Hakim v. Fozu Mia*, 36 Cr.L.J. 857, 155 I.C. 1003, A.I.R. 1935 Cal. 287, 39 C.W.N. 57, 62 Cal. 266, 1935 Cr.C. 392. See Note 1019 under that section

This section does not, coming as it does in the chapter relating to 'inquiries and trials', apply to a preliminary enquiry as contemplated in sec. 202, Cr. P. C. Where, therefore, the Sessions Judge directed further enquiry into a complaint by a Magistrate other than the Magistrate who dismissed it under sec. 203, Cr. P. C., and, thereupon, the District Magistrate transferred the case to another Magistrate who dismissed the case again under sec. 203, Cr. P. C., on the basis of the evidence partly recorded by himself and the evidence already on record, *held* that the Magistrate had power to do so, not under this section, but under sec. 203, Cr. P. C., which does not say that the Magistrate dismissing the complaint must have himself recorded the evidence in the preliminary enquiry—*Virumal Manghanmal v. Muhammad Khan*, 37 Cr.L.J. 1086, 164 I.C. 1020, A.I.R. 1936 Sind 146, 30 S.L.R. 217, 1936 Cr.C. 862.

When a case is remanded for the taking of further defence evidence to a trial Court and where it is found that when the case returns to the trial Court, the Magistrate or the Officer trying the case has been transferred and a new judicial officer has taken his place, the provisions of this section immediately come into operation and the accused are entitled to a *de novo* trial—*Daroga*, 27 Cr.L.J. 1125, 97 I.C. 645, A.I.R. 1927 Pat. 5, 8 P.L.T. 181.

This section applies only to Magistrates but not to Sessions Judges. A Sessions Judge is not competent to pronounce judgment on evidence recorded by his predecessor, or on evidence partly recorded by his predecessor and partly by himself—*Ramdoyal*, 21 W.R. 47; *Durga Charan*, 8 C.L.J. 59, 8 Cr.L.J. 121; *Tarada*, 3 Mad. 112; *Badri Prasad*, 35 All. 63, 13 Cr.L.J. 861. Even the consent of the accused would not enable the Sessions Judge to do so and validate such procedure—*Sakharam*, 3 Bom.L.R. 558, 26 Bom. 50; *Bhuta Singh*, 1890 P.R. 1; *Salamut*, 23 W.R. 59. See also *Darabji*, 28 Cr.L.J. 402, 101 I.C. 178, 29 Bom.L.R. 204, A.I.R. 1927 Bom. 161.

This section refers to cases where one Magistrate is succeeded by another Magistrate, and does not apply where the Magistrate remains the same and his official designation is merely changed, e.g., where a Head Assistant Magistrate is appointed to the office of a Deputy Magistrate in another place in the same District; in such a case he can proceed to try the case from the point at which he had arrived as Head Assistant Magistrate prior to his becoming Deputy Magistrate, and the accused cannot demand a *de novo* trial under proviso (a)—*Karuppana v. Akobolamatam*, 22 Mad. 47.

This section does not apply where a case is originally tried by a Magistrate (or Bench) in the summary way, and then is transferred to a Magistrate who is not invested with summary powers. In such a case, the second Magistrate cannot act on the evidence recorded by the first Magistrate, for that would amount to his virtually trying the case summarily, which he is not empowered to do. The second Magistrate must try the case *de novo* and in the ordinary way—*Nannier v. Desaler*, 55 Mad. 795, 62 M.L.J. 738, 1932 Cr.C. 509 (510), 33 Cr.L.J. 653, 138 I.C. 581, 1932 M.W.N. 244, 35 M.L.W. 760, A.I.R. 1932 Mad. 505.

This section, which gives a Magistrate jurisdiction to continue a trial begun by his predecessor, is not applicable to cases tried in a summary manner. Therefore, a Magistrate acted without jurisdiction when he continued in a summary manner the trial of the accused whose trial in a summary manner had been commenced by his predecessor. This section relates to jurisdiction and an error in jurisdiction is not a mere irregularity—*Hemandas*, A.I.R. 1936 Sind 40, 37 Cr.L.J. 455, 161 I.C. 267, 1936 Cr.C. 230.

The Nagpur High Court could not agree with this view in *Durgaprasad*, A.I.R. 1940 Nag. 239, 41 Cr.L.J. 782, 189 I.C. 689, 1940 N.L.J. 321, where Gruer, J., observed: "Sec. 350, Cr. P. C., does not in terms exclude summary trials from its operation. It applies to all enquiries or trials conducted by a Magistrate in which the whole or any part of the evidence has been heard and recorded. The learned Advocate-General who opposes the reference argues, and I think correctly, that it depends on the way in which the evidence has been recorded in each case whether sec. 350 would apply or not. In trying a case summarily it is enough if scanty notes of the evidence are made, and these need not be kept on the record at all. Where such notes are allowed to remain, it would obviously be improper for the Magistrate to rely on such inadequate material. But in the present case one finds that the prosecution evidence was recorded by the first Magistrate *in extenso* in narrative form, at least quite as fully as it would have been in a summons case where by sec. 355, Cr. P. C., a memorandum of the substance is enough. It could not be urged that sec. 350 would not apply to such evidence if recorded in a summons case."

1013. "Succeeded":—A liberal construction should be put upon the provisions of sec. 350. Where on the death of a Magistrate empowered under sec. 30, the District Magistrate, being the only remaining Magistrate in the district having powers under that section, took upon his file a case which was being tried by the deceased, it was held that the District Magistrate must be regarded as having succeeded the deceased Magistrate within the meaning of this section—*Gorelal*, 19 Cr.L.J. 705, 46 I.C. 289 (Nag.). When a case is transferred from one Magistrate to another, the former Magistrate is said to be 'succeeded' by the latter. See sub-sec. (3) and Notes thereunder.

1014. 'Recommence the inquiry or trial':—The resummoning of the witnesses is not tantamount to re-commencing the enquiry. Therefore, when the Magistrate re-summoned the witnesses and contemplated recommencing of the enquiry, he is not precluded from changing his mind before he recommences the enquiry—*Komma Hari Chandra Reddi*, 39 Cr.L.J. 828, 176 I.C. 879, A.I.R. 1938 Mad. 742, 1938 M.W.N. 587, 48 M.L.W. 136, (1938) 2 M.L.J. 222, 11 R.M. 189. If the succeeding Magistrate chooses to recommence the trial, he must recommence by re-summoning and re-examining the witnesses. But he cannot go to any stage previous to that. He cannot refer the case to the Police under sec. 202 for inquiry and report—*Sadappachariar v. Raghavachariar*, 9 Mad. 282. If the succeeding Magistrate examines some of the witnesses, he cannot go back to the stage of procedure of Chap. XVI, and cannot dismiss the complaint under sec. 203. He can pass an order of discharge—*Gokul Chand v. Mahabir*, 11 A.L.J. 451, 14 Cr.L.J. 412.

Reading sub-sec. (1) and proviso (a) together it appears clear that the right of the accused is not to demand a re-trial as such, but simply that any or all of the witnesses should be re-summoned and re-heard. Subject to giving effect to that right the option lies with the Magistrate to start the inquiry or trial all over again, or not—*Tukaram*, 37 Cr.L.J. 983 (984), 164 I.C. 744, A.I.R. 1936 Nag. 153, 1936 Cr.C. 708, I.L.R. 1936 Nag. 92. Whereas the accused's right under sub-sec. (1), proviso (a), arises only when the case is at the stage of trial, the Magistrate is not so bound and may recommence the case under sec. 350 (1), even when it has not reached the stage of trial—*Ganpat*, 38 Cr.L.J. 15, 165 I.C. 830, A.I.R. 1936 Nag. 220, 1936 Cr.C. 937.

If a charge has already been framed by the preceding Magistrate, the succeeding Magistrate cannot cancel the charge—*Sriramulu v. Veerasalingam*, 38 Mad. 585, A.I.R. 1915 Mad. 23, 15 Cr.L.J. 673, 25 I.C. 1001, 1914 M.W.N. 646; *Nathu*, 1903 P.R. 14; *Simhadri v. Sitaram*, 2 L.W. 1244, 17 Cr.L.J. 1. The principle is, that if the proceedings before the preceding Magistrate have developed into the stage of a trial by the frame of a charge, the succeeding Magistrate cannot go beyond the stage of trial and transform the trial-proceedings into an inquiry by cancellation of the charge—*Sriramulu v. Veerasalingam*, supra; *A. Ramanna*, A.I.R. 1933 Mad. 841, 1933 M.W.N. 94, 146 I.C. 523, 65 M.L.J. 791, 35 Cr.L.J. 79, 38 M.L.W. 995, 1933 Cr.C. 1518. The accused are entitled to have any of the witnesses re-called and re-heard, and that is the extent of their right

2 Lah. 237; *Abdul Ghani*, 1922 P.L.R. 1, 22 Cr.L.J. 511; *Itala*, 9 Bur.L.T. 203, 18 Cr.L.J. 96. Even the new sec. 350A does not apply where one Magistrate of a Bench is replaced by another; that section contemplates cases wherein all the Magistrates constituting the Bench have heard the proceedings throughout. When a case was heard by a Bench consisting of two Magistrates and, on the dissolution of the Bench, it was transferred for trial to one of those two Magistrates, *held* that sec. 350, Cr. P. C., did not in terms apply to a case like this and that the accused could not claim a *de novo* trial—*Abdul Hakim v. Fozu Mia*, 36 Cr.L.J. 857, 155 I.C. 1003, A.I.R. 1935 Cal. 287, 39 C.W.N. 57, 62 Cal 266, 1935 Cr.C. 392. See Note 1019 under that section.

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When a case is remanded for the taking of further defence evidence to a trial Court and where it is found that when the case returns to the trial Court, the Magistrate or the Officer trying the case has been transferred and a new judicial officer has taken his place, the provisions of this section immediately come into operation and the accused are entitled to a *de novo* trial—*Daroga*, 27 Cr.L.J. 1125, 97 I.C. 645, A.I.R. 1927 Pat. 5, 8 P.L.T. 181.

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This section does not apply where a case is originally tried by a Magistrate (or Bench) in the summary way, and then is transferred to a Magistrate who is not invested with summary powers. In such a case, the second Magistrate cannot act on the evidence recorded by the first Magistrate, for that would amount to his virtually trying the case summarily, which he is not empowered to do. The second Magistrate must try the case *de novo* and in the ordinary way—*Nannier v. Desolier*, 55 Mad. 795, 62 M.L.J. 738, 1932 Cr.C. 509 (510), 33 Cr.L.J. 653, 138 I.C. 581, 1932 M.W.N. 244, 35 M.L.W. 760, A.I.R. 1932 Mad. 505.

This section, which gives a Magistrate jurisdiction to continue a trial begun by his predecessor, is not applicable to cases tried in a summary manner. Therefore, a Magistrate acted without jurisdiction when he continued in a summary manner the trial of the accused whose trial in a summary manner had been commenced by his predecessor. This section relates to jurisdiction and an error in jurisdiction is not a mere irregularity—*Hemandas*, A.I.R. 1936 Sind 40, 37 Cr.L.J. 455, 161 I.C. 267, 1936 Cr.C. 230.

The Nagpur High Court could not agree with this view in *Durgaprasad*, A.I.R. 1940 Nag 239, 41 Cr.L.J. 782, 189 I.C. 689, 1940 N.L.J. 321, where Gruer, J., observed: "Sec. 350, Cr. P. C., does not in terms exclude summary trials from its operation. It applies to all enquiries or trials conducted by a Magistrate in which the whole or any part of the evidence has been heard and recorded. The learned Advocate-General who opposes the reference argues, and I think correctly, that it depends on the way in which the evidence has been recorded in each case whether sec. 350 would apply or not. In trying a case summarily it is enough if scanty notes of the evidence are made, and these need not be kept on the record at all. Where such notes are allowed to remain, it would obviously be improper for the Magistrate to rely on such inadequate material. But in the present case one finds that the prosecution evidence was recorded by the first Magistrate *in extenso* in narrative form, at least quite as fully as it would have been in a summons case where by sec. 355, Cr. P. C., a memorandum of the substance is enough. It could not be urged that sec. 350 would not apply to such evidence if recorded in a summons case."

1013. "Succeeded":—A liberal construction should be put upon the provisions of sec. 350. Where on the death of a Magistrate empowered under sec. 30, the District Magistrate, being the only remaining Magistrate in the district having powers under that section, took upon his file a case which was being tried by the deceased, it was held that the District Magistrate must be regarded as having succeeded the deceased Magistrate within the meaning of this section—*Gorelal*, 19 Cr.L.J. 705, 46 I.C. 289 (Nag). When a case is transferred from one Magistrate to another, the former Magistrate is said to be 'succeeded' by the latter. See sub-sec (3) and Notes thereunder.

1014. 'Recommence the inquiry or trial':—The resumption of the witnesses is not tantamount to re-commencing the enquiry. Therefore, when the Magistrate re-summoned the witnesses and contemplated recommencing of the enquiry, he is not precluded from changing his mind before he recommences the enquiry—*Komma Hari Chandra Reddi*, 39 Cr.L.J. 828, 176 I.C. 879, A.I.R. 1938 Mad. 742, 1938 M.W.N. 587, 48 M.L.W. 136, (1938) 2 M.L.J. 222, 11 R.M. 189. If the succeeding Magistrate chooses to recommence the trial, he must recommence by re-summoning and re-examining the witnesses. But he cannot go to any stage previous to that. He cannot take the case to the Police under sec. 202 for inquiry and report—*Sadappachariar v. Raghavachariar*, 9 Mad. 282. If the succeeding Magistrate examines some of the witnesses, he cannot go back to the stage of procedure of Chap. XVI, and cannot dismiss the complaint under sec. 203. He can pass an order of discharge—*Gokul Chand v. Mahabir*, 11 A.L.J. 451, 14 Cr.L.J. 412.

Reading sub-sec. (1) and proviso (a) together it appears clear that the right of the accused is not to demand a re-trial as such, but simply that any or all of the witnesses should be re-summoned and re-heard. Subject to giving effect to that right the option lies with the Magistrate to start the inquiry or trial all over again, or not—*Tukaram*, 37 Cr.L.J. 983 (984), 164 I.C. 744, A.I.R. 1936 Nag. 153, 1936 Cr.C. 708, I.L.R. 1936 Nag. 92. Whereas the accused's right under sub-sec (1), proviso (a), arises only when the case is at the stage of trial, the Magistrate is not so bound and may recommence the case under sec. 350 (1), even when it has not reached the stage of trial—*Ganpat*, 38 Cr.L.J. 15, 165 I.C. 830, A.I.R. 1936 Nag. 220, 1936 Cr.C. 937.

If a charge has already been framed by the preceding Magistrate, the succeeding Magistrate cannot cancel the charge—*Sriramulu v. Veerasalingam*, 38 Mad. 585, A.I.R. 1915 Mad. 23, 15 Cr.L.J. 673, 25 I.C. 1001, 1914 M.W.N. 646; *Nathu*, 1903 P.R. 14; *Simhadri v. Sitaram*, 2 L.W. 1244, 17 Cr.L.J. 1. The principle is, that if the proceedings before the preceding Magistrate have developed into the stage of a trial by the frame of a charge, the succeeding Magistrate cannot go beyond the stage of trial and transform the trial-proceedings into an inquiry by cancellation of the charge—*Sriramulu v. Veerasalingam*, supra; *A. Ramanna*, A.I.R. 1933 Mad. 841, 1933 M.W.N. 94, 146 I.C. 523, 65 M.L.J. 791, 35 Cr.L.J. 79, 38 M.L.W. 995, 1933 Cr.C. 1518. The accused are entitled to have any of the witnesses re-called and re-heard, and that is the extent of their right

—*A. Ramanna*, supra. And since the succeeding Magistrate cannot cancel the charge, an order subsequently passed letting off the accused is one of acquittal and not one of discharge—*Simhadri v. Sitaram*, supra; *Sriramulu v. Veerasalingam*, supra. This case was dissented from in *Sheorajsai v. Dani*, 32 Cr.L.J. 603, 130 I.C. 825, A.I.R. 1931 Nag. 39, 27 N.L.R. 13, 1931 Cr.C. 223, Ind. Rul. 1931 Nag. 73, where the succeeding Magistrate having dismissed the complaint under sec. 204 (3), the second trial on a fresh complaint was held to be not barred on the principle of *autrefois acquit* although a charge was framed against the accused before *de novo* trial was claimed by them on the transfer of the Magistrate. This view was also adopted by the Peshwar Court in *Abdul Hakim v. Haji Abdul Aziz*, 35 Cr.L.J. 170, 146 I.C. 443, A.I.R. 1933 Pesh. 78, 1933 Cr.C. 1311. After reviewing all the cases on the subject the Nagpur High Court has held that in some cases to which this section applies the previous charge is blotted out and in some cases not. It depends on which option the Magistrate adopts. The accused can in no case insist on a clean slate; and the Magistrate cannot ignore although he may amend the previous charge, if he desires to make use of any of the evidence previously recorded; but if he decides to wipe out that previous evidence the former charge is also wiped out—*Tukaram*, 37 Cr.L.J. 983 (1986), 164 I.C. 744, A.I.R. 1936 Nag. 153, 1936 Cr.C. 708, I.L.R. 1936 Nag. 92, 19 N.L.J. 115. See also *Kunwar Sen v. Emp.*, in Note 1015 under the heading "Framing of charge". The Bombay High Court has taken the same view and has held that "trial" has always been understood to mean the proceeding which commences when the case is called on with the Magistrate on the Bench, the accused in the dock and the representatives of the prosecution and defence, if the accused be defended, present in Court for the hearing of the case—*Dagdu Govindset Wani v. Punja Vedu Wani*, A.I.R. 1937 Bom. 55, 9 R.B. 247, 38 Bom.L.R. 1189, 166 I.C. 598, 38 Cr.L.J. 250, I.L.R. 1937 Bom. 211, 1937 A.I.Cr.R. 70, following *Gomer Sirda v. Queen-Emp.*, 25 Cal. 863, 2 C.W.N. 465, *Sahib Din v. Emp.*, A.I.R. 1922 Lah. 49, 66 I.C. 826, 3 Lah. 115, 23 Cr.L.J. 330, *Fakhruddin v. Emp.*, A.I.R. 1925 Lah. 435, 95 I.C. 63, 27 Cr.L.J. 735, 6 Lah. 176 and *Labhsingh v. Emp.*, A.I.R. 1934 Sind 106, 1934 Cr.C. 831, 151 I.C. 213, 35 Cr.L.J. 1261, 28 S.L.R. 239 and dissenting from *Sriramulu v. Veerasalingam*, supra. The Allahabad High Court has, however, followed the view of the Madras High Court—*Raza Husain*, 36 Cr.L.J. 912, 156 I.C. 186, 1935 A.L.R. 548, 7 R.A. 1057, A.I.R. 1935 All. 834, 1935 Cr.C. 980, 1935 A.L.J. 1022. See also *Gajju v. Emp.*, in Note 1015.

If a trial is commenced *de novo* by the succeeding Magistrate, he must observe all the procedure of the trial and cannot omit any part of the procedure. Where in a *de novo* trial the Magistrate omitted to examine the prosecution witnesses (who had already been examined by the preceding Magistrate) but allowed them to be cross-examined by the defence, it was held that the trial was not in due compliance with this section and ought to be set aside—*Sobh Nath*, 6 Cr.L.J. 431, 12 C.W.N. 138; *Sidik*, 20 S.L.R. 50, A.I.R. 1926 Sind 158, 92 I.C. 748, 27 Cr.L.J. 332. The Magistrate holding a *de novo* trial must examine all the witnesses for the prosecution. He cannot examine only some of them and decline to examine the others—*Gokul v. Mahabir*, supra. A *de novo* trial means a trial from the beginning of the case. The object of granting a *de novo* trial is to enable the Magistrate who hears the case to see the way in which the witnesses give evidence before him, to mark their demeanour and thereby to be in a position to judge of their credibility. This object is lost if the witnesses are not examined again but are only allowed to be cross-examined by the accused. Such a procedure is not a *de novo* trial, and the conviction of the accused must be set aside—*Narayana v. Enumula Bojamma*, 90 I.C. 668, 1925 M.W.N. 652, A.I.R. 1925 Mad. 1280, 49 M.L.J. 423, 26 Cr.L.J. 1596. Similarly, where the Magistrate holding the *de novo* trial merely read over to the accused the deposition of the prosecution witnesses (recorded by the preceding Magistrate) though he allowed them to be cross-examined the procedure was held to be illegal—*Hnin v. Than Pe*, 19 Cr.L.J. 321, 9 L.B.R. 92, 44 I.C. 337; *Mangal Singh*, 1919 P.W.R. 16; *Mangal Singh*, 22 Cr.L.J. 119 (Lah.). When the Magistrate noted the accused's claim for a *de novo* trial and ordered the witnesses

to be re-summoned, he must be deemed to have directed a *de novo* trial (including inquiry). If so, the failure to examine the witnesses-in-chief was a manifest illegality which vitiated the trial—*Purushothamrao Bhanji Berde v. Emp.*, 40 Cr.L.J. 73, 178 I.C. 465, A.I.R. 1938 Nag. 493, 1938 N.L.J. 309. The accused is not estopped from raising the plea of the illegality of the trial by reason of his acquiescence in the procedure adopted by the Magistrate—*Ibid.* A Magistrate proceeding to recommence the inquiry or trial cannot rely upon the previously recorded evidence—*Kartar*, 28 Cr.L.J. 302, 100 I.C. 382, A.I.R. 1927 Lah. 238 Cf. *Rangaswami*, 52 Mad. 73, 30 Cr.L.J. 183 (184). The accused asked that the prosecution witnesses might be resummoned and reheard. When they appeared, he said he would be content to cross-examine them. The witnesses were not examined-in-chief but were cross-examined by the accused. Held that the procedure was not illegal—*Arulay*, 27 Cr.L.J. 659, 94 I.C. 707, A.I.R. 1926 Mad. 815. When the accused have demanded that the witnesses be recalled, they are at liberty in respect of particular witnesses, if it suits their purpose to waive their examination or part of it. A decision based on evidence recorded partly by one Magistrate and partly by another is legal so long as the accused do not object to it—*Ibrahim*, 36 Cr.L.J. 41, 152 I.C. 236, A.I.R. 1934 Nag. 209, 1934 Cr.C. 980, 7 R.N. 80.

The discretion given to a Magistrate by sec. 350 (1), Cr. P. C., to act or not to act upon the evidence recorded by his predecessor is not absolute but is controlled by proviso 1 to that section and it is solely left to the accused whether to claim the right to have the witnesses already examined by the previous Magistrate recalled and re-examined by the succeeding Magistrate. But it is equally clear from the language of the proviso that this right has to be exercised by the accused only at the time "when the second Magistrate commences his proceedings." Where, therefore, after the transfer of the Magistrate who first tried the case, four accused wanted all the prosecution witnesses and all the Court witnesses resummoned and reheard, while the remaining accused wanted a *de novo* trial which was granted and, later on, all accused did not desire to have certain Court witnesses and defence witnesses resummoned and re-examined, held that the exercise of the option given to the accused could be exercised only once and they having definitely exercised the same in a particular manner and the fresh trial having proceeded on that basis none of the accused had any right to change the course of the trial as they wished to do by their subsequent joint application in which they stated that they did not desire to have certain Court witnesses and defence witnesses resummoned and re-examined—*J. B. Sane*, A.I.R. 1930 Nag. 59, 160 I.C. 416, 31 Cr.L.J. 110, Ind. Rul. 1930 Nag. 48. But see *Moti v. Keshrichand*, *infra*.

Section 350 (1) (a), Cr. P. C., does not require that even a witness on whom the prosecution does not rely and whom it does not wish to produce though produced before the first Court should also be produced in the second Court. Where the trial in the Court of the second Magistrate is *de novo*, the proceedings taken in the first Court should be ignored. That being so, the prosecution are at perfect liberty to produce whichever witness they like and they cannot be compelled to produce at the instance of the accused a witness on whose evidence they do not rely. Of course the Court will consider the effect of the prosecution not producing a witness previously examined by them and if he should happen to be one named in the first information report the circumstance will go against the prosecution; but sec. 350 (1) (a), does not appear to authorise an accused to compel the prosecution to produce a witness whom they do not wish to produce—*Sheo Ram v. Emp.*, 39 Cr.L.J. 854, 177 I.C. 200, 1938 O.L.R. 399, 1938 A Cr.C. 95, 11 R.O. 35, 1938 O.A. 661, 1938 O.W.N. 881, A.I.R. 1938 Oudh 212.

Framing of charge:—Where a trying Magistrate does not act *suo motu* but on the request of one of the accused under sec. 350 (1) (a), Cr. P. C., the trial does not become a fresh trial but all that is intended is that the prosecution witnesses should be resummoned and re-heard. The Legislature did not intend that the charge already framed should be wiped out—*Kunihar Sen v. Emp.*, A.I.R. 1933 Oudh 86, 141 I.C. 192, 9 O.W.N. 1136, Ind. Rul. 1933 Oudh 33, 34 Cr.L.J. 124, 1934 Cr.C. 168,

8 Luck. 286. This means that in a case governed by sec. 350 (1) (a), that is to say where the accused demands that the prosecution witnesses or any one of them be re-summoned and re-heard, it is not necessary for the Magistrate to frame a new charge at the request of the accused. If, however, he does frame a new charge, the accused can have no cause for grievance. Under sec. 227 (1), Cr. P. C., a Court can alter or add to any charge at any time before judgment—*Gajju v. Emp.*, 39 Cr.L.J. 849, 177 I.C. 193, 1938 O.W.N. 898, 11 R.O. 34, 1938 O.L.R. 391, 1938 A.Cr.C. 96, 1938 O.A. 658, A.I.R. 1938 Oudh 247. See also Note 1015.

Transfer of case to the third Magistrate:—Each transfer gives an accused a fresh opportunity of exercising his right under the proviso to sec. 350, Cr. P. Code. The word 'predecessor' shou'd be taken to mean 'predecessors' where there is more than one. It could not mean that a third Magistrate could act only on the evidence recorded by his predecessor, the second Magistrate and not also on the evidence recorded by the first Magistrate who handled the case. Where, therefore, the first Magistrate examined some witnesses and, on transfer of the case to the second Magistrate, the accused claimed a *de novo* trial before which the case was again transferred to the third Magistrate who decided the case on the evidence recorded by the first Magistrate accepting the waiver made by the defence counsel, *held* that the third Magistrate could act on the evidence recorded by the first and that the accused were entitled to a second choice and they exercised it, and even if they had not been entitled in law to change their minds, the irregularity would not be a fatal one as no prejudice was caused—*Moti v. Keshrichand*, 39 Cr.L.J. 815, 176 I.C. 808, A.I.R. 1938 Nag. 288, 1938 N.L.J. 96, 11 R.N. 80, I.L.R. 1939 Nag. 79, following *Govindan Nair v. Krishnan Nair*, 47 Mad. 245, 81 I.C. 54, 1923 M.W.N. 815, 45 M.L.J. 808, 18 M.L.W. 949, 33 M.L.T. 189, A.I.R. 1924 Mad. 227, 25 Cr.L.J. 566.

Transfer of Magistrate to his original place:—Before the conclusion of a trial, the trying Magistrate was transferred. Thereupon the case was transferred to the file of a superior Magistrate who began to try it *de novo*. Afterwards the original Magistrate was re-transferred to his original place, and the superior Magistrate transferred the case to him with a direction to proceed from where he had originally left it. It was held that the inferior Magistrate must try the case *de novo*, and could not proceed from where he had originally left the case, because all that had taken place before the inferior Magistrate originally had been superseded—*Daroga Choudhury*, 20 Cr.L.J. 638 (Pat.); *Jago Singh*, 20 Cr.L.J. 820 (Pat.); *Anand Sarup*, 3 All. 563. But see *Naddeem Sahib v. Emp.*, 1937 M.W.N. 1245, where it has been held that the refusal of the Magistrate to re-summon and re-hear the witnesses already examined by him before is only an irregularity.

Transfer of case to the original Magistrate:—A Magistrate was transferred after he had finished the major portion of the trial of a case. The succeeding Magistrate granted a *de novo* trial. But the District Magistrate was of opinion that as only a small amount of work remained to be done in the case it could be best done by the Magistrate who had tried the case, and so he (Dt Magistrate) transferred the case to the original Magistrate. *Held* that even the original Magistrate to whom the case was thus transferred could not take up the case from the point at which he had left it, but that he must start the case *de novo*, because as soon as he was transferred all the proceedings which had previously taken place before him were wiped out—*Sardar Khan Saheb v. Attaulla*, 47 M.L.J. 926, 26 Cr.L.J. 510, 85 I.C. 254, A.I.R. 1925 Mad. 174, 20 M.L.W. 847; *Ramalingam*, 35 Cr.L.J. 1363, 57 Mad. 1019, 1934 M.W.N. 369, 1934 Cr.C. 801, A.L.R. 1934 Mad. 530, 151 I.C. 309, 40 M.L.W. 832, A.I.R. 1934 Mad. 475, 67 M.L.J. 293. See also *Ganpat*, 38 Cr.L.J. 15, 165 I.C. 830, A.I.R. 1936 Nag. 220, 1936 Cr.C. 937. In another case it has been held that the District Magistrate cannot transfer the case to the original Magistrate (who has no longer jurisdiction to proceed with the case), but that the new Magistrate who has taken up the case *de novo* must proceed with the trial—*Sriranga v. Subramania*, 24 L.W. 640, 28 Cr.L.J. 23 (21), 99 I.C. 55, A.I.R. 1927 Mad. 81, 38 M.L.T. 137.

The Allahabad High Court has taken a different view. According to it there are two Magistrates contrasted by this section. The first Magistrate has two qualifications: (1) he must have heard and recorded the whole or any part of the evidence, and (2) he must have ceased to exercise jurisdiction. The second Magistrate is contrasted with the first as "another Magistrate". The word "another" means that the second Magistrate should differ from the first, both on point (1) and point (2). Where, therefore, the Magistrate is transferred from the district after examining the prosecution witnesses, recording the statement of the accused, framing the charge and cross-examining the prosecution witnesses and the case is then transferred to another Magistrate in whose Court no further proceedings take place and is again transferred to the original Magistrate when he is re-posted to the district, he cannot be considered "another Magistrate" within the meaning of sec 350 (1), Cr P. C., because he does not fulfil the two points of difference from the first Magistrate. Therefore he does not come under sec. 350 at all. As he has heard all the evidence for the prosecution, there is no power in this section for him to re-hear it even if he desired to do so. The accused also has no right to demand a re-hearing—*Shyama Pado Deb v. Sunder Das*, 39 Cr.L.J. 978, 117 I.C. 978, I.L.R. 1938 All 794, 1938 A Cr.C. 74, 1938 A.L.R. 801, 1938 A.L.J. 767, 1938 A.W.R. (H.C.) 492, A.I.R. 1938 All. 536, 11 R.A. 241.

1015. Proviso (a):—Right of Accused—Under the proviso (a), the accused has a right to demand that the witnesses or any of them shall be resummoned or reheard. The policy of the law is that an accused should be able to claim a right not to be convicted by a Magistrate who has not himself heard the whole evidence—*Sahib Din*, 3 Lah. 115, 23 Cr.L.J. 330. The accused cannot claim re-trial as such, but can only demand that any or all of the witnesses should be re-summoned and re-heard—*Tukaram*, 37 Cr.L.J. 983 (1984), 164 I.C. 744, I.L.R. 1936 Nag. 92, A.I.R. 1936 Nag. 153, 1936 Cr.C. 708, 19 N.L.J. 115. The accused has an absolute statutory right to claim a *de novo* trial and the Magistrate has no authority to limit that right by imposing any condition on its exercise (e.g., payment of any process-fees and expenses of the witnesses)—*Maung Chit Tay v. Maung Tun Nyun*, 36 Cr.L.J. 953, 156 I.C. 441, 13 Rang 297, A.I.R. 1935 Rang 108, 1935 Cr.C. 317. The accused can exercise his right under the proviso (a) in case of a trial only; where a preliminary inquiry before commitment is transferred before frame of charge, the accused is not as of right entitled to an inquiry *de novo*—*Palaniandy*, 32 Mad. 218; *Nathu*, 1903 P.R. 14. Where it is an enquiry and not a trial, the case does not come under the proviso (a) of sub-section (1) of sec. 350, Cr. P. Code. The Magistrate has, however, got a discretion to exercise whether he will act on the evidence recorded by his predecessor, or he will resummon any of the witnesses before he frames a charge against the accused. The Magistrate, if he is so satisfied, can resummon witnesses examined by his predecessor, in the exercise of his discretion as provided for in section 350, sub-section (1), Criminal Procedure Code—*Ashutosh Sen Gupta v. Emp.*, 42 C.W.N. 224. Proceedings in a warrant case before a charge is framed are merely an inquiry and not a trial, and if a case is transferred at that stage, the accused cannot demand a fresh examination of witnesses to be made by the succeeding Magistrate—*Ramanathan*, 46 Mad. 719; *Lakshmireddy v. Munireddy*, 54 Mad 512, 32 Cr.L.J. 635, 131 I.C. 5, A.I.R. 1931 Mad 488, 33 M.L.W. 336, 1931 M.N.W. 179, 60 M.L.J. 524, 1931 Cr.C. 552, Ind. Rul. 1931 Mad 469; *Tukaram*, 19 N.L.J. 115, 37 Cr.L.J. 983 (1985), 164 I.C. 744, I.L.R. 1936 Nag. 92, A.I.R. 1936 Nag. 153, 1936 Cr.C. 708; *Ganpat*, 38 Cr.L.J. 15, 165 I.C. 830, A.I.R. 1936 Nag. 220, 1936 Cr.C. 937; *Komma Hari Chandra Reddi*, 39 Cr.L.J. 828, 176 I.C. 879, A.I.R. 1938 Mad 742, 1938 M.W.N. 587, 46 M.L.W. 136, (1938) 2 M.L.J. 222, 11 R.M. 189. But the accused is not altogether without a remedy, because as soon as the charge is framed by the succeeding Magistrate, he can under sec. 255 recall all the prosecution witnesses whose evidence has been taken, and thus he has a right equivalent to that of demanding a *de novo* trial—*Palaniandy*, 32 Mad 218 (219). But according to the Calcutta High Court a trial commences as soon as the case is called on with the Magistrate on the Bench, the

accused on the dock, and the representatives of the prosecution and for the defence are present in Court for the hearing of the case. The proper time for the accused to ask for resumption and rehearing of the witnesses is as soon as the trial commences before the second Magistrate—*Gomar Sirdar*, 25 Cal. 863, 2 C.W.N. 465. In trials of summons cases and in summary trials, the time when the accused is to demand that the witnesses shall be resummoned and reheard is when the second Magistrate commences his proceedings—*Sahib Din*, 3 Lah. 115, 23 Cr.L.J. 330, 66 I.C. 826, A.I.R. 1922 Lah. 49, 10 P.W.R. 1922 (Cr.); *Labhsing*, 35 Cr.L.J. 1261, 151 I.C. 213, 28 S.L.R. 239, A.I.R. 1934 Sind 106, 1934 Cr.C. 831, A.I.R. 1934 Sind 116; *J. B. San*, 31 Cr.L.J. 282, 121 I.C. 646, A.I.R. 1930 Nag. 59, 1930 Cr.C. 147.

According to the Calcutta High Court, this proviso applies only to a *trial* and does not apply to an *inquiry* under sec. 145; consequently, a Magistrate has power to proceed with the inquiry of a case under sec. 145, where a portion of the evidence has been recorded by his predecessor, and he is not bound to resummon the witnesses on the application of the accused—*Syed Sadek v. Sachindra*, 37 C.L.J. 128; *Sondi Singh v. Gobind*, 5 P.L.T. 237, 25 Cr.L.J. 89. But a Full Bench of the Madras High Court has laid down that the proviso (a) applies to an *inquiry under sec. 117*, because such inquiry, according to sub-sec. (2) of sec. 117, is made in the manner prescribed for conducting "trials" in summons or warrant cases and in fact has all the features of a trial—*Venkata Chinnaya*, 43 Mad 511 (525, 527) (F.B.). This is also the view of the Oudh Court—*Baij Nath*, 27 O.C. 323, 25 Cr.L.J. 1380; and the Allahabad High Court—*Mahatab Singh*, A.I.R. 1937 All. 438, 1937 A.W.R. (H.C.) 382, 1937 A.L.J. 373, 169 I.C. 833, 1937 A.L.R. 598, 38 Cr.L.J. 804, 1937 A.I.Cr.R. 29; *Govinda v. Emp.*, 20 N.L.J. 117. See also Note 288.

But this proviso does not apply to a further inquiry which is held according to the direction of a Sessions Judge under sec. 436. Therefore, where an inquiry was at first held by a Magistrate which ended in an order of discharge, but the Sessions Judge ordered a further inquiry under sec. 436 and returned the case to the original Court, but in the meantime the former Magistrate had been succeeded by another Magistrate, held that this new Magistrate was entitled to go on with the case and frame a charge without re-examining the witnesses previously examined, and the accused had no right to demand that the witnesses be re-summoned and re-examined—*Lakshmireddy v. Muni Reddy*, 54 Mad 512, 60 M.L.J. 524, 32 Cr.L.J. 635 (636), 131 I.C. 5, 1931 M.W.N. 179, 33 M.L.W. 336, 1931 Cr.C. 552, A.I.R. 1931 Mad. 488. For contra—see *Ramaswami v. M. Subban*, 32 Cr.L.J. 226, 129 I.C. 79, 1930 M.W.N. 911, 32 M.L.W. 782, A.I.R. 1930 Mad 983, 1930 Cr.C. 1199, Ind. Rul 1931 Mad. 223. But the Allahabad High Court holds that proceedings on further inquiry must start *de novo*—*Hasnu*, 6 All. 367.

The discretion given to a Magistrate by sec. 350 (1), Cr. P. C., to act or not to act upon the evidence recorded by his predecessor is not absolute but is controlled by the first proviso to that section and it is solely left to the accused whether to claim the right to have the witnesses already examined by the previous Magistrate re-called and re-examined by the succeeding Magistrate—*J. B. San*, 31 Cr.L.J. 282, 121 I.C. 646, A.I.R. 1930 Nag. 59, 1930 Cr.C. 147. It is true that this section does enable a Magistrate to re-summon the witnesses and recommence the enquiry or trial, but that right of the Magistrate is subject to the proviso that the accused may, when the second Magistrate commences his proceedings, demand that the witnesses or any of them be resummoned and reheard. It follows, therefore, as a corollary from this that if the accused does not wish to have a fresh trial, he can insist upon his case being decided upon the evidence already recorded by the first Magistrate—*Manzoor Ali v. Abdul Salam*, 35 Cr.L.J. 1147, 150 I.C. 857, 11 O.W.N. 825, A.I.R. 1934 Oudh 324. This view of law was apparently not followed by the Calcutta High Court in Ref. No. 5 of 1937—(*Serajuddin Sheikh v. Sashi Bhusan*, unreported case decided on the 8th February, 1937). The Nagpur High Court also disagreed with the view taken in *Manzoor Ali v. Abdul Salam*, supra. It has laid down that the accused has no right to insist that there shall not be a *de novo* trial or inquiry, or that the Magistrate

is acting without jurisdiction in beginning the proceedings anew when the accused does not so desire. Section 350, Cr. P. C., lays down that one Magistrate succeeding another may either act on the evidence partly recorded by his predecessor or he may re-summon the witnesses and re-commence the inquiry or trial. The discretion is in the Magistrate and his action is only limited in the trial by proviso (a) There is no proviso that the accused may demand that witnesses examined by the Magistrate who has ceased to exercise jurisdiction shall not be re-summoned and re-heard. It is clearly desirable for the proper administration of justice that normally the Magistrate who passes the final order should be the Magistrate who has heard all the evidence, and in order that there should be no prejudice to the accused; it is expressly provided that, in cases where the Magistrate does not propose to follow this procedure, the accused is entitled to demand that this procedure shall be followed—*Sardaril v. Emp.*, 38 Cr.L.J. 697, 169 I.C. 47, 9 R.N. 295, 1 I.R. 1937 Nag. 538, A.I.R. 1937 Nag. 147. The Madras High Court has also held that the Magistrate as well as the accused has a privilege under this section. If he does not like the idea of giving judgment on evidence partly or wholly recorded by his predecessor, he may decide to re-summon the witnesses, re-commence the inquiry or trial. If he exercises that option it is clear that the accused cannot object to the examination afresh of any witness—*Mudda Verrappa*, 36 Cr.L.J. 1265, 157 I.C. 1020, 1935 M.W.N. 179, A.I.R. 1935 Mad. 318, 1935 Cr.C. 381, 8 R.M. 203. In a very recent case the Oudh Chief Court also accepted the view of the Nagpur and Madras High Courts as mentioned above and refused to follow the decision in *Manzoor Ali v. Abdus Salam*, supra. It has laid down that it does not appear on a consideration of the wording of sec. 350, sub-cl (1) that the proviso has any application in a case in which the second Magistrate decides to re-summon the witnesses and re-commence the inquiry or trial. The proviso gives the accused a right at the time of the commencement of the proceedings before the second Magistrate to demand that the witnesses or any one of them be re-summoned and re-heard, and it does not give him any other right. It would be difficult to say that there can in any judicial sense be prejudice to the interest of the accused by the Magistrate who is to try the case, re-summoning the witnesses and re-commencing the trial. It may be that the effect of such an order will be that the trial will be protracted somewhat longer than it might otherwise have been, and it may be that the Magistrate may decide to frame further charges in addition to the charge or charges, if any, framed by the first Magistrate, but that is a matter which would have been within his competence in any case under the provisions of sec. 227, Cr. P. Code—*Gur Dayal v. Sheo Dularey*, 39 Cr.L.J. 858, 177 I.C. 250, 1938 A.Cr.C. 86, 11 R.O. 37, 1938 O.L.R. 402, 1938 O.A. 652, 1938 O.W.N. 841, A.I.R. 1938 Oudh. 218. See also *Tukaram*, 19 N.L.J. 115, 37 Cr.L.J. 983, 164 I.C. 744, 1 I.R. 1936 Nag. 92, A.I.R. 1936 Nag. 153, 1936 Cr.C. 708 and *Ganpat*, 38 Cr.L.J. 15, A.I.R. 1936 Nag. 220, 1936 Cr.C. 937.

The Magistrate is not bound to ascertain from the accused whether he wishes to exercise the right conferred by this proviso. This section confers the right on the accused to demand, and does not prescribe that the Magistrate shall ask the accused whether he will exercise the right or not—*Nga Po*, U.B.R. (1912) 151, 14 Cr.L.J. 175. The Magistrate is not bound to have the accused brought before him to ascertain whether he wishes to exercise this right—*Kesram*, 1884 P.R. 6. An omission on the part of the Magistrate to ask the accused whether he wants evidence to be reheard is a mere irregularity curable by sec. 537. In *Baruchi*, 10 Bur.L.T. 73, 17 Cr.L.J. 401, however, it has been held that it is necessary for the Magistrate to acquaint the accused with the fact that he is entitled to have the witnesses re-called and re-examined, and that there are many cases in which it is desirable that the Magistrate who passes judgment should have the opportunity of seeing the witnesses. But see *Chinnayar v. Maung Ma Thi*, 40 Cr.L.J. 829 (831), 183 I.C. 216, A.I.R. 1939 Rang. 249, where it has been laid down that a duty is cast upon the accused to demand a new trial, if they desire it, and not upon the Magistrate to offer it.

But there is no doubt that if the accused wants the evidence to be reheard, the Magistrate must recommence the trial—*Hyin v. Than Pe*, 9 L.B.R. 92, 19 Cr.L.J. 321; and the refusal of the Magistrate to do so would be an illegality not curable by sec. 537—*Amir Khan*, 1903 P.R. 3; *Gomer Sirdar*, 25 Cal. 863.

That proviso does not mean that if the second Magistrate re-summons the witnesses at the request of the accused, the trial necessarily commences *de novo*, necessitating the framing of a fresh charge. The second Magistrate can legally convict the accused on the charges framed by his predecessor—*Kunwar Sen*, 9 O.W.N. 1136, 1933 Cr.C. 168, A.I.R. 1933 Oudh 86, 8 Luck. 286, 34 Cr.L.J. 124, 141 I.C. 192. Cf. *Sriramulu v. Veerasalingam*, 38 Mad 585. What is called a trial *de novo* is not strictly speaking a new or fresh trial. All that it means is that the accused has the right to have all or any of the witnesses re-summoned and re-heard by the new Magistrate. It does not mean that when the accused claims this privilege of re-summoning and re-hearing the witnesses what has taken place before is completely wiped out or that he should renew every application which he had made before he claimed that privilege—*D. M. Venkatanarayana*, 38 Cr.L.J. 537, 168 I.C. 291, 45 M.L.W. 240, 1937 M.W.N. 173, 9 R.M. 559, A.I.R. 1937 Mad. 448, (1937) 1 M.L.J. 338.

Where the accused claims under this section to have the witnesses re-examined by the succeeding Magistrate, the witnesses should be re-summoned without the payment of any fees—*Ehas v. Ezakiel*, 8 Bur.L.T. 43, 15 Cr.L.J. 687. See also *Maung Chit Tay v. Maung Tun Nyun*, 36 Cr.L.J. 953, 156 I.C. 441, 13 Rang. 297, A.I.R. 1935 Rang. 108, 1935 Cr.C. 317.

Under this clause, it is the duty of the Magistrate, on the desire of the accused, to re-summon the witnesses. But the Magistrate can re-summon only those witnesses who are available. If any witness dies in the meantime, and the evidence which he gave before the previous Magistrate is proved and relied upon, and the other witnesses are re-summoned, the procedure is quite in accordance with law—*Lekal*, 8 Lah. 570, 28 Cr.L.J. 451, 101 I.C. 483, 28 P.L.R. 199, A.I.R. 1927 Lah 332, 8 A.I.Cr.R. 83.

Where the demand of the accused under this proviso was satisfied by the Magistrate by re-summoning the witnesses and rehearing the evidence, the accused cannot claim a further opportunity of re-summoning prosecution witnesses for the purpose of cross-examining them inasmuch as such a right is not recognised under this section—*Edward Philbert*, A.I.R. 1935 Mad 258, 1934 M.W.N. 1357, 37 C.L.J. 150, 159 I.C. 663, 1935 Cr.C. 332.

Under proviso (a) to sec. 350, Cr. P. C., the right given to an accused person is the right of demanding that the prosecution witnesses or any one of them be re-summoned and re-heard, and it rests on the accused to say who should be re-summoned and re-heard and the complainant has no such right and cannot claim a *de novo* trial from the beginning—*Vadigalapudigadu*, 85 I.C. 366, 20 M.L.W. 916, A.I.R. 1925 Mad 317, 26 Cr.L.J. 526.

In a *de novo* trial the prosecution can examine witnesses in the order in which it desires—*Ibrahim*, 36 Cr.L.J. 41, A.I.R. 1934 Nag. 209, 1934 Cr.C. 980.

Where, during the hearing of an application for transfer, the petitioners' Advocate gave an undertaking that his clients would not ask for a *de novo* trial, held that, in the improbable event of the petitioners declining to honour their Advocate's undertaking, the powers of the High Court are not such that it would be impossible for it to pass a suitable order—*Hemanta Kumar v. Nanda Kumar*, 41 C.W.N. 188 (192).

Witness examined on commission:—The words 're-summoned and re-heard' used in proviso (a), sec. 350, Cr. P. C., pre-suppose that the witnesses have already been summoned and heard. Those words can not therefore apply to a witness who had neither been summoned to the Criminal Court nor heard therein but had been examined on commission. Apart from this interpretation of the wording, it is obvious that sec. 350, Cr. P. C., is inserted in order that an accused should not be prejudiced by a Magistrate relying on evidence which he did not himself record, and that in case

of witnesses examined by interrogatories there would be no point whatever in the second Magistrate issuing a further commission for interrogatories—*Kaura Ram v. Emp.*, 38 Cr.L.J. 748 (749), 169 I.C. 44, 9 R.Pesh. 131, A.I.R. 1939 Pesh. 67. Where a *de novo* trial is demanded and granted, it is not necessary that a fresh set of interrogatories should be issued, nor does it appear that the interrogatories which have already been answered can be excluded from evidence in the case. The object of re-summoning witnesses who have already been examined is that the Magistrate may see their demeanour in the witness box. This does not apply in the case of interrogatories. The answers given to the interrogatories before the *de novo* trial can therefore be considered as evidence against the accused in the case during *de novo* trial—*Roshan Lal v. Emp.*, A.I.R. 1940 Pesh. 17, 41 Cr.L.J. 681, 188 I.C. 770.

The purpose of this section clearly is to provide that the Magistrate should, if the circumstances so require, decide the case only on evidence that he has himself recorded, upon the evidence of witnesses that he has been. In a trial *de novo* by the succeeding Magistrate the purpose which governs this section cannot be assisted by the cross-examination upon commission of a witness whose evidence has been recorded upon commission during the proceedings before the first Magistrate and whom the Magistrate has never seen. A demand of re-summoning and re-hearing cannot apply to a case of a witness who has never been summoned, never been heard by the Court and whose evidence has only been taken upon commission—*Sukhranddas v. Emp.*, A.I.R. 1940 Sind. 193.

Effect of contravention:—See *Hyjin v. Than Pe*, supra, *Amir Khan*, supra and *Gomer Sirdar*, supra.

A contravention of the provisions of section 350 (1) (a), Criminal Procedure Code, will vitiate the trial only when there is a refusal on the Magistrate's part to re-summon and re-hear the witnesses or when the evidence of witnesses examined against the provisions of clause (a) is relied upon by the Court. It is undoubtedly a breach of sec. 350 (1) (a), Cr. P. C., when a witness is only cross-examined in the second Magistrate's Court. But if his evidence is discarded on account of the witness not being examined-in-chief in the Court of the second Magistrate, no prejudice can be caused to the accused by the omission of the prosecution to examine him and the defects of procedure which do not cause any prejudice to the accused do not vitiate the trial—*Shco Ram v. Emp.*, 39 Cr.L.J. 854, 177 I.C. 200, 1938 O.L.R. 399, 1938 A.Cr.C. 95, 11 R.O. 35, 1938 O.A. 661, 1938 O.W.N. 881, A.I.R. 1938 Oudh. 212.

The Madras High Court has, however, held that non-compliance with the demand of the accused to re-summon and re-hear witnesses is not an irregularity which vitiates the trial. Where all the witnesses were further cross-examined before the Magistrate who decided the case, the accused cannot, therefore, be said to have been prejudiced by the refusal of the Magistrate to re-summon and re-hear the witnesses and the conviction cannot be set aside on this ground—*Pedda Ramamuni Reddi*, 39 Cr.L.J. 932, 177 I.C. 598, 48 M.L.W. 248, 1938 M.W.N. 820, 11 R.M. 358, A.I.R. 1938 Mad. 724, (1938) 2 M.L.J. 41. See also *Naddeem Sahib v. Emp.*, 1937 M.W.N. 1245.

1016. Proviso (b):—A District Magistrate can under proviso (b) set aside a conviction passed by a first class Magistrate in the district though no appeal lies from his order to the District Magistrate—*Pirya Gopal*, 9 Bom. 100; *Opendra v. Dukhini*, 12 Cal. 473; *Laskari*, 7 All. 853; *Padmanabha*, 8 Mad. 18.

1017. Sub-section (2):—The procedure laid down in this section does not apply to proceedings stayed under sec. 346—*Muhammad*, 91 P.L.R. 1905, 2 Cr.L.J. 369. Thus, where a Magistrate trying a case was of opinion that the accused deserved a severer punishment than he could inflict, and stayed the proceedings and submitted the case to the District Magistrate under sec. 346, it was held that the District Magistrate could not convict the accused on the evidence recorded by the referring Magistrate even though the accused did not want the evidence to be re-heard—*Muhammad*, supra;

Ambika, 19 Cr.L.J. 625 (Pat.); *Paravada China Venku*, 17 L.W. 247, 24 Cr.L.J. 413. See also Note 1002.

This sub-section as now amended further lays down that the procedure of this section does not apply to sec. 349. Even prior to this amendment it was held that the superior Magistrate to whom a case had been transferred under sec. 349 could act upon the evidence already recorded by the subordinate Magistrate and was not bound to hold a *de novo* trial—*Raghava*, 2 Weir 428. This is now made clear by the present amendment. See *Dodo*, 18 S.L.R. 216, 26 Cr.L.J. 1363.

The first part of this sub-section refers to proceedings which have been stayed under sec. 346. Manifestly, it relates to the power given to a Magistrate by sub-sec. (1) of sec. 350 of acting upon evidence recorded either wholly or partly by his predecessors. It is abundantly clear that the first part of sub-sec. (2) was intended to provide that where proceedings had been stayed under sec. 346 the Magistrate by whom the case is subsequently taken up is to hold a *de novo* trial. The only reasonable construction to put upon second part of the sub-section would be to say that where proceedings have been submitted to a superior Magistrate under sec. 349, the accused may not insist upon a *de novo* trial—*Sasthi Gopal Samui v. Haridas Bagdi*, 39 Cr.L.J. 606, 175 I.C. 537, A.I.R. 1938 Cal. 415, 42 C.W.N. 508, 10 R.C. 799.

1018. Sub-section (3):—Transfer of proceedings:—Sub-section (1) applies where the *Magistrate* is transferred from one place to another, the case remaining in the same Court. But does that sub-section apply where a *case* is transferred from one Magistrate to another, under sec. 528, the Magistrate remaining in the same post? In other words, does that sub-section apply to transfer of *cases* as well, or is it confined only to transfer of *Magistrates* only? There was some difference of opinion under the old section as to this question. In the following cases, it has been held that this section covers cases where proceedings are transferred by sec. 528 from the Court of one Magistrate to that of another, because as soon as a case is transferred from one Magistrate to another the former 'ceases to exercise jurisdiction' in the case within the meaning of this section. Consequently, on a transfer of a case from one Magistrate to another, the latter Magistrate can decide the case on evidence recorded by the Magistrate from whom the case has been transferred, or on evidence partly recorded by that Magistrate and partly by himself—*Mokesh Chandra*, 35 Cal. 457; *Kudrutulla*, 39 Cal. 781; *Palaniandy*, 32 Mad. 218; *Barachi*, 10 Bur.L.T. 73, 17 Cr.L.J. 401; *Chandra Kishore*, 21 C.W.N. 755; *Ramdas*, 40 All. 307; *Nanhua*, 36 All. 315; *Akbar Ali*, 20 Cr.L.J. 41 (Nag); *Ganga Chetty*, 20 Cr.L.J. 496; *Rupa Singh*, 22 Cr.L.J. 82, 1 P.L.T. 679. But the contrary view was taken in the following cases—*Angru*, 1889 A.W.N. 139; *Upendra Kumar*, 12 C.W.N. 140, 6 Cr.L.J. 431 (438); *La Tok*, 1 L.B.R. 301; *Radhe*, 12 All. 66; *Basir*, 14 All. 346; *Larya*, 1 N.L.R. 187.

To remove this conflict of opinion, sub-sec. (3) has been added, adopting the former view. "There has been some difference of opinion as to the position when cases are transferred from one Magistrate to another otherwise than from a predecessor to a successor in office. The Amendment provides that the Magistrate from whom the case is transferred shall be deemed to cease to have jurisdiction within the meaning of this section"—*Statement of Objects and Reasons* (1914).

350A. No order or judgment of a Bench of Magistrates
 Changes in constitution of Benches shall be invalid by reason only of a change having occurred in the constitution of the Bench in any case in which the Bench by which such order or judgment is passed is duly constituted under sections 15 and 16, and the Magistrates constituting the same have been present on the Bench throughout the proceedings.

This section has been added by sec. 95 of the Criminal Procedure Code Amendment Act, XVIII of 1923.

"We have added a new section after sec. 350 which in our opinion gives effect to the law as laid down by the High Court. Briefly, it provides that a judgment of a Bench shall be valid when the Bench is duly constituted at the time of passing the judgment and the judgment is passed by Magistrates *all of whom have heard the proceedings throughout*."—*Report of the Joint Committee (1922)*.

1019. All Magistrates must be present throughout:—This section lays down that all the Magistrates who take part in the judgment must have been present throughout the proceedings. If, therefore, any member of the Bench is not present on any hearing, no properly constituted Bench can be said to have been in existence. A conviction in such trial is unsustainable—*Chiteswar*, 1932 A.L.J. 42, 33 Cr.L.J. 200 (201), 135 I.C. 835, 1932 Cr.C. 152, A.I.R. 1932 All 127. See also 20 Cr.L.J. 823, 53 I.C. 823, 10 M.L.W. 366. Four Magistrates A, B, C and D, commenced the trial. But A was absent during a part of the trial, but eventually he, with the three other Magistrates who had been sitting throughout the trial, signed the order convicting the accused. *Held* that the trial was vitiated, as A was absent during part of the proceedings, even though the three Magistrates sat throughout the proceedings and formed quorum according to rules. It is wrong that a Magistrate who has been absent during a part of the trial should express an opinion on evidence which he has not heard and very possibly influence his fellow Magistrates, although they are in a better position than he is to decide the case—*Gangappa*, 23 Bom.L.R. 833, 22 Cr.L.J. 615, 63 I.C. 151 (152); *Ram Khelawan v. Sheo Nandan*, 54 All 413, 1932 Cr.C. 207 (208), 140 I.C. 122, 33 Cr.L.J. 885, 1932 A.L.J. 166, A.I.R. 1932 All 191; *Shumbhu v. Ram Komul*, 13 C.L.R. 212; *Nago v. Shankar*, 28 N.L.R. 190, 1932 Cr.C. 447, 138 I.C. 175, 33 Cr.L.J. 559, 15 N.L.J. 1, A.I.R. 1932 Nag 95.

This section is intended to apply to only such cases where one or more members drop out altogether and the remaining Magistrates who constitute the Bench which passes the order or judgment have been present on the Bench throughout the proceedings. There can be no doubt that if any of the Magistrates constituting the Bench which pronounces the judgment or the order has not been present throughout the proceedings, then sec. 350A is not complied with. In such a case there would be an irregularity, and not an illegality vitiating the trial—*Dasrath Rai*, 36 Cr.L.J. 38, 152 I.C. 158, 56 All 599, 1934 A.L.J. 376, A.I.R. 1934 All 144, 1934 Cr.C. 210. See also *Mathura*, 34 Cr.L.J. 701, 144 I.C. 123, A.I.R. 1933 All 355, 1933 A.L.J. 547, 1933 Cr.C. 628, Ind Rul 1933 All 379, 55 All 459. It is an irregularity for an Honorary Magistrate to sign a judgment if he has not been present throughout the proceedings. This is an irregularity which would not necessarily vitiate the trial. Where the Honorary Magistrate, who had not been present on all the hearings, was present on the date when the judgment was delivered and inadvertently signed it and had taken no real part, *held* that no failure of justice had taken place and that the trial was not liable to be set aside—*Jafar Khan*, 36 Cr.L.J. 907, 156 I.C. 101, 1935 A.L.R. 545, 7 RA 1056, A.I.R. 1935 All 814, 1935 Cr.C. 916, 1935 A.L.J. 969. But see *Rameshwar v. Bharath*, 35 Cr.L.J. 417, 147 I.C. 516, A.L.R. 1934 Oudh 75, 1934 Cr.C. 255, A.I.R. 1934 Oudh 85, 11 O.W.N. 75, where the Oudh Chief Court, having come to the conclusion that all the members of the Bench were not present throughout, *held* the trial to be wholly irregular and illegal and set aside the conviction. See also *Atla Veeraswamy Reddi v. Gunisetty Venkataswamy*, 39 Cr.L.J. 680, 175 I.C. 874, 1938 M.W.N. 591, 48 M.L.W. 149, 11 R.M. 1, where it has been held that a conviction is illegal if the Magistrates who signed the judgment did not hear all evidence.

This section practically lays down that sec. 350 does not apply to trials before Benches of Magistrates; that in such trials the case should be decided by the Magistrates who have heard the whole of the evidence—*Damri v. Bhowani*, 23 Cal 194; *Hardwar v. Khega*, 20 Cal. 870; *Itala*, 8 L.B.R. 463, 18 Cr.L.J. 96; *Girdhari*, 2 Lah. 237 (238); *Abdul Ghani*, 1922 P.L.R. 1, 22 Cr.L.J. 511, 62 I.C. 335. Where the evidence for the prosecution was taken before two Honorary Magistrates A and B and on a subsequent day the evidence for the defence was taken and judgment delivered by B and C, *held*

that as C was not present throughout the proceeding, the trial was bad. The High Court set aside the decision and ordered a new trial—*Hardwar v. Kheda*, 20 Cal. 780 (873); *Basappa*, 18 Mad. 391. Where the evidence for the prosecution was heard by three Magistrates A, B and C, and on a subsequent day four *different* Magistrates, D E. F and G, none of whom had previously attended, recorded the evidence for the defence and acquitted the accused, *held* that the trial must be set aside—*Ram Sundar v. Rajab*, 12 Cal. 558 (559); *Itala*, 8 L.B.R. 463, 18 Cr.L.J. 96. Where the trial of the accused was commenced before a Bench of four Magistrates who heard part of the evidence, and continued before the same four Magistrates and another, who joined as the fifth, and all the five Magistrates delivered judgment, *held* that the trial was vitiated and there must be a retrial—*Subramania*, 38 Mad. 304 (305), 16 Cr.L.J. 489, 29 I.C. 329; *Damri v. Bhowani*, 23 Cal 194 (195). Where only three Magistrates heard the evidence and tried the case and the judgment was signed by seven, this is illegal and in case of conviction this illegality vitiates the trial. Even in case of acquittal the nature of illegality is such as would warrant interference in revision in the interests of the public—*Pichu Kudamban v. Sarvaikara Thevan*, A.I.R. 1931 Mad 494, 1930 M.W.N. 770, 3 M.Cr.C. 221, 1931 Cr.C. 558, 133 I.C. 4, 32 Cr.L.J. 971. In an Allahabad case a trial was partly held before J and N who heard the prosecution evidence, and the case was adjourned and on the next day was heard by J and P, before whom the prosecution witnesses were cross-examined and defence evidence was taken; the case was again adjourned and on the third day J and N proceeded to deliver judgment. *Held* that the judgment ought to have been delivered by J and P who had heard the major portion of the evidence—*Mathura*, 41 All. 116 (125). This case was decided with reference to certain rules framed by the U. P. Government as to the constitution of Benches, and also with reference to the circumstances of the case. But it is no longer good law in view of the present section 350A, because the Magistrate P was not present throughout the proceedings.

Where out of three Magistrates constituting a Bench, only one is present on all hearings throughout the trial, sitting sometimes with one, sometimes with the other, and sometimes with both, the trial is bad as contravening the provisions of this section, even though the quorum consisted of two—*Banwari*, 7 Lah. 122, 27 Cr.L.J. 463, A.I.R. 1926 Lah. 304. Thus, a Bench of Magistrates consisted of A, B and C. A and B began the trial and recorded a portion of the evidence. B and C sat at the next two hearings, and all the three sat at the subsequent hearings and signed the judgment. *Held* that the trial was bad as it contravened the provisions of this section, even though the quorum required was only two—*Sutaj Bai*, 4 O.W.N. 1240, 29 Cr.L.J. 310 (311), A.I.R. 1928 Oudh 212, 107 I.C. 875; *Brij Bhukhan v. Ram Kirat*, 10 O.L.J. 614, 25 Cr.L.J. 198, A.I.R. 1923 Oudh 163 (165). In order that the conviction should be legal, it must be by a quorum of Magistrates required under the rules, each of whom has heard the whole evidence—*Nihchal*, 13 S.L.R. 166, 53 I.C. 609, 20 Cr.L.J. 769.

1020. Absence of unnecessary Magistrates:—Where a trial was begun before a Bench of seven Magistrates, and when the judgment was pronounced, only five out of the seven were present, and these five members constituted a legal Bench, it was held that the mere circumstance that two out of the seven Magistrates were absent on the day on which the accused was convicted did not affect the legality of the conviction, as the other five Magistrates who legally constituted the Bench attended the trial from beginning to end—*Karuppana v. Chairman*, 21 Mad. 246. Where two Magistrates who decided a case sat throughout the trial and constituted the quorum of the Bench, the trial would not be vitiated by the mere fact that two other Magistrates who were not necessary to the quorum and who were present at the time of the commencement of the inquiry were not on the Bench at the time of the decision of the case—*Venkatrama v. Swaminatha*, 38 Mad. 797, 15 Cr.L.J. 549; *Balbhadri v. Tirubhan*, 6 Cr.L.J. 43, 3 N.L.R. 67; *Khuda Baksh*, 15 A.L.J. 463, 18 Cr.L.J. 749. But if by reason of the absence of a member, the remaining members did not legally constitute the Bench, the trial could not proceed. Thus, where a Bench consisted of A, B and C, but

A was absent on the first day of trial when the witnesses were examined and also on the day of judgment, it was held that the conviction of the accused by B and C alone was bad and that there must be a retrial—*Tantravali Bapiraju*, 36 M.L.J. 362, 20 Cr.L.J. 823, 53 I.C. 823 (824).

Want of quorum:—Where a Bench of Magistrates established by the local Government is, under the notification establishing it, to consist of not less than two members, one member of the Bench cannot alone adjudicate upon a case—*Lado*, 1902 A.W.N. 148. Where a case was tried by a Bench of Magistrates, one of whom recorded the evidence while the other was sitting close by and going on with another case, *held* that as the hearing took place practically before only one of the Honorary Magistrates, the order must be set aside and the case tried *de novo*—*Sultan v. Shamser*, 25 O.C. 182, 23 Cr.L.J. 696, A.I.R. 1922 Oudh 21. Where the rules relating to a Bench of Magistrates provide that two members shall constitute the quorum, the evidence recorded by a Magistrate sitting singly is not evidence recorded in a Court, and the mere reading over to the Bench, when properly constituted, of the statements so recorded would not render those statements admissible as evidence—*Gulu*, 20 S.L.R. 134, 27 Cr.L.J. 542 (543), 93 I.C. 1038, A.I.R. 1926 Sind 192. Similarly, a trial by two members of a Bench which according to rules must consist of not less than three members, is bad in law—*Muthia*, 16 Mad. 410. Thus, where a Bench of three Magistrates constituted under the rules commenced a trial and heard the prosecution evidence but afterwards one member of the Bench was absent, and the remaining two Magistrates went on with the trial, heard the defence evidence and convicted the accused, *held* that the trial having been in contravention of the rules was void. The trial ought to have been adjourned till the absent member was present, or it should have been held afresh before a different set of Magistrates—*Mohideen*, 44 Bom. 400, 21 Cr.L.J. 369. See also 36 M.L.J. 362, *supra*.

351. (1) Any person attending a Criminal Court, although
 Detention of offenders not under arrest or upon a summons, may
 attending Court be detained by such Court for the purpose
 of inquiry into or trial of any offence of which such Court can
 take cognizance and which, from the evidence, may appear to
 have been committed, and may be proceeded against as though
 he had been arrested or summoned

(2) When the detention takes place in the course of an
 inquiry under Chapter XVIII or after a trial has been begun, the
 proceedings in respect of such person shall be commenced afresh,
 and the witnesses reheard.

1021. This is a self-contained section and the cognizance which a Magistrate takes under this section in respect of an offence is independent of the provisions of sec. 190 (c). The accused against whom cognizance is taken under this section has full information as to the source and particulars of the materials upon which the Magistrate acts. He is thus not placed under a disability to combat the effect of the suspicious circumstances operating upon the mind of the Magistrate and influencing his judgment as in the case of a proceeding arising under clause (c) of sec. 190. Consequently, the provisions of sec. 191 are inapplicable where a Magistrate takes cognizance under this section—*Sakhia*, 5 N.L.R. 113 (144), 10 Cr.L.J. 303 (306), 3 I.C. 568. Sec. 190 finds place in a chapter which relates to the initiation of proceedings; whereas sec. 351 deals with a matter arising during the course of a proceeding already initiated—*Sakhia*, *supra*. Therefore, if a Magistrate who has already taken cognizance of a case on a complaint or a police report, joins as a co-accused in the case any person attending the Court (e.g., a prosecution witness) who seems to be implicated in the offence under trial,

he acts under this section and not under sec. 190 (c)—*Lalu*, 4 S.L.R. 258, 12 Cr.L.J. 399, 11 I.C. 583; *Sakhia*, supra (dissenting from *Khudiram*, 1 C.W.N. 105); *Intaz Khan*, 35 Cr.L.J. 1312, 151 I.C. 406, 1934 Cr.C. 887, A.I.R. 1934 Rang. 193, following *Nga Chan Tha*, 73 I.C. 55, A.I.R. 1923 Rang. 31, 24 Cr.L.J. 519, 11 L.B.R. 398 (F.B.).

352. The place in which any Criminal Court is held for the purpose of inquiring into or trying any offence shall be deemed an open Court, to which the public generally may have access, so far as the same can conveniently contain them:

Provided that the presiding Judge or Magistrate may, if he thinks fit, order at any stage of any inquiry into, or trial of, any particular case, that the public generally, or any particular person, shall not have access to or be or remain in, the room or building used by the Court.

1022. Court to be open:—Jail trial:—This section does not necessarily make a trial in a jail invalid where there is nothing to show that admittance was refused to any one who desired it or that the prisoners were unable to communicate with their friends or counsel. But it is undesirable to hold trials in a jail, because it is difficult to get counsel to appear in jail—*Sahai Singh*, 1917 P.W.R. 21, 18 Cr.L.J. 852.

Trial in jail:—The Magistrate must pass a formal order directing that the trial should be held in the jail premises. Such a formal order must invariably be passed, as otherwise, if accused persons consider that they have a grievance in any matter it would be difficult for them, in the absence of any formal order, to have recourse to higher authority for redress. It is as well to point out here that it is ordinarily for the trying Magistrate to take the initiative in these matters if he considers that the trial should not be held in his court-house. If, however, the Magistrate, who is responsible for law and order in his district, wishes to take the initiative in such matters himself, his proper course is not to move the Local Government himself straightway in the matter, but to instruct the Public Prosecutor to make an application to the Magistrate asking that the trial shall be held elsewhere. It is then for the Magistrate to pass formal orders as to whether he considers it desirable to hold a trial in the Court or outside it. If the Magistrate then wishes to try the case in a place other than his Court, he will do so after obtaining the permission of the necessary authorities who are in control of the premises in which the Magistrate desires to hold the trial—*U Khemein*, A.I.R. 1940 Rang. 72 (73), 41 Cr.L.J. 497, 187 I.C. 640, 1940 Rang. 122.

Trial in Camera:—Where a Magistrate conducted a trial in *camera* in the exercise of his own discretion under the proviso to this section and no objection to this course was made, the proceedings of the Magistrate cannot be upset on that ground unless the applicant can show that he was in fact prejudiced by the case being tried not in open Court—*W. E. Gardner v. U Kha*, 38 Cr.L.J. 48, 165 I.C. 596, A.I.R. 1936 Rang. 471, 1936 Cr.C. 961.

Trial in the Magistrate's private room:—A trial is not illegal when it is held in the Magistrate's private room without objection by the parties—*Narayanaswamy*, 12 Bur.L.R. 59, 3 Cr.L.J. 433.

Evidence of pardanashin lady:—The evidence of a Ghosha woman should be taken behind a purdah at a private place where she can come, in the presence of the accused only, the Judge taking such precaution as he can to secure her identity—*Anonymous*, 2 Weir 432.

Exclusion of police officers:—A police-officer who has investigated into a case should not be allowed to be present before a Magistrate when he records a confession made by the accused—*Ramananda*, 1885 A.W.N. 221.

This section gives power to the Court of ordering that any particular person shall not remain in the room used by the Court. It makes no exception in the case of a Police-officer. When the accused person objects to the presence of a Police-officer or other person, the Magistrate has to decide whether the accused's fear of prejudice to his case is reasonable, considering the intelligence and susceptibilities of the class to which he belongs, and not merely whether the presence is convenient or helpful to the Court or the prosecution. It is not advisable that a Police-officer interested in the case proceeding before the Magistrate should receive exceptional treatment, as a seat on a dais, as it is calculated to breed suspicion in the mind of the accused as to the independence of the Magistrate—*Nathu Singh*, 8 N.L.J. 95, 26 Cr.L.J. 1130, 88 I.C. 362.

CHAPTER XXV.

OF THE MODE OF TAKING AND RECORDING EVIDENCE IN INQUIRIES AND TRIALS.

353. Except as otherwise expressly provided, all evidence taken under Chapters XVIII, XX, XXI, XXII and XXIII shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in the presence of his pleader.

1023. Scope of section:—This section lays down that all evidence shall be taken in the presence of the accused; and it includes both the evidence for the prosecution as well as for the defence. Where, after all the prosecution witnesses were examined, the accused absconded, and the witnesses named by him were examined in his absence and he was convicted, the conviction was held to be illegal—*Nga Po Shian*, U.B.R. (1912) 4th Qr. 152, 14 Cr.L.J. 287, 19 I.C. 719.

If the witnesses are examined in the absence of the accused, and there is nothing to show that his personal attendance has been dispensed with, the trial is invalid and the conviction will be set aside. The fact that the Mukhtar of the accused was present and raised no objection and cross-examined the witnesses, cannot cure the illegality—*Bigan*, 6 Pat. 691, 29 Cr.L.J. 260, 107 I.C. 530. An order against a person is wholly illegal if it is based on evidence which was recorded behind his back at a time when he was not a party to the proceeding—*Narayan v. Chandrabhaga Bai*, 26 Cr.L.J. 1289, 89 I.C. 153, A.I.R. 1925 Nag. 457. When a *pardanashin* lady was examined in a passage screened from the direct view of the Court and her voice could be perfectly heard in the Court and by the accused, and he made no objection, it was held that the evidence was virtually heard in the presence of the accused—*Hassan Khan*, 1887 P.R. 41. But *pardanashin* ladies should not be generally summoned to appear in Court to give evidence but may be examined on commission—*Huro Sundery*, 4 Cal. 20; *Basant Bibi*, 12 All. 69; *Faridunnissa*, 5 All. 92 (93).

Two trials were held of two sets of accused who were the opposite parties in a fight; in each the accused wanted the evidence for the prosecution in the cross-case to be treated as defence evidence, and the Sessions Judge did so. Held that in such a case the defence evidence being one given by the prosecution in the other case, was obviously one given in the absence of the accused. This was a violation of the provisions of this section and was not only irregular but illegal—*Allu*, 4 Lah. 376; *Muhammad*, 25 Cr.L.J. 551, 81 I.C. 39, A.I.R. 1925 Lah. 149. Following this case it is laid down that it is illegal to read out the depositions of the witnesses, as they come into the witness-box, made on a previous occasion, to put a few more questions to them and then to tender them for cross-

examination—*Lyene*, 25 Cr.L.J. 377, 77 I.C. 425, 4 Lah. 382, A.I.R. 1924 Lah. 17. See Note 830A. Where a charge was framed and evidence taken against the accused by the committing Magistrate, when he was incapacitated from attending the Court by a gunshot wound, *held* that the commitment made on evidence taken in the absence of the accused was void, and the subsequent trial and conviction must be set aside—*Khanan*, 1913 P.L.R. 260. Where the evidence of witnesses taken in the absence of the prisoner at a former trial was read out to them and put in as evidence at the present trial, it was *held* that the proceeding was irregular and prejudicial to the prisoner, and that such witnesses should have been subjected to a fresh oral examination in the presence of the prisoner—*Bishonath*, 12 W.R. 3. See also *Nund Ram*, 9 All. 609; *Buldev*, Ratanlal 24.

The Magistrate should not only take the evidence in the presence of the accused, but his record must show on the face of it that he had done so. The Magistrate should, by the use of a few apt words on the face of the deposition, make it apparent that he had taken the evidence in the presence of the accused—*Pohop Singh*, 10 All. 174.

Where depositions of witnesses in the previous trial were exhibited without actually examining them *de novo* before a succeeding Judge who decided to hold the trial *de novo*, *held* that the procedure was contrary to law, even when it was adopted with the consent of the accused—*Umar Hajee*, 46 Mad. 117. But where the defence witnesses were called and examined in the presence of the accused and they swore to the truth of their previous statements made by them as prosecution witnesses in the counter-case, which were then filed with their consent to save them, *held* that there was nothing illegal or irregular in the procedure—*Krishnayya*, A.I.R. 1930 Mad 505, 53 Mad. 775, 58 M.L.J. 547, 1930 M.W.N. 410, 127 I.C. 289, 31 Cr.L.J. 1191, 1930 Cr.C. 577.

When his personal attendance is dispensed with :—See sec. 205. The presence of an accused person may be dispensed with on ground of his ill-health—*King*, 14 Bom.L.R. 236, 13 Cr.L.J. 464, 15 I.C. 96. A respectable *pardanashin* woman should not ordinarily be compelled to appear in person in the first instance unless and until there is a strong likelihood of the charge being proved—*Habbo*, 1909 P.W.R. 5, 9 Cr.L.J. 158; *Kandamani*, 45 Mad. 359; and where her presence is dispensed with, the evidence may be recorded in the presence of her pleader—*Prem Kaur v. Mai Sham*, 1908 P.W.R. 20; *Kandamani*, 45 Mad 359, 23 Cr.L.J. 266.

In a summary trial an accused appeared when some of the prosecution witnesses had already been examined in the case against the co-accused. They were not recalled or not examined in his presence. *Held* that the trial of the case against the accused was legally bad and his conviction could not be supported—*Chhotey Lal*, 28 Cr.L.J. 756, 103 I.C. 836, 1 Luck. Case 265, A.I.R. 1929 Oudh 353.

354. In inquiries and trials (other than summary trials)

Manner of recording evidence outside presidency-towns.

under this Code by or before a Magistrate (other than a Presidency Magistrate) or Sessions Judge, the evidence of the witnesses shall be recorded in the following manner.

355. (1) In summons cases tried before a Magistrate other

Record in summons cases and in trials of certain offences by first and second class Magistrates.

than a Presidency Magistrate, and in cases of the offences mentioned in sub-section (1) of section 260, clauses (b) to (m), both inclusive, when tried by a Magistrate of the first or second class, and in all proceedings under section 514 (if not in the course of a trial), the Magistrate shall make a memorandum of the substance of the evidence of each witness as the examination of the witness proceeds.

(2) Such memorandum shall be written and signed by the Magistrate with his own hand, and shall form part of the record.

(3) If the Magistrate is prevented from making a memorandum as above required, he shall record the reason of his inability to do so, and shall cause such memorandum to be made in writing from his dictation in open Court, and shall sign the same, and such memorandum shall form part of the record.

1024. Scope of section:—In summons cases, the deposition may be recorded in the form of a memorandum; but it is not necessary that the recorded deposition should be read over to the accused, and an omission to do so cannot be regarded as a fatal defect—*Anonymous*, 2 Weir 433

In cases referred to in sec. 260, if they are tried summarily, only the substance of the evidence must be embodied in the judgment, as well as the particulars mentioned in sec. 264. If those cases are tried regularly, instead of summarily, the procedure of this section is to be followed—*Kuchi*, 3 LBR 3, 2 CrLJ. 375. There are certain offences which a Magistrate may try summarily under the provisions of sec 260, Cr. P. C. If he does so try them he is not required to make any memorandum of the evidence at all. If he does not try them under the provisions of sec 260, Cr P C, but tries them in the ordinary course, he is required, under this section, to make a memorandum of evidence. He is not required to record the evidence in the language of the Court or have it so recorded—*Mohammad Rafiq Ahmad*, 37 CrLJ 710, 162 IC 758, AIR. 1936 All 319, 1936 ALJ 274, 1936 CrC 476. The language of sec 354 ("other than summary trials") shows that sec 355 does not apply to a summary trial, and in such a trial, the Magistrate need not make any memorandum of the substance of the evidence of each witness. Even if he makes such a memorandum, the notes do not form part of the record and need not and should not be kept on the record; the Magistrate is at liberty to destroy the notes if he pleases—*Mantoo*, 49 All 261, 25 ALJ. 140, 28 CrLJ 97 (dissenting from *Satish Chandra*, 48 Cal 280, 61 IC. 846, 32 CLJ. 451, 22 CrLJ 462); *Ismail*, 25 ALJ 346, 28 CrLJ. 442, 101 IC 474. Following the Allahabad High Court it is laid down that in summary cases the recording of evidence is governed by secs 263 and 264 and that sec. 355 has no application at all to summary cases—*Tippanna*, 35 Cr.L.J. 841, 148 IC. 1006, 36 BomLR. 212, A.I.R. 1934 Bom 157, 58 Bom. 298. See Note 864 under sec. 263. This section applies to offences coming within clauses (b) to (m) of sec. 260, but not to offences falling under sec. 261. Therefore, in a trial of an offence specified in sec 261, the Magistrate is not bound to make any memorandum of evidence. Even if he takes down rough notes of evidence in such a trial they do not form part of the record and may be destroyed by him—*Chimanlal*, 29 BomLR. 710, 28 CrLJ. 537 (538), 102 IC. 345, *Maung Po Saw*, AIR 1935 Rang. 106, 36 Cr.L.J. 892, 156 IC. 183, 13 Rang. 225, 1935 CrC 315.

In proceedings under Chapter XXXVI (maintenance proceedings) the evidence ought not to be recorded as in summary trials, but in the manner provided by this section—*Kalidasi v. Durga Charan*, 20 Cal. 351.

There is no provision as to the language in which the memorandum is to be recorded. But there is also no provision which renders it illegal for an Indian second class Magistrate to record the memorandum in English. Such a procedure is a mere irregularity which does not vitiate the trial, unless a failure of justice has been occasioned thereby—*Gopal*, 19 Mad. 269, 6 MLJ. 134.

Under sub-section (2) the Magistrate must sign the record; if he omits to do so, the illegality vitiates the trial—*Balkeshwar*, 3 P.L.T. 322, 23 Cr.L.J. 114, A.I.R. 1922 Pat 5, 65 IC. 546. This view has not been followed by the same High Court in a recent case where it has been held that the failure of the Magistrate merely to sign his memorandum cannot be regarded, since the decision of their Lordships of the Privy Council in *Abdul Rahman v. King-Em*, 5, Rang. 53, 100 IC. 227, A.I.R. 1927 P.C. 44,

31 C.W.N. 271, 25 A.L.J. 117, 1927 M.W.N. 103, 38 M.L.T. 64, 8 P.L.T. 155, 4 O.W.N. 283, 28 Cr.L.J. 259, 6 Bur.L.J. 65, 52 M.L.J. 585, 29 Bom.L.R. 813, 45 C.L.J. 441 (P.C.), as sufficient by itself, to vitiate the conviction—*Mohsin v. Emp.*, 41 Cr.L.J. 283, A.I.R. 1940 Pat. 272, 1940 P.W.N. 93, 186 I.C. 312.

Under sec. 355 as well as under sec. 356, Cr. P. C., a Magistrate is obliged to make a memorandum of the substance of evidence with his own hand, unless he records valid reason for not doing so. It cannot possibly be conceded that a Magistrate is entitled to attend to other work during the hearing of a case, and to plead that other work as the reason of his inability to comply with the requirements of the Cr. P. C., with regard to the recording of evidence. The irregularity is clearly of much more than a technical nature and it vitiates the trial—*Jagmohan Singh*, 38 Cr.L.J. 150, 165 I.C. 224, 1936 O.L.R. 728, 9 RO 294, 1937 O.W.N. 56, A.I.R. 1937 Oudh 126, 1937 A.Cr.C. 5.

356. (1) In all other trials before Courts of Session and Magistrates (other than Presidency Magistrates), and in all inquiries under Chapters XII and XVIII, the evidence of each

Record in other cases
outside presidency-towns.

witness shall be taken down in writing in the language of the Court by the Magistrate or Sessions Judge, or in his presence and hearing and under his personal direction and superintendence, and shall be signed by the Magistrate or Sessions Judge.

(2) When the evidence of such witness is given in English,

Evidence given in
English. the Magistrate or Sessions Judge may take it down in that language with his own hand,

and, unless the accused is familiar with English, or the language of the Court is English, an authenticated translation of such evidence in the language of the Court shall form part of the record.

(2A) *When the evidence of such witness is given in any other language, not being English, than the language of the Court, the Magistrate or Sessions Judge may take it down in that language with his own hand, or cause it to be taken down in that language in his presence and hearing and under his personal direction and superintendence, and an authenticated translation of such evidence in the language of the Court or in English shall form part of the record.*

(3) In cases in which the evidence is not taken down in

Memorandum when
evidence not taken down
by the Magistrate or
Judge himself.

writing by the Magistrate or Sessions Judge, he shall, as the examination of each witness proceeds, make a memorandum of the substance of what such witness deposes; and such memorandum shall be written and signed by the Magistrate or Sessions Judge with his own hand, and shall form part of the record.

(4) If the Magistrate or Sessions Judge is prevented from making a memorandum as above required, he shall record the reason of his inability to make it.

Change:—Sub-section (2A) has been added by section 96 of the Cr. P. C. Amendment Act, XVIII of 1923. The reason is thus stated: "Section 356 does not provide for evidence being taken down in any other language than that of the Court or, if the language of the Court is not English, in English. The result is a certain loss of accuracy whenever evidence is given in a third language, as it has to be translated into, and taken down, in the language of the Court or in English. The object of the amendment is to secure greater accuracy and to avoid waste of time in translation"—*Statement of Objects and Reasons* (1921).

The words "or cause it to be taken superintendence" in sub-section (2A) are intended "to meet the case of a Magistrate or Judge who does not know the language in which the evidence is given. In such cases it will be necessary for the Magistrate or Judge to have the statement recorded in the language in which the evidence is given"—*Legislative Assembly Debates*, 7th February 1923, page 2035.

1025. Record of evidence:—It was held in some cases that the provisions of this section were imperative, and omission to record the evidence in the mode prescribed by this section was a material irregularity sufficient to set aside the proceedings—*Janki Prosad*, 19 Cr L.J. 235, 43 I.C. 827 (Pat.); *Barmajit*, 1891 A.W.N. 145; and so where a Magistrate made no vernacular record of the evidence of the complainant and his witnesses, the procedure was held to be illegal—*Matai v. Anant Ram*, 1890 A.W.N. 161; *Udit Narain*, 17 A.L.J. 1146, 21 Cr L.J. 28, 54 I.C. 172. But the authority of these decisions is now shaken by the pronouncement of the Privy Council in *Abdul Rahman*, 5 Rang 53 (P.C.). See this case cited in Note 1029 under sec. 360. And so, where in a proceeding under sec. 145, the Magistrate recorded the evidence of the witnesses in English, but no vernacular record of the evidence was made either by the Magistrate or by any other person in his presence and hearing, as required by sub-section (1), held that it was a mere irregularity curable by the provisions of sec. 537. The mere fact that an imperative statutory rule of procedure has been broken is not enough to vitiate the trial or proceeding. The Court should consider the gravity of the irregularity or omission, and whether it might have worked actual injustice to the accused. In this case, the evidence of the witnesses was recorded fully and accurately, consequently it could not be said that the irregularity prejudiced the accused in any way—*Kallu v. Bashiruddin*, 53 All. 172, 1930 A.L.J. 1504, 1931 Cr C. 3 (6), 129 I.C. 269, 32 Cr.L.J. 372, A.I.R. 1931 All 3; *Sankatha v. Biswanath*, 32 Cr L.J. 368, 129 I.C. 265, A.I.R. 1931 All 2, 1931 Cr C. 2, Ind Rul 1931 All 137; *Natho Khan*, 34 Cr L.J. 216, 141 I.C. 628, A.I.R. 1932 Sind 145, 26 S.L.R. 353, 1932 Cr C. 681, Ind. Rul 1933 Sind 67. The evidence was not taken down in writing by the Judge himself. He did not make a memorandum of the substance of what the witnesses deposed, as required by cl. (3) of this section. The evidence was taken down in the presence and hearing and under the personal direction and superintendence of the Judge and the depositions of the witnesses were read over and interpreted to them in the presence of the accused and their pleader and admitted to be correct. Held that the omission or irregularity was cured by the provisions of sec. 537, Cr. P. C., as the accused were not prejudiced in any way—*Nayab Shahana*, 35 Cr L.J. 1479, 152 I.C. 44, 38 C.W.N. 659, 61 Cal. 399, A.I.R. 1934 Cal. 636, 1934 Cr.C. 929, A.I.R. 1935 Cal 579.

The provisions of sub-sec. (1) are imperative, and the entire evidence must be recorded fully either by the Magistrate himself, or by somebody else under the direction of the Magistrate. In the latter case (i.e., where the evidence is recorded by any person other than a Magistrate), the Magistrate should under sub-sec. (3) make a memorandum of the evidence. But sub-sec. (3) does not override the provisions of sub-sec. (1) but is merely supplementary to it. In other words, the fact that the Magistrate is making a memorandum of the evidence does not do away with the necessity of the evidence being fully recorded by some other officer of the Court. Where a Magistrate, in a proceeding under sec. 145, neither recorded the evidence fully in his own hand, nor caused it to be recorded fully by anybody else, but simply made a memorandum of the evidence, purporting to act under sub-sec. (3), it was held that the provision of sub-sec. (1) not

being complied with, the whole proceedings must be set aside—*Sadananda v. Krishna Mandal*, 42 Cal 381, 19 C.W.N. 124, 16 Cr.L.J. 192. See also *Natho Khan*, 32 Cr.L.J. 216, 141 I.C. 628, A.I.R. 1932 Sind 145, 26 S.L.R. 353, 1932 Cr.C. 681, Ind. Rul. 1933 Sind 67.

If the Court consists of more than one Judge (e.g., a Tribunal of three Commissioners constituted under the Defence of India Act), it is not necessary that all the Judges should sign the deposition. It is sufficient if the Presiding Officer alone signs it—*Taj Mahmud*, 29 P.L.R. 14, 29 Cr.L.J. 212 (214), 107 I.C. 100, A.I.R. 1928 Lah. 125, 15 Lah. 407.

Where there is a discrepancy in a material part of the evidence of the principal prosecution witnesses between the record in the vernacular in which that witness gave evidence and the record in English, the accused is entitled to the benefit of the doubt created thereby. Generally speaking, the evidence as recorded in the vernacular in which the witnesses deposed is entitled to a greater weight and is more reliable than the record made in the English language, but where the Magistrate who made the English record was an experienced Magistrate fully conversant with the vernacular in which the witness gave his evidence, the English record is also reliable; but all the same, the accused is entitled to the benefit of any doubt caused by the discrepancy between the two records—*Sadhu Singh*, 24 Cr.L.J. 624 (Lah.).

Where the evidence was taken in the language of the Court by the Magistrate's recorder, the omission on the part of the Magistrate to make a memorandum of the evidence under sub-sec. (3) did not vitiate the proceedings, where it appeared that the Magistrate carefully heard the evidence, clearly appreciated its gist, took considerable care in sifting the evidence and arrived at a correct conclusion. But still the Magistrate ought to have followed the provisions of sub-sec. (3) and ought not to have ignored them—*Sumran*, 4 O.W.N. 1200, 29 Cr.L.J. 70.

357. (1) The *Provincial Government* may direct that in any

Language of record of district or part of a district, or in proceedings before any Court of Session, or before any Magistrate or class of Magistrates the evidence of each witness shall, in the cases referred to in section 356, be taken down by the Sessions Judge or Magistrate with his own hand and in his mother-tongue, unless he is prevented by any sufficient reason from taking down the evidence of any witness, in which case he shall record the reason of his inability to do so and shall cause the evidence to be taken down in writing from his dictation in open Court.

(2) The evidence so taken down shall be signed by the Sessions Judge or Magistrate and shall form part of the record:

Provided that the *Provincial Government* may direct the Sessions Judge or Magistrate to take down the evidence in the English language, or in the language of the Court, although such language is not his mother-tongue.

Amendment:—The words "Provincial Government" have been substituted for "Local Government" by sec. 4 of the Government of India (Adaptation of Indian Laws) Order, 1937.

1026. The authority conferred on an officer by this section is personal to that officer and remains in force only so long as he remains in the particular district in which it has been conferred—*Anonymous*, 5 M.H.C.R. App. 9. Therefore, where a Magistrate empowered to record the deposition in his own handwriting while in district B did the

same when he was transferred to another district, under the belief that the authority previously given to him in the district B was personal to him and still remained in force, and committed the accused for trial, it was held that the Magistrate's proceeding was irregular; but since the accused was not prejudiced thereby, his commitment was not set aside—*Chattandiyil Kalu Nair*, 2 Weir 434 (435).

The plea of the accused need not be recorded in the words of the very language in which it is made; when it is a foreign language, the record must be in the language in which it is interpreted to the Court—*Vaimbilee*, 5 Cal 826.

358. In cases of the kind mentioned in section 355, the Magistrate may, if he thinks fit, take down the evidence of any witness in the manner provided in section 356, or, if within the local limits of the jurisdiction of such Magistrate the *Provincial Government* has made the order referred to in section 357, in the manner provided in the same section.

Amendment:—The words "Provincial Government" have been substituted for "Local Government" by sec. 4 of the Government of India (Adaptation of Indian Laws) Order, 1937.

1027. The ordinary and proper and convenient way of recording evidence is to take it down in the first person, exactly as spoken by the witness—*Zoolfikar*, 16 W.R. 36. The Judge should in taking down evidence adhere as far as possible to the words actually used either in the question or in the answer given by the witness. The provisions of law will not be complied with by recording a more or less accurate paraphrase of the evidence given by a witness—*Nga Saw*, 11 Bur L.R. 8. The Judge is not bound to make a verbatim record of any particular questions and answers. It is left to the discretion of the Judge, if either side specially requests him to do so—*Ibid*.

359. (1) Evidence taken under section 356 or section 357 shall not ordinarily be taken down in the form of question and answer, but in the form of a narrative.

(2) The Magistrate or Sessions Judge may, in his discretion, take down, or cause to be taken down, any particular question and answer.

360. (1) As the evidence of each witness taken under section 356 or section 357 is completed, it shall be read over to him in the presence of the accused, if in attendance, or of his pleader, if he appears by pleader, and shall, if necessary, be corrected.

(2) If the witness denies the correctness of any part of the evidence when the same is read over to him, the Magistrate or Sessions Judge may, instead of correcting the evidence, make a memorandum thereon of the objection made to it by the witness, and shall add such remarks as he thinks necessary.

(3) If the evidence is taken down in a language different from that in which it has been given and the witness does not understand the language in which it is taken down, the evidence

so taken down shall be interpreted to him in the language in which it was given, or in a language which he understands.

1028. Object and Scope of section:—The object of this section is to give an opportunity to the witnesses to explain or correct the statements made by them—*Ramdhari*, 4 P.L.W. 44, 19 Cr.L.J. 169. This section is enacted for the protection of witnesses; it provides that a witness in order to satisfy himself that the evidence which has been taken down is correct may have it interpreted to him, if he desires it, in a language which he understands—*In re Okhoy*, 7 CLR. 393.

This section applies to evidence recorded under sec. 356 or 357, but not to evidence recorded in summons cases under sec. 355. Where the evidence in a summons case is recorded in the form of a memorandum, under sec. 355, it is not incumbent on the Magistrate to read over the memorandum of the deposition to the witness—*Ramdhari*, 4 P.L.W. 44, 19 Cr.L.J. 169; and omission to do so is not fatal to the conviction—*Anonymous*, 2 Weir 433.

In an inquiry under sec. 107, the evidence must be recorded as in a summons case (see sec. 117), i.e., it must be recorded in the manner prescribed in sec. 355, and not as laid down in sec. 356 or sec. 357. Sec. 360 does not apply to a case in which the evidence is recorded under sec. 355 and hence in an inquiry under sec. 107 it is not necessary that the deposition should be read over to the witness in the presence of the accused—*Legal Remembrancer v. Jafar*, 52 Cal 668, 26 Cr.L.J. 1456.

But in an inquiry in a good behaviour case, the provisions of sec. 360 will apply, and failure to comply with those provisions would vitiate the inquiry or trial—*Sanatan*, 52 Cal. 632, 41 C.L.J. 352, 26 Cr.L.J. 1240; *Nawab Ali*, 52 Cal. 470, 26 Cr.L.J. 1233.

This section applies to proceedings under sec. 145, and the evidence of each witness must be read over to him in the presence of the accused, the term "accused" being applicable to persons proceeded against under Chap. XII. Even if the term "accused" does not apply to such persons, still this section would cover the proceedings under Chap. XII, because sec. 356 (which is referred to in this section) expressly mentions Chap. XII—*Ram Narain v. Dhontai*, 3 P.L.T. 291, 23 Cr.L.J. 125; *Aswini Kumar v. Puti*, 52 Cal 437, 29 C.W.N. 474, 26 Cr.L.J. 914. But a Full Bench of the Calcutta High Court has laid down that the parties to the proceedings under sec. 145 are not 'accused' persons, and that, therefore, the provisions of sec. 360 apply to proceedings under sec. 145 only to this extent that the evidence of each witness must be read over to that witness; and that the attendance of the parties at the reading over is not necessary—*Narendra v. Sabarati*, 52 Cal 721, 29 C.W.N. 701, 41 C.L.J. 479, 26 Cr.L.J. 1191 (F.B.). This decision practically overrules the case of *Ishan Chandra v. Hriday*, 29 C.W.N. 475, 26 Cr.L.J. 915, where it was held that the word 'accused' not being applicable to the parties in a proceeding under Chap. XII, sec. 360, had no application at all to such a proceeding, and it was not obligatory to read over the deposition to the witnesses. In a later Patna case, it has been held that even an omission to read over the evidence to the witness is a mere irregularity which does not vitiate an order under sec. 145—*Sondhi Singh v. Sri Govind*, 5 P.L.T. 237, 25 Cr.L.J. 89.

A Tribunal constituted under the Defence of India Act is bound to follow the provisions of this section. Even though the Commissioners forming the Tribunal are authorised to make only a memorandum of the substance of the evidence of each witness, instead of recording the evidence fully, still the memorandum must be read over to the witness under this section—*Taj Mahmud*, 29 P.L.R. 14, 29 Cr.L.J. 212 (215), 15 Lah. 407, 107 I.C. 100, A.I.R. 1928 Lah. 125, 9 A.I. Cr.R. 505.

1029. Deposition must be read over to witness:—The Calcutta High Court held that the provisions of this section are obligatory and not merely directory. It is incumbent on the Judge to read over the deposition to each witness, even though such a procedure should occupy considerable time—*Anrita Lal*, 42 Cal. 957; *Jyotish Chandra*, 36 Cal. 955, 4 I.C. 416, 14 C.W.N. 82, 10 Cr.L.J. 581. And a departure from such a practice might lead to considerable embarrassment and place a serious

impediment in the administration of justice—*Jyotish Chandra*, *supra*. The object of this section is to ensure the accuracy of the record, and omission to comply with the provisions of this section is an illegality which vitiates the trial, irrespective of whether the accused have been prejudiced or not, and is not a mere irregularity curable by sec. 537—*Haronath v. Sonar*, *Mta*, 28 C.W.N. 119, 38 C.L.J. 281, 25 Cr.L.J. 289; *Hiralal*, 28 C.W.N. 968, 52 Cal. 159, 83 I.C. 905, A.I.R. 1924 Cal. 889, 26 Cr.L.J. 201, 41 C.L.J. 224. It is not a sufficient compliance with this section if the Magistrate merely hands over the recorded deposition to the witness to read it for himself and the witness reads it himself, 'because the section requires that the deposition must be read over in the presence, *i.e.*, in the hearing of the accused, in order that the accused should have an opportunity of correcting any mistake in it—*Jogendra*, 42 Cal. 240; *Sahorati*, 26 Cr.L.J. 951, 87 I.C. 103, A.I.R. 1925 Cal. 1120; *Muhammad Yasin*, 88 I.C. 602, A.I.R. 1925 Cal. 782, 26 Cr.L.J. 1178, 52 Cal. 431, 29 C.W.N. 650. It is not a sufficient compliance with this section if the deposition is read by a witness himself, and afterwards it is explained by the Judge to the accused in the absence of the witness—*Jessarat*, 29 C.W.N. 526, 87 I.C. 833, A.I.R. 1925 Cal. 729, 26 Cr.L.J. 1009. But the Patna High Court holds that even though a deposition is not read over to the witness, according to the provisions of this section, but is read by the witness himself, still the deposition is legal evidence. In other words, non-compliance with this provision of the section does not vitiate the trial if the accused has not been prejudiced—*Jagwa Dhanuk*, 5 Pat. 63, 7 P.L.T. 396, 27 Cr.L.J. 484. See also *Mohuddin*, 4 Pat. 488, 6 P.L.T. 154, 26 Cr.L.J. 811 (815); *Abdul Rahman*, 27 Cr.L.J. 669, 4 Bur.L.J. 213; *Mayeth*, 3 Rang. 612, 27 Cr.L.J. 857. And the same view has recently been taken in the Privy Council case of *Abdul Rahman*, 5 Rang. 53, 31 C.W.N. 271, 28 Cr.L.J. 259 (P.C.), in which Lord Phillimore observed "Although it is regrettable that such an irregularity should creep in, and though it might be taken into account with other elements of objections to the satisfactory character of the trial, it would not by itself be a ground sufficient for quashing a conviction. The bare fact of such irregularity, unaccompanied by any probable suggestion of any failure of justice having been thereby occasioned, is not enough to warrant the quashing of a conviction, which may be supported by the curative provisions of sec. 537." Their Lordships disapproved of the ruling in the Calcutta case of *Hiralal*, 52 Cal. 159 (cited *supra*). The Privy Council ruling has since been followed by the Calcutta and Allahabad High Courts in *Fatiar*, 31 C.W.N. 691, 28 Cr.L.J. 751, 103 I.C. 799, A.I.R. 1927 Cal. 575; *Jiwan v. Sheodan*, 28 Cr.L.J. 514, 102 I.C. 210, A.I.R. 1927 All. 764; *Bajai v. Ram Sarup*, 28 Cr.L.J. 596, 102 I.C. 772, A.I.R. 1927 All. 757; *Sher Mohammad v. Bihari*, 28 Cr.L.J. 606, 102 I.C. 782, A.I.R. 1927 All. 755. The contrary view taken in the several Calcutta cases cited above as also in *Mirabux v. Emp.*, 18 N.L.R. 192, 68 I.C. 36, 23 Cr.L.J. 500, A.I.R. 1923 Nag. 39; *Nabab Ali Sarkar*, 51 Cal. 236, 81 I.C. 803, A.I.R. 1924 Cal. 705, 25 Cr.L.J. 1027, *Kamatchinanathan*, 28 Mad. 308, 2 Cr.L.J. 756, *Chenchiah*, 42 Mad. 561, 50 I.C. 987, 36 M.L.J. 296, 9 M.L.W. 349, (1919) M.W.N. 183, 25 M.L.T. 356, 20 Cr.L.J. 379, A.I.R. 1919 Mad. 45, *In re Kuppa Mudaliar*, 49 Mad. 71, 49 M.L.J. 121, 26 Cr.L.J. 1587, A.I.R. 1925 Mad. 1206, 90 I.C. 659, 22 M.L.W. 339, 1925 M.W.N. 795 and *Taj Mahmud*, 15 Lah. 407, 107 I.C. 100, 29 P.L.R. 14, 29 Cr.L.J. 212, A.I.R. 1928 Lah. 125, A.I.C.R. 505, must now be deemed as overruled—*Sheoshankar Dhondbaji v. Emp.*, A.I.R. 1940 Nag. 410 (412), 11 Cr.L.J. 697, 188 I.C. 885, 1940 N.L.J. 165.

Depositions of witnesses which have not been read over to the witnesses are nevertheless admissible under sec. 145, Evidence Act, to contradict the witnesses in a subsequent trial—*Fazlur Rahman*, 6 Pat. 478, 28 Cr.L.J. 772.

This section lays down that the evidence of each witness shall be read over to him as it is completed, and this procedure should be strictly followed. It is not a sufficient compliance with this section to read out each sentence of the statement of a witness as it is being recorded—*Wadhawa*, 22 Cr.L.J. 669 (Lah.). The evidence of a witness is 'completed' when he has been examined-in-chief, cross-examined, and, if necessary,

re-examined. Therefore, it is not improper, if the whole deposition is read over to the witness after his cross-examination is over. Thus, where a witness was examined on 18th November, and cross-examined on a subsequent day (on the 9th December) and then the Magistrate read over to him the whole of his deposition including his examination-in-chief on that day (9th December), the procedure was not illegal—*Kamini Kumar*, 33 C.W.N. 664, 1929 Cr.C. 26, 31 Cr.L.J. 373, A.I.R. 1929 Cal. 390, 122 I.C. 209. But it is improper for the Magistrate to examine a number of witnesses and ask them to be in a room and then the deposition read over to them at the end of the day's work. Such a procedure is not merely an irregularity but an illegality vitiating the trial—*In re Kuppa Mudalier*, 49 Mad. 71, 49 M.L.J. 421, 26 Cr.L.J. 1587, A.I.R. 1925 Mad. 1206, 90 I.C. 659, 22 M.L.W. 339, 1925 M.W.N. 795; *Abdul Bari*, 42 C.L.J. 585, 27 Cr.L.J. 375, A.I.R. 1926 Cal. 157; *Shamserali*, 53 Cal. 129, A.I.R. 1926 Cal. 563, 27 Cr.L.J. 688.

There is nothing in the section to indicate the exact time when the deposition should be read over, and if the deposition is read over at the close of the cross-examination, it fulfils the requirements and objects of the section—*Ramdhari*, 4 P.L.W. 44, 19 Cr.L.J. 169.

'In the presence of the accused' :—The deposition must be read over to the witness, *in the presence of the accused*, so as to give the accused an opportunity to challenge the correctness of the record—*Rameshar*, 6 P.L.T. 493, 26 Cr.L.J. 927, 86 I.C. 991, A.I.R. 1925 Pat. 723. It is improper to have the deposition of the witness read over to him by a clerk in the verandah of the Court-house, though both the witness and the clerk were in view in the accused. Such a deposition cannot be admitted in evidence—*Nga San*, U.B.R. (1912) 1st Qr. 123, 13 Cr.L.J. 569. If the accused is in attendance, the deposition must be read over in the presence of the accused, and not in the presence of his pleader. It is only when the accused appears by a pleader (*i.e.*, when his personal attendance has been dispensed with) that the reading over of the evidence in the presence of the pleader is sufficient—*Kasim Ali v. Sarad Kripa*, 30 C.W.N. 336, 27 Cr.L.J. 509, 93 I.C. 973. But in a recent Calcutta case it has been held that the words "if he appears by pleader" in this section are not restricted to cases where the personal attendance of the accused has been dispensed with, but that a deposition may be read over in the presence of the pleader during a temporary absence of the accused—*Hari Narayan*, 46 C.L.J. 368, 29 Cr.L.J. 49 (53), 106 I.C. 545. Where the accused persons appear by pleaders, the deposition of a witness may be read over in the presence of a pleader of one of several accused—*Rakkhal Chandra*, 36 Cal. 808, 13 C.W.N. 942.

The object of reading over a deposition to a witness is to obtain an accurate record from him of what he really means to say, and to give him an opportunity of correcting the words which the Magistrate or his clerk has taken down. It is not to enable the accused or his advocate to suggest corrections. No doubt, the evidence has to be read over in the presence of the accused or his pleader. He is entitled to be sure that it has been read over, and that the witness has had an opportunity of correcting the written word. But the accused is not entitled to convey any suggestion to a witness in the form of a correction which would make him alter his evidence, though the accused may call attention to obvious slips. The primary object of this section is to fix the witness and to enable him to protect himself against any inaccuracy in the words taken down from his lips—*Abdul Rahman*, 5 Rang. 53, 31 C.W.N. 271, 25 A.L.J. 117, 28 Cr.L.J. 259 (262), 29 Bom.L.R. 813, 100 I.C. 227, A.I.R. 1927 P.C. 44, 1927 M.W.N. 103, 38 M.L.T. 64, 8 P.L.T. 155, 4 O.W.N. 283, 6 Bur.L.J. 65, 52 M.L.J. 585, 45 C.L.J. 441 (P.C.); *Sheeshanker Dhondbaji Mahar v. Emp.*, 41 Cr.L.J. 697 (700), 188 I.C. 885, 1940 N.L.J. 165.

While the evidence of one witness is being read over to that witness, it is highly improper to proceed with the evidence of the next witness. Such a procedure is a violation of the provisions of this section, and vitiates the inquiry or trial—*Manik*, 41 C.L.J. 393, A.I.R. 1925 Cal. 933, 88 I.C. 1043, 26 Cr.L.J. 1267; *Adiladdi*, 26 Cr.L.J.

1016 (Cal.); *Singhi Eradu*, 2 Weir 435; *Darghai*, 52 Cal. 499, 26 Cr.L.J. 1213. The Rangoon High Court holds that such a procedure does not vitiate the trial but is a mere irregularity curable by sec. 537—*Abdul Rahaman*, 4 Bur.L.J. 213, 27 Cr.L.J. 669. A similar view has been taken in *Muthu Kumara*, 21 M.L.J. 411, 12 Cr.L.J. 44. This view has since been affirmed by the Privy Council in *Abdul Rahman*, 5 Rang 53 (P.C.).

Perjury—When a deposition is not read over to a witness in the presence of the accused according to the provisions of sub-sec. (1), the witness cannot be prosecuted for perjury—*Mavadeb*, 6 Cal 762; *Jyotish Chandra*, 36 Cal 955; *Mahendra*, 12 C.W.N. 845, 8 Cr.L.J. 116; *Ram Narain v. Dhanrai*, 3 P.L.T. 291, 23 Cr.L.J. 125; *Brahmadeo*, 2 P.L.T. 380; *Kartar Singh*, 1917 P.R. 12, 18 Cr.L.J. 607 (608), 39 I.C. 847, 15 P.W.R. 1917 (Cr.); *Kadir*, 18 Cr.L.J. 966, 11 Bur.L.T. 202; *Kamatchinathan*, 28 Mad. 308, 2 Cr.L.J. 756; *Nelluri*, 42 Mad 561; *Jogendra*, 42 Cal. 240, 18 C.W.N. 1242; *Kesar v. Sultan-ul-Mulk*, 28 Cr.L.J. 651, 103 I.C. 107; *Taj Mahmud*, 29 Cr.L.J. 212 (215), 107 I.C. 100, 9 A.I.Cr.R. 505, 15 Lah. 407, A.I.R. 1928 Lah 125, 29 P.L.R. 14. But according to the Burma High Court a witness can be prosecuted for perjury in spite of the fact that his deposition has not been read over to him in the presence of the accused; the deposition should not be treated as a nullity merely because of the irregularity; it can be proved by other evidence, e.g., by evidence that the witness admitted it to be correct when it was read over to him, and by the evidence of the Judge or Magistrate who recorded it—*Tunya*, 12 Bur.L.T. 167, 20 Cr.L.J. 506, 51 I.C. 666. This section is intended to protect the accused as well as the witnesses. Where the accused in the case in which the witness is examined takes no objection of his deposition as recorded by the Court, it must be inferred that he is in no way prejudiced by the irregularity, if any. So far as the witness himself is concerned, no prejudice in any case is caused to him when he admits to the Court that his deposition has been read out to him and that it has been clearly recorded. Therefore, in a trial for an offence of perjury his deposition is admissible in evidence—*Shroshanker Dhondaji Mahar v. Emp.*, 41 Cr.L.J. 697 (700), 188 I.C. 885, 1940 N.L.J. 165, A.I.R. 1940 Nag. 410 (413). So also it has been held in *In re Bogra*, 8 M.L.T. 117, 11 Cr.L.J. 482, 7 I.C. 414, 1910 M.W.N. 435, 20 M.L.J. 943, 34 Mad 141, that evidence read over to the witness in the absence of the accused may not be used as evidence against the accused but may be the basis of a prosecution of the witness for perjury. See also *Rakhal*, 36 Cal 808 (815), and *Ramesh*, 46 Cal. 895, where the Calcutta High Court seems also to have been taken the contrary view. It should, however, be noted that the decision in *Ramesh*, is with reference to O. XVIII, r. 5, C. P. Code.

Under this section, the Magistrate is not required to record a memorandum at the end of each deposition that the deposition was read over in the presence of the accused, though it is much better to do so in order to prevent complaints as to his not having done so—*Rameshwar*, 6 P.L.T. 493, 86 I.C. 991, A.I.R. 1925 Pat 723, 26 Cr.L.J. 927; *Bhagwat Singh*, 4 Pat. 231, 6 P.L.T. 73, 26 Cr.L.J. 939. The absence of such a memorandum does not prove that the deposition was not read over—*Bhagwat*, supra; *Arjun Kurmi*, 8 P.L.T. 166, 28 Cr.L.J. 77 (79). But the essential feature in verifying that this has been done is the certificate signed by the presiding officer of the Court. This is a statutory provision. Any initialling by the Reader prior to the signature by the Judge is unessential and is merely done for the Reader's own convenience or for the more certain satisfaction of the Judge; but when the Judge has certified that the evidence has been read over to the witness, it must be presumed until the contrary is shown that this has been done—*Vithoo Raghaji v. Emp.*, A.I.R. 1938 Nag. 487 (490), 1938 N.L.J. 285.

An objection on the ground that the provisions of sec. 360 have not been observed should be taken at once. Where no such contention has been raised in the Courts below, it is not competent for the accused to put forward this objection for the first time in revision before the High Court—*Arjun Kurmi*, supra.

1030. Deposition may be corrected:—Before a deposition is closed, a witness should be given an opportunity of explaining and correcting any contradictions

which it may contain, and the statement which the witness finally declares to be the true one must be taken to be that which he intended to make—*Balkrishna*, Ratanlal 51. An honest witness who wishes to alter or correct a statement he has once made, should be allowed to do so, and should not be deterred from doing so by the fear of a criminal charge—*Habibulla*, 10 Cal. 937.

If the Court instead of allowing the correction to be made, proceeds to make a memorandum according to sub-sec. (2), such memorandum must be appended to the deposition and care should be taken that the practice and the form prescribed by law are exactly adhered to—*Komurooddee*, 13 W.R. 17.

1031. Language:—If the deposition is recorded in a language which the witness does not understand, it must be interpreted to the witness in the language which he understands. If the deposition is read over to the witness in a language which is neither understood by the accused nor by the witness, it is an illegality which materially prejudices the accused—*Issur Raut*, 8 W.R. 63. But if the witnesses did not require their depositions to be interpreted to them in their own language, the reading over the depositions to them in a language which they did not understand, would not afford any ground for the accused to have his conviction set aside—*In re Okhoy*, 7 C.L.R. 393.

The distinction between sec. 360 and sec. 361 is very marked. Under the latter section if evidence is given in a language not understood by the accused or his pleader, it is to be interpreted in their language, while under sec. 360 when it is read over, it is to be interpreted to the witness in his own language, but there is no provision for its being interpreted to the accused. Thus, if the depositions are taken down in English, and the language of the accused is Hindee, and the language of the witness is Burmese, the depositions will have to be taken by getting the witness's answer in Burmese, having them interpreted to the Court so that they may be taken down in English, and further interpreted to the accused so that he may understand them in Hindee. When, however, the deposition comes to be read over, as it will be in English, it will be interpreted to the witness in Burmese, but not to the accused in Hindee; and if the accused neither knew English nor Burmese, he will be none the wiser—*Abdul Rahman*, 5 Rang. 53, 31 C.W.N. 271, 52 M.L.J. 585 (P.C.).

Sub-section (3) of this section does not mean that the deposition recorded in English should first be read over to the witness as recorded in English, and shall then be translated into the language in which the witness has deposed—*Hari Narayan*, 46 C.L.J. 368, 29 Cr.L.J. 49 (52), 106 I.C. 515.

361. (1) Whenever any evidence is given in a language

not understood by the accused, and he is present in person, it shall be interpreted to him in open Court in a language understood by him.

Interpretation of evidence to accused or his pleader.

(2) If he appears by pleader and the evidence is given in a language other than the language of the Court, and not understood by the pleader, it shall be interpreted to such pleader in that language.

(3) When documents are put in for the purpose of formal proof, it shall be in the discretion of the Court to interpret as much thereof as appears necessary.

1031A. If the accused appears by a pleader who understands the language in which the evidence is given by the witness, the omission to interpret the evidence to the accused is not a material defect—*Bhoobun*, 24 W.R. 50; *Arjun Kurmi*, 8 P.L.T. 166, 28 Cr.L.J. 77 (79). When witnesses give evidence in English it should be translated

to the accused ignorant of English. The omission is, however, a mere irregularity, cured by sec. 537, Cr. P. Code—*Annai Errappa*, 31 Cr.L.J. 827, 125 I.C. 253, 1929 M.W.N. 898, A.I.R. 1930 Mad 186, 31 M.L.W. 386, 1930 Cr.L.J. 186.

Under sub-sec. (3), it is not necessary to interpret formal documents such as Government Gazettes at length; that would be merely wasting time. It would be enough if the prisoner were made to understand what they were and for what purpose they were used—*Ametrooddeen*, 15 W.R. 25.

362. (1) *In every case tried by a Presidency Magistrate in which an appeal lies, such Magistrate shall either take down the evidence of the witnesses with his own hand, or cause it to be taken down in writing from his dictation in open Court. All evidence so taken down shall be signed by the Magistrate and shall form part of the record.*

Record of evidence in
Presidency Magistrate's
Courts.

(2) Evidence so taken down shall ordinarily be recorded in the form of a narrative, but the Magistrate may, in his discretion, take down, or cause to be taken down, any particular question or answer.

(2A) *In every case referred to in sub-section (1), the Magistrate shall make a memorandum of the substance of the examination of the accused. Such memorandum shall be signed by the Magistrate with his own hand, and shall form part of the record.*

(3) Sentences unless they are sentences of imprisonment ordered to run concurrently passed under section 35 on the same occasion shall, for the purposes of this section, be considered as one sentence.

(4) *In cases other than those specified in sub-section (1), it shall not be necessary for a Presidency Magistrate to record the evidence or frame a charge.*

Change:—The opening words of sub-sec. (1) have been amended, the italicised words in sub-section (3) have been inserted; and sub-sections (2A) and (4) have been newly added, by sec 99 of the Cr. P. C. Amendment Act, XVIII of 1923. The reasons are stated below.

1032. Scope:—*Summary trials*:—The provisions as to summary trials do not apply to trials before Presidency Magistrates. A warrant case must be tried by them in the manner laid down in Chap XXI, subject to the provisions of this section as to the recording of evidence—*Abdul, Ratanlal* 539.

Reference under sec. 123 (2):—In cases where the Presidency Magistrate makes a reference to the High Court under sec. 123 (2), he must duly record the evidence, but it is not necessary that he should record it as fully as a Mofussil Magistrate—*Nepal*, 13 C.W.N. 318, 10 Cr.L.J. 122, 9 C.L.J. 430, 2 I.C. 651.

Sub-section (1):—The opening words of sub-sec. (1) were:—"In every case in which a Presidency Magistrate imposes a fine exceeding two hundred rupees or imprisonment for a term exceeding six months, he shall either", etc. "We think that the opening words of sub-sec. (1) of sec. 362 require amendment. As the section stands, it seems to imply that a Presidency Magistrate, before he commences his inquiry, must make up

his mind as to the maximum limit of the sentence which he will impose. We think that the sub-section would read better as amended by us; compare the wording of sec. 261"—*Report of the Select Committee of 1916.*

But even this amendment does not improve the position, because in order to ascertain whether an appeal will lie from his sentence, the Presidency Magistrate will have to make up his mind whether he will pass a sentence of over six months' imprisonment or a fine exceeding two hundred rupees (sec. 411). The *Joint Committee* (1922) in confirming the above amendment has also admitted it :—

"We are inclined to agree with those critics who point out that the re-draft proposed in sub-sec. (1) of sec. 362 does not get rid of the difficulty that a Magistrate has to make up his mind as to the sentence he will impose before he begins trying the case. We do not see how this difficulty can be got rid of; but we think that the amendment proposed has the advantage of bringing the language of this section into conformity with the language of secs. 263 and 264, and we would, therefore, retain this sub-clause.

"In order to meet difficulties that have arisen, we have introduced a sub-sec. (2A) laying down that Presidency Magistrates, in cases subject to appeal, shall make a memorandum of the substance of the examination of the accused, and we have introduced a new clause making a consequential amendment in sub-sec. (4) of sec. 364."

Where a Presidency Magistrate sentences an accused person to imprisonment for more than 6 months, he is bound to record the evidence of witnesses, even though the sentence is imposed for the purpose of the detention of the accused in a reformatory—*Md Roshan*, 26 Bom.L.R. 1232, 26 Cr.L.J. 151, 85 I.C. 131.

A party is entitled to certified copies of the notes of the Presidency Magistrate—*Beni Madhab v. Sailendra*, 15 C.W.N. 770.

1033. Sub-section (2):—Mode of recording evidence :—Evidence should be recorded in the form of direct narration. Where a Presidency Magistrate, in contravention of the provisions of this section, recorded the evidence of some more or less formal witnesses in the form of an *indirect* narration, it was held that such irregularities in the mode of recording evidence, where no failure of justice had been occasioned thereby, were cured by sec. 537, and the trial was not on that account vitiated—*Gulab Chand*, 18 Cr.L.J. 336 (Mad.).

It is the duty of the Magistrate, in recording evidence under this section, to take a note of all the material facts, whether they appear in the course of the examination-in-chief or in the course of the cross-examination—*Ah Foong*, 46 Cal. 411, 22 C.W.N. 831, 20 Cr.L.J. 24.

This section lays down that when a Presidency Magistrate is going to pass an appealable sentence he shall ordinarily record the evidence in the form of a narrative. He may also at his discretion take down the evidence in the form of questions and answers. What is required is not merely the opinion of the Magistrate regarding the evidence given by the witnesses but a correct record of the evidence given by the witnesses. It is for the High Court to decide whether the evidence corroborates or contradicts the other evidence which can be done only if the evidence is before it. Where, therefore, in recording the evidence in chief of two witnesses the Magistrate merely records the following words, "corroborates P. W. 1," the provisions of sec. 362, Cr. P. C., are not complied with and the conviction cannot stand—*Ghulam Dastgir Khan v. Emp.*, A.I.R. 1939 Cal. 623.

Sub-section (2A):—Record of examination of accused in non-appealable cases :—Sub-section (2A) provides for a memorandum of the substance of the examination of an accused person being kept by the Presidency Magistrate, signed by the Magistrate with his own hand in *appealable* cases only. Section 364 does not apply to a record made by a Presidency Magistrate of an examination of an accused person in the course of a trial held by him [see sub-sec. (4) of sec. 364]. The result is, that the Legislature has made no provision for the record of examination of the accused in *non-appealable* cases. But it may be inferred that, when the Legislature has expressly taken away the necessity to record the evidence and to frame a charge in non-appealable

cases, by enacting sub-sec. (4) of sec 362, they have not certainly contemplated that the examination of an accused person in non-appealable cases should be recorded in full. It will be sufficient if the substance of the examination of the accused in non-appealable cases is recorded in the form provided under sec 370—*Sadagar*, 56 Cal. 1067, 33 C.W.N. 545, 30 Cr.L.J. 526, 49 CLJ 261. See also *Ismail*, 27 Cr.L.J. 110, 91 I.C. 542, A.I.R. 1926 Cal. 692, cited under sec. 370.

Sub-section (3):—"Unless concurrently" —"It is provided that when sentences in excess of one are passed which are ordered to run concurrently, it is the heaviest sentence which determines the applicability of sec 362"—*Statement of Objects and Reasons* (1914).

1034. Sub-section (4):—"It is intended by this sub-section to remove the uncertainty which at present exists regarding the duties of a Presidency Magistrate in recording evidence and framing a charge in petty cases"—*Statement of Objects and Reasons* (1915).

Sub-section (1) provides that the evidence must be fully recorded in cases where the Presidency Magistrate passes appealable sentences; and there is no obligation on the Magistrate to record evidence in non-appealable cases—*Emaman*, 31 Cal. 983; *Shaikh Babu*, 33 Cal. 1036, 4 Cr.L.J. 368. In a Bombay case it was held, prior to the present Amendment, that although the Magistrate had a discretion in cases not falling under this section to take down the evidence or not, still this discretion should be exercised judiciously in a reasonable spirit and not arbitrarily, and there should be a record of the evidence, so that the High Court in Revision could judge of the propriety or legality of the order passed by him—*Harris Chandra*, 10 Bom.L.R. 201, 7 Cr.L.J. 194. The new sub-sec. (4) now totally dispenses with the necessity of recording evidence in non-appealable cases, and practically over-rules the above Bombay case. Under the present sub-section, the Presidency Magistrate is not bound to record the evidence in non-appealable cases; if he likes to record any evidence, he may do so, but the High Court cannot compel him to record the evidence—*D'Souza*, 56 Bom. 200, 34 Bom.L.R. 286, 1932 Cr.C. 239 (240), 33 Cr.L.J. 404, 137 I.C. 188, A.I.R. 1932 Bom. 180, Ind. Rul. 1932 Bom. 236, 1932 Cr.C. 239. The evidence in a proceeding held under sec 488 is to be recorded in the manner prescribed in the trial of summons-cases. See sec. 488 (6). But as summons-cases tried by Presidency Magistrates are not appealable (see sec. 411), a case under sec 488 tried by a Presidency Magistrate falls under sub-sec. (4) of sec. 362, and the Presidency Magistrate is not required to record any evidence—*Chhogan Hargavan*, 34 Bom.L.R. 276, 1932 Cr.C. 238. See also *Hanifbai*, 32 Bom.L.R. 1499, 1931 Cr.C. 190 (191), 32 Cr.L.J. 276, 129 I.C. 339, A.I.R. 1931 Bom. 142, Ind. Rul. 1931 Bom. 147, where it has been laid down that when it appears to a Presidency Magistrate that he cannot finish the case at one hearing and he finds that he is obliged to put off the decision for a considerable time, he should, in the exercise of his wide discretion, make notes so as to enable him at the time of judgment to remember what evidence has been recorded and he should give his reasons for his decision in such detail as to make it clear to the parties as well as to the High Court that his judgment is based on a proper consideration of the evidence which has been given in the case.

It is only in non-appealable cases that a Presidency Magistrate is excused under this clause from framing a charge; in an appealable warrant case he is bound to frame a charge in accordance with sec. 254—*Raghubir*, 36 C.W.N. 791 (792), 33 Cr.L.J. 828, 55 C.L.J. 448, Ind. Rul. 1932 Cal. 651, A.I.R. 1932 Cal. 865, 1932 Cr.C. 889.

363. When a Sessions Judge or Magistrate has recorded the evidence of a witness, he shall also record such remarks (if any) as he thinks material respecting the demeanour of such witness whilst under examination.

Remarks respecting demeanour of witness.

1035. The object of this section is to give the Appellate Court some aid in estimating the value of the evidence recorded by the Magistrate—*Rasoo Kullah*, 12 W.R. 51. But though in criminal cases the Appellate Court should be guided by the remarks made under this section as to the demeanour of witnesses, yet it is bound to independently consider the facts of the case—*Moula Balsh*, 1898 P.R. 6. But where a Sessions Judge of experience had in the most emphatic manner stated that the demeanour of the witnesses was evasive, that they inspired him with no confidence, and that no man could be convicted on their testimony, the Appellate Court before accepting their testimony must be assured in the most positive and convincing manner that there was no ground for the Sessions Judge's criticism. Where the evidence is all oral, and its credibility is a mere matter of opinion, the opinion of the Court which heard the witnesses and noticed their demeanour must be treated as almost conclusive—*Bishen Singh*, 1914 P.L.R. 125, 15 Cr.L.J. 203.

It is always unsafe for a Judge or a Magistrate to pronounce an opinion as to the credibility of a witness, until the whole of the evidence has been taken. A Magistrate may note the demeanour of the witness, but except there is very clear proof afforded by his own statements that the witness is unworthy of credit, it is unsafe to assume that he is so, till the evidence has been exhausted—*Palani Nandan*, 2 Weir 435 (436). It is one thing to record a remark about the demeanour of the witness, and it is quite a different thing to make or record any remark or opinion as to the substance of the deposition of that witness. The parties are entitled to claim that the Magistrate shall not prejudice their cases or form an opinion about the respective merits of their cases or about the depositions of their witnesses, until they have been fully and finally presented to the Magistrate by the counsel in their concluding arguments and after the entire evidence has been recorded. Any opinion formed and expressed by the Magistrate at an earlier stage of the case is bound to be prejudicial to the party concerned, and he may apply for a transfer of the case to some other Magistrate—*Sikandar Lal*, 10 Lah. 778, 30 Cr.L.J. 129 (131), 113 I.C. 321, A.I.R. 1928 Lah. 975, Ind. Rul. 1929 Lah. 163, 31 P.L.R. 87.

This section, no doubt, empowers a Magistrate to record such remarks, if any, as he thinks material, respecting the demeanour of a witness whilst under examination. But a remark "the witness falters and from his demeanour it appears that he has not told the truth", shows that the witness has been altogether disbelieved by the Magistrate while recording the deposition of the witness and it is desirable that the case should be transferred to the file of some other Magistrate—*Golam v. Yar Ali*, 26 Cr.L.J. 852, 86 I.C. 708, 29 C.W.N. 316, A.I.R. 1925 Cal 180.

The Sessions Judge should not record his opinion that the accused looked like a murderer. The opinion of the Magistrate, who recorded the accused's confession, that his demeanour showed that he had done something wrong or seen something wrong being done and was suffering from a guilty conscience is not admissible—*Naval*, 30 Cr.L.J. 967, 118 I.C. 757, 6 O.W.N. 545, A.I.R. 1929 Oudh 381, Ind. Rul. 1929 Oudh 453.

364. (1) Whenever the accused is examined by any Magistrate, or by any Court other than a High Court established by Royal Charter or the Chief Court of Oudh, the whole of such examination, including every question put to him and every answer given by him, shall be recorded in full in the language in which he is examined, or, if that is not practicable, in the language of the Court or in English: and such record shall be shown or read to him, or, if he does not understand the language in which it is written, shall be interpreted to him in a language which he understands, and he shall be at liberty to explain or add to his answers.

(2) When the whole is made conformable to what he declares is the truth, the record shall be signed by the accused and the Magistrate or Judge of such Court, and such Magistrate or Judge shall certify under his own hand that the examination was taken in his presence and hearing and that the record contains a full and true account of the statement made by the accused.

(3) In cases in which the examination of the accused is not recorded by the Magistrate or Judge himself, he shall be bound, * * * * * as the examination proceeds, to make a memorandum thereof in the language of the Court, or in English, if he is sufficiently acquainted with the latter language; and such memorandum shall be written and signed by the Magistrate or Judge with his own hand, and shall be annexed to the record. If the Magistrate or Judge is unable to make a memorandum as above required, he shall record the reason of such inability.

(4) Nothing in this section shall be deemed to apply to the examination of an accused person under section 263, or in the course of a trial held by a Presidency Magistrate.

Change:—The words "Chief Court of Oudh" have been added by the Oudh Courts Act, XXXII of 1925. The italicised words at the end of sub-sec. (4) have been added and the words "unless he is a Presidency Magistrate" which occurred in sub-sec. (3) have been omitted, by the Criminal Procedure Code Second Amendment Act, XXXVII of 1923. The object of this amendment is "to make it clear that in cases where an appeal lies, the Presidency Magistrate shall take down a memorandum of the examination of the accused person as already provided in the new sub-sec. (2A) of sec. 362, and that in non-appealable cases no record of the examination of the accused need be made"—*Statement of Objects and Reasons*, (Gazette of India 1923, Part V, page 242). See also 56 Cal. 1067 cited in Note 1033 under sec. 362.

1036. Scope and application of section:—The rules laid down in this section are applicable to the examination of the accused under sec. 342—*Nagar*, 4 Bom L.R. 461. They are also applicable to confessions taken under sec. 164, in the course of an investigation. See sec. 164 (2). This section does not compel a Magistrate proceeding under sec. 164 to put a series of questions. Such procedure is ordinarily to be deprecated. The confessing person should be left to narrate his story, as a whole, without any unnecessary interference and allowed to give all the details that he remembers and wishes to describe—*Ghena*, 33 Cr.L.J. 414, 137 I.C. 95, 33 P.L.R. 16, A.I.R. 1932 Lah. 180, 1932 Cr.C. 179, Ind. Rul. 1933 Lah. 294. See also *Pahlean*, 31 Cr.L.J. 533, 123 I.C. 540, A.I.R. 1930 Lah. 454.

This section does not apply to a summary trial. See sub-sec. (4). See also sec. 354 ('other than summary trials'). If a case is tried summarily, the Magistrate need not record the full statement of the examination of the accused in the form under sec. 364; i.e., he need not record the questions and answers in detail. It is sufficient if he makes a brief note of the examination on the record—*Bhawani*, 3 O.W.N. 946, 28 Cr.L.J. 76; *Parsootim*, 6 Pat. 504, 8 P.L.T. 757, 28 Cr.L.J. 1037, A.I.R. 1927 Pat. 369. In a summary trial the Magistrate is not required to record the statement of the accused made in pursuance of an examination under sec. 342, Cr. P. C., in full and in the language in which it was made as sec. 364, Cl. (1), Cr. P. C., does not apply to summary trials. Where, therefore, after the close of the prosecution case the accused persons were examined and their statements were recorded by the Magistrate in English and were signed by them, held that there was sufficient compliance with the law—*Banka Nath v. Abdul Kadir*, 37 Cr.L.J. 1098, 165 I.C. 154, 39 C.W.N. 1306.

This section applies to the record of statement made by the *accused*. A person against whom no process has been issued is not in the position of an accused person, and if such person is examined in an inquiry under sec. 202, his statement cannot be regarded as having been recorded under this section—*Sat Narain*, 32 Cal. 1085.

This section does not apply where there has been no *examination* of the accused. The Magistrate only examines the accused when he thinks it necessary for the purpose of enabling him to explain any circumstance appearing in the evidence against him. The examination of an accused prior to commitment is in the discretion of the Magistrate. If the Magistrate does not examine the accused, if the accused is unwilling to submit to an examination, it is sufficient for the Magistrate to make a note of the fact and record it as a reason for not examining the accused—*Dosu*, 11 S.L.R. 52, 18 Cr.L.J. 913.

Where question put to the accused elicited a statement of a confessional nature, such examination is wholly inadmissible under this section—*Tufani*, 15 C.L.J. 323. See also *Haidar Ali*, 17 C.W.N. 354 (357).

1037. Record of questions and answers:—Where the Judge asked the accused person as to whether they would make any statement or not, and they replied in the negative, the Judge should record what the exact questions were that were put to the accused. Where in such a case there was *no record* made of the questions and answers and the only indication of it was to be found in the order sheet wherein the Judge made the following remark. "The accused declined to make any statement in this Court and on being asked whether they would adduce evidence they replied in the negative;" held that the provisions of sec. 364 were violated, and the trial having been vitiated by such omission, the accused should be retried—*Nani Mandai*, 52 Cal. 403, 41 C.L.J. 50, 26 Cr.L.J. 761; *Sarat Chandra*, 52 Cal. 446, 26 Cr.L.J. 1244, A.I.R. 1925 Cal. 821; *Messer Bepari*, 29 C.W.N. 939, 26 Cr.L.J. 1032, 87 I.C. 920. Every question put to the accused and every answer given by him must be recorded in full. Where a man is on his trial for his life, he must be allowed a certain amount of latitude. He may not be very intelligent and may make a long rambling statement; but everything that he wishes to say must be recorded—*Mata Din*, A.I.R. 1931 Oudh 166, 32 Cr.L.J. 854, 132 I.C. 232, Ind. Rul. 1931 Oudh 244, 8 O.W.N. 224, 1931 Cr.C. 438; *Bhagwan Din*, 35 Cr.L.J. 915 (917), 149 I.C. 195, 11 O.W.N. 444, A.I.R. 1934 Oudh 151, 1934 Cr.C. 495.

Where the confession of the accused was recorded in a simple *narrative* form instead of in the form of questions and answers as required by this section, and there was nothing to show that the accused was prejudiced thereby, it was held that the irregularity did not affect the admissibility of the statement in evidence and was cured by sec. 533—*Deo Dat*, 45 All. 166; *Anta*, 1892 A.W.N. 60; *Munshi*, 8 Cal. 616; *Fekoo*, 14 Cal. 539; *Khudiram Bose*, 9 C.L.J. 55, 3 I.C. 625. For contra see *Ramsukhia*, 36 Cr.L.J. 447 (449), 153 I.C. 922, 15 P.L.T. 586, A.I.R. 1934 Pat. 651, 1934 Cr.C. 1322. Where the Magistrate has not recorded the necessary preliminary questions, the confession is admissible provided the omission has not injured the accused in his defence on the merits. The defect is not a fatal one and can be cured under sec. 533, Cr. P. C. But if the questions were not put at all, the confession was not duly made. But it is not necessarily irrelevant. The Court may satisfy itself that there was no inducement, etc., and so fulfil the requirements of sec. 24 of the Evidence Act. It may have to take evidence to satisfy itself on this point—*Mohammad Ali*, 35 Cr.L.J. 385 (389), 147 I.C. 300, 1933 A.L.J. 1551 (F.B.). Although it is of great importance to record the questions put to the accused (because sometimes a statement made in answer to a question put may have a different meaning if considered without such question) still if the omission to record the questions does not affect the sense and meaning of the prisoner's statement, the omission will not make the statement inadmissible in evidence—*Sagambar*, 12 C.L.R. 120; *Nawab*, 28 Cr.L.J. 341 (342), 100 I.C. 821, 7 A.I.Cr.R. 562, A.I.R. 1927 Lah. 285; *Titu Afiah*, 8 Cal. 618 (foot-note). In cases where the accused person makes some statement during the course of the trial which is interpreted as a plea of guilty, the Court should record the exact words used when a statement is

made in answer to a question put by the Court under this section—*Sailabala*, 62 C.L.J. 260, 36 Cr.L.J. 1460, 158 I.C. 761, 1935 Cr.C. 881, 62 Cal. 1127, A.I.R. 1935 Cal. 489, 39 C.W.N. 940. Where the accused begins by saying that he is guilty but the body of the statement shows fairly clearly that what he means is that he is not guilty of the crime, the statement should not be taken as a confession of guilt—*Hem Chandra*, A.I.R. 1935 Cal. 681, 37 Cr.L.J. 69, 159 I.C. 31, 1935 Cr.C. 1073, 40 C.W.N. 64.

Record need not be in Magistrate's handwriting—There is nothing in this Code which necessitates a Magistrate to take down the examination of the accused in his own hand. It is enough if he appends a certificate that the examination was conducted in his presence and contains accurately all that was said by the accused—*Lucky Narain*, 20 W.R. 50.

Although the terms of secs 164 and 364 are imperative, still if the Magistrate, instead of recording the confession himself, employed a clerk to do so, it was held that the irregularity would be cured by sec 533 by examining the Magistrate—*Badan Singh*, 1909 P.R. 2.* See Notes in para 516.

1038. Language:—The law requires that ordinarily the statement of the accused must be recorded in the language in which it was made, the object being to represent the very words and expressions used so as to ensure accuracy and prevent misrepresentation and misconstruction of what was said—*Sagal*, 21 Cal. 642; *Nani Mandal*, 52 Cal. 403, 41 C.L.J. 50, 26 Cr.L.J. 761; *Jagannath Sah v. Emp.*, 38 Cr.L.J. 169, 166 I.C. 280, 1937 O.L.R. 7, 9 R.O. 300, 1937 O.W.N. 37 A.I.R. 1937 Oudh 425. This rule of law ought not to be deviated from unless it is shown that it was impracticable to write the statement in the language in which it was made. If the answers were not taken down in the language in which they were given, the irregularity cannot be cured by section 533—*Nimadhab*, 15 Cal. 595; *Jai Narayan*, 17 Cal. 862; *Bawa*, 10 O.C. 112, 6 Cr.L.J. 94. Section 364 lays down that the confession is to be recorded in the language in which it was made, or if that is not practicable, in the language of the Court or in English. And it would be for the prosecution to establish the impracticability of recording the statement in the language in which it was made—*Jai Narayan*, 17 Cal. 862; *Nimadhab*, 15 Cal. 595; *Bawa*, 10 O.C. 112, 6 Cr.L.J. 94. Where the accused was examined by the Magistrate in *Marathi* and gave his answers in *Marathi*, the statements should be recorded in *Marathi*. It is illegal to record them in English—*Surmal*, Ratanlal 633; *Visram Babajee*, 21 Bom. 495. If, however, it is not practicable to record the statement in the language in which it is made, the law directs that the statement shall be recorded in the language of the Court or in English—*Sagal*, 21 Cal. 642. Thus, where the confession of the accused person made in Bengali was recorded by the Magistrate in English, because he could not write Bengali well and there was no mohurrer with him at the time, it was held that there was no illegality—*Razai Mian*, 22 Cal. 817. See also *Khudiram Bose*, 9 C.L.J. 55, 3 I.C. 625. Where the confession was not taken down in the language it was made but in English and it was not signed or thumb-marked, held that these irregularities could not be considered to be material in view of the evidence given by the Magistrate in Court, which went to show that the confession was made voluntarily and correctly recorded—*Nanak Chand*, 32 Cr.L.J. 1036, 133 I.C. 545, 32 P.L.R. 792, A.I.R. 1932 Lah. 73, Ind. Rul 1931 Lah 785. Where the Magistrate recorded the confession of the accused on a holiday, and since he could not get the service of any one to write Hindustani, he recorded the confession in English, translated it in Urdu to the accused who admitted it to be correct, held that the confession was properly recorded in accordance with the provisions of this section—*Bachanna*, 1891 A.W.N. 55. Where a confession made in Hindustani was recorded by a Muhammadan Magistrate in Bengali, the language of the Court, the High Court held that it could not be presumed that the Magistrate must have had sufficient acquaintance with Urdu so as to be able to record the statement in that language, and that in the absence of any evidence it should be presumed that the Magistrate found it impracticable to record the statement in Urdu—*Lal Chand*, 18 Cal. 549 (dissenting from *Jai Narayan*, 17 Cal. 862). So also, in *Deo Dat*, 45 All. 166,

A.I.R. 1923 All. 90, 71 I.C. 54, 24 Cr.L.J. 6, 20 A.L.J. 915, *Anta*, 1892 A.W.N. 60, *Vistram Babaji*, 21 Bom. 495, *Ratti Ram*, 1899 P.R. 7, *Nawab*, 28 Cr.L.J. 341 (342), 100 I.C. 821, 7 A.I.Cr.R. 562, A.I.R. 1927 Lah. 285, and *Kommoju Brahman*, A.I.R. 1940 Pat. 163 (165, 170), 1939 P.W.N. 915, 41 Cr.L.J. 533, 188 I.C. 57, 19 Pat. 301. although it was practicable for the Magistrate to record the statement in the language in which it was made, still an English record was held to be good, if it was translated to the accused in his own own language, and no prejudice was caused to him, the irregularity being cured by sec. 533. See also *Fernand*, 4 Bom.L.R. 785. Where the Magistrate was a Bengalee, and the accused was a Bengalee, but the accused made his confession partly in Bengali and partly in English, and he understood English well and he read through his statement and corrected it, held that the Magistrate did not act illegally in recording the confession in English—*Nilmadhab*, 5 Pat. 171, 27 Cr.L.J. 957.

When a Magistrate is unable to record a confession in the language in which it is made, he should not employ a police officer to write it down. The employment of a police-officer even as a scribe in recording a confession is objectionable—*Khudiram Bose*, 9 C.L.J. 55, 3 I.C. 625.

If the confession of the accused is made in a foreign language, unknown to the Court or Magistrate, the Code does not require that it should be recorded in that language. In such a case, the record of the confession should be in the language in which it is conveyed to the Court by the interpreter—*Vaimbilee*, 5 Cal. 826. Where a statement was made by the accused in Manipuri and communicated to the Magistrate by an interpreter in Bengali, and the Magistrate recorded it in English, and there was also a record in Manipuri, but the two records differed, it was held that the record in Manipuri should be regarded as the proper record and the only evidence in the case—*Sagal*, 21 Cal. 642.

1039. "Shown or read over to accused," etc. :—Before a statement can be admitted in evidence, it is necessary to see that such statement has been deliberately made and recorded, and that after being recorded, it has been *shown or read over* to the accused so that he might be assured that his words have been correctly taken down—*Narain*, 7 W.R. 49. It is not sufficient for the Sessions Judge merely to read over to the accused the statement recorded by the committing Magistrate, but the Judge should record any explanation or statement, the accused may make at the time. Merely recording in the judgment of the Sessions Judge that the statement or examination of the accused as recorded by the committing Magistrate was put in and read out to him is not enough—*Fatu*, 6 P.L.J. 147. Where there was nothing to show that the record of the confessional statement made by the accused before the committing Magistrate was shown or read over to the accused, such statement cannot be used as evidence against him—*Dewan Kahar*, 4 P.L.T. 186, 24 Cr.L.J. 497. This section requires that the record shall be shown or read over to the accused, and if he does not understand the language in which it is written, it must be interpreted in a language which he understands. Where a Magistrate showed or read a confession recorded in English to the accused who did not understand English, the provisions of this section were not complied with—*Bheebeekee*, 4 N.W.P. 16.

Where the statement of the accused under sec. 342, Cr. P. C., was not read over to him and his signature taken immediately after the close of the prosecution but, when it was brought to the notice of the Magistrate, he was given an opportunity of making a further statement although it was not asserted that the original statement was not correct, held that there was no ground for interference—*Jogendra Nath v. Rabindra Nath*, 37 Cr.L.J. 1089, 165 I.C. 150, 40 C.W.N. 863, 64 C.L.J. 7.

1040. Sub-section (2) :—*Record must be signed :*—The record of confession must be signed by the accused. A record which does not bear the signature of the accused is not admissible in evidence until the defect is cured in the manner provided by sec. 533—*Gajadhar*, 1883 A.W.N. 243. Where the signature or mark of the accused was not taken to the record of the statement made by him to a Magistrate, the defect

can be cured by examining the Magistrate as a witness to prove that the statement recorded was duly made—*Chedda*, 1896 A W N 161; *Raghu*, 23 Bom. 221. Where the signature of the accused was not taken by the committing Magistrate, and no objection was raised before the Sessions Court by his pleader on the ground of absence of signature, and no prejudice was caused to the accused, it was held that, under the circumstances of the case, the irregularity was not a sufficient ground for reversing the judgment—*Dera Dayal*, 11 B H.C.R. 237. The signature of the accused to his confession is taken as a voucher of the authenticity of the statement, and not as an admission of its correctness. Therefore, where the signature is not taken at the time the confession is made, but is taken the next day, and the Magistrate swears of the authenticity of the confessional statement, there is no such illegality or irregularity as would affect the admissibility of the statement in evidence—*Khudiram Bose*, 9 C.L.J. 55, 3 I.C. 625. Where, through an oversight, the Magistrate did not take the signature of the confessing accused, and the latter refused to affix his signature when he was subsequently asked to do so, but at the trial the Magistrate and his clerk were examined as to the confession having been duly made by the accused, held that the defect was cured by sec. 553, and the confession was admissible in evidence—*Ba Yin*, 7 Rang. 759, 31 Cr.L.J. 297, A.I.R. 1930 Rang 53, 121 I.C. 782, 1930 Cr.C. 245. A confession which bore neither the signature of the Magistrate nor of accused would be one not in strict accordance with the provisions of this section. But the fact that it had been duly made by the accused can be proved by further evidence under sec. 533, Cr. P. C., and except, perhaps, in cases which are not easily conceivable, the accused is not likely to be injured in his defence on the merits on account of such an omission. Such a confession would, therefore, be certainly admissible in evidence—*Mohammad Ali*, 35 Cr.L.J. 385 (29), 147 I.C. 390, 1933 A.L.J. 1551 (F.B.). The record must be signed by the accused himself in his own handwriting; it cannot be signed by another person for the accused. If so signed, it is inadmissible in evidence—*Daya Anand*, 11 B H.C.R. 41; but see sec. 533.

If the accused is unable to write, his mark or thumb impression (45 All. 155) is a sufficient compliance with the requirements of this section. But if he can write, his thumb-impression is not sufficient—*Sadananda*, 32 Cal. 550.

The signature of the accused must be taken in the presence of the Magistrate. To take it in an adjoining room in the presence of a clerk and not in the presence of the Magistrate is not a proper compliance with provisions of this section—*Bhika*, Ratanlal 687.

The Magistrate is required to record the examination, and if there is no signature by the accused, the record presumably will only contain the questions put to the accused and a note that the accused had refused to answer the questions. If the questions have been properly completed in this way by the Court, the law requires that the Magistrate shall sign it in order to show that it is conformable to what he saw and heard.

Khan, 39 All. 399, where *Imperatrix*, 4 Bom. 15 was distinguished.

1041. Certificate:—The absence of the certificate in the record is not necessarily fatal to its admissibility—*Vijaya*, 1931 Cr.C. 104. Though a Magistrate omitted to certify a confession as required by sec. 553, Cr. P. C., and did not record the whole of the questions put to the accused, the High Court held that the confession was admissible where no prejudice resulted to the accused—*Kamalagadu*, 2 W.L.R. 104. The certificate to be attached by a Magistrate to the examination of the accused is cured only by taking evidence that the accused duly made the confession, and that it was taken by examining the Magistrate or some other person who was present when the confession was recorded. It cannot be cured by examining a witness to the confession. The confession must be down in the handwriting of the Magistrate himself—*Balan*, 1931 Cr.C. 104, 3 C.W.N. 387; *Peradi*, 2 B.H.C.R. 397; *Anga Valajan*, 22 All. 104.

Badan, 1909 P.R. 2, 9 Cr.L.J. 297. It cannot be cured by the addition of the certificate at the direction of the District Magistrate after an appeal is disposed of—*Vyankatrao*, 7 B.H.C.R. 50.

This section does not prescribe any particular form of the certificate. When a confession bore a certificate of the Magistrate containing the words "taken by me" but did not say that the confession was made in his hearing, it was held that the certificate substantially complied with the requirements of this section—*Noshai*, 5 Cal. 958.

The entire certificate need not be in the handwriting of the Magistrate; it is sufficient if it is signed by the Magistrate—*Rezza Hosain*, 8 W.R. 55.

See Note 519.

1042. Non-compliance with the section:—The rule laid down in this section should be strictly followed—*Gajadhar*, 1883 A.W.N. 243. Magistrates should in all cases be careful to observe all the provisions of section 164 and this section, for although various defects can be cured, *the value of the confession may be very much diminished* by non-compliance with the strict letter of the law—*Ratti Ram*, 1899 P.R. 7.

Non-compliance with the formalities of this section may be remedied by sec. 533 by oral evidence (of the Magistrate who recorded it) that the accused duly made the statement recorded—*Raghu*, 23 Bom. 221; *Lal Chand*, 18 Cal. 549; *Bala*, 35 Cr.L.J. 1382, 151 I.C. 745, A.I.R. 1934 Lah. 18, 1934 Cr.C. 36; *Nga Po Dwe*, 35 Cr.L.J. 823, 148 I.C. 1002, 1934 Cr.C. 401, A.I.R. 1934 Rang. 78, A.L.R. 1934 Rang. 169. Where the confession though signed by the accused was not recorded in the manner prescribed by this section, and there was no certificate showing that the record contained in full the statement made by the accused, it was admitted in evidence in spite of these defects, and held to be proved by its production—*Ahmed Din*, 1881 P.R. 20; *Sher Singh*, 1881 P.R. 21. Where, although sec. 164 or sec. 364 requires that certain things should be recorded by a Magistrate and he has omitted to do so, the Court can admit the statement by calling oral evidence to prove that the statement had in fact been 'duly made'. But there is a safeguard in the section and a statement which has not been recorded in accordance with law cannot be taken in evidence if the error has injured the accused as to his defence on the merits. Cases of this kind may arise where the statement has been taken down in a language different from that in which the accused made his statement and which was not intelligible to him, or where only part of his statement had been recorded and not the whole of it—*Mohammad Ali*, 35 Cr.L.J. 385, 147 I.C. 300, 1933 A.L.J. 1551 (F.B.).

But sec. 533 does not apply and cannot make a confession admissible, where no attempt has been made to conform to the provisions of this section. Thus, where the confessions were neither recorded in the language of the accused, nor were signed by the accused, nor certified by the Magistrate, *held* that there was a total non-compliance with the provisions of this section, and sec. 533 would not cure such grave irregularities—*Viran*, 9 Mad. 224. Where *no record* whatever has been made of a confession; such confession cannot be proved merely by oral evidence. Section 533 deals with errors in the record and does not apply where no record whatever has been made of such a confession—*Gulaba*, 35 All. 260, 14 Cr.L.J. 221. See also *Nani Mandal*, 52 Cal. 403 cited in Note 1037 *ante*.

See Notes under sec. 164, Cr. P. C. especially Note 511, where the point has been fully discussed.

1042A. Sub-section (4):—In a summary trial the Magistrate is not required to record the statement of the accused made in pursuance of an examination under sec. 342, Cr. P. C., in full in the language in which it was made as sec. 364, cl. (1), does not apply to summary trials. Where the records of the statements made and recorded in English by the Magistrate were made at the time when the prosecution closed its case, there was a sufficient compliance with the law—*Banka Nath v. Abdul Kadir*, 39 C.W.N. 1306, 37 Cr.L.J. 1098, 165 I.C. 154. The provision of this section are not applicable to summary trials but this only means that the examination of the

accused person need not be recorded in full, including every question and every answer as laid down in this section, but it is clear that some notes must be made of the examination of an accused person in a summary trial if he is examined—*Krishna Shankar*, 36 CrLJ 1303, 158 I.C. 16, 1935 O.W.N. 1042, AIR 1936 Oudh 16, 1935 O.L.R. 557.

See Notes 867 and 973.

365. Every High Court established by Royal Charter may from time to time, by general rule, prescribe the manner in which evidence shall be taken down in cases coming before the Court, and the Judges of such Court shall take down the evidence or the substance thereof in accordance with the rule (if any) so prescribed.

365. Every High Court established by Royal Charter, and the Chief Court of Oudh shall from time to time, by general rule, prescribe the manner in which evidence shall be taken down in cases coming before the Court, and the evidence shall be taken down in accordance with such rule.

Change:—This section has been amended by sec. 99 of the Criminal Procedure Code Amendment Act, XVIII of 1923. "The word 'shall' would make it compulsory upon High Courts to prescribe by rules the manner in which evidence should be taken down. The section will not of course limit the discretion of the High Court as to what form the rules should take"—*Report of the Select Committee of 1916*

"We do not think it necessary that the Judges of the Court should take down the evidence themselves. But we are of opinion that there should certainly be some record"—*Report of the Joint Committee (1922)*.

The words "and the Chief Court of Oudh" have been added by the Oudh Courts Act, XXXII of 1925.

CHAPTER XXVI.

OF THE JUDGMENT.

366. (1) The judgment in every trial in any Criminal Court of original jurisdiction shall be pronounced, or the substance of such judgment shall be explained,—

- (a) in open Court either immediately after the termination of the trial or at some subsequent time of which notice shall be given to the parties or their pleaders, and
- (b) in the language of the Court, or in some other language which the accused or his pleader understands:

Provided that the whole judgment shall be read out by the

presiding Judge, if he is requested so to do either by the prosecution or the defence.

(2) The accused shall, if in custody, be brought up, or, if not in custody, be required by the Court to attend to hear judgment delivered, except where his personal attendance during the trial has been dispensed with and the sentence is one of fine only or he is acquitted, in either of which cases it may be delivered in the presence of his pleader.

(3) No judgment delivered by any Criminal Court shall be deemed to be invalid by reason only of the absence of any party or his pleader on the day or from the place notified for the delivery thereof, or of any omission to serve, or defect in serving, on the parties or their pleaders or any of them, the notice of such day and place.

(4) Nothing in this section shall be construed to limit in any way the extent of the provisions of section 537.

The requirements of sections 366 and 367 are not mere matters of form. The provisions of these sections are based upon good and substantial grounds of public policy, and whether they are or not, the Sessions Judges must obey them and not be a law of themselves—*Hargobind*, 14 All 242.

This section has, however, no application to appeals and specifically to an appeal disposed of summarily whether by a District Magistrate or a Sessions Judge or a High Court—*Jodha v. King-Emp.*, 41 Cr.L.J. 711 (713).

1043. Judgment:—Judgment means the expression of opinion of the Judge or Magistrate arrived at after due consideration of the evidence and of the arguments—*Damu v. Sridhar*, 21 Cal 121. Judgment, though not defined anywhere in the Code, is usually taken to mean an order of conviction or acquittal containing the point or points for determination, the decision thereon and the reasons for the decision—*Madho Singh v. Emp.*, 41 Cr.L.J. 725 (726), 189 I.C. 258, 1940 O.W.N. 607, A.I.R. 1940 Oudh 396, 1940 O.L.R. 420. An order of dismissal of a complaint under sec. 203 is not a judgment—*Chinna*, 29 Mad. 126. An order dismissing a case for default of appearance of the complainant is not a judgment—*Ratanchand*, 5 N.L.R. 76, 9 Cr.L.J. 553; *Bibhuti v. Dasimoni*, 10 C.L.J. 80, 10 Cr.L.J. 287. Judgment means a judgment of conviction or acquittal, but not an order of discharge under sec. 209 or 253—*Dwarka v. Benimadhab*, 28 Cal. 652, 5 C.W.N. 457; *Mir Ahmad v. Md. Askari*, 29 Cal 726; *Maheshwari*, 31 Mad. 543; *Nabi*, 9 Bom.L.R. 250, 5 Cr.L.J. 255. An order dismissing the complaint for default either under sec. 203 or under sec. 259, Cr. P. C., or discharging the accused is not a judgment and the word 'judgment' indicates some final determination of the case which would end it once for all, such as an order of conviction or acquittal—*Harbai v. Raya Premji*, A.I.R. 1939 Sind 193 (195), 40 Cr.L.J. 745, 183 I.C. 283 (F.B.). On the other hand, if the Magistrate after taking some evidence, however incomplete the evidence may be, enters into the merits of the complaint and makes an order of discharge, such an order is a judgment—*Dwarka v. Benimadhab*, 28 Cal 652. The final order of acquittal on a petition of composition is not a judgment—*Hasta*, 1914 P.R. 29, 16 Cr.L.J. 81, because such an order is made without any consideration of the evidence. This section does not apply to an order under sec. 195, Cr. P. Code—*Nagappa*, 6 Bom.L.R. 897; or under sec. 476 Cr. P. Code—*Jagat Ram v. Emp.*, 38 Cr.L.J. 318, 166 I.C. 915, 9 R.A. 469, 1936 A.W.R. (H.C.) 1125, 1936 A.Cr.C. 235, 1937 A.L.R. 112, 1936 A.L.J. 1199, A.I.R. 1937 All. 76.

Neither under the English nor the Indian Law the term 'judgment' in a criminal

case includes an interlocutory order. In sec 205 (1) of the Government of India Act, 1935 (25 & 26 Geo V, Ch. 42), the word 'judgment' does not occur by itself but is used in conjunction with final order. When both the terms judgment and final order are used together in one expression, they undoubtedly connote different and distinct meanings, and judgment cannot be interpreted as embracing even interlocutory orders, which would make the category 'final order' wholly superfluous and unnecessary. Therefore the order of the High Court directing a re-hearing of the criminal appeal by the Sessions Court is not a judgment within the meaning of sec. 205 of the Government of India Act—*Dr. Hari Ram Singh v Emp*, 40 Cr L.J. 468 (473), 1939 M.W.N. 497, A.I.R. 1939 F.C. 43, 181 I.C. 317, 1939 O.L.R. 366, 1939 P.W.N. 429, 1939 M.Cr.C. 148, 50 M.L.W. 95, 20 P.L.T. 539, (1939) 2 M.L.J. Sup. 23, 43 C.W.N. 50, 41 P.L.R. 680.

One judgment should not be given in respect of three cases—*Chandu*, Ind. Rul. 1932 Lah. 664.

In this section "judgment" is referred to apparently as part of the trial—*Jalal*, A.I.R. 1937 Sind 22 (23), 38 Cr L.J. 350, 167 I.C. 75, 30 S.L.R. 456.

1044. Delivery of Judgment:—The delivery of judgment and the passing of sentence is an integral part of the criminal trial and must be done by the Judge himself. It is not a mere formality, and a deliberate breach of this express provision of law is not a mere irregularity curable by sec. 537. Where on the date fixed for delivery of the judgment, the Judge being ill, he signed and dated his judgment and sent it to be translated to the accused by the interpreter, the Judge himself not being present in Court, and the judgment was so translated by the interpreter, it was an illegality and a retrial must be ordered—*Rambit*, 24 Cr.L.J. 584, 1 Bur.L.J. 122, A.I.R. 1923 Rang 41. But the Allahabad High Court takes a more liberal view and holds that where a Magistrate wrote out a judgment, signed and dated it, but owing to physical incapacity had it read out by another Magistrate, it was at the most an irregularity which was covered by sec. 537—*Nur Md. Khan*, 21 A.L.J. 137, 24 Cr.L.J. 173. A judgment which is not delivered is no judgment. Where a Judge after writing his judgment but before delivering it, dies or leaves the Bench, his written judgment cannot be considered as a judgment, but it is merely an opinion. A judgment though written and signed, is inoperative until it is pronounced, and till then must be taken merely as an expression of opinion—*Ramdhan*, 11 A.L.J. 745, 14 Cr.L.J. 562.

The judgment must be delivered in open Court—*Damu v. Sridhar*, 21 Cal. 121.

Sections 366 and 367 read together require that a judgment shall be (1) written, (2) signed, (3) dated and (4) pronounced in open Court—the latter three must take place on the same occasion. Till all these formalities have been gone through the judgment is not delivered; and there is nothing to prevent the officer who wrote it from tearing it up and writing another—*Savarimuthu*, 40 Mad. 108 (109).

The judgment must be pronounced by the Judge or Magistrate who held the trial. The duty of signing and delivering the judgment cannot be delegated by the presiding officer to another person. The officer who delivers the judgment and thus makes himself responsible for the judgment must be the officer who had considered the evidence and heard the arguments. He must be responsible for the reasons of the decision. Therefore, where a Magistrate, after holding trial in one district, went away to another district and thence sent his judgment to the Magistrate of the former district to be delivered, and the District Magistrate delivered it, the trial was set aside and retrial ordered—*Jogesh Chandra v. Surendra*, 35 C.W.N. 838 (810), 1931 Cr.C. 837, 134 I.C. 1265, A.I.R. 1931 Cal. 637; *Mahomed Rafique*, 43 C.L.J. 100, 27 Cr.L.J. 406, 93 I.C. 70, A.I.R. 1926 Cal 537; *Jhingur Raut*, Ind Rul. 1931 Pat. 481, 134 I.C. 625, 32 Cr.L.J. 1224, A.I.R. 1931 Pat 386, 12 P.L.T. 647, 1931 Cr.C. 914; *Jia Lal*, 1889 A.W.N. 181; *Baisnab Charan v. Amin Ali*, 50 Cal. 664, 38 C.L.J. 202, 24 Cr.L.J. 489. A Sessions Judge has no jurisdiction to deliver judgment after handing over charge to his successor and after vacating his office—*Ram Ratan*, A.I.R. 1932 All. 582, 1932 A.L.J. 753, 1932 Cr.C. 700, 141 I.C. 31, 34 Cr.L.J. 112. But the Madras High Court and the Oudh

Chief Court are of opinion that the delivery of the judgment by the successor of the Magistrate who wrote it is not illegal—*Sankara Pillai*, 18 M.L.J. 197, 7 Cr.L.J. 459; *Bhogole*, 34 Cr.L.J. 117, 141 I.C. 176, 36 M.L.W. 881, Ind. Rul. 1933 Mad. 84, 1933 M.W.N. 95, A.I.R. 1933 Mad. 251, 1933 Cr.C. 365; *Chandika*, 28 O.C. 109, 25 Cr.L.J. 1075, 11 O.L.J. 725. See also *Savarimuthu*, 40 Mad. 108, where it has been held that the succeeding Magistrate can date, sign and pronounce a judgment written by his predecessor, and thus adopt it as his own. See Note 1011 where the recent rulings have been inserted.

The judgment must be pronounced in the presence of the accused. Where the accused having absconded, the Magistrate passed sentence in his absence, and upon his re-arrest pronounced the judgment again, it was held that the Magistrate should not have pronounced his previous judgment in the absence of the accused—*Ghotiram*, Ratanlal 325; *Sardar*, 1917 P.R. 36. If, however, the judgment is one of acquittal or of fine only, it may be passed in the absence of the accused, under sub-section (2)—*Jamal Khatun*, 6 S.L.R. 206, 14 Cr.L.J. 272.

The judgment in a criminal case must be passed without undue delay, as delay is not only unjust to the accused, as it prevents them from appealing at once, but is opposed to the principles of law—*Baldea*, 5 C.P.L.R. 24. In a trial by jury, it is not necessary, under sec. 367, to record a judgment, but only the heads of charge to the jury should be recorded; and these should be written out as soon as possible after the charge to the jury has been actually delivered, when the facts of the case are fresh in the mind of the Judge—*Fanindra*, 36 Cal. 281; *Jagmohan*, 52 All. 207, 30 Cr.L.J. 1146 (1147); *Rupan Singh*, 4 Pat. 626, 27 Cr.L.J. 49 (53).

It is not necessary that the whole of the judgment should be read. It is sufficient if the substance of the judgment is delivered. Omission to read a portion in the judgment is a mere irregularity covered by sec. 537—*Venkataramanayya*, 2 Weir 711; *Kamakshamma*, 38 Mad. 498, 14 Cr.L.J. 595.

1045. Conviction or acquittal before judgment:—The judgment must always be written and delivered before sentence is passed. It is illegal to pronounce a sentence at the termination of the trial and to postpone the writing of the judgment to a future occasion—*Punjab Circ.*, p. 239. In as much as the sentence in a case of conviction, and the direction to set the accused at liberty in a case of acquittal, can only follow on the decision and cannot precede it, and in as much as the decision must be contained in the written judgment, it necessarily follows that the sentence is illegal if there is no written judgment when it is passed—*Hargobind*, 14 All. 242. Where the judgment was written and delivered some days after the prisoners were convicted and sentenced, it was held that this was a violation of the express provisions of this section and was more than a mere irregularity; and the conviction and sentence must be set aside—*Bandana Atchayya*, 27 Mad. 237.

In some cases, however, it has been held that such an irregularity does not vitiate the whole proceedings unless there has been a failure of justice; such irregularity will be cured by sec. 537—*Tilak Chandra v. Baisagomoff*, 23 Cal. 502; *Moriokhan*, 5 S.L.R. 131, 12 Cr.L.J. 610; *Thave Issaji*, 12 Cr.L.J. 457, 13 Bom.L.R. 635; *Damu v. Sridhar*, 21 Cal. 121; *Kamakshamma*, 38 Mad. 498; *Sankaralinga v. Narayan*, 45 Mad. 913 (F.B.); *Mad. Hayat Mulla*, 7 Rang. 370, 1930 Cr.C. 203 (204), A.I.R. 1930 Rang. 77, 30 Cr.L.J. 1166, 120 I.C. 225; *Ata Muhammad*, 25 Cr.L.J. 705 (Lah.); *Dhonda v. Sitaram*, 34 Cr.L.J. 1036, 145 I.C. 664, A.I.R. 1933 All. 660, 1933 A.L.J. 1244, 1933 Cr.C. 1143, 55 All. 886; *Ata Mohammad*, 81 I.C. 193, A.I.R. 1925 Lah. 137, 25 Cr.L.J. 705. But the Patna High Court took a different view in *Jhari Lal*, A.I.R. 1931 Pat. 148, 8 Pat. 904, 1930 Cr.C. 90, 11 P.L.T. 195, 31 Cr.L.J. 416, 122 I.C. 531. Section 497 (4) now provides for acquittal of the accused before judgment on taking a bond from him for appearance on the day of judgment.

Where a Magistrate died after pronouncing the sentence but before writing the judgment, the High Court reversed the conviction and sentence and ordered a retrial—*Kamthia*, 1 Bom.L.R. 160. But in 2 Weir 438, where the Magistrate died after passing

sentence but before recording a judgment, it has been held that a conviction on a trial regularly held will not be set aside merely because the Magistrate had been unavoidably prevented from recording a judgment, and the right of appeal of the accused would not be taken away by the absence of a complete judgment.

Loss of judgment :—This section only imposes the condition that the judgment must be pronounced in open Court and imposes a few other conditions but such conditions do not include the condition that the record should not have been lost. In cases where the judgment has been lost, the appropriate course for a Judge is to re-write the judgment from memory and from the materials on record, and place it on record—*Kamakshamma*, 38 Mad. 498

The procedure of recording an order of acquittal on the order-sheet is to be deprecated. Magistrates should ordinarily write regular judgments except in very simple cases—*Gena Lai v. Turantlal*, A.I.R. 1935 Pat. 495 (496), 158 I.C. 332, 36 Cr.L.J. 1375.

367. (1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by the presiding officer of the Court *or from the dictation of such presiding officer* in the language of the Court, or in English; and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open Court at the time of pronouncing it, *and where it is not written by the presiding officer with his own hand, every page of such judgment shall be signed by him.*

(2) It shall specify the offence (if any) of which, and the section of the Indian Penal Code or other law under which the accused is convicted, and the punishment to which he is sentenced.

(3) When the conviction is under the Indian Penal Code, and it is doubtful under which of two sections, or under which of two parts of the same section, of that Code the offence falls, the Court shall distinctly express the same and pass judgment in the alternative.

(4) If it be a judgment of acquittal, it shall state the offence of which the accused is acquitted and direct that he be set at liberty.

(5) If the accused is convicted of an offence punishable with death, and the Court sentences him to any punishment other than death, the Court shall in its judgment state the reason why sentence of death was not passed:

Provided that, in trials by jury, the Court need not write a judgment, but the Court of Session shall record the heads of the charge to the jury.

(6) *For the purposes of this section, an order under section 118 or section 123, sub-section (3), shall be deemed to be a judgment.*

1046. Change:—This section has been amended by sec. 100 of the Cr. P. C. Amendment Act, XVIII of 1923

Under the old section it was held that the judgment must be written by the Magistrate himself; he could not get it written by a clerk—*Lakshmibai*, Ratanlal 545; *Subramanya*, 6 Mad. 396; and that if the judgment was written at the dictation of the Magistrate, and the Magistrate merely signed it, the procedure was illegal—*Manik Lal Mullick v. Corporation of Calcutta*, 4 C.L.J. 411, 4 Cr.L.J. 394. The present Amendment in sub-section (1) will now allow such procedure.

Scope:—Sections 366 and 367 do not apply to a High Court. There is no provision which requires that the High Court, after pronouncing a judgment in open Court, should date and sign the same. As a matter of fact all that sec. 425 requires is that the judgment should be certified to the Court below. This may be done by the Chief Justice when a Judge of the High Court dies after delivering judgment in open Court but before signing the fair copy made by his judgment writer—*Pragmadho*, 34 Cr.L.J. 703, 144 I.C. 149, 55 All. 132, Ind. Rul. 1933 All. 396, 1933 A.L.J. 13, 1933 Cr.C. 51, A.I.R. 1933 All. 40. The intention of the section is that the Magistrate should direct his own attention to every material question of fact or law to which he would be required to apply his mind—*Gul Shera*, A.I.R. 1932 Sind 180, 1932 Cr.C. 795.

The provision of this section applies to an appeal under sec. 476B, Cr. P. Code—*Nitya Gopal v. Nani Gopal*, 32 Cr.L.J. 1045, 133 I.C. 672, 35 C.W.N. 650, A.I.R. 1931 Cal. 454, 1931 Cr.C. 606, Ind. Rul. 1931 Cal. 736.

This section has however no application to appeals and specifically to an appeal disposed of summarily whether by a District Magistrate or a Sessions Judge or a High Court—*Jodha v. Emp.*, A.I.R. 1940 Oudh 369 (371), 1940 O.L.R. 408, 189 I.C. 83, 1940 O.W.N. 594, 41 Cr.L.J. 711.

Language of judgment:—Under this section, the judgment should be written in the language of the Court or in English. Where an Honorary Magistrate wrote his judgment in Urdu instead of in Hindi, the language of the Court, it was held to be irregular; but such irregularity was curable by sec. 537—*Dhanukdhari v. Harikar*, 4 C.L.J. 232, 4 Cr.L.J. 162. The language of a judgment should not be factious—*Public Prosecutor v. Diraviya*, 1931 M.W.N. 1152.

In cases which have assumed communal aspect the proceedings in Courts and the language of their judgments should not themselves promote the feelings of enmity, the promotion of which by others it is their duty to punish under the law—*Ala Ullah Shah*, A.I.R. 1936 Lah. 429 (433), 1936 Cr.C. 464, 162 I.C. 624, 38 P.L.R. 638, 37 Cr.L.J. 661.

1047. Contents of judgment:—The judgment in a criminal case should commence with a statement of the facts in respect of which the accused is charged and not with circumstances which might be held to provide a motive for the offence—*Bala*, A.I.R. 1935 Nag. 81 (85), 17 N.L.J. 274. It is the duty of the Judge presiding at the trial to do more than merely collect in his judgment the statements of witnesses who give evidence before him. A careful analysis and appraisal of the evidence is absolutely essential in the interests of justice—*Ramhit*, 35 Cr.L.J. 919 (925), 149 I.C. 210, 6 R.A. 872, A.I.R. 1934 All. 776. But a judgment is not required to be a resume or reproduction of all the evidence on record; a Court is entitled to and should select such important evidence as it considers necessary to support a decision on material points arising for consideration—*Jitendra Nath Gupta v. Emp.*, 38 Cr.L.J. 818 (828), 169 I.C. 977, A.I.R. 1937 Cal. 99, 10 R.C. 69. It is not necessary that a judgment should contain everything recorded in the evidence: when an appeal is heard, the evidence is read. The judgment should contain as much of the evidence as is necessary to ascertain the facts deposited to, and deal with the importance of and the value to be attached to the evidence of the witnesses, and the reasoning based on this evidence on which the Judge founds his decision and his sentence; to put more than this into a judgment is merely to confuse—*Nga Then v. The King*, 40 Cr.L.J. 871 (874), 184 I.C. 78, A.I.R. 1939 Rang. 263. The judgment must be self-contained and nothing should be left out. If any material finding is left out in the judgment, the defect cannot be cured

by the Magistrate's subsequent explanation to the Appellate Court—*Jurakhan*, 7 C.L.J. 238, 7 Cr.L.J. 312; *Abhay v. Fuller*, 25 Cal. 625, 2 C.W.N. 289. The judgment should show that the Court had considered the evidence and had found in a case of conviction that the facts proved to the satisfaction of the Court brought an offence home to the accused person whom the Court convicted—*Pandeh Bhat*, 19 All. 506 (F.B.). Where a judgment, though not a long and elaborate one, affords a clear indication that the Court duly considered the evidence, it is a good judgment—*Kasimuddi*, 1 C.W.N. 169. But if the judgment is so meagre that it is impossible to form an opinion as to the merits of the case or to say whether there has been a miscarriage of justice or not, the judgment must be set aside—*Rupa Mandal v. Keshab*, 5 C.L.J. 452, 5 Cr.L.J. 349. Where the judgment consists of a few notes on the arguments of Counsel and a somewhat vague conclusion, it does not comply with the provisions of this section—*Mahomed Baksh*, 32 Cr.L.J. 252, 129 I.C. 223, 31 P.L.R. 1017, A.I.R. 1930 Lah. 1054, 1930 Cr.C. 1230, Ind. Rul. 1931 Lah. 159.

The Judge should first discuss the prosecution evidence and come to an independent finding on the truth or falsity of the story related by them and should then examine the statement of the accused and criticize it in the light of the circumstances brought on the record. After having weighed the prosecution evidence and the statement of the accused he would then be justified in formulating his conclusion as to the guilt or innocence of the accused—*Ghulam Nabi v. Emp.*, 40 Cr.L.J. 185, 179 I.C. 237, A.I.R. 1938 Lah. 850, 40 P.L.R. 265.

Where an Appellate Court finds that the Magistrate has not written a judgment in conformity with the provisions of sec. 367, the correct procedure is to accept the appeal and to remand the case for hearing *de novo*. The Appellate Court cannot retain the appeal on its file and ask for a judgment which the Magistrate has failed to record—*Karuppiah*, 1920 M.W.N. 120, 21 Cr.L.J. 52.

Points for determination :—"The attention of all Criminal Courts is invited to the necessity of very strictly observing the provisions of the latter portion of clause (1) of sec. 367, which declares that the judgment must contain the points for determination, the decision thereon and the reasons for the decision"—*Cal. G.O. & C.O.*, p. 36. Where the Sessions Judge convicted the accused without stating the facts of the case or the points for determination or even the section under which the accused was convicted, the judgment was set aside—*Ektar Khan*, 9 C.W.N. xxiii. The accused person is entitled to have an independent judgment of the trying Court, and such judgment must be prepared in accordance with, and must contain the particulars required by sec. 367. Otherwise it is no judgment at all. Where a second class Magistrate thinking that a severer punishment should be inflicted on the accused than what he was authorised to award, recorded his opinion and forwarded the proceedings to the Sub-divisional Magistrate, and the latter in convicting the accused wrote the following judgment: "I agree with the finding arrived at by the learned trying Magistrate and convict all the accused for the offence of unlawful assembly as stated in the charge"; held that this was not a judgment at all—*Thakur Singh*, 20 Cr.L.J. 414 (Pat.). Where the Magistrate has given strong and legal reasons for his decision, his omission to refer to the minute details of the case does not vitiate his judgment—*Durga Singh*, 24 Cr.L.J. 181 (Pat.). Where the judgment showed that the Judge had appreciated the points which the prosecution had to establish, and that he had clearly in view the points for determination, viz., the credibility of the evidence of the witnesses for the prosecution, and he expressed his opinion on that point, it was held that the judgment was good and should not be set aside—*Rohimuddi*, 20 Cal. 353.

In a case of mischief, the question of legal title to the property is a point for determination. It is the duty of the Criminal Court to determine what was the intention of the alleged offender and whether he was not acting in the exercise of a *bona fide* claim of right—*Budh Singh*, 2 All. 101. In a case of dacoity, the Judge should at first give a general outline of the case, of the investigation and the arrest of the various accused and then the case for and against each accused should be dealt with in detail, and

the Judge should arrive at a conclusion with regard to each individual accused—*Nga Mu*, 2 Bur.L.J. 199, 76 I.C. 573, 25 Cr.L.J. 205, A.I.R. 1924 Rang. 67. In a case of unlawful assembly and riot, the judgment should contain as one of the points for determination a statement as to the existence of the elements constituting the unlawful assembly—*Ram Lal v. Haricharan*, 37 Cal. 194. It is the duty of the Judge to determine, where several alternative common objects of the unlawful assembly are alleged in the charge, which of the common objects is made out—*Manaruddi*, 35 Cal. 718; *Dasarathi v. Raghu*, 36 Cal. 158. In a charge of theft, the point for determination is the dishonest intention, especially if a *bona fide* claim is set up—*Ram Lal v. Hari Charan*, 37 Cal. 194, 11 C.L.J. 410, 5 I.C. 999.

Where there were six several prisoners accused of no less than seven separate offences and the Judge framed only one point for decision as to whether they or any one of them were guilty of the offences with which they were charged, *held* that such a compliance with the provisions of this section was perfunctory and perilous—*Mitho*, 26 Cr.L.J. 53, A.I.R. 1934 Sind 89, 28 S.L.R. 12, 151 I.C. 976, 1934 Cr.C. 748. The judgment should show that the mind of the assessors and the mind of the Judge himself has been distinctly directed to each and every one of the points which must be decided before a conviction can safely be recorded—*Ditto*, A.I.R. 1935 Sind 23, 28 S.L.R. 295, 36 Cr.L.J. 504, 154 I.C. 138, 1935 Cr.C. 118.

In a case under sec. 110, Cr. P. C., the judgment should contain discussion of how the evidence affects each individual among the accused. The evidence of general repute should be considered in detail by the trying Magistrate and it must be seen whether this evidence is to be regarded in any way rebutted by the evidence of repute which has been given on behalf of the defence—*Dhaju*, 35 Cr.L.J. 177 (178), 146 I.C. 934, A.I.R. 1933 Pat. 112, 1933 Cr.C. 261. See also *Kalu Mirza*, 37 Cal. 91.

'Decision thereon':—Where there are several accused, the case of each accused should be dealt with in detail, and the Judge should arrive at a decision with regard to each individual accused—*Nga Mu*, 2 Bur.L.J. 199; *Dakshinamurti*, 1918 M.W.N. 129, 19 Cr.L.J. 200.

Reasons for decision:—Every judgment must contain the reasons for decision; a judgment which states merely the offence and the punishment and contains no statement of the reasons for conviction is insufficient and invalid—*Kana*, Ratanlal 310. Even in a summary trial, the law requires under sec. 263 that the Magistrate should give a brief statement of the reasons for his finding. A judgment in a single line is not a judgment in accordance with law—*Jankey Rai*, 20 Cr.L.J. 431 (Pat.). In a proceeding under sec. 145, the Magistrate should, in the final order, sufficiently state the reasons therefor, so that the High Court may in revision determine whether or not the Magistrate has directed his mind to the consideration of the effect of the evidence adduced before him and has complied with sub-sec. (4) to sec. 367—*Bhuban Chandra v. Nibaran*, 49 Cal. 187, 25 C.W.N. 887, 62 I.C. 323, 34 C.L.J. 125, 22 Cr.L.J. 499, A.I.R. 1922 Cal. 82; *Motaherali v. Esha-Que*, 25 Cr.L.J. 1115, 81 I.C. 939, 39 C.L.J. 366, A.I.R. 1924 Cal. 848. An order of discharge under section 253 is not a judgment, and the writing of reasons is not necessary. But it is desirable that the Magistrate should record his reasons for the discharge, although it is not compulsory—*Nabi Fakira*, 9 Bom.L.R. 250.

Remarks and comments:—The testimony and conduct of police-officers examined in a criminal trial may be commented upon in the judgment in the same degree as those of any other material witnesses, but no further—*Budri*, 23 W.R. 65. Comments on the conduct of witnesses and parties should not go beyond what is really necessary for the elucidation of the case. Any humorous remarks or ridicule on strangers should be avoided—*Ma Kyn v. Kin Kat*, 12 Cr.L.J. 464, 4 Bur.L.T. 173; *Baldeo*, 5 C.P.L.R. 24. The language of a judgment should be temperate and sober, and not satirical. A judgment should not admit irrelevant matters to the record, but should confine itself to a consideration of the issues before the Court, together with a fair and legitimate comment on any errors or irregularities that may be disclosed in the course of the trial—*Thomas Pelloka*, 5 Bur.L.T. 20, 13 Cr.L.J. 259. See also 1931 M.W.N. 1152 cited in para. 1046.

A judgment should not contain remarks about the accused to the effect that he was a person of wealth and influence and had prevented truth from appearing, unless such conduct of the prisoner is established by evidence—*Dhurum*, 8 W.R. 13. The judgment should not contain any damaging remarks regarding a witness in a criminal trial—*Mallik Umar*, 1910 P.W.R. 2, 11 Cr.L.J. 178, or regarding the conduct of a counsel when such counsel's conduct was not at all objectionable—*Lachchu*, 1 O.L.J. 141, 15 Cr.L.J. 420; or regarding a person who is not a party or witness in the proceeding—*Benarsi Das*, 6 Lah. 166, 26 Cr.L.J. 1326, 89 I.C. 270, A.J.R. 1925 Lah. 392. No disparaging or libellous remarks should be made upon any person who has had no opportunity to defend himself and who has not even appeared in the witness-box—*Tejumal*, 34 Cr.L.J. 367, 142 I.C. 587, 27 S.L.R. 13, 1933 Cr.C. 219, A.I.R. 1933 Sind 91, Ind. Rul. 1933 Sind 105. The Magistrate is not bound to confine himself merely to a finding that the accused is not proved guilty. Such a verdict often leaves the accused with a stain on his character in the public estimation though not in law and it is the duty of a Magistrate if he considers that the prosecution case is not only not proved but was deliberately false and concocted to give such a finding in favour of the accused so that the accused should leave the Court without a stain on his character. It is also obvious that the Judge must be at liberty to make remarks on the character or conduct of witnesses for otherwise he can not arrive at proper findings. The witnesses have every chance of explaining their statements and if the Court finds those statements unbelievable in its judgment then unless it can be shown that the judgment is due to bias or perverse there is no reason why the Courts should be muzzled in expressing their opinion on the character of the witnesses who have appeared to support a case which the Court considers was false and fabricated—*Karamat Ullah v. Emp*, A.I.R. 1940 Lah. 42 (43), 41 Cr.L.J. 380, 186 I.C. 799. An appellate judgment should not contain any imputations about the motives of the trying Magistrate—*Yaccob*, 2 Weir 535. The High Court has power to expunge any objectionable remarks from the lower Court's judgment; see Notes 1214 and 1433A.

Specification of offence :—See sub-section (2). The offence of which the accused is convicted must be specified in the judgment with the same precision as in the charge—*Taik Pyn*, 5 L.B.R. 21, 2 I.C. 619; *Manaruddi*, 35 Cal. 718.

Sentence :—Under this section, the sentence is a part of the judgment, and when an accused person is convicted, it is incumbent upon the Court to pass a formal sentence of even a single day's imprisonment or any other punishment to make the record legally complete—*Kalua*, 1884 A.W.N. 219.

As to the legality of passing sentence before judgment, see Note 1045 under sec. 366.

1048. Signing :—This section requires that the judgment must be signed. But if the judgment is written entirely in the hand of the Magistrate, or partly written by his own hand and partly written by another at his dictation, it does not become inoperative by reason of the fact that he forgot to sign and date it. The irregularity does not affect the merits of the case, and is cured by sec. 537—*Ram Singh*, 47 All. 284, 23 A.L.J. 8, 26 Cr.L.J. 688; *Md. Hayat Mulla*, 7 Rang 370, 1930 Cr.C. 203 (204), A.I.R. 1930 Rang. 77, 30 Cr.L.J. 1166, 120 I.C. 225

The signature should be made with a pen and not with a stamp. There are obvious reasons why judicial documents should be authenticated in such a manner that their authenticity may admit of proof. But the affixing of a signature with a stamp would be no more than a mere irregularity—*Subramanya*, 6 Mad. 396. But mere initialling is not signing—*Nanhu*, O.S.C. 192.

The signature of the Magistrate must be appended to the judgment at the time of pronouncing it in open Court—*Ganpat*, Ratanlal 429; *In re Saravimuthu*, 40 Mad. 108. But omission to date and sign the judgment at the time of pronouncing it is an irregularity covered by sec. 537—*Venakataramanayya*, 2 Weir 711 (712). The judgment must be pronounced by the Judge in open Court, and the dating and signing must

take place at the time of pronouncing. Where the Judge signed and dated the judgment, but being too ill to attend the Court, sent the judgment to the Chief Clerk to deliver it, *held* that the judgment was not legally pronounced, and the conviction must be set aside—*Rambit*, 1 Bur.L.J. 122, A.I.R. 1923 Rang 44.

The dating and signing of the judgment must be done by the presiding officer of the Court; it cannot be delegated to anybody else—*Jia Lal*, 1889 A.W.N. 181. Where a Magistrate who has tried a case and written out the judgment is succeeded by another before he has actually pronounced the same, it is not obligatory on the succeeding Magistrate to pronounce the same, and much less can he be compelled to do so, though he may, if he chooses, date, sign and pronounce it, in which case he will be adopting it as his own—*In re Savarimuthu*, 40 Mad. 108. *Quære*, whether it will be legal for the Magistrate to date, sign and pronounce the judgment written by his predecessor, when the accused demands a *de novo* trial (under sec. 350)?—*Ibid*.

Sub-section (3):—Judgment in the alternative:—The 'doubt' in sub-section (3) is the same as referred to in sec. 236, *i.e.*, a doubt as to the application of law to the facts proved and not a doubt as to whether the accused had committed any offence. See Notes under sec. 236. Where the judgment did not state in express terms that the Court was in doubt as to the question under which of two sections the offence fell, it was held that this was at most an irregularity and did not vitiate the judgment—*Boya Takirugadu*, 2 Weir 440. Where a case falls neither under sec. 236 nor sec. 367 (3), Cr P. C., the conviction in the alternative is not in accordance with law—*Rangoon Electric Tramway and Supply Co. Ltd.*, 34 Cr.L.J. 1040 (1043), 11 Rang 162, 145 I.C. 710, 1933 Cr.C. 477, A.I.R. 1933 Rang 70. See paragraphs 4 and 5, Note 762.

Sub-section (4):—Judgment of acquittal:—Under sub-section (4) if the judgment is one of acquittal, the accused is entitled to be discharged from custody immediately on the judgment of acquittal being pronounced, and his further detention becomes unlawful. No formal warrant of release addressed by the Court to the Superintendent of the Jail is necessary; it is for the jail authorities (in whose custody the accused had remained) to satisfy themselves of the result of the trial—*Anonymous*, 5 M.H.C.R. App. 2. In a charge of murder it is desirable that the Judge should raise as one of his points for decision the question whether the accused is guilty of murder. If he decides to acquit, he should specifically record a judgment of acquittal—*Fateh Mahomed*, A.I.R. 1934 Sind 139, 1934 Cr.C. 1070, 152 I.C. 376, A.L.R. 1934 Sind 148, 36 Cr.L.J. 83.

1049. Sub-section (5):—Judgment in capital cases:—Where the Judge convicts the accused of murder and passes on him the alternative sentence of transportation for life, he should state his reasons for not passing the capital sentence—*Dwarka*, 4 O.W.N. 977, 28 Cr.L.J. 980 (982); *Mewa*, 36 Cr.L.J. 1001, 156 I.C. 786, A.I.R. 1935 Lah. 337, 1935 Cr.C. 571; *Naresh*, 36 Cr.L.J. 524, 154 I.C. 691, 1935 O.W.N. 321. A person convicted of murder should ordinarily be sentenced to death. To justify the passing of a sentence of transportation for life, there should be really extenuating circumstances, and not a mere absence of aggravating circumstances—*Nga Myat*, 18 Cr.L.J. 113 (Bur.); *Nga Tha*, 1 L.B.R. 216 (F.B.); *Mi She Yi*, 1 Rang. 751, 25 Cr.L.J. 1121, 81 I.C. 945, 2 Bur.L.J. 277, A.I.R. 1924 Rang. 179; *Local Government v. Sitrya*, reasons have been given barring the remark that there had been a dispassionate consideration of all the circumstances, it is not sufficient reason in the eye of law to justify the lesser penalty—*Mianji Khan v. Emp*, A.I.R. 1940 Pesh 49 (51). The fact that the assessors gave their opinion that the accused was not guilty is no reason for passing the lesser sentence. The responsibility for the sentence rests with the Judge and the Judge alone, and, having once made up his mind to differ from the assessors as regards conviction, he should not let their opinion weigh with him with regard to sentence—*Local Government v. Sitrya*, *supra*. The fact that the crime was committed without premeditation in the heat of passion upon a sudden quarrel is not an extenuating

circumstance—*Nga Myat*, 18 Cr.L.J. 113. The reasons justifying the infliction of the lesser penalty under sec. 357 (5) must be such as are in accordance with established legal principles. The drunkenness of the accused is not a sufficient reason for not inflicting capital sentence. Unless drunkenness amounts to unsoundness of mind so as to enable insanity to be pleaded by way of defence, or unless the degree of drunkenness is such as to establish incapacity in the accused to form the intent necessary to constitute the crime, drunkenness is neither a defence nor a palliation and is not a reason for inflicting a sentence of transportation for life instead of death sentence—*Waryam*, 7 Lah 141, 27 Cr.L.J. 764. Where the murder was brutal and cold-blooded, (a murder of a little boy of six for his ornaments), a sentence of death should be passed, and it is not a sufficient ground for passing a sentence of transportation on the ground that the accused is a youthful offender (18 or 19 years of age) and may reform. It is not for the Legislature to reform murderers, and youth may be a consideration only in those cases where the accused has not reached years of discretion or has been influenced by other persons—*Bhagwandin*, 7 O.W.N. 787, 1930 Cr.C. 965 (966), A.I.R. 1931 Oudh 89, 128 I.C. 80, 32 Cr.L.J. 83.

There is no rule of law that if there be no eye-witness to the murder the accused could not be sentenced to death—*Tulsi*, 34 Cr.L.J. 395, 142 I.C. 613, 14 P.L.T. 96, Ind Rul 1933 Pat. 165, A.I.R. 1933 Pat. 180, 1933 Cr.C. 511.

The fact that the accused murdered his victim merely to escape from custody is not a sufficient reason for imposing the lesser sentence of transportation. But where the case rests entirely on circumstantial evidence, and it is open to question whether the injuries to the head of the deceased would have caused his death had he not been drowned, these may be reasons for inflicting the lesser punishment—*Munnun*, 4 O.W.N. 754, 28 Cr.L.J. 860 (861). The fact that the accused is a woman is not a sufficient ground for passing a sentence of transportation instead of one of death—*Nibbia*, 1888 A.W.N. 134; *Mt She*, 1 Rang 751, 25 Cr.L.J. 1121. The fact that the accused is a pregnant woman is not a sufficient ground for commutation of sentence—*Janhee*, 15 W.R. 66; in such a case the execution is to be deferred till after delivery; see sec. 382. The fact that the body of the murdered man has not been found is not a sufficient ground—*Bhagirath*, 3 All 383; *Sadhu*, 1882 A.W.N. 160; *Rogi*, 1881 A.W.N. 112; but see *Contra*—*Buduroddcen*, 11 W.R. 20.

It is clear from sub-sec. (5) that when a person is found guilty of murder, the sentence of death must be the normal sentence and the sentence of transportation for life is provided only as an abnormal sentence, in passing which reasons must be given as to why the capital sentence is not passed—*per* Cuming, J., in *Dukari*, 33 C.W.N. 1226 (1230), 31 Cr.L.J. 817, 125 I.C. 305. But S. K. Ghosh, J., is of opinion (p. 1232) that sec. 367 (5) should not be interpreted in this way, for such a construction would make the sentence of transportation an exception in murder cases. But this is not true, for in actual practice, capital sentence is sparingly inflicted. Section 367 (5) has nothing to do with the measure or degree of punishment in murder cases, but simply lays down a matter of procedure, namely, that reasons should be recorded if a capital sentence is not passed. The sentence of death is not to be taken as a normal sentence, but the Court must look to the circumstances of the case in deciding the sentence to be passed. Therefore in fixing the measure of punishment one is to be guided not by sec. 367, Cr. P. C., but by various other matters, for instance, the enormity or otherwise of the offence and the particular circumstances under which the accused committed it. They will go back to the facts of the case. But in the case of the death penalty the Courts have gone so far as to consider matters which are not relevant to the crime, e.g., mere delay in passing judgment—a circumstance bringing into play humanitarian grounds. C. C. Ghose, J., to whom the matter was referred under sec. 429, Cr. P. C., has laid down that if in any case of murder sec. 302, I. P. C., one finds two Judges of the High Court are in disagreement over the question of sentence, one favouring the death penalty and the other recommending that the trans-

portation for life would meet the ends of justice, that in itself is a sufficient ground for holding that the death penalty should not be inflicted.

Where the Sessions Judge feels reasonable doubt whether a sentence of death would be the proper penalty, the doubt, like all other doubts, should be given in favour of the accused, and a sentence of transportation should be passed. In such a case, it is highly improper for the Sessions Judge to pass a sentence of death and to have the responsibility to the High Court of commuting the sentence, if necessary—*Shive Cho*, 3 L.B.R. 111, 3 Cr.L.J. 25 (dissenting from 1 L.B.R. 216). See also Note 71.

1050. Heads of charge to the jury:—Under this section, the Judge is not required to write out *in extenso* the charge which he addresses to the jury. He is to record merely the heads of the charge, because it is impossible for the Judge to write down everything he says to the jury—*Keamuddi*, 51 Cal. 79 (82). The heads of charge to the jury need not be a verbatim reproduction of the Judge's observations to the jury, nor is it necessary that the charge should be written out before it is delivered. But whether they are written out before delivery or taken down verbatim, they should be placed on the record by the Judge as soon as he may find it possible to do so and whilst what he said is fresh in his recollection. The record need not be meticulous or lengthy, but it must give accurately the substance of what the Judge said to the jury so that the High Court may, if occasion arises, be able to ascertain from the record whether the law and the facts relative to the case were fairly and properly put to the jurors. Where the Judge's record of his charge to the jury was simply this: "Sections 141 to 149 and 299 to 304, I. P. Code, read over and explained"; held that such a short summary was not a sufficient compliance with the law—*Rupan Singh*, 4 Pat. 626, 27 Cr.L.J. 49 (53); *Khijiruddin*, 53 Cal. 372, 27 Cr.L.J. 266 (272); *Chotan*, 7 Pat. 361, 29 Cr.L.J. 804 (805). It is absolutely necessary that the heads of charge should show clearly and distinctly what the exposition of the law actually was—*Madan Tilakdas*, 38 Cr.L.J. 767 (768), 169 I.C. 306, 41 C.W.N. 508, A.I.R. 1937 Cal. 266, 9 R.C. 914. The heads of the charge mean that the Judge must faithfully record the line upon which he addressed the jury, both on the evidence and on the law, and the object of these heads of charge is to inform the High Court, should occasion arise, of what direction he gave in law to the jury and the nature of the summing up of the evidence not only for the prosecution but also for the defence. The heads of charge are not intended to be an exhaustive detail of every particular which the Judge may have addressed to the jury; but they should contain in an intelligible form and with sufficient fulness the points of law and direction given by the Judge to the jury, and the record should represent with absolute accuracy the substance of the charge by the Judge to the jury—*Eknath*, 1 P.L.J. 317, 17 Cr.L.J. 353; *Fanindra*, 36 Cal. 281; *Ikramuddin*, 39 All. 348; *Abdul Gafur*, 35 C.L.J. 437, 26 C.W.N. 996; *Abbas*, 25 Cal. 736; *Shambulal*, 10 Bom.L.R. 565; *Panchu*, 34 Cal. 698; *Dwarkan*, 33 C.W.N. 84.

Although under sec. 367, only the heads of the charge to the jury are required to be recorded, still as the law allows an appeal on grounds of misdirection, it is not only desirable but necessary that the charge should be recorded with sufficient fulness to enable the Appellate Court to see that the facts and circumstances were properly placed before the jury, that all points of law were clearly explained to the jury, and that the summing up was proper and free from misdirection—*Wilson*, 30 C.W.N. 693, 27 Cr.L.J. 926; *Panchu*, 34 Cal. 698; *Abdul Gafur*, 26 C.W.N. 996, 24 Cr.L.J. 8; *Ikramuddin*, supra; *Khijiruddin*, 53 Cal. 372, 27 Cr.L.J. 266 (272); *Kasimuddin*, 36 Cr.L.J. 480, A.I.R. 1935 Cal. 31, 154 I.C. 110, 60 Cr.L.J. 45. The Judge should also record in his charge what evidence he reads out to the jury—*Baswantappa*, Ratanlal 917. It is not sufficient for the Judge to state in his record of the heads of the charge that he referred to certain sections of the Penal Code and explained to the jury the law with regard to the offence; he should set out in the record the directions which he gave to them in respect of the law, in order that the High Court may not have to speculate as to what the Judge said but may be in a position to judge whether the elements constituting the particular offence in question had been properly and fairly explained to the jury—

Kasimuddin, 47 Cal. 795, 21 Cr.L.J. 694; *Chotan Singh*, 7 Pat. 361, 29 Cr.L.J. 804 (805). The Judge's comments on the evidence of identification should be recorded in a form which will enable the Appellate Court to know what was actually said—*Abdul Gafur*, supra. But failure to record in the charge what actually the Judge's explanation of the law was, would not vitiate the trial where it has not occasioned a failure of justice. The High Court will not, therefore, order a retrial on this ground if it is of opinion that if the jury accepted the evidence of the prosecution they were entitled to convict the accused of the offence charged—*Chotan Singh*, 7 Pat. 361, 29 Cr.L.J. 804 (805); *Kasimuddin*, supra. In recording the heads of the charge to the jury, the Sessions Judge is not required to practically write a judgment. Where the facts of the case and the law applicable to the facts were not at all complicated, and the Sessions Judge recorded that such and such sections of the I. P. Code had been read and explained to the jury, *held* that there was a sufficient compliance with the law—*Dhanpat Tiwari*, 9 Pat. 148, 1930 Cr.C. 511 (512, 513), A.I.R. 1930 Pat. 243, 31 Cr.L.J. 786, 125 I.C. 131, 11 P.L.T. 646. Where the law regarding the offence charged was in fact fully explained to the jury, the mere fact that the Judge failed to record that the elements constituting the offence were fully explained was not sufficient to vitiate the conviction—*Ramsarup*, 9 Pat. 606, 1930 Cr.C. 1009, A.I.R. 1930 Pat. 512, 11 P.L.T. 867, 32 Cr.L.J. 72, 128 I.C. 121.

Where the fresh charge was the same as recorded in the original charge, the omission to record the heads of the re-charge is not fatal to the conviction—*Kasimuddin*, 60 C.L.J. 45, 36 Cr.L.J. 480, A.I.R. 1935 Cal. 31, 154 I.C. 110.

Where a joint trial is held of several offences some of which are triable by jury and others with the aid of assessors and in respect of the latter offences the jurors become assessors, it is the duty of the Sessions Judge to pronounce a judgment containing the particulars specified in this section, in respect of the latter offences. A reference to the charge to the jury is not a sufficient compliance with the requirements of this section—*Datta*, Ratanlal 426.

1050A. Judgment under sec. 349, Cr. P. C.:—See Note 1010.

1051. Appellate Judgment:—See section 424. "It should be observed that sec. 424 of the Code extends the provisions of section 367 to the judgments of the Lower Appellate Courts, and it is essential that the judgment of such Courts should comply with the provisions of this section"—*Cal G R. & C. O.*, p. 36. An appellate judgment, like the judgment of the Court of first instance, must fulfil the conditions laid down in this section; that is, the judgment must state the points for determination, the decision thereon, and the reasons for the decision—*Devendra*, 17 Bom.L.R. 1085, 16 Cr.L.J. 832; *Kali Charan v. Geli Bewa*, 2 P.L.T. 228, 22 Cr.L.J. 640, 63 I.C. 336; *Bundarban*, 21 Cr.L.J. 223 (Lah.); *Dalip Singh*, 5 Lah. 308; *Mangla*, 2 P.L.T. 616, 63 I.C. 416, 22 Cr.L.J. 656. If the Appellate Court dismisses the appeal without specifying these points, the appellate order must be set aside, and the appeal reheard—*Shanmukh Basapa*, 32 Bom.L.R. 353, A.I.R. 1930 Bom. 163, 125 I.C. 710, 31 Cr.L.J. 925, 14 A.I.Cr.R. 534, 1930 Cr.C. 487. A judgment must conform to the provisions of this section which require, *inter alia*, that it shall contain the points for determination, the decision thereon and the reasons for the decision. These requirements must be fulfilled in respect of each individual accused or suspect in cases where there are more than one. Where the reasons for decision in the judgment of the Appellate Court are not such as to enable a revisional Court acting under the provisions of secs. 435 and 439, Cr. P. C., to form any conclusion as to the correctness, legality or propriety of the findings, the judgment is clearly defective and the appeal must be reheard—*Abdul Karim v. Emp.*, A.I.R. 1940 Sind 113 (114), 41 Cr.L.J. 724, 189 I.C. 226.

Besides specifying these points, the Appellate Court has to decide two more points, *viz.* (1) is the objection raised in the memorandum of appeal a valid objection? and if not, (2) is there any ground apparent on the record for interference in appeal? A judgment which does not decide these points is not a valid judgment—*Jairam*, 8 N.L.R. 84, 13 Cr.L.J. 559.

It is the duty of the Sessions Judge, in disposing of an appeal, to record a judgment according to law; any deficiency in that judgment cannot be made up by a reference to the judgment of the Magistrate. It is his duty to go into the evidence and try the appeal in a proper manner. Where the Sessions Judge in appeal stated no facts and gave no reasons in his judgment for the conclusion arrived at by him, the appeal must be reheard—*Bhola Nath*, 7 C.W.N. 30; *Ektar*, 9 C.W.N. xxiii.

An appellate judgment must be quite independent and stand by itself; it ought not to be read in connection with or as supplementary to the judgment of the Court of first instance—*Jamail*, 35 Cal. 138, 6 C.L.J. 427, 12 C.W.N. 134; *Manglu*, 2 P.L.T. 616, 63 I.C. 416; *Solhu v. Krishna Ram*, 25 Cr.L.J. 113, 76 I.C. 177, A.I.R. 1924 Lah. 660; *Thakur Singh*, 20 Cr.L.J. 444 (Pat.); *Dasogi*, 20 Cr.L.J. 645 (Pat.); *Bach*, 1 Rang. 301; *Ghousbux*, A.I.R. 1937 Sind 26 (27), 167 I.C. 227, 30 S.L.R. 382, 38 Cr.L.J. 363, 9 R.S. 73. Even when confirming the judgment of the trial Court, the Appellate Court should take its own view of the evidence after perusing the record. The judgment of the Court of Appeal should be such that the High Court as a Court of Revision might in looking into the judgment be in a position to judge for itself what the case was and how far the Court of Appeal had considered the evidence as bearing on the guilt or innocence of the accused, before it affirmed the judgment of the trial Court—*Inatulla*, 39 C.L.J. 117, 25 Cr.L.J. 1041, 81 I.C. 820, A.I.R. 1924 Cal. 618. See also *Ahmed Ali*, 32 Cr.L.J. 271, 129 I.C. 276, 32 P.L.R. 92, 1930 Cr.C. 1227, A.I.R. 1930 Lah. 1051, Ind. Rul. 1931 Lah. 164. It is the duty of the Appellate Court not merely to consider whether there are reasons for differing from the judgment of the trial Court, but to apply its mind afresh to the evidence and to form its own conclusion and to embody its conclusions and the reasons on which they are based, in a considered judgment which will, if necessary, bear the scrutiny of the High Court. Where it is in fact, almost impossible to gather from the judgment of the Court of Appeal taken by itself, what the alleged occurrence was, and what was the real nature of the dispute between the parties, the judgment does not comply with the provisions of sec. 367 read with sec. 424, Cr. P. C., inasmuch as it does not set forth the points for determination, the decision thereon and the reasons for these decisions—*Kali Charan Som v. Priya Nath Das*, 39 Cr.L.J. 791, 176 I.C. 677, A.I.R. 1938 Cal. 522, 11 R.C. 150. It would be well for District Magistrates who hear appeals in criminal cases to bear in mind that they are also subordinate to higher Courts and it is their duty to satisfy the higher Courts by their judgments that they have applied their minds to the case before them and in recording a finding of conviction upon the evidence produced before them have arrived at a correct conclusion. In order to discharge this duty, it is necessary for them to see that their judgments fulfil the requirements laid down by the law. It is always easy for the Appellate Court to say that all the points arising in the case have been considered by the Court below and have been rightly decided. This does not, however, show that the Appellate Court has applied its mind to the points arising in the case and has arrived at its own independent judgment in respect of them as it is required by the law to do. Under the law it is clearly the duty of the District Magistrate to state the various points urged before him and to record his decisions thereon with his reasons for those decisions. If he fails to discharge that duty, his judgment must be set aside—*Banshidhar v. Emp.*, A.I.R. 1940 All. 18, 1939 A.L.J. 671, 41 Cr.L.J. 220, 185 I.C. 682, I.L.R. 1939 All. 865. But the whole evidence need not be recapitulated and analysed by the Appellate Court—*Kaloo*, 14 O.L.J. 257, 8 O.W.N. 304.

The judgment of the Appellate Court in dealing with the case of several accused convicted in a joint trial must show on the face of it that the case of each accused has been taken into consideration, and should state reasons, as far as may be necessary, to show that the Appellate Court has devoted judicial attention to the case of each accused—*Jamail*, 35 Cal. 138; *Dakshinamurti*, 1918 M.W.N. 129, 19 Cr.L.J. 200; *Arindra*, 20 C.W.N. 1296; *Batu Naidu*, 2 L.W. 958, 16 Cr.L.J. 735; *Cherutath*, 16 Cr.L.J. 496 (Mad.); *Chinna Menikkam*, 48 M.L.T. 504, 26 Cr.L.J. 1089; *Maded Ali*, 24 O.C. 230; *Solhu v. Krishna Ram*, 25 Cr.L.J. 113, 76 I.C. 177, A.I.R. 1924 Lah. 660.

The Appellate Court must record reasons for confirming, reversing or modifying the sentences or orders of the Magistrate. Where the Appellate Judge merely says that he adopts the reasons given by the trial Court, to support the grounds of his decision, or merely states that he is satisfied that the judgment of the trial Court is substantially right, the judgment is erroneous in form—*Dasogi*, 20 Cr L.J. 645 (Pat.); *Baishnab Charan*, 24 Cr L.J. 311 (Cal.).

An Appellate Court is not required to write a long and elaborate judgment, but it is clearly its duty not only to examine the evidence but also to write a judgment affording a clear indication that the appeal has been properly tried and that the points urged by the appellant have been duly considered and decided. An Appellate Court which writes a judgment which the High Court is unable to follow without reference to the judgment of the trial Court, obviously fails in the discharge of the duty imposed upon it by law—*Dalip Singh*, 2 Lah. 308 (310), A.I.R. 1921 Lah. 102, 23 Cr L.J. 9, 64 I.C. 337, 24 P.L.R. 1922; *Abdul Wahid v. Emp.*, A.I.R. 1937 Pesh. 88, 1937 Pesh L.J. 93, 173 I.C. 672.

Where the judgment of the Appellate Court does not discuss the facts nor the grounds of appeal, it is not in accordance with law and is liable to be set aside—*Hurmat Ali*, 27 Cr L.J. 114, 91 I.C. 690, 1 Lah. 399. Reasons for the decision should be given by the Appellate Court in order that the Superior Court may at once know the facts found and the reasons therefor without reference to the record and judgment of trial Court and satisfy itself as to whether the lower Court has, in fact, done its duty by an honest and careful consideration of the case—*Maroti v. Kasabai*, 27 Cr L.J. 1404, 98 I.C. 716, A.I.R. 1927 Nag. 88. It is the duty of the Judge hearing the appeal to state the facts and give the reasons for the conclusion he arrives at. The High Court will not in revision make up for the deficiency of the appellate judgment by having recourse to that of the Court of first instance—*Rahim Ali*, 25 Cr L.J. 246, 76 I.C. 710, A.I.R. 1923 Lah. 344.

The judgment of the Appellate Court must show that it has duly considered the evidence of both sides and the pleas raised in appeal, with a judicious mind; if it does not consider the evidence for the defence, nor even alludes to it, it is defective—*Beni*, 4 O.L.J. 80, 18 Cr L.J. 689; *In re Seperumal*, 11 Cr L.J. 331, 7 M.L.T. 182; *Ballusu*, 1912 M.W.N. 881, 13 Cr L.J. 712; *Hulasi v. Chhotey Lal*, 1939 O.A. 820, 1939 O.W.N. 1105, 1939 A.W.R. (C.C.) 319. Even though the Counsel for the applicant does not refer to the defence evidence, it is the duty of the Appellate Court to look into that evidence and after dealing with it come to its own decision—*Fidoi Hossein*, 40 Cal. 376, 14 Cr L.J. 419; *Hulasi v. Chhotey Lal*, 1939 O.A. 820, 1939 O.W.N. 1105, 1939 A.W.R. (C.C.) 319. Where the judgment of the Appellate Court did not discuss the defence evidence and had not arrived at any finding with regard to matters raised in the lower Court and it was not possible to ascertain from the Appellate Court's judgment what the occurrence was, it was not in accordance with law—*Gakharali*, 25 Cr L.J. 901, 81 I.C. 437, A.I.R. 1925 Cal. 266. Where the judgment of the Appellate Court, without discussing the points urged in the memorandum of appeal and without giving any reasons, holds that the conviction is correct, the judgment is not a legal judgment as it does not contain the point or points for determination raised in the memorandum of appeal, the decision thereon and the reasons for the decision—*Kalikram*, 29 Cr L.J. 270, 107 I.C. 665. Where a District Magistrate disposed of an appeal in a case under sec. 110, in which a large mass of evidence had been produced on both sides, by a short judgment in a few lines dealing with some general observations upon the volume of evidence which was put before him and without proper consideration thereof, the judgment was not in accordance with law—*Sunehi*, 19 A.L.J. 921, 23 Cr L.J. 378. A District Magistrate should not dispose of an appeal from an order requiring a person to furnish security, otherwise than by a judgment showing on the face of it that he has applied his mind to a consideration of the evidence on the record and of the pleas raised by the appellant both in the Court below and in the memorandum of appeal—*Lal Behari*, 38 All. 393, 17 Cr L.J. 309. But the Appellate Court is not bound to give its opinion as to the character of the evidence in prolix detail—*Pandeh Bhat*, 19 All. 506. Where in the judgment of the first

Court, evidence was set out at great length and reasons fully explained, the judgment of the Appellate Court which confirms the judgment of the trial Court does not become defective in law by reason of the fact that it does not set out again in detail the whole of the evidence and reasons for believing the witnesses, if it appears from the judgment that the Appellate Court appreciated the arguments adduced against the credibility of the prosecution witnesses—*Kafiluddin*, 20 Cr.L.J. 238 (Cal.). But where the facts are intricate, and the evidence is contradictory, it is incumbent on the Court of appeal to set out the points for determination and the reasons for decision with sufficient fulness. If the Appellate Court merely refers to the decision of the trial Court and says that nothing has been urged in appeal which affects the reasons given by the trial Court for conviction, such a decision is not in accordance with law—*Aghore Dutt*, 12 P.L.T. 601, 1931 Cr.C. 907, 32 Cr.L.J. 1197, 134 I.C. 619, A.I.R. 1931 Pat. 379, Ind. Rul 1931 Pat. 475, 11 Pat. 143. It is not a sufficient compliance with the requirements of this section, if the Appellate Court confirming the order of the lower Court gives no reasons for its decision but merely says that it has considered the evidence carefully and thinks that it is sufficiently strong to justify the order—*San Dun*, 2 Rang. 641; or if the Appellate Court states no reasons whatsoever and confirms the judgment of the Lower Court in these general terms. "I see no reason for disturbing the finding of the Lower Court"—*Ram Das*, 13 Cal. 110; *Samsher*, 1888 A.W.N. 280; *Bhujpal*, 1886 A.W.N. 289; *Manicka*, 1931 M.W.N. 119; or "after reading the evidence and hearing the counsel I am of opinion that the Lower Court has decided the case rightly; I find no ground for interference; appeal is dismissed"—*Girish*, 23 Cal. 420; *Farkan v. Samsher*, 22 Cal. 241; *Rohimuddy*, 20 Cal. 353; *Pandeh*, 19 All. 506; *Shannugh Basapa*, 32 Bom.L.R. 353, 1930 Cr.C. 487 (488), 31 Cr.L.J. 925, 125 I.C. 710, A.I.R. 1930 Bom. 163 (distinguishing *Patilbuva*, 28 Bom.L.R. 1029, 27 Cr.L.J. 1153); or "the prosecution evidence is sufficient to warrant the conviction, I decline to interfere"—*Shamsher Ali*, 2 Weir 536; or "I have perused the judgment of the Lower Court, and I agree with the findings arrived at by the learned trying Magistrate and convict all the accused for the offence of rioting as stated in the charge"—*Thakur Singh*, 20 Cr.L.J. 444 (Patna); or "Heard the appellant, I do not think it necessary to direct prosecution of the respondent in this case. Appeal dismissed"—*Nitya Gopal v. Nani Gopal*, 32 Cr.L.J. 1045, 133 I.C. 672, 35 C.W.N. 660, A.I.R. 1931 Cal. 454, 1931 Cr.C. 606, Ind. Rul 1931 Cal. 736; *Kalisadhan v. Nani Lal*, 52 Cal. 478; or "I have gone through the record. The conviction under sec. 419, I. P. C., is sound. The fine inflicted of Rs. 30 only is very light. I see no reason to interfere and dismiss the appeal"—*Jodhi*, A.I.R. 1933 Nag. 328, 146 I.C. 447, 35 Cr.L.J. 136.

Where, in acquitting the accused, the Appellate Court merely observed: "I have carefully gone through the whole evidence and I find that I cannot agree with the conviction" and later on, "I have gone through the depositions of the prosecution witnesses and I find that there are many discrepancies in their statements. The case is certainly of a doubtful nature," held that this was no discussion of the case at all—*Raghnathmal v. Patiram*, A.I.R. 1937 Nag. 394, 172 I.C. 177.

Where the judgment of the Appellate Court was in the nature of a stereotyped one, which might answer for any case, it was not one in accordance with this section or sec. 424—*Kasimuddin*, 1 C.W.N. 169.

Even when an Appellate Court rejects an appeal summarily under sec. 421, it is advisable to state shortly in its order the reason or reasons which have influenced it in coming to the conclusion that there is no sufficient ground for interference in the case—*Nanku*, 17 All. 241; *Ramrao*, 13 N.L.R. 169, 18 Cr.L.J. 993. Although in rejecting an appeal under sec. 421, the Appellate Court is not bound to write a judgment and give reasons for its decision—*Warubai*, 20 Bom. 540; *Rash Behari v. Balgopal*, 21 Cal. 92; *Ramrao*, supra; *Krishnaya*, 25 Mad. 534, still the recording of reasons is necessary in view of the possibility of such orders being challenged by an application for revision—*Nanku*, 17 All. 241; *Kundan*, 36 All. 496, 15 Cr.L.J. 512. See Note 1132 under sec. 421.

Even where the Appellate Court dismissed the appeal because no one appears to argue the appeal, the Court is bound to read and consider the evidence and dispose of

the appeal by writing a judgment in accordance with the provisions of this section—*Naai Sheikh*, 11 CWN. cxxv.

Defective Appellate Judgments —It is difficult to lay down any rule with precision as to what judgment of an Appellate Court complies, and what judgment does not comply, with the requirements of this Code. It cannot be held that merely because the form of judgment does not exactly comply with all the requirements of this section and of sec. 424, it is not a valid judgment. The omission in the judgment must be substantial in order to invalidate it—*Pandeh*, 19 All 506. Though the judgment of the Appellate Court is not in proper form, the High Court should not interfere with an order of acquittal, unless there has been a miscarriage of justice—*Rupa Mandal v Keshab*, 5 CLJ 452, 5 CrLJ 349. Where the Appellate judgment shows that the Judge had appreciated and had in view all the points, the High Court should not interfere in revision merely because the form of judgment does not exactly comply with all the requirements of this section—*Rohimuddy*, 20 Cal. 353. But where the Appellate Court which dismissed the appeal not summarily but after notice to the parties, omitted to write the judgment altogether, such an omission was not a mere irregularity curable by sec. 537, but a grave illegality—*Dubendra*, 17 BomLR. 1085, 16 CrLJ 832, 31 IC. 1008. Where the judgment of the Appellate Court did not strictly comply with the provisions of this section but made it clear that the Appellate Court had perused the evidence and heard arguments, and, having heard the case argued, had come to an independent opinion as to the guilt of the appellants, the High Court did not set aside the judgment. The High Court is not invariably bound to interfere in revision because there is an irregularity in the form of a judgment, unless there is some reason to believe that there has been a failure of justice—*Tippanna*, AIR 1932 Bom. 473, 34 BomLR. 1110, 1932 CrC. 601, 139 IC 608, 33 CrLJ. 801, Ind Rui 1932 Bom 519. So long as the Appellate Court writes a judgment from which the High Court can gather what the decision of the Appellate Court was, that in majority of instances ought to be sufficient. If it is possible for the High Court reasonably to arrive at an understanding of what has been found in the Court below, it is not necessary that the High Court should captiously or capriciously set aside the judgment of the Court below or even comment on it with any severe strictures. Still less is it obligatory upon the High Court to hold that the proceedings in appeal ought to be quashed and the matter reheard in appeal from the beginning—*Abdul Rahman*, AIR 1935 Cal 316 (321), 62 Cal. 749, 1935 CrC. 467, 156 IC 678, 36 CrLJ. 982.

The Appellate Courts should take care to write judgment which are in consonance with the provisions of the Cr. P Code because by failing to do so they encourage persons convicted to waste their money and the time of the High Court by making applications in revision—*Ram Singh v. Emp.*, AIR. 1940 All. 80, 1939 ALJ. 1146, 41 CrLJ 249, 186 IC 97.

The case of each of the appellants should be specifically dealt with—*Madho Singh v. Emp.*, 41 CrLJ. 725 (726), 189 IC. 258, 1940 O.W.N. 607.

1052. Sub-section (6):—"We think it desirable to lay down that orders under secs. 118 and 123 (3) should be deemed to be judgments for the purposes of the section"—*Report of the Joint Committee* (1922). This sub-section supersedes *Ramasamy Chetty*, 27 Mad. 510 (512) where it was held that an order passed in security proceedings was not a "judgment".

In *Venkatachinnaya*, 43 Mad. 510, it was contended for the Crown that the word 'inquiry' in sec. 117 did not mean a trial; but Aylmer J., in overruling this contention observed as follows (at pp 524-525).—"If the word is to be given the narrow interpretation contended for the Crown, such provisions as those in Chapter XXVI regarding judgments will not apply to security cases. That is to say, the Magistrate in ordering security under sec. 118 would be under no legal obligation, *inter alia*, to record a judgment setting forth his reasons (sec. 367) or to give the accused a copy of it without delay (sec. 371). So far as I can see, apart from the operation of sec. 117, the Magistrate might simply record an order requiring the execution of a bond, without

recording any reasons or discussing the evidence. I do not think this could have been intended, especially as care has been taken to provide for an appeal against an order for security (*vide* sec. 406) and for the interference of the Chief Presidency or District Magistrate (sec. 125)." The present sub-section gives legislative recognition to the above remarks of Ayling, J.

An order passed under sec. 118 or sec. 123 (3), Cr. P. C., must be self-contained; it must show that the Court has considered the evidence against each of the suspected persons and has found that the evidence proves the case against each of the suspected persons individually—*Ghousbux*, A.I.R. 1937 Sind 26 (27), 167 I.C. 227, 30 S.L.R. 382, 38 Cr.L.J. 363, 9 R.S. 173; *Abdul Karim v. Emp*, A.I.R. 1940 Sind 113 (114), 41 Cr.L.J. 724, 189 I.C. 226

368. (1) When any person is sentenced to death, the sentence shall direct that he be hanged by the neck till he is dead.

Sentence of death.
Sentence of transportation. (2) No sentence of transportation shall specify the place to which the person sentenced is to be transported.

The Sessions Judge should not sentence the accused "to receive the supreme penalty". The sentence should direct that the accused be hanged by the neck until he be dead—*Nga Shein Maung*, 37 Cr.L.J. 290 (292), 160 I.C. 459, A.I.R. 1936 Rang. 46, 1936 Cr.C. 45.

369. No Court, other than a High Court, when it has signed its judgment, shall alter or review the same, except as provided in sections 395 and 484 or to correct a clerical error.

369. *Save as otherwise provided by this Code or by any other law for the time being in force, or in the case of a High Court established by Royal Charter, by the Letters Patent of such High Court, no Court, when it has signed its judgment, shall alter or review the same, except* * to correct a clerical error.*

Change:—This section has been amended by sec. 101 of the Criminal Procedure Code Amendment Act, XVIII of 1923.

The wording of the old section admitted of the interpretation that High Court had unlimited powers of altering or reviewing their judgment (though such interpretation was never made in any of the decided cases). The present section as now amended lays down that the High Court has no power to alter or review its judgment except as provided by the Letters Patent. The references to secs. 395 and 484 have been omitted, because there are cases other than those referred to in these two sections, in which a review of judgment is possible, *e.g.*, sec. 434. See the *Report of the Joint Committee* of 1922.

Sections 369 and 561A:—When sec. 369 was amended in 1923 in such a way as to show that the High Court had no power of altering or reviewing a judgment, except to correct a clerical error, the Legislature did not attempt or intend to deprive the High Court of any inherent power which it had hitherto possessed. Section 561A does not, in terms, invest the High Court with any powers which it did not possess before. But it does refer to an inherent power of which the High Court is already in possession. The

High Court possessed no inherent power to review its judgment before the amendments of 1923. Consequently, it cannot be said that sec 561A either modifies the provisions of sec. 369 or clothes the High Court with any fresh powers—*Banwari Lal*, 36 Cr.L.J. 1286 (1288), 157 I.C. 1044, A.I.R. 1935 All. 466, 1935 A.L.J. 317, 1935 Cr.C. 507. See also *Raju*, 110 I.C. 221, A.I.R. 1928 Lah. 462, 29 Cr.L.J. 669, 10 Lah. 1; *Dahu Raut*, 31 Cr.L.J. 1100 (1105), 145 I.C. 937, A.I.R. 1933 Cal. 870, 1933 Cr.C. 1481, 38 C.W.N. 25; *Laxman Rao Parashram v Emp*, 39 Cr.L.J. 116, 10 R.N. 192, 172 I.C. 299, A.I.R. 1938 Nag. 74, not following *Kjng-Emp v Shiv Dat*, 3 Luck 680, 111 I.C. 573, 5 O.W.N. 641, 29 Cr.L.J. 893, A.I.R. 1928 Oudh 402 and *Mathra Das v Crown*, A.I.R. 1927 Lah. 139, 99 I.C. 1039, 9 L.L.J. 12, 28 Cr.L.J. 239.

Section 561A, Cr. P. C., does not confer upon the High Court any new powers but merely declares that such inherent powers as the Court may possess shall not be deemed or affected by anything contained in the Code. The High Court has, therefore, no power to alter or review its own judgment in a criminal case, once it has been pronounced and signed except in cases where it was passed without jurisdiction or in default of appearance without an adjudication on the merits or to correct a clerical error; nor is there any conflict between that section and sec. 369 of the Code—*Eduard Few v. Emp*, 40 Cr.L.J. 763, 183 I.C. 348, A.I.R. 1939 Lah. 244, distinguishing *Har Kishan Lal*, A.I.R. 1937 Lah. 497, 170 I.C. 375, I.L.R. 1937 Lah. 69, 38 Cr.L.J. 883, 39 P.L.R. 733, 10 R.L. 103 and *Rash Behari Singh*, A.I.R. 1934 Pat. 551, 152 I.C. 291, 1934 Cr.C. 1195, 36 Cr.L.J. 100, 15 P.L.T. 475, 7 R.P. 179.

See also Note 1433A

1053. Scope and effect of section—Judgment:—The effect of this section may—speaking broadly and without attempting strict accuracy—be put under three heads: (1) it saves powers to correct clerical errors, (2) it provides that, as a general rule, no Court shall alter or review its judgment after it has signed it, except to correct clerical errors; and (3) in cases where the judgment has been signed and it is sought (in contravention of the general rule) to alter or review the judgment for the purpose of correcting errors other than clerical; power to correct such errors is reserved only if it can be derived from any provisions in (a), the Criminal Procedure Code, or (b) in any other law for the time being in force, or (c) (in the case of a High Court established by Royal Charter), by the Letters Patent of such High Court. The general rule under this section comes into operation only when the Court has signed its judgment. In the case of the High Court exercising its Ordinary Original Criminal Jurisdiction, no judgment nor any other pronouncement of its decision is signed until the warrant is signed by the Presiding Judge. The warrant is drawn up some little time after the sentence has been orally pronounced. The practice has been for the Judges in proper cases to review their sentences though already pronounced in Court so long as the warrant has not been drawn up and signed—*Abdul Rahiman*, 37 Cr.L.J. 753 (754), 162 I.C. 950, A.I.R. 1936 Bom. 193, 38 Bom.L.R. 153, 1936 Cr.C. 573. Although this section refers in express terms to judgments under Ch. XXVI of the Code, still it is clear that the principle laid down herein applies also to final orders which are in the nature of judgments—*Harilal*, 22 Bom. 949. An order which is passed on full inquiry and after hearing both sides is in the nature of a judgment, and such an order cannot be altered after it is once passed and signed. Thus, an order of a District Magistrate, passed after full enquiry, refusing to deliver to the Political Superintendent of a Foreign State, a property seized in execution of a search warrant, cannot be altered by the Magistrate himself. The only course open to the Magistrate is to make a reference to the High Court, and have his own order cancelled—*In re Harilal*, 22 Bom. 949. The order of transfer cannot be regarded as an order in the nature of a judgment—*Chhotey Lal v. Tinke Lal*, 36 Cr.L.J. 918, A.I.R. 1935 All. 815, 156 I.C. 163. An order under Chapter XII is in the nature of a judgment, and a Magistrate having passed an order under sec. 146 cannot cancel the order and pass an order under sec. 147 instead—*Ram Dulare v. Ajodhya*, 16 O.C. 192, 14 Cr.L.J. 605; *Luchmi v. Bhusi*, 19 Cr.L.J. 225 (Pat.). An order in sanction proceedings (now abolished)

comes under this section and a Sessions Judge refusing to revoke a sanction has no jurisdiction to review his order and revoke it—*Q-E. v. Ganesh*, 23 Bom. 50. A final order in maintenance proceedings (sec. 488) is in effect a judgment, and the Magistrate cannot review a final order passed in such a proceeding—*Nanda v. Manmaya*, 21 C.W.N. 344. But see *Bhagubhai Ranchhodas v. Bai Arvinda*, A.I.R. 1937 Cal. 334 where it has been held that section 369, Cr. P. C., does not apply to a case of maintenance falling within the express provisions of secs. 488 and 489, Cr. P. Code.

But this section does not apply to an order of dismissal of complaint under sec. 203. Such an order is not a judgment within the meaning of this section—*Chinna Kaliappa*, 29 Mad. 126 (131) (F.B.) and the Magistrate can re-hear the complaint. See Note 681 under sec. 203. So also, an order directing issue of process under sec. 204 is not a judgment, and a Magistrate can, on a reconsideration of that order, cancel the issue of process and order an inquiry under sec. 202—*Lalit Mohan v. Nand Lal*, 27 C.W.N. 651, 25 Cr.L.J. 464. A Magistrate, after he has passed an interlocutory order for the examination of a witness (who is in prison) in Court can afterwards review that order, and pass an order for the examination of the witness on commission—*Asst. Govt. Advocate v. Upendra Nath Mukherjee*, 11 P.L.T. 892, 1931 Cr.C. 201, A.I.R. 1931 Pat. 81, 130 I.C. 538, 32 Cr.L.J. 551, 16 A.I.Cr.R. 29.

A complaint cannot be a judgment even when the complaint is made by a Court under sec. 476, Cr. P. Code. Therefore, sec. 369, Cr. P. C., cannot apply to a complaint and does not, therefore, amount to a bar against a Court altering or reviewing the complaint under sec. 476, Cr. P. Code—*Jagat Ram v. Emp.*, 38 Cr.L.J. 318 (319), 166 I.C. 915, 9 R.A. 469, 1936 A.W.R. (H.C.) 1125, 1936 A.Cr.C. 235, 1937 A.L.R. 112, 1936 A.L.J. 1199, A.I.R. 1937 All. 76.

An order dismissing a summons case for default of appearance under sec. 247 is in the nature of a judgment, and a Magistrate cannot revive the case once dismissed for default—*Ram Coomar v. Ramji*, 4 C.W.N. 26. But it is competent for a Magistrate to re-hear a warrant case in which he has discharged the accused person under sec. 253 or 259, because the order of discharge does not amount to a judgment—*Mir Ahmad v. Md. Askari*, 29 Cal. 726 (731); *Dwarka Nath v. Beni Madhab*, 28 Cal. 652 (660); *Chinnathambi v. Gurusamy*, 28 Mad. 310. But see *Phonsia*, 36 Cr.L.J. 128, A.I.R. 1935 All. 59, 152 I.C. 619, where it has been laid down that an application to the Magistrate to review his order of discharge was clearly against the provision of this section.

So also, it is open to the Appellate Court to re-hear an appeal which has been summarily dismissed by itself for default of appearance of the pleader—*Anonymous*, 7 M.H.C.R. App. 29. Contra—*Mahomed Yashin*, 4 Bom. 101. Where an appeal is rejected because it did not comply with the provisions of sec. 419, Cr. P. C., the order rejecting the appeal cannot be held to be an order amounting to a judgment within the meaning of this section. Therefore, the Sessions Judge can hear an appeal on the merits which he dismissed for non-compliance with his order for filing a copy of the judgment within the time fixed for it when the copy is filed with an explanation for not filing it in time—*Bansgopal*, 35 Cr.L.J. 441, 56 All. 299, 147 I.C. 347, A.L.R. 1934 All. 452, 4 A.W.R. 516, 1934 A.L.J. 329, A.I.R. 1934 All. 206, 1934 Cr.C. 254. See also Notes under sec. 561A.

It is not the intention of the Procedure Codes that they should encourage the hindering of justice and all procedure is intended to help justice. Even the criminal Courts have power to ignore their orders passed either under a mistake or by fraud—*Bhagubhai Ranchhodas v. Bai Arvinda*, A.I.R. 1937 Cal. 334.

This section must be read with sec. 430 of the Code, where it is said that "judgments and orders passed by an Appellate Court upon appeal shall be final, except in the cases provided for in sec. 417" (appeals against an acquittal by the Government) "and Ch. 32" of which sec. 439 is a part—*The King v. Nga Ba Saing*, A.I.R. 1939 Rang. 392 (393), 41 Cr.L.J. 108, 185 I.C. 142.

1054. Alteration of judgment:—No Judge or Magistrate can add to or alter or review his proceedings or judgments in any case after they are signed and published—*Surendra Nath Banerjee*, 10 C.W.N. 1062; *Ganesh*, 23 Bom 50; *Official Receiver v. Ganga Ram*, 1916 P.R. 25; *Narayan v. Chandrabhaga*, 26 Cr.L.J. 1289, 89 I.C. 193, A.I.R. 1925 Nag. 457. Where the statement of the points for determination and the reasons for decision were added to a judgment after it was pronounced in open Court, held that the action of the Magistrate was illegal and the conviction must be set aside—*Jhari Lal*, 8 Pat. 904, 1930 Cr.C. 90 (91), 31 Cr.L.J. 416. Where a Magistrate, after signing and pronouncing judgment in open Court, on the same day enhanced the sentence at the request of the accused in order to make his order appealable, it was held that though the Magistrate acted with the best of motives yet the alteration of the sentence was illegal—*Quarbay Ali v. Azizuddin*, 1883 A.W.N. 16. Where the accused was charged with theft (379, I.P.C.) and also under sec. 75 (previous conviction) and 379, I.P.C., and the Sessions Judge at first tried the accused on the first charge alone and convicted and sentenced him, and he next inquired into the further charge of previous conviction, it was held that the subsequent proceedings with reference to the previous conviction were not valid, because after the judgment including the sentence was pronounced in the trial on the first charge, there was no power to review or alter the same—*Mari Parsu*, 42 Bom. 202, 19 Cr.L.J. 279, 20 Bom.L.R. 87. A Court cannot after passing judgment and sentence, reconsider the question of sentence and make an order under sec. 562—*Ganpat*, 27 N.L.R. 163, 1931 Cr.C. 830; see also *Misri Lal*, 17 A.L.J. 426, 20 Cr.L.J. 392, 50 I.C. 1000. A Magistrate after passing the sentence and signing it, cannot even alter the date from which the sentence is to run—*Sahadat*, Ratanlal 804. Where an illegal sentence of flogging in addition to imprisonment was passed by the Magistrate and the illegality was discovered before execution but after the sentence had been pronounced and signed, it was held that such sentence could be altered only by the High Court, and not by the Magistrate himself—*Weir* (3rd Edn.) 983. Where a Sessions Judge or a Magistrate once sentences an offender to pay a fine but omits through oversight to pass a sentence of imprisonment in default of payment of fine, it is not open to him to pass the order subsequently. The proper course in such a case is to submit the proceedings to the High Court and ask that Court in its revisional jurisdiction to inflict imprisonment in default of payment of fine—*In re Dhondt Nathaji*, 23 Bom.L.R. 846, 62 I.C. 880. A Sessions Judge has no power to alter or set aside a conviction and sentence once signed by him, even on the ground that the sentence passed by him was illegal—*Poran Mal*, 23 W.R. 49. Where a Sessions Judge rejected a criminal appeal on the ground that it was barred by limitation, but subsequently on the representation by the prisoner he admitted the appeal and after hearing it acquitted the accused, it was held that the Sessions Judge had no power to re-admit the appeal—*Bhimappa*, 19 Bom. 732; *Raghunath*, 6 Bom.L.R. 360. It is not open to a Sessions Judge, after he has once accepted the verdict of the jury and has postponed the case for passing sentence, to reconsider his order and refer the case to the High Court under sec. 307, but he must pass sentence on the person awaiting sentence on the verdict. It is not open to him to reconsider his order any more than it would be for a jury to reconsider their verdict once given and recorded—*Mobahar*, 4 C.W.N. 683. Where a Bench of Magistrates has erroneously passed an order of acquittal, it is not open to the Bench to quash the decision and take the case again on the file and try it. The proper procedure is for the President to refer the matter to the District Magistrate, who, if so advised, would act under sec. 438—*Ekambara v. Alamel-ammal*, 53 Mad. 870, 59 M.L.J. 708, 1930 Cr.C. 1055 (1055), A.I.R. 1930 Mad. 1001, 32 Cr.L.J. 429. Even where the accused obtains a judgment of acquittal under sec. 247 by means of a fraud on the Court (e.g., by preventing the complainant from appearing when the case was called on, by wrongfully arresting and detaining him on a false charge), the Code does not permit the Court to cancel the judgment of acquittal on proof of the fraud and to restore the case to the file—*In re Sinnu Goundan*, 38 Mad. 1028, 15 Cr.L.J. 236. Even, if an appeal is summarily rejected under sec. 421 for default of appearance, the order of dismissal is not open to review—*Mohomed Yashin*, 4 Bom. 101. But in a Madras case it was held that if an appeal was summarily rejected under

sec. 421 for non-appearance of the appellant's pleader, the Court could restore the appeal to the file and rehear it, if sufficient cause was shown for the pleader's non-appearance—*Anonymous*, 7 M H C R. App. 29.

But where a Sessions Judge on appeal in annulling a conviction omits to order a retrial, he is not precluded by this section from passing such an order subsequently. Such an order does not amount to an alteration of judgment—*In re Ram Reddi*, 3 Mad. 48. A Magistrate who makes an order under sec. 145 without any direction as to costs, has power to order the same subsequently under sec. 148 (3), and such latter order is not an alteration or review of his judgment in the original case within the meaning of this section—*Nagar Chandra v. Siddhartha*, 47 Cal. 974. So also, where a Magistrate disposing of a criminal appeal accidentally omits to pass an order under sec. 520, it will be open to him or to his successor to pass the order afterwards. Such an order does not amount to an alteration of the judgment—*Subba Naidu*, 43 M L J. 87, A.I.R. 1922 Mad. 329. A Sessions Judge, after he has sentenced the accused to transportation and signed the judgment may afterwards add a direction that the sentence shall take effect immediately and not after a sentence of imprisonment which the accused is already undergoing—*Hari*, Ratanlal 391.

Where the appellate Court once passed an order for the evidence of two witnesses being recorded by the trial Court but decided the appeal without that evidence being recorded, this section did not apply to the order because that order was not a judgment but the procedure of the appellate Court was irregular—*Madho Singh*, A.I.R. 1940 Oudh 396 (397), 41 Cr L J. 725 (726), 189 I.C. 258, 1940 O.W.N. 607, 1940 O.L.R. 420.

Where the Sessions Judge passed a detailed order recommending that the conviction and sentence passed upon the accused should be set aside he became *functus officio* and had no power to revise or review his own order and by a separate order reject the application for revision filed by the accused. Even a High Court after signing and pronouncing a judgment in a criminal case becomes *functus officio* and neither that Court nor any Bench of that Court can review the order so passed—*Rameshwar v. Bharath*, 35 Cr.L.J. 417, 147 I.C. 516, A.L.R. 1934 Oudh 75, 1934 Cr.C. 255, A.I.R. 1934 Oudh 85, 11 O.W.N. 75.

See also Note 1293 under the heading "Review".

Further inquiry :—An order for further inquiry does not amount to a review of the order of dismissal or discharge. The terms of this section must be read as controlled by sec. 437 (now sec. 436). That section does not limit the power of a District Magistrate to make further inquiry into a case in which an order of dismissal or discharge may have been passed by a subordinate Magistrate; and there is no bar to a District Magistrate making further inquiry into a case in which such order may have been passed by himself—*Bidhu Chandalini v. Moti*, 28 Cal. 102 (104). But where a District Magistrate has already dealt with a case in revision and decided that there was no cause for interfering with the order of discharge, he cannot subsequently order further inquiry, because such an order would be an order reviewing the earlier one and is prohibited by this section—*Nga Than*, 5 Bur L.T. 37, 13 Cr.L.J. 301. A Court cannot revise its own revisional order—*Bhogi*, 34 Cr.L.J. 278, 142 I.C. 138, 1932 M.W.N. 1162, Ind Rul 1933 Mad. 179, A.I.R. 1933 Mad 247, 1933 Cr.C. 374, 65 M.L.J. 6, 38 M.L.W. 668.

Proper procedure :—When a mistake has been made in the judgment (e.g., when an appeal has been erroneously dismissed as time-barred, or when an illegal sentence has been passed) it is not open to the Judge or Magistrate to alter or review his judgment or order, but the only course open to him is to submit the case to the High Court—*Raghunath*, 6 Bom L.R. 360; *Poran Mal*, 23 W.R. 49; *In re Harilal*, 22 Bom. 949; *In re Dhondi*, 23 Bom L.R. 845, 22 Cr.L.J. 608, 62 I.C. 880. Where cases were wrongly decided by the High Court the only remedy in such circumstances is to move the Local Government to exercise the Royal prerogative where the accused had been prejudiced, otherwise there is no remedy—*Dahu Raut*, 34 Cr.L.J. 1100 (1104), 145 I.C. 937, A.I.R.

1933 Cal. 870, 1933 Cr.C. 1481, 38 C.W.N. 25. See also *Kalu*, 45 All. 143 cited in the next paragraph and *Kunji Lal*, 35 Cr.L.J. 1485 (1487), 151 I.C. 714, 1934 A.L.J. 704.

1055. No power of High Court to alter its judgment:—See Notes under "Change" above. The law is now the same as it was practically before. It should be noted that inspite of the words 'other than a High Court' occurring in the old section, the High Court held that it had practically no power to alter or review its own judgment, under the old law. There being no provision in the Letters Patent or the Government of India Act authorising the High Court to exercise the power of review, the words "other than a High Court" could not be read as conferring on the High Court that power by implication—*In re Kunhammad*, 46 Mad 382 (389), 24 Cr.L.J. 439. It has even been remarked in *In re Gibbons*, 14 Cal 42 (47) that so far as the High Court was concerned there was no substantive enactment in this section; it did not confer any power on the High Court, nor did it take away any of the powers which existed in that Court before the passing of this section.

The Legislature has not conferred in express words upon the High Court the power of reviewing its judgment in all criminal cases, as it has done in all civil cases. The provisions of the old section, so far as they affect a High Court, merely apply to questions of law, which arise in its original criminal jurisdiction, and which are reserved and subsequently disposed of under the provisions of sec. 434 and the corresponding sections of the Letters Patent—*Durgacharan*, 7 All 672. The words 'other than a High Court' do not give the Division Bench of the High Court power to review its judgment passed by it in a criminal appeal. The words are to be accounted for by the power of review given to the High Court under sec. 434 on points specially reserved by the Judge presiding at the High Court Sessions—*Mohan*, Ratanlal 791; *Kunhammad*, 46 Mad 382 (404). In other words, the High Court cannot entertain an application to review a judgment passed by it on appeal in a criminal case—*Godai*, 5 W.R. 61; *Mohan*, Ratanlal 791; *Hale*, 1909 P.R. 1; *Kale*, 45 All. 143 (145); *Arumuga*, 50 M.L.J. 51, 27 Cr.L.J. 184, 91 I.C. 1000, 23 M.L.W. 56, 1926 M.W.N. 147. The review is a definite method of procedure and that if the Legislature intended by the Amending Act, XVIII of 1923, to make a provision in the Code for a review, there would have been a definite section dealing with a right of review and laying down the conditions under which that right could be exercised—*Kunji Lal*, 35 Cr.L.J. 1485, 151 I.C. 714, 1934 A.L.J. 704, A.I.R. 1935 All. 60, 1934 A.L.R. 905, 4 A.W.R. 252. The Code of Criminal Procedure was passed after the Code of Civil Procedure. The latter contains a section expressly authorising review of judgment, but the former contains no corresponding section. From this it may be reasonably inferred that the Legislature did not intend to confer in criminal cases the power similar to that which they had given in civil cases—*Godai*, 5 W.R. 61 (63). In criminal matters, the Letters Patent of the High Court confer on it full power and authority to review a case decided in the exercise of its original criminal jurisdiction on points of law. But such power to review does not appear to apply to a case decided in the exercise of its appellate or revisional criminal jurisdiction—*Ibrahim*, 30 Cr.L.J. 749, 117 I.C. 243, A.I.R. 1928 Rang. 288, Ind. Rul. 1929 Rang. 179. As soon as an appellate judgment is pronounced and signed by the Judges, the High Court is *functus officio*, and neither the Court itself nor any Bench of it has any power to revise the decision or interfere with it in any way—*In re Gibbons*, 14 Cal. 42; *Durgacharan*, 7 All. 672; *Kunhammad*, 46 Mad. 382 (401); *Paras Ram*, 1 O.W.N. 891, 26 Cr.L.J. 543, 85 I.C. 383, A.I.R. 1925 Oudh 476; *Jodha v. Emp.*, 41 Cr.L.J. 711 (713). Even, if a single Judge of the High Court has passed an order dismissing an appeal, a Division Bench of the High Court cannot review that order by re-hearing the appeal—*Kunhammad*, 46 Mad. 382 (401). If the Division Bench of the High Court passes an erroneous order in appeal, the only remedy is to make a petition (under Chap. XXIX) to the Local Government, the authority with whom rests the discretion either of executing the law or of commuting or setting aside the sentence—*Mohan*, Ratanlal 791; *Kale*, 45 All. 143 (145). So also, a Division Bench cannot review an order which has been passed by them in revision—*Fox*, 10

Bom. 176 (F.B.); *Gobind Sahai*, 38 All. 134; *Durgacharan*, 7 All. 672; *Kunji Lal*, 35 Cr.L.J. 1485, 151 I.C. 714, 1934 A.L.J. 704, 7 R.A. 199, A.I.R. 1935 All. 60, 1935 Cr.C. 102; *Al Ak Lok*, 1905 U.B.R. (Cr. P. C.) 35; *Nand Kishore*, 20 Cr.L.J. 447, 51 I.C. 271 (Pat.); *Lachmi v. Bhushi*, 19 Cr.L.J. 225, 43 I.C. 817, A.I.R. 1917 Pat. 110; *Gaja v. Debi*, 72 I.C. 945, 24 Cr.L.J. 481, A.I.R. 1923 Pat. 532; *Chimaba*, Ratanlal 458; *Bhogi Reddi Ankamma*, 34 Cr.L.J. 278, 142 I.C. 138, 1932 M.W.N. 1162, Ind. Rul. 1933 Mad 199, A.I.R. 1933 Mad. 247, 1933 Cr.C. 374, 65 M.L.J. 6, 38 M.L.W. 668; *Ranga Rao*, 16 I.C. 518, 23 M.L.J. 371, 12 M.L.T. 350, 13 Cr.L.J. 710, 1932 M.W.N. 982. A High Court has no power to alter or review its own judgment in a criminal case, once it has been pronounced and signed, except in cases where it was passed without jurisdiction or in default of appearance without an adjudication on the merits, or to correct a clerical error—*Raju*, A.I.R. 1928 Lah. 462, 110 I.C. 221, 29 Cr.L.J. 669, 10 Lah. 1; *Diwan Singh*, A.I.R. 1936 Nag. 132 (133), 19 N.L.J. 84; *Raju*, 110 I.C. 221, A.I.R. 1928 Lah. 462, 29 Cr.L.J. 669, 10 Lah. 1 and *Banwari Lal*, 36 Cr.L.J. 1286, 157 I.C. 1044, A.I.R. 1935 All. 466, 1935 A.L.J. 317, 1935 Cr.C. 507, 1935 A.L.R. 904, 8 R.A. 258. A single Judge of the High Court has no power to alter or revise an order passed by him in revision—*Soma Naidu*, 47 Mad. 422 (431). The High Court will not review its order passed in appeal or revision, even on the ground of discovery of fresh evidence, because such evidence ought to have been produced at the trial—*Chimaba*, Ratanlal 458; *Kale*, 45 All. 143 (145). So also, if a revision case is dismissed by the High Court for default of payment of printing charges, it is not competent for the High Court to rehear the case or entertain a fresh application for revision—*Appayya v. Venkatappayya*, 44 M.L.J. 27, 23 Cr.L.J. 746. Even, if a revision petition is dismissed for default of appearance of the practitioner who filed it, the High Court is not competent to restore the petition to its file—*Ranga Rao*, 23 M.L.J. 371. But in another recent case of the Madras High Court, as well as in cases of the other High Courts it has been held that when a criminal appeal or revision petition is dismissed by the High Court for default of appearance, there is no decision on the merits, and, therefore, there is no proper disposal of the case according to law. There being no provision in the Code for dismissing an appeal or revision petition for default of appearance, the order of dismissal is no "judgment" at all, and the High Court is not debarred from rehearing the appeal or revision petition—*Kunhammad Haji*, 46 Mad. 382 (402, 403) (dissenting from *In re Ranga Rao*, 23 M.L.J. 371 and *Muhammad Yasin*, 4 Bom. 101); *Rajjab Ali*, 46 Cal. 60 (63), 20 Cr.L.J. 265; *Kishen Singh v. Girdhari*, 23 Cr.L.J. 750 (Lah.); *Ibrahim*, 30 Cr.L.J. 749, 117 I.C. 243, A.I.R. 1928 Rang. 288. Where a Jail appeal was dismissed by a single Judge of the High Court and an application for enhancement of sentence was made later on, held that in exercising the power of enhancement the High Court were not in any way violating the provisions of this section because the provisions of this section must be read subject to the provisions of sec. 430 and because a single Judge could not have exercised a jurisdiction for enhancing sentence—*Abdul Qayum*, 34 Cr.L.J. 1205, 146 I.C. 157, 55 All. 715, A.I.R. 1933 All. 485, 1933 Cr.C. 830, 1933 A.L.J. 957. Similarly, if an order is passed in the absence of the accused without giving him an opportunity of being heard in accordance with the provisions of sub-sec. (2) of sec. 439, as, for instance, where by mistake a case is posted on a day anterior to that fixed in the notice to the accused, the order is null and void, and the High Court is to proceed with the matter afresh after proper notice to the accused—*In re Soma Naidu*, 47 Mad. 428 (434), 46 M.L.J. 456, 34 M.L.T. 218, 26 Cr.L.J. 370; *Rajjab Ali*, 46 Cal. 60 (63). If an appeal is dismissed by a High Court Judge under sec. 421 without the appellant or his pleader being given reasonable opportunity of being heard in support of the same, the order is passed without jurisdiction, and the Court has power to make an order that the appeal should be reheard after giving the appellant or his pleader a reasonable opportunity of being heard—*Muhammad Sadiq*, 7 Lah.L.J. 108, 26 Cr.L.J. 1169, A.I.R. 1925 Lah. 355.

Under the present section as now amended, the power of the High Court is as it was before the amendment. "In view of the cases reported in the Indian Law Reports, 7 All. 672, 10 Bom. 176 (F.B.), and 14 Cal. 42 (F.B.), it is proposed to make

it clear that sec. 369 confers no power on the High Court to alter or review its own judgment after it has been signed"—*Statement of Objects and Reasons* (1921). See *Raju*, 110 I.C. 221, A.I.R. 1928 Lah. 462, 29 Cr.L.J. 669, 10 Lah. 1 and *Banwari Lal*, 35 Cr.L.J. 1286, 157 I.C. 1044, A.I.R. 1935 All. 466, 1935 A.L.J. 317, 1935 Cr.C. 507.

As soon as the judgment is signed, it becomes final and the Court is *functus officio*. The mere fact that there has been no formal order issued by the High Court or communicated to the Lower Court in pursuance of the judgment, does not enable the High Court to review its judgment. A judgment must be taken to mean and refer to the judicial act of the Court in finally disposing of the case and must, therefore, indicate only the order of the Court when it is read out and signed by the Judge, and cannot be meant to refer to the formal order on the judgment subsequently drawn up and issued merely as a clerical act by the ministerial officers of the Court—*In re Arumuga*, 50 M.L.J. 51, 27 Cr.L.J. 184, A.I.R. 1926 Mad. 420.

A judgment of two Judges of the High Court sitting as a Criminal Bench is a judgment of the High Court and no other Judge or Bench of Judges of the High Court has power to override such judgment—*Dahu Raut*, 34 Cr.L.J. 1100 (1101), 145 I.C. 937, A.I.R. 1933 Cal. 870, 1933 Cr.C. 1481, 38 C.W.N. 25. As to whether the High Court can review its judgment under the inherent powers conferred by sec. 561A, see Notes under that section.

The High Court, like the Lower Courts, can review its judgment before it is signed—*Amodini v. Darsan*, 38 Cal. 828, 13 Cr.L.J. 120; *Bibhuti v. Das Moni*, 7 C.W.N. 77. The Allahabad High Court can review its judgment after it is signed but before it is sealed, because the judgment of that High Court is not complete until it is sealed, and till then it may be altered by the Judge concerned—*Lalit*, 21 All. 177; *Gobind Sahai*, 38 All. 134; *Kallu*, 27 All. 92.

370. Instead of recording a judgment in manner herein-

Presidency Magistrate's judgment before provided, a Presidency Magistrate shall record the following particulars:—

- (a) the serial number of the case;
- (b) the date of the commission of the offence;
- (c) the name of the complainant (if any);
- (d) the name of the accused person, and (except in the case of an European British subject) his parentage and residence;
- (e) the offence complained of or proved;
- (f) the plea of the accused and his examination (if any);
- (g) the final order;
- (h) the date of such order; and
- (i) in all cases in which the Magistrate inflicts imprisonment, or fine exceeding two hundred rupees, or both, a brief statement of the reasons for the conviction.

1056. Scope of section:—This section does not apply to proceedings under secs. 2 (1) and 3 of the Workmen's Breach of Contract Act (XIII of 1859). Those proceedings are not *criminal proceedings*, and no offence can be said to have been committed under those sections. A Presidency Magistrate is not, therefore, bound to frame a record in such proceedings in accordance with the provisions of this section—*Abhram v. Abdul*, 27 Cal. 131. The Workman's Breach of Contract Act (XIII of 1859) has been repealed.

1057. Record:—The omission to record the various particulars required to be recorded under sec. 370 is a mere irregularity and not an illegality, where all the important itmes of these particulars have been recorded, and the omissions are of no real importance—*Bishnupada*, 30 C.W.N. 981, 27 Cr.L.J. 1131, 97 I.C. 651. But where not the slightest attempt was made to comply with the provisions of this section (e.g. where the Presidency Magistrate did not record who was the complainant, what was the offence, what was the date of the commission of the offence, etc.) the High Court severely condemned the Magistrate's proceedings—*Mon Mohan Pande*, 35 C.W.N. 868 (869), 136 I.C. 135, A.I.R. 1932 Cal. 62, 1932 Cr.C. 10, Ind. Rul. 1932 Cal. 183, 33 Cr.L.J. 264; *Probodh Chandra Guha*, 35 C.W.N. 867 (868), 136 I.C. 136, A.I.R. 1932 Cal. 64, Ind. Rul. 1932 Cal. 184, 1932 Cr.C. 12, 33 Cr.L.J. 265; *U. K. Mitra*, 35 C.W.N. 865 (867), 136 I.C. 465, A.I.R. 1932 Cal. 63, 58 Cal. 1293, 1932 Cr.C. 11, Ind. Rul. 1932 Cal. 193, 33 Cr.L.J. 303.

Where there is no record of the result of the examination by a Presidency Magistrate but it is noted below the record of evidence of the witnesses for the prosecution "examined under sec. 342" and there is no entry in the column for the plea of the accused and his examination (if any), the record is not in accordance with the requirements of this section—*Ismail*, 27 Cr.L.J. 110, 91 I.C. 542, A.I.R. 1926 Cal. 692.

Clause (i)—Reasons for conviction:—The meaning of this clause is that where the offence is sufficiently grave to involve a fine of Rs. 200 or imprisonment as the substantive sentence, the Magistrate is bound to record his reasons (*In re Derrish Hussain*, 49 Mad. 253) so as to enable the party to bring the matter up to the High Court; but in petty cases, which can be met by a fine of a few rupees, the decision of the Magistrate may be recorded shortly—*Moteeram v. Belasteerom*, 14 Cal. 174. This section requires that in a case in which the accused is sentenced to imprisonment, a Presidency Magistrate shall record a brief statement of the reasons for the conviction. It is not sufficient for him to record that the offence is proved, for that may be necessarily implied from the fact that he has convicted the accused. The law requires something further as the reasons for the conviction. The record should furnish some indication that he has considered the evidence in a critical manner—*Shamlal Khetry*, 139 I.C. 244, 33 Cr.L.J. 729, A.I.R. 1932 Cal. 655, Ind. Rul. 1932 Cal. 857, 36 C.W.N. 852, 1932 Cr.C. 632; *Natabar v. Protash*, 27 Cal. 461. So also, a mere statement to the effect "I believe the evidence for the prosecution and the evidence of the complainant, and I convict the accused" is not a statement of reasons—*Shankar*, 17 Bom.L.R. 890, 15 Cr.L.J. 771, 31 I.C. 371. The requirements of cl. (i) of this section are not fulfilled when the Magistrate simply says "Heard parties: Accused No. 3 acquitted. Nos. 1 and 2 sentenced to a month's rigorous imprisonment each"—*Ismail*, 27 Cr.L.J. 110, 91 I.C. 542, A.I.R. 1926 Cal. 662. The Magistrate should state his reasons in such a manner as to enable the High Court to judge of the sufficiency of the materials before the Magistrate to support the conviction—*Yacoob v. Adamson*, 13 Cal. 272; *Emaman*, 31 Cal. 983; *Toolsey*, 8 C.W.N. 587. Where there was not on the record any summary of the evidence nor such a statement of facts and reasons for conviction as would enable the High Court to say whether the materials were sufficient to support the conviction, it was held that the conviction should be set aside—*Toolsey*, 8 C.W.N. 587; *Yacoob v. Adamson*, 13 Cal. 272; *Emaman*, 31 Cal. 983. Even, in a non-appealable case, the Presidency Magistrate should state his reasons so as to enable the High Court in revision to judge the sufficiency of materials before the Magistrate to support the conviction—*Yacoob v. Adamson*, 13 Cal. 272. A Presidency Magistrate (as also an Honorary Presidency Magistrate), who tries and convicts an accused in a summary trial is bound to give reasons for the conviction—*In re Varadarajulu*, 31 M.L.T. 400, 23 Cr.L.J. 602; *In re Thurman*, 20 L.W. 330, 25 Cr.L.J. 1084. But the omission to record the reasons in a summary trial is a mere irregularity, and the High Court will not interfere in revision if the accused has not been prejudiced—*In re Thuman*, *supra*.

The imprisonment referred to in this clause is *substantive* imprisonment. A sentence

of imprisonment in default of payment of fine is not a sentence of imprisonment within the meaning of this clause—*Molccram v. Belascram*, 14 Cal. 174

If the Magistrate omits to record the reasons, the defect is not cured by sec 441 which permits a Presidency Magistrate to submit with the record (when called for under sec. 435) a statement setting forth the grounds of his decision. Sec 441 does not abrogate the terms of sec. 370, but it merely allows the Presidency Magistrate to supplement the reasons which have been already recorded under sec. 370—*In re Dervish Hussain*, 46 Mad 253 But if the statement submitted under sec 441 discloses sufficient grounds for the decision, the defect in not recording reasons under sec. 370 may be excused under sec. 537, if no substantial failure of justice has occurred—*Ibid*.

Where a Presidency Magistrate writes a judgment he should discuss the prosecution evidence and come to a finding on the points sought to be made out by the prosecution. He should not convict the accused merely on discussing the defence evidence—*Nishikanta v. Behari*, 34 Cr L J 1059, 60 Cal 656, 145 I C. 660, 37 C W.N 368, 1933 Cr.C. 891, A.I.R. 1933 Cal. 532

371. (1) On the application of the accused a copy of the judgment, or when he so desires, a translation in his own language, if practicable, or in the language of the Court, shall be given to him without delay. Such copy shall in any case other than a summons case, be given free of cost.

(2) In trials by jury in a Court of Session, a copy of the heads of the charge to the jury shall, on the application of the accused, be given to him without delay and free of cost.

(3) When the accused is sentenced to death by a Sessions Judge, such Judge shall further inform him of the period within which, if he wishes to appeal, his appeal should be preferred.

The application for a copy of judgment need not be stamped. See *Ragba, Ratanlal* 364.

Under clause (2), only a copy of the heads of the charge to the jury is supplied to the accused, because the Sessions Judge is not required to write a judgment but only to record the heads of the charge.

The period of limitation for appeal from a sentence of death is 7 days from the date of the sentence (Art. 150, Limitation Act) excluding the time requisite for obtaining copies (sec 12, Limitation Act). Under sub-sec. (3), the Judge should not only inform the accused that he must file his appeal within 7 days, but should also record that the accused was so informed, and whether he desires to appeal—See *N. W. P. Gazette*, 1873, p. 101.

372. The original judgment shall be filed with the record of proceedings, and where the original is recorded in a different language from that of the Court and the accused so requires, a translation thereof into the language of the Court shall be added to such record.

373. In cases tried by the Court of Session, the Court shall forward a copy of its finding and sentence (if any) to the District Magistrate within the local limits of whose jurisdiction the trial was held.

CHAPTER XXVII.

OF THE SUBMISSION OF SENTENCES FOR CONFIRMATION.

374. When the Court of Session passes sentence of death, the proceedings shall be submitted to the High Court, and the sentence shall not be executed unless it is confirmed by the High Court.

Sentence of death to be submitted by Court of Session.

When the record of a case in which a sentence of death has been passed is submitted to the High Court under sec. 374, all the Police Diaries connected with the case should be simultaneously forwarded—*Cal. G. R. & C. O.*, p. 39.

375. (1) If when such proceedings are submitted the High Court thinks that a further inquiry should be made into, or additional evidence taken upon, any point bearing upon the guilt or innocence of the convicted person, it may make such inquiry or take such evidence itself, or direct it to be made or taken by the Court of Session.

Power to direct further inquiry to be made or additional evidence to be taken.

(2) Such inquiry shall not be made nor shall such evidence be taken in the presence of jurors or assessors, and, unless the High Court otherwise directs, the presence of the convicted person may be dispensed with when the same is made or taken.

(3) When the inquiry and the evidence (if any) are not made and taken by the High Court, the result of such inquiry and the evidence shall be certified to such Court.

1058. Under this section the High Court can take additional evidence itself. In *Basvanta*, 25 Bom. 168, the High Court admitted in evidence a confession rejected by the Sessions Judge. In *Bhagwan*, 1911 P.W.R. 16, 12 Cr.L.J. 412, 11 I.C. 596, the High Court (then Chief Court) admitted further evidence and inspected the building where the offence was alleged to have been committed.

The High Court when recording further evidence under this section, can dispense with the presence of the accused, especially where the additional evidence is recorded by itself—*Tirumal*, 24 Mad. 523.

The High Court acting under this section is not entitled, with a view to make its opinion still more conclusive with reference to the discrepancies in the testimony of the witnesses on which the trial Judge has properly dwelt, to test that testimony still further by reading the earlier statements of those witnesses made to the police and entered in the police diary; in other words, to treat as evidence what could be used at all events only for the purpose of discrediting those witnesses—*Dal Sing*, 44 Cal. 876 (P.C.).

This section is not meant to enable a Court to remedy an important error in procedure which might have been calculated to prejudice the accused in the trial, and which, in fact, causes the trial to be vitiated. The proper course is to set aside the conviction and direct a retrial—*Hari*, A.I.R. 1935 Sind 145 (179), 28 S.L.R. 397, 1935 Cr.C. 753, 157 I.C. 697, 36 Cr.L.J. 1161.

376. In any case submitted under section 374, whether tried with the aid of assessors or by jury, the High Court—

Power of High Court to confirm sentence or annul conviction

- (a) may confirm the sentence, or pass any other sentence warranted by law, or
- (b) may annul the conviction, and convict the accused of any offence of which the Sessions Court might have convicted him, or order a new trial on the same or an amended charge, or
- (c) may acquit the accused person:

Provided that no order of confirmation shall be made under this section until the period allowed for preferring an appeal has expired, or, if an appeal is presented within such period, until such appeal is disposed of.

1059. Power of High Court:—Though a High Court has power to substitute its own finding for the unanimous verdict of the jury in a trial for murder, when the sentence comes on for confirmation before the High Court, still as a matter of practice the High Court will not generally allow the verdict to be attacked arbitrarily. It is necessary that the convict must show *prima facie* that the verdict is unsupported by evidence. The High Court will not permit the same latitude in the criticism of the evidence before the jury that it allows in an ordinary appeal from a trial with assessors—*Gul*, 15 SLR 103, 23 CrLJ 33, 64 IC 657, AIR. 1921 Sind 84 (F.B.); *Khadim v Emp.*, 38 CrLJ 808, 169 IC 716, 31 SLR 82, AIR. 1937 Sind 162. The High Court should be reluctant to differ from unanimous opinion of the jury apart from strong reasons which would induce it to do so—*Kumarish Chandra Karmakar v. Emp.*, 65 CLJ 423 (424). In capital sentence cases though the High Court is not bound by the verdict of the jury it must rely upon the jury's verdict if it answers a reasonable test. Capital offences are not to be tried as *res integra* on the paper-book. But if there is no sufficient evidence to warrant a conviction the High Court has an obligation to say so—*Asraf Ali*, 34 CrLJ 533 (536), Ind Rul 1933 Cal. 354, 37 CWN 595, 143 IC 173, 1933 Cr.C 624, AIR 1933 Cal. 426. But the High Court will undoubtedly interfere with the verdict if it is perverse or if evidence has been improperly admitted or excluded, or if there is a misdirection by the Judge—*Gul*, *supra*. Where there has been a misdirection in the summing up to the jury, the conviction and sentence should be set aside and a retrial ordered—*Rajab Ali*, 31 C.W.N. 881, 28 CrLJ. 742 (744), 46 CLJ. 31, 103 IC. 790. But the questions of misdirection are of less importance in a case of reference, because on a reference the High Court is bound to come to its own *independent* conclusion as to the guilt or innocence of the accused, independently of the verdict of the jury or of the opinion of the Judge—*Hazrat Gul Khan*, 32 C.W.N. 345 (349), 27 CrLJ. 546, 47 CLJ. 240.

In disposing of a reference under sec. 374, Cr. P. C., and the appeals by the accused, the High Court is bound to satisfy itself by going through the evidence whether the accused have been rightly convicted, but in doing so it must attach considerable weight to the verdict of the jury. If after examining the evidence which is admissible in law, it finds, even without any opportunity of hearing witnesses and seeing their demeanour, that certain facts emerge from the evidence as proved beyond reasonable doubt and the decision in the case depends upon inference to be drawn from these proved facts, it is not bound to order a retrial. When, however, the evidence cannot be properly weighed by the Court without hearing witnesses and seeing their demeanour in the witness box and it is not in a position to say whether the facts from which inferences are to be drawn are true or false, re-trial should be ordered. It cannot, therefore, be accepted as a broad proposition that in dealing with a reference under sec. 374 and the appeal by the accused only two courses are open to the High Court, *viz.*, either to acquit the accused or to order a re-trial—*Benoyendra*, 40 C.W.N. 432 (446), AIR. 1936 Cal. 73, 37 CrLJ. 394 (404), 161 IC. 74, 1936 Cr.C. 145, 64 CLJ. 154.

High Court may go into facts and law:—When a case is submitted under sec. 374, the whole case is reopened before the High Court, and the High Court is bound to go into the *facts* as well as the law, although the conviction is by the verdict of the jury—*Jaffir Ali*, 19 W.R. 57; *Chatradhari*, 2 C.W.N. 49; *Daji*, 17 Bom.L.R. 1072, 31 I.C. 994, 16 Cr.L.J. 818. Sec. 418, Cr. P. C., restricts appeals in jury cases as a general rule to matters of law. This restriction, however, does not apply to references under sec. 374—*Rashbehari Lal*, A.I.R. 1932 Pat. 302, 13 P.L.T. 440, 1932 Cr.C. 774, 140 I.C. 846, 34 Cr.L.J. 83. Though the jury have unanimously convicted an accused for murder, it is the duty of the High Court on a reference under sec. 374, to be satisfied that the finding of fact is supported by the evidence on the record—*Arshed Ali*, 30 C.W.N. 166, 27 Cr.L.J. 378, 92 I.C. 890. Where the material evidence in the case could not be believed and was not supported by trustworthy evidence, and the confessions of some of the co-accused were not genuine but appeared to have been inspired in order to bring them into a line with the evidence of the prosecution witnesses, the High Court set aside the conviction and acquitted the accused, even though the jury passed a unanimous verdict of guilty, and there was no misdirection by the Judge to the jury—*Panchu Mandal*, 32 C.W.N. 702 (704), 29 Cr.L.J. 833, 111 I.C. 385. Although the powers of the High Court are not limited as in the case of an appeal from a trial held by jury, and although it is open to the High Court to go into the facts and to reject the finding of the jury if it is not supported by the evidence on the record, still where the case depends entirely upon the evidence of witnesses whom the High Court has never seen and has therefore, not the advantages of noticing the development of the prosecution case and the development of the evidence, the High Court will attach the greatest possible weight to the conclusion of the jury, especially where the jury were unanimous—*Panchu Shaikh*, 34 C.W.N. 1154 (1160), 1931 Cr.C. 242, 32 Cr.L.J. 190, 128 I.C. 811.

Where the High Court hears the appeal of a co-accused not sentenced to death along with a reference under sec. 374 in respect of a person sentenced to death, it was held under the old law that it was not open to the High Court to go into the facts in the appeal—*Chatradhari*, 2 C.W.N. 49, and the hearing of the appeal was limited, as laid down in secs. 418 and 423 (2), to points of law only—*Ibid.* But now see the new sub-section (2) of sec. 418. Sec. 376, Cr. P. C., is now to be read with sec. 418 (2), Cr. P. C. It is now an exception to the general rule that an appeal on a trial by jury will lie only on a matter of law. The High Court must allow the accused in confirmation case full liberty to attack the verdict of the jury not only on questions of law but on questions of fact, and sub-sec. (2), sec. 418, Cr. P. C., would appear to meet the practical difficulties of the situation which arise by giving to the person convicted on a verdict of the jury at the same trial as the person sentenced to death the same right to appeal on questions of fact as well as law—*Khadim v. Emp.*, 38 Cr.L.J. 808 (810), 169 I.C. 716, 31 S.L.R. 82, A.I.R. 1937 Sind 162.

Question of jurisdiction:—In determining whether the sentence should be confirmed, the High Court may also consider whether the conviction was by a Court of competent jurisdiction—*Sarmukh*, 2 All. 218.

1060. Commutation of sentence:—Where the condition of the convict was such that if he were ordered to be hanged, a complete severance of the body from the neck would ensure (owing to an aperture in the neck communicating with the larynx), the High Court commuted the sentence of death into one of transportation for life—*Bodhoo*, 2 C.L.R. 215. In *Autor Singh*, 17 C.W.N. 1213, 14 Cr.L.J. 642, 21 I.C. 882, there being a difference of opinion among the Judges who heard the reference, the case had to be referred to a third Judge (sec. 378) and there was a delay of six months in the High Court, before the final decision was arrived at. The third Judge upheld the conviction for murder, but commuted the sentence of death into one of transportation on the ground that the capital sentence had been hung over the heads of the accused for six months owing to the delay in the High Court. So also, the High Court commuted the capital sentence into transportation where the accused was tried for the

second time before the Sessions Judge on a charge of murder committed 4 years ago—*Buta Singh*, 7 Lah. 396, 27 Cr L J. 1168.

Conviction for any other offence—Where the accused was tried before the Sessions Judge for murder and concealment of murder, and was convicted of murder, but no finding was given to the minor charge, the High Court in acquitting the accused of the charge of murder, could convict him of the minor charge, where there was evidence to support it, inspite of the omission of the Sessions Judge to give any finding in respect of this minor charge—*Mahomed Shah*, 1913 P.R. 8, 14 Cr L J 278, 223 P L R 1913. The Calcutta High Court altered the conviction for murder into a conviction for grievous hurt (sec 325, I P C) where it was found that the intention to kill was wanting—*Hazrat Gul Khan*, 32 CWN 345 (353), 29 Cr L J 546. The Bombay High Court holds that in a reference under this section, the High Court cannot alter a conviction for murder into one for culpable homicide not amounting to murder, unless there is a petition of appeal along with the reference. If no appeal is preferred, the only course is to order a retrial for the other offence—*Balapa*, 1 Bom. 639. But there is nothing in this section to warrant such a view.

1061. Retrial:—Where the evidence taken before the Court of Session was incomplete, and further evidence was necessary before judgment could be properly pronounced upon the accused, the High Court ordered a retrial—*Daulat*, 6 CWN 921. Where the accused was undefended in the Sessions Court, the High Court ordered a retrial on the same charge after proper arrangement being made for his defence—*Mohar Ali*, 19 CWN. 556, 16 Cr L J. 481, 21 C.L.J. 495, 29 I.C. 321. See also *Balapa*, 1 Bom 639 above.

Where there was no fair trial of the accused, he should under sec 376, Cr. P. C., be directed to be re-tried—*Najab Gul Mohammad v Emp.*, 38 Cr.L J. 741, 169 I.C. 257, 9 R.Pesh 143, A I R 1937 Pesh. 71.

Where the conviction and sentence of death passed on the accused could not be allowed to stand as the accused was most probably prejudiced by the trial of murder charges along with the charge of conspiracy to commit dacoities and as the evidence in the case was not properly put before the jurors, the High Court refused to send back the case against him for separate re-trial on murder charges, considering that the occurrence took place nearly two years ago and that the witnesses would be liable to confuse what they heard since, with what they had actually seen at the time of occurrence, and further considering that the High Court was convicting him on the charge of conspiracy to commit dacoities and passing a sentence of transportation for life on him on that charge—*Sanyasi Gan v Emp.*, 38 Cr L J. 1018 (1021), 171 I.C. 183, 10 R C. 235, A.I.R. 1937 Cal 269.

See also *Benoyendra*, cited in Note 1059 and Note 1143.

377. In every case so submitted, the confirmation of the sentence or any new sentence or order passed by the High Court, shall, when such Court consists of two or more Judges, be made, passed and signed by at least two of them.

Confirmation or new sentence to be signed by two Judges.

The new sentence or order referred to in sec. 377, Cr. P. C., refers to the powers of variation of the sentence, etc., conferred by sec. 376, Cr. P. C.—*Fakira v. Emp.*, infra. When the Court of the Resident of Hyderabad (which exercises the function of the High Court in the Administered Areas in Hyderabad State) consists of two Judges and the order of confirmation of a death sentence is only made, passed and signed by one of them, the peremptory provisions of sec. 377 are not complied with. It follows that the sentence of death passed by the Court of Session has not been validly confirmed, and that it remains submitted to the Court of the Resident, who will require to dispose of the same under secs. 375 to 379, Cr. P. C.—*Fakira v. Emp.*, 38 Cr.L.J. 498 (500),

167 I.C. 790, 39 P.L.R. 334, 1937 O.L.R. 216, 41 C.W.N. 741, 1937 M.W.N. 546, 9 R.P.C. 231, 1937 A.Cr.C. 74, 3 B.R. 426, 1937 O.W.N. 412, A.I.R. 1937 P.C. 119, 1937 A.L.R. 328, 64 I.A. 148, 46 M.L.W. 134, 39 Bom.L.R. 966, I.L.R. (1937) Bom. 711, 1937 A.W.R. (P.C.) 1128, 1937 A.L.J. 1055, (1937) 2 M.L.J. 323 (P.C.).

378. When any such case is heard before a Bench of Judges

Procedure in case of difference of opinion. and such Judges are equally divided in opinion, the case, with their opinions thereon, shall be laid before another Judge, and such Judge, after such hearing as he thinks fit, shall deliver his opinion, and the judgment or order shall follow such opinion.

If the Judges of the High Court are in disagreement over the question of sentence, one favouring the death penalty and the other recommending that a sentence of transportation would meet the ends of justice, this in itself is a sufficient ground that death sentence is not to be inflicted. But this is not an inflexible rule, and the third Judge is required to go into the facts of the case and to judge for himself after considering all the circumstances, whether the case is or is not a fit one for the infliction of the death penalty—*Dukari*, 33 C.W.N. 1226 (1234), 31 Cr.L.J. 817, 125 I.C. 305, A.I.R. 1930 Cal 193, 1930 Cr.C. 225. When a case is referred to a third Judge, he must give his own independent opinion, and should not necessarily decide the case according to the opinion of the Judge who was in favour of acquittal—*Bundu*, 1887 A.W.N. 125.

379. In cases submitted by the Court of Session to the

Procedure in cases submitted to High Court for confirmation. High Court for the confirmation of a sentence of death, the proper officer of the High Court shall, without delay, after the order of confirmation or other order has been made by the High Court, send a copy of the order under the seal of the High Court, and attested with his official signature, to the Court of Session.

380. Where proceedings are submitted to a Magistrate of

Procedure in cases submitted by Magistrate not empowered to act under section 562. the first class or a Subdivisional Magistrate as provided by section 562, such Magistrate may thereupon pass such sentence or make such order as he might have passed or made if the case had originally been heard by him, and, if he thinks further inquiry or additional evidence on any point to be necessary, he may make such inquiry or take such evidence himself or direct such inquiry or evidence to be made or taken.

1062. The Magistrate to whom a case is submitted under sec. 562, must pass such sentence and make such order as he thinks fit. If, however, on a perusal of the evidence he comes to the conclusion that the conviction should not have taken place, he can acquit the accused under the powers vested in him under this section—*Mi Thi v. Mi Kin*, 1915 U.B.R. 1st Qr. 55, 29 I.C. 663, 16 Cr.L.J. 535. This view has not been accepted by the Madras High Court. It has been laid down that there is a very clear difference between sec. 349 and sec. 380. When a Magistrate of the second or third class submits proceedings under sec. 349 he does not convict but merely expresses the opinion that an accused person is guilty. But when a case is submitted under sec. 562 a conviction has first of all to be recorded and so when the proceedings reach the Magistrate for disposal under sec. 380, that Magistrate has to deal with a person

who has been convicted. It is not permissible for the Magistrate acting under sec. 380 to set aside the conviction and to acquit him—*Public Prosecutor v. Malaipati*, 34 Cr L.J. 1043, 145 I.C. 659, 1933 M.W.N. 716, 65 M.L.J. 405, 38 M.L.W. 428, A.I.R. 1933 Mad. 728, 1933 Cr.C. 1312, 57 Mad. 85.

The Magistrate to whom the case is referred cannot send the case back to the inferior Magistrate. Where a second class Magistrate, finding the accused guilty of an offence under sec. 325, I.P.C., submitted the case to the District Magistrate for an order under sec. 562, but the District Magistrate sent the case back to the 2nd class Magistrate pointing out that sec. 562 [before its present amendment] was inapplicable (as the offence was beyond its scope), it was held that the District Magistrate's order sending back the case was illegal; because, under this section, he could pass such sentence or order as he might have passed if the case had originally come to him, and he could not have sent it to the second class Magistrate for the purpose of sentence if he had originally heard it—*Abdul*, 4 L.B.R. 150, 7 Cr L.J. 449.

Appeal:—See sections 407 and 408 as now amended

CHAPTER XXVIII.

OF EXECUTION.

381. When a sentence of death passed by a Court of Session is submitted to the High Court for confirmation, such Court of Session shall, on receiving the order of confirmation or other order of the High Court thereon, cause such order to be carried into effect by issuing a warrant or taking such other steps as may be necessary.

Execution of order passed under section 376.

"The date named by the Sessions Court, in its warrant for the execution of a sentence of death, shall not be less than fourteen or more than twenty-one days from the date of the issue of such warrant."—*Cal. G. R. & C. O.*, page 39.

382. If a woman sentenced to death is found to be pregnant, the High Court shall order the execution of the sentence to be postponed, and may, if it thinks fit, commute the sentence to transportation for life.

Postponement of capital sentence on pregnant woman.

1063. The fact that the accused is a pregnant woman is not a sufficient ground for commutation of sentence—*Panhee*, 15 W.R. 66; in such a case, execution will be deferred until delivery, as provided by this section.

The High Court is the only tribunal in which the law has vested the power of postponing the execution of a sentence of death passed on a woman found to be pregnant—*Anonymous*, 2 Weir 441 (442).

The pregnancy of the woman should be certified by a civil surgeon—*Bombay Gazette*, 1879, page 471.

383. Where the accused is sentenced to transportation or imprisonment in cases other than those provided for by section 381, the Court passing the sentence shall forthwith forward a warrant to the jail in which he is, or is to be confined, and, unless

Execution of sentences of transportation or imprisonment in other cases.

the accused is already confined in such jail, shall forward him to such jail, with the warrant.

1064. Sentence when to commence:—A sentence of imprisonment ought to commence from the time the sentence is passed. A sentence of imprisonment to take effect at a future date is bad in law. A Magistrate has no power to postpone the execution of the sentence at the request of the accused—*Kishen Soonder*, 12 W.R. 47. Where a Magistrate passes a sentence of imprisonment on an accused and admits him to bail in order that he may have the means of appealing, *held* that the admission to bail does not make the sentence one to commence at a future date, and does not, therefore, make it illegal—*Okhoy Kumar*, 7 C.L.R. 393; *Kishen Soonder*, 12 W.R. 47. When a Judge convicts the accused, he must pass sentence on him at once; he has no power to adjourn the passing of sentence for an indefinite period—*Keshavlal*, 14 Bom.L.R. 144, 13 Cr.L.J. 288.

The commencement of the sentence cannot also be antedated. A sentence of imprisonment for the time already passed in the lock-up is illegal. If the Magistrate thinks that the time already spent by the accused in detention has been a sufficient punishment for his offence (petty theft of plantains), the proper course would be to sentence him to one day's imprisonment. He would then be released on the same day on which he was sentenced—*Tha Hmun*, 4 L.B.R. 152, 7 Cr.L.J. 453; *Bhogel*, 1907 P.W.R. 9, 5 Cr.L.J. 217. Nowhere does the Code provide for the antedating of a sentence of imprisonment, and the antedating of a sentence of imprisonment seems to be contrary to the spirit of secs. 383 and 397—*Nga Po Min*, 34 Cr.L.J. 447, 142 I.C. 728, A.I.R. 1933 Rang. 28, Ind. Rul. 1933 Rang 45, 1933 Cr.C. 275. A sentence of imprisonment until the rising of the Court is good and legal—*Bhogel*, 1907 P.W.R. 9, 5 Cr.L.J. 217 (218).

When a prisoner has been committed to jail under two separate warrants, the sentence in the one to take effect from the expiry of the sentence in the other, the date of such second sentence shall, in the event of the first sentence being remitted on appeal, be presumed to take effect from the date on which he was committed to jail under the first or original sentence—*Cal. G. R. & C. O.*, page 40.

Where to be imprisoned:—When a case is submitted to the High Court under sec. 307, and the High Court passes a sentence, it does so as a Court of Reference and not in the exercise of its ordinary original jurisdiction; and, therefore, it has power, on conviction and sentence, to send the accused to jail outside the Presidency town. The High Court is required to send the accused to that jail in which he would have been confined by the Court submitting the case—*Horace Lyall*, 29 Cal. 286.

It is illegal for a Magistrate to direct the accused to be imprisoned in a *Police lock-up*. A jail is a prison within the meaning of the Prisons Act and the Prisoners Act, but it does not include a police lock-up—*Po Thin*, 7 L.B.R. 62, 15 Cr.L.J. 10, 22 I.C. 154.

It is illegal to confine a person in a jail other than that mentioned in the warrant—*Shamsonnessa v. Anne Lote*, 11 Cal. 527 (cited under sec. 384).

Calculation of period of imprisonment:—In calculating sentences of imprisonment, the day on which the sentence is passed and the day of release ought to be included and considered as days of imprisonment; for example, a man sentenced on the 1st January to one month's imprisonment should be released on the 31st January, and not on the 1st February.—*Mad. G. O. No. 2411*, dated 22-11-81.

Sentence upheld in appeal:—The procedure on the Sessions Court upholding a sentence of imprisonment on appeal is to issue a warrant to the jail under this section, and where the accused is on bail and is not present the Court issues a warrant for his arrest to a Police Officer under sec. 77, Cr. P. Code. There is no procedure laid down by the Code that the Court should ask the sureties to ask the accused to surrender. The accused commits contempt of Court by evading the warrants of the Sessions Court and also by having the misrepresentation made in his application of revision to the

High Court that he was in jail and should be released on bail—*Mumtaz v. Chhutwa*, 41 Cr.L.J. 741, 189 I.C. 468, A.I.R. 1940 All. 386, 1940 A.L.J. 309

384. Every warrant for the execution of a sentence of imprisonment shall be directed to the officer in charge of the jail, or other place in which the prisoner is, or is to be, confined.

1065. The warrant of imprisonment must be signed by the Magistrate; and the signature should be affixed by pen and not by means of a stamp—*Subramanya Ayyar*, 6 Mad. 396.

The period of imprisonment should be definite; thus, in an order under sec. 123, the Magistrate should state the period for which the accused is to be imprisoned in default of finding security; it is illegal to direct the accused to be imprisoned *until he gives security*—*Maulamdi v. Taripulla*, 8 Cal. 644.

It is illegal to confine a person in a jail other than that mentioned in the warrant. Where a sheriff's officer delivered over to the officer-in-charge of the Alipore Jail, a judgment-debtor who had been duly committed to the Presidency Jail, the confinement in the Alipore Jail was held to be illegal—*Shumsonnessa v. Anne Love*, 11 Cal. 527.

385. When the prisoner is to be confined in a jail, the warrant shall be lodged with the jailor.

Warrant with whom to be lodged.

386. (1) Whenever an offender has been sentenced to pay a fine, the Court passing the sentence may take action for the recovery of the fine in either or both of the following ways, that is to say, it may—

Warrant for levy of fine.

(a) issue a warrant for the levy of the amount by attachment and sale of any moveable property belonging to the offender;

(b) issue a warrant to the Collector of the District authorising him to realise the amount by execution according to civil process against the moveable or immoveable property, or both, of the defaulter:

Provided that, if the sentence directs that in default of payment of the fine the offender shall be imprisoned, and if such offender has undergone the whole of such imprisonment in default, no Court shall issue such warrant unless for special reasons to be recorded in writing it considers it necessary to do so.

(2) The Provincial Government may make rules regulating the manner in which warrants under sub-section (1), clause (a), are to be executed, and for the summary determination of any claims made by any person other than the offender in respect of any property attached in execution of such warrant.

(3) Where the Court issues a warrant to the Collector under sub-section (1), clause (b), such warrant shall be deemed to be a decree, and the Collector to be the decree-holder, within the meaning of the Code of Civil Procedure, 1908, and the nearest

Civil Court by which any decree for a like amount could be executed shall, for the purposes of the said Code, be deemed to be the Court which passed the decree, and all the provisions of that Code as to execution of decrees shall apply accordingly:

Provided that no such warrant shall be executed by the arrest or detention in prison of the offender.

Change:—The whole section has been redrafted by sec. 102 of the Cr. P. C. Amendment Act, XVIII of 1923. The old section stood as follows:—

“386. Whenever an offender is sentenced to pay a fine, the Court passing the sentence may, in its discretion, issue a warrant for the levy of the amount by distress and sale of any moveable property belonging to the offender, although the sentence directs that, in default of payment of the fine, the offender shall be imprisoned.”

The main changes introduced are:—*Firstly*, under the old law, fine could be recovered only by distress and sale of moveable property; under the present law it can be recovered by sale of *immoveable* property also, as provided in clause (b). *Secondly*, under the old law, fine could be recovered by distress and sale even though the offender had undergone the full term of imprisonment in default of payment of fine; the present section ordinarily prohibits the recovery of fine in such cases, and allows it only on special reasons; see the proviso to sub-sec. (1). *Thirdly*, sub-sections (2) and (3) have been newly added. The reasons have been stated below. In clause (a) the word ‘attachment’ has been substituted for ‘distress’ as it is “more appropriate.”

The words, “Provincial Government” have been substituted for “Local Government” by sec. 4 of the Government of India (Adaptation of Indian Laws) Order, 1937.

1066. Scope of section:—Sections 63–70, I P C, and the provisions of the Criminal Procedure Code in respect of levy of fines shall apply to all fines imposed under any Act, Regulation, Rule or Bye-law unless the Act, Regulation, Rule or Bye-law contains an express provision to the contrary—*Section 25, General Clauses Act* (X of 1897).

Compensation under section 250 of this Code shall be recoverable as a fine, and this section prescribes the mode in which the fine may ordinarily be recovered—*Paryag v. Arjun Mean*, 22 Cal 139. But the provisions of this section do not apply to fines imposed under Act XXI of 1856 (Abkari Act); such fines cannot be levied by distress and sale of the offender’s property—*Junglee Beldar*, 17 W.R. 7.

A warrant can be issued under this section only to levy a fine, but not to recover the amount of damage done to a Railway carriage, where no fine has been imposed on the offender. Such warrant is illegal and cannot be executed under this section—*Abdul Majid v. Mukherji*, 10 P.L.T. 124, 30 Cr.L.J. 635, 116 I.C. 524.

1067. Sentence of fine:—*It should be specific:*—A sentence of fine imposed upon more than one prisoner individually and collectively, is not a proper sentence. It should be specifically stated in the sentence what amount each individual prisoner is to pay—*Anonymous*, 5 M.H.C.R App. 5

It should be levied immediately:—There should be no delay in the levy of a fine directly upon passing a sentence. A Magistrate cannot defer the levying of the fine imposed on the prisoner till the period of appeal shall have expired, or until the orders of the Appellate Court are received on appeal preferred by the accused. Nor can the Appellate Court order the original Court to abstain from levying the fine till the disposal of the appeal—2 W.R. (Cr. Let.) 13. As to the period of limitation within which fine may be recovered, see section 70, I. P. Code

Who can levy fine:—The term ‘Court’ is not restricted to the particular individual who held office. The successor in office of a Judge or Magistrate may levy a fine imposed by his predecessor—*Chunder Coomar v. Modhusoodun*, 9 W.R. 50.

Refund of fine :—When a person pays money into the Criminal Court in payment of the fine imposed on the accused, the money must in law be deemed to have become the property of the accused because title thereto must pass to the Crown. There is no provision in the Cr. P. Code that on reversal of the sentence the Crown must return the amount to anybody other than the accused, even if the amount had been paid by such other person. He can, however, claim the amount from the accused—*Hiralal Jindani v. Official Assignee*, 38 Cr.L.J. 199, 166 I.C. 344, 1936 M.W.N. 1246, 9 R.M. 363, (1937) 1 M.L.J. 130, 45 M.L. 222, A.I.R. 1937 Mad. 191.

1068. Clause (a):—Distress and sale—It is lawful for the Magistrate to issue his warrant for the levy of the fine by distress and sale of the goods of the offender, and at the same time to order his imprisonment for non-payment of fine. It is not necessary to postpone imprisonment till the distress and sale of goods have failed to realise the fine, and the imprisonment should not be allowed to stop the process for the levy of fine so as to give the offender time to remove his goods beyond the reach of the law—*Jungle Beldar*, 17 W.R. 7. The surplus sale-proceeds in the hands of the first mortgagee must be regarded as moveable property and as such liable to distress under this section; and the Crown is entitled to priority over the claim of others—*Pichu v. Secretary of State*, 40 Mad. 767, 18 Cr.L.J. 426, 38 I.C. 986, 5 M.L.W. 664, 1917 M.W.N. 20, 21 M.L.T. 71.

A Magistrate acting under this section cannot attach salary, which the salary-earner has not only not drawn, but has not even yet earned. The warrant can issue only after the salary has come into the salary-earner's possession or into that of the bailiff in his behalf. The words "moveable property" as used in this section cannot be held to include salary not yet drawn from the treasury for or by the person who is entitled to it—*Maung Soe Hlaing v. Ma Thein Khin*, 36 Cr.L.J. 850, 155 I.C. 742, A.I.R. 1934 Rang. 82, 1934 Cr.C. 514.

This clause allows the distress and sale of moveable property of the offender. But growing crops are not moveable property for the purposes of this clause—*Anonymous*, 2 Weir 444. Rights and interests or shares in the joint moveable property of a joint Hindu family, of which the accused is a member, cannot be seized and sold under this clause—*Anonymous*, 2 Weir 442 (443); *Q-E v. Sita Nath*, 20 Cal. 478; *Hira Lal v. Crown*, 1915 P.L.R. 28, 16 Cr.L.J. 166; *Rajendra*, A.I.R. 1932 Pat. 292, 12 Pat. 29, 33 Cr.L.J. 872, 140 I.C. 101, 13 P.L.T. 549, 1932 Cr.C. 764, Ind. Rul. 1932 Pat. 281; *Pramatha*, 34 Cr.L.J. 503, 143 I.C. 97, A.I.R. 1933 Cal. 402, 37 C.W.N. 567, Ind. Rul. 1933 Cal. 334, 1933 Cr.C. 580, 60 Cal. 932; *Manmatha*, 34 Cr.L.J. 579, 143 I.C. 238, A.I.R. 1933 Cal. 401, Ind. Rul. 1933 Cal. 390, 1933 Cr.C. 579, 60 Cal. 851; *Shrawan*, 34 Cr.L.J. 1263, 146 I.C. 371, A.I.R. 1933 Nag. 248, 1933 Cr.C. 932, 29 N.L.R. 320; *Pritamdas*, 34 Cr.L.J. 354, 142 I.C. 524, A.I.R. 1933 Sind. 43, 1933 Cr.C. 189, Ind. Rul. 1933 Sind. 102. Section 386 (1) (a), Cr. P. C., authorizes the Court passing a sentence of fine to recover the amount by sale of moveable property of the offender. It cannot be said that moveable property owned by a coparcenary body is the property of the 'offender'. It is the property owned by several persons in which the offender has an interest which is unascertained and this will be the state of affairs so long as the property is not partitioned and the joint conditions continue. Therefore the fine imposed upon a coparcener cannot be realized by sale of moveable property belonging to the coparceners—*Bansraj Das v. Secretary of State*, A.I.R. 1939 Ail. 373 (374), 183 I.C. 134, 1939 A.W.R. (H.C.) 247. But in such a case the onus rests on the coparcener claiming the property as joint to prove the same—*Narasanna*, 55 Mad. 1041, 1932 Cr.C. 566, 33 Cr.L.J. 622, 138 I.C. 548, 1932 M.W.N. 457, 63 M.L.J. 142, Ind. Rul. 1932 Mad. 579, A.I.R. 1932 Mad. 538, 36 M.L.W. 402. If the accused is a member of an Alayasantana family, the distress and sale of his moveable property in execution of a warrant under this clause is illegal—*Achuma v. Rudra*, 2 Weir 443. The proper procedure for recovery of the fine out of the undivided interest in joint family moveable property is that prescribed by Order 21, rule 47, C. P. Code (appointment of receiver, or issue of prohibitory order), and not attachment by way of seizure—*Narasanna*, supra.

According to the Sind Court the proper procedure is not under sec. 386 (a), but under sec. 386 (b). The Court which imposed the fine may issue its warrant to the Collector of the district, and that officer may proceed as the law directs—*Pritamdas*, 34 Cr.L.J. 354, 142 I.C. 524, A.I.R. 1933 Sind 43, 1933 Cr.C. 189, Ind. Rul 1933 Sind 102; *Sahadto v. Ram Kishun*, 33 Cr.L.J. 671, 138 I.C. 310, 13 P.L.T. 235, A.I.R. 1932 Pat. 212, 1932 Cr.C. 493, Ind. Rul 1932 Pat. 180. But according to the Bombay High Court, the words "belonging to the offender" do not mean "belonging exclusively to the offender" and therefore the share of the accused in the moveable property of the joint Hindu family of which the accused is a member can be attached—*Shivlingappa v. Gurlingava*, 49 Bom 906, 27 Bom.L.R. 1363, 27 Cr.L.J. 652 (655). Where on the death of the offender the surviving members of his family succeeded by survivorship to the whole of the properties, there is no moveable property belonging to him which can be attached under this section after his death for his liability—*Ram Chander*, A.I.R. 1932 Pat. 301, 13 P.L.T. 536, 1932 Cr.C. 773, 33 Cr.L.J. 958, 140 I.C. 72, Ind. Rul. 1932 Pat. 290 (F.B.). Moveable property (money) belonging to the accused's brother and deposited in Court by the accused's brother as security for the appearance of the accused in a criminal trial cannot be seized, as the money does not belong to the accused. Even the fact that the accused and his brother are members of a joint Hindu family will not enable the Court to seize the money—*Girdhari Lal*, 19 A.L.J. 887, 22 Cr.L.J. 744. Moveable property of the offender in a Native State cannot be seized for the realisation of a fine adjudged by a British Court; only the property remaining in British India can be seized and sold—*Anonymous*, 2 Weir 444.

When moveable property belonging to coparceners was attached for realisation of fine imposed on one of them and another coparcener paid the fine to save the property from being sold away, the latter is entitled to recover back the amount paid by him from the Government—*Bansraj Das v. Secretary of State*, A.I.R. 1939 All 373, 183 I.C. 134.

1069. Clause (b):—The old law provided for the distress and sale of *moveable* property only; *immoveable* property could not be attached and sold for the recovery of fine—*Madari v. Mehr Din*, 22 Cr.L.J. 399, 61 I.C. 527 (Lah.); *Lallu*, 5 B.H.C.R. 63; *Sitanath*, 20 Cal. 478. Clause (b) now allows attachment and sale of *immoveable* properties also.

Where the accused, who was a member of a Hindu coparcenary, had unascertained share in standing crops belonging to all members of the family, the entire standing crops cannot be attached and sold in execution at the instance of the Collector of the district authorised to realise the fine from the accused in accordance with the provisions of this clause—*Kollivenkataratnam v. Collector of Kistna*, 37 Cr.L.J. 836, 163 I.C. 480, 43 M.L.W. 760, 70 M.L.J. 717, A.I.R. 1936 Mad. 560, 1936 M.W.N. 728.

1070. Proviso:—*Levy of fine after imprisonment*.—It was held under the old section that an offender who had undergone the full term of imprisonment to which he was sentenced in default of payment of fine was still liable to have the amount levied by distress and sale of any moveable property belonging to him—*Modosoodun*, 3 W.R. 61, because the imprisonment which the Court imposed in default of payment was intended as a punishment for non-payment and not as a satisfaction and discharge of the amount due—*Gulab Chand*, Ratanlal 91 (92).

The proviso in the present section now lays down that if the offender has undergone the *whole* term of the imprisonment awarded in default of fine, the Court should not issue a warrant for levy of the fine. "The new proviso directs that after the imprisonment awarded in default of payment of fine has been served, no further steps should be taken for the recovery of the fine, unless the Court for special reasons to be recorded considers it necessary. The infliction of a double punishment is ordinarily uncalled for, and by the issue of warrants for the recovery of fines when there is no real reason why they should be recovered, the time of the police is frequently wasted. Convicted persons also are thus harassed for long periods after, they have expiated their offences by undergoing imprisonment"—*Statement of Objects and Reasons* (1921).

"Unless for special reasons to do so" :—These words at the end of the proviso are intended for the case of a contumacious person who may evade the fine and suffer imprisonment, and yet having the means to pay the fine, would not pay the fine. In such a case, the serving of the period of imprisonment provided in default of payment of fine should not absolve the person from paying the fine. See *Legislative Assembly Debates*, 8th February, 1923, page 2061.

Section 386 (1) (b), proviso, requires the Magistrate to record his special reasons for issuing a distress warrant only when the warrant is issued after the offender has undergone the whole of the imprisonment in default. When the warrant was issued before the whole of the imprisonment in default had been undergone, it cannot be said that the issue of the warrant was illegal or that the sale was illegal merely because reasons were not recorded for issuing the warrant—*Sarojini*, 43 C.W.N. 443 (444), 40 Cr.L.J. 654, 182 I.C. 315, A.I.R. 1939 Cal. 337, I.L.R. (1939) 1 Cal. 471. The proviso does not apply to a case where the offender has not undergone the whole of the term of imprisonment to which he was sentenced—*Nikantha v Bisakha*, 36 Cr.L.J. 1267, 157 I.C. 1031, A.I.R. 1935 Cal. 546, 1935 Cr.C. 938. The proviso applies in terms only to the issue of a fresh warrant and does not require the withdrawal of a warrant already issued before expiration of the sentence in default of payment. In dealing with such existing warrant the Court should, however, follow the policy which seems to have inspired the proviso to sec 386. The policy appears to be that in general an offender ought not to be required both to pay the fine and to serve the sentence in default. But the proviso enables a warrant to be issued for recovery of the fine, even if the whole sentence in default has been served, if the Court considers that there are special reasons for issuing the warrant. The special reasons should be reasons accounting for the fact that the fine has been recovered before the sentence in default has been served, and any reasons which are directed to that point would be relevant. It may be that the authorities, through no negligence on their part, did not know of the existence of the property or the accused may have inherited property after he served his sentence in default; or there may not have been time to execute the warrant. Matters of that sort would all be special reasons for issuing a warrant after the sentence in default had been served; and, in the same way, they are reasons justifying the Court in refusing to withdraw a warrant already issued—*Digambar*, A.I.R. 1935 Bom. 160, 37 Bom.L.R. 99, 36 Cr.L.J. 1034, 156 I.C. 772, 1935 Cr.C. 320, 59 Bom. 350. Except in special cases it is both undesirable and unfair to seek to realise a fine when the sentence ordered to be served in default of payment of the fine has already been served in full and the proviso is intended to deal with cases where for some sufficient reason, the authorities have not been able to realise the fine before the default sentence has been served. That the accused is a man of dangerous character is not a special reason within the meaning of the proviso to this section—*Jadabendra*, 40 C.W.N. 604 (607), 37 Cr.L.J. 524, 161 I.C. 979, A.I.R. 1936 Cal. 149, 1936 Cr.C. 291.

Where a sentence of imprisonment is imposed by way of providing a sanction for the payment of a fine if the fine is not paid, and the sentence is served out in its entirety, it is still possible to insist on payment of the fine being made. To serve the sentence of imprisonment is not to be taken as an exoneration or absolution as regards the payment of fine—*Nikantha v Bisakha*, 36 Cr.L.J. 1267, 157 I.C. 1031, A.I.R. 1935 Cal. 546, 1935 Cr.C. 938.

Where the accused was released after undergoing his full term of imprisonment on offering security for fine payable by instalments and was recommitted to jail for default in making payment, held that the original order releasing the prisoner was illegal and that there was no law to order imprisonment in default of fine then—*Teja Singh*, 37 Cr.L.J. 503, 161 I.C. 886, A.I.R. 1936 Lah. 348, 37 P.L.R. 45, 1936 Cr.C. 268.

1071. Sub-section (2):—*Claims of third parties*—By this sub-section power is given to the Local Government to make rules regarding the execution of warrant and the determination of claims—*Statement of Objects and Reasons* (1914).

Notifications :—It is provided in para. 819 of the Manual of Government Orders that the inquiry shall be conducted in the same way as an inquiry under O. XXI, rr. 58 to 61, Civil Procedure Code—*Harimal*, 34 Cr.L.J. 847, 144 I.C. 883, A.I.R. 1933 All. 135, 1933 A.L.J. 265, 1933 Cr.C. 278.

For Rules framed by the Government of Bihar and Orissa under this clause, see Notification No. 251-J. R., dated May 17, 1927, published in the Bihar and Orissa Gazette, 1927, Part II, p. 689, and reproduced in the Supplement to the Bihar and Orissa Local Statutory Rules and Orders, 1927, Vol. II, p. 11. See *Suraj Narain*, 35 Cr.L.J. 682 (864), 148 I.C. 321, 15 P.L.T. 57, A.I.R. 1934 Pat. 178.

No rules have been made by the Government of Bengal under this sub-section for the determination of the claims of third parties to property attached under sub-sec. (1), para (a) of the section—*Manmatha*, 34 Cr.L.J. 579 (580), 143 I.C. 238, A.I.R. 1933 Cal. 401, Ind. Rul. 1933 Cal. 390, 1933 Cr.C. 579, 60 Cal. 851. It appears, however, that the Government of Bengal framed rules in the year 1925 which are contained in Circular Order No. 6 (Criminal) of 1925. The relevant rule is 117 (4) which reads—"If any person makes any claims in respect of the property attached, then the ownership of such property shall be determined by the Magistrate who issued the warrant, or his successor in office or the Magistrate in charge of accounts. The services of a junior Deputy Magistrate or Sub-Deputy Magistrate or Circle Officer may be utilised, if necessary, for the investigation of such claims." There is accordingly no necessity for a Magistrate in Bengal to follow the procedure laid down in Or. 21, r. 58, Civil Procedure Code; but on the other hand he is not entitled to utilise the services of a Police Officer in investigating such claims, nor is he entitled to rely simply on the report of a police officer—*Sarojini*, 43 C.W.N. 443 (444), 40 Cr.L.J. 654, 182 I.C. 315, A.I.R. 1939 Cal. 337, I.L.R. (1939) 1 Cal. 471.

Inquiry into claims :—Under the old law, when a claim was preferred by a third party to the ownership of the property distrained, the Magistrate was not required by law to try any such claim, because this section did not contain any provision for the trial of claims which might be preferred to the property distrained under this section—*Gasper*, 22 Cal. 935; *Hira Lal*, 1915 P.L.R. 28, 16 Cr.L.J. 166. What the Magistrate had to do in such a case was to postpone the sale of the property and to allow the claimant an opportunity of establishing his title in a Court having jurisdiction to determine civil rights—*Anonymous*, 2 Weir 445. When a claim was preferred, the Court was to direct postponement of the sale of the property for such time as might be necessary to enable the claimant to establish his right (by a civil suit). But if the property was of such a nature that an immediate sale would be for the benefit of the owner, the property could be sold and the sale proceeds held over—*Chhagan*, Ratanlal 976; *Kandappa*, 20 Mad 88; *Gasper*, 22 Cal. 935. No rules having been framed by the Bombay Government under this clause, the Bombay High Court held that it has no option but to follow the law as laid down in 22 Cal 935; 20 Mad. 88 and Ratanlal 976 and stayed the sale of the property attached for such time as will be sufficient to give claimant time to establish his right to property in a Civil Court—*Panduraung*, A.I.R. 1932 Bom. 476, 1932 Cr.C. 604, Ind. Rul. 1932 Bom. 501, 33 Cr.L.J. 805, 139 I.C. 541, 56 Bom. 364, 34 Bom.L.R. 1102. The Calcutta High Court left this point open in *Manmatha*, 34 Cr.L.J. 579, 143 I.C. 238, A.I.R. 1933 Cal. 401, Ind. Rul. 1933 Cal. 390, 1933 Cr.C. 579, 60 Cal. 851. But see *Sarojini*, supra.

Under the present law, the Magistrate is empowered to determine summarily the claims of third parties. This view was taken in a Burma case—*Mingaing*, 1 Bur.S.R. 332.

It is obviously the duty of the Magistrate himself to record all the evidence of both the parties and then to pronounce its judgment upon it. Where the Magistrate did not himself make any enquiry into the objection to the attachment and dismissed it on the report of the Naib-Tahsildar, held that the procedure was wholly unwarranted—*Parshotam*, A.I.R. 1931 Lah. 543, 1931 Cr.C. 783, 131 I.C. 912, 32 Cr.L.J. 812. Where the Magistrate acted solely on the report of the police, the Patna High Court also set

aside a similar order—*Bansidhar*, A.I.R. 1933 Pat. 698, 1933 Cr.C. 1551, 14 P.L.T. 639, 147 I.C. 730. A proper inquiry in accordance with the provisions of O. XXI, rr. 58 to 61, C. P. C., should be held in such cases—*Harimal*, 34 Cr.L.J. 847, 144 I.C. 883, A.I.R. 1933 All. 135, 1933 A.L.J. 265, 1933 Cr.C. 278.

The claim under sub-sec. (2), sec. 386 must be made promptly and can only be entertained so long as the attachment subsists. If such a claim has been preferred while the attachment subsists, the Court must not finally credit the money to Government until the claim has been disposed of; but the summary determination of claims under sub-sec. (2), sec. 386 can only be made while the attachment is subsisting. The claim preferred by the members of a joint Hindu family to the money which has been attached in realisation of a fine imposed on an individual member of the joint family and their application for refund of the same, cannot be entertained after the amount has been credited to the Government—*Suraj Narain*, A.I.R. 1934 Pat. 181, 35 Cr.L.J. 682, 148 I.C. 321, 15 P.L.T. 57 (S.B.).

Reasons :—The law does not require that reasons should be given for selling attached property after the disposal of claims—*Sarojini*, 43 C.W.N. 443 (444), 40 Cr.L.J. 654, 182 I.C. 315, A.I.R. 1939 Cal. 337, I.L.R. (1939) 1 Cal. 471.

Limitation :—No period for limitation is provided for in this section—*Suraj Narain*, A.I.R. 1934 Pat. 181 (183), 35 Cr.L.J. 682, 148 I.C. 321, 15 P.L.T. 57 (S.B.).

1072. Sub-section (3):—"We would add a clause after sub-section (2) to enable a fine to be realised through the Collector as if the order was a decree of a Civil Court. We can see no reason why a property-owner who may be able to conceal his moveables should not be forced to pay a fine which has been inflicted upon him by a Criminal Court, just as much, and by the same process, as a civil debt. It seems to be recognised that the liability is so enforceable by sec 70, Indian Penal Code, and the decision in *Sitanath Mitra*, I.L.R. 30 Cal. 478, and we think that this should be made clear by the section under consideration. The proper person to effect such realisation is, we think, the Collector of the district, who will be treated as the decree-holder"—*Report of the Select Committee* (1916).

Prior to 1923 it was only possible to realize a fine by distress and sale of moveable property. By the amendments of 1923 it was made lawful to proceed against the immovable property also. The plain reading of the section 386, Cr. P. C., as it now stands is that the warrant which is issued to the Collector must be accepted as a decree by the nearest Civil Court competent to execute it—*Collector of Peshawar v. Abdul Majid*, A.I.R. 1938 Pesh. 40, 177 I.C. 162, 11 R.Pesh. 18, 1938 Pesh.L.J. 48.

The immovable property of an agriculturist can be attached and sold in execution of an order passed under this section, and the mere fact that under sub-sec (3) the warrant is to be deemed a decree does not justify a Court in holding that the exceptional provisions of sec 22 of the Deccan Agriculturists' Relief Act must be applicable to such a warrant. Section 386, sub-sec. (3) only applies the provisions of the C. P. Code as to execution of decrees, and there is nothing in the C. P. Code which involves the application of sec 22 of the D. A. R. Act. Section 22 of that Act mainly has reference to decrees which are passed in the ordinary way in *suits to which an agriculturist is a party*, and the mere fact that the warrant under sec 386 (3), Cr. P. Code is executable as if it were a decree does not suffice to make the provision of sec 22 of the D. A. R. Act applicable to such a warrant—*Collector v. Mahadu*, 28 Bom.L.R. 1231, A.I.R. 1926 Bom. 582 (583), 50 Bom. 844. In Punjab, sec 16 of the Punjab Alienation of Land Act lays down that no land belonging to a member of an agricultural tribe shall be sold in execution of any decree or order by any Civil Court, and the combined effect of that section and of sec 386 (3), Cr. P. Code is that such land cannot be sold in pursuance of a warrant issued by a Magistrate to the Collector for levy of a fine in a criminal case—*Mulka*, 30 Cr.L.J. 1006 (1007), 1929 Cr.C. 212, A.I.R. 1929 Lah. 667, 119 I.C. 227.

1073. Revision:—The order of a Magistrate for sale of properties under this section is not a judicial proceeding and is not the proper subject of criminal revision;

Notifications :—It is provided in para. 819 of the Manual of Government Orders that the inquiry shall be conducted in the same way as an inquiry under O. XXI, r. 58 to 61, Civil Procedure Code—*Harimal*, 34 Cr.L.J. 847, 144 I.C. 883, A.I.R. 1933 All. 135, 1933 A.L.J. 265, 1933 Cr.C. 278.

For Rules framed by the Government of Bihar and Orissa under this clause, see Notification No 251-J. R., dated May 17, 1927, published in the Bihar and Orissa Gazette, 1927, Part II, p. 689, and reproduced in the Supplement to the Bihar and Orissa Local Statutory Rules and Orders, 1927, Vol. II, p. 11. See *Suraj Narain*, 35 Cr.L.J. 682 (864), 148 I.C. 321, 15 P.L.T. 57, A.I.R. 1934 Pat. 178.

No rules have been made by the Government of Bengal under this sub-section for the determination of the claims of third parties to property attached under sub-sec (1), para (a) of the section—*Manmatha*, 34 Cr.L.J. 579 (580), 143 I.C. 238, A.I.R. 1933 Cal 401, Ind. Rul. 1933 Cal 390, 1933 Cr.C. 579, 60 Cal 851. It appears, however, that the Government of Bengal framed rules in the year 1925 which are contained in Circular Order No 6 (Criminal) of 1925. The relevant rule is 117 (4) which reads :—"If any person makes any claims in respect of the property attached, then the ownership of such property shall be determined by the Magistrate who issued the warrant, or his successor in office or the Magistrate in charge of accounts. The services of a junior Deputy Magistrate or Sub-Deputy Magistrate or Circle Officer may be utilised, if necessary, for the investigation of such claims." There is accordingly no necessity for a Magistrate in Bengal to follow the procedure laid down in Or. 21, r. 58, Civil Procedure Code; but on the other hand he is not entitled to utilise the services of a Police Officer in investigating such claims, nor is he entitled to rely simply on the report of a police officer—*Sarojini*, 43 C.W.N. 443 (444), 40 Cr.L.J. 654, 182 I.C. 315, A.I.R. 1939 Cal 337, I.L.R. (1939) 1 Cal. 471.

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Under the present law, the Magistrate is empowered to determine summarily the claims of third parties. This view was taken in a Burma case—*Mingaing*, 1 Bur.S.R. 332.

It is obviously the duty of the Magistrate himself to record all the evidence of both the parties and then to pronounce its judgment upon it. Where the Magistrate did not himself make any enquiry into the objection to the attachment and dismissed it on the report of the Na'ib-Tahsildar, held that the procedure was wholly unwarranted—*Parshotam*, A.I.R. 1931 Lah 543, 1931 Cr.C. 783, 131 I.C. 912, 32 Cr.L.J. 812. Where the Magistrate acted solely on the report of the police, the Patna High Court also set

aside a similar order—*Bansidhar*, A.I.R. 1933 Pat. 698, 1933 Cr.C. 1551, 14 P.L.T. 639, 147 I.C. 730. A proper inquiry in accordance with the provisions of O. XXI, rr. 58 to 61, C. P. C., should be held in such cases—*Harimal*, 34 Cr.L.J. 847, 144 I.C. 883, A.I.R. 1933 All. 135, 1933 A.L.J. 265, 1933 Cr.C. 278.

The claim under sub-sec. (2), sec. 386 must be made promptly and can only be entertained so long as the attachment subsists. If such a claim has been preferred while the attachment subsists, the Court must not finally credit the money to Government until the claim has been disposed of; but the summary determination of claims under sub-sec. (2), sec. 386 can only be made while the attachment is subsisting. The claim preferred by the members of a joint Hindu family to the money which has been attached in realisation of a fine imposed on an individual member of the joint family and their application for refund of the same, cannot be entertained after the amount has been credited to the Government—*Suraj Narain*, A.I.R. 1934 Pat. 181, 35 Cr.L.J. 682, 148 I.C. 321, 15 P.L.T. 57 (S.B.).

Reasons :—The law does not require that reasons should be given for selling attached property after the disposal of claims—*Sarojini*, 43 C.W.N. 443 (444), 40 Cr.L.J. 654, 182 I.C. 315, A.I.R. 1939 Cal. 337, I.L.R. (1939) 1 Cal. 471.

Limitation :—No period for limitation is provided for in this section—*Suraj Narain*, A.I.R. 1934 Pat. 181 (183), 35 Cr.L.J. 682, 148 I.C. 321, 15 P.L.T. 57 (S.B.).

1072. Sub-section (3) :—“We would add a clause after sub-section (2) to enable a fine to be realised through the Collector as if the order was a decree of a Civil Court. We can see no reason why a property-owner who may be able to conceal his moveables should not be forced to pay a fine which has been inflicted upon him by a Criminal Court, just as much, and by the same process, as a civil debt. It seems to be recognised that the liability is so enforceable by sec. 70, Indian Penal Code, and the decision in *Sitanath Mitra*, I.L.R. 30 Cal. 478, and we think that this should be made clear by the section under consideration. The proper person to effect such realisation is, we think, the Collector of the district, who will be treated as the decree-holder”—*Report of the Select Committee* (1916).

Prior to 1923 it was only possible to realize a fine by distress and sale of moveable property. By the amendments of 1923 it was made lawful to proceed against the immovable property also. The plain reading of the section 386, Cr. P. C., as it now stands is that the warrant which is issued to the Collector must be accepted as a decree by the nearest Civil Court competent to execute it—*Collector of Peshawar v. Abdul Majid*, A.I.R. 1938 Pesh. 40, 177 I.C. 162, 11 R.Pesh. 18, 1938 Pesh.L.J. 48.

The immovable property of an agriculturist can be attached and sold in execution of an order passed under this section, and the mere fact that under sub-sec. (3) the warrant is to be deemed a decree does not justify a Court in holding that the exceptional provisions of sec. 22 of the Deccan Agriculturists' Relief Act must be applicable to such a warrant. Section 386, sub-sec. (3) only applies the provisions of the C. P. Code as to execution of decrees, and there is nothing in the C. P. Code which involves the application of sec. 22 of the D. A. R. Act. Section 22 of that Act mainly has reference to decrees which are passed in the ordinary way in *suits to which an agriculturist is a party*, and the mere fact that the warrant under sec. 386 (3), Cr. P. Code is executable as if it were a decree does not suffice to make the provision of sec. 22 of the D. A. R. Act applicable to such a warrant—*Collector v. Mahadu*, 28 Bom.L.R. 1231, A.I.R. 1926 Bom. 582 (583), 50 Bom. 844. In Punjab, sec. 16 of the Punjab Alienation of Land Act lays down that no land belonging to a member of an agricultural tribe shall be sold in execution of any decree or order by any Civil Court, and the combined effect of that section and of sec. 386 (3), Cr. P. Code is that such land cannot be sold in pursuance of a warrant issued by a Magistrate to the Collector for levy of a fine in a criminal case—*Mukha*, 30 Cr.L.J. 1006 (1007), 1929 Cr.C. 212, A.I.R. 1929 Lah. 657, 119 I.C. 227.

1073. Revision :—The order of a Magistrate for sale of properties under this section is not a judicial proceeding and is not the proper subject of criminal revision;

the claimant whose property is wrongly sold under this section may proceed by way of civil suit (either against the purchaser or against the Secretary of State)—*Secretary of State v Sukhdeo*, 1898 A.W.N. 173; *Kandappa*, 20 Mad. 88; *Hira Lal*, 1915 P.L.R. 28, 16 Cr.L.J. 166.

387. *A warrant issued under section 386, sub-section (1), clause (a), by any Court may be executed within the local limits of the jurisdiction of such Court, and it shall authorize the attachment and sale of any such property without such limits, when endorsed by the District Magistrate or Chief Presidency Magistrate within the local limits of whose jurisdiction such property is found.*

Change:—This section has been amended by sec. 102 of the Cr. P. C. Amendment Act, XVIII of 1923. The amendment is merely verbal, and consequential to the amendment of sec. 386. The word *attachment* has been substituted for the word *distress* in this section as well as in section 386, as the term is more appropriate.

388. (1) When an offender has been sentenced to fine only and to imprisonment in default of payment of the fine, and the fine is not paid forthwith, the Court may—

Suspension of execution of sentence of imprisonment.

(a) *order that the fine shall be payable either in full on or before a date not more than thirty days from the date of the order, or in two or three instalments, of which the first shall be payable on or before a date not more than thirty days from the date of the order and the other or others at an interval or at intervals, as the case may be, of not more than thirty days, and*

(b) *suspend the execution of the sentence of imprisonment and release the offender, on the execution by the offender of a bond, with or without sureties, as the Court thinks fit, conditioned for his appearance before the Court on the date or dates on or before which payment of the fine or the instalments thereof, as the case may be, is to be made; and, if the amount of the fine or of any instalment, as the case may be, is not realised on or before the latest date on which it is payable under the order, the Court may direct the sentence of imprisonment to be carried into execution at once.*

(2) *The provisions of sub-section (1) shall be applicable also in any case in which an order for the payment of money has been made on non-recovery of which imprisonment may be awarded and the money is not paid forthwith; and if the person against whom the order has been made, on being required to enter into a bond such as is referred to in that sub-section, fails to do so, the Court may at once pass sentence of imprisonment.*

1073A. Change:—This section has been redrafted by the Criminal Procedure Code Second Amendment Act, XXXVII of 1923. This amendment has been made on the recommendation of the Indian Jails Committee. See *Gazette of India*, 1923, Part V, p. 242.

The provision for *issue of warrant* for levy of the amount of fine by distress and sale has been omitted. The case of *Byravalu*, 26 Mad. 127 (129), in which it was held that before sending a person to prison under sec. 388 (2) for non-payment of the compensation awarded under sec. 250 (which is recoverable as a fine) the Magistrate was bound to issue *warrant* for levy by distress of the amount, is no longer good law.

Sub-section (1):—Sub-section (1) is inapplicable where no alternative sentence of imprisonment (for non-payment of fine) has been passed. Where a Magistrate sentences an offender to a fine, but omits to pass a sentence of imprisonment in default of payment of the fine, he has no power to bind over the accused in his own recognizance to appear [under clause (b)]—*Venkatrapragada*, 2 Weir 445.

The provisions of sub-sec. (1) refer solely to cases in which a sentence of fine only is passed. They are not applicable to a case where the sentence is a sentence of imprisonment combined with a sentence of fine, and it makes no difference whether the sentence of imprisonment is merely nominal, or is for a substantive term. The provisions of sub-sec. (2) refer to an order for payment of money which order is not a sentence passed upon an accused person. There is a clear distinction between the provisions of sub-sec. (1), which refer to a sentence passed in a trial and the provisions of sub-sec. (2), which refer to an order made by a Criminal Court for the payment of money, but which is not a punishment inflicted on an offender for a criminal offence. The provisions of the latter sub-section refer to cases like that of the payment of compensation under sec. 250, Cr. P. C., or the payment of the penalty due on a bond under sec. 514—*Mohmade*, 35 Cr.L.J. 608, 148 I.C. 112, 11 Rang 451, A.I.R. 1934 Rang. 11, 1934 Cr.C. 77. See also *Ali Hussain*, 34 Cr.L.J. 530 (532), 143 I.C. 120, A.I.R. 1933 Cal. 308, 56 C.L.J. 73, Ind. Rul. 1933 Cal. 343, 1933 Cr.C. 408.

389. Every warrant for the execution of any sentence may be issued either by the Judge or Magistrate
Who may issue warrant. who passed the sentence, or by his successor in office.

See 9 W.R. 50 cited under sec. 386.

390. When the accused is sentenced to whipping only, the sentence shall, *subject to the provisions of section 391*, be executed at such place and time as the Court may direct.

Time and place of execution of sentence of whipping only.

The italicised words have been added by sec. 21 of the Criminal Law Amendment Act, XII of 1923.

1074. It has been held that if the accused is sentenced to whipping only, the sentence cannot be deferred; it must be carried out as soon as practicable. This section authorises the Court to fix the time and place for its execution, but not to *postpone* it—*Abdulla*, Ratanlal 906; *Meyyan*, 26 Mad. 465. An order that an accused shall not be whipped until after the expiry of the sentence of imprisonment passed in another trial, is illegal. This sentence should be carried out as soon as practicable—*Nga Po*, L.B.R. (1900–1902) 53. The sentence cannot be postponed pending an intended appeal—*Meyyan*, 26 Mad. 465. But these cases should now be read subject to clause (a) of sec. 391 which allows a postponement of whipping if the accused furnishes bail.

Even if the case does not fall under sec. 391 (a), *i.e.*, even though the accused is sentenced to whipping only, and does not furnish bail, the sentence of whipping need not

necessarily be carried out *on the very day* that it is passed. The words "at such place and time as the Court may direct" give a wide discretion to the Court in the matter; and the Court may direct that the sentence should be carried out as soon as *practicable*. Thus, if the Court passes the sentence of whipping at a late hour on Saturday and directs the sentence to be carried out as soon as practicable, it is not illegal to carry out the sentence on Monday (whipping not being allowed on Sunday by the Jail Rules)—*Gopala*, 30 Bom.L.R. 389, 29 Cr.L.J. 573 (574), 100 I.C. 509.

For general rules as to whipping, see Notes under sec. 32.

Execution of sentence of whipping only, or of whipping in addition to imprisonment.

391. (1) When the accused—

(a) *is sentenced to whipping only and furnishes bail to the satisfaction of the Court for his appearance at such time and place as the Court may direct, or*

(b) *is sentenced to whipping in addition to imprisonment,*
the whipping shall not be inflicted until fifteen days from the date of the sentence, or if an appeal is made within that time, until the sentence is confirmed by the Appellate Court, but the whipping shall be inflicted as soon as practicable after the expiry of the fifteen days, or, in case of an appeal, as soon as practicable after the receipt of the order of the Appellate Court confirming the sentence.

(2) The whipping shall be inflicted in the presence of the officer in charge of the jail, unless the Judge or Magistrate orders it to be inflicted in his own presence.

(3) No accused person shall be sentenced to whipping in addition to imprisonment, when the term of imprisonment to which he is sentenced is less than three months.

1075. This section has been amended by sec. 22 of the Criminal Law Amendment Act, XII of 1923. The old section contemplated only those cases where the accused was sentenced to whipping as well as to imprisonment; if the accused was sentenced to whipping only, the section did not apply, and the sentence of whipping could not be postponed—*Anonymous*, 2 Weir 446. But the new clause (a) now provides for such cases.

Clause (a) provides that a sole sentence of whipping should not be inflicted, if the accused furnishes bail, until 15 days from the date of the sentence, or if an appeal is made within that time, until the sentence is confirmed on appeal. This is because the Code now provides for an appeal from a simple sentence of whipping (sec. 413) which formerly was not appealable—*Gopala*, 30 Bom.L.R. 389, 29 Cr.L.J. 573 (574), 109 I.C. 509, A.I.R. 1928 Bom. 138, 10 A.I. Cr.R. 306.

Postponement of whipping till after expiry of imprisonment—Where a person has been sentenced to whipping as well as to imprisonment, the whipping may be postponed, as provided by this section, until 15 days from the date of sentence or until confirmation of the sentence on appeal, but it is illegal to postpone the sentence of whipping till after the term of imprisonment has expired—*Anonymous*, 6 M.H.C.R. App. 38; *Anonymous*, 7 M.H.C.R. App. 29; *Habla*, Ratanlal 803 (804); *Jagannath*, 4 Bom.L.R. 929. Where an accused is convicted of *two different offences*, for one of which he is sentenced to imprisonment, and for the other to whipping, it is not permissible to postpone the whipping merely because the accused appeals against his conviction for the first offence—

Jaicant, 4 Bom.L.R. 436. Where a Magistrate ordered that the prisoner be brought before him at the expiration of the sentence of imprisonment, and that the sentence of whipping should then be carried out, the High Court cancelled the sentence of whipping as having become inoperative and incapable of being carried out by lapse of time—*Hur Chandra v. Jafar Ali*, 20 W.R. 72. Where an accused is sentenced in one case to 18 months' imprisonment and 15 stripes, and in another case he is also sentenced to 18 months' imprisonment and 15 stripes and the Magistrate orders in the second case that the sentence passed in that case must take effect after the expiry of the sentence in the first case, *held* that the sentence of whipping in the second case is illegal and must be set aside, because under this section, whipping can be postponed till 15 days from the date of sentence or till the disposal of the appeal, but it cannot be postponed till 18 months—*Sagram*, Ratanlal 300 (301). Where the accused was sentenced to imprisonment for two years and was further ordered "to receive 30 stripes on the day of his release from prison," *held* that the sentence of whipping was altogether illegal and improper and must be set aside, as it was ordered to be carried out after the expiry of the imprisonment—*Jiva Ram*, 1881 A.W.N. 138.

As soon as practicable.—The whipping must be carried into effect as soon as practicable after the expiry of the time specified in this section. But if through accident, or neglect or wilful breach of duty of the officer the sentence of whipping is not immediately carried into execution, the prisoner is not thereby free from the liability of undergoing the sentence still remaining unexecuted—*Mahadhu*, Ratanlal 136.

An order which says that the stripes will be given after the sentence of imprisonment for two years has been undergone, is clearly incorrect in the sense that the time mentioned for inflicting the corporal punishment is not accordance with law—*Rashbehari*, 36 Cr.L.J. 100, 152 I.C. 291, A.I.R. 1934 Pat. 551, 15 P.L.T. 475, 1934 Cr.C. 1195.

Double sentence of whipping.—An accused cannot be sentenced to a double sentence of whipping when he is convicted of two offences; *thus*, where a person is convicted of offences under secs. 454 and 380, I P C., it is illegal to pass a sentence of 15 stripes for each offence—*Dagdu*, Ratanlal 955. The High Court altered the sentence to 15 stripes for both the offences.

Sub-section (2).—Under the provisions of this sub-section whipping must be inflicted in the presence of an officer in charge of a jail unless the Judge or Magistrate orders it to be inflicted in his own presence. The Borstal Institution at Thayetmyo is not a jail, the Superintendent thereof is not an officer-in-charge of the jail, and, therefore, a sentence of whipping cannot be carried out in his presence. In cases of this kind where a youthful offender, for one offence, is ordered to be detained in a Training School or a Borstal Institution, and, for another offence tried at the same trial, is sentenced to whipping, the Magistrate must act under the provisions of sec. 390, Cr. P. C., and either order the whipping to be inflicted in his own presence, or direct that it shall be inflicted at some convenient jail in the presence of the officer-in-charge of the jail—*Nga Pyu*, 14 Rang. 625, 38 Cr.L.J. 33 (35), 165 I.C. 575, A.I.R. 1936 Rang 485, 1936 Cr.C. 976 (F.B.).

Sub-section (3).—When a sentence of imprisonment for less than three months is awarded, an additional sentence of whipping is illegal—*Bhica*, 2 Bom.L.R. 54.

392. (1) In the case of a person of or over sixteen years of age whipping shall be inflicted with a light rattan not less than half an inch in diameter, in such mode, and on such part of the person, as the Provincial Government directs; and, in the case of a person under sixteen years of age, it shall be inflicted in such mode, and on such part of the person, and with such instruments, as the Provincial Government directs.

- (2) In no case shall such punishment exceed thirty stripes and, in the case of a person under sixteen years of age, it shall not exceed fifteen stripes.

Limit of number of stripes.

Amendment:—The words "Provincial Government" have been substituted for "Local Government" by sec 4 of the Government of India (Adaptation of Indian Laws) Order, 1937.

Number of stripes:—Under the provisions of this section and the next, not more than one sentence of whipping and that not exceeding thirty stripes, should be awarded at one time—*Nga Po*, 1906 U.B.R. (Cr. P. C.) 47, 4 Cr.L.J. 281.

393. No sentence of whipping shall be executed by instal-

ments: and none of the following persons shall be punishable with whipping, namely:—

Not to be executed by instalments.
Exemptions.

- (a) females;
- (b) males sentenced to death or to transportation or to penal servitude, or to imprisonment for more than five years;
- (c) males whom the Court considers to be more than forty-five years of age.

1076. This section forbids the *execution* of the punishment of whipping in respect of certain persons, and since the execution is prohibited, such persons cannot be *sentenced* to whipping; for it is futile to pass a sentence which cannot be executed. Therefore, a person who is *sentenced to 7 years' rigorous imprisonment cannot be sentenced to whipping in addition*, because the execution of such punishment is prohibited by clause (b) of this section—*Akbar*, 1919 P.R. 30, 3 Lah L.J. 395, 21 Cr.L.J. 306, 55 I.C. 466.

Sentence of whipping cannot be enhanced:—The accused was convicted under sec. 382, I. P. C., and was sentenced to whipping, and the sentence was duly executed. An application was afterwards made to enhance the sentence on the ground that it was inadequate; it was held that the sentence of whipping could not be enhanced by the infliction of an additional number of stripes, because under this section no sentence of whipping could be executed by instalments—*Balu*, Ratanlal 537.

Clause (b) :—A sentence of whipping passed on a person who is already under sentence of death, etc., is illegal. Even if the sentence of whipping precedes instead of following the other sentence, the passing of the latter sentence renders the infliction of the punishment of whipping illegal—*Anonymous*, 1 Mad. 56.

No sentence of whipping can be passed on an accused who has been sentenced to more than five years' rigorous imprisonment. When, therefore, the accused was sentenced to rigorous imprisonment for 7 years and also ordered to receive 20 stripes, the sentence was against the provisions of this section—*Sona Khan v. Emp.*, 38 Cr.L.J. 429, A.I.R. 1937 Pesh. 22, 167 I.C. 655, 9 R.Pesh. 90.

Whipping cannot be given where a person has been sentenced to imprisonment for more than five years whether for the offence for which whipping has been given or for any other. The cumulative sentence of imprisonment of more than five years cannot be maintained in the case of an accused who has been sentenced to undergo punishment of whipping and *vice versa*—*Karim Shah v. Emp.*, 40 Cr.L.J. 681 (684), 182 I.C. 530, A.I.R. 1939 Pesh. 17.

The word "sentenced" is used in a general sense, whether sentenced in one case, or collectively in more than one case. Therefore, a person who is sentenced in two different cases to punishments which collectively exceed the term of five years (in Burma, seven

years) cannot be punished with whipping—*Nga Ni Gyi*, 7 Rang 769, 1930 Cr.C. 305, 120 I.C. 697, A.I.R. 1930 Rang. 138, 31 Cr.L.J. 176, Ind. Rul. 1930 Rang. 57, following 1 Mad. 56, 2 Weir 448. This section clearly lays down that a person who is sentenced to imprisonment for more than five years, shall not be punishable with stripes and there is ample authority for the proposition that this section applies even if the sentences aggregating more than five years' rigorous imprisonment are passed in different cases—*Nur Hahi v. Emp.*, A.I.R. 1937 Lah. 104, 39 P.L.R. 226, 171 I.C. 864. Although there may be justification for interpreting the word "sentenced" as including the sentence of an offender in two or more different trials for offences committed before conviction in any one of such trials, there is no reason whatever to warrant the reading of this word in such a way as to suggest "undergoing a sentence". There can, therefore, be no justification for the taking into account of the period of imprisonment to which a man has already been sentenced before the commission of the offence for which the sentence of whipping with or without imprisonment is passed, in the computation of the maximum period of imprisonment fixed by sec. 393, Cr. P. C., as amended by the Whipping (Burma Amendment) Act, 1927—*Nga Nye Nge*, 35 Cr.L.J. 1027, 149 I.C. 1073, 1934 Cr.C. 375, A.I.R. 1934 Rang 58

394. (1) The punishment of whipping shall not be inflicted unless a medical officer, if present, certifies, or, if there is not a medical officer present, unless it appears to the Magistrate or officer present, that the offender is in a fit state of health to undergo such punishment.

Whipping not to be inflicted if offender not in fit state of health.

(2) If, during the execution of a sentence of whipping, a medical officer certifies, or it appears to the Magistrate or officer present, that the offender is not in a fit state of health to undergo the remainder of the sentence, the whipping shall be finally stopped.

Stay of execution.

1077. "Particular attention should be directed to sec 394 which prohibits the execution of a sentence of whipping when the offender is not in a fit state of health to undergo that punishment, and all officers are reminded that the Governor-General in Council considers that the precaution of having a medical officer present at the time of infliction of the punishment should be observed in every instance when practicable"—*Cal. G. R. & C. O.*, page 65

Before the commencement of whipping, the Medical Officer must give a certificate whether the offender is in a fit state of health to undergo the *whole* punishment of whipping. There is no provision of law authorising a medical officer to give a certificate that the accused is fit to receive only a *portion* of the sentence; such a certificate cannot be held as granted under sub-sec (1)—*Public Prosecutor*, 31 Mad 84, 17 M.L.J. 555, 7 Cr.L.J. 5. Such a certificate cannot be treated as one under sub-section (2), because that sub-section refers to a certificate granted *during* the execution of the sentence—*Ibid*.

Under sub-sec (1), the Medical Officer is to give a certificate either that the offender is in a fit state of health to undergo the *whole* sentence passed on him or that he is not in fit state of health to undergo it at all. If he certifies that the accused is fit to undergo a *smaller number* of stripes than that ordered by the Magistrate, the certificate cannot be held as one granted under this section, and is *invalid*; the Magistrate cannot in such a case inflict a smaller number of stripes in accordance with the medical certificate, and in lieu of the rest of the stripes not inflicted he cannot award imprisonment under sec. 393—*Public Prosecutor*, 31 Mad 84, 17 M.L.J. 555, 7 Cr.L.J. 5.

A Magistrate should not reject the punishment of whipping on the ground that the

accused is too young and frail, unless he has medical opinion in support of his own—*Maung Tin Hlaing v. The King*, A.I.R. 1939 Rang. 383, 41 Cr.L.J. 22, 184 I.C. 464.

395. (1) In any case in which, under section 394, a sentence of whipping is wholly or partially prevented from being executed, the offender shall be kept in custody till the Court which passed the sentence can revise it; and the said Court may, at its discretion, either remit such sentence, or sentence the offender in lieu of whipping, or in lieu of so much of the sentence of whipping as was not executed, to imprisonment for any term not exceeding twelve months or to a fine not exceeding five hundred rupees which may be in addition to any other punishment to which he may have been sentenced for the same offence.

(2). Nothing in this section shall be deemed to authorize any Court to inflict imprisonment for a term or a fine of an amount exceeding that to which the accused is liable by law, or that which the said Court is competent to inflict.

Change:—The italicised words have been added by sec. 105 of the Cr. P. C. Amendment Act, XVIII of 1923, to enable a sentence of fine to be awarded in lieu of a sentence of whipping which cannot be carried out. Under the old law it was held that the Court had no power to revise a sentence of whipping by inflicting a fine—*Sheodin*, 11 All 308; *Anonymous*, 2 Weir 449. These cases are now rendered obsolete.

1078. "Wholly or partially prevented" :—"Wholly prevented" refers to sub-sec. (1) of sec. 394; 'Partially prevented' refers to sub-sec. (2) of that section—*Public Prosecutor*, 31 Mad 84.

'The Court which passed the sentence can revise it' :—The only Court which can revise the sentence is the Court which passed the sentence. Even where a sentence of imprisonment and whipping passed by a District Magistrate is confirmed on appeal by the Sessions Judge, still the Magistrate is not prevented from revising the sentence—*Chetu*, 1889 P.R. 10. But the words 'the Court which passed the sentence' do not mean the same officer who inflicted the sentence; therefore, where a Magistrate who passed the original sentence of whipping was transferred, the District Magistrate who had jurisdiction over the whole district was competent to commute the sentence of whipping to one of imprisonment—*Chhajju*, 1901 P.R. 33, 1902 P.L.R. 20.

Power of revision :—The Court can revise the sentence of whipping by awarding solitary confinement in lieu of whipping, under this section—*Gaman*, 1899 P.R. 14. The Court may remit the sentence altogether, even though it is competent to inflict a term of imprisonment in lieu of whipping—*Po Thit*, 1 L.B.R. 202.

The imprisonment which the Court can award under this section in lieu of whipping must not exceed the term which the Court is competent to award under sec. 32. Where a Magistrate sentences the accused to the maximum term of imprisonment which he is competent to inflict as well as whipping, and the whipping cannot be carried out, he cannot sentence him to a further term of imprisonment in lieu of whipping, but ought to remit the sentence of whipping altogether—*Karat Ahmad*, 2 Weir 449; *Ram Baran*, 21 All. 25; *Barkat Ali*, 1901 P.R. 11.

Section 562, Cr. P. Code :—The accused was sentenced to 25 lashes under sec. 379, I. P. C., and as it was reported that owing to an enlarged spleen the sentence of whipping could not be executed, the Magistrate directed him to enter into a bond under sec. 562, Cr. P. C., for one year. Held that the order was clearly beyond the Magistrate's powers. Section 395 (1), Cr. P. C., in such a case allows the Court to

remit the sentence altogether or to sentence the offender in lieu of whipping to imprisonment or fine. The reason why a Court is not empowered to release an offender on his entering into a bond for good behaviour in lieu of whipping is obviously that if such was suitable, it should be imposed in the first instance—*The King v. Ba Kyway*, 39 Gr.L.J. 707, 176 I.C. 224, 11 R.R. 39, A.I.R. 1938 Rang. 218.

396. (1) When sentence is passed under this Code on an escaped convict, such sentence, if of death, fine or whipping, shall, subject to the provisions hereinbefore contained, take effect immediately, and, if of imprisonment, penal servitude or transportation, shall take effect according to the following rules, that is to say—

Execution of sentences on escaped convicts.

(2) If the new sentence is severer in its kind than the sentence which such convict was undergoing when he escaped, the new sentence shall take effect immediately.

(3) When the new sentence is not severer in its kind than the sentence the convict was undergoing when he escaped, the new sentence shall take effect after he has suffered imprisonment, penal servitude or transportation, as the case may be, for a further period equal to that which, at the time of his escape, remained unexpired of his former sentence.

Explanation.—For the purposes of this section—

- (a) a sentence of transportation or penal servitude shall be deemed severer than a sentence of imprisonment;
- (b) a sentence of imprisonment with solitary confinement shall be deemed severer than a sentence of the same description of imprisonment without solitary confinement; and
- (c) a sentence of rigorous imprisonment shall be deemed severer than a sentence of simple imprisonment with or without solitary confinement.

What this section contemplates is that the severer sentence must be undergone first. Where the accused who was a life-convict under sentence of transportation for murder was convicted for attempting to escape from lawful custody and was sentenced to four months' rigorous imprisonment, the latter sentence must not commence immediately, but should be undergone after the expiry of the sentence of transportation—*Mahadu*, Ratanlal 965.

397. When a person already undergoing a sentence of imprisonment, penal servitude or transportation, is sentenced to imprisonment, penal servitude or transportation, such imprisonment, penal servitude or transportation shall commence at the expiration of the imprisonment, penal servitude or transportation to which he has been previously sentenced *unless the Court directs*

Sentence on offender already sentenced for another offence.

that the subsequent sentence shall run concurrently with such previous sentence:

Provided that, if he is undergoing a sentence of imprisonment, and the sentence on such subsequent conviction is one of transportation, the Court may, in its discretion, direct that the latter sentence shall commence immediately or at the expiration of the imprisonment to which he has been previously sentenced:

Provided, further, that where a person who has been sentenced to imprisonment by an order under section 123 in default of furnishing security is, whilst undergoing such sentence, sentenced to imprisonment for an offence committed prior to the making of such order, the latter sentence shall commence immediately.

Change:—This section has been amended by sec. 106 of the Cr. P. C. Amendment Act, XVIII of 1923. The reasons are stated below.

1080. Principle:—The general rule is that a sentence commences to run from the time of its being passed, and this section creates an exception in the case of persons already undergoing imprisonment, and postpones the operation of the subsequent sentence until after the expiry of the previous sentence—*In re Krishnanand*, 3 B.L.R. A.C. 50; *Sobrai*, 20 W.R. 70.

'Undergoing imprisonment':—A person is said to be undergoing an imprisonment the moment the sentence of imprisonment is passed, though he has not yet been sent to jail. Therefore, where a person is tried on the same day for two different offences in two different trials, then as soon as the first trial is over and he is convicted and sentenced he is said to 'undergo imprisonment'; and if he is convicted and sentenced in the second trial also, he is said to be sentenced to imprisonment 'while already undergoing a sentence of imprisonment' within the meaning of this section—*Muthusami*, 2 Weir 451; *Nga Po*, 3 Bur.L.J. 32, 82 I.C. 478, 25 Cr.L.J. 1310. But in *Makhan*, 19 Cr.L.J. 207, 43 I.C. 623 (All.), it has been held that until an accused has actually passed into jail, he cannot be said to be undergoing imprisonment, and therefore where two sentences of imprisonment are passed in two trials on the same accused on the same day, this section does not apply, as the accused cannot be said to be 'undergoing imprisonment' under the first trial, as soon as the sentence is passed; therefore, the second imprisonment need not commence after the expiry of the imprisonment awarded in the first trial; the Magistrate may order that the two sentences should be concurrent.

"Imprisonment" as used in sec. 397, Cr. P. C., includes imprisonment in default. *Prima facie* it would include imprisonment in default, which by virtue of sec. 64, I. P. C., is a sentence; and that being so, any subsequent sentence of imprisonment would not begin until the expiry of the sentence of imprisonment in default—*Punjaji Lalaji*, A.I.R. 1939 Bom. 174 (176), 41 Bom.L.R. 277, I.L.R. 1939 Bom. 160, 40 Cr.L.J. 602, 181 I.C. 979.

Detention under the order of a Civil Court is not a sentence of imprisonment with the meaning of this section; therefore, a Magistrate has no power to order that the sentence of imprisonment awarded by him shall take effect on the expiry of a term of detention in the civil jail which had been ordered by a Civil Court—*Makha Gyi*, 4 Bur.L.J. 9, 3 Rang 93, 26 Cr.L.J. 821.

Section 397, Cr. P. C., is not applicable to sentences of detention under sec. 8, Madras Borstal Schools Act (V of 1926) and the direction that the sentence of detention should commence after the expiration of the previous sentence of detention is illegal—*Public Prosecutor, Madras*, 39 Cr.L.J. 795, 176 I.C. 768, 11 R.M. 176, 47 M.L.W. 473, 1938 M.W.N. 352, A.I.R. 1938 Mad. 613.

1050A. Court:—Under this section the High Court in its appellate jurisdiction has power to direct separate sentences of separate trials to run concurrently—*Sis Ram*, A.I.R. 1929 All. 585, 1923 Cr.C. 175, 51 All. 888, 30 Cr.L.J. 904, 118 I.C. 384, 1929 A.L.J. 800. See also *Rcott*, A.I.R. 1933 All. 461 (463), 1933 A.L.J. 523, 34 Cr.L.J. 1018, 145 I.C. 609, 1933 Cr.C. 761; *Nagappa*, A.I.R. 1931 Bom. 529, 33 Bom.L.R. 1163, 1931 Cr.C. 917, 134 I.C. 1239, 33 Cr.L.J. 77. But see *Koural*, A.I.R. 1932 Sind 159, 1932 Cr.C. 695, 34 Cr.L.J. 24, 140 I.C. 481.

1081. Order of sentences:—The meaning of this section is that sentences will take effect in the order in which they are passed. The sentence which is first passed and which the accused is undergoing must be given effect to first, and any subsequent sentence passed upon the accused must follow after the expiration of the first sentence. Where a Magistrate passes separate sentences of imprisonment on the same accused in separate trials and on the same day, the sentences will take effect in the order in which they are passed, by the terms of this section, and the Magistrate need not, therefore, give any direction in his judgment in respect of the same—*Muthusami*, 2 Weir 451.

But the above rule as to the sequence of sentences applies only to the 1st para of this section. It is only the sentences mentioned in para 1 (*viz.*, sentences of imprisonment) that can be directed to take effect in the order in which they were passed. A sentence of whipping cannot be deferred till the sentence of imprisonment; for that will contravene the provisions of sec. 391—*Sagram*, Ratanlal 300. As regards the sentences mentioned in the first proviso, the Magistrate has a discretion to direct either that the subsequent sentence should take effect after the expiration of the prior sentence, or that it should take effect at once.

Imprisonment in foreign territory.—Where a person sentenced to imprisonment in a foreign territory is subsequently convicted of an offence in British India, it is competent for the Magistrate to pass a sentence which shall take effect after the expiration of the sentence in the foreign State—*Venkataram*, 20 Mad 444.

1082. Concurrent sentences:—It was held, prior to the present amendment, that a Magistrate could not direct that the subsequent sentences should run concurrently with the previous sentence, because a Magistrate could pass concurrent sentences only when the offences were tried at *one and the same trial* (see sec. 35)—*Kamal Mandal*, 20 C.W.N. 1300, 24 C.L.J. 54; *Bhagandas*, 2 Bom.L.R. 111; *Tukaram*, 4 Bom.L.R. 876; *Govindaswamy*, 13 Cr.L.J. 466, 1912 M.W.N. 396; *Pattayil v Sami*, 2 Weir 453; *Harak Narain*, 19 A.L.J. 316; *Makbul*, 11 A.L.J. 263, 14 Cr.L.J. 240; *Nga Sein Po*, 1 Rang. 306; *Ganda Singh*, 1912 P.L.R. 20; *Khuda Bux*, 2 S.L.R. 23; *San*, 4 L.B.R. 147, 7 Cr.L.J. 445; even where the trials were held on the same day, the Magistrate could not make the sentences in the two trials concurrent—*Muzafar*, 1894 P.R. 12. But now the amendment made at the end of the first para of this section will allow the subsequent sentence to run concurrently with the previous one. "In accordance with the amendment, a Court will be empowered to pass a sentence to run concurrently with any other term of imprisonment, etc., which the person convicted is already undergoing"—*Statement of Objects and Reasons* (1914). See *Mahadco*, 27 Cr.L.J. 807 (812), 95 I.C. 471, A.I.R. 1926 Nag 426.

'At the expiration of'—A person was convicted by a Magistrate and sentenced to 2 years' imprisonment, and a month afterwards he was sentenced to three years' imprisonment by the Court of Session, which directed the sentence to take effect on the expiration of the sentence passed by the Magistrate. On appeal the conviction and sentence passed by the Magistrate were set aside. It was held that the sentence of the Sessions Court must be deemed to have commenced from the time it was ordered to commence, *viz.*, after the expiration of the Magistrate's sentence whether by reversal or completion of the punishment, and not before—*Anonymous*, Ratanlal 139; *K'handu*, Ratanlal 523. But in *Anonymous*, 2 Weir 450, under similar circumstances, it was held that the imprisonment already undergone must be reckoned as imprisonment under the sentence in the conviction which was not reversed. So also, the Calcutta High Court lays down: "Where a prisoner has been committed to jail under two separate warrants, the sentence in the

one to take effect from the expiry of the sentence in the other, the date of such second sentence shall, in the event of the first sentence being remitted in appeal, be presumed to take effect from the date on which he was committed to jail under the first or original sentence"—*Cal. G. R. & C. O.*, page 40. But these remarks can only apply where the sentences in the two trials are of the same kind; otherwise the Bombay rulings cited above should apply. Those rulings are more reasonable and practical, though the Madras case and the Calcutta High Court Rule are more favourable to the accused. Equitable considerations, however, require that the period of imprisonment already undergone under the sentence which has been set aside should be deducted from the imprisonment subsequently inflicted—*Koural*, A.I.R. 1932 Sind 159, 1932 Cr.C. 695, 34 Cr.L.J. 24, 140 I.C. 481.

First proviso:—Where a person who is already undergoing imprisonment is sentenced by the Sessions Judge to transportation for life, the sentence of transportation passed by him will commence at the expiration of the previous sentence of imprisonment, unless the Judge in his discretion makes a further order that the sentence of transportation shall take effect immediately—*Hari, Ratanlal* 391.

An order directing that a sentence shall take effect on the expiration of another sentence, is not a part of the judgment and may, therefore, be made after the judgment has been signed. Therefore, where a Sessions Judge, in ignorance of the fact that the accused is already undergoing imprisonment, sentences him to transportation for life, it is subsequently open to him to order, even after the judgment has been signed, that the sentence of transportation shall take effect immediately—*Hari, Ratanlal* 391.

1063. Second proviso:—The proviso lays down that if a person who is imprisoned under sec. 123 in default of furnishing security, is subsequently sentenced to imprisonment for an offence committed prior to the passing of the order under section 123, the latter sentence (i.e., the substantive sentence of imprisonment) shall take effect immediately. This is also laid down in a large number of cases. *Joghi*, 31 Mad. 515; *Vishnu*, 37 Bom. 178, 17 I.C. 785, 14 Bom.L.R. 965, 13 Cr.L.J. 849; *Durga*, 5 Bom.L.R. 26; *Lekria*, 8 N.L.R. 20, 13 Cr.L.J. 189. The contrary view taken in *Tula Khan*, 30 All. 334 (340) (F.B.) must be deemed as overruled. If, however, a person who is imprisoned under sec. 123 in default of furnishing security is subsequently convicted of an offence (theft) committed prior to the passing of the order under sec. 123, and for that offence is sentenced to fine, or to imprisonment in default of fine (i.e., where both the sentences of imprisonment are alternative sentences and not substantive sentences of imprisonment), the imprisonment in the latter case (for the offence of theft) must run after the expiry of the sentence under sec. 123—*Nan Ne*, 9 Rang. 612, 1932 Cr.C. 210, 33 Cr.L.J. 174, 135 I.C. 655, Ind. Rul. 1932 Rang. 52, A.I.R. 1932 Rang. 50, following *Nga Pye*, 32 Cr.L.J. 714, 131 I.C. 501, 9 Rang. 110, Ind. Rul. 1931 Rang. 133, A.I.R. 1931 Rang. 127, 1931 Cr.C. 522.

Under the old law, there was no distinction as to whether the offence for which the person imprisoned under sec. 123 was subsequently convicted was committed before or after the making of the order under sec. 123. The law was that if a person undergoing imprisonment under sec. 123 was subsequently convicted of an offence and sentenced to imprisonment (whether this offence was committed before or after the sentence of imprisonment passed under sec. 123 was immaterial), the latter imprisonment must take effect at once and should not be postponed till after the expiry of the period of imprisonment awarded under sec. 123. The simple rule was that the sentence for the substantive offence must take effect before the sentence passed in default of furnishing security—*Tulskaya*, Ratanlal 970 (971); *Venkattagadu*, 2 Weir 452; *Pichari*, 16 Cr.L.J. 622 (Mad.); *Vishnu Balakrishna*, 14 Bom.L.R. 965, 37 Bom. 178, 17 I.C. 785, 13 Cr.L.J. 819; *Kanji*, 5 Bom.L.R. 26; *Durga*, 6 Bom.L.R. 1098; *Pandhi*, 3 S.L.R. 114, 4 I.C. 663; *Sukhal*, 15 S.L.R. 205, 23 Cr.L.J. 255; *Ghulam*, 7 S.L.R. 393; *Muthu Komaran*, 27 Mad. 525; *Joghi*, 31 Mad. 515; *Shin Taung*, 10 Bur.L.T. 266; *Dicean Chand*, 1895 P.R. 14; *Lekria*, 8 N.L.R. 20. In *Arjun*, 5 I.C. 361, 12 Bom.L.R. 129, 34 Bom. 326 and *Markenda*, 1 P.L.J. 212, it has been held that the two sentences

must run *concurrently*. This would be in consonance with the amendment made at the end of the first para of this section.

With reference to the second proviso the *Joint Committee* (1922) observe: "We think that the law should be that in cases where an offence has been committed prior to the order under sec. 123 but the conviction takes place subsequently, the sentences should ordinarily run concurrently; but when the offence is committed after the order under sec. 123 has been passed, e.g., cases of escape from custody or jail or offences committed in jail, then we think that the imprisonment for the subsequent offence should ordinarily not be concurrent; otherwise the prisoner might in some cases receive no further punishment for his subsequent offence." See *Jagmohan*, 34 Cr.L.J. 1152, 146 I.C. 1007, 10 O.W.N. 786, A.I.R. 1933 Oudh 381, 1933 Cr.C. 1098.

An order of committal to or detention in prison passed under sec. 123, Cr. P. C., in default of furnishing security is a sentence of imprisonment within the meaning of this section and its proviso. And so, where a convict who was committed to prison for two years under sec. 123 subsequently committed an offence (e.g., escaped from confinement) and was sentenced to six months' rigorous imprisonment, the second sentence should not run concurrently with the first, but should run consecutively and after the expiration of the sentence of 2 years' imprisonment—*Nga Pse*, 9 Rang. 110, 32 Cr.L.J. 714 (716), 131 I.C. 501, Ind. Rul. 1931 Rang 133, A.I.R. 1931 Rang. 127, 1931 Cr.C. 522.

Where during the time allowed to a suspect to furnish the security as required by the order passed under sec. 118, Cr. P. C., he is sentenced to imprisonment for an offence committed by him prior to the date of such order, it is not competent to the Magistrate to fix the date of the expiry of such sentence as the date for computing the period from which such security is to be furnished—*Ahmed*, 27 Cr.L.J. 865, 96 I.C. 113, A.I.R. 1926 Sind 273, 20 S.L.R. 163 (F.B.).

398. (1) Nothing in section 396 or section 397 shall be held to excuse any person from any part of the punishment to which he is liable upon his former or subsequent conviction.

Saving as to sections 395 and 397.

(2) When an award of imprisonment in default of payment of a fine is annexed to a substantive sentence of imprisonment, or to a sentence of transportation or penal servitude for an offence punishable with imprisonment, and the person undergoing the sentence is after its execution to undergo a further substantive sentence, or further substantive sentences, of imprisonment, transportation or penal servitude, effect shall not be given to the award of imprisonment in default of payment of the fine until the person has undergone the further sentence or sentences.

Sub-section (2) renders obsolete the ruling in *Anonymous*, Ratanlal 132, where it has been held that when a convict is imprisoned under two warrants which order consecutive punishments, the first warrant should be completely executed both in respect of the substantive sentence of imprisonment and the imprisonment in default of fine, before any effect is given to the second warrant. Now under sub-sec. (2) the imprisonment in default of payment of fine shall take effect last of all.

399. (1) When any person under the age of fifteen years is sentenced by any Criminal Court to imprisonment for any offence, the Court may direct that such person, instead of being

Confinement of youthful offenders in reformatories.

imprisoned in a criminal jail, shall be confined in any reformatory established by the *Provincial Government* as a fit place for confinement, in which there are means of suitable discipline and of training in some branch of useful industry or which is kept by a person willing to obey such rules as the *Provincial Government* prescribes with regard to the discipline and training of persons confined therein.

(2) All persons confined under this section shall be subject to the rules so prescribed.

(3) This section shall not apply to any place in which the Reformatory Schools Act, 1897, is for the time being in force.

Amendment:—The words, "Provincial Government" have been substituted for "Local Government" by sec. 4 of the Government of India (Adaptation of Indian Laws) Order, 1937.

1084. A sentence of imprisonment is a condition precedent to an order under this section. Where there is no preliminary sentence of imprisonment, an order under this section cannot be passed—*Bakhtawar*, 1910 P.R. 34, 8 I.C. 1166.

The Court should come to a clear finding as to age of a youthful offender before sending him to a Reformatory School. The Court must find that the youthful offender is a fit and proper person to be an inmate of such a school and must also fix the period of detention—*Sein Choung*, 3 Rang. 218. See also *Rama*, 24 Mad. 13.

The period of detention in the Reformatory School should be a *definite* period. Where the trying Magistrate ordered the offender to be detained in a Reformatory for five years "or until he attains the age of 18 years," in lieu of imprisonment, it was held that the words "or until . . . 18 years" should be deleted—*Rama Sudama*, 15 Bom.L.R. 306, 14 Cr.L.J. 256, 19 I.C. 512.

The period of detention in the Reformatory must not be longer than the period of imprisonment at first ordered. Where a Magistrate finding a juvenile offender guilty of theft in a building sentenced him to three months' rigorous imprisonment and ordered that in lieu of that sentence the offender should be confined in a Reformatory for 14 months, it was held that having once passed a sentence of imprisonment for a particular term, it was not competent to the Magistrate to direct that the offender should be confined in a Reformatory for a longer term—*Ganpaya*, Ratanlal 109.

'Reformatory':—Where no *Reformatories* have been established, but only *Reformatory Schools*, the Court should not order the offender under this section to be sent to a *Reformatory*, but should pass an order under the Reformatory Schools Act, sending the boy to a Reformatory School—*Madasami*, 12 Mad. 94.

Sub-section (3):—The introduction of the Reformatory Schools Act repeals the operation of this section so far as may be practicable in those places where that Act applies—*Madasami*, 12 Mad. 94. Thus, this section has no application in the Punjab where the Reformatory Schools Act is in force—*Noor Mahomed*, 1918 P.R. 17, 19 Cr.L.J. 917, 47 I.C. 433.

Section 16 of the Reformatory Schools Act does not in any way take away the power of the High Court or any other Appellate Court to alter or set aside the sentence in substitution of which an order for detention is made—*Reasul v. Courtney*, 28 Cal. 423; *Imp. v. Rajabali*, 13 I.C. 284, 5 S.L.R. 173, 13 Cr.L.J. 44; *Azimuddin*, 32 Cr.L.J. 1268, 131 I.C. 864, 27 N.L.R. 212, A.I.R. 1931 Nag. 179, Ind. Rul. 1931 Nag. 192, 1931 Cr.C. 920.

400. When a sentence has been fully executed, the officer executing it shall return the warrant to the Court from which it issued, with an endorsement under his hand certifying the manner in which the sentence has been executed.

Return of warrant on execution of sentence.

CHAPTER XXIX.

OF SUSPENSIONS, REMISSIONS AND COMMUTATIONS OF SENTENCES.

401. (1) When any person has been sentenced to punishment for an offence, * * * * * *the Provincial Government* may, at any time, without conditions or upon any conditions which the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced.

Power to suspend or remit sentences.

(2) Whenever an application is made to * * * * * *the Provincial Government* for the suspension or remission of a sentence, * * * * * *the Provincial Government*, * * * * * may require the presiding Judge of the Court before or by which the conviction was had or confirmed to state his opinion as to whether the application should be granted or refused, together with his reasons for such opinion, and also to forward with the statement of such opinion a certified copy of the record of the trial or of such record thereof as exists.

(3) If any condition on which a sentence has been suspended or remitted is, in the opinion of * * * * * *the Provincial Government*, * * * * * not fulfilled, *the Provincial Government* may cancel the suspension or remission, and thereupon the person in whose favour the sentence has been suspended or remitted may, if at large, be arrested by any police-officer without warrant and remanded to undergo the unexpired portion of the sentence.

(4) The condition on which a sentence is suspended or remitted under this section, may be one to be fulfilled by the person in whose favour the sentence is suspended or remitted, or one independent of his will.

(4A) The provisions of the above sub-sections shall also apply to any order passed by a Criminal Court under any section of this Code or of any other law, which restricts the liberty of any person or imposes any liability upon him or his property.

(5) Nothing herein contained shall be deemed to interfere

with the right of His Majesty or of the Central Government when such right is delegated to it, to grant pardons, reprieves, respites or remissions of punishment.

(5A) *Where a conditional pardon is granted by His Majesty or, in virtue of any powers delegated to it, by the Central Government, any condition thereby imposed, of whatever nature, shall be deemed to have been imposed by a sentence of a competent Court under this Code and shall be enforceable accordingly.*

(6) The * * * * * *Provincial Government* may, by general rules or special orders, give directions as to the suspension of sentences and the conditions on which petitions should be presented and dealt with.

Change:—The italicised words and sub-sections (4A) and (5A) have been added by sec. 107 of the Cr. P. C. Amendment Act, XVIII of 1923.

The following omissions have been made in this section by the Government of India (Adaptation of Indian Laws) Order, 1937, viz. :—

In sub-sections (1), (2) and (3) the words, "the Governor-General in Council or" have been omitted.

In sub-sections (2) and (3) the words, "as the case may be" have been omitted.

In sub-section (6) the words, "Governor-General in Council and the" have been omitted.

The words, "Provincial Government" have been substituted for "Local Government" by sec. 4 of the Government of India (Adaptation of Indian Laws) Order, 1937.

1085. Scope of section:—Viewing sub-section (1) of this section as a whole it is the clear intention of the Legislature to confer a power to suspend or remit a sentence—*Venkatesh Yeshwant v. Emp.*, A.I.R. 1938 Nag. 513, I.L.R. 1940 Nag. 1, 1938 N.L.J. 423, 40 Cr.L.J. 397, 180 I.C. 594 (F.B.). Though an order passed under this section is in the name of the Governor because that is the constitutional form it has to take, it is in reality an order of the Provincial Government—*Ibid.* It is not open to Government after remitting a sentence unconditionally, to restore it. Different considerations would arise in cases of fraud or mistake—*Ibid.* It cannot be said that an order of remission is never open to recall. It may be in certain circumstances; fraud and mistake for example might justify such action. But it cannot be done arbitrarily. The matter vitally affects the liberty of the subject, and so, if such power exists at all, it can only be exercised in circumstances which a Court of justice would uphold on general grounds of justice, equity and good conscience, and of public policy. In every case Government must be prepared to substantiate and justify its action and that means that it must give reasons, first to the person concerned, and then, if the matter reaches Court, to that tribunal. It cannot merely say, "I have done it and that is all that need be said. I have the right and I have the power." (Per Bose, J.)—*Ibid.* The effect of an order of remission is to wipe out the remitted portion of the sentence altogether and not merely to suspend its operation; suspension is separately provided for. (Per Bose, J.)—*Ibid.*

This section applies only to persons sentenced to imprisonment, and not to persons upon whom a conditional pardon has been tendered under sec. 337—*Gangacharan*, 11 All. 79.

In cases of murder, the Judge may report any extenuating circumstances calling for a mitigation of the punishment to the Government, and the Government may thereupon take such action under this section as it thinks proper—*Kader Nasya*, 23 Cal. 604; *Lakshman*, 10 Bom. 512; *Narayanawami Goundan*, 1931 M.W.N. 719; *Bagga*, 32 P.L.R. 331, 1931 Cr.C. 532 (534), 32 Cr.L.J. 1230, 134 I.C. 773, A.I.R. 1931 Lah. 276, Ind. Rul.

1931 Lah. 981; *Chajju Mal*, 94 P.L.R. 1909, 11 Cr.L.J. 105 (110), 4 I.C. 985; *Tola Ram*, 8 Lah. 684. In these cases, the accused committed murder without any apparent sane motive, and was suffering from mental derangement of some sort; and the High Court holding that the accused was not entitled to be acquitted under sec. 84, I.P.C., recommended the case to the Local Government under this section to be dealt with in such manner as it thought fit. The High Court also recommended a case to the Local Government where the accused, a young boy under 16, committed the murder, being provoked by the outrageous conduct of the deceased in having sexual intercourse with a female relative of the boy in an open and bare-faced manner—*Nawab*, 33 P.L.R. 279, 33 Cr.L.J. 580, 138 I.C. 410, A.I.R. 1932 Lah. 308, Ind. Rul. 1932 Lah. 486, 1932 Cr.C. 422; or where the accused, a young boy of 17, participated in the act of murder under the influence of his father and elder brother—*Kartar Singh*, 33 Cr.L.J. 484, 137 I.C. 293, A.I.R. 1932 Lah. 259, Ind. Rul. 1932 Lah. 338, 33 P.L.R. 191, 1932 Cr.C. 324; or where a woman caused the death of her child born as a result of illicit intimacy in order to hide her shame—*Glulam Jannat*, 94 I.C. 403, 27 Cr.L.J. 627, 7 Lah. 70, 27 P.L.R. 534, A.I.R. 1926 Lah. 271; *Alam Bibi*, 33 Cr.L.J. 448, 137 I.C. 259, 33 P.L.R. 223, Ind. Rul. 1932 Lah. 318, A.I.R. 1932 Lah. 297, 1932 Cr.C. 377; or where a boy of fifteen took part in a merciless beating resulting in the death of a man, under the influence of his maternal uncle—*Glulam Mohammad*, 35 Cr.L.J. 430, 147 I.C. 578, A.I.R. 1933 Lah. 1021, 1933 Cr.C. 1558; or where a woman of weak intellect caused the death of her child by throwing her in a pond on account of extreme poverty and the treatment of her relations—*Dhulan*, 35 Cr.L.J. 652, 148 I.C. 325, A.I.R. 1934 Lah. 31, 1934 Cr.C. 44; or where the accused committed the murder of a five months' old baby under the delusion that the sacrifice was necessary to appease the goddess—*Narayansuami*, 1931 M.W.N. 719.

The accused was a girl less than seventeen years of age at the time of the murder. She became an approver and made a statement after a promise of pardon had been duly made to her: this statement involved herself as well as the other three persons who were charged. In her direct statement before the Committing Magistrate she supported the statement already made by her, but in cross-examination she stated that she made her statement because the police told her that if she did not make the statement she would be hanged. She was subsequently tried and convicted under sec. 302, I.P.C., and sentenced to transportation for life. Held that the situation of a girl whose mother and husband were determined on murder was not an enviable one and though she failed to earn her pardon, it should be remembered in her favour that her statement as approver led to a successful investigation and to the conviction of the principal criminal. She had already served a considerable sentence and had suffered by reason of the birth of her child in jail. There could not be stronger case for the exercise of the prerogative of mercy—*Aziz Begum v. Emp.*, A.I.R. 1937 Lah. 689, 39 P.L.R. 394, 171 I.C. 954, 39 Cr.L.J. 16, 10 R.L. 254.

Procedure:—All recommendations for remission or suspension of a sentence made under sec. 401 by an officer of any subordinate Court to the Local Government, in regard to a convict whose case has been before the High Court on appeal, shall be made through the High Court—*Cal G. R. & C. O.*, p. 40.

Certified copy of record:—The original record need not be sent. "Objection has been taken to the inconvenience of this, and we think that it will be sufficient to require a certified copy of the record to be furnished"—*Report of the Select Committee* (1916).

"Such record thereof as exists":—"It is well known that in the case of proceedings in a High Court the Judges object to their notes being treated as part of the record, and we have, therefore, referred in our proposed amendment of sec. 401 (2) to 'a copy of the record of the trial' or of such record thereof as exists." We think in cases where it is necessary, in considering a petition for mercy, for the High Court frequently may be, the nature of the evidence given at a trial in a High Court to trust to the courtesy of High Court Judges to furnish a copy of the record—*the Select Committee* (1916).

The better course for the Local Government is to refrain from

with the right of His Majesty or of the Central Government when such right is delegated to it, to grant pardons, reprieves, respites or remissions of punishment.

(5A) Where a conditional pardon is granted by His Majesty or, in virtue of any powers delegated to it, by the Central Government, any condition thereby imposed, of whatever nature, shall be deemed to have been imposed by a sentence of a competent Court under this Code and shall be enforceable accordingly.

(6) The * * * * * Provincial Government may, by general rules or special orders, give directions as to the suspension of sentences and the conditions on which petitions should be presented and dealt with.

Change:—The italicised words and sub-sections (4A) and (5A) have been added by sec. 107 of the Cr. P. C. Amendment Act. XVIII of 1923.

The following omissions have been made in this section by the Government of India (Adaptation of Indian Laws) Order, 1937, viz. :—

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In sub-section (6) the words, "Governor-General in Council and the" have been omitted.

The words, "Provincial Government" have been substituted for "Local Government" by sec. 4 of the Government of India (Adaptation of Indian Laws) Order, 1937.

1085. Scope of section:—Viewing sub-section (1) of this section as a whole it is the clear intention of the Legislature to confer a power to suspend or remit a sentence—*Venkatesh Yeshwant v. Emp.*, A.I.R. 1938 Nag 513, I.L.R. 1940 Nag 1, 1938 N.L.J. 423, 40 Cr.L.J. 397, 180 I.C. 594 (F.B.). Though an order passed under this section is in the name of the Governor because that is the constitutional form it has to take, it is in reality an order of the Provincial Government—*Ibid*. It is not open to Government after remitting a sentence unconditionally, to restore it. Different considerations would arise in cases of fraud or mistake—*Ibid*. It cannot be said that an order of remission is never open to recall. It may be in certain circumstances; fraud and mistake for example might justify such action. But it cannot be done arbitrarily. The matter vitally affects the liberty of the subject, and so, if such power exists at all, it can only be exercised in circumstances which a Court of justice would uphold on general grounds of justice, equity and good conscience, and of public policy. In every case Government must be prepared to substantiate and justify its action and that means that it must give reasons, first to the person concerned, and then, if the matter reaches Court, to that tribunal. It cannot merely say, "I have done it and that is all that need be said. I have the right and I have the power." (*Per Bose, J.*)—*Ibid*. The effect of an order of remission is to wipe out the remitted portion of the sentence altogether and not merely to suspend its operation; suspension is separately provided for. (*Per Bose, J.*)—*Ibid*.

This section applies only to persons sentenced to imprisonment, and not to persons upon whom a conditional pardon has been tendered under sec. 337—*Gangacharan*, 11 All. 79.

In cases of murder, the Judge may report any extenuating circumstances calling for a mitigation of the punishment to the Government, and the Government may thereupon take such action under this section as it thinks proper—*Kader Nasya*, 23 Cal. 604; *Lakshman*, 10 Bom. 512; *Narayanawami Goundan*, 1931 M.W.N. 719; *Bagga*, 32 P.L.R. 331, 1931 Cr.C. 532 (534), 32 Cr.L.J. 1230, 134 I.C. 773, A.I.R. 1931 Lah. 276, Ind. Rul.

1931 Lah 981; *Chajju Mal*, 94 P.L.R. 1909, 11 Cr.L.J. 105 (110), 4 I.C. 985; *Tola Ram*, 8 Lah. 684. In these cases, the accused committed murder without any apparent sane motive, and was suffering from mental derangement of some sort; and the High Court holding that the accused was not entitled to be acquitted under sec. 84, I. P. C., recommended the case to the Local Government under this section to be dealt with in such manner as it thought fit. The High Court also recommended a case to the Local Government where the accused, a young boy under 16, committed the murder, being provoked by the outrageous conduct of the deceased in having sexual intercourse with a female relative of the boy in an open and bare-faced manner—*Nauab*, 33 P.L.R. 279, 33 Cr.L.J. 580, 138 I.C. 410, A.I.R. 1932 Lah 308, Ind. Rul. 1932 Lah. 486, 1932 Cr.C. 422; or where the accused, a young boy of 17, participated in the act of murder under the influence of his father and elder brother—*Kartar Singh*, 33 Cr.L.J. 484, 137 I.C. 293, A.I.R. 1932 Lah. 259, Ind. Rul. 1932 Lah. 338, 33 P.L.R. 191, 1932 Cr.C. 324; or where a woman caused the death of her child born as a result of illicit intimacy in order to hide her shame—*Ghulam Jannat*, 94 I.C. 403, 27 Cr.L.J. 627, 7 Lah. 70, 27 P.L.R. 534, A.I.R. 1926 Lah. 271; *Alam Babi*, 33 Cr.L.J. 448, 137 I.C. 259, 33 P.L.R. 223, Ind. Rul. 1932 Lah. 318, A.I.R. 1932 Lah. 297, 1932 Cr.C. 377; or where a boy of fifteen took part in a merciless beating resulting in the death of a man, under the influence of his maternal uncle—*Ghulam Mohammad*, 35 Cr.L.J. 430, 147 I.C. 578, A.I.R. 1933 Lah. 1021, 1933 Cr.C. 1558; or where a woman of weak intellect caused the death of her child by throwing her in a pond on account of extreme poverty and the treatment of her relations—*Dhulan*, 35 Cr.L.J. 652, 148 I.C. 326, A.I.R. 1934 Lah. 31, 1934 Cr.C. 44; or where the accused committed the murder of a five months' old baby under the delusion that the sacrifice was necessary to appease the goddess—*Narayanswami*, 1931 M.W.N. 719.

The accused was a girl less than seventeen years of age at the time of the murder. She became an approver and made a statement after a promise of pardon had been duly made to her: this statement involved herself as well as the other three persons who were charged. In her direct statement before the Committing Magistrate she supported the statement already made by her, but in cross-examination she stated that she made her statement because the police told her that if she did not make the statement she would be hanged. She was subsequently tried and convicted under sec. 302, I. P. C., and sentenced to transportation for life. Held that the situation of a girl whose mother and husband were determined on murder was not an enviable one and though she failed to earn her pardon, it should be remembered in her favour that her statement as approver led to a successful investigation and to the conviction of the principal criminal. She had already served a considerable sentence and had suffered by reason of the birth of her child in jail. There could not be stronger case for the exercise of the prerogative of mercy—*Aziz Begum v. Emp.*, A.I.R. 1937 Lah. 689, 39 P.L.R. 394, 171 I.C. 954, 39 Cr.L.J. 16, 10 R.L. 254.

Procedure:—All recommendations for remission or suspension of a sentence made under sec. 401 by an officer of any subordinate Court to the Local Government, in regard to a convict whose case has been before the High Court on appeal, shall be made through the High Court—*Cal. G. R. & C. O.*, p. 40.

Certified copy of record.—The original record need not be sent. "Objection has been taken to the inconvenience of this, and we think that it will be sufficient to require a certified copy of the record to be furnished"—*Report of the Select Committee* (1916).

"Such record thereof as exists":—"It is well known that in the case of proceedings in a High Court the Judges object to their notes being treated as part of the record, and we have, therefore, referred in our proposed amendment of sec. 401 (2) to 'a certified copy of the record of the trial' or of such record thereof as exists." We think in cases where it is necessary, in considering a petition for mercy, for Government to know, as it frequently may be, the nature of the evidence given at a trial in a High Court, we safely trust to the courtesy of High Court Judges to furnish a copy of their notes"—*Report of the Select Committee* (1916).

The better course for the Local Government is to refrain from taking action under

this section until the question of sentence is decided judicially by the Court—*Nga Ohu Shwe*, 35 Cr.L.J. 959, 149 I.C. 107, 6 R.Rang. 286, A.I.R. 1934 Rang. 125, 1934 Cr.C. 718, 12 Rang. 344.

Sub-sections (4A) and (5A):—"The new clause (4A) is intended to make it clear that the power to remit sentences conferred by sec. 401 can be exercised in the case of orders of a penal nature, e.g., orders under sec. 565 of the Code. The object of the new clause (5A) is to enable any condition, upon which a pardon has been granted by His Majesty or by the Governor-General when such power has been delegated to him, to be enforced in the same way as a sentence of a Court"—*Statement of Objects and Reasons* (1921).

In sub-section (4A), the word 'law' has been used instead of the more common word "Act" to make it clear that this section applies to the case of persons sentenced by tribunals constituted by Regulations and Ordinances—*Report of the Joint Committee* (1922).

Sub-section (5):—"Or of the Governor-General":—"We have made a formal amendment in this sub-section in view of the special delegation to the present Governor-General of His Majesty's prerogative of pardon"—*Report of the Select Committee* (1916).

402. (1) The * * * * * Provincial

Power to commute Government may, without the consent of the punishment. person sentenced, commute any of the following sentences for any other mentioned after it:—

death, transportation, penal servitude, rigorous imprisonment for a term not exceeding that to which he might have been sentenced, simple imprisonment for a like term, fine.

(2) *Nothing in this section shall affect the provisions of section 54 or section 55 of the Indian Penal Code.*

Sub-section (2) has been added by sec. 108 of the Cr. P. C. Amendment Act, XVIII of 1923. "Doubts have been expressed as to the consistency of sec. 402 with sec. 54 or 55 of the Indian Penal Code, and these have now been resolved"—*Statement of Objects and Reasons* (1914).

The words "Provincial Government" have been substituted for "Local Government" and the words "Governor-General in Council or the" have been omitted by the Government of India (Adaptation of Indian Laws) Order, 1937.

402A. *The powers conferred by sections 401 and 402 upon the Provincial Government may, in the case of sentence of death, also be exercised by the Governor-General in his discretion.*

This section was inserted by the Government of India (Adaptation of Indian Laws) Order, 1937.

CHAPTER XXX.

OF PREVIOUS ACQUITTALS OR CONVICTIONS.

403. (1) A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on

Person once convicted or acquitted not to be tried for same offence.

(g) A, B and C are charged by a Magistrate of the first class with, and convicted by him of, robbing D. A, B and C may afterwards be charged with, and tried for, dacoity on the same facts.

1086. Principle:—This section is an amplification of the well known maxim of law '*nemo debet bis vexari*.' This principle does not rest on any doctrine of estoppel but embodies the well established rule of common law that a man may not be put twice in peril for the same offence—*Chinna*, 29 Mad. 126 (F.B.). Where an offence has already been the subject of judicial investigation and adjudication, and there has been an acquittal, the acquittal is conclusive, and it would be a very dangerous principle to adopt to regard a judgment of not guilty as not fully establishing the innocence of the accused—*Rex v. Plummer*, [1902] 2 K.B. 339; *Lalit Mohan*, 38 Cal. 559 (578).

There is nothing like *res judicata* in a criminal trial as long as it does not terminate in either acquittal or conviction so as to attract the provisions of this section. Apart from this there is no law, authority or principle which would estop an accused person from showing that the act with which he is charged as penal did not constitute an offence and that on a right interpretation of the enactment under which he is sought to be penalised, it should be held that the Legislature never intended that any one placed in his position should be criminally liable. To debar him from this defence would be nothing short of a prohibition from proving his innocence and would amount to a clear denial of justice. Such a course is manifestly repugnant to the basic principle of all criminal jurisdiction—*Dewan Singh*, 37 Cr.L.J. 474 (477), 161 I.C. 635, 19 N.L.J. 84, 8 R.N. 219, A.I.R. 1936 Nag. 55, 1936 Cr.C. 367.

The principles underlying the English common law pleas of *autrefois convict* and *autrefois acquit* have been embodied so far as this country is concerned within the limits, however narrow they may be or have been stated to be, of the language of the statute itself. It would be bewildering and, indeed, might result in great injustice to the community at large if it is endeavoured to stretch the language or extend the principles in the way so as to give to the accused the benefit of the spirit underlying the provisions of sec. 403, Cr. P. C., rather than to apply the clear and precise words of the section itself—*Purnananda Das Gupta v. Emp.*, A.I.R. 1939 Cal. 65 (71), 68 C.L.J. 206, 179 I.C. 506, I.L.R. (1939) 1 Cal. 1, 40 Cr.L.J. 199.

There is no bar to proceedings being taken against a person under the Legal Practitioners Act (XVIII of 1879) after his conviction of a criminal offence as there is no question of any indictment or trial for the same offence under any other law and there is no question of punishing him over again for the offence—*Ram Govind*, 32 Cr.L.J. 1256 (1263), Ind Rul. 1931 Pat. 497, 134 I.C. 945, 12 P.L.T. 773, 1931 Cr.C. 897, A.I.R. 1931 Pat. 369 (F.B.).

Section 403 (1) will operate in cases covered by secs. 236 and 237, Cr. P. C., but will not operate in cases covered by sec. 235, sub-sec. (1), Cr. P. C.—*Ochharia*, A.I.R. 1933 Bom. 447 (448), 35 Bom.L.R. 985, 1933 Cr.C. 1406, 146 I.C. 587, 35 Cr.L.J. 112, 58 Bom. 23.

Decision of Civil Court:—"The higher grounds of public policy, in my opinion, undoubtedly necessitate the avoidance of conflict of decisions between Criminal and Civil Courts established for beneficent and good government. If I may be permitted to say so, with respect, I agree with the remarks of Heaton, J., in *In re Markur*, 41 Bom. 1, 33 I.C. 633, A.I.R. 1916 Bom. 163, 18 Bom.L.R. 185, 17 Cr.L.J. 153, on the subject to the following effect: "If we are to administer justice as a civilized country, if we are to avoid those conflicts between Civil and Criminal Courts which ordinarily must be fraught with evil and can produce no good, if, in short, we are to make the actual administration of justice in this country bear a proper relation to that which we profess it to be, then we cannot have Criminal Courts trying over again matters which have been thoroughly dealt with and finally decided by a Civil Court of competent jurisdiction. It may be that to this principle there would be rare exceptions founded on possibly, the discovery of new, cogent and important evidence. But

ordinarily that principle must prevail, and if that principle must prevail, then it is a matter of the first importance, of the very highest relevancy to show to a Criminal Court that the matter which the Criminal Court is asked to adjudicate on has already been fully dealt with by a Civil Court." For that purpose it is of great importance to scan the grounds of the decision of the Civil Court and consequently, the judgment of that Court becomes relevant and admissible. It was observed in *Agu Kumar Das v. Manazaddin*, 55 Cal. 290, 113 I.C. 181, A.I.R. 1928 Cal. 610, 30 Cr.L.J. 69, 48 C.L.J. 193, 32 C.W.N. 1173 (F.B.), that the civil and criminal law being products of the same Legislature it would be attributing an inconsistency to the Legislature to permit the Criminal Courts in the exercise of their limited jurisdiction to override or nullify the proceedings of Civil Courts. On grounds of public policy, harmony between the decisions of the two Courts must be secured. . . . It is also important to bear in mind the general principle of public policy usually invoked in reference to ratification of illegal and criminal acts resulting in the stifling of criminal prosecutions. Consistently with that principle, if the Civil Court's decree constitutes the composition of non-compoundable and felonious acts, the objections cannot be permitted to prevail against Crown prosecution," (*Per Wassoodew, J.*). ". . . I think it is essential to remember that there can be no estoppel of a criminal prosecution and no ratification of a criminal offence. It also seems to me that however necessary and desirable it may be, as a matter of public policy, to prevent conflicts between decisions of Civil and Criminal Courts, it is of far greater moment to the State that no non-compoundable offence should be left unpunished if it is possible to secure evidence to prove such offence. There can be, besides, no "relating back" in the case of an offence as a result of a civil proceeding which treats the act as the foundation of the civil claim, although the Criminal Court ought, as a rule, to take into consideration the Civil Court's judgment relating to such claim." (*Per Sen, J.*)—*Ramchandra Rango Saekar v. Emp.*, 40 Cr.L.J. 579, 181 I.C. 870, A.I.R. 1939 Bom. 129, 41 Bom.L.R. 98.

Though the civil suit and the prosecution may be based on exactly the same cause of action, the parties are, strictly speaking, not the same. The burden of proof is differently placed and different considerations may come in. The result may, therefore, be a conflict in decision. The risk of such conflict is one that is inherent in the division of causes into criminal and civil. The judgment of neither Court is binding on the other and each must decide the cause on the evidence before it. If they arrive at different conclusions, it is regrettable but unavoidable. The fact, therefore, that the matter in issue had already been decided in favour of the accused in a civil litigation between the same parties does not debar the Criminal Court from taking cognizance of the case and holding the trial—*Maung Po Nwe v. Ma Pwa Chone*, 41 Cr.L.J. 139 (141), 184 I.C. 842, A.I.R. 1939 Rang. 394, following *In re N. F. Markur*, A.I.R. 1916 Bom. 163, 33 I.C. 633, 17 Cr.L.J. 153, 41 Bom. 1, 18 Bom.L.R. 185, *Ramanamma v. Appalanarasayya*, 55 Mad. 346, 126 I.C. 348, A.I.R. 1932 Mad. 254, 1932 Cr.C. 184, 33 Cr.L.J. 307, 62 M.L.J. 230, 35 M.L.W. 176, Ind. Rul. 1932 Mad. 300, 1931 M.W.N. 1205 and *Traikynath Das v. Emp.*, 33 Cr.L.J. 441 (442), 59 Cal. 136, 137 I.C. 163, A.I.R. 1932 Cal. 293, 1932 Cr.C. 262, Ind. Rul. 1932 Cal. 275.

1086A. When the plea can be raised:—There is no rule of practice defining the proper time for raising a plea of *autre fois acquit* in this country. The artificial English rule against pleading double is certainly not to be applied. This section simply lays down the rule on which a plea of *autre fois acquit* or *convict* is founded; and it would seem that the rule could be invoked by an accused person at any stage of the proceedings—*John MacIver*, 37 Cr.L.J. 637 (640), 162 I.C. 592, 1936 M.W.N. 281, 43 M.L.W. 548, A.I.R. 1936 Mad. 353, 70 M.L.J. 635, 1936 Cr.C. 433 (F.B.).

Tests of the plea:—The question whether a particular trial is barred by reason of previous prosecution ending in conviction or acquittal is a question to be determined on the facts and circumstances of a particular case: one of the tests is whether the facts are same or not; but the true test is not so much whether the facts are the same in both trials as whether the acquittal or conviction from the first charge necessarily

involves an acquittal or conviction on the second charge. The provisions contained in sec. 403, Cr. P. C., are complete by themselves on the subject of the effect of previous acquittal or convictions and no question of inherent jurisdiction or the application of the rule of *res judicata* arises where there are specific provisions in the law—*Jitendra Nath v. Emp.*, A.I.R. 1937 Cal. 99 (113), 169 I.C. 977, 38 Cr.L.J. 818, 10 R.C. 69, following *Ram Sahay Ram v. Emp.*, A.I.R. 1921 Cal. 181, 57 I.C. 278, 21 Cr.L.J. 614, 48 Cal. 78, 24 C.W.N. 763; *Purnananda Das Gupta v. Emp.*, A.I.R. 1939 Cal. 65 (70), 68 C.L.J. 206, 179 I.C. 506, I.L.R. (1939) 1 Cal. 1, 40 Cr.L.J. 199.

1087. "A person":—*Person not tried at the first trial*:—This section bars a subsequent trial of the same person who had once been placed on trial for the same offence. But does it bar the trial of persons who had not been placed in the first trial but who were implicated in the offence committed by the accused who was placed in the first trial? According to *Bishun Das*, 7 C.W.N. 493, the principle of this section extends to such persons, and, therefore, where three out of five persons concerned in the same offence were at first placed on trial and acquitted, a subsequent trial of the remaining two persons for the abetment of the offence was barred by this section. But this ruling has been disapproved of in several other cases. Thus, where on a complaint charging a number of persons with several offences, only three were sent up for trial, and they were acquitted on the ground that the prosecution case was untrue, and subsequently other persons alleged to be implicated in the same offences were sent up, it was held (dissenting from *Bishun Das*, 7 C.W.N. 493) that the trial of these persons was not barred under this section—*Kokari Sardar v. Mehr Khan*, 37 Cal. 680; *Subal Chandra v. Ahadulla*, 53 Cal. 606, 30 C.W.N. 546, 27 Cr.L.J. 788. So also, where in a previous trial, two persons were acquitted by the jury of the offence of conspiring with a third person who was not placed on trial, it was held that the acquittal of those two persons did not operate as a bar to the trial of the third person as there were two others named and others unknown who were also alleged to have been members of the conspiracy—*Manindra*, 41 Cal. 754, 18 C.W.N. 580. Because an accused has been either acquitted or convicted there is nothing in law to prevent another accused being subsequently tried or acquitted even if the decision in the second trial differs from that of the original trial on exactly the same evidence. It is probable that on exactly the same evidence two equally competent Judges will arrive at the same conclusion, but it is the duty of a Court to decide a case on the evidence before it without being influenced by the fact that another Court has on the same evidence on a previous occasion come to a certain conclusion—*Awal Khan*, 37 Cr.L.J. 889 (890), 164 I.C. 145, A.I.R. 1936 Pesh. 152. See also *Hatim Mollah*, 10 C.W.N. 1031. But, in such a case, although the plea of *autre fois acquit* would not be available to the present accused, and the acquittal of another person would not bar the issue of process against the present accused, still the fact that another person accused upon the same facts of having been implicated in the same offence has been acquitted may properly be taken into consideration by the Magistrate in determining whether upon the materials before him there is sufficient ground for proceeding to issue process against the present accused—*Subal Chandra v. Ahadulla*, 53 Cal. 606, 30 C.W.N. 546, 27 Cr.L.J. 788. See also *Seshachalam v. Bapannayya*, 1933 M.W.N. 246 and *Singleton*, 29 C.W.N. 260, 41 Cr.L.J. 87, where it was held that the acquittal of a co-conspirator has no effect so far as the other conspirator is concerned, beyond suggesting that some of the evidence upon which one was convicted, was, in a different trial of another accused person, found unworthy of acceptance.

Person absent in the first trial:—Where a complaint against two accused A and B was dismissed, and the accused A who attended Court to answer the charge was acquitted, the acquittal would operate in favour of the other accused (B) also who was absent, and would bar fresh proceedings against him on the same facts—*Panchu v. Umar*, 4 C.W.N. 346. In this case the second accused was placed on trial, though he was absent on the day of hearing. But where out of three persons concerned in an offence, two persons were found and the third absconded and the two were placed on trial and

convicted, the case of the third, when found, should be heard and decided irrespective of the fact that there had been a previous trial and conviction of the other accused; the second trial is not barred by this section—*Ghure*, 36 All. 168, 12 A.L.J. 231, 15 Cr.L.J. 200.

1088. "Tried":—There must be a previous *trial* of the accused to bar a subsequent trial under this section. Where a complaint of a non cognizable offence was made before the Police, and the Magistrate did not take cognizance of that offence on the police report, there could not be said to have been a *trial* of that offence, and consequently a subsequent complaint of that offence is not barred by this section—*Govt. v. Shidapa*, 5 Bom. 405. So also, where a Magistrate after taking cognizance of an offence dismisses the complaint under sec. 203, there cannot be said to have been a *trial* of the accused; and it is open to the Magistrate to rehear the complaint—*Chinna*, 29 Mad. 126. So also, where no process had been issued against the accused, and no proceedings taken against them, but the Magistrate simply permitted the withdrawal of the charge-sheets against the accused, it was held that the withdrawal of the charge-sheets was no bar to fresh proceedings being taken against the accused by drawing fresh charge-sheets—*Muthia-Moopan*, 36 Mad. 315, 14 Cr.L.J. 559.

It is not necessary that there should be a *full* previous trial and an acquittal or conviction *on the merits*. Where the accused appears and answers to a charge but he is acquitted under sec. 247 for non-appearance of the complainant, he is said to be *tried* and acquitted (although there was no trial on the merits) and he cannot be tried again for the same offence—*Suraya v. Venkata*, 2 Weir 457; *Guggilapu Peddaya*, 34 Mad. 253; *Suku Ram v. Krishna*, 33 C.W.N. 260, 30 Cr.L.J. 585. The words "who has once been tried" means against whom proceedings have been commenced in Court, *i.e.*, against whom the Court has taken cognizance of the offence and issued process. Therefore, where the Police filed a charge-sheet against a certain person before a Magistrate and summons was issued, but before it was served the Public Prosecutor, with the consent of the Court, withdrew from the prosecution under sec. 494, and the accused was acquitted, it was held that the accused must be said to have been 'tried and acquitted' within the meaning of this section, and the acquittal barred a further trial for the same offence—*Dudikula Lal Sahib*, 40 Mad. 976. But in another Madras case it is held that the non-appearance of a complainant on the first day of hearing and the consequent acquittal of the accused under sec. 247 do not bar a retrial, because the accused cannot be said to have been 'tried' on the first complaint; the trial of an accused in a summons case cannot be said to begin until the particulars of the offence are stated to the accused under sec. 242, and where there is nothing in the record to show that any trial was commenced on the first complaint, sec. 403 would not bar the Court from taking cognizance of the second complaint—*Kotayya v. Venkayya*, 40 Mad. 977 (Note). See Note 1089 below. See also Note 798.

Irregularity in the first trial—If there is a gross irregularity or illegality in a trial, such trial will not operate as a bar to retrial of the accused for the same offence—*Shahabut*, 13 W.R. 42. But if the order of acquittal was passed in the first trial under a misapprehension of law, it would still operate as a bar to a second trial—*Bawa Manghnidas*, 4 S.L.R. 174, 11 Cr.L.J. 731, 8 I.C. 936. The absence of a charge does not make the trial illegal. Where the trial had otherwise been regularly conducted even though no formal charge had been framed, the order of acquittal would bar subsequent proceedings—*Gurdu*, 3 All. 129.

But where the first trial was conducted without any complaint at all, the trial was void *ab initio* and therefore a second trial is not barred—*Nanakram*, 19 Cr.L.J. 796 (Oudh). The trial of an accused under sec. 21 of the Bengal Food Adulteration Act (VI of 1919) without obtaining the sanction of the Municipality is not a *trial* at all. Consequently, the acquittal of the accused at such a trial does not bar a fresh prosecution after having obtained the necessary sanction—*P. Bantjee v. Bipin Bihary*, 30 C.W.N. 382, 27 Cr.L.J. 751, 95 I.C. 79, 43 C.L.J. 110, A.I.R. 1926 Cal. 691.

1089. Conviction or Acquittal:—This section bars a second trial when the accused is *acquitted* in the first trial, and not where he is simply *discharged*—*Parmeshwari v. Jagannath*, 17 A.L.J. 867. See also *Gaya Din*, 35 Cr.L.J. 570, 147 I.C. 1141, 11 O.W.N. 264, A.I.R. 1934 Oudh 235, A.I.R. 1934 Oudh , 1934 Cr.C. 765

What amounts to acquittal:—It is not necessary that there should be an acquittal *on the merits*; therefore, the withdrawal of the remaining charges under sec. 240 upon conviction on one of several charges, has the effect of acquittal, and bars a fresh trial on the same facts—*Okhoy v. Modhoo*, 19 W.R. 55. The non-appearance of the complainant in a summons case has the effect of acquitting the accused (sec. 247) and he cannot be tried again for the same offence—*Dulla*, A.I.R. 1923 All. 360, 74 I.C. 1054, 24 Cr.L.J. 862, 45 All. 58; *Nityananda v. Rakhahari*, 38 Cr.L.J. 196, 73 I.C. 910, A.I.R. 1924 Cal. 96, 24 Cr.L.J. 716; *Suku Ram v. Krishna*, 33 C.W.N. 260, 30 Cr.L.J. 585; *Panchu v. Umar*, 4 C.W.N. 346; *Ram Mahto*, 61 I.C. 59, 22 Cr.L.J. 331, 2 P.L.T. 170; *Kiram Sarkar*, 74 I.C. 719, 20 Pat.L.R. 10 (Cr.), A.I.R. 1924 Pat. 140, 5 P.L.T. 15, 24 Cr.L.J. 815; *Guggilapu Paddaya*, 9 I.C. 253, 9 M.L.T. 93, 12 Cr.L.J. 41, 34 Mad. 253; *Sinnu Goundan*, 38 Mad. 1028, 26 M.L.J. 160; *Suraya v. Venkata*, 2 Weir 457. The order of acquittal passed by the Magistrate under sec. 247, Cr. P. C., although the accused had not been served with a summons, is a good order and such an acquittal operates as a bar to any trial on the same facts—*Shanker Dattatraya Vaze v. Dattatraya Sadashiv Tendulkar*, 31 Cr.L.J. 1000 (1003), 126 I.C. 321, A.I.R. 1929 Bom. 408, 53 Bom. 693, 31 Bom.L.R. 795. Acquittal under sec. 247, Cr. P. C., though not an acquittal on the merits has the force of a complete acquittal for all purposes. A fresh and a separate trial on the same facts would be barred under sec. 403, Cr. P. C. The word "acquittal" under sec. 403 does not necessarily mean an acquittal because of the bar of further proceedings in the same way as an acquittal after trial on the merits—*Laxmi Prasad*, A.I.R. 1940 Nag. 357 (359), 1940 N.L.J. 399, 190 I.C. 467, 41 Cr.L.J. 919. Contra—*Kotayya v. Venkayya*, A.I.R. 1918 Mad. 212, 45 I.C. 257, 19 Cr.L.J. 497, 61 I.C. 59, 22 Cr.L.J. 331, 40 Mad. 977 (Note) cited in Note 1088. See also Note 798. The withdrawal of a summons-case by the complainant operates as an acquittal of the accused. A compromise under sec. 345 has the effect of acquittal—*Wali Asmal*, Ratanlal 519; *Hasta*, 1914 P.R. 29, 16 Cr.L.J. 81, 26 I.C. 993. The withdrawal of the Public Prosecutor from the case under sec. 494 (b) has the effect of acquitting the accused, and will bar a fresh trial—*Sivarama*, 12 Mad. 35; *Dudikala*, 40 Mad 976; *Mahadeogir*, 14 Cr.L.J. 135, 9 N.L.R. 26; *Menghraj*, 23 Cr.L.J. 306. But an order made under section 494 (a) is an order of *discharge* of the accused person and section 403 does not bar the entertainment of a fresh complaint—*Ramanand v. Ali Hassan*, 26 Cr.L.J. 129, 83 I.C. 689, A.I.R. 1924 Pat. 797; *Lari Chand v. Nirode*, 31 Cr.L.J. 1153, 127 I.C. 63, 34 C.W.N. 196, A.I.R. 1930 Cal. 369. See also Note 1301. This section does not bar a second trial even when, through mistake, an order of acquittal is passed under sec. 494 (a), Cr. P. C., instead of an order of discharge which can only be made under that section—*Tolladagu v. Mateli*, 43 Cr.L.J. 12, 140 I.C. 322, 36 M.L.W. 641, 1932 M.W.N. 1230, Ind. Rul. 1933 Mad. 850, A.I.R. 1933 Mad. 98, 1933 Cr.C. 129. The dismissal of a summons-case amounts to an acquittal—*Saifuddin*, 1917 P.W.R. 14, 18 Cr.L.J. 324. An order of acquittal under sec. 258 cannot be treated as an order of discharge; it is one of acquittal and bars a second trial of the same offence on the same facts—*Gandi Apparaju*, 43 Mad. 330, 21 Cr.L.J. 91.

Where a man is tried of a more serious offence and is convicted of less serious one he must be held to have been acquitted of the more serious offence and the acquittal cannot be set aside except upon an appeal filed by the Local Government—*Kishan Singh*, 50 All 722, 111 I.C. 332, A.I.R. 1928 P.C. 251, 29 Cr.L.J. 828, 55 I.A. 390, 5 O.W.N. 911, 28 M.L.W. 396, 1928 M.W.N. 749, 29 P.L.R. 575, 33 C.W.N. 1, 48 C.L.J. 397, 30 Bom.L.R. 1572, 55 M.L.J. 786, 26 A.L.J. 1099 (P.C.); *Motiram*, 38 Cr.L.J. 71 (72), A.I.R. 1936 All. 758, 165 I.C. 734, 1936 A.L.J. 1083, 1936 Cr.C. 999, 1936 A.I.R. 944, 9 R.A. 301. See also Note 1143 under the heading "Scope of re-trial".

An order of the Magistrate dismissing a complaint for non-examination of the

complainant under sec. 200, Cr. P. C., after the framing of the charge, does not operate as an order of acquittal so as to bar a second complaint on the same facts—*Ali Baux*, 35 Cr.L.J. 1177, 150 I.C. 1006, 1934 A.L.J. 648, 1934 Cr.C. 1084, A.I.R. 1934 All. 877, A.I.R. 1934 All. 624, 4 A.W.R. 213.

An order of discharge has to be taken as an order of acquittal when, in the circumstances, an order of acquittal was the only one that could legally be passed. Conversely an order that purports to be one of acquittal has to be regarded as one of discharge when under the provision of law that was applied, only a discharge order could be passed—*Tolladaga v. Match*, 34 Cr.L.J. 12 (13), 140 I.C. 322, 36 M.L.W. 641, 1932 M.W.N. 1230, Ind. Rul. 1932 Mad. 850, A.I.R. 1933 Mad. 98, 1933 Cr.C. 129.

But a wrong order of acquittal will not bar a subsequent trial under this section. If a Magistrate tries a warrant case as a summons-case and acquits the accused without framing a charge, such an order of acquittal will be treated as one of discharge only, and cannot operate as a bar to a re-trial—*Jadu*, 1886 A.W.N. 260; *Lajja Ram*, 1888 A.W.N. 96. If in a warrant case, before the charge is drawn up and the accused called upon to plead to it, the Magistrate erroneously acquits the accused, the acquittal amounts only to a discharge and does not bar a re-trial—*Robert Sheriff*, 6 W.R. 13. (But if the trial has been otherwise regularly conducted, the absence of a formal charge will not convert the order of acquittal into one of discharge, and the order of acquittal will bar a re-trial—*Gurdu*, 3 All. 129). Where a preliminary charge-sheet was laid by the Police before the Magistrate under sec. 107, against several persons, but the Police intending to withdraw it in order that they might present a fresh charge-sheet against some only of those included in it, the Magistrate permitted the withdrawal and endorsed on the charge-sheet that the accused were acquitted, it was held that such an endorsement was illegal, because neither an order of discharge nor one of acquittal could be passed in a case where no process has been issued against the accused; and, therefore, the Magistrate's order was no bar to fresh proceedings being taken on a second charge-sheet—*Muth'a Moopan*, 36 Mad. 315.

On the other hand, where a person who ought to have been acquitted, is erroneously ordered to be discharged only, the order of discharge will be treated as one of acquittal, and will bar a re-trial. Thus, where a Public Prosecutor withdraws from the case under sec. 494, after the frame of charge, the accused ought to be acquitted and not discharged; if, however, he is ordered to be discharged, he will be deemed to have been acquitted and a subsequent trial and conviction on the same facts is illegal and will be set aside—*Sitarama*, 12 Mad. 35. So also, where in a warrant case, the accused has pleaded to a charge, the Magistrate can either convict or acquit him; his order dismissing the case will be one of acquittal, and not one of discharge of the accused—*Jadubar*, 5 C.L.R. 259; *Hasta*, 1914 P.R. 29, 16 Cr.L.J. 81, 26 I.C. 993. See also *Chidambaram v. Ramaswamy*, 1933 M.W.N. 1278 cited in Note 798.

1180. The Crim.
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—*Nazir Ahmad*, 36 Cr.L.J. 202, 152 I.C. 884, A.I.R. 1934 All. 944, 1934 Cr.C. 1256.

An Appellate Court set aside a conviction and sentence on the ground that the Court below did not comply with the provision of sec. 360. It left the question of retrial to the District Magistrate. The District Magistrate held a retrial. Held that the order of the Appellate Court did not amount to an acquittal. It was passed on a consideration of a point of law only and without recording any finding on the merits of the case. Such an order did not bar the retrial of the accused by the District Magistrate—*Miajan*, 53 Cal. 192, 27 Cr.L.J. 733, 95 I.C. 61, A.I.R. 1926 Cal. 585, following *Madhab*, 46 Cal. 212. Where the Sessions Judge on appeal set aside the conviction under section 363, Indian Penal Code, and sent the case back to the trying Magistrate with a direction to commit the accused to the Sessions on a charge under section 366, Indian Penal Code, the Sessions Judge's order did not amount to an order of acquittal under section 363. Even, if the Judge used the word "acquitted"

it must be held to be merely an error, and did not bar a retrial—*Bajinath*, 33 Cr.L.J. 669, 138 I.C. 609, Ind. Rul. 1932 All. 488, A.I.R. 1932 All. 409, 54 All. 756, 1932 A.L.J. 483, 1932 Cr.C. 513 (515). Where the accused were charged under sec. 186, I. P. C., on a report which was sent by the Naib Nazir to the Munsif, who in his turn sent it to the Magistrate, but the Magistrate refused to treat the report as a complaint and "released" the accused, but directed the Naib Nazir to make a formal complaint, *held* that there was no trial at all, and the order of release did not amount to an acquittal, so as to bar a proper complaint subsequently filed by the Naib Nazir—*Nasir Sardar*, 34 Cr.L.J. 181, 141 I.C. 636, Ind. Rul. 1933 Cal. 153, 60 Cal. 149, 36 C.W.N. 1038 (1040), 1932 Cr.C. 893, A.I.R. 1932 Cal. 871. Where the Magistrate convicted the accused under secs. 20 and 29 (f) of the Arms Act, without passing any sentence under the latter section and the Sessions Judge set aside the conviction and sentence under sec. 20 on the ground that the Magistrate had no jurisdiction to try the accused under that section and set the accused at liberty, observing that if the Magistrate wished to proceed further in the matter he might commit the accused to the Court of Session, *held* that his order amounted to an order of discharge under sec. 19 (f) and this section could not operate as a bar to the prosecution of the accused under sec. 19 (f)—*Nagendra*, 33 Cr.L.J. 770, 36 C.W.N. 926, 1932 Cr.C. 636, A.I.R. 1932 Cal. 683, 139 I.C. 470, Ind. Rul. 1932 Cal. 628.

Burden of proof:—The burden of proof of previous conviction or acquittal is upon the party setting it up—*Raghnandan*, 1889 A.W.N. 8

1090. Court of competent jurisdiction:—The Council of Elders established under the Punjab Frontier Regulation (IV of 1873) is a Court of competent jurisdiction, for the purposes of this section, and a person convicted by such Council cannot be retried on the same facts—*Sarwar*, 1884 P.R. 30 Under the Burma Village Act, the village headman has the power to try as a Court an offence under sec. 294, I. P. C., and other offences. Therefore, a person who had once been tried by the village headman for an offence under sec. 294, I. P. C., is not liable to be tried again for the same offence—*Nga E*, 1 Rang. 499. A village Munsif in Madras is not a recognised tribunal under the Cr. P. Code, and consequently an acquittal by a village Munsif does not bar the trial of the accused by a Magistrate—*Rama Naidu v. Veerapuram Venkatasami*, 53 M.L.J. 102, 28 Cr.L.J. 507, 101 I.C. 891, 8 A.I.Cr.R. 178, A.I.R. 1927 Mad. 695.

It is necessary to a plea of *autre fois acquit* that the first Court should have had competent jurisdiction to try the offence, and therefore the conviction or acquittal of an accused by a Court not having jurisdiction is no bar to the institution of fresh proceedings against the accused on the same facts—*Protab*, 2 W.R. 9; *Robert Sheriff*, 6 W.R. 13. See also *Narayanaswami v. Karumbayiram*, A.I.R. 1934 Mad. 716, 1934 M.W.N. 1022, 1934 Cr.C. 1354, 36 Cr.L.J. 550, 154 I.C. 602, 58 Mad. 256. A trial by a Court not having jurisdiction is void *ab initio*, and the accused, if acquitted, is liable to be retried—*Husain*, 8 Bom. 307. But an illegal conviction is not the same as a conviction by a Court incompetent to try the case. So a second prosecution is barred under this section even when the previous conviction was illegal—*Ram Piyari*, 32 Cr.L.J. 731, 131 I.C. 373, A.I.R. 1931 Lah. 199, Ind. Rul. 1931 Lah. 469, 1931 Cr.C. 319. Where a conviction by a Magistrate who had no jurisdiction to try the offence is set aside by the Appellate Court, and that Court discharges the accused without ordering a retrial, this section does not bar fresh proceedings being taken in the proper Court—*Abdul Ghani*, 29 Cal. 412; *Hussain*, 39 All. 293. See also *Nagendra*, 33 Cr.L.J. 770, 36 C.W.N. 926, A.I.R. 1932 Cal. 683, 1932 Cr.C. 636, 139 I.C. 470, Ind. Rul. 1932 Cal. 628. But where an accused is tried and acquitted by a Court which on the face of it is a Court of competent jurisdiction in respect of the offence charged, his subsequent trial is barred by this section; and the second Court in which the accused is tried again is not entitled to impeach the competency of the Court which held the first trial on the ground that the presiding officer might, perhaps, have laboured under the disqualification prescribed by sec. 556. Until the order of acquittal passed by the first Court is set aside by some

competent Court, the man acquitted is entitled to plead it under sec. 403 in connection with any other proceeding that may be taken against him—*Darbari*, 8 A.L.J. 1129, 12 Cr.L.J. 575.

The trial of the accused by a Court in a *Native State* bars their trial by a Court in British India on the same facts and for the same offence—*Teja Singh*, 5 Lah L.J. 574.

The word "jurisdiction" refers not only to the character and status of the tribunal, but also includes *local jurisdiction* as laid down in secs 177-184 and 188. Therefore, previous acquittal of an offence by a Court having no local jurisdiction to try the offence is not a bar to the subsequent trial by a competent Court—*Shanker*, 53 Bom. 69, 30 Cr.L.J. 54 (56), 113 I.C. 70, 30 Bom.L.R. 1435, A.I.R. 1928 Bom 530. The Full Bench of the Madras High Court took a different view in *Rathnavelu v Iyer*, 34 Cr.L.J. 1080, 145 I.C. 878, 1933 M.W.N. 713, 38 M.L.W. 562, A.I.R. 1933 Mad. 765, 65 M.L.J. 529, 1933 Cr.C. 1372, 56 Mad. 996, following *Doraiswamy*, 30 Mad. 94. The Sind Judicial Commissioner's Court followed the view of the Full Bench of the Madras High Court in *Dhingano Khoso v. Gulsher Kambir Khan*, 38 Cr.L.J. 959 (960), 170 I.C. 314, A.I.R. 1937 Sind 179 where Davis, J. C., observed: "Therefore it appears to us, secs. 403 and 531, Criminal Procedure Code, must be read together and we must conclude that a Court is a Court of competent jurisdiction within the meaning of sec. 403, Criminal Procedure Code, where the finding, sentence or order of the Court could have been set aside under the provisions of sec. 531, Criminal Procedure Code, but has not in fact been so set aside. Section 531, Criminal Procedure Code, must be deemed to give jurisdiction to a Court which would otherwise lack it unless it appears that such lack of jurisdiction has in fact occasioned a failure of justice. Clearly it is not competent for a Court not acting under the provisions of sec. 531, Criminal Procedure Code, to say whether a failure of justice has or has not been occasioned. It was clearly not competent for the Resident Magistrate at Larkana to decide that the Sessions Court at Sukkur was not a competent Court within the provisions of sec. 403, Criminal Procedure Code merely because *ex facie* it lacked territorial jurisdiction."

Where the law requires a previous sanction (now complaint) under sec. 195 before a charge can be entertained by a Court, that Court is not a Court of competent jurisdiction until the sanction has been obtained or the complaint has been made. Therefore, the discharge or acquittal of the accused owing to want of such sanction (complaint) does not bar a subsequent trial of the accused for the same offence after the requisite complaint has been made or sanction obtained—*Ambaji*, 52 Bom 257, 109 I.C. 481, A.I.R. 1928 Bom. 143, 30 Bom.L.R. 380, 10 A.I.Cr.R. 288, 29 Cr.L.J. 545; *Jivan*, 27 I.C. 208, 13 A.L.J. 4, A.I.R. 1915 All. 114, 37 All. 107, 16 Cr.L.J. 144; *Samsuddin*, 22 Bom. 711; *Jivram*, 31 I.C. 351, A.I.R. 1915 Bom 203, 17 Bom.L.R. 831, 40 Bom. 97, 16 Cr.L.J. 761; *Fakir Mahomed*, 21 S.L.R. 1, 27 Cr.L.J. 1105 (1106), 97 I.C. 417, A.I.R. 1927 Sind 10; *Muhammad Yasin*, 5 Pat. 452, 95 I.C. 929, A.I.R. 1926 Pat 302, 7 P.L.T. 383, 27 Cr.L.J. 849 (850); *Chuhar v. Emp.*, 129 I.C. 224, A.I.R. 1930 Lah. 1055, 1930 Cr.C. 1231, 32 Cr.L.J. 253, Ind. Rul. 1931 Lah. 160; *Sanitary Inspector, Howrah Municipality v. Bepin Behary Ghosh*, 95 I.C. 79, A.I.R. 1926 Cal 691, 27 Cr.L.J. 751, 43 C.L.J. 110, 30 C.W.N. 382; *Ram Rakha*, 39 Cr.L.J. 960, 177 I.C. 894, 40 P.L.R. 501, A.I.R. 1938 Lah. 625, 11 R.L. 375, 1 I.R. 1939 Lah. 373. Therefore, where the accused was acquitted in the previous trial for the offence of forgery and cheating a Sub-Registrar, for which no sanction was obtained under sec. 195 before prosecution, the acquittal did not bar a subsequent trial for aiding and abetting cheating held after a formal sanction had been granted by the Sub-Registrar. The previous trial was not a trial by a Court of competent jurisdiction, since no sanction under sec. 195 was obtained before trial—*Jivan*, 13 A.L.J. 4, 37 All. 107. Contra—*Ganapathi*, 36 Mad. 308 (314), where it was held that the absence of a sanction or complaint did not affect the competency of the tribunal. But this decision has been disapproved of in almost all the cases cited above and by the Full Bench of the Madras High Court in *Mulhu Mooppan*, 38 Cr.L.J. 457, 167 I.C. 571, 9 R.M. 475, 1937 M.W.N. 17, 45 M.L.W. 226, 1 I.R. 1937 Mad. 664, A.I.R. 1937

Mad. 301, (1937) 1 M.L.J. 334 where Pandrang Row, J., has quoted the rule of English Law on the subject laid down in *Rex v. Marsham*, (1912) 2 K.B. 362, 81 L.J.K.B. 957, 107 L.T. 89, 76 J.P. 284, 28 T.L.R. 391, by Avary, J., as follows: "It is clear that in order to plead such a plea effectually—either a plea of *autre fois acquit* or *autre fois convict*—it must appear that the defendant has been legally convicted or legally acquitted, and it is laid down in Chitty on Criminal Law, 2nd Edition, Vol. I, page 445, that 'the point in discussion always is whether in fact, the defendant could have taken a fatal exception to the former indictment: for if he could, no acquittal will avail him.' King, J., also observed "The answers to these questions is in my opinion clear and is apparent on a perusal of sec. 530 of the Code. According to that section if any Magistrate 'not being empowered by law in this behalf' tries an offender, his proceedings shall be void. The Sub-Magistrate of Erode was certainly empowered by sec. 28 to try an offence under sec. 186, Indian Penal Code, but was he empowered to try these offenders for this particular offence? Clearly not, for sec. 195 prevents him from taking any notice whatever of the offence until a proper complaint is filed. His trial was, therefore, void. His charge was void. His judgment of acquittal was void. There is nothing which the accused can compel the Court to recognise in support of a plea under sec. 403." If the prosecution is defective for want of proper consent, the proceedings would be void and the complaint would be dismissed. The acquittal of the accused is obviously wrong, as that would prevent further proceeding even after the necessary consent is obtained—*Dr. Hori Ram Singh v. Emp.*, 40 Cr.L.J. 468 (475), 43 C.W.N. F.C. 50, A.I.R. 1939 F.C. 43, 1939 M.W.N. 497, 181 I.C. 317, 1939 O.L.R. 366, 1939 P.W.N. 429, 1939 M.Cr.C. 148, 50 M.L.W. 95, 20 P.L.T. 539, (1939) 2 M.L.J. Sup. 23, 41 P.L.R. 680

Where a complaint under sec. 182, I. P. C., was made by an officer who did not come within the description of sec. 195 (1), Cr. P. C., and the prosecution was withdrawn on account of this defect and the accused was acquitted, a second complaint by the officer described in sec. 195 (1) (a) is not barred under the provision of this section—*Mohendra*, 35 Cr.L.J. 686, 148 I.C. 437, A.L.R. 1934 Pat. 302, 15 P.L.T. 554, 1934 Cr.C. 882, A.I.R. 1934 Pat. 411, 6 R.P. 478.

No sanction is required for a prosecution under sec. 82 of the Registration Act, and, therefore, a Court has jurisdiction to try the accused for that offence, without a sanction—*Maung Saing*, 1 Rang 299, 25 Cr.L.J. 191 (following *Gopi Nath v. Kuldip*, 11 Cal. 566). But see *Hussain Khan*, 39 All. 293 and *Mohan Lal*, 19 A.L.J. 813, 22 Cr.L.J. 50.

While such conviction or acquittal remains in force :—This means 'as long as such conviction or acquittal is not set aside by a Court of Appeal or Revision.' If the conviction or acquittal is set aside by the Appellate Court, the result will be that the previous trial is annulled and the prisoner may be again put upon his trial—*Kali Churn*, 7 W.R. 2. So long as the conviction or acquittal is not set aside it will bar a second trial, even though the second Court considers that the acquittal in the first trial is not warranted by the evidence produced in the first trial—*Dwarkanath*, 7 W.R. 15 (22). So also, an acquittal of an offence arising out of certain facts under a wrong section will prevent a further inquiry into any offence based on the same facts, until that acquittal is set aside—*Ram Nath v. Ram Saran*, 26 O.C. 282.

Where the accused was acquitted of an offence, he cannot, as long as the order of acquittal remains in force, be deemed to have committed that offence. So the Sessions Judge cannot come to an adverse conclusion against him in respect of the same matter when deciding a subsequent appeal—*Munnoo*, A.I.R. 1933 Oudh 470, 35 Cr.L.J. 36, 146 I.C. 354, 1933 Cr.C. 1393, 10 O.W.N. 895, following *Ganesh*, 12 Cr.L.J. 94, 9 I.C. 511 (Lah.), *Sanalal*, 37 Born. 658, 20 I.C. 613, 14 Cr.L.J. 453 and *Lalit Mohan*, 38 Cal. 559, 10 I.C. 582, 12 Cr.L.J. 286.

1091. Retrial:—Where the jury is discharged under sec. 305, the accused may be retried under sec. 308; such a trial is not barred by this section. In such a case, the accused is being tried on the original indictment, and not 'tried again' The duty of the Court is to continue the trial of the accused before another jury, and this process

may continue, without the accused being 'tried again' under sec. 403—*Nirmal Kanta*, 41 Cal 1072. (Moreover, in a such a case, i.e., where the jury is discharged under sec. 305, the accused is neither convicted nor acquitted, and therefore his retrial is not barred under this section). But where the Appellate Court reverses the conviction and sentence without ordering acquittal or retrial, further trial of the accused for the same offences is barred under this section—*Simlan v Simlan*, 1933 M.W.N. 224.

An appeal or a revision is not a retrial, but a continuation of the same trial—*Jabanullah*, 23 Cal. 975 (1977); *Baluant*, 9 All. 134; *Bali Reddi*, 37 Mad. 119 (122); and, therefore, the Court of Appeal can convict the accused on a charge on which he has been acquitted by the first Court, or order a retrial on the same charge—*Krishna Dhan*, 22 Cal 377.

Before an Appellate Court passes an order for re-trial or commitment of the accused for trial, the conviction and sentence already passed have to be reversed. This reversal of the conviction and sentence does not amount to an acquittal such as is referred to in this section. This section does not bar a re-trial ordered by an Appellate Court under cl. (b) of sec 423, Cr P. Code—*Bahraichi*, 35 Cr.L.J. 1333, 158 I.C. 200, 1935 A.L.J. 1077. See Note 1143.

1092. "For the same offence":—The former conviction or acquittal is a bar to a second trial, if the offence is the same. Thus, a person charged with and acquitted of an offence under the Bombay Abkari Act (V of 1878) cannot subsequently be tried for the same offence—*Gustadji*, 10 Bom. 181 (182). An offence under sec. 5 of the Motor Vehicles Act, 1914 (reckless driving) and an offence under sec. 279, I.P.C. (rash driving on the public road so as to endanger human life) are the same, even though punishable under different Acts, and a person convicted of the former offence cannot be again charged with the latter—*Gur Narain*, 26 A.L.J. 160, 107 I.C. 687, 9 A.L.Cr.R. 99, A.I.R. 1928 All. 191, 29 Cr.L.J. 271. The accused was tried and convicted for an offence under the Railways Act. In that trial, although there was no charge for assault, the Court took into account the fact that the accused had committed an assault upon the complainant, and in consideration thereof inflicted a heavy sentence. The accused was subsequently charged under sec. 323, I.P.C., held that the second trial was illegal in as much as it was a trial for practically the same offence for which trial was illegal in as much as it was a trial for practically the same offence for which he had been already punished, though indirectly, in the first trial—*Ka.lashpati v. Gopi*, 33 C.W.N. 948 (949), 31 Cr.L.J. 613, 124 I.C. 69, A.I.R. 1930 Cal. 60, 1930 Cr.C. 12. The accused was at first charged with having forged pattahs A and B, but no mention of any charge as to pattah B was made in the order of commitment, and he was tried and acquitted on the indictment for forging pattah A. He was subsequently charged with having forged pattah B. Held that as the offence of forging pattah B was not the same offence as forging pattah A, the second trial was not barred, even though evidence was given at the first trial tending to show that both pattahs were forgeries. The Court before which the second trial is held has nothing to do with the evidence given in the former trial except for the purpose of ascertaining whether the offence which formed the subject of the first trial is the same as the offence which forms the subject of the second charge. If the offence is the same, the former conviction or acquittal is a bar to a second trial, whether the second Court considers that the former conviction or acquittal was warranted by the evidence given in the first trial or not. If the offence is not the same, the former conviction or acquittal is no bar to the trial upon the second charge, notwithstanding that the evidence given in the two cases is the same. Two distinct offences cannot be converted into one offence by reason of any evidence adduced upon the trial for one of them—*per Peacock, C.J.*, in *Duarkanath*, 7 W.R. 15 (20, 21).

The trial of the accused for the dishonest receiving or retaining of certain stolen articles bars a second trial of the accused in respect of other stolen articles found in his possession on the same date, in the absence of evidence to show that the different articles which were the subject of the charge in the two trials were received at different times—*Ganesh Sahu*, 50 Cal 594; *Bishun Singh*, 3 Pat. 503 (519), 5 P.L.T.

319, 25 Cr.L.J. 738; *Ishan Muchi*, 15 Cal. 511; *Makhan*, 15 All. 317. See also *Sheo Charan*, 45 All. 485, 24 Cr.L.J. 432. But the Sind Court dissents from those rulings and is of opinion that where properties are stolen on different dates, the presumption is that the properties passed from the hands of the thief to the receiver at different dates, and the burden lies on the accused to prove that they passed to him at one and the same time. In the absence of such proof, a prior acquittal of the receiver with regard to one item of stolen property does not bar subsequent trial in respect of a different item of property stolen on a different date—*Dadlomal*, 21 S.L.R. 154, 27 Cr.L.J. 1256 (1257), 98 I.C. 104, A.I.R. 1927 Sind 53.

Where the person has been tried for some offence and acquitted, he cannot be subsequently charged with *conspiracy*, of which that offence is alleged to form a part—*Lalit Mohan*, 38 Cal. 559. A different view seems to have been taken by the Allahabad High Court in *Ram Das*, 35 Cr.L.J. 1349 (1353), 151 I.C. 442, 1934 Cr.C. 130, 1934 A.L.J. 852, A.I.R. 1934 All. 61, where it has been laid down that there is nothing in the Indian Law to prevent an acquitted person, after his acquittal of a particular offence, from being charged with an offence of conspiracy. Only the evidence on which he has been acquitted cannot be received at a subsequent trial on a charge of conspiracy. But the previous conviction for the offence of criminal conspiracy cannot be a bar to a subsequent conviction for the offence of cheating merely because this act of cheating was considered in the previous case as one of the acts which was evidence of the conspiracy—*Ochhavlal*, A.I.R. 1933 Bom. 447, 35 Bom.L.R. 985, 1933 Cr.C. 1406, 146 I.C. 587, 35 Cr.L.J. 112, 58 Bom. 23. A person accused of conspiracy under sec. 121A, I. P. C., can be convicted of that offence, even if he had been convicted or acquitted of an overt act in regard to that conspiracy. The provisions contained in sec. 561A, Cr. P. C., relating to the saving of the inherent power of the High Court to prevent abuse of the process of any Court or otherwise to secure the ends of justice cannot be invoked in support of the position that the conviction or acquittal of the accused previously tried for commission of offences under the Indian Arms Act or under sec. 120B, I. P. C., can bar a prosecution under sec. 121A, I. P. Code—*Jitendra Nath v. Emp.*, A.I.R. 1937 Cal. 99 (114), 38 Cr.L.J. 818, 169 I.C. 977, 10 R.C. 69. The gist of the offence of conspiracy is the agreement of entering into the conspiracy. What sec. 403, Cr. P. C., merely lays down if it is a conspiracy matter to be considered—is that a man cannot be tried again for the particular entry into the conspiracy for which he has already been tried. Section 403 does not say, and indeed it would be clearly disastrous if it did say, that for any fresh entry into the conspiracy he cannot be tried. A person can, therefore, be tried again for any fresh entry into the same conspiracy—*Purnananda Das Gupta*, A.I.R. 1939 Cal. 65 (69), 68 C.L.J. 206, 179 I.C. 506, I.L.R. (1939) 1 Cal. 1, 40 Cr.L.J. 199.

The accused was charged under the provisions of sec. 222 (2) of this Code, for criminal breach of trust in respect of a gross sum of Rs. 18,924, alleged to have been misappropriated by him between 1st October 1921 and 1st March 1922. The charge was withdrawn with the leave of the Court and the accused was acquitted. He was subsequently charged with criminal breach of trust in respect of a sum of Rs. 100 on the 30th November 1921, which sum was not included in the previous sum of Rs. 18,924 and the facts relating thereto were not known to the prosecution at the time of the previous charge. *Held* that as the sum of Rs. 100 (the subject of the subsequent charge) was not included in the gross sum of Rs. 18,924 (the subject of the previous charge) the offence subsequently charged was *not the same* in respect of which the accused was previously acquitted; therefore, the previous acquittal did not operate as a bar to the subsequent trial of the accused—*Nagendra Nath*, 50 Cal. 632, 25 Cr.L.J. 156, 27 C.W.N. 578 (581), A.I.R. 1923 Cal. 654. For contra—see *Appadurai*, 17 Cr.L.J. 30, 32 I.C. 158. But where the prosecution knew perfectly well what was the gross sum in respect of which the accused had committed breach of trust, and they could have proceeded against the accused in the first trial in respect of the gross amount under sec. 222 (2), but instead of doing so they elected to proceed on three items and

got the accused convicted and then they picked up three other items and got the accused tried a second time, *held* that the second trial was not desirable, though not illegal—*Sidh Nath*, 33 C.W.N. 454 (457), 1929 Cr.C. 90 (91), A.I.R. 1929 Cal. 457, 57 Cal. 17, 49 C.L.J. 378, 124 I.C. 824, 31 Cr.L.J. 747, 57 Cal. 17, Ind. Rul. 1936 Cal. 472. After a trial in respect of a gross sum for which a breach of trust was alleged to have been committed between two specified dates a second trial in respect of an offence alleged to have been committed on intermediate days but not included in the gross sum is permissible. In certain cases the High Court can exercise its powers under sec. 439, Cr. P. C., and prevent a second trial for the ends of justice—*Brijwan Das*, 32 Cr.L.J. 376, 129 I.C. 558, 53 All. 411, A.I.R. 1931 All. 209, 1931 A.L.J. 98, 1931 Cr.C. 924. In a case of defalcation the prosecution should decide whether they are going to proceed against the accused for conspiracy or not. In the event of the prosecution deciding that a charge for conspiracy is not appropriate they can pick out three items from among the number of defalcations for the purpose of framing charges. In a trial upon three such charges it will undoubtedly be open to the prosecution to lead evidence relative to other items for the purpose of proving system. If, however, the prosecution decide that it is necessary to frame a charge of conspiracy they should frame one such charge covering all the items of defalcation which had been discovered up till then. The policy of splitting up the charges and the trials in respect of groups of three different items is contrary to good sense and unfair to the accused persons—*Jagdish Prosad Basu v Emp.*, 40 Cr.L.J. 90, 178 I.C. 576, A.I.R. 1938 Cal. 697, 43 C.W.N. 23. See also Note 726. The accused was tried for the offence of criminal breach of trust as a public servant in respect of a sum of money and acquitted. He was again tried for the same offence in respect of another sum misappropriated during the same period to which the former amount related and was convicted. *Held* that the previous acquittal did not operate as a bar to the accused's conviction at the second trial—*Kashinath*, 12 Bom.L.R. 226, 5 I.C. 970, 11 Cr.L.J. 337; *Seemakurti*, 32 Cr.L.J. 223, 129 I.C. 75, 32 M.L.W. 789, 59 M.L.J. 584, A.I.R. 1930 Mad. 978, Ind. Rul. 1931 Mad. 219, 1930 M.W.N. 1097, 1930 Cr.C. 1194. For the question of sentence in cases like these see *Mg Po Kywe v The King*, 40 Cr.L.J. 621, 182 I.C. 63, A.I.R. 1939 Rang. 152, 1939 Rang. 251 and *Jagdish Prosad Basu v Emp.*, 40 Cr.L.J. 90, 178 I.C. 576, A.I.R. 1938 Cal. 697, 43 C.W.N. 23.

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Second complaint by a different person:—A person once convicted of an offence cannot be tried again for the same offence and on the same facts, even though the complainant in the second case is not the same person as the complainant in the first case. Thus, the accused assaulted several persons A, B, etc. At first A filed a complaint against the accused, and they were convicted under sec. 323, I. P. C. Afterwards B filed a similar complaint against the same accused on the same facts. *Held* that the second trial was barred—*Ram Chandar*, 18 A.L.J. 83, 54 I.C. 772, 21 Cr.L.J. 164, A.I.R. 1919 All. 90.

Accused persons along with others presented a petition to the police against the complainant, who was a young girl aged about 17, and her father, alleging that his house was visited by persons of bad repute who drank liquor and committed debaucheries and were thus a nuisance to the people of the mohalla. The father of the complainant filed a complaint for defamation against the accused and other signatories of the application under sec. 500, I. P. C., which was eventually compounded upon the accused tendering an apology withdrawing their allegations. The accused were, therefore, acquitted. A second complaint was filed under sec. 500, I. P. C., by the girl with reference to the same application. *Held* that the previous complaint did not purport to be on her behalf and she being a minor, it could not, according to law, have been

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either instituted or compounded without permission of the Court, that the application made by the accused to the police contained matter which defamed both and consequently the complainant had an independent right to seek redress therefor in Civil and Criminal Courts and that sec. 403, I. P. C., was not a bar to the second complaint—*Mt. Harbans Kaur v. Lahari Ram*, A.I.R. 1938 Lah. 739, 178 I.C. 791, 40 Cr.L.J. 131, distinguishing *Ram Chandar*, supra.

"Same facts":—A Court ought not to decide that a charge pending trial before him is barred under this section without an investigation of the facts put forward on behalf of the complainant—*Radha Kishan v. Fatik Chand*, 23 C.W.N. 543, 22 Cr.L.J. 67. Where the complainant charges the accused before the Magistrate with a certain offence, and a preliminary objection is put forward on behalf of the accused that he had been previously tried on the same facts in another Court and acquitted, it is the duty of the Magistrate to hear the evidence and ascertain what are the facts in the two cases, in order to determine whether the facts in the present case are the same as those in the previous case—*M. N. Mukherjee v. Matangi Charan Palit*, 23 C.W.N. 599, 20 Cr.L.J. 572. Where the accused was charged in the former trial for an offence under sec. 401, I. P. C., but the charge failed because the approver's statement on which the prosecution was based was considered unreliable, a subsequent trial for an offence under sec. 413, I. P. C., is not barred by the provisions of this section, because the second trial is *not based on the same facts* as those on which the former trial proceeded. In the first trial the prosecution rested primarily on the approver's statement, but in the second trial the prosecution is based entirely on the evidence as to the discovery of the stolen property in the house of an accused—*Chhajju*, 26 P.L.R. 470, 26 Cr.L.J. 1097, 88 I.C. 185, A.I.R. 1925 Lah. 537. Where the prosecution of the accused rests on facts wholly and completely *different* from those on which he was previously prosecuted, the previous acquittal does not bar the subsequent proceedings, even though under the same section of the I. P. Code. Thus, the previous acquittal of an accused on a charge under sec. 498, I. P. C., is not a bar to subsequent proceedings under the same section on a charge of subsequent detention of the same woman, upon different facts—*Waryam*, 29 P.L.R. 52, 29 Cr.L.J. 3, 106 I.C. 339, 9 A.I.Cr.R. 315.

1093. Trial for a different offence upon the same facts:—The protection offered by this section extends to different offences only when they are based on the same facts and fall within the provisions of sec. 236 or sec. 237—*Subedar Krishnappa*, 1 Bom.L.R. 15; *Diwan Sahab v. Emp.*, 1938 M.W.N. 586, 47 M.L.W. 145. Where a person has been tried and convicted or acquitted for an offence arising out of a particular set of facts, he cannot, while such conviction or acquittal remains in force, be again tried in respect of any offence based on the same facts, unless the case can be brought under one or other of the specific exceptions to the rule provided by sub-sections (2) to (4)—*Mahadeogir*, 9 N.L.R. 26, 14 Cr.L.J. 135.

Examples—(1) A trial for the offence of theft of an animal bars a subsequent trial for the offence of mischief for subsequently killing that animal—*Madar*, 1 Weir 497. Similarly, where a person was tried for the offence of mischief and was acquitted on the ground that the tree in respect of which the mischief was alleged to have been committed was his own property, he cannot afterwards be tried for theft of the same tree on the same facts—*Erramreddi*, 8 Mad. 296.

(2) Where the accused with a body of people committed rioting and mischief to the trees of the complainant, and was at first tried for the offence of mischief alone and acquitted, *held* that he could not be tried again for the offence of rioting which was based on the same facts as the offence of mischief—*In re Chinnappa*, 19 L.W. 31, 25 Cr.L.J. 244, A.I.R. 1924 Mad. 478, 76 I.C. 708, 1924 M.W.N. 153.

(3) Where the accused have been tried and acquitted on charges of forgery and abetment thereof, they cannot afterwards on the same facts be prosecuted for offences under sec. 82 (c) of the Registration Act, since they could have been charged in the previous trial under sec. 82 of the Registration Act—*Maung Saing*, 1 Rang. 299, 25 Cr.L.J. 191, A.I.R. 1921 Rang. 213.

(4) A person acquitted of using criminal force cannot be tried for hurt on the same facts—*Kaplin v. Smith*, 16 W.R. 3.

(5) Where a person is convicted on a charge under sec. 411, I. P. C., of having been dishonestly in possession of property knowing it to be stolen, he cannot be subsequently convicted under sec. 414, I. P. C., of voluntarily assisting in concealing other property stolen on the same occasion from the same person—*Mian Jan*, 28 All. 313. The accused was charged before the Sessions Judge with the offence of abetment of theft; the Judge acquitted the accused but was satisfied that he had committed the offence of receiving stolen property (sec. 411, I. P. C.). The Judge, however, did not charge him with that offence, as he could have done under sec. 236 of this Code. Subsequently, the accused was charged with an offence under sec. 411, I. P. C., and put on his trial. Held that the second trial was barred under the provisions of sec. 403—*Pundalik*, 26 Bom. L.R. 440, 26 Cr. L.J. 831, 86 I.C. 479, A.I.R. 1924 Bom. 448.

(6) Where a person has been tried and acquitted on a charge under sec. 211, I. P. C., he cannot be tried again on a charge under sec. 182, I. P. C.—*Ganapathi*, 35 Mad. 308.

(7) A person acquitted on a charge under sec. 324, I. P. C., cannot be again tried on the same facts for an offence under sec. 323, I. P. C.—*Wali Asmal*, Ratanlal 519.

(8) A conviction under sec. 5 of the Motor Vehicles Act (VIII of 1914) for reckless driving bars a subsequent prosecution on the same facts under sec. 279, I. P. C., for rash driving on the public road so as to endanger human life—*Gur Narain*, 26 A.L.J. 160, 29 Cr. L.J. 271, 107 I.C. 687, 9 A.I.Cr.R. 99, A.I.R. 1928 All. 191. So also an acquittal for rash and negligent driving of a car precludes trial for driving the car without a license—*Maksudan*, A.I.R. 1921 Pat. 22, 59 I.C. 207, 22 Cr. L.J. 63, 2 P.L.T. 31.

(9) Where the prisoner was at first tried under sec. 498, I. P. C., for having enticed away a married woman from her husband, and was acquitted on the ground that the whole case was fabricated, and the prisoner was next charged and convicted under sec. 363, I. P. C., of having kidnapped two infants of the woman, who were with her when she left the house, it was held that the second trial was illegal, because so long as the acquittal under sec. 498, I. P. C., remained in force, the second Court was bound to take it as proved that the accused did not entice away the woman; and, therefore, the offence under sec. 363 alleged to have been committed while the prisoner enticed away the woman was disproved by the above finding of facts—*Ganesh Das*, 1911 P.L.R. 56, 12 Cr. L.J. 94, 9 I.C. 511.

(10) A person acquitted of the charge of cheating cannot be tried again for the offence of falsification of accounts, upon the same facts—*Nand Kishore*, 20 Cr. L.J. 667 (Patna). So also, the acquittal of cheating furnished a valid plea of *autrefois acquit* in bar of the accused being tried for criminal breach of trust on the same facts, even when the acquittal was under sec. 345, Cr. P. C.—*John MacIver*, 37 Cr. L.J. 637 (644), 162 I.C. 592, 1936 M.W.N. 281, 43 M.L.W. 548, A.I.R. 1936 Mad. 353, 70 M.L.J. 635, 1936 Cr.C. 433 (F.B.).

(11) The accused was tried under sec. 363, I. P. C., and acquitted. The Sessions Judge directed further inquiry to be made to ascertain whether offences under secs. 366 and 368, I. P. C., were committed. It was held that the order directing further inquiry was illegal, in as much as kidnapping (sec. 363, I. P. C.) is an essential element in offences under secs. 366, 368, I. P. C., and the accused having been already acquitted of the offence of kidnapping, he could not be put on trial again for offences under secs. 366, 368, I. P. C.—*Muhammad Saleh*, 20 Cr. L.J. 526 (Pat.).

(12) An acquittal of the prisoner on charges under secs. 380, 411, I. P. C., for being found in possession of a quantity of jute, bars subsequent proceedings in respect of the same act under sec. 54A of the Calcutta Police Act, because in the previous trial the charge of theft (secs. 380, 411, I. P. C.) might have been joined with a charge under sec. 54A of the Calcutta Police Act, under the provisions of sec. 236 of this Code—*Manhari*, 45 Cal. 727, 22 C.W.N. 199, 19 Cr. L.J. 198.

(13) Where the accused was acquitted of a charge of unlawful assembly with the

common object of assaulting a person, the District Magistrate is not justified in ordering a further inquiry into the offence of hurt on the same facts, while the order of acquittal remains in force—*Jaliram v. Raj Kumar*, 5 C.W.N. 72.

(14) Where a person was at first charged with kidnapping a minor girl, under sec. 363, I. P. C., but the trying Magistrate finding that the girl was not under sixteen, acquitted the accused, a second trial on the same facts for the offence of abducting the girl in order to confine her secretly (sec. 365, I. P. C.) was barred. The accused in the first trial might have been charged in the alternative with the second offence, under sec. 237 of this Code—*Kala Nath*, 24 C.W.N. 856, 21 Cr.L.J. 639.

(15) If a person charged under sec. 338, I. P. C., with having caused grievous hurt by rashly driving a motor car, was acquitted on the ground that it was not proved that he was driving the car, he cannot be subsequently tried under sec. 16 of the Motor Vehicles Act for the offence of driving the car without a license—*Maksudan*, 2 P.L.T. 31, 22 Cr.L.J. 63, A.I.R. 1921 Pat. 22.

(16) Where an accused was tried under sec. 408, I. P. C., for criminal breach of trust in respect of three sums of money alleged to have been dishonestly misappropriated, and it was part of the prosecution case at the trial that he had made three false entries to conceal the misappropriation, and he was acquitted by the jury, but was subsequently charged on the same evidence under sec. 477A, I. P. C. (falsification of accounts) in respect of the said three entries, it was held that he should not on the same facts be tried again for what were virtually the same offences charged in a different form—*Jhabbar*, 49 Cal. 924, A.I.R. 1923 Cal. 129, 72 I.C. 973, 24 C.L.J. 509. Where the accused was convicted under sec. 408, or in the alternative, sec. 408|109, I. P. C., but the Appellate Court held that the evidence did not establish that the accused had committed an offence under sec. 408 or sec. 408|109, I. P. C., and directed, at the same time, that a charge under sec. 477A, I. P. C., be framed against him and that he be committed to the Sessions, held that in view of the provisions of sub-secs. (1) and (4), sec. 403, Cr. P. C., it was not open to the Appellate Court to direct that, upon the same facts as the original charge under sec. 408 or sec. 408|109, I. P. C., had been based, the accused should be committed for an offence under sec. 477A, I. P. C., and the provisions of sec. 403 (2), Cr. P. C., did not warrant the committal of the accused upon a fresh charge—*Mahadeo Prasad v. Emp.*, 38 Cr.L.J. 368, 167 I.C. 360, A.I.R. 1937 All. 117, 1937 A.L.J. 2, 1937 A.L.R. 174, 9 R.A. 522, 1936 A.W.R. (H.C.) 1133.

(17) Where the accused were at first charged under sec. 193, I. P. C., and acquitted by the Magistrate, who dealt very exhaustively with the evidence and came to the conclusion that the culpability of the accused had not been established beyond reasonable doubt, and the accused were subsequently charged with offences under secs. 467 and 471 read with sec. 120B of the I. P. C., upon facts which were wholly inseparable from the facts upon which the previous case was proceeded with, held that the subsequent trial was barred by this section—*Cheraghali v. Satish*, 30 C.W.N. 384, 26 Cr.L.J. 1023, 87 I.C. 817, A.I.R. 1926 Cal. 450.

(18) The accused went into a Mahomedan grave yard and there cut down a tree. They were at first tried under sec. 297, I. P. C., for hurting the religious feelings of the Muhammadans by cutting down the tree, and were acquitted. They were subsequently prosecuted for theft of the tree. Held that the trial of the accused for theft, based on the same set of facts, was barred under sec. 403—*Fatfeh Muhammad*, 8 Lah. 52, 27 Cr.L.J. 1019 (1020), 96 I.C. 875, A.I.R. 1926 Lah. 639.

(19) The accused who was employed on a steamship assaulted the captain of the ship and was convicted of an offence under sec. 68, Calcutta Police Act. Subsequently the captain filed a complaint under sec. 103 (iv) of the Merchant Shipping Act against the accused on the same facts. Held that the second trial was barred. In fact the second complaint was for the same offence under a different enactment—*Alfred Laird*, 31 C.W.N. 195, 28 Cr.L.J. 233 (234), 99 I.C. 1033, A.I.R. 1927 Cal. 224.

(20) An accused person, who was acquitted of an offence under sec. 397, I. P. C., cannot, on the same facts, be tried again for an offence under sec. 307, I. P. C. Sec. 403,

Cr. P. C., bars the trial of the latter offence—*Penumatcha*, 35 Cr.L.J. 783, 148 I.C. 844, 1934 M.W.N. 41, 39 M.L.W. 433, A.I.R. 1934 Mad. 311, 66 M.L.J. 653, 57 Mad. 554, A.L.R. 1934 Mad. 1, 1934 Cr.C. 604.

(21) It would not be right or just, when the Court has once decided that there has been no failure to remove an encroachment and acquitted the accused, to make the same person liable to be tried again and again for failure to remove the same encroachment, simply because the same authority hopes to get a different decision by issuing one notice after another. Otherwise, there would be no end to such prosecutions—*Rangachariar v. Venkataswami*, A.I.R. 1935 Mad. 56, 1934 M.W.N. 1088, 40 M.L.W. 834, 67 M.L.J. 873, 36 Cr.L.J. 311, 153 I.C. 322.

(22) The acquittal of the accused on a charge under rule 21 of the Burma Forest Rules for having extracted teak timber without a license and under rule 71 for converting timber at a sawpit without a sawpit license, is a bar to the subsequent prosecution of the accused on the same facts for offences under secs 379 and 411, I. P. Code—*Yeok Kuk*, 6 Rang 386, 29 Cr.L.J. 930 (931), A.I.R. 1928 Rang. 252, 111 I.C. 850.

(23) The abduction and rape of the same woman are not so distinct that an acquittal on the first charge will not bar subsequent proceedings on the second. On the grounds of public policy too non-success in a prosecution for abduction ought not to entitle the prosecutrix to bring further evidence to support a rape alleged to have been committed during the pendency of the abduction in question, even when further evidence is relied upon. Such a proceeding is contrary both to good law and good sense—*Chit Hlaing Maung* 32 Cr.L.J. 205, 128 I.C. 843, A.I.R. 1930 Rang. 360, Ind. Rul. 1931 Rang. 59, 1933 Cr.C. 1238.

(24) The acquittal of the accused on a charge under sec. 41 (16), Rangoon Police Act, is equivalent to an acquittal on a charge of rioting—*Nga Myat Thaung*, A.I.R. 1935 Rang. 436, 1935 Cr.C. 1217, 159 I.C. 967.

(25) Where the accused was acquitted of an offence under sec 283, I. P. C., for creating an obstruction in the bed of a river by extending a tank and making banks, he cannot be subsequently tried under sec 76B of the Bengal Embankment Act (Act II of 1882, B.C.) for meddling with embankment—*Shib Chandra*, A.I.R. 1936 Cal. 686, 38 Cr.L.J. 1, 165 I.C. 847, 1936 Cr.C. 946, 9 R.C. 461.

But the previous trial for an offence founded on a particular set of facts does not bar a second trial for a different offence based on *different* facts. Thus, the previous acquittal on a charge of theft does not bar a subsequent trial for the offence of receiving stolen property, as the latter offence is supported by certain additional facts ascertained subsequent to the first trial—*Hatim Molla*, 10 C.W.N. 1031. An acquittal on the charge of murder does not prevent another trial upon a charge of robbery, because the two offences are so widely different that in the first trial for murder the accused could not have been convicted of the offence of robbery under the provisions of sec. 237 of the Code—*Walla*, 4 Lah. 373 (375). The accused falsely represented himself to be another and borrowed money by executing a mortgage of a property standing in the latter name, and subsequently falsely personated the latter in the Registration office for getting the mortgage registered. He was at first charged with cheating by false personation (sec. 419, I. P. C.) but acquitted. He was subsequently charged under sec. 82 (c), Registration Act. Held that the second trial was not barred, because the offence committed in the Registration office was a different and subsequent offence for which he could not in the first trial, under sec. 236 of this Code—*Me Tok*, 6 Bur.L.J. 201, 28 Cr.L.J. 908 (910), 105 I.C. 236, 6 Bur.L.J. 201, A.I.R. 1927 Rang. 303.

"For which a different charge might have been made":—Where a different charge could not have been framed on account of absence of a complaint under sec 195, Cr. P. C. in the first trial, a second trial in respect of that charge is not barred under this section—*Chuhar*, 32 Cr.L.J. 253, 129 I.C. 224, A.I.R. 1930 Lah. 1053, 1930 Cr.C. 1231, Ind. Rul. 1931 Lah. 160. This section protects a person against a trial for 'any other offence for which a different charge from the one made against him *might have been made*'; but where the offence for which he is to be tried again is the same

charge that was made against him in the first trial, the defence must fail. Thus, where the accused was charged in the first trial with the murder of A under sec. 302, I. P. C., as well as with culpable homicide of A under sec. 304, I. P. C., and was acquitted by the jury of the charge of murder, but the jury disagreeing as to the culpable homicide, the accused was retried for that offence, it was held that the second trial was not illegal, for a charge in respect of that offence had already been made in the first trial. If the accused had been charged with murder alone, no doubt a verdict of not guilty would protect him from another trial for culpable homicide; but where a charge of culpable homicide was also made, the case falls outside the provisions of the law dealing with cases where it 'might have been made'—*Nirmal Kanta Roy*, 41 Cal. 1072, 18 C.W.N. 723, 15 Cr.L.J. 460, 24 I.C. 340. Where the charge against the accused was only under sec. 302, I. P. C., and no charge under sec. 304, I. P. C., was framed against him, the second trial under sec. 304, I. P. C., is barred under this section—*Abla Isak*, A.I.R. 1931 Bom. 309, 55 Bom. 520, 134 I.C. 1219, 33 Cr.L.J. 62, 1931 Cr.C. 565, 33 Bom.L.R. 349.

Additional evidence :—If after the trial in which the accused has been acquitted, any additional evidence is available, but this evidence is of such a nature that it could not have affected the result of the first trial, it cannot be a ground for trying the accused again for any cognate offence for which he might have been charged in the first trial under sec. 236. The application of sec. 403 does not depend upon additional evidence being available or not. The prospect of getting additional evidence is not a ground for exceeding the principle of *autre fois acquit*—*Maksudan*, 2 P.L.T. 31, 22 Cr.L.J. 63, A.I.R. 1921 Pat. 22 (23).

1094. Sub-section (2) :—Sub-section (2) permits a second trial for a distinct offence for which a charge might have been framed under sec. 235 (1) as having been committed in the course of the same transaction.

The expression "distinct offence" means an offence entirely unconnected with a former offence charged—*Yeok Kuk*, 6 Rang. 386, 29 Cr.L.J. 930 (931), 111 I.C. 850, A.I.R. 1928 Rang. 252.

Examples :—(1) Where certain persons, after beating the inmates of a house, carried off a woman, and on the first trial they were charged under secs. 325 and 452, I. P. C., for house-trespass and grievous hurt, and convicted, it was held that such conviction did not bar a subsequent trial for the offence of abduction which had been committed in the course of the same transaction. The case fell under sec. 235 (1) and therefore under sub-sec. (2) of this section—*Baldeo*, 3 A.L.J. 2, 3 Cr.L.J. 93.

(2) A previous conviction for being in possession of counterfeit coins, under sec. 243, I. P. C., does not bar a subsequent trial under sec. 240, I. P. C., for passing other coins, knowing them to be counterfeit. They are two different offences—*Prasanna*, 31 Cal. 1007.

(3) The accused was at first tried on a charge of abetment of forgery of a document. He was again tried by the Sessions Court, in respect of the same document, for using as genuine a forged document. It was held that the previous acquittal was no bar to the second trial. The case was not governed by sub-sec. (1) of this section, in as much as the case was not one contemplated by sec. 236, there being nothing doubtful as to what should be the true view of the offence committed, the case fell under sub-sec. (2) of this section, because the two offences were distinct offences, and committed in the course of the same transaction within the meaning of sec. 235 (1)—*Jivram*, 40 Bom. 97, 31 I.C. 361, 16 Cr.L.J. 761, 17 Bom.L.R. 881. Where the accused was originally acquitted of cheating by filing a false affidavit he can be subsequently tried on the same facts for the offence of perjury or swearing a false affidavit as swearing a false affidavit and using that false affidavit are distinct offences even though they are parts of the same transaction—*Abdul Hamid*, 37 Cr.L.J. 492, 161 I.C. 763, A.I.R. 1936 Rang. 174, 74 Rang. 24, 1936 Cr.C. 271.

(4) The acquittal of an accused on a charge under sec. 400, I. P. C., does not bar the trial of the accused under sec. 395, I. P. C., for committing one of the dacoities

in respect of which evidence was given at the previous trial—*Subedar Krishnappa*, 1 Bom.L.R. 15.

(5) Where six documents were alleged to be fabricated at one and the same time, and at first the accused was tried for fabricating three of the documents and acquitted, a second trial for fabricating the other three of the documents was not barred. But in the circumstances of the case it was not desirable that the second trial should take place, as the fabricating of all the documents was treated in the first trial as one offence—*Inamullah*, 2 A.L.J. 673, 2 Cr.L.J. 790.

(6) A conviction for an offence under sec 5 of the Motor Vehicles Act, VIII of 1914 (reckless driving) does not bar a subsequent prosecution under sec 325 or 328, I P. C. (causing grievous hurt to a person in consequence of rash driving)—*Gur Narain*, 26 A.L.J. 160, 29 Cr.L.J. 271, 107 I.C. 687, 9 A.I.Cr.R. 99, A.I.R. 1928 All. 191.

(7) The conviction of the accused for an offence under the Excise Act does not prevent the accused from being subsequently tried for an offence under the Merchandise Marks Act, the two offences being distinct and committed in the course of the same transaction—*Croft*, 23 Cal 174.

(8) The conviction of the accused for committing affray (sec. 160, I. P. C.) is no bar to their trial and conviction for the offence of causing hurt (sec 323, I P. C.) committed in the course of the affray—*Ram Sukh*, 47 All 284, 23 A.L.J. 8, 26 Cr.L.J. 688, 86 I.C. 64, A.I.R. 1925 All 299. See also *Dodhee Kalu*, 118 I.C. 693, A.I.R. 1929 Bom. 451, 1929 Cr.C. 510, 30 Cr.L.J. 965, 31 Bom.L.R. 922, Ind. Rul. 1929 Bom. 469. Where the accused and others were acquitted of the charge of affray, he can be tried for an offence of causing hurt in the course of the same affray—*Sankatha Rai*, 37 Cr.L.J. 785 (Pat.) Where the accused was convicted of causing hurt under sec. 323, I. P. C., and in respect of the same conduct of being guilty of disorderly behaviour under sec. 3 (12) of the Madras Towns Nuisance Act (III of 1889) in two different cases, *held* that there was no bar to the trial of the one offence owing to the conviction in respect of the other—*Subbiah v Kandaswami*, 33 Cr.L.J. 522, 55 Mad. 788, Ind. Rul. 1932 Mad. 454, 137 I.C. 754, A.I.R. 1932 Mad 362, 62 M.L.J. 197, 1932 Cr.C. 295, 1932 M.W.N. 105, 35 M.L.W. 265.

(9) A complaint was preferred under secs. 352 and 504, I. P. C., but the Magistrate issued process upon the accused directing him to appear and take trial under sec. 352 only. The Magistrate acquitted the prisoner of the offence under sec 352, but being of opinion that on the evidence adduced a *prima facie* case of an offence under sec 504 had been made out, ordered process to issue directing the accused to appear and stand his trial under sec 504. It was held that sub-sec. (2) of this section applied and the retrial was not illegal—*Bijay Krishna v. Balai Chand*, 20 Cr.L.J. 43.

(10) The accused who were Police constables, committed rioting in the course of which they took several persons in custody. They were at first tried for wrongful confinement under sec. 342, I. P. C., in respect of the arrests made by them, and were acquitted; subsequently they were convicted of rioting under sec. 147, I. P. C. *Held*, that the second trial was not barred. The two offences fell under sec. 235 (1) of this Code—*Ram Sahay*, 48 Cal. 78, 24 C.W.N. 673, 21 Cr.L.J. 614.

(11) M sent a telegram to Mrs. P. in America asking her to send a certain sum of money wording the telegram as though it was despatched by P. M was prosecuted for an offence under sec. 420, I. P. C., but the case was compromised and M was acquitted. Subsequently, M was again prosecuted under sec. 468, I. P. C., and sec. 29, Telegraph Act. *Held* that M had committed three offences, *viz*, under sec. 468, I. P. C., when he wrote the telegram, under sec. 29, Telegraph Act, when he sent the false telegram, and under sec. 420, I. P. C., when Mrs. P received the telegram and sent the money; and all these offences having been committed in the same transaction, the previous acquittal of the offence under sec. 420, I. P. C., did not bar a second trial for offences under sec. 468, I. P. C., and sec. 29, Telegraph Act—*Mahomed Rafiq*, 25 S.L.R. 9, 1931 Cr.C. 734 (735), A.I.R. 1931 Sind 116, 134 I.C. 1004, Ind. Rul. 1931 Sind 156.

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(12) A person who has been convicted of theft (sec. 379, I. P. C.) in respect of a certain quantity of opium can be subsequently tried for illicit possession of the same opium under sec. 9 of the Opium Act (I of 1878)—*Deoki*, 48 All. 496, 24 A.L.J. 559, 27 Cr.L.J. 767.

(13) A person acquitted of the offence of causing hurt with a dangerous weapon (sec. 324, I. P. C.) can be subsequently tried for the offence of going armed with a dangerous weapon under sec. 19 (e), Arms Act—*Manjubhai*, 53 Bom. 604, 1929 Cr.C. 38, 30 Cr.L.J. 1059 (1061), 119 I.C. 641, 31 Bom.L.R. 536, A.I.R. 1929 Bom. 283, Ind. Rul. 1929 Bom. 513.

(14) Where a complaint was lodged under various sections particularly under secs. 453 and 379, I. P. C., and the Magistrate charged the accused under sec. 453, I. P. C. only and acquitted him and a second complaint was preferred, *held* that it was not barred under this section and it was not inappropriate and inexpedient to allow the accused to be prosecuted a second time for matters arising out of same set of facts as the complainant had no opportunity of having the matter investigated of which he complained under sec. 379, I. P. C.—*Ajodhya v. Kshitish*, 35 C.W.N. 1182.

(15) Where a police constable was acquitted of offences under sec. 223, I. P. C., and sec. 29 of the Police Act for negligently suffering a prisoner to escape from confinement and was subsequently prosecuted under Rule 77 (c) of the Police Manual which required a sentry on night duty to rouse the night officer for public service, *held* that sec. 403 did not bar the second trial as there were two distinct acts of omission, the acquittal for one not involving the acquittal for the other—*Balchand*, A.I.R. 1933 Pat. 670, 147 I.C. 773, 1933 Cr.C. 1492.

(16) The accused was committed to the Court of Session on two separate charges accusing him of two distinct offences, *viz.*, the offence of theft of a blank second class Railway ticket, punishable under sec. 380, I. P. C., and the offence of forgery in respect of certain entries alleged to have been made by him in that ticket with intent that fraud may be committed, punishable under sec. 467, I. P. C. The trial of the accused was proceeded with at first only in respect of the first offence and ended in acquittal. *Held* that the trial of the accused in respect of the second offence was one to which sec. 235 (1), Cr. P. C., applied—*Srirangachariar*, 35 Cr.L.J. 1503, 152 I.C. 154, 40 M.L.W. 586, 67 M.L.J. 583, A.I.R. 1934 Mad. 673, 1934 M.W.N. 994, 1934 Cr.C. 1307, 58 Mad. 178.

(17) Two separate Police *Challans* were sent up to the Magistrate, one for an offence under sec. 451, I. P. C., and sec. 42 of the Prisons Act and another under secs. 161|511, I. P. C., on the allegations that the accused had trespassed into the Presidency Jail in order to have communication with a prisoner and that thereafter he had offered a bribe to the European Warder of the said Jail. The case started on the former *Challan* was taken up first while the case which was started upon the latter *Challan* was adjourned *sine die*. After acquittal in the first case the second *Challan* was taken up and a charge was framed against the accused under sec. 161|116, I. P. C. *Held* that this section did not operate as a bar to the second trial as in the words of the sub-sec. (1) of this section, it might be said that no charge in respect of the offence under secs. 161|116, I. P. C., might have been made and the accused could not be convicted of the same offence which was expressly reserved for a separate trial and that the general principle of *autre fois acquit* was also inapplicable, because the fact that the accused was acquitted in the previous trial did not necessarily mean that the offence under sec. 161|116, I. P. C., was not committed—*Hira Lal*, 35 Cr.L.J. 1270, 151 I.C. 259, 1934 Cr.C. 352, A.I.R. 1934 Cal. 240, A.I.R. 1934 Cal. 12.

(18) The offence of abetment of forgery is plainly quite different from the offence of using as genuine a forged document. There is nothing either in law or in fact to prevent a man being innocent of the first offence and guilty of the second. Even, if one offence involve the other an accused cannot claim to be acquitted of both offences because the provisions of sec. 195, Cr. P. C., constitute a bar to his trial and conviction for one of them—*Ali Ahmad*, 34 Cr.L.J. 39, 140 I.C. 544, A.I.R. 1932 Cal. 545, 55 C.L.J. 336, 1932 Cr.C. 545, Ind. Rul. 1933 Cal. 11,

(19) In the course of a riot accused persons trespassed upon the lands of several tenants and caused damages to their crops. The accused were tried for rioting by damaging the crops of three of these tenants and were acquitted. *Held* that a separate offence of trespass and mischief could be charged in respect of each separate holding which was damaged and that there was no bar to the fresh trial of the accused for offences touching other holdings than those in respect of which they were definitely acquitted—*Ghana*, 31 Cr.L.J. 472, 123 I.C. 78, A.I.R. 1929 Pat. 710.

(20) The fact that the accused was found to be not guilty of the charge under sec. 376, I. P. C., cannot be said to be tantamount to an acquittal under secs. 376/511, I. P. C., as well—*Hanuman*, A.I.R. 1932 Cal 723 (725), 36 C.W.N. 1152, 1932 Cr.C. 728, 141 I.C. 622.

This clause applies when the case falls under sub-sec. (1) of sec. 235, and not to a case falling under sub-sec. (2) of sec. 235. Thus, a person who has been tried and acquitted of offences under secs. 201 and 202, I. P. C., cannot be tried again for an offence under sec. 176, I. P. C., based on the same facts. Such a case does not come under sec. 235 (1), but under sec. 235 (2), and, therefore, sub-sec. (2) of sec. 403 does not apply. It falls under sub-sec. (1) of sec. 403 and the second trial is barred—*Sharbekhan*, 10 C.W.N. 518; see also *Ghamandi v. Babu*, 1929 A.L.J. 1056, 1929 Cr.C. 491 (492).

(21) Where the accused might have been tried by the Chief Presidency Magistrate at one trial both under sec. 44 and sec. 45 of the Calcutta Police Act (Act IV of 1866) but was tried only under sec. 45 of the said Act, his failure to do so does not make the subsequent trial under sec. 44 of the said Act bad under the first clause of sec. 403, Cr. P. Code. The case is covered by the second clause of sec. 403, Cr. P. Code—*Kalicharan v. S. K. Brahmachari*, 42 C.W.N. 1232.

(22) The acquittal of a person on a charge under sections 379 and 411, I. P. C., is no bar to his being tried for an offence under the Forest Act Sandalwood Transit Rules, when the offence under the latter Act is established on the facts, and when the only doubt is whether an offence under the Penal Code is established—*Gurunatha Goundan v. Emp.*, 1937 M.W.N. 1247.

1095. Sub-section (3):—‘Constituted a different offence’:—The facts or circumstances must be such as to indicate a different kind of offence of which there could be no conviction at the first trial. It is not enough to show merely circumstances of aggravation or serious consequences of the offence which have occurred since the first trial. Where a person was convicted under sec. 31 of the Rangoon Police Act, 1899, for being in possession of an article supposed to be stolen, he cannot be tried subsequently for an offence under sec. 457, I. P. C., merely on the ground that the owner of the article is traced and some further evidence is available—*Nga Shwe*, 8 Bur.L.T. 129, 16 Cr.L.J. 267, 28 I.C. 155. The new evidence must constitute a different kind of offence, for which he could have been tried at the first trial.

‘Were not known to the Court’:—The new facts or consequences must have occurred since the conviction or acquittal at the first trial. Thus, where a person was at first tried for causing grievous hurt and convicted, and after the conviction the injured man died, it was held that the accused could be again tried for the offence of culpable homicide, since the consequence of hurt (i.e., the death) did not take place until after the first trial—*Sarbiland*, 1901 P.R. 3; *Salan*, 36 All. 4. The previous trial of the accused under sec. 307, I. P. C., was no bar to their subsequent trial under secs. 302/34, I. P. C., when the injured person died after the conviction of the accused in the previous trial—*Arsala Khan*, 36 Cr.L.J. 813, 155 I.C. 287, A.I.R. 1935 Pesh. 18, 1935 Cr.C. 191. So also where a person was acquitted of an offence under the Bombay City Municipal Act, for proceeding to erect certain balconies in contravention of the Act, he can be subsequently tried for failure to remove these balconies after notice, because the offence of non-removal of these balconies could not have been committed until the notice to remove them was served, and the service was made only after the previous acquittal—*Municipality of Bombay v. Javer*, 4 Bom.L.R. 575.

But if the new facts or consequences were known to the Court at the time of the first trial, a second trial for an offence constituted by these new facts would be barred. Thus, where the prisoner was at first tried for causing hurt, and before the trial and conviction for hurt the injured man died, and this fact was known to the Court which convicted the prisoner for hurt, he could not again be tried for homicide under this sub-section, though he might be tried again if the case fell under sub-section (4)—*Mahadeogir*, 9 N.L.R. 26, 14 Cr.L.J. 135.

1096. Sub-section (4):—*'Was not competent'*:—The words 'was not competent to try' mean 'had no jurisdiction to try'—*Krishna Aiyar*, 24 Mad. 641. Jurisdiction includes local jurisdiction; so if the previous Court had no local jurisdiction to try the subsequent offence, it was a Court "not competent to try" that offence within the meaning of this clause—*Shanker*, 53 Bom. 69, 30 Cr.L.J. 54 (56), 113 I.C. 70, 30 Bom.L.R. 1435, A.I.R. 1928 Bom. 530, Ind. Rul. 1929 Bom. 78. If a person has been acquitted or convicted of an offence, but the same facts disclose another offence which could not be tried by the same Magistrate who tried the first offence, then the previous acquittal or conviction is no bar to further proceedings for the latter offence—*Venkatarama*, 18 Cr.L.J. 643 (Mad.); *Palani Goundan*, 48 M.L.J. 490, 26 Cr.L.J. 1087, 88 I.C. 31, A.I.R. 1925 Mad. 711, 22 M.L.W. 205, 1925 M.W.N. 553. Therefore, where a Magistrate convicted the accused of rioting, a fresh complaint of dacoity based on the same facts was not barred, since the Magistrate who tried the offence of rioting was not competent to try the offence of dacoity—*Viran Kutti v. Chiyamu*, 7 Mad. 557. The prior conviction by a second class Magistrate for an offence under sec. 182, I. P. C., would be no bar to the subsequent trial by a first class Magistrate for an offence under sec. 211, I. P. C., since the latter offence was not triable by a second class Magistrate but only by a first class Magistrate—*Kannachampet Parangodan*, 2 Weir 482 (483). A person acquitted by a Second Class Magistrate of an offence under sec. 323, I. P. C., cannot subsequently be tried on the same facts under sec. 324, I. P. C., as that charge could have been framed by the Second Class Magistrate. The case is fully covered by Illus. (2) to sec. 403, Cr. P. C., and it does not come within paragraph 3 of the section—*Bhag Singh v. Emp.*, 39 Cr.L.J. 870, 177 I.C. 339, I.L.R. 1938 Lah. 127, 11 R.L. 298, 40 P.L.R. 1036, A.I.R. 1938 Lah. 614. But a previous conviction for the offence of causing hurt tried before a Magistrate does not bar a subsequent trial by the Sessions Judge of an offence under sec. 304, upon the same facts—*Bahinu*, 5 Bom.L.R. 125; *Gandi Apparaju*, 43 Mad. 330. A conviction by a Magistrate for a minor offence does not bar a subsequent trial for murder because the Magistrate was not competent to try the offence of murder—*Ladkia*, Ratanlal 337 (338); *Wadhawa*, 1912 P.R. 7. A person acquitted or convicted by a Magistrate under sec. 465, I. P. C., may on the same facts be tried by a Court of Session under sec. 467, I. P. C., on the allegation that the document said to have been forged was a valuable security—*Abdul Hakim*, 19 Cr.L.J. 388, 44 I.C. 740 (Cal.). When on a complaint made under secs. 409 and 477A, I. P. C., a second class Magistrate proceeded to deal with the case as one under sec. 408, I. P. C., and acquitted the accused, and the complainant afterwards presented a further complaint to the District Magistrate praying for the trial of the accused under secs. 409 and 477A, I. P. C.; it was held that the District Magistrate was competent to take cognizance of the second complaint, as the second class Magistrate who dealt with the first complaint was not empowered to commit the accused persons for trial to the Court of Session—*Krishna-dhone v. Mahendra*, 23 C.W.N. 518. The accused was tried and acquitted on a charge under sec. 498, I. P. C., for having taken away a girl from the custody of her mother with intent to have illicit intercourse with her. He was subsequently charged under secs. 363 and 366, I. P. C., for having kidnapped the girl from the lawful guardianship of her mother with intent to have intercourse with her. Held, that the plea of *autrefois acquit* would prevail with respect to the charge under sec. 363, but not with respect to the charge under sec. 366, as it was a Sessions offence which the Magistrate who tried the accused under sec. 498 was not competent to try—*Chhanu Prasad*, 10 P.L.T.

446, 29 Cr.L.J. 760 (761), 110 I.C. 792, A.I.R. 1928 Pat. 577, 11 A.I.Cr.R. 29. A person convicted by a village Headman under the Burma Village Act, for assault, can be tried subsequently by a Magistrate for the causing of hurt upon the same facts, the village Headman not being competent to try the offence of causing hurt—*Michit v. Mt Njun*, (1919) 3 U.B.R. 135, 20 Cr.L.J. 533, 51 I.C. 773.

If, however, the Court (Sessions Judge) which tried the previous offence was also competent to try the subsequent offence, the trial of the latter offence is barred by this section, and the fact that the first offence was triable with the aid of assessors and the second offence was triable by a jury, is immaterial—*Krishna Aiyar*, 24 Mad. 641. This sub-section refers to the competency of the tribunal to try the offence, and not to the nature of the offence, i.e., as to whether it is triable by jury or with assessors.

It was held in a Madras case that the words "competent to try" in this clause referred to the character and status of the tribunal, and that where the law required a sanction or complaint under sec. 195 before the Court could take cognizance of the offence, the sanction or complaint was not a condition of the competency of the tribunal but was only a condition precedent for the institution of proceedings before that tribunal; and that want of sanction or complaint did not make the Court incompetent to try the offence within the meaning of this clause if the Court was otherwise competent to try the offence—*Ganapathi*, 36 Mad. 308 (314). But this ruling has been disapproved of in 37 All 107, 52 Bom. 257 and several other cases. See these cases cited in Note 1090, *ante*. The words "competent to try" are equivalent to "in a legal position to have tried and acquitted or convicted". That is, they refer narrowly to the legal position of the Court at the time of the former trial in relation to the particular offence committed by the accused, and not broadly to the jurisdiction of the Court with regard to the class of offences in general—*Babu Lal v. Ram Saran*, 30 Cr.L.J. 806 (809), 117 I.C. 625, Ind. Rul. 1929 Pat. 433, A.I.R. 1930 Pat. 26. Thus, the absence of a proper complaint by the person specified under section 199 of this Code renders the Court "incompetent" to try the offence. Where a Magistrate dismissed a complaint of an offence under section 498, I. P. C., on the ground that the complaint was not made by the person specified under section 199, and acquitted the accused, it was held that the order of acquittal amounted to a finding that the Court was 'not competent to try the offence' in the absence of a complaint by the proper person, and, therefore, a fresh complaint instituted by the proper person (the husband of the woman) was not barred under this section—*Umeruddin*, 31 All. 317, 9 Cr.L.J. 526. Where the accused was first charged on a police-report under secs. 368 and 376, I. P. C., and acquitted, and subsequently, the husband of the woman preferred a complaint under sec. 498, I. P. C., on the same facts, and the accused was tried and convicted; it was held that the second conviction was not illegal, since the previous Court was not competent to try the accused under sec. 498 in the absence of a complaint by the husband—*Tikaram*, 17 Bom.L.R. 678, 16 Cr.L.J. 657.

Where a previous prosecution for an offence under sec. 171F, I. P. C., failed on the ground that sanction under sec. 196, Cr. P. C., was not obtained, a subsequent prosecution on the same facts and for the same offence is not illegal if it is launched after obtaining such sanction. In the absence of a sanction in the first trial, the first Court which tried the accused was not a Court of competent jurisdiction in respect of the offence, and the second trial is not therefore barred—*Ram Nath*, 24 A.L.J. 180, 94 I.C. 897, A.I.R. 1926 All 231, 27 Cr.L.J. 705. A prosecution for an offence specified in section 82 of the Registration Act cannot be commenced without the sanction of the officers mentioned in section 83 of that Act; and consequently, an acquittal in a previous trial for an offence under section 419, Indian Penal Code, when no such sanction under section 83 had been given, is no bar to a subsequent prosecution under sec. 82 of the Registration Act on such sanction being given. The Court in the previous trial was not competent to try the accused under sec. 82 of the Registration Act—*Mohan Lal*, 19 A.L.J. 813, 22 Cr.L.J. 50; *Hussain*, 39 All. 293. But see *Maung Saing*, 1 Rang. 299, 25 Cr.L.J. 191, A.I.R. 1924 Rang. 213; and *Gopi Nath*

v Kuldip, 11 Cal. 566. Where an accused charged under sec. 21 of the Bengal Food Adulteration Act, 1919 (Act VI of 1919) was acquitted on the ground that the sanction of the Municipal Commissioners was not obtained, and subsequently the sanction was obtained and another prosecution was launched, *held* that the previous acquittal did not operate as a bar to the fresh prosecution—*P. Banerjee v. Bipin*, 30 C.W.N. 382, 27 Cq.L.J. 751.

1097. "Explanation":—The Explanation to sec. 403, Cr. P. C., states that a dismissal of a complaint or discharge of the accused is not an acquittal for the purposes of this section. If the Legislature had intended to qualify this Explanation so that the dismissal of the complaint or the discharge of the accused is to be a bar to fresh proceedings on the same facts unless the order of dismissal or discharge is set aside by a higher Court, the Legislature would have said so either explicitly or by omitting the Explanation altogether—*Harbai v. Raya Premji*, 40 Cr.L.J. 745 (748), 183 I.C. 283, A.I.R. 1939 Sind 193 (F.B.).

It should be noted that whereas sub-sec. (1) says that a man who has been tried for an offence and convicted or acquitted shall not be liable to be tried for the same offence *while such conviction or acquittal remains in force*, there is no such qualifying words in the explanation. In other words, the meaning of the explanation is that the dismissal of a complaint or the discharge of the accused shall not amount to an acquittal and shall not bar subsequent proceedings, even though the order of dismissal or discharge remains in force and has not been set aside by a superior authority—*Ponnu-swami*, 55 Mad. 622 (F.B.), 62 M.L.J. 469, 33 Cr.L.J. 454 (456). See also the cases cited in Note 682 under sec. 203, Note 798 under sec. 247, Note 827 under sec. 253 and Note 854 under sec. 259.

What orders do not amount to acquittal:—(1) The dismissal of a complaint under sec. 203 is not an order of acquittal within the meaning of this section, and therefore upon such dismissal, it is competent for the Magistrate to entertain a fresh complaint or to re-hear the original complaint; see Note 681 under sec. 203. The explanation added to the section makes it clear that the dismissal of the complaint, or discharge of the accused is not an acquittal for the purposes of this section. This explanation, therefore, clearly implies that the retrial will not be barred if the complaint has been summarily dismissed or the accused has been discharged. The mere fact that there is a special procedure under which the District Magistrate or the Sessions Judge or the High Court can order further enquiry, does not necessarily mean that a fresh complaint is legally barred and cannot be entertained. An enquiry even on a second complaint whether after the accused has been discharged or the complaint has been summarily dismissed, is not absolutely barred—*Lallain*, 35 Cr.L.J. 1059, 150 I.C. 376, 1934 A.L.J. 241, A.L.R. 1934 All. 514, 1934 Cr.C. 614, 3 A.W.R. 571. The correct course for the complainant to adopt would be to make an application under sec. 436, Cr. P. C., without lodging a second complaint when the accused is discharged—*Phonsia*, 35 Cr.L.J. 128, A.I.R. 1935 All. 59, 152 I.C. 619. The dismissal of a complaint under sec. 204 (3) for non-payment of process-fee for summoning the witnesses does not amount to an acquittal and does not bar a fresh complaint—*Shcorajsai v. Dain*, 32 Cr.L.J. 603, 130 I.C. 825, A.I.R. 1931 Nag. 39, 27 N.L.R. 13, 1931 Cr.C. 233, Ind. Rul. 1931 Nag. 73.

(2) An order under section 249 stopping the proceedings of a trial has been specially excluded by the explanation from being an order of acquittal, and therefore it does not bar fresh proceedings—*Achhu*, 1913 P.R. 9, 13 Cr.L.J. 860.

(3) A stay of trial under sec. 240 has not the effect of acquittal of the accused. Where a Magistrate trying an accused for offences under secs. 193 and 204, I. P. C., convicted the accused under the former section, but with regard to the latter the Magistrate thinking that the facts constituted some other offences, ordered the papers to be placed before the District Magistrate, and later on the accused was again put on trial under sec. 204, I. P. C., it was held that the first disposal did not amount to an acquittal

but only to a stay of trial under sec. 240, and the subsequent trial was not barred by this section—*Raghunandan*, 1889 A.W.N. 8.

(4) Where the prisoner is released by the Appellate Court on the ground of illegal or irregular procedure in the Lower Court, the release is no bar to the retrial of the accused for the same offence—*Shahbut*, 13 W.R. 42.

Discharge of accused :—Section 403 applies only to cases of acquittal or conviction, and has no application to a case in which the accused person has been *discharged*—*Parameshwari v. Jagan Nath*, 17 A.L.J. 867, 20 Cr.L.J. 403, 51 I.C. 163.

It is competent for the Magistrate to rehear a complaint after the accused is discharged under sec. 253 or 259. See Notes 827, 852 and 854 under those sections. An order of discharge under sec. 333 is no bar to fresh proceedings—*Sheikh Idoo*, 49 Cal. 71; but see *Jitendra*, 52 Cal. 590, 26 Cr.L.J. 1397, 89 I.C. 709, A.I.R. 1925 Cal. 902. Where a person is discharged under sec. 119, he is merely permitted to depart. Such a discharge is not an acquittal, and fresh proceedings may be taken against the accused. See *Velu Tayi Ammal v. Chidambaramulu*, 33 Mad. 85; *Muthia In re Moopan*, 36 Mad. 315. Where a conviction by a Magistrate who had no jurisdiction to try the case is set aside on appeal, and the Appellate Court, without ordering a retrial, merely discharged the accused, this section does not bar a fresh trial by a competent Magistrate—*Abdul Ghani*, 29 Cal. 412; *Ram Reddi*, 3 Mad. 48.

But although there is nothing in law against the entertainment of a second complaint on the same facts against a person who has been discharged, yet, unless very strong grounds are shown, (*i.e.*, discovery of new facts, etc.), a person who has been charged once ought not to be harassed on the same charge—*Malayul*, 18 Cr.L.J. 329 (Mad.).

Where an order of discharge is passed, no formal order under sec. 436 or 437 is necessary for the institution of a fresh trial—*Mohesh Mistree*, 1 Cal. 282; *Donnelly*, 2 Cal. 405; *Hari Dayal*, 4 Cal. 16; *Nobin v. Russik*, 10 Cal. 268; *Dolegobind*, 28 Cal. 211; *Mir Ahmad v. Md. Askari*, 29 Cal. 726; *Mehrban*, 29 All. 7; *Gowdapa*, 2 Bom. 534; *Dorabji*, 10 Bom. 131; *Chinnathambi v. Gurusamy*, 28 Mad. 310; *Narayanaswamy*, 32 Mad. 220; *Alauddin*, 17 O.C. 273, 15 Cr.L.J. 638.

PART VII.

OF APPEAL, REFERENCE AND REVISION.

CHAPTER XXXI.

OF APPEALS.

404. No appeal shall lie from any judgment or order of a Criminal Court except as provided for by this Code or by any other law for the time being in force.

Unless otherwise provided, no appeal to lie.

1099. No appeal:—Ordinarily no appeal lies, except as otherwise provided by this Code or by any other special law. In a case in which no appeal lies from an order, the proper course is to make an application for revision—*Zahur v. Muhammad Hasan*, 1893 A.W.N. 147. Although the law may not allow appeal in certain cases, the High Court in the exercise of the powers vested in it as a Court of Revision, may, in those cases and on very exceptional grounds, act as an Appellate Court—*Sheikh Badrudin*, 8 Bom. 197. If an appeal is presented to the High Court in a case in which no appeal is allowed to the High Court, the case may be disposed of under its revisional powers, if the High Court finds that it is a proper case in which it may exercise its revisional jurisdiction. See *Rangai*, 9 Cal. 513.

Ordinarily no appeal lies, except as otherwise provided by Code of Criminal Procedure which contains no provision for appeal to the Privy Council. It is only in the power of the Judicial Committee of the Privy Council exercising the prerogative right on behalf of the Crown to entertain appeals in matters of criminal jurisdiction—*In re Joy Kissen Mookerjee*, 1 W.R. 13, (1861-63)-1 Moo.P.C. (N.S.) 272, 9 M.I.A. 168, 1 Suther. 481, 1 Sar. 860, 138 R.R. 522 (P.C.).

An appeal to the Privy Council lies only under very special and exceptional circumstances. It is not in every case in which it could be shown that the Judge had misdirected the jury, that an appeal will be allowed—*MacCrea*, 15 All. 310. The Criminal Procedure Code does not provide for an application for leave to appeal to the Privy Council being entertained by any High Court and such applications can only be entertained by Chartered High Courts under cl. 41 of the Letters Patent. When a person wishes to appeal from a decision of any High Court other than a Chartered High Court, the proper procedure is to apply to the Privy Council for special leave to appeal—*Thaprya*, 34 Cr.L.J. 931, 145 I.C. 246, A.I.R. 1933 Nag. 216, 1933 Cr.C. 798, 29 N.L.R. 340. See also *Dal Singh*, 44 Cal. 876, 15 A.L.J. 475, 19 Bom.L.R. 510, 21 C.W.N. 818, 33 M.L.J. 555, 18 Cr.L.J. 471 (P.C.) and *Shankar Ganesh*, 49 Cal. 845, 69 I.C. 367, A.I.R. 1922 P.C. 351, 18 N.L.R. 176, 27 C.W.N. 343, 1923 M.W.N. 528, 37 C.L.J. 136, 49 I.A. 319 (P.C.). Where an appeal is presented for the exercise of the royal prerogative either leave or a certificate from the tribunal which passed the appellate decision is not required as a preliminary step. The appellant may proceed direct, without an intermediate application to the High Court, to His Majesty in Council and there obtain leave to present his case. Clause 33, Letters Patent (Patna) has no application to such a case—*Rahman*, A.I.R. 1935 Pat. 65, 15 P.L.T. 833, 14 Pat. 318. The Bombay High Court has, however, held that before granting the certificate that the case is a fit one for appeal to the Privy Council, the High Court must be

satisfied that there is a reasonable ground for thinking that grave and substantial injustice may have been done by reason of some departure from the principles of natural justice—*Bal Gangadhar Tilak*, 33 Bom. 221, 10 Bom L.R. 973, 9 Cr.L.J. 226. Leave to appeal is not granted "except where some clear departure from the requirements of justice" exists [*Reil v. The Queen*, 10 A.C. 675], nor unless "by a disregard of the forms of legal process, or by some violation of the principles of natural justice or otherwise, substantial and grave injustice has been done" [*In re Dillet*, 12 A.C. 459, 56 L.T. 615, 35 W.R. 81, 16 Cox C.C. 241]. It is true that there are cases of applications for special leave to appeal, but the Board has repeatedly treated applications for leave to appeal and the hearing of criminal appeals as being upon the same footing [*Reil's case*, supra; *Ex parte Deeming*, 1893 A.C. 422]. The Board cannot give leave to appeal where the grounds suggested could not sustain the appeal itself; and conversely, it cannot allow an appeal on grounds that would not have been sufficient for the grant of permission to bring it. Misdirection, as such, even irregularity as such, will not suffice [*Ex parte Macrea*, 15 All. 310, 20 I.A. 90, 6 Sar. 344 (P.C.), 1893 A.C. 346]; *C. B. Plucknett*, 43 C.W.N. 133 (136), I.L.R. (1939) 1 Cal. 187, A.I.R. 1939 Cal 682, 184 I.C. 614, 41 Cr.L.J. 59. There must be something which, in the particular case, deprives the accused of the substance of fair trial and the protection of law, or which, in general, tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in future [*R. v. Bertrand*, 16 L.T. 752, 10 Cox C.C. 618 (1867)]—*Ibrahim*, 18 C.W.N. 705 (716), [1914] A.C. 599 (614); *Stephen Senviratne*, 41 C.W.N. 65 (68).

It ought to be understood very clearly in India that there is not a chance of the Judicial Committee turning itself into a mere Court of Criminal Appeal—*Taba Singh v. Emp.*, A.I.R. 1925 P.C. 59, 84 I.C. 935, 26 Cr.L.J. 391, 48 Bom. 515 (P.C.); *C. B. Plucknett*, supra. The Judicial Committee will not interfere with the course of criminal law unless there has been such an interference with the elementary right of an accused as has placed him outside the pale of the regular law or unless within that pale there has been so manifest a violation of the principles of natural justice that their Lordships are satisfied first, that the result arrived at was opposite to the result they themselves would have reached and, secondly, that the same opposite result would have been reached by the local tribunal even in the absence of an irregularity. The Judicial Committee will not intervene in the criminal administration of this country unless it can be shown that there is some violation of the principles of justice or some disregard of legal principles—*C. B. Plucknett*, supra. Although in very special and exceptional circumstances leave to appeal in criminal cases may be granted, misdirection by a Judge, either in leaving a case to the jury where there has been no evidence, or founded on an incorrect construction of the Penal Code, even if established, is insufficient for that purpose especially where no miscarriage of justice has resulted—*Ex parte Macrea*, supra; *C. B. Plucknett*, supra.

◁ The power of the Judicial Committee to review proceedings of a criminal nature is undoubted. But there are reasons both constitutional and administrative which make it manifest that this power should not be lightly exercised. The overruling consideration on the topic has reference to justice itself—*Channing Arnold*, 41 Cal. 1023, A.I.R. 1914 P.C. 116, 23 I.C. 651, 41 I.A. 149, 15 Cr.L.J. 309, 8 L.B.R. 16, 18 C.W.N. 785 (800) (P.C.). The Judicial Committee of the Privy Council does not lightly interfere in criminal cases; but where justice had been gravely and injuriously miscarried, and the sentence pronounced against the appeal formed an invasion of his liberty and denial of his just rights as a citizen, their Lordships felt called upon to interfere, although the proceedings taken were unobjectionable in form—*Louis Eduard Lenier*, 18 C.W.N. 98 (103), 15 Cr.L.J. 303, 26 M.L.J. 1 (P.C.). Where the High Court adopted the special procedure of an *ex officio* information (sec. 194) instead of the ordinary procedure of preliminary inquiry before a Magistrate and commitment, where the *ex officio* information did not contain a detailed statement of the charge, where the accused had not ample time and notice to prepare for his defence, where witnesses

who were available were not called, where copies of statements of prosecution witnesses were handed to the defence very late, and there were other irregularities, their Lordships interfered and set aside the conviction—*Dwarkanath Varma*, 14 P.L.T. 305, 37 C.W.N. 514 (531), 1933 Cr.C. 442, 34 Cr.L.J. 322 (P.C.).

The rule has been repeatedly laid down and invariably followed that His Majesty will not review or interfere with the course of criminal proceedings, unless it is shown that by a disregard of the forms of legal process or by some violation of the principles of natural justice or otherwise, substantial and grave injustice has been done—*In re Dillet*, (1887) 12 A.C. 459 (467); *Abdul Rahman*, 5 Rang. 53, A.I.R. 1927 P.C. 44, 100 I.C. 227, 54 I.A. 96, 6 Bur.L.J. 65, 29 Bom.L.R. 813, 31 C.W.N. 271, 52 M.L.J. 585, 25 A.L.J. 117, 28 Cr.L.J. 259 (P.C.); *Clifford*, 40 Cal. 568, 18 C.W.N. 374 (378) (P.C.); *Dal Singh*, 44 Cal. 876 (881) (P.C.); *Babulal Chokhani v. King-Emp.*, A.I.R. 1938 P.C. 130 (135), 65 I.A. 158, 32 S.L.R. 476, 1938 O.L.R. 189, 1938 O.A. 398, 1938 M.W.N. 505, 19 P.L.T. 343, 1938 A.L.R. 309, 10 R.P.C. 250, 4 B.R. 490, 39 Cr.L.J. 452, 67 C.L.J. 161, 40 Bom.L.R. 787, 42 C.W.N. 621, 1938 A.Cr.C. 27, 1938 O.W.N. 416, 1938 A.L.J. 382, 174 I.C. 1, 1938 A.W.R. (P.C.) 116, 1938 P.W.N. 320, (1938) 1 M.L.J. 647 (P.C.). In other words the Judicial Committee is not a Court of Criminal Appeal—*Babulal Choukhani v. King-Emp.*, supra; *C. B. Plucknett*, I.L.R. (1939) 1 Cal. 187, A.I.R. 1939 Cal. 682, 184 I.C. 614, 41 Cr.L.J. 59, 43 C.W.N. 133 (136), following *Rustom v. King-Emp.*, 48 Bom. 515 (516) and *Taba Singh v. King-Emp.*, 48 Bom. 515 (518), A.I.R. 1925 P.C. 59, 84 I.C. 935, 26 Cr.L.J. 391. The Board of Judicial Committee does not act as a Court of review of the decisions of a Court of Criminal Appeal, unless it can be shown that the error has led to injustice of a grave character—*Fakira v. Emp.*, 38 Cr.L.J. 498 (500), 167 I.C. 790, 39 P.L.R. 334, 1937 O.L.R. 216, 41 C.W.N. 741, 1937 M.W.N. 546, 9 R.P.C. 231, 1937 A.Cr.C. 74, 3 B.R. 426, 1937 O.W.N. 412, A.I.R. 1937 P.C. 119 (P.C.). In the region of fact, the Judicial Committee will not interfere unless something gross amounting to a complete misdescription of the whole bearing of the evidence has occurred—*Channing Arnold*, 41 Cal. 1023, 18 C.W.N. 785 (799) (P.C.). Where injustice of a serious character has occurred owing to the admission of a whole body of inadmissible evidence, their Lordships had to interpose—*Pillai*, 36 Mad. 501, 17 C.W.N. 1110 (P.C.). A mere mistake on the part of the Court below, as for example, in the admission of improper evidence, will not suffice, if it has not led to injustice of a grave character. Nor do the Judicial Committee advise interference merely because they themselves would have taken a different view of the evidence admitted. Such questions are, as a general rule, treated as being for the final decision of the Court below. Error in procedure may be of a character so grave as to warrant the interference of the Sovereign. Such error may, for example, deprive a man of the constitutional or statutory right to be tried by a jury or by some particular tribunal. Or it may have been carried to such an extent as to cause the outcome of the proceedings to be contrary to the fundamental principles which justice requires to be observed. But where the error consists only in the fact that evidence has been improperly admitted, which was not essential to a result which might have been come to wholly independently of it, the case is different. The dominant question is the broad one, whether substantial justice has been done, and if substantial justice has been done it is contrary to the general practice of the Board to advise the Sovereign to interfere with the result—*Dal Singh*, 44 Cal. 876 (882, 889), 15 A.L.J. 475, 19 Bom.L.R. 510, 21 C.W.R. 818, 33 M.L.J. 555, 18 Cr.L.J. 471 (P.C.). The extreme case in which the Judicial Committee would advise His Majesty to interpose is this, that it must be established demonstratively that justice itself in its very foundation has been subverted, and that it is, therefore, a matter of general Imperial concern that by way of an appeal to the King it should then be restored to its rightful position—*Channing Arnold*, 41 Cal. 1023, 18 C.W.N. 785 (803) (P.C.).

It is not for the Judicial Committee to interfere because its conclusion as to guilt or innocence might differ from the jury. But where there are no grounds on the

evidence taken, as a whole, upon which any tribunal could properly as a matter of legitimate inference, arrive at a conclusion that the Appellant was guilty and any conclusion on the available materials would be, and is, mere conjecture or guess, which are not, in law of justice, permissible grounds on which to base a verdict, it will interfere—*Stephen Seneviratne*, 41 C.W.N. 65 (78).

An appeal from the Federal Court should not lightly be admitted by the Privy Council, and should only be admitted if it arises in a really substantial case. Where the matter was anything but one concerned with the construction of a very exceptional section which would have no application in the future and it was a technical point, the Privy Council refused to grant leave to appeal—*Hori Ram Singh v. The King-Emp*, 44 C.W.N. 401, A.I.R. 1940 P.C. 54, 1940 O.W.N. 244, 1940 P.W.N. 232, 51 M.L.W. 407, 1940 M.Cr.C. 72, 1940 O.L.R. 190, 1940 M.W.N. 360, 187 I.C. 1, 1940 A.L.J. 205, 67 I.A. 122, 21 P.L.T. 327, (1940) 1 M.L.J. 706, 41 Cr.L.J. 413, 71 C.L.J. 307, 42 P.L.R. 392, I.L.R. 1940 Kar. 132, 42 Bom.L.R. 619, 6 B.R. 452, I.L.R. 1940 Lah. 413.

The right of appeal in criminal matters is a statutory one, and is primarily governed by the first sec. 404, Cr. P. C., which forms the commencement of this Chapter—*Kali Kumar Mitter v. Emp*, 38 Cr.L.J. 876, 170 I.C. 26, 10 R.C. 122, I.L.R. (1937) 1 Cal. 123, A.I.R. 1937 Cal. 413. See also *Kishori Singh v. Emp*, 38 Cr.L.J. 990 (1991), 170 I.C. 920, I.L.R. (1937) 2 Cal. 469, 10 R.C. 212, 41 C.W.N. 833, A.I.R. 1937 Cal. 394.

Period of limitation for appeal:—See Arts. 150, 150A, 154, 155 and 157 of the Indian Limitation Act, IX of 1908.

405. Any person whose application under section 89 for the delivery of property or the proceeds of the sale thereof has been rejected by any Court may appeal to the Court to which appeals ordinarily lie from the sentences of the former Court.

Appeal from order rejecting application for restoration of attached property.

'Court to which appeals ordinarily lie' means a Court to which appeals lie in the majority of cases, even though in a particular instance, the appeal may lie to another Court—*In re Anant Ram*, 11 Bom. 438.

406. Any person who has been ordered under section 118 to give security for keeping the peace or for good behaviour may appeal against such order—

Appeal from order requiring security for keeping the peace or for good behaviour.

- (a) if made by a Presidency Magistrate, to the High Court;
- (b) if made by any other Magistrate, to the Court of Session:

Provided that the Provincial Government may, by notification in the Official Gazette, direct that in any district specified in the notification, appeals from such orders made by a Magistrate other than the District Magistrate or a Presidency Magistrate shall lie to the District Magistrate and not to the Court of Session:

Provided, further, that nothing in this section shall apply to persons the proceedings against whom are laid before a Sessions

Judge in accordance with the provisions of sub-section (2) or sub-section (3A) of section 123.

1101. Change:—This section has been redrafted by sec. 109 of the Cr. P. C. Amendment Act, XVIII of 1923. The old section stood thus:—

"406. Any person ordered by a Magistrate other than the District Magistrate or a Presidency Magistrate to give security for good behaviour under sec. 118 may appeal to the District Magistrate."

The main changes introduced are:—(1) Under the old section an appeal was allowed only in a *good behaviour* case; no appeal lay from an order directing security to keep the peace—*Chet Ram*, 27 All. 623; *Har Datt*, 14 A.L.J. 268, 17 Cr.L.J. 165; *Baranasi v. Partab*, 11 A.L.J. 16, 35 All. 103; *Suleman*, 11 Bom.L.R. 740, 10 Cr.L.J. 375, 3 I.C. 774; *Shamrao*, 19 N.L.R. 160, 25 Cr.L.J. 67, A.I.R. 1924 Nag. 60. These cases are now over-ruled, and an appeal is now allowed from such order.

(2) Under the old law there was no appeal against an order of a *District Magistrate* or *Presidency Magistrate* directing security—*Phulla*, 1898 A.W.N. 127; under the present law, an appeal lies from the order of *any Magistrate*.

(3) Under the old law, the appeal lay to the *District Magistrate*; under the present law, it will ordinarily lie to the *Court of Session*, and in the case of orders by a Presidency Magistrate, to the High Court. The reason of this amendment has been thus stated: "All cases in the district relating to the breach of the peace and good behaviour are cases in which the District Magistrate is interested officially, and it is only fair that any order passed by a Magistrate should be revisable on appeal by an independent tribunal such as the Sessions Judge." *Legislative Assembly Debates*, 8th February 1923, pp. 2063, 2064.

The words "Provincial Government" and "Official Gazette" have been substituted for "Local Government" and "local Gazette", respectively, in this section by section 14 of the Government of India (Adaptation of Indian Laws) Order, 1937.

1102. Scope:—This section applies only to an order requiring security under sec. 118; an order directing security to keep the peace under sec. 106 is not appealable—*Rowtha v. Muthusamy*, 2 Weir 460.

Clause (b):—Under the old law, an appeal from an order passed by a Magistrate (other than the District Magistrate) lay to the Court of the District Magistrate and not to the Court of Session—*Mahendra*, 48 Cal. 874, 25 C.W.N. 383, 23 Cr.L.J. 229; *Mahendra*, 30 All. 47 (48); *Mahomed Shah*, 1 S.L.R. 98, 8 Cr.L.J. 356. Even an appeal from the order of an Additional District Magistrate lay to the District Magistrate and not to the Sessions Judge—*Mahendra*, 48 Cal. 874. Under the present law, the appeal will ordinarily lie to the Sessions Court; only under a special notification under the first proviso, the appeal will lie to the District Magistrate, even from an order by the Additional District Magistrate—*Jahangir*, 32 Cr.L.J. 819, 32 P.L.R. 453, 132 I.C. 206, 13 Lah. 251, A.I.R. 1931 Lah. 463.

Second proviso:—This proviso expressly lays down that the moment a reference is made to the Court of Session under sec. 123, it operates as a bar to an appeal. The reason is two-fold: first, since the Sessions Judge is seised of the case on the reference, any appeal to him is unnecessary; *Secondly*, if an appeal is allowed to the Court of the District Magistrate under the first proviso, there may be two different decisions, one by the District Magistrate on appeal, and another by the Sessions Judge on the reference. The principle of this proviso was also recognised under the old law, see *Qamar Din*, 23 Cr.L.J. 454 (1st.). See also *Fazal Mahomed*, 35 Cr.L.J. 936, 156 I.C. 284, A.I.R. 1933 Pesh. 55, 1935 Cr.C. 346; *Mangal Singh*, 28 Cr.L.J. 657 (659), 103 I.C. 139, A.I.R. 1928 Lah. 189.

If security is offered and accepted by the Magistrate after reference to the Sessions Judge under sec. 123 (2) Cr. P. C., the reference to the Sessions Judge, if not disposed of, would automatically come to an end when security is taken. At the same time

it follows that the right of appeal given under this section to the person from whom security is demanded revives once he has given security and if an appeal is preferred the fact that the appellant has been engaged in these proceedings should be taken into account by the Court or Magistrate hearing the appeal—*Muhammad Akbar*, 29 Cr.L.J. 236 (238), 107 I.C. 286, A.I.R. 1928 Lah. 64, 9 A.I.Cr.R. 490.

Where the order of a Subdivisional Magistrate under sec. 123 is confirmed by the Sessions Judge, the order passed by the Sessions Court becomes the operative order, and no appeal lies thereupon to the District Magistrate as it were from the order of the Subdivisional Magistrate—*Shew Gyan*, L.B.R. (1893-1900) 381. When a reference has been made to the Sessions Judge under sec. 123 and disposed of, no appeal lies to the District Magistrate—*Ida*, 1900 P.R. 15; nor even to the High Court—*Chand Khan*, 9 Cal. 878. Where a Sessions Judge has dealt with a case under the provisions of sec. 123, the order passed by him, whatever it may be, becomes the order in the case; and there is no longer an order by a Magistrate under sec. 118, which can be the subject of an appeal to the District Magistrate—*Amir Bala*, 35 Bom. 271 (274).

1102A. Duties of the Appellate Court:—It is settled law that a Court of Criminal Appeal dismissing an appeal summarily is not bound to write a judgment. The High Court has, however, always maintained a right to interfere, in the exercise of its discretion, where there was reason to suppose that the appeal had not received fair and adequate consideration. An appeal from an order requiring a person to furnish security to be of good behaviour is certainly distinguishable from an appeal against a conviction in respect of an offence specifically charged, where the only matter for consideration may be the credibility or otherwise of certain direct and positive evidence. In a case of furnishing security to be of good behaviour it is not unreasonable for the High Court to insist that the Appellate Court should not dispose of an appeal of this nature otherwise than by a judgment showing on the face of it that it had applied its mind to a consideration of the evidence on the record, of the pleas raised by the appellant, both in the Court below and in his memorandum of appeal—*Lal Behari*, 38 All. 393, 14 A.L.J. 445, 17 Cr.L.J. 309, 35 I.C. 485.

On an appeal from an order under sec. 110, Cr. P. C., it is the duty of the Appellate Court to look into the defence evidence, and, after dealing with it, to come to a decision, although no reference might have been made to it by the Counsel for the appellant during his arguments—*Fidoi Hossein*, 40 Cal. 376, 14 Cr.L.J. 419, 20 I.C. 403, 17 C.W.N. xx.

In an appeal from an order under sec. 107, Cr. P. C., the Appellate Court is competent to order a re-trial—*Bhagwat*, 27 Cr.L.J. 945, 96 I.C. 497, 48 All. 501, 24 A.L.J. 566, A.I.R. 1926 All. 403. The Lahore High Court seems to have taken a different view in *Chandan*, 30 Cr.L.J. 491, 115 I.C. 544, A.I.R. 1929 Lah. 28, 30 P.L.R. 416, Ind. Rul. 1929 Lah. 416, where it was held that a District Magistrate had no power to remand a case for fresh inquiry, while setting aside on appeal an order requiring a person to furnish security under sec. 110, Cr. P. Code. The Madras High Court seems to have taken the view adopted by the Lahore High Court. See *In re Narappa Reddy*, A.I.R. 1934 Mad. 202, 1933 M.W.N. 241, 145 I.C. 306, 34 Cr.L.J. 947. See also *Nasiban*, 49 I.C. 781, 20 Cr.L.J. 221; *Dayanath*, 33 Cal. 8.

See also the Note 273 where rulings regarding the requirements of an Appellate Court judgment have been quoted.

406A. Any person aggrieved by an order refusing to accept or rejecting a surety under section 122 may appeal against such order,—

(a) if made by a Presidency Magistrate, to the High Court;

(b) if made by the District Magistrate, to the Court of Session; or.

(c) if made by a Magistrate other than the District Magistrate, to the District Magistrate.

This section has been added by sec. 110 of the Criminal Procedure Code Amendment Act, XVIII of 1923. "We think that there should be a general right of appeal against the rejection of a surety, and we have provided for it in sec. 406A"—*Report of the Select Committee of 1916.*

407. (1) Any person convicted on a trial held by any Magistrate of the second or third class, or any person sentenced under section 349, or in respect of whom an order has been made or a sentence has been passed under section 380, by a Sub-divisional Magistrate of the second class, may appeal to the District Magistrate.

(2) The District Magistrate may direct that any appeal under this section, or any class of such appeals, shall be heard by any Magistrate of the first class subordinate to him and empowered by the *Provincial Government* to hear such appeals, and thereupon such appeal or class of appeals may be presented to such Subordinate Magistrate, or, if already presented to the District Magistrate, may be transferred to such Subordinate Magistrate. The District Magistrate may withdraw from such Magistrate any appeal or class of appeals so presented or transferred.

Change:—The italicised words have been added by sec. 111 of the Cr. P. C. Amendment Act, XVIII of 1923. A similar amendment is made in sec. 408 also.

The words "*Provincial Government*" have been substituted for "*Local Government*" in this section by sec. 4 of the Government of India (Adaptation of Indian Laws) Order, 1937.

1103. 'Convicted on a trial':—Since the word 'offence' as defined by sec. 4 includes an act in respect of which a complaint may be made under section 20 of the Cattle Trespass Act, a person against whom an order under sec 22 of that Act is made is a person 'convicted on a trial' within the meaning of this section, and an appeal against such conviction by a second or third class Magistrate lies under this section—*Ponnuswami*, 29 Mad. 517; see also *Rodriks v. Papa Dada*, 46 Bom. 58, 23 Bom.L.R. 236, 22 Cr.L.J. 624, 63 I.C. 160, A.I.R. 1922 Bom. 191.

Second or Third Class Magistrate:—If a 2nd class Magistrate after the hearing of the case is complete, is invested with first class powers and he convicts the accused in the latter capacity, he will be deemed to have held the trial as a second class Magistrate, and the appeal against his judgment in this trial will lie to the District Magistrate, and not to the Sessions Judge—*Nga Pira* 4 I.L.R. 239, 8 Cr.L.J. 48 (49); *Baramaddi*, 33 Cr.L.J. 516, 137 I.C. 854, A.I.R. 1932 Cal. 460, 36 C.W.N. 302, 1932 Cr.C. 450, Ind. Rul. 1932 Cal 394. The wording of this section ("trial held") shows that it is not the conviction by a second class Magistrate but the holding of trial by such Magistrate that determines the forum of the appeal—*Sheobhanjan*, *infra*. The Allahabad High Court supports the abovementioned view of the Calcutta High Court—*Bakshi Ram v. Emp.* A.I.R. 1938 All. 102, 1937 A.W.R. (H.C.) 1147, 1937 A.L.J. 1152, 1938 A.L.R. 164, 173 I.C. 663, 117 I.R. 1938 All 157, 39 Cr.L.J. 345. But see *Jalal*, A.I.R. 1937 Sind 22, 38 Cr.L.J. 350, 30 S.L.R. 456, 167 I.C. 75, 9 R.S. 162 where a contrary view has been taken. In a very recent case the Calcutta High Court dissented from the decision

in *Baramaddi*, supra, and held that, where a second class Magistrate was vested with first class powers before the date fixed for arguments in the case but after the evidence had been concluded, he could in passing sentence rely upon his first class powers and pass a sentence which only a Magistrate of the first class could pass and no appeal would lie to the District Magistrate and, if the sentence of fine imposed by the first class Magistrate did not exceed rupees fifty, no appeal would lie to the Sessions Judge either—*Bejoy Kumar v. Sita Nath*, 44 C.W.N. 677 (679), A.I.R. 1940 Cal. 540, I.L.R. (1940) 1 Cal. 519, following *Banwari Tewari v. Sheo Balak Rai*, 10 C.W.N. 243 (short notes). But where a Magistrate begins a trial as a second class Magistrate, but before hearing of the case is complete (e.g., before the examination and cross-examination of the prosecution witnesses is finished, or before a charge is framed), he is invested with first class powers, i.e., where part of the trial is held by him as a second class Magistrate and part as a first class Magistrate, the proper tribunal for hearing the appeal from his conviction is the Sessions Judge and not the District Magistrate—*Sheobhanjan*, 86 I.C. 978, A.I.R. 1925 Pat. 472, 29 C.W.N. 474, 3 Pat.L.R. 100, 6 P.L.T. 554, 26 Cr.L.J. 914 (915); *Babu Ram*, 8 Lah. 203, 28 Cr.L.J. 781 (782); *Durga Das*, 28 Cr.L.J. 50 (51), 99 I.C. 82 (Lah.); *Maganlal*, 29 Bom.L.R. 482, 101 I.C. 602, A.I.R. 1927 Bom. 366, 28 Cr.L.J. 474; *Venkatareddi v. Ramayya*, 51 Mad. 257, 29 Cr.L.J. 71, A.I.R. 1928 Mad. 55, 106 I.C. 583, 53-M.L.J. 733.

An appeal from a Bench of Magistrates invested with 2nd or 3rd class powers will lie under this section to the District Magistrate, even when the case was tried summarily—*Narayansami*, 9 Mad. 36. But if a Bench when sitting together is invested with first class powers, though consisting of second or third class Magistrate, an appeal from such Bench will not lie to the District Magistrate but to the Sessions Judge—*Havaldar v. Jagu Mian*, 9 Cal. 96.

1104. Sub-section (2):—Transfer by District Magistrate:—The District Magistrate may delegate his work of hearing appeals, but not any revisional work. Where a District Magistrate directed an Assistant Collector under him to perform all "routine work of the Collector's office including criminal, appellate and revisional work," it was held that as regards revisional works, such a delegation was *ultra vires*, because this section does not refer to work of that kind; but as regards appellate work, the delegation is valid—*Bai Harku v. Sitaram*, 2 Bom.L.R. 536.

Although the District Magistrate may delegate his work of hearing appeals (from orders of 2nd and 3rd class Magistrates) to a first class Magistrate, still the Court of this last mentioned Magistrate will not be deemed as an Appellate Court with reference to the Courts of the 2nd and 3rd class Magistrates—*Eroma*, 26 Mad. 656 (F.B.) (overruling *Subbaraya*, 18 Mad. 487); *Sadhu Lal v. Ram Churn*, 30 Cal. 394; *Mahim Chandra*, 56 Cal. 824, 33 C.W.N. 285 (288); *Anantharamayya v. Tukkadu*, 41 Mad. 787 (789).

An Additional District Magistrate is subordinate to the District Magistrate for the purposes of this sub-section, and the District Magistrate may transfer an appeal to the Additional District Magistrate. See sec. 10 (3).

The Court to which an appeal is transferred for disposal, and on which the responsibility for its correct disposal rests, is not bound by any opinion as to the necessity for taking further evidence formed by the Court from which the appeal was transferred and which is no longer responsible for the decision of the appeal.—*Alagu Ambalam*, 31 Mad. 277, 18 M.L.J. 89, 7 Cr.L.J. 329.

Even though a District Magistrate has transferred the appeal to a Sub-divisional Magistrate, the District Magistrate has jurisdiction to withdraw the appeal to his own file from the file of a Sub-divisional Magistrate, by whom it has been heard in part. Where such Sub-Divisional Magistrate has issued summons for the examination of certain witnesses as Court witnesses, it is not incumbent on the District Magistrate, on the withdrawal of the case to his own file, to examine those witnesses, as he is not bound by any opinion of the Sub-divisional Magistrate—*Alagu Ambalam*, supra.

408. Any person convicted on a trial held by an Assistant Sessions Judge, a District Magistrate or other Magistrate of the first class, or any person sentenced under section 349, *or in respect of whom an order has been made or a sentence has been passed under section 380*, by a Magistrate of the first class, may appeal to the Court of Session:

Provided as follows:—

(a) * * *

(b) when in any case an Assistant Sessions Judge or a Magistrate specially empowered under section 30 passes any sentence of imprisonment for a term exceeding four years, or any sentence of transportation, the appeal *of all or any of the accused convicted at such trial* shall lie to the High Court;

(c) when any person is convicted by a Magistrate of an offence under section 124A of the Indian Penal Code, the appeal shall lie to the High Court.

Change:—The italicised words have been added by sec. 112 of the Criminal Procedure Code Amendment Act, XVIII of 1923. Clause (a) which referred to European British Subjects has been omitted by the Criminal Law Amendment Act, XII of 1923.

Construction of this section:—This section grants the right of appeal and any restriction on that right of appeal must be strictly construed in favour of the subject. Any restriction that takes away a very substantial right must always be strictly construed and construed in favour of the subject—*Akabbar Ali*, A.I.R. 1931 Cal. 642, 35 C.W.N. 752, 134 I.C. 1196, 1931 Cr.C. 842, 33 Cr.L.J. 90, 59 Cal. 19.

1105. 'Convicted':—A person who is convicted but on whom no sentence is passed, the person being released on probation under sec. 562, is said to be 'convicted' within the meaning of this section and can appeal—*Manohar*, 1904 P.R. 24, 1 Cr.L.J. 1098; *Hayat*, 1917 P.R. 20, 18 Cr.L.J. 401; *Bahadur v. Ismail*, 52 Cal. 463, 29 C.W.N. 151, 85 I.C. 135, 41 C.L.J. 45, A.I.R. 1925 Cal. 329, 26 Cr.L.J. 455; *Madhav*, 27 Cr.L.J. 873, 96 I.C. 121, A.I.R. 1926 Bom. 882, 28 Bom.L.R. 671; *Mayandi v. Pala*, 36 Cr.L.J. 589, 154 I.C. 879, 1934 M.W.N. 1318, 41 M.L.W. 22, A.I.R. 1935 Mad. 157, 1935 Cr.C. 179, 58 Mad. 517. But see Note 1111 which deals with the question of appeal from an order of a Presidency Magistrate releasing the accused on probation under sec. 562.

If a Magistrate of the first class convicts a person and passes an order under sec. 562 in a *summary* trial, sec. 414 will not apply but the case will be governed by this section, and an appeal will lie to the Sessions Judge—*Hira Lal*, 46 All. 828 (830), 22 A.L.J. 751, 82 I.C. 172, A.I.R. 1924 All. 765, 25 Cr.L.J. 1244. This section gives a right of appeal immediately a conviction is recorded under sec. 562, Cr. P. C., without waiting for the passing of the subsequent sentence, if any. It confers upon the accused the right of appeal against their convictions, notwithstanding the fact that they have not yet been sentenced and that right is not taken away by sec. 414, Cr. P. C., which does not apply to such a case—*Shankar Sukul v. The King*, A.I.R. 1940 Rang. 223, 41 Cr.L.J. 877, 190 I.C. 226, 1940 Rang.L.R. 381, following *Mt Shwe Nyun v. King-Emp.*, (1904) 1 U.B.R. 7, 1 Cr.L.J. 543 and *Ma Chit Su v. King-Emp.*, (1909) 5 L.B.R. 129, 4 I.C. 1027.

An Ordinance (e.g., Ordinance III of 1914) is a law, and an infringement of its provision is an offence. A person convicted of such offence by a District Magistrate may appeal to the Sessions Judge and the latter has jurisdiction to hear the appeal—*Sher Singh*, 1916 P.R. 10, 17 Cr.L.J. 225 (226)

A person who is directed by a 1st class Magistrate to pay compensation under sec. 22 of the Cattle Trespass Act can be said to be convicted of an offence, and the appeal from his conviction is governed by this section—*Rodricks v. Papa Dada*, 46 Bom. 58, 23 Bom.L.R. 836, 22 Cr.L.J. 624, 63 I.C. 160, A.I.R. 1922 Bom. 191.

"Trial" :—If a trial is commenced by a second class Magistrate, but during the course of the trial and before the hearing is complete, he is invested with first class powers, the trial is said to be held by a first class Magistrate, and the appeal lies to the Sessions Judge. See *Shcobhanjan Sing*, 6 P.L.T. 554 and other cases cited in Note 1103 under sec. 407. See also Note 1107.

Sentence under section 349 :—When a case is referred to a District Magistrate under sec. 349, the fact that he is also invested with special powers under sec. 30 will not empower him to pass a sentence of five years' imprisonment; such a sentence is *ultra vires* having regard to the last clause of sec. 349. The appeal in such a case will lie to the Court of Session and not to the High Court under proviso (b)—*Nga Pya*, 4 L.B.R. 53, 6 Cr.L.J. 289. See also *Ragha*, 7 Bom.H.C.C.C. 31.

Sentence under section 380 :—Where proceedings were submitted under sec. 380 by a second class Magistrate to a first class Magistrate, in order that the accused might be dealt with under sec. 562, and the latter convicted and sentenced the accused, and the question arose under the old law as to whether an appeal lay to the Sessions Judge or to the District Magistrate, it was held that the sentence passed by the first class Magistrate under sec. 380 in a case submitted to him was unquestionably a sentence passed by such Magistrate, and the appeal lay to the Court of Session—*Bhimappa*, 17 Bom.L.R. 895, 16 Cr.L.J. 738, 31 I.C. 338. This is now expressly laid down in the present section as amended.

1106. Court of Session :—Where a Magistrate was authorised to try all offences throughout the whole District, and there were two Sessions Divisions in the District, an appeal from a sentence of the Magistrate will lie to the Sessions Division within whose jurisdiction the Head quarters of the Magistrate were situate, irrespective of the place where the offence was committed—*Valia Ambu*, 30 Mad. 136; *Hiralal*, 1918 P.R. 7, 19 Cr.L.J. 310.

Appeal heard without jurisdiction :—Where an accused person was acquitted by a Sessions Judge in an appeal which he had no jurisdiction to hear, he may be re-arrested even after the expiration of the period of which he was originally sentenced to be imprisoned, and may be made to undergo the remaining portion of the sentence—*Gopala Shiru*, Ratanlal 17 (18).

1107. Proviso (b) :—The reason for this proviso obviously is that when a long term of imprisonment has to be undergone, the question whether the offence is proved should be tried in appeal by a Court of a higher grade than it would be tried by if the sentence were less—*Nga Pya*, 4 L.B.R. 53, 6 Cr.L.J. 289. The sentence of imprisonment exceeding four years in this proviso must be taken to mean the substantive sentence of imprisonment apart from any sentence of imprisonment in default of fine. Therefore, an appeal from a sentence awarding 4 years' rigorous imprisonment and a fine of Rs. 100, and in default of fine, to six months' rigorous imprisonment, lies to the Court of Session and not to the High Court—*Khuda Baksh*, 1918 P.R. 19, 19 Cr.L.J. 742; *Nga Tun Tha*, 1 L.B.R. 57. An appeal from a sentence of four years' rigorous imprisonment and whipping by an Assistant Sessions Judge should be filed in the Court of the Sessions Judge and not in the High Court. The mere fact that the accused has been sentenced to whipping does not alter the position. The phrase "sentence of imprisonment for a term exceeding four years" in this clause has a reference to the substantive sentence of imprisonment apart from any sentence of whipping or fine or imprisonment in default of fine—*Kajjan*, 35 Cr.L.J. 1288, 151 I.C. 289, 11 O.W.N. 11 1934 Cr.C. 1311, A.I.R. 1934 Oudh 433.

An appeal from a conviction and sentence of less than 4 years' imp Assistant Sessions Judge lies to the Sessions Judge and not to the

because by the time the appeal is filed the Assistant Sessions Judge has been promoted to the position of Officiating Sessions Judge (and is therefore incompetent to hear the appeal against his own order). The proper procedure in such a case would be to file the appeal before the Officiating Sessions Judge who on receipt of the appeal would either send it to the High Court or would postpone its hearing till the return of the permanent incumbent—*Garib Lal*, 3 P.L.J. 192, 19 Cr.L.J. 442. The Court to which an appeal lies from the judgment of the Judge is determined by the status of the Judge on the day he pronounces judgment. So, where a trial was held by an Assistant Sessions Judge but before he pronounced judgment, sentencing the accused to four years' rigorous imprisonment, he was made an Additional Sessions Judge, *held* that an appeal from his judgment lay to the High Court and not to the Sessions Judge—*Jalal*, A.I.R. 1937 Sind 22, 38 Cr.L.J. 350, 167 I.C. 75, 30 S.L.R. 456, 9 R.S. 162. The Allahabad High Court has taken a contrary view and has held that, in such circumstances, the appeal lies to the Court of Session and not to the High Court—*Bakshi Ram v. Emp.*, A.I.R. 1938 All 102, 1937 A.W.R. (H.C.) 1147, 1937 A.L.J. 1152, 1938 A.L.R. 164, 173 I.C. 663, I.L.R. 1938 All. 157, 39 Cr.L.J. 345.

In calculating the term of 4 years under this proviso, the Court must not take into account the length of time during which the accused was under trial. The Court is only concerned with the actual substantive sentence imposed—*Jagadish*, 10 N.L.J. 135, 28 Cr.L.J. 672, 103 I.C. 208, A.I.R. 1927 Nag. 255, 8 A.I.Cr.R. 295.

An order of detention in a Borstal School is not a sentence of imprisonment, and the terms of this section itself plainly contemplate that, except in the instances mentioned in this proviso, all appeals from a Magistrate of the first class shall lie to the Court of Session. Where, therefore, under the provisions of sec. 25 (1) of the Burma Prevention of Crimes (Young Offenders) Act (III of 1930), the accused were directed to be detained in a Borstal School for a period of five years by a Special Power Magistrate, their appeal lay to the Court of Session and not to the High Court—*Nga Tha E*, 37 Cr.L.J. 793, 163 I.C. 144, A.I.R. 1936 Rang. 229, 14 Rang. 143, 1936 Cr.C. 513.

1108. Concurrent Sentences:—Under sec. 35 (3), concurrent sentences cannot be aggregated together for the purpose of raising the status of the forum of appeal—*Gurusahay*, 3 P.L.J. 138; *Tulsi Ram*, 35 All. 154, 11 A.L.J. 111, 14 Cr.L.J. 119. Therefore, where an Assistant Sessions Judge or a Magistrate specially empowered under sec. 30 passes several sentences of imprisonment upon an accused each of which is for a term of four years or under, and the sentences are ordered to run concurrently, the appeal from the conviction and sentences lies to the Sessions Court and not to the High Court—*Lakshmi*, 23 C.L.J. 595; *Gurusahay*, 3 P.L.J. 138; *Sher Muhammad*, 1901 P.R. 25; *Jagadish*, 10 N.L.J. 135, 103 I.C. 208, A.I.R. 1927 Nag. 255, A.I.Cr.R. 295, 28 Cr.L.J. 672; *Tulsiram*, 14 Cr.L.J. 119, 11 A.L.J. 111, 35 All. 154.

Magistrate acting under section 30:—Under this proviso, where a person is convicted by a Magistrate invested with enhanced power under sec. 30, and sentenced to imprisonment for more than four years, an appeal lies to the High Court and not to the Court of Session—*Ahmad Khan*, 1916 P.R. 5, 17 Cr.L.J. 290.

If the appeal is presented to the Sessions Judge instead of to the High Court, and the Sessions Judge disposes of the appeal, the proceedings before the Sessions Judge are void under sec. 530 (r)—*Abdulla*, 2 Rang. 386 (387), 26 Cr.L.J. 293, 84 I.C. 437, A.I.R. 1925 Rang. 39.

1108A. Consecutive Sentences:—See Note 88

1109. 'All or any of the accused':—"This amendment provides that in a trial in which more than one person are accused, and in which by reason of the sentences passed an appeal lies in the case of some persons to the Sessions Judge and of others to the High Court, the appeal of all shall lie to the latter tribunal"—*Statement of Objects and Reasons* (1914). If several persons are tried jointly, and the Assistant Sessions Judge passes a sentence of over four years' imprisonment on some of the accused, and a sentence of less than four years on the others, the appeal by the

latter will also lie to the High Court and not to the Court of Session—*Palant*, 17 M.L.J. 248, 5 Cr.L.J. 496; *Richhe*, 13 A.L.J. 272, 16 Cr.L.J. 353; *Jaisingh*, 1900 P.R. 12; *Debi Din*, 21 A.L.J. 151, 91 I.C. 959, A.I.R. 1926 All. 160, 27 Cr.L.J. 175; *Perumal*, 1931 M.W.N. 1068 (The contrary view held in *Nittoor Moideen*, 43 M.L.J. 561 is hereby overruled). Even, if in such a case, the persons on whom sentences of over four years were passed did not appeal to the High Court, the appeal of the other persons on whom sentences of less than four years were passed would lie to the High Court and not to the Court of Session—*Har Dayal*, 37 All. 471, 13 A.L.J. 719, 16 Cr.L.J. 606; *Ahmad Khan*, 1916 P.R. 5, *Debi Din*, 27 Cr.L.J. 175, 91 I.C. 959, 24 A.L.J. 151, A.I.R. 1926 All. 160.

Proviso (c):—Where the accused was convicted by a District Magistrate under sec. 124A, I. P. C., and sentenced to two years' imprisonment, and was in the same trial convicted of an offence under sec. 153A, I. P. C., and sentenced to one year's rigorous imprisonment, the two sentences must be aggregated and considered as one sentence under sec. 35 (3) for the purposes of appeal, and the appeal against the single sentence will lie to the High Court. It is not necessary that the prisoner will file an appeal against the conviction under sec. 124A to the High Court, and another appeal against the conviction under sec. 153A to the Court of Session—*Joy Chandra*, 38 Cal. 214 (219).

Where, overlooking this proviso, the Sessions Judge entertained an appeal from a conviction under sec. 124A, I. P. C., and reduced the sentence, his order is without jurisdiction and is liable to be set aside in revision by the High Court—*Krishna Chandra Pangoria v. Emp.*, 38 Cr.L.J. 972, 170 I.C. 874, 1937 A.L.J. 365, 1937 A Cr.C. 70, 1937 A.W.R. 401, 1937 A.L.R. 749, 10 R.A. 191, A.I.R. 1937 All. 466.

409. An appeal to the Court of Session or Sessions Judge

Appeals to Court of Session how heard. shall be heard by the Sessions Judge or by an Additional Sessions Judge:

Provided that an Additional Sessions Judge shall hear only such appeals as the Provincial Government may, by general or special order, direct or as the Sessions Judge of the division may make over to him.

Change:—The proviso has been added by sec. 113 of the Criminal Procedure Code Amendment Act, XVIII of 1923.

The words "Provincial Government" have been substituted for "Local Government" in this section by section 4 of the Government of India (Adaptation of Indian Laws) Order, 1937.

1110. Under this section, the Sessions Judge can transfer an appeal ~~presented to~~ him to the Additional Sessions Judge, he cannot transfer it to the Assistant Sessions Judge for disposal. Even sec. 193 (2) does not confer on him such power, ^{because the} word 'case' under that section does not include an appeal—*Abdul Razak*, 27 Ind. 209, 16 Cr.L.J. 316. Under sec. 528 (1), the Sessions Judge can only transfer a case (not an appeal) to the Assistant Sessions Judge.

The Additional Sessions Judge will try only those appeals which would be made over to him by the Sessions Judge; but that does not oust the jurisdiction of the Sessions Judge over those appeals. Therefore, if a Sessions Judge makes over a particular appeal to the Additional Sessions Judge to be tried by the latter, he can afterwards withdraw the appeal from the latter and take it on his own file and decide—*Binji Marwar*, 44 All. 157, 23 Cr.L.J. 107, 19 A.L.J. 952.

Where the High Court transferred an appeal from the file of the Sessions Judge to that of another Sessions Judge without any express direction that the Sessions Judge was to hear the appeal himself, the Sessions Judge to whom the appeal was transferred had power to transfer it to the Additional Sessions Judge ^{if he so wished}. ~~The power~~ this section should not be limited to apply only to appeals made within the ~~area~~ ^{jurisdiction} of the Sessions Judge.

of the Court of Session—*Kedarnath*, 35 Cr.L.J. 1167, 150 I.C. 927, 15 P.L.T. 318, 1934 Cr.C. 300, A.I.R. 1934 Pat. 114.

But an Additional Sessions Judge cannot transfer a criminal appeal from the file of another Additional Sessions Judge to the file of the Sessions Judge—*Daulat Ram*, 1931 A.L.J. 591, 33 Cr.L.J. 158 (159), 135 I.C. 252, A.I.R. 1931 All. 435, 1931 Cr.C. 707, Ind. Rul. 1932 All. 76.

410. Any person convicted on a trial held by a Sessions Judge, or an Additional Sessions Judge, may appeal from sentence of Court of Session. appeal to the High Court.

1110A. If a Sessions Judge imposes a fine for intentional insult to him in Court, in a summary way, the accused is said to be 'convicted on a trial,' and may appeal under this section to the High Court—*In re Chappu Menon*, 4 M.H.C.R. 146.

If a Sessions Judge on appeal has taken additional evidence under sec. 428, and has dismissed the appeal, the prisoner has no further right of appeal to the High Court—*Ishahak*, 27 Cal. 372.

'May appeal':—This section confers a right of appeal to the High Court to a person convicted on a trial held by the Sessions Judge or an Additional Sessions Judge. The word 'may' does not mean that it is at the option of the High Court to entertain or not appeals under this section—*Pohpi*, 13 All. 171 (178).

An appeal lies to the Sind Judicial Commissioner's Court against convictions and sentences passed by a Judge of that Court sitting in its Sessions Court jurisdiction with a jury only on a point of law—*Shewaram v. Emp.*, A.I.R. 1939 Sind 209 (211), 41 Cr.L.J. 28, 184 I.C. 474, 12 R.S. 107.

411. Any person convicted on a trial held by a Presidency Magistrate may appeal to the High Court, if the Magistrate has sentenced him to imprisonment for a term exceeding six months or to fine exceeding two hundred rupees.

1111. Imprisonment:—The word 'imprisonment' means a substantive sentence of imprisonment, and does not include an award of imprisonment in default of payment of fine, the operation of which is contingent only on the fine not being paid. Therefore, where the Presidency Magistrate inflicted a sentence of six months' rigorous imprisonment and a fine of Rs 200, and in default of payment, three months' simple imprisonment, the two sentences of imprisonment could not be combined to give the prisoner a right of appeal—*Jotharam*, 2 Mad. 30; *Schein*, 15 Cal. 799; *Hari*, 20 Bom. 145.

An order under sec. 562 is not a 'sentence'; therefore, no appeal lies to the High Court from an order of a Presidency Magistrate releasing the accused under sec. 562 on execution of a bond for good behaviour for two years—*Burks*, 36 C.W.N. 459 (460), Ind. Rul. 1932 Cal. 478, 138 I.C. 627, 33 Cr.L.J. 639, 1932 Cr.C. 480, A.I.R. 1932 Cal. 488; *Kali Kumar Mitter v. Emp.*, 38 Cr.L.J. 876, 170 I.C. 26, 10 R.C. 122, I.L.R. (1937) 1 Cal. 123, A.I.R. 1937 Cal. 413.

Where the accused was convicted by a Presidency Magistrate under sec. 408, I. P. C., and sentenced to suffer six months' rigorous imprisonment under each of three counts under that section, directed to run concurrently, held that the conviction was not appealable—*Suknandan*, 17 C.L.J. 392, 13 Cr.L.J. 787, 17 I.C. 531.

Whipping:—Where the sentence passed by a Presidency Magistrate is to receive five stripes, it is not a sentence of imprisonment for a term exceeding six months or of fine exceeding two hundred rupees and is, therefore, not appealable—*Motiram v. Emp.*, 38 Cr.L.J. 985, 170 I.C. 757, 10 R.B. 142, 39 Bom.L.R. 470, A.I.R. 1937 Bom. 336.

412. Notwithstanding anything hereinbefore contained, where an accused person has pleaded guilty and has been convicted by a Court of Session or any Presidency Magistrate or Magistrate of the first class on such plea, there shall be no appeal except as to the extent or legality of the sentence.

No appeal in certain cases when accused pleads guilty.

1112. Conviction on his own plea:—The principle of this section is that the accused in pleading guilty to the charge is considered to have waived his right to question the legality of the conviction, he can only question the extent or legality of the sentence—*Akub Ali*, 31 C.L.J. 122, 21 Cr.L.J. 547, 56 I.C. 851; *Jafar*, 5 Bom. 85. When a person has been convicted on his own plea by a Presidency Magistrate, no appeal shall lie to the High Court, except as to the extent or legality of the sentence, although he is sentenced for a term exceeding six months or to fine exceeding Rs. 200—*Jafar*, 5 Bom. 85. Where a charge has been framed against an accused person under sec. 221 (7) of this Code, and such person has pleaded guilty to the charge that he is a previous convict, the Appellate Court under sec. 412 is precluded from opening the question whether the accused is a previous convict or not—*Kissan*, 4 N.L.R. 163, 9 Cr.L.J. 56.

A person who pleaded guilty to the charge and was convicted by a *second class Magistrate*, is not barred from contending in appeal that the conviction is illegal. Sec. 412 bars the appeal where the conviction was by a *first class Magistrate*—*Chundal*, 28 Bom.L.R. 1023, 27 Cr.L.J. 1148, 97 I.C. 668.

If a person who has no right of appeal under this section, makes an appeal, and the Appellate Court hears the appeal, sets aside the conviction and acquits him, the order of acquittal is without jurisdiction and must be set aside by the High Court—*Nga Lu Gale*, 5 Rang 710, 29 Cr.L.J. 115 (116), 106 I.C. 707, A.I.R. 1928 Rang 49.

Where an accused pleads guilty on a charge under sec. 380, I. P. C., but the said plea is founded upon an erroneous conception of one's right in the property, this section is inapplicable to the case and cannot shut one's right of appeal—*Sat Narain*, 32 Cr.L.J. 576 (577), 130 I.C. 693, 1931 A.L.J. 201, A.I.R. 1931 All. 265, Ind. Rul. 1931 All. 309, 1931 Cr.C. 425, 53 All. 437.

Extent and legality of the sentence:—Under this section, the right of appeal, when the accused has pleaded guilty, is limited to such matter as may be a special ground of complaint with respect to the sentence (as distinguished from the conviction itself), whether on the ground that the sentence is beyond what the circumstances of the case required, or that the sentence is illegal or not authorized by law—*Jafar*, 5 Bom. 85. Although the Appellate Court may reject an appeal on the ground that the accused has pleaded guilty before the Lower Court, still the extent and legality of the sentence will have to be considered by the Appellate Court—*Geind Raghu*, *Ratanlal* 954; and in order to consider the legality of the sentence the Appellate Court must satisfy itself that the plea of guilty was properly made after the nature of the offence was explained to and understood by the prisoner—*Kalu Dosan*, 22 Bom. 759.

But where no sentence was passed (e.g., where the accused was convicted upon his own plea of guilty, and was released under sec. 562 on his executing a bond) the right of appeal is absolutely barred—*Hayata*, 1917 P.R. 20, 18 Cr.L.J. 401. In such a case the accused has no right of appeal even when his co-accused are convicted and appealable sentences are passed against them. Under sec. 415A, Cr. P. C., the accused's right of appeal is not more extensive. Sec. 412, Cr. P. C., is not controlled by sec. 415A—*Tejunai*, 32 Cr.L.J. 1142, 134 I.C. 379, 25 S.L.R. 337, Ind. Rul. 1931 Sind 123, 1931 Cr.C. 923, A.I.R. 1931 Sind 151.

413. Notwithstanding anything hereinbefore contained, there shall be no appeal by a convict-

413. Notwithstanding anything hereinbefore contained, there shall be no appeal by a convi

No appeal in petty cases.

No appeal in petty cases.

ed person in cases in which a Court of Session or the District Magistrate or other Magistrate of the first class passes a sentence of imprisonment not exceeding one month only or of fine not exceeding fifty rupees only or of whipping only.

ed person in cases in which a Court of Session [***] passes a sentence of imprisonment not exceeding one month only or, *in which a Court of Session or District Magistrate or other Magistrate of the first class passes a sentence of fine not exceeding rupees fifty only.* * *

Explanation.—There is no appeal from a sentence of imprisonment passed by such Court or Magistrate in default of payment of fine when no substantive sentence of imprisonment has also been passed.

Change:—This section has been amended by sec. 24 of the Criminal Law Amendment Act, XII of 1923. Under this section as now amended, a right of appeal is given against conviction by District Magistrate or Magistrates of the first class where they pass sentences of imprisonment even for a period of one month or less. Under the old law (section 416) only an European British subject could appeal against such sentence. We consider that outside the presidency towns, in the case of all persons, both Euro-

and will to a certain extent *in which a Court of Session or District Magistrate or other Magistrate of the first class passes a sentence of imprisonment not exceeding one month only or of fine not exceeding fifty rupees only or of whipping only.* are of opinion on general grounds, and apart from the particular case of the European British subject, that an appeal should lie against any sentence. It is to be noted that short sentences of imprisonment should where possible be avoided; and the number of sentences of one month and under passed by District Magistrates and first class Magistrates should not, as far as we can judge, be very large. In the case of a sentence passed in a trial by a Court of Session, we would allow no appeal in respect of a sentence of one month or under"—*Report of the Racial Distinctions Committee*, para. 19.

This section also gives a right of appeal against a sentence of whipping.

1113. Scope:—The words of this section are clear enough and wide enough to include cases under sec. 349 or sec. 380, Cr. P. C., though these are not specifically and distinctly mentioned, as in sec. 408, Cr. P. Code. What has to be seen, in considering whether a case is hit by sec. 413, Cr. P. C., is whether the sentence in question was one not exceeding the limit prescribed, and whether it was a sentence passed by a Court of the class mentioned therein. If these conditions are satisfied, sec. 413, Cr. P. C., would apply, whether the sentence was passed under sec. 349 or sec. 380, Cr. P. C., or otherwise—*Kishori Singh v. Emp.*, 38 Cr.L.J. 990 (992), 1 L.R. (1937) 2 Cal. 469, 170 I.C. 920, 10 R.C. 212, 41 C.W.N. 833, A.I.R. 1937 Cal. 394.

Sole sentence of imprisonment:—Where the accused was sentenced to 14 days' imprisonment and to pay the cost of court-fees, the sentence is a sole sentence of imprisonment not exceeding one month; and the order to pay the court-fees is no part of the sentence and is not a sentence of fine added to imprisonment, so as to make it appealable (sec. 415)—*Madan v. Haran*, 20 Cal. 687; *Khajabhoy*, 16 Mad. 423; *Karupanna*, 29 Mad. 188; *Para Muniyan*, 1 Weir 724. See also *Atul Chandra Modak v. Emp.*, 42 C.W.N. 760. Contra—*Thangavedu*, 22 Mad. 153; *Anonymous*, 2 Weir 723, 5 M.H.C.R. App. 28.

Fine:—Compensation awarded under sec. 22 of the *Trespass Act* is not a fine, and therefore an appeal lies from an order awarding it—*Rodricks v. Pada Dada*, 46 Bom. 58, 22 Cr.L.J. 621, 63 I.C. 160, A.I.R. 1922 Bom. 191.

rupees
Cr.L.J.

The words "a sentence of fine" includes a case where the aggregate fine does not exceed rupees fifty. So, if two sentences of fine are passed on the accused, one of Rs. 20 and another for Rs. 15, no appeal lies—*Nawab Ali v. Jamab*, 59 Cal. 1131, 36 C.W.N. 407, 1932 Cr.C. 551, Ind. Rul. 1932 Cal. 525, 138 I.C. 720, 33 Cr.L.J. 704, A.I.R. 1932 Cal. 551; *Kali Charan Sardar v. Adhar Mandal*, A.I.R. 1939 Cal. 274, 43 C.W.N. 360, I.L.R. (1939) 1 Cal. 325, 182 I.C. 258, 40 Cr.L.J. 652; *Paluvadi Venkataramayya*, *infra*. But see *Kandhai*, 7 Luck. 501 cited under sec. 414, and *Makrand Singh v. Ganga* under sec. 415 and *Public Prosecutor, Madras v. Kollur Dasa Pai*, 1936 M.W.N. 213 which has been dissented from in *Paluvadi Venkataramayya*, A.I.R. 1940 Mad. 111, 50 M.L.W. 614, 1939 M.W.N. 1039, 1939 M Cr.C. 285, (1939) 2 M.L.J. 878, I.L.R. 1939 Mad. 1035. Where the accused is convicted under sec. 147, I. P. C., and sentenced to pay a fine of Rs. 40 and he is also convicted under sec. 393, I. P. C., and sentenced to pay a fine of Rs. 40 in the same trial, he has a right of appeal—*Akabbai Ali*, A.I.R. 1931 Cal. 642, 35 C.W.N. 752, 134 I.C. 1196, 1931 Cr.C. 842, 33 Cr.L.J. 90, 59 Cal. 19; *Shidlingappa*, 27 Cr.L.J. 926, 96 I.C. 270, 28 Bom.L.R. 668, A.I.R. 1926 Bom. 416. See also Note 1114.

The costs of the court-fees, presumably awarded under sec. 546A, Cr. P. C., ought not to be regarded as forming part of the fine for the purposes of appeal—*Atul Chandra Modak v. Emp.*, 42 C.W.N. 760. See also the rulings mentioned above under the heading "Sole sentence of imprisonment."

Aggregation of sentences:—Where a person is charged with two separate offences in one trial, the amount of the whole punishment awarded for the two offences must be regarded as one sentence for the purpose of determining whether an appeal lies or not—*Haradhan*, 3 CLR 511; *Rama*, 1 Bom. 223. See section 415.

Passing appealable sentence at the request of accused:—When a Magistrate at first passed a non-appealable sentence, and shortly afterwards at the request of the accused enhanced the sentence to make it appealable, and on appeal the Sessions Judge struck out the added sentence as illegal, and declined to hear the appeal on the ground that the sentence as originally passed was not appealable, it was held that as the Magistrate had passed an appealable sentence, an appeal lay under this section, whether that sentence was passed legally or illegally, and that the Sessions Judge was bound to hear the appeal on the merits—*Keshavlal*, 35 Bom. 418, 12 Cr.L.J. 431. Where the accused, when he realized or surmised that he was about to be convicted, put in a petition praying for an appealable sentence, but was given a non-appealable one, held that it is quite true that the nature of the sentence does affect the question whether there is an appeal from the decision of the Court which inflicted the sentence; but to say that the Court ought to take into consideration the prayer of the accused in deciding what is the proper sentence, is wholly wrong. A Court should weigh the sentence with reference to the crime committed and the circumstances of the case and not with reference to anything which may happen subsequently—*Yar Muhammad*, A.I.R. 1931 Cal. 448, 58 Cal. 392, 1931 Cr.C. 600, 32 Cr.L.J. 1181, 134 I.C. 536. It is hardly open to the accused persons to say that they should have been given a higher sentence so that they might have a right of appeal—*Anant Singh*, A.I.R. 1936 All. 147, 37 Cr.L.J. 417, 161 I.C. 307, 1936 A.L.J. 209, 1936 Cr.C. 175. A sentence must be passed which is considered proper in all circumstances of the case, regardless of the consideration whether it should be an appealable one—*The King v. Maung Saw Han*, A.I.R. 1939 Rang. 69 (70), 40 Cr.L.J. 248, 179 I.C. 716, 11 R.R. 343.

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1113A. This section has been amended by sec. 25 of the Criminal Law Amendment Act, XII of 1923. By this amendment, certain sentences passed on summary convictions which were originally non-appealable (*viz.*, imprisonment for three months or less, or whipping) are now made appealable. Under the old law, only European British subjects could appeal from such sentences.

If a Magistrate of the first class passes an order under sec. 562 in a summary trial, this section does not apply, because an order under sec. 562 is not a sentence of imprisonment or fine, but sec. 408 will govern the case and an appeal will lie to the Court of Session—*Hira Lal*, 46 All. 828 (829), 22 A.L.J. 751, 25 Cr.L.J. 1244; *Shankar Sukul v. The King*, A.I.R. 1940 Rang. 223, 1940 Rang.L.R. 381. See also Note 1105.

The words "fine not exceeding Rs. 200" mean one sentence of fine. If in a summary trial a Magistrate imposes two sentences of fine, one of Rs. 50, and another of Rs. 150, the latter is within the meaning of Rs. 200. 9 (60), 33 Cr.L.J. 278, 136 I.C. 332 Oudh 27. But see 59 Cal. 1131, cited under sec. 413. This section does not apply only to a case where one sentence only is imposed. The singular includes the plural and reading this section with sec. 415, it is clear that what is meant is not two punishments of different kinds. Therefore, where aggregate fine imposed is less than Rs. 200, no appeal lies—*Hemandas*, A.I.R. 1936 Sind 40, 37 Cr.L.J. 455, 161 I.C. 267, 1936 Cr.C. 230. There is, therefore, a difference of opinion between the Sind Judicial Commissioner's Court and the Oudh Chief Court on his point.

415. An appeal may be brought against any sentence referred to in section 413 or section 414 by which any two or more of the punishments therein mentioned are combined, but no sentence which would not otherwise be liable to appeal shall be appealable merely on the ground that the person convicted is ordered to find security to keep the peace.

Explanation.—A sentence of imprisonment in default of payment of fine is not a sentence by which two or more punishments are combined within the meaning of this section.

1114. Combination of sentences:—Where the accused was sentenced to one day's imprisonment and a fine of fifty rupees, the fact that the accused was not actually sent to jail does not prevent the combination; the passing of the sentence of imprisonment is sufficient, and the two sentences of imprisonment and fine may be combined for the purposes of appeal—*Alam*, 33 All. 510, 12 Cr.L.J. 389, 8 A.L.J. 524, 11 I.C. 253. Where the accused were charged under secs. 323 and 427, I. P. C., and fined Rs. 50 each as the charge was brought home to them, held that in the absence of any indication that the Magistrate intended to pass two sentences or one sentence consisting of two punishments the Sessions Judge was not wrong in holding that the accused had no right of appeal—*Munna Lal*, 36 Cr.L.J. 1102, 157 I.C. 123, A.I.R. 1935 All. 630, 1935 Cr.C. 642, 1935 A.L.R. 703, 8 R.A. 103, 1935 A.L.J. 952.

It is not possible to interpret the reference in this section to a combination of punishments as meaning a combination of punishments of different kinds, that is to say, a combination of a punishment of imprisonment with a combination of fine, since the section, after referring to secs. 413 and 414, Cr. P. C., speaks of "any two or more of the punishments therein mentioned," and sec. 413, Cr. P. C., as it now stands, mentions only two forms of punishment, imprisonment and fine, and sec. 414, Cr. P. C., mentions only one form of punishment, that is to say, fine. For the purposes of sec. 414, Cr. P. C., read with sec. 415, Cr. P. C., therefore, the only possible combination of punishments is a combination of sentences of fine. It does not seem possible to interpret a combination of punishments for the purposes of sec. 414, read with sec. 415, Cr. P. C., as meaning a combination of sentences of fine, but to restrict it for the purposes of sec. 413 read with sec. 415, Cr. P. C., to a combination of punishment of different kinds, that is to say, a combination of a sentence of imprisonment with a sentence of fine. Therefore two sentences of fine may be combined for the purpose of appeal under this section—*Makrand Singh v. Ganga*, 38 Cr. L. J. 1062 (1065), 13 Luck 618, 171 I. C. 337, 1937 O. W. N. 1088, 1937 O. L. R. 547, 10 R. O. 114, A. I. R. 1937 Oudh 524. This view has, however, not been followed by the Calcutta High Court in *Kali Charan Sardar v. Adhar Mandal*, A. I. R. 1939 Cal. 274, 43 C. W. N. 360, I. L. R. (1939) 1 Cal. 325, 182 I. C. 258, 40 Cr. L. J. 652, where it has been laid down that there can be no appeal to a Sessions Judge from a conviction by a first class Magistrate in which the aggregate combined sentences do not exceed Rs. 50. The combination of punishments which is contemplated by sec. 415, Cr. P. C., as sections 413, 414 and 415 Cr. P. C., now stand after the amendment of 1923, refers to a combination of the punishments of imprisonment and fine, but sec. 415, Cr. P. C., can have no application in a case in which two non-appealable sentences of fine have been passed and the aggregate amount of fine does not exceed Rs. 50. See also *Nawab Ali*, in Note 1113. The Madras High Court has also adopted the view of the Calcutta High Court expressed above in *Paluvadi Venkataramayya*, A. I. R. 1940 Mad. 111, 41 Cr. L. J. 403, 187 I. C. 103, 50 M. L. W. 614, 1939 M. W. N. 1039, 1939 M. Cr. C. 285, (1939) 2 M. L. J. 878, I. L. R. 1939 Mad. 1035. The Nagpur High Court has also preferred the view of the Calcutta High Court as expressed in *Nawab Ali*, supra, and has held that there is nothing to show that the legislature intended to modify the principle that two or more punishments of different kinds, not of the same kind, should be appealable—*Provincial Government v. Bhivram*, 41 Cr. L. J. 544, 188 I. C. 80, 1940 N. L. J. 242, A. I. R. 1940 Nag. 264. See Note 1113.

Security to keep the peace:—The imprisonment to be undergone in default of furnishing security to keep the peace is not a part of the substantive sentence. If the substantive sentence is not in itself appealable, it does not become so, merely because the person convicted has been ordered to find security to keep the peace—*Maghu*, 7 O. C. 338, 1 Cr. L. J. 1054; *Kuhori Singh v. Emp.*, 38 Cr. L. J. 990 (991), 170 I. C. 920, I. L. R. (1937) 2 Cal. 469, 10 R. C. 212, 41 C. W. N. 833, A. I. R. 1937 Cal. 394.

The words "security to keep the peace" refer only to those cases where the accused is ordered to find security to keep the peace under *this Code*, and not where he is ordered to do so under any local enactment. Thus, where the accused was sentenced in a summary trial to a non-appealable term of imprisonment, and further ordered under sec. 31A of the Rangoon Police Act to give security, it was held that this section did not apply, and the sentence passed was appealable—*Kathan*, 4 L. B. R. 359, 9 Cr. L. J. 368.

Again, this section applies where the accused is ordered to give security to *keep the peace*, and not where he is required to furnish security for good behaviour—*Kathan*, supra.

Where the accused was fined Rs. 60 under Rule 60A of the Burma Motor Vehicles Rules read with sec. 16, Motor Vehicles Act, and his license was suspended for one year in a summary trial, held that the order for suspension of license was a part of the

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The words "fine not exceeding Rs. 200" mean *one* sentence of fine. If in a summary trial a Magistrate imposes two sentences of fine, one of Rs. 50, and another of Rs. 20, the case is one in which two punishments are combined within the meaning of sec. 415, and an appeal lies—*Kandhai*, 7 Luck. 501, 1932 Cr.C. 59 (60), 33 Cr.L.J. 278, 136 I.C. 248, Ind. Ruf. 1932 Oudh 104, 8 O.W.N. 1373, A.I.R. 1932 Oudh 27. But see 59 Cal. 1131, cited under sec. 413. This section does not apply only to a case where one sentence only is imposed. The singular includes the plural and reading this section with sec. 415, it is clear that what is meant is not two punishments of different kinds. Therefore, where aggregate fine imposed is less than Rs. 200, no appeal lies—*Hemandas*, A.I.R. 1936 Sind 40, 37 Cr.L.J. 455, 161 I.C. 267, 1936 Cr.C. 230. There is, therefore, a difference of opinion between the Sind Judicial Commissioner's Court and the Oudh Chief Court on this point.

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Security to keep the peace:—The imprisonment to be undergone in default of furnishing security to keep the peace is not a part of the substantive sentence. If the substantive sentence is not in itself appealable, it does not become so, merely because the person convicted has been ordered to find security to keep the peace—*Maghu*, 7 O.C. 338, 1 Cr.L.J. 1054; *Kishori Singh v. Emp.*, 38 Cr.L.J. 990 (991), 170 I.C. 920, I.L.R. (1937) 2 Cal. 469, 10 R.C. 212, 41 C.W.N. 833, A.I.R. 1937 Cal. 394.

The words "security to keep the peace" refer only to those cases where the accused is ordered to find security to keep the peace under *this Code*, and not where he is ordered to do so under any local enactment. Thus, where the accused was sentenced in a summary trial to a non-appealable term of imprisonment, and further ordered under sec. 31A of the Rangoon Police Act to give security, it was held that this section did not apply, and the sentence passed was appealable—*Kathan*, 4 L.B.R. 359, 9 Cr.L.J. 368.

Again, this section applies where the accused is ordered to give security to *keep the peace*, and not where he is required to furnish security for good behaviour—*Kathan*, supra.

Where the accused was fined Rs. 60 under Rule 60A of the Burma Motor Vehicles Rules read with sec. 16, Motor Vehicles Act, and his license was suspended for one year in a summary trial, *held* that the order for suspension of license was a part of the

sentence and that the conviction was appealable—*Guranand*, A.I.R. 1933 Rang. 329, 1933 Cr.C. 1146, 146 I.C. 545, 35 Cr.L.J. 116; *Dhekli*, A.I.R. 1932 Nag. 71.

415A. Notwithstanding anything contained in this Chapter,

Special right of appeal when more persons than one are convicted in certain cases. in one trial, and an appealable judgment or order has been passed in respect of any of such persons, all or any of the persons convicted at such trial have a right of appeal.

This section has been added by sec. 114 of the Cr. P. C. Amendment Act, XVIII of 1923, to remove the conflict of opinion which existed under the old law, as will be evident from the undernoted cases.

1115. Where several persons are tried and convicted at one trial, some of whom are sentenced to appealable sentences while the rest are awarded non-appealable sentences, all of them will be able to appeal; the fact that non-appealable sentences are passed on some of them does not, by virtue of sec. 413, take away their right of appeal. Section 413 applies to the case where only a non-appealable sentence is passed and not where non-appealable as well as appealable sentences are pronounced—*Naurati*, 1915 P.R. 30; *Ba Thaw*, 4 L.B.R. 354, 9 Cr.L.J. 356; *Jaisukh*, 1916 P.R. 16; *Sheopal*, 15 O.C. 386, 14 Cr.L.J. 170; *Lal Singh*, 38 All. 395; *Biswanath*, 22 Cr.L.J. 297 (Pat.); *Akabbar Ali*, 35 C.W.N. 752, 134 I.C. 1196, A.I.R. 1931 Cal. 642, 1931 Cr.C. 842, 33 Cr.L.J. 90, 59 Cal. 19. Section 413 curtails the right of appeal only in cases in which there is no sentence upon any convicted person above the limit prescribed by sec. 413; but if any of the punishment above that limit, the sentence below that limit is not at all, her punishment has the right uncontrolled and uncurtailed—*Pheku*, 4 P.L.J. 435, 20 Cr.L.J. 545 (*per* Jwala Prasad, J.). This view has been adopted in the present section.

The contrary view was taken in *In re Uruma*, 15 Cr.L.J. 371, 16 M.L.T. 33; *Venkatkrishnaya*, 40 Mad. 591; *Pheku*, 4 P.L.J. 435 (*per* Atkinson, J.); *Husain Khan*, 39 All. 293; *Unar*, 18 Cr.L.J. 72, 10 S.L.R. 156; *In re Annasami*, 7 L.W. 571; *Jhagru*, 24 Cr.L.J. 679 (All.); in these cases it was held that the language of sec. 413 was imperative and took away the right of appeal under such circumstances, and the accused against whom non-appealable sentences were passed could not acquire the right by reason of the fact that they were tried jointly with some other persons who received appealable sentences—*Annasami*, 7 L.W. 571, 19 Cr.L.J. 623. This view has not been accepted by the Legislature and is overruled by the present section.

Where a person has been ordered to be released on probation of good conduct under sec. 562 (which order is appealable under sec. 408) and other persons have been awarded non-appealable sentences, the latter persons also will be entitled to appeal, by operation of this section—*Bahadur v. Ismail*, 52 Cal. 463, 29 C.W.N. 151, 26 Cr.L.J. 455; *Mayandi v. Pala*, 36 Cr.L.J. 589, 154 I.C. 879, 1934 M.W.N. 1318, 41 M.L.W. 22, A.I.R. 1935 Mad. 157, 1935 Cr.C. 179; *Shankar Sukul v. The King*, A.I.R. 1940 Rang. 223, 41 Cr.L.J. 877, 190 I.C. 226, 1940 Rang.L.R. 381. But there is no provision for an appeal against an order under section 562, Criminal Procedure Code, made by a Presidency Magistrate. Therefore an accused, who is given a non-appealable sentence by a Presidency Magistrate who makes an order under sec. 562, Cr. P. C., against the co-accused in the same trial, has no right of appeal under this section—*Kali Kumar Mitter v. Emp.*, 38 Cr.L.J. 876, 170 I.C. 26, 10 R.C. 122, I.L.R. (1937) 1 Cal. 123, A.I.R. 1937 Cal. 413. Where more persons than one are jointly convicted in one trial by the High Court criminal sessions, and leave to appeal is granted to one of them under sec. 449 (1) on the ground of his being an European British Subject, such leave should also be granted to the other accused (even if they are not European British Subjects) in view of the provisions of sec. 415A—*Gallagher*, 54 Cal. 52, 28 Cr.L.J. 481, 101 I.C. 657, A.I.R. 1927 Cal. 307.

416. [Repealed].

This section, which has been repealed by the Criminal Law Amendment Act, XII of 1923 stood as follows :—

"416. Nothing in secs. 413 and 414 applies to appeals from sentences passed under Chapter XXXIII on European British subjects"

That is, it laid down that in respect of those sections which were non-appealable in the case of Indian subjects, an European British subject had a right of appeal. Thus distinction is now abolished and both European and Indian subjects are placed on the same footing, and given equal rights of appeal.

417. The Provincial Government may direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court.

Appeal on behalf of Government in case of acquittal.

Changes:—The words "Provincial Government" have been substituted for "Local Government" in this section by section 4 of the Government of India (Adaptation of Indian Laws) Order, 1937.

Scope of the section:—No appeal lies under this section against an order of acquittal passed by a Special Magistrate appointed under the provisions of the Bengal Act XII of 1932—*Lachmi Narayan*, 34 Cr.L.J. 1070, 38 C.W.N. 107, 145 I.C. 773, A.I.R. 1933 Cal. 776, 1933 Cr.C. 1327.

The terms of sec. 417 are unqualified by any restriction which may be derived from a consideration of the terms of sec. 414. Had the Legislature intended to limit the right of the Local Government to appeal against the order of the lower Appellate Court in a criminal case, it would have said so specifically—*Nur Ahmad*, 35 Cr.L.J. 1229 (1231), 151 I.C. 114, 7 R.A. 88, A.I.R. 1934 All. 842, 1934 A.L.J. 839, 1934 Cr.C. 1028.

If one of two accused is acquitted, and appeal is preferred by the Government against his acquittal, he must be deemed to be innocent of the charge made against him, and the Sessions Judge (in an appeal by the other accused against his conviction) ought not to pass any remarks impugning the correctness of the acquittal. If the Session Judge passes any such remarks, the High Court will order those remarks to be expunged from the record—*Abdul Aziz*, 25 Cr.L.J. 1245, 82 I.C. 173, A.I.R. 1925 Lah. 129.

1116. Only Government can appeal:—The High Court has no authority to entertain an appeal under this section except upon an appeal by the Local Government—*Okhoy v. Madhoo*, 19 W.R. 55; *A. David*, 6 C.L.R. 245; *Thandavan v. Periamma*, 14 Mad. 363. The intention of the Legislature is that there should be no interference by the High Court with an order of acquittal, even though improper, except upon a formal appeal by the Local Government—*Miyaji*, 3 Bom. 150. The law, by limiting the right of appeal against judgments of acquittal to the Local Government, prevents personal vindictiveness from seeking to call in question judgments of acquittal by way of appeal, and evidently intends that such interference shall take place only in those cases where there has been a miscarriage of justice so grave as would induce the Local Government to move in the matter—*Karuna*, 22 Cal. 164.

Even the District Magistrate is not competent to refer the case to the High Court. See Note 1197 under sec. 438. Where the prisoners convicted by a Magistrate are acquitted on appeal by the Sessions Judge, it is not competent for the District Magistrate to transmit the proceeding to the High Court to have the Sessions Judge's order of acquittal set aside—*A. David*, 6 C.L.R. 245.

The power of appeal under this section should be sparingly used by the Government, but the discretion to exercise that power is not subject to the control of the High Court—*Sakharam*, 21 Bom.L.R. 1054; *Moti*, 26 Bom.L.R. 113, 25 Cr.L.J. 786; *Arjan*,

1917 P.R. 43, 19 Cr.L.J. 85, 43 I.C. 245; *Mayandi*, 34 Cr.L.J. 948, 145 I.C. 371, A.I.R. 1933 Mad. 230, 1933 Cr.C. 288.

If a Judge or the Executive Government find that an obvious error in a decision has been committed, whether the question involved is of greater or lesser public importance, a case of injustice is established and one in which it is the duty of Government to make an appeal. A case, however petty it may appear to an administrator, is often a matter of great importance to the party affected by the decision and it is the duty of the Executive Government to view the matter from this angle when considering the question of an appeal under sec. 417, Cr. P. Code—*Sham Lal v. Chaman Lal*, A.I.R. 1939 Lah. 406 (409), 41 P.L.R. 175, I.L.R. 1939 Lah. 116, 40 Cr.L.J. 942, 184 I.C. 358.

As to the High Court's power of revising an order of acquittal, either at the instance of the Local Government, or at the instance of a private complainant, see Notes 1204 and 1219 under sec. 439.

1117. Public Prosecutor:—Only the Public Prosecutor can file an appeal under this section. The Local Government cannot direct any other person to appeal. The Legal Remembrancer is a Public Prosecutor within the meaning of this section—*Tularam*, 23 C.W.N. 96, 46 Cal. 544. But the Legal Remembrancer of Bengal cannot be deemed to be the Public Prosecutor for the province of Behar, from the mere fact that he has been directed by a letter of the Government of Bihar to file an appeal in the Calcutta High Court under section 417 against an order of acquittal passed in a Behar case, when the letter did not specially appoint him as such, and especially when there is already a Public Prosecutor for the province of Behar. And the Legal Remembrancer of Bengal therefore cannot file the appeal—*Gaya Prasad*, 41 Cal. 425.

A private prosecutor can neither present an appeal under this section nor apply in revision—*Thandavan v. Perianna*, 14 Mad. 363; *In re Poona Churn*, 7 Cal. 447.

1118. High Court:—An appeal will lie under this section only to the High Court. Where a District Magistrate entertained an appeal from an order of acquittal passed by the subordinate Magistrate, it was held that the District Magistrate acted without jurisdiction—*Rangasami*, 7 Mad. 213; *Sami Ayya*, 26 Mad. 478. A District Magistrate is not justified in setting aside an order of acquittal on his own initiative without moving the Local Government to file an appeal under this section for setting aside the same order—*Kallu*, 35 Cr.L.J. 1151 (1152), 150 I.C. 852, 11 O.W.N. 818, A.I.R. 1934 Oudh 327. So also, a Sessions Judge has no right to entertain an appeal against an order of acquittal—*Baijanath v. Gouri Kanta*, 20 Cal. 633; *Baroda*, 2 C.W.N. cclvi.

1119. Order of acquittal:—The withdrawal of a complaint by a complainant operates as an order of acquittal—*Luchi*, 19 W.R. 55. A judgment passed by the Sessions Judge, following the verdict of the jury acquitting the accused, is a judgment of acquittal for the purpose of appeal by the Local Government—*Judoonath*, 2 Cal. 273. The words 'appellate order of acquittal' mean and include all judgments of an Appellate Court by which a conviction is set aside—*Gokool*, 24 W.R. 41.

The 'acquittal' contemplated by this section need not be acquittal upon all the charges. Where in a case tried by jury, an accused charged with murder was acquitted of that charge but was convicted of culpable homicide not amounting to murder, this section would apply and an appeal by the Local Government would lie in respect of the charge of murder, even though the judgment of the Sessions Judge was not a judgment of absolute acquittal—*Judoonath*, 2 Cal. 273; *Sitaram*, 12 O.L.J. 421, 2 O.W.N. 550, 26 Cr.L.J. 1364.

The acquittal in this section means the particular acquittal complained of by the Government. Where the accused is charged under secs. 211 and 500, I. P. C., and acquitted of both the offences, but the Government preferred an appeal against the acquittal under sec. 500, I. P. Code, the High Court cannot question the propriety of the acquittal under sec. 211, I. P. Code—*Karigowda*, 19 Bom. 51.

An order of a Sessions Judge passed on appeal under sec. 406 *discharging* an accused who was ordered by a Magistrate under sec. 118 to furnish security for good behaviour, cannot be considered to be an original or an appellate order of *acquittal* within the meaning of sec. 417, so as to give the Local Government a right of appeal to the High Court—*Samai Deen*, 1 Luck. 231, 13 O.L.J. 276, 27 Cr.L.J. 626, 94 I.C. 402. See also *Babu Ram*, A.I.R. 1928 All 1.

Interlocutory orders:—This section allows an appeal only from an order of acquittal but not from any *interlocutory order* (e.g., an order refusing to amend the charges) which has been passed in a case which has ended in an acquittal. Any objection to such an interlocutory order cannot be included in the grounds of appeal against the order of acquittal. An order refusing to add to or amend the charges is not an "order of acquittal"; it is not even an order which can be said to form the basis of the order of acquittal or a necessary condition of its tenability. It cannot be said that the acquittal was due to the circumstance that the amendment was not allowed. But an order excluding as irrelevant a body of evidence tendered for the Crown, which had led to an acquittal as a *logical and inevitable consequence*, stands on a different footing. In such a case the Government, on its appeal against the acquittal, can also take objection to the order excluding the evidence—*Vajiram*, 16 Bom 414 (428), followed in *Stewart*, 21 S.L.R. 55, 27 Cr.L.J. 1217 (1228), 97 I.C. 1041, A.I.R. 1927 Sind 28 (*per* Rupchand, A.J.C.). In the latter case, Kincaid, J.C., is of opinion (dissenting from 16 Bom. 414) that although an order refusing to add or alter charges is not appealable under sec. 417, still if such order is followed by an order of acquittal, the Local Government may appeal.

1120. When appeal will lie:—An appeal against acquittal is a special weapon which the Local Government judiciously reserves for *exceptional* occasions and which is used after most anxious consideration and in cases which are themselves of great public importance or in which a principle is involved. It cannot be expected that the Government will utilise it freely in cases which, though of importance to individual subjects, are of little or no general interest—*Siban Rai v. Bhagwat*, 5 Pat. 25 (32), 92 I.C. 219, 6 P.L.T. 833, A.I.R. 1926 Pat 176, 27 Cr.L.J. 235. The High Court will not interfere merely because it might itself, sitting as a Court of original jurisdiction, have arrived at a different conclusion—*Mangat*, 1903 P.R. 11; *Jawai*, 19 Cr.L.J. 275, 44 I.C. 179, 1918 P.L.R. 70; *Bishen Singh*, 1914 P.L.R. 125, 15 Cr.L.J. 203 (207); *Ram Karan*, 26 P.L.R. 295, 7 Lah.L.J. 528, 26 Cr.L.J. 1141; *Robinson*, 16 All. 212; *Gayadin*, 4 All. 148; *Ramudu*, 1931 M.W.N. 729; *U Ba U*, 35 Cr.L.J. 855, 148 I.C. 1069, 1934 Cr.C. 267, A.I.R. 1934 Rang. 44; *Kunja Dusadh*, 23 Cr.L.J. 410, 3 P.L.T. 396; *Sheo Sewak Singh*, 40 Cr.L.J. 772 (776), 183 I.C. 405, A.I.R. 1939 All. 457; but it must be shown, before an appeal can be accepted, that the judgment of the Lower Court was so clearly wrong or perverse or unreasonable that its maintenance would amount to a miscarriage of justice—*Ghulam Muhammad*, 1897 P.R. 10; *Ram Karan*, *supra*; *Gayadin*, 4 All. 148; *Bishen Singh*, *supra*; *Robinson*, 16 All. 212; *Kunja Dusadh*, 23 Cr.L.J. 410, 3 P.L.T. 396; *Sundardas*, 26 Cr.L.J. 1028, 87 I.C. 96, A.I.R. 1925 Sind 295; *Sardara Singh*, 39 P.L.R. 776. In respect to pure questions of fact, the power of Government to appeal from an acquittal should be limited to those cases where through the incompetence, stupidity or perversity of a subordinate tribunal such unreasonable and distorted conclusions have been drawn from evidence as to produce a positive miscarriage of justice. Where the decision of the Subordinate Court is an honest and not an unreasonable one, of which the facts were susceptible, the High Court will not interfere—*Robinson*, 16 All. 212; *Baldeo*, 32 Cr.L.J. 1073, 133 I.C. 795, Ind. Rul. 1931 All. 747, A.I.R. 1931 All. 712, 1931 Cr.C. 1048, 1931 A.L.J. 1002. The interference of the High Court should be limited to those instances in which the Lower Court has so obstinately blundered and gone wrong as to produce a result mischievous at once to the administration of justice and to the interests of the public—*Gayadin*, 4 All. 148. In a Punjab case, however, it has been held (dissenting from 4 All. 148) that sec. 417 appears to place the Local

Government in no better or worse position in appealing from a conviction, and it would be legislating rather than interpreting the law, to weigh a Government appeal with the necessity of showing that the Court below 'obstinately blundered' or 'has so gone wrong as to produce a result mischievous to the administration of justice and to the interests of the public'—*Uttam*, 1885 P.R. 29. In some other Punjab cases it has been held (dissenting from the Allahabad ruling) that in order to justify interference with a judgment of acquittal on a question of fact, it is sufficient if the finding is clearly wrong on the evidence and unreasonable in the opinion of the Appellate Court, whether or not the unreasonableness amounts to perversity, stupidity or incompetence or whether the Court below can be said to have obstinately blundered in coming to it—*Chatter*, 1904 P.R. 7, 1 Cr.L.J. 781, 1904 P.L.R. 97; *Bakhtawar*, 28 P.L.R. 313, 28 Cr.L.J. 556 (561), 102 I.C. 492, 8 A.I.Cr.R. 196, A.I.R. 1927 Lah. 549; *Muzaffar*, A.I.R. 1933 Lah. 296, 1933 Cr.C. 396, 36 Cr.L.J. 626, 148 I.C. 36; *Rai Singh*, A.I.R. 1933 Lah. 871 (874), 1933 Cr.C. 1116, 146 I.C. 665, 35 Cr.L.J. 137, 34 P.L.R. 1010. In an appeal by the Government from acquittal, the accused starts with a double presumption in his favour. *Firstly*, there is the rule that it is for the prosecution to make out their case, and until they do so beyond all reasonable doubt the accused must be presumed to be innocent; and *secondly*, that the accused having succeeded in securing an acquittal from a Court, the superior Court will not interfere until the Crown shows conclusively that the inference of guilt is irresistible—*Ghulab Nabi*, 6 Pat. 768, 29 Cr.L.J. 301 (305), 107 I.C. 835, A.I.R. 1928 Pat. 146, 9 A.I.Cr.R. 385. Before the High Court will interfere with an acquittal, the culpability of the accused must be very clear and indubitable—*Lachhman Das*, 1918 P.W.R. 30, 19 Cr.L.J. 710.

In an appeal from an order of acquittal it ought to be remembered that there is always a presumption in favour of the innocence of the accused. This presumption very materially affects the question of onus, which except within a limited range of cases lies upon the Crown, and where the finding of the subordinate tribunal is in favour of the accused, the burden lies upon the prosecution to prove that the finding, reached by the Court below, was not justified by the evidence. Where the evidence against the accused is too scanty or insufficient to support the charge, the finding of the Court below cannot be displaced. Again, where the case is somewhere on the border line or very near it and it was possible for the Court, upon a balance of probabilities, to hold a person guilty or not guilty, the reversal of the order of acquittal is not only undesirable and inexpedient but is calculated to cause a miscarriage of justice. Where, however, the balance of evidence is distinctly against the accused or where material evidence has been misappreciated, overlooked or ignored, the High Court is bound to step in as much in the interest of the administration of justice as of the public generally—*Ram Adhin*, A.I.R. 1931 All. 439 (441), 1931 Cr.C. 711. In dealing with appeals from acquittal, the High Court in India, in view of well recognised principles of criminal jurisprudence, have always insisted that the Public Prosecutor must make out strong and cogent grounds to justify interference with a judgment of acquittal. One of the cardinal principles of criminal law is that an accused is presumed to be innocent until his guilt is satisfactorily established. If there is any room for reasonable doubt the accused must have the benefit of it. The trial Court which has the opportunity of seeing the witnesses is in a much better position to judge of their veracity than a Court of Appeal, and the Appellate Court should, therefore, be slow to differ from the value of their testimony unless there are good grounds for it—*Bharat Singh*, 33 Cr.L.J. 932, 139 I.C. 740, 9 O.W.N. 145, Ind. Rul. 1932 Oudh 390; *Paragi*, 33 Cr.L.J. 929, 9 O.W.N. 321, Ind. Rul. 1932 Oudh 391, 139 I.C. 756; *Hub Lal*, 34 Cr.L.J. 858, 144 I.C. 942, 10 O.W.N. 323, A.I.R. 1933 Oudh 254, 1933 Cr.C. 560. An appeal against an acquittal, which turns on the facts, would only succeed where the order of acquittal was clearly wrong and involved a miscarriage of justice—*U. San Win*, 33 Cr.L.J. 701, 138 I.C. 523, 10 Rang. 312, A.I.R. 1932 Rang. 146, 1932 Cr.C. 709, Ind. Rul. 1932 Rang. 170; *Chattar Singh*, 34 Cr.L.J. 384, 142 I.C. 312,

A.I.R. 1933 Pesh. 27, 1933 Cr.C. 327, Ind. Rul. 1933 Pesh. 10; *Superintendent and Rem., Legal Affairs, Bengal v. Bhagirath Mahto*, 35 Cr.L.J. 1367 (1372), 151 I.C. 662, A.I.R. 1934 Cal. 610, 38 C.W.N. 854, 1934 Cr.C. 908, 59 C.L.J. 482; *U Ba U*, 35 Cr.L.J. 855, 148 I.C. 1096, 1934 Cr.C. 267, A.I.R. 1934 Rang. 44; *Natha Singh*, 35 Cr.L.J. 349 (352), 147 I.C. 234, A.L.R. 1934 Lah. 192, 35 P.L.R. 75, 1934 Cr.C. 447, A.I.R. 1934 Lah. 212; *Kura*, A.I.R. 1934 Lah. 523, 36 Cr.L.J. 635, 155 I.C. 118, 35 P.L.R. 581, 1934 Cr.C. 809; *Mt. Giji*, 17 N.L.J. 189; *Nga Po Yin*, 35 Cr.L.J. 786, 148 I.C. 806, 1933 Cr.C. 1477, A.I.R. 1933 Rang. 387. The decision of the trial Court is entitled to great weight and the High Court should interfere only when it is satisfied that the view of the trial Magistrate was wrong and that it was contrary to the weight of the evidence—*Sheo Sewak Singh*, 40 Cr.L.J. 772 (776), 183 I.C. 405, A.I.R. 1939 All. 457.

If the Appellate Court, after bearing in mind that there is the presumption of innocence in favour of the accused, still further strengthened by his acquittal, and that the trial Court was in a better position to judge of the credibility of the witnesses examined before it and, therefore, great weight has to be attached to its view, is nevertheless fully convinced that the conclusion of the trial Court was clearly wrong and its conclusion was contrary to the weight of the evidence, it would be fully justified in setting aside the order of acquittal. The mere fact that it is not possible to hold that lower Court has been incompetent, stupid or perverse or has come to an unreasonable and distorted conclusion or has obstinately blundered, would not be sufficient to prevent the Appellate Court from allowing an appeal against an acquittal if it were fully convinced that the Court below has been misled by the extremely clever nature of some false evidence supported by a forged document—*Shew Janak*, 35 Cr.L.J. 364 (373), 147 I.C. 238, 1933 A.L.J. 1573, A.I.R. 1934 All. 27, 56 All. 354, A.L.R. 1934 All. 89, 1934 Cr.C. 59 (F.B.); *Sheo Sewak Singh*, 40 Cr.L.J. 772 (773), 183 I.C. 405, A.I.R. 1939 All. 457, 1939 A.W.R. (H.C.) 305. There is no indication in the Code of any limitation or restriction on the High Court in the exercise of its powers as an Appellate tribunal. No distinction is drawn as regards the powers of the High Court in dealing with an appeal, between an appeal from an order of acquittal and an appeal from a conviction. There is no foundation for the view that the High Court has no power or jurisdiction to reverse an order of acquittal on a matter of fact, except in cases in which the lower Court had "obstinately blundered," or has "through incompetence, stupidity or perversity" reached such "distorted conclusions as to produce a positive miscarriage of justice," or has in some other way so conducted or misconducted itself as to produce a glaring miscarriage of justice, or has been tricked by the defence so as to produce a similar result. Sections 417, 418 and 423 of the Code give to the High Court full power to review at large the evidence upon which the order of acquittal should be reversed. No limitation should be placed upon such power, unless it be found expressly stated in the Code. But in exercising the power conferred by the Code and before reaching its conclusion upon fact, the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial; (3) the right of the accused to the benefit of any doubt; and (4) the slowness of an Appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses—*Sheo Swarup*, 36 Cr.L.J. 785, 151 I.C. 322, 55 All. 645, 39 C.W.N. 15, A.I.R. 1934 P.C. 227, 60 C.L.J. 276, 67 M.L.J. 664, 15 P.L.T. 607, 1934 Cr.C. 1134, 36 Bom.L.R. 1185, 1934 M.W.N. 1017, A.L.R. 1934 P.C. 193, 4 A.W.R. 471, 1934 A.L.J. 905, 151 I.C. 322, 11 O.W.N. 1119, 40 M.L.W. 436. See also *Nur Ahmad*, 35 Cr.L.J. 1229 (1231), 151 I.C. 114, 7 R.A. 88, A.I.R. 1934 All. 842, 1934 A.L.J. 839, 1934 Cr.C. 1028; *Basant Rai*, 34 Cr.L.J. 1232, 145 I.C. 244, A.I.R. 1933 All. 574, 1933 Cr.C. 913; *Sital*, 25 Cr.L.J. 848, 148 I.C. 1059, 11 O.W.N. 568, 1934 Cr.C. 680, A.I.R. 1934 Oudh 229; *Bhuro*, 35 Cr.L.J. 1142, 150 I.C. 726, 1934 Cr.C. 743, A.I.R. 1934 Sind 84, A.L.R. 1934 Sind 92; *Nga Mya Maung*, A.I.R. 1935 Rang. 90 (94), 1935 Cr.C.

114; *Maung Aung Gyaio*, A.I.R. 1936 Rang 7, 161 I.C. 617; *Ghulamali Bahawal*, 39 Cr.L.J. 462, 174 I.C. 694, 32 S.L.R. 694, 10 R.S. 261, A.I.R. 1938 Sind 67; *Sheo Sewak Singh*, 40 Cr.L.J. 772 (773), 183 I.C. 405, A.I.R. 1939 All. 457, 1939 A.W.R. (H.C.) 305. In case of appeals at the instance of the Government under this section, as a matter of jurisdiction, the whole case is at large before the High Court both as to the facts and as to the law. But it is impossible to refuse to face the fact that there is a difference between the consideration of a case upon an appeal of this kind and its consideration when '*res integra*' in the Court below. As the Privy Council has pointed out in the first and fourth of the matters it has expressly alluded to, the Appellate Court will be slow to disturb a finding of fact arrived at by a Judge who has had opportunities for assessing the value of evidence which the Appellate Court has not had. An Appellate Court pursuing this principle will be slow to substitute a view of the facts of its own for an opposite view of the facts held by the Judge below, where the latter are, upon the evidence, reasonable views, even though the Judges in the Appellate Court might have preferred a view of their own if the matter had been '*res integra*'. Moreover, as has also been pointed out by the Judicial Committee, the presumption of innocence and the title of the accused to the benefit of any doubt are certainly not lessened by the fact that they have been acquitted at their trial—*Aftab Mohammad Khan*, 41 Cr.L.J. 647 (654), 188 I.C. 549, A.I.R. 1940 All. 291, 1940 A.L.J. 206. In an appeal against a conviction, it is only necessary to satisfy the Appellate Court that there is a reasonable doubt as to the guilt of the accused to induce the Appellate Court to interfere but when there is a reasonable doubt as to the guilt of the accused, the Appellate Court will not interfere with an acquittal. Nor will the Court in this or any other proceedings forget that the burden of proof lies upon the prosecution. It is for the prosecution to prove the guilt of the accused; it is not for the accused to prove his innocence. The High Court will not interfere and reverse an order of acquittal merely because there is room for an honest difference of opinion, merely because upon the evidence the Judge might have come to the conclusion that the accused was guilty. The High Court will not interfere unless it is quite clear that the Judge or Magistrate whose judgment of acquittal is appealed against is wrong and it must, in every case, assuming that Government have appointed competent Judges and competent Magistrates, give careful consideration and due weight to the findings of lower Courts. It is not intended that this section should be used in every case where Government thinks there should be a conviction. It is not a power lightly to be used. It should be used only when there can be no reasonable doubt upon the record as to the guilt of the accused, bearing in mind that when considering whether there is or is not such a doubt, the Appellate Court will bear in mind those rules both of justice and prudence to which the Privy Council in the case of *Sheo Swarup v. Emp.*, supra, refers—*Gulab Shah Kadir Shah*, 39 Cr.L.J. 504, 174 I.C. 835, A.I.R. 1938 Sind 80, 32 S.L.R. 689, 10 R.S. 269. It is an admitted principle of law that in an appeal by Government from acquittal the accused starts with the double presumption in his favour. Firstly, there is the rule that it is for the prosecution to make out their case, and until they do so beyond all reasonable doubt, the accused must be presumed to be innocent, and secondly, that the accused having succeeded in securing an acquittal from Court, the superior Court will not interfere until the Crown shows conclusively that the inference of guilt is irresistible. Where two opinions can be formed on the same evidence and one of them has been formed by the trial Court, the authorities are consistent that the Appellate Court would not disagree, even if the balance of probabilities be in favour of the opposite view. On the other hand, if only one opinion could be formed on the material on the record and the trial Court has gone counter to it, it would be presumed that the Court has acted perversely in weighing the proof and its judgment will be liable to interference—*Amir*, A.I.R. 1934 Pesh. 129 (132), 1932 Cr.C. 1402, 36 Cr.L.J. 443, 153 I.C. 35. In a case in which the result depends upon the appreciation of the evidence by the trial Judge, the High Court would be slow to interfere with his order of acquittal. But where the only question for decision is the proper or legal inference to be drawn from the facts proved in the case and the trial Judge has erred in failing to draw the

"clear, indubitable and irresistible" inference from the facts established according to him by the prosecution, the High Court will interfere and set aside the order of acquittal in appeal—*Public Prosecutor v. Rowthula Kondalrao*, A.I.R. 1939 Mad. 96, 1938 M.W.N. 1121, 48 M.L.W. 754, 1938 M.Cr.C. 334, 48 M.L.W. 754, 180 I.C. 631, 40 Cr.L.J. 458. Appeals by the Crown against acquittals on question of fact and fact alone are not often encouraged by Appellate Courts—*Supdt. & Rem., L. A., Bengal v. Jatindra Mohan Ray*, 38 Cr.L.J. 638, 168 I.C. 738, 9 R.C. 874, A.I.R. 1937 Cal. 156.

In appeal against an order of acquittal it is for the Crown to show that the judgment of acquittal is wrong—*Sultan*, 36 Cr.L.J. 1243 (1245), 157 I.C. 691, 8 R.L. 137, 37 P.L.R. 632. No condition is imposed on the High Court in an appeal against acquittal by a Judge trying the case with assessors. All that the High Court has to see is whether the offence charged is proved against each of the accused persons and for this purpose the High Court has to take the definition of "proved" given in the Indian Evidence Act—*Shea Dayal*, A.I.R. 1933 All. 535 (538), 55 All. 689, 147 I.C. 15, 1933 Cr.C. 870.

The High Court is loath to interfere and will only do so if it is proved without any doubt not only that the accused person is guilty, but that he has been acquitted on unreasonable grounds—*Ghafoor*, 32 Cr.L.J. 694 (697), 131 I.C. 436, 8 O.W.N. 101, A.I.R. 1931 Oudh 116, 1931 Cr.C. 276, Ind. Rul. 1931 Oudh 196; *Ram Dat*, 34 Cr.L.J. 538 (540), 143 I.C. 129, Ind. Rul. 1933 Oudh 161, A.I.R. 1933 Oudh 340, 1933 Cr.C. 775, 10 O.W.N. 585; *Parmeshwar Din*, A.I.R. 1933 Oudh 372, 1933 Cr.C. 1049, 146 I.C. 431, 35 Cr.L.J. 66, 10 O.W.N. 742; *Rama Murti v. Jai Indra*, 34 Cr.L.J. 661, 143 I.C. 852, 10 O.W.N. 345, A.I.R. 1933 Oudh 257, 1933 Cr.C. 562, Ind. Rul. 1933 Oudh 215.

Where there has been acquittal by a unanimous verdict of the jury accepted by the Sessions Judge, the mere fact that there has been a misdirection to the jury will not justify the reversal of the verdict, unless the misdirection has in fact occasioned a failure of justice—*Shyam Sundar*, 26 C.W.N. 558. The High Court will not accept an appeal against an acquittal merely because the trial in the Court was illegal on account of misjoinder of charges; the Appellate Court will interfere only where it is satisfied that the order of acquittal is obviously erroneous or is one which should not be maintained owing to the trial Court having omitted to consider material evidence—*Jagat Ram*, 48 I.C. 167, 19 Cr.L.J. 987 (Lah.). Where no evidence whatsoever was produced against the accused owing to the neglect or omission of the Crown, and he was acquitted, the High Court would not accept an appeal against the acquittal and remand the case to the lower Court on the ground that there had not been a proper trial of the accused. Such a procedure would expose the accused to a further ordeal and expenses, and he ought not to be made to suffer because of the deficiencies of the prosecution in the conduct of the trial—*Jaswant Rai*, 5 Lah. 404. The High Court will not interfere unless the judgment of the Court below was wrong and perverse and without jurisdiction and based upon obvious errors in procedure; it will not interfere where the decision of the Magistrate even though wrong was based at the most on a doubtful weighing of facts and not on any irregularity or negligence or other matter going to the jurisdiction or the regularity of the trial—*Amulya*, 18 C.W.N. 666, 15 Cr.L.J. 160. Where the question involved in the case is not of any public interest, and the parties have a remedy in a Civil Court, no interference with the order of acquittal is necessary—*Ganga Singh v. Ramzan*, 26 Cr.L.J. 337, 84 I.C. 641, A.I.R. 1923 Lah. 601. Where the evidence is all oral and its credibility is a mere matter of opinion without involving other considerations, the opinion of the Court which heard the witnesses must be treated as almost conclusive and the High Court should not interfere—*Chatter Singh*, 1904 P.R. 7, 1 Cr.L.J. 781; *Bishen Singh*, 1914 P.L.R. 125, 15 Cr.L.J. 203 (207); *Samand*, 22 Cr.L.J. 172 (Lah.); *Jauat*, 44 I.C. 179, 19 Cr.L.J. 275, 19 P.R. 1918 (Cr.), 70 P.L.R. 1918. But where the evidence of a large number of eye-witnesses including persons injured in the attack is discarded mainly on the ground that they belong to the party opposed to the accused persons and where the testimony of the disinterested witnesses supporting them is not acted upon, a Court of Appeal is clearly entitled to decide whether it will or will not attach the same importance as the Court below to an

argument of a general nature based on enmity between the parties—*Bhaikhan*, 32 Cr.L.J. 485 (490), 130 I.C. 324, A.I.R. 1931 Lah. 18, Ind. Rul. 1931 Lah. 260, 31 P.L.R. 1026, 1931 Cr.C. 82. Before the High Court could interfere, it must be satisfied that the indications of mistake are obvious or the evidence is too strong to be rejected—*Chatter Singh*, supra; *Bishen Singh*, supra; *Muhammad Shaffi*, 1918 P.R. 25, 19 Cr.L.J. 723; *Pallia*, 20 Cr.L.J. 188, 49 I.C. 604, 1919 P.W.R. 12; *Samand*, 22 Cr.L.J. 172 (Lah.), 59 I.C. 924. An appeal will lie under this section when there is an error of law on the part of the Lower Court—*Timmal*, 21 All. 122; *Kandaswami*, 1933 M.W.N. 242; *Supdt. & Rem. Legal Affairs, Bengal v. Ratsalle*, 34 Cr.L.J. 631, 143 I.C. 774, A.I.R. 1933 Cal. 145, 60 Cal. 44, 1933 Cr.C. 222, Ind. Rul. 1933 Cal. 477. Where the Sessions Judge has overlooked the main and crucial circumstance which goes to corroborate the evidence of an accomplice and has acquitted the accused, the High Court will entertain the appeal from acquittal, and determine one way or the other the guilt of the accused—*Gobardhan*, 9 All. 528. The Crown coming in appeal against an order of acquittal ought to show that the view taken by the first Court as to the reliability of the approvers is erroneous—*Wajid*, A.I.R. 1933 Pat. 500 (503). Where the Lower Court has considered the evidence from a wrong angle, and has come to an erroneous decision, an appeal will lie, and the High Court has jurisdiction to convict the accused—*Sunderdas*, 21 S.L.R. 111, 87 I.C. 916, A.I.R. 1925 Sind 295, 26 Cr.L.J. 1028 (1029); *Kadir Bux*, 9 S.L.R. 17, 16 Cr.L.J. 604, 32 I.C. 137.

Where there are facts or circumstances disclosed by the evidence which may not unreasonably be accepted as grounds for the conclusion arrived at by the Sessions Judge, the High Court should treat the application by the Crown for the admission of an appeal from an acquittal on the same footing as the application of a convicted person against his conviction and sentence and should decline to interfere—*Maung Aung Gyaw*, 38 Cr.L.J. 295, 166 I.C. 645, 9 R.R. 278, A.I.R. 1937 Rang. 7.

Where the question involved in the case is one of great importance in view of the scope of an Act under consideration and of the necessity, in the interests of the community, of the strict observance of its provisions, the High Court will interfere with an order of acquittal—*The Supdt. & Remem. of Legal Affairs, Bengal v. The Bengal Salt Co., Ltd.*, 63 C.L.J. 188.

The High Court should be somewhat less reluctant to interfere with acquittals in appellate than in original cases—*Chattar Singh*, 34 Cr.L.J. 384, 142 I.C. 312, A.I.R. 1933 Pesh. 27, 1933 Cr.C. 327, Ind. Rul. 1933 Pesh. 10.

1121. Appeal from acquittal and appeal from conviction compared:—The Code makes no distinction between an appeal from an acquittal and one from a conviction. Any rule of Court which differentiates their position would be tantamount to an usurpation of legislative function by the Court. If there is any difference in the respective positions of Government as appellant under sec. 417 and a convict appealing from the judgment convicting and sentencing him, it takes its rise from the principles of judicial construction and adjudication in criminal cases, with which the statute law has no concern. There are certain rules of adjudication and conduct which Judges in India invariably follow. One of these is that every man is to be presumed innocent until his guilt is established; another is that if there is a reasonable doubt, the accused must have the benefit of that doubt. An appellant from a judgment of conviction can always invoke the support of these principles, if he can show that the facts of his case come within their purview. If he makes out that the essential evidence against him is not sufficiently reliable, as the lower Court thought, or that all reasonable doubt as to his guilt is not removed thereby, he is bound to succeed on these principles. An appellant from a judgment of acquittal has, on the contrary, to work in the face of these principles and to satisfy the Court that the accused can derive no benefit from them on the facts of the case under appeal. His task is thus naturally more difficult than that of the convict appellant. In all questions of fact, the Court of first instance, which has all the witnesses before itself, has a great advantage over the Court of appeal, which deals with the evidence second hand; great regard is

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Where there are facts or circumstances disclosed by the evidence which may not unreasonably be accepted as grounds for the conclusion arrived at by the Sessions Judge, the High Court should treat the application by the Crown for the admission of an appeal from an acquittal on the same footing as the application of a convicted person against his conviction and sentence and should decline to interfere—*Maung Aung Gyaw*, 38 Cr.L.J. 295, 166 I.C. 645, 9 R.R. 278, A.I.R. 1937 Rang. 7.

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out in various rulings of the High Courts yet there is a real distinction, apart from the provisions of the Criminal Procedure Code. Every man is to be presumed innocent until his guilt is established; if there is a reasonable doubt, the accused must have the benefit of that doubt. An appellant from a judgment of conviction can always invoke the support of these principles. If he can show that the essential evidence against him is not sufficiently reliable, as the lower Court thought or that all reasonable doubt as to his guilt is not removed thereby, he is bound to succeed on these principles. An appellant from a judgment of acquittal has, on the contrary, to work in the face of these principles and to satisfy the Court that the accused can derive no benefit from them on the facts of the case under appeal. His task is thus naturally more difficult than that of the convict appellant. The effect of this and other considerations is to make in fact a considerable difference between an appeal from a conviction and one from an order of acquittal though both appeals are placed on the same footing in the statute law of procedure—*Ghulamali Bahawal*, 39 Cr.L.J. 462 (465), 174 I.C. 694, 32 S.L.R. 694, 10 R.S. 261, A.I.R. 1938 Sind 67. An appeal by Government against acquittal must be considered on its merit just as any other appeal always must be. The onus is on the appellant, and the onus is all the heavier if the judgment appealed from is one which approaches the consideration of the question from a correct point of view and gives the accused the benefit of a reasonable doubt which exists in the mind of the Judge—*Autar*, 47 All. 306, 23 A.L.J. 25, 26 Cr.L.J. 676.

In an appeal from an acquittal, as in an appeal from a conviction, the appellant is entitled to go into facts and ask the appellate Court to take a view of facts different from that taken by the trial Court. But the accused in an appeal from acquittal retains his right of being presumed to be innocent until the charge is fully brought home to him; he has the right of being given the benefit of any reasonable doubt as to his guilt; he has also the benefit of the opinion of the trial Court upon the credibility of the witnesses whom that Court had the advantage of seeing face to face; and he has the right to ask the Appellate Court that the acquittal should not be set aside unless the trial Court has taken a perverse view of the evidence and has arrived at an unnatural and distorted conclusion—*Deboo Singh*, 8 Pat. 496, 1929 Cr.C. 243 (248), 120 I.C. 634, A.I.R. 1929 Pat. 491, 10 P.L.T. 838, Ind. Rul. 1930 Pat. 58; *Maung Tun Hyan*, 32 Cr.L.J. 929, 132 I.C. 547, 8 Rang. 671, A.I.R. 1931 Rang. 86, Ind. Rul. 1931 Rang. 179, 1931 Cr.C. 374; *Chaturbhuj Naram*, A.I.R. 1936 Pat. 350 (353), 15 Pat. 108, 17 P.L.T. 302.

Examination of rulings shows that in the High Courts at Calcutta, Madras, Bombay, Allahabad and Patna, the weight of authority is for the principle that there is no difference between the treatment by a High Court of an appeal against a verdict of acquittal and that of an appeal from a conviction and that in the Lahore High Court the weight of authority is also on the same side, the inclination being, perhaps, in the interests of the person acquitted to attach more value and give greater prominence than other High Courts to the judgment of the lower Court—*Bhai Khan*, 32 Cr.L.J. 485 (490), 130 I.C. 324, A.I.R. 1931 Lah. 18, Ind. Rul. 1931 Lah. 260, 31 P.L.R. 1026, 1931 Cr.C. 82, where all previous rulings on the point were discussed. Although an appeal from an acquittal stands on the same footing as one from a conviction sound principles of criminal jurisprudence require that the indications of error in a judgment of acquittal ought to be more clear or more palpable in order to justify its being set aside—*Ramzan*, 32 Cr.L.J. 1130 (1131), 134 I.C. 112, Ind. Rul. 1931 Lah. 880, 32 P.L.R. 877, A.I.R. 1932 Lah. 12; *Rai Singh*, A.I.R. 1933 Lah. 871 (874), 1933 Cr.C. 1116, 146 I.C. 665, 35 Cr.L.J. 137, 34 P.L.R. 1010, following *Harnama*, 15 P.R. 1909 (Cr.), 11 Cr.L.J. 66, 4 I.C. 864; *Sher Singh*, 34 Cr.L.J. 598, 143 I.C. 499, A.I.R. 1933 Lah. 388, Ind. Rul. 1933 Lah. 361, 1933 Cr.C. 632, 34 P.L.R. 704. Although there is no difference in law between an appeal from an acquittal and an appeal from a conviction, it is not the practice to interfere with an order of acquittal unless the indications of error in the judgment are clear and the evidence too strong to be rejected—*Muhammad Khan*, A.I.R. 1934 Lah. 710 (715), 35 P.L.R. 641, 1934 Cr.C. 1020, 36 Cr.L.J. 419, 153 I.C. 889.

In a criminal appeal by the Government to the High Court, the arrest of the accused may be ordered pending appeal—*Gobin*, 1 Cal 281; *Mungu*, 2 All. 340. In capital cases, in which the Government appeals under this section, it is undesirable that the prisoner's fate should be discussed while he remains at large; in such cases, the Government should apply for the arrest of the accused under sec. 427—*Gobardhan*, 9 All 528. Where, on an appeal under this section, the accused is arrested and convicted, and sentence is passed on him, the sentence will run from the date of the committal of the accused to jail and not from the date of the arrest or of the sentence—*Mahuddi*, 6 C.L.R. 349.

Scope of appeal:—It is clear that in an appeal against acquittal the accused is entitled to ask the Court to consider all the evidence before it and all the possible grounds which may be raised against the conviction—*Public Prosecutor v. Panchaksharam*, 39 Cr.L.J. 871, 177 I.C. 432, A.I.R. 1938 Mad 723, 1938 M.W.N. 605, 48 M.L.W. 142, 11 R.M. 323, (1938) 2 M.L.J. 225. It would not be proper for the High Court to consider the appeal on grounds not contained in the objections urged on behalf of Government—*Queen-Empress v. Karigowda*, 19 Bom. 51.

It is not proper in an appeal against an acquittal for Government to attempt to snatch a conviction by making out another case against the accused. An appeal against an acquittal is a serious matter. The liberty of a person once acquitted is again to be put in jeopardy, and the High Court is justified in asking that cases, in which an appeal against an acquittal is to be made, should be carefully considered in all their aspects before the appeal is filed, and that Government should be bound in argument and should consider themselves bound in argument to the grounds raised in the memorandum of appeal—*Pursumal Germal*, 39 Cr.L.J. 630 (635), 175 I.C. 620, 10 R.S. 298, A.I.R. 1938 Sind 108.

Time of filing appeal:—An appeal under sec. 417, Cr. P. C., for conviction for a major offence can be preferred, although an appeal preferred by the accused against his conviction for a minor offence has already been heard and decided by the High Court. Appeals should, however, be preferred with all reasonable expedition possible. Where in the opinion of the Standing Counsel it is likely that Government will appeal against the acquittal, the appeal against the conviction should be postponed in order that both appeals may be heard together: but there should be no postponement if there is only a possibility that the Local Government may desire to appeal—*Mohammadi Gul*, 33 Cr.L.J. 849, 140 I.C. 49, A.I.R. 1932 Nag 121, 1932 Cr.C. 672, 28 N.L.R. 233, Ind. Rul. 1932 Nag. 118 (F.B.), dissenting from *Modkya*, 139 I.C. 63, A.I.R. 1932 Nag. 73, Ind. Rul. 1932 Nag. 85, 33 Cr.L.J. 728, 1932 Cr.C. 346.

Limitation:—An appeal under this section must be presented within six months from the date of the order appealed against (see Art. 157 of the Indian Limitation Act, 1908). See *Bhagirath Mahto's case* cited in Note 1227A.

It is true that a period of six months is the limitation allowed by law for appeals from acquittals, but it is earnestly recommended to the attention of Government the policy of and necessity for, such appeals, when made, being preferred with all reasonable expedition possible, not only in the public interest, but in justice to the persons whose acquittal it is sought to reverse—*U San Win*, 33 Cr.L.J. 701, 138 I.C. 523, 10 Rang. 312, A.I.R. 1932 Rang. 146, 1932 Cr.C. 709, Ind. Rul. 1932 Rang. 170, following *Yakub Khan*, 5 All. 253 (255); *Maung Aung Gyaw*, 38 Cr.L.J. 295, 9 R.R. 278, 166 I.C. 645, A.I.R. 1937 Rang. 7. See also *Nga Tok Hla*, 39 Cr.L.J. 490, 174 I.C. 839, 10 R.R. 437, A.I.R. 1938 Rang 109.

418. (1) An appeal may lie on a matter of fact as well as a matter of law, except where the trial was by jury, in which case the appeal shall lie on a matter of law only.

Appeal on what matters admissible.

(2) Notwithstanding anything contained in sub-section (1) or in section 423, sub-section (2), when, in case of a trial by jury

any person is sentenced to death, any other person convicted in the same trial with the person so sentenced may appeal on a matter of fact as well as a matter of law.

Explanation.—The alleged severity of a sentence shall, for the purposes of this section, be deemed to be a matter of law.

Change:—Sub-section (2) has been added by sec. 115 of the Cr. P. C. Amendment Act, XVIII of 1923. The reason is stated below.

1122. Scope of section:—This section is applicable alike both to appeals by Government (sec. 417) against an order of acquittal and to appeals by convicted persons against a conviction and sentence—*Gubbi*, 17 C.P.L.R. 75 (92). Therefore, where in a case tried by jury, the Local Government appealed to the High Court under sec. 417 against an order of acquittal, and the grounds of appeal were all questions of fact, the High Court rejected the application because under this section, an appeal in the jury-case could lie only on a question of law—*Parmeshur*, 10 Cal 1029; *Theri*, 36 Cr.L.J. 1467 (1469), 158 I.C. 913, 1935 O.W.N. 1153, A.I.R. 1936 Oudh 108, 1935 O.L.R. 684.

A Judicial Commissioner sitting on the original side and holding a Sessions trial is to be deemed a Sessions Judge and not a Judge of the High Court, and an appeal from his decision lies under this section to a Bench of the Judicial Commissioner's Court—*Khudabux*, 19 S.L.R. 309, 85 I.C. 706, A.I.R. 1925 Sind 249, 26 Cr.L.J. 562 (F.B.).

An appeal from the verdict and judgment in a trial held at the Sessions of the High Court does not lie under the provisions of this section—*Scott*, 36 Cr.L.J. 595, 154 I.C. 837, A.I.R. 1935 Rang 67, 13 Rang. 104, 1935 Cr.C. 167 (F.B.), overruling *Zagariya*, 89 I.C. 459, A.I.R. 1925 Rang. 239, 26 Cr.L.J. 1371, 3 Rang. 220.

1123. Trial by jury:—Where the trial was by jury, the appeal would lie on a matter of law only. By restricting appeals from cases triable by jury to matters of law only, this section gives finality to the verdict of the jury, where there has existed no error of law nor misdirection, and where the Judge has concurred with the majority—*Balappa*, Ratanlal 730. It is not for the High Court to adjudicate on the merits of the verdict of the jury. Unless the High Court finds a misdirection or a material non-direction which has vitiated the trial, the jury's verdict ought not to be disturbed—*Ebadi Khan v. Emp.*, 39 Cr.L.J. 674 (676), 176 I.C. 104, A.I.R. 1938 Cal. 460, 11 R.C. 36.

The words 'where the trial was by jury' mean 'where the trial was in fact held by jury' and not 'where the trial ought to have been held by jury.' And, therefore, where the accused was tried by jury in a case which ought to have been tried with the aid of assessors, no appeal would lie except on a question of law; the trial would be treated as one by a jury—*Parbhushanker*, 25 Bom. 680, 3 Bom.L.R. 278 (F.B.); *Jeyram*, 23 Bom. 696; *Surja Kurmi*, 25 Cal. 555; *Ramanna*, 1931 M.W.N. 129; *Dakhani*, 34 Cr.L.J. 441, 142 I.C. 800, 1932 A.L.J. 1103, A.I.R. 1933 All. 128, Ind. Rul. 1933 All. 155, 1933 Cr.C. 283, 55 All. 68; *Mavsang Bechar*, 33 Bom. 423, 2 I.C. 480, 11 Bom.L.R. 350. But in *Mohim Chunder*, 3 Cal. 765; *Goshain Luchman*, 21 W.R. 30; *Barabhai*, Ratanlal 951; *Narkoo*, 18 W.R. 59, it was held that in such a case the trial would be deemed as one held with the aid of assessors, treating the verdict of the jury as the opinion of the assessors, and the prisoner would not lose his right of appeal on the facts. The view expressed in *Mohim Chunder*, supra, was not followed by the Calcutta High Court in *Ekabbar Mondal v. Emp.*, A.I.R. 1937 Cal. 756, 1 L.R. (1937) 2 Cal. 315, 172 I.C. 891, 39 Cr.L.J. 182, where Henderson, J., observed: "The wording of sec. 418 is perfectly plain. It does not say that an appeal is limited to a question of law in a case triable by jury. The words used are 'except where the trial was by jury'. That to my mind is perfectly conclusive. I therefore hold that there is no appeal on facts on the conspiracy charge." In *Goloke Behari Takal v. Emp.*, 39 Cr.L.J. 161, 173 I.C. 65, A.I.R. 1938 Cal. 51, 66 C.L.J. 225, 42 C.W.N. 129, 10 R.C. 441, 1 L.R. (1938) 1 Cal. 290, Macnair,

J., agreed with the view expressed in the Full Bench decision in *Parbhushanker*, supra, but Biswas, J., after reviewing all the rulings mentioned above, interpreted the words "where the trial was by jury" in sec. 418 (1), Cr. P. C., as meaning "where the trial was lawfully by jury" and held that the accused had not lost the right of appeal on facts in such a case. In *Pattikadan Ummaru*, 26 Mad 243, 2 Weir 463, where a person was charged with an offence triable by jury, and the jury acquitted him of that charge but found him guilty of an offence triable with the aid of assessors, Benson, J., held that the verdict was to be treated as an opinion of assessors, and that an appeal lay on questions of facts; but Bhashyam Aiyanger, J., held that the jury had authority under sec. 238, in trying an offence triable by jury, to find as an incident to the trial that certain facts were proved in the trial which constituted a minor offence, and to return a verdict of guilty on such offence, though such offence might not be triable by a jury; and, therefore, in this case the verdict was to be treated as a verdict on a trial by jury and an appeal would lie only on a point of law. The latter view was followed in *Narayan*, 31 Cr.L.J. 557, 123 I.C. 477, A.I.R. 1929 Nag 295.

In a case where a person is tried by a jury, and there is also another charge which is tried by the Judge with the same jury as assessors, an appeal will lie on a question of fact—*Karuppa Goundan*, 18 Cr.L.J. 346 (Mad).

1124. Matter of law:—An appeal under this section from cases tried by jury lie on matters of law only, and the Appellate Court, cannot go into the facts of the case. If it were to do so, it would be substituting the decision of the Judges of that Court for the verdict of the jury who had the opportunity of seeing the demeanour of witnesses and weighing the evidence with the assistance which this affords, whereas the Judges of the Appellate Court can arrive at a decision only on a perusal of the paper-evidence—*Waladar*, 21 Cal 955; *Ikrumuddin* 39 Ail 348; *Ramesh Chandra*, 46 Cal 895, 23 C.W.N. 661. It is not open to the High Court to go behind the findings of fact arrived at by the jurors—*Shubrati* 35 Cr.L.J. 566, 147 I.C. 1176, 11 O.W.N. 202, A.I.R. 1934 Oudh 122. Where the Sessions Judge convicted the accused accepting the unanimous verdict of the jury no appeal lies on the merits of the case under this section—*Chubai*, 35 Cr.L.J. 285, 147 I.C. 53, 10 O.W.N. 971. If there is no question of law involved in the case, the High Court has no power to interfere, however absurd or perverse the verdict may be—*Chinna Tevan*, 14 Mad 36. But this section does not prohibit the High Court, in a case in which an appeal lies on a question of law, from deciding questions of fact which other sections of the Code require the Court to decide in order to do justice in the case—*Smither*, 26 Mad 1 (14).

In a trial by jury before the conviction is set aside the High Court must be satisfied that there is some misdirection on the part of the Sessions Judge or that there is improper admission or exclusion of some evidence—*Golam Ashbia* 33 Cr.L.J. 477, 137 I.C. 497, A.I.R. 1932 Cal. 295, 1932 Cr.C. 264, Ind. Rul. 1932 Cal. 336.

Every petition of appeal in cases tried by jury should state clearly in what respect the law has been contravened. The Court will not hunt through the records and find out the illegality if any. The parties must point out in their petition of appeal wherein there has been a departure from the law. Unless the exact contravention of law is pointed out, the petition of appeal is liable to be rejected—*Gopal*, 1 W.R. 21.

Instances of "matters of law":—The question as to the admissibility of evidence which has been rejected by the Sessions Judge is a matter of law—*Pitambar*, 2 Bom. 61; so also, the question as to whether the evidence which had been admitted by the Sessions Judge ought to have been admitted is a matter of law—*Waman*, 27 Bom. 626; *Ramesh*, 46 Cal. 895, 23 C.W.N. 661; so also, a misdirection to the jury—*Ali Fakir*, 25 Cal. 230; *Ramesh*, supra; or a non-direction by the Judge on question of prime importance in favour of the prisoner—*Malgouda* 27 Bom. 644. A conviction must be set aside on account of the admission of inadmissible evidence, damaging to the accused in the eyes of the jury and referred to in his charge by the Sessions Judge—*Ohedali*, 32 Cr.L.J. 421, 129 I.C. 680, 52 C.L.J. 423, A.I.R. 1931 Cal. 65, 1931 Cr.C. 63. But the

High Court will not interfere with the verdict of the jury merely because the Sessions Judge admitted an inadmissible evidence regarding an unimportant matter which had only a remote bearing on the question in issue and the admission of which could not have affected the verdict of the jury—*Keramat*, 27 Cr.L.J. 277, 92 I.C. 439, A.I.R. 1926 Cal. 320, 42 C.L.J. 524.

The High Court on a point of law as to the admissibility of evidence can review the whole case and determine whether the admission of rejected evidence would have affected the result of the trial—*Pitambar*, 2 Bom. 61; *Ram Chandra Gooma*, 19 Bom. 749.

When the High Court can go into facts :—Where a Judge does not agree with the verdict of the jury and submits the case to the High Court under sec. 307, the whole facts of the case may be gone into by the High Court. The clear provisions of sec. 307 allowing the High Court to consider the entire evidence are not in any way curtailed by sec. 418 or 423 and the High Court can interfere with the verdict of the jury if it thinks proper to do so—*McCarthy*, 9 All. 420; see also *Ikramuddin*, 39 All. 348. So also, the High Court can go into the facts when a case is referred to it under sec. 374 for a confirmation of the sentence of death—*Jaffir Ali*, 19 W.R. 57; *Chattradhari*, 2 C.W.N. 49. In short, in a case tried by a jury, the High Court can enter into facts only on a reference under sec. 307 or 374, and not on an appeal under this section.

Sub-section (2) :—Where in a Sessions trial of several accused, one of the accused was sentenced to death, and the other to lower punishments, and all of them appealed, it was held under the old law that the High Court, on a reference under sec. 374 in respect of the person sentenced to death, could go into the facts, but in dealing with the appeal of the other persons the High Court must be confined to matters of law and could not enter into the facts—*Chattradhari*, 2 C.W.N. 49. This anomaly is now removed by sub-sec. (2). "This clause provides that when in the case of a trial by jury, one person is sentenced to death and another to a lower punishment, the second accused may appeal on a matter of fact as well as on a matter of law. This is intended to remove the anomaly under the existing law that a High Court acting under sec. 374 could consider the facts of the case as regards the former accused, but on an appeal of the second accused could only intervene on a point of law"—*Statement of Objects and Reasons* (1914). See *Rashbehari Lal*, A.I.R. 1932 Pat. 302, 13 P.L.R. 440, 1932 Cr.C. 774, 140 I.C. 846, 34 Cr.L.J. 83 and *Khadim v. Emp.*, 38 Cr.L.J. 808 (810), 169 I.C. 716, 31 S.L.R. 82, A.I.R. 1937 Sind 162 in Note 1059.

419. Every appeal shall be made in the form of a petition in writing presented by the appellant or his pleader, and every such petition shall (unless the Court to which it is presented otherwise directs) be accompanied by a copy of the judgment or order appealed against, and, in cases tried by a jury, a copy of the heads of the charge recorded under section 367.

1125. Scope of section :—This section prescribes the form under which a petition of appeal is to be presented. It applies even where the accused is in jail; sec. 420 deals only with the manner in which the petition of appeal is to be presented when the petitioner is in jail, and does not dispense with the other formalities prescribed by this section. Section 420 is not derogatory to the general rule laid down in sec. 419—*Pokpi*, 13 All. 171 (179).

1126. Contents of petition :—A petition of appeal in a case tried by jury can be made only on a question of law, and the petition should state clearly in what respect the law has been contravened. The Court will not hunt through the records to find out the illegality, if any. If the contravention of law is not stated in the petition, it will be rejected—*Gopal*, 1 W.R. 21. But where a ground is not taken in the petition by the appellant, that would not debar him from urging it in the appeal—*Jhina Soma*,

A.I.R. 1939 Bom. 457 (459), 41 Bom L.R. 965, I.L.R. 1939 Bom. 648, 41 Cr L.J. 176, 185 I.C. 382.

A petition of appeal containing defamatory statements against the Magistrate will not be entertained. Such petition may be returned for representation after eliminating the scandalous remarks—*In re Clive Durant*, 15 Bom. 488. A petition of appeal containing a false statement will not make the petitioner liable to punishment for the false statement; because a criminal appeal is a continuation of the criminal case, and the appellant has got all the privileges of the accused—*Subbayya*, 12 Mad. 451 (cited in Note 981 under sec. 342).

1127. Presentation of petition:—As regards presentation, no special method is enjoined in the Code, and the question is one of administrative convenience alone. Therefore, an actual presentation to an officer of the Court, such as a Bench Clerk (in the High Court) or to one of the Judges, its members, is valid—*Kadinkoya*, 39 Mad. 527, 29 M.L.J. 101. But depositing a petition of appeal in a box for the convenience of parties (in the compound of a Court-house) and intended for the deposit of papers for the Court is not a proper presentation, because the box is not intended for appeals and also because a petition of appeal might have been deposited there by a person who could not legally present it—*Vasudevayya*, 19 Mad. 354.

The petition should be presented in person; the transmission of it by post is not a sufficient compliance with the requirements of this section—*Lurissetti Pitchaya*, 2 Weir 467; *Bhagwan*, Ratanlal 464; *Arappa*, 15 Mad. 137.

A joint appeal by persons with common interests convicted at the same trial is in accordance with law and should be heard. This rule has no application where the interests of any of the appellants conflict with each other—*Multhe*, A.I.R. 1936 Lah. 859, 38 Cr L.J. 115, 166 I.C. 46, 1936 Cr C 877, 17 Lah 771, 39 P.L.R. 105, 9 R.L. 330, following *Sitaram*, 5 Bom L.R. 704; *Mt. Batasha*, A.I.R. 1917 Oudh 329, 39 I.C. 480, 18 Cr.L.J. 512, 4 O.L.J. 82 and *Hira Singh*, 13 P.R. 1890 (Cr).

Presentation by Pleader—The petition should be delivered to the proper officer of the Court, either by the appellant or by his pleader—*Aripa*, 15 Mad. 137. Presentation of an appeal by the vakil's gomasta or clerk is equivalent to presentation by pleader, if the vakil has signed the petition and has been duly authorised by a *vakalat-nama*—*Gudiyati Samuel*, 2 Weir 469; *Karuppa Udayan*, 20 Mad. 87. But presentation of the petition through a person who is not the clerk of the pleader, and over whose action and conduct the pleader has no control, is not a proper presentation—*Ramasami*, 21 Mad. 114. Where a petition of appeal was prepared on behalf of three accused and signed under vakalat by their pleader, and was presented by another pleader who held vakalat only from one of the accused, it was held that there was a proper presentation of the petition of appeal on behalf of all the accused—*Muthu Mira*, 2 Weir 470 (471). But where the prisoners had conflicting interests to each other, e.g., where each of the prisoners made confessions exonerating himself and incriminating the other, it would be improper for one pleader to present an appeal on behalf of both and to represent both who had conflicting interests—*Hira*, 1890 P.R. 13.

The word 'pleader' includes a 'mukhtar' as well as any other person authorised by the appellant, and the presentation of the petition through them would be proper—*Sivaram*, 6 Bom. 14; *Suba Astala*, 1 Mad. 304. This is now made clear by the present definition of the word 'pleader' in sec. 4 (r) as amended in 1923, by which a mukhtar has been placed on the same footing as a pleader.

1128. Copy of judgment:—It is in the discretion of the Appellate Court to admit an appeal without its being accompanied by a copy of the judgment or order appealed against, where injustice might accrue to the appellant by insisting on a strict compliance with this section. But in such cases, before hearing the appeal, the Court should have before it a copy of such judgment or order which it may get by sending for the record—*Sitaram*, 5 Bom L.R. 704. Where there are several accused, in a case, and all of them prefer a joint appeal, only one copy of judgment appealed against is required to be filed, and it is not necessary that there shall be a distinct petition of

appeal by each of the convicted persons separately accompanied by a separate copy of the judgment—*Sitaram*, 5 Bom L.R. 704; *Batasha*, 18 Cr.L.J. 512 (Oudh). Where the order appealed against is not complete in itself, and the reasons of the dismissal are given in another judgment to which the order refers, a copy of such judgment also must be filed—*Paramanand v. Mohan Lal*, 30 Cr.L.J. 235 (236), 114 I.C. 61, Ind Rul. 1929 Lah. 221, A.I.R. 1929 Lah. 614.

The Appellate Court has a discretion to dispense with the copy or order appealed against not only at the time of filing the appeal but even at any subsequent stage—*Parmanand*, *supra*.

A copy furnished in the prisoner's own language is sufficient—*Ratanlal* 82. See Notes under sec. 371.

It is open to the Appellate Court to reject an appeal where the copy of the judgment or order appealed against is not supplied at the time of presentation of the appeal or within the time allowed by the Appellate Court to file it. The order rejecting the appeal cannot be held to be an order amounting to a judgment within the meaning of sec. 369, Cr. P. C., and cannot prevent the Appellate Court from considering the appeal on the merits subsequently—*Bansgopal*, 35 Cr.L.J. 441, 147 I.C. 347, 6 R.A. 458, A.I.R. 1934 All. 206, 1934 Cr.C. 254, 1934 A.L.J. 329, 56 All. 299.

420. If the appellant is in jail, he may present his petition of appeal and the copies accompanying the same to the officer in charge of the jail, who shall thereupon forward such petition and copies to the proper Appellate Court.

1129. This section deals with the manner of presentation of an appeal by a prisoner in jail, but it does not dispense with the formalities prescribed by sec. 419. These formalities must be observed; see 13 All. 171 cited in Note 1125 under sec. 419.

Where the petitioner is in jail, every facility such as pen, ink, paper and even a writer should be allowed to him to enable him to prepare the petition of appeal—*Nitto Gopaul*, 13 W.R. 69; *Shek Dadabhai*, 1 B.H.C.R. 16.

Where a jail appeal has been presented through the officer-in-charge of the jail and has been dismissed under sec. 421 no further appeal can be preferred through Counsel under sec. 419—*Khiali*, 20 A.L.J. 739, 68 I.C. 41, A.I.R. 1922 All. 480, 44 All. 759, 23 Cr.L.J. 505; *Gaya Din*, 9 O.L.J. 1, 65 I.C. 612, A.I.R. 1923 Oudh 56, 24 O.C. 304, 23 Cr.L.J. 148; *In re Kunhammad*, 72 I.C. 599, A.I.R. 1923 Mad. 426, 24 Cr.L.J. 439, 1923 M.W.N. 94, 44 M.L.J. 450, 46 Mad. 382 (392); *Ram Autar*, 11 O.L.J. 536, 1 O.W.N. 354, 25 Cr.L.J. 1313, 82 I.C. 545, A.I.R. 1924 Oudh 425; *Bhimappa*, 19 Bom. 732; *Prem Mahlon*, 14 Pat. 392, 159 I.C. 241, 16 P.L.T. 683, A.I.R. 1936 Pat. 426, 1935 Cr.C. 1123, 37 Cr.L.J. 58; *Ram Jas*, 37 Cr.L.J. 362, 160 I.C. 969, 1936 O.W.N. 194, A.I.R. 1936 Oudh 219, 1936 O.L.R. 125, 1936 Cr.C. 344. The reason is that when a right of appeal has once been exercised, and that appeal has been disposed of, the accused will not be allowed to appeal again—*Khiali*, *supra*. See also Note 1133 under the heading "Appeal from jail" where recent rulings have been inserted.

A jail appeal can be heard and disposed of by a Vacation Judge—*In re Kunhammad*, *supra*.

A jail appeal was preferred by some of the prisoners and while the appeal was pending, a petition of appeal on behalf of some of the prisoners was filed through a mukhtear. The Sessions Judge rejected the jail appeal in ignorance of the fact that an appeal had been filed through a mukhtear. Held that the High Court in its revisional powers would set aside the order of dismissal of the jail appeal, and direct the Sessions Judge to re-hear both the appeals—*Mewa Ram*, 48 All. 208, 23 A.L.J. 1051, 26 Cr.L.J. 1621. See also *Lachman*, cited in Note 1133.

When a prisoner sentenced to death subject to confirmation of the High Court presents his appeal from jail under the provisions of this section, and the Local Govern-

ment has granted him the privilege of being presented by a Counsel at the expense of the Crown, but the accused refuses to give any instruction to such counsel, stating that he does not wish to be represented by him, it is the duty of the counsel to conduct the appeal on behalf of the accused, without in the least considering what the accused's views may be on the subject. The concession of the Crown towards the accused may or may not be appreciated by the accused, but it in no way affects the conduct of the appeal—*Ram Prasad*, 4 O.W.N. 638, 28 Cr.L.J. 679 (680), 103 I.C. 407, A.I.R. 1927 Oudh 312.

421. (1) On receiving the petition and copy under section 419 or section 420, the Appellate Court shall peruse the same, and, if it considers that there is no sufficient ground for interfering, it may dismiss the appeal summarily:

Provided that no appeal presented under section 419 shall be dismissed unless the appellant or his pleader has had a reasonable opportunity of being heard in support of the same.

(2) Before dismissing an appeal under this section, the Court may call for the record of the case, but shall not be bound to do so.

1130. Appellant not bound to appear:—Once an appeal is received, it should not be dismissed merely because the appellant or his pleader failed to appear to support the petition; but the Appellate Court must consider whether there exist sufficient grounds for its interference, and must judicially determine the appeal on the merits—*Deoshanker*, Ratanlal 593; *Ram Bharose*, 14 A.L.J. 327, 17 Cr.L.J. 353; *Ratan Chand*, 9 Cr.L.J. 553, 5 N.L.R. 76; *In re Kunhammad*, 46 Mad 382 (402); *Baldeo*, 24 Cr.L.J. 475 (Pat.); *Koura*, 1895 P.R. 21. If the appellant does not appear but leaves the question of admission or rejection of the appeal to be determined by the Appellate Court on the papers, the Appellate Court is bound to peruse the papers and cannot dismiss the appeal summarily under this section on the ground of non-appearance of the appellant by counsel or in person—*Vali Mahomed*, Ratanlal 739 (740).

There is no provision for the dismissal of appeals on default of prosecution. The law requires that before an Appellate Court dismisses an appeal summarily, it shall read a copy of the judgment, and then, if there is no sufficient ground for interfering, it may dismiss the appeal summarily. But, clearly, the law requires that the dismissal of the appeal shall depend upon the exercise by the Judge of his independent and impartial judgment after he has read a copy of the judgment, and not upon the failure of the accused to prosecute his appeal—*Balumal Hotchand*, 39 Cr.L.J. 890 (891), 177 I.C. 346, 11 R.S. 58, A.I.R. 1938 Sind 171.

'No sufficient ground for interfering':—The appellant's pleader should be allowed, if necessary, to refer to the certified copies of the evidence to show that there were sufficient grounds for interfering. Where the Judge disallowed the pleader to refer to the evidence, he acted erroneously—*Manga*, 11 O.C. 360, 9 Cr.L.J. 55.

Where there are in the memorandum of appeal allegations of withholding witnesses, of refusal to grant warrants and summonses to witnesses, and of disregard of certain evidence filed in the case, there were sufficient grounds for interference—*Aham Isaq*, Ratanlal 916. So also, where the grounds of appeal disclose reasons for discrediting the witnesses for the prosecution, there are sufficient grounds for interference and the Appellate Court ought not to dismiss the appeal—*Rangachariu*, 29 Mad. 236.

If no sufficient grounds for interference are shown, the Appellate Court should not interfere, but should dismiss the appeal—*Sayman*, 5 All. 386.

1131. Summary dismissal of appeal:—This section applies to all appeals unless it is specifically provided otherwise. So an appeal under sec. 476B, Cr. P. C., can be disposed of summarily under this section—*Baidyanath*, 32 Cr.L.J. 735, 131 I.C. 536, A.I.R. 1931 Pat. 144, 12 P.L.T. 336, 1931 Cr.C. 360, Ind. Rul. 1931 Pat. 216; *Mahomed Boyetulla*, 32 Cr.L.J. 325, 129 I.C. 317, A.I.R. 1931 Cal. 3, 34 C.W.N. 923, Ind. Rul. 1931 Cal. 157, 58 Cal. 402, 1931 Cr.C. 35. The law does not mean to fetter the discretion of a Court receiving jail appeals which may also be summarily dismissed under this section—*Alla Bakhsh*, A.I.R. 1931 All. 555, 1931 A.L.J. 644, 1931 Cr.C. 897, 53 All. 797, 33 Cr.L.J. 259, 136 I.C. 281, Ind. Rul. 1932 All. 169. Although this section gives the Appellate Court power to dismiss an appeal summarily, that power must be exercised with judicial discretion. Appeals which are complicated both in law and fact ought not to be summarily dismissed—*Kailash*, 19 Cr.L.J. 228 (Cal.); *Sukhdeo*, 3 P.L.J. 389, 19 Cr.L.J. 209; *Rahimaddi*, 22 Cr.L.J. 349 (Cal.). An Appellate Court should exercise its power under this section with great care—*Thakuri*, 34 Cr.L.J. 1017, 145 I.C. 652, A.I.R. 1933 Pat. 160, 1933 Cr.C. 402. Where there has been a dispute as to facts and where the credibility of witnesses for the prosecution has been impugned, it is proper for the Appellate Court to call for the record and look at the evidence, and not to dismiss the appeal summarily—*Padarath*, 24 Cr.L.J. 477 (Pat.). The summary dismissal of an appeal is not justified where there were disputed questions of fact in the case, and the number of witnesses and documents were large, and the Court of first instance had discussed the evidence and come to certain findings—*Rahimaddi*, 22 Cr.L.J. 349 (Cal.). Where questions of title to immovable properties are raised by the defence the lower appellate Court will not be justified in rejecting an appeal summarily without recording its findings on the defence and without considering the defence which may have some bearing on the question of dishonest intention necessary to sustain a conviction for theft—*Abdul Latif v. Ahmed*, 34 Cr.L.J. 812, 144 I.C. 704, A.I.R. 1933 Cal. 515, 37 C.W.N. 235, 1933 Cr.C. 859, where it has also been laid down that the practice of admitting appeals without any hearing except on the question of bail cannot be defended, regard being had to this section.

An order of summary rejection of appeal under this section is final. Such an order is not open to review and it is immaterial whether such order is made before or after the papers have been called for—*Mahomed Yashin*, 4 Bom. 101; *Bhimappa*, 19 Bom. 732; *Clegg*, 1887 P.R. 24. But the Madras High Court holds that if the appeal has been dismissed for default of the pleader's appearance, and it is proved to the satisfaction of the Appellate Court that there is a reasonable excuse for the non-appearance of the pleader, the Appellate Court may re-hear the appeal on the merits—*Anonymous*, 2 Weir 471, 7 M.H.C.R. App. 29; *In re Kuhammad*, 46 Mad. 382 (403).

When an appeal is dismissed under this section, the Court has no power to alter the conviction and sentence—*Naga*, 2 Weir 475; *Govindrao*, Ratanlal 304 (305); *Bana*, Ratanlal 384 (385); *Mathuralaldas*, Ratanlal 74.

Withdrawal of appeal:—A petition of appeal presented for admission may be withdrawn, before it is dismissed under this section—*Chundernath*, 5 C.L.R. 372.

Admission of a connected appeal:—Where two co-accused presented two appeals, the fact that the Appellate Court admitted the appeal of one of the appellants, does not affect his power to dismiss the other appeal summarily under this section—*Jagat Chandra v. Lal Chand*, 5 C.W.N. 332.

Piecemeal disposal of appeal:—A person was convicted in one trial on two separate charges of cheating. On appeal the Sessions Judge summarily dismissed the appeal on one charge and admitted the appeal on the other, and the appeal on this charge was ultimately allowed. Held that the procedure adopted by the Appellate Court in disposing of the appeal piecemeal was no doubt unusual and undesirable, but not illegal—*Ismail*, 5 Rang. 274, 28 Cr.L.J. 765 (766), 103 I.C. 845, A.I.R. 1927 Rang. 239.

Summary dismissal of appeal and reduction of sentence:—Upon the true construction of the Cr. P. Code, the Appellate Court is not entitled to dismiss an appeal summarily in terms of this section unless the Court is satisfied that there is no sufficient ground

for interfering in accordance with the relief sought in the appeal, and where the appeal is not dismissed summarily, the Court is bound, in order to the disposal of the appeal to comply with the provisions of sec. 422 as to notice, and with the provisions of sec. 423 as to sending for the record, if such record is not already in Court. The terms of this section exclude the possibility of partial summary disposal, *e.g.*, so far as the conviction is appealed against. Where the High Court in its Appellate jurisdiction dismissed an appeal summarily under this section but reduced the sentences passed on the appellant without any notice to the Crown, *held* that the procedure of the High Court was in violation of *their statutory duty in respect of their failure to comply with the provisions of sec. 422 as to notice to the Crown, and the provisions of sec. 423 as to sending for the record—K.-E. v. Dahu Raut*, 39 C.W.N. 626 (632), 1935 M.W.N. 469, 1935 Cr.C. 551, 68 M.L.J. 653, 62 Cal. 983, A.I.R. 1933 P.C. 89, 36 Cr.L.J. 838, 37 Bom.L.R. 557, 62 I.A. 129, 7 R.P.C. 194, 41 M.L.W. 792, 37 P.L.R. 314, 17 P.L.T. 387, 1935 A.L.J. 802, 1935 O.L.R. 340, 1935 A.L.R. 438, 1 B.R. 487, 155 I.C. 386, 1935 O.W.N. 576, 61 C.L.J. 250 (P.C.), overruling *Dahu Raut*, 38 C.W.N. 25, 34 Cr.L.J. 1100, 145 I.C. 937, A.I.R. 1933 Cal. 870; *Baldeo Singh v. Dhenoo Coalm.*, 37 Cr.L.J. 234, A.I.R. 1936 Pat. 109, 160 I.C. 152. According to the Bombay High Court in such cases the correct procedure is that when the appeal first comes on for hearing it should not be dismissed summarily, but should be directed to stand over, and at the same time notice should be served on Government under the revisional powers conferred upon the Court by sec. 439, Cr. P. C., to show cause why the sentence should not be reduced. At the same time it will be convenient to send for the record. The notice and the appeal will then be heard on the same day. If after hearing the Government Pleader, the Court comes to the conclusion that the sentence ought to be reduced, it can be reduced under the revisional powers. Having reduced the sentence the Court can then, if so minded, say that it sees no ground for interfering with the conviction or sentence, and can dismiss the appeal summarily under sec. 421, Cr. P. C.—*Bai Dhankor v. Emp.*, 38 Cr.L.J. 572, 168 I.C. 504, 39 Bom.L.R. 74, A.I.R. 1937 Bom. 148, 9 R.B. 372, 1 I.R. 1937 Bom. 365

1132. Judgment and record of reasons:—An Appellate Court in rejecting an appeal summarily under this section is not bound to write a judgment—*Rash Behari v. Balgopal*, 21 Cal. 92; *Waruba*, 20 Bom. 540; *Annatarapa Krishnayya*, 25 Mad. 534; *Bala Subbanna*, 2 Weir 473; *Nazar Mohd v. Hara Singh*, 26 P.L.T. 616, 27 Cr.L.J. 23; *Gurbari*, 2 P.L.J. 695; *Nitya Pal v. Beni Madhab*, 9 C.W.N. 623; *Ramrao*, 13 N.L.R. 169, 18 Cr.L.J. 993; *Nga Ba*, 19 Cr.L.J. 316 (Bur.); *Nga Sein*, U.B.R. (1906) 2nd Qr. 49. But it is advisable that a Court which dismisses an appeal under this section should briefly record its reasons for such dismissal, in view of the possibility of such order being challenged by an application for revision—*Ram Narain*, 8 All. 514; *Kundan*, 36 All. 496, 15 Cr.L.J. 512; *Guru Bari*, 43 I.C. 439, 19 Cr.L.J. 151, 2 P.L.J. 695, 4 P.L.W. 153; *Krishna*, 32 Cr.L.J. 86, 127 I.C. 847, A.I.R. 1930 Pat. 520, Ind. Rul. 1930 Pat. 751, 1930 Cr.C. 1016, 12 P.L.T. 561; *Thakur Sahu*, 125 I.C. 121, A.I.R. 1930 Pat. 331, 1930 Cr.C. 616, 31 Cr.L.J. 760, 11 P.L.T. 242, Ind. Rul. 1930 Pat. 473; *Thakuri*, 34 Cr.L.J. 1017, 145 I.C. 652, A.I.R. 1933 Pat. 160, 1933 Cr.C. 402; *Abdul Latif v. Ahmed*, 34 Cr.L.J. 812, 144 I.C. 704, A.I.R. 1933 Cal. 515, 37 C.W.N. 235, 1933 Cr.C. 859; *Jaganathan*, A.I.R. 1935 Pat. 32, 152 I.C. 801, 36 Cr.L.J. 191; *Maroti v. Kasaba*, 27 Cr.L.J. 1404, 98 I.C. 716, A.I.R. 1927 Nag. 88; *Gobind*, 61 I.C. 49, 2 P.L.T. 10; *Ramkanti*, 19 Cr.L.J. 304 (Pat.); *Nanhu*, 17 All. 241; *Ramrao*, 13 N.L.R. 169, 18 Cr.L.J. 993; *Jaganath*, 25 Cr.L.J. 1237, 82 I.C. 165, A.I.R. 1925 Pat. 183; *Brij Mohan*, 26 Cr.L.J. 4, 83 I.C. 484, A.I.R. 1925 Oudh 290; *Chhathu Gope v. Emp.*, 39 Cr.L.J. 380, 173 I.C. 751, 4 B.R. 331, 10 R.P. 444, 19 P.L.T. 28, A.I.R. 1938 Pat. 176; *Bala Bux v. Emp.*, 39 Cr.L.J. 732 (733), 176 I.C. 558, A.I.R. 1938 Pat. 366, 19 P.L.T. 395, 4 B.R. 734, 11 R.P. 85. Though ordinarily an Appellate Court in rejecting an appeal summarily is not bound to record a judgment, still the Court should not dispose of an appeal under this section otherwise than by a judgment showing on the face of it that it has applied its mind to a consideration of the evidence on the record, and of the pleas raised by the accused both in the Court below and in his memorandum of appeal—*Lal Behari*, 33

All. 393, 17 Cr.L.J. 309; *Janesh Ram v. Gyan Chand*, 21 Cr.L.J. 139 (Pat.); *Chandrasekhar v. Rajaram*, 30 Cr.L.J. 791, 117 I.C. 279, A.I.R. 1929 Nag 150, Ind. Rul. 1929 Nag. 231; *Gobind*, 2 P.L.T. 10, 61 I.C. 49, 22 Cr.L.J. 321; *Brijmohan Singh v. Dasrath Singh*, 38 Cr.L.J. 232, 166 I.C. 494, 9 R.P. 304, 3 B.R. 172. Where in a case in which the evidence was voluminous, the Appellate Court, without considering either the evidence of the witnesses or the documents, disposed of the appeal practically in a single paragraph, held that the appellate judgment was not in accordance with law and the appeal must be reheard—*Narain Prasad*, 1 P.L.T. 716, 57 I.C. 664, 21 Cr.L.J. 648.

The Appellate Court need not go to the length of writing an elaborate judgment, but should notice briefly and clearly what objections were urged on appeal and how they were disposed of—*Ekkowrie*, 32 Cal. 178. It should record at least so much as would satisfy the High Court, when an application for revision is made, that it has fully considered all the questions in issue and has appreciated the simplicity or gravity of the case—*Gurbari*, 2 P.L.J. 695, 19 Cr.L.J. 151. Where no reason is given for the summary dismissal, the High Court will either remand the appeal to the Appellate Court to be admitted and heard, or will itself examine the evidence—*Ramkant*, 19 Cr.L.J. 304 (Pat.); *Nga Ba*, 19 Cr.L.J. 316. See also *Brijmohan Singh v. Dasrath Singh*, supra.

The provisions of the Code with reference to the judgment of a subordinate Court do not apply to the judgment of a High Court; the High Court can undoubtedly dismiss an appeal by an order without giving reasons—*Kuldip*, A.I.R. 1933 Pat. 38 (40), 11 Pat. 697, 141 I.C. 154, 1933 Cr.C. 54, 34 Cr.L.J. 118.

Where the Appellate Court simply noted "Heard. I see no reason to interfere," held that this was not a sufficient compliance with the requirements of this section, in a case where both oral and documentary evidence had been produced by both sides and where the memorandum of appeal contained a number of grounds that admitted of argument—*Barji*, 36 Cr.L.J. 261, 153 I.C. 152, 7 R.P. 304, A.I.R. 1935 Pat. 37, 16 P.L.T. 72, 1935 Cr.C. 77, 1 B.R. 131.

1133. Proviso—Right of appellant to be heard:—This proviso is an embodiment of the legal means "*Audi alteram partem*," i.e., no man shall be condemned unheard. This maxim derives its origin from the saying of Seneca to the following effect: "Whoever may have decided anything, the other side remaining unheard, granted that his decision may have been just, will not have been just himself"—*Pohi*, 13 All. 171 (175).

Appeal from Jail:—The proviso lays down that no appeal under sec. 419 shall be dismissed without giving the appellant or his pleader an opportunity of being heard. But this proviso does not apply to jail appeals presented under sec. 420; and, therefore, the Appellate Court is not bound to give the accused any time to engage counsel. But under Rule 50 of the Madras Rules and Practice, seven days' time is allowed before a jail appeal is circulated to the Judges. So an appellant has sufficient opportunity of engaging counsel if he wishes to do so—*In re Kunhammad*, 46 Mad. 382 (400).

As to the question whether notice should be given to an appellant filing his appeal from jail, it has been held in some Madras cases, that sec. 419 (which is referred to in this proviso) is of general application and embraces the cases of all appellants whether in or out of jail, and there is nothing in sec. 420 to indicate that it was intended to deprive appellants who are in jail of the opportunity of being heard on their appeal. Notice is, therefore, necessary to be given to the accused though he is in jail and there is nothing in this section to prevent the prisoner from being heard in person—*Kolina Dutchaiya*, 2 Weir 472 (473); if the prisoner is not represented by a pleader, the Appellate Court has power to direct that the prisoner be brought before it—*Anonymous*, 2 Weir 473. If the convict files a petition of appeal from jail through a legal practitioner, the Appellate Court is not competent to dismiss the jail appeal summarily, but should hear the convict's pleader—*Bhauani*, 3 A.L.J. 693, 4 Cr.L.J. 373. But Mahmood, J. has expressed the opinion in *Pohji*, 13 All. 171 (180) that as this proviso does not apply to an appeal presented from jail, neither the prisoner nor his pleader, if he engages one, has the right to insist that he shall be heard. The Sind Court is of opinion that

this proviso is confined to sec. 419, and does not apply to an appeal preferred by the accused from prison under sec. 420. If the accused is in jail, and has no pleader, any notice to him is useless, because he cannot appear in Court and cannot give any further information to the Court. Consequently, the Appellate Court can summarily dismiss such appeal on perusal of the papers, without calling upon him to appear—*Loung*, 20 S.L.R. 189, 27 Cr.L.J. 933 (934), 96 I.C. 389.

The express reference in the substantive part of sec. 421, Cr. P. C., to a petition presented under sec. 419 or sec. 420, Cr. P. C., indicates that the omission of any reference to sec. 420, Cr. P. C., in the Proviso to sec. 421, Cr. P. C., is deliberate, and that the Proviso is only intended to apply to an appeal presented under sec. 419, Cr. P. C., that is an appeal presented direct to the Court, and not through the officer-in-charge of the jail. Therefore, where the Court is dealing with an appeal under sec. 421, Cr. P. C., it is entitled to dismiss the appeal summarily without hearing the accused, who presents his appeal under sec. 420, Cr. P. C., and the accused has no right to insist on being heard. Where a man has already been condemned and deprived of his liberty, it requires some statutory provision to entitle him to insist upon leaving the place where he is confined and being brought to the place where his appeal is to be heard. The Court will always consider whether the ends of justice require that an appellant should be heard. If the Court thinks that there is any possibility of its decision being influenced by anything the accused may say, then the Court can always direct him to be brought before it when his appeal is being heard in the first instance—*Jalam Bharatsingh v. Emp.*, 39 Cr.L.J. 578, 175 I.C. 352, I.L.R. 1938 Bom. 357, 10 R.B. 535, 40 Bom.L.R. 317, A.I.R. 1938 Bom. 279.

The dismissal of the jail appeal must be deemed to be a provisional dismissal in no way affecting the right of the appellant to have his counsel heard under the proviso to this section in connection with the appeal under sec. 419, Cr. P. C. The practice in the Allahabad High Court is that a summary dismissal of a jail appeal by a Judge does not in any way debar the hearing of an appeal filed by counsel—*Lachhman*, A.I.R. 1934 All. 488, 4 A.W.N. 344, 1934 Cr.C. 1305, 36 Cr.L.J. 300, 153 I.C. 153; *Bhawani Dihal*, 1906 A.W.N. 303. But see *Khiyal v. Emp.*, 20 A.L.J. 739, 68 I.C. 41, 23 Cr.L.J. 505, A.I.R. 1922 All. 480, 44 All. 759. After reviewing the previous rulings on this point a contrary view was taken by the Patna High Court in *Pem Mahton*, 37 Cr.L.J. 58, 159 I.C. 241, A.I.R. 1935 Pat. 426, 14 Pat. 392, 2 B.R. 62, 8 R.B. 259, 16 P.L.T. 683, 1935 Cr.C. 1123, where it has been laid down that this Code does not confer more than one right of appeal to any accused person from a conviction and sentence passed on him nor does the Code or the Letters Patent of the High Court permit an appeal in a criminal matter from an order of one or more Judges of the High Court to other Judges of the same Court. The High Court has no power to entertain an appeal from the conviction and sentence passed on the appellants after the dismissal of the appeal which they preferred from jail and neither the Bench hearing the appeal nor the Bench which admitted it has power to review the order of dismissal. The Madras High Court as well as the Chief Court of Oudh have also held that once an appeal presented by a convict from jail has been dismissed it is not open to the same prisoner to file another memorandum of appeal through a Counsel—*Queen-Empress v. Bhimappa*, 19 Bom. 732; *Kanhamad Haji v. Emp.*, 46 Mad. 382, 72 I.C. 599, A.I.R. 1923 Mad. 426, 24 Cr.L.J. 439, 1923 M.W.N. 94, 44 M.L.J. 450; *Ganga Din v. Emp.*, 9 O.L.J. 1, 65 I.C. 612, 24 O.C. 304, A.I.R. 1923 Oudh 56, 23 Cr.L.J. 148; *Ram Autar v. Emp.*, 11 O.L.J. 536, 82 I.C. 545, A.I.R. 1924 Oudh 425, 25 Cr.L.J. 1313, 1 O.W.N. 354; *Ram Jas v. Emp.*, 37 Cr.L.J. 362, 160 I.C. 969, 1936 O.W.N. 194, 1936 O.L.R. 125, 8 R.O. 292, A.I.R. 1936 Oudh 219, 1936 Cr.C. 344, dissenting from *Hulai v. Emp.*, 3 O.L.J. 326, 36 I.C. 133, 17 Cr.L.J. 453, A.I.R. 1916 Oudh 85; *Rajkumari v. Emp.*, 41 Cr.L.J. 682, A.I.R. 1940 Oudh 371, 1940 O.L.R. 389, 1940 O.W.N. 520, 183 I.C. 760; *Jodha v. King-Emp.*, 41 Cr.L.J. 711, A.I.R. 1940 Oudh 369, 1940 O.L.R. 403, 189 I.C. 83, 1940 O.W.N. 594. The practice which has been followed in recent years of treating jail appeals summarily dismissed by the Judges of the Oudh Chief Court as not finally

dismissed unless and until they are sealed at the end of period of limitation has no justification in law. Such appeals, as soon as a Judge or a Bench of Judges has decided them and signed and dated their order are decided appeals and in such cases a represented appeal subsequently filed is not maintainable—*Jodha v. King-Emp.*, *supra*; *Rajkumari v. Emp.*, *supra*. See also Note 1129.

Notice to the Crown:—Where on presentation of an appeal the Sessions Judge appoints a day for hearing the appellant's pleader and after hearing him dismisses the appeal summarily but his judgment is a complete one dealing with the evidence in detail and with the points raised on behalf of the appellants, no grievance can be made of the fact that the Appellate Court did not issue notice to the Crown, considering it unnecessary to call upon the Public Prosecutor to reply to the arguments adduced on behalf of the appellants—*Sonu Kurmi v. Emp.*, 39 Cr.L.J. 950, 177 I.C. 697, 5 B.R. 12, 11 R.P. 176, A.I.R. 1939 Pat. 24.

Other Appeals:—It is not competent to the Appellate Court to reject an appeal summarily without giving a reasonable opportunity to the appellant or his pleader of being heard—*Rangachari*, 29 Mad. 236; *Gobind*, 2 P.L.T. 10, 61 I.C. 49, 22 Cr.L.J. 321; *Rajkumar v. Tinkowri*, 12 C.W.N. 248; *Ranga Row*, 23 M.L.J. 371, 13 Cr.L.J. 710. If the appeal is rejected under this section without hearing the appellant or his pleader, the Appellate Court may be directed to rehear the petition of appeal, and to give the appellant an opportunity of being heard—*Fakira*, Ratanlal 703. An appeal should not be dismissed merely because the appellants do not appear to support the petition, but the Appellate Court should consider whether there was sufficient ground for interfering which would imply judicial consideration of the appeal on the merits. Where the order of the District Magistrate does not indicate that he gave any consideration to the merits of the case and it appears that he dismissed the appeal summarily merely for default, the High Court directed the re-hearing of the appeal—*Gulab Das*, 37 Cr.L.J. 93, 159 I.C. 334, A.I.R. 1935 Pat. 460, 16 P.L.T. 607, 1935 Cr.C. 1169. Where the Appellate Court rejected the appeal summarily owing to default of the pleader's appearance, and satisfactory reason for his non-appearance was shown, the Court should rehear the appeal on the merits—*Anonymous*, 2 Weir 471, 7 M.H.C.R. App. 29; *In re Kunhammad*, 46 Mad. 382; *Ratan Chand*, 5 N.L.R. 76, 9 Cr.L.J. 553. Where the accused's pleader presents a time-barred appeal, together with an application for excusing the delay under sec. 5, Limitation Act, on the ground that the accused under a *bona fide* mistake had presented proceedings in a wrong Court, the Appellate Court should not dismiss the appeal summarily, but should give the pleader an opportunity of being heard as to the allegation of there being sufficient cause for excusing the delay—*Nurudin*, 29 Bom.L.R. 701, 103 I.C. 109, A.I.R. 1927 Bom. 445, 28 Cr.L.J. 653 (655). Where the notice for hearing the appeal was served in the afternoon of 21st March on the appellant's pleader at Amalner asking him to be present on the 22nd March at Jalgaon or any other place where the camp of the District Magistrate might be, and on the day in question the District Magistrate was encamped at Edlabad, at a considerable distance from Amalner, so that the appellant's pleader could not appear at the place and the appeal was consequently dismissed, held that the order of dismissal must be set aside as there was no sufficient notice to the appellant's pleader of the date and place of hearing—*In re Arjun*, 22 Bom.L.R. 188, 55 I.C. 853, 21 Cr.L.J. 373. Where the District Magistrate called upon the appellant's pleader to argue the appeal on the same day that it was presented, and on the pleader asking for time, the Magistrate refused to grant him time and rejected the appeal, it was held that the appellant's pleader was not afforded a reasonable opportunity of being heard—*Gurshida*, 2 Cr.L.J. 58, 7 Bom.L.R. 89; *Ramatchand*, 36 Cal. 385, 13 C.W.N. 684; *In re Turka Hussan*, 48 Mad. 385, 47 M.L.J. 661. But this section does not contemplate that an appeal cannot be heard on the very day on which it is presented, and that notice must be given of some future date on which the appellant or his pleader may be heard. There is nothing in this section to prevent the Court from hearing the appellant's pleader at the time when he presents the appeal, if the pleader desires that course; if he does not desire to be heard at once,

'then certainly the Court should appoint a future date of which notice is to be given to the appellant or his pleader,' so that he may be heard on that date—*Basavansappa*, 29 Bom.L.R. 488, 101 I.C. 595, A.I.R. 1927 Bom. 361, 8 A.I.Cr.R. 81, 28 Cr.L.J. 467 (468); *Kolappalli*, 53 Mad. 865, 32 Cr.L.J. 40, 127 I.C. 803, 32 M.L.W. 20, 1930 M.W.N. 686, A.I.R. 1930 Mad. 863, Ind. Rul. 1930 Mad. 1043, 59 M.L.J. 836, 1930 Cr.C. 1049.

A particular date should be fixed, on which the appeal is to be heard. A general notice posted in the Court that appeals will be heard for admission only on the first Court-day next after presentation is not a compliance with the provisions of this section. The Court should fix a time in each particular case, so as to enable the appellant or his pleader to be heard—*Malam*, 5 Mad. 11.

1134. Sub-section (2):—Although the Legislature does not make it obligatory on the part of the Appellate Court to send for the records before dismissing an appeal, still the practice of summarily dismissing an appeal without calling for the records is always inconvenient and must not be adopted—*Jugal Kishore*, 1883 A.W.N. 145. If questions of fact are argued in the appeal, the appeal ought not to be disposed of under sec. 421 without sending for the original records of the Court below—*Turka Husain*, 48 Mad. 385, 47 M.L.J. 661, 26 Cr.L.J. 411, 84 I.C. 1051, A.I.R. 1924 Mad. 895, 20 M.L.W. 623, 1924 M.W.N. 893. The Appellate Court is, however, not bound to send for the papers before taking action under this section—*Kolapalli*, 32 Cr.L.J. 40, 127 I.C. 803, 32 M.L.W. 20, 1930 M.W.N. 686, A.I.R. 1930 Mad. 863, Ind. Rul. 1930 Mad. 1043, 53 Mad. 865, 59 M.L.J. 836, 1930 Cr.C. 1039. Where the grounds of appeal disclose reasons for discrediting the witnesses for the prosecution, the Appellate Court ought to call for the records—*Rangachari*, 29 Mad. 236.

An Appellate Court is not bound to call for the record in an appeal in which the only question is a question of fact and the judgment of the Court below is so plain and clear that calling for the record would be a mere waste of time. But when the judgment of the lower Court is a long and intricate judgment requiring careful consideration, the Appellate Court ought not to refuse to call for the record—*Sukhdeo*, 3 P.L.J. 389, 19 Cr.L.J. 269.

Where the Appellate Court sent for the record and ordered notice to be given to the appellants' pleader before admitting the appeal but refrained from issuing any notice to the Public Prosecutor, held that it was perfectly justified in adopting such an intermediate course—*Maroti v. Kasabai*, 27 Cr.L.J. 1404, 93 I.C. 716, A.I.R. 1927 Nag. 88.

After the record is sent for and received, the Appellate Court ought to hear the pleader and cannot dismiss the appeal summarily without hearing him; if the Appellate Court so dismisses the appeal, the order of dismissal must be set aside and the appeal will be directed to be reheard—*Lalit Kumar*, 92 I.C. 894, A.I.R. 1926 Cal. 174, 42 C.L.J. 551, 27 Cr.L.J. 382; *Surendra*, 42 C.L.J. 554, 93 I.C. 76, 27 Cr.L.J. 412, A.I.R. 1926 Cal. 161; *Hatem Ali*, 33 Cr.L.J. 602, 138 I.C. 384, A.I.R. 1932 Cal. 397, 1932 Cr.C. 344, Ind. Rul. 1932 Cal. 450. The same High Court has taken a different view in *Monmotha v. Dhatrigram U. B.*, 40 C.W.N. 128, 37 Cr.L.J. 904, 164 I.C. 270, where it has been held that there is nothing contained in the section about the right of the appellant or his pleader to have two reasonable opportunities of being heard by the Court. The earlier view was, however, followed in the case of *Jitendra Nath Gorai*, 37 Cr.L.J. 831, 163 I.C. 238, A.I.R. 1936 Cal. 294, 1936 Cr.C. 531. Discussing the rulings quoted above the Calcutta High Court has recently held that all that the statute requires with reference to this matter is that the Appellate Court before dismissing an appeal summarily must afford the appellant or his pleader a reasonable opportunity of being heard. That being the case it would be a sufficient compliance with the statute if such reasonable opportunity is afforded either on the first presentation of the appeal or if the Appellate Court sends for the record, after the record has been received. Where, therefore, the Appellate Court allowed the pleader for the appellant to argue his clients' case in full on the day of presentation of the appeal, it was unnecessary to hear the appellant or his pleader again after the arrival of the record in the Appellate Court as the appellant was allowed a reasonable opportunity of

being heard in support of his appeal within the meaning of this section—*Akramaddin v. Emp.*, A.I.R. 1939 Cal. 541, I.L.R. (1939) 1 Cal. 314, 40 Cr.L.J. 839, 183 I.C. 742. The Patna High Court has also held that such a procedure was not an illegality—*Dewal Mahton v. Emp.*, 12 P.L.T. 147, 126 I.C. 911, A.I.R. 1930 Pat. 499, 1930 Cr.C. 927, 9 Pat. 768, 31 Cr.L.J. 1311, Ind. Rul. 1930 Pat. 671. But it is desirable in all cases where a busy Sessions Judge sends for the record in a criminal appeal, which is presented to him for admission, that he should note in the order-sheet the points for which he is sending for the record in order to satisfy himself as to the correctness of the submissions made by the appellants before him. It will be difficult, in many cases, if not in all, for a busy Sessions Judge to remember the submissions which were advanced by the Appellants' Advocate which had satisfied him to this extent that he was forced to send for the record—*Basdeo Koiri v. Emp.*, 39 Cr.L.J. 254, 172 I.C. 944, A.I.R. 1938 Pat. 12, 18 P.L.T. 915, 4 B.R. 204, 10 R.P. 369, 1938 P.W.N. 113. The Bombay High Court is also of opinion that it is not imperative on the Appellate Court to hear the appellant's pleader, after the record is called for, and there would be no illegality on the part of the Court in dismissing the appeal after perusal of the record, without giving the pleader another opportunity of being heard, especially when the pleader had been heard before the records were called for, because his arguments about the evidence can then be better appreciated—*Bosavanappa*, 29 Bom.L.R. 488, 101 I.C. 595, A.I.R. 1927 Bom. 361, 8 A.I.Cr.R. 81, 28 Cr.L.J. 467 (468). The Sind Court is also of opinion that although the records have been called for, still as the case is not fixed for hearing under sec. 423, it is not obligatory on the Court to give the pleader a hearing before dismissing the appeal, especially where the pleader has once been heard before the records were sent for—*Jivaya*, 2 S.L.R. 39, 10 Cr.L.J. 204.

1135. Review:—An order passed under this section, dismissing an appeal filed under sec. 419, is *prima facie final*. Such an order cannot be vacated under sec. 561A unless it is proved that either of the conditions precedent to the passing of the order as laid down by this section has not been fulfilled and this is a question of fact depending on the circumstances of each case. The burden of proving that either of the conditions has not been complied with, lies heavily on the person challenging the finality of the order. Where it is proved that either of the conditions precedent has not been complied with, the High Court has power to interfere under sec. 561A and in such a case it is immaterial whether the Bench which is called upon to interfere is composed of the same or different Judges. Where there is no proof that either of the conditions have not been complied with, the High Court, whether the Bench is composed of the same or other Judges, has no power to interfere—*Shahu*, 36 Cr.L.J. 831 (836), 155 I.C. 736, A.I.R. 1935 Sind 84, 1935 Cr.C. 370 (F.B.). See Note 1433A.

1135A. Revision:—Where an appeal has been dismissed summarily under this section without recording any reasons or judgment, the High Court can either go into the case on its own account and examine the evidence, or can remand the appeal to the Lower Appellate Court to be admitted and heard—*Ram Kant*, 19 Cr.L.J. 304 (Pat.). Though the practice usually is to remand the case to the Lower Appellate Court and ask for a judgment from that Court after a regular hearing, the High Court has discretion to go into the case itself, and, if necessary, to consider the question of fact as if in first appeal—*Aman Ali*, 13 O.C. 309, 11 Cr.L.J. 631; *Nga Ba*, 19 Cr.L.J. 316 (Bur.). If the High Court finds that the case should not have been dealt with summarily, the High Court will send back the case ordering the Appellate Court to hear it on its merits and pass a judgment—*Nga Ba*, 19 Cr.L.J. 316 (Bur.). Where the Sessions Judge summarily dismissed an appeal from the conviction of a Magistrate, the High Court itself finding that the evidence on which the conviction was based was insufficient, set aside the conviction and acquitted the accused, instead of remanding the appeal for a rehearing on the merits—*Iswar Chandra*, 10 C.W.N. 446 (448), 3 Cr.L.J. 385. See also *Aman Ali*, supra.

Where it does not appear from the order of the Sessions Judge dismissing an appeal summarily that he examined the record of the case or that he tested arguments

on questions of fact by examination of the evidence actually given by the witnesses, the High Court is practically obliged, if the appellate order of the Sessions Judge is to be supported, itself to hear the appeal on questions of fact, which is not the procedure prescribed by the Code of Criminal Procedure. The order is liable to be set aside in such cases—*Chhathu Gope v. Emp.*, 39 Cr.L.J. 380, 173 I.C. 751, 4 B.R. 331, 10 R.P. 444, 19 P.L.T. 28, A.I.R. 1938 Pat. 176. See also Note 1132.

422. If the Appellate Court does not dismiss the appeal summarily, it shall cause notice to be given

Notice of appeal.

to the appellant or his pleader, and to such officer as the *Provincial Government* may appoint in this behalf, of the time and place at which such appeal will be heard, and shall, on the application of such officer, furnish him with a copy of the grounds of appeal;

and, in cases of appeals under section 417, the Appellate Court shall cause a like notice to be given to the accused.

Amendment:—The words "Provincial Government" have been substituted for "Local Government" in this section by section 4 of the Government of India (Adaptation of Indian Laws) Order, 1937.

Scope:—This section deals only with appeals and there is no similar section dealing with revisions, nor does any section apply this procedure to revisions—*Sat Narain Lal v. Emp.*, A.I.R. 1940 All. 426, 1940 A.L.J. 462, 190 I.C. 225, 41 Cr.L.J. 876

1136. Restricted order for admission:—A restricted order for admission of a criminal appeal is not contemplated by this section, and must be deemed to be *ultra vires*. Therefore, where a criminal appeal was admitted for consideration of the sentence only, it was held that the whole appeal should have been heard and that the appellant could not be restricted to any selected ground out of those specified in his petition—*Nafar*, 20 I.C. 741, 14 Cr.L.J. 485, 18 C.L.J. 582, A.I.R. 1914 Cal. 276, 41 Cal. 406, 18 C.W.N. 147; *Gaya Singh*, 4 Pat. 254, 6 P.L.T. 381, 26 Cr.L.J. 862, 86 I.C. 718, 6 P.L.T. 381, A.I.R. 1925 Pat. 453, 3 Pat.L.R. 8 (Cr.); *Riyhu*, 32 Cr.L.J. 1017, 133 I.C. 163, 12 P.L.T. 536, A.I.R. 1931 Pat. 351, Ind. Rul. 1931 Pat. 323, 1931 Cr.C. 799; *Harnam Singh*, 40 Cr.L.J. 760, 183 I.C. 318, A.I.R. 1939 Lah. 295, I.L.R. 1939 Lah. 148, 41 P.L.R. 487. But where the Bench, which admitted the appeal on the question of sentence, did not only determine adversely all other considerations which could be advanced in favour of the appellants but dismissed the appeal summarily in respect of them under sec. 421, Cr. P. C., it is not open to the High Court to go behind such an order of dismissal even if passed by the same Bench at an earlier stage, and still less if passed by a different Bench. Section 422 only applies if and in so far as an appeal has not been dismissed summarily. If in part it has not been so dismissed, the provision will apply in respect of such part: it cannot, however, operate to nullify a definite order of dismissal under sec. 421—*Kuldip*, A.I.R. 1933 Pat. 38, 11 Pat. 697, 141 I.C. 154, 1933 Cr.C. 54, 34 Cr.L.J. 118. Except where there are express words as in secs. 412 and 418, the Code does not provide for an appeal of the limited purpose of reviewing only a part of the judgment. The appellant has a right to be heard fully on the merits and the Judge is bound by sec. 424 to record a complete judgment—*Dagdu Gangaram*, Ratanlal 826.

1137. Notice:—Notice to the appellant of the time and place of hearing is obligatory, and an order disposing of an appeal without giving such notice is illegal. The appeal must be restored to the file and disposed of according to law—*Venkataramudu*, 2 Weir 475 (476). Where a criminal appeal filed through a counsel is admitted, it cannot be dismissed summarily without giving notice to the accused; for, after an appeal is admitted, the Court cannot act under sec. 421—*Ta Pu*, 3 Bur.L.J. 18, 25 Cr.L.J. 933, 81 I.C. 549, A.I.R. 1924 Rang. 294.

- *To whom to be given* :—Notice must be given to the appellant or his pleader. But the attention of the pleader should be directed to the notice, when notice is given to the pleader only; the mere fact that the pleader of the appellant is present in Court when an order is made admitting an appeal, is not sufficient—*Gopal Chunder*, 10 C.L.R. 57.

The word 'pleader' includes a mukhtar, and notice to the mukhtar is sufficient for the purposes of this section—*Shivram*, 6 Bom. 14.

In case of appeals under sec. 417, notice must be given to the accused.

Where the Court passes an order, awarding compensation to the accused under sec. 250, and the complainant appeals, it is desirable that notice should be given to the accused so as to afford him an opportunity of supporting the order passed in his favour, although there is no express provision of law to that effect—*Palaniappavelan*, 29 Mad. 187; *Venkatarama v. Krishna*, 38 Mad. 1091; *Ram Chand v. Jesa Ram*, A.I.R. 1924 Lah. 675 (676), 76 I.C. 641, 25 Cr.L.J. 609; *Monoon v. Ibrahim*, 20 S.L.R. 41, 92 I.C. 424, A.I.R. 1926 Sind 143, 27 Cr.L.J. 248. But the absence of notice to the accused will not vitiate the appellate proceedings—*Nagi Reddi v. Basappa*, 33 Mad. 89; *Krishna v. Narayana*, 41 M.L.J. 172, 22 Cr.L.J. 583, 62 I.C. 823; *Rashid*, 8 Lah. 568, 101 I.C. 192, 28 P.L.R. 177, A.I.R. 1927 Lah. 357, 28 Cr.L.J. 416. So also, no notice to the Crown is necessary, because it is a matter in which the Crown is very little interested—*Palaniappavelan*, supra; *Krishna v. Narayan*, supra; *Gurusami v. Tirumurthi*, 27 M.L.J. 629, 15 Cr.L.J. 648.

Although this section does not require any notice to be given to the complainant, still in appeals from orders under sec. 545, (directing that the expenses properly incurred by the prosecution be defrayed out of the fine), it would be better in practice to give notice to the complainant also. But the absence of such notice will not afford any ground for interference in revision—*Mangalchand*, 14 N.L.R. 131, 19 Cr.L.J. 927, A.I.R. 1917 Nag. 122, 47 I.C. 443; *Htinda Meah v. Anamale Chettyar*, 37 Cr.L.J. 832, 163 I.C. 242, A.I.R. 1936 Rang 247, 1936 Cr.C. 523. In *Baluant v. Motilal*, A.I.R. 1936 Nag. 144, 19 N.L.J. 140, 1936 Cr.C. 694, I.L.R. 1936 Nag. 147, 9 R.N. 93, 38 Cr.L.J. 76, 165 I.C. 641, it has been held that, in such a case, the complainant is entitled to appear both on the question of the amount of compensation to be awarded and also to be heard in support of the conviction. It is the settled practice of the Calcutta High Court that where compensation has been awarded to the complainant under sec. 545, and an appeal is preferred, the notice of the appeal must be given to the complainant, and an order of acquittal in the absence of such notice may be set aside by the High Court in revision—*Bharasa v. Sukdeo*, 53 Cal. 569, 43 C.L.J. 583, 27 Cr.L.J. 1086, 97 I.C. 62, A.I.R. 1926 Cal 1054. See also *Venkatavarada v. Vengai*, 1933 M.W.N. 729.

Notice should also be given to such officer as the Local Government appoints—*Palaniappavelan*, 29 Mad 187. In Bengal, notice should be given to the Legal Remembrancer so far as the High Court is concerned. In other cases, the District Magistrate has been appointed as the officer to receive notices of appeals. If the rule is granted against the order of a Sessions Judge, he is the proper person to show cause—*Bepin Behari v. Nendi*, 7 C.W.N. 80; *Calcutta Gazette*, 1883, Part I, page 1200. Where an appeal is preferred to the District Magistrate, notice must be given to the Public Prosecutor—*Bharasa v. Sukhdeo*, 53 Cal. 569, 43 C.L.J. 583, 27 Cr.L.J. 1086. In Bombay, District Magistrates should be served with notice—*Bombay Gazette*, 1883, Part I, page 182; *Shivlingappa Basappa*, 24 Bom.L.R. 1150, A.I.R. 1923 Bom. 74. The same is the rule in the Punjab, Oudh and C. P. See *Punjab Gazette*, 1883, Part I, page 53; *Oudh Crim. Digest*, p. 27; *C. P. Gazette*, 1883, Part II, page 101. In Madras, the Public Prosecutor is the officer to be served with notice in case of appeals to the Sessions Court and the High Court—*Fort St. George Gazette*, 1887, Part I, page 30. In other cases, the District Magistrate is the proper officer. Thus, in an appeal before the Joint Magistrate, notice should be served on the District Magistrate—*Vellayan v. Solai*, 39 Mad. 595, 16 Cr.L.J. 600.

∴ Omission to give notice to the District Magistrate is a mere irregularity, according to the Madras High Court—*Vellayan v. Solai*, 39 Mad. 505, 28 M.L.J. 693. The fact

that notice of the appeal was not served on the complainant or on the officer appointed under this section, is no ground for interference with an order of acquittal where no injustice has been occasioned—*Para Kanakkan v. Amir Bi*, 84 I.C. 249, 20 M.L.W. 327, A.I.R. 1924 Mad 37, 26 Cr.L.J. 249. See also *Peria Kalathi v. Venkatesa*, 33 Cr.L.J. 596, 138 I.C. 385, 1932 M.W.N. 722, Ind. Rul. 1932 Mad. 561, A.I.R. 1933 Mad. 277. But according to the Bombay High Court, such omission is an illegality and not merely an irregularity—*Shivlingappa*, 24 Bom.L.R. 1150, A.I.R. 1923 Bom. 74, 24 Cr.L.J. 700. But objection on the ground of absence of notice should be made by the District Magistrate and not by the complainant; and the High Court will not interfere in revision at the instance of the complainant where the objection on the ground of absence of notice to the District Magistrate comes not from the District Magistrate but from the complainant—*Devendra v. Shetappa*, 25 Bom.L.R. 251, 26 Cr.L.J. 751, A.I.R. 1923 Bom. 264, 86 I.C. 287. See also *Peria Kanakkan v. Amir Bi*, supra. But where an appeal is heard by the District Magistrate who is himself the officer authorised to receive notice no formal notice to him is necessary—*Krishna v. Narayana*, 41 M.L.J. 172, 22 Cr.L.J. 583, 62 I.C. 823. But in another Madras case, where an appeal was originally heard by the District Magistrate and was ultimately heard by a Joint Magistrate, it was held that this fact did not relieve the Joint Magistrate of his duty of giving notice to the District Magistrate—*Mohammad Mustafa v. Shanmuga*, 25 Cr.L.J. 1389, A.I.R. 1925 Mad. 375, 83 I.C. 349.

Notice to appellant in jail :—If the appellant is in jail and is not represented by a pleader, notice must be given to him—*Kotina Butchayi*, 2 Weir 472 (473); *Lal Bahadur*, 50 All. 543, 29 Cr.L.J. 384 (385), 108 I.C. 122, A.I.R. 1928 All. 84, 26 A.L.J. 275 (F.B.). The obligation imposed on the Court under sec. 422, Cr. P. C., of giving notice to the appellant, if he has no pleader, involves that the appellant must have a right to act upon the notice and come to the Court to argue his appeal if he so desires—*Jalam Bharatsing v. Emp.*, 39 Cr.L.J. 578, 175 I.C. 352, I.L.R. 1938 Bom. 357, 10 R.B. 535, 40 Bom.L.R. 317, A.I.R. 1938 Bom. 279. The Sind Court is, however, of opinion that no notice is necessary to be given to the appellant in jail—*Loung*, 20 S.L.R. 189, 27 Cr.L.J. 933 (934), 96 I.C. 389.

Time and place of hearing :—The notice must specify the exact date of hearing. It is not enough that the Magistrate had directed that the appeal would be heard in a certain month (e.g., in January)—*Wazir Khan*, 1881 A.W.N. 46. So also, a general notice posted in the Court-house that the appeal will be heard on the first Court day next after presentation of the appeal is not sufficient. A particular date must be fixed—*Malan*, 5 Mad. 11.

It is imperative on a criminal Appellate Court to hear the appeal at the time and place named in the notice of appeal—*Ratan Chand*, 5 N.L.R. 76, 9 Cr.L.J. 553. Therefore, where a notice is issued fixing a particular place for the hearing of the appeal, the Court ought not to hear the appeal at a different place without giving notice of the change of place—*Bahaval*, 1891 P.R. 7; or on a date previous to the date fixed for hearing—*Shanmugam v. Alaga*, 2 Weir 475. If notice has been issued to an appellant to appear at the head quarters on a particular date, and if on that particular date, the officer who will hear the appeal moves out into camp, he should not dismiss the appeal for default of the appellant's appearance at the camp, but should fix a fresh date and issue a fresh notice. A general order directing appellants to follow the officer into camp is not sufficient—*Nihal Singh*, 1905 P.R. 11, 2 Cr.L.J. 66.

Where a Sessions Division covers two districts an appeal can, as a matter of law, be heard at any one of the places. It is a matter of discretion for the Sessions Judge, or the Additional Sessions Judge to whom the appeal is transferred, when the matter comes before him on appeal, to decide in which district it shall be heard; but that discretion must be exercised in a judicial manner and reasonable attention must be paid to the interest of the appellant. Where the discretion is exercised wrongly the High Court will interfere—*Doodhari*, A.I.R. 1934 Pat. 643, 15 P.L.T. 604, 1934 Cr.C. 1321.

423. (1) The Appellate Court shall then send for the record of the case, if such record is not already in Court. After perusing such record, and hearing the appellant or his pleader, if he appears, and the Public Prosecutor, if he appears, and, in case of an appeal under section 417, the accused if he appears, the Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may—

- (a) in an appeal from an order of acquittal, reverse such order and direct that further inquiry be made, or that the accused be retried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law;
- (b) in an appeal from a conviction, (1) reverse the finding and sentence, and acquit or discharge the accused, or order him to be retried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial, or (2) alter the finding, maintaining the sentence, or with or without altering the finding, reduce the sentence, or (3) with or without such reduction and with or without altering the finding, alter the nature of the sentence, but, subject to the provisions of section 106, subsection (3), not so as to enhance the same;
- (c) in an appeal from any other order, alter or reverse such order;
- (d) make any amendment or any consequential or incidental order that may be just or proper.

(2) Nothing herein contained shall authorize the Court to alter or reverse the verdict of a jury, unless it is of opinion that such verdict is erroneous owing to a misdirection by the Judge, or to a misunderstanding on the part of the jury of the law as laid down by him.

Scope:—As for the applicability of this section to an appeal arising under secs. 476, 476A and 476B, see Note 1257.

1138. Powers and duties of Appellate Court:—It is the duty of the Appellate Court to look into the evidence of both sides in order to come to a decision. Where the Appellate Court did not think it necessary to deal with the evidence adduced by the defence in the case, because no reference to that evidence was made by the counsel of the appellant, and that evidence was practically ignored by him, *held* that the Appellate Court acted illegally in doing so—*Fidoi Hossein*, 40 Cal. 376, 14 Cr.L.J. 419. The rule by which a Criminal Appellate Court is to be guided in dealing with a criminal appeal is that it has to come to a conclusion for itself upon the evidence on the record, assisted so far as it might be, by such reasons or arguments as it might elicit from the conclusions and reasons contained in the judgment of the original Court. If the Appellate Court entertains any doubt about the correctness of the conviction or the commission of the offence, it should discharge the accused—*Milan v. Sagai Bepari*, 23 Cal. 347; *Maula Baksh*, 1898 P.R. 6; *Ma Ka v. Po Shaw*, 4 L.B.R. 340, 9 Cr.L.J. 25,

It is the duty of the Appellate Court in every case to examine the evidence for itself and to give to the accused person the benefit of any reasonable doubt which it may entertain after such examination. Doubtless, an Appellate Court should not lightly disturb the conclusion of a Court of first instance, and should give due weight to the fact that the witnesses received credit from the Court before which their depositions were given but in every case it is the duty of an Appellate Court to arrive at an independent opinion—*Yacoub*, 2 Weir 535. The Appellate Court should ordinarily have very strong grounds for differing from the appreciation of evidence of the trial Court which had the advantage of seeing the witnesses and noting their demeanour; but where such grounds exist, it should interfere—*Jalal*, A.I.R. 1937 Sind 22 (25), 30 S.L.R. 456, 167 I.C. 75, 9 R.S. 162. In an appeal from a conviction and sentence, it is for the Appellate Court to be satisfied affirmatively that the prosecution case is substantially true and that the guilt of the accused has been established beyond all reasonable doubt. It is not for the appellants to satisfy the Appellate Court that the first Court had come to a wrong finding—*Kanchan*, 42 Cal. 374. It is the duty of the Appellate Court to consider the evidence both oral and documentary, and to apply its mind to the case before recording a judgment therein. Where the Appellate Court fails to do this, the judgment cannot be said to be a judgment in accordance with law—*Naram*, 21 Cr.L.J. 648, 57 I.C. 664, 1 P.L.T. 716. An accused is entitled to the judgment of an Appellate Court in every case in which an appeal is open to him. But if the Appellate Court does not do its duty the remedy lies only in an application for revision under sec. 439, Cr. P. C. It is true the accused can approach the Sessions Judge for a reference to the High Court under sec. 438, Cr. P. C., but in the end it is the High Court which deals with the matter, and its powers are contained in sec. 439. Under that the High Court may, if it so desires, exercise any of the powers conferred on a Court of appeal by this section; that is, it may itself hear the appeal and dispose of it—*Bapurao Annaji Khond*, A.I.R. 1936 Nag. 160, 1936 Cr.C. 715, I.L.R. 1937 Nag. 38.

In all cases in which the Court sits in criminal appeal, it has to consider the case against the appellant bearing in mind exactly the same principles as must be borne in mind by the Court of trial in the first instance. The appellant does not come here as one who has been convicted and has to satisfy the Court beyond all reasonable doubt that he has been wrongly convicted. If after a conviction before a Subordinate Court the Court of Appeal comes to the conclusion that there may have been a miscarriage of justice, the Appellate Court cannot allow the conviction to stand. The task of the appellant is, therefore, to bring before the consideration of the Appellate Court such matters as may cast a reasonable doubt of his guilt, having regard to all the circumstances of the case. It is true that a Sessions Judge hears and sees the witnesses and in many cases his opinion as to their demeanour or truthfulness may be of the highest value, and an Appellate Court should not lightly disregard the conclusion at which for properly expressed reasons he arrived. On the other hand, that does not absolve the Appellate Court from an independent duty of scrutinizing the evidence with care and of being satisfied not that a reasonable person might have come to the conclusion which the Sessions Judge came to, but that no reasonable person could have come to any other conclusion but that the accused was guilty of the offence charged against him—*Nga Kjaw Hla v. The King*, 39 Cr.L.J. 248 (250), 173 I.C. 94, A.I.R. 1938 Rang. 45, 10 R.R. 306.

It is somewhat unusual, though quite legal course of hearing and deciding certain law points by a preliminary order before proceeding to hear the appeal on the merits—*Nana v. Emp.*, 40 Cr.L.J. 197 (198), 179 I.C. 317, A.I.R. 1938 Nag. 283, 1938 N.L.J. 90.

When an inspection of the scene of the occurrence is material either to the case for the prosecution or for the defence, it is desirable that the Appellate Court should inspect the spot—*Bhagwan Kaur*, 1911, P.W.R. 16, 12 Cr.L.J. 412 (F.B.).

When an Appellate Court does not dismiss an appeal summarily, it must dispose of

it in the manner provided by this section. It has no power to refer to the High Court for decision on a question of law arising in an appeal—*Sulaiman*, 7 L.B.R. 251, 15 Cr.L.J. 667.

In dealing with a case under this section, there is no restriction on the powers of the Appellate Court to dispose of the case in any of the manners provided by this section; it can acquit the accused, or order a retrial or order the accused to be committed, etc.—*Taju Pramanik*, 25 Cal. 711; *Ramprasad*, 26 Cr.L.J. 1090 (1091), 88 I.C. 178, A.I.R. 1926 Nag. 53.

The Appellate Court can hear the respondent on other legal points besides replying to the points specifically taken in the grounds of appeal—*Terhi*, A.I.R. 1936 Oudh 108 (110), 1935 O.W.N. 1153, 1935 O.L.R. 684, 158 I.C. 913.

The power given to an Appellate Court under this section is not an unlimited power, but is to be taken as giving the Appellate Court power to do only that which the lower Court could and should have done. The Court of Appeal is not competent to alter the finding of a Magistrate so as to convict an accused person of an offence which the Court whose order is under appeal was not competent to try—*Muthia Chetty*, 29 Mad. 190, 3 Cr.L.J. 461; *Maung E Maung v. The King*, 41 Cr.L.J. 621 (623), 188 I.C. 539, A.I.R. 1910 Rang. 118, 1940 Rang. 215.

Sentence :—The power of an Appellate Court to pass sentence is measured by the power of the Court from whose judgment or order the appeal has been made. Therefore, an Appellate Court when passing a sentence on appeal cannot pass a sentence which the original Court was not competent to pass—*Muhammad Yakub*, 45 All. 594; *Mehi Singh v. Mangal*, 39 Cal. 157; *Subbaya*, 12 Mad. 451; *Sitaram*, 11 I.C. 788, 7 N.L.R. 109, 12 Cr.L.J. 444; *Maung E Maung v. The King*, supra. Thus, where a second class Magistrate passed a sentence of 4 months' imprisonment, but the District Magistrate on appeal altered the sentence into a fine of Rs. 400, held that the sentence passed by the Appellate Court was *ultra vires*, because the second class Magistrate could not have awarded a fine of Rs. 400 (sec. 32)—*Muhammad Yakub*, 45 All. 594.

Perusal of record :—The Appellate Court must peruse the whole record, and not merely the judgment of the Lower Court. A decision based upon a perusal of the judgment alone is not valid, and the appeal must be reheard—*Abbash Ali*, 14 Cr.L.J. 182 (183) (Cal.). An appeal may be dismissed summarily under sec. 421 without perusal of the record, and upon perusal of the copy of the judgment alone. But under sec. 423, the records must be called for and perused. If the records of the case are lost, it is the duty of the Appellate Court to order a new trial—*Khimat Singh*, 1889 A.W.N. 55.

No dismissal for default of appearance :—If the appeal is not dismissed summarily under sec. 421, the Appellate Court is bound to peruse the record and consider whether there is any ground for interference with the acquittal or conviction, *even though the appellant does not appear*. The Appellate Court must dispose of the appeal on the merits, and is not entitled to dismiss an appeal for default of appearance of the appellant—*Pohpi*, 13 All. 171 (187) (F.B.); *Bansi Mirdha*, 50 Cal. 927, 27 C.W.N. 947; *Ramchandra*, 24 Cr.L.J. 662, 21 A.L.J. 100; *Ram Bharose*, 14 A.L.J. 327, 17 Cr.L.J. 353; *Trimbak*, 50 Bom. 673, 27 Cr.L.J. 1167; *Kuldip*, 6 Pat. 16, 100 I.C. 831, A.I.R. 1927 Pat. 176, 8 P.L.T. 376, 7 A.I.Cr.R. 473, 28 Cr.L.J. 351; *Ratan Chand*, 5 N.L.R. 76, 9 Cr.L.J. 553; *Balkaran*, 6 O.L.J. 370, 20 Cr.L.J. 744, 50 I.C. 152; *Din Muhammad*, 35 Cr.L.J. 963, 148 I.C. 1078, A.I.R. 1934 Pesh. 21, 1934 Cr.C. 522, A.L.R. 1934 Pesh. 37.

Adjournment :—If the hearing of the appeal is adjourned to another date, notice of the adjournment should be given to the appellant—*Shambehari*, 20 Cr.L.J. 271 (Pat.). Where a Magistrate disposed of an appeal before the day fixed for the adjourned hearing, and without giving notice to the appellant or his pleader, it was held that the procedure was illegal—*Shanmugam v. Alagia*, 2 Weir 475.

Sufficient ground for interference :—An appellant is not precisely in the same position before an Appellate Court as he is before the Court trying him, but must satisfy the Court that there is sufficient ground for interfering with the order of conviction. If no

sufficient ground has been shown, it is the duty of the Appellate Court not to interfere—*Sajwan*, 5 All. 386.

1139. Dismiss the appeal:—Where an appeal is admitted and dealt with under this section, the Appellate Court can dismiss the appeal only *on the merits*, and has no power to dismiss it *summarily* (e.g., without perusing the records and without giving notice under sec. 422)—*Gopala*, 1 Bom.L.R. 225; *Ram Hari v. Santosh*, 23 Cr.L.J. 733 (Cal.); *Virasami*, 2 Weir 474 (475); *Neua Lal*, 4 P.L.T. 552, 24 Cr.L.J. 453, A.I.R. 1923 Pat. 363; *Ta Pu*, 3 Bur.L.J. 18, 81 I.C. 549, A.I.R. 1924 Rang. 294, 25 Cr.L.J. 933. An appeal can be summarily dismissed only under sec. 421; whereas sec. 423 contemplates the regular hearing or consideration of the appeal which has not been summarily dismissed under sec. 421.

1140. Right of parties to be heard:—If the appellant is present or is represented by a pleader, the appellant in person or his pleader must be heard—*Pohpi*, 13 All. 171 (187), 20 Cr.L.J. 271 (F.B.). But where the Appellate Court disposed of the appeal on the merits after perusing the records and considering the grounds of appeal, the judgment of the Appellate Court would not be set aside on the mere ground that the pleader for the accused was not heard in the Appellate Court (the pleader being prevented from appearing in time on account of a railway strike)—*Olayet Khan*, 1 Pat. 589 (590), 24 Cr.L.J. 118. But see *Venkatakrishnayya v. Emp.*, 1937 M.W.N. 91 where the High Court ordered a re-hearing of the appeal by a different Judge as it was dismissed at 7-30 A.M. on the fixed date on the merits without hearing the pleader who appeared before the Court on the same day at 10 A.M. and pleaded for a hearing on the ground that he was not aware of the fact that the time of hearing was 7-30 A.M. Where the appellant's Counsel was not prepared to, and did not, argue the case on the merits, after he had failed to persuade the Appellate Court that his client was entitled to a postponement of the hearing until an investigation had been made into the allegations which he then made and the judgment of the Appellate Court, however, showed that without the assistance of the appellant's Counsel the Judge himself examined the evidence against the appellant and satisfied himself that the convictions were well-founded, it could not be said that there had been no hearing of the appeal against the conviction within the meaning of this section—*Kewal Ram*, 36 Cr.L.J. 1354 (1355), 153 I.C. 324, 16 P.L.T. 693, A.I.R. 1935 Pat. 515.

If the appellant is *in jail* and is not represented by a pleader, he may be heard in person—*Kotina*, 2 Weir 472 (473); and the Appellate Court has power to direct that the prisoner be brought before it—*Anonymous*, 2 Weir 473. If the appellant, who is in jail, is not represented by a pleader, and if on receipt of the notice under sec. 422, he desires to be heard in person, he must be allowed to appear in person at the hearing of the appeal, and the Appellate Court must arrange for the appellant to be produced in Court—*Lal Bahadur*, 50 All. 543, 26 A.L.J. 275, 29 Cr.L.J. 384 (385) (F.B.), dissenting from *Pohpi*, 13 All. 171 (F.B.) and *Ram Prasad*, 4 O.W.N. 638, 103 I.C. 477, A.I.R. 1927 Oudh 312, 28 Cr.L.J. 679, where it has been held that an appellant from jail has no right to appear at the hearing of the appeal. The *Sind Court* is of opinion that an appellant in jail cannot appear in person in Court—*Loung*, 20 S.L.R. 182, 27 Cr.L.J. 933 (934), 96 I.C. 389.

A complainant cannot claim as of right to be heard in the appeal. The matter is one which may be left in each case to the discretion of the Court—*Anonymous*, 2 Weir 476, 7 M.H.C.R. App. 42. A private prosecutor as such has no right to be heard, but the Court may grant permission in any particular case—*Akbar*, 1886 P.R. 23; *Dowlatabam*, 9 C.W.N. 1x. It is true that in some cases it has been held that it may be advantageous to the Appellate Court to allow the complainant to support the judgment. But where the Appellate Court did not exercise its discretion on the point in favour of the complainant it cannot be said that it did something that was wrong in law—*Behari v. Her*, 33 Cr.L.J. 305, 136 I.C. 474, A.I.R. 1932 Cal. 61, 35 C.W.N. 976, 54 C.L.J. 1932 Cr.C. 9.

If the Public Prosecutor does not appear on behalf of the Government, a vakil privately instructed to support the prosecution may be heard—*Anonymous*, 2 Weir 476.

There is no provision in the Code of Criminal Procedure for allowing the complainant to be heard when the Crown does not wish to argue the case. It is, however, open to the Appellate Court to hear the complainant in suitable cases, and a discretion in this matter is left to the Appellate Court and it is for the Appellate Court's consideration whether in the circumstances of the case it should not allow the complainant to be represented—*Raghunathmal Shermal Marwadi v. Putiram Sadaram*, A.I.R. 1937 Nag 394 (396), 172 I.C. 177, I.L.R. 1938 Nag. 157, 10 R.N. 172, 39 Cr.L.J. 219. The strict rule is that in an appeal against a conviction only the Crown is entitled to be served with notice, and heard. Notice is served on an officer on behalf of the Local Government under sec. 422, Cr. P. C., and nobody but the Crown is entitled to be heard, because no private citizen is technically interested in upholding a conviction. The true rule, which should be followed in all Courts, is that in private prosecutions the Court in its discretion may allow the complainant to appear by an Advocate, but it is not in any case bound to do so—*Paragji Bhulabhai v. Bhagwanji Bawabhai*, A.I.R. 1940 Bom. 14, 41 Bom.L.R. 1231, 41 Cr.L.J. 245, 185 I.C. 795.

The counsel for the appellant has a right of reply. There is nothing in the language of this section to preclude the appellant or his pleader from replying to the arguments of the Public Prosecutor, and as a matter of principle such right of reply should be conceded to him. The practice of the High Court has been uniformly in favour of allowing this right to the appellant or his pleader—*Buta Singh*, 18 Cr.L.J. 3, 1917 P.R. 21; *Amanat v. Vagendra*, 38 Cal 307. The Oudh Court holds that although the appellant's counsel has no right of reply, still it is a *privilege* which should not be ordinarily be refused—*Prag*, 11 O.L.J. 693, 1 O.W.N. 473, 25 Cr.L.J. 1169; *Bahra*, 25 Cr.L.J. 1173, 82 I.C. 37, A.I.R. 1925 Oudh 50.

If the parties are to be heard at all, they must be heard in each others' presence and if the respondent is heard the appellant shall have a right to reply—*Bhotali v. Kalu*, 33 Cr.L.J. 775, 36 C.W.N. 699, A.I.R. 1932 Cal. 856, 1932 Cr.C. 887, 139 I.C. 493, Ind. Rul. 1932 Cal. 621.

The respondent is entitled to raise other legal points, besides replying to the points specifically taken in the grounds of appeal—*Terhi*, A.I.R. 1936 Oudh 108 (110), 158 I.C. 913, 1935 O.L.R. 684, 1935 O.W.N. 1153, 36 Cr.L.J. 1467.

1141. Clause (a)—Appeal from acquittal:—Clause (a) of this section can apply only to the *High Court*, because sec. 417 which provides for appeals against orders of acquittal requires that such appeals shall be to the High Court—*Rangasami v. Narasimhalu*, 7 Mad 213, 2 Weir 477.

Clause (b) of sec. 423 (1), Cr. P. C., does not apply to cases of acquittal, partial or total, but to cases of conviction, and clause (a) applies to cases of acquittal; and if the appellate powers of the High Court are to be exercised to convert an acquittal into a conviction, then they should be exercised on an appeal against an acquittal under sec. 423 (1) (a) and not on an appeal against a conviction under sec. 423 (1) (b) Cr. P. Code—*Jado Rahim v. Emp.*, A.I.R. 1938 Sind 202, 178 I.C. 520, 40 Cr.L.J. 93.

As to the grounds on which the High Court will interfere with an order of acquittal, see Note 1120 under sec. 417.

An appeal against an order of acquittal in a case tried by jury must be supported by a ground which is covered by sec. 418, which provides in cases of trial by jury, for an appeal on a matter of law only. Where the Local Government appealed against an order of acquittal, and the grounds upon which the appeal was sought to be preferred were questions of fact, the High Court rejected the appeal—*Parmeshur*, 10 Cal. 1029.

The High Court, in exercising jurisdiction in the matter of appeals against acquittals, should confine its exercise to the particular acquittal complained of by the Government. At the same time it would not be proper for the High Court to consider the appeal on grounds not contained in the objection urged on behalf of the Government—*Karigowda*,

19 Bom. 51 (68). But see *Jhina Soma*, A.I.R. 1939 Bom. 457 (459), I.L.R. 1939 Bom. 648, 41 Cr.L.J. 176, 185 I.C. 382, 41 Bom.L.R. 965.

The words "that the accused be re-tried" in this clause do not apply to a case where the order of acquittal is passed on appeal and the High Court is, therefore, bound to come to a decision on the facts—*U Kadoo*, 37 Cr.L.J. 1008 (1009), 164 I.C. 769, A.I.R. Rang. 369, 1936 Cr.C. 771.

Acquittal :—This clause confers a power to direct further inquiry only in respect of a case of an appeal from an order of acquittal, and not in a case in which an order of discharge or dismissal may have been passed—*Charanbala v. Barendra*, 27 Cal. 126.

'Find him guilty' :—These words do not necessarily mean that the Appellate Court can find the accused guilty only of the offence of which he has been acquitted by the trial Court, and not of any other offence. The Appellate Court can certainly convict the accused of another offence or of a minor offence covered by the offence of which he has been acquitted, under the provisions of sec. 237 or 238, read with sec. 423, provided no prejudice has been caused to the accused—*Ismail*, 52 Bom. 385, 29 Cr.L.J. 403 (405), 30 Bom.L.R. 330; *Kauromal*, 25 Cr.L.J. 1057 (1059), A.I.R. 1925 Sind 105, 81 I.C. 881.

1142. Clause (b)—Appeal from conviction:—If an accused, who is charged with several offences, is convicted of some of the offences and acquitted of the others, and appeals, the case is one of 'appeal from conviction' and not of appeal from acquittal; consequently sec. 417 does not apply—*Jabanulla*, 23 Cal. 975 (978, 980).

When the prosecution brings a false case it is almost impossible to bring out a new one in the Court of appeal—*Moslem Khalife v. Emp*, A.I.R. 1940 Cal. 350, 41 Cr.L.J. 792, 189 I.C. 734.

In an appeal from a conviction, the Appellate Court may, if it likes, take further evidence (sec. 428) but cannot direct further inquiry—*Muhammad Ata*, 19 A.L.J. 961, 23 Cr.L.J. 402.

An Appellate Court is not competent to set aside a conviction merely on the ground that all the witnesses cited for the defence have not been examined. The proper course in such a case is to have the evidence taken of the other witnesses before disposing of the appeal—*Turaka Pakir*, 2 Weir 481. A conviction ought not to be reversed unless the admission of the rejected evidence would have affected the result of the trial—*Pitambar*, 2 Bom. 61. The proper procedure on appeal in a case where the Lower Court had refused to take the defence of the accused, is to set aside the conviction and sentence passed by the Lower Court, and order the Magistrate to begin the proceedings anew against the accused from the stage when his evidence was refused—*Gohar*, 1884 P.R. 28.

Appellate Court cannot itself try the accused :—After reversing the finding and sentence, the Appellate Court can order the accused either to be retried by a competent Court or to be committed for trial. The Appellate Court cannot itself frame a charge against the accused, and hold a regular trial and convict the accused of another offence—*C. C. Sircar*, 3 Rang. 68, 4 Bur.L.J. 29, 26 Cr.L.J. 1119 (1120).

Power to acquit :—When an Appellate Court set aside a verdict of the jury on the ground of misdirection, it is open to that Court to acquit the accused. At the same time, as a matter of practice the proper course in such cases is to direct a re-trial. It is only in special circumstances that an Appellate Court would be justified in acquitting—*Dhiraji v. Akasi*, 24 A.L.J. 506, 27 Cr.L.J. 785, 95 I.C. 385, A.I.R. 1926 All. 429.

Power to consider case of non-appealing accused :—See Note 1213 under sec. 439 and *Jalal* in Note 1147.

1143. Re-trial:—A Sessions Judge has power to order a new trial when the case comes before him in appeal. This power should, however, be sparingly exercised and a re-trial should not be ordered unless there are grave reasons for doing so—*Moman Lal*, 13 A.L.J. 477, 16 Cr.L.J. 433.

Before quashing a conviction and ordering a new trial on the ground that the accused has been convicted under a wrong section, the Appellate Court must come to a certain conclusion as to the offence which the accused was shown by the evidence to have

committed, and it ought to consider whether, if the evidence showed that the accused should properly have been convicted of other offence than that he was charged with, he would be prejudiced by amending the conviction. Before ordering a re-trial, the Appellate Court is bound to see what possible object could be served by a fresh trial—*Iyachikone*, 2 Weir 480.

The order directing a partial re-trial can certainly not be supported. The Appellate Court can either direct a complete re-trial or call for further evidence to be placed before itself—*Ramchandra Prasad v. Emp.*, 38 Cr.L.J. 657 (658), 168 I.C. 979, 3 B.R. 508, 18 P.L.T. 483, 9 R.P. 522, 1937 P.W.N. 519, A.I.R. 1937 Pat. 246.

When retrial may be ordered:—It is rather for supplying formal defects that an Appellate Court orders retrial—*Dara Lakshmi v. Garine Satyakarayan*, 32 Cr.L.J. 749, 131 I.C. 454, 1930 M.W.N. 1215, A.I.R. 1931 Mad. 227, Ind. Rul. 1931 Mad. 518, 1931 Cr.C. 323, following *Varadarajulu*, 51 Mad. 343, 42 Mad. 885, 20 Cr.L.J. 455, 37 M.L.J. 81, 1919 M.W.N. 669. A retrial may be ordered where the trial is held to be illegal on the ground of want of jurisdiction of the Court that tried the case—*Sukha*, 8 All. 14; *Hamdu*, 3 Bur.L.T. 9, 11 Cr.L.J. 684. Thus, where an offence triable only by a Magistrate of the 1st class or Court of Session was tried by a second class Magistrate, the Appellate Court may order the accused to be retried by a 1st class Magistrate or by the Court of Session—*Sukha*, 8 All. 14 (17). The power of the Appellate Court is not confined to cases where the conviction and sentence are set aside for want of jurisdiction in the trying Magistrate. It may order a retrial if it is of opinion that much necessary evidence had not been adduced and much documentary evidence had not been exhibited in the trial Court, and that a full and complete inquiry into the real facts is advisable—*Satish Chandra*, 27 Cal. 172 (174); *Jeremiah v. Vas*, 36 Mad. 457 (468). But it is an established principle of criminal law that if the evidence actually adduced by the prosecution is insufficient to support a conviction, a re-trial cannot be ordered simply to give the prosecution another chance of producing further and better evidence—*Tripurari Bhattacharjee v. Emp.*, 39 Cr.L.J. 604 (605), 175 I.C. 514, 10 R.C. 797, 42 C.W.N. 812, A.I.R. 1938 Cal. 361. Where the case originally made out against the appellant has failed through the absence of sufficient evidence, the appellant should be acquitted, and no order of remand for the purpose of allowing the prosecution to supply deficiencies in their original case should be passed—*Suresh Chandra De v. Emp.*, 40 Cr.L.J. 56, 178 I.C. 415, A.I.R. 1938 Cal. 782. See also *Sochiram v. Emp.*, under the heading "when re-trial should not be ordered." A retrial would be proper where the accused was rightly acquitted of one offence, but the Appellate Court comes to the conclusion that he ought to have been tried for another, or where persons who ought not to have been tried together have been so tried—*Jeremiah v. Vas*, 36 Mad. 457 (468). A retrial should be ordered if the Appellate Court is of opinion that the applicant ought to have been convicted of an offence different from that with which he was charged in the Lower Court—*Ram Prasad*, 1882 A.W.N. 112; or where there has been a misdirection to the jury—*Sadhu Sheikh*, 4 C.W.N. 576 (582); or if there was a misjoinder of charges or misjoinder of parties in the trial Court, and the Judge's charge to the jury was defective—*Birendra*, 30 Cal. 822 (830); *Kumudini Kanta*, 28 Cal. 104; *Hamdu*, 3 Bur.L.T. 9, 8 I.C. 594. An Appellate Court may order a retrial on the ground that the trial Court had omitted to consider an important piece of documentary evidence, and that there was a gross mistake in drawing up the charge—*Sheoparsan*, 28 Cr.L.J. 893, 104 I.C. 909, A.I.R. 1928 Pat. 50, 9 A.I.Cr.R. 40; or on the ground that the Lower Court has committed an error in procedure in convicting the accused upon evidence which was not given in their presence—*Pera Naicken*, 2 Weir 481 (482); or on the ground that in the trial Court there was an irregularity in the procedure by which material evidence was excluded—*Sadashiv*, Ratanlal 938 (939); or on the ground that there has been no fair trial of the accused—*Najab Gul Mohammad v. Emp.*, 38 Cr.L.J. 741, 169 I.C. 257, 9 R.Pesh. 143, A.I.R. 1937 Pesh. 71. A Sessions Judge has power to direct a retrial to be had upon a charge framed in whatever manner he thinks

fit, on the ground that the accused has been misled in their defence by the absence of a charge or by a defect in the charge—*Sarat Chandra*, 7 C.W.N. 301; see also *Manna*, 9 N.L.R. 42, 14 Cr.L.J. 230. Where the trial Court has failed to record a judgment in conformity with section 367, the proper procedure for the Appellate Court is to reverse the order of the Court below and to remand the case for a trial *de novo*—*Karupiah*, 1920 M.W.N. 120, 21 Cr.L.J. 52, 54 I.C. 404.

The power of setting aside convictions and ordering a new trial for any error or defect in the Judge's charge to the jury will be exercised by the High Court, only when the Court is satisfied that the accused has been prejudiced by error or defect or that a failure of justice has been occasioned thereby—*Samarendra Kumar Chakravarti v. Emp.*, 38 Cr.L.J. 673 (681), 169 I.C. 48, 15 Pat. 817, 18 P.L.T. 535, 9 R.P. 526, 3 B.R. 514, A.I.R. 1937 Pat. 263. But where the evidence would not, on any proper view of the case, support of conviction, it would be worse than useless to send back the case for a new trial in order that a jury may have the opportunity of convicting upon such evidence on a proper summing-up—*Queen v. Elahi Bux*, 5 W.R. 80 (88) (Cr.), Beng.L.R. Sup. Vol. 459; *Goloke Behari Takal v. Emp.*, 39 Cr.L.J. 161 (168), I.L.R. (1938) 1 Cal. 290, 173 I.C. 65, 10 R.C. 441, 66 C.L.J. 225, 42 C.W.N. 129, A.I.R. 1938 Cal. 51.

Where the High Court on appeal set aside the verdict of the jury who convicted the accused, and observing that it would be open to the Crown to proceed further with the case if so advised, directed the petitioner to be released on bail until fresh trial, if any, it was held that the order amounted to an order of retrial—*Beni Madhab*, 46 Cal. 212, 23 C.W.N. 94, 20 Cr.L.J. 225.

Scope of retrial:—Where an Appellate Court reverses the verdict of a jury and orders a retrial, such retrial, unless the Appellate Court has limited the scope, must be taken to be one upon all the charges originally framed—*Krishna Dhan*, 22 Cal. 377; *Nizamuddin*, 15 I.C. 641, 13 Cr.L.J. 497, 40 Cal. 163; *Jabanulla*, 23 Cal. 975; *Jamiruddi*, 16 I.C. 523, 16 C.W.N. 909, 13 Cr.L.J. 715; *Abdul Khan*, 39 C.W.N. 677, 62 Cal. 928, 62 C.L.J. 217, 37 Cr.L.J. 707, 162 I.C. 931.

In *Abdul Khan's* case Lord-Williams, J. (Jack, J. dissenting) has held that when an accused is tried by jury under two charges and on being acquitted under one and convicted under the other, he appeals and on such appeal his conviction and sentence are set aside and a re-trial ordered, such order cannot cover or authorise a re-trial under the charge of which the accused was acquitted and re-trial under that charge is illegal. This view was also taken in *Nitya Gopal*, 36 Cr.L.J. 553, 154 I.C. 609, A.I.R. 1935 Cal. 120, 38 C.W.N. 1128, 1935 Cr.C. 155; *Naimuddin Biswas*, 40 C.W.N. 666, 63 C.L.J. 124, 63 Cal. 112. The Allahabad and Lahore High Courts have also taken the same view—*Lala*, A.I.R. 1933 All. 941, 148 I.C. 339, 56 All. 210, 1933 Cr.C. 1561, 1933 A.L.J. 1446, 35 Cr.L.J. 668; *Motiram*, 38 Cr.L.J. 71, A.I.R. 1936 All. 758, 165 I.C. 734, 1936 A.L.J. 1083, 1936 Cr.C. 999; *Ali Muhammad*, A.I.R. 1935 Lah. 945, 37 P.L.R. 564, 37 Cr.L.J. 303, 160 I.C. 363, 1935 Cr.C. 1284.

In *Kamala Kanta v. Emp.*, 41 C.W.N. 1112 (1115) the Calcutta High Court has, however, laid down that it is only common sense that, when once the conviction and sentence have been set aside and a retrial ordered, the whole matter should be re-opened. In this case all the previous rulings of the Calcutta High Court on this point were discussed and the rulings mentioned in the last paragraph were dissented from and those mentioned in the last but one paragraph were followed.

But it cannot be laid down as a general rule that a retrial necessarily opens up the whole case. In cases falling within sec. 236 of this Code, where a retrial is ordered without any express limitation, it must be taken to mean the retrial of the whole case. But in cases not falling under sec. 236, that is, where an accused person is charged at one trial with distinct offences constituted by distinct acts, a different principle would apply—*Krishna Dhan*, supra. In cases falling within sec. 236, there is one set of facts which may be viewed in different ways. When a retrial is ordered, the whole facts are necessarily reopened and nothing can prevent the jury in the second trial from

coming to any verdict that they consider right upon the facts proved before them. But where there are two different sets of facts and a verdict has been given on one set which no one impugns, then there is no reason why, when an appeal is brought on the other set of facts, the order for retrial should reopen both—*Abdul Hamid*, 6 Pat. 208, 27 Cr.L.J. 1100 (1102), 97 I.C. 364, A.I.R. 1927 Pat. 13, 8 P.L.T. 12.

It is doubtful whether the Appellate Court can order a retrial of the accused for a graver offence than that for which he has been convicted—*Bir Singh*, 28 P.L.R. 166, 28 Cr.L.J. 575, 102 I.C. 511, A.I.R. 1927 Lah. 733.

Where an order of retrial is passed by an Appellate Court, the Court cannot restrict the evidence to be taken to that mentioned in its order, but it should order the case to be retried in view of the instructions contained in its order. The accused is entitled to adduce such additional evidence as he may desire—*Mir Sarwarjan*, 3 C.L.J. 303. Thus, where in an appeal from a conviction, the Sessions Judge set aside the conviction and ordered a retrial, but at the same time directed that the evidence already on the record should be treated as evidence in the case, it was held that the direction was contrary to the provisions of secs. 423 and 428 and was therefore illegal—*Bhado*, 3 P.L.W. 224, 19 Cr.L.J. 77, 43 I.C. 109; *Potram*, 36 Cr.L.J. 740 (742), 155 I.C. 258, A.I.R. 1935 Nag. 125. When the Appellate Court thinks that two documents, admitted in evidence without objection, ought to be proved, that the examination of the accused under sec. 342 had not been satisfactory and that the accused should be examined afresh, two courses are open to it. One is to proceed under sec. 428, that is to say, to keep the appeal pending on his own file while directing additional evidence to be taken by a Magistrate and duly certified to the Appellate Court which would then dispose of the appeal under sec. 428 (2), Cr. P. C. The other course is under this section to set aside the conviction and order the accused to be re-tried by a Court of competent jurisdiction. The Appellate Court cannot, however, pass an order setting aside the conviction and sending the case back for further evidence but not for complete re-trial—*Sri Krishna Prasad Sinha*, 37 Cr.L.J. 906, 164 I.C. 184, A.I.R. 1936 Pat. 438, 17 P.L.T. 444, 1936 Cr.C. 699, following *Gajanand Thakur*, 1 Pat.L.J. 99, A.I.R. 1916 Pat. 219, 35 I.C. 508, 17 Cr.L.J. 332. If there is to be a re-trial, the accused is entitled to demand that there shall be a *de novo* trial—*Potram* and *Sri Krishna Prasad Sinha*, *supra*.

When retrial should not be ordered:—After reversing a conviction and sentence an Appellate Court cannot order an innocent man to be re-tried without formulating a charge—*Dara Lakshmi v. Garine Satyanarayana*, 32 Cr.L.J. 749, 131 I.C. 454, 1930 M.W.N. 1215, A.I.R. 1931 Mad. 227, Ind. Rul. 1931 Mad. 518, 1931 Cr.C. 323. A re-trial in a criminal case should not be ordered too lightly and should be avoided, as much as possible. A re-trial certainly should not be ordered where it can be established that there is really no evidence to go before a jury; because, to order a re-trial in such circumstances would be to put the accused to unnecessary harassment—*Rafiqueuddin*, 40 C.W.N. 368 (374), 36 Cr.L.J. 808, 155 I.C. 687, A.I.R. 1935 Cal. 184, 1935 Cr.C. 241, 62 Cal. 572. See also *Dharanidhar*, 59 C.L.J. 15. The mere fact that the Appellate Court finds the decision of the Lower Court not so satisfactory as it should have been, does not authorise the Appellate Court to pass an order remanding the case to the Lower Court with instructions to write out a proper judgment—*Tara Chand*, 32 Cal. 1069. Where a Sessions Judge on appeal thinks that the evidence of some more witnesses, who were not examined in the Lower Court, is necessary, he should proceed under sec. 428 (1) and cannot order retrial on that ground—*Luchman*, 31 Cal. 710; *Israr Prasad*, 16 A.L.J. 325, 19 Cr.L.J. 485, 45 I.C. 149. Where the prosecution wanted to let in evidence necessary to prove the offence, but the Magistrate refused to take that evidence, stating that it was unnecessary, the case was a proper one in which retrial could be ordered or in which the Court could properly call for additional evidence under sec. 428; but as a new trial would involve much unnecessary delay and expense, it is more convenient to order additional evidence to be taken than to order a retrial—*Jeremiah v. Vas*, 36 Mad. 457 (450). Where the evidence recorded by the Magistrate

as full as the law requires and there is no irregularity in the procedure, it is not competent to a Sessions Judge on appeal to order a retrial. He must consider the case on the evidence before him and proceed to judgment—*Maganlal*, *Ratanlal* 530; *Boudville*, 1 Bur.L.J. 32. In the absence of any material irregularity in a trial in which all available evidence was produced, an order of re-trial would merely amount to an expression of dissatisfaction with the result. It is established practice in all the High Courts in India that an order of re-trial should not be given merely because the revisionable authority disagrees with the trial Judge as to the offences constituted by proved facts—*Bauar Shah*, 37 Cr.L.J. 1039 (1043), 164 I.C. 889, A.I.R. 1936 Pesh. 172. See also *Molniam*, 38 Cr.L.J. 71 (72), 165 I.C. 734, A.I.R. 1936 All 758, 1936 A.L.J. 1083, 1936 Cr.C. 999. The mere fact that an inadmissible or irrelevant evidence has been admitted by the Lower Court does not justify a retrial. Such evidence may be left out of consideration—*Boudville*, 1 Bur.L.J. 32; *Wajadar*, 21 Cal. 955 (970); *Ramaswami Ayyar v. Chittoor Municipality*, A.I.R. 1940 Mad 685, 1940 M.W.N. 386, 51 M.L.W. 542, 1940 M.Cr.C. 108, 41 Cr.L.J. 897, 190 I.C. 317. The Appellate Court ought not to send the case back for retrial unless there is some material already on the record tending to indicate that the offence has been committed, or unless the Appellate Court was given by the prosecution sufficient assurance indicating that there would be produced practically unimpeachable evidence of the offences if a retrial is ordered—*Mogambara*, 28 M.L.J. 379, 17 Cr.L.J. 193. Where the prosecution has failed to prove its main case, the Appellate Court should acquit the accused without ordering a retrial on the chance that some better evidence may be produced by the prosecution—*Subramanyam*, 1931 M.W.N. 517. See also *Tripurari Bhattacharjee v. Emp.*, and *Suresh Chandra De v. Emp.*, under the heading "when the re-trial may be ordered". Where the prosecution has failed to adduce the necessary evidence which would justify the conviction of the accused, they should not be allowed another opportunity to fill in the gaps which were deliberately left by them. The prosecution must realize that they are required and expected to produce all the relevant and available evidence in order to bring home the charge to the accused and they cannot be allowed to produce evidence at their pleasure piece-meal—*Sochnam v. Emp.*, 39 Cr.L.J. 278, 173 I.C. 12, A.I.R. 1938 Pat. 39, 18 P.L.T. 871, 4 B.R. 218, 10 R.P. 389. Where far from there being a certainty, there is not even much probability that, in the event of a retrial, there would be a conviction, the Appellate Court should refrain from ordering a retrial, especially when the first trial had taken up a considerable portion of public time and the expense of a new trial would be very heavy—*Khim Chand*, 35 Cr.L.J. 1477 (1479), 151 I.C. 934, A.L.R. 1934 Bom. 308, 36 Bom.L.R. 639, 1934 Cr.C. 1036, A.I.R. 1934 Bom. 303.

Where there is undoubtedly enmity between the parties in the case and the Court is very doubtful as to the value of any evidence adduced upon a re-hearing in the case, it would be dangerous to order a re-hearing—*Feroze Kazi v. Emp.*, 41 Cr.L.J. 267 (271).

Where the prosecution is launched not with any desire to vindicate the law in the public interest but only with a view to humiliate the accused, it is not fair or advisable for the High Court to play into the hands of a party by ordering a re-trial in order to enable him to satisfy his grudge, especially where the public interest has been sufficiently protected for future—*Ghaziabad Municipality v. Harsaran Das*, A.I.R. 1939 All. 19 (21), 1939 A.L.J. 1034, 41 Cr.L.J. 281, 186 I.C. 261.

By a Court of competent jurisdiction:—Under this section, when an Appellate Court orders a retrial, it can specify the Court by which the appellant is to be retried. There is nothing in this section which prevents such specification—*Kasturbhai*, *Ratanlal* 367. See also *Amor*, 34 Cr.L.J. 320 (322), 142 I.C. 310, Ind. Rul. 1933 Cal. 259, 37 C.W.N. 481, A.I.R. 1933 Cal. 364, 1933 Cr.C. 500, 60 Cal. 814.

If the Appellate Court finds that the accused had committed an offence triable by a Magistrate of the first class but has been tried by a 2nd class Magistrate through oversight or under a misapprehension, the Appellate Court may order the accused to be retried by a Court competent to try the offence, i.e., by a first class Magistrate—

Sukha, 8 All. 14 (17). Even if the Lower Court was competent to try the offence, the Appellate Court may order the retrial by another Court of competent jurisdiction—*Shaik Ali*, L B R. (1893—1900) 238.

Under the provisions of this section, the retrial, if ordered, must be by a Court of competent jurisdiction 'subordinate to the Appellate Court,' and, therefore, an Appellate Court cannot direct a case to be retried by itself—*Fakira*, Ratanlal 982; *Dhiraji v. Akasi*, 24 A.L.J. 506, 95 I.C. 385, A.I.R. 1926 All. 429, 27 Cr.L.J. 785. But in *Manikka*, 30 Mad. 228 and *Vedakadeth Kanaran*, 2 Weir 481, it has been held that the words 'Court of competent jurisdiction subordinate to such Appellate Court' are not to be taken as words of limitation, and do not exclude the power of the Appellate Court of itself trying the offender when the offence is within the jurisdiction of the Appellate Court. But if the accused has been tried before a jury, and the High Court, on appeal, sets aside the conviction on the ground of misdirection, the accused is entitled to be re-tried *before a jury*, and as a matter of procedure and in justice to the accused, this course should be adopted. It is doubtful whether the High Court can, under this section, retry the case itself—*Sadhu Sheikh*, 4 C.W.N. 576 (581, 582). An order of retrial which directs that a case which has originally been heard before a jury should be reheard before a Court without a jury, is an order that ought not to be made unless it is justified by exceptional circumstances. There is jurisdiction to make it, but it is obvious that it has, and is likely to have, a very serious effect upon the rights of the accused, and his privilege which he previously enjoyed of trial by a jury he ought in general to retain—*Hari*, 36 Cr.L.J. 978 (980), 156 I.C. 3, A.I.R. 1935 P.C. 122, 1935 O.W.N. 744, 39 C.W.N. 929 (P.C.).

If an order for re-trial is made by the High Court and it is not stated in the order whether the re-trial is to be held by the same Magistrate or by some other Magistrate, then it should not be presumed that it was the intention of the High Court to direct that the re-trial should be held by the same Magistrate. Under these circumstances the matter is left entirely in the discretion of the Magistrate who has got to appoint the Court by which the case is to be tried—*Bali Ram Kalwar v. Sitaram Kalwar*, 30 C.W.N. 1002 (1003), A.I.R. 1926 Cal. 1173.

The question whether a trial before a particular Magistrate is expedient for the ends of justice or not is a question which has got to be considered from the point of view of the accused person as well, and unless it is impossible to get a Magistrate other than the one who has already convicted the accused person on the same charge at a previous trial, or unless there be circumstances which would necessitate the trial of the same case before the same Magistrate over again, it is desirable that the trial should not be held before the same Magistrate—*Bali Ram Kalwar v. Sitaram Kalwar*, *supra*.

The Appellate Court may order the retrial to be held by any Court of competent jurisdiction. The High Court has power under this section to order a retrial of the appeal by the Lower Appellate Court—*Chanda Singh*, 1913 P.L.R. 7, 13 Cr.L.J. 737. See Note 1091.

1144. Order of commitment:—If the Appellate Court finds that the accused has committed an offence which the Lower Court was not competent to try, the Appellate Court may order a retrial by a Court of competent jurisdiction; and if there is no Court of competent jurisdiction subordinate to the Appellate Court, it ought to direct the committal of the accused to the Sessions—*Chinna*, 2 Weir 484 (485). Where the accused who has committed an offence triable solely by the Sessions Court, has been tried by a Magistrate, the Appellate Court is competent to direct a committal to the Sessions—*Sukha*, 8 All. 14 (17); *Hasan Raza*, 20 A.L.J. 568. In *Sukha*, *supra*, Brodhurst, J., expressed the opinion that an Appellate Court can order a commitment only where the offence committed by the accused is triable exclusively by the Court of Session. But this view has been dissented from in the following cases, where it has been laid down that even if the offence be not exclusively triable by the Court of

Session, the Appellate Court is still competent to direct a committal to the Sessions—*Misri Lal v. Lachmi*, 23 Cal. 350 (351); *Maula Baksh*, 15 All. 205 (206); *Abdul Rahiman*, 16 Bom. 580 (584). This section gives the Appellate Court the power to order an accused person to be committed to the Sessions, when it considers that that is the procedure which should have been adopted by the Magistrate in the case—*Abdul Rahiman*, 16 Bom. 580 (584). Thus, a commitment may be ordered by the Appellate Court, if it is of opinion that the Magistrate, though of competent jurisdiction to try the case, was not competent to punish the accused adequately—*Dani*, 1895 P.R. 16; *Abdul Rahiman*, 16 Bom. 580 (584). See also *Salon*, 34 Cr.L.J. 640, 143 I.C. 649, A.I.R. 1933 Lah. 128, 1933 Cr.C. 242, Ind. Rul. 1933 Lah. 375, where the Sessions Judge dealt with the case under sec. 423 as well as under sec. 437, Cr. P. Code.

Where the Appellate Court directs a commitment to the Court of Session, an investigation preliminary to commitment is not necessary. The commitment can be made on the evidence already recorded—*Anonymous*, 2 Weir 479. The Appellate Court under this section may either itself commit the accused for trial before the Sessions Court or it may direct a Magistrate to do so. But where it adopts the latter course, it does not give the Magistrate any jurisdiction to make any further enquiry and that the enquiry held is sufficient for the purpose of Chap. XVIII. The Magistrate then frames a charge or amends the charge under sec. 210, Cr. P. C., and under sec. 211 requires the accused to give in his list of witnesses and the Magistrate makes a formal order of commitment under sec. 213. To hold otherwise would also lead to the conclusion that although the Appellate Court had ordered that the accused should be committed for trial, the Magistrate would have jurisdiction to decide whether the accused person should be committed for trial or not and if he thought fit to disregard the order of the Appellate Court and discharge the accused person—*Sahadeo Ram*, 35 Cr.L.J. 1013 (1016), 156 I.C. 849, A.I.R. 1935 All. 579, 1935 Cr.C. 598, 1935 A.L.J. 618, 58 All. 23. But see Note 694A under sec. 207.

An order of commitment passed by the Sessions Judge on appeal under this clause can be revised by the High Court under sec. 439—*Ram Samujh*, 11 O.L.J. 748, 1 O.W.N. 525, 25 Cr.L.J. 1375.

Commitment to itself.—The Appellate Court has power of ordering the accused appellant to be committed to the Court of Session, even though the Court of Session is the Appellate Court itself—*Moula Bakhsh*, 15 All. 205 (207). But the Appellate Court cannot itself commit a case to itself, but, as a Court of Appeal, can only direct a competent Magistrate to make a commitment to itself. Reading this section with sec. 193 it is manifest that except in cases in which a Court of Session is expressly empowered to take cognizance of an offence as a Court of original jurisdiction, it has no power to do so unless a commitment has been made by a Magistrate duly empowered in this behalf—*Maula Khan*, 1907 A.W.N. 178, 6 Cr.L.J. 7.

1145. Alteration of finding:—Where the accused were charged by the lower Court with several offences, and were convicted of the graver offences and acquitted of the minor charges, the Appellate Court can alter the finding of the lower Court and convict the accused of the minor charges, and acquit them of the graver offences—*Golla Hannappa*, 35 Mad. 243. An Appellate Court can convict the accused for a lesser offence than that which was found by the Court of first instance to have been committed by the accused—*Jawad Husain*, 2 Luck. 503, 103 I.C. 401, 1 Luck. Cas. 159, A.I.R. 1927 Oudh 296, 8 A.I.Cr.R. 321, 28 Cr.L.J. 673. But in convicting an accused of an offence with which he was not charged in the lower Court, the Appellate Court can act only in accordance with the provisions of secs. 237 and 238—*Padmanabha*, 33 Mad. 264; *Sakharam*, 8 Bom.L.R. 120; *C. C. Sircar*, 3 Rang. 68, 4 Bur.L.J. 29, 26 Cr.L.J. 119; *Mahabir*, 49 All. 120, 24 A.L.J. 998, 27 Cr.L.J. 1118, A.I.R. 1927 All. 35, 97 I.C. 430; *Nand Kishore v. Emp.*, A.I.R. 1939 All. 710 (712), 1939 A.W.R. (H.C.) 661, 185 I.C. 151, 41 Cr.L.J. 111, 1939 A.L.J. 941. The powers of an Appellate Court under this section are very wide and are only subject to the provisions of sections 234 to 238, Criminal Procedure Code—*Shco Narain*, A.I.R. 1936 Oudh 44.

(47), 1935 O.W.N. 1177, 158 I.C. 945, 1935 O.L.R. 630. See also *Diwan Singh*, A.I.R. 1936 Nag. 132 (134), 19 N.L.J. 84; *Muthia Chetty*, 29 Mad. 190, 3 Cr.L.J. 461 and *Maung E Maung v. The King*, 41 Cr.L.J. 621 (623), 188 I.C. 539, A.I.R. 1940 Rang 118, 1940 Rang. 215 in Note 1138. Thus, where on an appeal from a conviction of murder, the Appellate Court comes to the conclusion that the offence of murder is not proved but that there is evidence on the record to support a conviction for an offence against property, the Appellate Court ought to acquit the accused of murder, but it cannot alter the conviction of murder into a conviction of an offence against property, because the latter offence is so widely different from the former that it is illegal under sec. 237 or 238 to convict the accused of the latter offence when he is charged only with the former—*Wallu*, 4 Lah. 373; *Ghaus*, 7 Lah. 561, 27 P.L.R. 610, 27 Cr.L.J. 1004; *Yusuf*, 20 All. 107. It has, however, been laid down that sec. 423 (1) (b) is not in any way dependent upon or restricted and controlled by secs. 236, 237 and 238, Cr. P. C. So the Appellate Court can alter a conviction under sec. 302, I. P. C., to one under sec. 366/109, I. P. C.—*Sharif*, 34 Cr.L.J. 266 (269), A.I.R. 1933 Pesh. 9, 1933 Cr.C. 151, Ind. Rul. 1933 Pesh. 5, following *Krishna Chetty*, 35 I.C. 816, 17 Cr.L.J. 384, 1916 M.W.N. 267, 4 M.L.W. 373; or to one under sec. 307, Indian Penal Code—*Sheo Narain*, supra. But see *Sheo Narain*, 37 Cr.L.J. 12, 158 I.C. 945, 1935 O.W.N. 1177, A.I.R. 1936 Oudh 44, 1935 O.L.R. 630, where it has been laid down that the powers of an Appellate Court under this section are very wide and are only subject to the provisions of secs. 234 to 238. It is not open to an Appellate Court to find a man guilty of the abetment of an offence, on a charge of the substantive offence itself—*Padmanabha*, 33 Mad. 264. See Note 771 under sec. 238. It is not competent to an Appellate Court to alter a conviction into a conviction of an entirely different offence. And so, where the Sessions Judge had convicted an accused of an offence under sec. 409, I. P. C., the High Court on appeal refused to alter the finding into a conviction for an offence under sec. 161, I. P. Code, for which the accused has not been charged or tried in the original Court and which was of an entirely different nature from the offence with which he was charged—*Imdad Khan*, 8 All. 120. When the accused was charged with and convicted of an offence under sec. 457, I. P. C., and on appeal the Sessions Judge altered the charge and recorded a conviction under section 411, Indian Penal Code, held that the Appellate Court had no power to so alter the charge as to make it necessary for the accused to meet an entirely different case from that with which he was charged in the trial Court—*Mula*, 23 A.L.J. 924, 90 I.C. 150, A.I.R. 1926 All. 33, 26 Cr.L.J. 1494. Where in the trial Court the case for the prosecution was that the person, for attempting to cheat whom, the petitioner and his co-accused were being tried, was A and the finding of the Magistrate was also to the same effect and, on appeal, the Sessions Judge altered the conviction holding that the person cheated was B, held that the conviction could not be maintained in as much as the nature of the charge was charged entirely and the petitioner was materially prejudiced by this procedure—*Rattan Singh*, A.I.R. 1934 Lah. 833, 35 P.L.R. 666, 1934 Cr.C. 1180, A.I.R. 1934 Lah. 421. But where the prosecution has established certain acts constituting an offence, and the Court has misapplied the law to those acts by charging and convicting the accused for an offence other than that for which he should have been charged, and it appears that inspite of such error of the Court, the accused has by his defence endeavoured to meet the accusation of the commission of those acts, then the Appellate Court may alter the charge or finding and convict him for an offence which those acts properly constitute, if the accused is not at all prejudiced by the alteration of finding—*Lala Ojha*, 26 Cal. 863. Such an error is one of form rather than of substance, and the alteration by an Appellate Court of the charge or finding into a more serious offence would not necessitate a retrial for that offence. Therefore, where a person is convicted of an attempt to commit an offence, the Appellate Court, if it thinks that the acts of the accused constitute the substantive offence itself, may convict him of the substantive offence without ordering a retrial—*Lala Ojha*, supra. Where the accused has been convicted by the trial Court of an offence under sec. 380, I. P. C., the Appellate Court can alter the conviction into one under sec. 403, I. P. Code,

as the two offences are of the same nature and the appellant cannot be taken by surprise by such a procedure—*Biru*, 30 Cr L.J. 413 (414), 11 Lah L.J. 113, A I R. 1929 Lah. 508, Ind. Rul. 1929 Lah 361. See Notes under secs. 237 and 238

The Appellate Court in altering a finding under this clause cannot act in contravention of the provisions of sec. 239. Thus, the petitioner and four others were tried jointly, the other four being convicted of an offence under sec 454 of the I. P. Code and the petitioner was convicted of abetment thereof. On appeal the Appellate Court acquitted the petitioner of the offence of abetment but convicted him under secs. 411 and 414, I P. C. Held, that the conviction by the Appellate Court cannot be maintained, because under sec. 239 the petitioner could not have been tried in the original Court jointly with the four accused under secs 411 and 414, I P. C., while the latter were being tried under sec 454, I. P. C.—*Salub Singh*, 1905 P.R. 38, 1905 P.L.R. 115.

If the Appellate Court alters the finding, it cannot maintain the conviction (though it can maintain the sentence). Thus, the trying Magistrate convicted the accused of theft of mangoes and of rioting, the common object of the unlawful assembly being the taking of mangoes; on appeal the Sessions Judge disbelieved the evidence relating to the taking of mangoes and came to a finding that the cause of the riot was a dispute relating to a land; but the Judge confirmed the conviction and sentence. The High Court held that the Sessions Judge was wrong in confirming the conviction on a different finding of fact to which the accused were never called upon to plead and to defend themselves, because the result of the Judge's action was that the accused were convicted by him of an offence for which they had never been tried. The High Court acquitted the accused—*Rahimuddi v. Asgar*, 27 Cal. 990 (991), 5 C.W.N. 31; *Poresh Nath*, 33 Cal. 295, 2 C.L.J. 516.

Under clause (b) the Appellate Court can, in an appeal from a conviction, alter the finding of the Lower Court and find the appellant guilty of any offence of which he has been acquitted by that Court. Sec 417 does not stand in the way, because that section applies only where there has been a complete acquittal and not where an appeal is preferred in a case in which the Magistrate has acquitted the accused of one offence but convicted him of another—*Jabanulla*, 23 Cal 975 (979, 980); *Sardar*, 34 All 115 (117), 12 IC 836, 8 A.L.J. 1239, 12 Cr L.J. 572; *Golla Hanumappa*, 10 IC. 372, 35 Mad. 243, 10 M.L.T. 66, 1911 M.W.N. 106, 12 Cr L.J. 269; *Raghunath*, 34 Cr L.J. 1064, 55 All 834, 6 R.A. 174, 145 IC 849, A I R. 1933 All 565, 1933 Cr C 897, 1933 A.L.J. 1377; *Lakhan*, 35 Cr L.J. 973 (979), 149 IC 533, 11 O.W.N. 534, A I R. 1934 Oudh 200, 1934 Cr C. 587. Thus, where the Sessions Judge acquitted the appellant of the charge under sec. 376, I P C., but convicted him under sec 354, I P C., the High Court, on appeal, altered the conviction under sec. 354, I P. C., to one under sec. 376/511, I P. C.—*Hanuman*, A I R 1932 Cal 723, 36 C.W.N. 1152, 1932 Cr C 728, 141 IC 622. Where the accused were charged in the alternative under sec. 366 or sec. 366A or sec. 498, I. P. C., but was convicted under sec. 366A, I. P. C., without a finding one way or the other, whether specifically or in the alternative, under sec. 498, I. P. C., the Appellate Court is competent under sec. 423 (1) (b), Cr. P C., to alter the conviction under sec. 366A, I. P. C., into a conviction on the alternative charge under sec. 498, I. P. C.—*Jagannath Gir*, 38 Cr L.J. 621 (626), 1937 A.W.R. (H.C.) 203, 1937 A Cr C. 39, 168 IC. 833, 9 R.A. 676, 1937 A.L.J. 547, 1937 A.L.R. 417, A I R. 1937 All. 353. Where the Magistrate acquitted the accused under sec. 148, I. P. C., and convicted him under sec. 325, I. P. C., it was open to the Sessions Judge to alter the conviction under sec. 325 into one under sec 148, I P. C.—*Appanna v. Pitkani*, 34 Mad. 545. Similarly, where in such a case the Lower Court has found only one of the accused guilty of murder and acquitted the others of murder but convicted them of other offences, an appeal against the conviction of murder opens out the entire case and the Appellate Court may find all the three persons guilty of murder—*Dulli*, 16 A.L.J. 918, 20 Cr L.J. 22, 48 IC. 502, A I R. 1918 All 65. Where in the trial Court the accused was charged with murder (section 302, I. P. C.) but was convicted of culpable homicide (section 304),

the Appellate Court can convict the accused of murder—*On Shive*, 1 Rang. 436, 25 Cr.L.J. 247, 76 I.C. 411, A.I.R. 1924 Rang. 93.

The Allahabad High Court has, however, taken a different view. It has laid down that where the Court below has either acquitted an accused expressly or by necessary implication, then, unless there is an appeal from acquittal, the finding cannot be converted into one of conviction. There is clearly a distinction between reversing a finding and merely altering it. Where an order of acquittal is to be converted into an order of conviction, it amounts to a reversal of the order. On the other hand, where the conviction under one section is altered to a conviction under some other section maintaining the sentence or reducing it or altering it, it amounts merely to an alteration of the finding and not to a reversal of the finding. It is clear that sub-sec. (1)(b) of this section is not applicable to a case where there is an express order of acquittal and no appeal from a conviction pending before the Appellate Court. In such a case the Appellate Court has no power to reverse the finding at all. It cannot by convicting the accused of the offence of which he has been acquitted, reverse the finding, by regarding it as if it were merely an alteration of the finding. Where the accused was charged of separate offences under each section but the Court below has wrongly acquitted him of one offence, the Appellate Court may report the case to the High Court for proper orders to be passed. But the Appellate Court cannot itself set aside the acquittal and convict the accused of the offence of which he had been charged and acquitted—*Sarda Prasad v. Emp.*, 38 Cr.L.J. 521 (524), 168 I.C. 17, 1937 A Cr.C. 1, 9 RA 623, 1937 A.L.R. 309, A.I.R. 1937 All. 240, 1937 A.L.J. 143, following *Kishen Singh v. Emp.*, 50 All 722, 111 I.C. 332, A.I.R. 1928 P.C. 254, 29 Cr.L.J. 828, 55 I.A. 390, 5 O.W.N. 911, 28 M.L.W. 396, 1928 M.W.N. 749, 29 P.L.R. 575, 33 C.W.N. 1, 48 C.L.J. 397, 30 Bom.L.R. 1572, 55 M.L.J. 786, 26 A.L.J. 1099 (P.C.) and *Sheedarshan Singh*, 44 All. 332, 65 I.C. 858, A.I.R. 1922 All. 487, 23 Cr.L.J. 202, 20 A.L.J. 190.

If Appellate Court finds that the sentence is illegal or inadequate, it may alter the conviction (if the facts found justify such alteration) in order to legalise the sentence—*Kyaw Hla*, 3 L.B.R. 112, 3 Cr.L.J. 348 (349).

In altering the finding of the Lower Court, the Appellate Court is not bound by any preliminaries of complaint under sec. 198. Thus, on an appeal from a conviction under sec. 182, I. P. C., the Appellate Court is competent to alter the conviction into one under sec. 500, I. P. C., notwithstanding that there was no complaint by the aggrieved party—*Gura Narain*, 25 All. 534 (536). The Appellate Court is also competent to change the conviction from sec. 181, I. P. C., to sec. 193, I. P. C. There is no reason for thinking that the Appellate Court cannot exercise this power simply because the prosecution has been launched under an inappropriate section—*Nathu Singh*, A.I.R. 1936 Nag 263, 1936 Cr.C. 1025. But the Oudh Chief Court has held that the Appellate Court cannot alter a conviction of rape into a conviction of adultery, where there was no formal complaint by the husband in respect of the latter offence, as required by section 199—*Baji*, 10 O.W.N. 107, A.I.R. 1933 Oudh 163, 143 I.C. 73, 34 Cr.L.J. 496, 1933 Cr.C. 318 (320); cannot alter a conviction of simple hurt into a conviction of grievous hurt—*Hasan Khan*, 33 Cr.L.J. 162, 135 I.C. 382, 8 O.W.N. 1299, A.I.R. 1932 Oudh 25, Ind. Rul. 1932 Oudh 30, 1932 Cr.C. 57. See Note 1219 under the heading "Converting acquittal into conviction."

The word 'finding' is not limited to a finding upon a point of law, as distinct from a finding upon a point of fact—*Mahangu Singh*, 3 P.L.J. 565, 19 Cr.L.J. 735. But when the prosecution bring a false case it is impossible to bring out a new one in the Court of appeal—*Moslem Khalifa v. Emp.*, 41 Cr.L.J. 792, 189 I.C. 734, A.I.R. 1940 Cal. 350.

Under sec. 423 (b), Cr. P. C., in an appeal from conviction the Appellate Court may alter the finding maintaining the sentence or with or without altering the finding reduce the sentence. Where, therefore, the accused were tried by a Magistrate who convicted them under secs. 363 and 498, I. P. C., and sentenced them under sec. 363, I. P. C., to rigorous imprisonment for one year and six months each and awarded no

separate sentence under sec. 498, I. P. C., and in appeal the Sessions Judge found them not guilty under sec. 363, I. P. C., but guilty under sec. 498, I. P. C., and felt that he had no authority to pass a proper sentence as the Magistrate had not passed any sentence under that section, *held* that what the Sessions Judge did was to alter the conviction from secs. 363 and 498, I. P. C., to a conviction under sec. 498, I. P. C., and that in such a case he could have maintained the sentence of one and a half years which had been passed by the Magistrate or given a reduced sentence—*Supdt. & Remembr. of Legal Affairs, Bengal v. Hossein Ali*, 39 Cr L.J. 684, 175 I.C. 799, 11 R.C. 38, 42 C.W.N. 1040, A.I.R. 1938 Cal. 439.

1146. Alteration when improper:—(1) It is improper for the Appellate Court to alter the finding so as to convict the accused of an offence of an entirely different character. See Note 1145. Thus, under the provisions of secs. 237 and 238, it is illegal to alter a conviction under sec. 376, I. P. C., into one under sec. 366, I. P. C., because the charge under the latter section involves different elements and different questions of fact from the former—*Sakharam*, 8 Bom L.R. 120; *C. C. Sircar*, 3 Rang 68, 4 Bur.L.J. 29, 26 Cr L.J. 1119; so also, it is illegal to alter a conviction under sec. 379, I. P. C., into one under sec. 143, I. P. C.—*Jatu v. Mahabir*, 27 Cal. 660. So again, it is improper to alter a conviction under secs. 211 and 109, I. P. C., into one under sec. 193, I. P. C.—*Manoranjan*, 3 C.W.N. 367; or to alter a conviction under sec. 468, I. P. C., into a conviction under sec. 471, I. P. C.—*Akbar*, 8 N.L.J. 87, 26 Cr L.J. 1358, 89 I.C. 398, A.I.R. 1925 Nag 294; or to alter a conviction under sec. 147 into one under secs. 448 and 323, I. P. C.—*Yakub Ali v. Lethu*, 30 Cal 288 (289); or to alter a conviction for wrongful confinement into one for assault—*Rameswar v. Jogi*, 5 C.W.N. 296.

(2) It would be improper and unfair to the accused for the Appellate Court to convict him of a more serious offence to which he had never pleaded at the trial, especially if the new offence was not cognate to the offence for which he was tried and convicted, and if there were circumstances of aggravation to which he had not pleaded guilty—*Lala Ojha*, 26 Cal 863; *Po Yin*, 3 L.B.R. 232.

(3) An Appellate Court is not competent to alter the finding of a Magistrate, so as to convict an accused person of an offence which the Lower Court is not competent to try—*Pershad*, 7 All. 414, 1885 A.W.N. 105 (F.B.)

(4) When a person has been charged with a certain offence and has been convicted of that offence, the Appellate Court cannot, on finding that the conviction is not sustainable, convict the accused of abetment of that offence—*Mahabir*, 24 A.L.J. 998, 49 All. 120, 27 Cr.L.J. 1118; *Padmanabha*, 33 Mad 264; *Chand Nur*, 11 B.H.C.R. 240. See Note 771 under sec. 238.

(5) It is not illegal for the Appellate Court to convict a man of an offence under sec. 452, I. P. C., in a case in which he has been charged under sec. 323, I. P. C., in the light of the wording of secs. 236 and 237, Cr. P. C., but the question which is to be decided in each case is whether the accused has or has not been prejudiced in his trial by the fact that the charge was framed under the wrong section—*Shankar Dayal*, 39 Cr.L.J. 937, 177 I.C. 616, 1938 A.Cr.C. 100, 11 R.O. 59, 1938 O.A. 740, 1938 O.L.R. 432, 1938 O.W.N. 960, A.I.R. 1938 Oudh 263.

(6) The Appellate Court has power to alter a conviction under sec. 353, I. P. C., to one under sec. 352, I. P. C., and to reduce the sentence—*Maung Ba v. The King*, 39 Cr.L.J. 761, 176 I.C. 670, 1938 Rang L.R. 139, 11 R.R. 69, A.I.R. 1938 Rang. 281. But see *In re Akbar Momin*, 6 C.W.N. 202, where the facts were different.

(7) When a Second Class Magistrate convicts an accused under sec. 414, I. P. C., the Appellate Court cannot alter the conviction to one under sec. 409 read with sec. 109, I. P. C., as the offence under sec. 409, I. P. C., is not triable by the Magistrate of the Second Class—*Ponnuswami Servai v. Emp.*, 39 Cr.L.J. 465, 174 I.C. 776, 10 R.M. 742, 1938 M.W.N. 223, A.I.R. 1938 Mad. 315.

(8) Where the complainant had put forward a very clear and definite case of cheating and never alleged that the accused had either concealed or removed the property

within the meaning of sec. 424, I. P. C., and no evidence was produced to prove it, the Appellate Court had no power to alter the conviction under sec. 418, I. P. C., into one under sec. 424, I. P. C., though the accused were not charged under the latter section—*Nand Kishore v. Emp.*, A.I.R. 1939 All 710, 1939 A.L.J. 941, 41 Cr.L.J. 111, 185 I.C. 151.

Notice to appellants:—If a Judge on appeal finds that the evidence recorded discloses a different offence, he may alter the finding of the Court below; but in doing so, he ought to give information to the accused or to his pleader of what he proposes to do, and thus give him an opportunity of showing cause against the new conviction—*Mi Mo Da*, 3 L.B.R. 283, 5 Cr.L.J. 420. The powers conferred by this section on an Appellate Court are not intended to be used in such a way as to spring up a new case on the accused without giving him any notice of the charge he has to meet—*Debi Singh*, 16 Cr.L.J. 599 (All.). Where the accused had a good answer to the only charge made against him and he was acquitted of that charge, the High Court ought not to interfere with his acquittal and cannot at the stage ascertain under what section his offence fell and convict him under it—*Ahmad Din*, A.I.R. 1934 Lah. 843, 152 I.C. 615, A.L.R. 1934 Lah. 419, 1934 Cr.C. 1184.

1147. Reduction of sentence:—Where the Lower Court passes only a single sentence on a conviction for two offences, the Appellate Court, if it acquits the appellant of one of the offences, ought not to maintain the sentence in its entirety but must make some reduction of sentence, unless it thinks that the sentence ought not to be reduced, in which case it should refer the matter to the High Court for enhancement of the sentence—*Paramasiva Pillai*, 30 Mad. 48; *Ramanujan*, 2 Weir 487a. But no reduction of sentence by the Appellate Court is necessary, if the inference can be drawn that the trying Magistrate did not intend to pass any sentence on the conviction which is set aside on appeal—*Mari*, 7 M.L.T. 81, 11 Cr.L.J. 243. Where a Magistrate in convicting a person of two offences passed a single sentence of imprisonment and fine, it was held that separate sentences ought to have been passed, and that the Appellate Court in reversing the conviction for one offence cannot regard the imprisonment as imposed for one offence and the fine for the other, and reduce the sentence by eliminating the fine—*Pascoe*, Ratanlal 409.

Where the proceedings had been unduly prolonged in the trial Court owing to delays and adjournments for which the accused were not wholly responsible, and the accused were put to severe strain, anxiety and mental suffering during this long time, the High Court on appeal reduced the sentence of one year to nine months—*Billinghurst*, 27 C.W.N. 821 (852), 25 Cr.L.J. 1313, 82 I.C. 545, A.I.R. 1921 Cal. 18.

But a sentence will not be reduced on the ground of high birth and social position of the accused. Where a man of high family and position committed an act of criminal breach of trust upon a defenceless old lady, who was his relative, whose interest he was bound to protect, and who reposed utmost confidence in him, and the Sessions Judge passed a sentence of 5 years' rigorous imprisonment, the High Court on appeal held that though the sentence was heavy it was deservedly heavy, that in the interests of the public the sentence must be carried out as it stands, and that no consideration of the high birth or previous position of the accused should operate for its reduction—*Mohammad Hadi Husain*, 3 Luck. 491, 29 Cr.L.J. 983 (937), 112 I.C. 103, 5 O.W.N. 281, A.I.R. 1928 Oudh 277.

In *Jalal*, A.I.R. 1932 Lah. 615, 1932 Cr.C. 921, the Lahore High Court reduced the sentences passed on two accused while hearing the appeal filed by only one of them.

1148. Clause (b) (3):—No power to enhance the sentence:—The words "so as not to enhance the same" imply that no Appellate Court can enhance the sentence passed by the Lower Court. (That power is now vested only in the High Court in the exercise of its power of revision). And, therefore, if the Appellate Court finds the appellant to be guilty of a graver offence, the Court has no power to enhance

the sentence; the proper course would be to let the conviction stand as it is, or to have the case referred to the High Court—*Chadalavada Ramanappa*, 2 Weir 486. See also *Ramji Vala*, 41 Cr.L.J. 916, 190 I.C. 412, A.I.R. 1940 Bom. 279, 42 Bom.L.R. 475, 11 L.R. 1940 Bom. 500.

In an appeal from an order of acquittal passed by the Appellate Court the High Court need not necessarily pass the same sentence which was passed by the trying Court but, under the provisions of this section, is empowered to pass a new sentence within the powers of the Magistrate who tried the case—*Local Government v. Abasalli*, 36 Cr.L.J. 867 (868), 156 I.C. 184, 7 R.N. 224, A.I.R. 1935 Nag. 139, 1935 Cr.C. 667, 31 N.L.R. 312.

The High Court has power under the combined provisions of secs. 423 and 439, Cr. P. C., to alter the conviction under sec. 326 to one under sec. 302, I. P. C.—*Mehdi*, A.I.R. 1933 Lah. 661, 1933 Cr.C. 883, 146 I.C. 949, 35 P.L.R. 238, 6 R.L. 29, 35 Cr.L.J. 250, following *Bah. Reddi*, A.I.R. 1914 Mad. 258, 22 I.C. 756, 15 Cr.L.J. 180, 37 Mad. 119 and *On Shive*, A.I.R. 1924 Rang. 93, 76 I.C. 711, 25 Cr.L.J. 247, 1 Rang. 436 and explaining *Kishen Singh*, 50 All. 722, 55 I.A. 390, 111 I.C. 332, A.I.R. 1928 P.C. 254. The powers relating to appeals under this section are given to the Appellate Court, and the Appellate Court may include a Court subordinate to the High Court, and the Appellate Court, as such, has no power to enhance a sentence, differing from the provision which was in the old Cr. P. C. of 1872. On the other hand, the powers of revision are given to the High Court alone, and the powers of revision are given to the High Court in the case of any proceeding, the record of which has been called for by itself or which has been reported for orders or which otherwise comes to its knowledge. When the High Court has before it on appeal a record of a criminal proceeding, the condition precedent is performed, and the High Court can then, though the record has only come to its knowledge in the appellate proceeding, proceed to exercise its revision powers if it chooses to do so—*Chunbidva*, 36 Cr.L.J. 482 153 I.C. 936, 1935 O.W.N. 205, A.I.R. 1935 P.C. 35, 68 M.L.J. 166, 41 M.L.W. 188, 37 Bom.L.R. 160, 1935 M.W.N. 177, 1935 Cr.C. 199 (P.C.). But the Privy Council did not approve the exercise of these combined powers, while in a recent case the Privy Council approved, not the exercise by a High Court of its combined powers as a mixed Court of Appeal and revision, but the exercise by the High Court of its powers in appeal and its powers in revision, not simultaneously but in succession—*Jado Rahim v. Emp.*, 40 Cr.L.J. 93 (96), 178 I.C. 520, A.I.R. 1938 Sind. 202. The question was discussed at great length in *Ambika Thakur v. Emp.*, A.I.R. 1939 Pat. 611 (621), 18 Pat. 544, 1939 P.W.N. 747, but no conclusion was arrived at.

It is difficult to read into sec. 423 (1)(b), Cr. P. C., the power to convert an acquittal into a conviction on an appeal against a conviction. The words "alter the finding, maintaining the sentence" occurring in sec. 423 (1)(b)(2), Cr. P. C., must be read as a whole. The better view to take is that cl. (b) of sec. 423 (3), Cr. P. C., does not apply to cases of acquittal, partial or total, but to cases of conviction, and that cl. (a), applies to cases of acquittal; and that if the appellate powers of the Court are to be exercised to convert an acquittal into a conviction, then they should be exercised on an appeal against an acquittal under sec. 423 (1)(a), Cr. P. C., and not on an appeal against a conviction under sec. 423 (1)(b), Cr. P. C.—*Jado Rahim v. Emp.*, supra.

Thus restriction on the power of the Appellate Court to enhance the sentence in some cases prevent that Court from altering the finding. Thus, if the accused is charged with murder and grievous hurt, but is acquitted of the former offence and convicted of the latter, and sentenced to 7 years' imprisonment by the trial Court, the Appellate Court cannot on the appeal of the accused, alter the finding into one of murder, because, as it cannot enhance the sentence, the result will be that a person charged with murder, for which the only punishment is either death or transportation for life, will be punished merely with 7 years' imprisonment—a sentence which is not a punishment with law—*Jabanullah*, 23 Cal. 975 (979).

What amounts to enhancement of sentence:—The test of enhancement of sentence must be found not among the technicalities of penal definition, but by answering the broad question: "For this man's offence has the Appellate Court inflicted punishment more severe than that originally awarded"?—*Rangaswami*, 53 M.L.J. 694, 104 I.C. 440, 39 M.L.T. 20, A.I.R. 1927 Mad 789, 28 Cr.L.J. 824 (825).

(1) When an accused is convicted and sentenced by the lower Court for two distinct offences on two separate charges, and the Appellate Court reverses the conviction on one of the charges, it cannot retain intact the whole sentence but must reduce the sentence; the retention of the sentence has virtually the effect of enhancement of sentence—*Hanma*, 22 Bom. 760; *Ramchandra*, 30 Bom.L.R. 967, 112 I.C. 586, 30 Bom.L.R. 967, A.I.R. 1928 Bom 346, 29 Cr.L.J. 1082 (1083); *Ramzan v. Ram Khelawan*, 24 Cal. 316; *Mrs Torpey*, 49 All. 484, 101 I.C. 671, 25 A.L.J. 396, A.I.R. 1927 All. 375, 7 A.I.Cr.R. 339, 28 Cr.L.J. 495 (496); *Paramasiva*, 30 Mad 48; *Samasundaram*, 3 M.L.T. 312, 7 Cr.L.J. 361; *Prola Narasimham*, (1911) 2 M.W.N. 97, 12 Cr.L.J. 454; *Varadan*, 8 M.L.T. 117, 11 Cr.L.J. 483; *Bechu Singh*, 10 P.L.T. 587, 120 I.C. 753, 31 Cr.L.J. 173 (174); *Mangal Singh*, 1916 P.R. 31, 18 Cr.L.J. 372; *Balbhaddri v. Tribhuvan*, 3 N.L.R. 67, 6 Cr.L.J. 43. Thus, where a person was convicted by a Magistrate of rioting and theft and was sentenced for the first offence to four months' and for the latter offence to two months' rigorous imprisonment, and the District Magistrate on appeal acquitted the accused of rioting but upheld the conviction for theft and the sentence of six months' rigorous imprisonment, it was held that the effect of the order was to enhance the sentence for theft from 2 months' to 4 months' rigorous imprisonment, which he had no authority to do under this section—*Ramzan v. Ram Khelawan*, 24 Cal. 316. See also *Kehr Singh*, A.I.R. 1933 Lah 933, 1933 Cr.C 1392, 146 I.C. 442, 35 Cr.L.J. 108. But where only one offence has been committed, and the Magistrate erroneously splits it up into two offences, and passes two sentences, the Appellate Court can join the two offences into one offence and maintain the whole of the original sentence: such maintaining of sentences does not amount to an enhancement of sentence (because no conviction has in fact been reversed)—*Balbhaddri v. Tribhuvan*, supra.

(2) Where an Appellate Court reduced a sentence of 4 months' rigorous imprisonment into one of 3 months, but added a sentence of fine or in default six weeks' rigorous imprisonment, such sentence amounted to an enhancement of the original sentence, and was in excess of the powers of the Appellate Court—*Ishtri*, 17 All. 67, 1904 A.W.N. 202; *Meda*, 1887 A.W.N. 100. Where the Court of first instance sentenced the accused to rigorous imprisonment for 2 months and to a fine of Rs. 50 or in default one month's rigorous imprisonment, and on appeal the Appellate Court changed the sentence to one of one month's rigorous imprisonment and a fine of Rs. 200 or in default 2 months' rigorous imprisonment, held that the Appellate Court's sentence amounted to an enhancement of the sentence passed by the trial Court, for supposing the fine was not paid, the accused would still have to undergo three months' rigorous imprisonment and still be liable to pay the fine—*Bhola Singh*, 3 Pat. 638 (639), 5 P.L.T. 622, 25 Cr.L.J. 1186, 82 I.C. 50, A.I.R. 1924 Pat 563. See also *Sagawa*, 23 All. 497, 1901 A.W.N. 176; *Stamlay*, 3 N.L.R. 60, 6 Cr.L.J. 100; *Man Chand*, 1916 P.W.R. 5, 17 Cr.L.J. 212. It is objectionable on appeal to enhance the sentences of fine, even in lieu of imprisonment—*Abdul Rahman v. Emp.*, 37 Cr.L.J. 950, A.I.R. 1936 Lah 729, 164 I.C. 462, 38 P.L.R. 247, 9 R.L. 130, 1936 Cr.C. 764. Contra—*Chagan*, 23 Bom. 439. [But now see the proviso to sec. 386 which lays down that if the accused has undergone the full term of imprisonment awarded in default of payment of fine, the fine will not be levied.] If the aggregate sentence of imprisonment (i.e., the substantive sentence of imprisonment plus the imprisonment in default of fine) imposed by the Appellate Court is less than the period of the original sentence, the imposition of fine does not amount to an enhancement of sentence—*Bhaktavatsalu*, 30 Mad. 103, 5 Cr.L.J. 36, 16 M.L.J. 560, 1 M.L.T. 375 (F.B.); *Rakkhal v. Khirode*, 27 Cal. 175; *Mehar Chand*, 24 I.C. 607, 15 Cr.L.J. 519, 36 All. 485; *Kirpa Ram*, 1915 P.R. 7, 19 Cr.L.J. 603; *Prabhu Dayal v. Emp.*, 38 Cr.L.J. 428, 167 I.C. 723, 9 R.L. 541, 38 P.L.R. 1051, A.I.R. 1937 Lah.

195. Where a sentence of one year's rigorous imprisonment and Rs 50 fine or six months' further imprisonment in default was altered by the Appellate Court to a sentence of six months' rigorous imprisonment and Rs. 500 fine or six months' rigorous imprisonment in default, there was no enhancement of sentence—*Mohammad Hussain*, 32 Cr.L.J. 1217, 134 I.C. 792, A.I.R. 1931 Lah. 159, 32 P.L.R. 165, 12 Lah. 449, 1931 Cr.C. 271, Ind. Rul. 1931 Lah. 1000. See also *Satyawan*, 7 R.A. 496, 36 Cr.L.J. 335, 153 I.C. 411, A.I.R. 1934 All. 1031, 4 A.W.R. 488, 1934 Cr.C. 1338, where it has been held that no general rule can be laid down to determine what is or what is not an enhancement of sentence in matters like these.

To impose a substantial fine in place of a sentence of imprisonment and maintain the same sentence of imprisonment in default of payment does amount to enhancement. For the appellants may not be able to pay the fine, then they will have to undergo the imprisonment and their property is liable to attachment for payment of the fine as well. The question depends on the circumstances of each case. If the argument, that the appellants themselves asked the Appellate Court to impose a fine in place of imprisonment and, therefore, they can have no complaint, were correct, an absolutely crushing fine might be imposed—*Shanker Singh v. Emp.*, 38 Cr.L.J. 935, 170 I.C. 538, 10 R.O. 35, 1937 O.L.R. 452, 1937 A Cr.C. 104, 1937 O.W.N. 754, A.I.R. 1937 Oudh 462.

There is thus a conflict of rulings on this point :

(3) A sentence of fine is always considered lighter than a sentence of imprisonment—*Chagan*, 23 Bom. 439; therefore, the alteration of a sentence of fine into one of imprisonment is an enhancement of sentence within the meaning of this clause, and the Appellate Court has no power to alter a sentence in this way—*Lachmi Kant*, 18 All. 301; *Dhansang*, 18 Bom. 751.

(4) Where the Lower Court imposed fine and imprisonment, and the Appellate Court, in lieu of imprisonment, imposed an additional fine, thus increasing the amount of fine imposed by the Lower Court, it amounted to an enhancement of sentence—*Ramasami*, 2 Weir 487; *Abdul Rahman*, 37 Cr.L.J. 950, 164 I.C. 462, A.I.R. 1936 Lah. 729, 38 P.L.R. 247, 1936 Cr.C. 764.

(5) The addition of imprisonment (even one day's imprisonment) by the Appellate Court to a sentence of fine only imposed by the Lower Court is an enhancement of sentence—*Chandalavadda Ramanappa*, 2 Weir 486.

(6) The addition of a sentence of whipping by the Appellate Court, although the sentence of imprisonment is reduced, that is, the alteration of a part of the imprisonment into a sentence of whipping, amounts to an enhancement of the sentence—*Appu*, 2 Weir 487. The Rangoon High Court also holds that the alteration of the whole or part of the sentence of imprisonment into a sentence of whipping amounts to an enhancement—*K'yang*, 30 Cr.L.J. 328 (329), 114 I.C. 523, A.I.R. 1928 Rang. 265, Ind. Rul. 1929 Rang. 91. See also *Banda Ali*, 15 W.R. 7, where their Lordships expressed a doubt as to which sentence was the more severe "The Legislature has not supplied us with any data from which the comparative severity of the two sentences of whipping and rigorous imprisonment can be determined, and it is impossible to say how many lashes would be equivalent to a sentence of rigorous imprisonment for a specified period"—Mitter, J. Recently a Full Bench of the Rangoon High Court has attempted to find out a standard of comparison, and by applying the provisions of sec. 395, has laid down that the substitution of 30 stripes for a sentence of one year's rigorous imprisonment or more, or the substitution of 25 stripes for a sentence of 9 months' imprisonment or more, or the substitution of 20 stripes for a sentence of six months' imprisonment or more, would not ordinarily amount to an enhancement of sentence. But a substitution of 30 stripes for a sentence of 3 months' imprisonment is manifestly an enhancement and is therefore illegal—*Chit Pan*, 7 Rang. 319, 119 I.C. 209, A.I.R. 1929 Rang. 177, Ind. Rul. 1929 Rang. 289, 30 Cr.L.J. 986 (989) (F.B.). But in deciding what sentence of whipping to pass, the Appellate Court would be bound to consider the imprisonment already undergone—*Nga Aung Myat*, 33 Cr.L.J. 758 (760), 139 I.C. 284, 10 Rang. 317, A.I.R. 1932 Rang. 150, 1932 Cr.C. 711, Ind. Rul. 1932 Rang. 177.

(7) Where in a criminal appeal, the terms of imprisonment are reduced but a punishment of solitary confinement is imposed, it amounts to an enhancement of the sentence—*Peman*, 1890 A.W.N. 170. Where a person was tried and convicted by a second class Magistrate on a charge under sec. 406, I. P. C., and sentenced to three months' simple imprisonment and the Appellate Court altered the sentence to a fine of four hundred rupees with an alternative term of rigorous imprisonment, *held* that the sentence passed by the Appellate Court was *ultra vires* of that Court in as much as the Appellate Court, in varying the sentence, was bound by the limitations imposed by sec. 32, Cr. P. C., on the trial Court—*Muhammad Yakub Ali*, 45 All. 594.

(8) The substitution of rigorous imprisonment in place of simple imprisonment amounts to an enhancement of sentence—*Muhammad Yakub Ali*, 45 All. 594.

(9) Where an accused had been sentenced to rigorous imprisonment and whipping for an offence where whipping could not be awarded in addition, and on appeal the Sessions Judge commuted the sentence of whipping to one of a further sentence of imprisonment, *held* that as the additional punishment of whipping was illegal, the Judge could not legally commute it and that he could only set the sentence of whipping aside, and if he considered enhancement necessary he should have referred the proceedings to the High Court in revision—*Ba Chao*, A.I.R. 1935 Rang 64, 12 Rang. 607, 153 I.C. 516, 36 Cr.L.J. 366.

(10) Where an accused was dealt with under sec 562, Cr. P. C., by the trying Magistrate, although the imposition of fine by the Appellate Court in the circumstances of the case can hardly be said to be an enhancement of sentence, as no sentence was given to the accused by the trying Magistrate, still the imposition of fine entails a greater burden on the accused than the execution of a bond under sec. 562, Cr. P. C.—*Shital Prasad v. Emp.*, 39 Cr.L.J. 889, 177 I.C. 386, 11 R.O. 48, 1938 O.A. 699, 1938 A.Cr.C. 98, 1938 O.W.N. 919, 1938 O.L.R. 421, A.I.R. 1938 Oudh 233.

What does not amount to enhancement:—(1) An additional order passed by the Appellate Court directing the accused to furnish security to keep the peace does not amount to an enhancement of sentence—*Miran Bakhsh*, 1905 P.R. 21, 2 Cr.L.J. 190; *Zafar Hussain*, 20 Cr.L.J. 302 (All); *Maharaj Singh*, 20 Cr.L.J. 760 (Nag.). Such power has been expressly conferred on a Court of Appeal by sec. 106 (3) and a Judge is competent in appeal to demand such security—*Ibid*.

(2) An order passed by the Appellate Court directing the accused person to pay the costs of the complainant under sec. 31 of the Court Fees Act (now sec. 545A of this Code) does not amount to an enhancement of sentence, because the order of costs is not a penalty or sentence passed in the case but is an incidental order under clause (d) of this section—*Karuppanna*, 29 Mad. 188; *Thimiah*, 47 Mad. 914 (915). Although the fees ordered to be paid are to be recovered as if they were fines, still there is no warrant for treating the same as part of the fine imposed as punishment for the offences—*Vemuri Sheshanna*, 26 Mad 421; *Thimiah*, 47 Mad 914 (915).

(3) Where an Appellate Court adopts the view taken by the original Court as to the acts committed by the accused, and only differs from it in its application of the law, and maintains the sentence, neither the letter nor the spirit of sec. 423 is broken by the Appellate Court in maintaining the sentence. There is no enhancement. Thus, where the accused was convicted by the trial Court for voluntarily causing hurt with a dangerous weapon under sec. 324, I. P. C., and was sentenced to 2 months' imprisonment, and in appeal the Appellate Court altered the conviction into one for simple hurt under sec. 323, I. P. C., but the sentence was maintained, *held* that it did not amount to an enhancement of sentence—*Rangaswami*, 53 M.L.J. 694, 104 I.C. 440, 39 M.L.T. 20, A.I.R. 1927 Mad. 789, 28 Cr.L.J. 821 (825).

(4) An order for detention in a Borstal School for any period permitted by the provisions of the Act can never amount to an enhancement of sentence. So the Appellate Court can exercise the powers conferred by sec. 25 of the Burma Prevention of Crimes (Young Offenders) Act (III of 1930) and order detention of an accused in a Borstal School for any period which is legal under the provisions of sub-sec. (1), sec. 25 of the

said Act, in substitution of a sentence of imprisonment passed on him by the trial Court—*Ah Hwe*, 37 Cr.L.J. 790, 163 I.C. 74, A.I.R. 1936 Rang 227, 14 Rang. 119, 1936 Cr.C. 527.

If conviction is confirmed, some sentence must be passed:—If the Court of Appeal affirms a conviction, it should, if it disapproves of the sentence passed by the Lower Court, pass some other sentence, even though a nominal one. It cannot set aside the sentence absolutely while upholding the conviction. Every conviction must be followed by sentence—*Lakshimibai*, Ratanlal 545. See Note 1221.

Clause (c):—An order requiring a person to furnish security falls under this clause. The Appellate Court can either reverse (*i.e.*, set aside) the order or alter the order, *e.g.*, by reducing the amount of security. But an order remanding the case for fresh inquiry is bad in law. But, of course, fresh proceedings can be started under sec 110 on receiving fresh information—*Chandan*, 30 P.L.R. 416, 115 I.C. 544, A.I.R. 1929 Lah. 28, Ind. Rul 1929 Lah 416, 30 Cr.L.J. 491; *Narappa*, 34 Cr.L.J. 947, 145 I.C. 206, 1933 M.W.N. 241. For contra see *Bhagwant Singh*, cited below in Note 1150 (2).

A suspect, who has been ordered to give security under Chap. VIII, and, on failure to give security, has been ordered to suffer simple imprisonment, is not a convict and has not been sentenced. Where, therefore, a Sessions Judge made a reference to the High Court for substitution of rigorous imprisonment in place of simple imprisonment in such a case, the High Court is not limited in the exercise of its revisional powers by the conditions in cl. (b), sub-sec. (1) of this section. But the clause under which it can act is cl. (c) of this sub-section. Under this sub-section it is competent to the High Court as a revisional Court, reading this section with sec. 439, to alter or reverse an order other than the order referred to in cls (b) and (a) and to give effect to the recommendation of the Sessions Judge—*Manu Chabilo*, A.I.R. 1936 Sind 188, 1936 Cr.C. 973, 166 I.C. 298.

1149. Clause (d)—Amendment:—Under this clause the Court can make any amendment that may be just or proper. Thus, where the accused was convicted under sec 325, I.P.C., and on appeal the parties applied to compromise the case, the High Court acting under sec 423 (d) amended the order of conviction by substituting for it an order that the offence should be compromised—*Ram Piyari*, 32 All 153. Where the Sessions Judge had directed certain property to be handed over to the Magistrate as unclaimed property, the High Court amended the order by directing that the Magistrate should dispose of the property according to law—*Abadi Begam v. Ali Husen*, 1897 A.W.N. 26. The Sessions Judge can amend the order of the Magistrate by directing a greater amount of property to be restored to the complainant than the amount restored by the Magistrate—*Gopi Nath*, 3 A.L.J. 770, 4 Cr.L.J. 370.

'Amendment' means amendment of the main order of the Court below; and the Appellate Court cannot make any amendment when there has not been an appeal against the main order of the lower Court. Thus, where the Magistrate in passing a judgment of acquittal has made some unfavourable remarks about the credibility of certain witnesses, it was held that the High Court could not amend the judgment by directing those remarks to be expunged from the judgment, when there has been no appeal to the High Court against the main order of acquittal—*Dunn*, 44 All. 401 (405, 406), 20 A.L.J. 261, 23 Cr.L.J. 319. But this is no longer good law in view of sec. 561A which empowers the High Court to pass any orders that may be just (and thus to expunge remarks from the lower Court's judgments) irrespective of the fact whether there has been an appeal against the main order or not. But see *Rogers v. Shrinivas Gopal Kawale* in Note 1433A. See also Notes 1214 and 1433A and the report of the Joint Committee cited under sec. 561A. But the ruling in 44 All. 401 would apply to lower Appellate Courts, and those Courts would have no power to expunge remarks from the trial Court's judgment unless there be an appeal from the main order in the case.

1150. Incidental or consequential orders:—An incidental order is an order which is liable or likely to follow as a result of the main order—*The King v. Maung Khin Maung*, A.I.R. 1940 Rang 278 (279), 1940 Rang.L.R. 502.

(1) An order under sec. 106 demanding security from the appellant is an incidental order. Sec. 106 (3) gives the Appellate Court power to pass such order in appeal, even where the original Court was not competent to do so. So also, an order under sec. 106 passed by the Original Court may be set aside in appeal; and the appellate order setting aside the order for security is an incidental order within the meaning of this section—*Abdul Wahed v. Amiran*, 30 Cal. 101.

(2) On an appeal against an order binding over a person to keep the peace under sec. 107, the Appellate Court can reverse the order of security and order a retrial. The order of retrial is an incidental order under clause (d) of sec. 423. It does not fall under clause (b), because the case is not one of 'appeal from conviction,' the person proceeded against under sec. 107 not being a person convicted of any offence—*Bhagwant Singh*, 48 All. 501, 24 A.L.J. 566, 96 I.C. 497, A.I.R. 1926 All. 403, 27 Cr.L.J. 945. But see the rulings cited in Note 1148 under the heading "Clause (c)" where a contrary view was adopted.

(3) If an order awarding a sum of money as compensation to the accused under sec. 250 is passed illegally, the Appellate Court in setting aside that order can direct the money to be refunded to the complainant—*Safdar Husain*, 25 All. 315 (316).

(4) An order under sec. 471 (1), directing the accused to be committed to a lunatic asylum, is clearly an order which the acquitting Court, whether original or appellate, not only has the power to make, but is bound to make under sec. 423 (d)—*Nga E. Maung*, 8 Bur.L.T. 286, 16 Cr.L.J. 670.

(5) An order under sec. 517, 520 or 522 is a consequential or incidental order within the meaning of this clause and can be passed by the Appellate Court—*Gourhari*, 29 Cal. 724; *Arunachala Thevan*, 46 Mad. 162 (164). Therefore, an order in a case of criminal misappropriation, directing restoration of property which is found to have belonged to the complainant, is clearly a consequential or incidental order and one which is under the circumstances just and proper—*Gopi Nath*, 3 A.L.J. 770, 4 Cr.L.J. 370.

An order of the Appellate Court setting aside an order passed by the Lower Court under sec. 522, is an incidental order within the meaning of this clause—*Ujir v. Syed Ali*, 19 C.W.N. 990, 16 Cr.L.J. 607. See also *Gourhari*, 29 Cal. 724. Where the accused was convicted under secs. 352 and 448, I. P. C., and the convicting Magistrate passed an order under sec. 522 of this Code restoring possession of the property (which was the subject-matter of the offence under sec. 448, I. P. C.) to the complainant, but the accused was afterwards acquitted on appeal, it was held that the Appellate Court had power, under sec. 423 (d) and sec. 522 read together, to order restitution of the property to the accused—*Manki v. Bhagwanti*, 27 All. 415.

(6) Under this clause, the Appellate Court can exercise the powers conferred by sec. 562—*Birch*, 24 All. 306. 'The Court before which he is convicted' in sec. 562 is not limited to the Court of first instance, but includes the Court of Appeal—*Narayana-swami*, 29 Mad. 567. This is now expressly provided by sub-sec. (2) of sec. 562.

(7) An order by the Appellate Court directing the accused to pay the costs of the complainant under sec. 31 of the Court Fees Act (now sec. 546A of this Code) is no part of the penalty or sentence passed in the case and therefore not an enhancement of sentence, but is an incidental order under this clause—*Karuppana*, 29 Mad. 188; *Thimiah*, 47 Mad. 914 (915). The contrary view taken in *Tangavelu*, 22 Mad. 153, decided under the Code of 1882 which did not contain clause (4), is no longer correct.

(8) Where a case was tried by a Bench of Honorary Magistrates and the judgment being signed by one of them only, the District Magistrate on appeal, without in any way interfering with the judgment of the Bench of Magistrates, passed an order sending back the case so that the judgment might be signed by the other Magistrates, held that there was nothing wrong in the order of the District Magistrate. It was an incidental order under this clause—*Gopal Das*, 41 All. 217 (219).

Order which cannot be passed:—The only consequential or incidental orders which fall within the purview of this clause are orders which follow as a matter of course being necessary complements to the main orders passed, without which the latter would

be incomplete and ineffective (such as directions as to the refund of fines realised from acquitted appellants, or on the reversal of acquittals, any direction as to the restoration of compensation paid under sec. 250) for which no separate authority is needed—*Dunn*, 44 All. 401 (405). But an Appellate Court cannot award compensation under sec. 250, because such order is not a necessary complement of the main order of acquittal; only the Magistrate by whom the case is heard in the first instance can pass such order—*Balli Pande v. Chittan*, 28 All. 625; *Mehm Singh v. Mangal*, 39 Cal. 157, 14 C.L.J. 437, 16 C.W.N. 10, 15 Cr.L.J. 529, 12 I.C. 297. This view of law was doubted in *Ma Mya Khin v. Maung Po Htwa*, A.I.R. 1933 Rang. 288 (290), 11 Rang. 361, 1933 Cr.C. 1084, 145 I.C. 837, 35 Cr.L.J. 1 (F.B.). According to the recent view of the Rangoon High Court, sec. 423 (1)(d), Cr. P. C., does amplify the powers of Appellate Courts but it does not invest an Appellate Court with authority to make any order which might have been made by the Court below. As a matter of construction, an order for compensation under sec. 250, Cr. P. C., is not an order consequential or incidental to an order of discharge or acquittal passed by the High Court in revision or appeal. The High Court has, therefore, no power to award compensation under that section—*The King v. Maung Khin Maung*, A.I.R. 1940 Rang. 278 (279), 1940 Rang.L.R. 502. See Note 808. An order of confiscation under the Indian Forests Act, VII of 1878, cannot be regarded as an order incidental on a conviction under that Act; under sec. 54 of that Act, the confiscation is regarded as a punishment in addition to any other punishment prescribed for the offence. Therefore, an Appellate Court cannot pass such order—*Anuddi*, 27 Cal. 450. The High Court cannot award the costs incurred in a revision petition filed against an order passed under Chap. XII—*Vecrappa v. Arudayammal*, 48 Mad. 262. See this case cited in Note 478 under sec. 148.

1151. Sub-section (2)—Interference with verdict of jury:—See Notes 916 and 917. The considerations governing an appeal from a trial held with the aid of assessors differ greatly from those governing an appeal from a trial by jury. In the latter case the appeal is restricted by the provisions of sec. 423 (2), whereas in the former case the whole case is before the Appellate Court—*Champa Pasin*, 29 Cr.L.J. 325 (329), 108 I.C. 81, A.I.R. 1928 Pat. 326, 9 A.I.Cr.R. 545. While on an appeal against the finding of a Judge sitting alone the appellant has to satisfy the Appellate Court that the Judge was wrong, on an appeal against a jury's verdict following on a properly directed charge, the appellant has the burden of showing that the verdict is unreasonable. Upon an appeal from a conviction founded on a jury's verdict the proper way of approaching it is to accuse that the findings of fact are correct and reasonable and lay the burden on the appellant of showing them to be otherwise. In other words, it means that the Appellate Court in reaching its conclusions must give full weight and consideration to the unanimous opinions of the Judge and the jury—*James Dowdall*, A.I.R. 1936 Nag. 103 (106), 37 Cr.L.J. 607, 162 I.C. 430, 31 N.L.R. Sup. 215. The High Court will only interfere with a verdict of a jury when such verdict is obviously perverse or manifestly wrong or unreasonable—*Ramadhan Brahmin v. Emp.*, A.I.R. 1929 Nag. 36, 29 Cr.L.J. 963 (964), 112 I.C. 51. In a trial by jury appeal is limited to questions of law and the Appellate Court is also limited by the provisions of this sub-section and sec. 537, Cr. P. Code—*Nanak*, 35 Cr.L.J. 1104, 150 I.C. 687, 15 P.L.T. 264, A.I.R. 1934 Pat. 309, 1934 Cr.C. 730, 13 Pat. 529. By the provisions of sec. 537 (d), Cr. P. C., the Appellate Court cannot set aside the verdict of the jury merely because there was a misdirection unless it finds that the misdirection had in fact occasioned a failure of justice—*Hari*, 37 Cr.L.J. 320, 160 I.C. 675, A.I.R. 1936 Pat. 46, 1936 Cr.C. 70. The High Court cannot alter or reverse the verdict of the jury unless it is of opinion that the verdict is erroneous owing to a misdirection by the Judge or to a misunderstanding on the part of the jury of the law as laid down by the Judge—*Bongiri Pattakadar*, 32 Mad. 179; *Smither*, 26 Mad. 1 (15); *Shabhu*, 10 Bom.L.R. 565; *Waman*, 27 Bom. 625; *Rallansabapathy Goundan v. Public Prosecutor*, 37 Cr.L.J. 909 (911), 164 I.C. 243, 1936 M.W.N. 459, A.I.R. 1936 Mad. 516, 44 M.L.W. 155, 71 M.L.J. 231, 1936 Cr.C. 635. When the Court is of

that opinion, it can reverse the verdict, but the power ought not to be exercised lightly, especially when the verdict is one of acquittal and unanimous—*Shambhu*, 10 Bom L.R. 565. The High Court cannot, on an appeal from the unanimous verdict of the jury, interfere with it, in the absence of a misdirection by the Judge, where there is some circumstantial evidence of the guilt—*Mohini Mohan*, 46 Cal. 635, 21 Cr.L.J. 8. Where there is evidence on the record to justify the jury's verdict, and the Judge's charge to the jury was fair and accurate, and the jury arrived at an eminently reasonable conclusion, the High Court will not interfere—*Babban*, 4 O.W.N. 901, 28 Cr.L.J. 937, 105 I.C. 457, 9 A.I.Cr.R. 101, A.I.R. 1927 Oudh 549.

If there has been no misdirection by the Sessions Judge nor a misunderstanding on the part of the jury of the law as laid down by him, the High Court cannot reverse the verdict; but if it is of opinion that the accused should have been acquitted and the verdict was against the weight of the evidence, it can direct a copy of its judgment together with a copy of the paper book to be sent to the Local Government for such action as the latter may like to take—*Ram Charitar*, 8 P.L.T. 691, 28 Cr.L.J. 691 (691). Unless there has been a misdirection on the part of the Judge, the High Court cannot go into the question of fact and examine the evidence. By merely showing that the prosecution story was improbable or that there were material discrepancies or even contradictions in the evidence, Counsel for the accused cannot succeed in persuading the High Court to set aside the conviction—*Bansidhar*, 36 Cr.L.J. 322, 153 I.C. 364, A.I.R. 1934 All. 1032, 1934 A.L.J. 1160, 1934 Cr.C. 1339, 4 A.W.R. 788. The Appellate Court cannot go into the facts of the case except to see whether there has been any misdirection by the Judge—*Ratnasabapathy v. Public Prosecutor*, A.I.R. 1936 Mad 516 (519), 1936 M.W.N. 459. No Court will interfere with the verdict of a jury, even if it may itself think differently of the evidence, or because it thinks that another jury may have come to a different conclusion. To lightly interfere with the verdict of a jury with which the Sessions Judge has agreed would be to reduce trial by jury in this country to a farce—*Jhina Soma*, A.I.R. 1939 Bom. 457 (460), 41 Bom L.R. 965, I.L.R. 1939 Bom 648, 41 Cr.L.J. 176, 185 I.C. 382.

The Appellate Court is also not entitled to go into the facts of the case and reverse the findings of the jury because a criminal revision case has been filed by the Crown for enhancement of the sentence calling upon the High Court to exercise its powers of revision under sec. 439, Cr. P. Code—*Ratnasabapathy v. Public Prosecutor*, supra, following *Khodabux Haji*, A.I.R. 1934 Cal. 105, 147 I.C. 1124, 35 Cr.L.J. 554, 1934 Cr.C. 156, 61 Cal. 6, 37 C.W.N. 1122. See also Note under sec. 439 (b).

"Alter or reverse" :—The word 'reverse' evidently means to set aside, to make null; the word 'alter' is intended to mean the substitution of a finding of 'guilty' for 'not guilty' or *vice versa*. The verdict may be reversed, i.e., set aside, or it may be altered, i.e., another finding may be substituted for that of the jury—*Smither*, 26 Mad. 1 (15).

"Erroneous" :—To enable the Appellate Court to interfere with the verdict of the jury, the verdict must be erroneous. The High Court will not set aside the verdict, if it is not erroneous in spite of the misdirection—*Naimuddi*, 22 C.W.N. 572, 19 Cr.L.J. 649. The effect of this clause is to prevent the High Court from reversing the verdict of the jury, on account of any misdirection by the Judge or misunderstanding of the law by the jury, unless such misdirection or misunderstanding is on points material to the verdict, so that the verdict may be said to be tainted with error in the process in which it has been arrived at—*Wafadar*, 21 Cal. 955 (977). The word 'erroneous' is not to be read as meaning 'wrong on the facts'. It must be read in connection with the words that follow, as meaning that the verdict has been vitiated and rendered bad or defective by reason of a misdirection or a misunderstanding of the law—*Wafadar*, 21 Cal. 955 (977); *Waman*, 27 Bom. 626; *Lalsingh*, Ratanlal 452 (454). The Lahore High Court, however, holds that the general trend of authorities appears to suggest that the term "erroneous" is practically synonymous with "incorrect," which is the normal dictionary meaning. It is possible perhaps to go a little further and say that one meaning of sec. 423 (2), Cr. P. C., would appear to be that if the Court after

examining the evidence finds that, even if the misdirection had not occurred, the jury could not reasonably without being perverse or unduly foolish have come to any other decision it will not interfere—*A. M. Mathew v. Emp.*, A I R. 1940 Lah. 87 (89), 41 Cr.L.J. 482, 187 I C 456. It is the duty of the Appellate Court to ascertain whether the process or method which the Judge directed the jury to follow as to the acceptance or discarding of evidence, or as to the view taken of the law, was erroneous on any material point; but it is not the duty of the Appellate Court to determine for itself whether the verdict as a conclusion of fact was right or wrong. To hold the latter view would be tantamount to hold that an appeal would lie upon the facts from the verdict of the jury, in the face of the provisions of sec. 418—*Wafadar*, 21 Cal. 955 (977). Where there is no error in matter of law, and there was some evidence to go to the jury, the High Court cannot interfere—*Choonee*, 5 W R. 13; *Jaspath*, 14 Cal. 164.

Misdirection :—See Notes under sec. 297. Both secs 423 (2) and 537 require that before the verdict can be set aside on the ground of misdirection, the Court must be satisfied that the misdirection is of such a nature that it may be reasonably supposed that the verdict was erroneous by reason of such misdirection, or in other words, there has been a *failure of justice* by reason of such misdirection—*Ali Fakir*, 25 Cal. 230; *Biru Mandal*, 25 Cal. 561; *Shyam Sundar*, 26 C.W.N. 558. In determining whether the verdict ought to be set aside and a new trial granted, on the ground of defective summing up of the evidence, the question to be considered is not whether upon a proper summing up of the whole evidence a jury might have given a different verdict, but whether the legitimate effect of the evidence would require a different verdict. If the evidence is such that the High Court would have affirmed the conviction if the trial had been before a Judge and assessors, instead of a trial by jury, the High Court ought not to set aside a verdict given by a jury merely because the Judge has not, in summing up, given a proper caution or advice to the jury as to the weight which they might properly give to the evidence—*Elahee Buksh*, 5 W R. 80 (*per* Peacock, C.J.); followed in *Jamiruddin Masali*, 29 Cal. 782. On a question of misdirection as to evidence the High Court has to see whether it is reasonably probable that the jury would not have returned the verdict but for the misdirection complained of—*Ilu*, 36 Cr.L.J. 358 (359), A I R. 1934 Cal. 847, 1934 Cr.C. 1364, 153 I C. 454.

As to the effect of admission of inadmissible evidence see Note 920.

Misunderstanding :—There must be misunderstanding by the jury of the law as laid down by the Judge; the verdict will not be set aside on the ground that the counsel for the accused (and not the jury) had misunderstood the expressions used by the Judge, especially when it appeared that the expression used by the Judge was perfectly intelligible and could not have the meaning suggested by the counsel for the accused—*Shib Chunder*, 10 Cal. 1079. In no case the verdict of the jury should be set aside solely on the ground that the heads of the charge were in the form "Sections 141, 142, 146 to 148, 319 to 322, 326, 201, Indian Penal Code, explained secs. 96, 97, 99 to 106, Indian Penal Code, explained Charges explained"—*Hafezali*, 32 Cr.L.J. 236, 129 I.C. 109, A I R. 1930 Cal. 712, Ind. Rul. 1931 Cal. 125, 1930 Cr.C. 1112.

Verdict must be set aside in its entirety :—The term 'verdict' in this sub-section means a verdict on all the charges, and not merely the verdict upon each charge separately. Therefore if in a trial there are several charges in which there is an acquittal on some and a conviction on the other charges, and the verdict is found to be erroneous on appeal, the Appellate Court must set aside the verdict in its entirety. Where the Appellate Court in such a case reverses the verdict of the jury and orders a retrial, the retrial, unless the Appellate Court has limited the scope, must be taken to be one upon all the charges originally framed—*Krishna Dhan*, 22 Cal. 377; *Jamiruddi Biswas*, 16 C.W.N. 909, 13 Cr.L.J. 715; *Bhola*, 1904 P R. 12, 1 Cr.L.J. 942. The Lahore High Court has, however, held that where the High Court finds the verdict by jury on one of the charges to be erroneous it can set aside that verdict and uphold conviction on other charges on which the verdict is not found to be erroneous and need not send the case for retrial after setting aside the whole trial and the verdict on

all charges—*A. M. Mathews v. Emp.*, A.I.R. 1940 Lah 87 (90), 41 Cr.L.J. 482, 187 I.C. 456.

Misconduct of the jury :—See Notes 889 and 886B. Where in a trial by jury some of the accused were acquitted and some convicted, and it appeared that the foreman of the jury was subsequently convicted of having taken bribe in connection with that very trial, it was not possible to let the verdict stand—*Hafez Molla*, 34 Cr.L.J. 1072, 145 I.C. 816, A.I.R. 1933 Cal. 639, 60 Cal 751, 1933 Cr.C. 1038.

Bias of the jury :—Where the Sessions Judge strongly expressed his opinion as regards the atmosphere of bias and prejudice in which a jury trial took place, it is impossible to uphold the trial, quite apart from the merits of the case. A verdict obtained on a trial by jury cannot possibly be sustained where the jurors were influenced by their private knowledge based on what they had heard outside Court and they were prepared to make an assumption against the accused without any evidence to support it—*Dharanidhar*, 59 CL.J. 15.

Interference by the Privy Council :—In the case of misdirection, as in any other case of an alleged failure in the proper trial of a criminal case, the Board give advice to His Majesty to intervene only if there is shown to be such a violation of the principles of justice that grave and substantial injustice has been done. The Board has repeatedly declined to act as a general Court of Appeal; and if English Law were shown to be applicable in all its details a failure to state the law in the summing up to the jury in the terms carefully considered, and expounded in *Bateman's case* [19 Cr. App. Rep 8 at p 13] or to insist more clearly on the onus of proof lying upon the prosecution would not in the opinion of their Lordships necessarily establish that there had been a serious miscarriage of justice. Apart from the circumstance that a summing up in the dominions or abroad is often imperfectly reported (if it is reported at all), admissions by the prosecuting Counsel or other incidents in the course of the trial may well have sufficiently brought home to the minds of a jury some factor in the case or some principle such as that of the onus of proof which might appear to have been omitted from the summing up of the Judge—*Dennis Romain Renouf v. Attorney-General of Jersey*, 37 Cr.L.J. 679 (687) (P.C.). See also Note 1099.

1152. Power of High Court after reversal of verdict :—Once the verdict of the jury is set aside under this sub-section there is no restriction on the power of the Appellate Court to deal with the case, of which it has complete seisin, in any of the manners provided in this section. Its power is not restricted to directing a retrial, and it may also reverse the finding and sentence and acquit or discharge the accused, or order him to be retried, or alter the finding and maintain the sentence, or, without altering the finding, reduce the sentence—*Taju Pramanik*, 25 Cal. 711. Sub-section (2) contains no provision as to what the Court is to do, or has power to do, when it reverses or alters the verdict of the jury. To ascertain that, it is necessary to revert to the language of sub-section (1), and in it no distinction is made between the powers of an Appellate Court in a case tried by jury and in any other case. And so, after reversal of the verdict of the jury, in an appeal against an acquittal, the High Court may under clause (a) order further inquiry or retrial or commitment or may find the accused guilty and pass sentence on him according to law—*E. W. Smither*, 26 Mad 1 (15).

Power to order retrial .—The High Court, on setting aside a verdict of the jury on the ground of irregularity, has jurisdiction to order a retrial—*Bani Madhab*, 46 Cal. 212; *Topandas v. Emp.*, A.I.R. 1925 Sind 116, 81 I.C. 249, 25 Cr.L.J. 761; *Shewaram v. Emp.*, A.I.R. 1939 Sind 209 (216), 184 I.C. 474, 41 Cr.L.J. 28, 12 RS. 107. It is open to the High Court to order a new trial by a new jury, when it is found that the verdict of the jury is tainted with prejudice and is based on rumours as to the prisoner's previous conduct—*Anchala Nallacharlu*, 2 Weir 381. But it is not always obligatory on the High Court to order a retrial, whatever may be its view as to the weight to be attached to the evidence. To do so would be an intolerable hardship on the accused person in a case where the

High Court (in an appeal from verdict of acquittal) is satisfied of his innocence and that the acquittal was right, or that the conviction (in an appeal against a conviction) was not justified by the evidence. Thus, it would be unreasonable to hold that once a misdirection is established, the High Court is bound mechanically to order a retrial, even though in its opinion the evidence for the prosecution is untrustworthy—*Smither*, 26 Mad. 1 (15, 16). If the verdict is set aside on the ground that there was a defective summing up by the Judge and that the error of the Judge has caused a failure of justice, it may be necessary in some cases to grant a new trial. But if the High Court is satisfied that no failure of justice has been caused and that the evidence is wholly insufficient to support a conviction, and would upon the same evidence have reversed a conviction if the case has been tried without the intervention of a jury, it would be unnecessary and improper to grant a new trial—*Elahee Buksh*, 5 W.R. 80; *Jamruddi*, 29 Cal 782, 6 C.W.N. 553. See also *Sita Ram*, 33 Cr.L.J. 167 (169), 135 I.C. 392, 8 O.W.N. 1215, A.I.R. 1932 Oudh 23, Ind. Rul. 1932 Oudh 40, 7 Luck 390, 1932 Cr.C. 55; *Shewaram v. Emp.*, A.I.R. 1939 Sind 209 (217), 41 Cr.L.J. 28, 184 I.C. 474, 12 R.S. 107. A retrial will not be ordered on the mere ground that the deposition of a witness which was not admissible was allowed to be put in as evidence in the Sessions Court, if there is plenty of other evidence to the same effect, and there is nothing to show that this deposition had any effect on the verdict of the jury as bearing on the guilt or innocence of the accused—*Wafadar*, 21 Cal 955 (970).

Where much depends upon the impression made by the witnesses in their evidence and the accused in their statements upon the Court, it is not a case where the High Court should proceed to decide upon the paper record after setting aside the verdict of the jury but it is essentially a case where the guilt or innocence of the accused should be determined by a Judge and jury, who have seen the witnesses and heard them give their evidence, who have seen the accused and who have heard them give their statements. It is a case in which there should be a retrial—*Shewaram v. Emp.*, A.I.R. 1939 Sind 209 (217), 184 I.C. 474, 12 R.S. 107, 41 Cr.L.J. 28.

An order, which directs that a case which has originally been heard before a jury should be re-heard before a Court without a jury, is an order that ought not to be made unless it is justified by exceptional circumstances. There is jurisdiction to make it, but it is obvious that it has, and is likely to have, a very serious effect upon the rights of the accused, and his privilege which he has previously enjoyed of trial by a jury he ought in general to retain—*Hart*, 39 C.W.N. 929 (933), 36 Cr.L.J. 978, 156 I.C. 3, A.I.R. 1935 P.C. 122, 1935 O.W.N. 744 (P.C.).

See Note 1061.

Power to try the case itself—The Calcutta High Court has expressed a doubt as to whether the High Court has power to retry the case itself. When a case has been tried before a jury, and the conviction has been set aside on the ground of misdirection, the accused is entitled to have his case retried *before a jury*, and as a matter of procedure and in justice to the accused this course should be adopted—*Sarku*, 4 C.W.N. 576 (581, 582). But the Calcutta and Allahabad High Courts hold the view that if a verdict is erroneous owing to a misdirection by the Judge, the Appellate Court has no option but to set aside the verdict and order a retrial. Were the Appellate Courts to go into the facts in such a case, it would be substituting the decision of the Judges of that Court for the verdict of the jury, who have the opportunity of seeing the demeanour of the witnesses and weighing the evidence with the assistance which this affords, whereas the Judges of the Appellate Court can only arrive at a decision on a perusal of the paper evidence—*Wafadar*, 21 Cal. 955 (978) (following *Makin v. Attorney-General of N. S. Wales*, L.R. [1894] A.C. 57); *Krishna Dhan*, 22 Cal. 377; *Ikramuddin*, 39 All. 348 (351), 18 Cr.L.J. 491, 39 I.C. 331. The Calcutta High Court seems to have modified its view by holding that there is no reason why in a proper case the Court may not assume to deal with the whole case itself under the powers and duty conferred upon it by law—*Govt. of Bengal v. Santiram*, 32 Cr.L.J. 10 (18), 127 I.C. 657, A.I.R. 1930 Cal. 370, Ind. Rul. 1931 Cal. 865, 1930

Cr.C. 634, 58 Cal. 96. See also *Saroj Kumar*, 35 Cr.L.J. 854, 139 I.C. 873, 1932 Cr.C. 464, 59 Cal 1361, A.I.R. 1932 Cal. 474, 55 C.L.J. 439, Ind Rul. 1932 Cal. 667. See also *Benoyendra*, 40 C.W.N. 432 (446), A.I.R. 1936 Cal. 73, cited in Note 1059. The Madras High Court is of opinion that the High Court has power to try the case itself. It is true that the High Court, not having an opportunity of observing the demeanour of the witnesses, is at a disadvantage in weighing the evidence, but it is the same in all cases where an Appellate Court deals with the facts and is no worse in a case triable by jury than in one triable by a Judge with the aid of assessors. Further, if it is said that in weighing the evidence the High Court would be assuming the function of the jury, the answer is that it is a duty so frequently cast upon the High Courts (*Cf.* sec 307) that no adverse argument can be drawn from it—*Smither*, 26 Mad 1 (16). In this case the Madras High Court added (at p. 18) that the dicta of the Judicial Committee in the case of *Makin v. Attorney-General*, supra, ought not to be applied in India. The same view has been taken by the Bombay High Court in *Ram Chandra*, 19 Bom. 749 (763). In a case of trial by jury the Appellate Court has power in the event of any misdirection or admission of inadmissible evidence either to convict or acquit the accused according as the evidence is or is not sufficient for conviction, or where the facts have to be determined and the evidence is of such a character as to render it difficult to pronounce any opinion on its character without hearing witnesses, a new trial may be ordered—*Ramchandra*, 35 Cr.L.J. 747 (749), 148 I.C. 553, 35 Bom.L.R. 174, A.I.R. 1933 Bom. 153, 1933 Cr.C. 465. Where the evidence is practically undisputed, and the result depends upon the inference to be drawn from that evidence, the High Court can itself decide the case, and there is no necessity of ordering a retrial—*Ram Chandra*, supra. Where illegal admission of evidence, misdirection and non-direction seriously prejudiced the accused, or their omission would possibly have led to a different result, or they caused any failure of justice, it would be necessary to order a new trial. Where the decision, however, does not really turn upon questions about the veracity of witnesses or upon the finding of doubtful facts, but upon the question what inference is to be drawn from well-established facts about the existence of which there is not and cannot be any reasonable doubt, the Court is at least as well, if not better, qualified than the jury to draw the necessary inference—*Benoyendra*, 40 C.W.N. 432 (441), A.I.R. 1936 Cal. 73, 37 Cr.L.J. 394, 161 I.C. 74, 1936 Cr.C. 145, 64 C.L.J. 154. The Sind Court is also of opinion that whether the High Court should itself decide the case or order a retrial depends upon the facts of each case. When a case is complicated, a fresh trial may be advisable; but in a simple case the High Court has jurisdiction to decide the case, and a fresh trial would only cause unnecessary trouble and expense—*Saran*, 21 S.L.R. 356, 28 Cr.L.J. 66 (69); *Murid*, 3 S.L.R. 125, 11 Cr.L.J. 15; *Topandas*, 25 Cr.L.J. 761, A.I.R. 1925 Sind 116.

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powers to go into the case in such circumstances once he finds that there has been a misdirection. Vide *Topan Das v. Emp.*, A.I.R. 1925 Sind 116, 81 I.C. 249, 25 Cr.L.J. 761; *Ramprasad v. Emp.*, A.I.R. 1925 Nag 53, 88 I.C. 178, 26 Cr.L.J. 1090; and *Ramchandra v. Emp.*, A.I.R. 1933 Bom 153, 1933 Cr.C. 465, 148 I.C. 553, 35 Cr.L.J. 747, 35 Bom.L.R. 174. Even the Calcutta High Court has also come round to this view in a recent case reported in A.I.R. 1932 Cal 474, 1932 Cr.C. 464, 139 I.C. 873, 33 Cr.L.J. 854, 59 Cal. 1361, 55 C.L.J. 439 (*Saroj Kumar v. Emp.*) The latter and better view therefore seems to be that if the Court finds there is a misdirection it has to examine the evidence to see whether the verdict was erroneous and has caused a failure of justice. If it cannot so find it cannot interfere—*A. M. Mathews v. Emp.*, A.I.R. 1940 Lah 87 (89), 41 Cr.L.J. 482, 187 I.C. 456.

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In cases, however, where the appellants have been sentenced to death they have in the High Court an appeal on matter of fact as well as of law. Section 374 read with sec. 418 (2), supports this view. In disposing of a reference under sec. 374, and the appeals by the persons sentenced to death the High Court is, therefore, obliged to come to its own independent conclusions as to the guilt or innocence of the accused independently of the verdict of the jury or of the opinion of the Judge. In these cases the questions of misdirection are of less importance. But though the High Court is not bound by the verdict of the jury it must attach greatest possible weight to the verdict of the jury if it answers a reasonable test—*Benoyendra*, 37 Cr.L.J. 394 (403), 40 C.W.N. 432, A.I.R. 1936 Cal 73, 161 I.C. 74, 1936 Cr.C. 145, 64 C.L.J. 154.

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Provided that, unless the Appellate Court otherwise directs, the accused shall not be brought up, or required to attend, to hear judgment delivered.

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But if the appeal is dismissed not summarily but under sec. 423, after notice given under sec. 422, the Court must deliver a judgment that would fulfil the conditions laid down in sec. 367. Omission to write a judgment is not an irregularity cured by sec. 537 (a)—*Devendra*, 17 Bom.L.R. 1085, 16 Cr.L.J. 832. See Note 1051.

Appellate Court:—Judges of the Sind Judicial Commissioner's Court, sitting as Sessions Judges for the district of Karachi, should follow as closely as possible the provisions of sec. 367 and 424. But the omission to do so cannot nullify the whole proceeding before the Sessions Court. The clause "so far as may be practicable" occurring in sec. 424 would certainly bring the error within the scope of sec. 537—*Fakir Bux*, 20 S.L.R. 261, 27 Cr.L.J. 833.

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of appeal, the decision thereon and the reasons for that decision—*Devendra*, supra; *Kalu Mirza*, 37 Cal. 91; *Jairam*, 8 N.L.R. 84, 13 Cr.L.J. 559. See Note 1051 under sec. 367, under heading "Appellate judgment." An appeal under sec. 476B must be dealt with as an ordinary appeal under sec. 424, and cannot be disposed of summarily without giving any reason. If it is so disposed of, the case will be remitted to the Appellate Judge so that he may rehear the appeal and write a judgment in accordance with law—*Hamid Ali v. Madhusudan*, 54 Cal. 355, 31, 31 C.W.N. 281.

If the appellate judgment is not in accordance with law, the High Court may remand the appeal for rehearing and delivery of a proper judgment—*Bholanath*, 7 C.W.N. 30; *Ram Lal v. Haricharan*, 37 Cal. 194; *Chandra Singh*, 1913 P.R. 2, 13 Cr.L.J. 737; *Gopala*, 1 Bom.L.R. 255.

See also Note 1044 regarding the delivery of judgment by the successor of the Judge or the Magistrate who wrote it.

It is improper for an Appellate Court to record in its judgment grave imputations on the motives of the trying Magistrate, when such imputations have no other foundation than suspicion. If the Appellate Magistrate considers that the trying Magistrate is actuated by improper considerations in the performance of his judicial functions, it is his duty to report his opinion to the District Magistrate, but any imputations ought not to find a place in the judgment—*Yacoub*, 2 Weir 535.

425. (1) Whenever a case is decided on appeal by the High Court under this Chapter, it shall certify its judgment or order to the Court by which the finding, sentence or order appealed against was recorded or passed. If the finding, sentence or order was recorded or passed by a Magistrate other than the District Magistrate, the certificate shall be sent through the District Magistrate.

(2) The Court to which the High Court certifies its judgment or order shall thereupon make such orders as are conformable to the judgment or order of the High Court, and, if necessary, the record shall be amended in accordance therewith.

426. (1) Pending any appeal by a convicted person, the Appellate Court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and, also, if he is in confinement, that he be released on bail or on his own bond.

(2) The power conferred by this section on an Appellate Court may be exercised also by the High Court in the case of any appeal by a convicted person to a Court subordinate thereto.

(3) When the appellant is ultimately sentenced to imprisonment, penal servitude or transportation, the time during which he is so released shall be excluded in computing the term for which he is so sentenced.

1154. 'Pending an appeal' :—A sentence cannot be suspended until an appeal has been actually preferred and is pending. Where a Magistrate postponed the execution of the sentence for a stated period, at the request of the accused, to allow him to appeal,

it was held that the suspension of the sentence was bad in law—*Kishen Soonder*, 12 W.R. 47. A sentence cannot be suspended in the absence of an appeal—*Anonymous*, 5 M.H.C.R. App. 1.

"Convicted person" :—See Note 240 regarding the power of the Appellate Court to suspend the order relating to the furnishing of security

"Appellate Court" :—The power conferred by this section to suspend the sentence can be exercised only by the Appellate Court—2 Weir 536. The sentence cannot be suspended by the Magistrate or Judge who passed it—*Kishen Soonder*, 12 W.R. 47; *Anonymous*, 4 M.H.C.R. App. 1. So also, a Sessions Judge has no power to suspend the execution of a sentence passed by a second class Magistrate, because the appeal from that Magistrate will not lie to the Sessions Judge—*Kodu Moidin*, 2 Weir 536.

Sentence :—An order of detention passed by a District Magistrate under sec. 10 of the Reformatory Schools Act (VIII of 1897) is not a 'sentence' within the meaning of this section, nor is it a punishment enumerated in sec. 53 of the Penal Code. A Sessions Judge has therefore no power to suspend its operation under this section—*Krishna Pandaram*, 16 Cr.L.J. 134 (Mad.).

Release on bail :—The Appellate Court can exercise the powers conferred by this section and release the accused on bail, whether the offence is bailable or not—*Anonymous*, 5 M.H.C.R. App. 1.

Exclusion of time :—See sub-section (3). It is only when the convicted person has been released (and not where his sentence has been illegally suspended) that the term during which the sentence is suspended shall be excluded in computing the sentence—*Kodu Moidin*, 2 Weir 536.

This clause does not lay down that the period during which a person is released shall be excluded from the term; what it lays down is that this period will be excluded in computing the term which means that this period will be left out in making calculation. On the plain interpretation of the clause the period during which a person is released on bail cannot reduce the term of the sentence. On the other hand, it will not affect the term at all as it will not be taken into consideration in computing the period of the term which the accused has to serve on the dismissal of his appeal—*Naram Singh*, A.I.R. 1936 All. 12, 158 I.C. 906, 36 Cr.L.J. 1479, 1935 A.L.J. 1168. See also Note 296.

427. When an appeal is presented under section 417, the

Arrest of accused in
appeal from acquittal

High Court may issue a warrant directing that the accused be arrested and brought before it or any subordinate Court, and the Court before which he is brought may commit him to prison pending the disposal of the appeal, or admit him to bail.

See Notes at page 1066, *ante*.

428. (1) In dealing with any appeal under this Chapter,

Appellate Court may
take further evidence or
direct it to be taken.

the Appellate Court, if it thinks additional evidence to be necessary, shall record its reasons, and may either take such evidence itself, or direct it to be taken by a Magistrate, or, when the Appellate Court is a High Court, by a Court of Session or a Magistrate.

(2) When the additional evidence is taken by the Court of Session or the Magistrate, it or he shall certify such evidence to the Appellate Court, and such Court shall thereupon proceed to dispose of the appeal.

(3) Unless the Appellate Court otherwise directs, the accused or his pleader shall be present when the additional evidence is taken; but such evidence shall not be taken in the presence of jurors or assessors.

(4) The taking of evidence under this section shall be subject to the provisions of Chapter XXV, as if it were an inquiry.

1155. Object and scope of Section:—Section 423, Cr. P. C., is not exhaustive of the methods by which a Court can deal with an appeal. Section 423, Cr. P. C., deals with the disposal of an appeal, and sec. 428, Cr. P. C., provides powers for the Appellate Court to call for further evidence before the appeal is disposed of. An Appellate Court can direct the taking of further evidence in support of the prosecution; *a fortiori* it is open to the Court to direct that the accused persons may be given a chance of adducing further evidence—*Sheoram v. Emp.*, 38 Cr.L.J. 1058 (1059), 10 R.N. 102, I.L.R. 1927 Nag. 541, 171 I.C. 262, A.I.R. 1937 Nag. 285.

The object of this section is the prevention of a guilty man's escape through some careless or ignorant proceedings of a Magistrate, or the vindication of an innocent person wrongfully accused, where the Magistrate through the same carelessness or ignorance has omitted to record the circumstances essential to the elucidation of truth—*Wooday Chand*, 18 W.R. 31; *Akhatar*, 6 P.L.T. 431, 26 Cr.L.J. 1171; *Varadarajulu*, 42 Mad. 885 (892). The intention of the Legislature in enacting this section is to empower the Appellate Court to see that justice is done between the prosecutor and the person prosecuted, and if the Appellate Court finds that certain evidence is necessary in order to enable it to give a correct finding, it would be justified in taking action under this section—*Dulla*, 7 Lah. 148, 27 Cr.L.J. 463. But this section cannot be invoked to cure an illegality. Thus, where the Magistrate committed an illegality in procedure by not allowing the accused to cross-examine the prosecution witnesses, the Sessions Judge cannot remand the case to the Magistrate with a direction to allow the accused to cross-examine the prosecution witnesses and to certify the additional evidence so taken by the Sessions Judge. The proper course for the Sessions Judge is to set aside the conviction and order the Magistrate to commence from the stage when the illegality occurred or to hold a *de novo* trial—*Lakshman*, 53 Bom. 578, 1929 Cr.C. 130 (134), 121 I.C. 588, A.I.R. 1929 Bom. 309, 31 Cr.L.J. 309, 31 Bom.L.R. 593, Ind. Rul. 1930 Bom. 76. But see *Munshi v. Muzaffar* in Note 1156.

In ordering additional evidence to be taken it would be quite proper to direct a further examination of the accused at the same time—*Sri Krishna Prasad Sinha*, 37 Cr.L.J. 906, 164 I.C. 184, A.I.R. 1936 Pat. 438, 17 P.L.T. 444, 1936 Cr.C. 699.

It is clear from the very language of this section that only when the Court of Session is sitting to hear an appeal from a judgment of a Magistrate has it got power under this section to record additional evidence itself, or direct it to be taken by a Magistrate, and it is only the High Court, which is the Appellate Court of the Court of Session, that can under this section, direct a Court of Session or a Magistrate, to record additional evidence in a case pending before it in appeal. The Sessions Judge is not legally authorised to record additional evidence in hearing an appeal from a judgment of an Assistant Sessions Judge who tried the case with the aid of assessors—*Hori Lal*, 36 Cr.L.J. 844, 155 I.C. 753, 1935 O.W.N. 592, A.I.R. 1935 Oudh 402. The power under this section can be exercised only by the Appellate Court. A Sessions Judge or a District Magistrate not acting as an Appellate Court is not authorised to take additional evidence or order it to be taken—*Moni Mohan*, 6 C.L.J. 251. But the High Court acting as a Court of revision, under sec. 439, has the power of an Appellate Court to direct evidence to be taken—*Ibid.* See *Bal Krishna*, 36 Cr.L.J. 1048 (1049), 156 I.C. 1001, A.I.R. 1935 Pat. 208, 16 P.L.T. 151. The power to take or call for additional evidence given by this section is expressly limited to appeals under this Chapter; see *Krishna*, 33 Mad. 90.

A proceeding under sec. 125 is neither appellate nor revisional: consequently, this section has no application to an order under sec. 125. Therefore, when a District Magistrate finds that an order directing the furnishing of security is irregular, he should set it aside; he has no jurisdiction to remand the case to the Magistrate for further evidence—*Nasir*, 20 Cr.L.J. 221, 49 I.C. 221 (Pat.).

Enquiry by Police:—This section does not warrant an Appellate Court sending a case to the Police for investigation, if it has been originally started by a complaint in Court—*Maheshri*, 1900 A.W.N. 130.

Powers of Civil and Criminal Courts compared:—A Civil Court has ordinarily no power to take evidence of its own motion; it has to decide the case on the evidence adduced by the parties. But a Criminal Court stands on a different footing. Section 540 enables the Magistrate at any stage of the inquiry or trial to examine any witness he may find necessary, in order to come to a proper conclusion. Section 428 also in general terms empowers the Appellate Court to take additional evidence—*Bhami Laxman*, 1910 M.W.N. 819, 11 Cr.L.J. 511.

1156. When additional evidence may be taken and when not:—This section gives a discretion to the Appellate Court, and this discretion is not to be exercised against the accused and in favour of the prosecution, unless in exceptional cases and where the merits are clearly against the accused—*Varadarajulu*, 42 Mad. 885 (892). An Appellate Court cannot decide whether it should exercise the discretion under this section unless it has heard the appeal on the merits. Specially in a case involving the consideration of a very difficult question (e.g., a case of sedition) it is almost impossible, before the appeal is heard on the merits, to hold any definite view as to the *prima facie* guilt of the accused or whether his guilt is grave enough to justify the view that it is desirable to allow additional evidence in order to prevent the offence from going unpunished—*Varadarajulu*, *supra*. Additional evidence may be taken under this section only if the Appellate Court thinks it to be *necessary*, and the necessity for taking such evidence must be apparent from something on the record and cannot be derived from external information—*Po Gyi*, 3 L.B.R. 114. The mere fact that some fresh evidence has been discovered after the filing of the appeal does not empower the Appellate Court to allow the fresh evidence to be adduced, unless the Court thinks it necessary—*Gurumurthi v Read*, 9 M.L.T. 323, 12 Cr.L.J. 40. When the Original Court has taken all the evidence produced by the prosecution which had ample opportunities to do so, and that evidence has failed to sustain the charge, an Appellate Court will not, except in very exceptional circumstances, direct that additional evidence should be taken—*Fateh*, 5 All. 217. This section merely enables an Appellate Court, if it thinks necessary, to call for additional evidence which will explain or clear up or perhaps supplement within limitation the evidence for the prosecution in support of a charge which has resulted in a conviction and which conviction is the subject of an appeal and it does not enable an Appellate Court to substitute an offence in respect of which there has not been a conviction and then say that additional evidence must be called which may support such an offence—*Konda v Mangala*, 32 Cr.L.J. 109, 128 I.C. 159, 59 M.L.J. 458, 32 M.L.W. 534, A.I.R. 1930 Mad. 854, 1930 M.W.N. 1209, 54 Mad. 63, 1930 Cr.C. 1149, Ind Rul 1931 Mad 15. Where evidence which should not have been admitted was tendered by the prosecution, and was admitted by the Magistrate, the Appellate Court can discard that evidence, and supply the gap in the prosecution evidence by taking further evidence. Thus, where the report of an excise analyst to the effect that a certain bottle contained cocaine was improperly admitted by the Magistrate, the Sessions Judge on appeal may call in the excise analyst to have him examined as to the contents of the bottle—*Bansal*, 52 Bom. 686, 29 Cr.L.J. 990 (991). Where the Appellate Court thinks that the evidence of some more witnesses who were not examined in the Lower Court is necessary, it cannot order a retrial on that ground, but should proceed under this section by summoning and examining those witnesses—*Iskwar Prasad*, 16 A.L.J. 325, 19 Cr.L.J. 485, 45 I.C. 149; *Luchman*, 31 Cal. 710 (713). Where the Lower Court has refused to examine certain important witnesses for the defence,

and the accused has been prejudiced in his defence by such refusal, the Appellate Court may direct the Lower Court to take the evidence of such witnesses and to certify the same to it—*Sirasami*, 19 Mad. 375; *Mahomed*, 3 P.L.J. 632, 19 Cr.L.J. 902. Similarly, where the prosecution was prepared to adduce evidence necessary to prove the offence, but the Magistrate intervened stating that such evidence was unnecessary, and refused to take it, the case was one in which the Appellate Court could properly call for fresh evidence under this section—*Jeremiah v. Vas*, 36 Mad. 457 (470), 12 I.C. 961, 10 M.L.T. 506, 22 M.L.J. 75, 12 Cr.L.J. 585. But this section does not apply where the prosecution having had ample opportunities to produce evidence has failed to do so—*Jeremiah v. Vas*, 36 Mad. 457 (467); *Bansi Lal*, 52 Bom. 686, 29 Cr.L.J. 900, 112 I.C. 110, A.I.R. 1928 Bom. 241; *United Motor Finance Co.*, A.I.R. 1935 Mad. 325, 68 M.L.J. 336, 1934 M.W.N. 183. The object of sec. 428, Cr. P. C., is not for the purpose of enabling the prosecution to produce evidence which could easily have been produced at the first trial. It is not to enable the prosecution, having failed once, to have an opportunity of trying the case all over again—*Pujari Hanumathappa*, 38 Cr.L.J. 257, 166 I.C. 623, 9 R.M. 385, A.I.R. 1937 Mad. 181, (1937) 1 M.L.J. 75, 1936 M.W.N. 1149, 44 M.L.W. 884, following *Jeremiah v. Vas*, supra, and *V. M. Rathnavelu Mudaliar v. Emp.*, 1930 M.W.N. 47 (Cr.). In other words, this section cannot be utilised for excusing the negligence of the prosecution—*Varadarajulu*, 42 Mad. 885 (894). An Appellate Court ought not to give the complainant an opportunity to fill up gaps in his evidence by directing a retrial. So the order, giving the trial Court liberty to hear other evidence to "complete the inquiry" is improper—*Muhammad Din*, 35 Cr.L.J. 1166, 150 I.C. 973, 1934 Cr.C. 548, A.I.R. 1934 Lah 316. See also *Hari Lal*, A.I.R. 1935 Oudh 402 (404), 36 Cr.L.J. 844, 155 I.C. 753, 1935 O.W.N. 592. An Appellate Court can call for additional evidence by directing the Sessions Judge to bring upon his record the statements of witnesses as given in the Court of the committing Magistrate, under sec. 288, after giving notice to the accused—*Nagina*, 19 A.L.J. 947, 27 Cr.L.J. 813 (814). An Appellate Court can admit additional evidence in order to ascertain the value of statements made by a defence witness—*Subramania*, 55 M.L.J. 676, 30 Cr.L.J. 133 (134).

The Appellate Court has jurisdiction to proceed under this section in cases where the prosecution witnesses have not been cross-examined at the trial and the appellant wishes for this additional evidence to be brought before the Court. Where, therefore, the Appellate Court recorded an order under this section, asking the Magistrate to cross-examine the prosecution witnesses who were not cross-examined during the trial, to certify the evidence and to re-submit it to him and, on receipt of the further evidence, heard and dismissed the appeal, there was no want of jurisdiction in the Appellate Court or any illegality in the procedure—*Munshi v. Muzaffar*, 40 Cr.L.J. 47, 178 I.C. 422, A.I.R. 1938 Cal. 781, 43 C.W.N. 85, I.L.R. (1939) 1 Cal. 205, distinguishing *Laxman Ramshet*, 53 Bom. 578, 121 I.C. 588, A.I.R. 1929 Bom. 309, 1929 Cr.C. 130, 31 Cr.L.J. 309, 31 Bom.L.R. 593, Ind. Rul. 1930 Bom. 76 cited in Note 1155.

There may be some doubt as to the duty of the Public Prosecutor to call witnesses who know important facts but are not likely to turn hostile, but there is a duty cast upon the Court to arrive at the truth by all lawful means and one of such is the examination of witnesses of its own accord when for certain obvious reasons neither party is prepared to call witnesses who are known to be in a position to speak to important relevant facts. Where the trial Court fails to do this, the Appellate Court should avail itself of the power conferred by this section—*Donald Dixon*, 40 Cr.L.J. 35, 178 I.C. 341, A.I.R. 1938 Mad. 900, 1938 M.W.N. 817, 48 M.L.W. 363.

When the Appellate Court thinks that some documents which had been marked as exhibits had not been proved according to law although they had been admitted in evidence without objection and that the examination of the accused under sec. 312, Cr. P. C., had not been satisfactory, two courses are open to it. One is to proceed under this section, that is to say, to keep the appeal pending on its own file while directing additional evidence to be taken by a Magistrate and duly certified to the Appellate Court which would then dispose of the appeal under cl. (2) of this section.

In ordering additional evidence to be taken it would be quite proper to direct a further examination of the accused at the same time. The other course is under sec. 423, Cr. P. C., to set aside the conviction and order the accused to be retried by a Court of competent jurisdiction. Such a re-trial, if ordered, would be a *de novo* trial. Where the Appellate Court has done neither of these things but has passed an order setting aside the conviction and sending the case back for further evidence but not for complete re-trial, the order is illegal—*Sri Krishna Prasad Sinha*, 37 Cr.L.J. 906, 164 I.C. 184, A.I.R. 1936 Pat. 438, 17 P.L.T. 444, 1936 Cr.C. 699, 2 B.R. 715, 9 R.P. 91, following *Gajanan Thakur v. Emp.*, 1 P.L.J. 99, A.I.R. 1916 Pat. 219, 35 I.C. 508, 17 Cr.L.J. 332. See also *Ramchandra Prasad v. Emp.*, 38 Cr.L.J. 657 (658), 168 I.C. 979, A.I.R. 1937 Pat. 246, 3 B.R. 508, 9 R.P. 522, 18 P.L.T. 483, 1937 P.W.N. 519.

Where it was the duty of the prosecution to have placed before the Court the first report made by the complainant in a case under sec. 358, I.P.C., and it did not do so, the Appellate Court should have taken additional evidence on the point as the accused had not come to know of this report at an earlier stage—*Sarnam Singh*, 36 Cr.L.J. 117 (119), 152 I.C. 550, 4 A.W.R. 949, A.I.R. 1935 All. 63.

The Appellate Court may take additional evidence to supply a defect in formal proof (e.g., proof as to whether the sanction for prosecution required under sec. 196 was granted by the proper authority), when the conviction for a serious charge such as sedition, which is otherwise sustainable, is likely to be upset for want of such proof—*Varadarajulu Naidu*, 42 Mad. 885 (889).

As for the power of the Appellate Court in the matter of taking additional evidence in an appeal under sec. 476B, Cr. P. C., see Note 1257.

There is no provision in the Code under which an affidavit sworn by a prosecution witness declaring that the evidence given by her against the appellant at the trial was false and that it had been given under the influence of the police, can be produced or taken notice of—*Moti Ram*, A.I.R. 1933 Lah. 993, 1933 Cr.C. 1513, 147 I.C. 692.

Recording reasons:—Before taking additional evidence the Court must record its reasons for so doing—*Varadarajulu Naidu*, 42 Mad. 885 (890); *Dulla*, 7 Lah. 148, 27 Cr.L.J. 463. But omission to do so is a mere irregularity curable by sec. 537—*Karnam*, 9 M.L.T. 406, 12 Cr.L.J. 240; *Seeniah v. Abdul*, A.I.R. 1930 Mad. 483, 53 Mad. 688, 1930 M.W.N. 534, 31 Cr.L.J. 602, 123 I.C. 809, 31 M.L.W. 524, 58 M.L.J. 414, 1930 Cr.C. 507.

Revision of order allowing additional evidence:—The powers of an Appellate Court to take additional evidence should not be unduly restricted. The scope of sec. 428 is *prima facie* not limited by any consideration save that the Appellate Court should be of opinion that additional evidence is necessary and should record its reasons. Accordingly, if any restriction is to be placed upon the power conferred on the Appellate Court by sec. 428, it certainly cannot be that negligence or inadvertence on the part of the prosecution is to be allowed to effect a miscarriage of justice; on the contrary, the enactment is directed to the attainment of justice even at a late stage of the proceedings by the introduction of further materials which the Court considers to be essential to a just decision of the case. Consequently, the Court of Revision will not interfere with an order allowing additional evidence even where the Court of Revision might itself, as an Appellate Court, have declined to admit such evidence. To justify interference, the Revision Court must be satisfied that the Appellate Court committed an error of law which has prejudiced the accused on the merits—*Akhlar*, 6 P.L.T. 431, 26 Cr.L.J. 1171.

1157. Procedure:—This section empowers an Appellate Court to merely call for additional evidence and not to call upon the Lower Court to give its finding upon such evidence. Where the Appellate Court calls for such finding of the Lower Court, the order of the Appellate Court will be set aside—*Karnam*, 12 Cr.L.J. 240, 9 M.L.T. 406; *Muthu Karappan v. Vellayya Kudumban*, 16 Cr.L.J. 79, 1914 M.W.N. 778. When the subordinate Court is directed to take additional evidence, it shall merely certify evidence to the Appellate Court and is not entitled to give any finding on

or to retry the case on such fresh evidence, such duty being left to the Appellate Court—*Anonymous*, 3 B.L.R. 62; and if the Magistrate gives any finding on such evidence, the Appellate Court cannot accept such finding but must form its own conclusion upon the evidence so taken—*Muthu Karappan v. Vellayya*, *supra*. This section does not empower an Appellate Court to take evidence regarding the proceedings before a Magistrate, such as to examine the accused as to the truth of an allegation that the Magistrate had refused to examine some witnesses—*Subbaya*, 12 Mad. 451.

The accused persons were convicted by the trial Court without any examination under sec. 342, and the Appellate Court directed as follows: "The Lower Court will examine the accused under sec. 342 and call upon them to adduce any defence evidence, if they choose to give any, and after examination of the defence witnesses, he will re-submit the record to this Court. The appeal will then be heard by me on the merits." Held that the Appellate Judge's procedure was erroneous. He appears to have followed the provision of the Civil Procedure Code rather than of the Criminal Procedure Code. He should have set aside the conviction and sentence and remanded the case to the first Court for that Court to deal with the case on the merits after compliance with sec. 342, as if it were before that Court for the first time—*Abdus Samad*, 40 C.L.J. 319, 26 Cr.L.J. 313 (314).

This section does not provide that the accused should be re-examined under sec. 342 after the evidence of the witnesses for the prosecution is taken on remand. The examination of the witnesses after remand may be made even in the absence of the accused, and the provisions of sec. 342 do not apply to sec. 428—*Mohiuddin*, 4 Pat. 488, 6 P.L.T. 154, 26 Cr.L.J. 811 (813); *Narayan*, 52 Bom. 699, 29 Cr.L.J. 972 (973).

Where the Appellate Magistrate, having once passed an order for the evidence of certain witnesses being recorded by the trial Court, decides the appeal without that evidence being recorded, the procedure of the Magistrate is undoubtedly irregular—*Madho Singh v. Emp.*, 41 Cr.L.J. 725 (726), 189 I.C. 258, 1940 O.W.N. 607.

1158. Power of Appellate Court after taking additional evidence:—The Appellate Court cannot consider and determine a new case disclosed by the additional evidence, except in so far as to affirm or modify or set aside the sentence under appeal or to act as otherwise provided by sec. 423 (b). An Appellate Court cannot under this section pass a fresh sentence, which may be subject to further appeal. Under the 1898 Code the Appellate Court is directed to dispose of the appeal finally and not to pass a new judgment, sentence, etc., which may be further appealed against—*Isahak*, 27 Cal. 372.

The Appellate Court can re-hear the appeal after obtaining the additional evidence. Both under the Criminal Procedure and under sec. 107 of the Government of India Act of 1915, the High Court has full jurisdiction and power in criminal revision to direct the Lower Appellate Court to re-hear an appeal after obtaining additional evidence certified by the trial Court—*Mahomed*, 3 P.L.J. 632, 19 Cr.L.J. 902.

1159. No further appeal:—An appellant whose appeal is dismissed by an Appellate Court, after it has taken additional evidence under this section, has no further right of appeal. According to sec. 430, except in certain cases, judgments and orders passed by an Appellate Court upon appeal are final—*Isahak*, 27 Cal. 372. If additional evidence is taken, it does not entitle a party to appeal from a finding upon such evidence to the High Court upon the merits, treating it in substance as an original judgment—*Natamram*, 6 B.H.C.R. 64.

1160. Sub-section (3):—Where the Appellate (High) Court acting under this section, directs the Sessions Judge to bring upon the record under sec. 288 the statements of certain witnesses made in the Court of the committing Magistrate, those statements cannot be properly brought on the record until notice is given to the accused that it is proposed to use those statements against him; and so it will be necessary for the Sessions Judge to take those proceedings in the presence of the accused or his pleader. This is provided for in clause (3) of this section—*Nagina*, 19 A.L.J. 947, 27 Cr.L.J. 813

(815). Under this clause a Court of Session is authorised to record the additional evidence, *in the absence of the jury* or the assessors, and this is the only instance in which it can do so. But in no other cases can the presence of the jurors be dispensed with; and therefore, where in a trial for murder the Sessions Judge, relying on a statement made by the deceased, convicted the accused, and the necessary evidence to prove the statement was not recorded by the Judge until after the assessors had been discharged, it was held that the error vitiated the trial and was not covered by the provisions of sec. 537—*Ram Lal*, 15 All. 136.

429. When the Judges composing the Court of Appeal are equally divided in opinion, the case, with their opinion thereon, shall be laid before another Judge of the same Court, and such Judge, after such hearing (if any) as he thinks fit, shall deliver his opinion, and the judgment or order shall follow such opinion.

Procedure where Judges of Court of Appeal are equally divided.

1161. Scope of section:—This section applies not only to appeals but to revision proceedings as well. Therefore, if two learned Judges differ in a Criminal Revision case, sec. 439 read with sec. 429 requires the case to be decided by a third Judge—*Dudikula Lalsaheb*, 40 Mad. 976; *Sukdeo Narain*, 27 Cal 892 (at p. 910); *Pandita v. Rahimulla*, 27 Cal. 501 (at p. 505); *Ganguly v. Watson*, 53 Cal 929. See sec. 439 (1).

The principle of this section applies also to a reference under sec. 307. In case of difference between the High Court Judges on such reference, the rule of this section is to be followed—*Dada Ana*, 15 Bom 452

The third Judge to whom a case is referred cannot refer the case to a Full Bench. A Division Bench can alone do it; and a third Judge sitting singly is not a Division Bench—*Ishan Chandra v. Hriday Krishna*, 29 C.W.N. 475 (483), 26 Cr L J 915.

"Case":—Where upon a difference of opinion between two Judges, the case is laid before a third Judge, the *whole case* is referred to the third Judge and not merely the point or points on which the Judges differed, and it is the duty of the Judge to whom the case is referred, to consider *all* the points involved before he delivers his opinion, and it will be according to the opinion of such Judge that the judgment will follow—*Sarat Chandra*, 38 Cal 202, 15 C.W.N. 18, 11 Cr L J 515, 7 I C 641, 12 C.L.J. 294; *Ganguly v. Watson*, 53 Cal 929, 27 Cr L J 1268 (1272). But in another case of the same High Court it has been held that the third Judge cannot differ from the referring Judges on a point on which both the referring Judges are agreed, unless there are strong grounds for doing so—*Venkataratnam v. Corporation of Calcutta*, 22 C.W.N. 745 (756), 19 Cr L.J. 753. In other words, it lays down that the third Judge can consider only the points on which the referring Judges have disagreed, and not *all* the points. To remove this conflict of opinion it was proposed by the *Select Committee* of 1916 to add the following proviso to this section "Provided that, if either of the Judges composing the Court of appeal so require, the appeal shall be *re-heard* before them and another Judge or if the Chief Justice so directs, before three other Judges, and the judgment or order shall follow the opinion of the majority of the Judges so re-hearing the case." But the Joint Committee of 1922 deleted this proviso, as it was disapproved of by many Judges and also because the difficulty which the amendment intended to meet was of rare occurrence. A similar proviso was intended to be added to sec. 378 and it was omitted by the Joint Committee for the same reason. See clauses 98 and 113 of the *Report of the Joint Committee* (1922).

But there can be no question that where there are two accused, and the Judges are agreed in opinion with regard to one of them but are divided in opinion as regards the other, the case which is laid before the third Judge is only the case of the prisoner with regard to whom the Judges are divided in opinion—*Sarat Chandra*, 38 Cal. 202,

15 C.W.N. 18, 11 Cr.L.J. 515, 7 I.C. 641, 12 C.L.J. 294; *Ahmad Sher*, 32 Cr.L.J. 868, 132 I.C. 381, Ind. Rul. 1931 Lah. 573, A.I.R. 1931 Lah. 513, 1931 Cr.C. 737.

430. Judgments and orders passed by an Appellate Court upon appeal shall be final, except in the cases provided for in section 417 and Chapter XXXII.

Finality of orders on appeal.

1162. A sentence is said to be final when it cannot be set aside or interfered with by any Court or authority, whether on appeal or otherwise—*Dular v. Najabat*, 12 Cal 536.

Where the Sessions Judge rejected a criminal appeal on the ground that it was barred by limitation, the rejection was final and the Sessions Judge was not competent, on a later representation by the prisoner, to admit the appeal again—*Bhimappa*, 19 Bom 732; *Clegg*, 1887 P.R. 21. An order of summary rejection of an appeal is final; it is immaterial whether the order is passed before or after the papers are called for—*Mahomed Yashin*, 4 Bom 101. An order passed by a Sessions Judge declining to interfere with a sanction granted by the Lower Court is final and is not open to interference except in the manner laid down in Chap XXXII—*Ganesh Ramkrishna*, 23 Bom. 50. But an order rejecting an appeal summarily for *non-appearance* of the appellant is an improper order and it is open to the Court to re-hear the appeal and deal with it—*Anonymous*, 2 Weir 471, 7 M.H.C.R. App. 29; *Kunhammad*, 46 Mad. 382 (403); *Ratan Chand*, 5 N.L.R. 76, 9 Cr.L.J. 553.

Even though this section does not apply to judgments in revision applications, the principle of finality of judgments there laid down must apply to judgments in revision applications also—*Inderchand*, A.I.R. 1934 Bom. 471 (473), 36 Bom.L.R. 954, 1934 Cr.C. 1313, 36 Cr.L.J. 351, 153 I.C. 525.

See Note 1121 under the heading "Time of filing appeal".

431. Every appeal under section 417 shall finally abate on the death of the accused, and every other appeal under this Chapter (except an appeal from a sentence of fine) shall finally abate on the death of the appellant.

Abatement of appeals.

1163. The Code has made no provision for the continuance of the appeal by the heir of devisee or executor of the deceased convict or by any other person. The appeal abates on the appellant's death—*Dongaji*, 2 Bom. 564; *Nabi Shah*, 19 Bom. 714. But an exception is made as regards an appeal from a sentence of fine. "An appeal against a sentence of fine should not abate by reason of the death of the accused, because it is not a matter which affects his person, but one which affects his estate"—*Select Committee's Report* (1898). See also *Daulat Ram*, 20 Cr.L.J. 214, 1919 P.R. 8; *Nurudin*, 29 Bom.L.R. 701, 28 Cr.L.J. 653 (655).

The principle of this section applies also to revisions; and therefore, where a fine inflicted upon an accused was a heavy one and its recovery from the estate would entail hardship on the widow, it was held that the application for revision filed by the accused did not abate on his death as regards the sentence of fine; and the High Court in revision remitted the fine—*Daulat Ram*, 1919 P.R. 8, 20 Cr.L.J. 214, 49 I.C. 744.

Compensation awarded under sec. 250 is recoverable as if it were a fine; therefore, an application for revision against an order of compensation does not abate on the death of the applicant, but can be prosecuted by his legal representatives—*Prem Singh v. Bhola*, 1908 P.R. 24, 9 Cr.L.J. 103.

CHAPTER XXXII.

OF REFERENCE AND REVISION.

432. A Presidency Magistrate may, if he thinks fit, refer for the opinion of the High Court any question of law which arises in the hearing of any case pending before him, or may give judgment in any such case subject to the decision of the High Court on such reference and, pending such decision, may either commit the accused to jail, or release him on bail to appear for judgment when called upon.

1164. This section empowers only a Presidency Magistrate to refer a question of law. No other Magistrate has power to make a reference. A District Magistrate cannot refer; he can only bring a case before the High Court by way of revision—*Bakuli*, 1 S.L.R. 4, 9 Cr.L.J. 248; *Rahimuddin*, 22 S.L.R. 201, 28 Cr.L.J. 978 (979). A Sessions Judge has no power to refer a case to the High Court on a point arising in an appeal pending before him—*Mohan Lal*, 13 A.L.J. 477, 16 Cr.L.J. 433.

Under this section there can be a reference to the High Court only on a question of law, and not on a question of fact—*Sheikh Ibrahim*, Ratanlal 838; *Toja*, Ratanlal 539. And the High Court, upon a reference under this section, can deal with the particular points of law referred to it; it cannot deal with the facts of the case, nor any other objection against the proceedings of the Court of the Presidency Magistrate—*Molla Fuzla Karim*, 33 Cal 193.

The Magistrate can refer a question which has arisen 'in the hearing of the case'; he cannot make a reference on a question of law where the accused has been merely placed before him and the hearing of the case has not begun—*Nanu*, 1 Bom.L.R. 521.

Although the Presidency Magistrates have, under this section, the power to refer for the opinion of the High Court any question of law which arises at the hearing of any case pending before them, it may be undesirable to make the reference in the form which involves giving a decision on law, divorced to some extent from the facts. The more desirable course is for the Magistrate to use the second part of this section which provides that he may give judgment in any such case subject to the decision of the High Court on such reference. By adopting this course, duplicity of hearing in both Courts would probably be avoided and all the facts would be before the High Court once for all—*Hemendra Prosad Ghosh*, 40 Cr.L.J. 782, 183 I.C. 349, A.I.R. 1939 Cal. 529, 69 C.L.J. 599, 43 C.W.N. 950, 1 L.R. (1939) 2 Cal. 411, 12 R.C. 153, 2 Fed.L.J. (Part II) 55.

433. (1) When a question has been so referred, the High Court shall pass such order thereon as it thinks fit, and shall cause a copy of such order to be sent to the Magistrate by whom the reference was made, who shall dispose of the case conformably to the said order.

Disposal of case according to decision of High Court.

Direction as to costs.

(2) The High Court may direct by whom costs of such reference shall be paid.

1165. On a reference by a Presidency Magistrate to the High Court as to whether on the facts stated any offence has been committed by an accused person, the prosecution has to make out that the accused has committed the offence, and, therefore, the counsel for the prosecution has the right to begin—*Haradhan*, 19 Cal. 380 (385).

The High Court sitting in appeal cannot review an order passed by it under this section—*Canji*, Ratanlal 638.

434. (1) When any person has, in a trial before a Judge of a High Court consisting of more Judges than one and acting in the exercise of its original criminal jurisdiction, been convicted of an offence, the Judge, if he thinks fit, may reserve and refer for the decision of a Court consisting of two or more Judges of such Court any question of law which has arisen in the course of the trial of such person, and the determination of which would affect the event of the trial.

(2) If the Judge reserves any such question, the person convicted shall, pending the decision thereon, be remanded to jail, or, if the Judge thinks fit, be admitted to bail; and the High Court shall have power to review the case or such part of it as may be necessary, and finally determine such question, and thereupon to alter the sentence passed by the Court of original jurisdiction, and to pass such judgment or order as the High Court thinks fit.

1166. Reference discretionary:—The words 'may reserve and refer' show that it is in the discretion of the single Judge whether or not he will reserve a point of law for the opinion of the High Court consisting of two or more Judges—*Pestonji*, 10 B.H.C.R. 75; and this discretion of the single Judge is not reviewable under clause 26 of the Letters Patent—*Ibid*.

When reference can be made:—A reference can be made when the point of law has arisen in the course of the trial; where a point is raised before the accused is called upon to plead, it cannot be referred to the Full Bench, because the point cannot be said to have arisen in the course of the trial—*Dolegobind*, 28 Cal. 211.

Right to begin:—Where, on the application of the prisoner's counsel, a question of law has been reserved for the decision of the Court under this section, the counsel for the prisoner has the right to begin—*Appa Subhana*, 8 Bom. 200.

1167. Sub-section (2):—*High Court's power to review the case:*—The High Court in considering a point of law reserved under this section can review the whole case, if it is of opinion that any evidence has been improperly admitted or rejected, and can affirm or quash the conviction—*Hurribole*, 1 Cal. 207; *O'Lara*, 17 Cal. 642; *Patrick McGuire*, 4 C.W.N. 433; *Narayan*, 32 Bom. 111; *Fateh Chand*, 44 Cal. 477.

This is the only section which enables the Division or Full Bench of the High Court to review the judgment of a single Judge exercising original criminal jurisdiction. The powers of a single Judge in a matter with which he has jurisdiction to deal are the powers of the Court and cannot be in any way controlled (except as under this section) by a Division or Full Bench of the Court. As no appeal lies, no revision lies—*Hale*, 1909 P.R. 1, 9 Cr.L.J. 306; *Press*, 4 P.R. 1909, 9 Cr.L.J. 378 (380). In the absence of any reservation of a question of law by the trying Judge, the High Court is precluded from re-opening a question which has been decided by the single Judge presiding at the trial—*Narayan*, 32 Bom. 111.

The High Court can review the judgment or order of a Judge passed in the exercise of his *original jurisdiction*. A Division Bench of the High Court has no power to alter or review the order of a High Court pronounced in the exercise of its *revisional jurisdiction*—*Durga Charan*, 7 All. 672; *Fox*, 10 Bom. 176; *Godai*, 5 W.R. 61; *Ganesh Ram krishna*, 23 Bom. 50; *Nagangowda*, 19 Bom.L.R. 695.

The Code does not make any provision for reviewing the judgment of *subordinate Courts*. The High Court can only revise such judgment under the ample powers conferred by sec. 439—*Bhimappa*, 19 Bom. 732.

435. (1) The High Court or any Sessions Judge or District Magistrate or any Subdivisional Magistrate empowered by the *Provincial Government* in this behalf, may call for and examine the record of any proceeding, before any inferior Criminal Court situate within the local limits of its or his jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of such inferior Court, and may, when calling for such record, direct that the execution of any sentence be suspended and, if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record.

Explanation.—All Magistrates, whether exercising original or appellate jurisdiction, shall be deemed to be inferior to the Sessions Judge for the purposes of this sub-section and of section 437.

(2) If any Sub-divisional Magistrate acting under sub-section (1) considers that any such finding, sentence or order is illegal or improper, or that any such proceedings are irregular, he shall forward the record, with such remarks thereon as he thinks fit, to the District Magistrate.

(3) *Omitted.*

(4) If an application under this section has been made either to the Sessions Judge or District Magistrate, no further application shall be entertained by the other of them.

Change:—The italicised words at the end of sub-section (1) and the Explanation have been added, and sub-section (3) has been omitted, by sec. 116 of the Criminal Procedure Code Amendment Act, XVIII of 1923. Sub-section (3) stood as follows—

“(3) Orders made under secs. 143 and 144 and proceedings under Chap. II and sec. 176 are not proceedings within the meaning of this section.”

The grounds for the omission of sub-sec. (3) have been thus stated by Dr. Gour : “The intention of this amendment is to preserve to the High Courts revisional jurisdiction in cases disposed of under secs 144, 145, etc. Honourable Members are aware that not only the Chartered High Courts but all the non-chartered High Courts such as the Chief Courts and the Courts of the Judicial Commissioners do, under various local Acts, possess a statutory power of revision in such cases... Now, Sir, I ask the House a simple question. If it is a fact that all the Courts, chartered and non-chartered, possess this power, then I say clause (3) of sec. 435 is superfluous, nay misleading. If it is a fact that they do not possess that power, in that case I ask the House to endorse my opinion that this power is both salutary and necessary. It will not be denied that this power has in fact been exercised under section 107 of the Government of India Act and other Local Acts. If so, this clause conflicts with the express provisions of section 107 of the Government of India Act. It creates utter confusion. If the High Courts have power under section 107 of the Government of India Act to exercise the general power of superintendence over the Subordinate Courts,

The High Court sitting in appeal cannot review an order passed by it under this section—*Canji, Ratanlal* 638.

434. (1) When any person has, in a trial before a Judge of a High Court consisting of more Judges than one and acting in the exercise of its original criminal jurisdiction, been convicted of an offence, the Judge, if he thinks fit, may reserve and refer for the decision of a Court consisting of two or more Judges of such Court any question of law which has arisen in the course of the trial of such person, and the determination of which would affect the event of the trial.

(2) If the Judge reserves any such question, the person convicted shall, pending the decision thereon, be remanded to jail, or, if the Judge thinks fit, be admitted to bail; and the High Court shall have power to review the case or such part of it as may be necessary, and finally determine such question, and thereupon to alter the sentence passed by the Court of original jurisdiction, and to pass such judgment or order as the High Court thinks fit.

1166. Reference discretionary:—The words 'may reserve and refer' show that it is in the discretion of the single Judge whether or not he will reserve a point of law for the opinion of the High Court consisting of two or more Judges—*Pestonji*, 10 B.H.C.R. 75; and this discretion of the single Judge is not reviewable under clause 26 of the Letters Patent—*Ibid*.

When reference can be made:—A reference can be made when the point of law has arisen in the course of the trial; where a point is raised before the accused is called upon to plead, it cannot be referred to the Full Bench, because the point cannot be said to have arisen in the course of the trial—*Dolegobind*, 28 Cal. 211.

Right to begin:—Where, on the application of the prisoner's counsel, a question of law has been reserved for the decision of the Court under this section, the counsel for the prisoner has the right to begin—*Appa Subhana*, 8 Bom. 200.

1167. Sub-section (2):—*High Court's power to review the case:*—The High Court in considering a point of law reserved under this section can review the whole case, if it is of opinion that any evidence has been improperly admitted or rejected, and can affirm or quash the conviction—*Hurribole*, 1 Cal. 207; *O'Lara*, 17 Cal. 642; *Patrick McGuire*, 4 C.W.N. 433; *Narayan*, 32 Bom. 111; *Fateh Chand*, 44 Cal. 477.

This is the only section which enables the Division or Full Bench of the High Court to review the judgment of a single Judge exercising original criminal jurisdiction. The powers of a single Judge in a matter with which he has jurisdiction to deal are the powers of the Court and cannot be in any way controlled (except as under this section) by a Division or Full Bench of the Court. As no appeal lies, no revision lies—*Hale*, 1909 P.R. 1, 9 Cr.L.J. 306; *Press*, 4 P.R. 1909, 9 Cr.L.J. 378 (380). In the absence of any reservation of a question of law by the trying Judge, the High Court is precluded from re-opening a question which has been decided by the single Judge presiding at the trial—*Narayan*, 32 Bom. 111.

The High Court can review the judgment or order of a Judge passed in the exercise of his original jurisdiction. A Division Bench of the High Court has no power to alter or review the order of a High Court pronounced in the exercise of its revisional jurisdiction—*Durga Charan*, 7 All. 672; *Fox*, 10 Bom. 176; *Godai*, 5 W.R. 61; *Ganesh Ram Krishna*, 23 Bom. 50; *Nagangowda*, 19 Bom.L.R. 695.

The Code does not make any provision for reviewing the judgment of *subordinate Courts*. The High Court can only revise such judgment under the ample powers conferred by sec. 439—*Bhimappa*, 19 Bom. 732.

435. (1) The High Court or any Magistrate or any

Power to call for records of inferior Courts. Magistrate or any empowered by the

this behalf, may call for and examine the record of any proceeding, before any inferior Criminal Court situate within the local limits of its or his jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of such inferior Court, and may, when calling for such record, direct that the execution of any sentence be suspended and, if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record.

Explanation.—All Magistrates, whether exercising original or appellate jurisdiction, shall be deemed to be inferior to the Sessions Judge for the purposes of this sub-section and of section 437.

(2) If any Sub-divisional Magistrate acting under sub-section (1) considers that any such finding, sentence or order is illegal or improper, or that any such proceedings are irregular, he shall forward the record, with such remarks thereon as he thinks fit, to the District Magistrate.

(3) *Omitted.*

(4) If an application under this section has been made either to the Sessions Judge or District Magistrate, no further application shall be entertained by the other of them.

Change:—The italicised words at the end of sub-section (1) and the Explanation have been added, and sub-section (3) has been omitted, by sec. 116 of the Criminal Procedure Code Amendment Act, XVIII of 1923. Sub-section (3) stood as follows:—

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The grounds for the omission of sub-sec. (3) have been thus stated by Dr. Gour: “The intention of this amendment is to preserve to the High Courts revisional jurisdiction in cases disposed of under secs. 144, 145, etc. Honourable Members are aware that not only the Chartered High Courts but all the non-chartered High Courts such as the Chief Courts and the Courts of the Judicial Commissioners do, under various local Acts, possess a statutory power of revision in such cases. Now, Sir, I ask the House a simple question. If it is a fact that all the Courts, chartered and non-chartered, possess this power, then I say clause (3) of sec. 435 is superfluous, nay misleading. If it is a fact that they do not possess that power, in that case I ask the House to endorse my opinion that this power is both salutary and necessary. It will not be denied that this power has in fact been exercised under section 107 of the Government of India Act and other Local Acts. If so, this clause conflicts with the express provisions of section 107 of the Government of India Act. It creates utter confusion. If the High Courts have power under section 107 of the Government of India Act to exercise the general power of superintendence over the Subordinate Courts,

what object is served by inserting this clause that orders under sections 143, 144 and 145 shall not be open to revision under section 435? I hope that the Government out of sheer consistency will accept my amendment."—*Legislative Assembly Debates*, 8th February 1923, page 2076-2077.

By reason of the omission of this sub-section, the above orders and proceedings are now subject to revision under this Code. See Notes under secs. 143, 144, 145—148 and 176.

The words "Provincial Government" have been substituted for "Local Government" in this section by sec. 4 of the Government of India (Adaptation of Indian Laws) Order, 1937.

1167A. Object:—The object of this revisional legislation is to confer upon superior Criminal Courts a kind of paternal or supervisory jurisdiction, in order to correct miscarriage of justice arising from misconception of law, irregularity of procedure, neglect of proper precautions or apparent harshness of treatment, which has resulted on the one hand in some injury to the due maintenance of law and order, or on the other hand in some undeserved hardship to individuals—*Nasrullah*, 29 Cr.L.J. 446 (447), 108 I.C. 567, 9 A.I.Cr.R. 305, A.I.R. 1928 All. 287. The Courts enumerated in this section have power to call for the records of subordinate Courts for the purpose of satisfying themselves as to correctness, legality or propriety of the orders passed by the lower Courts. The object of the Legislature in this section is to set right some patent defect or error. In the absence of some well founded suspicion it is inexpedient for the High Court to scrutinize orders of discharge or other orders passed by the lower Courts which upon the face of them bear token of careful consideration and appear good and lawful. This section does not give the High Court a roving commission either in the direction of stamping with approval the proceedings of a Lower Court or in the direction of questioning about and looking to see if possibly under a fair record there lies some trace of possible error—*Dukes*, 1899 A.W.N. 135.

1168. To whom application should be made:—The revisional jurisdiction of the District Magistrate and Sessions Judge is concurrent with that of the High Court; but although the three tribunals have concurrent powers, the aggrieved party should in the first instance seek his remedy before the lower tribunal and not in the High Court direct. In the matter of applications in criminal revision of the High Court, it is a recognised rule of practice that a previous application to the Lower Court (District Magistrate or Sessions Judge) should be considered an essential step in the procedure, irrespective of whether such lower Court has or has not power to grant the relief claimed; and that failure on the part of the applicant to submit his application to the Lower Court will operate as a bar to the application being entertained by the High Court—*Sheriff Ahmed v. Qabul*, 43 All. 497, 22 Cr.L.J. 715; *Reolah*, 14 Cal. 887; *Abdus Sobhan*, 36 Cal. 643; *Rash Behari v. Phani Bhusan*, 48 Cal. 534; *Abdul Mutlab v. Nanda Lal*, 50 Cal. 423; *Chagan Dayaram*, 14 Bom. 331; *Jadunandan v. Sheopahal*, 27 A.L.J. 514; *Mansur*, 41 All. 587 (591); *Gullay v. Bakar*, 28 All. 268; *Shafaqat v. Wali Ahmed*, 30 All. 116; *Bepin Bihari*, 3 P.L.J. 302; *Muhammad Ishaq*, 28 Cr.L.J. 815, 104 I.C. 255, A.I.R. 1927 Lah. 689; *Gopabandhu v. Venkatesam*, (1923) M.W.N. 837, 18 L.W. 651; *Sat Narain*, 25 O.C. 37; *Krishna v. Badri*, A.I.R. 1931 Oudh 418, 1931 Cr.C. 1053, 8 O.W.N. 1027, 135 I.C. 701; *Bajras v. Dadibhai*, 27 Cr.L.J. 71, 91 I.C. 247, A.I.R. 1926 Nag. 285; *Bepin Behari*, 19 Cr.L.J. 589, 45 I.C. 397, 3 Pat.L.J. 302; *Ajodhia*, 35 Cr.L.J. 475, 147 I.C. 797, 10 O.W.N. 733; *Haidari Begum v. Jawad Ali*, 36 Cr.L.J. 554 (555), 154 I.C. 638, A.I.R. 1935 All. 55, 1934 A.L.J. 946, 1934 Cr.C. 525, 4 A.W.R. 1406. See also *Mohiud-Din Lal Badshah v. Emp.*, 40 Cr.L.J. 127, 178 I.C. 632, A.I.R. 1938 Lah. 762, 40 P.L.R. 716, 11 R.L. 482. A person invoking the revisional jurisdiction of the High Court is bound, according to the rules of that Court, to apply first to the Sessions Judge or District Magistrate. If the latter considers that a case for revision is made out, he reports the matter to the High Court under section 438, with a view to the

High Court exercising its revisional powers under sec. 439. If the Sessions Judge or District Magistrate considers that the application should not be entertained, he rejects it, leaving the aggrieved party to apply to the High Court direct—*Abdulwahid v. Abdullah*, 45 All. 656 (661, 662). So also, the High Court will not allow a point to be raised for the first time before it, when such point was not taken by the petitioner in his revision application presented to the Sessions Judge—*Bhure Mal*, 45 All. 526 (528). See also Note 1222 under the heading "New plea in revision." The object of requiring an application for revision to be presented first to the District Magistrate or Sessions Judge, is *firstly*, to prevent the time of the High Court from being wasted over frivolous and unsustainable applications; and *secondly*, the High Court in dealing with the matter may have before it an expression of opinion by a Court of superior jurisdiction such as that of the Sessions Judge or the District Magistrate—*Mansur*, 41 All. 587 (591); *Sukhray*, 28 Cr.L.J. 475, 101 I.C. 603, 7 A.I.Cr.R. 248, A.I.R. 1927 All. 834; *Bhure Mal*, *supra*. Thus, where the District Magistrate dismisses a complaint under the provisions of section 203, the High Court will not entertain an application by the complainant asking for further inquiry under section 436, when no application for that object has been made to the Sessions Judge—*Gullay v. Bakar*, 28 All. 268. But when an application to the High Court for revision has already been heard and the Rule granted, the High Court will not afterwards discharge the Rule on the ground that the petitioner ought to have moved the Sessions Court in the first instance, but will proceed to dispose of the Rule on the merits—*Abdul Mallab v. Nanda Lal*, 50 Cal. 423. It is not usual for the High Court to entertain revisional applications direct, but after they have been admitted, they must be disposed of on the merits—*Chokat Ahir v. Suraj Singh*, 41 Cr.L.J. 257, A.I.R. 1940 Pat. 299, 1940 P.W.N. 271, 186 I.C. 182. Though it has been laid down that the High Court will not ordinarily entertain revision applications when the Sessions Court has jurisdiction to entertain them, it has also been laid down that the High Court will do so in special cases—*Abdullakhan*, A.I.R. 1932 Sind 28, 136 I.C. 513, 33 Cr.L.J. 298, 1932 Cr.C. 114, 25 S.L.R. 395, Ind. Rul. 1932 Sind 33. In observance of the well-established practice of the High Court, neither an application in revision by an accused nor an application by a third party for the purpose of informing the High Court, should be entertained, unless there are special reasons why the applicant should not have gone to the District Magistrate or the Sessions Judge in the first instance, but if a Judge on very special grounds decides to intervene, he cannot be said to be acting illegally although it may be contrary to the practice. Once the application has been admitted and the record called for, such an objection should not be entertained—*Shailabala*, 34 Cr.L.J. 1115 (1122), 145 I.C. 977, A.I.R. 1933 All. 678, 1933 A.L.J. 1059, 1933 Cr.C. 1190 (F.B.). See *R. N. Basu*, 34 Cr.L.J. 1053, 145 I.C. 736, A.I.R. 1933 All. 612, 1933 Cr.C. 984, 1933 A.L.J. 1112.

Where the petitioners filed an *appeal* to the District Magistrate, who was sitting as a Court of Appeal, and the appeal having been dismissed, they moved the High Court in revision, *held* that although it might have been better if the petitioners had followed the usual rule of practice and moved the Sessions Judge before coming to the High Court still the High Court entertained the revision petition—*Muhammad Ishaq*, 28 Cr.L.J. 815, 104 I.C. 255, A.I.R. 1927 Lah. 689; *Mansur*, 41 All. 587 (592); followed in *Sharif Ahmad v. Qabul Singh*, 43 All. 497, 19 A.L.J. 425, 22 Cr.L.J. 715, A.I.R. 1921 All. 258, 50 I.C. 875 and *Balkrishna Sharma*, 54 All. 331, 1932 Cr.C. 150 (151), A.I.R. 1932 All. 125, 1932 A.L.J. 39, 137 I.C. 686, 33 Cr.L.J. 28, 17 A.I.Cr.R. 48. In spite of the above rule of practice, it is competent to the High Court in the exercise of its discretion to entertain an application for revision, even though no petition has been made to the Sessions Judge; and if the High Court admits the application for revision (even though *ex parte*), it is not open to any party to call it in question—*Mansur*, *supra*. But in *Sukhray*, 28 Cr.L.J. 475, 101 I.C. 603, 7 A.I.Cr.R. 248, A.I.R. 1927 All. 834, where there was an appeal to the District Magistrate, and the appeal having been dismissed, the accused applied to the High Court in revision, it was held that the applicant not having made a previous application for

revision to the Sessions Judge, the revision petition to the High Court must be dismissed. The Allahabad High Court has further held that an *ex parte* order of admission made by a Judge of the High Court under cl. (1) of this section will not be sufficient to take the case out of the operation of such rule of practice—*Mohammad Hashim v. Notified Area, Moghal Serai*, 34 Cr.L.J. 1048, 145 I.C. 726, 6 R.A. 152, 55 All. 261, 1933 A.L.J. 119, A.I.R. 1933 All. 283, 1933 Cr.C. 523; *Natha Singh v. Emp.*, A.I.R. 1927 All. 829, 102 I.C. 123, 7 A.I.Cr.R. 438, 28 Cr.L.J. 544. This is also the view of the Oudh Chief Court—*Raja Ram v. Emp.*, 38 Cr.L.J. 1024, 171 I.C. 167, 1937 O.L.R. 523, 10 R.O. 92, 1937 A Cr.C. 153, 1937 O.W.N. 1044. But see *Shailabala*, supra.

1168A. When application can be moved:—See *Sheo Mandil v. Emp.*, in Note 1224 and *Khairat v. Wahed* in Note 1205.

1169. Call for record:—The powers of a Sessions Judge to call for and examine the record under this section are powers which can be exercised at all times—*Anonymous*, 2 Weir 538. Records may be called for even after the prisoner has served out his sentence—*Sinha*, 7 All. 135. Even after the death of the prisoner pending an appeal before the Lower Appellate Court, the High Court has the right to call for the records and make such order thereon as it may deem to be due to justice—*Dongaji*, 2 Bom. 564. When records are called for under this section, the inferior Courts must forward the *original* records, and not merely copies thereof—*Padmanabha*, Ratanlal 128.

A Session Judge's action under this section is not limited to cases in which he happens to have personal knowledge leading him to suspect an irregularity nor to cases in which the persons directly interested as complainants or accused move him to call for records. Directly the Sessions Judge has any reasonable cause of suspicion that an irregularity has occurred he should call for the records irrespective of the source of his information—*Roshan Lal*, 32 Cr.L.J. 653, 131 I.C. 108, 12 Lah. 471, A.I.R. 1931 Lah. 107, 32 P.L.R. 130, Ind. Rul. 1931 Lah. 380, 1931 Cr.C. 171.

When an order is made by the District Magistrate under this section calling for the records of proceedings pending before a Magistrate with a view to withdrawing the case and transferring it to another Magistrate, the jurisdiction of the former Magistrate is suspended, and he is not therefore entitled to proceed any further in the case, *e.g.* to allow composition and to acquit the accused under sec. 345, even though the case may not have been actually transferred to some other Magistrate—*Maruti*, 49 Bom. 533, 26 Cr.L.J. 996.

"Any proceeding" :—It is competent to the High Court to call for the record of any proceeding of an inferior Criminal Court and revise the same, whether it is of a *preliminary* or *final nature*—*Jagan Singh*, 1892 A.W.N. 102. Hence, where the District Magistrate passed a preliminary order calling upon a witness who gave evidence before him to show cause why he should not be prosecuted for perjury, the High Court was competent to revise that order—*T. N. Chadha*, 14 A.L.J. 851, 18 Cr.L.J. 46.

1170. Power of revision after prior refusal:—An accused person has no right to come in revision more than once. Where his first application for revision has failed, the Court has a discretionary power not to entertain a second application at all, based on the same point as the first—*Kohna Ram*, 45 All. 11 (12). See also *Ankamma*, 1932 M.W.N. 1162. When a Magistrate has already dealt with a case in revision and decided that there was no cause for interference, he cannot subsequently direct further inquiry, because such an order would be one reviewing the prior order and is prohibited by sec. 369—*Nga Than*, 5 Bur.L.T. 37, 13 Cr.L.J. 301. Once a criminal revision case has been dismissed by the High Court for default of payment of printing charges, it is a final disposal and it is not competent to the High Court to re-hear the case or entertain a fresh application for revision, because there can be no review of the prior order of dismissal—*Appayya v. Venkatappayya*, 44 M.L.J. 27, 23 Cr.L.J. 746, A.I.R. 1923 Mad. 276. The High Court has no jurisdiction to entertain a revisional application through counsel after a similar application made by the applicant

from jail was disposed of by it—*Banwari Lal*, A.I.R. 1935 All. 466, 36 Cr.L.J. 1286, 157 I.C. 1044, 1935 A.L.J. 317, 1935 Cr.C. 507. So also, if a revision petition is dismissed for default of appearance of the pleader who filed it, the High Court is not competent to restore to its file such a petition—*Ranga Rao*, 23 M.L.J. 371, 13 Cr.L.J. 710. But the Calcutta High Court holds that there being no provision in the Code for dismissing a revision petition for default of appearance, the order of dismissal is no 'judgment' at all within the meaning of sec. 369 and the High Court is not debarred from re-hearing the petition—*Rajjabali*, 46 Cal. 60, 20 Cr.L.J. 265. See Note 1433A.

The Allahabad High Court has laid down that if a matter has once come before the High Court in revision *not on the application* of the accused but on the motion of the Sessions Judge who has referred the matter to the High Court, and the High Court looks into the matter and comes to the conclusion that there is no ground for revision, the accused is not thereby deprived of his right to apply to the High Court in revision—*Kohna Ram*, 45 All. 11 (12), 20 A.L.J. 775, 23 Cr.L.J. 496. The Burma Chief Court likewise holds that where a Sessions Judge *of his own motion* called for proceedings in which a Magistrate had discharged certain accused persons, but finding on record no cause of interference returned the proceedings to the Magistrate without taking further action, and subsequently the complainant applied to him to have the case re-opened, it was held that the mere fact that the Judge had declined to interfere *suo motu* on a prior occasion did not preclude him from hearing the complainant, and, if the arguments led him to do so, from altering his view—*Tun Myang v. Kauk San*, 8 Bur.L.T. 243, 16 Cr.L.J. 711.

1171. Inferior Criminal Court:—Inferior:—The term 'inferior' must be interpreted to mean 'judicially inferior,' i.e., a Court over which the Court proceeding under sec. 435 has appellate jurisdiction—*Nobin v. Russick*, 10 Cal. 268. 'Inferior' means one who is statutorily incompetent to hold or exercise equal powers; it carries with it the idea of subordination which means 'inferiority in rank'—*Prisya Gopal*, 9 Bom. 100 (103). The term 'inferior' in this section includes the term 'subordinate' as used in section 436. The reason for the employment of the term 'inferior' in sections 435 and 437 is that in both these sections the Court of Session and the District Magistrate are combined, and the Magistrates other than the District Magistrate though subordinate to him are not directly subordinate to the Court of Session. It was therefore necessary to employ a term applicable to the relation of the Magistracy both to the supervising authority and to the appellate tribunal—*Padmanabha*, 8 Mad. 18.

The District Magistrate is competent under this section to call for and deal with the record of any proceeding before any Magistrate of whatever class in his own district—*Opendra v. Dukhini*, 12 Cal. 473 (F.B.). A first class Magistrate is subordinate to the District Magistrate for the purposes of this section—*Waryam v. Amir*, 1894 P.R. 10; *Iaskari*, 7 All. 835 (F.B.); *Indar Singh*, 30 Cr.L.J. 490, 30 P.L.R. 448. The District Magistrate can call for and examine the record of any first class Magistrate within the district even though the latter has been appointed as an Additional District Magistrate—*Abdul Karim*, 1908 P.R. 25. In *Nawab Ali*, 12 Bur.L.T. 56, 51 I.C. 478, 20 Cr.L.J. 494, it was held that a District Magistrate could not call for the record of any proceeding before an Additional District Magistrate. But under the new sub-section (3) of section 10 the Additional District Magistrate is deemed to be inferior to the District Magistrate.

A District Magistrate is not competent to refer the proceedings of a *superior* Court (Sessions Court) to the High Court. See Note 1198 under sec. 438.

As a Court of *revision*, the District Magistrate is not inferior to the Sessions Judge. But where he passes an order as a Court of *original jurisdiction*, he is inferior to the Sessions Judge—*Balwant*, 24 Cr.L.J. 616 (Oudh); *Harkaram v. Harnam*, 17 Cr.L.J. 223, 19 O.C. 108; *Opendra v. Dukhini*, 12 Cal. 473; *Najib Khan*, 1889 A.W.N. 100. This is now made clear by the *Explanation* newly added. Even a District Magistrate empowered under sec. 30 is also inferior to the Sessions Judge—*Jalloo*, 1904 P.R. 15. The *Explanation* further makes it clear that "for the purposes of this section a Magistrate

under sec. 4 (2) of the Goondas Act he is given the powers of a Presidency Magistrate; therefore the High Court cannot interfere, under sec. 439, in the matter of the warrant issued by him—*Bhimraj Benia*, 51 Cal. 460 (467, 468), 83 I.C. 500, A.I.R. 1924 Cal. 698, 26 Cr.L.J. 20. The term 'inferior Criminal Court' in this section does not include a Civil or Revenue Court exercising its powers under sec. 476. See Note 1254 under sec. 476.

In a Bombay case it has been said that even though the proceedings are of a civil nature, still if they are held in a criminal Court, they are subject to revision under sec. 435 (e.g., proceedings of a Magistrate under sec. 2 of the Workmen's Breach of Contract Act, or under sec. 448 of this Code). The test is not the nature of the proceeding held by the Court, but the nature of the Court in which that proceeding is held—*Devappa*, 43 Bom 607 (609).

When the District Magistrate passes orders under Rule 17 of the Rules for licensing and controlling places of public entertainment framed under sec. 39-A, Bombay District Police Act, the District Magistrate or Magistrate of the District whichever he may be called, is not acting as an inferior Court within the meaning of sec. 435, Cr. P. C.; he is acting as an executive officer in the exercise of powers conferred upon him under sec. 39-A, Bombay District Police Act (IV of 1890)—*Manghanmal Gianchand v. Emp.*, A.I.R. 1939 Sind 340, 185 I.C. 392

The District Magistrate in granting or refusing an application to take the name of a person out of the register kept under sec. 5 of the Criminal Tribes Act (III of 1911) does not perform any judicial functions, his functions are administrative and the High Court is not entitled to interfere with any order made by the District Magistrate in this respect—*Hasan Ali Bepari v. The King-Emp.*, 24 C.W.N. 624 (625), 47 Cal. 843, 57 I.C. 101, A.I.R. 1920 Cal 635, 21 C.L.J. 581; *Bideshi Mian v. Emp.*, 34 Cr.L.J. 346, 142 I.C. 298, A.I.R. 1932 Pat 155, 1932 Cr.C. 272, 13 P.L.T. 119, Ind. Rul. 1933 Pat 138.

1171A. Finding, Sentence or Order:—The words "finding, sentence or order" in this section are three separate matters and are separated by the disjunctive conjunction "or"—"finding or sentence or order" There are, therefore, three matters in regard to which the revision may be heard One is the finding, another is the sentence and the third is an order—*Sat Narain Lal v. Emp.*, 41 Cr.L.J. 876, 190 I.C. 225, A.I.R. 1940 All 426, 1940 A.L.J. 462

1172. Orders which are not open to revision:—The proceedings which are open to revision are the proceedings of a Court If an order is an executive order, it is clear that it is not revisable under this section—*Mohammad Ahmad Khan v. Emp.*, 41 Cr.L.J. 781, 189 I.C. 666, 1940 O.W.N. 652; *Bejoy Krishna Das v. Shyam Narain Singh*, 41 Cr.L.J. 442 (444), 187 I.C. 310, A.I.R. 1940 Cal 30, I.L.R. (1939) 2 Cal. 532. Therefore the following executive orders are not liable to revision under this section :—

(1) An order passed by a District Magistrate whereby he prohibited certain petition writers to carry on their business within the precincts of the District Court—*Sukdeo Prasad*, 1902 A.W.N. 175.

(2) An administrative circular issued by a District Magistrate prohibiting uncertificated pleaders from practising in the Criminal Courts in his district, is not open to revision by the High Court The proper course for the pleader who has been refused appearance in a particular case by a Magistrate in pursuance of such circular, is to apply for revision of the illegal or improper order of the Magistrate refusing to allow him to appear—*Chinnasami*, 19 M.L.J. 566, 4 I.C. 876, 11 Cr.L.J. 69.

(3) Proceedings under the Legal Practitioners Act are neither civil nor criminal, and therefore an order passed under sec. 76 of that Act declaring a person to be a tout cannot be revised by the High Court either under sec. 439, Cr. P. Code or under sec. 115, Cr. P. Code, but may be revised by virtue of the wide powers of superintendence under sec. 13 of the Punjab Courts Act or sec. 15 of the High Courts Act—*Man Singh*, 1909 P.R. 11, 3 I.C. 977; *Kedar Nath*, 6 A.L.J. 22, 9 Cr.L.J. 22, 1 I.C. 143 (144). An order passed by a District Judge declaring a person to be a tout under sec. 32

Legal Practitioners' Act is capable of being revised by the High Court under sec. 115, C. P. Code. Section 439, Cr. P. C., would have no application to such a case—*Adiraju, Somanna*, A.I.R. 1938 Mad. 634, I.L.R. 1938 Mad. 988, 177 I.C. 456, 11 R.M. 334, 1938 M.W.N. 426, 47 M.L.W. 578, (1938) 2 M.L.J. 100, 1938 M.Cr.C. 310.

(4) An order passed by a Magistrate under sec. 2 of the Sind Frontier Regulation (V of 1872) is an executive order, and not open to revision by the High Court—*Jaro*, 5 S.L.R. 54, 12 Cr.L.J. 558. But an order under sec. 23 of the Sind Frontier Regulation (III of 1892) declaring the forfeiture of a bond entered into by a person under secs. 20 and 21 of the Regulation, is revisable by the High Court under sec. 435, Cr. P. Code as the order is a judicial order virtually passed under sec. 514 of this Code—*Imambux*, 7 S.L.R. 194, 15 Cr.L.J. 544 (545).

(5) An order passed by a Magistrate under sec. 41 of the Bombay District Police Act (IV of 1890) is an executive order and the High Court has no jurisdiction to interfere—*Satan*, 15 S.L.R. 126, 23 Cr.L.J. 39, A.I.R. 1922 Sind 21. So also, an order passed by a District Magistrate under sec. 41 of the Bombay District Police Act is not a judicial order, but a mere executive order made by him as the head of the Police, and is not revisable by the High Court under the present section—*Pandurang*, 12 Bom.L.R. 1029, 11 Cr.L.J. 705. So again, the High Court has no power to interfere with the District Magistrate's order duly made under sec. 43 of the Bombay District Police Act—*Kaji Sultan*, Ratanlal 540; nor can the Court of Session call for the records of proceedings taken by a Magistrate under sec. 46 of that Act—*In re Haibati*, Ratanlal 692. Orders passed by the District Magistrate under Rule 17 of the Rules for licensing and controlling places of public entertainment framed under sec. 39-A, Bombay District Police Act (IV of 1890) are executive orders not revisable by the High Court under this section—*Manghanmal Gianchand v. Emp.*, A.I.R. 1939 Sind 340, 185 I.C. 392, 41 Cr.L.J. 179.

(8) An order passed by the Collector under the Bengal Alluvial Lands Act (V of 1920) directing that certain huts erected on a disputed *char* should be sold and the sale proceeds credited to the Treasury, is not a judicial but an executive order—*Osman v. Kader*, 33 C.W.N. 836, 1929 Cr.C. 480.

(9) A Magistrate's order under sec. 17 of the Police Act (V of 1861) appointing certain persons as special constables is an order of an executive nature and an order made in a criminal proceeding—*Parmeswar*, 20 O.C. 229, 18 Cr.L.J. 900 (901). See also *Rahman Sirkar*, 18 W.R. 67, 10 Beng.L.R. App. 4.

(10) An order by a District Magistrate for execution of a warrant issued by a Political Agent under sec. 7 of the Extradition Act—*Gulli Sahu*, 42 Cal. 793 (798, 799); 26 I.C. 335, 16 Cr.L.J. 31, 19 C.W.N. 221, 21 C.L.J. 112; *Sandal Singh v. District Magistrate, Dehra Dun*, 35 Cr.L.J. 1296 (1299), 56 All. 409, 151 I.C. 279, A.I.R. 1934 All. 148, 1934 Cr.C. 214, 1934 A.L.J. 556, 7 R.A. 128. For contra see *Bai Asha*, 117 I.C. 321, 53 Bom. 149, A.I.R. 1929 Bom. 81, 30 Cr.L.J. 772, 36 Bom.L.R. 62.

(11) An order of conviction made by the Union Bench under the Bengal Village Self-Government Act (V of 1919) as the High Court's revisional power under this section seems to be restricted by the provisions of secs. 71 and 93 of the said Act. The powers of superintendence given to the High Court under sec. 107, Government of India Act, might justify, in a proper case, interference with an order of conviction made by the Union Bench—*Yasin Maral v. Isaf Khan*, A.I.R. 1932 Cal. 867, 59 Cal. 1080, 1932 Cr.C. 891, 34 Cr.L.J. 111, 140 I.C. 873. Section 71 of the Bengal Village Self-Government Act (V of 1919) bars any appeal by a person convicted by a Union Bench. The right to challenge any such decision is not taken away but it must be exercised in the manner provided in the Act itself. There cannot be any such challenge by way of invocation of the revisional jurisdiction of the High Court, the jurisdiction invoked in all such cases being a jurisdiction derived from the Code of Criminal Procedure, and outside Chap. XXXIII of that Code—*Hari Sadhan Roy v. Probhakar Roy*, 40 Cr.L.J. 359, 180 I.C. 408, A.I.R. 1939 Cal. 259, I.L.R. (1938) 2 Cal. 523. See also *Badri Nath y. Sheopthal* in Note 1171,

(12) An order by which the names of persons cancelled from the list of jurors are restored—*Nagendra Chandra v. Benamali*, A.I.R. 1924 Cal. 487, 38 C.W.N. 363, 152 I.C. 10, 1934 Cr.C. 695.

(13) Orders of convictions and sentences passed by a Special Magistrate under the Bengal Suppression of Terrorist Outrages (Supplementary) Act (XXIV of 1932) are not subject to revision by the High Court—*Madan Mohan Ray*, 63 Cal. 1086, 40 C.W.N. 735.

(14) The order passed by the Additional District Magistrate in the exercise of the special powers conferred upon the District Magistrate by sec. 4, U. P. Naik Girls' Protection Act (II of 1929), is an executive order passed by an officer of the Government specially designated to carry out the provisions of that Act and not a judicial order passed by an inferior Criminal Court constituted under the Cr. P. C., so that the revisional powers of the High Court under sec. 439, Cr. P. C., cannot be invoked for setting aside that order—*Hazari v. Emp.*, 40 Cr.L.J. 305, 180 I.C. 37, A.I.R. 1939 All. 124, 1938 A.L.J. 1147, 11 R.A. 407, I.L.R. 1939 All. 178.

(15) An order passed by the District Magistrate permitting the taking out of a certain procession under certain conditions in order to prevent any breach of the peace is purely an executive order for controlling the procession which he could pass as a District Magistrate and no revision against that order lies—*Mohammad Ahmad Khan v. Emp.*, 41 Cr.L.J. 781, 189 I.C. 666, 1940 O.W.N. 652.

(16) An order passed by the District Magistrate directing payment of costs of capture and feeding of an elephant, which escaped into the jungle from the custody of the servant of its owner and was captured by a person at some cost, is not even an executive order and is not liable to revision under this section—*Bejoy Krishna Deb v. Shyam Narain Singh*, 41 Cr.L.J. 442, 187 I.C. 310, A.I.R. 1940 Cal. 30, I.L.R. (1939) 2 Cal. 532.

(17) An order made by the Magistrate under sec. 63 of the Indian Merchant Shipping Act (XXI of 1923)—*A. F. Noronha v. Gladstone Wyllie*, 45 C.W.N. 55.

See also Note 1207 under sec. 439.

1173. Orders which are open to revision:—The following orders being judicial orders, are open to revision:—

(1) An order passed by a Magistrate under sec. 449 of the Calcutta Municipal Act—*Abdul Samad v. Corporation of Calcutta*, 33 Cal. 287; *Chuni Lal v. Corporation of Calcutta*, 34 Cal. 341.

(2) The proceedings of a Magistrate under sec. 113 of the Railways Act (IX of 1890)—*Grey v. N. W. Ry.*, 1891 P.R. 13; *Horniman*, 34 Bom L.R. 1666.

(3) An order passed by a Magistrate under E. B. and Assam Disorderly Houses Act—*Rajani Khemtawali v. Pramatha*, 37 Cal. 287.

(4) An order made by a District Judge under sec. 58 of the Forest Act (VII of 1878) on appeal from the order of a Magistrate passed under sec. 54 of that Act—*Nathu Khan*, 4 All. 417 (419).

(5) An order purporting to have been made under sec. 283 of the Cantonment Code (1899)—*Mangi Ram*, 1909 P.R. 9, 4 I.C. 611, 11 Cr.L.J. 17.

(6) An order passed by a Magistrate under sec. 161 (2) of the Bombay District Municipalities Act (III of 1901)—*In re Dinbai*, 43 Bom. 864 (866), 20 Cr.L.J. 702.

(7) An order passed by a Magistrate under sec. 2 of the Workmen's Breach of Contract Act (1859), directing either the return of the advance or specific performance of the contract—*Devappa*, 43 Bom. 607 (609), 20 Cr.L.J. 316. The Workmen's Breach of Contract Act has been repealed.

(8) An order passed by a Magistrate under the Upper Burma Ruby Regulation 1887 is open to appeal or revision under the Cr. Pro. Code, although under the Regulation no specific provision appears to have been made for appeal or revision—*Maung Po Leone*, 2 Rang. 321 (323), 26 Cr.L.J. 289.

(9) An order of a Magistrate acting under sec. 221 of the Madras Local Boards Act (XIV of 1920)—*Rangesa Rao v. Suaminatha*, 27 L.W. 320, 29 Cr.L.J. 389 (390).

(10) An order passed under sec. 7 of the Extradition Act (XV of 1903) is a judicial and not an executive order and can be revised by the High Court under sec. 439, 491 or 561A—*Bai Asha*, 53 Bom. 149, 30 Cr.L.J. 772, 117 I.C. 321, A.I.R. 1929 Bom. 81, 36 Bom.L.R. 62. Contra see Note 1172 (10).

(11) A Magistrate's order declining to stay proceedings—*Louis Philip Dias v. Mahadev*, A.I.R. 1933 Bom. 485, 58 Bom. 49, 1933 Cr.C. 1589, 35 Bom.L.R. 1054.

• See also Note 1206 under sec. 439.

When an order passed by a judicial officer is a matter coming within the purview of law and justice and within the scope of the authority of the Courts, the mere fact that the officer passing the order states that he is acting not as a judicial officer but in his executive capacity does not oust the revisional jurisdiction of the High Court—*Shiv Nath*, 1903 P.R. 4, 7 Cr.L.J. 202 (201).

Powers of High Courts in revision:—See Notes under sec. 439.

1174. Powers of other Courts in revision:—Sessions Judges and District Magistrates when exercising their powers under this section should pay particular attention of the following points in the proceedings of the inferior Criminal Courts:—(1) the rash issue of process; (2) the dealing with disputed claims of right under colour of a charge of criminal trespass or mischief, and convictions held of the former offence without a finding as to the criminal intent; (3) the indiscreet imposition of fines beyond the means of offenders; (4) the light punishment by inferior Courts of offences requiring severe punishments in cases which ought to have gone up to a superior Court for enhanced punishment; (5) the imposition of heavy fines in addition to imprisonment, with a view, in default of payment, to extend the term of imprisonment beyond the ordinary powers of the Magistrate to inflict; (6) the exaction of excessive bail or excessive security for keeping the peace or for good behaviour; (1) unnecessary delay in the trial of cases—*Mad. H. C. Rul 17-12-1884*, para. 17.

Suspension of sentence—Release on bail:—By the italicised words added at the end of sub-sec. (1), "power is given to suspend a sentence or to release an accused on bail pending the examination of the record, thus avoiding the result, should delay occur, that the sentence may have been served before orders are passed"—*Statement of Objects and Reasons* (1914).

1175. Sub-section (4):—The intention of the Legislature in enacting this clause is to prevent the Sessions Judge and the District Magistrate from simultaneously exercising their powers of revision, and to prevent them from exercising their powers in such a way as would amount to one of them as it were hearing an appeal from or reviewing an order passed by the other—*Debi Din*, 4 O.C. 119.

The District Magistrate or the Sessions Judge cannot entertain a second application for revision on the same facts—*Chunnu v. Kripa*, 34 Cr.L.J. 923, 145 I.C. 280

Under this section, the District Magistrate and the Sessions Judge have co-ordinate powers; and therefore, after an application for revision has been made to the District Magistrate, no further application can be entertained by the Sessions Judge, even though the Sessions Judge was not asked to revise the order passed by the District Magistrate in revision but only to call for the record and report the Magistrate's order to the High Court—*Karpurasundaram*, 17 M.L.J. 153; nor can the Sessions Judge act *suo motu* to call for the records under this section, after an application has been made to the District Magistrate—*Waryam*, 1912 P.R. 10, 14 Cr.L.J. 134. Where a complaint having been dismissed by the Deputy Magistrate under sec. 203, a fresh complaint was made before the District Magistrate in revision, who again dismissed the complaint, it was not open to the Sessions Judge to order further inquiry into the complaint—*Sheik Siddiq v. Sheikh Chakuri*, 17 C.W.N. 451 17 Cr.L.J. 608. Similarly, the District Magistrate is prohibited by this sub-section from entertaining an application for a direction to commit the accused, after a similar application to the Sessions Judge has been refused, the reason for the prohibition being the avoidance of a conflict between the orders of the two District authorities having co-ordinate powers in the matter—*Kalimuthu*, 26 Mad.

477. But where an application for revision preferred to the Sessions Judge has been dismissed for want of prosecution, the District Magistrate is competent to entertain a second application for revision and exercise his powers under this section—*Debi Din*, 4 O.C. 119.

Where a District Magistrate called for the record of a case in which the accused had been discharged, and where the complainant subsequently presented an application to the Sessions Judge to have the order of discharge of the accused set aside, and the Sessions Judge sent for the proceedings and after a perusal of them ordered the committal of the accused for trial, it was held that the Sessions Judge's action was not illegal since no application was made to the District Magistrate, and as the District Magistrate's action in calling for the record was not equivalent to entertaining an application—*Po Gyi*, 8 L.B.R. 361, 17 Cr.L.J. 497.

The word "made" in this sub-section means not only "made" but "entertained and decided." Making an application does not merely mean presenting a petition to the District Magistrate or the Sessions Judge but it must mean something more, *i.e.*, that the application must be heard and determined. Thus, where a District Magistrate declined to consider a revisional application on the merits on the ground that it would be convenient to present the application to the Sessions Judge, this sub-section cannot operate as a bar to the entertainment of the application by the Sessions Judge—*Appachi Goundan*, 32 Cr.L.J. 1278, 134 I.C. 990, 34 M.L.W. 44, 1931 M.W.N. 771, 61 M.L.J. 123, 54 Mad. 842, A.I.R. 1931 Mad. 772, Ind. Rul. 1931 Mad. 878, 1931 Cr.C. 1028.

Revision and Appeal:—There is a distinction between a revision and an appeal. In the latter the appellant is given a statutory right to demand an adjudication from the Court either on a question of fact or on a question of law or upon both. When a matter comes up in revisional jurisdiction the appellant has no right whatsoever beyond the right of bringing his case to the notice of the Court. It is for the Court to interfere in exceptional cases where it seems that some real and substantial injustice has been done. That is the main point which the Court has to consider. A revisional application is not to be regarded as in some sort a second appeal on a question of law—*Jafar Khan*, 36 Cr.L.J. 907 (908), A.I.R. 1935 All. 814, 156 I.C. 101. Where it is an application in revision and not an appeal the main question which the High Court has to consider is whether substantial justice has been done. In the case of an appeal the applicants no doubt are entitled to demand an adjudication upon all questions of fact or law which they wished to raise but in revision the only question is whether the High Court should interfere in the interests of justice—*Kewal Singh*, 37 Cr.L.J. 1022, 164 I.C. 701, 9 R.A. 184, 1936 A.L.R. 798.

436. On examining any record under section 435 or otherwise, the High Court or the Sessions Judge may direct the District Magistrate by himself or by any of the Magistrates subordinate to him to make, and the District Magistrate may himself make or direct any subordinate Magistrate to make, further inquiry into any complaint which has been dismissed under section 203 or sub-section (3) of section 204, or into the case of any person accused of an offence who has been discharged:

Provided that no Court shall make any direction under this section for inquiry into the case of any person who has been discharged, unless such person has had an opportunity of shewing cause why such direction should not be made.

Change:—This is an old sec. 437; and the old sec. 436 has been renumbered as sec. 437.

The words "person accused of an offence" have been substituted for the words "accused person" occurring in the old section. "There have been different rulings as to whether the expression *accused person* in this section means any person *accused of an offence*, and it is now made clear that it does"—*Statement of Objects and Reasons* (1914). The proviso has been newly added. "We have added a proviso to this section to give effect to the rule laid down by the Courts that a fresh inquiry should not be made into the case of a person who has been discharged unless he has had an opportunity of showing cause"—*Report of the Joint Committee* (1922).

1175A. Scope:—This section does not speak of *Presidency Magistrates*, and the High Court has no power under this section to direct further inquiry into a case of dismissal of complaint or discharge of accused by a Presidency Magistrate—*Kedar Nath v. Khetranath*, 6 C.L.J. 705; *Debi Bux v. Jutmal*, 33 Cal. 1282 (1284); *Charubala v. Barendra*, 27 Cal. 126 (129); *Mir Ahwad v. Mahomed Askari*, 29 Cal. 726 (731, 734), 6 C.W.N. 633; *Dole Gobind*, 28 Cal. 211 (216). But the High Court can exercise such power under sec. 439—*Malik Pratap v. Khan Mahomed*, 36 Cal. 994 (997); and if not under sec. 439 of this Code, at any rate under sec. 15 of the Charter Act—*Charubala v. Barendra*, *supra*; *Debi Bux v. Jutmal*, *supra*. See Note 682 under sec. 203.

A Sessions Judge can revise an order of discharge passed by a Magistrate, in a case instituted under sec. 476, even though he is moved by a private person to do so. There is nothing in this Code to limit the persons who can bring the matter (*i.e.*, the order of discharge) to the notice of the Sessions Judge, and it is immaterial how these facts are brought to his notice—*Peary Lal v. Sagar Mal*, 49 All. 230, 25 A.L.J. 42, 27 Cr.L.J. 1130.

This section is only an enabling section and does not take away by implication the jurisdiction vested in a Magistrate to hear the complaint again—*Harbai v. Raya Premji*, 40 Cr.L.J. 745 (747), 183 I.C. 283, A.I.R. 1939 Sind 193, 12 R.S. 44, 1 L.R. 1940 Kar. 74 (F.B.), following *Mir Ahwad v. Mahomed Askari*, *supra*. See Notes under sec. 203.

1176. Who can direct further inquiry:—The mention of the three tribunals together, the High Court, the Sessions Judge and the District Magistrate, shows that the Legislature intended them to have the same power with regard to the matter dealt with under this section—*Haridas v. Saritulla*, 15 Cal. 608; *Narayanawamy*, 32 Mad. 220. But though the powers of the three tribunals are co-ordinate, still as a matter of procedure the application should be made at first to the lower tribunal. Thus, where a District Magistrate has dismissed a complaint under sec. 203, the High Court will not entertain an application for revision under this section unless a previous application has been made to the Sessions Judge. The High Court will interfere only as a Court of last resort—*Gullay v. Bakar Husain*, 28 All. 268; *Kali Charan*, 1904 A.W.N. 232. So also, where the District Magistrate and the Chief Court have concurrent jurisdiction, an order under this section will be more conveniently made by the District Magistrate than by the Chief Court—*Rahim Ali*, 1888 P.R. 7.

Where a person has been improperly discharged, no reference to the High Court is necessary; the District Magistrate can himself order a fresh inquiry—*Raola Viskta*, Ratanlal 213; *Dajiba*, Ratanlal 988. The intention seems to be to give revisional jurisdiction to the Sessions Court or District Magistrate in cases of improper discharge concurrently with that of the High Court, and thereby to obviate the expense and inconvenience which the necessity to resort to the High Court might in some cases entail—*Balasinnatambi*, 14 Mad. 334 (338).

Since the District Magistrate and the Sessions Judge have co-ordinate powers under this section to direct further inquiry, it follows that where a District Magistrate has directed an inquiry into a case and decided upon it, the Sessions Judge is not competent to order further inquiry under this section—*Shaikh Siddiq v. Shaikh Chakuri*, 17 C.W.N. 451, 17 Cr.L.J. 608. See Note 1175 under sub-sec. (4) to sec. 435. In like manner, when the Sessions Judge has made an order for further inquiry under this section, the District Magistrate cannot make a contrary order, but should submit the matter to the High Court through the medium of the Public Prosecutor—*Prithi*, 12 All. 434. When

a further inquiry has been refused by one of the officers, it should not be ordered by the other; if the Sessions Judge is of opinion that the order of the District Magistrate for further inquiry is wrong, it is open to the Judge to refer the matter to the High Court, under sec. 438, but he has no power to review the order passed by the District Magistrate under this section—*Darbari v. Jagoo Lal*, 22 Cal 573.

A District Magistrate can make a further inquiry not only in a case in which an order of discharge has been passed by a subordinate Magistrate but also in a case in which an order of discharge has been passed by himself. This section is not controlled by sec. 369. In other words, a further inquiry does not amount to a view of a judgment of discharge—*Bidhu Chandanini v. Mati Sheikh*, 28 Cal. 102 (104).

A Deputy Magistrate placed in charge of the current duties of the District Magistrate is not thereby invested with the jurisdiction of a District Magistrate under this section—*Ramanand v. Koylash*, 11 Cal. 236.

Further inquiry after prior refusal:—When a District Magistrate has once decided under this section that there is no case for further inquiry, he cannot subsequently order further inquiry; such an order would be an order reviewing the earlier one and is prohibited by sec. 369—*Nga Than*, 5 Bur.L.T. 37, 13 Cr.L.J. 301. So also, where a District Magistrate refuses to direct further inquiry, it is not competent to his successor-in-office, in the face of his predecessor's order, to direct a further inquiry—*Ratta Singh v. Kari Singh*, 4 C.W.N. 100. But a District Magistrate, who has once declined to order further inquiry on the ground that there was no cause for interference, is competent to order further inquiry on a new information being brought to his notice—*Krishnaji, Ratanlal* 522 (523).

1177. Who can be directed to make further inquiry:—The District Magistrate may be directed to make further inquiry, even though he exercises enhanced powers under sec. 30 of the Code—*Jalloo*, 1904 P.R. 15. The District Magistrate may direct a subordinate Magistrate to make further inquiry under this section. For the purposes of this section, a first class Magistrate is subordinate to the District Magistrate—*Laskari*, 7 All 853; *Padmanabha*, 8 Mad 18. The District Magistrate has a discretion in selecting the particular Magistrate who is to make the further inquiry under this section, and this discretion in selection is vested in the District Magistrate and not in the Sessions Judge. The Sessions Judge has not the power of directing a particular subordinate Magistrate by name to make the further inquiry—*Chundi Churn v. Hem Chandra*, 10 Cal. 207; *Queen-Emp v. Dorabji Hormasji*, 10 Bom 131; *Ramaswami v. Subban*, 32 Cr.L.J. 226, 129 I.C. 79, 1930 M.W.N. 911, 32 M.L.W. 782, A.I.R. 1930 Mad 983, Ind. Rul. 1931 Mad. 223. The language of this section is plain and leaves no room for doubt that the Sessions Judge has not the power in directing the same Magistrate to go on with the inquiry in the light of the observations he has made in his judgment. (*Per Haveliwala, A.J.C.*)—*Jethanand Munjmal v. Shivram*, 38 Cr.L.J. 596 (601), 168 I.C. 777, A.I.R. 1937 Sind 86, 9 R.S. 239. In the same case Mehta, A.J.C., took a different view and observed: "If a District Magistrate can select a Magistrate under him to make the further inquiry, there is no reason why the High Court and the Court of Session exercising the same power may not do so . . . Ordinarily when the Sessions Judge does not wish to send the case back to the same Magistrate he has no special choice and leaves the option to the District Magistrate, but that does not mean that the Sessions Judge cannot select the Magistrate himself. To deny the right of selection to the Sessions Judge, it must be remembered, is to deny the right to the High Court also, so far as the wording of sec. 436 goes." But where in case of a Sessions offence, the Sessions Judge directed the further inquiry to be made by a Magistrate specially empowered under sec. 30, because having formed an opinion on the evidence he considered that the case should be disposed of by a special power Magistrate rather than that it should be committed to him (Sessions Judge), *held* that the action of the Sessions Judge was not improper—*Tun Win*, 4 L.B.R. 233, 7 Cr.L.J. 493 (494) (distinguishing 10 Cal. 207).

The further inquiry should ordinarily be made by the same Magistrate who held the

first inquiry—*Brij Kishore v. Gopal*, 11 C.W.N. 316 (319); *Ram Bhagos v. Baban*, 36 All. 129 (132); except in case of death or transfer of such Magistrate, in which case it may be conducted by another Magistrate—*Erramreddi*, 8 Mad. 296; *Amir Khan*, 8 Mad. 336. But it is not illegal for the Sessions Judge to direct the further inquiry to be made by a Magistrate other than the Magistrate who had discharged the accused—*Tun Win*, 4 L.B.R. 233, 7 Cr.L.J. 493 (494). Where the further inquiry involves the taking and weighing of additional evidence, the function will generally be best performed by the same Magistrate who made the previous inquiry; but peculiar or prejudiced views or even the possibility of them, may make it desirable to bring a fresh mind into the facts. Where the further inquiry involves the consideration of the same evidence or of the testimony of the same witnesses, it is usually desirable that the inquiry should be committed to a different Magistrate from the one who has made the first inquiry and has already formed an opinion on the case—*Balkrishna, Ratanlal* 328 (329). Where the Magistrate who had held the first inquiry had dealt with the case in a most unsatisfactory way, it was held to be a good ground for directing the further inquiry to be made by a different Magistrate—*Narayanawamy*, 32 Mad. 220. Where there were many irregularities in the proceedings before the Magistrate, the High Court ordered that the District Magistrate should direct the case to be tried by some other Magistrate—*Brij Kishore v. Gopal*, 11 C.W.N. 316 (320).

But the District Magistrate cannot direct the further inquiry to be held by a Magistrate inferior to the Magistrate who held the first inquiry. Where a case has been tried by a Magistrate specially empowered under sec. 30, and has ended in a discharge, the District Magistrate should order the further inquiry to be made by the same Magistrate or by another Magistrate equally empowered, but not by a Magistrate who is not empowered under sec. 30 and who is therefore in a sense a Court of inferior jurisdiction to the Court which ordered the discharge—*Yado*, 12 N.L.R. 94, 17 Cr.L.J. 245.

When the District Magistrate has sent the case to a subordinate Magistrate for further inquiry under this section, the Sub-divisional Magistrate cannot withdraw the case to his own file from that of the subordinate Magistrate—*Sentaram, Ratanlal* 315. But when a case is sent to the Sub-divisional Magistrate for further inquiry, he can transfer the case to a 2nd class Magistrate subordinate to him—*Karuppa*, 2 Weir 563.

1178. Dismissal of complaint:—Further inquiry may be ordered when a complaint is dismissed under sec. 203 or 204 (3). But if a complaint was made in respect of one offence and the accused was convicted, further inquiry cannot be directed in respect of another offence for which no charge was made in the complaint—*Har Kishore v. Jugal*, 27 Cal. 658. Where a case was taken up not upon a complaint but upon a police-report, a Magistrate's order directing the case to be struck off is not a dismissal of complaint, and cannot be revised by the Sessions Judge—*Kamru, Ratanlal* 521. No further inquiry can be directed when no complaint was made against a person and no regular process was issued against him—*Ambar Ali v. Anjab Ali*, 39 Cal. 238. Where a complaint has been dismissed under sec. 203, the revisional jurisdiction of the District Magistrate may be exercised even though there may have been some irregularity on the part of the officer taking cognizance upon the complaint. This section also contemplates that where a complaint has in fact been dismissed under sec. 203, the revisional jurisdiction of the District Magistrate may be invoked irrespective of the consideration whether the dismissal is legal or illegal—*Sadhu Charan v. Balai*, 3 P.L.J. 346, 19 Cr.L.J. 874. Where a complaint which contained several charges was dismissed in respect of one of the charges, and the complaint was dismissed merely on the report of the President of a Panchayet without giving the complainant any opportunity to substantiate his case, it was held that there should be a further inquiry into the complaint—*Purna Chandra v. Ambika*, 23 C.W.N. 575. When ordering a further inquiry in respect of a complaint which has been dismissed under sec. 203, the Sessions Judge cannot direct that the accused be summoned, but his power is restricted to making an order for a further inquiry of the same nature as that which has been already made, i.e., a further inquiry under sec. 202—*Bechu Mian v. Anwar*, 30 C.W.N. 312, 26 Cr.L.J. 305.

Where on a complaint made against several persons the Magistrate proceeded against only one of them and convicted him, but refused to issue process against the others, *held* that the order of refusal was to all intents and purposes an order of dismissal of complaint against those persons under sec. 203—*Griish Chandra*, 29 Cal. 457, 6 C.W.N. 638; *Hari Lal*, 20 Cr.L.J. 835 (Pat.). See Note 675

This section does not lay down any rule that further inquiry should only be directed when it is found that the judgment of the Magistrate is perverse or foolish. But, as a rule of prudence, the superior Court should not lightly discard the estimate of the evidence appraised by the Court which heard it, and should not set aside the dismissal of a complaint simply because a different view of the evidence might be taken. Each case has to be decided upon its own merits—*Radha Prasad*, 28 Cr.L.J. 857 (858), 104 I.C. 633, A.I.R. 1928 Pat. 12, 9 A.I.Cr.R. 61.

1179. Discharge of accused:—Section 203 contemplates a case in which the complaint is dismissed without process being issued to the accused. Under sec. 253 (2) it is open to the Magistrate to discharge the accused at any stage of the proceeding. Where the Magistrate merely dismissed the complaint after the accused appeared in answer to summons of Court, his order cannot be considered to be otherwise than an order discharging the accused under sec. 253 (2), Cr. P. C.—*Bhagwan Das v. Chander Bhan*, 35 Cr.L.J. 418, 147 I.C. 335, A.I.R. 1934 All. 51, 56 All. 285, 3 A.W.R. 137, A.L.R. 1934 All. 235, 1934 A.L.J. 69, 1934 Cr.C. 107. The District Magistrate may direct further inquiry where the accused has been discharged. But it is not in every case of discharge that a further inquiry may be directed. Where the order of discharge is not perverse or foolish, and where the Magistrate has made a full inquiry and dealt at length with the evidence and recorded what appears as sound reasons for the discharge, interference under this section is illegal—*Nura*, 1902 P.L.R. 101; *Nasiruddin v. Abdul*, 1916 P.W.R. 20, 17 Cr.L.J. 161; *Dani*, 3 Lah.L.J. 97, 22 Cr.L.J. 199, 60 I.C. 55; *Kishan Chand*, 21 Cr.L.J. 591 (Lah.), 57 I.C. 91; *Faiz Muhammad*, 7 Lah.L.J. 216, 26 P.L.R. 198, 26 Cr.L.J. 1328; *Khan Zamman*, 26 Cr.L.J. 1357, 89 I.C. 397, 1 Lah. Cas. 372, A.I.R. 1926 Lah. 81. Although the word 'improperly' which occurs before the word 'discharged' in section 437, is omitted in this section, still it is illegal to direct a further inquiry unless the order of discharge was improper, i.e., manifestly perverse or foolish or based upon a record of evidence which was obviously incomplete—*Kiru*, 1911 P.R. 10, 11 I.C. 132 (138); *Zahur v. Niadar*, 9 Lah.L.J. 114, 28 Cr.L.J. 238; *Sauan*, 26 P.L.R. 291, 26 Cr.L.J. 1393; *Nabi Bux*, 1 Lah. 216; *Gopal Das v. Maghi Ram*, 26 P.L.R. 353, 26 Cr.L.J. 1508; *Sheo Charan*, 21 N.L.R. 88; *Yado*, 12 N.L.R. 94, 17 Cr.L.J. 245; *Kallu*, 4 Lah.L.J. 411, 23 Cr.L.J. 693; *Mami*, 27 P.L.R. 397, 27 Cr.L.J. 565. An order of discharge should not be set aside in revision except on such grounds as would justify the setting aside of an order of acquittal in appeal. That is, an order of discharge which is made after hearing all the evidence for the prosecution ought not to be set aside unless it can be said that the order is perverse or manifestly unreasonable and inconsistent with an honest appreciation of the evidence before the Court—*Parashram*, 57 Bom. 430, 35 Bom.L.R. 245, 1933 Cr.C. 470 (473). See also *Durgadas*, cited in Note 1181. But the Allahabad High Court is of opinion that there is no rule that a Sessions' Judge cannot interfere with an order of discharge passed by a Magistrate unless the order is manifestly foolish and perverse. The Sessions Judge can revise the order of discharge passed by a Magistrate, where he disagrees with the finding of the Magistrate and points out considerations which in his opinion should have led to a different thing—*Peary Lal v. Sagar Mal*, 49 All. 230, 27 Cr.L.J. 1130. The word "improperly" which is to be found in sec. 437 has been omitted from this section, and the omission seems to indicate that it was intended by the Legislature to confer a very wide discretion, so as to meet not only the case in which an improper discharge has been made but also those cases in which upon the facts as they stand the discharge is proper but in the interests of justice and in regard to the peculiar and particular facts of the case it is right that the inquiry should be reopened—*Chotu*, 9 All. 52 (57, 58), 1886 A.W.N. 281 (F.B.).

No formal order of discharge is necessary, to enable the District Magistrate to direct further inquiry. When an order is one of discharge in substance, though not in form, the Sessions Judge or the District Magistrate is competent, upon motion being made by the complainant, to make an order for further inquiry—*Nogendra Nath v. Korb*, 8 C.W.N. 456. Where after the issue of warrant against certain persons, the Magistrate does not think it proper to proceed further and stops further proceedings, the termination of the proceedings is in effect an order of discharge and is, therefore, subject to revision under this section—*Moul Singh v. Mahabir*, 4 C.W.N. 242. Where a Magistrate deliberately frames a charge on a minor section instead of on the major section on which the case starts, his action is equivalent to a discharge with regard to the major offence. The Sessions Court has power to interfere under this section in such a case—*Ganga Datta*, A.I.R. 1936 Nag. 87, 37 Cr.L.J. 715, 162 I.C. 925, 1936 Cr.C. 552. Where, therefore, a person was charged with offences under secs. 323 and 307, I. P. C., and the Magistrate framed a charge under sec. 323 only and said nothing about sec. 307, held that this was equivalent to saying that there was no evidence against the accused of an offence under sec. 307, I. P. C., and that in effect the accused was discharged of that offence. The Court of revision could, therefore, order further inquiry in respect of that offence—*Sheo Narain v. Radha Mohan*, 42 All. 128 (130), 53 I.C. 618, 20 Cr.L.J. 778, A.I.R. 1919 All. 66, 17 A.L.J. 1093; *Sukhlal*, 35 Cr.L.J. 865, 148 I.C. 999, A.I.R. 1934 Cr.C. 193, 1934 A.L.J. 478.

This section applies where the accused has been discharged, i.e., discharged under sec. 209, 253 or 259—*Velu v. Chidambaram*, 33 Mad. 85; therefore, no further inquiry can be directed when the accused has been acquitted by a Magistrate—*Bajjnath v. Gaurikanta*, 20 Cal. 633; *Erramreddi*, 8 Mad. 296; *Jaliram v. Rajkumar*, 5 C.W.N. 72; *Bishun Das*, 7 C.W.N. 493; *Kallu*, 35 Cr.L.J. 1151, 150 I.C. 852, 11 O.W.N. 818, A.I.R. 1934 Oudh 327, A.I.R. 1934 Oudh 323. If the complainant is aggrieved by the dismissal of his complaint and the discharge of the accused under sec. 259, Cr. P. C., it is open to him to move the Sessions Court to order further inquiry under this section because this section is now amended and relates not only to a dismissal of complaint under sec. 203 or under sub-sec. (3) of sec. 204 but to any case where persons accused of an offence have been discharged—*Chellomal v. Kewaimal Jeramdas*, 40 Cr.L.J. 287, 179 I.C. 898, A.I.R. 1939 Sind 38, 11 R.S. 164, I.L.R. 1939 Kar. 228. Thus, where a complaint in a summons case has been dismissed for default, the order is one under section 247 acquitting the accused. Such an order does not fall within the purview of section 436—*Bindra v. Bhagawanta*, 25 Cr.L.J. 359, 77 I.C. 295, A.I.R. 1925 Oudh 44. Even, if an order of acquittal was passed in a warrant case without any charge having been framed or evidence for the defence taken, still it cannot be subject of revision under this section—*Sayid Khan*, 1 A.L.J. 415. Where an accused is discharged under circumstances which make the order of discharge equivalent to one of acquittal, no further proceedings should be taken against him under this section—*Kiru*, 10 P.R. 1911, 11 I.C. 132 (137), 12 Cr.L.J. 364; *Dodd*, 1900 P.L.R. 31; *Pothuri Venkataramayya*, 17 Cr.L.J. 95 (Mad.). Thus, where in a summons case, the Magistrate follows the procedure of a warrant case and discharges the accused, the order of discharge is one of acquittal, although he styles it as an order of discharge, and no order under this section can be passed—*Venkataramaiyer*, 8 M.L.T. 78, 11 Cr.L.J. 350. Similarly, after a charge has been framed in a warrant case, the accused can only be acquitted under sec. 258 and not discharged, and if the Magistrate erroneously passes an order of discharge, still there can be no order for further inquiry—*Sriramulu v. Veerasalingam*, 38 Mad. 585. Where after a full trial the accused persons were discharged, the discharge was for all practical purposes as good as an acquittal, and there should be no order for further inquiry—*Sundar v. Bhaiyan*, 4 Lah L.J. 331.

The discharge of the accused under sec. 494 (a) upon withdrawal of the case by the Public Prosecutor before the frame of charge does not amount to an acquittal, and further inquiry may be directed—*Hata*, 30 P.L.R. 58, 30 Cr.L.J. 233; *Kanhaiya Lal v. Bajjnath*, 34 Cr.L.J. 519, 143 I.C. 77, A.I.R. 1933 Nag. 78, 1933 Cr.C. 315, 29 N.L.R.

201, Ind. Rul. 1933 Nag. 149; *Devendra Kumar Roy v. Yar Bakht Chaudhury*, 40 Cr.L.J. 349 (353), 180 I.C. 384, A.I.R. 1939 Cal. 220, 43 C.W.N. 301, 11 R.C. 676, I.L.R. (1939) 1 Cal. 407. See also *Dattatraya Govindrao Pakode v. Emp.*, 39 Cr.L.J. 65 (67), 172 I.C. 130, A.I.R. 1938 Nag. 76, 10 R.N. 167.

The circumstances under which an order of discharge under sec. 209, Criminal Procedure Code, will be set aside are exactly similar to those in which an order would be set aside which had been passed under sec. 253, Cr. P. C.—*Zarin*, 35 Cr.L.J. 1282, 151 I.C. 143, A.I.R. 1934 Pesh. 52, 1934 Cr.C. 884, following *Parashram*, 143 I.C. 28, A.I.R. 1933 Bom. 158, 35 Bom.L.R. 245, Ind. Rul. 1933 Bom. 266, 34 Cr.L.J. 564, 1933 Cr.C. 470, 57 Bom. 430 and dissenting from *Aulad Hussain*, 32 Cr.L.J. 128, 1930 Cr.C. 955, 7 O.W.N. 749, A.I.R. 1930 Oudh 415, 128 I.C. 285. But see *Ramchandra*, cited in Note 1190, which overruled *Parashram*, supra.

No further inquiry can be directed where the proceedings have been stopped under sec. 249 and the accused has been released—*Achhu*, 1913 P.R. 9, 13 Cr.L.J. 860.

No further inquiry can be directed in a case where the accused has been convicted. If in fact in such a case the Sessions Judge thinks that further inquiry is necessary, he must report the matter to the High Court, which Court alone can direct further inquiry in such a case—*Valav*, Ratanlal 407.

Where the order is neither one of dismissal of complaint nor one of discharge of accused, no order for further inquiry can be passed. Thus, where on the acquittal of an accused, the other accused against whom processes of arrest had been issued surrendered before the Deputy Magistrate, and he passed an order directing that the accused should not be proceeded against and that the warrant and other processes issued against him be withdrawn, the order was neither one of dismissal of complaint nor one of discharge of the accused, and the District Magistrate had no jurisdiction under this section to direct further inquiry—*Panchu v. Khoosdel*, 12 C.W.N. 68.

When the Police refer a case as false and the Magistrate orders it to be so treated this is not a judicial act and such an order is not revisable by the Sessions Judge under this section—*Venkata Subba Rao v. Anjanayulu*, 33 Cr.L.J. 785 (788), 139 I.C. 500, 1932 M.W.N. 548, Ind. Rul. 1932 Mad. 733, 36 M.L.W. 788, A.I.R. 1932 Mad. 673, 63 M.L.J. 679, 1932 Cr.C. 831.

1180. No further inquiry where no accusation of 'offence':—Further inquiry can be directed only in the case of an *accused person*, the term 'accused' means a person accused of an *offence* and not a person against whom proceedings are taken under Chap. VIII—*Imam Mandal*, 27 Cal. 662; *Dayanath*, 33 Cal. 8. Therefore, sec. 436 does not enable a Court to order further inquiry to be made in a case of discharge of a person against whom security proceedings were taken under Chap. VIII, because such a person was not in the position of an accused person and could not be said to have committed an 'offence'—*Imam Mandal*, 27 Cal. 662; *Dayanath*, 33 Cal. 8; *Roshan Singh*, 46 All. 235; *Mid. Yusuf v. Abdul Majid*, 53 All. 148, 32 Cr.L.J. 570, 130 I.C. 630, 1930 A.L.J. 1475, A.I.R. 1931 All. 53, 1931 Cr.C. 125, Ind. Rul. 1931 All. 294; *Maung Than*, A.I.R. 1924 Rang. 207, 81 I.C. 970, 25 Cr.L.J. 1146, 2 Rang. 30 (31); *Velu v. Chidambaram*, 33 Mad. 85; *Naram v. Durga*, 1911 P.R. 6, 12 Cr.L.J. 232, 10 I.C. 178. The word 'discharged' in sec. 119 means only 'permitted to depart' and does not mean the discharge of an *accused* as contemplated by this section; therefore, further inquiry cannot be directed in a case of discharge under sec. 119—*Velu v. Chidambaram*, supra. This is now made clear by the present amendment by the use of the words "accused of an offence." (The contrary view taken in 21 All. 107, 24 All. 148, 36 All. 147, 16 Bom. 661, 35 Bom. 401, is no longer correct). If a District Magistrate, on examining the record of a security case, is of opinion that the person discharged by the subordinate Magistrate ought to be proceeded against, he can, under sec. 428, report the result of his examination of the record to the High Court, which will then pass the necessary orders. But he cannot direct further inquiry under sec. 435—*Roshan Singh*, 46 All. 235, 22 A.L.J. 129, 25 Cr.L.J. 467; *Near Ahir*, 51 All. 408, 30 Cr.L.J. 63 (64); *Mid. Yusuf v. Abdul Majid*, supra.

This section does not apply to proceedings under sec. 133 of the Code, since the person proceeded against under that section is not said to have committed an 'offence'. A Sessions Judge or District Magistrate acts without jurisdiction if he directs further inquiry into proceedings under that section—*Srinath v. Ainaddi*, 24 Cal. 395; *Idranath*, 25 Cal. 425; *Prithipal*, 2 O.W.N. 549, 26 Cr.L.J. 1251. The only action which a Sessions Judge or District Magistrate can take in such case will be under sec. 438—*Prithipal*, supra. Similarly, proceedings under sec. 144 do not refer to any offence; and no further inquiry can be directed in a case under that section—*Har Kishore v. Jugal*, 27 Cal. 658. So also, this section does not authorise a Magistrate to direct further inquiry into a case under section 145, as that section has no reference to any offence at all—*Chathu v. Niranjani*, 20 Cal. 729; *Maung San v. Maung Mye*, 30 C.L.J. 709, 117 I.C. 59, A.I.R. 1928 Rang. 292, Ind Rul. 1929 Rang. 171. The proper procedure in such a case is to make a reference to the High Court under sec. 438—*Maung San*, supra. So again, the District Magistrate cannot direct further inquiry into cases under sec. 488, since refusal of maintenance is not an 'offence' and the application for maintenance is not a complaint of an offence—*Parbati v. Chotey*, 17 C.P.L.R. 127, 1 Cr.L.J. 864; *Tokee Bibee v. Abdul Khan*, 5 Cal. 536.

1181. When further inquiry may be directed:—A Sessions Judge or District Magistrate has jurisdiction to direct further inquiry or a re-hearing upon the same materials which were before the subordinate Magistrate though there is no further evidence forthcoming—*Haridas v. Saritulla*, 15 Cal. 608; *Balasinnatambi*, 14 Mad. 334; *Dorabji*, 10 Bom. 131; *Chotu*, 9 All. 52 (56) (F.B.); *Dayanand*, 23 A.L.J. 20, 25 Cr.L.J. 376; *Sahib Kaur v. Md. Kasim*, 14 P.R. 1891; *Haider Khan*, 25 Cr.L.J. 66, 75 I.C. 978, A.I.R. 1925 Oudh 36; *Po Yin*, 3 L.B.R. 97. Further inquiry does not in all cases mean taking of additional evidence, but may mean rehearing and reconsideration of the evidence already taken—*Dulla*, 1901 P.R. 2; *Sheocharan*, 21 N.L.R. 88, 26 Cr.L.J. 1537, 90 I.C. 385, A.I.R. 1926 Nag. 117; *Begraj*, 10 S.L.R. 68, 17 Cr.L.J. 349. But in *Harbhanj v. Jowala*, 1887 P.R. 68, and *Amir Khan*, 8 Mad. 336, it has been held that further inquiry means the taking of additional evidence and not a mere re-hearing of the same evidence, which is the same thing as retrial; and therefore, where there has been a full inquiry by a competent Court and the accused has been discharged, the Sessions Judge has no power to direct a further inquiry, unless further evidence has been disclosed—*Dodd*, 1900 P.L.R. 31. The Calcutta High Court has also held that in cases where the trying Magistrate has discussed the evidence carefully and has given sufficient reason for the discharge of the accused, and no fresh evidence is likely to be produced on further inquiry, the superior Court should hesitate before ordering further inquiry, unless there are palpable errors in the decision of the lower Court—*Abdul Rashid v. Momtaz*, 38 C.L.J. 206, A.I.R. 1924 Cal. 229, 25 Cr.L.J. 191; *Sulav v. Prafulla*, 50 C.L.J. 284, 1929 Cr.C. 467, A.I.R. 1929 Cal. 755.

Reference may be made to the case in *Hari Dass Sanyal v. Saritulla*, 15 Cal. 608 (F.B.), the case in *Queen-Emp. v. Chatu*, 9 All. 52, 1886 A.W.N. 281 (F.B.), the case in *Narayanaswamy Naidu v. Emp.*, 32 Mad. 220, 1 I.C. 228, 19 M.L.J. 157, and the case in *Begraj Basharam v. Emp.*, 10 S.L.R. 68, 35 I.C. 525, A.I.R. 1916 Sind 63, 17 Cr.L.J. 349, in support of the statement that a Sessions Judge or District Magistrate has jurisdiction to direct a further inquiry or re-hearing upon the same materials which were before the Subordinate Magistrate, though there is no further evidence forthcoming. But none of those cases is authority for the statement that any such further inquiry or re-hearing is justified when the order of the Magistrate upon the evidence appears to be a reasonable order—*Azizuddin R. Faruqui v. Emp.*, 40 Cr.L.J. 454 (455), I.L.R. 1939 Kar. 370, 180 I.C. 581, 11 R.S. 180, A.I.R. 1939 Sind 71.

Generally speaking, further inquiry after discharge is improper unless the order of discharge is manifestly perverse or foolish or is based upon a record of evidence which is obviously incomplete—*Kruu*, 11 I.C. 132, 12 Cr.L.J. 364, 24 P.W.R. 1911 (Cr.), 205 P.L.R. 1911, 10 P.R. 1911 (Cr.) (F.B.); *Dani v. Emp.*, 60 I.C. 55, 22 Cr.L.J. 199, 3 U.P.L.R. (L.) 11, 3 Lah.L.J. 97; *Nabi Baksh v. Emp.*, 56 I.C. 777, 1 Lah. 216,

This section does not apply to proceedings under sec. 133 of the Code, since the person proceeded against under that section is not said to have committed an 'offence'. A Sessions Judge or District Magistrate acts without jurisdiction if he directs further inquiry into proceedings under that section—*Srinath v. Ainaddi*, 24 Cal. 395; *Idranath*, 25 Cal. 425; *Prithipal*, 2 O.W.N. 549, 26 Cr.L.J. 1251. The only action which a Sessions Judge or District Magistrate can take in such case will be under sec. 438—*Prithipal*, supra. Similarly, proceedings under sec. 144 do not refer to any offence; and no further inquiry can be directed in a case under that section—*Har Kishore v. Jugal*, 27 Cal. 658. So also, this section does not authorise a Magistrate to direct further inquiry into a case under section 145, as that section has no reference to any offence at all—*Chathu v. Niranjani*, 20 Cal. 729; *Maung San v. Maung Mye*, 30 C.L.J. 709, 117 I.C. 59, A.I.R. 1928 Rang. 292, Ind. Rul. 1929 Rang. 171. The proper procedure in such a case is to make a reference to the High Court under sec. 438—*Maung San*, supra. So again, the District Magistrate cannot direct further inquiry into cases under sec. 488, since refusal of maintenance is not an 'offence' and the application for maintenance is not a complaint of an offence—*Parvati v. Chotey*, 17 C.P.L.R. 127, 1 Cr.L.J. 864; *Tokee Bibee v. Abdul Khan*, 5 Cal. 536.

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21 Cr.L.J. 521, 109 P.L.R. 1920, 8 P.W.R. 1920 (Cr.); *Karam Chand v. Mathra Das*, 72 I.C. 369, A.I.R. 1923 Lah. 329, 24 Cr.L.J. 369, 7 P.W.R. 1923 (Cr.); *Jagadamb*, 81 I.C. 802, A.I.R. 1924 Oudh 368, 25 Cr.L.J. 1026, 11 O.L.J. 334, 1 O.W.N. 345; *Nazar Muhammad v. Jumma*, 38 Cr.L.J. 1072, 171 I.C. 336, 39 P.L.R. 402, A.I.R. 1937 Lah. 682, 10 R.L. 186. The same principle is applicable to cases where a complaint has been dismissed under sec. 203, Cr. P. C.—*Nazar Muhammad v. Jumma*, supra; *Moti Lal v. Emp.*, 29 Cr.L.J. 39, 9 A.I.Cr.R. 328 and 399, A.I.R. 1928 Lah. 97, 106 I.C. 455, 9 Lah.L.J. 508, not following *Pearey Lal v. Sagar Mal*, 97 I.C. 650, 49 All. 230, 27 Cr.L.J. 1130, 25 A.L.J. 42, A.I.R. 1927 All. 38. But see *Aulad Husain*, 32 Cr.L.J. 128, 128 I.C. 285, 7 O.W.N. 749, A.I.R. 1930 Oudh 415, Ind. Rul. 1931 Oudh 45, 1930 Cr.C. 955; *Dulu v. Khusal*, 147 I.C. 447, 34 P.L.R. 833, 35 Cr.L.J. 449 (451); *Shocharan*, supra; *Nathu*, 37 Cr.L.J. 89, 159 I.C. 238, 8 R.N. 124, 18 N.L.J. 90. It may be that another view may be taken of the case than that which the Magistrate took; but that circumstance alone would not justify a retrial—*Mubarak Jan v. Rahat Jan*, 32 Cr.L.J. 302, 129 I.C. 300, A.I.R. 1930 Lah. 543, 1930 Cr.C. 691, Ind. Rul. 1931 Lah. 188, 31 P.L.R. 729; *Ishar Singh*, Ind. Rul. 1932 Lah. 631. Where the Magistrate has not dealt with the evidence, it is certainly open to the District Magistrate to direct a further enquiry—*Bhagawantrao*, 37 Cr.L.J. 858, 163 I.C. 702, 18 N.L.J. 238, following *Shocharan*, supra. Where a man is discharged under circumstances which make the order of discharge equivalent to one of acquittal, no further proceedings should be taken against him under this section—*Kiru*, supra. The mere fact that the District Magistrate places a different value on the evidence from that placed by the trial Court is not a good reason for directing further enquiry under this section—*Dani*, 60 I.C. 55, 22 Cr.L.J. 199, 3 Lah. 97. The order of the Magistrate may not commend itself to the District Magistrate, the Magistrate may or may not have attached too much importance to the discrepancies and too little to the probabilities, but unless the order can be said to be perverse or foolish, it will not be interfered with—*Ghulam*, 102 I.C. 783, A.I.R. 1927 Lah. 815, 28 Cr.L.J. 607. See also *Daulat Ram*, 34 Cr.L.J. 190, 141 I.C. 263, 34 P.L.R. 148, A.I.R. 1933 Lah. 166, 1933 Cr.C. 311, Ind. Rul. 1933 Lah. 105. Unless the view taken by the Magistrate is palpably unreasonable or perverse, the Sessions Judge or the District Magistrate should not order further enquiry on the same materials because he was inclined to take a view of the evidence different from that of the Magistrate—*Diwan Singh*, 34 Cr.L.J. 735 (737), 144 I.C. 331, A.I.R. 1933 Lah. 561, 34 P.L.R. 719, 1933 Cr.C. 819, Ind. Rul. 1933 Lah. 446. It is not for the accused to convince the Court of Revision why further enquiry should not be ordered against him, but it is for the prosecution to bring the case within the rule laid down in *Kiru's* case—*Diwan Singh*, supra.

* An order of discharge should only be set aside very sparingly and only when it can be said either to be perverse or *prima facie* incorrect when there is a suggestion that any further evidence may be forthcoming. But in this section no distinction is drawn between a discharge where all the evidence had been heard for the prosecution and a discharge where it had not all been heard—*Nazir Ahmad*, 36 Cr.L.J. 202, A.I.R. 1934 All. 944, 4 A.W.R. 37, 152 I.C. 884, 1934 Cr.C. 1256. Where the trying Magistrate had not overlooked or ignored any evidence nor could it be said that the view taken by the trying Magistrate was palpably unreasonable or perverse and it was found that the trying Magistrate had seen and heard the witnesses and was not satisfied with their evidence and the order of discharge was one which could not be said to be either perverse or *prima facie* incorrect, a further enquiry under this section should not be ordered in the case—*Kallu*, 35 Cr.L.J. 1151, 150 I.C. 852, 11 O.W.N. 818, A.I.R. 1934 Oudh 327, A.L.R. 1934 Oudh 323.

When the complainant does not choose to be present for being examined on oath and his complaint is dismissed under sec. 203, Cr. P. C., he cannot be heard afterwards to say that the matter should be sent back to the Magistrate for further enquiry—*Ram Prosad*, 29 Cr.L.J. 798, 111 I.C. 126, 48 C.L.J. 90, A.I.R. 1928 Cal. 569, 11 A.I.Cr.R. 48. Where the Magistrate did not personally examine the applicant and record his statement when the complaint was presented and did not take the applicant's evidence, these were

This section does not apply to proceedings under sec. 133 of the Code, since the person proceeded against under that section is not said to have committed an 'offence'. A Sessions Judge or District Magistrate acts without jurisdiction if he directs further inquiry into proceedings under that section—*Srinath v. Ainaddi*, 24 Cal. 395; *Idranath*, 25 Cal. 425; *Prithipal*, 2 O.W.N. 549, 26 Cr.L.J. 1251. The only action which a Sessions Judge or District Magistrate can take in such case will be under sec. 438—*Prithipal*, supra. Similarly, proceedings under sec. 144 do not refer to any offence; and no further inquiry can be directed in a case under that section—*Har Kishore v. Jugal*, 27 Cal. 658. So also, this section does not authorise a Magistrate to direct further inquiry into a case under section 145, as that section has no reference to any offence at all—*Chalku v. Nirnanjan*, 20 Cal. 729; *Maung San v. Maung Mye*, 30 Cr.L.J. 709, 117 I.C. 59, A.I.R. 1928 Rang. 292, Ind. Rul. 1929 Rang. 171. The proper procedure in such a case is to make a reference to the High Court under sec. 438—*Maung San*, supra. So again, the District Magistrate cannot direct further inquiry into cases under sec. 488, since refusal of maintenance is not an 'offence' and the application for maintenance is not a complaint of an offence—*Parbati v. Chotey*, 17 C.P.L.R. 127, 1 Cr.L.J. 864; *Tokee Bibee v. Abdul Khan*, 5 Cal. 536.

1181. When further inquiry may be directed:—A Sessions Judge or District Magistrate has jurisdiction to direct further inquiry or a re-hearing upon the same materials which were before the subordinate Magistrate though there is no further evidence forthcoming—*Haridas v. Saritulla*, 15 Cal. 608; *Balasinnatambi*, 14 Mad. 334; *Dorabji*, 10 Bom. 131; *Chotu*, 9 All. 52 (56) (F.B.); *Dayanand*, 23 A.L.J. 20, 25 Cr.L.J. 376; *Sahib Kaur v. Md. Kasim*, 14 P.R. 1891; *Haider Khan*, 25 Cr.L.J. 66, 75 I.C. 978, A.I.R. 1925 Oudh 36; *Po Yin*, 3 L.B.R. 97. Further inquiry does not in all cases mean taking of additional evidence, but may mean rehearing and reconsideration of the evidence already taken—*Dulla*, 1901 P.R. 2; *Sheocharan*, 21 N.L.R. 88, 26 Cr.L.J. 1537, 90 I.C. 385, A.I.R. 1926 Nag. 117; *Begraj*, 10 S.L.R. 68, 17 Cr.L.J. 349. But in *Harbhanj v. Jowala*, 1887 P.R. 68, and *Amir Khan*, 8 Mad. 336, it has been held that further inquiry means the taking of additional evidence and not a mere re-hearing of the same evidence, which is the same thing as retrial; and therefore, where there has been a full inquiry by a competent Court and the accused has been discharged, the Sessions Judge has no power to direct a further inquiry, unless further evidence has been disclosed—*Dodd*, 1900 P.L.R. 31. The Calcutta High Court has also held that in cases where the trying Magistrate has discussed the evidence carefully and has given sufficient reason for the discharge of the accused, and no fresh evidence is likely to be produced on further inquiry, the superior Court should hesitate before ordering further inquiry, unless there are palpable errors in the decision of the lower Court—*Abdul Rashid v. Momtaz*, 38 C.L.J. 206, A.I.R. 1924 Cal. 229, 25 Cr.L.J. 191; *Sulav v. Prasulla*, 50 C.L.J. 284, 1929 Cr.C. 467, A.I.R. 1929 Cal. 755.

Reference may be made to the case in *Hari Dass Sanyal v. Saritulla*, 15 Cal. 608 (F.B.), the case in *Queen-Emp. v. Chatu*, 9 All. 52, 1886 A.W.N. 281 (F.B.), the case in *Narayanawamy Naidu v. Emp.*, 32 Mad. 220, 1 I.C. 228, 19 M.L.J. 157, and the case in *Begraj Basharam v. Emp.*, 10 S.L.R. 68, 35 I.C. 525, A.I.R. 1916 Sind. 63, 17 Cr.L.J. 349, in support of the statement that a Sessions Judge or District Magistrate has jurisdiction to direct a further inquiry or re-hearing upon the same materials which were before the Subordinate Magistrate, though there is no further evidence forthcoming. But none of those cases is authority for the statement that any such further inquiry or re-hearing is justified when the order of the Magistrate upon the evidence appears to be a reasonable order—*Azizuddin R. Faruqi v. Emp.*, 40 Cr.L.J. 454 (455), I.L.R. 1939 Kar. 370, 180 I.C. 581, 11 R.S. 180, A.I.R. 1939 Sind. 71.

Generally speaking, further inquiry after discharge is improper unless the order of discharge is manifestly perverse or foolish or is based upon a record of evidence which is obviously incomplete—*Kiru*, 11 I.C. 132, 12 Cr.L.J. 364, 24 P.W.R. 1911 (Cr.), 205 P.L.R. 1911, 10 P.R. 1911 (Cr.) (F.B.); *Dani v. Emp.*, 60 I.C. 55, 22 Cr.L.J. 199, 3 U.P.L.R. (L.) 11, 3 Lah.L.J. 97; *Nabi Baksh v. Emp.*, 56 I.C. 777, 1 Lah. 216,

21 Cr.L.J. 521, 109 P.L.R. 1920, 8 P.W.R. 1920 (Cr.); *Karam Chand v. Mathra Das*, 72 I.C. 369, A.I.R. 1923 Lah. 329, 24 Cr.L.J. 369, 7 P.W.R. 1923 (Cr.); *Jagadamb*, 81 I.C. 802, A.I.R. 1924 Oudh 368, 25 Cr.L.J. 1026, 11 O.L.J. 334, 1 O.W.N. 345; *Nazar Muhammad v. Jumma*, 38 Cr.L.J. 1072, 171 I.C. 336, 39 P.L.R. 402, A.I.R. 1937 Lah. 682, 10 R.L. 186. The same principle is applicable to cases where a complaint has been dismissed under sec. 203, Cr. P. C.—*Nazar Muhammad v. Jumma*, supra; *Moti Lal v. Emp.*, 29 Cr.L.J. 39, 9 A.I.Cr.R. 328 and 399, A.I.R. 1928 Lah. 97, 106 I.C. 455, 9 Lah.L.J. 508, not following *Pearey Lal v. Sagar Mal*, 97 I.C. 650, 49 All. 230, 27 Cr.L.J. 1130, 25 A.L.J. 42, A.I.R. 1927 All. 38. But see *Aulad Husam*, 32 Cr.L.J. 128, 128 I.C. 285, 7 O.W.N. 749, A.I.R. 1930 Oudh 415, Ind. Rul. 1931 Oudh 45, 1930 Cr.C. 955; *Dulu v. Khusal*, 147 I.C. 447, 34 P.L.R. 833, 35 Cr.L.J. 449 (451); *Sheocharan*, supra; *Nathu*, 37 Cr.L.J. 89, 159 I.C. 238, 8 R.N. 124, 18 N.L.J. 90. It may be that another view may be taken of the case than that which the Magistrate took; but that circumstance alone would not justify a retrial—*Mubarak Jan v. Rahat Jan*, 32 Cr.L.J. 302, 129 I.C. 300, A.I.R. 1930 Lah. 543, 1930 Cr.C. 691, Ind. Rul. 1931 Lah. 188, 31 P.L.R. 729; *Ishar Singh*, Ind. Rul. 1932 Lah. 631. Where the Magistrate has not dealt with the evidence, it is certainly open to the District Magistrate to direct a further enquiry—*Bhagawantrao*, 37 Cr.L.J. 858, 163 I.C. 702, 18 N.L.J. 238, following *Sheocharan*, supra. Where a man is discharged under circumstances which make the order of discharge equivalent to one of acquittal, no further proceedings should be taken against him under this section—*Kiru*, supra. The mere fact that the District Magistrate places a different value on the evidence from that placed by the trial Court is not a good reason for directing further enquiry under this section—*Dani*, 60 I.C. 55, 22 Cr.L.J. 199, 3 Lah. 97. The order of the Magistrate may not commend itself to the District Magistrate, the Magistrate may or may not have attached too much importance to the discrepancies and too little to the probabilities, but unless the order can be said to be perverse or foolish, it will not be interfered with—*Ghulam*, 102 I.C. 783, A.I.R. 1927 Lah. 815, 28 Cr.L.J. 607. See also *Daulat Ram*, 34 Cr.L.J. 190, 141 I.C. 263, 34 P.L.R. 148, A.I.R. 1933 Lah. 166, 1933 Cr.C. 311, Ind. Rul. 1933 Lah. 105. Unless the view taken by the Magistrate is palpably unreasonable or perverse, the Sessions Judge or the District Magistrate should not order further enquiry on the same materials because he was inclined to take a view of the evidence different from that of the Magistrate—*Dewan Singh*, 34 Cr.L.J. 735 (737), 144 I.C. 331, A.I.R. 1933 Lah. 561, 34 P.L.R. 719, 1933 Cr.C. 819, Ind. Rul. 1933 Lah. 446. It is not for the accused to convince the Court of Revision why further enquiry should not be ordered against him, but it is for the prosecution to bring the case within the rule laid down in *Kiru's* case—*Dewan Singh*, supra.

* An order of discharge should only be set aside very sparingly and only when it can be said either to be perverse or *prima facie* incorrect when there is a suggestion that any further evidence may be forthcoming. But in this section no distinction is drawn between a discharge where all the evidence had been heard for the prosecution and a discharge where it had not all been heard—*Nazir Ahmad*, 36 Cr.L.J. 202, A.I.R. 1934 All. 944, 4 A.W.R. 37, 152 I.C. 884, 1934 Cr.C. 1256. Where the trying Magistrate had not overlooked or ignored any evidence nor could it be said that the view taken by the trying Magistrate was palpably unreasonable or perverse and it was found that the trying Magistrate had seen and heard the witnesses and was not satisfied with their evidence and the order of discharge was one which could not be said to be either perverse or *prima facie* incorrect, a further enquiry under this section should not be ordered in the case—*Kallu*, 35 Cr.L.J. 1151, 150 I.C. 852, 11 O.W.N. 818, A.I.R. 1934 Oudh 327, A.L.R. 1934 Oudh 323.

When the complainant does not choose to be present for being examined on oath and his complaint is dismissed under sec. 203, Cr. P. C., he cannot be heard afterwards to say that the matter should be sent back to the Magistrate for further enquiry—*Ram Prosad*, 29 Cr.L.J. 798, 111 I.C. 126, 48 C.L.J. 90, A.I.R. 1928 Cal. 569, 11 A.I.Cr.R. 48. Where the Magistrate did not personally examine the applicant and record his statement when the complaint was presented and did not take the applicant's evidence, these were

technical irregularities in procedure and were no sufficient grounds for interference in revision when the Magistrate made local enquiries and came to the conclusion that the story was not true and the matter was more or less of a civil nature—*Ram Gir v. Ravi Saran*, 36 Cr.L.J. 1035, A.I.R. 1935 All. 883, 156 I.C. 948.

When a complaint has been dismissed under sec. 203, Cr. P. C., after a full enquiry under sec. 202, Cr. P. C., the District Magistrate can interfere. There is nothing in this section to support the view that it is only on the point of law that the District Magistrate can interfere—*Durga Prasad*, 36 Cr.L.J. 526, A.I.R. 1935 All. 439, 154 I.C. 513. But the discretion of Magistrates in dismissing complaints is not lightly to be interfered with. Where he has used his discretion in dismissing a complaint, if there is as much to be said in its favour as against it, the discretion should not be interfered with. Jurisdiction in revision is not lightly to be exercised—*Sadhuram Chimandas v. Chimandas Budhuram*, 38 Cr.L.J. 742 (744), 169 I.C. 112, 9 R.S. 277, A.I.R. 1937 Sind 81.

This section is limited by the words "on examining the record under sec. 435" and that section lays down that a Court may call for and examine the record for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order. And, therefore, a District Magistrate cannot set aside an order of discharge and direct further inquiry, if he finds no irregularity, illegality or impropriety in the proceedings—*Pran Khan*, 16 C.W.N. 1078, 13 Cr.L.J. 764.

Where a Magistrate had discharged the accused without considering the necessary evidence, the Sessions Judge ought to direct further inquiry in the case—*Dhanias v. Clifford*, 13 Bom 376. Section 253, Cr. P. C., gives the Magistrate power of discharge before the entire case is complete. The District Magistrate also acts legally when he directs a further enquiry on the ground that the enquiry before the Magistrate was not a complete one—*Hakim Singh v. Lal Singh*, 31 Cr.L.J. 239, 121 I.C. 289, A.I.R. 1930 Lah 158, 1930 Cr.C. 166.

Mere lapse of time (e.g., 6 months) is not a sufficient ground for refusal to order further inquiry, if the Court feels that an offence has been committed which should be inquired into—*Brijbhukhan v. Jaurao*, 23 Cr.L.J. 745 (Nag). But an order for further inquiry or retrial passed after the lapse of a year and a half from the date of discharge amounts to a travesty of justice—*Bishan v. Abdul*, 29 Cr.L.J. 895 (896), 111 I.C. 575, A.I.R. 1928 Lah. 178, 9 A.I.Cr.R. 428.

Section 436, must be read with sec. 435, Cr. P. C., and the limitations within which jurisdiction in revision is to be exercised, are indicated by the words of sub-section (1) itself. It is true that these words are wide but they again are limited in their application by the fact that jurisdiction exercised in revision is an extraordinary jurisdiction and that that jurisdiction is to be exercised only in exceptional cases and sparingly—*Azizuddin R. Faruqi*, 40 Cr.L.J. 454 (455), I.L.R. 1939 Kar. 370, 180 I.C. 581, 11 R.S. 180, A.I.R. 1939 Sind 71. The power of ordering further inquiry should be used sparingly and with great circumspection. Therefore, where an accused person has been three times subjected to a Magisterial inquiry, it would be an oppression on the accused to send him a fourth time before the Magistrate for inquiry on the same evidence which has been thrice pronounced to be insufficient and untrustworthy—*Balkrishna, Ratanlal* 328 (330). Sessions Judges and District Magistrates should use the powers under this section sparingly and with great caution and circumspection, especially in cases where the questions involved are mere matters of fact—*Chotu*, 9 All. 52 (59) (F.B.); *Alam*, 49 All 879, 28 Cr.L.J. 601 (602). A District Magistrate cannot set aside an order of discharge passed by a Subordinate Magistrate and direct further inquiry solely on the ground that the latter has misappreciated the evidence—*Lakshminarasappa*, 31 Mad. 133. (But see *Begraj*, 10 S.L.R. 68, 17 Cr.L.J. 349, and *Kallu*, 4 Lah.L.J. 411, 23 Cr.L.J. 693, A.I.R. 1922 Lah 59). If on the prosecution evidence itself there is reasonable doubt as to whether the acts of the accused were merely negligent or dishonest, the accused even at that stage was entitled to the benefit of doubt. An

order for further inquiry against a discharge in such a case is not warranted—*Krishna Chetty v. Karur Vyasa Bank Ltd.*, 1937 MWN 871. Before an order of discharge can be set aside it must be shown that it is perverse—*Daulat Ram*, 34 Cr.L.J. 190, 141 I.C. 263, Ind. Rul. 1933 Lah. 105, 34 PLR 148, AIR 1933 Lah. 166, 1933 Cr.C. 311. Further inquiry cannot be directed on the bare possibility of an offence being disclosed on further evidence being taken. There must be something on record to indicate that such an offence was committed or there must be something to show that further evidence is available which has not been taken and which would support a charge for that offence—*In re Arumuga*, 43 MLJ. 564. The powers conferred by this section are not to be exercised promiscuously in all cases wherever the District Magistrate, who has not seen the witnesses, forms a different opinion of the value of their evidence from that which was formed by the Magistrate who has seen them—*Narainah Venkatesh*, 18 Cr.L.J. 646 (647), 19 Bom.LR 350; *Umrao Khan*, 21 ALJ. 194; *Uday Raj*, 44 All. 691; *Kallu*, 4 Lah.L.J. 411, 23 Cr.L.J. 693. A District Magistrate would be wrong in directing further inquiry merely upon the strength of his own appreciation of the evidence, in a case where the accused had had a perfectly fair trial reaching a lawful conclusion and the trial Magistrate's discussion of the evidence had been quite reasonable—*Narainah Venkatesh*, supra. In directing a further inquiry, the true criterion is not whether the revising Court agrees with the order of discharge, but whether it is a reasonable order, in the sense that it cannot be described as perverse or contrary to evidence—*Parashram*, 57 Bom. 430, 1933 Cr.C. 470 (474), 143 I.C. 289, 35 Bom.LR 245, AIR 1933 Bom. 158, Ind. Rul. 1933 Bom. 266, 34 Cr.L.J. 564. An order of discharge made by a Magistrate after hearing all the evidence for the prosecution ought not to be set aside unless it can be said that the order was perverse or manifestly unreasonable and inconsistent with an honest appreciation of the evidence before the Court—*Durgadas*, 35 Cr.L.J. 644, 148 I.C. 271, 35 Bom.LR. 1181, A.I.R. 1934 Bom. 48. See also *Zarin*, 35 Cr.L.J. 1282, 151 I.C. 143, 1934 Cr.C. 884, A.I.R. 1934 Pesh. 52, and *Gul Muhammad v. Habibullah Karim Ullah*, 40 Cr.L.J. 674, 182 I.C. 522, 12 R.Pesh. 1, AIR 1939 Pesh. 16. But no hard and fast rule can be laid down. This section which empowers the High Court, the Sessions Judge, or the District Magistrate to direct a further inquiry into a complaint dismissed under sec. 203 or 204 does not lay down any rule that further inquiry should only be directed when it is found that the judgment is perverse or foolish. As a rule of prudence, however, it has often been held that the superior Court should not lightly discard the estimate of evidence appraised by the Court which heard it and should not set aside the dismissal of a complaint simply because a different view of the evidence might be taken—*Radha Prasad Bhagat v. Emp.*, 28 Cr.L.J. 857, 104 I.C. 633, A.I.R. 1928 Pat. 12, 9 A.I.Cr.R. 61, following *Rubhajan v. Emp.*, 86 I.C. 822, 6 PLT. 570, 26 Cr.L.J. 886, A.I.R. 1925 Pat. 599 and *Queen-Emp. v. Chotu*, 9 All. 52, 1886 A.W.N. 281, 5 Ind. Dec. (N.S.) 465.

Though it may be said that it is wrong to say that a revising Court will not interfere with an order unless it can be fairly described as perverse or manifestly contrary to the evidence, it is clear that the Court will not interfere with a reasonable order made by a Magistrate in the exercise of his jurisdiction and that it will not interfere unless it is satisfied that the order is an unreasonable order, though it may not be necessary or proper to describe that order as perverse or manifestly contrary to the evidence—*Azizuddin R. Faruqui v. Emp.*, 40 Cr.L.J. 454 (456), I.L.R. 1939 Kar. 370, 180 I.C. 581, 11 RS 180, A.I.R. 1939 Sind. 71. When the circumstances and the evidence are such that two different Courts might take two different views of the evidence, and the order of discharge is neither perverse nor *prima facie* incorrect, and there is no suggestion that further evidence is forthcoming, a further inquiry should not be directed merely because the District Magistrate was inclined to take a different view of the evidence from that of the trying Magistrate—*Ramanand*, 9 O.W.N. 134, Ind. Rul. 1932 Oudh. 196, 137 I.C. 71, 33 Cr.L.J. 383, A.I.R. 1932 Oudh. 114, 1932 Cr.C. 187; *Alam*, 49 All. 879, 25 A.L.J. 703, 28 Cr.L.J. 601 (602); *Mathura v. Chakra*, 35 Cr.L.J. 1236, 150 I.C. 951, 10 O.W.N. 810; *Bindeshri*, 18 ALJ. 1135, 22 Cr.L.J.

49; *Etrad Husain v. Amjad Husain*, 33 Cr.L.J. 571, 138 I.C. 142, 9 O.W.N. 442, Ind. Rul. 1932 Oudh 296; *Chandan v. Kallu*, 8 A.L.J. 45; *Kumaraswami Mudali v. Kalammal*, 1937 M.W.N. 332; *Azizuddin R. Faruqui v. Emp.*, 40 Cr.L.J. 454 (455), 180 I.C. 581, A.I.R. 1939 Sind 71, 11 R.S. 180, I.L.R. 1939 Kar. 370. It is both legal and proper for a Sessions Judge or a District Magistrate to set aside an order of discharge on the ground of misapprehension of evidence. It is, strictly speaking, legal for a Sessions Judge or a District Magistrate to do so on the ground of misappreciation of evidence, but it is not proper to do so unless he is clearly of opinion that the misappreciation is so flagrant that in effect the order is perverse or manifestly unreasonable or foolish or *prima facie* incorrect. Where exactly to draw the line is a matter for the exercise of common sense. In the application of these principles there is no practical difference between sec. 436 and sec. 437, Cr. P. C. (*Per Gruer, J.*). Section 435, Cr. P. C., does not contemplate mere difference of opinion between the revisional authority and the inferior Courts but something more: the finding, sentence, order or procedure of the inferior Court must be intrinsically erroneous or defective. The material words must, therefore, be construed in an objective sense, *i.e.*, the error or defect must be capable of being demonstrated. Such defect or error may arise from mere perversity, misconception of law or fact, illegality or material irregularity in procedure or undue harshness or leniency. There is obvious difference between "misapprehension" and "misappreciation." Misapprehension is misconception, *i.e.* to regard a thing as something different from what it is. Misappreciation is putting a wrong value on a thing. While the former is capable of objective demonstration, the latter is not, because appreciation is mostly, if not wholly, a subjective process. Section 435, Cr. P. C., clearly covers a case of misapprehension of evidence but does not cover a case of bare misappreciation of evidence. If, however, a District Magistrate sets aside an order of discharge on the sole ground of misappreciation of evidence, his action cannot be treated as illegal. He has power to send for the record, examine it and set aside the order of discharge. The legality of an order does not depend on the correctness of the reason given and therefore wrong reason cannot impair the legality of the order but only its propriety (*per Niyogi, J.*)—*Sheoprasad v. Emp.*, 39 Cr.L.J. 917 (920, 921), 177 I.C. 605, 1938 N.L.J. 250, A.I.R. 1938 Nag. 394, I.L.R. 1938 Nag. 442, 11 R.N. 148. It is necessary that the District Magistrate should not be satisfied with the "correctness, legality or propriety of any finding, sentence or order," and it is then his duty to exercise the discretion he possesses under this section and to order that further enquiry be made into the complaint that had been dismissed—*Maung Su v. Emp.*, 38 Cr.L.J. 709 (710), 169 I.C. 63, 9 R.R. 386, A.I.R. 1937 Rang. 120.

In a private prosecution where the accused has been found by both the Courts below to be innocent the High Court will be reluctant to interfere—*Brendra v. Umananda*, 30 C.W.N. 120. The High Court will not interfere for the benefit of the complainant with an order which was passed upon his own request by the trial Court—*Dagar v. Budh*, 34 Cr.L.J. 718, 144 I.C. 289, A.I.R. 1933 Lah. 323, 34 P.L.R. 181 and 680, 1933 Cr.C. 585, Ind. Rul. 1933 Lah. 436.

The mere fact that an accused person has been exonerated in a previous departmental inquiry is not sufficient ground for dismissal of a complaint—*Azizuddin R. Faruqui v. Emp.*, *supra*.

Further inquiry cannot be directed into an offence (*e.g.*, under sec. 193, I. P. C.) if the sanction of the Court in which that offence has been committed is wanting—*Meherban v. Sitaram*, 30 Cr.L.J. 874 (875), 118 I.C. 232, A.I.R. 1929 All. 374, 1929 Cr.C. 1 1929 A.L.J. 512, Ind. Rul. 1929 All. 824. A Magistrate's order that he declined to proceed with the case for want of a proper complaint under sec. 195, Cr. P. C., is not in law an order of discharge at all under sec. 209 (2), Cr. P. C. Nor is it an order dismissing a complaint under section 203, Cr. P. C., for such an order can only be passed by a Magistrate having jurisdiction to take cognizance of the complaint. Such an order cannot be revised under this section—*Subramania v. Swamikannu*, 34 Cr.L.J. 800 (802), 144 I.C. 519, 37 M.L.W. 547, 1933 M.W.N. 217, A.I.R. 1933 Mad. 413, 1933

Cr.C. 366, Ind. Rul 1933 Mad. 424. See also *Koibola v. Suvarna*, 1933 M.W.N. 1031, where it has further been held that if the Sessions Judge finds the order wrong, he can only call for the records under sec. 435 and refer the matter to the High Court. The Patna High Court has taken a different view of law on that point and has laid down that it is open to the Sessions Judge to order further enquiry into the complaint in such a case, without referring it to the High Court—*Ram Singh v. Rizwi*, 36 Cr.L.J. 650 (651), 155 I.C. 126, A.I.R. 1935 Pat. 52, 15 P.L.T. 775, 1935 Cr.C. 83, 14 Pat. 299.

When a complaint of forgery is dismissed and an application is made to the Sessions Judge under secs. 436 and 437, Cr. P. C., the Sessions Judge should either proceed under sec. 436 or sec. 437 or dismiss the application. The circumstance that the accused has filed a civil suit in respect of the same matter is absolutely irrelevant to the question whether his discharge should or should not be set aside—*Subramanyam v. Veeraraghavulu*, 33 Cr.L.J. 352, 136 I.C. 780, A.I.R. 1932 Mad. 216, 1932 Cr.C. 158, 1931 M.W.N. 1191, 35 M.L.W. 267, Ind. Rul 1932 Mad 316.

Effect of order for further inquiry:—An order for further inquiry directed to a subordinate Court means that the case should be taken up again, and that the question of dismissing the complaint, or discharging the accused, as the case may be, should be again considered, and an appropriate order made as a result of such fresh consideration—*In re Narayanswamy*, 32 Mad. 220. Where a complaint was dismissed under sec. 203 after an investigation held under sec. 202, the effect of an order for further inquiry is to restore the case to the stage under sec. 202, and the inquiry should be taken up from that point—*Radha Prasad*, 28 Cr.L.J. 857 (859), 104 I.C. 633, A.I.R. 1928 Pat. 12. See also Note 1183.

1182. Powers of Courts directing further inquiry:—This section does not authorize a Sessions Judge or District Magistrate to *take evidence* or direct it to be taken supplementing the evidence given in the Lower Court. He is authorised to direct further inquiry, but not to take evidence or direct evidence to be taken. Under sec. 428, an Appellate Court dealing with an appeal may direct additional evidence to be taken and itself record such evidence. The High Court under sec. 439 has all the powers of an Appellate Court and can direct evidence to be taken. But no such powers are given to the Sessions Judge or the District Magistrate under the present section—*Moni Mohun v. Iswar*, 6 C.L.J. 251.

The District Magistrate directing further inquiry cannot direct that the accused be put on his trial. All that he can do is to direct further inquiry, leaving it entirely to the inquiring Magistrate to determine whether or not the evidence justifies the accused being charged and put on his trial—*Ganjan Khan*, 2 Bom.L.R. 586; *Sitaram v. Kausilia*, 29 Cr.L.J. 572, 109 I.C. 508, 10 A.I.Cr.R. 326 (Pat.). The Sessions Judge should leave it to the Magistrate to select the particular form of enquiry instead of directing him categorically to issue a summons against the accused—*Annakali Debi v. Gvanendra Chakravarty*, 39 Cr.L.J. 292 (293), 173 I.C. 318, A.I.R. 1938 Cal. 22, 10 R.C. 501. This point was left undecided in *Pazarali v. Moonsab*, 32 C.L.J. 44. But see *Ramji*, 32 Cr.L.J. 548, 130 I.C. 529, A.I.R. 1931 Pat. 50, Ind. Rul 1931 Pat. 177, 1931 Cr.C. 146, 12 P.L.T. 729. There is nothing to prevent a District Magistrate when moved to act under this section from taking cognizance in his discretion of the complaint under sec. 190 (1), Cr. P. Code—*Ramji*, supra. But see *Nagireddi*, 1937 M.W.N. 1242, 46 M.L.W. 642.

The Sessions Judge or District Magistrate cannot himself commit the accused for trial at the Sessions, because that order is to be made in the course of the further inquiry—*Narayanaswamy*, 32 Mad. 220. When a District Magistrate directs a subordinate Magistrate to make a further inquiry, the whole case is made over to the latter, and the District Magistrate cannot retain seisin of the case in himself. He cannot try the accused or direct process to issue under sec. 204. It is the subordinate Magistrate who has complete jurisdiction to hold the inquiry, to issue process and to try and pass final orders in the case—*Ram Barai v. Ram Pratap*, 5 P.L.J. 47 (55), 21 Cr.L.J. 594,

The District Magistrate directing further inquiry cannot even suggest that the accused be committed to the Sessions; he must leave it to the judgment and discretion of the Sub-Magistrate who is to make the inquiry, and cannot fetter the Sub-Magistrate's judicial discretion by any suggestion or direction—*Munisami*, 15 Mad 39. The District Magistrate is wholly wrong in directing a subordinate Magistrate that he should pass such and such order in a case pending judicially before him—*Thakar v. Kirpal*, 1918 P.L.R. 53, 19 Cr.L.J. 436, 44 I.C. 964. See also 13 Lah. 599 below. In making an order for further inquiry it is improper for the superior Magistrate to write a judgment which is practically a mandate to the Subordinate Magistrate—*Yado*, 12 N.L.R. 94, 17 Cr.L.J. 245.

Under sec. 436, Cr. P. C., the Additional District Magistrate can only order enquiry into a case which has been dismissed under sec. 202 (sec. 203), Cr. P. C., but he cannot compel the Magistrate to issue process and make an enquiry for the purpose of framing a charge. But where the matter is properly before the Additional District Magistrate under sec. 435, Cr. P. C., he has the power to go into the merits of the case to satisfy himself as to the correctness and legality or propriety of the order passed by the Magistrate. If he does so, and he is of opinion that the Magistrate has misconceived the evidence recorded by him, he would certainly be right in even ordering the Magistrate to issue process against the accused—*Haroon v. Gajadhar Sukhdeo Marwadi*, 41 Cr.L.J. 312, 186 I.C. 459, 1940 N.L.J. 43, A.I.R. 1940 Nag. 128.

The Sessions Judge or the District Magistrate cannot, when directing further inquiry under this section, himself frame a charge or order the Sub-Magistrate to frame the charge and try the accused. He might, of course, make the inquiry himself and frame a charge in course of it—*Narayanaswamy*, 32 Mad. 220. Further 'inquiry' does not mean trial. The Sessions Judge cannot direct the Magistrate to frame such and such charge and to try the accused on that charge. All that he can do is to direct the Magistrate to hold a further inquiry and then to proceed in accordance with law. If upon inquiry the Magistrate finds that a charge should be framed, he can frame the charge; if the result of the inquiry renders it in the opinion of the Magistrate unnecessary to frame a charge, he can discharge the accused again—*Ibrahim v. Guran Ditta*, 13 Lah. 599, 1932 Cr.C. 491 (492), Ind. Rul. 1932 Lah. 241, 33 P.L.R. 267, 136 I.C. 705, 33 Cr.L.J. 341, A.I.R. 1932 Lah. 362.

In an order for further inquiry passed under this section no directions or instructions can lawfully be given to the Magistrate as to the manner in which he should conduct the inquiry. The Magistrate must exercise the power that he possesses in that behalf according to law. It is the function of the Magistrate to determine whether or not process shall issue or a trial take place, and his discretion in the matter is not to be fettered by instructions or directions from any quarter. Of course, it may be that a mere perusal of the record discloses so strong a *prima facie* case against the accused, or the person against whom the complaint has been laid, that it would be a work of supererogation and waste of time to prolong the preliminary investigation; in which case it would be the duty of the Sessions Judge or District Magistrate in the exercise of his judicial discretion to decide whether he ought not to report the result of the examination to the High Court for such orders as it might think fit to pass under sec. 439, rather than to order a further enquiry under this section—*Maung Ba Thon*, 32 Cr.L.J. 950 (959), 132 I.C. 822, 9 Rang 239, Ind. Rul. 1931 Rang. 214, A.I.R. 1931 Rang. 225, 1931 Cr.C. 865 (F.B.).

1183. Powers and duties of the Magistrate making the inquiry:— It is impossible to restrict the "further inquiry" of sec. 436 to an inquiry under sec. 202. The power to direct "further inquiry" enables the superior Court, acting under this section to direct either an additional investigation of the facts, or a reconsideration of the evidence, by the Magistrate whose order is set aside, or a new inquiry before another Magistrate—*Hema Singh*, A.I.R. 1929 Pat. 644 (650), 126 I.C. 146, 1929 Cr.C. 372, 31 Cr.L.J. 961, 12 P.L.T. 36, 9 Pat. 155, Ind. Rul. 1930 Pat. 578, following *Haridas v. Saritulla*, 15 Cal. 608 (F.B.); *Ramji*, 32 Cr.L.J. 548, 130 I.C. 529, A.I.R. 1931 Pat. 50,

Ind. Rul. 1931 Pat. 177, 1931 Cr.C. 146, 12 P.L.T. 729. The order by a superior Court to an inferior Court to hold further enquiry into a complaint, which has been dismissed under sec. 203, Cr. P. C., has acquired what may be called a technical meaning. It simply means reconsideration. What step is to be taken thereafter will depend upon the circumstances of the case. Supposing a Magistrate dismisses a complaint immediately after the initial examination of the complainant and the superior Court orders further enquiry, the Magistrate may, in that case, if he likes, before summoning the accused, hold an enquiry under sec. 202, Cr. P. Code. But in a case in which a complaint has been dismissed after a complete inquiry, it is obvious that the case is one in which the order of the superior Court for further inquiry can only be complied with by putting the accused on trial—*Udit Narayan Patwari v. Emp.*, 39 Cr.L.J. 778, 176 I.C. 715, A.I.R. 1938 Pat. 369, 19 P.L.T. 336, 1938 P.W.N. 542, 4 B.R. 750, 11 R.P. 100. When an order of discharge is set aside and further enquiry ordered, the enquiry recommences where it was left off at the time when the improper order of discharge was passed. Further enquiry does not mean merely an examination of witnesses, but a further reconsideration of the evidence and the Magistrate is, therefore, justified upon perusing the evidence in framing the charge—*Komma Hari Chandra Reddi*, 39 Cr.L.J. 828, 176 I.C. 879, A.I.R. 1938 Mad. 742, 1938 M.W.N. 587, 48 M.L.W. 136, (1938) 2 M.L.J. 222, 11 R.M. 189, following *Balasenna Thambi*, 14 Mad. 335.

In holding the further inquiry the Magistrate will be at liberty to conduct the inquiry in his own way, provided he conforms to the provisions of the Code. For example, he can examine such persons (whether or not they were examined in the course of the previous enquiry), and take such further or other steps for the purpose of ascertaining whether or not process should issue or a charge should be framed, as are permitted by law, and as he deems to be advisable; or he may determine the matter upon a reconsideration of the same materials as were available when the earlier order of dismissal or discharge was passed in the light of the observations of the revising officer and at the conclusion of the enquiry the Magistrate will decide according to law whether or not process shall issue, or an order of committal be made, or a trial be held, as the case may be. An order for further inquiry directed to a Subordinate Court means that the case should be taken up again, and that the question of dismissing the complaint or discharging the accused, as the case may be, should be again considered and an appropriate order made as a result of such fresh consideration—*Maung Ba Thon*, supra.

If the inquiry is directed to be held by a Magistrate other than the officer who held the first inquiry, he should take the evidence *de novo*, and cannot proceed on the evidence already taken by the previous Magistrate—*Ram Dial*, 13 Cr.L.J. 255, 9 A.L.J. 310; *Hasnu*, 6 All. 367. This view has been dissented from by the Madras High Court in *Lakshmireddy v. Muni Reddy*, 54 Mad. 512, 60 M.L.J. 524, 32 Cr.L.J. 635 (636); see this case cited in Note 1015 under sec. 350.

The Magistrate making the further inquiry can take further evidence which he had omitted in the first inquiry—*Dhanja v. Clifford*, 13 Bom. 375. Where, the Sessions Judge having directed that the matter be further enquired into and that the Civil Surgeon and certain other persons should be examined in the presence of the complainant who should be given an adequate opportunity of putting questions to the witnesses, the Magistrate ordered that, if the complainant so desired, his witnesses would be summoned on payment of the necessary costs, held that when allegations had been made that an offence under sec. 304, I. P. C., had been committed by certain persons and that certain Police Officers had conspired with those persons and others with a view to the suppression of true facts, they should be promptly and thoroughly investigated, and that no question of payment or non-payment of costs should be allowed to stand in the way of the examination of all persons whose evidence might throw light on the matter—*Surendra Nath De v. Krishna Dhan De*, 40 C.W.N. 1251.

The Magistrate is not bound to try the accused for the very offence for which he

was originally discharged, but is competent to try him for any other offence which may be established by the evidence—*Papadu*, 7 Mad. 454.

When further inquiry is directed into a complaint dismissed under sec. 203, the Magistrate directed to hold the inquiry cannot at once proceed under sec. 204 and summon the accused for trial, but must make an inquiry under sec. 202; and then if upon inquiry he is satisfied that the case is one in which the accused should be put up on trial, he will summon the accused (sec. 204); if on the other hand he is satisfied upon such inquiry that the case is one in which the accused need not be summoned, he will dismiss the complaint (sec. 203)—*Radha Prasad*, 28 Cr.L.J. 857 (859), 104 I.C. 633, A.I.R. 1928 Pat. 12, 9 A.I.Cr.C. 61; *Sitaram v. Kausilia*, 29 Cr.L.J. 572 (573), 109 I.C. 508, 10 A.I.Cr.R. 326 (Pat.). In two other Patna cases it has been held that if the Magistrate directed to hold the inquiry at once summons the accused and proceeds to trial, the procedure is merely irregular and can be cured by sec. 537 if no failure of justice has been occasioned—*Janakdhari*, 8 Pat. 537, 1929 Cr.C. 333 (355); *Hema Singh*, 9 Pat. 155, 1929 Cr.C. 372 (375, 376), A.I.R. 1929 Pat. 644 (dissenting from *Radha Prasad*, supra). If the Magistrate in the exercise of his own discretion chooses to issue a summons immediately instead of wasting time over a possibly useless enquiry, he is quite at liberty to do so—*Annakali Dibi v. Gyanendra Chakravarty*, 39 Cr.L.J. 292 (293), 173 I.C. 318, A.I.R. 1938 Cal. 22, 10 R.C. 501. See also *Ramji*, supra.

A Magistrate holding a further inquiry into a complaint which has been once dismissed under sec. 203 can again dismiss the complaint under sec. 203—*Nibaran v. Sital Chandra*, 25 C.W.N. 312 (313). But if the Sessions Judge orders a further inquiry into two counter cases, and directs that if one of the cases be found false the other should be tried, the effect of the order is that the cases should be decided in the usual way after trial, and in such circumstances, the Magistrate is not competent to dismiss the case under sec. 203, he must hold a regular trial—*Brij Kishore v. Gopal*, 11 C.W.N. 316 (320).

The Magistrate directed to make the inquiry gets the seisin of the entire case, and has jurisdiction to inquire under sec. 202 as to whether a *prima facie* case has been made out against the accused, and if he is satisfied that a *prima facie* case has been made out, he has jurisdiction to issue process to the accused under sec. 204, and to try and dispose of the case himself—*Ram Barai v. Ram Pratap*, 5 P.L.J. 47 (55), 21 Cr.L.J. 594. When a further enquiry is made, whether by the District Magistrate, or by a Magistrate subordinate to him, the Magistrate who holds that enquiry, can if he finds sufficient grounds for so doing, not only frame a charge but also proceed to hold a trial—*Ratnam Mudaliar*, 35 Cr.L.J. 691, 148 I.C. 573, 1934 M.W.N. 102, A.I.R. 1934 Mad. 209, 66 M.L.J. 318, 39 M.L.W. 344, A.I.R. 1934 Mad. 213, 1934 Cr.C. 405.

1184. Notice to accused:—See the proviso newly added. Although no notice to the accused was necessary under the old section, still it was held in numerous cases that a Court did not exercise a proper discretion if before proceeding under this section he did not give the accused an opportunity, by service of a notice, to show cause against an order directing further inquiry—*Haridas v. Saritulla*, 15 Cal. 608; *Nabi Bakhs*, 1 Lah. 216; *Mubund*, 8 Bom.L.R. 694; *Abhran*, 19 Bom.L.R. 908, 19 Cr.L.J. 101; *Brij Kishore v. Gopal*, 11 C.W.N. 316 (319); *Abdul Latif*, 40 All. 416; *Kharga*, 35 All. 147; *Ajudhia*, 20 All. 339; *Chotu*, 9 All. 52 (59) (F.B.); *Rith Nath*, 24 O.C. 142, 22 Cr.L.J. 655; *Sanwal v. Dipchand*, 3 S.L.R. 7, 9 Cr.L.J. 446; *Vaidyanath*, 16 Cr.L.J. 696, 8 Bur.L.T. 133. This is now expressly laid down in the proviso. This proviso makes it obligatory on a Court not to pass an order under this section until the person discharged has had an opportunity of showing cause—*Chhajju v. Behari*, A.I.R. 1933 Lah. 1018, 35 P.L.R. 149, 1933 Cr.C. 1555; *Ghulam*, 34 Cr.L.J. 1157, 146 I.C. 35, A.I.R. 1933 Snd 299, 1933 Cr.C. 1035. A disregard of the proviso is an illegality and in any case, such irregularity as seriously prejudices an accused person who is ordered to be proceeded against—*Bhagaran Das v. Chander Bhan*, 35 Cr.L.J. 418, 147 I.C. 335, A.I.R. 1934 All. 51, 56 All. 285, 3 A.W.R. 137, A.I.R. 1934 All. 235, 1934 A.L.J. 69, 1934 Cr.C. 107. Where a trial held in pursuance of an order passed by a

revising authority in exercise of the power conferred by this section, without first complying with the requirement of the proviso thereto, results in a conviction, the conviction should not be set aside if the failure to comply with this section has not resulted in a miscarriage of justice. This section is not mandatory but only a directory provision of law—*Nga Kyaung Baung*, 35 Cr.L.J. 1408, 151 I.C. 722, 1934 Cr.C. 816, A.I.R. 1934 Rang 181.

The opportunity to show cause may be given even after the accused is arrested and brought before the Court—*Girdhari*, 12 C.W.N. 822; *Wahed Ali*, 32 Cal. 1090; *Sahib Kaur v. Mahomed Kasim*, 1891 P.R. 14; *Fazal Din*, 1895 P.R. 17.

This proviso applies only where the accused has been discharged, i.e., discharged under sec. 209, 253 and 259. No notice would be necessary where further inquiry is directed into a complaint which was dismissed under section 203—*Gajraj*, 47 All 722, 23 A.L.J. 451, 26 Cr.L.J. 1176; *Liakat Hussain*, 40 All 138; *Appa Rao v. Janakiammal*, 49 Mad 918 (F.B.); *Dhondu*, 29 Bom.L.R. 713, 102 I.C. 511, A.I.R. 1927 Bom 436, 8 A.I.Cr.R. 228, 28 Cr.L.J. 575 (576); *Daya Ram*, 2 Luck. 573, 103 I.C. 106, 1 Luck Cas 184, A.I.R. 1927 Oudh 264, 28 Cr.L.J. 650; *Nawsher v. Hazratulla*, 49 C.L.J. 422, 119 I.C. 376, A.I.R. 1929 Cal. 508, Ind Rul. 1929 Cal. 792, 30 Cr.L.J. 1030; *Haridas v. Saritulla*, 15 Cal 608; *Grish Chunder*, 29 Cal 457; *Wahed Ali*, 32 Cal. 1090; *Fazal v. Moonshah*, 32 Cr.L.J. 44; *Tabarak*, 30 All 52; *Sheo Narain v. Ram Pratap*, 4 P.L.J. 456 (459); *Angan v. Ram Purbhan*, 35 All. 78; *Morrison v. Crowder*, 27 Cr.L.J. 302, 92 I.C. 590, A.I.R. 1926 Sind 198; *Rambadra*, 29 Cr.L.J. 1059, 112 I.C. 563, A.I.R. 1928 Mad 1198; *Abdullah Jan v. Toti Gul*, 36 Cr.L.J. 1384, 158 I.C. 31, A.I.R. 1935 Pesh 141, 1935 Cr.C. 1000. But where the accused person was given an opportunity of being heard before the complaint was dismissed under sec. 203, a further inquiry ought not to be directed without giving notice to him. As he was present from the very commencement of the proceedings, it is proper that he should be given an opportunity of being heard before an order is made under this section—*Jogesh Chandra v. Nikunja Behari*, 27 C.W.N. 552, 25 Cr.L.J. 140, 76 I.C. 236, A.I.R. 1923 Cal 651.

When notice is issued under this section, the accused is not legally bound to avail himself of the opportunity given to him to show cause; and he is at liberty either to appear and show cause or to stay away—*Kanwar Singh*, 1893 P.R. 15.

1185. Recording reasons:—Before making an order under this section a Sessions Judge or District Magistrate is bound to record his reasons and to state in what respect the trial Judge's conclusions are unsatisfactory—*Sawan*, 26 P.L.R. 291, 89 I.C. 705, 2 Lah Cas 59, A.I.R. 1928 Lah 50, 26 Cr.L.J. 1393; *Lokhia*, 1890 A.W.N. 147; *Abinash*, 13 C.W.N. 76; *Nga Than*, 5 Bur.L.T. 37, 13 Cr.L.J. 301. The wide jurisdiction to set aside an order of discharge cannot be properly exercised without having and assigning solid and sufficient reasons for doing so—*Haridas v. Saritulla*, 15 Cal. 608; *Thrukonan Kupbachari*, 14 Cr.L.J. 572, 1913 M.W.N. 638. The Magistrate should record his reasons for ordering further inquiry, because the High Court in the absence of such reasons cannot exercise supervision over the Magistrate's or Judge's proceedings, and also because it is fair to the person against whom the order is made that the reasons for directing such inquiry should be made explicit to him and that he should have notice of the grounds on which the further inquiry has been directed—*Nga Min Dum*, U.B.R. (1917) 2nd Qr. 16, 19 Cr.L.J. 14, 42 I.C. 926; *Wahed Ali*, 32 Cal. 1090. Where the order of the Sessions Judge for further inquiry does not state any proper grounds, it is liable to be set aside by the High Court—*Nagendra v. Korb*, 8 C.W.N. 456. But where the order of discharge passed by the trying Magistrate was *prima facie* improper (e.g., where he discharged the accused without taking any evidence for the prosecution or the defence), the District Magistrate's order for further inquiry without recording reasons was not illegal—*Dhandu*, 29 Bom.L.R. 713, 28 Cr.L.J. 575 (576), 102 I.C. 511, A.I.R. 1927 Bom. 436, 8 A.I.Cr.R. 228. See also *Sitaram v. Kausilia*, 29 Cr.L.J. 572 (573), 109 I.C. 508, 10 A.I.Cr.R. 326 (Pat.) where the omission to record reasons was excused.

It is not ordinarily desirable that a District Magistrate or Sessions Judge in ordering a further inquiry should make a detailed examination of the evidence and give elaborate reasons, because that might prejudice the trial afterwards, but it is desirable that he should give enough in the shape of reasons to show that his order is proper—*Wahed Ali*, 32 Cal 1090; *Sanwal v. Dipchand*, 3 S.L.R. 7, 9 Cr.L.J. 446; *Subbier v. Manickam Chettiar*, 1937 M.W.N. 729. In case in which the Sessions Judge reverses the order of the Magistrate discharging an accused person the Sessions Judge ought to give reasons for directing further enquiry. As to what an order of this character should contain, the Cr. P. Code has not made express provision, but it is highly desirable that such order should make it clear that the Magistrate's order discharging an accused person is based on grounds which cannot be sustained—*Bhagwan Das v. Chander Bhan*, 35 Cr.L.J. 418, 147 I.C. 335, A.I.R. 1934 All 51, 56 All. 285, 3 A.W.R. 137, A.L.R. 1934 All. 235, 1934 A.L.J. 69, 1934 Cr.C. 107. In a Burma case, where in an order for further inquiry the Sessions Judge simply stated: "I have translated and considered the whole of the evidence on the record, and the conclusion I have arrived at is that there should be a further inquiry," it was held that it contained ample reasons for the order. It would have been improper for the Judge to comment on the evidence in detail, because such a proceeding would tend to prejudice the accused at the trial—*Tun Win*, 4 L.B.R. 233, 7 Cr.L.J. 493 (494).

1186. Interference by High Court:—An order of a Sessions Judge or a District Magistrate setting aside an order of discharge is liable to be reviewed by the High Court as a Court of Revision. If in any case, the High Court were to find that the District Magistrate or Sessions Judge had set aside an order of discharge on insufficient grounds or that while there were good grounds for setting it aside, the District Magistrate or Sessions Judge had made an order inappropriate to the facts of the case, the High Court would be acting properly in revising the order—*Haridas v. Saritulla*, 15 Cal 608. Where the order of the Sessions Judge did not stand on any proper grounds for directing a further inquiry, it was set aside by the High Court in revision—*Nagendra v. Korb*, 8 C.W.N. 456. But where the Sessions Judge after going carefully through the evidence was of opinion that the finding of the trying Magistrate was either perverse or in all probability wrong or manifestly at variance with the evidence which he has recorded, and directed further inquiry after a consideration of all the circumstances, the High Court would not interfere—*Zahur v. Niadar*, 9 Lah L.J. 114, 28 Cr.L.J. 238; *Karkley v. Jagannath*, 11 O.L.J. 611, 1 O.W.N. 302, 26 Cr.L.J. 959.

Where it appears from the records that there are no sufficient grounds for issuing notice to an accused person, the High Court will not be justified in interfering in revision merely because the Magistrate, who had taken cognisance of the matter, failed to give reasons for not issuing the process; but if it is found from the records that the Magistrate had not good grounds for not issuing process, the High Court will interfere in revision. In a case where serious allegations of tyranny are made, the interests of justice require that the High Court and the complainant should be satisfied that the Sub-divisional Magistrate has considered the allegations against the accused and has come to a decision either that there is no case against him or that there is. If there is, the Magistrate must issue process to him—*Venkatasubba Pillai*, 39 Cr.L.J. 984, 177 I.C. 957, (1938) 2 M.L.J. 372, A.I.R. 1938 Mad. 879, 1938 M.W.N. 973, 11 R.M. 396, 48 M.L.W. 801.

437. When, on examining the record of any case under section 435 or otherwise, the Sessions Judge or District Magistrate considers that such case is triable exclusively by the Court of Session and that an accused person has been improperly discharged by the inferior Court, the Sessions Judge or District Magistrate may cause him to be arrested, and may thereupon, instead of directing a fresh

Power to order commitment.

inquiry, order him to be committed for trial upon the matter of which he has been, in the opinion of the Sessions Judge or District Magistrate, improperly discharged:

Provided as follows:—

- (a) that the accused has had an opportunity of showing cause to such Judge or Magistrate why the commitment should not be made;
- (b) that, if such Judge or Magistrate thinks that the evidence shows that some other offence has been committed by the accused, such Judge or Magistrate may direct the inferior Court to inquire into such offence.

This is the old section 436. The old section 437 has now been renumbered as sec. 436.

1187. Application of section:—The words 'or otherwise' do not mean 'in any other way whatsoever' but 'in any other way provided by the Code'—*Nobin v. Russik*, 10 Cal. 268. The reason for exercising the powers under this section must arise upon material to be found on the record, and not upon extraneous matter—*Lokhia*, 1890 A.W.N. 147; *Haridas v. Saritulla*, 15 Cal. 608.

1188. Who can order commitment:—The Sessions Judge and the District Magistrate have co-ordinate powers to order a commitment under this section—*Surendra*, 28 Cal. 397; *Kalu Sandu*, Ratanlal 837. A Sessions Judge may take action under this section though the District Magistrate has refused to call for the record and to direct a committal of the case—*Gandi Apparaju*, 43 Mad. 330, 21 Cr L.J. 91.

The word 'District Magistrate' in this section includes a District Magistrate specially empowered under sec. 30—*Arjan Singh*, 1904 P.L.R. 234. Also, a District Magistrate can, under this section revise an order of discharge passed by a subordinate Magistrate of the First Class invested with powers under sec. 30 of the Code, in a case which is triable exclusively by the Court of Session—*Yado*, 12 N.L.R. 94, 17 Cr L.J. 245.

The Joint Sessions Judge cannot exercise the powers of a Sessions Judge under this chapter, and cannot order a committal to the session in a case discharged by a Magistrate—*In re Musa*, 9 Bom. 164. This case was decided before sub-section (2) to sec. 438, Cr. P. C., was enacted. Under that sub-section an Additional Sessions Judge shall have and may exercise all the powers of a Sessions Judge under "this chapter," and "this chapter" provides by sec. 437 that the Sessions Judge may direct the committal of a case triable exclusively by the Court of Session. Therefore an Additional Sessions Judge has power to order commitment under this section—*Akberally Tayaballi v. Alimahomed Abdul Hussain*, 40 Cr.L.J. 951 (1952), 184 I.C. 282, 12 R.B. 159, 41 Bom.L.R. 749, A.I.R. 1939 Bom. 372.

Sections 436 and 437 do not apply to *Presidency Magistrates*; a Presidency Magistrate can himself revive the complaint after he has discharged the accused without any order of the superior authority—*Opoorba v. Probod Kumary*, 1 C.W.N. 49; *Dwarka v. Benimadhab*, 28 Cal. 652.

1189. "Exclusively triable by Court of Session":—To give jurisdiction to the Sessions Judge or District Magistrate, the accused must have been charged with an offence triable exclusively by the Court of Session—*Arjan Singh*, 1904 P.L.R. 234; *Kanchan*, 1 All. 413; *Tarachand*, 7 C.L.R. 168; *Bhullu*, 1897 P.R. 3. Therefore a Sessions Judge cannot direct commitment or order fresh inquiry in a case where the accused is discharged of an offence within the Magistrate's jurisdiction—*Ramchand*, Ratanlal 42; *Muhammad Bakhsh*, 1882 A.W.N. 105; *Bajjanath v. Gouri Kanta*, 20 Cal. 633; *Kanchan*, 1 All. 413; *Nelluri Chenchia*, 42 Mad. 561; *Thammanna*, 15 M.L.J. 373.

If a case is not exclusively triable by the Court of Session the District Magistrate cannot order a commitment under this section, merely because in his opinion the offence could not be adequately punished by a Magistrate—*Debi Prasad*, 1908 A.W.N. 189, 8 Cr.L.J. 47. The words 'triable exclusively by a Court of Session' are to be construed strictly and it is not competent to the Sessions Judge to direct a commitment under this section if the offence is not exclusively triable by the Court of Session, e.g., an offence under sec. 193 or 471, I. P. C.—*Nelluri Chenchia*, 42 Mad. 561 (563). This is also the view of the other High Courts. See *Ramchand*, Ratanlal 42; *Bajinath v. Gaurikanta*, 20 Cal 633. But in a Burma case, it has been held that the term "triable exclusively by the Court of Session" means either a case where the District Magistrate considers that the facts constitute an offence which is triable exclusively by the Court of Session, or it might mean a case in which the District Magistrate considers that the sentence which the Magistrate could pass might not be sufficient and therefore it was a case which should be tried by a Court of Session—*Tambi*, 12 Bur.L.T. 62, 19 Cr.L.J. 801, 9 L.B.R. 208.

Where an accused is discharged of an offence exclusively triable by a Court of Session, a Sessions Judge can commit him on a charge not exclusively triable by a Sessions Court if it is intimately connected with a charge exclusively triable by the Sessions Court and forms part of the same transaction. But he has no power to commit for such an offence if it is of an entirely different character. Thus, where an accused is discharged of an offence under sec. 436, I. P. Code, he may be ordered to be committed by the Sessions Judge for trial for an offence under sec. 427, I. P. C., but not for an offence under section 280, Indian Penal Code which is totally different from the category of offences under sections 427 and 436, Indian Penal Code—*Bijoy Gopal v. Iswar*, 53 Cal. 645, 97 I.C. 659, A.I.R. 1926 Cal. 1090, 27 Cr.L.J. 1139. Where the accused was charged with two offences, under sections 477A (triable exclusively by the Court of Session) and 408, I. P. C. (not so triable), of which the principal offence was the latter one and the other was merely secondary, and the subordinate Magistrate refused to commit the accused to the Sessions and discharged him, held that the District Magistrate was competent under this section to direct the commitment of the accused even though the primary offence was not triable exclusively by the Court of Session, because the two offences were intimately connected and formed part of the same transaction—*Gendhal Chimanbhai*, 16 Bom.L.R. 80, 15 Cr.L.J. 292. (The offence under sec. 477A, I. P. C., is now triable also by a Magistrate vested with 1st class powers.) So also, where an accused person appears to have committed culpable homicide, his conviction by a Magistrate of a minor offence does not prevent his trial for murder, etc. The Sessions Judge, if he thinks there is a *prima facie* case, may call on the accused to shew cause why a commitment should not be ordered, and may thereafter order his commitment under this section if satisfied that there is sufficient cause for it—*Ladkia*, Ratanlal 337.

1190. "Improperly discharged":—The language of the section requires that the case should be triable exclusively by the Court of Session, but it does not go on to state that an accused person has been improperly discharged on such a charge. On the contrary the section merely says that it requires that an accused person has been improperly discharged by the inferior Court. These words are general and cover a discharge on any kind of charge and not merely a discharge on a charge of an offence exclusively triable by the Court of Sessions—*Alopi Din*, 36 Cr.L.J. 1103 (1106), 157 I.C. 205, A.I.R. 1935 All. 366, 1935 Cr.C. 384, 1935 A.L.J. 653. But where in the course of a trial under sec. 409, I. P. C., the accused made an application to the Court of Session and the Sessions Judge directed the Magistrate to commit him for trial, the order of the Sessions Judge was entirely without jurisdiction. All he could do was to make a reference to the High Court if he thought that an interference was necessary. He had no power himself to make such an order—*Supdt. & Remem. of Legal Affairs, Bengal v. Nabin Chandra Hur*, 39 Cr.L.J. 569, 175 I.C. 521, A.I.R. 1938 Cal. 416.

A Sessions Judge may direct a commitment even where the District Magistrate himself discharged the accused—*Laskari*, 7 All. 853.

The mere fact that a Magistrate has discharged the accused in a case triable exclusively by the Court of Session without committing him to the Sessions, is not a ground of interference under this section—*Sankarappa v. Kerala*, 2 Weir 260. The Sessions Judge should be very slow to interfere in revision to set aside an order of discharge—*Akberally Tayaballi v. Alimahomed Abdul Hussain*, 40 Cr.L.J. 951 (1953), 184 I.C. 282, 12 R.B. 159, 41 Bom.L.R. 749, A.I.R. 1939 Bom. 372, following *Ramchandra*, 37 Bom.L.R. 16, 155 I.C. 101, A.I.R. 1935 Bom. 137, 1935 Cr.C. 288, 36 Cr.L.J. 643, 59 Bom. 125, 7 R.B. 405 (F.B.). The District Magistrate or Sessions Judge, before ordering the committal of the accused to the Sessions Court, must come to a finding, with reference to the evidence that the accused has been improperly discharged—*Srikishen*, 1 P.L.J. 97, 17 Cr.L.J. 330; *Inoyia v. Harbans Prasad*, 34 Cr.L.J. 1201 (1203), 146 I.C. 160, A.I.R. 1933 All. 482, 1933 Cr.C. 827, 1933 A.L.J. 1115. The word 'improperly' as used in this section does not mean perverse. A discharge based on a lenient view of the evidence is not improper. But impropriety does imply that the order could not have been passed, if the Magistrate had taken a reasonable view of all the circumstances of the case—*Harichandra Reddi v. Syed Kashim Sahib*, 1937 M.W.N. 1240. The mere fact that the charge is in the opinion of the District Magistrate of such an important character that it should be considered by a Court of Session, is not a sufficient reason for interfering with the order of discharge—*Srikishen*, supra.

It is the duty of the Sessions Judge, in considering whether the accused person has been improperly discharged, to consider all the grounds upon which such order of discharge has been passed, including a consideration of the evidence which has been disbelieved or held to be insufficient to establish a *prima facie* case. Then only can he pass an order for the commitment of the accused or for further inquiry—*Harbans v. Fakir*, 7 C.W.N. 77. The Sessions Judge has to consider whether it was open to the Magistrate to come to the conclusion to which he did come on the materials before him. That a different view could be taken on the evidence would not justify the Sessions Judge in ordering commitment; he must come to the conclusion that the finding of the Magistrate is not only wrong but perverse—*Rubhanjan*, 6 P.L.T. 570, 86 I.C. 822, A.I.R. 1925 Pat. 599, 26 Cr.L.J. 886 (888); *Palaniappa Thevan v. Karuppa Gounden*, 40 Cr.L.J. 392, 180 I.C. 576, A.I.R. 1939 Mad. 253, 1938 M.W.N. 1311, 11 R.M. 727. Where the Magistrate gave perfectly adequate reasons in support of his conclusion but no *prima facie* has been made out against the accused and, in fact, he went to the length of saying that most of the important prosecution witnesses were totally unworthy of credit and that the prosecution evidence was on the face of it absolutely incredible, it is impossible to say that the Magistrate acted improperly in assessing the evidence that was put before him and that the order of discharge made by him which followed as a matter of course from the opinion which he formed of the evidence in the prosecution case was improper—*Palaniappa Thevan v. Karuppa Gounden*, supra.

Further inquiry will not be made unless the Magistrate has not heard all the evidence, or unless the order of discharge is perverse, foolish or manifestly against the weight of the evidence. The circumstances under which an order of discharge under sec. 209, Cr. P. C., will be set aside are exactly similar to those in which an order would be set aside which had been passed under sec. 253, Criminal Procedure Code—*Zarin*, 35 Cr.L.J. 1282, 151 I.C. 143, 1934 Cr.C. 884, A.I.R. 1934 Pesh. 52; *Fazal Razak*, A.I.R. 1937 Pesh. 12, 38 Cr.L.J. 427, 167 I.C. 602, 9 R.Pesh. 88. The Magistrate is both entitled and bound to value and weigh the evidence and if he disbelieved the evidence and makes an order of discharge, the question whether it ought to be set aside in revision depends on whether it is a reasonable order, the criterion being, not whether the revisional Court agrees with it, but whether it is rational in the sense that it cannot be fairly described as perverse or manifestly contrary to the evidence. The suggestion that a Magistrate has a wider discretion to appreciate evidence under sec. 253 than he has under sec. 209 is clearly untenable—*Parashram*, 34 Cr.L.J. 554 (568), 143 I.C. 289, 35 Bom.L.R. 245, A.I.R. 1933 Bom. 153, Ind. Rul. 1933 Bom. 266, 1933 Cr.C. 470, 57 Bom. 430. See also *Venkatreddi v. Saramma*, 1937 M.W.N. 863.

Under this section all that the Sessions Judge has to do is to come to the conclusion that the order for discharge was improper. He may reach that conclusion not only on the grounds that the order was perverse or manifestly unreasonable and inconsistent with an honest appreciation of the evidence in the case; but also on the ground that the Magistrate has, however, competently, taken upon himself the discharge of a duty which under the Code is entrusted to the Sessions Court, that is to say, the duty of appreciation of evidence of doubtful credibility. In a proper case he may also set aside an order of discharge on the ground that he disagrees with the appreciation of evidence by the Magistrate—*Ramchandra*, 36 Cr.L.J. 613 (614), 155 I.C. 101, A.I.R. 1935 Bom. 137, 37 Bom.L.R. 16, 59 Bom. 125, 7 R.B. 405, 1935 Cr.C. 288 (F.B.), overruling *Parashram*, supra, and differing from *Narainan*, 40 I.C. 291, A.I.R. 1917 Bom. 227, 18 Cr.L.J. 616, 19 Bom.L.R. 350; *Akberally Tayaballi v. Alimohamed Abdul Hussain*, A.I.R. 1939 Be- 372, 41 Bom.L.R. 719, 40 Cr.L.J. 931, 181 I.C. 282, 12 R.B. 159. See *Alopi Din*, 36 Cr.L.J. 1103 (1105), 157 I.C. 205, A.I.R. 1935 All. 366, 1935 Cr.C. 381, 1935 A.L.J. 653 which did not follow the contrary view laid down in *Rutbhanjan*, 86 I.C. 822, A.I.R. 1925 Pat. 599, 26 Cr.L.J. 886, 6 P.L.T. 570. See also *Ishaq v. Emp.*, 38 Cr.L.J. 659, 168 I.C. 958, 1937 A.L.J. 291, 1937 A.W.R. (H.C.) 261, 1937 A.Cr.C. 55, 9 R.A. 687, 1937 A.L.R. 431, A.I.R. 1937 All. 373 and Note 701.

The Sessions Judge can direct the committal of an accused person improperly discharged by the sub-Magistrate, though no express order of discharge has been recorded by that Magistrate—*Gandi Apparaju*, 43 Mad. 330.

The section applies where the accused person has been discharged and not where he has been acquitted—*Baija Nath v. Gauri*, 20 Cal. 633; *Hamumontha*, 23 Mad. 225. Where the Magistrate has in fact discharged the accused though he has used the expression 'acquitted and released,' the Sessions Judge is to order a committal under this section—*Nectail Dulal*, 8 W.R. 41. Where, on a complaint in respect of a sessions offence, the Magistrate finding that no sessions offence had been committed, tried the accused of a non-sessions offence and acquitted him, it was held that this section did not apply; even the acquittal of the accused in respect of the minor offence could not be construed to amount to a discharge in respect of the graver offence, and no order under this section could be passed by the Sessions Judge—*Baija Nath v. Gauri*, 20 Cal. 633. Where the accused was tried and acquitted by a competent Magistrate on a charge of simple forgery under sec. 465, I. P. Code, but the Sessions Judge by an order under sec. 437, Cr. P. Code directed the commitment of the accused on a charge of forgery of a valuable security under sec. 467, I. P. Code (a sessions offence) with which he held the accused should have been charged, held that sec. 437 contemplated a case of discharge, and the accused not having been properly or improperly discharged in respect of an offence under sec. 467, I. P. Code, the Sessions Judge had no power to direct his committal under sec. 437—*Abdul Hakim v. Bajruk Ali*, 22 C.W.N. 117 (120), 18 Cr.L.J. 834, 26 C.L.J. 210, 41 I.C. 658 (per Richardson, J.). But in *Krishna Reddi v. Subbamma*, 24 Mad. 136, it was held that the acquittal of the accused in respect of the minor offence was in substance a discharge of the accused in respect of the graver offence, and the Sessions Judge was, therefore, justified in having made an order for further inquiry in respect of the graver offence and for committal to the Sessions. Similarly, in a Sind case, where a Magistrate of the first class acquitted certain persons who were charged under secs. 421 and 506 of the I. P. Code, whereupon the complainant made applications to the Magistrate to frame a charge under sec. 395, I. P. Code, but the Magistrate declined to entertain them, and then the District Magistrate, being moved by the complainant, and acting under sec. 437, Cr. P. Code, framed a charge against the accused and committed them to take their trial before the Sessions Court, held that the Magistrate's order was in substance one discharging the accused in respect of an alleged offence under sec. 395, I. P. Code, and the District Magistrate had jurisdiction to pass the order in question—*Khanu*, 19 S.L.R. 353, 25 Cr.L.J. 1368, A.I.R. 1925 Sind 190 (following 24 Mad 136); *Shambhooram*, 37 Cr.L.J. 80, 159 I.C. 271, A.I.R. 1935 Sind 221, 1935 Cr.C. 1272. See also *Sukhlal*, 35 Cr.L.J. 865, 148 I.C. 999,

A.I.R. 1934 All. 141, 1934 Cr.C. 193, 1934 A.L.J. 478, where the view of the Madras High Court was followed. See also *Zuji Manu*, 5 Bom.L.R. 125; *Sheo Narain v. Radha Mohan*, 42 All. 128, 53 I.C. 618, 20 Cr.L.J. 778, A.I.R. 1919 All. 66, 17 A.L.J. 1093; *Ramrao*, 33 Cr.L.J. 558, 137 I.C. 904, A.I.R. 1932 Nag. 85, 15 N.L.J. 26, 1932 Cr.C. 435, Ind. Rul. 1932 Nag. 72. The word "discharged" in this section does not necessarily mean absolutely discharged and set at liberty. It can also be held to mean partially discharged, or in other words, not charged with an offence exclusively triable by the Court of Sessions—*Sultan Ali*, A.I.R. 1934 Lah. 164, 15 Lah. 138, A.I.R. 1934 Lah. 513, 1934 Cr.C. 346, 36 Cr.L.J. 466, 153 I.C. 1029, 36 P.L.R. 508.

This section applies not only where the accused has been expressly discharged, but also where he has been *impliedly* discharged. Thus, where on a complaint for an offence under sec. 302, I. P. C., the Magistrate disbelieving the evidence did not frame any charge under sec. 302 or 304, I. P. C., but framed only charges under secs. 147, 323, 325, I. P. C., held that the action of the Magistrate amounted to an implied order of discharge in regard to secs. 302 and 304, I. P. C., and an order directing committal in regard to sec. 304 can be made by the Sessions Judge—*Ganda Apparaju*, 43 Mad. 330, 21 Cr.L.J. 91. Where the Police Report on which the case was instituted in the Court of the Magistrate quoted sec. 307 together with sec. 326, I. P. C., but the Magistrate framed a charge under sec. 326, I. P. C., and acquitted the accused in respect of that charge and there was nothing in the order of the Magistrate to show that he consciously considered whether sec. 307, I. P. C., would be applicable to the case against the accused, held that there was a case before the Magistrate under sec. 307, I. P. C., and although he had not passed any orders in regard to that part of the case, an order of discharge was implied and that the Sessions Judge, therefore, had jurisdiction under this section to direct that the accused should be committed for trial to the Court of Sessions under sec. 308, I. P. C.—*Sukhlal*, 35 Cr.L.J. 865, 148 I.C. 999, A.I.R. 1934 All. 141, 1934 Cr.C. 193, 1934 A.L.J. 478, 56 All. 529. But after all, if a trial has taken place, it is doubtful whether the Sessions Judge has jurisdiction to set it aside and, in matters of doubt, it is useless to subject the accused to the cost and strain of a re-trial—*Kripal Singh v. Emp.*, 38 Cr.L.J. 992 (1995), 170 I.C. 780, 39 P.L.R. 444, 10 R.L. 148, A.I.R. 1937 Lah. 217. The Oudh Court, however, holds that the word 'discharge' means *absolute* discharge, and not a *partial* discharge. Therefore, where the police challan mentioned offences under secs. 147 and 304, I. P. C., but the Magistrate after hearing the evidence for the prosecution framed a charge under secs. 147 and 325, the accused could not be said to have been discharged, and the Sessions Judge was not authorised to order commitment for an offence under sec. 304, I. P. C.—*Bilodar*, 3 O.W.N. 201, 27 Cr.L.J. 417, 13 O.L.J. 490. See Note 1179.

'By an inferior Court':—For the meaning of 'inferior', see Note 1171 under sec. 435.

A Subordinate Magistrate of the First Class, invested with powers under sec. 30 is inferior to the District Magistrate, and the latter can revise an improper order of discharge passed by the former in a case triable exclusively by the Court of Session—*Yado*, 12 N.L.R. 94, 17 Cr.L.J. 245.

1191. Order for commitment:—Under this section the Sessions Judge can himself commit the accused. The words 'order him to be committed' do not mean more than 'pass an order for his committal' and the intervention of a Magistrate for making the commitment is not necessary—*Krishnabhai*, 10 Bom. 319. There is nothing in this section to shew that when a District Magistrate or Sessions Judge directs a discharged person to be committed for trial, the commitment must be made by the discharging Magistrate—*Ibid.* But, of course, it is not wrong to call upon the discharging Magistrate to make the commitment—*Priya Gopal*, 9 Bom. 100; *Surendra*, 28 Cal. 397.

This section enables the Sessions Judge or District Magistrate to commit the accused person or direct his committal for trial only for the offence with which he was substantially charged in the complaint and not for another offence—*Taruck Nath*, 19 W.R. 30 (31); *Sundaram*, 2 Weir 549. Thus, where the police charge-sheet on which the

subordinate Magistrate took cognizance of a case charged the accused with a minor offence, and the grave offence of rape was not mentioned in it, nor did the prosecution press for the framing of a charge in respect of the offence, and the Magistrate framed a charge only of the minor offence, it was held that the District Magistrate had no jurisdiction to direct the subordinate Magistrate to commit the accused to the Sessions for the higher offence—*Marappa Goundan*, 41 Mad. 982, 19 Cr.L.J. 945, 47 I.C. 665, A.I.R. 1919 Mad. 817, 1918 M.W.N. 486, 35 M.L.J. 667. If on the evidence it appears that some other offence has been committed by the accused, the proper course is to order an inquiry under proviso (b). The order under this section must state the offence in respect of which the commitment is to be made—*Ankamma*, 1932 M.W.N. 1162, 34 Cr.L.J. 278, 142 I.C. 138, Ind. Rul. 1933 Mad. 199, A.I.R. 1933 Mad. 247, 1933 Cr.C. 374, 65 M.L.J. 6, 38 M.L.W. 668.

Order passed after prior refusal:—Where some of the accused persons are discharged, and an application being made to the Sessions Judge for revision of the order of discharge, he summarily rejects the application upon a perusal only of the judgment of the Magistrate, the Sessions Judge is not precluded, upon examining the record when the case of the other accused comes to him for trial, from passing an order of commitment of the persons who have been discharged. The first order was a summary order passed without examining the record, and was not properly speaking a judgment at all. Consequently, sec. 369 is no bar to the subsequent order. The case would have been otherwise if the order had been passed after calling for the record and perusing the same—*Debidas*, 33 C.W.N. 974.

1192. Further inquiry, whether can be ordered:—A District Magistrate proceeding under this section is not restricted to ordering commitment of the accused who may have been discharged by a subordinate Magistrate; he can also direct a *further inquiry*, prior to making an order for commitment—*Moniruddin*, 18 Cal. 75. Where, after the discharge of an accused person, fresh evidence comes to light, the District Magistrate should not direct a subordinate Magistrate to commit the accused, for it will amount to a committal for trial on the evidence of witnesses whom the accused has not had an opportunity of cross-examining. The proper course for the District Magistrate is to direct a fresh inquiry—*Lingappa*, 2 Weir 550. A District Magistrate has no jurisdiction to order a further enquiry under this section into an offence which is triable not only by a Court of Session but also by a Magistrate of the first class—*Kallu*, 35 Cr.L.J. 1151, 150 I.C. 852, 11 O.W.N. 818, A.I.R. 1934 Oudh 327, A.L.R. 1934 Oudh 323.

Where a Magistrate discharged two accused and framed a charge under sec. 354, I. P. C., against the remaining three and an application for revision of not only the order of discharge but also the order of framing a charge against the three accused under sec. 354, was filed in the Court of Sessions Judge who forwarded the proceeding to the District Magistrate asking him to direct further inquiries by any other Magistrate and holding that on the evidence a *prima facie* case under secs. 366|511 and not under sec. 354 had been made out, held that the order was tantamount to quashing the charge which the Sessions Judge had no power to do under sec. 436 or sec. 437, Cr. P. C., and that the correct procedure would have been to submit the case to the High Court with a recommendation to order further inquiries on the lines indicated—*Sultan v. Ma Hla Khin*, 34 Cr.L.J. 1083, 145 I.C. 720, A.I.R. 1933 Rang. 214, 1933 Cr.C. 869.

When commitment should be ordered and when not: Where the District Magistrate is satisfied that on the evidence taken

discharges the accused because in his opinion the evidence is insufficient or incredible, then if the District Magistrate comes to a different conclusion upon the evidence, his proper course is to make an order of commitment and not to direct further inquiry—*Yado*, 12 N.L.R. 94, 17 Cr.L.J. 245. Where in a case triable exclusively by the Sessions Court, the Sessions Judge or District Magistrate is satisfied that on the evidence taken there is a clear case for committal, and there is no reason for desiring a further con-

sideration by the Magistrate, it would ordinarily be his duty to commit under this section without ordering a further inquiry—*Haridas v. Saritulla*, 15 Cal. 608.

1193. Proviso (a):—Notice to accused:—It is an essential condition precedent to an order under this section that the accused should have an opportunity of showing cause against his commitment. An order made without issuing such notice is bad in law and not maintainable—*Asif Khan v. Fallu*, 1888 A.W.N. 236; *Duarkanath*, 1 C.L.R. 93; *Thammanna*, 15 M.L.J. 373. Where some of the accused were not made parties to the revision petition to the District Magistrate against the order of discharge, and no notice had been ordered to be served upon them, and they had no opportunity of showing cause against the order of commitment made by the District Magistrate, *held* that the order of commitment made by the District Magistrate was clearly wrong and must be set aside so far as these accused were concerned—*Mania Manika*, 48 Mad. 874, 49 M.L.J. 155, 26 Cr.L.J. 1570. Where, however, a District Magistrate ordered the subordinate Magistrate to make a committal to the Court of Session, without giving the accused any notice, but the committing Magistrate issued a notice before doing so, the defect was cured by sec. 537—*Rabha*, Ratanlal 899. Also, where no objection was taken to the want of notice and the omission has not occasioned a failure of justice, the High Court will not interfere—*Khamir*, 7 Cal. 662.

The opportunity to shew cause mentioned in this proviso does not mean any opportunity but that the accused must have a special opportunity. Where the Sessions Judge who was trying a case of false evidence suddenly asked a witness in the course of his examination to explain why he should not be again committed for a trial for murder in respect of an act for which he had been previously discharged, and on answers given by the witness to the above question, ordered his commitment for trial for murder, *held* that the order was illegal since the accused had not been properly called upon to shew cause—*Govind*, Ratanlal 588.

If a notice is given to the accused under this proviso, he is not under any obligation to appear and shew cause. He may or may not avail himself of the opportunity as he chooses—*Kanwar*, 1893 P.R. 15.

1194. Interference by High Court:—Under sec. 439, the High Court has power to revise an order of commitment passed under this section by the Sessions Judge or District Magistrate—*Rash Behari*, 12 C.W.N. 117. In the exercise of the powers of revision, the High Court can, on the merits of the case, cancel an order of commitment passed by the Sessions Judge under this section, as for instance, where the order setting aside a discharge and directing commitment is made, on insufficient or unreliable evidence—*Prithi Chand v. Sampatia*, 7 C.W.N. 327, or where there is no *prima facie* case for commitment—*Shcobux*, 9 C.W.N. 829.

The order of a Sessions Judge or District Magistrate under this section directing commitment can be quashed by the High Court in the exercise of its revisional powers under sec. 439 and not under sec. 215—*Kalagana*, 27 Mad. 54. Sec. 215 refers only to a commitment actually made and not to an order directing commitment contemplated by sec. 437. Therefore, the High Court, in considering the order of a Sessions Judge or District Magistrate passed under sec. 437, may consider the facts as well as the question of law involved and is not limited to points of law only as under sec. 215—*Muthia Chetty*, 30 Mad. 224; *Rash Behari*, 12 C.W.N. 117; *Tinkouri*, 1 P.L.T. 153, 21 Cr.L.J. 328, 55 I.C. 66; *Munshi Mander v. Karu*, 6 P.L.T. 146, 81 I.C. 913, A.I.R. 1925 Pat. 279, 25 Cr.L.J. 1089.

But though the High Court possesses the powers to revise orders of commitment, it should exercise those powers most sparingly, and only where it is manifest that the Sessions Judge's order is improper, e.g., where there is no evidence to prove the offence charged—*Muthia Chetty*, 30 Mad. 224; *Mania Manika*, 48 Mad. 874, 49 M.L.J. 155. It is evident from this section that the fullest and widest discretion has been given to District Magistrates and Sessions Judges, and when an order of commitment has been duly made, the High Court should be most unwilling to interfere except upon strong grounds and under exceptional circumstances—*Fallu v. Fallu*, 25 All. 564; *Mangat*

Rai, 13 A.L.J. 111, 16 Cr.L.J. 139. There is no authority which would justify the High Court in once more appreciating the evidence and holding that no Court could possibly convict when one Court at least has given an indication that on the evidence a conviction is possible. The Sessions Court should be very slow to interfere in revision to set aside an order of discharge, a principle which *a fortiori* would apply to the High Court in what may be called a second revision—*Alberally Tajaballi v. Alimahomed Abdul Hussan*, 40 Cr.L.J. 951 (1953), 181 I.C. 282, 12 R.B. 159, 41 Bom.L.R. 749, A.I.R. 1939 Bom. 372, following *Ramchandra*, 7 R.B. 405, 36 Cr.L.J. 613, 155 I.C. 101, A.I.R. 1935 Bom. 137, 37 Bom.L.R. 16, 59 Bom. 125, 1933 Cr.C. 288 (F.B.). Where a District Magistrate sets aside the order of discharge passed by a Committing Magistrate and orders a case to be committed to Sessions which is exclusively triable by a Court of Session, the High Court will not interfere in revision unless the District Magistrate's order is in the circumstances of the case shown to be unjustifiable—*Aulad Husain*, 32 Cr.L.J. 128, 128 I.C. 285, 7 O.W.N. 749, A.I.R. 1930 Oudh 415, Ind. Rul. 1931 Oudh 45, 1930 Cr.C. 955. Where a competent District Magistrate, acting upon a discretion which the law confers, has committed an accused for trial by a Court of Session, and his proceedings are not on the face of them illegal or arbitrary or capricious, the practice of the High Court is that as revisional Court it would neither enquire into the reasons, nor interfere. Where there is no question of law involved, it is only in exceptional cases that the High Court will exercise revisional powers after a valid order of commitment, to see if the commitment deserves to be quashed on the ground that the evidence does not make out a *prima facie* case. Where there is no evidence at all the commitment may be quashed, because, absence of evidence for commitment is held to be a point of law—*Hussainbhoy*, A.I.R. 1934 Sind 27, 148 I.C. 1066, 35 Cr.L.J. 881, A.L.R. 1934 Sind 28, 1934 Cr.C. 225. See also *Ramchandra*, 36 Cr.L.J. 613 (646), 155 I.C. 101, A.I.R. 1935 Bom. 137, 37 Bom.L.R. 16, 59 Bom. 125, 1935 Cr.C. 288 (F.B.). But see *Palaniappa Thevan v. Karuppa Gounden*, 40 Cr.L.J. 392, 180 I.C. 576, A.I.R. 1939 Mad. 253, 1938 M.W.N. 1311, 11 R.M. 727.

438. (1) The Sessions Judge or District Magistrate may, if he thinks fit, on examining under section 435 or otherwise the record of any proceeding, report for the orders of the High Court the result of such examination, and, when such report contains a recommendation that a sentence be reversed or altered, may order that the execution of such sentence be suspended, and, if the accused is in confinement, that he be released on bail or on his own bond.

(2) An Additional Sessions Judge shall have and may exercise all the powers of a Sessions Judge under this Chapter in respect of any case which may be transferred to him by or under any general or special order of the Sessions Judge.

Change:—The italicised words have been added by sec. 118 of the Cr. P. C. Amendment Act XVIII of 1923. "In order to provide for the absence of a Sessions Judge, we think it is necessary to empower him to make a general order authorising the Additional Sessions Judge to exercise all his powers. We have provided for it specially by this amendment"—*Report of the Select Committee of 1916*.

1195. Who can report:—The only Courts which can make a reference to the High Court are the Court of Session and District Magistrate. An Additional Sessions Judge has jurisdiction to exercise the powers of a Sessions Judge only in respect of cases transferred to him by the Sessions Judge—*Ramchandra*, 1903 A.W.N. 28. In the absence of such transfer, an Additional Sessions Judge has not the powers of a Sessions Judge under this section—*Abdul Gaffur*, 1 L.B.R. 119. Where a jail appeal by one of

two convicted persons was transferred to the Additional Sessions Judge who acquitted the appellant and made a reference to the High Court under this section with a recommendation for the acquittal of the non-appealing accused, held that in view of cl (2) of this section he was not competent to make a reference in respect of an accused whose case was not transferred to him—*Zama Shah*, 35 Cr.L.J. 296, 11 O.W.N. 66, 147 I.C. 382, A.I.R. 1934 Oudh 73, 1934 Cr.C. 256, A.I.R. 1934 Oudh 86.

1196. When reference may be made:—A District Magistrate or Sessions Judge should refer all cases in which he considers the order of the Subordinate Court as illegal—*Anonymous*, 2 Weir 564 (565); e.g., when he considers that the judgment or order is contrary to law, or that the punishment is severe or inadequate—*Khubi*, 1881 A.W.N. 12. So also, where a District Magistrate is of opinion that a subordinate Magistrate has no jurisdiction to try a particular case, the District Magistrate has no power to quash the proceedings of the Sub-Magistrate but must report the case for proper orders to the High Court—*Kandaswami v Soli Goundan*, 23 Mad 540. So again, if a Sessions Judge is of opinion that an order of a District Magistrate directing a further inquiry under sec 436 is wrong, a reference to the High Court may be made under this section—*Darbari v. Jagoo Lal*, 22 Cal. 573. Where the District Magistrate decided, upon a consideration of the application and examination of the record, that the order of the Special Magistrate regarding the custody of a minor girl was unjust, he could only act under this section and had no power to set it aside—*Moti v. Beni*, A.I.R. 1936 All. 852, 1936 A.L.J. 1097, 1936 A.W.R. 920, 1936 Cr.C. 1111, 166 I.C. 847. A Sessions Judge cannot, upon examining the monthly criminal return of Magistrate, order further inquiry under sec. 436 into the case of a person who has been convicted. If he thinks any further inquiry necessary, he should refer the case to the High Court under this section—*Valav*, Ratanlal 407.

A Magistrate's order declining to stay proceedings is an order within the meaning of sec. 435 and the Additional Sessions Judge has power to refer it to the High Court under sec. 438—*Louis Philip Dias v. Mahadev*, A.I.R. 1933 Bom. 485, 35 Bom.L.R. 1054, 1933 Cr.C. 1589, 58 Bom. 49.

See *Roshan Lal*, cited in Note 1169, for the power of the Sessions Judge to make a reference at the instance of a third party even when the convicted person do not desire it. See also Notes 1204 and 1220.

Power of reference after prior refusal:—The fact that a Sessions Judge has once refused to make a reference to the High Court after examination of the case in the ordinary way under sec. 435, does not take away his jurisdiction to make a reference on subsequent facts which come to his knowledge. The words "or otherwise" in this section are wide enough to meet a case where there is clear evidence of some gross miscarriage of justice having occurred, which ought to be brought to the knowledge of the Revisional Court, although in the absence of knowledge of such evidence an application for revision might have been previously rejected—*Sitaram*, 29 Bom.L.R. 480, 104, I.C. 912, A.I.R. 1927 Bom. 360, 9 A.I.Cr.R. 27, 28 Cr.L.J. 896.

Power of refusal after reference:—After having passed the order of reference the Sessions Judge becomes *functus officio* and has no power to revise or review his order and by a separate order reject the application for revision. The proceedings subsequent to the order of reference are clearly *ultra vires* and illegal—*Rameshwar v. Bharath*, 35 Cr.L.J. 417, 147 I.C. 516, 11 O.W.N. 75, A.I.R. 1934 Oudh 75, 1934 Cr.C. 255, A.I.R. 1934 Oudh 85.

1197. When reference is improper:—This section allows a reference only when the Court of Session is of opinion that the judgment or order is contrary to law, or that the punishment is too severe or inadequate, but not on the ground of the insufficiency or incredibility of the evidence—*Khubi*, 1881 A.W.N. 12. Speaking generally, a report ought not to be made to the High Court under this section on matters of fact or unless the examination of the proceeding in the inferior Court discloses a question of law which the Sessions Judge or District Magistrate thinks would properly be.

determined by the High Court—*Maung Ba Thon*, 32 Cr.L.J. 950 (1958), 132 I.C. 822, 9 Rang. 239, Ind. Ruf. 1931 Rang. 214, A.I.R. 1931 Rang. 225, 1931 Cr.C. 865 (F.B.). See also *Phakir v. Madar*, cited in Note 1210 and *Chandreshwar Prasad Narain Singh v. Arunendra Mohan Ghosh*, *infra*. The objections to making a reference or to interfering in revision on the question of credibility of witnesses are still stronger when the proceeding is a pending proceeding instituted in accordance with law and carried on regularly and in which no error of procedure is suggested to have been committed by the Magistrate before whom those proceedings are pending—*Chandreshwar Prasad Narain Singh v. Arunendra Mohan Ghosh*, A.I.R. 1936 Pat. 626 (627), 17 P.L.T. 794, 38 Cr.L.J. 2, 165 I.C. 931, 9 R.P. 231, 3 B.R. 101, 1936 Cr.C. 1064. A reference can only be made to the High Court if after accepting loyally the finding of facts arrived at by the trial Magistrate some question of law arises which necessitates interference with the order passed by the trial Court—*Peters*, A.I.R. 1934 Oudh 276, 11 O.W.N. 717, A.L.R. 1934 Oudh 220, 1934 Cr.C. 773, 1934 O.L.R. 507, 36 Cr.L.J. 812, 155 I.C. 724. The Sessions Judge must not make any reference to the High Court or submit any application for revision of any order contrary to the findings of fact arrived at by the trial Court. No reference or revision can be accepted by the High Court which involves no question of law—*Dulari v. Mt. Sundaria*, A.I.R. 1934 Oudh 278, 11 O.W.N. 718, A.L.R. 1934 Oudh 216, 1934 Cr.C. 774, 1934 O.L.R. 507, 36 Cr.L.J. 838, 155 I.C. 726. See *Bhola Prasad v. Ram Dulari*, 35 Cr.L.J. 951, 149 I.C. 361, A.L.R. 1934 Oudh 223, 11 O.W.N. 719, 1934 Cr.C. 776, A.I.R. 1934 Oudh 280. See also *Ram Bahal*, A.I.R. 1936 All. 364, 1936 A.L.J. 283.

A case should not be reported unless it is very clear that the conviction is *wrong* and that there can be no reasonable doubt on the matter. A Sessions Judge should not refer a case to the High Court merely because he considers the conviction of the accused to be *bad* on the ground that the prosecution witnesses had something in common with the complainant and were on bad terms with the accused—*Sudaman*, 49 All. 551, 100 I.C. 1055, 25 A.L.J. 379, 7 A.I.Cr.R. 343, A.I.R. 1927 All. 475, 28 Cr.L.J. 399 (400). A necessity for altering a conviction from one section to another for a cognate offence, when the accused has not been prejudiced by any such error, is not a sufficient ground for a reference to the High Court under this section—*Ishan Chandra*, 9 Cal. 847.

When a District Magistrate or Sessions Judge has himself the power to make the order which he proposes in his letter of reference, a reference under this section is unnecessary—*Bidhu v. Moti*, 28 Cal. 102. The High Court will not exercise its revisional powers in a case where the Magistrate making the reference has jurisdiction to dispose of the case himself—*Rahimdino*, 22 S.L.R. 201, 105 I.C. 802, A.I.R. 1928 Sind 69, 28 Cr.L.J. 978 (979). Thus a case which regularly comes to the Sessions Judge or District Magistrate, on the appeal of a prisoner, cannot be referred to the High Court under this section but must be disposed of by the Sessions Judge or District Magistrate himself—*Mohan Lal*, 13 A.L.J. 477, 16 Cr.L.J. 433 (434); *Bega Singh*, A.I.R. 1914 Lah. 266, 21 I.C. 573, 7 P.W.R. 1914 (Cr.), 1914 P.L.R. 62, 15 Cr.L.J. 485 (487). A report cannot be made in a case where the proceedings are themselves the subject of a revision case or appeal case pending before the District Magistrate, whose duty it is to pass a judicial order on that case himself—*In re Palani Gownden*, 15 Cr.L.J. 472, A.I.R. 1914 Mad. 100, 24 I.C. 352. The reporting Court should decide the appeal, and if it considers that it has been unable to do substantial justice, it may then report the case on the revision side with recommendations as to suggested action which as an appellate Court it was not able to take itself—*Mir Ghawas*, A.I.R. 1936 Pesh. 81, 37 Cr.L.J. 470, 161 I.C. 320, 1936 Cr.C. 210. See also *Rahimdino*, *supra*.

Where an Assistant Sessions Judge accepting the verdict of the jury convicted the accused but the Additional Sessions Judge finding himself unable to interfere under sec. 423 (2), Cr. P. C., as there was no misdirection, made a reference to the High Court instead of referring the case to the Local Government for orders, the position is that the appeal of the accused has been dismissed. Had not the Sessions Judge referred

the case to the High Court it would have been open to the accused to move the High Court in revision and ask it to interfere on the ground that the Additional Sessions Judge was wrong in holding that there was no misdirection and if the High Court found that there was misdirection by the Assistant Sessions Judge which had been ignored by the Additional Sessions Judge and which has occasioned a failure of justice it would have interfered. The fact that the High Court has examined the record on an incompetent reference by the Additional Sessions Judge does not alter the position. It must interfere if a case for interference has been made out.—*Rameshwar Singh v. Emp.*, 38 Cr.L.J. 919 (922), 170 I.C. 464, 16 Pat. 413, 1937 P.W.N. 596, 3 B.R. 734, 10 R.P. 128, 18 P.L.T. 607, A.I.R. 1937 Pat. 440.

Where an accused has been discharged by a Magistrate, the District Magistrate, if he is of opinion that the discharge is wrong, may take action under sec. 436 (if he deems it necessary) and need not make a reference to the High Court—*Shrinivas, Ratanlal* 290 (291); *Shco Balak Singh v. Sant Bux Singh*, 37 Cr.L.J. 1128, 165 I.C. 28, 1936 O.W.N. 1079.

The word "proceeding" which is used in this section must be a proceeding as referred to in sec. 435, Cr. P. C., that is to say, a proceeding before any inferior Criminal Court—*Bejoy Krishna Das v. Shyam Narain Singh*, 41 Cr.L.J. 442 (443), 187 I.C. 310, A.I.R. 1940 Cal. 30, I.L.R. (1939) 2 Cal 532. This section authorises the District Magistrate or Sessions Judge to make reports to the High Court in respect of proceedings of inferior Criminal Courts, but not in respect of proceedings pending before his own Court; nor does it authorise him to transfer the decision of a difficult case pending before him to the High Court—*In re Palani Gownden*, 15 Cr.L.J. 472; see also 13 A.L.J. 477 and 1914 P.L.R. 62, cited above. But see Note 1198 under the heading "Reference against its own order" for a contrary view.

Clause (1) of this section appears to contemplate action by the Sessions Judge or District Magistrate upon examination of the proceedings of a subordinate Court. It does not apparently authorize the Sessions Judge or Magistrate to refer his own order with a recommendation that it be altered. Therefore, where the District Magistrate dismissed a jail appeal and came to the conclusion that the order of dismissal was erroneous while hearing the appeal preferred by a co-accused and made a reference to the High Court for setting aside his own order, the reference was incompetent—*Ramasis*, A.I.R. 1933 Pat. 697, 1933 Cr.C. 1550, 146 I.C. 370, 14 P.L.T. 759, 35 Cr.L.J. 22.

A reference by the District Magistrate direct to the High Court for enhancement of sentence is irregular and not warranted by law. The proper course for him to adopt would be to instruct the law officers of the Crown in the High Court to file an application for revision asking for enhancement of the sentence—*Gulab*, 29 Cr.L.J. 235 (236), 107 I.C. 285, A.I.R. 1928 Lah. 660. But see *Yakub Brohi*, cited in Note 1198.

Reference in cases of acquittal:—In the case of an acquittal by a Subordinate Magistrate, if the Government does not appeal, the proper course for the District Magistrate, if he is dissatisfied with the order of acquittal, would be to move the Local Government for exercising its powers under sec. 417 and not to make a reference to the High Court under this section. It is not proper and expedient for the High Court as a general rule to exercise its powers of revision in respect of orders of acquittal on a reference from the District Magistrate, when the Local Government has not appealed against the order—*Sheikh Aminuddin*, 24 All. 346; *Madar*, 25 All. 128; *Achar Singh*, A.I.R. 1924 Lah. 451, 81 I.C. 547, 5 Lah. 16 (19), 25 Cr.L.J. 931; *Hrishikesh v. Abadhut*, 44 Cal. 703; *Dabiruddin v. Sakat*, 33 C.W.N. 258, 49 C.L.J. 129, 116 I.C. 164, A.I.R. 1929 Cal. 169, 56 Cal. 924, 30 Cr.L.J. 579; *Ranga Row*, 15 Mad. 36; *Mogal Beg*, 42 Mad. 109; *Gur Dayal*, 12 A.L.J. 255, 15 Cr.L.J. 304; *Sinnu Gownden*, 38 Mad. 1028; *Rasul v. Zarin*, 32 Cr.L.J. 1128, 134 I.C. 208, A.I.R. 1931 Lah. 533, 1931 Cr.C. 773, Ind. R./1931 Lah. 912, 32 P.L.R. 789; *Ganpat*, A.I.R. 1933 Nag. 259, 35 Cr.L.J. 28, 146 I.C. 332, 29 N.L.R. 365, 1933 Cr.C. 930; *Janu Fakir*, 15 S.L.R. 171, 66 I.C. 999, A.I.R. 1922 Sind 22, 23 Cr.L.J. 343.

In *Ganpat*, supra, it is stated that where reference under sec. 437 is received asking for interference against an order of acquittal the High Court is very reluctant to accept such a reference. In cases of acquittal the Provincial Government has a right to appeal. If the Provincial Government does not choose to file an appeal and if a reference is made asking the High Court to interfere with an order of acquittal it will interfere only if there be radical and incurable irregularity or a complete disregard of the law and procedure or a manifest injustice which has got to be cured. When an accused is acquitted a very valuable and substantial privilege accrues in his favour and it is not proper for a Court to interfere with an acquittal simply because the complainant thinks that the accused has committed the offence and the offence will remain unpunished—*Laxmi Prasad*, 41 Cr.L.J. 919 (921, 922), 190 I.C. 467, A.I.R. 1940 Nag. 357, 1940 N.L.J. 399.

In a recent Patna case it has been held that the High Court may justly refuse to interfere on a reference by a District Magistrate, where it is clear that the case is one in which the Local Government would be expected to move on account of its special importance to the administration. But the High Court cannot refuse to entertain a reference in those cases of acquittal which are of no public interest (so that the Government would not move) and in which the High Court would interfere under sec. 439 at the instance of a private party—*Wazir Kunjra*, 7 Pat. 579, A.I.R. 1929 Pat. 139, 116 I.C. 768, 30 Cr.L.J. 673 (674). Moreover, a distinction should be drawn between a reference by a District Magistrate and a reference by a Sessions Judge. A District Magistrate has the means of communicating with the Local Government with a view to an appeal under sec. 417, but a Sessions Judge has no such means, and he must either act under sec. 438 or not at all. Further, a Sessions Judge's outlook on the matter is purely judicial. Consequently, a reference made by him ought not to be rejected by the High Court—*Wazir Kunjra*, supra.

The High Court has jurisdiction to entertain a reference by the Sessions Judge against the order of acquittal and, if necessary, to set it aside, though such power must be exercised in exceptional cases only, where there has been either a denial of the right of a fair trial or a flagrant and glaring failure of justice. The High Court can entertain such a reference even where the Local Government has not been moved to prefer an appeal to the High Court under sec. 417, Cr. P. C., or having been moved, has declined to prefer such an appeal—*Nathu Mal v. Abdul Haq*, 31 Cr.L.J. 584 (585, 586), A.I.R. 1930 Lah. 159, 1930 Cr.C. 167, 123 I.C. 841. See also *Soni v. Kishnomal Manghandas*, 40 Cr.L.J. 524, 180 I.C. 989, I.L.R. 1939 Kar. 385, 11 R.S. 198, A.I.R. 1939 Sind 75.

The judicial powers of the District Magistrate to make a reference under this section against an order of acquittal cannot be restricted by sub-sec. (5), sec. 439, Cr. P. C., on the ground that the Local Government should have appealed and has not done so. The District Magistrate, not being the Local Government, is not the person entitled to appeal, whether or not he may be able in his executive capacity to move the Local Government to appeal—*Bashir*, 32 Cr.L.J. 143, 128 I.C. 395, 53 All. 42, 1930 Cr.C. 997, A.I.R. 1930 All. 741.

The District Magistrate should not refer cases of acquittal on pure questions of fact. But where the judgment of the trial Magistrate was full of surmises and special pleadings and reading it one was left in the dark as to whether his mind worked for a conviction or for an acquittal, the High Court accepted a reference against an order of acquittal on questions of fact made by a District Magistrate through the Sessions Judge who also supported it and ordered a retrial—*Dhum Bahadur v. Hori Lal*, 35 Cr.L.J. 1289, 151 I.C. 350, 3 A.W.R. 564, 1934 Cr.C. 902, A.I.R. 1934 All. 714.

Where the District Magistrate or Sessions Judge merely differs from the first Court's appreciation of facts, or where he suspects an error of law, then, unless the error of law is manifest, unless the case involves a matter of principle, and unless there has been a serious failure of justice, unless in short he is clearly of opinion that the public interest demands that there should be intervention by the High Court he is under no obligation to refer the case. Where the only interests affected are those of

private parties he will more often do better by leaving the party aggrieved to pursue his remedy by an application to the High Court. The High Court has ample powers in revision and the widest possible discretion, and if the High Court eventually allows such an application it is not thereby implied that the District Magistrate or Sessions Judge ought to have made a reference—*Abdul Manir v Kadir Khan*, AIR. 1937 Pat. 110 (112), 1937 P.W.N. 220, 18 P.L.T. 227, 167 I.C. 894, 9 R.P. 447, 3 B.R. 377, 38 Cr.L.J. 470, following *Phakir v. Madar*, 32 Cr.L.J. 1237, 134 I.C. 915, 58 Cal. 1081, 35 C.W.N. 374, AIR 1931 Cal. 619, 1931 Cr.C. 803, Ind. Rul. 1931 Cal. 915.

Reference in Police Proceedings:—This section does not empower a District Magistrate to refer to the High Court the proceedings of a Superintendent of Police, as the latter is not a Court subordinate to the Magistrate—*Sankal Chand*, Ratanlal 133.

Ordinance II of 1932:—Sec. 51 of this Ordinance has the effect of depriving the Sessions Judge of the right of calling for and examining the record under sec. 435 and of referring the case for orders of the High Court under sub-sec. (1) of this section—*Manmatha*, 34 Cr.L.J. 579 (580), 143 I.C. 238, AIR. 1933 Cal. 401, Ind. Rul. 1933 Cal. 390, 1933 Cr.C. 579, 60 Cal. 851.

Improper form of reference:—Where a reference asked the High Court not to quash the entire order (under sec. 145) passed by a Magistrate, but to confirm a part of the order and to quash the rest, the High Court rejected the reference as improper in form—*Collector of Howrah v. Santak*, 44 C.L.J. 593, 28 Cr.L.J. 210 (212), 99 I.C. 1010, AIR. 1927 Cal. 261, 7 A.I.Cr.R. 383.

1198. Power to refer proceedings of superior Court:—The powers of the Sessions Judge or District Magistrate under this section are limited by sec. 435, which speaks of proceedings of an inferior Criminal Court; and therefore the District Magistrate has no power to question the propriety of an order of the superior Court (*Sessions Judge's Court*) and to refer the order to the High Court for the purpose of having it quashed or modified, especially if the order of the Sessions Judge is one which sets aside or modifies the order of the District Magistrate himself—*Allah Mahr*, 49 All. 443, 28 Cr.L.J. 281 (283); *Jamnabai*, 28 All. 91; *Wasawi*, 5 Lah. 11 (14), 81 I.C. 544, AIR. 1924 Lah. 437, 25 Cr.L.J. 928, 81 I.C. 544, AIR 1924 Lah. 437; *Q.-E. v. Nga Kya Bu*, L.B.R. (1893-1900) 311; *Maung Myat E*, 32 Cr.L.J. 1125, 134 I.C. 220, 9 Rang. 352, AIR. 1931 Rang. 251, 1931 Cr.C. 891, Ind. Rul. 1931 Rang. 284; *Lobo*, 41 Bom. 47, 18 Bom.L.R. 796; *Anonymous*, 2 Weir 565; *Jahandi*, 23 Cal. 249; *Karamdi*, 23 Cal. 250; *Hiraman v. Ram Kumar*, 18 Cal. 186; *Mahabirpuri*, 2 N.L.R. 149; *Ganga*, 36 All. 378; *Baldeo Prasad*, 46 All. 851 (855); *Daulat*, 24 A.L.J. 224, 92 I.C. 743, 27 Cr.L.J. 327; *Zor Singh*, 10 All. 146; *Shah Newaz*, 1 S.L.R. 40, 8 Cr.L.J. 161; *Kassim*, 17 S.L.R. 268, 83 I.C. 881, AIR. 1925 Sind. 188, 26 Cr.L.J. 177 (179); *Patrakhan*, 33 Cr.L.J. 474, 137 I.C. 525, 1932 A.L.J. 67, AIR. 1934 All. 124, 1932 Cr.C. 149, Ind. Rul. 1932 All. 327. The District Magistrate has no power to report against and recommend revision of an order passed on appeal by the Sessions Judge—*Bajinath*, 34 Cr.L.J. 947, 145 I.C. 393, AIR 1933 Pat. 305, 14 P.L.T. 364, 1933 Cr.C. 826; *Wali*, 34 Cr.L.J. 371, 142 I.C. 622, Ind. Rul. 1933 Lah. 224, AIR 1933 Lah. 433, 1933 Cr.C. 674, following *Wasawi*, 25 Cr.L.J. 928, 81 I.C. 544, 5 Lah. 11, AIR. 1924 Lah. 437; *Raja Ram*, 40 Cr.L.J. 879, 184 I.C. 204, 12 R.L. 180, 41 P.L.R. 825, AIR. 1939 Lah. 323; although the order of reference was made by the District Magistrate in ignorance of the existence of an appellate order passed by the Sessions Judge as the principles involved are similar—*Faqir Mohd*, AIR 1937 Pesh. 6, 166 I.C. 881, 9 R.Pesh. 74, 38 Cr.L.J. 335. The District Magistrate and the Sessions Judge have concurrent jurisdiction and the District Magistrate can make a reference direct to the High Court for enhancement of sentence under this section—*Yakub Brohi*, AIR. 1934 Sind. 154, 1934 Cr.C. 1146, 152 I.C. 339, 36 Cr.L.J. 27. *A fortiori*, the District Magistrate has no power to call upon the Sessions Judge to forward the reference to the High Court, and the Sessions Judge can rightly refuse to forward it—*Allah Mahr*, *supra*. The District Magistrate cannot make a reference to the High Court taking exception to

certain remarks made by a Sessions Judge in his judgment, and asking the same to be expunged therefrom—*Khudabux*, 21 S.L.R. 48, 98 I.C. 101, A.I.R. 1927 Sind 45, 27 Cr.L.J. 1253; but when the error is a simple and obvious one, the reference should be accepted—*Lashkaro*, 38 Cr.L.J. 961, 170 I.C. 676, A.I.R. 1937 Sind 203, 10 R.S. 71, 31 S.L.R. 409. It is never intended that a Subordinate Magistrate should have the power of questioning the propriety of an order passed by an Appellate Court, and of reporting it to the High Court, for revision, simply on the ground that he considers that the original sentence was a proper sentence and should not have been reduced—*Ram Lal*, 8 Cal. 875. If the District Magistrate thinks that there has been a miscarriage of justice in an appeal heard by the Sessions Judge, or if he is dissatisfied with a sentence passed by the Sessions Judge, he should not report the case to the High Court for orders under sec. 438, but should communicate with the Public Prosecutor and invite his attention to it—*Shere Singh*, 9 All. 362 (363); *Pirthi*, 12 All. 434; *Baldeo Prasad*, 46 All. 851 (855); *Shah Newaz*, 1 S.L.R. 40, 8 Cr.L.J. 151; *Hiraman v. Ram Kumar*, 18 Cal. 186; *Angamuthu Vanathrian*, 23 M.L.J. 732, 13 Cr.L.J. 714; *Krishnaji*, 6 Bom.L.R. 1099; *Fazal Dad*, 24 Cr.L.J. 573 (Lah.); *Karsan*, Ratanlal 601; *Bajio*, Ratanlal 623; *Kassim*, 17 S.L.R. 268, 83 I.C. 881, A.I.R. 1925 Sind 188, 26 Cr.L.J. 177 (178); *Raja Ram*, 40 Cr.L.J. 879, 184 I.C. 204, 12 R.L. 180, 41 P.L.R. 825, A.I.R. 1939 Lah. 323. Where a person was convicted by a Deputy Magistrate and the appeal from the conviction was dismissed by the Sessions Judge and then the District Magistrate made a reference to the High Court for enhancement of sentence under this section, *held* that the District Magistrate had power to call for the record from the Deputy Magistrate's Court under sec. 435 or to make a reference to the High Court under sec. 438 and that it was not desirable that the High Court should entertain the matter on a letter of reference addressed to the High Court by a District Magistrate when the facts of the case were brought to the notice of the Sessions Judge in the appeal—*Sarafoti*, A.I.R. 1933 Cal. 791, 57 C.L.J. 211, 1933 Cr.C. 1358, 146 I.C. 354, 35 Cr.L.J. 27.

Reference against its own order:—Although it is unusual for a Judge to make a reference regarding the legality of his own order there is nothing in this section to preclude him from doing so. The words "or otherwise" are wide enough to cover such a reference—*Radha Raman Mitra*, 32 Cr.L.J. 364 (365), 120 I.C. 260, 1930 A.L.J. 1076, A.I.R. 1930 All. 817, Ind. Rul. 1931 All. 132, 1930 Cr.C. 1201. See also *Chand Mal Goenka*, 35 Cr.L.J. 1436, 151 I.C. 830, 35 P.L.R. 8, A.I.R. 1934 Lah. 155, 1934 Cr.C. 333, 15 Lah. 63, 7 R.L. 209. If a Court of Sessions finds that it has passed an illegal order and informs the High Court of the mistake and the High Court is of opinion that the order is illegal, it is competent to the High Court to set right the illegality although the form in which the information has come happens to be in the form of a reference—*Rashbehari*, 36 Cr.L.J. 100, 152 I.C. 291, A.I.R. 1934 Pat. 551, 15 P.L.T. 475, 1934 Cr.C. 1195. The Sessions Judge if he thinks that injustice has been committed by an order made by his Assistant Judge can refer the matter to the High Court, just as he could refer the matter to the High Court if he came to the conclusion that he had himself made a mistake which ought to be corrected by the High Court in revision. Once the matter has been brought to the attention of the High Court, the High Court can act in revision under sec. 439, Cr. P. C., whatever the method adopted in bringing the matter to its attention—*Bhatu Sadu Mali*, 39 Cr.L.J. 495 (498), 174 I.C. 780, 40 Bom.L.R. 297, I.L.R. 1938 Bom. 331, 10 R.B. 495, A.I.R. 1938 Bom. 225 (F.B.). For contra see *Palani Gownden* and *Ramasis* in Note 1197.

1199. Power to refer question of law:—This section empowers the Sessions Judge and District Magistrate, on examining the record of any proceedings under sec. 435, to report to the High Court for order the result of such examination, which means that the Sessions Judge or District Magistrate is to report the incorrectness or illegality of the sentence or order and not that he should refer abstract points of law to the High Court—*Chouri v. Putai*, 5 O.C. 316. This section was not intended to enable the District Magistrate or Sessions Judge to get the opinion of the High Court on a question of law

arising in a case pending before him—*Palani Gownden*, 15 Cr.L.J. 472 (Mad); *Rahim-dino*, 22 S.L.R. 201, 28 Cr.L.J. 978; *Prithvinath*, 20 N.L.J. 151, A.I.R. 1938 Nag. 56 (57), I.L.R. 1938 Nag 248, 175 I.C. 935, 39 Cr.L.J. 660. He cannot make a reference to the High Court on the ground that he entertains some doubt about the correctness of some rulings of the High Court—*Bega Singh*, 1914 P.L.R. 62, 15 Cr.L.J. 485 (487). There is no provision of law which enables a Judge to stop a trial already commenced and to refer to the High Court any questions of law arising on the merits in the case—*Bapuji*, Ratanlal 214. Where a Sessions Judge, after having asked the opinions of the assessors in a case tried before him, made a reference to the High Court on a question whether he had jurisdiction or not, the High Court held that the Sessions Judge ought to have disposed of the question himself and that this section 'was never intended to be used for the purpose of sending questions to the High Court for opinion—*Bhup Singh*, 2 All 771.

The object of secs. 435 and 438 is that incidents of incorrectness, illegality or impropriety should be brought to the notice of the High Court, and where there has been no no illegality, etc., there is no proper ground for making a reference—*Prithvinath*, supra.

Where the Sessions Judge or District Magistrate does not really dissent from the actual decision arrived at by the trial Court, a reference to the High Court merely with the object of obtaining a ruling on a question of law ought not to be made—*Madho Singh*, 47 All 409, 23 A.L.J. 189, 26 Cr.L.J. 865; *Prithvinath v. Emp.*, supra.

Power to take evidence:—Neither sec. 435 nor this section enables the District Magistrate or Sessions Judge to take further evidence with a view to report the case—*Mulla Ibrahim*, 3 Bom L.R. 677; *Mahaginia v. Ram Charan*, 12 A.L.J. 461, 15 Cr.L.J. 575.

1200. Contents of the reference:—(1) A Sessions Judge before he refers the case to the High Court is bound to call upon the inferior Court for an explanation of the order passed, and should submit such explanation to the High Court together with the record—*Mailamdi v. Taripulla*, 8 Cal. 644; *Ramchandra Lal*, 35 Cr.L.J. 1020, 149 I.C. 839, 15 P.L.T. 288, A.I.R. 1934 Pat. 316, 1934 Cr.C. 737. When a Magistrate tenders an explanation it is the duty of the Sessions Judge to make a comment on that explanation—*Churanji Lal v. Mahadeo Prasad*, A.I.R. 1932 All. 683 (685), 1932 A.L.J. 819, 1932 Cr.C. 938.

(2) The reasons for the reference should accompany the record—*Kunjai*, 1891 A.W.N. 80.

(3) The order of reference should set forth the points on which orders are required—*Bechan*, OSC 64.

(4) The reference should contain a recommendation that the sentence be revised or altered—*Mohan Lal*, 27 All. 25; and the District Magistrate should also give a brief abstract of the case and the grounds upon which he recommends that the order of sentence he considers to be incorrect and should be set aside by the High Court—*Keshava*, 9 Cr.L.J. 502 (Mad.).

Reference under this section should always be made in the form prescribed for such reference by the General Rules and Circular Orders of the High Court, Criminal Appellate Side, Chap. I, r. 139—*Kutiswar v. Jitendra*, 26 Cr.L.J. 1055, 87 I.C. 975, 30 C.W.N. 646, A.I.R. 1926 Cal. 316.

But the report should not contain any representation of the complainant protesting against the Subordinate Magistrate's decision—*Nagoo*, Ratanlal 340. So also, a representation made by the Inspector of Police to the District Magistrate in the form of a letter, in which the former expressed his view that a case should be retried (together with the grounds for retrial) should not be forwarded to the High Court along with the reference—*Brahmadin*, 26 A.L.J. 76, 28 Cr.L.J. 946 (947), 105 I.C. 658, 8 A.I.Cr.R. 335, A.I.R. 1927 All 727. If the prosecuting Inspector, being dissatisfied with the order of the trial Court, moves the District Magistrate for referring the case to the High Court, the notes of the Inspector should be examined by the District

certain remarks made by a Sessions Judge in his judgment, and asking the same to be expunged therefrom—*Khudabux*, 21 S.L.R. 48, 98 I.C. 101, A.I.R. 1927 Sind 45, 27 Cr.L.J. 1253; but when the error is a simple and obvious one, the reference should be accepted—*Lashkaro*, 38 Cr.L.J. 961, 170 I.C. 676, A.I.R. 1937 Sind 203, 10 R.S. 71, 31 S.L.R. 409. It is never intended that a Subordinate Magistrate should have the power of questioning the propriety of an order passed by an Appellate Court, and of reporting it to the High Court, for revision, simply on the ground that he considers that the original sentence was a proper sentence and should not have been reduced—*Ram Lal*, 8 Cal. 875. If the District Magistrate thinks that there has been a miscarriage of justice in an appeal heard by the Sessions Judge, or if he is dissatisfied with a sentence passed by the Sessions Judge, he should not report the case to the High Court for orders under sec. 438, but should communicate with the Public Prosecutor and invite his attention to it—*Shere Singh*, 9 All. 362 (363); *Pirthi*, 12 All. 434; *Baldeo Prasad*, 46 All. 851 (855); *Shah Newaz*, 1 S.L.R. 40, 8 Cr.L.J. 151; *Hiraman v. Ram Kumar*, 18 Cal. 186; *Angamuthu Vanathrian*, 23 M.L.J. 732, 13 Cr.L.J. 714; *Krishnaji*, 6 Bom.L.R. 1099; *Fazal Dad*, 24 Cr.L.J. 573 (Lah.); *Karsan*, Ratanlal 601; *Bajjo*, Ratanlal 623; *Kassim*, 17 S.L.R. 268, 83 I.C. 881, A.I.R. 1925 Sind 188, 26 Cr.L.J. 177 (178); *Raja Ram*, 40 Cr.L.J. 879, 184 I.C. 204, 12 R.L. 180, 41 P.L.R. 825, A.I.R. 1939 Lah. 323. Where a person was convicted by a Deputy Magistrate and the appeal from the conviction was dismissed by the Sessions Judge and then the District Magistrate made a reference to the High Court for enhancement of sentence under this section, held that the District Magistrate had power to call for the record from the Deputy Magistrate's Court under sec. 435 or to make a reference to the High Court under sec. 438 and that it was not desirable that the High Court should entertain the matter on a letter of reference addressed to the High Court by a District Magistrate when the facts of the case were brought to the notice of the Sessions Judge in the appeal—*Sarafort*, A.I.R. 1933 Cal. 791, 57 C.L.J. 211, 1933 Cr.C. 1358, 146 I.C. 354, 35 Cr.L.J. 27.

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1200. Contents of the reference:—(1) A Sessions Judge before he refers the case to the High Court is bound to call upon the inferior Court for an explanation of the order passed, and should submit such explanation to the High Court together with the record—*Mailamdi v. Taripulla*, 8 Cal 644; *Ramchandra Lal*, 35 Cr.L.J. 1020, 149 I.C. 839, 15 P.L.T. 288, A.I.R. 1934 Pat. 316, 1934 Cr.C. 737. When a Magistrate tenders an explanation it is the duty of the Sessions Judge to make a comment on that explanation—*Chitranji Lal v. Mahadeo Prasad*, A.I.R. 1932 All. 683 (685), 1932 A.L.J. 819, 1932 Cr.C. 938.

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(4) The reference should contain a recommendation that the sentence be revised or altered—*Mohan Lal*, 27 All. 25; and the District Magistrate should also give a brief abstract of the case and the grounds upon which he recommends that the order of sentence he considers to be incorrect and should be set aside by the High Court—*Keshava*, 9 Cr.L.J. 502 (Mad).

Reference under this section should always be made in the form prescribed for such reference by the General Rules and Circular Orders of the High Court, Criminal Appellate Side, Chap. I, r. 139—*Kutiswar v. Jitendra*, 26 Cr.L.J. 1055, 87 I.C. 975, 30 C.W.N. 646, A.I.R. 1926 Cal. 316.

But the report should not contain any representation of the complainant protesting against the Subordinate Magistrate's decision—*Nagoo*, Ratanlal 340. So also, a representation made by the Inspector of Police to the District Magistrate in the form of a letter, in which the former expressed his view that a case should be retried (together with the grounds for retrial) should not be forwarded to the High Court along with the reference—*Brahmadin*, 26 A.L.J. 76, 28 Cr.L.J. 946 (947), 105 I.C. 658, 8 A.I.Cr.R. 335, A.I.R. 1927 All. 727. If the prosecuting Inspector, being dissatisfied with the order of the trial Court, moves the District Magistrate for referring the case to the High Court, the notes of the Inspector should be examined by the District

Magistrate, and if there is any portion of them which he considers to be of value, he should embody them in his own order; but it is improper for him to accept *en bloc* the Inspector's criticisms and to attach them to his letter of reference. And it would be more seriously wanting in propriety if the Inspector's notes contain unbecoming language about the trying Magistrate, and the District Magistrate allows a document containing that language to be forwarded to the High Court—*Ram Lal*, 51 All. 663, 1929 A.L.J. 361, 30 Cr.L.J. 562 (566). The District Magistrate should not append to his letter of reference what appears to be the opinion of Police Prosecutor on the order which is the subject of reference to the High Court—*Ali Muhammad*, 38 Cr.L.J. 117, 165 I.C. 950, A.I.R. 1936 Sind 243.

1201. High Court's power in dealing with reference:—Where a District Magistrate referred a case with a recommendation that the order of the Sub-Magistrate should be set aside on the ground that the latter did not apply his mind to the actual evidence before him and took a grossly biased and distorted view of the case: *held* that the High Court would not rely upon the expression of opinion of the District Magistrate, without satisfying itself upon the evidence and upon the conduct of the proceedings generally that that opinion was right; that is, the High Court would investigate the whole of the facts before it would come to the conclusion whether it ought to interfere in revision—*Hrishikesh*, 44 Cal. 703, 21 C.W.N. 250. Where the trial Court has fully considered the evidence and discharged the accused, the High Court will not interfere, on a reference by the District Magistrate, unless it is shown that the order of the trial Court was either perverse or unreasonable—*Jagdamba*, 11 O.L.J. 334, 1 O.W.N. 245, 25 Cr.L.J. 1026.

The power of the High Court to interfere on the merits is undoubted, but this Court will not exercise its power so as virtually to give a right of appeal, and in reporting a case under this section the Sessions Judge must bear in mind this limitation which exists in practice as regards the exercise of the High Court's power of revision—*Sudaman*, 49 All. 551, 28 Cr.L.J. 399 (400), 100 I.C. 1055, 25 A.L.J. 379, 7 A.I.Cr.R. 343, A.I.R. 1927 All. 475.

439. (1) In the case of any proceeding the record of which has been called for by itself or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of Appeal by sections * * 423, 426, 427 and 428 or on a Court by section 338, and may enhance the sentence; and when the Judges composing the Court of Revision are equally divided in opinion, the case shall be disposed of in manner provided by section 429.

High Court's powers of revision.

(2) No order under this section shall be made to the prejudice of the accused unless he has had an opportunity of being heard either personally or by pleader in his own defence.

(3) Where the sentence dealt with under this section has been passed by a Magistrate acting otherwise than under section 34, the Court shall not inflict a greater punishment for the offence which, in the opinion of such Court the accused has committed, than might have been inflicted for such offence by a Presidency Magistrate or a Magistrate of the first class.

(4) Nothing in this section applies to an entry made under

section 273, or shall be deemed to authorize a High Court to convert a finding of acquittal into one of conviction.

(5) Where under this Code an appeal lies and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed.

(6) *Notwithstanding anything contained in this section, any convicted person to whom an opportunity has been given under sub-section (2) of showing cause why his sentence should not be enhanced shall, in showing cause, be entitled also to show cause against his conviction.*

Change:—This section has been amended by sec. 119 of the Cr. P. C. Amendment Act, XVIII of 1923. In sub-section (1) the figure "195" has been omitted; this is consequential to the amendment made in sec. 195. Sub-section (6) has been newly added. The reasons are stated in proper places.

1202. Scope of section:—The series of sections 435-439 must be read together. Of these, sec. 435 is the principal section dealing with the grounds upon which revisional jurisdiction may ordinarily be exercised, and sec. 439 must be read along with and subject to the provisions of sec. 435—*Har Prasad*, 40 Cal 477, 17 C.W.N. 674, 17 C.L.J. 245, 14 Cr.L.J. 197 (F.B.); *Haridas v Santulla*, 15 Cal. 608. Section 439 must be read along with and subject to sec. 435; if a case is outside the scope of sec. 435, sec. 439 cannot apply to it—*Monam v. Mrijan*, 47 Cal 438. Sections 435-438 prescribe the method by which the records of any criminal case come to the High Court, and the power of the High Court to deal with the record is in sec. 439. Sections 435-438 provide the machinery and sec. 439 gives the power to dispose of the record—*Kamal Kuttu v. Udayavarma*, 36 Mad 275. The words "the record of which has been called for by itself" refer to sec. 435, and the words "which has been reported for orders" refer to sec. 438.

This section confers no right on a person convicted either by a trial Court or a lower Appellate Court to invoke the revisional jurisdiction of the High Court. The exercise of that jurisdiction is, subject to the limitations imposed by the section, purely discretionary. The High Court can and often does exercise the jurisdiction of its own motion without an application having been made to it—*H. G. Bolton*, 60 Cal. 676, 34 Cr.L.J. 671 (672), 143 I.C. 892, A.I.R. 1933 Cal. 240, 1933 Cr.C. 325, Ind. Rul. 1933 Cal. 492. The exercise by the High Court of the revisional jurisdiction is a matter of discretion—*Abdullah Karim*, A.I.R. 1939 Sind 335 (337), I.L.R. 1940 Kar. 83, 41 C.L.J. 143, 185 I.C. 268.

Where applicants have a separate remedy, there appears to be no reason why the High Court should interfere in revision—*Assudomal v. Isardas*, 35 Cr.L.J. 1251, 151 I.C. 60, 1934 Cr.C. 628, A.I.R. 1934 Sind 78, A.L.R. 1934 Sind 73. See also *Gopala Bhattar v. Parthasarathi Iyengar*, 1937 M.W.N. 19.

'Any proceeding':—Under the old Code of 1872, the words used in this section were 'judicial proceeding' instead of the words "any proceeding," and the High Court could call for and revise the record of a *judicial* proceeding only; but under the Code of 1882 (as well as under the present Code) the High Court can call for and examine the record of 'any proceeding,' e.g., an order by a Magistrate under sec. 517 below—*Gangamma*, 2 Weir 538 (539).

High Court should not be moved in the first instance:—See Note 1168 under sec. 435, under heading "To whom application should be made."

1203. Grounds of interference:—The controlling power of revision of the High Court in criminal cases is an extraordinary power and it must be exercised with due regard to the circumstances of each particular case, anxious attention being given

to the said circumstances which vary greatly. This discretion ought not to be crystallized, as it would become in course of time, by one Judge attempting to prescribe definite rules with a view to bind other Judges in the exercise of the discretion which the Legislature has committed to them. This discretion, like all other judicial discretions, ought, as far as practicable, to be left untrammelled and free, so as to be fairly exercised according to the exigencies of each case—*Bankatram*, 28 Bom. 533 (566); *Kulada v. Danesh*, 33 Cal. 33 (46). No hard and fast limitation should be placed on the exercise of the powers of superintendence of the High Court over the proceedings of inferior Courts. There is no species of injustice which the High Court would be powerless to correct, where its interference is called for—*National Bank Ltd. v. Kothandarama*, 14 M.L.T. 200, 14 Cr.L.J. 529, 1913 M.W.N. 728; *Lakhraj v. Debi Pershad*, 12 C.W.N. 678. It is plain that under this section, a High Court's revisional powers are only exercisable to rectify any illegality, irregularity, impropriety or mistake appearing on the face of the record of any proceeding in any inferior Court. Incidentally judicial authority has repeatedly laid it down that while it is not desirable to crystallise or restrict the revisional powers of a High Court, these powers are to be exercised with circumspection and care, and are discretionary—*Jumo Machhi*, 41 Cr.L.J. 568, 188 I.C. 306, A.I.R. 1940 Sind 65, 1940 Kar. 157. The circumstances which will justify the interference of the High Court have not been and cannot be laid down with precision. While the Judges have repeatedly held that only when exceptional grounds exist the High Court ought to interfere, the decided cases show that no hard and fast rule can be laid down but that when in the interests of justice the High Court's intervention becomes necessary, it ought not to be refused—*Ramanathan v. Subrahmanya*, 47 Mad. 722 (725). The powers of the High Court under this section, wide though they are, are purely discretionary and must be exercised not, as a matter of course, but only to further the ends of justice. It is not every irregularity or error committed by a Subordinate Court which the Revisional Court will take upon itself to set right. Indeed it frequently stays its hands, if it thinks that substantial justice has been done in the case. But where the Court is satisfied that a serious miscarriage of justice has taken place, it undoubtedly possesses unfettered power to pass such order as it in its discretion, thinks fit to do, even though the aggrieved person could have taken the matter to an Appellate Court and has failed to do so—*Pars Ram*, 32 Cr.L.J. 700 (705), 131 I.C. 353, A.I.R. 1931 Lah. 145, 32 P.L.R. 71, Ind. Rul. 1931 Lah. 419, 1931 Cr.C. 257. Where the applicant was treated with leniency, the High Court should not interfere in its extraordinary jurisdiction in revision—*Anant Singh*, 37 Cr.L.J. 417, 161 I.C. 307, A.I.R. 1936 All. 147, 1936 A.L.J. 209, 1936 Cr.C. 175. In regard to the grounds of law the High Court does not interfere with an error or omission or irregularity unless the same has caused a failure of justice—*Hanuman Prasad v. Mathura Prasad*, A.I.R. 1933 Oudh 421, 35 Cr.L.J. 118, 146 I.C. 577, 1933 Cr.C. 1294, 10 O.W.N. 903. The applicant cannot require the High Court to adjudicate upon a question of law in revision—*Kunj Behari Das*, 37 Cr.L.J. 694 (696), 162 I.C. 736, A.I.R. 1936 All. 322, 1936 A.L.J. 370, 1936 Cr.C. 492. See also *Kewal Singh*, 37 Cr.L.J. 1022, 164 I.C. 701, 9 R.A. 184, 1936 A.L.R. 798. Even if an illegality more than an irregularity had been committed, the High Court has discretion to refuse to interfere in revision if substantial justice has been done—*Giani*, A.I.R. 1936 Lah. 1015, 38 P.L.R. 332, 38 Cr.L.J. 123, 166 I.C. 71, following *Aladya*, (1906) 5 P.R. 1906 (Cr.), 4 Cr.L.J. 75, 116 P.L.R. 1907. Interests of justice do not require any interference in revision on what can only be regarded as a technical ground—*Jadunandan Jha v. Emp.*, 38 Cr.L.J. 790 (792), 169 I.C. 489, 10 R.P. 24, 3 B.R. 582, 18 P.L.T. 628, A.I.R. 1937 Pat. 317. The High Court will interfere in revision only when substantial questions arise—*Ganesh v. Emp.*, 40 Cr.L.J. 347 (349), 180 I.C. 230, A.I.R. 1939 All. 166, 1938 A.L.J. 1217, 11 R.A. 434.

It is of considerable doubt as to whether it is within the province of the High Court, when acting under sec. 435, Cr. P. C., to canvass, and express opinions upon, all topics, however interesting may be the points of law or practice involved in them, which have

arisen in the course of the proceedings before the inferior Criminal Court. On revision, its inquiry is limited to "the correctness, legality or propriety of any finding, sentence or order recorded or passed" and to "the irregularity of any proceedings of such inferior Court"—*Maung Thounng Shwe*, 39 Cr.L.J. 642 (646), 175 I.C. 639, A.I.R. 1938 Rang. 161, 11 R.R. 9. Section 439 empowers the High Court to revise an order which, in the language of sec. 435 is incorrect, illegal or improper. Where a Magistrate passing an order under sec. 449 of the Calcutta Municipal Act (1899) for demolition of a building, has not properly exercised his discretion under that section, or has passed an erroneous order, the High Court can set aside the order in revision—*Abdul Samad v. Corporation of Calcutta*, 33 Cal. 287 (290, 291); *Chun Lal v. Corporation of Calcutta*, 34 Cal. 341 (345). Sections 435 and 439 give the High Court power to control the propriety as well as the legality of a finding, sentence or order of any inferior Criminal Court. If, therefore, a sentence has been passed or confirmed by a Court which could not legally try the case by reason of the prohibition contained in sec. 556, or should not properly have tried the case, the High Court has a discretion to interfere and set aside the proceedings—*Faiz Muhammad*, 9 N.L.R. 81, 14 Cr.L.J. 385 (386, 387). When an illegal order is passed and action taken by a Magistrate which involves matters coming within the purview of law and justice and within the scope of authority of the Court, the revisional power of the High Court cannot be ousted by the mere *ipsi dixit* of the Magistrate that he was not acting as a Judicial officer but in his executive capacity; and the High Court can interfere in revision—*Shiv Nath*, 1908 P.R. 4, 7 Cr.L.J. 202 (204).

The High Court can interfere in revision on the ground of misreading of documentary evidence and fundamental errors in principle which vitiate the conduct and disposal of the case—*Bal Gangadhar Tilak*, 28 Bom. 479.

The High Court will interfere with an order of a Magistrate passed without jurisdiction under a certain Act, even though that Act provides that the conviction under it shall not be open to appeal or revision—*Khamiso*, 2 S.L.R. 20, 10 Cr.L.J. 233. Thus, although sec. 15 of the Extradition Act ousts the jurisdiction of the High Court to inquire into the propriety of a warrant issued under Chap. III of that Act, yet where the order was made clearly without jurisdiction, it is open to revision by the High Court at the instance of the party whose liberty is affected by it—*Gull Sahu*, 41 Cal. 400, 18 C.W.N. 869, 14 Cr.L.J. 673; *Husenally*, 7 Bom.L.R. 463, 2 Cr.L.J. 439.

The High Court will interfere and reduce the sentence where the Magistrate has passed a heavy sentence for non-judicial reasons which have no bearing on the gravity of the offence committed by the accused (e.g., on the ground that the accused falsely blamed the Court for expressing its opinion and for helping the prosecution), although the passing of a heavy sentence is not by itself a ground of revision at all—*Jawad Hussain*, 2 Luck 503, 28 Cr.L.J. 673 (674), 103 I.C. 401, 1 Luck. Cas. 159, A.I.R. 1927 Oudh 296, 8 A.I.Cr.C. 321. The High Court can exercise its power of revision even after the expiry of the sentence; and though it is not possible to interfere with the sentence because it has expired, the law does not prevent the High Court from interfering with the conviction—*Sinha*, 7 All. 135.

The High Court has ample power to interfere, should it see fit to do so, in any case in which the Magistrate has either refused to exercise a discretion vested in him by the law, or has exercised that discretion in an improper manner or on improper grounds—*Nizam v. Jacob*, 19 Cal 52; *Juggut Chunder*, 2 Cal. 110; e.g., where the Appellate Court did not give the appellant's pleader an opportunity of being fully heard on all the points that arose in the appeal—*Basanappa*, 29 Bom.L.R. 488, 101 I.C. 595, A.I.R. 1927 Bom. 361, 8 A.I.Cr.R. 81, 28 Cr.L.J. 467 (468). The High Court will interfere with the order of the Sessions Judge declining jurisdiction to hear appeals when he had such jurisdiction—*Alla Satyam*, 38 Cr.L.J. 81, 165 I.C. 919, 9 R.M. 312, 1936 M.W.N. 1244, 44 M.L.W. 689, A.I.R. 1937 Mad. 17, (1937) 1 M.L.J. 759.

The High Court will interfere in revision when there is a material error in the proceedings, which means not an error in decision upon the facts, but some error in law

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The High Court will interfere and reduce the sentence where the Magistrate has passed a heavy sentence for non-judicial reasons which have no bearing on the gravity of the offence committed by the accused (e.g., on the ground that the accused falsely blamed the Court for expressing its opinion and for helping the prosecution), although the passing of a heavy sentence is not by itself a ground of revision at all—*Jauad Hussain*, 2 Luck 503, 28 Cr L.J. 673 (674), 103 I.C. 401, 1 Luck. Cas. 159, A.I.R. 1927 Oudh 296, 8 A.I.Cr.C. 321. The High Court can exercise its power of revision even after the expiry of the sentence; and though it is not possible to interfere with the sentence because it has expired, the law does not prevent the High Court from interfering with the conviction—*Sinha*, 7 All 135.

The High Court has ample power to interfere, should it see fit to do so, in any case in which the Magistrate has either refused to exercise a discretion vested in him by the law, or has exercised that discretion in an improper manner or on improper grounds—*Nizam v. Jacob*, 19 Cal 52; *Juggut Chunder*, 2 Cal. 110; e.g., where the Appellate Court did not give the appellant's pleader an opportunity of being fully heard on all the points that arose in the appeal—*Basavanappa*, 29 Bom L.R. 488, 101 I.C. 595, A.I.R. 1927 Bom. 361, 8 A.I.Cr.R. 81, 28 Cr L.J. 467 (468). The High Court will interfere with the order of the Sessions Judge declining jurisdiction to hear appeals when he had such jurisdiction—*Alla Satyam*, 38 Cr L.J. 81, 165 I.C. 919, 9 R.M. 312, 1936 M.W.N. 1244, 44 M.L.W. 689, A.I.R. 1937 Mad. 17, (1937) 1 M.L.J. 759.

The High Court will interfere in revision when there is a material error in the proceedings, which means not an error in decision upon the facts, but some error in law

or procedure which affects the decision—*Debi Churn*, 20 W.R. 40. Thus, where there is a doubt as to the guilty intention of the accused, it is a material error not to give the accused the benefit of the doubt, and the High Court can interfere and acquit the accused—*Ras Jas*, 1916 P.L.R. 66, 17 Cr.L.J. 303; *Mahabli*, 1915 P.L.R. 188, 16 Cr.L.J. 699. Where the Court has taken a wrong view of the facts through an error of law, e.g., where it places the burden of proof on the accused, contrary to the principles laid down in sec. 101 of the Evidence Act, the High Court will interfere—*Nagesh*, Ratanlal 794. Where the evidence for the prosecution was weak and biassed and it was possible that the accused did the act complained of (theft) under a *bona fide* belief that he had the right to the property, it was an error of law of the Magistrate not to have acquitted him; and in revision the High Court set aside the conviction—*Ram Jas*, supra; see also *Udai Narain v. Rama Nath*, 18 Cr.L.J. 732 (733) (Cal.).

The High Court will interfere where the order of the Lower Court was passed without recording sufficient evidence. Where the evidence on record was insufficient to support a conviction, the High Court in revision set aside an order of the Sessions Judge summarily rejecting the appeal, and remanded the case for rehearing on the merits—*Iswar Chandra*, 10 C.W.N. 446. The High Court will also interfere where the Lower Court has failed to consider important evidence and has accepted certain other evidence without any critical examination—*Nizamaddi*, 23 C.W.N. 488, 20 Cr.L.J. 551. Where the lower Court relied upon evidence inadmissible for the purposes to which they put it, there is a case for revision—*Fazal Ahmad*, 37 Cr.L.J. 603, 161 I.C. 885, A.I.R. 1936 Pesh. 72, 1936 Cr.C. 218.

The High Court will interfere in revision to correct a grave error on the part of the Magistrate to refuse to summon any witnesses whom the complainant cited even before the stage indicated in sec. 252, Cr. P.Code—*Seth Thakurdas v. Narayan*, A.I.R. 1936 Nag. 192 (197), 1936 Cr.C. 805, I.L.R. 1936 Nag. 205, 166 I.C. 709.

The High Court can interfere with an order in a criminal case on the ground that inferences unfavourable to the accused and not warranted by the evidence had been drawn to the prejudice of the accused—*Nga Shwe*, 18 Cr.L.J. 116 (Bur.).

An argument *ad miseri cordiam* is out of place in a Court of Revision which is concerned with law and procedure—*Ram Harak*, 32 Cr.L.J. 124, 128 I.C. 275, 7 O.W.N. 751, Ind. Rul. 1935 Oudh 35, A.I.R. 1931 Oudh 80, 1931 Cr.C. 136.

1204. How powers of High Court can be invoked:—The High Court will interfere either by calling for the record under sec. 435, or when the case has been reported to it for orders under sec. 438, or when the case “otherwise comes to its knowledge.” The High Court may interfere in revision upon information in whatever way received—*In re Aurokiam*, 2 Mad. 38. The powers conferred by this section are at all times to be exercised and they may be put in force not merely on matters coming before the Judge in Court, but also on matters coming to his knowledge on reliable information—*Anonymous*, 2 Weir 538. The High Court can exercise its revisional powers, when a case comes to the knowledge of the Court on an application made by the Government through an official communication instead of through the Law Officers of the Crown—*Mata Din*, 1887 A.W.N. 144. The High Court has power to interfere in revision on a matter being brought to its notice in any manner whatever, nor necessarily by means of an application on the part of the person convicted. It can interfere on information contained in a newspaper or a placard on a wall or an anonymous postcard, if it considers that sufficient grounds have been established to justify its so doing—*Narain Prasad*, 45 AIL 128 (129).

Although the Court has power under sec. 439 of the Code to call for cases not only on judicial information but also to deal with a case which “otherwise comes to its knowledge,” yet in most circumstances it is a right practice that the Judge should be moved in open Court—*Abdul*, Ratanlal 577; *Abdul Rahiman*, 16 Bom. 580.

The High Court may exercise its power of revision upon the petition of a private person occupying the position of a complainant in the case in which revision is sought—

In re Auro Kiam, 2 Mad. 38; *Sukho v. Durga*, 2 All 448; *Teju*, 2 S.L.R. 25, 10 Cr.L.J. 237; *Pheku*, 4 P.L.J. 435, 20 Cr.L.J. 545. When an order of discharge of an accused person has the effect of operating to the detriment of a *third person*, such person has the right to apply in revision—*G. V. Raman*, 56 Cal. 1023, 33 C.W.N. 468 (473).

The High Court may also exercise its power on its own initiative—*Radha Kishen*, 1912 P.L.R. 67, 13 Cr.L.J. 476; *Dongaji*, 2 Bom. 564. The revisional jurisdiction of the High Court can be exercised *suo motu* even though the accused does not desire it—*Hiranand*, 17 S.L.R. 245, 25 Cr.L.J. 134, A.I.R. 1924 Sind 129. Where the record of the case is before the High Court in connection with a revisional application made by one accused, the High Court can set aside the conviction of other accused who have made no such application—*Abdul Kayum*, 35 Cr.L.J. 1254, 151 I.C. 175, 28 S.L.R. 140, 1934 Cr.C. 625, A.I.R. 1934 Sind 72, A.L.R. 1934 Sind 79. There is no warrant for the proposition that the omission of a convict to appeal is by itself sufficient in law, or as a matter of well-established practice, to debar the High Court from examining the record *suo motu* or on a reference by a Sessions Judge, or at the instance of a third party, and from passing such orders as it thinks appropriate—*Pars Ram*, 32 Cr.L.J. 700, 131 I.C. 353, A.I.R. 1931 Lah 145, 32 P.L.R. 71, Ind. Rul. 1931 Lah. 419, 1931 Cr.C. 257. See also *Sakinabai*, 32 Cr.L.J. 283, 32 Bom.L.R. 1506, 1931 Cr.C. 78, A.I.R. 1931 Bom. 70, 129 I.C. 346; *Abdul Qadir*, 129 I.C. 221, A.I.R. 1930 Lah 1044, 1930 Cr.C. 1220, 32 Cr.L.J. 249; *Bhim Sen*, 131 I.C. 360 (363), A.I.R. 1931 Lah 153, 32 Cr.L.J. 708, Ind. Rul. 1931 Lah 456; *High Court Bar Association, Lahore*, 33 Cr.L.J. 339, 136 I.C. 717, Ind. Rul. 1932 Lah. 253, 33 P.L.R. 384, A.I.R. 1932 Lah. 364, 1932 Cr.C. 482; *High Court Bar Association, Lahore*, 33 Cr.L.J. 831, 132 I.C. 696, A.I.R. 1932 Lah. 559, 1932 Cr.C. 713, 33 P.L.R. 1911, Ind. Rul. 1932 Lah. 606. See also *Roshan Lal*, cited in Note 1169 and *Shadabala*, 34 Cr.L.J. 1115, 145 I.C. 977, A.I.R. 1933 All 678, 1933 A.L.J. 1059, 1933 Cr.C. 1190 (F.B.). The mere fact that an accused in the Magistrate's Court refused to take part in the proceedings before him or stated that he had nothing to say in defence should not prevent a revision from his conviction from being heard. There is an obligation on the High Court to superintend and supervise the Subordinate Criminal Courts and to see that orders of conviction passed by such Court are not illegal and contrary to law. If the illegality of a conviction is brought to its notice, there should not be a refusal on its part to interfere merely because the accused concerned is quite content with the order and does not wish to challenge it or because he had no objection to his being prosecuted and convicted—*Shadabala*, *supra*.

Application by third party:—Where the convicted person who might have appealed did not appeal or apply in revision because they (being non-co-operators) refused to recognize the authority of any Court established by British authority in India, the High Court should be loath to take action on an application for revision presented by a third party on his own responsibility and without authority from the convicts on whose behalf it was presented—*Naram Prasad*, 45 All 128 (129). Similarly, where the application for revision of an order of conviction was presented not by the person convicted (Subhas Chandra Bose) but by another posing as his friend and the former informed the Court that the application had been made without his knowledge or consent, and that he did not intend to take part in the proceeding (which was likely to do him harm), because he refused to recognize the jurisdiction of the British Courts, *held* that the High Court would not entertain the application for revision unless there has been a miscarriage of justice in the conviction of the prisoner. Even, where there has been a miscarriage of justice, still where the prisoner prefers to abide by the conviction and sentence, the Court of Revision must be careful to avoid any action which may place him in other and perhaps greater jeopardy, while seeking to remove the stigma of illegality from the administration of the law. On the other hand, the Court cannot allow any such alleged miscarriage to be used to gratify a desire for self-advertisement or pretended martyrdom at the expense of the Court's reputation for impartiality and justice—*Ramendra Chandra Roy* (on behalf of Subhas Chandra Bose), 58 Cal. 1303,

35 C.W.N. 716, 132 I.C. 174, 1931 Cr.C. 506, A.I.R. 1931 Cal. 410, 32 Cr.L.J. 844 (845). Where all the convicted persons were educated and many of them held University degrees and were practising lawyers, the High Court declined to entertain an application for reduction of sentence at the instance of a third party, the convicted persons not having seen fit to appeal—*Ambika*, A.I.R. 1933 Cal. 361, 34 Cr.L.J. 814, 144 I.C. 691, 1933 Cr.C. 497. But see *Pars Ram*, supra, and *Mohanlal*, A.I.R. 1930 Oudh 497, 32 Cr.L.J. 104, 128 I.C. 221, 7 O.W.N. 895, 1930 Cr.C. 1161; *Bhim Sen*, supra; *High Court Bar Association, Lahore*, supra; *Vidyawati*, A.I.R. 1932 Lah. 613, 34 Cr.L.J. 87, 141 I.C. 33, 34 P.L.R. 32, 1932 Cr.C. 919; *Girdhariraj*, 33 Cr.L.J. 280, 136 I.C. 249, 8 O.W.N. 1333, A.I.R. 1932 Oudh 31, 1932 Cr.C. 63, Ind. Rul. 1932 Oudh 105. An application filed by a third party, who is a total stranger to the proceedings and had no *locus standi* to invoke the jurisdiction of the Court is merely one for bringing the matter to the knowledge of the Court; and in such a proceeding his Counsel should not expect to be heard—*Shailabala*, supra.

Interference with acquittal:—In case of *acquittal*, the High Court can exercise its powers of revision *on the application of a private prosecutor*, when there is a material error in the proceeding in the case—*Hardeo*, 1 All. 139; *Teju*, 2 S.L.R. 25; *Sukho v. Durga*, 2 All. 448; *Maung Htin v. Mg. Po*, 4 Rang. 471, 99 I.C. 1019, A.I.R. 1927 Rang 74, 7 A.I.Cr.R. 373, 28 Cr.L.J. 219 (221). Any private person may invoke the revisional powers of the High Court under sec. 439 to set aside an order of acquittal, or the High Court may of its own motion set aside such an order—*Anwar Ali v. Chairman, Deoghur Municipality*, 6 Pat. 83, 99 I.C. 112, A.I.R. 1926 Pat. 449, 7 A.I.Cr.R. 231, 8 P.L.T. 271, 28 Cr.L.J. 80 (82). Though, as a Court of Appeal, the High Court can consider an order of acquittal only on an appeal by the Local Government, yet as a Court of Revision it can deal with an original or appellate order of acquittal either when reported under sec. 438 or whenever it may otherwise come to its knowledge. It can do so even on the application of a private prosecutor—*Basant Lal*, 27 Cal. 320. See also *Kangali v. Bama Charan*, 38 Cal. 786; *Sheik Bajoo v. Raika*, 18 C.W.N. 1244, 15 Cr.L.J. 722; *Gangadhar v. Reid*, 25 C.W.N. 609, 23 Cr.L.J. 41; *Jitam v. Damoo*, 1 P.L.J. 264, 18 Cr.L.J. 151; *Ram Chand v. Jai Dial*, 1915 P.W.R. 18, 16 Cr.L.J. 657; *Tirthidas*, 6 S.L.R. 120, 13 Cr.L.J. 771; *Nand Ram v. Khazan*, 61 I.C. 161, A.I.R. 1921 All. 266, 22 Cr.L.J. 357, 19 A.L.J. 589; *Dhum Bahadur v. Hori Lal*, 35 Cr.L.J. 1289, 151 I.C. 350, 1934 Cr.C. 902, A.I.R. 1934 All. 714, 3 A.W.R. 564; *Municipal Committee, Bilaspur v. Bansidhar*, 36 Cr.L.J. 1336, 157 I.C. 781, 31 N.L.R. 261, A.I.R. 1936 Nag. 40, 1936 Cr.C. 312; *Sitaram v. Tilokchand*, A.I.R. 1933 Nag. 36, 1933 Cr.C. 78, 141 I.C. 273, 28 N.L.R. 298, 34 Cr.L.J. 145; and *Allahrakho*, 6 S.L.R. 101, 13 Cr.L.J. 780, where the High Court entertained an application for revision preferred by the private complainant against the order of acquittal. The High Court can entertain an application for revision against an order of acquittal at the instance of a private complainant. This power appears to be expressly given by sec. 439 as read with sec. 423 (1) (a), Cr. P. C., as limited by sec. 439 (4)—*Raghunathmal Shermal Marwadi v. Patiram Sadaram*, A.I.R. 1937 Nag. 394, 172 I.C. 177, 11 L.R. 1938 Nag. 157, 10 R.N. 172, 39 Cr.L.J. 219. The High Court ought to interfere with an order of acquittal at the instance of a private complainant especially in a case like defamation where the offence is of so personal a nature that the Local Government would seldom be willing to appeal from the acquittal—*Sunderbai v. Kishore*, 20 Cr.L.J. 708 (Nag.); *Foujdar v. Kasi*, 42 Cal. 612 (616), A.I.R. 1915 Cal. 388, 27 I.C. 186, 16 Cr.L.J. 122, 19 C.W.N. 184, 21 C.L.J. 53 (*per Jenkins, C.J.*); *Asutosh v. Purna Chandra*, 50 Cal. 159 (163), 36 C.L.J. 287, 24 Cr.L.J. 206, 71 I.C. 670, A.I.R. 1923 Cal. 11; so also, in a case of insult—*Rakkal v. Kaulash*, 11 C.L.J. 113, 11 Cr.L.J. 213. The High Court will also interfere where the order of acquittal was passed under sec. 247 for non-appearance of the complainant—*Ram Nidh v. Ram Saran*, 26 O.C. 282, 81 I.C. 314, A.I.R. 1924 Oudh 64, 25 Cr.L.J. 794. The High Court interfered on the motion of a private person, in a case where the lower Court proceeded on a wrong view of the law, and where the matter was of great importance to the petitioner in his position as the author of a book, which, if the judgment of acquittal was allowed to stand, would

be pirated by another who would secure himself the gains that ought legitimately to go to the petitioner—*Venkatrao v. Padmanabha*, 53 M.L.J. 529, 28 Cr.L.J. 957 (958), 105 I.C. 669, 26 M.L.W. 489, 1927 M.W.N. 772, 39 M.L.T. 328, A.I.R. 1927 Mad 981, 51 Mad. 180.

In some cases, however, it has been held that the High Court has no power to revise an order of acquittal, except at the instance of the Local Government. Where no appeal has been preferred by the Local Government, an application for revision by a private person should be discouraged on public grounds. It has been the settled practice that the High Court will not ordinarily interfere with an order of acquittal at the instance of a private prosecutor, because it is always open to the aggrieved complainant to move the Local Government to appeal under sec. 417—*Thandavan v. Periantha*, 14 Mad 363; *Hazrat Kibulai*, 1933 M.W.N. 878; *Pahlwan v. Sahib Singh*, 19 A.L.J. 382, 22 Cr.L.J. 597, 62 I.C. 869; *Jotta v. Parshottam*, 25 Bom.L.R. 488, 24 Cr.L.J. 734; *Binda Prasad v. Ripusanan*, 5 N.L.R. 4, 9 Cr.L.J. 211; *Faredoon Cowasji*, 41 Bom. 560 (561); *Prag Dat*, 20 All. 459; *Qayyum v. Faiz Ali*, 27 All. 359; *Karuna*, 22 Cal. 164; *Faujdar v. Kasi*, 42 Cal. 612 (616); *Gulli Bhagat v. Narain*, 2 Pat. 708; *Rameshwar*, 53 Bom. 564; *Damodar v. Jujharsingh*, 23 N.L.R. 99, 89 I.C. 388, A.I.R. 1926 Nag 115, 26 Cr.L.J. 1348; *Sher Khan v. Anwar Khan*, 28 Cr.L.J. 523, 102 I.C. 219, A.I.R. 1927 Nag 170, 23 N.L.R. 40; *Janu v. Fakir*, 15 S.L.R. 171, A.I.R. 1922 Sind 22, 23 Cr.L.J. 343; *Bachcha v. Bachcha*, 28 O.C. 384, 12 O.L.J. 63, 27 Cr.L.J. 854; *Kalka Prasad v. Niranjana Singh*, 8 O.W.N. 1336. The right of an accused person who has been acquitted, that he should not be tried a second time, is a valuable right and is not to be interfered with lightly. In exceptional circumstances the High Court will interfere in revision even with an acquittal but the High Court certainly will not consider doing so until the normal procedure has been followed and has failed. That normal procedure is for the party aggrieved to apply to the District Magistrate, who will then refer the matter, if he thinks proper, to Government, and Government can, if they think proper, sanction proceedings under sec. 417, Cr. P. C. When this course has not been followed and no attempt has been made to move the Government through the District Magistrate, the High Court will not interfere—*Karachi Municipal Corporation v. Thaoomal Khusaldas*, 38 Cr.L.J. 665, 169 I.C. 40, 9 R.S. 254, A.I.R. 1937 Sind 100. Ordinarily the High Court does not entertain applications in revision from an order of acquittal when the Crown has preferred no appeal but that it has jurisdiction in such cases cannot be doubted and will interfere where there is some glaring defect either in the procedure or in the view of the evidence taken by the Court below—*Kamikka Prasad*, 104 I.C. 228, 4 O.W.N. 729, 28 Cr.L.J. 788, A.I.R. 1927 Oudh 345; *Abdul Shakur v. Palla Ram*, 32 Cr.L.J. 828, 132 I.C. 50, 8 O.W.N. 341, A.I.R. 1931 Oudh 273, Ind. Rul. 1931 Oudh 210, 1931 Cr.C. 633. Where the error of law into which the Judge has fallen is apparent and the result has been that he has not exercised the jurisdiction with which he was legally vested to try the appeal on merits, the parties were entitled in law to have such jurisdiction exercised—*Abdul Shakur v. Palla Ram*, supra. Applications against orders of acquittal are not entertained from private petitioners except if be on some very broad ground of the exceptional requirements of public justice—*Faredoon Cowasji*, supra; *Faujdar v. Kasi Chowdhury*, supra; *Rameshwar*, supra; *Sankaralinga v. Narayana*, 45 Mad. 913; *Banke Lal v. Manika*, A.I.R. 1933 Oudh 430, 35 Cr.L.J. 121, 10 O.W.N. 1037, 1933 Cr.C. 1315, 146 I.C. 638; *U Min v. Maung Taik*, 8 Rang 663, 32 Cr.L.J. 928, 132 I.C. 545, A.I.R. 1931 Rang. 94, Ind. Rul. 1931 Rang. 177, 1931 Cr.C. 382; *Nga Po Pyaw v. Nga Po Nwe*, 42 I.C. 330, 18 Cr.L.J. 970, 3 U.B.R. (1917) 19; where there is no matter of public importance involved, nor are the interests of public justice closely concerned, and the petitioners have the opportunity of obtaining full redress in the Civil Courts, the High Court will not interfere with an order of acquittal on the motion of a private complainant—*Faredoon Cowasji*, 41 Bom. 560 (562); *Sher Khan v. Anwar Khan*, 23 N.L.R. 40, 102 I.C. 219, A.I.R. 1927 Nag. 170, 28 Cr.L.J. 523 (528). A petition for revision of an order of acquittal, preferred by a private complainant, will be rejected, where it appears that the complainant is not anxious so much to secure due administration of justice as to serve his personal grudge

—*Sher Khan v. Anwar Khan*, *supra*. In cognizable cases the private prosecutor has no position at all, and if the Crown decides to let an offender go, no other aggrieved party can be heard to object that he has not taken his full toll of private vengeance—*Siban Rai v. Bhagwant*, 5 Pat. 25, 6 P.L.T. 833, 27 Cr.L.J. 235 (*per* Mullick, J.). (But Macpherson, J. holds in this case that even in cognizable cases, the private prosecutor, if he has initiated the proceeding, can apply for revision of an order of acquittal). The High Court should not entertain an application by a complainant to revise an order of acquittal, after the Local Government has declined to direct an appeal against it—*Graham v. Elsey*, 9 Bur.L.T. 47, 17 Cr.L.J. 91 (92).

It is not proper and expedient for the High Court, as a general rule, to exercise its power of revision against orders of acquittal *on a reference from the District Magistrate* under sec. 438, where the Local Government has not appealed from the order of acquittal—*Sheikh Amiruddin*, 24 All. 346; *Hrishikesh*, 44 Cal. 703; *Madar Baksh*, 25 All. 128; *Ranga Row*, 15 Mad. 36; *Gur Dayal*, 12 A.L.J. 255, 15 Cr.L.J. 304; *Sinnu Gounden*, 38 Mad. 1028; *Mogal Beg*, 42 Mad 109; *Achar Singh*, 5 Lah. 16 (19). Where no appeal has been preferred by the Local Government against an order of acquittal, the High Court does not ordinarily interfere in revision *suo motu* to set aside the acquittal—*Nga Aung*, 1 Rang. 604, 25 Cr.L.J. 270, A.I.R. 1924 Rang. 98. The High Court interfered with an order of acquittal where the applicant in revision was not a private individual but a public body, *e.g.*, a municipality. In such a case interference rested on grounds of public importance or public justice. See *Ahmedabad Municipality v. Maganlal*, 9 Bom.L.R. 156, 5 Cr.L.J. 171; *Mukund v. Ladu*, 3 Bom.L.R. 854; *Municipal Board v. Vadyadhari*, 24 O.C. 57, 22 Cr.L.J. 638, 63 I.C. 334.

As to the grounds on which the High Court will revise orders of acquittal, see Note 1219, *infra*.

An order of *discharge* is not the same thing as an order of acquittal, and the High Court can revise an order of discharge at the instance of a private prosecutor—*Maung Htin v. Maung Po*, 4 Rang. 471, 28 Cr.L.J. 219 (221), 99 I.C. 1019, A.I.R. 1927 Rang. 74, 7 A.I.Cr.R. 373. See also *Malik Pratap v. Khan Mahomed*, 36 Cal. 994.

Where the order purported to be an order discharging the accused but was in substance and in fact an order of acquittal, no application in revision would be entertained at the instance of the Local Government which might have preferred an appeal against it—*San Win*, 33 Cr.L.J. 763, 139 I.C. 182, 10 Rang. 315, A.I.R. 1932 Rang. 147, 1932 Cr.C. 710, Ind. Rul. 1932 Rang. 190.

1205. When High Court will not interfere:—In the exercise of its revisional powers, the High Court will not interfere in revision unless it is satisfied that it is necessary to do so to prevent an otherwise irreparable injustice—*Umakant*, 9 Bom.L.R. 706, 6 Cr.L.J. 70; *Narain Prasad*, 45 All 128; *Kuppuswami*, 39 Mad. 561. The High Court will not always interfere even though the order of the Court below is wrong in law or the trial in the Court below is illegal and not merely irregular, if no prejudice is shown to have resulted to the accused—*Aladya*, 1906 P.R. 5, 4 Cr.L.J. 75; *Tha Byaw*, 4 L.B.R. 315, 9 Cr.L.J. 15; *Hari Singh*, 1913 P.L.R. 313, 14 Cr.L.J. 599 (600); *Sri Krishan v. Devi Dayal*, 2 O.W.N. 823, 26 Cr.L.J. 1619, 90 I.C. 915, A.I.R. 1925 Oudh 739; *Sakharam*, 4 Bom.L.R. 686. It is not in every case of illegal trial that the High Court is necessarily obliged to interfere, without due regard to circumstances of the particular case. The illegality of a trial is no doubt a *prima facie* good and strong ground for the exercise of revisional jurisdiction, but it is not imperative on the High Court to take action in every case, however small and scanty may be the necessity for adopting such course, especially where no prejudice is shown to have been caused by such illegality—*Aladya*, *supra*. It is not the practice of the High Court to entertain applications in revision where the decision of the lower Court involves some point of law. The Cr. P. Code does not give a right of appeal upon points of law analogous to that given in civil cases by sec. 100, C. P. Code. The discretion under secs. 435 and 439, Cr. P. Code ought only to be exercised in order to prevent substantial injustice, or where is involved a point of

law of general importance which may govern other cases—*Shriang Jayaba*, 56 Bom. 554, 1932 Cr.C. 871 (872), 34 Bom.L.R. 1444, A.I.R. 1932 Bom. 637, 34 Cr.L.J. 142, 141 I.C. 339. The High Court will not interfere unless the error in law has led to a failure of justice. It is not the duty of this Court to correct mere mistakes in law which have no more effect than mistakes in grammar or spelling. The power of interference is to be exercised only for the purpose of correcting injustice, not mere illegality—*Narsinghadas*, 29 Cr.L.J. 86 (87), 106 I.C. 678, 9 A.I.Cr.R. 282, A.I.R. 1928 Nag. 113. See also *Pitani*, 33 Cr.L.J. 811 (812), 139 I.C. 636, A.I.R. 1932 Oudh 311, 1932 Cr.C. 186, 9 O.W.N. 116, Ind. Rul. 1932 Oudh 369. When the accused has not been prejudiced in any way and unless it were necessary to do so, it would be obviously undesirable to interfere in revision when the effect of the interference would merely be that the evidence which has been recorded will have to be recorded over again, with consequent waste of time and money—*Alimahomed Joosab v. Kasturchand Balabhai Jhaveri*, 40 Cr.L.J. 346 (347), 180 I.C. 241, A.I.R. 1939 Bom. 89, 41 Bom.L.R. 90, 11 R.B. 291. Where a case has been properly disposed on the merits by the Court below, the High Court will not interfere in revision merely on the ground of some error in procedure, e.g., on the ground that the pleader on behalf of the accused was not heard in the Lower Court—*Olayet Khan*, 1 Pat. 589, 24 Cr.L.J. 118, 4 P.L.T. 98.

In a revisional matter, the High Court does not take a technical view and interfere in every case where an order has been made irregularly or even improperly. Where the trial Court has given inadequate reasons for passing a particular order, but the order has been rightly made, the High Court will not interfere merely on the technical ground that the Magistrate has not stated his reasons more in detail—*Sher Sing v. Jitendra*, 59 Cal. 275, 36 C.W.N. 16 (25), 33 Cr.L.J. 3.

The mere fact that the High Court sitting as a Court of appeal might have come to a different conclusion on facts from what the Magistrate arrived at, is not a sufficient ground for entertaining an application for revision—*Damodar v. Jujharasingh*, 26 Cr.L.J. 1348, 89 I.C. 388, A.I.R. 1926 Nag. 115; *Narasim Das*, 29 Cr.L.J. 86, 106 I.C. 678, 9 A.I.Cr.R. 282, A.I.R. 1928 Nag. 113.

The High Court will not interfere when there is no error in law on the face of the record—*Sakharam*, 4 Bom.L.R. 686. Where a discretion has been exercised by a Court of competent jurisdiction which is not on the face of it arbitrary, the High Court in revision will neither inquire into the reasons nor interfere—*Gulli Bhagat v. Narain Singh*, 2 Pat. 708 (710).

Where a Magistrate convicts an accused person of an offence falling within his jurisdiction, though the facts found would also constitute a more serious offence not within his jurisdiction, his proceedings are not void *ab initio*, and the High Court will not ordinarily interfere unless the sentence appears inadequate or unless the accused has been deprived of his right of appeal—*Barhamdeo*, 26 Cr.L.J. 1559, 90 I.C. 439, A.I.R. 1926 Pat. 36, 7 P.L.T. 272; *Gundya*, 13 Bom. 502; *Ayyan*, 24 Mad. 675. If the accused has been adequately punished by the trying Magistrate, the High Court will not interfere, even though the proceedings before the Magistrate have been somewhat irregular (e.g., where the accused has been punished under one Act, whereas he ought to have been punished under another Act)—*Bishen Singh v. Ismail*, 6 Bur.L.J. 81, 28 Cr.L.J. 757 (758), 103 I.C. 837, A.I.R. 1927 Rang. 240, 8 A.I.Cr.R. 441.

Ordinarily the High Court will not entertain a revision against what purports to be no more than a complaint under sec. 195 (a), Cr. P. C.—*Abdul Jalil Khan*, A.I.R. 1936 All. 354 (356), 1936 A.L.J. 373, 1936 A.W.R. 210, 1936 Cr.C. 418, 162 I.C. 755, 1936 A.L.R. 468, 37 Cr.L.J. 713.

The revisional powers of the High Court will not be exercised until all the other remedies (e.g., appeal) provided by law have been exhausted—*Rajcoomar*, 3 Cal. 573; *Nilambar*, 2 All. 276; *Abdur Rahim*, 1905 A.W.N. 143, 2 Cr.L.J. 335. See Note 1220 under sub-section (5). So also, the High Court will not interfere in revision while an

appeal in respect of the same matter is pending before the Appellate Court—*In re Atakuri*, 44 M.L.J. 366.

The High Court will not interfere in revision when the accused has pleaded guilty before the Lower Court, except as to the extent or legality of the sentence—*Pattam Lal*, 1907 A.W.N. 204; *Tha Byaw*, 4 L.B.R. 315, 9 Cr.L.J. 15. Cf. sec. 412.

The High Court will not interfere in revision when there has been a long delay in applying for revision and the delay is not explained or accounted for by the applicant—*Jagan Nath*, 27 All. 468; *Ram Narayan*, 8 All. 514; *Ala Bakhsh*, 6 All. 484; *Puttan Lal*, 1907 A.W.N. 204; *Avadh Behari v. Dwarka*, 1 P.L.J. 165. See Note 1222 and *Kumud Nath v. Brojendra Nath*, cited in Note 1215.

The revisional jurisdiction of the High Court will not be exercised in such a way that a right of appeal may practically be given in cases where such right is definitely excluded by the Code—*Ashanullah v. Mansukh*, 36 All. 403; *Sudaman*, 49 All. 551, 28 Cr.L.J. 399 (400), 100 I.C. 1055, 25 A.L.J. 379, 7 A.I.Cr.R. 343, A.I.R. 1927 All. 475.

The High Court will not allow a revision application when a remedy can be easily obtained from the Civil Court—*Loke Nath v. Nidu*, 6 C.W.N. 469. See also *Gopala Bhatta v. Parthasarathi Iyenger*, 1937 M.W.N. 19.

The High Court will not interfere on the motion of a party who is in contempt—*Khairat v. Wahed Ali*, A.I.R. 1928 Cal. 241. See also Note 1224.

1206. Orders which are subject to revision:—(1) *Orders of a Presidency Magistrate*:—Under secs. 423 and 439 the High Court has jurisdiction to set aside an order of discharge or dismissal of complaint passed by a Presidency Magistrate and to direct that the person improperly discharged should be committed for trial or to direct further inquiry into the complaint—*Varjivandas*, 27 Bom. 84; *Nanda Gopal*, 20 C.W.N. 1128, 17 Cr.L.J. 428; *Malik Pratap v. Khan Mahomed*, 36 Cal. 994; *Dwarka v. Beni Madhab*, 28 Cal. 652; *Colville v. Krishna Kishore*, 26 Cal. 746. In *Charoobala v. Barendra*, 27 Cal. 126, *Kedar v. Kheira*, 6 C.L.J. 705 and *Debi Bux v. Jutmal*, 33 Cal. 1282 it has been held that the High Court can interfere with an order of dismissal or discharge passed by a Presidency Magistrate, not under this Code, but under sec. 15 of the Charter Act. See Note 682 under sec. 203. An order made by the Chief Presidency Magistrate of Bombay under the Maintenance Orders Enforcement Act (XVIII of 1921) can be revised by the High Court under sec. 107 of the Government of India Act or under clauses 27 and 28 of the Letters Patent, if not under secs. 435 and 439 of this Code—*Katti v. Katti*, 52 Bom. 262, 29 Cr.L.J. 513 (514), 109 I.C. 337, 30 Bom L.R. 350, A.I.R. 1928 Bom. 117, 10 A.I.Cr.R. 179.

(2) *Non-appealable orders*:—The High Court's power of revision is not limited to orders from which an appeal would lie. On the other hand, the High Court ought to rectify cases of injustice or illegality when the person affected is unable to appeal. The High Court in revision can exercise its power of appeal with reference to any particular order, whether appealable or not—*Ram Kala v. Ganda*, 1885 P.R. 42; *Kishen Das*, 1910 P.R. 33, 8 I.C. 1161 (1165), 12 Cr.L.J. 50 (dissenting from *Charoobala v. Barendra*, 27 Cal. 126 and *Azim Khan*, 1885 P.R. 45).

(3) *Order granting bail*:—The proceeding in which it has to be determined whether the accused person should be admitted to bail is a judicial proceeding, and is therefore cognizable by the High Court as a Court of Revision—*Manikam Mudali*, 6 Mad. 63. But where a Sessions Judge, finding that there was no reasonable ground for believing that the accused was guilty, released him on bail under sec. 497, the High Court would not interfere with such order in revision, though it has power to do so—*Thimma*, 10 M.L.J. 411; *Badri Prasad*, 5 A.L.J. 419. See Notes under sec. 497.

(4) *Preliminary or interlocutory order*:—It is competent to the High Court to call for the record of any proceeding in an inferior Criminal Court, and if necessary or expedient, to revise an order passed by such Court, whether of a preliminary or final nature—*T. N. Chadha*, 14 A.L.J. 851, 18 Cr.L.J. 46; *Jagan Singh*, 1892 A.W.N. 102; *Thakaria v. Puran*, 23 Cr.L.J. 429 (Lah.). Thus, where a District Magistrate called upon a witness who gave evidence before him to show cause why he should not be

prosecuted for perjury, the High Court was competent to revise such order—*T. N. Chadha*, supra. So also, where a Magistrate, after dismissing a complaint without inquiry, passed an order calling upon the complainant to show cause why he should not be prosecuted for bringing a false complaint, the High Court revised the preliminary order, though no final order directing the prosecution of the complainant had yet been passed—*Shco Balak*, 22 Cr.L.J. 81 (All.). See Note 1215.

(6) *Orders under sections 88, 94, 106, 118, 143, 144, 145-148, 250, 344, 386, 476, 488, 514, 515, 517, 520, 522*; see Notes under those sections.

See also Note 1173 under sec. 435.

1207. Orders which are not open to revision:—(1) *Order under Press Act*:—An order under sec. 8, Press Act (Act I of 1910) for the deposit of security by the publisher of a newspaper is an executive order and not revisable by the High Court—*Aga Syed Jalauddin*, 17 C.W.N. 1245, 15 Cr.L.J. 145; so also an order under sec. 3 (1) of the Press Act—*Annie Besant v. Govt. of Madras*, 39 Mad. 1085, 18 Cr.L.J. 157; or an order of forfeiture passed under sec. 12 of that Act—*Mahomed Ali*, 41 Cal. 466, 18 C.W.N. 1, 14 Cr.L.J. 497 (F.B.).

(2) *Order under the Extradition Act*:—The High Court has no power under this section to interfere in respect of a warrant issued by a Political Agent in a Native State under sec. 7 of the Extradition Act (XV of 1903), either on the ground that there is no *prima facie* case against the petitioner or on the ground that the circumstances under which the officer was originally moved do not justify him in exercising his power under the said Act—*Giyan Chand*, 1909 P.R. 3, 3 Cr.L.J. 3. Where a warrant is issued by a Political Agent under sec. 7 of the Extradition Act, its execution by the District Magistrate in accordance with the Act is an executive act, and the High Court cannot interfere in revision with such execution. But the High Court can interfere otherwise than by way of revision, under sec. 491—*Guli Sahu*, 42 Cal. 793, 19 C.W.N. 221.

(3) *Order of the Local Government sanctioning prosecution under sec. 197*. See Note 649 under sec. 197.

(4) *Orders of the High Court itself*:—A single Judge of the High Court has no power to revise an order passed by another single Judge in appeal and to set aside the conviction, even on the ground of discovery of new materials. The only remedy is to refer the matter to the Local Government under Chapter XXIX of this Code—*Kale*, 45 All. 143 (145). The judgment of the Division Bench of the High Court as well as the sentence is final, and the Court is *functus officio* as soon as the judgment is signed by the Judges, and the High Court or any Bench of it has no power to revise the sentence or interfere with it in any way—*Gibbons*, 14 Cal. 42. So also, a Division Bench cannot revise an order of a single Judge of the High Court—*Press*, 1909 P.R. 4, 9 Cr.L.J. 378 (379); *Hale*, 1909 P.R. 1, 9 Cr.L.J. 306; *Hira*, 1909 P.R. 8, 10 Cr.L.J. 314; *Durga Charan*, 7 All. 672; *Kunhammad*, 46 Mad. 382. See Notes under sec. 369. The only exception is in a case under sec. 434. See Notes under that section, and 1909 P.R. 1 cited therein.

For other orders which are not open to revision, see Note 1172 under sec. 435.

1208. Powers of the High Court in revision—Powers of an Appellate Court:—Sec. 439 enumerates the powers which the High Court may exercise in revision, and it declares that in any proceeding the record of which has been called for by itself or reported for orders or otherwise comes to its knowledge, or on application made by the complainant, the Court may in its discretion exercise any of the powers conferred on a Court of Appeal by certain preceding sections, among others, by sec. 423—*Varjivandas*, 27 Bom. 84; *Murli*, 2 All. 336; *Picku*, 4 P.L.J. 435, 20 Cr.L.J. 545. The nature of the powers that the High Court has in revision is the same as that which a Court of appeal has in the case of an appeal from any order against which an appeal is allowed by the Code—*National Bank v. Kothandarama*, 14 M.L.T. 200, 14 Cr.L.J. 529. But a *Sessions Judge* or a *District Magistrate* cannot while sitting in revision exercise the powers conferred by the Code on an Appellate Court. Appellate powers are in

revision conferred by sec. 439 only on the *High Court*—*Baijnath v. Gauri Kanta*, 20 Cal 633. But the High Court sitting as a Court of revision will not exercise the powers of an Appellate Court except on very exceptional grounds—*Sheik Sahib*, 8 Bom. 197. A High Court undoubtedly has jurisdiction to entertain a revision on grounds of fact, but it is equally well established that this power should be very sparingly exercised. There is a well marked distinction between an application in revision and an appeal. It would be futile for the Legislature to grant the right of appeal in some cases and to withhold it in others, if the High Court under the guise of a revision were to allow conclusions of fact based on evidence to be canvassed and attacked on the footing of an appeal. Broadly speaking, the rule is that the High Court will only entertain a revision on fact where either there is no evidence to support the finding or where the finding arrived at is perverse or such as no reasonable man could have arrived at on the evidence produced—*Abdul Wahid v. Abdullah*, 45 All. 656 (661). Specially, in a case where no appeal is allowed by the law, the High Court will not in revision exercise the powers of an Appellate Court except on very exceptional grounds—*Mahomed Husan*, Ratanlal 244; *Umakant*, 3 Bom L.R. 706. The revisional jurisdiction of the High Court may be exercised in order to prevent gross and palpable failure of justice, but it should not be exercised in such a way that a right of appeal may practically be given in cases where such right is definitely excluded by the Code—*Ahsanulla v. Mansukh Ram*, 36 All. 403. The High Court must not allow what would virtually be an appeal from the order of the Lower Court, in a non-appealable case—*Sheoshankarpuri*, 10 N.L.R. 177, 16 Cr.L.J. 161. The High Court in criminal revisions, as a rule, depends mainly upon the findings arrived at by the lower Appellate Court on questions of evidence. It is, therefore, the duty of such Courts to see that their judgments are self-contained and give a full analysis of the evidence and that their findings are clear so that the High Court accepting those findings, may be able to direct itself to the considerations of the questions of law and procedure only—*Ahmad Ali*, 32 Cr.L.J. 271, 129 I.C. 276, A.I.R. 1930 Lah. 1051, Ind. Rul 1931 Lah. 164, 32 P.L.R. 92, 1930 Cr.C. 1227.

There is considerable doubt as to whether it is within the province of the High Court, when acting under sec. 435, Cr. P. C., to canvass, and express opinions upon, all topics, however interesting may be the points of law or practice involved in them, which have arisen in the course of the proceedings before the inferior Criminal Court. On revision, its enquiry is limited to "the correctness, legality or propriety of any finding, sentence or order recorded or passed" and to "the irregularity of any proceedings of such inferior Court"—*Maung Thounng Shwe*, 39 Cr.L.J. 642 (646), 175 I.C. 639, A.I.R. 1938 Rang. 161, 11 R.Rang. 9.

Power to alter or reverse order or to quash proceeding:—The High Court as a Court of revision has the power conferred on a Court of appeal by sec. 423 to alter or reverse an order of the Lower Court—*Khepu Nath v. Girish*, 16 Cal 730. The High Court has power, under this section read with sec. 423 (e) to alter or set aside any order, and thus to quash the whole proceedings in the lower Court which terminated in the order—*Official Liquidator v. Kali Charan*, 3 Luck. 287, 106 I.C. 694, 1 Luck. Cas. 653, A.I.R. 1928 Oudh 104, 9 A.I.Cr.R. 356, 29 Cr.L.J. 102 (103). The High Court can quash the charge and set aside the proceedings against the accused—*Amar Nath*, 113 I.C. 536, A.I.R. 1928 Lah. 945, Ind Rul 1929 Lah. 184, 30 Cr.L.J. 162 (163); *Bishen Das*, 1910 P.R. 33, 12 Cr.L.J. 50; *Tarak Singh*, 29 P.L.R. 237, 103 I.C. 835, 9 Lah.L.J. 440, 8 A.I.Cr.R. 447, A.I.R. 1927 Lah. 731, 28 Cr.L.J. 755 (756); *Tahiru v. Jallu*, 9 Lah.L.J. 440, 106 I.C. 224, A.I.R. 1927 Lah. 825, 28 Cr.L.J. 1040; *Gokul v. Devi Prasad*, 23 A.L.J. 21, 26 Cr.L.J. 748 (749). The High Court can quash the proceedings initiated by the lower Court where no advantage would be gained by continuing the proceedings—*Chitan Lal*, 19 Cr.L.J. 730, 16 A.L.J. 734, 46 I.C. 410. But the fact that the case against the accused is an extremely weak one is no ground for quashing the charge in revision. If the case results in a conviction the appellate Court can rectify the matter—*Nand Lal*, A.I.R. 1932 Lah. 349,

34 Cr.L.J. 82, 140 I.C. 807, 1932 Cr.C. 446, 33 P.L.R. 231. See also *Parmesshari Dayal v. Guman Ram*, 40 P.L.R. 311.

Power to alter conviction:—The High Court has also power to *alter a conviction* for one offence into a conviction for another offence, at the same time maintaining the sentence passed—*Joti Prasad*, 1887 A.W.N. 95; *e.g.*, where the accused was convicted by a Magistrate for an offence triable exclusively by the Court of Session, the Chief Court interfered in revision and altered conviction into one for an offence triable by a Magistrate—*Devi Buksh*, 1889 P.R. 10. The High Court altered a conviction under sec. 186, I P. C., into one under sec. 225B, I. P. C., when all the material facts were stated in the complaint and duly deposed to by witnesses, and the accused was not prejudiced by the alteration of the finding—*Jamna Das*, 9 Lah. 214, 103 I.C. 833, 9 Lah.L.J. 408, 8 A.I.Cr.R. 443, A.I.R. 1927 Lah. 708, 29 P.L.R. 196, 28 Cr.L.J. 753 (754). So also in *Tarapada Shastri v. Emp.*, 1938 A.W.R. (H.C.) 467, 1938 A.Cr.C. 75, 1938 A.L.J. 769, the High Court altered a conviction under sec. 500, I. P. C., to one under sec. 500 read with 120-B, I P. Code. But a conviction for an offence for which a particular set of facts are required cannot be altered into a conviction for an offence of which quite a different set of facts are the constituents. And so, the High Court cannot substitute a conviction for cheating in place of a conviction for an offence under sec. 215, I. P. Code—*Bakeshwari Ahir*, 11 Pat 392, Ind. Rul. 1932 Pat. 201, 139 I.C. 76, 33 Cr.L.J. 709, A.I.R. 1932 Pat. 241, 13 P.L.T. 732, 1932 Cr.C. 638 (639). It is not fair in revision to alter a conviction under the Arms Act to one under the Explosives Act unless a conviction under the latter Act were obviously correct and unless it were certain that the accused had not been prejudiced by being charged under the Arms Act—*Kifayatullah Khan*, 32 Cr.L.J. 564, 130 I.C. 626, 1930 A.L.J. 1467, A.I.R. 1931 All. 17, Ind. Rul. 1931 All. 290, 53 All. 226, 1931 Cr.C. 33. The High Court cannot, in revision, alter a conviction on a charge under sec. 498, I. P. C., only to a conviction under sec. 366A or 373, I. P. C., as these offences are major offences—*Mahandi*, 36 Cr.L.J. 423, 153 I.C. 721, A.I.R. 1934 Lah. 122, A.L.R. 1934 Lah. 796, 1934 Cr.C. 239. See Notes under secs. 237 and 238.

Sentence:—The question of punishment is peculiarly a matter for the Court. In revision the Crown has no right to seek to influence the Court in this question unless invited by the Court to do so—*Dahu Raut*, 34 Cr.L.J. 1100 (1103), 145 I.C. 937, A.I.R. 1933 Cal. 870, 1933 Cr.C. 1481, 38 C.W.N. 25. See the last paragraph of Note 1131.

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The High Court cannot direct the Subordinate Court to *refrain from trying* an accused person against whom such Court has issued process—*Jharu Lal v. Mahanth Madan Das*, 2 Pat. 257.

In a case where a second complaint has been entertained on the same facts after the dismissal of the first complaint, if the matter is brought up to the High Court on revision, it would be open to the High Court in a proper case either to revise the previous order, set aside the dismissal and direct further enquiry, or to quash the subsequent proceedings—*Lallain*, 35 Cr.L.J. 1059, 150 I.C. 376, 1934 A.L.J. 241, A.I.R. 1934 All. 514, 1934 Cr.C. 614, 3 A.W.R. 571, A.L.R. 1934 All. 491. See also *Dula v. Khushal*, 35 Cr.L.J. 449, 147 I.C. 447, 34 P.L.R. 833, 147 I.C. 447, 6 R.L. 419.

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Power to order retrial:—Like the Appellate Court, the High Court in revision has power to *order a retrial*. Cf. Note 1143 under sec. 423. Under the provisions of sec. 439, cl. (1) the High Court has the power to reverse the finding and sentence and order that the accused be retried by a Court of competent jurisdiction subordinate to the High Court or committed for trial—*Mahadeo*, A.I.R. 1938 Oudh 261, 1938 O.W.N. 1062, 1938 O.A. 805, 178 I.C. 248, 1938 A.Cr.C. 131, 1938 A.W.R. (C.C.) 92, 1938 O.L.R. 472, 40 Cr.L.J. 25, following *Yusaf*, 28 P.R. 1879 (Cr.). But the High Court cannot direct a retrial on the ground that subsequent to the conviction it becomes known that the accused was previously convicted—*Sham Singh*, 1884 P.R. 36. Where evidence of the previous conviction of the accused for a similar offence was not adduced at the trial, the High Court refused to interfere in revision and to order a retrial to enable the prosecution to supplement the record by producing fresh evidence bearing on the question of punishment—*Maidhan*, 1905 P.R. 19. But see *Mahadeo*, supra. The power of ordering a retrial merely for the purpose of enhancing the punishment is a power that ought to be very sparingly exercised—*Mohan Lal*, 13 A.L.J. 477, 16 Cr.L.J. 433 (434). It would not be proper to order a retrial and thus to allow the prosecution to shape its case afresh, after the whole matter has been thrashed out and the defects in the prosecution case brought to light in the course of prolonged appellate and revisional proceedings—*Kedar Nath*, 29 C.W.N. 408, 41 C.L.J. 172, 26 Cr.L.J. 849.

In the exercise of its revisional powers a re-trial is ordered by the High Court only in cases where non-compliance with the provisions of the Cr. P. Code has prejudiced the accused. The High Court is not bound to set aside a trial on a technical point on the revision side if no injustice has resulted—*Gurdas Singh v. Emp.*, 40 Cr.L.J. 186, 179 I.C. 249, A.I.R. 1938 Lah. 832, 40 P.L.R. 589, 11 R.L. 547.

Power to order commitment or set aside commitment:—The High Court when acting as a Court of Revision, can *order a committal* for trial to the Court of Session after reversing the finding and sentence—*Maula Bakhsh*, 15 All. 205. Where the evidence discloses a more serious offence not within the jurisdiction of the Magistrate, the High Court may quash the conviction and sentence for the minor offence and direct a commitment for trial before a tribunal having jurisdiction for the graver offence—*Anonymous*, 2 Weir 569, 7 M.H.C.R. App. 5; *Nishi Kanta*, 20 C.W.N. 732, 17 Cr.L.J. 202; *Moze Ali*, 23 C.W.N. 1031; *Kesavulu*, 2 Weir 569 (570). Where the accused has been improperly discharged, the High Court has power to set aside the order of discharge and to direct that the person improperly discharged be arrested and forthwith committed for trial—*Vargjivandas*, 27 Bom. 84; *Ram Lal*, 6 All. 40; *Ponnusami*, 52 Mad 156, 30 Cr.L.J. 184 (185), 113 I.C. 546, 1928 M.W.N. 312, 28 M.L.W. 651, 55 M.L.J. 674, A.I.R. 1928 Mad. 1267, Ind. Rul. 1929 Mad. 146 (F.B.).

The High Court has power under this section to set aside an order of commitment passed by the Sessions Judge under sec. 423 (1) (b)—*Ram Samui*, 11 O.L.J. 748, 25 Cr.L.J. 1375, 82 I.C. 767, A.I.R. 1925 Oudh 223, 1 O.W.N. 525; *Lachman*, 2 All. 398.

1209. Power to direct further inquiry:—If an order of dismissal of complaint or discharge of accused is passed by a *Mofussil Magistrate*, the High Court can order further inquiry under sec. 436.

But if any order of dismissal or discharge is passed by a *Presidency Magistrate*, the High Court cannot make an order for further inquiry under sec. 436, as that section does not apply to *Presidency Magistrates*. See Note 1175A under sec. 436. Consequently the High Court's power to order further inquiry must be sought for elsewhere.

Section 439 read with sec. 435 confers on the High Court the powers to call for and revise the proceedings of all inferior Criminal Courts, which include the Courts of *Presidency Magistrates*. Consequently, the High Court can revise and set aside an order of dismissal of complaint or discharge of accused passed by a *Presidency Magistrate* if such order has been erroneously passed. But the question is, whether the High Court can at the same time, make an order for *further inquiry*?

Section 439 confers on the High Court all the powers of an Appellate Court under sec. 423, but the latter section allows an order for further inquiry to be made only in cases of acquittal and not in cases of orders of dismissal or discharge passed by inferior Courts. And so it has been held that the High Court cannot direct further inquiry *under this Code* where an order of dismissal of complaint or discharge of accused has been passed by a Presidency Magistrate. But the High Court can make such order under sec. 15 of the Charter Act—*Charoobala v Barendra*, 27 Cal 126 (129); *Debi Bux v. Jutmal*, 33 Cal. 1282 (1284); *Colville v Kristo Kishore*, 26 Cal. 746 (748). But in some other cases, it has been held that the High Court can *under this Code* (sec. 439) direct further inquiry into a case of discharge of accused or dismissal of complaint ordered by a Presidency Magistrate "It is strange, if the Legislature enabled us to interfere in the case of an acquittal, but nevertheless gave us no power of interference in the case of an order of discharge"—*Malik Pratap v. Khan Mahomed*, 36 Cal 994 (997); *Dwarka v. Beni Madhab*, 28 Cal 652 (667).

It may be said that the order for further inquiry is included in the "incidental or consequential order" mentioned in clause (d) of sec. 423. When the High Court reverses an order of dismissal of complaint or discharge of accused, it can direct further inquiry as a necessary incident or consequence of such reversal. See Note 674.

Power to direct further evidence to be taken:—Under this section the High Court has power to direct further evidence to be taken—*Mulla Ibrahim*, 3 Bom.L.R. 677; *Prasanno*, 19 W.R. 56. The High Court under sec. 439 has power as an Appellate Court to direct evidence to be taken. No such powers are given to the Sessions Judge or the District Magistrate under sec. 436—*Moni Mohan v Iswar*, 6 C.L.J. 251.

The High Court can also direct additional evidence to be taken if it thinks additional evidence to be necessary—*Bal Kishan*, 36 Cr.L.J. 1048 (1049), 156 I.C. 1001, A.I.R. 1935 Pat. 208, 16 P.L.T. 154. The High Court in the exercise of its revisional powers under this section can admit fresh evidence if it is relevant and its production is found to be necessary in the interest of justice—*Lala v Emp*, 40 Cr.L.J. 145 (146), 178 I.C. 894, A.I.R. 1938 All 637, 1938 A.L.J. 1010, 118 I.R. 1938 All. 968, 1937 A.W.R. (H.C.) 638, 1938 A.Cr.C. 103.

The High Court has also power under this section to call for additional evidence upon which the High Court can itself come to a conclusion, but this section does not give the High Court power to call for a finding of the Magistrate—*Sudalamuthu v. Enan*, 16 Cr.L.J. 767 (Mad.).

1210. Power to go into facts:—The High Court in revision is not confined to question of law alone, but can also deal with questions of fact—*Sham Sunder*, 20 A.L.J. 276, 23 Cr.L.J. 241, A.I.R. 1922 All 122. If the Judges in revision think it necessary to consider the whole evidence they have power to do so—*Reid v Richardson*, 14 Cal 361 (362); *Soma Chatur*, Ratanlal 908. As regards questions of fact, though the Court's jurisdiction to interfere in respect of the correctness of the finding of fact, even when the findings are concurrent, is unquestionable, it will not, as a rule, go into the evidence save in exceptional cases or where the judgment of the facts is manifestly wrong and grossly and palpably unjust; otherwise, though there is no right of appeal, an appeal might in effect be admitted in every case in the guise of an application for revision—*Pitani*, 33 Cr.L.J. 811, 139 I.C. 636, Ind. Rul. 1932 Oudh 369, 9 O.W.N. 116, 1932 Cr.C. 186, A.I.R. 1932 Oudh 311. The High Court will not interfere in revision with the finding of the lower Court on a question of fact—*Chheda Lal*, A.I.R. 1933 Oudh 195, 34 Cr.L.J. 793, 144 I.C. 577, 1933 Cr.C. 382, 10 O.W.N. 233; *Banke Lal v. Maiku*, A.I.R. 1933 Oudh 430, 10 O.W.N. 1037, 1933 Cr.C. 1315, 146 I.C. 638, 35 Cr.L.J. 121; *Jai Narain*, A.I.R. 1933 Oudh 117, 10 O.W.N. 47, 1933 Cr.C. 238, 143 I.C. 835, 34 Cr.L.J. 649; *J. Chan Toon v. Ma Ti*, A.I.R. 1935 Rang. 359 (360), 37 Cr.L.J. 6, 159 I.C. 81, 1935 Cr.C. 1083; *Chaudhuri*, A.I.R. 1933 Oudh 568, 10 O.W.N. 1211, 1933 Cr.C. 1582, 147 I.C. 122; *Abdul Rahman*, 36 Cr.L.J. 982 (995), 156 I.C. 678, A.I.R. 1935 Cal. 316, 1935 Cr.C. 467; *Nisar Husain*, 35 Cr.L.J. 809 (881), 148 I.C. 899, 11 O.W.N. 501, A.L.R. 1934 Oudh 148, 1934 Cr.C. 575, A.I.R. 1934 Oudh 179. In the

ordinary course the High Court would not interfere in revision unless it can be shown that the Magistrate has gravely misapprehended the trend of the evidence or has overlooked some important points which, if he had taken into consideration, would have caused him to come to a different conclusion—*Nga Po Tun*, 36 Cr.L.J. 1215, 157 I.C. 437, 8 R.R. 96. Ordinarily the Court will not go into the facts at all unless the conscience of the Court has been touched in regard to them—*Ramasis*, A.I.R. 1933 Pat. 697, 1933 Cr.C. 1550, 146 I.C. 370, 14 P.L.T. 759, 35 Cr.L.J. 22. See also *Tahirali*, 37 Cr.L.J. 876, 164 I.C. 58, A.I.R. 1936 Sind 90, 30 S.L.R. 72. Although the powers of the High Court to interfere with finding of fact in revision are not in any way restricted by this section, in practice, they are only exercised in exceptional cases and under exceptional circumstances. They are, however, invariably exercised in cases where it is established that the findings of fact reached by the two Courts below are based either on no evidence or on inadmissible evidence or on legally inadequate evidence or are perverse—*Diwan Singh*, 36 Cr.L.J. 744 (758), 155 I.C. 450, A.I.R. 1935 Nag. 90, 1935 Cr.C. 418. The High Court sitting in revision is not a Court of first instance dealing with questions of fact, and though it will in certain circumstances interfere on question of fact, ordinarily it will not do so. It will interfere only on the clearest and strongest grounds as when, for instance, there is no evidence to justify the finding of the lower Court or when it appears to the Court that those proceedings are so defective that the conscience of the Court is touched or there has clearly been a miscarriage of justice—*Ali Muhammad*, 38 Cr.L.J. 117 (118), 165 I.C. 950, A.I.R. 1936 Sind 243. The revisional jurisdiction can be exercised in order to prevent a gross and palpable failure of justice which means such an error of fact as is obvious upon the face of the record and is not in effect a mistake made by the Magistrate as to the question of which set of facts should be deemed more acceptable but a blunder relating to the question as to whether some fact has been proved or not. Where there was evidence before the Magistrate which, if he believed it, would enable him to find as he did, it is not for the High Court to treat the revisional application as an appeal. The machinery of the High Court in Criminal Revision cannot be invoked in a case such as this—*U Pandita v. Maung Tint*, 39 Cr.L.J. 492, 174 I.C. 860, 10 R.R. 438, A.I.R. 1938 Rang. 103. So long as the proceedings of the Magistrate were in order and so long as the Magistrate has fairly estimated the evidence before him in his own mind, his decision should not be disturbed even if the Court should be of opinion that on the evidence another conclusion might have been reached—*Ignations v. Alagamma*, A.I.R. 1935 Rang. 192 (193), 36 Cr.L.J. 1044, 156 I.C. 968, 1935 Cr.C. 748. Where the Magistrate seems to have taken every care to get all possible evidence upon the record regarding a question of fact, there seems to be no reason why the High Court should go into it—*Ram Bharosey*, 37 Cr.L.J. 522 (523), 162 I.C. 47, A.I.R. 1936 All. 269, 1936 A.L.J. 303, 1936 Cr.C. 246. The High Court will not go into the question of fact in revision where the Magistrate examined the matter apparently with great care and there is nothing to show that his decision was in any way perverse—*Ram Bahal Ahir*, A.I.R. 1936 All. 364, 1936 A.L.J. 283, 1936 A.W.R. 325, 1936 Cr.C. 428, 162 I.C. 653, 37 Cr.L.J. 675, 1936 A.L.R. 462.

Ordinarily a High Court exercising revisional jurisdiction would not agree to be taken through the whole of the record for the purpose of re-appreciating the evidence which has already been believed by two Courts below. Where the Magistrate who convicted the accused-appellant had not the benefit of weighing the prosecution evidence first-hand and on a very important point urged on behalf of the applicant as against the credibility of the prosecution story and the Appellate Court expressed no definite opinion, the High Court yielded to the prayer for a re-scrutiny of the whole evidence—*Rabu*, A.I.R. 1933 Sind 139 (141), 34 Cr.L.J. 802, 144 I.C. 427, 1933 Cr.C. 337. Where the Courts below have not applied their minds properly to the defence set up by the accused and consequently there has been a failure of justice, it is necessary for the High Court to interfere—*Keshowdas*, A.I.R. 1933 Sind. 359, 146 I.C. 952, 1933 Cr.C. 1335. In a summary trial where the Courts below had not properly before their minds the con-

tentions of the parties as to the ownership and possession of the property in dispute, the High Court interfered in revision—*Lalchand*, A.I.R. 1933 Sind 396, 1933 Cr.C. 1436, 147 I.C. 66. The High Court will not interfere in revision with a finding of fact regarding the trustworthiness of a witness—*Mohan Banjari*, A.I.R. 1933 Nag 384, 1933 Cr.C. 1577, 30 N.L.R. 55. It is unnecessary to go into the facts of the case in greater detail where the High Court is not convinced that the view taken by the two Courts below is so contrary to law or reason as to require interference—*Trikamji*, 34 Cr.L.J. 1038 (1040), 145 I.C. 550, A.I.R. 1933 Nag. 33, 1933 Cr.C. 75. The question whether the principal object of the criminal act was acquisition of property or interference with another person's enjoyment is primarily a question of fact for the Courts below and ordinarily would not be taken up in revision if the Courts below have concurred in finding that the acts proved, and the intention with which they were done constituted the offence of theft—*Baldeo Narayan*, A.I.R. 1936 Pat 38, 1936 Cr.C. 68, 160 I.C. 443, 37 Cr.L.J. 309, 16 P.L.T. 891. But where the weight of evidence is in favour of the applicant and the trial Magistrate as well as the Sessions Judge have not given due weight to the evidence adduced on behalf of the accused, the High Court will interfere with the conviction—*Kalu Ram*, 35 Cr.L.J. 1278, 151 I.C. 288, 11 O.W.N. 1035, 1934 Cr.C. 1285, A.I.R. 1934 Oudh 424. Where the lower Court has based its inference on circumstances which really did not exist, it is obviously right for the High Court to interfere in the interests of an accused person who has been convicted—*Nga Ba Myat*, 35 Cr.L.J. 849 (850), 148 I.C. 1035, 1934 Cr.C. 265, A.I.R. 1934 Rang. 42, A.L.R. 1934 Rang 133. Where the finding of fact is not based upon the evidence on the record and is proved to be wrong from the record itself, then it is open to the applicant even in revision to challenge that finding of fact—*Munoo Lal*, A.I.R. 1935 Oudh 241 (242), 1935 O.W.N. 126, 1935 O.L.R. 141, 154 I.C. 258, 36 Cr.L.J. 477, 154 I.C. 258. Normally a Court of revision will not interfere with concurrent findings of fact, but where it is evident that the Courts below have not really approached the case with either a clear appreciation of the issues involved, or a clear understanding of the principles of criminal law, the High Court will interfere—*Ramaswami Naick v Rangaswami Chettiar*, A.I.R. 1937 Mad. 968 (969), 1937 M.W.N. 733, 1937 M.Cr.C. 269, 172 I.C. 501, 47 M.L.W. 140, 39 Cr.L.J. 144.

The High Court can go into the facts when the Lower Court has totally mis-conceived the evidence and come to an obviously wrong conclusion—*Maganlal*, 14 Bom. 115. The High Court in revision does not decide the balance of credibility between two conflicting sets of witnesses or two conflicting issues of fact, but it may be compelled to dissent from a finding of fact which is either perverse or has been arrived at contrary to well-established principles of law—*Umed Singh*, 21 A.L.J. 765. It is sufficient that there was sufficient evidence on the record from which the trying Magistrate could reach the decision—*Babulal v. Tundial*, 33 Cr.L.J. 835 (836), 139 I.C. 401, A.I.R. 1932 Nag 97, 28 N.L.R. 106, 1932 Cr.C. 519, Ind. Rul. 1932 Nag. 112. The ground of inadequacy of evidence is not one on which the High Court should interfere in revision. Appreciation of the evidence is a matter for the Courts which deal with the facts of the case—*Hafizar Rahaman v. Amina Hoque*, 44 C.W.N. 1114 (1123). The High Court will interfere where the finding of fact is contrary to the mass of un rebutted evidence, and there is a clear case of miscarriage of justice—*Sarju Prasad*, 27 O.C. 290, 11 O.L.J. 330, 25 Cr.L.J. 1066. The High Court can go into the facts of the case, where evidence which is not admissible has been wrongly admitted—*Bhim Bahadur*, 55 I.C. 854, 1 P.L.T. 121; *Ramchand*, 28 Cr.L.J. 91, 99 I.C. 123, 7 A.I.Cr.R. 33, A.I.R. 1927 All. 147; *Fazal Ahmad*, 37 Cr.L.J. 603, 161 I.C. 885, A.I.R. 1936 Pesh. 72, 1936 Cr.C. 218; or where the evidence has not been considered from the right point of view, e.g., where the evidence of accomplices was regarded as that of ordinary witnesses—*Rajoni v. Asan*, 2 C.W.N. 672; *Jagdish Prasad*, 37 Cr.L.J. 951 (953), A.I.R. 1936 Oudh 401, 164 I.C. 428, 1936 O.L.R. 454, 1936 O.W.N. 829. That there is no legally admissible evidence against the applicant is rather a question of law or question of fact—*Nga Tun Hlang*, 35 Cr.L.J. 808, 148 I.C. 876, A.I.R. 1934

1934 Cr.C. 377, A.L.R. 1934 Rang 118. The High Court does not usually interfere in revision as regards findings of facts. But the question whether a criminal has been sufficiently identified, and whether his conviction on the evidence of one witness only should stand is a point more of law than of fact—*Meherali*, 32 Cr.L.J. 543 (545), 130 I.C. 378, A.I.R. 1931 Sind 13, 1931 Cr.C. 61. Where the construction of a document upon which the guilt or innocence of the accused largely depends, is erroneous, the High Court has power to go into the facts fully—*Karim Baksh*, 1908 P.R. 12. The High Court can examine the evidence where the case is not an ordinary one, and it is necessary in the interests of justice to peruse the evidence to see whether the offence of the accused has been established beyond reasonable doubt—*Thakur Das*, 28 Cr.L.J. 834 (836), 104 I.C. 450, A.I.R. 1928 Pat. 13. Where evidence against the accused is weak, suspicious and inconclusive, the High Court can, on its revision side, examine and discuss the evidence on record and upset the finding of fact of the lower Courts—*Bhagwan Singh*, 1907 P.W.R. 20. When a case seems *ab initio* improbable and there is enmity between the parties, the element of doubt is so very strong therein that the conviction must be set aside even on revision notwithstanding the concurrent findings of fact by the Courts below—*Boori v. King-Emp*, 16 I.C. 520, 28 P.W.R. 1912 (Cr.), 13 Cr.L.J. 712, 10 P.L.R. 1912 Sup.; *Brij Kishore v. King-Emp*, 40 Cr.L.J. 463, 1939 O.L.R. 140, 180 I.C. 467, 11 R.O. 247, 1939 O.W.N. 265, 1939 A.W.R. (C.C.) 57, 1939 A.Cr.C. 43, 1939 O.A. 291, A.I.R. 1939 Oudh 156. Where with reference to the first report at the *thanah* and other circumstances the case against an accused person is very doubtful, the benefit of the doubt should be given to the accused and in such cases even the concurrent findings of fact of the lower Courts are liable to be set aside on revision—*Kisar Singh v. Emp*, 19 I.C. 1008, 5 P.W.R. 1913 (Cr.), 152 P.L.R. 193, 14 Cr.L.J. 320; *Brij Kishore v. King-Emp*, *supra*. Where the Lower Courts have failed to scrutinize carefully the proof of corroboration of accomplice evidence, the High Court in revision entered into the evidence and set aside the concurrent findings of fact of both the Lower Courts—*Manna*, 1911 P.W.R. 3, 12 Cr.L.J. 35. The High Court, as a Court of Revision, has power to re-examine the evidence if there are *prima facie* good grounds for doing so, especially where the accused has been given a non-appealable sentence and has no means of vindicating his character except in revision—*Tikekar v. Piareylal*, 45 I.C. 1002, 19 Cr.L.J. 666 (Nag.). In a case where there can be no appeal because non-appealable sentence is awarded, different considerations prevail as regards the duty of the Court exercising revisional jurisdiction—*Periakaruppan Chettiar v. Chidambaram Chettiar*, 1937 M.W.N. 51. See also *Abdul Wahid v. Abdullah*, 45 All. 656 cited under Note 1208, *ante*.

Where the judgment of the Appellate Court is a meagre one and shows that the Appellate Court has not gone thoroughly into the questions dealt with at the trial by the first Court, the High Court will in revision investigate the original trial to see whether the nature of the procedure and the decision arrived at were such as to leave no doubt that the accused had a fair trial and that the decision was given according to law—*Alay Ahmed*, 20 Cr.L.J. 270, 50 I.C. 978 (All.).

But though the High Court has power to revise a finding of fact arrived at by the Lower Courts and the law imposes no limits to this jurisdiction (*Chagan Dayaram*, 14 Bom. 331; *Nobin v. Rassick*, 10 Cal. 1047) still it is not bound to do so, if it does not think fit, and will not exercise such a discretionary power unless there appears on the face of the judgment or order complained of or on the record some ground to induce the Court to think that the evidence ought to be examined in order to see whether there has been any failure of justice—*Keshab v. Akhil*, 22 Cal. 998, or any material departure from legal principles—*Ram Lal*, 51 All. 663, 30 Cr.L.J. 562 (564), 116 I.C. 25, A.I.R. 1929 All. 273, Ind Rul. 1929 All. 505, 1929 A.L.J. 361. The High Court is always averse to interfering on facts by way of revision as it would tend to remove the difference specially laid down by the statute between appeal and revision—*Hafiz Khan*, 1 O.W.N. 878. It is unusual in revision to disturb a finding of fact unless it is so manifestly erroneous that a miscarriage of justice would result from its being

uncorrected—*Buranshabib*, 6 Bom L.R. 1096; *Chagan Dayatam*, 14 Bom. 331; *Duli Chand*, 18 Cr L.J. 437 (411) (Cal.); *Shidoo*, 29 Cr L.J. 936 (938), 111 I.C. 856, A.I.R. 1929 Sind 26, 22 S.L.R. 453; *Bankatram*, 28 Bom 533 (536); *Muhammed Zahur*, 9 O.L.J. 488; *Miranand*, 17 S.L.R. 245, 76 I.C. 230, A.I.R. 1924 Sind 129, 25 Cr L.J. 134; *Bhuneswari Pershad*, 32 Cr L.J. 860, 132 I.C. 234, Ind Rul 1931 Oudh 250, 14 O.L.J. 438, 8 O.W.N. 503, 1931 Cr.C. 444, A.I.R. 1931 Oudh 172. Ordinarily, the High Court will not in revision go behind the concurrent findings of the Courts below on a question of fact—*Maruthayee v. Appavu*, 24 Cr L.J. 476, A.I.R. 1923 Mad 237, 31 M.L.T. 388; *Tabri*, 26 Cr L.J. 393, 84 I.C. 937, A.I.R. 1925 Lah 42, 6 Lah L.J. 326; *Jan Mahomed*, 36 Cr L.J. 1464, 158 I.C. 498, A.I.R. 1935 Sind 105, 1935 Cr.C. 523; *Paluvadi Venkataramayya*, A.I.R. 1940 Mad 111 (113), 50 M.L.W. 614, 1939 M.W.N. 1039, 1939 M.Cr.C. 285, (1939) 2 M.L.J. 878, I.L.R. 1939 Mad 1035. It is the settled practice of the High Court to accept the findings of the Lower Appellate Court as correct, unless such findings are based on no legal evidence or are manifestly erroneous—*Lukman*, 21 S.L.R. 107, 98 I.C. 49, A.I.R. 1927 Sind 39, 27 Cr L.J. 1233 (1234); *Allahbux*, 23 S.L.R. 216, 116 I.C. 99, A.I.R. 1929 Sind 90, Ind Rul. 1929 Sind 99, 30 Cr L.J. 548. When the Appellate Court has dealt with the evidence carefully and has not omitted to consider any relevant or important portion of the evidence, the High Court will not interfere in revision with the finding of fact of the lower Appellate Court—*Gajo Singh*, 4 P.L.T. 265. The uniform practice of the High Court is not to exercise its power of upsetting a finding of fact, except for some extraordinary reason, and the circumstance that the High Court itself, after examining the evidence, might have come to a different conclusion is not such a reason—*Maganlal*, 14 Bom 115; *Thakur Das*, 28 Cr L.J. 834 (836), 104 I.C. 450, A.I.R. 1928 Pat. 13. The High Court can interfere with regard to a finding of fact, only on very exceptional grounds, such as a mis-statement of evidence by the Lower Court, or the misconstruction of documents, or placing by that Court on the accused the onus of proof contrary to the law of evidence—*Ganesh*, 12 Bom L.R. 21, 11 Cr L.J. 180, or where there has been a conviction of a clearly innocent person—*Nandeyappa*, 8 Bom L.R. 851, 4 Cr L.J. 446. In revision the High Court ought not to re-open a finding favourable to the accused at which the Sessions Judge has arrived on the evidence—*Gurudas*, 32 Cr L.J. 122, 128 I.C. 351, A.I.R. 1930 Pat 509, Ind Rul 1931 Pat. 47, 1930 Cr.C. 937.

The first rule which has always been observed is that the High Court will not go into evidence unless it is necessary to do so by reason of special circumstances or by reason of the character of the error of law. There must appear, on the face of the judgment or of the order complained of or of the record, some ground—which need not always be a ground of law—to induce the High Court to think that the evidence ought to be examined in order to see whether there has been a miscarriage of justice, and it is not the right of a party to claim that the Court should investigate the facts merely on the allegation that there should be another trial because he has not succeeded before the lower Court. Referring Courts must always bear in mind the limits which the High Court has, in practice, put upon its own discretion and they should not make a reference where the only objection is to the finding of the Court below upon the merits. Even if it should appear from the judgment of the Magistrate that there is an error of law, references should not be made unless it appears that the error of law is of such a character as to call for interference by a higher authority. The practice, in a case under sec 145, Cr. P. C., is exactly like the practice in any ordinary case—*Phakir v. Madar*, 32 Cr L.J. 1237 (1239), 134 I.C. 915, 58 Cal 1081, 35 C.W.N. 374, A.I.R. 1931 Cal 619, 1931 Cr.C. 803, Ind. Rul. 1931 Cal. 915. See *Suami Dayal*, 8 P.R. 1908 (Cr.), 15 P.W.R. 1908, 149 P.L.R. 1908, 7 Cr L.J. 353; *Ramphul*, A.I.R. 1933 Lah. 236 (238), 1933 Cr.C. 356, 35 P.L.R. 157.

Though the High Court has a wide power of interference in revision applications to prevent injustice, this power is to be exercised in accordance with well established principles. It is not, for instance, for the High Court in revision to deal with questions of fact or of law as would a Court of first appeal. To justify the interference of the

High Court in revision, it must be shown, first, that the Judge below has committed some error of law; and secondly, that the accused has been materially prejudiced by the error. The High Court may also exercise its revisional power, even as regards findings of fact, in cases where the lower Court has totally misconceived the evidence and come to an obviously wrong conclusion. But it is only very extreme cases which justify such an interference with the appreciation of fact by the lower Court which heard the evidence and the Appellate Court which reconsidered its value—*Mohanlal Bhanlal v. Emp.*, A.I.R. 1937 Sind 293 (294), 172 I.C. 874, 39 Cr.L.J. 123, following *Maganlal*, 14 Bom. 115.

The Criminal Procedure Code confers the widest powers of revision upon the High Court, and the Judges should not seek to lay down rules which confine that discretion in a manner which the Legislature has not seen fit to confine it. It is clearly open to an accused person in revision to contend that he has been convicted on the strength of tainted evidence and tainted evidence only, and that it is not the practice of the High Court to convict on such evidence; and that if such contention is established the High Court should interfere—*Shankarshet*, A.I.R. 1933 Bom. 482, 35 Bom.L.R. 1040, 1933 Cr.C. 1586, 58 Bom. 40, 147 I.C. 25.

When the High Court sets aside a conviction as being bad in law, it is not necessarily bound to go further into the question whether on the facts established by the evidence a conviction of some lesser offence might or might not be recorded—*Mansur Husain*, 41 All. 587.

1211. Power to allow composition:—The High Court as a Court of Revision has power to give effect to the compounding of offences which the parties have agreed to after conviction—*Nidhan*, 1904 P.L.R. 252; *Ram Pyari*, 32 All. 153; *Shiboo*, 45 All. 17; *Lalla*, 17 O.C. 92; *Bhaiyalal*, 30 Cr.L.J. 960, 118 I.C. 681, A.I.R. 1929 Nag. 278, Ind. Rul. 1929 Nag. 281; *Ram Sarup*, 13 O.C. 161, 7 I.C. 539. This is now expressly provided by the new sub-section (5A) of section 345 added by the Amendment Act of 1923. (In *Adhar v. Subodh*, 18 C.W.N. 1212; *Akhoy v. Rameshwar*, 43 Cal. 1143; *Andhi*, 3 P.L.T. 458; *S. Rangayya v. Ramayya*, 39 Mad. 604; *Nga*, 11 A.L.J. 13; *Lala*, 15 A.L.J. 467 and *Harnam*, 1918 P.R. 35, it was held that the High Court had no power to allow composition in revision. These cases are no longer good law). The High Court may in revision grant permission to compound the offence and acquit the accused where such permission was wrongly withheld by the lower Court—*Titan v. Chintan*, 55 Cal. 1190, 30 Cr.L.J. 484 (485), 115 I.C. 528, A.I.R. 1929 Cal. 96, Ind. Rul. 1929 Cal. 384; *Singheswar v. Ali Hasan*, 1929 Cr.C. 272, A.I.R. 1929 Pat. 512. See also *Kumar*, 1933 M.W.N. 245.

1212. Power to order restoration of property:—The High Court in its revisional jurisdiction has the power under sec. 423 (d) of making any amendment or any consequential or incidental order that may be just and proper. An accused person may upon his acquittal by the High Court in revision be restored to possession of the property of which he has been deprived in favour of the complainant—*Manki v. Bhagwanti*, 27 All. 415. The High Court may in the exercise of its revisional powers pass an order under sec. 517 to refund the money received by false pretences—*Nga Than*, 15 Cr.L.J. 555 (Bur.).

1213. Power to consider case of non-appealing accused:—Where two or more persons have been convicted by the Sessions Judge and one of them has appealed, the High Court has power under sec. 439 to deal with the case of the accused persons not appealing against their conviction, while considering and trying the appeal preferred by the other accused; clause (5) of this section does not in any way affect the jurisdiction of the High Court to deal with the case of the non-appealing accused—*Braja Rakhal*, 5 C.W.N. 330; *Mir Mouse*, 31 C.L.J. 305; *Ratan Singh*, 1893 A.W.N. 51; *Raghu*, 5 P.L.J. 430, 58 I.C. 49, 21 Cr.L.J. 705, 1 P.L.T. 241; *Bichinta*, 1916 P.W.R. 7, 32 I.C. 833, 17 Cr.L.J. 97; *Allah Ditta*, 25 Cr.L.J. 435, 77 I.C. 723, A.I.R. 1924 Lah. 585; *Champa Pasin*, 29 Cr.L.J. 325 (334) (Pat.); *Sada*, 4 I.C. 980, 11 Cr.L.J.

99, 14 P.W.R. 1909 (Cr.); *Chari*, 10 I.C. 792, 12 Cr.L.J. 250, 4 Bur.L.T. 87; *Mangal Singh*, 35 Cr.L.J. 1046, 150 I.C. 21, 1934 Cr.C. 565, A.I.R. 1934 Lah. 346, 36 P.L.R. 121, A.L.R. 1934 Lah. 230; *Rajanikanta*, 58 Cal. 902, 32 Cr.L.J. 1003 (1004), 133 I.C. 183, 35 C.W.N. 347, Ind. Rul. 1931 Cal. 647, A.I.R. 1931 Cal. 618, 1931 Cal. 802; *Sant Ram*, 131 I.C. 375, A.I.R. 1931 Lah. 97; *Pars Ram*, 32 Cr.L.J. 700 (704), 131 I.C. 353, A.I.R. 1931 Lah. 145, 32 P.L.R. 71, Ind. Rul. 1931 Lah. 419, 1931 Cr.C. 257; *Bhagwan Din*, 35 Cr.L.J. 915, 149 I.C. 195, 11 O.W.N. 444, A.I.R. 1934 Oudh 151, 1934 Cr.C. 495. Where four persons were convicted and three of them were awarded non-appealable sentences, and on appeal by the other the conviction of all of them is found to be wrong, the High Court has power under this section to deal with and set aside the conviction even as regards those who have not appealed—*Karam Ali*, 1891 A.W.N. 149; *Bhola*, 39 All. 549; *Mir Mouze*, 31 C.L.J. 305. Similarly, where there are several convicted persons and one only of them has applied for revision, the High Court has power to deal with the convictions of all offenders who were tried together and convicted, though only one person has applied for revision—*Mangi Ram*, 11 Cr.L.J. 17, 1909 P.R. 9; *Sangli Nandan*, 12 Cr.L.J. 495, (1911) 2 M.W.N. 170; *Tulsi*, 29 Cr.L.J. 259 (260), 107 I.C. 529, A.I.R. 1928 Pat. 249, 9 A.I.Cr.R. 543.

1214. Power to expunge remarks from Lower Court's judgment:—

In a Bombay case, a Sessions Judge in convicting the accused passed certain remarks about the complainant, a police officer, as a result of which he was dismissed from service. He thereupon applied to the High Court to delete the remarks from the judgment of the Sessions Judge. It was held, dismissing the application, that it would be an extraordinary exercise of the powers of the High Court, to expunge from the Lower Court's judgment the remarks complained of—*Shidramayya*, 19 Bom.L.R. 912, 19 Cr.L.J. 97, 43 I.C. 321. In an Allahabad case it was held that the High Court could not do so even under sec. 423 (d) read with sec. 439 because the 'amendment' mentioned in sec. 423 (d) means an amendment of the main order; and the incidental or consequential order means an order incidental to and consequential upon the main order; that is, the High Court could make an amendment or pass an incidental or consequential order only when there was an appeal or revision petition against the main order; but where the main order passed by the Lower Court had not been appealed against, the High Court could not entertain an application merely for expunging certain remarks made by the Lower Court in its judgment—*Dunn*, 44 All. 401 (405), 66 I.C. 1005, A.I.R. 1922 All. 107, 23 Cr.L.J. 349, 20 A.L.J. 261. But where there has been an appeal or revision petition against the order of the Lower Court, the High Court in dealing with the whole evidence of the case and considering the judgment can expunge any improper remarks made in it by the Court below. This will be evident from 2 C.W.N. 261; *Lachchu*, 1 O.L.J. 141, 15 Cr.L.J. 420, and *Thomas Pellako*, 14 I.C. 643, 5 Bur.L.T. 20. In *Makava v. Kim Lat*, 11 I.C. 1000, 4 Bur.L.T. 173, the Chief Court held that it had power to expunge the objectionable passage from the Lower Court's judgment, though it refused to do so.

But sec. 561A (newly added by the Amendment Act of 1923) gives inherent power to the High Court to make any order to secure the ends of justice, and thus to expunge any objectionable remarks from the Lower Court's judgment, irrespective of the fact whether there has or has not been an appeal or revision petition against the main order. Thus, in *Amar Nath*, 5 Lah. 476 (481), 26 Cr.L.J. 463, 85 I.C. 143, A.I.R. 1925 Lah. 187, where a Sessions Judge made certain unwarranted remarks about the testimony of a Police witness, and that witness applied to the High Court in revision to expunge those remarks from the judgment of the Sessions Judge, the High Court directed those remarks to be expunged, although there was no revision petition in the main case in which that witness gave his evidence. So also, where one of two accused tried together by a Magistrate was acquitted, and the Sessions Judge, in an appeal preferred by the other accused against his conviction, passed certain remarks about the acquitted person impugning the correctness of the acquittal,

and that person applied to the High Court to expunge those remarks, the High Court ordered the remarks, to be expunged, although no revision petition was made in the main case—*Abdul Aziz*, 25 Cr.L.J. 1245, 82 I.C. 173, A.I.R. 1925 Lah. 129. See also *Benarsi Das*, 6 Lah. 166, 26 P.L.R. 315, 26 Cr.L.J. 1326, where the High Court expunged certain remarks in a Magistrate's judgment about a person who was not a party or a witness in the proceedings. See also *Bhagat Singh*, 35 P.L.R. 373, 36 Cr.L.J. 383, 153 I.C. 262. It may often be the duty of a Sessions Judge to comment adversely upon the conduct of an investigation. But great care should be taken, when it is necessary to do anything of this kind, that no disparaging or libellous remarks should be made upon any person who has had no opportunity to defend himself and who has not even appeared in the witness box. Where this was done the High Court allowed the judgment to stand subject to its comment without cutting it to rags by making excisions of objectionable remarks—*Tejmal Naraindas*, 34 Cr.L.J. 367 (368), 142 I.C. 587, A.I.R. 1933 Sind 91, 27 S.L.R. 13, 1933 Cr.C. 219, Ind. Rul. 1933 Sind 105. See also Note 1433A where recent rulings have been inserted.

According to the Bombay High Court the judgment in *Dunn*, supra, was right and has not been altered by the introduction of sec. 561A, Cr. P. C., and the High Court has no jurisdiction to expunge passages from the judgment of an inferior Court which has not been brought before it in regular appeal or revision—*Rogers v. Shrinivas Gopal Kawale*, 41 Cr.L.J. 855 (857), 190 I.C. 205, A.I.R. 1940 Bom. 266, I.L.R. 1940 Bom. 415, 42 Bom.L.R. 478.

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1215. Power to interfere in a pending case:—The High Court will, especially at an interlocutory stage, not interfere unless the impropriety is a flagrant one and prompt action is necessary to prevent an injustice—*Hansraj Harjiwan v. Emp.*, A.I.R. 1940 Nag. 390 (393), 1940 N.L.J. 449. Under section 435, the High Court can call for and examine the records of any proceeding of an inferior Criminal Court not only to satisfy itself as to the correctness, legality or propriety of any finding, sentence or order of such Court, but also as to the regularity of any proceedings of that Court; and for that purpose it has power to interfere at any stage of the proceedings in a pending trial. Thus, it can interfere when the proceedings before the inferior Court have not proceeded any further beyond the issue of summons—*Ramanathan v. Subrahmanya*, 47 Mad. 722 (725), 81 I.C. 785, 20 M.L.W. 234, 1924 M.W.N. 556, A.I.R. 1925 Mad. 39, 47 M.L.J. 373, 25 Cr.L.J. 1009; *Nageshappa*, 20 Bom. 543 (545). But where the trial has not proceeded beyond the stage of examination of only two witnesses, so that there has not been any finding, sentence or order nor there is any allegation of the proceedings being irregular, the High Court will not interfere—*Sheo Saran v. Jitendra*, A.I.R. 1927 Oudh 571, 104 I.C. 254, 28 Cr.L.J. 814. What the High Court may properly be asked to do is to put right any incorrect or irregular or improper sentence or order which a Subordinate Court may have delivered or to check any such irregularity as sec. 537 does not condone. What the High Court should not be asked to do is to decide in first instance those questions which the Magistrate ought to decide for himself—*Atmaram*, 35 Cr.L.J. 891 (892), 148 I.C. 985, A.I.R. 1934 Sind 20, 1934 Cr.C. 218, A.I.R. 1934 Sind 25. The High Court can interfere with a case while it is still pending in the subordinate Court, and can quash the proceedings if the materials before the Magistrate disclose no offence and no useful purpose would be served by continuing the proceedings—*Hari Charan v. Girish Chandra*, 38 Cal. 68 (74), 13 C.L.J. 43, 11 Cr.L.J. 525; *Maung Ba Yone v. Ma Hla Kin*, A.I.R. 1933 Rang. 297, 35 Cr.L.J. 52, 146 I.C. 402, 1933 Cr.C. 1128; *Krishna Rao*, 6 N.L.J. 119, 73 I.C. 335, 24 Cr.L.J. 591, A.I.R. 1924 Nag. 47. See also *Kumud Nath v. Brojendra Nath*, A.I.R. 1933 Cal. 647, 35 Cr.L.J. 29, 146 I.C. 366, 1933 Cr.C. 1057, where the High Court entertained revisional application for quashing the proceedings when the accused were able to give a sufficient explanation of the delay that had taken place before the High Court was moved. The High Court will interfere to quash proceedings in cases where it is clear that interference

is necessary and where no offence has obviously been committed—*Krishnarao*, 35 Cr.L.J. 230, A.I.R. 1933 Bom. 409 (411), 35 Bom.L.R. 845, 1933 Cr.C. 1173, 57 Bom. 690, 146 I.C. 688. The High Court seldom interferes in the preliminary stage with the discretion of the Magistrate taking action under the preventive sections of the Cr. P. Code, but when the materials on which the orders are based are clearly insufficient to support those orders the High Court feels bound to interfere in the preliminary stage—*Najar Chandra*, 38 C.L.J. 198, 28 C.W.N. 23, 25 Cr.L.J. 189, 76 I.C. 429, A.I.R. 1923 Cal. 114. The power is to be exercised with great care and is generally exercised not only when the error is patent on the face of the record, but also when grave injustice would result unless prompt redress were given—*Murtiza Khan*, A.I.R. 1934 Nag. 138, 1934 Cr.C. 569. Only in exceptional circumstances will the High Court interfere in revision in pending cases. To justify such interference would require that on the face of the proceedings there should appear some clear injustice requiring immediate redress—*Amirbux*, A.I.R. 1934 Sind 183, 1934 Cr.C. 1378, 36 Cr.L.J. 331, 153 I.C. 230, following *Mahomed v. Mahomed Idris*, A.I.R. 1925 Sind 328, 88 I.C. 189, 26 Cr.L.J. 1101, 18 S.L.R. 274; *Muridhar v. Narandas*, A.I.R. 1914 Sind 85, 27 I.C. 205, 16 Cr.L.J. 141, 8 S.L.R. 143; and *Jwandas*, A.I.R. 1928 Nag. 31, 53 I.C. 492, 20 Cr.L.J. 746; *Iqbal Begum v. Iqbal Hussain*, 40 P.L.R. 776. So far as the Sind Court is concerned, it has consistently refused to interfere at an interlocutory stage of a criminal proceeding save where exceptional circumstances called for the exercise of its revisional jurisdiction, for example, when it was apparent on the face of the record that there was no ground at all for the institution of criminal proceedings or for the continuation of such proceedings already instituted—*Jumo Machhi*, 41 Cr.L.J. 568 (570), 188 I.C. 306, A.I.R. 1940 Sind 65, 1940 Kar. 157. The High Court can interfere at as early a stage as when the accused has been summoned to show cause why sanction (under sec. 195) should not be granted for his prosecution—*Jagan Singh*, 1892 A.W.N. 102; *Chandha*, 14 A.L.J. 851, 19 Cr.L.J. 46. The High Court can interfere with the proceedings of a Magistrate while they are in the interlocutory stage pending investigation, and may suspend such proceedings, even without having the record before it—*Abdool Kadir*, 20 W.R. 23. The High Court can, pending trial, interfere with the interlocutory order of a Magistrate refusing to summon certain witnesses for the defence—*Ravel Singh*, 1901 P.L.R. 130. The High Court can interfere pending trial when the Subordinate Magistrate improperly declines to take any evidence or to allow cross-examination of the prosecution witnesses and arbitrarily follows a procedure of his own—*Durga Dutt*, 10 A.L.J. 144, 13 Cr.L.J. 443 (444). Where the Magistrate has decided that no evidence for the prosecution is necessary to prove the offence, the High Court can interfere at an interlocutory stage in order to determine whether it is necessary for the prosecution to adduce evidence of the offence—*Lurindaram v. Karachi Municipality*, 8 S.L.R. 238, 16 Cr.L.J. 255, 28 I.C. 111. If a charge is framed where no charge should have been framed, the proceeding of the Magistrate becomes irregular, and the High Court has power to interfere, under this section as well as under sec. 561A, during the pendency of the case to prevent the abuse of the process of the Court and to secure the ends of justice by setting aside the charge—*Gokul Prasad v. Devi Prasad*, 23 A.L.J. 21, 86 I.C. 284, A.I.R. 1925 All. 311, 26 Cr.L.J. 748 (749); *C. S. Joseph*, 41 C.W.N. 251 (252); *Ramaswami Mudaliar*, 47 M.L.W. 136, 1938 M.W.N. 217, (1938) 1 M.L.J. 310. But the High Court will not stop proceedings in a trial merely because the accused cited as one of his witnesses a person on whom process cannot be served and who cannot be examined on commission—*Fazal Rahman Khan*, 37 Cr.L.J. 618, 162 I.C. 270, A.I.R. 1936 Pesh. 101, 1936 Cr.C. 311. The High Court will not interfere at a preliminary stage on the ground of misjoinder of charges based upon a criticism of the evidence of the prosecution witnesses whose cross-examination has been reserved—*C. S. Joseph*, supra. The High Court has power to examine the proceedings of the Lower Court at the stage when a charge is framed, and, if necessary, to set aside the charge and quash the proceedings if no offence appears to have been committed—*Tarak Singh*, 29 P.L.R. 237, 103 I.C. 835, 9 Lah.L.J. 440, 8 A.I.Cr.R. 447, A.I.R. 1927 Lah. 731, 28 Cr.L.J. 755 (756); *Harendra v. Jolish*, 40 C.L.J. 283, 52 Cal. 188, 85 I.C. 641,

and that person applied to the High Court to expunge those remarks, the High Court ordered the remarks, to be expunged, although no revision petition was made in the main case—*Abdul Aziz*, 25 Cr.L.J. 1245, 82 I.C. 173, A.I.R. 1925 Lah. 129. See also *Benarsi Das*, 6 Lah. 166, 26 P.L.R. 315, 26 Cr.L.J. 1326, where the High Court expunged certain remarks in a Magistrate's judgment about a person who was not a party or a witness in the proceedings. See also *Bhagat Singh*, 35 P.L.R. 373, 36 Cr.L.J. 383, 153 I.C. 262. It may often be the duty of a Sessions Judge to comment adversely upon the conduct of an investigation. But great care should be taken, when it is necessary to do anything of this kind, that no disparaging or libellous remarks should be made upon any person who has had no opportunity to defend himself and who has not even appeared in the witness box. Where this was done the High Court allowed the judgment to stand subject to its comment without cutting it to rags by making excisions of objectionable remarks—*Tejmal Naraindas*, 34 Cr.L.J. 367 (368), 142 I.C. 587, A.I.R. 1933 Sind 91, 27 S.L.R. 13, 1933 Cr.C. 219, Ind. Rul 1933 Sind 105. See also Note 1433A where recent rulings have been inserted.

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is necessary and where no offence has obviously been committed—*Krishnarao*, 35 Cr.L.J. 230, A.I.R. 1933 Bom 409 (411), 35 Bom L.R. 845, 1933 Cr.C. 1173, 57 Bom. 690, 146 I.C. 688. The High Court seldom interferes in the preliminary stage with the discretion of the Magistrate taking action under the preventive sections of the Cr. P. Code, but when the materials on which the orders are based are clearly insufficient to support those orders the High Court feels bound to interfere in the preliminary stage—*Nafar Chandra*, 38 C.L.J. 198, 28 C.W.N. 23, 25 Cr.L.J. 189, 76 I.C. 429, A.I.R. 1923 Cal. 114. The power is to be exercised with great care and is generally exercised not only when the error is patent on the face of the record, but also when grave injustice would result unless prompt redress were given—*Murtiza Khan*, A.I.R. 1934 Nag. 138, 1934 Cr.C. 569. Only in exceptional circumstances will the High Court interfere in revision in pending cases. To justify such interference would require that on the face of the proceedings there should appear some clear injustice requiring immediate redress—*Amurbux*, A.I.R. 1934 Sind 183, 1934 Cr.C. 1378, 36 Cr.L.J. 331, 153 I.C. 230, following *Mahomed v. Mahomed Idris*, A.I.R. 1925 Sind 328, 88 I.C. 189, 26 Cr.L.J. 1101, 18 S.L.R. 274; *Murlidhar v. Naraindas*, A.I.R. 1914 Sind 85, 27 I.C. 205, 16 Cr.L.J. 141, 8 S.L.R. 143; and *Jiwandas*, A.I.R. 1928 Nag. 31, 53 I.C. 492, 20 Cr.L.J. 746; *Iqbal Begum v. Iqbal Hussain*, 40 P.L.R. 776. So far as the Sind Court is concerned, it has consistently refused to interfere at an interlocutory stage of a criminal proceeding save where exceptional circumstances called for the exercise of its revisional jurisdiction, for example, when it was apparent on the face of the record that there was no ground at all for the institution of criminal proceedings or for the continuation of such proceedings already instituted—*Jumo Machhi*, 41 Cr.L.J. 568 (570), 188 I.C. 306, A.I.R. 1940 Sind 65, 1940 Kar. 157. The High Court can interfere at as early a stage as when the accused has been summoned to show cause why sanction (under sec. 195) should not be granted for his prosecution—*Jagan Singh*, 1892 A.W.N. 102; *Chandha*, 14 A.L.J. 351, 12 Cr.L.J. 46. The High Court can interfere with the proceedings of a Magistrate while they are in the interlocutory stage pending investigation, and may suspend such proceedings, even without having the record before it—*Abdool Kadir*, 20 W.R. 21. The High Court can, pending trial, interfere with the interlocutory order of a Magistrate refusing to summon certain witnesses for the defence—*Rovel Singh*, 1901 P.L.R. 131. The High Court can interfere pending trial when the Subordinate Magistrate improperly declines to take any evidence or to allow cross-examination of the prosecution witnesses and arbitrarily follows a procedure of his own—*Durga Dutt*, 10 A.L.J. 144, 12 Cr.L.J. 443 (444). Where the Magistrate has decided that no evidence for the prosecution is necessary to prove the offence, the High Court can interfere at an interlocutory stage in order to determine whether it is necessary for the prosecution to adduce evidence of the offence—*Lurindaram v. Karachi Municipality*, 8 S.L.R. 238, 16 Cr.L.J. 255, 22 I.C. 111. If a charge is framed where no charge should have been framed, the proceedings of the Magistrate becomes irregular, and the High Court has power to interfere under this section as well as under sec. 561A, during the pendency of the case to prevent the abuse of the process of the Court and to secure the ends of justice by setting aside the charge—*Gokul Prasad v. Devi Prasad*, 23 A.L.J. 21, 86 I.C. 234, 112 1925 All. 311, 26 Cr.L.J. 748 (749); *C. S. Joseph*, 41 C.W.N. 251 (252); *Ramanani Mudaliar*, 47 M.L.W. 136, 1938 M.W.N. 217, (1938) 1 M.L.J. 819. But the High Court will not stop proceedings in a trial merely because the accused cited as one of his witnesses a person on whom process cannot be served and who cannot be examined on commission—*Fazal Rahman Khan*, 37 Cr.L.J. 618, 162 I.C. 27, A.I.R. 1936 Pesh. 101, 1936 Cr.C. 311. The High Court will not interfere at a preliminary stage on the ground of misjoinder of charges based upon a criticism of the evidence of the prosecution witnesses whose cross-examination has been reserved—*C. S. Joseph*, supra. The High Court has power to examine the proceedings of the Lower Court at the stage when a charge is framed, and, if necessary, to set aside the charge and quash the proceedings if no offence appears to have been committed—*Tarak Sankar*, 29 P.L.R. 237, 103 I.C. 835, 9 Lah.L.J. 440, 8 A.I.Cr.R. 47, A.I.R. 1927 Lah. 28 Cr.L.J. 755 (756); *Harendra v. Jolish*, 40 C.L.J. 233, 52 Cal. 183, 85 I.C.

A.I.R. 1925 Cal. 100, 26 Cr.L.J. 545 (547); *Amar Nath*, 10 Lah.L.J. 485, 113 I.C. 536, A.I.R. 1928 Lah. 945, Ind. Rul. 1929 Lah. 184, 30 Cr.L.J. 162 (163); *Bishen Das*, 1910 P.R. 33, 8 I.C. 1161 (1165), 12 Cr.L.J. 50; *Tahiru v. Jallu*, 9 Lah.L.J. 440, 106 I.C. 224, A.I.R. 1927 Lah. 825, 28 Cr.L.J. 1040. The High Court can interfere in revision with a pending proceeding where a criminal charge is unsustainable on the evidence of the prosecution witnesses. It is the duty of the High Court to interfere where the facts proved do not constitute an offence and the continuance of the trial would be an abuse of the process of the Court—*Abdul Rahim Khan v. Emp.*, 41 Cr.L.J. 753 (754), 189 I.C. 579, 1940 N.L.J. 183, A.I.R. 1940 Nag. 360. Where the trial was a vexatious and protracted one, and material injury was thereby likely to be caused to the accused, the High Court interfered during the pendency of the trial and set aside the charge in order to prevent further harassment of the accused—*In re Kuppuswami*, 39 Mad. 561, 28 M.L.J. 505, 16 Cr.L.J. 477; *Chandi v. Abdur Rahaman*, 22 Cal. 131; *Shripad*, 52 Bom. 151, 108 I.C. 37, 30 Bom.L.R. 70, A.I.R. 1928 Bom. 184, 9 A.I.Cr.R. 563, 29 Cr.L.J. 317 (318); *Choa Lal v. Anant*, 25 Cal. 233 (234). Where the notice and the preliminary order of a Magistrate under sec. 112 were defective and could not form the basis of a proceeding under sec. 110, the High Court interfered and set aside the proceedings so far taken by the Magistrate—*Bahadur Singh*, 1910 P.W.R. 18, 11 Cr.L.J. 388.

But though the High Court has power to interfere with pending proceedings at any stage, it will not do so except only under rare and exceptional circumstances—*Choa Lal v. Anant Pershad*, 25 Cal. 233; *Inamulla*, 2 A.L.J. 673, 2 Cr.L.J. 790; *Salamatrai*, 9 Cr.L.J. 270, 1 S.L.R. 30; *In re Kuppuswami*, 39 Mad. 561, 16 Cr.L.J. 477; *Mahomed v. Muhammad Idris*, 26 Cr.L.J. 1001, 88 I.C. 189, A.I.R. 1925 Sind 328, 18 S.L.R. 274; *Madhab*, 26 Cr.L.J. 1093, 88 I.C. 181, A.I.R. 1925 Nag. 345; *Ghanshamdas*, A.I.R. 1933 Sind 412, 35 Cr.L.J. 519, 1933 Cr.C. 1545; *Raghunath*, 34 Cr.L.J. 956, 145 I.C. 400, 1933 A.L.J. 30, A.I.R. 1933 All. 211, 1933 Cr.C. 367; *Nana Sadoba v. Emp.*, A.I.R. 1938 Nag. 283, 1938 N.L.J. 90, 179 I.C. 317, 40 Cr.L.J. 197. It is only in exceptional instances that the High Court will interfere with the action of a subordinate Court in respect of any pending case, especially when such a case has reached the stage where a charge has been drawn and only the defence of the accused remains to be heard. No hard and fast rule can be laid down on the subject, because the interference of the High Court should be regulated by the particular circumstances of each case, but speaking generally, it is inadvisable to interfere in a pending case, unless there is some manifest and patent injustice apparent on the face of the proceeding and calling for prompt redress—*Jagat Chandra*, 26 Cal. 786 (790); *Manilal v. Kamberali*, 22 S.L.R. 79, 103 I.C. 100, A.I.R. 1927 Sind 231, 28 Cr.L.J. 644. The High Court will allow the proceedings in the subordinate Court to go on and take their course and will not interfere with a pending proceeding, even though it is irregularly conducted, unless there is exceptional ground for interference—*Choa Lal v. Anant*, 25 Cal. 233 (234); *Sami Goundan*, 20 L.W. 937, 85 I.C. 37, A.I.R. 1925 Mad. 315, 26 Cr.L.J. 421 (422); *Varumal*, 34 Cr.L.J. 1049 (1050), A.I.R. 1933 Sind 169, 1933 Cr.C. 533, 145 I.C. 617. A safe and practical test to determine if the High Court would interfere is to see whether a bare statement of the facts of the case without any elaborate argument would suffice to persuade the High Court that the case was a fit one for interference—*Varumal*, supra. Ordinarily, if the Magistrate has ordered an accused to be tried, the trial must proceed. But when the High Court is satisfied that an accused is being prosecuted without there being any material before the Magistrate for his prosecution, it will be abdication of its function if it did not interfere to stop patent injustice calling for a prompt redress—*Raghunath*, 33 Cr.L.J. 349 (355), 136 I.C. 842, 12 P.L.T. 937, A.I.R. 1932 Pat. 72, 1932 Cr.C. 136, Ind. Rul. 1932 Pat. 129. It has been the invariable practice of the High Court not to interfere with the proceedings in the Court of a Magistrate just after the issue of summons on the accused save in one contingency, and only one. That contingency is, that the complaint on the face of it does not disclose any offence—*Jhamandas v. Khem Chand*, 34 Cr.L.J. 884, 145 I.C. 136, A.I.R. 1933 Sind 196, 1933 Cr.C. 711, 27 S.L.R. 214; *Gul Mohammad v. Emp.*, 39

P.L.R. 957. Where no offence has been committed, the proceedings must be set aside as an abuse of the process of the Criminal Court, even after the framing of the charge—*Wasinda Ram v. Bahadarkhan*, A.I.R. 1934 Lah. 434, 35 P.L.R. 361, 152 I.C. 224, A.L.R. 1934 Lah. 630, 1934 Cr.C. 697. It is impossible as well as undesirable to lay down any hard and fast rule to determine whether any particular case is of such an exceptional nature as to call for the interference of the High Court during its pendency; but one safe practical test would be this, namely, that bare statement of the facts of the case without any elaborate argument should be sufficient to convince the High Court that it is a fit one for its interference at an intermediate stage. If it is contended by the accused that the offence charged against him is a civil wrong rather than a criminal trespass, obviously that question cannot be determined by the High Court on the bare facts of the case without a lengthy or elaborate argument, and the High Court cannot, therefore, intervene during the pendency of the case and set aside the charge—*Choa Lal v. Anant*, 25 Cal 233 (235); *Kula Singh*; 32 Cr.L.J. 782 (784), 131 I.C. 785, 12 P.L.T. 69, A.I.R. 1931 Pat. 140, Ind. Rul. 1931 Pat. 225, 1931 Cr.C. 336, 10 Pat. 596; *Donlea v. Mrs. Donlea*, 32 Cr.L.J. 145, 128 I.C. 542, A.I.R. 1931 Lah. 881, Ind. Rul. 1931 Lah. 78, 1930 Cr.C. 977, 31 P.L.R. 809. The fact that the case against the accused is a weak one is no ground for quashing the charge in revision—*Nand Lal*, 34 Cr.L.J. 82, 140 I.C. 807, 33 P.L.R. 231, A.I.R. 1932 Lah. 349, 1932 Cr.C. 446. See also *U. Nyo Sein*, 36 Cr.L.J. 1293, 158 I.C. 33, A.I.R. 1935 Rang. 292, 1935 Cr.C. 988; *Parmesshahi Dayal v. Gumam Ram*, 40 P.L.R. 311.

Power to quash proceedings at the outset is vested in the High Court and will in proper cases be exercised. But it is a power of which the High Court make a circumspect and sparing use. The rule is that on the face of the proceedings there must appear some infraction or evasion of law calling for prompt redress—*Kalumal v. Kissu-mal*, 36 Cr.L.J. 881, 156 I.C. 219, A.I.R. 1935 Sind 81, 1935 Cr.C. 367. There is little doubt that the High Court has power to interfere in any case and at any stage of it but this proposition must be made subject to certain limitations. Ordinarily, the High Court will not interfere at an interlocutory stage of criminal proceedings in a Subordinate Court but the High Court is under an imperative obligation to interfere in order to prevent the harassment of a subject of the Crown by an illegal prosecution. It would also interfere whenever there is any exceptional and extraordinary reason for doing so. One of the tests to apply in order to determine whether any particular case is of that exceptional nature or not is to see whether a bare statement of facts of the case should be sufficient to convince the High Court that it is a fit case for its interference at an intermediate stage. Another test to be applied is to see whether in the admitted circumstances of the case it would be a mock trial if the case is allowed to proceed—*Abdul Wali*, 35 Cr.L.J. 148 (149), 146 I.C. 661, 10 O.W.N. 807, A.I.R. 1933 Oudh 387, 1933 Cr.C. 1088. The High Court will not interrupt the course of a trial by interfering with a decision of a Magistrate that he has jurisdiction in a case. If the High Court has to decide in the midst of the trial held in a Magistrate's Court as to whether he has jurisdiction or not, it would be interfering in a most improper manner on a point which may conclusively have to be decided on appeal—*Kashi Ram v. Dikshut*, 1 Luck. 48, 3 O.W.N. 104, 27 Cr.L.J. 191. But if on the face of complaint the offence alleged against an accused person appears not to have been committed within the jurisdiction of the Court in which the complaint is filed, then it would certainly be the duty of the High Court to interfere and save waste of public time and needless expense—*Saleh Sumar*, 34 Cr.L.J. 364, 142 I.C. 590, A.I.R. 1933 Sind 88, 1933 Cr.C. 216, Ind. Rul. 1933 Sind 104. The High Court will rarely interfere in the midst of a trial and order commitment, unless it is shown that the failure on the part of the Magistrate to commit is extremely improper—*Blodar*, 13 O.L.J. 490, 3 O.W.N. 201, 27 Cr.L.J. 417 (418). The High Court will interfere with a pending trial only when it is satisfied that an interference is necessary and that any delay in the rectification of the error will cause waste of time or a miscarriage of justice—*Sobha Ram*, 1904 P.R. 8. Where the delay in the disposal of a case is not due to the complainant, proceedings should not be quashed—

Mohan v. Khan Mohammad, 28 Cr.L.J. 164, 99 I.C. 596, 8 Lah L.J. 518, 27 P.L.R. 705, A.I.R. 1927 Lah. 66.

The High Court will interfere in a pending case when the balance of convenience is in favour of deciding the points—*Nana Sadoba*, A.I.R. 1938 Nag. 283, 1938 N.L.J. 90, 179 I.C. 317, 40 Cr.L.J. 197 (198).

Where a Magistrate, making inquiry preliminary to commitment to the Court of Session, admits certain document, the High Court will not interfere in the stage of preliminary inquiry for if the case is committed for trial, it will rest upon the trial Court independently to decide upon the admissibility of the evidence—*Rama Rao v. Venkataramayya*, 58 Mad. 430, A.I.R. 1935 Mad. 257, 1934 M.W.N. 1173, 41 M.L.W. 280, 68 M.L.J. 282, distinguishing *Ponruswami*, A.I.R. 1933 Mad. 372, 1933 Cr.C. 555, 143 I.C. 424, 34 Cr.L.J. 582, 56 Mad. 475.

1216. Power to enhance sentence:—This is a power which is not conferred by sec. 423, and the High Court can exercise this power not as an Appellate Court, but only in revision. Thus, in an appeal against a conviction by a prisoner, the High Court dismissed the appeal as an Appellate Court, but enhanced the sentence as a Court of Revision—*Mehter Ali*, 11 Cal. 530. The effect of secs. 423 and 439 read together is that the High Court when hearing an appeal against a conviction may alter the finding under sec. 423, and then as a Court of Revision may enhance the sentence under this section so as to make the sentence appropriate to the altered finding—*Bali Reddi*, 37 Mad. 119 (123). Ordinarily it is for Government to move the High Court to enhance a sentence, but if the attention of Government is not drawn to a particular matter which requires their attention, that is, so far as the High Court can see, no reason why it should not do its duty and exercise powers conferred on it by law—*Haji Khamoo*, A.I.R. 1936 Sind 233 (235), 38 Cr.L.J. 114, 165 I.C. 933. A District Magistrate or Sessions Judge or the Government pleader may draw the attention of the High Court to a sentence with a view to its being enhanced. The High Court may also of its own motion send for the record and take action with a like object. But it is not a private complainant to apply to the High Court for this purpose. If he considers a sentence unduly lenient, he should draw the attention of the Government to the fact—*In re Nagji Dula*, 48 Bom. 358 (360), 26 Bom L.R. 182, 25 Cr.L.J. 966; *Lakhi v. Raju*, 19 S.L.R. 64; *Nga San v. Nga Ye*, 5 Bur.L.J. 1, 27 Cr.L.J. 818. But the High Court is always reluctant to enhance sentences *suo motu*—*Mianji Khan v. Emp.*, A.I.R. 1940 Pesh. 49 (51). The Calcutta High Court is of opinion that a private complainant may make an application to the High Court for enhancement of sentence where a grossly inadequate sentence has been passed which deserves to be enhanced, and the High Court has power to issue a Rule on such application; but it is a safe practice to interfere on such applications made on behalf of private complainants. But if a rule has been issued, the High Court should go into the facts and ascertain whether the sentence should be enhanced—*Pramatha v. Ganga Charan*, 33 C.W.N. 395 (398), 30 Cr.L.J. 979, 118 I.C. 894, A.I.R. 1929 Cal. 340, Ind. Rul 1929 Cal. 702, 56 Cal. 964. In this case, the High Court, after considering the facts, enhanced the sentence even though the Crown did not appear in support of the Rule. But in another case, where a Rule was issued on the application of a private complainant, but the Crown did not appear, the High Court refused to enhance the sentence (although it was considered to be inadequate) and discharged the Rule. "Had the application been made at the instance of the Crown, I should have been more inclined to enhance the sentence"—*Ali Akbbar v. Kasem*, 33 C.W.N. 605 (608), A.I.R. 1929 Cal. 785, 50 C.L.J. 176, 121 I.C. 305, 1929 Cr.C. 439 (virtually dissenting from 33 C.W.N. 395).

Where an accused's revision petition against his conviction has been dismissed, the High Court can entertain a second revision petition from the complainant or a reference from a District Magistrate (sec. 438) for enhancement of the sentence. The disposal of the first revision petition is no bar to the disposal of the second revision petition or reference, though arising out of the same original trial, because the Judges disposing of the revision petition filed by a convicted person against the propriety of his conviction

cannot be said to be adjudicating on the question of enhancing the sentence, so that the matter of the second proceeding cannot be said to be of the nature of *res judicata* so as to violate sec. 369. It cannot be accepted as a sound principle that once the High Court has passed an order in a criminal revision, it is *functus officio* and is precluded from entertaining any further revision petition or reference or from proceeding *suo motu*, in respect of another aspect of the case—*In re Saiyed Anif*, 26 Cr.L.J. 583 (585, 586), 85 I.C. 727, A.I.R. 1925 Mad. 993; *Jorabhai*, 50 Bom. 783, 27 Cr.L.J. 1173 (1175), 97 I.C. 805, 28 Bom.L.R. 1051, A.I.R. 1926 Bom. 555.

And conversely, when a Sessions Judge has reported a conviction to the High Court for the purpose of enhancing the sentence and the High Court rejected the reference, it is not precluded from entertaining a subsequent revision petition presented by the accused against his conviction—*Kohina Ram*, 45 All. 11, 23 Cr.L.J. 496.

Generally the cases in which the powers of the High Court to enhance the sentence have been exercised are those in which the records have been called for by the High Court or which have been reported to it, or which otherwise comes to its knowledge on a perusal of the returns from the subordinate Courts. But when the case comes to the knowledge of the High Court by an appeal being filed by the accused against his conviction, it is not desirable, if the appeal is admitted, to issue a notice *at the same time* for enhancement of the sentence. It is incongruous that the Court should in the same breath admit the appeal, and should call upon the accused to show cause why the sentence should not be enhanced. The proper procedure is to deal first with the appeal, and then to consider whether a notice to enhance the sentence should issue—*Mangal Naran*, 49 Bom. 450, 27 Bom.L.R. 355, 26 Cr.L.J. 968 (969). See also *Modkia*, 33 Cr.L.J. 728, 139 I.C. 63, A.I.R. 1932 Nag. 73, Ind. Rul. 1932 Nag. 85, 1932 Cr.C. 346. But see Note 1221.

The High Court has power to enhance a sentence so as to alter its nature—*Ram Kuria*, 6 All. 622. Thus, where a Sessions Judge convicted the accused of culpable homicide not amounting to murder and sentenced him to seven years' rigorous imprisonment, the High Court in revision altered the conviction into one of murder and sentenced him to transportation for life—*Golam Muhammad*, 1871 P.R. 11. Where the Sessions Judge convicted the accused of murder but sentenced him to transportation for life, and the murder appeared to be singularly brutal, the High Court in revision enhanced the sentence of transportation to a sentence of death—*Duarka*, 4 O.W.N. 977, 105 I.C. 804, 9 A.I.Cr.R. 136, A.I.R. 1927 Oudh 588, 28 Cr.L.J. 980 (982). See *Local Government v. Sitrya*, 34 Cr.L.J. 1168, 146 I.C. 118, A.I.R. 1933 Nag. 307, 1933 Cr.C. 1265.

An application by a *private complainant* for enhancement of sentence will not be entertained by the High Court except in extreme cases, e.g., where the sentence passed by the Magistrate is wholly inadequate—*Debi Singh v. Ram Charan*, 30 Cr.L.J. 219, 113 I.C. 768, A.I.R. 1928 All. 419; *Khuda Baksh v. Feroz Din*, 30 Cr.L.J. 300, 114 I.C. 442, Ind. Rul. 1929 Lah. 282, A.I.R. 1929 Lah. 531; *Nagji Dula*, 25 Cr.L.J. 966, 48 Bom. 358, 26 Bom.L.R. 182, 81 I.C. 614, A.I.R. 1924 Bom. 320; *Ala Mohammad v. Khanu*, 39 P.L.R. 659. It is a safe working rule not to interfere on petitions for enhancement of sentences passed on accused persons made on behalf of private complainants. But where a rule has been issued by the High Court, it is its obvious duty to go into the facts and ascertain for itself whether in the circumstances of the case, the sentence should be enhanced—*Pramatha Nath Basu v. Ganga Charan Chakravarty*, 30 Cr.L.J. 979, 118 I.C. 894, 33 C.W.N. 393, A.I.R. 1929 Cal. 340, Ind. Rul. 1929 Cal. 702, 56 Cal. 964. It is the part of the Crown, not of individuals, to ask Court to enhance sentences passed upon criminal offenders—*Hanuman Prasad v. Mathura Prasad*, A.I.R. 1933 Oudh 421, 35 Cr.L.J. 118, 146 I.C. 577, 35 Cr.L.J. 118, 6 R.O. 145, 1933 Cr.C. 1294, 10 O.W.N. 903, following *Jadunandan*, A.I.R. 1927 Oudh 321, 4 O.W.N. 699, 104 I.C. 242, 28 Cr.L.J. 802, 2 Luck. 805. The High Court has power to enhance the sentence of an accused on the application of a private person. But it is the part of the Crown and not of individuals to ask Courts to enhance sentences. Where the applicants' application for enhancement of the opposite parties'

sentences was rejected by the District Magistrate, the head of the Magistracy in the district, it shows that an enhancement of the sentences was not considered necessary in the interests of justice—*Som Nath*, 40 Cr.L.J. 181, 179 I.C. 250, 14 Luck. 401, 11 R.O. 153, 1939 A.Cr.C. 28, 1939 O.L.R. 9, 1938 A.W.R. (C.C.) 144, 1938 O.W.N. 1366, 1939 O.A. 101, A.I.R. 1939 Oudh 54. But see *Man Singh v. Reoti*, 32 Cr.L.J. 312, 129 I.C. 444, 1930 A.L.J. 1324, A.I.R. 1931 All. 13, Ind. Rul. 1931 All. 172, 53 All. 223, 1931 Cr.C. 13; and *M. T. Das v. E. D. Aboo*, 32 Cr.L.J. 353, 129 I.C. 510, 8 Rang. 578, A.I.R. 1931 Rang. 52, Ind. Rul. 1931 Rang. 78, 1931 Cr.C. 175, where a contrary view was taken. In most cases the High Court should refuse to entertain an application for enhancement of sentence from a private complainant where Government has not seen fit to move. But there is no absolute rule, and in a case where there is manifestly a ground for interference beyond all reasonable doubt, it matters not whether the case comes before the High Court of its own motion or at the instance of a private prosecutor or through any other channel whatever, and the High Court will interfere. The High Court does not regard the question of enhancement only from the point of view of public interest but from the circumstances of the particular case before it—*Shankar Shrivani v. Rama Adu*, A.I.R. 1940 Nag. 276, 1940 N.L.J. 389, 189 I.C. 731, 41 Cr.L.J. 793.

The High Court is as a rule loath to entertain, in ordinary circumstances, an application in revision from private parties asking the High Court to convict the accused of the offences of which they have been acquitted by the Sessions Judge and to enhance the sentences passed upon them. But where there are in a case clear indications that the accused party has been defying law and disobeying the orders, both of the Civil and of the Criminal Courts, and has been repeatedly creating trouble in the locality for many years past, the High Court should entertain the application—*Ambika Thakur v. Emp.*, A.I.R. 1939 Pat. 611 (620), 18 Pat. 544, 1939 P.W.N. 747, 41 Cr.L.J. 191, 21 P.L.T. 45, 185 I.C. 529.

The application for enhancement must be looked at askance by the High Court where it is made by a complainant direct and is opposed by the Counsel for the Crown. It would only be a very extraordinary case that the High Court would enhance under these conditions. It may well be true that the complainant has been put to considerable expense in prosecuting the case. The Criminal Courts, however, cannot guarantee to reimburse a complainant by infliction of a heavy penalty on the accused. This is rather the function of a Civil Court—*Bhagolelal v. Emp.*, 41 Cr.L.J. 734, 189 I.C. 382, 1940 N.L.J. 309, A.I.R. 1940 Nag. 249.

An enhancement of sentence is a serious proceeding, and the High Court will not interfere as a Court of Revision in order to enhance the sentence if the sentence passed by the Lower Court involves substantial punishment, and should interfere only if the sentence is manifestly inadequate—*Dhana Lal*, 29 Cr.L.J. 764 (766), 110 I.C. 796, A.I.R. 1928 Lah. 951, 11 A.I.Cr.R. 15; *Sitaram*, 12 O.L.J. 421, 2 O.W.N. 550, 26 Cr.L.J. 1364; *Ghura*, 6 O.W.N. 43, 30 Cr.L.J. 544, 10 S.L.R. 207; *Parlo*, A.I.R. 1917 Sind 46, 40 I.C. 708, 18 Cr.L.J. 708, 10 S.L.R. 207; *Mubarak*, A.I.R. 1934 Sind 157, 1934 Cr.C. 1149, 152 I.C. 872, 35 Cr.L.J. 218; *Fauja*, 32 Cr.L.J. 539, 130 I.C. 432, A.I.R. 1931 Lah. 31, Ind. Rul. 1931 Lah. 304, 32 P.L.R. 273, 1931 Cr.C. 95; *Ram Sarup*, 32 Cr.L.J. 943, 132 I.C. 577, A.I.R. 1931 Lah. 132, 32 P.L.R. 5, Ind. Rul. 1931 Lah. 625, 1931 Cr.C. 280; *Dukhala*, 15 N.L.R. 46; *Bhola Nath*, 33 Cr.L.J. 365, 136 I.C. 729, 33 P.L.R. 49, A.I.R. 1932 Lah. 199, Ind. Rul. 1932 Lah. 265, 1932 Cr.C. 220; *Kalla*, 16 N.L.J. 194, 35 Cr.L.J. 760, 148 I.C. 884, A.I.R. 1934 Nag. 117. Though it is competent to the High Court to enhance the sentence in revision, it will only do so for exceptional reasons. Where a sentence passed is substantial even though inadequate, it will not be enhanced in revision—*Manna Singh v. Emp.*, 38 Cr.L.J. 720 (722), 169 I.C. 171, 9 R.L. 720, A.I.R. 1937 Lah. 215, following *Dharam Singh v. Emp.*, 108 I.C. 162, A.I.R. 1928 Lah. 507, 29 Cr.L.J. 343, 9 A.I.Cr.R. 557. Unless there is something that is manifestly wrong with the sentence, unless it is clearly out of proportion to the offence, if it is within the jurisdiction of the Magistrate

and he has exercised his discretion, no interference in revision should take place—*Sheikh Gulzar*, 35 Cr.L.J. 1327, 151 I.C. 361, 15 P.L.T. 196, 13 Pat. 63, A.I.R. 1934 Pat. 214, 1934 Cr.C. 440, A.I.R. 1934 Pat. 68. It is not the practice of the High Court to enhance the sentence if it is otherwise substantial even if the superior Court might have originally awarded a higher sentence—*Martin*, 35 Cr.L.J. 1453 (1455), 151 I.C. 924, 1934 Cr.C. 172, A.I.R. 1934 Lah. 89. The High Court is slow to interfere where interference would involve the imprisonment of persons already discharged from jail, though that circumstance is no insuperable obstacle—*Das*, 36 Cr.L.J. 414, 153 I.C. 449, A.I.R. 1934 Lah. 613, 35 P.L.R. 527, following *Chunni Lal*, 7 P.R. 1889 (Cr.). It is not the practice of the High Court to interfere where the sentence, though on the light side, is substantial—*Tayab*, A.I.R. 1934 Lah. 975, 36 P.L.R. 184, 1934 Cr.C. 1357; *Ghulam Haidar v. Emp.*, 39 P.L.R. 11. The High Court has full authority to enhance any sentence, if it considers that the sentence passed in the Lower Court is improper. Each case will depend on its own merits—*Mewa*, 36 Cr.L.J. 1001, 156 I.C. 786, A.I.R. 1935 Lah. 337, 1935 Cr.C. 571. And for this purpose the High Court should see whether there is matter on the record of the case showing that the sentence passed, is clearly inadequate to the offence—*Mahadco*, 26 Cr.L.J. 821 (824), 85 I.C. 469, A.I.R. 1925 Nag. 321; *Hurnath*, 20 W.R. 22. The High Court will be reluctant to enhance the sentence passed by the Sessions Court except on very serious grounds. It will not enhance the sentence when the Public Prosecutor in the Sessions Court has allowed the Court to pass the sentence it did without any serious attempt to modify it—*Kassim*, 17 S.L.R. 268, 83 I.C. 881, A.I.R. 1925 Sind 188, 26 Cr.L.J. 177. See also *Haji Khamoo*, A.I.R. 1936 Sind 233 (235), 1936 Cr.C. 1089, 165 I.C. 933. The mere fact that the High Court would have inflicted a heavier punishment if the case had come before it for trial, is not a proper ground for enhancement of sentence, especially if the sentence passed by the Magistrate is a substantial one—*Khana*, 29 Cr.L.J. 276, 107 I.C. 759, 9 A.I.Cr.R. 504 (Lah.); *Budha*, 48 P.L.R. 1919, 8 P.W.R. 1919 (Cr.), 1919 P.R. 7, 20 Cr.L.J. 212, 49 I.C. 772; *Sitaram*, supra; *Kassim*, supra; *Bhola Nath*, supra; *Inderchand*, A.I.R. 1934 Bom 471 (474), 36 Bom.L.R. 954, 1934 Cr.C. 1343, 36 Cr.L.J. 351, 153 I.C. 525, *Das*, supra; *Manna Singh v. Emp.*, 38 Cr.L.J. 720 (722), 169 I.C. 171, 9 R.L. 720, A.I.R. 1937 Lah 215. The power to enhance sentences should be sparingly exercised by the High Court and sentences should be enhanced only in cases where the failure to enhance the sentence would lead to a serious miscarriage of justice. The mere fact that the High Court, had it been trying the case, might have imposed the capital sentence, is not a sufficient reason for enhancement—*Uttam Singh Sochet Singh v. Emp.*, 39 Cr.L.J. 502 (504), I.L.R. 1938 Lah. 347, 174 I.C. 949, 10 R.L. 644, A.I.R. 1938 Lah. 260, 40 P.L.R. 982. If a public servant is proved to have taken bribes, exemplary punishment should be awarded. Where in such a case the sentence inflicted by the lower Court was inadequate, the High Court would enhance the sentence—*Jhangir*, 29 Bom.L.R. 996, 106 I.C. 100, A.I.R. 1927 Bom 501, A.I.Cr.R. 324, 28 Cr.L.J. 1012 (1018). But the High Court will not interfere in a case where a sentence has been passed by the Magistrate on a consideration of all the circumstances of the case and no question of principle is involved, even though the sentence appears to be lenient. Even in cases of communal disturbance, the Government should refrain from appealing to the revisional jurisdiction of the High Court for enhancement of sentence, unless violence has been done to some general principle which requires immediate and authoritative interference—*Nasrullah*, 29 Cr.L.J. 446 (447), 108 I.C. 557, 9 A.I.Cr.R. 305, A.I.R. 1928 All. 287.

Where the judgment is perverse on the question of sentence the High Court ought to interfere—*Sardara*, 33 Cr.L.J. 500, 137 I.C. 716, 33 P.L.R. 215, A.I.R. 1932 Lah. 258, 1932 Cr.C. 323, Ind. Rul. 1932 Lah. 346.

Where the fact of previous conviction was brought to the notice of the Magistrate at the commencement of the trial, but he paid no attention to it, the High Court would interfere to enhance the sentence, but if the previous conviction was not a recent one but took place nearly 3 years prior to the present offence, and there was nothing against

the accused during the period that intervened, the High Court would not think it necessary to enhance the sentence—*Prcm*, 27 A.L.J. 397, 30 Cr.L.J. 529 (530), 115 I.C. 858, A.I.R. 1929 All. 270, Ind. Rul. 1929 All. 468. Also, where the fact of previous conviction which was known to the prosecution was not at all brought to the notice of the Magistrate through the negligence of the prosecution, the High Court will not interfere to enhance the sentence. To permit the prosecution to plead their own negligence and to harass the accused with further proceedings directed towards the enhancement of the sentence, would be to put a premium on the negligence of the prosecution—*Bashir*, 30 Cr.L.J. 505 (506), 115 I.C. 614, A.I.R. 1929 All. 267, Ind. Rul. 1929 All. 390; *Gul*, 1902 P.R. 21, 1902 P.L.R. 144; *Hyoth Mastan*, 2 Weir 574. *A fortiori*, the High Court would interfere to enhance the sentence, where the previous conviction was not known to the prosecution at the time of trial, but was discovered after the conviction—*Maidhan*, 1905 P.R. 19, 2 Cr.L.J. 228; *Nur Mahammad*, 1905 P.R. 43, 3 Cr.L.J. 341.

The High Court does not generally interfere in revision to enhance the sentence when the convicted person has undergone the full term of his imprisonment or has paid the fine imposed upon him, even though the order of the Court below is clearly wrong in law—*Hari Singh*, 1913 P.W.R. 29, 14 Cr.L.J. 599 (600); *Jagat Singh*, 1 Lah. 453, 21 Cr.L.J. 557. The High Court is slow to interfere in cases where interference would involve the imprisonment of persons already discharged from jail—*Chuni Lal*, 1889 P.R. 7. But the test in each case is, whether the sentence inflicted by the trying Court involves substantial punishment. The High Court will not interfere if adequate punishment has been inflicted; but if the sentence is manifestly inadequate, it is competent to the High Court to impose an additional punishment, even though the accused has served out the whole of the imprisonment inflicted by the lower Court—*Chuni Lal*, supra; *Shankar Narayan*, 28 Bom.L.R. 300, 93 I.C. 1053, A.I.R. 1926 Bom. 256, 27 Cr.L.J. 557 (558); *Jagat Singh*, supra; *Shahzad Ahmad*, 30 Cr.L.J. 240 (241), 114 I.C. 72, A.I.R. 1928 Lah. 961, Ind. Rul. 1929 Lah. 232. Where the Magistrate's order was proper on the materials before him, the sentence should not be enhanced in revision on the ground of previous conviction being disclosed; it is not fair to the accused to reverse the conviction and direct him to be committed to the Sessions, after he has undergone the full term of imprisonment inflicted by the Magistrate, merely because his previous convictions were not known at the time of his trial by the Magistrate—*Usman*, 17 Cr.L.J. 3, 9 S.L.R. 95. The High Court will not interfere to enhance the sentence, after a long period has elapsed—*Nasrullah*, 29 Cr.L.J. 446 (447), 108 I.C. 567, 9 A.I.Cr.R. 305, A.I.R. 1928 All. 287.

The power of enhancement conferred on the High Court under sec. 439 is limited only by clause (3) of this section. This clause does not regard the difference in the powers of the trying Magistrate under sec. 32, but lays down that in cases of sentences passed by Magistrates not empowered under sec. 34, the limit of enhancement shall be the sentence that might have been inflicted by a Presidency Magistrate or a Magistrate of the first class. Therefore the High Court has power to enhance the sentence of imprisonment to two years—*Kamal*, 9 S.L.R. 82, 16 Cr.L.J. 712. See also *Mahomed Yousif*, 34 Cr.L.J. 618, 143 I.C. 605, A.I.R. 1933 Sind 87, 1933 Cr.C. 215, Ind. Rul. 1933 Sind 131. The High Court has the power to inflict any punishment which might have been inflicted for the offence by a first class Magistrate, and is not limited to the powers of the trying Magistrate—*Jagat Singh*, 1 Lah. 453, 21 Cr.L.J. 557, 56 I.C. 861, A.I.R. 1920 Lah. 213. The power of the High Court to enhance sentences does not depend upon the powers which the trial Court may have with regard to sentences. Under cl. (3) of this section where the case was originally tried by a Magistrate acting otherwise than under s. 34, Cr. P. C., the powers of the High Court are limited but they are not limited if the case was originally tried by a Magistrate acting under sec. 34. If there is no limitation upon the power of the High Court to enhance sentences passed by Magistrates acting under sec. 34, there can also be no limitation on its power in dealing with sentences passed by the Assistant Sessions Judges. In the

absence of express words limiting the powers of the High Court in cases of sentences passed by Assistant Sessions Judges the High Court can enhance such sentence up to the maximum sentence prescribed by law for the offence—*Ram Nath*, 37 Cr L.J. 49 (53), 159 I.C. 290, A.I.R. 1935 All 989, 1935 Cr C 1219; *Raja Ram*, 36 Cr L.J. 454, 154 I.C. 93, 1935 O.W.N. 140, A.I.R. 1935 Oudh 239, 1935 O.L.R. 109. The words 'enhance the sentence' presuppose that a sentence has been imposed by the Lower Court. Therefore, where no sentence has been passed by the trying Magistrate but the accused has been released on probation under sec. 562, the High Court cannot substitute a sentence of imprisonment or whipping in revision—*Nux Khan*, 48 I.C. 979, 20 Cr.L.J. 99 (Oudh); *Ghasite*, 37 All. 31, 12 A.L.J. 1244, 16 Cr L.J. 43.

Where a Magistrate convicted an accused under sec. 325 and sentenced him to a fine only although there should have been a substantive sentence of imprisonment, held that notwithstanding that the sentence was irregular the High Court should not interfere under its revisional powers which were intended for the redress of genuine grievances and not of mere formal defects—*Ramchander v. Ram Belas*, 34 Cr L.J. 407, 142 I.C. 624, 14 P.L.T. 71, Ind. Rul. 1933 Pat. 161, A I R 1933 Pat. 179, 1933 Cr C. 510.

Lastly, the power of enhancement of sentence can be exercised under this section where the sentence passed by the Magistrate is a legal one. A retrospective sentence of imprisonment for the period already passed by the accused in the lock-up is not a legal sentence—*Asghar Ali*, 1919 P.R. 27, 20 Cr L.J. 684, 52 I.C. 604.

Where an application is made to the High Court for enhancement of sentence of transportation on a conviction for murder, the proper test to be applied is whether the only sentence which could be passed on the evidence is a sentence of death. There are many cases where Sessions Judges are too lenient in the exercise of the discretion vested in them by law, but the High Court will not interfere except when it finds that the sentence of death is the only possible sentence that could be inflicted—*Narayanawami Goundan v Emp.*, 1937 M.W.N. 1241. See also Note 71.

Under clause (c) of sub-sec. (1), sec. 423, Cr P C, it is competent to the High Court, reading that section with sec. 439, Cr. P. C., to alter or reverse an order other than the orders referred to in clauses (b) and (a) of sec. 423. Where, therefore, a person has been bound over under Chap VIII to be detained with simple imprisonment, it is competent for the High Court in the exercise of its revisional jurisdiction to substitute for simple imprisonment, rigorous imprisonment—*Manu Chabdo*, 38 Cr.L.J. 168, 166 I.C. 298, A I R 1936 Sind 188, 1936 Cr C. 973.

1217. Procedure if two Judges differ:—If two learned Judges of the High Court differ in a Criminal Revision case, sec. 439 read with sec. 429 requires the case to be decided by a third Judge, and precludes any further appeal under the Letters Patent or any reference to a Full Bench under the rules of the Court—*Dudikula Lal Sahib*, 40 Mad 976. But where an application is made to the High Court not under sec. 435, Cr. P. Code, but under sec. 107 of the Government of India Act, section 439 of the Code cannot apply, and consequently sec. 429 (which is referred to in sec. 439) is also not applicable; and therefore if in such a case there is a difference of opinion between the Judges, the provisions of sec. 36 of the Letters Patent will apply, and the decision of the senior Judge will prevail—*Moiram v. Mrijan*, 47 Cal. 433, 21 Cr.L.J. 25, 24 C.W.N. 97.

Reference to a Division Bench:—There is no provision in the Code or in the rules of the Patna High Court under which a reference can be made by a single Judge to a Division Bench for the expression of an opinion on a point of law only—*Aghare*, 32 Cr.L.J. 1197 (1200), 134 I.C. 619, 12 P.L.T. 601, A.I.R. 1931 Pat. 379, Ind. Rul. 1931 Pat. 475, 1931 Cr.C. 907, 11 Pat. 143.

1218. Sub-section (2)—Notice to accused:—The High Court's power merely as a Court of Appeal includes all its powers of revision when there is a question of giving relief to the appellant. When it is question of acting against the appellant in enhancing the sentence, that, on the face of this section, has to be done under its revi-

the accused during the period that intervened, the High Court would not then necessary to enhance the sentence—*Prem*, 27 A.L.J. 397, 30 Cr.L.J. 529 (530), 11 I.C. 868, A.I.R. 1929 All. 270, Ind. Rul. 1929 All. 468. Also, where the fact of previous conviction which was known to the prosecution was not at all brought to the notice of the Magistrate through the negligence of the prosecution, the High Court will not interfere to enhance the sentence. To permit the prosecution to plead their own negligence and to harass the accused with further proceedings directed towards the enhancement of the sentence, would be to put a premium on the negligence of the prosecution—*Bashir*, 30 Cr.L.J. 505 (506), 115 I.C. 614, A.I.R. 1929 All. 267, Ind. Rul. 1929 All. 390; *Gul*, 1902 P.R. 21, 1902 P.L.R. 144; *Hyoth Mastan*, 2 Weir 574. *A fortiori*, the High Court would interfere to enhance the sentence, where the previous conviction was not known to the prosecution at the time of trial, but was discovered after the conviction—*Maidhan*, 1905 P.R. 19, 2 Cr.L.J. 228; *Nur Mahammad*, 1905 P.R. 43, 3 Cr.L.J. 341.

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absence of express words limiting the powers of the High Court in cases of sentences passed by Assistant Sessions Judges the High Court can enhance such sentence up to the maximum sentence prescribed by law for the offence—*Ram Nath*, 37 Cr.L.J. 49 (53), 159 I.C. 290, A.I.R. 1935 All. 989, 1935 Cr.C. 1219; *Raja Ram*, 36 Cr.L.J. 454, 154 I.C. 93, 1935 O.W.N. 140, A.I.R. 1935 Oudh 239, 1935 O.L.R. 109. The words 'enhance the sentence' presuppose that a sentence has been imposed by the Lower Court. Therefore, where no sentence has been passed by the trying Magistrate but the accused has been released on probation under sec. 562, the High Court cannot substitute a sentence of imprisonment or whipping in revision—*Nux Khan*, 48 I.C. 979, 20 Cr.L.J. 99 (Oudh); *Ghasite*, 37 All. 31, 12 A.L.J. 1244, 16 Cr.L.J. 43.

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Where an application is made to the High Court for enhancement of sentence of transportation on a conviction for murder, the proper test to be applied is whether the only sentence which could be passed on the evidence is a sentence of death. There are many cases where Sessions Judges are too lenient in the exercise of the discretion vested in them by law, but the High Court will not interfere except when it finds that the sentence of death is the only possible sentence that could be inflicted—*Narayanswami Goundan v. Emp.*, 1937 M.W.N. 1241 See also Note 71.

Under clause (c) of sub-sec (1), sec 423, Cr P C, it is competent to the High Court, reading that section with sec. 439, Cr P. C., to alter or reverse an order other than the orders referred to in clauses (b) and (a) of sec. 423. Where, therefore, a person has been bound over under Chap. VIII to be detained with simple imprisonment, it is competent for the High Court in the exercise of its revisional jurisdiction to substitute for simple imprisonment, rigorous imprisonment—*Manu Chabilo*, 38 Cr.L.J. 168, 166 I.C. 298, A.I.R. 1936 Sind 188, 1936 Cr.C. 973

1217. Procedure if two Judges differ:—If two learned Judges of the High Court differ in a Criminal Revision case, sec 439 read with sec. 429 requires the case to be decided by a third Judge, and precludes any further appeal under the Letters Patent or any reference to a Full Bench under the rules of the Court—*Dudikula Lal Sahib*, 40 Mad 976. But where an application is made to the High Court not under sec. 435, Cr P. Code, but under sec 107 of the Government of India Act, section 439 of the Code cannot apply, and consequently sec. 429 (which is referred to in sec. 439) is also not applicable; and therefore if in such a case there is a difference of opinion between the Judges, the provisions of sec. 36 of the Letters Patent will apply, and the decision of the senior Judge will prevail—*Moiram v. Mrijan*, 47 Cal. 438, 21 Cr.L.J. 25, 24 C.W.N. 97.

Reference to a Division Bench:—There is no provision in the Code or in the rules of the Patna High Court under which a reference can be made by a single Judge to a Division Bench for the expression of an opinion on a point of law only—*Aghare*, 32 Cr.L.J. 1197 (1200), 134 I.C. 619, 12 P.L.T. 601, A.I.R. 1931 Pat. 379, Ind. Rul. 1931 Pat. 475, 1931 Cr.C. 907, 11 Pat. 143.

1218. Sub-section (2)—Notice to accused:—The High Court's power merely as a Court of Appeal includes all its powers of revision when there is a question of giving relief to the appellant. When it is question of acting against the appellant in enhancing the sentence, that, on the face of this section, has to be done under its revi-

sional power as distinct from its power merely as a Court of Appeal. That being so the High Court is bound to comply with cls. (2) and (4) of this section before it can enhance the sentence—*Kitabdi*, 32 Cr.L.J. 890, 132 I.C. 247, 35 C.W.N. 184, A.I.R. 1931 Cal. 450, Ind. Rul. 1931 Cal. 567, 1931 Cr.C. 602. The language of this sub-section is mandatory and it is clearly enacted as an exception to section 440. An order of enhancement of sentence is an order to the prejudice of the accused, and if such an order is passed without giving the accused an opportunity of being heard, it is more than an irregularity and the order so passed is without jurisdiction—*Soma Naidu*, 47 Mad. 428 (432); *Romesh Chandra*, 22 C.W.N. 168; *Natha*, Ratanlal 179. When the High Court has before it on appeal a record of a criminal proceeding, the condition precedent is performed, and the High Court can then, though the record has only come to its knowledge in the Appellate proceeding, proceed to exercise its revision powers if it chooses to do so and, in exercise thereof, enhance the sentence after giving notice to the accused and hearing him—*Chunbiddya*, 39 C.W.N. 350, 36 Cr.L.J. 482, A.I.R. 1935 P.C. 35, 153 I.C. 936, 1935 O.W.N. 205, 68 M.L.J. 166, 41 M.L.W. 188, 37 Bom.L.R. 160, 1935 M.W.N. 17, 1935 Cr.C. 199, 57 All. 156 (P.C.). Where a case comes to the knowledge of the High Court by an appeal having been filed against a conviction, it is not desirable, if the appeal is admitted, to issue a notice at the same time to enhance the sentence. It seems to be absolutely incongruous that the High Court in the same breath should admit the appeal of the accused, and issue a notice calling upon him to show cause why the sentence should not be enhanced. The notice should issue after the appeal has been dismissed after being dealt with on the merits—*Mangal Naran*, 48 Bom. 450, 27 Bom.L.R. 355, 26 Cr.L.J. 968. But see Note 1221. Where notice has been issued to the accused to show cause why his sentence should not be enhanced, and at the hearing neither the accused nor his counsel is present, the High Court cannot pass an order enhancing the sentence—*Parasram*, 26 Cr.L.J. 543, 85 I.C. 383, 1 O.W.N. 891, A.I.R. 1925 Oudh 476.

Although the interests of justice require that ordinarily an accused person should have notice of any proceeding in which an order awarding compensation to him is to be set aside, he cannot be deemed an accused person on his defence within the meaning of sec. 439 (2), Cr. P. C., so that if after proper attempts have been made, he cannot be served, an illegal order for compensation passed under sec. 250, Cr. P. C., must not necessarily stand for ever. Moreover, sec. 439 (2), Cr. P. C., must be read with sub-sec. (1) of the same section and the frame of the whole section appears to have application to an accused person charged with some offence and not to an accused person to whom compensation has been ordered to be paid and who is in the position, so far as the order of compensation is concerned, of the complainant—*Jumo Sileman v. Hashim Umar*, 38 Cr.L.J. 783, 169 I.C. 431, 31 S.L.R. 51, 10 R.S. 3, A.I.R. 1937 Sind 125, referring to *Krishna Kone v. Narayan Dass*, 41 M.L.J. 172, 62 I.C. 823, A.I.R. 1921 Mad. 281, 22 Cr.L.J. 583, 13 M.L.W. 689, 1921 M.W.N. 387.

A High Court may issue a warrant of arrest without previous notice to the accused, because a warrant of arrest is not an order to the prejudice of the accused within the meaning of this sub-section—*Nga E. Moung*, 8 Bur.L.T. 286, 16 Cr.L.J. 670, 30 I.C. 654.

If the High Court makes an order to the prejudice of the accused without issuing notice to him and giving him an opportunity of being heard, the order is a nullity, and the High Court has power to vacate that order and rehear the matter in the presence of both sides—*Ramesh Pada v. Kadambini*, 55 Cal. 417, 31 C.W.N. 960, 28 Cr.L.J. 831 (832); *Romesh Chandra*, 22 C.W.N. 168.

1219. Sub-section (4)—Interference with orders of acquittal:—As to the powers of the High Court to revise orders of acquittal at the instance of a private prosecutor, or on a reference under sec. 438, see Note 1204, *ante*.

When the Government has not appealed, the High Court will not interfere with an order of acquittal except in extreme cases and under exceptional circumstances, whether it is moved by the District Magistrate or by private party—*Mogal Beg*, 42 Mad. 109; *Joita v. Parshotam*, 25 Bom.L.R. 488, 24 Cr.L.J. 734; *Khem Chand v. Lalu*,

3 Bur L.J. 323, 26 Cr L.J. 511; *Crown v. Dayal Singh*, 17 Lah 604. As under sec 417, Cr. P. C., an appeal is permitted against an order of acquittal, the High Court does not ordinarily entertain an application for revision of such an order. But if there be illegality in the proceedings in the Court which passed the order of acquittal, or if the order was made without jurisdiction, the High Court would exercise its discretion in a proper manner by interfering in revision—*Htanda Meah v. Anamale Chettyar*, 37 Cr.L.J. 832, 163 I.C. 242, A.I.R. 1936 Rang 247, 1936 Cr.C. 523. But it would be a most dangerous thing to say that whenever a Magistrate happens to be so unfortunate as to make a mistake in law that the accused person should be put in peril again; for it may well be that although the Magistrate has decided a law point wrongly in favour of the accused, he may also have decided the facts wrongly in favour of the prosecution. Clearly an acquittal is not to be set aside merely because bad reasons are given for it. Before the High Court can be induced to take such a course, it must be satisfied that the acquittal is wrong altogether apart from the reasons given by the trial Magistrate. (*Per Henderson, J.*). Acquittals should not, except in exceptional circumstances, be interfered with *suo motu* by an Appellate Court without, of course, a full investigation of the facts. The High Court cannot go into these facts without having a new investigation in the trial Court which is usually set on foot by the Crown and the Crown alone. In these circumstances even where acquittal is considered wrong both in fact and in law, it must stand because there should be a certain integrity about acquittals which prevent them from being lightly interfered with. (*Per Cunliffe, J.*)—*Roshan Lal Khettri v. S. Z. Ahmed*, 37 Cr L.J. 1081, 164 I.C. 996, 40 C.W.N. 931. The High Court will not move in such a case unless there was some glaring defect either in the procedure or in the view of law taken by the Court below and there has been a flagrant miscarriage of justice—*Kamikka Pershad*, 2 Luck. 680, 104 I.C. 228, 4 O.W.N. 729, A.I.R. 1927 Oudh 345, 28 Cr L.J. 788 (790); *Rama Murti v. Jas Indra*, 34 Cr L.J. 661, 143 I.C. 852, 10 O.W.N. 345, A.I.R. 1933 Oudh 257, 1933 Cr.C. 562, Ind Rul. 1933 Oudh 215, *Mathura v. Chakra*, 35 Cr L.J. 1236, 150 I.C. 951, 11 O.W.N. 810, A.I.R. 1935 Oudh 176; *Basrulla v. Asadulla*, 33 C.W.N. 576, 119 I.C. 130, A.I.R. 1929 Cal. 639, 30 Cr L.J. 1013, Ind Rul. 1929 Cal. 738. The only case in which applications at the instance of private parties against orders of acquittal could be entertained are those in which there has been a failure of justice through want of jurisdiction or a failure to understand the law applicable to the case—*U Min v Maung Taik*, 32 Cr L.J. 928, 132 I.C. 545, 8 Rang. 663, A.I.R. 1931 Rang 94, Ind Rul. 1931 Rang 177, 1931 Cr.C. 382, following *Nga Po Pyaw v. Nga Po Nwe*, 42 I.C. 330, 3 UBR (1917) 19, 18 Cr L.J. 970.

It is open to the High Court to set aside an order of acquittal at the instance of any party other than Government, coming to the High Court in appeal under sec. 417, Cr. P. C., and a private complainant has *locus standi* in such proceedings. No distinction can be made between a petition for revision by a private complainant and a case reported by a Sessions Judge or a District Magistrate and interference by the High Court is not limited to cases where there has been an error of law or apparent injustice resulting in misappreciation or misapprehension of a legal principle—*Sham Lal v. Chaman Lal*, A.I.R. 1939 Lah. 406 (411), 41 P.L.R. 175, I.L.R. 1939 Lah 116, 40 Cr L.J. 942, 184 I.C. 358.

The High Court has power to interfere with an order of acquittal in revision; otherwise the Code would not contain the provisions in sec. 439 (4) that in revision a High Court should not convert a finding of acquittal into one of conviction. The question is one of discretion as to whether in any particular case the High Court should or should not order a retrial—*Ram Khelauan v. Shoo Nandan*, 33 Cr.L.J. 885, 140 I.C. 122, 1932 A.L.J. 166, A.I.R. 1932 All 191, 1932 Cr.C. 207, 54 All 413, Ind. Rul. 1932 All 613. Though the High Court has jurisdiction to interfere in revision with an acquittal, it shall ordinarily exercise this jurisdiction sparingly and only in serious cases where it is urgently demanded in the interests of public justice, to prevent a gross miscarriage of justice—*Nand Ram v. Khazan*, 19 A.L.J. 589, 61 I.C. 161, 22 Cr.L.J. 337; *Faujdar v.*

Kasi, 42 Cal. 612 (616), 27 I.C. 186, A.I.R. 1915 Cal. 388, 19 C.W.N. 184, 21 C.L.J. 53, 16 Cr.L.J. 122; *Hrishikesh Mandal v. Abadhaut Mandal*, 44 Cal. 703, 38 I.C. 421, A.I.R. 1917 Cal. 159, 21 C.W.N. 250, 18 Cr.L.J. 309; *Maula Bakhsh v. Riaz Ahmed*, 37 Cr.L.J. 490, 161 I.C. 828, 1936 O.W.N. 384; *Pramatha v. P. C. Lahiri*, 47 Cal. 818, (827); *Natesa*, 28 M.L.J. 690; *Vellayanambalam v. Solai*, 39 Mad. 505; *Rameshwar*, 53 Bom. 564; *Parakanakkan v. Amir*, 20 L.W. 327, 26 Cr.L.J. 249; *Sankarlinga v. Narayana*, 45 Mad. 913, A.I.R. 1922 Mad. 502, 68 I.C. 615, 23 Cr.L.J. 583, 43 M.L.J. 369 (F.B.); *Pahelwan v. Sahib Singh*, 19 A.L.J. 382, 22 Cr.L.J. 597, 6 All. 484; *Fareedoon Cawasji*, 41 Bom. 560 (562); *Mehr v. Nur Md.* 26 P.L.R. 644, 26 Cr.L.J. 1596; *Panchan v. Upendra*, 49 All. 254, 27 Cr.L.J. 1407; *Nga Po Pyaw v. Nga Po Nwe*, A.I.R. 1917 U.B. 7, 42 I.C. 330, 3 U.B.R. 19, 18 Cr.L.J. 970; *Siban Rai v. Bhagwant*, 5 Pat. 25, 27 Cr.L.J. 235, A.I.R. 1926 Pat. 176, 92 I.C. 219, 6 P.L.T. 833; *Kamikka Pershad*, 2 Luck. 680, 28 Cr.L.J. 788 (790); *Sher Khan v. Anwar Khan*, 23 N.L.R. 40, 28 Cr.L.J. 523 (528); *Binda Prasad v. Ripusudan*, 5 N.L.R. 4, 9 Cr.L.J. 211; *Basudeo Lal v. Bindeshri*, A.I.R. 1937 Pat. 646, 1937 P.W.N. 706, 172 I.C. 175. Such an interference by the High Court is reserved for exceptional circumstances and for cases in which there appears to have been a failure of justice due to some error in a matter of principle, but no hard and fast rule has been laid down in any of the decisions or can be laid down—*Abdul Manir v. Kadir Khan*, 38 Cr.L.J. 470 (471), 167 I.C. 894, 9 R.P. 447, 3 B.R. 377, 1937 P.W.N. 220, 18 P.L.T. 227, A.I.R. 1937 Pat. 110. The powers possessed by the High Court under this section are very wide. Though the Court cannot convert an order of acquittal into one of conviction, yet there is nothing to bar the setting aside of the order of acquittal, when the order is one wholly without jurisdiction. The High Court set aside an order of acquittal passed by Bench Magistrates vested with Second Class powers in a case under sec. 506, I. P. C., which they had no jurisdiction to try as the accused threatened the complainant with death, holding that any acquiescence or even consent could not invest a Court with jurisdiction to which it was not otherwise possessed—*Ram Udit*, 33 Cr.L.J. 511, 137 I.C. 625, 9 O.W.N. 319, 1932 Cr.C. 592, A.I.R. 1932 Oudh 251, Ind. Rul. 1932 Oudh 263. The High Court will interfere with an order of acquittal only where there has been an error in law, or where the trial has been illegal or so radically and incurably irregular as in fact to have occasioned a failure of justice—*Sher Khan v. Anwar Khan*, supra. Thus, the High Court will interfere where a Magistrate acquitted the accused disregarding the uncontradicted evidence and facts admitted which proved the guilt of the accused, and acted illegally in trying a warrant case as a summons case—*Sabathi v. Kuppusami*, 15 M.L.J. 225. Where the trying Magistrate, in his judgment of acquittal, while laying great stress on all considerations that might affect the credibility of the witnesses for the prosecution, omitted to consider what might be advanced in their favour, and also failed to appreciate the corroborative value of an important witness for the prosecution, the High Court set aside the order of acquittal and directed a retrial—*Shaik Bagu v. Raika Singh*, 18 C.W.N. 1244, 26 I.C. 170, A.I.R. 1915 Cal. 235, 15 Cr.L.J. 722. An order of acquittal will be set aside in revision where the acquittal is the result of an alleged composition which turns out to be invalid—*Hannam v. Sam Das*, 24 Cr.L.J. 120; *Khilawan Singh v. Emp.* 38 Cr.L.J. 334, I.L.R. 1937 Nag. 286, 166 I.C. 926, 9 R.N. 154, A.I.R. 1937 Nag. 72; e.g., where the Magistrate acquitted the accused by allowing the parties to compromise a non-compoundable case—*Zahiruddin v. Nasiruddin*, 24 Cr.L.J. 186 (Oudh). The High Court will not hesitate to interfere where the acquittal is based on a manifest error in law appearing on the face of the judgment—*Ahmedabad Municipality v. Manganlal*, 9 Bom.L.R. 156, 5 Cr.L.J. 171; *Nanhi Bahu v. Dhunde*, 6 A.L.J. 758; *Hardeo*, 1 All. 139; *Ram Dayal v. Mata Din*, 38 Cr.L.J. 329, 166 I.C. 987, 9 R.O. 352, 1937 O.L.R. 82, 1937 A Cr.C. 57, 1937 O.W.N. 281, A.I.R. 1937 Oudh 283. Revision of an order of acquittal may be allowed when the order of acquittal is based on an erroneous view of the law—*Mt. Harbans Kaur v. Lahari Ram*, A.I.R. 1938 Lah. 739 (741), 178 I.C. 791, 40 Cr.L.J. 131, 11 R.L. 499, following *Chotha Ram v. Mt. Karman Bai*, A.I.R. 1918 Lah. 204, 44 I.C. 169, 8 P.R. 1918; *Fakir Chand v. Fakir*, A.I.R. 1924 Lah. 286, 69 I.C. 379 and *Nathu Mal v.*

Abdul Haq, A.I.R. 1930 Lah. 159, 1930 Cr.C. 167, 123 I.C. 841, 31 Cr.L.J. 584. See also *Thamman*, A.I.R. 1918 Lah. 188, 44 I.C. 751, 19 Cr.L.J. 399, 8 P.R. 1918 (Cr.); *Lalji*, 18 P.R. 1883 (Cr.); *Saunderson v. Wilson*, 10 P.R. 1883 (Cr.); *Achhar Singh*, A.I.R. 1924 Lah. 451, 81 I.C. 547, 25 Cr.L.J. 931, 5 Lah. 16; *Dayal Singh*, A.I.R. 1937 Lah. 132, 167 I.C. 559, 38 Cr.L.J. 432, 38 P.L.R. 1015, 17 Lah. 604. Although the High Court is competent to entertain an application to set aside an acquittal, it is not the custom of the High Court to do so on a consideration of the evidence at the instance of private individuals except in extreme cases—*Kisni*, 38 Cr.L.J. 719 (720), 169 I.C. 96, I.L.R. 1937 Nag. 163, 169 I.C. 96, 9 R.N. 301, A.I.R. 1937 Nag. 103. As a matter of practice, the High Court will not go into evidence, as a rule, in revision; it will ordinarily confine its interference in cases of exceptional circumstances, or where there is error of law; nor will it interfere with the acquittal unless the trial has been illegal or so radically and incurably irregular as in fact to have occasioned a failure of justice. It is not contrary to practice for the High Court to set aside a finding of acquittal if that finding is based on an erroneous view of the law. If the findings of fact would justify a conviction if a correct view of the law has been taken, that should not prevent interference—*Sitaram v. Tilockchand*, 34 Cr.L.J. 145, 141 I.C. 273, 28 N.L.R. 298, Ind. Rul. 1933 Nag. 55, A.I.R. 1933 Nag. 36, 1933 Cr.C. 78, following—*Sher Khan v. Anwar Khan*, 102 I.C. 219, 23 N.L.R. 40, A.I.R. 1927 Nag. 170, 28 Cr.L.J. 523. The High Court will interfere but rarely in revision with acquittals, whether put forward on behalf of Government or on behalf of private individuals, particularly so in cases where the correctness of the acquittal cannot be considered without a consideration of the evidence—*Khilawan Singh v. Emp.*, 38 Cr.L.J. 334 (335), I.L.R. 1937 Nag. 286, 166 I.C. 926, 9 R.N. 154, A.I.R. 1937 Nag. 72, following *Ganpat*, 29 N.L.R. 365, 146 I.C. 332, A.I.R. 1933 Nag. 259, 1933 Cr.C. 930, 6 R.N. 85, 35 Cr.L.J. 28. But when a case comes to the notice of the High Court where the acquittal has depended not on an appreciation of the evidence but has occurred in complete disregard of the Code of Criminal Procedure, the High Court should interfere despite the fact that no appeal has been preferred by Government—*Khilawan Singh v. Emp.*, *supra*. Where the trying Magistrate failed to appreciate the question of fact which he had to determine in order to adjudicate on the plea of right of private defence and there was no proper trial of those questions, the High Court set aside the order of acquittal and directed a re-trial—*Abdul Manir v. Kadir Khan*, 38 Cr.L.J. 470 (471), 167 I.C. 894, 9 R.P. 447, 3 B.R. 377, 1937 P.W.N. 220, 18 P.L.T. 227, A.I.R. 1937 Pat. 110. Where the order of the trying Magistrate proceeded on a supposition that a certain bye-law did not exist, though in fact it did, the High Court interfered with an order of acquittal and directed a re-trial—*Bala Prasad v. Muzammil*, 35 Cr.L.J. 998, 149 I.C. 612, 1934 A.L.J. 541, 1934 Cr.C. 200, A.I.R. 1934 All. 190, A.I.R. 1934 All. 531, 4 A.W.R. 569. In regard to grounds of law the Court does not interfere with an error or omission or irregularity unless the same has caused a failure of justice—*Rama Murti v. Jai Indra*, 34 Cr.L.J. 661, 143 I.C. 852, Ind. Rul. 1933 Oudh 215, 10 O.W.N. 345, 1933 Cr.C. 562, A.I.R. 1933 Oudh 257. In Oudh it is well-established practice that the Court is loath to interfere in cases of acquittal and the power of interference is exercised if it is proved without any doubt not only that the accused person is guilty but that he has been acquitted on unreasonable grounds—*Mendhai Lal v. Beni Madho*, 35 Cr.L.J. 416, 146 I.C. 523, 6 R.O. 270, 10 O.W.N. 999. The High Court will in revision set aside an order of acquittal and order a retrial, where in a serious case of rioting in connection with the possession of land, the Magistrate did not come to any finding on the question of possession—*Surendra v. Janaki*, 53 Cal. 471, 96 I.C. 527, A.I.R. 1926 Cal. 945, 27 Cr.L.J. 975. The High Court will interfere where the order of acquittal was not passed on the merits, but was made on account of the death of the complainant, and the complainant's son was not allowed to continue the proceeding—*Jitan v. Damoo Sahu*, 1 P.L.J. 264, 20 C.W.N. 862, 18 Cr.L.J. 151. Where the case was posted for an unusual hour (namely, 7 A.M.) and the complaint was dismissed and the accused acquitted for non-appearance of the complainant at that time, the High Court interfered and ordered a retrial; otherwise an offender would escape punishment through

sheer accident—*Ottavu Subbiah v. Inukotiobiah*, 27 Cr.L.J. 1931, 93 I.C. 607, A.I.R. 1927 Mad. 139. An order of acquittal passed by the Lower Court will be set aside where the judgment of that Court is very summary and contains no discussion of the case or distinct findings on the questions involved—*Nabin Chandra v. Rajendra*, 18 Cr.L.J. 519 (Cal). The High Court will exercise its powers to set aside an acquittal, where there has been no trial, or where there has been a denial of the right of fair trial—*Siban Rai v. Bhagwant*, 5 Pat. 25, 6 P.L.T. 833, 27 Cr.L.J. 235. The High Court has, in exercise of its powers under this section, power to set aside an order of acquittal passed under sec. 247, Cr. P. C., and to order the case to proceed from the stage which it had reached when the improper order of acquittal was passed—*Soni v. Kishnomal Manghandas*, 40 Cr.L.J. 524, 180 I.C. 989, I.L.R. 1939 Kar. 385, 11 R.S. 198, A.I.R. 1939 Sind 75. Where there were grave irregularities in procedure and the trial was conducted in an atmosphere of prejudice, the High Court interfered with an order of acquittal—*Gangadhar v. Reid*, 25 C.W.N. 609 (*Khoreal shooting case*), 23 Cr.L.J. 41. The High Court will interfere in certain exceptional circumstances where a matter of public importance is involved—*Municipal Board v. Vadyadhari*, 24 O.C. 57, 22 Cr.L.J. 638, 63 I.C. 334; see also *Ahmedabad Municipality v. Mangalal*, supra. An application for revision against an order of acquittal may appropriately be allowed, when legal points alone are involved—*Thamman*, 1918 P.R. 8. But the mere fact that the High Court if it were sitting as a Court of Appeal would have come to a different conclusion of fact, is no ground for exercising revisional jurisdiction upon a petition against an order of acquittal—*Vellavanambalam v. Solai*, 39 Mad 505; *Mellor v. Muthia*, 20 Cr.L.J. 101, 35 M.L.J. 518; *Binda Prasad v. Ripusudan* 5 N.L.R. 4, 1 I.C. 238, 9 Cr.L.J. 211; *Damodar v. Juiharsingh*, 26 Cr.L.J. 1348, 89 I.C. 388, A.I.R. 1926 Nag. 115. The High Court should not interfere with an order of acquittal when the question is merely as to the appreciation of doubtful evidence, and there is no patent error or defect in the order of acquittal passed by the Lower Court resulting in grave injustice—*Vellavanambalam v. Solai*, 39 Mad 505; *Mellor v. Muthia*, 35 M.L.J. 518, 48 I.C. 981. When the acquittal of an accused is based on a finding of fact, the High Court will not interfere in revision—*Harphul*, 26 P.L.R. 38, 26 Cr.L.J. 689; *Banke Lal v. Maiku*, A.I.R. 1933 Oudh 430, 10 O.W.N. 1037, 1933 Cr.C. 1315, 146 I.C. 638, 35 Cr.L.J. 121. In *King-Emb v. Mr B. A. Peters*, 11 O.W.N. 717, 155 I.C. 724, A.I.R. 1934 Oudh 276, 1934 Cr.C. 773, 36 Cr.L.J. 842, 7 R.O. 616, *Dulare v. Mst. Sundaria*, 11 O.W.N. 718, 155 I.C. 726, A.I.R. 1934 Oudh 278, 1934 Cr.C. 774, 36 Cr.L.J. 838, 7 R.O. 616 and *Bhola Prasad v. Mst. Ram Dularv*, 11 O.W.N. 719, 149 I.C. 364, 6 R.O. 554, 35 Cr.L.J. 951, A.I.R. 1934 Oudh 280, 1934 Cr.C. 776 the view was expressed that an application in revision or a reference made on such an application must be founded on an acceptance of the findings of fact of the trial Court that is such an application or reference can only be made on a point of law. This is not a sound view—*Chandrika Prasad v. Mohammad Jafar*, 41 Cr.L.J. 891 (892), 190 I.C. 266, 1940 O.W.N. 757. But the High Court will not as a rule, go into evidence, save in exceptional cases, as where the judgment of the facts is manifestly wrong and grossly and palpably unjust—*Rama Murthi v. Jai Indra* supra; *Mathura v. Chakra*, supra. See also *Atma Ram*, A.I.R. 1934 All. 846, 4 A.W.R. 246, 1934 Cr.C. 1033, 36 Cr.L.J. 490, 154 I.C. 315; and *Din Mahomed v. Ilahi Baksh*, 35 P.L.R. 730. Where the trial Court has acquitted the accused after giving due weight to all evidence on the record, the High Court will not interfere—*Mehr Nur Md. v. Nur Md.*, 26 P.L.R. 644, 26 Cr.L.J. 1596. Where the Magistrate took one view of the oral evidence and the Sessions Judge took the opposite view, and there was no legal point or question of jurisdiction involved, held that there was no ground for interference with the order of acquittal—*Khem Chand v. Lalu* 3 Bur.L.J. 323, 26 Cr.L.J. 511. According to the Oudh Chief Court the unshot of the whole matter would seem to be this that the High Court will not on an application in revision against an acquittal treat the case before it as a case of appeal. It will not be prepared to interfere unless there are exceptional matters compelling it to do so, as for example, where the Magistrate does not appear to have exercised an impartial judicial mind in considering the evidence, where he has entirely left evidence out of

consideration or has relied upon evidence which is not to be found on the record. It is going too far to say that the High Court must accept loyally the findings of facts of the trial Court or the lower Appellate Court, as the case may be, but at the same time it is obvious that the power to interfere is one to be exercised most sparingly and only when there appears to have been a miscarriage of justice or a perverse and unreasonable decision. The High Court cannot be asked to set aside the order of acquittal and direct a re-trial merely on the ground that it should take a different view of the evidence from that which has been taken by the Magistrate who tried the case and had the witnesses before him—*Chandrika Prasad v. Mohammad Jafar*, 41 Cr.L.J. 891 (893), 190 I.C. 266, 1940 O.W.N. 757.

A single mistake on the part of an appellate Magistrate of misreading the evidence of a witness would not justify the use of extraordinary power which the High Court has in revision of setting aside an order of acquittal—*Ragho Singh v. Rambirich Singh*, 39 Cr.L.J. 968, 177 I.C. 999, 11 R.P. 203, 5 B.R. 21, A.I.R. 1939 Pat. 28. A mere error of procedure is not by itself a good ground for setting aside an acquittal; thus, a mere error of improper admission of evidence which was not essential to a result which might have been come to wholly independent of it, is not a ground of interference—*Ganga Singh v. Rambhajan*, A.I.R. 1925 Pat. 165, 25 Cr.L.J. 1266 (Pat.); so also, an omission by the Appellate Court to serve the notice of appeal on the complainant or on the officer appointed under sec. 422 is not a ground for setting aside the order of acquittal passed by the Appellate Court—*Parakanakkan v. Amur*, 20 L.W. 327, 26 Cr.L.J. 249, 84 I.C. 249, A.I.R. 1924 Mad. 837. The High Court will not interfere in revision with an order of acquittal passed by a Magistrate of competent jurisdiction who has taken a correct view of the law, e.g., an order of acquittal passed by a Magistrate on a prosecution for an alleged offence under sec. 225, I.P. Code, irregularly instituted on a report sent in by a Munsif which was treated as a complaint—*Madho Singh*, 47 All. 409, 23 A.L.J. 189, 26 Cr.L.J. 865.

The High Court shall always be reluctant to interfere with an order of acquittal, specially when the real dispute between the parties can be properly decided in a civil action—*Corporation of Calcutta v. Bengal Dooars Railway Co.*, A.I.R. 1940 Cal. 531, 44 C.W.N. 648, I.L.R. (1940) 1 Cal. 585.

The above remarks equally apply to cases of revision against an order of discharge under sec. 253; and the High Court would be unwilling or very reluctant to interfere with an order of discharge based on a consideration of all the prosecution evidence, when no evidence has been shut out and there is no illegality or irregularity in the procedure adopted by the trying Court, even if the High Court should on the materials on the record consider that it was a fit case for the framing of a charge and putting the accused on his defence—*Mellor v. Muthia Chetty*, 35 M.L.J. 518, 20 Cr.L.J. 101, 48 I.C. 981.

Converting acquittal into conviction:—The High Court may interfere with an order of acquittal, when such interference is urgently demanded in the interests of justice (see *supra*); but it cannot convert a finding of acquittal into one of conviction. So, it cannot set aside the order of acquittal passed by the Sessions Judge on appeal, and restore the order of conviction of the trial Court—*Rameshwar*, 53 Bom. 564, 30 Cr.L.J. 1062 (1064), A.I.R. 1929 Bom. 306, 1929 Cr.C. 135, 119 I.C. 643, 31 Bom.L.R. 529. Thus, where the trial Court convicted the accused under section 376, Indian Penal Code but the Sessions Judge on appeal altered the conviction into one under section 366, I.P. Code (i.e., acquitted the accused under section 376 and convicted him under sec. 366) and the High Court found the conviction under sec. 366 to be wrong, the High Court set aside the conviction under sec. 366, I.P. C., discharged the accused, but could not restore the conviction of the trial Court under sec. 376, I.P. C.—*C. C. Sircar*, 3 Rang. 68, 26 Cr.L.J. 1119 (1120), 4 Bur.L.J. 29. After revising the order of acquittal, the proper order of the High Court must be one remanding the case to the lower Court and directing the retrial of the accused person—*Rameshwar v. Gorind*, 23

A.L.J. 433, 87 I.C. 426, A.I.R. 1925 All. 473, 26 Cr.L.J. 970; *Balwant*, 9 All. 134, 1886 A.W.N. 322 (F.B.); *Har Piari v. Nathe Lal*, 22 Cr.L.J. 97 (All.), 59 I.C. 401; *Nand Ram v. Khazan*, 19 A.L.J. 589, 22 Cr.L.J. 337; *Ma Nyen v. Moung Chit*, 7 Rang 538, A.I.R. 1929 Rang. 321, 120 I.C. 912, 31 Cr.L.J. 186, 1929 Cr.C. 497. Sub-section (4) of this section clearly lays down that the High Court cannot convert a finding of acquittal into one of conviction by acting on its revisional side. There is, however, no prohibition in that section against the High Court ordering a retrial, even where there has been an acquittal and there has been no appeal preferred by Government against such an acquittal. The power to order a retrial is unrestricted and such an order does not amount to a conversion of a finding of acquittal into one of conviction, which obviously means convicting an accused straight off, who has already been acquitted by a subordinate Court—*Sarda Prasad v. Emp.*, 38 Cr.L.J. 521 (524), 168 I.C. 17, 1937 A.Cr.C. 1, 1937 A.L.J. 143, 1937 A.W.R. 66, 9 R.A. 623, A.L.R. 1937 All. 309, A.I.R. 1937 All. 240. Though the High Court, in exercising revisional powers against orders of acquittal, can go into the question of fact, still it cannot then and there convict but can only order retrial—*Virumal v. Sadhu*, 1908 P.L.R. 157, 8 Cr.L.J. 462. But the High Court will not order a retrial, when such order would be tantamount to converting an acquittal into conviction. Where owing to non-recording of evidence or improper recording of inadmissible evidence, the High Court reverses an order of acquittal, it can direct a retrial; but in a case where there is no erroneous recording or shutting out of evidence, if the High Court were to set aside the acquittal and order a retrial on the same evidence, it would be the same thing as sending the case to a Magistrate with directions to convict; in other words, it would be for all practical purposes converting an acquittal into conviction—*Ma Nyen v. Mg. Chit*, 7 Rang 538, A.I.R. 1929 Rang. 321, 120 I.C. 912, 31 Cr.L.J. 186, 1929 Cr.C. 497. It is clear that, though the High Court should not, in revision, direct a re-hearing of an appeal on the ground that the Appellate Court had taken a mistaken view of the facts, (for that would be tantamount to a direction to take the view that commended itself to the High Court, and in effect to direct that an acquittal be turned into a conviction), yet the High Court can, and should, in proper cases where the Appellate Court has misdirected itself on a point of law, point out the error and direct the re-hearing of the appeal—*Ma Thaung v. Nandiya*, 39 Cr.L.J. 623 (624), 175 I.C. 547, 1938 Rang.L.R. 121, 10 R.R. 511, A.I.R. 1938 Rang. 193. But the High Court in revision set aside an appellate order of acquittal where the judgment did not contain a proper discussion of the evidence and of the questions involved—*Nabin Chandra v. Rajendra Nath*, 18 Cr.L.J. 519, 39 I.C. 487, A.I.R. 1918 Cal. 392. The High Court has power to interfere in revision with an appellate judgment of acquittal, and though the power should be sparingly exercised, it would be wrong to refuse to exercise it in cases where there has been a failure of justice by reason of the Appellate Court not having brought a judicial mind to bear upon the evidence—*Satish Chandra Das v. Chintla Haran Saha*, 39 Cr.L.J. 988 (991), 178 I.C. 56, 43 C.W.N. 25, 67 C.L.J. 571, A.I.R. 1938 Cal. 613, 11 R.C. 316.

The High Court, as a Court of Appeal, is not debarred from converting a finding of acquittal into one of conviction, because sec. 439 (4) limits the powers of the High Court when acting as a Court of Revision, and not as a Court of Appeal. An Appellate Court has no such restriction under sec. 423, cl. (a). But as a Court of Revision, the High Court cannot convert an acquittal into conviction—*Bali Reddi*, 37 Mad. 119 (122, 123); *Jabanulla*, 23 Cal. 975 (979); *Bawar Shah*, 37 Cr.L.J. 1039 (1043), 164 I.C. 899, A.I.R. 1936 Pesh. 172.

The only way of securing conviction in a case of acquittal is by an appeal by the Local Government against the order of acquittal—*Sheo Darshan*, 44 All. 332 (333), 23 Cr.L.J. 202.

An order under sec. 471 is not an order of conviction. Therefore, where the accused was acquitted by the Lower Court on the ground that he was insane, the passing of an order under sec. 471 by the High Court in revision does not amount to an alteration

of an order of acquittal into one of conviction within the meaning of this sub-section—*Mahammad*, 42 M.L.J. 72, 23 Cr.L.J. 71, A.I.R. 1922 Mad. 54, 65 I.C. 423.

The High Court is precluded from converting the finding of acquittal into one of conviction, in the absence of a Government appeal. But the High Court can convict the accused person of an offence under another section of the Penal Code *upon which he has not been acquitted* by the Lower Court. Thus, in a trial for an offence under sec. 302, I. P. C., the trial Court acquitted the accused under sec. 302, I. P. C., but convicted him under sec. 323, I. P. C. *Held* that the High Court can in revision convict the accused of an offence under sec. 325, I. P. Code, inasmuch as the trial Court had not considered the applicability of sec. 325, I. P. C., and there was no acquittal under sec. 325, I. P. Code—*Dulh v. Mangli*, 24 A.L.J. 414, 27 Cr.L.J. 564, 94 I.C. 132, A.I.R. 1926 All. 332.

Conviction of one offence and acquittal of another:—It was held that in some cases that the word 'acquittal' in this sub-section meant a *complete* acquittal on all the facts and allegations charged, and not an acquittal in respect of one charge and conviction in respect of another; therefore, where the accused was convicted by the Magistrate of one offence and acquitted of another, in the same trial, the High Court had power in revision to convert the acquittal into conviction—*Bhola*, 1904 P.R. 12, 1 Cr.L.J. 942. Thus, where the accused was charged under sec. 302, I. P. C., but was convicted under sec. 304, I. P. C., it was held that the High Court was competent to alter the conviction under sec. 304, I. P. C., into a conviction under sec. 302, I. P. C.—*Fazal Khan*, 8 Lah. 136, 28 Cr.L.J. 508 (following *Bhola*, 1904 P.R. 12). It was explained in a Madras case that sub-sec (4) of sec. 439 refers to a case where the trial has ended in a complete acquittal, and not to a case where the trial has ended in a conviction but the Court has wrongly applied the law or has wrongly found some fact not proved and has in consequence held that the conviction should be under some section of the I. P. Code other than the section properly applicable—*Bali Reddi*, 37 Mad. 119 (123); followed in *Shahu*, 20 S.L.R. 352, 27 Cr.L.J. 1121 (1122). In a Patna case, where the accused was convicted by a Magistrate under sec. 205, I. P. C., but the Sessions Judge on appeal altered the conviction into one under sec. 419, I. P. C., the High Court being of opinion that the former offence had been committed and not the latter, altered the conviction into one under sec. 205, I. P. Code. The High Court remarked that the substitution of the conviction under sec. 419 for one under sec. 205 by the Sessions Judge did not amount to an *acquittal* of the accused with regard to the offence under the latter section and that sec. 439 (4), Cr. P. Code, was no bar to the High Court re-altering the conviction under sec. 419 into one under sec. 205, I. P. C.—*Ganpat Lal*, 6 Pat. 217, 28 Cr.L.J. 529 (531). Where the accused was charged under secs. 148 and 326, I. P. C., but the Magistrate convicted him under sec. 148 and acquitted him under sec. 326, the High Court converted the acquittal into conviction under section 326, Indian Penal Code—*Wazir Kunjra*, 7 Pat. 579, 30 Cr.L.J. 673 (675), 116 I.C. 786, A.I.R. 1929 Pat. 139, Ind. Rul. 1929 Pat. 336. But the Bombay High Court dissented from this view. Thus, where the accused was convicted by a Magistrate under sec. 326, I. P. C., but the Sessions Judge on appeal altered the conviction into one under sec. 323, *held* that the order of the Sessions Judge was to be taken as an acquittal of the offence under sec. 326, I. P. C., and the High Court could not restore the conviction under sec. 326, because it would amount to converting a finding of acquittal into one of conviction—*Shivaputrava*, 48 Bom. 510 (511), 26 Bom.L.R. 438, 26 Cr.L.J. 830 (dissenting from *Bhola*, 1 Cr.L.J. 942, 1904 P.R. 12). The Allahabad High Court also held that an order of acquittal could not be converted into an order of conviction, even though the acquittal was a partial acquittal. Thus, where the accused was charged with both murder and culpable homicide, and the Sessions Judge acquitted him on the charge of murder but convicted him of culpable homicide, the High Court in revision refused to convict the accused of murder—*Sheo Darshan*, 44 All. 332 (333), 20 A.L.J. 190, 23 Cr.L.J. 202. In a Madras case, where the accused was charged with murder (sec. 302, I. P. C.) but the Sessions Judge convicted him under the second part of sec. 304, I. P. C., *held* that the High Court had no power to convict the accused of murder. The order of the Sessions Judge

A.L.J. 433, 87 I.C. 426, A.I.R. 1925 All. 473, 26 Cr.L.J. 970; *Balwant*, 9 All. 134, 1886 A.W.N. 322 (F.B.); *Har Piari v. Nathe Lal*, 22 Cr.L.J. 97 (All.), 59 I.C. 401; *Nand Ram v. Khazan*, 19 A.L.J. 589, 22 Cr.L.J. 337; *Ma Nyen v. Moung Chit*, 7 Rang. 538, A.I.R. 1929 Rang. 321, 120 I.C. 912, 31 Cr.L.J. 186, 1929 Cr.C. 497. Sub-section (4) of this section clearly lays down that the High Court cannot convert a finding of acquittal into one of conviction by acting on its revisional side. There is, however, no prohibition in that section against the High Court ordering a retrial, even where there has been an acquittal and there has been no appeal preferred by Government against such an acquittal. The power to order a retrial is unrestricted and such an order does not amount to a conversion of a finding of acquittal into one of conviction, which obviously means convicting an accused straight off, who has already been acquitted by a subordinate Court—*Sarda Prasad v. Emp.*, 38 Cr.L.J. 521 (524), 168 I.C. 17, 1937 A Cr.C. 1, 1937 A.L.J. 143, 1937 A.W.R. 66, 9 R.A. 623, A.L.R. 1937 All. 309, A.I.R. 1937 All. 240. Though the High Court, in exercising revisional powers against orders of acquittal, can go into the question of fact, still it cannot then and there convict but can only order retrial—*Virumal v. Sadhu*, 1908 P.L.R. 157, 8 Cr.L.J. 462. But the High Court will not order a retrial, when such order would be tantamount to converting an acquittal into conviction. Where owing to non-recording of evidence or improper recording of inadmissible evidence, the High Court reverses an order of acquittal, it can direct a retrial; but in a case where there is no erroneous recording or shutting out of evidence, if the High Court were to set aside the acquittal and order a retrial on the same evidence, it would be the same thing as sending the case to a Magistrate with directions to convict; in other words, it would be for all practical purposes converting an acquittal into conviction—*Ma Nyen v. Mg. Chit*, 7 Rang. 538, A.I.R. 1929 Rang. 321, 120 I.C. 912, 31 Cr.L.J. 186, 1929 Cr.C. 497. It is clear that, though the High Court should not, in revision, direct a re-hearing of an appeal on the ground that the Appellate Court had taken a mistaken view of the facts, (for that would be tantamount to a direction to take the view that commended itself to the High Court, and in effect to direct that an acquittal be turned into a conviction), yet the High Court can, and should, in proper cases where the Appellate Court has misdirected itself on a point of law, point out the error and direct the re-hearing of the appeal—*Ma Thaung v. Nandiya*, 39 Cr.L.J. 623 (624), 175 I.C. 547, 1938 Rang.L.R. 121, 10 R.R. 511, A.I.R. 1938 Rang. 193. But the High Court in revision set aside an appellate order of acquittal where the judgment did not contain a proper discussion of the evidence and of the questions involved—*Nabin Chandra v. Rajendra Nath*, 18 Cr.L.J. 519, 39 I.C. 487, A.I.R. 1918 Cal 392. The High Court has power to interfere in revision with an appellate judgment of acquittal, and though the power should be sparingly exercised, it would be wrong to refuse to exercise it in cases where there has been a failure of justice by reason of the Appellate Court not having brought a judicial mind to bear upon the evidence—*Satish Chandra Das v. Chinta Haran Saha*, 39 Cr.L.J. 988 (991), 178 I.C. 56, 43 C.W.N. 25, 67 C.L.J. 571, A.I.R. 1938 Cal 613, 11 R.C. 316.

The High Court, as a Court of Appeal, is not debarred from converting a finding of acquittal into one of conviction, because sec. 439 (4) limits the powers of the High Court when acting as a Court of Revision, and not as a Court of Appeal. An Appellate Court has no such restriction under sec. 423, cl. (a). But as a Court of Revision, the High Court cannot convert an acquittal into conviction—*Bali Reddi*, 37 Mad. 119 (122, 123); *Jabanulla*, 23 Cal. 975 (979); *Bawar Shah*, 37 Cr.L.J. 1039 (1043), 164 I.C. 899, A.I.R. 1936 Pesh. 172.

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Conviction of one offence and acquittal of another:—It was held that in some cases that the word 'acquittal' in this sub-section meant a complete acquittal on all the facts and allegations charged, and not an acquittal in respect of one charge and conviction in respect of another; therefore, where the accused was convicted by the Magistrate of one offence and acquitted of another, in the same trial, the High Court had power in revision to convert the acquittal into conviction—*Bhola*, 1904 P.R. 12, 1 Cr.L.J. 942. Thus, where the accused was charged under sec. 302, I. P. C., but was convicted under sec. 304, I. P. C., it was held that the High Court was competent to alter the conviction under sec. 304, I. P. C., into a conviction under sec. 302, I. P. C.—*Fazal Khan*, 8 Lah. 136, 28 Cr.L.J. 508 (following *Bhola*, 1904 P.R. 12). It was explained in a Madras case that sub-sec. (4) of sec. 439 refers to a case where the trial has ended in a complete acquittal, and not to a case where the trial has ended in a conviction but the Court has wrongly applied the law or has wrongly found some fact not proved and has in consequence held that the conviction should be under some section of the I. P. Code other than the section properly applicable—*Bali Reddi*, 37 Mad. 119 (123); followed in *Shahu*, 20 S.L.R. 352, 27 Cr.L.J. 1121 (1122). In a Patna case, where the accused was convicted by a Magistrate under sec. 205, I. P. C., but the Sessions Judge on appeal altered the conviction into one under sec. 419, I. P. C., the High Court being of opinion that the former offence had been committed and not the latter, altered the conviction into one under sec. 205, I. P. Code. The High Court remarked that the substitution of the conviction under sec. 419 for one under sec. 205 by the Sessions Judge did not amount to an acquittal of the accused with regard to the offence under the latter section and that sec. 439 (4), Cr. P. Code, was no bar to the High Court re-altering the conviction under sec. 419 into one under sec. 205, I. P. C.—*Ganpat Lal*, 6 Pat. 217, 28 Cr.L.J. 529 (531). Where the accused was charged under secs. 148 and 326, I. P. C., but the Magistrate convicted him under sec. 148 and acquitted him under sec. 326, the High Court converted the acquittal into conviction under section 326, Indian Penal Code—*Wazir Kunjra*, 7 Pat. 579, 30 Cr.L.J. 673 (675), 116 I.C. 786, A.I.R. 1929 Pat. 139, Ind. Rul. 1929 Pat. 336. But the Bombay High Court dissented from this view. Thus, where the accused was convicted by a Magistrate under sec. 326, I. P. C., but the Sessions Judge on appeal altered the conviction into one under sec. 323, held that the order of the Sessions Judge was to be taken as an acquittal of the offence under sec. 325, I. P. C., and the High Court could not restore the conviction under sec. 326, because it would amount to converting a finding of acquittal into one of conviction—*Shivaputraya*, 48 Bom. 510 (511), 26 Bom.L.R. 438, 26 Cr.L.J. 830 (dissenting from *Bhola*, 1 Cr.L.J. 942, 1904 P.R. 12). The Allahabad High Court also held that an order of acquittal could not be converted into an order of conviction, even though the acquittal was a partial acquittal. Thus, where the accused was charged with both murder and culpable homicide, and the Sessions Judge acquitted him on the charge of murder but convicted him of culpable homicide, the High Court in revision refused to convict the accused of murder—*Sheo Darshan*, 44 All. 332 (333), 20 A.L.J. 190, 23 Cr.L.J. 202. In a Madras case, where the accused was charged with murder (sec. 302, I. P. C.) but the Sessions Judge convicted him under the second part of sec. 304, I. P. C., held that the High Court had no power to convict the accused of murder. The order of the Sessions Judge

amounted to an order of acquittal in respect of the charge of murder, and the High Court had no power to do what would be tantamount to converting a finding of acquittal into one of conviction. The finding of acquittal referred to in s. 439 (4) does not necessarily mean complete acquittal. The wording of the section says nothing about the acquittal being partial or complete. It includes cases where there has been an acquittal in respect of a particular offence, and a conviction in respect of another—*Subba Chukli*, 50 Mad. 259, 52 M.L.J. 707, 28 Cr.L.J. 397 (dissenting from *Bali Reddi*, 37 Mad. 119). These conflicting views have been recently considered in a case coming before the Judicial Committee, and they have laid down that if the accused is charged with murder (sec. 302, I. P. C.) but is convicted by the Sessions Judge of culpable homicide not amounting to murder (sec. 304, I. P. C.), it amounts to an acquittal in respect of the charge of murder under sec. 302 (although the Sessions Judge has not recorded an express finding of acquittal on this charge of murder), and the High Court cannot in revision convict the accused under sec. 302, for that would be tantamount to converting a finding of acquittal into one of conviction; and that the 'acquittal' mentioned in sec. 439 (4) does not contemplate only a *complete* acquittal in respect of all charges and offences but includes a case where the accused has been acquitted of the charge of murder but convicted of the offence of culpable homicide not amounting to murder—*Kishan Singh*, 50 All. 722 (P.C.), 33 C.W.N. 1 (3, 5, 6), A.I.R. 1928 P.C. 254, 111 I.C. 332, 51 I.C. 390, 26 A.L.J. 1099, 30 Bom L.R. 1572, 29 P.L.R. 575, 55 M.L.J. 786, 29 Cr.L.J. 828 (P.C.) (approving 44 All. 332, and 48 Bom. 510, and overruling the view of 37 Mad. 119); *Jado Rahim v. Emp.*, A.I.R. 1938 Sind 202, 178 I.C. 520, 40 Cr.L.J. 93. The bar in sub-section (4) of this section applies to a partial as well as to a total acquittal—*Jado Rahim v. Emp.*, supra; *Khudu v. Emp.*, 40 Cr.L.J. 375 (377), 180 I.C. 418, A.I.R. 1939 Sind 57, 32 S.L.R. 18, 11 R.S. 173. The contrary view taken in 8 Lah. 136, 1904 P.R. 12, 20 S.L.R. 352, 48 Mad. 774, 6 Pat. 217 and 7 Pat. 579 is overruled. See also *Hasan Khan*, 8 O.W.N. 1299, 33 Cr.L.J. 162, 135 I.C. 382, A.I.R. 1932 Oudh 25, Ind. Rul. 1932 Oudh 30, 1932 Cr.C. 57; *Ebrahim*, 33 Cr.L.J. 360, 136 I.C. 836, A.I.R. 1931 Rang. 321, 1931 Cr.C. 1007, Ind. Rul. 1932 Bom. 91, where it has been held that the High Court in revision cannot alter a conviction under sec. 323, I. P. C., into one under sec. 325, I. P. C. The High Court has power under the combined provisions of sec. 423 and sec. 439, Cr. P. C., to alter the conviction under sec. 326, I. P. C., to one under sec. 302, I. P. C. In *Kishan Singh's* case, their Lordships of the Privy Council expressly stated that they did not decide the point as to the combined powers of the High Court under the two sections decided in *Bali Reddi's* case—*Mehdi*, A.I.R. 1933 Lah. 661 (664), 35 Cr.L.J. 250, 25 P.L.R. 238, 1933 Cr.C. 883, 146 I.C. 949. See Note 1148.

The Rangoon High Courts holds that where a man charged with murder has been convicted by the Sessions Judge for a minor offence, the question whether the High Court can convict the man of murder (of which he has been acquitted by the Sessions Judge) depends on whether the High Court is dealing with the case both as an Appellate and a Revisional Court, or whether it is merely acting in its revisional capacity. If the High Court is acting both as an Appellate and a Revisional Court, it can convict the appellant of murder and sentence him to death (*On Shwe*, 1 Rang. 436, 25 Cr.L.J. 247). But if it is acting solely as a Court of Revision, it cannot convert the acquittal of murder into conviction—*Kan Thein*, 4 Rang. 140, 5 Bur.L.J. 80, 27 Cr.L.J. 1393.

Where the accused was convicted by a Magistrate under secs. 420 and 507, I. P. Code, but on appeal the Sessions Judge held that secs. 420 and 507 were not the proper sections applicable on the fact and altered the conviction into one under secs. 385 and 508, I. P. C., the High Court can convict the accused under sec. 420 and 511, I. P. Code (attempt to cheat). Such an order would not amount to an alteration of acquittal into conviction, because the Sessions Judge has not considered whether the accused was guilty of an attempt to cheat and has not recorded any finding of acquittal on such a charge, and the prohibition in this clause did not apply to this case. The case is one in which it was difficult to say what the offence committed by the accused was on the facts proved. In such a case it was doubtful whether the alteration of one section into another by the Sessions Judge could be said to be a case of 'acquittal' under the former section, within

the meaning of this clause—*In re Doraisamy*, 48 Mad. 774, 48 M.L.J. 190, 26 Cr.L.J. 755, A.I.R. 1925 Mad. 480.

1220. Sub-section (5)—No revision where right of appeal exists:—

Under this sub-section, the High Court is precluded from exercising the powers of revision at the instance of the accused who had a right of appeal but did not exercise it—*Nandeyappa*, 8 Bom.L.R. 851, 4 Cr.L.J. 446; *Dinonath v. Rajcoomar*, 3 Cal. 537; *Bhagwan Singh*, 1907 P.R. 20, 6 Cr.L.J. 263; *Nalambar*, 2 All 276; *Gurdit Singh*, 1904 P.L.R. 1; *Saravayya*, 44 M.L.J. 366; *Laxman Hangu*, 35 Bom. 253; *Juma*, 8 S.L.R. 229; *Harbhagwandas*, 14 S.L.R. 173, 22 Cr.L.J. 313, 60 I.C. 1001; *Jamnadas Nathji Shah*, 38 Cr.L.J. 606, 168 I.C. 718, 1 I.R. 1937 Bom. 263, 39 Bom.L.R. 82, 9 R.B. 393, A.I.R. 1937 Bom. 153. And, therefore, it is impossible for an appeal filed beyond limitation to be treated as an application for revision as far as Criminal Procedure goes—*Genimal v. Shewa Ram*, 20 S.L.R. 90, 95 I.C. 316, A.I.R. 1926 Sind 215, 27 Cr.L.J. 780 (781). Where the accused who had a right of appeal to the Sessions Judge did not appeal but came in revision before the High Court, this Court would be precluded from hearing the applicant, and in such a case the High Court cannot even interfere *suo motu*, for that would be an evasion of the statute, which the Court cannot permit—*Nuran*, 18 S.L.R. 262, 25 Cr.L.J. 1362; *Juma*, 8 S.L.R. 229 19 Cr.L.J. 252. See also *Jamnadas Nathji Shah*, *supra*. Thus, in an application by an accused person for revision of an order of a Magistrate refusing to allow a private vakil to appear on his behalf, it was held that the case was not one for interference in revision because the accused could have appealed from his conviction and made it a ground of appeal that he was improperly deprived of legal assistance at the trial—*Saravayya*, 44 M.L.J. 366, A.I.R. 1923 Mad. 484. Where a complaint is made by a Court under sec. 476, the accused has a right of appeal to a superior Court and it is not competent to the High Court to quash the proceedings in revision—*Abdul Karim*, 10 P.L.T. 161, 117 I.C. 309, Ind. Rul. 1929 Pat. 421, A.I.R. 1929 Pat. 640, 30 Cr.L.J. 765 (766). But there is no inflexible rule that where the accused has a right of appeal and does not exercise it, the High Court cannot exercise its revisional powers under this section; but such powers should be sparingly used and in every exceptional circumstances—*Ala Baksh*, 6 All. 484. Ordinarily, when an accused has a right of appeal but has not exercised the same, the High Court will not permit him to apply in revision instead. But where the effect of not allowing the revision is to make him suffer long periods of imprisonment when under the law a sentence of only a few months could be imposed on him, the High Court will interfere under the general powers of revision—*In re Povanar*, 20 L.W. 914, 86 I.C. 283, A.I.R. 1925 Mad. 239, 26 Cr.L.J. 747. Where in a particular case an appeal lies only to the High Court, e.g., in case of conviction under sec. 124A, I.P. Code, an appeal against which lies only to the High Court under sec. 408 (c) of this Code, the accused may make an application for revision to the High Court, instead of preferring an appeal. Cf. *Balkrishna Sharma*, 54 All 331, 1932 Cr.C. 150, Ind. Rul. 1932 All. 351, 137 I.C. 686, 33 Cr.L.J. 528, 1932 A.L.J. 39, A.I.R. 1932 All. 125.

The prohibition in this sub-section is limited only to those cases in which the High Court is asked to interfere at the instance of the party who could have appealed, but has not done so. It leaves untouched the power of the High Court to exercise its revisional powers under sub-sec. (1) of this section in all other cases, namely, those in which the records have been called for by itself, or which have been reported to it for orders under sec. 438 or which otherwise has come to its knowledge—*Parsi Ram*, 32 Cr.L.J. 700 (703), 131 I.C. 353, A.I.R. 1931 Lah. 145, 32 P.L.R. 71, Ind. Rul. 1931 Lah. 419, 1931 Cr.C. 257; or which came to its knowledge on the application of a third party who had no right of appeal—*Mohanlal*, A.I.R. 1930 Oudh 497, 7 O.W.N. 895, 128 I.C. 221, 32 Cr.L.J. 104, 1930 Cr.C. 1161. No doubt, the High Court has jurisdiction to entertain applications in revision, where no right of appeal has been exercised, where the application is made by a third party but entertaining such an application seems somewhat in breach of the provision of this sub-section—*Gantsh*, 32 Cr.L.J. 471, 130 I.C.

25, 55 Bom. 353, 1931 Cr.C. 188, 33 Bom.L.R. 56, A.I.R. 1931 Bom. 140, Ind. Rul. 1931 Bom. 233. Where a party aggrieved has a right of appeal which he has deliberately elected to leave unused the High Court shall, as a rule, be slow to interfere in revision either on its own motion or at the instance of any unauthorized third person—*Tejmal*, A.I.R. 1932 Sind 211, 1932 Cr.C. 902, 34 Cr.L.J. 67, 26 S.L.R. 345, 140 I.C. 697. See also *Nga Nyum*, A.I.R. 1935 Rang. 393; *Jumo*, A.I.R. 1914 Sind 139, 28 I.C. 108, 16 Cr.L.J. 252, 8 S.L.R. 229; *Harbhagwandas*, A.I.R. 1920 Sind 75, 60 I.C. 1001, 14 S.L.R. 173; *Janu Fakir*, A.I.R. 1922 Sind 22, 66 I.C. 999, 23 Cr.L.J. 343, 15 S.L.R. 171; *Nuran*, A.I.R. 1925 Sind 206, 82 I.C. 754, 25 Cr.L.J. 1362, 18 S.L.R. 262; *Hiranand*, A.I.R. 1924 Sind 129, 76 I.C. 230, 25 Cr.L.J. 134, 17 S.L.R. 245. An application for revision would not be entertainable, if the accused has failed to avail himself of his right of appeal; but the Court can receive information or knowledge from a third party and act upon it of its own accord—*Shaibala*, 34 Cr.L.J. 1115 (1118), 145 I.C. 977, A.I.R. 1933 All. 678, 1933 A.L.J. 1059, 1933 Cr.C. 1190 (F.B.). The question whether the High Court can take action in such cases under sec. 561A, Cr. P. C., was left undecided in *Jamnadas Nathji Shah*, 38 Cr.L.J. 606, 168 I.C. 718, I.L.R. 1937 Bom. 263, 39 Bom.L.R. 82, 9 R.B. 393, A.I.R. 1937 Bom. 153 where it was thought very doubtful whether a reference under sec. 438, Cr. P. C., by the Sessions Judge, on his own motion, could be entertained by the High Court.

No appeal after revision:—Where a case has been heard in revision and orders have been passed after the High Court fully went into the facts of the case, the Court cannot afterwards hear an appeal in the same case—*Kanhia Lal*, 1890 A.W.N. 225.

Revision after appeal:—Although the High Court is competent to interfere in revision as well as to interfere on appeal, still it could not have been the intention of the Legislature that a person, who had appealed and had the opportunity of advancing any objection he desired to take to the proceedings of the Lower Court, should again have the opportunity of raising any points of law he may have omitted to raise in the appeal, by an application for revision—*Venkatachalam*, 2 Weir 573. But the High Court after it has acted as a Court of Appeal, may act as a Court of Revision on special grounds, e.g., to correct an error which cannot be set right in appeal. For instance, if a man should be found guilty of murder and sentenced to 7 years' transportation, then if the prisoner should appeal on the facts the High Court might uphold the finding of guilty of murder on appeal, and afterwards as a Court of revision might set aside the sentence of 7 years' transportation and pass a legal sentence for murder—*Gora Chand*, 5 W.R. 45.

Where the appeal has been withdrawn it is the duty of the High Court, when a matter has been brought to its notice which it considers should be corrected, to deal with it under its revisional powers—*Saham Lal*, 32 Cr.L.J. 732, 131 I.C. 375, A.I.R. 1931 Lah. 97, 31 P.L.R. 990, 12 Lah.L.J. 312, Ind. Rul. 1931 Lah. 471, 1931 Cr.C. 161. See *Pitchai v. Md. Athan* cited in Notes 380 and 382.

1221. Sub-section (6):—By virtue of this new clause, an accused person, who has been called upon to show cause why a sentence passed upon him should not be enhanced, will have the right of showing not only that the sentence should not be enhanced but that the whole conviction is wrong. This amendment enables the High Court not only to refuse an enhancement of sentence but also to set aside a conviction if the High Court finds that both the sentence and the conviction are equally unjustifiable.

Prior to this amendment, in cases that came up before the High Court for enhancement of sentence, it was the practice to accept the conviction as *conclusive*, and to consider the question of enhancement of sentence on that basis; see *Chinto*, 32 Bom. 162, 7 Cr.L.J. 119, 10 Bom.L.R. 93. But this is no longer correct; the amendment is intended to give the accused person, who has been brought to the bar of the High Court to answer why a sentence passed upon him should not be enhanced, the right of showing by argument *a fortiori* not only that the sentence should not be enhanced but that the conviction itself is wrong and should be set aside—*Mahadeo*, 26 Cr.L.J. 821, 86 I.C. 469, A.I.R. 1925 Nag. 321; *Jorabhai*, 50 Bom. 783, 27 Cr.L.J. 1173 (1174), 97 I.C. 805, A.I.R. 1926 Bom. 555, 28 Bom.L.R. 1051, dissenting from *Mangal Naran*, 49 Bom. 450, 87 I.C. 424, A.I.R.

1925 Bom. 268, 26 Cr.L.J. 968, 27 Bom.L.R. 355. The effect of the enactment of this sub-section is that the High Court when adjudicating upon an application for enhancement of sentence, is converted into a Court of Appeal against conviction and the accused is entitled to show that his conviction was unjustified—*Tej Ram*, 27 P.L.T. 112, 92 I.C. 892, A.I.R. 1927 Lah. 34, 27 Cr.L.J. 380 (381). An accused person when showing cause why his sentence should not be enhanced, is entitled to show that the whole trial was illegal (e.g., as contravening the provisions of sec. 234), though the question of illegality was not raised at the trial—*Manant*, 49 Bom. 892, 27 Bom.L.R. 1343, 27 Cr.L.J. 305.

This sub-section was only added when the Code was revised in 1923. It is important to note that the initial words are "notwithstanding anything contained in this section," and not "notwithstanding anything contained in this Code." It would seem clear, therefore, that this sub-section can only refer to sub-sec. (5) of this section, and means that, although a party who has not appealed cannot be allowed to make an application in revision, yet, if proceedings are taken against him in revision and notice to show cause why his sentence should not be enhanced is issued to him, he shall, in showing cause, be entitled also to show cause against his conviction—*The King v. Nga Ba Saing*, A.I.R. 1939 Rang. 392 (393), 41 Cr.L.J. 108, 185 I.C. 142.

When the High Court sets aside an order under sec. 562 (1), Cr. P. C., and passes a sentence on the accused in lieu thereof, the accused cannot claim to be heard on the merits because the High Court does not thereby enhance a sentence or act under sec. 439 (6), Cr. P. C., as the enhancement of a sentence presumes there is a sentence to be enhanced—*Miro Ghulam Hussain*, A.I.R. 1939 Sind 339, 41 Cr.L.J. 187, 185 I.C. 428, I.L.R. 1940 Kar. 88.

When a case comes to the knowledge of the High Court by an appeal having been filed it is not desirable, if the appeal is admitted, to issue a notice at the same time on the accused, under this section, asking him to show cause why the sentence passed upon him should not be enhanced—*Mangal Naran*, A.I.R. 1925 Bom. 268, 87 I.C. 424, 26 Cr.L.J. 968, 49 Bom. 450, 27 Bom.L.R. 355; *Ramchandra*, A.I.R. 1933 Bom. 153 (156), 35 Cr.L.J. 747, 148 I.C. 553, 35 Bom.L.R. 174, 1933 Cr.C. 465. This view of law has been dissented from in *Babu Pandurang*, cited below.

But where a High Court has given a finding on appeal as to the guilt of the accused person, and subsequently a notice is served upon that person to show cause why his sentence should not be enhanced, he is not at liberty under sec. 439 (6) to re-open the question of the correctness of his conviction because of the inherent incapacity of a Bench of the High Court to reconsider a decision given by another Bench (secs. 369 and 430)—*Jorabhai*, 50 Bom. 783, 97 I.C. 805, A.I.R. 1925 Bom. 555, 28 Bom.L.R. 1051, 27 Cr.L.J. 1173 (1175); *Koya Partab*, 129 I.C. 158, 32 Bom.L.R. 1286, A.I.R. 1930 Bom. 593, 32 Cr.L.J. 242, Ind. Rul. 1931 Bom. 143, 54 Bom. 822, 1930 Cr.C. 1140; *Haji Khamoo*, A.I.R. 1936 Sind 233, 38 Cr.L.J. 114, 165 I.C. 993, following *Khodabux Haji*, A.I.R. 1934 Cal. 105, 1934 Cr.C. 156, 35 Cr.L.J. 554, 147 I.C. 1124, 61 Cal. 6 and *Inderchand*, A.I.R. 1934 Bom. 471, 1934 Cr.C. 1343, 153 I.C. 525, 36 Bom.L.R. 954. This sub-section does not destroy and was not intended to destroy the finality of judgment of Appellate Courts given by sec. 430, Criminal Procedure Code—*Haji Khamoo*, supra. It is open to a Division Bench of the High Court to exercise the powers of enhancement vested in it, even after the dismissal of the accused's jail appeal by a single Judge who cannot exercise the jurisdiction of an enhancement under the rules of the Allahabad High Court, Chap. I (17) (d)—*Abdul Qayum*, 34 Cr.L.J. 1205, 146 I.C. 157, A.I.R. 1933 All. 483, 1933 A.L.J. 957, 1933 Cr.C. 830, 55 All. 715. Similarly, where an accused has filed a petition against his conviction and that petition has been dismissed by the High Court (whether *in limine* or on the merits) and then proceedings are taken against him before the High Court for enhancement of the sentence, the accused would be precluded from re-agitating the question of the legality of the conviction; because the High Court cannot decide again what it has decided once—*In re Saiyed Ansf*, 85 I.C. 727, A.I.R. 1925 Mad. 993, 26 Cr.L.J. 583 (586); *Sher Singh*, 8 Lah. 521, 28 Cr.L.J. 266, 100 I.C. 234, A.I.R. 1927 Lah. 217, 28 P.L.R. 559; *Dharma*

Lal, 10 Lah. 241, 30 Cr.L.J. 815 (818), 117 I.C. 669, A.I.R. 1929 Lah. 797, 1929 Cr.C. 429, 30 P.L.R. 409, Ind. Rul. 1929 Lah. 685; *Ramlakhan*, 33 Cr.L.J. 155, 135 I.C. 522, 10 Pat. 872, 13 P.L.T. 17, Ind. Rul. 1932 Pat. 42, A.I.R. 1932 Pat. 126, 1932 Cr.C. 158; *Inderchand*, 36 Cr.L.J. 351, 153 I.C. 525, 1934 Cr.C. 1343, 36 Bom.L.R. 954, A.I.R. 1934 Bom. 471; *The King v. Nga Ba Saing*, 41 Cr.L.J. 108, 185 I.C. 142, A.I.R. 1939 Rang. 392. The dismissal of a revision petition or an appeal by the High Court does not prevent it from enhancing the sentence passed upon the petitioner or appellant after giving him notice—*In re Sayyed Anif*, 85 I.C. 727, 26 Cr.L.J. 583, A.I.R. 1925 Mad. 993; *Ramlakhan*, supra.

Where the Court gives notice to show cause why the sentence should not be enhanced, it ought not to dispose of the appeal before the notice is heard. If the appeal is a jail appeal, it ought to be admitted. If the appeal has been argued, before the Court comes to the conclusion that there is a case for enhancing the sentence, the Court should refrain from passing any order on the appeal until the notice to enhance can be dealt with—*Babu Pandurang*, 35 Cr.L.J. 1435, 151 I.C. 865, 36 Bom.L.R. 382, A.I.R. 1934 Bom. 198, 1934 Cr.C. 649, 58 Bom. 392, dissenting from *Mangal Naran*, 87 I.C. 424, 27 Bom.L.R. 355, A.I.R. 1925 Bom. 268, 26 Cr.L.J. 986, 49 Bom. 450. See also *Khoda Bux*, 35 Cr.L.J. 554, 147 I.C. 1124, A.I.R. 1934 Cal. 105, 37 C.W.N. 122, 61 Cal. 6, 1934 Cr.C. 156, where it has been laid down that where the matter has come before the High Court on the motion of the convicted person himself, it may well be that it is open to the High Court, if it thinks fit, there and then to give his Pleader the opportunity called for by sub-sec. (2) of this section. If the Advocate or Pleader representing the convicted persons were to state that he wished to consult with his clients or to take further instructions, it would only be right and proper that he should have an opportunity of so doing and an adjournment might have to be granted for the purpose. See also *Alef Shaikh*, 62 Cal. 952 (953), 37 Cr.L.J. 859, 163 I.C. 768. See Note 1218.

Power of accused to challenge findings of fact:—Where an accused has been convicted by a Magistrate, and that conviction has been confirmed on appeal by the Sessions Judge, and then a notice is issued to the accused to show cause why the sentence should not be enhanced, the accused is entitled under this sub-section to show that his conviction is wrong, and in doing so he is entitled to *challenge the findings of fact* of the lower Appellate Court. It is not correct to say that he can show cause against his conviction only on *points of law*. In showing cause the accused is entitled to argue that the estimate of evidence made by the Courts below is erroneous and that the conviction is against the weight of evidence upon the record; and the High Court can go into the evidence to find whether the conviction can be sustained—*Badan Singh*, 30 Cr.L.J. 933 (935, 936), 118 I.C. 577, A.I.R. 1928 All. 150, Ind. Rul. 1929 All. 881. The Lahore High Court is also of opinion that where an accused person, whose conviction has been confirmed on appeal, applies in revision, and a notice is also issued to show cause why the sentence should not be enhanced it is competent to him to show from the whole record that he ought to have been acquitted, and he cannot be restricted with any considerations that the application is in revision only and not an appeal. The High Court can, therefore, go through the facts and consider the whole evidence—*Kula*, 30 P.L.R. 437, 116 I.C. 883, Ind. Rul. 1929 Lah. 595, A.I.R. 1929 Lah. 584, 30 Cr.L.J. 699 (700). But the Sind Court is of opinion that while this sub-section gives the accused the right to show cause against his conviction, he cannot claim the right to attack the findings of fact, if he has appealed to the lower Appellate Court and that appeal has been dismissed. If he had not appealed but had remained content on account of the light sentence inflicted on him by the trial Court, and then a notice is issued why his sentence should not be enhanced, he should not be denied the opportunity of challenging the findings of fact, while showing cause against his conviction under this sub-section. But he cannot claim the same privilege if he appealed and lost, and the High Court will not disturb the findings of fact of the lower Appellate Court—*Lukman*, 21 S.L.R. 107, 98 I.C. 49, A.I.R. 1927 Sind 39, 27 Cr.L.J. 1233 (1234). If he has exercised his right of appeal and the appeal has been dismissed, he cannot, in showing cause

under this sub-section, challenge the findings of fact of the lower Appellate Court, but he can, as in an ordinary revision application, only show cause to the extent that the conviction was based on no legal evidence or was manifestly erroneous—*Shidoo*, 29 Cr.L.J. 936 (937), 111 I.C. 856, A.I.R. 1929 Sind 26, 22 S.L.R. 53. And this principle applies whether the appeal was dismissed on the merits or was dismissed summarily, because the summary dismissal amounts to an order confirming the findings of fact and law of the trial Court—*Shidoo*, supra. In *Balumal Hotchand*, 39 Cr.L.J. 890, 177 I.C. 346, A.I.R. 1938 Sind 171, 11 R.S. 58, where the Sessions Judge did not dismiss the appeal in the manner required by law, the Sind Judicial Commissioner's Court heard the accused within reason upon the facts.

This sub-section gives the accused person no more right than that when he was asked to show cause why the sentence should not be enhanced, he might also show cause against his conviction. This section is intended to operate for the benefit of the accused person who otherwise would have lost his right to show cause against his conviction. This section does not operate so as to reduce the effect of sec. 423, cl. (2), Cr. P. C. So, in a trial by jury the convicted persons who are showing cause against an enhancement of their sentences cannot be allowed to have the whole question of their conviction re-opened even to the extent of asking the High Court to consider for itself the whole of evidence given at the trial—*Khoda Bux*, 35 Cr.L.J. 554 (562), 147 I.C. 1124, 6 R.C. 401, A.I.R. 1934 Cal. 105, 37 C.W.N. 1122, 1934 Cr.C. 156, 61 Cal. 6; *Alef Shaikh*, 37 Cr.L.J. 859 (860), 9 R.C. 84, 62 Cal. 952, 163 I.C. 768; *Moscladdi v. Emp.*, 40 Cr.L.J. 877, 184 I.C. 206, A.I.R. 1939 Cal. 497, 12 R.C. 212; *Ramji Vala*, A.I.R. 1940 Bom. 279 (280), 41 Cr.L.J. 916, 190 I.C. 412, 42 Bom.L.R. 475, 1 I.L.R. 1940 Bom. 500; *Rathanasabapathy Goundan v. Public Prosecutor*, 37 Cr.L.J. 909 (912), 164 I.C. 243, 1936 M.W.N. 459, A.I.R. 1936 Mad. 516, 59 Mad. 904, 44 M.L.W. 155, 71 M.L.J. 231, 1936 Cr.C. 635.

The provision in sec. 439, sub-sec. (6), that the accused shall be entitled to show cause against the conviction, means that he can show cause in accordance with law. He cannot claim, for example, in revision proceedings to call fresh evidence. He can only challenge his conviction in accordance with law, and where the conviction is based on the verdict of a jury, he has no greater right of appeal than he possesses under sec. 423, and cannot challenge the facts—*Ramji Vala*, supra.

The effect of those decisions is that the High Court cannot examine the facts for itself to decide whether the appellants are guilty or not. Being placed in that position the High Court will not inflict a sentence of death. The result of the failure of the Judge to do his duty is that the appellants are precluded from asking the High Court to examine the evidence in the case to see whether it is satisfied of their guilt. It would be an intolerable position if in such circumstances they are to be sentenced to death—*Moscladdi v. Emp.*, supra. It is now well settled in the Calcutta High Court that on an appeal from the verdict of a jury, an accused person is not entitled to appeal on the facts merely because he is called upon to show cause why the sentence should not be enhanced. The High Court would not certainly examine the facts in order to see whether a sentence should be enhanced or not; otherwise it would mean that there would be two final Courts of fact on exactly the same evidence, one to decide whether the accused is to be convicted and another to decide whether he is to be sentenced to an enhanced punishment—*Fazal Ali v. Emp.*, 43 C.W.N. 1032. See also 43 C.W.N. cxlvi.

The combined effect of sec. 439 (6) and sec. 423 (2) is to entitle the accused to question the conviction by showing that the Judge misdirected the jury or that the jury misunderstood the law laid down by the Judge in his charge. To hold that sec. 439 (6) confers an unlimited right of impugning the conviction would be to introduce the anomaly that a person convicted on the verdict of a jury can question the conviction only within the narrow limits laid down in sec. 423 (2), but if he has to show cause against a motion for enhancement of sentence, his right to question his conviction is very materially enlarged. This was not the intention of the Legislature nor there is anything in sec. 439 (6) read with other provisions of the Cr. P. Code which justify this view—*Bishuanath*, A.I.R. 1936 All. 850 (851), 38 Cr.L.J. 137, 166 I.C. 176, 1936

A.L.J. 1287. The High Court in considering whether the conviction was justified cannot go behind the verdict of the jury on facts; but, of course, in considering the notice to enhance, the High Court can look at the whole of the evidence in order to satisfy itself as to the exact nature of the offence in order to determine what sentence should be imposed—*Ramji Vala*, supra.

In a case where the sentence given by a Presidency Magistrate is one from which no appeal lies, the High Court has power under this section to enhance the sentence. But the High Court ought to be slow to exercise that power, because under this subsection the accused is entitled, before having the sentence enhanced, to challenge his conviction, and where he has been given a sentence which is not appealable by a Presidency Magistrate, and there is no evidence recorded, he has really no material on which he can challenge his conviction, and he is in a worse position than if he had been given an appealable sentence—*Ahmad Ebrahim*, A.I.R. 1935 Bom. 37, 36 Bom.L.R. 1126, 36 Cr.L.J. 527, 154 I.C. 377, 1935 Cr.C. 71.

Conviction on plea of guilty:—If a person has been convicted on his plea of guilty he cannot in showing cause against his conviction, question the legality of his conviction or go behind his plea of guilty. He can only question the extent or legality of the sentence (e.g., whether the Court was entitled in law to pass such sentence) or he can possibly show that there was some defect in the proceedings or that the fact to which he confessed by his plea of guilty did not amount to an offence or the offence of which he has been convicted—*Jnanendra*, 33 C.W.N. 599 (604, 605), 49 C.L.J. 432, 30 Cr.L.J. 1038. But see *Nga Yua*, A.I.R. 1935 Rang. 49, 36 Cr.L.J. 336, 12 Rang. 616, 153 I.C. 390, where it has been held that the accused can appeal against both his conviction and the sentence notwithstanding his plea of guilty, when notice is served upon him for enhancement of sentence.

1222. Miscellaneous:—Limitation:—See Notes 1205 and 1215. According to the practice of the Calcutta High Court an application for revision in criminal cases must be presented within 60 days from the date of the order complained of, exclusive of the time necessary for obtaining copies. This is not, however, an inflexible rule, and in exceptional circumstances the rule may be departed from—*Khetra Mohan v. Darpa Narain*, 43 Cal. 1029, 35 I.C. 979, 20 C.W.N. 1170, A.I.R. 1917 Cal. 849; *Nathu Ramji v. Jagannath*, 41 Cr.L.J. 745, 189 I.C. 479, A.I.R. 1940 Nag. 259, 1940 N.L.J. 319. Although there is no law of limitation applicable to revision application, still it is the settled practice of the Allahabad High Court not to admit them unless they are made within a reasonable time after the order complained of. An application for revision preferred 5 months after the order complained of was passed was therefore rejected—*Ram Narain*, 27 Cr.L.J. 1021, 96 I.C. 877, A.I.R. 1926 All. 577. It is the practice of the Patna High Court not to entertain, save under the most exceptional circumstances, an application for revision of a criminal case after the expiry of sixty days from the date of the decision or order impugned. The period of 60 days is intended to cover the proceedings of normal length before the Sessions Judge, and ordinarily will not be extended because the petitioner negligently or deliberately delayed to move the Sessions Judge (for making a reference under sec. 438) till the period had nearly expired. When an application is made to the Sessions Judge beyond or even within the period of 60 days from the date of the first Court's decision, a further period of 60 days does not become available to the petitioner from the date when the Sessions Judge refuses to make a reference under sec. 438—*Kelu Patra v. Iswar Parida*, 8 Pat. 468, 30 Cr.L.J. 1053 (1054), 119 I.C. 401, 11 P.L.T. 18, A.I.R. 1929 Pat. 404, Ind. Rul. 1929 Pat. 577; *Bholanath v. Bishun Prasad*, 36 Cr.L.J. 97, 152 I.C. 311, 15 P.L.T. 569, A.I.R. 1934 Pat. 301; *Baldeo Singh v. Dheno Goolin*, 37 Cr.L.J. 234, 160 I.C. 152, A.I.R. 1936 Pat. 109; *Nathu Ramji v. Jagannath*, supra; *Zafar Ahsan v. Jugeshwar Bux Roy*, 41 Cr.L.J. 171 (172), 185 I.C. 346, A.I.R. 1910 Pat. 135, 1939 P.W.N. 855; *Bechan Kuer v. Maharaja of Chotanagpur*, 40 Cr.L.J. 196, 179 I.C. 15, 11 R.P. 338, 5 B.R. 206, 1939 P.W.N. 862, A.I.R. 1939 Pat. 320. The fact that pleaders in the *mofassil* are not aware of the practice of the High Court and that the petitioners include a *pardanashin* lady, who is in fact the principal peti-

tioner, cannot be regarded as among the most exceptional circumstances—*Bechan Kuer v. Maharaja of Chotanagpur*, *supra*. This is not a rule of law and, of course, does not take away the power of the High Court to interfere in any case as undoubtedly the High Court has power to do even of its own motion and in the absence of any application at all on a perusal of the record—*Dhunmun v. Baleshwar*, A.I.R. 1933 Pat. 601, 146 I.C. 551, 35 Cr.L.J. 91, 1933 Cr.C. 1363.

The proper procedure in such a case is for a complainant to file an application for revision before the High Court within time, and without waiting for a decision of his application to the District Magistrate to take steps for an appeal—*Nathu Ramji v. Jagannath*, *supra*. (In this case the complainant moved the High Court to set aside an order of acquittal after 60 days *plus* the period required for obtaining the copies.)

So far as the Lahore High Court is concerned, there is no rule of practice that criminal revisions, which are filed after the expiry of the period say of sixty or ninety days, must be rejected simply on the ground of delay and laches—*Des Raj*, 35 Cr.L.J. 1447 (1448), 151 I.C. 943, 1934 Cr.C. 502, A.I.R. 1934 Lah. 264, A.L.J. 1934 Lah. 803. No hard and fast rule can be laid down to the effect that application for revision cannot be entertained if filed after the period allowed for an appeal. There can be no doubt that the admission or non-admission of an application for revision under this section is a matter entirely within the discretion of the revisional Court. If an application for revision is made after unreasonable delay, that alone can be sufficient ground for the Court to reject the application. It would not be unreasonable to regard the period for limitation in the case of appeals as a standard of reasonable time within which applications for revision should ordinarily be filed. When the application for revision has been made after the expiry of the period allowed for an appeal the Court would ask the applicant to give reasons for the delay and if those reasons are not sufficient the Court can dismiss the application—*Gokaran*, 33 Cr.L.J. 506, 137 I.C. 684, 9 O.W.N. 334, 7 Luck. 699, A.I.R. 1932 Oudh 242, 1932 Cr.C. 405, Ind. Rul. 1932 Oudh 257, explaining *Shah Naim*, 31 Cr.L.J. 1012, 126 I.C. 395, 7 O.W.N. 668, Ind. Rul. 1930 Oudh 363, A.I.R. 1930 Oudh 401, 1930 Cr.C. 941; *Nathu Ramji v. Jagannath*, *supra*.

There is nothing in this section to restrict a rule for enhancement to any particular time after the conviction—*Ramlakhan*, 33 Cr.L.J. 155 (157), 135 I.C. 522, 10 Pat. 872, 13 P.L.T. 17, Ind. Rul. 1932 Pat. 42, A.I.R. 1932 Pat. 126, 1932 Cr.C. 158.

New plea in revision:—Although it is a general rule that all grounds for revision must first of all be urged before the first Court of revision (Sessions Judge's Court), still a party is not debarred from urging a new plea, when there are intricate and important points involved in the case which could not be appreciated by the *vakils* in the *mofussil*—*Manruddin v. Abdul*, 40 Cal. 41 (43). But an accused cannot be heard to urge a new plea entirely inconsistent with the one which was raised by him during the trial—*Raghubar Dayal*, 18 Cr.L.J. 435 (437) (All.). See also *Bhure Mal*, 45 All. 526 in Note 1168. A new point cannot be raised in revision which involves a decision on a question of fact—*Kapoor Chand v. Suraj Prasad*, 34 Cr.L.J. 414 (416), 142 I.C. 537, 55 All. 301, 1933 A.L.J. 188, A.I.R. 1933 All. 264, 1933 Cr.C. 434, Ind. Rul. 1933 All. 125. The High Court cannot allow the applicant to introduce before it in revision questions of fact which, as they were not disputed, by implication, were admitted in the lower Court—*Nebhandas Hollaram v. Emp.*, A.I.R. 1939 Sind 337, I.L.R. 1940 Kar. 91, 185 I.C. 832, 41 Cr.L.J. 246. See also *Mathura v. Chakra*, A.I.R. 1935 Oudh 176, 35 Cr.L.J. 1236, 150 I.C. 951, 11 O.W.N. 810. But where a ground regarding a point of law was not taken in the revisional application, the High Court is entitled to take notice of it *suo motu*—*Jagannath*, A.I.R. 1935 Nag. 23, (25), 1935 Cr.C. 111.

It is doubtful whether, when an accused person does take an objection at the earliest possible moment, he can be debarred from raising it subsequently in a Court of Appeal or revision merely because he did not come up straightway to the High Court. But there is ample authority for the proposition that an objection with regard to the legality of a trial can be taken in a Court of revision or appeal, even though it was never taken in the Court of first instance at all—*C. S. Joseph*, 41 C.W.N. 251 (254).

A.L.J. 1287. The High Court in considering whether the conviction was justified cannot go behind the verdict of the jury on facts; but, of course, in considering the notice to enhance, the High Court can look at the whole of the evidence in order to satisfy itself as to the exact nature of the offence in order to determine what sentence should be imposed—*Ramji Vala*, supra.

In a case where the sentence given by a Presidency Magistrate is one from which no appeal lies, the High Court has power under this section to enhance the sentence. But the High Court ought to be slow to exercise that power, because under this subsection the accused is entitled, before having the sentence enhanced, to challenge his conviction, and where he has been given a sentence which is not appealable by a Presidency Magistrate, and there is no evidence recorded, he has really no material on which he can challenge his conviction, and he is in a worse position than if he had been given an appealable sentence—*Akmal Ebrahim*, A.I.R. 1935 Bom. 37, 36 Bom L.R. 1126, 36 Cr.L.J. 527, 154 I.C. 377, 1935 Cr.C. 71.

Conviction on plea of guilty:—If a person has been convicted on his plea of guilty he cannot in showing cause against his conviction, question the legality of his conviction or go behind his plea of guilty. He can only question the extent or legality of the sentence (e.g., whether the Court was entitled in law to pass such sentence) or he can possibly show that there was some defect in the proceedings or that the fact to which he confessed by his plea of guilty did not amount to an offence or the offence of which he has been convicted—*Jnanendra*, 33 C.W.N. 599 (604, 605), 49 C.L.J. 432, 30 Cr.L.J. 1038. But see *Nga Ywa*, A.I.R. 1935 Rang. 49, 36 Cr.L.J. 336, 12 Rang. 616, 153 I.C. 390, where it has been held that the accused can appeal against both his conviction and the sentence notwithstanding his plea of guilty, when notice is served upon him for enhancement of sentence.

1222. Miscellaneous:—Limitation:—See Notes 1205 and 1215. According to the practice of the Calcutta High Court an application for revision in criminal cases must be presented within 60 days from the date of the order complained of, exclusive of the time necessary for obtaining copies. This is not, however, an inflexible rule, and in exceptional circumstances the rule may be departed from—*Khetra Mohan v. Darpa Narain*, 43 Cal. 1029, 35 I.C. 979, 20 C.W.N. 1170, A.I.R. 1917 Cal. 849; *Nathu Ramji v. Jagannath*, 41 Cr.L.J. 745, 189 I.C. 479, A.I.R. 1940 Nag. 239, 1940 N.L.J. 319. Although there is no law of limitation applicable to revision application, still it is the settled practice of the Allahabad High Court not to admit them unless they are made within a reasonable time after the order complained of. An application for revision preferred 5 months after the order complained of was passed was therefore rejected—*Ram Narain*, 27 Cr.L.J. 1021, 96 I.C. 877, A.I.R. 1926 All. 577. It is the practice of the Patna High Court not to entertain, save under the most exceptional circumstances, an application for revision of a criminal case after the expiry of sixty days from the date of the decision or order impugned. The period of 60 days is intended to cover the proceedings of normal length before the Sessions Judge, and ordinarily will not be extended because the petitioner negligently or deliberately delayed to move the Sessions Judge (for making a reference under sec. 438) till the period had nearly expired. When an application is made to the Sessions Judge beyond or even within the period of 60 days from the date of the first Court's decision, a further period of 60 days does not become available to the petitioner from the date when the Sessions Judge refuses to make a reference under sec. 438—*Kelu Patra v. Iswar Parida*, 8 Pat. 468, 30 Cr.L.J. 1053 (1054), 119 I.C. 401, 11 P.L.T. 18, A.I.R. 1929 Pat. 404, Ind. Rul. 1929 Pat. 577; *Bholanath v. Bishun Prasad*, 36 Cr.L.J. 97, 152 I.C. 311, 15 P.L.T. 569, A.I.R. 1934 Pat. 301; *Baldeo Singh v. Dhana Goolin*, 37 Cr.L.J. 234, 160 I.C. 152, A.I.R. 1936 Pat. 109; *Nathu Ramji v. Jagannath*, supra; *Zafar Ahsan v. Jugeshwar Bux Roy*, 41 Cr.L.J. 171 (172), 185 I.C. 346, A.I.R. 1940 Pat. 135, 1939 P.W.N. 855; *Bechan Kuer v. Maharaja of Chotanagpur*, 40 Cr.L.J. 196, 179 I.C. 15, 11 R.P. 338, 5 B.R. 206, 1939 P.W.N. 862, A.I.R. 1939 Pat. 320. The fact that pleaders in the *mofassil* are not aware of the practice of the High Court and that the petitioners include a *pardanashin* lady, who is in fact the principal peti-

tioner, cannot be regarded as among the most exceptional circumstances—*Bechan Kuer v. Maharaja of Chotanagpur*, *supra*. This is not a rule of law and, of course, does not take away the power of the High Court to interfere in any case as undoubtedly the High Court has power to do even of its own motion and in the absence of any application at all on a perusal of the record—*Dhummun v. Baleshwar*, A.I.R. 1933 Pat. 601, 146 I.C. 551, 35 Cr.L.J. 91, 1933 Cr.C. 1363.

The proper procedure in such a case is for a complainant to file an application for revision before the High Court within time, and without waiting for a decision of his application to the District Magistrate to take steps for an appeal—*Nathu Ramji v. Jagannath*, *supra*. (In this case the complainant moved the High Court to set aside an order of acquittal after 60 days plus the period required for obtaining the copies.)

So far as the Lahore High Court is concerned, there is no rule of practice that criminal revisions, which are filed after the expiry of the period say of sixty or ninety days, must be rejected simply on the ground of delay and laches—*Des Raj*, 35 Cr.L.J. 1447 (1448), 151 I.C. 943, 1934 Cr.C. 502, A.I.R. 1934 Lah. 264, A.L.J. 1934 Lah. 803. No hard and fast rule can be laid down to the effect that application for revision cannot be entertained if filed after the period allowed for an appeal. There can be no doubt that the admission or non-admission of an application for revision under this section is a matter entirely within the discretion of the revisional Court. If an application for revision is made after unreasonable delay, that alone can be sufficient ground for the Court to reject the application. It would not be unreasonable to regard the period for limitation in the case of appeals as a standard of reasonable time within which applications for revision should ordinarily be filed. When the application for revision has been made after the expiry of the period allowed for an appeal the Court would ask the applicant to give reasons for the delay and if those reasons are not sufficient the Court can dismiss the application—*Gokaran*, 33 Cr.L.J. 506, 137 I.C. 684, 9 O.W.N. 334, 7 Luck. 699, A.I.R. 1932 Oudh 242, 1932 Cr.C. 405, Ind. Rul. 1932 Oudh 257, explaining *Shah Naim*, 31 Cr.L.J. 1012, 126 I.C. 395, 7 O.W.N. 668, Ind. Rul. 1930 Oudh 363, A.I.R. 1930 Oudh 401, 1930 Cr.C. 941; *Nathu Ramji v. Jagannath*, *supra*.

There is nothing in this section to restrict a rule for enhancement to any particular time after the conviction—*Ramlakhan*, 33 Cr.L.J. 155 (157), 135 I.C. 522, 10 Pat. 872, 13 P.L.T. 17, Ind. Rul. 1932 Pat. 42, A.I.R. 1932 Pat. 126, 1932 Cr.C. 158.

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It is doubtful whether, when an accused person does take an objection at the earliest possible moment, he can be debarred from raising it subsequently in a Court of Appeal or revision merely because he did not come up straightway to the High Court. But there is ample authority for the proposition that an objection with regard to the legality of a trial can be taken in a Court of revision or appeal, even though it was never taken in the Court of first instance at all—*C. S. Joseph*, 41 C.W.N. 251 (254).

Loss of record:—The loss of a record after conviction is no ground for the acquittal of the accused in revision. In serious cases where the accused has been convicted and sentenced to a substantial punishment it may be that a retrial may be ordered. But if the case is a petty one, in which a small fine was inflicted, the High Court will not interfere either to set aside the conviction or to direct a retrial—*Sheo Jawan v. Ram Sekhi*, 18 Cr.L.J. 737 (Pat.).

Death of the applicant:—Any case can be brought to the notice of the High Court by any person and it will thereafter take action *suo motu* if the record indicates that there is sufficient reason to do so. It does not matter whether the applicant, who invoked the revisional powers of the High Court, is dead or not—*Fariduddin Khan*, A.I.R. 1936 All. 313, 1936 A.L.J. 253, 37 Cr.L.J. 562, 162 I.C. 338.

There are no provisions similar to those of sec. 431, Cr. P. C., as regards revisions, but the same principle would seem to apply, so that a revisional application against a sentence of fine would not abate by the reason of the death of the applicant. Under the provisions of sec. 70, I. P. C., the death of an offender does not discharge any property which would, after his death, be legally liable for his debts from liability to discharge any fine due from him—*Sita Ram v. Emp.*, 38 Cr.L.J. 509, 168 I.C. 177, 9 R.O. 447, 1937 O.L.R. 232, 1937 A.Cr.C. 88, 1937 O.W.N. 587, A.I.R. 1937 Oudh 320. Where pending the revision against the sentence of fine the accused dies, the revision continues—*Ram Chand v. Emp.*, A.I.R. 1940 Lah. 274, 42 P.L.R. 215, 41 Cr.L.J. 729, 189 I.C. 74, following *Daulat Ram v. Emp.*, A.I.R. 1919 Lah. 347, 49 I.C. 774, 8 P.R. 1919 (Cr.), 95 P.L.R. 1918, 20 Cr.L.J. 214.

Duty of Magistrate showing cause:—Though it is open to a Magistrate called upon to show cause to submit his remarks in answer to the ground urged by the petitioner who obtained the rule, it is not open to him to submit observations with a view to supplement or add to his judgment—*Madhu Sudan v. Sasti*, 7 C.W.N. 859.

A Magistrate called upon to show cause should not, in submitting his explanation, express himself in a language wanting in decorum and politeness, nor should make sneering references or adverse comments upon any Judge of a superior Court—*Kartick Chandra*, 51 C.L.J. 5, 31 Cr.L.J. 1205 (1207), 127 I.C. 267, A.I.R. 1930 Cal. 278.

Costs:—If a criminal revision is dismissed, the High Court cannot grant costs to the other party. The Code has made provisions for granting of costs in certain specific instances (*vide* sections 148, 443, 488, 526 and 545), but has made no provision for granting costs of revision; and so the High Court cannot, even by invoking its inherent powers, grant costs in cases of revision. It can grant costs only in those cases where the Code makes express provision, but not in other cases; the maxim *expressio unius est exclusio alterius* applies—*Sankaralinga v. Narayana*, 45 Mad 913 (919) (F.B.); *Veerappa Naidu v. Avudayammal*, 86 I.C. 147, 48 Mad. 262, 48 M.L.J. 106, A.I.R. 1925 Mad. 438, 26 Cr.L.J. 707, 21 M.L.W. 688 (F.B.); *Mehi Singh v. Mangal Khandu*, 12 I.C. 297, 39 Cal. 157, 14 C.L.J. 437, 16 C.W.N. 10, 12 Cr.L.J. 529. See 423 (d), Cr. P.C., read with sec. 439 does not authorise the High Courts, in revision, to award costs of the proceedings before it—*Kapoor Chand v. Suraj Prasad*, 31 Cr.L.J. 414 (419), 142 I.C. 537, 1933 A.L.J. 188, Ind. Rul. 1933 All 125, A.I.R. 1933 All. 264, 1933 Cr.C. 434, 55 All. 301 (F.B.). See, however, *Mg Po Lon v. Mg Ba*, 81 I.C. 548, A.I.R. 1925 Rang. 111, 3 Bur.L.J. 256, 26 Cr.L.J. 324 where such costs were actually allowed to the respondent. Even where the revision petition is brought by a private complainant against an order of acquittal, and the petition fails, the High Court cannot award costs to the other party (accused), although it is quite reasonable that he should be granted costs—*Sankaralinga v. Narayana*, *supra*.

440. No party has any right to be heard either personally or by pleader before any Court when exercising its powers of revision:

Optional with Court to hear parties.

Provided that the Court may, if it thinks fit, when exercising

such powers, hear any party either personally or by pleader, and that nothing in this section shall be deemed to affect section 439, sub-section (2).

1223. Scope of section:—The rule in this section is the general rule provided by the Legislature, and it must be taken as a legislative recission of the general principle that persons are entitled to be heard before any order affecting them to their prejudice can be made—*Nobin v. Russick*, 10 Cal. 268. Under this section, it is open to the High Court to determine the question raised by a Rule without hearing the counsel or pleader for or against the Rule—*Bibhuti v. Dasimoni*, 10 C.L.J. 80. The High Court can deal with the question whether the District Magistrate has properly exercised his power under sec. 437, without giving notice to the accused or allowing him an opportunity of being heard—*Nobin v. Russick*, 10 Cal. 268.

The provisions of this section apply only to revision, and do not apply to the summary rejection of an appeal under sec. 421—*Raj Kumar v. Tincowri*, 12 C.W.N. 248. This section does not apply to sec. 439 (2); that is, if an order is passed to the prejudice of the accused, he must be heard either personally or by pleader.

1224. No right to be heard:—The revisional power of the High Court is exercised at its own discretion and no petitioner has a right to be heard—*In re Ranga Rao*, 23 M.L.J. 371; *Sripat v. Gahbar*, 25 A.L.J. 1010, 29 Cr.L.J. 88 (89). And the fact that the pleader of a party was not heard when the High Court was exercising revisional powers is not a ground for a second application for revision or for review—*Sripat Narain v. Gahbar*, supra. The accused is not entitled to be heard when an order under sec. 436 is made directing a further inquiry into a summary rejection of complaint—*Haridas v. Saritulla*, 15 Cal. 608 (see also, the other cases cited in Note 1184 under sec. 436). The High Court refused to hear the counsel who appeared to support a petition for the revision of an acquittal—*Thandavan v. Periantha*, 14 Mad. 363.

Where an accused person applied in revision to the High Court, and pending the revision he was let off on bail and thereafter he absconded, held that the High Court would not hear his pleader in the revision application—*Har Narain*, 24 Cr.L.J. 240, A.I.R. 1923 All. 327, 71 I.C. 704. When the accused, who has been ordered by the lower Court to surrender to his bail bonds, does not enter appearance in obedience to the order of the Court below, the High Court will not be justified in exercising its discretionary powers in favour of the applicant. Further until the order of the Court below is complied with, the counsel representing the applicant will not have a right of audience—*Sheo Mandu v. Emp.*, A.I.R. 1939 All. 5, 1938 A.L.J. 1022, 11 L.R. 1938 All. 991, 178 I.C. 1000, 40 Cr.L.J. 153, 1938 A.W.R. 690, 1938 A.L.R. 930. See also Note 1205, last paragraph.

In a reference under sec. 438 a counsel is not entitled to appear against the report—*Reg v. Devama*, 1 Bom. 64. A private prosecutor cannot be allowed to appear on a reference to the High Court under sec. 438. If he is heard at all, he can be heard only with the permission of the Court—*Sudderuddin v. Ram Joy*, 14 W.R. 51.

But by virtue of the discretionary power given by the proviso, the High Court always hears the counsel in matters of importance—*Haradhan*, 19 Cal. 380; *Ram Nihore*, 8 A.L.J. 237, 12 Cr.L.J. 231. Whether the matter is a matter of importance must be left to the discretion of the Judge hearing the matter of revision—*Sripat v. Gahbar*, supra. Where a complaint has been dismissed under sec. 203, and the complainant applies in revision, the High Court may, in its discretion, hear the complainant on the subject of his complaint, but to this limited extent, viz, in order to see in effect what his case is about. If, for instance, that case on investigation should tend to show that there has been any denial of natural justice or that some gross and palpable error has been committed in the Court below, then the High Court would direct a rule to issue in order to hear what is to be said on the other side—*Shamdasani*, 31 Bom.L.R. 1144, 1929 Cr.C. 555 (556), A.I.R. 1929 Bom. 443 (444).

The High Court can pass orders under this section limiting the right of the applicant's counsel to be heard only on the question of sentence—*Sat Narain Lal v. Emp.*, A.I.R. 1940 All. 426, 1940 A.L.J. 462, 41 Cr.L.J. 876, 190 I.C. 225.

441. When the record of any proceeding of any Presidency Magistrate is called for by the High Court under section 435, the Magistrate may submit with the record a statement setting forth the grounds of his decision or order and any facts which he thinks material to the issue; and the Court shall consider such statement before over-ruling or setting aside the said decision or order.

1225. A statement filed under this section takes away any irregularity in the proceedings of a Magistrate caused by the omission to record reasons before referring a case under sec. 202 or dismissing a complaint under sec. 203—*Rengammal v. Krishnamachari*, 5 M.L.T. 79.

A statement submitted by a Presidency Magistrate under this section must be regarded as a completion of the record and possesses a conclusive character as against affidavits—*Bhawoo v. Mulji*, 12 Bom. 377.

This section is not enacted to enable Presidency Magistrates to give fresh reasons for their decision contradictory to those already given, but to enable them to supply reasons where in the exercise of their privilege under sec. 370 they have given no reasons at all—*Swarnammal v. Muniswami*, 1929 M.W.N. 893, 1930 Cr.C. 120, A.I.R. 1930 Mad. 225, 3 M.Cr.C. 55, 122 I.C. 800, 31 Cr.L.J. 460, 14 A.L.Cr.R. 341. This section does not abrogate the terms of section 263 or 370. It merely allows the Presidency Magistrate to supplement the reasons which have been already stated under sections 263 and 370. It does not apply where *no reasons whatever* have been recorded by the Presidency Magistrate. A Bench of Presidency Magistrates imposing a sentence of imprisonment for an offence must record their reasons for the conviction. The omission to do so in a case where no record of the evidence was taken is a grave irregularity. But having regard to the reasons for conviction disclosed in the record submitted by the Presidency Magistrate under this section, the High Court in this case did not set aside the order of the Bench on the ground of the irregularity—*In re Dervish Hossain*, 46 Mad. 253.

442. When a case is revised under this Chapter by the High Court, it shall, in manner hereinbefore provided by section 425, certify its decision or order to the Court by which the finding, sentence or order revised was recorded or passed, and the Court or Magistrate to which the decision or order is so certified shall thereupon make such orders as are conformable to the decision so certified; and, if necessary, the record shall be amended in accordance therewith.

1226. Scope of section:—This section deals with every case which is revised under this Chapter by a High Court; in other words, it applies to all revisions, whether under sec. 435 or sec. 439; and it provides that it shall certify its decision or order to the Lower Court, but it contains no such provision that it will certify its decision to itself. This shows that the High Court cannot revise any judgment passed by itself—*Press*, 1909 P.R. 4, 9 Cr.L.J. 378.

PART VIII.

SPECIAL PROCEEDINGS.

CHAPTER XXXIII.

SPECIAL PROVISIONS RELATING TO CASES IN WHICH EUROPEAN AND INDIAN BRITISH SUBJECTS ARE CONCERNED.

This Chapter has been added by sec. 27 of the Criminal Law Amendment Act XII of 1923.

"The procedure for the trial of cases in which racial considerations are involved is included in a new chapter which takes the place of the old Chapter XXXIII of the Code.

"As regards the new Chapter XXXIII it will be observed that it applies to offences punishable with imprisonment which are alleged to have been committed outside a presidency-town. The first step to be taken to secure that such a case shall be tried under the provisions of the Chapter is a claim to be made by the accused person before the Magistrate. Unless such claim is made at one of the stages indicated for the trial of a summons-case or of a warrant-case, or for the inquiry preliminary to commitment, the provisions of the Chapter will not apply. The Magistrate then makes such inquiry as he thinks necessary. As a guide to the Magistrate in coming to a finding as to whether the case should be tried under the provisions of the Chapter or not, it is provided that if the complainant and the accused persons or any of them are respectively European and Indian British subjects or Indian and European British subjects, he shall find that the case should be tried under the provisions of the Chapter. For other cases with which both European British subjects and Indian British subjects are connected the Magistrate must be satisfied that it is expedient for the ends of justice that the case shall be so tried. This, it is observed, is the same criterion as that now contained in clause (e) of sub-section (1) of section 526 of the Code of Criminal Procedure relating to the powers of a High Court to transfer Criminal cases. If the Magistrate rejects the claim, the person has a right of appeal to the Sessions Judge whose decision is final, and if the claim is rejected by the Magistrate, the Magistrate is required to stay the proceedings until the expiration of the period allowed for the presentation of the appeal, or, if an appeal is presented, until it has been decided. The period allowed for the presentation of an appeal is fixed by Article 156A of the Indian Limitation Act, 1908, at seven days. The persons who will be included within the term "complainant" for the purpose of these provisions are then defined by the proposed section 444. Incidentally public servants and officers and servants of companies, associations or bodies to which the Local Government by general or special order may declare the provisions of the section to apply, will not be included within the definition merely because they have made a complaint or given information in their official or "quasi" official capacity. The procedure in summons-cases punishable with imprisonment is then laid down. For warrant-cases which would normally be tried under the provisions of Chapter XXI of the Code, if it is found that the case ought to be tried under the provisions of this Chapter, a Magistrate is required, if he does not discharge the accused, to commit the case for trial to the Court of Session, whether the case is or is not exclusively triable by that Court. Normally in the Court of

Session the case will then be tried by a jury of mixed nationality, the majority of the jurors being either Indians or Europeans and Americans according as the accused person is an Indian or an European subject of His Majesty."—*Statement of Objects and Reasons*, para 11.

The direction contained in this Chapter is to be followed only when a plea of status is raised. Where the offences mentioned in the complaint are all triable by a Second Class Magistrate and the fact that the accused is a European British subject is not admitted by the complainant and is not known to the Magistrate at the time the warrant is issued, it is open to the accused to submit to the jurisdiction of the Magistrate—*G. A. St. Gorge v. Uma Dutt*, A.I.R. 1939 All. 602, 1939 A.L.J. 574, 40 Cr.L.J. 917, 184 I.C. 313, 1939 A.W.R. 570, I.L.R. 1939 All. 851.

443. (1) *Where, in the course of the trial outside a presidency-town of any offence punishable with imprisonment, the accused person, at any time before he is committed for trial under section 213 or is asked to show cause under section 242 or enters on his defence under section 256, as the case may be, claims that the case ought to be tried under the provisions of this Chapter, the Magistrate inquiring into or trying the case, after making such inquiry as he thinks necessary, and after allowing the accused person reasonable time within which to adduce evidence in support of his claim, shall, if he is satisfied—*

(a) *that the complainant and the accused persons or any of them are respectively European and Indian British subjects or Indian and European British subjects, or*

(b) *that, in view of the connection with the case of both an European British subject and an Indian British subject, it is expedient for the ends of justice that the case should be tried under the provisions of this Chapter,*

record a finding that the case is a case which ought to be tried under the provisions of this Chapter, or, if he is not so satisfied, record a finding that it is not such a case.

(2) *Where the Magistrate rejects the claim, the person by whom it was made may appeal to the Sessions Judge, and the decision of the Sessions Judge thereon shall be final and shall not be questioned in any Court in appeal or revision.*

(3) *Where the Magistrate rejects the claim, he shall stay the proceedings until the expiration of the period allowed for the presentation of the appeal or, if an appeal is presented, until it has been decided.*

1226A. The old law has been materially altered, and the mere fact that the accused is an European British subject does not *ipso facto* entitle him to a right of any special procedure and does not specially restrict a Magistrate or a Court of Session in his or its power of punishment; nor is it necessary that the Magistrate should be a Justice of the Peace in order to have power to try the case—*Barnsfield*, 30 Cr.L.J. 918 (920), 118 I.C. 438, A.I.R. 1929 Lah. 187, Ind. Rul. 1929 Lah. 774.

There seem to be two fundamental conditions precedent for the trial of a case outside a presidency town under the provisions of this Chapter, namely that the accused person shall claim that the case ought to be tried under the provisions of this Chapter and that the Magistrate shall make an enquiry and record a finding that the case is a case which ought to be tried under the provisions of the Chapter—*Plucknett v. Emp.*, A.I.R. 1939 Cal 545 (554), I.L.R. (1939) 1 Cal. 162, 184 I.C. 757, 43 C.W.N. 120, 41 Cr.L.J. 72 (81), 12 R.C. 251.

The mere fact of the accused person being an European British subject does not entitle him to the benefit of Chapter XXXIII. He must claim before the committing Magistrate to be tried under the special procedure, and the Magistrate must find that the necessary ingredients are present. If any such claim is made prior to commitment, but there is no finding by the Magistrate, the question cannot be raised in the Sessions Court. If a claim is made and the Magistrate finds favourably to the accused, the order is final and the Sessions Court cannot go behind it. If the finding of the Magistrate is adverse, the party should appeal, and the decision of the Sessions Judge would be final. The intention of the Legislature is clear that the point should not be raised in the High Court—*Hay*, 28 O.C. 230, 2 O.W.N. 469, 26 Cr.L.J. 1217, 88 I.C. 833.

It is possible for a European British subject to waive his right to be dealt with as such—*Plucknett v. Emp.*, A.I.R. 1939 Cal. 545 (555), 43 C.W.N. 120, I.L.R. (1939) 1 Cal. 162, 184 I.C. 757, 41 Cr.L.J. 72, following *Grant*, 12 Bom. 561. See also *E. L. Wise v. Emp.*, in Note 1227.

No special procedure is prescribed where both the complainant and the accused are European British subjects—*Barnsfield*, supra. This Chapter is only designed to apply to cases of racial distinction where there is a real clash between a European as defined in the Code on the one side and an Indian on the other or *vice versa*—*Plucknett v. Emp.*, A.I.R. 1939 Cal 545 (553), 43 C.W.N. 120, I.L.R. (1939) 1 Cal. 162, 184 I.C. 757, 41 Cr.L.J. 72, 12 R.C. 251.

The provisions of this section are not applicable to proceedings under sec 107, Cr. P. Code—*Christy v. Christy*, 35 Cr.L.J. 505, A.I.R. 1933 Lah. 1019, 1933 Cr.C. 1556, 147 I.C. 997.

Sub-section (1) of this section requires a finding to be recorded by the Magistrate—*E. L. Wise v. Emp.*, 39 Cr.L.J. 789 (790), 176 I.C. 705, 11 R.S. 35, A.I.R. 1938 Sind 150. The omission of the Magistrate to record his separate finding on the application under this section does not invalidate his proceeding if his committal order implies that he had come to a finding. It is sufficient that he decides under this section that the case ought to be tried under the provisions of this Chapter, and, consequently, commits the case for trial to the Court of Session under sec 446 (1), Cr. P. Code—*M. I. Mamsa v. The King*, 39 Cr.L.J. 470, 174 I.C. 824, 10 R.R. 433, A.I.R. 1938 Rang. 105.

A claim to be tried under the provisions of Chapter XXXIII is wholly different from a claim to be tried as an European British subject, etc., under sec. 528A. So far as the former claim is concerned, the question of the status of the claimant does not always arise, as is evident from the provisions of clause (b) of sec. 443. In a claim to be dealt with as an European or Indian British subject (under sec. 528A), the claimant has to prove his own status, but in a claim to be tried under the provisions of Ch. XXXIII the claimant may or may not have to do so—*Martindale*, 52 Cal. 347, 29 C.W.N. 447, 26 Cr.L.J. 401.

This chapter does not apply to Presidency Towns. There is no provision in the Code for enabling a person to put forward a claim to be tried under Chapter XXXIII either before a Magistrate holding an inquiry or trial in a Presidency Town, or before the High Court during the trial of a case. It is unreasonable to suppose that the Legislature even intended that when there was no knowing whether there would be a conviction or an acquittal (and both are open to appeal under sec. 449) an inquiry might be asked for and the Court required to decide on the question as to whether if tried outside a presidency-town the case would have been triable under the provisions

of Chapter XXXIII. The only object of such an inquiry is that the result of it may be availed of for the purposes of an appeal by the accused in the case of a conviction and by the Crown in the case of an acquittal. The proper time to raise the question is when leave to appeal is applied for under sec. 449 (c)—*Martindale*, supra.

The words "offence punishable with imprisonment" mean all serious offences for which a sentence of imprisonment might be passed, as distinguished from petty offences punishable with fine only. The words include the offence of murder, for although it is punishable with death or transportation for life, still it often happens that a person charged with murder is ultimately convicted of a lesser offence punishable with imprisonment—*Armstrong*, 33 P.L.R. 578, 1932 Cr.C. 628 (629), 33 Cr.L.J. 529, 1932 Cr.C. 628, A.I.R. 1932 Lah. 490, 137 I.C. 763, Ind. Rul. 1932 Lah. 352, 13 Lah. 755.

Reasonable time within which to adduce evidence:—The right to make a claim that the case ought to be tried under the provisions of this Chapter is an absolute right of the accused and cannot be defeated except on the merits, and in order to come to a finding on the merits, the Magistrate is required to follow the procedure laid down in the section. He may make such inquiry as he thinks necessary: This is left to his discretion, but what is not discretionary is that he shall allow the accused person reasonable time within which to adduce evidence in support of his claim. This requirement of the section is indeed mandatory, and it is not open to the Magistrate on any grounds whatsoever to refuse this opportunity—*Nitya Nanda Sarma v. Emp.*, 41 C.W.N. 996 (1997).

Proof of status:—A statement in an affidavit by the accused's wife that she heard from their grand-parents while they were all living together that the accused's grandfather was born in England of English parent, though not controverted by the Crown by a counter-affidavit, is merely hearsay evidence and is not sufficient to establish the status of the accused as an European British subject—*Thomas*, 53 Cal. 746, 98 I.C. 248, A.I.R. 1926 Cal. 1203, 27 Cr.L.J. 1304 (1306). In an application for leave to appeal under sec. 449 (c), the affidavit of the accused as to his nationality was held to be admissible—*Gallagher*, 54 Cal. 52, 101 I.C. 657, A.I.R. 1927 Cal. 307, 28 Cr.L.J. 481 (482).

Revision:—The Legislature has provided an appeal from an order rejecting a claim under this section, but it has provided no appeal from an order accepting such a claim. In the absence of an appeal revision is always open unless there is something special barring revision. There is nothing special barring revision in such a case—*Christy v. Christy*, 35 Cr.L.J. 505, A.I.R. 1933 Lah. 1019, 1933 Cr.C. 1556, 147 I.C. 997.

The words "rejects the claim" in sub-section (2) must mean "rejects the claim on coming to a finding on the merits of the claim in compliance with the provisions of sub-section (1) of sec. 443." Where the Magistrate disposed of the matter without giving any time to the accused to adduce evidence, as he thought that the application was a mere pretext for obtaining a further adjournment of the case, the Magistrate was, in so doing, plainly transgressing the provisions of the statute, and, in so far as he did so, his order was improper, if not without jurisdiction. Such an order cannot be hit by sub-sec. (2) of this section. Sub-section (2) is not intended in any way to bar the High Court's power of revision in a case like this where the express provisions of the statute are not complied with—*Nitya Nanda Sarma v. Emp.*, 41 C.W.N. 996 (1997).

444. *For the purposes of section 443, "complainant" means any person making a complaint or, in relation to any case of which cognizance is taken under clause (b) of section 190, sub-section (1), any person who has given information relating to the commission of the offence within the meaning of section 154:*

Definition of "complainant."

Provided that a Public Prosecutor, a public servant, a member, officer or servant of any local authority, a railway servant as defined in section 3 of the Indian Railways Act, 1890, or an officer or servant of any company, association or other body to which the Provincial Government may, by general or special order published in the Official Gazette, declare the provisions of this section to apply, shall not, by reason only of the fact that he has made a complaint of, or given information of, an offence in his capacity as such Public Prosecutor, public servant, railway servant, member, officer or servant, be deemed to be a complainant within the meaning of this section, nor shall a police officer be so deemed by reason only of the fact that a report under section 173 relating to a case has been made by or through him.

Amendment:—The words "Provincial Government" and "Official Gazette" have been substituted for "Local Government" and "local official Gazette" respectively in this section by sec 4 of the Government of India (Adaptation of Indian Laws) Order, 1937.

1226B. The proviso lays down that the word "complainant" does not include a person who, although he is an European British subject, is merely an instrument which sets the Court in motion. Thus, where a public servant (who is an European British subject) makes a complaint, under the orders of the Government, as public servant, this Chapter does not apply—*Zahir Haider*, 7 P.L.T. 367, 27 Cr.L.J. 1041 (1059), A.I.R. 1926 Pat. 566, 97 I.C. 17. The proviso is intended to exclude from the definition of "complainant" such persons as public prosecutors or public servants who make complaints or lodge informations before the police in their official capacity, irrespective of whether or not they have personal knowledge of the facts or a personal interest in the case; i.e., the definition excludes not only those public servants who file complaints as mere automatons of the Government but also those public servants who file complaints as mere automatons and at the same time have personal knowledge of the facts of, and a personal interest in, the case—*Mrs. Burchell*, 20 S.L.R. 178, 27 Cr.L.J. 770 (771), 95 I.C. 306, A.I.R. 1926 Sind 230.

Even the Police Inspector cannot rightly be deemed to be a complainant for the purposes of the provisions of this Chapter and so if a Police Inspector who in an official document was described as "the complainant" is not 'a complainant' for the purposes of this Chapter, *a fortiori* the durwan or any other adult or child who gives information which is recorded in the general diary kept in Calcutta that a certain person was lying on the floor with blood marks on his person ought not to be considered as a 'complainant' for the purposes of this Chapter—*Plucknett v Emp*, A.I.R. 1939 Cal. 545 (556), 43 C.W.N. 120, I.L.R. (1939) 1 Cal. 162, 184 I.C. 757, 41 Cr.L.J. 72, 12 R.C. 251.

This chapter does not apply where the complaint is preferred against a British Indian subject by an European British subject (railway servant) on behalf of a Railway Administration—*Joseph v. Lammond*, 3 Bur.L.J. 147, 26 Cr.L.J. 190, 83 I.C. 894, A.I.R. 1924 Rang. 373. A sleeper-passing officer of a railway is employed in connection with the service of the railway and is therefore a "railway servant" as defined in sec. 3 (7) of the Railways Act. He is, therefore, not a "complainant" coming within the definition of sec. 444, Cr. P. Code—*Ibid*.

445. (1) *Where a Magistrate or a Sessions Judge decides under section 443 that a case ought to be tried under the provisions of this Chapter and the case is a summons case, the Magis-*

Procedure in summons cases.

trate trying the same shall direct that the case be referred to a Bench of two Magistrates and shall send a copy of such order to the District Magistrate who shall forthwith provide for the constitution of a Bench of two Magistrates of the first class, of whom one shall be an European and the other an Indian, for the trial of the case.

(2) Where the Magistrates, constituting the Bench by which a case is tried under this section differ in opinion, the case together with their opinions thereon, shall be laid before the Sessions Judge, who may examine any party or recall and examine any witness who has already given evidence in the case, and may call for and take any further evidence, and shall thereafter pass such judgment, sentence or order in the case as he thinks fit and as is according to law.

(3) Any person convicted by a Bench under this section shall have the same right of appeal as if he had been convicted by a Magistrate of the first class, and any person convicted by a Sessions Judge under sub-section (2) shall have the same right of appeal to the High Court as if he had been convicted by the Sessions Judge at a trial held by the Sessions Judge under this Code.

(4) In any case in which it is impracticable to constitute a Bench in accordance with the provisions of sub-section (1) in any district, the District Magistrate shall transfer the case for trial by a like Bench to such other district as the High Court may, by general or special order, direct.

(5) Notwithstanding anything contained in this section, the Provincial Government may, by notification in the Official Gazette, direct that all summons-cases tried under the provisions of this chapter in any district specified in the notification shall be tried as if they were warrant-cases in accordance with the provisions hereinafter in this Chapter laid down for the trial of warrant-cases.

Amendment:—The words "Provincial Government" and "Official Gazette" have been substituted for "Local Government" and "local official Gazette" respectively by sec. 4 of the Government of India (Adaptations of Indian Laws) Order, 1937.

Sub-section (5):—"The Local Government and High Courts were consulted on these proposals of the Committee; from the opinions received it is clear that in many areas in India these proposals, i.e., sub-sections (1), (2) and (4), will be impracticable, and it is considered that in any case the adoption of the procedure proposed for similar warrant cases (sec. 446), namely, commitment to and trial in a Court of Session by jury, would not be more expensive than the proposals of the Committee. Accordingly, it is proposed (in analogy with the powers given to Local Government by sec. 269) to permit Local Governments to direct that in particular districts such cases shall be triable according to the provisions laid down for the trial of similar warrant cases"—*Statement of Objects and Reasons*, para 6.

446. (1) *Where a Magistrate or a Sessions Judge decides under section 443 that a case ought to be tried under the provisions of this Chapter and the case is a warrant-case, the Magistrate inquiring into or trying the case shall, if he does not discharge the accused under section 209 or section 253, as the case may be, commit the case for trial to the Court of Session, whether the case is or is not exclusively triable by that Court.*

(2) *Where an accused is committed to the Court of Session under sub-section (1), the Court shall proceed to try the case as if the accused had required to be tried in accordance with the provisions of section 275, and the provisions of that section and the other provisions of Chapter XXIII, so far as they are applicable, shall apply accordingly:*

Provided that where the trial before the Court of Session would in the ordinary course be with the aid of assessors and the accused, or all of them jointly, require to be tried in accordance with the provisions of section 284A, the trial shall be held with the aid of assessors all of whom shall, in the case of European British subjects, be persons who are Europeans or Americans or, in the case of Indian British subjects, be Indians.

1227. Where the complainant is an Indian, and one of the accused person is an European British subject, and the Magistrate decides that the case ought to be tried under the provisions of this Chapter, and the case is a warrant case, the Magistrate must commit the case to the Sessions. He cannot, after making the above decision, assume jurisdiction in respect of the Indian accused persons by discharging the European accused—*Banarsi Das*, 51 All. 483, 27 A.L.J. 188, 30 Cr.L.J. 218, 113 I.C. 764, A.I.R. 1929 All. 84, Ind. Rul. 1929 All. 188.

Before a Magistrate makes a commitment under clause (1) of this section he must hold a preliminary inquiry under Chap. XVIII and consider whether there are grounds for discharging the accused under sec. 209 or sec. 253, Cr. P. C.; and he cannot do this without taking evidence for the prosecution—*K. T. Keshan*, 35 Cr.L.J. 174, 146 I.C. 879, 12 Pat. 707, A.I.R. 1933 Pat. 677, 14 P.L.T. 726, 1933 Cr.C. 1491; *G. A. St. George v. Uma Dutt*, 40 Cr.L.J. 917, 184 I.C. 313, 12 R.A. 217, 1939 A.W.R. (H.C.) 570, 1939 A.Cr.C. 117, I.L.R. 1939 All. 851, A.I.R. 1939 All. 602 (604), 1939 A.L.J. 574. It is open to him to discharge the accused under sec. 209 or sec. 253, Cr. P. Code—*G. A. St. George v. Uma Dutt*, supra.

This section lays down that if the Magistrate does not discharge the accused under sec. 209, he must commit the case to the sessions; that is, he must frame a charge under sec. 210, and make an order of commitment under sec. 213 (1). But once he has framed a charge, he cannot cancel it and discharge the accused under sec. 213 (2)—*Rashid Ahmad v. Rich*, 1931 A.L.J. 526, 32 Cr.L.J. 866 (867), 132 I.C. 332, Ind. Rul. 1931 All. 492, 1931 Cr.C. 622, A.I.R. 1931 All. 366, 53 All. 690; *E. L. Wise v. Emp.*, 39 Cr.L.J. 789, 176 I.C. 705, 11 R.S. 35, A.I.R. 1938 Sind 150. In other words, sec. 446 does not mean that all the procedure of Chap. XVIII will apply to the case.

When proceedings have been taken at the accused's request under this Chapter, the Magistrate has no option but to commit him to the Court of Session to take his trial, even if he waives his right subsequently and wants to be tried by the Magistrate under the ordinary procedure. The High Court can, however, take action under sec. 561-A, Cr. P. C., and direct that the proceedings be taken out of Chap. XXXIII

and be placed under Chap. XXI, Cr. P. Code. There is no reason why the High Court should compel the accused to continue to avail himself of a privilege which, there is good reason to believe, his impoverished state will render infructuous, if not harmful. This Chapter provides for a special procedure of which certain individuals at their own request are permitted to avail themselves. Therefore the accused can waive a right which he need never have claimed provided his request can be granted without prejudice to the trial of his co-accused or business of the Courts—*E. L. Wise v. Emp.*, supra. See also *Plucknett v. Emp.*, A.I.R. 1939 Cal. 545 (555), 43 C.W.N. 120, I.L.R. (1939) 1 Cal. 162, 184 I.C. 757, 41 Cr.L.J. 72.

Magistrate:—The 'Magistrate' in sec. 446 (1), Cr. P. C., means a Magistrate having jurisdiction to inquire into the case. Section 446 must be read with sec. 29-A of the Code. Under sec. 29-A, Cr. P. C., a Second Class Magistrate has no jurisdiction to inquire into or try offences under secs. 403, 417 and 427, I. P. C., which are punishable otherwise than with fine not exceeding Rs. 50. So he has no authority to commit the accused to the Court of Session. The only course open to him is to return the complaint to the complainant to be presented to a Magistrate having jurisdiction to entertain it—*G. A. St George v. Uma Dutt*, supra.

Trial to be by jury:—When an European British Subject is committed to the Court of Session under the provisions of sec. 446 (2) the trial must be in accordance with sec. 275, that is to say, the accused *must be tried by a jury*, the majority of whom shall, if before the first juror is called and accepted the accused so requires, consist of persons who are Europeans or Americans. But when the trial before the Court of Session would in the ordinary course be with the aid of assessors, the accused has the right under the proviso to sec. 446, to be tried with the aid of assessors, all of whom shall be of the category within which the accused comes. By "ordinary course" is here meant the course which would be followed in the absence of a claim by the accused to be dealt with under the provisions of Chap. XXXIII or in the absence of a Notification by the Local Government under the provisions of sec. 269—*Bray v. Crown*, 5 Lah. 515 (517, 518).

If the Magistrate decides that the case is one to be tried under this Chapter, and the case being a warrant case, he commits it to the Court of Session, the decision of the Magistrate is final, and the Sessions Judge has no discretion in the matter, having regard to the provisions of sub-sec. (2). The Sessions Judge would be acting illegally if he refuses to hold the trial by jury and holds it with the aid of assessors—*Armstrong*, 33 P.L.R. 578, 1932 Cr.C. 628 (630), 33 Cr.L.J. 529, 137 I.C. 673, Ind. Rul. 1932 Lah. 352, 1932 Cr.C. 628, A.I.R. 1932 Lah. 490, 13 Lah. 755.

447. *If at any stage of an inquiry or trial under this Code*

Court to inform accused persons of their rights in certain cases.

it appears to the Magistrate that the case is or might be held to be a case which ought to be tried under the provisions of this Chapter, he shall forthwith inform the accused person of his rights under this Chapter.

The omission by the Magistrate to inform the accused of his right to be tried under this Chapter is curable by the provisions of sec. 534—*Zagariya*, 3 Rang. 220, 4 Bur.L.J. 41, 89 I.C. 459, A.I.R. 1925 Rang. 239, 26 Cr.L.J. 1371. See also *Scott*, 36 Cr.L.J. 593 (596), 154 I.C. 837, A.I.R. 1935 Rang. 67, 13 Rang. 104, 1935 Cr.C. 167 (F.B.).

References to Sessions Judge to be construed as references to High Court in Rangoon.

448. *[This section has been omitted by the Government of India (Adaptation of Indian Laws) Order, 1937].*

Special provisions relating to appeal.

449. (1) *Where—*

- (a) *a case is tried by jury in a High Court or Court of Session under the provisions of this Chapter, or*
- (b) *a case which would otherwise have been tried under the provisions of this Chapter is under this Code committed to or transferred to the High Court and is tried by jury in the High Court, or*
- (c) *a case is tried by jury in the High Court in a Presidency-town and the High Court grants leave to appeal on the ground that the case would, if it had been tried outside a presidency-town, have been triable under the provisions of this chapter,*

then, notwithstanding any thing contained in section 418, or section 423, sub-section (2), or in the Letters Patent of any High Court, an appeal may lie to the High Court on a matter of fact as well as on a matter of law.

(2) Notwithstanding anything contained in the Letters Patent of any High Court, the Provincial Government may direct the Public Prosecutor to present an appeal to the High Court from an original order of acquittal passed by the High Court in any such trial as is referred to in sub-section (1).

(3) An appeal under sub-section (1) or sub-section (2) shall, where the High Court consists of more than one Judge, be heard by two Judges of the High Court.

See Para 7 (b) and (c) of the *Statement of Objects and Reasons*.

Amendment:—The words "Provincial Government" have been substituted for "Local Government" by sec. 4 of the Government of India (Adaptation of Indian Laws) Order, 1937.

1227A. Appeal:—*Matter of fact, matter of law* :—The accused, on appearing before the committing Magistrate, asserted his right to be tried as an European British subject, and the Magistrate being satisfied that he was one, passed an order that he was to be dealt with under sec 443. In the trial before the Sessions Judge, the prosecution did not take any steps to have the Magistrate's order set aside, but had him charged and tried in the ordinary way. On appeal from the conviction, held that under this section, the appeal lay on a matter of fact as well as on a *matter of law*, and the accused could question the legality of the conviction, even though there might not be any foundation for his claim to be tried under this chapter—*Singleton*, 29 C.W.N. 260, 41 C.L.J. 87, 26 Cr.L.J. 662. This section lays down that in cases tried by jury, an appeal lies to the High Court on a matter of fact as well as on a matter of law; therefore, in a case tried under this chapter, the finding of a jury on a question of fact is not final; and, therefore, to justify an interference by the High Court under sec. 307, the finding of the jury need not be manifestly wrong or perverse—*Crown v. Bimal Parshad*, 6 Lah. 98, 26 P.L.R. 263, 26 Cr.L.J. 1241. The terminology of this section is so clear and definite that there is hardly any room for entertaining any uncertainty about the plenary powers of the High Court. It cannot, with due conformity to the law so clearly worded, refuse to entertain an appeal on a matter of fact notwithstanding that the jury's verdict is unanimous and concurred in by the Judge. Nevertheless the powers, un-

restricted as they are, must be exercised in accordance with the well recognised principles governing appeals in general and due weight must be given to the opinions of the Sessions Judge and the jury—*James Doudall*, 37 Cr.L.J. 607 (609), 162 I.C. 430, A.I.R. 1936 Nag. 103, 31 N.L.R. 215 (Sup.).

The right of appeal under sec. 449 (1) depends not upon whether in certain circumstances the accused might have been tried under the provisions of Chap. XXXIII, but whether he was in fact so tried. Before it can be held that there has been a trial by a jury in the High Court under the provisions of Chap. XXXIII within the meaning of sec. 449 (1) (a), it is incumbent upon the accused to satisfy the Court that he had duly preferred a claim before the Magistrate that the case ought to be tried under the provisions of Chap. XXXIII, before he was committed for trial and that upon such claim having been made, the Magistrate after making such inquiry as he deemed necessary and being satisfied that the status of the complainant and the accused respectively were such as to entitle the accused to a trial under Chap. XXXIII, had recorded a finding that the case was one which ought to be tried under the provisions of that Chapter or that the Magistrate on the claim having only been made to him in that behalf had rejected the claim but that on appeal to the Sessions Judge, the claim of the accused to be tried under Chap. XXXIII had been granted. The Legislature plainly intended and enacted that before a trial could be held under the provisions of Chap. XXXIII, the question whether the complainant and the accused possessed different nationalities should be investigated and determined by the Magistrate as a preliminary issue in the case before the accused was committed to trial, and that unless the claim was duly made and had been determined by the Magistrate or by the Sessions Judge as might be, the right of the accused to be tried in accordance with the provisions of Chap. XXXIII did not accrue—*Scott*, 36 Cr.L.J. 595, 154 I.C. 837, A.I.R. 1935 Rang. 67, 13 Rang. 104, 1935 Cr.C. 167 (F.B.).

The foundation of a right to obtain an appeal against the verdict and sentence given at a trial in the Sessions in the High Court contrary to the normal rights of a convicted person as laid down in the Letters Patent depends primarily and fundamentally upon the status of the applicant—*Plucknett v. Emp.*, A.I.R. 1939 Cal. 545 (553), 43 C.W.N. 120, I.L.R. (1939) 1 Cal. 162, 184 I.C. 757, 41 Cr.L.J. 72, 12 R.C. 251.

Leave to appeal:—It is desirable that an application for leave to appeal under clause (c) should be made to the Judge who tried the case. The right of appeal depends upon extraneous circumstances which have nothing to do with the guilt of the accused, and the trying Judge is better qualified than any one else to decide whether these circumstances exist or not—*Martindale*, 52 Cal. 347, 29 C.W.N. 447, 26 Cr.L.J. 401, A.I.R. 1925 Cal. 14, 84 I.C. 1041, 40 C.L.J. 256. But in another Calcutta case it has been held that, since no appeal would lie against the decision of the Single Judge refusing leave to appeal, it is better in the interests of justice that the application for leave to appeal should be heard by a Division Bench—*Turner*, 52 Cal. 636, 29 C.W.N. 458, 41 C.L.J. 325, 26 Cr.L.J. 835, A.I.R. 1925 Cal. 673, 86 I.C. 659.

Application for leave to appeal should be made with notice to Crown, but once the leave is granted without such notice, it cannot be revoked on the ground of want of such notice—*Martindale*, *supra*.

This section gives the right of appeal against the decision of a High Court in three classes of cases. The first class are the cases tried by jury in a High Court under the provisions of this chapter and can only apply to a High Court outside a Presidency Town. The second class of cases are those which would otherwise be tried under the provisions of this chapter but are committed or transferred to the High Court and tried by jury in the High Court. In these two classes of cases, an absolute right of appeal is given. But in classes of cases referred to in clause (c) the right of appeal is dependent on the condition of the granting of leave to appeal. The necessity of this condition appears to be due to the fact that in cases which come under clause (b) the question whether Chap. XXXIII is applicable or not has been decided before the case is committed or transferred to the High Court. But in cases which come under clause (c)

this question has not arisen, and it is to be decided by the High Court before leave to appeal is granted, and if that is decided in accused's favour, he is entitled as of right to an appeal—*Turner, supra*.

The High Court can only grant leave to appeal as laid down in sub-sec. (1) (c) on the unique ground that the case would, if it had been tried outside a presidency town, have been triable under the provisions of this Chapter, that is to say Ch. XXXIII—*Plucknett v. Emp.*, A.I.R. 1939 Cal. 545 (554), 43 C.W.N. 120, I.L.R. (1939) 1 Cal. 162, 184 I.C. 757, 41 Cr.L.J. 72, 12 R.C. 251.

Limitation:—An appeal to the High Court (Division Bench) from an order passed by a Judge presiding at the criminal sessions of the High Court, under clause (c) of this section is governed by Article 155 of the Limitation Act, and if that appeal is barred, an application for leave to appeal is also barred; and consequently, an application for the determination of the status of the accused as to his being an European British subject under sec. 449 (c) read with sec. 443 is necessarily out of time—*Thomas*, A.I.R. 1926 Cal. 1203, 98 I.C. 248, 53 Cal. 746, 27 Cr.L.J. 1304 (1306); *Gallagher*, 54 Cal. 52, 23 Cr.L.J. 481, 101 I.C. 657, A.I.R. 1927 Cal. 307; *Plucknett v. Emp.*, A.I.R. 1939 Cal. 545 (556), 43 C.W.N. 120, I.L.R. (1939) 1 Cal. 162, 184 I.C. 757, 41 Cr.L.J. 72.

The right of appeal against an order of acquittal is created by sec. 417, Cr. P. C., and sec. 449, in its application to appeals against acquittals merely has the effect of enlarging the scope of such appeals in certain classes of cases. The effect of Article 157, Sch. I, Limitation Act is to fix the period of limitation in respect of such appeals at six months in all classes of cases whatever may have been the form of trial and whatever may be the scope of the appeal—*Supdt. & Rem., Legal Affairs, Bengal v. Bagirath Mahto*, 35 Cr.L.J. 1367, 151 I.C. 662, A.I.R. 1934 Cal. 610, 38 C.W.N. 854, 1934 Cr.C. 908, 59 Cr.L.J. 482.

Practice:—Under the Rules of the Calcutta High Court, a vakil cannot appear for a party in an appeal from a trial held on the criminal sessions of the High Court. Therefore, the proper and the only permissible course in cases under this section, where a new right of appeal is given by the Code to the subject, is for this right to be exercised so long as the rules remain unchanged, in the way laid down by the rules, namely, on the footing that it is part of the business of the Court from which, as the rules stand, Vakils are excluded—*Satya Narain*, 55 Cal. 858, 32 C.W.N. 319 (328), 29 Cr.L.J. 1022, 112 I.C. 350, A.I.R. 1928 Cal. 675.

450-463. * * * *

Sections 453, 454, 455 and 459 are now re-enacted as secs. 528A, 528B, 528C and 528D, respectively. Sections 456—458 are incorporated in secs. 491 and 491A; sec. 460 is included in sec. 284A, sub-sec. (2); sec. 462 is now merged in sec. 326. The remaining sections (450, 451, 452, 461) are omitted.

1227B. Under the old Code, an European British subject had a right to claim to be tried by jury; that right was a substantive right and not a mere matter of procedure, and therefore, where the commitment was made prior to the coming into force of the Amendment Act of 1923, but the trial in the Sessions Court was held after its coming into force, held that the accused's right to be tried by jury was not lost, and he was not to be tried by the Judge with the aid of assessors—*Fitzmaurice*, 6 Lah. 262, 26 P.L.R. 415, 27 Cr.L.J. 421.

CHAPTER XXXIV.

LUNATICS.

464. (1) When a Magistrate holding an inquiry or a trial

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accused being lunatic.

has reason to believe that the accused is of unsound mind and consequently, incapable of making his defence, the Magistrate shall inquire into the fact of such unsoundness, and shall cause such person to be examined by the Civil Surgeon of the district or such other medical officer as the *Provincial Government* directs, and thereupon examine such Surgeon or other officer as a witness, and shall reduce the examination to writing.

(1A) *Pending such examination and inquiry, the Magistrate may deal with the accused in accordance with the provisions of section 466.*

(2) If such Magistrate is of opinion that the accused is of unsound mind and consequently incapable of making his defence, he shall record a finding to that effect and shall postpone further proceedings in the case.

Change:—Sub-section (1A) and italicised words in sub-section (2) have been added by sec. 120 of the Cr. P. Code Amendment Act, XVIII of 1923. "The first amendment is consequential on the amendment in sec. 466. The second requires the Magistrate to record a finding if he is of opinion that the accused is of unsound mind and incapable of making a defence"—*Statement of Objects and Reasons* (1914).

The words "Provincial Government" have been substituted for "Local Government" by sec. 4 of the Government of India (Adaptation of Indian Laws) Order, 1937.

1228. Application of section:—The provisions of this Chapter are incidental provisions for dealing with exceptional classes of persons. This Chapter is not to be so construed as to override the rules of general procedure, except in so far as the special provision contained in it is clearly incompatible with the general provisions—1894 P.R. 11. When a charge of an offence to which Chap. XVIII applies is made before a Magistrate, he ought in the first place to make an inquiry into the truth of the charge; it is only when he is satisfied after such inquiry that there is a *prima facie* case against the accused that he can make the inquiry prescribed by this section into the question of the unsoundness of mind of the accused—*Ibid*.

The procedure laid down in this Chapter does not strictly apply to proceedings under sec. 488, Cr. P. C., because the counter-petitioner is not an accused. However, the provisions of this section at least are those which a Court of equity and good conscience would naturally follow; that is, if it finds that the counter-petitioner is insane and incapable of understanding questions put to him and giving rational answers, it must postpone further proceedings until it is satisfied that the counter-petitioner is capable of so understanding the proceedings—*Appachi Goundan v. Kuttiammal*, 48 Mad. 388.

The question involved in this section is whether the accused is of unsound mind at the time of trial, and, therefore, incapable of making his defence; and this question should not be confused with the question raised under sec. 84, I. P. C., as to whether the accused was or was not of unsound mind at the time when he committed the offence with which he is charged—*Chadami Lal*, 1900 A.W.N. 47; *Nabi Ahmad Khan*, 9 O.W.N. 355, 1932 Cr.C. 373 (374), 33 Cr.L.J. 542, 137 I.C. 800. The question whether the accused was of unsound mind at the time of the alleged offence is an entirely separate

one to be inquired into in an entirely separate manner (see secs. 469-471)—*Santokh*, 7 Lah. 315, 27 Cr.L.J. 552, 93 I.C. 1048, 2 Lah. Cas. 939, A.I.R. 1926 Lah. 498, 27 P.L.R. 454. See *Bahadur*, 9 Lah. 371, cited under sec. 469.

The first point that a Court has to decide when an accused person is brought before it who is suspected or alleged to be a lunatic, and before the Court can even proceed with the trial, is whether the accused person appears to the Court to be of unsound mind and incapable of making his defence—*Nabi Ahmad Khan*, supra. When an issue is raised as to the soundness of the mind of the accused person, the Court is bound to inquire, before it begins to record evidence, whether the accused is or is not incapacitated by unsoundness of mind from making his defence. If it omits to do so, the subsequent inquiry about the soundness or unsoundness of mind does not cure the defect—*Jhabbu*, 42 All. 137.

If the Medical Officer reports that there is some mental defect which amounts to feeble-mindedness, but that his condition does not warrant to certify him as insane, as he understands the nature of the act, the Magistrate is justified in proceeding with the inquiry or trial. See *Nabi Ahmad Khan*, supra.

Examination by Civil Surgeon:—A Magistrate cannot consign a lunatic to an asylum or jail on his own unprofessional opinion. He must have before him the deliberate statements of the Medical Officer reduced into writing—*Milan*, 1 Bur. 87.

A mere certificate of a Medical Officer of the District that the prisoner is of unsound mind and incapable of making his defence is not sufficient evidence of the prisoner's insanity. The Medical Officer should be called as a witness and carefully examined—*Ram Rutton*, 9 W.R. 23, 2 Weir 580. The mandatory provisions of this section require the Magistrate not only to have the accused examined by the Civil Surgeon of the district or such other Medical Officer as the Local Government directs, but to examine such officer as a witness. Where the Magistrate did not examine the Civil Surgeon but examined the House Surgeon who was not an officer empowered in that behalf by the Local Government, his order could not be sustained—*Narain*, A.I.R. 1933 Sind 267 (270), 1933 Cr.C. 941, 146 I.C. 850, 35 Cr.L.J. 200. In *Nabi Ahmad Khan* (supra), however, neither the committing Magistrate nor the Sessions Judge examined the Medical Officer as a witness in Court, but merely acted upon his report.

When the evidence of the Medical Officer cannot be considered as decisive on the point of the prisoner's state of mind, evidence must be let in regarding his ordinary habits and behaviour, and his demeanour both before and after the commission of the alleged offence—*Vaumbilee*, 5 Cal. 826. This section cannot be regarded as directing that the enquiry shall be limited to an examination by a Civil Surgeon, or other Medical Officer, of the person concerned. An opportunity should be given to the accused for rebutting the evidence given by the Civil Surgeon—*Onkar Dat*, 34 Cr.L.J. 914, 144 I.C. 1031, 10 O.W.N. 719, A.I.R. 1933 Oudh 362, 1933 Cr.C. 1042; *Sherdil Sher Baz*, 39 Cr.L.J. 737, 176 I.C. 447, A.I.R. 1938 Pesh. 24, 11 R.Pesh. 14. The question as to whether the prosecution could also produce evidence was not considered in *Onkar Dat*'s case, but it would be contrary to all principles of administration of justice to allow one party to produce evidence and not allow the other party to do so. The evidence of the Civil Surgeon is not evidence produced by the prosecution. The examination of the Civil Surgeon is a duty which is placed by statute upon the Magistrate himself. It is obvious that the burden of proving that the accused is of unsound mind and incapable of making his defence lies upon the accused and it is for him to lead evidence on the point in the first place and such evidence as is led on his behalf can be rebutted by the prosecution—*Sherdil Sher Baz*, supra.

Postponement of further proceedings:—Where the Magistrate is of opinion that the accused is of unsound mind and therefore incapable of making his defence, he cannot try the accused—2 Weir 581. Nor can he legally acquit him. But he is bound to postpone further proceedings in the case, and either release him on security or detain him in custody and report the case to the Government (sec. 466)—2 Weir 581; *Roman*

Audheekharee, 10 W.R. 37, 1882 A.W.N. 106, 1900 A.W.N. 47; 1 W.P. 11. If on examination, the accused person appears to be insane and unable to understand questions and to return intelligible replies, the Magistrate should act under secs. 464 and 466 of the Code and not under sec. 341—*Ratanlal* 382.

465. (1) If any person committed for trial before a Court of Session or a High Court appears to the Court at his trial to be of unsound mind and consequently incapable of making his defence, the jury, or the Court with the aid

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of assessors, shall, in the first instance, try the fact of such unsoundness and incapacity, and if the jury or Court, as the case may be, is satisfied of the fact, the Judge shall record a finding to that effect, and shall postpone further proceedings in the case *and the jury, if any, shall be discharged.*

(2) The trial of the fact of the unsoundness of mind and incapacity of the accused shall be deemed to be part of his trial before the Court.

Change:—The italicised words at the end of sub-section (1) have been added by sec. 121 of Cr. P. C. Amendment Act, XVIII of 1923. "This amendment provides for the discharge of the jury in the event of the Court of Session or the High Court being satisfied that the accused is of unsound mind and incapable of making his defence"—*Statement of Objects and Reasons* (1914).

1229. Fact of insanity must be tried:—There are two different stages of procedure contemplated by this section. The first stage in the procedure laid down is that it must appear to the Court that the accused placed on his trial was of unsound mind and incapable of making his defence. The next stage that was to follow when it appeared to the Judge that the accused was of unsound mind and, consequently, incapable of making his defence, was that the fact of such unsoundness of mind and incapacity should be enquired into on the materials placed before the Court. Where it did not appear to the Judge that the accused was of unsound mind or that he was incapable of making his defence, it was not therefore necessary, much less was it incumbent upon the Judge, to adopt the procedure provided by the second part of this section, namely to hold an enquiry as to the unsoundness of mind of the accused placed on his trial, for the purpose of ascertaining whether he was incapable of making his defence—*Durga Charan Sing*, 41 C.W.N. 1312 (1313).

The provisions of this section are mandatory, and their non-compliance vitiates the trial. Where a Sessions Judge's mind is in doubt as to the mental state of the accused at the time of trial, it is incumbent upon him to hold an inquiry on the question whether the accused is capable of making his defence when he comes before him on commitment, and to take the opinion of the assessors on that question and to come to a decision before proceeding further with the trial—*Santokh*, 7 Lah. 315, 27 Cr.L.J. 552, 93 I.C. 1048, 2 Lah. Cas. 939, A.I.R. 1926 Lah. 498, 27 P.L.R. 454—*Ramnath*, 31 Cr.L.J. 899, 125 I.C. 767, A.I.R. 1930 All. 450.

The question of unsoundness of mind must be tried by the Judge *and jury*, and not by the Judge himself personally—*Bheekoo*, 19 W.R. 15. Where, after a trial has been once adjourned on account of the prisoner's insanity, the Zillah Surgeon reports that the prisoner is capable of making his defence, the Judge should find *with the aid of assessors* whether the prisoner is capable of making his defence, and cannot act merely on the letter of the Zillah Surgeon—*Kunnugan*, 2 Weir 582.

Again, the question of the unsoundness of mind must be tried in the first instance. The issue as to the unsoundness of mind of the accused is a preliminary issue, and

must be submitted to the jury first before proceeding with the trial—*Doorjodhan*, 19 W.R. 26; *Jhabbu*, 42 All. 137. The preliminary issue as to the unsoundness of mind and incapability of the accused to take his trial is to be tried by the jury, the moment the question of insanity is raised—*Radhanath*, 27 Cr.L.J. 896, 96 I.C. 160, 44 C.L.J. 285. See also *Ram Nath*, 31 Cr.L.J. 899, 125 I.C. 767, A.I.R. 1930 All. 450. Evidence must be led on the point as to whether the accused is of unsound mind or can stand his trial and understand the proceedings. It is not enough to merely put to the jury the question of the insanity of the accused—*Radhanath*, supra. If this procedure is not followed, the trial must be set aside, and the Sessions Judge must hold the trial before a fresh jury—*Radhanath*, supra. Where the question of unsoundness of mind or incapability of the accused of making his defence is not raised before the Court at all but there is only verbal application made by the pleader for the defence for an adjournment of the case in order that the accused may be kept under mental observation, that is not what is contemplated by this section and there is no case for an enquiry as contemplated by this section—*Durga Charan Sing*, 41 C.W.N. 1312 (1313, 1314).

Where in the course of his examination under sec. 364, the accused said that he was not in his senses when he tried to rob, it was held that the Court of Session should have acted under this section and tried the fact whether on the date the accused was called upon to plead he was or was not of unsound mind and capable or incapable of making his defence—*Jagdeo*, 15 A.L.J. 239. When the accused committed to the Sessions appears to be of unsound mind, the Sessions Judge is bound to try the fact of insanity first, and should not try it along with the trial for the offence—*Niaz Ali*, 1905 A.W.N. 2.

If in a case committed to the Sessions, objection is taken on behalf of the accused that he is of unsound mind, and the Civil Surgeon when examined as a witness on behalf of the accused states that the accused is a person of unsound mind and therefore not in a fit state to understand the proceedings and to stand his trial, the onus lies on the prosecution to prove that the accused is of sound mind. In such a case, it is improper for the Sessions Judge to charge the jury that it is for the defence to satisfy the Court that he is of unsound mind. But such a charge to the jury, though improper, does not amount to a misdirection so as to make the verdict of the jury on this point unacceptable specially if the verdict is unanimous—*Shib Das*, 51 Cal. 584 (586, 587).

In a trial at the Sessions, if a plea is taken on the prisoner's behalf under this section, that he is of unsound mind and incapable of making his defence, it is for the Crown to establish the soundness and capacity of the accused. The inquiry as to the soundness or unsoundness of the mind of the accused is a preliminary inquiry which is conducted for the satisfaction of the Court, and in that view the prosecution ought to commence and give their evidence—*Gopi Mohan Saha*, 51 Cal. 827 (828), 26 Cr.L.J. 276, 84 I.C. 340, A.I.R. 1925 Cal. 479 (*Day Murder Case*).

Where a Court entertains doubts as to the sanity of the accused, the Court should not merely put questions to the accused but should try the fact of such unsoundness of mind by examining the Civil Surgeon or some other medical officer, and taking such evidence as might have been procurable from the village at which the accused resides, with the view of ascertaining whether the accused had at any time prior to the commission of the crime exhibited symptoms of sanity—*Hira Panja*, 1 B.H.C.R. 33.

Where the Sessions Judge did not comply with the provisions of this section, but convicted the accused, held that the trial was vitiated, and the High Court set aside the conviction and ordered the Sessions Judge to hold an inquiry under this section before retrial on the charge—*Pala Singh v. K.E.*, 1905 P.R. 54, 3 Cr.L.J. 80; *Santokh*, 7 Lah. 315, 93 I.C. 1048, 2 Lah. Cas. 939, A.I.R. 1926 Lah. 498, 27 P.L.R. 454, 27 Cr.L.J. 552. Where on a reference for confirmation of a sentence of death, the High Court entertained doubts as to the accused's sanity, the case would be referred to the Sessions Judge for further inquiry—*Azao Bebee*, 2 W.R. 33.

1230. Postponement of trial:—Where the prisoner is found to be insane, the Sessions Judge should postpone the trial and proceed under sections 466 and 467,

instead of proceeding with the trial and acquitting the accused—*Ram Rattan*, 9 W.R. 23; *Noor Khan*, 1 W.R. 11, 3 W.R. 70; *Moorali*, 3 W.R. 57.

A Sessions Judge has no power to stay proceedings and direct an inquiry to be made into the state of the accused's mind, where it appears to him problematic whether the accused is capable of making his defence. The proper procedure to be followed is that prescribed by secs. 465 and 466—*Pisari Turaka*, 2 Weir 138 (139).

1231. Sub-section (2):—The preliminary inquiry held under this section is not a trial in the sense of ascertaining whether the accused is guilty or not of the offence charged—*Ghinua*, 3 P.L.J. 291, 19 Cr.L.J. 135, 43 I.C. 423.

466. (1) Whenever an accused person is found to be of unsound mind and incapable of making his defence, the Magistrate or Court, as the case may be, *whether the case is one in which bail may be taken or not*, may release him on sufficient security being given that he shall be properly taken care of and shall be prevented from doing injury to himself or to any other person, and for his appearance when required before the Magistrate or Court or such officer as the Magistrate or Court appoints in this behalf.

(2) If the case is one in which, *in the opinion of the Magistrate or Court*, bail should not be taken, or if sufficient security is not given, the Magistrate or Court, as the case may be, *shall order the accused to be detained in safe custody in such place and manner as he or it may think fit; and shall report the action taken to the Provincial Government.*

Provided that no order for the detention of the accused in a lunatic asylum shall be made otherwise than in accordance with such rules as the Provincial Government may have made under the Indian Lunacy Act, 1912.

Change:—This section has been amended as shown by the italicised words, by sec. 122 of the Cr. P. C. Amendment Act, XVIII of 1923. "This section is so amended as to allow bail to be granted at the discretion of the Court, in any case in which the accused is a lunatic, and the amendment also permits the accused to be kept in custody. The object in view is to delegate the power of the Local Government, and to do away with the existing distinction in procedure between bailable and non-bailable cases"—*Statement of Objects and Reasons* (1914).

The words "Provincial Government" have been substituted in this section for "Local Government" by sec. 4, of the Government of India (Adaptation of Indian Laws) Order, 1937.

1232. Where a Magistrate or Sessions Judge, instead of proceeding under this section, tries the accused and acquits him on the ground of insanity, the order of acquittal is illegal—1882 A.W.N. 106; *Romon Audheekharee*, 10 W.R. 37, 9 W.R. 23; *Shah Mahomed*, 3 W.R. 70

Under the old section, the accused could be confined in a lunatic asylum or jail or some other place of safe custody only under the order of the Government, and the Magistrate's power over the accused ceased from such confinement, and he could not release him on security later on. He could deal with the accused only if the accused

was sent back to him under sec. 473 on a certificate that the accused was capable of making his defence—*Joy Hari*, 2 Cal. 356. But under the present section as amended, the Court itself will have power to detain the insane accused in a jail or other place of safe custody (but not a lunatic asylum) and in such a case it will not cease to have control over the accused, but will be able to release him afterwards on sufficient security being given.

There is nothing in this section to empower the Magistrate to add any other condition. Where the Magistrate ordered that the accused be released provided "a responsible gentleman comes forward to take care of her outside Karachi," held that the order of conditional release could not possibly be sustained—*Narain*, A.I.R. 1933 Sind 267 (270), 1933 Cr.C. 941, 146 I.C. 850, 35 Cr.L.J. 200.

467. (1) Whenever an inquiry or a trial is postponed under section 464 or section 465, the Magistrate or Court, as the case may be, may at any time resume the inquiry or trial, and require the accused to appear or be brought before such Magistrate or Court.

(2) When the accused has been released under section 466, and the sureties for his appearance produce him to the officer whom the Magistrate or Court appoints in this behalf, the certificate of such officer that the accused is capable of making his defence shall be receivable in evidence.

When a trial is postponed under sec. 465 on the ground of insanity of the accused, it should not be resumed at the point at which it was previously stopped, but should be commenced *de novo*, when the Court finds him capable of making his defence—*Kunnukan*, 2 Weir 582

468. (1) If, when the accused appears or is again brought before the Magistrate or the Court, as the case may be, the Magistrate or Court considers him capable of making his defence, the inquiry or trial shall proceed.

(2) If the Magistrate or Court considers the accused to be still incapable of making his defence, the Magistrate or Court shall again act according to the provisions of sec. 464 or sec. 465, as the case may be, and if the accused is found to be of unsound mind and incapable of making his defence, shall deal with such accused in accordance with the provisions of section 466.

Change:—The italicised words at the end of the section have been added by sec. 123 of the Cr. P. C Amendment Act, XVIII of 1923. This amendment is consequential to the amendment of sec. 466.

Sub-section (1) does no more than say that when the accused who has not been put on trial because he was of unsound mind appears or is again brought before the Magistrate or the Court, as the case may be, if the Magistrate or Court considers him capable of making his defence, the inquiry or trial shall proceed—*Ahmad Ali*, A.I.R. 1935 Pat. 501, 16 P.L.T. 828, 159 I.C. 963, 1935 Cr.C. 1286.

The inquiry or trial should commence *de novo*. See 2 Weir 589 cited under sec. 467.

Where the accused was not insane at the time of the preliminary inquiry, and he was duly committed, but he afterwards developed an attack of insanity, but when he was produced before the Sessions Judge, the Medical Officer reported that his state of mind was considerably better and that he was fit to stand his trial, whereupon the

There were four sub-sections in this section in the Code of 1898. Sub-sections (2) and (3) were repealed by the Indian Lunacy Act (IV of 1912) and sub-section (4) was numbered as sub-section (2). Previously the words at the end of sub-section (1) were "and shall report the case for the orders of the Local Government," so that the Court could not itself send the accused to a lunatic asylum or jail but had to report the case to the Local Government, and the latter gave orders for sending the accused to an asylum or jail. See 43 Bom. 134. But those words have been omitted by the Repealing and Amending Act, X of 1914, and its effect is that Magistrates and Courts are no longer required to report cases for the orders of the Local Government but are themselves competent to direct the detention of the accused in an asylum or jail or some other place prescribed for the reception of criminal lunatics—*Nga E*, 8 Bur.L.T. 286, 16 Cr.L.J. 670, 30 I.C. 654; *Meiku*, 22 O.C. 259, 21 Cr.L.J. 46, 54 I.C. 254. But it does not deprive the power of the Government to detain the accused in some other place of custody, under the provisions of the Indian Lunacy Act (IV of 1912). The Government have powers, in spite of this section, to decide the future fate of the lunatic—*Irani Hasan*, 25 Bom.L.R. 286, 26 Cr.L.J. 348, 84 I.C. 652.

As clauses (2) and (3) of sec. 471, Cr. P. C., and the words "and shall report the case for the orders of the Local Government" at the end of clause (1) of the same section have been repealed by the Indian Lunacy Act of 1912 and the Repealing and Amending Act, 1914 (Act X of 1914) respectively, a Magistrate or Court is now competent under sec. 471 (1) of the Cr. P. C. (as it now stands), read with sec. 24 of the Indian Lunacy Act and Rules 53—55 of the rules framed under sec. 91 of the said Act, referred to above, to pass orders for the transfer of a criminal lunatic to a lunatic asylum without reference to Government. (*Vide* page 25 of Rules Relating to Lunatics, corrected up to August, 1925 and published by the Government of Bengal in 1926.)

1235. Application of section:—This section should be applied not only where the accused are insane persons, but also where the accused persons, though not insane, labour under defects which render their trial impossible. Thus, where a *deaf and dumb* person, who is unable to understand the proceedings of the trial, is found guilty of murder, the proper course to be taken is to treat him as a lunatic and to proceed under sec. 471—*Dost Muhammad*, 1911 P.R. 13, 12 Cr.L.J. 613, 12 I.C. 989, following *Gehna*, 1889 P.R. 37. This section does not compel the Court to send the accused to the lunatic asylum; all that is necessary is to see that such safeguards are taken as would keep him from mischief—*Mohammad*, 42 M.L.J. 72, 23 Cr.L.J. 71, A.I.R. 1922 Mad. 54, 65 I.C. 423, 30 M.L.T. 74, 1922 M.W.N. 10. This section contemplates the committing of a crime by a person who owing to the state of his mind cannot be deemed to have known the quality of his act. So the case of a deaf and dumb person does not come within this section when he is charged under sec. 411, I. P. C., inasmuch as it cannot be said in his case that he knew the property to have been stolen—*A Deaf and Dumb*, 37 Cr.L.J. 107, 159 I.C. 577, A.I.R. 1935 Pat. 451, 16 P.L.T. 568, 1935 Cr.C. 1168.

Where the Court below while acquitting an accused on the ground of insanity omitted to pass orders under sec. 471, the High Court in revision can pass the necessary orders. The passing of an order under sec. 471 by the High Court, after an acquittal by the Court below, does not amount to an alteration of a finding of acquittal into one of conviction within the meaning of sec. 439 (4)—*Mohammad*, *supra*.

The words "detained in safe custody" do not mean detained in the custody of friends or relatives; that is, the Magistrate cannot direct that the person acquitted under this section should be kept in the safe custody of his friends or relatives. This is evident from the language of sec. 475. All that the Magistrate can do is to detain the accused in a place of safe custody and report the matter to the Local Government, and it is the Local Government who can deliver the accused to any friend or relative under sec. 475—*Sisik Chandra*, 56 Cal. 208, 48 C.L.J. 148, 29 Cr.L.J. 847 (848); *Anonymous*, 2 Weir

was sent back to him under sec. 473 on a certificate that the accused was capable of making his defence—*Joy Hari*, 2 Cal. 356 But under the present section as amended, the Court itself will have power to detain the insane accused in a jail or other place of safe custody (but not a lunatic asylum) and in such a case it will not cease to have control over the accused, but will be able to release him afterwards on sufficient security being given.

There is nothing in this section to empower the Magistrate to add any other condition. Where the Magistrate ordered that the accused be released provided "a responsible gentleman comes forward to take care of her outside Karachu," held that the order of conditional release could not possibly be sustained—*Narain*, A.I.R. 1933 Sind 267 (270), 1933 Cr.C. 941, 146 I.C. 850, 35 Cr.L.J. 200.

467. (1) Whenever an inquiry or a trial is postponed under section 464 or section 465, the Magistrate or Court, as the case may be, may at any time resume the inquiry or trial, and require the accused to appear or be brought before such Magistrate or Court.

(2) When the accused has been released under section 466, and the sureties for his appearance produce him to the officer whom the Magistrate or Court appoints in this behalf, the certificate of such officer that the accused is capable of making his defence shall be receivable in evidence.

When a trial is postponed under sec. 465 on the ground of insanity of the accused, it should not be resumed at the point at which it was previously stopped, but should be commenced *de novo*, when the Court finds him capable of making his defence—*Kunnukan*, 2 Weir 582.

468. (1) If, when the accused appears or is again brought before the Magistrate or the Court, as the case may be, the Magistrate or Court considers him capable of making his defence, the inquiry or trial shall proceed.

(2) If the Magistrate or Court considers the accused to be still incapable of making his defence, the Magistrate or Court shall again act according to the provisions of sec. 464 or sec. 465, as the case may be, and if the accused is found to be of unsound mind and incapable of making his defence, shall deal with such accused in accordance with the provisions of section 466.

Change:—The italicised words at the end of the section have been added by sec. 123 of the Cr. P. C. Amendment Act, XVIII of 1923. This amendment is consequential to the amendment of sec. 466.

Sub-section (1) does no more than say that when the accused who has not been put on trial because he was of unsound mind appears or is again brought before the Magistrate or the Court, as the case may be, if the Magistrate or Court considers him capable of making his defence, the inquiry or trial shall proceed—*Ahmad Ali*, A.I.R. 1935 Pat. 501, 16 P.L.T. 828, 159 I.C. 963, 1935 Cr.C. 1286.

The inquiry or trial should commence *de novo*. See 2 Weir 589 cited under sec. 467.

Where the accused was not insane at the time of the preliminary inquiry, and he was duly committed, but he afterwards developed an attack of insanity, but when he was produced before the Sessions Judge, the Medical Officer reported that his state of mind was considerably better and that he was fit to stand his trial, whereupon the

Judge proceeded to try him, and throughout the trial the accused did not appear to be the least abnormal, *held* that the Sessions Judge acted rightly in proceeding with the trial—*Nabi Ahmad Khan*, 9 O.W.N. 355, 1932 Cr.C. 373 (375), A.I.R. 1932 Oudh 190, 137 I.C. 800, 33 Cr.L.J. 542, 18 A.I.Cr.R. 319.

Under sub-sec. (1), there does not appear to be any injunction upon the Magistrate or Court to take evidence as to capacity of the accused to make his defence. The view of the Magistrate or Court is made the criterion of whether action is required under sub-sec. (2). Where there was the certificate of the Inspector General of Jails before the Magistrate and the accused appeared in his Court, the Magistrate certainly had a basis for a decision as to whether sub-sec. (1) or sub-sec. (2) applied and there is no reason to hold that his decision was not arrived at under a due sense of responsibility—*Ahmad Ali*, *supra*.

469. When the accused appears to be of sound mind at the time of inquiry or trial, and the Magistrate

When accused appears to have been insane.

is satisfied from the evidence given before him that there is reason to believe that the accused committed an act which, if he had been of sound mind, would have been an offence, and that he was, at the time when the act was committed, by reason of unsoundness of mind, incapable of knowing the nature of the act or that it was wrong or contrary to law, the Magistrate shall proceed with the case, and, if the accused ought to be committed to the Court of Session or High Court, send him for trial before the Court of Session or High Court, as the case may be.

1232A. "The Magistrate shall proceed with the case," etc.:—Where the Magistrate is of opinion that the accused is of sound mind at the time of trial was of unsound mind at the time of committing an offence, the Magistrate cannot discharge the accused on that ground, but should proceed under secs. 470 & 471—2 Weir 582. A Magistrate can commit an accused to the Sessions, whom he finds to be sane at the time of the preliminary investigation, although at the time of committing the offence he was insane—*Ram Rutton*, 9 W.R. 23. This section must not be confused with secs. 464-465. If the committing Magistrate finds that the accused is sane at the time of the preliminary inquiry, but was insane at the time of committing the offence, he has no alternative but to proceed in accordance with this section; and it is not incumbent upon him to order a medical inquiry, or to try the issue of insanity. It is only when the case falls under secs. 464-465, that is, when the accused is insane at the time of the inquiry or trial, that the issue of insanity has to be tried before the trial for the offence is proceeded with—*Bahadur*, 9 Lah. 371, 29 Cr.L.J. 204 (206, 207), 106 I.C. 796.

Whenever a Magistrate acting under this section shall send for trial before the Court of Session an accused person regarding whose sanity at the time of committing the offence he entertains any doubt, he shall at the same time inform the jail authorities of the supposed state of the accused, in order that he may be placed under careful surveillance prior to his trial before the Court of Session—*Bom. H. C. Cir.*, p. 18.

If the accused was sane at the time of committing the offence, and is sane at the time of the trial, and is convicted, but subsequently becomes insane in jail, the Local Government will take steps to inquire into his mental condition. This is a matter for the Local Government and not for the Court—*Bahadur*, *supra*.

Presumption:—The law presumes every person who has attained the age of discretion to be sane, unless the contrary is proved; and where a lunatic has lucid intervals, the law presumes the offence to have been committed during such interval, unless it is proved that the act was committed during mental derangement—*Balu*, *Ratanlal* 172.

470. Whenever any person is acquitted upon the ground that, at the time at which he is alleged to have committed an offence, he was, by reason of unsoundness of mind, incapable of knowing the nature of the act alleged as constituting the offence, or that it was wrong or contrary to law, the finding shall state specifically whether he committed the act or not.

1233. Acquittal on ground of lunacy:—The fact of unsoundness of mind must be clearly and distinctly proved before any jury is justified in pronouncing a verdict of acquittal under sec. 84, *I. P. C.* It is not because a man commits a horrible murder or because he commits it while labouring under strong passions and feelings that therefore the world is to assume that he must have been insane when he committed the deed. Every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his crimes until the contrary is proved—*Nobin Chunder*, 20 W.R. 70 (71), Ratanlal 172. Where the prisoner killed his brother-in-law apparently without any enmity or quarrel, and the only motive given out by the prisoner was that he might be hanged by the authorities and go to heaven, it was held that the opinion of a medical witness as to the state of the accused's mind would be necessary—*Venkatesh Bhatta*, 2 Weir 583.

If the Magistrate finds that the accused is of sound mind at the time of trial, but was suffering from temporary insanity while he committed the offence, he should not discharge the accused, but acquit him and proceed under this section and sec. 471—*Lanka Chinna*, 2 Weir 582; *Katty Kishan*, 17 C.P.L.R. 113 (125), 1 Cr.L.J. 854.

471. (1) Whenever the *finding* states that the accused person committed the act alleged, the Magistrate or Court before whom or which the trial has been held, shall, if such act would, but for the incapacity found, have constituted an offence, order such person to be *detained* in safe custody in such place and manner as the Magistrate or Court thinks fit, and shall report the action taken to the Provincial Government.

Provided that no order for the detention of the accused in a lunatic asylum shall be made otherwise than in accordance with such rules as the Provincial Government may have made under the Indian Lunacy Act, 1912.

(2) The Provincial Government may empower the officer-in-charge of the jail in which a person is confined under the provisions of section 466 or this section, to discharge all or any of the functions of the Inspector-General of Prisons under section 473 or section 474.

Power of Provincial Government to relieve Inspector-General of certain functions.

1234. Change:—The word '*finding*' has been substituted for the word '*judgment*' and the word '*detained*' for the word '*kept*'; the words "and shall report the action taken to the Local Government" and the proviso have been added by sec. 124 of the Cr. P. C. Amendment Act, XVIII of 1923.

The words "Provincial Government" have been substituted in this section for "Local Government" by sec. 4 of the Government of India (Adaptation of Indian Laws) Order, 1937.

There were four sub-sections in this section in the Code of 1898. Sub-sections (2) and (3) were repealed by the Indian Lunacy Act (IV of 1912) and sub-section (4) was numbered as sub-section (2). Previously the words at the end of sub-section (1) were "and shall report the case for the orders of the Local Government," so that the Court could not itself send the accused to a lunatic asylum or jail but had to report the case to the Local Government, and the latter gave orders for sending the accused to an asylum or jail. See 43 Bom. 134. But those words have been omitted by the Repealing and Amending Act, X of 1914, and its effect is that Magistrates and Courts are no longer required to report cases for the orders of the Local Government but are themselves competent to direct the detention of the accused in an asylum or jail or some other place prescribed for the reception of criminal lunatics—*Nga E*, 8 Bur.L.T. 286, 16 Cr.L.J. 670, 30 I.C. 654; *Maiku*, 22 O.C. 269, 21 Cr.L.J. 46, 54 I.C. 254. But it does not deprive the power of the Government to detain the accused in some other place of custody, under the provisions of the Indian Lunacy Act (IV of 1912). The Government have powers, in spite of this section, to decide the future fate of the lunatic—*Imam Hasan*, 25 Bom.L.R. 286, 26 Cr.L.J. 348, 84 I.C. 652.

As clauses (2) and (3) of sec. 471, Cr. P. C., and the words "and shall report the case for the orders of the Local Government" at the end of clause (1) of the same section have been repealed by the Indian Lunacy Act of 1912 and the Repealing and Amending Act, 1914 (Act X of 1914) respectively, a Magistrate or Court is now competent under sec. 471 (1) of the Cr. P. C. (as it now stands), read with sec. 24 of the Indian Lunacy Act and Rules 53–56 of the rules framed under sec. 91 of the said Act, referred to above, to pass orders for the transfer of a criminal lunatic to a lunatic asylum without reference to Government. (*Vide* page 25 of Rules Relating to Lunatics, corrected up to August, 1925 and published by the Government of Bengal in 1926.)

1235. Application of section:—This section should be applied not only where the accused are insane persons, but also where the accused persons, though not insane, labour under defects which render their trial impossible. Thus, where a *deaf and dumb* person, who is unable to understand the proceedings of the trial, is found guilty of murder, the proper course to be taken is to treat him as a lunatic and to proceed under sec. 471—*Dost Muhammad*, 1911 P.R. 13, 12 Cr.L.J. 613, 12 I.C. 989, following *Gahna*, 1889 P.R. 37. This section does not compel the Court to send the accused to the lunatic asylum; all that is necessary is to see that such safeguards are taken as would keep him from mischief—*Mahammad*, 42 M.L.J. 72, 23 Cr.L.J. 71, A.I.R. 1922 Mad. 54, 65 I.C. 423, 30 M.L.T. 74, 1922 M.W.N. 10. This section contemplates the committing of a crime by a person who owing to the state of his mind cannot be deemed to have known the quality of his act. So the case of a deaf and dumb person does not come within this section when he is charged under sec. 411, I. P. C., inasmuch as it cannot be said in his case that he knew the property to have been stolen—*A Deaf and Dumb*, 37 Cr.L.J. 107, 159 I.C. 577, A.I.R. 1935 Pat. 451, 16 P.L.T. 568, 1935 Cr.C. 1168.

Where the Court below while acquitting an accused on the ground of insanity omitted to pass orders under sec. 471, the High Court in revision can pass the necessary orders. The passing of an order under sec. 471 by the High Court, after an acquittal by the Court below, does not amount to an alteration of a finding of acquittal into one of conviction within the meaning of sec. 439 (4)—*Mahammad*, *supra*.

The words "detained in safe custody" do not mean detained in the custody of friends or relatives; that is, the Magistrate cannot direct that the person acquitted under this section should be kept in the safe custody of his friends or relatives. This is evident from the language of sec. 475. All that the Magistrate can do is to detain the accused in a place of safe custody and report the matter to the Local Government, and it is the Local Government who can deliver the accused to any friend or relative under sec. 475—*Shish Chandra*, 56 Cal. 208, 48 C.L.J. 148, 29 Cr.L.J. 817 (848); *Anonymous*, 2 Weir

580; *The King v. Tun Khin*, 39 Cr L J. 544, 175 I.C. 48, A.I.R. 1938 Rang. 96, 10 R Rang 460

Safe Custody:—e.g., a Mental Hospital; see *Karma Uiang*, 32 C.W.N. 342 (345). Where the accused is proved to be a criminal lunatic and in the opinion of the medical expert there is no likelihood of his even regaining his mental sanity, the High Court directed that the accused be detained in safe custody in a Mental Hospital—*Onkar Dat*, 36 Cr L J. 392 (401), 153 I.C. 780, 1935 O.W.N. 53.

472. [*Repealed by the Indian Lunacy Act, 1912.*]

473. If such person is detained under the provisions of section 466, and in the case of a person detained in a jail, the Inspector-General of Prisons, or, in the case of a person detained in a lunatic asylum, the visitors of such asylum or any two of them shall certify that, in his or their opinion, such person is capable of making his defence, he shall be taken before the Magistrate or Court, as the case may be, at such time as the Magistrate or Court appoints, and the Magistrate or Court shall deal with such person under the provisions of section 468; and the certificate of such Inspector-General or visitors as aforesaid shall be receivable as evidence.

The word 'detained' has been substituted for 'confined,' and the italicised words added, by section 125 of the Cr P C Amendment Act, XVIII of 1923

This section, while it compels a Court to proceed in accordance with the provisions of sec 468, does not preclude the Court from proceeding under sec 468, at any time when an accused is brought before it. Where, therefore, a Sessions Judge, after taking evidence, found the accused insane and unable to make his defence and ordered his detention in a Mental Hospital and subsequently the Medical Superintendent of the Hospital wrote to him reporting that the accused was feigning insanity and that he was sane and therefore the Sessions Judge commenced a fresh trial with a different set of assessors without any preliminary inquiry into the sanity of the accused and without putting it on the record that the accused was in the Judge's opinion able to conduct his defence, held that the trial by the Sessions Judge was not contrary to law though the Sessions Judge would have acted wisely if before considering it he had placed it on the record that he considered the accused to be capable of making his defence and stated the grounds on which he came to that conclusion—*Ibrahim*, 35 Cr L J. 869, 148 I.C. 987, 1934 Cr C. 239, A I R 1934 Lah. 123.

A certificate of the visitors of a lunatic asylum as contemplated in this section is a public document, the genuineness of which is to be presumed under sec. 79 of the Indian Evidence Act—*Kalidas Sarkar*, 63 Cal. 425.

474. (1) If such person is detained under the provisions of section 466 or section 471, and such Inspector-General or visitors shall certify that, in his or their judgment, he may be released without danger of his doing injury to himself or to any other person, the Provincial Government may thereupon order him to be released or to be detained in custody, or to be transferred to a public lunatic asylum if he has not been already sent to such an asylum; and, in case it orders him to be

* Procedure where lunatic detained under section 466 or 471 is declared fit to be released.

There were four sub-sections in this section in the Code of 1898. Sub-sections (2) and (3) were repealed by the Indian Lunacy Act (IV of 1912) and sub-section (4) was numbered as sub-section (2). Previously the words at the end of sub-section (1) were "and shall report the case for the orders of the Local Government," so that the Court could not itself send the accused to a lunatic asylum or jail but had to report the case to the Local Government, and the latter gave orders for sending the accused to an asylum or jail. See 43 Bom. 134. But those words have been omitted by the Repealing and Amending Act, X of 1914, and its effect is that Magistrates and Courts are no longer required to report cases for the orders of the Local Government but are themselves competent to direct the detention of the accused in an asylum or jail or some other place prescribed for the reception of criminal lunatics—*Nga E*, 8 Bur.L.T. 286, 16 Cr.L.J. 670, 30 I.C. 654; *Maiku*, 22 O.C. 269, 21 Cr.L.J. 46, 54 I.C. 254. But it does not deprive the power of the Government to detain the accused in some other place of custody, under the provisions of the Indian Lunacy Act (IV of 1912). The Government have powers, in spite of this section, to decide the future fate of the lunatic—*Imam Hasan*, 25 Bom.L.R. 286, 26 Cr.L.J. 348, 84 I.C. 652.

As clauses (2) and (3) of sec. 471, Cr. P. C., and the words "and shall report the case for the orders of the Local Government" at the end of clause (1) of the same section have been repealed by the Indian Lunacy Act of 1912 and the Repealing and Amending Act, 1914 (Act X of 1914) respectively, a Magistrate or Court is now competent under sec. 471 (1) of the Cr. P. C. (as it now stands), read with sec. 24 of the Indian Lunacy Act and Rules 53–56 of the rules framed under sec. 91 of the said Act, referred to above, to pass orders for the transfer of a criminal lunatic to a lunatic asylum without reference to Government. (*Vide* page 25 of Rules Relating to Lunatics, corrected up to August, 1925 and published by the Government of Bengal in 1926.)

1235. Application of section:—This section should be applied not only where the accused are insane persons, but also where the accused persons, though not insane, labour under defects which render their trial impossible. Thus, where a *deaf and dumb* person, who is unable to understand the proceedings of the trial, is found guilty of murder, the proper course to be taken is to treat him as a lunatic and to proceed under sec. 471—*Dost Muhammad*, 1911 P.R. 13, 12 Cr.L.J. 613, 12 I.C. 989, following *Gahna*, 1889 P.R. 37. This section does not compel the Court to send the accused to the lunatic asylum; all that is necessary is to see that such safeguards are taken as would keep him from mischief—*Mahammad*, 42 M.L.J. 72, 23 Cr.L.J. 71, A.I.R. 1922 Mad. 54, 65 I.C. 423, 30 M.L.T. 74, 1922 M.W.N. 10. This section contemplates the committing of a crime by a person who owing to the state of his mind cannot be deemed to have known the quality of his act. So the case of a *deaf and dumb* person does not come within this section when he is charged under sec. 411, I. P. C., inasmuch as it cannot be said in his case that he knew the property to have been stolen—*A Deaf and Dumb*, 37 Cr.L.J. 107, 159 I.C. 577, A.I.R. 1935 Pat. 451, 16 P.L.T. 568, 1935 Cr.C. 1168.

Where the Court below while acquitting an accused on the ground of insanity omitted to pass orders under sec. 471, the High Court in revision can pass the necessary orders. The passing of an order under sec. 471 by the High Court, after an acquittal by the Court below, does not amount to an alteration of a finding of acquittal into one of conviction within the meaning of sec. 439 (4)—*Mahammad*, *supra*.

The words "detained in safe custody" do not mean detained in the custody of friends or relatives; that is, the Magistrate cannot direct that the person acquitted under this section should be kept in the safe custody of his friends or relatives. This is evident from the language of sec. 475. All that the Magistrate can do is to detain the accused in a place of safe custody and report the matter to the Local Government, and it is the Local Government who can deliver the accused to any friend or relative under sec. 475—*Shrish Chandra*, 56 Cal. 203, 48 C.L.J. 148, 29 Cr.L.J. 847 (818); *Anonymous*, 2 Weir

80; *The King v. Tun Khin*, 39 Cr.L.J. 544, 175 I.C. 48, A.I.R. 1938 Rang. 96, 10 L.Rang. 460.

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472. [Repealed by the Indian Lunacy Act, 1912.]

473. If such person is detained under the provisions of section 466, and in the case of a person detained in a jail, the Inspector-General of Prisons, or, in the case of a person detained in a lunatic asylum, the visitors of such asylum or any two of them shall certify that, in his or their opinion, such person is capable of making his defence, he shall be taken before the Magistrate or Court, as the case may be, at such time as the Magistrate or Court appoints, and the Magistrate or Court shall deal with such person under the provisions of section 468; and the certificate of such Inspector-General or visitors as aforesaid shall be receivable as evidence.

The word 'detained' has been substituted for 'confined,' and the italicised words added, by section 125 of the Cr. P. C. Amendment Act, XVIII of 1923.

This section, while it compels a Court to proceed in accordance with the provisions of sec. 468, does not preclude the Court from proceeding under sec. 468, at any time when an accused is brought before it. Where, therefore, a Sessions Judge, after taking evidence, found the accused insane and unable to make his defence and ordered his detention in a Mental Hospital and subsequently the Medical Superintendent of the Hospital wrote to him reporting that the accused was feigning insanity and that he was sane and therefore the Sessions Judge commenced a fresh trial with a different set of assessors without any preliminary inquiry into the sanity of the accused and without putting it on the record that the accused was in the Judge's opinion able to conduct his defence, held that the trial by the Sessions Judge was not contrary to law though the Sessions Judge would have acted wisely if before considering it he had placed it on the record that he considered the accused to be capable of making his defence and stated the grounds on which he came to that conclusion—*Ibrahim*, 35 Cr.L.J. 869, 148 I.C. 987, 1934 Cr.C. 239, A.I.R. 1934 Lah. 123.

A certificate of the visitors of a lunatic asylum as contemplated in this section is a public document, the genuineness of which is to be presumed under sec. 79 of the Indian Evidence Act—*Kalidas Sarkar*, 63 Cal. 425.

474. (1) If such person is detained under the provisions of section 466 or section 471, and such Inspector-General or visitors shall certify that, in his or their judgment, he may be released without danger of his doing injury to himself or to any other person, the Provincial Government may thereupon order him to be released or to be detained in custody, or to be transferred to a public lunatic asylum if he has not been already sent to such an asylum; and, in case it orders him to be

* Procedure where lunatic detained under section 466 or 471 is declared fit to be released.

transferred to an asylum, may appoint a Commission, consisting of a judicial and two medical officers.

(2) Such Commission shall make formal inquiry into the state of mind of such person, taking such evidence as is necessary, and shall report to the *Provincial Government*, which may order his *release* or detention as it thinks fit.

The word 'detained' has been substituted for 'confined,' and the word 'released' for 'discharged,' by sec. 126 of the Cr. P. C. Amendment Act, XVIII of 1923.

The words "Provincial Government" have been substituted for "Local Government" by sec. 4 of the Government of India (Adaptation of Indian Laws) Order, 1937.

475. (1) Whenever any relative or friend of any person detained under the provisions of section 466 or section 471 desires that he shall be delivered to his care and custody, the *Provincial Government* may, upon the application of such relative or friend and on his giving security to the satisfaction of such *Provincial Government* that the person delivered shall—

Delivery of lunatic to care of relative or friend.

- (a) be properly taken care of and prevented from doing injury to himself or to any other person, and
- (b) be produced for the inspection of such officer, and at such times and places, as the *Provincial Government* may direct, and
- (c) *in the case of a person detained under section 466, be produced when required before such Magistrate or Court,*

order such person to be delivered to such relative or friend.

(2) *If the person so delivered is accused of any offence the trial of which has been postponed by reason of his being of unsound mind and incapable of making his defence, and the inspecting officer referred to in sub-section (1), clause (b), certifies at any time to the Magistrate or Court that such person is capable of making his defence, such Magistrate or Court shall call upon the relative or friend to whom such accused was delivered to produce him before the Magistrate or Court; and, upon such production, the Magistrate or Court shall proceed in accordance with the provisions of section 468, and the certificate of the inspecting officer shall be receivable as evidence.*

Change:—The whole section has been re-drafted by sec. 127 of the Cr. P. C. Amendment Act, XVIII of 1923. Clause (c) and sub-section (2) are entirely new. Clause (b) was formerly sub-section (2).

"The new sub-section (2) simplifies the procedure under which a person accused of an offence, whose trial has been postponed by reason of his unsoundness of mind, is again produced before the Court on the certificate of the Inspecting Officer as to his memory"
—*Statement of Objects and Reasons* (1914).

The words "Provincial Government" have been substituted for "Local Government" by sec. 4 of the Government of India (Adaptation of Indian Laws) Order, 1937.

See *Swish Chandra*, cited under sec. 471.

CHAPTER XXXV.

PROCEEDINGS IN CASE OF CERTAIN OFFENCES AFFECTING
THE ADMINISTRATION OF JUSTICE.

476. (1) When any Civil, Criminal or Revenue Court is of opinion that there is ground for inquiring into any offence referred to in section 195 and committed before it or brought under its notice in the course of a judicial proceeding, such Court, after making any preliminary inquiry that may be necessary, may send the case for inquiry or trial to the nearest Magistrate of the first class, and may send the accused in custody, or take sufficient security for his appearance, before such Magistrate; and may bind over any person to appear and give evidence in such inquiry or trial.

Procedure in cases mentioned in section 195.

476. (1) When any Civil, Revenue or Criminal Court is, *whether on application made to it in this behalf or otherwise*, of opinion that it is expedient in the interests of justice that an inquiry should be made into any offence referred to in section 195, *subsection (1), clause (b) or clause (c), which appears to have been committed in or in relation to a proceeding in that Court*, such Court may, after such preliminary inquiry, if any, as it thinks necessary, *record a finding to that effect and make a complaint thereof in writing signed by the presiding officer of the Court, and shall forward the same to a Magistrate of the first class having jurisdiction*, and may take sufficient security for the appearance of the accused before such Magistrate or if the alleged offence is non-bailable may, if it thinks necessary so to do, send the accused in custody to such Magistrate, and may bind over any person to appear and give evidence before such Magistrate:

Provided that, where the Court making the complaint is a High Court, the complaint may be signed by such officer of the Court as the Court may appoint.

*For the purposes of this subsection, a * * * Presidency Magistrate shall be deemed to*

transferred to an asylum, may appoint a Commission, consisting of a judicial and two medical officers.

(2) Such Commission shall make formal inquiry into the state of mind of such person, taking such evidence as is necessary, and shall report to the *Provincial Government*, which may order his release or detention as it thinks fit.

The word 'detained' has been substituted for 'confined,' and the word 'released' for 'discharged,' by sec. 126 of the Cr. P. C. Amendment Act, XVIII of 1923.

The words "Provincial Government" have been substituted for "Local Government" by sec. 4 of the Government of India (Adaptation of Indian Laws) Order, 1937.

475. (1) Whenever any relative or friend of any person detained under the provisions of section 466 Delivery of lunatic to care of relative or friend. or section 471 desires that he shall be delivered to his care and custody, the *Provincial Government* may, upon the application of such relative or friend and on his giving security to the satisfaction of such *Provincial Government* that the person delivered shall—

(a) be properly taken care of and prevented from doing injury to himself or to any other person, and

(b) be produced for the inspection of such officer, and at such times and places, as the *Provincial Government* may direct, and

(c) *in the case of a person detained under section 466, be produced when required before such Magistrate or Court,*

order such person to be delivered to such relative or friend.

(2) *If the person so delivered is accused of any offence the trial of which has been postponed by reason of his being of unsound mind and incapable of making his defence, and the inspecting officer referred to in sub-section (1), clause (b), certifies at any time to the Magistrate or Court that such person is capable of making his defence, such Magistrate or Court shall call upon the relative or friend to whom such accused was delivered to produce him before the Magistrate or Court; and, upon such production, the Magistrate or Court shall proceed in accordance with the provisions of section 468, and the certificate of the inspecting officer shall be receivable as evidence.*

Change:—The whole section has been re-drafted by sec. 127 of the Cr. P. C. Amendment Act, XVIII of 1923. Clause (c) and sub-section (2) are entirely new. Clause (b) was formerly sub-section (2).

"The new sub-section (2) simplifies the procedure under which a person accused of an offence, whose trial has been postponed by reason of his unsoundness of mind, is again produced before the Court on the certificate of the Inspecting Officer as to his memory"—*Statement of Objects and Reasons* (1914).

The words "Provincial Government" have been substituted for "Local Government" by sec. 4 of the Government of India (Adaptation of Indian Laws) Order, 1937.

See *Prish Chandra*, cited under sec. 471.

CHAPTER XXXV.

PROCEEDINGS IN CASE OF CERTAIN OFFENCES AFFECTING
THE ADMINISTRATION OF JUSTICE.

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Procedure in cases mentioned in section 195.

476. (1) When any Civil, Revenue or Criminal Court is, *whether on application made to it in this behalf or otherwise*, of opinion that it is expedient in the interests of justice that an inquiry should be made into any offence referred to in section 195, *subsection (1), clause (b) or clause (c), which appears to have been committed in or in relation to a proceeding in that Court*, such Court may, after such preliminary inquiry, if any, as it thinks necessary, *record a finding to that effect and make a complaint thereof in writing signed by the presiding officer of the Court, and shall forward the same to a Magistrate of the first class having jurisdiction, and may take sufficient security for the appearance of the accused before such Magistrate or if the alleged offence is non-bailable may, if it thinks necessary so to do, send the accused in custody to such Magistrate, and may bind over any person to appear and give evidence before such Magistrate:*

Procedure in cases mentioned in section 195

*Provided that, where the Court making the complaint is a High Court, the complaint may be signed by such officer of the Court as the Court may appoint. For the purposes of this subsection, a * * * Presidency Magistrate shall be deemed to*

transferred to an asylum, may appoint a Commission, consisting of a judicial and two medical officers.

(2) Such Commission shall make formal inquiry into the state of mind of such person, taking such evidence as is necessary, and shall report to the *Provincial Government*, which may order his *release* or detention as it thinks fit.

The word 'detained' has been substituted for 'confined,' and the word 'released' for 'discharged,' by sec. 126 of the Cr. P. C. Amendment Act, XVIII of 1923.

The words "Provincial Government" have been substituted for "Local Government" by sec. 4 of the Government of India (Adaptation of Indian Laws) Order, 1937.

475. (1) Whenever any relative or friend of any person

Delivery of lunatic to
care of relative or
friend. detained under the provisions of section 466
or section 471 desires that he shall be deli-
vered to his care and custody, the *Provincial*
Government may, upon the application of such relative or friend
and on his giving security to the satisfaction of such *Provincial*
Government that the person delivered shall—

- (a) be properly taken care of and prevented from doing injury to himself or to any other person, and
- (b) be produced for the inspection of such officer, and at such times and places, as the *Provincial Government* may direct, and
- (c) *in the case of a person detained under section 466, be produced when required before such Magistrate or Court,*

order such person to be delivered to such relative or friend.

(2) *If the person so delivered is accused of any offence the trial of which has been postponed by reason of his being of unsound mind and incapable of making his defence, and the inspecting officer referred to in sub-section (1), clause (b), certifies at any time to the Magistrate or Court that such person is capable of making his defence, such Magistrate or Court shall call upon the relative or friend to whom such accused was delivered to produce him before the Magistrate or Court; and, upon such production, the Magistrate or Court shall proceed in accordance with the provisions of section 468, and the certificate of the inspecting officer shall be receivable as evidence.*

Change:—The whole section has been re-drafted by sec. 127 of the Cr. P. C. Amendment Act, XVIII of 1923. Clause (c) and sub-section (2) are entirely new. Clause (b) was formerly sub-section (2).

"The new sub-section (2) simplifies the procedure under which a person accused of an offence, whose trial has been postponed by reason of his unsoundness of mind, is again produced before the Court on the certificate of the Inspecting Officer as to his memory"
—*Statement of Objects and Reasons* (1914).

The words "Provincial Government" have been substituted for "Local Government" by sec. 4 of the Government of India (Adaptation of Indian Laws) Order, 1937.

See *Srish Chandra*, cited under sec. 471.

CHAPTER XXXV.

PROCEEDINGS IN CASE OF CERTAIN OFFENCES AFFECTING
THE ADMINISTRATION OF JUSTICE.

476. (1) When any Civil, Criminal or Revenue Court is of opinion that there is ground for inquiring into any offence referred to in section 195 and committed before it or brought under its notice in the course of a judicial proceeding, such Court, after making any preliminary inquiry that may be necessary, may send the case for inquiry or trial to the nearest Magistrate of the first class, and may send the accused in custody, or take sufficient security for his appearance, before such Magistrate; and may bind over any person to appear and give evidence in such inquiry or trial.

Procedure in cases mentioned in section 195.

476. (1) When any Civil, Revenue or Criminal Court is, *whether on application made to it in this behalf or otherwise*, of opinion that it is expedient in the interests of justice that an inquiry should be made into any offence referred to in section 195, *subsection (1), clause (b) or clause (c), which appears to have been committed in or in relation to a proceeding in that Court*, such Court may, after such preliminary inquiry, if any, as it thinks necessary, *record a finding to that effect and make a complaint thereof in writing signed by the presiding officer of the Court, and shall forward the same to a Magistrate of the first class having jurisdiction*, and may take sufficient security for the appearance of the accused before such Magistrate or if the alleged offence is non-bailable may, if it thinks necessary so to do, send the accused in custody to such Magistrate, and may bind over any person to appear and give evidence before such Magistrate:

Provided that, where the Court making the complaint is a High Court, the complaint may be signed by such officer of the Court as the Court may appoint.

*For the purposes of this subsection, a * * * Presidency Magistrate shall be deemed to*

be a Magistrate of the first class.

(2) Such Magistrate shall thereupon proceed according to law, and as if upon complaint made and recorded under section 200, and may, if he is authorised under section 192 to transfer cases, transfer the inquiry or trial to some other competent Magistrate.

(2) Such Magistrate shall thereupon proceed according to law and as if upon complaint made under section 200. * * *

(3) *Where it is brought to the notice of such Magistrate, or any other Magistrate to whom the case may have been transferred, that an appeal is pending against the decision arrived at in the judicial proceeding out of which the matter has arisen, he may, if he thinks fit, at any stage adjourn the hearing of the case until such appeal is decided.*

Change:—The whole section has been redrafted by sec. 128 of the Cr. P. C. Amendment Act, XVIII of 1923, but no important change has been introduced. Subsec. (3) is new. "The changes that we have made are not of great importance. We have provided that a Court can act on application made to it or *suo motu* and after such preliminary inquiry, if any, as it thinks necessary. For the word "committed before it or brought under its notice in the course of a judicial proceeding" we have substituted the phraseology used in clause (b) of sec. 195. We have substituted "may make a complaint" for "shall make a complaint" and, in view of the criticism of the words "nearest first-class Magistrate" we have provided that a complaint should be sent to a first class Magistrate having jurisdiction. In order to give effect to our decision that proceedings under sec. 476, etc., should be subject to revision, we have introduced words which will make it necessary for the Court to record an order"—*Report of the Joint Committee* (1922). The proviso to sub-section (1) has been added recently by the Cr. P. Code Amendment Act II of 1926. For reasons, see Note 1240. From the third para. of sub-section (1) the word 'Chief' has been omitted by the same Amendment Act; for reason of this omission see Note 1250.

1236. Object and scope of section:—It is easy to imagine the inconvenience which might be caused if a Munsif or a Subordinate Judge or a Judge were to appear before a Magistrate and make a complaint on oath under sec. 195 in order to lay the foundation for a prosecution, and this section has been enacted to obviate the difficulty. The Legislature thought it desirable that the procedure to be followed in cases of complaint by a Court should be different from that which has to be observed by an ordinary complainant—*Ishri Prasad v. Sham Lal*, 7 All. 871. Under section 195, it is open to the Court, before which the offence was committed to prefer a complaint for the prosecution of the offender; and sec. 476 prescribes the procedure as to how that complaint may be preferred—*In re Lakshmidas*, 32 Bom. 184; *Rahimatullah*, 31 Mad. 140; *Aiyakannu*, 32 Mad. 49. The language of this section indicates that when a Court is acting under sec. 195, a complaint in the strict sense of the Code is not required, and the procedure herein laid down constitutes the complaint mentioned in sec. 195—*Ishri Prasad v. Sham Lal*, 7 All. 871. The order of a Court under sec. 476 is in the nature of a complaint under sec. 195—*Kisan Kohale*, 9 C.P.L.R. 26. Proceedings taken by a Court under this section operate of themselves to set a prosecution in motion without the necessity of any other complaint, the Court itself being the complainant—*Nageswara*, 2 Weir 589.

For the purpose of an action for malicious prosecution proceedings under this section are criminal proceedings, although they were taken in a Civil Court—*Nagarmull v. Jaharmull*, 35 Cr.L.J. 925, 148 I.C. 1129, 60 Cal. 1022, A.I.R. 1933 Cal. 909. See also *Rabindra v. Jogendra*, 33 C.W.N. 79, A.I.R. 1928 Cal. 691 and *Narendra v. Jyotish*, 27 C.W.N. 387, 49 Cal. 1035, 69 I.C. 705.

The words in sub-sec (2) of this section "and as if upon complaint made and recorded under sec. 200", have been introduced into the Code in 1898 in order to give legislative effect to the Full Bench ruling in 7 All. 871 in which it was held that the order of the Court under this section was a complaint within the meaning of sec 195—*Bhup Kunwar*, 26 All 249. That one of the functions of sec 476 is to provide the machinery by which a Court is enabled without inconvenience to make a complaint is made very clear by these words introduced in the present section—*Rahmatullah*, 31 Mad. 140 (*per* Miller, J.). Under sub-sec (1) as now amended the Court will have to frame a complaint *in writing*

This section does not authorize a complaint with reference to offences described in sub-sec. (1), cl (a) committed in or in relation to a proceeding in a Court. The jurisdiction to make a complaint under this section is limited to cases as are provided for in sec. 195, sub-sec (1), cl (b) or (c)—*Ram Nath*, 27 Cr L.J. 1247, 98 I.C. 63, 3 O.W.N. 757, A.I.R. 1927 Oudh 51. But if a Magistrate, acting under this section, considers that a complaint should be made, it is open to him to include in that complaint not merely offences which are referred to in sec. 195, Cr P C, but also other offences such as one under sec. 161, I P. C. This section is an enabling section and does not bar a Magistrate from including in his complaint other sections of the Penal Code. Nor would it bar the Magistrate to whom the complaint was presented from issuing process under other sections of the Penal Code, if from the facts alleged offences under other sections appeared to have been committed—*Dharumal v. Teunmal*, A.I.R. 1940 Sind 133 (134), 41 Cr L.J. 821, 190 I.C. 119

A complaint, outside the provisions of sec 476, Cr. P. C., cannot be filed by any Civil, Revenue or Criminal Court under its inherent jurisdiction—*Kushal Pal*, 32 Cr L.J. 1105 (1115), 134 I.C. 225, A.I.R. 1931 All 443, 1931 Cr C 715, 53 All 804, 1931 A.L.J. 697, Ind Rul 1931 All 801 (F.B.). See also *Mahadeo Sahu* cited in para. 1243. See also *Gobinda v. Rex*, 42 Mad 450; *Sengoda v. Vajapuri*, 1931 M.W.N. 1047, 61 M.L.J. 684, 34 M.L.W. 841 and *Indarjit*, 27 Cr L.J. 974, 96 I.C. 525, 3 O.W.N. 618, 13 O.L.J. 653, 1 Luck 527. For contra see *Mehr Singh*, 35 Cr L.J. 86, 146 I.C. 387, A.I.R. 1933 Lah 884, 1933 Cr.C. 1178 See Note 629

1236A. Application under this section:—An application under this section is entirely different from a complaint; it is merely the means of drawing the Court's attention to the fact that an offence appears to have been committed in proceedings before that Court a fact, which it can in the majority of cases verify even without the help of the applicant. It is manifestly most improper for the Court to shirk its obvious duty of applying its mind to the question whether it should make a complaint or not, merely because the applicant does not appear in support of his application. There is no provision of law making it necessary to examine the applicant on his application as there is in the case of a complaint. In fact an application might well be anonymous, if it were sufficiently precise and definite there would be no justification for not acting upon it. It is clearly the duty of a Court to which such an application is made either to make a complaint or to reject the application on the merits. This is also borne out to some extent by the language of secs. 476A and 476B, Cr. P. C., which do not talk about dismissing an application but, in the one case, of rejecting it and, in the other case, of refusing to make a complaint upon an application. Therefore the order dismissing the application on account of the non-appearance of the applicant is an improper order which there is no provision in law for making and, therefore, an order without jurisdiction. There would, however, be nothing wrong in an order rejecting the application on the ground that it does not give sufficient indication of the facts, and that the

applicant is not there to supplement it—*Jawala Parshad v. Ram Parshad*, A.I.R. 1940 Lah. 526.

Second Application:—Where a previous application by a party asking the Court to make a complaint was dismissed for non-prosecution, the Court is not thereby precluded from itself making a complaint, if it is expedient in the interests of justice—*Harekrishna*, 8 Pat. 736, 31 Cr.L.J. 143, A.I.R. 1929 Pat. 242, 120 I.C. 629, Ind. Rul. 1930 Pat. 53, 11 P.L.T. 75; *Kalastri Madali*, A.I.R. 1932 Mad. 130, 1931 M.W.N. 1048, 34 M.L.W. 629, 1932 Cr.C. 109, 33 Cr.L.J. 272, 136 I.C. 313, 61 M.L.J. 684, Ind. Rul. 1932 Mad. 281; *Naubat*, 36 Cr.L.J. 470, 153 I.C. 947, A.I.R. 1935 Pesh. 1; *Jawala Parshad v. Ram Parshad*, A.I.R. 1940 Lah. 526. There is no such provision of law and the principle of "*nemo debet*" is not applicable where there has been no inquiry on the merits—*Jawala Parshad v. Ram Parshad*, supra. A Magistrate, who has passed an order refusing to start proceedings under this section, can take further action on a subsequent application moving him to the same effect. Ordinarily, however, it would be undesirable to do so unless some fresh facts had emerged showing that the previous order was clearly wrong—*Bhagwandas v. Mathura*, 37 Cr.L.J. 977, 164 I.C. 713, 1936 Cr.C. 711, A.I.R. 1936 Nag. 156.

1237. Section 476 is supplementary to sec. 195:—Section 195 lays down the bar and sec. 476 lays down the method of removing the bar. The two sections must be read together—*Kushal Pal*, supra. The word 'offences referred to in sec. 195' mean not merely the offences covered by the sections of the I. P. C., mentioned in sec. 195, but they mean the offences covered by those sections *and committed under the qualifying circumstances* mentioned in sec. 195. That is, sec. 476 must be read along with sec. 195, and the qualifications mentioned in sec. 195 are to be treated as incorporated in the provisions of sec. 476—*Jadunandan*, 37 Cal. 250 (256); *Govinda Iyer*, 42 Mad. 540. Thus, an offence under sec. 467, I. P. C., does not come within the purview of sec. 195 unless it is committed by a 'party to the proceeding'; and, therefore, a Court is not competent to pass an order under sec. 476 directing the prosecution of a person who is *not a party to the proceeding*, for an offence under sec. 467, I. P. C.—*Ramalingam*, 40 Mad. 100 (102); *Jiwan Mal*, 18 Cr.L.J. 544, 1917 P.R. 10 (Nor is a complaint under this section necessary in order to proceed against such person—21 C.W.N. 950, 42 I.C. 133, 18 Cr.L.J. 901). So also, where certain documents were put in a Court in a pending suit, but *not given in evidence*, the Court is not competent to order the prosecution of the party, who had put in the documents, for forgery—*Abdul Khadar v. Meera Saheb*, 15 Mad. 224; *Adhar v. Ablakh*, 1895 A.W.N. 145; 1920 P.L.R. 3. So again, if an offence referred to in sec. 195 (b), e.g., false charge, is not committed in or in relation to a proceeding in Court, but is committed before the police, it is not competent to a Court to direct a prosecution under sec. 476—*Jadunandan*, 37 Cal. 250 (256).

But a different view has been taken in the following cases. Thus, in *Aiyakanru*, 32 Mad. 49, Sankaran Nair, J., has held that sec. 476 must be construed as entirely self-contained, and the power given to the Court under this Chapter to take action regarding the offences specified in sec. 195 is not restricted by the qualifying circumstances mentioned in sec. 195. And, therefore, it is competent to a Court to order prosecution for forgery of a person who was *not a party to the proceeding in Court*—*Derji*, 18 Bom. 581; *Keshav*, 14 Bom.L.R. 968, 13 Cr.L.J. 848; *Balgaunda Ramgaunda*, 55 Bom. 461, 32 Cr.L.J. 1017 (1018); *Bachu Behari*, 20 Cr.L.J. 630 (Pat.); *Ejaz Ali*, 24 O.C. 367, 23 Cr.L.J. 228, A.I.R. 1922 Oudh 220. It is competent to a Court to proceed under sec. 467 against a party who has filed a forged document, whether such document has been actually *given in evidence* or not—*Jamal Khan*, 1897 P.R. 12; *Akhil Chandra*, 22 Cal. 1004. The words "referred to in sec. 195" are merely words descriptive of the class of offences with which a particular Court can deal. They do not mean that sec. 195 governs sec. 476 to any extent other than this—*Khushali*, 40 All. 116; *Ganga Ram*, 40 All. 21; *Narayanshaligram*, 20 Cr.L.J. 426 (Nag). Section 476 is a self-contained section, and the reference made to sec. 195 is only for the purpose of avoiding

the enumeration of the sections of the Penal Code mentioned in sec. 195—*Raj Kumar*, 1 P.L.J. 298, 18 Cr.L.J. 135.

But the intention of the Legislature in making the present amendment is to make this section not independent of, but *supplementary* to, sec. 195. "One of the most weighty changes introduced by this measure is in respect of prosecutions for offences committed before or in relation to proceedings of the Court" ... A glance at any commentary on the Code will give some indication of the difficulties that have arisen in putting sections 195 and 476 into operation. After a long and careful thought, Government have decided on a line of action which, I may say, has met with general approval. The two sections as they stand (under the old Code) provide an alternative procedure for the Courts in dealing with them. Sanction is given to proceedings under sec. 195 or action is directed by the Courts under sec. 476. The sanction proceedings are now omitted, and the two sections will in future supplement each other... Sec. 195 will contain the prohibition of prosecution except upon complaint by the Court; sec. 476 will lay down the procedure to be followed. It has been suggested that it will be better to bring the two sections together. That is a matter to be considered when the consolidation of the Code will be undertaken"—*Council of State Debates*, September 13, 1922. See also *Dwarka v. Makund*, 24 A.L.J. 122, 26 Cr.L.J. 1506, 90 I.C. 290, A.I.R. 1926 All. 21 in Note 611.

"The recent amendment in secs. 195 and 476 had resulted in connecting the two sections more closely together. Section 476 gives the Court power with respect to any offence referred to in sec. 195. The offence referred to in sec. 195 (c) is not merely an offence under certain sections, but such an offence *when committed by a party to the proceeding*—*per Brown, J.*, in *Guruswamy v. Ebrahim*, 2 Rang. 374 (381, 382), A.I.R. 1925 Rang. 28, 26 Cr.L.J. 295 "By the recent amendment of the Cr. P. Code, the words 'offence referred to in sec. 195 (c)' in sec. 476 *must be read in conjunction with the wording to sec. 195 (c)*. The only offence which sec. 195 (c) bars from the cognizance of the Magistrate without a complaint by the Courts is when such offence is "alleged to have been committed by a party to any proceeding before the Court" and it is not right to divorce these words or take only a part of the section in endeavouring to discover what the offence referred to in sec. 195 is"—*per Robinson, C.J.*, in *Ibid* (p. 380). Therefore, the Court has no jurisdiction to file a complaint in respect of a forged document against persons who were not parties to the previous suit—*Shankar Sahai*, 7 O.W.N. 638, 31 Cr.L.J. 938 (939); *Kushal Pal*, 53 All. 804, 32 Cr.L.J. 1105 (1116) (F.B.); *Shwe Pue v. Ma Me Hmoke*, 3 Rang. 48, 3 Bur L.J. 344, 26 Cr.L.J. 500. So also, where there is no evidence to suggest that a forged document was produced or given in evidence in a Court, a complaint under sec. 476, Cr. P. C., by the Court is not justified—*Bahiruddy*, 28 C.W.N. 880, 25 Cr.L.J. 1095.

1237A. Section 476 and Section 480:—In cases covered by both sec. 476 and sec. 480, Cr. P. C., it is optional with the Court to proceed either under sec. 480 or under sec. 476 and the existence of sec. 482, Cr. P. C., does not appear to operate so as to take away this option—*Ram Lal Anand*, 41 Cr.L.J. 766 (768), 189 I.C. 628, A.I.R. 1940 Lah. 233, 42 P.L.R. 505.

1238. Civil, Criminal and Revenue Court:—As to what are Courts, and what are not, see Notes 622 under sec. 195.

An Income Tax Collector is a Revenue Court within the meaning of this section—*Nataraja*, 36, Mad. 72; *Rup Singh*, 1905 P.R. 44, 3 Cr.L.J. 128; *Panamchand*, 38 Bom. 642. Contra—*Kalidas*, 8 Bom L.R. 477, 4 Cr.L.J. 34. A Collector or Deputy Collector holding an inquiry for the purpose of determining who should be called upon to pay the stamp duty of an insufficiently stamped document is not a Court, as he is not holding a judicial enquiry—*Kedarnath*, 7 C.W.N. 795. A certificate officer acting under the powers conferred upon him by secs. 57, 58 and 66 of the Behar and Orissa Public Demands Recovery Act, 1914, is, while acting in that capacity, a 'Court' (Revenue Court), and where such officer inquires into the question of an alleged payment where a certificate has been issued, the proceeding before him is a judicial proceeding—*Mathura Prasad*, 4

P.L.J. 475, 20 Cr.L.J. 529. A Commissioner sitting as an election tribunal is a Civil Court—*Ram Nath*, 46 All. 611 (613); *Mohammad Mehdi v. Ramji Lal*, 42 Cr.L.J. 85, 191 I.C. 146, 1940 O.W.N. 1004; *Mahabaleswarappa v. Gopalaswami*, A.I.R. 1935 Mad. 673, 36 Cr.L.J. 895, 156 I.C. 311, 41 M.L.W. 503, 1935 M.W.N. 152, 58 Mad. 954; but see *Bilas Singh*, 23 A.L.J. 845, 47 All. 934. A Special Judge sitting as a Court under the U. P. Encumbered Estates Act (XXV of 1934) has jurisdiction as a Civil Court to proceed under this section—*Mohammad Mehdi v. Ramji Lal*, supra. A Judge receiving and dealing with a petition under sec. 83 of the Transfer of Property Act (for deposit of mortgage money) is a Court, and he can, therefore, start a prosecution under this section against the person depositing the money, if the mortgage-deed is found to be forged—*Chamari*, 4 Pat. 24, 6 P.L.T. 225, 26 Cr.L.J. 170. An Assistant Collector concerned in mutation proceeding is acting as a Revenue Court—*Lachman*, 6 O.W.N. 953, 31 Cr.L.J. 679.

A Revenue Officer preparing a record of rights but not authorised to take evidence on oath is not a Court—*Hanumantha*, 39 Mad. 414. An officer acting in an executive, and not in a judicial capacity cannot exercise the powers conferred under this section—*Babu Ram*, 15 A.L.J. 654, 18 Cr.L.J. 942. See Note 1244 below under heading "Proceeding in Court".

A District Registrar (before whom a forged document was produced for registration) is not a Civil, Criminal or Revenue Court within the meaning of this section, but in his capacity as District Magistrate he can take cognizance of the offence (sec. 471, I. P. C.) under sec. 190 (1) (c) of this Code—*Cheta Mahto*, 2 Pat. 459, 26 Cr.L.J. 1482.

The Collector reported to the District Judge that an amin never went to a village and his report that he went there to conduct a sale and the endorsement and signatures of three persons of the village endorsing the report of the amin were false and ordered the Tahasildar to hold an enquiry. In the enquiry before the Tahasildar two of the attesting witnesses in the warrant deposed that the signatures in the warrant were not theirs and that the amin never came to the village. Later, on enquiry by the District Judge himself, it transpired that the two persons had deposed falsely in the enquiry before the Tahasildar to save the Village Munsif who was guilty of dereliction of duty by absenting himself from the village on the day the sale was to be conducted by the amin, and when the amin was there. The District Judge ordered proceedings under secs. 195 and 476, Cr. P. C., for offences against the two villagers under secs. 191 and 193, I. P. C., and preferred a complaint. Held that the enquiry held by the District Judge was a departmental enquiry and sec. 476, Cr. P. C., was not applicable and the complaint should be withdrawn—*Kuruba Anjanappa*, A.I.R. 1940 Mad. 892, 1940 M.W.N. 805, 52 M.L.W. 345.

In performing the functions laid upon him by the rules made under the Burma Rusal Self-Government Act (IV of 1921) the District Judge does not act as a Court and his proceedings are not subject to appeal to the High Court or to revision by the High Court because he acts as a *persona designata* and, consequently, sec. 195 and sec. 476, Cr. P. C., do not apply. The District Judge, acting not as a Court but as a *persona designata* under a particular Act, is not entitled to proceed under sec. 476, Cr. P. C., and is not entitled to lay a complaint in pursuance of an order passed in the proceedings purporting to have been taken under that section—*U Aung Myin U v. District and Sessions Judge, Henzada*, 41 Cr.L.J. 687, 188 I.C. 793, A.I.R. 1910 Rang. 148, following *Municipal Corporation of Rangoon v. M. A. Shakur*, 3 Rang. 560, 91 I.C. 550, A.I.R. 1926 Rang. 25 (F.B.) and *U Ba Pe v. U Ba Shwe*, A.I.R. 1933 Rang. 41, 142 I.C. 80, 11 Rang. 1, Ind. Rul. 1933 Rang. 28.

Power after transfer:—Magistrate, who after trying a case has been transferred from the charge of the particular Court in which the case was tried to some other duty in the same district, is not competent to make an order under this section in respect of a case which he tried as the presiding officer of that Court—*Chunni Lal v. Harbans*, 1 A.L.J. 315; *Baldo*, 46 All. 851 (854). In such an event, the only officer who can order the prosecution in his successor-in-office in that Court—*Baldo*, 46 All.

851 (855). A Joint Magistrate after dismissing the complaint in a case became the District Magistrate, and then ordered the prosecution of the complainant for perjury under sec. 193, I. P. Code. It was held that the order of the Joint Magistrate as a District Magistrate was and should be set aside—*Mallu Khan*, 1 A.L.J. 388.

1239. What Court can take action:—See Note 623 The words "in or in relation to a proceeding in that Court" show that the Court which can take action under this section is only the Court before which, or in relation to whose proceeding, the offence has been committed. Under the old section also, the words "committed before it or brought under its notice in the course of a judicial proceeding" indicated that it was the Court alone who tried the case who could take action for prosecution, and it was not competent for another Court who had not tried the case to exercise the powers under this section—*Begu Singh*, 34 Cal. 551 (555) (F.B.). But, where a person gave false evidence before the committing Magistrate and that evidence, on account of his inability to attend the Sessions Court owing to illness, was read out as evidence at the sessions trial, the Sessions Judge would be competent to direct the prosecution of that person for giving false evidence, as the offence was brought under the notice of the Sessions Judge in the trial before him—*Attar Singh*, 1916 P.R. 29, 18 Cr L J 337.

It is not necessary that the complaint should be made by the same Judge before whom the offence was committed; it is sufficient if it is made by the same Court. Therefore, where the offence was committed before the Additional Sessions Judge of Pabna who was afterwards transferred, and the complaint was made by the Sessions Judge of Pabna, *held* that the complaint was valid because it was made by the same Court, i.e., the Court of Sessions of Pabna—*Iqbalulla*, 58 Cal. 1117, 35 CWN. 400, 32 Cr L J. 842 (843).

Where a reference was ordered under the schedule to the Civil Procedure Code to the arbitration and false evidence is given before the arbitrator, it is necessary that an application to the Court appointing the arbitrator should be made under sec 476—*Ganti v. Harcourt*, 58 Cal 215, 32 Cr L J 826 (827), 132 I.C. 97, Ind. Rul. 1931 Cal. 525, 1931 Cr C 588, A I R 1931 Cal 436 See also Note 623.

Where a *Mamlatdar* was acting merely as an agent for executing the decree of the Court of the Subordinate Judge under sec 68 and Sch III, C. P. C., and was not exercising the functions of the Court under O. XXI, r 2, C P. C., which could not be delegated to him or to the Collector, when he considered the genuineness of a receipt for the purpose of determining whether he would adjourn the sale, the offence of forging the receipt was committed in or in relation to proceedings in the Court of the Subordinate Judge, and not in or in relation to any proceedings before the *Mamlatdar* constituting a Court. Therefore, the *Mamlatdar* was not the proper authority to file a complaint under this section—*Narsappa*, 36 Cr L J. 1005, 156 I.C. 752, A.I.R. 1935 Bom. 158, 37 Bom L.R. 93, 1935 Cr.C. 296.

Transfer of proceedings taken under this section:—Section 476 is self-contained and exhaustive, and the intention of the Legislature is that the power of making a complaint should not be exercised by any Court except the Court before which the offence has been committed or the Court to which appeals from that Court ordinarily lie. Therefore, while proceedings under this section are going on in a Civil Court before which the offence has been committed, it is not in the power of the District Judge under sec 24, C. P. Code, to transfer the proceedings from Civil Court to another Civil Court—*Rameshwar v. Rajdhari*, 49 All 460, 25 A.L.J. 433, A I R. 1927 All. 469 (470). The order of transfer is invalid, and the original Civil Court should conclude the proceedings—*Ibid*.

Section 476, Cr. P. C., refers not to the "Magistrate" but to the "Court", and then the section goes on to refer to "such Court" holding a preliminary inquiry, if any; so that it would appear that what the section contemplates is the Court itself and not the personality of the trying Magistrate. Therefore, it is not possible by reason of the words of sec. 476, Cr. P. C., to grant a transfer of proceedings under sec. 476, Cr. P. C., to the file of the Magistrate before whom the alleged offence was

committed on the ground that, though transferred to a different place, he is the proper Magistrate to appreciate, whether a complaint under sec. 476, Cr. P. C., should or should not be made—*Jethanand Hemandas v. Emp.*, 40 Cr.L.J. 750, 183 I.C. 195, 12 R.S. 47, A.I.R. 1939 Sind 181.

Transfer of case:—Where a case which has been partly heard by one Court is transferred to another Court, the former Court is not deprived of its jurisdiction to take proceedings against a witness in respect of a perjury *before it*; nor is that jurisdiction taken away by the circumstance that the second Court may have formed a different view as to the veracity of the witness—*Sundar Lal*, 44 All. 642, 20 A.L.J. 666, 23 Cr.L.J. 603. But where a criminal case is transferred or withdrawn from the Court of one Magistrate to that of another, and the second Magistrate dismisses the complaint as false, under sec. 203, it is the second Magistrate who can take action under sec. 476 for prosecution of the complainant for the offence under sec. 211, I. P. Code; the Magistrate in whose Court the complaint was originally filed is not competent to proceed under sec. 476—*Tarakeshwar*, 53 Cal. 488, 30 C.W.N. 504, 27 Cr.L.J. 648; *Amanat Ali*, 33 C.W.N. 1058 (1061), 1929 Cr.C. 360. The principle is, that the Court which tries a case on the merits rather than the Court before which the case is originally instituted, even though process may be issued by it, is the proper Court to make a complaint under sec. 476—*Amanat Ali*, *supra*; Cf. *Jiban v. Benoy*, 6 C.W.N. 35; *Putiram v. Mahomed Kasem*, 3 C.W.N. 33.

Where a suit was at first filed at S, but a new Court having been established at SH, the suit was transferred to the latter Court, because the cause of action arose within the limits of that Court, *held* that the Court at SH and not the Court at S had jurisdiction to take action under sec. 476 in respect of the offence of perjury committed in that suit. The only Court which can exercise the power conferred by sec. 476 is the Court which has jurisdiction over the suit in which the alleged offence has been committed, whether such suit was instituted in such Court or *came to its file by transfer* from any other Court or otherwise—*Gerimal v. Shewa Ram*, 20 S.L.R. 90, 27 Cr.L.J. 780.

See also Note 623.

Power of successor-in-office to act under this section:—The power to direct prosecution is conferred on the "Court" and not on the particular officer who fills the judicial office at a particular time; and, therefore, the successor-in-office is competent to make an order under this section in respect of an offence committed before his predecessor-in-office—*Purna Chandra v. Shaikh Dhalu*, A.I.R. 1930 Cal. 721, 129 I.C. 561, 52 C.L.J. 87, 34 C.W.N. 914 (918), 1930 Cr.C. 1129; *Darpa Narayan v. Pepin*, 15 C.W.N. 691; *Naval Singh*, 34 All. 393; *Badri Singh*, 19 A.L.J. 819, 22 Cr.L.J. 860; *Lakshmidas*, 32 Bom. 184 (189); *Ranga*, 29 Mad. 331; *Daulat*, 14 N.L.R. 16, 18 Cr.L.J. 1015; *Venkatasubbayya*, 1919 M.W.N. 112, 20 Cr.L.J. 172; *Behram*, 7 Lah. 108, 27 Cr.L.J. 776; *Khan Muhammad*, 4 Lah. 58, 24 Cr.L.J. 180; *Shue Pwe v. Ma Me Hmoke*, 3 Rang. 48, 3 Bur.L.J. 344. See also *Jethandas Hemandas v. Emp.*, 40 Cr.L.J. 750, 183 I.C. 195, 12 R.S. 47, A.I.R. 1939 Sind 181. But in some other cases it was held that a succeeding Magistrate had no jurisdiction to institute proceedings under this section, where an offence was neither 'committed before him nor was brought under his notice in the course of a judicial proceeding' (see the words of the old section)—*Begu Singh*, 31 Cal. 551 (F.B.); *Kartik Ram*, 35 Cal. 114; *Krishna Gobinda*, 9 C.W.N. 859 (860); *Dauli*, 10 Cr.L.J. 158, 1909 P.R. 6; *Ramakrishna*, 2 Weir 597. These words have now been replaced by the more general words "committed in or in relation to a proceeding in that Court" and in this view of the law, the ruling in 31 Cal. 551, etc., is no longer correct. Moreover, the new sec. 559 expressly lays down that all the powers of a Judge or Magistrate may be exercised by his successor-in-office. See also Note 623.

Where proceedings under this section have been commenced by a presiding officer of a Court, it is competent for his successor-in-office to continue the proceedings—*Purna Chandra v. Saikh Dhalu*, 34 C.W.N. 914 (922), 1930 Cr.C. 1129; *Bahadur v. Eradat-ullah*, 37 Cal. 612 (618) (F.B.); *Bholu*, 7 A.L.J. 991, 11 Cr.L.J. 438 (439). If an

officer orders a preliminary inquiry, but before he can hold that inquiry, is transferred, his successor would be competent to hold the inquiry, and, as a result of that inquiry, to direct a prosecution—*Begu Singh*, 34 Cal 551 (562). But where the preliminary inquiry has been commenced by the proper officer who issued the notice, and after his transfer, is continued by another officer who is *not the successor of the former officer* but to whom the District Judge merely makes over the case for disposal, the latter officer is not competent to complete the inquiry and pass an order under this section—*Muhammad Munir Khan*, 10 P.L.R. 1911, 12 Cr L.J. 68, 9 I.C. 389 (390).

Power of superior (Appellate) Court to take action:—See secs. 476A, 476B. An Appellate Court can make a complaint only when the case in which the offence has been committed is before that Court in appeal, or when the original Court has omitted to make a complaint (sec. 476A) or when the original Court has refused to make a complaint and the order of refusal is appealed from to the Appellate Court (sec. 476B). But when the proceedings for making a complaint are already going on before the original Court, the Appellate Court cannot step in and deal with the matter—*Rajdhari v. Rameshwar*, 49 All 460, 25 A L.J. 433, A I.R. 1927 All. 469 (470).

1240. Power of High Court:—The old section did not apply to proceedings in High Court or Courts in Presidency towns; consequently, it was not competent to the High Court, acting under this section, to direct the prosecution of a person for the offence for forgery or abetment of forgery brought to its notice in the course of hearing an appeal in a Probate case—*In re a Vakul*, 19 Cr L.J. 638 (Cal.); See also *Aditram*, 9 Bom.L.R. 1160, 6 Cr L.J. 326. This ruling is no longer correct in view of the second para (newly added) of sub-section (1).

A High Court sitting to exercise the revisional powers under this Code can lay a complaint under sec. 476—*Syed Khan*, 3 Rang 303, 27 Cr L.J. 4, A I.R. 1925 Rang. 321, 91 I.C. 36; *Ivor Henry Bridgnell*, 38 Cr L.J. 1002 (1004), 170 I.C. 891, 10 R.S. 81, A I.R. 1937 Sind 193. Section 476A, Cr P.C., does not exclude the power of a High Court to make a complaint in revision—*Ivor Henry Bridgnell*, supra. The High Court has also the power, if it does not wish to enquire itself, to order the trial Court to enquire either under the provisions of sec. 423 (d), Cr. P. C., as an 'incidental order' or under sec. 561A, Cr P. Code. The objection that sec. 195, Cr. P. C., no longer finds a place in sec. 439, Cr. P. C., has no force—*Ivor Henry Bridgnell*, supra.

The High Court has also jurisdiction in an application in civil revision to order proceedings under sec. 476, Cr P. C., in respect of the alleged offences under secs. 193 and 471, I P. C., which were no doubt committed in the trial Court but were also committed in the High Court when the person proceeded against relied upon the disputed documents in his application in civil revision—*Shankar Lal v. Emp.*, 38 Cr L.J. 1080, 171 I.C. 525, 1 L.R. 1937 All 774, 1937 A L.J. 820, 1937 A W R. (H.C.) 690, 1937 A Cr C. 115, 1937 A L.R. 582, A I.R. 1937 All 681.

The proviso newly added in 1926 lays down that a complaint by a High Court need not be signed by the Judge himself but may be signed by an officer of the Court. "The Lahore High Court (see 6 Lah. 34 below) has represented that it is a needless waste of time of the Judges of a High Court that they should be required to sign all complaints under sec. 476. The proposed change enables any officer of such a Court whom the Court may appoint to sign the complaint"—*Statement of Objects and Reasons* (Gazette of India, 1925 Part V, p. 215). Before this proviso was added it was held by the Lahore High Court that the procedure of the new sec. 476 in its application to a High Court Judge that he should have to make and sign a complaint which was to be inquired into by one of his subordinates, and that he should be treated and recorded as a complaint throughout the proceedings was open to serious objections; nor was it fair to the accused that he should be arraigned in a case instituted on a complaint made by a Judge of the highest tribunal and was to be tried by a judicial officer who was subordinate to the complainant. There could be little doubt that by reason of a circumstance that the complaint was preferred by a High Court Judge, the accused

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person was likely to entertain an apprehension, not altogether without justification, that his conviction was a foregone conclusion—*Qadir Baksh*, 6 Lah. 34, 26 P.L.R. 158, 27 Cr.L.J. 98. The proviso has been added in deference to these remarks.

The usual practice of the High Court in making a complaint is to give a direction that the judgment in the suit out of which the matter arises shall be treated as a complaint, in which case a copy of this judgment signed by the Judge will be sent by the Registrar to the Magistrate. But as sec. 476 requires a finding and a complaint, the better course is to make a separate order containing the requisite finding, setting out in detail specific matters extracted from the proceedings, and directing a complaint to be made in respect thereof, this being followed by a complaint which conforms to the term of the previous order—*Ramjan v. Mooli*, 56 Cal. 932, 33 C.W.N. 329 (332), 30 Cr.L.J. 974.

A Judge of the High Court can grant a direction to prosecute, under sec. 476, although the matter out of which the action arose was heard by another Judge of the Court; because any Judge of the High Court has power to exercise the powers of the High Court. But as a matter of convenience the prosecution must be directed by the same Judge, unless it becomes impracticable by reason of that Judge ceasing to hold office—*Bai Kasturibai v. Vanmalidas*, 49 Bom. 710, 27 Bom.L.R. 616, 26 Cr.L.J. 1189, 88 I.C. 709, A.I.R. 1925 Bom. 436. When a suit is tried by a Judge of the High Court, the term 'Court' occurring in the section must be taken to mean the High Court. There is nothing to prevent any Judge of the High Court from dealing with the matter though as a matter of convenience this would seldom be done—*T. Varadarajulu Naidu*, 38 Cr.L.J. 871, 170 I.C. 255, 1937 M.W.N. 330, I.L.R. 1937 Mad. 612, 10 R.M. 163, 1937 M.W.N. 330, 45 M.L.W. 257, (1937) 1 M.L.J. 396.

1241. Duty of Court:—The Court may, under this section, make the complaint on application made to it or otherwise—*T. Varadarajulu Naidu*, supra. Whether the Court acts on its own motion or on the application of a party, the responsibility for directing the prosecution rests entirely on the Court; and the power given by this section should be exercised with great care and caution—*Begu Singh*, 34 Cal. 551 (558); *Jadunandan*, 37 Cal. 250 (258). It is not in every instance in which a party fails to prove his case that the Judge who has decided against him is justified in exercising the powers conferred by this section. Judges should bear in mind that criminal prosecutions are frequently suggested by successful litigants merely to prevent an appeal in the civil suit, and they should be careful not to lend themselves to such suggestions too readily. The Judges should also recollect that when they proceed under this section, the responsibility for the prosecution rests upon them entirely—*Baijoo Lall*, 1 Cal. 450. As prosecutions ending in failures are to be deprecated as being calculated to do harm rather than good, they ought not to be undertaken without considerable circumspection and care. The offences contemplated by this section are offences against public justice; whence it follows that they ought to be pressed primarily in the interests of public justice, and never as a means of satisfying a private grudge—*Ram Prasad*, 37 Cal. 13 (20), 13 C.W.N. 1038, 10 Cr.L.J. 454. The Court will be astute to see that there shall be no abuse of the administration of criminal justice. No one therefore would be permitted to use the penal law merely to satisfy his own private ends or personal spite; that would be to misuse it—*An Attorney*, 41 Cal. 446 (458), 15 Cr.L.J. 49, 22 I.C. 321. Under the old section, it was held that proceedings should not be taken where the case was at best doubtful. There must be a *reasonable foundation* for the charge in respect of which prosecution is directed, before the criminal law could be set in motion—*Jadu Nandan*, 37 Cal. 250 (258), 14 C.W.N. 330. The view expressed in this ruling was quoted with approval in *U Po Thein v. Buta Khan*, A.I.R. 1936 Rang. 173 (474), 1936 Cr.C. 953. It was also held that before a Court was justified in directing a prosecution under section 476, there must be some *direct evidence* fixing the offence upon the persons whom it is sought to charge, either in the preliminary inquiry or in the earlier proceedings out of which the inquiry arises. It was not sufficient that the evidence in the case might induce some sort of *suspicion* that these

persons were guilty of an offence, but there must be distinct evidence of the commission of an offence by such persons—*Khepunath v. Girish*, 16 Cal. 730 (740); *Ganda Mal*, 21 Cr.L.J. 601 (Lah.), or that there must be a *reasonable prospect of a conviction*, in order to justify a Court in taking action—*Abdul Husen*, 9 N.L.R. 184, 15 Cr.L.J. 33 (35); *Abdul Qadir v. Muhammad Ibrahim Khan*, 25 Cr.L.J. 119, 76 I.C. 183, A.I.R. 1924 Lah. 569, *Bhagirathi*, 26 Cr.L.J. 1401 (1404), 89 I.C. 713, A.I.R. 1926 Nag. 141; *Jagat*, 31 Cr.L.J. 179, 120 I.C. 687, A.I.R. 1930 Lah. 55, 1930 Cr.C. 23; *Venkataswami*, 28 Cr.L.J. 1007, 105 I.C. 831, 26 M.L.W. 476, 39 M.L.T. 414, A.I.R. 1927 Mad. 996; *Gopaldas Khetriya v. Jnanendra Nath Dawn*, 40 Cr.L.J. 450 (453), 180 I.C. 586, A.I.R. 1938 Cal. 677; *Nand Lal v. Emp.*, A.I.R. 1937 Lah. 867 (868), 39 P.L.R. 812, 172 I.C. 942; *Natha Mal v. Emp.*, 41 P.L.R. 96. But the wording of the section has now been changed. The Madras High Court holds that under the present section it is not the duty of the Court to see that there is a reasonable probability of the prosecution ending in a conviction, though the Court acting under this section should not act capriciously or without proper grounds—*Seshamma v. Venkamma*, 22 L.W. 863, 27 Cr.L.J. 280 (283). See also *Gopaldas Khetriya v. Jnanendra Nath Dawn*, supra. Under sections 195 and 476, all that a Court has to see is that a *prima facie* case has been made out upon the evidence before it for inquiring further into the question whether any of the offences punishable as set out in sec. 195 has or has not been made out. The Court has not to see that the case must necessarily lead to conviction. The Court can take action if a suspicion is raised as to the commission of an offence—*Kidha Singh*, 13 A.L.J. 1111, 16 Cr.L.J. 817 (dissenting from *Jadunandan*, 37 Cal. 250). See also *Naurang Rai*, 32 Cr.L.J. 60, 127 I.C. 859, A.I.R. 1930 Lah. 347, 1930 Cr.C. 395, Ind. Rul. 1930 Lah. 891; *Surendra*, 35 Cr.L.J. 785, 148 I.C. 866, 1933 A.L.J. 1623, A.I.R. 1934 All. 385, 1934 Cr.C. 464, which has been dissented from in *Ali Naqi v. Sheikh Raqidu*, A.I.R. 1934 All. 1065, 4 A.W.R. 342, 1934 A.L.J. 870, 152 I.C. 34, 57 All. 351. But the Oudh Chief Court is of opinion that proceedings should not be taken on the application of private persons unless the prosecution is reasonably certain to result in a conviction—*Shankar Sahai*, 7 O.W.N. 638, 31 Cr.L.J. 938; *Suraj Lal v. Sheo Shankar*, 35 Cr.L.J. 908 (912); *Adkibai v. Parbatibai*, 30 Cr.L.J. 407, 115 I.C. 174, Ind. Rul. 1929 Nag. 110; *Kishen*, 35 Cr.L.J. 1277, 151 I.C. 290, 11 O.W.N. 1058, A.I.R. 1934 Oudh 377. It is undesirable that proceedings under this section should be initiated at the instance of a private party—*Begerath v. Ramnarain*, 120 I.C. 15, A.I.R. 1930 Pat. 194, Ind. Rul. 1929 Pat. 686, 30 Cr.L.J. 1144. It will rarely be in the interests of justice that a Judge should prefer a charge which is not likely to succeed—*Ghanshamdas*, 35 Cr.L.J. 519 (521), 147 I.C. 1019, A.I.R. 1934 Sind. 412, 1934 Cr.C. 1545; *Naualal*, 37 Cr.L.J. 193 (195), 159 I.C. 817, 2 B.R. 112, 8 R.P. 313, A.I.R. 1936 Pat. 162, 1936 Cr.C. 254. Moreover, the Court taking action under this section must be *prima facie* satisfied that the offence has been committed by some definite individual or individuals against whom proceedings in the Criminal Court are to be taken—*Mahomed Bhakku*, 23 Cal. 532. It must come to a finding as to which of the individuals sent for trial has committed the offence—*Amar Nath v. Mam Raj*, 2 Lah. 63, 22 Cr.L.J. 329. Where a District Judge being of opinion that the forgery of a document produced before him was committed either by the plaintiff or by the defendant, sent both of them to a first class Magistrate so that the guilty party might be proceeded against, it was held that the order was illegal and must be set aside in revision—*Pirbhu Dayal*, 1905 P.L.R. 163, 3 Cr.L.J. 73; *Amar Nath*, supra. See also Note 613.

In considering whether a prosecution is to be ordered or not, it is desirable to have regard to the interests of public justice rather than to the gratification of private spite. Regard may also be had to the question whether the prayer for prosecution is a manoeuvre to obtain an undue advantage by embarrassing the defence in a pending civil proceeding. Another point which might well be considered is whether there is evidence of any criminal act against each individual person against whom it is proposed to take proceedings; and with reference to the general question whether there is a *prima facie* case at all, it may be examined whether the person aggrieved was in fact following a

lawful procedure—*Bajrang Manwari v. Durga Prasad*, A.I.R. 1937 Pat. 31 (33), 33 Cr.L.J. 292 (294), 166 I.C. 870, 9 R.P. 350, 3 B.R. 226.

'Whether on application or otherwise':—A complaint under sec. 476 may be made by a Court either on application or otherwise. It is immaterial whether the application is made by a person who was not a party in the original suit—*Harekrishna*, 8 Pat. 736, 31 Cr.L.J. 143, A.I.R. 1929 Pat. 242, 11 P.L.T. 75, Ind. Rul. 1930 Pat. 53. It is open to the Court to entertain an application under this section at the instance of a stranger to the proceedings out of which the application arises—*Bhagwandas Narandas v. D. D. Patel & Co.*, 41 Cr.L.J. 526 (528), 187 I.C. 867, I.L.R. 1940 Bom. 403, A.I.R. 1940 Bom. 131, 42 Bom.L.R. 231.

Under this section there is no necessity for an application. The Court can be moved otherwise to take action under this section—*Behari Lal v. Abdul Qadir*, A.I.R. 1940 Lah. 292 (298), 41 Cr.L.J. 843, 190 I.C. 178.

Death of the applicant:—Where the applicant died after putting in the petition under this section and his minor sons said that they did not desire to take any part by way of argument either in support of the petition or in opposition to it, *held* that the death of the applicant made no difference at all and that the Court once having been moved, it was then a question for the Court to decide and not the parties themselves—*Venkatarama Reddi v. Srinivasa Reddi*, 37 Cr.L.J. 557 (559), 162 I.C. 285, A.I.R. 1936 Mad. 350.

'Is of opinion':—There must be an *opinion*, as distinguished from a mere surmise or assumption; that is, the Court should act on evidence and not perversely—*Karri Venkanna*, 31 M.L.J. 400, 17 Cr.L.J. 515; but it is not possible to fix the quantity or nature of the material on which the Court's opinion is to be formed, or to restrict the exercise of the general discretion which the Legislature has conferred on the Court—*Ibid.* The opinion must be opinion of the Court taking action under this section and not the opinion of any superior Court—*Alamdard*, 23 All. 249. The Court must form its own opinion and should not take opinion from others., Where the High Court directed the Sessions Judge to take action under this section, *held* that it was the duty of the Sessions Judge to apply his own mind to the matter on the merits and then decide whether a prosecution was necessary or not—*Ghanram*, 21 A.L.J. 930. Where a Munsiff in making an order under this section purported to act not of his own accord but at the direction of the District Judge, it was *held* that the order of the Munsiff was bad, in as much as it was only nominally his, and the opinion was really the opinion of the District Judge—*Raizul Hasan*, 6 A.L.J. 924, 10 Cr.L.J. 525 (526). There is nothing either in sec. 476 or 476A to warrant the suggestion that where a Subordinate Judge asked for directions from the District Judge he become *functus officio* and that any complaint subsequently filed by him under sec. 476 is prohibited by the Statute—*Moolchand*, 34 Cr.L.J. 305 (307), 142 I.C. 74, 26 S.L.R. 105, A.I.R. 1933 Sind 37, 1933 Cr.C. 166, Ind Rul 1933 Sind 82.

'Expedient in the interests of justice':—A prosecution should be undertaken only when it is expedient in the interests of justice that a complaint should be made. Thus, the mere fact that a person has made contradictory statements in his deposition is not a sufficient basis for his prosecution for perjury; the Court should consider and come to a finding that the prosecution is necessary in the interests of justice—*Karamat Ali*, 55 Cal. 1312, 30 Cr.L.J. 221 (222); *Kamini Kumar*, 33 C.W.N. 664 (668), 31 Cr.L.J. 373. Every case of perjury need not necessarily result in the prosecution of the person who is guilty of the offence. The Court has to see whether it is in the interests of justice to direct the prosecution of the person concerned. It is the policy of the law, as appears from the amendment of the relevant sections of the Cr. P. Code, whereby such prosecutions have not now been left to private prosecutors but their conduct has been entrusted to the Courts, that in dealing with such matters the Court should see that the prosecution is undertaken in the interests of justice and not to satisfy the private grudge of a litigant—*Nand Lal v. Emp.*, A.I.R. 1937 Lah. 867 (868, 869),

39 P.L.R. 812, 172 I.C. 942. See also Notes 616 and 617. When cases of intentionally giving false evidence or giving inconsistent evidence come to the notice of the Court, they should be adequately dealt with. In such cases, it is in the interests of justice that the offenders should be prosecuted and punished—*Kamini Kumar*, supra.

If the Court is satisfied that it is expedient in the interests of justice to make a complaint, it has jurisdiction to do so, inspite of the fact that in the Appellate Court the parties agreed to compromise the matter or to get it decided by a reference to arbitration or in accordance with the statement of a referee—*Narain Das*, 49 All. 792, 28 Cr.L.J. 549 (551), 25 A.L.J. 559.

Where one of the allegations made about the Senior Subordinate Judge practically amounts to an accusation of corruption against him and such an allegation appears *prima facie* to be false, it is in the highest degree expedient in the interests of justice that there should be an enquiry into it. The Court is justified in making a complaint under sec. 193, I. P. C., against the person making such allegation—*Jai Ram v. Emp.*, 41 Cr.L.J. 701 (702), 188 I.C. 863, A.I.R. 1940 Lah. 203, 42 P.L.R. 40.

See also Note 1246.

Inquiry:—The proceedings under Chap XVI precede a summons case as well as a warrant case and the term "inquiry" in this section is wide enough to include any proceedings under that chapter even if they only consist of the act of the Magistrate in reading the complaint to find out whether it is a fit case in which to proceed against the accused or not. This section is not, therefore, restricted to a warrant case but applies to a summons case also—*Ram Lal Anand*, 41 Cr.L.J. 766, 189 I.C. 628, A.I.R. 1940 Lah. 233, 42 P.L.R. 505.

Appears:—There is nothing whatever in the language of this section to suggest that a Court making a complaint can only act on statements that are made on oath before it. All that this section lays down is that it should "appear" to the Court that an offence has been committed and if a responsible officer in the position of a Senior Subordinate Judge makes a report that certain statements made on oath are false it would be sufficient to make it "appear" for the purposes of this section that an offence of perjury has been committed—*Jai Ram v. Emp.*, 41 Cr.L.J. 701, 188 I.C. 863, A.I.R. 1940 Lah. 203, 42 P.L.R. 40.

1242. Power to take action in a pending case or appeal:—It has been held in some cases that proceedings under this section should not be taken until *after the close* of the case in which the false evidence was given or forged document was used as genuine, etc. Thus, it is improper for a Magistrate to order the prosecution of a witness for perjury, while the proceedings in which the witness has given his deposition are pending before him—*Rustomji*, 4 Bom LR 778; *Ramoo Singh*, 21 Cr.L.J. 29 (Pat.); *Kolu v. Tikaram*, 26 Cr.L.J. 1350 (Nag); *Raj Kumar v. Satish Chandra*, 21 C.W.N. 753; *Brojobashi v. Emp.*, 13 C.W.N. 398 (401). Such a hasty proceeding, as placing a witness on his trial as an accused immediately after he has given his evidence, and before the close of the case, is bad, because the necessary result of such a step would be to frighten the remaining witnesses and seriously affect the case of the party who called him as witness—*Sikandar Lal*, 10 Lah. 778, 30 Cr.L.J. 129 (131); *Bhogslal*, Ratanlal 477; *Kashinath*, 8 B.H.C.R. 126; *Ramoo Singh*, 21 Cr.L.J. 29; *Nadershah*, 9 S.L.R. 176, 17 Cr.L.J. 77. When a criminal offence is alleged to have been committed in the course of revenue or civil proceedings, the rule is that the facts upon which the criminal offence is founded should, as far as possible, be finally determined in the Civil or Revenue Court before a prosecution in respect of the criminal offence is commenced. The refusal of the Revenue or Civil Court to try out the proceedings in which the criminal offence is alleged to have been committed materially affects the criminal proceedings and amounts to a denial of the right of fair trial—*Faujdar Rai v. Emp.*, 26 Cr.L.J. 1565 (1567), A.I.R. 1926 Pat. 25, 90 I.C. 445, 7 P.L.T. 199. But this is not an invariable rule. Although in most cases it would be improper to take action under this section before the close of the original case, still in exceptional cases (e.g.,

in cases of bare-faced perjury) the Court can at once send the witness to a Magistrate. At any rate the action of the Court in taking proceedings under sec. 476 during the pendency of the case would be *improper* or premature, but not *illegal* or without jurisdiction, and does not constitute any material irregularity in the exercise of its jurisdiction—*Karri Venkanna*, 31 M.L.J. 440, 17 Cr.L.J. 515 (522) (F.B.). See also *Devji Valad Bhavani*, 18 Bom. 581. The object of this section would be entirely frustrated if the proceedings were invariably allowed to be delayed pending the disposal of the civil litigation which might be indefinitely protracted even up to a final decision on appeal to the Privy Council—*Bal Gangadhar Tilak*, 26 Bom. 785 (791), followed in *Lakhmichand*, 21 S.L.R. 43, 27 Cr.L.J. 1249 (1250). If there is a delay in the disposal of the suit in which the offence has been committed, there is no reason why the Court should delay proceedings under this section until the suit is disposed of, which disposal may not occur until months or years later—*In re Perumalla*, 44 M.L.J. 74, A.I.R. 1923 Mad. 228, 23 Cr.L.J. 712.

Since an appeal is a continuation of the trial, proceedings under this section should not be taken during the pendency of the appeal in the case in which the petitioner is alleged to have given false evidence or produced a fabricated document—*Gendon Singh*, 3 Cr.L.J. 303, 3 C.L.J. 302; *Shri Nana*, 16 Bom. 729; *Mutty Lall*, 6 Cal. 308; *Attar Singh*, 1916 P.R. 29, 18 Cr.L.J. 337 (338); *Harnam Singh v. Atri*, 7 Lah.L.J. 73, 26 Cr.L.J. 1168. A contrary view seems to have been taken in *Hriday*, A.I.R. 1929 Pat. 500, 10 P.L.T. 889, 30 Cr.L.J. 1101, 119 I.C. 888, 1929 Cr.C. 252; *Bhagirath v. Ram Narain*, A.I.R. 1930 Pat. 194, 30 Cr.L.J. 1144, 120 I.C. 45, where proceedings under this section were not stayed pending hearing of the appeal in the civil suit. If the same question of fact is in issue in the appeal it is undesirable to allow proceedings to be taken under sec. 476 during the pendency of the appeal. But where a second appeal has been preferred to the High Court, in which no question of fact is in issue, but only a question of law, it is not improper to take action under this section during the pendency of the second appeal—*Rajkumar*, 1 P.L.J. 298, 18 Cr.L.J. 135 (136). The new sub-sec. (3) now provides that if a proceeding has already been taken, it may be adjourned till the decision of the appeal. See *Sochet Singh*, 32 Cr.L.J. 584, 130 I.C. 651, Ind. Rul. 1931 Lah. 331, A.I.R. 1931 Lah. 49, 1931 Cr.C. 113, 32 P.L.R. 303; and *Singheswar Prasad v. Sakhichand*, 38 Cr.L.J. 476, 167 I.C. 895, 9 R.P. 446, 3 B.R. 376, A.I.R. 1937 Pat. 139, where it has been laid down that in the event of the prosecution being launched before the disposal of the appeal, the Magistrate will have to consider whether it should be adjourned till the disposal of the appeal and will also have to decide at what stage it should be adjourned, that is to say, whether it will be expedient to adjourn it before taking the evidence or after. But see *Nagendra*, A.I.R. 1930 Cal. 578, 127 I.C. 64, 31 Cr.L.J. 1154, 1930 Cr.C. 892.

Where the criminal case is calculated to hamper the fair trial of the issue, on which the alleged offence is founded, in the Civil Court, no complaint should be made under this section. Nothing should be done to anticipate or prejudice the result of the civil litigation that is sure to ensue at no distant future—*Rewashanker v. Emp*, A.I.R. 1910 Nag. 72, 1939 N.L.J. 562, 185 I.C. 400.

1243. "In or in relation to a proceeding in that Court".—Under the old law, the offences which fell under this section were those which were "committed before the Court or were brought under its notice in the course of a judicial proceeding." The wording of the present section is different, and follows the language of clause (b) of sec. 195. Where an offence committed in a case instituted before a 2nd class Magistrate was brought to the notice of the District Magistrate through a report from a Forest Ranger (who was the prosecutor in the case before the 2nd class Magistrate) it was held under the old section that the District Magistrate was not competent to act under this section as the offence was not brought to his notice in the course of a judicial proceeding—*Subbaraya*, 18 Mad. 487. Under the present law, the District Magistrate would be competent to take action under sec. 476A. This section applies when the offence is committed not only in a proceeding in a Court of law, but also in relation to a proceeding

in such Court. The same remarks apply to sec. 195 (b)—*Durga*, 34 Cr.L.J. 686, 144 I.C. 194, 1933 Cr.C. 484, Ind. Rul. 1933 All. 397, A.I.R. 1933 All. 318.

During the trial of a case by a jury, a certain person informed the Sessions Judge that he had seen the foreman of the jury talking to one of the accused. Thereupon, the Judge held an inquiry, and that person made the same statement before the Judge, who afterwards found the statement to be false and took action against that person under this section. Held that the action of the Judge was not without jurisdiction—*Bhuban Chandra*, 55 Cal. 279, 31 C.W.N. 828, 28 Cr.L.J. 783 (784).

Where a constable, who was entrusted with the execution of warrants against witnesses issued by a Magistrate trying a case, is prosecuted under sec. 211, I. P. C., for giving false information at the thanah to the effect that some persons had rescued one of those witnesses from his custody, cognizance cannot be taken of the case without a complaint of the Magistrate under sec. 476, Cr. P. C., inasmuch as the constable committed the offence in a transaction which arose out of the execution of those warrants and it was impossible to say that the offence was not committed in relation to the proceedings in which the warrants had been issued—*Ganga Prasad Singh v. Emp.*, 45 C.W.N. 195.

Where an affidavit containing a false statement was filed by a person before a *Munsarim of Court*, it was held under the old section that the Judge could not direct the prosecution of that person, because the offence of perjury was not committed before the Judge himself—*Mathura Prasad*, 15 A.L.J. 517, 18 Cr.L.J. 883. But this is no longer correct, and the above case would be covered by the present section which contemplates an offence committed 'in relation to a proceeding in the Court.' See also *Rameshwar Lal*, 49 All. 898, 25 A.L.J. 555, 28 Cr.L.J. 668 (670), where it has been held that a document produced before the *Munsarim* of the Court may be said to be a document produced in Court, and the Judge can take action under sec. 476 in respect of an offence committed in relation to the document. The old section was wide enough to enable a Court to take action in respect of an offence committed in another forum (even in another province) and on some previous occasion, provided it was brought to the notice of the Court in the course of a judicial proceeding—*Girwar*, 9 Cr.L.J. 219, 1 I.C. 306, 6 A.L.J. 392; *Khushali*, 40 All. 116; *Raj Kumar*, 1 P.L.J. 298, 18 Cr.L.J. 135 (136); *Kampta Prasad*, 33 All. 396. See also 43 Cal. 542. The present section is confined to offences committed 'in relation to a proceeding in that Court'.

Where the offence is not committed in or in relation to a proceeding in Court, this section does not apply. Thus, if a false charge is made before the Police, a Court cannot direct prosecution—*Hasbut Khan*, 33 Cal. 30 (32); *Jadunandan*, 37 Cal. 250 (256), 14 C.W.N. 1330; but if the person making the false charge before the police, subsequently makes a false complaint before a Magistrate in respect to the same matter, he commits an offence before a Court, and the Court can take action under this section—*Jadunandan*, supra. In fact, in such a case the complaint of the Court under sec. 476 is essential. See Note 620 under sec. 195.

The words "in relation to a proceeding" mean that the offence has entered as a component into the proceeding. The offence need not have been committed before the Court, and it may have been committed before the proceedings began, but it is indispensable that the offence must in some manner have affected those proceedings or been designed to affect them or come to light in the course of them. An offence committed after the close of the proceedings is outside the scope of this section. So, where a document was filed in a suit on the 7th January, and the suit came to an end on the 9th, and an offence (false endorsement on the document) was committed after the 9th, held that the offence was not committed in relation to the suit, as it was committed after its termination and the fact that the document remained in the custody of the Court for a long time afterwards, made no difference. The mere fact of the document remaining in the Court records makes only an accidental connection between the offence and the suit. Documents sometimes remain in the custody of the Courts for a number of years, after the termination of a proceeding, and to relate them for this purpose to the

proceeding in which they were filed would be to extend the meaning of the words "in relation to" beyond reasonable limits—*Subbarayudu v. Gopayya*, 55 Mad. 531, 62 M.L.J. 310, 33 Cr.L.J. 788 (789, 790), 139 I.C. 482, 1932 M.W.N. 241, 35 M.L.W. 319, 1932 Cr.C. 276, A.I.R. 1932 Mad. 290.

Statements made during the course of an investigation under sec. 164, Cr. P. C., into an offence of murder, which is triable only by a Sessions Court, must be held to be in relation to the trial in that Court. The Sessions Judge can, therefore, make a complaint under sec. 193, I. P. C., with reference to those statements—*Maromma*, 34 Cr.L.J. 92, 140 I.C. 756, A.I.R. 1933 Mad. 125, 1933 Cr.C. 157, 1933 M.W.N. 100, Ind. Rul. 1933 Mad. 43. See also *Ponnusami*, 1933 M.W.N. 896 and *Krishnamachari*, A.I.R. 1933 Mad. 767, 1933 M.W.N. 902, 65 M.L.J. 534, 38 M.L.W. 564, 1933 Cr.C. 1373, 147 I.C. 794.

The words "in or in relation to a proceeding in Court" occur in sec. 476, as well as in clause (b) of sec. 195, but not in clause (c) of that section. This does not mean that so far as the offences mentioned in sec. 195, clause (c) are concerned, sec. 476 applies only if the offences are committed in or in relation to a proceeding in Court, and that if those offences are not committed in relation to any proceeding in Court, the procedure of sec. 476 need not be followed, though a complaint under sec. 195 would be necessary if the offences are committed by a party to the proceeding. This is not the intention of the Legislature. The words "in or in relation to" have been left out in clause (c) of sec. 195, because the sense produced by these words is sufficiently conveyed by the language used in clause (c). In other words, the offences mentioned in clause (c) are necessarily committed in relation to a proceeding in Court, in the same manner as the offences mentioned in clause (b); and sec. 476 applies to both—*Kushal Pal*, 53 All. 804 (F.B.), 1931 A.L.J. 697, 32 Cr.L.J. 1105 (1109, 1116).

"Offence referred to in sec. 195":—These words incorporate the conditions laid down in sec. 195 for taking cognizance of the offence by a Court—*Gobinda v. Rax*, 42 Mad. 540. As the offences contemplated by this section are offences described in section 195, a Magistrate cannot direct a prosecution for an offence under sec. 421, I. P. C., because this offence is not mentioned in sec. 195—*Mahadeo Sadhu*, 18 A.L.J. 50. See also *Kushal Pal*, *supra* and Note 1236.

For the offences referred to in sec. 195 (b) and (c), see fuller notes under that section.

The jurisdiction to make a complaint under this section is limited to the offences mentioned in clauses (b) and (c) of sec. 195. Section 476 does not authorise a complaint with reference to the offences mentioned in clause (a) of section 195, e.g. offences under secs. 183, 185, 186, 188 or 409, I. P. Code—*Dore Sah*, 2 Luck. 636, 28 Cr.L.J. 681; *Indarjit*, 1 Luck. 527, 3 O.W.N. 618, 27 Cr.L.J. 974 (975); *Ram Nath*, 2 Luck. 395, 3 O.W.N. 757, 27 Cr.L.J. 1247; *Din Mahomed*, 10 Lah. 231, 29 P.L.R. 617, 29 Cr.L.J. 877. If the Court takes proceedings in respect of such offences, the irregularity is not curable by sec. 537, as that section no longer applies to proceedings under sec. 476—*Dore Sah*, *supra*. But see *Dharmumal v. Tenumal*, in Note 1248. See also Note 614B.

In this section the words "referred to in sec. 195, sub-section (1), clause (b) or clause (c)" require that the offence in respect of which the complaint is ultimately laid must be one of those offences to which those clauses apply or have reference. Reading sec. 476 with sec. 195, Cr. P. C., it is to be observed that the offence of abetment is dealt with only in sub-section (4) of sec. 195. By that sub-section it was added as an amendment that the provisions of sec. 195, sub-section (1), clause (b) or clause (c), were to apply to an abetment. And in that sense quite clearly sec. 195, sub-section (1), clause (b) or clause (c) is made to have reference to an abetment. The Court has, therefore, jurisdiction to make a complaint of abetment of an offence mentioned in clause (b) or clause (c) of sub-section (1), sec. 195 Cr. P. C., in accordance with the provisions of this section—*Tan Ba Cheng v. Registrar, O.S., High Court*, 41 Cr.L.J. 515, 187 I.C. 754, A.I.R. 1910 Rang. 164, 1910 Rang. 12.

1244. Proceedings in Court:—A departmental inquiry is not a proceeding in Court—*Maung Ba Hla*, 18 Cr.L.J. 331 (332) (Bur.); 23 O.C. 136. Where a person preferred a complaint to a District Registrar containing an allegation against the Sub-Registrar, and the District Registrar after holding a departmental inquiry was satisfied as to the falsity of the complaint and directed the prosecution of the complainant for an offence under sec. 182, I. P. C., the order was held to be wholly without jurisdiction, as the inquiry held by the District Registrar was a departmental inquiry and not a judicial proceeding—*Muljat Ali*, 10 C.W.N. 222. Where a District Magistrate called for the record of a case tried before a Sub-Magistrate, in his executive capacity, for the purpose of enabling him to ascertain whether an application for an inquiry into the conduct of a police officer should be granted or not, and then directed the prosecution of the officer under sec. 193, I. P. C., it was held that the order should be set aside, in as much as there was no judicial proceeding before a Court for the purposes of this section—*Sanglia Pillai*, 25 Mad. 659. Where a District Magistrate directed the prosecution of a person under sec. 211, I. P. C., for having given a false report of theft to the Police, it was held that the order was not one passed under this section but one passed by the District Magistrate as the *ex officio* head of the Police to whom a false complaint was made—1890 A.W.N. 167. A village headman made an application to the District Magistrate stating that he wished to resign his post. On being questioned as to his reasons, he stated that the police in the course of the investigation into a dacoity case was forcing a large number of people to pay money to them. Thereupon the Magistrate examined the headman on oath and sent the papers to the District Superintendent of Police, who after an inquiry reported that the charge against the Police was false. Thereafter the District Magistrate passed an order directing the prosecution of the headman for perjury. It was held that the order was illegal, as the proceedings before the District Magistrate were not judicial proceedings—38 All. 32. After the dismissal of a complaint as false by a Deputy Magistrate, the papers were sent to the District Magistrate, on the motion of the Police for the case being struck off the 'register.' The District Magistrate in striking off the case ordered the prosecution of the complainant for an offence under sec. 211, I. P. C. It was held that the proceeding before the District Magistrate was not judicial but purely an executive one, relating solely to the question as to the removal of the case from the register, and the order therefore did not come under this section—*Thakur v. Bilar*, 1884 A.W.N. 290. A proceeding before a Deputy Commissioner or Chairman of the District Board is not a proceeding in any Court within the meaning of this section—23 O.C. 136. Where the accused went to the Magistrate's house and made a false statement there, the offence could not be said to have been committed in any proceeding before a Court—3 Lah.L.J. 535. Where a person escaped from the lawful custody of a servant of a Civil Court, the offence (escape from the custody) was not committed in relation to any proceeding in Court; consequently this section does not apply, and the proper procedure is that the servant of the Court should file a complaint in the ordinary way—*Madho Singh*, 47 All. 409, 23 A.L.J. 189, 26 Cr.L.J. 864. But see *Ganga Prasad Singh v. Emp.*, in Note 1243.

Proceedings which are irregular or illegal or without jurisdiction are not proceedings under this section, and therefore no order for prosecution can be passed in such proceedings. Thus, where the order of a Magistrate, before whom a complaint was preferred, in making over the complaint to a Subordinate Magistrate for inquiry and disposal of the case was bad in law, the order of the Subordinate Magistrate under sec. 476 for the prosecution of the complainant passed after such inquiry would be illegal—18 C.W.N. 95. See also 16 C.W.N. 885; 43 Cal. 173. But see *contra*—1 P.L.J. 553. A charge of unprofessional conduct made against a second grade pleader can be inquired into only by the presiding officer of the Court in which the pleader practises. The District Judge has no jurisdiction to inquire into the matter; where the District Judge assumes jurisdiction in such a case, makes an inquiry and acquits the pleader, and takes proceedings under this section against a person for giving false evidence, the order cannot be upheld, as it is one without jurisdiction—32 M.L.J. 402.

Where the complainant did not desire to take further proceedings and applied to withdraw the complaint, the Magistrate was not competent to order under this section the prosecution of the complainant under sec. 211, I. P. C., for making a false complaint, on taking evidence, as there was no proceeding before him, it being withdrawn by the complainant—*Mauli v. Naurangi*, 4 C.W.N. 351.

The user of a document in the course of the inquiry under sec. 202, Cr. P. C., is user of it in or in relation to a proceeding of the Court of the Subdivisional Magistrate—*Raghuandan Lal*, 35 Cr.L.J. 1309, 151 I.C. 320, 15 P.L.T. 17, 1934 Cr.C. 340, A.I.R. 1934 Pat. 156, A.L.R. 1934 Pat. 52.

Execution proceedings are proceedings in Court—*Bahadur v. Eradatullah*, 37 Cal. 642 (648) (F.B.); *Bholanath*, 10 C.W.N. 55; *Daklineswar v. Haris Chandra*, 10 Cr.L.J. 450, 25 M.L.J. 593, 17 O.C. 309, 10 N.L.R. 177, 19 Cr.L.J. 153 (Pat.). An appeal in a mutation case before the Commissioner is a proceeding contemplated by this section—6 P.L.J. 178. Proceedings before a Collector under sec. 69 of the Bengal Tenancy Act fall under this section—*Lakshan v. Naranarain*, 48 Cal. 1086.

Proceeding need not be judicial:—Under the amended section it is not necessary that the proceeding in respect of which action is taken should be of a judicial character. Where a prosecution started under this section was dropped on the ground that the proceeding in the course of which the offence was committed was not of a judicial character (under the old section), but after the amended Code came into force, under which the proceeding in respect of which the alleged offence was committed need not be of a judicial character, the Public Prosecutor again moved the Court for taking the same action against the same person, held that the petitioner could be proceeded against. The dropping of the previous proceeding was no bar to the institution of the present proceeding—*Chamari v. Public Prosecutor*, 4 Pat. 24, 6 P.L.T. 225, 26 Cr.L.J. 170.

1245. Preliminary inquiry:—Where not necessary:—The words "such preliminary inquiry, if any, as it thinks necessary" show that a preliminary inquiry is not always indispensable—*Darpa Narayan v. Bepin*, 15 C.W.N. 691 (692); *Jivabhai*, 7 Bom.L.R. 84, 2 Cr.L.J. 54; *K. C. V. Reddy*, 8 Rang. 25, 31 Cr.L.J. 793 (795); *Jamuna v. Laldhari*, A.I.R. 1934 Pat. 536, 152 I.C. 228, 15 P.L.T. 694, 1934 Cr.C. 1191; *T. Varadarajulu Naidu*, 38 Cr.L.J. 871, 1937 M.W.N. 330, 170 I.C. 255, I.L.R. 1937 Mad. 612, 10 R.M. 163, 1937 M.W.N. 330, 45 M.L.W. 257, (1937) 1 M.L.J. 396; *Nand Kumar v. Emp.*, A.I.R. 1937 Pat. 534 (536), 1937 P.W.N. 119, 172 I.C. 237. Under this section itself the High Court can direct a preliminary enquiry—*Gopaldas Khetriya v. Jnanendra Nath Dawn*, 40 Cr.L.J. 450, 180 I.C. 586, A.I.R. 1938 Cal. 677 (679). It is within the discretion of a Court proceeding under this section, to hold a preliminary inquiry or not to hold such inquiry—*Kewal Ram*, 36 Cr.L.J. 1354 (1356), 158 I.C. 324, 16 P.L.T. 693, A.I.R. 1935 Pat. 515. This section does not make it imperative on a Court to hold a preliminary inquiry before taking action under this section. To justify the Court in initiating a prosecution, it is necessary only to hold that it is expedient in the interests of justice that an inquiry should be made into an offence referred to in sec. 195—*Qadir Buksh*, 6 Lah. 34, 26 P.L.R. 158, 27 Cr.L.J. 98; *Baperam v. Gouri*, 20 Cal. 474; *Matabadal*, 15 All. 392, 34 All. 267. It is for the Court acting in the matter to determine in the exercise of its discretion, whether or not to make a preliminary inquiry—*Choudhuri Mahomed Ishaful Huq*, 20 Cal. 349; *Baperam v. Gouri*, 20 Cal. 474. And an order under this section will not be set aside on account of omission to make a preliminary inquiry, unless the accused has been prejudiced by reason of such omission—*Darpa Narayan v. Bepin Behari*, 15 C.W.N. 691 (693). It cannot be laid down as a proposition of law that in every case it is prudent to hold a preliminary inquiry. In a case where an offence has been committed outside the Court and not in the presence of the Judge, it would be judicious, if not incumbent upon the Court, to hold a preliminary inquiry in order to find out for itself whether such an offence has been really committed. Where an offence was committed in the presence of the Court or where from a perusal of the record it is of opinion that it is in the interests of

justice that a complaint should be made in the Criminal Court it may make a complaint to that effect without making a preliminary inquiry—*Purna Chandra v. Shaikh Dhalu*, 34 C.W.N. 914 (918), 1930 Cr.C. 1129, 129 I.C. 561, 52 C.L.J. 87, A.I.R. 1930 Cal. 721, 58 Cal. 374, Ind. Rul. 1931 Cal. 209 (dissenting from *Sarat Chandra v. Hari Charan*, 51 C.L.J. 45, A.I.R. 1930 Cal. 282, 1930 Cr.C. 352). Where a Munsiff sent a case under this section to the nearest first class Magistrate without making any inquiry, and where there was nothing to show that any inquiry the Munsiff could have made would have put the Magistrate in a better position for dealing with the case, the omission to hold a preliminary inquiry was not bad—*Juala Prasad*, 5 All. 62 (64). If in the course of a proceeding, either civil or criminal, the Judge or Magistrate finds clear grounds for believing that either the parties or their witnesses have committed perjury, he is justified in directing criminal proceedings against such persons, without any further inquiry than that which he had already held in his Court—*Mutty Lal*, 6 Cal. 308. Where an application for a complaint is supported not by oral evidence but by documents, no further inquiry is necessary beyond that which the Court makes on the materials before it—*Ganti v. Harcourt*, 58 Cal. 215, 32 Cr.L.J. 826 (827). Where an order was made under this section directing the prosecution of a witness under sec. 193, I. P. C., on the very day or the day after, the witness's cross-examination had been finished, and upon a clear statement by the witness and after an opportunity having been given him to explain the inconsistency in his statements and in the cross-examination, it was held that it was not incumbent on the Court to institute a fresh inquiry or to give any notice to the accused—*Ramdhari*, 19 Cr.L.J. 169. The successor-in-office of the officer before whom the offence was committed, can pass an order under this section upon considering the evidence on the record and hearing the parties, without holding any preliminary investigation—*Darpa Narayan v. Bepin*, 15 C.W.N. 691 (693); *Purna Chandra v. Shaikh Dhalu*, 34 C.W.N. 914 (918), 1930 Cr.C. 1129, 52 C.L.J. 87, 129 I.C. 561, A.I.R. 1930 Cal. 721.

Where necessary:—See *Purna Chandra v. Shaikh Dhalu*, supra. When it depends upon matters not on the record, a preliminary inquiry should be held—*M. Mohamed Kaka v. Dist. Judge, Bassein*, A.I.R. 1937 Rang. 62, 38 Cr.L.J. 615, 168 I.C. 632, 9 R.R. 359, 1937 Rang.L.R. 276. Where a prosecution is ordered for making a false affidavit, but it appears that the document was written in English, and it does not appear whether the contents of the affidavit were explained to the deponent, held that a preliminary inquiry should be made before a prosecution is ordered—*Mathura Prasad*, 15 A.L.J. 517, 18 Cr.L.J. 883. Where a Subordinate Judge acting upon the report of a bailiff ordered the prosecution of persons who obstructed him in executing a warrant of attachment, held that he should have made a preliminary inquiry before ordering prosecution—*Sadashiv, Ratanlal* 701. Where in a civil suit, settled without any evidence being gone into, by confession of judgment, the Court had grounds for supposing that an offence of false personation under sec. 205, I. P. C., had been committed before it, the Court before directing a prosecution would be competent to hold a preliminary inquiry to satisfy itself whether a *prima facie* case has been made out for directing the prosecution—*Shashi Kumar*, 19 Cal. 345. The Court directed the prosecution of a person under sec. 174, I. P. C., for the disobedience of the summons to attend the Court and give evidence, and that person appeared and denied the service of summons on him; held that before prosecution a preliminary inquiry should be held as to the service of summons, and the said person should be given an opportunity to cross-examine the person who had deposed to the service of summons on him—*Lokpal Singh*, 19 A.L.J. 56, 22 Cr.L.J. 143, 59 I.C. 55.

Where in proceedings under sec. 528, Cr. P. C., the Additional District Magistrate made a complaint against the complainant stating that he had filed an affidavit and that the explanation of the trying Magistrate showed that a certain statement in the affidavit was false, held that it was unwise on the part of the Additional District Magistrate to act upon the explanation when the difficulty could have been overcome by an enquiry under this section—*Ambica*, 32 Cr.L.J. 674, 131 I.C. 252, 53 C.L.J. 184,

A.I.R. 1931 Cal. 314, 35 C.W.N. 690, 58 Cal. 1211, 1931 Cr.C. 408, Ind. Rul. 1931 Cal. 438.

A Court ought not to file a complaint in respect of offences under secs. 209, 467 and 471, I. P. C., when the matter has not been thoroughly shifted by it in course of a regular judicial inquiry—*Gauri*, 37 Cr.L.J. 518, 161 I.C. 602, 1936 O.W.N. 268.

1246. Procedure in preliminary inquiry:—The preliminary inquiry is a judicial proceeding, and oath can be administered to the suspected person—*Viswanath*, 8 Bom L.R. 589, 4 Cr.L.J. 183 (but see *Maung Po v. Mutu Kurpan*, 10 Bur.L.T. 316 given below in this Note); or to any person examined as a witness in the preliminary inquiry; and if such witness gives false evidence, he may be prosecuted for an offence under sec. 193, I. P. Code—*Abdullah*, 37 Cal. 52 (55), 14 C.W.N. 132 (134).

The inquiry must be on evidence; one mode of making inquiry is certainly to take evidence—*Abdullah*, 37 Cal. 52; *Raghubar v. Kokil*, 17 Cal. 872. The law does not require a minute or detailed or exhaustive inquiry, but only such preliminary inquiry as may be necessary to make out a *prima facie* case. The extent of the preliminary inquiry is left to the discretion of the Court—*Chamari*, 4 Pat. 484, 27 Cr.L.J. 371; *Bhuban Chandra*, 55 Cal. 279, 31 C.W.N. 828, 28 Cr.L.J. 783 (784); *Juala Prasad*, 5 All. 62. The nature, method and extent of the inquiry are entirely at the discretion of the Court. The inquiry need not take the form of a full-dressed trial, so as to satisfy the Court that an offence has *actually* been committed. Nothing more is necessary than to find that an offence *appears* to have been committed and a long discussion or a decision on the merits is as undesirable as it is unnecessary—*Raja Rao*, 50 Mad. 660 (661), 27 Cr.L.J. 1149 (1150), 51 M.L.J. 551. Where an inquiry is made, it is not necessary that it should be detailed or formal—*Kewal Ram*, 36 Cr.L.J. 1354 (1356), 158 I.C. 324, 16 P.L.T. 693, A.I.R. 1935 Pat. 515. The authority which is called upon to take action under this section need not, and should not, decide the question of the guilt or innocence of the party against whom proceedings are to be instituted—*Jadunandan*, 37 Cal. 250 (258). The section does not say that before a Court makes a complaint, it must try the whole case and be absolutely satisfied that the accused cannot by any possibility escape a conviction—*Abdul Husen*, 9 N.L.R. 84, 15 Cr.L.J. 33 (35). The Code does not contain any provision as to the manner in which the evidence in the inquiry should be recorded, but for further reference the Court should make a summary of the statement of the witness examined—*Jogendra Nath*, 42 Cal. 240, 18 C.W.N. 1242.

It is not necessary that the preliminary inquiry should be conducted in the presence of the accused, or that any notice should be given to him. See Note 1247, *infra*. The accused has no right to cross-examine any witness in the preliminary inquiry—*Bakir Sahab*, 18 Bom L.R. 284, 17 Cr.L.J. 249; *Abdul Ghaffoor v. Razu*, 34 All. 267; *Raja Rao*, *supra*; but see *contra*—*Ganeshwar*, 6 P.L.J. 146, 22 Cr.L.J. 458; *Lokpal Singh*, 19 A.L.J. 56, 22 Cr.L.J. 143, 59 I.C. 55; *Perumalla Venkata Subbiah*, 44 M.L.J. 74, A.I.R. 1923 Mad. 228, 23 Cr.L.J. 712; *M. Mahomed Kaka v. Dist. Judge, Bassein*, A.I.R. 1937 Rang. 62, 168 I.C. 632, 9 R.R. 359, 38 Cr.L.J. 615, 1937 Rang.L.R. 276; and *U Ba Hla v. Maung Tun Sein*, A.I.R. 1938 Rang. 297, 178 I.C. 305, 40 Cr.L.J. 56.

The person proceeded against under this section is in the position of an accused person, and cannot be examined on oath as a witness in the course of the preliminary inquiry. He can only be examined in accordance with the provisions of sec. 342—*Maung Po v. Mutu Kurpan*, 10 Bur.L.T. 32, 17 Cr.L.J. 316 (317); *Sami Sastri*, 2 Weir 598 (599). But see first paragraph of this Note. The person proceeded against in the preliminary inquiry can be called upon to produce a necessary document in his possession (sec. 94)—*Damri Ram*, 19 Cr.L.J. 217, 43 I.C. 793 (794).

Who can hold the inquiry:—The preliminary inquiry must be conducted by the officer who directs prosecution (i.e., makes the complaint) under this section, and cannot be delegated to any other officer—*Sakhi Rai*, 20 Cr.L.J. 245 (Pat.). It is for the *complaining* Court to make any inquiry that is necessary, and then to make a complaint. This section does not contemplate that the Court should send the case to a

Magistrate for preliminary inquiry, asking the Magistrate to make the inquiry and to prosecute if he is satisfied that the offence has been committed. It is the complaining Court that must be satisfied that there is a *prima facie* case against the person sent to the Magistrate—*Chamari*, 4 Pat. 24, 6 P.L.T. 225, 26 Cr.L.J. 170; *Shabbir Hasan*, 26 A.L.J. 46, 28 Cr.L.J. 986 (1987).

It is not necessary that the whole of the preliminary inquiry ought to be conducted by the Officer directing the prosecution. After making some inquiry, he can apply to the District Magistrate as the Head of the Police, for the assistance of the C. I. D., and the fact that he takes the assistance of the District Magistrate does not make him *functus officio* and deprive him of his jurisdiction to pass an order under this section—*Waman*, 43 Bom. 300, 20 Bom.L.R. 993, 20 Cr.L.J. 433. The complaining Court may order the inquiry to be made by the Police, but in that case, when the police papers arrive, the Court has to determine whether it is necessary to take action—*Shabbir Hasan*, *supra*. The Calcutta High Court is of opinion that this section contemplates that the inquiry (i.e., the whole inquiry) is to be made by the Court itself, and it is not competent to a Civil Court to base its order upon a police-report—*Provat Ranjan v. Uma Shankar*, 58 Cal. 727, 35 C.W.N. 98 (101), 32 Cr.L.J. 883, 1931 Cr.C. 590, A.I.R. 1931 Cal. 438, 132 I.C. 241, Ind. Rul. 1931 Cal. 561. But see *Fazlar Rahaman*, A.I.R. 1930 Cal. 515, 31 Cr.L.J. 1055, 126 I.C. 553, 1930 Cr.C. 859.

In deciding whether in the interests of justice that an inquiry should be made the Court is not confined to the record of the proceedings, but is entitled to take into account and consider information otherwise acquired. The applicant is entitled to adduce evidence outside the record of the proceedings out of which the application arises to show that evidence given in those proceedings was false—*Bhagwandas Narandas v. D. D. Patel & Co.*, 41 Cr.L.J. 526 526 (528), 187 I.C. 867, A.I.R. 1940 Bom. 131, I.L.R. 1940 Bom. 403, 42 Bom.L.R. 231.

The preliminary inquiry should not be unduly protracted. Action under this section should be prompt and expeditious. Where the Court passed the order for prosecution of the offender, nearly a year after the offence was brought to its notice, the High Court expressed disapproval of the undue protraction of the proceeding—*Bahadur v. Eradatullah*, 37 Cal. 642 (649) (F.B.).

Recording and finding:—The words in the section are “may record a finding”; this shows that it is not compulsory for the Court to expressly record a finding to the effect that it is expedient in the interests of justice that an inquiry should be made. Absence of such a finding will not invalidate the complaint—*K. C. V. Reddy*, 8 Rang. 25, 31 Cr.L.J. 793 (795); *Bhuban Chandra*, 55 Cal. 279, 31 C.W.N. 828, A.I.R. 1927 Cal. 628, 104 I.C. 111, 28 Cr.L.J. 783 (784); *Banke Lal v. Rampadarth*, 35 Cr.L.J. 459, 147 I.C. 712, 14 P.L.T. 635, A.I.R. 1933 Pat. 713, 1933 Cr.C. 1536; *Nawal Jha*, A.I.R. 1936 Pat. 162, 159 I.C. 817, 37 Cr.L.J. 193; *Naurang*, 32 Cr.L.J. 60, 127 I.C. 859, A.I.R. 1930 Lah. 347, Ind. Rul. 1930 Lah. 891, 1930 Cr.C. 395, *Sampuran*, 35 Cr.L.J. 1392, 151 I.C. 691, 35 P.L.R. 593; *Ibu Ali*, 36 Cr.L.J. 781, 155 I.C. 490, 1935 A.L.J. 395, A.I.R. 1935 All. 608. For contra see *Suraj Lal v. Sheo Shankar*, 35 Cr.L.J. 908, 149 I.C. 201, 11 O.W.N. 683, A.I.R. 1934 Oudh. 272, 1934 Cr.C. 768; *Keramat Ali*, 113 I.C. 842, 55 Cal. 1312, A.I.R. 1928 Cal. 862, 30 Cr.L.J. 221; *Surendra v. Kuniade*, A.I.R. 1930 Cal. 352, 51 C.L.J. 208, Ind. Rul. 1930 Cal. 736, 126 I.C. 416; *Satis*, A.I.R. 1930 Cal. 705, 52 C.L.J. 52, 32 Cr.L.J. 237, Ind. Rul. 1931 Cal. 126, 129 I.C. 110, 1930 Cr.C. 1105; *Chidukuri*, 33 Cr.L.J. 960, 140 I.C. 323, 56 Mad. 157, 63 M.L.J. 670, 1932 M.W.N. 1081, 35 M.L.W. 635, A.I.R. 1933 Mad. 67, 1933 Cr.C. 80, Ind. Rul. 1932 Mad. 851; *Nabani*, 34 Cr.L.J. 684, 144 I.C. 88, A.I.R. 1933 Cal. 147, 1933 Cr.C. 224, Ind. Rul. 1933 Cal. 501; *Suraj Lal v. Sheo Shankar*, A.I.R. 1934 Oudh. 272, 1934 O.L.R. 473, 11 O.W.N. 683, 149 I.C. 201; *Bal Gobind v. Jannabai*, A.I.R. 1935 Nag. 199, 1935 Cr.C. 1096, 158 I.C. 496, 36 Cr.L.J. 1371, 31 N.L.R. 370; *Yernemi*, 30 Cr.L.J. 370, 114 I.C. 834, 28 M.L.W. 774, A.I.R. 1929 Mad. 74, Ind. Rul. 1929 Mad. 354; *Ramayya*, 33 Cr.L.J. 960, 140 I.C. 323, 63 M.L.J. 670, 35 M.L.W. 636, 1932 M.W.N. 1081, Ind. Rul. 1932 Mad. 851, 56 Mad. 157. It is certainly

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Recording and finding:—The words in the section are “may . . . record a finding”; this shows that it is not compulsory for the Court to expressly record a finding to the effect that it is expedient in the interests of justice that an inquiry should be made. Absence of such a finding will not invalidate the complaint—*K. C. V. Reddy*, 8 Rang. 25, 31 Cr.L.J. 793 (795); *Bhuban Chandra*, 55 Cal. 279, 31 C.W.N. 828, A.I.R. 1927 Cal. 628, 104 I.C. 111, 28 Cr.L.J. 783 (784); *Banke Lal v. Rampadarth*, 35 Cr.L.J. 459, 147 I.C. 712, 14 P.L.T. 635, A.I.R. 1933 Pat. 713, 1933 Cr.C. 1536; *Nawal Jha*, A.I.R. 1936 Pat. 162, 159 I.C. 817, 37 Cr.L.J. 193; *Naurang*, 32 Cr.L.J. 60, 127 I.C. 859, A.I.R. 1930 Lah. 347, Ind. Rul. 1930 Lah. 891, 1930 Cr.C. 395; *Sampuram*, 35 Cr.L.J. 1392, 151 I.C. 691, 35 P.L.R. 593; *Ibu Ali*, 36 Cr.L.J. 781, 155 I.C. 490, 1935 A.L.J. 395, A.I.R. 1935 All. 608. For contra see *Suraj Lal v. Shoo Shankar*, 35 Cr.L.J. 908, 149 I.C. 201, 11 O.W.N. 683, A.I.R. 1934 Oudh. 272, 1934 Cr.C. 768; *Keramat Ali*, 113 I.C. 842, 55 Cal. 1312, A.I.R. 1928 Cal. 862, 30 Cr.L.J. 221; *Surendra v. Kumade*, A.I.R. 1930 Cal. 352, 51 C.L.J. 203, Ind. Rul. 1930 Cal. 736, 126 I.C. 416; *Satis*, A.I.R. 1930 Cal. 705, 52 C.L.J. 52, 32 Cr.L.J. 237, Ind. Rul. 1931 Cal. 126, 129 I.C. 110, 1930 Cr.C. 1105; *Chulukuri*, 33 Cr.L.J. 960, 140 I.C. 323, 56 Mad. 157, 63 M.L.J. 670, 1932 M.W.N. 1081, 35 M.L.W. 636, A.I.R. 1933 Mad. 67, 1933 Cr.C. 80, Ind. Rul. 1932 Mad. 851; *Nabani*, 34 Cr.L.J. 684, 144 I.C. 83, A.I.R. 1933 Cal. 147, 1933 Cr.C. 224, Ind. Rul. 1933 Cal. 501; *Suraj Lal v. Shoo Shankar*, A.I.R. 1934 Oudh. 272, 1934 O.L.R. 473, 11 O.W.N. 683, 149 I.C. 201; *Bal Gobind v. Jannabai*, A.I.R. 1935 Nag. 199, 1935 Cr.C. 1096, 158 I.C. 496, 36 Cr.L.J. 1371, 31 N.L.R. 370; *Yernemi*, 30 Cr.L.J. 370, 114 I.C. 834, 28 M.L.W. 774, A.I.R. 1929 Mad. 74, Ind. Rul. 1929 Mad. 354; *Ramayya*, 33 Cr.L.J. 960, 140 I.C. 323, 63 M.L.J. 670, 36 M.L.W. 636, 1932 M.W.N. 1081, Ind. Rul. 1932 Mad. 851, 56 Mad. 157. It is certainly

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A Court ought not to file a complaint in respect of offences under secs. 209, 467 and 471, I. P. C., when the matter has not been thoroughly shifted by it in course of a regular judicial inquiry—*Gauri*, 37 Cr.L.J. 518, 161 I.C. 602, 1936 O.W.N. 268.

1246. Procedure in preliminary inquiry:—The preliminary inquiry is a judicial proceeding, and oath can be administered to the suspected person—*Viswanath*, 8 Bom.L.R. 589, 4 Cr.L.J. 183 (but see *Maung Po v. Mutu Kurpan*, 10 Bur.L.T. 316 given below in this Note); or to any person examined as a witness in the preliminary inquiry; and if such witness gives false evidence, he may be prosecuted for an offence under sec. 193, I. P. Code—*Abdullah*, 37 Cal. 52 (55), 14 C.W.N. 132 (134).

The inquiry must be on evidence; one mode of making inquiry is certainly to take evidence—*Abdullah*, 37 Cal. 52; *Raghubar v. Kokil*, 17 Cal. 872. The law does not require a minute or detailed or exhaustive inquiry, but only such preliminary inquiry as may be necessary to make out a *prima facie* case. The extent of the preliminary inquiry is left to the discretion of the Court—*Chamari*, 4 Pat. 484, 27 Cr.L.J. 371; *Bhuban Chandra*, 55 Cal. 279, 31 C.W.N. 828, 28 Cr.L.J. 783 (784); *Juala Prasad*, 5 All. 62. The nature, method and extent of the inquiry are entirely at the discretion of the Court. The inquiry need not take the form of a full-dressed trial, so as to satisfy the Court that an offence has *actually* been committed. Nothing more is necessary than to find that an offence *appears* to have been committed and a long discussion or a decision on the merits is as undesirable as it is unnecessary—*Raja Rao*, 50 Mad. 660 (661), 27 Cr.L.J. 1149 (1150), 51 M.L.J. 551. Where an inquiry is made, it is not necessary that it should be detailed or formal—*Kewal Ram*, 36 Cr.L.J. 1354 (1356), 158 I.C. 324, 16 P.L.T. 693, A.I.R. 1935 Pat. 515. The authority which is called upon to take action under this section need not, and should not, decide the question of the guilt or innocence of the party against whom proceedings are to be instituted—*Jadunandan*, 37 Cal. 250 (258). The section does not say that before a Court makes a complaint, it must try the whole case and be absolutely satisfied that the accused cannot by any possibility escape a conviction—*Abdul Husen*, 9 N.L.R. 84, 15 Cr.L.J. 33 (35). The Code does not contain any provision as to the manner in which the evidence in the inquiry should be recorded, but for further reference the Court should make a summary of the statement of the witness examined—*Jogendra Nath*, 42 Cal. 240, 18 C.W.N. 1242.

It is not necessary that the preliminary inquiry should be conducted in the presence of the accused, or that any notice should be given to him. See Note 1247, *infra*. The accused has no right to cross-examine any witness in the preliminary inquiry—*Bakir Saheb*, 18 Bom.L.R. 284, 17 Cr.L.J. 249; *Abdul Ghaffoor v. Razu*, 34 All. 267; *Raja Rao*, *supra*; but see *contra*—*Ganeshwar*, 6 P.L.J. 146, 22 Cr.L.J. 458; *Lokpal Singh*, 19 A.L.J. 56, 22 Cr.L.J. 143, 59 I.C. 55; *Perumalla Venkata Subbiah*, 44 M.L.J. 74, A.I.R. 1923 Mad. 228, 23 Cr.L.J. 712; *M. Mahomed Kaka v. Dist. Judge, Bassein*, A.I.R. 1937 Rang. 62, 168 I.C. 632, 9 R.R. 359, 38 Cr.L.J. 615, 1937 Rang.L.R. 276; and *U Ba Hla v. Maung Tun Sein*, A.I.R. 1938 Rang. 297, 178 I.C. 305, 40 Cr.L.J. 56.

The person proceeded against under this section is in the position of an accused person, and cannot be examined on oath as a witness in the course of the preliminary inquiry. He can only be examined in accordance with the provisions of sec. 342—*Maung Po v. Mutu Kurpan*, 10 Bur.L.T. 32, 17 Cr.L.J. 316 (317); *Sami Sastri*, 2 Weir 598 (599). But see first paragraph of this Note. The person proceeded against in the preliminary inquiry can be called upon to produce a necessary document in his possession (sec. 94)—*Damri Ram*, 19 Cr.L.J. 217, 43 I.C. 793 (794).

Who can hold the inquiry:—The preliminary inquiry must be conducted by the officer who directs prosecution (*i.e.*, makes the complaint) under this section, and cannot be delegated to any other officer—*Sakhi Rai*, 20 Cr.L.J. 245 (Pat). It is for the *complainant* Court to make any inquiry that is necessary, and then to make a complaint. This section does not contemplate that the Court should send the case to a

Magistrate for preliminary inquiry, asking the Magistrate to make the inquiry and to prosecute if he is satisfied that the offence has been committed. It is the complaining Court that must be satisfied that there is a *prima facie* case against the person sent to the Magistrate—*Chamari*, 4 Pat. 24, 6 P.L.T. 225, 26 Cr.L.J. 170; *Shabbir Hasan*, 26 A.L.J. 46, 28 Cr.L.J. 986 (1987).

It is not necessary that the whole of the preliminary inquiry ought to be conducted by the Officer directing the prosecution. After making some inquiry, he can apply to the District Magistrate as the Head of the Police, for the assistance of the C. I. D., and the fact that he takes the assistance of the District Magistrate does not make him *functus officio* and deprive him of his jurisdiction to pass an order under this section—*Waman*, 43 Bom. 300, 20 Bom.L.R. 998, 20 Cr.L.J. 433. The complaining Court may order the inquiry to be made by the Police, but in that case, when the police papers arrive, the Court has to determine whether it is necessary to take action—*Shabbir Hasan*, supra. The Calcutta High Court is of opinion that this section contemplates that the inquiry (i.e., the whole inquiry) is to be made by the Court itself, and it is not competent to a Civil Court to base its order upon a police-report—*Provat Ranjan v. Uma Shankar*, 58 Cal. 727, 35 C.W.N. 98 (101), 32 Cr.L.J. 883, 1931 Cr.C. 590, A.I.R. 1931 Cal. 438, 132 I.C. 241, Ind. Rul. 1931 Cal. 561. But see *Fazlar Rahaman*, A.I.R. 1930 Cal. 515, 31 Cr.L.J. 1055, 126 I.C. 553, 1930 Cr.C. 859.

In deciding whether in the interests of justice that an inquiry should be made the Court is not confined to the record of the proceedings, but is entitled to take into account and consider information otherwise acquired. The applicant is entitled to adduce evidence outside the record of the proceedings out of which the application arises to show that evidence given in those proceedings was false—*Bhagwandas Narandas v. D. D. Patel & Co.*, 41 Cr.L.J. 526 526 (528), 187 I.C. 867, A.I.R. 1940 Bom. 131, I.L.R. 1940 Bom. 403, 42 Bom.L.R. 231.

The preliminary inquiry should not be unduly protracted. Action under this section should be prompt and expeditious. Where the Court passed the order for prosecution of the offender, nearly a year after the offence was brought to its notice, the High Court expressed disapproval of the undue protraction of the proceeding—*Bahadur v. Eradatullah*, 37 Cal. 642 (649) (F.B.).

Recording and finding:—The words in the section are “may . . . record a finding”; this shows that it is not compulsory for the Court to expressly record a finding to the effect that it is expedient in the interests of justice that an inquiry should be made. Absence of such a finding will not invalidate the complaint—*K C V. Reddy*, 8 Rang. 25, 31 Cr.L.J. 793 (795); *Bhuban Chandra*, 55 Cal. 279, 31 C.W.N. 828, A.I.R. 1927 Cal. 628, 104 I.C. 111, 28 Cr.L.J. 783 (784); *Banke Lal v. Rampadarth*, 35 Cr.L.J. 459, 147 I.C. 712, 14 P.L.T. 635, A.I.R. 1933 Pat. 713, 1933 Cr.C. 1536; *Nawal Jha*, A.I.R. 1936 Pat. 162, 159 I.C. 817, 37 Cr.L.J. 193; *Naurang*, 32 Cr.L.J. 60, 127 I.C. 859, A.I.R. 1930 Lah. 347, Ind. Rul. 1930 Lah. 891, 1930 Cr.C. 395; *Sampuran*, 35 Cr.L.J. 1392, 151 I.C. 691, 35 P.L.R. 593; *Ibu Ali*, 36 Cr.L.J. 781, 155 I.C. 490, 1935 A.L.J. 395, A.I.R. 1935 All. 608. For contra see *Suraj Lal v. Sheo Shankar*, 35 Cr.L.J. 908, 149 I.C. 201, 11 O.W.N. 683, A.I.R. 1934 Oudh 272, 1934 Cr.C. 768; *Keramat Ali*, 113 I.C. 842, 55 Cal. 1312, A.I.R. 1928 Cal. 862, 30 Cr.L.J. 221; *Surendra v. Kumade*, A.I.R. 1930 Cal. 352, 51 C.L.J. 208, Ind. Rul. 1930 Cal. 736, 126 I.C. 416, *Satts*, A.I.R. 1930 Cal. 705, 52 C.L.J. 52, 32 Cr.L.J. 237, Ind. Rul. 1931 Cal. 126, 129 I.C. 110, 1930 Cr.C. 1105; *Chilukuri*, 33 Cr.L.J. 960, 140 I.C. 323, 56 Mad. 157, 63 M.L.J. 670, 1932 M.W.N. 1081, 35 M.L.W. 636, A.I.R. 1933 Mad. 67, 1933 Cr.C. 80, Ind. Rul. 1932 Mad. 851; *Nabam*, 34 Cr.L.J. 684, 144 I.C. 88, A.I.R. 1933 Cal. 147, 1933 Cr.C. 224, Ind. Rul. 1933 Cal. 501; *Suraj Lal v. Sheo Shankar*, A.I.R. 1934 Oudh 272, 1934 O.L.R. 473, 11 O.W.N. 683, 149 I.C. 201; *Bal Gobind v. Jannabai*, A.I.R. 1935 Nag. 199, 1935 Cr.C. 1096, 158 I.C. 496, 36 Cr.L.J. 1371, 31 N.L.R. 370; *Yernemi*, 30 Cr.L.J. 370, 114 I.C. 834, 28 M.L.W. 774, A.I.R. 1929 Mad. 74, Ind. Rul. 1929 Mad. 354; *Ramayya*, 33 Cr.L.J. 960, 140 I.C. 323, 63 M.L.J. 670, 36 M.L.W. 636, 1932 M.W.N. 1081, Ind. Rul. 1932 Mad. 851, 56 Mad. 157. It is certainly

A.I.R. 1931 Cal. 314, 35 C.W.N. 690, 58 Cal. 1211, 1931 Cr.C. 408, Ind. Rul. 1931 Cal. 438.

A Court ought not to file a complaint in respect of offences under secs. 209, 467 and 471, I. P. C., when the matter has not been thoroughly shifted by it in course of a regular judicial inquiry—*Gauri*, 37 Cr.L.J. 518, 161 I.C. 602, 1936 O.W.N. 268.

1246. Procedure in preliminary inquiry:—The preliminary inquiry is a judicial proceeding, and oath can be administered to the suspected person—*Viswanath*, 8 Bom L.R. 589, 4 Cr.L.J. 183 (but see *Maung Po v. Mutu Kurpan*, 10 Bur.L.T. 316 given below in this Note); or to any person examined as a witness in the preliminary inquiry; and if such witness gives false evidence, he may be prosecuted for an offence under sec. 193, I. P. Code—*Abdullah*, 37 Cal. 52 (55), 14 C.W.N. 132 (134).

The inquiry must be on evidence; one mode of making inquiry is certainly to take evidence—*Abdullah*, 37 Cal. 52; *Raghubar v. Kokil*, 17 Cal. 872. The law does not require a minute or detailed or exhaustive inquiry, but only such preliminary inquiry as may be necessary to make out a *prima facie* case. The extent of the preliminary inquiry is left to the discretion of the Court—*Chamari*, 4 Pat. 484, 27 Cr.L.J. 371; *Bhuban Chandra*, 55 Cal. 279, 31 C.W.N. 828, 28 Cr.L.J. 783 (784); *Juala Prasad*, 5 All. 62. The nature, method and extent of the inquiry are entirely at the discretion of the Court. The inquiry need not take the form of a full-dressed trial, so as to satisfy the Court that an offence has *actually* been committed. Nothing more is necessary than to find that an offence *appears* to have been committed and a long discussion or a decision on the merits is as undesirable as it is unnecessary—*Raja Rao*, 50 Mad. 660 (661), 27 Cr.L.J. 1149 (1150), 51 M.L.J. 551. Where an inquiry is made, it is not necessary that it should be detailed or formal—*Kewal Ram*, 36 Cr.L.J. 1354 (1356), 158 I.C. 324, 16 P.L.T. 693, A.I.R. 1935 Pat. 515. The authority which is called upon to take action under this section need not, and should not, decide the question of the guilt or innocence of the party against whom proceedings are to be instituted—*Jadunandan*, 37 Cal. 250 (258). The section does not say that before a Court makes a complaint, it must try the whole case and be absolutely satisfied that the accused cannot by any possibility escape a conviction—*Abdul Husen*, 9 N.L.R. 84, 15 Cr.L.J. 33 (35). The Code does not contain any provision as to the manner in which the evidence in the inquiry should be recorded, but for further reference the Court should make a summary of the statement of the witness examined—*Jogendra Nath*, 42 Cal. 240, 18 C.W.N. 1242.

It is not necessary that the preliminary inquiry should be conducted in the presence of the accused, or that any notice should be given to him. See Note 1247, *infra*. The accused has no right to cross-examine any witness in the preliminary inquiry—*Bakir Saheb*, 18 Bom L.R. 284, 17 Cr.L.J. 249; *Abdul Ghaffoor v. Razu*, 34 All. 267; *Raja Rao*, *supra*; but see *contra*—*Ganeshwar*, 6 P.L.J. 146, 22 Cr.L.J. 458; *Lokpal Singh*, 19 A.L.J. 56, 22 Cr.L.J. 143, 59 I.C. 55; *Perumalla Venkata Subbiah*, 44 M.L.J. 74, A.I.R. 1923 Mad. 228, 23 Cr.L.J. 712; *M. Mahomed Kaka v. Dist. Judge, Bassein*, A.I.R. 1937 Rang. 62, 168 I.C. 632, 9 R.R. 359, 38 Cr.L.J. 615, 1937 Rang L.R. 276; and *U Ba Hla v. Maung Tun Sein*, A.I.R. 1938 Rang. 297, 178 I.C. 305, 40 Cr.L.J. 56.

The person proceeded against under this section is in the position of an accused person, and cannot be examined on oath as a witness in the course of the preliminary inquiry. He can only be examined in accordance with the provisions of sec. 342—*Maung Po v. Mutu Kurpan*, 10 Bur.L.T. 32, 17 Cr.L.J. 316 (317); *Sami Sastri*, 2 Weir 598 (599). But see first paragraph of this Note. The person proceeded against in the preliminary inquiry can be called upon to produce a necessary document in his possession (sec. 94)—*Damri Ram*, 19 Cr.L.J. 217, 43 I.C. 793 (794).

Who can hold the inquiry:—The preliminary inquiry must be conducted by the officer who directs prosecution (*i.e.*, makes the complaint) under this section, and cannot be delegated to any other officer—*Sakhi Rai*, 20 Cr.L.J. 245 (Pat.). It is for the complaining Court to make any inquiry that is necessary, and then to make a complaint. This section does not contemplate that the Court should send the case to a

the person intended to be proceeded against, and the want of notice is at best a mere irregularity in procedure—*Ram Piari Rai*, 10 A.L.J. 247, 13 Cr.L.J. 707. For a proceeding under this section, neither notice to show cause why the party should not be sent before a Magistrate, nor a preliminary inquiry is indispensable—*In re Jivanbhai*, 7 Bom.L.R. 84, 2 Cr.L.J. 54; *Jagat Singh*, 31 Cr.L.J. 179 (180) (Lah.); *Ganti v. Harcourt*, 58 Cal. 215, 32 Cr.L.J. 826 (827), Ind. Rul. 1931 Cal. 525, 1931 Cr.C. 588, A.I.R. 1931 Cal. 436, 132 I.C. 93; *Darpa Narayan v. Bepin*, 15 C.W.N. 691 (692); *Sajjad Husain*, A.I.R. 1935 Oudh 113, 1934 O.L.R. 980, 153 I.C. 346, 10 Luck. 503, 36 Cr.L.J. 319, 1935 O.W.N. 28, 1935 Cr.C. 203; *T. Varadarajulu Naidu*, 38 Cr.L.J. 871, 1937 M.W.N. 330, 170 I.C. 255, I.L.R. 1937 Mad. 612, 10 RM. 163, 1937 M.W.N. 330, 45 M.L.W. 257, (1937) 1 M.L.J. 396; *Nazar Mohammad v. Harnam Singh*, A.I.R. 1938 Lah. 641, I.L.R. 1938 Lah. 188, 40 P.L.R. 951, 178 I.C. 795, 40 Cr.L.J. 140, dissenting from *Amar Nath*, A.I.R. 1927 Lah. 173, 99 I.C. 1027, 28 Cr.L.J. 227; *Venkata Subbiah*, A.I.R. 1923 Mad. 228, 69 I.C. 440, 23 Cr.L.J. 712, 44 M.L.J. 74; *Lokpal Singh*, A.I.R. 1921 All. 98, 59 I.C. 655, 22 Cr.L.J. 143, 19 A.L.J. 56 and *Imam Ali*, A.I.R. 1924 All. 435, 77 I.C. 888, 25 Cr.L.J. 488 where it has been laid down that while the statute (sec. 476, Cr. P. Code) does not require any preliminary enquiry, if any enquiry is made notice should be given to the accused person. But although as a matter of strict law, no notice would be necessary to the accused before taking proceedings under this section still it is but right that he should have notice—*Bas Kasturbai v. Vanmalidas*, 49 Bom. 710, 27 Bom.L.R. 616; *James*, A.I.R. 1933 Cal. 606, 34 Cr.L.J. 833, 1933 Cr.C. 970, 144 I.C. 846. If a preliminary inquiry is started, it must be a real inquiry and not merely a formal one, and the accused must be given ample opportunity to show cause why he should not be prosecuted—*Ajodhya Prasad*, 1 P.L.T. 342, 21 Cr.L.J. 718; *Ram Piari Rai*, supra; *Mathura Prasad*, 4 P.L.J. 475, 20 Cr.L.J. 529; *Anonymous*, 2 Weir 587. Where the prosecution has been ordered by a Court on evidence given by witnesses whom the accused had no opportunity to cross-examine, and whose evidence had thus not been tested, the Court acts with material irregularity in directing a criminal prosecution in the matter without giving the petitioner any chance to know and meet the case against him—*In re Perumalla*, 44 M.L.J. 74, 23 Cr.L.J. 712, A.I.R. 1923 Mad. 228; *Amar Nath*, supra. When a Magistrate dismisses a complaint and takes action under this section against the complainant for preferring a false charge, he should give the complainant an opportunity of showing the truth or *bona fide* character of his complaint—*Yendava*, 7 Mad. 189; *Kachi Madar*, 21 M.L.J. 795, 12 Cr.L.J. 323; *Karimdad*, 6 Cal. 496; *Gurish Chunder*, 7 Cal. 87; *Lalji Gope v. Giridhari*, 5 C.W.N. 106. So also, where a Civil Court directed the prosecution of the defendant in a civil suit for fabricating false evidence, without calling upon the defendant to shew cause, it was held that the Court acted wrongly in ordering the prosecution without giving the person concerned an opportunity to shew cause against such order—*Thakur Das*, 17 O.C. 25, 15 Cr.L.J. 217.

1248. Complaint under this section:—Where the proceedings are embodied in a single document, that document itself serves the dual purpose of a finding and also of a complaint and should be held sufficiently to comply with the requirements of the section—*Numbermal v. Mainappa*, 54 Mad. 331, A.I.R. 1931 Mad. 16, 59 M.L.J. 850, 32 Cr.L.J. 200, 32 M.L.W. 513, 1930 M.W.N. 991, 128 I.C. 719. The Court is not required to make a formal complaint like a private complainant. See Notes 614, 614A, 614B, 614C, 614D, 1236, 1237, ante. In complaints of offences of giving false evidence and fabricating false evidence it is incumbent upon the Court to make clear and precise allegations regarding the passages in the deposition of the accused as a witness and the false evidence fabricated by him because the trying Magistrate cannot travel outside the limit of the complaint and also because the Court is not in the position of an ordinary complainant, whose allegations, if vague, would be reduced by the Magistrate to precision when the complaint is presented—*Yerneni*, 30 Cr.L.J. 370, 114 I.C. 438, 28 M.L.W. 774, A.I.R. 1929 Mad. 74, Ind. Rul. 1929 Mad. 354. Where a Judge sets forth the particulars in respect of which he considers that

desirable that Courts of fact should express themselves definitely and unequivocally on the question whether it is expedient in the interest of justice that an inquiry should be made; otherwise as in *Keramati Ali*, supra, the High Court may have to look into the facts for itself and form its own opinion as to whether a prosecution is desirable or not—*Nand Kumar v. Emp.*, A.I.R. 1937 Pat. 534 (537), 1937 P.W.N. 119, 172 I.C. 237.

When the Judge's order shows that in his opinion the accused has given false evidence before him, that order by itself carries the implication that the Judge must have felt that the ends of justice require that an inquiry before a Magistrate should take place—*Ijjatulla Paikar*, 58 Cal. 1117, 35 C.W.N. 400 (403), 32 Cr.L.J. 842, 132 I.C. 160, 53 C.L.J. 177, A.I.R. 1931 Cal. 190, Ind. Rul. 1931 Cal. 544, 1931 Cr.C. 251; *Bhuban Chandra*, supra; *Numberumal v. Naniappa*, 59 M.L.J. 850, 32 Cr.L.J. 200 (201); *Charandas Kanayalal v. Emp.*, 40 Cr.L.J. 707, 182 I.C. 914, A.I.R. 1939 Sind 170, I.L.R. 1939 Kar. 280. There is no reason why sec. 537, Cr. P. C., should not, in appropriate cases, apply to the failure to record an express finding under the provisions of sec. 476, Cr. P. Code—*Charandas Kanayalal v. Emp.*, supra.

Where the offence is of considerable gravity, the High Court will assume that the Judge making the complaint must have considered whether it is expedient in the interests of justice to make the complaint, and the High Court will not set aside the order making a complaint, merely because the Judge had not recorded a finding to that effect—*Nawabali v. Chandrakanta*, 58 Cal. 965, 32 Cr.L.J. 1236 (1237), 134 I.C. 914, A.I.R. 1931 Cal. 760, 1931 Cr.C. 1006, Ind. Rul. 1931 Cal. 914 (distinguishing *Keramati Ali*, 55 Cal. 1312, 30 Cr.L.J. 221, 113 I.C. 842, A.I.R. 1928 Cal. 862); *Nawalal*, 37 Cr.L.J. 193. The Court should record a finding that it is expedient in the interests of justice that an inquiry should be made, but the absence of such a finding does not mean that the point has not been considered and that it is necessary to interfere in revision. Where it is clear that the Appellate Court considered that an inquiry was necessary in the interests of justice and that a *prima facie* case had been made out, although it is unfortunate that it omitted to record a finding on either point, the High Court declined to interfere in revision—*Dwarkaprasad v. Emp.*, A.I.R. 1940 Nag. 227, 1940 N.L.J. 108, 187 I.C. 521, 41 Cr.L.J. 466. But where the Court does not record any finding and the order is so brief that it seems that the Court did not direct its mind to the question whether it was expedient in the interests of justice to make a complaint, the order (complaint) under this section must be set aside—*Surendra Nath v. Kumeda Charan*, 51 C.L.J. 208; *Satish Chandra Maulik*, 52 C.L.J. 52, 32 Cr.L.J. 237 (238).

Though it has been held that the absence of such a finding is not necessarily fatal, it is certainly desirable that Courts dealing with these matters should apply their minds directly to the question; and in doing so, they should consider whether an attempt to use the law in aid of a private grudge is being made and whether the Courts should allow themselves to become the instrument of a private grudge and also what facts can be proved and whether these facts are likely to be sufficient to support the conviction—*Bachu Singh v. Tribeni Sah*, 40 Cr.L.J. 157 (159), 179 I.C. 167, 5 B.R. 203, 11 R.P. 328, 1938 P.W.N. 904, A.I.R. 1939 Pat. 178.

The mere fact that a finding has not been recorded does not prevent the accused from filing an appeal under sec. 476B; because the words of sec. 476B show that the appeal has not to be filed against the finding, but that the fact that a complaint has been made against him opens the way to an appeal as soon as the accused is aware that a complaint has been filed—*K. C. V. Reddy*, 8 Rang. 25, 31 Cr.L.J. 793.

See also Note 1241.

1247. Notice to accused:—The wording of sec. 476, Cr. P. C., does not make it incumbent on the Court to hold any preliminary inquiry or to give accused notice and if an inquiry is held, its nature, method and extent are entirely within the discretion of the Court—*Nand Kumar v. Emp.*, A.I.R. 1937 Pat. 534 (536), 1937 P.W.N. 119, 172 I.C. 237. This section nowhere says that notice shall be given to

the person intended to be proceeded against, and the want of notice is at best a mere irregularity in procedure—*Ram Piarai Rai*, 10 A.L.J. 247, 13 Cr.L.J. 707. For a proceeding under this section, neither notice to show cause why the party should not be sent before a Magistrate, nor a preliminary inquiry is indispensable—*In re Jivanbhai*, 7 Bom.L.R. 84, 2 Cr.L.J. 54; *Jagat Singh*, 31 Cr.L.J. 179 (180) (Lah.); *Ganits v. Harcourt*, 58 Cal. 215, 32 Cr.L.J. 826 (827), Ind. Rul. 1931 Cal 525, 1931 Cr.C. 588, A.I.R. 1931 Cal. 436, 132 I.C. 93; *Darpa Narayan v. Bepin*, 15 C.W.N. 691 (692); *Sajjad Husain*, A.I.R. 1935 Oudh 113, 1934 O.L.R. 980, 153 I.C. 346, 10 Luck. 503, 36 Cr.L.J. 319, 1935 O.W.N. 28, 1935 Cr.C. 203; *T. Varadarajulu Naidu*, 38 Cr.L.J. 871, 1937 M.W.N. 330, 170 I.C. 255, I.L.R. 1937 Mad. 612, 10 R.M. 163, 1937 M.W.N. 330, 45 M.L.W. 257, (1937) 1 M.L.J. 396; *Nazar Mohammad v. Harnam Singh*, A.I.R. 1938 Lah. 641, I.L.R. 1938 Lah. 188, 40 P.L.R. 951, 178 I.C. 795, 40 Cr.L.J. 140, dissenting from *Amar Nath*, A.I.R. 1927 Lah. 173, 99 I.C. 1027, 28 Cr.L.J. 227; *Venkata Subbiah*, A.I.R. 1923 Mad. 228, 69 I.C. 440, 23 Cr.L.J. 712, 44 M.L.J. 74; *Lokpal Singh*, A.I.R. 1921 All. 98, 59 I.C. 655, 22 Cr.L.J. 143, 19 A.L.J. 56 and *Imam Ali*, A.I.R. 1924 All. 435, 77 I.C. 888, 25 Cr.L.J. 488 where it has been laid down that while the statute (sec. 476, Cr. P. Code) does not require any preliminary enquiry, if any enquiry is made notice should be given to the accused person. But although as a matter of strict law, no notice would be necessary to the accused before taking proceedings under this section still it is but right that he should have notice—*Bai Kasturbai v. Vanmalidas*, 49 Bom. 710, 27 Bom.L.R. 616; *James*, A.I.R. 1933 Cal. 606, 34 Cr.L.J. 833, 1933 Cr.C. 970, 144 I.C. 846. If a preliminary inquiry is started, it must be a real inquiry and not merely a formal one, and the accused must be given ample opportunity to show cause why he should not be prosecuted—*Ajodhyya Prasad*, 1 P.L.T. 342, 21 Cr.L.J. 718; *Ram Piarai Rai*, supra; *Mathura Prasad*, 4 P.L.J. 475, 20 Cr.L.J. 529; *Anonymous*, 2 Weir 587. Where the prosecution has been ordered by a Court on evidence given by witnesses whom the accused had no opportunity to cross-examine, and whose evidence had thus not been tested, the Court acts with material irregularity in directing a criminal prosecution in the matter without giving the petitioner any chance to know and meet the case against him—*In re Perumalla*, 44 M.L.J. 74, 23 Cr.L.J. 712, A.I.R. 1923 Mad 228; *Amar Nath*, supra. When a Magistrate dismisses a complaint and takes action under this section against the complainant for preferring a false charge, he should give the complainant an opportunity of showing the truth or *bona fide* character of his complaint—*Yendava*, 7 Mad. 189; *Kachi Madar*, 21 M.L.J. 795, 12 Cr.L.J. 323; *Karimdad*, 6 Cal. 496; *Gurish Chunder*, 7 Cal. 87; *Lalji Gope v. Girdhari*, 5 C.W.N. 106. So also, where a Civil Court directed the prosecution of the defendant in a civil suit for fabricating false evidence, without calling upon the defendant to shew cause, it was held that the Court acted wrongly in ordering the prosecution without giving the person concerned an opportunity to shew cause against such order—*Thakur Das*, 17 O.C. 25, 15 Cr.L.J. 217.

1248. Complaint under this section:—Where the proceedings are embodied in a single document, that document itself serves the dual purpose of a finding and also of a complaint and should be held sufficiently to comply with the requirements of the section—*Namberumal v. Mainiappa*, 54 Mad. 331, A.I.R. 1931 Mad. 16, 59 M.L.J. 850, 32 Cr.L.J. 200, 32 M.L.W. 513, 1930 M.W.N. 991, 128 I.C. 719. The Court is not required to make a formal complaint like a private complainant. See Notes 614, 614A, 614B, 614C, 614D, 1236, 1237, ante. In complaints of offences of giving false evidence and fabricating false evidence it is incumbent upon the Court to make clear and precise allegations regarding the passages in the deposition of the accused as a witness and the false evidence fabricated by him because the trying Magistrate cannot travel outside the limit of the complaint and also because the Court is not in the position of an ordinary complainant, whose allegations, if vague, would be reduced by the Magistrate to precision when the complaint is presented—*Yenneni*, 30 Cr.L.J. 370, 114 I.C. 438, 28 M.L.W. 774, A.I.R. 1929 Mad. 74, Ind. Rul. 1929 Mad. 354. Where a Judge sets forth the particulars in respect of which he considers that

desirable that Courts of fact should express themselves definitely and unequivocally on the question whether it is expedient in the interest of justice that an inquiry should be made; otherwise as in *Keramati Ali*, supra, the High Court may have to look into the facts for itself and form its own opinion as to whether a prosecution is desirable or not—*Nand Kumar v. Emp.*, A.I.R. 1937 Pat. 534 (537), 1937 P.W.N. 119, 172 I.C. 237.

When the Judge's order shows that in his opinion the accused has given false evidence before him, that order by itself carries the implication that the Judge must have felt that the ends of justice require that an inquiry before a Magistrate should take place—*Ijratulla Paikar*, 58 Cal. 1117, 35 C.W.N. 400 (403), 32 Cr.L.J. 842, 132 I.C. 160, 53 C.L.J. 177, A.I.R. 1931 Cal. 190, Ind. Rul. 1931 Cal. 544, 1931 Cr.C. 251; *Bhuban Chandra*, supra; *Namberumal v. Naniappa*, 59 M.L.J. 850, 32 Cr.L.J. 200 (201); *Charandas Kanayalal v. Emp.*, 40 Cr.L.J. 707, 182 I.C. 914, A.I.R. 1939 Sind 170, I.L.R. 1939 Kar. 280. There is no reason why sec. 537, Cr. P. C., should not, in appropriate cases, apply to the failure to record an express finding under the provisions of sec. 476, Cr. P. Code—*Charandas Kanayalal v. Emp.*, supra.

Where the offence is of considerable gravity, the High Court will assume that the Judge making the complaint must have considered whether it is expedient in the interests of justice to make the complaint, and the High Court will not set aside the order making a complaint, merely because the Judge had not recorded a finding to that effect—*Nawabali v. Chandrakanta*, 58 Cal. 965, 32 Cr.L.J. 1236 (1237), 134 I.C. 914, A.I.R. 1931 Cal. 760, 1931 Cr.C. 1006, Ind. Rul. 1931 Cal. 914 (distinguishing *Keramat Ali*, 55 Cal. 1312, 30 Cr.L.J. 221, 113 I.C. 842, A.I.R. 1928 Cal. 862); *Nawalal*, 37 Cr.L.J. 193. The Court should record a finding that it is expedient in the interests of justice that an inquiry should be made, but the absence of such a finding does not mean that the point has not been considered and that it is necessary to interfere in revision. Where it is clear that the Appellate Court considered that an inquiry was necessary in the interests of justice and that a *prima facie* case had been made out, although it is unfortunate that it omitted to record a finding on either point, the High Court declined to interfere in revision—*Dwarkanprasad v. Emp.*, A.I.R. 1940 Nag 227, 1940 N.L.J. 108, 187 I.C. 521, 41 Cr.L.J. 466. But where the Court does not record any finding and the order is so brief that it seems that the Court did not direct its mind to the question whether it was expedient in the interests of justice to make a complaint, the order (complaint) under this section must be set aside—*Surendra Nath v. Kumeda Charan*, 51 C.L.J. 208; *Satish Chandra Maulik*, 52 C.L.J. 52, 32 Cr.L.J. 237 (238).

Though it has been held that the absence of such a finding is not necessarily fatal, it is certainly desirable that Courts dealing with these matters should apply their minds directly to the question; and in doing so, they should consider whether an attempt to use the law in aid of a private grudge is being made and whether the Courts should allow themselves to become the instrument of a private grudge and also what facts can be proved and whether these facts are likely to be sufficient to support the conviction—*Bachu Singh v. Tribeni Sah*, 40 Cr.L.J. 157 (159), 179 I.C. 167, 5 B.R. 203, 11 R.P. 328, 1938 P.W.N. 904, A.I.R. 1939 Pat. 178.

The mere fact that a finding has not been recorded does not prevent the accused from filing an appeal under sec. 476B; because the words of sec. 476B show that the appeal has not to be filed against the finding, but that the fact that a complaint has been made against him opens the way to an appeal as soon as the accused is aware that a complaint has been filed—*K. C. V. Reddy*, 8 Rang. 25, 31 Cr.L.J. 793.

See also Note 1241.

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1248. Complaint under this section:—Where the proceedings are embodied in a single document, that document itself serves the dual purpose of a finding and also of a complaint and should be held sufficiently to comply with the requirements of the section—*Namberumal v. Mainiappa*, 54 Mad. 331, A.I.R. 1931 Mad. 16, 59 M.L.J. 850, 32 Cr.L.J. 200, 32 M.L.W. 513, 1930 M.W.N. 991, 128 I.C. 719. The Court is not required to make a formal complaint like a private complainant. See Notes 614, 614A, 614B, 614C, 614D, 1236, 1237, *ante*. In complaints of offences of giving false evidence and fabricating false evidence it is incumbent upon the Court to make clear and precise allegations regarding the passages in the deposition of the accused as a witness and the false evidence fabricated by him because the trying Magistrate cannot travel outside the limit of the complaint and also because the Court is not in the position of an ordinary complainant, whose allegations, if vague, would be reduced by the Magistrate to precision when the complaint is presented—*Yenneni*, 30 Cr.L.J. 370, 114 I.C. 438, 28 M.L.W. 774, A.I.R. 1929 Mad. 74, Ind. Rul. 1929 Mad. 354. Where a Judge sets forth the particulars in respect of which he considers that

false evidence was given and the nature of the proof that the evidence is in fact false, these particulars serve the purpose of a complaint, and the proceedings cannot be challenged merely because there is no separate complaint—*Numberumal v. Nainappa*, 59 M.L.J. 850, 32 Cr.L.J. 200 (201).

A complaint under sec. 195 read with sec. 476, Cr. P. C., should disclose the Court before which and the occasion on which the offence is alleged to have been committed—*Hiralal*, 33 Cr.L.J. 860, 139 I.C. 543, 13 P.L.T. 370, 1932 Cr.C. 640, A.I.R. 1932 Pat. 243, Ind. Rul. 1932 Pat. 245. A complaint under this section must specify the person alleged to have committed the offence. Where a District Judge, being of opinion that the forgery of a document produced before him was committed either by the plaintiff or by the defendant, sent both of them to the nearest first class Magistrate so that the guilty party might be proceeded against, it was held that the order was illegal and must be set aside in revision—*Pirbhu Dyal*, 1905 P.L.R. 163, 3 Cr.L.J. 73. A finding has to be recorded in respect of each individual accused specifically—*Shabbir Hasan*, 26 A.L.J. 46, 28 Cr.L.J. 986 (1987).

The order must specify the offence committed—*Khubomal*, 8 S.L.R. 179, 16 Cr.L.J. 104. 'The complaint must set forth the offence, the precise facts on which it is based, and the evidence available for proving it—*Ram Prosad*, 49 All. 752, 25 A.L.J. 639, 28 Cr.L.J. 543. But see *Ismail Panju*, 26 Cr.L.J. 1115, 88 I.C. 283, A.I.R. 1925 Nag. 337, where it has been laid down that it is not really necessary that the Court making a complaint should state under what section the offence falls. A mere clerical mistake in stating the offence does not make the complaint illegal, e.g., where the Magistrate in his complaint wrote by mistake "sec. 477, I. P. C." instead of sec. 465, I. P. C.—*Bal Manuk*, 9 Lah. 678, 29 Cr.L.J. 652 (655). If the Magistrate, acting under sec. 476, Cr. P. C., considers that a complaint should be made, it would be open to him to include in that complaint not merely offences which are referred to in sec. 195, Cr. P. C., but also other offences such as one under sec. 161, I. P. C. Sec. 476, Cr. P. C., is an enabling section and does not debar a Magistrate from including in his complaint other sections of the I. P. C. Nor would it bedar the Magistrate to whom the complaint was presented from issuing process under other sections of the I. P. C., if from the facts alleged offences under other sections appeared to have been committed—*Dharmumal v. Tenumal*, 41 Cr.L.J. 821 (823), 190 I.C. 119, A.I.R. 1940 Sind 133. See Note 614B.

A District Magistrate passed an order directing prosecution for perjury or in the alternative for an offence under section 182, Indian Penal Code. It was held that the order of that kind was not an order at all and therefore not valid—*Hasan Shah v. Hardeo*, 25 All. 234. If the offence is perjury, the Court directing the prosecution should specify the false statement in regard to which the prosecution is directed, and should not leave it to the Magistrate to fish about and find it; if the offence is in respect of a forged document, the Court should mention the forged portion of the document. Omission to specify these particulars amounts to a material irregularity calling for interference by the High Court in revision—*Kashi Shukul*, 38 All. 695; *Kalyanji v. Ram Deen*, 49 Mad. 395, 48 M.L.J. 290, 26 Cr.L.J. 801; 86 I.C. 449, A.I.R. 1925 Mad 609; *Ramdhari*, 19 Cr.L.J. 169 (Pat.); *Kalisadhan v. Naini Lal*, 52 Cal. 478, 26 Cr.L.J. 1307; *Surendra*, 35 Cr.L.J. 785, 148 I.C. 866, 1933 A.L.J. 1623, A.I.R. 1934 All. 385, 1934 Cr.C. 464; *Sathi Reddy*, 31 Cr.L.J. 1060, 126 I.C. 530, A.I.R. 1930 Rang 153; *Yernenni*, 30 Cr.L.J. 370, 114 I.C. 834, 28 M.L.W. 774, A.I.R. 1929 Mad 74, Ind. Rul 1929 Mad 354. It is preferable that a Court making a complaint for perjury should quote the passages in the witness's evidence which form the basis of the complaint—*Dwarka v. Makund*, 24 A.L.J. 122, 26 Cr.L.J. 1506, 90 I.C. 290.

Where a complaint under this section had the heading "in the High Court of Judicature at Lahore" although the complaint was ordered to be made to the Magistrate, held that this was an error which amounted to a mere irregularity curable under sec. 537 (a), Cr. P. C.—*Brahm Datt*, A.I.R. 1934 Lah. 981, 1934 Cr.C. 1375, 36 Cr.L.J. 402,

153 I.C. 547. Where the accused was discharged by two Magistrates of the Bench and a complaint under sec 211, I. P. C., was made by three Magistrates, held that the defect was a technical one and there was no ground for interference in revision—*Banke Lal v. Maiku*, A.I.R. 1933 Oudh 430, 35 Cr.L.J. 121, 146 I.C. 638, 1933 Cr.C. 1315, 10 O.W.N. 1037. Where a Subordinate Judge described his complaint as one under secs. 195 and 476, Cr. P. C., regarding offences under secs. 183 and 186, I. P. C., the mere fact that he has made a reference to sec. 476, Cr. P. C., will not make his complaint any the less one under sec. 195, Cr. P. C.—*Jodhi*, A.I.R. 1934 Oudh 277, 149 I.C. 377, 11 O.W.N. 720, 1934 O.L.R. 510.

An order under this section should disclose the materials upon which it is based. Such an order is a judicial order; if it does not show the basis upon which it is passed, it is liable to be set aside in revision by the High Court—*Brijnandan*, 1 P.L.T. 717, 57 I.C. 457 (458). The officer making the complaint must state the evidence on which he relies; otherwise the Magistrate to whom the case is sent has no means of ascertaining what the evidence is on which the prosecution is based—*Shankar Sahai*, 7 O.W.N. 638, 31 Cr.L.J. 938 (939). The complaining Court must hold such inquiry that its order when sent to the Magistrate will amount to a complaint under sec. 200. For that purpose the complaining Court must decide upon and name the witnesses to be examined by the Magistrate; otherwise the complaint is liable to be dismissed on the ground that there are no witnesses. The Court must not leave it to the Magistrate to inquire and find out for himself who the witnesses may be—*Kalyani v. Ram Deen*, 48 Mad. 395, 48 M.L.J. 290, 26 Cr.L.J. 801, 86 I.C. 449, A.I.R. 1925 Mad. 609. But see *Banke Lal v. Maiku*, A.I.R. 1933 Oudh 430, 35 Cr.L.J. 121, 146 I.C. 638, 1933 Cr.C. 1315, 10 O.W.N. 1037, where it has been held that there is no provision in the Cr. P. C. that there should be a list of witnesses along with the complaint.

A Magistrate is competent under sec 250 to order the complainant to pay compensation to the accused and also to make a complaint under this section for bringing a false charge—*Adikhan v. Aitagan*, 21 Mad. 237, *Tuni Reddi*, 27 Mad. 59; *Beni Madhab v. Kumud*, 30 Cal. 123; *Allabux*, 10 S.L.R. 162, 18 Cr.L.J. 414 (Contra—*Bachu v. Jagdam*, 26 Cal 181; *Shib Nath v. Sarat*, 22 Cal 586). See Note 817 under sec 250. But the two orders must be simultaneous; where the Magistrate ordered the complainant to pay compensation to the accused under sec 250, and three weeks later he passed an order under this section directing the issue of notice to the complainant to show cause why he should not be prosecuted for an offence under sec 211, I. P. C., it was held that that latter order was not proper under the circumstances—*Lalji Hari*, 20 Cr.L.J. 226 (Pat.).

An order under this section which merely directs the prosecution of the accused, but omits to direct the accused to be taken before the First Class Magistrate, was held to be at most an irregularity cured by sec 537 (b) of this Code—*Suppaya Tharagan*, 37 Mad 317. But it would not be so now, because clause (b) of sec. 537 which cured irregularities under sec 476 has been omitted by the Amendment Act of 1923.

A Magistrate passed the following order: "Whereas D instituted a false case before the S. I. of Police, I therefore sanction the prosecution of D under sec. 211, I. P. C., and send the proceeding to the Sub-Divisional Magistrate for favour of disposal. The prosecution is sanctioned under sec 476, Cr. P. Code" Held that the order could not be treated as a complaint in proper form under this section. The proceeding against D based on such a complaint must be quashed—*Durjodhan*, 52 Cal 666, 26 Cr.L.J. 1459.

Although it is no longer possible to apply the provisions of sec. 537, Cr. P. C., in the case of want of sanction required by sec. 195, Cr. P. C., an irregularity in a complaint made by one Court to another is curable under sub-sec. (a), since a complaint made by a Court is, for the purposes of sec 537, Cr. P. C., in no wise different from a complaint made by a private individual—*Vithoo Raghoji v. Emp.*, A.I.R. 1938 Nag. 487 (489), 1938 N.I.J. 285, 40 Cr.L.J. 388, 180 I.C. 577.

Recording Reasons:—This section merely states that the Judge should record a finding; it does not state that the finding should be supported by reasons, or that it

should contain issues for decision—*Lakhmichand*, 21 S.L.R. 43, 27 Cr.L.J. 1249 (1250), 98 I.C. 97. But see *Yerneni*, 30 Cr.L.J. 370, 114 I.C. 834, 28 M.L.W. 774, A.I.R. 1929 Mad. 74, Ind. Rul. 1929 Mad. 354.

See also Note 1255A.

Review of Complaint:—A complaint cannot be a judgment even when the complaint is made by a Court under this section. Therefore, sec. 369, Cr. P. C., cannot apply to a complaint and does not, therefore, amount to a bar against a Court altering or reviewing the complaint under this section. Where, therefore, a Civil Court made a complaint to a Magistrate under this section but the complaint was returned to him by the District Magistrate with the request that he should act under sec. 478, Cr. P. C., and the Civil Court acted accordingly, *held* that it was open to the Civil Court under these circumstances when the record was sent back to it by the District Magistrate to pass the order of commitment after the further enquiry which is made and that the commitment having been made, no ground existed for the High Court to set it aside in its revisional powers under sec. 215, Cr. P. C.—*Jagat Ram*, A.I.R. 1937 All. 76, 1936 A.L.J. 1199.

Once an order has been passed by the Magistrate declining to take action, that order can be displaced only by the order of the Appellate Court under sec. 476B, Cr. P. C. The District Magistrate has no power to direct the prosecution and if the Magistrate in making the complaint allows himself to be guided by the wishes of a superior executive officer, he manifestly acts improperly and contrary to law and the proceedings are liable to be quashed—*Ramdeni Pathak v. Emp.*, 39 Cr.L.J. 358 (359), 173 I.C. 738, 10 R.P. 432, 4 B.R. 327, A.I.R. 1938 Pat. 145.

See also Note 1255A.

"May take security.....custody to such Magistrate".—"The object of this is not to make it compulsory on the Magistrate to send the accused in custody even in non-bailable cases. I want to leave a discretion to the Magistrate to come to a conclusion that it is necessary for him to do so. Otherwise he may take security for his appearance."—Speech of Mr. Rangachariar (*Legislative Assembly Debates*, 8th February, 1923, page 2087).

1249. Effect of reversal of the order directing prosecution:—If an order under sec. 476 (1) directing any enquiry by a Magistrate of the First Class is set aside, it is just and proper that proceeding under sub-sec. (2) before that Magistrate must also cease; the Magistrate cannot proceed with the inquiry any further—*San Tin*, 6 L.B.R. 49, 13 Cr.L.J. 492. Thus, where in a suit on a registered bond alleged to have been executed by the defendant, the Munsiff held that the bond was genuine, and directed the prosecution of the defendant, who had denied the execution of the bond, for an offence under sec. 193, I. P. C., and sent the defendant to the nearest First Class Magistrate to be tried for the offence, but on appeal the judgment of the Munsiff was reversed by the Sub-Judge who held that the bond was not genuine and that the defendant had not executed it, it was held that the result of the judgment of the Appellate Court must be taken to be that the order for the prosecution of the defendant was not maintainable and that the inquiry into the case of the defendant by the First Class Magistrate must be stopped and should proceed no further; and that if the defendant had been convicted by the Magistrate, the conviction would be set aside by the High Court, although the defendant did not move the High Court to quash the proceeding taken against him—*Kanullah*, 12 C.W.N. 1. But where a Magistrate dismissed a complaint and directed the prosecution of the complainant under this section, and the Sessions Judge directed further inquiry setting aside the order of dismissal, but *passed no order in respect of the order of prosecution*, it was held that the order of prosecution remained good until it was quashed and the Magistrate to whom the case was sent was competent to continue the inquiry—*Kachi Madar*, 21 M.L.J. 795, 12 Cr.L.J. 323. If an order directing the prosecution is set aside by the High Court as not being in proper form, it does not debar the Court from instituting fresh proceedings by making a complaint in proper form—*Durjodhan*, 52 Cal. 666, 26 Cr.L.J. 1459.

1250. First Class Magistrate:—Under the old section, the Court before which an offence was committed had to send the case for inquiry or trial to the nearest First Class Magistrate; and it was not necessary that such Magistrate should be a Magistrate having local jurisdiction over the offence. The order making the transfer was of itself sufficient to confer jurisdiction on such Magistrate—*Nagappa*, 16 Mad. 461; *Rup Narain*, 20 Cr.L.J. 202 (Pat.). But in a Sind case, it was held that the word 'nearest' was merely directory; and the trial of the offender by a Magistrate who was not the nearest Magistrate but who had local jurisdiction over the offence was not illegal—*Neuand*, 1 S.L.R. 84, 8 Cr.L.J. 209. See also *Donaldson*, 43 Cal. 542, where the High Court sent the case to a Magistrate who was the nearest Magistrate having jurisdiction over the offender, though not the nearest Magistrate to the High Court. To remove this conflict of opinion, it has now been expressly laid down that the Magistrate to whom the accused is to be sent must be a Magistrate having jurisdiction.

If a High Court or Chief Presidency Magistrate takes action under this section, he shall send the case to a Presidency Magistrate; see para. 3 of sub-section (1). In this para as originally framed by the Amendment Act of 1923, the words were "Chief Presidency Magistrate," but the word 'Chief' has been omitted by the Cr. P. C. Amendment Act, II of 1926. "This amendment proposes to make all Presidency Magistrate, Magistrates of the first class for the purpose of sec. 476 (1). At present, if a Chief Presidency Magistrate wishes to take action, it is necessary for him to send the case to a first class Magistrate outside the Presidency town, because the other Presidency Magistrates are not first class Magistrates for the purposes of this section"—*Statement of Objects and Reasons* (Gazette of India, 1925, Part V, p. 215). Such a difficulty arose in the case of *Mackey*, 53 Cal. 350, 30 C.W.N. 276, 27 Cr.L.J. 385 (F.B.). In this case the accused gave false evidence before the Chief Presidency Magistrate, whereupon he drew up a complaint for an offence under sec. 193, I. P. Code. This complaint he preferred in his own Court (i.e., to himself), because the other Presidency Magistrates were not first class Magistrates; then he transferred the complaint under sec. 192, Cr. P. Code to the Third Presidency Magistrate. The Full Bench decided that the procedure adopted by the Chief Presidency Magistrate in making the complaint to himself was irregular, though not absolutely illegal. The present amendment, however, has removed this difficulty.

This section authorises the Court to send the accused to the First Class Magistrate; it does not permit the Court to commit him to the Sessions—*Anwarkha*, 3 Bom.L.R. 185

The Court should specify the Magistrate to whom the case is sent; an order that the case be sent to the Magisterial authorities for investigation is not sufficient—*Nurput*, 4 N.W.P. 86.

1251. Power of Magistrate to whom case is sent:—The expression 'proceed according to law' in sub-sec. (2) means that the Magistrate receiving the reference must proceed under Chapters XVIII to XXI of the Code according to the nature of the offence supposed to have been committed. Chapter XVII has, of course, no application, in as much as the accused must necessarily appear before the Magistrate as a consequence of the reference itself—*Duidin v. Narayan*, 21 Cr.L.J. 310 (Nag.).

The Magistrate receiving a case under sec. 476 cannot act under sec. 202. The latter section enables a Magistrate who is not satisfied as to the truth of the complaint to postpone the issue of process and to direct a local investigation. Now, sec. 476 presupposes that the Court (Civil, Criminal or Revenue) making the reference to the Magistrate must be of opinion that there is ground for inquiry into the offence in respect of which the case is sent to the Magistrate. This shows that sec. 476 precludes the application of sec. 202, and that there can be no room for the investigation which is contemplated by that section—*Duidin v. Narayan*, 55 I.C. 470, 21 Cr.L.J. 310 (Nag.).

The Magistrate to whom a case has been sent is competent to discharge the accused person, if in his opinion the evidence against the accused is insufficient—*Rachappa*, 13 Bom. 109 (113). He has power to dismiss the complaint under sec. 203—*Gopal Barik*, 34 Cal. 42 (46). If the Magistrate passes an order of discharge, the Sessions Judge can

should contain issues for decision—*Lakhmichand*, 21 S.L.R. 43, 27 Cr.L.J. 1249 (1250), 98 I.C. 97. But see *Yerneni*, 30 Cr.L.J. 370, 114 I.C. 834, 28 M.L.W. 774, A.I.R. 1929 Mad. 74, Ind. Rul. 1929 Mad. 354.

See also Note 1255A.

Review of Complaint:—A complaint cannot be a judgment even when the complaint is made by a Court under this section. Therefore, sec. 369, Cr. P. C., cannot apply to a complaint and does not, therefore, amount to a bar against a Court altering or reviewing the complaint under this section. Where, therefore, a Civil Court made a complaint to a Magistrate under this section but the complaint was returned to him by the District Magistrate with the request that he should act under sec. 478, Cr. P. C., and the Civil Court acted accordingly, held that it was open to the Civil Court under these circumstances when the record was sent back to it by the District Magistrate to pass the order of commitment after the further enquiry which is made and that the commitment having been made, no ground existed for the High Court to set it aside in its revisional powers under sec. 215, Cr. P. C.—*Jagat Ram*, A.I.R. 1937 All. 76, 1936 A.L.J. 1199.

Once an order has been passed by the Magistrate declining to take action, that order can be displaced only by the order of the Appellate Court under sec. 476B, Cr. P. C. The District Magistrate has no power to direct the prosecution and if the Magistrate in making the complaint allows himself to be guided by the wishes of a superior executive officer, he manifestly acts improperly and contrary to law and the proceedings are liable to be quashed—*Ramdeni Pathak v. Emp*, 39 Cr.L.J. 358 (359), 173 I.C. 738, 10 R.P. 432, 4 B.R. 327, A.I.R. 1938 Pat. 145.

See also Note 1255A.

"May take security.....custody to such Magistrate".—"The object of this is not to make it compulsory on the Magistrate to send the accused in custody even in non-bailable cases. I want to leave a discretion to the Magistrate to come to a conclusion that it is necessary for him to do so. Otherwise he may take security for his appearance."—Speech of Mr. Rangachariar (*Legislative Assembly Debates*, 8th February, 1923, page 2087).

1249. Effect of reversal of the order directing prosecution:—If an order under sec. 476 (1) directing any enquiry by a Magistrate of the First Class is set aside, it is just and proper that proceeding under sub-sec. (2) before that Magistrate must also cease; the Magistrate cannot proceed with the inquiry any further—*San Tin*, 6 L.B.R. 49, 13 Cr.L.J. 492. Thus, where in a suit on a registered bond alleged to have been executed by the defendant, the Munsiff held that the bond was genuine, and directed the prosecution of the defendant, who had denied the execution of the bond, for an offence under sec. 193, I. P. C., and sent the defendant to the nearest First Class Magistrate to be tried for the offence, but on appeal the judgment of the Munsiff was reversed by the Sub-Judge who held that the bond was not genuine and that the defendant had not executed it, it was held that the result of the judgment of the Appellate Court must be taken to be that the order for the prosecution of the defendant was not maintainable and that the inquiry into the case of the defendant by the First Class Magistrate must be stopped and should proceed no further; and that if the defendant had been convicted by the Magistrate, the conviction would be set aside by the High Court, although the defendant did not move the High Court to quash the proceeding taken against him—*Kamullah*, 12 C.W.N. 1. But where a Magistrate dismissed a complaint and directed the prosecution of the complainant under this section, and the Sessions Judge directed further inquiry setting aside the order of dismissal, but passed no order in respect of the order of prosecution, it was held that the order of prosecution remained good until it was quashed and the Magistrate to whom the case was sent was competent to continue the inquiry—*Kachi Madar*, 21 M.L.J. 795, 12 Cr.L.J. 323. If an order directing the prosecution is set aside by the High Court as not being in proper form, it does not debar the Court from instituting fresh proceedings by making a complaint in proper form—*Durjodhan*, 52 Cal. 666, 26 Cr.L.J. 1459.

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order further inquiry under sec. 436—*Peary Lal v. Sagar Mal*, 49 All. 230, 27 Cr.L.J. 1130.

If the complaint under this section is made without jurisdiction, the Magistrate to whom the case is sent is competent to dismiss the complaint—*Kulandai v. Ramasami*, (1911) 2 M.W.N. 431, 12 I.C. 644 (645). The Magistrate while dismissing the case and acquitting the accused, cannot direct compensation to be paid to the accused. Thus, where the decree-holder complained to the Civil Court of obstruction by the judgment-debtor under this section, and after the trial and acquittal of the accused the Magistrate ordered the decree-holder to pay compensation, it was held that the order was not valid, since the decree-holder was not the complainant. The real complainant was the Civil Court which directed the prosecution of the accused—*Kishandas Hirachand*, 14 Bom.L.R. 1166, 14 Cr.L.J. 1.

The Magistrate is competent to proceed against persons not named in the order of the Court directing the prosecution under this section. The Code provides for taking cognizance of offences and not of offenders, and a Magistrate who has legally taken cognizance of an offence on an order under sec. 476 has jurisdiction to proceed against any one who may be proved by the evidence to be concerned in the offence, whether he was mentioned in the order or not—*Girdhari Lal*, 21 C.W.N. 950, 18 Cr.L.J. 901; *Waman*, 43 Bom. 300; *Ajaib Singh*, 34 P.R. 1917, 18 Cr.L.J. 893 (895). See Note 614C.

Where the accused failed to place on record of the case sufficient material to satisfy the Magistrate that the preliminaries laid down by sec. 476 had not been complied with by the Court before filing the complaint, it cannot be presumed that the Court had not applied its mind to the case and that in filing the complaint he merely carried out the order of his superior officer—*Moolchand*, 34 Cr.L.J. 305 (307), 142 I.C. 74, 26 S.L.R. 105, A.I.R. 1933 Sind 37, 1933 Cr.C. 166, Ind. Rul. 1933 Sind 82.

1252. Limit of time for taking action:—This section does not limit the time within which action should be taken, and there is no necessity to proceed under this section immediately after the close of the original trial or proceeding in which the offence complained of is said to have been committed—*Badri Singh*, 19 A.L.J. 819, 22 Cr.L.J. 680, 63 I.C. 616 (617); *Daman*, 43 Bom. 300; *Attar Singh*, 1916 P.R. 29, 18 Cr.L.J. 337 (339); *Seshamma v. Venkamma*, 22 L.W. 863, 27 Cr.L.J. 280 (282); *Tilak Panday*, 37 All. 344, 13 A.L.J. 466; *Lakshmidas*, 32 Bom. 184 (190, 191), 7 Cr.L.J. 35, 10 Bom.L.R. 28; *Jethamal v. Wadhmal*, 7 S.L.R. 187, 15 Cr.L.J. 541; *Jawala Parshad v. Ram Parshad*, A.I.R. 1940 Lah. 526, distinguishing *Ram Nath v. Emp.*, A.I.R. 1916 Lah. 259, 88 P.L.R. 1916, 17 Cr.L.J. 470 and *Chothu Ram v. Emp.*, A.I.R. 1930 Lah. 316, 126 I.C. 794, 31 Cr.L.J. 1135. But still it is desirable that an order under this section should be made either at the close of the proceeding or so shortly thereafter that it may be reasonably said that the order is a part of the proceeding—*Rahimatulla*, 31 Mad. 140, 7 Cr.L.J. 54, 17 M.L.J. 584 (F.B.); *Yad Rau v. Risal*, 5 I.C. 469, 7 A.L.J. 50, 11 Cr.L.J. 140; *Abdul Qadir v. Muhammad Ibrahim Khan*, 25 Cr.L.J. 119, 76 I.C. 183, A.I.R. 1924 Lah. 569; *Sarat Chandra*, 20 Cr.L.J. 184; *Choudhury Mean*, 20 Cr.L.J. 286; *Maung Ba Hla*, 18 Cr.L.J. 331 (332) (Bur.); *Aiyakannu*, 32 Mad. 49, 9 Cr.L.J. 41, 4 M.L.T. 204. If the Court thinks that action should be taken under this section, it ought to pass such order at or immediately after the termination of the original trial (and should not delay it by several months)—*Begu Singh*, 34 Cal. 551 (556), 5 Cr.L.J. 398, 5 C.L.J. 508, 11 C.W.N. 568 (F.B.); *Bhim Lal v. Bisu*, 40 Cal. 444, 17 C.W.N. 290; *Kashi Shukul*, 38 All. 695; *Subbaraya*, 15 M.L.J. 489, 3 Cr.L.J. 118. See also *Trailokya v. Radharanjan*, 25 C.W.N. 886, 67 I.C. 204, 23 Cr.L.J. 380. In *Bai Kasturbai v. Vanamalidas*, 49 Bom. 710, A.I.R. 1925 Bom. 436, 26 Cr.L.J. 1189, 27 Bom.L.R. 616, Crump, J. considered *Begu Singh*, supra, and after pointing out that it was overruled by *Bahadur v. Eradatullah Mallick*, 37 Cal. 642, 6 I.C. 801, 14 C.W.N. 799, he said: "It is also obvious from a reference to the section itself as it stood, and as it now stands, that the main grounds on which the decision rests are no longer in force. The learned Judges relied on the words 'committed before it or brought under its notice in the course of a judicial proceeding'"

which are no longer to be found in the section." On the section as it now stands it is clear that the application need not be made in the course of the proceedings out of which it arises, or immediately thereafter, and the difference of opinion upon the former section is now immaterial. Whether the Court would accede to an application made long after the termination of the proceedings out of which it arises is a matter which would arise upon the merits and would no doubt depend upon all the circumstances—*Bhagwandas Narandas v. D. D. Patel & Co*, 41 Cr.L.J. 526 (528), 187 I.C. 867, 1940 Bom. 403, A.I.R. 1940 Bom. 131, 42 Bom.L.R. 231. But no hard and fast rule can be laid down that delay is a ground for setting aside an order for prosecution. It may, under certain circumstances, be almost a sufficient ground in itself, but in other cases it may be no ground at all. It is possible to imagine a case in which the commission of an alleged offence may not have actually come to light for many months or even years after it had been committed. But a prosecution for false complaint under sec. 211, I. P. C., should be ordered as soon as the complaint is dismissed as false, and not many months afterwards, because the facts justifying the prosecution are known to the Court at the time when the complaint is dismissed—*Baldeo Prosad*, 46 All. 851 (852); *Sajjad Husain*, A.I.R. 1935 Oudh 113, 1934 O.L.R. 980, 153 I.C. 346, 1935 O.W.N. 29, 1935 Cr.C. 203. In some cases a Court might refuse to take proceedings on the ground that an application was unduly delayed, but that is a matter of discretion to be exercised in the circumstances of each case—*Banke Lal v. Maiku*, A.I.R. 1933 Oudh 430, 35 Cr.L.J. 121, 146 I.C. 638, 1933 Cr.C. 1315, 10 O.W.N. 1037. Before exercising its jurisdiction to lay a complaint the Court should find, first, that it is in the interests of public justice that a complaint should be made, and secondly, that there is a reasonable probability of a conviction resulting from a complaint. In regard to the first point, although no time limit for the institution of such prosecutions is laid down in the section, it has been held by all the High Courts that prompt action is desirable, and the delay on the part of a party in making his application to move the Court to lay a complaint may, if unexplained, be fatal to the application. If the application is delayed, and the delay is not satisfactorily explained, evidence called in support thereof naturally comes under suspicion, and the inference arises that the interests of public justice are less likely to be served than the interests of the applicant by the laying of a complaint. Moreover, a party who has been unsuccessful in a case should not remain indefinitely under the threat that an application for his prosecution may be filed; such a weapon is likely to be used for improper purposes. These considerations apply with most force when the application is not founded on materials to be found on the record of the trial, but on evidence of additional facts which the applicant alleges to be available. In such cases strict explanation of the reasons for the delay in making the application is necessary; otherwise it cannot be held that it is in the interests of justice to make a complaint—*M. Mohamed Kaka v. District Judge, Bassein*, A.I.R. 1937 Rang. 62 (64), 168 I.C. 632, 9 R.R. 359, 38 Cr.L.J. 615, 1937 Rang.L.R. 276. While, no doubt, a Court may properly hesitate to make a complaint on an application which is presented long after proceedings have ended and which is obviously not prompted by any other motive than personal grudge, there is nothing in the statute warranting the proposition that action under sec. 476, Cr. P. C., is only to be taken before the close of the proceedings in which the perjury is alleged to have been committed, or in strict continuation of them, or within any particular time after their termination. Nor is there justification for the view that only applications prompted by high motives are to be entertained—*Jahan Khan v. Emp.*, 39 Cr.L.J. 698 (699), 176 I.C. 116, 11 R.L. 164, 40 P.L.R. 136, A.I.R. 1938 Lah. 429. A delay of three months was considered too long—*Maung Ba*, 18 Cr.L.J. 331 (332). In *Lalji Hari*, 20 Cr.L.J. 226 (Pat.) a delay of three weeks was held to be too much under the circumstances of the case. In fact, each case would depend upon its own circumstances, so that no hard and fast rule can be laid down as to within what time a complaint should be made under sec. 476, and in view of the amendment made in this section and the enactment of the two new secs. 476A and 476B it is no longer necessary that the proceeding under sec. 476 should be taken immediately after the termination of the original proceeding. But, of course, a complaint made after the

order further inquiry under sec. 436—*Peary Lal v. Sagar Mal*, 49 All. 230, 27 Cr.L.J. 1130.

If the complaint under this section is made without jurisdiction, the Magistrate to whom the case is sent is competent to dismiss the complaint—*Kulandai v. Ramasami*, (1911) 2 M.W.N. 431, 12 I.C. 644 (645). The Magistrate while dismissing the case and acquitting the accused, cannot direct compensation to be paid to the accused. Thus, where the decree-holder complained to the Civil Court of obstruction by the judgment-debtor under this section, and after the trial and acquittal of the accused the Magistrate ordered the decree-holder to pay compensation, it was held that the order was not valid, since the decree-holder was not the complainant. The real complainant was the Civil Court which directed the prosecution of the accused—*Kishandas Hirachand*, 14 Bom.L.R. 1166, 14 Cr.L.J. 1.

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Where the accused failed to place on record of the case sufficient material to satisfy the Magistrate that the preliminaries laid down by sec. 476 had not been complied with by the Court before filing the complaint, it cannot be presumed that the Court had not applied its mind to the case and that in filing the complaint he merely carried out the order of his superior officer—*Moolchand*, 34 Cr.L.J. 305 (307), 142 I.C. 74, 26 S.L.R. 105, A.I.R. 1933 Sind 37, 1933 Cr.C. 166, Ind. Rul. 1933 Sind 82.

1252. Limit of time for taking action:—This section does not limit the time within which action should be taken, and there is no necessity to proceed under this section immediately after the close of the original trial or proceeding in which the offence complained of is said to have been committed—*Badri Singh*, 19 A.L.J. 819, 22 Cr.L.J. 680, 63 I.C. 616 (617); *Daman*, 43 Bom. 300; *Attar Singh*, 1916 P.R. 29, 18 Cr.L.J. 337 (339); *Seshamma v. Venkamma*, 22 L.W. 863, 27 Cr.L.J. 280 (282); *Talak Panday*, 37 All. 344, 13 A.L.J. 466; *Lakshmidas*, 32 Bom 184 (190, 191), 7 Cr.L.J. 35, 10 Bom.L.R. 28; *Jethamal v. Wadhmal*, 7 S.L.R. 187, 15 Cr.L.J. 541; *Jawala Parshad v. Ram Parshad*, A.I.R. 1940 Lah. 526, distinguishing *Ram Nath v. Emp.*, A.I.R. 1916 Lah. 259, 88 P.L.R. 1916, 17 Cr.L.J. 470 and *Chothu Ram v. Emp.*, A.I.R. 1930 Lah. 316, 126 I.C. 794, 31 Cr.L.J. 1135. But still it is desirable that an order under this section should be made either at the close of the proceeding or so shortly thereafter that it may be reasonably said that the order is a part of the proceeding—*Rahimatulla*, 31 Mad 140, 7 Cr.L.J. 54, 17 M.L.J. 584 (F.B.); *Yad Rau v. Risal*, 5 I.C. 469, 7 A.L.J. 50, 11 Cr.L.J. 140; *Abdul Qadir v. Muhammad Ibrahim Khan*, 25 Cr.L.J. 119, 76 I.C. 183, A.I.R. 1924 Lah. 569; *Sarat Chandra*, 20 Cr.L.J. 184; *Chowdhury Mean*, 20 Cr.L.J. 286; *Maung Ba Hla*, 18 Cr.L.J. 331 (332) (Bur.); *Aiyakannu*, 32 Mad. 49, 9 Cr.L.J. 41, 4 M.L.T. 204. If the Court thinks that action should be taken under this section, it ought to pass such order at or immediately after the termination of the original trial (and should not delay it by several months)—*Begu Singh*, 34 Cal. 551 (556), 5 Cr.L.J. 398, 5 C.L.J. 508, 11 C.W.N. 568 (F.B.); *Bhim Lal v. Bisu*, 40 Cal. 444, 17 C.W.N. 290; *Kashi Shukul*, 38 All. 695; *Subbaraya*, 15 M.L.J. 489, 3 Cr.L.J. 118. See also *Trailokya v. Radharanjan*, 25 C.W.N. 886, 67 I.C. 204, 23 Cr.L.J. 380. In *Bai Kasturbai v. Vanamaldas*, 49 Bom. 710, A.I.R. 1925 Bom 436, 26 Cr.L.J. 1189, 27 Bom.L.R. 616, Crump, J. considered *Begu Singh*, supra, and after pointing out that it was overruled by *Bahadur v. Eradatullah Mallick*, 37 Cal. 642, 6 I.C. 801, 14 C.W.N. 799, he said: "It is also obvious from a reference to the section itself as it stood, and as it now stands, that the main grounds on which the decision rests are no longer in force. The learned Judges relied on the words "committed before it or brought under its notice in the course of a judicial proceeding"

which are no longer to be found in the section." On the section as it now stands it is clear that the application need not be made in the course of the proceedings out of which it arises, or immediately thereafter, and the difference of opinion upon the former section is now immaterial. Whether the Court would accede to an application made long after the termination of the proceedings out of which it arises is a matter which would arise upon the merits and would no doubt depend upon all the circumstances—*Bhagwandas Narandas v. D. D. Patel & Co.*, 41 Cr.L.J. 526 (528), 187 I.C. 867, 1940 Bom. 403, A.I.R. 1940 Bom. 131, 42 Bom.L.R. 231. But no hard and fast rule can be laid down that delay is a ground for setting aside an order for prosecution. It may, under certain circumstances, be almost a sufficient ground in itself, but in other cases it may be no ground at all. It is possible to imagine a case in which the commission of an alleged offence may not have actually come to light for many months or even years after it had been committed. But a prosecution for false complaint under sec. 211, I.P.C., should be ordered as soon as the complaint is dismissed as false, and not many months afterwards, because the facts justifying the prosecution are known to the Court at the time when the complaint is dismissed—*Baldeo Prosad*, 46 All. 851 (852); *Sajjad Husain*, A.I.R. 1935 Oudh 113, 1934 O.L.R. 980, 153 I.C. 346, 1935 O.W.N. 29, 1935 Cr.C. 203. In some cases a Court might refuse to take proceedings on the ground that an application was unduly delayed, but that is a matter of discretion to be exercised in the circumstances of each case—*Banke Lal v. Maiku*, A.I.R. 1933 Oudh 430, 35 Cr.L.J. 121, 146 I.C. 638, 1933 Cr.C. 1315, 10 O.W.N. 1037. Before exercising its jurisdiction to lay a complaint the Court should find, first, that it is in the interests of public justice that a complaint should be made, and secondly, that there is a reasonable probability of a conviction resulting from a complaint. In regard to the first point, although no time limit for the institution of such prosecutions is laid down in the section, it has been held by all the High Courts that prompt action is desirable, and the delay on the part of a party in making his application to move the Court to lay a complaint may, if unexplained, be fatal to the application. If the application is delayed, and the delay is not satisfactorily explained, evidence called in support thereof naturally comes under suspicion, and the inference arises that the interests of public justice are less likely to be served than the interests of the applicant by the laying of a complaint. Moreover, a party who has been unsuccessful in a case should not remain indefinitely under the threat that an application for his prosecution may be filed; such a weapon is likely to be used for improper purposes. These considerations apply with most force when the application is not founded on materials to be found on the record of the trial, but on evidence of additional facts which the applicant alleges to be available. In such cases strict explanation of the reasons for the delay in making the application is necessary; otherwise it cannot be held that it is in the interests of justice to make a complaint—*M. Mohamed Kaka v. District Judge, Bassein*, A.I.R. 1937 Rang. 62 (64), 168 I.C. 632, 9 R.R. 359, 38 Cr.L.J. 615, 1937 Rang.L.R. 276. While, no doubt, a Court may properly hesitate to make a complaint on an application which is presented long after proceedings have ended and which is obviously not prompted by any other motive than personal grudge, there is nothing in the statute warranting the proposition that action under sec. 476, Cr. P. C., is only to be taken before the close of the proceedings in which the perjury is alleged to have been committed, or in strict continuation of them, or within any particular time after their termination. Nor is there justification for the view that only applications prompted by high motives are to be entertained—*Jahan Khan v. Emp.*, 39 Cr.L.J. 698 (699), 176 I.C. 116, 11 R.L. 164, 40 P.L.R. 136, A.I.R. 1938 Lah. 429. A delay of three months was considered too long—*Maung Ba*, 18 Cr.L.J. 331 (332). In *Lalji Hari*, 20 Cr.L.J. 226 (Pat.) a delay of three weeks was held to be too much under the circumstances of the case. In fact, each case would depend upon its own circumstances, so that no hard and fast rule can be laid down as to within what time a complaint should be made under sec. 476, and in view of the amendment made in this section and the enactment of the two new secs. 476A and 476B it is no longer necessary that the proceeding under sec. 476 should be taken immediately after the termination of the original proceeding. But, of course, a complaint made after the

lapse of a considerable time would be open to the objection that it was made after an undue delay—*Seshamma v. Venkamma*, 22 L.W. 863, 27 Cr.L.J. 280 (282), 92 I.C. 456.

Where an appeal is preferred against the original case, the Court is justified in waiting till the disposal of the appeal, before directing a prosecution under this section—*Attar Singh*, 18 Cr.L.J. 337 (338), 1916 P.R. 29; *Gendan Singh*, 3 C.L.J. 302; *Shri Nana Maharaj*, 16 Bom. 729; *Mutty Lall*, 6 Cal 308; *Khan Muhammad*, 4 Lah. 58. See sub-section (3).

Where proceedings for directing a prosecution are commenced in the course of a judicial proceeding or so soon thereafter as to make the former substantially a continuation of the latter, the final order directing the prosecution will not be vitiated by the fact that it was passed more than a year afterwards—*Venkatasubbayya*, 1919 M.W.N. 112, 20 Cr.L.J. 172, 49 I.C. 492. But the Court will set aside an order directing a prosecution if it is passed so long after the offence that the delay is oppressive or scandalous—*Ibid*.

1253. Revision:—*Power of Sessions Judge* :—A Sessions Judge has no power to interfere with an order under sec. 476, nor with a complaint under sec. 195 made by a Magistrate—*Ankanna*, 23 Mad. 205 (260); *Gopal Barik*, 34 Cal. 42 (45). If the Sessions Judge is of opinion that the order should be set aside, he should refer the matter to the High Court—*Kanhu v. Natabar*, 15 Cr.L.J. 1 (Cal); *Arjun v. Bira*, 15 Cr.L.J. 16 (17). It is the High Court which alone has the power to interfere with an order under sec. 476; a Sessions Judge has no such power—*Gopal Barik*, *supra*.

Power of High Court :—In *Eranpoli Athan*, 26 Mad. 98, it was held that the effect of the words "as if upon complaint made and recorded under sec. 200" was that the order under this section was merely a complaint and not an order, and, as such, was not subject to revision by the High Court. Whereas in various other cases it was laid down that these words did not mean that the proceedings of the Court directing prosecution were to be taken merely as a complaint and not as an order; the order of prosecution was, therefore, subject to revision—*Ottupura Natayanam*, 33 Mad. 48 (F.B.); *Srinivasulu*, 21 Mad. 124; *Bal Gangadhar Tilak*, 26 Bom. 785; *Gopal Barik*, 34 Cal. 42 (46); *Chaudhuri Mahomed Isharul*, 20 Cal. 349; *Mathura Das*, 16 All. 80. The decision in 26 Mad. 98 (*supra*) must be deemed as overruled by the Full Bench case of 33 Mad. 48. In *Narakka*, 13 Mad. 144, it was held that the High Court had no power to interfere on appeal with a complaint duly made by a Court under sec. 476, but the Judges indicated that they were of opinion that if sufficient cause were shown they might have interfered in revision. Further, it is the intention of the Legislature that an order under this section is subject to revision. This will be evident from the amendment made in 1923 to the effect that the Court shall record a finding "In order to give effect to our decision that proceedings under sec. 476 should be subject to revision we have introduced words which will make it necessary for the Court to record an order"—*Report of the Joint Committee* (1922).

1254. When High Court will interfere and when not:—Orders purporting to be made under this section are open to revision by the High Court when they have been made during proceedings held entirely without jurisdiction—*Suryanarayana*, 29 Mad. 100. When the Lower Court has proceeded upon merely fanciful grounds or grounds so obviously wrong that it could not be said to have formed a serious judicial opinion at all, then the High Court will interfere and set aside the order of the Court below—*Alamdar*, 23 All. 249, 1901 A.W.N. 59; *Parshotamdas*, 25 Bom.L.R. 282, 24 Cr.L.J. 359, A.I.R. 1923 Bom. 201; *Abdul Husen*, 9 N.L.R. 184, 15 Cr.L.J. 33 (34); but where the Lower Court has arrived at a judicial opinion on substantial grounds and the order shows that the Court has acted with circumspection and mature deliberation, the order should not be interfered with, merely because the High Court disagrees with that opinion—*Alamdar*, 23 All. 249; *Mata Ratan v. Mahabir*, 4 A.L.J. 803, 7 Cr.L.J. 1; *Abdul Husen*, *supra*; *Daulat*, 14 N.L.R. 16, 18 Cr.L.J. 1015 (1016). Where

the undisputed and indisputable facts speak for themselves, and on those facts a responsible officer of the Government after obviously careful consideration, has sought to prosecute the petitioner in order to vindicate public justice, and the conditions laid down in sections 195 and 476 have been observed, mere technicalities should not be permitted to interfere with the course of justice—*Ram Prasad*, 37 Cal. 12 (21). The question whether a complaint should be made under sec. 476 is almost invariably a matter of discretion, and the High Court is always loath to interfere except in extraordinary cases—*Ranjit Narain v Ram Bahadur*, 5 Pat. 262, 7 P.L.T. 114, 27 Cr.L.J. 641; *Hiralal*, 33 Cr.L.J. 860, 139 I.C. 543, 13 P.L.T. 370, 1932 Cr.C. 640, A.I.R. 1932 Pat. 243, Ind. Rul. 1932 Pat. 245. See also *Beyas Narain Singh v. Dasrath Singh*, 37 Cr.L.J. 838, 163 I.C. 451, 4 I.R. 1936 Pat. 382, 17 P.L.T. 276, 1936 Cr.C. 581. Ordinarily the High Court is reluctant to interfere with orders where the Courts below, after a consideration of the entire material on the record, have come to the conclusion that an offence has been committed, which it is desirable, in the interests of justice, to send for inquiry to a Magistrate—*Nand Lal v. Emp.*, A.I.R. 1937 Lah. 867, 39 P.L.R. 812, 172 I.C. 942. If the trial Court or the Court to which it is subordinate thinks that no complaint should be made, then it is not desirable that the High Court should interfere—*Somabhai v. Adibhai*, 48 Bom. 401, 26 Bom.L.R. 289. Revision should be granted if there be some error of law, some irregularity, some abuse of or failure to exercise jurisdiction, and not simply because the Revisional Court has formed a different opinion from that of the Court below about the case—*Ganda Singh v. Bisaki*, 18 P.R. 1902, 73 P.L.R. 1902; *Behari Lal Sud v. Emp.*, 41 Cr.L.J. 204 (205), 185 I.C. 588, A.I.R. 1939 Lah. 529, 41 P.L.R. 652. See also *Dauood Rowther v. Abdul Kadar Rowther*, 40 Cr.L.J. 312 (314), 179 I.C. 980, A.I.R. 1938 Mad. 976, 48 M.L.W. 441, 1938 M.W.N. 1009, (1938) 2 M.L.J. 843. Where an order was made on insufficient grounds and no further action was taken by the Court for more than a year, it was held that this was a case in which the revisional powers of the High Court might properly be exercised and the order set aside—*Zafim Singh*, 1901 A.W.N. 177.

Formerly, when sec. 195 enabled a private person to obtain sanction to institute a prosecution, and when no appeal was provided for from an order by a Magistrate under sec. 476, it was sometimes desirable for the High Court to interfere in revision, because sanction was frequently used merely as a means of blackmail, and orders under sec. 476 were passed occasionally by inexperienced Magistrates. Now, after the change effected in 1923, the choice of instituting a prosecution is not placed in the hands of private persons, but is left to the Court, and the person who is the subject of the complaint has a definite right of appeal to a superior Court. This being the situation, it does not seem to be the function of the High Court, unless the circumstances are altogether outside the ordinary, to examine in revision the merits of the complaint with a view to discovering whether it is likely to result in a conviction. Moreover, when a Magistrate presiding over a Court and a responsible Court of Appeal are agreed that a prosecution is necessary in the interests of justice and in accordance with public policy, it would be extremely difficult for the High Court to interfere in revision and to declare that the prosecution is not in the interests of a public policy. Such a course is not even in the interests of the accused person as it deprives him of the only means of clearing his character which would otherwise remain affected by the fact of the complaint having been made and endorsed by the Court of appeal—*Behram*, 7 Lah. 108, 27 P.L.R. 314, 27 Cr.L.J. 776, 95 I.C. 312, A.I.R. 1926 Lah. 305; *Kaloo Mal*, 27 Cr.L.J. 1101, 95 I.C. 867; *Behari Lal Sud v. Emp.*, 41 Cr.L.J. 204 (205), 185 I.C. 588, A.I.R. 1939 Lah. 529, 41 P.L.R. 652. In spite of the right of appeal given under sec. 476B to persons against whom an order is made or persons whose application for an order under s. 476 has been refused, matters under this section are not matters of private litigation between individual parties and should not be so treated. They are matters which affect the administration of public justice, and when a Court has decided to make a complaint in the public interest, a superior Court should be reluctant to interfere with such

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exercise of discretion—*Purna Chandra v. Shaikh Dhalu*, 34 C.W.N. 914 (923), 1930 Cr.C. 1129, 52 C.L.J. 87.

Revision of proceedings of Civil and Revenue Courts:—When a Munsiff or Sub-Judge or District Judge takes proceeding under this section, he acts as a *Civil Court*, and the proceedings cannot be interfered with by a *Criminal Bench* of the High Court in Revision under sec. 439. The power of revision under secs. 435-439 is confined to records of inferior *Criminal Courts*. When an order is passed by a Civil Court making or refusing to make a complaint under this section, the High Court can interfere only under sec. 115 of the Civil Procedure Code, or sec. 15 of the High Courts Act or sec. 107, Government of India Act—*Har Prasad*, 40 Cal. 477, 17 C.W.N. 647, 14 Cr.L.J. 197, 17 C.L.J. 245, 19 I.C. 197 (F.B.); *Purna Chandra v. Shaikh Dhalu*, 52 C.L.J. 87, 129 I.C. 561, A.I.R. 1930 Cal. 721, 58 Cal. 374, Ind. Rul. 1931 Cal. 209, 34 C.W.N. 914 (916), 1930 Cr.C. 1129; *Surendra Nath v. Susil*, 35 C.W.N. 775 (778), 1931 Cr.C. 756, A.I.R. 1931 Cal. 604, 134 I.C. 1063, 33 Cr.L.J. 38, 59 Cal. 68, Ind. Rul. 1932 Cal. 23; *Bhup Kanwar*, 26 All. 249, 1904 A.W.N. 15, 1 Cr.L.J. 73 (F.B.); *Saliq Ram v. Ramji*, 28 All. 554; *Kashi Shukul*, 38 All. 695; *Banwari Lal v. Jhunka*, 24 A.L.J. 217, 27 Cr.L.J. 278; *Jagannath v. Rajagopalachari*, 12 P.L.T. 671, 1931 Cr.C. 699, A.I.R. 1931 Pat. 411; *Faujdar*, 26 Cr.L.J. 1565, 90 I.C. 445, A.I.R. 1926 Pat. 25; *Babu Ram*, 16 N.L.R. 23, 55 I.C. 286; *Maung Po v. Mutu Kurpan*, 10 Bur.L.T. 32, 17 Cr.L.J. 316 (317); *Ko Maung v. Ma*, 10 Bur.L.T. 13, 18 Cr.L.J. 121; *Bismilla v. Shakir Ali*, 4 Luck. 155; *Kartmulla v. Rameshwar*, 51 All. 344; *In re Chennagoud*, 26 Mad. 139, 2 Weir 197; *Venkanna*, 31 M.L.J. 440, 36 I.C. 483, A.I.R. 1917 Mad. 971, 17 Cr.L.J. 515, 20 M.L.T. 252, 4 M.L.W. 383, 1917 M.W.N. 130 (F.B.); *Abdul Haq v. Sheo Ram*, 49 All. 536; *Ejaz Ali Khan*, 24 O.C. 367; *Nawab Ali v. Madhuri*, 3 O.W.N. 905, 28 Cr.L.J. 16; *Thakur Das*, 17 O.C. 25 (31), 15 Cr.L.J. 217 (219); *Sheopal v. Mahendra*, 35 Cr.L.J. 432, 147 I.C. 535, A.I.R. 1934 Pat. 55; *Shiva Prasad v. Pahlad Singh*, A.I.R. 1935 All. 696, 1935 A.W.R. (H.C.) 792, 1935 A.L.J. 943. If the Civil Court (e.g., Munsiff) refuses to institute a prosecution under this section, and this order of refusal is upheld by the Civil Appellate Court (e.g., Subordinate Judge), the High Court cannot interfere with the appellate order under sec. 439 of this Code but can do so only under sec. 115 of the Civil Procedure Code—*Nawab Ali v. Madhuri*, supra. An order of the Small Cause Court under sec. 476 of the Code directing a prosecution for perjury can be interfered with only under sec. 25 of the Provincial Small Cause Courts Act—*Valab Das v. Maung Ba Than*, 1 Rang. 372.

Similarly, the High Court has no power in revision to interfere with an order passed by a *Revenue Court* under this section; the application for revision should be filed before the Board of Revenue—*Abdool Raof*, 4 A.L.J. 701, 6 Cr.L.J. 350; *Asharfi Lal*, 39 All. 91; *Pandit Ganga Sahai*, 15 Cr.L.J. 2 (Oudh); *Nataraja Iyer*, 36 Mad. 72 (per Sundara Ayyar, J.); *Raghunadha v. Govinda*, 55 M.L.J. 798, 114 I.C. 161, A.I.R. 1928 Mad. 1032, Ind. Rul. 1929 Mad. 225 (F.B.). But see *Rajah of Mandasa v. Jagannayakalu*, 63 M.L.J. 450, 140 I.C. 331, A.I.R. 1932 Mad. 612, 1932 M.W.N. 350, 36 M.L.W. 292, Ind. Rul. 1932 Mad. 859, 55 Mad. 883 (F.B.), where doubts were cast on the correctness of the decision in *Raghunadha v. Govinda*, supra.

In some cases, however, the High Court, in the exercise of its revisional jurisdiction under secs. 435 and 439, interfered with an order of a Civil Court directing a prosecution under this section—*Bal Gangadhar Tilak*, 26 Bom. 785 (789); *Mathura Das*, 16 All. 80 (81); *Bishan Singh v. Amritsari*, 1908 P.R. 5, 7 Cr.L.J. 281 (286), 103 P.L.R. 1908 (F.B.); *Hari Ram*, 116 I.C. 711, A.I.R. 1929 Lah. 676, 11 Lah.L.J. 103, 30 P.L.R. 392, 30 Cr.L.J. 666, Ind. Rul. 1929 Lah. 567; *Lachman*, 32 Cr.L.J. 647, 131 I.C. 216, 32 P.L.R. 46, 1931 Cr.C. 169, A.I.R. 1931 Lah. 105.

See Note 1255 & Note 1257 under the heading "Revision of order under this section."

1255. Sec. 115, C. P. Code, and Sec. 439, Cr. P. Code, compared:—If an order under sec. 476 (or under sec. 476A or 476B) is passed by a *Criminal Court*, the application for revision lies under sec. 439 of this Code; whereas in case of an order

under sec. 476 (or 476A or 476B) passed by a Civil Court, the application for revision will lie on the *civil side* of the High Court, under sec. 115 of the C. P. Code. The High Court's powers of revision under the two sections are different. Section 439 of this Code enables the High Court to call for the records of an inferior Criminal Court in order to satisfy itself as to the correctness, legality or propriety of an order passed by such Court; i.e., the High Court has power to interfere whenever it finds the order to be *incorrect, illegal or improper*. But its power under sec. 115, C. P. Code is narrower, and can be exercised only where the lower Court has failed to exercise its jurisdiction or has exceeded its jurisdiction or has exercised its jurisdiction illegally or with irregularity. If the Civil Court has properly exercised its jurisdiction in making a complaint under sec. 476 or 476A or 476B, the High Court has no power to interfere under sec. 115, Civil Procedure Code, even though the complaint is based on a faulty application of the facts or on a faulty view of the law or is based on insufficient grounds or on wrong grounds—*Abdul Haq v. Sheo Ram*, 49 All. 536, 25 A.L.J. 569, 28 Cr.L.J. 296; *Purna Chandra v. Shaikh Dhalu*, 34 C.W.N. 914 (916), 1930 Cr.C. 1129, 58 Cal. 374, 32 Cr.L.J. 377, 52 C.L.J. 87, A.I.R. 1930 Cal. 721, Ind. Rul. 1931 Cal. 209. In the Allahabad case, Ashworth, J., has suggested that some amendment of the law is necessary to give larger powers to the High Court under sec. 115, C. P. Code.

See Note 1257 under the headings "Procedure in appeal" and "Revision of order under this section".

1255A. Review:—If the Court at first refuses to make a complaint under this section, it cannot subsequently make a complaint, because the subsequent order would amount to a *review* of the first order of refusal—*Kulandi v. Ramaswami*, (1911) M.W.N. 431, 12 I.C. 644 (645). This Code generally makes no provision for a review. In view of an appeal being now allowed by sec. 476B, it is undesirable that a Court should review its order refusing to make a complaint—*Ram Prosad*, 49 All. 752, 28 Cr.L.J. 543, 25 A.L.J. 639. But see *Jagat Ram v. Emp.*, in Note 1259; *Kunjo Chaudhry*, 39 Cr.L.J. 353 (356), 16 Pat. 650, 19 P.L.T. 21, 1938 P.W.N. 41, 173 I.C. 742, 4 B.R. 332, 10 R.P. 443, A.I.R. 1938 Pat. 99; and *Vithoo Raghaji v. Emp.*, in Note 1257. See also Notes 634B and 1248A.

Costs:—Courts have jurisdiction to award costs to one party or the other only where the parties are the same as in the civil litigation; but if a *Magistrate* makes an application to a Munsif to make a complaint in respect of a forgery committed in a civil suit decided by the Munsif, and that application is dismissed, the Munsif cannot award costs against the Magistrate, as the latter was not a party to the civil suit—*Behari Lal*, 51 All. 338, 27 A.L.J. 62, A.I.R. 1928 All. 588 (590), 114 I.C. 741, 1929 A.L.J. 62, Ind. Rul. 1929 All. 277. The Bombay High Court has also held that in proceedings under sec. 476, Cr. P. C., the Court acts as a Civil Court, and that the Civil Court would have jurisdiction to award costs to one or the other party where the parties were the same as those in the civil litigation. An application under sec. 476, Cr. P. C., being in the nature of a civil application the Court has full jurisdiction to award costs—*Bhagandas Narandas v. D. D. Patel & Co.* 41 Cr.L.J. 526 (531), 187 I.C. 867, A.I.R. 1940 Bom. 131, 42 Bom.L.R. 231, I.L.R. 1940 Bom. 403.

See Note 634B.

476A. *The power conferred on Civil, Revenue and Criminal Courts by section 476, sub-section (1) may be exercised, in respect of any offence referred to therein and alleged to have been committed in or in relation to any proceeding in any such Court, by the Court to which such former Court is subordinate within the meaning of section 195, sub-section (3), in any case in which such former Court has neither made a complaint under section 476 in respect of such offence*

Superior Court may complain where subordinate Court has omitted to do so.

nor rejected an application for the making of such complaint; and, where the superior Court makes such complaint, the provisions of section 476 shall apply accordingly.

1256. This section has been added by section 128 of the Cr. P. C. Amendment Act XVIII of 1923. Under the old law, there was a conflict of opinion as to whether a superior Court could take action in respect of an offence committed before a subordinate Court. In *Mahadeo*, 27 Cal. 921; *Mathura*, 16 All. 80; *Godai Shah*, 9 C.W.N. 1030; *Loke Nath*, 10 C.W.N. 1091; *Arumugan*, 2 Weir 598, it was held that the superior Court could not take action in respect of an offence which was not committed before itself but before a subordinate Court; whereas in *Lakshmidas*, 32 Bom. 184 (192); *Rajkumar*, 1 P.L.J. 298, 18 Cr.L.J. 135 (136); and *Chandra Kishore*, 21 C.W.N. 755, it was held that the superior Court had that power. The present section adopts the latter view.

Where an application under sec. 476 is pending before the original Court (in which the offence has been committed) for a very long time, and has not been rejected by that Court, there is no objection to the superior Court taking such action as could be taken by the original Court under sec. 476—*Ramdas*, 26 Bom.L.R. 713, A.I.R. 1924 Bom. 511 (512), 25 Cr.L.J. 1287. But the superior Court should not interpose soon after an application under sec. 476 has been made to the original Court, and is pending in that Court. The superior Court should allow the original Court to conclude the proceeding—*Rajdhari v. Rameshwar*, 49 All. 460, A.I.R. 1927 All. 469 (470). Where a person instituted a false case before a Bench of (2nd or 3rd class) Honorary Magistrates, but they took no action against that person, the District Magistrate could order the prosecution of that person under this section—*Moti Ram*, 26 Cr.L.J. 566 (567), 85 I.C. 710, A.I.R. 1925 All. 410. If a false charge is made by a person before a Magistrate of the 1st class, who takes no action under sec. 476, a complaint against that person under sec. 211, I. P. Code should be made by the Sessions Judge and not by the District Magistrate, since the 1st class Magistrate is subordinate to the Sessions Judge and not to the District Magistrate. If the District Magistrate makes the complaint, it is *ultra vires*, but that does not prevent the Sessions Judge from making a complaint on his own initiative—*Gulab*, 26 Cr.L.J. 923 (924), 86 I.C. 987, A.I.R. 1925 All. 667.

Section 476A must be distinguished from sec. 476B. If the subordinate Court has neither made a complaint nor rejected an application for the making of a complaint under sec. 476, then the superior Court can take action and make a complaint under sec. 476A. But where the subordinate Court has rejected an application for the making of a complaint, then the procedure which is contemplated by this Code is by way of an appeal to the superior Court under sec. 476B—*Chandra Kumar v. Mathuriya*, 52 Cal. 1009, 29 C.W.N. 1035, 26 Cr.L.J. 1569 (1570). See also *Jahan Khan v. Emp.*, 39 Cr.L.J. 698, 176 I.C. 116, 11 R.L. 164, 40 P.L.R. 136, A.I.R. 1938 Lah. 429, where it has also been held that the Court is not concerned with the reasons for which the application was dismissed (so long as the procedure was regular) and had it been the intention of the legislation that 'rejection' in sec. 476A, Cr. P. C., should not include rejection on the ground that the complainant did not appear to prosecute the application as he ought to have done, it would presumably have made this clear. See Note 1248A.

The word "rejected" means rejected after consideration on the merits; merely to allow the application to be withdrawn without consideration of the merits does not amount to rejection—*Vasudermal*, 23 S.L.R. 29, 37 Cr.L.J. 1051, 112 I.C. 475, 11 A.I.Cr.R. 360.

Where an appeal against the order of a Munsif refusing to make a complaint was preferred, under sec. 476B, to the District Judge who transferred it to the Subordinate Judge and the latter dismissed the appeal on the ground of limitation but decided to take action *suo motu* under this section, held that the Subordinate Judge was not the Court to which appeals from orders of the Munsif ordinarily lay, and, therefore, he was not authorised under this section to make a complaint—*Fauzdar v. Narendranath*, 35 Cr.L.J. 1061, 150 I.C. 239, 15 P.L.T. 303, A.I.R. 1934 Pat. 366.

The Deputy Commissioner in the exercise of his powers as superior Court under this section has authority to direct a complaint being made in respect of an offence committed in the course of mutation proceedings in the Court of a *Tahsildar* who is subordinate to him when dealing with a mutation case—*Sajjad Husain*, 36 Cr L.J. 319, 153 I.C. 346, 1935 O.W.N. 28.

Under this section the power, which a Subordinate Judge as Election Commissioner could have exercised under sec. 476, is exercisable by the Court to which he is subordinate within the meaning of sec. 195, sub-sec. (3), i.e., by the District Judge as the principal Court having ordinary original civil jurisdiction within the local limits of whose jurisdiction the Election Court was situate—*Mahabalaswarappa v. Gopalaswami*, A.I.R. 1935 Mad 673 (679), 1935 M.W.N. 152, 41 M.L.W. 503, 156 I.C. 311, 36 Cr.L.J. 895, 58 Mad. 954.

Where a Subordinate Judge is alleged to have abetted an offence under sec. 193, I. P. C., in course of a suit in his Court and the District Judge as superior Court has transferred the suit to senior Subordinate Judge but has retained the proceedings under sec. 476, Cr. P. C., to himself, the effect of this order is to take away the power of senior Subordinate Judge to make complaint and hence the latter Court's order refusing to make complaint on the ground of lack of jurisdiction is right. The District Judge as a superior Court has jurisdiction to deal with the matter under this section—*Behari Lal v. Abdul Qadir*, A.I.R. 1940 Lah. 292 (298), 41 Cr.L.J. 843, 190 I.C. 178.

There is no rule having the force of law which requires a power of attorney to be filed with an appeal from an order on a petition under this section—*Harcharan v. Kupa*, A.I.R. 1935 Lah. 677, 36 Cr L.J. 1485, 158 I.C. 1005, 1935 Cr.C. 1039.

See Note 631.

476B. *Any person on whose application any Civil, Revenue or Criminal Court has refused to make a complaint under section 476 or section 476A, or against whom such a complaint has been made, may appeal to the Court to which such former Court is subordinate within the meaning of section 195, sub-section (3), and the superior Court may thereupon, after notice to the parties concerned, direct the withdrawal of the complaint or, as the case may be, itself make the complaint which the subordinate Court might have made under section 476, and if it makes such complaint, the provisions of that section shall apply accordingly.*

Appeals.

This section has been added by section 128 of the Cr. P. Code Amendment Act, XVIII of 1923. Under the old law, when an application was made to a Munsiff asking him to take action under sec. 476, and the Munsiff refused to do so, it was held that no appeal lay to the District Judge against the order of the Munsiff—*Bhagirathi v. Suraj Mal*, 12 A.L.J. 684, 15 Cr L.J. 575. This ruling is now rendered obsolete by the present section.

1257. Scope:—This section cannot have any application to a case where the complaint was not made under sec. 476, Cr. P. C., but under sec. 70 of the Provincial Insolvency Act (V of 1920)—*Madan Mohan Sarkar v. Emp.* 40 Cr L.J. 335 (336), 180 I.C. 237, A.I.R. 1939 Cal. 264, I.L.R. (1938) 2 Cal 478, 42 C.W.N. 787.

The jurisdiction of the Court of Session only arises under this section when a Court subordinate to it has directed the filing of a complaint or refused to make a complaint under sec. 476 or 476A, Cr. P. Code. When the Subordinate Court passed no such order, the Court of Session has no jurisdiction to take action under this section—*Wajid Ali*, 35 Cr L.J. 824, 148 I.C. 1075, 8 Luck. 633, 11 O.W.N. 490, 1934 Cr.C. 1015, A.I.R. 1934 Oudh 344.

A person who has made no application for action being taken under sec. 476, Cr. P. C., has no right of appeal under this section—*Narotam Das v. Bhagawan Das*, A.I.R. 1939 All 79 (80), 179 I.C. 673, 1938 A.W.R. (H.C.) 747, 1938 A.L.J. 1196.

When an application is dismissed for default, there is no sanction (now complaint) given or refused by the Court and no appeal lies. The only jurisdiction which the superior Court has under the circumstances is to revise the order dismissing the application as for default—*Gopal Siddeshwar*, 32 Bom 203 (205). This section gives an appeal against a refusal to make a complaint, not against a dismissal for default, an order which does not seem to have been contemplated by the law—*Jawala Parshad v. Ram Parshad*, A.I.R. 1940 Lah. 526.

When a complaint, under sec. 476, Cr. P. C., is made against several persons, each of them ought to prefer a separate appeal—*Maromma*, 34 Cr.L.J. 92, 1933 M.Cr.C. 25, 140 I.C. 756, A.I.R. 1933 Mad. 125, 1933 Cr.C. 157, 1933 M.W.N. 100, Ind. Rul. 1933 Mad 43.

The remedy open to a person aggrieved by a complaint made under sec. 476 should be limited to an appeal under sec. 476B and it is not permissible to call the complaint in question in the course of an appeal against conviction—*Ali Ahmed*, 55 C.L.J. 336, 1932 Cr.C. 545, 34 Cr.L.J. 39, 140 I.C. 544, A.I.R. 1932 Cal 545, 1932 Cr.C. 545, Ind. Rul. 1933 Cal. 11; *Jabbar Ali*, A.I.R. 1929 Cal. 203, 49 C.L.J. 193, 116 I.C. 632, 30 Cr.L.J. 656; *U Kadoo*, 37 Cr.L.J. 1008, 164 I.C. 769, A.I.R. 1936 Rang 369, 1936 Cr.C. 771; *Kunjo Chaudhry v. Emp.*, 39 Cr.L.J. 353 (356), 173 I.C. 742, 16 Pat. 650, 19 P.L.T. 21, 1938 P.W.N. 41, 4 B.R. 332, 10 R.P. 443, A.I.R. 1938 Pat. 99; *Vithoo Raghoji v. Emp.*, A.I.R. 1938 Nag. 487 (490), 1938 N.L.J. 285, 40 Cr.L.J. 388 (391), 180 I.C. 577. See also *Jugeshwar Singh*, 15 Pat. 26, A.I.R. 1936 Pat. 346, 17 P.L.T. 234, 37 Cr.L.J. 893, 164 I.C. 86, 1936 Cr.C. 537 cited in Note 1408 and *Ramdeni Pathak v. Emp.*, 39 Cr.L.J. 358 (359), 173 I.C. 738, 10 R.P. 432, 4 B.R. 327, A.I.R. 1938 Pat. 145.

This section applies where a complaint has been made under sec. 476, which again refers to offences under clauses (b) and (c) of sec. 195. An offence under sec. 174 or 182, I. P. Code, falls under clause (a) of sec. 195 and is, therefore, not an offence for which the Court can make a complaint under sec. 476. So, an order of a Magistrate or District Judge (as a public servant) making a complaint for an offence under sec. 174 or 182, I. P. Code is not appealable under sec. 476B—*P. J. Money*, 6 Rang. 529, 29 Cr.L.J. 812; *Brijendra*, 28 Cr.L.J. 547, 102 I.C. 483, 8 A.I.Cr.R. 55, A.I.R. 1927 All. 828; *Yusuf Ali v. Lachmi*, A.I.R. 1931 All. 630, 53 All. 594, 1931 A.L.J. 366, 132 I.C. 419, 1931 Cr.C. 926. See also *Bajrang Marwari v. Durga Prasad*, A.I.R. 1937 Pat. 31, 17 P.L.T. 747, 1936 P.W.N. 747, 166 I.C. 870, 38 Cr.L.J. 292. But the Appellate Court can withdraw the complaint under sec. 195 (5)—*Brijendra*, supra. See Note 634A.

An appeal lies under this section against an order passed by a Court making a complaint under sec. 476 even where the order was passed *suo motu* and not on the application of any person—*Numberumal v. Nainiappa*, 59 M.L.J. 850, 32 Cr.L.J. 200 (201), 54 Mad. 331, A.I.R. 1931 Mad. 16, 32 M.L.W. 513, 1930 M.W.N. 991, 128 I.C. 719 (dissenting from *Sattos*, 30 Cr.L.J. 163, 113 I.C. 537, A.I.R. 1929 Lah. 9, Ind. Rul. 1929 Lah. 185); *Prabhu Dayal*, 31 P.L.R. 153, 32 Cr.L.J. 30; *Thiraj*, 11 Lah. 55, 30 Cr.L.J. 1019 (1024), 119 I.C. 265, A.I.R. 1929 Lah. 641, 1929 Cr.C. 205, 31 P.L.R. 464, 1929 Ind. Rul. 857; *Ram Prasad*, 52 All. 79, 120 I.C. 113, A.I.R. 1929 All. 899, 1929 Cr.C. 491, 1930 A.L.J. 203, Ind. Rul. 1930 All. 1; *Mester Zoda*, 37 Cr.L.J. 1043, 164 I.C. 1057, A.I.R. 1936 Lah. 828, 38 P.L.R. 16, 1936 Cr.C. 796.

This section is not intended to be exhaustive, but provides powers supplementary to those which are given in Chapter XXXI—*Surendra v. Susil*, A.I.R. 1931 Cal. 604, 35 C.W.N. 775, 59 Cal. 68, 1931 Cr.C. 756, 134 I.C. 1063, 33 Cr.L.J. 38.

Death of appellant:—The right of appeal under this section does not survive on the death of the appellant before hearing; the appeal abates—*Nihal v. Ramji*, 47, All. 359, 26 Cr.L.J. 1008, A.I.R. 1925 All. 620.

Time of filing appeal:—An appeal cannot be filed until a complaint has actually been made—*Bal Govind*, A.I.R. 1935 Nag. 199, 36 Cr.L.J. 1371, 158 I.C. 496, 1935 Cr.C. 1096.

To which Court appeal will lie:—The appeal will lie to the Court to which the trial Court is subordinate. For the meaning of the term 'subordinate' see Note 631 under sec. 195.

This section indicates with sufficient clearness that the Court to which the appeal lies is one to which the Court making or filing the complaint is subordinate; in other words, if it is a *Civil Court* which has made an order under s. 476, the appeal against such an order must lie to and be heard by the authority or tribunal to which such *Civil Court* is subordinate. Thus, if the order is made by a Munsif, the appeal would lie to the District Judge (i.e., the Appellate Court exercising *Civil* appellate jurisdiction)—*Nasaruddin*, 53 Cal. 827, 99 I.C. 124, 28 Cr.L.J. 92 (93). A mere mistake of the office in putting the appeal under the list of criminal cases, instead of in the list of civil cases, is not material. Thus, where an appeal from an order of a Munsiff was preferred to the District Judge of Meerut, but the clerk of the office made the mistake of heading the proceedings as "in the Court of the Sessions Judge of Meerut," and gave a number of criminal appeal, but the Dist. Judge signed as "Dist. Judge" (and not as Sessions Judge), *held* that the mistake of the office was immaterial and did not affect the proceedings, as the Judge really acted as District Judge and not as Sessions Judge—*Hikmatullah v. Sakina*, 53 All. 416, 32 Cr.L.J. 367 (368). An appeal under this section from an order of an Assistant Sessions Judge lies to the Court of Session and not to the High Court—*Nagendra*, 34 Cr.L.J. 628, 143 I.C. 703, A.I.R. 1933 Cal. 192, 37 C.W.N. 192, 1933 Cr.C. 243, Ind. Rul. 1933 Cal. 464, 60 Cal. 596. See Note 631.

Procedure in appeal:—An appeal under sec. 476B, from the order of a subordinate *Civil Court* (Sub-Judge) to a superior Civil Court (District Judge) must be dealt with as a miscellaneous *Civil* appeal regulated by the procedure of O. XLI, Civil Procedure Code—*Hamid Ali v. Madhusudan*, 54 Cal. 355, 31 C.W.N. 281 (*per* Duval, J., Chotzner, J., *contra*); *Nasaruddin*, 53 Cal. 827, 99 I.C. 124, 28 Cr.L.J. 82 (93); *Mahendra*, 49 C.L.J. 374, 1929 Cr.C. 54 (55), A.I.R. 1929 Cal. 428. In a later Calcutta case also, it has been said that applications originating in Civil Courts must be dealt with according to the provisions of the C. P. Code, and, therefore, the District Judge, on appeal, can remand the case for further inquiry under O. XLI, C. P. Code—*Surendra Nath v. Susil*, 35 C.W.N. 775 (777), 1931 Cr.C. 756, A.I.R. 1931 Cal. 604, 134 I.C. 1063, 59 Cal. 68. But it has also been stated in this case that the provisions of Cr. P. Code under Chapter XXXI may also apply to matters arising under secs. 476, 476A, 476B, and, therefore, the order of remand may come under sec. 423 (1) (b) and (c) of this Code. A Full Bench of the Madras High Court has followed the view adopted in this Calcutta case—*Janardana v. Lakshmi*, A.I.R. 1934 Mad. 52, 38 M.L.W. 940, 65 M.L.J. 873, 1934 Cr.C. 52, 57 Mad. 177, 6 R.M. 330, 1933 M.W.N. 1476, 35 Cr.L.J. 392, 147 I.C. 351 (F.B.). The Nagpur High Court has also followed the view taken in *Nasiruddin Khan*, *supra*, and has held that the Appellate Court hearing an appeal from an order of a Civil Court under this section has powers conferred on him by O. 41, Civil P. C., and under rule 27 of that order he is entitled to take further evidence if he requires that evidence in order to enable him to decide the case—*Bholanath v. Achheram*, A.I.R. 1937 Nag. 91, 169 I.C. 816, 10 R.N. 20. But a Full Bench of the Lahore High Court has held that the procedure of an appeal under this section must be governed by the *Criminal Procedure Code*, irrespective of whether the trial Court be a Civil, Criminal or Revenue Court. The Appellate Court cannot make a remand to the trial Court—*Dhanpat Rai v. Balak Ram*, 13 Lah. 342, 1931 Cr.C. 1065 (1066), A.I.R. 1931 Lah. 761, 135 I.C. 594, 33 Cr.L.J. 178, 33 P.L.R. 558 (F.B.). The Oudh Chief Court and the Bombay and Rangoon High Courts have followed this view in *Mendi Lal v. Ram Adhin*, A.I.R. 1935 Oudh 59, 158 I.C. 104, 11 O.W.N. 1469, 1934 O.L.R. 949, 10 Luck. 335, 1935 Cr.C. 113, 36 Cr.L.J. 254; *Bhatu Sadu Mali*, 39 Cr.L.J. 495 (497), I.L.R. 1938 Bom. 331, 174 I.C. 780, 10 R.B. 495, 40 Bom.L.R. 297,

A.I.R. 1938 Bom. 225 (F.B.), and *Abdul Hussain v. Mohamed Ibrahim*, A.I.R. 1937 Rang 526 respectively. The Full Bench of the Allahabad High Court has also held that a Court hearing an appeal under sec. 476B, Cr. P. C., has no jurisdiction to return the case to the Magistrate with direction to take evidence and then to dispose of the matter afresh. It is, however, open to the Appellate Court when it finds that the Subordinate Court has not made a proper enquiry to report the matter to the High Court on its revisional side and in such special cases the High Court can pass any orders that it considers just and fit. By enacting sec. 476B, Cr. P. C., the Legislature did not intend to confer on the Appellate Court the powers conferred by secs. 423 and 428, Cr. P. Code—*Manni Lal v. Emp.*, 38 Cr.L.J. 561 (566), I.L.R. 1937 All. 517, 168 I.C. 434, 1937 A.W.R. (H.C.) 290, 9 R.A. 639, 1937 A.Cr.C. 94, 1937 A.L.R. 360, 1937 A.L.J. 192, A.I.R. 1937 All. 305 (F.B.). But in recent Calcutta, Madras, Nagpur and Patna cases it has been held that appeals under this section are subject to all the provisions applicable to criminal appeals laid down in section 419 and the following sections. Consequently, such an appeal can be summarily disposed of by the District Magistrate under section 421—*Mahomed Boyatulla*, 34 C.W.N. 923, 32 Cr.L.J. 325, 1931 Cr.C. 35, A.I.R. 1931 Cal. 3, 58 Cal 402, 129 I.C. 317; *Baidyanath Giri*, 12 P.L.T. 336, 32 Cr.L.J. 735 (736); *Krishnamachari*, A.I.R. 1933 Mad. 767, 1933 M.W.N. 902, 65 M.L.J. 534, 38 M.L.W. 564, 1933 Cr.C. 1373, 147 I.C. 794; *Surendra Nath v. Susil*, 35 C.W.N. 776, 59 Cal. 68, 134 I.C. 1063, A.I.R. 1931 Cal. 604, 1931 Cr.C. 756, 33 Cr.L.J. 38, Ind. Rul. 1932 Cal. 23; *Kunjo Chaudhry v. Emp.*, 39 Cr.L.J. 353 (356), 173 I.C. 742, 16 Pat. 650, 19 P.L.T. 21, 1938 P.W.N. 41, 4 B.R. 332, 10 R.P. 443, A.I.R. 1938 Pat. 99; *Vithoo Raghoji v. Emp.*, A.I.R. 1938 Nag. 487 (489), 1938 N.L.J. 285, 40 Cr.L.J. 388, 180 I.C. 577; and the Appellate has also a power of remand—*Krishnamachari*, supra; *Vithoo Raghoji v. Emp.*, supra; *Surendra Nath v. Susil*, supra; *Kunjo Chaudhry v. Emp.*, supra. The jurisdiction that is exercised by a Court in filing a complaint under sec. 476, Cr. P. C., is a jurisdiction exercised under the Cr. P. C. and is therefore of a criminal nature. There is no rule that everything done by a Civil Court should be regarded as being of a civil nature. The order of the Court which is challenged in a superior Court is an order passed in exercise of criminal jurisdiction; the right of appeal is also provided by another provision in the Cr. P. Code. Therefore appeals from orders, under sec. 476, Cr. P. C., of Civil Courts including revisions preferred from appellate orders made under sec. 476B, Cr. P. C., are proceedings of a criminal nature and should therefore be filed on the criminal side of the High Court and not on the civil side—*D. S. Raju Gupta*, A.I.R. 1939 Mad. 472, I.L.R. 1939 Mad. 439, 1939 M.W.N. 243, 49 M.L.W. 330, (1939) 1 M.L.J. 480. But see *Kumaravel Nadar v. Shanmuga Nadar*, under the heading "Revision of order under this section" in this Note. See also *Sarat Chandra v. Hari Charan*, 51 C.L.J. 45 (49).

The Appellate Court has no power to take any additional evidence under sec. 428, for that section applies only to an appeal under Chap. XXXI, and not to an appeal under sec. 476B—*Sami Vannia v. Periaswami*, 51 Mad. 603, A.I.R. 1928 Mad. 391, 29 Cr.L.J. 445; *Dhanpat Rai v. Balak Ram*, supra. See also *Seeniah v. Abdul*, A.I.R. 1930 Mad. 483, 53 Mad. 688, 1930 Cr.C. 507, 58 M.L.J. 414, 31 M.L.W. 524, 123 I.C. 809, 31 Cr.L.J. 602, 1930 M.W.N. 534. But the Sind Court and the Allahabad High Court have taken a contrary view—*Ramchand v. Lilaram*, 25 S.L.R. 68, 1931 Cr.C. 733, 134 I.C. 1007, A.I.R. 1931 Sind 115, Ind. Rul. 1931 Sind 159; *Rahamatulla v. Emp.*, 32 I.C. 157; *Jagrup Shukul*, 40 All. 21 (24), A.I.R. 1918 All 332, 42 I.C. 915, 19 Cr.L.J. 4, 15 A.L.J. 844; *Manni Lal v. Emp.*, 38 Cr.L.J. 561 (566), 168 I.C. 434, I.L.R. 1937 All. 517, 1937 A.W.R. 290, 9 R.A. 639, 1937 A.Cr.C. 94, 1937 A.L.R. 360, 1937 A.L.J. 192, A.I.R. 1937 All. 305 (F.B.), where it has been laid down that there certainly is nothing in the language of sec. 510, Cr. P. C., which would prevent an Appellate Court hearing an appeal under sec. 476B, Cr. P. C., from examining a witness under that section. See also *Abdul Hussain v. Mohamed Ibrahim*, A.I.R. 1937 Rang 526.

Itself make the complaint:—If the Appellate Court accepts an appeal against

an order refusing to make a complaint, it would itself make the complaint; an order directing the subordinate Court to file a complaint is illegal—*Manir Ahmed v. Jogesh*, 55 Cal. 1277, A.I.R. 1929 Cal. 195, 115 I.C. 36; *Kuppuswami v. Sathiapria*, 1931 M.W.N. 713, 134 I.C. 1216, 1931 Cr.C. 928, A.I.R. 1931 Mad. 768, 33 Cr.L.J. 51.

The Nagpur High Court has taken a different view. It has held that whatever the powers of an Appellate Court are to remand a case when an appeal has been filed before it under sec. 476B, Cr. P. C., the powers of a Court to lay a complaint in respect of an offence committed before it, remain unimpaired. There is no reason why a Court, after having declined to accede to a petition that it should lay a complaint, is debarred from laying one *suo motu* if, on a further consideration, it finds, whether such conclusion is reached on a further study of the facts or on an elucidation by a higher tribunal, that there is really a case for making a complaint—*Vithoo Raghon v. Emp.*, A.I.R. 1938 Nag. 487 (489), 1938 N.L.J. 285, 40 Cr.L.J. 388, 180 I.C. 577.

Limitation:—For the purposes of limitation, an appeal under this section is an "appeal under the Criminal Procedure Code within the meaning of Articles 154 and 155, and not an "appeal under the Civil Procedure Code" under Article 152 or 156. See *Chandra Kumar v. Mathuria*, 52 Cal. 1009, 29 C.W.N. 1035, 26 Cr.L.J. 1569; *Rajani v. Bistoo*, 46 Cr.L.J. 40, 104 I.C. 456, A.I.R. 1927 Cal. 718, 8 A.I.Cr.R. 433, 28 Cr.L.J. 840 (841); *Shco Prasad v. Shco Bans*, 24 A.L.J. 358, A.I.R. 1926 All. 211 (212); *Kandaswami v. Thirunavukarasu*, 1931 M.W.N. 1064; *Harcharan v. Kirpa*, A.I.R. 1935 Lah. 677, following *Dhanpat v. Balak*, 13 Lah. 312, 1931 Cr.C. 1065, 135 I.C. 594, A.I.R. 1931 Lah. 761; *Daulat Ram v. Kanhaiya Lal*, 47 All. 462.

The limitation must be held to run from the date of the complaint, for the words of the section make it clear that it is only on the refusal to make a complaint or on a complaint being made that an appeal is possible. But for this it would undoubtedly be open to argument that time ran from the date of the finding and order that a complaint should be made—*Ramjan Ali v. Moohi Seeka*, A.I.R. 1929 Cal. 521 (523), 33 C.W.N. 329, 118 I.C. 889, 56 Cal. 932, 30 Cr.L.J. 974, 1929 C.C. 184; *Fitzhollmes*, 7 Lah. 77, A.L.R. 1927 Lah. 54, 98 I.C. 393, 27 Cr.L.J. 1321, 28 P.L.R. 232; *Daga Devji Patil*, A.I.R. 1928 Bom. 64, 52 Bom. 164, 108 I.C. 26, 29 Cr.L.J. 315, 30 Bom.L.R. 76; *Bal Govind*, A.I.R. 1935 Nag. 199, 35 Cr.L.J. 1371, 158 I.C. 496, 1935 Cr.C. 1096.

Extension of the period of limitation:—Where the appellant was not given any opportunity of showing cause why the complaint should not be made against him, he knew nothing about the matter until he received a summons from the Court to appear and answer a charge upon a complaint made against him and as soon as he did this he applied for a copy of the order of the Magistrate and by that time his appeal was out of time because more than thirty days had elapsed, clearly this is a case where the delay should be condoned because in the ordinary way the accused person would have received some notice if such a complaint was to be made against him to appear before the Magistrate and show cause why the complaint should not be made against him—*Radhakrishnan G. Kesuani v. Emp.*, 40 Cr.L.J. 449, 180 I.C. 436, A.I.R. 1939 Sind. 78, I.L.R. 1939 Kar. 648, 11 R.S. 178.

Transfer of appeal:—An appeal made to the District Judge may be transferred by him to the Additional District Judge, and as the latter is competent to discharge any of the functions of a District Judge, under sec. 8 of the Civil Courts Act (XII of 1887), the Additional Judge can make a complaint under this section—*Nara n Das*, 49 All. 792, 102 I.C. 485, 25 A.L.J. 559, 7 A.I.Cr.R. 534, A.I.R. 1927 All. 555, 28 Cr.L.J. 549 (552); *Lal Muhammad*, 57 Cal. 831, 34 C.W.N. 80, 31 Cr.L.J. 921 (922), A.I.R. 1930 Cal. 361 distinguishing *Ram Charan v. Taripulla*, 16 C.W.N. 645, 39 Cal. 774, 13 I.C. 1007, 13 Cr.L.J. 191; *Beyas Nara n Singh v. Dasrath Singh*, 37 Cr.L.J. 838, 163 I.C. 451, A.I.R. 1936 Pat. 382, 1936 Cr.C. 531, 17 P.L.T. 276. See also *Karimulla v. Rameshwar*, 51 All. 344, 1929 A.L.J. 55, 111 I.C. 595, 12 A.I.Cr.R. 199, A.I.R. 1929 All. 774. In an Oudh case, it has been held that under the provisions of sec. 40 of the Oudh Courts Act, an appeal made under this section to a District Judge from

the order of a Munsif refusing to make a complaint cannot be transferred to a Subordinate Judge—*Bismilla v. Sakhr Ali*, 4 Luck. 155, 30 Cr.L.J. 382 (384), 114 I.C. 812, 5 O.W.N. 882, A.L.R. 1928 Oudh 494, Ind. Rul. 1929 Oudh 204. A similar view has been taken by the Patna High Court following *Ram Charan v. Tariqulla*, supra, and distinguishing *Ram Chandra*, 117 I.C. 878, 8 Pat. 428, A.L.R. 1929 Pat. 367, 30 Cr.L.J. 834 and *Dinanath v. Muhammad Abdulla*, 61 I.C. 53, 2 Lah. 57, 22 Cr.L.J. 325 on the ground that in these two cases notifications had been issued directing that certain appeals from the decision of Munsif should be preferred to the Subordinate Judge—*Dulari v. Fauzdar*, 34 Cr.L.J. 410, 142 I.C. 621, 14 P.L.T. 131, Ind. Rul. 1933 Pat. 161, A.L.R. 1933 Pat. 179, 1933 Cr.C. 510. See also *Fauzdar v. Narendra Nath*, A.L.R. 1934 Pat. 366, 15 P.L.T. 303, 35 Cr.L.J. 1061, 1934 Cr.C. 798, A.L.R. 1934 Pat. 253. The Allahabad High Court has also taken the same view in *Manpholl v. Budhan*, 36 Cr.L.J. 1231, 57 All. 785, 157 I.C. 901, A.L.R. 1935 All. 440, 1935 A.L.J. 473, 1935 Cr.C. 531; *Mehdi Hasan*, 57 All. 687, 36 Cr.L.J. 1253, 157 I.C. 990, A.L.R. 1935 All. 212, 1935 A.L.J. 66, 1935 Cr.C. 255 and *Shiva v. Phlad*, A.L.R. 1935 All. 696, 161 I.C. 322, 58 All. 85, 1935 A.L.J. 943, 1935 A.W.R. (H.C.) 792, dissenting from *Karim Ullah v. Rameshwar Prasad*, A.L.R. 1929 All. 774, 111 I.C. 595, 51 All. 344, 1929 A.L.J. 55, 12 A.L.Cr.R. 199.

An appeal from an order of a Judge of the Small Cause Court under sec. 476, Cr. P. C., lies to the District Judge and cannot be transferred by him to the Subordinate Judge for hearing—*Abdul Ghani Khan v. Ram Mohan Lal*, 36 Cr.L.J. 960, 156 I.C. 593, 1935 A.L.J. 671, A.L.R. 1935 All. 573, 1935 Cr.C. 594; *Ram Sarup*, 36 Cr.L.J. 1302, 158 I.C. 101, A.L.R. 1935 All. 446, 1935 A.L.J. 476, 1935 Cr.C. 575.

Notice of appeal:—In an appeal against a refusal to make a complaint, the party entitled to receive notice is the accused person. But in an appeal against an order making a complaint, the party entitled to receive notice is the Crown, and not the person on whose application the complaint was made—*Labha Mal v. Wasawa*, 29 P.L.R. 128, 29 Cr.L.J. 72, 106 I.C. 584, 9 A.L.Cr.R. 395.

Duty of Appellate Court:—The Appellate Court, in the case of appeals under this section, should reconsider the entire matter on the merits, and while allowing reasonable weight to the opinion of the Court below, should nevertheless reconsider the question of the propriety of the order appealed against, upon a complete review of the entire facts. If the Appellate Court is not satisfied that a *prima facie* case has been made out, the order appealed against must be set aside—*Ram Charan*, 23 A.L.J. 515, 25 Cr.L.J. 1126, A.L.R. 1926 All. 544; *Jagabandhu v. Abdul*, 33 C.W.N. 945, 57 Cal. 500, A.L.R. 1929 Cal. 480, 1929 Cr.C. 94. When the Court below has refused to make a complaint under sec. 476, the superior Court in reversing the order of the Court below must give sufficient reasons for such reversal—*Kalusadhan v. Nani Lal*, 52 Cal. 478, 25 Cr.L.J. 1307. Like the Original Court, the Appellate Court making a complaint under this section would apply its mind to the question whether it is expedient in the interests of justice to make an inquiry into the offence complained of, and should record a finding to that effect—*Ramchand v. Lularam*, 25 S.L.R. 68, A.L.R. 1931 Sind. 115, 134 I.C. 1007, 33 Cr.L.J. 43, 1931 Cr.C. 733. When affirming the order of the original Court making a complaint, it is not necessary that the Appellate Court should record a finding that the prosecution is expedient in the interests of justice—*Keralam*, 1933 M.W.N. 1257.

The power to lay a complaint under sec. 476, Cr. P. C., is a discretionary power, and an Appellate Bench of the High Court would not interfere with the exercise of his discretion by a Single Judge of the High Court unless it could be shown that the discretion had been exercised under some misapprehension or error which was plain on the face of the record—*Tan Ba Chang v. Registrar, O. S. High Court*, 41 Cr.L.J. 515 (517), 187 I.C. 754, A.L.R. 1940 Rang. 104, 1940 Rang. 12.

Where the subordinate Court (Munsif) refused to make a complaint under sec. 476 on the ground that he had no jurisdiction, as the offence was not committed in relation to any proceeding in his Court, and the Appellate Court made a complaint under sec. 476B, without deciding whether the Munsif had jurisdiction or not to make the complaint,

held that the complaint made by the Appellate Court was illegal and must be set aside. For, it is quite clear that if the Munsif had really no jurisdiction to make the complaint, the Appellate Court also had no power to make the complaint and ought to dismiss the appeal. For this reason, it was incumbent on the Appellate Court first of all to decide whether the Munsif had no jurisdiction—*Kanai v. Makhan*, 55 Cal 836, 29 Cr.L.J. 483 (484), 109 I.C. 211, 47 C.L.J. 277, A.I.R. 1928 Cal 237, 10 A.I.Cr.R. 167.

Power to Stay:—An order to stay criminal proceedings cannot be passed in an appeal under sec. 423 from a complaint which has been actually made by a subordinate revenue authority to a competent Magistrate and which is being investigated by the latter—*Jagannath v. Rajagopalachari*, A.I.R. 1931 Pat. 411 (413), 12 P.L.T. 671, 1931 Cr.C. 999, 33 Cr.L.J. 147, 135 I.C. 513.

Second Appeal from order under this section:—If the original Court has made or refused to make a complaint under sec. 476, but on appeal the Appellate Court withdraws or makes a complaint under sec. 476B, no further appeal lies. Section 476B does not provide for a second appeal to the High Court from an order passed by the Appellate Court under sec. 476B itself. It only contemplates one appeal, viz., an appeal from an order passed by the original Court under sec. 476, or from an order passed by a superior Court under section 476A—*Mo On Khin v. N. K. M. Firm*, 5 Rang. 523, A.I.R. 1927 Rang 313, 105 I.C. 457, 28 Cr.L.J. 937 (938); *Hikmatullah v. Sakina*, 53 All. 416, 32 Cr.L.J. 367, 1931 A.L.J. 177, 129 I.C. 264, A.I.R. 1931 All. 305, 1931 Cr.C. 449, Ind. Rul. 1931 All. 136; *Teomal Gerimal v. Ali Muhammad Shah Rashidi*, 38 Cr.L.J. 873, 170 I.C. 360, 31 S.L.R. 77, 10 R.S. 53, A.I.R. 1937 Sind 116; *Moiddeen v. Mijassa*, 51 Mad. 777, 111 I.C. 114, A.I.R. 1928 Mad. 506, 28 M.L.W. 134, 10 A.I.Cr.R. 480, 55 M.L.J. 444, 29 Cr.L.J. 786; *Somabhai v. Adutbhai*, 48 Bom. 401 (403), 26 Bom.L.R. 289; *Mohim*, 49 C.L.J. 342, 116 I.C. 638, 30 Cr.L.J. 658, A.I.R. 1929 Cal. 172, 56 Cal. 824, 33 C.W.N. 285 (287); *Kanai Lal v. Makhan*, 55 Cal. 836, 109 I.C. 211, 47 C.L.J. 277, A.I.R. 1928 Cal. 237, 10 A.I.Cr.R. 167, 29 Cr.L.J. 483 (484); *Ahmadar v. Dwip Chand*, A.I.R. 1928 Cal. 281, 55 Cal. 765, 32 C.W.N. 164, 29 Cr.J.L. 119, 106 I.C. 711; *Mahomed Idris*, 88 I.C. 528, A.I.R. 1925 Lah. 322, 1 Lah. Cas. 480, 7 Lah.L.J. 581, 6 Lah. 56, 26 P.L.R. 199, 26 Cr.L.J. 1168; *Bismulla v. Shakir Ali*, 4 Luck. 155, 30 Cr.L.J. 382 (383); *Chinai*, 25 N.L.R. 192; *Govind Hari*, 36 Cr.L.J. 981, 156 I.C. 713, A.I.R. 1935 Bom. 157, 59 Bom. 340, 37 Bom.L.R. 106, 1935 Cr.C. 295, 8 R.B. 20, where the appeal was allowed to be converted to revisional application. See also *Bachu Singh v. Tribeni Sah*, infra. But the Patna High Court holds that if the original Court refuses to make the complaint, but, on appeal the Appellate Court makes the complaint, a second appeal lies—*Faujdar*, 7 P.L.T. 199, 26 Cr.L.J. 1565, 90 I.C. 445, A.I.R. 1926 Pat. 25; *Narayan Meher v. Dhana Meher*, 10 Pat. 446, 32 Cr.L.J. 1065, Ind. Rul. 1931 Pat. 395, 133 I.C. 683, A.I.R. 1931 Pat. 343, 1931 Cr.C. 791, 12 P.L.T. 633; *Ranjit Narain v. Ram Bahadur*, 5 Pat. 262, 7 P.L.T. 114, 27 Cr.L.J. 641 (645). In the last mentioned case (5 Pat. 262), section 476B has been thus analysed: (a) Where a Munsif has refused to make a complaint, and an appeal has been made to the District Judge, under sec. 476B, but the District Judge dismisses the appeal and makes no com-

against whom such a complaint has been made may appeal to the Court to which such former Court is subordinate', i.e., the person proceeded against by the District Judge may take a second appeal to the High Court, to which the District Judge's Court is subordinate. (c) Where the Munsif has done nothing and has been asked to do nothing, and the District Judge has, either *suo motu* or on application, made a complaint, the complaint falls under sec. 476A, and the person against whom the complaint is made may appeal to the High Court. (d) Where the Munsif has made a complaint, and an appeal is made to the District Judge under sec. 476B, but the Judge upholds the Munsif's view and dismisses the appeal, but makes no complaint himself there is no further right

the latter section made it obligatory on the Court to make a complaint and send it to a first class Magistrate. This defect has been removed by one of the amendments we have made in section 476, but we are doubtful whether section 477 should stand. We considered a proposal to enable a Court of Session to try a case committed to it after a complaint had been made by itself, but we do not think it desirable that a Court which has instituted the proceedings should dispose of the case, and we have, therefore, repealed section 477."

478. (1) When any such offence is committed before any Civil or Revenue Court, or brought under the notice of any Civil or Revenue Court in the course of a judicial proceeding, and the case is triable exclusively by the High Court or Court of Session, or such Civil or Revenue Court thinks that it ought to be tried by the High Court or Court of Session, such Civil or Revenue Court may, instead of sending the case under section 476 to a Magistrate for inquiry, itself complete the inquiry, and commit or hold to bail the accused person to take his trial before the High Court or Court of Session, as the case may be.

(2) For the purposes of an inquiry under this section the Civil or Revenue Court may * * exercise all the powers of a Magistrate; and its proceedings in such inquiry shall be conducted as nearly as may be in accordance with the provisions of Chapter XVIII, and of Chapter XXXIII in cases where that Chapter applies, and shall be deemed to have been held by a Magistrate.

Change:—In sub-section (2), the words "subject to the provisions of sec. 443" have been omitted after the word "may", and the italicised words have been added, by section 28 of the Criminal Law Amendment Act, XII of 1923. As a result of this Amendment, this section has been made applicable to European British subjects.

1258. Sections 476 and 478:—If a Sessions offence has been committed, the Civil Court taking proceedings under sec. 476 has the option either to continue the proceedings under that section and send the case to a first class Magistrate, or to hold an inquiry under Chap XVIII and pass an order of commitment under sec. 478. And if the Civil Court in the exercise of this option elects to proceed under sec. 478, the accused cannot object on the ground that the Civil Court has by proceeding under sec. 478 deprived him of his right of appeal (there being no appeal from an order under sec. 478) which he would have had (under sec. 476B) if the Court had proceeded under sec. 476—*Rameshwar Lal*, 49 All. 898, 25 A.L.J. 555, 28 Cr.L.J. 668 (669). The procedure of this section is only alternative to that prescribed in sec. 476 as indicated by the words "*instead of sending the case under sec. 476.*" But this section does not give any power to a Court on failure of one to adopt the other method of procedure; and, therefore, if the accused has been sent by the Civil Court to a First Class Magistrate under sec. 476, and has been discharged by the Magistrate, the Civil Court has no power to revive the case against the accused and adopt the procedure prescribed by this section—*Raoji Moreshwar*, Ratanlal 959 (960). In the Allahabad case (49 All. 898) the Court acted under sec. 478 before sending the case to a Magistrate.

Section 476 merely lays down the procedure that may be followed in certain cases, and does not confer any new jurisdiction on a Court. This section does not by itself

give to the Civil Court the powers of committal in the cases referred to in that section, and that is why section 478 has been enacted—*Popat*, 4 Bom. 487.

An order passed under sec. 476 is open to appeal (see sec. 476B), but there is no right of appeal against an order under sec. 478—*Rameshwar Lal*, supra.

1259. Scope:—The power of a Civil Court to commit is limited to cases which are triable exclusively by the Court of Session or which ought to be tried by such Court, and to such cases only when the offence charged has been committed before the Civil Court or brought under its notice—*Popat*, 4 Bom. 287. The Court has power to commit under this section, even if some of the offences imputed to the accused are triable exclusively by the Court of Session, and the others are not so triable—*Rameshwar Lal*, supra.

An Assistant Collector concerned in mutation proceedings is acting as a *Revenue Court*—*Lachman Prosad*, 5 Luck. 435, 6 O.W.N. 953, 1930 Cr.C. 154, A.I.R. 1930 Oudh 58, 124 I.C. 364, 31 Cr.L.J. 679.

This section, like section 476, must be taken as supplementary to sec. 195. The expression "any such offence" means an offence referred to under sec. 195 and committed under the circumstances mentioned in sec. 195. And, therefore, a Civil Court cannot direct a committal for offences under secs 463 and 471, I. P. C., unless the documents have been given in evidence, as mentioned in clause (c) of sec. 195. If the documents have been merely put in Court but not given in evidence, sec. 195 cannot apply and sec. 478 also will not apply—*Abdul Khadar v. Meera Saheb*, 15 Mad 224. But in *In re Devji*, 18 Bom. 581; *Akhil Chandra*, 22 Cal 1004 and *Khushali*, 40 All 116, it has been held that the words "any such offence" in this section simply mean an offence referred to in sec. 195 and not an offence qualified by the circumstances mentioned in sec. 195. But this view is no longer correct. See this subject fully discussed in Note 1237 under section 476.

Procedure:—Sub-section (2) lays down that the procedure of Chapter XVIII must be followed as nearly as possible. Where the Court recorded very brief statements of the accused, and passed a commitment order without examining the witnesses in the presence of the accused and without explaining the charge, held that the Court not having followed the procedure as laid down in Chap. XVIII, the order was illegal—*Babu Prasad*, 40 All. 32. A Civil Court has no power to order a commitment merely on proceedings held in the civil suit, without holding the preliminary inquiry required by this section—*Rangatoonee*, 22 W.R. 52.

If an Assistant Judge (Civil Court) before whom a witness gave a false deposition, transfers the case to himself as District Magistrate for inquiry, he is competent to do so under this section, because the action taken by him amounts to his taking action under sec. 478, as the offence was brought under his notice as a Civil Court in the course of a judicial proceeding—*Rashid Karmalli*, 9 Bom.L.R. 212, 5 Cr.L.J. 202 (209).

Where a Civil Court made a complaint to a First Class Magistrate under sec. 476, Cr. P. C., in respect of offences some of which were exclusively triable by the Court of Session and the District Magistrate suggested that the Civil Court should itself commit the case for trial by the Court of Session under sec. 478, Cr. P. C., as the First Class Magistrate was very busy with other cases and the Civil Court passed an order of commitment under sec. 478, Cr. P. C., held that the Civil Court had power to alter or review the complaint, which was not a judgment within the meaning of sec. 369, Cr. P. C., and that it was open to the Civil Court under these circumstances when the record was sent back to it by the District Magistrate to pass the order of commitment after the further enquiry which it made—*Jagat Ram v. Emp.*, 38 Cr.L.J. 318, 166 I.C. 915, 9 R.A. 469, 1936 A.W.R. (H.C.) 1125, 1936 A.Cr.C. 225, 1937 A.L.R. 112, 1936 A.L.J. 1199, A.I.R. 1937 All 76.

No appeal:—There is no appeal from an order passed under this section. "It is not for me to speculate why no right of appeal has been given against an order passed under sec. 478. The mere fact remains that there is no right of appeal against such

order"—*Rameshwar Lal*, 49 All. 898, 28 Cr.L.J. 668 (669), 25 A.L.J. 555, 8 A.I.Cr.R. 85, A.I.R. 1927 All. 571, 103 I.C. 204.

1260. Revision:—Though certain Magisterial powers have been given to the Civil Court under this section for the purposes of investigating cases of contempt of Court, it still remains while exercising those powers a Civil Court, and is not an 'inferior Criminal Court' within the meaning of sec. 435. It is not, therefore, competent to the Sessions Judge to revise the proceeding of the Civil Court—*Ramachandra v. Subramania*, 5 M.L.J. 226. In *Salig Ram v. Ramji*, 28 All. 554 (561), Knox, J., has expressed an opinion (*obiter*) that the express language of sub-section (2) of this section shows that the Civil Court is converted into a Criminal Court for the time.

479. When any such commitment is made by a Civil or Revenue Court, the Court shall send the charge with the order of commitment and the record of the case to the Presidency Magistrate, District Magistrate or other Magistrate authorized to commit for trial, and such Magistrate shall bring the case before the High Court or Court of Session, as the case may be, together with the witnesses for the prosecution and defence.

480. (1) When any such offence as is described in section 175, section 178, section 179, section 180 or section 228 of the Indian Penal Code is committed in the view or presence of any Civil, Criminal or Revenue Court, the Court may cause the offender * * * to be detained in custody and at any time before the rising of the Court on the same day may, if it thinks fit; take cognizance of the offence and sentence the offender to fine not exceeding two hundred rupees, and in default of payment, to simple imprisonment for a term which may extend to one month, unless such fine be sooner paid.

(2) Nothing in section 29A or in Chapter XXXIII shall be deemed to apply to proceedings under this section.

Change:—The words "whether he is an European British Subject or not" have been omitted in sub-section (1); and the words "section 29A or in Chapter XXXIII" in sub-section (2) have been substituted for the words "section 443 or 444," by sec. 29 of the Criminal Law Amendment Act, XII of 1923.

1261. Scope and application of Section:—This section and the next deal with what is known in English law as direct contempt that is, contempt committed in the view or presence of the Court. The High Court has got greater powers (not by virtue of this Code or the Penal Code but by virtue of the common law of England) to punish for contempts committed *out of Court*, e.g., comments in newspapers on proceedings pending in the High Court—*Surendra Nath Banerjee*, 10 Cal. 109 (P.C.). See also *In re Claridge*, 14 Bom.L.R. 231, 13 Cr.L.J. 461; *In re Amrita Bazar Patrika*, 45 Cal. 169, 21 C.W.N. 1161, 19 Cr.L.J. 530 (F.B.); *Weston v. Editor, Bengalee*, 15 C.W.N. 771; *In re Banks*, 26 C.L.J. 401, 19 Cr.L.J. 449; *In re Satyabodha*, 24 Bom.L.R. 928, 23 Cr.L.J. 644; *In re Taylor*, 26 Cr.L.J. 245, 19 Cr.L.J. 402, 44 I.C. 930.

As to the power of the High Court to punish for contempts of subordinate Courts, see the Contempt of Courts Act, XII of 1926. The procedure to be followed under this Act has been laid down in *Amulya v. Satish*, 33 Cr.L.J. 444, 137 I.C. 238, 35 C.W.N.

1265, A.I.R. 1932 Cal. 254, 1932 Cr.C. 287, Ind. Rul. 1932 Cal. 281. See also *Balakrishna*, 46 Bom. 592, 24 Bom.L.R. 16; *In re Venkat Rao*, 21 M.L.J. 832 (F.B.); and *In re M. K. Gandhi*, 22 Bom.L.R. 368, 21 Cr.L.J. 835, 58 I.C. 915 (F.B.). The ruling in *Moti Lal Ghosh*, 41 Cal. 173 (*A. B. Patilka case*), in 17 C.W.N. 1253 (where it was held that the High Court had no power to punish for contempts of mofussil Courts) is no longer good law in view of the Contempt of Courts Act. See *Ananta Lal v. Alfred Henry Watson*, A.I.R. 1931 Cal. 257, 58 Cal. 884, 35 C.W.N. 189, 1931 Cr.C. 289, 131 I.C. 267, 32 Cr.L.J. 675.

The High Court has inherent power to punish a witness for contempt when he leaves the jurisdiction of the Court without being discharged as a witness and without the permission of the Court—*Ebrahim*, 4 Rang. 257.

The offence of contempt must be committed during a judicial proceeding, in order to come under this section. An inquiry by a Magistrate into a case of breach of the peace in order to ascertain whether he should make a report to his official superior and to satisfy himself, whether he should act under sec. 108, is not a judicial proceeding, and a person behaving insolently to the Magistrate in such proceeding cannot be proceeded against under this section—*Yerumakaran*, 2 Weir 605. A Tahsildar or a Naib-Tahsildar has to perform various miscellaneous duties, most of which are of non-judicial character, and the mere fact that on a particular day he has to try a case does not necessarily lead to the conclusion that he is doing judicial business during the whole of that day. If it appears that at the time when the incident took place, he was engaged in conversation with two persons who were sitting in his room, it is doubtful whether it can be said that he was sitting in any stage of a judicial proceeding, and it is, therefore, doubtful whether he can take summary action under this section—*Dalip Singh*, 2 Lah. 308 (312), 23 Cr.L.J. 9.

The offence must be committed in the view and presence of the Court, to attract the provisions of this section. The plaintiff in a suit was directed to appear with certain account books on a specified date and to give his deposition before Small Cause Court, failing which the suit was to be decided against him. The plaintiff did not appear as directed and the Munsif called upon him to show cause why he should not be fined for disobedience. Cause was shown by a petition, but there was no appearance, and he was fined for contempt of Court. It was held that the case did not come under this section, as there was no offence committed in the view or presence of the Court, and the order was, therefore, without jurisdiction—*Chagmal*, 23 C.W.N. 389, 20 Cr.L.J. 373.

The provisions of this section must be applied then and there, or at any rate *before the rising of the Court* in whose view or presence a contempt has been committed, if it considers that it can be properly and adequately dealt with under this section. Therefore, where a Magistrate in whose presence a contempt was committed, after taking cognizance of the matter, postponed passing final orders in order to afford the accused an opportunity of showing cause why such order should not be passed, and eventually fined him several days after, it was held that the procedure adopted by the Magistrate was irregular, and that the proper procedure would have been to detain the accused and to deal with the matter at once or before rising—*Palambar Bakhsh*, 11 All. 361. But rising for a short time in the middle of the day (for luncheon) does not amount to 'rising of the Court' for the day—*Venkat Rao*, 46 Bom. 973 (979), 24 Bom.L.R. 386, 23 Cr.L.J. 325.

In the case of a contempt committed *coram judice* and punishable under sec. 228, I. P. C., a Court has the option of proceeding either under secs. 480 to 482, Cr. P. C., or under sec. 476, Cr. P. C., and it cannot be held that the complaint under sec. 476, Cr. P. C., is invalid—*Ram Lal Anand*, 41 Cr.L.J. 766 (768), 189 I.C. 628, A.I.R. 1940 Lah. 233, 42 P.L.R. 505.

Where the Court deals with the offence of contempt of Court under this section, it cannot pass the sentence prescribed by sec. 228, I. P. C., but should under this section limit the punishment to a fine of Rs. 200 or imprisonment in default for 30 days—*Dhanakoti Mudali*, 2 Weir 603. If it considers the fine of Rs. 200 too light a sentence

order"—*Rameshwar Lal*, 49 All. 898, 28 Cr.L.J. 668 (669), 25 A.L.J. 555, 8 A.I.Cr.R. 85, A.I.R. 1927 All. 571, 103 I.C. 204.

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479. When any such commitment is made by a Civil or Revenue Court, the Court shall send the charge with the order of commitment and the record of the case to the Presidency Magistrate, District Magistrate or other Magistrate authorized to commit for trial, and such Magistrate shall bring the case before the High Court or Court of Session, as the case may be, together with the witnesses for the prosecution and defence.

480. (1) When any such offence as is described in section 175, section 178, section 179, section 180 or section 228 of the Indian Penal Code is committed in the view or presence of any Civil, Criminal or Revenue Court, the Court may cause the offender * * * to be detained in custody and at any time before the rising of the Court on the same day may, if it thinks fit; take cognizance of the offence and sentence the offender to fine not exceeding two hundred rupees, and in default of payment, to simple imprisonment for a term which may extend to one month, unless such fine be sooner paid.

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As to the power of the High Court to punish for contempts of subordinate Courts, see the Contempt of Courts Act, XII of 1926. The procedure to be followed under this Act has been laid down in *Amulya v. Satish*, 33 Cr.L.J. 414, 137 I.C. 238, 35 C.W.N.

1265, A.I.R. 1932 Cal. 254, 1932 Cr.C. 287, Ind. Rul 1932 Cal. 281. See also *Bala-krishna*, 46 Bom. 592, 24 Bom.L.R. 16; *In re Venkat Rao*, 21 M.L.J. 832 (F.B.); and *In re M. K. Gandhi*, 22 Bom.L.R. 368, 21 Cr.L.J. 835, 58 I.C. 915 (F.B.). The ruling in *Moti Lal Ghosh*, 41 Cal. 173 (*A. B. Patilka case*), in 17 C.W.N. 1253 (where it was held that the High Court had no power to punish for contempts of mofussil Courts) is no longer good law in view of the Contempt of Courts Act. See *Ananta Lal v. Alfred Henry Watson*, A.I.R. 1931 Cal. 257, 58 Cal. 884, 35 C.W.N. 189, 1931 Cr.C. 289, 131 I.C. 267, 32 Cr.L.J. 675.

The High Court has inherent power to punish a witness for contempt when he leaves the jurisdiction of the Court without being discharged as a witness and without the permission of the Court—*Ebrahim*, 4 Rang. 257.

The offence of contempt must be committed during a judicial proceeding, in order to come under this section. An inquiry by a Magistrate into a case of breach of the peace in order to ascertain whether he should make a report to his official superior and to satisfy himself, whether he should act under sec. 108, is not a judicial proceeding, and a person behaving insolently to the Magistrate in such proceeding cannot be proceeded against under this section—*Yerumakaran*, 2 Weir 605. A Tahsildar or a Naib-Tahsildar has to perform various miscellaneous duties, most of which are of non-judicial character, and the mere fact that on a particular day he has to try a case does not necessarily lead to the conclusion that he is doing judicial business during the whole of that day. If it appears that at the time when the incident took place, he was engaged in conversation with two persons who were sitting in his room, it is doubtful whether it can be said that he was sitting in any stage of a judicial proceeding, and it is, therefore, doubtful whether he can take summary action under this section—*Dalip Singh*, 2 Lah. 308 (312), 23 Cr.L.J. 9.

The offence must be committed in the view and presence of the Court, to attract the provisions of this section. The plaintiff in a suit was directed to appear with certain account books on a specified date and to give his deposition before Small Cause Court, failing which the suit was to be decided against him. The plaintiff did not appear as directed and the Munsif called upon him to show cause why he should not be fined for disobedience. Cause was shown by a petition, but there was no appearance, and he was fined for contempt of Court. It was held that the case did not come under this section, as there was no offence committed in the view or presence of the Court, and the order was, therefore, without jurisdiction—*Chagmal*, 23 C.W.N. 389, 20 Cr.L.J. 373.

The provisions of this section must be applied then and there, or at any rate *before the rising of the Court* in whose view or presence a contempt has been committed, if it considers that it can be properly and adequately dealt with under this section. Therefore, where a Magistrate in whose presence a contempt was committed, after taking cognizance of the matter, postponed passing final orders in order to afford the accused an opportunity of showing cause why such order should not be passed, and eventually fined him several days after, it was held that the procedure adopted by the Magistrate was irregular, and that the proper procedure would have been to detain the accused and to deal with the matter at once or before rising—*Paiambar Bakhsh*, 11 All. 361. But rising for a short time in the middle of the day (for luncheon) does not amount to 'rising of the Court' for the day—*Venkat Rao*, 46 Bom. 973 (979), 24 Bom.L.R. 386, 23 Cr.L.J. 325.

In the case of a contempt committed *coram judice* and punishable under sec. 228, I. P. C., a Court has the option of proceeding either under secs. 480 to 482, Cr. P. C., or under sec. 476, Cr. P. C., and it cannot be held that the complaint under sec. 476, Cr. P. C., is invalid—*Ram Lal Anand*, 41 Cr.L.J. 766 (768), 189 I.C. 628, A.I.R. 1940 Lah. 233, 42 P.L.R. 505.

Where the Court deals with the offence of contempt of Court under this section, it cannot pass the sentence prescribed by sec. 228, I. P. C., but should under this section limit the punishment to a fine of Rs. 200 or imprisonment in default for 30 days—*Dhanakoti Mudiali*, 2 Weir 603. If it considers the fine of Rs. 200 too light a sentence

for the offence, or considers that a substantive sentence of imprisonment is necessary in the circumstances of the case, it ought to refer the case under sec. 482 to some competent Magistrate—*Buham Khan*, 10 W.R. 47; *Anonymous*, 6 M.H.C.R. App. 16.

A substantive sentence of imprisonment cannot be passed under this section in a case under sec. 228, I. P. Code—*Buham Khan*, 10 W.R. 47. The imprisonment will be only in default of fine.

A Debt Conciliation Board constituted under the Punjab Relief of Indebtedness Act (VII of 1934) is a Court and its proceedings are judicial proceedings under sec. 16 of that Act. The Board would, therefore, be acting within jurisdiction in passing an order of fine under sec. 228, I. P. C., and in adopting the procedure laid down in this section—*Budhu v. Emp.*, 39 Cr.L.J. 658 (659), 175 I.C. 797, 11 R.L. 147, 40 P.L.R. 218, A.I.R. 1938 Lah. 366.

1262. Contempt:—An application for transfer of a case from a particular Court on the ground of probable miscarriage of justice is not a contempt of that Court—*Sirdar Buksh*, 1869 P.R. 34; *Venkat Rao*, 46 Bom. 973 (976), 24 Bom.L.R. 386. Even if in such an application the accused uses certain unhappy remarks concerning the Magistrate from whose Court the case is sought to be transferred, it cannot be presumed that the accused intended to insult that Court—*Murli Dhar*, 38 All. 284, 17 Cr.L.J. 163, 14 A.L.J. 247; *Abdulla Khan*, 1898 A.W.N. 145. A refusal by a witness to affix his thumb-mark to the record of his deposition is not an offence under sec. 180, I. P. C.—*Fateh Ali*, 1912 P.R. 8, 13 Cr.L.J. 713. A witness on being asked the name of his grandfather replied that he did not remember it. *Held* that it did not amount to a refusal to answer a question (section 179, Indian Penal Code) and he could not be proceeded against under section 480, Criminal Procedure Code—*Kallu*, 27 Cr.L.J. 252, 92 I.C. 428, A.I.R. 1926 Lah. 240. But a refusal by an accused to sign a statement under section 364 of this Code is punishable under section 180, Indian Penal Code—*Umar Khan*, 39 All. 399. Walking with creaking shoes near the Court-room does not *ipso facto* lead to the conclusion that the accused intended to insult or interrupt the Court in its work—*Davuluri Veerayya*, 5 M.L.T. 286, 9 Cr.L.J. 309. Courts should not be unduly sensitive about their dignity, and a mere audible remark by the accused which interrupted the proceedings of a Court is not enough to sustain a conviction unless the accused intended to interrupt the Court—*Ramasami Gounden*, 29 M.L.J. 274, 16 Cr.L.J. 610; *Dalip Singh*, 2 Lah. 308 (312). In the absence of any intention to insult the Court and of any interruption to the Court, a person accused of a scuffle in the verandah of a Court is not guilty of an offence under section 228, I. P. Code—*Manghal Ram*, 20 Cr.L.J. 777 (All.). Prevarication by a witness may, though it does not necessarily, amount to contempt of Court—*Jaimal*, 10 B.H.C.R. 69. See also *Chota Hurry*, 15 W.R. 5; *Auba*, 4 B.H.C.R. 6; *Pandu*, 4 B.H.C.R. 7. Where a witness refused to answer the questions put to him in his examination-in-chief and cross-examination unless an application made by him for stay of proceedings was granted, *held* that this conduct amounted to contempt—*Gopi Chand*, 1918 P.R. 14, 19 Cr.L.J. 676. When a complainant refused to answer questions put to him on the pretext that he had pain in his stomach but was found smiling and talking freely about other things, *held* that he was guilty under section 179, I. P. Code—*Moti Lal*, 36 Cr.L.J. 446, 153 I.C. 907, 1935 A.L.J. 299. An accused person who, during the hearing of a case, makes an impertinent threat to a witness in the box commits an offence under sec. 228, I. P. C.—*Allu*, 45 All. 272. An irrelevant question put by a pleader to a witness cannot amount to contempt, though persistence in vexatious or irrelevant questions after warning might amount to contempt—*Azeemoola*, 1887 P.R. 44. But every little insistence on the part of a pleader in the conduct of his case should not be turned into an occasion for a criminal trial, unless the pleader's conduct is so clearly vexatious as to lead to an inference that his intention is to interrupt or insult the Court—*Dattatraya*, 6 Bom.L.R. 541; *Surendra Nath Banerjee*, 10 C.W.N. 1062. Any trivial incident such as laughter or hesitation in speaking is not a contempt—*Chappu Menon*, 4 M.H.C.R. 146. A witness who having a document in his possession will not produce

it, is guilty of contempt, and can be dealt with under this section—*Premchand Dowlatram*, 12 Bom. 63. An accused who in the course of his statement under sec. 342 calls the Judge a 'prejudiced Judge' and being called upon by the Judge to withdraw the remarks refuses to do so, is guilty of contempt, and can be proceeded against under this section—*Venkat Rao*, 46 Bom. 973, 24 Bom L.R. 386, 23 Cr.L.J. 325.

Talking outside the Court in the verandah and refusing to come before the Court when summoned by the *Chaprassi* does not appear to constitute any of the five offences mentioned in this section—*Armugam Chettyar*, 30 Cr.L.J. 118, 113 I.C. 278, A.I.R. 1928 Rang. 280, Ind. Rul. 1929 Rang. 32.

There is no rule as to the dress of assessors. Where an assessor in a session case appeared in a dress consisting of a 'paheran,' a cap and a scarf and there was no suggestion that this dress offended against any rule of public decency, or was intended to be insulting to the Court, the Sessions Judge had no jurisdiction to fine the assessor—Chhaganlal, A.I.R. 1933 Bom. 478, 35 Cr.L.J. 107, 146 I.C. 446, 35 Bom L.R. 1025. In order to bring a case within the purview of sec. 480, Cr. P. C., and sec. 228, I. P. C., it must be shown that an intentional insult was meant to the Court—*Chhaganlal*, supra.

A comment on a pending case, if it has or may have the effect of prejudicing the fair trial of an accused person, amounts to a contempt of Court—*Claridge*, 14 Bom L.R. 231, 13 Cr.L.J. 461. An article in a newspaper reflecting on a party to a suit, more especially when he is under cross-examination, is a contempt of Court—*Weston v. Editor, Bengalee*, 15 C.W.N. 771. But such contempts can be punished only by the High Court. See Note 1261 above.

1263. Appeal:—A summary order under this section by a Sessions Judge for an offence under sec. 228, I. P. C., imposing a fine on a person for intentional insult to the Judge when sitting in a stage of judicial proceeding, amounts to a trial, though by a summary mode, and is therefore, appealable—*Chappu Menon*, 4 M.H.C.R. 146. A Sessions Judge cannot refuse to hear an appeal against an order under this section, because in his opinion the matter is a mere trifle. He is bound to hear the appeal and come to a finding whether the conviction is legal or not—*Jivacharam Keshavram*, Ratanlal 978.

481. (1) In every such case the Court shall record the facts constituting the offence, with the statement (if any) made by the offender, as well as the finding and sentence.

(2) If the offence is under section 228 of the Indian Penal Code, the record shall show the nature and stage of the judicial proceeding in which the Court interrupted or insulted was sitting, and the nature of the interruption or insult.

1264. Record:—The procedure prescribed by sec. 480 for punishing a contempt committed *in facie curie* is of a summary character, and the Court taking action under that section is, therefore, required to record certain particulars mentioned in sec. 481. When the guilt or innocence of a person depends upon the exact words used by him, it is the duty of the Magistrate to record them with a reasonable degree of precision, and his omission to record the nature of the insult constitutes a great defect in the procedure—*Dalip Singh*, 2 Lah 308 (311), 23 Cr.L.J. 9. The directions contained in this section are mandatory, and the omission to record the particulars as directed by the section is fatal to the proceedings—*Surendra Nath Banerjee*, 10 C.W.N. 1062, 4 C.L.J. 415, 9 Cr.L.J. 210. No person can be punished for contempt unless the specific offence charged against him be distinctly stated and an opportunity given him of answering the charge, by making a statement. The expression "statement, if any" does not mean that the Court should not give the accused an opportunity to make a statement; all that it indicates is that the Court cannot compel the accused to make a statement. The omission

to record the statement of a legal practitioner charged for contempt is a fatal defect to the prosecution—*Krishna Chandra*, 37 C.L.J. 535, 24 C.L.J. 798, A.I.R. 1923 Cal. 562; *Pohu Ram*, 25 Cr.L.J. 588, A.I.R. 1923 Lah. 88, 81 I.C. 76.

Sub-section (2) lays down that where a person is charged with an offence under sec. 228, I. P. C., the record convicting him must show the stage of the judicial proceeding interrupted, and the nature of the interruption, and the evidence must establish that such interruption was intentional; omission to do so is a vital irregularity in procedure not curable by sec. 537, and the conviction is illegal—*Jathu Mal*, 29 P.L.R. 653, 111 I.C. 464, A.I.R. 1928 Lah. 357, 29 Cr.L.J. 880; *Kukati*, 15 Cr.L.J. 621, 25 I.C. 629 (Mad); *Khushal Singh*, 1886 P.R. 36; *Arumugam Chettiyar*, 113 I.C. 278, 30 Cr.L.J. 118, A.I.R. 1928 Rang. 280, Ind. Rul. 1929 Rang. 32; *Ram Lal*, 1931 Cr.C. 831, 32 Cr.L.J. 1221, 134 I.C. 686, 14 N.L.J. 106, A.I.R. 1931 Nag. 193, Ind. Rul. 1931 Nag. 172

482. (1) If the Court in any case considers that a person accused of any of the offences referred to in section 480 and committed in its view or presence should be imprisoned otherwise than in default of payment of fine, or that a fine exceeding two hundred rupees should be imposed upon him, or such Court is for any other reason of opinion that the case should not be disposed of under section 480, such Court, after recording the facts constituting the offence and the statement of the accused as hereinbefore provided, may forward the case to a Magistrate having jurisdiction to try the same, and may require security to be given for the appearance of such accused person before such Magistrate, or if sufficient security is not given, shall forward such person in custody to such Magistrate.

(2) The Magistrate, to whom any case is forwarded under this section, shall proceed to hear the complaint against the accused person in manner hereinbefore provided.

1265. Scope:—The provisions of this section can only be employed where cognizance has already been taken under sec. 480, Cr. P. C., and the section is in no way independent of sec. 480—*Ram Lal Anand*, 41 Cr.L.J. 766 (768), 189 I.C. 628, A.I.R. 1940 Lah. 233, 42 P.L.R. 505.

Under sec. 480 the Magistrate can award a fine up to Rs 200, or a sentence of imprisonment in default of payment of fine. If, however, the Magistrate considers that a substantive sentence of imprisonment or a heavier fine is demanded by the circumstances of the case, he ought to forward the case to another Magistrate under this section—*Anonymous*, 6 M.H.C.R. App. 16; *Buham Khan*, 10 W.R. 47.

Section 482 need not be read along with sec. 480, and sec. 482 does not require a Magistrate to draw up proceedings on the same day that the offence is committed—*Bepin Chandra Pal*, 35 Cal. 161; *Malkhan Singh*, 38 Cr.L.J. 55, 165 I.C. 698, A.I.R. 1936 All. 762, 1936 A.L.J. 1056, 1936 Cr.C. 1003.

Procedure:—If a Court considers a substantive sentence of imprisonment necessary, it should record a statement of the facts constituting the contempt and the statement of the accused, and forward the case to another Magistrate—*Rutton Sahoo*, 11 W.R. 49. Where a Court chooses to act under sec. 482 instead of sec. 480, in respect of an offence under sec. 179, I. P. C., it must give reasons for not taking cognizance under sec. 480—*Chedi Lal*, 11 O.L.J. 358, 25 Cr.L.J. 1127, 81 I.C. 951, A.I.R. 1924 Oudh 402.

A Barrister in the course of the trial of a case in which he was the complainant, used insulting language to the Sub-Magistrate. The Magistrate then recorded proceedings required by this section but failed to take any statement from the accused explanatory to his conduct as the accused left the Court at once. It was held that the omission to take such statement was not fatal to the proceedings, and the case ought not to be dismissed on that ground—*Anonymous*, 2 Weir 604.

An application under sec 476, Cr. P. C., was made to the Subordinate Judge to file a complaint against the defendants for an offence under sec 175, I P. C. The Sub-Court was abolished. The application was transferred to the District Court and it was dismissed on the ground that sec. 476, Cr. P. C., was not applicable. But a complaint was made under sec. 482, Cr. P. C. Held that the complaint was not competent as the District Court did not order the production of any document, nor could the alleged offence under sec. 175, I P. C., be said to have been committed in the view or presence of the District Court—*Ayancherri Kovilagath Sankara Varma Rajah*, 41 Cr L.J. 465, 187 I.C. 470, (1940) 1 M.L.J. 272

Court:—See *Vithal Sonaji Marathi* in Note 622

483. When the *Provincial Government* so directs, any Registrar or any Sub-Registrar appointed under the Indian Registration Act, 1877,* shall be deemed to be a Civil Court within the meaning of sections 480 and 482.

When Registrar or Sub-Registrar to be deemed a Civil Court within sections 480 and 482.

1266. The words "*Provincial Government*" have been substituted for "*Local Government*" by sec 4 of the Government of India (Adaptation of Indian Laws) Order, 1937.

A Registrar or Sub-Registrar may be deemed to be a Court only for the purposes of secs 480 and 482; and it cannot be implied that he is to be deemed a Court for ordinary purposes. A provision that a particular officer may for a particular purpose be deemed a Court does not warrant the extension of that provision so as by inference to produce a group of rules in conflict with the general system. A provision such as that contained in this section is an excrescence on the general system; such an exceptional provision should not be drawn out into all its logical consequences—*Tulja*, 12 Bom. 36. In the absence of a direction by the Local Government under this section, an offence under sec 228, I P. C., if committed before a Sub-Registrar cannot be dealt with under secs. 480 and 482 of this Code—*Probhat Chandra*, 57 Cal. 1007, 34 C.W.N. 56, 31 Cr L.J. 942.

484. When any Court has under section 480 or section 482 adjudged an offender to punishment or forwarded him to a Magistrate for trial for refusing or omitting to do anything which he was lawfully required to do, or for any intentional insult or interruption, the Court may, in its discretion, discharge the offender or remit the punishment on his submission to the order or requisition of such Court, or on apology being made to its satisfaction.

Discharge of offender on submission or apology.

1267. Discharge on submission or apology:—Too much notice should not be taken of a hasty language used by rustic litigants during a moment of excitement without any serious intention of insulting the Court. If the offender offers an

* See now the Indian Registration Act, 1908 (XVI of 1908).

apology or adopts a submissive attitude, an admonition by the Court, or at the most a petty fine, would be sufficient—*Jit Singh*, 1912 P.W.R. 23, 13 Cr.L.J. 567, 15 I.C. 983.

Power of High Court to interfere:—A pleader was tried and punished for contempt by a Munsiff for having used certain words which the latter thought to be derogatory to his position. The pleader gave an assurance that the words in question had no reference to the Court, but the Munsiff declined to accept the assurance. The District Judge refused to interfere on appeal by the pleader. The High Court on revision directed the Munsiff to consider whether it was not a case in which he himself should take action under sec. 484. Upon the Munsiff, declining to do so because the pleader had not withdrawn the words in question, the High Court held that the assurance given by the pleader should be taken as sufficient, and remitted the punishment—*Ram Bali*, 11 A.L.J. 955, 14 Cr.L.J. 687, 21 I.C. 1007.

485. If any witness or person called to produce a document or thing before a Criminal Court refuses to answer such questions as are put to him or to produce any document or thing in his possession or power which the Court requires him to produce, and does not offer any reasonable excuse for such refusal, such Court may, for reasons to be recorded in writing, sentence him to simple imprisonment, or by warrant under the hand of the presiding Magistrate or Judge commit him to the custody of an officer of the Court for any term not exceeding seven days, unless in the meantime such person consents to be examined and to answer, or to produce the document or thing. In the event of his persisting his refusal, he may be dealt with according to the provisions of section 480 or section 482, and, in the case of a Court established by Royal Charter, shall be deemed guilty of a contempt.

1268. Witness:—A complainant is not a witness and therefore not punishable under this section—*Ganesh*, 13 Bom. 600.

A witness cannot be punished for not answering a question which is irrelevant to the real issue or which he is not legally bound to answer—*Ganesh*, 13 Bom. 600. Where the question is asked with a view to criminal proceedings being taken against the witness, he is not legally bound to answer it and he cannot be punished for refusing to answer—*Hari Lakshman*, 10 Bom. 185.

486. (1) Any person sentenced by any Court under section 480 or section 485 may, notwithstanding anything hereinbefore contained, appeal to the Court to which decrees or orders made in such Court are ordinarily appealable.

(2) The provisions of Chapter XXXI shall, so far as they are applicable, apply to appeals under this section, and the Appellate Court may alter or reverse the finding, or reduce or reverse the sentence appealed against.

(3) An appeal from such conviction by a Court of Small Causes in a Presidency-town shall lie to the High Court, and

an appeal from such conviction by any other Court of Small Causes shall lie to the Court of Session for the sessions division within which such Court is situate.

(4) An appeal from such conviction by any officer as Registrar or Sub-Registrar appointed as aforesaid may, when such officer is also Judge of a Civil Court, be made to the Court to which it would, under the preceding portion of this section, be made if such conviction were a decree by such officer in his capacity as such Judge, and in other cases may be made to the District Judge, or in the presidency towns, to the High Court.

See 4 M.H.C.R. 146 and Ratanlal 978 cited in Note 1263 under section 480, under heading 'Appeal.'

487. (1) Except as provided in sections ** 480 and 485,

Certain Judges and Magistrates not to try offences referred to in section 195 when committed before themselves.

no Judge of a Criminal Court or Magistrate, other than a Judge of a High Court, shall try any person for any offence referred to in section 195, when such offence is committed before himself or in contempt of his authority, or is brought under his notice as such Judge or Magistrate in the course of a judicial proceeding.

(2) Nothing in section 476 or section 482 shall prevent a Magistrate empowered to commit to the Court of Session or High Court from himself committing any case to such Court.

Change:—The word "477" has been omitted in sub-section (1) by section 130 of the Cr. P. C Amendment Act, XVIII of 1923. This is consequent to the repeal of sec. 477.

1269. General rule:—A Magistrate cannot convict a person for contempt of Court committed in respect of his own authority. A commitment to another Magistrate is necessary in all such cases—*Atmaram Govind*, Ratanlal 64; *Kashmiri*, 1 All. 625; *Seshayya*, 13 Mad. 24. The Court before which an offence was committed, and by which the preliminary inquiry was held under sec. 476, should not be the Court to try the case—*Taraprosad*, 15 W.R. 88.

Thus, where a Sessions Judge has directed the trial of a person for the offence of giving false evidence committed before him in the course of a judicial proceeding of a criminal nature, he cannot try the case himself—*Makhdam*, 14 All. 354. If the facts alleged to constitute the offence came to the knowledge of the Magistrate in the course of judicial proceedings, he has no jurisdiction himself to try the case—*Kunwar Bahadur*, 23 O.C. 138, 57 I.C. 936, 21 Cr.L.J. 696. A Magistrate whose summons was disobeyed has no jurisdiction to try the offence of disobedience of summons—*Anonymous*, 2 Weir 612; *Deo Saran*, 16 A.L.J. 432, 19 Cr.L.J. 688, 46 I.C. 48; *Pahalwan*, 27 Cr.L.J. 1344, 98 I.C. 416 (All.); *Muhammad Din*, 36 Cr.L.J. 407(2), 153 I.C. 514(1), 35 P.L.R. 454, A.I.R. 1934 Lah. 545, 1934 Cr.C. 865(1). The prohibition is absolute and the consent or otherwise of the accused is immaterial—*Muhammad Din*, supra. A Magistrate who issued an order under sec. 144 of this Code cannot himself try the disobedience of that order (sec. 188, I. P. C.)—*Ranchod Dayal*, 10 B.H.C.R. 424; *Mritunjoy Gon*, 23 C.W.N. 520, 20 Cr.L.J. 557; *Abdulla*, 24 Mad. 262; *Langadaya*, Ratanlal 901; *Lokendra Lal Pal Choudhury*, 37 Cr.L.J. 936, 164 I.C. 434, 61 C.L.J. 579, 39 C.W.N. 1053; *Veerappa Moopan*, 40 Cr.L.J. 752, 183 I.C. 240, A.I.R. 1939 Mad. 496, 49 M.L.W. 474, 1939 M.W.N. 340, (1939) 1 M.L.J. 573. A Magistrate, who makes

an order under sec. 133 for the removal of a nuisance, cannot himself try and convict the person to whom such order was directed and who has disobeyed it—*Hua Lal*, 1883 A.W.N. 222. If the Magistrate holds a trial for an offence committed in contempt of his authority the whole proceedings of the trial are invalid, and a person who disobeys a warrant issued in the course of such trial commits no offence—*Pahalwan Singh*, 27 Cr.L.J. 1344, 98 I.C. 416 (All.). The Rangoon High Court holds that although it is not desirable that a Magistrate whose lawful orders are disobeyed should, save in very exceptional circumstances, himself try and dispose of the charge of disobedience, still, unless there has been a clear failure of justice, the High Court will not ordinarily interfere with the Magistrate's action—*J. R. Das*, 1 Rang. 540.

1270. Scope of section:—Sec. 487, which says that no Court shall try any person for the offence committed in contempt of its own authority, is not limited to offences falling under Chapter X of the Penal Code. It extends to all contempts of Courts—*Parsapa Mahadevapa*, 1 Bom. 339. Moreover, the prohibition in this section extends to the *abetment* of the offences referred to in the section. Therefore, a Magistrate is not competent to convict a person of abetting the offence of giving false evidence in a judicial proceeding before himself—*Anonymous*, 7 M.H.C.R. App. 28.

Where a District Magistrate (as the head of the Police) gave sanction to prosecute a person for giving false information to the police, the District Magistrate was not incompetent to try or hear an appeal from the conviction of such person; section 487 would not apply, because the offence was committed before the Police and not before the District Magistrate or in contempt of his authority or brought to his notice as Magistrate in the course of a judicial proceeding—*Ramaswamy Lal*, 27 Cal. 452; *Baldeo*, 3 All. 322; *Karim Baksh*, 1905 P.R. 12, 2 Cr.L.J. 66. Where the Deputy Commissioner directed the prosecution of the accused under sec. 182, I. P. C., for having made a false report to a Forest Officer, and then the Deputy Commissioner, as District Magistrate, heard the accused's appeal against his conviction in the case, held that sec. 487 did not apply as the offence was not committed before the Deputy Commissioner nor brought to his notice as Magistrate in the course of a judicial proceeding. But sec. 556 applied—*Faiz Muhammad*, 9 N.L.R. 81, 14 Cr.L.J. 385 (386).

Magistrate:—This section is wide enough to include a Presidency Magistrate. Such Magistrate cannot try a case under sec. 188, I. P. C., for the disobedience of an order which he had himself passed—*Leakat Hussain*, 12 C.W.N. 246, 7 Cr.L.J. 103, 7 C.L.J. 70.

Prohibition to 'try' the case:—According to the Madras High Court, this section prohibits the Judge or Magistrate only from trying the case; but a Sessions Judge before whom an offence was committed is not precluded by this section to hear an appeal in the case—*Kesavaia*, 2 Weir 607. But the Calcutta High Court holds that the words "shall try a person" in this section include the trial of an appeal. Therefore, where a Judge sanctions the prosecution of a decree-holder under sec. 210, I. P. C., for an offence committed before a Munsiff he is not competent to hear an appeal from the conviction of the decree-holder for that offence—*Madhub Chunder v. Narodeep*, 16 Cal. 121. So also, the Burma Chief Court holds that a Judge who has directed a prosecution should not hear the appeal of the accused, when convicted, even though the appeal is not against the conviction but only against the severity of the sentence—*Htuktalwe*, 2 L.B.R. 302, 1 Cr.L.J. 1021. Where a District Magistrate procured the initiation of a number of prosecutions against the same person, and one of them which resulted in conviction came before him in appeal, the High Court considering that it was not altogether proper that he should hear the appeal, ordered its transfer to the Sessions Judge—*Ramzan Ali v. Durpo*, 24 W.R. 58. The Nagpur Court also holds (following 16 Cal. 121) that the word "try" as used in this section includes the hearing of an appeal—*Krishnappa*, 25 Cr.L.J. 713, A.I.R. 1924 Nag. 51, 81 I.C. 201.

Judicial proceeding:—The proceeding of a Magistrate granting or revoking or refusing a sanction under sec. 195 is a judicial proceeding. Therefore, a Magistrate who

has declined to revoke a sanction granted to a person on a charge of forgery, is precluded from himself trying the case—*Seshadri*, 20 Mad. 383.

1271. "As such Judge or Magistrate":—In some cases it has been said that this expression means that the Judge or Magistrate is precluded from trying the case only when the offence was committed before him or brought to his notice while acting in his capacity as Judge or Magistrate; but it does not prevent the Magistrate or Judge from trying an offence which was committed before him or brought under his notice in another capacity. Thus, in *Sarat Chandra*, 16 Cal 766 (FB), it is stated that a Sessions Judge may as Sessions Judge try the accused for an offence which was committed before him in another capacity as District Judge; that is, the prohibition is restricted to a 'Judge' of a Criminal Court, and that being so, a strict construction must be placed upon the words 'as such Judge' and it must be held that they do not include a Judge of a Civil Court or a District Judge. The same view has been taken in *Gaspar*, 6 Bom. 479 (481); *Banka Behari*, 7 C.W.N 708; *Rajit Daji*, 18 Bom. 280. Thus, it is held that a Magistrate is not debarred from trying an accused person for disobedience of summons issued by him in his capacity as Mamlatdar—*Rajit Daji*, 18 Bom. 380. Where sanction is given by a Deputy Collector and Magistrate in his capacity as Revenue Officer, he is not debarred from trying the case himself as Deputy Magistrate—*Moula Sahib*, 2 Weir 613.

But in some other cases it has been pointed out that the above view runs counter to the fundamental principle of law (sec. 556) that no man ought to try a case in which he is interested. The prohibition in this section is a *personal* one, the mischief to be prevented being that the same *person* should not decide a matter which he may have already prejudged. It does not refer to the *office* of the Magistrate or Judge before whom an offence of the class described in the section is committed, but refers to the *person* of the Judge or Magistrate—*Anonymous*, 1 Mad. 305. An officer before whom, while acting in a particular capacity, an offence has been committed, punishable under sec. 228, I. P. C., cannot in another capacity take up and try the offence—an offence committed against himself. If he could do so, it would be in violation of that fundamental rule in the administration of justice that no man can be a Judge in a case wherein he is interested—*Chander Seekur*, 12 W.R. 18. When a Judge on the Civil side has already formed an opinion that a document has been forged or a perjury has been committed, he should not try the case as a Sessions Judge, and it is proper for the High Court to transfer the case to another Judge, as a means of relieving the former Judge from a position which he himself would desire to avoid—*Arunachella*, 5 M.H.C.R. 212. In *Gaspar* 6 Bom. 479 (481), it has been said that it is desirable that a trial should not be held before an officer who has already prejudged the guilt of the accused, and on this ground the case should be transferred; but in the case of an offence exclusively triable by the Court of Session, great inconvenience would be caused if the case has to be transferred; and if the accused is perfectly willing to be tried by the Sessions Judge, no transfer is necessary.

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CHAPTER XXXVI.

OF THE MAINTENANCE OF WIVES AND CHILDREN.

Sir James FitzJames Stephen describes this chapter as "a mode of preventing vagrancy or at least of preventing its consequences." The object of maintenance proceedings is not to punish a parent for his past neglect, but to prevent vagrancy by compelling those who can do so to support those who are unable to support themselves and who have a moral claim to support—*Sardar Muhammad v. Nux Muhammad*, 1917 P.R. 22, 18 Cr.L.J. 811. The scope of this chapter is limited and the Magistrate may not, except as herein provided, usurp the jurisdiction in matrimonial disputes possessed by the Civil Courts—*Gulabdas Bhaidas*, 16 Bom. 269.

488. (1) If any person having sufficient means neglects or refuses to maintain his wife or his legitimate or illegitimate child unable to maintain itself, the District Magistrate, a Presidency Magistrate, a Sub-divisional Magistrate or a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, at such monthly rate not exceeding *one hundred rupees* in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate from time to time directs.

(2) Such allowance shall be payable from the date of the order, or if so ordered from the date of the application for maintenance.

(3) If any person so ordered *fails without sufficient cause* to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in manner hereinbefore provided for levying fines, and may sentence such person, for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made:

Provided that, if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing:

Provided, further, that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due.

(4) No wife shall be entitled to receive an allowance from her husband under this section if she is living in adultery, or if,

without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.

(5) On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order.

(6) All evidence under this Chapter shall be taken in the presence of the husband or father, as the case may be, or, when his personal attendance is dispensed with, in the presence of his pleader, and shall be recorded in the manner prescribed in the case of summons-cases:

Provided that if the Magistrate is satisfied that he is wilfully avoiding service, or wilfully neglects to attend the Court, the Magistrate may proceed to hear and determine the case *ex parte*. Any order so made may be set aside for good cause shown on application made within three months from the date thereof.

[(7) (*Omitted*).]

(7) The Court in dealing with applications under this section shall have power to make such order as to costs as may be just.

(8) Proceedings under this section may be taken against any person in any district where he resides or is, or where he last resided with his wife, or, as the case may be, the mother of the illegitimate child.

This section has been amended by section 131 of the Cr. P. Code Amendment Act, XVIII of 1923, and the changes introduced are the following:—*First*, in sub-section (1), the words 'one hundred' have been substituted for 'fifty,' in order to suit modern conditions of life. *Secondly*, in sub-section (3) the words 'fails without sufficient cause' have been substituted for the words 'wilfully neglects' owing to the difficulties which have been felt in the interpretation of the word 'wilfully' (*Statements of Objects and Reasons*, 1914). *Thirdly*, a proviso has been added to sub-section (3) to provide a period of limitation for the recovery of outstanding arrears. *Fourthly*, sub-section (7) has been omitted; it ran thus: "The accused may tender himself as a witness and in such case shall be examined as such." This is now expressly provided by sub-section (2) of sec 340. The old sub-sections (8) and (9) have been re-numbered as (7) and (8). *Fifthly*, in the present sub-sec. (8) the words "any person" have been substituted for the words "the accused" in order to make it clear that the person proceeded against under this section is not in the position of an *accused* person.

1272. Section not affected by personal law:—The right to maintenance conferred by this section is a Statutory right, which the Legislature has created irrespective of the nationality or creed of the parties, the only condition precedent to the possession of that right, in the case of a wife, being the existence of the conjugal relation—*Din Mahommed*, 5 All. 226. This section provides a statutory right and cannot be affected by personal law. The right conferred upon the wife by the provisions of this section is independent of personal law and to claim protection of Muhammadan Law in derogation of the statutory provisions of the Criminal Procedure Code is not permissible—*Muhammad Azizullah v. Abdul Halim*, 36 Cr.L.J. 524, 154 I.C. 561, 1935 O.W.N. 292.

1935 O.L.R. 172, A.I.R. 1935 Oudh 285 Thus, a *mulatta* wife is not, under the Muhammedan Law of the Shia sect, entitled to maintenance; but this disability arising from her personal law is different from her statutory right to maintenance under this Code. In other words, she is entitled to maintenance under this section, irrespective of the fact that she is not entitled to maintenance under her personal law—*Luddon Sahiba v. Mirza Kamar*, 8 Cal. 736. The right of illegitimate children to be maintained by their actual father is a statutory right, and the duty is created by express enactment independent of the personal law of the parties—*Kariyadan Pokkar v. Veeran*, 19 Mad. 461. There is no text of Hindu law under which an illegitimate son of a Hindu by a woman who is not a Hindu can claim maintenance; but under this section such illegitimate child is entitled to claim maintenance from his putative father—*Lingappa v. Esudason*, 27 Mad. 13. Apart from the Hindu Law, maintenance is awardable in such cases on general principles; the defendant having begotten the child is bound to provide for its maintenance—*Ghana Kanta v. Gereli*, 32 Cal. 479. The father of an illegitimate child cannot get rid of statutory obligation under this Code to maintain that child by pleading that he is a Buddhist monk. The Criminal Procedure Code must override his personal law if it conflicts with it—*U Thiri v. Ma Pwa*, 4 U.B.R. 138, A.I.R. 1923 Rang. 131, 24 Cr.L.J. 368.

On the other hand, the provision in the Cr. P. Code does not take away any right conferred by the Hindu Law. Thus, under this Code, the illegitimate daughters are entitled to claim maintenance only from their father, but under the Hindu law, they can claim maintenance not only from their father but also from his co-parceners who took his property by survivorship—*Nataranjan v. Mutha*, 22 L.W. 650, A.I.R. 1926 Mad. 261.

1272A. Procedure:—Proceedings under this section are not complaints and hence it is not legally necessary for the wife to be examined before issue of process—*Nur Muhammad v. Harjan*, 36 Cr.L.J. 792, 153 I.C. 609, A.I.R. 1934 Lah. 946, 36 P.L.R. 181, 1934 Cr.C. 1334.

This section contemplates applications by a wife or a child. When maintenance is claimed for the child, the application should be made by the mother as guardian of the child and for the child—*Kumli*, 25 Cr.L.J. 1249, 82 I.C. 257, A.I.R. 1925 All. 73.

An application for maintenance under this section should not be dismissed on the failure on the part of the applicant to comply with an order for payment of process fees—*Ponnammal*, 16 Mad. 234. See Note 1292.

1272B. Maintain:—Maintenance is not intended to go further than to insure to the wife or children food, clothing and lodging. It does not include education—*Nga Hla v. Mi Hla Kyu*, 4 I.C. 758, U.B.R. (1907-1909) Cr. P. C., p. 17, 11 Cr.L.J. 40; *Kumli*, 25 Cr.L.J. 1249 (1251), 82 I.C. 257, A.I.R. 1925 All. 73. In criminal law maintenance would not include cost of College education—*Shanno Debi v. Daya Ram*, 147 I.C. 719, A.I.R. 1933 Lah. 1026, 1934 Cr.C. 12, 35 Cr.L.J. 473, 35 P.L.R. 320. But see *Maung Shwe Ba v. Ma Thein Nya*, 40 Cr.L.J. 440 (441), 180 I.C. 584, A.I.R. 1939 Rang. 95, 1938 Rang. 673, 11 R. Rang. 423 where it has been held that the meaning of "maintenance" as used in this section includes the education of children, that is to say, the minimum amount of education which the conventions of the country call for. See also Note 1279.

1273. Who can be ordered:—An undivided son living with his father can be ordered to maintain his wife under this section—*Ramasami*, 13 Mad. 17. The mere fact that the defendant is 16 years of age only and studying at school will not by itself be a sufficient cause for his being relieved of the liability imposed by this section of providing for his illegitimate child—*Koer v. Roshun Lal*, 4 N.W.P. 123.

The order may be passed only against the father or husband, as the case may be. This section does not authorise a Magistrate to order the father-in-law to pay maintenance to his daughter-in-law—*Miran*, 1903 P.R. 26, 1 Cr.L.J. 110. Nor can the father-in-law and the husband be made jointly liable for the maintenance of the wife.

on the ground that the husband is a minor—*Waryam Singh*, 12 P.R. 1914, 15 Cr.L.J. 577; *Sohna v. Kartar*, 32 P.L.R. 346, 1931 Cr.C. 772, 32 Cr.L.J. 1175, 134 I.C. 488, A.I.R. 1931 Lah. 532, Ind. Rul. 1931 Lah. 936; *Ghulam Muhammad v. Fatima*, 30 Cr.L.J. 135, 113 I.C. 327, Ind. Rul. 1929 Lah. 162; *Raila v. Atti*, 115 P.L.R. 1914, 15 Cr.L.J. 529 (530).

'Of sufficient means':—Before an order is passed under this section it must be proved that the person ordered has sufficient means to support his wife and children—*Payaji v. Dudhnath*, 1882 A.W.N. 179. If he has sufficient means, he is not relieved of the obligation to maintain his wife on the ground that the wife has means of earning money by her own labour—*Ghurbin v. Gobindi*, 1887 A.W.N. 107; or that the wife has relations able and willing to maintain her—*Veluth Ahmed*, 2 Weir 615; *Chanda v. Rama Misari*, 16 Cr.L.J. 80 (Mad.)

A Magistrate is not justified in absolutely refusing to order maintenance to be paid to the wife on the ground that the husband is a man of slender means. In such a case, only a small amount will be ordered—*Chockingam*, 2 Weir 617. So also, the fact that the father is a professional beggar does not relieve him from his obligation to maintain his illegitimate child. If a man is capable of labour, and the Magistrate is satisfied that the child is his child, he should order the payment of a reasonable sum—*Boya Kondanma*, 2 Weir 616. The word 'means' in this section does not signify only visible means, such as real property or definite employment. If a man is healthy and able-bodied he must be held to have the means to support his wife; and he cannot be relieved of this obligation on the ground that he is only 19 years old and unemployed—*In re Kandasamy*, 1926 M.W.N. 146, 92 I.C. 862, 50 M.L.J. 44, 27 Cr.L.J. 350. The word 'sufficient means' includes a capacity to earn money; and if a man can be shown to be capable of earning money, he has then the 'means' to maintain his wife. *Prima facie*, a man 26 years old must be presumed to be capable of earning money. But it is open to him to rebut that presumption by showing that in fact because of disease, accident or labour market he is not capable of earning anything—*Muni Kantivijayari*, 56 Bom. 260, 34 Bom.L.R. 587, 1932 Cr.C. 397, 33 Cr.L.J. 625, 138 I.C. 517, A.I.R. 1932 Bom. 285, Ind. Rul. 1932 Bom. 385; *Ganga Devi v. Ram Sarup*, A.I.R. 1939 Lah. 24, 179 I.C. 766, 11 R.L. 624, 41 P.L.R. 161. The words "sufficient means" should not be confined to the actual pecuniary resources but should have reference to the earning capacity. Where the husband is a vigorous man in the prime of life and is able to earn sufficient if he wishes and the amount granted to the wife is not more than is necessary for her simple needs, the order should be upheld—*Abdul v. Sugrabi*, 37 Cr.L.J. 86, 159 I.C. 120, 18 N.L.J. 107. So also, the mere fact that the husband is a young boy of 16 is not a ground for granting merely nominal maintenance. He must make serious endeavour to find work, and must pay sufficient maintenance to his wife—*Ma E Sin v. Mg Hla*, 4 Bur.L.J. 258, 27 Cr.L.J. 725. In a Burma case it has been held that in the case of a Pongyi or Buddhist priest, the presumption is that he possesses no property except such as is necessary for his religious life and which is held under conditions which do not make it available for other purposes; and a woman who allows herself to be seduced by a member of the priesthood cannot obtain any maintenance for her child; she ought to have known beforehand that a priest has no money—*Ma E Shi v. Aditsa*, 1 Bur.L.J. 97, 24 Cr.L.J. 510. But in another Burma case it has been held that a Buddhist monk cannot get rid of his statutory obligation under this Code to maintain his illegitimate child. If he is an able-bodied man, the presumption is that he has sufficient means to maintain himself and his child, and it is for him to prove the contrary. If he cannot pay the maintenance ordered if he remains a monk, it is his duty to throw off the yellow robe and work—*U Thiri v. Ma Pua*, 4 U.B.R. 138, A.I.R. 1923 Rang. 131, 72 I.C. 368. The Full Bench of the Rangoon High Court accepted the view laid down in *U Thiri v. Ma Pua*, and held that a Burmese Buddhist monk is liable for the maintenance of his child—*Maung Tin v. Ma Hmin*, 34 Cr.L.J. 815, 144 I.C. 187, A.I.R. 1933 Rang. 138, 11 Rang. 226, Ind. Rul. 1933 Rang. 92 (F.B.), dissenting from *Ma E Shi v. Aditsa*, supra. A man by merely becoming a Jain *Sadhu*

is not in law excused from maintaining his wife. If, on the other hand, he can prove that by reason of the vows which he has taken he is incapable of holding any property or earning any money which will enable him to maintain his wife without incurring such serious consequences that no Court could expect him to incur, then he cannot be said to have sufficient means to maintain his wife—*Muni Kantivipayaji*, supra.

The onus is on the husband or father to show that he has no sufficient means to support his wife and children. An able-bodied man who is suffering from no physical infirmity will be presumed to have sufficient means to support himself and his family—*Me Tha v. Nga San*, 1911 U.B.R. 1st Qr. 90, 15 Cr.L.J. 162 (164), 13 I.C. 915.

1274. Neglect or refusal to maintain:—The first essential for proceedings under this section is that the person proceeded against should have neglected or refused to maintain his wife or children. If there is no evidence as to the neglect or refusal, an order for maintenance passed by the Magistrate is bad in law—*Intazar v. Samidan*, 27 O.C. 271, 1 O.W.N. 150, 20 Cr.L.J. 128; *Gulabdas Bhaidas*, 16 Bom. 269; *Sita Debi v. Har Narain*, 32 Cr.L.J. 196 (198), 129 I.C. 17, 1930 Cr.C. 982, A.I.R. 1930 Lah. 886, 31 P.L.R. 876, Ind. Rul. 1931 Lah. 97. Where the evidence was that since the separation had taken place, the husband was regularly paying Rs. 92 for the maintenance of his wife and children, it was held that the Magistrate was wrong in having entertained the petition at all—*Graham v. Graham*, 4 Bur.L.J. 11, 26 Cr.L.J. 831.

The neglect or refusal to maintain wife and children may be express or implied. The Court may infer the neglect or refusal from the conduct of the husband—*Bhikaiji v. Maneckji*, 9 Bom.L.R. 359, 5 Cr.L.J. 334. To give jurisdiction to a Magistrate, it is not necessary to prove express refusal to maintain; if the husband or father does not in fact maintain his wife or children, he is said to 'neglect or refuse' to maintain them—*Ha Hun*, 8 Bur.L.R. 96. Where the father has denied his paternity of the child, that is a fact from which the Court can infer neglect to maintain the child—6 S.L.R. 208, 14 Cr.L.J. 303. But where the husband is willing to maintain his wife and the wife is willing to live with her husband, i.e., where both parties are willing to live together, the fact that the wife deposes that though she is willing to live with her husband, the latter refuses to maintain her, will not lead the Court to infer that the husband is unwilling to maintain his wife—*Phula Khan*, 213 P.L.R. 1915, 16 Cr.L.J. 86.

This section is based on the principles that there is continuing obligation upon a father, who has sufficient means, to support his child. If a man who is bound to maintain his child continuously does not do so, he is deemed to have neglected to maintain, and proof of actual refusal to maintain is not necessary. The fact that the child is not in a starving condition is no answer to an application for maintenance—*Ma Hnin v. Maung Myat*, L.B.R. (1900-1902) 189; *Baran v. Ma Chan*, 2 Rang 682, 26 Cr.L.J. 535; *Ha Hun Bya*, 8 Bur.L.R. 96. See *Ambirathu v. Lakshmi Amma*, 1937 M.W.N. 985.

The fact that a lump sum has been paid to the wife in final settlement of all her claims is no answer to an application for maintenance, if in fact that money has been spent or lost or does not yield a sufficient income—*Mi Le v. Ng. Paw Din*, 1905 U.B.R. (Cr. P. C.) 45; *Ma Hnin v. Maung Myat*, L.B.R. (1900-1902) 189. See also Note 1276 under the heading "Effect of agreement or compromise". But where the father has given certain property to the mother for the maintenance of herself and the child, which yields sufficient monthly income and furnishes means of support, he cannot be said to have neglected to maintain his wife and child and an order cannot be made under this section—*Maung Mya v. Ma Bok*, U.B.R. (1897-1901) 108; *Gangaraju v. Bhadrappa*, 2 Weir 648.

A father's neglect to sue for the custody of a girl who has chosen to live within her mother who is living in adultery, cannot be deemed to be a neglect on his part to maintain the daughter—*Parvathi v. Ramaswami*, 2 Weir 630 (631). Where the father is entitled to the custody of children, and the mother who takes them away does not allow them to return to him, there is no such neglect or refusal to maintain them as is contemplated by this section—*Venkatasubbaiyan*, 2 Weir 632. Where the children who

were being properly maintained while in the custody of their father, were dissuaded by their mother from his custody and went away to live with their mother, the refusal of the father to maintain them unless they returned to his custody, was not a refusal to maintain within the meaning of this section—*Ma Shwe v Maung Po Chit*, 8 L.B.R. 105, 16 Cr.L.J. 217, 27 I.C. 841. Where the wife (who has been deserted) is allowed maintenance under this section, the mere fact that the son is of tender years and that it is in the interests of the minor son that he should be left with the mother till the father is able to get the custody of the minor son from the Civil Court, is not sufficient to invest the Criminal Court with jurisdiction as regards the son, unless it can be shown that the father has neglected or refused to maintain the boy—*Sita Devi v. Har Narain*, 31 P.L.R. 876, 1930 Cr.C. 982 (1935), 32 Cr.L.J. 196, 129 I.C. 17, A.I.R. 1930 Lah. 886, Ind. Rul. 1937 Lah. 97.

Where a husband, whose wife has deserted him and has taken the child with her, is prepared to take the child, it cannot be held that the father is neglecting or refusing to maintain the child. The father may apply to a Civil Court for the custody of the child, but meanwhile he is bound to pay maintenance for the child, even though it is living with its mother, for the child cannot be allowed to starve merely because its father and mother do not live together—*Maung San v. Ma Lai*, 10 Rang. 486, 1932 Cr.C. 818, 140 I.C. 150, 33 Cr.L.J. 918, A.I.R. 1932 Rang. 183, Ind. Rul. 1932 Rang. 217; *Ma Shwe Kyin v. Maung San Nyein*, 38 Cr.L.J. 782, 169 I.C. 428, 10 R.R. 5, A.I.R. 1937 Rang. 205. The negligence lies in the fact that from the time the child left his protection he has been making no contribution towards his support—*Ma Shwe Kyin v. Maung San Nyein*, supra.

Before passing an order under this section, the Magistrate ought to ascertain whether the husband has been called upon to maintain his wife. Where the husband has not been called upon to do so, and the wife was living with her father who refused to allow her to live with her husband without a money payment from him, the Magistrate cannot make an order for maintenance—*Somree v. Jitun*, 22 W.R. 30.

The neglect or refusal must be a *present neglect* or refusal. Where a wife, subsequent to her application for maintenance, came to live with her husband and compromised her claim, but prayed for an order of the Magistrate to the effect that if her husband failed to maintain her *in future*, he should pay her a certain allowance, it was held that the Magistrate could not pass such order but must dismiss the application, as no *present* refusal or neglect was established—*Kuppa Mudali*, 2 Weir 630. But where the husband neglected his wife for a number of years, the fact that he has succeeded by means of a subterfuge in making her live in his house for a short while during the pendency of an application for maintenance made by her, should not be allowed to affect the decision of the application—*Ghulam Mohammad v. Allah Rakhi*, 41 Cr.L.J. 107, 185 I.C. 69, A.I.R. 1939 Lah. 533, 41 P.L.R. 605. See also Note 1286 under the heading "Wife returning to her husband."

1275. Right of wife to maintenance:—To justify an order under this section, it must be shown that the complainant is the wife of the defendant—*Gulabdas*, 16 Bom. 269; *Lakshmi Ambalām v. Audiammal*, A.I.R. 1938 Mad. 66 (67), 1937 M.Cr.C. 317, 1937 M.W.N. 1131, 46 M.L.W. 766, (1937) 2 M.L.J. 885, 172 I.C. 811, 39 Cr.L.J. 228. The condition precedent to a right of maintenance, in the case of a wife, is the existence of a conjugal relation—*In re Din Mahomed*, 5 All. 226. It is only on proof of the relationship of husband and wife that an order of maintenance should be made; but where such relationship has ceased to exist, an order already made may be stayed—*Sobhan v. Subraton*, 5 Cal. 558. No order for maintenance can be passed under this section as against the husband, in favour of the wife, where there is no proof that the latter is the lawfully married wife of the former, according to his personal law—*Wa Foon v. Ma Thein*, 7 Bur.L.T. 71, 15 Cr.L.J. 484; *Pua Me v. San Hal*, 7 L.B.R. 270, 16 Cr.L.J. 39. Among Jats, Karoo marriage is a valid marriage, and the woman is entitled to maintenance—*Bahadur Singh*, 4 N.W.P. 128. A *muta* wife is entitled to maintenance under this section, though she is not so entitled under the Mahomedan law

—*Luddun Saheba v. Mirza*, 8 Cal. 736. A marriage between a *Naidu* and an *Adi Dravida*, is valid and the *Adi Dravida* wife can claim maintenance against her *Naidu* husband under this section—*Manickam v. Poongavanammal*, 35 Cr.L.J. 852, 148 I.C. 921, 39 M.L.W. 439, 1934 M.W.N. 185, A.I.R. 1934 Mad. 323, 66 M.L.J. 543, A.I.R. 1934 Mad 116.

Where on an application made by the wife for maintenance, the husband denies the validity of the marriage, it is for the Magistrate to decide such question in his own Court. It is erroneous to leave the wife to establish her claim by a civil suit—*Mangli v. Ganda Singh*, 23 P.L.R. 230, 1932 Cr.C. 381 (382), A.I.R. 1932 Lah. 301, 33 Cr.L.J. 447, 137 I.C. 30, Ind. Rul. 1932 Lah. 312. The Calcutta High Court has, however, held that if the husband wishes to impeach the validity of his marriage, he should bring a declaratory suit in a Civil Court when the whole question can be investigated and authorities pros and cons canvassed in this regard. The Magistrate or the High Court ought not to be burdened with the decision of a point of personal civil law which could not possibly concern it. Therefore a claim for maintenance made by a wife under this section cannot be resisted on the ground that the parties were not lawfully married, both having been born Indian Christians and married according to Hindu rites on conversion to Hinduism—*Edward Sailendra v. Snehalata*, 41 C.W.N. 898.

A woman is not entitled to maintenance if she has lived with a man as his wife for 12 years and has also borne him a child. Only legally married women are entitled to maintenance—*Lakshmi Ambalam v. Andiammal*, A.I.R. 1938 Mad. 66, 1937 M.Cr.C. 317, 1937 M.W.N. 1131, 46 M.L.W. 766, (1937) 2 M.L.J. 885, 172 I.C. 811, 39 Cr.L.J. 228. A man of uncertain religion and a Burmese Buddhist woman lived together for 13 years as a man and wife with the repute of being such. There was no proof that the man was a Buddhist and that they were married according to Burmese Buddhist rites. The woman claimed maintenance against the man under this section. Held that the presumption of marriage could not arise from the fact of co-habitation with habit and repute for a number of years and that she was not entitled to maintenance—*Singleyo v. Ma To*, 35 Cr.L.J. 1502, 151 I.C. 1089, A.I.R. 1934 Rang. 166, 1934 Cr.C. 783. Where a Muhammadan married a Buddhist woman, she is to be regarded as a wife for purposes of the Code of Criminal Procedure. Even in the eye of the Muhammadan Law, she appears to be so regarded and it is in accordance with justice, equity and good conscience that she should be so regarded—*Maung Pakhtan v. Ma Sau*, 40 Cr.L.J. 653, 182 I.C. 259, 12 R.R. 1, A.I.R. 1939 Rang 207. The parties were both Madras of the domestic servant class, and were probably people of low caste, among whom *nika* marriages were recognized. The marriage, if it took place at all, took place some 17 or 18 years ago, and there was no evidence that the priest who celebrated the marriage was dead. They lived together as man and wife for many years and in a passport issued to the woman some eight years ago, she was described as the wife of the man. There was proof of admission made by the man to his landlord, in whose house they lived for many years as man and wife, that she was his wife. Held that in these circumstances it would not be reasonable to expect very strict proof of the actual celebration of the marriage—*Bogis Mangati v. Applama*, A.I.R. 1932 Cal. 866, 59 Cal. 1257, 1932 Cr.C. 890, 34 Cr.L.J. 108, 140 I.C. 876.

There is no warrant for holding that a dancing girl once dedicated to a temple can never re-marry; and hence there is no bar to award her maintenance under this section against her husband—*Ramanuja Mudaliar v. Nagarathnammal*, 1937 M.W.N. 735.

Effect of divorce:—A Muhammadan wife is entitled to maintenance up to the date of divorce—*Sha Abu v. Ulfat Bibi*, 19 All. 50, 1896 A.W.N. 173. Even after divorce, she is entitled to maintenance during the *iddat*. This part of the personal law of the parties has not been abrogated by sec. 488, Cr. P. Code—*Shekhan Mian*, 31 Cr.L.J. 1110, 126 I.C. 893, 32 Bom.L.R. 582, 1930 Cr.C. 610; *Ghulam v. Nias*, 1905 P.R. 5, 2 Cr.L.J. 40; *Gulam Mohidin v. Kasara*, 2 Weir 617; *Syed Saib v. Meeran*,

0 Cr.L.J. 502, 20 M.L.J. 12. There is nothing in the provisions of this section which suggest that a husband can avoid payment of sums which a Magistrate might order to be paid under sec. 488 (2), Cr. P. C., by divorcing his wife in the middle of the proceedings. The proper date to be considered is a date on which the application is made. If, on the date on which the application is made, relations of husband and wife exist, the Magistrate has jurisdiction to pass an order under sec. 488 (2) directing the husband to pay sums due on account of maintenance from the date of the application until the period of *iddat* has expired—*Mahomed Nagman v. Zullekhan*, 0 Cr.L.J. 814 (815), 183 I.C. 536, A.I.R. 1939 Sind 179, 12 R.S. 58, I.L.R. 1939 Lar 659. But an order for maintenance *subsequent* to the expiration of the *iddat* is illegal, unless pregnancy is alleged—*Gulam Mohidin*, 2 Weir 617; *Murad*, 1888 A.W.N. 16; *Mahomed Husain v. Ma Pwa*, 13 Bur L.T. 43, 56 I.C. 663; *Mariam v. Kadir*, 6 A.W.N. 942, 1929 Cr.C. 625, 5 Luck. 442.

When a husband pleads non-liability to maintain his wife on the ground of his having divorced her, the Magistrate is bound to entertain and enquire into such plea, and determine on such evidence as may be adduced before him whether the plea is a valid one. Unless the relation of husband and wife exists between them, the Magistrate has no authority to pass an order for maintenance as between husband and wife. If he finds the plea established, he cannot order maintenance—*Shah Abu v. Ulfat*, 19 All. 50; *Khaja Sharfoodeen*, 2 Weir 620; *Hasen Chanea v. Mi Sin*, 16 Cr.L.J. 531, 1915 U.B.R. 1st. Qr. 3. Where a Magistrate makes an order under this section, the order becomes *functus officio* on a subsequent divorce of the wife by the husband—*Jadi*, 17 O.C. 260, 15 Cr.L.J. 646. Where there has been a divorce by mutual consent, the order of maintenance passed in favour of wife cannot stand—*Maung Tin U v. Ma Hla Kyi*, 38 Cr.L.J. 913, 170 I.C. 13, 10 R.Rang 79, A.I.R. 1937 Rang. 246.

1276. Right of children to maintenance:—The child must be *born*; no order can be passed under this section for the maintenance of a foetus, when it is believed that a woman is pregnant. Until it is born, it can hardly be regarded as a child—*Arlee v. Bunsee*, 3 N.W.P. 70; *Anonymous*, 2 Weir 618.

The word 'child' in this section simply means son or daughter. Reference to age is purposely omitted, the object being that any son or daughter is entitled to maintenance so long as he or she is unable to maintain himself or herself—*Bhagat Singh*, 11 Cr.L.J. 27, 1910 P.W.R. 28; *Ma E Mya v. U Ko Ko Gyi*, A.I.R. 1937 Rang. 370 (372), 171 I.C. 800. In *Krishnasamy v. Chandravadana*, 37 Mad. 565, 1913 M.W.N. 695, 20 C. 1005, 14 M.L.T. 224, 25 M.L.J. 349, 14 Cr.L.J. 525; *Baran Shanta v. Ma Chin Tha Ma*, 26 Cr.L.J. 535, 85 I.C. 375, 2 Rang. 628, A.I.R. 1925 Rang. 197; and *Gangaramsa v. Vishnusa*, 23 Cr.L.J. 167, it has been held that the word "child" means one who has not attained majority. The same view has been taken in *Channo Debi v. Daya Ram*, 35 Cr.L.J. 473, 35 P.L.R. 320, 147 I.C. 719, A.I.R. 1933 Lah. 1026, 1934 Cr.C. 12 and *Hemanta v. Monorama*, 36 Cr.L.J. 1114, 157 I.C. 365, A.I.R. 1935 Cal. 488, 19 C.W.N. 432, 61 C.L.J. 141, 62 Cal. 639, 1935 Cr.C. 880. See also Note 1277.

The defendant may be ordered to pay maintenance for his own children, whether legitimate or illegitimate, but not for the child of another person, e.g., for a daughter of his wife by her first husband—*Abdul Rahim v. Amir Begum*, 7 Lah. 365, 27 Cr.L.J. 610.

Legitimate children:—A child born during the continuance of the form of marriage known as *Sambandham* and prevalent among the Nayar community in Malabar, is entitled to maintenance under this section—*Venkataskrishna v. Chimmukuttee*, 22 Mad. 246; *Ayya Patter v. Kalfani*, 22 Mad. 247 (foot-note). Children of a *Nikah* wife are legitimate and entitled to maintenance—*Sheikh Moneerooddeen v. Ramdhan*, 18 W.R. 28.

Illegitimate children:—An order under this section may be passed for the maintenance of legitimate as well as *illegitimate* children. The basis of an application for the maintenance of a child under this section is the paternity of the child irrespective of its legitimacy or illegitimacy—*Nur Mahomed v. Bismulla*, 16 Cal. 781. But before

an order for the maintenance of illegitimate children is passed, it must be proved that the man against whom the woman proceeds was the father of the children—*Hira Lal v. Saheb Jan*, 18 All. 107. In a case where the question at issue is, whether a certain man is the father of a certain child, it is *prima facie* improper to accept without corroboration the mere statement on oath of the mother who asserts the paternity—*Vedanthachari v. Marie*, 27 Cr.L.J. 1095, 97 I.C. 359, 24 M.L.W. 409, A.I.R. 1926 Mad. 1130. Where maintenance is claimed for an illegitimate child from an alleged father, it is not enough that the defendant may have been the father; but the Magistrate must be able to find that in all reasonability no one else can have been the father—*Arunachella v. Kamala*, 2 Weir 621. The Magistrate is not justified in holding that the child is the child of the defendant on the ground of the similarity of the features and the name of the child with those of the defendant—*Nur Mahomed v. Bismulla*, 16 Cal. 781.

Independently of any legislative enactment the law of Malabar does not recognise marriage as a legal institution, the relation being in truth not marriage but a state of concubinage into which the woman enters of her own choice and is at liberty to change when and so often as she pleases and the offspring of such a connection would be entitled to an order for maintenance against the father only if and when the mother's *tavazhi* or *tarwad* is unable to maintain them—*Raman v. Parvathi*, 34 Cr.L.J. 1159, 145 I.C. 970, 38 M.L.W. 587, A.I.R. 1933 Mad. 794, 1933 Cr.C. 1399, 65 M.L.J. 629, 1933 M.W.N. 1276.

Adopted child:—An adopted child does not fall within the phrase "his legitimate or illegitimate child" in this section. Therefore an adoptive father is not liable under this section to pay maintenance to his adopted child—*Nanu Nair v. Puthan Veetil Kathayini Amma*, 38 Cr.L.J. 602, 168 I.C. 782, 45 M.L.W. 431, 1937 M.W.N. 464, (1937) 1 M.L.J. 618, 9 R.M. 648, A.I.R. 1937 Mad. 547, I.L.R. 1937 Mad 775; *Ma E Mya v. U Ko Ko Gyi*, A.I.R. 1937 Rang. 370, 171 I.C. 800.

Children in custody of mother:—Where a mother has the custody of a child and has to maintain it, she is entitled to claim maintenance on its account—*Vaithilinga*, 2 Weir 630. And the father cannot refuse to maintain his children on the ground that they are living with their mother. If he wants to have them in his custody, he must enforce his right, if any, in the Civil Court—*Murugesu v. Sodiamma*, 8 Bur.L.T. 134, 16 Cr.L.J. 656, 30 I.C. 480; *Mi Saw v. S*, 7 I.C. 460, (1910) U.B.R. 1. See also *Maung San v. Ma Lai*, 10 Rang. 486 cited in Note 1274, *ante*. This view of law has not been accepted in—*Sita Devi v. Har Narain*, 32 Cr.L.J. 196 (198), 129 I.C. 17, 1930 Cr.C. 982, A.I.R. 1930 Lah. 886, 31 P.L.R. 876, Ind. Rul. 1931 Lah. 97, where it has been laid down that however desirable such an arrangement might be, it is not sufficient to invest Criminal Courts with jurisdiction under sec. 488 as the neglect or refusal on the part of the father to maintain the child cannot be presumed in such a case. Under the Mahomedan law, the mother is the lawful guardian of her minor daughter, and is entitled to her custody; consequently, the daughter living with her mother can claim maintenance from her father; and the order cannot be refused on the ground that the father is willing to maintain her daughter if her custody is given to him—*Sarfraz v. Miran*, 9 Lah. 313, 29 Cr.L.J. 1052 (1053), 112 I.C. 476, A.I.R. 1928 Lah. 543, 29 P.L.R. 401; *Zahura Bi v. Muhammad Yusuf*, 129 I.C. 216, A.I.R. 1930 Lah. 1043, 32 Cr.L.J. 247, 32 P.L.R. 143, 1930 Cr.C. 1219, Ind. Rul. 1931 Lah. 152; *Mahomed Jusub v. Haji Adam*, 37 Bom. 71, 15 I.C. 520, 14 Bom.L.R. 336; *Moideen*, 21 I.C. 469, 14 Cr.L.J. 597, 14 M.L.T. 223, 25 M.W.N. 355, 1913 M.W.N. 997; *Allah Rakhi v. Karam Ilahi*, 35 Cr.L.J. 344, 147 I.C. 123, 14 Lah. 770, 1933 Cr.C. 1457, A.I.R. 1933 Lah. 969, 35 P.L.R. 34. Where maintenance was claimed by a Mahomedan wife for herself and her children and her husband made a *bona fide* offer to maintain them in his own house, which his wife unreasonably refused to accept and her application was accordingly dismissed, *held* that the Magistrate should have awarded maintenance to the children, whose legal guardian their mother was, and who could not, therefore, be taken separately to live with their father—*Mohideen Bi v. Bashu Sahib*, A.I.R. 1937

Mad. 809, 1937 M.W.N. 565, 46 M.L.W. 318, 171 I.C. 905, (1937) 2 M.L.J. 278, 1937 M.Cr.C. 179; *Akhতার Begum v. Abdul Rashid*, 38 Cr.L.J. 672, 168 I.C. 896, 9 R.L. 699, 38 P.L.R. 1117, A.I.R. 1937 Lah. 236. An enquiry into Muhammadan Law as to custody of children is not made necessary by the Statute law (the Code of Criminal Procedure) which governs these proceedings. The mother is the proper person to have custody of a child of four and the father must maintain that child—*Akhতার Begum v. Abdul Rashid*, supra. A divorced wife is, under the Mahomedan law, as well as under the Marumakatayam law, entitled to the custody of her children, and the father is not thereby relieved of his liability to maintain them—*Ayshabai*, 6 Bom.L.R. 536, 1 Cr.L.J. 599; *Kariyadam v. Kayat Beeran*, 15 Mad. 461; *In re Parathy*, 25 M.L.J. 355, 14 Cr.L.J. 597 (598). But where a child has left its father and has chosen to live with its mother who is leading a life of adultery since she left her husband, the father cannot be directed to pay an allowance to the child under this section—*Parvathi v. Ramaswami*, 2 Weir 630 (631). See also 8 L.B.R. 105 cited in Note 1274, ante.

Children in custody of guardian:—If the father is entitled to the custody of his children as their lawful guardian, he cannot be compelled to pay for their maintenance, if they live separately from him. But if another person is appointed guardian of the children, then the father is liable to maintain them while they are living with such guardian—*Sardar Muhammad v. Nur Muhammad*, 1917 P.R. 22, 18 Cr.L.J. 811 (815).

Offer to maintain children:—If, at the trial, the father makes an offer to maintain his children on condition that they should live with him, the offer is not sufficient to oust the Magistrate of his jurisdiction, if as a matter of fact the father has paid nothing for the maintenance of his children for several years—*Kent v. Kent*, 49 Mad. 891, 49 M.L.J. 335, 26 Cr.L.J. 1597; *Kambu Ammal v. Ranganathan*, 1924 M.W.N. 465, 25 Cr.L.J. 94; *Mi Gauk v. Nga Po*, 2 Cr.L.J. 830, 1905 U.B.R. Cr.P.C. 39. If in fact the father has neglected or refused to maintain his children in the past, the Magistrate can make an order for the payment of monthly allowance for the maintenance of the children, in spite of his offer to maintain the children. Otherwise in those cases where the children are very young, a man, knowing full well that no mother would part with such children, has simply to make an ostensible offer to keep the children with him, and he can thus defeat an application for maintenance. The Magistrate will be entitled to consider the circumstances in which the offer was made, and whether it is right and proper that the children, if not in the custody of the father, should be handed over to him—*David Sasson*, 49 Bom. 562, 27 Bom.L.R. 359, 26 Cr.L.J. 975. If the children are too young (e.g., daughters aged 5 to 10), it is in their interests that they should remain with their mother; and a separate maintenance will be granted to them, in spite of the father's offer to maintain them—*In re Bas Manek*, 52 Bom. 763, 29 Cr.L.J. 1049 (1050). But the Punjab Chief Court has held that if the father offers to maintain his children on condition that they should live with him, the Magistrate should refrain from passing an order against him—*Sardar Muhammad v. Nur Muhammad*, 1917 P.R. 22, 18 Cr.L.J. 811 (815); *Ralla v. Atti*, 1914 P.L.R. 115, 15 Cr.L.J. 529; *Sultan v. Mahtab*, 27 P.L.R. 233, 27 Cr.L.J. 1319; *Man Singh v. Dharman*, 1894 P.R. 18. The Chief Court further holds that although past neglect by a father to support his children may be a cogent factor in deciding that at the time of the application the father is neglecting or refusing to maintain his children, still it should not be considered as sufficient by itself to hold that the offer is not made in good faith. If a father offers to maintain his children on condition that they should live with him, the Magistrate should refrain from passing an order for maintenance until the father has had an opportunity of proving that his offer is made in good faith—*Sardar Muhammad*, supra. The same Court has, however, taken a different view and has held that in the case of a minor who is living with its legal guardian the condition imposed by the father that he would maintain it only if the child want to reside with him, is tantamount to a refusal to maintain the child—*Sarfaraz v. Miran*, 9 Lah. 313,

29 Cr.L.J. 1052, Ind. Rul. 1929 Lah. 39, 112 I.C. 476, A.I.R. 1928 Lah. 543, 29 P.L.R. 401; *Zahura v. Muhammad Yusuf*, 32 Cr.L.J. 247, 129 I.C. 216, A.I.R. 1930 Lah. 1013, Ind. Rul. 1931 Lah. 152, 32 P.L.R. 143, 1930 Cr.C. 1219.

Effect of agreement or compromise:—Obligation to maintain a child is a statutory obligation and the parties cannot contract themselves out of it. Thus, the father cannot divest himself of his liability to maintain his child, by an agreement with his wife—*Alla Pichai*, 2 Weir 648; *Maung Tin U v. Ma Hla Kyi*, 38 Cr.L.J. 913, 170 I.C. 13, A.I.R. 1937 Rang 246, 10 R.Rang. 79. The language of this section is inconsistent with the capacity of a wife to make a contract absolving her husband from his statutory liability. So, where a wife first applied for maintenance but on receipt of a lump sum from her husband withdrew her application, and later on, again applied stating that the lump amount had been expended, and the respondent (husband) objected that the lump amount had been paid in final settlement of all her claims, *held* that the Magistrate should inquire whether the settlement made by the husband still furnishes sufficient means for the wife's support; but if the money has been in fact spent or lost, the wife is entitled to maintenance. The object of the law being to prevent his wife, whom her husband is able to support, from becoming a burden on other people, this object would not be obtained by a contract which ultimately leaves the wife to the charity of her neighbours. The section does not say that a wife is not entitled to maintenance if she is able to maintain herself, or if she has made a bad use of the money which her husband gave her sometime back—*Mi Lee v. Nga Paw*, U.B.R. 1905 Cr.P.C. 54. The mere fact that sec. 488, sub-sec. (1), Cr. P. C., refers to monthly allowances and monthly rates of allowances merely shows that the Court has taken the month as a convenient unit whereby to calculate allowances. It does not show that independently of an order of the Court lump sums cannot be paid for the maintenance of a child. Of course this lump sum is not a complete answer to future applications by the woman. If at any time she finds that she has nothing left of this sum she can apply to the Court for a fresh order for maintenance, and there will be no obstacle then to this fresh order in the fact that this lump sum had been paid on a previous occasion—*Maung Tin U v. Ma Hla Kyi*, *supra*. But it has been held in *Yerukula Jagabandhu v. Jamuna*, 2 Weir 631, that where the mother of the illegitimate children renounced on their behalf all future claims of maintenance by a document on payment of a certain sum by the father, the Magistrate was not competent to pass any further order for maintenance unless there was proof of fraud in the execution of the document, or unless it was proved that there was a valid subsequent oral agreement in supersession of the document. In another Madras case it has been stated that a compromise by the lawful guardian of a minor acting *bona fide* for his benefit cannot be set aside even at his instance, except upon proof of fraud—*Parvathi v. Ramaswami*, 2 Weir 630.

But there can be no doubt that when a compromise made by the guardian of a minor does not appear to be for his benefit, and it is very likely that he would be materially injured by a manifestly inadequate adjustment of his maintenance claim under the section, the compromise will not bind the minor nor any one acting as guardian after the mother's death—*Hildephonsus v. Malone*, 1885 P.R. 13.

Anything short of a decree entitling the wife to maintenance is not sufficient to take away the jurisdiction of the Magistrate. Where there was an agreement between the husband and the wife that the amount of maintenance should be Rs. 7 per month but the agreement was not acted upon in the sense that arrears of maintenance for one year accrued, the Magistrate has jurisdiction to take action under this section—*Saraswati v. Narayan*, 33 Cr.L.J. 634, 138 I.C. 613, 36 C.W.N. 571, 55 C.L.J. 341, 59 Cal. 1229, 1932 Cr.C. 653, A.I.R. 1932 Cal. 698, Ind. Rul. 1932 Cal. 471.

1277. 'Unable to maintain itself':—The words 'unable to maintain itself' refer to the child and not to the wife—*Nga Po*, 10 Bur.L.R. 166.

The father is bound to maintain the child if it is unable to maintain itself, even though its mother may be able to maintain it. The question as to the means of the

mother is not to be taken into account; the true criterion is the inability of the child to support itself—*Mt Them v. Nga Po*, 15 Cr L.J. 278, 7 Bur L.T. 34. A father who has sufficient means is bound to maintain his child who is under the age of majority; and, in fixing the sum payable, no regard should be paid to the fact that the child is able to contribute towards its own support by means of labour or work of any kind—*Baran Shanta v. Ma Chan Tha Ma*, 26 Cr L.J. 535, 85 I.C. 375, 2 Rang. 628, A.I.R. 1925 Rang. 197. The fact that the child belongs to a well-to-do *tarwad* does not relieve the father from his liability to maintain it. The inability referred to in this section relates to the absence of sufficient maturity of physical and mental development in the child rendering it in consequence unable to earn its living by its own efforts, and does not refer to inability through poverty or absence of all means—*In re Parathi*, 25 M.L.J. 355, 14 Cr.L.J. 597 (598), 13 M.W.N. 997. But in *Chanta v. Chakkapayan*, 39 Mad. 957 and *Kariyadan v. Kayal Beeran*, 19 Mad. 461, it has been held that this section has no application to cases where the children are being maintained by a *tarward* which is bound by law to maintain them. The words 'unable to maintain itself' cannot be confined to the tender age of the child but have also reference to its financial position. Therefore, where there are enough funds to support the child in the *tarward* to which it belongs, it cannot be said to be unable to maintain itself—*Thillu Amma v. Sankunni*, 37 M.L.J. 361, 52 I.C. 893, 20 Cr L.J. 733. The offspring of a *sambandham* marriage are entitled to maintenance from their *tavazhi*, and if the *tavazhi* or *tarward* has sufficient means to maintain them, they are not entitled to an order of maintenance under this section—*In re Bharata Aiyar*, 46 M.L.J. 324.

A child who is deaf and dumb and unable to maintain itself is entitled to maintenance even though it may have attained majority—*In re Todd*, 5 N.W.P. 237. A minor girl earning her living by prostitution will still be considered as "unable to maintain herself" because prostitution is not to be treated as a profession by which a girl can maintain herself for the purpose of this section—37 Mad. 565. Where the minor girl is married, the person bound to maintain her is not her natural father but her husband—*Bhojan Lal v. Swarna*, 11 C.W.N. 100 (short notes). A minor married girl, whose husband is willing to maintain her, cannot be regarded as a person unable to maintain herself, and her father cannot be ordered to maintain her on the ground that the husband is not bound to maintain his wife until she attains puberty—*Gurusami Pillai*, 2 Weir 650. But if it in spite of her marriage the girl still remains unable to maintain herself either because her husband is too poor to maintain her or for any other good reason; the father's liability to maintain the child would still exist—*Meenakshi v. Karupanna*, 48 Mad. 503, 48 M.L.J. 183, 26 Cr L.J. 732. The child is entitled to get maintenance until it is able to maintain itself; the Magistrate is not justified in ordering maintenance 'till the child attains the age of 14'; a Magistrate has no power to fix an arbitrary age limit up to which the child will get maintenance—2 P.L.T. 109. A Mahomedan girl aged between 15 to 16 years is not a child able to maintain herself and her father may rightly be ordered to maintain her—*S. A. Haldar v. Sajura Bibi*, A.I.R. 1937 Rang. 518, 172 I.C. 879. Where a boy is aged 17 or 18 and is able to work and earn his living, he cannot be said to be 'unable to maintain himself' and he cannot compel his father to educate him in a college and thus better his prospect—1 Bur.L.J. 123. But a boy of 11 years must be deemed to be a child 'unable to maintain itself', and is entitled to maintenance; it would be contrary to public policy to encourage child labour by holding that a boy of 11 years should contribute towards his own support by work, when he should be in school—*Baran Shanta v. Ma Chan*, 2 Rang. 682, 26 Cr.L.J. 535, 85 I.C. 375, A.I.R. 1925 Rang. 197. A father who has sufficient means is bound to maintain his child who is under the age of majority, and in fixing the sum payable, no regard should be paid to the fact that the child is able to contribute towards its own support by means of labour or work of any kind—*Ma E Shi v. U San Kai*, 40 Cr.L.J. 241 (242), 179 I.C. 643, A.I.R. 1939 Rang. 67, 11 R.Rang. 336.

A boy under 18 years of age can ask for maintenance from his parent so long as he is unable to earn his own living, even though that inability results from his taking an

educational course provided the said educational course is not being undergone with the object of inflicting upon the parent the burden of maintenance—*Shanno Debi v. Daya Ram*, 147 I.C. 719, A.I.R. 1933 Lah. 1026, 1934 Cr.C. 12, 35 Cr.L.J. 473, 35 P.L.R. 320; *Hemanta v. Manorama*, 36 Cr.L.J. 1114, 157 I.C. 365, A.I.R. 1935 Cal. 488, 39 C.W.N. 432, 61 C.L.J. 141, 62 Cal. 639, 1935 Cr.C. 880.

See Note 1276.

1278. Order for maintenance:—Evidence:—The trial Court is entitled to act if it thinks fit upon the evidence of the wife. The law does not require corroboration in cases of this kind, though, of course, such corroboration is always desirable. Where the circumstances strongly support the wife's testimony, the Magistrate is right in accepting it—*Bathulu Bhagirathi v. Bathulu Lakshmi Devi*, 41 Cr.L.J. 718 (719), 189 I.C. 105, A.I.R. 1940 Pat. 242.

Compromise:—The only order that can be passed under this section is either an order allowing maintenance or an order dismissing the application for maintenance. He cannot pass any other order. Where a claim for maintenance is compromised by the parties, the Magistrate is not competent to pass an order in accordance with the terms of the compromise. He can only dismiss the petition and strike it off the file. To pass an order in terms of the compromise would be to assume the functions of the Civil Court—*Lingadu v. Labbakka*, 2 Weir 629; *Kuppa Mudali*, 2 Weir 630. In a later case it has, however, been held that the Magistrate has no power to dismiss an application under this section on the ground that the case has been compromised. It is his duty to pass an order awarding maintenance at a certain amount arrived at in pursuance of the agreement between the parties and mentioned in the joint petition filed by them—*Rama Bai v. Bhoja Rao*, 1937 M.W.N. 640. Where there was a compromise it could not be said that there was refusal to maintain a wife and, therefore, a Magistrate should not pass an order under this section—*Jai'Dial*, 42 P.R. 1888. Even if an order is passed by a Magistrate in terms of the compromise, the order cannot be enforced by Criminal Courts but can be enforced only by Civil Courts—*Sham Singh v. Hakam Devi*, 1930 Cr.C. 623 (624), 31 Cr.L.J. 1179, A.I.R. 1930 Lah. 524; *Raham Ali v. Fateh Bibi*, 108 P.L.T. 1905, 2 Cr.L.J. 690 (692).

Where a husband has in fact neglected or refused to maintain his wife and has thus forced her to make an application under sec. 488, Cr. P. C., his entering into a compromise to pay her a fixed monthly allowance when summoned before the Court, without any attempt to rebut the wife's allegation cannot be said to annul his previous refusal to maintain her so as to take the case outside the provisions of sec. 488, but where such compromise contemplates the passing of an order under sec. 488, an order in the terms of the compromise can properly be passed by the Criminal Court under that section—*Lee v. Lee*, 34 Cr.L.J. 744, 144 I.C. 51, 10 O.W.N. 374, A.I.R. 1933 Oudh 119, 1933 Cr.C. 270, Ind. Rul. 1933 Oudh 226; *Birch v. Birch*, 34 Cr.L.J. 238, 141 I.C. 805, 9 O.W.N. 1189, Ind. Rul. 1933 Oudh 87, A.I.R. 1933 Oudh 122, 1933 Cr.C. 273. The Madras High Court differed from the view of the Lahore High Court as expressed in *Budhu Ram v. Khem Devi*, 95 I.C. 315, A.I.R. 1926 Lah. 469, 27 Cr.L.J. 779 and *Sham Singh v. Hakim Devi*, 127 I.C. 13, A.I.R. 1930 Lah. 524, 31 Cr.L.J. 1179, 1930 Cr.C. 623, and held that if the passing of an order under this section is an essential part of the compromise the Court could not refuse to enforce the order, merely because it was based on a compromise and if the compromise was entirely independent of the Court, the Court would be under no necessity to pass an order under sec. 488, Cr. P. C.—*Mangayamma v. Appalaswami*, 32 Cr.L.J. 688, 131 I.C. 173, 60 M.L.J. 213, A.I.R. 1931 Mad. 185, 33 M.L.W. 405, 1931 M.W.N. 327, Ind. Rul. 1931 Mad. 509, 1931 Cr.C. 226. Following this ruling the Lahore High Court has held that merely because the parties agreed as to what was the proper rate of maintenance, does not mean that sec. 488, Cr. P. C., is no longer applicable; nor does it mean that it can no longer be said that the husband had neglected or refused to maintain his wife—*Hakim Devi v. Sham Singh*, 32 Cr.L.J. 993, 132 I.C. 854, 1931 Cr.C. 862, Ind. Rul. 1931 Lah. 694, 13 Lah. 313. The parties can compromise before the Magistrate by agreeing among themselves as to

what is the proper rate of maintenance. But if the compromise is with respect to other matters which do not come under sec. 488, or where the compromise amounts to an agreement to live separately by mutual consent, the agreement cannot be embodied in an order under this section, and cannot be given effect to in a Criminal Court. In such a case the Magistrate should dismiss the petition for enforcement of the order, and refer the wife to a Civil Court to enforce the agreement—*Pal Singh v. Nihal Kaur*, 33 P.L.R. 292, 1932 Cr.C. 430 (432), A.I.R. 1932 Lah. 349, 33 Cr.L.J. 488, 137 I.C. 364, Ind. Rul. 1932 Lah. 339. It is only where the compromise between the husband and wife does not cover matters outside the purview of sec. 488 that an order for maintenance can properly be passed by a Criminal Court. Where the Magistrate's order incorporated only the agreement as to the amount of maintenance but it purported to be based on a compromise which could not justly be enforced separately from and without regard to the other conditions agreed upon by the parties which conditions a Criminal Court had no jurisdiction to enforce, the Magistrate could not pass such an order—*Ram Saran v. Damodri*, 36 Cr.L.J. 193, 152 I.C. 946, 36 P.L.R. 153, A.I.R. 1934 Lah. 864, 16 Lah. 420, 7 R.L. 346.

The Magistrate can pass an absolute order under this section based on a compromise between the parties referring only to the amount fixed as maintenance and nothing else—*Bhagwati v. Gajadhar*, A.I.R. 1935 All. 294, 37 Cr.L.J. 9, 158 I.C. 1123, 1935 Cr.C. 327.

In *Nirmala v. Bejoy*, 35 Cr.L.J. 606, 148 I.C. 151, 37 C.W.N. 538, 6 R.C. 439, A.I.R. 1933 Cal. 675, 1933 Cr.C. 1157, the Calcutta High Court upheld an order of maintenance based on a compromise, one of the terms to which was that the wife should live separate from the husband. A contrary view was, however, taken in *Colbert v. Colbert*, 35 Cr.L.J. 501, A.I.R. 1933 Cal. 776, 6 R.C. 379, 147 I.C. 914, 37 C.W.N. 736, 1933 Cr.C. 1327 by M. C. Ghose, J., who was in favour of setting aside the order of maintenance in *Nirmala v. Bejoy*, supra.

Discussing the rulings cited above the Nagpur High Court has held that the function of the Magistrate is restricted to passing an order as to the amount of maintenance and that his order should not embody restrictive conditions which could not be enforced in summary criminal proceedings. It would certainly be undesirable if a Magistrate were to pass an order with regard to one part of the compromise incompatible with an order which the Civil Court might pass with regard to the rest; but where the Magistrate restricts himself to the fixation of the amount of maintenance and where that order is to take effect immediately without further conditions, then it would not matter if changes are contemplated in the future—*John P. E. Coelho v. Mrs. Blanche*, 38 Cr.L.J. 170 (172), 166 I.C. 27, A.I.R. 1936 Nag. 228, 1936 Cr.C. 913, 9 R.N. 116, 11 R.L. 1937 Nag. 230.

There is nothing in the provisions of this section which would lead to the conclusion that an order for maintenance passed by a Magistrate with the consent of a husband and wife cannot afterwards be enforced. Whether it is or is not to be enforced depends upon the circumstances of the case into which the Magistrate has power to make an enquiry—*Ram Saran Das v. Mt. Ram Piari*, A.I.R. 1937 All. 115 (117), 1936 A.L.J. 1379, 1936 A.W.R. (H.C.) 1268, 1937 A.L.R. 102, 166 I.C. 894, 38 Cr.L.J. 312, 11 R.L. 1937 All. 430, dissenting from *Pal Singh v. Nihal Kaur* and *Ram Saran v. Damodri*, supra. In *Bhagwan Singh v. Gurcharan Kaur*, 40 Cr.L.J. 794, 183 I.C. 464, A.I.R. 1939 Lah. 209, 41 P.L.R. 527, 12 R.L. 117 the Lahore High Court referred to *Ram Saran Das v. Mt. Ram Piari*, supra, with approval.

The *ratio decidendi* of the rulings *Pal Singh v. Nihal Kaur*, supra and *Ram Saran v. Damodri*, supra, is that where a compromise is with respect to other matters as well which do not come within the purview of this section or where the compromise amounts to an agreement to live separately by mutual consent, then the compromise cannot be given effect to in a Criminal Court. But the condition, in the order of maintenance passed on the basis of a compromise, that the husband will provide a house for his wife where she will live separately from his second wife, does not amount to the husband and wife "living separately by mutual consent," as laid down in sub-sec. (4) of this

section and does not make the order of maintenance illegal or unenforceable—*Bhagwan Singh v. Gurcharan Kaur*, supra.

Whatever the validity of the contention, that an order embodying a petition of compromise cannot be enforced under this section, may be in an application in revision, directed towards the setting aside of the order passed under this section, it has no application whatsoever to a case in which the Magistrate refuses to enforce an order made by his own predecessor and in his own Court: When such an order has actually been made by a Magistrate, a successor cannot refuse to enforce it—*Latifannessa v. Namu*, 44 C.W.N. 734, A.I.R. 1940 Cal. 398, 41 Cr.L.J. 789, 189 I.C. 714.

Where a Magistrate made an order allowing the wife maintenance at the rate of Rs. 10 per mensem and during the pendency of a revisional application against that order in the Court of the Sessions Judge the parties entered into a compromise by which the wife agreed to live with her husband who promised to support her and in the event of the husband's default the wife was entitled to recover the same maintenance, held that the compromise being made out of Court and no order under sec. 488 being made in pursuance of that compromise, the order of the Magistrate allowing maintenance at the rate of Rs. 10 per mensem was neither rescinded nor modified and the Criminal Court cannot take cognizance of the compromise and refuse to enforce the order made by it—*Fazal Din v. Fatima*, 33 Cr.L.J. 121, 135 I.C. 198, Ind. Rul. 1932 Lah. 70, A.I.R. 1932 Lah. 1115, 1932 Cr.C. 135, 32 P.L.R. 927.

Under this section, the Magistrate can award maintenance only and nothing else, e.g., a house to live in—*Makhan v. Harnamo*, 29 Cr.L.J. 909 (910), 111 I.C. 669 (Lah.).

The order under this section must not be *conditional* and must not have reference to any *future* circumstances. When the wife, after compromising the claim for maintenance, prayed for an order by the Magistrate that if her husband failed to support her in future, he should pay her a monthly allowance, it was held that the Magistrate could not pass an order of this nature, he must dismiss the application—*Kuppa Mudali*, 2 Weir 630. An order directing the husband to take away his wife with him, and maintain her, and in the event of his failing to do so or turning her out, to pay a fixed sum to her for maintenance, is a conditional order and hence illegal—*Natha Singh v. Harnam*, 7 Lah. 313, 27 Cr.L.J. 556. An order for maintenance passed on condition that the woman must reside in her husband's house is illegal—*Jamiet*, 1917 P.R. 14, 18 Cr.L.J. 528. The order that if the accused lives with the complainant the latter would not be entitled to any maintenance, is illegal—*Ramzan v. Sahib Bibi*, 29 Cr.L.J. 895, 111 I.C. 575, A.I.R. 1929 Lah. 56.

Who can order:—Only the Magistrate enumerated in this section can inquire into the case and pass an order for maintenance. An inquiry under this section cannot be delegated by a First Class Magistrate to a Magistrate of a lower rank—*Chokalingam Pillai*, 2 Weir 617. A First Class Magistrate cannot refer an application under this section to a Subordinate Magistrate of lower grade and act upon his report—*Sardaran v. Amir*, 1905 P.R. 29; *Venkata v. Paramma*, 11 Mad. 199.

Monthly allowance:—The law empowers a Magistrate only to direct payment of a *monthly* maintenance. An agreement between a husband and wife whereby the husband agreed that he would furnish his wife with certain ornaments, build a house for her, deliver to her *annually* a certain amount of grain, and pay her a certain sum in cash, is not an agreement which can be made the basis of an order under this section, and, therefore, cannot be enforced under its provision—*Viramma v. Narayya*, 6 Mad 283; *Masta*, 21 Cr.L.J. 612, 57 I.C. 276 (Lah.). The payment ordered must be a *monthly* payment. An order for the payment of a certain sum *annually* for the value of clothes is not legal—*Chavadi v. Basuvan*, 2 Weir 627. But where a *razinama* entered into between the parties contains an agreement for the payment of a certain sum annually for value of clothes, the wife is entitled to ask the Court to give effect to the general intention of the parties as disclosed by the *razinama*, by allotting in the monthly allowance the value of the clothes agreed to be paid annually—*Sivabagiam v. Saminatha*, 2 Weir 634.

The payment of maintenance must be in *money*; an order for payment of maintenance in grain is not in accordance with this Code—*Selambal*, 2 Weir 626; *Odachi v. Viramulhan*, 2 Weir 627; *Atru v. Mahou*, 25 Cr.L.J. 1271, 82 I.C. 279, A.I.R. 1925 Lah. 142. So also, an order directing a mixed payment in kind and cash is contrary to the terms of this section—*Mukta v. Dattu Mahadev*, 26 Bom L.R. 186, 25 Cr.L.J. 965, 81 I.C. 613, A.I.R. 1924 Bom. 332. The allowance shall be made in cash and not in kind whether of grain or clothing—*Kaluram v. Chinto*, 34 Cr.L.J. 123, 141 I.C. 15, 28 N.L.R. 284, 1932 Cr.C. 906, A.I.R. 1932 Nag. 183.

An order under this section fixing the duration of the period for which the maintenance is to be paid, is illegal—*Mangala Thayammal v. Mangala Baghavathi*, 2 Weir 634.

1279. Amount of maintenance:—In determining the amount of maintenance, no luxury should be allowed; only the necessaries of life should be considered according to the station in life of the applicant and the means of the respondent—*Dragon v. Dragon*, 4 Bur.L.T. 269, 13 Cr.L.J. 55; *Ma E Mya v. U Ko Ko Gyi*, A.I.R. 1937 Rang. 370 (372), 171 I.C. 800, dissenting from *Nga Hla v. Mi Hla Kyu*, (1909) 1 U.B.R. (Cr.) 17, 4 I.C. 758, 11 Cr.L.J. 40 where it has been laid down that it is not intended to go further than to ensure to the wife or children food, clothing and lodging and that the proceedings under this Chapter do not amount to a civil suit where the issue is as to the social standing of the wife and the amount of alimony appropriate.

The meaning of "maintenance" as used in this section includes the education of children, that is to say, the minimum amount of education which the conventions of the country call for. The mere maintenance of the body is not sufficient; provisions has to be made for the child's developing mind and conscience; and, in our time, "maintenance" should be held to include this. Therefore, any calculation which fails to take these matters into account, is bound to result in an inadequate sum being estimated for the maintenance of the child—*Maung Shwe Ba v. Ma Thein Nya*, 40 Cr.L.J. 440, 180 I.C. 584, A.I.R. 1939 Rang. 95, 1938 Rang. 673, 11 R.Rang. 423. See also Note 1272B.

The maximum amount which can be awarded for the maintenance of each person is now Rs. 100; under the old law it was Rs. 50. The words 'in the whole' mean that a sum of money not exceeding Rs. 100 should be ordered to be paid, and no other payment either in the shape of school fees or medical expenses, etc., should be ordered to be paid. The words do not mean that when a woman makes an application for herself and for her children, she can only be awarded Rs. 100 for the maintenance of herself and of her children whatever be the number. The Magistrate can order a sum not exceeding Rs. 100 to be paid for the wife and for each of the children unable to maintain itself—*Kent v. Kent*, 49 Mad. 891, 49 M.L.J. 335, 26 Cr.L.J. 1597, 90 I.C. 669, A.I.R. 1926 Mad. 59. The words "in the whole" are intended to prevent the Court from exceeding the statutory limit in the case of any particular dependent and are not intended to restrict the powers of the Court to ordering a monthly allowance of Rs. 100 in respect of the maintenance of all the dependants—*Tulsi Das v. Sarju Devi*, 34 Cr.L.J. 590, 143 I.C. 296, 37 C.W.N. 655, A.I.R. 1933 Cal. 406, 1933 Cr.C. 584, Ind. Rul. 1933 Cal. 398; *Maung Ba Tun v. Ma Kyway*, 40 Cr.L.J. 537, 181 I.C. 377, A.I.R. 1939 Rang. 151, 11 R.Rang. 460. The word "or" is used in sec. 488 (1), Cr.P.C. Power is given therein to make an order for the maintenance of the wife "or such child". Therefore, an application can be made for the maintenance of the wife or for the maintenance of the child. There is nothing in the section which says that if an application is made on behalf of the wife, an application shall not lie on behalf of the child. Where an application is made for the maintenance of the wife and the child, it can be treated as an application for an order in favour of the wife and also for an order in favour of the child. Therefore, to contend that when a woman makes an application for herself and for her children, she could only be given Rs. 100 for the maintenance of herself and her children, whatever be the number, is opposed to the clear wording of the section—*M. Bulteel v. R. C. Bulteel*, 39 Cr.L.J. 865, 177 I.C. 334, A.I.R. 1923 Mad. 721, 47 M.L.W. 594, 1938 M.W.N. 424, (1938) 1 M.L.J. 821, I.L.R. 1933 Mad.

729, 11 R.M. 305, overruling *Bulteel v. Emp.*, 1937 M.W.N. 1127. (But see *Palmerino v. Palmerino*, 28 Bom L.R. 1299, 28 Cr.L.J. 49 (50) where an order awarding a total sum of Rs. 150 for the wife and child was held to be in excess of the Magistrate's jurisdiction.) Where a wife applied for maintenance of herself and her four children and the Magistrate ordered the husband to pay Rs. 50 (under the old section) for maintenance of the wife and Rs. 10 for each child, every month, it was held that the order was legal. The husband was liable to maintain his wife and each of his children, and the Magistrate might order him to pay as much as Rs. 50 for each of them, if each child was living with a different person. And the fact that all the children were at the time in the custody of the mother could not affect the question of what should be paid to each child—*Clement v. Florencé*, 4 Bur.L.T. 139, 12 Cr.L.J. 538, 12 I.C. 847.

A prospective order, providing for increase being made in the amount awarded for the child's maintenance hereafter as the child grows older, is not justified by law—*Munglo v. Jumna*, 2 N.W.P. 454. A Magistrate cannot, under this section, make an order for maintenance at a progressively increasing rate. He may, however, under sec. 489, from time to time alter the rate of monthly allowance granted under this section, as the child grows older—*Upendra Nath v. Soudamini*, 12 Cal. 535; *Ramayee*, 14 Mad. 398.

The Magistrate shall order the amount to be paid to the wife or child as the case may be. An order for the payment of the amount of maintenance at the Taluk Kutchery is not authorised by law—*Kallavellapil Alagamma*, 2 Weir 627.

Order should specify amount payable to each person:—An order under this section awarded Rs. 42 for the maintenance of the wife and son; but nothing was said as to what portion was to be for the wife and what portion for the son. At the time the wife applied for enforcement of the order, the son was over 19 years of age and earning sufficient for him to live on. The Magistrate altered (under sec. 489) the monthly allowance into Rs. 25 payable to the wife only. It was held that as regards the son the foundation of the order was taken away when he was able to maintain himself, and it became spent so far as he was concerned and was not enforceable; and that the Magistrate in the original order not having allotted any particular portion to the wife, the order could not be partially enforced to the extent of Rs. 25 by the wife, but that she should make a fresh application for maintenance for herself alone—*Thumbusyami Pillai*, 9 L.B.R. 49, 18 Cr.L.J. 103.

Sub-section (2):—The maintenance allowance is payable only from the date of the order (or at most from the date of the application). A direction to pay maintenance from a date prior to such date is opposed to this section—*Anonymous*, 2 Weir 635; *Abdul Rahim v. Amir Begum*, 7 Lah. 365, 27 Cr.L.J. 610; *Omree v. Elahi*, 1870 P.R. 5. But where an order for such retrospective payment was made with the consent of the parties, the High Court did not interfere—*Anonymous*, 2 Weir 635.

1280. Sub-section (3)—Enforcement of order:—In this sub-section, the words "fails without sufficient cause" have been substituted for the words "wilfully neglects," because of difficulties which had arisen in the interpretation of the word 'wilfully'. Under the old law it was held that before an order for imprisonment could be made on default of payment of maintenance, strict proof was necessary that the non-payment was due to wilful neglect on the part of the defendant, and mere omission to pay the arrears was not sufficient—*Sidheswar v. Gyanada*, 22 Cal. 291; *Bhiku v. Zahuran*, 25 Cal. 291. Under the present law, no such proof is necessary; the simple fact of non-payment without sufficient cause is sufficient to bring this sub-section into operation.

When execution of a maintenance order is applied for and the counter-petitioner files a counter-petition setting out certain grounds on which he contends that the order should not be executed, the Court is bound to consider the sufficiency of the cause alleged by him, and to refuse the execution if the Court is satisfied that the cause is sufficient and to grant execution if the Court is not satisfied with the cause alleged.

The Legislature has used the expression 'sufficient cause' obviously intending that the Magistrate before whom the matter comes up should be in a position to use his judicial discretion having regard to all the circumstances, and that such judicial discretion should not be fettered or limited by any definite rules. The expression 'sufficient cause' is wide enough to include all possible considerations that may be submitted to the Magistrate in the circumstances of the case—*Theetharappa v. Meenakshi*, 48 M.L.J. 949, 26 Cr.L.J. 953.

The words 'sufficient cause' are wide enough to justify the raising of a plea that the order of maintenance passed in favour of a child has become spent owing to the child having attained majority and being able to maintain itself. Consequently, if the Court finds on defence raised that the child attained the age of majority and was able to maintain itself during the period for which the arrears were claimed, it should refuse to grant those arrears; and it is not necessary for the defendant to make a formal application under sec. 489—*U Ba Thaung v. Ma Aye*, 10 Rang. 194, 1932 Cr.C. 476 (477), 137 I.C. 439, 33 Cr.L.J. 495, A.I.R. 1932 Rang. 94, Ind. Rul. 1932 Rang. 130. See also *John P. E. Coelho v. Mrs. Blanche*, 38 Cr.L.J. 170 (172), 166 I.C. 27, A.I.R. 1936 Nag. 228, 1936 Cr.C. 913, 9 R.N. 116, I.L.R. 1937 Nag. 230.

Where the parties entered into a compromise after the passing of the maintenance order under sec. 488 (1), Cr. P. C., the order remains in force but the existence of the compromise, which can be proved at any time, is sufficient ground for any Magistrate to refuse to enforce the order if moved to do so under sec. 488 (3) or sec. 490, Cr. P. Code. It is not until the woman seeks to enforce the order that any necessity for considering the compromise arises—*Sultan Khan Gulshan Khan v. Khanam Jan*, 38 Cr.L.J. 614, 168 I.C. 832, A.I.R. 1937 Pesh. 45, 9 R.Pesh. 133.

Jagir income of a person, against whom maintenance order had been passed by a Magistrate, when collected by the revenue authorities can be taken in satisfaction of the arrears due under the order. The provisions of the Civil Procedure Code, exempting certain property from attachment and sale, do not apply to Criminal Courts. Under sections 4 and 9, Cr. P. C., Civil Courts have no jurisdiction to go into the matter—*Natha Singh v. Mt. Bachint Kaur*, A.I.R. 1937 Lah. 367, 39 P.L.R. 100, 169 I.C. 944.

Under this section, the Magistrate can imprison the persons proceeded against after default is made; but he cannot take security from that person in anticipation of default—*Kanoo Soudagar*, 24 W.R. 72.

This clause lays down that if the amount of maintenance is not paid, a distress warrant should be issued for the realisation of the dues. But the Magistrate cannot order a third party, e.g., a mortgagee of a house belonging to the defendant, to pay the amount to the petitioner monthly out of the rents of the house—*Lalit Mohan v. Sarojini*, 35 C.W.N. 692 (693), 1931 Cr.C. 844, 134 I.C. 1199, A.I.R. 1931 Cal. 644.

Warrant:—A warrant in respect of the breach of the order is a condition precedent to the inflicting of imprisonment—*Naram*, 9 All 240. A Police officer when executing a warrant for the levy of the amount of maintenance recoverable under this section, can break open an inner door of the house of the person against whom it is executed—*Baba, Ratanlal* 431. The law contemplates only a single warrant of commitment regarding the arrears due at the time of issue. Where six months' arrears are due, a separate warrant or commitment for each months' arrears is bad in law—*Bhiku v. Zahuran*, 25 Cal. 291. The levy of accumulated arrears of maintenance by a single warrant and in one proceeding is not illegal—*Anonymous*, 7 M.H.C.R. App. 38; *Anonymous*, 6 M.H.C.R. App. 22, 2 Weir 637.

See Note 1297.

Second proviso:—The second proviso (newly added) to this sub-section provides a period of limitation (one year from the date of default) within which the application is to be made for the issue of the warrant for realisation of the outstanding arrears.

Under this proviso, the Court's power extends to the recovery of arrears falling due

for a period of one year next before the date of application, but it does not follow that that power should be fully exercised; and so the petitioner may ask for the recovery of arrears for less than a year—*Kanagammal*, 50 Mad. 663, 28 Cr.L.J. 271 (272).

The proviso does not say that no such warrant shall be issued except on an application made to levy such amount within a period of one year from the date on which it became due. The proviso was clearly enacted to prevent the person in whose favour an order for maintenance was made from being negligent, and allowing arrears to pile up until their recovery would become a hardship or an impossibility. It was not meant that a loop hole should be given to the person against whom an order for maintenance was made to evade payment by preventing the service of process on him. In fact the proviso was evidently worded in the way it was expressly to preclude the possibility of such an evasion. The order of the Magistrate allowing enforcement of the order of maintenance for fifteen months was held to be correct when a previous case for realisation of arrears of maintenance for first four of these fifteen months was made in the fifth month and had to be closed as the person liable to make payment could not be traced—*U Hpay Lait v. Ma Po Byu*, A.I.R. 1935 Rang. 407, 37 Cr.L.J. 91, 159 I.C. 289, 13 Rang. 289, 1935 Cr.C. 1192.

This proviso can only mean that a person in whose favour an order for maintenance has been made must, to enable her to recover arrears of maintenance, apply to the Court to recover such arrears within one year from the date the arrears became due. She cannot allow arrears to accumulate indefinitely and apply for the recovery of those arrears for the first time after several years. Any other interpretation of the proviso would clearly lead to an absurdity, for a party who at any time successfully evaded execution of a maintenance order for the period of one year would escape all liability for that period and this could hardly be said to be the intention of the Legislature—*Chetibai v. Naroomal Shehoomal*, 39 Cr.L.J. 847 (848), 176 I.C. 863, 11 R.S. 72, A.I.R. 1938 Sind 151.

Where the first application for arrears of maintenance is made long after a period of one year from the date on which the order of maintenance was made, the fact that the applicant so long delayed does not under this proviso deprive her entirely of all rights of maintenance or to an order for maintenance. This proviso merely provides that if an applicant delays the making of the application for the payment of arrears, she can recover no more than 12 months' arrears due to her at the time of her application. There is nothing in the words of the section which justifies the interpretation that the absence of an application within 12 months of the order of maintenance extinguishes such orders—*Jasodabai v. Tarachand Tekchand*, 40 Cr.L.J. 776, 183 I.C. 336, 1 I.L.R. 1939 Kar. 674, A.I.R. 1939 Sind 180, 12 R.S. 51.

1281. Imprisonment:—The imprisonment may be awarded only after default is made. Where it was provided in the order of maintenance itself that in case of the defendant failing to pay the monthly allowance, he should be imprisoned for a term of 16 days for every breach of the order, it was held that the order was in anticipation of the procedure to take place on a wilful default, if such should occur, and was therefore illegal—*Anonymous*, 2 Weir 637, 5 M.H.C.R. App. 34. Imprisonment is a means of enforcing payment, and an order for imprisonment can be passed only after there has been negligence to pay the amount of maintenance—*Sidheswar v. Gyanada*, 22 Cal. 291.

Release on payment:—The imprisonment awarded under this section is not punishment for contempt of the Court's order, nor it is an absolute sentence. It is passed only for the unpaid portion of the maintenance, or in other words, it is owing to default of payment of the unrealised portion of the maintenance. Therefore, the imprisonment ought to cease upon payment of the amount of maintenance—*Sidheswar v. Gyanada*, 22 Cal. 291. The words "until payment if sooner made" did not occur in the 1882 Code, and therefore it was held in *Biyacha v. Maidin*, 8 Mad. 70, that a person committed to jail for non-payment of maintenance was not entitled to be released even when the arrears were paid, because the imprisonment ordered in default of

payment was held to be a punishment for breach of the order of the Court. This ruling is no longer good law.

Nature of imprisonment:—The imprisonment under this section may be either simple or rigorous, looking to the terms of sec. 2 (18) of the General Clauses Act—*Naran*, 9 All. 240. In Form XL not only simple but rigorous imprisonment is provided for, but it would be safer to order the imprisonment to be simple—*Mr. Tasok v. Nga Te Naung*, U.B.R. (1892-1896) 70.

Term of imprisonment:—It was held in *Naran*, 9 All. 240, and 6 M.H.C.R. App. XXIII that the maximum term of imprisonment was one month, and that only one month's imprisonment could be awarded on the whole in default of payment of the aggregate of the amounts due. But these cases were decided under the Code of 1872 and are not of any authority at present. In a Burma case also the same view has been taken, and the words "for the whole or any part of each month's allowance remaining unpaid" have been interpreted to mean "for the whole or any part of every month's or all months' allowance remaining unpaid"—*Zaw Ta*, 7 Bur.L.T. 225, 15 Cr.L.J. 434. Such an interpretation seems to be too laboured. The more reasonable view has been taken in the following cases. Thus, the Punjab Chief Court expressed the opinion that a person who has wilfully neglected to pay the arrears of maintenance for several months may be imprisoned for more than one month—*Mono v. Kaka*, 1877 P.R. 12; *Budhu Ram*, 1919 P.R. 12, 50 I.C. 847, 20 Cr.L.J. 367. The imprisonment in default of payment of maintenance is not to be limited to one month. The procedure contemplated by the Code appears to be to ascertain how many months' arrears are due. The maximum imprisonment that can be imposed will then be *one month for each month's arrears* and if there is a balance representing the arrears for a portion of a month, a further term of a month's imprisonment may be imposed for such arrears—*Allapichai v. Mohidin*, 20 Mad. 3, 2 Weir 638; *Bhiku v. Zahuran*, 25 Cal. 291; *Saradar Mahmud*, A.I.R. 1935 Lah. 758, 36 P.L.R. 191, 37 Cr.L.J. 207, 159 I.C. 939, 1935 Cr.C. 1050, 8 R.L. 437; *Budhu Ram*, 50 I.C. 847, A.I.R. 1919 Lah. 197, 20 Cr.L.J. 367, 12 P.P. 1919 (Cr.), 75 P.L.R. 1919.

Discussing the rulings mentioned above the Full Bench of the Allahabad High Court has held that the intention of the Legislature was to empower the Magistrate after execution of one warrant only to sentence a person, who has defaulted in the payment of maintenance ordered under this section to imprisonment for a period of one month in respect of each month's default and that the section does not enjoin that there should be a separate warrant in respect of each term of imprisonment for one month. In other words, where arrears have been allowed to accumulate, a Court can issue one warrant and impose a cumulative sentence of imprisonment—*Beni*, 39 Cr.L.J. 720, 176 I.C. 397, 1 L.R. 1938 All. 750, 1938 O.W.N. 591, 1938 A Cr.C. 47, 10 R.A. 104, 1938 A.L.R. 601, 1938 A.L.J. 565, 1938 A.W.R. (H.C.) 379, A.I.R. 1938 All. 386 (F.B.), overruling *Naran*, supra.

A person making default in respect of payment of certain arrears of maintenance cannot be sentenced a *second time* to imprisonment for the same default for which he has already undergone a sentence of imprisonment—*Maung Kyi Pe v. Ma Htu*, 10 Rang. 176, 1932 Cr.C. 475 (476), 33 Cr.L.J. 554, A.I.R. 1932 Rang. 93, 137 I.C. 673, Ind. Rul. 1932 Rang. 154.

Costs:—The person in whose favour an order of maintenance has been passed, cannot be ordered to pay expenses of the person committed to jail for his maintenance—*Sardar Muhammad*, A.I.R. 1935 Lah. 758, 36 P.L.R. 191, 37 Cr.L.J. 207, 159 I.C. 939, 1935 Cr.C. 1050.

1282. When order cannot be enforced:—Where the husband has been adjudged an insolvent, the order of maintenance cannot be enforced so long as the order of adjudication stands, and he cannot, therefore, be imprisoned for default of payment—*Halhide v. Halhide*, 50 Cal. 867, 25 Cr.L.J. 1088, 81 I.C. 912, A.I.R. 1924 Cal. 230. This case relates to cl. (3) of sec. 488 and decides that if the husband has applied for

for a period of one year next before the date of application, but it does not follow that that power should be fully exercised; and so the petitioner may ask for the recovery of arrears for less than a year—*Kanagammal*, 50 Mad. 663, 28 Cr.L.J. 271 (272).

The proviso does not say that no such warrant shall be issued except on an application made to levy such amount within a period of one year from the date on which it became due. The proviso was clearly enacted to prevent the person in whose favour an order for maintenance was made from being negligent, and allowing arrears to pile up until their recovery would become a hardship or an impossibility. It was not meant that a loop hole should be given to the person against whom an order for maintenance was made to evade payment by preventing the service of process on him. In fact the proviso was evidently worded in the way it was expressly to preclude the possibility of such an evasion. The order of the Magistrate allowing enforcement of the order of maintenance for fifteen months was held to be correct when a previous case for realisation of arrears of maintenance for first four of these fifteen months was made in the fifth month and had to be closed as the person liable to make payment could not be traced—*U Hpay Latt v. Ma Po Byu*, A.I.R. 1935 Rang. 407, 37 Cr.L.J. 91, 159 I.C. 289, 13 Rang. 289, 1935 Cr.C. 1192.

This proviso can only mean that a person in whose favour an order for maintenance has been made must, to enable her to recover arrears of maintenance, apply to the Court to recover such arrears within one year from the date the arrears became due. She cannot allow arrears to accumulate indefinitely and apply for the recovery of those arrears for the first time after several years. Any other interpretation of the proviso would clearly lead to an absurdity, for a party who at any time successfully evaded execution of a maintenance order for the period of one year would escape all liability for that period and thus could hardly be said to be the intention of the Legislature—*Chetibai v. Naroomal Shehoomal*, 39 Cr.L.J. 847 (848), 176 I.C. 863, 11 R.S. 72, A.I.R. 1938 Sind 151.

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1281. Imprisonment:—The imprisonment may be awarded only *after* default is made. Where it was provided in the order of maintenance itself that in case of the defendant failing to pay the monthly allowance, he should be imprisoned for a term of 16 days for every breach of the order, it was held that the order was in *anticipation* of the procedure to take place on a wilful default, if such should occur, and was therefore illegal—*Anonymous*, 2 Weir 637, 5 M.H.C.R. App 34. Imprisonment is a means of enforcing payment, and an order for imprisonment can be passed only *after* there has been negligence to pay the amount of maintenance—*Sidheswar v. Gyanada*, 22 Cal. 291.

Release on payment:—The imprisonment awarded under this section is not punishment for contempt of the Court's order, nor it is an absolute sentence. It is passed only for the unpaid portion of the maintenance, or in other words, it is owing to default of payment of the unrealised portion of the maintenance. Therefore, the imprisonment ought to cease upon payment of the amount of maintenance—*Sidheswar v. Gyanada*, 22 Cal. 291. The words "until payment if sooner made" did not occur in the 1882 Code, and therefore it was held in *Biyacha v. Maidin*, 8 Mad. 70, that a person committed to jail for non-payment of maintenance was not entitled to be released even when the arrears were paid, because the imprisonment ordered in default of

payment was held to be a punishment for breach of the order of the Court. This ruling is no longer good law.

Nature of imprisonment:—The imprisonment under this section may be either simple or rigorous, looking to the terms of sec. 2 (18) of the General Clauses Act—*Narain*, 9 All. 240. In Form XL not only simple but rigorous imprisonment is provided for, but it would be safer to order the imprisonment to be simple—*Mi Tasok v. Nga Te Naung*, U.B.R. (1892-1896) 70

Term of imprisonment:—It was held in *Narain*, 9 All. 240, and 6 M.H.C.R. App. XXIII that the maximum term of imprisonment was one month, and that only one month's imprisonment could be awarded on the whole in default of payment of the aggregate of the amounts due. But these cases were decided under the Code of 1872 and are not of any authority at present. In a Burma case also the same view has been taken, and the words "for the whole or any part of each month's allowance remaining unpaid" have been interpreted to mean "for the whole or any part of every month's or all months' allowance remaining unpaid"—*Zaw Ta*, 7 Bur.L.T. 225, 15 Cr.L.J. 434. Such an interpretation seems to be too laboured. The more reasonable view has been taken in the following cases. Thus, the Punjab Chief Court expressed the opinion that a person who has wilfully neglected to pay the arrears of maintenance for several months may be imprisoned for more than one month—*Mono v. Kaka*, 1877 P.R. 12; *Budhu Ram*, 1919 P.R. 12, 50 I.C. 847, 20 Cr.L.J. 367. The imprisonment in default of payment of maintenance is not to be limited to one month. The procedure contemplated by the Code appears to be to ascertain how many months' arrears are due. The maximum imprisonment that can be imposed will then be *one month for each month's arrears* and if there is a balance representing the arrears for a portion of a month, a further term of a month's imprisonment may be imposed for such arrears—*Allapichai v. Mohidin*, 20 Mad. 3, 2 Weir 638; *Bhiku v. Zahuran*, 25 Cal. 291; *Saradar Mahmud*, A.I.R. 1935 Lah. 758, 36 P.L.R. 191, 37 Cr.L.J. 207, 159 I.C. 939, 1935 Cr.C. 1050, 8 R.L. 437; *Budhu Ram*, 50 I.C. 847, A.I.R. 1919 Lah. 197, 20 Cr.L.J. 367, 12 P.P. 1919 (Cr.), 75 P.L.R. 1919

Discussing the rulings mentioned above the Full Bench of the Allahabad High Court has held that the intention of the Legislature was to empower the Magistrate after execution of one warrant only to sentence a person, who has defaulted in the payment of maintenance ordered under this section to imprisonment for a period of one month in respect of each month's default and that the section does not enjoin that there should be a separate warrant in respect of each term of imprisonment for one month. In other words, where arrears have been allowed to accumulate, a Court can issue one warrant and impose a cumulative sentence of imprisonment—*Beni*, 39 Cr.L.J. 720, 176 I.C. 397, I.L.R. 1938 All. 750, 1938 O.W.N. 591, 1938 A.Cr.C. 47, 10 R.A. 104, 1938 A.L.R. 601, 1938 A.L.J. 565, 1938 A.W.R. (H.C.) 379, A.I.R. 1938 All. 386 (F.B.), overruling *Narain*, *supra*.

A person making default in respect of payment of certain arrears of maintenance cannot be sentenced a *second time* to imprisonment for the same default for which he has already undergone a sentence of imprisonment—*Maung Kyi Pe v. Ma Htu*, 10 Rang. 176, 1932 Cr.C. 475 (476), 33 Cr.L.J. 554, A.I.R. 1932 Rang. 93, 137 I.C. 673, Ind. Rul. 1932 Rang. 154.

Costs:—The person in whose favour an order of maintenance has been passed, cannot be ordered to pay expenses of the person committed to jail for his maintenance—*Sardar Muhammad*, A.I.R. 1935 Lah. 758, 36 P.L.R. 191, 37 Cr.L.J. 207, 159 I.C. 939, 1935 Cr.C. 1050.

1282. When order cannot be enforced:—Where the husband has been adjudged an insolvent, the order of maintenance cannot be enforced so long as the order of adjudication stands, and he cannot, therefore, be imprisoned for default of payment—*Halshide v. Halshide*, 50 Cal. 867, 25 Cr.L.J. 1088, 81 I.C. 912, A.I.R. 1924 Cal. 230. This case relates to cl. (3) of sec. 488 and decides that if the husband has applied for

insolvency and has been adjudicated an insolvent, it cannot be said that he has wilfully neglected to maintain his wife under cl. (3) of sec. 488, Cr. P. C., and that the order for adjudication being conclusive on the point of his inability to pay his debts, the Magistrate may not issue a warrant for enforcement of the order passed under sec. 488, Cr. P. Code. There is, however a change in cl. (3) of sec. 488. The words "fail without sufficient cause" are substituted for the words "wilfully neglects". The case is not an authority on the question of the jurisdiction of the Magistrate to pass an order under sub-sec. (1) of sec. 488 in case the husband has applied for insolvency and neglected to maintain his wife—*Mahomedalli*, 31 Cr.L.J. 609, 124 I.C. 127, 31 Bom.L.R. 1366, A.I.R. 1930 Bom. 144. See also *Sardar Muhammad*, A.I.R. 1935 Lah. 753 (760), 36-P.L.R. 191, 37 Cr.L.J. 207, 159 I.C. 939, 1935 CrC. 1050, where it has been laid down that under section 44 (1) (d), Insolvency Act, an order of discharge shall not release the insolvent from any liability under an order of maintenance made under this section.

As the law stands at present, however, the amended section 488 (3), Cr. P. C., does not specify wilful neglect. That definition was contained in the law before amendment. But under the amended Code if any person ordered to pay maintenance fails, without "sufficient cause", to comply with that order, the Magistrate may proceed by means of a distress warrant. Under the previous law, he could only do so on proof of wilful neglect by the party to comply with the order made and what the case of *Haljhide v. Haljhide*, referred to above, lays down is that an order of adjudication in insolvency is a complete answer to an allegation of wilful neglect. That case, however, does not lay down that an order of adjudication, in itself, is a rebuttal of an allegation that the insolvent has failed without sufficient cause to comply with the order of the Magistrate directing the payment of maintenance. The correct position seems to be, therefore, that on presentation of an application to a Magistrate, the duty of the Magistrate is to decide, in the first place, whether the person against whom the adjudication is made, has failed without sufficient cause to comply with the order and if that fact is established, to proceed as directed by sec. 488 (3), Cr. P. Code—*Radharani Dasi v. Mati Lal Sen*, A.I.R. 1940 Cal. 569, 71 C.L.J. 507, 44 C.W.N. 898, I.L.R. (1940) 2 Cal. 110. The mere fact that the husband has been adjudicated an insolvent does not show that he is unable to pay for the maintenance of his wife and that constitutes sufficient cause for non-payment. The property of the insolvent which vests in the Receiver does not include any property which is exempted by the Code of Civil Procedure, 1908, from liability to attachment and sale in execution of a decree. Under the provisions of sec. 60, Civil Procedure Code as now enacted, the salary to the extent of the first hundred rupees and one-half of the remainder of such salary is exempt from attachment. The husband would, therefore, if he is prepared to do work and earn salary, be in a position to support his wife—*Shyama Charan v. Auguri Debi*, 39 Cr.L.J. 553, A.I.R. 1938 All. 253, 175 I.C. 235, I.L.R. 1938 All. 486, 1938 A.L.J. 225, 1938 A.Cr.C. 19, 10 R.A. 652, 1938 A.L.R. 391, 1938 A.W.R. (H.C.) 157. Assuming that the order for payment of past maintenance constituted a debt provable in insolvency, but even so, a protection order under sec 25, Presidency Towns Insolvency Act, does not protect the debtor from being proceeded against in a Criminal Court. A provable debt might have been incurred by reason of some criminal offence, such as cheating or criminal misappropriation. It is obvious that a protection order would not protect against prosecution and conviction for such an offence and also a protection order does not protect against the special statutory power of committal given to a Criminal Court—*Mahammed Hussein v. Emp.*, A.I.R. 1940 Bom. 344, 42 Bom.L.R. 742. The wording of this section shows that in every case it is the duty of the Magistrate to find out whether the person ordered to pay maintenance under this section has or has not failed without sufficient cause to comply with the order. Neither the protection order nor the adjudication order could be conclusive on this point. The question is one of fact which the Magistrate has to decide for himself. *Prima facie*, of course, it would appear to a Magistrate that an order of protection or an order of adjudication would be sufficient to show that failure to comply with, an order to

pay maintenance had not been without sufficient cause, but it cannot be said that the Magistrate's hands would be tied by the order of the Insolvency Court—*Muni Krishnayya v. Akulamma*, A.I.R. 1940 Mad. 697, 1940 M.W.N. 237, 1940 M.Cr.C. 83, (1940) 1 M.L.J. 868, 51 M.L.W. 718, 41 Cr.L.J. 785, 189 I.C. 692, I.L.R. 1940 Mad. 692. No doubt the adjudication of insolvency might to some extent alter the position. Insolvency is *prima facie* evidence of inability to pay a debt on the part of a husband but it cannot be treated as conclusive evidence—*Mahomed Hussein v. Emp*, *supra*.

Arrears of maintenance are a debt provable in insolvency and in respect of which a protection order can be given—*S Yakia v. Amaturrab Ghousunnissa Begum*, 37 Cr.L.J. 1129, 165 I.C. 297, 44 M.L.W. 292, A.I.R. 1936 Mad. 793, 71 M.L.J. 430, 1936 M.W.N. 1024, I.L.R. 1937 Mad. 90, following *Takee Bibi v. Abdool Khan*, 5 Cal. 536 and *Halfhide v. Halfhide*, *supra*.

The term "arrest or detention" used in sec 31 of the Provincial Insolvency Act (V of 1920) cannot include arrest in execution of a Criminal Court process or detention under a sentence of imprisonment passed by a Criminal Court. It is clear that arrest or detention must mean arrest or detention in pursuance of an order of a Civil Court passed in execution of a decree of such Court. An order passed by a Magistrate under section 488 (3), Cr. P. C., for the imprisonment of a person who fails to pay a maintenance is a sentence of imprisonment. The protection order in favour of such a person does not protect him from arrest under a warrant issued by a Criminal Court or detention in accordance with a sentence of imprisonment by such Court—*Shyama Charan v. Anguri Debi*, *supra*. It is not possible for a Magistrate who has passed a sentence of imprisonment under sec. 488 (3), Cr. P. C., to cancel the sentence merely because the insolvency Court has issued an order of protection. The sentence of imprisonment is a punishment inflicted for breach of the order. It cannot be considered in the terms of sec. 23, Provincial Insolvency Act (V of 1920), that a person who has been sentenced under sec. 488 (3), Cr. P. C., is under "imprisonment in execution of the decree of any Court for the payment of money"—*Muni Krishnayya v. Akulamma*, *supra*.

If the person against whom an order of maintenance has been made dies, the order cannot be enforced against his estate—*Ead Ali v. Lal Bibi*, 41 Cal. 88, 17 C.W.N. 1130.

When a composite order of maintenance of a wife and child has been made and it is not known what proportion of the total amount awarded is to be devoted to the maintenance of the wife, it is not possible to enforce the order in respect of the maintenance of the wife—*Thambuswamy Pillay v. Ma Lon*, 9 L.B.R. 49, 37 I.C. 311, A.I.R. 1917 L.B. 84, 18 Cr.L.J. 103, 10 Bur.L.T. 209. But where an order is made against a father for the maintenance of his three children and subsequently the eldest child attains majority and is in a position to maintain himself, the order ceases to be enforceable in respect of him but it does not cease to be enforceable in respect of the remaining two children—*Ma E Shi v. U San Kai*, 40 Cr.L.J. 241, 179 I.C. 643, A.I.R. 1939 Rang. 67, 11 R.Rang. 336.

The defendant's inability to pay is not a ground for the Magistrate's refusal to enforce the order for maintenance. If the allowance granted is too excessive, he may revise the rate of maintenance on further inquiry, and the order will take effect from the date of such inquiry—*Vembali*, 2 Weir 636.

1283. Offer to maintain wife:—Where the husband offers to receive his wife to live with him, an order for maintenance should not be made except on proof of adultery or cruelty on the part of the husband—*Makhan v. Harnamo*, 29 Cr.L.J. 909 (910), 111 I.C. 669 (Lah.). Where the husband offers to maintain his wife and the wife states that she is willing to live with him, the Magistrate cannot make an order under this section, unless the complainant (wife) satisfies him that notwithstanding such offer there is a just ground for making such order—*Hakimi v. Mouze*, 1 C.L.J. 214. See also *Phani Khan*, 16 Cr.L.J. 86, A.I.R. 1914 Lah. 590, 26 I.C. 998, 213 P.L.R. 1915.

But the mere offer to maintain is not sufficient—*Saraswati v. Narayan*, A.I.R. 1932 Cal. 698 (699), 33 Cr.L.J. 634, 138 I.C. 613, 36 C.W.N. 571, 55 C.L.J. 341, 59 Cal. 1229, 1932 Cr.C. 653, Ind. Rul. 1932 Cal. 471, following *Kent v. Kent*, A.I.R. 1926 Mad. 59, 90 I.C. 669, 49 Mad. 891, 49 M.L.J. 335, 26 Cr.L.J. 1597. The offer to maintain must be a *bona fide* offer, and not made with the object of escaping obligation—*Dragon v. Dragon*, 4 Bur.L.T. 269, 13 Cr.L.J. 55. If it is found that the husband had formerly ill-treated his wife, and turned her out of his house, his subsequent offer to keep her in his house cannot be taken to be *bona fide*; and he cannot escape his liability to maintain her under this section merely by such offer, because he may break his promise as soon as she gets home—*Aishan v. Sher Muhammad*, 22 Cr.L.J. 149, 59 I.C. 853 (Lah.); *Kaluram*, A.I.R. 1932 Nag. 183, 28 N.L.R. 284, 1932 Cr.C. 906; *Pritam v. Basant*, 27 Cr.L.J. 507, 93 I.C. 971, A.I.R. 1926 Lah. 353; *Sama Jetha*, 54 Bom. 548, 1930 Cr.C. 780 (782). In a claim for maintenance it is no defence for a husband to say that he is prepared to take his wife back if the facts show that the wife has reasonable cause for fearing to return to her husband's home. If a wife has been ill-treated and there is ground for believing that if she returns the ill-treatment will continue, then the wife is entitled to live apart from her husband. In such a case the husband, who is the guilty party, must maintain his wife. Causing a wife to leave the protection of the husband by ill-treatment is tantamount to driving the wife deliberately from the home. In such a case the wife is justified in refusing to return to her husband—*Bathulu Bhagirathi v. Bathulu Lakshmi Devi*, 41 Cr.L.J. 718 (719), 189 I.C. 105, A.I.R. 1940 Pat. 242. But see *Nur Muhammad v. Harjan*, 36 Cr.L.J. 792, 155 I.C. 609, A.I.R. 1934 Lah. 946 36 P.L.R. 181, 1934 Cr.C. 1334, where it has been laid down that the mere fact that some three years ago the husband beat the wife and turned her out is no reason for holding that the subsequent offer was not *bona fide* or could justify the refusal of the wife to go back to her husband. In such a case unless the Magistrate gives his finding that the offer is not *bona fide* or that the reason given by the wife for not going back to her husband is sufficient, the order for maintenance is illegal.

; This section contemplates a careful order made after a careful inquiry. It is wrong to dismiss an application by the wife under this section on the mere offer of the husband to maintain her without taking any evidence or giving any finding as to neglect or refusal to maintain the wife or as to the sufficiency or otherwise of the wife's reasons for refusing to live with her husband. "Finding" means a finding after an inquiry which is of a judicial nature—*Nooran v. Rasool Baksh*, 40 Cr.L.J. 496, 181 I.C. 75, 11 R.S. 204, A.I.R. 1939 Sind 80, I.L.R. 1939 Kar. 383.

The husband left the house in which he and his wife were living together and went to live elsewhere. He left behind him a note pointing out that they had been quarrelling even since they were married and that owing to these quarrels and unpleasantness, he was unable to continue their joint living. He further alleged that he suspected that his wife on one occasion had poisoned his soup. The husband made no attempt to maintain his wife who instituted a suit for judicial separation which was dismissed. Subsequently there was an attempt on the part of the neighbours to bring about a compromise which also failed as the husband told that he could not compromise. The wife then applied for maintenance under this section. It was contended that as the wife's suit for judicial separation failed, and as the husband was ready to maintain her, it could not be said that she was refusing to live with him for sufficient cause and she was, therefore, not entitled to maintenance. Held that in such circumstances the Magistrate quite rightly refused to believe that the belated offer to maintain his wife on condition that she lived with him was made *bona fide*. It made no difference that in the interim the wife had brought a suit for judicial separation which had failed. That suit did not alter the fact that the husband had deserted his wife and failed to maintain her. The order of maintenance was, therefore, proper—*Bibian Ludwig De Cruz v. Alice Winifred De Cruz*, 39 Cr.L.J. 287, 173 I.C. 212, 10 R.R. 322, A.I.R. 1938 Rang. 25.

The offer must be to maintain wife *as wife*. It has, however, been held in *Gulabdas Bhaidas*, 16 Bom. 269 that where the husband offered to keep the complainant in his house, not as wife but as servant or dependant, the offer was a sufficient offer within the meaning of this section. But this decision does not seem to be just. The Madras High Court rightly lays down that an offer to maintain wife must be one to maintain her with the consideration due to her position as wife—*Manatha Achari*, 17 Mad. 260. And therefore where a Hindu husband having two wives offered to maintain his first wife in his own house, adding that he would not live with her, but would supply grain for her to cook her own food and eat it separately in the house, such an offer was not a sufficient offer within the meaning of this section—*Marakkal v. Kandappa*, 6 Mad. 371; *Sakrulla v. Fatma*, 25 Cr.L.J. 453, 77 I.C. 805, A.I.R. 1924 Nag. 297. Following *Gulabdas Bhaidas*, supra, the Allahabad High Court has held that the object of proceedings for maintenance is to prevent vagrancy and that object is attained by the provision of lodging, food and clothing. A husband is bound to maintain his wife but he is not bound to do more than supply her with lodging, food and clothing, he is not bound to maintain her as wife—*Kumli*, 25 Cr.L.J. 1249 (1251), 82 I.C. 257, A.I.R. 1935 All. 73. In a recent case similar view has been taken by the Madras High Court—*Arunachala v. Anandayammal*, cited in Note No. 1284. The offer must be an offer by the husband to maintain the wife in *his own house*. An offer of maintenance in a *separate* residence even though the residence be one befitting the status of the wife is not sufficient. The wife is entitled to be kept in the house where her husband lives, and so she may refuse the offer of her husband to provide her with a separate house, and may claim maintenance—*In re Bai Manek*, 52 Bom. 763, 29 Cr.L.J. 1049 (1050).

1284. Grounds of wife's refusal to live with husband:—An order for separate maintenance in favour of the wife may be made under this section if the wife has some just ground for living apart from her husband—*Bai Parvati v. Ghanchi*, 44 Bom. 972 (975). Inability of husband and wife to agree to live together is not a ground for ordering separate maintenance for wife—*Jesmut v. Shoojaut*, 6 W.R. 59. A Magistrate cannot pass an order for maintenance, where the husband has neither ill-treated his wife nor has refused or neglected to maintain her but she of her own accord and without any just ground left her husband's house and protection and refuses to live with him unless he gives her a separate house—*Tota v. Durgi*, 30 P.L.R. 367, 30 Cr.L.J. 861 (862); *Gangumal v. Himathmal*, 36 Cr.L.J. 1457, 158 I.C. 376, 8 R.S. 50. When the wife voluntarily leaves her husband's house without sufficient justification, she is not entitled to any order under this section, unless the husband refuses to maintain her, or turns her out or ill-treats her, so as to make it impossible for her to live with her husband—*Gourishankar v. Bai Reva*, 5 Bom.L.R. 614.

If the husband is willing to maintain his wife, but the wife refuses to live with him, the Magistrate should *make an inquiry* as to why she is not willing to go and live with her husband. She should be given a chance by the Magistrate to substantiate her reasons for refusal by such evidence as she can produce. The omission of the inquiry vitiates the proceedings—*Sultan v. Mahtab*, 27 P.L.R. 233, 27 Cr.L.J. 1319; *Subbayya v. Ambamma*, 9 Cr.L.J. 501, 2 I.C. 155; *Said Bibi v. Umar Din*, 31 P.L.R. 664, 1930 Cr.C. 533, 32 Cr.L.J. 468, 130 I.C. 51, A.I.R. 1930 Lah. 464, Ind. Rul. 1931 Lah. 243.

The following are proper grounds for the wife's refusal to live with her husband —

(1) *Cruelty* :—If the husband so ill-treats his wife (e.g., drives her out with blows) that she is compelled to leave his house, she is justified in refusing to live with her husband and in claiming maintenance—*Rajpati v. Deoli*, 46 All. 877 (878); *Kalviya v. Hira*, 1929 A.L.J. 1208, 31 Cr.L.J. 3, 120 I.C. 195, A.I.R. 1929 All. 950, 1929 Cr.C. 593; and the fact that the parties belong to a low class makes no difference—*Kalviya*, supra. Under the Code of 1882, cruelty was the only ground on which a wife was justified in living separately from her husband and demanding maintenance. But the words "that he habitually treated his wife with cruelty" which occurred in the Code of 1882 have been substituted by the words "that there is just ground for so doing." This alteration gives the Magistrate larger discretion in giving maintenance. The present Code does

But the mere offer to maintain is not sufficient—*Saraswati v. Narayan*, A.I.R. 1932 Cal 698 (699), 33 Cr.L.J. 634, 138 I.C. 613, 36 C.W.N. 571, 55 C.L.J. 341, 59 Cal. 1229, 1932 Cr.C. 653, Ind. Rul. 1932 Cal. 471, following *Kent v. Kent*, A.I.R. 1926 Mad. 59, 90 I.C. 669, 49 Mad. 891, 49 M.L.J. 335, 26 Cr.L.J. 1597. The offer to maintain must be a *bona fide* offer, and not made with the object of escaping obligation—*Dragon v. Dragon*, 4 Bur.L.T. 269, 13 Cr.L.J. 55. If it is found that the husband had formerly ill-treated his wife, and turned her out of his house, his subsequent offer to keep her in his house cannot be taken to be *bona fide*; and he cannot escape his liability to maintain her under this section merely by such offer, because he may break his promise as soon as she gets home—*Aishan v. Sher Muhammad*, 22 Cr.L.J. 149, 59 I.C. 853 (Lah.); *Kalutam*, A.I.R. 1932 Nag 183, 28 N.L.R. 284, 1932 Cr.C. 906; *Pritam v. Basant*, 27 Cr.L.J. 507, 93 I.C. 971, A.I.R. 1926 Lah. 353; *Sama Jetka*, 54 Bom. 548, 1930 Cr.C. 780 (782). In a claim for maintenance it is no defence for a husband to say that he is prepared to take his wife back if the facts show that the wife has reasonable cause for fearing to return to her husband's home. If a wife has been ill-treated and there is ground for believing that if she returns the ill-treatment will continue, then the wife is entitled to live apart from her husband. In such a case the husband, who is the guilty party, must maintain his wife. Causing a wife to leave the protection of the husband by ill-treatment is tantamount to driving the wife deliberately from the home. In such a case the wife is justified in refusing to return to her husband—*Bathulu Bhagirathi v. Bathulu Lakshmi Devi*, 41 Cr.L.J. 718 (719), 189 I.C. 105, A.I.R. 1940 Pat. 242. But see *Nur Muhammad v. Harjan*, 36 Cr.L.J. 792, 155 I.C. 609, A.I.R. 1934 Lah. 946, 36 P.L.R. 181, 1934 Cr.C. 1334, where it has been laid down that the mere fact that some three years ago the husband beat the wife and turned her out is no reason for holding that the subsequent offer was not *bona fide* or could justify the refusal of the wife to go back to her husband. In such a case unless the Magistrate gives his finding that the offer is not *bona fide* or that the reason given by the wife for not going back to her husband is sufficient, the order for maintenance is illegal.

4 This section contemplates a careful order made after a careful inquiry. It is wrong to dismiss an application by the wife under this section on the mere offer of the husband to maintain her without taking any evidence or giving any finding as to neglect or refusal to maintain the wife or as to the sufficiency or otherwise of the wife's reasons for refusing to live with her husband. "Finding" means a finding after an inquiry which is of a judicial nature—*Nooran v. Rasool Baksh*, 40 Cr.L.J. 496, 181 I.C. 75, 11 RS 204, A.I.R. 1939 Sind 80, I.L.R. 1939 Kar. 383.

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The offer must be to maintain wife *as wife*. It has, however, been held in *Gulabdas Bhaidas*, 16 Bom. 269 that where the husband offered to keep the complainant in his house, not as wife but as servant or dependant, the offer was a sufficient offer within the meaning of this section. But this decision does not seem to be just. The Madras High Court rightly lays down that an offer to maintain wife must be one to maintain her with the consideration due to her position as wife—*Manatha Achari*, 17 Mad. 260. And therefore where a Hindu husband having two wives offered to maintain his first wife in his own house, adding that he would not live with her, but would supply grain for her to cook her own food and eat it separately in the house, such an offer was not a sufficient offer within the meaning of this section—*Marakkal v. Kandappa*, 6 Mad. 371; *Sakrulla v. Fatma*, 25 Cr.L.J. 453, 77 I.C. 805, A.I.R. 1924 Nag. 297. Following *Gulabdas Bhaidas*, supra, the Allahabad High Court has held that the object of proceedings for maintenance is to prevent vagrancy and that object is attained by the provision of lodging, food and clothing. A husband is bound to maintain his wife but he is not bound to do more than supply her with lodging, food and clothing, he is not bound to maintain her as wife—*Kumli*, 25 Cr.L.J. 1249 (1251), 82 I.C. 257, A.I.R. 1935 All. 73. In a recent case similar view has been taken by the Madras High Court—*Arunachala v. Anandayammal*, cited in Note No 1284. The offer must be an offer by the husband to maintain the wife in his own house. An offer of maintenance in a separate residence even though the residence be one befitting the status of the wife is not sufficient. The wife is entitled to be kept in the house where her husband lives, and so she may refuse the offer of her husband to provide her with a separate house, and may claim maintenance—*In re Bai Manek*, 52 Bom. 763, 29 Cr.L.J. 1049 (1050).

1284. Grounds of wife's refusal to live with husband:—An order for separate maintenance in favour of the wife may be made under this section if the wife has some just ground for living apart from her husband—*Bai Parvati v. Ghanchi*, 44 Bom 972 (975). Inability of husband and wife to agree to live together is not a ground for ordering separate maintenance for wife—*Jesmut v. Shoojaut*, 6 W.R. 59. A Magistrate cannot pass an order for maintenance, where the husband has neither ill-treated his wife nor has refused or neglected to maintain her but she of her own accord and without any just ground left her husband's house and protection and refuses to live with him unless he gives her a separate house—*Tota v. Durgi*, 30 P.L.R. 367, 30 Cr.L.J. 861 (862); *Gangumal v. Himathmal*, 36 Cr.L.J. 1457, 158 I.C. 376, 8 R.S. 50. When the wife voluntarily leaves her husband's house without sufficient justification, she is not entitled to any order under this section, unless the husband refuses to maintain her, or turns her out or ill-treats her, so as to make it impossible for her to live with her husband—*Gourishankar v. Bai Reva*, 5 Bom.L.R. 614.

If the husband is willing to maintain his wife, but the wife refuses to live with him, the Magistrate should make an inquiry as to why she is not willing to go and live with her husband. She should be given a chance by the Magistrate to substantiate her reasons for refusal by such evidence as she can produce. The omission of the inquiry vitiates the proceedings—*Sultan v. Mahtab*, 27 P.L.R. 233, 27 Cr.L.J. 1319; *Subbayya v. Ambamma*, 9 Cr.L.J. 501, 2 I.C. 155; *Said Bibi v. Umar Din*, 31 P.L.R. 664, 1930 Cr.C. 533, 32 Cr.L.J. 468, 130 I.C. 51, A.I.R. 1930 Lah. 464, Ind. Rul. 1931 Lah. 243.

The following are proper grounds for the wife's refusal to live with her husband:—

(1) *Cruelty*.—If the husband so ill-treats his wife (e.g. drives her out with blows) that she is compelled to leave his house, she is justified in refusing to live with her husband and in claiming maintenance—*Raypati v. Deoti*, 46 All. 877 (878); *Kalviya v. Hira*, 1929 A.L.J. 1208, 31 Cr.L.J. 3, 120 I.C. 195, A.I.R. 1929 All. 950, 1929 Cr.C. 593; and the fact that the parties belong to a low class makes no difference—*Kalviya*, supra. Under the Code of 1882, cruelty was the only ground on which a wife was justified in living separately from her husband and demanding maintenance. But the words "that he habitually treated his wife with cruelty" which occurred in the Code of 1882 have been substituted by the words "that there is just ground for so doing." This alteration gives the Magistrate larger discretion in giving maintenance. The present Code does

not restrict the payment of maintenance, when the wife is living separately, only to cases of cruelty—*Dragon v. Dragon*, 4 Bur.L.T. 269, 13 Cr.L.J. 55. Where the husband did not habitually ill-treat the wife but behaved in a very violent manner towards her, it is not necessary for her to prove habitual ill-treatment in order to justify her refusal to return to his house—*Ignatious v. Alagamma*, 36 Cr.L.J. 1044, 156 I.C. 968, A.I.R. 1935 Rang. 192, 1935 Cr.C. 748. A wife is not bound to return to her husband and live with him if really she has reasonable apprehension of physical ill-treatment—*Sundarammal v. Palaniandi Mudali*, A.I.R. 1940 Mad. 292, 1939 M.W.N. 1255, (1940) 1 M.L.J. 171, 1940 MCr.C. 9, 51 M.L.W. 204, 41 Cr.L.J. 532, 188 I.C. 32. There are other grounds on which the wife may live separately and claim maintenance, and these are stated below.

(2) If a Christian husband reverts to Hinduism and marries a second (Hindu) wife, the Christian wife may refuse to live with her husband, and apply for maintenance—*Anonymous*, 4 M.H.C.R. App 3.

(3) Adultery on the part of the husband, although not punishable under the I. P. Code may nevertheless constitute sufficient cause for the wife living separately from her husband and enable her to claim maintenance under this section—*Gantapalli v. Gantapalli*, 20 Mad. 470 (472); *Malcolm De Castro*, 13 All 348. Where the husband is living with a mistress in the house at the time of application, the wife is entitled to refuse to live with him, and a subsequent offer made by the husband in Court to give up his mistress does not deprive the wife of her right of refusal to live with her husband—*Garraty v. Garraty*, 14 Bur.L.R. 240, 8 Cr.L.J. 422. But in such cases, the Magistrate should take into consideration the social habits of the particular community to which the parties belong. If that community does not completely disapprove of concubinage and tolerates it so far as to give kept woman some status and rights, the fact that the husband keeps a concubine ought not by itself to entitle the wife to claim separate maintenance—*Gantapalli v. Gantapalli*, 20 Mad. 470 (475). The circumstance that a Hindu husband keeps a concubine in the house will not entitle a wife to an allowance for maintenance if her husband is willing to receive her and treat her with the consideration which is due to her position—*Latchmi v. Pavadai*, 2 Weir 641. A married woman should not, however, be put to the degradation of being brought into the society of a concubine of her husband—*Abdul v. Sugrabi*, 37 Cr.L.J. 86, 159 I.C. 120, 18 N.L.J. 107; *Ram Saran Das v. Mt. Ram Piari*, A.I.R. 1937 All. 115 (116), 1936 A.L.J. 1379, 1936 A.W.R. (H.C.) 1268, 1937 A.L.R. 102, 166 I.C. 894, 38 Cr.L.J. 312, 1 L.R. 1937 All 430. If the husband is keeping in his own house another woman as his mistress, the wife is justified in refusing to accept his offer to take her to live with him, and to refuse to return to him. If he does not offer to expel the mistress from the house or to satisfy his wife that the mistress is no longer there, the Magistrate is perfectly entitled to pass an order for maintenance—*Joseph Henry Robert v. Alice Kamalam Robert*, 1937 M.W.N. 984. But the wife cannot exact a promise of sexual fidelity before she returns to live with her husband. Where the husband has never insulted his wife to compel her to live in the same house as his mistress and offers to take her back, and maintain her, she cannot refuse to go unless he will give up his mistress and cannot claim separate maintenance—*P. Amaldoss v. Kamala Amaldoss*, A.I.R. 1937 Mad. 794, 46 M.L.W. 324, (1937) 2 M.L.J. 488, 1937 M.W.N. 1197, 1937 MCr.C. 284, 171 I.C. 914.

(4) Where the breach between the husband and wife is irremediable and it is quite impossible for the latter to return to the former after many years' separation without leading to fresh trouble and dispute, she is entitled to live separately and get maintenance—*Nihal Kaur v. Bhagwan*, 170 P.L.R. 1914, 15 Cr.L.J. 554, A.I.R. 1914 Lah. 185, 24 I.C. 962 (distinguished in *J. Chan Toon v. Ma Ti*, 37 Cr.L.J. 6, 159 I.C. 81, A.I.R. 1935 Rang. 359, 1935 Cr.C. 1083 on the ground that in that case the wife had already obtained an order many years ago and the question was whether the husband was entitled to have the order set aside on his offering to take his wife back); *Baloch v. Zainib*, 32 P.L.R. 619, 1931 Cr.C. 849 (850), 32 Cr.L.J. 1251, 131 I.C.

817, A.I.R. 1931 Lah. 561, Ind. Rul. 1931 Lah. 1009. But if the wife finds her husband cold and indifferent, it may make her prefer to live separately from him; but that is a matter of preference or choice. She cannot be said to have been forced to live separately from him. Her departure amounts definitely to a refusal to live with her husband even if the parties could not be said to be living apart by mutual consent and she is not entitled to an order of maintenance from her husband under this section—*Chan Toon v. Ma Ti*, supra.

(5) The marriage of a Mahomedan with the step-mother of his wife is not valid under the Mahomedan law. The wife is entitled in such a case to say that she would not live with her husband during the continuance of such marriage—*Sheik Issake v. Biyyamunni*, 2 Weir 647.

(6) Where a Burmese Buddhist has taken a lesser wife without the consent of the chief wife, the latter can refuse to live with her husband and at the same time claim maintenance—*Ma Ka v. Po Saw*, 4 L.B.R. 340, 9 Cr.L.J. 25. Also, according to Burmese Buddhist law, the fact that the husband took a second wife might be a good reason for the first wife's refusal to live with him, unless he provided her with a separate residence—*Po Nyein v. Ma Shwe*, 11 Bur.L.T. 105, 47 I.C. 866; *Ma Ka v. Po Saw*, supra. See also *Maung Paik v. Ma Ohu Sint*, infra.

(7) Where the Magistrate found that there was nothing before him from which he could conclude that the husband was even in the past anxious that his wife should come away from her mother to live with him, secondly, that his present offer was not *bona fide*, but made simply with the object of escaping liability, and finally that he used to neglect her and treat her badly, until he finally left her after assaulting her, this is a finding of "sufficient reason" within the meaning of sub-section (4) of this section—*Richard Bruce Whigham Teasdale v. Florence Teasdale*, 39 Cr.L.J. 969, 177 I.C. 939, 66 C.L.J. 567, A.I.R. 1938 Cal 623.

The following are *not sufficient grounds* for the wife's refusal to live with her husband:—

(1) The fact that the husband has married again does not entitle the first wife to separate maintenance, if the husband is willing to maintain her in his house—*Arumugam v. Tulukanam*, 7 Mad 187; *Khushala*, 1880 P.R. 27; *Basant v. Kuri*, 1882 P.R. 31; *Dhara v. Nando*, 1878 P.R. 2; *Purushotam*, Ratanlal 7; *Waryam Singh*, 1914 P.R. 12, 15 Cr.L.J. 577, 25 I.C. 329, 245 P.L.R. 1914; *Pritam v. Basant*, 93 I.C. 971, 27 Cr.L.J. 507, A.I.R. 1926 Lah. 353, *Ramzan v. Sahib Bibi*, 29 Cr.L.J. 895, 111 I.C. 575, A.I.R. 1929 Lah. 56; *Kirpal v. Santi*, 28 Cr.L.J. 236, 99 I.C. 1036, A.I.R. 1927 Lah. 168; *Sukrulla v. Fatma*, 35 Cr.L.J. 453, 77 I.C. 805, A.I.R. 1924 Nag 297. Though this is not a just ground for the first wife's refusal to live with her husband, that is a factor to be taken into account in considering whether the offer is really *bona fide* or not—*Sundarammal v. Palaniandi Mudali*, A.I.R. 1940 Mad 292, 1939 M.W.N. 1255, (1940) 1 M.L.J. 171, 1940 M.C.R.C. 9, 51 M.L.J. 204, 41 Cr.L.J. 532, 188 I.C. 32. The existence of a co-wife with whom, the complainant had quarrels, or the husband's want of affection for the complainant or his greater affection for the co-wife, is not a valid ground of the complainant's refusal to live with her husband—*Ganda Singh v. Atma Devi*, 1901 P.R. 14. The fact that the younger wife will suffer annoyance from the elder wife and that the husband may not protect her from such annoyance, is not a proper ground for the younger wife's refusing to live with her husband and claiming maintenance—*Maung Waing v. Ma Chit*, 1904 U.B.R. 1st Qr. (Cr. P. C.) 10, 1 Cr.L.J. 545, 10 Bur.L.R. 319. But two wives of a Burmese Buddhist do not live or cannot live amicably in the same house. Therefore even if the wife is asked to live with the husband in the same house with his another wife and even if she refuses, she is perfectly justified in doing so and is entitled to claim maintenance—*Maung Paik v. Ma Ohu Sint*, 40 Cr.L.J. 702, 182 I.C. 671, A.I.R. 1939 Rang 210, 12 R.Rang. 24.

(2) Minority of the wife is not a ground for her not living with her husband, if the husband offers to maintain his wife in his house—*Jandoo*, 1882 P.R. 1; though in

not restrict the payment of maintenance, when the wife is living separately, only to cases of cruelty—*Dragon v. Dragon*, 4 Bur.L.T. 269, 13 Cr.L.J. 55. Where the husband did not habitually ill-treat the wife but behaved in a very violent manner towards her, it is not necessary for her to prove habitual ill-treatment in order to justify her refusal to return to his house—*Ignatious v. Alagamma*, 36 Cr.L.J. 1044, 156 I.C. 968, A.I.R. 1935 Rang. 192, 1935 Cr.C. 748. A wife is not bound to return to her husband and live with him if really she has reasonable apprehension of physical ill-treatment—*Sundarammal v. Palaniandi Mudali*, A.I.R. 1940 Mad. 292, 1939 M.W.N. 1255, (1940) 1 M.L.J. 171, 1940 M.Cr.C. 9, 51 M.L.W. 204, 41 Cr.L.J. 532, 188 I.C. 32. There are other grounds on which the wife may live separately and claim maintenance, and these are stated below.

(2) If a Christian husband reverts to Hinduism and marries a second (Hindu) wife, the Christian wife may refuse to live with her husband, and apply for maintenance—*Anonymous*, 4 M.H.C.R. App. 3.

(3) Adultery on the part of the husband, although not punishable under the I. P. Code may nevertheless constitute sufficient cause for the wife living separately from her husband and enable her to claim maintenance under this section—*Gantapalli v. Gantapalli*, 20 Mad. 470 (472); *Malcolm De Castro*, 13 All. 348. Where the husband is living with a mistress in the house at the time of application, the wife is entitled to refuse to live with him, and a subsequent offer made by the husband in Court to give up his mistress does not deprive the wife of her right of refusal to live with her husband—*Garraty v. Garraty*, 14 Bur.L.R. 240, 8 Cr.L.J. 422. But in such cases, the Magistrate should take into consideration the social habits of the particular community to which the parties belong. If that community does not completely disapprove of concubinage and tolerates it so far as to give kept woman some status and rights, the fact that the husband keeps a concubine ought not by itself to entitle the wife to claim separate maintenance—*Gantapalli v. Gantapalli*, 20 Mad. 470 (475). The circumstance that a Hindu husband keeps a concubine in the house will not entitle a wife to an allowance for maintenance if her husband is willing to receive her and treat her with the consideration which is due to her position—*Latchmi v. Pavadai*, 2 Weir 541. A married woman should not, however, be put to the degradation of being brought into the society of a concubine of her husband—*Abdul v. Sugrabi*, 37 Cr.L.J. 86, 159 I.C. 120, 18 N.L.J. 107; *Ram Saran Das v. Mt. Ram Piar*, A.I.R. 1937 All 115 (116), 1936 A.L.J. 1379, 1936 A.W.R. (H.C.) 1268, 1937 A.L.R. 102, 166 I.C. 894, 38 Cr.L.J. 312, 11 L.R. 1937 All 430. If the husband is keeping in his own house another woman as his mistress, the wife is justified in refusing to accept his offer to take her to live with him, and to refuse to return to him. If he does not offer to expel the mistress from the house or to satisfy his wife that the mistress is no longer there, the Magistrate is perfectly entitled to pass an order for maintenance—*Joseph Henry Robert v. Alice Kamalam Robert*, 1937 M.W.N. 984. But the wife cannot exact a promise of sexual fidelity before she returns to live with her husband. Where the husband has never insulted his wife to compel her to live in the same house as his mistress and offers to take her back, and maintain her, she cannot refuse to go unless he will give up his mistress and cannot claim separate maintenance—*P. Amaldoss v. Kamala Amaldoss*, A.I.R. 1937 Mad. 794, 46 M.L.W. 324, (1937) 2 M.L.J. 488, 1937 M.W.N. 1197, 1937 M.Cr.C. 284, 171 I.C. 914.

(4) Where the breach between the husband and wife is irremediable and it is quite impossible for the latter to return to the former after many years' separation without leading to fresh trouble and dispute, she is entitled to live separately and get maintenance—*Nihal Kaur v. Bhagwan*, 170 P.L.R. 1914, 15 Cr.L.J. 554, A.I.R. 1914 Lah. 185, 24 I.C. 962 (distinguished in *J. Chan Toon v. Ma Ti*, 37 Cr.L.J. 6, 159 I.C. 81, A.I.R. 1935 Rang 359, 1935 Cr.C. 1083 on the ground that in that case the wife had already obtained an order many years ago and the question was whether the husband was entitled to have the order set aside on his offering to take his wife back); *Balock v. Zainib*, 32 P.L.R. 619, 1931 Cr.C. 849 (850), 32 Cr.L.J. 1231, 134 I.C.

such a case, having regard to her tender age, it might be better that she should live with her parents.

(3) Where the husband is willing to maintain his wife, the fact that the prompt dower had not been paid is not a ground for separate residence and maintenance—*Sadar Din v. Suban*, 1888 P.R. 6; *Mehtab v. Dina*, 1880 P.R. 15. The non-payment by the husband of a prompt dower may be a good and sufficient reason under the Muhamaddan Law for a married woman to withhold her person from her husband, but it does not follow that such non-payment is a sufficient or good ground within the meaning of this section so as to empower a Court to pass a decree for maintenance to a Muhammadan wife against a husband who is willing to maintain her upon condition of her living with him. Non-payment of prompt dower is not sufficient reason under the provisions of this section to entitle a wife to claim separate maintenance when she refuses to live with her husband without any good reason—*Muhammad Azizullah v. Abdul Halim*, 36 Cr.L.J. 524, 154 I.C. 561, 1935 O.W.N. 292

(4) Where the husband offered to give his wife maintenance in his house but wanted her to live in a separate room and not to associate with the other members of his family and she refused the offer, *held* that she had no sufficient grounds for refusing and that under sec. 488, Cr. P. C., she could only claim to be maintained on a scale appropriate to her station in life but could not claim to be treated "as a wife." This section has nothing to do with ordinary conjugal rights; it deals with "maintenance" only which cannot include anything more than appropriate food, clothing and lodging—*Arunachala v. Anandayammal*, 34 Cr.L.J. 950, 145 I.C. 378, 38 M.L.W. 392, A.I.R. 1933 Mad. 688, 65 M.L.J. 386, 1933 Cr.C. 1178, 1933 M.W.N. 1029, 56 Mad. 913.

(5) So long as a Jewish husband does not harass a *Christian* wife, so long as he treats her as husband should and permits her to practise her own religion and does not apply any temporal or moral pressure to her to cause her to abandon her religion or to adopt his, the Christian wife of the Jewish husband has no right to leave her husband. If she does so, she cannot reasonably expect that the Court should award her maintenance from him—*Talkar*, 27 Cr.L.J. 1177 (1178), 97 I.C. 809, 19 S.L.R. 128, A.I.R. 1926 Sind 278.

1285. Sub-section (4):—"Living in adultery":—Living in adultery means following a course of adulterous conduct more or less *continuous*; a single act of adultery cannot be considered as living in adultery—*Gantapalli v. Gantapalli*, 20 Mad. 470; *Paiki v. Vishwanath*, 5 N.L.R. 19, 9 Cr.L.J. 390; *Patala Atchmma v. Patala Mahalakshmi*, 30 Mad. 332, 17 M.L.J. 279, 5 Cr.L.J. 359; *In re Fulchand*, 52 Bom. 160, 108 I.C. 24, A.I.R. 1928 Bom. 59, 30 Bom.L.R. 79, 29 Cr.L.J. 314 (315); *Ram Autar v. Raghuri*, 13 O.L.J. 802, 3 O.W.N. 717, 27 Cr.L.J. 1190; *Gopaldeo v. Ratni*, 30 Cr.L.J. 403, 115 I.C. 161, A.I.R. 1929 Nag 238, Ind Rul. 1929 Nag 97; *Ma Thein v. Maung Mya Khin*, 38 Cr.L.J. 646, 168 I.C. 825, 9 R.R. 368, A.I.R. 1937 Rang. 67; *Chetibai v. Naroomal Shehoomal*, 39 Cr.L.J. 847 (849), 176 I.C. 863, 11 R.S. 42, A.I.R. 1938 Sind 151. The word 'living in adultery' refer to a course of conduct or at least to something more than a single lapse from virtue. Where the wife, two years prior to the application for maintenance, had given birth to an illegitimate child, but since that time she had been living with her parents leading a chaste and respectable life, she cannot be said to be living in adultery so as to disentitle her to maintenance—*Kallu v. Kaunsilia*, 26 All. 326, 1 A.L.J. 18, 1 Cr.L.J. 84, 1904 A.W.N. 23; *Nandan*, 1881 A.W.N. 37. Although the woman may be found to have given birth to an illegitimate child it is open to the Magistrate to find that, apart from that circumstance, she is not living in adultery—*Jalindra v. Gouri Bala*, 25 Cr.L.J. 1184, 88 I.C. 608, 29 C.W.N. 647, A.I.R. 1925 Cal. 794.

The principle is that a husband is absolved from the obligation to maintain his wife when his wife has a *de facto* protector with whom she lives and by whom she is being maintained as if she were his wife. The obligation of a husband to maintain his wife arises from the anxiety of the Legislature to protect deserted wives from the bitter necessity

of earning a living by trading on their sex. That obligation, however, ceases when it has been voluntarily assumed by some man other than the woman's husband. No woman can fairly claim a right to be kept by two men. But it obviously is not the law that a man may desert and neglect his wife and thus tempt her to unchastity and then resist her claim to be maintained by him on the ground that she is unchaste—*Lakshmi Ambalam v. Audiammal*, A.I.R. 1938 Mad 66, 1937 M.Cr.C. 317, 1937 M.W.N. 1131, 46 M.L.W. 766, (1937) 2 M.L.J. 885, 172 I.C. 811, 39 Cr.L.J. 228. It cannot be said that, unless a married woman lives with the adulterer in the latter's own house and is maintained by him as wife, the husband will be liable to pay maintenance under this section. Emphasis is no doubt to be laid on the words "is living in adultery". The clear implication from the words used by the Legislature in this section is that, unless the wife is actually living in adultery at or about the time of the application, she is not disentitled to obtain maintenance. It is nowhere said in the section and there is no need to introduce additional words therein that "living in adultery" must be in the house of the adulterer. The words 'living in adultery' are merely indication of the principle that occasional lapses from virtue are not a sufficient reason for refusing maintenance. Continued adulterous conduct is what is meant by 'living in adultery'. The question, therefore, for the Magistrate to decide is whether there had been such adulterous conduct on the part of the wife at or about the time of the application, that is to say, shortly before or shortly after the application was made, interpreting the word shortly in a reasonable manner—*Kista Pillai v. Amirthammal*, 39 Cr.L.J. 951, 177 I.C. 736, I.L.R. 1938 Mad. 1100, 48 M.L.W. 273, 1938 M.W.N. 829, A.I.R. 1938 Mad. 833, (1938) 2 M.L.J. 407, 11 R.M. 382, following *Fulchand*, supra.

In a case for claim for maintenance under this section the respondent who puts forward a charge of 'living in adultery' against the petitioner as his only defence to the claim for maintenance ought to begin his case and the petitioner against whom this charge is made ought to have an opportunity of adducing rebutting evidence—*Kista Pillai v. Amirthammal*, supra.

The fact that the wife had been outcasted and that her husband, therefore, could not take her to live with him without himself being outcasted, is not sufficient reason to induce a Magistrate to refuse to order maintenance—*Yesubai v. Parasram*, 34 Cr.L.J. 140, 141 I.C. 348, 34 Bom.L.R. 1449, A.I.R. 1931 Bom. 21, 1933 Cr.C. 15, Ind. Rul. 1933 Bom. 77, dissenting from 31 Mad. 185.

Under certain circumstances, *past adultery* of the wife would disentitle her to maintenance, although she was not living in adultery at the time of the application. Thus, where a woman committed adultery with a man of low caste and was expelled from her caste, thereby making it impossible for her husband to live with her, she could not claim maintenance, although at the time of application she was not living in adultery—*Ponnajee v. Peria Moopan*, 31 Mad. 185; *Ram Aular v. Raghurai*, 3 O.W.N. 717, 13 O.L.J. 802, 27 Cr.L.J. 1190. Where the wife had deserted her husband many years ago and led a life of adultery and did not attempt to seek her husband's pardon for past misconduct, the wife was not entitled to maintenance, merely because she was not living in adultery at the time of making the application for maintenance—*In re Shivram*, Ratanlal 506 (507). But the fact that the wife does not seek the husband's pardon for her past misconduct is not, by itself, a sufficient reason for excluding a wife who committed only a single act of adultery from the benefit of sec. 488—*In re Fulchand*, 52 Bom. 160, 30 Bom.L.R. 79, 29 Cr.L.J. 314 (315), 108 I.C. 24, A.I.R. 1928 Bom. 59, 9 A.I.Cr.R. 447.

There must be *clear proof* of adultery. The mere fact that the husband considers the wife's conduct open to suspicion is not sufficient—*Soundarajaswami*, 2 Weir 647. A mere suspicion by the husband that the child of the wife was the result of her intimacy with another man is not a ground of refusing maintenance—*Nandon*, 1881 A.W.N. 37. The mere fact that the panchayet of the brotherhood condemned the wife's conduct is not a ground for dismissing an application for maintenance, and the Magistrate should have inquired whether the wife was living in adultery—*Kashij*

Sheodiala, 1881 A.W.N. 62. It is erroneous to refuse to award maintenance to a wife (a young girl of 14) merely because she had been excommunicated from her caste by her caste-fellows for a stray case of misconduct against her will—*Yesubai v. Parasram*, 34 Bom L.R. 1449, 1933 Cr.C. 15.

See also Note 1286.

"Refuses to live with her husband":—See Note 1284, *ante*. If a Civil Court has passed a decree for restitution of conjugal rights, ordering the wife to live with her husband, and she refuses to do so, she is debarred from making any claim to maintenance—*Bai Parvati v. Ghanchi*, 44 Bom. 972 (975, 977). Where a Hindu wife leaves her husband's house without good cause, her right of maintenance is only suspended, and she has the right to return to her husband's house and claim maintenance—*Janaki v. Shivram*, 12 S.L.R. 90, 20 Cr.L.J. 98, 48 I.C. 978.

"Living separately by mutual consent":—A wife is not entitled to maintenance from her husband when both have entered into an agreement which provides for their living separately by mutual consent, and they are actually living separately in terms of that agreement—*Tricumal Kalidas*, Ratanlal 870. Where it appeared that by mutual consent, the husband and wife had been living separately for a number of years, and that the maintenance of the wife was, by arrangement made at the time they began to live separately, provided for by the assignment to her of some land, the Magistrate had no jurisdiction to make an order under this section—*Gangaraju v. Bhadrappa*, 2 Weir 648.

To bring the case within sub-section (4) it must be shown that the husband and the wife are living apart by a definite contract mutually made between them. A contract *voluntarily* and *freely* made and entered into between the parties is essential. Where, therefore, a husband and wife are living apart in obedience to the decree of a Panchayet of their castemen by which the wife is awarded maintenance, it cannot be said that they are living apart by mutual consent—*Nathun v. Maturwa*, 4 P.L.J. 109, 20 Cr.L.J. 154.

Where each party finds it impossible to live amicably and comfortably with the other and each party is content that they should live separately, they are living separately by mutual consent. If the wife finds her husband cold and indifferent it may make her prefer to live separately from him; but that is a matter of preference or choice. She cannot be said to have been forced to live separately from him unless it is established that he made it impossible for her to live with him by overt unkindness—*Chan Toon v. Ma Ti*, A I R. 1935 Rang. 359, 1935 Cr.C. 1083, 159 I.C. 81, 37 Cr.L.J. 6.

Because the wife would not live in a separate house with the husband, but insisted on staying on with him where they were, and he on his part was not willing or did not find it possible to comply with her wishes, this would not amount to "mutual consent" to live apart from each other—*Richard Bruce Whigham v. Florence Teasdale*, 39 Cr.L.J. 969, 177 I.C. 939, 66 C.L.J. 567, A.I.R. 1938 Cal 623. An agreement by the husband to pay half the salary every month to his wife as maintenance does not imply mutual agreement to live apart—*Ibid*.

The mutual consent as used in the sub-sec. (4) of this section means a consent on the part of the husband and wife to live apart no matter what the circumstances may be. Where a wife refuses to live with her husband on some specific ground such as cruelty or the fact that he is keeping another woman, it cannot be said that the husband and wife are living apart by mutual consent if the husband does not insist that the wife should live with him—*Ram Saran Das v. Mt. Ram Piari*, A.I.R. 1937 All. 115 (116), 1936 A.L.J. 1379, 1936 A.W.R. (H.C.) 1268, 1937 A.L.R. 102, 166 I.C. 894, I.L.R. 1937 All. 430, 38 Cr.L.J. 312, 9 R.A. 458, 1937 A Cr.C. 136.

See Note 1286.

1285. Sub-section (5)—Cancellation of order:—Under sub-cl. (5) the Magistrate is entitled to cancel the previous orders of maintenance and render them of no effect for the future on a finding that the applicant in whose favour the order had

been made was "living in adultery". Under sub-cl. (4) the Magistrate is entitled to refuse to enforce the maintenance orders on a finding that during the period in respect of which maintenance was sought to be recovered the applicant was "living in adultery"—*Chetibai v. Naroomal Shehoomal*, 39 Cr.L.J. 847 (849), 176 I.C. 863, 11 R.S. 42, A.I.R. 1938 Sind 151.

The general principles of law that an order, whose term is not fixed, and whose currency is not made expressly dependent upon the continued existence of some circumstances or set of circumstances, remains in force until it is cancelled, is, *prima facie*, applicable to maintenance orders passed under this section. The husband may, on proof of circumstances specified in sec. 488 (5) or sec. 489, Cr. P. C., obtain the cancellation or modification of the original order, as the case may be, and until he does that, the original order must be deemed to be still in force. Sec. 488 (5), Cr. P. C., provides for cancellation of the order. The reasons given therein for cancellation are not exhaustive—*Pearey Lal v. Narami*, 37 Cr.L.J. 62, 159 I.C. 308, A.I.R. 1935 All. 977, 159 I.C. 308, 1935 Cr.C. 1197, 58 All. 379, 1935 A.L.J. 1186, 1935 A.L.R. 1106, 8 R.A. 426. See also *Kanagammal v. Pandara Nadar*, 50 Mad. 663, 100 I.C. 239, A.I.R. 1927 Mad. 376, 28 Cr.L.J. 271, 52 M.L.J. 176, 25 M.L.W. 148, 1927 M.W.N. 111 and *Jasodabai v. Tarachand Tekchand*, 40 Cr.L.J. 776, 183 I.C. 336, A.I.R. 1939 Sind 180, 12 R.S. 51, I.L.R. 1939 Kar. 674.

Under this sub-section, an allowance granted to the wife only can be cancelled; an allowance granted to a child cannot be cancelled, though it may be altered under sec. 489—*Mehtab v. Allah Baksh*, 17 P.R. 1885. An order for maintenance of the child of a divorced Mahomedan wife, who has married again, cannot be cancelled under this section. Such an order can be cancelled only on the ground of change of circumstances mentioned in sec. 489—*Budhni v. Dadal*, 27 All. 11.

'Is living in adultery':—An order granting maintenance to a wife can be cancelled under this sub-section upon proof that the wife is living in adultery subsequent to the order—*Totaram, Ratanlal* 353; *Laraut v. Ram Dial*, 5 All. 224. But adultery previous to the order of maintenance is not admissible in evidence to cancel the order. Specially, where a Magistrate had awarded maintenance to the wife after adjudicating upon all the facts antecedent thereto and connected with the objection of the husband as to wife's leading an adulterous life, held that on the principle of *res judicata*, another Magistrate would be wrong in re-opening the same antecedent facts as to adultery of the wife, and in discontinuing the maintenance on those facts—*Laraut v. Ram Dial*, 5 All. 224. Evidence of past adultery is admissible under sub-section (4) before passing an order of maintenance; but after an order is passed, such past adultery cannot be considered for the purpose of cancelling the order. The ruling in 5 All. 224 has been dissented from in 5 Rang. 697. See Note 1291, *infra*.

There must be sufficient evidence of adultery. The fact that the wife continually went to the bazar, or that men went to the house where she lived (especially when other people including the wife's mother lived in that house) is not sufficient evidence to lead to the conclusion that the wife was living in adultery—*Shyama v. Madho*, 1893 A.W.N. 56. The words 'living in adultery' mean a continuous course of misconduct; and unless this continuity is established it cannot be inferred from a single act of adultery that the woman is living in adultery. Therefore, where a woman to whom maintenance had been awarded under this section gave birth to an illegitimate child, held that this single instance of misconduct did not show that she was living in adultery, so as to enable the Magistrate to cancel the allowance—*Jatindra v. Gauribala*, 29 C.W.N. 647, 26 Cr.L.J. 1184, 88 I.C. 608, A.I.R. 1925 Cal. 794; *Ma Mya Khin v. Godenho*, 37 Cr.L.J. 1115, 165 I.C. 205, A.I.R. 1936 Rang. 446, 1937 R.L.R. 86, 1936 Cr.C. 864; *Paiki v. Vishwanath*, 5 N.L.R. 19, 9 Cr.L.J. 390; *Chetibai v. Naroomal Shehoomal*, 39 Cr.L.J. 847 (849), 176 I.C. 863, 11 R.S. 42, A.I.R. 1938 Sind 151. Where the husband alleges adultery, the Magistrate should make an inquiry and adjudicate upon such allegation—*Uttam Chand*, 1902 P.R. 36; *Sohni v. Manohar*, 1882 A.W.N. 168.

Sheodiala, 1881 A.W.N. 62. It is erroneous to refuse to award maintenance to a wife (a young girl of 14) merely because she had been excommunicated from her caste by her caste-fellows for a stray case of misconduct against her will—*Yesubai v. Parasram*, 34 Bom L.R. 1449, 1933 Cr.C. 15.

See also Note 1286.

"Refuses to live with her husband":—See Note 1284, *ante*. If a Civil Court has passed a decree for restitution of conjugal rights, ordering the wife to live with her husband, and she refuses to do so, she is debarred from making any claim to maintenance—*Bai Parvati v. Ghanchi*, 44 Bom. 972 (975, 977). Where a Hindu wife leaves her husband's house without good cause, her right of maintenance is only suspended, and she has the right to return to her husband's house and claim maintenance—*Janaki v. Shivram*, 12 S.L.R. 90, 20 Cr.L.J. 98, 48 I.C. 978.

"Living separately by mutual consent":—A wife is not entitled to maintenance from her husband when both have entered into an agreement which provides for their living separately by mutual consent, and they are actually living separately in terms of that agreement—*Tricumal Kalidas*, Ratanlal 870. Where it appeared that by mutual consent, the husband and wife had been living separately for a number of years, and that the maintenance of the wife was, by arrangement made at the time they began to live separately, provided for by the assignment to her of some land, the Magistrate had no jurisdiction to make an order under this section—*Gangaraju v. Bhadrappa*, 2 Weir 648.

To bring the case within sub-section (4) it must be shown that the husband and the wife are living apart by a definite contract mutually made between them. A contract *voluntarily* and *freely* made and entered into between the parties is essential. Where, therefore, a husband and wife are living apart in obedience to the decree of a Panchayet of their castemen by which the wife is awarded maintenance, it cannot be said that they are living apart by mutual consent—*Nathun v. Maturwa*, 4 P.L.J. 109, 20 Cr.L.J. 154.

Where each party finds it impossible to live amicably and comfortably with the other and each party is content that they should live separately, they are living separately by mutual consent. If the wife finds her husband cold and indifferent it may make her prefer to live separately from him; but that is a matter of preference or choice. She cannot be said to have been forced to live separately from him unless it is established that he made it impossible for her to live with him by overt unkindness—*Chan Toon v. Ma Ti*, A.I.R. 1935 Rang. 359, 1935 Cr.C. 1083, 159 I.C. 81, 37 Cr.L.J. 6.

Because the wife would not live in a separate house with the husband, but insisted on staying on with him where they were, and he on his part was not willing or did not find it possible to comply with her wishes, this would not amount to "mutual consent" to live apart from each other—*Richard Bruce Whigham v. Florence Teasdale*, 39 Cr.L.J. 969, 177 I.C. 939, 66 C.L.J. 567, A.I.R. 1938 Cal. 623. An agreement by the husband to pay half the salary every month to his wife as maintenance does not imply mutual agreement to live apart—*Ibid*.

The mutual consent as used in the sub-sec. (4) of this section means a consent on the part of the husband and wife to live apart no matter what the circumstances may be. Where a wife refuses to live with her husband on some specific ground such as cruelty or the fact that he is keeping another woman, it cannot be said that the husband and wife are living apart by mutual consent if the husband does not insist that the wife should live with him—*Ram Saran Das v. Mt. Ram Piari*, A.I.R. 1937 All. 115 (116), 1936 A.L.J. 1379, 1936 A.W.R. (H.C.) 1268, 1937 A.L.R. 102, 166 I.C. 894, I.L.R. 1937 All. 430, 38 Cr.L.J. 312, 9 R.A. 458, 1937 A.Cr.C. 136.

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1285. Sub-section (5)—Cancellation of order:—Under sub-cl. (5) the Magistrate is entitled to cancel the previous orders of maintenance and render them of no effect for the future on a finding that the applicant in whose favour the order had

been made was "living in adultery". Under sub-cl. (4) the Magistrate is entitled to refuse to enforce the maintenance orders on a finding that during the period in respect of which maintenance was sought to be recovered the applicant was "living in adultery."—*Chetibai v. Naroomal Shehoomal*, 39 Cr.L.J. 847 (848), 176 I.C. 863, 11 R.S. 42, A.I.R. 1938 Sind 151.

The general principles of law that an order, whose term is not fixed, and whose currency is not made expressly dependent upon the continued existence of some circumstances or set of circumstances, remains in force until it is cancelled, is, *prima facie*, applicable to maintenance orders passed under this section. The husband may, on proof of circumstances specified in sec. 488 (5) or sec. 489, Cr. P. C., obtain the cancellation or modification of the original order, as the case may be, and until he does that, the original order must be deemed to be still in force. Sec 488 (5), Cr. P. C., provides for cancellation of the order. The reasons given therein for cancellation are not exhaustive—*Pcarey Lal v. Naraini*, 37 Cr.L.J. 62, 159 I.C. 308, A.I.R. 1935 All. 977, 159 I.C. 308, 1935 Cr.C. 1197, 58 All. 379, 1935 A.L.J. 1186, 1935 A.L.R. 1106, 8 R.A. 426. See also *Kanagammal v. Pandara Nadar*, 50 Mad 663, 100 I.C. 239, A.I.R. 1927 Mad. 376, 28 Cr.L.J. 271, 52 M.L.J. 176, 25 M.L.W. 148, 1927 M.W.N. 111 and *Jasodabas v. Tarachand Tekchand*, 40 Cr.L.J. 776, 183 I.C. 336, A.I.R. 1939 Sind 180, 12 R.S. 51, I.L.R. 1939 Kar. 674.

Under this sub-section, an allowance granted to the wife only can be cancelled; an allowance granted to a child cannot be cancelled, though it may be altered under sec. 489—*Mektab v. Allah Baksh*, 17 P.R. 1885. An order for maintenance of the child of a divorced Mahomedan wife, who has married again, cannot be cancelled under this section. Such an order can be cancelled only on the ground of change of circumstances mentioned in sec. 489—*Budhni v. Dadal*, 27 All 11.

'Is living in adultery':—An order granting maintenance to a wife can be cancelled under this sub-section upon proof that the wife is living in adultery *subsequent* to the order—*Totaram, Ratanlal* 353; *Larati v Ram Dial*, 5 All 224. But adultery previous to the order of maintenance is not admissible in evidence to cancel the order. Specially, where a Magistrate had awarded maintenance to the wife after adjudicating upon all the facts antecedent thereto and connected with the objection of the husband as to wife's leading an adulterous life, *held* that on the principle of *res judicata*, another Magistrate would be wrong in re-opening the same antecedent facts as to adultery of the wife, and in discontinuing the maintenance on those facts—*Larati v Ram Dial*, 5 All 224. Evidence of past adultery is admissible under sub-section (4) *before* passing an order of maintenance, but after an order is passed, such past adultery cannot be considered for the purpose of cancelling the order. The ruling in 5 All 224 has been dissented from in 5 Rang. 697. See Note 1291, *infra*.

There must be sufficient evidence of adultery. The fact that the wife continually went to the bazar, or that men went to the house where she lived (especially when other people including the wife's mother lived in that house) is not sufficient evidence to lead to the conclusion that the wife was living in adultery—*Shyama v. Madho*, 1893 A.W.N. 56. The words 'living in adultery' mean a continuous course of misconduct; and unless this continuity is established it cannot be inferred from a single act of adultery that the woman is living in adultery. Therefore, where a woman to whom maintenance had been awarded under this section gave birth to an illegitimate child, *held* that this single instance of misconduct did not show that she was living in adultery, so as to enable the Magistrate to cancel the allowance—*Jatindra v Gauribala*, 29 C.W.N. 647, 26 Cr.L.J. 1184, 88 I.C. 608, A.I.R. 1925 Cal 794; *Ma Mya Khin v. Godenho*, 37 Cr.L.J. 1115, 165 I.C. 205, A.I.R. 1936 Rang. 446, 1937 R.L.R. 86, 1936 Cr.C. 864; *Paiki v. Vishwanath*, 5 N.L.R. 19, 9 Cr.L.J. 390; *Chetibai v. Naroomal Shehoomal*, 39 Cr.L.J. 847 (849), 176 I.C. 863, 11 R.S. 42, A.I.R. 1938 Sind 151. Where the husband alleges adultery, the Magistrate should make an inquiry and adjudicate upon such allegation—*Uttam Chand*, 1902 P.R. 36; *Sohni v. Manohar*, 1882 A.W.N. 168.

The fact that a wife is living in adultery does not automatically deprive her of the maintenance for the order of maintenance once passed stands good until it has been cancelled. It cannot be cancelled with retrospective effect. The wife can, therefore, recover the amount that was due to her before the order of cancellation—*Bhag Sultan v. Muhammad Akbar*, 30 Cr.L.J. 719, 117 I.C. 67, A.I.R. 1930 Lah. 99, 1930 Cr.C. 96, Ind. Rul. 1929 Lah. 611.

An order of cancellation under this sub-section takes effect from the date of the order and has no retrospective operation. It cannot, therefore, affect the arrears due up to the date of the order—*Tari Bala v. Kibal Ram*, 39 Cr.L.J. 357, 173 I.C. 785, I.L.R. (1938) 1 Cal. 509, 66 C.L.J. 571, 10 R.C. 573, 42 C.W.N. 64, A.I.R. 1938 Cal. 144.

Where the maintenance allowances under this section were in favour jointly of the applicant and her minor son, even if the applicant had forfeited her claim to a maintenance allowance for living in adultery, that reason did not affect the claim of the minor son who was jointly entitled to the maintenance allowance. The Magistrate is to consider separately the claim of the minor son under the applicant's application—*Chetibai v. Naroomal Shehoomal*, 39 Cr.L.J. 847, 176 I.C. 863, 11 R.S. 42, A.I.R. 1933 Sind 151.

See also Note 1285.

'Living separately by mutual consent':—Where after an order for maintenance had been passed, both the husband and wife while temporarily living together presented a petition by which they agreed that the husband should pay his wife Rs. 10 a month so long as she stayed at the house of her father, and the petition asked for a decree on the said terms, held that the intention of the parties was, when they filed the petition, that the wife should abandon all claims for arrears due till then—*Parul Bala v. Satish*, 37 C.L.J. 180; 24 Cr.L.J. 945, A.I.R. 1923 Cal. 456, 75 I.C. 529.

Where the wife denied the validity of an alleged deed of compromise by which the parties agreed to a reduction in the rate of the allowance ordered by the Magistrate, it was held that the Magistrate was not competent to cancel the order for maintenance until the agreement had been declared by a competent tribunal to be binding on the wife—*Karuppa v. Karupakkal*, 2 Weir 649.

See also Note 1285.

Other cases:—Sub-sec. (5) is not exhaustive of the grounds on which an order for maintenance may be cancelled. Thus, an order can be cancelled on the ground of *divorce*. Where the husband pleads in answer to an application for enforcement of the order of maintenance, that subsequent to the order of maintenance he has lawfully divorced his wife, and such plea is proved, the Court will decline to enforce the order, for the period subsequent to the date when the marriage ceased to exist—*Shah Abu v. Ulfat*, 19 All 50; *Ahmad Kasim v. Khalun*, 59 Cal 833; *Shaikh Daud*, 17 N.L.R. 92, 63 I.C. 392, 22 Cr.L.J. 633. On a valid divorce actually taking place, the Magistrate's order ceases to have operation—*Abdul Ali*, 7 Bom. 180. The apostasy of a Mahomedan wife *ipso facto* dissolves the marriage and the wife, therefore, is not entitled to maintenance from her husband—*Sonaullah v. Ma Kin*, 9 L.B.R. 206, 46 I.C. 716, 19 Cr.L.J. 799. In case of Mahomedans the order becomes inoperative on the expiry of the period of *iddat after divorce*—*Mahomed Hossin v. Ma Pua*, 13 Bur.L.T. 43, 21 Cr.L.J. 503, 56 I.C. 663. So also, where the father was ordered to pay maintenance to his daughter, the marriage of the daughter makes her maintenance a charge on her husband and not on her father, and the father may apply for cancellation of the order—*Gurusyami*, 2 Weir 650 (651).

Wife returning to her husband:—If a wife who has obtained an order for maintenance, returns to her husband, and lives with him for some time (and even bears a child), the order for maintenance will not come to an end, but will only remain in *suspense*; so that if she leaves him again, she will be entitled to enforce the order, and a fresh application for a fresh order will not be necessary—*Kanaammal v. Pandara*, 50 Mad 663, A.I.R. 1927 Mad. 376, 100 I.C. 239, 52 M.L.J. 176, 25 M.L.W. 148,

1927 M.W.N. 111, 28 Cr.L.J. 271 (272); *Narayanaswami v. Mangayarkarasammal*, 28 Cr.L.J. 237; *Zahura Bi v. Muhammad Yusuf*, 32 P.L.R. 143, 1930 Cr.C. 1219 (1220), 129 I.C. 216, 32 Cr.L.J. 247, A.I.R. 1930 Lah. 1043, Ind. Rul. 1931 Lah. 152. A mere temporary stay of this kind, though it may have suspended the operation of the order, has not the effect of cancelling it in the way in which it can be cancelled under sec. 488 (5)—*Parul Bala v. Satish*, 37 C.L.J. 180, 24 Cr.L.J. 945, A.I.R. 1923 Cal. 456, 75 I.C. 529. But the Allahabad and Burma Courts are of opinion that upon a wife voluntarily returning to her husband, the order for maintenance would become permanently ineffectual, and that if afterwards the parties separate again, she would have to obtain a fresh order for maintenance upon fresh application; the original order cannot be enforced—*Phulkari v. Harnam*, 1888 A.W.N. 217; *Ma Tin v. Maung An Gyi*, 1 Cr.L.J. 870 (871); *U Po Shem v. Ma Sein*, 8 Rang. 460, 32 Cr.L.J. 114 (115), 128 I.C. 353, A.I.R. 1931 Rang. 89, Ind. Rul. 1931 Rang. 1. In a very recent case the Allahabad High Court followed the view of the Calcutta and Madras High Courts mentioned above, distinguishing *Phulkari v. Harnam*, supra—*Pearey Lal v. Naraini*, A.I.R. 1935 All. 977, 37 Cr.L.J. 62, 159 I.C. 308, 1935 A.L.J. 1186, 1935 Cr.C. 1197, 1935 A.L.R. 1105, 8 R.A. 416, 58 All. 379.

The view of the High Courts, excepting Rangoon, is consistent with the principles underlying sub-sec. (3) of the section. It is always open for the husband to apply to have the original order cancelled on good cause being shown so that the Rangoon argument that it should not be held *in terrorem* against him does not appear convincing. The re-union does not automatically vacate the previous order. The length of time during which re-union lasts is hardly relevant. The parties may contemplate permanent re-union and yet quarrel and separate again after a short interval—*John P. E. Coelho v. Mrs. Blanche*, 38 Cr.L.J. 170 (172), 166 I.C. 27, A.I.R. 1936 Nag. 228, 1936 Cr.C. 913, 9 R.N. 116, I.L.R. 1937 Nag. 230.

See also the last paragraph of Note 1274.

Application for cancellation is essential:—Sub-section (5) provides that in certain specific circumstances the Magistrate shall cancel the order. In such cases it will be incumbent upon the counter-petitioner to make an application for cancellation of the order; until he does so, the order will remain in force. Thus, the mere fact that a wife is living in adultery will not bring the order to an end automatically. So also, the mere fact that the wife has returned to live with her husband will not put an end to the order—*Kanagammal v. Pandara*, 50 Mad. 663, 28 Cr.L.J. 271 (272); *Narayanaswami v. Mangayarkarasammal*, 28 Cr.L.J. 237, 99 I.C. 1037, 38 M.L.T. 13, A.I.R. 1927 Mad. 1148.

Application to whom to be made:—An application for the cancellation of an order of maintenance must be made to the Magistrate who made the original order or to his successor-in-office—*Bhagwanta v. Sheo Charan*, 25 All. 545.

Magistrate can go into question of divorce:—The Magistrate can go into the question of divorce, even in a summary proceeding under sec. 488, if the husband applies for cancellation of the order of maintenance on the ground that he has divorced his wife. If the husband is able to adduce satisfactory evidence that there has been a valid divorce, the Magistrate would be justified in acting upon that evidence. It is not necessary for the husband to produce a decree of a Civil Court declaring that he has divorced his wife—*Punjyalal*, 30 Bom.L.R. 617, 29 Cr.L.J. 908 (909). Cf. also *Shah Abu v. Ulfat*, 19 All. 50; *Abdul Ali*, 7 Bom. 180. See also Note 1275 under the heading "Effect of divorce".

1287. Sub-section (6)—Evidence:—An order under this section must be passed on proof in the proceedings, and not upon knowledge acquired by the Magistrate in some other case—*Lopotee v. Tikha*, 8 W.R. 67. An order for payment of maintenance without recording evidence and without examining any witnesses is illegal—*Venkatachala Paduachi*, 2 Weir 628. Where a Magistrate, instead of examining the applicant at length, and her witnesses, got her only to verify on oath the truth and

correctness of her application, and treating her application as legal evidence against the husband, passed an order for maintenance, *held* that the order was bad—*Kamta v. Mangal Dei*, 23 O.C. 237, 25 Cr.L.J. 302. Proceedings under this Chapter are judicial in their nature and should not be conducted as if they were ministerial matters. The notes of evidence, therefore, should not be vague or inadequate and the order recorded must be issued on distinct findings of fact—*Laraiti v. Ram Dial*, 5 All. 224. If, however, an order is made with the consent of parties, the necessity of evidence may be dispensed with—*Rangammal*, 2 Weir 629.

The evidence must be recorded as provided by sec. 355. Proceedings under this Chapter cannot be conducted as in a summary trial under Chap XXII—*Kali Dasi v. Durga*, 20 Cal 351. But if the proceedings are held before a Presidency Magistrate, it is not necessary for him to record evidence. This is the effect of sec. 488 (6) and sec. 362 (4) read together—*Chhagan Hargovan*, 34 Bom.L.R. 276, 1932 Cr.C. 238, 33 Cr.L.J. 461, 137 I.C. 27, A.I.R. 1932 Bom. 179, Ind. Rul. 1932 Bom. 242, where *Hanifabai*, 32 Cr.L.J. 276, 129 I.C. 339, 33 Bom.L.R. 1499, Ind. Rul. 1931 Bom. 147, A.I.R. 1931 Bom. 142, 1931 Cr.C. 190 was not followed.

The Magistrate is bound to inquire as to whether the wife has good reason for not living with her husband—*Tajbaro v. Ghulam Qadar*, 35 Cr.L.J. 491, 147 I.C. 772, A.I.R. 1933 Pesh. 101, 1935 Cr.C. 9.

Presence of the defendant:—As directed by this sub-section, the inquiry should be conducted in the presence of the person proceeded against. A proceeding under this section should not be conducted *ex parte*. Evidence should be taken in the presence of the defendant or his pleader, unless the Court is satisfied that the defendant is willingly avoiding service of summons or neglecting to attend the Court, proceedings should not be taken *ex parte*, especially in a case where proceedings are taken against a person on the ground that he is the father of an illegitimate child—*Ajoy Chandra v. Dubi*, 1 C.L.J. 102. Proceedings can be conducted in the presence of the pleader, only when the personal attendance of the defendant has been dispensed with. Where his attendance has not been dispensed with the Court is justified in refusing to hear the Mukhtear by whom he is represented, and the Court ought to insist upon the presence of the defendant and should not proceed *ex parte*—*Hormuzshah v. Perozbai*, 2 Bom.L.R. 700.

Ex parte:—The word *ex parte* is not defined in the Cr. P. Code but the proceedings instituted under this section are a quasi civil nature. Therefore, the word *ex parte* used in this section is used in the same sense as is used in Orders IX and XVII, Civil Procedure Code. Therefore, an order passed against an absent party at the adjourned hearing of a case under this section is an *ex parte order*—*Maung Ba Tun v. Ma Kyway*, 40 Cr.L.J. 537, 181 I.C. 377, A.I.R. 1939 Rang. 151, 11 R.Rang. 460.

Under the proviso to this sub-section, the Magistrate may proceed *ex parte*, if he is satisfied that the defendant is willingly avoiding service and neglecting to attend the Court. But in every case of absence of the defendant the Court ought not to treat the absence as due to wilful neglect—*Mormuzshah v. Perozbai*, 2 Bom.L.R. 700. A Court ought not to infer that the defendant was neglecting to attend the Court, when the inability to attend was due to the absence of specification in the summons of the place where he was to appear—*Anonymous*, 7 M.H.C.R. App. 43, 2 Weir 38.

Where, no notice having been served on the person against whom the proceedings were taken, the order was passed *ex parte*, and within three months he applied to the Magistrate's successor to have the order revised, stating that he had no notice of the application, such succeeding Magistrate had jurisdiction under sec. 488 (6) to have the case re-opened and disposed of according to law—*Maung Tun v. Ma Thein*, 2 Bur.L.J. 61, 24 Cr.L.J. 928, A.I.R. 1923 Rang. 159.

Examination of defendant:—Sec. 342 does not apply to a proceeding under sec. 488, because the words "after the witnesses for the prosecution have been examined and before he is called on for his defence" are inappropriate to such a proceeding—

Vithaldas, 53 Bom. 768, 29 Cr.L.J. 1051 (1052); *Meher Khan*, 10 Lah. 406, 29 Cr.L.J. 1002 (1003, 1004), 112 I.C. 218, A.I.R. 1929 Lah. 32. For contra see *Demello v. Demello*, 27 Cr.L.J. 1000, 96 I.C. 856, A.I.R. 1926 Lah. 667. At any rate, if the defendant has given evidence on his own behalf, it is not necessary to further examine him under sec. 342—*Bachai v. Jamuna*, 25 Cr.L.J. 1901, 81 I.C. 915, A.I.R. 1925 Cal. 339. Where the defendant did not appear, and the matter was decided *ex parte* under sec. 488 (6), the non-examination of the defendant was immaterial—*Raspin v. Raspin*, 36 C.W.N. 380 (381), 138 I.C. 629, 33 Cr.L.J. 640, 1932 Cr.C. 480, A.I.R. 1932 Cal. 488, Ind. Rul. 1932 Cal. 477.

Presence of complainant:—This section does not require the personal attendance of the complainant. If the complainant be a *pardanashin* lady, her presence may be dispensed with—*Ghulam v. Niazali*, 1903 P.R. 19. In *Hakim v. Mouzi*, 1 C.L.J. 214 and *Ma Sa v. Paul Sassoon*, U.B.R. (1892-96) 64, however, the Magistrate dismissed an application for maintenance for default of appearance of the complainant.

1287A. Sub-section (7)—Costs:—Under this sub-section the High Court has power to deal with costs—*Yesubai v. Parasram*, 34 Cr.L.J. 140, 141 I.C. 348, 34 Bom.L.R. 1449, A.I.R. 1933 Bom. 21, Ind. Rul. 1933 Bom. 77, 1933 Cr.C. 15. The High Court ordered payments of costs in this as well as in *Kent v. Kent*, 49 Mad. 891, 49 M.L.J. 335, 26 Cr.L.J. 1597, A.I.R. 1926 Mad. 59, 90 I.C. 669.

1288. Sub-section (8)—Forum:—This sub-section did not occur in the 1872 and 1882 Codes and it was, therefore, held that the application must be heard by the Magistrate within whose jurisdiction the wife resided—*Malcolm De Castro*, 13 All. 348; *Todd*, 5 N.W.P. 237. These decisions are no longer good law. Under the present Code the proper Court to take cognizance of a petition by the wife under this section is the Court within whose jurisdiction the husband or the father, as the case may be, resides. In fact, the circumstances which it may be necessary for the husband to prove in answer to the complaint of his wife are better known in the place of his residence than in that of her residence, and the inconvenience of going with his evidence to a place hundreds of miles away from the place of his residence is a strong reason why the jurisdiction to take cognizance of such a complaint should be confined to Magistrates having local jurisdiction at the place where the husband may reside. See *In re Shaik Fakruddin*, 9 Bom. 40 (46); *Benbow v. Benbow*, 24 Cal. 638; *Hildephonsus v. Malone*, 1885 P.R. 13; *Bishen Das v. Nanaki*, 1893 P.R. 3. This sub-section does not give the wife or child to select a forum other than that where the husband or father is then residing or last resided with the complainant—*Maung Wang v. Ma Chut*, 10 Bur.L.R. 319, 1 Cr.L.J. 545. See also *Bishen Das v. Amar Kaur*, 34 Cr.L.J. 1171, 146 I.C. 51, A.I.R. 1933 Lah. 387, 1933 Cr.C. 640. The mere fact that the marriage of the parties took place at a certain place is not sufficient to confer jurisdiction under this section on the Magistrate within whose jurisdiction the place is situated—*Ghulam Hussain v. Hakab Bibi*, 27 Cr.L.J. 1009, 96 I.C. 865, A.I.R. 1926 Lah. 663.

The words "last resided" do not contemplate a mere casual residence in a place for a temporary purpose with no intention of remaining there. Such residence does not give jurisdiction to the Magistrate of that place—*Ramdeo v. Jhunni Lal*, 1 Luck. 343, 3 O.W.N. 231, 27 Cr.L.J. 820; Cf. *Flowers v. Flowers*, 32 All. 203, 5 I.C. 871, 7 A.L.J. 193 (F.B.). Where the husband has a fixed place of residence, it is Magistrate of that place who has jurisdiction, and an occasional visit to the wife at another place where the wife resides, does not give jurisdiction to the Magistrate of the latter place. See *Flowers v. Flowers*, 32 All. 203; *Khairunnissa*, 53 Bom. 781, 1929 Cr.C. 462, 122 I.C. 59, A.I.R. 1929 Bom. 410. Therefore, where the husband who was a permanent resident of Lahore for 11 years, took his wife to Lucknow at her brother's house and left her there declaring that he would support her no longer, and his stay at Lucknow did not exceed a week, held that as the residence at Lucknow was a mere flying visit, the application for maintenance should be made at Lahore and not at Lucknow—*Ramdeo v. Jhunni*, supra. See also *Lee v. Lee*, 34 Cr.L.J. 744, 144 I.C. 51, 10 O.W.N. 374, A.I.R. 1933 Oudh. 119,

1933 Cr.C. 270, Ind. Rul. 1933 Oudh 226. Where the husband pays only occasional visits to his wife, who lives apart from him, he cannot be said to reside at the place where the wife resides, so as to give jurisdiction to the Magistrate of that place—*Ram Kumar v. Rukmin*, 24 O.C. 249, 63 I.C. 870, 22 Cr.L.J. 710. But if the parties have no fixed place of residence, the application should be made to the Court within whose jurisdiction the husband and wife last resided, even though temporarily. See *Bright v. Bright*, 36 Cal. 964 (1966), 4 I.C. 419; *Murphy v. Murphy*, 45 Bom. 547 (550); *Khair-un-nissa*, 53 Bom. 781, A.I.R. 1929 Bom. 410, 31 Cr.L.J. 331, 31 Bom.L.R. 931, 1929 Cr.C. 462. Where a man has no fixed dwelling, any place where he is staying at any particular time may be treated as his residence—*Fernandez v. Wray*, 25 Bom. 176. (The cases of 32 All. 203, 36 Cal. 964 and 45 Bom. 547 were decided with reference to the meaning of the word "resided" in sec. 3 of the Indian Divorce Act, 1869). In a later Allahabad case, it has been held that though a mere flying visit does not amount to residence (as in 3 O.W.N. 231), still the residence contemplated by this sub-section does not necessarily mean permanent residence, but includes a temporary residence. And so, where a husband and wife left their permanent place of residence (Bhatgaon) and stayed for two months at Agra, the husband paying occasional visit to his permanent place of residence, held that the temporary residence at Agra was sufficient to give jurisdiction to the Magistrate at Agra—*Sher Singh v. Amur Kunwar*, 49 All. 479, 25 A.L.J. 435, 101 I.C. 670, A.I.R. 1927 All. 291, 28 Cr.L.J. 494; *Sama Jettha*, 54 Bom. 548, 1930 Cr.C. 780 (781), 31 Cr.L.J. 1157, 127 I.C. 179, A.I.R. 1930 Bom. 410. The same view has been taken in *Allah Ditta v. Sakina*, 29 Cr.L.J. 687, A.I.R. 1928 Lah. 853, 110 I.C. 239; in *Jolly v. Jolly*, 21 C.W.N. 872, 18 Cr.L.J. 706, 40 I.C. 706 and *Janki*, A.I.R. 1932 Nag. 85, 34 Cr.L.J. 32, 140 I.C. 394, 15 N.L.J. 24, 1932 Cr.C. 435. But the mere hiring or purchase of a residential building at a place, irrespective of the actual residence of the owner therein, would not confer jurisdiction on the Magistrate of that place to entertain petitions under this section against the owner—*Bai Ganga v. Amrillal Purshottam*, 38 Cr.L.J. 248, 166 I.C. 574, 9 R.B. 244, 38 Bom.L.R. 1107, A.I.R. 1937 Bom. 35.

Where there is something more than a flying visit, where a man leaves his house and resides for some time in the house of his parents-in-law with his wife, that is a sufficient residence within the meaning of this sub-section. This sub-section does not necessarily refer to permanent residence. It refers also to temporary residence. The word "residence", of course, implies something more than a mere brief visit, a mere flying visit. It suggests a certain continuity, but if there be a continuity for such a period of time as to allow it fairly to be said that the husband did reside even for a matter of some weeks with his wife, it does not appear to us that the section should be so strictly construed as to deprive the woman, who often in these cases is helpless, of assistance from the Court which is most easily accessible to her. It is not possible in such cases to fix any arbitrary period of time to say, for instance, two months at Agra, six weeks at Bombay, one month at Karachi as a minimum to constitute residence for the purposes of this section. Each case will have to be dealt with on its merits. It could easily be said that a visit of a few days is not residence within the meaning of this section, but it could not easily be said that a visit of a few weeks was not residence within the meaning of this section. Each case, however, must be dealt with on its merits, the distinction between a mere visit and residence being borne in mind—*Gongabai v. Pamanmal Lachman*, 40 Cr.L.J. 117, 178 I.C. 527, A.I.R. 1938 Sind 223.

In the case of persons who have a fixed residence, a visit to another place for however long a period, so long as it is casual, will not confer jurisdiction. A person who works and has a permanent home in L cannot, by his visits during period of casual leave, confer jurisdiction on the S courts. Where, however, the parties have no home of any sort and are moving about from place to place, each place where they so live, would be their home for the time being. The sole test on the question of residence is whether a party has *animus manendi*, or an intention to stay for an indefinite period, at one place; and if he has such an intention, then alone can he be said to reside there.

When, therefore, the wife left the husband and went to live with her mother at S and the husband went there on two or three occasions apparently with the intention of persuading his wife to return, the Courts at S has no jurisdiction to entertain the application of the wife under this section—*Chayan Das v. Surasti Bai*, AIR. 1940 Lah. 449 (451), 42 P.L.R. 470, overruling *Allah Dutta v. Sakina*, supra.

The intention of the Legislature in using the words, "where he resides or is, or where he last resided with his wife," in this sub-section was to make it as easy as possible for an aggrieved person to obtain a maintenance under the provisions of this section. Obviously, it was intended in the first place to confer jurisdiction upon the proper authorities within the district in which the permanent residence or home of the opposite party happened to be situated. But by using the words "or is" the further intention appears to have been that proceedings might also be taken against opposite parties, who had no permanent residence within the jurisdiction of the Magistrate concerned, but who might be easily found there. This expression is certainly sufficiently wide to confer jurisdiction upon the Chief Presidency Magistrate in a case in which the opposite party works for gain within the jurisdiction of his Court, even though he may not have a permanent residence within such jurisdiction—*Indubala Devi v. Satchid Prosad*, 40 Cr.L.J. 598, 181 I.C. 898, I.L.R. (1939) 1 Cal. 345, 11 R.C. 871, A.I.R. 1939 Cal. 333.

In the case of a kept mistress, a man is said to reside with her if he visits her only occasionally at her settled abode, so long as he has the intention of continuing to so visit her. If the woman has no settled abode, her stay for two months at a place where she is occasionally visited by the man would give jurisdiction to the Magistrate of that place—*Hidayat v. Mahomed*, 5 S.L.R. 220, 13 Cr.L.J. 522 (523).

An order passed by a Magistrate who is empowered to try maintenance cases under this section would not be bad merely because the proceedings were taken in a wrong Court. To such a case, sec 531 is applicable and not sec. 530 (n)—*Sitaram v. Sukia*, 49 C.L.J. 205, 30 Cr.L.J. 525, 115 I.C. 602; *Maung Park v. Ma Ohu Sint*, 40 Cr.L.J. 702, 182 I.C. 671, A.I.R. 1939 Rang. 210, 12 R.Rang. 24.

1289. Whether civil suit lies:—Where the right to maintenance is conferred by this section as well as by the personal law of the parties, the right can be enforced not only under this section but also by a civil suit for maintenance. But where the right is not conferred by the personal law of the parties (e.g., the right of the illegitimate children of a Hindu by a non-Hindu woman, to get maintenance from their putative father), such right cannot be enforced by a civil suit, and the only remedy is that provided by this section. The distinction between a remedy under the common law and a remedy under this section is that the right under the common law may be enforced not only against the defendant during his life-time, but also against his estate after his death, but a right under this section does not survive the death of the defendant—*Lingappa v. Esudason*, 27 Mad. 13.

Order does not bar civil suit:—An order under this section passed by a Magistrate does not take away the jurisdiction of the Civil Courts—*Deraji Mahinga v. Maratikarim*, 30 Mad. 400 (401). A Magistrate's order for payment of separate maintenance does not bar the jurisdiction of the Civil Court to make a declaration that the husband is not liable to pay separate maintenance to his wife—*Veeran v. Ayyammah*, 2 Weir 615. In spite of an order for maintenance of illegitimate children passed by a Magistrate, a civil suit is maintainable for a declaration that the children are not the children of the plaintiff—*Kailasa v. Raghubar*, 17 O.C. 331, 26 I.C. 526; *Nga Po v. Ma Me*, A.I.R. 1922 U.B. 20, 1 Bur.L.J. 82. Similarly, an order of a Magistrate refusing maintenance does not bar a suit in a Civil Court for maintenance—*Ghana Kanta v. Gereli*, 32 Cal. 479.

Although an order under sec. 488 has been passed with the consent of both the parties, yet it cannot operate as a bar to a civil suit for restitution of conjugal rights, unless in the maintenance proceedings the husband had consented not merely to the order for maintenance but that in all circumstances the wife should live apart from him—*Guruvappa v. Thayarammal*, 54 Mad. 558, 60 M.L.J. 433, 1931 Cr.C. 546 (547),

A.I.R. 1931 Mad. 482, 33 M.L.W. 423, 1931 M.W.N. 364, 131 I.C. 463, Ind. Rul. 1931 Mad. 527.

1290. Effect of Civil Court decree:—*Effect of previous decree*:—A Civil Court's decree cannot be disturbed by an order of the Magistrate. Where a decision for a monthly allowance for maintenance has been obtained in the Civil Court and is in force, the Magistrate is not competent to order a further and separate maintenance—*Subburamakamma*, 2 Weir 615. And it is immaterial whether the Civil Court decree was passed *ex parte* or after contest—*Sharda Prasad*, 1932 A.L.J. 766, A.I.R. 1932 All. 583, 1932 Cr.C. 701. The jurisdiction vested in the Magistrate being auxiliary to that of the Civil Court, it is not open to a Magistrate to ignore a Civil Court decree on the ground that it rests on reasons which do not appear to him satisfactory—*Veeran v. Ayyammah*, 2 Weir 615. Where the husband has obtained a decree for restitution of conjugal rights, and the decree is in force, an application for separate maintenance by the wife ought not to be entertained by the Magistrate—*Nga Po Saw v. Mi Thet*, 11 Cr.L.J. 662; *Mt Hta v. Aye Maung*, A.I.R. 1931 Rang. 111, 1931 Cr.C. 352, 133 I.C. 96. But where the husband had been making unfounded allegations of adultery against the wife she was justified in refusing to live with him, and was, therefore, entitled to maintenance, even when a decree for restitution of conjugal rights was subsisting against her—*Sher Khan v. Bakhat Bhari*, 33 Cr.L.J. 748, 139 I.C. 123, 33 P.L.R. 554, Ind. Rul. 1932 Lah. 566. Where a Civil Court has declared that the child is not child of the defendant, the Magistrate should treat the decree as conclusive on the question of relationship and should refuse to pass any order for the maintenance of the child—*Narayanan Itticherry*, 33 M.L.J. 449, 18 Cr.L.J. 971. But the weight to be attached to a decree must depend upon the particular circumstances of the case; and no hard and fast rule can be laid down that a decree of a Civil Court is for ever binding on the Magistrate. If, after the husband had obtained a decree for restitution of conjugal rights, he ill-treated his wife so much that she had to leave his house, and she applied to the Magistrate for an order of maintenance, and the Magistrate granted the application on the ground that she was justified in refusing to live with her husband, *held* that the Magistrate was justified in ignoring the decree and in exercising his discretion in favour of the wife by absolving her from the condition that she must live with her husband. Otherwise the husband can at first get a decree for restitution of conjugal rights and then turn his wife out without any allowance at all—*Rajpati v. Deoli*, 46 All. 877 (878), 22 A.L.J. 806, 25 Cr.L.J. 1246. The Civil Court decree, although *ex parte*, cannot be ignored by the Criminal Court. Where an application under this section is put in deliberately for the purpose of ignoring any decree that the Civil Court may pass in a pending suit for restitution of conjugal rights, the wife is not entitled to any relief in the Criminal Court—*Sharda Prasad*, A.I.R. 1932 All. 583, 1932 A.L.J. 766, 1932 Cr.C. 701, 141 I.C. 610.

The existence of an order of the Probate, Divorce and Admiralty Division of the High Court in England whereby the husband is directed to pay his wife so much alimony per month, is no bar to an application by the wife under sec. 488, Cr. P. C., if in fact the husband has neglected to maintain his wife. The existence of the order is not sufficient to oust the jurisdiction of the Magistrate, for a mere order for maintenance is not equivalent to maintenance. Sec. 488 gives jurisdiction to the Magistrate to award maintenance if he is satisfied that a person has neglected to maintain his wife—*Kent v. Kent*, 49 Mad. 891, 49 M.L.J. 335, 26 Cr.L.J. 1597, A.I.R. 1926 Mad. 59, 90 I.C. 669; *Saraswati v. Narayan*, 33 Cr.L.J. 631, 138 I.C. 613, 36 C.W.N. 571, 55 C.L.J. 311, 59 Cal. 1229, 1932 Cr.C. 653, A.I.R. 1932 Cal. 698, Ind. Rul. 1932 Cal. 471. Where there is a decree of the Civil Court for maintenance in favour of the wife and the decree cannot be executed on account of the insolvency proceedings initiated by the husband, *held* that a mere decree of Civil Court awarding maintenance is not equivalent to maintaining the wife and that a Magistrate has jurisdiction under this section to pass an order for maintenance in favour of the wife—*Mahomedalli*, 31 Cr.L.J. 609, 124 I.C. 127, 31 Bom.L.R. 1366, A.I.R. 1930 Bom. 141. This section contains no direction that an

order under it cannot be made if there is a decree for maintenance of a Civil Court, although under sub-sec. (4) conditions are specified under which an order cannot be made. Of course the existence of a decree of a Civil Court is relevant when the Magistrate is considering what form of order he should make under this section, but the mere existence of a decree of a Civil Court does not oust the jurisdiction of a Magistrate in a proper case to make an order under this section. If the Magistrate comes to the conclusion that an order for maintenance should be made, he ought to make it clear in his order that anything paid under the decree of the Civil Court will be taken into account against anything which he may order to be paid—*Taralakshmi Manuprasad*, 40 Cr L J. 91, 178 I.C. 533, A.I.R. 1938 Bom 499, 40 Bom L.R. 1103, distinguishing *Saraswati v. Narayan*, A.I.R. 1932 Cal. 698, 33 Cr L J. 634, 59 Cal. 1229, 36 C.W.N. 571, 55 C.L.J. 341, 138 I.C. 613, 1932 Cr C. 653, Ind. Rul. 1932 Cal. 471.

Effect of subsequent decree:—See the new sub-sec (2) of sec. 489. Where an order passed by a Magistrate under this section for maintenance against the husband, and in a subsequent suit by the husband in the Civil Court for restitution of conjugal rights a consent decree is passed allowing the wife maintenance and residence, held that the decree of the Civil Court will supersede the Magistrate's order—*Nur Muhammad v. Ayesha*, 27 All 483. The decree of a Civil Court for restitution of conjugal rights supercedes any previous order of a Magistrate for maintenance, if the wife should persist in refusing to live with her husband. The Magistrate ought to cancel his order or rather to treat it as determined if the wife failing to comply with the decree for restitution refuses to live with her husband—*Bulakidas*, 23 Bom. 484; *Maung Tha v. Ma Mya*, 9 Bur L.T. 162, 17 Cr L J. 412, 35 I.C. 972, A.I.R. 1916 L.B. 17; *Maung Pan Aung v. Ma Hmue Bon*, 1 Bur L.T. 104; *Chandulal*, 43 Bom 885, 21 Bom L.R. 766, 20 Cr L J. 687. The subsequent decree of the Civil Court for restitution of conjugal rights has to be considered, and if the wife persists without cause in refusing to live with the husband, then the order for maintenance is to be cancelled—*Ma Pwa Shein v. Maung Po Kue*, 40 Cr L J. 827, 183 I.C. 692, 1939 Rang L.R. 741, 12 R.R. 100, A.I.R. 1939 Rang 314. But a decree of a Civil Court ordering restitution of conjugal rights does not *ipso facto* cancel a maintenance order passed under the Cr. P. Code. In considering any application for cancellation of a maintenance order, the Magistrate is not necessarily bound to follow the order of the Civil Court, but must consider it along with any other circumstances which may be brought before him—*Maung Dun v. Ma Sein*, 3 Rang 150, 26 Cr L J. 1341, 89 I.C. 317, A.I.R. 1935 Rang 268; *Maung Chit Tun v. Ma Pwa Sein*, 35 Cr L J. 813, 148 I.C. 908, 1934 Cr C. 262, A.I.R. 1934 Rang. 39. A decree for restitution of conjugal rights does not necessarily debar a wife from claiming separate maintenance. Sec. 489 (2) gives a certain amount of discretion to the Magistrate as to whether he should cancel the order, and thus discretion must be exercised judicially—*Ali Mahomed*, 20 S.L.R. 145, 27 Cr L J. 876 (877). Undoubtedly, if Civil Court had given to the husband a decree for restitution and the husband *bona fide* wished to execute that decree and the wife refused, that would be a good ground for cancelling the order of maintenance under sec. 488—*Ali Mahomed*, supra. Where a decree for restitution of conjugal rights imposing certain conditions on the husband is passed against a wife, who had obtained an order for maintenance, non-compliance by the husband with the condition of the decree would revive the right of the wife to claim maintenance and to have the order enforced—*Devi Datta v. Ganga Devi*, 115 P.L.R. 1907, 1906 P.R. 4, 4 Cr L J. 73. The party who obtains decree for restitution must comply with the conditions of the decree, and failure to comply with those conditions would justify the Magistrate in holding that the order of maintenance should not be cancelled—*Ma Pwa Shein v. Maung Po Kue*, supra. See also *Ramdheyan v. Ram Sularia*, A.I.R. 1923 Pat 153, 3 P.L.T. 51. A husband against whom an order for maintenance was passed obtained subsequently a decree for restitution of conjugal rights. Two execution petitions filed by him were dismissed as he failed to prosecute the same diligently, and it was clear from his conduct that he was not at all anxious to get back his wife to live with him on the ordinary terms of husband and wife.

Held that as the object in getting the decree for restitution of conjugal rights was merely to get the maintenance order cancelled, and not a *bona fide* wish to live amicably with her, the Court should not exercise its discretion under clause (2) of sec. 489 and cancel the order for maintenance—*Pavakkal v. Athappa*, 49 M.L.J. 269, 27 Cr.L.J. 30; Bombay High Court Circular Rule "Bombay Gazette", January 8, 1892. The Magistrate would be justified in not cancelling the order for maintenance where the suit for restitution is brought, not with a view to take the wife back, but simply to evade the payment of the allowance awarded—*Ma Pwa Shein v. Maung Po Kwe*, *supra*. But if the husband, who has obtained a decree for restitution makes a *bona fide* attempt to live with his wife, but the latter flatly refuses to live with him, she is not entitled to claim maintenance, and the order for maintenance must be cancelled—*Ali Mahomed*, 20 S.L.R. 145, 27 Cr.L.J. 876 (878).

Where a Civil Court has decided any points which would disentitle the wife to maintenance, the Magistrate who had previously passed an order for maintenance, will be bound, in the interests of justice, to take the judgment into consideration before proceeding to pass a fresh order enforcing payment of the allowance—*Anonymous*, 2 Weir 614. And so, when the Civil Court finds that the relationship of husband and wife has ceased to exist, the husband is entitled to ask the Magistrate, who is enforcing the order of maintenance, to abstain from giving further effect to the order—*Mahomed Abid v. Luddon Saheba*, 14 Cal 276. Similarly, where the relationship of father and child on which the maintenance order is based has been declared by a final decree of a competent Civil Court not to exist, it is open to the person adversely affected by the order to ask the Magistrate to abstain from giving any further effect to the order of maintenance. Therefore, a Civil Court decree declaring that A is not the child of B supersedes a Magistrate's previous order for A's maintenance, and the Magistrate cannot enforce the Criminal Court's order after the Civil Court decree is passed—*Venkayya v. Padamma*, 46 Mad. 721, 45 M.L.J. 104, 24 Cr.L.J. 720; *Raghubar*, 2 O.L.J. 251, 16 Cr.L.J. 609. No doubt, the Civil Courts have no jurisdiction to cancel an order for maintenance (see *Subhudra v. Basdeo*, 18 All. 29), or to grant an injunction against a Criminal Court, but where the Civil Court has passed a declaration that a person is not the father of a child, the party who has obtained it can apply to the Criminal Court under sec. 489 for an order to stay the payment of maintenance to the child—*Nga Po Thein v. Ma Me San*, 1 Bur.L.J. 82, A.I.R. 1922 U.B. 20 (21); *U Arzeina v. Ma Kyin Shwe*, A.I.R. 1940 Rang 298 (300), 1940 Rang L.R. 668. The proper course in such cases is for the plaintiff, if he is successful in his civil suit, to approach the Criminal Court under sec. 489 (2), Cr. P. C., and to apply to the Magistrate to cancel or vary the order for maintenance accordingly—*U Arzeina v. Ma Kyin Shwe*, *supra*. See also *Maung Dun v. Ma Sein*, A.I.R. 1925 Rang. 268, 89 I.C. 317, 26 Cr.L.J. 1341, 3 Rang 150.

When the wife obtained an order for maintenance of herself and of her child, subsequent order of the Civil Court for restitution of conjugal rights in favour of husband does not affect the question of his liability to maintain the child—*Ma Pwa Shein v. Maung Po Kwe*, *supra*, following *Nan Saw Shwe v. Maung Hpont*, 6 L.B.R. 127, 18 I.C. 658, 14 Cr.L.J. 98.

Effect of pending civil proceedings:—The Magistrate would exercise a better discretion on receiving an application under this section against a husband who had already instituted proceedings in the Divorce Court, if he refers the applicant for her remedy to the Civil Court. It was not the intention of the Legislature in sec. 489 to encourage applicants to resort to Criminal Courts up to the very time when an order was passed by a competent Civil Court. As the Civil Court was seised of the matter, it is better that the Civil Court should dispose of it. Where the Criminal Court entertained the application in such circumstances, the High Court stayed criminal proceedings under this section until the conclusion of the divorce petition—*Ross v. Ross*, A.I.R. 1932 Sind 210, 1932 Cr.C. 901.

The fact that the litigation is pending is no reason whatever for not giving effect

to the order awarding maintenance which is still in force—*Mahbub Sultan v. Qutabdin*, 31 Cr.L.J. 770, 125 I.C. 63, 30 P.L.R. 740, A.I.R. 1930 Lah. 213, 1930 Cr.C. 201.

The Civil Court has no jurisdiction to restrain a wife by an injunction from pursuing her remedy in the Criminal Court. Where a husband instituted a suit for restitution of conjugal rights against his wife after she instituted proceedings against him in the Criminal Court under this section and obtained an order of injunction from the Civil Court restraining the wife to proceed with her application, held that the order of injunction was to be treated as a nullity and that the Magistrate had jurisdiction to proceed with the case—*Krishna Gobinda v. Kishoribala*, 32 Cr.L.J. 232, 129 I.C. 103, A.I.R. 1930 Cal. 753, Ind. Rul. 1931 Cal. 119, 1930 Cr.C. 1153.

1291. Miscellaneous:—*Second application*—It is not competent for a Magistrate to hold a second inquiry into the same facts and allegations which have once been already inquired into and dismissed by himself or by another Magistrate—*Sadrudin v. Musahib*, 1916 P.R. 24, 18 Cr.L.J. 326; *Mutcsari v. Nand Kumar*, 17 Cr.L.J. 106, 32 I.C. 842 (Cal.). On the general principle of *res judicata*, a Magistrate is wrong in law in re-opening a matter of maintenance which had already been adjudicated on by another Magistrate—*Larait v. Ram Dial*, 5 All. 224. But the Rangoon High Court, dissenting from this view, has said that the Magistrate is not wrong in law in entertaining the second application, nor are his proceedings bad or void regardless of merits, but, of course, the Magistrate ought not to act on the second application without considering the previous decision—*Po So v. Ma Kyin*, 4 L.B.R. 337, 9 Cr.L.J. 21; *Maung Hla v. Ma On Kin*, 8 Rang. 697, 28 Cr.L.J. 912; *Ma Saw May v. U Aung Thein*, A.I.R. 1935 Rang. 277, 1935 Cr.C. 982, 36 Cr.L.J. 1391, 158 I.C. 641. But the Magistrate can entertain a subsequent application for fresh cause shown. There may be change of circumstances which would enable the applicant to come into Court again, not on the same ground, but on a new ground—*Maung Hla v. Ma On*, 5 Rang. 697, 28 Cr.L.J. 912; *Ma Su v. Paul Sassoon*, U.B.R. (1892-96) 64; *Avudai v. Subramania*, 2 Weir 633.

An order refusing to enforce the maintenance order in respect of arrears of maintenance for one period does not operate as a bar to a subsequent application to enforce the order for arrears of maintenance that have accrued during a different and a later period—*Maung Tin v. Ma Hmin*, 34 Cr.L.J. 815, 144 I.C. 187, A.I.R. 1933 Rang. 138, 1933 Cr.C. 728, 11 Rang. 226, Ind. Rul. 1933 Rang. 92 (F.B.).

But if the previous application has been dismissed for default of appearance and there was no adjudication regarding the merits, a second application is entertainable—*Monmohan v. Surabala*, 24 C.W.N. 32, 21 Cr.L.J. 3, 30 C.L.J. 128; *Maung Hla v. Ma On*, supra. *Contra*—*Hakimi v. Mouze*, 1 C.L.J. 214, 2 Cr.L.J. 213, where it has been held that if an application under this section is dismissed for non-appearance, the law does not empower the Magistrate to re-hear the application.

Insanity of defendant:—If the defendant in a proceeding under this section is alleged to be insane, the Magistrate has no power to appoint a guardian *ad litem*, but he should hold a judicial inquiry into his sanity and put him under medical observation, if necessary. If, as a result of such inquiry he comes to the conclusion that the defendant is insane, he must follow the procedure laid down in Chap. XXXIV and postpone the proceedings until the Magistrate is satisfied that the defendant is capable of understanding the proceedings—*Appichi v. Kuthu Jammal*, 48 Mad. 388, 48 M.L.J. 187, 26 Cr.L.J. 701, A.I.R. 1925 Mad. 440, 86 I.C. 77. But an application under section 488 for maintenance against a husband or father stands on a different footing altogether from an application under section 489 by the person who has been ordered to pay maintenance. Where the husband or father becomes incapable of understanding the proceedings, there may be no alternative but to stay those proceedings until he recovers his sanity. But the same considerations do not apply where it is the person in whose favour an order has been made who becomes insane. The Manager appointed by the District Judge under the Indian Lunacy Act (IV of 1912) is obviously the

proper person to state the case for the lunatic wife—*Zinabkhai v. Bai Mani*, A.I.R. 1937 Bom. 454 (455), 39 Bom.L.R. 626, I.L.R. 1937 Bom. 674, 171 I.C. 899.

No limitation:—A wife does not lose her right of maintenance because she has delayed in making the application—*Kunnath v. Veluth*, 2 Weir 616. The law has not fixed any time within which a claim for maintenance is to be made. The fact that the wife has not advanced her claim immediately on her husband's desertion of her does not disentitle her to maintenance—*Velth*, 2 Weir 615. The second proviso to sub-section (3) provides a period of limitation for an application for the issue of a warrant for enforcement of the order, but not for an application for maintenance.

1292. Nature of proceedings under this section:—A proceeding under this section is of a criminal nature, and therefore it is a criminal case within the meaning of section 528, and the District Magistrate may withdraw a case instituted under this section from the file of a first class Magistrate to his own file—*Ghulam Rukia v. Niaz Ali*, 1905 P.R. 5, 2 Cr.L.J. 40. (But section 528 speaks of a 'case', and not of a 'criminal case'; and the word 'criminal' has been omitted from sects. 526 and 527 also; so that it is no longer necessary to consider whether a case under sec. 488 is a criminal case or not.) As the order is one passed in a criminal trial, no appeal lies under clause 15 of the Letters Patent against the order of a single Judge made on a revision petition against the order of a Magistrate under this section—*Rayana Appadu v. Rayana Appanna*, 39 Mad. 472. If the parties to the proceedings compromise the claim for maintenance, the Magistrate cannot pass an order in accordance with the terms to the compromise; because to do so would be to assume the functions of a Civil Court—*Lingada v. Labbakka*, 2 Weir 629. He can only dismiss the petition for maintenance and strike it off the file—*Lingada*, supra.

The Calcutta High Court holds that proceedings under this section are civil proceedings and the defendant thereto may give evidence on his own behalf—*Nur Mahomed v. Bismulla*, 16 Cal. 781. This is now expressly provided by sub-section (2) of sec. 340. A proceeding under this section being a proceeding of a civil nature, the parties can be examined as witnesses. Thus, the wife may be examined as to the non-access of her husband during her married life, in order to prove the illegitimacy of her children—*Rozario v. Ingles*, 18 Bom. 468. The person proceeded against under this section is not an accused—*Parbati v. Chotey*, 17 C.P.L.R. 127, 1 Cr.L.J. 864. The word 'accused' was formerly inadvertently used in sub-section (9). The Legislature has now corrected the error by substituting the words "any person" for the word "accused". This section is not intended to be punitive but a preventive one, and hence the neglect or refusal to pay maintenance is not an 'offence' within the meaning of sec. 4—*Ponnammal*, 16 Mad. 234; *Hildephonsus v. Malone*, 13 P.R. 1885. An application for maintenance is not a complaint of an offence, and the provisions of sec. 177 are not applicable to determine the jurisdiction of the Court competent to entertain the application—*Hildephonsus v. Malone*, supra. Nor is the person against whom the application is made an accused—*Mehr Khan v. Bahkt Bhari*, 29 Cr.L.J. 1002, 112 I.C. 218, 10 Lah. 406, A.I.R. 1929 Lah. 32. Compensation cannot be awarded under sec. 250 to the person proceeded against if the application for maintenance is dismissed as false and frivolous or vexatious—*Amboo v. Baboo*, 6 M.L.T. 261, 11 Cr.L.J. 156. The Magistrate cannot send the case under sec. 202 for inquiry—*Makhan v. Harnamo*, 29 Cr.L.J. 909 (910), 111 I.C. 669 (Lah.). The defendant cannot be examined under sec. 342, as he is not an accused. See Note 973 under sec. 342.

The provisions in the Criminal Procedure Code in regard to applications for maintenance stand by themselves. In fact, they might properly form part of a separate Act. They are not really criminal proceedings in the sense in which are proceedings in regard to the prosecution for the commission of an offence. No analogy can be drawn between complaints in regard to the commission of offences and application for maintenance—*Ma Saw May v. U. Aung Thein*, A.I.R. 1935 Rang. 277. See also *Mehr Khan v. Bahkt Bhari*, supra.

Further inquiry:—When an application under this section is dismissed by a Magistrate, the District Magistrate cannot order *further inquiry* under sec. 436, because it cannot be said that a complaint has been dismissed or the *accused* has been discharged—*Parbati v. Chotey*, 17 C.P.L.R. 127, 1 Cr.L.J. 864.

Appeals:—When a Magistrate orders maintenance under this section no appeal lies as there is no *conviction* of an offence—*Golam Hossein*, 7 WR 10; *Thaku*, 5 B.H.C.R. 81.

1293. Revision:—When the Magistrate has given most careful and considered attention to the evidence put before him, it would not be proper for the High Court to alter his findings when it cannot be shown that he has made any grievous error in his estimation of the evidence—*Chan Toon v. Ma Ti*, A.I.R. 1935 Rang 359, 1935 Cr.C 1083, 159 I.C. 81, 37 Cr.L.J. 6. The High Court dealing with a case under this section will not approach the matter as if it were a Court of Appeal. So long as the proceedings of the Magistrate were in order and so long as the Magistrate has fairly estimated the evidence before him in his mind, his decision should not be disturbed even if the High Court should be of the opinion that on the evidence another conclusion might have been reached—*Ignatious v. Alagamma*, 36 Cr.L.J. 1044, 156 I.C. 968, A.I.R. 1935 Rang. 192, 1935 Cr.C 748. The High Court will be very loath to interfere with a finding of fact, for the party aggrieved by the finding may always file a suit. But it must interfere if the Magistrate awards maintenance to a woman and does not justify his action by a definite finding that she is the wife of the person ordered to pay her maintenance—*Lakshmi Ambalam v. Audiammal*, A.I.R. 1938 Mad 66, 1937 M.Cr.C 317, 1937 M.W.N. 1131, 46 M.L.W. 766, (1937) 2 M.L.J. 885, 172 I.C. 811, 39 Cr.L.J. 228.

The High Court is not disposed to interfere with the discretion of a Magistrate when he has fixed an amount of maintenance after considering all the circumstances of the case—*In re Bai Manek*, 52 Bom 763, 29 Cr.L.J. 1049 (1050). But in awarding maintenance Magistrates must award a reasonable amount. Where the allowance is obviously grossly inadequate, the High Court will interfere—*Ma E Mya v. U Ko Ko Gyi*, A.I.R. 1937 Rang. 370 (372), 171 I.C. 800.

The High Court can set aside in revision a previous order of a Criminal Court passed under this section in view of a subsequent decree of a Civil Court—*Raghubar*, 2 O.L.J. 251, 16 Cr.L.J. 509.

But the High Court does not interfere in revision when other issues are raised which should be settled in the Civil Courts, and when nothing is to be gained by protracted litigation in the Criminal Court. In such cases, the persons aggrieved by Magisterial orders should take their case to the Civil Courts—*Kandasami*, 50 M.L.J. 44, 27 Cr.L.J. 350.

Where the husband applied in revision for cancellation of the order of maintenance on the ground that the marriage had become null and void on account of the first husband of the wife being alive, *held* that the High Court could not, in a revision application of this kind, properly deal with that question, but that the petitioner must apply to the Court of matrimonial jurisdiction to have the marriage declared null and void—*Palmerino v. Pamerino*, 28 Bom L.R. 1299, 28 Cr.L.J. 51 (52). See also *Edward Saitendra v. Suchalata*, 41 C.W.N. 898.

In proceedings under this section the applicant was exempted from personal appearance in Court. On the date fixed for applicant's evidence she was not present and her Counsel failed to attend the Court as he missed a motor connection. Thereupon the Magistrate made an order under sec. 247, Cr. P. C., acquitting the accused. On revision the High Court quashed the order and directed the Magistrate to decide the case on the merits—*Fatima v. Abdul Hamid*, 25 Cr.L.J. 1501, 151 I.C. 1096, A.I.R. Lah. 195, 1934 Cr.C 436.

Review:—The Code of Criminal Procedure does not authorise a Magistrate to review the final order made by him in a proceeding under sec. 488 of that Code. Even

if sec. 369, Cr. P. C., does not apply in terms the principle laid down in that section does apply, as there is no doubt that proceedings under sec. 488 are judicial proceedings and that the final order or the reason given for the final order in any such proceeding is in effect a judgment—*Nandan Narain v. Manmaya*, 21 C.W.N. 344, 18 Cr.L.J. 556, 39 I.C. 700; *Saw Gwan Shein v. Ma Kin Kin*, A.I.R. 1940 Rang. 222, 41 Cr.L.J. 833, 190 I.C. 142. If he finds that he has committed any error, it is his duty to submit the proceedings to the Sessions Judge for submission to the High Court for rectification—*Ibid.* See also *Punjali*, 29 Cr.L.J. 908, 111 I.C. 668, 30 Bom.L.R. 617, A.I.R. 1928 Bom. 224.

Nature of the order:—Arrears of maintenance under order of a Criminal Court are not attachable property within the meaning of sec. 60 of the Civil Procedure Code. The right to receive maintenance is a purely personal right created by an order of a competent Court; it is inalienable. It is a personal right which is not assignable and consequently not liable to be sold in execution of a decree for money—*Gribala v. Nirmalabala*, 62 Cal. 404.

489. (1) On proof of a change in the circumstances of any person receiving under section 488 a monthly allowance, or ordered under the same section to pay a monthly allowance to his wife or child, the Magistrate may make such alteration in the allowance as he thinks fit:

Provided that if he increases the allowance the monthly rate of one hundred rupees in the whole be not exceeded.

(2) Where it appears to the Magistrate that, in consequence of any decision of a competent Civil Court, any order made under section 488 should be cancelled or varied, he shall cancel the order or, as the case may be, vary the same accordingly.

Change:—In sub-section (1) the words 'one hundred' have been substituted for the word 'fifty', and sub-section (2) has been newly added, by section 132 of the Cr. P. Code Amendment Act, XVIII of 1923.

1294. Scope:—The parties to a proceeding under section 488 can always move the Magistrate again when there is a change of circumstances—*Shanno Debi v. Daya Ram*, 35 Cr.L.J. 473, 147 I.C. 719, A.I.R. 1933 Lah. 1026, 1934 Cr.C. 12.

Before an alteration in the allowance is made there should be an application by one of the parties—*Lilawanti v. Madan Gopal*, A.I.R. 1935 Lah. 24, 37 Cr.L.J. 68, 159 I.C. 310, 1935 Cr.C. 18.

This section furnishes the ground on which the Court passing an order under sec. 488 can modify the order. An order of a competent Court under sec. 488 for the maintenance of a child can be modified under this section—*Budhuni*, 27 All. 1. When a maintenance order is made without reference to the means of the husband, he should apply under this section, if he is aggrieved, for reduction of the allowance—*Goyamoney v. Mfohesh Chunder*, 9 W.R. 1. The alteration of an order of maintenance and the grant of it on a lower scale than that of the original order is not legal, without an application under this section from one of the parties and without proof of change of circumstances—*Venkatachala Podiachi*, 2 Weir 628.

If an order which was passed by a Magistrate under sec. 488 has been varied by the High Court in revision, the Magistrate has jurisdiction under sec. 489 to vary the amount of maintenance in accordance with the High Court's decision. He need not refer the applicant to the High Court—*Haji v. Fatma*, 1932 Cr.C. 200, 33 Cr.L.J. 646, 138 I.C. 624, A.I.R. 1932 Sind 59, Ind. Rul. 1932 Sind 87.

The Magistrate has jurisdiction to vary the amount of maintenance fixed under sec. 488 not only by himself but by his predecessor-in-office—*Haji v. Fatma*, supra. Where an application under this section is referred to an arbitrator who makes an award, he is not competent to review his award subsequently—*Bhagwati v. Gajadhar*, 36 Cr.L.J. 186, 152 I.C. 822, A.I.R. 1934 All. 940, 1934 Cr.C. 1248. Before the orders regarding fixation of maintenance can be vacated, action must be taken under this section. So a Magistrate cannot refuse to enforce an application for arrears of maintenance merely because the opposite party appears, makes part payment and promises to allot land in lieu of future maintenance—*Multan v. Faramosh*, 37 Cr.L.J. 347, 160 I.C. 802, A.I.R. 1936 Pesh. 32, 1936 Cr.C. 119.

An application under this section can be made so long as there is a subsisting order under section 488. Thus, an order awarding maintenance to the wife was passed in 1910; afterwards in 1912 the husband obtained a decree for restitution of conjugal rights, but he never executed it and went on paying the maintenance to his wife as before. In 1918, the wife applied for increase of the amount of maintenance under sec. 489. Held that this application could not be granted because there was no subsisting order under section 488, the same having been put an end to by the decree of 1912. The fact that the husband continued to pay the maintenance in spite of the decree of 1912 did not keep the order of 1910 alive—*Chandulal*, 43 Bom. 885, 20 Cr.L.J. 687, 52 I.C. 607. Similarly, where after the wife's application for maintenance, the parties compromised and the husband agreed to pay his wife Rs. 5 per month whether she lived in his house or at her father's house, and the Court passed an order to that effect, the wife was not afterwards entitled to apply for an increase of maintenance on the ground that her father, with whom she had been living, had died. The fact that the parties came to a compromise put an end to the jurisdiction of the Criminal Court. The wife must seek her remedy in the Civil Court—*Sham Singh v. Hakam Devi*, 1930 Cr.C. 623 (624), A.I.R. 1930 Lah. 524, 31 Cr.L.J. 1179, 127 I.C. 13, 15 A.I.Cr. 125.

It is only a change of circumstances of the kind mentioned in this section that the Magistrate can make an alteration in the maintenance allowance that has to be paid. He cannot inquire whether at the time when the husband was directed to pay the allowance he had sufficient means, because that in effect would be a review of the previous judgment of the Court, which is prohibited by sec. 369—*Punjatal*, 30 Bom.L.R. 617, 29 Cr.L.J. 908.

Notice:—There is no provision in this section requiring the issue of a notice to the wife or child. In accordance with the maxim *audi alteram partem*, the Court may properly require that the point of view of the wife or child, as the case may be, should be properly placed before it in the case of an application under this section for reduction of the amount of maintenance. But the Court is not fettered by any technical rules as to representation or as to the kind of evidence which it may accept as sufficient. There is no need for the appointment of a guardian *ad litem*. The manager appointed by the District Judge under the Indian Lunacy Act (IV of 1912) is obviously the proper person to state the case of the lunatic wife. There is nothing in the Code which prevents the Magistrate from taking his evidence. Nor is there anything in the Code which requires that any additional or different evidence should be produced or that the wife should be otherwise represented. The Magistrate takes a narrow view of his powers under this Chapter in holding that he cannot proceed with an application under this section for reduction of the amount of maintenance ordered to be paid to the wife who becomes insane—*Zinabhai v. Bai Mani*, A.I.R. 1937 Bom. 454 (455), 39 Bom.L.R. 626, I.L.R. 1937 Bom. 674, 171 I.C. 899.

1295. Change of circumstances:—The expression 'change in the circumstances' in this section means not merely a temporary or accidental change in one of such circumstances (such as salary) but a change in all the circumstances connected with the condition of the person—*Rukmini v. Priari*, 1891 A.W.N. 32.

The change of circumstances in this section is a change of pecuniary or other circumstances of the party paying or receiving the allowance, which would justify an

increase or decrease of the amount of the monthly payment originally fixed, and not a change in the status of the parties, which would entail stoppage of the allowance—*Shah Abu v. Ulfat*, 19 All. 50. The words 'alteration in the allowance' clearly indicate that the section refers to such change of circumstances as would necessitate only an *alteration in the amount* of allowance, and not to circumstances (e.g., divorce) which entail the *discontinuance* of the allowance altogether—*Din Mahamad*, 5 All. 226 (*per Mahmood, J.*); *Punjatal*, 30 Bom.L.R. 617, 29 Cr.L.J. 908 (909). Circumstances which necessitate not merely an alteration in the allowance but a *cancellation* of the order of maintenance do not come under this section but under sub-section (5) of section 488; or can be pleaded by the husband when the order is being enforced under sub-section (3) of that section—*In re Punjalal*, 30 Bom.L.R. 617, 29 Cr.L.J. 908 (909). See also *U Ba Thaung v. Ma Aye*, 10 Rang. 196, 1932 Cr.C. 476 (477). But the Madras High Court holds the opinion that the word 'alteration' includes cancellation. The reduction of the maintenance allowance to nothing (which is the same thing as cancellation of the order granting maintenance) would come within the meaning of the word 'alteration'. Therefore, a Magistrate can under this section cancel the allowance granted to the daughter, if she has since been married and has thus become able to maintain herself by reason of her marriage—*Meenakshi v. Karupanna*, 48 Mad. 503, 48 M.L.J. 183, 26 Cr.L.J. 732.

The growth of the child, or the birth of another child, or the death of a child is a change in the circumstances—*Ramayee*, 14 Mad. 398; *Upendra v. Soudammi*, 12 Cal. 535. The advance in age of the child is a change of the child's circumstances—*Maung Shwe Ba v. Ma Thein Nya*, 40 Cr.L.J. 440 (441), 180 I.C. 584, A.I.R. 1939 Rang. 95, 1938 Rang. 673, 11 R.Rang. 423, following *Charles Nepean v. Ma Kyaw*, (1893-1900) L.B.R. 393. The fact that the children are grown up and are no longer unable to maintain themselves amounts to a change in the circumstances—*Ma Yu v. Coloquhoun*, 19 Cr.L.J. 160; *Thambuswamy*, 10 Bur.L.T. 209, 18 Cr.L.J. 103, 9 L.B.R. 49. See also *Ma E Shi v. U San Kai*, 40 Cr.L.J. 241, 179 I.C. 643, A.I.R. 1939 Rang. 67, 11 R.Rang. 336. Where a divorced Mahomedan wife has married again, the fact that the second husband has merely undertaken to maintain her child by the first husband, does not empower the Magistrate to cancel the order of maintenance passed against the first husband to maintain his child. There is no such change of circumstances as is contemplated by this section—*Budhni v. Dabal*, 27 All. 11. The second husband is not bound by law to maintain the child; perhaps he may refuse to maintain it any day. So the change of circumstances in this case is not such as can be relied upon.

The change of circumstances must be actual and of such a nature that the law would recognise it. The mere fact that the wife might possibly be able to earn something by her own labour is not a ground on which the husband may apply for reduction of the rate of allowance—*Ghurbin v. Gobindi*, 1887 A.W.N. 107, because the law does not compel a wife to work for her livelihood, while her husband is living and has sufficient means to maintain her. If the parties, subsequent to an order under sec. 488, make an agreement modifying its terms, such agreement would amount to a change in the circumstances, and the party interested can apply under this section and get the order modified—*Prabhu v. Rami*, 25 All. 165.

Before the original order of maintenance can be altered, it must be shown that there has been, if not a change in the circumstances of the husband, then a change in the circumstances of the wife. The mere fact that the wife is living in a different manner from the manner in which she lived at the time the order of maintenance was passed, does not necessarily constitute a change in her circumstances. The facts that the husband is heavily in debt because of the infructuous litigation which he has been conducting against his wife and that has a mistress and children by her to maintain, would be no reason for reducing the allowance awarded to his legal wife—*Msa Mya Khin v. N. L. Godenho*, 39 Cr.L.J. 274, 173 I.C. 135, 10 R.R. 312, A.I.R. 1938 Rang. 42.

In an application for cancellation of the order of maintenance the question whether the marriage between the parties was null and void in consequence of the wife's first husband being alive at the time of the marriage of the parties cannot properly be dealt with. This question could have been gone into at the time when the application of the wife for maintenance was heard. This being not done, it must be left to be determined in a proper proceeding under the matrimonial jurisdiction of the Court which may have jurisdiction to deal with the matter—*Palmerino v. Palmerino*, 28 Cr.L.J. 51, 99 I.C. 83, 28 Bom L.R. 1299, A.I.R. 1927 Bom. 46.

The father made a deed of gift of his half share in a house, the other half share of which was held by the mother of the girl, to the girl in whose favour the order of maintenance had been previously made. Nothing was said in the deed of gift about the gift being intended to take the place of the order for maintenance. The father made an application for cancellation of the order of maintenance on the ground that the gift made an alteration in the child's circumstances. *Held* that the child's income from her half share was not an income which was sure by any means and hence the order could not be cancelled completely, but in view of the fact that the house had become the sole property of mother and the child and thus caused a change in the child's circumstances, the effect of which it was difficult to assess, the amount might be reduced—*Maung Din v. Ma Dwe*, 38 Cr.L.J. 910, 170 I.C. 285, 10 R.R. 75, A.I.R. 1937 Rang. 239.

1296. Alteration of allowance:—An order of alteration of allowance under this section cannot take effect retrospectively. The Magistrate has no power to reduce the rate of maintenance which has already accrued due; his order will take effect in respect of the allowance that will fall due after the date of the order. The arrears which have fallen due will be enforced at the rate originally fixed—*Parvatnam v. Mutha*, 2 Weir 650; *Lilauanti v. Madan Gopal*, A.I.R. 1935 Lah. 24, 1935 Cr.C. 18, 159 I.C. 310, 37 Cr.L.J. 68.

When an application for modification of the allowance has been preferred under this section, the Magistrate cannot inquire into the propriety or otherwise of the previous order of maintenance—*Marrakkal*, 2 Weir 650.

An application for alteration of allowance is no ground for staying the execution of an order of maintenance already granted, as that order carries with it all the proper consequences so long as it remains in force—*Sidheswar v. Gyanada*, 22 Cal 291.

The amount of maintenance payable to each person must be specified; otherwise it cannot be altered. See *Thambuswamy*, 9 L.B.R. 49, 18 Cr.L.J. 103, cited in Note 1279 under section 488.

Sub-section (2):—See Notes 1282 and 1290

Where an application is made under this sub-section praying that, in view of the subsequent decree for restitution of conjugal rights the Magistrate should cancel the maintenance order, he should give each side an opportunity of being heard—*Maung Chit Tun v. Ma Pwa Sein*, 35 Cr.L.J. 813, 148 I.C. 908, A.I.R. 1934 Rang. 39, 1934 Cr.C. 262, A.L.R. 1934 Rang. 122.

The Magistrate cancelled his order for maintenance under sec. 488, Cr. P. C., passed in favour of the wife when the husband brought to the notice of the Magistrate that he had obtained a decree for restitution of conjugal rights against his wife. He did not then inform the Magistrate that an appeal against the decree was pending. When the decree was reversed on appeal the wife petitioned the Magistrate who restored the original order of maintenance. *Held* that section 369, Cr. P. C., does not apply to the case in view of the express provisions of secs. 488 and 489, Cr. P. Code. The order cancelling the previous order for maintenance was really obtained by fraud upon the Magistrate in his not being apprised on that date that the decree for restitution of conjugal right was liable to be set aside on appeal which was then pending and an order obtained by fraud must be treated as having no legal effect. Section 489 (2), Cr. P. C., suggests that it is open to the Magistrate to vary the order of maintenance.

nance or to alter it if circumstances so require—*Bhagubhai Ranchhodas v. Bai Arvinda*, A.I.R. 1937 Cal. 334.

490. A copy of the order of maintenance shall be given without payment to the person in whose favour it is made, or to his guardian, if any, or to the person to whom the allowance is to be paid; and such order may be enforced by any Magistrate in any place where the person against whom it is made may be, on such Magistrate being satisfied as to the identity of the parties and the non-payment of the allowance due.

1296A. Scope:—The only conditions laid down in respect of the enforcement of the order under this section are: (1) the identity of the parties and the non-payment of the allowance due. If any such thing occurs as may be fit to vacate the order, the proper procedure for the husband is to apply to the Court and get the order cancelled. So long as the order stands, it is capable of being enforced though in the case of the woman living with her husband, it would remain suspended for the period during which she lives with her husband—*Pearey Lal v. Naraini*, 37 Cr.L.J. 62, A.I.R. 1935 All. 977, 159 I.C. 308, 1935 Cr.C. 1197, 58 All. 379, 1935 A.L.J. 1186, 1935 A.L.R. 1106, 8 R.A. 426

1297. Who can enforce order:—The order can be enforced by a second class Magistrate, if the person against whom the order is passed resides within his jurisdiction—*Ubhai*, Ratanlal 288.

The words 'any Magistrate in any place where the person against whom it is made may be' do not deprive the Magistrate who has made the order of his power to enforce the order under sec. 488 (3), even though the defendant no longer resides within his jurisdiction. It was not intended by the Legislature that the poor wife would have to rush about the country pursuing her absconding husband to wherever he chooses to go. When the defendant is beyond the jurisdiction of the Magistrate who made the order, he may issue a warrant for collection of the arrears of maintenance—*Gnanambalammal*, 52 Mad 77, 55 M.L.J. 516, 29 Cr.L.J. 932; *Kari Papayamma*, 4 Mad. 230. The application for an order to enforce the recovery of maintenance may be made either to the Magistrate who passed the original order or to the Magistrate having jurisdiction over the place where the person resides. It is left in the applicant to choose where she will apply. The provisions of this section cannot be held to derogate from the provisions of sec. 488 (3)—*Ma Thaw*, 7 L.B.R. 116, 15 Cr.L.J. 701 (702), dissenting from *Kari Papayamma*, 4 Mad. 230, where it was held that if the defendant had left the jurisdiction of the Court passing the order, the Court had a discretion to refer the application to the Magistrate having jurisdiction at the place where the defendant was to be found. See also *U Hpay Latt v. Ma Po Byu*, A.I.R. 1935 Rang. 407, 37 Cr.L.J. 91, 159 I.C. 289, 1935 Cr.C. 1192, 13 Rang. 289, where *Ma Thaw*, supra, was followed.

Section 135 of the Civil Procedure Code does not exempt a party from being arrested in execution of an order under sec. 488, Cr. P. C., enforced by a criminal Court—*Dani*, 30 Cr.L.J. 788, 117 I.C. 238, A.I.R. 1929 Lah. 785, Ind. Rul. 1929 Lah. 670.

Powers and Duties of the Magistrate:—It has been held in *Prabhu v. Rami*, 25 All 165 (166), that a Magistrate to whom an application has been made to enforce an order of maintenance, should not take into consideration anything further than the identity of the parties and the non-payment of the allowance. He may also consider whether the person (in case of a Mahomedan) to whom maintenance is ordered still holds the position of wife. But no further steps relaxing the clear words of sec. 490 should be allowed. The fact that the parties had made an agreement subsequent to

the order modifying its terms is not a matter for the consideration of the Magistrate enforcing the order. If the person against whom an order for maintenance is made considers that such order should no longer be in force against him, it is for him to apply under sec. 489 and get the order altered. It is not suitable or expedient that it should be open to a second Magistrate to call in question an order duly given upon proof.

But a wider view has been taken in *Rangamma v. Muhammad Ali*, 10 Mad. 13. In this case it has been held that where in answer to an application for enforcement of an order of maintenance, the husband pleads that the claim has been released, the wife having received a lump sum in satisfaction of her claims for maintenance, the Magistrate enforcing the order is competent to consider such plea, and if it is proved, to refuse to enforce the order.

But there can be no doubt that the Magistrate enforcing the order must take into consideration the question whether the person to whom the order has been given is, at the time she makes the application, still holding the position of wife (i.e., has not been divorced). This is a most material question which it is incumbent on the Magistrate to consider. If the wife no longer occupies the position of wife by reason of being divorced, the allowance ceases to be due, and the order cannot be enforced for any period subsequent to the divorce—*Shah Abu v. Ulfat*, 19 All 50; *Prabhu v. Rami*, 25 All 165; *Baji v. Nawab*, 1894 P.R. 21; *Daulat v. Jadu*, 17 O.C. 260, 15 Cr L.J. 646; *Hasan v. Mi Sin*, 1915 U.B.R. 1st Qr. 53, 16 Cr L.J. 531.

The Magistrate enforcing the order is also bound to consider a Civil Court decree passed subsequent to the order of maintenance. If the Civil Court has decided that the complainant is not and never had been the wife of the defendant, the Magistrate must refuse to enforce the order for maintenance—*Nawab Zulfikar v. Zainal*, 9 O.C. 49 (B), 3 Cr L.J. 229. For further notes as to the effect of Civil Court decree, see Note 1290 under sec. 488.

An order refusing to enforce the maintenance order in respect of arrears of maintenance for one period does not operate as a bar to a subsequent application to enforce the order for arrears of maintenance that have accrued during a different and a later period—*Maung Tin v. Ma Hmin*, 34 Cr L.J. 815 (816), 144 IC 187, A.I.R. 1933 Rang 138, 1933 Cr C. 728, 11 Rang 226, Ind. Rul. 1933 Rang 92 (FB).

A Second Class Magistrate is not competent to pass a sentence of imprisonment for breach of an order under sec. 488, directing payment of maintenance. Even assuming that the words "any Magistrate" in sec. 490 have not been used with reference to the class of Magistrates referred to in secs. 488 and 489, the power to enforce an order of maintenance does not necessarily include the power to sentence the person against whom it was passed, to imprisonment—*Kuppins Naiken*, 36 Cr L.J. 830, 155 IC 694, 1934 M.W.N. 922, 68 M.L.J. 493, 41 M.L.W. 697, A.I.R. 1935 Mad 572.

Costs:—This section does not contain any provision such as that in sub-clause (7), sec. 488, Cr P.C., which would enable the Court to grant costs—*Ma E Shi v. U San Kai*, 40 Cr L.J. 241 (242), 179 IC 643, A.I.R. 1939 Rang. 67, 11 R.Raj. 336.

See Note 1280.

nance or to alter it if circumstances so require—*Bhagubhai Ranchhodas v. Bai Arvinda*, A.I.R. 1937 Cal. 334.

490. A copy of the order of maintenance shall be given without payment to the person in whose favour it is made, or to his guardian, if any, or to the person to whom the allowance is to be paid; and such order may be enforced by any Magistrate in any place where the person against whom it is made may be, on such Magistrate being satisfied as to the identity of the parties and the non-payment of the allowance due.

1296A. Scope:—The only conditions laid down in respect of the enforcement of the order under this section are: (1) the identity of the parties and the non-payment of the allowance due. If any such thing occurs as may be fit to vacate the order, the proper procedure for the husband is to apply to the Court and get the order cancelled. So long as the order stands, it is capable of being enforced though in the case of the woman living with her husband, it would remain suspended for the period during which she lives with her husband—*Pearey Lal v. Naraini*, 37 Cr.L.J. 62, A.I.R. 1935 All. 977, 159 I.C. 308, 1935 Cr.C. 1197, 58 All. 379, 1935 A.L.J. 1186, 1935 A.L.R. 1106, 8 R.A. 426.

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the order modifying its terms is not a matter for the consideration of the Magistrate enforcing the order. If the person against whom an order for maintenance is made considers that such order should no longer be in force against him, it is for him to apply under sec. 489 and get the order altered. It is not suitable or expedient that it should be open to a second Magistrate to call in question an order duly given upon proof.

But a wider view has been taken in *Rangamma v. Muhammad Ali*, 10 Mad. 13. In this case it has been held that where in answer to an application for enforcement of an order of maintenance, the husband pleads that the claim has been released, the wife having received a lump sum in satisfaction of her claims for maintenance, the Magistrate enforcing the order is competent to consider such plea, and if it is proved, to refuse to enforce the order.

But there can be no doubt that the Magistrate enforcing the order must take into consideration the question whether the person to whom the order has been given is, at the time she makes the application, still holding the position of wife (i.e., has not been divorced). This is a most material question which it is incumbent on the Magistrate to consider. If the wife no longer occupies the position of wife by reason of being divorced, the allowance ceases to be due, and the order cannot be enforced for any period subsequent to the divorce—*Shah Abu v. Ulfat*, 19 All. 50; *Prabhu v. Rami*, 25 All. 165; *Baji v. Nawab*, 1894 P.R. 21; *Daulat v. Jadu*, 17 O.C. 260, 15 Cr.L.J. 646; *Hasan v. M. Sin*, 1915 U.B.R. 1st Qr. 53, 16 Cr.L.J. 531.

The Magistrate enforcing the order is also bound to consider a Civil Court decree passed subsequent to the order of maintenance. If the Civil Court has decided that the complainant is not and never had been the wife of the defendant, the Magistrate must refuse to enforce the order for maintenance—*Nauab Zulfikar v. Zamal*, 9 O.C. 49 (B), 3 Cr.L.J. 229. For further notes as to the effect of Civil Court decree, see Note 1290 under sec. 488.

An order refusing to enforce the maintenance order in respect of arrears of maintenance for one period does not operate as a bar to a subsequent application to enforce the order for arrears of maintenance that have accrued during a different and a later period—*Maung Tin v. Ma Hmin*, 34 Cr.L.J. 815 (816), 144 I.C. 187, A.I.R. 1933 Rang. 138, 1933 Cr.C. 728, 11 Rang. 226, Ind. Rul. 1933 Rang. 92 (F.B.)

A Second Class Magistrate is not competent to pass a sentence of imprisonment for breach of an order under sec. 488, directing payment of maintenance. Even assuming that the words "any Magistrate" in sec. 490 have not been used with reference to the class of Magistrates referred to in secs. 488 and 489, the power to enforce an order of maintenance does not necessarily include the power to sentence the person against whom it was passed, to imprisonment—*Kuppini Naiken*, 36 Cr.L.J. 830, 155 I.C. 694, 1934 M.W.N. 922, 68 M.L.J. 493, 41 M.L.W. 697, A.I.R. 1935 Mad. 572.

Costs:—This section does not contain any provision such as that in sub-clause (7), sec. 488, Cr. P. C., which would enable the Court to grant costs—*Ma E Shi v. U San Kai*, 40 Cr.L.J. 241 (242), 179 I.C. 643, A.I.R. 1939 Rang. 67, 11 R.Rang. 336.

See Note 1280.

CHAPTER XXXVII.

DIRECTIONS OF THE NATURE OF A HABEAS CORPUS.

491. (1) *Any High Court* may, whenever it thinks fit, direct—

Power to issue directions of the nature of a habeas corpus.

- (a) that any person within the limits of its *appellate criminal jurisdiction* be brought up before the Court to be dealt with according to law;
- (b) that a person illegally or improperly detained in public or private custody within such limits be set at liberty;
- (c) that a prisoner detained in any jail situate within such limits be brought before the Court to be there examined as a witness in any matter pending or to be inquired into in such Court;
- (d) that a prisoner detained as aforesaid be brought before a Court-martial or any Commissioners * * * * * for trial or to be examined touching any matter pending before such Court-martial or Commissioners respectively;
- (e) that a prisoner within such limits be removed from one custody to another for the purpose of trial; and
- (f) that the body of a defendant within such limits be brought in on the Sheriff's return of *cepi corpus* to a writ of attachment.

(2) The High Court may, from time to time, frame rules to regulate the procedure in cases under this section.

(3) Nothing in this section applies to persons detained under the Bengal State Prisoners Regulation, 1818, Madras Regulation II of 1819, or Bombay Regulation XXV of 1827, or the State Prisoners Act, 1850, or the State Prisoners Act, 1858.

1298. Scope:—This section has been amended by sec. 30 of the Criminal Law Amendment Act, XII of 1923. Under the old law, power under this section was given only to the High Courts at Calcutta, Madras and Bombay; under the present section power is given to *all* High Courts. Under the old law, the jurisdiction of the High Court in respect of proceedings under this section was confined to the limits of its *original jurisdiction* (*In re Charu Chandra*, 44 Cal. 76 and *Tops*, 46 Cal. 52); under the present section the jurisdiction has been extended to *mofussil* places. See also *Govindan Nair*, 54 Mad. 922, 43 M.L.J. 396 (F.B.). So also, the Criminal Appellate Bench of the High Court has power to dispose of applications under this section—*Subodh Chandra*, 52 Cal. 319, 29 C.W.N. 98, 26 Cr.L.J. 625.

In clause (d) of sub-section (1) the words "acting under the authority of any commission from the Governor-General in Council" have been omitted by the Government of India (Adaptation of Indian Laws) Order, 1937.

The proceedings by way of *habeas corpus* are proceedings calling upon a person having custody of another person to produce him and demonstrate under what authority he holds him in custody. If the authority is a legitimate authority, the High Court cannot interfere. All that this Court can do is to see that there is no patent defect visible in the authority by which the person having custody detains any person—*Jamna*, 20 S.L.R. 128, 27 Cr.L.J. 37 (38), A.I.R. 1926 Sind 126, 91 I.C. 69. See also *Bajinath v. Emp.*, 134 I.C. 594, A.I.R. 1931 Oudh 394, 1931 Cr.C. 826, 32 Cr.L.J. 1243, 8 O.W.N. 933, Ind. Rul. 1931 Oudh 386 and *Gyan Chand v. Emp.*, 3 P.R. 1909 (Cr.), 1 I.C. 198, 9 Cr.L.J. 3, 36 P.W.R. 1908 (Cr.). It is doubtful whether the exercise of jurisdiction under section 491 is necessary where the person detained is on bail—*Jamna*, supra. This section is very widely worded and entitles the High Court to inquire into the question whether the applicant was illegally or improperly detained in public or private custody and if the High Court is satisfied that he was so detained, to order that he be set at liberty. The mere fact that after his arrest he was temporarily released on bail does not oust the jurisdiction of the High Court under this section—*Sandal Singh v. District Magistrate, Dehra Dun*, 35 Cr.L.J. 1296 (1299), 151 I.C. 279, 1934 A.L.J. 556, 1934 Cr.C. 214, A.I.R. 1934 All. 148, 56 All. 409. The powers of the High Court under this section are limited and they do not authorize the High Court to enter as it were upon an enquiry into the conduct of the Political Agent before issuing a warrant of arrest under sec. 7, Extradition Act. All that the High Court is concerned with while exercising its powers under this section is to see that the authority under which a person is being detained is on the face of it legal and valid. If there are any formal defects in the warrant under which the applicant is arrested, the High Court can certainly take notice of them and can upon that basis hold that the warrant is on the face of it invalid. It would necessarily follow in that event that the detention of the applicant was unlawful, but this is the limit beyond which the High Court cannot go in the exercise of its power under this section—*Israr Husain v. Emp.*, 41 Cr.L.J. 152, 185 I.C. 302, A.I.R. 1939 All. 730, 1939 A.L.J. 895, 1939 A.Cr.C. 172, 1939 A.W.R. (H.C.) 737, 1 I.L.R. 1940 All. 23. There are with reference to section 7, Extradition Act (XV of 1903) three conditions precedent for the issue of a legal warrant: (1) the offence must be an extraditable offence, that is, one of those given in Sch. I, Extradition Act, (2) the accused must not be a European British subject, and (3) the offence must have been committed by the accused in the territories of the State. Without all these three conditions being fulfilled, the Political Agent would have no authority to issue a warrant for the arrest of any person who has either escaped into or is in British India, and the arrest of such a person in pursuance of such a warrant would be illegal and under sec. 491, Cr.P.C., a High Court would be within its rights in quashing the proceeding taken against the accused and setting him at liberty—*A. W. Goulter*, 37 Cr.L.J. 312, 160 I.C. 115, 8 R.S. 120, A.I.R. 1935 Sind 244, 29 S.L.R. 60, 1935 Cr.C. 1307, following *Sandal Singh v. District Magistrate, Dehra Dun*, supra.

Nasirabad is outside the limits of British India and, therefore, the First Class Magistrate, Nasirabad, has no jurisdiction to issue a warrant under sec. 83, Cr.P.C., for the arrest of a person who is residing in British India and, that being so, the Additional District Magistrate, Karachi, has no jurisdiction to enforce the warrant under sec. 86, Cr.P.C. When there is such a patent defect visible in the warrant under which a person is being detained in custody, the High Court can, in exercise of powers under this section, set aside the proceedings which have been taken in pursuance of the warrant and direct that the person be set at liberty—*Tahilram Khanchand v. Emp.*, 39 Cr.L.J. 298, 173 I.C. 322, 10 R.S. 203, 32 S.L.R. 134, A.I.R. 1938 Sind 46.

The investment of the extraordinary powers of *habeas corpus* in a High Court does not take away from the litigants their ordinary rights which they have under the Civil Law. Therefore a refusal by the High Court to exercise the powers under this section to recover the custody of a child will not deprive the applicant of his right to seek his remedy either by means of an application under the Guardians and Wards

Act or by a regular suit—*Swa Lay v. Yeo Boon*, 4 Bur.L.J. 269, 27 Cr.L.J. 737. The remedy provided by this section may be resorted to by a husband seeking the custody of his wife, even though he has another remedy under the Guardians and Wards Act—*Subbaswamy v. Kamakshi*, 53 Mad. 72, 57 M.L.J. 642, 31 Cr.L.J. 187 (189), 120 I.C. 892, 30 M.L.W. 685, 1929 M.W.N. 689, A.I.R. 1929 Mad. 834, Ind. Rul. 1930 Mad. 92. If the provisions of this section are satisfied there is no reason to refuse the expeditious relief provided for in this section because it is possible for the applicant to seek other remedies—*Deputy Commissioner, Gonda v. Mohammad Shikoh*, 35 Cr.L.J. 1108 (1111), 150 I.C. 706, 11 O.W.N. 803.

The Allahabad High Court has taken a different view and has laid down that where there is Special Act dealing with a special subject resort should be had to that Act instead of to a general provision. The power under this section is a general power of the nature of a *habeas corpus*. The power under the Guardians and Wards Act, is a power under a Special Act, dealing with a special subject, that is, the subject of minors. It is more desirable that the matter should be heard under the Special Act, because there are provisions in the Special Act such as sec. 7 which indicate to the Court how it should proceed whereas in the general provision in this section there are no special provisions to indicate to the Court as to how it should proceed in the case of a minor. Moreover, an order by the High Court under this section would not bar a party from making an application to the District Judge under the Guardian and Wards Act. The proceedings in the High Court, therefore, would not be final and it is not desirable that the High Court should take proceedings which are not final unless there is such urgency in the matter that a remedy does not exist otherwise—*Haidari Begum v. Jawad Ali*, 36 Cr.L.J. 554, 154 I.C. 638, A.I.R. 1935 All 55, 1934 A.L.J. 946, 4 A.W.R. 1406.

Where a Court of competent jurisdiction has declared a person to be a fit and proper person to exercise guardianship over the infant, it is never intended that the procedure by way of *habeas corpus* should be utilized for the purpose of going behind such an order—*Subbarathnammal v. Seshachalam*, A.I.R. 1931 Mad. 773, 1931 M.W.N. 768, 34 M.L.W. 171, 61 M.L.J. 219, 54 Mad. 759, 1931 Cr.C. 1029, 134 I.C. 1215, 33 Cr.L.J. 49.

Where a satisfactory decision of an application under this section involves deciding two important questions of fact, whether a woman was converted from Muhammadanism to Hinduism and whether she is now the wife of the applicant, it is not proper that such questions involving status should be summarily decided in an application of this kind if it can be avoided. The application was, in these circumstances, adjourned in order that they may be decided by a Civil Court—*Jai Dayal v. Sohagan*, 35 Cr.L.J. 1397, 151 I.C. 692, 35 P.L.R. 591, A.I.R. 1934 Lah. 647, 1934 Cr.C. 979.

Under this section the High Court has no power to question the manner in which the Government exercises its prerogative of mercy. Even, if the High Court had such power, it would ill become it to do anything that would interfere with the freedom of the Government to act in matters of this kind according to the dictates of humanity. Where a person sentenced to imprisonment after trial was allowed to go home temporarily to be at the bed side of his wife who was seriously ill and was taken back into prison after a few days, the High Court refused to interfere in a matter like this under this section—*Girdhari Lal*, 36 Cr.L.J. 325, A.I.R. 1935 All. 181.

This section does not apply where there has been a conviction and sentence in the usual course. Thus, where the accused was tried before the High Court Sessions, convicted by a majority of the jury, and sentenced to a term of imprisonment, and there was no illegality in the trial, the accused was not entitled to make an application under clause (b), asking the High Court to set the accused at liberty. Such an application would be in effect an appeal indirectly from the decision of the High Court, where no appeal is allowed by law. If the accused alleges any miscarriage of justice the proper course would be to apply to the Government—*Bonomally*, 44 Cal. 723, 21 C.W.N. 167, 18 Cr.L.J. 311 (F.B.). See also *Rameswar Khiroriwalla*, cited below in Note 1299.

It is not reasonable, or normal procedure, to make applications to the High Court under sec. 491, Cr. P. C., or for bail, while applications by the same petitioners for bail

are still pending in the Sessions Court. The proper course in a matter of this kind is to apply to the lower Courts before coming up to the High Court—*Kanshi Ram*, 30 Cr.L.J. 301, 114 I.C. 444, A.I.R. 1929 Lah. 522, Ind. Rul. 1929 Lah. 284.

Where a Special Tribunal, out of the ordinary course, is appointed by an Act to determine questions as to rights which are the creation of that Act, then, except so far as otherwise expressly provided or necessarily implied, that Tribunal's jurisdiction to determine those questions is exclusive. Where, therefore, a person is arrested under the orders of the Manager, Encumbered Estates, under the provisions of sec. 10 of the Sind Encumbered Estates Act (XX of 1896) read with sec. 157 of the Bombay Land Revenue Code (Act V of 1879), the High Court has no jurisdiction to issue a writ of *habeas corpus* under this section—*Ghanshamdas Khatumal v. Manager, Encumbered Estates*, 28 Cr.L.J. 194 (196), 22 S.L.R. 24, 99 I.C. 930, A.I.R. 1927 Sind 123; *Sherkhan v. Emp.*, 40 Cr.L.J. 710, 182 I.C. 963, 12 R.S. 37, A.I.R. 1939 Sind 155.

Habeas Corpus:—For any of the purposes mentioned in what is now sec. 491, Cr. P. C., it is not open to an applicant still to say that he will make his application, independently of that section altogether, for the prerogative writ of *habeas corpus* on the civil side of the High Court—*Girindra v. Birendra*, 31 C.W.N. 593 (613), 8 A.I.Cr.R. 121, 102 I.C. 647, A.I.R. 1927 Cal. 496, 54 Cal. 727. Sec. 491, Cr. P. C., in so far as it displaces writ of *habeas corpus* is not illegal—*Pratul v. C. H. D. Camp*, 35 Cr.L.J. 1466 (1471), 151 I.C. 1028, 38 C.W.N. 299, A.I.R. 1934 Cal. 259, 59 C.L.J. 185, 1934 Cr.C. 381, 61 Cal. 197. But the Madras High Court took the view that jurisdiction to issue a writ of *habeas corpus* had not been displaced by any provision of the Cr. P. C., and that sec. 491 merely substituted a different form of procedure—*Govindan*, 68 I.C. 838, A.I.R. 1922 Mad. 499, 23 Cr.L.J. 614, 45 Mad. 922, 16 M.L.W. 349, 43 M.L.J. 396, 31 M.L.T. 304. This point was also raised before the Bombay High Court in *Chanappa*, A.I.R. 1931 Bom. 57 (63), 55 Bom. 263, 32 Cr.L.J. 403, 129 I.C. 596, 1931 Cr.C. 65, 32 Bom.L.R. 1623, Ind. Rul. 1931 Bom. 196, but was not gone into as it appeared to be unnecessary for the decision of that case. The question has been set at rest by the decision of the Privy Council in *C. P. Matthen v. District Magistrate of Trivandrum*, 40 Cr.L.J. 675, 11 R. 1939 Mad. 744, 41 Bom.L.R. 1119, 1939 A.L.J. 836, 70 C.L.J. 270, 182 I.C. 551, 1939 M.W.N. 744, 50 M.L.W. 48, 1939 O.W.N. 602, 1939 O.L.R. 433, 1939 P.W.N. 581, 12 R.P.C. 4, 20 P.L.T. 597, 1939 A.Cr.C. 110, 5 B.R. 841, 1939 A.W.R. (P.C.) 141, 43 C.W.N. 981, A.I.R. 1939 P.C. 213, (1939) 2 M.L.J. 406 (P.C.), where it has been laid down that the common law writ of *habeas corpus* does not run in British India and that, assuming that the High Court formerly had the power to issue a writ of *habeas corpus*, that power has been taken away and the powers conferred by sec. 491 of the Code of Criminal Procedure substituted. The Privy Council confirmed the view taken in *District Magistrate of Trivandrum v. K. C. Mammen Mappillai*, 40 Cr.L.J. 320, 180 I.C. 216, A.I.R. 1939 Mad. 120, 1938 M.W.N. 1289, 11 R.M. 663, (1939) 2 M.L.J. 135, 11 R. 1939 Mad. 708 (F.B.), which reversed *Crown Prosecutor, Madras v. M. Mappillai*, 40 Cr.L.J. 297, A.I.R. 1939 Mad. 115, 179 I.C. 917, 1938 M.W.N. 1161, 11 R.M. 634.

High Court's power not taken away by the Extradition Act:—The High Court's power to issue a writ of *habeas corpus* has not been taken away by the procedure provided in the Indian Extradition Act (XV of 1903), sec. 3, sub-secs. (6) and (7)—*Tops*, 46 Cal. 52; *Gullu Sahu*, 42 Cal. 793, 19 C.W.N. 221, 21 C.L.J. 112, 16 Cr.L.J. 31, 26 I.C. 335; *Bas Aisha*, 117 I.C. 321, 53 Bom. 149, A.I.R. 1929 Bom. 81, 30 Cr.L.J. 772, 36 Bom.L.R. 62; *Sandal Singh v. District Magistrate, Dehra Dun*, 35 Cr.L.J. 1296 (1299), 151 I.C. 279, 1934 A.L.J. 556, 1934 Cr.C. 214, A.I.R. 1934 All. 148, 56 All. 409; *A. W. Goulter*, 37 Cr.L.J. 312, 160 I.C. 115, A.I.R. 1935 Sind. 244, 29 S.L.R. 60, 1935 Cr.C. 1307. The High Court has power to issue an order and to examine whether a person detained in public custody under the Extradition Act is legally detained, and this power is not taken away merely because the Government have already issued a warrant for surrender under sec. 3, sub-section (8) of that Act—*Rudolf Stallmann*, 39 Cal. 164, 12 Cr.L.J. 505, 14 C.L.J. 375, 15 C.W.N. 1053, 12 I.C. 273. Where persons were

arrested and detained in custody under sec. 10 of the Indian Extradition Act for more than two months without the sanction of the Local Government the High Court released them on an application under this section inasmuch as their detention was illegal in view of the provisions of sub-sec. (3) of sec. 10 of the same Act—*Suraj Narayan*, 36 Cr.L.J. 1500, 158 I.C. 981, A.I.R. 1935 Pat. 419, 16 P.L.T. 551, 1935 Cr.C. 1063.

1299. Clause (b)—Custody of wife or children:—As regards custody of wife or children, the husband or father has a remedy not only under this section, but also under the Guardians and Wards Act. See 53 Mad. 72 and 6 Bur.L.J. 269, cited *supra*. But the power under this section is to be exercised in a matter of *urgency*, where, for instance, the father is suddenly deprived of the custody of his sons and there is danger to life of the sons in the transferred custody. It is a remedy for a person deprived of his liberty. The power, therefore, has to be exercised with caution, and not in a case where there is a dispute merely as to who should be the guardian of particular minors—*Sultan Singh v. Maya Ram*, 52 All 491, 1930 A.L.J. 615, 31 Cr.L.J. 719. Where a Hindu mother, who has custody of her minor children, is inclined towards Christianity and is likely to be converted to that religion and to bring up her children in such a way that they will ultimately express a desire to be converted to Christianity, the proper course is to remove the mother from guardianship and appoint another person as guardian, under the provisions of the Guardians and Wards Act. The High Court will not take action under sec. 491—*Veeraswami v. Ratnamma*, 29 Cr.L.J. 1048 (1049), 112 I.C. 472, A.I.R. 1928 Mad. 1087.

The High Court before passing an order in respect of a minor child, ought to take into consideration the interest and welfare of the child—*Zarabibi v. Abdul*, 12 Bom.L.R. 891, 11 Cr.L.J. 687; *Swa Lay v. Yeo Boon*, 4 Bur.L.J. 269, 27 Cr.L.J. 737; *Moidin v. Kunhadavi*, 31 Cr.L.J. 985, 126 I.C. 111, A.I.R. 1929 Mad. 33 (F.B.). The Court will not ordinarily force a child to remain in custody to which the child objects, and before deciding as to its custody, the Court will take account the wishes of the child, if it is old enough to form an intelligent preference—*Pollard v. Rouse*, 33 Mad 288. If she is not old enough to make an intelligent preference, e.g., if she is a girl of only 13 years of age, her consent or refusal to stay with her husband is immaterial. What the Court has to consider is the welfare of the minor wife, and in so doing, the fact that she prefers to reside elsewhere than with her husband should not have any weight at all, though if she had been old enough to form a good opinion this fact would have been a very important circumstance for consideration—*Subbaswami v. Kamakshi*, 53 Mad. 72, 57 M.L.J. 642, 31 Cr.L.J. 187 (188, 189). Where a mother had for eight years neglected her child who had been educated at a mission school, the High Court refused her application for custody of the girl aged 15 years, on the ground that, if granted, it would be detrimental to the welfare of the child—*In re Saithri*, 16 Bom. 307. Where the father has delegated the guardianship of his children to another person, the question whether the father is entitled to resume the guardianship depends on the children's interests and welfare—*Annie Besant v. Narayaniah*, 38 Mad 807 (P.C.).

A Full Bench of the Madras High Court refused to make over a boy aged between 7 and 8 to the custody of his father, who was his natural guardian, when there was nothing to show that the father was in a position to look after the boy—*Moidin v. Kunhadavi*, *supra*.

The High Court of Judicature has, under its Common Law powers, jurisdiction to issue a writ for the production of children outside British India, provided it is satisfied that they are in the custody or control of a person within its jurisdiction. Sec. 491 cannot be said to have affected this Common Law jurisdiction of the High Court—*Mahomedali v. Ismailji*, 50 Bom. 616, 95 I.C. 49, A.I.R. 1926 Bom. 332, 27 Cr.L.J. 721. But sec. 491 cannot apply if the person is in custody outside British India, and the person having the custody or control of that person is also outside British India—*Shira Prasad*, 27 A.L.J. 520, A.I.R. 1929 All 347 (348), 30 Cr.L.J. 1083, 119 I.C. 527, Ind. Rul. 1929 All 1055. Where a person is in the custody in a Native State over which the

High Court does not exercise jurisdiction, the power of the High Court to issue directions of the nature of the *habeas corpus* under this section cannot be exercised—*Ibid*.

Illegal or improper detention:—Where an accused person is remanded to police custody under sec. 167, the mere fact that the Magistrate does not record reasons for such detention does not render the custody *illegal* within the meaning of sec. 491, especially where there are sufficient grounds for believing that the prisoner was concerned in a serious offence, and further information has been obtained during the investigation—*Sunder Singh*, 12 Lah. 16, 31 P.L.R. 780, 32 Cr.L.J. 339 (340). Where a boy, who had been under the guardianship of his uncle, went to his sister's house to attend her marriage, and refused to return on the ground that he intended to discontinue his studies and to get some work, and he also said that he was kept back to stay with his sister because she was left alone when her husband was out on work, *held* that there was nothing to show that he was *detained* against his will, and as there was no suggestion that his sister and her husband were not proper persons to live with, it could not be said that he was *improperly* detained—*Paul v. Hunt*, 6 Bur.L.J. 111, 28 Cr.L.J. 865.

When a person is detained under the Bengal Criminal Law Amendment Act, 1930, the only test to be applied is whether in the opinion of the Local Government there are reasonable grounds for believing certain things about that person (see sec. 2 of that Act). The only question, therefore, that the High Court can inquire into in the case of a detention under the Act is whether that opinion existed. But on the question whether there were reasonable grounds for such belief the Local Government's decision is final, and there is no right of appeal to a Court of Law. Moreover, the word "improperly" in this clause does not include any consideration of the question whether a particular legislation is proper, but only whether a particular *detention* is proper, e.g., whether, although the forms of law have been observed, there has been a fraud on an Act or an abuse of the powers given by the Legislature. The High Court can decide whether the law has been legally and properly applied in the case of detention of a particular person—*Jitendra Nath Ghose*, 36 C.W.N. 1088 (1100), 141 I.C. 866, A.I.R. 1932 Cal. 753, 1932 Cr.C. 796, Ind. Rul. 1933 Cal. 198, 34 Cr.L.J. 245, 60 Cal. 364. See also *Pramila v. Prentice*, 36 C.W.N. 669, 138 I.C. 358, A.I.R. 1932 Cal. 470, 1932 Cr.C. 460, 33 Cr.L.J. 609, Ind. Rul. 1932 Cal. 455, 59 Cal. 1440 and *Pratul v. C H D Camp*, 35 Cr.L.J. 1466, 151 I.C. 1028, 38 C.W.N. 299, A.I.R. 1934 Cal. 259, 59 C.L.J. 185, 1934 Cr.C. 387, 61 Cal. 197.

The words "detained" and "custody" imply some sort of confinement or physical restraint on the liberty of movement of the detainee. The use of the word "be set at liberty" also supports this construction. The powers conferred by clause (b) of this section cannot be exercised in respect of a person who enjoys the fullest liberty of movement but whose liberty of other sorts is curtailed. Thus, the restraint imposed on one's right to see anybody whom she wants to see is not sufficient to entitle her to relief under cl. (b) of sub-sec. (1) of this section—*Hazoor Ara Begum v. Deputy Commissioner of Gonda*, 35 Cr.L.J. 1052. See also *Girindra v. Birendra*, 31 C.W.N. 593, 102 I.C. 647, A.I.R. 1927 Cal. 496, 54 Cal. 727, where a person, interned in a village under sec. 11 of the Bengal Criminal Law Amendment Act, 1925, with certain restrictions, was held to be not detained in the custody of the Sub-Inspector of Police within whose jurisdiction the village is situate.

Successive applications:—Each Judge of the High Court of Justice has jurisdiction to entertain an application for a writ of *habeas corpus* in term time or in vacation and he is bound to hear and determine such an application on its merits, notwithstanding that some other Judge has already refused a similar application—*Halsbury's Laws of England*, 2nd Ed., Vol. IX, para 1239; *Eshugbayi Eleko v. Government of Nigeria*, 30 Cr.L.J. 113 (116), 113 I.C. 273, A.I.R. 1928 P.C. 300, 28 M.L.W. 874, Ind. Rul. 1929 P.C. 1, 26 A.L.J. 1169 (P.C.). The rulings upon which this practice is founded have

power conferred upon the High Court under sec. 491, Cr. P. C. *Prima facie* an application for the exercise of powers under sec. 491 should be regulated by the procedure governing an application for the exercise of powers conferred under any other section of the Code, e.g., an application for bail. Sec. 491 empowers the High Court to frame rules to regulate the procedure in cases under that section and it is, therefore, apparently open to them to make special rules permitting successive identical applications. In the absence of such special rule and in the face of Rule 8, Chap. I of the Allahabad High Court General Rules, the Allahabad High Court did not adopt the rule of common law relating to writs of *habeas corpus*, permitting successive identical applications—*Hydari Begum v. Jawad Ali Shah*, 35 Cr.L.J. 493, 147 I.C. 820, 1933 A.L.J. 1410, A.I.R. 1934 All 22, 1934 Cr.C. 125.

It would be improper for the Criminal Bench acting under sec. 491, Cr. P. C., to retry for itself the question which has already been determined by the High Court in its Ordinary Original Criminal Jurisdiction or to pass an order overriding an order already made by the High Court—*Rameswar Khiroriwalla*, 32 C.W.N. 889, 56 Cal. 32, A.I.R. 1928 Cal. 367.

Forum:—An application under this section is to be made to the High Court in its Ordinary Original Criminal Jurisdiction—*Charu Chandra*, 20 C.W.N. 1233. In practice the powers conferred by this section, which before 1923 were exercisable only over persons within the limits of the Ordinary Original Civil Jurisdiction of the High Court, were exercised by the Judge taking Sessions, that is, by the Judge exercising the Ordinary Original Criminal Jurisdiction of the High Court. Now that the powers are applicable to persons within the limits of the High Court's Appellate Criminal Jurisdiction, it is certainly more convenient that they should be exercised by the Division Bench appointed to deal with criminal cases—*Rameswar Khiroriwalla*, *supra*; *Subodh Chandra*, A.I.R. 1925 Cal 278, 85 I.C. 913, 52 Cal 319. See also *C. P. Matthen v. District Magistrate of Trivandrum*, 40 Cr.L.J. 675, I.L.R. 1939 Mad. 744, 41 Bom.L.R. 1119, 1939 A.L.J. 836, 70 C.L.J. 270, 182 I.C. 551, 1939 M.W.N. 744, 50 M.L.W. 48, 1939 O.W.N. 602, 1939 O.L.R. 433, 1939 P.W.N. 581, 12 R.P.C. 4, 20 P.L.T. 597, 1939 C.Cr.C. 110, 5 B.R. 841, 1939 A.W.R. (P.C.) 141, 43 C.W.N. 981, A.I.R. 1939 P.C. 213, (1939) 2 M.L.J. 406 (P.C.), where it has been held that the application under this section must be dealt with in accordance with the rules of the High Court (i.e., Rules 2 and 2A of the Appellate Side Rules of the Madras High Court) which means that it must be dealt with by the Criminal Bench and that a Single Judge of the Madras High Court has no jurisdiction to deal with such an application. See also *District Magistrate of Trivandrum v. K. C. Mammen Mappilai*, 40 Cr.L.J. 320, 180 I.C. 216, A.I.R. 1939 Mad. 120, 1938 M.W.N. 1289, 11 R.M. 663, (1939) 2 M.L.J. 135, I.L.R. 1939 Mad. 708 (F.B.), which reversed *Crown Prosecutor, Madras v. M. Mappilai*, A.I.R. 1939 Mad 115, 179 I.C. 917, 1938 M.W.N. 1161, 11 R.M. 634, 40 Cr.L.J. 297.

Appeal:—When a petitioner obtains a rule calling upon the other side to show cause why a child should not be delivered to her, and the rule is discharged, the order discharging the rule is a judgment within the meaning of clause 15 of the Letters Patent and is therefore appealable—*In re Narrondas*, 14 Bom. 555. An order by a Judge directing a writ of *habeas corpus* to issue is not an order made "in the exercise of criminal jurisdiction" within the meaning of cl. 15 of the Letters Patent, and is open to appeal—*Mohamedali v. Ismailji*, *supra*. But an appeal under sec. 10, Letters Patent, is not maintainable from an order passed on an application under sec. 491, Cr. P. C.—*Haidri Begum v. Jawad Ali Shah*, A.I.R. 1934 All. 606, 3 A.W.R. 297, 1934 A.L.J. 399, 150 I.C. 740, following *Girindra v. Birendra*, 31 C.W.N. 593, 102 I.C. 647, A.I.R. 1927 Cal. 496, 54 Cal. 727 and distinguishing *Mahomedali v. Ismailji*, *supra*.

491A. Any High Court established by Letters Patent may exercise the powers conferred by section 491 in the case of any European British subject within such territories, other than Powers of High Court outside the limits of appellate jurisdiction.

those within the limits of its appellate criminal jurisdiction, as the Central Government may direct.

This section has been added by sec. 31 of the Criminal Law Amendment Act, 1923. By this section, European British subjects, even when outside the limits of British India, will get the privilege of obtaining writs in the nature of *Habeas Corpus* from the High Courts.

The words "Central Government"—have been substituted for "Governor-General in Council" by sec. 4 of the Government of India (Adaptation of Indian Laws) Order, 1937.

PART IX.

SUPPLEMENTARY PROVISIONS.

CHAPTER XXXVIII.

OF THE PUBLIC PROSECUTOR.

492. (1) The * * * * * *Provincial Government* may appoint, generally, or in any case, or for any specified class of cases, in any local area, one or more officers to be called Public Prosecutors.

(2) * * The District Magistrate, or, subject to the control of the District Magistrate, the Sub-divisional Magistrate, may, in the absence of the Public Prosecutor, or where no Public Prosecutor has been appointed, appoint any other person, not being an officer of police below *such rank as the Provincial Government may prescribe in this behalf*, to be Public Prosecutor for the purpose of any case.

Change:—This section has been amended by sec. 133 of the Cr. P. C. Amendment Act, XVIII of 1923. *Firstly*, the words "In any case committed for trial to the Court of Session" in the beginning of sub-sec. (2) have been omitted, because the necessity of appointing a Public Prosecutor in the absence of that officer may arise not only in Sessions Courts but in all other instances. *Secondly*, the italicised words have been added because "as there is a variety of nomenclature of the Police officers, we think it better to leave it to the Local Government to prescribe the rank of police-officers who may be appointed Public Prosecutors for the purposes of a particular case"—*Report of the Joint Committee (1922)*.

The words "Governor-General in Council or the" have been omitted and the words "Provincial Government" have been substituted in place of "Local Government" by the Government of India (Adaptation of Indian Laws) Order, 1937.

1300. Public Prosecutor:—It is highly objectionable to appoint the Magistrate, who in the first instance tried and convicted the accused, to be Crown Prosecutor to conduct an inquiry subsequently directed in the same case. To convert a Judge into an Advocate seeking to uphold his decision before another tribunal is quite unprecedented and most objectionable, as he has an interest in the case which a Public Prosecutor should not have—*Kashinath*, 8 B.H.C.R. 126.

The Legal Remembrancer is *ex-officio* Public Prosecutor on the Appellate Side of the High Court and as such has the power to instruct counsel, his authority to act for the Local Government being in no way dependent on anything in the nature of a vakalat-nama or warrant of attorney—*Tushar Kanti v. Governor of Bengal*, A.I.R. 1933 Cal. 118 (120), 1933 Cr.C. 134, 37 C.W.N. 276, 60 Cal. 603, 143 I.C. 790, 34 Cr.L.J. 662. See also *Deputy Legal Remembrancer, Bengal v. Gaya Prosad*, 41 Cal. 425, where it was held that the Legal Remembrancer of Bengal was not the Legal Remembrancer of the province of Behar and Orissa, entitling him to file an appeal against an order of acquittal on behalf of the Government of Bihar and Orissa, merely because he was instructed to do so by a

letter, when the Government of Bihar and Orissa appointed a separate Legal Remembrancer for that province.

Duty of Public Prosecutor:—The purpose of a criminal trial is not to support a theory but to investigate the offence and to determine the guilt or innocence of the accused, and the duty of a Public Prosecutor is to represent not the Police but the Crown, and this duty should be discharged by him fairly and fearlessly and with a full sense of the responsibility that attaches to his position. The guilt or innocence of the accused is to be determined by the tribunal appointed by law and not according to the tastes of any one else—*Ram Ranjan*, 42 Cal 422, 19 C.W.N. 28, 16 Cr L.J. 170; *Kunja Subudhi*, 8 Pat. 289, 30 Cr L.J. 675 (683), 116 I.C. 770, A.I.R. 1929 Pat 275, Ind Rul. 1929 Pat. 338, 10 P.L.T. 549. There should be no unseemly eagerness on the part of the Prosecutor at securing a conviction. His object must be the furtherance of justice and not to act as counsel for any particular person or party—*Kashinath*, 8 B.H.C.R. 126

There should be on part of the Public Prosecutor no "unseemly eagerness for or grasping at, conviction." He is not to aggravate the case against the prisoner but has "to perform his duties with that calmness and impartiality which should ever characterize a Public Prosecutor." He has to "aid the Court in discovering the truth" and also in the discharge of its duty to do justice as between the Crown and the accused—*Chandekar*, 26 Cr L.J. 163 (165), 83 I.C. 723, 7 N.L.J. 155, A.I.R. 1924 Nag. 243, following *Kashinath*, supra, and *Sardari Lal*, 71 I.C. 1006, 3 Lah 443, A.I.R. 1923 Lah. 264, 24 Cr L.J. 286. Those who appear on behalf of the prosecution must be made to realise that it is no part of their duty to try by hook or by crook to obtain convictions—*Major Robert*, A.I.R. 1932 Cal 800 (803), 38 C.W.N. 187, 58 C.L.J. 405, 35 Cr L.J. 156, 146 I.C. 767, 1933 Cr C. 1375. His duty as a Public Prosecutor is not merely to secure the conviction of the accused at all costs but to place before the Court whatever evidence is in the possession of the prosecution, whether it be in favour or against the accused and to leave the Court to decide upon all such evidence, whether the accused had or had not committed the offence with which he stood charged—*Ghirao*, 34 Cr L.J. 1009 (1012), 145 I.C. 470, A.I.R. 1933 Oudh 265, 1933 Cr C 592, 10 O.W.N. 1108. It is the duty of the Public Prosecutor to prosecute, not to persecute, the accused and that responsibility rests upon him not to allow the Court to place reliance unwittingly upon the evidence of a witness who has made a contradictory statement—*Nga Lun Thauang*, A.I.R. 1935 Rang 370, 1935 Cr C 1088, 158 I.C. 784, 13 Rang. 570, 36 Cr L.J. 1487; or who has made a statement as to the course of investigation which is demonstrably untrue—*Nga San*, A.I.R. 1936 Rang 75 (76), 1936 Cr C 80, 161 I.C. 14, 37 Cr L.J. 414. See also Note 893.

"In the absence of the Public Prosecutor":—These words are very wide and include temporary absence of the Public Prosecutor at the place and in the Court where the case is proceeding—*Dipchand*, 31 Cr L.J. 684 (686), 124 I.C. 378, A.I.R. 1930 Sind 156.

493. The Public Prosecutor may appear and plead without

any written authority before any Court in which any case of which he has charge is under inquiry, trial or appeal, and if any private person instructs a pleader to prosecute in any Court any person in any such case, the Public Prosecutor shall conduct the prosecution, and the pleader so instructed shall act therein under his directions.

1301. Pleader privately instructed:—The Counsel instructed and retained by a private individual can watch the case on behalf of his client, but he cannot, without being especially empowered by the District Magistrate, conduct the prosecution—*Chaitan Lal*, O.S.C. No. 31. Where in a criminal appeal pending before the Chief Court of

Punjab, the brother of the murdered man appointed a pleader to support the conviction; held that the pleader so appointed was not a Public Prosecutor—*Akbar*, 1886 P.R. 29.

Where the Public Prosecutor has charge of the prosecution, the pleader instructed by a private person must act under the directions of the Public Prosecutor and is not entitled to conduct the prosecution in preference to the Public Prosecutor—*B. N. Ry. Co., Ltd. v. Shaikh Makbul*, 7 P.L.T. 343, 27 Cr.L.J. 313. The Public Prosecutor may always avail himself of the services of the counsel retained by a private individual, but in doing so he does not deprive himself of the management of the case—*Narayan*, 11 B.H.C.R. 102.

This section does not refer to applications made by a private party for the amendment of the charge and does not bar the hearing of such applications on the merits, although such applications were not made by the Public Prosecutor or with his consent—*Dasundha v. Lachman*, 29 Cr.L.J. 1056, 112 I.C. 480, A.I.R. 1929 Lah. 127.

494. Any Public Prosecutor * * may, with the consent of the Court, in cases tried by jury before the return of the verdict, and in other cases before the judgment is pronounced, withdraw from the prosecution of any person *either generally or in respect of any one or more of the offences for which he is tried*; and upon such withdrawal,—

- (a) if it is made before a charge has been framed, the accused shall be discharged *in respect of such offence or offences*;
- (b) if it is made after a charge has been framed, or when under this Code no charge is required, he shall be acquitted *in respect of such offence or offences*.

Change:—This section has been amended by sec. 134 of the Cr. P. C. Amendment Act, XVIII of 1923. The reasons are stated below.

1302. Scope of section:—The old section contained the words "appointed by the Governor-General in Council or the Local Government" after the words "Public Prosecutor." That is, under the old law this section applied only to Public Prosecutors appointed by Government. A Prosecutor especially appointed by the Magistrate, under sec. 492 (2) to conduct a case had not the power to withdraw from the prosecution under this section—*Madhoo*, 8 All 291; *Ramkrishna*, 2 Weir. 653. The present section as now amended will confer the power of withdrawal on *all* Public Prosecutors.

This section (as well as sec. 495) does not apply to security proceedings. It applies only to proceedings which can end in a discharge or acquittal of the accused. But security proceedings do not contemplate the frame of a charge at all, and as a result of the proceedings neither an order of discharge nor one of acquittal is passed therein. Hence secs. 494 and 495 cannot apply to security proceedings—*Muthia Moopan*, 36 Mad. 315, 14 Cr.L.J. 559, 21 I.C. 159. This section has no application to proceedings under Chap. VIII of the Cr. P. C., because such proceedings are not prosecutions. Consequently if, after having made his preliminary order under sec. 107, Cr. P. C., the Magistrate is convinced by evidence, or other materials of which he is permitted to take judicial notice, that the respondent is no longer likely to do anything which might lead to a breach of the peace, it is open to him to make an order under sec. 119, Cr. P. C., discharging the respondent. That is the only way in which proceedings under sec. 107, Cr. P. C., can be brought to an end. They cannot be brought to an end by the Crown withdrawing from the enquiry—*The King v. Ba Khin*, A.I.R. 1940 Rang. 189, 1910 Rang.L.R. 226, 41 Cr.L.J. 853, 190 I.C. 196.

Secs. 337 and 494:—As to the distinction between these sections, see Note 950A under sec. 337.

Who can withdraw from prosecution:—Every case in which a person is committed for trial to the Sessions Court is not to be tried. The Public Prosecutor is not a machine or a slave to prosecute every case in which there has been a committal. To the Public Prosecutor is entrusted discretion to withdraw from the prosecution with the consent of the Court and his withdrawal puts an end to the case. The law gives him a real discretion in the matter. It may often be proper for him to consult the District Magistrate or other authorities before exercising that discretion. But in the eye of the law and of the Court the discretion is his alone, subject to the consent of the Court. The Public Prosecutor holds a very honourable and responsible office—*Jaggu Naidu v. Emp*, 1932 M.W.N. 692; *Labbi Kutti*, A.I.R. 1939 Mad. 190 (193), 1938 M.W.N. 582, 1938 M Cr.C. 212, 40 Cr.L.J. 437, 180 I.C. 605.

This section contemplates that no person other than the Public Prosecutor can withdraw from the prosecution; even a Vakul acting under the directions of the Public Prosecutor cannot do so. But if the prosecution is withdrawn by the Public Prosecutor and the Vakul, and the application for withdrawal of the case is signed by both the persons, the withdrawal is not invalid—*Sital Singh*, 46 Cal. 700, 30 C.L.J. 255, 21 Cr.L.J. 5, 54 I.C. 53.

A Government Pleader who has not been appointed a Public Prosecutor under the provisions of sec. 492 (1) cannot withdraw from the prosecution under this section. He can withdraw only under sec. 240; i.e., in cases where several charges have been preferred against the accused and he has been convicted on one of those charges, the Government Pleader can withdraw the remaining charges—*Anonymous*, 2 Weir 258. But see *Dipchand*, 31 Cr.L.J. 684, 124 I.C. 378, A.I.R. 1930 Sind 156, where a contrary view has been taken.

An application for withdrawal of prosecution made by a Public Prosecutor who is *not in charge of the case* but who applies only to withdraw the prosecution, is not a proper procedure. But the action of the Public Prosecutor is not illegal—*Sher Singh v. Jitendra*, 59 Cal. 275, 36 C.W.N. 16 (28), 54 Cr.L.J. 253, A.I.R. 1931 Cal. 607, 33 Cr.L.J. 3, 134 I.C. 1045.

When a case was conducted from its commencement almost to its finish by a Public Prosecutor, and then it was transferred to another district, and there the District Magistrate instructed the Public Prosecutor of that place to withdraw the case, whereupon the prosecution was withdrawn, *held* that it was unusual (though not illegal) for the District Magistrate to take action for the withdrawal without consulting the first Public Prosecutor who had conducted the case from its commencement—*Dipchand*, 24 S.L.R. 377, 1930 Cr.C. 620, 31 Cr.L.J. 684, A.I.R. 1930 Sind 156, 124 I.C. 378. This section does not recognize the authority of the District Magistrate to interfere with the discretion either of the Public Prosecutor or of the Court. The matter rests entirely with the Public Prosecutor and the Court before which the case is pending for trial—*Ah*, 33 Cr.L.J. 912 (914), 140 I.C. 25, 33 P.L.R. 793, Ind. Rul. 1932 Lah 675, A.I.R. 1932 Lah 611, 1932 Cr.C. 917.

The complainant has no *locus standi* in the matter of withdrawal of a prosecution. When a case has been started upon a police report, and the Court Sub-Inspector (who is the Public Prosecutor) wants to withdraw the case, the Court cannot reject the application for withdrawal simply because the complainant wants to proceed with the case—*Gopi Bari*, 1 P.L.T. 400, 57 I.C. 657, 21 Cr.L.J. 641. But when in case of a private complaint the complainant is given permission to conduct the prosecution and be responsible for its conclusion, it is highly improper that after he has closed his evidence, and the charge has been framed, the prosecution should be suddenly withdrawn, without even consulting him, by a Court Inspector who up till then had nothing to do with the case. The withdrawal is illegal and the acquittal must be set aside—*Ram Gobind v. Lallu*, 46 All. 88 (90), 21 A.L.J. 855, 25 Cr.L.J. 970, A.I.R. 1924 All. 203.

1303. Withdrawal from prosecution:—The Legislature not having defined the circumstances under which an withdrawal is permissible, no hard and fast rule can be laid down circumscribing the limits within which an withdrawal may be made. A

concurrence of opinion between the Judge and the Public Prosecutor that the prosecution case is a weak one and is not likely to end in a conviction is not a sufficient ground for withdrawal. This section has been expressed in general words, because it does not intend to limit the materials on which action may be taken. This section contemplates action to be taken upon circumstances extraneous to the record of the case; e.g., inexpediency of a prosecution for reasons of State, necessity to drop the case on grounds of public policy, credible information having reached the Government as to the falsity of the evidence by which the prosecution is supported, and other matters of that description—*Giribala v. Madar*, 36 C.W.N. 928 (936), 56 C.L.J. 79, 1932 Cr.C. 654, 60 Cal. 233, A.I.R. 1932 Cal. 699, 34 Cr.L.J. 433, 142 I.C. 891, Ind. Rul. 1933 Cal. 317. An opinion that the prosecution case is a weak one is not sufficient to justify the Public Prosecutor in applying for its withdrawal and the Judge in consenting thereto—*Satwarao Nagorao Hatkar v. Kanbarao Bhago Rao Hatkar*, 39 Cr.L.J. 458 (459), 174 I.C. 510, 10 R.N. 403, 1938 N.L.J. 12, A.I.R. 1938 Nag. 334, following *Giribala v. Madar*, supra. The Public Prosecutor cannot withdraw a case on the ground that the complainant was keeping out of the way and could not be served with summons. He should take steps to enforce his attendance—*Anonymous*, 2 Weir 655. But the Court can allow a Public Prosecutor to withdraw the prosecution against an accused in order that *he may call him as a witness* for the prosecution against the other accused person—*G. V. Raman*, 56 Cal. 1023, 33 C.W.N. 468 (471). In fact, when it is necessary to take the evidence of one accused against the others, the usual practice is either to tender pardon to the accused under sec. 337, or to withdraw the prosecution against him under sec. 494, or to enter a *nolle prosequi* under sec. 333 (in cases before High Courts). See *G. V. Raman*, supra; *Regina v. Lyons*, (1840) 9 Carr. & Payne 555; *Queen v. Owen*, 9 Carr. & Payne 83; *R. v. Rowland*, Ry. & M. 401. In all cases, where two persons are joined in the same indictment, and it is desirable to take the evidence of the one against the other, it is desirable for the purpose of insuring the greatest possible amount of truthfulness in the person coming to give evidence, to take a verdict of not guilty as to him, so that the witness may give his evidence with a mind free of all the influence which the fear of impending punishment might otherwise produce—*Wilson v. Queen*, (1886) L.R. 1 Q.B. 289 (312).

This section contemplates the case of withdrawal of a prosecution, in cases tried by jury, before the return of the verdict, and in other cases, before the judgment is pronounced. It does not contemplate the case of withdrawal of prosecution *after* the conviction of the accused by the first Court, and in the Appellate stage of the case. Withdrawal at that stage is illegal, and the appeal must be heard and judicially determined—*Ananta Lal v. Jahiruddin*, 46 C.L.J. 121, 28 Cr.L.J. 833, 104 I.C. 449, A.I.R. 1927 Cal. 816. The Public Prosecutor may apply for withdrawal of the prosecution at any time before pronouncement of judgment or delivery of verdict, and it is immaterial that at the time of such application the Court has come to the conclusion that the prosecution case is true and that the accused has committed the offence. In a suitable case the Court may still give its consent to the withdrawal, if there are good reasons for doing so—*Sher Sing v. Jitendra*, supra. The words "cases tried by jury" contemplate cases in which a jury trial is in fact being held. Therefore, when the accused has been committed to the Sessions Court but the jury trial has not begun, the case falls under the category of "other cases before the judgment is pronounced," (i.e., in such a case the withdrawal may be permitted until the judgment is pronounced). Therefore, if in such a case, the Public Prosecutor withdraws from the prosecution before the charge is read out and explained to the accused and before he is called on to plead, there is a legal withdrawal—*Giribala v. Madar*, 36 C.W.N. 928 (935), 1932 Cr.C. 654, 56 C.L.J. 79, 60 Cal. 233, A.I.R. 1932 Cal. 699, 34 Cr.L.J. 433, 142 I.C. 891, Ind. Rul. 1933 Cal. 317.

The Sessions Judge on a perusal of the commitment order and the evidence adduced before the Committing Magistrate may invite the Public Prosecutor to consider whether he should undertake action under this section on the ground of insufficiency of evidence—*Maroti*, 36 Cr.L.J. 1389, 158 I.C. 537, 18 N.L.J. 227, 1935 Cr.C. 1099.

There must be a *formal withdrawal* from prosecution by the Public Prosecutor. Where the Prosecuting Inspector simply dropped out and let a Vakil carry on the prosecution, there was no withdrawal and consequently the accused could not be acquitted—*Gopala v. Alaginswami*, 54 Mad. 598, 32 Cr.L.J. 690. A withdrawal by a Public Prosecutor is withdrawal from the prosecution of any person for any act or omission made punishable by any law; that is, the Public Prosecutor states that he does not want to prosecute for certain alleged acts or omissions. Where he merely stated that there was no case under sec. 218, I. P. C., held that there was no withdrawal by the Public Prosecutor—*Alopi Din*, A.I.R. 1935 All. 366, 157 I.C. 205, 1935 A.L.J. 653, 1935 Cr.C. 384, 36 Cr.L.J. 1103.

The Public Prosecutor is the person responsible for making the application for withdrawal. There is no provision in the Code for any formal inquiry by the Court under this section—*Gombai*, 26 S.L.R. 67, 1932 Cr.C. 532, 33 Cr.L.J. 449, 137 I.C. 344, A.I.R. 1932 Sind 92, Ind. Rul. 1932 Sind 74.

Consent of Court:—'Consent' means a consent freely given by a free and independent Magistrate—*Fakirchand Ramkrishin v. Murad Umar*, A.I.R. 1940 Sind 233 (239).

Consent of the Court is necessary to the withdrawal of the prosecution. The Court in coming to the decision as to whether it would give consent should not take into consideration any extraneous circumstance. The discretion as to whether the Magistrate should give consent to the withdrawal is to be exercised not arbitrarily but must be based on correct legal principles—*G. V. Raman*, 56 Cal. 1023, 31 Cr.L.J. 315, A.I.R. 1929 Cal. 319, 121 I.C. 678, 33 C.W.N. 468 (473). A Magistrate does not exercise his discretion wrongly in relying on the discretion of the Public Prosecutor in withdrawing the prosecution against an accused in order that his evidence might be available after his discharge against his co-accused who is being jointly tried with him—*Sudan*, 34 Cr.L.J. 675, 144 I.C. 74, A.I.R. 1933 Cal. 148, 1933 Cr.C. 225, Ind. Rul. 1933 Cal. 494; *G. V. Raman*, supra. The latter case has been dissented from in *Abdul Majid*, 36 Cr.L.J. 1248, 39 C.W.N. 1082, A.I.R. 1935 Cal. 473, 1935 Cr.C. 865, cited below in Note 1304. Consent is not to be given as a matter of course, neither is it to be unreasonably withheld—*Sher Sing v. Jitendra*, 59 Cal. 275, 36 C.W.N. 16 (24). In a private prosecution, the Sessions Judge (or District Magistrate) should not give directions or suggestions to the Public Prosecutor to withdraw from the prosecution. Such a direction is not only irregular but illegal, and unwarranted by the Code. But, if the Public Prosecutor acts upon such direction and withdraws from the prosecution, his action is not illegal nor irregular, but merely unusual—*Sher Sing v. Jitendra*, 59 Cal. 275, 36 C.W.N. 16 (28), 33 Cr.L.J. 3, 54 C.L.J. 253, A.I.R. 1931 Cal. 607, 134 I.C. 1045.

The fact that the District Magistrate has instructed the Public Prosecutor to apply for withdrawal is no reason for a Magistrate giving his consent to such withdrawal. The Magistrate must not surrender his authority to the District Magistrate, but must act judicially and come to his own independent conclusion as to whether withdrawal ought to be permitted or not upon a consideration of all the relevant circumstances. The Public Prosecutor acts with grave impropriety in showing his instructions to the trial Magistrate and the Magistrate acts with equal impropriety in looking at them—*The King v. Ba Khin*, A.I.R. 1940 Rang. 189, 1940 Rang.L.R. 225, 41 Cr.L.J. 853, 190 I.C. 196; *Fakirchand Ramkrishin v. Murad Umar*, A.I.R. 1940 Sind 233 (238).

A Magistrate who has issued process on the ground that there was sufficient ground for proceeding against the accused, is not precluded from permitting withdrawal of the prosecution if on reconsideration of the materials he comes to the conclusion that the evidence is not likely to lead to a conviction—*Sher Sing v. Jitendra*, supra. See this case cited in Note 687 under section 204.

Withdrawal of some of the charges:—Under the old section, a Public Prosecutor was not competent to withdraw *only one or some* of the charges. If he withdrew at

all, he had to withdraw *all* the charges. Where one of the charges was withdrawn, and the accused was tried on the other charges, the High Court ordered the trial on the charge withdrawn—2 Cr.L.J. 18 (n). But the law has now been changed, and this section empowers the Public Prosecutor to withdraw *one or some* of the charges.

Record of reasons:—When a Court, acting under this section gives its consent to a withdrawal from the prosecution, the order passed is a judicial order, and the Court should record its reasons in order that the High Court may be in a position to say whether the discretion vested in the Court has been properly exercised—*Umesh v. Satish*, 26 C.L.J. 208, 18 Cr.L.J. 886, 41 I.C. 998, 22 C.W.N. 69; *Rajani v. Idris*, 22 Cr.L.J. 760, 64 I.C. 280, A.I.R. 1921 Cal 259, 34 C.L.J. 51, 48 Cal. 1105, 25 C.W.N. 615; *Jagat v. Kalimuddi*, 26 C.W.N. 880, 24 Cr.L.J. 229, A.I.R. 1924 Cal. 382, 71 I.C. 693; *G. V. Raman*, 56 Cal. 1023, 121 I.C. 678, 31 Cr.L.J. 315, Ind. Rul. 1930 Cal. 166, 33 C.W.N. 468 (471), A.I.R. 1929 Cal. 319; *Sugan Chand v. Chunilal*, 6 N.L.J. 177, 24 Cr.L.J. 361, A.I.R. 1923 Nag. 260; *Abdul Gani v. Abdul Kadir*, 1 Rang. 756, A.I.R. 1924 Rang. 168, 81 I.C. 930, 25 Cr.L.J. 1106, 2 Bur.L.J. 287; *Rujulu*, 25 N.L.R. 6, 30 Cr.L.J. 872, A.I.R. 1929 Nag. 133, Ind. Rul. 1929 Nag. 255; *Kanhaiya Lal v. Baijnath*, 34 Cr.L.J. 519, 143 I.C. 77, 29 N.L.R. 201, A.I.R. 1933 Nag. 78, 1933 Cr.C. 315, Ind. Rul. 1933 Nag. 149. Where the proceedings of the case are somewhat peculiar the Magistrate should state his reasons in detail in the order permitting withdrawal of prosecution. But even if the reasons are not adequately expressed, the High Court will not merely on that account interfere in revision—*Sher Sing v. Jitendra*, supra. It is true that the proposition, that a Magistrate is bound to record his reasons, has been doubted. But there is certainly nothing in law which prevents a Magistrate from recording his reasons and in practice he generally does so. It would always be open to the Crown to explain in any case what the actual reasons were—*Devendra Kumar Roy v. Yar Bakht Chaudhury*, 40 Cr.L.J. 349 (353, 354), 180 I.C. 384, A.I.R. 1939 Cal. 220, 43 C.W.N. 301, 11 R.C. 676, I.L.R. (1939) 1 Cal. 407. This section itself does not prescribe that reasons in writing must be given, but it is obviously desirable that reasons should be given in order to enable the High Court to judge whether the withdrawal has been rightly made—*Satwarao Nagorao Hatkar v. Kanbarao Bhago Rao Hatkar*, 39 Cr.L.J. 458 (459), 174 I.C. 510, 10 R.N. 403, 1938 N.L.J. 12, A.I.R. 1938 Nag. 334. Reasons no doubt for giving permission to withdraw a case are desirable, but to say that they are essential is oversteering the law. The Cr. P. Code makes no such requirement, and once the consent of the Court is given, it rests on the party applying to have this decision set aside to show that the consent was given in disregard of the judicial exercise of the discretion which the Magistrate had, to give his consent to the withdrawal—*Dattatraya Govindrao Pakode v. Emp.*, 39 Cr.L.J. 65 (66), 10 R.N. 167, 172 I.C. 130, A.I.R. 1938 Nag. 76. The Madras, Lahore and Patna High Courts hold that the Court is not bound to give any reason for its action and the High Court has no power to interfere—*Sadayan*, 5 M.L.T. 216, 4 I.C. 1126, 11 Cr.L.J. 193; *Lakshmi v. Mohammad*, 33 Cr.L.J. 337, 136 I.C. 714, 33 P.L.R. 394, A.I.R. 1932 Lah. 368, 1932 Cr.C. 486, Ind. Rul. 1932 Lah. 250; *Gulli Bhagat v. Narain*, 2 Pat. 708, A.I.R. 1924 Pat. 283.

The Sind Chief Court has very recently laid down that an order under this section consenting to the withdrawal of a case is a judicial order; to be a judicial order there must be reasons underlying it. These reasons should be capable of articulate expressions. This being so, it is more than desirable and it is in the interest of justice that reasons should be given by a subordinate Magistrate so that the High Court can judge whether the Magistrate's discretion has been rightly exercised—*Fakirchand Ramkrishin v. Murad Umar*, A.I.R. 1940 Sind 233 (236), following *Rajani v. Idris*, supra. See also *Gomibai v. Emp.*, A.I.R. 1932 Sind 92, 137 I.C. 344, 33 Cr.L.J. 449, 26 S.L.R. 67.

The failure to obtain consent of the Court amounts to a mere irregularity—*Abdul Hamid*, 6 Pat. 208 (217). The failure on the part of the Magistrate to place sufficient materials on record to satisfy the High Court that *prima facie* there was some good ground for the withdrawal, is not by itself sufficient to justify an interference by the

High Court—*Abdul Majid v. Arbab Shah*, 35 Cr.L.J. 142, 146 I.C. 542, A.I.R. 1933 Sind 357, 1933 Cr.C. 1340; *Dipchand*, 31 Cr.L.J. 684, 124 I.C. 378, A.I.R. 1930 Sind 156.

Reasons extraneous to the case are not proper reasons for the withdrawal of the case—*Fakirchand Ramkrishn v. Murad Umar*, supra, following *Gomibai v. Emp.*, supra.

1304. Acquittal:—The withdrawal of the prosecution after a charge is framed amounts to an acquittal—*Nagendra Nath*, 50 Cal. 632, 27 C.W.N. 578 (581). If the Public Prosecutor withdraws from the case after a charge is framed, the accused must be acquitted under clause (b), and not discharged—*Sivarama*, 12 Mad 35. Where therefore a prisoner, the charge against whom was withdrawn by the Public Prosecutor, was discharged, instead of being acquitted, and was again committed to the Session on a second charge for the same offence, it was held that the conviction was bad in law—*Sivarama*, 12 Mad. 35. In a summons case, an order of discharge under this section amounts to an order of acquittal—*Mul Singh*, 24 Cr.L.J. 433 (Lah.).

Where a person acquitted, on the charge being withdrawn by the Public Prosecutor, the acquittal should be recorded without taking the opinions of the assessors. In such a case, an acquittal is a matter of right to the accused, whatever might be the opinions of the assessors—*Chenbasapa*, Ratanlal 307.

Retrial:—An order of acquittal under this section bars a retrial for the same offence by virtue of section 403—*Mahadeo Gir*, 14 Cr.L.J. 135, 9 N.L.R. 26; *Dudikula Lal Sahab*, 40 Mad. 976; *Mengharaj*, 23 Cr.L.J. 305 (Sind). If a case is withdrawn against an accused in order that his evidence may be available against his co-accused, and he is acquitted, he cannot be retried, even though he refuses to give his evidence for the prosecution. In this respect this section differs from secs 337 and 339—*G. V. Raman*, 56 Cal 1023, 33 C.W.N. 468 (474).

Accused a competent witness against co-accused:—When a prosecution against a person has been withdrawn under this section, he can be examined as a witness in the case against his other co-accused—*Hussein Haji*, 25 Bom 422, 2 Bom L.R. 1095; *Banu Singh*, 33 Cal 1353; *Kasem Ali*, 47 Cal 154, 55 I.C. 994, 31 C.L.J. 192, 21 C.L.J. 386; *Sital Singh*, 46 Cal. 700 (710); *Govind*, 18 Bom.L.R. 266, 17 Cr.L.J. 256, A.I.R. 1916 Bom. 229, 34 I.C. 976. See also *G V Raman*, 56 Cal 1023 and the English cases cited in Note 1303.

But the prosecution must be withdrawn and the accused discharged under this section, before he can be examined as a witness against his co-accused; because so long as he is in the position of an accused, no oath can be administered to him under sec. 342 (4), and he cannot therefore be examined as a witness. Where the Court sanctions the withdrawal of a prosecution but omits to record an order of discharge, and the accused continues to be kept in custody, his position is in no way changed from that of the accused, and he cannot be examined as a witness—*Banu Singh*, 33 Cal. 1353, 4 Cr.L.J. 145, 10 C.W.N. 962. But if the accused was in fact discharged from custody by virtue of withdrawal from prosecution, the omission to record a formal order of discharge would be cured by section 537, and the accused would be a competent witness against the other accused—*Muhammad Nur*, 7 A.L.J. 86, 11 Cr.L.J. 21; *Sherati*, 18 C.W.N. 1213, 15 Cr.L.J. 693.

The Criminal Procedure Code gives certain powers under which the evidence of an accomplice can be made available. He can be granted a conditional pardon by the Magistrate under sec. 337, Cr. P. C., or the Public Prosecutor, with the consent of the Magistrate, can withdraw the charge under sec 494, Cr P Code. Those powers ought to be exercised where the prosecution considers that the evidence of an accomplice is necessary. The Police have no right to take upon themselves not to charge a person against whom they have evidence because they require him as a witness. Where that improper course is adopted, the evidence of the accomplice so obtained is entitled to very little weight—*Keshav*, 36 Cr.L.J. 937, 156 I.C. 392, A.I.R. 1935 Bom. 186, 37 Bom. 179, 1935 Cr.C. 487, 59 Bom. 355; *Amdumijan Guljar Patil v. Emp.*, A.I.R. 1937

17 (23), 168 I.C. 582, I.L.R. 1937 Nag. 315, 38 Cr.L.J. 237, 9 R.N. 126 (F.B.). It is illegal to examine as a witness for the prosecution a person who has also been charged but who has not been offered pardon or discharged under section 169 or 494, Cr. P. Code—*Sohan Lal*, 34 Cr.L.J. 568, 143 I.C. 467, A.I.R. 1933 Oudh 305, Ind. Rul. 1933 Oudh 174, 1933 Cr.C. 686, 10 O.W.N. 678. But see *Mohammad Yakub*, 33 Cr.L.J. 373, 137 I.C. 73, A.I.R. 1932 All. 73, 1932 Cr.C. 93, where it has been laid down that a Magistrate is not bound to try all accused jointly and, when one of the accused is tried separately and is not put upon a joint trial with other accused, his evidence is not inadmissible against the other accused. See also *Karamalli Gulamalli*, quoted in Note 984. It is the duty of the Police to work up a case and to secure evidence against the real culprits. If there is no evidence against an accused person, it is their duty to tell the Magistrate so. But they cannot be permitted to examine an accused person as a witness against a co-accused person by adopting the simple process of splitting up the case against them, before he has been convicted or not found guilty of the offence with which he is charged—*Dholiomal Karoomal*, 37 Cr.L.J. 716, 162 I.C. 863, A.I.R. 1936 Sind 47, 1936 Cr.C. 319. See also Notes 983 and 984.

The co-accused against whom the charge has been unconditionally withdrawn is a more reliable witness than the accomplice who is examined under conditional pardon—*Sudam*, 34 Cr.L.J. 675, 144 I.C. 74, A.I.R. 1933 Cal. 148, 1933 Cr.C. 225, Ind. Rul. 1933 Cal. 494, following *Hussein*, 25 Bom. 422, 2 Bom.L.R. 1095. But see *Abdul Majid*, cited below.

The withdrawal of the prosecution under sec. 494 must be with the consent of the Court, and in exercising his discretion, the judge must act judicially. The section is only intended to be applied in cases where either the evidence is insufficient to secure a conviction, or in cases of compromise and similar circumstances. It is not intended to be used by the prosecution to get the evidence of an accused against his co-accused and so escape the safeguards laid down in the Code with regard to such evidence under sec. 337, Cr. P. Code. The evidence of the accused, in such a case, ought to be rejected. (*Per* Lort-Williams, J.). The witness can only be considered a competent witness in the sense that his evidence is not inadmissible in respect of the facts to which it relates. The evidence is no doubt admissible but in practice no weight should be given to it without corroboration—*Abdul Majid*, 36 Cr.L.J. 1248, 157 I.C. 840, A.I.R. 1935 Cal. 473, 39 C.W.N. 1082, 1935 Cr.C. 865. There is nothing in this section which prevents a Public Prosecutor if he thinks it is in the interests of the administration of justice, from withdrawing the case as against one of the accused for the purpose of calling him as a witness against the others. It may well be in the interests of justice that the Public Prosecutor should so withdraw so that such evidence should be given to help to secure a conviction against the others. In the same way for the same reasons it may well be that the Court ought to give its consent to such withdrawal—*Harihar Sinha*, 37 Cr.L.J. 758 (760), 163 I.C. 9, A.I.R. 1936 Cal. 356, 40 C.W.N. 876, 1936 Cr.C. 583, 63 C.L.J. 307 (F.B.) Thus, the view of Lort-Williams, J., given above, has practically been overruled by the Full Bench. See also *Faqir Singh v. Emp.*, in Note 957. For distinction between sections 337 and 494, Cr. P. C., see Note 950A.

To order a fresh inquiry against a discharged co-accused after examining and cross-examining him as a prosecution witness and thus gathering from his own mouth the evidence against him is contrary to the traditions of justice in Criminal Courts—*Chuni Lal*, 34 Cr.L.J. 761, 144 I.C. 380, A.I.R. 1933 All. 399, 1933 Cr.C. 682, 1933 A.L.J. 735, Ind. Rul. 1933 All. 420, following *Easatulla Mian*, 76 I.C. 1031, A.I.R. 1925 Cal. 104, 25 Cr.L.J. 311; *Nanda Gopal Roy*, 20 C.W.N. 1128, 35 I.C. 988, 17 Cr.L.J. 288. But see *Chandra Shekhar Prasad*, 36 Cr.L.J. 500 (502), 154 I.C. 387, A.I.R. 1935 Pat. 91, 1935 Cr.C. 146, 1 B.R. 302, 7 R.P. 464.

Discharge—Fresh Complaint:—Where the prosecution is withdrawn under clause (a), i.e., before the frame of charge, the accused is *discharged*, and not acquitted and therefore sec. 403 does not debar the entertainment of a fresh complaint on the same facts—*Ramanand v. Ali Hassan*, 26 Cr.L.J. 129 (130), 83 I.C. 689, A.I.R. 1924

Pat. 797; *Biso Ram*, 23 Cr.L.J. 236, A.I.R. 1922 Pat. 372; *Lari Chand v. Nirode*, 31 Cr.L.J. 1153, 127 I.C. 63, 34 C.W.N. 196, A.I.R. 1930 Cal. 369; *Nasir v. Sh. Abdul Karim*, A.I.R. 1934 Lah. 169; *Devendra Kumar Roy v. Yar Bakht Chaudhury*, 40 Cr.L.J. 349 (354), 180 I.C. 384, A.I.R. 1939 Cal. 220, 43 C.W.N. 301, 11 R.C. 676, I.L.R. (1939) 1 Cal. 407. In *Biso Ram's* case it has been observed that though an order of discharge does not prevent a fresh complaint on the same facts, still prosecution should not be started afresh unless there are *new materials* which were not before the Magistrate formerly. Compare also the cases cited in Note 681 (sec. 203), Note 827 (sec. 253), Note 854 (sec. 259), and Note 1089 (sec. 403).

Where an accused is discharged under this section, he shall be discharged from those proceedings and not put back into them. He may be tried again in other proceedings on the same charge, but not in those proceedings—*Harihar Singh*, 37 Cr.L.J. 758 (760), 163, I.C. 9, A.I.R. 1936 Cal. 356, 40 C.W.N. 876, 1936 Cr.C. 583, 63 C.L.J. 307 (F.B.).

An order that purports to be one of acquittal has to be regarded as one of discharge when, under the provision of law that was applied only an order of discharge could be passed and specially when the Magistrate had expressly shown that it was his intention to pass such order. What has to be looked at is how the case was treated at the time of withdrawal—*Musalayya v. Ranga Rao*, 36 L.W. 641, 1933 Cr.C. 129, 34 Cr.L.J. 12, 140 I.C. 322, 1932 M.W.N. 1230, Ind. Rul. 1932 Mad. 850, A.I.R. 1933 Mad. 98.

1305. Revision:—The High Court is in a position to consider whether the discretion vested in the Magistrate to give consent to the withdrawal of a prosecution has been rightly exercised—*Rajani v. Idris*, 48 Cal. 1105, 25 C.W.N. 615, 64 I.C. 280, 34 C.L.J. 51, 22 Cr.L.J. 76; *Jagat v. Kalimuddi*, 26 C.W.N. 880; *Gopi Bari*, 1 P.L.T. 400, 57 I.C. 657, 21 Cr.L.J. 641; *Devendra Kumar Roy v. Yar Bakht Chaudhury*, 40 Cr.L.J. 349 (353), 180 I.C. 384, A.I.R. 1939 Cal. 220, 43 C.W.N. 301, 11 R.C. 676, I.L.R. (1939) 1 Cal. 407.

But where good reasons have been shown by the Court below for allowing the withdrawal of a prosecution, the High Court will be slow to interfere in revision against the order allowing the withdrawal—*Bepin Behari v. Haripada*, 24 Cr.L.J. 5, 71 I.C. 53 (Cal.). Where the Sessions Judge has exercised his discretion in refusing permission to withdraw a case, and he has not improperly exercised that discretion, the High Court would be very reluctant to interfere with his discretion—*Kaliappa*, 23 L.W. 101, 27 Cr.L.J. 334; *Gomibat*, 26 S.L.R. 67, 1932 Cr.C. 532, 137 I.C. 344, 33 Cr.L.J. 449, A.I.R. 1932 Sind 92, Ind. Rul. 1932 Sind 74. Where a discretion has been exercised by a Court of competent jurisdiction, which is not on the face of it arbitrary, the practice of the High Court is that as a revisional Court it will neither inquire into the reasons nor interfere. Specially where the Court has *acquitted* the accused upon withdrawal of the charges, the High Court would not be right in interfering except upon a properly constituted appeal preferred by the Local Government under sec. 417—*Gulli Bhagat v. Narain*, 2 Pat. 708 (710), 77 I.C. 734, A.I.R. 1924 Pat. 283, 5 P.L.T. 404, 25 Cr.L.J. 446; *Sadayan*, 11 Cr.L.J. 193, 5 M.L.T. 216; *Abdul Gam v. Abdul Kadir*, 1 Rang. 756, 25 Cr.L.J. 1106, 2 Bur.L.J. 287. Where the prosecution does not seem to be *bona fide*, and the evidence that has been adduced leaves the matter in doubt, and the Magistrate allows withdrawal of the prosecution and discharges the accused on reasons which cannot be said to be unsound, it is not proper that the High Court should interfere and the case should be revived—*Sher Sing v. Jitendra*, 59 Cal. 275, 36 C.W.N. 16 (28), 33 Cr.L.J. 3, 54 C.L.J. 253, A.I.R. 1931 Cal. 607, 134 I.C. 1045.

Ordinarily the High Court will not interfere with the discretion given to the prosecution by this section, but it undoubtedly has power to do so, and will do so in special circumstances where the withdrawal appears to be manifestly improper. Where the prosecution has been launched by an experienced Civil Judge after a full trial on the merits and the accused had an opportunity to appeal against the order for prosecution, but apparently did not do so, it would be allowing an undesirable precedent if such a prosecution were to be, unless for very cogent reasons, cut short by the prosecuting authorities. If such a prosecution is allowed to be withdrawn on the

ground that the prosecution is weak or that the trial would be costly, it is a fit case in which the High Court should interfere—*Satwarao Nagorao Hatkar v. Kanbarao Bhago Rao Hatkar*, 39 Cr.L.J. 458 (459), 174 I.C. 510, 10 R.N. 403, 1938 N.L.J. 12, A.I.R. 1938 Nag. 334. See also *Debendra Kumar Roy v. Yar Bakht Chaudhury*, 40 Cr.L.J. 349, 180 I.C. 384, A.I.R. 1939 Cal. 220, 43 C.W.N. 301, 11 R.C. 676, I.L.R. (1939) 1 Cal. 407.

Where a charge is withdrawn, and the accused is acquitted, it is not competent to the revisional Court to consider the question of the legality of the charge. A number of persons were charged before the Magistrate with the offence of robbery. The Public Prosecutor withdrew the charge, and the Magistrate recorded an order of acquittal. On revision, it was contended that the charge of robbery was wrong, in as much as more than five persons were implicated in the act, and the Magistrate ought to have framed a charge of dacoity, and therefore the acquittal on the charge of robbery was wrong. The High Court refused to enter into the question as to the legality of the charge, and held that the Magistrate's procedure was right. There being a charge before him, and the charge having been withdrawn, he acted rightly in recording an order of acquittal—*Sheobaran v. Shibi*, 2 A.L.J. 30.

The High Court will not interfere with the order of acquittal passed by the trial Court under this section, at the instance of a private prosecutor. If the Court has allowed the Public Prosecutor to withdraw the case upon insufficient or improper grounds, and has passed an order of acquittal, the private prosecutor cannot be heard to object to it in revision. The Local Government is the only authority who can take action for the correction of that error—*Gulli Bhagat v. Narain*, 2 Pat. 708 (711), 5 P.L.T. 404, 25 Cr.L.J. 446. The Sind Chief Court has, however, held that there is no reason why it should not exercise its jurisdiction because the revision application is made by a witness in the case who is the aggrieved person—*Fakirchand Ramkrishin v. Murad Umar*, A.I.R. 1940 Sind 233 (234).

When an order of withdrawal has the effect of operating to the detriment of a third person he has right to apply in revision against such an order—*G. V. Raman*, 31 Cr.L.J. 315 (318), 121 I.C. 678, A.I.R. 1929 Cal. 319, 33 C.W.N. 468, 56 Cal. 1023, Ind. Rul. 1930 Cal. 166; *Satwarao Nagorao Hatkar v. Kanbarao Bhago Rao Hatkar*, 39 Cr.L.J. 458, 174 I.C. 510, 10 R.N. 403, 1938 N.L.J. 12, A.I.R. 1938 Nag. 334.

Further enquiry:—If the case is withdrawn under clause (a), the accused will be discharged; and further inquiry may be directed under sec. 436—*Hata*, 30 P.L.R. 58, 30 Cr.L.J. 223; *Kanhaiya Lal v. Baijnath*, 34 Cr.L.J. 519, 143 I.C. 77, A.I.R. 1933 Nag. 78, 1933 Cr.C. 315, Ind. Rul. 1933 Nag. 149, 29 N.L.R. 201; *Dattatraya Govindrao Pakode v. Emp.*, 39 Cr.L.J. 65 (66), 10 R.N. 167, 172 I.C. 130, A.I.R. 1938 Nag. 76. Where the order of discharge under this section is a proper one, no further inquiry should be directed under section 436—*Sitaramayya*, (1911) M.W.N. 74, 12 Cr.L.J. 440.

It is clearly necessary to distinguish between an order of acquittal and an order of discharge under this section. Under the very terms of secs. 436 and 437, Cr. P. C., the High Court has power to order a further enquiry in a case in which an accused person has been discharged under this section—*Devendra Kumar Roy v. Yar Bakht Chaudhury*, 40 Cr.L.J. 349 (353), 180 I.C. 384, A.I.R. 1939 Cal. 220, 43 C.W.N. 301, 11 R.C. 676, I.L.R. (1939) 1 Cal. 407.

495. (1) Any Magistrate inquiring into or trying any case

Permission to conduct prosecution.

may permit the prosecution to be conducted by any person other than an officer of police below the rank to be prescribed by the Provincial Government in this behalf, * * * but no person, other than the Advocate General, Standing Counsel, Government Solicitor, Public Prosecutor or other officer generally or specially

empowered by the *Provincial Government* in this behalf shall be entitled to do so without such permission.

(2) Any such officer shall have the like power of withdrawing from the prosecution as is provided by section 494, and the provisions of that section shall apply to any withdrawal by such officer.

(3) Any person conducting the prosecution may do so personally or by a pleader.

(4) An officer of police shall not be permitted to conduct the prosecution if he has taken any part in the investigation into the offence with respect to which the accused is being prosecuted.

Amendment:—The words "Provincial Government" have been substituted for "Local Government" by section 4 of the Government of India (Adaptation of Indian Laws) Order, 1937.

1306. Permission to conduct prosecution:—The permission of the Magistrate is discretionary, and the High Court will not interfere with such discretion. Where a Magistrate has, after due consideration, exercised the discretion and allowed counsel to appear on behalf of the prosecution, the High Court cannot, as a Court of Revision, overrule the order of the Magistrate and direct him to refuse to allow counsel to appear—*Mangiah v. Dakshina Murthi*, 2 Weir 655. Similarly, where the District Magistrate considers that the too frequent appearance of pleaders for the prosecution in petty criminal cases is detrimental to the interests of justice, he can refuse to permit the prosecution to be conducted by a pleader, and the Chief Court will decline to interfere with the order of the District Magistrate—*Rala Ram v. Buta*, 1905 P.R. 6, 2 Cr.L.J. 43.

Before a Counsel engaged by a party can conduct the Crown case it is necessary for the party to obtain permission of the Court under cl (1) of this section, that he should himself be put in charge of the prosecution. If he obtains permission for himself, then it is no doubt open to him to brief counsel to represent him. The provisions of sec. 495, cl. (1) are no doubt wide enough so as to empower a trying Magistrate to permit any person to conduct the prosecution but that does not mean that the trying Magistrate should grant such permission indiscriminately. He has to exercise his discretion after considering all circumstances of the case—*Kabul*, A.I.R. 1933 Sind 345, 1933 Cr.C. 1121, 147 I.C. 131, 27 S.L.R. 331, 35 Cr.L.J. 320.

When there is an officer present in Court who has been empowered by the Local Government to conduct prosecution, it cannot be open to the Magistrate to give permission to some other person to conduct the prosecution either instead of or along with him without his consent—*Janke Gopal*, 37 Cr.L.J. 333, 160 I.C. 689, A.I.R. 1936 Bom 35, 37 Bom.L.R. 967, 1936 Cr.C. 90.

A Magistrate, presumably after giving due consideration to the complainant's application in this behalf, permitted her advocate to appear and conduct a Crown prosecution under section 354, I.P.C. The case proceeded and the complainant was examined-in-chief and partly cross-examined. The Magistrate then rose for the midday recess. After the recess an application was made to the Court by a Police Jamadar submitting that he and not the complainant's advocate should be permitted to conduct the prosecution on the ground that the case was a Crown case instituted by the police and that it was his duty to conduct it. The Magistrate made a reference to the District Magistrate and granted the Police Jamadar's application after receiving instructions from him. *Held*, on revision, that the procedure adopted by the Magistrate in referring the matter to the District Magistrate was not proper, that in the first place it was not competent for him to apply to higher authority for advice in such circumstances, and in

the next place, having obtained such advice, to vary an order already passed in the exercise of a proper judicial discretion, and that his original order must stand—*Janat Achar*, A.I.R. 1935 Sind 3, 36 Cr.L.J. 1046, 156 I.C. 789, 1935 Cr.C. 44. But see *Janke Gopal*, supra, where a contrary view seems to have been taken.

In the prosecution of a case of murder an advocate privately engaged is not a proper person to conduct the prosecution. He must represent the interests of his client and it is above all things essential that in the prosecution on behalf of the Crown private interests and private feelings, for instance, the desire for vengeance which may not unnaturally move the complainant, in such a case, should have no place. Therefore, an advocate privately engaged to represent the complainant should have no other place than that of one strictly subordinate to the officer who prosecutes on behalf of the Crown, for the Crown stands not necessarily for a conviction but for justice—*Ahmed Mahomed v. Emp.*, A.I.R. 1940 Sind 220 (221), I.L.R. 1940 Kar. 482.

Who can be permitted:—The Magistrate is not precluded from exercising in exceptional cases his discretion by allowing private Vakils of good character to conduct the prosecution—*Krishnamachariar*, 12 M.L.J. 354. The words 'any person' include persons other than certified pleaders. It is however discretionary with the Criminal Courts in each case to permit such persons to conduct the prosecution—*Mad. H. C. Pro*, 2-9-1882.

The fact that a certain person is also a Prosecuting Inspector does not deprive him of his right as a private citizen, and he may in his private capacity ask for permission to prosecute in his case—*Maung Pu*, 10 Bur.L.T. 213, 17 Cr.L.J. 486, 36 I.C. 166. So also, the fact that a particular person is a complainant is not a sufficient ground for not permitting him to prosecute the case—*Ibid.* But it is doubtful whether the words 'any person' would include an absolute stranger who had no connection in the remotest degree with the prosecution and whose desire to help the prosecution was based on a personal grudge only—*Darsan v. Atmaram*, 11 A.L.J. 313, 14 Cr.L.J. 389.

If the offence be of a nature affecting the public (e.g., rioting or unlawful assembly) which the Crown alone in the interests of public peace and security has a right to conduct, a private person should not be permitted to conduct the prosecution—*Malayil Kottagil*, 18 Cr.L.J. 329 (Mad.).

Under a notification of the Madras Government all superior police-officers above the rank of a first class Head Constable in charge of a police station are generally empowered to conduct the prosecution without even the permission of the Magistrate under sub-section (1); such officers would be entitled under sub-section (2) to withdraw from the prosecution with the permission of the Court as mentioned in sec. 494—*Anantharama v. Mithia Thevan*, 1914 M.W.N. 776, 15 Cr.L.J. 614, 25 I.C. 841.

The moment a notice is issued under sec. 112, Cr. P. C., the Crown has the right to conduct the case against the person called upon to show cause and sec. 495, Cr. P. C., gives discretion to the Magistrate to permit the prosecution to be conducted by any person mentioned in that section—*Laxmi Narayan*, A.I.R. 1932 All. 670, 1932 A.L.J. 880, 34 Cr.L.J. 42, 140 I.C. 536, 1932 Cr.C. 822.

Sub-section (2):—'Any such officer':—These words refer only to the Advocate-General, Standing Counsel, etc., mentioned in sub-section (1). If any person other than these officers (e.g., an Advocate privately engaged by the complainant and permitted by the Magistrate) withdraws from the prosecution, the effect provided in sec. 494 does not follow; in other words, the trial will proceed—*Nga Maung v. Nga Lu*, 10 Cr.L.J. 14, 1903 U.B.R. 1st Qr. (Cr. P. C.) 15; see also *Lakshmana v. Keelan Peria*, 1911 M.W.N. 106, 11 Cr.L.J. 722, 8 I.C. 867. A private Vakil appearing for the Crown cannot withdraw from the prosecution, even though he was conducting the case under the directions of the Public Prosecutor of the district who could not appear personally—*Sital Singh*, 46 Cal. 700 (709).

In Bengal by a Notification (*vide* Cal. Gaz., 10th July 1907, Part I, p. 1162), every Inspector or Sub-Inspector of Police appointed to prosecute cases before Magistrates is

a Public Prosecutor for all such cases. Consequently, he can withdraw from the prosecution. And the fact that the application for withdrawal from prosecution is signed jointly by the Court Inspector (Public Prosecutor) and a private Vakil who is not a Public Prosecutor, does not invalidate the withdrawal—*Sital Singh*, 46 Cal. 700 (710).

In U. P., a Court Inspector is not a Public Prosecutor; and if he is not specially empowered by the Local Government to act as Public Prosecutor, he cannot withdraw, even with the consent of the Court. Such a withdrawal is illegal and cannot have the effect of acquittal of the accused—*Ram Gobind v. Lallu*, 46 All. 88 (90), 21 A.L.J. 855, 25 Cr.L.J. 970.

It is clear from this section that an officer of the Police not below a certain rank which the Local Government is to prescribe, is entitled to conduct the prosecution and is therefore, by the same section, entitled to make an application for withdrawal. Where the lowest rank prescribed by the Local Government is that of the Sub-Inspector and a Circle Inspector being above that rank, his appearance in the case under the instructions of the District Superintendent of Police to apply for withdrawal is sufficient to enable him to present the application—*Dattatrya Govindrao Pakode v. Emp.*, 39 Cr.L.J. 65 (66), 10 R.N. 167, 172 I.C. 130, A.I.R. 1938 Nag. 76.

Sub-section (3):—A person, whether a private complainant or not, when he is permitted to conduct the case as prosecutor, may instruct a counsel to appear—*Narayan*, 11 B.H.C.R. 102.

It is not open to a Magistrate to decline to allow the complainant, who is conducting the prosecution, to have a particular pleader of his own choice. The section does not authorise the Magistrate to take the prosecution out of the hands of the pleader of the complainant and to assign it to some other person who is not the Public Prosecutor—*Ghadially*, 18 S.L.R. 30, 25 Cr.L.J. 571.

1307. Sub-section (4):—*Exclusion of Police-officer*:—In all important cases and specially in cases of murder and dacoity, the police-officer making the investigation should be examined as a witness, regarding the circumstances of the investigation. It is probably for this reason that he is debarred from conducting the prosecution.

A police-officer who, on receiving the information of an offence obtained a warrant, arrested the accused, and seized some books and papers, may be said to have "taken part in the investigation of an offence" under this clause, even though he may not have examined any of the witnesses and his investigation was confined to an inspection of the articles seized; consequently, if he was allowed to conduct the prosecution, the procedure was highly improper, but since in this case the accused were not prejudiced thereby, the irregularity did not vitiate the trial but was cured by sec. 537—*Tribhovan-das*, 26 Bom. 533, 4 Bom.L.R. 271.

Excise Officers are not impliedly as they are not expressly included in the expression "Officer of Police" in sec. 495 (4) of the Cr. P. C.—*Gopal*, 34 Cr.L.J. 905 (907), 145 I.C. 138, 35 Bom.L.R. 376, A.I.R. 1933 Bom. 234, 1933 Cr.C. 657, 57 Bom. 441.

A person in respect of whom an enquiry is being made under sec. 110, Cr. P. C., is not being prosecuted for any offence. It is, therefore, quite clear that sub-sec. (4) of this section does not apply in the case of an inquiry under sec. 110, Cr. P. C., but, on the other hand, sub-sec. (1) of this section does apply, since the Magistrate is enquiring into a case. Under that sub-section the Magistrate has a discretion whether to allow the Police Sub-Inspector, who has been enquiring into a case under sec. 110, Cr. P. C., to conduct the prosecution or not, and he is entitled to exercise his discretion by analogy to sub-sec. (4) of this section. It is generally undesirable for the Police Sub-Inspector, who has been inquiring into a case under sec. 110, Cr. P. C., to conduct such cases—*Anandya Sambhya Mahar*, A.I.R. 1940 Bom. 416, 42 Bom.L.R. 909.

CHAPTER XXXIX.

OF BAIL.

496. When any person other than a person accused of a non-bailable offence is arrested or detained without warrant by an officer in charge of a police-station, or appears or is brought before a Court, and is prepared at any time while in the custody of such officer or at any stage of the proceedings before such Court to give bail, such person shall be released on bail: Provided that such officer or Court, if he or it thinks fit, may, instead of taking bail from such person, discharge him on his executing a bond without sureties for his appearance as hereinafter provided:

Provided, further, that nothing in this section shall be deemed to affect the provisions of section 107, sub-section (4), or section 117, sub-section (3).

Change:—The second proviso has been added by sec. 135 of the Cr. P. C. Amendment Act, XVIII of 1923. For notes relating to this proviso, see Note 240 under sec. 107.

Scope:—See Note 240.

1308. Grant of bail:—The principle to be deduced from secs. 496 and 497 is that grant of bail is the rule, and refusal is the exception. An accused person is presumed under the law to be innocent, till his guilt is proved. As a presumably innocent person he is entitled to every freedom and every opportunity to look after his case. An accused person if he enjoys freedom will be in a much better position to look after his case and properly defend himself than if he were in custody—*Hutchinson*, 1931 A.L.J. 515, 32 Cr.L.J. 1271 (1273), Ind. Rul. 1931 All. 858, 134 I.C. 842, 1931 Cr.C. 612, A.I.R. 1931 All. 356, 53 All. 931. No such rule exists as regards serious non-bailable offences which are punishable with death or transportation for life—*Joglekar*, 33 Cr.L.J. 94 (96), 135 I.C. 113, 1931 A.L.J. 773, A.I.R. 1931 All. 504, Ind. Rul. 1932 All. 1, 1931 Cr.C. 892, 54 All. 115 (F.B.). This section is imperative in its terms and the Court is bound to comply with its provisions. In every bailable offence, bail is a right and not a favour. Detention in the lock up is the alternative, not the original order—*Raghunandan*, 32 Cal. 80. When the offence is a bailable one, the Magistrate is bound to admit the accused to bail if he can furnish a satisfactory bail—*M. A. Azeez v. The King*, 41 Cr.L.J. 252, 186 I.C. 147, A.I.R. 1940 Rang. 26. See also *Bashir-ud-Din*, 33 Cr.L.J. 752 (754), 139 I.C. 330, A.I.R. 1932 All. 327, 1932 Cr.C. 306, Ind. Rul. 1932 All. 554. When a man who is arrested is not accused of a non-bailable offence, no needless impediment should be placed in the way of his being admitted to bail. The intention of the law is that in such cases the man is ordinarily to be at liberty, and it is only when he is unable to furnish such moderate security, if any is required of him, as is suitable for the purpose of securing his appearance before a Court pending inquiry, that he should remain in detention—*Mir Hashamali*, 20 Bom.L.R. 121, 19 Cr.L.J. 329, 44 I.C. 345. Whether the accused is to remain at large on bail depends in most cases upon the exigencies of the particular case before the Court. In cases involving the taking of accounts it is desirable that the accused should be granted bail so that he may have full opportunity of instructing his counsel as regards accounts—*Ram Narain*, 32 P.L.R. 383, 32 Cr.L.J. 1175, Ind. Rul. 1931 Lah. 938, 134 I.C. 490. If a case is proceeding in an extremely tardy manner, the Magistrate should enlarge the

accused on bail, instead of insisting upon his rotting in jail during the time the Crown is collecting evidence in support of the prosecution—*Tularam*, 97 I.C. 39, A.I.R. 1927 Nag. 53, 27 Cr.L.J. 1063 (1065). Where the accused has surrendered himself before the date of hearing, that is a circumstance to show that the accused is not likely to abscond; consequently he may be granted bail—*Tularam*, *supra*.

When the Police arrests a person under sec. 55, he should be given the option of bail—*Daulat Singh*, 14 All. 45. Where a person arrested under Chapter VIII claims a bail, he is entitled to bail as a matter of right—*Sheolalsing*, 6 C.P.L.R. 31; *Raghunandan*, 32 Cal. 80; *Narainaswamy*, 36 Mad. 474; *Mir Hashamali*, 20 Bom.L.R. 121, 19 Cr.L.J. 329; *Jatvi*, 20 S.L.R. 122, 27 Cr.L.J. 935 (936). This section authorizes the Magistrate conducting an enquiry under sec. 117, Cr. P. C., to release the person concerned in the enquiry on bail with or without surety to ensure his attendance in Court—*Karbalai Hussain*, A.I.R. 1940 Nag. 75, 41 Cr.L.J. 155, 185 I.C. 318, 1939 N.L.J. 537, I.L.R. 1940 Nag. 61, following *U Gandama*, 145 I.C. 314, A.I.R. 1933 Rang. 164, 1933 Cr.C. 763, 6 R.Rang. 41, 34 Cr.L.J. 950. See *Maung Saw Hlaing*, 34 Cr.L.J. 1195, 146 I.C. 23, A.I.R. 1933 Rang. 165, 1933 Cr.C. 764, 6 Rang. 70. See also Note 240. A person who is re-arrested after having been discharged on executing a surety bond under sec. 117, sub-cl. (3), Cr. P. C., is entitled to be released on bail, if he is not accused of a non-bailable offence—*Nathan Gope*, 10 P.L.T. 801, 30 Cr.L.J. 809, 117 I.C. 628, A.I.R. 1929 Pat. 654, Ind. Rul. 1929 Pat. 436.

Appeal:—When the accused is convicted of a bailable offence and prefers an appeal from the order of conviction, the Appellate Court can only act in the exercise of its jurisdiction as regards bail under sec. 496, Cr. P. C., and is obliged to grant bail under that section—*Mahendra*, 14 C.W.N. cxxxviii. However serious an offence may be, if it is bailable and there is no reason, such as the likelihood of the applicant absconding if released on bail, the seriousness of the offence would not alone justify a Court in refusing bail to which a convicted person is entitled under the law—*Abdul Habib Khan*, 29 Cr.L.J. 450, 108 I.C. 689, 26 A.L.J. 363, A.I.R. 1928 All. 211.

Court to decide sufficiency of bail:—When the bail is ordered by the Court, the duty of deciding as to the sufficiency or otherwise of the bail is with the Court itself, and not with the police. If such duties are irregularly entrusted to police, two dangers are likely to arise; first, a police officer may sometimes be unscrupulous enough to take advantage of the power entrusted to him, for the purpose of extortion; and secondly, the bringing of false charges against the police. But the Court, when it admits a man to bail, is at liberty to call for a report from the police as to the sufficiency of the bail—*Gayitri Prosunno*, 15 Cal. 455.

1309. Bond:—Bail means security with sureties, whereas the bond referred to in the first proviso is a simple recognizance of the principal without any surety.

Section 496 coupled with the form given in the Schedule to the Code (Form XLII, Sch. V) contemplates two kinds of security, namely, (1) the simple recognizance of the principal, and (2) security with sureties. The word "bail" is properly applicable to the second kind of security and that is the meaning which has been attached to the word in the practice and procedure of Courts—*Rudolf Stallman*, 15 C.W.N. 736 (737), 12 Cr.L.J. 358.

Under this section, a Police officer can either demand a bail from an accused or accept his own bond without sureties, but under no provision of the law can he take a third party's bond for the appearance of the accused without taking an undertaking from the accused himself—*Wadhawa Singh*, 109 I.C. 219, A.I.R. 1928 Lah. 318, 29 Cr.L.J. 491 (492). Such a bond is invalid, and the person executing it incurs no legal liability if the accused absconds—*Ibid*. But see *Indar v. Emp.*, in Note 1317.

See *Karbalai Hussain* in Note 240.

Amount of the security:—The object is not to penalise the accused but to ensure his presence in Court and the amount of security must be fixed with due regard to

the means of the accused and the nature of the offence—*Chetnand v. Gurbakhsh*, 31 Cr.L.J. 980, 126 I.C. 615, A.I.R. 1930 Lah. 668.

Bond of agent:—Where the personal attendance of the accused is dispensed with, a recognizance bond, if deemed necessary, should be taken from him (and not from his agent), binding him to appear, either in person or by agent. A Magistrate has no legal authority to secure the attendance of the accused, by a bond taken from the agent.—*Lallubhai Jassubhai*, 5 B.H.C.R. 64.

Court-fees:—Bail-bonds in criminal cases, recognizances to prosecute or give evidence, and recognizances for personal appearance or otherwise are not chargeable with any court-fee. *Vide* sec. 19, cl. (xv) of the Court Fees Act, 1870 (Act VII of 1870).

497. (1) When any person accused of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a Court, he may be released on bail, but he shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or transportation for life:

When bail may be taken in case of non-bailable offence.
Provided that the Court may direct that any person under the age of sixteen years or any woman or any sick or infirm person accused of such an offence be released on bail.

(2) If it appears to such officer or Court at any stage of the investigation, inquiry or trial, as the case may be, that there are not reasonable grounds for believing that the accused has committed a non-bailable offence, but that there are sufficient grounds for further inquiry into his guilt, the accused shall, pending such inquiry, be released on bail, or, at the discretion of such officer or Court, on the execution by him of a bond without sureties for his appearance as hereinafter provided.

(3) An officer or a Court releasing any person on bail under sub-section (1) or sub-section (2) shall record in writing his or its reasons for so doing.

(4) If at any time after the conclusion of the trial of a person accused of a non-bailable offence and before judgment is delivered, the Court is of opinion that there are reasonable grounds for believing that the accused is not guilty of any such offence, it shall release the accused, if he is in custody, on the execution by him of a bond without sureties for his appearance to hear judgment delivered.

(5) A High Court or Court of Session and, in the case of a person released by itself, any other Court may cause any person who has been released under this section to be arrested and may commit him to custody.

Change:—This section has been amended by section 136 of the Cr. P. C. Amendment Act, XVIII of 1923. "What we have done is to allow the Court or police-officer to release on bail a non-bailable case unless there appear to be reasonable grounds

for believing that the accused has been guilty of an offence punishable with death or transportation, and, as some safeguard against this, we have provided in sub-sec. (5) for a review by the Sessions Court or the High Court of any order admitting to bail in a non-bailable case"—*Report of the Joint Committee* (1922). As regards the new sub-sec. (4), see Note 1312 below.

1310. Scope of section:—Under the old section the general rule was that bail was not to be taken in respect of non-bailable offences—*Nensi Hansraj*, 8 Bom L.R. 420, 3 Cr.L.J. 499; *Narendra Lal*, 36 Cal. 166; *Har Chand*, 10 S.L.R. 208, 18 Cr.L.J. 640. Under the present section, the Legislature by defining the offences under which bail is not to be granted (*viz.*, offences punishable with death or transportation) has practically laid down that *bail should ordinarily be granted*, and that only in cases of heinous offences it will be refused. "This cannot but be regarded as the result of a liberalising influence on the policy of the Legislature, and the discretion of the Courts will henceforth be less fettered than before"—*Nagendra Nath*, 51 Cal. 402 (417), 25 Cr.L.J. 732, 38 C.L.J. 288. The new sec. 497 of the Cr. P. Code has been materially altered. Under the new section when any person accused of any non-bailable offence is arrested, he may be released on bail, but he shall not be so released if there appear reasonable grounds for believing that he has been guilty of "an offence punishable with death or transportation for life". The words in inverted commas were substituted for the words "the offence of which he is accused". This change cannot but be regarded as the result of a liberalising influence on the policy of the Legislature and the discretion of the Courts will be less fettered than before. The section draws a distinction between non-bailable offences which are punishable with death or transportation for life and other non-bailable offences. In the former case the Magistrate's powers for granting bail are restricted, but it is not so in the latter class of cases—*King-Emp. v. Abharaj Kunwar*, 40 Cr.L.J. 841 (843), 183 I.C. 713, 1939 O.W.N. 791, 1939 O.L.R. 548, 12 R.O. 54, A.I.R. 1940 Oudh 8, 1939 A Cr.C. 155, 1939 A W.R. (C.C.) 144, 1939 O.A. 665.

The present policy of law is to allow the bail in the case of under-trial prisoners rather than to refuse it. The High Court granted bail where the only reason given by the Magistrate for refusing bail was that to grant it would be prejudicing the case—*Ghulam*, 27 Cr.L.J. 302, 92 I.C. 590, A.I.R. 1925 Lah 510, 7 Lah.L.J. 331.

In view of the express provision contained in this section, it is not open to Courts in India to follow the principles laid down in the decisions of English Courts in determining matters of bail—*Narendra Lal*, 36 Cal. 166, 13 C.W.N. 43, 9 Cr.L.J. 375, 1 I.C. 738; *Gul*, 29 Cr.L.J. 470.

Where a person, being accused of a bailable offence, was released on bail but owing to changes in the condition of the injured party it appeared later on that he would have to be accused of a non-bailable offence, the provisions of sec. 497, Cr. P. C., and not the provisions of sec. 496, Cr. P. C., came into operation and the Magistrate had power to cancel the bail and to remand him in custody—*Osman Piroo*, 38 Cr.L.J. 93, 165 I.C. 923, A.I.R. 1936 Sind 187, 1936 Cr.C. 972, 30 S.L.R. 131.

As to distinction between sub-sections (1) and (2), see Note 1311 below.

There is no provision in the Criminal Procedure Code or in the Extradition Act (XV of 1903) authorising a Magistrate to hold a person to bail to appear before a tribunal in a State, to which the Extradition Act applies, unless the warrant is endorsed under the provisions of sec. 8 of the Act—*Balthasar*, 33 Cal. 1032.

As the law stands now, it is no longer the case that bail ought to be refused merely because the offence is a non-bailable one. That rule is now restricted to offences punishable with death or transportation—*Abhram Bali*, 28 O.C. 220, 26 Cr.L.J. 1286, 89 I.C. 150. Where the offence in respect to which a person is accused is a non-bailable one punishable with transportation for life, strictly speaking, he ought not to be released on bail at all having regard to the provisions of sec. 497 (1), Cr. P. C.—*Giani Meher Singh v. Emp.*, 41 Cr.L.J. 138, 185 I.C. 249, I.L.R. (1939) 2 Cal. 42, 43 C.W.N. 639, A.I.R. 1939 Cal. 714. But the mere fact that the offence is a serious one is not a ground for refusing bail. However serious an offence may be, if it is bailable and there

is no likelihood of the accused absconding if released on bail, the seriousness of the offence would not alone justify a Court in refusing bail—*Abdul Habib*, 26 A.L.J. 363, 29 Cr.L.J. 450. Where the accused charged with a serious non-bailable offence is an old man and is a Government servant, and it is found that if he is not released on bail there would be nobody to instruct his counsel in going through the documentary evidence and that he would not be able to make a proper defence, *held* that bail should be granted—*Abhram Bali*, 28 O.C. 220, 12 O.L.J. 394, 26 Cr.L.J. 1286. But this matter is left to the discretion of the Court, and the Magistrate may in the exercise of this discretion refuse to grant bail to a person accused of a non-bailable offence—*Jumo*, 20 S.L.R. 136, 27 Cr.L.J. 859 (860).

The matters for consideration in an application for bail may be enumerated as follows: (a) whether there is or is not a reasonable ground for believing that the applicant has committed the offence with which he is charged, (b) the nature and the gravity of the charge, (c) the severity or degree of the punishment which might follow in the particular circumstances in case of a conviction, (d) the danger of the applicant absconding if he is released on bail, (e) the character, means and standing of the applicant, (f) the danger of the alleged offence being continued or repeated, assuming that the accused is guilty of having committed that offence in the past, (g) the danger of witnesses being tampered with, (h) opportunity to the applicant to prepare his defence and (i) the fact that the applicant has already been some months in jail and that the trial is not likely to conclude for further several months at least—*Hutchinson*, 32 Cr.L.J. 1271 (1275), 1931 A.L.J. 515, Ind. Rul. 1931 All. 858, 134 I.C. 842, 1931 Cr.C. 12, A.I.R. 1931 All. 356, 53 All. 931. These do not appear to have been laid down as exhaustive or inflexible tests. It cannot be suggested that any one of those tests would, by itself, even in the face of other considerations to the contrary, be conclusive. It is the net result of all the considerations for and against the accused which must ultimately decide the matter. Many more considerations can be added, without any attempt to make the list exhaustive. Even the extreme youth or old age or sex of the accused may be a matter for consideration and so also the state of his health. His previous conduct and behaviour in Court, or want of confidence in obtaining reliable sureties or the character of the sureties, if indemnified by the accused, may equally be taken into account. Even his social status or the position which an accused person occupies in relation to the other member of his family, particularly when he is the only adult male member, the rest being woman and children has also not been lost sight of. Sometimes even the fact that he was arrested during the harvesting time has also been considered though, of course, not made the sole ground of release—*Joglekar*, 33 Cr.L.J. 91 (96), 135 I.C. 113, 1931 A.L.J. 773, A.I.R. 1931 All. 504, Ind. Rul. 1932 All. 1, 1931 Cr.C. 892, 54 All. 115 (F.B.). See also *Mahammad Panah*, A.I.R. 1934 Sind 131, 28 S.L.R. 47.

The main points for consideration in the application for bail are:—(1) Whether there is any likelihood of the accused absconding; (2) whether there is any likelihood of the accused tampering with the evidence by threatening the complainant. The social position or status of an accused person should never be taken into consideration when granting or rejecting an application for bail. It is the duty of the Court to see that both sides are not hampered. The Court must see that the Crown does not get a free hand the accused are not locked up or are hampered in their defence simply on the ground that it is alleged or feared that they will tamper with the evidence—*King-Emp. v. Abhairaj Kunwar*, 40 Cr.L.J. 841, 183 I.C. 713, 1939 O.W.N. 791, 1939 O.L.R. 548, 12 R.O. 54, A.I.R. 1940 Oudh 8, 1939 A.Cr.C. 155, 1939 A.W.R. (C.C.) 144, 1939 O.A. 665.

The discretionary power of the Court to admit to bail is not arbitrary but is judicial and is governed by established principles. In deciding whether bail should be granted, Court should consider the seriousness of the charge, the nature of the evidence, the severity of the punishment prescribed for the offence, and in some instances the character, means and standing of the accused—*Nagendra Nath*, 51 Cal. 402 (416), 81 I.C. 220, 38 Cr.L.J. 388, 25 Cr.L.J. 732; *Tularam*, 27 Cr.L.J. 1063 (1066), 97 I.C. 39.

Magistrates are bound to consider the nature of the offence charged, the character of the evidence against the prisoner, and the punishment which in the event of conviction is likely to be inflicted on the prisoner. While mere vague allegations that the prisoner, if released, will tutor witnesses should not be taken into account, the Magistrate may well refuse to enlarge on bail where the prisoner is likely to intimidate witnesses or where there are reasonable grounds for believing that he will use his liberty to suborn evidence—*Mohammad Eusoof*, 3 Rang. 538 (542), 27 Cr.L.J. 401, followed in *Nga San Htun*, 5 Rang. 276, 28 Cr.L.J. 773 (F.B.); *Achhaiyar*, 27 A.L.J. 927, 30 Cr.L.J. 718; *Guru*, 32 Cr.L.J. 278, 129 I.C. 341, 32 Bom.L.R. 1131, A.I.R. 1930 Bom. 484, 1931 Cr.C. 1020, Ind. Rul. 1931 Bom. 149; *Mahammad*, 36 Cr.L.J. 711, 155 I.C. 113, 28 S.L.R. 47, A.I.R. 1934 Sind 131; *Krishna Chandra*, 6 Pat. 802, 28 Cr.L.J. 621; or where there are reasonable grounds for believing that he will get up false evidence in support of the defence—*Allahrakhsa*, 35 Cr.L.J. 144, 146 I.C. 561, A.I.R. 1933 Sind 367, 1933 Cr.C. 1339. The Court is not called upon to conduct a preliminary trial of the case and consider the probability of the accused's guilt or innocence. It would be entirely exceeding its function if it did that in any detail; but it may incidentally have to look at the weight of the evidence against the accused as a necessary part of its proper function; that is to enquire whether the giving of the bail as opposed to the arrest of the accused might lead to a real danger of his absconding and not appearing to take his trial or whether there is any real reason to suppose that he is likely to tamper with the witnesses who would be called against him—*Sanyasaya v. Public Prosecutor*, 26 Cr.L.J. 1593, 90 I.C. 665, 22 M.L.W. 156, A.I.R. 1925 Mad. 1224. See also *Hardwari*, 33 Cr.L.J. 497, 137 I.C. 514, 33 P.L.R. 331, Ind. Rul. 1932 Lah. 344. The necessity of a severe punishment in case of conviction is no reason for a refusal to grant bail. Bail may be refused if there is reason to believe that the accused may commit a similar or any other serious offence while on bail—*Achhaiyar*, 30 Cr.L.J. 718, 117 I.C. 99, 27 A.L.J. 297, A.I.R. 1929 All 614, Ind. Rul. 1929 All. 675. Persons accused of an offence under s. 302 read with s. 115, I. P. C., are not entitled to bail as a matter of right—*King-Emp. v. Abhairaj Kunwar*, 40 Cr.L.J. 841 (842), 183 I.C. 713, 1939 O.W.N. 791, 1939 O.L.R. 518, 12 R.O. 54, A.I.R. 1940 Oudh 8, 1939 A Cr.C. 155, 1939 A.W.R. (C.C.) 144, 1939 O.A. 665. Where the accused was charged under sec. 307, I. P. C., and it was alleged that the accused might, if left on bail, assail the complainant, he should not be released on bail—*Naranji Premji*, 30 Bom.L.R. 622, 29 Cr.L.J. 901, 111 I.C. 661, A.I.R. 1928 Bom. 244. Where a person is arrested and charged with a serious offence as attempt to murder, bail should not be allowed; it is not a sufficient reason to allow bail on the ground that the injured person is not well enough to be subjected to the ordeal of an identification parade and the prosecution is not in a position to state definitely whether the person arrested actually inflicted the wound—*Pritam Singh*, 33 P.L.R. 387, 1932 Cr.C. 579 (580), 33 Cr.L.J. 335, Ind. Rul. 1932 Lah. 245, 136 I.C. 709, A.I.R. 1932 Lah. 433. Where a person has been found guilty of deliberately attempting to shoot a man with a revolver, he should not be released on bail on the grounds that he is only 19 years of age and that it will be unfortunate that he should be associated with bad characters in jail if ultimately it is found that he was not guilty. An argument of this kind certainly has some force, but after all it is an argument which could be raised in almost every case, because respectable men even if they are more than 19 years of age may suffer deterioration from detention in jail—*Dhanpal*, 37 Cr.L.J. 1017, 164 I.C. 703, A.I.R. 1936 All 656, 1936 A.L.J. 961, 1936 Cr.C. 792. Save in exceptional circumstances persons accused of crimes punishable with long terms of imprisonment should not be released by Magistrates and Sessions Judges on bail. The richer the accused, and the more easy it is for him to find bail, the less it is desirable that he should be released, and in no circumstances without an order of the High Court, should any person accused of murder be admitted to bail—*Hikayat Singh*, 11 Pat. 280, 1932 Cr.C. 522 (524), 138 I.C. 27, 33 Cr.L.J. 574, 13 P.L.T. 530, A.I.R. 1932 Pat. 209, Ind. Rul. 1932 Pat. 162.

'Reasonable grounds for believing,' etc.:—Persons accused of non-bailable offences should not be released on bail as a rule, but they may be so released if the

reasons for believing that the case against them is such that it is not likely to succeed, or if there are special circumstances justifying bail—*Bashiram*, 26 Cr.L.J. 4, 83 I.C. 483, A.I.R. 1923 All. 479. This section lays down that a person accused of a heinous offence like murder shall not be released on bail if there appear reasonable grounds for believing that he has been guilty of the offence with which he is charged—*Nga San Tin*, 5 Bur.L.J. 170, 28 Cr.L.J. 188; *Jahana*, 36 Cr.L.J. 227, 152 I.C. 180, 35 P.L.R. 558, A.I.R. 1934 Lah. 609, 1934 Cr.C. 941. The fact that the accused has no member in his family who can look after his case, is no reason whatever to admit him to bail in a case of murder—*Sri Chand*, 36 Cr.L.J. 184, 152 I.C. 802, A.I.R. 1934 All. 815, 1934 Cr.C. 998. That one of the two accused, who are brothers, should be given an opportunity to arrange for the defence and for funds is no reason for the Sessions Judge to grant bail when the High Court has already held that the release of the accused persons has led to tampering with the witnesses for the prosecution—*Sardar Jahan*, A.I.R. 1933 All. 895, 1933 Cr.C. 1525. The section says nothing about taking into consideration the likelihood of the accused person absconding. All that the Court has to consider is whether there are reasonable grounds for believing that the accused is guilty—*Henderson*, 6 L.B.R. 172, 19 I.C. 171, 14 Cr.L.J. 171. Other considerations may arise in deciding the question as to granting bail, and one of those considerations is whether there are any grounds for supposing that the accused would abscond. But the main question for consideration in determining matters of bail is whether there are reasonable grounds for believing the accused to be guilty—*Jamini Mullick*, 36 Cal. 174, 13 C.W.N. 51; *Gul*, 29 Cr.L.J. 470 (471). Whether there are reasonable grounds or not for believing that the accused is guilty must be decided judicially, that is to say, there must be tangible evidence on which, if unrebutted, the Court might come to the conclusion that the accused might be convicted—*Jamini Mullick*, 36 Cal. 174.

On a complaint under sec. 409, I. P. C., the Magistrate examined the complainant who was not asked and did not state how he proposed to prove the allegations. He held no preliminary enquiry but directed the issue of a warrant of arrest forthwith. There was considerable delay in filing the complaint. The accused surrendered to Court and applied for bail which was refused. *Held* that there was nothing but the statement of the complainant, entirely unsupported by any evidence whatsoever and in the particular circumstances of the case while there might be reasonable grounds for believing that an enquiry should be held into the matter, there could not yet appear to be reasonable grounds for believing that the accused was guilty of the offence with which he had been charged and that the accused should under such circumstances be granted bail—*Htye Yar v. The King*, A.I.R. 1937 Rang. 474, 172 I.C. 176.

After the accused had been convicted of a serious offence under sec. 120B read with sec. 302, I. P. C., by the unanimous verdict of the jury even though the Sessions Judge disagreed with the verdict of the jury and made up his mind to refer the matter to the High Court, it is desirable that the convicted persons should be held in custody pending the final decision of the High Court—*Benat Pramanik*, 39 C.W.N. 954 (960).

In determining matters of bail, the Appellate Court also should be guided by this principle. That Court should not refuse bail on the ground that the accused has been sentenced to a long term of imprisonment by the trying Court, or that the granting of bail has a tendency to increase the number of appeals and of protracting the appellate proceedings. The main question for consideration by the Appellate Court is whether there are reasonable grounds for believing the accused to be guilty of the offence charged—*Gul*, 29 Cr.L.J. 470 (471), 109 I.C. 118, A.I.R. 1928 Sind. 142, 22 S.L.R. 435.

The phrase "an offence punishable with death or transportation for life" covers not only offences which are punishable with death as well as in the alternative with transportation for life, but also covers an offence which is punishable with transportation for life but not in the alternative with capital punishment. The phrase must be read disjunctively, as if it ran, "offence punishable with death, or punishable with transportation for life"—*Nga San Htwa*, 5 Rang. 276 (F.B.), 28 Cr.L.J. 773 (overruling *Mohammad Eusool*, 3 Rang. 538, 27 Cr.L.J. 401); *Naranji*, supra. See also *Janki*, 33 Cr.L.J.

844, 140 I.C. 59; A.I.R. 1932 Nag. 130, 28 N.L.R. 260, 1932 Cr.C. 666, Ind. Rul. 1932 Nag. 115, dissenting from *Tularam*, 27 Cr.L.J. 1063.

Proviso:—"This clause provides for the grant of bail in any case at the discretion of the Court, if the accused is a minor, female, sick or infirm person"—*Statement of Objects and Reasons* (1914).

1311. Sub-section (2):—Sub-section (1) applies to a stage when the accused is first brought before a Court or his arrest is brought to the notice of the Court, and there is little or no information before the Court on which it can act. This clause has no reference to an application for bail presented during the trial, even if it is made before a Magistrate. The appropriate provision applicable where the investigation or inquiry or trial has been proceeding is sub-section (2). The importance of the distinction lies in the fact that the relaxation of the restriction on the powers of the Magistrate under sub-section (1) effected by the Amendment of 1923 does not find place in sub-section (2)—*Hutchinson*, 1931 A.L.J. 515, 32 Cr.L.J. 1271 (1275), Ind. Rul. 1931 All. 858, 134 I.C. 842, 1931 Cr.C. 612, A.I.R. 1931 All. 356, 53 All. 931.

Bond for appearance:—When a Police officer takes a bond under this section, he has power to make it a condition of the bond that the accused person shall appear *before the police*; the law does not require that the accused person shall always be directed to appear before a Court. When the law enables a Police officer to take bonds, that officer can certainly direct the accused to appear before the police. To hold otherwise would be to render secs. 499 and 514 meaningless—*Kansai Ram*, 1913 P.R. 22, 14 Cr.L.J. 631. But in *Chandra Sekhar*, 11 Cal. 77, it has been held that a bond for appearance before a Police officer is void.

1312. Sub-section (4):—The reason for adding this sub-section has been thus stated by Mr. Rangachariar (the mover of the amendment): "The reason for this amendment is this. As Honorable Members are aware, at the conclusion of the trial in the original Court, oftentimes judgment is not ready for delivery at once, but the Court has come to the conclusion, after taking the verdict of the assessors or the jury in a Sessions trial, or the Magistrate has made up his mind, that the accused is not guilty and therefore proposes to acquit him. As sections 366 and 367 stand, a doubt has been expressed whether really the accused could be set at liberty before judgment is actually pronounced"—*Legislative Assembly Debates*, 12th February 1923, page 2206.

In a case under the old section a trial was held with the aid of assessors, and they gave their opinions that the accused were not guilty. The Sessions Judge then wrote a short note setting forth the findings of the assessors, and adding his own finding agreeing with the assessors that the accused were not guilty, and they were acquitted. At a later date he wrote a full reasoned judgment. Held that the procedure was a mere irregularity curable by section 537—*Sankaralinga v. Narayan*, 45 Mad. 913 (F.B.).

The present sub-section validates such procedure, making it conditional on the accused to execute a bond for his appearance when judgment is to be delivered.

1313. Sub-section (5)—Cancellation of bail:—The Magistrate can cancel any bail allowed to an accused person and direct him to surrender, if it appears on the production of further evidence that a case is made out against him—*Johur Mull*, 10 C.W.N. 1093, 4 Cr.L.J. 221; *Jamini Mullick*, 36 Cal. 174, 13 C.W.N. 51, 9 Cr.L.J. 409, 1 I.C. 910. The High Court and the Court of Session can cancel a bail granted by the Subordinate Court.

But the District Magistrate has no power to cancel a bail and order the re-arrest of a person released on bail by a Subordinate Magistrate—*Maung Ba Chit*, 4 Bur.L.T. 70, 12 Cr.L.J. 244; *Bashir-ud-Din*, 33 Cr.L.J. 752, (754), 139 I.C. 330, A.I.R. 1932 All. 327, 1932 Cr.C. 306, Ind. Rul. 1932 All. 554. Sub-section (5) gives that power only to the High Court and the Court of Sessions.

In the case of an accused who is released by Police, the Magistrate has no power under section 497 (5) to commit him to custody. The words "by itself" must mean by the Magistrate in question—*Lakhamji*, 35 Cr.L.J. 580, 147 I.C. 1159, A.I.R.

1933 Sind 331, 27 S.L.R. 197, 1933 Cr.C. 1078. But the principle of law laid down in *Lakhami's* case does not apply and the words "by itself" in this sub-section are of no significance where bail was granted by the police and was confirmed by the Court on the next day and was subsequently cancelled by it as the offence with which the accused was charged, though appearing as a bailable one in the beginning, turned ultimately to be a non-bailable one—*Osman Piroo*, 38 Cr.L.J. 93, 165 I.C. 923, A.I.R. 1936 Sind 187, 1936 Cr.C. 972, 30 S.L.R. 131.

Every Judge or Magistrate trying a criminal case has inherent power to see that the trial is properly conducted and that the ends of justice are not defeated, and if facts are brought to its attention, which suggest that unless the person who is being tried is placed under arrest the ends of justice will be defeated, the Court has inherent power to direct his re-arrest. Where, therefore, the Magistrate is satisfied that the accused has been tampering with a prosecution witness, in order to prevent a repetition of the offence he is entitled to direct that the accused be re-arrested notwithstanding the order for his release on bail which had been passed by another Magistrate who dealt with the case at an earlier stage—*Rautmai Kanumal*, A.I.R. 1940 Bom. 40, 41 Bom.L.R. 1232, 186 I.C. 101, I.L.R. 1940 Bom. 38, 41 Cr.L.J. 251.

The granting of bail in a non-bailable offence is a concession allowed to an accused person and it presupposes that this privilege is not to be abused in any manner and that the accused person has not to come into contact with the prosecution witnesses or to exert any undue influence on them so as to destroy the evidence or to minimise its effect against him. It is a sort of trust reposed in him by Court and if it is found that he has betrayed this trust in any manner or that he has misused the liberty thus granted to him by Court he disentitles himself to the privilege so granted. This is more specially so when he happens to occupy a dominating position in relation to the witnesses concerned and can injure or benefit them by his own fiat. Where, therefore, an accused, in making an attempt to approach the prosecution witnesses and require them to supply with the gist of the statements made by them to the Police, abused the opportunity granted to him by the Court by releasing him on bail, he disentitled himself to enjoy the concession any longer and his bail was cancelled—*Jivan Lal Gauba*, 37 Cr.L.J. 937, 164 I.C. 376, A.I.R. 1936 Lah. 730, 1936 Cr.C. 765, 17 Lah. 779, 9 R.L. 110, 39 P.L.R. 56.

Under this clause, the powers of the High Court are confined to cases of persons released by the *Trial Magistrate*. Therefore, there is no jurisdiction in the High Court to entertain an application under this clause against an order granting bail passed by a *Sessions Judge* in a case pending before a sub-Magistrate. But under sec. 561A the High Court has inherent power to interfere with an order granting bail passed by a *Sessions Judge*—*Gulam Jilani*, 25 Cr.L.J. 1363, 82 I.C. 755, A.I.R. 1925 Nag. 228. Where it appears that attempts have been made by a prisoner to pervert the course of justice the High Court has power under sec. 561A, assuming there to be no power otherwise, to direct the cancellation of the bail-bond, and that the prisoner be committed to custody—*Rameswar K'horiwalla*, 32 C.W.N. 889 (892). When the High Court passed an order under sec. 498 granting bail, that order for bail may be cancelled by the High Court in exercise of the powers under sec. 561A without the accused person having done anything since the order to violate any condition on which bail was granted—*Mohammad Ibrahim*, 33 Cr.L.J. 684, 138 I.C. 768, 1932 A.L.J. 701, A.I.R. 1932 All. 534, 1934 Cr.C. 630, Ind. Rul. 1932 All. 494. See also *Bashiran*, 26 Cr.L.J. 4, 83 I.C. 483, A.I.R. 1923 All. 479 and *Sanyasaya v. Public Prosecutor*, 26 Cr.L.J. 1593, 90 I.C. 665, 22 M.L.W. 156, A.I.R. 1925 Mad. 1224.

Reasons must be recorded for cancelling the bail. When the Magistrate did not state his reasons, the High Court in revision admitted the accused to bail—*Chengalraya*, (1911) 2 M.W.N. 138, 12 Cr.L.J. 503.

Enhancement of bail:—It is open to a Magistrate to demand enhanced bail during the course of the trial if there are circumstances which in the opinion of the Magistrate call for the course to be taken—*Keshab*, 25 Cr.L.J. 1003, 81 I.C. 715, A.I.R. 1924

All. 320. See also *Bashir-ud-Din*, 33 Cr.L.J. 752 (754), 139 I.C. 330, A.I.R. 1932 All. 327, 1932 Cr.C. 306, Ind. Rul. 1932 All. 554.

1314. Revision:—Where the Sessions Court allows the accused to be at large on bail, it is within the jurisdiction of the High Court to consider whether the order passed by the Sessions Court should or should not be maintained, and also whether under sub-section (5) the accused should be allowed to continue at large—*Pritam Singh*, 33 P.L.R. 387, 1932 Cr.C. 579 (580), 33 Cr.L.J. 335, A.I.R. 1932 Lah. 433, 136 I.C. 709. But the District Magistrate cannot revise any order as to bail passed by a subordinate Magistrate under this section. If the District Magistrate considers the subordinate Magistrate's order to be wrong, he should report it to the High Court—*Sadashiv Narayan*, 22 Bom 549.

Even the High Court's power of interference is limited. The High Court has jurisdiction to interfere in revision, only if the Judge has passed an illegal order. Where a Sessions Judge after considering the evidence thinks that there are no reasonable grounds for believing the accused to be guilty of the offence of which he is accused, and releases him on bail, the High Court will not go behind this finding and cancel the order of the Judge releasing the accused on bail—*Thimma Reddi*, 10 M.L.J. 411; *Badri Prasad*, 5 A.L.J. 419, 8 Cr.L.J. 49. Similarly, if the Sessions Judge, after considering all the grounds of objection, has in his discretion refused to grant bail in case of a non-bailable offence, the High Court will not interfere and admit the accused to bail under section 498—*Nga San Tan*, 5 Bur.L.J. 170, 28 Cr.L.J. 188. See also *Allahrakhio*, 35 Cr.L.J. 144, 146 I.C. 561, A.I.R. 1933 Sind 367, 1933 Cr.C. 1339. The High Court will be very cautious in interfering with the discretion of a Magistrate in case of bail under section 497, especially where the prosecution has not tendered evidence to connect the accused with the offence—*Lakshman Sangor*, Ratanlal 892.

1314A. Affidavit:—It is highly desirable that an affidavit supporting an application for bail should set forth in the beginning on what ground bail is desired, and after having set forth the ground, the reasons for the ground should be explained—*Sri Chand*, A.I.R. 1934 All 815, 3 A.W.R. 668, 36 Cr.L.J. 184, 152 I.C. 802, 1934 Cr.C. 998.

1314B. Right to argue:—Permission to appear and argue one's own application for bail may be granted but this cannot be treated as a precedent for all accused persons in all cases—*Hutchinson*, 1931 A.L.J. 515, 32 Cr.L.J. 1271, Ind. Rul. 1931 All. 858, 134 I.C. 842, 1931 Cr.C. 612, A.I.R. 1931 All. 356, 53 All 931.

1314C. Explanation:—The trying Magistrate is not entitled to make any suggestion or representation in the explanation which he may submit in any case to the High Court of anything which is not founded on the record before him—*Mani Krishna*, 34 C.W.N. 256.

498. The amount of every bond executed under this Chap-

Power to direct admission to bail or reduction of bail.

ter shall be fixed with due regard to the circumstances of the case, and shall not be excessive; and the High Court or Court of Session may, in any case, whether there be an appeal on conviction or not, direct that any person be admitted to bail, or that the bail required by a police officer or Magistrate be reduced.

1314D. Scope of section:—Under this section the High Court can only release the accused on bail or reduce the amount of bail, but cannot order the arrest or commitment to custody of any person who has been released on bail by the lower Courts—*Gulam Jilani*, 25 Cr.L.J. 1363, 82 I.C. 755, A.I.R. 1925 Nag 228. The High Court can grant bail in cases pending anywhere in the Presidency—*Jumna v. Ramanathan*, 52 Mad. 52, 55 M.L.J. 690, A.I.R. 1929 Mad. 29 (30). This section does not specially empower the High Court to cancel a bail granted by itself. But it can hardly be said

that the High Court has no such power, when such a power is given to a Sessions Judge or Magistrate under sec. 497. Under the wide powers conferred by sec. 561A, the High Court can direct the arrest of a person who has been released on bail under its orders, if it appears that he has committed a serious non-bailable offence—*Mirza Mahomed Ibrahim*, 1932 A.L.J. 701, 1932 Cr.C. 630. See Note 1313.

The High Court, in the absence of any order by any Court, has no power to direct the offender to be released on bail either under sec. 497 or under sec. 498, Cr. P. C.—*Srilal Agarwalla*, 44 C.L.J. 134 (135).

Although there is no hard and fast rule, it is desirable that the ordinary practice should certainly be that the lower Court should first be moved and this is particularly desirable in a bail application, where the appropriate Court to deal with the matter is the Court which is going to try the case and where an expression of opinion by a superior Court is likely to prejudice the trial in the lower Court—*Mohd-ud-Din Lal Badshah v. Emp.*, 40 Cr.L.J. 127, 178 I.C. 632, A.I.R. 1938 Lah. 762, 40 P.L.R. 716, 11 R.L. 482.

The words "in any case" and "whether there be an appeal on conviction or not" cannot be taken to mean that the Court can act once it has reached finality. The Code must be read as a whole and since its scheme is to render a Court *functus officio* the moment judgment is signed, the section cannot possibly mean that nevertheless the High Court has power to release an accused on bail and thus suspend sentence when no tribunal is seized of the proceedings—*Bashiruddin Ahmad*, 38 Cr.L.J. 384, 167 I.C. 373, 9 R.N. 182, I.L.R. 1937 Nag. 236, A.I.R. 1937 Nag. 181.

Granting of bail by Appellate Court:—When an accused person has been convicted of a non-bailable offence by a competent Court after a regular trial, the Appellate Court should not ordinarily release the accused on bail unless there is an error of law or mistake or mis-statement of fact apparent on the face of the record, or unless there exists any of the reasons mentioned in the proviso to sec. 497 (1). But the Appellate Court should not refuse to grant bail merely on the ground that the accused has been sentenced to a long term of imprisonment by the trial Court, or that the granting of bail has a tendency to increase the number of appeals and of protracting the appellate proceedings—*Gul*, 29 Cr.L.J. 470 (471, 472), 109 I.C. 118, A.I.R. 1928 Sind 142, 22 S.L.R. 435.

1315. Powers of High Court and Sessions Court:—This section gives the High Court and the Court of Session very wide powers to admit an accused person to bail in any case even when he is charged with a non-bailable offence—*Badri Prasad*, 5 A.L.J. 419, 8 Cr.L.J. 49; *Kamaraju Pandia*, 2 Weir 657. The powers of the High Court or the Court of Session given by sec. 498 are not controlled by the statutory limitation laid down in sec. 497 of refusing bail if there appear reasonable grounds for believing the accused to be guilty of an offence punishable with death or transportation for life. The powers in sec. 498 are not fettered by any rules defining the limits within which they would be exercised, as the powers under sec. 497 are—*Bishambhar Nath*, 11 O.L.J. 527, 1 O.W.N. 281, 25 Cr.L.J. 1132; *Hutchinson*, 32 Cr.L.J. 1271, 1931 A.L.J. 515, 53 All. 931, 134 I.C. 842, A.I.R. 1931 All. 356, 1931 Cr.C. 612; *Fateh Singh*, 51 All. 603, 30 Cr.L.J. 697; *Achhaibar*, 27 A.L.J. 927, 30 Cr.L.J. 718 (719), 117 I.C. 99, A.I.R. 1929 All. 614, Ind. Rul. 1929 All. 675; *Joglekar*, 33 Cr.L.J. 94, 135 I.C. 113, 1931 A.L.J. 773, A.I.R. 1931 All. 504, Ind. Rul. 1932 All. 1, 1931 Cr.C. 892, 54 All. 115 (F.B.). See *Krishan Gopal*, 35 Cr.L.J. 294, 146 I.C. 1083, A.I.R. 1933 Lah. 925, 1933 Cr.C. 1384, 31 P.L.R. 1068. That discretion is unfettered but of course it cannot be exercised arbitrarily but must be exercised judicially. Where there is a reasonable ground for believing that the accused has been guilty of an offence punishable with death or transportation for life, as regards which the Legislature has thought fit to prohibit Magistrates from granting bail at all, the grant of bail by a Sessions Judge or the High Court, who have undoubtedly power under sec. 498, Cr. P. C., is to be made not as a general rule but only in exceptional cases. This is particularly so when the accused is on his trial, the prosecution evidence is closed and the Sessions Judge has refused to exercise his discretion in his favour. This is a rule of practice and

caution only—*Joglekar*, supra. See also *Keshav*, 35 Cr.L.J. 539, 147 I.C. 1010, A.I.R. 1933 Bom. 492, 35 Bom.L.R. 1072, 1933 Cr.C. 1596; *Mahammed Panah*, A.I.R. 1934 Sind 131, 28 S.L.R. 47. According to the Oudh Chief Court the High Court has power to release a person on bail in any case, that is to say, that the powers in granting bail in non-bailable offences is unrestricted, but that power has to be used judicially and not in an arbitrary manner—*Abhairaj Kunwar*, 40 Cr.L.J. 841 (843), 183 I.C. 713, 1939 O.W.N. 791, 1939 O.L.R. 548, 12 R.O. 54, A.I.R. 1940 Oudh 8, 1939 A.Cr.C. 155, 1939 A.W.R. (C.C.) 144, 1939 O.A. 665. The Calcutta High Court also holds that although the power of the High Court under this section to grant bail 'in any case' is quite unfettered, still in exercising its discretion the High Court ought to take into consideration the limitations imposed by section 497—*Sourindra*, 37 Cal. 412, 14 C.W.N. 512. This case has been followed by Nagpur Court in *Sheikh Karim*, 27 Cr.L.J. 319. (But now the limitations imposed by section 497 are very few). The rule laid down in sec. 497 for the guidance of Courts other than High Courts is a rule founded upon justice and equity, and one which should be followed by the High Courts as well as by every other Court, unless anything appears to the contrary. The extended powers given to the High Court under sec. 498 are not to be used to get rid of this very reasonable and proper provision of the law—*Ashraf Ali*, 42 Cal. 25, 16 Cr.L.J. 1215. In another case the Calcutta High Court has said that in exercising its discretion under section 498 the High Court should not confine its attention to the question whether the prisoner is likely to abscond or not. Other circumstances may also affect the question of granting bail to accused persons charged with crimes of a grave character—*Narendra Lal Khan*, 36 Cal. 166, 13 C.W.N. 43, 9 Cr.L.J. 375, 1 I.C. 738. The Rangoon High Court holds that although the High Court has absolute direction in the matter of granting bail, and it is not bound by the provision of sec. 497, still the Legislature having placed the initial stage of dealing with crimes with Magistrates and having in fact enacted that persons accused of non-bailable offences shall not be released on bail except under the terms of section 497, the High Court is bound to follow the general law as a rule, and not to depart from it except under very special circumstances—*Boudville*, A.I.R. 1925 Rang 129, 85 I.C. 43, 26 Cr.L.J. 427, 2 Rang. 546 (547); *Nga San Htwa*, 5 Rang 276, 28 Cr.L.J. 773, A.I.R. 1927 Rang 205, 104 I.C. 101 (F.B.); *Henderson*, 6 L.B.R. 172, 19 I.C. 171, 6 Bur.L.T. 73, 14 Cr.L.J. 171; *Htye Yar v. The King*, A.I.R. 1937 Rang. 474, 172 I.C. 176. In an earlier Sind case it was held that the High Court when passing an order under section 498 was not limited by the restrictions imposed by section 497; that bail should not as a matter of principle be granted in non-bailable cases except in special circumstances; and that the discretion given under section 498 was one that should be exercised according to the exigencies of each case—*Harchand*, 18 Cr.L.J. 642, 10 S.L.R. 208. But in a later Sind case it has been held that though section 498 gives wide powers to the High Court of granting bail, it should be interpreted as controlled by the provision of sec. 497—*Gul*, 29 Cr.L.J. 470 (471) (following 37 Cal. 412 and 42 Cal. 25). But the principles of law laid down in *Harchand's* case was quoted with approval by the same Court in *Mahammad*, 36 Cr.L.J. 711 (713), 155 I.C. 113, 28 S.L.R. 47, A.I.R. 1934 Sind 131, 1934 Cr.C. 1067. When the High Court is concerned with persons who have been actually convicted, the principle which will necessarily guide the High Court in granting bail will be whether there are reasonable grounds for believing that the convicts committed the offences in question—*Sheikh Karim*, 27 Cr.L.J. 319, 92 I.C. 703, A.I.R. 1926 Nag 279.

The High Court and the Court of Session can exercise their power of granting bail, as soon as the Police have arrested the accused and even before the case is sent up to the Magistrate—*Ebrahim Ahmed*, 7 Bur.L.R. 86. They can admit a person to bail even where he has been convicted and has not appealed—*Badri Prasad*, 8 Cr.L.J. 49, 5 A.L.J. 419. Where the accused relies merely on a technical ground against the probability of his conviction, he should not be admitted to bail—*Clive Durant*, Ratanlal 480. The High Court refused to grant bail, where the application for bail contained defamatory statements and allegations consisting of attacks on the trying Magistrate and on the

public and private conduct of other officers of high rank—*Clive Durant*, 15 Bom. 483, and *Ratanlal* 480.

Where after an exhaustive enquiry the accused has been committed by a competent Magistrate on grave and serious charges relating to non-bailable offences the High Court should not lightly enlarge him on bail—*Mohi-ud-Din Lal Badshah v. Emp.*, 40 Cr.L.J. 127, 178 I.C. 632, A.I.R. 1938 Lah. 762, 40 P.L.R. 716, 11 R.L. 482. See also *Nasir Ali v. Abdul Hamid* in Note 1316.

Grant of bail pending appeal to Privy Council:—Where the accused obtained special leave from the Privy Council to appeal to that tribunal, and applied for bail to the Judicial Committee, and the Judicial Committee expressed an opinion that the matter should be decided by the High Court, whereupon the petitioner applied to the High Court for bail, held that the High Court had jurisdiction to make an order in the case releasing the accused on bail, pending the decision of the Privy Council—*Subrahmanya Ayyar*, 24 Mad. 161. But when in a case the petitioner has no right to appeal to the Privy Council, and the High Court has no power to give leave to appeal to that tribunal, the High Court cannot after it confirms the conviction of the Court below, admit the petitioner to bail, simply because he *proposes to apply* (but has *not yet applied*) to the Judicial Committee for leave to appeal to the Privy Council. It cannot do so even under clause 41 of the Letters Patent. As soon as the High Court confirms the conviction on appeal or revision, it becomes *functus officio*, and has no jurisdiction afterwards to grant bail in order that a petition for leave to appeal may be made to His Majesty in Council, or until the petition for leave to appeal to His Majesty in Council is disposed of—*Tulsi Teli*, 72 I.C. 362, 24 Cr.L.J. 362, A.I.R. 1924 Cal. 64, 50 Cal. 585; *Diwan Chand*, 1908 P.R. 15, 19 P.W.R. 1908, 8 Cr.L.J. 89; *Hanmantrao*, 21 N.L.R. 161, A.I.R. 1926 Nag. 228, 91 I.C. 1001, 27 Cr.L.J. 185; *Pitmal*, 81 I.C. 160, 25 Cr.L.J. 672; *Babu Lal Chaukani*, 9 R.C. 558, 116 I.C. 612, 1936 Cr.C. 1121, I.L.R. (1937) 1 Cal. 464, A.I.R. 1936 Cal. 809, 40 C.W.N. 1313; *Bashiruddin Ahmad*, 38 Cr.L.J. 384, 167 I.C. 373, 9 R.N. 182, I.L.R. 1937 Nag. 236, A.I.R. 1937 Nag. 181. But when the further stage had been reached by the acceptance on the part of the Judicial Committee of the appeal, the powers of the High Court in regard to bail would be revived and fresh *seisin* of the case with regard to the question of bail could be considered—*Babu Lal Chaukani*, *supra*. Once, however, leave is granted and *seisin* taken, then section 498, Cr. P. C., expressly empowers the High Court to act in the matter, not on its own motion but on behalf of their Lordships of the Privy Council. Its jurisdiction to that limited extent revives. The highest judicial tribunal in the Empire is then seized of the proceedings and it directs a Court subordinate to it, as it has every right to do, to perform a function which it has authority to perform under this section. The wording of section 498 is wide enough to cover that. The High Court's *seisin* of the proceedings then revives for this limited purpose in accordance with well-known rules of procedure—*Bashiruddin Ahmad*, *supra*. Once the High Court has ordered in a criminal appeal, it becomes *functus officio* and has no *seisin* in the case. The *seisin* may be revived when the Judicial Committee has granted leave to appeal. There is a further distinction between a case in which the Privy Council in granting leave to appeal has also given a direction to the appellant to apply to the High Court for bail, and one in which there is no such direction. The power of the High Court to deal with an application of this sort depends on whether it has been directed by the Privy Council to do so or not. Once leave is granted and *seisin* taken, his section expressly empowers the High Court to act in the matter not on its own motion but on behalf of the Privy Council and its jurisdiction to that limited extent revives. The High Court has no power to grant bail in this matter, unless it is directed to consider the petitioner's application for bail by their Lordships of the Judicial Committee of the Privy Council which has given him leave to appeal—*Bauca Faqir Singh v. Emp.*, 39 Cr.L.J. 982, 177 I.C. 1001, A.I.R. 1938 Lah. 697, 40 P.L.R. 595, 11 R.L. 385.

The High Court has inherent jurisdiction (under sec. 561A) to grant bail to an

accused who has filed an application to the Judicial Committee for special leave to appeal to the Privy Council but has not yet obtained the leave; but it would be proper for the High Court to wait till the Privy Council has granted the special leave, and then to grant bail on a fresh application being made—*Ram Saroop*, 49 All. 247, 25 A.L.J. 97, 27 Cr.L.J. 1377, 98 I.C. 593, A.I.R. 1927 All. 97. A different view has been taken by the Nagpur High Court. It has been held that as regards sec. 561A, Cr. P. C., the inherent power of a Court cannot be invoked with respect to any matter which is expressly dealt with by the Code. The question of bail has been expressly dealt with, and although the matter of bail pending an appeal to the Judicial Committee is not there, its provisions on the subject must be regarded as exhaustive. Moreover there should not be any resort to inherent power when there are other remedies available. The Local Government has ample power to suspend sentence and to release a convict on such terms as it chooses to fix. Inherent powers should be used sparingly—*Bashiruddin Ahmad*, supra. See also *Barendra*, 39 CLJ 1, where the High Court stayed execution of the sentence in order that the appeal to His Majesty in Council may not be frustrated.

1316. Power of Sessions Judge:—The Sessions Judge can grant bail to 'any person' who has been wrongly convicted by the Magistrate and whose case he can either deal with himself or can refer to the High Court. But the words 'any person' do not include a person convicted by the Sessions Judge himself. When a Sessions Judge, after convicting the accused, released them on bail pending their appeal to the High Court, it was held that he had no jurisdiction to do so. This section does not give him power to alter or vary his own order—*Basuppa*, 4 Bom.L.R. 55.

The Sessions Judge has power to admit the petitioners to bail in *any case*, e.g., on a reference under section 123 (2). It stands to reason that if in the case of a person who is convicted and who has preferred an appeal, bail is allowable, bail can similarly be allowed in the case of a person against whom an order has been made under sec. 118, which order is liable to be revised by the Sessions Judge under section 123, sub-section (2)—*Ahmed Ali Sardar*, 50 Cal 969, 37 CLJ 595, 24 Cr.L.J. 953; *Mangal Singh*, 28 Cr.L.J. 657, 103 I.C. 193, A.I.R. 1928 Lah 189.

As for the powers of the Sessions Judge to grant bail to a person in appeal from an order passed against him under sec. 118, Cr. P. C., see Note 240.

The mere fact that a committal order has been passed, does not in itself afford reasonable grounds to the Sessions Judge for believing that the person so committed is guilty of the offence with which he is charged. The Sessions Judge can, therefore, grant bail to the accused even after commitment in suitable cases—*Nasir Ali v. Abdul Hamid*, 36 Cr.L.J. 1141, 157 I.C. 286, A.I.R. 1935 Pesh. 101. But see *Badshah v. Emp.* in Note 1315.

There is no authority which authorises a Sessions Judge to reverse an order of the High Court in regard to the granting of bail to a particular person before him on trial where no new case for granting bail appears to have arisen after the date of the order of the High Court refusing bail to him—*Sardar Jahan*, A.I.R. 1933 All. 895, 1933 Cr.C. 1525, 35 Cr.L.J. 614, 148 I.C. 133.

The admission to bail is a matter within the discretion of the Sessions Judge, and where the Judge uses his discretion with proper care, the High Court will decline to interfere—*Badri Prasad*, 5 A.L.J. 419, 8 Cr.L.J. 49; *Sheikh Karim*, 27 Cr.L.J. 319, 92 I.C. 703, A.I.R. 1926 Nag. 279.

The direction of the Sessions Judge that the petitioners are to show cause why their bail should not be enhanced, is not proper, where it proceeds solely on the basis that the petitioners had challenged the order of the trying Magistrate under section 5, Identification of Prisoners Act, directing measurements and photographs of the petitioners to be taken. The question whether there is any valid reason for enhancing the bail granted to them should be left to the Magistrate who might very well deal with the matter of enhancement of bail on materials placed before him—*J. E. Gubbay*, A.I.R. 1936 Cal. 65, 40 C.W.N. 415.

499. Before any person is released on bail or released on his own bond, a bond for such sum of money as the police officer or Court, as the case may be, thinks sufficient shall be executed by such person, and, when he is released on bail, by one or more sufficient sureties conditioned that such person shall attend at the time and place mentioned in the bond, and shall continue so to attend until otherwise directed by the police-officer or Court, as the case may be.

(2) If the case so require, the bond shall also bind the person released on bail to appear when called upon at the High Court, Court of Session or other Court to answer the charge.

1316A. Scope:—The provisions of this section are not exhaustive and do not override the inherent powers of the High Court in matters of bail. There are no restrictions on the High Court in the matter of imposing conditions on which it grants bail. It is open for instance to the High Court in granting bail, where an accused has been convicted by making a seditious speech, to impose the condition that the accused should abstain from addressing any public meeting or publishing any matter until the decision of the appeal. There is no irregularity in the High Court directing that the sureties shall be responsible for the production of an accused person on bail in the High Court and for his subsequent production in the Court of the District Magistrate of the district where he was tried to hear the reserved judgment in his appeal—*Adkoo Umrao*, A.I.R. 1938 Nag. 420 (421), 40 Cr.L.J. 464, 180 I.C. 608, I.L.R. 1939 Nag. 170, 11 R.N. 387. See also *Ram Bilas v. Emp.*, A.I.R. 1940 Pat. 375, 185 I.C. 598, 1940 P.W.N. 151, 21 P.L.T. 194, 41 Cr.L.J. 214.

The Calcutta-High Court has taken a different view in the matter. It has held that the only condition contemplated by a bail bond is a condition for attendance in Court. A bail bond in which any other condition (e.g., an undertaking for good behaviour such as that the accused will not deliver any speech until the disposal of the case under section 124A, I. P. C., against him) is included, cannot be regarded as a bond under the Code and cannot be forfeited by the Magistrate under sec. 514, Cr. P. Code—*Giani Meher Singh v. Emp.*, 41 Cr.L.J. 138, 185 I.C. 249, A.I.R. 1939 Cal. 714, I.L.R. (1939) 2 Cal. 42, 43 C.W.N. 639. The procedure which should be adopted in a case of this sort is for the Police to bring to the notice of the Court the fact that there has been a violation of the undertaking in order that the Court may thereupon cancel the bail bond in the exercise of its inherent jurisdiction. It is also possible that by violating the undertaking the accused may commit a contempt of Court. An undertaking, not to make a speech, should not be imported into the bail bond and the bond cannot be forfeited under section 514, Cr. P. C., on breach of that condition—*Ibid.*

1316B. Power to accept sureties, if can be delegated to another Magistrate:—The granting of bail is a judicial act and not a ministerial one; and no judicial function can be delegated to another in the absence of an express provision of law, or of some rule having the force of law. The proceedings entail something more than the mere passing of an order. The Judge or Magistrate who grants bail has to be personally satisfied in his judicial capacity that the sureties produced are reliable and solvent and also that the persons who sign are actually the persons they purport to be. Fraudulent impersonation is not unknown in these matters. It follows he cannot delegate this responsibility to another, unless the law expressly empowers him to do so. The very fact that secs. 60, 76 (1), 85 and 86, Cr. P. C., which allow a bond to be executed before a Magistrate or person not seized of the proceedings, were deemed necessary by the Legislature indicates that they are exceptions, and not part

of the general law. The sureties must appear before him and satisfy him of their solvency and their identity, except in so far as they are expressly authorised to do otherwise by some express rule or provision of law—*Banarsidas*, 38 Cr.L.J. 633, 168 I.C. 876, I.L.R. 1937 Nag. 168, 9 RN 275

Acceptance of sureties:—The surety bond is something more than a mere contract with the Crown. The parties to a contract are not bound to enter into it; nor are the results which flow from one the same. Provided certain conditions are fulfilled, a Magistrate is bound to grant bail. It is a right to which the accused is entitled and not a mere favour. That at once removes the matter from the realm of contract. So also the Magistrate is bound to accept the sureties produced, provided they are properly identified and are solvent, and reliable. He cannot, for instance, reject them on the ground of their political views—*Ibid*.

1317. Time and place:—If a bail-bond fixes neither the time for the production of the prisoner, nor the place of appearance it cannot be forfeited for the non-appearance of the prisoner—*Chattar Singh*, 1885 A.W.N. 44. Bail proceedings are special proceedings about which there are specific directions in the Code, and they must be strictly followed. This section states that the time and place at which the accused is to appear must be mentioned in the bond, and the second clause of this section states that if the accused is to appear in some other Court the bond must expressly say so. It is not open to Courts to depart from these express provisions. Where in the printed bond executed by the accused as well as the surety, there is no mention of the Court in which the accused is directed to appear, it is impossible to enforce the vague and slovenly bond of this character—*Chitaram*, 38 Cr.L.J. 100, 165 I.C. 825, A.I.R. 1936 Nag. 243, 1936 Cr.C. 1037, I.L.R. 1937 Nag. 137; *Brahma Nand v. Emp.*, A.I.R. 1939 All. 682 (684), 1939 A.L.J. 779, 184 I.C. 662, 1939 A.W.R. (H.C.) 696, 1939 A.Cr.C. 164, 41 Cr.L.J. 85. See also *Imarat Mallik* in Note 1333.

There is nothing illegal in requiring the accused to bind himself to appear from the date of the execution of the bail-bond *on every day* until the case is disposed of. No notice is necessary before proceeding to enforce the penalty if default is made—*Anonymous*, 6 M.H.C.R. App. 38, 2 Weir 662.

If no day is specified in the bond but the day is to be a day of which notice is to be given thereafter, reasonable notice must be given to enable both the accused and the surety to attend—*Fatehchand Wadhwal v. Emp.*, A.I.R. 1940 Sind 136 (137), 41 Cr.L.J. 802, 189 I.C. 800.

Where the accused himself did not execute a bond for his appearance but a third person executed a bond as a surety, the bond was in accordance with the provisions of this section and the surety was amenable to the penalties contemplated by law in the event of his failure to produce the accused. It was not necessary as a condition precedent that there should have been a bond executed by the accused himself—*Reoti Prasad*, 36 Cr.L.J. 297, 153 I.C. 155, A.I.R. 1934 All. 1046, 1934 Cr.C. 1329. The same High Court took a different view in *Brahma Nand v. Emp.*, supra. It has been held that when a person is released on bail he must himself execute a bond. The law does not contemplate any person being released on bail without executing a bond himself merely upon an undertaking or security given by a surety. The only exception to this rule is to be found in sec. 514B, Cr. P. Code. It is incumbent under sec. 499, Cr. P. C., to get a bond executed by the person who is released on bail and unless that is done there can be no valid bond by a surety alone. See also *Wadhwa Singh v. Emp.*, A.I.R. 1928 Lah. 318, 10 A.I.Cr.R. 247, 109 I.C. 219, 29 Cr.L.J. 491. The recent view of the Lahore High Court, however, is that section 496, Cr. P. C., does not state that a person released on bail must give a bond himself. Nor is there anything requiring such a bond on first principles. The person giving bail enters into a contract with a penalty clause to produce the accused person before a Magistrate when called upon. The person giving bail is the principal. The person for whom bail is given is the subject of the contract. If the person giving bail fails to

499. Before any person is released on bail or released on his own bond, a bond for such sum of money as the police officer or Court, as the case may be, thinks sufficient shall be executed by such person, and, when he is released on bail, by one or more sufficient sureties conditioned that such person shall attend at the time and place mentioned in the bond, and shall continue so to attend until otherwise directed by the police-officer or Court, as the case may be.

(2) If the case so require, the bond shall also bind the person released on bail to appear when called upon at the High Court, Court of Session or other Court to answer the charge.

1316A. Scope:—The provisions of this section are not exhaustive and do not override the inherent powers of the High Court in matters of bail. There are no restrictions on the High Court in the matter of imposing conditions on which it grants bail. It is open for instance to the High Court in granting bail, where an accused has been convicted by making a seditious speech, to impose the condition that the accused should abstain from addressing any public meeting or publishing any matter until the decision of the appeal. There is no irregularity in the High Court directing that the sureties shall be responsible for the production of an accused person on bail in the High Court and for his subsequent production in the Court of the District Magistrate of the district where he was tried to hear the reserved judgment in his appeal—*Adkoo Umrao*, A.I.R. 1938 Nag. 420 (421), 40 Cr.L.J. 464, 180 I.C. 608, I.L.R. 1939 Nag. 170, 11 R.N. 387. See also *Ram Bilas v. Emp.*, A.I.R. 1940 Pat. 375, 185 I.C. 598, 1940 P.W.N. 151, 21 P.L.T. 194, 41 Cr.L.J. 214.

The Calcutta-High Court has taken a different view in the matter. It has held that the only condition contemplated by a bail bond is a condition for attendance in Court. A bail bond in which any other condition (e.g., an undertaking for good behaviour such as that the accused will not deliver any speech until the disposal of the case under section 124A, I. P. C., against him) is included, cannot be regarded as a bond under the Code and cannot be forfeited by the Magistrate under sec. 514, Cr. P. Code—*Giani Meher Singh v. Emp.*, 41 Cr.L.J. 138, 185 I.C. 249, A.I.R. 1939 Cal. 714, I.L.R. (1939) 2 Cal. 42, 43 C.W.N. 639. The procedure which should be adopted in a case of this sort is for the Police to bring to the notice of the Court the fact that there has been a violation of the undertaking in order that the Court may thereupon cancel the bail bond in the exercise of its inherent jurisdiction. It is also possible that by violating the undertaking the accused may commit a contempt of Court. An undertaking, not to make a speech, should not be imported into the bail bond and the bond cannot be forfeited under section 514, Cr. P. C., on breach of that condition—*Ibid.*

1316B. Power to accept sureties, if can be delegated to another Magistrate:—The granting of bail is a judicial act and not a ministerial one: and no judicial function can be delegated to another in the absence of an express provision of law, or of some rule having the force of law. The proceedings entail something more than the mere passing of an order. The Judge or Magistrate who grants bail has to be personally satisfied in his judicial capacity that the sureties produced are reliable and solvent and also that the persons who sign are actually the persons they purport to be. Fraudulent impersonation is not unknown in these matters. It follows he cannot delegate this responsibility to another, unless the law expressly empowers him to do so. The very fact that secs. 60, 76 (1), 85 and 86, Cr. P. C., which allow a bond to be executed before a Magistrate or person not seized of the proceedings, were deemed necessary by the Legislature indicates that they are exceptions, and not part

of the general law. The sureties must appear before him and satisfy him of their solvency and their identity, except in so far as they are expressly authorised to do otherwise by some express rule or provision of law—*Banarsidas*, 38 Cr L J. 633, 168 I.C. 876, 11 R. 1937 Nag. 168, 9 R.N. 275.

Acceptance of sureties:—The surety bond is something more than a mere contract with the Crown. The parties to a contract are not bound to enter into it; nor are the results which flow from one the same. Provided certain conditions are fulfilled, a Magistrate is bound to grant bail. It is a right to which the accused is entitled and not a mere favour. That at once removes the matter from the realm of contract. So also the Magistrate is bound to accept the sureties produced, provided they are properly identified and are solvent, and reliable. He cannot, for instance, reject them on the ground of their political views—*Ibid*.

1317. Time and place:—If a bail-bond fixes neither the time for the production of the prisoner, nor the place of appearance it cannot be forfeited for the non-appearance of the prisoner—*Chattar Singh*, 1885 A.W.N. 44. Bail proceedings are special proceedings about which there are specific directions in the Code, and they must be strictly followed. This section states that the time and place at which the accused is to appear must be mentioned in the bond, and the second clause of this section states that if the accused is to appear in some other Court the bond must expressly say so. It is not open to Courts to depart from these express provisions. Where in the printed bond executed by the accused as well as the surety, there is no mention of the Court in which the accused is directed to appear, it is impossible to enforce the vague and slovenly bond of this character—*Chitaram*, 38 Cr L J. 100, 165 I.C. 825, A.I.R. 1936 Nag. 243, 1936 Cr.C. 1037, 11 R. 1937 Nag. 137; *Brahma Nand v. Emp.*, A.I.R. 1939 All. 682 (684), 1939 A.L.J. 779, 184 I.C. 662, 1939 A.W.R. (H.C.) 696, 1939 A Cr.C. 164, 41 Cr L J. 85. See also *Imarat Mallik* in Note 1333.

There is nothing illegal in requiring the accused to bind himself to appear from the date of the execution of the bail-bond on every day until the case is disposed of. No notice is necessary before proceeding to enforce the penalty if default is made—*Anonymous*, 6 M.H.C.R. App. 38, 2 Weir 662.

If no day is specified in the bond but the day is to be a day of which notice is to be given thereafter, reasonable notice must be given to enable both the accused and the surety to attend—*Fatehchand Wadhwal v. Emp.*, A.I.R. 1940 Sind 136 (137), 41 Cr.L.J. 802, 189 I.C. 800.

Where the accused himself did not execute a bond for his appearance but a third person executed a bond as a surety, the bond was in accordance with the provisions of this section and the surety was amenable to the penalties contemplated by law in the event of his failure to produce the accused. It was not necessary as a condition precedent that there should have been a bond executed by the accused himself—*Reoti Prasad*, 36 Cr.L.J. 297, 153 I.C. 155, A.I.R. 1934 All 1046, 1934 Cr.C. 1329. The same High Court took a different view in *Brahma Nand v. Emp.*, supra. It has been held that when a person is released on bail he must himself execute a bond. The law does not contemplate any person being released on bail without executing a bond himself merely upon an undertaking or security given by a surety. The only exception to this rule is to be found in sec. 514B, Cr. P. Code. It is incumbent under sec. 499, Cr. P. C., to get a bond executed by the person who is released on bail and unless that is done there can be no valid bond by a surety alone. See also *Wadhawa Singh v. Emp.*, A.I.R. 1928 Lah. 318, 10 A.I.Cr.R. 247, 109 I.C. 219, 29 Cr.L.J. 491. The recent view of the Lahore High Court, however, is that section 496, Cr. P. C., does not state that a person released on bail must give a bond himself. Nor is there anything requiring such a bond on first principles. The person giving bail enters into a contract with a penalty clause to produce the accused person before a Magistrate when called upon. The person giving bail is the principal. The person for whom bail is given is the subject of the contract. If the person giving bail fails to perform

his contract then the penalty clause may be put into operation against him, although as in other contracts with a penalty clause it is not necessary to exact the penalty in full—*Indar v. Emp.*, A.I.R. 1940 Lah. 339, 42 P.L.R. 411, 41 Cr.L.J. 958, 190 I.C. 688.

Verbal direction to appear:—By the terms of a bail-bond the defendant bound himself to appear 'on the first day of inquiry or at other times required'. He appeared on the first day of the inquiry and was verbally directed to appear on a subsequent date, but failed to do so. It was held that the amount secured by the bond could be legally forfeited by reason of such non-attendance—*Haslavaram Subba Reddi*, 2 Weir 658.

Sufficient sureties:—The Magistrate will not be committing an illegality in insisting that, in the light of the provisions laid down in sec. 514, Cr. P. C., that security alone can be termed sufficient which is backed by movable property of the value of the amount secured—*K. L. Gauba v. Emp.*, 38 Cr.L.J. 955 (957), 170 I.C. 586, 18 Lah. 114, 10 R.L. 135, 39 P.L.R. 643, A.I.R. 1937 Lah. 411.

Omission of date by surety:—In a bail-bond, the accused person bound himself to appear on a specified date, and below his signature was the undertaking by the surety that he would cause the accused to appear, but this declaration did not mention the date for the accused's appearance. The accused having made default, the security was forfeited. It was held that the bail-bond and the undertaking by the surety should be read as one document, and the undertaking should be read as referring to the date mentioned in the portion of the bond signed by the accused, that the omission of date by the surety was immaterial, and that therefore the security was rightly forfeited—*Mappillai Kader*, 19 Cr.L.J. 687, 46 I.C. 47 (Mad.).

Appearance before Police:—The words 'until otherwise directed by the Police officer' shew that a bond under sec. 497 may require the accused to appear before the Police; the direction as to appearance is not limited to appearance before a Court—*Kansai Ram*, 22 P.R. 1913, 14 Cr.L.J. 613.

500. (1) As soon as the bond has been executed, the person for whose appearance it has been executed shall be released; and, when he is in jail, the Court admitting him to bail shall issue an order of release to the officer in charge of the jail, and such officer on receipt of the order shall release him.

(2) Nothing in this section, section 496 or section 497 shall be deemed to require the release of any person liable to be detained for some matter other than that in respect of which the bond was executed.

1317A. Released:—When a Court orders the release of an accused under this section, it has no right or power to put any restrictions on the accused's movements, and obviously when an accused person is released on the suretyship of another, the intention is that the surety should have control over his movements. Otherwise there is no sense in making the surety responsible for the attendance of the accused in Court. Therefore the order of the Magistrate that the accused should be kept in the Mahila Ashram relieves the surety of his responsibility under the bond as the accused is not actually "released". That is to say, she is not released within the meaning of this section, and this being so, the surety is not bound by the terms of his bond—*Raghubar Dayal v. Emp.*, 39 Cr.L.J. 219 (220), 172 I.C. 862, A.I.R. 1938 Oudh 81, 10 R.O. 196, 1938 O.W.N. 46, 1938 O.L.R. 31, 13 Luck. 720, 1938 A Cr.C. 7, 1938 O.A. 75.

501. If, through mistake, fraud or otherwise, insufficient sureties have been accepted, or if they afterwards become insufficient, the Court may issue a warrant of arrest directing that the person released on bail be brought before it and may order him to find sufficient sureties, and, on his failing so to do, may commit him to jail.

1318. Scope:—This section applies only to a case where there were sureties; it does not apply where the accused was let out on his own bond, without any surety—*Karuthan Ambalam*, 38 Mad. 1088, 17 Cr.L.J. 132, 33 I.C. 308.

Insufficient sureties:—A Magistrate is justified in increasing the amount of bail if by inquiry the case turn out to be more serious than he at first imagined—*Sita Ram v. Govind*, 66 P.L.R. 1912, 13 Cr.L.J. 474, 15 I.C. 314.

502. (1) All or any sureties for the attendance and appearance of a person released on bail may at any time apply to a Magistrate to discharge the bond, either wholly or so far as relates to the applicants.

(2) On such application being made, the Magistrate shall issue his warrant of arrest directing that the person so released be brought before him.

(3) On the appearance of such person pursuant to the warrant, or on his voluntary surrender, the Magistrate shall direct the bond to be discharged either wholly or so far as relates to the applicants, and shall call upon such person to find other sufficient sureties, and, if he fails to do so, may commit him to custody.

Where a surety has applied for cancellation of the bail-bond and the Magistrate has received the application there is no other alternative left to the Magistrate than to cancel the bail-bond. There is no need to hear the application on the merits, and the Magistrate cannot dismiss it because of the applicant's failure to attend and plead—*Narayan Shivram*, 9 Bom.L.R. 1285, 6 Cr.L.J. 385. This section does not provide for a Magistrate discharging a surety so soon as he applies. The Magistrate shall issue a warrant directing the arrest of the accused, and only on the appearance of the accused before him shall the Magistrate then discharge the surety. He cannot discharge the surety before the accused appears or is brought before him—*Fatehchand Wadhwal*, A.I.R. 1940 Sind 136, 41 Cr.L.J. 802, 189 I.C. 806, I.L.R. 1940 Kar. 479. Where a surety applies for discharge of his bond and the arrest of the accused, a Magistrate cannot forfeit the security bond without complying with the provisions of sub-sec. (2) of this section—*Gurmukh*, 27 Cr.L.J. 848, 95 I.C. 768; *Tha Maung*, 38 Cr.L.J. 1010, 171 I.C. 80, 10 R.R. 130, A.I.R. 1937 Rang. 244. There is nothing in this section that it is the duty of the sureties to surrender the accused persons if they feel that they are unable to carry out their obligations—*Tha Maung*, supra.

CHAPTER XL.

OF COMMISSIONS FOR THE EXAMINATION OF WITNESSES.

503. (1) Whenever, in the course of an inquiry, a trial or any other proceeding under this Code, it appears to a Presidency Magistrate, a District Magistrate, a Court of Session or the High Court that the examination of a witness is necessary for the ends of justice, and that the attendance of such witness cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable, such Magistrate or Court may dispense with such attendance and may issue a commission to any District Magistrate or Magistrate of the first class, within the local limits of whose jurisdiction such witness resides, to take the evidence of such witness.

When attendance of witness may be dispensed with.

Issue of commission and procedure thereunder.

(2) When the witness resides in any *Indian State or tribal area* in which there is an officer representing the *Central Government or the Crown Representative* the commission may be issued to such officer.

(2A) *When the witness resides in British Burma, the commission may be issued to any District Magistrate or Magistrate of the first class within the local limits of whose jurisdiction in British Burma such witness resides.*

(3) The Magistrate or officer to whom the commission is issued, or, if he is the District Magistrate, he, or such Magistrate of the first class as he appoints in this behalf, shall proceed to the place where the witness is or shall summon the witness before him, and shall take down his evidence in the same manner, and may for this purpose exercise the same powers, as in trials of warrant cases under this Code.

(4) Where the commission is issued to such officer as is mentioned in sub-section (2), he may delegate his powers and duties under this commission to any officer subordinate to him whose powers are not less than those of a Magistrate of the first class in British India.

Amendment:—In sub-section (2) for “the territories of any Prince or Chief in India” the words “any Indian State or tribal area” and for “British Indian Government” the words “the Central Government or the Crown Representative” have been substituted, by the Government of India (Adaptation of Indian Laws) Order, 1937.

Sub-section (2A) has been inserted by the Code of Criminal Procedure (Amendment) Act, 1940 (Act XXXV of 1940) which comes into force on such date as the Central Government may, by notification in the official Gazette, appoint in this behalf.

1319. Scope of section:—This section provides for the issue of a commission

to examine a witness in British India or in the territories of any Prince or Chief in India in which there is an officer representing the British Government. This section does not provide for the examination of a witness residing outside India—*Moorga Chetty*, 5 Bom. 338; *Corporal Allen*, 10 Cr.L.J. 571, 4 I.C. 400; *Abdul Gani*, 49 Bom. 878, 27 Cr.L.J. 114 (116), 27 Bom.L.R. 1373; *Fazal Rahman Khan*, 37 Cr.L.J. 618, 162 I.C. 270, A.I.R. 1936 Pesh. 101, 1936 Cr.C. 311.

Burma has ceased to be part of British India. Therefore this section does not empower the District Magistrate to issue a commission for the examination of any witness in Burma—*Nachiappa Chetty v. Nachiappa Chettiar*, A.I.R. 1938 Mad. 192, 1937 M.Cr.C. 318, 1937 M.W.N. 1132, 46 M.L.W. 703, 171 I.C. 931, (1937) 2 M.L.J. 902, I.L.R. 1938 Mad. 455, 39 Cr.L.J. 27. In order to remove this difficulty sub-section (2A) has been inserted by the Code of Criminal Procedure (Amendment) Act, 1940 (Act XXXV of 1940). This sub-section now empowers the British Indian Courts to issue commissions to any District Magistrate or Magistrates of the first class in British Burma to take evidence of persons residing within the local limits of his jurisdiction.

In *Suppaya Chettyar v. Karuppaya Pillay*, A.I.R. 1937 Rang. 528 (530) Mackney, J., also observed: "As regards the question of summoning witnesses residing in Madras, it has been pointed out to me that it is to say the least of it doubtful, whether, now after 1st April when this country no longer forms part of the Indian Empire, summons could be issued to persons residing out of Burma, and even whether there is any procedure for the issue of commission for the examination of these witnesses."

The High Court has no authority in a criminal case to issue a commission or a letter of request to the English Court for the examination of a witness residing in England—*Corporal Allen*, 10 Cr.L.J. 571, 4 I.C. 400 (All).

A Criminal Court in British India has no jurisdiction to issue a commission to an officer representing British Indian Government resident in the territory of an Indian State for the purpose of examining the Ruling Prince of that State. Section 503 (2) has no application to a Ruling Prince of an Indian State—*Cheda*, 34 Cr.L.J. 795, 144 I.C. 582, 10 O.W.N. 234, A.I.R. 1933 Oudh 181, 1933 Cr.C. 384, Ind. Rul. 1933 Oudh 270, 8 Luck. 439, where *A. M. Jacob*, 19 Cal. 113, was distinguished on the ground that commission was issued in that case with the express consent of the Ruler.

This section relates to the issue of a commission to a District Magistrate or a 1st class Magistrate; and the District Magistrate or 1st class Magistrate can proceed to the place where the witness resides. But the District Magistrate cannot direct a subordinate Magistrate, before whom the case is pending to go to the house of a witness to examine him. Even if it were to be construed as an order for examination by a Commissioner, the District Magistrate had no jurisdiction to make such an order except on a reference made to him under section 506—*Chato*, 2 S.L.R. 8, 10 Cr.L.J. 211.

Where no writ of commission was issued and there was no return to the commission but the evidence was merely placed on the record without comment, the High Court was not prepared to take the evidence into consideration—*Lachmi Lal*, 1922 Pat.H.C.C. 159, 23 Cr.L.J. 218, 65 I.C. 1002.

'In the course of inquiry':—A committing Magistrate is competent to examine a witness in the course of the inquiry before himself. But after making the order of committal, he has no jurisdiction to issue a commission for taking evidence so that it might be available at the trial before the Court of Session or High Court. After a commitment is made, application for the examination of witness on commission must be made to the High Court or to the particular Judge exercising original criminal jurisdiction in the High Court or to the Court of Session, as the case may be—*Jacob*, 19 Cal. 113; *Ramchandra Govind*, 19 Bom. 749.

'Witness':—The section relates to commission for the examination of witnesses. In the preliminary stage of a proceeding a complainant is not a witness, and a

commission cannot be issued for his examination—*Sarb Dayal*, 10 P.R. 1896. But if a complainant calls himself to testify to matters within his knowledge, he will as regards such testimony be a witness for the prosecution and the issue of commission for his examination is perfectly legal—*Mirza Abdul*, 14 Cr.L.J. 3, 1913 P.W.R. 11. The terms of this section are very wide. They refer not only to an inquiry or trial, but to any proceeding. This section authorises the examination of any witness, and a complainant is certainly a witness—*Abhoyeswari v. Kishori Mohan*, 42 Cal. 19, 18 C.W.N. 1020, 15 Cr.L.J. 348.

Witness residing within jurisdiction:—There is nothing in the language of this section to support the contention that the Court has no authority to examine a witness on commission when he is within the Court's jurisdiction—*Bal Gangadhar Tilak*, 6 Bom. 285. See also *Hem Coomaree*, 24 Cal. 551, 1 C.W.N. 333.

It is doubtful whether a Presidency Magistrate or the High Court has power under this section to issue commission for the examination of a witness in a Presidency-town, because there is no "District Magistrate or Magistrate of the first class" in a Presidency-town to whom the commission can be issued. But there is nothing to prevent a Presidency Magistrate from examining a witness residing within his jurisdiction, at some place other than the Court-house—*Hem Coomaree*, 24 Cal. 551, 1 C.W.N. 333.

Expert witnesses:—Where an expert in handwriting appears to be the principal witness in the case, he ought not to be examined on commission but should appear before the Court—*McGrath v. Brachis*, 1911 M.W.N. 97, 9 I.C. 347, 12 Cr.L.J. 64, 9 M.L.T. 334. The evidence of a handwriting expert has always to be carefully weighed but when given on commission, in the absence of the accused, its value is very considerably reduced—*Nur Din*, 29 Cr.L.J. 377, 108 I.C. 369, 10 Lah.L.J. 235, A.I.R. 1928 Lah. 533.

1320. Pardanashin ladies:—A *pardanashin* lady has a right, as a witness in a criminal case, to be exempt from personal appearance at Court and to be examined on commission—*Hurro Soondery*, 4 Cal. 20. If a complainant is a *pardanashin* lady, she may be examined on commission under this section, because a complainant is treated as a witness—*Abhoyeswari v. Kishori Mohan*, 42 Cal. 19, 18 C.W.N. 1020. This section allows the examination on commission of a witness who is a *ghosha* woman although she is practically the complainant—2 Weir 659. The word 'inconvenience' in this section empowers the Court to allow their examination by commission, where according to the customs and manners of the country they ought not to be compelled to appear in public—*Faridunnissa*, 5 All. 92 (93). See also 1 S.L.R. 5, 9 Cr.L.J. 249. An application by a *pardanashin* woman to be examined on commission on the ground that her appearance in Court would cause social degradation to her, was granted where she lived near the Court house and volunteered to pay the expenses of the commission, and the opposite party did not insist on her examination in open Court—*Din Tarini*, 15 Cal. 775; *Hem Coomaree*, 24 Cal. 551, 1 C.W.N. 333. The same view was adopted by the Madras High Court—*Man Bhoy*, 12 Cr.L.J. 501, 12 I.C. 221. Even a daughter of a prostitute is entitled to be examined on commission if she is *pardanashin* and living a married life, despite her lowly origin—*Mirza Abdul*, 1913 P.W.R. 11, 14 Cr.L.J. 3.

In an Allahabad case, however, it has been held that it cannot be adopted as a general principle that *pardanashin* ladies are in all cases to be examined on commission at some place other than the Court-house itself. If it becomes imperatively necessary to take her evidence the Magistrate should make arrangements, so as to take her evidence either in an empty Court-room in the presence of himself, the accused, his pleader and the pleader of the prosecution, if there be any, or if no empty room is available, in his own private room or some other room in the Court building—*Basant Bibi*, 12 All. 69. In a prosecution under sec. 498, I. P. C., where the identity of the woman alleged to have been enticed is in question, and the accused insists on issuing

a commission for her examination on the ground that she is a *pardanashin* woman, the better course is that instead of issuing commission, the Magistrate should examine her in Chambers—*Mahomed v. Bacho*, AIR. 1930 Sind 56, 120 I.C. 518, 32 Cr.L.J. 115, 1930 Cr.C. 94. See also *Imp. v. Mewaram*, 12 Cr.L.J. 398, 11 I.C. 582, 4 S.L.R. 257. In another Allahabad case it was held that where the *pardanashin* woman was not merely a witness but was also the complainant in a case of defamation (which gave both a civil and a criminal remedy), the fact that she avoided the civil remedy and chose to set the criminal law in motion materially altered her position, and the accused had a right to have her evidence taken in his presence in the Court. Otherwise there would be endless cases of false charge and malicious prosecution—*Fardunnissa*, 5 All. 92 (93).

1321. Delay, expense or inconvenience:—The taking of evidence on commission in criminal cases should be most sparingly resorted to. Such a procedure is unknown to English practice, and in this country it ought not to be adopted except in cases of delay, expense or inconvenience. The Courts would have to experience extreme difficulty in dealing with cases of false charge and perjured testimony, if they have not the advantage of considering the demeanour of witnesses in order to ascertain the truth—*Fardunnissa*, 5 All. 92 (94). If a witness is unable to attend the Court owing to illness (e.g., weak heart and a painful internal malady) the proper course for the Magistrate would be to first ascertain whether it would be possible for the witness to come to Court within a reasonable time; and if not possible, then the Magistrate will have to reluctantly come to the conclusion that his evidence should be taken on commission—*Jamuna Singh*, 3 Pat. 591 (594). Where the evidence of two witnesses was a most material one in the case, in as much as they deposed to the identification of the stolen property, on which deposition the whole case depended, the witnesses ought not to have been examined on commission but their attendance before the Court ought to have been procured, and the expense of Rs. 500 in procuring their attendance was not considered to be unreasonable or excessive, having regard to the circumstances of the case—*Burke*, 6 All. 224.

'May issue'—Discretion of Court:—The issue of a commission for examination is entirely in the discretion of the Court. In criminal cases, the issue of a commission would be a most unsatisfactory course of proceeding, and one dangerous to the interests of the community. And the High Court refused to issue commission for the examination of a prosecution witness even though he was 63 years old and unable to attend owing to sickness—*Counsell*, 8 Cal. 896. The issue of commission is an unsatisfactory proceeding, because on the one hand the Court has no opportunity of noting the demeanour of the witness, and on the other hand, of controlling irrelevant and unnecessary or harassing cross-examination of the witness. The discretion to issue a commission should be sparingly exercised, and only in cases of real hardship and inconvenience, having due regard to the prejudice which is likely to be thereby caused to the opponent—*Vishnoo v. Dipchand*, 20 S.L.R. 28, 27 Cr.L.J. 89, 91 I.C. 393. It is desirable, where possible, that the normal procedure of the Court should be followed, witnesses should ordinarily be examined in the Court precincts, and the Magistrate who tries the case should himself see the witnesses—*Saleh*, AIR. 1936 Sind 221, 38 Cr.L.J. 127, 166 I.C. 45. It is desirable that the witness on whose statement the accused is likely to be convicted should be examined in the presence of the accused so that the latter may get a chance of cross-examining him and the Court may also have a chance of noticing the demeanour of the witness; but to say that in no case a commission should be issued for the examination of a witness would be to delete the provisions of secs. 503 and 506, Cr. P. C.—*Bala Bux v. Emp.*, 39 Cr.L.J. 732, 176 I.C. 558, AIR. 1938 Pat. 366, 19 P.L.T. 395, 4 B.R. 734, 11 R.P. 85. A Mahant cannot claim the privilege of being examined on commission—*Saleh*, supra. The mere fact that a witness is temporarily ill is no ground for allowing him to be examined on commission—*Mahomed Shafi*, 13 P.L.T. 345, 1932 Cr.C. 639, 33 Cr.L.J. 942, 140 I.C. 291, AIR. 1932 Pat. 242, Ind. Rul. 1932 Pat. 298. It is always better that the complainant attends in person

commission cannot be issued for his examination—*Sarb Dayal*, 10 P.R. 1896. But if a complainant calls himself to testify to matters within his knowledge, he will as regards such testimony be a witness for the prosecution and the issue of commission for his examination is perfectly legal—*Mirza Abdul*, 14 Cr.L.J. 3, 1913 P.W.R. 11. The terms of this section are very wide. They refer not only to an inquiry or trial, but to any proceeding. This section authorises the examination of any witness, and a complainant is certainly a witness—*Abhoyeswari v. Kishori Mohan*, 42 Cal. 19, 18 C.W.N. 1020, 15 Cr.L.J. 348.

Witness residing within jurisdiction:—There is nothing in the language of this section to support the contention that the Court has no authority to examine a witness on commission when he is within the Court's jurisdiction—*Bal Gangadhar Tilak*, 6 Bom. 285. See also *Hem Coomaree*, 24 Cal. 551, 1 C.W.N. 333.

It is doubtful whether a Presidency Magistrate or the High Court has power under this section to issue commission for the examination of a witness in a Presidency-town, because there is no "District Magistrate or Magistrate of the first class" in a Presidency-town to whom the commission can be issued. But there is nothing to prevent a Presidency Magistrate from examining a witness residing within his jurisdiction, at some place other than the Court-house—*Hem Coomaree*, 24 Cal. 551, 1 C.W.N. 333.

Expert witnesses:—Where an expert in handwriting appears to be the principal witness in the case, he ought not to be examined on commission but should appear before the Court—*McGrath v. Brachis*, 1911 M.W.N. 97, 9 I.C. 347, 12 Cr.L.J. 64, 9 M.L.T. 334. The evidence of a handwriting expert has always to be carefully weighed but when given on commission, in the absence of the accused, its value is very considerably reduced—*Nur Din*, 29 Cr.L.J. 377, 108 I.C. 369, 10 Lah.L.J. 235, A.I.R. 1928 Lah. 533.

1320. Pardanashin ladies:—A *pardanashin* lady has a right, as a witness in a criminal case, to be exempt from personal appearance at Court and to be examined on commission—*Hurro Soondery*, 4 Cal. 20. If a complainant is a *pardanashin* lady, she may be examined on commission under this section, because a complainant is treated as a witness—*Abhoyeswari v. Kishori Mohan*, 42 Cal. 19, 18 C.W.N. 1020. This section allows the examination on commission of a witness who is a *ghosha* woman although she is practically the complainant—2 Weir 659. The word 'inconvenience' in this section empowers the Court to allow their examination by commission, where according to the customs and manners of the country they ought not to be compelled to appear in public—*Faridunnissa*, 5 All. 92 (93). See also 1 S.L.R. 5, 9 Cr.L.J. 249. An application by a *pardanashin* woman to be examined on commission on the ground that her appearance in Court would cause social degradation to her, was granted where she lived near the Court house and volunteered to pay the expenses of the commission, and the opposite party did not insist on her examination in open Court—*Din Tarini*, 15 Cal. 775; *Hem Coomaree*, 24 Cal. 551, 1 C.W.N. 333. The same view was adopted by the Madras High Court—*Man Bhoy*, 12 Cr.L.J. 501, 12 I.C. 221. Even a daughter of a prostitute is entitled to be examined on commission if she is *pardanashin* and living a married life, despite her lowly origin—*Mirza Abdul*, 1913 P.W.R. 11, 14 Cr.L.J. 3.

In an Allahabad case, however, it has been held that it cannot be adopted as a general principle that *pardanashin* ladies are in all cases to be examined on commission at some place other than the Court-house itself. If it becomes imperatively necessary to take her evidence the Magistrate should make arrangements, so as to take her evidence either in an empty Court-room in the presence of himself, the accused, his pleader and the pleader of the prosecution, if there be any, or if no empty room is available, in his own private room or some other room in the Court building—*Basant Bibi*, 12 All. 69. In a prosecution under sec. 498, I. P. C., where the identity of the woman alleged to have been enticed is in question, and the accused insists on issuing

a commission for her examination on the ground that she is a *pardanashin* woman, the better course is that instead of issuing commission, the Magistrate should examine her in Chambers—*Mahomed v. Bacho*, A.I.R. 1930 Sind 56, 120 I.C. 518, 32 Cr.L.J. 115, 1930 Cr.C. 94. See also *Imp. v. Mewaram*, 12 Cr.L.J. 398, 11 I.C. 582, 4 S.L.R. 257. In another Allahabad case it was held that where the *pardanashin* woman was not merely a witness but was also the complainant in a case of defamation (which gave both a civil and a criminal remedy), the fact that she avoided the civil remedy and chose to set the criminal law in motion materially altered her position, and the accused had a right to have her evidence taken in his presence in the Court. Otherwise there would be endless cases of false charge and malicious prosecution—*Faridunnissa*, 5 All. 92 (93).

1321. Delay, expense or inconvenience:—The taking of evidence on commission in criminal cases should be most sparingly resorted to. Such a procedure is unknown to English practice, and in this country it ought not to be adopted except in cases of delay, expense or inconvenience. The Courts would have to experience extreme difficulty in dealing with cases of false charge and perjured testimony, if they have not the advantage of considering the demeanour of witnesses in order to ascertain the truth—*Faridunnissa*, 5 All 92 (94). If a witness is unable to attend the Court owing to illness (e.g., weak heart and a painful internal malady) the proper course for the Magistrate would be to first ascertain whether it would be possible for the witness to come to Court within a reasonable time; and if not possible, then the Magistrate will have to reluctantly come to the conclusion that his evidence should be taken on commission—*Jamuna Singh*, 3 Pat. 591 (594). Where the evidence of two witnesses was a most material one in the case, in as much as they deposed to the identification of the stolen property, on which deposition the whole case depended, the witnesses ought not to have been examined on commission but their attendance before the Court ought to have been procured, and the expense of Rs. 500 in procuring their attendance was not considered to be unreasonable or excessive, having regard to the circumstances of the case—*Burke*, 6 All 224.

'May issue'—Discretion of Court:—The issue of a commission for examination is entirely in the discretion of the Court. In criminal cases, the issue of a commission would be a most unsatisfactory course of proceeding, and one dangerous to the interests of the community. And the High Court refused to issue commission for the examination of a prosecution witness even though he was 63 years old and unable to attend owing to sickness—*Counsell*, 8 Cal 896. The issue of commission is an unsatisfactory proceeding, because on the one hand the Court has no opportunity of noting the demeanour of the witness, and on the other hand, of controlling irrelevant and unnecessary or harassing cross-examination of the witness. The discretion to issue a commission should be sparingly exercised, and only in cases of real hardship and inconvenience, having due regard to the prejudice which is likely to be thereby caused to the opponent—*Vishnoo v. Dipchand*, 20 S.L.R. 28, 27 Cr.L.J. 89, 91 I.C. 393. It is desirable, where possible, that the normal procedure of the Court should be followed, witnesses should ordinarily be examined in the Court precincts, and the Magistrate who tries the case should himself see the witnesses—*Saleh*, A.I.R. 1936 Sind 221, 38 Cr.L.J. 127, 166 I.C. 45. It is desirable that the witness on whose statement the accused is likely to be convicted should be examined in the presence of the accused so that the latter may get a chance of cross-examining him and the Court may also have a chance of noticing the demeanour of the witness; but to say that in no case a commission should be issued for the examination of a witness would be to delete the provisions of secs. 503 and 506, Cr. P. C.—*Bala Bux v. Emp.*, 39 Cr.L.J. 732, 176 I.C. 558, A.I.R. 1938 Pat. 366, 19 P.L.T. 395, 4 B.R. 734, 11 R.P. 85. A Mahant cannot claim the privilege of being examined on commission—*Saleh*, supra. The mere fact that a witness is temporarily ill is no ground for allowing him to be examined on commission—*Mahomed Shafi*, 13 P.L.T. 345, 1932 Cr.C. 639, 33 Cr.L.J. 942, 140 I.C. 291, A.I.R. 1932 Pat. 242, Ind. Rul. 1932 Pat. 298. It is always better that the complainant attends in person

rather than he should be examined on commission, but, where he has already appeared twice in Court for cross-examination and his condition is clearly very bad, commission must be issued—*H. Guha v. R. R. Chanda*, 38 Cr.L.J. 875, 170 I.C. 238, 10 R.R. 67, A.I.R. 1937 Rang. 231. In *Asst. Govt. Advocate v. Upendra*, 32 Cr.L.J. 551, 130 I.C. 538, A.I.R. 1931 Pat. 81, 11 P.L.T. 892, 1931 Cr.C. 201, Ind. Rul. 1931 Pat. 186, a commission was issued for examination of a prisoner in jail provided the accused were reimbursed for the additional expenditure that would be entailed on them.

It is most unsatisfactory that an important witness should be examined on commission in the absence of both complainant and accused—*Sardul Singh*, 27 Cr.L.J. 840, 95 I.C. 760, A.I.R. 1926 Lah. 567. See also *Lachman Lal*, 1922 Pat. H. C. C. 159, 23 Cr.L.J. 218, 65 I.C. 1002, where this principle of law was enunciated although there was no question regarding the absence of the parties at the time of the examination of the witness on commission.

Sub-section (2):—Where the accused was convicted on the basis of the evidence taken on commission in Nepal, held that the onus of proving that Nepal is in India as defined by the General Clauses Act, sec. 3, sub-sec. 27, lies on the party who alleges that the evidence taken there is proper evidence and on their failing to do so the conviction must be set aside—*Singbir Lama*, 7 C.W.N. 635.

Sub-section (3):—Where the Magistrate issues commission for the examination of a witness in a Native State, the officer representing the British Indian Government is bound either to proceed where the witness is, or to summon such witness before him; or he may delegate his functions to any officer subordinate to him. But he cannot decline to execute the commission on the ground of inconvenience or some other similar reason. The provisions of sub-section (3) are mandatory in this respect. Thus, the officer cannot refuse to execute the commission on the ground that there is no Resident Political Officer in that State who can execute the commission, for the Cr. P. Code nowhere speaks of a 'Resident Political Officer'—*Sikandar*, 9 Lah. 347, 29 Cr.L.J. 202.

Sub-section (4)—Delegation:—This sub-section was added to the Code of 1898. Under the Code of 1882, when a commission was issued to a British Resident for the examination of a witness residing in a Native State, he could not delegate his powers to his subordinate, but had to personally execute such commission—*Mohpal Singh*, 1896 A.W.N. 106. The present sub-section provides for such delegation.

1322. Commissioner cannot make complaint under section 195:—Although the Commissioner appointed under this section may be a 'Court' for the purpose of issuing process against the witness and for recording evidence, still he is not a 'Court' within the meaning of sec. 195. Therefore, where a witness gives false evidence before such Commissioner, the proper authority to make a complaint for the prosecution of the witness for perjury is not the Commissioner but the Court which issued the commission—*Saadat Ali*, 11 C.W.N. 909, 6 Cr.L.J. 160.

1322A. Revision:—This section empowers a District Magistrate to issue a commission for the examination of a witness whose evidence is necessary if his attendance cannot be obtained without unreasonable expense. The District Magistrate is given under sec. 503 a discretion in the matter of issuing a commission. Where he has not acted arbitrarily or unreasonably in the exercise of that discretion, the High Court will not interfere with his order—*Parma Nand*, 25 Cr.L.J. 652, 81 I.C. 140, 4 Lah.L.J. 538, A.I.R. 1923 Lah. 73.

Where the High Court remanded a case to a Magistrate with directions to examine the defence witnesses on commission but the Magistrate recorded the depositions of those witnesses himself, held that no valid objection can be taken to the admissibility of the evidence recorded by the Magistrate and that the irregularity, if any, is covered by sec. 537 C—*Sikander*, 30 Cr.L.J. 948, 118 I.C. 643, A.I.R. 1929 Lah. 104, alleged to have Rul. 1929 Lah. 803.

504. (1) If the witness is within the local limits of the jurisdiction of any Presidency Magistrate, the Magistrate or Court issuing the commission may direct the same to *such Presidency Magistrate*, who thereupon may compel the attendance of, and examine, such witness as if he were a witness in a case pending before himself.

(1A) *When a commission is issued under this section to a Chief Presidency Magistrate, he may delegate his powers and duties under the commission to any Presidency Magistrate subordinate to him.*

(2) Nothing in this section shall be deemed to affect the power of the High Court to issue commissions under the Slave Trade Act, 1876, section 3.

Change:—Sub-section (1A) has been added by section 137 of the Cr. P. C. Amendment Act, XVIII of 1923, to provide for the delegation of powers and duties of a Presidency Magistrate to a subordinate Presidency Magistrate.

505. (1) The parties to any proceeding under this Code in which a commission is issued, may respectively forward any interrogatories in writing which the Magistrate or Court directing the commission may think relevant to the issue, and the Magistrate or officer to whom the commission is directed *or to whom the duty of executing such commission has been delegated*, shall examine the witness upon such interrogatories.

(2) Any such party may appear before such Magistrate or officer by pleader, or if not in custody, in person, and may examine, cross-examine and re-examine (as the case may be) the said witness.

Change:—The italicised words have been added by sec. 138 of the Cr. P. C. Amendment Act, XVIII of 1923. This amendment is consequential to the amendment made in sec. 504.

Section 256, Cr. P. C., gives an accused person the right to have the witnesses for the prosecution cross-examined after charge has been framed, and that right is not in any way affected by the provisions contained in Chap. XL. Sec. 507, which is one of the sections contained in Chap. XL, provides for the inspection of depositions taken on commission, and it is open to a person accused in a warrant case, to refrain from putting in any interrogatories when the commission is first issued and to apply at a later stage (that is to say, after he has inspected the deposition taken on commission and after charge has been framed against him), for reissue of the commission together with his cross-interrogatories—*Dombain v Somesuar*, 36 Cr. L.J. 239, 152 I.C. 1005, 38 C.W.N. 673, 59 C.L.J. 377, A.I.R. 1934 Cal. 698, 1934 Cr. C. 1044, 61 Cal. 824.

506. Whenever, in the course of an inquiry or a trial or any other proceeding under this Code before any Magistrate other than a Presidency Magistrate or District Magistrate, it appears that a commission ought to be

Power of provincial Subordinate Magistrate to apply for issue of commission.

issued for the examination of a witness whose evidence is necessary for the ends of justice, and that the attendance of such witness cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable, such Magistrate shall apply to the District Magistrate, stating the reasons for the application; and the District Magistrate may either issue a commission in the manner hereinbefore provided or reject the application.

1323. Where a case is pending before a subordinate Magistrate, the District Magistrate cannot issue a commission for the examination of a witness in that case, without a reference by the subordinate Magistrate under this section. The District Magistrate cannot on his own motion direct the subordinate Magistrate to go to the house of a witness to examine him—*Chato*, 2 S.L.R. 8, 10 Cr.L.J. 211. Any party, who has a case pending in a Court other than the Courts mentioned in sec. 503 and desires that his witnesses should be examined on commission, should move the trial Court to apply to the District Magistrate in the manner stated in sec. 506. If the trial Court declines to comply with this request, the party aggrieved will have his remedy by an application in revision—*Khanchand v. Gomibai*, 35 Cr.L.J. 22, 146 I.C. 203, A.I.R. 1933 Sind 278, 1933 Cr.C. 952; *Saleh*, A.I.R. 1936 Sind 221, 38 Cr.L.J. 127, 166 I.C. 45. A Magistrate can take action under this section if the evidence of the witness is necessary, but not otherwise—*Dinabandhu v. Hasan Ali*, 33 C.W.N. 1088, 31 Cr.C. 645, 124 I.C. 325.

507. (1) After any commission issued under sec. 503 or sec. 506 has been duly executed, it shall be returned, together with the deposition of the witness examined thereunder, to the Court out of which it issued; and the commission, the return thereto and the deposition shall be open at all reasonable times to inspection of the parties, and may, subject to all just exceptions, be read in evidence in the case by either party, and shall form part of the record.

(2) Any deposition so taken, if it satisfies the conditions prescribed by section 33 of the Indian Evidence Act, 1872, may also be received in evidence at any subsequent stage of the case before another Court.

1324. Sub-section (2)—Admissibility of evidence taken on commission:—This section has been enacted on the basis of the judgment in *Ramchandra Gobind*, 19 Bom. 749. Under the 1882 Code, evidence taken under a commission issued by the Chief Presidency Magistrate during the course of an inquiry before him was held inadmissible at the trial of the same case at the High Court Sessions—*Jacob*, 19 Cal. 113. This difficulty has been removed by this sub-section.

The words "Any deposition so taken" in sub-sec. (2) of this section mean a deposition taken under sub-sec. (1). If a deposition satisfies the conditions prescribed by sec. 33, Evidence Act, 1872, it may also be received in evidence at any subsequent stage of the case before another Court. So, it is clear that the examination and cross-examination of a witness taken on commission in the previous proceedings in the case is admissible without anything further in subsequent proceedings before another Magistrate when the accused demands that the witnesses be re-examined and re-heard in accordance with the provisions of sec. 350 (1)(a), Cr. P. C. A demand of this sort cannot apply to a case of a witness who has never been summoned, never been heard

by the Court and whose evidence has only been taken upon commission. But sub-sec. (2) may not cover a case where a Magistrate on his own motion in the subsequent proceeding recommending the inquiry or trial has framed a charge, when the right of the accused to cross-examine the witness under sec. 256 or sec. 257, Cr. P. C., might arise—*Sukhranddas v. Emp.*, A.I.R. 1940 Sind 193, 42 Cr L.J. 80, 191 I.C. 127, I.L.R. 1940 Kar. 498. See also *Dombrain v. Someswar* in Note 835 and the rulings under the heading "Witness" examined on commission" in Note 1015.

Evidence taken on commission is admissible in a trial of a seaman for an offence committed on the High Seas—*Barton*, 16 Cal. 238.

508. In every case in which a commission is issued under sec. 503 or sec. 506, the inquiry, trial or other proceeding may be adjourned for a specified time reasonably sufficient for the execution and return of the commission.

1324A. When a commission has been issued, the trial should be postponed till the return of the commission. The trial and commission cannot go together. The discretion given by this section to adjourn proceedings ought to be exercised in a reasonable manner. The accused person should not be detained for an unnecessarily long time—See *Jacob*, 19 Cal. 113.

508A. *The provisions of sub-section (3) of section 503, sub-sections (1) and (1A) of section 504 and so much of sections 505 and 507 as relate to the execution of a commission and its return by the Magistrate or officer to whom the commission is directed shall apply in respect of commissions issued by a Magistrate or Court in British Burma under the law in force in British Burma relating to commissions for the examination of witnesses, as they apply to commissions issued under section 503 or section 506.*

1324B. This section has been inserted by the Code of Criminal Procedure (Amendment) Act, 1940 (Act XXXV of 1940) which comes into force on such date as the Central Government may, by notification in the official Gazette, appoint in this behalf. It empowers the British Indian Courts to execute commissions issued by the Courts in British Burma.

CHAPTER XLI.

SPECIAL RULES OF EVIDENCE.

509. (1) The deposition of a Civil Surgeon or other medical witness, taken and attested by a Magistrate in the presence of the accused, or taken on commission under Chapter XL, may be given in evidence in any inquiry, trial or other proceeding under this Code, although the deponent is not called as a witness.

(2) The Court may, if it thinks fit, summon and examine

Power to summon such deponent as to the subject-matter of medical witness. his deposition.

1325. Scope:—This section is not intended to be applied where the medical witness is present in Court—*Rangappa Goundan*, 37 Cr.L.J. 471, 161 I.C. 663, 1936 M.W.N. 110, 43 M.L.W. 307, 70 M.L.J. 447, 59 Mad. 349.

This section confines itself to expert evidence tendered by a medical witness as such. It has no application to evidence relating to facts tendered by a person who also happens to be a medical man. In recording the statement of the deceased the doctor does not act as a medical man. It is, therefore, necessary to prove the dying declaration by producing the doctor who records it—*Waris Khan v. Emp.*, A.I.R. 1940 Oudh 209 (211), 1940 O.W.N. 177, 15 Luck. 429.

1325A. Deposition:—It is only deposition of a Civil Surgeon that can be taken in evidence; the only opinion of the Civil Surgeon which can be considered in judicially dealing with the case is an opinion expressed by him when examined as a witness under the usual tests to which witnesses are subjected. The Civil Surgeon's letter addressed to the Sessions Judge expressing an opinion as to the nature of the wound inflicted upon the deceased, is an extra-judicial matter and cannot be received in evidence—*Samuruddin*, 8 Cal. 211; *Budhu Koiri*, 40 C.L.J. 563, A.I.R. 1925 Cal. 538; *Bechun Prasad v. Jhuri*, A.I.R. 1936 All 363 (364), 1936 Cr.C. 427, 161 I.C. 49, A.L.R. 1936 All. 248, 1936 A.L.J. 189, 1936 A.W.R. (H.C.) 188. So also, the certificate of a medical officer as to the cause of the death of a person and of the fatal character of the wounds is no evidence. He should be examined regarding those points, and some evidence should be taken to identify the wounded body with that of the person whose murder is the subject of the charge—*Venkatroyadu*, 2 Weir 659. See also *Rampear Rai v. Bhogia*, 8 I.C. 713 (Cal.); *Ahila Manaji v. Emp.*, 26 Cr.L.J. 339 (340), 47 Bom. 74, 24 Bom.L.R. 83, A.I.R. 1923 Bom 183; *Madhawa v. Jai Kishan Das*, A.I.R. 1928 Lah. 427, 106 I.C. 493, 29 P.L.R. 195. The report of a Medical man on his *post mortem* examination cannot be treated as evidence, though it may be used by him to refresh his memory when giving evidence—*Roghuni Singh*, 9 Cal. 455. The report (notes of *post mortem* examination) is not admissible as evidence except to contradict the officer who made it. It may, however, be used by that officer when under examination for the purpose of refreshing his memory—*Jadob Das*, 4 C.W.N. 129 (143), 27 Cal. 295; *Ram Sarup*, 6 C.W.N. 98 (101); *Mohammad Yusuf*, 31 Cr.L.J. 1026 (1038), 126 I.C. 449, A.I.R. 1930 Sind 225; *Rangappa Goundan*, 37 Cr.L.J. 471, 161 I.C. 663, 1936 M.W.N. 110, 43 M.L.W. 307, 70 M.L.J. 447, 59 Mad. 349, A.I.R. 1936 Mad 426, 1936 Cr.C. 509; *Mohammad Salabat*, 38 Cr.L.J. 869 (870), 170 I.C. 253, 39 P.L.R. 290, A.I.R. 1937 Lah. 475; *Ramaswami*, A.I.R. 1938 Mad. 336, 40 Cr.L.J. 596, 181 I.C. 849, 1938 M.W.N. 36, 47 M.L.W. 272, 11 R.M. 870. A paper which purports to be the substance of a report from a subordinate medical officer with an expression of concurrence by the Civil Surgeon cannot be used as evidence, although the examination of a medical witness written in proper form may be so used—*Chintamonee*, 11 W.R. 2. A certificate granted by the Professor of a Medical College as regards the bones submitted to him for examination is not admissible in evidence. He must be examined as a witness—*Ahilya Manaji*, 47 Bom. 74, 24 Bom.L.R. 83, 26 Cr.L.J. 339, A.I.R. 1923 Bom. 183.

It is the bounden duty of the Public Prosecutor to tender in evidence not only the medical evidence and the *post mortem* report of the Civil Surgeon, but also the reports of the Chemical Examiner and of the Imperial Serologist. A Sessions Judge ought not to allow the Public Prosecutor to refuse to produce them as evidence on behalf of the prosecution and, if he does so, the defence Counsel may request that those reports, which ought to be tendered on behalf of the prosecution, should be treated as evidence on behalf of the defence—*Ghirrao*, 34 Cr.L.J. 1009 (1012), 145 I.C. 470, A.I.R. 1933 Oudh 265, 1933 Cr.C. 592, 10 O.W.N. 1108.

1326. 'Taken and attested':—Before the deposition of a medical witness given before the committing Magistrate can be admitted in the Sessions Court, it must either appear in the Magistrate's record or must be proved by the evidence of witnesses to have been taken and attested in the prisoner's presence. It should not be merely presumed under sec. 114 Illustration (e) of the Evidence Act to have been so taken and attested—*Riding*, 9 All. 720.

'By a Magistrate':—The deposition may be attested by a Magistrate, *i.e.*, any Magistrate, not necessarily by the committing Magistrate who is holding the preliminary inquiry—*Durga*, 1893 A.W.N. 180.

'In the presence of the accused':—To render the deposition of a medical officer admissible in evidence, it must be shown to have been taken and attested by the Magistrate in the presence of the accused—*Kachali Hari*, 18 Cal. 129; *Jhubboo Mahton*, 8 Cal. 739. The evidence of a Medical officer given before a committing Magistrate is not admissible in the Sessions Court where the committing Magistrate does not certify that the evidence was given in the presence of the accused—*Bajrangi*, 4 C.W.N. 49 (56). This section does not enact that the deposition of a medical witness shall be taken and attested by a Magistrate in the presence of the accused. What it provides is that the deposition, if so taken and attested, may be put in evidence in the trial. Therefore, in the absence of proof that the deposition was taken and attested by the Magistrate in the presence of the accused, it cannot be presumed, that the deposition was so taken and attested—*Pohp Singh*, 10 All. 174 (178); *Kachali Hari*, *supra*; *Riding*, 9 All. 720. The depositions of the medical witnesses are not inadmissible merely because the Magistrate has failed to append certificates in the prescribed form. This section does not in so many words require any certificates by the Magistrate in any particular form and the requirements of law would be complied with if it appears from the Magistrate's record or is made to appear that the statement was taken and signed in the presence of the accused—*Nawab*, 34 Cr L.J. 443, 142 I.C. 577, A.I.R. 1933 Lah. 131, 1933 Cr.C. 247, Ind. Rul. 1933 Lah. 213. The examination of a medical witness taken in the absence of the accused is inadmissible in evidence. When, however, there is sufficient *prima facie* evidence to warrant a commitment to the Sessions Court, and the evidence of the medical witness is likely to be only of a formal character, and great inconvenience would result from his being summoned to a Magistrate's Court, the examination need not be taken before a Magistrate, but attendance before the Sessions Court must be secured. Under all other circumstances the Magistrate should invariably record the evidence of the medical witness before himself—*Anonymous*, Ratanlal 81.

A medical witness, like any other witness in a case, must give his evidence orally in the presence of the accused. Where he is allowed to prove statements made at the trial of other accused persons in the absence of the accused under trial, such mode of giving evidence is illegal—*Sardara v. Emp.*, 27 Cr L.J. 571, 94 I.C. 139, 26 P.L.R. 80.

A Magistrate should take and attest a deposition in the presence of the accused, and should also, by the use of few apt words on the face of the deposition, make it apparent that he has done so—*Pohp Singh*, *supra*. In order to secure compliance with the provisions of this section, Magistrates are hereby directed to sign at the foot of the deposition of medical witnesses a certificate in the following form—"The foregoing deposition was taken in the presence of the accused (name) who had an opportunity of cross-examining the witness. The deposition was explained to the accused, and was attested by me in his presence"—*Cal. G. R. & C. O.*, page 14; *C. P. Cr. Cir.*, Part II, No. 55; *N. W. P. H. C. Cr. Cir.*, para 38, p. 17.

Deposition should be carefully recorded:—The statement of a medical witness, if taken and attested by the Magistrate in the presence of the accused, is admissible as evidence in the Sessions Court, although the medical witness is not himself called. It should, therefore, be recorded with the utmost care and accuracy—*Bharat*, 20 O.C. 61, 18 Cr.L.J. 380 (381), and not in an untidy, slipshod and illegible fashion—*Baldeo*, 19 O.C. 239, 18 Cr.L.J. 105 (106).

1327. Value of medical evidence:—Mere theories of medical witnesses should not be accepted as against proved facts. It would be improper for a Judge to reject facts which were proved by the evidence of certain witnesses, merely because a medical officer gave his opinion that what the witnesses deposed to could not be true—*Ahmed Ali*, 11 W.R. 25. Medical experts and others such as Judges who have to form opinions and exercise their judgment should have regard primarily to the facts and not draw upon their imagination; otherwise the administration of justice would depend upon their individual idiosyncrasies and become unstable and unworkable—*Yunus Ali*, 32 C.W.N. 783 (787). A Judge is not right in discarding the whole of the direct evidence of credible and unimpeachable witnesses who depose on oath that with their own eyes they saw a thing being done, merely upon the strength of the opinion of a medical witness to the effect that such a thing could not have been done—*Wazir Ali*, 1889 A.W.N. 74.

1328. Sub-section (2)—Summoning of medical witness:—In a case of murder or man-slaughter, where the medical report is inconsistent with the prosecution evidence, it is the duty of the prosecution to call the medical officer himself or to give other medical evidence in the hearing of the jury, and not to stand merely on the deposition given by the medical officer before the committing Magistrate in its recorded form. It is unreasonable to expect the jury to convict if a proper exposition and explanation of the medical evidence is not given *viva voce* by a doctor who can deal with the matter and satisfy the jury—*Debendra Narayan*, 56 Cal. 566, 50 C.L.J. 1, 119 I.C. 378, A.I.R. 1929 Cal. 244, 33 C.W.N. 632, 30 Cr.L.J. 1031 (1033); *Bahadur Singh Arjan Singh v. Emp.*, 39 Cr.L.J. 410, 174 I.C. 420, 40 P.L.R. 484, 10 R.L. 563, A.I.R. 1938 Lah. 176. In any event, Counsel who acts for the accused in the Sessions Court should notice the point and insist upon the medical officer coming to the Sessions Court—*Bahadur Singh Arjan Singh v. Emp.*, *supra*. No consent or admission by the prisoner's Advocate to dispense with the medical witness could relieve the prosecution of proving by evidence the nature of injuries received by the deceased and that the injuries were the cause of death—*Rangappa Goundan*, 37 Cr.L.J. 471, A.I.R. 1936 Mad. 426, 1936 Cr.C. 509, 161 I.C. 663, 1936 M.W.N. 110, 43 M.L.W. 307, 70 M.L.J. 447, 59 Mad. 349. In a Sessions case, depending almost entirely on the medical evidence, the examination of the Surgeon before the Magistrate should not be tendered or accepted as sufficient. All the evidence before the Magistrate as to the symptoms should be re-taken, and the Surgeon should be examined as an expert in regard to the case of those symptoms—*Mantapampalla*, 2 Weir 660. The recorded deposition of a medical witness should be carefully scrutinized by the Sessions Judge, and if it appears that the deposition is essentially deficient or requires further explanation or elucidation, the Judge should summon and examine the witness—*Bharat*, 20 O.C. 61, 18 Cr.L.J. 380 (381). Where the medical evidence given before the committing Magistrate appeared to be inconsistent with the confessions of the accused, e.g., where the method by which the murder was committed as given in the confession of the accused, did not fit in with the medical evidence, the Sessions Judge ought to call the medical officer instead of explaining away with the remark that the injuries might have been caused in some other manner. Such theorising is unsound in principle—*Bharat*, *supra*.

No doubt this section permits the deposition of a medical witness taken in the Commitment Court to be given in evidence at the Session trial, but that is subject to the condition that the accused should have been given full opportunity to cross-examine the witness and the Court may, if it thinks fit, summon and examine such a witness as to the subject matter of his deposition. Where, therefore the accused reserved the cross-examination of the medical witness in the Commitment Court which apparently was allowed and the witness was summoned by the Sessions Court to give evidence on behalf of the prosecution, the Sessions Court was apparently in error in refusing to re-summon the witness when he did not attend and in admitting the

evidence of the witness given in the Commitment Court—*Shivadhin v. King-Emp.*, A.I.R. 1923 Pat. 116 (118), 3 P.L.T. 32, 60 I.C. 662.

"If Magistrates carefully and fully record the medical evidence, there will be no necessity for summoning the medical witness to attend before the Sessions Court, except for special reasons in particular cases. The accused persons or their pleaders should be asked at the time of commitment whether they wish to have the medical witness summoned before the Sessions Court or whether they consider that the evidence recorded by the Magistrate, which should be carefully attested in their presence, is sufficient. If they desire the personal attendance of the medical witness, this should be regarded as a sufficient reason for summoning him"—*Cal. G. R. & C. O.*, p. 14.

510. Any document purporting to be a report under the hand of any Chemical Examiner or Assistant Chemical Examiner to Government, upon any matter or thing duly submitted to him for examination or analysis and report in the course of any proceeding under this Code, may be used as evidence in any inquiry, trial or other proceeding under this Code.

1329. Report:—A Court cannot send an exhibit to a Chemical Examiner and get a report from him merely to satisfy its own mind. The Magistrate must take evidence in a regular manner, i.e., he should have the report formally put in evidence and shall take also the evidence necessary to prove that what was sent to the Chemical Examiner was what had been seized from the possession of the accused. But where there is enough evidence to show what the contents of the exhibits are, the mere fact that the Magistrate did not follow the above procedure would not render the conviction illegal—*Tan Kyi*, 5 Bur L.J. 100, 27 Cr L.J. 1281.

The report must be the original report of the Chemical Examiner, bearing his signature, and not a copy of the report; and it must be signed by the Chemical Examiner—45 WR 49. Where a matter containing poison was submitted to the Chemical Examiner, his report as to the discovery of poison in the matter, in order to be admissible in evidence, must purport to be signed by the officer or officers who detected the poison in the matter and who from personal knowledge could certify to the correctness of the result embodied in the report. Otherwise the report cannot be accepted as one made under a sense of personal responsibility—*Venkataswami Achari*, 2 Weir 661 (662). The defect in this case was remedied by the High Court taking the evidence of the Chemical Examiner under sec. 375 (the case having been submitted to the High Court for confirmation of the sentence of death).

Where all that is on the record of a case is a little scrap of paper on which it is written in somebody's handwriting that the Chemical Examiner's report shows that the packets in question contained cocaine, it is not legal evidence and cannot be a substitute for the original certificate or at least for a copy of it certified by the Magistrate as being a true copy. The provisions relating to the production of a report by the Chemical Examiner in place of the Chemical Examiner's own personal appearance in Court are special provisions of the Code and must be strictly adhered to—*Peary Lal v. Emp.*, 39 Cr L.J. 714, 176 I.C. 225, A.I.R. 1938 Lah. 496, 40 P.L.R. 783, 11 R.L. 167.

'Any Chemical Examiner':—The word 'any' includes an Additional Chemical Examiner. The word 'any' did not occur in the earlier Code, and it was therefore held in *Autal Muchi*, 10 Cal 1026 that the report of an Additional Chemical Examiner could not be received in evidence.

A report made by a Government Excise Analyst does not come within the purview of this section—*Bansi Lal*, 30 Bom.L.R. 646.

The certificate of a Professor of Anatomy is not *per se* admissible in evidence

apart from special authority like section 510, Cr. P. Code—*Ahila Manaji v. Emp.*, 26 Cr.L.J. 339 (340), 47 Bom. 74, 24 Bom.L.R. 83, A.I.R. 1923 Bom. 183.

Identity of articles examined:—When committing cases, a Magistrate must take care to send up evidence to prove that a body sent to the hospital for *post mortem* examination is really the body of the person referred to in the case under trial, or that an article analysed by the Chemical Examiner was actually the article sent to him for analysis in the case under trial. A Sessions Judge must insist upon being furnished with such evidence and must not record either the chemical analysis report or the evidence of the medical officer until the connecting links requisite to render them admissible have been established—*Nag Pya*, 1 Bur.L.R. 634; *Autal Muchi*, 10 Cal. 1026; *Chuk-karpalli Ramayya*, 20 M.L.J. 657, 1 Cr.L.J. 222; *Muhammad Din*, 26 P.L.R. 748, 26 Cr.L.J. 1420. A Sessions Judge is bound to warn the jury that before using the Chemical Examiner's report, they must be satisfied on the evidence that the substances examined were in fact what they were said to be—*Ofel Molla*, 18 C.W.N. 180, 15 Cr.L.J. 147.

Use of the report as evidence:—The report of a Chemical Examiner may be used as evidence in any inquiry, trial or other proceeding. This, however, does not imply that without tendering it in evidence it can be made use of for the first time in appeal. It is a piece of evidence that does not require any formal proof, but at the same time it must be tendered as evidence and used as such, so that the accused may have a chance of questioning it—*Wali Muhammad*, 21 A.L.J. 869, 26 Cr.L.J. 200, A.I.R. 1924 All. 193, 83 I.C. 904. See *Ghirrao* cited in Note 1325.

Contents of the report:—In a case of murder by poison it is not enough for the Chemical Examiner to merely state his opinion that arsenic was detected. He must state the grounds on which he arrives at that opinion. It is extremely desirable that his report should be full and completed and take the place of evidence which he would give if he were called to Court as a witness—*Gajrani*, 34 Cr.L.J. 754 (759), 144 I.C. 357, A.I.R. 1933 All. 394, 1933 Cr.C. 664, 1933 A.L.J. 1617, Ind. Rul. 1933 All. 414.

Value of the report:—Sec. 510, fortunately for accused persons, says nothing as to the weight to be attached to the Chemical Examiner's report. No person, therefore, ought to be put in peril of capital, or any punishment on a written report not given on oath and untested by cross-examination. To accept such a report whatever it may contain—as proof of death by arsenic poisoning or of anything, appears to be an impossible proposition in law. (*Per Young, J.*). When a report is received from the Chemical Examiner containing a quantitative analysis, it should be shown to the medical officer who conducted the *post-mortem* examination so that he will be in a position to state before the committing Magistrate what are the medico-legal inferences to be drawn from the report—*Happu*, A.I.R. 1933 All. 837, 1933 Cr.C. 1463, 146 I.C. 1089, 35 Cr.L.J. 280, 1934 A.L.J. 106; *Ujagar Singh*, 40 Cr.L.J. 576, 181 I.C. 861, A.I.R. 1939 Lah. 149, 11 R.L. 895, 41 P.L.R. 493, I.L.R. 1939 Lah. 206. It is to be expected that whenever a Magistrate or a Court of Session finds that the report of the Chemical Examiner is inadequate, he or it should not admit it in evidence unless the officer concerned submits a full and satisfactory report or has been examined in support of it. The High Court cannot reject it as inadmissible in the face of section 510 where the Sessions Judge admitted it in evidence. No hard and fast rule can be laid down as regards the value to be attached to such reports but a meagre and cryptic report is hardly of any value—*Gaya Kunwar*, 35 Cr.L.J. 700 (702), 148 I.C. 600, 11 O.W.N. 312, 1934 Cr.C. 231, 1934 O.L.R. 341, A.I.R. 1934 Oudh. 62. It cannot be accepted as a proposition of law that the Chemical Examiner must be called in all cases in which a Chemical Analysis has been made and in which the result of such analysis is a determining factor in the case. Where neither the accused nor his Counsel objected to the admission of the Chemical Examiner's report and they did not request that the Chemical Examiner be sent for and put into the witness-box, the Chemical Examiner's report was admissible in evidence, establishing the contents

of the report—*Bachcha*, A.I.R. 1934 All. 873, 36 Cr.L.J. 362, 153 I.C. 472, 1934 Cr.C. 1082, A.L.R. 1935 All. 19, 57 All. 256. There is no doubt that the provision of law contained in section 510, Cr. P. C., is of an exceptional nature. It was, however, deliberately enacted by the Legislature, and the Courts are bound to give effect to it so long as it remains on the Statute Book whatever may be said of the wisdom of the policy underlying it. It can hardly be open to the Courts to render this enactment nugatory by refusing to attach any weight to the reports in question. If they are not to have any weight, there would be no object in making them admissible in evidence. The intention of the Legislature is that they should have the same value as they would have if they were formally proved by sworn testimony. It is always open to the Courts to call the Chemical Examiner when this course is deemed to be necessary in the interests of justice. He does not, as a rule, give any opinion as to the cause of death, but merely reports the result of the Chemical Examination of the substances sent to him. It is for the Court to determine the cause of death after a consideration of such report together with *post mortem* appearances as deposed to by the officer who conducts the autopsy and of the other evidence in the case—*Aishan Bibi*, 36 Cr.L.J. 14 (16), A.I.R. 1934 Lah. 150, 15 Lah. 310, 152 I.C. 206, 1934 Cr.C. 330, 37 P.L.R. 67, A.L.R. 1934 Lah. 573.

The negative effect of the Chemical Examiner's report that no blood was detected by him on leaves, grass and earth taken from the alleged place of occurrence, is not sufficient to rebut the strong direct evidence as to the place of occurrence—*Hassenulla*, 26 Cr.L.J. 5 (8), 83 I.C. 485, 28 C.W.N. 561, A.I.R. 1924 Cal. 625.

The evidence of blood-stained nails is not only of no value but may be extremely dangerous to innocent persons. Giving such evidence as corroborating an approver or as circumstantial evidence connecting an accused person with homicide may lead to the miscarriage of justice—*Ujagar Singh v Emp.*, 40 Cr.L.J. 576, 181 I.C. 864, A.I.R. 1939 Lah. 149, 11 R.L. 895, 41 P.L.R. 493, I.L.R. 1939 Lah. 206.

The Imperial Serologist is a highly responsible officer and a duly qualified scientist who would never venture to give any definite opinion on a question unless he has the fullest scientific data in support of his conclusion. His opinion is entitled to great weight—34 Cr.L.J. 1009 (1100), 145 I.C. 470, 1933 Cr.C. 592, A.I.R. 1933 Oudh 265, 10 O.W.N. 1108.

511. In any inquiry, trial or other proceeding under this

Code, a previous conviction or acquittal may be proved, in addition to any other mode provided by any law for the time

being in force—

- (a) by an extract certified under the hand of the officer having the custody of the records of the Court in which such conviction or acquittal was had, to be a copy of the sentence or order, or,
- (b) in case of a conviction, either by a certificate signed by the officer in charge of the jail in which the punishment or any part thereof was inflicted, or by production of the warrant of commitment under which the punishment was suffered;

together with, in each of such cases, evidence as to the identity of the accused person with the person so convicted or acquitted.

1330. Proof of previous convictions:—Before passing sentence, it is desirable and necessary that if there are previous convictions they should properly be

proved—*Turimella*, 17 Cr.L.J. 179. Magistrates are not absolved from the ordinary rules of evidence in taking proof of previous convictions. Whenever it is required to prove a previous conviction against a man, whether it be for the purpose of enhancement of punishment under s. 75, I. P. C., or in proceedings under Ch. VIII of the Cr. P. C., such previous conviction must be proved strictly and in accordance with law. Unless it is so proved, no Court can properly take such previous conviction into consideration—*Sheik Abdul*, 43 Cal. 1128, 20 C.W.N. 725, 33 I.C. 825, A.I.R. 1916 Cal. 344, 17 Cr.L.J. 185. Previous conviction should, regard being had to the provisions of this section, be proved by copies of judgments or extracts from judgments or by any other documentary evidence of the fact of such previous convictions; and the examination of the accused in respect of those convictions is, having regard to sec. 342, without legal warrant or jurisdiction—*Yasin*, 28 Cal. 689, 5 C.W.N. 670; *Alloomiya*, 28 Bom. 129. Previous conviction should be proved by one of the modes laid down in this section. The Court should not be satisfied only with the admission of the accused—*Dayaram*, 30 P.L.R. 530, 30 Cr.L.J. 1082; *Sardar Ahmad*, A.I.R. 1934 Lah. 693, 35 P.L.R. 697, 36 Cr.L.J. 778, 155 I.C. 478, 1934 Cr.C. 1008; *Said Ali*, 35 Cr.L.J. 1387, 151 I.C. 719, 36 P.L.R. 7. Before an accused can be questioned about previous convictions, there must be evidence legally admissible upon the record which shows that he has committed these previous offences about which he is examined by the Court; and legally admissible evidence as to previous convictions must fall either within sec. 511, Cr. P. C., or sec. 54, Evidence Act—*Ghous Baksh Muhammad Amin v. Emp.*, 40 Cr.L.J. 770, 183 I.C. 219, A.I.R. 1939 Sind 203, 12 R.S. 49, I.L.R. 1939 Kar. 677.

When the previous conviction has been put to the accused and he denies it, the certified extract from the records of the Court in which he was convicted should be put in evidence; proof should be given that he and the person named therein are one and the same person, and the Court should record a specified finding upon that point—*Mundar*, 1881 A.W.N. 144; *Tuki Mahomed v. Kishto*, 15 W.R. 53. But a mere *Kaifiat* from the record office is not sufficient to prove a previous conviction—*Tuki Mahomed v. Kisto*, 15 W.R. 53.

Finger-impressions are evidence of identity:—The manner in which a previous conviction may be proved is not limited to the method laid down by this section. Any relevant evidence upon which the Court can properly base a finding that the accused was on a previous occasion convicted of an offence will do as the method indicated by this section. Thus, a previous conviction may be proved by *finger-impressions*. See *Sahadeo*, 3 N.L.R. 1, 5 Cr.L.J. 220; *Murit Roy*, 6 C.P.L.R. 3; *Abdul Hamid*, 32 Cal 759; *Fakir Mahomed*, 1 C.W.N. 33. If the identity of the accused is to be proved by a comparison of finger-prints, the one taken in Court being compared with certain finger-prints contained in the record of previous convictions, there ought to be evidence to prove the similarity between the two, and the identification of the last mentioned finger-prints as those of the person who has been previously convicted—*Ramdas*, 21 C.W.N. 469, 16 Cr.L.J. 462. The papillary ridges on the bulbs of the fingers and thumbs, by means of which finger-impressions are made, while proved to be almost beyond change from birth to death, are never wholly repeated in the case of the fingers of any other person, and they therefore furnish a surer test of identity than any other comparable bodily feature. Where two prints made on different occasions resemble one another in the *minutia*, and contain no points of disagreement, an irresistible conclusion arises that they were made by the same finger—*Sahadeo*, 3 N.L.R. 1, 5 Cr.L.J. 220.

Where the only evidence of previous conviction is merely the extracts from the records of the Central Bureau for finger-prints and the evidence of an expert of the Finger-print Bureau and no certificate from the officer in charge of the jail or the warrant of commitment is produced to prove it, the Court cannot take account of previous conviction on such evidence. The evidence of finger-prints is evidence of identity and is not in itself evidence of the previous conviction—*Abdullah Karim*, 41 Cr.L.J. 143 (144), 185 I.C. 268, A.I.R. 1939 Sind 335, I.L.R. 1940 Kar. 83.

512. (1) If it is proved that an accused person has absconded, and that there is no immediate prospect of arresting him, the Court competent to try or commit for trial such person for the offence complained of may, in his absence, examine the witnesses (if any) produced on behalf of the prosecution, and record their depositions. Any such deposition may, on the arrest of such person, be given in evidence against him on the inquiry into, or trial for, the offence with which he is charged, if the deponent is dead or incapable of giving evidence or his attendance cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable.

(2) If it appears that an offence punishable with death or transportation has been committed by some person or persons unknown, the High Court may direct that any Magistrate of the first class shall hold an inquiry and examine any witnesses who can give evidence concerning the offence. Any depositions so taken may be given in evidence against any person who is subsequently accused of the offence, if the deponent is dead or incapable of giving evidence or beyond the limits of British India.

1331. Scope of section:—This section, which empowers a Magistrate to take the deposition of certain witnesses in the absence of the accused, enacts an exception to the principle embodied in section 33, Evidence Act, namely that the evidence of a witness which a party had no right and opportunity to cross-examine is not legally admissible. Before an exception can be availed of, the conditions prescribed by the statute must be strictly complied with. Even under section 33, Evidence Act, strict proof of the conditions required in that section are insisted on, especially in criminal cases—*Labhai Kutti*, AIR 1939 Mad 190, 1938 M.W.N. 582, 1938 M.Cr.C. 212, 40 Cr.L.J. 437, 180 I.C. 605.

This section has been specially enacted for enabling the Magistrate to record evidence in the absence of an absconding accused; and therefore a Magistrate cannot reject an application of the complainant to summon witnesses or to call on them to produce documents, on the ground that the accused has absconded and no inquiry is being then conducted—*Wasudeo*, 2 Bom.L.R. 707.

The Magistrate can only record the evidence, but cannot convict or sentence the accused in his absence. The whole trial must take place in the presence of the accused, and his defence must be heard, before he can be convicted and sentenced—*Sardar*, 1917 P.R. 36.

A pardon can be tendered to an approver under sec. 337 even though the principal accused has absconded; in such a case, the approver's evidence will be recorded under this section—*Dagdu*, 46 Bom. 120, 22 Cr.L.J. 620, 23 Bom.L.R. 839, 63 I.C. 156.

Nature of proceedings:—Proceedings under cl. (1) of this section are judicial proceedings which are not an inquiry. Hence an order made at the conclusion of such proceedings, for the disposal of property produced before the Court, is made under the provisions of sec. 523, Cr. P. C., and not under sec. 517, Cr. P. C., and therefore no appeal lies against such an order—*U Ba Hlaing v. Balabux Sodani*, A.I.R. 1937 Rang. 42 (44), 14 Rang. 633.

Proof of absconding:—In order to give jurisdiction to the Court to examine witnesses in the absence of the accused, it must be proved to the satisfaction of the Court that the accused has absconded and that there is no immediate prospect of arresting him—*Makhni*, 1890 A.W.N. 100; *Sahub Singh*, 1896 A.W.N. 182. So, where evidence was recorded by the Magistrate while there was no proof that the accused had absconded, there was no judicial proceeding, and any witness giving false evidence therein could not be prosecuted for an offence under sec. 193, I P. Code—*Makhni*, 1890 A.W.N. 100.

According to the Lahore High Court, to satisfy the requirements of this section, all that is necessary is that it should be proved that the accused has absconded, and it is not necessary that a *finding* should be given by the Court to that effect—*Daya Ram*, 6 Lah. 489, 27 Cr.L.J. 247, 26 P.L.R. 845. But in an earlier case the Punjab Chief Court held that where the accused had absconded, the Court had to take evidence as to the accused person having absconded, and to record a *finding* to that effect. In the absence of such proof and finding, the recording of the deposition of witnesses in the absence of the accused was illegal—*Wahid*, 1883 P.R. 21. The Allahabad High Court also held that a finding that the accused has absconded *should be recorded as a condition precedent* by the Magistrate who takes the evidence under sec. 512—*Sheoraj*, 48 All. 375, 27 Cr.L.J. 874, 24 A.L.J. 394, 96 I.C. 122, A.I.R. 1926 All. 340. The Court which records the deposition under section 512 must first of all *record an order* that in its opinion it has been proved that the accused has absconded—*Rustam*, 38 All. 29, 13 A.L.J. 1043, 16 Cr.L.J. 801, 31 I.C. 817. It is sufficient if the Magistrate records a finding that the accused has absconded; it is not necessary to *record further that there is no immediate prospect of arresting him*. And so, where the Magistrate recorded a clear finding that the accused had absconded, the mere fact that he did not recite in his order a finding that there was no immediate prospect of arresting the accused, would not render the evidence taken in the absence of the accused inadmissible against them when arrested—*Bhagwati*, 41 All. 60, 16 A.L.J. 902, 20 Cr.L.J. 6, 48 I.C. 481. In *Ghurbin*, 10 Cal. 1097, the Calcutta High Court has laid down that evidence can be recorded against the accused in his absence, only if the fact of his absconding is alleged, tried and established before the deposition is recorded; but nothing is said in this case as to whether the Court should record a *finding* as to the absconding of the accused, as in fact the evidence in this case was not recorded under section 512.

Procedure:—Where the procedure laid down in this section has not been taken, the depositions of witnesses examined at the trial of an accused cannot subsequently be used at the trial of an absconding accused. It is not the law that for the purpose of being used under this section the depositions of witnesses must be recorded over again in a separate proceeding. It will suffice if at the commencement of the hearing the prosecutor brings to the notice of the Court the fact that such a person is absconding, examines a witness or witnesses to prove that fact and obtains a direction of the Court that the evidence about to be taken is being taken for the purpose of being used, if necessary, against the absconder under this section as well as against the person present and under trial—*Baharuddin*, A.I.R. 1938 Pat. 49 (51), 16 Pat. 116, 1937 P.W.N. 348, 173 I.C. 230, 19 P.L.T. 164, 39 Cr.L.J. 281, 4 B.R. 225.

Value of the deposition given in absence of accused:—The latter part of sub-sec. (1) seems clearly to indicate that the witnesses who were examined during the absence of the absconding accused should be examined in the presence of the accused, when he is found, unless it is impracticable to obtain their attendance. The statements recorded by a Magistrate under sec. 512 in the absence of the accused cannot be treated as evidence in the Sessions Court, if the witness is living and can be procured—*Rakhia*, 1911 P.L.R. 157, 12 Cr.L.J. 214, 10 I.C. 119. Where it was not impracticable to obtain the attendance of the witnesses when the accused was found, and the accused was committed to the Sessions merely on the strength of the recorded deposition of those witnesses, the commitment was held to be illegal—*Bocha Chowkeedar*, 22 W.R. 33. But if the accused pleads to the charge, the commitment cannot be quashed—*Sagambar*,

12 C.L.R. 120. If, however, upon such commitment, the Sessions Judge in the course of the trial is of opinion that the prosecution has not laid a basis for the reception of the deposition taken before the Magistrate in the absence of the accused, he should adjourn the trial and, under sec. 540, summon such witnesses as he may deem material—*Sagambar*, 12 S.L.R. 120.

When two witnesses who had given evidence at a previous trial against four persons then on trial, happened to have referred in the course of their deposition at that trial to a person S who was then absconding, and that person S is subsequently tried, the statements of those two witnesses cannot be read at the subsequent trial of S merely because they happen to be absent and cannot give evidence. The two witnesses gave their evidence at a trial in which S was not an accused person; they merely mentioned the name of S, but the attention of the Court was not then directed against S, nor was the evidence given in any sense as evidence against S—*Sheoraj*, 48 All. 375, 27 Cr.L.J. 874, A.I.R. 1926 All. 340, 96 I.C. 122, 24 A.L.J. 394.

Death:—It is incumbent that the death of the witnesses must be proved and there can be no doubt that the burden of proving the factum of death is upon the party who wishes to tender the evidence. The fact of death must be proved like any other fact and a mere report that a certain person is dead is not sufficient—*Labbi Kutti*, A.I.R. 1939 Mad 190 (191), 1938 M.W.N. 582, 1938 M.Cr.C. 212, 40 Cr.L.J. 437, 180 I.C. 605.

'Incapable of giving evidence':—Where a witness who had been examined under section 512 appeared in Court at the trial but could not remember the details of the occurrence, *held* that he could not be considered as 'incapable of giving evidence' within the meaning of this section. What the Court should do in such a case is to refresh the memory of the witness by reading out his deposition and then ask them if he remembers the details of the occurrence—*Bhika*, 25 Cr.L.J. 95, 76 I.C. 31, A.I.R. 1924 Lah 605.

Restoration of property:—Where, as under clause (1) of this section, the proceeding before the Magistrate is neither an inquiry nor a trial, the Magistrate has no authority to arrive at conclusions regarding facts which are in dispute between the contending parties, in order to decide which of these parties is the person entitled to the possession of the property; he must give possession to the person so entitled, having regard to the indisputable or admitted facts, and leave the contending parties to fight out their rights in a Civil Court. In such a case the order is not made under the provisions of section 517, Cr. P. C., but is made under the provisions of section 523, Cr. P. C., and, therefore, no appeal lies from such order—*U Ba Hlaing v Balabux Sodani*, A.I.R. 1937 Rang 42 (45), 14 Rang 633, 38 Cr.L.J. 358, 9 R.R. 305. See also *Vallappa Chetty v. Joseph*, 2 Bur.L.J. 85, 25 Cr.L.J. 666, A.I.R. 1923 Rang. 248, 81 I.C. 154. But see *A K A. R. A. Chettyar v. Ma Saw Hla* in Note 1365.

CHAPTER XLII.

PROVISIONS AS TO BONDS.

513. When any person is required by any Court or officer to execute a bond, with or without sureties, such Court or officer may, except in the case of a bond for good behaviour, permit him to deposit a sum of money or Government promissory notes to such amount as the Court or officer may fix, in lieu of executing such bond.

Deposit instead of recognition.

Scope:—The deposit allowed in this section is allowed in substitution only of the bond which the principal himself would otherwise execute, not in substitution of any bond which his surety executes—*Laxmanlal v. Mulshankar*, 32 Bom. 449 (453). This view has not been accepted by the Oudh Chief Court. It has held that the words used in this section are that the Court may permit the deposit of a sum of money or Government promissory notes in lieu of executing such bond. If the bond is a bond with sureties, this deposit replaces the whole bond and not merely the bond of the principal—*Abdus Sattar v. King-Emp.*, 39 Cr.L.J. 831 (834), 176 I.C. 948, 11 R.O. 7, 1938 A.Cr.C. 55, 1938 O.L.R. 355, 1938 O.A. 566, 1938 O.W.N. 676, A.I.R. 1938 Oudh 195.

'Except in case of bond for good behaviour':—The object of law in making this exception in good behaviour cases, is to secure the good conduct of the person bound over, not by means of money but by a bond and sureties, and by making the sureties responsible for the good behaviour of the person bound down. See *Sheo Buksh*, 2 N.W.P. 295.

1332. Deposit of money:—The deposit of money is *in lieu of* executing a bond. Where a person was ordered to execute a bond for good behaviour, and also to deposit a certain sum in addition thereto, the order as to deposit was illegal, because it was not *in lieu of*, but in addition to, execution of bond, and also because it was a good behaviour case—*Fata, Ratanlal* 671.

Where money has been deposited in Court as bail, the Magistrate is bound to return the amount, on the appearance of the accused, to the person who made the deposit. It has no jurisdiction to attach this money in order to realise out of it the fine imposed on the accused—*Raghunandan*, 11 O.L.J. 296; *Girdhari Lal*, 19 A.L.J. 887, 22 Cr.L.J. 744.

Under this section it is optional for the Magistrate in cases specified to allow a man who has been called upon to execute a bond with or without surety to deposit the amount in Court—*Surja Narain*, 36 Cr.L.J. 730 (734), 155 I.C. 430, 16 P.L.T. 223, A.I.R. 1935 Pat. 195, 1935 Cr.C. 534. There is nothing against a legal practitioner becoming a surety for accused persons. But where a *mukhtear* enters into an agreement, with a person whose security the Court refused to accept, to the effect that the amount deposited by that person with the *mukhtear* would indemnify the latter if he suffered any loss on account of the bail-bond being forfeited, the contract is unquestionably illegal, being against public policy as it hampers the administration of justice—*Ibid*.

514. (1) Whenever it is proved to the satisfaction of the Court by which a bond under this Code has been taken, or of the Court of a Presidency Magistrate or Magistrate of the first class,

or when the bond is for appearance before a Court, to the satisfaction of such Court,

that such bond has been forfeited, the Court shall record the grounds of such proof, and may call upon any person bound by such bond to pay the penalty thereof, or to show cause why it should not be paid.

(2) If sufficient cause is not shown and the penalty is not paid, the Court may proceed to recover the same by issuing a warrant for the attachment and sale of the moveable property belonging to such person or his estate if he be dead.

(3) Such warrant may be executed within the local limits of the jurisdiction of the Court which issued it; and it shall

authorize the *attachment* and sale of any moveable property belonging to such person without such limits, when endorsed by the District Magistrate or Chief Presidency Magistrate within the local limits of whose jurisdiction such property is found.

(4) If such penalty is not paid and cannot be recovered by such attachment and sale, the person so bound shall be liable, by order of the Court which issued the warrant, to imprisonment in the civil jail for a term which may extend to six months.

(5) The Court may, at its discretion, remit any portion of the penalty mentioned and enforce payment in part only.

(6) Where a surety to a bond dies before the bond is forfeited, his estate shall be discharged from all liability in respect of the bond. * * *

(7) *When any person who has furnished security under section 106 or section 118 or section 562 is convicted of an offence the commission of which constitutes a breach of the conditions of his bond, or of a bond executed in lieu of his bond under section 514B, a certified copy of the judgment of the Court by which he was convicted of such offence may be used as evidence in proceedings under this section against his surety or sureties, and, if such certified copy is so used, the Court shall presume that such offence was committed by him unless the contrary is proved.*

Change:—This section has been amended by section 139 of the Cr. P. C. Amendment Act, XVIII of 1923. In sub-section (3) the word 'attachment' has been substituted for the word 'distress' as the former word is more appropriate. In sub-section (6) the words 'but the party who gave the bond may be required to find a new surety' have been omitted, but a separate provision to the same effect is made in the new section 514A. Sub-section (7) has been newly added; the reason is stated in Note 1339 below.

1333. Scope:—This section indicates that the place of appearance must be expressly stated in the bond. It deals with two positions. The first is when a bond is taken by a Court for appearance, not before a Court, but elsewhere. In that case certain Courts alone have jurisdiction to determine whether the bond has been forfeited. The second is where the bond is for appearance before a Court, and in that case only the Court before whom appearance is to be made can determine whether the bond has been forfeited or not. It is clear that this provision cannot be satisfied unless and until the Court before whom appearance is to be made is expressly stated in the bond—*Chintaram*, 38 Cr L.J. 100, 165 I.C. 825, A I.R. 1936 Nag. 243, 1936 Cr C. 1037, I.L.R. 1937 Nag. 137. Where a person is arrested by a police officer or a Magistrate and is released on executing a bond which does not fix any place where or the Court in which the accused person is to appear it is not possible to take any proceeding under section 514, Cr. P. C., for determining whether the bond has been forfeited or not. When the bond has been taken by some Court it is that Court alone or the Court of a Presidency Magistrate or of a Magistrate of the First Class that can initiate a proceeding under section 514, Cr. P. C., for determining whether a bond has been forfeited. When the bond is for appearance before a particular Court it is only again that Court which can start a proceeding under section 514, Cr. P. C., for determining whether the bond has been forfeited. If a bond has been taken by a Magistrate or a

Scope:—The deposit allowed in this section is allowed in substitution only of the bond which the principal himself would otherwise execute, not in substitution of any bond which his surety executes—*Laxmanlal v. Mulshankar*, 32 Bom. 449 (453). This view has not been accepted by the Oudh Chief Court. It has held that the words used in this section are that the Court may permit the deposit of a sum of money or Government promissory notes in lieu of executing such bond. If the bond is a bond with sureties, this deposit replaces the whole bond and not merely the bond of the principal—*Abdus Sattar v. King-Emp.*, 39 Cr.L.J. 831 (834), 176 I.C. 948, 11 R.O. 7, 1938 A.Cr.C. 55, 1938 O.L.R. 355, 1938 O.A. 566, 1938 O.W.N. 676, A.I.R. 1938 Oudh 195.

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1934 Cr.C. 1144. The surety undertook to produce the accused before a Magistrate until the case against the accused was disposed of. The case was transferred to a different Court in a different district where the surety failed to produce the accused. Then the Magistrate, before whom the bond was executed, called upon the surety to produce the accused in his Court. The surety having failed to do so, the Magistrate forfeited his bail bond. *Held* that the surety was bound to produce the accused and that his bail bond was rightly forfeited—*Amulya*, 36 Cr L J 133, 152 I C. 646, 38 C.W.N. 852, A.I.R. 1934 Cal. 785, 1934 Cr.C. 1207, distinguishing *Hemlal*, *supra*, and *Shamsuddin*, *supra*. If a bail-bond binds the surety to produce the accused in the Court of Agra, an order of the Magistrate calling upon the surety to produce the accused in the Court of Purnea is wholly illegal—*Parbhu Dayal*, 49 All 825, 28 Cr L J. 586 (587). But where a bond required the attendance of the accused in a particular Court and that Court had been *abolished*, the bond can be enforced by its successor to which all the functions of the defunct Court has been transferred—*Mustaqimuddin*, 24 A.L.J. 327, 27 Cr.L.J. 377 (378), A.I.R. 1926 All 297. So also where the Court before which the appearance was to be made did not in point of fact sit on the date when the surety was asked to produce certain persons, the security bond could not be forfeited, because when there was no Court the accused were under no obligation to appear, nor were the sureties under any obligation to produce them—*Samman Singh*, 9 Lah L J. 411, 23 Cr.L.J. 1020.

When the term of the bail bond was to surrender the accused persons to the District Magistrate on the day of decision or within the three days after or on such other date as the District Magistrate might direct, the surety had three alternatives and the bond could not be forfeited unless the District Magistrate had fixed a date for the production of the accused—*Bishambar*, 32 Cr L J. 121 (122), 128 I C 348, 11 P.L.T. 578, Ind. Rul 1931 Pat 44. There can be no forfeiture of a bail bond except on its own terms. It is no concern of the sureties to find out what exactly it is that the Police Officer has been directed by the District Magistrate in the way of taking bail with sureties. Their liability must be determined by the agreement that is actually taken from them—*A. N Bhattacharjee v Emp*, 39 Cr L J 523, 174 I C. 984, A.I.R. 1938 Pat. 211, 10 R P. 566, 4 B R 503, 17 Pat 436.

Where the sureties were well aware of the terms on which they had undertaken to furnish security for the due appearance of the accused, as the terms were set out in the bond which they signed, and they knew that they were responsible for his appearance not only in the High Court but in such Court as the High Court might direct him to attend, in order to surrender to his bail and they failed to produce the accused before the Court according to the direction of the High Court, the bond was rightly forfeited—*Adkoo Umrao*, A.I.R. 1938 Nag 420, 40 Cr L J 464, 180 I C 608, 11 R N 1939 Nag. 170, 11 R.N. 387.

In respect of a bond executed in a trial Court the liability of the obligor continues till the final order in appeal. The liability is not discharged simply because the order of the trial Court is in his favour, if the order is reversed in appeal—*Maung Po v. Maung Shwe*, 30 Cr L.J. 346 (348).

See also Note 1317.

As to the forfeiture of bond for keeping the peace or for good behaviour, see Notes 297 and 298 under sec 121.

The offence under sec 323, I. P. C., is a breach of the peace and entitles the Magistrate to forfeit the bonds and the sureties—*Abdus Sattar v. King-Emp.*, 39 Cr L J 831 (832), 176 I C. 948, 11 R O 7, 1938 A Cr.C 55, 1938 O.L.R. 355, 1938 O.A. 566, 1938 O.W.N. 676, A.I.R. 1938 Oudh 195.

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What amounts to forfeiture:—Bonds for appearance should be strictly construed. If the bond requires the accused to appear on a day fixed, and if he appears on that day, the bond is complied with, and the failure of the accused to appear on any other day to which the case is adjourned, does not entail a forfeiture of the bond. The party alleging that the condition has been broken must prove the breach. The breach cannot be assumed—*Vithaldas Moolji*, A.I.R. 1932 Bom. 290, 34 Bom.L.R. 584, 138 I.C. 512, 33 Cr.L.J. 628, 56 Bom. 220, 1932 Cr.C. 402 (403); *Anonymous*, 2 Weir 663; *Anonymous*, 4 M.H.C.R. App. 44; *Behari Lal*, 36 Cal. 749. When granting adjournment, the Magistrate ought to have taken a fresh bond from the accused requiring him to attend on the date of adjourned hearing. If this is not done, he cannot forfeit the original bond for failure to attend on the adjourned date—*Vithaldas Moolji*, supra. Where bonds were taken from the accused and his sureties to appear on Sunday when the Court was closed, and when on the next Monday the case was called on and the accused not being present the bonds were forfeited, it was held that as the bond required the attendance of the accused on the day fixed, i.e., on Sunday and not on the next day, the failure of the accused to appear on Monday did not cause a forfeiture of the bond—*Asanulla*, 2 C.W.N. 519. If, however, the bond required the accused to appear from day to day until the close of the trial, the bond is not illegal—*Anonymous*, 6 M.H.C.R. App. 38, 2 Weir 662, and the accused will forfeit his bond if he fails to appear on any adjourned hearing. Where a bond required the accused to appear 'on the first hearing or at other times required' and the accused appeared on the first day as mentioned in the bond, and was verbally directed to appear on a subsequent date on which he failed to appear, it was held that the failure to comply with the verbal direction would entail a forfeiture of the bond—*Haslavaram Subba Reddi*, 2 Weir 658. Where on a person being arrested under sec. 55 of this Code, the usual security bond was taken for his appearance, held that the bond was only with respect to the offence for which the person was arrested under sec. 55, and the failure of the surety to produce the person in connection with any other offence which he might be suspected of having committed subsequently did not entail a forfeiture of the bond—*Mana*, 25 Cr.L.J. 131, 76 I.C. 227, A.I.R. 1924 Lah. 622.

Where the surety undertakes to produce the accused before a Court on certain dates at a camp without giving any undertaking to produce him at the Sadar Court, his failure to produce him at Sadar Court on a different date does not cause forfeiture of the bail bond—*Basudeb*, 36 Cr.L.J. 76, 152 I.C. 341, 38 C.W.N. 804, A.I.R. 1934 Cal. 763, 1934 Cr.C. 1188.

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Where a bond requires the accused to appear before a particular Court, the failure of the accused to appear before another Court to which the case has been transferred, does not work a forfeiture of the bond, if no obligation to appear in the latter Court has been specified in the bond—*Shamsuddin*, 30 Cal. 107, 6 C.W.N. 885; *Behari Lal*, 36 Cal. 749; *Mahobir*, 18 A.L.J. 631, 21 Cr.L.J. 632, 57 I.C. 456; *Manung Nge*, 2 Rang. 581 (585), 26 Cr.L.J. 389, 84 I.C. 933, A.I.R. 1925 Rang. 153; *Chintaram*, 38 Cr.L.J. 100, 165 I.C. 825, A.I.R. 1936 Nag. 243. The obligation under the bond so expressed ceases to exist on the transfer of the case and the bond cannot be said to have been revived on the subsequent re-transfer of the case to the original Court where the bond was executed—*Hem Lal*, 37 C.W.N. 880, 35 Cr.L.J. 532, 147 I.C. 1041, A.I.R. 1934 Cal. 101, 1934 Cr.C. 145. This is also the case where a fresh bail bond was executed for the appearance of the accused in the Court to which the case was transferred—*Pandhi Khan*, 35 Cr.L.J. 215, 152 I.C. 874, A.I.R. 1934 Sind 152,

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warrant was issued to a woman in the first instance instead of a summons, without recording reasons under sec. 90, the warrant is wholly illegal, and the bond given by the surety for the woman's appearance has no legal force and cannot be forfeited if the woman does not appear—*Bela Singh*, 1918 P.L.R. 50, 19 Cr.L.J. 443, 44 I.C. 971; *Kala Singh*, 1907 P.W.R. 22, 6 Cr.L.J. 275. But see *Chajju*, 2 Lah 204, 22 Cr.L.J. 662, 63 I.C. 454, where it has been laid down that where the principal agreement is void the surety is liable as a principal debtor. Where the warrant for the arrest of a person was endorsed with an order directing his release on *personal* recognizance, the police-officer executing the warrant had no authority to take security bond from a surety for the attendance of that person, and the bond being illegal, the surety was not liable to pay anything if that person failed to attend—*Kala Singh*, *supra*.

See also *Karbalai Hussain* in Note 240 and *Gyani Meher Singh v. Emp*, in Note 1316A.

Death of accused:—The death of the accused discharges the sureties from all liabilities. "The object of the surety bonds is to ensure that the accused person shall not evade justice by flying from the country or the jurisdiction of the Court. But if the accused elects to die sooner than face his trial, that can hardly be a sufficient reason for forfeiting the surety bonds, since that was an event, which his sureties could not have in contemplation, and which is not of the kind which would impose upon them any moral obligation or responsibility of the Court"—*Rama Bapu*, 18 Bom L.R. 683, 17 Cr.L.J. 393 (394); *Virjiraghavalu*, 37 Mad 156, 26 M.L.J. 63, 1913 M.W.N. 77, 13 Cr.L.J. 684 (in this case the accused committed suicide); *Nrisingha*, 16 C.W.N. 550, 13 Cr.L.J. 592, 15 I.C. 1008.

Where a person executing bond under sec 117 (3), Cr. P. C., dies, proceedings against him as an accused must necessarily cease and there is no obstacle to an enquiry whether he has broken the conditions of the bond in order to take proceedings against the sureties under this section—*Namdeo v. Emp*, A I.R. 1938 Nag 275 (276), 40 Cr.L.J. 23, 187 I.C. 207, 1938 N.L.J. 79, 11 R.N. 210.

Arrest of the accused in another case:—Where the surety fails to produce the accused due to an act of law (for instance, where the accused is arrested and detained in custody or in jail on a criminal charge), his bail-bond should not be forfeited—*Alauddin*, 26 Cr.L.J. 833, 86 I.C. 657, A I.R. 1925 Pat 389, 6 P.L.T. 397, 4 Pat. 259, 3 Pat L.R. 123 (Cr), 1925 Pat H.C.C. 46. The most important point is not mere arrest but confinement under arrest on the date when production is to be made, which makes such production impossible. If, however, on being arrested in a different case the accused escapes from custody, the surety is not released from his liability by the mere fact that the accused was under arrest for one day or less between the date of the bond and the date when the accused must have been produced in Court—*Madan Mohan*, 32 Cr.L.J. 467, 130 I.C. 161, A I.R. 1931 Pat. 19, Ind Rul. 1931 Pat. 145, 1931 Cr.C. 55, 12 P.L.T. 814.

1334. What Court can proceed under this section:—So far as bonds generally are concerned, action may be taken under this section by the Court by which the bond was taken or by the Court of a Presidency Magistrate or a Magistrate of the first class. But in the case of a bond for appearance before a Court, the tribunal indicated is the Court and there is no other tribunal. Where the bond is for appearance before a Sessions Court, a Deputy Magistrate cannot take action for the forfeiture of the bond. The Sessions Judge cannot delegate that function to the Deputy Magistrate under sec. 516 which deals with the levy of the amount only—*Hiralal Sahu*, 14 C.W.N. 259, 10 Cr.L.J. 248 (250). Where a bail-bond was executed for due appearance of the accused before a certain Court, and no provision was made therein for his appearance before any other Court to which the case might thereafter be transferred, held that after such transfer, the former Court had no jurisdiction to forfeit the bond on ground of non-appearance of the accused either before the Court to which the was transferred or before itself—*Mayang Nge*, 2 Rang. 581 (586), 26 Cr.L.J.

personal recognizance to appear was taken from the accused by the Magistrate of Karjat. The accused having failed to appear on the day fixed, the Magistrate at Karjat issued a notice to the accused under this section. In the meanwhile, the accused was transferred to the Court of the Magistrate at Khalapat, who forfeited the bond and directed the accused to pay the penalty. It was held that the Magistrate at Khalapat had no jurisdiction to make the order under this section, as he was not the Magistrate who had taken the bond or before whom the accused had to appear on the date of default—*Mir Husen*, 16 Bom.L.R. 84, 15 Cr.L.J. 295. It is only the Court which has taken the bond that can enforce it—*Kanshi Ram*, 34 Cr.L.J. 952, 145 I.C. 270, A.I.R. 1933 Lah 678. The Presidency Magistrate of Bombay has no jurisdiction under this section to order the forfeiture of a bond for appearance before the *Police* taken by the Police under sec. 106 of the City of Bombay Police Act (Bom. Act IV of 1902)—*Crawford*, 42 Bom. 400, 19 Cr.L.J. 607, 20 Bom.L.R. 379.

See also *Mustaqimuddin* in Note 1333.

1335. Notice to show cause:—This section requires the Court to record grounds of the proof that the bond has been forfeited and a bond for the appearance is forfeited when the accused does not appear, but it does not require the Court to issue notice to show cause why the bond should not be forfeited—*Fatehchand Wadhmal v. Emp.*, A.I.R. 1940 Sind 136, 41 Cr.L.J. 802, 189 I.C. 800, I.L.R. 1940 Kar. 479.

If an order of forfeiture is passed without any notice to the person whose bond is forfeited, it amounts to a failure of justice, and the defect cannot be cured by sec. 537—*Sarju v. Jai Raj*, 25 Cr.L.J. 445, A.I.R. 1925 Oudh 51. Before a warrant can be issued for the attachment of his property, the surety should be called upon to show cause why he should not pay the penalty mentioned in the bond; and it should be clear on the face of the record that he was so called upon. A mere verbal and unrecorded order to show cause is not sufficient—*Khoode v. Doorgadass*, 15 W.R. 82. A summary order for recovering the amount due on the security bond from a surety without serving upon him any notice to pay the same or to show cause why it should not be paid, is invalid—*Jeebun Sheikh*, 9 W.R. 4. Where a Magistrate, in a proceeding to forfeit the surety bond for good behaviour issued notice to the surety and upon his non-appearance did not proceed to hold any inquiry as to whether the principal offender had committed any offence, but relying on the evidence he had recorded before giving notice, passed an order forfeiting the surety bond, held that the procedure was illegal in as much as the only evidence recorded was not recorded upon notice to the surety, and that the order must be set aside—*Moslem Mandal*, 54 Cal. 134, 44 C.L.J. 170, 27 Cr.L.J. 1293.

Where the Magistrate held the sureties to their bonds without calling upon them to show cause why the penalty should not be paid, the Magistrate undoubtedly failed to follow the appropriate procedure under this section. But where there is no real dispute about the facts, this is sufficient in the circumstances of the case to prevent interference in revision—*Ram Bilas v. Emp.*, A.I.R. 1940 Pat. 375 (376), 185 I.C. 598, 1940 P.W.N. 151, 21 P.L.T. 194, 41 Cr.L.J. 214.

Procedure, if party appears to show cause:—If the party appears to show cause, he should be allowed an opportunity to cross-examine the witnesses upon whose evidence the rule to show cause was issued—*Nobin Chunder*, 4 Cal. 865, 4 C.L.R. 243 (F.B.); *Har Chandra*, 25 Cal. 440. If the accused appears and shows cause, and the Magistrate still considers that the recognizance should be forfeited, it is his duty to record the evidence upon which it is proved that the accused has acted in such a way that it becomes necessary to forfeit the recognizance. There must be a regular judicial trial and legal inquiry before punishment can be inflicted—*Kalikant Roy*, 12 W.R. 54. Before it can be declared that a bond executed by a surety is forfeited, there must be a formal finding arrived at after taking evidence in the presence of such surety, which evidence must prove that the principal person has so acted as to necessitate or render it advisable that the surety should, by reason of the act of the principal, forfeit his bond—*Har Chandra*, 25 Cal. 440.

Discussing the rulings mentioned above it has been held that in case of bond under sec. 106, Cr. P. C., it is obviously necessary for the Magistrate to record evidence to prove the commission of a fresh breach of the peace and the forfeiture of the bond. Such evidence need not, according to the terms of this section, be taken in the presence of the respondent, but clearly, as was said in *Nobin Chunder*, supra, when the respondent appears and shows cause he must be given an opportunity of cross-examining the witnesses upon whose evidence the Magistrate had directed him to show cause why the bond should not be forfeited. The section does not require that before a final order is made the witnesses on whose evidence the forfeiture is held to be established, if they have been previously examined in the absence of the accused, must again be examined in his presence. Where a bond has been executed for appearance merely, it is often unnecessary for the Magistrate to record any evidence at all. The Magistrate knows by his own observation that the accused failed to appear in his Court. The burden of proving the negative, that is to say, that the accused absented themselves without reasonable cause for their non-appearance, is not upon the prosecution and it is for the surety to give an explanation why the accused person was unable to attend Court. The accused persons should be given an opportunity of proving their allegation, if they so desire. Where the Magistrate does not give the respondents a proper opportunity of showing cause, the order directing the forfeiture of the bonds will be set aside—*Kumarappan v. The King*, A.I.R. 1939 Rang 427, 185 I.C. 614, 41 Cr.L.J. 216.

See also Note 1333 under the heading "Proof of forfeiture of the bond."

1336. Order when to be passed:—If the accused's bond is forfeited, the Court may at once proceed to pass an order of forfeiture. If the accused fails to appear on the day fixed, the order of forfeiture of the bond of appearance is not illegal if it is passed on the very next day—*Nihal Chand*, 2 Bom.L.R. 589. Indeed, a Magistrate ought to take action immediately, otherwise it will be deemed that the Magistrate has decided not to take action under this section. Thus, where a person who is already bound over under Chap. VIII is charged with an offence before a Magistrate, and the Magistrate at the time of passing his sentence in the second offence knows that there is an outstanding recognizance, he should decide once for all whether he will proceed on it or not. If he does not make any order for the forfeiture of the recognizance, or makes no reference to the recognizance, it must be taken that he has decided not to forfeit the recognizance, and he cannot afterwards, in a subsequent and separate proceeding, reconsider his decision and direct forfeiture of the recognizance—*Munshi*, 25 Cr.L.J. 4, A.I.R. 1924 Lah 680, 75 I.C. 692; *Mawaz*, 1913 PR 13, 14 Cr.L.J. 67, 18 I.C. 403, 39 P.L.R. 1913 (F.B.); *Gul Khan*, 1904 PR 26, 1 Cr.L.J. 1100; *Ramchundra*, 1 CLR. 134; *Parbatti Churn*, 3 CLR 406; *Ali Mardan v. Bakar Khan*, 13 PR. 1913, 17 I.C. 680, 7 P.W.R. 1913, 27 P.L.R. 1913 (F.B.); *Bali Ram v. Ishar Chand*, 25 P.L.R. 1904, 65 P.L.R. 1904. But where, although the convicting Court and the confiscating Court were the same, there was nothing to show that at the time of conviction the Magistrate retained any knowledge of the fact that the accused was upon security and the case concerned the surety and not the convicted person, the order of confiscation was not illegal although it was not passed in the same judgment in which the man who had been bound down, was convicted—*Muam Shah*, 37 Cr.L.J. 849, 163 I.C. 443, A.I.R. 1936 Pesh. 141. But it is sufficient if the Magistrate passes an order of forfeiture in substantially the same proceeding in which he convicts the accused, though he does not pass such order immediately on conviction. Thus, where the Magistrate did not pass an order of forfeiture of security at the time of conviction of the principals, but while convicting them he plainly wrote in his judgment that "in as much as the sureties would forfeit Rs. 4,000 presently, I refrain from passing a heavy sentence on the accused," and then the Magistrate issued process to the sureties and confiscated the security in full; it was held that the Magistrate having plainly showed in his judgment his intention to confiscate, the order of forfeiture of security though passed subsequently after conviction was legal—*Hussain Khan*, 1917 P.R. 15, 18 Cr.L.J. 566, 39 I.C. 806. But the Allahabad High Court holds that the mere fact

that no immediate action is taken against a person under this section is no bar to his taking such action at a subsequent time; there is nothing in the language of this section which lays down any such limitation; the Magistrate can wait till the time of appealing has expired or till the appeal has been dismissed, and then he can proceed under this section—*Raja Ram*, 26 All 202, 1903 A.W.N. 237. This case has been followed by the Sind Court in *Jeomal*, 27 Cr.L.J. 326 (327), 92 I.C. 742, A.I.R. 1926 Sind 180, 20 S.L.R. 95. Even the Judges who decided the case of 1913 P.R. 13 (cited above) have also admitted that there is nothing in sec. 514 to debar a Magistrate who has convicted a person of an offence, which involves the forfeiture of the bond, from subsequently taking action against that person by forfeiting the bond in question.

Discussing the rulings mentioned above the Full Bench of the Lahore High Court has held that there is nothing in this section or any other part of the Code, which restricts expressly or by necessary implication the power of the Court to take action for realization of the penalty under the bond after the order convicting the accused had been passed. The mere fact that no immediate action under this section has been taken against the person under recognizance to keep the peace, or against the surety, on the conviction of the former to keep the peace, is no bar to such proceedings being taken, at a subsequent time, and the wide proposition to the contrary laid down in *Mawaz*, supra, cannot be supported. It is, of course, a matter for decision in each case, depending upon its own facts and circumstances, whether, when proceedings under this section has been taken subsequently, the penalty should or should not be exacted in whole or in part—*Rasul Khan v. Emp.*, 40 Cr.L.J. 505 (508), 180 I.C. 849, I.L.R. 1939 Lah. 283, 11 R.L. 725, 41 P.L.R. 69, A.I.R. 1939 Lah. 70 (F.B.).

If a person is bound down to keep the peace, say for one year, and the bond is forfeited, proceedings for forfeiture of the bond must be initiated within the term of the bond, i.e., within one year from the date of the bond; and if the proceedings are started within that period, the termination of the period of the bond before the proceedings are finished will not invalidate the subsequent order of forfeiture—*Uma Dutt*, 20 A.L.J. 692, 44 All. 657, 23 Cr.L.J. 623.

Moveable property:—During the surety's lifetime, only moveable property can be attached and sold for recovery of the penalty—*Nanhe*, 16 A.L.J. 503, 19 Cr.L.J. 711 (see this case cited in Note 293 under sec. 118). But a surety can offer house property as security under sec. 118, though his moveable property alone can be attached and sold—*Ibid.*

'His estate if he be dead':—These words were introduced into the Code of 1898 to meet *Gulab Shah*, 1894 P.R. 22, where it was held that the legal representative of a deceased surety could not be proceeded against under the provisions of this section.

1337. Liability of sureties:—See *A. N. Bhattacharjee v. Emp.*, in Note 1333. It is the duty of the surety to see that the accused does not run away, but where a surety has failed to produce the accused by reason of an illegal order passed by a Magistrate which the surety was not bound to carry out, and where there is no connivance and no negligence, it cannot be said that the surety has acted irresponsibly so as to be penalised—*Parbhu Dayal*, 49 All. 825, 28 Cr.L.J. 586 (587), 25 A.L.J. 537. A surety executed a bond whereby he undertook to produce the accused before the Magistrate of Agra during an inquiry into an offence. The Magistrate ordered the surety later on to produce the accused at Purnea. The surety sent the accused to Purnea, but the latter absconded on his way to Purnea. Nine months later the surety was ordered to produce the accused before the Magistrate at Agra in connection with a case at Purnea, and on his failing to do so his security was forfeited. Held that as the bond directed the surety to produce the accused at Agra, the first order directing the surety to produce the accused at Purnea was illegal. The second order was legal, but as the accused had absconded during an honest attempt of the surety to carry out the illegal order of the Magistrate (by sending the accused over to Purnea), the surety should not be penalised to the full extent, and the High Court directed that the order

forfeiting the sum of Rs. 1,000 be reduced to a sum of Rs. 250—*Parbhu Dayal*, supra. In the absence of anything to show that the surety was really responsible for the disappearance of the person for whose attendance he stood surety, and without inquiry into the circumstances under which he came to stand surety, the forfeiture of the whole amount of the bond is improper—*Kala Singh*, 22 P.W.R. 1907, 6 Cr.L.J. 275 (276).

Where the accused and the complainant came to an arrangement that they would not appear in Court on the next day of hearing and the surety having knowledge of the arrangement concluded that the case would not proceed, and took no steps to procure the attendance of the accused, *held* that the surety was not altogether relieved of his liability, but in such a case he should not be ordered to pay the full amount—*Ali Muhammad*, 27 P.L.R. 646, 27 Cr.L.J. 1152 87 I.C. 672. (In this case the High Court ordered that only Rs. 25 was to be recovered, where the full amount of the bond was Rs. 500.)

The liability of the sureties is not confined to the bail bonds alone. If a contract is required to be in writing, it is not the law that it must be contained in one piece of writing alone and the full terms of contracts in writing have often to be gathered from a series of letters passing between the parties put together. Where the sureties sign the order-sheet of the Magistrate against the part which contains the undertaking on which he accepted the bail bonds, the order-sheet with the sureties' signatures itself becomes a part of the contract between the parties—*Ram Bilas v. Emp.*, A.I.R. 1940 Pat. 375 (376), 185 I.C. 598, 1940 P.W.N. 151, 21 P.L.T. 194, 41 Cr.L.J. 214.

Only one bond should be taken from the accused and his sureties for one determinate amount, the sureties engaging to be bound jointly and severally for the same amount as the accused, so that it may be realizable from any one of the obligors, and there is no warrant in law for taking separate bonds from the accused and his sureties individually and severally exceeding in the aggregate the amount for which the accused is liable—*Jawaya*, 1890 P.R. 30 (Cr.) The bond executed by the principal and the bond executed by the surety are to be considered as *one* bond for *one* amount, and is discharged on forfeiture by the payment of the amount due by *either* the principal or the surety—*Kaku*, 1894 P.R. 26. In no case can an amount in excess of the amount secured by the bond be demanded or recovered from the person bound for his sureties, individually or collectively—*Ali Mahomed*, 1911 P.L.R. 226, 12 Cr.L.J. 404, 11 I.C. 588; *Kaung Nga*, 2 L.B.R. 235. Where the principal accused was bound over (under sec. 107) in the sum of Rs. 500, and his surety in the same amount, and on forfeiture of the bond the Magistrate ordered that the principal should forfeit the whole amount of his *bond*, viz., Rs. 500, and the surety should forfeit Rs. 250, *held* that the order was illegal; the Magistrate could not demand a sum in excess of Rs. 500, whether from the principal or from the surety or from both. The High Court modified the order of the Magistrate by directing the principal to pay Rs. 250 and the surety to pay Rs. 250—*Harnam*, 5 Lah. 448 (449), A.I.R. 1925 Lah. 228, 84 I.C. 546, 26 Cr.L.J. 322. See also *Guran Ditta*, 31 P.R. 1890 (Cr.). When the amount of the bond has been recovered from the principal, the sureties are not liable to any further amount. The liability of the surety is only a joint and several liability with the principal and there is no warrant to collect the amount twice over—*Nga Kaung*, 2 Cr.L.J. 463, U.B.R. (1905) 31; *Kaku*, 1894 P.R. 26; *Nanak Chand v. Anant Ram*, 26 P.R. 1894; *Abdul Aziz*, 4 Lah. 462, 25 Cr.L.J. 1131, 81 I.C. 955, A.I.R. 1924 Lah. 262. But the Calcutta High Court holds that on the breach of the bond *both the surety and the principal* are liable to pay the penalty of their respective bonds; and the surety is liable quite irrespective of the question whether the amount of the bond of the principal has been realised or not. The liability of the surety is not co-extensive with that of the principal as in the ordinary case of a surety for a debtor for the payment of his debt, where the surety is discharged as soon as the principal debtor pays the money due from him. Here the surety is an additional safeguard against a breach of the peace. Therefore, where the principal accused was bound down in the sum of Rs. 100, to keep the peace under sec. 107, and the surety bound himself in the sum of Rs. 50 and upon the bond of the accused being

declared forfeited, both he and his surety were ordered to pay the amounts of their respective bonds (*viz.* Rs. 100 and 50), *held* that the order was not illegal—*Saligram*, 36 Cal. 562, 9 C.L.J. 296, 13 C.W.N. 555, 2 I.C. 592, 10 Cr.L.J. 89. The Allahabad, Madras, Sind and Peshwar rulings are to the same effect—*Q-E. v. Rahimbux*, 20 All. 206, 1898 A.W.N. 21; *Rajaram*, 26 All. 202, 1903 A.W.N. 237; *Kulur Alapa Naih*, 10 Cr.L.J. 294, 8 I.C. 470; *Kuldip Sahai*, 9 Cr.L.J. 296; *Abdul Karim*, A.I.R. 1933 Sind 320, 147 I.C. 127, 1933 Cr.C. 1074, 35 Cr.L.J. 315; *Miram Shah*, 37 Cr.L.J. 849, 163 I.C. 443, A.I.R. 1936 Pesh. 141. The correct form of the bond to keep the peace is given in Sch V and the correct form of the bond by sureties is also given in the same schedule. These show that the surety does not take responsibility for the payment of the amount forfeited by the principal in the event of the principal failing to pay it, but enters into a direct bond taking responsibility that the principal shall not commit a breach of the peace—*Miram Shah*, *supra*.

In *Sardar Khan v. Emp.*, A.I.R. 1937 Lah. 133, 17 Lah. 523, 38 P.L.R. 951, 167 I.C. 746, 38 Cr.L.J. 420, the Lahore High Court has observed that the considered decision of the Calcutta High Court in *Saligram*, *supra*, is to be preferred to the Lahore decisions, given above, as the view expressed in those decisions is, on first principles and also on a consideration of the words of the statute, untenable. It has been held therein that the order requiring a surety, who executed a bond in accordance with the provisions of sec.106, Cr. P. C., to pay the full amount specified in the bond in addition to any amount which may be recovered from the principal is in accordance with law. In a recent case *Skemp, J.*, of the same High Court, has, however, followed *Abdul Aziz*, *supra*, and has observed: "In the first place it is the principal bond which was to be forfeited; only if that cannot be realized, is the surety liable to pay. The same principle would apply to a fractional sum out of the bond"—*Chanda Singh v. Emp.*, 41 Cr.L.J. 359, 186 I.C. 642, A.I.R. 1940 Lah. 32.

The Oudh Chief Court has, however, not accepted the view of the Calcutta High Court. It has held that where persons execute bonds for keeping peace together with sureties, upon the failure to keep peace the principals can be called upon to pay the amount under the bond and any one of the sureties can also be called upon to pay the same amount but if any one is called upon to pay the whole amount under the bond any other on that bond, be he principal or surety, cannot be ordered to pay anything more—*Abdus Sattar v. King-Emp.*, 39 Cr.L.J. 831 (834), 176 I.C. 948, 11 R.O. 7, 1938 A Cr.C. 55, 1938 O.L.R. 355, 1938 O.A. 566, 1938 O.W.N. 676, A.I.R. 1938 Oudh 195.

As regards the liability of sureties *per se*, if three sureties sign a bond, they are jointly and severally liable to pay the amount of the bond, but every one of them cannot be called on to pay the whole amount; the sum named can be recovered only once—*Mahomed Ibrahim*, 8 S.L.R. 173, 16 Cr.L.J. 100, A.I.R. 1914 Sind 13. Where a bond for Rs. 2,000 under sec. 117 (3), Cr. P. C., is executed and there are two sureties for a like amount, the two sureties are jointly and severally liable and, therefore, more than a total sum of Rs. 2,000 cannot be recovered from them—*Namdeo v. Emp.*, 40 Cr.L.J. 23 (25), 178 I.C. 207, 1938 N.L.J. 79, A.I.R. 1938 Nag. 275, 11 R.N. 210.

Right of sureties:—Since sureties on a bond are required in order that the failure of the principal to appear may be at their peril, it follows that the object of this provision is defeated if the principal and surety are allowed to relieve the latter of the peril and confine it to the former by any arrangement among themselves. Therefore, an agreement by an accused with his surety that the accused will indemnify the surety if the bail is forfeited on account of his non-appearance, is void—*Jodhraj v. Bishanlal*, 20 N.L.R. 166.

It is essential that when a man stands surety for the appearance of another that he should take every precaution to insure the carrying out of his undertaking. If the surety in such circumstances is allowed to recover any sum forfeited under the bond either from the actual person for whom he stood surety or from any person who induced him to so stand, it would only tend to render the surety callous and the whole object of demanding the bond would be defeated—*Bhana Mal v.*

Bhartu Mal, A.I.R. 1932 Lah. 23, 135 I.C. 224, 32 P.L.R. 739. The principle of law was laid down in a case where a surety executed a bond by which he undertook to produce a judgment-debtor in a Civil Court when necessary and the bond was forfeited on his failure to do so.

1337A. Sub-section (4):—Imprisonment:—When default is made in payment, the Magistrate cannot forthwith direct imprisonment. He should order the attachment and sale of the defaulter's moveable property, and if the penalty cannot be recovered from such attachment and sale, then and then only can he direct imprisonment—*Mokesh Chandra*, 10 C.L.R. 571; *Maung Po v. Maung Shwe*, 30 Cr.L.J. 346 (348), 114 I.C. 682, A.I.R. 1928 Rang. 310, Ind. Rul. 1929 Rang 74; *Reoti Prasad*, A.I.R. 1934 All. 1046, 36 Cr.L.J. 297, 153 I.C. 155, 1934 Cr.C. 1329.

1338. Sub-section (5)—Remission of penalty:—It is not really fine, but penalty incurred by way of forfeiture under this section—*Imarat Mallik*, 39 Cr.L.J. 473, 174 I.C. 823, 10 R.C. 728, A.I.R. 1938 Cal. 255.

This sub-section gives the Court power to remit the penalty or to reduce its amount. Under the Codes of 1872 and 1861, neither the Magistrate nor even the High Court in revision had power to reduce the amount of the penalty under a recognizance bond which had been forfeited. See *Naki Haji*, 8 C.L.R. 72; *Nurul Huqq*, 3 Cal. 757; *Nilmadhub Ghoshal*, 19 W.R. 1. If the Magistrate thought that the amount of recognizance was excessive, he was to refer the matter to Government—*Ibid*.

The Court remitted portions of penalty where the accused had been subsequently arrested and the amount forfeited was excessive and the surety was unable to pay—*Jora Singh*, A.I.R. 1933 Lah. 42, 145 I.C. 967, 1933 Cr.C. 121, 34 Cr.L.J. 1158, 34 P.L.R. 895; *Girindra*, A.I.R. 1935 Cal. 246, 37 Cr.L.J. 77, 159 I.C. 385, 1935 Cr.C. 319, where the surety did not act irresponsibly and there had been no connivance or negligence on the part of the surety; *Probhudayal*, A.I.R. 1927 All. 831, 102 I.C. 554, 28 Cr.L.J. 586, 49 All. 825.

1339. Sub-section (7)—Admissibility of judgment of conviction:—This sub-section has been newly enacted. Under the old law there was a conflict of opinion among the High Courts. The Allahabad and Punjab Courts laid down that where a person who had given a security bond with a surety for good behaviour, was convicted of an offence, the production of the judgment of conviction and the proof, if necessary, of the identity of the principal was sufficient evidence upon which a Magistrate was competent to issue notice to the surety. It was not incumbent on the Magistrate to prove that the principal was properly convicted, by re-summoning the witnesses on whose evidence the principal was convicted—*Man Mohan*, 21 All. 86; *Wadhawa*, 1903 P.R. 32, 15 P.L.R. 1904; *Ali Mahomed*, 12 Cr.L.J. 404, 11 I.C. 588, 1911 P.L.R. 226. But in *Har Chandra*, 25 Cal. 440 it was held that the mere production of the original record or of a certified copy of the original record of the trial in which the principal was convicted would not be conclusive evidence to show that the accused had really committed an offence; such fact must be proved by evidence taken in the presence of the surety, unless it was admitted by him. The present sub-section adopts the view of the Allahabad and Punjab decisions. "There has been a conflict of opinions whether a judgment convicting the principal in a bond taken under the Code and ordering the forfeiture of the bond is sufficient *prima facie* proof in proceedings under this section against the sureties. The amendment permits the use of such a judgment as evidence in such proceedings and directs that the Court shall presume that such offence was committed unless the contrary is proved"—*Statement of Objects and Reasons* (1914).

The judgment of conviction is undoubted evidence against the principal himself. Thus, where the bond is given by the person bound to keep the peace, the judgment convicting him of breach of the peace is admissible in evidence against him, and may form a sufficient basis for an order under this section, he having had an opportunity

of cross-examining the witness on whose evidence the forfeiture is held to be established—*Har Chandra*, 25 Cal. 440; *Nobin Chunder*, 4 Cal. 865.

Revision:—The High Court can revise all orders made under this section. See notes under section 515.

514A. *When any surety to a bond under this Code becomes insolvent or dies, or when any bond is forfeited under the provisions of section 514, the Court, by whose order such bond was taken, or a Presidency Magistrate or Magistrate of the first class, may order the person from whom such security was demanded to furnish fresh security in accordance with the directions of the original order, and if such security is not furnished, such Court or Magistrate may proceed as if there had been a default in complying with such original order.*

This section has been added by sec. 140 of the Cr. P. C. Amendment Act, XVIII of 1923, to make up the deletion of certain words in sub-section (6) of section 514. It also covers the case of a surety who becomes insolvent.

514B. *When the person required by any Court or officer to execute a bond is a minor, such Court or officer may accept, in lieu thereof, a bond executed by a surety or sureties only.*

"We have added a new section 514B to provide for the case of a bond being required from a minor"—*Report of the Select Committee* (1916).

Under the old law, where a person released on probation under section 562 and ordered to execute a bond for good conduct was a minor, the bond could not be executed by his sureties; see *Mi Pyu*, 4 L.B.R. 12, 6 Cr.L.J. 123. This is no longer law.

515. All orders passed under section 514 by any Magistrate other than a Presidency Magistrate or District Magistrate, shall be appealable to the District Magistrate, or, if not so appealable, may be revised by him.

1341. Appeal and revision:—Under the old Codes of 1861 and 1872 there was no provision for appeal or revision of orders forfeiting a security bond under sec. 514; see *Ananthachari v Ananthachari*, 2 Mad. 169. This section makes provision for such appeal or revision.

Under this section, all orders passed by the subordinate Magistrates shall be appealable to the District Magistrate, but not to any other first Class Magistrate—*Shambhaji*, Ratanlal 384. A Sub-divisional Magistrate authorized to hear appeals under sec. 407 (2), Cr. P. C., has no power to hear appeals under this section from an order under sec. 514, Cr. P. Code—*Muhammad Shah*, 36 Cr.L.J. 557, 154 I.C. 522, A.I.R. 1934 Lah. 294, 1934 Cr.C. 525.

Where an appeal from an order under sec. 514 is not admitted by the District Magistrate as being time-barred, it is within the competence of the District Magistrate to revise the order under this section without making a reference to the High Court for revision—*Pandhi Khan*, 36 Cr.L.J. 215, 152 I.C. 874, A.I.R. 1934 Sind 152, 1934 Cr.C. 1144.

A bond for keeping the peace or for good behaviour is not given to any particular person but to the Court, and no private party is entitled to appeal against an order of

a Magistrate refusing to forfeit the bond, but it is open to the District Magistrate to take action in revision—*Sarju v. Jai Raj Kumar*, A.I.R. 1925 Oudh 51, 25 Cr.L.J. 445, 77 I.C. 733

Orders passed by a District Magistrate under this section may be subject to revision by the High Court—*Masta*, 1905 P.R. 15, 2 Cr.L.J. 131.

516. The High Court or Court of Session may direct any Magistrate to levy the amount due on a bond to appear and attend at such High Court or Court of Session.

Power to direct levy of amount due on certain recognizances.

This section empowers the Court of Session to delegate his power of levying fine to a Magistrate; but he cannot delegate his power of *initiating proceedings* for forfeiture of the bond—*Hira Lal Sahu*, 14 C.W.N. 259, 3 I.C. 113, 10 Cr.L.J. 248 (250) (cited in Note 1334 under section 514).

CHAPTER XI.III.

OF THE DISPOSAL OF PROPERTY.

516A. When any property regarding which any offence appears to have been committed, or which appears to have been used for the commission of any offence, is produced before any Criminal Court during any inquiry or trial, the Court may make such order as it thinks fit for the proper custody of such property pending the conclusion of the inquiry or trial, and, if the property is subject to speedy or natural decay, may, after recording such evidence as it thinks necessary, order it to be sold or otherwise disposed of.

1341A. Scope:—This section has been newly added by sec. 141 of the Cr. P. C. Amendment Act, XVIII of 1923: "It is proposed to add to the chapter a new section to enable the Court to pass orders for the custody or disposal of property during an inquiry"—*Statement of Objects and Reasons* (1914). Under the old law, an order for disposal of property could be made only when the inquiry or trial was *concluded* (sec. 517), but no order could be made while the offence committed in connection with such property was still under inquiry, and the trial was not yet ended—*Valji Mahomed*, Ratanlal 957; *Nux Mohamed v. Jafar Meher*, 5 Cr.L.J. 147, 5 C.L.J. 229. This section enables a Court to make an order for disposal of property pending the inquiry or trial.

"Property used for the commission of an offence":—See Note 1343 under sec. 517. Where a motor-driver is prosecuted for an offence under sec. 338, I P. C., it cannot be said that the motor car has been used by the accused for the commission of an offence; consequently, it is illegal for the Magistrate to detain the car pending the conclusion of the trial—*Phula Singh*, 1931 Cr.C. 853, A.I.R. 1931 Lah. 565. Cf. *Ilahi Baksh*, 4 P.L.R. 1904, 1 Cr.L.J. 38.

Where the accused was charged with cheating or, alternatively, criminal breach of trust and it appeared that the accused had an account with a bank and the police served a "stop order" on the bank to prevent the accused from operating on his account, held that no such order can be made on the bank, nor is there any section

1342. Scope of section:—Under the Code of 1882, the operation of this section was much restricted, and the Court could make an order under this section only with reference to property in respect of which any offence had been committed or which had been used for the commission of any offence: otherwise not—*Fattah Chand*, 24 Cal. 499; *Basudeb v. Nazruddin*, 14 Cal. 834; *Anna Purna Bai*, 1 Bom. 630; *Anant Ramchandra*, 10 Bom. 197; *Ratanlal Ranglidas*, 17 Bom. 748; *Devidin*, 22 Bom. 844; and the order could be made only when the offence was actually under investigation or trial by the Court—*Amra Nathu*, *Ratanlal* 500; *Abdul Khalik*, 46 P.R. 1888.

Under the 1898 Code, the scope of the section has been enlarged and an order can be made with regard to any property produced before the Court, or in its custody, even though it has not been used for the commission of any offence or though no offence in regard to it has been committed—*Rassul v. Ahmed*, 34 Cal. 347; *Pyde Ramanna*, 42 Mad. 9; *Maung Ma v. Ma Kra*, 6 Rang. 259, 29 Cr.L.J. 958; or though the offence actually under investigation is not in connection with the property or is not proved—*Parasanada*, 2 Weir 666. See also *Gulabchand Umayi*, A.I.R. 1937 Sind 33 (35).

In a Madras and a Calcutta case, it was held that this section applied only when it appeared that an offence had been committed with respect to a property; and therefore where a person was bound down for good behaviour under sec. 109 or 110, but it did not appear that any offence had been committed with respect to the property in dispute which the accused claimed as his own, held that no order could be passed under this section as to the property—*Govindaranja Padayachi*, 16 Cr.L.J. 811, 31 I.C. 827, A.I.R. 1916 Mad. 839; *Surendra v. Rai Mohan*, 30 Cal. 690, 7 C.W.N. 634. These decisions are incorrect as the Judges failed to notice the amendment made in the 1898 Code of the addition of the word "produced before it or in its custody". Section 517 gives jurisdiction to a Criminal Court to pass an order of confiscation of property produced before it in proceedings under section 109 or 110, though there is no proof that an offence has been committed in respect of such property or that such property has been used for the commission of any offence—*Pyde Ramanna*, 42 Mad. 9 (12), 49 I.C. 167, 8 M.L.W. 350, 24 M.L.T. 256, 20 Cr.L.J. 135; *Bem Madho*, 38 Cr.L.J. 175, 166 I.C. 271, A.I.R. 1936 Nag. 143, 1936 Cr.C. 694, I.L.R. 1936 Nag. 150.

See *U Ba Hlaing v. Balabux Sodani*, cited in Note 1331 under the heading "Nature of proceedings."

See also Note 1362A.

1343. Property—Property produced in Court:—When a portion of a property (e.g., a portion of salt or other articles in bulk) is produced in Court and received in evidence as a sample, the whole bulk is taken to have been produced before the Court, and the Magistrate can make an order with respect to the entire bulk—*Anonymous*, 2 Weir 670.

Where the accused was convicted of criminal breach of trust in respect of two G. P. Notes, the Court cannot direct the restoration to the complainant of the renewed notes subsequently issued in lieu of the old at the instance of a third party who was no party to the criminal case; because the renewed notes cannot be said to be property produced before the Court or in its custody or regarding which an offence has been committed—*Zainul Abidin*, 9 O.W.N. 434, 1932 Cr.C. 521, 33 Cr.L.J. 569, 138 I.C. 156, A.I.R. 1932 Oudh 218, Ind. Rul. 1932 Oudh 292.

This section not only refers to property in respect of which an offence has been committed but also the property before the Court and in its custody—*Gulabchand Umayi*, 38 Cr.L.J. 382 (384), 167 I.C. 428, A.I.R. 1937 Sind 33, 9 R.S. 190; *Namdeo*, 39 Cr.L.J. 342 (343), 173 I.C. 620, A.I.R. 1938 Nag. 316, I.L.R. 1938 Nag. 454, 10 R.N. 314.

Property regarding which an offence appears to have been committed:—In order that the Magistrate should have jurisdiction to dispose of property, it is only necessary that he should find that it appears that an offence has been committed in respect of that property and it is not necessary that the property should be proved to have been

stolen—*Kasiram Marwari v. Makhanji Dwarka Prasad*, 38 Cr.L.J. 1091 (1092), 171 I.C. 589, 18 P.L.T. 441, A.I.R. 1937 Pat. 591, 10 R.P. 221, 4 B.R. 40. These words mean property which has been the subject of offences like theft or criminal misappropriation—*Abinash Chandra*, 34 Cal. 986, 11 C.W.N. 1046, 6 C.L.J. 754, 6 Cr.L.J. 293. Where the accused gave false information that his jewels were stolen and afterwards these jewels were found in his possession, and the Magistrate after convicting him of an offence under section 182, I. P. C., confiscated those jewels under this section, it was held that the order under this section was illegal, because the jewels were neither produced before the Court nor was there any offence committed with regard to them—*Lakshmi Narayan*, 9 C.W.N. 597, 2 Cr.L.J. 273.

Cash is not, strictly speaking, property, except in so far as it is capable of being possessed and identified in specie. If, however, it is certain that the coins found on the person of thieves are the actual coins which have been the subject of theft, then it is permissible to treat such coins as stolen property and the Magistrate can pass an order as to their disposal (e.g., an order to pay them to the complainant as compensation). But coins which have been put into circulation and passed on to other persons cannot be treated in the same way as stolen coins actually remaining in the possession of thieves—*Parsu*, 18 S.L.R. 218, 26 Cr.L.J. 1315. But in an Allahabad case, where the accused embezzled some money from a Bank and sent part of the embezzled money to one of his creditors in notes under insured cover which was traced and seized by the police, and the Magistrate after convicting the accused ordered the money to be handed over to the Bank, held that the order was strictly justified under the provisions of this section, as the money was "property in respect of which an offence was committed" and it was property to which the Bank was entitled—*Bankey Lal v. Allahabad Bank*, 23 A.L.J. 889, 26 Cr.L.J. 1232. Where in certain disputes regarding possession of boats, nets and tackle a quarrel arose which ultimately ended in riot, assault and murder, held the boats, nets, tackle were "properties regarding which an offence was committed," the attempt to take possession of the boats, etc., was the occasion which gave rise to the quarrel which ultimately ended in the murder, although the boats were not actually the subject of the offence of murder. The words "property regarding which an offence has been committed" include moveable property regarding the possession of which a quarrel or riot is begun, whatever may be the offence which might ultimately be committed in the course of the quarrel or fight—*Sheikh Dawood v. Velayuda*, 51 Mad. 606, 54 M.L.J. 312, 29 Cr.L.J. 322 (323), 108 I.C. 65, A.I.R. 1928 Mad. 194, 27 M.L.W. 132, 9 A.I.Cr.R. 538.

Where the accused were prosecuted under section 17 (2) (a), Bihar and Orissa Mica Act (I of 1930) for not entering some quantity of crude mica in the stock book, pleaded guilty and were sentenced and they were not asked to meet a charge of having obtained mica by illicit means, and the mica, which was seized, was not made an exhibit, the mica was not a property regarding which any offence was committed and it was not a fit case in which confiscation should be ordered—*Mani Ram*, 38 Cr.L.J. 602, 168 I.C. 795, 18 P.L.T. 146, A.I.R. 1937 Pat. 257, 3 B.R. 486, 9 R.P. 505, 16 Pat. 323, 1937 P.W.N. 167.

An order directing the keys of a house to be made over to the complainant is in fact an order directing that possession of the house in dispute be delivered to him for the purposes of this section—*Sundar Das*, 32 Cr.L.J. 847, 132 I.C. 202, A.I.R. 1931 Lah. 527, 1931 Cr.L.J. 751.

The Magistrate can dispose of property stolen in British territory, though the Police might have seized it in foreign territory—*Kushen Koer*, 1878 P.R. 20.

"Property used for the commission of an offence":—This means property which has been instrumental in the commission of an offence, e.g., guns or swords—*Abinash Chandra*, 34 Cal. 986, 11 C.W.N. 1046, 6 C.L.J. 754, 6 Cr.L.J. 293. Thus, where the accused stole two bullocks and killed them, it was ordered that the axe and the knives with which he slaughtered the animals and which were found with the accused when he was arrested, should be confiscated and sold—*Bhura*, 26 Cr.L.J. 1495 (1496).

10 I.C. 151, A.I.R. 1026 Nag. 89 (Nag.). But any instrument or thing which is too remotely connected with the commission of an offence cannot be confiscated under this section. Thus, it is illegal to confiscate a press in which a seditious matter has been published, because the press is a too remote instrument and cannot be said to be property which has been used for the commission of the offence—*Abinash Chandra*, supra; *Pandi Das*, 1907 P.W.R. 37, 6 Cr.L.J. 411 (416). A Magistrate convicting a person for gambling under secs. 6 and 7 of the Madras Towns Nuisances Act cannot confiscate the money found in his waistcoat pocket, when there was no evidence to show that the money was actually staked—*Appaji Aiyar*, 41 Mad. 644. So also, a boat which has been used by the accused in going to commit a theft or in escaping from pursuit, cannot be said to be property used for the commission of an offence—*Farid Gazi*, 8 C.W.N. 387; see also *Beera*, Ratanlal 688. Similarly, where the accused has been guilty of rash driving, it is illegal to pass an order that the cart and pony of the accused should be sold and the sale proceeds paid over to the complainant as compensation—*Ilahi Baksh*, 1904 P.L.R. 4, 1 Cr.L.J. 38. Cf. *Phula Singh*, 1931 Cr.C. 853, A.I.R. 1931 Lah. 565. Where several counterfeit currency notes were prepared from a genuine currency note, it cannot be said that the genuine currency note has been used for the commission of the offence of counterfeiting currency notes. The Judge is therefore wrong in ordering the genuine currency note to be confiscated and sent to the Collector for cancellation. It should be returned to the accused—*Gopal Raghunath*, 53 Bom. 344, 31 Bom.L.R. 148, 30 Cr.L.J. 588 (593).

Where some books would be works which would supply the material on which the accused could write the articles on Russia which were among the activities of which he had been found guilty, the books might be said to have been used by him for the commission of the offence of section 121A, I. P. C., and should not be returned to him under this section—*Phillip Spratt*, 35 Cr.L.J. 1389, 151 I.C. 735, 1934 A.L.J. 425, A.I.R. 1934 All 207, 7 R.A. 195, 4 A.W.R. 550. This decision has gone a little beyond what is contemplated in this section—*Mani Ram*, 38 Cr.L.J. 602 (605), 168 I.C. 795, 18 P.L.T. 146, A.I.R. 1937 Pat. 257, 3 B.R. 486, 9 R.P. 505, 16 Pat. 323, 1937 P.W.N. 167.

Property must be moveable:—This section has no application to immovable property. Where the accused dispossessed the complainant of his garden by breaking the pad-lock of its gate and were convicted of the offence of criminal trespass the Court had no power to order the restoration of the garden to the complainant under this section as this section did not apply to immovable property—*Sheonandan v. Bholanath*, 18 C.W.N. 1146, 15 Cr.L.J. 222. See also *Adepu Reddi v. Ramayya*, 12 L.W. 227, 22 Cr.L.J. 110, 59 I.C. 414. An order for demolition of a wall on a conviction for building in contravention of Municipal rules is *ultra vires*, and sec 517 cannot apply to a case of this kind—*Nanhu*, 1900 A.W.N. 81. *Contra*—*Tun Hla v. Shwe Ngo*, 4 L.B.R. 229, 7 Cr.L.J. 490, where the word 'property' was held to include immovable property.

Property must have been in existence:—No order can be made under this section with respect to property which was not in existence at the time of the offence. Thus an innocent purchaser of a stolen cow cannot be ordered to deliver up the calf which was not even in embryonic existence when the theft took place, but which was given birth to by the cow while she was in his possession—*Vernede*, 10 Mad. 25.

1344. Order, when can be made:—According to the words of this section an order for disposal of the property can be made only upon the conclusion of the trial, and not long after the conclusion of the trial—*Nani Mal*, 24 Cr.L.J. 804 (All). See also *Rash Mohan v. Kali Nath*, 19 W.R. 3 (Cr.), which is directly based on the words in section 132 (a) of the Code of Criminal Procedure, 1861. An order for disposal of property passed 14 days after the date of the passing of the judgment in the trial is not invalid—*Kishan Chand v. Nanak Chand*, 7 Lah.L.J. 625, 89 I.C. 973, A.I.R. 1926 Lah. 9, 26 Cr.L.J. 1453. But in another Lahore case it has been held that the order under section 517 and the judgment in the trial must be contemporaneous. And

so, if no order is passed by a Court in respect of the disposal of the property on the conclusion of the trial of the accused, the Court has no jurisdiction to pass an order at any subsequent time directing delivery of the property to the complainant—*Abdul v. Ghulam Muhammad*, 4 Lah. 460 (461), 76 I.C. 20, A.I.R. 1924 Lah. 261, 25 Cr.L.J. 84. This case has been dissented from in 7 Lah.L.J. 625, cited above. See also *Kanshi Ram v. Emp.*, A.I.R. 1924 Lah. 75, 73 I.C. 937, 24 Cr.L.J. 713, 4 Lah. 49, where it was held that there was no period of limitation for an order under this section. After reviewing the rulings quoted above the Patna High Court has held that section 517 gives jurisdiction to the Court to pass necessary orders for the disposal of property either at the time of the conclusion of the trial or at a later date. It would be surprising if this were not so in relation to property in the custody of the Court, for, it is the duty of the Court to make some arrangement for its disposal and it must continue to be the Court's duty until the property is disposed of in some way or other either by destruction or by passing out of the hands of the Court. Section 517 cannot be read as requiring that the order for disposal of property must be passed simultaneously with the judgment of the case unless words that are not in the section are read into it. The passing of such orders should not be unreasonably postponed, but the lapse of time does not relieve the Court of the duty and the corresponding jurisdiction to pass orders for the disposal of property which is in the Court's custody or under its control—*Deopujan Mahto v. Kukur Ahir*, A.I.R. 1940 Pat. 198 (200), 1939 P.W.N. 911, 41 Cr.L.J. 559, 188 I.C. 260, 21 P.L.T. 448, 19 Pat. 337.

Where the order disposing of the property under section 517, Cr. P. C., was not made on the application of any party and after notice but was made in the property register probably at the instance of the office, it cannot be upheld. The application of the petitioner for return of the property to him must be dealt with according to law—*Akella Rama Krishnayya v. Devulapalli Seethamma*, 41 Cr.L.J. 275, 186 I.C. 224, A.I.R. 1939 Mad. 916, 1939 M.W.N. 740.

No order as to the disposal of property can be made under this section if the trial is barred under sec. 403. The words 'when an inquiry or trial is conducted' cannot apply to a case in which the Court is prohibited from conducting a trial at all—*Tun Hla v. Shwe Ngo*, 4 L.B.R. 229, 7 Cr.L.J. 490.

An order under this section can be made when an inquiry or trial is concluded; that is, there must have been some inquiry or trial before the Magistrate. Therefore, where there was no criminal proceeding before the Magistrate, he had no jurisdiction to pass an order directing delivery of a property, which was in the possession of the opposite party, to the applicant merely on the application of the latter—*Sreedam Chunder v. W. J. O'Grady*, 6 C.L.J. 707, 6 Cr.L.J. 402 (403). Where the complainant practically abandoned the prosecution and the matter of complaint was not investigated, the Court would not be justified in making any order under this section. The proper order in such a case would be to let the property remain with the person in whose possession it was when the criminal proceeding was started—*Brojendra v. K. S. Sama*, Ind. Rul. 1931 Cal. 614, 132 I.C. 902, 32 Cr.L.J. 983, A.I.R. 1931 Cal. 455, 35 C.W.N. 198 (200), 1931 Cr.C. 607; *Hrisikesh Ghosh v. R. P. Michael*, 67 C.L.J. 569. It has also been laid down that there is no reason why on principle the Magistrate should not order the resumption of the *status quo* so that the determination of the rights of the parties might be properly sought before the Civil Courts. The language of the section is wide enough to cover an order such as this, and that there is no lack of jurisdiction in the Magistrate—*Rama Iyer v. S. P. Das Gupta*, 34 Cr.L.J. 676, 144 I.C. 78, A.I.R. 1933 Cal. 149, 1933 Cr.C. 226, Ind. Rul. 1933 Cal. 495.

Where in a case under sec. 379, I. P. C., the police seized some articles used in cultivation from the possession of one of the accused and after investigation referred the case as one of civil nature and the Magistrate struck off the case from the Police file but, on the recommendation of the police, ordered that the articles be returned to the complainant, held that the property was seized from one of the accused and it has

to be returned to him—*Paidi Subbaya*, 41 Cr.L.J. 203, 185 I.C. 440, A.I.R. 1939 Mad. 905, 1939 M.W.N. 739.

Where a person charged with criminal breach of trust in respect of certain jewels died before the day fixed for his trial, and there was *no trial*, no order could be made by the Magistrate under this section. The jewels were ordered to be returned to the person from whom the Police recovered them—*Kuppanmal*, 29 Mad. 375, 4 Cr.L.J. 233.

See Note 1362A.

Order discretionary:—Orders under this section are discretionary. The section invests the Magistrate with a discretionary power and it is a rule of law that such power must be exercised judicially, i.e., according to the sound principles of law and not in an arbitrary manner—*Sadashiv*, 11 Bom.L.R. 16, 9 Cr.L.J. 162. This discretion is open to correction by the High Court where it has been exercised in violation of judicial principles—*Pandharinath*, 40 Bom. 186, 16 Cr.L.J. 783, 17 Bom.L.R. 922, 31 I.C. 383, A.I.R. 1915 Bom. 265.

Any property or document in regard to which an offence appears to have been committed or which has been used for the commission of an offence should not be returned by a Criminal Court to the person who has been convicted—*Philip Spratt*, 35 Cr.L.J. 1389, 151 I.C. 735, 1934 A.L.J. 425, A.I.R. 1934 All. 207, 4 A.W.R. 550, A.I.R. 1934 All. 549, 7 R.A. 195.

1345. Nature of order under this section:—The old section stated that the Magistrate could make such order as he thought fit, for the '*disposal*' of the property. This was a general term and the nature of the order to be passed for disposal was not specified. It depended upon the discretion of the Magistrate to say that order was to be passed having regard to all facts of the case—*Sadashiv*, 11 Bom.L.R. 16, 9 Cr.L.J. 162. Under the amended section the word '*disposal*' has been elucidated by certain explanatory words.

Order in a bribe case:—When the accused was convicted of taking bribe and the money paid as bribe was deposited in Court by the complainant, the Magistrate could order a portion of the bribe to be confiscated and the rest to be paid to the complainant—*Buta Singh*, 1873 P.R. 9.

Order in respect of currency note:—Where the accused stole a currency note from the complainant and changed it at the Government Treasury, then on conviction of the accused for theft, the currency note should be delivered to the Treasury and not to the complainant. Currency note is money and the ownership passes by mere delivery, and the original owner cannot claim the amount as against the Treasury—*Nizam v. Jacob*, 19 Cal. 52. The accused purchased some gold ornaments and handed to the jeweller a currency note which he had stolen. The jeweller not having had adequate cash took the note to a neighbouring shopkeeper who cashed it in good faith. Afterwards, during the prosecution of the accused, the note was attached from the shopkeeper, and on conviction of the accused the Magistrate ordered it to be returned to the Crown whose property it was found to have been. *Held* that the currency note should be returned to the shopkeeper, for property in it had passed to him by mere delivery—*Pandharinath*, 40 Bom. 186, 31 I.C. 383, 16 Cr.L.J. 783, A.I.R. 1915 Bom. 265, 17 Bom.L.R. 922. Title to a currency note passes by mere delivery, and therefore where a stolen currency note was recovered from an innocent third person, it should be returned to that person, and not to the person who lost it by theft—*Srinivasamoorthi v. Narasimhalu*, 50 Mad 916, 28 Cr.L.J. 879 (880). See also *In re Collector of Salem*, 2 Weir 664, 7 M.H.C.R. 233; *Joggesur Mochi*, 3 Cal. 379. But where the notes did not pass to the petitioner's firm in the ordinary course of business and an offence had been committed with reference to the notes within the meaning of this section and the circumstances in which the offence was committed seem *prima facie* to indicate that the petitioner had allowed himself to be duped by the accused, the Magistrate cannot be said to have improperly exercised the discretion vested in him under this section by directing the petitioner's firm to return the currency notes

to the complainant's firm—*Akshoy Kumar Saha v. Naba Kumar Singh Dudhuria*, A.I.R. 1940 Cal. 346, 41 Cr.L.J. 791, 189 I.C. 714.

Order in respect of coins:—So is the rule in respect of current coins. *Badashahi coin* is not current coin in British India, and it is to be delivered to the complainant from whom it is stolen, like any other common article or property—*Mathu*, 25 Bom. 702.

Order of confiscation:—An order of disposal under this section includes an order of forfeiture or confiscation—*Iswar*, Ratanlal 492. This is now expressly provided for in the present section. In *Prithwiger*, 5 N.L.R. 59, 9 Cr.L.J. 539, it was held that the 'disposal' of property could not be held to include confiscation or forfeiture, as the penalty of confiscation or forfeiture having been expressly provided for in secs. 62, 121, etc., of the Indian Penal Code and in numerous other sections of other Acts, it could not be included in the general word 'disposal' used in this section. The same view was taken in *Secretary of State v. Lown Karan*, 5 P.L.J. 321; *Abinish Chandra*, 34 Cal. 986, 11 C.W.N. 1046, 6 C.L.J. 754, 6 Cr.L.J. 293; *Pindi Das*, 1907 P.W.R. 37, 6 Cr.L.J. 411. These rulings are no longer correct in view of the express words of the present section.

An order of confiscation can be passed in respect of property found with the accused and produced before the Court, when security proceedings are taken under sec. 109—*Pyde Ramanna*, 42 Mac. 9, 49 I.C. 167, 8 M.L.W. 350, 24 M.L.T. 256, 20 Cr.L.J. 135; *Beni Madho*, 38 Cr.L.J. 175, 166 I.C. 271, A.I.R. 1936 Nag. 143, 1936 Cr.C. 694, I.L.R. 1936 Nag. 150. When a Criminal Court imposed fine on the accused and directed that the fine should be recovered from the money which was found with the accused when he was arrested and which was in the custody of the Court, held that the order of the trial Court should be justified on the ground that the effect of the order which the Court made was to impose a fine and direct that the fine should be recovered by confiscation of the money in Court under this section—*Samant*, 35 Cr.L.J. 1344, 151 I.C. 472, 36 Bom.L.R. 324, 1934 Cr.C. 707, A.I.R. 1934 Bom. 193.

Where the property was seized upon the accused who has since been acquitted, it must be returned to him. However strong the suspicion may be the Crown has no right to confiscate property seized from another's possession without proving that it does not belong to him. This section confines the powers of confiscation to property "regarding which any offence appears to have been committed or which has been used for the commission of any offence." Where no offence appears to have been committed, there is no power to make an order of forfeiture—*Shaligram v. Emp.*, 39 Cr.L.J. 105 (107), 172 I.C. 213, 10 R.N. 185, A.I.R. 1938 Nag. 52.

An order for the confiscation of property which is the subject-matter of an offence cannot be made without first giving notice to and hearing the person to whose prejudice the order would be. Want of notice would be a good ground for setting aside the order—*Ambica Tewari*, 9 Bur.L.T. 193, 17 Cr.L.J. 207.

Order of destruction of counterfeit coin:—If the accused is convicted of an offence under sec. 241, I. P. C., and counterfeit coin is found in his possession, the Magistrate can order the destruction of the coin—*Aiyavaiyan*, 2 Weir 669.

Order of restoration of property:—If no offence is proved to have been committed in respect of any property produced before the Court, and the accused is acquitted, the Magistrate should restore the property to the person from whom it was last taken—*Hagu v. Manmatha*, 18 C.W.N. 959; *Nagaratnam v. Rukmani*, 2 Weir 668; *Sattar Ali v. Afzal*, 54 Cal. 283, 28 Cr.L.J. 546, A.I.R. 1927 Cal. 532, 102 I.C. 482, 8 A.I. Cr.R. 179; *In re Devidin*, 22 Bom. 844; *Anna Purna Bai*, 1 Bom. 630; *Anant Ramchandra*, 10 Bom. 197; *Ratanlal Rangildas*, 17 Bom. 748; *Ahmad*, 9 Mad. 448; *Gulabchand Umaji*, A.I.R. 1937 Sind 33 (34), 38 Cr.L.J. 382, 167 I.C. 482, 9 R.S. 190. This principle of law, however, does not apply where all the accused are not acquitted—*Gulabchand Umaji*, supra. The Magistrate has a discretion to decide the question of possession but it is very rarely that discretion, if properly exercised, will go beyond restoring the property to the party from whom it was taken—*Vaiyapuri v. Sinniah*, 32 Cr.L.J. 355.

129 I.C. 458, 59 M.L.J. 901, A.I.R. 1931 Mad. 17, 1930 M.W.N. 1106, 33 M.L.W. 36, Ind. Rul. 1931 Mad. 266, 1931 Cr.C. 30, following *Sadashir*, 1 I.C. 103, 9 Cr.L.J. 162, 11 Bom.L.R. 160 and *Srinivasamurti v. Narashimhalu*, 50 Mad. 916, 104 I.C. 719, A.I.R. 1927 Mad. 797, 28 Cr.L.J. 879, 26 M.L.W. 168, 39 M.L.T. 18, 53 M.L.J. 309, 1927 M.W.N. 692. See also *Lakshmana v. Arunagiri*, 33 Cr.L.J. 783, 139 I.C. 340, A.I.R. 1932 Mad. 495, 1932 Cr.C. 470, 1932 M.W.N. 813, Ind. Rul. 1932 Mad. 670; *Devidan v. Janaki*, 33 Cr.L.J. 539, Ind. Rul. 1932 Mad. 510, 138 I.C. 126, 1932 M.W.N. 106, 35 M.L.W. 625, 1932 Cr.C. 409, A.I.R. 1932 Mad. 428, 62 M.L.J. 632. The property should be restored especially when there is no finding in the case that it belongs to some one else—*Goparaju*, 3 M.L.T. 334. Thus, where an accused person has been acquitted of the offence of cheating, it is not competent to the Court to restore the goods found in the possession of the accused to the complainant. The proper order in such a case would be to let the goods remain in the possession of the person in whose custody they were found—*Ram Dan v. Hari Das*, 27 Cr.L.J. 853 (854), A.I.R. 1926 Cal. 1048, 95 I.C. 933. But in view of the provisions of this section as they now stand, it cannot be laid down generally that if no offence was proved to have been committed in respect of property produced before a Criminal Court, and the accused is acquitted, the Magistrate should restore the property to the person from whom it was last taken. The amendment in the year 1923 by the addition of the words "by destruction, confiscation or delivery to any person claiming to be entitled to possession thereof or otherwise" after the word "disposal" in this section, has materially changed the scope of the law as it stood before the amendment. Where, therefore, there were conflicting claims to the properties in question and the titles set up could only be adequately dealt with by a Civil Court, it may properly be ordered that the properties are to remain in the custody of the trial Court, subject to any order that might be made by a competent Court of civil jurisdiction—*Ramphal Tatwa v. Jasodia Malani*, 40 C.W.N. 862. See also Note 1347.

Where the Magistrate, though he discharges the accused, believes that the property in his custody is the subject of some offence, he is not bound to restore the property to the person from whom it was taken, but can make any other order of disposal under this section—*Ahmed*, 9 Mad. 448. But if the person who claims to be the owner is before the Magistrate, and if he desires that the Magistrate should treat anybody as the owner other than the person who was in possession of the property, he should prove that the property is his—*Kasiram Marwari v. Mahanji Dwarka Prasad*, 38 Cr.L.J. 1091 (1092), 171 I.C. 589, 18 P.L.T. 441, A.I.R. 1937 Pat. 591, 10 R.P. 221, 4 B.R. 40.

It is perfectly true that in an ordinary case of property or documents with which the Court is called upon to deal, under the provisions of this section, the proper order to pass generally is that such property or such document should in the absence of a definite finding as to the ownership, be returned to the person with whom it was found. In case of pension papers, however, there is a marked exception to the general rule. The only person entitled to the possession of the papers is the pensioner himself, and further the only person to whom they have any value whatsoever is the pensioner himself. In this state of affairs, the common sense view of the matter is that the petitioner should be allowed to regain possession of his own papers—*Reza Ali v. Duarka Pershad*, A.I.R. 1939 Cal. 158, 182 I.C. 571, 12 R.C. 83.

A Magistrate cannot, on dismissal of a complaint, restore the property (e.g., money) to the accused, if he disclaims the property. In such a case the Court should retain the property until one or other of the parties has established his right in the Civil Court. If the property has been already given to the accused, the Court should call upon him to return it back to Court without delay—*Chaman*, 1913 P.W.R. 37, 14 Cr.L.J. 596 (597), 21 I.C. 468, 30 P.L.R. 1913; where a person disclaims the property it is obviously improper to restore it to him—*Benu Madho*, 38 Cr.L.J. 175, 166 I.C. 271, A.I.R. 1935 Nag. 143, 1936 Cr.C. 694, 1 I.L.R. 1936 Nag. 150.

Where a person accused of theft is acquitted and claims as his own the property

to the complainant's firm—*Akshoy Kumar Saha v. Naba Kumar Singh Dudhoria*, A.I.R. 1940 Cal. 346, 41 Cr.L.J. 791, 189 I.C. 714.

Order in respect of coins:—So is the rule in respect of current coins. *Badashahi* coin is not current coin in British India, and it is to be delivered to the complainant from whom it is stolen, like any other common article or property—*Mathu*, 25 Bom. 702.

Order of confiscation:—An order of disposal under this section includes an order of forfeiture or confiscation—*Iswar, Ratanlal* 492. This is now expressly provided for in the present section. In *Prithwiger*, 5 N.L.R. 59, 9 Cr.L.J. 539, it was held that the 'disposal' of property could not be held to include confiscation or forfeiture, as the penalty of confiscation or forfeiture having been expressly provided for in secs. 62, 121, etc., of the Indian Penal Code and in numerous other sections of other Acts, it could not be included in the general word 'disposal' used in this section. The same view was taken in *Secretary of State v. Lown Karan*, 5 P.L.J. 321; *Abinish Chandra*, 34 Cal. 986, 11 C.W.N. 1046, 6 C.L.J. 754, 6 Cr.L.J. 293; *Pindi Das*, 1907 P.W.R. 37, 6 Cr.L.J. 411. These rulings are no longer correct in view of the express words of the present section.

An order of confiscation can be passed in respect of property found with the accused and produced before the Court, when security proceedings are taken under sec. 109—*Pyde Ramanna*, 42 Mac 9, 49 I.C. 167, 8 M.L.W. 350, 24 M.L.T. 256, 20 Cr.L.J. 135; *Beni Madho*, 38 Cr.L.J. 175, 166 I.C. 271, A.I.R. 1936 Nag. 143, 1936 Cr.C. 694, I.L.R. 1936 Nag. 150. When a Criminal Court imposed fine on the accused and directed that the fine should be recovered from the money which was found with the accused when he was arrested and which was in the custody of the Court, held that the order of the trial Court should be justified on the ground that the effect of the order which the Court made was to impose a fine and direct that the fine should be recovered by confiscation of the money in Court under this section—*Samant*, 35 Cr.L.J. 1344, 151 I.C. 472, 36 Bom.L.R. 324, 1934 Cr.C. 707, A.I.R. 1934 Bom. 193.

Where the property was seized upon the accused who has since been acquitted, it must be returned to him. However strong the suspicion may be the Crown has no right to confiscate property seized from another's possession without proving that it does not belong to him. This section confines the powers of confiscation to property "regarding which any offence appears to have been committed or which has been used for the commission of any offence." Where no offence appears to have been committed, there is no power to make an order of forfeiture—*Shaligram v. Emp.*, 39 Cr.L.J. 105 (107), 172 I.C. 213, 10 R.N. 185, A.I.R. 1938 Nag. 52.

An order for the confiscation of property which is the subject-matter of an offence cannot be made without first giving notice to and hearing the person to whose prejudice the order would be. Want of notice would be a good ground for setting aside the order—*Ambica Tewari*, 9 Bur.L.T. 193, 17 Cr.L.J. 207.

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them he acted in good faith—*Shue Wa v. C. I. Mehta*, 28 Cr.L.J. 932 (933), A.I.R. 1927 Rang. 322, 103 I.C. 452, 5 Rang. 533. The amendment to the Contract Act which took effect in 1930, has altered this position. So where some bangles, which were given for mere use, were misappropriated and pledged and the accused were convicted, *held* that the bangles should be returned to the owner and not to the pawnee—*Chettyar Firm v. Ma Nan*, A.I.R. 1935 Rang. 205; *Subbarama Ayyar v. Damodaran*, A.I.R. 1937 Mad. 313, 1937 M.W.N. 53, (1937) 1 M.L.J. 128, 1937 M.Cr.C. 51, 169 I.C. 80, 38 Cr.L.J. 690. Under section 178, Contract Act, there is a valid pledge if the pledger had not obtained possession of the goods from the original owner by means of an offence or fraud, and the pledger is not acting improperly, and the pawnee also acts in good faith. So, if the pledger (accused) had been expressly or impliedly authorised by the owner of the goods to pledge them and raise money on them, and the accused pawned the goods to the pawnee who also acted in good faith, but the pledger afterwards misappropriated the proceeds, *held* that there was a valid pledge within the meaning of section 178, Contract Act, when the transaction of pledge took place, and the pledgee was entitled to the possession of the goods under sec. 517, Cr. P. Code; and the fact that the pledgor (accused) afterwards changed his mind and misappropriated the proceeds was immaterial—*Sharaf Din v. Gokal Chand*, 12 Lah. 304, Ind. Rul. 1931 Lah. 675, 132 I.C. 835, 32 Cr.L.J. 960, 32 P.L.R. 724, A.I.R. 1931 Lah. 526, 1931 Cr.C. 750 (751). See also *Veeracharyulu v. Rajamma*, 1932 M.W.N. 1270. But if the pledgee was not a *bona fide* pledgee and knew that the pledgor had no authority to pledge the articles, *held* that the articles should be delivered to the owner and not to the pledgee—*Nga Po Chit*, 1 Rang. 199, A.I.R. 1923 Rang. 277, 74 I.C. 1050, 2 Bur.L.J. 241, 24 Cr.L.J. 858; *Valliappa Chetty v. Joseph*, *supra*. Where the pledgers were not mercantile agents and had no right whatever to pledge ornaments or to raise money on them, the pledgee is not protected by the provisions of sec. 178, Contract Act, especially when he did not act in good faith—*Gulabchand Umaji*, A.I.R. 1937 Sind 33 (35), 38 Cr.L.J. 382, 167 I.C. 428, 9 R.S. 190. Where a pledged property was stolen from the possession of the pledgee by the pledgor who was thereupon convicted of theft, the Court should pass an order restoring the property to the pledgee and not to the person to whom the pledgor had sold it for value after the theft—*Gour Mohan v. Bansidhar*, 24 Cr.L.J. 238 (Cal.). A goldsmith was entrusted with a certain quantity of gold and diamonds for making a comb for the complainant. When the article was nearly completed, the goldsmith pledged it to a diamond merchant who had no knowledge that the property was the property of the complainant. The Court ordered the jewel to be returned to the complainant. *Held* that the order was justifiable—*Chaganlal v. Maung Po Kouk*, 2 Bur.L.J. 152. Where certain jewels were given to a broker for sale and the broker sold the jewels and misappropriated the sale proceeds, and was convicted of criminal breach of trust, the jewels ought to be restored to the purchaser and not to the owner, because the offence was committed not with respect to the jewels but with respect to the sale proceeds and, therefore, the Magistrate was not competent to make any order with respect to the jewels which validly belonged to the purchaser—*Nanlal v. Maung Tun*, 4 Bur.L.T. 170, 12 Cr.L.J. 467, 11 I.C. 1003.

Any person belonging to any of the classes mentioned in secs. 178 and 178A, Indian Contract Act, 1872 (Act IX of 1872), and sec. 30, Indian Sale of Goods Act, 1930 (III of 1930), which relate to a valid pledge of goods, and of the classes mentioned in secs. 27 to 30 Sale of Goods Act, which relate to sale, can make a valid pledge or sale provided the requirements of the provisos are fulfilled, and in that case the property should be returned not to the owner but to the pledgee or the buyer, as the case may be. But where such person does not belong to any of the classes mentioned above but is merely a bailee and thus cannot make either a valid pledge or sale, the property must be returned to the owner—*Maung Po Thaung v. Noor Mohamed*, A.I.R. 1937 Rang. 385 (387), 171 I.C. 897.

If the property were seized from the servant or agent of the principal owner, and the fact of employment or agency were admitted, the property would rightly be restored

seized from him by the Police and alleged to have been stolen, it should be restored to him in the absence of special reasons to the contrary—*Savudi Karuppanan v. Guruswami*, 34 Cr.L.J. 586, 143 I.C. 510, 56 Mad. 654, Ind. Rul. 1933 Mad. 306, 1933 M.W.N. 88, 37 M.L.W. 415, 1933 Cr.C. 662, A.I.R. 1933 Mad. 434, 64 M.L.J. 431. If a complaint of theft of a certain property is dismissed on the ground of there being a *bona fide* dispute about the ownership of the property, the Magistrate should take custody of the property, sell it (if it is perishable) and retain the sale proceeds until they are shown to be payable to one or other of the parties, either by virtue of a decree of Court, or of an agreement between themselves—*Visa Samta*, 16 Bom.L.R. 951, 16 Cr.L.J. 111, 27 I.C. 159; *Chenga Reddi v. Ramasamy*, 1 L.W. 1032, 27 I.C. 152, 16 Cr.L.J. 104. In *Syed Mohideen Sahib*, 2 Weir 667, it has been held that in such a case, the Magistrate may deliver the property to the person from whose possession it was last taken, with a condition that the property, or its value, must be forthcoming in case the rival claimant establishes a title. But another Madras case lays down that in such a case the accused cannot claim the return of the property to him as a matter of course; the Court has jurisdiction to deliver the subject-matter of the alleged theft to somebody else—*Kanaga Sabai*, 34 Mad. 94 (95). And so, if it is found that the property belongs partly to the accused and partly to another person, it is not illegal to deliver the property to both of them on their joint receipt—*Kanaga Sabai*, 34 Mad. 94 (96).

Where properties ordered to be restored by a party had been converted to their own use it is open to the Criminal Court to compel them to produce such properties as may be capable of production and also to produce the money equivalent of such properties as may be incapable of production—*Nagendra*, 35 Cr.L.J. 886 (889), 149 I.C. 36, 1934 Cr.C. 620, A.I.R. 1934 Cal. 454; *Shwe Wa v. C. J. Mehta*, 105 I.C. 452, A.I.R. 1927 Rang. 322, 28 Cr.L.J. 932, 5 Rang. 553; *Shamsunder v. Teja Singh*, 36 Cr.L.J. 1237, 157 I.C. 763, A.I.R. 1935 Pesh. 98, 1935 Cr.C. 856; *Naini Mall*, 24 Cr.L.J. 804, 74 I.C. 708, A.I.R. 1924 All. 189.

1346. Order, when rights of third parties are concerned:—Where a property was stolen from the office of T and the thief sold it to F who pledged it to N, and prosecution was instituted against F, but he was acquitted, and then the property was delivered by the Court to T, held that the order was wrong. There being disputed ownership, the proper order was to order N to deposit the property in Court until the decision of a Civil Court relating to the ownership of the property—*Narendra v. Studd*, 19 Cr.L.J. 788, 46 I.C. 708 (Cal.). When the evidence disclosed that the property was obtained by the accused from the owner by means of fraud and subsequently pledged, then upon conviction of the accused, the property should be delivered to the owner and the remedy of the pledgee was to bring a suit in the Civil Court to enforce his lien on the property—*Kong Lone v. Ma Kay*, 4 L.B.R. 13, 6 Cr.L.J. 125; *Palaniappa v. Ko Saye*, 3 Bur.L.T. 111, 12 Cr.L.J. 88 (89), 8 I.C. 1204; *Valiappa Chetty v. Joseph*, 2 Bur.L.J. 85, 25 Cr.L.J. 666, A.I.R. 1923 Rang. 248, 81 I.C. 154; *Subbarama Ayyar v. Damodaram*, 38 Cr.L.J. 690, 169 I.C. 80, A.I.R. 1937 Mad. 313, 1937 M.W.N. 53, (1937) 1 M.L.J. 128, 1937 M.Cr.C. 51, 9 R.M. 680. Similarly, where the owner of the jewellery gave it to the accused in order that the latter might deposit it for safe custody with a Bank, but the accused instead of doing so pawned it and misappropriated the money, held that upon conviction of the accused, the jewellery ought to be restored to the owner—*Mohammad Hadi Husain*, 3 Luck. 494, 29 Cr.L.J. 983 (1987). But where certain jewels were given to the accused to sell, but the accused instead of selling them gave them to another person who pledged them to a third person, it was held that the jewels should be restored to the pledgee and not to the owner; because the owner, having parted with the jewels to be disposed of for money, was not entitled to the assistance of a Criminal Court in recovering them from a pawnee to whom they were so disposed of—*Stephen Aviet*, 4 L.B.R. 25, 6 Cr.L.J. 135; *Annamalai v. Mrs. Basch*, 11 L.B.R. 217, 23 Cr.L.J. 216. Under section 178 of the Contract Act the pledges to the pawnee were valid, if in accepting

them he acted in good faith—*Shwe Wa v. C. I. Mehta*, 28 Cr.L.J. 932 (933), A.I.R. 1927 Rang. 322, 105 I.C. 452, 5 Rang 533. The amendment to the Contract Act which took effect in 1930, has altered this position. So where some bangles, which were given for mere use, were misappropriated and pledged and the accused were convicted, *held* that the bangles should be returned to the owner and not to the pawnee—*Chettyar Firm v. Ma Nan*, A.I.R. 1935 Rang. 205; *Subbarama Ayyar v. Damodaran*, A.I.R. 1937 Mad. 313, 1937 M.W.N. 53, (1937) 1 M.L.J. 128, 1937 M.Cr.C. 51, 169 I.C. 80, 38 Cr.L.J. 690. Under section 178, Contract Act, there is a valid pledge if the pledger had not obtained possession of the goods from the original owner by means of an offence or fraud, and the pledger is not acting improperly, and the pawnee also acts in good faith. So, if the pledger (accused) had been expressly or impliedly authorised by the owner of the goods to pledge them and raise money on them, and the accused pawned the goods to the pawnee who also acted in good faith, but the pledger afterwards misappropriated the proceeds, *held* that there was a valid pledge within the meaning of section 178, Contract Act, when the transaction of pledge took place, and the pledgee was entitled to the possession of the goods under sec. 517, Cr. P. Code; and the fact that the pledgor (accused) afterwards changed his mind and misappropriated the proceeds was immaterial—*Sharaf Din v. Gokal Chand*, 12 Lah. 304, Ind. Rul. 1931 Lah. 675, 132 I.C. 835, 32 Cr.L.J. 960, 32 P.L.R. 724, A.I.R. 1931 Lah. 526, 1931 Cr.C. 750 (751). See also *Veeracharyulu v. Rajamma*, 1932 M.W.N. 1270. But if the pledgee was not a *bona fide* pledgee and knew that the pledgor had no authority to pledge the articles, *held* that the articles should be delivered to the owner and not to the pledgee—*Nga Po Chit*, 1 Rang. 199, A.I.R. 1923 Rang. 277, 74 I.C. 1050, 2 Bur.L.J. 241, 24 Cr.L.J. 858; *Valliappa Chetty v. Joseph*, *supra*. Where the pledgers were not mercantile agents and had no right whatever to pledge ornaments or to raise money on them, the pledgee is not protected by the provisions of sec. 178, Contract Act, especially when he did not act in good faith—*Gulabchand Umaji*, A.I.R. 1937 Sind 33 (35), 38 Cr.L.J. 382, 167 I.C. 428, 9 RS 190. Where a pledged property was stolen from the possession of the pledgee by the pledgor who was thereupon convicted of theft, the Court should pass an order restoring the property to the pledgee and not to the person to whom the pledgor had sold it for value after the theft—*Gour Mohan v. Bansidhar*, 24 Cr.L.J. 238 (Cal.). A goldsmith was entrusted with a certain quantity of gold and diamonds for making a comb for the complainant. When the article was nearly completed, the goldsmith pledged it to a diamond merchant who had no knowledge that the property was the property of the complainant. The Court ordered the jewel to be returned to the complainant. *Held* that the order was justifiable—*Chaganlal v. Maung Po Kauk*, 2 Bur.L.J. 152. Where certain jewels were given to a broker for sale and the broker sold the jewels and misappropriated the sale proceeds, and was convicted of criminal breach of trust, the jewels ought to be restored to the purchaser and not to the owner, because the offence was committed not with respect to the jewels but with respect to the sale proceeds and, therefore, the Magistrate was not competent to make any order with respect to the jewels which validly belonged to the purchaser—*Nanlal v. Maung Tun*, 4 Bur.L.T. 170, 12 Cr.L.J. 467, 11 I.C. 1003.

Any person belonging to any of the classes mentioned in secs. 178 and 178A, Indian Contract Act, 1872 (Act IX of 1872), and sec. 30, Indian Sale of Goods Act, 1930 (III of 1930), which relate to a valid pledge of goods, and of the classes mentioned in secs. 27 to 30 Sale of Goods Act, which relate to sale, can make a valid pledge or sale provided the requirements of the provisos are fulfilled, and in that case the property should be returned not to the owner but to the pledgee or the buyer, as the case may be. But where such person does not belong to any of the classes mentioned above but is merely a bailee and thus cannot make either a valid pledge or sale, the property must be returned to the owner—*Maung Po Thauang v. Noor Mohamed*, A.I.R. 1937 Rang. 383 (387), 171 I.C. 897.

If the property were seized from the servant or agent of the principal owner, and the fact of employment or agency were admitted, the property would rightly be restored

to the master or principal—*U Ba Hlaing v. Balabux Sodani*, 38 Cr.L.J. 358 (360), 167 I.C. 245, 14 Rang 633, 9 R.R. 305, A.I.R. 1937 Rang. 42.

Notice:—It is true that the section does not in terms require the issue of any notice and if an order regarding disposal of property is passed simultaneously with the judgment in the criminal case, no one would contend that a separate notice to the parties to show cause in respect of the disposal of the property was necessary; but when an application is made after some lapse of time, it is only proper on general principles of law that the party to be affected by the proposed order should have notice of the application—*Deopujan Mahto v. Kukur Ahir*, A.I.R. 1940 Pat 198 (200), 1939 P.W.N. 911, 41 Cr.L.J. 559, 188 I.C. 260, 21 P.L.T. 448, 19 Pat. 337, following *Arunachala Thevan v. Vellachami Thevan*, A.I.R. 1923 Mad. 324, 71 I.C. 514, 24 Cr.L.J. 162, 46 Mad 162, 44 M.L.J. 56.

In a case in which the question of the right to possession is not one between the complainant and the accused, but one between the complainant and a third person, an order for the restoration of the property should not be made without giving the opposite party an opportunity of being heard. Thus, where the complainant entrusted certain jewels to the accused who committed criminal breach of trust in respect of them and pledged them to another person, the Court should not order the jewels to be restored to the complainant without giving any notice to the pledgee—*Shw Wa v. C. I. Mehta*, 5 Rang. 553, 28 Cr.L.J. 932, A.I.R. 1927 Rang. 322, 105 I.C. 452.

1347. Question of title:—Where a question of *bona fides* and of title by purchase or otherwise clearly arises, the duty of the Criminal Court is not to pass any order under this section, but to leave the complainant to his remedy in the Civil Court if he thinks he has one—*Naini Mall*, 24 Cr.L.J. 804, A I R. 1924 All. 189, 74 I.C. 708. Where the title to the seized property is doubtful, it should be returned to the person from whom it was seized, unless there are special circumstances which would render such a course unjustifiable—*Srinivasamoorthi v. Narasimhalu*, 50 Mad. 916, 28 Cr.L.J. 879 (880). If conflicting claims are put forward to the property by different parties, the Magistrate cannot give a decision as to the ownership of the property; the proper procedure would be to keep the property in Court, pending any order which may be made by a competent Civil Court—*Ram Khelawan v. Tulsu*, 28 C.W.N. 1094, 26 Cr.L.J. 300. See also *Ramphal Tatwa v. Jasodia Malain*, 40 C.W.N. 862, cited in Note 1345. Where the property in dispute was a certain quantity of wood, the proper order would be to sell the property and retain the sale proceeds in Court until they were shown to be payable to one or other of the parties either in virtue of a decree or in virtue of an agreement among themselves—*Visa Samta*, 16 Bom L.R. 951, 16 Cr.L.J. 111, 27 I.C. 159.

See also *U Ba Hlaing v. Balabux Sodani*, cited in Note 1331 under the heading "Restoration of property."

1348. Improper orders:—(1) *Disposal in charity*:—The section does not place the property at the disposal of the Magistrate in the sense of enabling him to bestow it in charity. He is to make such legal disposition thereof as seems right, i.e., to direct its restoration to some one to whom it seems to belong or permit it to continue in the possession in which it is found or otherwise—*Anonymous*, 2 Weir 666.

(2) *Order regarding custody of children*:—Orders regarding custody of children cannot be passed under this section because children are not "property"—*Howka Ramalakshmi*, 1 Weir 348.

(3) *Order for removal of building*:—Where the accused built a new wall abutting on the road in contravention of the rules of the Municipality and the Magistrate after convicting and fining the accused ordered the wall to be pulled down, it was held that the order as to the removal of the wall was illegal—*Nanhu*, 1900 A.W.N. 81.

(4) *Order demanding security*:—The Magistrate cannot take a bond from the accused to produce the property (with respect to which an offence is alleged to have been committed) in Court whenever required. There is no provision of the law which enables a Magistrate to make an order demanding security. He can proceed under

sec. 94 in order to secure the production of the property, and on failure of the accused to produce it, he can proceed under sec. 96—*Purna Chandra v. Sashi*, 7 C.W.N. 522. Sub-section (4) does not apply to the case, because under that sub-section a Magistrate can take a bond from a person at the time of delivering the property to him.

(5) *Detention of property*:—If no offence is proved in respect of the property produced in Court, the proper order that the Court may pass is to restore the property to the person from whom it was originally taken. It cannot detain the property until the title of the rightful owner is declared by a Civil Court—*Devidin*, 22 Bom. 844.

Sub-section (4):—If no offence is proved to have been committed, the Magistrate may restore the property to the accused, and at the same time demand security from him for its production whenever required—*Subbarayadu*, 2 Weir 668.

1349. Explanation:—The words 'conversion' and 'exchange' used in the Explanation to the section must be taken in their ordinary sense. They apply to such acts as melting down of gold and silver into ornaments or the exchange of notes for cash. When, therefore, a person fraudulently obtained a decree upon a forged pro-note and in execution of that decree purchased a garden and was subsequently convicted of cheating, it was held that the convicting Court could not direct restoration of the garden to its owner, because it could not be said that the garden was acquired by the conversion of the forged promissory note into a decree—*Nga Ke Maung*, 4 Bur L T 211, 12 Cr.L.J. 473, 12 I.C. 81. A gold ornament was stolen from the complainant and sold by the thief for Rs. 184 to the applicant who converted it into gold and sold it in pieces to different persons. In the course of the trial of the theft case, the applicant was made to produce Rs. 184, and at the end of the trial the Magistrate ordered the sum to be paid over to the complainant. It was held that the money could not be paid over to the complainant, since it merely represented the sum which the applicant paid to the accused as the price of the gold bangles, and it could not be treated under the Explanation to this section as the exchanged property with reference to which an offence had been committed—*Anant*, 20 Bom L.R. 604, 19 Cr L J 721, 46 I.C. 401.

In view of this Explanation, the objection that the coins directed to be returned are not the identical coins stolen cannot be sustained—*Soni*, 4 S.L.R. 255, 12 Cr L J. 397.

The money which the Magistrate finds to be the sale-proceeds of stolen property, is itself "property" to which this section relates and may, therefore, be made over to the persons claiming it by the Court—*Gobind*, 34 Cr.L.J. 581, 143 I.C. 358, Ind Rul. 1933 Lah. 347.

Appeal:—See section 520.

1350. Revision:—The High Court has jurisdiction to interfere with an order of the Magistrate passed under this section—*Gangamma*, 2 Weir 538 and 669; *Pandharinath Pundalik*, 40 Bom. 186, 16 Cr.L.J. 783, A.I.R. 1915 Bom. 265, 31 I.C. 383, 17 Bom.L.R. 922. An order passed by a Magistrate under this section is a judicial order and is open to review by the higher Courts on appeal or revision, as the case may be—*Sundar Das*, 32 Cr L J 847, 132 I.C. 202, A.I.R. 1931 Lah 527, 1931 Cr C 751. An order made under this section may be revised by the High Court either under sec. 520 or by virtue of the powers conferred on it by sec. 439 read with secs. 433 and 423 (d) of the Code—*Hagu v. Manmatha*, 18 C.W.N. 959, 15 Cr.L.J. 184. But where the case is one in which an appeal lies, any party aggrieved by an order as to the disposal of property must go to the Court of Appeal. In such a case, a Court of revision has no jurisdiction to interfere with an order as to the disposal of property. It is only when there is neither an appeal nor a confirmation that a Court of revision or reference can interfere—*Laxman Rangu*, 35 Bom. 253, 12 Cr L.J. 169.

The Magistrate is given a wide discretion and unless it is clear that he exercised it on some wrong principle and that he returned the property to somebody obviously not entitled to have it, the High Court in revision will be unwilling to interfere—*Subbarama Ayyar v. Damodaran*, A.I.R. 1937 Mad. 313 (314), 1937 M.W.N. 53, (1937) 1 M.L.J. 128, 1937 M.Cr.C. 51, 169 I.C. 80, 38 Cr.L.J. 690, 9 R.M. 680.

1351. Power of Appellate Court to make orders under this section:—Under clause (d) of sec. 423 the Appellate Court is competent to make any incidental or consequential order that may be just or proper. An order directing the disposal of property is a 'consequential or incidental order' within the meaning of sec. 423 (d). Therefore, where such order was not passed by the Court of first instance, the Appellate Court is entitled to do so—*Gopi Nath*, 3 A.L.J. 770, 4 Cr.L.J. 370; *Azmat Shah*, 35 All. 374, 14 Cr.L.J. 526. See Notes under sec. 423 (d). *Contra*—*Locanadu v. Seethal*, 2 Weir 674, where it has been held that an Appellate Court cannot pass an order under this section when the Subordinate Court has not done so. But this ruling is no longer correct in view of sec. 423 (1)(d).

Since the High Court in Revision possesses all the powers of an Appellate Court, the High Court can in revision pass an order under this section. See Note 1212 under sec. 439.

518. In lieu of itself passing an order under section 517, the Court may direct the property to be delivered to the District Magistrate or to a Sub-divisional Magistrate, who shall in such cases deal with it as if it had been seized by the police and the seizure had been reported to him in the manner hereinafter mentioned.

Scope of section:—An order under this section can be made only in respect of property regarding which an offence appears to have been committed or which has been used for the commission of an offence—*Girji*, Ratanlal 496.

519. When any person is convicted of any offence which includes, or amounts to, theft or receiving stolen property, and it is proved that any other person has bought the stolen property from him without knowing, or having reason to believe, that the same was stolen, and that any money on his arrest has been taken out of the possession of the convicted person, the Court may, on the application of such purchaser and on the restitution of the stolen property to the person entitled to the possession thereof, order that out of such money a sum not exceeding the price paid by such purchaser be delivered to him.

'Any money has been taken out of the possession, etc.':—The Magistrate can give compensation to an innocent purchaser only out of any money found on the person of the accused; when no money was found in the possession of the person convicted, the Magistrate cannot grant compensation to the innocent purchaser out of the fine imposed on the accused—*Puyuthinni Pramutha*, 2 Weir 671 (672); *Abdul*, 3 Bom.L.R. 449; *Dhondur*, 3 Bom.L.R. 764. See also *Rama*, Ratanlal 631.

The Magistrate cannot call upon the owner to pay the purchase-money of the stolen property to the *bona fide purchaser*; and an order delivering the property to the purchaser from the thief because the original owner would not pay him the purchase-money, is illegal—*Karim Baksh*, 1886 A.W.N. 291.

520. Any Court of appeal, confirmation, reference or revision may direct any order under section 517, section 518 or section 519 passed by a Court subordinate thereto, to be stayed pending consideration by

the former Court, and may modify, alter or annul such order and make any further orders that may be just.

Scope:—Under this section strictly speaking there is no right of appeal in the proper sense of the word. This section is not in the Chapter of the Cr. P. Code which deals with appeals, but it gives Sessions Court power to "modify, alter or annul" the order passed under sec. 517. This is a statutory right of revision, or it may be said of interference with any order passed under sec. 517 by a Magistrate subordinate to the Court of Session—*Maung Pu Tu v. The King*, 39 Cr.L.J. 763, 176 I.C. 451, 11 R.R. 67, A.I.R. 1938 Rang. 278.

1352. "Any Court of appeal or revision":—The words "any Court of appeal" are not necessarily limited to a Court before which an appeal in the main case is pending. The orders under secs. 517-519 are appealable quite independent of the fact whether an appeal has been preferred or not from the main order of conviction or acquittal—*Joggesur*, 3 Cal. 379; *Ahmed*, 9 Mad. 448; *U Po Hla v. Ko Po*, 7 Rang 345, 30 Cr.L.J. 540 (542), 115 I.C. 901, A.I.R. 1929 Rang 97 (F.B.). Therefore, where a second class Magistrate restored certain property to the complainant when no offence was found to have been committed, the District Magistrate was competent to annul the order and restore the property to the person from whose possession it was taken, although there was no appeal pending before the District Magistrate—*Subbaya v. Narayya*, 2 Weir 673. So also, even where no appeal has been preferred from a conviction by a subordinate Court, the District Magistrate has got jurisdiction to interfere as a Court of revision under sec. 520 with an order passed by the trial Court under sec. 517—*Nga Po Chit*, 1 Rang 199, 24 Cr.L.J. 858, A.I.R. 1923 Rang. 227; *U P. Hla*, supra.

But the Sessions Judge is not a Court of appeal or revision in respect of an order passed by a second class Magistrate. So also, a Sessions Judge is not a Court of appeal from the decision of a second class Magistrate, because there can be no second appeal to the Sessions Judge. Moreover, the Sessions Judge has no revisional powers over the order of a Sub-divisional Magistrate passed on appeal—*Soma Pillai v. Krishna Pillai*, 47 M.L.J. 481, 25 Cr.L.J. 1247, 20 L.W. 521. But see *Explanation* to sec. 435.

The Bombay High Court was once of opinion that the words 'Court of Appeal' implied the Court to which an appeal lay in the particular case and not the Court to which appeals would ordinarily lie from the Court deciding the particular case. And therefore where a 1st class Magistrate, in acquitting the accused person charged with theft of cattle, ordered the cattle to be restored to him, but on appeal the Sessions Judge revised the order and held that the complainant was entitled to the cattle, held that the Sessions Judge had no jurisdiction to act under sec. 520 since he was not a Court of appeal in this particular case, because no appeal could lie to him against a judgment of acquittal; the appeal ought to have been preferred to the High Court—*Khema Rukhad*, 42 Bom. 664, 20 Bom.L.R. 395, 19 Cr.L.J. 597. But this decision has been recently overruled by the Full Bench case of *Walchand Jasraj v. Hari Anant*, 56 Bom. 369, 34 Bom.L.R. 1203, 1932 Cr.C. 789 (790), 139 I.C. 433, Ind. Rul. 1932 Bom. 499, 33 Cr.L.J. 807, A.I.R. 1932 Bom. 534, where it is stated that this section means that any Court which has power of hearing appeal, reference or revision in respect of orders of the trial Court can make an order under this section, and the jurisdiction of superior Court is not dependent upon the question in what Court an appeal against an order of acquittal might have been brought which in fact has not been brought. The Rangoon High Court similarly holds that even in case of an acquittal by the trial Court, the Sessions Judge or District Magistrate, as a Court of revision, has power under sec. 520 to interfere with the order of the trial Court with regard to the disposal of property—*U Po Hla v. Ko Po*, 7 Rang 345, 30 Cr.L.J. 540 (542), 115 I.C. 901, A.I.R. 1929 Rang 97 (F.B.), overruling *Maung Ma v. Ma Kra*, 6 Rang. 259, 29 Cr.L.J. 958. The words "Court of Appeal," as used in this section, are not limited to a Court before which an appeal from an order of acquittal could be, and the jurisdiction of the Court of Appeal to deal with an order of disposal of property is not dependent upon the question in what Court an appeal from an

1351. Power of Appellate Court to make orders under this section:

—Under clause (d) of sec. 423 the Appellate Court is competent to make any incidental or consequential order that may be just or proper. An order directing the disposal of property is a 'consequential or incidental order' within the meaning of sec. 423 (d). Therefore, where such order was not passed by the Court of first instance, the Appellate Court is entitled to do so—*Gopi Nath*, 3 A.L.J. 770, 4 Cr.L.J. 370; *Azmat Shah*, 35 All. 374, 14 Cr.L.J. 526. See Notes under sec. 423 (d). *Contra*—*Locanadu v. Seethal*, 2 Weir 674, where it has been held that an Appellate Court cannot pass an order under this section when the Subordinate Court has not done so. But this ruling is no longer correct in view of sec. 423 (1) (d).

Since the High Court in Revision possesses all the powers of an Appellate Court, the High Court can in revision pass an order under this section. See Note 1212 under sec. 439.

518. In lieu of itself passing an order under section 517,

the Court may direct the property to be delivered to the District Magistrate or to a Sub-divisional Magistrate, who shall in such cases deal with it as if it had been seized by the police and the seizure had been reported to him in the manner hereinafter mentioned.

Scope of section:—An order under this section can be made only in respect of property regarding which an offence appears to have been committed or which has been used for the commission of an offence—*Girji*, *Ratanlal* 496.

519. When any person is convicted of any offence which

includes, or amounts to, theft or receiving stolen property, and it is proved that any other person has bought the stolen property from him without knowing, or having reason to believe, that the same was stolen, and that any money on his arrest has been taken out of the possession of the convicted person, the Court may, on the application of such purchaser and on the restitution of the stolen property to the person entitled to the possession thereof, order that out of such money a sum not exceeding the price paid by such purchaser be delivered to him.

'Any money has been taken out of the possession; etc.':—The Magistrate can give compensation to an innocent purchaser only out of any money found on the person of the accused; when no money was found in the possession of the person convicted, the Magistrate cannot grant compensation to the innocent purchaser out of the fine imposed on the accused—*Puyuthinni Pramutha*, 2 Weir 671 (672); *Abdul*, 3 Bom L.R. 449; *Dhondu*, 3 Bom L.R. 764. See also *Rama*, *Ratanlal* 631.

The Magistrate cannot call upon the owner to pay the purchase-money of the stolen property to the bona fide purchaser; and an order delivering the property to the purchaser from the thief because the original owner would not pay him the purchase-money, is illegal—*Karim Baksh*, 1886 A.W.N. 291.

520. Any Court of appeal, confirmation, reference or

revision may direct any order under section 517, section 518 or section 519 passed by a Court subordinate thereto, to be stayed pending consideration by

the former Court, and may modify, alter or annul such order and make any further orders that may be just.

Scope:—Under this section strictly speaking there is no right of appeal in the proper sense of the word. This section is not in the Chapter of the Cr. P. Code which deals with appeals, but it gives Sessions Court power to “modify, alter or annul” the order passed under sec. 517. This is a statutory right of revision, or it may be said of interference with any order passed under sec. 517 by a Magistrate subordinate to the Court of Session—*Mauung Pu Tu v. The King*, 39 Cr L J. 763, 176 I C. 451, 11 R R. 67, A.I.R. 1938 Rang. 278.

1352. “Any Court of appeal or revision”:—The words “any Court of appeal” are not necessarily limited to a Court before which an appeal in the main case is pending. The orders under secs 517-519 are appealable quite independent of the fact whether an appeal has been preferred or not from the main order of conviction or acquittal—*Joggessur*, 3 Cal 379; *Ahmed*, 9 Mad. 448; *U Po Hla v. Ko Po*, 7 Rang. 345, 30 Cr L J. 540 (542), 115 I C. 901, A.I.R. 1929 Rang. 97 (F.B.). Therefore, where a second class Magistrate restored certain property to the complainant when no offence was found to have been committed, the District Magistrate was competent to annul the order and restore the property to the person from whose possession it was taken, although there was no appeal pending before the District Magistrate—*Subbayya v. Narasayya*, 2 Weir 673. So also, even where no appeal has been preferred from a conviction by a subordinate Court, the District Magistrate has got jurisdiction to interfere as a Court of revision under sec. 520 with an order passed by the trial Court under sec. 517—*Nga Po Chit*, 1 Rang 199, 24 Cr L J. 858, A.I.R. 1923 Rang 227; *U P. Hla*, supra.

But the Sessions Judge is not a Court of appeal or revision in respect of an order passed by a second class Magistrate. So also, a Sessions Judge is not a Court of appeal from the decision of a second class Magistrate, because there can be no second appeal to the Sessions Judge. Moreover, the Sessions Judge has no revisional powers over the order of a Sub-divisional Magistrate passed on appeal—*Soma Pillai v. Krishna Pillai*, 47 M L J. 481, 25 Cr L J. 1247, 20 L.W. 521. But see *Explanation* to sec. 435.

The Bombay High Court was once of opinion that the words ‘Court of Appeal’ implied the Court to which an appeal lay in the particular case and not the Court to which appeals would ordinarily lie from the Court deciding the particular case. And therefore where a 1st class Magistrate, in acquitting the accused person charged with theft of cattle, ordered the cattle to be restored to him, but on appeal the Sessions Judge revised the order and held that the complainant was entitled to the cattle, held that the Sessions Judge had no jurisdiction to act under sec. 520 since he was not a Court of appeal in this particular case, because no appeal could lie to him against a judgment of acquittal; the appeal ought to have been preferred to the High Court—*Khema Rukhad*, 42 Bom. 664, 20 Bom L R 395, 19 Cr L J 597. But this decision has been recently overruled by the Full Bench case of *Walchand Jasraj v. Hari Anant*, 56 Bom. 369, 34 Bom L R 1203, 1932 Cr C 789 (790), 139 I C 433, Ind Rul 1932 Bom 499, 33 Cr L J. 807, A I R. 1932 Bom 534, where it is stated that this section means that any Court which has power of hearing appeal, reference or revision in respect of orders of the trial Court can make an order under this section, and the jurisdiction of superior Court is not dependent upon the question in what Court an appeal against an order of acquittal might have been brought which in fact has not been brought. The Rangoon High Court similarly holds that even in case of an acquittal by the trial Court, the Sessions Judge or District Magistrate, as a Court of revision, has power under sec. 520 to interfere with the order of the trial Court with regard to the disposal of property—*U Po Hla v. Ko Po*, 7 Rang 345, 30 Cr L J 540 (542), 115 I C. 901, A.I.R. 1929 Rang 97 (F.B.), overruling *Mauung Ma v. Ma Kra*, 6 Rang 259, 29 Cr L J. 958. The words “Court of Appeal,” as used in this section, are not limited to a Court before which an appeal from an order of acquittal could lie, and the jurisdiction of the Court of Appeal to deal with an order of disposal of property is not dependent upon the question in what Court an appeal from an

order of acquittal might have been brought, which, in point of fact has not been brought. Consequently, when a Magistrate passes an order of acquittal and makes an order under sec. 517, Criminal Procedure Code, the Sessions Judge has jurisdiction to deal with and set aside that order under this section, although no appeal lies to him from the order of acquittal—*Banuruddin v. Gani Mia*, 40 C.W.N. 287, 37 Cr.L.J. 313, 160 I.C. 591, A.I.R. 1936 Cal. 21, 1936 Cr.C. 112; *Ramphal Tatwa v. Jasodia Malain*, 40 C.W.N. 862. The same view was taken in an earlier Madras case—*Ahmed*, 9 Mad. 448. The Punjab Chief Court also held that the 'Court of Appeal' merely implied the Court to which appeals would ordinarily lie, and did not mean that an appeal must lie in the particular case in which the order was passed as to disposal of property—*Bhagat Ram*, 96 P.L.R. 1911; 12 Cr.L.J. 400, 11 I.C. 584. But the Allahabad High Court holds otherwise. Thus, where the trying Magistrate acquitted the accused who was charged with theft of a drum, and under sec. 517 directed the drum to be returned to the accused, but on appeal the District Magistrate set aside the order under sec. 517 and directed the drum to be delivered to the complainant, held that the District Magistrate had no jurisdiction to do so, because he was not a Court of Appeal within the meaning of sec. 520, since no appeal could lie to him against an order of acquittal—*Devi Ram*, 46 All. 623 (624), 22 A.L.J. 505, 25 Cr.L.J. 1168.

A Sessions Judge, as a Court of Revision, can himself make an order under this section; he need not refer the matter to the High Court under sec. 438. Sec. 520 is not controlled by the provisions of sec. 438—*Walchand Jasraj*, supra.

An order made under sec. 517 (1), Cr. P. C., by an Assistant Sessions Judge, directing confiscation to the Government of property found on the person of an accused convicted of dacoity, is appealable to the High Court—*Bir Bikram Kishore v. Emp.*, 41 C.W.N. 512, 65 C.L.J. 397.

An appeal from an order of a second class Magistrate ordinarily lies to the District Magistrate, but if the District Magistrate has directed an appeal or a certain class of appeals to be heard by a Sub-divisional Magistrate, the Court of the Sub-divisional Magistrate, and not that of the District Magistrate is the 'Court of Appeal' under this section. Therefore, where an appeal in the main case lies to the Sub-divisional Magistrate, that Magistrate has jurisdiction to pass an order as to the disposal of property under this section—*Arunachala Thevan*, 46 Mad. 162, 24 Cr.L.J. 162, 44 M.L.J. 56, 32 M.L.T. 104, 17 M.L.W. 462, 71 I.C. 514, A.I.R. 1923 Mad. 324.

But when no appeal is preferred against the main order in the case (i.e., against the acquittal or conviction), but the appeal is confined entirely to the question of disposal of property, the appeal would lie to the Court to which an appeal ordinarily lies, (e.g., to the District Magistrate from an order of a second class Magistrate, and not to the Sub-divisional Magistrate)—*Arunachala Thevan*, supra; *Jogi Venkiah*, 42 M.L.J. 401, 23 Cr.L.J. 387, A.I.R. 1922 Mad. 78.

But when an appeal has been preferred to a particular Court from the main order of conviction or acquittal, no appeal or revision against an order as to the disposal of property can be preferred to any other Court. The jurisdiction of the other Courts as to the revision of the order is suspended owing to the seisin of the whole case by the Court of appeal—*Hussain Shah*, 17 C.P.L.R. 107, 1 Cr.L.J. 764. But where the Appellate Court in dealing with an appeal has left untouched the order passed by the Original Court under secs 517-519, there exists no bar to an application for revision of that order being made in any other Court having jurisdiction to revise that order—*Hussain Shah*, supra.

Where a Magistrate disposing of a criminal appeal fails to pass an order under sec. 520, it will be open to his successor to do so—*Subba Naidu*, 43 M.L.J. 87, A.I.R. 1922 Mad. 329. See sec. 559.

Where an Additional District Magistrate is invested by the Local Government by virtue of the powers conferred upon it by sec. 10 (2), Cr. P. C., with the powers of a Court of Revision he is competent when disposing of a case by virtue of those powers to make any consequential order as to the disposal of the property under this section—

Nagappan v. Ramaram, 31 Cr L.J. 1085, 126 I.C. 594, A.I.R. 1930 Mad. 769. But see *Mana Pillai v. Gopalkrishna Iyer*, 1928 M.W.N. 633, where a different view seems to have been taken. This view was not approved in *Abdur Rahman Kutty v. Emp.*, A.I.R. 1937 Mad. 637, (1937) 1 M.L.J. 498, 1937 M.W.N. 321, 45 M.L.W. 435, 1937 M.Cr.C. 114, 169 I.C. 71, 38 Cr L.J. 664, I.L.R. 1937 Mad. 1034.

An Additional Sessions Judge is a Court of appeal but not a Court of revision within the meaning of this section—*Sabhapati v. Ramkishan*, 62 Cal. 861, 37 Cr L.J. 541, 162 I.C. 255, A.I.R. 1936 Cal. 185. See also *Ramphal Tatwa v. Jasoda Malain*, 40 C.W.N. 862.

Notice:—An order under this section should not be passed without giving notice to the opposite party—*Laxman Rangu*, 35 Bom. 253; *Kanshi Ram*, 4 Lah. 49 (51); *Janki Das*, 33 Cr L.J. 369, 136 I.C. 735, 33 P.L.R. 167, Ind. Rul. 1932 Lah. 271. Although there is no rule of law which requires that such a notice is absolutely necessary, still if there is some interval between the date of the main order in the appeal and the order as to disposal of property, it is desirable that notice should be given to the opposite party before passing the second order—*Arunachala Thevan*, 46 Mad. 162, A.I.R. 1923 Mad. 324, 71 I.C. 514, 24 Cr L.J. 162, 44 M.L.J. 56.

Scope of the section:—See *U Ba Hlaing v. Balabux Sodani*, cited in Note 1331 under the heading "Nature of proceedings."

1353. "And make any further orders that may be just":—These words did not occur in the old Codes and were for the first time introduced into the Code of 1898. Under the old Codes it was doubted whether the Appellate or Revisional Court would direct restitution of property when setting aside the order of the Lower Court. But now the addition of the words "and make any further orders that may be just" in this section gives such power to the Superior Court beyond any doubt. See *Arunachala Thevan*, 46 Mad. 162 (at p. 167), A.I.R. 1923 Mad. 324, 71 I.C. 514, 24 Cr L.J. 162, 44 M.L.J. 56, *Hagu v. Manmatha*, 18 C.W.N. 959, and *Badrul v. Chamela*, 19 Cr L.J. 995 (Pat.). Owing to this change in the section, the following rulings are no longer good law—*Basudeb Surma*, 14 Cal. 834; *Abhram Umar*, 8 Bom. 575; *Devudin*, 22 Bom. 844.

Where the trial Court has not made any order as to the disposal of property, the Sessions Judge on appeal can pass any order that may be just with regard to the disposal of property—*Thiraj*, 10 Lah. 187, 29 Cr L.J. 810. The fact that an order for delivery of property under sec. 517 has been carried out, does not deprive the High Court of its power to order restoration of the property to the rightful power—*Shwe Wa v. C. I. Mehta*, 5 Rang. 553, 28 Cr L.J. 932, A.I.R. 1927 Rang. 322, 105 I.C. 452. It is clearly just that when a subordinate Court has made over property to a person who is not entitled to its possession, the High Court should remedy the error by restoring the property to the person properly entitled to its possession—*Ibid.* It is not necessary that an order as regards the property should be passed under this section by the Appellate Court simultaneously with the disposal of the appeal. Thus, where a conviction for theft of bulls was set aside by the Appellate Magistrate but at that time he forgot to pass any order as to the bulls, and some time after the disposal of the appeal he passed an order for restoration of the bulls to the accused, held that the second order was not illegal as it could be treated as part of the proceedings of the main appeal (the interval being a short one)—*Arunachala Thevan*, 46 Mad. 162, 44 M.L.J. 56, 24 Cr L.J. 162.

The District Magistrate acting under this section cannot direct that the property should be sold and that the sale-proceeds should be retained in criminal deposit awaiting the decision of a Civil Court as to its ownership. Even if the parties talk of going to the Civil Court, the Magistrate ought not, by the application of this section, to make an order tantamount to attachment before judgment in a civil suit—*Kasiram Marwari v. Makhanji Dwarka Prasad*, 38 Cr L.J. 1091 (1092), 171 I.C. 589, 18 P.L.T. 441, A.I.R. 1937 Pat. 591, 4 B.R. 40, 10 R.P. 221. See also *Mahammad Yusuf v. Krishna Mohan*, 41 C.W.N. 1376 (1379).

Limitation:—When an application is made to the Superior Court "to make any further orders as may be just," such application should not always be deemed as an appeal and need not be presented within the period of limitation prescribed for filing an appeal from the order of a Magistrate—*Srinivasamoorthi v. Narasimhalu*, 50 Mad 916, 28 Cr.L.J. 879 (880). Thus, a person was convicted in June 1920 for dishonestly receiving stolen currency notes, and was ordered by the Magistrate to make over the money to the complainant. On appeal, the Sessions Judge in July 1921 reversed the conviction and acquitted the accused, but passed no order as regards the notes. Subsequently, in January 1922, the accused made an application to the Sessions Judge for the restoration of the money, which the Judge rejected as barred by limitation. *Held*, that this application was in no sense an appeal against the order of the trying Magistrate, but an independent application to the Sessions Judge with a view to his taking action under sec. 520 and 'passing any order that may be just.' No period of limitation is prescribed for such an application and it can be made within a reasonable time from the date on which an accused person is acquitted of the crime with which he was charged—*Kanshi Ram*, 4 Lah. 49 (51), 24 Cr.L.J. 713.

1354. Revision:—When an order of the Lower Court has been set aside by the Sessions Court on appeal under this section, the order of the Sessions Court is not further appealable; the remedy is by way of revision to the High Court—*Debi Prasad v. Puran*, 1898 A.W.N. 40.

521. (1) On a conviction under the Indian Penal Code, section 292, section 293, section 501 or section 502, the Court may order the destruction of all the copies of the thing in respect of which the conviction was had, and which are in the custody of the Court or remain in the possession or power of the person convicted.

(2) The Court may, in like manner, on a conviction under the Indian Penal Code, section 272, section 273, section 274 or section 275, order the food, drink, drug or medical preparation in respect of which the conviction was had, to be destroyed.

522. (1) Whenever a person is convicted of an offence attended by criminal force or *show of force* or by criminal intimidation, and it appears to the Court that by such force or *show of force* or criminal intimidation any person has been dispossessed of any immovable property, the Court may, if it thinks fit, *when convicting such person or at any time within one month from the date of the conviction, order the person dispossessed to be restored to the possession of the same.*

(2) No such order shall prejudice any right or interest to or in such immovable property which any person may be able to establish in a civil suit.

(3) *An order under this section may be made by any Court of appeal, confirmation, reference or revision.*

Change:—The italicised words and sub-section (3) have been added by section 143 of the Cr. P. C. Amendment Act, XVIII of 1923. "This amendment provides for the order of restoration being passed within one month from the date of conviction;

secondly, it extends the scope of the section to ouster from possession by show of criminal force or criminal intimidation; and thirdly, it gives power to an Appellate Court or to the High Court in revision to pass such an order"—*Statement of Objects and Reasons* (1914).

1355. Scope of section:—An order under this section should not be made where the accused person has not been convicted of an offence attended by criminal force—*Soita v. Dochhi*, 12 C.W.N. 269; *Tulshi Ram v. Abrar Ahmad*, 37 All. 654, 30 I.C. 1002, 13 A.L.J. 932, 16 Cr.L.J. 714; *Ali Bahadur*, 24 O.C. 352, 66 I.C. 324, 23 Cr.L.J. 260, A.I.R. 1922 Oudh 144. See also *Sukhlal v. Ladbhai*, 17 N.L.J. 27. Therefore, a Magistrate after acquitting an accused person cannot proceed to pass an order under this section—*Ali Bahadur*, supra. So also, no order can be passed under this section, where the trespass which the accused was alleged to have committed was not a criminal trespass but merely a civil one—*Soita v. Dochhi*, 12 C.W.N. 269. Where the accused were found not guilty of the offence with which they stood charged, the offence was not attended by any criminal force or show of criminal force or by criminal intimidation and there was no evidence to show that by such force or show of force or criminal intimidation the complainant had been dispossessed of his immovable property, this section had no application and an order for restoration of property could not be passed in favour of the complainant. Nor can the accused be ordered to be given possession. The *status quo ante* should be allowed to continue in tact pending a decision by the Civil Court—*Gulab Singh v. Ram Prasad*, 35 Cr.L.J. 685, 148 I.C. 436, 11 O.W.N. 372, A.L.R. 1934 Oudh 256, 1934 Cr.C. 586, A.I.R. 1934 Oudh 199. If the conviction is set aside in appeal or revision, the order under sec. 522 resulting from the conviction must also be set aside, and the accused is entitled to get back possession of the property—*Lal Chand v. Dasodhi*, 24 Cr.L.J. 493, A.I.R. 1923 Lah. 15; *Raghunath v. Raghunath*, 30 Cr.L.J. 902, 118 I.C. 392, Ind. Rul. 1929 Lah. 744.

But it is not necessary that all the accused persons must have been convicted. There is no reason for putting a narrow construction upon this section. An order of restoration would not be bad if some of the accused are convicted and others are acquitted. An order under this section naturally follows from a finding that the complainant has been dispossessed by force. A conviction is undoubtedly necessary, but not necessarily the conviction of all the accused—*Garbad Y'adav*, 55 Bom. 155, 32 Bom.L.R. 1496, 1931 Cr.C. 46 (47), Ind. Rul. 1931 Bom. 145, 129 I.C. 337, 32 Cr.L.J. 275, A.I.R. 1931 Bom. 77.

1356. Criminal force:—To justify an order under this section the Court must find that the offence of which the accused is convicted was attended with criminal force as defined in sec. 350 of the I. P. Code; and therefore, where a person was convicted of criminal trespass, in which no criminal force was used, the Magistrate could not make an order under this section—*Churaman v. Ramlal*, 25 All. 341, 1903 A.W.N. 59; *Chunni v. Baldeo*, 21 A.L.J. 593, 25 Cr.L.J. 42, A.I.R. 1924 All. 84; *Ishan v. Dino Nath*, 27 Cal. 174, 4 C.W.N. 307; *Pan Nyun v. Maung Nyo*, 2 Cr.L.J. 377 (378), 3 L.B.R. 20; *Balram v. Chamru*, 2 P.L.T. 120, 61 I.C. 57, 22 Cr.L.J. 329, A.I.R. 1921 Pat. 391; *Hari Chand*, 20 Cr.L.J. 488, A.I.R. 1919 Lah. 248, 1919 P.R. 16, 51 I.C. 472; *Shera*, 28 P.L.R. 238, 28 Cr.L.J. 320; *Ali Bahadur Wajid*, 23 Cr.L.J. 260, 24 O.C. 352; *Rajathammal v. Rajamanickam*, 1922 M.W.N. 356, 23 Cr.L.J. 502, A.I.R. 1922 Mad. 188. If the accused armed with sticks and lathis rushed at the complainant and used threats, whereupon the complainant was obliged to run away from his field, held that there was criminal force as defined in secs. 349 and 350, I. P. C., although actual physical force was not used, and an order under this section was justified—*Ashiq Hussain*, 45 All. 25 (26), 24 Cr.L.J. 857. But where the accused broke open the fence and forcibly removed the cots and constructed a building thereon in spite of the complainant's protest but used no force against her, an order under this section was not justifiable. It must be shown that the owner or occupier of the land was dispossessed by reason of the force shown to him or her—*Daw Mja*, 38 Cr.L.J. 918, 170 I.C. 363, 10 R.R. 80, A.I.R. 1937 Rang. 248.

But the words 'attended by criminal force' do not mean an offence of criminal force as an ingredient; to hold such view is to put a narrow construction on the general

Limitation:—When an application is made to the Superior Court “to make any further orders as may be just,” such application should not always be deemed as an appeal and need not be presented within the period of limitation prescribed for filing an appeal from the order of a Magistrate—*Srinivasamoorthi v. Narasimhalu*, 50 Mad. 916, 28 Cr.L.J. 279 (880). Thus, a person was convicted in June 1920 for dishonestly receiving stolen currency notes, and was ordered by the Magistrate to make over the money to the complainant. On appeal, the Sessions Judge in July 1921 reversed the conviction and acquitted the accused, but passed no order as regards the notes. Subsequently, in January 1922, the accused made an application to the Sessions Judge for the restoration of the money, which the Judge rejected as barred by limitation. *Held*, that this application was in no sense an appeal against the order of the trying Magistrate, but an independent application to the Sessions Judge with a view to his taking action under sec. 520 and ‘passing any order that may be just.’ No period of limitation is prescribed for such an application and it can be made within a reasonable time from the date on which an accused person is acquitted of the crime with which he was charged—*Kanshi Ram*, 4 Lah. 49 (51), 24 Cr.L.J. 713.

1354. Revision:—When an order of the Lower Court has been set aside by the Sessions Court on appeal under this section, the order of the Sessions Court is not further appealable; the remedy is by way of revision to the High Court—*Debi Prasad v. Puran*, 1898 A.W.N. 40.

521. (1) On a conviction under the Indian Penal Code, section 292, section 293, section 501 or section 502, the Court may order the destruction of all the copies of the thing in respect of which the conviction was had, and which are in the custody of the Court or remain in the possession or power of the person convicted.

(2) The Court may, in like manner, on a conviction under the Indian Penal Code, section 272, section 273, section 274 or section 275, order the food, drink, drug or medical preparation in respect of which the conviction was had, to be destroyed.

522. (1) Whenever a person is convicted of an offence attended by criminal force *or show of force* or by criminal intimidation, and it appears to the Court that by such force *or show of force* or criminal intimidation any person has been dispossessed of any immovable property, the Court may, if it thinks fit, *when convicting such person or at any time within one month from the date of the conviction, order the person dispossessed to be restored to the possession of the same.*

(2) No such order shall prejudice any right or interest to or in such immovable property which any person may be able to establish in a civil suit.

(3) *An order under this section may be made by any Court of appeal, confirmation, reference or revision.*

Change:—The italicised words and sub-section (3) have been added by section 143 of the Cr. P. C. Amendment Act, XVIII of 1923. “This amendment provides for the order of restoration being passed within one month from the date of conviction;

secondly, it extends the scope of the section to ouster from possession by show of criminal force or criminal intimidation; and *thirdly*, it gives power to an Appellate Court or to the High Court in revision to pass such an order"—*Statement of Objects and Reasons* (1914).

1355. Scope of section:—An order under this section should not be made where the accused person has not been *convicted of an offence* attended by criminal force—*Soita v. Dochhi*, 12 C.W.N. 269; *Tulshi Ram v. Abrar Ahmad*, 37 All. 654, 30 I.C. 1002, 13 A.L.J. 932, 16 Cr.L.J. 714; *Ali Bahadur*, 24 O.C. 352, 66 I.C. 324, 23 Cr.L.J. 260, A.I.R. 1922 Oudh 144. See also *Sukhlal v. Ladhikhai*, 17 N.L.J. 27. Therefore, a Magistrate after *acquitting* an accused person cannot proceed to pass an order under this section—*Ali Bahadur*, *supra*. So also, no order can be passed under this section, where the trespass which the accused was alleged to have committed was not a criminal trespass but merely a civil one—*Soita v. Dochhi*, 12 C.W.N. 269. Where the accused were found not guilty of the offence with which they stood charged, the offence was not attended by any criminal force or show of criminal force or by criminal intimidation and there was no evidence to show that by such force or show of force or criminal intimidation the complainant had been dispossessed of his immovable property, this section had no application and an order for restoration of property could not be passed in favour of the complainant. Nor can the accused be ordered to be given possession. The *status quo ante* should be allowed to continue in tact pending a decision by the Civil Court—*Gulab Singh v. Ram Prasad*, 35 Cr.L.J. 686, 148 I.C. 436, 11 O.W.N. 372, A.L.R. 1934 Oudh 256, 1934 Cr.C. 586, A.I.R. 1934 Oudh 199. If the conviction is set aside in appeal or revision, the order under sec. 522 resulting from the conviction must also be set aside, and the accused is entitled to get back possession of the property—*Lal Chand v. Dasandhi*, 24 Cr.L.J. 493, A.I.R. 1923 Lah. 15; *Raghunath v. Raghunath*, 30 Cr.L.J. 902, 118 I.C. 392, Ind. Rul. 1929 Lah 744.

But it is not necessary that *all* the accused persons must have been convicted. There is no reason for putting a narrow construction upon this section. An order of restoration would not be bad if some of the accused are convicted and others are acquitted. An order under this section naturally follows from a finding that the complainant has been dispossessed by force. A conviction is undoubtedly necessary, but not necessarily the conviction of *all* the accused—*Garbad Yadav*, 55 Bom. 155, 32 Bom.L.R. 1496, 1931 Cr.C. 46 (47), Ind. Rul. 1931 Bom. 145, 129 I.C. 337, 32 Cr.L.J. 275, A.I.R. 1931 Bom 77.

1356. Criminal force:—To justify an order under this section the Court must find that the offence of which the accused is convicted was attended with criminal force as defined in sec. 350 of the I. P. Code; and therefore, where a person was convicted of criminal trespass, in which no criminal force was used, the Magistrate could not make an order under this section—*Churaman v. Ramlal*, 25 All 341, 1903 A.W.N. 59; *Chunni v. Baldeo*, 21 A.L.J. 593, 25 Cr.L.J. 42, A.I.R. 1924 All. 84; *Ishan v. Dino Nath*, 27 Cal 174, 4 C.W.N. 307; *Pan Nyeun v. Maung Nyo*, 2 Cr.L.J. 377 (378), 3 L.B.R. 20; *Balram v. Chamru*, 2 P.L.T. 120, 61 I.C. 57, 22 Cr.L.J. 329, A.I.R. 1921 Pat. 391; *Hari Chand*, 20 Cr.L.J. 488, A.I.R. 1919 Lah 248, 1919 P.R. 16, 51 I.C. 472; *Shera*, 28 P.L.R. 238, 28 Cr.L.J. 320; *Ali Bahadur Wajid*, 23 Cr.L.J. 260, 24 O.C. 352; *Rajathammal v. Rajamanickam*, 1922 M.W.N. 356, 23 Cr.L.J. 502, A.I.R. 1922 Mad. 188. If the accused armed with sticks and *lathis* rushed at the complainant and used threats, whereupon the complainant was obliged to run away from his field, *held* that there was criminal force as defined in secs. 349 and 350, I. P. C., although actual physical force was not used, and an order under this section was justified—*Ashiq Hussain*, 45 All 25 (26), 24 Cr.L.J. 857. But where the accused broke open the fence and forcibly removed the cots and constructed a building thereon in spite of the complainant's protest but used no force against her, an order under this section was not justifiable. It must be shown that the owner or occupier of the land was dispossessed by reason of the force shown to him or her—*Daw Mja*, 38 Cr.L.J. 918, 170 I.C. 368, 10 R.R. 80, A.I.R. 1937 Rang. 248.

But the words 'attended by criminal force' do not mean an offence of criminal force as an ingredient; to hold such view is to put a narrow construction on the general

words. Therefore, an offence under sec. 447, I. P. C. or under sec. 341, I. P. C. would fall under the present section, if criminal force was *in fact* used in committing the offence, although the use of criminal force is not a necessary ingredient of an offence under sec. 447 or 341, I. P. Code—*Batakala Pottia vadu*, 26 Mad. 49 (50), 12 M.L.J. 447, 2 Weir 675; *Mohini v. Narendra*, 31 Cal. 691 (696) (F.B.). *Contra*—*Ram Chandra v. Jityandria*, 25 Cal. 434 (439). However, these questions of nicety would no longer arise by reason of the words "show of criminal force" added to this section.

There must be a *clear finding* by the Magistrate that criminal force was in fact used by the accused, and that the complainant was dispossessed by such force. In the absence of such finding, an order under this section cannot be made—*Batakala*, 26 Mad. 49 (50), 12 M.L.J. 447, 2 Weir 675; *Ramchandra v. Jityandria*, 25 Cal. 434 (438); *Bhagbat v. Siddique*, 39 Cal 1050; *Teja Singh*, 28 Cr.L.J. 819, 104 I.C. 435, A.I.R. 1927 Lah. 792, 9 Lah. 322; *Suba v. Ali Gauhar*, 36 Cr.L.J. 1161, 8 R.L. 110, 157 I.C. 471, A.I.R. 1935 Lah. 477, 37 P.L.R. 176, 1935 Cr.C. 871. In *Usmanmiya v. Amirmiya*, 28 Cr.L.J. 191 (192), 99 I.C. 863, A.I.R. 1927 Nag. 131 it has been held that there need not be an express finding that criminal force was used, if the evidence on record leaves not a doubt as to the matter.

The word 'force' means force to a *person* as defined in sec. 349, I. P. C., and not force to *property*. Thus, where the accused dispossessed the complainant of his garden by breaking open the padlock of the gate but used no force or violence to any person, it was held that the case did not fall under this section—*Sheonandan v. Bholanath*, 15 Cr.L.J. 222, 18 C.W.N. 1146, A.I.R. 1914 Cal. 629, 22 I.C. 751. [But see *Usman v. Amirmiya*, 28 Cr.L.J. 191 (192), 99 I.C. 863, A.I.R. 1927 Nag. 131.] Where the accused committed rioting and used violence to the complainant's fencing but not to any person, it was held that this section did not apply—*Sadasib Mandal*, 18 C.W.N. 1150, 15 Cr.L.J. 720, 26 I.C. 168, A.I.R. 1915 Cal. 131. This section does not apply to a case of criminal trespass and dispossession of the complainant unless it is found that the trespass was attended with use of criminal force on the *person* of the complainant—*Bakram v. Chamru*, 2 P.L.T. 120, A.I.R. 1921 Pat. 391, 22 Cr.L.J. 329, 61 I.C. 57; *Bhani v. Narain Singh*, 41 Cr.L.J. 387, 186 I.C. 895, A.I.R. 1940 Lah. 84, 41 P.L.R. 908. But the mere fact that the accused were acquitted of assault and convicted only under sec. 447, I. P. C., does not mean that no criminal force or show of criminal force or criminal intimidation was present in the conduct of the accused so as to exclude the operation of this section—*Mahadeo*, 36 Cr.L.J. 328, 153 I.C. 407, A.I.R. 1934 All. 1025 (1027), 1934 A.L.J. 1061, 1934 Cr.C. 1335. Where trespass was committed in the absence of the complainant an order for restoration cannot be passed—*Mangi Ram*, A.I.R. 1927 Lah. 830, 26 P.L.R. 500, 105 I.C. 676, 28 Cr.L.J. 964; *Bihari Lal*, A.I.R. 1934 Lah. 454, 1934 Cr.C. 702, A.I.R. 1934 Lah. 257, 36 P.L.R. 91, 152 I.C. 162, 36 Cr.L.J. 59, 15 Lah. 786. See also *Zamin Husain*, cited below in Note 1357.

Dissenting from the view stated above it has been held that 'when a person breaks open the lock of a house in the absence of the person in possession and enters into possession thereof, he uses criminal force to the lock which he breaks, criminal because it involves the crime of mischief and an order under this section is therefore competent—*Roda v. Autar Singh*, A.I.R. 1938 Lah. 839 (840), 40 P.L.R. 923, 40 Cr.L.J. 380, 180 I.C. 801, 11 R.L. 693. This view of law has been dissented from by the same High Court in a recent case. It has been held that in a case where the complainant himself alleges that the house was locked when the unlawful entry was effected, it can by no stretch of language be argued that the offence of criminal trespass was attended by criminal force or show of force or by criminal intimidation. The term "force" is defined in sec. 349, I. P. C., and the term criminal force is defined in sec. 350, I. P. C., and both sections contemplate the use of force to a *person* and not to a thing. In *Roda v. Autar Singh*, Skemp, J., has no doubt remarked that when a person breaks a lock, he uses criminal force to it. But this is not so, especially when it is seen that this section contemplates not only criminal force but criminal intimidation, too, and it

is inconceivable how a person can criminally intimidate an inanimate object. In such a case an order under this section is illegal—*Ram Chand v. Emp.*, 40 Cr.L.J. 781, 12 R.L. 111, 183 I.C. 340, A.I.R. 1939 Lah. 184, I.L.R. 1939 Lah. 513, 41 P.L.R. 63. See also *Bhani v. Narain Singh*, A.I.R. 1940 Lah. 84, 41 P.L.R. 908, 41 Cr.L.J. 387, 186 I.C. 895. In a very recent case a Division of the Lahore High Court has held that the law has been correctly laid down in *Ram Chand v. Emp.*, supra, and that the decision in *Roda v. Autar Singh*, supra, is incorrect—*Narain Singh v. Panna Lal*, A.I.R. 1940 Lah. 460. The use of criminal force to a human being is necessary before this section comes into operation—*Ibid.*

An order under this section can only be passed in cases when criminal force as defined in sec. 350, I. P. C., has been used and where a finding to that effect has been recorded—*Suba v. Ali Gauhar*, A.I.R. 1935 Lah. 477, 1935 Cr.C. 871, 157 I.C. 471, 36 Cr.L.J. 1161, 37 P.L.R. 176. But where the Magistrate does not record a finding that there was criminal force but finds that the complainant's evidence is true, an order under this section is competent—*Roda v. Autar Singh*, supra.

1357. Show of force:—An order may be passed under this section even if the offence is attended with mere show of force. On this point there was a conflict of opinion prior to the present amendment. In some cases it was held that there must be actual criminal force and not mere show of criminal force. Thus, it was held that the offence of being members of an unlawful assembly was one in the composition of which the use of criminal force did not enter, though the show of criminal force might exist; and therefore an order under this section could not be passed on conviction for being members of an unlawful assembly—*Ramchandra v. Jityandria*, 25 Cal. 343 (349); *Ishan v. Deno Nath*, 27 Cal. 174; *Narayan v. Visaji*, 23 Bom. 494; *Bundhi Singh*, 19 Cr.L.J. 516, 45 I.C. 276, 4 P.L.W. 329; *Mahesh*, 50 I.C. 30, 20 Cr.L.J. 270 (Pat.). But these cases were dissented from in *Chhako Mandal*, 11 C.W.N. 467, 5 C.L.J. 278; and *Nga Po Tok*, 1918 U.B.R. 3rd Qr. 111, 20 Cr.L.J. 115, where it was held that an order as to possession of property could be passed by a Magistrate even where a person was dispossessed by mere show of criminal force. The Legislature has now given effect to the ruling in the latter set of cases by inserting the words "show of force or criminal intimidation" in this section, and the former set of cases must be deemed as overruled. And thus it has been held under the amended Code that where the accused succeeded in taking possession of the complainant's house by means of criminal trespass, threatening to use force to the complainant and his men, the accused's act clearly came within this section and an order for restoration of the house to the complainant was just and proper—*Rameshar*, 4 Pat. 438, 27 Cr.L.J. 137 (138); *Sitaram v. Tilok Chand*, 28 N.L.R. 298. But where there was no occasion for the use of any force or show of force on the part of the accused when they took possession of the property as the complainant was absent and no one on behalf of the complainant appeared to prevent the accused from committing the offences of which they were convicted and the complainant was still fighting out the question of his dispossession from the property in certain criminal cases, no order for restoration of possession to the complainant could be made under this section—*Zamin Husain*, 35 Cr.L.J. 788, 148 I.C. 790, 11 O.W.N. 472, 1934 Cr.C. 581, A.I.R. 1934 Oudh 185, A.L.R. 1934 Oudh 150.

1358. Dispossession:—To justify an order under this section it must be shown that a party has been dispossessed by criminal force. Where there is no evidence of such dispossession, an order under this section cannot be sustained—*Vadamalai Pallavarayan*, 2 War 674; *Kaon*, 1917 P.L.R. 62, 18 Cr.L.J. 898. There should be an express finding that the person in whose favour the order was made had been dispossessed by the use of criminal force—*Lachmidas v. Pallat*, 23 W.R. 54. Where the accused was convicted of wrongfully restraining the complainant by obstructing a path along which he was entitled to pass, and the Magistrate ordered under this section that the obstructions should be removed and the complainant should be allowed to use the path, held that the order was unsustainable in the absence of a finding that the complainant had been dispossessed of any immoveable property—*Mohan Khan v. Gayzuddin*,

18 C.W.N. 399 (401). Where the accused was convicted of rioting and an order was passed under this section to the effect that one of the witnesses be put in possession of certain land until ousted by a Court of competent jurisdiction, *held* that as there was no evidence that the witness had been *dispossessed* by criminal force, the order of the Magistrate was bad—*Vadamalai*, 2 Weir 674. If the Magistrate purported to act under sec. 145, he should have instituted separate proceedings.

Where it is found that neither party is in *actual* possession, an order under this section cannot be made—*Bhairi Surayya*, 2 Weir 675.

Order affecting possession of third person:—The object of the provisions of this section is to enable the Criminal Court, by a summary order, to restore the state of things which existed at the time of the dispossession by the convicted person or persons. It cannot go behind the state of affairs existing at the time of forcible dispossession leading to the criminal prosecution. Where an auction-purchaser of a mortgaged property was put in possession of the property by ejecting the tenant, and the auction-purchaser was forcibly dispossessed by certain persons, *held* that upon the conviction of the latter, the auction-purchaser was entitled to be restored to actual possession which he held of the house at the time of his dispossession, and that the tenant had no right to any possession, but that he should seek his remedy in the Civil Court—*Rameshwar v. Biswa Nath*, 5 C.W.N. 374. If the Court finds that possession was with the complainant when the offence was committed and he was dispossessed by force, it will order the complainant to be put in possession, but will not look into the title of a third person to possession; especially if that person had an opportunity of disproving the complainant's title and proving his own at the trial of the accused but did not prove it—*Garbad Yadav*, 55 Bom. 155, 32 Bom.L.R. 1496, 1931 Cr.C. 46 (47), Ind. Rul. 1931 Bom. 145, 129 I.C. 337, 32 Cr.L.J. 275, A.I.R. 1931 Bom. 77.

An order under this section can only be binding between the parties to the order and can have no finality in favour of one who was not a party to the order and does not claim under any party—*Adinarayana v. Surama*, 48 M.L.J. 372, A.I.R. 1925 Mad. 799.

1359. Order under this section:—The order to be passed under this section is an order to the effect that the person dispossessed be restored to the possession of the property. Where the accused obstructed the complainant's right of way over a path by the erection of a hut, and used criminal force to the complainant when the latter objected to the obstruction, *held* that the Magistrate could order the hut to be removed, because that was the only way in which the complainant could be restored to the possession of his right of way of which he had been dispossessed by reason of the obstruction—*Mohini v. Harendra*, 31 Cal 691 (695) (F.B.). Where the accused was convicted under sec. 323, I. P. C., for having forcibly dispossessed the complainant of a bungalow and its contents, it was the duty of the Magistrate to pass orders under this section directing restoration to the complainant of the bungalow and its contents—*Ahmed Ali v. Keenoo*, 36 Cal. 44, 13 C.W.N. 77.

Order when can be made:—An order under this section, although it can be made only on the conviction of an offence, is an independent order and need not be made simultaneously with the conviction—*Narayan v. Visaji*, 23 Bom. 494. It is not essential in law that an order restoring possession should find a place in the actual judgment. But it must be immediate, that is, directly arising out of the judgment of the Court convicting in the case, and without any fresh materials having in the meantime been produced—*Jatindra*, 14 Cr.L.J. 172 (Cal.); See also *Khushi v. Bakhtyal*, 16 A.L.J. 489, 19 Cr.L.J. 734, 46 I.C. 414. It is proper if it is made within a *reasonable* time from the date of conviction—*Nga Po Tok*, U.B.R. (1918) 3 Qr. 111, 20 Cr.L.J. 115. It is not necessary for the Magistrate to pass an order under this section simultaneously with the conviction and there is no illegality if he passes the order at any time after the conviction, if the cause of delay in applying for the order is fully explained to his satisfaction and the complainant moves the Court promptly after the cause of delay has ceased—*Ghulam Muhammad v. Karam Singh*, 1914 P.R. 15, 15 Cr.L.J. 275. In this case, there was 20

months' delay owing to the filing of a civil suit by the accused; and the Court excused the delay, since the complainant applied for restoration immediately after this civil suit had terminated in his favour.

It should be noted that the present section as now amended gives *only one month's time*. And order passed after the expiry of one month is invalid and cannot stand—*Ghazan v. Bhag Bhari*, 33 P.L.R. 481, 1932 Cr.C. 254, Ind. Rul. 1932 Lah. 151, 135 I.C. 679, 33 Cr.L.J. 191, A.I.R. 1932 Lah. 210.

In *Mohun v. Rat Chand*, 4 C.W.N. 308, it was held that an order under this section must be made *simultaneously* with the order of conviction of the accused, and could not be made subsequently. But this ruling is no longer good law in view of the words "or at any time within one month" newly added in this section. "We do not think that an order of restoration need be made simultaneously with the conviction, but we think that any application for such an order should be made promptly, and that one month is sufficient time to allow for this purpose"—*Report of the Select Committee of 1916*.

This section specifically limits the time to one month from the date of conviction. If an application for restoration of possession is made within one month, the Magistrate is not justified in adjourning the application on the ground that an appeal by the accused against his conviction is pending in the Appellate Court, and in making the order after the dismissal of the appeal. No conduct on the accused's part can extend the jurisdiction conferred by the statute—*Aswini Kumar v. Sasanka*, 59 Cal. 1153, 36 C.W.N. 624 (625), 140 I.C. 66, Ind. Rul. 1932 Cal. 685, 1932 Cr.C. 745, A.I.R. 1932 Cal. 750, 33 Cr.L.J. 868. The proper course for the complainant would have been to make an application for restoration to the Appellate Court when the appeal was dismissed—*Ibid*. But where the petition was filed before the Magistrate only two days after the conviction and the delay in passing the order was not due to any fault on the part of the complainant, the order is not defective. Even if there be any defect in the order of the Magistrate who had passed it, the High Court would make that order following the procedure in *Rameshwar Singh v. King-Emperor*, 4 Pat. 438, 91 I.C. 809, A.I.R. 1925 Pat. 689, 27 Cr.L.J. 137, 7 P.L.T. 285, where an order under section 522, Cr. P. C., was passed by the High Court—*Sahebjan v. Emp.*, 41 Cr.L.J. 311, A.I.R. 1940 Pat. 409, 186 I.C. 423. In a case like this the Allahabad High Court set aside the order of the Magistrate, which was passed beyond time, but directed that the complainant be restored to the possession of the property from which he was wrongfully dispossessed by the accused, in exercise of powers under sub-section (3) of this section—*Nihal Singh v. Emp.*, 40 Cr.L.J. 958, 184 I.C. 384, A.I.R. 1939 All. 662, 1939 A.L.J. 595, 12 R.A. 225, I.L.R. 1939 All. 863, 1939 A Cr.C. 140, 1939 A.W.R. (H.C.) 566. But see *Said Umar v. Abdulkadir*, *infra*.

The order of the Court must be passed within one month from the date of the conviction. It is not sufficient that the application to the Court to exercise its powers should be made within one month of the conviction—*Daw Mya*, 38 Cr.L.J. 918, 170 I.C. 368, 10 R.R. 80, A.I.R. 1937 Rang. 248.

Who can make the order:—Where an accused is convicted by a Special Bench of Honorary Magistrates since abolished, another Bench has no jurisdiction to pass an order under this section—*Bhani v. Narain Singh*, A.I.R. 1940 Lah. 84, 41 P.L.R. 908, 41 Cr.L.J. 387, 186 I.C. 895.

1360. Notice to party:—Since an order under this section is to be immediate, that is, directly arising out of the judgment of the Court convicting the accused, and without any fresh materials having in the meantime been produced, it is not necessary that any notice should go to the accused before the order is passed—*Jatindra Nath*, 14 Cr.L.J. 172 (Cal); *Garband Yadav*, 55 Bom. 155, 1931 Cr.C. 46 (47), Ind. Rul. 1931 Bom. 145, 129 I.C. 337, 32 Cr.L.J. 275, A.I.R. 1931 Bom. 77. It was not the intention that notice should be issued to the opposite side before orders should be passed; otherwise it would be easy for convicted persons to bring it about that the Court should never be able to pass order within one month from the date of the conviction—*Daw Mya*, 38 Cr.L.J. 918, 170 I.C. 368, 10 R.R. 80, A.I.R. 1937 Rang. 248. See also

18 C.W.N. 399 (401). Where the accused was convicted of rioting and an order was passed under this section to the effect that one of the witnesses be put in possession of certain land until ousted by a Court of competent jurisdiction, *held* that as there was no evidence that the witness had been *dispossessed* by criminal force, the order of the Magistrate was bad—*Vadamalai*, 2 Weir 674. If the Magistrate purported to act under sec. 145, he should have instituted separate proceedings.

Where it is found that neither party is in *actual* possession, an order under this section cannot be made—*Bhairi Surayya*, 2 Weir 675.

Order affecting possession of third person:—The object of the provisions of this section is to enable the Criminal Court, by a summary order, to restore the state of things which existed at the time of the dispossession by the convicted person or persons. It cannot go behind the state of affairs existing at the time of forcible dispossession leading to the criminal prosecution. Where an auction-purchaser of a mortgaged property was put in possession of the property by ejecting the tenant, and the auction-purchaser was forcibly dispossessed by certain persons, *held* that upon the conviction of the latter, the auction-purchaser was entitled to be restored to actual possession which he held of the house at the time of his dispossession, and that the tenant had no right to any possession, but that he should seek his remedy in the Civil Court—*Rameshwar v. Biswa Nath*, 5 C.W.N. 374. If the Court finds that possession was with the complainant when the offence was committed and he was dispossessed by force, it will order the complainant to be put in possession, but will not look into the title of a third person to possession; especially if that person had an opportunity of disproving the complainant's title and proving his own at the trial of the accused but did not prove it—*Garbad Yadav*, 55 Bom. 155, 32 Bom.L.R. 1496, 1931 Cr.C. 46 (47), Ind. Rul. 1931 Bom. 145, 129 I.C. 337, 32 Cr.L.J. 275, A.I.R. 1931 Bom. 77.

An order under this section can only be binding between the parties to the order and can have no finality in favour of one who was not a party to the order and does not claim under any party—*Adinarayana v. Surama*, 48 M.L.J. 372, A.I.R. 1925 Mad. 799.

1359. Order under this section:—The order to be passed under this section is an order to the effect that the person dispossessed be restored to the possession of the property. Where the accused obstructed the complainant's right of way over a path by the erection of a hut, and used criminal force to the complainant when the latter objected to the obstruction, *held* that the Magistrate could order the hut to be removed, because that was the only way in which the complainant could be restored to the possession of his right of way of which he had been dispossessed by reason of the obstruction—*Mohini v. Harendra*, 31 Cal. 691 (695) (F.B.). Where the accused was convicted under sec. 323, I. P. C., for having forcibly dispossessed the complainant of a bungalow and its contents, it was the duty of the Magistrate to pass orders under this section directing restoration to the complainant of the bungalow and its contents—*Ahmed Ali v. Keenoo*, 36 Cal. 44, 13 C.W.N. 77.

Order when can be made:—An order under this section, although it can be made only on the conviction of an offence, is an independent order and need not be made simultaneously with the conviction—*Narayan v. Visaji*, 23 Bom. 494. It is not essential in law that an order restoring possession should find a place in the actual judgment. But it must be immediate, that is, directly arising out of the judgment of the Court convicting in the case, and without any fresh materials having in the meantime been produced—*Jatindra*, 14 Cr.L.J. 172 (Cal.); See also *Khubi v. Bakhtayal*, 16 A.L.J. 489, 19 Cr.L.J. 734, 46 I.C. 414. It is proper if it is made within a *reasonable* time from the date of conviction—*Nga Po Tok*, U.B.R. (1918) 3 Qr. 111, 20 Cr.L.J. 115. It is not necessary for the Magistrate to pass an order under this section simultaneously with the conviction and there is no illegality if he passes the order at any time after the conviction, if the cause of delay in applying for the order is fully explained to his satisfaction and the complainant moves the Court promptly after the cause of delay has ceased—*Ghulam Muhammad v. Karam Singh*, 1914 P.R. 15, 15 Cr.L.J. 275. In this case, there was 20

months' delay owing to the filing of a civil suit by the accused; and the Court excused the delay, since the complainant applied for restoration immediately after this civil suit had terminated in his favour.

It should be noted that the present section as now amended gives *only one month's time*. And order passed after the expiry of one month is invalid and cannot stand—*Ghazan v. Bhag Bhari*, 33 P.L.R. 481, 1932 Cr.C. 254, Ind. Rul. 1932 Lah. 151, 135 I.C. 679, 33 Cr.L.J. 191, A.I.R. 1932 Lah. 210

In *Mohun v. Ras Chand*, 4 C.W.N. 308, it was held that an order under this section must be made *simultaneously* with the order of conviction of the accused, and could not be made subsequently. But this ruling is no longer good law in view of the words "or at any time within one month" newly added in this section. "We do not think that an order of restoration need be made simultaneously with the conviction, but we think that any application for such an order should be made promptly, and that one month is sufficient time to allow for this purpose"—*Report of the Select Committee of 1916*.

This section specifically limits the time to one month from the date of conviction. If an application for restoration of possession is made within one month, the Magistrate is not justified in adjourning the application on the ground that an appeal by the accused against his conviction is pending in the Appellate Court, and in making the order after the dismissal of the appeal. No conduct on the accused's part can extend the jurisdiction conferred by the statute—*Aswini Kumar v. Sasanka*, 59 Cal 1153, 36 C.W.N. 624 (625), 140 I.C. 66, Ind. Rul. 1932 Cal. 685, 1932 Cr.C. 745, A.I.R. 1932 Cal. 750, 33 Cr.L.J. 868. The proper course for the complainant would have been to make an application for restoration to the Appellate Court when the appeal was dismissed—*Ibid*. But where the petition was filed before the Magistrate only two days after the conviction and the delay in passing the order was not due to any fault on the part of the complainant, the order is not defective. Even if there be any defect in the order of the Magistrate who had passed it, the High Court would make that order following the procedure in *Rameshwar Singh v. King-Emperor*, 4 Pat. 438, 91 I.C. 809, A.I.R. 1925 Pat. 689, 27 Cr.L.J. 137, 7 P.L.T. 285, where an order under section 522, Cr. P. C., was passed by the High Court—*Sahebjan v. Emp.*, 41 Cr.L.J. 311, A.I.R. 1940 Pat. 409, 186 I.C. 423. In a case like this the Allahabad High Court set aside the order of the Magistrate, which was passed beyond time, but directed that the complainant be restored to the possession of the property from which he was wrongfully dispossessed by the accused, in exercise of powers under sub-section (3) of this section—*Nihal Singh v. Emp.*, 40 Cr.L.J. 958, 184 I.C. 384, A.I.R. 1939 All. 662, 1939 A.L.J. 595, 12 R.A. 225, I.L.R. 1939 All. 863, 1939 A.Cr.C. 140, 1939 A.W.R. (H.C.) 566. But see *Said Umar v. Abdulkadir*, *infra*.

The order of the Court must be passed within one month from the date of the conviction. It is not sufficient that the application to the Court to exercise its powers should be made within one month of the conviction—*Daw Mya*, 38 Cr.L.J. 918, 170 I.C. 368, 10 R.R. 80, A.I.R. 1937 Rang. 248.

Who can make the order:—Where an accused is convicted by a Special Bench of Honorary Magistrates since abolished; another Bench has no jurisdiction to pass an order under this section—*Bhani v. Narain Singh*, A.I.R. 1940 Lah. 84, 41 P.L.R. 908, 41 Cr.L.J. 387, 186 I.C. 895.

1360. Notice to party:—Since an order under this section is to be immediate, that is, directly arising out of the judgment of the Court convicting the accused, and without any fresh materials having in the meantime been produced, it is not necessary that any notice should go to the accused before the order is passed—*Jatindra Nath*, 14 Cr.L.J. 172 (Cal.); *Garband Yadav*, 55 Bom. 155, 1931 Cr.C. 46 (47), Ind. Rul. 1931 Bom. 145, 129 I.C. 337, 32 Cr.L.J. 275, A.I.R. 1931 Bom. 77. It was not the intention that notice should be issued to the opposite side before orders should be passed; otherwise it would be easy for convicted persons to bring it about that the Court should never be able to pass order within one month from the date of the conviction—*Daw Mya*, 38 Cr.L.J. 918, 170 I.C. 368, 10 R.R. 80, A.I.R. 1937 Rang. 248. See a!

Said Umar v. Abdul Kadir, infra. But the Magistrate should give the party an opportunity to show cause as a matter of due exercise of judicial discretion—*Pan Nyun v. Maung Nyo*, 3 L.B.R. 20, 2 Cr.L.J. 377. Where an order under this section was made in respect of a house on a conviction of rioting and hurt, and the Sessions Judge on appeal set aside the conviction but directed the order under section 522 to be in abeyance pending a reference to the High Court, and subsequently in the absence of the complainant declared the order to be void, it was held that the Sessions Judge's order should not have been made behind the back of the party affected by it—*Majid Ali v. Ali Asrab*, 23 C.W.N. 862, 20 Cr.L.J. 846. See also *Muran Bakhsh v. Bhag Mal*, 32 P.L.R. 758, 33 Cr.L.J. 123, 135 I.C. 206, A.I.R. 1932 Lah. 17, Ind. Rul. 1932 Lah. 78, 1932 Cr.C. 27.

Sub-section (2):—Limitation for civil suit:—See Art. 47 of the Indian Limitation Act, which provides a period of three years from the date of the order.

1361. Sub-section (3):—This sub-section has been newly added. Prior to this amendment it was held that an Appellate Court had no power to pass an order under this section where the convicting Magistrate had not passed any order hereunder—*Bhagabat v. Siddiq Octagar*, 39 Cal. 1050; *Muhammad Din*, 20 Cr.L.J. 30, 1919 P.R. 14; *Aziz Ahmad v. Budhu*, 45 All. 553 (554), 24 Cr.L.J. 677. These rulings are no longer correct. Under the present amendment, the High Court acting in reference or revision has power to pass the order even though no such order might have been made by the trial or appellate Court—*Lachman*, 46 All. 92, 21 A.L.J. 871, 26 Cr.L.J. 206. In a proper case, the Court of appeal or the Court of revision can pass an order under this section, if such Court is satisfied that an order of the nature is necessary in the interest of justice—*Sahebjan v. Emp*, 41 Cr.L.J. 311. This clause comes into play when an appeal or revision has been preferred against the conviction. It is then that the appellate or revisional Court is seised of the jurisdiction to restore possession although the original Court may not have done so and it appears that such higher Courts are not bound by the limitation of one month in doing so—*Said Umar v. Abdul Qadir*, A.I.R. 1937 Pesh. 7, 38 Cr.L.J. 333, 166 I.C. 872, 9 R.Pesh. 73.

One month is the time limit fixed for the trial Court in sub-section (1), but there is nothing in sub-section (3) to show that this limitation applies to a Court of Appeal. If it did, the result would be that sub-section (3) would be of little or no practical use, as a case will not usually reach the Appellate Court before the expiry of the month—*Namdeo*, 39 Cr.L.J. 342 (343), 173 I.C. 620, A.I.R. 1938 Nag. 316, I.L.R. 1938 Nag. 454, 10 R.N. 314. An order under this section may be passed by the Court of appeal or revision at any time *howsoever long* after the conviction by the Magistrate and not necessarily within one month from the date of conviction—*Rameshwar*, 4 Pat. 438, 27 Cr.L.J. 137 (138), 91 I.C. 809, A.I.R. 1925 Pat. 689, 7 P.L.T. 285; *Roda v. Autar Singh*, A.I.R. 1938 Lah. 839 (841), 40 P.L.R. 923, 40 Cr.L.J. 380, 11 R.L. 693; *Nihal Singh v. Emp*, 40 Cr.L.J. 958, 184 I.C. 384, A.I.R. 1939 All. 662, 1939 A.L.J. 595, 12 R.A. 225, I.L.R. 1939 All. 863, 1939 A.Cr.C. 140, 1939 A.W.R. (H.C.) 566. Clause (3) of this section does not impose any time limit within which a Court of appeal, confirmation, reference or revision must act. The Legislature, it would seem, thought fit to rely on the discretion of appellate and revisional Courts not to exercise their powers under this section in cases where there has been undue or excessive delay in moving the Court for its use—*Fida Hussain v. Sarfaraz*, 34 Cr.L.J. 940, 145 I.C. 327, 14 P.L.T. 696, A.I.R. 1933 Pat. 617, 1933 Cr.C. 1366, 12 Pat. 787, following *Rameshwar*, supra; *Gudri v. Jangi*, 35 Cr.L.J. 1158, 150 I.C. 787, 15 P.L.T. 163, A.I.R. 1934 Pat. 154, 1934 Cr.C. 339, A.L.R. 1934 Pat. 178.

The words "Court of appeal or revision" mean the Court to which an appeal or application for revision is preferred against the original order of conviction, and not the Court to which an appeal or revision petition may be made against the order of restoration—*Ghazan v. Bhag Bhari*, 33 P.L.R. 481, 1932 Cr.C. 254, Ind. Rul. 1932 Lah. 151, 135 I.C. 679, 33 Cr.L.J. 191, A.I.R. 1932 Lah. 210, dissenting from *Rameshwar*, supra. Sub-section (3) of this section only applies to the Court which is dealing with the original matter either as a Court of Appeal, confirmation, reference or revision

in relation to that matter. It does not give any sort of right of appeal by itself against an order passed under this section—*Mohammad Sharif v. Diwan Singh*, A.I.R. 1940 Lah. 95, 41 Cr.L.J. 458, 187 I.C. 407, distinguishing *Fida Hussain v. Sarfaraz Hussain*, 12 Pat. 787, 145 I.C. 327, A.I.R. 1933 Pat. 617, 1933 Cr.C. 1366, 34 Cr.L.J. 940, 14 P.L.T. 696, 6 R.P. 161. See also *Said Umar v. Abdulkadir*, supra.

A Court of reference can only be a Court such as is described in section 433, Cr. P. Code, where the word 'refer' is definitely used. No such word is used in section 438, Cr. P. C., where the word 'report' is used instead. There would have been no difficulty in using the word 'refer' in section 438, Cr. P. C., in place of the word 'report' had it been the intention of the Legislature to include a Court acting under section 438, Cr. P. C., in the category of Courts of reference. Therefore a Court of reference in sub-section (3) of this section can only be interpreted as meaning a Court which has the power to refer and that is only a Court empowered under section 433, Cr. P. Code. A Court which has got the power to report a case under section 438, Cr. P. C., to the High Court for orders is not a Court of reference—*Mohammad Sharif v. Diwan Singh*, A.I.R. 1940 Lah. 95, 41 Cr.L.J. 458, 187 I.C. 407.

1362. Appeal or Revision:—Since an Appellate Court can pass an incidental or consequential order under sec. 423 (d), an order under this section (which is in the nature of an incidental or consequential order) is also subject to appeal and is similarly subject to the revisional powers of the High Court under sec. 439—*Gourhari v. Allaz*, 29 Cal 724. The ruling in *Ramchandra v. Nobin*, 25 Cal. 630 is not correct in view of sec. 423 (d). An Appellate Court may set aside an order under this section, while affirming the conviction—*Ujir Sheikh v. Syed Ali*, 19 C.W.N. 990, 16 Cr.L.J. 607. The High Court has full power to interfere with an order passed by a Magistrate under this section, although this section is not mentioned in section 520—*Ahmed Ali v. Kenoo*, 36 Cal 44, 13 C.W.N. 77. Where the Magistrate ordered that a property which the accused had taken possession of by force should be restored to the complainant, but on the application of the accused the High Court set aside the order of restoration, held that the order of the High Court amounted to an order of restoration of the property to the accused—*Sheonandan v. Bhola Nath*, 18 C.W.N. 1147, 15 Cr.L.J. 222.

Under this section, a month after the date of conviction the trial Judge becomes *functus officio* in the matter of delivering possession. It would be illogical to hold that in spite of the lower Court having ceased to have the power of giving possession, the revisional Court can, when moved to consider the order of that Court refusing to give possession on the ground of limitation, enlarge that period and grant the relief. The legislature could never have intended this result. Sub-clause (3) comes into play when an appeal or revision has been preferred against the conviction. It is then that the appellate or revisional Court is seized of the jurisdiction to restore possession although the original Court may not have done so and such higher Courts are not bound by the limitation of one month in doing so. But this clause does not help if the Court of revision is considering the order of the trial Court under this section refusing to grant possession because the time for making the order had passed—*Said Umar v. Abdulkadir*, 38 Cr.L.J. 333, 166 I.C. 872, 9 R.Pesh. 73, A.I.R. 1937 Pesh. 7. But see *Sahchjan v. Emp.*, supra.

523. (1) The seizure by any police officer of property taken under section 51, or alleged or suspected to have been stolen, or found under circumstances which create suspicion of the commission of any offence, shall be forthwith reported to a Magistrate, who shall make such order as he thinks fit respecting the disposal of such property or the delivery of such property to the person entitled to the possession thereof, or,

Procedure by Police upon seizure of property taken under section 51 or stolen.

if such person cannot be ascertained, respecting the custody and production of such property.

(2) If the person so entitled is known, the Magistrate may order the property to be delivered to him on such conditions (if any) as the Magistrate thinks fit. If such person is unknown, the Magistrate may detain it and shall, in such a case, issue a proclamation specifying the articles of which such property consists, and requiring any person who may have a claim thereto, to appear before him and establish his claim within six months from the date of such proclamation.

1362A. Sections 517 and 523:—Section 517 applies only when an inquiry or trial in a Criminal Court is concluded. But section 523 applies even though there has been no inquiry or trial, as in a case where a complaint has been dismissed under section 203—*Ramasami v. Venkateswara*, 24 M.L.J. 1, 14 Cr.L.J. 27.

In order that section 517 may apply, one of the conditions is that there must have been "an inquiry or trial in any Criminal Court", and that such inquiry or trial must have been concluded. Where the Police submitted a final report under sec. 173, or more strictly under sec. 169, this was a stage prior to the commencement of an inquiry or trial as sub-section (4) of sec. 173 would show. The case would more properly come under sec. 523, which applies where there has been no inquiry or trial, and expressly deals with a case *inter alia* where property is seized by a police officer as alleged or suspected to have been stolen, that is to say, where property is seized under sec. 550. Section 517 does not at all contemplate a provisional order for delivery or for custody, except as provided for in sub-section (4). If by reason of a disputed claim to possession, an order for delivery cannot be made, or the property may not be finally disposed of by destruction or confiscation or otherwise, the Court will not make any order under sec. 517 at all, but leave the parties to their remedy in a Civil Court, if any. Meanwhile, it will be quite proper to make an order under sec. 523, where the property is property seized in the manner stated in the section. Section 523 will equally apply where there has been and there has not been an inquiry or trial, or where the property has been or has not been produced in Court: in other words, even in a case which comes under sec. 517, if on the facts the Court finds itself unable to make an order for the disposal of the property in the manner indicated therein, it will be open to it to deal with the matter under sec. 523—*Mahammad Yusuf v. Krishna Mohan*, 41 C.W.N. 1376 (1378, 1379), 69 C.L.J. 95. But where the Police investigated the case and sent accused persons up for trial under sec. 380 read with sec. 411, I. P. C., and the Magistrate entered the case in his Register, fixed dates for hearing witnesses, directed summonses to issue to them and released the accused on furnishing security, but, before the date fixed for hearing, discharged the accused, as the case was withdrawn against them under sec. 494, Cr. P. C., and passed the order for disposal of the property, it must be held that there had been an inquiry before the Court which terminated finally in the discharge of the accused, that the order of the Magistrate with regard to the property was passed rightly under sec. 517, Cr. P. C., and that therefore the Sessions Judge could deal with the application filed before him under sec. 520, Cr. P. Code—*Maung Pu Tu v. The King*, 39 Cr.L.J. 763, 176 I.C. 451, A.I.R. 1938 Rang. 278, 1938 Rang. 143, 11 R.Rang. 67.

See *U Ba Hlaing v. Balabux Sodani*, cited in Note 1331 under the heading "Nature of proceedings."

1363. Scope of section:—This section does not apply where the property was not taken possession of by the Police under sec. 51 or 54, i.e., where it was not seized by the police under the suspicion of its being stolen property nor had the petitioner committed any offence in respect to the property. Thus, it does not apply where the

police obtained possession of the property in question in the course of an investigation into an offence which is in no way related to the property—*Chuni Lal v. Ishar Das*, 4 Lah. 38 (42, 43), 24 Cr.L.J. 670. This section applies only to property seized by the Police of their own motion in the exercise of the powers conferred on them, i.e., under secs. 51, 54, 165 and 166. Such property should be disposed of by the Magistrate under this section. But property seized by the Police under a search warrant issued by the Magistrate during the course of an inquiry or trial comes under sec. 517 and not under this section—*Ratanlal Rangildas*, 17 Bom. 748. So also, this section does not apply where the property is seized by the Police on the complaint of certain persons claiming as owners thereof—*Kuppammal*, 29 Mad. 375 (377), 4 Cr.L.J. 233. Contra—*Lakshman Govind*, 26 Bom. 552, where it has been held that the words 'seized by the Police' apply equally whether the seizure was under a warrant of the Magistrate, or without such warrant, and the Magistrate has power under this section to dispose of the property seized under a search warrant.

Property:—Standing crops do not come under the provisions of this section—*Narayan v. Visaji*, 23 Bom. 494.

Where the Magistrate considered that, having refused to take proceedings under sec. 144, Cr. P. C., he was not competent to investigate the question as to who was in possession of the paddy seized by the police, apprehending a breach of the peace and he therefore directed the police to retain it in their custody and, if it was liable to decay, to sell it, and deposit the money in safe custody pending orders from a proper Court, he has not judicially exercised the discretion which this section confers on him. In such a case he must exercise the discretion conferred on him by this section. If he decides that one or other of the parties was in possession at the time the police seized the property, the proper order to be passed will be to restore that party to possession. If the Magistrate is unable to decide who is in possession, it will be his duty to issue a proclamation under sub-section (2) of this section and proceed in accordance with the provisions of that sub-section—*Ramsagar Yadav v. M. Yunus*, 41 Cr.L.J. 234, 185 I.C. 773, A.I.R. 1940 Pat. 32, 20 P.L.T. 712.

1364. Order under this section:—Under this section the Magistrate may make 'such order as he thinks fit.' This discretion given by these words should be properly exercised. If there is no evidence as to the ownership of the property, it should be delivered to the person from whose possession it was taken—*Bahinu*, 5 Bom.L.R. 25; *Kareppa Chanasappa*, 16 Cr.L.J. 207, 17 Bom.L.R. 79; *Kyin Tou v. E Cho*, 4 L.B.R. 14, 6 Cr.L.J. 126; *Aslum*, 8 S.L.R. 141, 16 Cr.L.J. 138. Where the offence charged is not made out, the property seized should be returned to the person from whom it was taken—*Devidan v. Janaki*, A.I.R. 1932 Mad. 428 (430), 1932 M.W.N. 106, 62 M.L.J. 632, 35 M.L.W. 625, 1932 Cr.C. 409, 138 I.C. 126, 33 Cr.L.J. 539; *Paidi Subbayya*, A.I.R. 1939 Mad. 905, 1939 M.W.N. 739, 1939 M.Cr.C. 199, 185 I.C. 440. A Magistrate is also competent to order the property seized by the Police to be made over to the complainant if the Magistrate finds on the materials before him that the complainant is entitled to the property—*Husansha v. Mashaksha*, 12 Bom.L.R. 232, 11 Cr.L.J. 339. But if the property is alleged or suspected to have been stolen or found under circumstances which create suspicion of the commission of any offence, the Magistrate can pass orders that the property should be at the disposal of the Government even though the complainant may be entitled thereto—*Ramasami v. Venkateswara*, 24 M.L.J. 1, 14 Cr.L.J. 27, 18 I.C. 171. So also, if neither party succeeds in establishing his title to possession, the property would be at the disposal of the Government—*Ibid.* The mere fact that there may be confiscation under sec. 524 after proclamation as prescribed by sec. 523 (2) does not preclude confiscation at once under sec. 523 (1) without issuing such a proclamation. Clause (1) of sec. 523 empowers a Magistrate to adopt alternative courses and if he adopts the second alternative the section does not specifically state what the nature of the order should be and there is nothing to prevent a Magistrate from an order of forfeiture of the property to Government—

Syed Mahbub, A.I.R. 1936 Nag. 266, 19 N.L.J. 244, following *Ramasami v. Venkateswara*, supra.

Conditional order regarding property:—The Magistrate cannot demand security, either under this section or under sec. 517, from the person in whose possession the articles are, for their production if required—*Purna Chandra v. Sasi*, 7 C.W.N. 522 (see Note 1348 under sec. 517). But if before the inquiry or trial, it becomes necessary to pass an immediate order to save the property from possible loss or decay, the Magistrate can order the property to be delivered to one of the parties on certain terms—*Nasib Ali v. Rukmini*, 5 C.W.N. 415. But in no circumstances, whether the case be one under sec. 517 or under sec. 523, can an order be made for detention in Court custody or in the custody of one of the parties, conditional on a civil suit being instituted, for this might mean detention for an indefinite period, if no such suit was brought—*Mahammad Yusuf v. Krishna Mohan*, 41 C.W.N. 1376 (1379), 69 C.L.J. 96. See also *Kasiram Marwari v. Mahhanji Dwarka Prasad* in Note-1353.

1365. Inquiry:—It has been pointed out in a Bombay case that the provisions of this section are wider than those of the corresponding section of the Code of 1872, and the Magistrate instead of delivering the property to the person from whom it was taken, may now hold an inquiry and then deliver it to the person legally entitled—*Joti Rajnak*, 8 Bom. 338. In another case it has been held that the Magistrate is bound to make a proper inquiry before making an order concerning the right of possession of property under this section—*Ratanlal Ranghidas*, 17 Bom. 748. See also *Lakshman Govind*, 26 Bom. 552, 4 Bom L.R. 276. This view has been accepted by the Calcutta High Court in *Mahammad Yusuf v. Krishna Mohan*, 41 C.W.N. 1376 (1379), 69 C.L.J. 96. But the Madras High Court holds that from a study of the section it appears that there is no obligation on the Magistrate to hold an inquiry for the purpose of determining as to which of the contending parties is entitled to the property. 'It does not appear that it is authorised to usurp the functions of a Civil Court and convert the trial of an accused person into an inquiry in regard to property'—*Kuppammal*, 29 Mad. 375 (378). In another Bombay case it is laid down that the Magistrate need not hold an inquiry but may proceed on such evidence as is available and pass an order under this section. He can base his order on a mere statement made by the accused to the Police that the property was stolen by him from the adjudged owner—*Tribhovan*, 9 Bom. 131. The same view has been taken by the Sind Court—*Asi*, 5 S.L.R. 3, 12 Cr.L.J. 108, 9 I.C. 634 (dissenting from 17 Bom 748). The Magistrate is not bound to make a judicial inquiry by examination of witnesses on oath before making an order under this section. All that the law requires is that he should have materials before him to satisfy himself as to who is entitled to possession—*Ma Thein v. Ma The*, 12 Bur.L.T. 266, 57 I.C. 81, 21 C.L.J. 561; *Chuni Lal v. Ishar Das*, 4 Lah. 38 (42), 24 Cr.L.J. 670. An order under this section can be passed on police reports and papers alone without any independent inquiry on oath with regard to the question of ownership—*Chuni Lal v. Ishar Das*, supra. The Court would no doubt be slow to pass an order of forfeiture in cases of mere suspicion under this section—*Ramasami v. Venkateswara*, 18 I.C. 171, 14 Cr.L.J. 27, 24 M.L.J. 1; *Syed Mahbub*, A.I.R. 1936 Nag 266, 19 N.L.J. 244. If there is no question that the property was taken out of the complainant's possession, the Magistrate can return the property to the complainant without making any inquiry—*Ahmed Saheb*, *Ratanlal* 365 (366).

On the materials which are ordinarily available when an order under this section is made, the person entitled to the immediate possession of the property is usually the person from whom it was seized, but one can readily imagine circumstances under which the indisputable fact, or facts admitted by the parties contending for the possession of the property, show that a person other than the person from whom the Police seized the property is entitled to the possession thereof. For instance, if a thief be caught with stolen property in his possession, and the property is seized from him, but the thief succeeds in making good his escape, then surely the order under this section would not direct the return of the property to the thief. Also,

when the person from whom the property is seized admits or alleges that the property was left in his temporary custody by some other person it could not be returned to him: and, equally it could not be returned to him if he admitted that the property was found on his premises, but alleged that it was there without his knowledge. But where, as under section 512 (1), Cr. P. C., the proceeding before the Magistrate is neither an inquiry nor a trial, the Magistrate has no authority to arrive at conclusions regarding facts which are in dispute between the contending parties, in order to decide which of these parties is the person entitled to the possession of the property: he must give possession to the person so entitled, having regard to the indisputable or admitted facts, and leave the contending parties to fight out their rights in a Civil Court—*U Ba Hlang v. Balabux Sodani*, 38 Cr.L.J. 358 (361), 167 I.C. 245, 4 Rang. 633, 9 R.R. 305, A.I.R. 1937 Rang. 42. But where the known facts plainly show that the property has been stolen, it would be intolerable to allow the person in whose possession the property is found to retain it as against the rightful owner, and force the latter to a civil suit for its recovery if the accused absconds—*A. K. A. R. A. Chettyar v. Ma Saw Hla*, A.I.R. 1937 Rang. 450, 172 I.C. 106.

Under this section what the Magistrate has to consider is who is entitled to the possession of property which has been seized by the police. Where it is proved that the person from whose possession the property was seized came by it dishonestly, the Magistrate may have to consider question of title in order to determine the best right to possession. But where it appears that the police have seized property from a person who is not shown to have committed any offence in relation to that property, then the Magistrate can only hold that that person is entitled to possession of property. If the complainant considers that the person has no title to the property he has a remedy in a Civil Court but the burden will be upon him to prove his title. If, however, the property is handed over to the complainant, the burden will be upon that person to prove his title in a Civil Court. There is no reason why the burden of proof in a civil suit should be affected by the seizure by the police of property in relation to which no offence is proved—*Lakshmichand Rajmal v. Gopikisan Balmukund*, 37 Cr.L.J. 573, 162 I.C. 265, A.I.R. 1936 Bom. 171, 38 Bom.L.R. 117, 60 Bom. 183, 1936 Cr.C. 363.

An order for custody and production of the property can be made under this section only if the person entitled to possession cannot be ascertained. If, on the materials placed before the Magistrate, he is of opinion that it cannot be definitely said that the property belongs to one party rather than the other, he cannot order it to be detained till the parties settle their disputes in a Civil Court. In that case it is his duty to proceed under sub-section (2) of this section and then under sec. 524. It would be quite open to the parties in the meantime to go to the Civil Court, if they so desire, and in case a Civil Court decree is passed, further proceedings before the Magistrate would then at once cease—*Mahammad Yusuf v. Krishna Mohan*, 41 C.W.N. 1376 (1379), 69 C.L.J. 96.

When the Magistrate has issued a proclamation under sub-sec. (2), he is not bound to make any inquiry till after the expiry of the six months from the date of the proclamation—*Mahalabuddin*, 22 Cal 761.

Question of title:—The Magistrate deciding a case under this section should not decide any question of title but must be confined only to the question of possession—*Husansha v. Mashaksha*, 12 Bom.L.R. 232, 11 Cr.L.J. 339. The order under this section does not conclude the right of any person. The real owner may proceed in the Civil Court against the holder of the articles for damages—*Trubhovan*, 9 Bom. 131; *Ahmad Sahab*, Ratanlal 365 (366).

1366. Proclamation:—When the person legally entitled to the property is known, the Magistrate need not make a proclamation nor wait for six months before delivering the property to him. He may deliver the property to the person entitled, whether he has issued a proclamation or not. If he has issued a proclamation, that fact will not invalidate an order for immediate delivery of the property to such a known person—*Po Luin*, 3 L.B.R. 197, 4 Cr.L.J. 203.

1367. Appeal:—No appeal lies against a decision under this section—*Syed Mahbub*, A.I.R. 1936 Nag. 266, 19 N.L.J. 244. See also *U Ba Hlaing v. Balobux Sodani* 38 Cr.L.J. 358 (360), 167 I.C. 245, 14 Rang. 633, 9 R.R. 305, A.I.R. 1937 Rang. 42 in Note 1331 and *Maung Pu Tu v. The King* in Note 1362A.

Revision:—On a proper case being made out, the High Court in revision has jurisdiction to examine an order passed under this section—*Chuni Lal v. Ishar Das*, 4 Lah. 38 (42), 24 Cr.L.J. 670. The High Court has power in revision not only to set aside a Magistrate's order for the disposal of property passed under this section, but also to order restitution of the property to the person entitled thereto—*Ma Thein v. Ma The*, 12 Bur.L.T. 266, 21 Cr.L.J. 561, 57 I.C. 81. In *Syed Mahbub*, supra, a petition of appeal against an order under this section was treated as an application for revision, even after the period of limitation for such an application, as no appeal lay against the order.

Review:—Order under this section cannot be reviewed. When once a Magistrate has passed an order restoring possession of the property, he cannot reconsider it and pass another order subsequently—*Sakharam v. Jairam*, 4 Bom.L.R. 12.

524. If no person within such period establishes his claim to such property, and if the person in whose possession such property was found is unable to show that it was legally acquired by him, such property shall be at the disposal of the *Provincial Government*, and may be sold under the orders of the Presidency Magistrate, District Magistrate or Sub-divisional Magistrate, or of a Magistrate of the first class empowered by the *Provincial Government* in this behalf.

(2) In the case of every order passed under this section, an appeal shall lie to the Court to which appeals against sentences of the Court passing such order would lie.

Amendment:—The words "Provincial Government" have been substituted for "Government" and "Local Government" by the Government of India (Adaptation of Indian Laws) Order, 1937.

1367A. "Unable to show that.....him":—When the proclamation has been issued under sec. 523, and the six months have expired, then the provisions of sec. 524 come in, and the person in whose possession the property was found can come up and prove his title to the property—*Mahalabuddin*, 22 Cal. 761. If he is unable to show that the property is his own, it may be forfeited to Government. But the words "unable to show that it was legally acquired by him" do not reverse the presumption laid down in sec. 110 of the Evidence Act; i.e., it should be presumed that the accused is the owner of the property, in the absence of any proof to the contrary. Where the police seized certain property from the accused and no claimant came forward to claim the same though a proclamation was issued, and several items of the property bore the name of the accused, but the Magistrate said that the evidence produced by the accused was suspicious, though no evidence was elicited to show clearly that the accused's claim was false, it was held that under the circumstances the proper and safest course is to follow the presumption laid down in sec. 110 of the Evidence Act—*Aslum*, 8 S.L.R. 141, 16 Cr.L.J. 133, 27 I.C. 202; *Yaru*, 19 S.L.R. 133, 26 Cr.L.J. 1048. Where no offence is found to have been committed, the property should be returned to the accused and should not be forfeited to the Government—*In re Kareppa*, 17 Bom.L.R. 79, 16 Cr.L.J. 207, 27 I.C. 767.

If no claimant appears within six months, then the further question arises, whether the person in whose possession the property was found is able to show that it was legally

acquired by him; and, therefore, the Magistrate should hold an inquiry as to whether that person is entitled to retain possession of the property. Without holding the inquiry, the Magistrate is not entitled to confiscate the property—*Yaru*, supra.

The period of limitation of six months (sec 523) applies only to the third person and not to the person in whose possession the property was found. Such person is not required to show within six months that the property was legally acquired by him. Such question comes in after the lapse of the period of six months—*Yaru*, supra.

Property shall be at the disposal of the Government:—The Criminal Court can make arrangements for the custody and protection of the property while in the possession of the Government, and can make a transfer of the property to such person as it thinks proper—*Secretary of State v Lown Karan*, 5 P.L.J. 321 (324), 21 Cr.L.J. 475. The words "at the disposal of the Government" may reasonably be interpreted as meaning that the Government shall be free to sell the property or to hold it as a trustee for the true owner, who will be entitled to bring a suit for possession of the property—*Ibid* (at p. 327).

1368. Appeal:—The appeal allowed by sub-section (2) is an appeal in the full sense of Chapter XXXI, and the provisions of that chapter must be fully complied with. Where an appeal to the Court of Session from an order of the District Magistrate was treated as a sort of miscellaneous application and decided *ex parte* without a notice to the other party, and none of the procedure of Chapter XXXI was followed, the order of the Sessions Judge was set aside—*Din Dajal*, 1881 A.W.N. 150.

Civil suit:—In one case the Bombay High Court has expressed the opinion that as this section allows an appeal from an order under this section, it is doubtful whether the law contemplates a remedy by suit—*Secretary of State v. Wakhul*, 19 Bom 668. But in another case the same High Court has laid down that the Magistrate's order under this section is not conclusive as to title, and the owner is entitled to bring a civil suit for possession—*Tribhuvan*, 9 Bom. 131. See also *Wasappa v Secretary of State*, 40 Bom. 330. These two cases have been followed in *Secretary of State v. Lown Karan*, 5 P.L.J. 321 (326), 21 Cr.L.J. 475.

525. If the person entitled to the possession of such property is unknown or absent and the property is subject to speedy and natural decay, or if the Magistrate to whom its seizure is reported is of opinion that its sale would be for the benefit of the owner, or that the value of such property is less than ten rupees, the Magistrate may at any time direct it to be sold; and the provisions of sections 523 and 524 shall, as nearly as may be practicable, apply to the net proceeds of such sale.

The italicised words have been added by section 144 of the Cr. P. C. Amendment Act, XVIII of 1923.

CHAPTER XLIV.

OF THE TRANSFER OF CRIMINAL CASES.

526. (1) Whenever it is made to appear to the High Court:—

High Court may transfer case or itself try it.

(a) that a fair and impartial inquiry or trial cannot be had in any Criminal Court subordinate thereto, or

- (b) that some question of law of unusual difficulty is likely to arise, or
- (c) that a view of the place in or near which any offence has been committed may be required for the satisfactory inquiry into or trial of the same, or
- (d) that an order under this section will tend to the general convenience of the parties or witnesses, or
- (e) that such an order is expedient for the ends of justice, or is required by any provision of this Code;

it may order—

- (i) that any offence be inquired into or tried by any Court not empowered under sections 177 to 184 (both inclusive), but in other respects competent to inquire into or try such offence;
- (ii) that any particular * * * case or appeal, or class of * * * cases or appeals, be transferred from a Criminal Court subordinate to its authority to any other such Criminal Court of equal or superior jurisdiction;
- (iii) that any particular * * * case or appeal be transferred to and tried before itself; or
- (iv) that an accused person be committed for trial to itself or to a Court of Session.

(2) When the High Court withdraws for trial before itself any case from any Court other than the Court of a Presidency Magistrate, it shall, except as provided in section 267, observe in such trial the same procedure which that Court would have observed if the case had not been so withdrawn.

(3) The High Court may act either on the report of the lower Court, or on the application of a party interested, or on its own initiative.

(4) Every application for the exercise of the power conferred by this section shall be made by motion, which shall, except when the applicant is the Advocate General, be supported by affidavit or affirmation.

(5) When an accused person makes an application under this section, the High Court may direct him to execute a bond, with or without sureties, conditioned that he will, if so ordered, pay any amount which the High Court may under this section award by way of compensation to the person opposing the application.

(6) Every accused person making any such application shall give to the Public Prosecutor notice in writing of the application, together with a copy of the grounds on which it is made;

Notice to Public Prosecutor of application under this section.

and no order shall be made on the merits of the application unless at least twenty-four hours have elapsed between the giving of such notice and the hearing of the application.

(6A) *Where any application for the exercise of the power conferred by this section is dismissed, the High Court may, if it is of opinion that the application was frivolous or vexatious, order the applicant to pay by way of compensation to any person who has opposed the application such sum not exceeding two hundred and fifty rupees as it may consider proper in the circumstances of the case.*

(7) Nothing in this section shall be deemed to affect any order made under section 197.

(8) *If in an inquiry under Chapter VIII or Chapter XVIII or in any trial, any party interested intimates to the Court at any stage before the defence closes its case that he intends to make an application under this section, the Court shall, upon his executing, if so required, a bond without sureties of an amount not exceeding two hundred rupees, that he will make such application within a reasonable time to be fixed by the Court, adjourn the case for such a period as will afford sufficient time for the application to be made and an order to be obtained thereon:*

Adjournment on application under this section.

Provided that nothing herein contained shall require the Court to adjourn the case upon a second or subsequent intimation from the same party, or, where an adjournment under this sub-section has already been obtained by one of several accused, upon a subsequent intimation by any other accused.

(9) *Notwithstanding anything hereinbefore contained, a Judge presiding in a Court of Session shall not be required to adjourn a trial under sub-section (8) if he is of opinion that the person notifying his intention of making an application under this section has had a reasonable opportunity of making such an application and has failed without sufficient cause to take advantage of it.*

Explanation.—Nothing contained in sub-section (8) or sub-section (9) restricts the powers of a Court under section 344.

(10) *If, before the argument (if any) for the admission of an appeal begins, or, in the case of an appeal admitted, before the argument for the appellant begins, any party interested intimates to the Court that he intends to make an application under this section, the Court shall, upon such party executing, if so required, a bond without sureties of an amount not exceeding two hundred rupees that he will make such application within a reasonable time to be fixed by the Court, postpone the appeal for*

such a period as will afford sufficient time for the application to be made and an order to be obtained thereon.

Change:—In clauses (ii) and (iii) the word 'criminal' has been omitted; in sub-sec. (5) the words 'any amount application' have been substituted for the words 'the costs of the prosecutor'; and sub-sections (6A) and (9) have been added, by sec. 145 of the Cr. P. Code Amendment Act, XVIII of 1923.

Sub-sections (5) and (6A) have been further amended by the Cr. P. C. Amendment Act, XXI of 1932. By the same Amendment Act, sub-sec. (8) has been redrafted, and the Explanation to sub-sec. (9), as well as sub-sec. (10) has been newly added. The reasons are stated below in their proper places.

Scope:—This section deals with cases which are not in the High Court, though it is not necessarily to be exclusively confined thereto—*Hari*, 39 C.W.N. 929 (932), 36 Cr.L.J. 978, 156 I.C. 3, 1935 O.W.N. 744, A.I.R. 1935 P.C. 122.

Sections 526 and 269:—Section 269 in no way limits the powers of transfer conferred on the High Court by this section. The High Court has power to transfer a case from a jury-district to a non-jury district—*Jumo*, 10 S.L.R. 154, 18 Cr.L.J. 51 (cited under sec. 269). See Note 876.

1369. Conditions precedent:—Before an application is made to the High Court for transfer, the *District Magistrate* must be moved first. The High Court will not ordinarily entertain an application for transfer when the applicant can under the law move the District Court for the same relief but has not done so. The High Court will interfere only in the last resort—*Ravi Chandra v. Sundar*, 26 Cr.L.J. 960, 87 I.C. 112, A.I.R. 1925 All 640; *In re Fonseca*, 1 Cr.L.J. 589, 6 Bom.L.R. 480; *Ghulam Navi v. Jwala*, 24 Cr.L.J. 466 (Lah.). See also *Mohiud-Din Lal Badshah v. Emp.*, 40 Cr.L.J. 127, 178 I.C. 632, A.I.R. 1938 Lah. 762, 40 P.L.R. 716, 11 R.L. 482. (Contra—*Nahoomal*, 20 S.L.R. 54, 27 Cr.L.J. 40 (41), where it has been held that the application for transfer lies direct to the High Court, and a trial will be unnecessarily delayed if the District Magistrate has to be moved in the first instance before applying to the High Court). In a recent case the Bombay High Court has decided that though in the case of a transfer of a proceeding from a Presidency Magistrate's Court, the general practice is to present the application for transfer to the Chief Presidency Magistrate in the first instance, and though in many cases it would be a convenient course, yet if the accused chooses to go direct to the High Court in order to avoid the expenses of a double application, he cannot be prevented from doing so—*Shamdasani*, 32 Bom.L.R. 1128, 1930 Cr.C. 1067 (1068), 129 I.C. 399, A.I.R. 1930 Bom. 480, Ind. Rul. 1931 Bom. 175.

The case to be transferred must be a case pending before a *competent Court*. The High Court cannot transfer a case which is not properly before a Subordinate Court of competent jurisdiction to receive and try it—*Mangal Tekchand*, 10 Bom. 274; *Ledgard v. Bull*, 9 All 191 (P.C.); *Scott v. Rickets*, 9 Mad. 356; *In re Sikka*, 17 L.W. 69; 7 Bom.L.R. 104; *Girdharilal v. Motilal*, 3 Bom.L.R. 121. If the complaint has been made to a Magistrate who is not competent to take cognizance of the case, he shall return the complaint for presentation to the proper Court with an endorsement to that effect (see sec. 201).

The application for transfer must be made *before* the disposal of the case. A case cannot be transferred after acquittal. This section contemplates interference by the High Court by way of transfer, when a person is aggrieved or injured by any order of the Magistrate *before* the disposal of the case. It is not intended to give power to interfere in order to set aside an acquittal or discharge—*Corporation of Calcutta v. Bhéechunram*, 2 Cal 290; *Fakira*, 1 Bom.L.R. 782.

1370. Cases which can be transferred:—In clauses (i) and (ii) of the old section, the Legislature used the words 'criminal case' and so the word *criminal* led to a divergence of views in several cases. Thus, as regards cases under Chap. VIII, it

was held in *Wazed Ali Khan*, 41 Cal. 719, *Wahid Ali*, 32 All. 642 (644), *Baggu Mal*, 1913 P.R. 1, 13 Cr.L.J. 746, and *Mohamed Shah*, 1 S.L.R. 98, 8 Cr.L.J. 356 (360), that such cases were criminal cases and were, therefore, covered by this section; but in *Ahmed Bakhsh*, 1914 P.R. 5, 15 Cr.L.J. 563, and *Rehman*, 1916 P.L.R. 78, it was held that those cases not being criminal cases could not be transferred from one Court to another. So also, as regards cases under Chap. XII, in *Gurudas v. Gaganendra*, 2 C.L.J. 614, 3 Cr.L.J. 83, *Atumuga Tegundan*, 26 Mad. 188, *Jaggu Ahir v. Murti*, 34 All. 533, and *Sardar Karam Singh*, 11 O.C. 61, 7 Cr.L.J. 423, it was held that proceedings under sec. 145, being criminal proceedings, could be transferred from one Court to another, whereas the contrary view was taken in *Pandurang*, 25 Bom. 179 (184) and 8 S.L.R. 215, 16 Cr.L.J. 249. In *Lalit v. Surya*, 28 Cal. 709 (720), 5 C.W.N. 749, it was held that though a proceeding under Chap. XII was not a 'criminal' case under the Cr. P. Code (as it did not relate to an offence), still it was a 'criminal' case with n the meaning of the Letters Patent, and could be transferred by the High Court under sec. 15 of the Charter Act. The Legislature has now wisely omitted the word 'criminal', so that all cases inquired into and tried in Criminal Court can now be transferred under this section. "The word criminal has been omitted to make it clear that the powers of a High Court to transfer criminal cases extend to the transfer of miscellaneous proceedings under the Code"—*Statements of Objects and Reasons* (1914). And, therefore, a person proceeded against under sec. 107 can apply for transfer of the proceedings under the present section—*Haji Baqridd*, 26 A.L.J. 398, 29 Cr.L.J. 448 (449), 108 I.C. 569, A.I.R. 1928 All. 268; *Wahid Ali Khan*, 32 All. 642, 11 Cr.L.J. 412, 7 A.L.J. 813, 6 I.C. 874; *U Gandama*, 145 I.C. 314, A.I.R. 1933 Rang. 164, 1933 Cr.C. 763, 6 Rang. 41, 34 Cr.L.J. 950. See also *Om Radhe v. Emp.*, in Note 1387. A proceeding under section 14 of the Legal Practitioners' Act is neither civil nor criminal, but is a 'case' within the meaning of section 526, and as it is held in a Criminal Court, it can be transferred from one Court to another under this section—*Lakshmi Narain v. Ratnu*, 27 P.L.R. 225, 27 Cr.L.J. 476 (477). The contrary view held in *Jamal Singh v. Lala Bhagwan*, 1888 P.R. 41 is no longer correct.

Future cases cannot be transferred:—The High Court can transfer actual cases only, i.e., cases actually pending before a Court; it cannot direct that cases that may be filed in future should, when filed, not be heard by the authority to which they are presented but should be transferred to some other Court—*Lagma*, Ratanlal 973.

As for the effect of section 193 on this section see Note 610.

1370A. Transfer for the second time:—When a case has already been transferred, very strong grounds are required to transfer it a second time. If accused or his counsel are so unfortunate as to have a reasonable apprehension that the second Magistrate will not give them justice and want to get their case transferred to a third Magistrate, it may well be supposed that the accused or his counsel are to blame in part—*Mirza Jaffar Beg v. Emp.*, A.I.R. 1940 Lah. 354 (355), 41 Cr.L.J. 948, 190 I.C. 561.

1371. Grounds for transfer:—It must be that the accused must have a fair trial—*Amrit Mandal*, 1 P.L.J. 399, 18 Cr.L.J. 95. Before the High Court would take into consideration an apprehension, it must be satisfied that the apprehension is not a fanciful one—*Ko Ko Gyi*, A.I.R. 1936 Rang. 114, 37 Cr.L.J. 436, 161 I.C. 240, 1936 Cr.C. 181. When there are circumstances existing to create a reasonable apprehension in the mind of the accused that he will not receive a fair and unprejudiced trial, a transfer should be directed, though there is really no bias in the mind of the Court from which the transfer is sought and though the circumstances may be capable of explanation—*Baktu Singh v. Kali Prasad*, 28 Cal. 297; *Dupeyon v. Driver*, 23 Cal. 495; *Kali Churn*, 33 Cal. 1183; *Wilson*, 18 Cal. 247; *Ram Kishan*, 35 All. 5; *Farzani v. Hanuman*, 19 All. 64; *Pandurang*, 25 Bom. 179 (183); *Sardari Lal*, 3 Lah. 443, 24 Cr.L.J. 283; *Rang Bahadur v. Kariman*, 2 P.L.T. 297, 63 I.C. 868; *Benode Behari*, 5 P.L.T. 63, 25 Cr.L.J. 590. Confidence i

the administration of justice is an essential element of good government, and reasonable apprehension of failure of justice in the mind of the accused person should, therefore, be taken into serious consideration on an application for transfer—*Kali Churn*, 33 Cal. 1183, 10 C.W.N. 793; *Sardari Lal*, 3 Lah. 443, 24 Cr.L.J. 286. It is not so much a matter of convenience nor of possible injustice, which has to be considered, but it is the apprehension in the mind of the accused person—and incidentally the public—which ought to be taken into account. It is, of course, most undesirable that there should be any feeling on the part of the accused persons or of the general body of citizens, that any trial which may lead to a conviction should have been tainted with the slightest suspicion of unfairness—*Pateshwari*, A.I.R. 1933 Rang. 9, 147 I.C. 126, 1933 Cr.C. 179, 35 Cr.L.J. 272. It is necessary to avoid not only any partiality on the part of a Magistrate, but any circumstances that might lead to a reasonable apprehension of a partiality in the mind of an accused person; that is to say, it is desirable not only that justice should be done but that it should be manifest to all the world that justice is being done—*Kunja Sahu*, 36 Cr.L.J. 1266, 157 I.C. 758, 1 B.R. 811, 8 R.P. 161, 16 P.L.T. 587; *Lal Bahadur Raut v. Emp.*, 39 Cr.L.J. 527 (529), 175 I.C. 110, A.I.R. 1938 Pat. 238, 10 R.P. 581, 4 B.R. 533. In a criminal case, it is not enough that justice is done but what is more important, the parties must feel that justice has been done. Where the accused's apprehensions, however foolish, appear to be real and genuine and he has moved for transfer at the earliest opportunity and no prejudice is likely to be caused to the complainant, the case should be transferred to another Magistrate for trial—*Balaji Bari v. Punabai*, 37 Cr.L.J. 855, 163 I.C. 677, 18 N.L.J. 293.

When a transfer is asked for, it is not sufficient merely to allege that the applicant would not get an impartial trial, but he must place before the Courts the facts which give rise to this belief in his mind—*Amar Singh v. Sadhu Singh*, 6 Lah. 396, 26 Cr.L.J. 853, 86 I.C. 709, A.I.R. 1925 Lah. 361, 7 Lah.L.J. 241.

When sufficient grounds are made out for a transfer, the High Court is bound to act under this section. It is precluded from considering the possible effect which the transfer may have on the reputation or authority of the Magistrate concerned—*Narain v. Howrah Municipality*, 10 C.W.N. 441, 3 Cr.L.J. 379. One of the most important duties of the High Court is to create and maintain confidence in the administration of justice, and this can be done by giving to every citizen an assurance that so far as practicable he will never be forced to undergo a trial by a Judge or Magistrate, when he has reasonable apprehension that a fair and impartial trial cannot be obtained from that Judge or Magistrate—*Mahomed Shah*, 1 S.L.R. 8, 9 Cr.L.J. 251 (253). In transferring a case from one Magistrate to another, the High Court ought not to be guided by the impressions produced in its own mind as to the impartiality of the Magistrate, but must look to the effect likely to be produced in the minds of the parties and their witnesses by the selection of a Magistrate whose personal antecedents or circumstances have, however, unavoidably connected him with either one party or the other—*Pandurang*, 25 Bom. 179 (183).

If the duty of the Magistrate not only to conduct the case impartially, but also to conduct himself in such a manner that the parties may have absolute confidence in him that only full justice will be dealt out to them. If the Magistrate, though not actually biased, still conducts himself in such a manner and utters such words as to impair the confidence of any of the parties, then there is good ground for the transfer of the case from his file to that of some other Magistrate—*Bhairab Chandra*, 25 Cal. 727; *Lalit Mohan v. Surya Kanta*, 28 Cal. 709 (718), 5 C.W.N. 749; *Muhammad Akbar*, 47 All. 288, 23 A.L.J. 133; *Sikandar Lal*, 10 Lah. 778, 30 Cr.L.J. 129; *Vellu Thevar*, 10 Rang. 180, 1932 Cr.C. 472 (473), Ind Rul 1932 Rang. 152, 137 I.C. 675, A.I.R. 1932 Rang. 90, 33 Cr.L.J. 550; *Samuel*, 35 Cr.L.J. 411, 147 I.C. 289, A.I.R. 1934 Nag. 17, A.I.R. 1934 Nag. 39, 1934 Cr.C. 152; *M. De Carmo Lobo v. G. C. Bhattacharjee*, 38 Cr.L.J. 882, 170 I.C. 270, 10 R.R. 71, A.I.R. 1937 Rang. 272. Judicial officers should be careful to avoid the opportunity of having imputations made against them. If a Magistrate offers a seat on the dais to a gentleman not necessarily having any connection with the

case, while he is hearing it, receives visits from the complainant and the defendant during the hearing of the proceedings, thereby laying himself open to an imputation, and accepts a lift in the complainant's car and sits in with the complainant's brother, it is advisable to transfer the hearing of the case—*Ganpat v. Kashalendra*, 3 O.W.N. 245, 13 O.L.J. 644, 27 Cr.L.J. 498. Magistrates should not fail to remember that it is their duty no less to preserve an outward appearance of impartiality than to maintain the internal freedom from bias, which is incumbent on all judicial officers, and that if they allow their executive zeal to appear to outturn their judicial discretion, their action is certain to induce the party to make an application to the High Court for transfer—*Mahomed Shah*, 1 S.L.R. 8, 9 Cr.L.J. 251 (253). "The trial of a case should be in atmosphere which does not create even a suspicion that there has been or is likely to be an improper interference with the course of justice. It is not merely of some importance but of fundamental importance that justice should not only be done but should manifestly be seen to be done"—per Lord Hewart, C.J., in *R. v. Sussex Justices, Ex parte McCarthy*, [1921] 1 K.B. 256; *Muzzaffar Khan v. Ahmad Khan*, 36 Cr.L.J. 192, 152 I.C. 896, 35 P.L.R. 874, A.I.R. 1934 Lah. 541, 1934 Cr.C. 820; *Hemanta Kumar v. Nanda Kumar*, 41 C.W.N. 188 (190), A.I.R. 1937 Cal. 54, 64 C.L.J. 532. It cannot be impressed too strongly on all judicial officers that they should deal at arm's length with persons engaged or interested in cases pending before them and should so conduct themselves as not to allow an impression to be created that they are on terms of undue familiarity with one of them—*Muzzaffar Khan v. Ahmad Khan*, supra.

What is a reasonable apprehension should be decided according to the incidents of the case and in reference to the special circumstances. It is difficult to lay down any hard and fast rule under which a transfer should be made, for the circumstances in one case might differ from those of the other—*Kali Churn*, 33 Cal. 1183; *Benode Behari*, 5 P.L.T. 63, 25 Cr.L.J. 590; *Rajani Kanta*, 36 Cal. 904; *Rekha Ahir*, 1 P.L.T. 494, 56 I.C. 664. It is not sufficient if the accused merely alleges that a fair and impartial trial cannot be had. He should also place before the Court the facts and circumstances from which he is led to entertain such belief, and if these will reasonably give rise to that belief, a transfer will be made—*Sant Bakhsh*, 10 O.C. 165, 6 Cr.L.J. 254 (256); *Aligullah*, 1917 P.W.R. 13, 18 Cr.L.J. 719. Where the accused honestly entertained an apprehension, the case should be transferred, specially where the trial had not yet commenced, as no administrative inconvenience would be caused by such transfer but the accused could not be permitted to choose their own Court—*Abdul Hakim*, 145 I.C. 524, 34 Cr.L.J. 1025, A.I.R. 1933 Pat. 597, 1933 Cr.C. 1360; *Deo Dutt Bharati*, 35 Cr.L.J. 1483 (1485), 151 I.C. 1003, 11 O.W.N. 1193, A.I.R. 1934 Oudh 452, 1934 Cr.C. 1311. The allegation by the accused that he distrusts the tribunal and that he believes that he will not get a fair trial, must be examined and found true before it can be accepted; otherwise the accused person has only to say that he distrusts the Magistrate in order to get the case transferred, and he will go on doing so indefinitely—*Abdulla*, 22 N.L.R. 99, 27 Cr.L.J. 835. It is not every kind of apprehension that will entitle an accused person to get a transfer of the case; the apprehension of the accused must be shown to be reasonable—*Rekha Ahir*, supra; *Pulin v. Asutosh*, 39 C.L.J. 330, 25 Cr.L.J. 944, A.I.R. 1924 Cal. 981; *Narain Chandra v. Howrah Municipality*, 10 C.W.N. 441, 3 Cr.L.J. 379. The transfer of a criminal case should not be necessarily ordered simply because an accused person thinks that he would not get an impartial trial, but the real question to be considered is whether on the facts disclosed in the application for transfer, there arises a reasonable inference that the Magistrate who is seized of the case may be prejudiced willingly or unwillingly against the accused—*Sumeshwar*, 12 A.L.J. 33, 14 Cr.L.J. 666; *Jagan*, 36 All. 239 (243). Although it may be the case that where an applicant has a reasonable apprehension that the mind of the trial Magistrate is biased against him, the High Court will order a transfer, although in fact it might appear that so far as the Magistrate is concerned, there is no real ground for supposing that the applicant would not get a fair and impartial trial—the reason being that the existence of such an apprehension might militate against the applicant's being able to defend himself to

the best advantage, yet before such an order will be made, the High Court must be convinced that the apprehension is reasonable and *bona fide*—*Suppaya Chettyar v. Karuppaya Pillay*, A.I.R. 1937 Rang. 528 (530). What is a reasonable apprehension must, of course, depend on the degree of intelligence of the accused—*Ahmad Din*, 81 I.C. 126, - Lah. Cas. 8, A.I.R. 1925 Lah. 101, 25 Cr.L.J. 638; *Sardari*, 3 Lah. 443, 24 Cr.L.J. 286; *Machal v. Matru*, 10 N.L.R. 15, 15 Cr.L.J. 196 (197). The possibility or probability of his entertaining a reasonable apprehension must also be determined from the circumstances which might give rise to such apprehension and from the conduct of the accused, after taking into consideration the accused's position in life, his conduct and behaviour, his character, social status and mental development—*Fasiuddin*, 30 Cr.L.J. 728 (731), 117 I.C. 213, A.I.R. 1929 Nag. 172, Ind. Rul. 1929 Nag. 197. Where there have been a good many irregularities in the trial which are calculated to prejudice the accused, the accused has good reason for thinking that the Magistrate is prejudicial against them and it is unnecessary to find that he is in fact prejudiced—*Durga Das*, 34 Cr.L.J. 900, 145 I.C. 173, A.I.R. 1933 Lah. 914, 1933 Cr.C. 1375. Where there is no reason to suppose that the trial Magistrate has any real bias against the petitioner but the circumstances of the case are such that the petitioner is bound to entertain a reasonable apprehension in his mind that he will not get a fair trial in the Court of the Magistrate, the case should be transferred to some other Magistrate—*Allah Ditta*, 35 Cr.L.J. 1380, 151 I.C. 669, 35 P.L.R. 702. Where the attitude and orders of the Magistrate have created a reasonable apprehension in the minds of the accused that they would not get a fair and impartial trial at his hands, ends of justice require that the case should be transferred from his file—*Lal Bahadur Raut v. Emp.*, 39 Cr.L.J. 527 (529), 175 I.C. 110, 4 B.R. 533, 10 R.P. 581, A.I.R. 1938 Pat. 238. In determining whether an application is reasonable, it is the duty of the High Court to place itself in the position of the accused and to consider the facts and circumstances attending his position. Abstract reasonableness ought not to be the standard—*Kali Churn*, 33 Cal. 1183; *Gayitri Prosunno*, 15 Cal. 455; *Kishori Gir v. Ram Narayan*, 8 C.W.N. 77; *Surat Lall*, 29 Cal. 211, 6 C.W.N. 251; *Pulin v. Ashutosh*, 39 C.L.J. 330, 25 Cr.L.J. 944; *Tofa Sahu*, 34 Cr.L.J. 1024, 145 I.C. 521, 6 R.P. 189. The important point is the fact which is then created in the mind of the accused—*Vellachami v. Murugappa*, 34 Cr.L.J. 832, 144 I.C. 677, A.I.R. 1933 Rang. 89, 1933 Cr.C. 573. The Nagpur Court, however, goes further and holds that if an accused person does in fact believe that he will not have a fair and impartial trial in a certain tribunal, it is inexpedient that he should be tried by it, however high the certainty of impartiality of that tribunal may be in the mind of all right-thinking men. That the belief is entirely wrong and does not do him any credit is immaterial. The question is not whether the belief is reasonable or unreasonable, but whether it exists or not, though the only way of deciding whether it exists or not is to see whether it might reasonably be expected to exist in a person of the standard of intelligence or honesty common in the class to which the accused belongs—*Abdulla*, 22 N.L.R. 99, 27 Cr.L.J. 835; *Machal v. Matra*, supra. What the Court has to consider is not merely the question whether there has been any real bias in the mind of the presiding Judge against the applicant, but also the further question whether incidents may not have happened which, though they may be susceptible of explanation and may have happened without there being any real bias in the mind of the Judge, are nevertheless such as are calculated to create in the mind of the applicant a justifiable apprehension that he would not have an impartial trial—*Amar Singh v. Sadhu Singh*, 6 Lah. 396; *Hemanta Kumar v. Nanda Kumar*, 41 C.W.N. 188 (190), A.I.R. 1937 Cal. 64, 64 C.L.J. 532, 167 I.C. 251, 38 Cr.L.J. 344, 9 R.C. 660. In a Sind case it is laid down that the apprehension to be established must be an apprehension reasonable in the opinion of the Court, and not such apprehension as would appear reasonable in the mind of the accused. The Court itself should be satisfied on that point, and the real test is not what the accused may reasonably have been led to think about it—*Wali Mahomed*, A.I.R. 1917 Sind 45, 18 Cr.L.J. 644, 10 S.L.R. 183; followed in *Abdullah*, 26 S.L.R. 255, 33 Cr.L.J. 908 (911), 139 I.C. 791, Ind. Rul. 1932 Sind 151, A.I.R. 1933 Sind 17, 1933 Cr.C. 17; *Sugnomal v. Phatandas*, A.I.R. 1936 Sind 237 (239), 38 Cr.L.J. 133, 166 I.C. 83. But this

would be putting a wrong construction on the section. For, it is not so much the *mind of the Magistrate* that determines the question, but it is the impression that is reasonably created in the *mind of the accused* by the conduct of the Magistrate—*Sikandar Lal*, 10 Lah. 778, 30 Cr.L.J. 129 (131). It has been observed in an oft quoted English case, that the law of transfer of cases is based not so much upon the motives which might be supposed to bias the *Judge* as upon the susceptibilities of the litigant *parties*. One important object at all events is to clear away everything which might engender suspicion and distrust of the tribunal and so to promote the feeling of confidence in the administration of justice which is so essential to social order and security—*Serjeant v. Dale*, 2 Q.B.D. 558 (567); *Satindra Nath Sen*, 1929 Cr.C. 597 (600), A.I.R. 1929 Cal. 809; *Awadh Singh v. Puran*, 2 P.L.T. 198, 22 Cr.L.J. 726, A.I.R. 1921 Pat. 413; *Machal v. Matru*, 10 N.L.R. 15, 15 Cr.L.J. 196; *Deo Dutt Bharati*, supra; *Ali Reza Beg*, 37 Cr.L.J. 386, 160 I.C. 965, O.W.N. 254.

Where good grounds are made out for a transfer, the application ought not to be refused merely because the case had reached an advanced stage or that the transfer might entail expenses and trouble—*Sikander Lal*, 10 Lah. 778, 30 Cr.L.J. 129. But see *Fakra v. Goma*, 37 Cr.L.J. 861, 163 I.C. 694, 18 N.L.J. 279 in Note 1382.

The transfer of a case from one Court to another is not a thing lightly to be done. If a Magistrate transfers a case from one Court to another at his whim and caprice, it would seriously interfere with the working of the Courts and would shake the confidence of the public in those Courts—*Sugnomal v. Phatandas*, A.I.R. 1936 Snd 237 (240), 38 Cr.L.J. 133, 166 I.C. 83.

1372. Instances of reasonable apprehension:—When the District Magistrate and the Sessions Judge expressed an opinion that an impartial jury could not be obtained if the case was tried in the district, it was held that the expression of such belief was sufficient to shake the confidence of the public and of the parties in the fairness and impartiality of the jury, and to create in their minds a reasonable apprehension that a fair and impartial trial could not be had if the case was tried there, and therefore an order for transfer was expedient for the ends of justice—*Bhairab Chandra*, 25 Cal. 727. Where there is material in the affidavits on the record showing that there is an atmosphere in a district which either is unfavourable to the accused or about which there are reasonable apprehensions in his mind, it is desirable in the interests of justice to transfer the case for trial to some other district—*Amrit Lal*, 32 Cr.L.J. 1188 (1190), 134 I.C. 519, 32 P.L.R. 471, A.I.R. 1931 Lah. 540, 1931 Cr.C. 780, Ind. Rul. 1931 Lah. 951. See also *Gurdial*, Ind. Rul. 1932 Lah. 654. When in a case of petty theft, the Magistrate issued non-bailable warrants against the accused in the first instance, and then exacted a very heavy bail from them, there was a sufficient ground for apprehension that a trial could not be had from him, and therefore a transfer should be directed—*Girish Chandra v. Chandramoni*, 8 C.W.N. 589. Where a Magistrate before disposing of a bail application consulted the District Magistrate, and refused the application as advised by the latter, held that though the subordinate Magistrate in consulting the District Magistrate and the latter in advising him in the matter of the bail might have acted with the best of intentions, still it cannot be denied that such action on their part was wholly unjustified, and was certainly calculated to raise a reasonable apprehension in the mind of the accused—*Chiranjil Lal*, 9 Lah. 537, 29 Cr.L.J. 815. Where the Magistrate refused to grant bail to some of the accused person after the High Court had granted bail to those who had applied to that Court, held that this action of the Magistrates disclosed a certain amount of bias against the accused—*Mohandas Joyramdas*, 20 S.L.R. 171, 27 Cr.L.J. 1333 (1335). Where the application for bail is refused unlawfully and the trial of the case is deliberately postponed by the granting of unnecessarily lengthy adjournments, there is sufficient reason for the transfer of the case to the Court of some other Magistrate—*M. A. Azeez v. The King*, 41 Cr.L.J. 252, 186 I.C. 147, A.I.R. 1940 Rang. 26. Where the trial Magistrate for erroneous reason twice refused to accept the bail-bond and unnecessarily prolonged the proceedings until the Sessions Judge accepted the same bail-bonds and ordered their release, held that though there was no reason

to suppose that the Magistrate had any real bias in his mind against the accused, there could be no doubt that the procedure adopted by him was such as was likely to raise a reasonable apprehension in the mind of the accused that they should not have a fair trial in his Court—*Natha Singh*, A.I.R. 1932 Lah. 440, 33 P.L.R. 416, 1932 Cr.C. 519, 34 Cr.L.J. 89, 141 I.C. 43. Where a Magistrate rejected the various sureties for appearance offered by the applicant and demanded an enhanced security from him, the circumstances are such as might reasonably cause an apprehension in the mind of an accused person and the case should be transferred—*Sukhai*, 36 Cr.L.J. 1285, 157 I.C. 1048, A.I.R. 1935 All. 517, 1935 Cr.C. 543. See also *Brij Mohan Pande*, 38 Cr.L.J. 105, 165 I.C. 873, 1936 O.W.N. 1232, 9 R.O. 266, A.I.R. 1937 Oudh 79, 1936 O.L.R. 691. Where the Magistrate wrongly refuses to give certified copies of the statement of a prosecution witness and the order of the District Magistrate dismissing an application for transfer, the accused have a reasonable apprehension that they may not receive a fair trial in his Court and the case should be transferred—*Gurdas Ram v. Emp.*, A.I.R. 1940 Lah. 283, 189 I.C. 605, 41 Cr.L.J. 756, 42 P.L.R. 192. Where in a summons case the Magistrate had issued a warrant without any apparent reason, and there was reason to believe that in other proceedings connected with the case the Magistrate had formed an opinion unfavourable to the accused, there ought to be a transfer of the case—*Wilson*, 18 Cal. 247. See also *Nanjandiah*, 1933 M.W.N. 1427 and *Badaruddin v. Balocho*, A.I.R. 1939 Sind 342, I.L.R. 1940 Kar. 110. Where the complainants obtained an order of the High Court staying further proceedings, and on the date fixed for hearing, one of the complainants appeared before the Magistrate and apprised him of that order, but the Magistrate instead of staying the proceedings issued a warrant for the arrest of the complainant who had not appeared, *held* that this action on the part of the Magistrate was a sufficient ground for transfer of the case from his file—*Fazal Ahmed v. Abdullah*, 26 P.L.R. 701, 27 Cr.L.J. 104, 91 I.C. 536, 7 L.L.J. 571, A.I.R. 1926 Lah. 151. Where the Magistrate makes inordinate delay in examining the complainant, or awaits the consideration of the evidence in another case with which the accused has no concern, in order to decide whether any action should be taken upon the complaint, these may give rise to a reasonable apprehension that a fair trial cannot be had, and the case should be transferred—*Rekha Ahir*, 1 P.L.T. 494, 21 Cr.L.J. 504, 56 I.C. 664. See also *Tyab Ali v. Hussainali*, in Note 1378. Where the complainant made a verbal statement in chambers before the District Magistrate who at once arrested the accused before making any inquiry, and there was a likelihood of the Magistrates of the district figuring as witnesses in the case, *held* that the case should be transferred to a different district altogether—*Din Dayal*, 1 P.L.T. 522, 21 Cr.L.J. 795, 58 I.C. 523. A Court of Justice is not justified in exercising any pressure upon an accused person before it with the object of coercing him to produce persons who are fugitives from justice. When such steps were taken by a Magistrate in order to secure the attendance of the absconding co-accused, he should not be permitted to go on with the trial of the case, however open his mind may be—*Fakir Mohammad*, 32 Cr.L.J. 344, 129 I.C. 485, A.I.R. 1930 Lah. 953, Ind. Rul. 1931 Lah. 197, 1930 Cr.C. 1049. Where after the application of the accused for adjournment of the case to enable them to move the High Court for transfer, the Magistrate raised the amount of bail of some of the accused from Rs. 100 to Rs. 250, and cancelled the bail-bonds of others, it was held that the action of the Magistrate might be absolutely *bona fide*, but it was sufficient to create a reasonable apprehension in the minds of the accused that they would not have a fair trial before him—*Tittu Sahu*, 1 P.L.T. 652, 21 Cr.L.J. 530, 57 I.C. 454. See also *Takaya Ram*, 32 P.L.R. 96, 1930 Cr.C. 1054 (1055), 32 Cr.L.J. 569, 130 I.C. 501, A.I.R. 1930 Lah. 958; *Sitla Prasad*, 35 Cr.L.J. 292, A.I.R. 1933 Oudh 480, 147 I.C. 96, 1933 Cr.C. 1397, 10 O.W.N. 906; *Durgadas*, 34 Cr.L.J. 900, 6 R.O. 218, 145 I.C. 173, A.I.R. 1933 Lah. 914, 1933 Cr.C. 1375 and *Mt. Lalan v. Emp.*, A.I.R. 1937 Pesh. 20, 38 Cr.L.J. 387, 167 I.C. 175, 9 R.Pesh. 82. Where the Magistrate exhibits haste in recording the statement of an accused person before all the evidence for the prosecution is concluded, this fact may create an apprehension in the mind of the accused that he will not get a fair trial, and entitles him to a transfer of the case—*Abdul Rab v. Azmat Ali*, 18 A.L.J. 1145, 59 I.C.

876. Where in a proceeding under sec. 107, the persons against whom the proceeding was taken were appointed special constables, it might arouse a reasonable apprehension that they would not have a fair and impartial trial, and a transfer ought to be allowed—*Bibi Kulsum v. Umatul*, 4 Cr.L.J. 455, 11 C.W.N. 121; *Gopinath Paryah*, 10 C.W.N. 82, 3 Cr.L.J. 169. Where it was alleged by the accused that the District Magistrate had cancelled his license for arms and refused to see him when he called to pay his respects, it was held that these incidents were likely to lead the accused to believe that the District Magistrate was displeased with him and there was a reasonable apprehension of his not having a fair trial from the Magistrate—*Ram Krishna*, 35 All. 5, 17 I.C. 567, 10 A.L.J. 357, 13 Cr.L.J. 823. Where the trying Magistrate stopped the cross-examination of the complainant in a case because in his view the complainant had been fully cross-examined for one hour, it was held that the act of the Magistrate was indiscreet and might reasonably lead the accused to believe that they would not get a fair trial at his hand. The principle to be kept in view by Magistrates is that they should not increase the grave anxiety of the accused—*Yusuf v. Bupi Lal*, 20 Cr.L.J. 559 (Pat.), 51 I.C. 347. But see Note 1379. Where there was an order of the Superintendent of Police that the accused was to be allowed facilities for instructing legal advisers only on application to him, it was held that there might be a reasonable apprehension in the mind of the accused that his movements are unduly restricted by that order, and the High Court therefore allowed a transfer of the case to another place—*Hanikar*, 23 C.W.N. 481, 20 Cr.L.J. 675; *Hanikar Roy*, 46 Cal. 807 (815) (Footnote), 23 C.W.N. 479. Where the Magistrate was entirely acting on Police reports and under the influence of the Police officials of the district and accepted all the allegations of the Court Prosecuting Officer without any material to support them, these allegations taken in conjunction with the conduct of the Magistrate in cancelling the bail and thereafter in calling upon the applicants to furnish security while they were applying to the High Court for transfer, would undoubtedly raise apprehension in the minds of the applicants that they would not get a fair and impartial trial in his Court—*Maung Saw Hlaing*, 34 Cr.L.J. 1195, 146 I.C. 23, A.I.R. 1933 Rang. 165, 1933 Cr.C. 764. Where a Magistrate, during the course of the trial, received a letter from the witness for the defence, which was calculated to create an apprehension in the mind of the petitioner that the witness was a friend of the Magistrate; where the witnesses for the petitioner were treated in a manner different from that in which the witnesses of the opposite party were treated; and where the Magistrate while complying with the prayer for postponement when the petitioner wanted to move for transfer to another Court, passed an illegal order imposing condition when he had no discretion but to postpone; held that a strong ground was made out for transfer—*Dayawanti v. Bitanand*, 119 I.C. 327, A.I.R. 1929 Lah. 702, Ind. Cr.L.J. 1048. Where the proceedings of the warrant against the accused's wife, who was arraigned the case from the Magistrate—*Hari Kishen v. Polo Ram*, 27 P.L.R. 604, 28 Cr.L.J. 225 (226). Where the Magistrate refused to dispense with the personal appearance of *pardanashin* ladies belonging to respectable families, and repeatedly insisted on their appearance in Court, the High Court transferred the case from that Magistrate—*Raj Rajeswar*, 17 C.W.N. 1248, 15 Cr.L.J. 281 (283). Where a complaint of murder had been preferred against the accused before the Sub-Divisional Magistrate, and during the pendency of the complaint, the Deputy Commissioner of the District made a speech in the presence of all the Magistrates including the Sub-Divisional Magistrate, that the accused was innocent and that baseless charges had been imputed from malicious motives, held that under the circumstances, the apprehension on the part of the complainant that he would not get justice at the hands of the Magistrate was reasonable, and that there was a sufficient ground for transfer—

sent for and detained by the Magistrate so as to delay the decision in the civil suit, held that this was a good ground for apprehension that the accused would not get a

fair trial from the Magistrate—*Faqir Singh*, 10 Lah. 223, 29 Cr.L.J. 769 (770). An examination of the accused by the Magistrate under sec. 342 amounting practically to a lengthy cross-examination by a series of searching questions is injudicious, and may raise an apprehension in the mind of the accused about the fairness of the trial and is a valid ground for transfer—*Faqir Singh*, *supra*. Where the Magistrate based his examination of an accused on detailed instructions given by the prosecuting Counsel and, during such examination, made use of a document which he obtained from the same Counsel and the record of evidence contained a good deal of material which he should not have done, it was expedient for the ends of justice to direct a transfer of the case—*Krishna Murari-lal*, 34 Cr.L.J. 1172, 146 I.C. 149, 16 N.L.J. 158, 1933 Cr.C. 1003, A.I.R. 1933 Nag. 269. Where the Magistrate sent for a party in a case pending before him, and pressed upon him the desirability of a compromise, *held* that such a course was likely to raise a reasonable apprehension in the mind of the party that the Magistrate was showing favour to the other side, and the case should be transferred to some other Magistrate—*Rahim Bakshsh v. Dula*, 32 P.L.R. 358, 1931 Cr.C. 96, 32 Cr.L.J. 537, A.I.R. 1931 Lah. 32, Ind. Rul. 1931 Lah. 302; *Gaya Charan v. Kunwar Bahadur*, 25 Cr.L.J. 570, A.I.R. 1925 Oudh 179. See Note 1377. Where a subordinate Magistrate before whom a case was pending was written to and influenced by the District Magistrate regarding an order to be passed in the case (e.g., where the trying Magistrate at first granted bail but afterwards cancelled the bail under the order or influence of the District Magistrate), *held* that the action of both the Magistrates, specially of the District Magistrate was to be highly condemned, and the case should be transferred to another District—*Vellu Thevar*, 10 Rang. 180, 1932 Cr.C. 472 (474), Ind. Rul. 1932 Rang. 152, 137 I.C. 675, 33 Cr.L.J. 550, A.I.R. 1932 Rang. 90. Where a Magistrate allowed the judicial record of a pending case to be removed from the Court and handed over to a person who was to be examined as a witness in the case, *held* that this was a sufficient ground for transfer—*Brahmo Dutt*, 33 Cr.L.J. 223, 136 I.C. 9, Ind. Rul. 1932 Lah. 185, A.I.R. 1932 Lah. 294, 33 P.L.R. 438, 1932 Cr.C. 442. The Lahore High Court transferred a case in which the trying Magistrate admitted to have examined some of the prosecution witnesses after 9 P.M. in contravention of the directions contained in the High Court Circular—*Shamshad Ali Khan v. Mohommad Amin Khan*, 34 Cr.L.J. 383, 142 I.C. 696, 33 P.L.R. 1032, A.I.R. 1933 Lah. 96, 1933 Cr.C. 211, 14 Lah. 201, Ind. Rul. 1933 Lah. 245. Where the Magistrate fixed 11-30 A.M. to 5 P.M. and again from 5-30 to 10 P.M. for the hearing of the case although the defence lawyers, who were Muhammadans, protested owing to Ramzan and, by an earlier order, refused to adjourn the case for a reasonable opportunity of engaging and instructing another lawyer on the ground of illness of the lawyer who had conducted the cross-examination for the accused on the previous day and was to continue it, there are sufficient grounds for an order of transfer—*Lal Bahadur Raul v. Emp.*, 39 Cr.L.J. 527, 175 I.C. 110, 4 B.R. 533, 10 R.P. 581, A.I.R. 1938 Pat. 238.

Where the trying Magistrate issued summons to the defence witnesses including the District Magistrate and subsequently modified his previous order of summoning the defence witnesses, unknown to the applicant and his Counsel, after some correspondence between himself and the District Magistrate, which was not kept on the record but was destroyed, the High Court directed the trying Magistrate to commit the applicant to take his trial before the Court of Session on the charges already framed under cl. (1) (iv) of this section—*Samuel*, 35 Cr.L.J. 411, 147 I.C. 289, A.I.R. 1934 Nag. 17, A.I.R. 1934 Nag. 39, 1934 Cr.C. 152.

For a transfer of a case on the ground of bias on the part of the Magistrate it is not necessary for an accused person to prove actual bias; it is sufficient to show circumstances which may raise a *reasonable* apprehension in the mind of an accused person that he will not have a fair and impartial trial, although the circumstances may be susceptible of explanation and may have happened *without any real bias* in the mind of the Magistrate—*Wilson*, 18 Cal. 247; *DuPeyon v. Driver*, 23 Cal. 495; *Bhairab Chandra*, 25 Cal. 727; *Lolit v. Surya*, 28 Cal. 709 (719); *Baktu v. Kali*, 28 Cal. 297; *Kali Churn*, e a. 1183; *Pandurang*, 25 Bom. 179; *Rang Bahadur v. Kariman*, 2 P.L.T. 297, 63 I.C. 523; *Dayal*, 1 P.L.T. 522, 58 I.C. 523; *Fazand v. Hanuman*, 19 All. 64; *Amar*

Singh v. Sodhu Singh, 6 Lah. 396, 26 Cr.L.J. 853; *Faqir Singh*, 10 Lah. 223, 29 Cr.L.J. 769 (771); *Sikandar*, 10 Lah. 778, 30 Cr.L.J. 129; *In re Vakils*, 26 A.L.J. 1250, 29 Cr.L.J. 750 (752); *Amrit Lal*, 32 Cr.L.J. 1188 (1190), 134 I.C. 519, 32 P.L.R. 471, A.I.R. 1931 Lah. 540, 1931 Cr.C. 780, Ind. Rul. 1931 Lah. 951; *Ali Raza Beg*, 37 Cr.L.J. 386, 160 I.C. 965, 1936 O.W.N. 254. The question whether sufficient grounds are made out for a transfer is often a matter of opinion and depends on inferences to be drawn from facts which have happened. If the application for transfer is made in good faith, the mere fact that it turns out subsequently that there are not sufficient grounds of transfer would not amount to casting an aspersion on the Magistrate personally so as to lead to inference that there was misconduct on the part of the legal practitioners (under the Legal Practitioners' Act) who were responsible for the application—*In re Vakils*, supra.

Where the Magistrate orders the payment of subsistence allowances for the witnesses by the accused when he applies for an adjournment to move the High Court for transfer, this in itself is sufficient to raise an apprehension in the mind of the accused that he will not get a fair and impartial trial in the Court of the Magistrate and on this ground alone the case should be transferred—*Lay Tin Ngar v. Emp*, 38 Cr.L.J. 963, 170 I.C. 841, 10 R.R. 105, A.I.R. 1937 Rang. 311.

Where in an anonymous letter it is stated that some Civil and Police Officers are in the pay of the accused, anybody placed in the position of the accused will apprehend that the Civil Officers knowing that some allegation has been made against them will try to clear their character by convicting him and this is an apprehension which it is reasonable to hold will be raised in the mind of the accused. The case should be transferred on this ground—*Lay Tin Ngar v. Emp*, supra.

Where the Sessions Judge declined to allow the pleaders for the defence to see the records of statements of prosecution witnesses to a Magistrate under the provisions of sec. 164, Cr. P. C., or to cross-examine the witnesses thereon, refused to permit reference in cross-examination to the contents of the charge-sheet and disallowed a material question in the course of the cross-examination of a prosecution witness, there was in the minds of the accused or their legal advisers a reasonable apprehension that they might not have a fair and impartial trial in his Court and hence the case should be transferred—*Brahmayya v. The King*, A.I.R. 1938 Rang. 442 (446), 179 I.C. 783, 11 R.R. 347, 40 Cr.L.J. 265.

Where the Magistrate has displayed far too much haste in the trial of the case and has wrongly failed to give the accused opportunity to engage such legal assistance as he thought proper, the conduct of the Magistrate, although not inspired by any unfair motives, is such as to fill the mind of the accused with an apprehension that he will not secure a fair and impartial trial before him and the accused therefore can get his case transferred to another Magistrate—*U Po Mya v. The King*, 39 Cr.L.J. 576, 175 I.C. 350, 10 R.R. 483, A.I.R. 1938 Rang. 198.

Where the trying Magistrate refuses to supply a copy of the order of the District Magistrate under sec. 528, Cr. P. C., on the ground that the District Magistrate's sanction is necessary and also wrongly refuses to give a certified copy of the statement of a prosecution witness, the party has a reasonable apprehension from all that has happened that he may not receive a fair trial in the Court of the trying Magistrate and the case should be transferred—*Gurdas Ram v. Emp.*, 41 Cr.L.J. 756 (757), 189 I.C. 605, A.I.R. 1940 Lah. 283, 42 P.L.R. 192.

Although each of the circumstances alleged may not by itself be sufficient to show that there was a bias on the part of the Magistrate, a transfer would nevertheless be justified, where having regard to all the circumstances taken together, the accused might reasonably apprehend that he would not have a fair trial—*Nityanand Kanarar*, 2 Cr.L.J. 339, 9 C.W.N. 619; *Titu Sahu*, 1 P.L.T. 652, 57 I.C. 454; *Din Dayal*, 1 P.L.T. 522, 58 I.C. 523.

1373. Expression of opinion or remarks:—A Magistrate who has already formed a decided opinion about the case before him and has expressed a strong opinion as to the guilt of the accused, is precluded from trying the case and a transfer ought to

be directed—*Harischandra*, 10 Bom.L.R. 201, 7 Cr.L.J. 194; *Wahid Ali*, 32 All 642 (643), 6 I.C. 874, 7 A.L.J. 813; *Sartaj Singh*, 22 A.L.J. 430, 26 Cr.L.J. 139; *Grish Chunder*, 20 Cal. 857; *Wilson*, 18 Cal. 247; *Alexander v. Connor*, 20 C.W.N. 698, 17 Cr.L.J. 193; *Sitanath*, 8 C.W.N. 641; *Maung Po Thit v. Maung Pyu*, 8 Rang 654, 32 Cr.L.J. 938, 132 I.C. 556, A.I.R. 1931 Rang. 87, Ind. Rul. 1931 Rang. 188, 1931 Cr.C. 375; *Rang Bahadur v. Kariman*, 2 P.L.T. 297, 63 I.C. 868; *In re Virji*, 6 Bom.L.R. 856; *Rehmani*, 78 P.L.R. 1916; *Motumal v. Md. Ramzan*, 19 S.L.R. 117, 27 Cr.L.J. 802. Where a case was sent to a Magistrate for disposal with a remark by the District Magistrate that it was quite a clear case and the defence was ridiculous, it was a good ground for transfer of the case to another district—*Muhammad Yakub*, 2 O.W.N. 688, 26 Cr.L.J. 1525. A transfer was ordered where in the course of the examination of the prosecution witnesses, the Magistrate made certain observations which went to show that he was not favourable to the prosecution—*Shcodhari v. Jhingur*, 7 P.L.T. 49, 26 Cr.L.J. 1249. Where a Magistrate made certain premature and ill-advised remarks regarding the evidence of certain defence witnesses, and held out threats to the accused regarding the sentence and the effect of his transfer application, *held* that the case was a fit one for transfer—*Sikandar Lal*, 10 Lah. 778, 30 Cr.L.J. 129 (131). Where a Magistrate had already formed a very strong opinion and passed strong remarks on the conduct of the Sub-Inspector, the case should be transferred from his Court—*Sartaj Singh*, 22 A.L.J. 430, 26 Cr.L.J. 139 (140). A Magistrate in recording the evidence of a witness made a note regarding the demeanour of the witness (sec. 363) to the effect that the witness faltered and that from his demeanour it appeared that he had not told the truth; *held* that as the witness was altogether disbelieved by the Magistrate, this was a sufficient ground for transfer of the case to some other Magistrate—*Golam Bari v. Yar Ali*, 29 C.W.N. 316, 26 Cr.L.J. 852. But where the Magistrate has noted some observations as regards the demeanour of the witness which go against his credibility, this fact by itself is not sufficient to show that there will be no impartial or fair trial—*Abdul Naseer v. Emp.*, 39 Cr.L.J. 33, 171 I.C. 934, A.I.R. 1937 All. 664, 1937 A.L.J. 845, 10 R.A. 349, 1937 A.L.R. 919, 1937 A.Cr.C. 117, 1937 A.W.R. (H.C.) 729. Where a Magistrate, in recording the examination of the accused under sec. 364, added a note which amounted to an expression of opinion that he had already made up his mind as to the value of the defence, *held* that this was a good ground for transfer—*Faqir Singh*, 10 Lah. 233, 29 Cr.L.J. 769 (771). Where a Magistrate has by reason of an order passed in the course of the proceedings used words which indicate that before the case is finished and the accused has been heard in his defence, the Magistrate had found the charge against him to be established, it may reasonably give just ground for apprehension in the mind of the accused and it is only proper in the circumstances that the case should be transferred—*Bagomal*, A.I.R. 1935 Sind 223, 37 Cr.L.J. 152, 159 I.C. 687, 1935 Cr.C. 1312.

Expression of opinion in the same case:—Where the Sessions Judge set aside the conviction under sec. 363, I. P. C., and remanded the case for re-trial on the ground that there was a *prima facie* case against the accused persons under sec. 366 or 366A, I. P. C., it is expedient, in the interests of justice, that the appeal from conviction under sec. 366A, I. P. C., on re-trial, be heard by the Court of some other Sessions Judge—*Allah Bakhsh v. Emp.*; A.I.R. 1937 Lah. 652, 39 P.L.R. 78, 171 I.C. 791, 39 Cr.L.J. 28, 10 R.L. 231.

Expression of opinion in a connected or counter case:—The fact that a Magistrate is trying or has tried one case against an accused person is no reason why he should not try any subsequent case against the same person, especially when no allegation of prejudice or unfair treatment has been made against him—*Sadasheo*, 34 Cr.L.J. 1035, 145 I.C. 445, A.I.R. 1933 Nag. 201, 1933 Cr.C. 97, 29 N.L.R. 338. A Judge is not disqualified from trying a case of rioting merely because he has decided a counter-case of rioting and expressed an opinion. But the Judge should be careful to confine himself in the trial to the evidence before him and should not let his mind be influenced by the evidence given in the former case—*Asimaddi v. Govinda*, 1 C.W.N. 426. So also,

the mere fact that in another analogous case on other evidence the Judge has come to a particular conclusion is not in itself a sufficient ground of transfer of the present case—*Ramyad Singh*, 11 P.L.T. 248, 1930 Cr.C. 709 (following *Rajani Kanta*, 36 Cal 904). Judges are presumed to be upright men who will approach each case from the point of view of that case alone and not permit their minds to be affected in any way by anything that has gone before that case. The mere fact that the Judge, in a former proceeding arising out of a counter case to the one now coming before him, expressed certain views upon the evidence in the former case as to which of the two versions is correct, is not a reasonable ground of apprehension that the accused will not have a fair trial—*Amrit Mandal*, 1 P.L.J. 399, 18 Cr.L.J. 95; *Hargobind*, 33 All. 583. Interest or bias on the part of the Magistrate is not to be inferred from opinions formed on evidence judicially recorded; otherwise a Magistrate would, after disposing of one of two counter cases, be disqualified from trying the other—*Kamil*, 1 S.L.R. 37, 9 Cr.L.J. 275; *In re Vaddal*, 6 Bom.L.R. 1092; *Crown v. Methram*, 15 IC 804, 5 S.L.R. 264, 13 Cr.L.J. 532; *Ghulamali*, 36 Cr.L.J. 866, 155 I.C. 994, A.I.R. 1935 Sind 7. The mere fact that the complaint of one party is dismissed and he is apprehensive of a conviction is by itself no good grounds for transfer—*Wahidad v. Nizam-ud-din*, 111 I.C. 854, A.I.R. 1929 Lah. 48, 29 Cr.L.J. 934. But when in a case and a counter case, the Magistrate in discharging the accused in one case expressed a strong opinion on the guilt of the accused in the other case, a transfer of the case pending will be directed—*Rangasami*, 30 Mad. 233. See also *Manla Khan*, 140 IC 685, 9 O.W.N. 963, 34 Cr.L.J. 46, A.I.R. 1933 Oudh 21, 1933 Cr.C. 159, Ind. Rul. 1933 Oudh 8; *Balu*, A.I.R. 1934 Lah. 458, 36 Cr.L.J. 238, 152 I.C. 1060, 35 P.L.R. 427, 1934 Cr.C. 704. Where in a proceeding it appeared that the Magistrate had expressed his opinion in a very strong language against the petitioner in a connected case, a transfer should be directed—*Rehmani*, 1916 P.L.R. 78; *Viswanath*, 27 Cr.L.J. 210, 92 IC 162, A.I.R. 1926 Nag. 98; *Chaudhuri Zahiruddin*, 11 O.L.J. 556, 26 Cr.L.J. 158.

Where an accused in a particular case was examined as a defence witness in another case before the same Magistrate who, in the course of his judgment in that case, said that in the circumstances it appeared that the accused was dealing in illicit sale of salt, held that although the Magistrate might have honestly intended to confine the remark to the position of the accused as a witness in the other trial without any prejudice to his position, in the trial in which he was an accused, yet it was too plain that a remark of that kind would suffice to raise a reasonable apprehension in the mind of the accused that he was not likely to receive an impartial trial from the Magistrate and that the case should be transferred—*Mohamed Isahuck*, 37 Cr.L.J. 220, 160 IC 85, A.I.R. 1935 Rang. 446, 1935 Cr.C. 1242.

Proceedings for contempt:—Where the Judge has already convicted the accused for contempt of Court, it cannot be said that he cannot be trusted to bring to bear on the facts of the case an impartial mind so far as the accused is concerned. It may be that the Judge erred in taking proceedings for contempt of Court and in convicting the accused for that offence, but the mere conviction of the accused by the Judge does not warrant the transfer of the case from his Court. To hold otherwise would be to concede the privilege to a party to a case to secure the transfer of a case from a particular Court by being unnecessarily offensive and insolent and thus courting proceedings for contempt of Court—*Salag Ram v. Emp.*, 38 Cr.L.J. 416 (420), 167 I.C. 515, 9 R.A. 550, 1937 A.L.R. 201, A.I.R. 1937 All. 171.

Re-trial:—When a case is remanded on appeal it is advisable that it should be sent to some other Magistrate. The position of a Magistrate who had decided against the accused before remand is indeed difficult, since, however fair he may be, in fact, he cannot remove the vague fear in the mind of the accused as to his own attitude and impose confidence in him—*Mushrital*, 37 Cr.L.J. 459, 161 IC 317, 18 N.L.J. 199. Where it is possible, it is desirable that such a retrial should not be taken by the officer who has already expressed his final opinion upon the matter. It is quite true that an endeavour may be made to keep the mind entirely free from bias, and to

ject from it any preconceived ideas which may have been formed in general by what has taken place at the earlier trial. But those are after all counsels of perfection—*Mahadev v. Kishun Lal*, 3 P.L.T. 147, 72 I.C. 339, A.I.R. 1922 Pat. 60, 24 Cr.L.J. 339; *Muhammad Kaisar v. Emp.*, 38 Cr.L.J. 229, 166 I.C. 466, 9 R.P. 299, 3 B.R. 170. Any accused person who has once been convicted by a Magistrate to whom the case is sent back because of errors in procedure has a reasonable apprehension that he is likely to be convicted again by that Magistrate. *Prima facie* the case ought to be sent to another Magistrate—*Kanwar Sam v. Emp.*, A.I.R. 1939 Lah. 27, 179 I.C. 819, 11 R.L. 640, 41 P.L.R. 213.

1374. Inspection by Magistrate:—The inspection of a locality by the Magistrate acting fairly and judiciously during the inspection is not only not illegal, but under certain circumstances proper for the right understanding of the evidence. The Magistrate does not constitute himself a witness by a mere local inspection, and such inspection is no ground for transferring the case—*Harsa Singh*, 1901 P.L.R. 89, 1901 P.R. 13. It is not only not objectionable but in many cases highly advisable that a Magistrate trying a criminal case should himself inspect the scene of occurrence in order to understand fully the bearing of the evidence given in Court. But if he does so, he should be careful not to allow any person on either side to say anything to him which might prejudice his mind one way or another. If the Magistrate goes out of his way in making a local inspection and makes the inspection with the complainant without notice to several of the accused and in their absence, the accused may very rightly apply for a transfer under this section—*Faquiray Lal*, 21 Cr.L.J. 166, 6 O.L.J. 680, 54 I.C. 774; *In re Lalji*, 19 All 302; *Atiar Rai*, 39 Cal 476; *Bhai Gopal*, 1901 P.L.R. 165; *Kardan Ullah v. Azmat*, 12 C.W.N. 748. Section 539B clearly lays down that if a Magistrate visits the scene of occurrence, he should do so after due notice to the parties. Where the Magistrate visited the place without notice to the parties, made inquiries, and as a result of his inquiry he summoned several persons as witnesses, held that the Magistrate by his action placed himself in the position of a witness to corroborate or contradict the other evidence, and was therefore disqualified from completing the trial of the case—*Pakir Muhammad*, 4 Rang 106, 27 Cr.L.J. 1084. See also Note 1432 under sec. 556, under heading "Local Inspection."

Magistrate being a witness in the case:—The fact that the Magistrate may be a witness in the case for the defence is a ground of transfer, but in applying to the High Court for a transfer on that ground, it must be shown that the Magistrate will be a necessary and essential witness for the defence—*Srilal Chamarla*, 19 Cr.L.J. 632, 45 I.C. 680 (Cal.). When in a criminal case the evidence of the Magistrate is found necessary by the defence, it is proper that the case should be transferred to another Magistrate—*Abdul Latif*, 26 All. 536.

1375. Magistrate having personal knowledge of the case:—If a Magistrate has knowledge in respect of matters which form the subject matter of the proceedings, and he derives such knowledge from outside the Court and not from evidence on the record, the case should be transferred from him—*Satindra Nath Sen*, 1929 Cr.C. 597 (600), A.I.R. 1929 Cal 809. The mere fact that the Magistrate is unable to deny that he has had an interview with the opposite party in the litigation privately and out of Court and has heard from that party his version of the facts, is sufficient to disqualify him from subsequently trying the case in his magisterial capacity even if there are no reasons for ascribing any prejudice or undue interest in the case to the Magistrate—*Pran Nath v. Emp.*, 39 Cr.L.J. 606, 175 I.C. 520, 40 P.L.R. 157, 10 R.L. 734, A.I.R. 1938 Lah. 346. When a Magistrate initiates proceedings under sec. 110 on information within his own knowledge, he is not the proper person to conduct the inquiry under sec. 117; the case must be transferred to some other Magistrate—*Alimuddin Howladar*, 29 Cal 392; *Lolit Mohan v. Surya Kanta*, 28 Cal. 709. But in an Allahabad case it has been held that there is nothing to limit the source or the nature of the information on which a Magistrate can act under sec. 110; and therefore the mere fact that the Magistrate has initiated proceedings on information

based upon his own personal knowledge is not a ground for transfer—*Mithu Khan*, 27 All. 172 (173). Where a Magistrate became aware of some of the facts in connection with a case by his taking part, or at any rate by his being present, at a search made by the Police during the investigation, it was expedient that the case should be transferred to the file of some other Magistrate—*Gya Singh v. Mahomed Soliman*, 5 C.W.N. 864. Where a Magistrate had dealt with the dispute in an informal manner as a private arbitrator, it is desirable that the case should be transferred to another Court, as his previous informal knowledge would necessarily hamper him at every turn—*Gobinda Chandra v. Gopal Chandra*, 18 Cr.L.J. 150, 14 Cr.L.J. 602.

As a general rule the mere fact that a Magistrate has, in his capacity as a Magistrate, exercised the powers given to him under section 127 (1), Cr. P. C., in relation to a particular disturbance or series of disturbances affords no ground for the transfer from the cognizance of that Magistrate of a case arising out of that disturbance or series of disturbances. If, on the other hand, a Magistrate, in the course of the performance of his duties in relation to any particular disturbance, were to acquire any particular knowledge by his own observation or otherwise which might, in the hearing of any case, tend to embarrass him, it is possible that a transfer, either at the instance of the Magistrate himself or at the instance of the accused person, might in some cases be desirable in the interests of justice—*Maung Ba Chien v. The King*, A.I.R. 1938 Rang. 454 (455), 178 I.C. 942, 40 Cr.L.J. 154, 11 R.R. 287.

1376. Magistrate being master, subordinate, friend or relation of complainant:—The mere fact that the Magistrate is the master of the complainant does not deprive him of his jurisdiction, but in such a case it would generally be expedient for him to refer the complainant to another Magistrate—*Basappa*, 9 Bom. 172. It is not a ground of transfer that the Magistrate is a subordinate to the officer making the complaint—*Wasudeo*, 26 Cr.L.J. 1425, 89 I.C. 897, A.I.R. 1925 Nag. 433. An application cannot be granted as a matter of course and to agree to transfer a case from a Magistrate's Court merely because his official superior is the complainant, would be to cast a reflection upon the integrity and impartiality of the Magistrate which even an apprehension of an accused person would not justify; because before an application for transfer should succeed there must be some reasonable basis for the apprehension of the accused person—*Bagomal v. Noor Nabi Khan*, 36 Cr.L.J. 1480, 158 I.C. 809, A.I.R. 1935 Sind 195, 1935 Cr.C. 1060. But it is not inconceivable that a subordinate, prosecuted at the instance of the head of the district, might feel a little nervousness on his trial taking place before a Magistrate who is in immediate subordination to the head of the district. No doubt an apprehension that he would not receive an impartial trial might actually be groundless, but it is not unlikely that a fear might arise in the accused's mind. It is therefore proper for the ends of justice to transfer the case to a Magistrate of the district who is not under the immediate control of the Deputy Commissioner and this can be done by transferring the case to a Civil Judge invested with the powers of the Magistrate in the same district—*Maung Than Shwe v. Deputy Commissioner, Hanthawaddy*, 38 Cr.L.J. 923, 170 I.C. 420, A.I.R. 1937 Rang. 284, 10 R.R. 81. The mere fact alone that it is the Deputy Commissioner who has laid the complaint does not afford a reasonable ground for apprehension in the mind of any person that he will not receive a fair trial in the district of the Deputy Commissioner. He must further show that the Subordinate Magistrates in that district are in awe of the Deputy Commissioner and look upon him as a person who must, on no account, be crossed. But cases of this nature which have been instituted by the Deputy Commissioner or District Magistrate of a district should not be tried by the Magistrate who is in such immediate touch with the Deputy Commissioner or District Magistrate as is the Headquarters Magistrate of the district. Where there are Magistrates who are not executive officers, it is desirable that they should be chosen to try such cases. It cannot be denied that an accused person might feel some apprehension that a subordinate executive officer might be unduly influenced by the expressed opinion of the Deputy Commissioner, and might be ready to pay too much deference to that

opinion and might even be inclined to follow it in preference to his own. Such an apprehension could scarcely exist in regard to a Magistrate who belongs to the judicial service, and is in no likelihood of being unduly impressed by the authority of the executive head of the district—*Maung Ba Gou v. The King*, 40 Cr.L.J. 532 (533), 181 I.C. 315, 11 R.R. 458, A.I.R. 1939 Rang. 88. But where the Deputy Commissioner has himself lodged the first information report and will have to be examined as a witness for the prosecution, it would, no doubt, be somewhat embarrassing to the trial Magistrate to have his Deputy Commissioner as a witness before him, especially when the accused is inclined to criticize the manner of the investigation made against him and, therefore, the case should be transferred beyond the district—*Harmusji Harjibhoy v. Emp.*, A.I.R. 1940 Nag. 275, 1940 N.L.J. 335, 190 I.C. 153.

Where the Magistrate is in rather an embarrassing position in having before him an accused person, a high officer of the Government, who is his superior officer in respect of a considerable amount of his duties, the complainant might reasonably, albeit quite wrongly, have the apprehension that the particular relationship that the Magistrate has to the accused in the case might have some influence on him; and even if it merely embarrasses him, it would be sufficient to justify the complainant's apprehension that the trial might not be all that could be desired. Where a party to a case has such an apprehension with reasonable grounds, it has always been considered right that the case in question should be transferred to some other Court: for the existence of such an apprehension in the mind of one of the parties must militate against a proper trial, if for no other reason than that it places the party concerned under a very serious handicap—*Maung Chit Tin v. H. O. Reynolds*, 39 Cr.L.J. 415, 174 I.C. 400, A.I.R. 1938 Rang. 68, 10 R.R. 403.

The fact that the Magistrate is a friend or remote relation of the complainant is no ground whatever for transfer. Magistrates and Judges quite appreciate the duty of impartiality—*Damodar Babuji*, 33 Bom.L.R. 311, 1931 Cr.C. 350, 32 Cr.L.J. 806, 131 I.C. 891, A.I.R. 1931 Bom. 206, Ind. Rul. 1931 Bom. 315; *Sitaram v. Govind*, 1912 P.L.R. 16, 13 Cr.L.J. 474. But where the complainant, being an old friend of the Magistrate, came into his chamber to pay 'a formal complimentary call', it was very unfortunate that the Magistrate should ever have allowed him, knowing that he was the complainant in the case before him, to make 'a complimentary call'. He should have known that his action in receiving the complainant in his chamber would undoubtedly raise an apprehension in the mind of the accused that he would not have a fair and impartial trial and, therefore, the transfer of the case to another Magistrate was proper—*M. De Carmo Lobo v. G. C. Bhattacharjee*, 38 Cr.L.J. 882, 170 I.C. 270, 10 R.R. 71, A.I.R. 1937 Rang. 272. Where the trying Magistrate was a friend of a person, who was also a Magistrate, to whom the petitioner attributed the institution of the case, the case should be transferred to some other Magistrate as the petitioner honestly entertained an apprehension and it was desirable that he should have confidence in the Court by which he was to be tried. The petitioner must not, however, be permitted to choose his own Court—*Abdul Hakim*, 34 Cr.L.J. 1025, 145 I.C. 524, A.I.R. 1933 Pat. 597, 1933 Cr.C. 1360. So also the fact that the accused was a class-fellow of the Magistrate some 15 years previously is not a sufficient ground for transfer. If a case had to be transferred on every occasion in which the Magistrate fifteen years before had rubbed shoulders with somebody who was a complainant or respondent or advocate in the case, the whole of judicial work would come to an end—*Gokul Prasad*, 27 A.L.J. 616, 30 Cr.L.J. 522. The fact that both the complainant and the accused are acquainted with the Magistrate who sometimes gets medical help from each, is not a ground of transfer—*Aliquallah*, 1917 P.W.R. 13, 18 Cr.L.J. 719. So also, the fact that the Magistrate is a relation of the Sub-Inspector of Police or that he is in private life a guardian of a person who has a claim to the estate whose manager or servant instituted the proceeding, is not a valid ground of transfer—*Baktu Singh v. Kalli*, 28 Cal 297. But in *Abbas*, 13 C.W.N. 50 (note), where the prosecution witness was a relation of the Magistrate, it was held that though it did not strictly fall

within the grounds mentioned in sec. 526, still it was expedient in the interests of justice that the case should be tried by another Magistrate. Where the Magistrate is a great friend of a prosecution witness, who is himself a friend of the complainant, the complaint should be transferred from the file of that Magistrate—*Trilok Singh*, 8 Lah.L.J. 257, 27 Cr.L.J. 782.

The mere fact that the Magistrate's son was a Pleader and was engaged in a criminal case before that Magistrate, was no ground for granting a transfer to another Magistrate—*Pearay Lal v. Puttan*, 85 I.C. 56, A.I.R. 1925 Oudh 348, 26 Cr.L.J. 440. Put in a Calcutta case the fact that the complainant's mukhtar was a near relation of the Magistrate was held to be a ground for transfer—*Nityaranjan*, 29 C.W.N. 648, 26 Cr.L.J. 1183, 88 I.C. 607, A.I.R. 1925 Cal. 806. It is not very seemly or suitable that a practising lawyer should pursue his practice in the Court of a near relative; it gives rise to ideas in the mind of the public which should not have the opportunity of being thus engendered. But where a Crown case was being concluded by the Court Inspector and the complainant engaged to watch the case a Barrister who was the brother of the Magistrate, there was no ground for ordering any transfer so long as he confined his attention to watching the case without taking any active part in the conduct of the prosecution—*Dwarika*, 27 Cr.L.J. 844, 95 I.C. 764, A.I.R. 1926 Pat. 464, 7 P.L.T. 770, 1926 Pat.H.C.C. 383, dissenting from *Pearay Lal v. Puttan*, *supra*.

The position of a Magistrate may be of some difficulty when the Magistrate has before him as an Advocate, one who, as President of a Municipality, is the official superior of his own brother who is the Assistant Chief Officer and whose promotion, it may be said, depends upon the goodwill of the Advocate who may directly or indirectly influence the brother of the Magistrate or the Magistrate himself. In such a case the matter, as to whether he should or should not try the case himself, should better be left to the good sense of the Magistrate. If by reason of the relationship of his brother to the Advocate, as a Municipal subordinate to a Municipal President, he feels himself in any way embarrassed in dealing with the matter (*i.e.*, proceedings under sec. 476, Cr. P. C.), he should send the papers to the Sessions Court which under sec. 195, Cr. P. C., will be the "superior Court" for the purpose of the section and which can, in the inquiry held by itself, make any necessary complaint—*Jethanand Hemandas v. Emp.*, 40 Cr.L.J. 750, 183 I.C. 195, 12 R.S. 47, A.I.R. 1939 Sind 181.

It is undesirable that the Magistrate should be putting up with a person, who endorsed the complaint, while trying a case which started on that complaint. An order of transfer should be made in such a case to avoid apprehension of prejudice from his connection with the case and with the Magistrate—*Bindeshwari Missir v. Emp.*, 39 Cr.L.J. 517, 179 I.C. 49, 4 B.R. 519, 10 R.P. 571, 1938 P.W.N. 518, A.I.R. 1938 Pat. 376.

If a complaint is filed against a near relation of the District Magistrate, it should only be inquired into by a Magistrate who cannot, in any reasonable sense of the word, be described as a subordinate of the District Magistrate. As a rule it should be transferred for disposal to a Magistrate who is entirely independent of the District Magistrate (*i.e.*, the Additional District Magistrate)—*J. W. Atkinson v. S. W. H. Xavier*, A.I.R. 1936 Rang. 242 (243), 37 Cr.L.J. 723, 162 I.C. 988, 1936 Cr.C. 519.

1377. Magistrate being interested in the case:—Where the District Magistrate had taken a keen personal interest in the matter which had led up to the proceedings (under sec. 107) being taken against the accused and that he had even taken part in the inquiry and has himself instituted the proceedings and was more or less convinced of the accused's guilt, and the case had aroused some commotion in the district, *held* that the proceedings ought to be transferred to another district—*Wakil Ali*, 7 A.L.J. 813, 32 All. 642 (643). Where the accused was connected with a Raj estate which was under the management of the District Magistrate as Collector and Agent to the Court of Wards, the High Court granted the application for transfer of the case from the file of the District Magistrate, lest there might be some bias in the

the Magistrate inducing him to look with favour upon the interests of any party—*Kishori Gir v. Ram Narayan*, 8 C.W.N. 77. Where a Magistrate has interested himself in a case pending before him in the way of obtaining a settlement by the parties, it is to the interest of both the parties and it is but fair to the Magistrate himself that he should not hear the case—*Muzaffer Husain v. Md. Yakub*, 47 All 411, 23 A.L.J. 191, 26 Cr.L.J. 869; *Gobinda Chandra v. Gopal*, 18 C.L.J. 150, 14 Cr.L.J. 602. See Note 1372. But the mere fact that the District Magistrate in his capacity as Collector is concerned in the management of an estate under the Court of Wards is no ground for transfer of a case instituted by a servant of the estate against a tenant of the estate and pending before a Subordinate Magistrate in the district, especially where there was not even a suggestion that the Collector or Magistrate knew of the institution of the case—*Baktu Singh v. Kali Prasad*, 28 Cal. 297. See also Notes under section 556.

Where a Magistrate in his capacity as an executive officer, has been taking steps to put down picketing of certain shops, it would be very desirable and would promote that confidence in the administration of justice which is all important, that such a Magistrate should not as far as possible hear cases arising out of picketing, in his judicial capacity—*Asa Nand*, 32 Cr.L.J. 491, 130 I.C. 330, A.I.R. 1931 Lah. 30, Ind. Rul. 1931 Lah. 266, 32 P.L.R. 272, 1931 Cr.C. 91. Where the trying Magistrate was the Honorary Secretary of the Co-operative Society which was interested in the prosecution and members of which were material witnesses, one of them being the complainant, held that the relationship of the Magistrate with the bank and the connection of the prosecution witnesses with the bank provided the petitioners with a ground, which was not unreasonable, that they would not receive a fair trial at his hands—*Toja Sahu*, 34 Cr.L.J. 1024, 145 I.C. 521.

Where a son of the trying Magistrate was a salesman attached to a firm with which the complainant was carrying on business transactions and when these allegations were brought to the notice of the Magistrate he proceeded to make enquiries and nowhere said that he asked his son whether these allegations were true and that the son denied them, held that, in circumstances such as these, it would be highly undesirable for that particular Magistrate to try the case, unless there were other more weighty considerations in favour of the opposite course—*Hemanta Kumar v. Nanda Kumar*, 41 C.W.N. 188 (192), A.I.R. 1937 Cal. 64, 64 C.L.J. 532, 9 R.C. 660, 167 I.C. 251, 38 Cr.L.J. 344.

It is ordinarily undesirable that a Magistrate who believes that the information that a house has been used as a public gaming house is credible and issues a search warrant under section 5 of the Public Gambling Act (III of 1867) should not try the case, but he cannot be said to be personally interested in the case and section 526, Cr.P.C., would not apply. He merely comes to the conclusion that the information given to him is credible and he has subsequently to decide the case on the evidence given in it. Even if the case is tried by another Magistrate, there would be the same presumption and the result would be the same—*Khemchand Girdharilal v. Emp.*, 39 Cr.L.J. 55, A.I.R. 1938 Nag. 63, 171 I.C. 1007, 10 R.N. 150.

Magistrate proceeding with the case after issue of rule for transfer:—See Note 1388, *infra*.

1378. Other cases:—Where from the number of witnesses on both sides the case could not be finished in one day but the Judge insisted on finishing the case in one day and was unwilling to grant an adjournment to another date—*Ram Sarub*, 17 A.L.J. 48, 20 Cr.L.J. 127, 49 I.C. 111; where the trying Magistrate ordered that he would examine only one witness a day during the trial and would devote no more time each day, and thus prolonged the trial of the case—*Narain Das*, 26 Cr.L.J. 1363, 89 I.C. 451, 1 Lah. Cas. 525, A.I.R. 1926 Lah. 78; where the Magistrate threatened the accused that he would be dealt with severely and sent to jail unless he admitted his guilt and furnished security (under section 110)—*Gudar Singh*, 19 All 291 (292); where the Magistrate conducted the trial on a public holiday at the request of the police-officer—*Ram Diya*, 29 Cr.L.J. 294, 107 I.C. 779; these

were sufficient grounds for transfer to another Magistrate. It is always desirable that in his anxiety to dispose of a case the Magistrate should not act in a manner which may raise a fear in the mind of the accused that he has already made up his mind—*Ishar Singh v. Shama Dسادh*, 38 Cr.L.J. 484 (485), 167 I.C. 881, 17 P.L.T. 627, A.I.R. 1937 Pat. 131, 3 B.R. 379, 9 R.P. 449. During a trial a prosecution witness made certain statements which showed his complicity in the offence and the Magistrate ordered him to be put on trial along with the accused, *held* that the action taken by the Magistrate was quite legal, but inasmuch as the witness had been examined on oath before the Magistrate who might to a certain extent have been prejudiced, the case against him should be tried by a different Magistrate—*Radharaman v. Kamakshya*, 20 Cr.L.J. 385, 50 I.C. 993 (Cal). Where in a case of rioting and murder committed to the Sessions Court, which had apparently aroused considerable local interest, it appeared that the Civil Surgeon had been discussing the case at the local club with the officers of the station including the Sessions Judge, *held* that this fact by itself was sufficient to justify an order of transfer of the case from the Sessions Judge—*Muhammad Daraz*, 19 A.L.J. 946, 23 Cr.L.J. 126. Where the Magistrate had asked the pleader for the defence not to defend the accused, *held* that under such circumstances the accused could not have confidence in the impartiality of the Magistrate and the case should be transferred—*Dhara Singh v. Ram Singh*, 3 Lah L.J. 528. Where no practitioner in a district ordinarily employed in criminal cases is willing to act for the accused, for fear of incurring the displeasure of the District Magistrate and the Police, it is a ground for transfer of the case to another district—*Lalla v. Zahoor Ahmed*, 2 O.W.N. 682, 26 Cr.L.J. 1272; *Mutsuddi Lal*, 28 Cr.L.J. 787, 104 I.C. 227, A.I.R. 1927 Lah. 709. Where at the request of the complainant, his case is sent to a particular Magistrate for trial, the accused will be justified in asking for a transfer from the Court—*Gharsi Mal v. Debi Sahai*, 25 Cr.L.J. 989, A.I.R. 1925 Lah. 121. The petitioner is bound to entertain a reasonable apprehension in his mind that he will not get a fair trial in the Court of a Magistrate who had made a report against his father and had got him dismissed from the post of a *Lambardar* and is entitled to get his case transferred from his file—*Allah Ditta*, 35 Cr.L.J. 1380, 151 I.C. 669, 35 P.L.R. 702.

Where the Magistrate begins a fresh inquiry on his own account under sec. 202, Cr. P. C., after having sent the case for inquiry to a Magistrate and receiving his report and, apart from the irregularity of conducting a second inquiry, there is also inordinate delay in either dismissing the case or directing the issue of process, the complainant may well feel some apprehension that the fate of his case, so far as the admission of the complaint is concerned, will not rest entirely on the consideration of the report and the Magistrate's conclusions thereon and his application for transfer is justified—*Tyab Ali v. Hussaini*, A.I.R. 1937 Nag. 389, 172 I.C. 203, 39 Cr.L.J. 80, 10 R.N. 174.

The mere fact that the Magistrate lives in a bungalow which is owned by the father of one of the accused persons and was taken on rent fixed long before the institution of the case in his Court is not a ground for transfer at the instance of the complainant in a cognizable case when the landlord lives in another town and has no financial hold on the tenant, especially if the Crown opposes the transfer—*Dhana*, 39 Cr.L.J. 853, 177 I.C. 187, 40 P.L.R. 468, 11 R.L. 274, A.I.R. 1938 Lah. 569.

1379. What are not grounds of transfer:—Want of temper and discretion on the part of the Magistrate in dealing with the petitioner's written statement and failure to give satisfactory explanation to the High Court are not, by themselves, sufficient grounds for granting an application for transfer—*Kisto Chunder*, 2 W.R. 58. The mere fact that the complainant is a man of importance in the place where the trial is held is not sufficient to justify a transfer to another place—*In re Ratanji*, Ratanlal 474.

A *bona fide* mistake of law is not a ground of transfer. Thus, in a case under sec. 380, I. P. C., the Magistrate should at once give the accused an opportunity to cross-examine the prosecution witnesses if he so desires, even though the charge may not

be framed, but a refusal to give such opportunity, when the Magistrate acts *bona fide* under a mistaken view of the law, is not a good ground for transferring the case—*Asirbad Muchi v. Maju*, 8 C.W.N. 838; *Fasiuddin*, 30 Cr.L.J. 728, 117 I.C. 213, A.I.R. 1929 Nag. 172; *Sadashiv*, 22 Bom. 549; *Narayan v. Bala*, 37 Cr.L.J. 1146, 165 I.C. 425, A.I.R. 1936 Nag. 146, 1936 Cr.C. 693. The mere fact that certain orders passed by the trying Magistrate are erroneous or illegal is by itself insufficient to justify transfer of the case from his Court. But where the procedure adopted by him is such as to justify a reasonable apprehension in the minds of the accused persons that they would not have a fair and impartial trial in his Court, there is sufficient ground for transferring the case—*Hari Chand*, 32 Cr.L.J. 253 (255), 129 I.C. 193, A.I.R. 1931 Lah. 59, Ind. Rul. 1931 Lah. 129, 1931 Cr.C. 139. Where the whole procedure was extremely arbitrary and in direct contravention of law and the Magistrate displayed plenty of zeal but betrayed a grievous lack of discretion and judicial spirit, the apprehension entertained by the applicant that he will not have a fair trial is perfectly reasonable and the case must be transferred—*Ajodhya Prosad v. Municipal Com., Khurai*, 37 Cr.L.J. 837, 163 I.C. 413, 18 N.L.J. 320. But the mere mistake of law committed by a Court during the trial of a case is no ground for the transfer of a case unless it is made to appear that the Court with a view to prejudice the party applying for transfer passed an illegal order—*Salag Ram v. Emp.*, 38 Cr.L.J. 416 (420), 167 I.C. 515, 9 R.A. 550, 1937 A.L.R. 201, A.I.R. 1937 All. 171. Magistrates must inevitably make mistakes sometimes in the course of the trial of one or other of the cases before them. The fact that they have made a mistake cannot possibly in itself induce any reasonable person to believe that the Magistrate is prejudiced against him. There must be some other circumstances in the light of which the apprehension in the accused's mind arises—*Suppaya Chettyar v. Karuppaya Pillay*, A.I.R. 1937 Rang. 528 (530). Courts may pass orders which may either be legal or illegal, but the mere passing of an illegal order will not justify an inference against their honesty or impartiality—*K. L. Gauba v. Emp.*, 38 Cr.L.J. 955 (957), 170 I.C. 586, 18 Lah. 114, 10 R.L. 135, 39 P.L.R. 643, A.I.R. 1937 Lah. 411. The mere fact that a trial Court has committed an error of judgment in admitting an evidence is no ground for transferring a case from such Court—*Bahir Ali*, 20 Cr.L.J. 609, 52 I.C. 273 (Pat.). It is true the duty lies upon the Court to exclude evidence which is inadmissible in law but the fact that the Magistrate wrongly admits evidence, an error of law, is not of itself necessarily good ground to transfer a case—*Om Radhe v. Emp.*, 40 Cr.L.J. 803 (805), 183 I.C. 460, 12 R.S. 55, A.I.R. 1939 Sind 238. So also, errors of judgment in refusing to summon a prosecution witness for cross-examination, insisting on his being summoned as a witness for the defence, disallowing the objections as to the fitness of a person to serve as assessor, and permitting the prosecution to examine-in-chief a witness on the substantive case of the prosecution after the defence has disclosed its case in the cross-examination of the witnesses, are insufficient by themselves to justify a transfer of the case—*Shivadhin*, 3 P.L.T. 32, A.I.R. 1923 Pat. 116 (119). The fact that a Magistrate erroneously refused to admit a document in evidence or asked party to deposit the probable expenses for summoning a person as witness is no ground for transferring a case—*Nand Kishore v. Kalka*, 5 P.L.T. 487, 25 Cr.L.J. 458. No apprehension should arise from the ordinary acts of a Magistrate performed in the course of a case. Thus, during a protracted trial of a case it necessarily happens that many points arise upon which the Magistrate has to give a decision, and the fact that he makes a decision against the accused is not sufficient to warrant an apprehension that he will not get an impartial trial, if the order is passed in good faith and the reasons for the order are duly stated—*Fasiuddin*, 30 Cr.L.J. 728 (731), 117 I.C. 213, A.I.R. 1929 Nag. 172.

The fact that the Magistrate has released the accused on bail (and has thus shown a tendency to treat the accused with undue leniency) is not a ground of transfer, for it is a discretion vested in him by law—*Sadashiv Narayan*, 22 Bom. 549. Similarly, the fact that the Magistrate has refused to grant bail in a case of non-bailable offence does not show that he has been biased against the accused—*Jumo*, 20 S.L.R. 136, 27 Cr.L.J.

859 (860). The mere fact that the accused is called upon to submit the list of defence witnesses in a warrant case before the cross-examination of all prosecution witnesses is not an irregularity which will afford sufficient ground for transfer—*Ishar Singh v. Shama Dسادh*, 38 Cr.L.J. 484 (487), 167 I.C. 881, 17 P.L.T. 627, A.I.R. 1937 Pat. 131, 3 B.R. 379, 9 R.P. 449. The Magistrate has a discretion under sec. 244 to refuse to summon any of the witnesses named by the accused; and the fact that he has refused to summon some of the witnesses is not a ground of transfer—*Mangal*, 36 All. 13 (15). The fact that the Magistrate was under a misapprehension as to the purpose for which the witnesses were called, and as to his being justified under section 257, Cr. P. C., in refusing to issue summons, should not indicate to any reasonable person, in the absence of any other factors, that the Magistrate is prejudiced against him—*Suppaya Chettyar v. Karuppaya Pillay*, A.I.R. 1937 Rang. 528 (530); *Minza Jaffar Beg v. Emp.*, A.I.R. 1940 Lah. 354, 41 Cr.L.J. 948, 190 I.C. 561. Because a Magistrate refused to issue summons but directed only that witnesses should be examined on commission does not give any reasonable grounds for the apprehension that the Magistrate would not listen to the accused's defence with an open mind—*Suppaya Chettyar v. Karuppaya Pillay*, supra. The mere fact that the Magistrate has granted several unnecessary adjournments to enable the complainant to appear is not a ground for transferring the case from the Magistrate—*Maula Bakhsh v. Marshall*, 27 Cr.L.J. 1022 (1023), 96 I.C. 878, A.I.R. 1926 Lah. 628. So also, a Magistrate who has tried one set of accused is not thereby debarred from trying another set of accused on the same facts—*Joharuddin*, 31 Cal. 715; *Dalsher*, 24 Cr.L.J. 800 (Oudh).

The High Court did not transfer a case from the Court of a Magistrate who said to the complainant that he was determined that the case should be finished within six weeks and he would so finish it in some way or other either by dismissing it for default or discharging the accused or any other way—*Kamni Begam v. Bashir Ulzaman Khan*, 37 Cr.L.J. 1100, 165 I.C. 20, A.I.R. 1936 All. 695, 1936 A.L.J. 975, 1936 Cr.C. 891. The fact that a Magistrate has a lot of work and cannot find time to dispose of the case quickly, alone is no ground why a case in which almost the entire prosecution evidence has been recorded by the Magistrate should be transferred from his Court to another Court—*Baij Nath v. Ram Sarup*, A.I.R. 1936 Lah. 827, 38 Cr.L.J. 181, 166 I.C. 373, 1936 Cr.C. 795.

If in fact the case is a sensational one and arouses a certain amount of public interest or public feeling, that is no reason why the accused or the High Court should lose faith in the Court and the case should be transferred—*Sugnomai v. Phatandas*, A.I.R. 1936 Sind 237 (239), 1936 Cr.C. 1093, 166 I.C. 83, 38 Cr.L.J. 133. Where the challan does not disclose that the facts of the case are of any extraordinary complexity or involve any specially difficult questions of law, the mere fact that public interest and some excitement are aroused at the time is no reason for taking the case away from the Magistrate—*Pruthvinath*, A.I.R. 1938 Nag. 56 (59), 20 N.L.J. 151, 1 L.R. 1938 Nag. 248, 175 I.C. 935, 39 Cr.L.J. 660.

The possibility that some officials of a higher rank than the trying Magistrate might be cited as witnesses is also not an adequate ground for transferring the case—*Pruthvinath*, supra.

It is undesirable to transfer a case from a district because police officers of the district are witnesses in that case—*Devan Singh v. Emp.*, A.I.R. 1940 Lah. 527 (528), 42 P.L.R. 589.

Refusal by the Magistrate to allow the accused to cross-examine the complainant, although improper, is not a ground of transfer, especially when the case has reached a very advanced stage—*Sujan Singh v. Jia Lal* 1917 P.W.R. 29, 18 Cr.L.J. 690. See also *Salag Ram v. Emp.*, 38 Cr.L.J. 416 (418), 167 I.C. 515, A.I.R. 1937 All. 171, 1937 A.L.R. 201, 9 R.A. 550. Where the Magistrate gave a proper warning to counsel that he would have to bring the cross-examination to an end in a minute or two but he did not, as a matter of fact, stop cross-examination, there was no ground for transferring the case—*Tara Chand*, A.I.R. 1933 All. 949 (952), 1933 Cr.C. 1550.

But see *Yusuf v. Bupi Lal* in Note 1372. The mere fact that the trial Magistrate frequently cross-examined the witnesses of the complainant or disallowed questions as irrelevant is no ground for a transfer of the case—*Abdul Aziz v. Ganesh*, 25 Cr.L.J. 1185, 82 I.C. 49, A.I.R. 1925 Oudh 52. A witness who had been examined by the Police can reasonably be asked whether a particular version which he was giving in Court was given by him to the Police. The question would be perfectly relevant and legitimate. However, the rejection of the question cannot be a ground for transfer—*Lal Bahadur Raut v. Emp.*, 39 Cr.L.J. 527 (528), 175 I.C. 110, 4 B.R. 533, 10 R.P. 581, A.I.R. 1938 Pat. 238. The fact that when the Magistrate disallowed questions in cross-examination he made no note of the same on the record is no ground for transfer under this section—*Dewan Singh v. Emp.*, A.I.R. 1910 Lah. 527 (528), 42 P.L.R. 589.

A Judge or Magistrate who conscientiously tries a case in a judicial proceeding has a legal duty to apply, to the best of his ability, the rules of evidence, as those rules are laid down in the Evidence Act. And his judicial duty is to exclude irrelevant evidence, whether in examination-in-chief or in cross-examination. The allowance or disallowance of questions by a Judge in pursuance of a judicial duty cannot ever by itself afford a ground upon which to base an application for a transfer of a case, unless it is either shown affirmatively that there exists some improper motive or unless upon the face of the questions themselves, disallowed or allowed as the case may be, the only possible inference must be that they have been allowed or disallowed for some ulterior and improper reason—*U Saw v. The King*, A.I.R. 1938 Rang. 456 (457), 179 I.C. 72, 40 Cr.L.J. 162, 11 R.R. 298.

The Additional District Magistrate of Rangoon was trying a case against the accused who was editor-in-chief of the "Sun". He made an application for transfer on the ground that the Additional District Magistrate, having been the object of an unfavourable comment by the "Sun" newspaper while Deputy Commissioner of Myingyan, might harbour a resentment against him which would prevent him doing justice in the case. *Held* that this could not be accepted as a ground for transfer because there was no reason whatever to impute any such frailty to the Magistrate—*U Saw v. The King*, *supra*.

The fact that the Magistrate accepted the complaint at a late hour in the evening and issued warrant forthwith, or the fact that the Magistrate recorded statements of only one of the accused persons, or the fact that the complainant and the accused are both acquainted with the Magistrate who sometimes gets medical help from each, is not a sufficient ground for transfer—*Atiqullah*, 1917 P.W.R. 13, 18 Cr.L.J. 719. When a case is adjourned, the Court can award costs of adjournment, whenever it thinks proper; and the passing of such order of costs against a party does not disclose any prejudice on the part of the Magistrate and is not a valid ground for the transfer of the case to another Magistrate—*Raghunandan v. Ramdin*, 2 P.L.W. 218, 19 Cr.L.J. 6, 42 I.C. 918. See also *Ishar Singh v. Shama Dسادh*, 38 Cr.L.J. 484 (486), 167 I.C. 881, 17 P.L.T. 627, A.I.R. 1937 Pat. 131, 3 B.R. 379, 9 R.P. 449. When the District Magistrate refuses to produce the papers called for by the defence on the ground that some are missing and others are confidential, it cannot be said that the trial Court entertains any bias against the accused or that the accused should reasonably apprehend any such bias—*Bahir Ali*, 20 Cr.L.J. 609, 52 I.C. 273 (Pat.). The mere fact that the Magistrate's son is a pleader and that he has been engaged by the other side is no ground for granting a transfer to another Court—*Peary Lal v. Puttan*, 26 Cr.L.J. 440, 85 I.C. 56, A.I.R. 1925 Oudh 318. But see 29 C.W.N. 648 and 27 Cr.L.J. 844 cited in Note 1376.

That the Magistrate is himself unwilling to proceed with the case is certainly no reason for removing the case from his file—*Fakira v. Goma*, 37 Cr.L.J. 861, 163 I.C. 694, 18 N.L.J. 279.

An accused is not entitled to have his case transferred from the Court of a Magistrate who is seised of it merely because he chooses to place a sinister interpretation on an innocent act of the Magistrate. Otherwise, an accused person endowed with a

suspicious nature will make the administration of justice impossible—*K. L. Gauba*, 38 Cr.L.J. 955 (958), 170 I.C. 586, 18 Lah. 114, 10 R.L. 135, 39 P.L.R. 643, A.I.R. 1937 Lah. 411. Any Magistrate who seeks inspiration from any Counsel for the Crown, even if he be of the position of Government Advocate, or from any Police Officer, however highly placed he may be is unworthy of his office—*Ibid*.

Suppression of facts:—Where the applicants induced the High Court to issue a rule by suppression of facts and by making certain allegations which were absolutely unfounded, the application for transfer was dismissed and they were ordered to pay costs of the Public Prosecutor under cl. (6A) of this section—*Abdullah v. Chandoomal*, A.I.R. 1933 Sind 361, 35 Cr.L.J. 147, 146 I.C. 586, 1933 Cr.C. 1337.

Provocation to the Magistrate:—The method adopted by a counsel in attempting to provoke the Magistrate trying a case into some unguarded expression and then applying for a transfer is a method which is neither in the interest of client nor in the interest of justice—*Tara Chand*, A.I.R. 1933 All. 949 (952), 1933 Cr.C. 1569.

1380. Onus of proof:—The applicant who wants the transfer of the case on the ground of bias in the mind of the Magistrate must show the very clearest grounds for believing that the Magistrate is likely to be prejudiced or influenced by an improper motive in the decision of the case. In the absence of such ground it is highly improper to transfer a case from his Court and thus to throw a gratuitous slight upon the Magistrate—*Shankar Abaji*, 6 B.H.C.R. 69; *Vishnu*, Ratanlal 323; *Ganga D.*, 1887 A.W.N. 139. When an application for transfer is objected to by the accused, the prosecution must bring forward the very best evidence to prove that a fair trial cannot be held in the district in which the case is ordinarily triable—*Nobogopal*, 6 Cal. 491.

See Note 1386.

Clause (b):—Since the Code allows appeals and revision applications from convictions, and since the verdict of the jury is not in all cases final, the High Court is loth to transfer a case to itself on the ground of any difficult question of law arising in the case. If the Lower Court errs in any point of law, it can be set right afterwards by the High Court in appeal or revision. See *Ameer Khan*, 15 W.R. 69 (*per* Phear, J.).

1381. Clause (d)—Convenience of parties:—When all the acts constituting the offence took place in Bombay, but the complainant chose to lodge his complaint in the Ratnagiri Sessions Court and the accused also wished to be tried there, the High Court ordered the trial to proceed before the Sessions Judge of Ratnagiri—2 Bom.L.R. 394. In transferring a case no consideration should be had to the fact that by the transfer to a particular district the accused will have the benefit of a trial by a jury, where previously he had none. The real question is that of convenience of parties—*Durga Charan*, 8 Cr.L.J. 121, 8 C.L.J. 59. See also *Lakshman*, 55 Bom. 576, 1931 Cr.C. 569. Where with reference to a case which stood committed to the Court of Session at Thana, the Government by a Notification directed that the case should be tried at Alibag by Mr. G., the Sessions Judge of Thana, and the accused applied to the High Court to have the case transferred to Thana on the ground of convenience of the parties and their witnesses, held that the case should be transferred to the Sessions Judge sitting at Thana in the interests of justice and the convenience of parties, and the powers of transfer vested in the High Court under sec 526 were in no way affected by the Notification of the Local Government—*Lakshyan Chavvi*, 55 Bom. 576, 1931 Cr.C. 569 (578), 32 Cr.L.J. 1147, 33 Bom.L.R. 675, 134 I.C. 347, Ind. Rul. 1931 Bom. 459, A.I.R. 1931 Bom. 313. The convenience of defence witnesses when they are numerous will outweigh the convenience of the prosecution witnesses especially when they are few, and a transfer will be directed to suit the convenience of the former—*Ratanlal* 927. The convenience of the accused has to be considered rather than that of the complainant, for transferring a case—*Sohan Lal v. Gopal*, 27 Cr.L.J. 563. But when the convenience of the complainant or witnesses is not concerned, the case will not be transferred for the sole convenience of the accused—*Ghulam Kader*, 20 S.L.R. 310, 27 Cr.L.J. 1261. The fact that an accused person and his defence witnesses reside at a considerable distance from where the

being tried is ordinarily no ground for transfer. But where it will be highly inconvenient and risky for the applicant to appear either as an accused person or as a witness in a certain district, the case should be transferred to the district where the accused and his witnesses reside—*Satbhari v. Muhammad Sidik*, 36 Cr.L.J. 869, 155 I.C. 1010, A.I.R. 1935 Sind 68. A transfer will be allowed from one Court to another, where the accused are residents within the jurisdiction of the latter Court, and all the witnesses belong to the same place, so that it will be conducive to the convenience of parties if the case is inquired into in the latter place—*Bansi v. Lakshmi*, 45 All. 700 (701), 25 Cr.L.J. 72. The High Court transferred a case from one subdivision to another subdivision where both the complainant and the accused lived in the latter place, but on this understanding that the accused must not ask for a *de novo* trial, and that the evidence recorded by the Magistrate of the former subdivision should continue to be the evidence in the case—*Hari Kishen v. Polo Ram*, 27 P.L.R. 604, 28 Cr.L.J. 233 (234). Where a case has given rise to communal feeling to such an extent that one of the parties find it difficult to persuade his witnesses to appear in Court, owing to the fear that they might render themselves liable to injury at the hands of the members of the opposite community, it is desirable that the case should be transferred to some other locality—*Halim*, 8 P.L.T. 153, 27 Cr.L.J. 1391.

1382. Clause (e)—“Expedient for the ends of justice”:—When a Magistrate who had seisin of the case did not know English and there was a large amount of evidence oral and documentary in English in the case, a transfer was necessary in the interests of justice—*Mohammad v. Ali Raza*, 16 Cr.L.J. 73, 26 I.C. 665 (All.). But the fact that the Magistrate was not well versed in Telegu and Sanskrit in which a book produced in evidence was written is not a ground of transfer, because it is a difficulty which is of common occurrence—*Venkateswara Sastri*, 35 Mad. 739.

Unnecessary delay in the disposal of a petty case is a good ground for transfer—*Mangalam v. Abdul*, 2 Weir 679; *Gorind Sahai*, 12 A.L.J. 262, 15 Cr.L.J. 363 (364).

It is inexpedient to transfer a case when it is mature for judgment; unless it be for purely administrative reasons—*Fakira v. Goma*, 37 Cr.L.J. 861, 163 I.C. 861, 18 N.L.J. 279. But see *Sikandar Lal*, 10 Lah. 778, 30 Cr.L.J. 129 in Note 1371.

The fact that the accused is an acquaintance of the Magistrate, and that it would be in the interests of justice if the trial were held by a stranger Magistrate who knew nothing about either party, is not a ground of transfer—*Mewa Ram v. Narain*, 16 A.L.J. 490, 19 Cr.L.J. 702, 46 I.C. 158.

The general principle that it is desirable that a Magistrate who has heard the greater part of a case should conclude it, should not be allowed to outweigh the prejudice and loss likely to result to the accused by acceding to the transfer of the case to a different district where the Magistrate, who heard the case, was transferred—*Tarachand*, 36 Cr.L.J. 1495, 158 I.C. 964, A.I.R. 1935 Sind 197, 1935 Cr.C. 1062. See also *Murugappa*, cited in Note 1390.

While it is true that convenience and expedition are factors to be considered in the trial of a case, it must be remembered that beyond even these considerations is the even more important consideration that justice should be done, and the necessity for expedition should not be allowed to deprive the accused of a reasonable opportunity to call evidence in defence on a charge of an offence of which, at the outset of the proceedings, he had no knowledge he would be called upon to meet—*Jashanmal J. Gulrajani v. Emp.*, 40 Cr.L.J. 818 (822), 183 I.C. 619, 12 R.S. 64, A.I.R. 1939 Sind 222.

Where the committing Magistrate has not sufficiently appreciated the responsibility that rests upon him under section 495, Cr. P. C., and has permitted an advocate privately engaged by the complainant to conduct the prosecution in a case under section 302, I. P. C., it is expedient in the interests of justice that the case should be transferred from the Court of the committing Magistrate—*Ahmed Mahomed v. Emp.*, A.I.R. 1940 Sind 220, I.L.R. 1940 Kar. 482.

Communal dispute:—Where the case was relating to a dispute between Hindus and Mahomedans in respect of a mosque or graveyard, it is desirable that the case should

be tried by the District Magistrate or some other European Magistrate—*Kader Baksh v. Sundar Lal*, 1915 P.L.R. 127, 16 Cr.L.J. 213; *Mangat*, 87 I.C. 976, A.I.R. 1925 Lah. 626, 26 P.L.R. 267, 26 Cr.L.J. 1056; *Harikishen v. Allah Baksh*, 28 Cr.L.J. 588, 102 I.C. 556, A.I.R. 1927 Lah. 520, 8 A.I.Cr.R. 260; *Nand Kishore*, 102 I.C. 556, A.I.R. 1927 Lah. 520, 28 Cr.L.J. 588. But see *Gowardhan v. Abbas Ali*, 1900 Cr.C. 176 (178), A.I.R. 1930 Lah. 168, 121 I.C. 374, 31 Cr.L.J. 257, 13 A.I.Cr.R. 347 and *Pandurang Krishna*, 28 Cr.L.J. 898, 105 I.C. 226, 10 N.L.J. 184, A.I.R. 1928 Nag. 21, 9 A.I.Cr.R. 49, where it is said that Courts should not be influenced by general allegations regarding the so-called communal feelings and cases should not be transferred on the basis of such allegations, because an intolerable position would arise if it were open to any accused person in a case of communal or quasi-communal nature to obtain a transfer of a case from the Court of a Hindu Magistrate, merely because the accused is a Mahomedan, or vice versa. The Allahabad High Court holds that in cases where communal interests are involved, a transfer should be granted with considerable hesitation. In such cases the matter is not to be decided in the abstract whether a Hindu or a Mahomedan Magistrate would deal with the matter impartially or not. The question always would be whether through some error or unfortunate incident the Magistrate has behaved in a way to give legitimate ground for fear to any party or the other—*Ghasso*, 1930 A.L.J. 606, 31 Cr.L.J. 555. See also *Bhagwan Das*, 22 A.L.J. 1103. It is no ground for the transfer of a case from the Court of a Hindu or Muhammadan Magistrate to that of a European Magistrate merely because the parties belong to different religions or the dispute is of a communal or quasi-communal nature. In order to obtain a transfer it must be shown that there is a reasonable apprehension in the mind of the person applying for it that he will not get a fair trial. This is a question to be determined in each case and is not one to be decided by any general rule—*Nathu v. Joti Parshad*, 35 Cr.L.J. 624, 148 I.C. 201, A.I.R. 1934 Lah. 73, 1934 Cr.C. 140.

Ordinarily, it is not a correct proposition that merely because the case is between Hindus and Mahomedans, either a Hindu or a Mahomedan Judge or Magistrate is *ipso facto* debarred from hearing it. But where the petitions for transfer have unfortunately given the communal aspect of the case an importance which it really does not deserve on the merits, it is useless to shut one's eyes to the fact that the question has cropped up and become a prominent issue and it is desirable in the interests of everybody concerned to transfer the case—*Amba Parshad v. Imam Ali*, A.I.R. 1938 Lah. 706, 178 I.C. 507, 40 Cr.L.J. 79.

A Magistrate is not barred by reason of belonging to one community or the other from trying cases between members of those two communities. But when a Magistrate finds himself placed in such a position, it is incumbent upon him to exercise the greatest tact and discretion in handling the case. Where he commits errors of procedure so as to give rise to an apprehension in the minds of petitioners that they would not get an impartial trial, the case should be transferred—*Lal Singh v. Emp.*, 39 Cr.L.J. 888, 177 I.C. 507, 40 P.L.R. 505, 11 R.L. 333, A.I.R. 1938 Lah. 576.

1383. Clause (ii)—“From a Criminal Court subordinate to its authority”.—The High Court has no jurisdiction to direct the transfer of a case from a Court not subordinate to its jurisdiction. Sec. 185 does not empower such a transfer. Thus, Presidency Magistrate of Bombay to the Court of the Presidency Magistrate at Madras—*Mahomed Ghouse v. Nathu*, 40 Mad. 835, 18 Cr.L.J. 148.

The Courts of the District Magistrate and Sessions Judge of Bangalore are subordinate to the High Court of Madras, and the High Court can transfer the cases pending before those Courts—*Scott v. Ricketts*, 9 Mad. 356. The Perim Sessions Court and the Court of the Cantonment Magistrate at Secunderabad are subject to the Bombay High Court, and that High Court can transfer any case pending before those Courts to any other Court of equal or superior jurisdiction—*Mangel Tekchand*, 10 Bom. 274; *Eduards*, 9 Bom. 333.

In an Allahabad case it has been held that powers under this section cannot be exercised to transfer a proceeding pending in one Panchayat Court *consuetudo*.

under the provisions of the United Provinces Act VI of 1920 to another—*Sat Narain v. Sarju*, 46 All. 167 (168, 169). In this case, Kanhaiya Lal, J., is of opinion that the High Court cannot transfer a case from one village Panchayat to another under the provisions of *this section*, but it can do so under section 22 of the Letters Patent—*Ibid* (p. 170). In a later case of the same High Court, however, it has been laid down that as Panchayat Courts are Criminal Courts, the High Court has jurisdiction to transfer cases pending before a Panchayat Court—*Basdeo v. Badal*, 49 All. 188, 28 Cr.L.J. 94. In this case the learned Judge did not enter into the question whether the Panchayat Courts were subordinate to the High Court.

1383A. Clause (iv):—This jurisdiction clearly covers both classes of cases, that is, cases exclusively triable by a Court of Session and also cases not exclusively triable by such a Court. It follows that the Legislature contemplated that for the ends of justice a case of the latter description may forthwith be ordered by the High Court to be committed to a Court of Session for trial—*Bolting*, 35 Cr.L.J. 928 (930), A.I.R. 1934 Oudh 220, 149 I.C. 235, 11 O.W.N. 780, 1934 Cr.C. 1018, A.I.R. 1934 Oudh 349.

1384. To what Court case may be transferred:—The transfer must be from one Court to another Court. Therefore, the High Court cannot transfer a case from the file of one Presidency Magistrate to another, both being Magistrates presiding over the same Court—*Murugesu Mudaliar*, 13 M.L.J. 69. In *Venkateswara Sastri*, 35 Mad 739, however, the High Court transferred a case from the file of a Chief Presidency Magistrate to the file of another Presidency Magistrate.

The transfer must be to a Court of competent authority and of equal or superior jurisdiction. Where the High Court directed the District Magistrate to transfer a case (under sec. 107) to another Magistrate, and the District Magistrate transferred the case to a 2nd Class Magistrate, the transfer was illegal because the 2nd Class Magistrate was not competent to hear the case under sec. 107, and also because he was of inferior jurisdiction to the District Magistrate—*Gobind Sahai*, 37 All. 20. The transfer should have been made to a First Class Magistrate as in *Munna*, 24 All. 151.

In selecting a Court to which the case is to be transferred regard must be had to the gravity of the offence. Where a case under sec. 211, I. P. C., was transferred from the Court of a Joint Magistrate to that of an Honorary Magistrate with first class powers, where the case remained pending for four months, it was held that the case, being of a serious nature, ought to have been transferred to the Court of Session or to the Court of a more experienced Magistrate—*Magan Lal v. Ganesh*, 16 A.L.J. 294, 45 I.C. 515, 19 Cr.L.J. 611.

As for transfer of any preventive proceeding, from one district to another see Note 277A.

Power of Court to which case is transferred :—See Note 606 under sec. 192.

1385. Sub-section (3)—‘A party interested’:—Ordinarily, the only persons who are recognised by the Code as parties to a criminal case are the persons who have the right to control the proceedings; these are the Crown, the accused and the parties engaged in conducting certain proceedings within the meaning of this Code. The Code does not recognise a private prosecutor, who is a complainant, as a party to the case, and he, consequently, is not competent to apply for a transfer as a party interested—*Jamuna v. Rudra Kumar*, 4 P.L.J. 656, 20 Cr.L.J. 648 (*per* Mullick, J.). But *Jwala Prasad, J.* held in this case that the person at whose instance a criminal case is lodged (*i.e.*, the complainant) is a person interested in the prosecution and is entitled to apply for transfer but his rights are subordinate to those of the Crown; that is, if the Public Prosecutor or the person who is conducting the case on behalf of the Crown is unwilling to have the case transferred, the private prosecutor has no right to get the case transferred. The opinion of *Jwala Prasad, J.* has been followed in a recent case of the Patna High Court in *Sheodhari v. Jhingur*, 7 P.L.T. 49, 88 I.C. 993, A.I.R. 1925 Pat. 818, 26 Cr.L.J. 1249; by the Lahore High Court in *Bagh Ali v. Md. Din*, 6 Lah. 541, 27 P.L.R. 80, 27 Cr.L.J. 411, 93 I.C. 75, A.I.R. 1926 Lah. 156; and by the Allahabad High

Court in *Abdul Naseer v. Emp.*, 39 Cr.L.J. 33, 171 I.C. 934, A.I.R. 1937 All. 664, 1937 A.L.J. 845, 10 R.A. 349, 1937 A.L.R. 919, 1937 A.C.C. 117, 1937 A.W.R. (H.C.) 729. The expression "party interested" does not necessarily mean the complainant but may include a police informant. Moreover, where the conduct of the case is in the hands of the Public Prosecutor, and there is a conflict between the Public Prosecutor and the party interested, the right of the former must prevail—*Rajagopal v. Narayan*, 57 M.L.J. 547, 1929 Cr.C. 612 (613), 2 M.Cr.C. 199, 30 M.L.W. 640, 120 I.C. 80, 30 Cr.L.J. 1163. In a charge which is instituted on a Police report and in which the prosecution is in the hands of the Public Prosecutor exceptionally strong grounds would have to be shown before the High Court would exercise its power of transfer, at the instance of a private complainant when the responsible authorities are satisfied that there is no ground for withdrawing the case from the Court which is hearing it—*Bhik Chand*, 27 Cr.L.J. 454, 93 I.C. 246, A.I.R. 1926 All. 307; *Sardar Shah v. Gurdit Singh*, 36 Cr.L.J. 222, 152 I.C. 1053, 35 P.L.R. 567, A.I.R. 1934 Lah. 612, 1934 Cr.C. 942. But the first informant has *locus standi* to make an application for transfer even in such a case—*Sardar Shah v. Gurdit Singh*, *supra*.

A person who makes a report to the Police of a certain offence is a person who is interested in the prosecution which may be started by the Police within the meaning of cl. (3) and cl. (8) of this section. He, therefore, has *locus standi* to make an application for a transfer under this section. Where such an application is opposed on behalf of the Crown and there is thus a conflict between the Crown and the applicant, the rights of the applicant must be subordinate to those of the Crown because the Crown is responsible for the prosecution—*Abdul Naseer v. Emp.*, *supra*; *Dhana*, 39 Cr.L.J. 853, 177 I.C. 187, 40 P.L.R. 468, 11 R.L. 274, A.I.R. 1938 Cal. 569.

One of the injured persons may perhaps be regarded as a complainant though the case is a cognizable one and is entitled to apply for transfer under this section—*Dhana*, *supra*.

A person alleging himself to be the complainant, but who in fact is not the complainant and from whose hands the prosecution has been taken away by the order of the Magistrate, is not a party interested within the meaning of this section—*Gannon*, 5 Bom.L.R. 869.

Under sec. 195 as amended in 1923, it is no longer open to a private person to take proceedings in respect of offences mentioned in that section; a private person may move the Court, but it is for the Court to decide whether to take proceedings or not. A person moving the Court to take action under sec. 195 cannot therefore be considered to be a party interested, and has no *locus standi* to apply for a transfer of the case—*Ram Sarup v. Mahomed Mehr*, 31 P.L.R. 840, 31 Cr.L.J. 1174.

Own initiative:—So far as the transfer of cases is concerned, however, the powers of the High Court are wide. The High Court can of its own motion under sub-sec. (3) transfer a case; it can, if it thinks proper, act upon the application of a witness and would certainly do so if it was satisfied that the process of the Court was being abused, that the proceedings were sham or bogus proceedings instituted or continued for some ulterior purpose for a purpose not within the intention and provisions of the relevant sections of the Code. But where no useful purpose, public or private, would be served by the transfer of the case nor is there any reasonable ground for apprehension on the part of the applicant that the Magistrate will not deal fairly and honestly in his final order with the questions under the provisions of the Cr. P. Code before him for decision, the case should not be transferred—*Om Radhe v. Emp.*, 40 Cr.L.J. 803 (804), 183 I.C. 460, 12 R.S. 55, A.I.R. 1939 Sind. 238.

1386. Sub-section (4)—Mode of making an application for transfer:—Every person, whether accused or not except the Advocate-General, who makes the application under this section must support his application by an affidavit—*Sadashee*, 34 Cr.L.J. 1035, 45 I.C. 445, A.I.R. 1933 Nag. 201, 1933 Cr.C. 797, 29 N.L.R. 338. It is necessary for a person who claims a transfer to prove by affidavit, fully and strictly, all the facts on which he rests his claim—*Maung Ba Chien v. The King*, A.I.R. 1920

Rang. 454 (456), 178 I.C. 942, 40 Cr.L.J. 154; 11 R.R. 287. An application for transfer should be made by motion supported by affidavit or affirmation and not by a letter addressed by the Sessions Judge to the High Court—*Zahiruddin*, 1 Cal. 219; *Abdool Sobhan*, 8 Cal. 63; *Ahmed Baksh*, 1894 A.W.N. 154. An application for transfer which is not supported by an affidavit, cannot be entertained—*Ujagar Singh*, A.I.R. 1936 Lah. 356, 37 P.L.R. 80, 37 Cr.L.J. 510, 161 I.C. 921, 1936 Cr.C. 297. An application for transfer should not be made by a mere written statement prepared by Counsel but should be made by an application supported by affidavit or by a properly verified petition—*Amrita Lal v. Lachman*, 1891 A.W.N. 37.

Affidavit:—When the transfer is asked for on the ground that the appellant wishes to call the Magistrate as a witness, the application must be supported by an affidavit showing that the evidence required from the Magistrate is relevant and material—*Nizam Ahmed*, 1886 A.W.N. 257.

The Madras High Court holds that an application for the transfer of a criminal case by the accused is a criminal proceeding within the meaning of sec. 5 of the Indian Oaths Act, and no oath can be administered to the accused. Therefore no affidavit can be put in by the accused person. If any affidavit is put in, it is a nullity, and the accused cannot be convicted for any false statement contained therein—*Ramaswami*, 1 Weir 176. This is also the view of the Allahabad High Court; see *Barkat*, 19 All. 200; *Bindeshri*, 28 All. 331 and *Matan*, 33 All. 163. But in *Ghulam Muhammad*, 3 Lah. 46, 23 Cr.L.J. 399, 67 I.C. 351, A.I.R. 1922 Lah. 113, it has been held that the affidavit is not a nullity; the provision in sec. 342 (4) that no oath can be administered to an accused has reference only to the statement made by him during his examination under that section; it does not preclude him from making an affidavit in support of his application under sec. 526. See also *Sadasheo*, supra.

See sec. 537 and the notes thereunder.

Counter-affidavit by District Magistrate:—When an application for transfer is made on the ground of partiality of the Magistrate before whom the case is pending, it is highly improper for the District Magistrate to make an affidavit swearing as to the impartiality of that Magistrate—*Pandurang*, 25 Bom. 179.

Explanation of the Magistrate:—The High Court has power to call for a report from the Magistrate regarding the allegations made in the affidavit in support of an application for transfer although there is no provision for it in the Cr. P. Code. Such report is not made in a judicial capacity. It is in essence a report of an administrative character and can be contradicted by the affidavit of the parties. It can even be disbelieved for sufficient reasons—*Ananthachariar v. Emp.*, 1937 M.W.N. 328.

As a matter of practice the best course to adopt is that when an application for transfer is made, the Judge from whose Court the transfer is sought to be obtained should be given an opportunity of instructing the Government Advocate on the matters raised in the affidavits, but any formal explanation which is subsequently incorporated in the proceedings is not desirable—*Brahmayya v. The King*, A.I.R. 1938 Rang. 442 (443), 179 I.C. 783, 11 R.R. 347, 40 Cr.L.J. 265.

Where in more than one paragraph of their petition for transfer the petitioners stated that the Magistrate was intimate with M and in the explanation submitted by him the Magistrate said that "what the petitioners believe is not evidence" and "purely conjectural and do not admit of any discussion", it would have been much more satisfactory if the Magistrate had denied his intimacy with M if that intimacy were not a fact—*Bindeshwari Missir v. Emp.*, 39 Cr.L.J. 517, 175 I.C. 49, 4 B.R. 519, 10 R.P. 571, 1938 P.W.N. 518, A.I.R. 1938 Pat. 376.

Sub-section (5)—Compensation:—This sub-section as well as sub-section (6A) has been amended by the Cr. P. C. Amendment Act, XXI of 1932; the main amendment being the substitution of the word "compensation" for "costs". The reason is thus stated: "Applications in the High Court are opposed usually by or on behalf of the Legal Remembrancer who is paid by salary and not by fees, which makes it difficult

to assess his reasonable expenses incurred in opposing the application (see the judgment of Lord Williams, J. in *Neamat Sha*, 59 Cal. 481). The amendments made in sub-sections (5) and (6A) are aimed at meeting this criticism—"Statement of Objects and Reasons" (Gazette of India, 1932, Part V, p. 198).

Costs of transfer:—When the case is transferred at the instance of the accused, he will be ordered to pay all the complainant's costs incurred before the Magistrate from whose file the transfer was ordered—*Girish Chandra v. Chandramoni*, 8 C.W.N. 589. In *Khetu v. Mohim Nath*, 8 C.W.N. 75, the Crown bore all the expenses of the complainant's witnesses.

Sub-section (6A):—This sub-section has been added by the Amendment Act of 1923 to provide a safeguard against frivolous, vexatious or dilatory applications "We recognise that the provisions of the section, as they stand, have lent themselves to gross abuse, and therefore we feel that great safeguards are necessary. For these reasons, the new sub-section (6A) enables the High Court in cases where it is of opinion that the application was frivolous or vexatious, to award such amount by way of reasonable costs in the High Court and Court below as it thinks fit"—*Report of the Joint Committee* (1922). By the Amendment Act of 1932, a maximum limit (Rs. 250) has been fixed to be the amount of compensation that may be awarded.

The words "any person who has opposed the application" are comprehensive enough to include the *Crown* or the *Local Government*. The words also include any private individual who has an interest in the subject-matter of the complaint, as also all or any of the accused persons—*Kanver Sen*, 52 All 263, 1930 A.L.J. 209, 1930 Cr.C. 319 (321, 322).

Where an application for transfer has been made without any justification, is not supported by any good or cogent reason and is found to be vexatious and made with the view of causing delay or otherwise hindering the course of justice, an order should be made under this sub-section for payment of costs by the applicant—*Sadasheo*, 34 Cr L J. 1035, 145 I.C. 445, A.I.R. 1933 Nag 201, 1933 Cr.C. 97, 29 N.L.R. 338. Where the petition for transfer contained allegations attributing to the trying Magistrate remarks which, if true, would undoubtedly render him unfit to be a person to continue to exercise judicial functions and also statements regarding the Magistrate's conduct of the proceedings which, if believed, would cast serious reflection on the Magistrate's ability to preside over a criminal trial, the High Court assessed the compensation at the maximum amount allowable under this sub-section—*Kali Charan*, 35 Cr.L.J. 1056, 150 I.C. 79, A.I.R. 1935 Pat. 120.

1387. Sub-section (8)—Change in the law:—Sub-sections (8) and (10) and the Explanation to sub-section (9) are the result of an amendment made by the Cr. P. C. Amendment Act, XXI of 1932. Sub-section (8) previously (as amended in 1923) stood as follows :—

"(8) If, in the course of an inquiry or trial or before the commencement of the hearing of any appeal, the Public Prosecutor, the complainant or the accused notifies to the Court before which the case or appeal is pending his intention to make an application under this section in respect of such case or appeal, the Court shall adjourn the case or postpone the appeal for such period as will afford a reasonable time for the application to be made and an order to be obtained thereon."

The subject-matter of this sub-section has now been divided into two sub-sections, (8) and (10), of which sub-sec. (8) provides for an adjournment during the inquiry or trial, and sub-sec. (10) refers to the appellate stage.

The main changes are the following :—

Firstly, the application for adjournment, during an inquiry or trial must be made before the defence closes its case. Formerly, this could be done at any stage during the inquiry or trial. "We recognize the necessity of greater safeguards against the abuse of the section than those now existing. We think that provision should be made for a compulsory adjournment if a party notifies his intention to move for a transfer at any

Rang. 454 (456), 178 I.C. 942, 40 Cr.L.J. 154; 11 R.R. 287. An application for transfer should be made by motion supported by affidavit or affirmation and not by a letter addressed by the Sessions Judge to the High Court—*Zahiruddin*, 1 Cal. 219; *Abdool Sobhan*, 8 Cal. 63; *Ahmed Baksh*, 1894 A.W.N. 154. An application for transfer which is not supported by an affidavit, cannot be entertained—*Ujagar Singh*, A.I.R. 1936 Lah. 356, 37 P.L.R. 80, 37 Cr.L.J. 510, 161 I.C. 921, 1936 Cr.C. 297. An application for transfer should not be made by a mere written statement prepared by Counsel but should be made by an application supported by affidavit or by a properly verified petition—*Amrita Lal v. Lackman*, 1891 A.W.N. 37.

Affidavit:—When the transfer is asked for on the ground that the appellant wishes to call the Magistrate as a witness, the application must be supported by an affidavit showing that the evidence required from the Magistrate is relevant and material—*Nizam Ahmed*, 1886 A.W.N. 257.

The Madras High Court holds that an application for the transfer of a criminal case by the accused is a criminal proceeding within the meaning of sec. 5 of the Indian Oaths Act, and no oath can be administered to the accused. Therefore no affidavit can be put in by the accused person. If any affidavit is put in, it is a nullity, and the accused cannot be convicted for any false statement contained therein—*Ramaswami*, 1 Weir 176. This is also the view of the Allahabad High Court; see *Barkat*, 19 All. 200; *Bindeshri*, 28 All. 331 and *Matan*, 33 All. 163. But in *Ghulam Muhammad*, 3 Lah. 46, 23 Cr.L.J. 399, 67 I.C. 351, A.I.R. 1922 Lah. 113, it has been held that the affidavit is not a nullity; the provision in sec. 342 (4) that no oath can be administered to an accused has reference only to the statement made by him during his examination under that section; it does not preclude him from making an affidavit in support of his application under sec. 526. See also *Sadasheo*, supra.

See sec. 537 and the notes thereunder.

Counter-affidavit by District Magistrate:—When an application for transfer is made on the ground of partiality of the Magistrate before whom the case is pending, it is highly improper for the District Magistrate to make an affidavit swearing as to the impartiality of that Magistrate—*Pandurang*, 25 Bom. 179.

Explanation of the Magistrate:—The High Court has power to call for a report from the Magistrate regarding the allegations made in the affidavit in support of an application for transfer although there is no provision for it in the Cr. P. Code. Such report is not made in a judicial capacity. It is in essence a report of an administrative character and can be contradicted by the affidavit of the parties. It can even be disbelieved for sufficient reasons—*Ananthachariar v. Emp.*, 1937 M.W.N. 328.

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time before the arguments begin, that is to say, at any time before the defence closes its case"—*Report of the Select Committee* (Gazette of India, 1932, Part V, p. 199). But Mohammad Noor, J., observed: "The learned Magistrate has invited this Court to express its opinion whether an application for adjournment under sec. 526 is entertainable after the defence witnesses have been examined but before the close of the argument. I do not think I am called upon to decide this point in this case as it does not arise; any expression of my opinion will be purely *obiter dictum*. It may, however, be said with some justification that if the defence argument has not concluded, the defence case has not been closed. I am not prepared to say that there cannot be a case in which the accused cannot justly say that the Court became prejudiced during the hearing of the argument"—*Ishar Singh v. Shama Dusadh*, 38 Cr.L.J. 484 (487), 167 I.C. 881, 17 P.L.T. 627, A.I.R. 1937 Pat. 131, 3 B.R. 379, 9 R.P. 449.

Secondly, the applicant is now required to execute a bond. This provision is added as a check upon applications not made *bona fide*. "We recognize that the power at present enjoyed of paralysing the action of the Court by repeatedly notifying an intention to make an application, sometimes without any intention of following up the notification with an application, must be checked"—*Report of the Select Committee*. In the case of *Neamat Shah*, 59 Cal. 481, 35 C.W.N. 1112, 1931 Cr.C. 810, Lord Williams, J. criticised the old sub-section (8) with the following remarks: "The position created by sec. 526 (8) is truly amazing one effect being that no accused person can be convicted except with his own consent. No discretion is given to the Court by the section. If the accused notifies his intention to make an application to the High Court for transfer, the trial must be adjourned immediately. There is no limit to the number of such notifications which may be given during the course of any trial."

Thirdly, the proviso to sub-section (8) has been added as an additional safeguard against several applications by several accused. Lord Williams, J. observed in the Calcutta case cited above: The abuse of process which sub-section (8) makes possible may be aggravated to any extent, when there is a joint trial, and each accused person is represented by a different pleader." The *Select Committee* has accordingly added the proviso with the following remarks: "We have accordingly provided that when once a party has secured an adjournment, the Court shall not be bound to adjourn on any subsequent intimation of an intention to apply for a transfer made by that same party, and that where there are more than one accused, it shall not be possible for different accused by a series of successive intimations to secure a series of adjournments." This was also decided in *Peshori Lal*, 1931 Cr.C. 530 (531), 32 Cr.L.J. 1229, 1931 Cr.C. 530, A.I.R. 1931 Lah. 274, Ind Rul 1931 Lah. 978. The words "or the accused" apply to the accused as a whole, and, although any further incident might give rise to a fresh application, it would equally give rise to a fresh application on the part of the same applicant provided always that there is something to justify or form the foundation of the application—*Peshori Lal*, supra.

Explanation to sub-section(9):—"We note that the inherent powers of the Court to adjourn a case is not affected, but we have inserted an Explanation after sub-sec. (9) of sec. 526 to make this absolutely clear"—*Report of the Select Committee*.

Scope:—The words "inquiry or trial" in this sub-section do not apply to a transfer application pending before the Magistrate, but are only intended to apply to inquiries to trials which are specially referred to in the earlier portion of the Code—*Muhammad Sharif v. Hari Prasad*, 5 Pat. 229, 27 Cr.L.J. 1214.

It is not correct to say that an inquiry or trial does not commence before the Magistrate begins to record evidence; nor is it correct to say that the inquiry commences with the lodging of the complaint or the issue of the processes. It really commences with the appearance of the accused on such processes to answer the charges. If, therefore, the accused appeared before the Magistrate and applied for adjournment before he proceeded to record evidence, the application was not premature and the Magistrate was bound to adjourn the case—*Pandurang Pundalik*, 33 Bom.L.R. 668, 32 Cr.L.J. 1161 (1162), Ind. Rul. 1931 Bom. 473, 134 I.C. 361, 1931 Cr.C. 726, A.I.R. 1931 Bom. 411.

This clause applies only to inquiries under Ch. 8 or 18, but not to proceedings under sec. 145. Probably the Legislature thought that proceedings which are quasi-civil in nature, such as inquiries into the possession of land, do not require the exercise of the very summary powers which clause (8) confers—*Loka Mahton v. Kali Singh*, 6 Pat. 553, 28 Cr.L.J. 1035; *Jamir Sheikh v. Murari*, 57 Cal. 869, 34 C.W.N. 59 (60), 50 C.L.J. 331, 1929 Cr.C. 522.

This sub-section applies only where the complainant or the accused notifies to the Court before which the case is pending his intention to make an application for transfer to the High Court under sec. 526 and the onus lies on the applicants in revision to show that the information required by this sub-section was given to the Magistrate—*Ram Kunuar*, 32 Cr.L.J. 363, 129 I.C. 259, 1930 A.L.J. 1320, A.I.R. 1930 All. 835, Ind. Rul. 1931 All. 131, 1930 Cr.C. 1232.

Adjournment compulsory:—Under the present amendment, as well as under the amendment of 1923, an adjournment is compulsory, except that a Sessions Court may refuse to adjourn (sub-section 9) when it is of opinion that the application has been unreasonably delayed.

The Magistrate is bound to adjourn the case, and while granting the adjournment he has no power to impose any condition—*Dayawanti v. Bitanand*, 30 P.L.R. 657, 30 Cr.L.J. 1048. After an application is made under this clause, the Magistrate is bound to adjourn the case at once, and cannot proceed with the case and record any evidence at all—*Sartaj Singh*, 22 A.L.J. 430, 26 Cr.L.J. 139 (140); *Chiranj Lal*, 9 Lah. 537, 29 Cr.L.J. 815. If the Magistrate refuses to grant the adjournment and proceeds with the case, all the subsequent proceedings are vitiated, and the trial becomes illegal and not merely irregular—*Ghulam Rasul*, 29 Cr.L.J. 536, 109 I.C. 360, A.I.R. 1928 Lah. 850; *In re Nathan*, 53 Mad. 165, 57 M.L.J. 763, 31 Cr.L.J. 715, 124 I.C. 501, A.I.R. 1930 Mad. 187, 1930 Cr.C. 187, 30 M.L.W. 883, Ind. Rul. 1930 Mad. 693; *Luttur*, 1930 A.L.J. 547, 108 I.C. 569, A.I.R. 1928 All. 268, 31 Cr.L.J. 590 (591), 1930 Cr.C. 375; *Pandurang*, 33 Bom.L.R. 668, 32 Cr.L.J. 1161 (1162), Ind. Rul. 1931 Bom. 473, 134 I.C. 361, 1931 Cr.C. 726, A.I.R. 1931 Bom. 411; *Yakoob Kassim*, 36 Cr.L.J. 885, 156 I.C. 223, A.I.R. 1935 Sind. 27, 1935 Cr.C. 121. The Calcutta High Court seems to have taken a contrary view in *Ncamat*, 35 C.W.N. 1112 (1121), 134 I.C. 1057, 1931 Cr.C. 810, A.I.R. 1931 Cal. 626, Ind. Rul. 1932 Cal. 17, 55 C.L.J. 34, 59 Cal. 478, 33 Cr.L.J. 31, where it has been laid down that the refusal of the Magistrate to adjourn is an irregularity which can be cured by applying the provisions of sec. 537, Cr. P. C., and that the High Court is not bound to set aside the proceedings as invalid where the notification was given *mala fide* for the purpose of delay and to defeat the ends of justice, the accused had no intention of applying to the High Court and no grounds existed upon which an order for transfer could have been made. See also *Ram Piara Lal*, 32 Cr.L.J. 146 (147), 128 I.C. 543, A.I.R. 1930 Lah. 882, 1931 Cr.C. 978, Ind. Rul. 1931 Lah. 79.

But it is not correct to say that as an effect of the application the Magistrate ceases to have jurisdiction in the case. In spite of the application he can pass *emergent* order which the law requires him to pass, e.g., an order under sub-sec. (3) of sec. 117—*Haji Baquid*, 26 A.L.J. 398, 29 Cr.L.J. 448 (449), 108 I.C. 569, A.I.R. 1928 All. 268. Excepting such emergent orders, the Court cannot pass any other order, e.g., an order directing the accused to appear on the next day and forfeiting the recognizance bond on default of appearance—*Pandurang Pundalik*, supra. This does not mean that the trial Magistrate loses seisin of the case by reason of his having granted adjournment or is rendered incapable of even disposing of miscellaneous applications for grant of copies, inspection of records, etc.—*Hari Chand*, 32 Cr.L.J. 253 (255), 129 I.C. 193, A.I.R. 1931 Lah. 59, Ind. Rul. 1931 Lah. 129, 1931 Cr.C. 139.

An application for adjournment cannot, however, be granted if no ground is stated therein and the application is made at a very late stage, e.g., after the evidence on behalf of the opposite party has been closed—*Jamir Sheikh v. Murari*, 57 Cal. 869, C.W.N. 59 (61), 1929 Cr.C. 522; or if it is made after the arguments have

and when nothing remains to be 'done' by the Court except to deliver judgment—*Chockalingam*, 52 Mad. 355, 30 Cr.L.J. 908; *Murugappa*, A.I.R. 1936 Mad. 163, 1935 M.W.N. 1281, 160 I.C. 104, 43 M.L.W. 257, 37 Cr.L.J. 223. But the question whether there is or is not good ground upon which the High Court might order a transfer is not a question for the Judge himself—*Yakoob Kassim*, supra. The present amendment expressly provides that the application must be made before the defence closes its case.

When an application is made under this clause, it is not for the Magistrate to decide whether the applicant has an apprehension that he will not receive a fair trial at his hands. That is the function of the High Court. The Magistrate is bound to adjourn the case, unless in his judgment he is *bona fide* satisfied that the application is a mere pretext to obtain an adjournment, and that the applicant has no intention of making an application for transfer, in which case the application must be refused—*Jatoi*, 20 S.L.R. 122, 27 Cr.L.J. 935 (1937); *Nathoomal*, 20 S.L.R. 54, 27 Cr.L.J. 40 (42, 43). Once the petitioner had informed the trial Magistrate that she intended to apply for transfer, he should have stayed all further proceedings immediately. It was not for him to consider whether the application for transfer was frivolous or not—*Mt. Lalan*, A.I.R. 1937 Pesh. 20. The present amendment provides an additional safeguard by requiring the applicant to execute a bond.

A refusal to adjourn the case without just cause is by itself a sufficient ground for transfer of the case—*Waliid Khan*, 26 A.L.J. 1321, 29 Cr.L.J. 671; *Jatoi*, supra; *Shewa Uka*, 3 S.L.R. 155, 10 Cr.L.J. 570; *Olandas*, 8 S.L.R. 341, 16 Cr.L.J. 476; *Nenumal v. Fida Ali*, 34 Cr.L.J. 1144, 146 I.C. 20, A.I.R. 1933 Sind 307, 1933 Cr.C. 1041; *Baliram v. Marubai*, 37 Cr.L.J. 1054, A.I.R. 1936 Nag. 233, 164 I.C. 165, where it has also been laid down that sec. 526 (8), Cr. P. C., is mandatory; *Narayan v. Bala*, 37 Cr.L.J. 1146, 165 I.C. 425, A.I.R. 1936 Nag. 146, 1936 Cr.C. 693; *Janki Prasad v. Mst. Sukh Rani*, 1938 N.L.J. 36. The fact that the application is defective or not in proper form is no ground for declining to adjourn the case—*Janki Prasad v. Mst. Sukh Rani*, supra.

The postponement should be for a reasonable time to allow the party to move the High Court for transfer. A postponement for too short a time is useless—*Virasami*, 19 Mad 375. An adjournment for one day is quite inadequate—*Pandurang Pundalik*, 23 Bom.L.R. 668, 32 Cr.L.J. 1161 (1162). An adjournment for six days is not a reasonable time within which to move the High Court—*Syed Ahmad*, 2 Weir 686.

Adjournment costs:—See Note 990 and Note 1388 under the heading "Explanation".

Where the hasty action of the Magistrate in not giving a short adjournment in accordance with the provisions of this clause resulted in the transfer of the case, the High Court directed that the costs of the complainant in the future would be borne by the Crown—*Baliram v. Marubai*, supra.

Any party interested:—See Note 1385. It is true that sub-sec. (8) before amendment referred to "the Public Prosecutor, the complainant or the accused" as persons competent to move a Court to stay proceedings under sec. 526 (8), Cr. P. C., but that section has been amended and for the words "the Public Prosecutor, the complainant or the accused" the words "any party interested" have been substituted, and this amendment was made not in order to bring sub-sec. (8) in harmony with sub-sec. (3) in which these words already occurred but to cover cases under Chap. VIII where the informant wishes to move the Court. Therefore, the word "party" within the meaning of sec. 526 (8), Cr. P. C., does include an informant under sec. 107. Cr. P. C.—*Om Radhe v. Emp.*, 40 Cr.L.J. 803 (804), 183 I.C. 460, 12 R.S. 55, A.I.R. 1939 Sind 238, I.L.R. 1940 Kar. 113.

If a doubt exists whether the applicant is or is not a party within the meaning of sub-sec. (8) of sec. 526, the Magistrate should err on the safe side and grant the adjournment, for otherwise, he may find all the proceedings from the date of his refusal declared illegal—*Om Radhe v. Emp.*, supra, following *Surat*, 29 Cal. 211, 6 C.W.N. 251.

Before the defence closes its case:—See Notes above under the heading "Change in the law."

Section 526 (8), Cr. P. C., clearly lays down that the intimation of an intention to make an application under this section must be made before the defence closes its case. Where an application intimating such an intention is made not only after the defence has closed its case but after the judgment has been written and signed, it is not maintainable—*Gian Singh-Munsha Singh v. Amar Singh-Jaimal Singh*, 40 Cr L J. 288, 179 I.C. 990, A.I.R. 1939 Lah. 21, 40 P.L.R. 996, I.L.R. 1938 Lah. 567.

1388. Magistrate proceeding with the case after issue of rule for transfer:—When an application was made under sub-sec. (8), and the Magistrate without passing any orders thereon proceeded with the case, and even though a telegram to the effect that a rule *nisi* by the High Court staying proceedings had been issued was shown to the Magistrate, he examined some more witnesses for the prosecution and committed the accused, it was held that the action on the part of the Magistrate was enough to show a bias, and consequently a transfer was necessary—*Wahed Molla v. Basaraddi*, 11 C.W.N. 507; *Surya Naram*, 5 C.W.N. 110 (113); *Ratnessari*, 2 C.W.N. 498 (500); *Hem Chandra v. Mathur*, 16 C.W.N. 1031, 13 Cr.L.J. 766. Magistrates should act with every loyalty towards the orders of the High Court, and if they are told that an order has been made by the High Court staying further proceedings they ought then and there to hold their hands, unless they have good grounds for believing that the information given to them is false. If the Magistrate entertained any doubt about the truth of the telegram, he could have satisfied himself by a telegram to the Registrar of the High Court—*Ratneswari*, 2 C.W.N. 498 (501). Where, upon the High Court having issued a rule staying further proceedings, the petitioner sent a telegram which was laid before the trying Magistrate, but the petitioner having failed to appear on the date previously fixed, the Magistrate issued a warrant upon the petitioner, it was held that the sending of the telegram did not in any way absolve the petitioner from the obligation to appear before the Court on the date fixed, and the issue of the warrant upon the petitioner was no ground for transfer of the case—*Chandi Prasad*, 17 C.W.N. 536 (537), 14 Cr L J 823. But where further proceedings having been stayed by the High Court's order, one of the complainants appeared before the Magistrate on the date fixed for hearing and appraised him of that order, but the Magistrate instead of staying further proceedings issued a warrant for the arrest of the complainant who had not appeared, held that the Magistrate's action was unjust and hostile to the complainants and the case must be transferred—*Fazal Ahmad v. Abdulla*, 7 Lah.L.J. 571, 26 P.L.R. 701, 27 Cr.L.J. 104.

Where the High Court granted a transfer on the 26th, and on the 27th a telegram to that effect was shown to the Magistrate, and the Magistrate adjourned proceedings till the 30th so that the order of the High Court might reach him; and on the 30th the Magistrate proceeded with the case and convicted the accused, and on the 31st the order of the High Court reached the Magistrate, it was held that the Magistrate's action though not illegal was indiscreet, in as much as he did not wait sufficiently for the order of the High Court to reach him—*Vinayak*, Ratanlal 46.

Stay of proceedings:—When the High Court admits an application for transfer, invariably there is an order of stay of proceedings. Even if the order is not expressly made it is implied, because it will be meaningless to issue a Rule and send for the record and then allow the proceedings in the lower Court to continue—*Ishar Singh v. Shama Dasadh*, 38 Cr.L.J. 484 (487), 167 I.C. 881, 17 P.L.T. 627, A.I.R. 1937 Pat. 131, 3 B.R. 379, 9 R.P. 449.

With regard to stay applications in criminal matters, the stay order operates only from the date on which the order is communicated to the Court whose proceedings are stayed. But the order of prohibition does not take away the jurisdiction of the trial Court, it merely suspends it. If, therefore, the order has not been received the Court does not lose its jurisdiction because the order has been passed. It, therefore, follows that any act done after the order of stay is passed is still valid unless the order of the higher Court has been disobeyed. This reasoning would not, however, apply to an application for transfer. The ordinary rule is that any order operates from the date

on which it is passed, the rule with regard to stay proceedings and injunctions being exceptions to that general rule. The order of transfer must, however, operate from the date on which the order is passed and, therefore, any Court which continues to do any act after the order is passed even though a copy of the order has not been received by it, is acting without jurisdiction. Nevertheless it does not follow from the mere fact that the Court had no jurisdiction, that its order is void. Sec. 531, Cr. P. C., would apply to a case of this kind and so prevent the passing of this order without jurisdiction from being void. The whole principle underlying the various provisions of Chap. XLV is that no order or sentence shall be void on the mere ground of some irregularity or want of jurisdiction, unless it leads to a miscarriage of justice or prejudices the accused. Therefore the trial and conviction of an accused cannot, in the absence of a miscarriage of justice, be set aside on the ground that the trial was held after the case was ordered to be transferred from the Court which tried it—*Borai Goundar v. Comr., Ootacamund Municipality*, 39 Cr.L.J. 987, 178 I.C. 40, 1 L.R. 1938 Mad. 1003, 1938 M.W.N. 830, 48 M.L.W. 287, A.I.R. 1938 Mad. 832, (1938) 2 M.L.J. 394, 1938 M.Cr.C. 239 referring to *Venkatachalapathi v. Kameswanna*, 41 Mad. 151, 43 I.C. 214, 22 M.L.T. 330, 33 M.L.J. 515, 6 M.L.W. 617, 1917 M.W.N. 785 (F.B.) and *Adenama v. Venkatasubbayya*, 56 Mad. 692, 144 I.C. 923, 1933 M.W.N. 789, 65 M.L.J. 137, 38 M.L.W. 133, 6 R.M. 26, A.I.R. 1933 Mad. 627.

Forfeiture of the bond:—The applicant wanted to apply to the High Court for the transfer of a case from the Court of a Magistrate to another Court and the Magistrate granted an adjournment on getting a surety bond from him. Instead of applying to the High Court for transfer the applicant made an application to the Sub-divisional Magistrate who dismissed it. Thereafter he compromised the case resulting in the acquittal of the accused. The Magistrate then forfeited his bond for not moving the High Court. *Held* that there was no doubt that there was a technical non-compliance by the applicant with the terms of his bond, but that was not enough, that if he had gone to the High Court at once he might have been told to go to the Sub-divisional Magistrate, that the parties having compromised, there was no occasion for the applicant to go to the High Court and that, in these circumstances, the order of forfeiture of the bond should be set aside—*Muhammad Ramzan*, 37 Cr.L.J. 792, 162 I.C. 985, A.I.R. 1936 Sind 51, 1936 Cr.C. 489.

There is sufficient compliance with the bond if an application for transfer is made before the date mentioned in it. The fact that the application is returned because of a certain defect has not the effect of involving, as it were, a breach of the bond. There is no justification at all for directing forfeiture of the bond when the application is re-filed within time after remedying the defect—*Narasimha Rao v. Emp.*, 1937 M.W.N. 576.

There is no doubt that the intention of the recently added provisions regarding the furnishing of security bonds is to prevent persons from obtaining adjournments in cases on the pretext of filing transfer applications where there is no real intention of making such applications, and it is equally clear that this intention is frustrated if an adjournment is obtained by a person who actually files an application in the High Court but fails to prosecute it. At the same time it cannot be denied that a person does carry out the letter of the terms of his bonds by filing an application in the High Court. If the intention of the law was that bonds should be furnished with the undertaking that not only applications should be filed but also that final orders should be obtained thereon, this should be more clearly expressed in the section itself and should also be clearly set out in the terms of the bonds themselves. Where, therefore, a person actually files an application for transfer in the High Court but does not prosecute it, his bond under this sub-section cannot be forfeited—*Tara Singh v. Emp.*, 39 Cr.L.J. 609, 175 I.C. 545, 10 R.L. 745, A.I.R. 1938 Lah. 337.

The applicant was granted an adjournment on condition that he applied within a reasonable time to the High Court. He, through mistake but in good faith, first moved the local Court and there was some delay in moving the High Court. *Held* that he

should, if his mistake was made for the first time, be pardoned for the delay and his bond should not be forfeited—*Gajadhar Bhagchand v. Emp.*, 39 Cr.L.J. 425, 174 I.C. 521, 10 R.S. 258, A.I.R. 1938 Sind 66.

Sub-section (9):—Under this sub-section the Sessions Court may refuse to adjourn when it is of opinion that the application has been unreasonably delayed. The reason is that "the calendars of Sessions Courts involving the convenience of jurors, assessors, and parties are peculiarly liable to be upset by the postponement of cases"—*Statements of Objects and Reasons* (1914).

In Sessions trials the provisions of sub-sec. (8) of this section are no doubt subject to the provisions of this sub-section, but unless the case falls strictly within the provisions of this sub-section the Judge is bound to grant time in accordance with the provisions of sub-sec. (8). In considering the question whether or not the applicant had ample opportunity before to file an application for transfer, regard must be had to the fact whether or not the ground on which the application for transfer is proposed to be based did exist earlier. Where an order adverse to the applicant is passed on the very date on which an adjournment is asked for with a view to move an application for transfer of the case on the ground of passing the said order, it is impossible to hold that the applicant had "reasonable opportunity" of applying for transfer of the case on an earlier date and the order of the Judge rejecting the application of the applicant for the postponement of the case cannot therefore be supported—*Salag Ram v. Emp.*, 38 Cr.L.J. 416 (419), 167 I.C. 515, A.I.R. 1937 All. 171, 1937 A.L.R. 201, 9 R.A. 550.

Explanation:—See Note 990. Under sec. 344, Cr. P. C., a Magistrate may adjourn a case on such terms as he thinks fit but where the adjournment is one which is covered by the provisions of sec. 526, sub-sec. (8), Cr. P. C., the Court has to grant it. It is true that the explanation to sub-sec. (9) says that nothing contained in sub-sec. (8) or sub-sec. (9) restricts the powers of a Court under sec. 344, Cr. P. C., but at the same time it is difficult to see how a Court can impose terms for granting an adjournment when it is bound to grant that adjournment whether the terms are accepted or not. Costs should not be imposed in a case of this kind—*Salek Chand v. Emp.*, 38 Cr.L.J. 142, 166 I.C. 198, A.I.R. 1936 All. 851, 1936 A.L.J. 1123, 1936 A.L.R. 1015, 1936 Cr.C. 1110, 1 L.R. 1937 All. 161, 9 R.A. 369, following *Sorabji M. Shroff v. Erachshaw B. Katrak*, 56 Bom. 536, A.I.R. 1932 Bom. 470, 1932 Cr.C. 598, 139 I.C. 577, 33 Cr.L.J. 802, 34 Bom.L.R. 1106, Ind. Rul. 1932 Bom. 509. What has been laid down in *Salek Chand v. Emp.*, supra, is that a conditional order for an adjournment under sec. 526 is not justifiable as a Magistrate is bound to adjourn under sub-sec. (8) of that section. A Court cannot, of course, pass a conditional order of adjournment because it has to pass such an order, but it may, when passing its order of adjournment, direct that the party whose application has necessitated adjournment shall pay costs of the opposite party—*Ram Rakshpal v. Ram Nath*, 39 Cr.L.J. 352, 173 I.C. 385, A.I.R. 1938 All. 112, 1937 A.L.J. 1356, 1937 A.W.R. (H.C.) 1226, 1 L.R. 1938 All. 233, 1938 A Cr.C. 4, 1938 A.L.R. 133, 10 R.A. 481.

The Magistrate has no power to order the payment of subsistence allowances for the witnesses by the accused when he makes an application for an adjournment to move the High Court for transfer—*Lay Tin Ngar v. Emp.*, 38 Cr.L.J. 963, 170 I.C. 841, 10 R.R. 105, A.I.R. 1937 Rang. 311.

Sub-section (10):—This sub-section relates to an application for adjournment of an appeal, which was originally provided for in sub-sec. (8), but the application must be made before the argument for the admission of an appeal begins, instead of before the commencement of the hearing. The applicant will have to execute a bond, as in an inquiry or trial.

526A. (1) *Where any person subject to the Naval Discipline Act [other than a person to whom that Act applies by virtue of the Indian Navy (Discipline) Act, 1934] or to the*

High Court to transfer for trial to itself in certain cases.

Army Act or to the Air Force Act is accused of any offence such as is referred to in proviso (a) to section 41 of the Army Act, the Advocate General shall, if so instructed by the competent authority, apply to the High Court for the committal or transfer of the case to that High Court, and thereupon the High Court shall order that the case be committed for trial to or be transferred to itself and shall thereafter proceed to try the case by jury.

(2) *The Central Government may, by notification in the Official Gazette, declare any officer to be competent authority for the purpose of issuing instructions under sub-section (1) in regard to any class of cases specified in the notification.*

This section has been inserted by sec. 32 of the Criminal Law Amendment Act, XII of 1923.

The words "(other than a person...Navy Discipline Act, 1934)" have been added by the Amending Act, 1934 (Act XXXV of 1934).

In sub-section (2) the words "Central Government" and "Official Gazette" have been substituted for "Governor-General in Council" and "Gazette of India" respectively by sec. 4 of the Government of India Adaptation of Indian Laws) Order, 1937.

527. (1) *The Provincial Government may, by notification in the official Gazette, direct the transfer of any particular * * case or appeal from the High Court to another High Court, or from any Criminal Court subordinate to one High Court, to any other Criminal Court of equal or superior jurisdiction subordinate to another High Court, whenever it appears to it that such transfer will promote the ends of justice, or tend to the general convenience of parties or witnesses :*

Provided that no case or appeal shall be transferred to a High Court or other Court in another Province without the consent of the Provincial Government of that Province.

(2) *The Court to which such case or appeal is transferred shall deal with the same as if it had been originally instituted in, or presented to, such Court.*

The word "criminal" has been omitted from this section by sec. 146 of the Cr. P. C. Amendment Act, XVIII of 1923.

The words "Provincial Government" and "official Gazette" have been substituted in place of "Governor-General in Council" and "Gazette of India" respectively, and the proviso to sub-section (1) has been inserted, by the Government of India (Adaptation of Indian Laws) Order, 1937.

Sections 185 and 527:—See Notes under section 185.

528. (1) *Any Sessions Judge may withdraw any case from, or recall any case which he had made over to, any Assistant Sessions Judge subordinate to him.*

(2) *Any Chief Presidency Magistrate, District Magistrate or Sub-divisional Magistrate may withdraw any case from, or recall any case which he has made over to, any Magistrate subordi-*

nate to him, and may inquire into or try such case himself, or refer it for inquiry or trial to any other such Magistrate competent to inquire into or try the same.

(3) The Provincial Government may authorize the District Magistrate to withdraw from any Magistrate subordinate to him either such classes of cases as he thinks proper, or particular classes of cases.

Power to authorize District Magistrate to withdraw classes of cases.

(4) Any Magistrate may recall any case made over by him under section 192, sub-section (2) to any other Magistrate and may inquire into or try such case himself.

(5) A Magistrate making an order under this section shall record in writing his reasons for making the same.

(6) The head of a Village under the Madras Village-Police Regulation, 1816, or the Madras Village-Police Regulation, 1821, is a Magistrate for the purposes of this section.

Change:—Sub-section (1) and (4) have been added, and sub-section (6) has been slightly amended, by sec. 147 of the Cr. P. C. Amendment Act, XVIII of 1923.

The words "Provincial Government" have been substituted for "Local Government" by section 4 of the Government of India (Adaptation of Indian Laws) Order, 1937.

Sub-section (1):—"In order to facilitate arrangements for the disposal of sessions business, it is proposed to empower Sessions Judges to withdraw or recall cases from the file of Assistant Sessions Judges. This question does not arise in the case of appeals as they are heard by Sessions or Additional Sessions Judges"—*Statement of Objects and Reasons* (1921).

This sub-section empowers a Sessions Judge to withdraw or recall any case from an Assistant Sessions Judge, but not from an Additional Sessions Judge. There is a distinction made between the position of an Additional Sessions Judge and that of an Assistant Sessions Judge. Section 17 (3) enacts that Assistant Sessions Judge shall be subordinate to the Sessions Judge but does not enact that the Additional Sessions Judge shall be subordinate to him—*Daulat Ram*, 1931 A.L.J. 591, 33 Cr.L.J. 158 (160), 1931 Cr.C. 707 (708, 709), 135 I.C. 252, A.I.R. 1931 All. 435, Ind. Ryl. 1932 All. 76.

There is nothing in this Code which gives jurisdiction to the Sessions Judge to transfer an appeal from the file of an Additional Sessions Judge to his own file. much less an Additional Sessions Judge has jurisdiction to transfer an appeal from the file of another Additional Sessions Judge to the file of the Sessions Judge. Even sec. 17 (4) does not give power to the Additional Sessions Judge to make the transfer, because the power under that section can be exercised only in urgent cases and only when there is an application, oral or written, preferred by some party—*Daulat Ram*, *supra*.

The powers of a Sessions Judge to make a transfer are expressly set out in this clause, and there is no further "inherent" power of a Sessions Judge, *viz.*, power to transfer a case or appeal from an Additional Sessions Judge's Court to his own Court—*Daulat Ram*, *supra*.

1389. Sub-sec. (2)—Dist. Magistrate and Sub-divisional Magistrate:—Under this section, the District Magistrate and the Sub-divisional Magistrate within his sub-division have co-ordinate jurisdiction. The District Magistrate cannot set aside a

section. If the District Magistrate is of opinion that the order of the Sub-divisional Magistrate is not legal or proper, he can take action under sec. 435 or 438. He can interfere with the transfer made by the Sub-divisional Magistrate only on the ground of *expediency*; i.e., he can withdraw the case from the Magistrate to whom it was transferred by the S. D. Magistrate, on the ground that it is inexpedient that that Magistrate should try the case; and the District Magistrate may then try the case himself or refer it to some other Magistrate—*Raghunatha Pandaram*, 26 Mad. 130, 2 Weir 689; *Kishori Lal*, 30 Cr.L.J. 654, 116 I.C. 751, A.I.R. 1928 All. 546. See also *Ilaf Hossain*, 17 I.C. 414, 13 Cr.L.J. 782. Magistrates of co-ordinate jurisdiction should not interfere with each other's jurisdiction. Where a District Magistrate acts on his own initiative in transferring a criminal case, his order is not vitiated by the fact that another Magistrate of co-ordinate authority (e.g., the Sub-divisional Magistrate) has refused to make the transfer. But, if the District Magistrate examines the reasons given by the S. D. Magistrates and finds them to be wrong, that amounts to interfering by way of appeal, and the order of transfer passed by him is not sustainable in law—*Narayanasamy v. Kuppusamy*, 5 L.W. 372, 18 Cr.L.J. 57 (58). But in *Thaman v. Alagiri*, 14 Mad. 399, it has been held that a Magistrate subordinate to the Sub-divisional Magistrate is also subordinate to the District Magistrate within the meaning of this section, and the District Magistrate can set aside an order of transfer made by the Sub-divisional Magistrate, if he is of opinion that there were no sufficient grounds for the transfer, and can retransfer the case to the file of the original Magistrate from whom it was transferred by the S. D. Magistrate. The better view seems to be that the District Magistrate and the Sub-divisional Magistrate have equal authority in withdrawing cases from Subordinate Magistrates and the District Magistrate should not exercise powers of an Appellate Court as regards orders passed by the Sub-divisional Magistrate. If he considers the Court to which the case is transferred by the Sub-divisional Magistrate not the proper Court for the trial of the case, for reasons to be stated by him, he should transfer the case to any Court which he thinks proper after notice to the parties concerned. While it is true that the District Magistrate has not appellate jurisdiction under this section, he has a concurrent jurisdiction and that jurisdiction is not barred merely because it has been exercised by the Sub-divisional Magistrate in the first instance—*Sugnomal v. Photandas*, A.I.R. 1936 Sind 237 (238), 38 Cr.L.J. 133, 166 I.C. 83, following *Kishori Lal*, *supra*. See also *Ganpat*, 38 Cr.L.J. 15, 165 I.C. 830, A.I.R. 1936 Nag. 220, 1936 Cr.C. 937. Similarly, where a Sub-divisional Magistrate has refused to transfer certain criminal cases under sec. 528 at the instance of a party to the proceedings, it is nevertheless open to the District Magistrate at the request of the same party to transfer the cases, on any ground—*Sethuraman v. Govindasawmy*, 40 Mad. 791 (following *Thaman v. Alagiri*, 14 Mad. 399 and dissenting from 26 Mad 130).

But this section cannot be read as to imply that after a District Magistrate has transferred some cases from one file to the file to another Magistrate, a Sub-divisional Magistrate who is subordinate to the District Magistrate has jurisdiction to nullify that order by ordering a fresh transfer of the cases to his own file—*Muhammad Akbar*, 47 All. 288, 23 A.L.J. 133, 26 Cr.L.J. 538, A.I.R. 1925 All. 283, 85 I.C. 378.

A District Magistrate ought not to withdraw a case from the Court of a subordinate Magistrate to his own Court, merely out of a desire to inform his own mind as to the nature of the dispute which led to the criminal proceedings—*Amrit Majhi*, 46 Cal 854 (860), 23 C.W.N. 623.

An application made to the District Magistrate under sec. 144 (4), Cr. P. C., cannot be brought either under sec. 192 or 528, Cr. P. C., which deals with the subject of transfer of cases. So the order of the District Magistrate to whom the application was made transferring the application to a Sub-divisional Magistrate is bad—*Mooka Pandaram v. Snnu Mutheriyar*, 38 Cr.L.J. 125 (127), 166 I.C. 77, 1936 M.W.N. 1089, 44 M.L.W. 686, 71 M.L.J. 761.

Chief Presidency Magistrate:—The Chief Presidency Magistrate has under this section power to withdraw any case from one of the Presidency Magistrates and

refer it for inquiry or trial to any other Presidency Magistrate—*Nageswar*, 1 Bom.L.R. 557. The Chief Presidency Magistrate has power to transfer to his own file a case which had been transferred to the Fourth Presidency Magistrate for disposal by the Additional Chief Presidency Magistrate who took cognizance of the offence—*Mohini Melan v. Pandu Chaud*, 51 Cal. 820, 28 C.W.N. 903, 26 Cr.L.J. 101.

Application if necessary:—There is nothing in this sub-section which disables the Magistrate from taking action unless he is set in motion by the petition of one of the parties. Orders of transfer are frequently made for reasons of administrative convenience and it is not the intention of the Legislature to make an application from either of the parties a necessary preliminary—*Chakral v. Mt. Manjibai*, A.I.R. 1933 Sind 205, 34 Cr.L.J. 801 (S.C.), 144 I.C. 881, 1933 Cr.C. 718.

Who can make the application:—There is nothing in the provisions of the Criminal Procedure Code which would prevent any person from bringing facts to the notice of the District Magistrate which might suggest to that Magistrate that it was advisable to transfer a case from one Court to another. The mere fact that the District Magistrate received information on an application would not debar him from making an order for transfer if it appeared to be a proper order—*Kamru Bigam v. Empu*, 29 Cr.L.J. 878 (879), 177 I.C. 460, I.L.R. 1938 All 738, 1938 A.L.J. 703, 1938 A.W.R. (H.C.) 477, 1938 A.Cr.C. 66, 1938 A.L.R. 764, 11 R.A. 198, A.I.R. 1938 All 517.

1390. Transfer:—Cases which can be transferred:—This section is applicable to—(1) proceedings under Chap. VIII—*Dumendra*, 8 Cal. 851; (2) proceedings under Chap. XII *Satish v. Rajendra*, 22 Cal. 898; *Gurudas v. Ganendra*, 2 C.L.J. 614; *Raj Mohan v. Prasanna*, 5 C.W.N. 686 and (3) proceedings under section 488—*Gulam*, 1905 P.R. 5.

The term "case" includes a proceeding upon a complaint as soon as the complaint has been received by the Magistrate who takes cognizance of the offence complained of. A case can be transferred even before the Magistrate decides to issue process against the accused—*Asaram v. Bhagurath*, 11 I.C. 621, 12 Cr.L.J. 437, 7 N.L.R. 97.

Case when can be transferred:—(1) A case may be transferred as soon as the complaint is filed and the Magistrate takes cognizance of the case and before he issues process. A person who apprehends that a complaint made against him will not be impartially tried by the Magistrate is entitled to have the case transferred even before issue of any process against him—*Asaram v. Bhagurath*, supra. But when a complaint has been dismissed by a Magistrate under sec. 203 and the Sessions Judge has directed further inquiry into the case, the District Magistrate cannot transfer the case from the file of that Magistrate to any other Magistrate—*Brij Kishore v. Gopal*, 11 C.W.N. 316, 5 Cr.L.J. 112. (2) A case cannot be transferred at a very late stage of the trial, when the prosecution evidence has been taken and all that remains to be done is to pass an order of commitment or discharge—*Pakira*, 2 Weir 691; or judgment—*Fakira v. Goma*, 37 Cr.L.J. 861, 163 I.C. 694, 18 N.L.J. 279. When a Magistrate, after hearing arguments and adjourning the case for judgment, was suddenly transferred to a place in the same district and the Additional District Magistrate thereupon transferred the case to that place so that the judgment might be pronounced by the Magistrate who had actually heard the arguments, *held* that it seems to follow from the language of sec. 528 (2) that however convenient it may be, in practice, to do what the Additional District Magistrate did, there is no warrant for this procedure in the Cr. P. C., and it must be *held* that the transfer is not legal—*Murugappa*, A.I.R. 1936 Mad. 163, 1935 M.W.N. 1221, 43 M.L.W. 257, 160 I.C. 104. (3) A District Magistrate ought not to transfer a case pending before a subordinate Magistrate after the whole of the prosecution evidence has been taken and the Magistrate has expressed an opinion that the evidence for the prosecution is not sufficient to support the charge—*Nobo*, 14 W.R. 12; *Gobind Singh*, 2 Pat. 333, A.I.R. 1923 Pat. 228. (4) A case which has been disposed of by a competent authority cannot be withdrawn by the District Magistrate to his file *held* that

—*Shaik Siddik v. Shaik Chakauri*, 17 C.W.N. 451, 14 Cr.L.J. 123 (124). But where several persons were charged before the police with rioting and only one of them was sent up by the police for trial and convicted, whereupon the complainant asked the Magistrate to issue process against the other persons, but the Magistrate refused, and the District Magistrate thereupon withdrew the case to his own file, it was held that the District Magistrate had ample jurisdiction to do so; the refusal of the subordinate Magistrate to issue process against the other accused did not dispose of the case finally, but the case was still pending before the subordinate Magistrate—*Ayen Mahamad*, 5 C.W.N. 488. (5) Where records of a case have been sent to a Head Assistant Magistrate under sec. 349 for enhancement of punishment, the case can be validly transferred at that stage by the District Magistrate to a Joint Magistrate—*Chandra Sekaram*, 2 Weir 690.

To whom cases may be transferred:—The Dist. Magistrate, after withdrawing a case, can refer it to any subordinate Magistrate. An additional District Magistrate is now subordinate to the District Magistrate under the express provision of sec 10 (3) and the latter can transfer cases to the former. The contrary ruling in *Prakas Chunder*, 34 Cal. 918 is no longer good law. When a Magistrate is gazetted to the office of the Chairman of the Municipal Board and takes charge of that office, he is thereby divested of his office as Magistrate. He ceases to be subordinate to the District Magistrate and the latter cannot transfer any criminal case to him for trial—*Nathi Mal*, 36 All. 513. Moreover, the case must be transferred to a Magistrate competent to try the case. A District Magistrate cannot transfer a case under sec. 107 to a second class Magistrate—*Govind*, 37 All. 20; or to a Magistrate who has no local jurisdiction over the matter—*Konda Reddy*, 41 Mad. 246.

A District Magistrate, after he has transferred a case from a Sub-divisional Magistrate, can retransfer the case to the same Sub-divisional Magistrate; such retransfer does not amount to revision of his own original order of transfer, as an order of transfer is not a final order—*Ramalinga*, 51 Mad. 610, 29 Cr.L.J. 734, 55 M.L.J. 217.

Transfer must be unconditional:—When a District Magistrate passes an order of transfer, he cannot impose a condition, without the consent of the accused, that the accused must not ask a *de novo trial*, this right of the accused being recognized by sec. 350 (1)(a)—*Gowardhan v. Abbas Ali*, 1930 Cr.C. 176 (178), 121 I.C. 374, 31 Cr.L.J. 257, 13 A.I.Cr.R. 347, A.I.R. 1930 Lah. 168.

1391. Grounds of transfer:—The District Magistrate is bound to act generally on the principles underlying sec. 526, Cr. P. C.—*Fakira v. Goma*, 37 Cr.L.J. 861, 163 I.C. 694, 18 N.L.J. 279. The District Magistrate's powers under this section are very wide and undefined, and he should exercise the powers with due discretion and for really good reasons—1899 P.R. 13; *Ghulam Mohiuddin*, 20 Cr.L.J. 402; *Jagashkar*, 1929 Cr.C. 660, A.I.R. 1929 All. 932, 120 I.C. 261, 31 Cr.L.J. 30, 1930 A.L.J. 148. In this section there are no words which have the effect of fettering the discretion of the Chief Presidency Magistrate or other Magistrates in transferring cases from the files of Magistrates subordinate to them. At the same time it is beyond argument that before such an order is made the Magistrate must and should have reasons and those reasons should be such as the law regards as satisfactory from the point of view of principle—*Shanta Ram v. Kanai Lal*, 58 C.L.J. 214 (217), 35 Cr.L.J. 597, 148 I.C. 121, A.I.R. 1934 Cal. 137, 1934 Cr.C. 177.

When personal allegations are made against a Magistrate as grounds of transfer, the District Magistrate must require strict proof of the allegations—*In re Mohadhu*, Ratanlal 590. To move a case from one Magistrate to another on grounds personal to such Magistrate is tantamount to a severe censure on such officer, and the very clearest grounds must exist before a transfer can be allowed—*Shankar Abaji*, 6 B.H.C.R. 69; and moreover the Magistrate must be given an opportunity of answering the allegations made against him by the applicant—*Vedu Bapu v. Bhagwandas*, 5 Bom.L.R. 28.

Where a Magistrate in the course of an investigation held a prolonged inquiry during which he made a number of notes, and collected a large amount of information

which by reason of the way in which it was acquired he could not properly or legally consider in arriving at a judicial determination, and the notes made by the Magistrate were of such a nature that he ought to be examined as a witness in respect thereto, it was held that in such a case, the Magistrate ought not to try the case, but that it must be transferred to some other Magistrate—*Hari Kishore v. Abdul*, 21 Cal. 920. The fact that a Magistrate before whom a case is pending is also the Treasury Officer and has very little time at his disposal by virtue of his duties as a Treasury Officer is not a sufficient ground for directing a transfer of a case from his Court—*Ghulam Moh.uddin*, 20 Cr.L.J. 402, 51 I.C. 162. Where a Magistrate tried and convicted an accused in a case and expressed an opinion that the evidence of the accused was not believable, it was held that the expressed opinion in itself was no ground for a transfer of another case against the same accused by a different complainant under a different set of facts—*Hayat Khan*, 4 P.L.W. 21, 19 Cr.L.J. 121. The fact that the trial of a case before a Magistrate extended for a long time (e.g., 3 months) is not a vital ground for withdrawing the case from the file of the Magistrate—*Jewraj v. Dullabji*, 19 Cr.L.J. 119, 43 I.C. 407 (Pat.).

1392. Recording reasons:—See sub-section (5). The reasons for transfer of a case from one Magistrate to another must be recorded—*Mahadhu*, Ratanlal 590; *Sardara*, 5 Lah.L.J. 230; *Dwarka Das*, 32 Cr.L.J. 492, 130 I.C. 330, A.I.R. 1931 Lah. 29, Ind. Rul. 1931 Lah. 266, 32 P.L.R. 356, 1931 Cr.C. 92 (93); *Gowardhan v. Abbas*, 1930 Cr.C. 176, 121 I.C. 374, 31 Cr.L.J. 257, 13 A.I.Cr.R. 347, A.I.R. 1930 Lah. 168; *Venkatachalam v. Chairman*, 16 Cr.L.J. 626 (Mad.), 30 I.C. 450; *Mahomed Din v. Umra*, Ind. Rul. 1932 Lah. 649; *Ahmad Chibhir*, A.I.R. 1936 Sind 42, 37 Cr.L.J. 545, 161 I.C. 939, 1936 Cr.C. 289; and an omission to record reasons renders the order of transfer liable to be set aside—*Venkata Reddy*, 1924 M.W.N. 873, 26 Cr.L.J. 221. But the Calcutta, Patna, Lahore, Nagpur and Bombay High Courts are opinion that a failure to record the reasons will not vitiate the proceedings unless it has prejudiced the accused—*Prakas Chunder*, 34 Cal. 918; *Mahomed Sharif v. Hari Prasad*, 5 Pat. 229, 27 Cr.L.J. 1214; *Shripad*, 52 Bom. 151, 29 Cr.L.J. 317 (319); *Hari Ram v. Allah Bakhsh*, 34 Cr.L.J. 630, 143 I.C. 474, A.I.R. 1933 Lah. 385, 1933 Cr.C. 639, 34 P.L.R. 577, Ind. Rul. 1933 Lah. 358; *Hari Chand*, 34 Cr.L.J. 1174, 146 I.C. 166, A.I.R. 1933 Lah. 807, 1933 Cr.C. 1040; *Chotemiya v. Asrafmiya*, 37 Cr.L.J. 1006, 164 I.C. 692, A.I.R. 1936 Nag. 181, I.L.R. 1936 Nag. 87, 1936 Cr.C. 705. Where by virtue of a Government order the District Magistrate had been directed to withdraw all cases in which complaints had been made against a police officer, the omission to record reasons therefor was a mere irregularity and did not vitiate the subsequent proceedings—*Dukki Kewat*, 28 All. 421.

The method of giving reasons by reference to other papers is inconvenient and is not to be recommended. But where the Magistrate applied his mind to the questions requiring his consideration and the order which he made was made in the exercise of a discretion neither capricious nor arbitrary, there is no necessity of interfering upon this ground—*Uddomal v. Mt. Majnubai*, A.I.R. 1933 Sind 205, 34 Cr.L.J. 861 (823), 116 I.C. 881, 1933 Cr.C. 718.

1393. Notice:—Although the section does not provide for the giving of a notice to the opposite party, still on general principles notice should be given to the party affected, so as to give him an opportunity of showing cause against an order of transfer—*Ajodhya v. Paryag*, 7 C.W.N. 114; *Kamatchi Ammal*, 30 L.W. 401, 53 Cr.L.J. 243; *Sardara*, 24 Cr.L.J. 187, 5 Lah.L.J. 230, A.I.R. 1923 Lah. 380; *Dwarka Das*, 32 P.L.R. 356, Ind. Rul. 1931 Lah. 266, 130 I.C. 330, 32 Cr.L.J. 492, A.I.R. 1931 Lah. 29, 1931 Cr.C. 92 (93); *Umrao v. Fakir*, 3 All. 749; *Teacotta v. Ameri Miya*, 3 Cal. 225; *Shripad*, 52 Bom. 151, 29 Cr.L.J. 317 (319); *Nageshwar*, 1 Bom.L.J. 365; *Veda v. Bhagwandas*, 5 Bom.L.R. 28; *Sadashiv*, 22 Bom. 549; *Bakshi v. Tala*, 132 P.R. 5; *Gowardhan v. Abbas*, 1930 Cr.C. 176; 121 I.C. 374, 31 Cr.L.J. 257, A.I.Cr.R. 347, A.I.R. 1930 Lah. 168; *Ramalinga*, 51 Mad. 100, 122 I.C.

A.I.R. 1928 Mad. 560, 55 M.L.J. 217, 28 M.L.W. 303, 29 Cr.L.J. 734; *Mahomed Din v. Umra*, Ind. Rul. 1932 Lah. 649; *Udhomal v. Mt. Majnibai*, supra; *Jageshwar v. Emp.*, 1930 A.L.J. 148, 120 I.C. 261, A.I.R. 1929 All. 932, 1929 Cr.C. 660, 31 Cr.L.J. 30, Ind. Rul. 1930 All. 37. See also *Ahmad Chibhir*, A.I.R. 1936 Sind 42, 37 Cr.L.J. 545, 1936 Cr.C. 289, 161 I.C. 939; *Fakira v. Goma*, 37 Cr.L.J. 861, 163 I.C. 694, 18 N.L.J. 279. Where a transfer is made at a late stage of the trial (e.g., when all the witnesses have been examined), the Magistrate does not exercise a sound discretion in not giving notice to the complainant or to the accused—*Syed Lala Mian*, 6 M.L.T. 14, 9 Cr.L.J. 407; *Mahadhu*, Ratanlal 590. Where at the instance of the complainant a Sub-divisional Magistrate after hearing the parties has transferred a case from the file of one Sub-Magistrate to that of another, it is incumbent upon the District Magistrate when retransferring the case at the instance of the accused, to give notice to the complainant—*Manikkam*, 39 M.L.J. 714, 60 I.C. 55, 22 Cr.L.J. 199.

But in several other cases it has been held that the issue of a notice is not mandatory, and the want of notice is not an illegality but a mere impropriety. The question of propriety is one to be decided on the facts of each case—*Hawaji*, 21 Bom.L.R. 276, 50 I.C. 496, 20 Cr.L.J. 320; *Virji*, 6 Bom.L.R. 856; *Nur Mahomed v. Allahdino*, 5 S.L.R. 190, 13 Cr.L.J. 32; *Udhomal v. Mt. Majnibai*, A.I.R. 1933 Sind 205, 34 Cr.L.J. 861 (863), 144 I.C. 881, 1933 Cr.C. 718; *Hari Ram v. Allah Bakhsh*, 34 Cr.L.J. 630, 143 I.C. 474, A.I.R. 1933 Lah. 385, 1933 Cr.C. 639, 34 P.L.R. 577. The question is general in its terms, and although as a rule of practice it is desirable that notice should be issued, still it cannot be said that the omission to issue notice is in itself a reason for setting aside the order of transfer—*Gobinda*, 2 Pat. 333, A.I.R. 1923 Pat. 228; *Bagh Ali v. Muhammad Din*, 6 Lah. 541, 27 Cr.L.J. 411; *Chhotey Lal v. Tinki Lal*, 36 Cr.L.J. 918, A.I.R. 1935 All. 815, 156 I.C. 163; *Chotemiya v. Aerafoniya*, 37 Cr.L.J. 1006, 164 I.C. 692, A.I.R. 1936 Nag. 181, I.L.R. 1936 Nag. 87, 1936 Cr.C. 705. There is no authority for a general proposition of law that no District Magistrate can transfer a case without the issue of notice to the accused or complainant or both. It may well be that it is advisable for a District Magistrate ordinarily to do so, but there is certainly no law which requires him to do so—*Kamni Begam v. Emp.*, 39 Cr.L.J. 878, 177 I.C. 460, A.I.R. 1938 All. 517, 1938 A.L.J. 703, 1938 A.L.R. 764, I.L.R. 1938 All. 738, 11 R.A. 198, 1938 A.W.R. (H.C.) 477, 1938 A.Cr.C. 66. If the opposite party acquiesces in the transfer, he cannot complain on the ground of absence of notice—*Asaram v. Bhagirath*, 7 N.L.R. 97, 12 Cr.L.J. 437. Where absence of notice led to miscarriage of justice the order transferring the case should be set aside—*Kesho Datt v. Ram Kishen*, 35 Cr.L.J. 1439, 151 I.C. 839, 1934 Cr.C. 436, A.I.R. 1934 Lah. 194, 36 P.L.R. 274. When the District Magistrate transferred a case *suo motu* on administrative grounds, no notice was held to be necessary—*Abdullah*, 1910 P.R. 3, 11 Cr.L.J. 150 (151). When the order of transfer was made at the request of the trying Magistrate, no notice need be given to either party—*Kuppaumuthu*, 24 Mad. 317. Where there was great delay in disposing of a petty case, an order of transfer could be made without notice to the accused to shew cause against the order—*Masha Sabjee*, 2 Weir 692. When by virtue of a Government order the District Magistrate was directed to withdraw all cases in which complaints had been made against a police officer, no notice to the complainant was necessary before making a transfer—*In re Dukhi*, 28 All. 421.

1394. Power of District Magistrate after transfer:—The District Magistrate after he has transferred the case to a subordinate Magistrate has no jurisdiction relating to the case, so long as the transfer subsists. But he can again withdraw the case to his own file if he thinks fit—*Mrs. Belil's*, 12 W.R. 53. When a District Magistrate makes an order of transfer, the case is out of his hands, and the District Magistrate has no jurisdiction to make any order in the case when it is properly seised of by a subordinate Magistrate—*Ajab Lal*, 32 Cal. 783. He cannot dismiss the complaints, much less prosecute the complainant—*Shaik Kutab Ali*, 3 C.W.N. 490; nor can he issue process for the apprehension of the absconding accused—*Golapdy Sheikh*,

27 Cal 979. He can make no order in the case except such order as may be made by him by way of revision—*Radhabullabh v. Benode*, 30 Cal. 449.

Powers and duties of Magistrates to whom case is transferred:—When a case has been transferred after process has been issued to the accused, the Magistrate to whom the case has been transferred should proceed from the stage in which the proceedings were left. He cannot go back and dismiss the complaint under sec. 203—*Raghoo Parra*, 19 WR 28.

The Magistrate to whom a case is transferred can act upon the evidence already recorded by the Magistrate from whom the case is withdrawn. See Notes under sub-section (3) of section 350.

The Magistrate to whom a case is transferred cannot further transfer the case to some other Magistrate subordinate to him—*Bashir Husain v. Ali Hussain*, 36 All. 166; *Darra v. Mukat*, 12 ALJ 277, 15 Cr.L.J. 357.

1394A. Sub-section (6):—This sub-section supersedes *Madhavarayachar v. Subba Row*, 15 Mad. 94 (decided under the 1882 Code) in which it was held that the village Headman not being a Magistrate, no case from his file could be transferred to the file of another Magistrate.

Prior to its present amendment, this sub-section applied only to village Headman appointed under Madras Regulation IV of 1821; and therefore a District Magistrate was not competent to transfer a case from a village Headman appointed under any other Regulation (e.g., Reg. I of 1816)—*Sevakolandai v. Ammayan*, 26 Mad. 394. This case is now overruled as the present sub-section expressly mentions the Regulation of 1816.

1394B. Costs:—A Magistrate has no power to award costs in an application under this section—*District Magistrate, Kurnool v. Chandra Tirumal Reddy*, 40 Cr.L.J. 46, 178 IC. 126, AIR 1938 Mad 909, 48 MLW 381, (1938) 2 M.L.J. 531, 1938 M.W.N. 1105.

1394C. Copy:—An order under this section dismissing an application for transfer is a judicial order a copy of which ought to be given to a party on requisition—*Gurdas Ram v. Emp.*, AIR 1940 Lah 283, 42 PLR. 192, 41 Cr.L.J. 756, 189 IC 605.

1395. Revision:—The High Court will not interfere in revision with an order of the District Magistrate dismissing an application under sec. 528 for the transfer of a case. The High Court's powers of revision are in express terms limited to those conferred by certain sections mentioned in sec. 439; section 526 is not one of those. The Letters Patent does not confer any power of transfer over and above that conferred by section 526. The remedy of the applicant is to make an independent petition for transfer under sec. 526 supported by affidavit or affirmation—*Ashu v. Maung Po Kha*, 1 Rang 632, 77 IC. 885, 25 Cr.L.J. 485, AIR. 1924 Rang. 100. The Sessions Judge has no authority to revise the order of a District Magistrate passed under the provisions of this section, any more than the High Court has any such authority—*Mohamed Isahuck*, 37 Cr.L.J. 220, 160 IC. 85, AIR. 1935 Rang 446, 1935 Cr.C. 1242. But when the High Court is not, strictly speaking, asked to transfer any case from one Court to another but to pronounce that an order making such a transfer under this section was made on improper and inadequate grounds and ought for these reasons to be set aside, the High Court has ample powers to deal with such an application under sec. 439, Cr. P. C.—*Udhamal v. Mt. Majnubai*, AIR. 1933 Sind 205 (207), 34 Cr.L.J. 861, 144 IC. 881, 1933 Cr.C. 718; *Vellachami v. Murugappa*, 34 Cr.L.J. 832, 144 IC. 677, AIR. 1933 Rang. 89, 1933 Cr.C. 573, dissenting from *Ashu v. Maung Po Kha*, *supra*.

CHAPTER XLIV-A.

SUPPLEMENTARY PROVISIONS RELATING TO EUROPEAN AND INDIAN BRITISH SUBJECTS AND OTHERS.

This Chapter has been inserted by section 33 of the Criminal Law Amendment Act, XVII of 1923.

528A. (1) *Where, in any case to which the provisions of Chapter XXXIII do not apply, any person claims to be dealt with as an European or Indian British subject, or where any person claims to be dealt with as an European (other than an European British subject) or an American, he shall state the grounds of such claims to the Magistrate before whom he is brought for the purpose of the inquiry or trial; and such Magistrate shall inquire into the truth of such statement and allow the person making it a reasonable time within which to prove that it is true, and shall then decide whether he is or is not an European British Subject or an Indian British subject, or an European or an American, as the case may be, and shall deal with him accordingly.*

(2) *When any such claim is rejected by the Magistrate and the person by whom it was made is committed by the Magistrate for trial before the Court of Session, and such person repeats the claim before such Court, such Court shall, after such further inquiry, if any, as it thinks fit, decide the claim, and shall deal with such person accordingly.*

(3) *When any Court before which any person is tried rejects any such claims as aforesaid, the decision shall form a ground of appeal from the sentence or order passed in such trial.*

This is the old section 453 with certain alterations.

1396. Analysis of section:—(a) An Indian British subject claiming to be dealt with as such must put in his claim before the Magistrate before whom he is brought for the purpose of inquiry or trial, according to the provisions of sub-section (1). This sub-section applies to Presidency Magistrates as well as Magistrates in the mufassal. (b) If the Magistrate rejects the claim and tries him, the decision shall form a ground of appeal from the sentence or order passed in such appeal. See sub-section (3). This sub-section applies to Presidency Magistrates as well as to Magistrates in the mufassal. (c) If the Magistrate rejects the claim and commits the accused to the Court of Sessions, he may repeat the claim before the latter Court. See sub-section (2). It should be noted that under sub-section (2) such repetition may only be made before a Court of Session (in the mufassal) and not before the High Court Sessions. (d) If the Court of Session rejects the claim and tries the accused, the decision shall form a ground of appeal from the sentence or order passed in such trial. (e) If a claim is made before a Presidency Magistrate and rejected by him, and the accused is committed to the High Court, there is no provision for repetition of the claim before the High Court, and the accused will not be entitled to put in, under sec. 275 of the Code, before the High Court a further claim for being tried by a jury the majority of whom should be Indians. But the decision of the Presidency Magistrate rejecting the claim is not

final, and is subject to revision by the High Court—*Harendra Chandra*, 51 Cal. 980 (1989, 990), 29 C.W.N. 384, 26 Cr.L.J. 385, A.I.R. 1925 Cal. 384, 84 I.C. 929.

1397. Claim as to status:—Evidence:—The plea that the accused is an European British subject must be substantiated by ample evidence. Where the prisoner pleaded that he was an European British subject, but evidence as to nationality was incomplete, it was held that the plea was not made out—*Turnbull*, 2 Weir 11, 6 M.H.C.R. 7. So also, a mere statement by the prisoner that he is an European British subject cannot be acted upon—*Clarke v. Beane*, 5 W.R. 53. The Judge may be satisfied by the appearance of the prisoner and the circumstances brought forward at the time that the plea is true, but if he is not so satisfied, and the plea is persisted in, it must be substantiated by sufficient evidence—*Turnbull*, 6 M.H.C.R. 7. A statement in an affidavit by the accused's wife that she heard from their grandparents while they were all living together that the accused's grandfather was born in England of English parents, though not controverted by the Crown by a counter affidavit, is hearsay evidence, and is not sufficient to establish the status of the accused as an European British subject—*Thomas*, 53 Cal. 746, 27 Cr.L.J. 1304 (1306).

Opportunity to plead must be given:—The Magistrate trying the prisoner ought to give him an opportunity of pleading that he is an European British subject—*Clarke v. Beane*, 5 W.R. 53. But the Magistrate is not obliged to ask an accused, who apparently is a European British subject, whether he claims to be tried as such. Such a procedure is no longer necessary so far as a case which comes within Chapter XLIV-A of the Cr. P. C., is concerned—*Carmen v. O'Brien*, 54 Cal. 1041 (1044), 29 Cr.L.J. 245, A.I.R. 1928 Cal. 97.

Time for making claim:—A claim on the ground of status may be put forward before a committing Magistrate at any time up till the time when the commitment is made—*Harendra Chandra*, 51 Cal. 980 (991). But in a later case, it has been held that the claim to be tried as an European British subject must be made when the accused is first brought before the Magistrate for inquiry or trial, i.e., before the inquiry or trial actually begins. If the claim is not made at that stage, it cannot be made at any subsequent stage—*Carmen v. O'Brien*, 54 Cal. 1041, 29 Cr.L.J. 245 (247), A.I.R. 1928 Cal. 97.

528B. *If in any such case an European or Indian British subject or an European (other than an European British subject) or an American does not claim to be dealt with as such by the Magistrate before whom he is tried or by whom he is committed, or if, when such claim has been made before and rejected by the committing Magistrate, it is not repeated before the Court to which such person is committed, he shall be held to have relinquished his right to be dealt with as an European British Subject or an Indian British subject, or an European or an American, as the case may be, and shall not assert it in any subsequent stage of the case.*

Failure to plead status
a waiver.

This is the old section 545 with certain alterations.

1398. Waiver:—An European British subject can relinquish his rights. The provisions of this Code give certain rights and privileges to the European British subjects, which rights they are at liberty to give up—*Quirros*, 6 Cal. 83; *Nulty*, 7 N.L.R. 93, 12 Cr.L.J. 436. Failure to make a claim amounts to a relinquishment of rights—*Alexander Ruffe*, 1912 P.R. 6, 13 Cr.L.J. 197. Where the Magistrate explained to the accused his rights under this Code and then asked him if he claimed to be dealt with as such, and the accused stated that he did not claim the rights, it was held that he

had relinquished the rights—*Barindra Kumar Ghosh*, 37 Cal. 467. If no claim is put forward before the committing Presidency Magistrate, the accused will not be allowed to assert before the High Court any claim to be tried by a jury the majority of whom should belong to his own nationality—*Harendra Chandra*, 51 Cal. 980 (191), 26 Cr.L.J. 385, A.I.R. 1925 Cal. 384, 84 I.C. 929, 29 C.W.N. 384. But the omission of the accused to avail himself of his right to claim the benefit of section 528A does not conclude the matter and he is not debarred from urging that the conditions mentioned in clause (a) or (b) of section 443 exist—*Martindale*, 52 Cal. 347, 29 C.W.N. 447, 26 Cr.L.J. 401.

The expression "any subsequent stage of the case" includes the stages of appeal and revision—*Jeremiah v. Johnson*, 45 M.L.J. 800, 76 I.C. 695, A.I.R. 1924 Mad. 373, 18 M.L.W. 895, 33 M.L.T. 194, 1924 M.W.N. 60, 25 Cr.L.J. 231. See *Grant*, 12 Bom. 561. But the Allahabad High Court observes that an application in revision is not a subsequent stage of the same case, but is a totally independent matter giving a right to apply to a superior Court independently of any proceedings necessarily subsequent or consequent upon the hearing of the original case—*Harris v. Peal*, 17 A.L.J. 896, 58 I.C. 351, 21 Cr.L.J. 767. Therefore the High Court can interfere in revision in the case of an European British subject even though he had not pleaded that he was European British subject in the trial Court—*H. S. Bolton*, 34 Cr.L.J. 671, 143 I.C. 892, A.I.R. 1933 Cal. 240, 1933 Cr.C. 325, Ind. Rul. 1933 Cal. 492, 60 Cal. 676.

Discussing all the rulings mentioned above the Madras High Court has held that proceeding in revision before the High Court on a conviction by a trial Court or an Appellate Court is a subsequent stage of the same case—*H. B. Babington*, A.I.R. 1937 Mad. 14 (16), 1936 M.W.N. 1091, 44 M.L.W. 755, 71 M.L.J. 827, 1936 M.Cr.C. 386, 167 I.C. 160, 38 Cr.L.J. 336, I.L.R. 1937 Mad. 339. See also Note 18.

Magistrate whether bound to inform accused of his right:—The Calcutta High Court was formerly of opinion that before an European British subject could be considered to have waived the privileges conferred upon him by this Code it must appear that his rights were distinctly made known and explained to him to enable him to exercise his choice and judgment whether he would or would not claim those rights—*Quiros*, 6 Cal. 83, and if this was not done, the conviction was liable to be set aside—*Baladev v. Clarke*, 18 C.W.N. 385. This was also the view of the Nagpur Court—*Nully*, 7 N.L.R. 93, 12 Cr.L.J. 436 (following 6 Cal. 83). But the Calcutta High Court has changed its view, and is now of opinion that a Magistrate is not required to ask the accused, who is apparently an European British subject, whether he claims to be tried as such. It is the accused who is to put forward his claim to be dealt with as an European British subject—*Carmen v. O'Brien*, 54 Cal. 1041, 29 Cr.L.J. 245, A.I.R. 1928 Cal. 97. The Punjab Chief Court holds that it is not the duty of the Magistrate to ask categorically whether the accused claims his right as an European British subject, much less his duty to explain his right to him as such subject. The Legislature appears to presume that a person entitled to a privilege knows of its existence, and that if he desires to assert it he will assert it—*Tobin*, 1885 P.R. 5.

Revocation of waiver:—The waiver is not irrevocable. If the withdrawal of the waiver is made promptly and shortly after the waiver had been made, and if substantially nothing had been done in the interval on the waiver, the withdrawal should be allowed—*Sterling*, 1908 P.R. 1, 7 Cr.L.J. 274; *Keough*, 1878 P.R. 17.

528C. Where a person, not being an European British subject, is dealt with as an European British subject or, not being an Indian British subject, is dealt with as an Indian British subject, or, not being an European (other than an European British subject) or American, is dealt with as an European or American, and such person does not object, the inquiry, commit-

Trial of persons as belonging to class to which he does not belong.

ment, trial or sentence, as the case may be, shall not, by reason of such dealing, be invalid.

This is the old section 455 with certain alterations.

528D. (1) Unless there is something repugnant in the context, all enactments made by the *the Central Legislature which confer on Magistrate or on the Court of Session jurisdiction over offences shall be deemed to apply to European British subjects, although such persons are not expressly referred to therein.*

Application of Acts conferring jurisdiction on Magistrates or Courts of Session.

(2) Nothing in this section shall be deemed to authorise any Court to exceed the limits prescribed by this Code as to the amount of punishment which it may inflict on an European British subject or to confer jurisdiction on any Magistrate of the second or third class for the trial of such subjects.

This is the old section 459 with certain alterations.

The words "the Central Legislature" have been substituted for "the Governor-General in Council or the Indian Legislature" by the Government of India (Adaptation of Indian Laws) Order, 1937.

CHAPTER XLV.

OF IRREGULAR PROCEEDINGS.

529. If any Magistrate not empowered by law to do any of the following things, namely:—

Irregularities which do not vitiate proceedings.

- (a) to issue a search-warrant under section 98;
- (b) to order, under section 155, the police to investigate an offence;
- (c) to hold an inquest under section 176;
- (d) to issue process, under section 186, for the apprehension of a person within the local limits of his jurisdiction who has committed an offence outside such limits;
- (e) to take cognizance of an offence under section 190, sub-section (1), clause (a) or clause (b);
- (f) to transfer case under section 192;
- (g) to tender a pardon under section 337 or section 338;
- (h) to sell property under section 524 or section 525; or
- (i) to withdraw a case and try it himself under section 528;

erroneously in good faith does that thing, his proceedings shall not be set aside merely on the ground of his not being so empowered.

1399. Scope:—The provisions of sections 529 and 530, Cr. P. C., do not apply to the village Panchayat under the U. P. Village Panchayat Act (VI of 1920)—*Mehdi Husain v. Emp.*, 39 Cr.L.J. 827 (828), 175 I.C. 662, 1938 O.W.N. 596, A.I.R. 1938 Oudh 183, 1938 O.L.R. 303, 11 R.O. 2.

Clause (e):—If a Magistrate who is empowered to take cognizance of offences under clauses (a) and (b) of sec. 190, erroneously and in good faith, takes cognizance of a case under clause (b) instead of taking cognizance under clause (a), his proceedings cannot be set aside. Section 529 will cure the defect—*Sivasami*, 51 Bom. 498, 28 Cr.L.J. 939 (942). If a police-report does not contain a sufficiently specific statement of facts as required by clause (b) of section 190, but only a certain number of facts, still the Magistrate can take cognizance upon such report, the defect being cured by this section—*Raghunath*, 34 Bom.L.R. 901, 1932 Cr.C. 868 (869), 139 I.C. 281, 33 Cr.L.J. 733, A.I.R. 1932 Bom. 610, Ind. Rul. 1932 Bom. 484.

It may be said with reference to clause (e) of this section, and sec. 530 (k) and sec. 531, that unless it appears that the proceedings wrongly held have in fact occasioned a failure of justice, they cannot be set aside—*Lalit Chandra*, 39 Cal. 119 (127), 13 Cr.L.J. 433. See also *Chuni Lal*, 34 Cr.L.J. 761 (762), Ind. Rul. 1933 All. 420, 144 I.C. 380, 1933 A.L.J. 735, 1933 Cr.C. 682, A.I.R. 1933 All. 399; *Chunnu Sonar v. Kripa Sankar*, 34 Cr.L.J. 923 (924), 145 I.C. 280.

Where the Sub-divisional Magistrate directed the complainant to prove his case before another Magistrate, calling for a report from him by the fixed date and the latter, misunderstanding his position in respect of the case, ordered summons to be issued on the accused and proceeded to try the case, he could not be said to have acted in good faith (i.e., with due care and caution) within the meaning of this section as he ignored the order that he was directed to make a report and overlooked it and the proceeding before him could not be allowed to stand—*Udit Narayan Patwari v. Emp.*, 39 Cr.L.J. 778 (779), 176 I.C. 715, A.I.R. 1938 Pat. 369, 19 P.L.T. 336, 1938 P.W.N. 542, 4 B.R. 750, 11 R.P. 100. See Note 670.

Where in consequence of a wrongly given sanction under section 197, Cr. P. C., a Magistrate otherwise competent to entertain the case is specially appointed under section 197 (2), Cr. P. C., to try the particular case, the provisions of section 529, Cr. P. C., cannot apply—*Pearey Lal v. Emp.*, A.I.R. 1940 Pesh. 41 (43), 42 Cr.L.J. 68, 191 I.C. 91.

Clause (f):—'A case' includes cases under Chapter VIII or XII. See Notes under sec 192. The irregularity of transfer under sec 192 by a Magistrate not empowered to do so is cured by this section—*Dasarath*, 36 Cal. 869; *Kishori v. Srinath*, 26 Cal. 370.

Where a case has been transferred to a First Class Magistrate by a Sub-divisional Magistrate, the former cannot again transfer the case to a subordinate Magistrate. If, however, he transfers the case erroneously and in good faith, to a subordinate Magistrate, believing that he has power to transfer, section 529 (f) applies, and the trial of the case by the subordinate Magistrate is not invalid—*Hasanali*, 30 Bom.L.R. 653, 30 Cr.L.J. 467, 115 I.C. 399, A.I.R. 1928 Bom. 286, Ind. Rul. 1929 Bom. 303. See Note 599.

When an application is made to the District Magistrate under sub-section 4 of sec. 144, Cr. P. C., there is no power of transfer in respect of an order passed under sec. 144. However, even assuming that there is no power of transfer, the order of transfer cannot be regarded as void and cannot be set aside merely on that ground in view of sec. 529 (f), Cr. P. C., and also of sec. 531 of the same Code—*Sevugan Chettiar v. Karuppan Chettiar*, 38 Cr.L.J. 864 (865), 170 I.C. 193, 1937 M.W.N. 210, 45 M.L.W. 367, A.I.R. 1937 Mad. 487, 10 R.M. 152. See Note 380.

530. If any Magistrate, not being empowered by law in this behalf, does any of the following things, Irregularities which vitiate proceedings, namely:—

- (a) attaches and sells property under section 88;
- (b) issues a search-warrant for a letter, parcel or other thing in the Post Office, or a telegram in the Telegraph Department;
- (c) demands security to keep the peace;
- (d) demands security for good behaviour;
- (e) discharges a person lawfully bound to be of good behaviour;
- (f) cancels a bond to keep the peace;
- (g) makes an order under section 133, as to a local nuisance;
- (h) prohibits, under section 143, the repetition or continuance of a public nuisance;
- (i) issues an order under section 144;
- (j) makes an order under Chapter XII;
- (k) takes cognizance, under section 190, sub-section (1) clause (c), of an offence;
- (l) passes a sentence, under section 349, on proceedings recorded by another Magistrate;
- (m) calls, under section 435, for proceedings;
- (n) makes an order for maintenance;
- (o) revises, under section 515, an order passed under section 514;
- (p) tries an offender;
- (q) tries an offender summarily; or
- (r) decides an appeal;

his proceedings shall be void.

Clause (i):—See Note 380.

1400. Clause (j):—This clause refers only to a case where a Magistrate is not competent, by virtue of the position he holds or the powers vested in him, to try a case of the character mentioned in sec. 145. But where a Magistrate is a 1st class Magistrate and therefore competent to try a case under sec. 145, the fact that he has no *local jurisdiction* over the matter will not make the trial void (especially where he has not taken cognizance of the case on his own initiative, but the case has been transferred to him under the order of the District Magistrate)—*Raj Mohan v. Prosunno*, 5 C.W.N. 686 (689).

Clause (n):—If an order under section 488 is passed by a Magistrate who is *duly empowered* to try maintenance cases, the order is not vitiated by the fact that the proceedings were taken in a wrong Court. To such a case sec. 530 (n) does not apply, but sec. 531—*Sitaram v. Sukia*, 49 C.L.J. 205, 30 Cr.L.J. 525.

Clause (p):—Section 530 (p), Cr. P. C., lays down that if any Magistrate not being empowered by law in this behalf tries an offender, his proceedings shall be void. The word "proceedings" is not defined in the Code, but is frequently used therein and, from the nature of its use throughout the Code, it includes, in connection with a trial, the whole bundle of actions taken and recorded by the Court from the moment of taking cognizance of the case until its disposal. The "proceedings" in a joint trial cannot be differentiated into separate "proceedings" against each accused person. Therefore, three persons were prosecuted jointly and one of them raised an appeal under sec. 197, Cr. P. C., after the trial was carried to a

conclusion, the whole trial against all the accused was without jurisdiction as the trial Magistrate was not empowered to take cognizance in it—*Faisal Rahman*, 38 Cr.L.J. 1042 (1045), 170 I.C. 772, A.I.R. 1937 Pesh. 52, 10 R.Pesh. 23.

Where the allegations made in the complaint under sec. 420, I. P. C., were that the accused owed the complainant certain amount of money, that on a false representation being made to the complainant that the accused wanted to settle their account, the complainant was induced to produce his *bahi* and that when the *bahi* was opened for the inspection of the account, the accused tore away that part of the page of the *bahi* which bore their thumb-impressions and decamped and the Magistrate acquitted them of an offence under sec. 420, I. P. C., held that the facts disclosed in the complaint constituted an offence under sec. 477 and not under sec. 420, I. P. C., that the acquittal of the accused was bad in law and that all proceedings taken before the trial Magistrate were void inasmuch as he had no jurisdiction to try the case—*Ram Pershad v. Dhanna*, A.I.R. 1929 Lah. 513, 41 Cr.L.J. 184, 185 I.C. 415, 41 P.L.R. 192.

If a Third Class Magistrate, not being specially empowered by the Local Government, tries an offender under section 2 of the Bombay Public Conveyances Act (IV of 1863), the trial is void—*Rama*, Ratanlal 921. If a Second Class Magistrate tries an accused, who has actually committed an offence under sec. 409, I. P. C. (which is triable by a First Class Magistrate), as though for an offence under sec. 406, I. P. C., the trial and conviction are void—*Sitaram*, 1 Bom.L.R. 27. But where the offence consists of circumstances of aggravation which make it triable by a higher Court, and a 2nd Class Magistrate tries it, ignoring those aggravating circumstances, the proceedings are not void *ab initio* under this section—*Gundya*, 13 Bom. 502. A distinction should be drawn between proceedings which are *improper* and proceedings which are *void*. If a Magistrate tries an offender for an offence which is beyond his jurisdiction, his proceedings shall be *void*. But where the facts disclose an offence within the jurisdiction of the Magistrate, it is a complete fallacy to say that he is not empowered to try the person charged for the offence which is within his jurisdiction merely because the same facts disclose a more serious offence which is beyond his jurisdiction. No doubt it would be *improper* for a Magistrate to intentionally ignore the circumstances of aggravation which show that an offence beyond his jurisdiction has been committed, and to try the accused for a lesser offence within his jurisdiction, but his proceedings would not be *void* on that ground—*Ayyan*, 21 Mad. 675; *Kuttuva Rowther v. Suppan*, 25 L.W. 86, 28 Cr.L.J. 164 (165). See also *Razya Bhagwanta*, 4 Bom.L.R. 267, and *Dawson*, 2 Rang. 455, 26 Cr.L.J. 1108. If a Magistrate is competent to try the accused for the offences named in the complaint, and he tries accordingly, it cannot be said that, because another offence under another section could also be charged in the complaint, therefore, the trial of the offence named in the complaint is void—*Sirpat Rai*, 1930 A.L.J. 1422, 1931 Cr.C. 10 (11), 32 Cr.L.J. 360, Ind. Rul. 1931 All. 129, 129 I.C. 257, A.I.R. 1931 All. 10. See Note 62.

If a 2nd Class Magistrate, who has no jurisdiction to try an offence under sec. 471, I. P. C. (which is triable by a 1st Class Magistrate or Court of Session) holds the trial, his proceedings are void. Even if he does not hold the entire trial, but merely records some evidence, and then the case is transferred to a First Class Magistrate, the evidence recorded by the 2nd Class Magistrate cannot be legally considered by the 1st Class Magistrate. If he does so, the conviction will be set aside and the case must be retried—*Budhu Totua*, 55 Cal. 65, 29 Cr.L.J. 464, 47 C.L.J. 122.

Where a trial is void under this section, sec. 403 does not bar a retrial—*Hussain Gaibu*, 8 Bom. 307; *Abdul Ghani*, 29 Cal. 412.

Clause (q):—Trying an offender summarily under sec. 530 (q), Cr. P. C., means trying the particular offender in a particular case summarily and trying that offender for that offence of which he is accused. The words "offender" and "offence" are not always used in the Cr. P. Code with great precision. Hence if a Magistrate tries an offence under sec. 4, Bombay Gambling Act, summarily, sec. 530 (q) applies—

Mahanand Kherajmal, A.I.R. 1939 Sind 341 (342), 41 Cr.L.J. 190, 185, I.C. 543, I.L.R. 1940 Kar. 123.

Where a Magistrate deliberately disregards the offence actually complained of, viz., an offence not triable summarily, and tries it summarily, his proceedings are absolutely void—*Kalash v. Joynuddi*, 5 C.W.N. 252; *Bishnu Shah v. Jaber*, 29 Cal. 409; *Abdool Karim*, 4 Cal. 18; *Ram Naram*, 46 All. 446.

See Note 857.

Clause (r):—The word 'Magistrate' in this section includes a Sessions Judge; therefore, if a Sessions Judge hears an appeal which ought to have been presented to the High Court, the proceedings before the Sessions Judge are absolutely void—*Abdulla*, 2 Rang 386 (387), 26 Cr.L.J. 293.

If a Subdivisional Magistrate, not exercising the powers of a District Magistrate but having powers to hear appeals under sec. 407 (2), Cr. P. C., hears an appeal from an order passed under sec. 514, Cr. P. C., his proceedings are void—*Muhammad Shah*, A.I.R. 1934 Lah 294, 1934 Cr.C 525, 36 Cr.L.J. 557, 154 I.C. 522.

The accused was convicted by the Sub-divisional Magistrate and then he appealed to the Sessions Judge and the appeal was dismissed. He subsequently came to learn that the Sub-divisional Magistrate was exercising powers of a Magistrate of the Second Class and he then filed an appeal in the Court of the District Magistrate. The District Magistrate then made a reference to the High Court, really asking its advice on the question whether he ought to hear the appeal or whether he ought to dismiss it. Held that the reference was misconceived and irregular, that technically it might fail on the ground that the District Magistrate did not send up, for the consideration of the High Court, some proceedings that arose in another Court subordinate to him, that, in view of the provisions of sec. 530, Cr. P. C., the proceedings before the Sessions Judge were void and that strictly speaking, before filing appeal in the Court of the District Magistrate the accused ought first to have applied to the High Court to set aside the order of the Sessions Judge. To avoid mere waste of time the High Court set aside the order of the Sessions Judge dismissing the appeal and directed the District Magistrate to hear the appeal and dispose of it in accordance with law—*Rakhu Sarif v. Panchanon Mondal*, 38 Cr.L.J. 688, 169 I.C. 34, A.I.R. 1937 Cal 256, 9 R.C. 888, I.L.R. (1937) 2 Cal. 116.

Void:—An order which was void for want of jurisdiction must nevertheless be regarded as valid unless it is set aside by a Court of competent jurisdiction—*Rakhu Sarif v. Panchanon Mondal*, 38 Cr.L.J. 688, 169 I.C. 34, I.L.R. (1937) 2 Cal. 116, 9 R.C. 88, A.I.R. 1937 Cal 256, following *Yena*, 4 L.B.R. 49, 6 Cr.L.J. 287.

531. No finding, sentence or order of any Criminal Court

Proceedings in wrong place shall be set aside merely on the ground that the inquiry, trial or other proceeding in the course of which it was arrived at or passed, took place in a wrong sessions division, district, sub-division or other local area, unless it appears that such error has in fact occasioned a failure of justice.

1401. Object and scope of section:—The policy of this Code as shown by secs. 531-538 is to uphold in most cases orders passed by a Criminal Court which was lacking in local jurisdiction or which has committed illegalities or irregularities, unless failure of justice has been occasioned or is likely to be occasioned through such want of jurisdiction or such illegalities or irregularities—*Ganapathi*, 42 Mad 791.

"Other local area":—The expression "local area" used in this section is not confined to a province but includes all local areas governed by the Cr. P. C., which extends to the whole of British India. The words "other local area" were inserted to remove a defect pointed out in 21 W.R. 66 (Cr.) (*Peter v. Mr. C. D. Field*) in the case of sec. 70, Criminal Procedure Code, 1872, and to bring the offence committed

in British India within the scope of that section to which sec. 531 now corresponds. Where, therefore, although the offence was committed at Delhi but was wrongly tried at Hoshangabad, the conviction should not, in view of this section, be set aside—*Diwan Singh*, A.I.R. 1936 Nag. 55 (63), 37 Cr.L.J. 474 (482).

There is nothing in the language of this section to confine its operation to cases where offences committed within the jurisdiction of the Court are tried by such Court outside the limits of the local area of its jurisdiction—*Doraiswamy Mudali*, 30 Mad. 94 (95), 1 M.L.T. 345, 4 Cr.L.J. 253.

This section only refers to districts, sub-divisions and local area governed by this Code, and not to tributary Mahals like Keonjhar or Mourbhanj to which the Code does not extend—*Bichitranund v. Bhugbut*, 16 Cal. 667 (675); *Keshub*, 8 Cal. 985. See also *Ali Muhamed Kassim*, 32 Cr.L.J. 1120 (1124), 9 Rang. 338, Ind. Rul. 1931 Rang. 273, 134 I.C. 209, 1931 Cr.C. 660, A.I.R. 1931 Rang. 164.

The 'order' under this section includes an order of committal—*Bhagwantia*, 3 Pat. 417 (421), 26 Cr.L.J. 49.

Offence in one place, trial or commitment in another:—See Notes 549 and 552.

Sections 403 and 531, Cr. P. C., must be read together and a Court is of competent jurisdiction within the meaning of sec. 403, Cr. P. C., where the finding, sentence or order of the Court could have been set aside under the provisions of sec. 531, Cr. P. C., but has not in fact been set aside. Section 531, Cr. P. C., must be deemed to give jurisdiction to a Court which would otherwise lack it unless it appears that such lack of jurisdiction has in fact occasioned a failure of justice. Clearly it is not competent for a Court not acting under the provisions of sec. 531, Cr. P. C., to say whether a failure of justice has or has not been occasioned. Where, therefore, the accused was tried in the S. Sessions Court for the offence of cheating in L as well as for the offence of abduction which offence was committed within the territorial jurisdiction of the S. Court and was acquitted and was subsequently proceeded against on a charge of cheating in the Court of a Magistrate at L, the proceedings must be quashed—*Dhingano Khoso v. Gulsher Kambir Khan*, 38 Cr.L.J. 959, 170 I.C. 314, A.I.R. 1937 Sind 179, 10 R.S. 57, following *Ratnavelu v. K. S. Iyer*, 56 Mad. 996, A.I.R. 1933 Mad. 765, 1933 Cr.C. 1372, 145 I.C. 878, 65 M.L.J. 529, 34 Cr.L.J. 1080, 1933 M.W.N. 743, 6 R.M. 143, 38 M.L.W. 562 (F.B.), and not following *Shankar Tulsiram v. Kundalik Anyaba*, 53 Bom.L.R. 69, A.I.R. 1928 Bom. 530, 113 I.C. 70, 30 Bom.L.R. 1435, 30 Cr.L.J. 54.

Where the charge under sec. 6 of the Indian Merchandise Marks Act (IV of 1889), is not tried at the place where the offence of applying the false trade description was committed, the defect is one curable under this section—*A. K. Sen v. Madhu Mongal*, A.I.R. 1940 Cal. 583.

A commitment by a Magistrate who had no territorial jurisdiction over the place where the offence was committed, will not be set aside, unless there has been a failure of justice occasioned by such commitment—*Abbi Reddi*, 17 Mad. 402 (403); *Nga Taung*, 7 Bur L.T. 26, 15 Cr.L.J. 270. If the Sessions Judge who tried the case had territorial jurisdiction, the irregularity in the commitment was immaterial—*Abbi Reddi*, supra.

Commitments to wrong Sessions:—See Notes 549 and 552.

Trial at a place outside jurisdiction:—Where a criminal appeal was heard and disposed of at a place which was outside the local limits of his criminal jurisdiction, but where he had civil jurisdiction, it was held that the procedure was an irregularity, but no failure of justice being occasioned thereby, the trial was not a nullity—*Fazl Azim*, 17 All 36.

Jurisdiction of Court to order forfeiture:—This section applies only to proceedings in a wrong place and cures defects as to local jurisdiction. But it cannot cure a defect where a bond of appearance taken from the accused by one Magistrate is forfeited by another Magistrate, for it is a defect not of local jurisdiction but of personal jurisdiction—*Mir Husen*, 16 Bom.L.R. 84, 15 Cr.L.J. 295 (cited under sec. 514).

Failure of justice:—Where objection as to the jurisdiction of the Court was not seriously taken in the Lower Court, and the petitioner failed to show in the High Court that he had been prejudiced, the High Court declined to interfere—*Sanatun v. Gooroo Churn*, 21 W.R. 88. Even the fact that the objection to jurisdiction was taken at a comparatively early stage of the proceedings was not a conclusive proof that the accused was prejudiced by the irregularity—*Kali Charan*, 34 C.L.J. 200, 22 Cr.L.J. 666, 63 I.C. 458. Where it has been nobody's case throughout the prosecution either in the Court of first instance or in the Appellate Court that the wrong assumption of territorial jurisdiction has in fact occasioned a failure of justice, nor has the Judge in his judgment expressed himself to that effect, a conviction cannot be set aside by the Appellate Court on the ground of want of such jurisdiction—*Abdul Shakur v. Palla Ram*, 32 Cr.L.J. 828 (829), 132 I.C. 50, Ind. Rul. 1931 Oudh 210, 14 O.L.J. 246, 8 O.W.N. 341, 1931 Cr.C. 633, A.I.R. 1931 Oudh 273. See also *Narain Das*, A.I.R. 1936 All. 105 (107), 37 Cr.L.J. 157, 159 I.C. 808.

Section 177, Cr. P. C., only provides for the ordinary place of inquiry and trial, and there is no difficulty whatsoever in reading it along with this section, the result being that a conviction cannot be set aside merely on the ground that the trial has taken place in a wrong district but that the party aggrieved is entitled to have the conviction set aside if he shows that such error has in fact occasioned a failure of justice—*Acharaja Singh*, 15 Pat. 418 (420).

532. (1) If any Magistrate or other authority purporting to exercise powers duly conferred, which were not so conferred, commits an accused person for trial before a Court of Session or High Court, the Court to which the commitment is made may, after perusal of the proceedings, accept the commitment if it considers that the accused has not been injured thereby, unless during the inquiry and before the order of commitment, objection was made on behalf either of the accused or of the prosecution to the jurisdiction of such Magistrate or other authority.

(2) If such Court considers that the accused was injured, or if such objection was so made, it shall quash the commitment and direct a fresh inquiry by a competent Magistrate.

1402. Scope of section:—Section 531 must be read as complete in itself and not as in any way cut down or limited by the proviso contained in the latter part of sec. 532. Sec. 531 applies only to cases in which there is no jurisdiction by reason of the inquiry, trial or other proceeding being held in a wrong local area. Sec. 532 seems to refer to cases in which the Magistrate is competent to deal with the offence as having taken place within the local limits of his jurisdiction, but has no power to commit to the Sessions either because he is a Second Class Magistrate or from some reasons other than that of want of local jurisdiction—*James Ingle*, 16 Bom. 200.

This section applies only to cases where the Magistrate or other authority who has assumed to commit has not been duly invested with the powers under which he has assumed to make the commitment, i.e., when the defect is one personal to the committing authority and there is no defect in his proceeding—*Shantal Khan*, 1890 P.R. 16. This section applies where the Magistrate purporting to exercise certain powers had really no such powers. But where the Magistrate was duly invested with the powers which he exercised (e.g., power to commit for trial), this section has no application—*Abbi Reddi*, 17 Mad. 402 (403). This section does not deal with cases in which the defect in the committal order arises from want of territorial jurisdiction—*James Ingle*, 16 Bom. 200;

in British India within the scope of that section to which sec. 531 now corresponds. Where, therefore, although the offence was committed at Delhi but was wrongly tried at Hoshangabad, the conviction should not, in view of this section, be set aside—*Diwan Singh*, A.I.R. 1936 Nag. 55 (63), 37 Cr.L.J. 474 (482).

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Jurisdiction of Court to order forfeiture:—This section applies only to proceedings in a wrong place and cures defects as to local jurisdiction. But it cannot cure a defect where a bond of appearance taken from the accused by one Magistrate is forfeited by another Magistrate, for it is a defect not of local jurisdiction but of personal jurisdiction—*Mir Husen*, 16 Bom.L.R. 84, 15 Cr.L.J. 295 (cited under sec. 514).

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Section 177, Cr. P. C., only provides for the ordinary place of inquiry and trial, and there is no difficulty whatsoever in reading it along with this section, the result being that a conviction cannot be set aside merely on the ground that the trial has taken place in a wrong district but that the party aggrieved is entitled to have the conviction set aside if he shows that such error has in fact occasioned a failure of justice—*Acharaja Singh*, 15 Pat. 418 (420).

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(2) If such Court considers that the accused was injured, or if such objection was so made, it shall quash the commitment and direct a fresh inquiry by a competent Magistrate.

1402. Scope of section:—Section 531 must be read as complete in itself and not as in any way cut down or limited by the proviso contained in the latter part of sec. 532. Sec. 531 applies only to cases in which there is no jurisdiction by reason of the inquiry, trial or other proceeding being held in a wrong local area. Sec. 532 seems to refer to cases in which the Magistrate is competent to deal with the offence as having taken place within the local limits of his jurisdiction, but has no power to commit to the Sessions either because he is a Second Class Magistrate or from some reasons other than that of want of local jurisdiction—*James Ingle*, 16 Bom. 200.

This section applies only to cases where the Magistrate or other authority who has assumed to commit has not been duly invested with the powers under which he has assumed to make the commitment, i.e., when the defect is one personal to the committing authority and there is no defect in his proceeding—*Shamal Khan*, 1890 P.R. 16. This section applies where the Magistrate purporting to exercise certain powers had really no such powers. But where the Magistrate was duly invested with the powers which he exercised (e.g., power to commit for trial), this section has no application—*Abbi Reddi*, 17 Mad. 402 (403). This section does not deal with cases in which the defect in the committal order arises from want of territorial jurisdiction—*James Ingle*, 16 Bom. 200;

Abbi Reddi, 17 Mad. 402 (403); *Rathiram*, 20 Cr.L.J. 416, 51 I.C. 176 (Mad.). This section has no reference to a case where the Magistrate who has general powers of commitment commits an accused over which he has no jurisdiction or commits him for an offence which is not triable by a Court of Session or High Court—*Girish Chandra*, 1929 Cr.C. 468, A.I.R. 1929 Cal 756, 50 C.L.J. 408, 34 C.W.N. 13 (F.B.). It does not apply where the commitment is bad owing to a disqualification of the Magistrate under section 556—*Maung Lat*, 2 L.B.R. 209. It has no application to commitments made by Magistrates acting under section 346—*Kamini v. Fakir Chand*, 12 C.W.N. 136, 6 Cr.L.J. 429. But this section applies where the commitment is irregular by reason of want of sanction under sec. 196 or 197—*Bal Gangadhar Tilak*, 22 Bom. 112; *Morton*, 9 Bom. 288. This section does not apply to a case where the prosecution is illegal on the ground of want of permission required under sec. 83 of the Indian Registration Act. Sec. 537 also cannot cure the defect—*Mohd. Mehdi*, A.I.R. 1934 All. 963 (968), 1934 A.L.J. 965, 152 I.C. 667, 4 A.W.R. 524, 1934 Cr.C. 1291, 36 Cr.L.J. 137, 57 All. 412 (F.B.). It applies where the commitment of the approver (who has broken the conditions of pardon) is irregular by reason of want of the certificate of Public Prosecutor required under sec. 339—*Nga Wa*, 3 Rang. 55, 4 Bur.L.J. 23.

Objection to jurisdiction:—If a Magistrate being duly empowered to commit to the Sessions but having no territorial jurisdiction over the place of offence, commits a case to the Sessions, the commitment is valid under sec. 531, and there can be no objection to his jurisdiction to commit—*Abbi Reddy*, 17 Mad. 402 (404).

Where objection to the want of jurisdiction of the Magistrate to commit is not taken before the Magistrate, the High Court can accept the commitment under this section, if it considers that the accused has not been prejudiced thereby—*Bal Gangadhar Tilak*, 22 Bom. 112. See also *Desaihai Khushalbai*, A.I.R. 1938 Bom. 50 (54), 39 Bom.L.R. 1055.

533. (1) If any Court, before which a confession or other statement of an accused person recorded or purporting to be recorded under section 164 or section 364 is tendered or has been received in evidence, finds that any of the provisions of either of such sections have not been complied with by the Magistrate recording the statement, it shall take evidence that such person duly made the statement recorded; and, notwithstanding anything contained in the Indian Evidence Act, 1872, section 91, such statement shall be admitted if the error has not injured the accused as to his defence on the merits.

(2) The provisions of this section apply to Courts of Appeal, Reference and Revision.

1403. Scope of section:—What this section means is this, that where a confession or other statement of an accused person is duly made, but in recording it the provisions of the law have not been complied with, oral evidence is admissible to prove that the confession or the statement was duly made. The defect which this section intends to cure is one not of substance, but of form only, as for instance when the Magistrate has omitted to sign the certificate, or has omitted to state in the certificate that the statement was taken in his hearing—*Bhairab Chunder*, 2 C.W.N. 702; *Balmokand*, 1915 P.R. 17, 16 Cr.L.J. 354, or where the Magistrate has omitted to record that the required warning was given to the accused under sec. 164—*Partap Singh*, 6 Lah. 415, 7 Lah.L.J. 482; *Ranai*, 3 Pat. 872; *Kheman*, 6 Lah. 58, 26 Cr.L.J. 1074; *Bawa Singh*, 7 Lah.L.J. 250, 26 Cr.L.J. 1458; or where the Magistrate has recorded that the confession was

voluntarily made but omitted to record the questions and answers which would show that the confession was voluntary—*Rama Kariappa*, 31 Bom.L.R. 565, A.I.R. 1929 Bom. 327 (328). The words "purporting to be recorded" and "has been received in evidence" imply that even if a statement be not recorded strictly in conformity with the provisions of sec. 164 (e.g., if the signature of the accused is not taken to the statement) still so long as the Magistrate purports to have recorded it under that section, and even after the statement has been received in evidence, sec. 533 can be resorted to and evidence taken that an accused person duly made the statement recorded—*Ba Yin*, 7 Rang 759, 31 Cr.L.J. 297 (299). But this section will not render a confession admissible when the provisions of the law have been totally disregarded, as for instance, where a statement has been neither signed by the accused nor certified by the Magistrate—*Viran*, 9 Mad 224; *Jas Narayan*, 17 Cal. 862; or where no warning was given at all under sec. 164—*Partap*, 6 Lah. 415, A.I.R. 1925 Lah. 605; or where the Magistrate neither recorded the fact whether the confession was voluntarily made nor the questions and answers tending to show that the confession was voluntary, nor the fact whether the required warning was given to the accused—*Prag*, 6 Luck. 335, Ind. Rul. 1931 Oudh 23, 7 O.W.N. 909, 128 I.C. 215, 1930 Cr.C. 1073, A.I.R. 1930 Oudh 449, 32 Cr.L.J. 97 (100); or where the Magistrate did not at all question the accused as to whether he was making the confession voluntarily—*Ranbir Singh*, 33 P.L.R. 241, 33 Cr.L.J. 242. This section has no application where no record whatsoever has been made of a confession—*Gulabu*, 35 All. 260. But the Bombay High Court lays down that neither the language nor the object of sec. 533 would justify a distinction between an omission to comply with the law and an infraction or direct violation of the law. The test is that as long as the irregularity does not injure the accused as to his defence on the merits, it can be cured under sec. 533—*Visram Babaji*, 21 Bom. 495 (501); *Raghu*, 23 Bom. 221; *Rama Kariappa*, *supra*. In these cases it has been held that this section applies to omissions to comply with the law as well as to infractions of the law, i.e., to defects not only of form but of substance also.

Irregularity in record of confession:—See Notes 1037, 1038 and 1042 under sec. 364.

Omission to sign the record:—See Note 516 under sec. 164 and Note 1040 under sec. 364.

Want of memorandum or certificate:—See Note 519 under sec. 164 and Note 1041 under sec. 364.

Irregularity in recording confession:—See Note 516 under sec. 164.

534. *An omission to inform under Section 447 any person of his rights under Chapter XXXIII shall not affect the validity of any proceeding.*

Omission to give information under section 447.

This section has been inserted by sec. 34 of the Criminal Law Amendment Act, XII of 1923.

535. (1) No finding or sentence pronounced or passed shall be deemed invalid merely on the ground that no charge was framed, unless, in the opinion of the Court of appeal or revision, a failure of justice has in fact been occasioned thereby.

Effect of omission to prepare charge.

(2) If the Court of appeal or revision thinks that a failure of justice has been occasioned by an omission to frame a charge, it shall order that a charge be framed, and that the trial be recommenced from the point immediately after the framing of the charge.

1404. Omission to frame charge:—An omission to frame a charge does not invalidate an order of acquittal and render it equivalent to an order of discharge; such order is a bar to a retrial for the same offence—*Gurdu*, 3 All. 129. Mere omission to frame a charge will not justify a reversal of the order of the Lower Court, unless a failure of justice has been occasioned, especially where at the close of the prosecution evidence-in-chief, the Magistrate laid down the charge—*Madhab*, 53 Cal. 738, 27 Cr.L.J. 1295. So also, the mere omission to state the previous conviction in the charge as required by sec. 221 (7), is not a sufficient reason for interfering in appeal or revision with the enhanced sentence passed by the trial Court, if there has not been any failure of justice—*Abbullu*, 7 M.L.T. 77, 11 Cr.L.J. 217; *Bisakhi*, 29 P.R. 1917, 18 Cr.L.J. 875 (878).

Where a charge was framed under sec. 147, I. P. C., but the accused was convicted of an offence under sec. 323, I. P. C., it was held that the conviction was illegal on account of the absence of a charge under sec. 323, I. P. C., and sec. 535 of this Code did not cure the defect. The words "merely on the ground that no charge was framed" in this section must mean a case where the offence being a petty one, and the evidence being fairly taken the Court framed no charge at all. But where a charge *has been framed* (in this case a charge under sec. 147, I. P. C., was framed), this section does not apply and it cannot be said that the conviction 'shall not be deemed invalid merely on the ground that no charge was framed'; and the persons charged under sec. 147, I. P. C., for rioting with the common object of causing hurt to the complainant cannot be convicted under sec. 323, I. P. C., of causing hurt to another person—*Sita Ahir*, 40 Cal. 168. (In other words the Court held that an erroneous or misleading charge was more dangerous than no charge). But in a later case the same High Court has laid down that this section is not confined to cases where no charge at all has been framed, but also applies to cases in which no charge was framed of the particular offence of which the accused has been convicted (though a charge of another offence was framed)—*Abdul Rahim*, 41 C.L.J. 474, 26 Cr.L.J. 1279. Where a trial was at first begun as a warrant case for an offence under sec. 353, I. P. C., but in the course of hearing the Magistrate found that the offence under sec. 535 was not proved but that the offence was really under sec. 186, I. P. C., which was a summons case, and the Magistrate framed no charge under that section and convicted the accused, *held* that the trial was not vitiated as the Magistrate was not bound to frame a charge for the summons offence. Even, if the omission appears to have occasioned a failure of justice, the Court of appeal or revision would under sub-sec. (2) of this section order a frame of charge and recommencement of the trial—*Ambika Prasad*, 53 All. 206, 1930 A.L.J. 1314, 32 Cr.L.J. 313 (314), Ind. Rul 1931 All. 145, 129 I.C. 369, 1931 Cr.C. 7, A.I.R. 1931 All. 7.

In a summons case, the omission to state the particulars of the offence to the accused (which virtually amounts to a frame of charge) is cured by secs. 535 and 537, if there is no suggestion of any failure of justice having been occasioned by such omission—*Lahani v. Khushal*, 28 N.L.R. 163, 1932 Cr.C. 678 (679).

Where a Magistrate framed a charge under sec. 19 (e) and (f) of the Arms Act, and then submitted the record to the District Magistrate for his sanction and the District Magistrate sanctioned the institution of proceedings, whereupon the trial proceeded and the accused was convicted, it was held that the omission to frame a charge afresh after sanction was cured by this section—*Kaka*, 4 L.B.R. 247, 8 Cr.L.J. 85.

536. (1) If an offence triable with the aid of assessors is tried by a jury, the trial shall not on that ground only be invalid.

(2) If an offence triable by a jury is tried with the aid of assessors, the trial shall not on that ground only be invalid, unless the objection is taken before the Court records its finding.

Trial by jury of offence triable with assessors.

Trial with assessors of offence triable by jury.

1405. Sub-section (1):—The difference between a trial by a jury and a trial with the aid of the assessors lies in the summing up of the case; and the manner in which the verdict of the jury and the opinions of the assessors are taken. It is at this latter point that there is a departure of ways, and if the accused does not put any objection at the crucial point, he cannot afterwards be heard to complain. Where no objection was taken at the trial, it was too late to take objection on appeal—*Mausing*, 33 Bom. 423, 11 Bom.L.R. 350; *Karuppa Thevan*, 1930 M.W.N. 776

Section 536, Cr. P. C., merely cures an admitted irregularity in procedure, but even so it says nothing as to whether a trial which should have been a trial with the aid of assessors but was in fact held by a jury should be deemed to have been held as a valid trial by jury, or conversely whether a trial which should have been by jury but was actually held with the aid of assessors should be deemed a valid trial with assessors. In any case sec. 536, Cr. P. C., does not and cannot affect the right of appeal which is governed by sec. 418 (1) read with sec. 410, Cr. P. C. Where the trial ends in an acquittal, and there is or is not an appeal by the Local Government, there will be obviously no prejudice, and the trial may stand. But where it ends in a conviction, and the accused appeals, and the accused is sought to be shut out of an appeal on facts, he will certainly have been prejudiced, and on a strict reading of sec. 536 (1), Cr. P. C., the trial will be incurably bad. To render the trial valid in such a case, the right of appeal on facts would indeed have to be conceded. Prejudice may arise also in another way where the Judge takes a view more favourable to the accused than the jury but is unable to give effect to it because the trial is a trial by jury. (*Per Biswas, J.*—*Goloke Behari Takal v. Emp.*, 39 Cr.L.J. 161 (175), 173 I.C. 65, A.I.R. 1938 Cal. 51, 66 C.L.J. 225, 42 C.W.N. 129, 10 R.C. 441, I.L.R. (1938) 1 Cal. 290.

Sub-section (2):—Where a case was triable by jury but was tried with the aid of assessors and no objection was taken at the trial, it was held that the trial was not invalid, even though the accused was materially injured, by reason of the fact that the Judge differed from the opinions of the assessors and convicted the accused—*Ganapathi*, 23 Mad. 632; *Sakhawat v. Emp.*, 38 Cr.L.J. 330, 167 I.C. 61, 19 N.L.J. 320, A.I.R. 1937 Nag. 50, 9 R.N. 163, I.L.R. 1937 Nag. 277. The objection must be taken at the trial and cannot be taken in appeal—*Ibid.*

In certain cases the failure to choose a jury is not fatal. Assessors may be chosen instead of a jury and *vice versa* and a failure to take objection at the time is an answer to a subsequent objection that a case triable by a jury was tried with assessors, but this is the result of special statutory provisions, and sec. 536, Cr. P. C., presumably contemplates a jury lawfully empanelled. Sec. 537, Cr. P. C., also makes provision for errors in the jury list, but an irregularity in the constitution of the jury is an irregularity in the proceedings before or during the trial within the meaning of sec. 537, Cr. P. C., for the words "other proceedings" must be read *ejusdem generis* with the words which precede these. Sec. 537, Cr. P. C., refers to a Court of competent jurisdiction. It does not refer to anything done in the matter of the constitution of the trial Court, and in a trial by Judge and jury the Court is the Judge and jury. Any material irregularity in the constitution of the jury affects the constitution of the Court and its competence. It must be in the public interest that a body of persons in whom lies the power to give a verdict of guilty or not guilty should be constituted strictly according to law—*Sheuaram v. Emp.*, 41 Cr.L.J. 28 (39), 184 I.C. 474, A.I.R. 1939 Snd 209.

537. Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered under Chapter XXVII or on appeal or revision on account—

Finding or sentence when reversible by reason of error or omission in charge or other proceedings.

— (a) of any error, omission or irregularity in the com-

plaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, or

(b) (Omitted).

(c) of the omission to revise any list of jurors or assessors in accordance with section 324, or

(d) of any misdirection in any charge to a jury, unless such error, omission, irregularity or misdirection has in fact occasioned a failure of justice.

Explanation.—In determining whether any error, omission or irregularity in any proceeding under this Code has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings.

1405A. Change:—Clause (b) and the illustration have been omitted by sec. 148 of the Cr. P. C. Amendment Act, XVIII of 1923. Clause (b) ran as follows:—“(b) of want of, or any irregularity in, any sanction required by sec. 195 or any irregularity in proceedings taken under sec. 476.” By reason of the omission of this clause, any irregularity in a proceeding under sec. 476 can no more be condoned under sec. 537. Thus, if the Court takes action under sec. 476 in respect of an offence referred to in clause (a) of sec. 195, the proceeding is without jurisdiction, and sec. 537 cannot cure the irregularity—*Dore Sah*, 2 Luck. 646, 28 Cr.L.J. 681 (682), 103 I.C. 681, 4 O.W.N. 640, A.I.R. 1927 Oudh 326, 8 A.I.Cr.R. 400.

The illustration ran as follows:—“A Magistrate being required by law to sign a document signs it in initials only. This is purely an irregularity and does not affect the validity of the proceeding.” This Illustration was given to show the class of irregularity contemplated by this section, as distinguished from substantial departures from law—*Allu*, 4 Lah. 376 (380). But as this Code nowhere lays down that the Magistrate must sign his name in full and not in initials, the Illustration was considered by the *Select Committee of 1916* as “inappropriate” and has been consequently omitted. But a recent Madras case has expressed the opinion that the omission of the Illustration clearly indicates that the Legislature no longer views the defect (signing not by full name but by initials) as a mere irregularity. The inference from the omission of this Illustration is that the defect affects the validity of the proceedings. Therefore, where a judgment prepared by a Bench of Magistrates under sec. 265 was signed by the Magistrates not by full names but by their initials only, the conviction was set aside—*Brahmiah*, 54 Mad 252, 59 M.L.J. 674, 32 Cr.L.J. 430 (431).

1406. Scope of section:—This section applies to mere errors of procedure arising out of mere inadvertence and not to substantive errors of law, or to cases of disregard or disobedience of the mandatory provisions of this Code—*Tirka v. Nanak*, 49 All 475, 28 Cr.L.J. 291; *Appa Subhana*, 8 Bom. 200. It does not apply to cases of disregard or disobedience of the whole of some mandatory provisions of the Code, but applies only to cases of failure to comply with some part of such provisions in the course of a general compliance with the whole—*Gangadhar v. Bhangi*, 25 Cr.L.J. 1152, 81 I.C. 976, A.I.R. 1925 Nag. 147. When a trial is contrary to law, it is no trial at all, and a disobedience to an express provision of law as to the mode of the trial is not an irregularity which can be cured by this section, but is an illegality which vitiates the whole trial. This section has not the effect of curing material irregularities and absolute illegalities. The errors which can be cured by this section are formal defects of procedure and not substantive errors of law—

Subramanya Ayyar, 25 Mad. 61 (P.C.). This section does not apply to an infringement of statutory requirements. It only applies to errors, omissions and irregularities of a technical nature which may occur by accident or oversight in the course of proceedings conducted in the mode prescribed by statute. If in conducting a trial the Judge adopts a procedure which is a departure from the authorised procedure, it would amount to a violation of the law, which cannot be cured by sec. 537—*Allu*, 4 Lah. 376, 25 Cr.L.J. 68, 75 I.C. 980, 6 L.L.J. 103, A.I.R. 1924 Lah. 104; *Lyme*, 4 Lah. 382 (386). Thus, where two cross-cases were at first tried by the Judge separately but were afterwards tried jointly, the evidence for the prosecution in one case was treated at the request of the accused as the defence evidence in the cross-case, only one set of findings was recorded in respect of both cases, and finally one composite judgment was delivered, *held* that the procedure adopted by the Judge was a serious departure from the usual and proper course, and was not only irregular but grossly illegal. Sec. 537 could not apply to the case—*Allup*, *supra*. But see in this connection *Sukhi Ahr*, 50 All. 457, 26 A.L.J. 176, 30 Cr.L.J. 337; *Madat Khan*, 8 Lah. 193 (P.C.), 31 C.W.N. 393 (394) and Note 830A. The test to be applied in considering whether a particular infringement of the provisions of the Code does or does not fall within the purview of sec. 537 appears to be thus: Does the error go to the whole root of the trial? Does it in effect vitiate the proceedings? Has the Court assumed an authority which it does not possess? Has it broken the vital rules of procedure? If the error is of such a nature, then the proceedings are vitiated in their very inception and sec. 537 has no application; but the mere fact that a certain provision of this Code is imperative does not in itself indicate that a breach of the provision vitiates the whole proceedings—*Bechu Chaube*, 45 All. 124 (127), 20 A.L.J. 874, 24 Cr.L.J. 67; *Nurmahomed*, 54 Bom. 934, 32 Bom.L.R. 1279, 1930 Cr.C. 1182 (1184). A distinction should be made between a positive enactment by the Code that a certain trial shall not take place and a positive enactment that in the course of such a trial certain detailed procedure should be followed. Both are imperative provisions. But still the one is a different thing from the other. In the former case an infringement of the enactment amounts to an assumption of jurisdiction and vitiates the trial from the very beginning. In the latter case, an infringement merely amounts to an error, omission or irregularity in the procedure adopted in the course of the trial. This section aims at curing infringements of the latter type—*Nga Hla U*, 3 Rang. 139, 26 Cr.L.J. 1336. The bare fact of an omission or irregularity in procedure (e.g., an irregularity in reading over the depositions of witnesses to the accused according to the provisions of sec. 360) unaccompanied by any probable suggestion of any failure of justice having been thereby occasioned, is not enough to warrant the quashing of a conviction, which may be supported by the curative provisions of secs. 535 and 537—*Abdul Rahman*, 5 Rang. 53, 31 C.W.N. 271 (281), 52 M.L.J. 585, 29 Bom.L.R. 813 (P.C.). After *Subrahmanya Ayyar's* case (25 Mad. 61, P.C.), the idea prevailed that sec. 537 did not apply to the mandatory provisions of the Code, although there was nothing in the section itself to give such a restricted scope. But the ruling in *Abdul Rahman* has dispelled that idea, and sec. 537 may now be taken to cover any irregularity in the widest sense of that term, provided there has been no failure of justice—*Annai Erappa*, 31 L.W. 386, 1930 Cr.C. 186, 31 Cr.L.J. 827. In the face of the pronouncement in *Abdul Rahman's* case it is no longer open to the Courts in India to hold that the mere fact that an imperative statutory rule of procedure has been broken is enough to vitiate the trial or proceeding. The Court should consider the gravity of the irregularity or omission and whether it might have worked actual injustice to the accused—*Kallu v Bashiruddin*, 32 Cr.L.J. 372 (375), 129 I.C. 269, 1930 A.L.J. 1504, A.I.R. 1931 All. 3, 53 All. 172, 1931 Cr.C. 3, Ind. Rul. 1931 All. 141. See also *Rajabali*, 32 Cr.L.J. 521, 1930 Cr.C. 1147, 24 S.L.R. 446, 130 I.C. 442, A.I.R. 1930 Snd. 315; and *Ramaraju*, 32 Cr.L.J. 30, 127 I.C. 654, 1930 M.W.N. 377, A.I.R. 1930 Mad. 857, Ind. Rul. 1930 Mad. 1038, 32 M.L.W. 894, 59 M.L.J. 945, 1930 Cr.C. 1033, 53 Mad. 937. A breach of a provision, even though mandatory, cannot be said to be an illegality necessarily vitiating the proceedings. If the judgment has been passed by a Court of competent jurisdiction the sole criterion in every case is whether there has been a

failure of justice. The test to be applied is to ascertain whether the accused had a fair trial in spite of the transgression of the prescribed rule of procedure. Even if there is an illegality the High Court will not interfere except in case of failure of justice—*Mektar*, 42 Cr.L.J. 37 (38), 190 I.C. 838, A.I.R. 1910 Nag. 375, 1940 N.L.J. 224, I.L.R. 1940 Nag. 488, following *Kapoor Chand v. Suraj Prasad*, 55 All. 301, 142 I.C. 537, 1933 A.L.J. 188, Ind. Rul. 1933 All. 125, 34 Cr.L.J. 414, A.I.R. 1933 All. 264, 1933 Cr.C. 431 (F.B.), *Ramaraja*, supra, *Nga Po Min*, 10 Rang. 511, 141 I.C. 89, A.I.R. 1932 Rang. 190, 1932 Cr.C. 932, Ind. Rul. 1933 Rang. 14, 34 Cr.L.J. 121 (F.B.), *Ertman Ali*, 57 Cal. 1228, 123 I.C. 664, 34 C.W.N. 296, A.I.R. 1930 Cal. 212, Ind. Rul. 1930 Cal. 360, 31 Cr.L.J. 536, 51 C.L.J. 171, 1930 Cr.C. 212 (F.B.), *Gangadhar Pradhan v. Emp.*, 43 Cal. 173, 33 I.C. 626, 20 C.W.N. 63, 17 Cr.L.J. 146, A.I.R. 1916 Cal. 867, *Lahani v. Khushal*, 28 N.L.R. 163 (166), 140 I.C. 113, A.I.R. 1932 Nag. 127, 1932 Cr.C. 678, Ind. Rul. 1932 Nag. 134, 33 Cr.L.J. 938, *Nayeb Sahana v. Emp.* 61 Cal. 399, 152 I.C. 44, A.I.R. 1934 Cal. 636, 38 C.W.N. 659, 1934 Cr.C. 929, 35 Cr.L.J. 1479, 7 R.C. 225 and *Seva Subramanian v. Emp.*, A.I.R. 1931 Rang. 161, 133 I.C. 489, Ind. Rul. 1931 Rang. 265, 32 Cr.L.J. 1068, 1931 Cr.C. 657.

The provisions of this section are mandatory, and no Court is entitled to set aside a finding, sentence or order of a subordinate Court in direct contradiction of the terms of the section. The words "subject to the provisions hereinbefore contained" must refer to the other sections in this Chapter unless there is any specific provision in any other section of the Code which says that any particular error will vitiate proceedings in spite of the fact that no failure of justice has been occasioned by such error. There is considerable authority for making a distinction between irregularities which may be cured under the provisions of this section and illegalities which may not be so cured, but it is doubtful whether such a distinction is justified by any section in the Code of Criminal Procedure. The procedure in this country is governed by statute and it is doubtful whether it is admissible for Court to go outside the statute and proceed in a manner contrary to its provisions on general principles—*Bhajja v. Emp.*, 40 Cr.L.J. 549 (551), A.I.R. 1939 All. 238, 1939 A.L.J. 81, 181 I.C. 537, 1939 A.W.R. (H.C.) 1, 11 R.A. 573, 1939 A.Cr.C. 17.

'Subject to the provisions hereinbefore contained':—These words do not refer to the provisions of the entire Code preceding this section, but only to the provisions of this chapter (*i.e.*, secs. 529 to 536)—*Ram Subheg*, 19 C.W.N. 972, 16 Cr.L.J. 641 (*per* Sharfuddin and Beachcroft, JJ.); *Contra—Raj Chunder v. Gour*, 22 Cal 176; *Niratan v. Jogesh*, 23 Cal 983; *Ram Subheg*, 19 C.W.N. 972 (*per* Fletcher, J.).

'Court of competent jurisdiction':—This means a Court of competent jurisdiction in respect of the particular offence charged—*Krishnabhat*, 10 Bom. 319. If a Magistrate in consequence of a personal disqualification (*e.g.*, under sec. 556) is forbidden by law to try a particular case, though he may be authorised generally to try cases of the same class, he cannot be said to be a Court of competent jurisdiction with respect to that particular case—*Sudhama*, 23 Cal. 328. Thus, a Magistrate who takes cognizance of a case under sec. 190 (1) (c) is not competent to try the case, if the accused objects to it, and if in spite of such objection he proceeds to try the same himself, he cannot be said to be a Court of competent jurisdiction in respect of that case—*Hawthorne*, 13 All. 345. If a District Magistrate transfers to a subordinate Magistrate a case which the latter is not competent to try, a trial by the latter of that case is a defect which cannot be cured by this section, as the trial is not held by a Court of competent jurisdiction—*Raghu Singh v. Abdul Wahab*, 23 Cal. 442. A second class Magistrate is not competent to try an offence under sec. 420, I. P. Code. This is a matter which goes to the very root of the case and is not an irregularity which is covered by this section—*Khuda Bakhsh*, A.I.R. 1933 Lah 1009 (1010), 1933 Cr.C. 1554, 147 I.C. 737, following *Bakhtawar*, A.I.R. 1921 Lah 63, 67 I.C. 588, *Jwala Prasad*, 11 L.L.J. 95 and *Rangayya v. Somappa*, A.I.R. 1925 Mad. 367.

1407. Failure of justice:—The test in case of errors, omissions or irregularities and other matters of like nature referred to in this section is not whether the Court had

acted illegally, (for in one sense every error or irregularity in so far as it contravenes the provisions of the Code is illegal) but whether there had been a failure of justice—*Abdur Rahman v. Keramat*, 27 Cal. 839. Moreover, the test (*viz.*, whether the error or irregularity has occasioned a failure of justice) is one which can be properly applied only *after* the final result of the case is known, and cannot be applied while the case is in its preliminary stage. Thus, where a complaint is summarily dismissed under sec. 203, and a fresh complaint on the same facts is entertained by a Magistrate, but the High Court annuls the proceedings taken on the second complaint and orders a further inquiry, the question arises whether the further inquiry should commence *de novo* or from the stage which was reached in the proceedings taken on the second complaint, and whether the latter course would occasion a failure of justice. But this test cannot be applied at this stage of the case (when no inquiry or trial has yet taken place), and the safest course is to commence the inquiry *de novo*—*Nisratan v. Jogesh*, 23 Cal. 983 (1900). If, however, the inquiry has proceeded far enough to enable the test required by this section to be applied, this section may be called in to cure the error or irregularity—*Jhamandas*, 12 Cr.L.J. 320 (321) (Sind).

The question of prejudice is always a question of fact to be proved by the person raising the question and where there is no prejudice even if there is an irregularity the matter is completely covered by the provisions of this section—*Pahlu*, 41 Cr.L.J. 55 (58), A.I.R. 1939 Lah. 475, I.L.R. 1939 Lah. 243, 184 I.C. 549, 41 P.L.R. 731.

'In fact':—The words 'in fact' have been introduced into the Code of 1898 apparently in order to emphasize the duty of the Court to go into the merits before interfering in consequence of misdirection or other error—*Smither*, 26 Mad. 1 (16). The words have been added to emphasize the reality of the requirement that no failure of justice has occurred—*Gangadhar*, 43 Cal. 173 (177), 20 C.W.N. 63.

1408. Error, omission or irregularity—Error or irregularity in summons or warrant:—See 8 All. 293 in Note 143 under section 68; 38 Mad. 1088, and 18 A.L.J. 1149 in Note 182 under sec. 90; and Note 285 under sec. 115.

A search warrant issued illegally under sec. 96 (1) cannot, by the operation of this section be taken to have been validly issued under sec. 98. The section cannot give legal effect to a defective warrant—*Resh Behary*, 35 Cal. 1076.

Omission to state the name of the prosecutor or the particulars of the offence in the summons or a delay in the filing of the complaint or the hearing of the case within less than seven days from the date of the service of the summons, in contravention of sec. 15 of the U. P. Prevention of Adulteration Act (VI of 1912), would certainly be an irregularity, but that alone is not sufficient to make the conviction illegal. The irregularity is cured by this section—*Kehar Singh*, 36 Cr.L.J. 68, A.I.R. 1935 All. 219, 152 I.C. 367, 1934 A.L.J. 1192.

An omission in the summons cannot by itself vitiate a trial. The trial can only be vitiated by a defect in the proceedings at the trial by which the accused is prejudiced. An objection of this nature must be considered in the light of the provisions of sec. 537, Cr. P. C., and the objection must be rejected unless the person concerned can show that he has in fact been prejudiced by the defect alleged—*Abdul*, A.I.R. 1940 Oudh 77 (79), 1939 O.W.N. 960, 1939 O.L.R. 647, 184 I.C. 742, 41 Cr.L.J. 92, 1939 A.W.R. (C.C.) 248; *Muhammad Sadiq v. Delhi Electric Supply and Traction Co.*, A.I.R. 1929 Lah. 867, 1929 Cr.C. 601, 116 I.C. 889, 30 Cr.L.J. 702. See also *H. B. Spiers v. Johiuddin*, 33 Cr.L.J. 549, 138 I.C. 98, A.I.R. 1932 Cal. 461, 36 C.W.N. 246, 59 Cal. 113, Ind. Rul. 1932 Cal. 419, 1932 Cr.C. 451. For contra see *Rananjay Singh*, 29 Cr.L.J. 357 (359), 108 I.C. 203, 26 A.L.J. 331, A.I.R. 1928 All. 261; *Hasan Ahmad v. Emp.*, 29 Cr.L.J. 799, A.I.R. 1928 All. 492, 111 I.C. 127, 50 All. 876, 26 A.L.J. 1381; *Lal Chand v. Emp.*, 35 Cr.L.J. 1161, 11 O.W.N. 823, 150 I.C. 941, A.I.R. 1934 Oudh 340, 1934 Cr.C. 1156; *Gajraj Singh v. Emp.*, 38 Cr.L.J. 69, A.I.R. 1936 All. 761, 165 I.C. 716, 1936 A.L.R. 932, 1936 Cr.C. 1002, 1936 A.L.J. 1011, 1936 A.W.R. 874; *Maiku Lal*, 38 Cr.L.J. 326, 166 I.C. 978, 1937 O.W.N. 283, 1937 O.L.J. 79; and

Mohammad Hafiz v. Emp., 38 Cr.L.J. 947, 170 I.C. 476, 1937 O.L.R. 432, 1937 O.W.N. 815, A.I.R. 1937 Oudh 444.

Issue of fresh summons:—Where on an information a summons was issued to the accused, and owing to its disclosing no offence, a fresh summons was issued without any fresh or supplemental information, the error, omission or irregularity in the fresh summons was not sufficient to upset the finding and sentence unless it had occasioned a failure of justice—*Jeevanji*, 31 Bom 611.

Irregularity in arrest:—Where certain arrests were made without the substance of the warrants being notified to the persons arrested, the omission was cured by this section—*Rangpal*, 18 Cr.L.J. 666 (All.).

Absence of complaint:—The absence of complaint of Court required by sec. 195 of this Code goes to the root of the case and vitiates the whole trial—*Girdhari Lal*, 29 O.C. 1, 86 I.C. 993, 2 O.W.N. 174, A.I.R. 1925 Oudh 413, 12 O.L.J. 194, 26 Cr.L.J. 929; *Ameraj*, 23 A.L.J. 35, 26 Cr.L.J. 751, 86 I.C. 287, A.I.R. 1925 All. 306. Although it is no longer possible to apply the provisions of this section in the case of want of sanction required by section 195, Cr. P. C., an irregularity in a complaint made by one Court to another is curable under sub-section (a), since a complaint made by a Court is, for the purposes of this section, in no wise different from a complaint made by a private individual—*Vithoo Raghoji v. Emp.*, A.I.R. 1938 Nag. 487 (489), 1938 N.L.J. 285, 40 Cr.L.J. 388, 180 I.C. 577, 11 R.N. 373, I.L.R. 1939 Nag. 338. See Note 614A under section 195.

When a complaint under sec. 21 of the Cattle Trespass Act (I of 1871) is made by an unauthorized person there is really no complaint before the Court at all. The defect is one that cannot be cured under the provisions of this section—*Hammimal v. Vinayakrao*, A.I.R. 1931 Nag. 98, 32 Cr.L.J. 896, 132 I.C. 457, 27 N.L.R. 197, Ind. Rul. 1931 Nag. 105. When a complaint under sec. 22 of the Cattle Trespass Act (I of 1871) is not made within ten days from the date of the seizure to the Magistrate of the District or any Magistrate authorised to receive and try charges without reference by the Magistrate of the District, this section does not cure the defect—*Mehdi Husain v. Emp.*, 39 Cr.L.J. 827, 175 I.C. 662, 1938 O.W.N. 596, A.I.R. 1938 Oudh 183, 1938 O.L.R. 303, 11 R.O. 2.

A complaint by an unauthorized person in contravention of sec. 228 of the Punjab Municipal Act (1911) is illegal. The defect cannot be cured by this section and the conviction is liable to be set aside—*Shiv Dass*, A.I.R. 1934 Lah. 972, 150 I.C. 693, 36 P.L.R. 180, 1934 Cr.C. 1356.

In revision if there is an absence of a complaint by the local authority or an authorized person as contemplated in sec. 10 of the Bihar and Orissa Prevention of Adulteration Act (II of 1919), and if the proceedings are irregular for that reason, this section provides sufficiently to cure the irregularity—*Sarup Lal*, 38 Cr.L.J. 192, 166 I.C. 206, A.I.R. 1936 Pat. 636, 17 P.L.T. 953, 3 B.R. 137, 9 R.P. 264, 1936 Cr.C. 1067.

Error or omission in the charge:—See Notes 748 and 754 where recent rulings have been inserted and discussed. An omission to set out the guilty intention of the accused in a charge will be cured by this section unless it is shown that the omission has occasioned a failure of justice—*Balmakand v. Ghansamram*, 22 Cal. 391. Where the law and section of the law were mentioned in the charge, the omission of the words "unlawfully and maliciously" in the charge was not so material as to prejudice the accused—*Amritalal*, 42 Cal. 957. The omission of the word 'dishonestly' in a charge under section 411, I. P. C., is not a ground of reversing the conviction and sentence, where the accused person fully understood the nature of the offence with which he was charged and has not been prejudiced by the omission—*Rakhma*, 10 B.H.C.R. 373. Where there is ample evidence to show the common object of an assembly, the omission to mention the common object in the charge can be cured by this section—*Harinder*, 2 P.L.J. 541, 18 Cr.L.J. 911; *Basiraddi*, 21 Cal. 827; *Hasanali*, 30 Bom.L.R. 653, 30 Cr.L.J. 467 (468). But where the charge neither specifies the common object of the unlawful

assembly nor specifies the property the taking possession of which is supposed to be the common object of the assembly, the defect in the charge cannot be cured by this section—*Paresh Nath*, 33 Cal 295. Where the description given in the charge is not a complete description, alternatively it is supererogatory, the provisions of secs. 225, 232 and 537, Cr. P. C., apply—*Ramendra*, 32 Cr.L.J. 844 (847), 132 I.C. 174, A.I.R. 1931 Cal. 410, 35 C.W.N. 716, Ind. Rul. 1931 Cal. 558, 1931 Cr.C. 506, 58 Cal. 1303.

Where there was an irregularity in the proceedings before the trial as the sanction of the Provincial Government was wrongly given under section 197, Cr. P. C., and there was also an irregularity in consequence thereof during the trial as the Magistrate refused to stay proceedings pending an application under sec. 526, Cr. P. C., to the High Court in view of the provisions of sub-section (7) of sec. 526, Cr. P. C., it was necessary for the accused to show that as a consequence of these irregularities there had in fact been a failure of justice—*Pearey Lal v. Emp.*, A.I.R. 1940 Pesh. 41 (44), 42 Cr.L.J. 68, 191 I.C. 91.

A preliminary enquiry under section 10 of the Child Marriage Restraining Act (XIX of 1929) is absolutely necessary before a Court can take cognizance of an offence under that Act. Where such an enquiry was not held, the issue of process was set aside and the case was remanded for the holding of a preliminary enquiry—*Jaggu Naidu*, A.I.R. 1939 Mad 530, 183 I.C. 581, 49 M.L.W. 552, 1939 M.W.N. 411, (1939) 1 M.L.J. 900, 12 R.M. 343, 40 Cr.L.J. 818; *Mangal v. Kalu*, 12 Lah. 383, 130 I.C. 783, A.I.R. 1931 Lah. 56, 31 P.L.R. 945, Ind. Rul. 1931 Lah. 351, 32 Cr.L.J. 616, 1931 Cr.C. 120; *Chand Mal*, 15 Lah. 63, 151 I.C. 830, A.I.R. 1934 Lah. 155, 35 P.L.R. 8, 1934 Cr.C. 333, 7 R.L. 209, 35 Cr.L.J. 1436; *Muhammad Hashim*, A.I.R. 1940 Sind 213, I.L.R. 1940 Kar 442. Where the Magistrate has not recorded any reason why the complainant in a case under the Child Marriage Restraining Act (XIX of 1929) was not required to execute a bond, held that the provision of sec. 11 of that Act was imperative, that the irregularity could not be cured by anything in sec. 537, Cr. P. C., and that the conviction was liable to be set aside for this irregularity—*Kaluram*, 34 Cr.L.J. 554, 143 I.C. 279, 37 C.W.N. 626, 1933 Cr.C. 705, A.I.R. 1923 Cal. 433, Ind. Rul. 1933 Cal. 393. This section applies only to errors of procedure arising out of inadvertence and not to substantial errors of law, or to cases of disobedience of the mandatory provisions of the Code or any other law at the time in force in respect of the conduct of trials. Therefore the omission to comply with the provisions of sections 10 and 11 of the Child Marriage Restraining Act (Act XIX of 1929) is a substantive error of law vitiating the proceedings and not curable by this section—*Gajai v. Bhagawandas*, 20 N.L.J. 115. Distinguishing the abovementioned rulings it has, however, been recently held that the failure to comply with sec. 10 of the Child Marriage Restraining Act (XIX of 1929), although it is an irregularity being a non-compliance with a mandatory provision of law, is one of procedure only. It is one in the exercise of jurisdiction and cannot destroy the competent jurisdiction on which the Court already has. Strictly speaking the irregularity is not in the mode of trial either, because although the Court has taken cognizance of the case the trial does not begin until the accused appears in Court. Section 537, Cr. P. C., applies to this case. It is for the High Court in its discretion to exercise its powers of revision under sec. 439, Cr. P. C., and it will do so only to correct miscarriage of justice—*Mekhtar*, 42 Cr.L.J. 37 (39), 190 I.C. 838, A.I.R. 1940 Nag. 375, 1940 N.L.J. 224, I.L.R. 1940 Nag. 488.

It should be noted that clause (a) refers to a finding, sentence or order, i.e. it refers to a conviction and not to an acquittal. In other words, when the Court of Appeal has before it the question of confirming or setting aside a conviction, an omission by the trial Magistrate to frame a charge or an omission or irregularity in the charge is no ground for setting aside a conviction unless there has been a failure of justice. But when a Court of appeal is dealing with an appeal against an acquittal, there is no provision under which a defect in the charge can be condoned and indeed no such provision could

Judge, or any Commissioner for taking affidavits in any Court of Record in British India, or any Commissioner to administer oaths in England or Ireland, or any Magistrate authorized to take affidavits or affirmations in Scotland.

1409. Affidavits sworn before the Presidency Magistrate of Calcutta cannot be used before the Patna High Court—*B. N. Ry. Co. v. Sheikh Makbul*, 7 P.L.T. 343, 27 Cr.L.J. 313. An affidavit which purports to have been sworn before an officer of a District Judge's Court cannot be used in support of an application for transfer under sec. 526, Cr. P. C. The High Court refused to entertain an application for transfer based on such an affidavit—*Mahim v. Amjad*, A.I.R. 1931 Cal. 710, 134 I.C. 1278, 1931 Cr.C. 990, 33 Cr.L.J. 61, Ind. Rul. 1932 Cal. 62; *Ramditta Mall v. Emp.*, 40 Cr.L.J. 847, 184 I.C. 10, 12 R.Pesh. 22, A.I.R. 1939 Pesh. 38. An affidavit made before a Magistrate who has no seisin of the case or who is not competent to try the case (but is competent only to commit, it being a sessions case) is not valid and cannot be used before a High Court—*Ram Chandra*, 5 Pat. 110, 7 P.L.T. 304, 27 Cr.L.J. 499. A Deputy Magistrate has no power to administer oath to a person making an affidavit to be used in High Court; and such person cannot be prosecuted for perjury if he makes any false statement in such affidavit—*Iswarchandra*, 14 Cal. 653. But an affidavit to be used in a Civil Court may be sworn to before any Magistrate by virtue of sec. 139 of the Civil Procedure Code—*Dinobandhu v. Hurrymutty*, 8 C.W.N. xl.

An affidavit must contain nothing but bare facts known to the person who makes the affidavit either personally or upon information from a source which he believes to be a correct source and one on which reliance can be placed. As human beings are liable to make mistakes in reciting facts, the law further requires that the contents of affidavits should be carefully read over to the deponents in a language which they understand and should be vouched by them to be correct. Those who make affidavits, those who prepare affidavits and those who are entrusted with the duty of having affidavits sworn before them must take proper care to see that these provisions of law are duly carried out—*Mangal Prasad*, 36 All. 13 (16), 11 A.L.J. 985, 15 Cr.L.J. 164.

The expression "any Commissioner for taking affidavits in any Court of Record in British India" in this section does not mean any Commissioner for taking affidavits for use in any Court of Record in British India. The Commissioner referred to in this section is a person who is actually sitting in the Court precincts where he is entitled to sit and who has been authorized to administer oaths within the Court precincts. Where an affidavit is sworn before a Commissioner of Oaths appointed under sec. 139, Civil Procedure Code, it cannot be said to have been sworn before a person who is authorized to administer the oath—*Ramditta Mall v. Emp.*, 40 Cr.L.J. 847 (849), 184 I.C. 10, 12 R.Pesh. 22, A.I.R. 1939 Pesh. 38.

539A. (1) *When any application is made to any Court in the course of any inquiry, trial or other proceeding under this Code, and allegations are made therein respecting any public servant, the applicant may give evidence of the facts alleged in the application by affidavit, and the Court may if it thinks fit, order that evidence relating to such facts be so given.*

An affidavit to be used before any Court other than a High Court under this section may be sworn or affirmed in the manner prescribed in section 539, or before any Magistrate.

Affidavits under this section shall be confined to, and shall state separately, such facts as the deponent is able to prove from

his own knowledge and such facts as he has reasonable grounds to believe to be true, and, in the latter case, the deponent shall clearly state the grounds of such belief.

(2) *The Court may order any scandalous and irrelevant matter in an affidavit to be struck out or amended.*

This section and the next have been added by section 150 of the Cr. P. C. Amendment Act, XVIII of 1923. "This new section is intended to discourage the making of false and scandalous statements in petitions filed before the Courts, if such petition seeks to impugn the action of subordinate authorities"—*Statement of Objects and Reasons* (1914). "We think that the provisions of this section should apply to all criminal proceedings, including appeals. We would allow the applicant to give evidence by affidavit, and would leave the Court a discretion to require this to be done in any case"—*Report of the Select Committee of 1916.*

1409A. Under this section, an affidavit to be used before a Court other than a High Court, e.g., before a District Magistrate, must be sworn in the manner prescribed in sec. 539 or before a Magistrate, but neither of these sections authorises the swearing of an affidavit before the Nazir of a subordinate Court, who has no authority to administer oath; and the person making a false statement in the affidavit cannot be convicted of an offence under sec. 193, I. P. Code—*Ganpat Devaji*, 31 Bom.L.R. 144, 30 Cr.L.J. 593 (594).

This section applies to an accused. It applies to any person who chooses to make allegations respecting a public servant and in support of those allegations swears an affidavit. If the accused person chooses to come within the scope of this section and swears an affidavit on false facts, he should be liable to punishment which can be inflicted upon persons who swear such false affidavits. In view of the change of law the judgment in the case of—*Malan*, 7 I.C. 914, 33 All. 163, 11 Cr.L.J. 537, 7 A.L.J. 1143 need no longer be followed—*Badri Prasad v. Jhamman*, 34 Cr.L.J. 457, 142 I.C. 900 55 All 114, Ind. Rul. 1933 All 140, 1932 A.L.J. 1076, 1933 Cr.C. 53, A.I.R. 1933 All. 47.

Where in an affidavit the accused has made a reckless accusation against the Magistrate as well as the Government Advocate and the Deputy Superintendent of Police, it is expedient in the interests of justice that he should be called upon to show cause why he should not be prosecuted under section 193 read with sec. 199, I. P. C., for affirming a false affidavit—*K. L. Gouba v. Emp.*, 38 Cr.L.J. 955 (959), 170 I.C. 586, 18 Lah. 114, 10 R.L. 135, 39 P.L.R. 643, A.I.R. 1937 Lah. 411.

The Chief Minister of a Province is a public servant within the meaning of this section—*Ramditta Mall v. Emp.*, 40 Cr.L.J. 847 (848), 184 I.C. 10, 12 R.Pesh. 22, A.I.R. 1939 Pesh. 38.

539B. (1) *Any Judge or Magistrate may, at any stage of any inquiry, trial or other proceeding, after due notice to the parties, visit and inspect any place in which an offence is alleged to have been committed, or any other place which it is in his opinion necessary to view for the purpose of properly appreciating the evidence given at such inquiry or trial, and shall without unnecessary delay record a memorandum of any relevant facts observed at such inspection.*

Local inspection.

(2) *Such memorandum shall form part of the record of the case. If the Public Prosecutor, complainant or accused so desires, a copy of the memorandum shall be furnished to him free of cost:*

Provided that, in the case of a trial by jury or with the aid of assessors, the Judge shall not act under this section unless such jury or assessors are also allowed a view under section 293.

"This section is inserted definitely prescribing that any Judge or Magistrate may, at any stage of any inquiry or trial, visit and inspect any place connected with the occurrence, subject to his recording a note of his inspection"—*Statement of Objects and Reasons* (1914). "We are of opinion that the Judge or Magistrate shall view the *locus in quo* only for the purpose of properly appreciating the evidence given at the trial, and that in the case of a trial by jury or with assessors, the Judge should only view if the jury or assessors do the same under sec. 293. We also think that notice should be given to the parties of the intention of the Judge or Magistrate to visit the *locus*. We would also provide that the memorandum to be made by the Judge or Magistrate shall form part of the record of the case, and that a copy of it may be furnished to both sides"—*Report of the Select Committee of 1916*.

1410. Local inspection:—The object of local inspection is to enable the Magistrate to understand and test the evidence of witnesses examined in the Court and not to obtain additional information or to extract admission from the accused—*Ajodhya Prasad Sonar v. Municipal Committee, Khurai*, 37 Cr.L.J. 837, 163 I.C. 413, 18 N.L.J. 320. A trying Magistrate may visit the scene of an alleged offence to test the evidence he has heard in Court, and act on the opinion he has formed from what he has seen in adjudicating between the parties. The Court ought, in every case in which it has made a local inspection, to acquaint the parties with the opinion it has formed. An immediate report of what is seen should be placed on the record and laid open to the scrutiny of the parties—*Babbon Sheikh*, 37 Cal. 340 (349, 357); *Parmeshwar*, 3 P.L.T. 347, 23 Cr.L.J. 440, A.I.R. 1922 Pat. 296. A Magistrate, when making an inspection of the scene of offence, should invariably be accompanied by both the parties or their pleaders, who should draw his attention to facts if they choose and thus prevent him from drawing wrong inference—*Chanbasappa*, Ratanlal 854, *Munikam*, 19 Mad. 263 (266); *Krishnappa v. Singoda*, 2 Ver 272. If the Magistrate makes the local inquiry at the instance of one party, without giving notice to the other party, the procedure is illegal—*Ram Sahai v. D.arka*, 1 P.L.T. 569, 22 Cr.L.J. 424, 61 I.C. 712 (713). See also *Ajodhya Prasad Sonar v. Municipal Committee, Khurai*, supra; *Bankim Behari Sen v. Yusuf Mian*, 40 Cr.L.J. 514, 180 I.C. 858, A.I.R. 1939 Pat. 185, 19 P.L.T. 918, 5 B.R. 498, 11 K.P. 549 and *Jumo Sileman v. Hashim Umar*, 38 Cr.L.J. 783, 169 I.C. 431, A.I.R. 1937 Sind 125 (126), 31 S.L.R. 51, 10 R.S. 3. A local inspection must be held sparingly and the danger of such local inspection is intensified when one or both of the parties are absent at the time of local inspection—*Wlayat*, A.I.R. 1931 Oudh 388 (391), 8 O.W.N. 857, 1931 Cr.C. 820. A Magistrate may make a local inspection not only for the purpose of understanding the evidence adduced in Court, but also for the purpose of testing it by the light of his own observations. If the Magistrate has seen a certain state of things in making a local inspection, he can use the testimony of his own senses for testing the veracity of the witnesses deposing before him as regards the feature of the locality—*Rabbon Sheikh*, 37 Cal. 340 (355, 256). But where a Magistrate made a local inspection and used it not for the purpose of understanding the evidence given at the trial, but for the purpose of obtaining information which did not appear from the evidence of the witnesses, the procedure was quite illegal, as the Magistrate went beyond the powers granted to him by this section and made himself a witness in the case. The trial was vitiated and must be set aside—*Fakira*, 29 Cr.L.J. 655, 110 I.C. 112, A.I.R. 1928 Pat. 567, 10 A.I.Cr.R. 455, 10 P.L.T. 279; *Hari Mohan*, 30 Cr.L.J. 491 (492), 115 I.C. 556, Ind. Rul. 1929 Pat. 220.

If a case is tried by a Bench of Magistrates, the inspection must be made by all the Magistrates. The memorandum drawn up by some of the Magistrates would be of no use or finality to a Magistrate who has not seen the spot and consequently

be in a position to state whether the description therein is correct. It is therefore necessary that *all* the members of the Bench should join in any inspection made—*S. bastian Lobo v. D'Souza*, 1932 M.W.N. 645, 33 Cr.L.J. 655, Ind. Rul. 1932 Mad. 595, 138 I.C. 608, 1932 Cr.C. 834, A.I.R. 1932 Mad. 676. See *Vithal v. Madho*, 17 N.L.J. 269, A.I.R. 1935 Nag. 77.

A local inspection is only permitted for the purpose of properly appreciating the evidence in the case, and *cannot take the place of evidence itself*. If the Magistrate uses it for the purpose of deciding the main issues in the case, i.e., if he uses his *personal knowledge derived from the local inspection*, without affording the accused an opportunity to cross-examine or to explain the points against him, it amounts to a material irregularity vitiating the proceedings—*Moinuddin*, 2 P.L.T. 455, 22 Cr.L.J. 442, 61 I.C. 794 (797); *Tirkha v. Nanak*, 49 All. 475, 28 Cr.L.J. 291 (293); *Ram Sahai v. Dwarka*, 1 P.L.T. 569, 22 Cr.L.J. 424, 61 I.C. 712 (713); *Jowala Singh*, 10 Lah. 138, 29 Cr.L.J. 719 (720).

The right of a Magistrate to make a local inspection has now been declared and recognized by this section. Where in a case under sec. 145, Cr. P. C., the Magistrate finds difficulty in following the plans put in by the parties and therefore he, after notice to the parties makes a local inspection in order better to understand the evidence and the topographical conditions, and the inspection note is made in the presence of the parties and no objection is taken, there is no irregularity in the procedure adopted by the Magistrate—*Gurditta v. Taja*, 40 Cr.L.J. 519 (521), 181 I.C. 59, A.I.R. 1939 Lah. 108, I.L.R. 1938 Lah. 611, 41 P.L.R. 217, 11 R.L. 741.

If the Sessions Judge thinks it necessary or desirable to visit the place of occurrence, he should give due *notice to the parties*, and proceed thither with the assessors and the parties, before the close of the trial, and *before* the opinions of the assessors are recorded—*Oudh Behari*, 1 C.L.R. 143; *Deya*, 9 L.B.R. 88, 9 Bur.L.T. 133, 17 Cr.L.J. 500. If no notice is given to the parties, it is not competent to the Judge to take into account any observations of the locality made by him. And where the Judge made an inspection of the locality *after* the assessors had given their opinions, the Appellate Court eliminated that portion of the judgment which related to the visit to the spot and the Judge's conclusion therefrom, and decided the case on the other materials—*Deya*, supra.

During the trial of the accused persons, one of whom had made a confession, the Sessions Judge went himself to the scene of the crime accompanied by the assessors and the confessing accused, who showed him the ground and made certain *additional* statements by way of comment or illustration of his confession, and the Judge made note of them. *Held* that the law does not recognize a procedure of this kind and that the Judge was clearly wrong in allowing the accused to make the additional statements and in recording them—*Kesho Singh*, 20 O.C. 136, 18 Cr.L.J. 742. See Note under section 293.

When a Magistrate makes a local inspection, he should without unnecessary delay record a memorandum of the inspection and supply the petitioner with a copy thereof. The Magistrate's refusal to make a memorandum is an illegality vitiating the proceedings, or in any case, an irregularity by which the defence is prejudiced—*Jowala Singh*, 10 Lah. 138, 110 I.C. 463, A.I.R. 1928 Lah. 479, 10 A.I.Cr.R. 435, 29 Cr.L.J. 719 (720). The Magistrate must prepare a memorandum, and put it on the record. If he makes rough notes in pencil and then destroys them after writing his order, he acts illegally—*Tirkha v. Nanak*, 49 All. 475, 28 Cr.L.J. 291 (293). He must record the result of his inspection *at once* so that the parties may have an opportunity of seeing what the facts are which he considered to be established by the local inspection—*Jowala*, supra. A Magistrate should not, after making a local inspection, deliver his judgment relying upon that inspection without giving the parties an opportunity to rebut his opinion. His report should be open to the scrutiny of the parties—*Babbon Sheikh*, 37 Cal. 340. If the Magistrate holds a local inquiry but makes no memorandum of the facts observed, and then convicts the accused upon the knowledge of those

facts, the procedure is illegal—See also *Parmeshwar*, 3 P.L.T. 347, 23 Cr.L.J. 440, A.I.R. 1922 Pat. 296. In a Calcutta case it has been held that the provisions of sub-section (2) are mandatory, and therefore where the Magistrate made a local inspection and drew up a diagram and made an inspection note thereon but the note did not form part of the record of the case, the procedure was illegal and not merely irregular, and the defect could not be cured even though there was no prejudice to the accused—*Hriday Gobinda*, 52 Cal. 148, 40 C.L.J. 149, 25 Cr.L.J. 1375, 82 I.C. 767, A.I.R. 1924 Cal. 1035. But this ruling has been dissented from in numerous cases. Thus, in a later case of the same High Court, where the local inquiry was made in the presence of both parties, and the Magistrate made no memorandum of the inspection, but the petitioners' pleader who was present at the time did not ask the Magistrate to record a memorandum or to attach a memorandum to the record or to give him a copy, and was content to go on to judgment without seeing the memorandum or even ascertaining whether one was made, it was held that the petitioners could not be allowed to say that for this formal defect the proceedings should be set aside, unless they could show that the Magistrate's omission had caused them prejudice—*Forbes v. Md. Ali Haidar*, 53 Cal. 46, 42 C.L.J. 131, 90 I.C. 308, A.I.R. 1925 Cal. 1046, 26 Cr.L.J. 1524 (dissenting from *Hriday Gobinda*, supra). The other High Courts also are of opinion that where it is clear that the order of the Magistrate was mainly based on the evidence adduced in the case and not on what he saw in his local inspection, the omission to make a memorandum of the inspection does not render the trial illegal. It is at most an irregularity covered by section 537—*Todar Mal*, 53 All. 215, 1930 A.L.J. 1437, Ind. Rul. 1931 All. 169, 129 I.C. 441, 1931 Cr.C. 14, A.I.R. 1931 All. 14, 32 Cr.L.J. 309 (310); *Raghunandan*, A.I.R. 1931 All. 433, 1931 Cr.C. 705, 1931 A.L.J. 912; *Jagannath*, A.I.R. 1935 Nag. 23; *Tan Kyi Lin*, 5 Bur.L.J. 100, 27 Cr.L.J. 1281 (1282); *Saryu*, 135 I.C. 226, 1932 Cr.C. 37, A.I.R. 1932 All. 28, Ind. Rul. 1932 All. 50, 1932 A.L.J. 523, 33 Cr.L.J. 124; *Khushal Jeram*, 50 Bom. 680, 27 Cr.L.J. 1151, 97 I.C. 671, A.I.R. 1926 Bom. 534, 28 Bom.L.R. 1026; *Jumo Sileman v Hashim Umar*, 38 Cr.L.J. 783 (784), 169 I.C. 431, 31 S.L.R. 51, 10 R.S. 3, A.I.R. 1937 Snd. 125; *Jamna Prasad v Emp.*, 39 Cr.L.J. 427, 174 I.C. 523, 10 R.N. 417, A.I.R. 1938 Nag. 325, I.L.R. 1940 Nag. 188; *Shakura v Nasira*, 39 Cr.L.J. 630, 175 I.C. 259, 1938 O.W.N. 595, 1938 O.A. 504, 1938 A.Cr.C. 50, 1938 O.L.R. 290, 10 R.O. 319, A.I.R. 1938 Oudh. 182. All these cases dissented from 52 Cal. 148. Where after the Magistrate had made a local inspection, he gave judgment convicting the accused and then after delivering judgment he made a note of the result of such inspection in the order sheet, *held* that the procedure was irregular; but as the Magistrate's judgment in this case was mainly based on the documents on the record and on the oral evidence before him, and he used the local inspection only to confirm the evidence which he had already before him, the judgment of the Magistrate should not be set aside as the accused was not prejudiced by such irregularity—*Bhola Nath v. Kedar*, 25 Cr.L.J. 705, A.I.R. 1925 Cal. 353. But where the Magistrate gave no notice to the parties, kept no memorandum of the facts observed by him and referred to by him in his judgment and was largely influenced in his judgment not only by personal inspection of the site but by local inquiries made by him, the irregularities disclosed in the proceedings cannot be cured under section 537, Cr. P. Code—*Jumo Sileman v. Hashim Umar*, supra.

This section which empowers the Court to make a local inspection does not contemplate a procedure by which the presiding officer would, to all intents and purposes, put himself in the position of a witness in the case. A Magistrate, therefore, rightly refuses the offer by the accused to make a demonstration of moon gazing in his presence in order to test whether his advertisement, which was the basis of a charge of cheating against him, was true or false—*Akhil Kishore Ram v Emp.*, 29 Cr.L.J. 442 (444), 174 I.C. 635, 19 P.L.T. 375, 4 B.R. 463, 10 R.P. 541, 1938 P.W.N. 93, A.I.R. 1938 Pat. 185.

• The Magistrate had to determine whether he was prepared to accept the evidence

of identification, the defence being that the case was one of mistaken identity. He visited the spot one evening and came to the conclusion that there was sufficient light to enable anybody to mark closely the features of a stranger but did not record a memorandum of relevant facts observed at such inspection. *Held* that the Magistrate had gone beyond the scope of this section. He assumed that the condition of the light and atmosphere were the same on the night that he went to the spot as they were at the time of occurrence and also that the powers of observation of other persons were as well developed as his. Such local inspection could not, therefore, be made the basis of conviction—*Badal Ali v. Emp.*, 40 Cr.L.J. 624, 181 I.C. 990, 11 R.C. 885, 43 C.W.N. 392, A.I.R. 1939 Cal. 304. Human memory being what it is, it is very difficult to place any reliance upon what the Magistrate found, unless a memorandum has been made almost immediately—*Ibid*; *Dalu Ghose v. Emp.*, 40 Cr.L.J. 795, 183 I.C. 431, 12 R.C. 157, 43 C.W.N. 896, A.I.R. 1939 Cal. 487.

Where the Magistrate not only fails to record a memorandum of local inspection but he also prepares a map which is used as evidence in the case, it is quite clear that in doing this he places himself in the position of a witness. Unless the sketch map is proved in the witness-box, it is impossible to use it as evidence or to say what value should be attached to it. In such a case the only course open to a Court of Revision is to order a re-trial by some other Magistrate—*Dalu Ghosh v. Emp.*, *supra*.

As to the circumstances under which a Magistrate making a local inspection is incompetent to try the case, see Note 1374 under section 526, and Note 1432 under section 556.

540. Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case.

1411. Examination of Court witnesses:—This section confers very wide powers upon a Court in the matter of summoning witnesses, but the wider the powers, the greater is the exercise of discretion required of the Magistrate. It was not intended by this section that the Magistrate should exercise his powers at the bidding of any person, but the powers are given to prevent any danger or miscarriage of justice owing to some particular witness not having been called—*Sitab Singh v. Dalaganjan*, 12 A.L.J. 15, 14 Cr.L.J. 682 (683). As for the summoning of Court witnesses, that is entirely a matter for the Court to decide and it is not for the accused to insist. It is open to the accused to summon them in his defence, if so advised—*Chhotey Miyan*, A.I.R. 1936 Nag 250. If the Magistrate thinks that certain evidence is necessary for a proper decision of the case, he is bound to bring that evidence upon the record under the provisions of this section, whether the suggestion emanates from the complainant or not. He should not, of course, examine any witness under this section merely because the complainant chooses to suggest the witness; but if he himself thinks that the evidence of the witness is essential he is not only allowed to examine the witness but is by law bound to do so—*Ram Bharosey*, A.I.R. 1936 All 269, 37 Cr.L.J. 522, 162 I.C. 47, 1936 A.L.J. 303, 1936 Cr.C. 246. This section is a supplementary provision enabling the Court to examine, and in certain circumstances imposing on it the duty of examining, a material witness who would not otherwise have been brought before the Court. But a Magistrate misuses this power if he uses it to anticipate the defence of an accused to his prejudice, or if he uses it, after satisfying himself that the accused has a good defence, to discharge the accused instead of acquitting him. A Magistrate cannot resort

to this section in order to avoid the responsibility of making up his mind as to the value of the prosecution evidence—*Chetu*, 1886 P.R. 11.

This section is expressed in the widest possible terms and the intention is not to limit the discretion of the trying Court in any way. At the same time the Courts ought to remember that the purpose of this section is not to enable one party or the other to fill up the gaps in his case and to improve it by new matter at a late stage, but to enable the Court to act in the interest of justice when it considers such action necessary—*Ramchandra Prasad v. Emp.*, 38 Cr.L.J. 657 (658), 168 I.C. 979, A.I.R. 1937 Pat. 246, 3 B.R. 508, 9 R.P. 522, 18 P.L.T. 483, 1937 P.W.N. 519.

The discretion given to Magistrate under this section has to be exercised with a great deal of caution. Where after examining the record as it stood at the time, the Magistrate felt that some points had been left obscure and in order to elucidate them it was necessary to recall certain witness and to examine a new witness, and when this evidence was recorded, he took the precaution of asking the accused if he wanted to add anything to his previous statement, and on his replying in the negative, he heard further arguments and then proceeded to decide the case, *held* that there was no illegality in the procedure—*Mangat Rai*, 10 Lah L.J. 262, 29 Cr.L.J. 740.

The first part of this section is an enabling provision whereby a Court in the exercise of its discretion is empowered, at any time before it actually pronounces judgment, to take further evidence either for the prosecution or for the defence, and for that purpose it may adjourn the hearing of a case in order to procure the attendance of the proper persons. In many instances it happens that a new light is thrown on the case by witnesses for the defence and it then becomes desirable, sometimes in the interests of the accused himself, that fresh evidence should be called for. The second part of this section is imperative. If the new evidence appears to the Court essential to the just decision of the case, the Court has no choice but to take such evidence. The new witnesses should be examined, cross-examined and re-examined. Where the defence case could not have been anticipated by the prosecution, and it is said that witnesses are available to prove the falsity of the defence case, the Court should allow such witnesses to be examined. The accused should be given liberty to examine any further witnesses whom he wishes to examine to meet the evidence of the fresh witnesses for the prosecution—*Maung Po Hmyin*, 1 Rang 308, 25 Cr.L.J. 217, A.I.R. 1923 Rang. 216, 2 Bur.L.J. 127.

It is manifestly the duty of the Court to summon and examine any person whose evidence the Court considers essential to the just decision of the case—*Narsingh Singh v. Emp.*, A.I.R. 1939 Pat. 659 (661), 1939 P.W.N. 712, 20 P.L.T. 655, 185 I.C. 594, 6 B.R. 215. It is the duty of the trial Court to examine any witness that may throw light on the occurrence—*Bhagwantrao v. Emp.*, 37 Cr.L.J. 858 (859), 163 I.C. 702, 18 N.L.J. 289, 9 R.N. 14. Where witnesses, who were in a position to know what happened at the time of the alleged commission of the crime, are not called by the prosecution for any sufficient reason and the defence do not desire to examine them as their witnesses, they should be examined as witnesses called by the Court under this section—*Nga Kan Chai v. Emp.*, 38 Cr.L.J. 1040 (1042), 171 I.C. 129, 13 R.R. 133, A.I.R. 1937 Rang. 139, following *Nga Aung Gyi v. Emp.*, 14 Rang 45. See also *Murd Dood*, 38 Cr.L.J. 1101 (1102), 171 I.C. 672, A.I.R. 1937 Sind 254, 10 R.S. 116. There is a duty cast upon the Court to arrive at the truth by all lawful means and one of such is the examination of witnesses of its own accord when for certain obvious reasons neither party is prepared to call witnesses who are known to be in a position to speak to important relevant facts—*Donald Dixon*, 40 Cr.L.J. 35 (36), 178 I.C. 341, 1938 M.W.N. 817, 48 M.L.W. 363, A.I.R. 1938 Mad. 900, 11 R.M. 443.

Where the Magistrate visited the scene of occurrence without notice to the parties, in contravention of the provisions of sec. 539B, and made certain inquiries in the course of inspection, and then as a result of the inquiry, summoned several persons as witnesses, purporting to do so under sec. 540, *held* that the action of the Magistrate could not be justified under section 540. This section merely provides that a Magistrate may

mon any witness whose evidence appears to be necessary; and the most common way of knowing whether the evidence of such a witness is necessary is through the evidence of other witnesses in the case. But this section does not contemplate that the Magistrate should acquire such knowledge by going into the highways and by-ways and searching for further evidence; and the power to summon a witness does not by any means imply a power to discover such witness by personal inquiry out of Court—*Pakir Muhammad*, 4 Rang. 106, 27 Cr.L.J. 1084. And so, where in a proceeding under sec. 488, the Magistrate being unable to arrive at a decision as to the legitimacy of a child, and as to whether there was a valid marriage between its parents, went to the village of the defendant and examined four of its residents, and on the strength of the evidence of those persons decided that the child was legitimate, *held* that the Magistrate went beyond the reasonable discretion afforded by sec. 540—*Narayana v. Bhargavi*, 52 M.L.J. 118, 28 Cr.L.J. 251.

When an accused person has been examined under sec. 342 after the close of the prosecution, and then a witness is examined under sec. 540, it is not necessary to examine the accused again. See 3 Pat. 1015 and other cases cited in Note 977 under sec. 342.

A Magistrate may summon any person as a Court witness at any stage of the proceedings, but in fairness to the parties and to afford them an opportunity of proper cross-examination he should (save under exceptional circumstances) inform them beforehand of the names of those witnesses—*Udho Ram*, 10 Lah. 790, A.I.R. 1929 Lah. 120 (121).

There is nothing in sec. 139A, Cr. P.-C., which can exclude the exercise of the Court's powers under this section—*Kishorimohan v. Krishnabipari*, A.I.R. 1931 Cal. 527, 58 Cal. 461, 1931 Cr.C. 679, 32 Cr.L.J. 1187, 134 I.C. 574, Ind. Rul. 1931 Cal. 862.

Who can summon witnesses:—Only the trying Magistrate can summon witnesses under this section. It cannot be done by another Magistrate who is not seised of the case, during the temporary absence of the trying Magistrate—*Mangal Prasad*, 36 All. 13, 11 A.L.J. 986.

'May summon':—It is entirely in the discretion of the Court to call and examine witnesses; and the Public Prosecutor cannot demand as a matter of right to call and examine any witness not examined before the committing Magistrate—*Hayfield*, 14 All. 212. See Note 893.

'At any stage':—Although it is true that proper discretion has to be exercised under sec. 540, still the terms of this section are extremely wide, and any Court can at any stage of any inquiry, trial or other proceeding summon any person as a witness, if his evidence appears to it essential to the just decision of the case. This power can be exercised even after the close of the case for the prosecution and the defence—*In re Chellaperumal*, 46 M.L.J. 325, 25 Cr.L.J. 354. A Magistrate can, under this section, receive fresh evidence after the evidence on both sides has been taken and the case adjourned for judgment, in as much as the case is still pending when such evidence is being taken—*Ananda Chunder*, 24 Cal. 167. Where in a criminal trial, after the evidence for the defence was closed, the Magistrate examined certain witnesses for the prosecution giving at the same time full liberty to the accused to cross-examine them, the High Court declined to interfere in revision—*Gur Baksh*, 21 O.C. 95, 19 Cr.L.J. 630, 45 I.C. 678. But although a Magistrate has discretion to admit evidence on behalf of either side at any stage of the inquiry or trial, still he ought not to admit further evidence for the prosecution after the prosecution has closed its case and the accused has entered upon his defence, unless there be valid reasons which must be recorded—*Ganga*, 10 A.L.J. 383, 13 Cr.L.J. 772. Magistrates should exercise their discretion under this section very cautiously. Where after both sides had closed their respective cases, and after arguments were heard and the case posted for judgment, for a certain day, two witnesses who were named by the prosecution were summoned by Magistrate and examined under this section, *held* that the examination of the witnesses at such a

stage' could not be justified—*Natabar v. Adynath*, 27 C.W.N. 975, 37 C.L.J. 415, 75 I.C. 541, 24 Cr.L.J. 957; *Beni Madho v. Emp.*, 41 Cr.L.J. 816. No doubt the provisions of this section are very wide and a witness can be summoned and examined by the Court at any stage of an enquiry or trial, still it is not proper to examine witnesses under this section after a case is practically finished and without examining the accused again under section 342, Cr. P. C.—*Beni Madho v. Emp.*, supra. The Magistrate can summon and examine witnesses, at a late stage of the case, after the defence has closed, where it is necessary to meet the evidence of a witness who is suddenly sprung upon the prosecution; but it is improper to examine witnesses after the defence is closed, to bolster up the prosecution—*Radha Madhab*, 15 C.W.N. 414, 12 Cr.L.J. 7 (8). When the trial has been concluded so far that no witnesses remain to be examined on either side and the assessors have given their opinions; it is not open to the Sessions Judge to fish for witnesses under this section or to order for further inquiry to be made by the committing Magistrate—*Alual Khan*, 1892 P.R. 4. But if the evidence of the witness is *essential* to the proper decision of a case, the Court is bound to examine such witness even at a late stage, under the imperative provisions of the latter part of this section. And so a rebutting evidence was allowed to be brought on the record at the eleventh hour for the purpose of contradicting the evidence adduced on behalf of the defence—*Nayan Mandal*, 34 C.W.N. 170 (172). Where an essential document had been overlooked by the prosecution, it is the Judge's duty to have it admitted in evidence by recalling a witness at any stage of the trial—*Kesava Pillai*, 57 M.L.J. 681, 1929 Cr.C. 485. See Note 942 "Taking fresh evidence after opinion."

1412. Who may be examined:—Under the latter part of this section the Court is bound to summon and examine any witnesses whose evidence seems to be essential to the just decision of the case—*Ram Sarup Rai*, 6 C.W.N. 98. Discretion by sec. 540 is wide, but the section is not wholly discretionary. The last part of it imposes upon the Magistrate an obligation; it is, that the Court shall summon and examine all persons whose evidence appears to be essential to the just decision of the case. If the Magistrate is of opinion that the evidence of certain witnesses is essential, then the section imposes upon him the obligation of summoning them. Even if the evidence, though not essential, is yet expedient, then the Magistrate does not exceed his authority in putting these witnesses in the box—*Ibrahim*, 34 Cr.L.J. 591 (592), 143 I.C. 351, A.I.R. 1933 Sind 49, 1933 Cr.C. 175, Ind. Rul. 1933 Sind 128. The Court would not be bound to issue summons to witnesses, under this section, unless it is satisfied that their evidence will be very material—*Shakir Ali*, 19 All 502. When the committing Magistrate refuses to examine any witnesses mentioned in the list submitted to him under sec. 211, the Sessions Judge can under this section direct those witnesses to be summoned and examined—*Raja of Kantur*, 8 All 668; *Hayfield*, 14 All 212.

Magistrates are at liberty to summon witnesses who are resident outside the limits of their own districts—*Anonymous*, 2 Weir 713.

The Magistrate may summon and examine *any person* as a witness. The power to summon a witness is not limited to the witnesses cited for the prosecution or the defence—*Chetu*, 1886 P.R. 11. The Magistrate may examine the witnesses whom the defence had called and whom on reconsideration the defence decided not to examine—*Ibrahim*, supra. A person who had been suspected and charged with an offence but was afterwards discharged by the Magistrate for want of evidence, may be examined afterwards as a witness for the prosecution—*Behari Lal*, 7 W.R. 44. Where the prosecution declines to examine any witnesses, the Court may on its own initiative cause them to be produced and examine them under this section—*Satyendra*, 37 C.L.J. 173, 24 Cr.L.J. 193, A.I.R. 1923 Cal. 463. But the power of the Magistrate will not be exercised where the prosecut on has wantonly failed to examine the witness, and when the application to the Court to examine the witness as a Court witness is made after the whole case has closed—*Collett*, 1929 M.W.N. 395. Where the defence is based on section 84, I. P. C., the Sessions Judge may under this section ascertain the behaviour of the prisoner during the years previous to the homicide, and if he has been kept in a lunatic asylum

This section requires the presence of the accused "before the Court" as a condition precedent to an order dispensing with his attendance during the further proceedings—*Pokhar Das-Ganga Ram v. Emp.*, 39 Cr.L.J. 439, 174 I.C. 422, 10 R.L. 562, 40 P.L.R. 1, A.I.R. 1938 Lah. 216.

Normally, a trial in the absence of the accused is a nullity and it is only by virtue of this section that this consequence of the absence of the accused can be avoided: if the requirements of the section are not fulfilled, the trial remains a nullity. A joint trial is a single trial and cannot be considered as a separate trial of each person accused: it is one and indivisible. It follows that an illegality which vitiates the trial so far as one of the accused is concerned, prevents the trial from holding good in respect of the remaining accused. Where, therefore, one of the accused remains absent throughout the trial being granted an illegal exemption, the illegality vitiates the whole trial—*Pokhar Das-Ganga Ram v. Emp.*, supra.

541. (1) Unless, when otherwise provided by any law for the time being in force, the *Provincial Government* may direct in what place any person liable to be imprisoned or committed to custody under this Code shall be confined.

(2) If any person liable to be imprisoned or committed to custody under this Code is in confinement in a civil jail, the Court or Magistrate ordering the imprisonment or committal may direct that the person be removed to a criminal jail.

(3) When a person is removed to a criminal jail under subsection (2), he shall, on being released therefrom, be sent back to the civil jail, unless either—

- (a) three years have elapsed since he was removed to the criminal jail, in which case he shall be deemed to have been discharged from the civil jail under section 342 of the Code of Civil Procedure, 1882; or
- (b) the Court which ordered his imprisonment in the civil jail has certified to the officer in charge of the criminal jail that he is entitled to be discharged under section 341* of the Code of Civil Procedure, 1882.

Amendment:—The words "Provincial Government" have been substituted for "Local Government" by sec. 4 of the Government of India (Adaptation of Indian Laws) Order, 1937.

1414. Confinement of accused in police lock-up:—Under sec. 383, a Magistrate can direct that an accused person who is sentenced to imprisonment, shall be forwarded to a "jail," which means a prison. He has no power to sentence the accused to suffer imprisonment in a *police lock-up*. It is only the Local Government which can direct under sec. 541 that the person sentenced to imprisonment may be confined in a police lock-up—*Po Th'n.* 7 L.B.R. 62, 15 Cr.L.J. 10.

So also, an approver cannot be detained in police custody. If there is any Notifica-

* Now sec. 58 of the Civil Procedure Code, 1908 (Act V of 1908).

tion issued by the Local Government directing confinement of approvers in police custody, such Notification must be held to be *ultra vires*, because this section only empowers the Local Government to prescribe a place for the confinement of the persons mentioned therein and it cannot be invoked for the purpose of prescribing the custody in which he is to be kept—*In re Khairati*, 12 Lah. 635, 32 P.L.R. 493, 32 Cr.L.J. 913 (916), Ind. Rul. 1931 Lah. 615, 132 I.C. 519, 1931 Cr.C. 700, A.I.R. 1931 Lah. 476; *Kundan Lal*, Ind. Rul. 1931 Lah. 481, 131 I.C. 625, 1931 Cr.C. 625, A.I.R. 1931 Lah. 353, 12 Lah. 604, 32 P.L.R. 423, 32 Cr.L.J. 785 (788, 791).

Dividing imprisonment in different jails:—A Criminal Court passing a sentence of imprisonment cannot divide the imprisonment in different jails. From this section and sec. 63 (1), Prisons Act (IX of 1894), and the Prisoners Act of 1871, it is clear that the power of directing imprisonment to be undergone in different jails belongs to the Local Government and the Inspector-General of Prisons, and not to the Court passing the sentence—*Radha*, Ratanlal 827.

542. (1) Notwithstanding anything contained in the Prisoner's Testimony Act, 1869,* any Presidency Magistrate desirous of examining, as a witness or an accused person, in any case pending before him, any person confined in any jail within the local limits of his jurisdiction, may issue an order to the officer in charge of the said jail requiring him to bring such prisoner in proper custody, at a time to be therein named, to the Magistrate for examination.

(2) The officer so in charge, on receipt of such order, shall act in accordance therewith, and shall provide for the safe custody of the prisoner during his absence from the jail for the purpose aforesaid.

543. When the services of an interpreter are required by any Criminal Court for the interpretation of any evidence or statement, he shall be bound to state the true interpretation of such evidence or statement.

1415. When an interpreter is employed, a statement of an accused or the deposition of a witness should be recorded by the Court in the language in which the statement or deposition is conveyed to the Court by an interpreter—*Vambalee* 5 Cal. 826. It is not necessary to administer oath to an interpreter or to a witness. See sec. 5, Oaths Act (X of 1873). But the omission to administer oath only renders it necessary for the prosecution to prove that the interpretation of the deposition was made accurately; but the omission does not make the deposition inadmissible in evidence—*Rakkhal Chandra* 36 Cal. 808. Where a person (a Chinaman) who had taken an active part in the police investigation and was examined as a prosecution witness before the committing Magistrate and who was ready and willing to give evidence in the Sessions trial, was employed as an interpreter by the Sessions Court at the trial of the accused, who was also a Chinaman, *held* that the procedure was absurd and opposed to justice, and vitiated the trial—*Ah So*, 53 Cal. 659, 27 Cr.L.J. 805 (806).

544. Subject to any rules made by the Provincial Government, * * * any Criminal Court may, if it thinks fit, order payment, on the part of

Expenses of complainants and witnesses.

* See now the Prisoners' Act, 1900 (Act III of 1900).

Government, of the reasonable expenses of any complainant or witnesses attending for the purposes of any inquiry, trial or other proceeding before such Court under this Code.

Amendment:—The words "Provincial Government" have been substituted for "Local Government" by sec. 4 of the Government of India (Adaptation of Indian Laws) Order, 1937.

Section 544, and the Rules framed by the Local Government under this section, give a discretion to the Magistrate in the matter of expenses of complainants and witnesses, but such discretion should be exercised not arbitrarily but on sound judicial principles—*Ganesh*, 9 Bom.L.R. 353, 5 Cr.L.J. 329.

As the statute itself has given the power to make rules not to the High Court but to the Local Government, any rules made by the High Court would be *ultra vires*, especially if they are inconsistent with rules made by Government. The only fair interpretation of r. 1, Chap. 9, Vol. 3 of the Rules and Orders made by the Punjab Government under this section which makes no distinction between prosecution witnesses and defence witnesses is that Government by exercising its power of restriction, which it is authorized by this section, has limited the cases in which Magistrates may pay the expenses of witnesses to those mentioned in the rule. If the rule framed by the High Court lays down the contrary, that is to say, that ordinarily the expenses of witnesses are to be paid by Government in every warrant case, it is *ultra vires*—*Nanak Chand v. Suraj Parkash*, 40 Cr.L.J. 68 (69), 178 I.C. 468, A.I.R. 1938 Lah. 693, 40 P.L.R. 944, 11 R.L. 460 not following *Syed Habib v. Emp.* A.I.R. 1929 Lah. 23, 117 I.C. 667, 30 Cr.L.J. 814, Ind. Rul. 1929 Lah. 68, *Habib v. Mehdi Hussain*, 108 I.C. 907, 29 Cr.L.J. 459, 10 A.I.R. 87, *Ram Narain v. Emp.* A.I.R. 1932 Lah. 481, 139 I.C. 508, 1932 Cr.C. 619, 33 Cr.L.J. 761, 33 P.L.R. 811, Ind. Rul. 1932 Lah. 581, *Parshotam Das v. Emp.*, A.I.R. 1936 Lah. 919, 166 I.C. 128, 1936 Cr.C. 1007, 38 P.L.R. 1168, 9 R.L. 340 and *Kushi Muhammad v. Abdullah Khan*, A.I.R. 1937 Lah. 458, 170 I.C. 539, 38 Cr.L.J. 941, 39 P.L.R. 137, 10 R.L. 132. See Notes 840 and 848.

This section empowers the Court to order that the expenses of the complainant and his witness should be paid by the Government under proper circumstances. But it does not empower the Court trying a complaint to order that the diet money of a witness produced before it should be paid by the complainant. That power is vested in the Court under the general rules of the High Court. If the Court orders such payment, in accordance with such rules, the amount cannot be recovered under the provisions of sec. 547 as if it were a fine, but can be recovered by a suit in the Civil Court—*Kamal v. Paramasukh*, 29 C.W.N. 1033, A.I.R. 1926 Cal. 289, 90 I.C. 488.

It is entirely within the discretion of the Court which summons a witness to order how much expenses should be allowed to him and which party should pay it. In criminal cases the Court may within certain limits order the Government to pay the expenses of the complainant and witnesses. If a Court has ordered a certain sum to be paid to a witness and if he is aggrieved by that order and thinks that he has not been sufficiently paid it is open to him to approach a higher tribunal for the redress; but he cannot appeal to the Civil Court against the order nor can he sue the party or the Government for recovery of any additional amount, much less can he claim it from the presiding officer of the Court—*Purna Chandra v. Secy. of State*, A.I.R. 1937 Pat. 477 (478), 9 R.P. 455, 3 B.R. 361, 1937 P.W.N. 281, 167 I.C. 938, 18 P.L.T. 434.

545. (1) Whenever under any law in force for the time being, a Criminal Court imposes a fine or

Power of Court to pay expenses or compensation out of fine

confirms in appeal, revision or otherwise a sentence of fine, or a sentence of which fine

forms a part, the Court may, when passing judgment, order the whole or any part of the fine recovered to be applied—

(a) in defraying expenses properly incurred in the prosecution;

(b) in the payment to *any person* of compensation for *any loss or injury* caused by the offence, when substantial compensation is, in the opinion of the Court, recoverable by such person in a Civil Court; and

(c) *when any person is convicted of any offence which includes theft, criminal misappropriation, criminal breach of trust, or cheating, or of having dishonestly received or retained, or of having voluntarily assisted in disposing of, stolen property knowing or having reason to believe the same to be stolen, in compensating any bona fide purchaser of such property for the loss of the same, if such property is restored to the possession of the person entitled thereto.*

(2) If the fine is imposed in a case which is subject to appeal, no such payment shall be made before the period allowed for presenting the appeal has elapsed, or, if an appeal be presented, before the decision of the appeal.

Change:—Clause (b) has been slightly amended and clause (c) newly added, by sec 152 of the Cr P C. Amendment Act, XVIII of 1923. "Clause (m) makes it clear that compensation under sec 546 may be paid to *any person* by whom it would be recoverable in a Civil Court. The payment of compensation to an innocent purchaser of stolen property is provided for in clause (c) when the property is restored to the possession of the person entitled thereto"—*Statement of Objects and Reasons* (1914).

1416. Order when can be made:—An order of compensation can be made under this section when the Court imposes a fine. If the accused is discharged or acquitted and no fine is imposed, no order under this section can be passed—*In re Baste*, 22 Bom 717; *Govind Narayan*, Ratanlal 407. If the accused is convicted of theft and sentenced to imprisonment but no fine is imposed on him, the Court cannot order payment of compensation to the person whose property was stolen—*Bhura*, 26 Cr L J. 1495, 90 IC 151, AIR. 1926 Nag 89. Where a person is dealt with under sec 562 and no fine is imposed on him, the Court has no power to direct him to pay compensation to the other party—*Munney Mirza*, 25 Cr L J 1116, 81 IC 940, AIR. 1925 Oudh 110. In a proceeding under section 107, an order directing the accused to pay the costs of the complainant is *ultra vires*—*Sheo Prasad v Mahangoo*, 25 Cr L J 476, AIR. 1924 All 694, 77 IC 828. Where the Magistrate on convicting the accused under sec 14 of the Bombay Public Ferries Act, does not impose any fine but orders the sale of the boat of the accused and directs the compensation to be paid out of the sale-proceeds, the order is illegal—*Beera*, Ratanlal 688. Similarly, a compensation cannot be ordered to be paid out of the rents and profits of the property forfeited—*Nana Patlu*, Ratanlal 146. A Magistrate cannot, without imposing a substantive sentence of fine, order payment of compensation to the complainant—*Anonymous* 2 Weir 715. The proper course is to impose a fine, and out of the fine realised direct payment to the complainant of such amount as the Court thinks fit, having regard to the provisions of this section—*Mohesh v. Bholanath*, 3 C L R. 404.

What Court can award compensation:—Compensation may be awarded not only by trying Court, but also by the High Court in revision, see *Bishen v. Ismail*, 6 Bur L J. 81, 28 Cr L J. 757 (758).

A Police Patel's Court is not a "Criminal Court" and he cannot make an order of compensation under this section—*Ramja*, Ratanlal 317.

Order cannot be made after judgment:—The award of compensation should be a part of the sentence and order made upon a conviction of an offence, and should be founded upon a statement of the loss, damage or expenses ascertained at the trial—*Mittum*, 11 W.R. 53. The order should be made when passing judgment; after the judgment is passed, the Court becomes *functus officio* and has no further power to make any order under this section—*Nga Hlwe*, U.B.R. (1892-96) 80.

1417. Clause (a)—Expenses of the prosecution:—The award of costs should not exceed the actual costs of the complainant out of pocket—*Mohesh v. Bhola-nath*, 3 C.L.R. 405.

Expenses under this section do not include such expenses as are incurred in bringing the person of the offender before the Magistrate—*Ramaswamy*, Ratanlal 608. Where fine is imposed on a person for destroying land-marks, a portion of the fine so imposed cannot be ordered to be paid to the Amin for the purpose of paying the expenses of his deputation to restore the land-marks destroyed—*Moorut Laal*, 6 W.R. 93; such expenses are not expenses incurred in the prosecution. Subsistence allowances and cart hire for prosecution witnesses cannot be ordered to be paid by the accused—*Ma Pu*, U.B.R. (1892-95) 7. Court-fees and process fees are now provided for in sec. 546A.

Expenses under this section should be directed to be paid out of the amount of the fine imposed, and a separate order for such expenses is improper—*Saolairam*, Ratanlal 341; *Tukaram*, 4 Bom.L.R. 877. An order for expenses to be paid in addition of the fine is illegal—*Yamana Rao*, 24 Mad. 305; *Rajubhai*, 5 Bom.L.R. 126; *Dhanji*, Ratanlal 196. But the expenses mentioned in sec. 546A may be awarded in addition to fine.

If fine is partially realised:—In a cheating case the accused was fined Rs. 4,000, and the Judge ordered: "Out of the fine, if received, I direct that Rs. 3,000 be paid to prosecution witness No. 1". The full amount of Rs. 4,000 could not be realised out of the moveable properties of the accused; and thereupon the Judge ordered that the Government had a prior claim to Rs. 1,000, and that it was only in the event if there being a balance that the prosecution witness had any claim to the money. Held that the Judge's order did not mean that nothing should be paid to the prosecution witness unless the full amount of fine was recovered. It was open to the Judge to provide for the proportionate distribution of the amount realised, though he has not done so. The amount so far realised was ordered by the High Court to be paid to the prosecution witness—*Khaddam Venkata*, 2 L.W. 22, 16 Cr.L.J. 58 (59). The Magistrate sentenced accused A and B to pay fines of Rs. 30 and Rs. 80 respectively and directed that out of the fine, if recovered, Rs. 40 be paid as compensation to a defence witness. Accused B paid the fine of Rs. 80 but accused A did not pay the fine but suffered imprisonment in default. Held that the only reasonable construction of the order passed by the Magistrate was that, of the fine, if recovered, whether it be from A or B, the witness should be paid his compensation first and the balance of the fine should be credited to the Government—*Bhagwan-das Lalchand*, A.I.R. 1937 Sind 3, 38 Cr.L.J. 292, 166 I.C. 528, 9 R.S. 147.

1418. Clause (b)—Compensation:—Amount of compensation:—When compensation is awarded under this section, the distinction between clauses (a) and (b) of the section should be borne in mind; and it should be clearly stated in the order, whether the payment out of the fine is intended to defray the expenses incurred in the prosecution or to make compensation for the injury caused by the offence committed—*Mi Te*, U.B.R. (1892-96) 290. In awarding compensation, no sum in excess of the loss actually suffered by the complainant should be ordered to be paid. Where the accused was convicted of illegally demanding money, and was fined three times the amount of the illegal receipt, and the whole of the fine was ordered to be paid to the complainant, the order was held to be improper—*Maung Thin*, 5 L.B.R. 50, 10 Cr.L.J. 78. In a theft case, it is illegal to award compensation to the complainant in excess of the price of the property stolen from him—*Shib Das*, 1913 P.L.R. 335, 14 Cr.L.J. 659. This clause allows the Court to order the whole or part of the fine recovered to be applied in the payment to any person of compensation for any loss or injury caused by the offence,

"The offence" must be clearly the offence of which the accused has been convicted. It is not possible for the Court under these rules to award compensation for other offences which the accused may have committed but with which he has not been charged. Thus, where the accused was convicted of three offences of criminal breach of trust, as a servant, of money amounting in each case to Rs. 272-4-0 and was sentenced to two years' rigorous imprisonment and a fine of Rs. 2,000 in respect of one charge and to two years' rigorous imprisonment in respect of the other two charges, *held* that out of the fine paid, a sum not exceeding Rs. 272 should be paid to the complainant as compensation, although the accused might have misappropriated several thousand rupees—*Ram Prasad*, 36 Cr.L.J. 1030, 156 I.C. 957, A.I.R. 1935 Rang. 199, 1935 Cr.C. 741.

Where a complainant cannot recover substantial compensation in a Civil Court, compensation cannot be awarded to him under clause (b), but a sum may be awarded to him under clause (a) to defray the expenses of the prosecution—*Nga Tha Yin*, 15 Cr.L.J. 555 (Bur.); *J. M. Khan v. Emp.*, 38 Cr.L.J. 718, 169 I.C. 245, 9 R.R. 390, A.I.R. 1937 Rang. 192. Therefore, a Magistrate convicting a person under sec. 193, I.P.C., can only order the expenses properly incurred in the prosecution to be defrayed out of the fine, but no power to award compensation, because substantial compensation is not recoverable by a civil suit for perjury—*Mangulchand v. Mohan*, 14 N.L.R. 131, 15 Cr.L.J. 927, 47 I.C. 443. K had stated in his evidence in a civil suit where one D had sued him for dismissal from his post as Manager of K's mine, that he dismissed D because he had been informed that D had arranged to sell K's ore to one S, and had borrowed money on the strength of this from S. This statement was made in cross-examination and again in re-examination voluntarily. The statement was not true, and not believed in good faith by K to be true; for it was improbable and came from persons whom he had himself described as rascals and thieves, and was not in any way verified by him. *Held* that compensation for such defamation was not recoverable in a Civil Court and so the order for compensation under sec. 545 (1) (b), Cr.P.C., should be set aside and that it was no doubt a fit case under sub-sec (1) (a) of the same section—*J. M. Khan v. Emp.*, supra.

Where the accused was convicted and fined for being drunk on a public road, no compensation could be awarded to the constable who in arresting the accused had to struggle with him and in so doing lost his whistle and Rs. 5; because such compensation is not for injury caused by the offence committed—*Anonymous*, UBR (1892-96) 79. A Court cannot award compensation for alleged offences other than those which form the subject of the inquiry in the case in which the order is made—*Govind Narayan*, Ratanlal 407. Where the accused took his sister who was suffering from plague into town without informing the authorities and was thereupon convicted for an offence under sec. 188, I.P.C., no compensation could be awarded to the Municipality on account of the expenses incurred by it in disinfecting the house into which the accused brought the case of plague—*Rahimatkha*, Ratanlal 958. Where the offence is under the I.P.C., no compensation can be awarded under any other special law. Thus, where the accused was fined under sec. 379, I.P.C., for cutting trees in a field, and out of the fine recovered a reward of Rs. 5 was ordered to be paid to the complainant (under the Forest Act) for detecting the offence, it was held that the order of reward was illegal since the offence was under the I.P.C., and not under the Forest Act—*Vithu*, Ratanlal 873. See also *Bhikari*, Ratanlal 241.

1419. Who is entitled to compensation:—Heirs of the deceased:—Under the Code of 1882, compensation could only be awarded to the person injured; if a person was killed, it could be awarded to the heirs of the deceased (e.g. to the widow)—*Lutchmah*, 12 Mad. 352; *Yalla Sanguli Mamidi*, 21 Mad. 74. In *Morgan*, 36 Cal. 302 and *Saif Ali*, 1898 P.R. 17 (F.B.), the heirs of the deceased were awarded compensation. In the Punjab case, compensation was awarded on the ground that the loss of the husband's support affecting a widow prejudicially was an injury for which substantial compensation could be awarded by a Civil Court. See also *Kesar Singh* 10 P.R. 1878, which holds that where the complainant can recover damages in an action, he can

compensated under this section. The present amendment now makes it clear that compensation can be awarded to any person by whom it can be recovered in a Civil Court.

The amendment of this section in 1923 entitles a person to compensation if he can get damages in Civil Court for any loss or injury caused by the offence. Act XIII of 1855 defines such persons to be a wife, husband, parent and child, if any, of the person whose death has been caused. Reading the two sections together no doubt remains whatsoever that the mother is entitled to compensation when her son is killed by the accused who is convicted under sec 304A, I. P. C., and is sentenced to a fine—*Nur Sahibi*, 36 Cr.L.J. 1208, 157 I.C. 531, A.I.R. 1935 Pesh. 102, 1935 Cr.C. 854.

Where the person to whom the injury was directly caused, is dead, her heirs can only bring an action in a Civil Court for the recovery of damages under the Fatal Accidents Act (XIII of 1885). Consequently, an order under sec. 545 (1) (b), Cr. P. C., can only be passed if the heirs have the right to bring an action under Act XIII of 1885. No order of compensation can be made where no such right exists. Thus, where a woman with full knowledge and of her own free will consented to being attended by an unqualified midwife during her delivery and died and the midwife was convicted under sec. 304A, I. P. C., and sentenced to pay a fine of Rs 150, the maxim *volenti non fit injuria* applied and the woman would not have been entitled to damages in a suit against the midwife. Hence the order of compensation out of fine to the heirs of the woman made by the Magistrate was illegal and without jurisdiction—*Maung Sein*, 37 Cr.L.J. 199, 159 I.C. 1026, A.I.R. 1935 Rang 471, 1935 Cr.C. 1257.

In awarding compensation to the heirs of the person killed, the names of the heirs should be mentioned. An order of compensation of the 'nearest heirs,' without specifying who those heirs may be, is bad in law—*Chuha*, 1913 P.R. 18, 14 Cr.L.J. 522.

Where a person is convicted of enticing away a married woman, compensation may be awarded to the husband for injury done to his honour—*Alhoo*, 1878 P.R. 14; *Kesar Singh*, 1878 P.R. 10.

Compensation for injury caused to another:—Where the accused was charged with causing hurt to two persons, but was fined for causing injuries to one of them only, compensation out of the fine cannot be awarded to the other person—*Vobanna*, 2 Weir 718.

Refund of compensation:—Where a conviction is set aside on appeal and a refund of the fine levied is ordered, and the party who has received a portion of the money as compensation refuses to refund it, the only remedy lies in a Civil Court—*Anonymous*, 2 Weir 717. But in *Mutsuddi v. Mani Ram*, 19 All. 112, and other cases it has been held that the amount may be recovered by a process under sec. 547 and not necessarily by a Civil suit in a Civil Court. See Note 1422 under sec. 547.

Effect of acquittal in appeal:—The necessary consequence of the setting aside of the conviction is the setting aside of the sentence of which the necessary consequence is the extinguishment of the order made under sub-section (1), cl. (b) of this section—*Htanda Meah v. Anamale Chettyar*, A.I.R. 1936 Rang 247 (248), 37 Cr.L.J. 832, 163 I.C. 242, 1936 Cr.C. 523.

1420. Clause (c)—Bona fide purchaser of stolen property:—This clause has been newly added. Under the old law, it was held that when a person was convicted of theft, an order awarding compensation, out of the fine imposed, to the innocent purchaser of the stolen property was not authorised by this section—*Reddon*, 6 Mad. 286; *Anonymous*, 2 Weir 715; because the injury to the purchaser was not the consequence of the theft but of the invalid sale—*Marivappa*, 2 Weir 716. On a conviction of theft, the stolen property should be returned to the owner, but it was illegal to impose a condition that a portion of the fine imposed on the accused should be paid to the innocent purchaser. No such condition could be imposed on the return of the property to the owner—*Abdul*, 3 Bom.L.R. 449. When theft was proved, the stolen property was ordered to be restored to the rightful owner and not to the *bona fide* purchaser. The rule of English law protecting *bona fide* purchasers for value in market overt was not to be applied in India,

and on conviction of the accused the property with respect to which the theft was committed should be delivered to the original owner—*Nobo Kristo v Lall Chand*, 20 W.R. 38; *Faiz Muhammad*, 1908 P.R. 2, 7 Cr.L.J. 279. See also *Khairati Ram v. Budhu*, 1893 A.W.N. 61. In *Sawan*, 1878 P.R. 21, it was held, however, that when stolen property was in the hands of a *bona fide* purchaser, the proper order to be made was to leave it in his hands and the remedy of the complainant was to secure possession of the property in a Civil Court.

Under the present law, as provided by this clause, compensation will be awarded to the innocent purchaser.

The clause applies only to a purchaser and not to a mortgagee or pledgee; an innocent mortgagee or pledgee who has advanced money on the security of the stolen property will not be entitled to any compensation—*Rama*, Ratanlal 631; *Ramchandra*, 46 Bom. 893, 23 Cr.L.J. 341.

1420A. Appeal:—See Note 1137.

546. At the time of awarding compensation in any subsequent civil suit relating to the same matter, the Court shall take into account any sum paid or recovered as compensation under section 545.

Payments to be taken into account in subsequent suit.

'Take into account'—This expression does not mean that in a subsequent civil suit, at the time of awarding damages, the amount of compensation recovered under sec. 545 is to be deducted from the damages awarded in the suit—*Love v Hume*, 22 W.R. 336 (Civil).

546A. (1) Whenever any complaint of a non-cognizable offence is made to a Court, the Court, if it convicts the accused, may, in addition to the penalty imposed upon him, order him to pay to the complainant—

Order of payment of certain fees paid by complainant in non-cognizable cases.

- (a) the fee (if any) paid on the petition of complaint, or for the examination of the complainant, and
- (b) any fees paid by the complainant for serving processes on his witnesses or on the accused.

and may further order that, in default of payment, the accused shall suffer simple imprisonment for a period not exceeding thirty days.

(2) An order under this section may also be made by an Appellate Court, or by the High Court when exercising its powers of revision.

This section has been added by sec. 153 of the Cr. P. C. Amendment Act, XVIII of 1923. "It embodies the provisions of sec 31 of the Court Fees Act in order that greater prominence may be given to them"—*Statement of Objects and Reasons* (1914). The provision as to imprisonment in default of payment, and sub-section (2) did not occur in the Court Fees Act. Section 31 of the Court Fees Act has now been repealed by sec. 163 of the Cr. P. C. Amendment Act, XVIII of 1923.

1421. Scope of the section:—This section does not apply, and the costs of the complainant cannot be awarded, where the offence is not a non-cognizable one—*Nuruddin*, 25 Cr.L.J. 1161, 81 I.C. 985, A.I.R. 1925 Oudh 109.

In awarding costs the Court can take into consideration only the costs set out in clauses (a) and (b) of this section. The witness-fees should not be included :

costs—*Swee Ing v. Koon Han*, A.I.R. 1935 Rang. 163, 1935 Cr.C. 626, 156 I.C. 598, 36 Cr.L.J. 970. This section is limited in terms to process and petition-writers' fees—*Mohamed Cassim v. Thumby Sahib*, A.I.R. 1910 Rang. 33, 41 Cr.L.J. 392, 187 I.C. 77.

No order can be made under this section when the complainant did not incur any cost for the purposes mentioned in clauses (a) and (b) of this section—*Maung Po Hla*, A.I.R. 1935 Rang. 208, 36 Cr.L.J. 1018, 156 I.C. 980, 1935 Cr.C. 748.

If the complaint is not required by law to be stamped, the fact that the Court-fee has been illegally levied by the Court will not be a ground for ordering the accused to pay the fee on conviction—*Avji Naru*, 8 B.I.C.R. 22. Thus, no fee is leviable on a complaint by Municipal Officers, and the accused on conviction should not be ordered to pay the same—*Khajabhog*, 16 Mad. 423.

A proceeding under the Workmen's Breach of Contract Act is not a proceeding for an offence, and if in such a proceeding the workman admits the advance and repays the same, it is not open to the Magistrate to make him pay the complainant the Court-fee paid on the complaint—*Dhondur*, 6 Bom.L.R. 255.

If there are several persons convicted, the order of payment of the value of the Court-fee and process-fee should be joint and not several—*Sankara*, Bom. II. C. Cr. Rule, 1872.

The provisions of this section are not to be controlled by sec. 545; unlike sec. 545 the expenses awarded under this section are directed to be paid in addition to fine and not out of the fine imposed—*Yamuna*, 24 Mad. 305.

According to the Calcutta High Court, the order of payment of Court-fee is no part of the principal sentence in the case and is not to be treated as a fine added to a sentence of imprisonment so as to make the sentence appealable—*Madan Mandal*, 20 Cal. 687. But the Madras High Court holds that it is an integral part of the sentence—*Thangavelu*, 22 Mad. 153. See these cases cited in Note 1113 under section 413.

"May":—"We think the Court should not be bound to exercise the power conferred by this section in trivial cases, and we have accordingly used the word "may"—*Report of the Joint Committee* (1922).

547. Any money (other than a fine) payable by virtue of Moneys ordered to be any order made under this Code, and the paid recoverable as fines. method of recovery of which is not otherwise expressly provided for, shall be recoverable as if it were a fine.

The italicised words have been added by sec. 154 of the Cr. P. C. Amendment Act, XVIII of 1923. These words provide for the recovery of compensation under sec. 250, of costs under sec. 148 (3), and of the Court-fees and process-fees mentioned in sec. 516A.

1422. This section only provides a summary method of realising 'money payable' and these words cannot be stretched so as to include live stock or other goods—*Phumman*, 23 Cr.L.J. 157 (Lah.).

An order of refund of compensation paid to the complainant under sec. 545 may be enforced by process under this section. It is not necessary that the accused should bring a civil suit for recovery of the money—*Mutsuddi v. Mani Ram*, 19 All. 112; *Ishri v. Bakshi*, 6 All. 96; *Pola Varapa*, 7 Mad 563; *Ali Ahmad v. Nathu*, 1881 P.R. 14; *Ravji, Ratanlal* 213. Contra—*Anonymous*, 2 Weir 717.

Money ordered to be paid as compensation under sec. 250 is recoverable as if it were a fine—*Ram Chunder*, 33 Cr.L.J. 958, 140 I.C. 72, A.I.R. 1932 Pat. 301, Ind. Rul 1932 Pat. 290, 13 P.L.T. 536, 1932 Cr.C. 773. An order by the Appellate Court or High Court setting aside an award of compensation which was ordered to be paid under sec. 250 to the accused, must be deemed to be an order directing refund of the money; and the refund of the money is enforceable under this section as if it were a fine—*Hiranand*, 29 P.R. 1903, 2 P.L.R. 1904.

An order directing the complainant to pay the diet money of his witness can be passed not under this Code but under the rules of the High Court; consequently, it cannot be enforced under this section; the remedy of the witness to recover the money is by a civil suit—*Kamal v. Paramsukh*, 29 C.W.N. 1033 (see this case cited under section 544).

The methods of recovering fine are provided by section 386.

548. If any person affected by a judgment or order passed by a Criminal Court desires to have a copy of the Judge's charge to the jury or of any order or deposition or other part of the record, he shall, on applying for such copy be furnished therewith:

Provided that he pays for the same, unless the Court, for some special reason, thinks fit to furnish it free of cost.

1423. 'Affected by judgment, order', etc.:—A complainant whose complaint is dismissed is a person affected by the order of dismissal, and, therefore, he is entitled to ask for a copy of the Magistrate's order of discharge—*In re Abdul*, Ratanlal 305; *Bank of Bengal v. Dinonath*, 8 Cal. 166. But a 'charge' is not an order of a Criminal Court by which an accused person can be said to be affected within the meaning of this section, so as to entitle him to copies of deposition where the trial has not proceeded beyond the frame of charge and the examination of the prosecution witnesses—*Prag Sahu*, 1892 A.W.N. 140.

A third party, i.e., a member of the public who is not a party to the case, is not a person affected by a judgment or order, and is not entitled to apply for copies of deposition and judgment—*Pandurang Bhaial*, 34 Bom.L.R. 1445, 1932 Cr.C. 871, A.I.R. 1932 Bom. 636, 34 Cr.L.J. 141, 141 I.C. 338, Ind. Rul. 1933 Bom. 76. In this case the Secretary of the Lawyers' Association asked for a copy of the judgment of a case decided under the Criminal Law Amendment Act, and the application was refused. The Allahabad High Court, however, is of opinion that the expression "person affected by a judgment, or order" must not be narrowly construed, so as to include only a party to the judgment or order. The public, as a whole, are certainly affected by a judgment or a Court and have a right of access to the judgments of the Courts which express the law. At any rate, the father of the convicted person is certainly a person "affected by a judgment"—*Ladli Prasad*, 53 All. 724, 1931 A.L.J. 405, 32 Cr.L.J. 864, Ind. Rul. 1931 All. 487, 132 I.C. 327, 1931 Cr.C. 620, A.I.R. 1931 All. 364.

A convicted person is entitled to copies of all documents for which he applies and which he thinks necessary for his defence—*Shceb Prasad*, 14 W.R. 77.

Copies of the proofs only, or at least a summary of the evidence, which a new witness is expected to give, should be furnished by the prosecution within a reasonable time to the accused free of cost before a new witness is examined in the Sessions Court—*Dhondiba*, 36 Cr.L.J. 344, 153 I.C. 278, 36 Bom.L.R. 950, A.I.R. 1934 Bom. 487, 1934 Cr.C. 1413.

A report of the police of an investigation ordered under sec. 202 is a "part of the record" which should be furnished to the accused on his application—*Muthu Kumara Pillai*, 33 L.W. 570, 1931 Cr.C. 477, Ind. Rul. 1931 Mad. 510, 131 I.C. 174, 32 Cr.L.J. 689, 1931 M.W.N. 325, 1931 Cr.C. 477, A.I.R. 1931 Mad. 429. The record means a magisterial record. But the information which leads to an action under sec. 107 is often of the most varied and confidential nature and does not form "part of the record". The accused is not entitled to get a copy thereof—*Anantapadamanabh'ak*, 59 M.L.W. 784, 129 I.C. 70, 32 Cr.L.J. 217.

See also Notes 386B, 483A, 512A.

549. (1) The *Central Government* may make rules, consistent with this Code and the Army Act, *the Naval Discipline Act (29 & 36 Vict., c. 109)* and that Act as modified by the *Indian Navy (Discipline) Act, 1934*, and the *Air Force Act* or any similar law for the time being in force as to the cases in which persons subject to military, naval or air force law shall be tried by a Court to which this Code applies, or by Court-martial, and when any person is brought before a Magistrate and charged with an offence for which he is liable to be tried either by a Court to which this Code applies or by a Court-martial, such Magistrate shall have regard to such rules, and shall in proper cases deliver him, together with a statement of the offence of which he is accused, to the commanding officer of the regiment, corps, ship or detachment to which he belongs, or to the commanding officer of the nearest military, naval or air force station, as the case may be, for the purpose of being tried by Court-martial.

(2) Every Magistrate shall, on receiving a written application for that purpose by the commanding officer of any body of soldiers, sailors or airmen stationed or employed at any such place, use his utmost endeavours to apprehend and secure any person accused of such offence.

Amendments:—The words “and the Air Force Act,” “or air force” and “as the case may be” have been added by the Repealing and Amending Act, 1927 (Act X of 1927); and the other italicised words have been inserted by the Amending Act, 1931 (Act XXXV of 1931).

The words “Central Government” have been substituted for “Governor-General in Council” by section 4 of the Government of India (Adaptation of Indian Laws) Order, 1937.

550. Any police-officer may seize any property which may be alleged or suspected to have been stolen, or which may be found under circumstances which create suspicion of the commission of any offence. Such police-officer, if subordinate to the officer in charge of a police-station, shall forthwith report the seizure to that officer.

1424. If a Police officer has reason to suspect certain property to be stolen he must himself seize the property. He cannot order any other person to detain the same. And if such person fails to keep the property under his detention, he cannot be convicted of an offence under sec. 188, I P. C.—*Bithal*, 16 O.C. 371, 15 Cr.L.J. 177. This section gives the Police officer power to seize only the property suspected to be stolen; but it does not empower him to seize any other property which is mixed with the stolen one—1909 P.W.R. 14, 11 Cr.L.J. 99.

Where a property was seized by the police under this section, on suspicion of its being stolen property, and the Magistrate issued proclamation under sec. 523, without satisfying himself as to the claim of the person in whose possession the property was

found by the police, held that the Magistrate's action was not illegal, because it was not incumbent on him to satisfy himself as to any such claim. The person in whose possession the property was found had an opportunity of making good his claim to the Magistrate after issue of the proclamation—*Gangaram*, 2 S.L.R. 32, 10 Cr.L.J. 198 (199).

551. Police-officers superior in rank to an officer in charge of a police-station may exercise the same powers, throughout the local area to which they are appointed, as may be exercised by such officer within the limits of his station.

Powers of superior officers of Police.

There is no authority for the proposition that the word "may" in this section means "must"—*Mathuranath*, 33 Cr.L.J. 657 (662), 1932 Cr.C. 881, A.I.R. 1932 Cal. 850, 139 I.C. 89, Ind. Rul. 1932 Cal. 561.

552. Upon complaint made to a Presidency Magistrate or District Magistrate on oath of the abduction or unlawful detention of a woman, or of a female child under the age of sixteen years, for any unlawful purpose, he may make an order for the immediate restoration of such woman to her liberty, or of such female child to her husband, parent, guardian or other person having the lawful charge of such child, and may compel compliance with such order, using such force as may be necessary.

Power to compel restoration of abducted females.

Change:—The word "sixteen" has been substituted for "fourteen" by the Criminal Law Amendment Act, XVIII of 1924, for the purpose of affording greater protection to girls. By the same Act, the age limit has been raised from sixteen to eighteen in sections 372 and 373, I. P. Code.

Scope of the section:—The District Magistrate can only act under this section where there is a complaint before him on oath of the abduction or unlawful detention of a woman or of a female under the age of 16 years—*Moti v Beni*, A.I.R. 1936 All. 852, 1936 A.W.R. (H.C.) 920, 1936 A.L.J. 1097, 1936 Cr.C. 1111, 166 I.C. 847. The only order which the District Magistrate can pass under this section is one directing the restoration of a woman or of a female child under the age of 16 years. But the order of the District Magistrate to produce her before him is not an order under this section. There is nothing in this section which requires service of the order on any person. The order is one capable of execution, and the section lays down that the Magistrate "may compel compliance with such order using such force as may be necessary." Once an order under this section has been passed, it is open to the Magistrate to use all lawful means to have the woman restored to her liberty. For that end he may legally issue an appropriate direction to some other person in whose custody the woman may be—*Abdul Jalil Khan*, A.I.R. 1936 All. 354, 1936 A.L.J. 373, 37 Cr.L.J. 713, 162 I.C. 755, 1936 Cr.C. 418.

The main purpose of this section is to protect women and girls from detention for immoral purposes, although no doubt the section would be appropriate to cases where the purpose of the detention is clearly unlawful though not necessarily immoral. Taking the word 'unlawful' in its ordinary meaning of 'contrary to or prohibited by law' there cannot be much difficulty in particular cases in determining whether the purpose is or is not unlawful. In these matters the Legislature by section 25, Guardians and Wards Act, has provided full powers for orders to be made for the custody of minors. The powers given to District Magistrate by this section are exceptional powers to be used with caution and only when the conditions of the section are satisfied. It may be that the Magistrate considers that the course he follows is that which

would be followed by the District Court upon an application made by the applicant under sec. 25, Guardians and Wards Act. But this is no reason for him to assume a jurisdiction which in the absence of allegations of unlawful purpose, he does not possess, and he should not strain this section, even with the best of intentions, to give a relief which it is the function of another Court to grant—*Om Radhe v. Emp.*, 40 Cr.L.J. 698 (700), 182 I.C. 710, I.L.R. 1939 Kar. 760, 12 R.S. 28, A.I.R. 1939 Sind 152.

1425. Unlawful detention:—The detention of a child in a missionary school, against the will of her parent or guardian with a view that she should be brought up in a religion which such parent or child disapproved of and the adoption of which would not only involve a total change in the child's mode of life, but would also deprive the parent or guardian of any control in the education or bringing up of the child, would amount to unlawful detention—*Abraham v. Mahtaba*, 16 Cal. 487.

The detention of a girl by the father in his house against the will of her husband does not amount to unlawful detention, unless it is shown that the detention was contrary to the wish of the girl—*Nathu v. Nari Lal*, 15 Cr.L.J. 712 (Cal.). If a woman is residing with her relatives who are aiding her in endeavouring to procure a divorce, such detention is not unlawful—*Syed Umar v. Syed Dastood*, 2 Weir 724.

Unlawful purpose:—A Magistrate can act under this section when both the detention and the purpose are unlawful. In *Abraham v. Mahtaba*, 16 Cal. 487 cited above the detention was held to be unlawful, but the purpose was not. Unlawful purpose means immoral purpose. This section applies to female children only, and not to children generally; this shows that the purpose has some special reference to the sex of the person against whom it is entertained. In other words, the section has reference to adultery, concubinage, prostitution, deflowering or other similar purposes. But it certainly does not include the detention of a Hindu girl in a Christian Institution in order that she may be a Christian, or the detention of a Christian child in a Mahomedan Institution in order that she may be a Mahomedan—*Abraham v. Mahtaba*, 16 Cal. 487. The purpose contemplated in this section must be in itself an unlawful purpose. It does not include purposes, which although not unlawful in themselves might become so when entertained towards a child in opposition to the wishes of its guardian—*Thakordas v. Bhagwandas*, 4 Bom.L.R. 609.

If the unlawful detention is for a purpose which is an offence or is legally prohibited or which is a civil wrong it would constitute an unlawful purpose under this section. Tested in this light the detention by a father of his minor married daughter contrary to the wish of her husband with the object to remarry her would clearly constitute unlawful detention for an unlawful purpose because bigamy is declared an offence by section 494, I. P. Code. If the girl is being detained by her father contrary to her own wish such detention would fall within the purview of sec. 339, I. P. C., and would equally be detention for an unlawful purpose. Since the unlawful detention of minor wife by her father *prima facie* affords a cause of action to the husband to recover possession of his wife by a civil action, the purpose of such detention would likewise be unlawful within the meaning of this section—*Tulsidas v. Chetandas*, A.I.R. 1933 Nag. 374 (377), 16 N.L.J. 310, 1933 Cr.C. 1573. The question whether an order under this section should issue or not depends entirely on the question of the age of the girl who is living in another man's house with her consent but against the will of her mother who is lawfully entitled to have charge of her—*Ma Ngwe v. Maung Ye*, A.I.R. 1935 Rang 494, 37 Cr.L.J. 278, 160 I.C. 282, 1935 Cr.C. 1269.

The jurisdiction conferred by this section depends upon two factors. There must be, in the first place, an unlawful detention and secondly that unlawful detention must be for an unlawful purpose. Where, therefore, the mother originally handed over the daughter to the society for the protection of children in India and asked them to take charge of her and asked the society to send the girl back to her, on receipt of letters from the girl asking to be brought back and to be married and the society refused to send her back, the purpose of the society to whom the girl had been entrusted in the first place by her mother for the purpose of housing and care could not be

termed "unlawful" within the meaning of this section and an order for restoration of the girl to her mother could not be passed under this section—*Sccy., S. P. C. v. Archana Das*, 43 C.W.N. 362 (363).

1426. Procedure:—It is the District Magistrate who alone has jurisdiction to entertain a complaint and make an order under this section. He has no power to transfer such a case to a Sub-Magistrate, and that Magistrate would have no jurisdiction therein—*Bai Dahi v. Jagwan, Ratanlal* 963.

An application under this section does not necessarily allege the commission of an offence, and is not a complaint; consequently the provisions of secs. 200 and 203 do not apply to proceedings under this section—*Thakordas v. Bhagwandas*, 4 Bom L.R. 609; *Tulsidas v. Chetandas*, supra. All that appears necessary to take action under the section is to examine the applicant on oath in support of his complaint of the unlawful detention of a woman or a minor girl, as the case may be, for an unlawful purpose, and issue a notice to the non-applicant to show cause against the complaint and to produce the woman or the girl before the Court to be dealt with according to law. This is the procedure adopted in cases under sec. 491, Cr. P. C., and this procedure should be followed in cases falling under this section—*Tulsidas v. Chetandas*, supra. A person proceeded against under this section is not in the position of an accused person, and may offer himself as a witness in the proceeding; see section 340.

Under this section the Magistrate should have the statement on oath of the complainant. If no such statement is taken, that may be a defect in his procedure and may vitiate any order which he may pass for the restoration of the woman. The omission has, however, no effect on the order for the prosecution of the complainant under sec. 182, I. P. C., for the offence under that section is complete as soon as the information is given—*Dalpat Rai v. Emp.*, 37 Cr.L.J. 857 (858), 163 I.C. 609, A.I.R. 1936 All. 469, 1936 Cr.C. 614, 1936 A.L.J. 592, 1936 A.L.R. 620, 9 R.A. 42.

Where a Magistrate has reason to believe that a woman is unlawfully detained but cannot find who so detains her, the proper course is for the Magistrate to issue an order to have the woman brought before him and to examine her; it would be illegal for the Magistrate in such a case to order the restoration of the woman to liberty without any finding that she was unlawfully detained by any one and without ordering any one to restore her to liberty—*Syed Umar v. Syed Davood*, 2 Weir 724.

An application to get back a girl from her father's custody on the allegation that she is the wife of the applicant must be made to a Civil Court and not to the Magistrate under this section—*Chenga Molla v. Masir*, 10 C.W.N. lxxv.

This section provides for an order of restoration. No doubt, such an order can be enforced by warrant if necessary, but in many cases an order will meet the purpose and the Magistrate should not make an order for the *ex parte* issue of warrant—*Om Radhe v. Emp.*, 40 Cr.L.J. 698 (700), 182 I.C. 710, I.L.R. 1939 Kar 760, 12 R.S. 28, A.I.R. 1939 Sind 152.

Nature of the order:—Where the Magistrate ordered restoration of a girl to her mother and directed that the mother must give a guarantee from a responsible Government officer holding gazetted rank that the best interests of the girl would be looked after by the mother, the second portion of his order is entirely without jurisdiction. No such direction is contemplated by this section—*Sccy., S. P. C. v. Archana Das*, 43 C.W.N. 362.

553. (1) Whenever any person causes a police-officer to arrest another person in a presidency-town, if it appears to the Magistrate by whom the case is heard that there was no sufficient ground for causing such arrest, the Magistrate may award such compensation, not exceeding fifty rupees

Compensation to persons groundlessly given in charge in Presidency-town.

would be followed by the District Court upon an application made by the applicant under sec. 25, Guardians and Wards Act. But this is no reason for him to assume a jurisdiction which in the absence of allegations of unlawful purpose, he does not possess, and he should not strain this section, even with the best of intentions, to give a relief which it is the function of another Court to grant—*Om Radhe v. Emp.*, 40 Cr.L.J. 698 (700), 182 I.C. 710, I.L.R. 1939 Kar. 760, 12 R.S. 28, A.I.R. 1939 Sind 152.

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The detention of a girl by the father in his house against the will of her husband does not amount to unlawful detention, unless it is shown that the detention was contrary to the wish of the girl—*Nathu v. Nari Lal*, 15 Cr.L.J. 712 (Cal.). If a woman is residing with her relatives who are aiding her in endeavouring to procure a divorce, such detention is not unlawful—*Syed Umar v. Syed Davood*, 2 Weir 721.

Unlawful purpose:—A Magistrate can act under this section when both the detention and the purpose are unlawful. In *Abraham v. Mahtaba*, 16 Cal. 487 cited above the detention was held to be unlawful, but the purpose was not. Unlawful purpose means immoral purpose. This section applies to female children only, and not to children generally; this shows that the purpose has some special reference to the sex of the person against whom it is entertained. In other words, the section has reference to adultery, concubinage, prostitution, deflowering or other similar purposes. But it certainly does not include the detention of a Hindu girl in a Christian Institution in order that she may be a Christian, or the detention of a Christian child in a Mahomedan Institution in order that she may be a Mahomedan—*Abraham v. Mahtaba*, 16 Cal. 487. The purpose contemplated in this section must be in itself an unlawful purpose. It does not include purposes, which although not unlawful in themselves might become so when entertained towards a child in opposition to the wishes of its guardian—*Thakordas v. Bhagwandas*, 4 Bom.L.R. 609.

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The jurisdiction conferred by this section depends upon two factors. There must be, in the first place, an unlawful detention and secondly that unlawful detention must be for an unlawful purpose. Where, therefore, the mother originally handed over the daughter to the society for the protection of children in India and asked them to take charge of her and asked the society to send the girl back to her, on receipt of letters from the girl asking to be brought back and to be married and the society refused to send her back, the purpose of the society to whom the girl had been entrusted in the first place by her mother for the purpose of housing and care could not be

termed "unlawful" within the meaning of this section and an order for restoration of the girl to her mother could not be passed under this section—*Secy., S. P. C. v. Archana Das*, 43 C.W.N. 362 (363).

1426. Procedure:—It is the District Magistrate who alone has jurisdiction to entertain a complaint and make an order under this section. He has no power to transfer such a case to a Sub-Magistrate, and that Magistrate would have no jurisdiction therein—*Bai Dahi v. Jagivan, Ratanlal* 963.

An application under this section does not necessarily allege the commission of an offence, and is not a complaint; consequently the provisions of secs. 200 and 203 do not apply to proceedings under this section—*Thakordas v. Bhagandas*, 4 Bom L.R. 609; *Tulsidas v. Chetandas*, supra. All that appears necessary to take action under the section is to examine the applicant on oath in support of his complaint of the unlawful detention of a woman or a minor girl, as the case may be, for an unlawful purpose, and issue a notice to the non-applicant to show cause against the complaint and to produce the woman or the girl before the Court to be dealt with according to law. This is the procedure adopted in cases under sec. 491, Cr. P. C., and this procedure should be followed in cases falling under this section—*Tulsidas v. Chetandas*, supra. A person proceeded against under this section is not in the position of an accused person, and may offer himself as a witness in the proceeding; see section 340.

Under this section the Magistrate should have the statement on oath of the complainant. If no such statement is taken, that may be a defect in his procedure and may vitiate any order which he may pass for the restoration of the woman. The omission has, however, no effect on the order for the prosecution of the complainant under sec. 182, I. P. C., for the offence under that section is complete as soon as the information is given—*Dalpat Rai v. Emp.*, 37 Cr L J. 857 (858), 163 I.C. 609, A I.R. 1936 All 469, 1936 Cr C. 614, 1936 A L J 592, 1936 A L R. 620, 9 R.A. 42.

Where a Magistrate has reason to believe that a woman is unlawfully detained but cannot find who so detains her, the proper course is for the Magistrate to issue an order to have the woman brought before him and to examine her; it would be illegal for the Magistrate in such a case to order the restoration of the woman to liberty without any finding that she was unlawfully detained by any one and without ordering any one to restore her to liberty—*Syed Umar v. Syed Duwood*, 2 Weir 724.

An application to get back a girl from her father's custody on the allegation that she is the wife of the applicant must be made to a Civil Court and not to the Magistrate under this section—*Chenga Molla v. Masir*, 10 C.W.N. lxxv.

This section provides for an order of restoration. No doubt, such an order can be enforced by warrant if necessary, but in many cases an order will meet the purpose and the Magistrate should not make an order for the *ex parte* issue of warrant—*Om Radhe v. Emp.*, 40 Cr L J 698 (700), 182 I C 710, I L R 1939 Kar 760, 12 R.S. 28, A I R. 1939 Sind 152.

Nature of the order:—Where the Magistrate ordered restoration of a girl to her mother and directed that the mother must give a guarantee from a responsible Government officer holding gazetted rank that the best interests of the girl would be looked after by the mother, the second portion of his order is entirely without jurisdiction. No such direction is contemplated by this section—*Secy., S. P. C. v. Archana Das*, 43 C.W.N. 362.

553. (1) Whenever any person causes a police-officer to arrest another person in a presidency-town, if it appears to the Magistrate by whom the case is heard that there was no sufficient ground for causing such arrest, the Magistrate may award such compensation, not exceeding fifty rupees,

Compensation to persons groundlessly given in charge in Presidency-town.

to be paid by the person so causing the arrest to the person so arrested, for his loss of time and expenses in the matter, as the Magistrate thinks fit.

(2) In such cases, if more persons than one are arrested, the Magistrate may, in like manner, award to each of them such compensation, not exceeding fifty rupees, as such Magistrate thinks fit.

(3) All compensation awarded under this section may be recovered as if it were a fine, and, if it cannot be so recovered, the person by whom it is payable shall be sentenced to simple imprisonment for such term not exceeding thirty days as the Magistrate directs, unless such sum is sooner paid.

554. (1) *With the previous sanction of the Provincial Government, any High Court established by Royal Charter may, from time to time, make rules for the inspection of the records of subordinate Courts.*

(2) *Every High Court not established by Royal Charter may, from time to time, and with the previous sanction of the Provincial Government,—*

- (a) make rules for keeping all books, entries and accounts to be kept in all Criminal Courts subordinate to it, and for the preparation and transmission of any returns or statements to be prepared and submitted by such Courts;
- (b) frame forms for every proceeding in the said Courts for which it thinks that a form should be provided;
- (c) make rules for regulating its own practice and proceedings and the practice and proceedings of all Criminal Courts subordinate to it; and
- (d) make rules for regulating the execution of warrants issued under this Code for the levy of fines:

Provided that the rules and forms made and framed under this section shall not be inconsistent with this Code or any other law in force for the time being.

(3) All rules made under this section shall be published in the *Official Gazette*.

Amendment:—The words "With the previous sanction of the Provincial Government, any High Court", "Provincial Government" and "Official Gazette" have been substituted for "With the previous sanction of the Governor General in Council, the High Court at Fort William, and with the previous sanction of the Local Government, any other High Court," "Local Government" and "local official Gazette" respectively by the Government of India (Adaptation of Indian Laws) Order, 1937.

555. Subject to the power conferred by section 554, and by section 224 of the Government of India Act 1935, the forms set forth in the fifth schedule, with such variation as the circumstances of each case require, may be used for the respective purposes therein mentioned, and if used shall be sufficient.

Forms.

Amendment:—The words "section 224 of the Government of India Act, 1935" have been substituted for "section 107 of the Government of India Act, 1915" by the Government of India (Adaptation of Indian Laws) Order, 1937.

1427. "With such variation":—There being no prescribed form of warrant under sec. 100, a Magistrate who had to issue one under that section adapted a form under sec. 96 to the provision of sec. 100 by altering the figures and by drawing up the warrant in terms required by sec. 100. It was held that the warrant was perfectly legal—*Mozam Molla*, 45 Cal. 905 See also Note 205 under section 100.

556. No Judge or Magistrate shall, except with the permission of the Court to which an appeal lies from his Court, try or commit for trial any case to or in which he is a party or personally interested, and no Judge or Magistrate shall hear an appeal from any judgment or order passed or made by himself.

Case in which Judge or Magistrate is personally interested.

Explanation.—A Judge or Magistrate shall not be deemed a party, or personally interested, within the meaning of this section, to or in any case by reason only that he is a Municipal Commissioner or otherwise concerned therein in a public capacity, or by reason only that he has viewed the place in which an offence is alleged to have been committed or any other place in which any other transaction material to the case is alleged to have occurred, and made an inquiry in connection with the case.

Illustration.

A, as Collector, upon consideration of information furnished to him, directs the prosecution of B for a breach of the Excise Laws. A is disqualified from trying this case as a Magistrate.

1428. Principle and scope of section:—It is one of the oldest and plainest rules of justice and common sense that no man shall sit as a Judge in a case in which he has any interest—*Bholanath Sen*, 2 Cal 23 It is an unshaken doctrine of human jurisprudence that no man can be judge in his own case (*Name debet esse iudex in propria sua causa*). This maxim rests not upon any suspicion as to the honesty of the Judge or his capacity for the purposes of adjudication, but it rests upon a thing higher than the technicalities of law It rests upon the philosophy that says that human beings are after all human beings, and with all honour due to the honesty and integrity of the Judge, they are not to hear cases in which they are themselves concerned—*Pohpn*, 13 All. 171 (174) "The law in laying down this strict rule had regard not so much to the motives which might be supposed to bias the Judge as to the susceptibilities of the litigant parties. One important object, at all events, is to clear away everything which might engender suspicion and distrust in the tribunal and to promote the feelings of confidence in the administration of justice which is so essential to social order and security"—*Serjeant v. Dale*, 2 QBD. 558 (567).

exercising his judicial functions in relation to the offences imputed—*Venkana*, Ratanlal 339. So also, a Magistrate, who was one of the persons obstructed by the accused driving on the wrong side of the road, could not himself try the accused for offences under sections 28 and 29 of the Bombay Act VII of 1867—*Lahana*, Ratanlal 321.

1429. Personally interested:—The words 'personally interested' do not imply mere intellectual interest but something of the nature of an expectation of advantage to be gained, or of a loss or some disadvantage to be avoided, by the person who is said to be interested in the case—*Cholappa*, 8 Bom L.R. 947, 5 Cr L.J. 2. Thus, a public officer whose duty it is to see that the law is obeyed cannot, merely by reason of that duty, be said to be personally interested in the prosecution and trial of an offender—*Ganeshi*, 15 All. 192, 1893 A.W.N. 79. The words 'personally interested' cannot refer to any remote interest in the matter, but must refer to some particular and immediate personal interest in the case and its result—*Ganeshi*, 15 All. 192, 1893 A.W.N. 79. The law does not measure the amount of interest which a Judge possesses. If he has any personal pecuniary interest in the decision of the question one way, he is disqualified, no matter how small the interest may be—*Dimes v. Proprietors of Grand Junction Canal*, (1852) 3 H.L.C. 759; *R. v. Recorder of Cambridge*, (1857) 8 El. & Bl. 637, 112 R.R. 724; *R. v. Hammond*, (1864) 9 L.T. 423, 140 R.R. 824; *Serjeant v. Dale*, 2 Q.B.D. 558.

It is not a mere interest in a case or in the circumstances of the case which disqualifies a Magistrate or a Judge from trying a case but that which disqualifies him must be "a substantial interest giving rise to a real bias and not merely to a possibility of a bias". The interest—where not pecuniary—must be substantial so as to make it likely that the justice has a real bias and the mere possibility of bias is not sufficient to disqualify—*Mg Po Kywe v The King*, 40 Cr L.J. 621 (624), 182 I.C. 63, 11 R.R. 510, 1939 Rang L.R. 251, AIR 1939 Rang 152, following *Ganeshi*, supra; *Reg v. Handsley*, (1882) 8 Q.B.D. 383, 51 L.J.M.C. 137, 30 W.R. 368, 46 J.P. 119 and *Reg v. Meyer*, (1876) 1 Q.B.D. 173, 34 L.T. 246, 24 W.R. 392.

If a case is tried by a Board of Magistrates, and one of the Magistrates has a substantial interest in the case which disqualifies him from acting as Judge, the conviction will be set aside—*Bholanath Sen*, 2 Cal 23. But if a Bench requires the presence of two members only as a quorum, but the trial is commenced by four members, of which two are related to the complainant, and no objection being taken the District Magistrate orders the trial to be concluded by the remaining two, the trial and conviction are not illegal—*Balbhadri v. Tribhuban*, 3 N.L.R. 67, 6 Cr L.J. 43 (44).

... ..

against the accused and himself tried and convicted them, it was held that the Magistrate should not have tried the case himself as he had initiated and directed the whole proceedings and could be said to have been personally interested in them—*Girish Chunder*, 20 Cal 857. Where the investigation of the police at the preliminary inquiry was directed by a Magistrate to a considerable degree and where the Magistrate himself traced some of the accused and ordered their arrest, he was disqualified from trying the case—*Sudhama*, 23 Cal 328. A Magistrate who takes more than a formal part in a police investigation should not try the case—*Nga Po*, 4 Bur.L.J. 65, 26 Cr L.J. 1317.

(2) Magistrate being a witness:—A Magistrate cannot, in a case in which he is the sole Judge of law and fact, be a competent witness. The trial and conviction by a Magistrate of an accused in a case where he (the Magistrate) is himself a witness is illegal—*Donnelly*, 2 Cal 405; *Mangni Lal*, 20 Cr L.J. 45, 48 I.C. 685 (Pat.); 1901 P.L.R. 21. A Magistrate cannot import matters (e.g. personal knowledge) into his judgment not stated on oath before the Court in the presence of the accused. If he does so he makes himself a witness in the case, and renders himself incompetent to try it—*Mangni Lal*, 48 I.C. 685, 20 Cr L.J. 45 (Pat.); *Girish Chunder*, 20 Cal 857. A Magistrate

becomes aware of some of the facts in connection with a case by his taking some part, or at any rate of being present, at a search made by the police during the investigation, should not try the case but transfer it to some other Magistrate—*Gya Singh v. Mohamed Saliman*, 5 C.W.N. 864. An officer should not try an offence under sec. 174, I. P. C., in his capacity as a Magistrate, when the offence has been committed before him in his capacity as a Settlement Officer—*Sukhari*, 2 All. 405. But the mere fact that the accused examines the trying Magistrate as a defence witness does not in any way prevent him from trying the case; for, it would be a most dangerous finding to hold that an accused person could upset the decision against him by the simple expedient of calling the Magistrate who was trying the case as a formal defence witness—*Javed Husain*, 2 Luck. 503, 28 Cr.L.J. 673 (674), 103 I.C. 401, A.I.R. 1927 Oudh 296. See also *Lal Hari Har Bakhsh Singh*, 28 Cr.L.J. 65, 99 I.C. 97, 3 O.W.N. 914, A.I.R. 1927 Oudh 31. If during the course of the trial, the Magistrate himself made a statement on oath which he recorded, and permitted himself to be cross-examined and re-examined, it was held that he was not incompetent to try the case—*Nanke*, 27 All. 33, 1904 A.W.N. 157; *Mohammad Jan*, 27 Cr.L.J. 1193, 97 I.C. 953, 3 O.W.N. 178 (Sup.), A.I.R. 1926 Oudh 557.

The mere fact that the Magistrate has merely held an identification parade and has thus made himself a witness in the case does not debar him from holding the commitment proceedings—*Bhola Ram*, 13 Lah. 461, 1932 Cr.C. 217 (219), 33 Cr.L.J. 188, 135 I.C. 675, 33 P.L.R. 641, A.I.R. 1932 Lah. 196, Ind. Rul. 1932 Lah. 147; *Ram Prosad*, A.I.R. 1927 Oudh 369 (377), 106 I.C. 721, 2 Luck. 631, 1 I.C. 721. Ordinarily, in such a case, his evidence would be taken for the first time in the Court of Session and the method adopted would be to call him as a Court witness. But if, in order to give the defence a better opportunity of preparing their criticisms, the Magistrate takes the unusual course of going into the witness-box during the committal proceedings, there is nothing objectionable to the course adopted by him—*Ram Prosad*, supra, following *Nanke*, 27 All. 33, 1904 A.W.N. 157. But it certainly would appear to be open to objection for a Magistrate to decide on the value of his own evidence—*Ram Prosad*, supra. See also *Ram Jatan*, 25 Cr.L.J. 665, 81 I.C. 153, 21 A.L.J. 420, A.I.R. 1924 All. 185.

It is wrong that a Magistrate who takes the dying deposition should record the evidence in the committal Court. It means that the accused is in that Court precluded from questioning the Magistrate as to what happened when the dying deposition was taken—*Nga Chit So v. The King*, A.I.R. 1937 Rang. 467, 172 I.C. 197, 39 Cr.L.J. 117.

A Magistrate does not, by reason of his having heard the statements made by the accused in open Court when he was brought up before him under the warrant and not recorded by the Magistrate under sec. 364, Cr. P. C., made himself a witness in the case and thereby disqualify himself from trying the case—*Q.E. v. Fallah Chand*, 24 Cal. 499 (502).

(3) **Pecuniary interest:**—If a Judge has any pecuniary interest, however small, in the result of the proceedings, it is against public policy that he should take part in the proceedings; he is disqualified from trying the case and the Court will not inquire whether he was really biassed or likely to be biassed—*Allison v. General Council of Medical Education*, (1894) 1 Q.B. 750, 70 L.T. 471; *Shamdasani*, 53 Bom. 716, 31 Bom.L.R. 925, 122 I.C. 141, 31 Cr.L.J. 383, A.I.R. 1929 Bom. 404, 1929 Cr.C. 433 (434); *Rodrigues*, 20 Bom. 502. Thus, a Magistrate who is a shareholder of the Company against whose auditors a prosecution is started under sec. 282, Companies Act, must be deemed to be personally interested, and cannot try the case—*Shamdasani*, supra. A Magistrate who is a shareholder of the company which is the complainant in the case is disqualified from trying a case. In such a case, it is not necessary to inquire whether there was any real or substantial ground for suspecting bias on his part—*Rodrigues*, 20 Bom. 502. See also *Bholanath Sen*, 2 Cal. 23. A Magistrate should

not entertain a criminal case in which persons indebted to him are concerned either as complainants or as accused—*C. P. Cr.*, Part II, No. 59.

(4) Judge or Magistrate being complainant:—It is impossible to allow the same Judge or the Magistrate to be the complainant and the Court. If a Sessions Judge makes a complaint under sec. 476A, he cannot hear an appeal in the case. The accused is entitled to a decision from a Judge who approaches the case with an absolutely open mind—*Sai*, 8 Lah. 496, 29 Cr.L.J. 6 (7), 106 I.C. 342, 28 P.L.R. 688, A.I.R. 1927 Bom. 35. See also *Hiralal*, in Note 1430. But see *Sessions Judge of Bhandara v. Pandia*, 25 Cr.L.J. 171, 76 I.C. 395, A.I.R. 1924 Nag. 23, 26 Cr.L.J. 1481, 89 I.C. 1049.

When during the hearing of a sessions case the Sessions Judge came to the conclusion that a prosecution witness ought to have been charged as a receiver of stolen property and ordered him to be arrested and produced before a Magistrate to be put on trial for the same offence and the Magistrate committed him to the Court of Session for trial, held that the Sessions Judge ought not to have tried the case without the permission of the appellate Court as he was the complainant and that there was a technical defect more serious than could be overlooked—*Rahumbux*, A.I.R. 1935 Sind 1, 36 Cr.L.J. 824, 155 I.C. 148, 1935 Cr.C. 42, 28 S.L.R. 347.

The accused was an accountant of the District Superintendent of Police's office and as such, his duty was to prepare bills and treasury vouchers for withdrawal of money required for official purposes, submit them to the District Superintendent of Police or in his absence to the Headquarters Assistant to the District Superintendent of Police and, after they have been passed and approved of, present the bills or vouchers at the treasury and receive payment thereon either in cash or in the shape of cash order. The offences with which the accused was charged in the eight trials were offences alleged to have been committed in connection with the accused's duties which also included the maintenance of accounts and cash registers including a register known as General Remittance Receipts. The Headquarters Magistrate who tried the cases also functioned as Treasury Officer of the station, and as such, was responsible for the conduct of the business in the treasury. Held that the alleged falsification of accounts, the embezzlements, the cheating and the forgeries were all alleged to have been perpetrated by the accused in the District Superintendent of Police's office or in connection with the books and papers maintained, or issued from there, and no question whatever with reference to the efficiency of the work of the Treasury Officer or to the discharge of the work of his office was substantially involved in any of the cases. The Headquarters Magistrate either in his capacity as the Treasury Officer or in any other capacity was not a party, was not interested in any of the cases and was not debarred from trying them—*Mg Po Kywe v. The King*, 40 Cr.L.J. 621 (623), 1939 Rang.L.R. 251, 182 I.C. 63, 11 R.R. 510, A.I.R. 1939 Rang. 152.

(5) Magistrate being servant of complainant:—A Magistrate who is a servant of a corporation is deemed to have such an interest in the result of a prosecution by the corporation as to disqualify him from trying the case—*Wood v. Corporation of Calcutta*, 7 Cal. 322; *Nobin v. Chairman*, 10 Cal. 194.

(6) Magistrate being master of complainant:—The mere fact that the Magistrate is the master of the complainant who is complaining on his own account merely, does not deprive the Magistrate of his jurisdiction, though in such a case it should generally be expedient for him to order the complainant to some other Magistrate—*Basappa*, 9 Bom. 172. But where the complainant was the servant of the Magistrate, and it appeared that the Magistrate's wife was driving in the dog-cart for passing which the accused was charged with rash and negligent driving, the Magistrate was held to be personally interested and ought not to try the case—*Sahadev*, 14 Bom. 572.

(7) Magistrate being Agent of Court of Wards:—The mere fact that the District Magistrate is in his capacity as Collector, concerned in the management of an estate under the Court of Wards, does not disqualify him from trying a case of theft arising out of a dispute between the landlord and tenant in an estate under the management

of the Court of Wards—*Amrit Majhi*, 46 Cal. 851 (859, 860), 29 Cr.L.J. 322, 23 C.W.N. 623, 20 Cr.L.J. 608, 51 I.C. 668; *Baktu Singh v. Kali Prasad*, 28 Cal. 297. But where the manager of an estate under the Court of Wards, who was also the Sub-divisional Officer, drew up proceedings as Magistrate under sec. 145 against one who disputed the possession of a piece of land, in which the estate claimed an interest, and the Magistrate refused an application for transfer of the case, it was held that the Magistrate showed a lack of appreciation of ordinary principles which should guide judicial officers in matters of this kind—*Asghar Raza*, 9 C.W.N. cccxvi.

(8) Magistrate being friend of a party:—If a Magistrate is in close business or friendly relationship with a party, it is on the whole undesirable that he should take part in hearing a case in which the interests of that person are gravely affected. Thus, a Magistrate is disqualified from trying a case, if the complainant during the pendency of the case has paid several visits to him and supplied him with servants and catables. But the fact that on only one occasion the person at whose instance the complaint was made visited the Magistrate, and the visit was of a wholly innocent nature paid in the regular course of the Magistrate's social duties, would not disqualify the Magistrate—*In re S Mukhtar*, 8 Pat. 575, A.I.R. 1929 Pat. 151 (153), 116 I.C. 762, 10 P.L.T. 711 (F.B.).

(9) Magistrate holding adverse opinion:—The mere fact that in the preliminary departmental enquiry in the case, the Magistrate forwarded the papers to the Collector with his opinion that there was apparently sufficient evidence to justify criminal prosecution, does not render the Magistrate personally interested so as to debar him from afterwards trying the case—*Rarji*, 5 Bom.L.R. 512. See in this connection the cases cited in Note 1373 under sec. 526.

(10) Magistrate taking cognizance under sec. 190 (1)(c), Cr. P. C.:—The mere fact that a Magistrate takes cognizance of a case on his own knowledge under sec. 190 (1)(c), Cr. P. C., does not bring the case within the operation of this section and so long as the Magistrate complies with the provisions of sec. 191, Cr. P. C. he is entitled to try the case—*Nga Chit Kyau v. Emp.*, 25 Cr.L.J. 249, 84 I.C. 249, 3 Bur.L.J. 121, A.I.R. 1921 Rang. 352. But see *Oziullah v. Beni Madhab*, 50 Cal. 135 in Note 590.

1430. Sanctioning or directing the prosecution:—A public servant, who, or a Court which, makes a complaint under sec. 195, Cr. P. C., can on no account be allowed to take part in holding the trial of the case which is started on the basis of such complaint. The order consenting to the initiation of proceedings under cl. (2) of sec. 195A, stands on a very different footing from a complaint under section 195. The Magistrate giving consent under sec. 195A, cl. (2) is not disqualified from trying the case—*Hiralal*, 35 Cr.L.J. 714, 148 I.C. 558, 38 C.W.N. 581, 1934 Cr.C. 532, A.I.R. 1934 Cal. 521, A.I.R. 1934 Cal. 391. See the Illustration. A Magistrate who takes a mere formal part in the prosecution cannot be said to direct the prosecution and is not, therefore, deprived of his jurisdiction in the case. Thus, a Magistrate who simply issued process as officer-in-charge of the Sudder sub-division is not precluded from hearing an appeal in the case—*Dasarath Rai*, 36 Cal. 859. Where a Magistrate under the Excise Act lays before the Inspector of Police certain information regarding the conduct of the accused in his dealings in opium and directs the said Inspector to make an inquiry on the basis of that information, and a prosecution is subsequently instituted in the ordinary course by the investigating police officer, held that the Magistrate cannot be said to have such connection with the proceedings antecedent to the prosecution as would debar him from trying the accused—*Babu Ram*, 15 Cr.L.J. 17, 11 A.L.J. 852, 22 I.C. 161. Where the Magistrate in his capacity as the Cantonment Small Cause Court Judge issued a warrant, the execution of which was obstructed, and on the complaint of the bailiff convicted the persons who caused the obstruction, held that as the Magistrate had not directed the prosecution, the mere issue of the warrant did not make him personally interested, and he was concerned in the matter in a public capacity only—*Muso*, 8 S.L.R. 41, 15 Cr.L.J. 649. Whether a given case falls within the provisions of

this section is a question of fact to be determined by the circumstances of each case. Where a Deputy Tahsildar made a report to the Tahsildar about certain offences and the Tahsildar in his turn reported the matter to the Deputy Magistrate, who authorised the Tahsildar to prosecute the accused, and the Tahsildar then lodged a complaint before the Deputy Magistrate who tried the case, *held* that the Deputy Magistrate was not disqualified, since he merely *authorised* or *sanctioned* the prosecution and not *directed* it. A distinction should be drawn between *authorisation* or *sanction* of prosecution and *direction* of prosecution—*Chenchi Reddy*, 24 Mad. 238. If a District Magistrate or other executive head of a district or department orders a prosecution because the matter before him demands elucidation by judicial inquiry, this section would not be applicable, but where the officer ordering the prosecution has satisfied his own mind that the accused is guilty, then clearly he should not try the accused. Thus, where a Forest Officer asked the Deputy Commissioner to give a warning to the accused for having made a false report to that officer, but the Deputy Commissioner directed prosecution of the accused under sec. 182, I. P. C., on the ground that he was satisfied that there was a clear case of a false report deliberately made, *held* that the Deputy Commissioner was disqualified from hearing the case as Magistrate—*Faiz Muhammad*, 9 N.L.R. 81, 14 Cr.L.J. 385 (386, 387). Where the prosecution is by a Town Committee, the mere fact that the Magistrate had as the President of the Town Committee sanctioned the prosecution cannot be said to give the Magistrate any personal interest in the proceedings, and the Magistrate is competent to try the case himself. But nevertheless it is not desirable that he should try the case when other Magistrates are available—*Gopi Chand*, 1 Rang. 517, 25 Cr.L.J. 273, 76 IC 865, A.I.R. 1924 Rang. 87. A Sessions Judge is not prohibited in law from hearing an appeal from a conviction in a case, in which as an Insolvency Judge, on the application of a creditor, he had allowed the prosecution to proceed—*Srikrishna*, 21 A.L.J. 90. But where proceedings were instituted on a complaint by a District Judge in accordance with sec. 69 (5) of the Provincial Insolvency Act (V of 1920), he, as a Sessions Judge, cannot hear appeal against the conviction of the accused by the Magistrate in the same proceedings—*Mamoon* A.I.R. 1922 Lah. 30, 67 IC 622, 4 Lah.L.J. 452, 14 P.W.R. 1922 (Cr.), 61 P.L.R. 1922, 23 Cr.L.J. 446. Where the prosecution of the accused has been sanctioned by the Joint Magistrate, the appeal should not be heard by him except with the permission of the Court to which an appeal lies from his Court—*Ponnuswamy Pillai*, A.I.R. 1940 Mad. 945, 1940 M.W.N. 805, 52 M.L.W. 345, 1940 M.Cr.C. 183, 190 IC 640, 42 Cr.L.J. 55, 190 IC 640. Where a District Magistrate who as Inspector of Factories ordered an inquiry to be made in the same capacity *directed* the prosecution of the accused for an offence under the Factories Act, he was disqualified from trying the case—*Lorinda*, 1 Lah. 35, 76 P.L.R. 1920, 55 IC 997, 21 Cr.L.J. 389 A.I.R. 1920 Lah. 334. Sanction under section 29, Arms Act, would only be granted on a consideration of the facts connected with the prosecution, and having once granted sanction in his capacity as an Additional District Magistrate the accused could not be tried by the Magistrate granting the sanction whether he acted as Additional District Magistrate or as City Magistrate. Such trial is illegal under this section—*Yusuf Umar Tindal v Emp.* 41 Cr.L.J. 507, 189 IC 29, A.I.R. 1940 Sind 107, 11 L.R. 1940 Kar 296. Where a Cantonment Magistrate in his capacity as secretary of the Cantonment Committee ordered the prosecution of the accused in respect of an alleged building in contravention of the Cantonment Rules and proceeded to try the case, *held* that the case ought to be transferred to another Magistrate—*Hira Lal* 20 A.L.J. 911. A Magistrate, who upon information furnished to him directs the issue of a warrant under sec. 6 of the Gambling Act, is disqualified from trying the case—*Chin Pin* 13 Bur.L.T. 154 61 IC 835 22 Cr.L.J. 401. A.I.R. 1924 Lah. 247 73 IC 521 5 Lah.L.J. 429 24 Cr.L.J. 633. *See also* *1934 All. 987*, 4 A.W.R. 345, 1934 Cr.C. 1305, 36 Cr.L.J. 293. *See also* *1934 Raja Ram*, *supra* was followed and *Muhammad Ali Khan* 25 Cr.L.J. 102 A.I.R. 1924 A.L.J. 558, A.I.R. 1926 All. 428, where a contrary view was *held*. Where after the close of a trial, the trying Magistrate issues a charge-sheet in respect of a witness for the prosecution, *held* that the

so, tries that person and convicts him, *held* that the Magistrate having directed the prosecution is not competent to hold the trial—*Gundoo*, 23 Bom.L.R. 842, 22 Cr.L.J. 603, 62 I.C. 875. See sec. 487 and the Notes thereunder.

1431. Explanation:—Under the Explanation, a Magistrate is not deemed to be a party or personally interested in any case by reason of the fact that he is a Municipal Commissioner or otherwise concerned therein in a public capacity. But if in addition to a connection of that sort, he *directs* the prosecution of a person for an offence, he is disqualified from trying the case, not by reason of the fact that he is a Municipal Commissioner or publicly connected with the case, but by reason of the further fact that he has constituted himself the *prosecutor*—*Bhojraj*, 5 S.L.R. 137, 13 Cr.L.J. 30; *Inayat Hussain*, 1899 A.W.N. 74; *Gundoo*, 23 Bom.L.R. 842, 22 Cr.L.J. 603, A.I.R. 1921 Bom. 365, 62 I.C. 875; *Mohandas Joyramdas*, 20 S.L.R. 171, 98 I.C. 405, A.I.R. 1927 Sind 98, 27 Cr.L.J. 1333 (1334). Thus, the mere fact that the Magistrate might happen to be a Municipal Commissioner does not necessarily disqualify him from holding a trial in which some municipal matter was involved. But it is a very different matter when it is found that the Magistrate is practically one of the prosecutors and the Judge—*Kharak Chand v. Tarack*, 10 Cal 1030. A Municipal Commissioner in his capacity as such Commissioner had invited the attention of the Executive Officer of the Municipality to the manner in which a certain Bye-law of the Municipality was being disregarded by the accused. The Executive Officer called the attention of the Health Officer to the matter and the Health Officer instituted the prosecution after satisfying himself that there were good *prima facie* grounds for believing that the Bye-law was being broken and that the interests of the public health required its enforcement. The case was tried by a Bench of Honorary Magistrates of which the Municipal Commissioner was a member, and ended in a conviction. *Held*, that the trial and conviction were not illegal, because the Municipal Commissioner was not a party to the prosecution nor did he cause it to be instituted—*Nanoo*, 24 Cr.L.J. 135, A.I.R. 1923 All 483, 71 I.C. 359. The mere fact that the Magistrate is the Vice-President of the Municipality and Chairman of the Managing Committee does not disqualify him from trying an offence against the Municipality. But if he has taken any part in promoting the prosecution, as for instance, by concurring in sanctioning it at a meeting of the Managing Committee or otherwise, he would be disqualified—*Pherozsha*, 18 Bom 422; *Mahammad Babsh*, 10 Lah 718, 116 I.C. 881, 1929 Cr.C. 310, 30 P.L.R. 705, A.I.R. 1929 Lah 718, 30 Cr.L.J. 698 (699); *Fazl Ilahi v. Municipal Committee*, 1896 P.R. 5. So also, if the Magistrate is the Vice-President of a Municipal Committee and was present at the meeting in which the resolution was passed, for the disobedience of which the accused is prosecuted, the Magistrate is debarred from trying the case—*Nurkishan*, 23 Cr.L.J. 704, A.I.R. 1922 Lah. 72. A Magistrate does not, by reason of his being a member of a sub-committee of a Municipal Board, become personally interested so as to be disentitled to try the accused for an offence against the Municipal Board—*Mohan Lal*, 27 All. 25. See also *Khusal Chand*, 29 Cr.L.J. 822, 111 I.C. 326, A.I.R. 1928 Lah. 946. But if he presides at a meeting of the Municipal Board which directs the prosecution of the accused, he becomes disqualified—*Deendoval*, 14 N.L.R. 14; *Bhojraj*, 5 S.L.R. 137, 13 Cr.L.J. 30; *Rama Rao*, 20 Cr.L.J. 244, 49 I.C. 916. See also *Hem Raj*, 29 P.L.R. 282, 108 I.C. 271, 9 Lah.L.J. 583, A.I.R. 1928 Lah 114, 29 Cr.L.J. 371. It may be that he did not speak or vote at the meeting but the fact remains that he attended the meeting where the question was debated and the prosecution ordered, and he has therefore placed himself personally to some extent in the position of a prosecutor—*Bhojraj*, 5 S.L.R. 137. Where the Municipal Committee resolved to institute criminal proceedings against the accused and directed the Secretary to take necessary steps, and the Secretary forwarded a copy of the resolution to the Joint Magistrate (who was no other than the Secretary himself) who took proceedings and tried the accused, it was held that the trial was not only illegal but a mere show—*Basant*, 1883 A.W.N. 181. The District Magistrate is not disqualified from hearing the appeal merely because he happens to be the *Chairman* of the Municipal Board—

Inayet Hussain, 1899 A.W.N. 74. Contra—*Nistarini v. A. C. Ghose*, 23 Cal. 44 and *Erugadu*, 15 Mad. 83, where it was held that the very fact that the Chairman of the Municipality was the Magistrate, disqualified him from trying the offence, and the Explanation did not apply to his case.

In *Nobin v. Chairman*, 10 Cal. 194, a distinction has been drawn between a salaried officer of a Corporation and an Honorary Officer, and it has been held that the Explanation does not apply to a salaried officer. A salaried officer of the Corporation is, by reason of the very fact that he is a servant of the Corporation, precluded him from trying any Municipal case as a Magistrate. But a gentleman who without remuneration is merely discharging a public and honorary office, and who has no personal interest in the proceedings of the Municipality, may well be supposed to be free from that bias which the jealousy of the law presumes in other persons more immediately interested.

'Concerned therein in a public capacity':—A Magistrate in charge of opium and excise administration of a district is not personally interested in the observation of the provisions of the Opium Act, merely because it is his duty to see the law relating to sale of opium enforced and maintained in his district; he is, therefore, not precluded from exercising jurisdiction in respect of offences against the said Act—*In re Ganeshi*, 15 All. 192. A District Magistrate is not precluded under this section from trying an offence under the Police Act, merely because he is the head of the police—*Narain Singh*, 22 All. 340. The fact that the District Magistrate is also the District Superintendent of Police does not of itself disqualify him from trying or inquiring into cases investigated by the police of his district—*Maung Lat*, 2 L.B.R. 209, 1 Cr.L.J. 477. But if the Magistrate in his public capacity directs the prosecution, he is disqualified. Thus, where the Magistrate as president of the octroi sub-committee directed the prosecution of an accused for evading the payment of octroi, the Magistrate was debarred from trying the case, even though the accused had consented to be so tried—*Bhakeshar*, 32 All. 635. A Magistrate is not disqualified from trying a case based on a private complaint and which has not been filed under his direction and sanction, merely and solely on the ground that the validity of certain orders passed by him in his capacity as an Executive or Revenue Officer is directly put in issue and is likely to be challenged before him, and that the innocence or guilt of the accused considerably depends on the effect of such orders—*Mohandas Joyramdas*, 20 S.L.R. 171, 27 Cr.L.J. 1333 (1334). Where a licensee of a liquor shop was ordered by the Excise Officer to change the site of his shop, and on his refusing to do so, he was tried by the Excise Officer in his capacity as District Magistrate, and convicted, held that the conviction was not illegal—*Janki Das*, 5 A.L.J. 357, 7 Cr.L.J. 393. It was further held in this case that the Illustration did not apply, as the Excise Officer and District Magistrate must be deemed to be two different persons. The correctness of this statement may be doubted.

1432. Local inspection:—Under the Code of 1882, it was held that a Magistrate making a personal inspection of the *locus in quo* where the offence was committed, made himself a witness in the case and thereby rendered himself incompetent to try the case—*Manikam*, 19 Mad. 263; *Gurish Chunder*, 20 Cal. 857; *Hari Kishore v. Abdul*, 21 Cal. 920. But now the law has been changed by the addition of the latter part of the Explanation.

A Magistrate is competent to inspect personally a locality in order to test the connection of the evidence and the plans of the locality submitted in the case. Such an inspection would not disqualify him from trying the case—*Hansa Singh*, 1901 P.R. 13; *Babbon Singh*, 37 Cal. 340 (355). Where the Magistrate inspected the *locus in quo* and stated in his judgment what he saw when he inspected, he was not disqualified—*Dataraja*, 2 Weir 728. Where a Magistrate made a local inspection in the presence of both the parties and the pleaders, and stated in his judgment some facts which he then observed, it was held that the Magistrate was competent to convict the accused—*Krishnappa v. Sengoda*, 2 Weir 727. Where the Judge personally inspected

of offence with the prosecution witnesses and the *vakil* for the accused, and acting under the powers vested in him under sec. 540 recalled some of the prosecution witnesses and examined them in such a way as to put on record the most important points observed at the inspection, and the accused were given full opportunity of cross-examining those witnesses with reference to the facts relating to the personal inspection, *held* that it was open to the Judge to make the inspection, and that he did not act illegally or with material irregularity in using the results of his inspection in his disposal of the case—*Thackroth Hydross*, 45 M.L.J. 279. It is not only not objectionable but in many cases highly advisable that a Magistrate trying a criminal case should view the place in order to understand fully the bearing of the evidence given in Court. But if he does so, he should be careful not to allow any one on either side to say anything to him which might prejudice his mind one way or the other—*Atar Rai*, 39 Cal. 476. A local inspection should only be made for the purpose of enabling the Magistrate to understand better the evidence adduced before him (see sec. 539B) and it must be strictly confined to that—*Manilam*, 19 Mad. 263 (266); *Krishnappa v. Sengoda*, 2 Weir 727. When the law allows a view of the locality, every possible precaution should be taken that such a view should be nothing but a view of the local feature. Where the Magistrate did much more than viewing the place for the purpose of understanding and testing the evidence, and imported into his judgment matters of opinion and inference based upon circumstances not on the record, *held* that there was an error of procedure necessitating a retrial before another Magistrate—*Babbon Sheikh*, 37 Cal. 340 (357), 11 C.W.N. 422, 11 C.L.J. 335, 11 Cr.L.J. 121, 5 I.C. 365. Where a Magistrate in visiting the scene of occurrence not merely noted the various features of importance but imported into his judgment what he could not have possibly noted from the locality or from anything connected therewith (e.g., the position of the accused and of other men at the time of the alleged occurrence) he exceeded the proper limits of his discretion in making the inspection and thus disqualified himself from trying the case—*Sattri Dulali*, 3 C.W.N. 607. Under this section local inquiry does not deprive a Magistrate of jurisdiction. That merely means that the local inquiry would not amount to a necessity for transfer but there may be circumstances under which it would be advisable to direct a transfer from the Court of a Magistrate who has made a local inquiry—*Ghassoo*, 31 Cr.L.J. 555 (557), 123 I.C. 685, 1930 A.L.J. 606, A.I.R. 1930 All. 737. See also Note 1374 under sec. 526.

Inquiry under sec. 202:—As to whether the holding of an inquiry under sec. 202 disqualifies the Magistrate from trying the case, see Note 670 under sec. 202.

1432A. Illustration:—The illustration shows that if an officer is actively concerned in instituting and originating the proceedings in *one capacity* (e.g., as the executive head of the district), he is disqualified from trying the case or hearing the appeal in the case, in *another capacity*, viz., in the capacity of a judicial officer—*Mahomed Shah*, 1 S.L.J. 98 (101), 8 Cr.L.J. 356 (358). A District Magistrate, having in his capacity as *Collector* directed the prosecution of the accused, is disqualified from trying the case, or hearing a revision petition in the case in his capacity as *District Magistrate*—*Nataraja*, U.B.R. 1905 Cr.P.C. 37, 2 Cr.L.J. 468 (470). Where a Magistrate, as the Chairman of a Local Board, issued a notice calling upon the petitioner to remove a certain obstruction and upon the petitioner failing to show sufficient cause, the Magistrate initiated proceedings against the petitioner under sec. 133, *held* that the case was covered by the Illustration, and the Magistrate was disqualified from trying the case. The Magistrate's concern in the case had been not merely in a public capacity, so as to bring it within the Explanation—*Rajani Kanta*, 10 C.L.J. 481, 11 Cr.L.J. 2 (3). (But *quære*, whether the act of initiating proceedings under sec. 133 amounts to 'trying' a case?). It is highly undesirable that a Magistrate should act judicially in a case which he himself has extra-judicially investigated and in which upon facts so investigated he has come to conclusions of facts adversely to the party against whom he subsequently initiates criminal proceedings—*Rajani Kanta*, supra.

557. No pleader who practises in the Court of any Magistrate in a presidency-town or district shall sit as a Magistrate in such Court or in any Court within the jurisdiction of such Court.

Practising pleader not to sit as Magistrate in certain Courts.

1433. The appointment of a pleader to act as Presidency Magistrate is not forbidden by any provision of the Code. The only thing required of him is to give up practice on appointment—*Jivanji*, 23 Bom. 490.

This section does not forbid a pleader to practise in any Court but forbids him to sit as a Magistrate in certain Courts. If a pleader practises in the Honorary Magistrate's Court, or in the Township Magistrate's Court within whose jurisdiction that Court is, he is debarred from sitting as a Magistrate in the Honorary Magistrate's Court—*Nga Tha Shewin*, 25 Cr.L.J. 311, 76 I.C. 1031, 4 U.B.R. 127, A.I.R. 1923 Rang. 119.

558. The Provincial Government may determine what, for the purposes of this Code, shall be deemed to be the language of each Court within the territories administered by such Government, other than the Courts which are High Courts for the purposes of the Government of India Act, 1935.

Power to decide language of Courts.

Amendment:—The words "Provincial Government" and "the Courts which are High Courts for the purposes of the Government of India Act, 1935" have been substituted for "Local Government" and "the High Courts established by Royal Charter" respectively, by the Government of India (Adaptation of Indian Laws) Order, 1937.

"With the permission of the presiding Judge or Magistrate, any Advocate or Pleader may address the Court in English, when any one of the pleaders on the opposite side is acquainted with that language, or whenever the senior of such pleaders or his client consents to that being done"—*Cal G. R. & Co O*, p. 58.

559. (1) Subject to the other provisions of this Code, the powers and duties of a Judge or Magistrate may be exercised or performed by his successor in office.

Provision for powers of Judges and Magistrates being exercised by their successors in office.

(2) When there is any doubt as to who is the successor in office of any Magistrate, the Chief Presidency Magistrate in a Presidency-town, and the District Magistrate outside such towns, shall determine by order in writing the Magistrate who shall, for the purposes of this Code or of any proceedings or order thereunder, be deemed to be the successor in office of such Magistrate.

(3) When there is any doubt as to who is the successor in office of any Additional or Assistant Sessions Judge, the Sessions Judge shall determine by order in writing the Judge who shall for the purposes of this Code or of any proceedings or order thereunder, be deemed to be the successor in office of such Additional or Assistant Sessions Judge.

This section has been redrafted by section 155 of the Cr P C. Amendment Act, XVIII of 1923. The old section stood as follows —

"559 All powers conferred by this Code on the Governor-General in Council, or on the Local Government, may be exercised from time to time as occasion requires."

But this section was unnecessary, because its provisions are covered by sec. 14 of the General Clauses Act. The old section has, therefore, been omitted and an entirely

different section has been framed in its place. "A new section is intended to be inserted, providing for the powers of Judges and Magistrates being exercised by their successors-in-office, and the determination by the Chief Presidency or District Magistrate of the person to be deemed the successor-in-office of a Subordinate Magistrate in cases of doubt"—*Statement of Objects and Reasons* (1914).

A complaint under sec. 476 relating to an offence committed in relation to a proceeding in a Magistrate's Court can be made by the successor-in-office of the Magistrate—*Behram*, 7 Lah. 108, 27 Cr.L.J. 776. See Note 1239 under sec. 476.

If sec. 559 is read subject to sec. 192, it may well mean that the powers under the latter section are not intended to be exercisable by a successor-in-office—*Ramkrishna Sinha v. Emp.*, 42 C.A.W.N. 216 (251).

550. A public servant having any duty to perform in connection with the sale of any property under the Code shall not purchase or bid for the property.

Officers concerned in sales not to purchase or bid for property.

551. (1) Notwithstanding anything in this Code, no Magistrate except a Chief Presidency Magistrate or District Magistrate shall—

Special provisions with respect of offence of rape by a husband.

- (a) take cognizance of the offence of rape where the sexual intercourse was by a man with his wife, or
- (b) commit the man for trial for the offence.

(2) A Chief Presidency Magistrate, if a Chief Presidency Magistrate deems it necessary to direct an investigation with respect to such an offence as is referred to in sub-section (1), no police-officer of a rank below that of police-inspector shall be employed either to make, or to take part in, the investigation.

Clause (a):—Where the offence referred to in this clause was taken cognizance of by the District Magistrate, the fact that the investigation into the offence had been conducted by a subordinate Police-officer was not a material irregularity which would vitiate the proceedings—*Mehri*, 1895 A.W.N. 9.

551A. Nothing in this Code shall be deemed to limit or affect the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.

1433A. Amendment:—This section has been added by section 156 of the Cr. P. C. Amendment Act, XVIII of 1923. "By this section it is proposed to give statutory recognition to the inherent powers of the High Court—a principle which is already well-recognized"—*Statement of Objects and Reasons* (1914).

Scope:—No legislative enactment dealing with procedure can provide for all the cases that may possibly arise, and it is an established principle that Courts must possess inherent powers, apart from the express provisions of the law, which are necessary to their existence and the proper discharge of duties imposed upon them by law. This doctrine finds expression in section 561A, which does not confer any new powers on the High Court, but merely recognizes and preserves the inherent powers previously possessed by it—*Sukh Dev*, 11 Lah. 539, 31 P.L.R. 207, 31 Cr.L.J. 482 (483).

See also *Dahu Raut*, 34 Cr.L.J. 1110 (1115), 145 I.C. 937, 38 C.W.N. 25, 1933 Cr.C. 1481, A.I.R. 1933 Cal. 870, 61 Cal. 155, 6 R.C. 168.

All that this section does is to declare that such inherent powers as the High Court may possess have not been taken away or abridged by any of the provisions of the Code of Criminal Procedure. It does not confer any new powers, but merely declares that such inherent powers as the Court may possess shall not be deemed to be limited or affected by anything contained in the Code. There is no conflict between this section and sec. 369. Section 369 does not affect any powers inherent in the Court, as there never has been an inherent power in the High Court to alter or review its own judgment in a criminal case once it has been pronounced and signed except in cases where it was passed without jurisdiction or in default of appearance without an adjudication on the merits. The High Court is not given nor did it ever possess, an unrestricted and undefined power to make any order which, it might please to consider, was in the interest of justice. Its inherent powers are much controlled by principle and precedent as are its express powers by Statute—*Raju*, 110 I.C. 221, A.I.R. 1928 Lah. 462, 10 A.I.R. 494, 29 Cr.L.J. 669, 30 P.L.R. 247, 10 Lah. 1. See also *Banwari Lal*, 36 Cr.L.J. 1286, 157 I.C. 1044, 1935 A.L.R. 904, 8 R.A. 258, A.I.R. 1935 All. 466, 1935 A.L.J. 317, 1935 Cr.C. 507; *Kunji Lal*, 35 Cr.L.J. 1485, 151 I.C. 714, 1934 A.L.J. 704, A.I.R. 1935 All. 60, 1934 A.L.R. 905, 4 A.W.R. 252; *Laxmanrao Parashram v. Emp.*, 39 Cr.L.J. 116, 10 R.N. 192, 172 I.C. 299, A.I.R. 1938 Nag. 74, I.L.R. 1940 Nag. 267, not following *Shiv Dat*, 3 Luck. 680, 111 I.C. 573, 5 O.W.N. 641, 29 Cr.L.J. 893, A.I.R. 1928 Oudh 402 and *Mathra Das*, A.I.R. 1927 Lah. 139, 99 I.C. 1039, 9 L.L.J. 12, 28 Cr.L.J. 239; *Edward Few v. Emp.*, 40 Cr.L.J. 763, 183 I.C. 348, A.I.R. 1939 Lah. 244, distinguishing *Har Kishen Lal*, A.I.R. 1937 Lah. 497, 170 I.C. 375, I.L.R. 1937 Lah. 69, 38 Cr.L.J. 883, 39 P.L.R. 733, 10 R.L. 103 and *Rash Behari Singh*, A.I.R. 1934 Pat. 551, 152 I.C. 291, 1934 Cr.C. 1195, 36 Cr.L.J. 100, 15 P.L.T. 475, 7 R.P. 179, and the Note given under section 369 and Note 1170.

The use of extraordinary powers under this section ought to be reserved as far as possible for extraordinary cases. They are not usually invoked when there is another remedy available. Orders in the nature of attachment before judgment are not altogether consistent with the spirit of criminal proceedings, in view of the presumption that the accused is innocent until he is found guilty—*In re Lloyds Bank Ltd.*, A.I.R. 1934 Bom. 74, 36 Bom.L.R. 88, 35 Cr.L.J. 1028 (1032), 58 Bom. 152, A.I.R. 1934 Bom. 199, 149 I.C. 1005.

This inherent jurisdiction should be exercised with due care and caution, and must conform to sound general principles and precedents. It was never contemplated by the Legislature that the High Court should exercise its inherent powers for making pronouncements upon questions of law in order to guide a Magistrate in conducting an inquiry or trial. And so, where in a pending case the prosecution applied to the High Court to give directions to the Magistrate to cut short the preliminary inquiry by dispensing with certain witnesses, the High Court refused to give such directions, as the law relating to such matters was expressly laid down in section 208 (2). If the High Court would be called upon to adjudicate upon all sorts of hypothetical questions, then it would be required to perform the functions of a legal adviser to the litigants and the subordinate Magistracy—*Sukh Dev*, supra.

"Or otherwise to secure the ends of justice"—Expunge remarks:—
 "We understand that a High Court has recently held [44 All. 401] that it had no power to direct the expunging of objectionable matter from a record. We think it desirable that it should be made clear that this clause is intended to meet such a case"—*Report of the Joint Committee* (1922). See Note 1214 under sec. 439. Thus, by virtue of the inherent powers conferred on it by this section, the High Court can expunge any objectionable remark from the judgment of a lower Court—*Amar Nath*, A.I.R. 1925 Lah. 187, 85 I.C. 143, 5 Lah. 476 (481), 26 Cr.L.J. 463; *Abdul Aziz*, 25 Cr.L.J. 1245, 82 I.C. 173, A.I.R. 1925 Lah. 129; *Bernarsi Das*, A.I.R. 1925 Lah. 392, 89 I.C. 270, 6 Lah. 166, 26 Cr.L.J. 1326; *Daly*, 9 Lah. 269, 29 Cr.L.J. 620, A.I.R. 1928 Lah. 740, 29

P.L.R. 461, 109 I.C. 812; *Panchanan v. Upendra*, 49 All. 251, 27 Cr.L.J. 1407 (1408), A.I.R. 1927 All. 193, 98 I.C. 917, 25 A.L.J. 100; *Muhammad Qasam v. Anwar Khan*, 27 Cr.L.J. 510 (511); *Mahomed Umer*, 35 Cr.L.J. 1138, 150 I.C. 610, A.I.R. 1934 Sind 78, 1931 Cr.C. 637, A.I.R. 1934 Sind 68; *Mahomed Husain*, 23 S.L.R. 432, 30 Cr.L.J. 970, A.I.R. 1929 Snd 213, 1929 Cr.C. 537, 118 I.C. 747; *Fazir Singh*, A.I.R. 1930 Lah. 1018, 31 P.L.R. 992, 129 I.C. 273, Ind. Rul. 1931 Lah. 161, 32 Cr.L.J. 268, 1930 Cr.C. 1224; *Ram Lal*, 109 I.C. 812, 9 Lah. 269, 29 Cr.L.J. 620, 29 P.L.R. 461, A.I.R. 1928 Lah. 740; *Fazal Din*, 33 Cr.L.J. 531, 137 I.C. 850, 33 P.L.R. 608, Ind. Rul. 1932 Lah. 352; *Gokaran Prasad Gupta v. Emp.*, 40 Cr.L.J. 923, 181 I.C. 250, 1939 O.W.N. 872, 1939 O.L.R. 593, 12 R.O. 90. It is, however, not open to the High Court under sections 435 and 439 Cr. P. C., to expunge offensive remarks but, under the provisions of this section, the High Court has inherent power, in order to secure the ends of justice, to pass any order that may be necessary to remove the legitimate grievance of the applicant—*Rishi Lal v. Emp.*, 38 Cr.L.J. 376 (379), 167 I.C. 11, 9 R.O. 379, 1937 A.C.C. 51, 1937 O.L.R. 118, 1937 O.W.N. 258, A.I.R. 1937 Oudh 277.

The High Court of course can interfere under this section in cases where remarks are made about a person who is not a party to the proceedings or not a witness in the case. The High Court can also interfere when remarks are made about a party to the proceedings or a witness to the case which are not justified by the findings—*Karamat Ullah v. Emp.*, 41 Cr.L.J. 380, 185 I.C. 799, A.I.R. 1910 Lah. 42 (43). See also *K. V. Lakshmana Rao*, 41 Cr.L.J. 317, 185 I.C. 472, A.I.R. 1910 Mad. 131, 1939 M.W.N. 1131, 50 M.L.W. 782. But such power can be exercised only where there is no foundation whatever for the remarks objected to and not where it is a matter of inference from evidence—*Panchanan v. Upendra*, supra. The powers under this section should be sparingly used and only in exceptional cases. It is not desirable that the High Court should on the motion of a subordinate Magistrate, expunge remarks made by a lower Appellate Court relating to the conduct of judicial proceedings taken by the said Magistrate—*Muhammad Qasam*, supra. It is the duty of the High Court, in order to prevent abuse of the process of the Court and secure the ends of justice, to delete passages commenting adversely upon a person who is not a party to the proceedings and has not had a fair opportunity of being heard, and also to delete such passages when they are based upon no evidence or evidence not properly upon the record. There appears to be no good reason why the High Court's power should not be used to delete passages which, though based on evidence, damage the character of a person and are wholly irrelevant to any point in issue and which, a Court has unnecessarily gone out of its way to include in a judgment. Further where the High Court's notice has been drawn to a judgment which appears to it to be couched in language injudicious and uncalled for, the High Court can and ought to express its opinion in the matter whether any passage is or is not ultimately expunged. In cases which have assumed a communal aspect, the proceedings in Courts and the language of their judgments should not themselves promote the feelings of enmity, the promotion of which by others it is their duty to punish under the law—*Atta Ullah Shah*, A.I.R. 1936 Lah. 429 (433), 37 Cr.L.J. 661, 162 I.C. 621, 1936 Cr.C. 464, 38 P.L.R. 638, 8 R.L. 295, distinguishing *Tejmal*, A.I.R. 1933 Sind 91, 27 S.L.R. 30, where it is laid down that it is desirable that a judgment once delivered should remain in the shape in which it was originally published.

It is a serious matter for the High Court to expunge remarks from a Magistrate's judgment or order. The High Court will interfere to expunge remarks which are libellous and irrelevant. But if they form an integral part of the judgment or its argument, and if they are inseparable, the High Court will not interfere and mutilate a judgment so that it reads disjointly or incoherently, nor will it interfere merely because the Court may have passed remarks adverse to a witness provided the judgment shows there is some basis for them, however inadequate may appear this basis to the higher Court. It may well be the bounden duty of a Judge or Magistrate in giving his judgment and his reasons to comment adversely upon the conduct of witnesses;

so also it may be his duty to comment adversely upon the conduct of accused persons even though he may not consider the evidence sufficient to commit them for trial to the Court of Session. Nor will the High Court in revision inquire into question of fact, but in dealing with applications of this nature it will take the Magistrate's judgment as it stands. Where the Magistrate's own order exculpates rather than inculpates the accused, he is not justified in making remarks seriously to his prejudice which will be justified only if his order tended to inculpate rather than exculpate. A Magistrate when he is called upon to investigate a case in which a large number of persons may be involved and may appear to be implicated in some offence, may in his order consider the case against a person who is neither a witness nor an accused. He may have to consider facts in relation to a particular individual who is not an accused or witness in order to weigh fairly the evidence against the accused or the evidence given by witnesses, but a Magistrate is not justified in condemning any person without his being given an opportunity of being heard—*Kartarchand Shankerdas v. Emp.*, 39 Cr.L.J. 524, 175 I.C. 57, 10 R.S. 279, A.I.R. 1938 Sind 103. See also *K. V. Lakshmana Rao*, A.I.R. 1940 Mad. 134, 41 Cr.L.J. 317, 186 I.C. 472, 1940 M.Cr.C. 1, 50 M.L.W. 782, 1939 M.W.N. 1131.

While on the one hand Courts are at liberty to discuss the conduct of the persons before them, either as parties or as witnesses untrammelled by any considerations, on the other they are not permitted to travel beyond the record and are bound to exercise due restraint on the language employed by them. In other words, they should neither make any such sweeping assertions as are not borne out by the evidence produced before working of the Police and to start a public agitation against them. Courts are not make an appeal to the Press to take up the particular defects pointed out by him in the working of the Police and to start a public agitation against them. Courts are not expected to play to the gallery nor to invoke the Press in a manner which is liable to be misunderstood and may land the administration in general in an awkward situation. They should play the part of Judges alone and not that of propagandists and confine their whole attention to the evidence led before them and to the matters requiring determination at their hands. If they strictly observe these principles, they would be able to approach their task with a clear vision and an unclouded mind and this would not only conduce to the better administration of justice but would further save their time as well as the time of everybody else concerned—*In re Advocate-General*, 40 Cr.L.J. 655, 182 I.C. 281, A.I.R. 1939 Lah. 174, 41 P.L.R. 74, 11 L.R. 1939 Lah. 327.

It is an elementary principle of justice that no man should be condemned unless he has had opportunity of defending himself. Nobody can dispute that in the interests of proper administration of justice, the Courts should be allowed to perform their functions freely and fearlessly and to comment upon the statements of witnesses in so far as those statements are relevant to the case, but it is equally necessary that the Courts should not be allowed to make disparaging remarks upon persons who appear either as witnesses during the course of trial of a case or whose names are mentioned. It is not open to a Court to condemn a witness merely on conjectures or materials not before it in the shape of evidence. Before passing adverse remarks against a witness on the basis of certain facts, those facts must be established by evidence on the record of the case—*Gokaran Prasad Gupta v. Emp.*, 40 Cr.L.J. 923 (924), 184 I.C. 250, 1939 O.W.N. 872, 1939 O.L.R. 593, 12 R.O. 90, 1939 A.W.R. (C.C.) 189, 1939 A.Cr.C. 174.

A Magistrate is within his rights in drawing inferences from facts. If there is no evidence on the record which would support his remarks even as legitimate inferences, the remarks are wholly unjustified. When they reflect on the character of the applicant and may affect his future it is only fair that they should be expunged—*Lachman Das v. Jai Gopal*, A.I.R. 1938 Lah. 793, 179 I.C. 523, 40 Cr.L.J. 214, 11 R.L. 582. Where, travelling beyond its legitimate functions in the case, the appellate Court had, on the uncorroborated statements of a boy which had not received the binding sanction of an oath, and without giving an opportunity to the applicant to be heard, held him guilty

of indecent assault upon the boy, a finding which was wholly irrelevant for the right decision of the case, the High Court set aside the finding in exercise of its powers under this section—*Rishi Lal v. Emp.*, 38 Cr.L.J. 376, 167 I.C. 11, 9 R.O. 379, 1937 A.Cr.C. 51, 1937 O.L.R. 118, 1937 O.W.N. 258, A.I.R. 1937 Oudh 277.

In the opinion of the Bombay High Court, the judgment in *Dunz*, 44 All. 401, 66 I.C. 1005, A.I.R. 1922 All. 107, 23 Cr.L.J. 349, 20 A.L.J. 251, was right and has not been altered by the introduction of section 561A, Cr. P. C., and the High Court has no jurisdiction to expunge passages from the judgment of an inferior Court which has not been brought before it in regular appeal or revision—*Rogers v. Shrinivas Gopal Kauale*, 41 Cr.L.J. 855, 190 I.C. 205, A.I.R. 1910 Bom. 266, 11 L.R. 1910 Bom. 415, 42 Bom.L.R. 478.

See Note 1214.

Quash proceedings:—The inherent jurisdiction of the High Court to pass any orders necessary to prevent abuse of the process of any Court is not questioned and indeed has been clearly expressed in section 561A, Cr. P. Code. Since prevention is always better than cure, the obligation to prevent specious and spiteful criminal prosecutions for actions which, though strictly dishonourable, yet do not amount to crimes, is one that must never be shirked. In the world of business things are often done which are betrayals of confidence and deceptions which arouse moral indignation but are nevertheless civil wrongs which can be righted by Civil Courts and are not crimes which can be punished by a Criminal Court. Not every immoral act is criminal and it is an abuse of the process of a Court to attempt to create new crimes in order to compel men to conform to a high standard of probity in business dealings or to force them to execute their promises—*Chidambaram Chettiar v. Shanmugham Pillai*, A.I.R. 1938 Mad. 129, 1937 M.W.N. 999, 46 M.L.W. 629, 1937 M.Cr.C. 278, (1937) 2 M.L.J. 878, 173 I.C. 14, 39 Cr.L.J. 261. If a charge has been framed by the trial Court in a case where no offence appears to have been committed, the High Court can interfere under this section during the pendency of the case, and set aside the charge and quash the entire proceedings—*Gokul Prasad v. Debi Prasad*, 26 Cr.L.J. 748, 85 I.C. 281, 23 A.L.J. 21, A.I.R. 1925 All. 311. Under the provisions of this section the High Court has power to interfere at interlocutory stage of criminal proceedings in a subordinate Court in order to prevent harassment of a subject of the Crown by an illegal prosecution. It will also interfere whenever there is any exceptional and extraordinary reason for doing so—*Abdul Wali*, A.I.R. 1933 Oudh 387, 35 Cr.L.J. 148, 146 I.C. 661, 1933 Cr.C. 1088, 10 O.W.N. 807. See also *Bagh Ali v. Karim Bakhsh*, 34 Cr.L.J. 377, 142 I.C. 575, 34 P.L.R. 126, Ind. Rul. 1933 Lah. 233. Where the criminal case pending against the applicant cannot succeed for the simple reason that the pro-note, which at first was suspected to be a forgery, has been proved to be genuine and upon the basis of that pro-note, a decree has been obtained in his favour, it is proper for the High Court in the exercise of the jurisdiction vested in it under this section to quash the criminal proceedings pending against him when he has not been discharged by the trial Court—*Girdhar Gopal*, 35 Cr.L.J. 576, 147 I.C. 1208, 11 O.W.N. 265, A.I.R. 1931 Oudh 114, A.I.R. 1931 Oudh 169, 1931 Cr.C. 380. See also Note 1215.

In the exercise of its inherent powers under this section, the High Court cannot pass any order which would conflict with the provisions of the Code. Thus, the High Court has no jurisdiction to make an order for the restoration of attached property, where the application is made beyond the period prescribed in sec. 89—*Gurunath*, 26 Bom.L.R. 719, 25 Cr.L.J. 1293, A.I.R. 1924 Bom. 485, 82 I.C. 365. In this case it was not intended to lay down a general proposition that this section could not be used for passing any orders conflicting with any other provisions of the Code—*Jamnadas Nathji Shah*, 38 Cr.L.J. 606 (607), 168 I.C. 718, 11 L.R. 1937 Bom. 263, 39 Bom.L.R. 82, 9 R.B. 393, A.I.R. 1937 Bom. 153. The High Court cannot, in the exercise of its inherent powers, act in contravention of law. Thus, as an Appellate Court, it cannot admit a time-barred criminal appeal, when no sufficient cause for the delay has been

e out under sec. 5, Limitation Act—*Mahadya*, 31 Cr.L.J. 381, 1931 Cr.C. 453, R. 1931 Nag. 101.

The powers conferred on the High Court under this section are powers which must bound within the Criminal Procedure Code. This section confers no new powers on High Court, because the Court cannot, by invoking its inherent powers, extend the powers given to it by statute—*Sukh Dev*, 1929 Cr.C. 351, A.I.R. 1929 Lah. 705; *Maru-a v Shanmuga*, 49 M.L.J. 593. Thus, the High Court has no power to appoint a receiver pending the disposal of a revision petition against an order passed under sec. 145—*Arudayya v Shanmuga Sundara*, 49 M.L.J. 593. See this case cited in Note 421 under sec. 145. See also Note 443A.

It has been held in some cases that the words "save as otherwise provided by this Code" in sec. 369, and the words "Nothing in this Code shall be deemed to limit" in 561A, show that sec. 369 must be read as subject to sec. 561A, and that the latter section is in no way limited or governed by sec. 369. Therefore, the High Court is competent to review its own order when the ends of justice require it—*Mathra Das*, 49 M.L.J. 42, A.I.R. 1927 Lah. 139, 99 I.C. 1039, 28 Cr.L.J. 239 (240); *Shiva Das*, 30 I.C. 680, 111 I.C. 573, 5 O.W.N. 641, A.I.R. 1928 Oudh 402, 29 Cr.L.J. 893. Thus, as has been held that the High Court, after altering the conviction and maintaining the sentence of the lower Court, can afterwards reconsider the question of sentence and alter the sentence—*Mahtra Das*, supra. On the other hand, there are some other judgments to the effect that this section does not confer on a High Court the power to review its own judgment—*Rameshwar*, 56 Cal. 32, 30 Cr.L.J. 254; *Raju*, 10 Lah. 1, 10 I.C. 221, A.I.R. 1928 Lah. 462, 10 A.I.Cr.R. 494, 29 Cr.L.J. 669 (670); *Nazar Ali v Hara Singh*, 26 P.L.R. 616, 27 Cr.L.J. 23; *Muhammad Sadiq*, 7 Lah.L.J. 108, Cr.L.J. 1169; *Ganpat*, 27 N.L.R. 163, 32 Cr.L.J. 1222, 134 I.C. 686, A.I.R. 1931 Cal. 169, Ind. Rul. 1931 Nag. 174, 1931 Cr.C. 830; *Dahu Raut*, 34 Cr.L.J. 1100 (1105), 10 I.C. 937, 38 C.W.N. 25, 1933 Cr.C. 1481, A.I.R. 1933 Cal. 870, 61 Cal. 155, 61 Cal. 168, where Lord-William, J., has, however held that clerical errors in the draftsmanship of the order may be corrected by the High Court; *Bonwaris Lal*, A.I.R. 1935 Cal. 466, 157 I.C. 1044, 1935 A.L.J. 317, 1935 Cr.C. 507, 1935 A.L.R. 904, 8 R.A. 36, 36 Cr.L.J. 1286; *Ram Jas*, 12 Luck. 30, 160 I.C. 969, 1936 O.W.N. 194, 1936 P.L.R. 125, 8 R.O. 292, 36 Cr.L.J. 362, A.I.R. 1936 Oudh 719, 1936 Cr.C. 344; *Pemerton*, 14 Pat. 392, 159 I.C. 241, A.I.R. 1935 Pat. 426, 16 P.L.T. 683, 1935 Cr.C. 3, 2 B.R. 62, 8 R.P. 259, 37 Cr.L.J. 58; *Laxmanrao Parashram Deshmukh*, 39 Cr.L.J. 172, I.C. 299, 10 R.N. 192, A.I.R. 1938 Nag. 74. This section does not confer on the High Court any new powers but merely declares that such inherent powers which the Court may possess shall not be deemed to be limited or affected by anything contained in the Code. The High Court has, therefore, no power to alter or review its own judgment in a criminal case, once it has been pronounced and signed except in cases where it was passed without jurisdiction or in default of appearance without adjudication on the merits or to correct a clerical error; nor is there any conflict between this section and section 369 of the Code—*Edward Few v. Emp.*, 40 Cr.L.J. (764), 183 I.C. 348, 12 R.L. 110, 41 P.L.R. 794, A.I.R. 1939 Lah. 244. The High Court has not and never has had any inherent power to review its own judgment and this section does not confer on it any power so to do—*Jodha v. Emp.*, 41 Cr.L.J. 711 (3), A.I.R. 1940 Oudh 369, 1940 O.L.R. 408, 189 I.C. 83, 1940 O.W.N. 594. The High Court has no power to amend its order by way of explanation or otherwise—*Ansham Das Bula v. Suraj Bhan*, 41 Cr.L.J. 708, 188 I.C. 856, A.I.R. 1940 Cal. 42, 42 P.L.R. 153. See also the rulings quoted under section 369, Note 1055.

The inherent power of the High Court under this section can be exercised in a criminal proceeding till the disposal of a civil suit pending in a civil court in the same dispute—*Kanhaiyalal v. Ghagwan Das*, 48 All. 60, 23 A.L.J. 35; *Jehangir v. Framji*, 30 Bom.L.R. 962, 29 Cr.L.J. 1053. While conducting an inquiry under sec. 176 into a case of death under suspicious

the District Magistrate interfered and put a stop to the inquiry. *Held* that the action of the District Magistrate unjustly interfered with the exercise of the powers of the Magistrate under sec. 176, and the case was certainly one where that action could be properly scrutinised, under the inherent powers of the High Court to pass the necessary orders to secure the ends of justice under sec. 561A—*In re Laxminarayan*, 30 Bom.L.R. 1050, 29 Cr.L.J. 1063 (1066). A High Court has power under this section to interfere with an illegal order of search of a house—*Bhairon Prasad*, 51 All. 377, 30 Cr.L.J. 62 (63). Under this section, the High Court has the power to order restitution of property—*Shree Wa v. C. J. Mehta*, 5 Rang. 553, 28 Cr.L.J. 932. The High Court has inherent jurisdiction to grant bail to an accused pending appeal to the Privy Council—*Ram Saroop*, 49 All. 217, 27 Cr.L.J. 1377, 93 I.C. 593, A.I.R. 1927 All. 97, 25 A.L.J. 97. See Note 1315 under the heading "Grant of bail pending appeal to Privy Council." It would be incorrect to interpret this section as having reference to bail, a matter which is specifically provided for by the Code itself. But the High Court has jurisdiction to extend the time for an accused to surrender, under the power preserved to it by this section, when the accused wants such extension of time on the ground that he has instructed his solicitors in England to place a petition before the Judicial Committee of the Privy Council with regard to an appeal—*Babu Lal Chautani*, A.I.R. 1936 Cal. 809 (811), 40 C.W.N. 1313, 1935 Cr.C. 1121. The High Court is not specifically empowered by section 498 of the Criminal Procedure Code to cancel bail granted by itself; but it can hardly be argued that it will be exercising the wide powers with which it is endowed by section 561A improperly, if it follows the procedure that would be observed by a Sessions Judge or Magistrate, and directs the arrest of a person who has been released on bail under its orders, for the reason that there do now appear to be reasonable grounds for believing that he has committed a non-bailable offence—*Mohammad Ibrahim*, 33 Cr.L.J. 681 (685), 138 I.C. 768, Ind. Rul. 1932 All. 494, 1932 A.L.J. 701, 1932 Cr.C. 630, A.I.R. 1932 All. 534. The High Court has inherent power to excuse the personal attendance of the accused in the trial and permit him to appear by a pleader—*Saji v. Bhimji*, 26 N.L.R. 50, 31 Cr.L.J. 284 (285). The High Court has an inherent power to order examination of a defence witness on commission although it might have made an *ex parte* order under sec. 39, Prisoners Act (III of 1900) for his production in the Court to give evidence as a defence witness—*Assistant Govt. Advocate v. Upendra*, 32 Cr.L.J. 551, 130 I.C. 538, A.I.R. 1931 Pat. 81, 11 P.L.T. 892, Ind. Rul. 1931 Pat. 186, 1931 Cr.C. 201. The High Court has power to pass an order for re-trial with the help of other assessors when one of the assessors expressed during the course of the trial that he was not going to allow the accused to be convicted—*Lal Singh*, A.I.R. 1933 Lah. 926, 15 Lah. 20, 1933 Cr.C. 1385, 146 I.C. 446, 35 Cr.L.J. 107, following *Thagaraja*, 1912 M.W.N. 378, 13 Cr.L.J. 473, 15 I.C. 313. Where the subordinate Court is holding separate trials in respect of several acts of criminal misappropriation, the High Court can stop the trial if it is shown to be oppressive though it is not illegal—*Kanakayya*, 59 M.L.J. 854, 1930 Cr.C. 1191, A.I.R. 1930 Mad. 978, 1930 M.W.N. 1097, 32 M.L.W. 789, 129 I.C. 75, 32 Cr.L.J. 223, 4 M.Cr.C. 17. The High Court exercised inherent power under this section to correct a mistake in fixing time for inflicting a sentence of whipping, although the appeal against the same sentence was previously dismissed summarily by it—*Rashbehari*, 36 Cr.L.J. 100, 152 I.C. 291, A.I.R. 1934 Pat. 551, 15 P.L.T. 475, 1934 Cr.C. 1195, A.L.R. 1934 Pat. 303. If frivolous and vexatious applications for transfer are resorted to as a means of preventing the ends of justice, the High Court has power under this section to penalise such conduct by committal to prison, apart from the power to direct the payment of costs (compensation) under sec. 526 (6A). The High Court may also direct the party to lodge a certain sum in Court as security for costs incurred by the opponent—*Shamdasani*, 54 Bom. 553, 1930 Cr.C. 1065, 32 Bom.L.R. 1123, 129 I.C. 584, A.I.R. 1930 Bom. 477, Ind. Rul. 1931 Bom. 184.

Where the Additional Sessions Judge erroneously supposed that he had no jurisdiction to disagree with the verdict of the jury, this section amply justifies the order of the

High Court setting aside the convictions of the accused and the sentences passed on them and sending the case back to the Court of the Additional Sessions Judge to consider whether he would express disagreement with the verdict or not, and, if so, make a reference under section 307, Cr. P. C., to the High Court or uphold the verdict and convict the accused and pass suitable sentences—*Manjia v. Emp.*, 38 Cr L.J. 465 (467), 167 I.C. 802, 9 R.A. 578, 1937 A.Cr.C. 11, 1936 A.W.R. (H.C.) 1284, 1 L.R. 1937 All. 419, 1937 A.L.R. 250, 1937 A.L.J. 43, A.I.R. 1937 All. 195.

The object of the re-trial is, so to say, to legalize the proceedings that have already taken place and not to give further opportunity to the complainant to fill in the gaps. Under section 561A, Cr. P. C., therefore, with a view to secure the ends of justice and to prevent abuse of the process of the Court, the High Court can direct that the complainant should not be allowed to lead any evidence in the case which has not been adduced before—*Rampershad v. Dhanna*, 41 Cr L.J. 184 (185), 185 I.C. 415, A.I.R. 1939 Lah. 513, 41 P.L.R. 198.

As to inherent jurisdiction, it cannot be said that a Court, especially Civil Court, has an inherent jurisdiction to file a complaint. That is not the ordinary function of a Civil or any Court. The power to file a complaint is given by the Cr. P. Code and this does not indicate existence of any inherent jurisdiction, except that of a High Court (section 561A)—*Kushal Pal*, 32 Cr L.J. 1105 (1115), 134 I.C. 225, 1931 A.L.J. 697, 1931 Cr.C. 715, A.I.R. 1931 All. 443, Ind. Rul. 1931 All. 801 (F.B.).

Where the accused were tried for kidnapping a girl and were acquitted on appeal to the High Court and the husband of the girl brought a case on the same facts against them after ten months and the accused had been already in jail for eight months on account of the occurrence, the subsequent proceedings were an abuse of the process of the Court and ought to be quashed under the provisions of this section—*Mahammad Hossain v. Bholanath Das*, A.I.R. 1936 Cal. 224, 1936 Cr.C. 357, 37 Cr.L.J. 538, 162 I.C. 176.

An order passed under sec. 421, Cr. P. C., dismissing an appeal filed under sec. 419, Cr. P. C., is *prima facie* final. Such an order cannot be vacated under sec. 561A, Cr. P. C., unless it is proved that either of the conditions precedent to the passing of the order as laid down by sec. 421, Cr. P. C., has not been fulfilled and this a question of fact depending on the circumstances of each case. The burden of proving that either of the conditions has not been complied with, lies heavily on the person challenging the finality of the order. Where it is proved that either of the conditions precedent has not been complied with, the High Court has power to interfere under sec. 561A, Cr. P. C., and in such a case, it is immaterial whether the Bench which is called upon to interfere is composed of the same or different Judges. Where there is no proof that either of the conditions have not been complied with, the High Court, whether the Bench is composed of the same or other Judges, has no power to interfere—*Shahu*, 36 Cr.L.J. 831, 155 I.C. 736, 1935 Cr.C. 370, A.I.R. 1935 Sind. 84 (89) (F.B.). See also *Daku Raut*, *supra*. The High Court has no power to entertain an appeal from the conviction and sentence passed on the appellants, after the dismissal of the appeal which they preferred from jail and neither the Bench which admitted the appeal nor any other Bench has power to review or revise the order of dismissal—*Pem Mahton*, A.I.R. 1935 Pat. 426, 14 Pat. 392. See also Notes 1129 and 1133.

First Offenders.

552. (1) *When any person not under twenty-one years of age is convicted of an offence punishable with imprisonment for not more than seven years, or when any person under twenty-one years of age or any woman is convicted of an offence not punishable with death or transportation for life, and no previous conviction is proved*

Power of Court to release certain convicted offenders on probation of good conduct instead of sentencing to punishment.

against the offender, if it appears to the Court before which he is convicted, regard being had to the age, character or antecedents of the offender * * * and to the circumstances in which the offence was committed, that it is expedient that the offender should be released on probation of good conduct, the Court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period (not exceeding *three years*) as the Court may direct, and in the meantime to keep the peace and be of good behaviour:

Provided that, where any first offender is convicted by a Magistrate of the third class, or a Magistrate of the second class not especially empowered by the *Provincial Government* in this behalf, and the Magistrate is of opinion that the powers conferred by this section should be exercised, he shall record his opinion to that effect, and submit the proceedings to a Magistrate of the first class or Sub-divisional Magistrate, forwarding the accused to, or taking bail for his appearance before, such Magistrate, who shall dispose of the case in manner provided by section 380.

(1A) *In any case in which a person is convicted of theft, theft in a building, dishonest misappropriation, cheating or any other offence under the Indian Penal Code punishable with not more than two years' imprisonment, and no previous conviction is proved against him, the Court before whom he is so convicted may, if it thinks fit, having regard to the age, character, antecedents or physical or mental condition of the offender and to the trivial nature of the offence or to any extenuating circumstances under which the offence was committed, instead of sentencing him to any punishment, release him after due admonition.*

(2) *An order under this section may be made by an Appellate Court or by the High Court when exercising its power of revision.*

(3) *When an order has been made under this section in respect of any offender, the High Court may, on appeal when there is a right of appeal to such Court, or when exercising its powers of revision, set aside such order, and in lieu thereof pass sentence on such offender according to law:*

Provided that the High Court shall not under this sub-section inflict a greater punishment than might have been inflicted by the Court by which the offender was convicted.

(4) *The provisions of sections 122, 126A and 406A shall, so far as may be, apply in the case of sureties offered in pursuance of the provisions of this section.*

Change:—Sub-section (1) has been substantially amended, and sub-sections (2) to (4) have been newly added, by sec 157 of the Cr. P. C. Amendment Act, XVIII of 1923. The main changes are the following —“*First*, this section extends the list of offences on conviction for which a person may be released upon probation; *secondly*, it is made clear that sec. 562 does not apply merely to the case of *youthful* offenders but applies to a wider class of persons; *thirdly*, the word ‘trivial’ has been omitted, *fourthly*, the period for which an offender may be released under this section has been extended from one to three years; *fifthly*, power has been conferred on an Appellate Court or upon a High Court in the exercise of its revisional jurisdiction to make an order under sec 562; and *finally*, the High Court has been empowered, either on appeal or in revision, to inflict a sentence of imprisonment in lieu of an order under this section”—*Statement of Objects and Reasons* (1914). Sub-section (1A) has been added by the Cr. P. C. Second Amendment Act, XXXVII of 1923. This amendment has been made on the recommendation of the Jail Committee

The words “Provincial Government” have been substituted for “Local Government” by section 4 of the Government of India (Adaptation of Indian Laws) Order, 1937.

1434. Scope and application of section:—Under this section the first offender need not necessarily be a youth; its operations are not limited to *juvenile offenders*. It applies to persons of advanced age—*Tukaram*, 2 Bom.L.R. 817; *Salimi*, 1916 P.R. 11, 17 Cr.L.J. 254; *Pullabholla*, 18 Cr.L.J. 469 (Mad.); *Po Thein*, 2 L.B.R. 314, 1 Cr.L.J. 1121. The intention of the law is not to make it essential that the offender must be young or that the offence must be trivial in its nature, etc., but merely to indicate the lines on which the discretion of the Court should be exercised—*Ba Han*, 2 L.B.R. 65.

In order to give a Court jurisdiction to release an offender under this section, there must co-exist two conditions, viz., there should be no previous convictions proved and the offence must be one of those specified in the section. If the two conditions are fulfilled, the Court has jurisdiction in the exercise of its discretion to act under this section. But in exercising the discretion the Court must have regard to the points specified in the section, namely, the age, character and antecedents of the offender, and to the circumstances under which the offence was committed—*Ba Han*, 2 L.B.R. 65; *Tukaram*, 2 Bom.L.R. 817.

It is undesirable to send a youth of 16 or 17 to prison for a first offence, unless he has been charged with a serious offence. It is not so much a question of whether the prisoner is repentant or whether he has been guilty of moral turpitude. The object of the section is to offer an alternative to the Courts, so that in the case of first offenders the Courts may avoid the necessity of sending such persons to jail, and offer them a further chance to turn over a new leaf. To send such persons to jail may have the effect of turning into habitual criminals those who have drifted without thinking into crime—*Bangru Barman* 38 C.W.N. 362, A.L.R. 1934 Cal 608. This section may be a very valuable section if properly applied; and it may very often happen that a juvenile offender who is sentenced to jail for a short period of imprisonment for a trivial offence may be practically ruined for life, whereas he would be saved by the due application of sec. 562. But in passing an order under this section, at least two things are necessary to guard against, viz., danger to the public, and danger to the accused himself. The public must not be led to suppose that all juvenile offenders may commit any crimes that they like without any fear of punishment, because that would be an incentive to criminal parents to imitate their children into a life of crime. And even children themselves being immune from the fear of punishment might be tempted to go astray into the paths of crime. It is obvious therefore that before applying this section one must consider whether there is a good cause for its application or not. If the offence is by no means a simple crime such as is committed by children out of mere thoughtlessness rather than of criminality, but it shows a singular combination of design and ingratitude and a general character of craft and deceit, it would call for a severe punishment indeed, and resort should not be had to the provisions of this section—*Daryalal*,

18 S.L.R. 61, 25 Cr.L.J. 1221, 82 I.C. 152, A.I.R. 1925 Sind 75; *Allahdino*, 35 Cr.L.J. 1149 (1150), 150 I.C. 763, 27 S.L.R. 463, 1931 Cr.C. 752, A.I.R. 1931 Sind 93, A.L.R. 1931 Sind 50. Magistrates should be very careful in applying this section and should not allow themselves to be misled into the use of this section by misplaced leniency and sympathy—*Mahto*, 27 Cr.L.J. 209, 92 I.C. 693, A.I.R. 1926 Sind 101, 20 S.L.R. 7. Cattle lifting is an offence which is very common in this country, and it cannot be repressed without condign punishment. A person convicted of such an offence should not be dealt with under this section simply because he has not been convicted before. The knowledge that a first offence will go unpunished is very apt to lead the young into a course of crime—*Jhangri*, 31 Cr.L.J. 420, 142 I.C. 511, A.I.R. 1933 Sind 44, 1933 Cr.C. 190, 27 S.L.R. 31, Ind. Rul. 1933 Sind 113. Offences of cattle theft are particularly mean and despicable offences in a community where so much depends upon cattle. They are inspired by no other motive than the ordinary motive of gain which in many other cases prompts a thief to steal, and it must be made plain to young men who steal cattle that if they are not going to prison they will have at least to pay a heavy fine—*Miro Ghulam Hussain*, A.I.R. 1939 Sind 339, I.L.R. 1940 Kar. 88, 185 I.C. 428, 41 Cr.L.J. 187. This section is intended to apply to offenders (especially youthful offenders) who without being persons of depraved character may on occasions succumb to sudden temptations, and the Legislature very humanely and very properly allows the Magistrate in such cases to give the young man a chance and to deal with him leniently under this section. But where an offence implies a good deal of preparation (e.g. the offence of illicit manufacture of liquor) it cannot be said that it is done in consequence of succumbing to a sudden temptation, and the section should not be applied to such a case—*Sujan Singh*, 1916 P.R. 19, 17 Cr.L.J. 310; *Piara Singh*, 7 Lah. 32, 27 P.L.R. 221. Where a youth of 18 years enticed away a girl, and no attempt was made by him to seduce or ill-treat her, but on the other hand he wished honourably to marry her, held that it was precisely for this sort of case that sec. 562 was enacted—*Mukham*, 1929 Cr.C. 658, A.I.R. 1929 All 930, 120 I.C. 257, 31 Cr.L.J. 23. But if the offence be a hideous and reprehensible one calling for condign and deterrent punishment (e.g. rape upon an infant girl of 5 years), the fact that the offender is a lad of 17 years of age is no ground for taking action under this section—*Sardha Ram*, 29 Cr.L.J. 1096 (1097), 112 I.C. 680, A.I.R. 1929 Lah. 198. Where the accused, a full grown man of 25, made a criminal assault on a woman with intent to outrage her modesty publicly and in broad day light, he merited a substantial sentence of imprisonment and should not have been dealt with under this section—*Mohammad Khan*, A.I.R. 1934 Lah. 36, 14 Lah. 800, 1934 Cr.C. 69, 35 P.L.R. 83, 148 I.C. 96, 35 Cr.L.J. 613. This section has not been enacted with the intention of letting off every juvenile offender who has committed an offence described in this section, regardless of circumstances in which the crime was committed. This section can have no application to the case of a youth (even though he is a boy of 15 or 16) who grapples with another and after having been separated by others turns back in a rage upon his adversary and inflicts a heavy *lathi* blow on him, and later on flourishes his stick in a spirit of truculent *braggadocio* threatening to kill those who attempt to capture him—*Alla*, 10 Lah. 876, 1930 Cr.C. 291 (292), A.I.R. 1930 Lah. 259, 31 P.L.R. 115, 122 I.C. 97, 31 Cr.L.J. 348, 14 A.I.Cr. 31. So also, a person who has deliberately committed perjury in order to screen an offender should not be dealt with under this section—*Akbar*, 29 Cr.L.J. 219, 107 I.C. 107, 29 P.L.R. 219, A.I.R. 1928 Lah. 296, 9 A.I.Cr.C. 496. So again, burglary is a serious offence, and whenever it is detected, the accused must be given a deterrent punishment. It is not proper to release burglars on probation of good conduct; such a course would embolden them to commit the crime because they will think that they can easily escape—*Sardara*, 33 P.L.R. 215, 1932 Cr.C. 323, 137 I.C. 716, 33 Cr.L.J. 550, A.I.R. 1932 Lah. 258, Ind. Rul. 1932 Lah. 316; *Bhasat Singh*, 34 Cr.L.J. 779, Ind. Rul. 1933 Lah. 500, 144 I.C. 538, 1933 Cr.C. 637, A.I.R. 1933 Lah. 393. This section is not applicable to the offence of burglary committed by persons above 21 years of age—*Bhagat Singh*, *supra*. The provisions of this section should not be extended to a serious crime such as conspiracy

to possess fire-arms and ammunition without a license even though the offender be a law student and belongs to a respectable family—*Nirmal Chandra*, 31 C.W.N. 239, 28 Cr.L.J. 241 (243). Undoubtedly this section should only be applied in special cases and for special reasons. Where the accused has been convicted under section 19 (e), Arms Act, for possession of an unlicensed dagger, he should not be placed on security under this section simply because he happens to be a *lambardar* aged 30 years and it is his first offence—*Akhtar Munir v. Emp.*, 38 Cr.L.J. 610, 168 I.C. 783, 9 R.Pesh. 131, A.I.R. 1937 Pesh 51. But where it is found that though the offence be a serious one (culpable homicide) yet the part which the young boys took in the crime was not very much, and the offence was really committed by the elderly persons with whom they associated, an order under sec. 562 on the young boys was not illegal—*Bhusan Chandra v. Kanai*, 44 C.L.J. 208, 28 Cr.L.J. 6 (7).

Petty squabbles of young boys and girls should be dealt with under this section—*Ma Kywe*, 4 Bur.L.T. 68, 12 Cr.L.J. 242. Where the offender is a person of good position in life, he should rather be dealt with under this section than sentenced to whipping—*Bhagel Singh*, 1907 P.W.R. 9, 5 Cr.L.J. 217. Where a woman was driven to commit suicide by family discord, poverty, loss of a dear relation or other cause of a like nature she should be released on probation of good conduct under this section or sentenced to a fine if she is not too poor to pay it—*Mt. Barkat*, A.I.R. 1934 Lah. 514, 1934 Cr.C. 805, 35 P.L.R. 439, 36 Cr.L.J. 682, 155 I.C. 283, 15 Lah. 872. Where the accused was a widow of over 45, and it appeared that in committing the offence (forgery, false personation) she was a puppet in the hands of the accused, held that this was a case in which the Court instead of sentencing her to imprisonment should release her on her entering into a bond—*Kiran Bala*, 30 C.W.N. 373, 27 Cr.L.J. 409. An old man of 55 committing criminal breach of trust in respect of a small amount may be dealt with under this section—*Nur Hussain*, 31 P.L.R. 334, 1930 Cr.C. 108, A.I.R. 1930 Lah. 92, 124 I.C. 315, 31 Cr.L.J. 653.

This section would not be in any way appropriate when the accused was convicted under sec. 181, I.P.C., for deliberately swearing a false affidavit—*Gajadhar*, A.I.R. 1934 Nag. 193, 1934 Cr.C. 892, A.L.R. 1934 Nag. 238; or where the accused was convicted of an offence as bad a form of that punishable under sec. 317, I.P.C., as can well be imagined—*Shah Huran*, 36 Cr.L.J. 1043, 156 I.C. 431, A.I.R. 1935 Pesh 48, 1935 Cr.C. 349.

This section applies when no previous conviction is proved against the offender. If the accused has been previously convicted and released on probation of good conduct, a second order under this section placing the accused again on probation of good conduct upon a subsequent conviction for another offence, is illegal—*Mahadeo Gobind*, 32 Bom.L.R. 356, 1930 Cr.C. 552, A.I.R. 1930 Bom. 176, 125 I.C. 712, 31 Cr.L.J. 926, 15 A.I.Cr.R. 19. A previous conviction is a technical bar to an order under this section; but if no such conviction is proved at the trial and an order under this section is passed, a subsequent discovery of a previous conviction is no ground for interference in revision—*Partab Naram*, 2 O.W.N. 593, 26 Cr.L.J. 1278.

The words in this section are "instead of sentencing him." Therefore where the Magistrate convicted the accused and passed a sentence of imprisonment and fine, and then added: "As the accused is a young man of respectable family, I do not think jail life would be suitable to him. Therefore, under sec. 562 I order him to execute a bond for Rs. 200, etc.," held that the order under sec. 562 was illegal. This section cannot be applied where the Magistrate has not only convicted the accused but has also sentenced him. The order under sec. 562 must be set aside—*Musri Lal*, 17 A.L.J. 426, 50 I.C. 1000 (1001), 20 Cr.L.J. 392. A Court cannot, after passing judgment and sentence, reconsider the question of sentence and make an order under sec. 562, because that would amount to a review of its own judgment under sec. 369—*Ganpat*, 27 N.L.R. 163, 1931 Cr.C. 830, A.I.R. 1931 Nag. 169, 32 Cr.L.J. 1222, 134 I.C. 686. In another case, where the Magistrate fined the accused as well as passed an order under sec. 562, the High Court set aside the order as to fine—*Karim Baksh*,

10 Lah. 722, 30 Cr.L.J. 46 (47), 112 I.C. 910, 1930 Cr.C. 21, A.I.R. 1930 Lah. 56; *Ayyub*, A.I.R. 1928 All 759, 112 I.C. 911, 30 Cr.L.J. 47. The sentence of imprisonment imposed upon an accused, while she is released on probation of good conduct, is wholly illegal—*Mt. Barkat*, A.I.R. 1934 Lah. 514, 35 P.L.R. 439, 1934 Cr.C. 806, 36 Cr.L.J. 682, 155 I.C. 283, 15 Lah. 872.

Where the accused was sentenced to 25 lashes and, as it was reported that owing to an enlarged spleen the sentence of whipping could not be executed, the Magistrate directed him to enter into a bond under this section, *held* that the order was clearly beyond the Magistrate's powers. Section 295 (1), Cr. P. C., in such a case, allows the Court to remit the sentence altogether or to sentence the offender in lieu of whipping to imprisonment or fine. The reason why a Court is not empowered to release an offender on his entering into a bond for good behaviour in lieu of whipping is obviously that if such a sentence was suitable, it should be imposed in the first instance—*Ba Kiyay*, 39 Cr.L.J. 707, 176 I.C. 224, A.I.R. 1938 Rang. 218, 11 R.Rang. 39.

1435. Sub-section (1):—Under the law this sub-section applied only where the offender was convicted of one of certain offences under the *Penal Code*, and not of an offence under any other law, e.g., an offence under the Indian Railways Act—*John Scott*, 1 N.L.R. 139, 1 Cr.L.J. 751; or an offence under the Excise Act—*Sujan Singh*, 1916 P.R. 19, 17 Cr.L.J. 310. This restriction has now been removed. This sub-section is expressed in general language. It applies to a person convicted of an offence punishable with imprisonment of not more than a certain period, and this sub-section, unlike sub-section (1A), which only applies in the case of convictions under particular sections of the Indian Penal Code, covers the case of conviction under any law. It is impossible to limit the previous conviction which prevents the operation of the section to a conviction under the Indian Penal Code. Therefore, a conviction under the Bombay Prevention of Gambling Act is a previous conviction within the meaning of this sub-section so as to exclude its operation—*Chhotan*, 36 Cr.L.J. 1376, 158 I.C. 378, A.I.R. 1935 Bom. 188, 37 Bom.L.R. 182, 1935 Cr.C. 489, 59 Bom. 514.

The old sub-section (1) could not apply where the offender was punishable with more than 2 years' imprisonment. Thus, it could not apply where the accused was convicted of receiving stolen property—*Atmaram*, 2 Bom.L.R. 343; or of lurking house trespass—*Maruti*, 15 C.P.L.R. 11; or of using as genuine a forged document—*Ramjan Dadubhai*, 17 Bom.L.R. 921, 16 Cr.L.J. 781; or of house-breaking—*Pullabholla*, 18 Cr.L.J. 469 (Mad.); or of voluntarily causing grievous hurt—*Abdul Lal*, 4 L.B.R. 150, 7 Cr.L.J. 449; or of aggravated form of cheating under sec. 420, I. P. Code—*Nga Pyi*, 3 L.B.R. 95, 3 Cr.L.J. 21; *Rab Nawaz*, 1 Lah. 612; *Sundaram Ayyar*, 41 Mad. 533; *Harnam Singh*, 16 P.L.R. 1911, 12 Cr.L.J. 213; or of an offence under sec. 381, I. P. Code—*Bajru Rao*, 4 N.L.R. 18, 7 Cr.L.J. 319. All these cases will now fall under the present sub-section (1).

No order can be made under this section where the accused has been convicted of an offence not falling under this section as well as of an offence falling under this section—*Krishna Aiyangar*, 2 Weir 731.

The phrase "death or transportation for life" is not a single and inseparable definition, but must be read disjunctively, meaning an offence punishable with death or an offence punishable with transportation for life. It does not mean an offence punishable with both penalties. Therefore, the offence of voluntarily causing hurt in the commission of a robbery or causing hurt in an attempt to murder (sec. 307, I. P. C.) for which one of the punishments is transportation for life (though not death), comes within the above phrase. A person convicted of such an offence cannot be dealt with under this section—*Janki*, Ind. Rul. 1932 Nag. 115, 140 I.C. 59, 33 Cr.L.J. 844, A.I.R. 1932 Nag. 130, 28 N.L.R. 260, 1932 Cr.C. 666 (667), following *Nga San Htwa*, 5 Rang. 276 (F.B.); *Bahawali*, 30 Cr.L.J. 789, A.I.R. 1928 Lah. 920. Where the accused a youth of about eighteen years of age, was convicted under sec. 394, I. P. C., his case does not come under this section as the offence is punishable with transportation for life—*Bakhsha*, A.I.R. 1934 Lah. 131, 152 I.C. 233, 36 P.L.R. 370, A.L.R. 1934 Lah. 746,

1934 Cr.C. 311, 36 Cr.L.J. 105, 152 I.C. 233. The Magistrate has no power to act under this sub-section when the accused is more than 21 years old and the offence is under sec. 454, I. P. C., which is punishable with more than seven years' imprisonment—*Yeshaba Sakhoba Patil*, 40 Cr.L.J. 48, 178 I.C. 330, A.I.R. 1938 Bom. 463, 40 Bom.L.R. 927; or the offence is under sec. 458, I. P. C., which is punishable with fourteen years' imprisonment—*Jawand Singh v. Jagat Singh*, 40 P.L.R. 999.

When the offences charged are theft and house-breaking, if the Magistrate gives merely a nominal sentence of imprisonment till the rising of the Court, then although he is complying with the letter of the law, he is in fact treating the accused more leniently than if he had applied sec. 562 (1), Cr. P. C. But theft and house-breaking are offences for which separate punishments can be given. If the accused is convicted under sec. 379, theft, or sec. 380, theft in a building, he may, in a proper case, be released on probation of good conduct. If he is convicted of house-breaking with intent to commit theft (secs. 454 and 457), a sentence of imprisonment is obligatory. When, therefore, the accused is convicted under both these sections and the Magistrate considers that it is not desirable to inflict a substantial sentence of imprisonment, his proper course is to direct the accused to execute a bond under sec. 562 (1), Cr. P. C., for the offence of theft and to sentence him to imprisonment until the rising of the Court for the offence of house-breaking—*Yeshaba Sakhoba Patil*, *supra*.

Sub-section (1) cannot apply to an offence which is punishable with fine only. It applies where the offence is punishable with imprisonment—*Meruani M Mistry*, 52 Bom. 250, 29 Cr.L.J. 566 (567), 109 I.C. 502, A.I.R. 1928 Bom. 152, 30 Bom.L.R. 375; *Kasturi*, 28 Bom.L.R. 1031, 97 I.C. 742, A.I.R. 1926 Bom. 544, 27 Cr.L.J. 1158. The expression "offence punishable with imprisonment for not more than seven years" is intended to be read in the same sense as the expression in sub-sec. (1A) "offence punishable with not more than two years' imprisonment," and that both expressions are intended to cover offences punishable with a less severe sentence than those indicated, and, therefore, to include offences punishable only with fine—*Vaiyappa*, 36 Cr.L.J. 1470, 153 I.C. 649, A.I.R. 1935 Bom. 402, 37 Bom.L.R. 739, 8 R.B. 138, 1935 Cr.C. 1109, 60 Bom. 55 (F.B.), overruling *Kasturi*, *supra*. This is also the view of the Oudh Chief Court—*Shital Prasad v. Emp.*, 39 Cr.L.J. 889, 177 I.C. 386, 11 R.O. 48, 1938 O.A. 699, 1938 A.Cr.C. 98, 1938 O.W.N. 919, 1938 O.L.R. 421, A.I.R. 1938 Oudh 233.

Who can pass order:—An order under this section can be passed not only by the Court which convicted the accused but also by the Appellate Court, as well as by the High Court in revision—*Birch*, 24 All. 306; *Narayanasamy*, 29 Mad. 567; *Abdul Kadar v. Monmohan*, 25 C.W.N. 720, 23 Cr.L.J. 235. This is now expressly provided in the new sub-section (2).

1436. Bond:—The bond to be taken should be not only to keep the peace and to be of good behaviour, but to appear and receive sentence when called upon, and in the meantime to keep the peace and be of good behaviour—*Yessu*, 2 Bom.L.R. 112. But it is not competent to a Magistrate to direct the accused to appear in Court on a fixed day to receive sentence; all he can do is to release the accused on probation of good conduct for a certain period and to direct him to appear and receive sentence when called upon during such period, if he does not observe the conditions of the bond—*Rama*, 2 Bom.L.R. 702.

Bond by minor:—It was held that the third proviso to sec. 118, providing for bond of minors to be executed by the sureties, applied only to bonds under that section, and did not apply to bonds of first offenders released under this section. A bond under this section had to be executed by the minor himself and not by his sureties (*Cf.* the words 'on his entering into a bond')—*Ma Yau*, 4 L.B.R. 12, 6 Cr.L.J. 123 (overruling *Nga Pan Tin*, 2 L.B.R. 137). But this is no longer good law in view of the new section 514B.

Inability to furnish security:—If an accused person is ordered to give security

under this section and he fails to do so, he should not be detained in prison till the expiration of the period for which security is to be furnished; but the proper course is for the Magistrate before passing an order under this section, to ascertain whether the accused is likely to be able to give security immediately or within a reasonable time. If he fails to give security within a reasonable time, the Magistrate should pass a sentence which should be only nominal—*Tun Gaung*, 3 L.B.R. 2, 2 Cr.L.J. 374; *Nasu Meah*, 2 Rang. 360 (361), 26 Cr.L.J. 285; *Jamsher*, 36 Cr.L.J. 381, 153 I.C. 272, 15 Lah. 824, A.I.R. 1934 Lah. 582, 35 P.L.R. 368, 1934 Cr.C. 913. The order of imprisonment on failure to furnish security cannot be added to the order of release on probation of good conduct—*Jamsher*, supra. The Magistrate should not imprison the accused under sec. 123, on failure to give security under sec. 562. Sec. 123 specifically applies only to secs. 106 and 118 and not to sec. 562—*Nasu Meah*, 2 Rang. 360 (361).

When the surety of a convict gets his security bond cancelled the Magistrate should give the convict an opportunity to execute another bond with a fresh surety—*Jamsher*, supra.

1437. Proviso:—Power of a 2nd or 3rd Class Magistrate:—It is not open to a Second Class Magistrate, who has not been specially empowered to exercise jurisdiction under sub-sec. (1) of the section, to take proceedings under that sub-section, although he was invested by a notification issued under the 1882 Code with all the powers specified in the fourth schedule of that Code—*Dorasami Aiyangar*, 2 Weir 731. If a Second Class Magistrate not empowered under this section is of opinion that the case is a fit one for the exercise of the powers conferred by sub-sec. (1) of sec. 562, he should record his opinion to that effect and submit the case to a first class Magistrate or Sub-divisional Magistrate for orders—*Jawali*, 5 Lah. 36 (37), 25 Cr.L.J. 1124. The same remarks apply to third class Magistrates. It should be noted, however, that in the Punjab, all Second Class Magistrates have been invested with powers to act under sec. 562, by a Notification, dated 18th April 1910, published in the Punjab Government Gazette, 22nd April 1910. This fact was not pointed out to the Judges who gave the decision in 5 Lah. 36, cited above. See *Bakshan*, 28 P.L.R. 285, 28 Cr.L.J. 316 (317); *Hasham*, 29 P.L.R. 215, 29 Cr.L.J. 588.

Power of the Magistrate to whom proceedings are submitted:—See Notes under sec. 380.

Joint trial of young and aged offenders:—Where the first accused aged nearly 50 and the second accused a boy of 11, were charged with theft before a Second Class Magistrate, and the Magistrate sent the case of both the accused to a First Class Magistrate so that the second accused might be dealt with under sec. 562 it was held that the Second Class Magistrate should have disposed of the case of the first accused according to law without submitting the case to the First Class Magistrate, and that he should have submitted the case of the second accused only—*Yessu*, 2 Bom.L.R. 112. Under the present law, the case of the aged offender also falls under this section.

1438. Sub-section (1A):—The offences enumerated in this sub-section are the same as those mentioned in the old section. It is restricted to offences under the Indian Penal Code, and does not apply to an offence under any other law, e.g., an offence under the Indian Railways Act—*John Scott*, 1 N.L.R. 139, 1 Cr.L.J. 751 (but see *Kodumal*, 36 Cr.L.J. 827 at p. 829, 152 I.C. 697, A.I.R. 1935 Sind 90, 1935 Cr.C. 373); or an offence under the Excise Act—*Sujan Singh*, 1916 P.R. 19, 17 Cr.L.J. 310; or an offence punishable under the Bombay City Municipal Act (III of 1888)—*Merwanji M. Mistry*, 52 Bom. 250, 29 Cr.L.J. 566 (567); or an offence under the Motor Vehicles Act—*Pandu Rabji*, 28 Bom.L.R. 297, 27 Cr.L.J. 528; or an offence under the Stamp Act—*Iswar Dayal*, 25 A.L.J. 401, 28 Cr.L.J. 166 (167).

This sub-section deals with offences "punishable with not more than two years' imprisonment" and taking those words literally they seem to cover an offence punishable only with fine, which cannot be said to be more than two years' imprisonment—*Manchershaw*, 36 Cr.L.J. 1036, 156 I.C. 735, A.I.R. 1935 Bom. 156, 37 Bom.L.R. 106, 1935 Cr.C. 302, 59 Bom. 352. See also *Vaijappa*, cited in Note 1435.

Again, the benefit of this sub-section is not extended to the aggravated forms of the offences mentioned herein. Thus, when this sub-section speaks of theft, dishonest misappropriation or cheating it must be construed to mean theft, etc., in its simple form, punishable respectively under secs. 379, 403 and 417, I P. C., and does not include the aggravated form of it under sec. 420, I. P. C.—*Nga Pyi*, 3 Cr.L.J. 21, 3 L.B.R. 95 (F.B.); *Sundaram Ayyar*, 41 Mad 533, 47 I.C. 658, 19 Cr.L.J. 934; *Rab Nawaz*, 59 I.C. 854, 1 Lah. 612, 22 Cr.L.J. 150; *Deva Kantha*, 5 P.L.J. 267, 21 Cr.L.J. 468; *Rabjan*, 16 Cr.L.J. 781, 17 Bom.L.R. 921, 31 I.C. 381; *Mt Kywa*, 35 Cr.L.J. 1241, 150 I.C. 1121, 12 Rang 259, A.I.R. 1934 Rang. 203, 1934 Cr.C. 891. The word 'theft' can only mean simple theft; otherwise it would not have been followed by the words 'theft in a building' as well. A servant found guilty of theft and convicted under sec. 381, I. P. C., is not entitled to the benefit of this clause, as theft by servant is not one of the offences specified herein. It is an evasion of law to treat an aggravated form of offence as an ordinary offence and thus introduce a different jurisdiction or a lower scale of punishment—*Bapu Rao*, 4 N.L.R. 18, 7 Cr.L.J. 319; *Brij Lal*, 13 P.L.R. 1913, 14 Cr.L.J. 113. See also *Mayandi v. Pala Kuduban*, A.I.R. 1935 Mad. 157, 1934 M.W.N. 1318, 36 Cr.L.J. 589, 154 I.C. 879, 58 Mad. 517, 41 M.L.W. 22 and *Nur Muhammad Kalu Khan*, 40 Cr.L.J. 14, 184 I.C. 311, A.I.R. 1939 Sind 260, I.L.R. 1939 Kar. 749, 12 R.S. 102 where it has been held that this sub-section does not apply to a case of house-breaking. It also does not apply to a case under sec. 411, I. P. C.—*Bhola Mia*, 18 P.L.T. 872. But the Allahabad High Court holds that the words 'dishonest misappropriation' and 'cheating' apply to and cover those offences in all their forms; thus 'cheating' covers secs 418, 419 and 420, I P. C., and 'criminal misappropriation' includes offences under secs. 404 and 405, I. P. C.; otherwise the words are a mere surplusage, because these offences are not punishable with more than two years' imprisonment. The words of a Statute should be given an extended meaning of which they are reasonably susceptible, when a restricted meaning would reduce those words to a mere surplusage—*Har Narain v. Ramji*, 12 A.L.J. 465, 15 Cr.L.J. 375. The Nagpur Court has taken the same view *Jai Lal*, 24 Cr.L.J. 251, A.I.R. 1923 Nag 158.

This sub-section also speaks of any other offence punishable with not more than two years' imprisonment. In applying this sub-section to those offences, the term of imprisonment and not the nature of the offences is the test. If the offence is punishable with not more than two years' imprisonment, the clause may be applied, even though the offence be a serious one. Thus a boy of 18 years who attempted to cause hurt with a dangerous weapon may be dealt with under this sub-section, because the attempt to cause hurt is punishable with imprisonment for 18 months, though the offence of causing hurt itself is punishable with 3 years' imprisonment—*Kra Pru Aung*, 3 L.B.R. 30.

The Magistrate should know the evil effects a short term of imprisonment, or indeed, imprisonment at all, may have upon a young offender. It places the stigma of prison upon him; it may remove the fear of prison from his mind and by bringing him into contact with old offenders may turn him towards a life of crime. Therefore, in a case under secs. 380 and 457, I. P. C., the proper course for the Magistrate, when it is clear that the young offender can give no sureties, is to admonish him for the offence under sec. 380, I P C., under sec 562 (1A), Cr. P C., and to sentence him to imprisonment till the rising of the Court for the offence under sec 457, I P. C.—*Nur Muhammad Kalu Khan*, 41 Cr.L.J. 14, 184 I.C. 311, I.L.R. 1939 Kar 749, 12 R.S. 102, A.I.R. 1939 Sind 260.

This sub-section is not intended to be applied to offences of the nature of defamation. The principle of this clause is that leniency should be shown to people of tender years and to first offenders, but it is not applicable to men of responsible position who made defamatory statements and aggravated the offence by repeating them and attempting justification—*Babulal v. Tundilal*, 28 N.L.R. 106, 1932 Cr.C. 519 (521), 33 Cr.L.J. 835, Ind. Rul. 1932 Nag. 112, 139 I.C. 401, A.I.R. 1932 Nag. 97.

Where a money-lender and his nephew endeavoured to overawe a witness for the

other side in a civil suit and, because he refused to comply with the money-lender's demands, organised an assault party, taking part in the assault on the man in quest on and further during the course of the criminal trial wen over a number of prosecution witnesses by bribing them, they should not be released after due admonition—*Hira Kurmi v. Madan Rao*, A.I.R. 1935 Pat. 175, 37 Cr.L.J. 502, 161 I.C. 932, 1935 Cr.C. 253, 17 P.L.T. 327.

The words "the Court before whom he is so convicted" occurring in sub-section (1A) should not be read as controlled by the proviso to sub-section (1), so that it is not necessary that the Magistrate passing an order under sub-section (1A) should be a first class Magistrate or a second class Magistrate specially empowered. Therefore an ordinary Magistrate of the second class who has convicted an accused under section 279, I. P. Code, can order his release after due admonition—*Mullickar v. Mahboob Khan*, 47 All. 353, A.I.R. 1925 All. 644, 85 I.C. 848, 25 Cr.L.J. 624. But the Bombay High Court holds that the proviso to sub-section (1) governs the whole section, and is therefore applicable to sub-section (1A); so that a 3rd class Magistrate is not competent to release an offender after due admonition under sub-section (1A)—*Ranchood*, 27 Bom.L.R. 1019, 25 Cr.L.J. 1461, 89 I.C. 1009, A.I.R. 1925 Bom. 479. Overruling *Ranchood*, supra, the Full Bench of the Bombay High Court has held that there is no reason for reading the Proviso to sec. 532 (1) into sec. 532 (1A). Both on the language of the section as it stands and on a consideration of the policy of the Legislature as appearing from the history of the enactment and the language of the section as a whole, it is clear that the Proviso to sub-sec. (1) does not extend to the powers conferred by sub-sec. (1-A) and that a third class Magistrate is therefore entitled to exercise the powers conferred by sub-sec. (1-A)—*Waman Ramji Patil*, A.I.R. 1937 Bom. 481, 39 Bom.L.R. 1055, 171 I.C. 1004, 39 Cr.L.J. 81, 10 R.B. 247, 11 L.R. 1938 Bom. 58 (F.B.). The Legislature purposely placed the new sub-sec. (1A) where it did, so that all Magistrates, of whatever class they might be, could exercise this new power—*The King v. Maung Thrin Aung*, A.I.R. 1940 Rang. 280 (281), 1940 Rang.L.R. 507.

Distinct conviction must be recorded:—Where the charge was in the alternative either of theft or of retaining stolen property, and the Magistrate while convicting the accused did not say of which of those offences he convicted the accused, *held* that in the absence of a conviction for theft, the Magistrate was not competent to pass an order under this section—*Bhagwant Ganesh*, 1 Bom.L.R. 857.

Sub-section (2)—Power of Appellate or Revisional Court to pass order:—Under sub-section (2), an Appellate Court can pass an order releasing the accused on probation of good conduct. Where the High Court, on an appeal from a conviction and sentence by the Presidency Magistrate, ordered that the accused be released on entering into a bond, but the accused failed to execute the bond, the punishment originally awarded by the Presidency Magistrate would not stand (because that sentence had been already cancelled by the High Court), but the Presidency Magistrate should treat the accused as a person who was convicted but not sentenced to punishment and is again produced before his Court for the purpose of a suitable punishment being awarded—*In re Badsha*, 21 L.W. 40, 25 Cr.L.J. 683.

1439. Sub-section (3)—Appeal and Revision:—An appeal lies from an order under this section releasing a convict on his entering into a bond—*Manohar*, 1904 P.R. 24; *Bakadur v. Ismail*, 29 C.W.N. 151, 52 Cal. 463, 23 Cr.L.J. 455. And the appeal may be preferred even after the expiry of the period of the bond—*Hana'a*, 1917 P.R. 20, 18 Cr.L.J. 401. An appeal will lie to the Sessions Judge from an order of a Magistrate of the first class passed under this section in a summary trial—*Hua Lal*, 46 All. 828 (see this case cited under sec. 414). But no appeal lies from an order under this section passed by a Presidency Magistrate (see sec. 411), because the order is not a sentence of imprisonment or fine within the meaning of sec. 411—*Birks*, 35 C.W.N. 459 (460), Ind. Rul. 1932 Cal. 478, 138 I.C. 627, 1932 Cr.C. 480, A.I.R. 1932 Cal. 488,

Cr.L.J. 653; *Kali Kumar Mitter v. Emp.*, 38 Cr.L.J. 876, 170 I.C. 26, 10 R.C. 122, R. (1937) Cal. 123, A.I.R. 1937 Cal. 413

In cases coming under secs 562 and 563, Cr. P. C., the proceedings fall into two—*the sentence does not immediately follow the conviction—but that does not give the person convicted of the right given him by sec. 408, Cr. P. C., of appealing first either conviction only, or sentence only, or both. If he is dissatisfied with the conviction, although he has not been sentenced, he may appeal against the conviction only. If he is not dissatisfied with the conviction and therefore does not appeal against it he can nevertheless, if dissatisfied with the subsequent sentence (if any), then appeal against the sentence only. A person against whom a conviction is recorded under sec. 562, Cr. P. C., and who is subsequently sentenced more than sixty days after the recording of the conviction can appeal against the sentence in the High Court if he does so within sixty days from the date of that sentence—Mohamed Khalick v. The King, 1940 Rang. 257 (258), 42 Cr.L.J. 91, 191 I.C. 169, 1940 Rang.L.R. 386, following Inkar Sukul v. The King, A.I.R. 1940 Rang. 223, 1940 Rang.L.R. 381; Mst Shweun v. King-Emp., (1904-05) 1 U.B.R. 7, 1 Cr.L.J. 543 and Ma Chut Su v. King-Emp., 1 B.R. 129, 4 I.C. 1027.*

See also Note 1105 where other rulings on the point have been cited

The High Court in revision can set aside the conviction and the order demanding surety, even though the convicts have not moved the High Court to exercise that power—*Radha Kishen*, 67 P.L.R. 1912, 13 Cr.L.J. 476; *Chhaju Mal*, 1914 P.L.R. 21. But unless the order passed by the Magistrate under this section is clearly mistaken or judicious or amounts to a failure of justice, the High Court will not interfere in revision—*Murlidhar v. Mahboob*, 47 All. 353, 26 Cr.L.J. 624. The High Court is reluctant to interfere with an order of a Magistrate passed under this section in the exercise of his discretionary jurisdiction unless the discretion has been wrongly and reasonably exercised, even though the High Court itself would have awarded a substantive sentence of imprisonment in the case—*Nur Hussain*, 31 P.L.R. 334, 1930 I.C. 108; *Kesho Ram*, 28 Cr.L.J. 255 (256), 99 I.C. 127, 7 A.I.C.R. 427, 1927 Lch. 353; *Surendra v. Dharendra*, 1929 Cr.C. 386, A.I.R. 1929 Cal. 5; *Parlab Narain*, 2 O.W.N. 593, 26 Cr.L.J. 1278; *Abdul*, 1910 P.W.R. 19, 6 L. 639, 11 Cr.L.J. 389. The Lahore High Court refused to interfere in a case where a trial Magistrate had resorted to the provisions of this section, although that case the section could not legally be applied, on the ground that there was nothing to be gained by passing a substantive sentence—*Abdul*, supra; *Bhagat Singh*, 1933 Lah. 393, 144 I.C. 538, 1933 Cr.C. 637, 34 Cr.L.J. 779, Ind. Rul. 1933 Lah. 0. See also *Alhtar Munir v. Emp.*, 38 Cr.L.J. 610, 168 I.C. 783, 9 R.Pesh. 131, 1937 Pesh. 51. In the last mentioned case the High Court refused to interfere, even though the order had been passed in a case to which this section was wholly applicable.

Where a Magistrate convicted the accused under sec. 411, I.P.C., and illegally dealt with him under sub-sec. (1A) of this section, the High Court in revision can alter the conviction into one under sec. 379, I.P.C., and maintain the order under sub-sec. (A), which would then be perfectly legal—*Bhola Mia*, 18 P.L.T. 872

It was held under the old law that in setting aside the order under this section in revision the High Court could not substitute in its place a sentence of imprisonment, cause no 'sentence' had been passed by the Lower Court (the order under sec. 552 not being a 'sentence'), and the provisions of sec. 439 as to enhancement of sentence did not apply—*Bhasite*, 37 All. 31, 12 A.L.J. 1244, 16 Cr.L.J. 43. If the Appellate or Revisional Court considered that any sentence should be passed upon the accused, it could order a retrial—*Harnam Singh*, 12 Cr.L.J. 213, 1911 P.R. 16; *Bhasite*, 37 All. 31. But the new sub-section (3) now empowers the High Court, in appeal or in revision, to pass sentence on the accused after setting aside the order as to security—*Kesar*, 1 A.L.J. 228, 27 Cr.L.J. 303; *Janki*, 28 N.L.R. 260, 1932 Cr.C. 666 (669), Ind. Rul. 1932 Nag. 115, 140 I.C. 59, 33 Cr.L.J. 844, A.I.R. 1932 Nag. 130; *Mohammad Khan*, 1934 Lah. 36, 35 Cr.L.J. 613, 14 Lah. 800, 148 I.C. 56, 35 P.L.R. 83, 1934 Cr.C. 69.

Under this section when an accused is released on probation of good conduct, no sentence is passed by the Court. Therefore, when, as under sec. 562 (3), Cr. P. C., the High Court sets aside an order and passes a sentence in lieu thereof, it cannot be said that the High Court enhanced a sentence within the meaning of sec. 439 (6), Cr. P. C. The accused cannot, therefore, claim to be heard on the merits of the case though he is entitled to be heard on all matters material to the question before the High Court, that is the passing of a sentence in lieu of the order passed by the Magistrate under this section—*Miro Ghulam Hussain*, 41 Cr.L.J. 187, 185 I.C. 428, A.I.R. 1939 Sind 339, I.L.R. 1940 Kar. 88.

563. (1) If the Court which convicted the offender, or a Court which could have dealt with the offender in respect of his original offence, is satisfied that the offender has failed to observe any of the conditions of his recognizance, it may issue a warrant for his apprehension.

(2) An offender, when apprehended on any such warrant, shall be brought forthwith before the Court issuing the warrant, and such Court may either remand him in custody until the case is heard or admit him to bail with a sufficient surety conditioned on his appearing for sentence. Such Court may, after hearing the case, pass sentence.

564. (1) The Court, before directing the release of an offender under section 562, *sub-section (1)*, shall be satisfied that the offender or his surety (if any) has a fixed place of abode or regular occupation in the place for which the Court acts or in which the offender is likely to live during the period named for the observance of the conditions.

(2) Nothing in this section or in sections 562 and 563 shall affect the provisions of section 31 of the Reformatory Schools Act, 1897.

The words "sub-section (1)" has been added by the Repealing and Amending Act, VII of 1924. "This is intended to make it clear that sec. 564 (1) does not relate to the release of an offender under sub-sec. (1A) of sec. 562"—*Gazette of India*, 1924, Part V, page 59.

Previously convicted offenders.

565. (1) When any person having been convicted—

(a) by a Court in British India of an offence punishable under section 215, section 489A, section 489B, section 489C, or section 489D, of the Indian Penal Code, or of any offence punishable under Chapter XII or Chapter XVII of that Code, with imprisonment of either description for a term of three years or upwards, or

(b) by a Court or Tribunal in any Indian State acting under the general or special authority of the *

Central Government or of the Crown Representative of any offence which would, if committed in British India, have been punishable under any of the aforesaid sections or Chapters of the Indian Penal Code with like imprisonment for a like term,

is again convicted of any offence punishable under any of those sections or Chapters with imprisonment for a term of three years or upwards by a High Court, Court of Session, Presidency Magistrate, District Magistrate, Sub-Divisional Magistrate or Magistrate of the first class, * * * such Court or Magistrate may, if it or he thinks fit, at the time of passing sentence of transportation or imprisonment on such person, also order that his residence and any change of *or absence from such* residence after release be notified as hereinafter provided for a term not exceeding five years from the date of the expiration of such sentence.

(2) If such conviction is set aside on appeal or otherwise, such order shall become void.

(3) *The Provincial Government* may make rules to carry out the provisions of this section relating to the notification of residence *or change of or absence from residence* by released convicts.

(4) *An order under this section may also be made by an Appellate Court or by the High Court when exercising its powers of revision.*

[(5) *Omitted by section 3 of the Criminal Law Amendment Act, 1939 (Act XXII of 1939).*]

(5) *Any person charged with a breach of any such rule may be tried by a Magistrate of competent jurisdiction in the district in which the place last notified by him as his place of residence is situated.*

Change:—This section has been almost redrafted by section 158 of the Cr. P. C. Amendment Act, XVIII of 1923. The main changes introduced are the following.—*“Firstly*, it extends the list of offences after a conviction for which a person may be required to notify his residence and subsequent changes of residence, *secondly*, on the analogy of sec. 75 of the Penal Code, as amended in 1910, provision has been made for previous conviction before tribunals of Native States which exercise their jurisdiction under the general or special authority of the Government of India or the Local Government; *thirdly*, all first class Magistrates, in place of those specially empowered, have been authorised to pass orders under this section; *fourthly*, the rule-making power has been extended to cover the provisions of this section relating to the notification of residence, *or change of residence, or absence from residence* of released convicts, *fifthly*, the punishment of a breach of the rules made under this section has been enhanced; and *lastly*, Courts of Appeal or Revision have been empowered to pass orders under this section”—*Statement of Objects and Reasons* (1914).

The words “any Indian State acting under the general or special authority of the Central Government or of the Crown Representative” in sub-sec. (1) (b) and the words “Provincial Government” in sub-sec. (3) of this section have been substi-

tuted for the words "the territories of any Prince or State in India acting under the general or special authority of the Governor-General in Council or of any Local Government" and "Local Government" respectively by the Government of India (Adaptation of Indian Laws) Order, 1937.

Sub-section (5) of this section has been omitted and sub-section (6) of this section has been re-numbered as sub-section (5) by section 3 of the Criminal Law Amendment Act, 1939 (Act XXII of 1939).

1440. Application of section:—This section applies when the accused has been *previously* convicted; the passing of an order under this section on a *first offender* is illegal—*Nottaparambul Kunhammad*, 1910 M.W.N. 567, 11 Cr.L.J. 636; *Bakhsu*, A.I.R. 1931 Lah. 675, 35 P.L.R. 615, 1931 Cr.C. 1001, 36 Cr.L.J. 392, 153 I.C. 434.

This section does not apply where either the previous or the subsequent conviction is for an *attempt* to commit the offence under Chap. XII or XVII of the I. P. Code—*Hainam*, 1907 P.R. 17, 6 Cr.L.J. 378.

This section does not apply where the accused, upon the subsequent conviction, is sentenced to *whipping*. An order under this section can be passed only when the accused is sentenced to *transportation or imprisonment*—*Fuljiditya*, 35 Bom. 137, 8 I.C. 623, 11 Cr.L.J. 691, 12 Bom.L.R. 901; *Eticar*, 36 Cr.L.J. 1497, 158 I.C. 991, A.I.R. 1935 Pat. 435, 1935 Cr.C. 1106, 16 P.L.T. 586, 15 Pat. 44; *Ba Kyaw*, A.I.R. 1940 Rang. 258, 1940 Rang.L.R. 527, 42 Cr.L.J. 81, 191 I.C. 117.

This section does not apply where the subsequent conviction is a technical one. Where a person is found only technically guilty of theft, it is absurd to make his conviction for such a trifling offence the occasion for a long period of police supervision under this section—*Jauahir*, 4 P.L.R. 1914, 15 Cr.L.J. 183.

Where the previous conviction of the accused is set aside on appeal, though on technical grounds the accused cannot be called an old offender and an order of restriction cannot be passed under this section on a subsequent conviction—*Nga Po*, 3 Rang. 156, 26 Cr.L.J. 1344.

Under the old law, this section did not apply where the previous conviction had been in a Native State, even though the law of that State was identical in terms with the Indian Penal Code—*Ghasia Teli*, 1 N.L.R. 137, 2 Cr.L.J. 149. But now this section *does* apply to such a case. See clause (b) which has been newly added.

Under the old law, a first class Magistrate could not pass orders under this section unless he was specially authorised by the Local Government to do so—*Dino*, 8 S.L.R. 310, 16 Cr.L.J. 469. Under the present law, *all* first class Magistrates can pass orders under this section.

Previous conviction need not be specified in charge:—An order under this section is not such punishment as is meant by the words of section 221. Therefore, the provisions of sec. 221 (7) do not apply to an order under this section, and such an order can be legally passed without the previous conviction on which it is based having been mentioned in the charge. The omission is a mere irregularity cured by section 537—*Jhagroo*, 9 N.L.R. 88, 14 Cr.L.J. 390.

1441. Notification of residence:—*Change of residence:*—As long as a man retains his residence in the same place, his temporary absence from house for a day or two does not require notification. Whether he retains his residence must always be a question of fact, but provided a man leaves his family and household effects in the house in which he was residing, he would ordinarily be considered to retain his residence there. Where all that was proved was that the accused was absent from the notified residence for a single night, *held* that there was nothing to indicate that the residence itself was changed, and it was not necessary that he should notify such temporary absence for a single night—*Naddi Chengadu*, 40 Mad 789, 18 Cr.L.J. 638. But under the present law, *absence* from residence must also be notified.

This section does not provide for an order to restrict the movements of the accused and the order of the trial Magistrate, so far as it relates to the restriction of the

accused's residence to a certain specified area on his release, is clearly illegal—*Nga Po Mit v. Emp.*, 38 Cr.L.J. 722, 168 I.C. 1008, 9 R.R. 385, A.I.R. 1937 Rang. 164.

An order requiring the accused to report during certain period his change of residence to a person named in the order at a fixed place mentioned in the order is not contemplated by this section and therefore is irregular—*Ba Kyaw*, A.I.R. 1940 Rang. 258, 1940 Rang.L.R. 527, 42 Cr.L.J. 81, 191 I.C. 117.

1442. Power of Appellate Court:—Under the old law, it was held that an Appellate Court could not pass an order under this section, where the original Court did not or could not do so—*Dino*, 8 S.L.R. 340, 16 Cr.L.J. 469. But now sub-section (4) gives such power to the Appellate Court and to the High Court in revision.

1443. Punishment:—Under the old law it was held that any person refusing or neglecting to comply with the rules made under sub-section (3) was punishable as if he had committed an offence under the *first part* (and not second part) of sec. 176, I. P. Code—*Bhola*, 1 N.L.R. 133, 2 Cr.L.J. 745; *Husein Beg*, 31 Mad. 548

By section 2 of the Criminal Law Amendment Act, 1939 (Act XXII of 1939) the words "or, if the notice or information required to be given is required by an order passed under sub-section (1) of section 565 of the Code of Criminal Procedure, 5 of 1898, with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both," have been added to section 176, I. P. Code. The addition of this clause introduces a specific provision for the breach of an order under section 565 (1), Cr P. C., and the punishment therefor is altered into one of imprisonment of either description whereas only simple imprisonment is mentioned in section 176.

Rules:—For Bengal Rules, see *Cal G. R. & C. O.*, pp. 58—60. For Madras Rules, see G. O. No. 940, dated 15th June, 1904; for Bombay Rules, see *Bombay Govt. Gazette*, 1900, Part I, p. 374; for Punjab Rules, see *Punjab Gazette*, 1901, Part I, p. 182; for Burma Rules, see *Burma Gazette*, 1902, Part I, p. 63; for C. P. Rules, see *Central Provinces Gazette*, 1901, Part III, p. 87; for Assam Rules, see *Assam Gazette*, 1902, Part II, pp. 80, 81.

THE CRIMINAL LAW AMENDMENT ACT

Act No. XXIII of 1932.

An Act to supplement the Criminal Law.

WHEREAS it is expedient to supplement the Criminal Law and to that end to amend the Indian Press (Emergency Powers) Act, 1931, and further to amend temporarily the Indian Criminal Law Amendment Act, 1908, for the purposes hereinafter appearing: It is hereby enacted as follows:—

Short title, extent, duration and commencement. 1. (1) This Act may be called the Criminal Law Amendment Act, 1932.

(2) It extends to the whole of British India including British Baluchistan and the Sonthal Parganas.

(3) It shall remain in force three years from its commencement.

(4) The whole of the Act except section 4 and section 7 shall come into force at once, and the Provincial Government may, by notification in the official Gazette, direct that section 4 or section 7 shall come into force in any area on such date as may be specified in the notification.

2. Whoever willfully dissuades or attempts to dissuade the public or any person from entering the Military, Naval, Air or Police service of His Majesty shall be punished with imprisonment for a term which may extend to one year, or with fine, or with both.

Dissuasion from enlistment.

Exception 1.—This provision does not extend to comments on or criticisms of the policy of Government in connection with the Military, Naval, Air or Police service made in good faith and without any intention to dissuade from enlistment.

Exception 2.—This provision does not extend to the case in which advice is given in good faith for the benefit of the individual to whom it is given or for the benefit of any member of his family or of any of his dependants.

3. Whoever induces or attempts to induce any public servant to fail in his duty as such servant shall be punished with imprisonment for a term which may extend to one year, or with fine, or with both.

Tampering with public servants.

Explanation.—For the purposes of this section, a public servant denotes a public servant as defined in section 21 of the Indian Penal Code, a servant of a local authority or railway administration, a village choudkdar, and an employee of a public utility service as defined in section 2 of the Trade Disputes Act, 1929.

4. (1) Whoever, with intent to harass any public servant in the discharge of his duties, or to cause him to terminate his services or fail in his duty, refuses to deal with, whether by supplying goods to, or otherwise, or to let on reasonable rent a house usually let for hire or land not being cultivated land to, or to render any customary service on the terms on which such things from such person or his family such be punished with imprisonment for ith fine which may extend to five

Boycotting a public servant.

on "public servant" has the same in the Military, Naval or Air Service

(2) No Court shall take cognizance of an offence punishable under this section unless upon complaint made by order of or under authority from the Provincial Government or some officer empowered by the Provincial Government in this behalf.

5. (1) Whoever publishes, circulates or repeats in public any passage from a newspaper, book or other document copies whereof have been declared to be forfeited to His Majesty under any law for the time being in force, shall be punishable with imprisonment for a term which may extend to six months, or with fine, or with both.

Dissemination of contents of prescribed document.

(2) No Court shall take cognizance of an offence punishable under this section unless the Provincial Government has certified that the passage published, circulated or repeated contains in the opinion of the Provincial Government, seditious or other matter of the nature referred to in sub-section (1) of section 99A of the Code of Criminal

Procedure, 1898, or sub-section (1) of section 4 of the Indian Press (Emergency Powers) Act, 1931.

6. (1) Whoever makes, publishes or circulates any statement, rumour or report which is false and which he has no reasonable ground to believe to be true, with intent to cause or which is likely to cause fear or alarm to the public or to any section of the public, or hatred or contempt towards any class of public servants or any class of His Majesty's subjects, shall be punished with imprisonment which may extend to one year, or with fine, or with both.

Explanation.—For the purposes of this section public servant means a public servant as defined in section 21 of the Indian Penal Code.

(2) So long as the section remains in force, clause (b) of section 505 of the Indian Penal Code shall be inoperative.

7. (1) Whoever—

(a) with intent to cause any person to abstain from doing or to do any act which such person has a right to do or to abstain from doing, obstructs or uses violence to or intimidates such person or any member of his family or person in his employment or person or member of employment or business or happens to be, or interferes with any property of or hinders him in the use thereof, or

(b) loiters or does any similar act at or near the place where a person carries on his business, or is engaged in any labour, or is employed, or is engaged in any business, shall be punished with imprisonment which may extend to six months, or with fine which may extend to five hundred rupees, or with both.

Explanation.—Encouraging or assisting any person to commit an offence without the commission of which the offence would not be committed under this section.

(2) No Court shall take cognizance of an offence punishable under this section except upon a report in writing of facts which constitute such offence made by a police officer not below the rank of officer in charge of a police station.

8. (1) Where any young person under the age of sixteen years is convicted by any Court of an offence which, in the opinion of the Court, has been committed in furtherance of a movement prejudicial to public safety or peace and such young person is sentenced to fine, the Court may order that the fine shall be paid by the parent or guardian of such young person as if it had been a fine imposed upon the parent or guardian.

Explanation.—In this section the word "guardian" includes any person who in the opinion of the Court, has for the time being the charge of or control over the offender.

(2) Before making an order under this section the Court shall give the parent or guardian an opportunity to appear and be heard, and no such order shall be made if the parent or guardian satisfies the Court that he has not conducted to the commission of the offence by neglecting to control the offender, or that the offence was not committed in furtherance of a movement prejudicial to the public safety or peace.

(3) Where a parent or guardian is ordered to pay a fine under this section, the amount may be recovered in accordance with the provisions of the Code of Criminal Procedure, 1898.

Procedure in offences under the Act. 9. Notwithstanding anything contained in the Code of Criminal Procedure Code, 1898,—

(i) no Court inferior to that of a Presidency Magistrate or Magistrate of the first class shall try an offence under this Act;

(ii) an offence punishable under section 2, 3, 5, 6 or 7 shall be cognizable by

(iii) a Magistrate of the first class shall be an offence in which a warrant may be issued; and

(iv) an offence punishable under section 7 shall be non-bailable.

10. (1)

Power of Government to amend the Code of Criminal Procedure, 1898, shall, while such notification remains in force, be deemed to be amended accordingly.

THE CRIMINAL LAW AMENDMENT ACT

Act No. XXIII of 1932.

An Act to supplement the Criminal Law.

WHEREAS it is expedient to amend the Criminal Law and to that end to amend the Indian Penal Code and to further amend temporarily the Indian Criminal Law for the purposes hereinafter appearing:
It is hereby enacted as follows.

Short title, extent, duration and commencement. 1. (1) This Act may be called the Criminal Law Amendment Act, 1932.

(2) It extends to the whole of British India including British Baluchistan and the Sonthal Parganas.

(3) It shall remain in force three years from its commencement.

(4) The whole of the Act except section 4 and section 7 shall come into force at once, and the Provincial Government may, by notification in the official Gazette, direct that section 4 or section 7 shall come into force in any area on such date as may be specified in the notification.

2. Whoever wilfully dissuades or attempts to dissuade the public or any person from entering the Military, Naval, Air or Police service of His Majesty shall be punished with imprisonment for a term which may extend to one year, or with fine, or with both.

Exception 1.—This provision does not extend to comments on or criticisms of the policy of Government in connection with the Military, Naval, Air or Police service made in good faith and without any intention to dissuade from enlistment.

Exception 2.—This provision does not extend to the case in which advice is given in good faith for the benefit of the individual to whom it is given or for the benefit of any member of his family or of any of his dependants.

3. Whoever induces or attempts to induce any public servant to fail in his duty as such servant shall be punished with imprisonment for a term which may extend to one year, or with fine, or with both.

Explanation.—For the purposes of this section, a public servant denotes a public servant as defined in section 21 of the Indian Penal Code, a servant of a local authority or railway administration, a village chaukidar, and an employee of a public utility service as defined in section 2 of the Trade Disputes Act, 1929.

4. (1) Whoever, with intent to harass any public servant in the discharge of his duties, or to cause him to terminate his services or fail in his duty, refuses to deal with, whether by supplying goods or by any customary service on which such things are required for the use of such servant or his family such as rent a house usually or with imprisonment for a term which may extend to five hundred rupees, or with both.

Explanation.—For the purposes of this section "public servant" has the same meaning as in section 3 but includes also a person in the Military, Naval or Air Service of His Majesty.

(2) No Court shall take cognizance of an offence punishable under this section unless upon complaint made by order of or under authority from the Provincial Government or some officer empowered by the Provincial Government in this behalf.

5. (1) Whoever publishes, circulates or repeats in public any passage from a newspaper, book or other document copies whereof have been declared to be forfeited to His Majesty under any law for the time being in force, shall be punishable with imprisonment for a term which may extend to six months, or with fine, or with both.

(2) No Court shall take cognizance of an offence punishable under this section unless the Provincial Government has certified that the passage published, circulated or repeated contains in the opinion of the Provincial Government, seditious or other matter of the nature referred to in sub-section (1) of section 99A of the Code of Criminal

Procedure, 1898, or sub-section (1) of section 4 of the Indian Press (Emergency Powers) Act, 1931.

6. (1) Whoever makes, publishes or circulates any statement, rumour or report which is false and which he has no reasonable ground to believe to be true, with intent to cause or which is likely to cause fear or alarm to the public or to any section of the public, or hatred or contempt towards any class of public servants or any class of His Majesty's subjects, shall be punished with imprisonment which may extend to one year, or with fine, or with both.

Explanation.—For the purposes of this section public servant means a public servant as defined in section 21 of the Indian Penal Code.

(2) So long as the section remains in force, clause (b) of section 505 of the Indian Penal Code shall be inoperative.

7. (1) Whoever—

(a) with intent to cause any person to abstain from doing or to do any act
Molesting a person to prejudice of employment or business.

(b)

shall be punished with fine which
Explanation without the commission of an offence under this section.

(2) No Court shall take cognizance of an offence punishable under this section except upon a report in writing of facts which constitute such offence made by a police officer not below the rank of officer in charge of a police station

8. (1) Where any young person under the age of sixteen years is convicted by any Court of an offence which, in the opinion of the Court, has been committed in furtherance of a movement prejudicial to public safety or peace and such young person is sentenced to fine, the Court may order that the fine shall be paid by the parent or guardian of such young person as if it had been a fine imposed upon the parent or guardian.

Explanation.—In this section the word "guardian" includes any person who, in the opinion of the Court, has for the time being the charge of or control over the offender.

(2) Before making an order under this section the Court shall give the parent or guardian an opportunity to be heard and shall not make an order unless the parent or guardian has been given an opportunity to be heard and has not committed an offence by neglecting to pay the fine.

(3) Where a parent or guardian is ordered to pay a fine under this section, the amount may be recovered in accordance with the provisions of the Code of Criminal Procedure, 1898.

9. Notwithstanding anything contained in the Code of Criminal Procedure, 1898,—

- (i) no Court inferior to that of a Presidency Magistrate or Magistrate of the first class shall try an offence under this Act;
- (ii) an offence punishable under section 2, 3, 5, 6 or 7 shall be cognizable by the police;
- (iii) an offence punishable under section 4 shall be an offence in which a warrant shall ordinarily issue in the first instance; and
- (iv) an offence punishable under section 7 shall be non-bailable.

10. (1) The Provincial Government may, by order, declare any offence cognizable and non-bailable under the Code of Criminal Procedure, 1898, to be deemed to be amended accordingly.

(2) The Provincial Government may, in the like manner and subject to the like conditions, and with the like effect, declare that an offence punishable under section 183 or section 506 of the Indian Penal Code shall be non-bailable.

11—13. (*Amendments of Criminal Law Amendment Act, XIV of 1908*).

14—16. (*Amendments of Indian Press Emergency Powers Act, XXIII of 1931*).

Cessation of effect of section 62, Ordinance X of 1932.

17. On the commencement of this Act section 62 of the Special Powers Ordinance, 1932, shall cease to have effect.

18. Anything done or any proceedings commenced in pursuance of the provisions of Chapter VI of the Special Powers Ordinance, 1932, shall upon the commencement of this Act, be deemed to have been done or to have been commenced in pursuance of the corresponding provisions of the Indian Criminal Law Amendment Act, 1908, as amended by this Act, and shall have effect as if this Act was already in force when such thing was done or such proceedings were commenced.

19. Anything done or any proceedings commenced in pursuance of the provisions of the Indian Press (Emergency Powers) Act, 1931, as amended by section 77 of the Special Powers Ordinance, 1932, shall, upon the commencement of this Act, be deemed to have been done or to have been commenced in pursuance of the corresponding provisions of the Indian Press (Emergency Powers) Act, 1931, as amended by this Act, and shall have effect as if this Act was already in force when such thing was done or such proceedings were commenced.

20. Any person accused of the commission of an offence punishable under sec. 24, 25, 26, 28, 67 or 70, or by reason of the provisions of Chapter VI of the Special Powers Ordinance, 1932, may, notwithstanding the expiry of the said Ordinance, be tried and punished as if such offence were an offence punishable under or by reason of the corresponding enactment of this Act, and as if this Act had been in force at the time of such commission; and any trial of any such offence begun but not completed at the expiry of the Special Powers Ordinance, 1932, may be continued and completed as if it had been begun after the passing of this Act:

Provided that no trial of an offence punishable under section 67 or 70 of the said Ordinance shall be begun, continued or completed in any area in which section 4 or section 7, as the case may be, is not in force.

STATEMENT OF OBJECTS AND REASONS.

The Civil Disobedience movement has made it necessary to supplement the criminal law by means of certain Ordinances promulgated by the Governor-General in exercise of his powers under section 72 of the Government of India Act. The Special Powers Ordinance, which combines powers taken by the earlier Ordinances, expires on the 29th December, 1932. Though the Ordinances have enabled Local Government and their officers to control the movement, its organisers have not yet abandoned their attempt to paralyse Government and to coerce law-abiding citizens. The experience of the last two years and of previous movements on the same lines shows that, in the absence of certain of the powers at present existing, it is no difficult matter to start or revive such subversive movements. The conditions prevailing at present as a result of the measures taken by the Government of India and Local Governments are such as to render it necessary to assume for the whole of British India all the powers conferred by the Special Powers Ordinance now in force, and it is hoped that the powers conferred by Chapter II (Emergency Powers), Chapter IV (Special Courts) and Chapter V (Special provisions against instigation to the illegal refusal of the payment of certain liabilities) will only be needed in certain provinces. It is, therefore, intended by this Bill to take only those powers which a general review of the situation shows are required for the whole of India, and to leave it to Local Governments to supplement these provisions by means of local legislation in order to meet local or emergent conditions.

The present Bill reproduces in the form of amendments to Acts already on the Statute-Book certain provisions of the Special Powers Ordinance (X of 1932) and includes—

- (a) provisions against associations dangerous to the public peace,
- (b) provisions against certain forms of intimidation,
- (c) provisions to secure greater control over the Press.

(*Gazette of India, 1932, Part V, pp. 206-207.*)

SCHEDULES.

SCHEDULE I.

ENACTMENTS REPEALED.

(Repealed by the Amending and Repealing Act X of 1914.)

Offences under the following Secs. of the I. P. C., may be tried by any Magistrate :—

140, 143, 144, 145, 147, 151, 153, 160, 170, 171, 172, 174, 277, 278, 279, 285, 286, 289, 290, 294-A, 323, 334, 336, 341, 352, 356, 357, 358, 374, 379, 380, 403, 426, 447, 448, 451, 504, 510.

*Offences under the following Secs. of the I. P. C., may be tried by First or Second-class Magistrates :—*135, 136, 137, 138, 154, 155, 156, 157, 158, 165, 166, 173, 175, 176, 177, 178, 179, 180, 182, 183, 184, 185, 186, 187, 188, 189, 190, 202, 203, 206, 207, 217, 221-A, 241, 254, 259, 261, 262, 264, 265, 266, 267, 269, 270, 271, 272, 273, 274, 275, 276, 280, 282, 283, 284, 287, 288, 291, 295, 296, 297, 298, 309, 324, 325, 335, 337, 338, 342, 343, 353, 354, 355, 381, 384, 385, 404, 405, 406, 408, 411, 414, 417, 418, 419, 421, 422, 423, 424, 427, 428, 429, 430, 431, 432, 434, 451, 452, 453, 454, 456, 457, 461, 462, 482, 483, 486, 487, 488, 489, 490, 491, 492, 498, 508.

*Offences under the following Secs. of the I P C., to be tried by First class Magistrates only .—*124-A, 129, 133, 148, 152, 153-A, 161, 162, 163, 164, 167, 168, 169, 171-E, 171-F, 171-G, 171-H, 171-I, 181, 193, 196, 197, 198, 199, 200, 201-A, 204, 205, 208, 209, 210, 211, 212, 213-A, 214-A, 215, 216, 221, 222-A, 223, 224, 225, 229, 233, 235, 237, 239, 240, 242, 243, 246, 247, 248, 249, 250, 251, 252, 253, 263, 292, 293, 304-A, 317, 318, 326, 332, 344, 345, 346, 347, 348, 363, 365, 368, 369, 372, 373, 377, 382, 392, 393, 394, 401, 407, 409, 420, 435, 440, 455, 458, 465, 468, 469, 477-A, 484, 485, 494, 497, 500, 501, 502, 505, 506, 507, 509.

*Offences under the following Secs. of the I. P C., are exclusively triable by the Court of Session :—*121 to 124, 125 to 128, 130, 131, 132, 134, 194, 195, 201, 211 (partly), 213, 214, 218 to 221, 222, 226, 231, 232, 234, 235 (if Queen's Coin), 236, 238, 244, 245, 255, 256 to 258, 302 to 304, 305 to 308, 310 to 316, 327 to 331, 333, 364, 366-A, 366-B, 367, 370, 376, 386 to 391, 395 to 400, 402, 412, 413, 433, 436 to 439, 449, 450, 459, 460, 466, 467, 471 (partly), 472 to 477, 489-A to 489-D, 492, 493, 495, 496, 511 (partly).

*Offences under the following Secs of the I P Code to be tried as warrant cases :—*115—136, 144—148, 152, 153, 153-A, 159, 161—170, 177, 181, 189—201, 203—227, 229—267, 270, 281, 295—333, 335, 338, 342—348, 353—357, 363—424, 427—440, 448—489, 493—509, 511.

*Offences under the following Secs. of the I. P. Code to be tried as summons cases :—*137—143, 151, 153—158, 160, 171—180, 182—188, 202, 225-B, 228, 263-A, 269, 271—280, 282—294-A, 334, 336, 337, 341, 352, 358, 426, 447, 490—492, 510.

*Offences under the following Secs. of the I. P. Code are to be tried as warrant cases, sometimes as summons cases :—*153-177, 225.

*Offences under the following Secs. of the I. P. Code are punishable with fine only :—*137, 154, 155, 156, 171-G, 171-H, 171-I, 263-A, 278, 282, 290, 294-A partly.

SCHEDULE II. TABULAR STATEMENT OF OFFENCES.

EXPLANATORY NOTE.—The entries in the second and seventh columns of the schedule, headed respectively, "Offences" and "Punishment under the Indian Penal Code," are not intended as definitions of the offences and punishments described in the several corresponding sections of the Indian Penal Code, or even as abstracts of those sections, but merely as references to the subject of the sections, the numbers of which are given in the first column.

The third column of this schedule applies also to the Police in the towns of Calcutta and Bombay.

[**ABBREVIATIONS.**—Cog.= cognizable (may arrest without warrant); Not Cog.=not cognizable (shall not arrest without warrant); Not B.=not bailable; Com.=compoundable; Not Com.=not compoundable; Imp.=imprisonment; e. d.=of either description; S. I.=simple imprisonment; Ses.=Session; P. Mag.=Presidency Magistrate; Mag.=Magistrate; Ct.=Court; Dt. M.=District Magistrate; C. P. M.=Chief Presidency Magistrate.]

CHAPTER V.—ABETMENT.

1	2	3	4	5	6	7	8.
Section.	Offence.	Cog. or not.	Warrant or summ.	Bailable or not.	Com. or not.	Punishment under the I. P. C.	By what Ct. triable.
109	Abetment of any offence, if the act abetted is committed in consequence, and where no express provision is made for its punishment.	Cog. if the offence abetted is cog.	As in the offence abetted.	As in the offence abetted.	As in the offence abetted.	Same punishment as for the offence abetted.	The Ct. by which the offence abetted is triable.
110	Abetment of any offence, if the person abetted does the act with a different intention from that of the abettor.	Do.	Do.	Do.	Do.	Do.	Do.
111	Abetment of any offence when one act is abetted and a different act is done; subject to the proviso.	Do.	Do.	Do.	Do.	Same punishment as for the offence intended to be abetted.	Do.
113	Abetment of any offence, when an effect is caused by the act abetted different from that intended by the abettor.	Do.	Do.	Do.	Do.	Same punishment as for the offence committed.	Do.
114	Abetment of any offence, if abettor is present when offence is committed.	Do.	Do.	Do.	Do.	Do.	Do.

115	Abetment of an offence punishable with death or transportation for life, if the offence be not committed in consequence of the abetment. If an act which causes harm be done in consequence of the abetment.	Do.	Do.	Not B	Do.	Imp. e. d. for 7 years, and fine.	Do.
116	Abetment of an offence, punishable with imprisonment, if the offence be not committed in consequence of the abetment. If the abettor or the person abetted be a public servant whose duty it is to prevent the offence.	Do.	Do.	As in the offence abetted.	Do.	$\frac{1}{4}$ Imp. of the longest term provided for the offence, or fine, or both.	Do.
117	Abetting the commission of an offence by the public, or by more than ten persons	Do.	Do.	Do.	Do.	$\frac{1}{2}$ Imp of the longest term provided for the offence, or fine, or both.	Do.
118	Concealing a design to commit an offence punishable with death or transportation for life, if the offence be committed. If the offence be not committed.	Do.	Do.	Not B	Do.	Imp. e. d. for 7 years, and fine.	Do.
119	A public servant concealing a design to commit an offence which it is his duty to prevent, if the offence be committed If the offence be punishable with death or transportation for life. If the offence be not committed	Do.	Do.	Bailable.	Do.	Imp. e. d. for 3 years, and fine.	Do.
		Do.	Do.	As in the offence abetted.	Do.	$\frac{1}{2}$ Imp. of the longest term provided for the offence, or fine, or both.	Do.
		Do.	Do.	Not B	Do.	Imp. e. d. for 10 years.	Do.
		Do.	Do.	Do.	Do.	$\frac{1}{4}$ Imp. of the longest term provided for the offence, or fine, or both.	Do.
120	Concealing a design to commit an offence punishable with imprisonment, if the offence be committed. If the offence be not committed	Cog if the offence concealed is cog.	As in the offence concealed.	As in the offence concealed.	Do.	$\frac{1}{4}$ Imp. of the longest term provided for the offence, or fine, or both.	Do.
		Do.	Do.	Bailable.	Do.	$\frac{1}{2}$ Imp of the longest term provided for the offence, or fine, or both.	Do.

1	2	3	4	5	6	7	8
Section	Offence.	Cog. or not.	Warrant or summons.	Bailable or not.	Comm. or not.	Punishment under the I. P. C.	By what Ct. triable.

CHAPTER V.-OF CRIMINAL CONSPIRACY.

120B	Criminal conspiracy to commit an offence punishable with death, transportation, or rigorous imprisonment for a term of two years or upwards.	Cog. if the offence which is the object of the conspiracy is cog.	As in the offence which is the object of the conspiracy.	As in the offence which is the object of the conspiracy.	Not Com.	Same punishment as for the abetment of the offence which is the object of the conspiracy.	Ct. of Sess., when the offence which is the object of the conspiracy is triable exclusively by such Courts in all other cases, Ct. of Sess., P. Mag. or Mag. 1st class.
	Any other criminal conspiracy	Not Cog.	Summons	Bailable.	Do.	Imp. e. d. for 6 months, or fine, or both.	Ct. of Sess.
121	Waging or attempting to wage war, or abetting the waging of war against the Queen.	Not Cog.	Warrant	Do.	Do.	Death, or transportation for life, and fine.	P. Mag., or Mag. 1st class.
121A	Conspiring to commit certain offences against the State.	Do.	Do.	Do.	Do.	Trans. for life or any shorter term, or Imp. e. d. for 10 years, and fine.	Ct. of Sess.
122	Collecting arms, etc., with the intention of waging war against the Queen.	Do.	Do.	Do.	Do.	Trans. for life, or Imp. e. d. for 10 years & fine.	Do.
123	Concealing with intent to facilitate a design to wage war.	Do.	Do.	Do.	Do.	Imp. e. d. for 10 years, and fine.	Do.
124	Assaulting Governor-General, Governor, etc., with intent to compel or restrain the exercise of any lawful power.	Do.	Do.	Do.	Do.	Imp. e. d. for 7 years, and fine.	Do.
124A	Sedition	Do.	Do.	Do.	Do.	Trans. for life or for any term and fine, or Imp. e. d. for 3 years and fine, or fine.	Ct. of Sess., C. P. M. or Dt. M. or Mag. 1st class specially empowered.
125	Waging war against any Asiatic Power in alliance or at peace with the Queen, or abetting the waging of such war.	Do.	Do.	Do.	Do.	Trans. for life and fine, or Imp. e. d. for 7 years, and fine, or fine.	Ct. of Sess.

126	Committing depredation on the territories of any Power in alliance or at peace with the Queen.	Do.	.	Do.	.	Do.	.	Do.	.	Imp. e. d for 7 years, and fine, and forfeiture of certain property.	Do.
127	Receiving property taken by war or depredation mentioned in Sections 125 and 126.	Do.	.	Do.	.	Do.	.	Do.	.	Do	Do.
128	Public servant voluntarily allowing prisoner of State or war in his custody to escape.	Do	.	Do.	.	Do.	.	Do.	.	Trans. for life, or imp. e. d. for 10 years, & fine.	Do.
129	Public servant negligently suffering prisoner of State or war in his custody to escape	Do.	.	Do.	.	Bailable	Do.	.	S. I. for 3 years and fine.	Ct. of Ses., P. Mag., or Mag. 1st class.	
130	Aiding escape or, rescuing or harbouring such prisoner, or offering any resistance to the recapture of such prisoner.	Do.	.	Do	.	Not B	Do.	.	Trans. for life, or imp. e. d. for 10 years, and fine.	Ct. of Ses.	
CHAPTER VII—OFFENCES RELATING TO THE ARMY AND NAVY.											
131	Abetting mutiny, or attempting to seduce an officer, soldier, sailor or airman from his allegiance or duty	Cog	.	Warrant	Not B	Not Com.	Trans. for life, or imp. e. d for 10 years, and fine	Ct. of Ses.			
132	Abetment or mutiny, if mutiny is committed in consequence thereof	Do.	.	Do.	.	Do.	.	Do.	.	Death, or trans. for life, or imp e. d for 10 years, and fine.	Do.
133	Abetment of an assault by an officer, soldier, sailor or airman on his superior officer, when in the execution of his office.	Do	.	Do.	.	Do.	.	Do.	.	Imp e d. for 3 years, and fine.	Ct. of Ses., P. Mag., or Mag. 1st class.
134	Abetment of such assault, if the assault is committed	Do	.	Do	.	Do	.	Do.	.	Imp e. d. for 7 years, and fine.	Ct. of Ses.
135	Abetment of the desertion of an officer, soldier, sailor or airman.	Do.	.	Do	.	Bailable	Do	.	Imp. e. d for 2 years, or fine, or both.	P. Mag. or Mag. 1st or 2nd class.	
136	Harbouring such an officer, soldier, sailor or airman who has deserted	Do	.	Do	.	Do	.	Do.	.	Do.	Do.
137	De-verter concealed on board merchant-vessel, through negligence of master or person in charge thereof	Not Cog.	Summons	Do.	.	Do.	.	Do.	.	Fine of 500 rupees	Do.

1	2	3	4	5	6	7	8
	Offence.	Cog. or not.	Warrant or summ.	Bailable or not.	Com. or not.	Punishment under the I. P. C.	By what Ct. triable.
138	Abetment of act of insubordination by an officer, soldier, sailor or airman, if the offence be committed in consequence.	Cog.	Warrant	Bailable.	Not Com.	Imp. e. d. for 6 months, or fine, or both.	P. Mag. or Mag. 1st or 2nd class.
140	Wearing the dress or carrying any token used by a soldier, sailor or airman, with intent that it may be believed that he is such a soldier, sailor or airman.	Do.	Summons	Do.	Do.	Imp. e. d. for 3 years, or fine of 500 rupees, or both.	Any Mag.
CHAPTER VIII.—OFFENCES AGAINST THE PUBLIC TRANQUILITY.							
143	Being member of an unlawful assembly.	Cog.	Summons	Bailable.	Not Com.	Imp. e. d. for 6 months, or fine, or both.	Any Mag.
144	Joining an unlawful assembly armed with any deadly weapon.	Do.	Warrant	Do.	Do.	Imp. e. d. for 2 years, or fine, or both.	Do.
145	Joining or continuing in an unlawful assembly, knowing that it has been commanded to disperse.	Do.	Do.	Do.	Do.	Do.	Do.
147	Rioting	Do.	Do.	Do.	Do.	Do.	Do.
148	Rioting armed with a deadly weapon	Do.	Do.	Do.	Do.	Imp. e. d. for 3 years, or fine, or both.	Ct. of Sess., P. Mag., or Mag. 1st class.
149	If an offence be committed by any member of an unlawful assembly, every other member of such assembly shall be guilty of the offence.	Cog. if the offence is cog.	As in the offence	As in the offence.	Do.	Same as for the offence.	Court by which the offence is triable.
150	Hiring, engaging or employing persons to take part in an unlawful assembly.	Cog.	According to the offence committed by the persons hired, etc.	As is the offence.	Not Com.	The same as for being a member of such assembly, and for any offence committed by any member of such assembly.	Do.

151	Knowingly joining or continuing in any assembly of five or more persons after it has been commanded to disperse.	Do.	Summons	Bailable.	Do.	Imp. e. d. for 6 months, or fine, or both.	Any Mag.
152	Assaulting or obstructing public servant when suppressing riot, etc.	Do.	Warrant	Do.	Do.	Imp. e. d. for 3 years, or fine, or both.	Ct. of Ses., P. Mag., or Mag. 1st class.
153	Wantonly giving provocation with intent to cause riot, if rioting be committed.	Do.	Do.	Do.	Do.	Imp. e. d. for 1 year, or fine, or both.	Any Mag.
	If not committed	Do.	Summons	Do.	Do.	Imp. e. d. for 6 months, or fine, or both.	Do.
153A	Promoting enmity between classes.	Not Cog	Warrant	Not B	Do.	Imp. e. d. for 2 years, or fine, or both.	P. Mag., or Mag. 1st class.
154	Owner or occupier of land not giving information of riot, etc.	Do.	Summons	Bailable.	Do.	Fine of 1,000 rupees.	P. Mag., or Mag. 1st or 2nd class.
155	Person for whose benefit or on whose behalf a riot takes place not using all lawful means to prevent it.	Do.	Do.	Do.	Do.	Fine	Do.
156	Agent of owner or occupier for whose benefit a riot is committed not using all lawful means to prevent it.	Do.	Do.	Do.	Do.	Do	Do.
157	Harbouring persons hired for an unlawful assembly.	Cog.	Do.	Do.	Do.	Imp. e. d. for 6 months, or fine, or both.	Do.
158	Being hired to take part in an unlawful assembly or riot.	Do.	Do.	Do.	Do.	Do	Do.
	Or to go armed	Do.	Warrant	Do.	Do.	Imp. e. d. for 2 years, or fine, or both.	Do.
160	Committing affray	Not Cog	Summons	Do.	Do.	Imp. e. d. for 1 month, or fine of 100 rupees, or both.	Any Mag.

CHAPTER IX—OFFENCES BY OR RELATING TO PUBLIC SERVANTS.

161	Being or expecting to be a public servant, and taking gratification other than legal remuneration in respect of an official act.	Not Cog.	Summons	Bailable.	Not Com.	Imp. e. d. for 3 years, or fine, or both.	Ct. of Ses., P. Mag., or Mag. 1st class.
162	Taking a gratification, in order by corrupt or illegal means to influence a public servant.	Do.	Do.	Do.	Do.	Do	Do.

1	2	3	4	5	6	7	8
Section.	Offence.	Cog. or not.	Warrant or summons.	Bailable or not.	Com. or not.	Punishment under the I. P. C.	By what Ct. triable.
163	Taking a gratification for the exercise of personal influence with a public servant.	Not Cog.	Summons	Bailable.	Not Com.	S. I. for 1 year, or fine, or both.	P. Mag., or Mag. 1st class.
164	Abetment by public servant of the offences defined in the last two preceding clauses with reference to himself.	Do.	Do.	Do.	Do.	Imp. e. d. for 3 years, or fine, or both.	Ct. of Ses., P. Mag., or Mag. 1st class.
165	Public servant obtaining any valuable thing, without consideration, from a person concerned in any proceeding or business transacted by such public servant.	Do.	Do.	Do.	Do.	S. I. for 2 years, or fine, or both.	P. Mag., or Mag. 1st or 2nd class.
166	Public servant disobeying a direction of the law with intent to cause injury to any person.	Do.	Do.	Do.	Do.	S. I. for 1 year, or fine, or both.	Do.
167	Public servant framing an incorrect document with intent to cause injury.	Do.	Do.	Do.	Do.	Imp. e. d. for 3 years, or fine, or both.	Ct. of Ses., P. Mag., or Mag. 1st class.
168	Public servant unlawfully engaging in trade.	Do.	Do.	Do.	Do.	S. I. for 1 year, or fine, or both.	P. Mag., or Mag. 1st class.
169	Public servant unlawfully buying or bidding for property.	Do.	Do.	Do.	Do.	S. I. for 2 years, or fine, or both, and confiscation of property purchased.	Do.
170	Personating a public servant.	Cog.	Warrant	Do.	Do.	Imp. e. d. for 2 years, or fine, or both.	Any Mag.
171	Wearing garb or carrying token used by public servant with fraudulent intent.	Do.	Summons	Do.	Do.	Imp. e. d. for 3 years, or fine of 200 rupees, or both.	Do.

CHAPTER IX-A.—OFFENCES RELATING TO ELECTIONS.

171E	Bribery	Not Cog.	Summons	Bailable.	Not Com.	Imp. e. d. for 1 year, or fine, or both.	P. Mag., or Mag. 1st class.
171F	Undue influence and personation at an election	Do.	Do.	Do.	Do.	Do.	Do.

CHAPTER X.—CONTEMPTS OF THE LAWFUL AUTHORITY OF PUBLIC SERVANTS.

171G	False statement in connection with an election	Do.	Do.	Do.	Do.	Fine	Do.
171H	Illegal payments in connection with elections	Do.	Do.	Do.	Do.	Fine of 500 rupees	Do.
171-I	Failure to keep election accounts	Do.	Do.	Do.	Do.	Do. . . .	Do.
172	Abdonding to avoid service of summons or other proceedings from a public servant. If summons or notice require attendance in person, etc., in a Court of Justice.	Not Cog.	Summons	Bailable.	Not Com.	S. I. for 1 month, or fine of 500 rupees, or both.	Any Mag.
173	Preventing the service or the affixing of any summons or notice, or the removal of it when it has been affixed, or preventing a proclamation.	Do.	Do.	Do.	Do.	S. I. for 6 months, or fine of 1,000 rupees, or both.	Do.
	If summons, etc., require attendance in person, etc., in a Ct. of Justice.	Do.	Do.	Do.	Do.	S. I. for 1 month, or fine of 500 rupees, or both.	P. Mag., or Mag. 1st or 2nd class.
174	Not obeying a legal order to attend at a certain place in person or by agent, or departing therefrom without authority. If the order require personal attendance, etc., in a Court of Justice.	Do	Do.	Do.	Do.	S. I. for 6 months, or fine of 1,000 rupees, or both.	Do.
175	Intentionally omitting to produce a document to a public servant by a person legally bound to produce or deliver such document.	Do	Do.	Do.	Do.	S. I. for 1 month, or fine of 500 rupees, or both.	The Ct. in which the offence is committed, subject to the provisions of Ch. XXXV; or if not committed in a Ct., a P. Mag., or Mag. of the 1st or 2nd class.
	If the document is required to be produced in or delivered to, a Ct. of Justice.	Do	Do.	Do.	Do.	S. I. for 6 months, or fine of 1,000 rupees, or both.	Do.

1	2	3	4	5	6	7	8
	Offence.	Cog. or not.	Warrant or summons.	Bailable or not.	Com. or not.	Punishment under the I. P. C.	By what Ct. triable.
176	ally omitting to give notice to a public servant on legally bound to give notice or information.	Not Cog.	Summons	Bailable	Not Com.	S. I. for 1 month, or fine of 500 rupees, or both.	P. Mag., or Mag. 1st or 2nd class.
	the commission of an etc.	Do.	Do.	Do.	Do.	S. I. for 6 months, or fine of 1,000 rupees, or both.	Do.
	notice or information is received by an order passed under 1) of sec. 565 of this Code.	Do.	Do.	Do.	Do.	Imp. c. d. for 6 months, or fine of 1,000 rupees, or both.	Do.
177	y furnishing false information to a public servant.	Do.	Do.	Do.	Do.	Do.	Do.
	a public servant.	Do.	Do.	Do.	Do.	Do.	Do.
	information required respects mission of an offence, etc.	Do.	Do.	Do.	Do.	Imp. c. d. for 2 years, or fine, or both.	The Ct. in which the offence is committed, subject to the provisions of Ch. XXV; or if not committed in a Ct., a P. Mag., or Mag. 1st or 2nd cl.
178	oath when duly required.	Do.	Do.	Do.	Do.	S. I. for 6 months, or fine of 1,000 rupees, or both.	Do.
	oath by a public servant.	Do.	Do.	Do.	Do.	Do.	Do.
179	Being legally bound to state truth, and refusing to answer questions.	Do.	Do.	Do.	Do.	Do.	Do.
180	Refusing to sign a statement made to a public servant when legally required to do so.	Do.	Do.	Do.	Do.	S. I. for 3 months, or fine of 500 rupees, or both.	Do.
181	Knowingly stating to a public servant on oath as true that which is false.	Do.	Warrant	Do.	Do.	Imp. c. d. for 3 years, and fine.	Ct. of Ses., P. Mag., or Mag. 1st class.
182	Giving false information to a public servant in order to cause him to use his lawful power to the injury or annoyance of any person.	Do.	Summons	Do.	Do.	Imp. c. d. for 6 months, or fine of 1,000 rupees, or both.	P. Mag., or Mag. 1st or 2nd class.
183	Resistance to the taking of property by the lawful authority of a public servant.	Do.	Do.	Do.	Do.	Do.	Do.

* This has been inserted by sec. 4 of the Criminal Law Amendment Act, 1939 (Act XXII of 1939).

Section.	Offence.	Cog. or not.	Warrant or summ.	Bailable or not.	Com. or not.	Punishment under the I. P. C.	By what Ct. triable.
194	Giving or fabricating false evidence with intent to cause any person to be convicted of a capital offence. If innocent person be thereby convicted and executed.	Not Cog.	Warrant	Not B.	Not Com.	Transportation for life or rigorous imp. for 10 years and fine.	Ct. of Ses.
195	Giving or fabricating false evidence with intent to procure conviction of an offence punishable with transportation for life or with imprisonment for seven years or upwards.	Do.	Do.	Do.	Do.	Death or as above	Do.
196	Using in a judicial proceeding evidence known to be false or fabricated.	Do.	Do.	Do.	Do.	The same as for the offence.	Do.
197	Knowingly issuing or signing a false certificate relating to any fact of which such certificate is by law admissible in evidence.	Do.	Do.	As in the Do. offence of giving such evidence.	Do.	Same as for giving or fabricating false evidence.	Ct. of Ses., P. Mag., or Mag. 1st class.
198	Using as a true certificate one known to be false in a material point.	Do.	Do.	Bailable.	Do.	Same as for giving false evidence.	Do.
199	False statement made in any declaration which is by law receivable as evidence.	Do.	Do.	Do.	Do.	Do.	Do.
200	Using as true any such declaration known to be false.	Do.	Do.	Do.	Do.	Do.	Do.
201	Causing disappearance of evidence of an offence committed, or giving false information touching it to screen the offender, if a capital offence.	Do.	Do.	Do.	Do.	Imp. e. d. for 7 years, and fine.	Ct. of Ses.
	If punishable with transportation for life or imprisonment for 10 years.	Do.	Do.	Do.	Do.	Imp. e. d. for 3 years, and fine.	Ct. of Ses., P. Mag., or Mag. 1st class.
	If punishable with less than 10 years imprisonment.	Do.	Do.	Do.	Do.	$\frac{1}{4}$ Imp. of the longest term provided for the offence, or fine or both.	P. Mag., or Mag. 1st class or Ct. by which the offence is triable.

202	Intentional omission to give information of an offence by a person legally bound to inform.	Do.	.	Summons	Do.	.	Do.	.	Imp. e. d. for 6 months, or fine, or both.	P. Mag., or Mag. 1st or 2nd class.
203	<i>Giving false information respecting an offence committed.</i>	Not Cog.		Warrant	Bailable.	Not Com.			Imp. e. d. for 2 years, or fine, or both.	Do.
204	Secreting or destroying any document to prevent its production as evidence.	Do.	.	Do.	Do.	Do.	Do.	Do.	Do.	P. Mag., or Mag. 1st class.
205	False personation for the purpose of any act or proceeding in a suit or criminal prosecution, or for becoming bail or security	Do.	.	Do.	Do.	Do.	Do.	Do.	Imp. e. d. for 3 years, or fine, or both	Ct. of Ses., P. Mag., or Mag. 1st class.
206	Fraudulent removal or concealment, etc., of property to prevent its seizure as a forfeiture, or in satisfaction of a fine under sentence, or in execution of a decree.	Do.	.	Do.	Do.	Do.	Do.	Do.	Imp. e. d. for 2 years, or fine, or both.	P. Mag., or Mag. 1st or 2nd class.
207	Claiming property without right, or practising deception touching any right to it, to prevent its being taken as a forfeiture, or in satisfaction of a fine under sentence, or in execution of a decree.	Do.	.	Do.	Do.	Do.	Do.	Do.	Do.	Do.
208	Fraudulently suffering a decree to pass for a sum not due or suffering a decree to be executed after it has been satisfied.	Do.	.	Do.	Do.	Do.	Do.	Do.	Do.	P. Mag., or Mag. 1st class.
209	False claim in a Court of Justice.	Do.	.	Do.	Do.	Do.	Do.	Do.	Imp. e. d. for 2 years, and fine.	Do.
210	Fraudulently obtaining a decree for a sum not due, or causing a decree to be executed after it has been satisfied.	Do.	.	Do.	Do.	Do.	Do.	Do.	Imp. e. d. for 2 years, or fine, or both.	Do.
211	False charge of offence made with intent to injure.	Do.	.	Do.	Do.	Do.	Do.	Do.	Do.	Do.
	If offence charged be punishable with imprisonment for 7 years or upwards.	Do.	.	Do.	Do.	Do.	Do.	Do.	Imp. e. d. for 7 years, and fine.	Ct. of Ses., P. Mag., or Mag. 1st class.

1 Section.	2 Offence.	3 Cog. or not.	4 Warrant or summ.	5 Bailable or not.	6 Com. or not.	7 Punishment under the I. P. C.	8 By what Ct. triable.
194	Giving or fabricating false evidence with intent to cause any person to be convicted of a capital offence. If innocent person be thereby convicted and executed.	Not Cog.	Warrant	Not B.	Not Com.	Transportation for life or rigorous imp. for 10 years and fine.	Ct. of Ses.
195	Giving or fabricating false evidence with intent to procure conviction of an offence punishable with transportation for life or with imprisonment for seven years or upwards. Using in a judicial proceeding evidence known to be false or fabricated.	Do.	Do.	Do.	Do.	Death or as above.	Do.
196		Do.	Do.	Do.	Do.	The same as for the offence.	Do.
197	Knowingly issuing or signing a false certificate relating to any fact of which such certificate is by law admissible in evidence.	Do.	Do.	As in the offence of giving such evidence.	Do.	Same as for giving or fabricating false evidence.	Ct. of Ses., P. Mag., or Mag. 1st class.
198	Using as a true certificate one known to be false in a material point.	Do.	Do.	Bailable.	Do.	Same as for giving false evidence.	Do.
199	False statement made in any declaration which is by law receivable as evidence.	Do.	Do.	Do.	Do.	Do.	Do.
200	Using as true any such declaration known to be false.	Do.	Do.	Do.	Do.	Do.	Do.
201	Causing disappearance of evidence of an offence committed, or giving false information touching it to screen the offender, if a capital offence.	Do.	Do.	Do.	Do.	Imp. e. d. for 7 years, and fine.	Ct. of Ses.
	If punishable with transportation for life or imprisonment for 10 years.	Do.	Do.	Do.	Do.	Imp. e. d. for 3 years, and fine.	Ct. of Ses., P. Mag., or Mag. 1st class.
	If punishable with less than 10 years' imprisonment.	Do.	Do.	Do.	Do.	1/4 Imp. of the longest term provided for the offence, or fine or both.	P. Mag., or Mag. 1st class or Ct. by which the offence is triable.

202	Intentional omission to give information of an offence by a person legally bound to inform.	Do.	.	Summons	Do.	.	Do.	.	Imp. e. d. for 6 months, or fine, or both.	P. Mag., or Mag. 1st or 2nd class.
203	Giving false information respecting an offence committed.	Not Cog.	.	Warrant	Bailable.	.	Not Com.	.	Imp e. d. for 2 years, or fine, or both.	Do.
204	Secreting or destroying any document to prevent its production as evidence.	Do	.	Do.	Do.	.	Do.	.	Do.	P. Mag., or Mag. 1st class.
205	False personation for the purpose of any act or proceeding in a suit or criminal prosecution, or for becoming bail or security.	Do	.	Do.	Do.	.	Do.	.	Imp. e. d. for 3 years, or fine, or both.	Ct. of Ses, P. Mag., or Mag. 1st class.
206	Fraudulent removal or concealment, etc., of property to prevent its seizure as a forfeiture, or in satisfaction of a fine under sentence, or in execution of a decree.	Do.	.	Do.	Do.	.	Do.	.	Imp e. d. for 2 years, or fine, or both.	P. Mag., or Mag. 1st or 2nd class.
207	Claiming property without right, or practising deception touching any right to it, to prevent its being taken as a forfeiture, or in satisfaction of a fine under sentence, or in execution of a decree.	Do.	.	Do.	Do.	.	Do.	.	Do.	Do.
208	Fraudulently suffering a decree to pass for a sum not due or suffering decree to be executed after it has been satisfied.	Do.	.	Do.	Do.	.	Do.	.	Do	P. Mag., or Mag. 1st class.
209	False claim in a Court of Justice .	Do.	.	Do.	Do.	.	Do.	.	Imp. e. d. for 2 years, and fine.	Do.
210	Fraudulently obtaining a decree for a sum not due, or causing a decree to be executed after it has been satisfied	Do.	.	Do.	Do.	.	Do.	.	Imp e d. for 2 years, or fine, or both.	Do.
211	False charge of offence made with intent to injure.	Do.	.	Do	Do.	.	Do.	.	Do.	Do.
	If offence charged be punishable with imprisonment for 7 years or upwards.	Do.	.	Do.	Do.	.	Do.	.	Imp. e. d. for 7 years, and fine.	Ct. of Ses, P. Mag., or Mag. 1st class.

216	Harbouring an offender who has escaped from custody, or whose apprehension has been ordered, if the offence be capital.	Do	.	Do.	.	Do.	.	Imp. e. d. for 7 years, and fine.	Ct. of Ses., P. Mag., or Mag. 1st class.
	If punishable with transportation for life, or with imprisonment for 10 years.	Do.	.	Do.	.	Do.	.	Imp. e. d. for 3 years, with or without fine.	Do.
	If with imprisonment for 1 year, and not for 10 years.	Do.	.	Do.	.	Do.	.	1/4 Imp. of the longest term provided for the offence, or fine or both.	P. Mag., or Mag. 1st class, by which the offence is triable.
216A	Harbouring robbers or dacoits . . .	Do.	.	Do.	.	Do.	.	R. I. for 7 years, and fine.	Ct. of Ses., P. Mag., or Mag. 1st class.
217	Public servant disobeying a direction of law with intent to save person from punishment, or property from forfeiture.	Not Cog.	Summons	Do.	.	Do.	.	Imp. e. d. for 2 years, or fine, or both. . .	P. Mag., or Mag. 1st class.
218	Public servant framing an incorrect record or writing with intent to save person from punishment, or property from forfeiture	Do	.	Warrant	Do.	Do.	.	Imp. e. d. for 3 years, or fine, or both.	Ct. of Ses.
219	Public servant in a judicial proceeding corruptly making and procuring an order, report, verdict or decision which he knows to be contrary to law	Do.	.	Do	.	Do.	.	Imp. e. d. for 7 years, or fine, or both.	Do.
220	Commitment for trial or confinement by a person having authority, who knows that he is acting contrary to law.	Do	.	Do.	.	Do	.	Do.	Do.
221	Intentional omission to apprehend on the part of a public servant bound by law to apprehend an offender, if the offence be capital.	Do	.	Do.	.	Do.	.	Imp. e. d. for 7 years, with or without fine.	Do.
	If punishable with transportation for life, or imprisonment for 10 years.	Do	.	Do.	.	Do.	.	Imp. e. d. for 3 years, with or without fine.	Ct of Ses., P. Mag., or Mag. 1st class.
	If with imprisonment for less than 10 years.	Do.	.	Do.	.	Do.	.	Imp. e. d. for 2 years, with or without fine.	P. Mag., or Mag. 1st class, or 2nd class.

1	2	3	4	5	6	7	8
Section	Offence.	Cog. or not.	Warrant or return.	Bailable or not.	Com. or not.	Punishment under the I. P. C.	By what Ct. triable.
222	Intentional omission to apprehend on the part of a public servant bound by law to apprehend person under sentence of a Court of justice, if under sentence of death. If under sentence of transportation or penal servitude for life, or transportation, imprisonment or penal servitude for 10 years or upwards. If under sentence of imprisonment for less than 10 years or lawfully committed to custody.	Not Cog.	Warrant	Not B.	Not Com.	Trans. for life, or imp. e. d. for 14 years with or without fine.	Ct. of Ses.
		Do.	Do.	Do.	Do.	Imp. e. d. for 7 years, with or without fine.	Do.
		Do.	Do.	Bailable.	Do.	Imp. e. d. for 3 years, fine or both.	Ct. of Ses., P. Mag., or Mag. 1st class.
223	Escape from confinement negligently suffered by a public servant.	Do.	Summons	Do.	Do.	S. I. for 2 years, or fine or both.	P. Mag., or Mag. 1st or 2nd class.
224	Resistance or obstruction by a person to his lawful apprehension.	Cog.	Warrant	Do.	Do.	Imp. e. d. for 2 years, or fine, or both.	Do.
225	Resistance or obstruction to the lawful apprehension of another person, or rescuing him from lawful custody.	Do.	Do.	Do.	Do.	Do.	Do.
	If charged with an offence punishable with transportation for life or imprisonment for 10 years.	Not B.	Do.	Do.	Do.	Imp. e. d. for 3 years, and fine.	Ct. of Ses., P. Mag., or Mag. 1st class.
	If charged with a capital offence.	Do.	Do.	Do.	Do.	Imp. e. d. for 7 years, and fine.	Ct. of Ses.
	If the person is sentenced to transportation for life, or to transportation, penal servitude or imprisonment for 10 years or upwards.	Cog.	Warrant	Not B.	Not Com.	Do.	Do.
	If under sentence of death.	Do.	Do.	Do.	Do.	Trans. for life, or imp. e. d. for 10 years, and fine.	Do.

225A	Omission to apprehend, or sufferance of escape, on part of public servant, in cases not otherwise provided for— (a) in case of intentional omission or sufferance; (b) in case of negligent omission or sufferance.	Not Cog.	Do.	Bailable	Do.	Imp. e. d. for 3 years, or fine, or both. S. I. for 2 years, or fine, or both.	Ct. of Ses, P. Mag., or Mag. 1st class. P. Mag., or Mag. 1st or 2nd class.
225B	Resistance or obstruction to lawful apprehension, or escape or rescue in case not otherwise provided for.	Cog.	Do.	Warrant	Do.	Imp. e. d. for 6 months or fine, or both.	Do.
226	Unlawful return from transportation.	Do.	Do.	Do.	Not B	Trans for life, and fine, and R I for 3 years, before transportation.	Ct. of Ses.
227	Violation of condition of remission of punishment	Not Cog.	Summons	Do.	Do.	Punishment of original sentence, or if part of the punishment has been undergone, the residue.	The Ct. by which the original offence was triable
228	Intentional insult or interruption to a public servant sitting in any stage of a judicial proceeding.	Do	Do.	Bailable.	Do.	S I for 6 months, or fine of 1,000 rupees, or both	Ct. in which offence is committed, subject to provisions of Chap. XXXV.
229	Personation of a juror or assessor	Do.	Do.	Do.	Do.	Imp. e. d. for 2 years, or fine, or both.	P. Mag., or Mag. 1st class.
CHAPTER XII—OFFENCES RELATING TO COIN AND GOVERNMENT STAMPS.							
231	Counterfeiting, or performing any part of the process of counterfeiting	Cog	Warrant	Not B	Not Com.	Imp. e d for 7 years, and fine.	Ct. of Ses
232	Counterfeiting, or performing any part of the process of counterfeiting the Queen's coin.	Do	Do	Do	Do	Trans for life, or imp. e d for 10 years, and fine.	Do.
233	Making, buying or selling instrument for the purpose of counterfeiting coin.	Do.	Do.	Do.	Do.	Imp. e d for 3 years, and fine.	Ct. of Ses, P. Mag., or Mag. 1st class.
234	Making, buying or selling instrument for the purpose of counterfeiting Queen's coin.	Do	Do.	Do.	Do.	Imp. e d. for 7 years, and fine.	Ct. of Ses.

1	2	3	4	5	6	7	8
Section	Offence.	Cog. or not.	Warrant or summ.	Bailable or not.	Com. or not.	Punishment under the I. P. C.	By what Ct. triable.
235	Possession of instrument or material for the purpose of using the same for counterfeiting coin. If Queen's coin	Cog. Do.	Warrant Do.	Not B. Do.	Not Com. Do.	Imp. e. d. for 3 years, and fine. Imp. e. d. for 10 years, and fine.	Ct. of Ses., P. Mag., or Mag. 1st class Ct. of Ses.
236	Abetting in British India the counterfeiting out of British India of coin.	Do.	Do.	Do.	Do.	The punishment provided for abetting the counterfeiting of such coin within British India.	Do.
237	Import or export of counterfeit coin, knowing the same to be counterfeit.	Do.	Do.	Do.	Do.	Imp. e. d. for 3 years, and fine.	Ct. of Ses., P. Mag., or Mag. 1st class
238	Import or export of counterfeit of the Queen's coin, knowing the same to be counterfeit.	Do.	Do.	Do.	Do.	Trans. for life, or imp. e. d. for 10 years, and fine.	Ct. of Ses.
239	Having any counterfeit coin known to be such when it came into possession and delivering, etc., the same to any person.	Do.	Do.	Do.	Do.	Imp. e. d. for 3 years, and fine.	Ct. of Ses., P. Mag., or Mag. 1st class
240	The same with respect to the Queen's coin.	Do.	Do.	Do.	Do.	Imp. e. d. for 10 years, and fine.	Do.
241	Knowingly delivering to another any counterfeit coin as genuine which, when first possessed, the deliverer did not know to be counterfeit.	Do.	Do.	Do.	Do.	Imp. e. d. for 2 years, or fine of 10 times the value of the coin counterfeited, or both.	P. Mag., or Mag. 1st or 2nd class
242	Possession of counterfeit coin by a person who knew it to be counterfeit when he became possessed thereof.	Do.	Do.	Do.	Do.	Imp. e. d. for 3 years, and fine.	Ct. of Ses., P. Mag., or Mag. 1st class
243	Possession of Queen's coin by a person who knew it to be counterfeit when he became possessed thereof.	Do.	Do.	Do.	Do.	Imp. e. d. for 7 years, and fine.	Do.
244	Person employed in a Mint causing coin to be of a different weight or	Do.	Do.	Do.	Do.	Do.	Ct. of Ses.

1	2	3	4	5	6	7	8
Section	Offence.	Cog. or not.	Warrant or sum.	Bailable or not.	Com. or not.	Punishment under the I. P. C.	By what Ct. triable.
258	Sale of counterfeit Government stamp.	Cog.	Warrant	Not B.	Not Com.	Imp. e. d. for 7 years, and fine.	Ct. of Ses.
259	Having possession of a counterfeit Government stamp.	Do.	Do.	Do.	Do.	Do.	Ct. of Ses., P. Mag., or Mag. 1st class.
260	Using as genuine a Government stamp known to be counterfeit.	Do.	Do.	Do.	Do.	Imp. e. d. for 7 years, or fine, or both.	Do.
261	Effacing any writing from a substance bearing a Government stamp, or removing from a document a stamp used for it with intent to cause loss to Government.	Do.	Do.	Do.	Do.	Imp. e. d. for 3 years, or fine, or both.	Do.
262	Using a Government stamp known to have been before used.	Do.	Do.	Bailable.	Do.	Imp. e. d. for 2 years, and fine.	P. Mag., or Mag. 1st or 2nd class.
263	Erasure of mark denoting that stamp has been used.	Do.	Do.	Do.	Do.	Imp. e. d. for 3 years, or fine, or both.	Ct. of Ses., P. Mag., or Mag. 1st class.
263A	Fictitious stamps	Do.	Do.	Do.	Do.	Fine of 200 rupees . .	P. Mag., or Mag. 1st class.
CHAPTER XIII.—OFFENCES RELATING TO WEIGHTS AND MEASURES.							
264	Fraudulent use of false instrument for weighing.	Not Cog.	Summons	Bailable.	Not Com.	Imp. e. d. for 1 year, or fine, or both.	P. Mag., or Mag. 1st or 2nd class.
265	Fraudulent use of false weight or measure.	Do.	Do.	Do.	Do.	Imp. e. d. for 1 year, or fine, or both.	Do.
266	Being in possession of false weights or measures for fraudulent use.	Do.	Do.	Do.	Do.	Do.	Do.
267	Making or selling false weights or measures for fraudulent use.	Do.	Do.	Do.	Do.	Do.	Do.
CHAPTER XIV.—OFFENCES AFFECTING THE PUBLIC HEALTH, SAFETY, CONVENIENCE, DECENCY AND MORALS.							
269	Negligently doing any act known to be likely to spread infection of any disease dangerous to life.	Cog.	Summons	Bailable.	Not Com.	Imp. e. d. for 6 months, or fine, or both.	P. Mag., or Mag. 1st or 2nd class.
270	Malignantly doing any act known to be likely to spread infection of any disease dangerous to life.	Do.	Do.	Do.	Do.	Imp. e. d. for 2 years, or fine, or both.	Do.

271	Knowingly disobeying any quarantine rule.	Cog.	.	Summons	Do	.	Do.	.	Imp. e. d. for 6 months, or fine, or both.	Do.
272	Adulterating food or drink intended for sale, so as to make the same noxious.	Do	.	Do.	Do.	.	Do.	.	Imp. e. d. for 6 months, or fine of 1,000 rupees, or both.	Do.
273	Selling any food or drink as food for sale, knowing the same to be noxious.	Do	.	Do.	Do.	.	Do.	.	Do	Do.
274	Adulterating any drug or medical preparation intended for sale so as to lessen its efficacy, or to change its operation, or to make it noxious.	Do.	.	Do.	Do.	.	Do.	.	Do.	Do
275	Offering for sale or issuing from a dispensary any drug or medical preparation known to have been adulterated	Do	.	Do	Do	.	Do.	.	Do.	Do.
276	Knowingly selling or issuing from dispensary any drug or medical preparation as a different drug or medical preparation	Do	.	Do	Do.	.	Do.	.	.	.
277	Defiling the water of a public spring or reservoir.	Cog.	.	Do	Do	.	Do.	.	Imp. e. d. for 3 months, or fine of 500 rupees, or both.	Any Mag
278	Making atmosphere noxious to health.	Not Cog.	.	Do	Do	.	Do.	.	Fine of 500 rupees.	Do
279	Driving or riding on a public way so rashly or negligently as to endanger human life, etc	Cog	.	Do	Do	.	Do.	.	Imp. e. d. for 6 months, or fine of 1,000 rupees, or both	Do.
280	Navigating any vessel so rashly or negligently as to endanger human life, etc.	Do	.	Do.	Do.	.	Do.	.	Do.	P. Mag. or Mag. 1st or 2nd class.
281	Exhibition of a false light, mark or buoy.	Do	.	Warrant	Do.	.	Do.	.	Imp. e. d. for 7 years, or fine, or both.	Ct. of Ses
282	Conveying for hire any person by water, in a vessel in such a state, or so loaded, as to endanger his life.	Cog.	.	Summons	Do	.	Do.	.	Imp. e. d. for 6 months, or fine of 1,000 rupees, or both.	P. Mag. or Mag. 1st or 2nd class

1	2	3	4	5	6	7	8
Section.	Offence.	Cog. or not.	Warrant or summons.	Bailable or not.	Com. or not.	Punishment under the I. P. C.	By what Ct. triable.
283	Causing danger, obstruction or injury in any public way or line of navigation.	Cog.	Summons	Bailable.	Not Com.	Fine of 200 rupees.	P. Mag., or Mag. 1st or 2nd class.
284	Dealing with any poisonous substance so as to endanger human life, etc.	Not Cog.	Do.	Do.	Do.	Imp. c. d. for 6 months, or fine of 1,000 rupees, or both.	Do.
285	Dealing with fire or any combustible matter so as to endanger human life, etc.	Cog.	Do.	Do.	Do.	Do.	Any Mag.
286	So dealing with any explosive substance.	Do.	Do.	Do.	Do.	Do.	Do.
287	So dealing with any machinery.	Not Cog.	Do.	Do.	Do.	Do.	P. Mag., or Mag. 1st or 2nd class.
288	A person omitting to guard against probable danger to human life by the fall of any building over which he has a right entitling him to pull it down or repair it.	Do.	Do.	Do.	Do.	Do.	Do.
289	A person omitting to take order with any animal in his possession, so as to guard against danger to human life, or of grievous hurt, from such animal.	Cog.	Do.	Do.	Do.	Do.	Any Mag.
290	Committing a public nuisance.	Not Cog.	Do.	Do.	Do.	Fine of 200 rupees.	Do.
291	Continuance of nuisance after injunction to discontinue.	Cog.	Do.	Do.	Do.	S. I. for 6 months, or fine or both.	P. Mag., or Mag. 1st or 2nd class.
292	Sale, etc., of obscene books, etc.	Do.	Warrant	Do.	Do.	Imp. c. d. for 3 months, or fine, or both.	P. Mag., or Mag. 1st class.
293	Sale, etc., of obscene objects to young persons.	Do.	Do.	Do.	Do.	Imp. c. d. for 6 months, or fine, or both.	Do.
294	Obscene Songs	Do.	Do.	Do.	Do.	Do.	Any Mag.
294A	Keeping a lottery office.	Not Cog.	Summons.	Do.	Do.	Imp. c. d. for 6 months, or fine, or both.	Do.
	Publishing proposals relating to lotteries.	Do.	Do.	Do.	Do.	Fine of 1,000 rupees.	Do.

CHAPTER XV.—OFFENCES RELATING TO RELIGION.

295	Destroying, damaging or defiling a place of worship or sacred object with intent to insult the religion of any class of persons.	Cog	Summons	Bailable.	Not Com.	Imp. e. d for 2 years, or fine, or both.	P. Mag. or Mag. 1st or 2nd class
295A	<i>Malevolently insulting the religion or the religious belief of any class</i>	Not Cog	Warrant	Not B	Do.	Imp e d. for 2 years, or fine, or both.	Court of Session or P. Mag.
296	Causing a disturbance to an assembly engaged in religious worship	Cog.	Summons	Bailable.	Do.	Imp e d. for 1 year, or fine, or both.	P. Mag. or Mag. 1st or 2nd class.
297	Trespassing in place of worship or sepulchre, disturbing funeral with sepulchre, disturbing funeral with intention to wound the feelings or to insult the religion of any person, or offering indignity to a human corpse.	Do.	Do.	Do.	Do.	Do.	Do.
298	Uttering any word or making any sound in the hearing or making any gesture or placing any object in the sight, of any person, with intention to wound his religious feeling.	Not Cog	Do	Do.	Com.	Do.	Do.

CHAPTER XVI.—OFFENCES AFFECTING THE HUMAN BODY.
Of Offences Affecting Life.

302	Murder	Cog	Warrant	Not B.	Not Com.	Death, or trans. for life and fine.	Ct. of Ses.
303	Murder by a person under sentence of transportation for life	Do.	Do.	Do.	Do.	Death	Do.
304	Culpable homicide not amounting to murder, if act by which the death is caused is done with intention of causing death, etc If act is done with knowledge that it is likely to cause death, but without any intention to cause death, etc	Do	Do.	Do.	Do.	Trans for life, or imp. e d. for 10 years, and fine.	Do.
304A	Causing death by rash or negligent act.	Do.	Do	Do.	Do.	Imp. e d for 10 years, or fine, or both.	Do.
		Do.	Do.	Bailable.	Do.	Imp. e. d. for 7 years, or fine, or both.	Ct. of Ses., P. Mag, or Mag 1st class.

Section.	2	1	3	4	5	6	7	8
	Offence.		Cog. or not.	Warrant or summ.	Bailable or not.	Com. or not.	Punishment under the I. P. C.	By what Ct. triable.
305	Abetment of suicide committed by a child, or insane, or delirious person, or an idiot, or a person intoxicated.		Cog.	Warrant	Not B.	Not Com.	Death, or trans. for life, or imp. e. d. for 10 years, and fine.	Ct. of Ses.
306	Abetting the commission of suicide.		Do.	Do.	Do.	Do.	Imp. e. d. for 10 years, and fine.	Do.
307	Attempt to murder		Do.	Do.	Do.	Do.	Do.	Do.
	If such act cause hurt to any person.		Do.	Do.	Do.	Do.	Trans. for life, or as above.	Do.
	Attempt by life-convict to murder, if hurt is caused.		Do.	Do.	Do.	Do.	Death, or as above	Do.
308	Attempt to commit culpable homicide.		Do.	Do.	Bailable.	Do.	Imp. e. d. for 3 years, or fine, or both.	Do.
	If such act cause hurt to any person.		Do.	Do.	Do.	Do.	Imp. e. d. for 7 years, or fine, or both.	Do.
309	Attempt to commit suicide		Do.	Do.	Do.	Do.	S. I. for 1 year, or fine, or both.	P. Mag.; or Mag. 1st or 2nd class
311	Being a thug		Do.	Do.	Not B.	Do.	Trans. for life, and fine.	Ct. of Ses.
<i>Of the Causing of Miscarriage; of Injuries to Unborn Children; of the Exposure of Infants; and of the Concealment of Births.</i>								
312	Causing miscarriage		Not Cog.	Warrant	Bailable.	Not Com.	Imp. e. d. for 3 years, or fine, or both.	Ct. of Ses.
	If the woman be quick with child		Do.	Do.	Do.	Do.	Imp. e. d. for 7 years, and fine.	Do.
313	Causing miscarriage without woman's consent.		Do.	Do.	Not B.	Do.	Trans. for life, or imp. e. d. for 10 years, and fine.	Do.
314	Death caused by any act done with intent to cause miscarriage.		Do.	Do.	Do.	Do.	Imp. e. d. for 10 years, and fine.	Do.
	If act done without woman's consent.		Do.	Do.	Do.	Do.	Trans. for life, or as above.	Do.
315	Act done with intent to prevent a child being born alive, or to cause it to die after its birth.		Do.	Do.	Do.	Do.	Imp. e. d. for 10 years, or fine, or both.	Do.

316	Causing death of a quick unborn child by an act amounting to culpable homicide	Do.	Do.	Do.	Do.	Imp e. d. for 10 years, and fine.	Do.
317	Exposure of a child under 12 years of age by parent or person having care of it with intention of wholly abandoning it.	Cog.	Do.	Bailable.	Do.	Imp e. d. for 7 years, or fine, or both.	Ct. of Ses., P. Mag., or Mag. 1st class.
318	Concealment of birth by secret disposal of death body.	Do.	Do.	Do.	Do.	Imp e. d. for 2 years, or fine, or both.	Ct. of Ses., P. Mag., or Mag. 1st class.
<i>Of Hurt.</i>							
323	Voluntarily causing hurt . . .	Not Cog.	Summons	Bailable.	Com.	Imp. e. d. for 1 year, or fine of Rs. 1,000, or both.	Any Mag.
324	Voluntarily causing hurt by dangerous weapons or means.	Cog.	Do.	Do.	Com. with permission of Court.	Imp. e. d. for 3 years, or fine, or both.	Ct of Ses., P. Mag., or Mag. 1st or 2nd class.
325	Voluntarily causing grievous hurt .	Do.	Do.	Do.	Do.	Imp. e. d. for 7 years, and fine.	Do.
326	Voluntarily causing grievous hurt by dangerous weapons or means.	Do	Do.	Not B	Not Com.	Trans for life, or imp. e. d for 10 years, and fine	Ct of Ses., P. Mag., or Mag. 1st class
327	Voluntarily (property or to constrain is illegal or the commiss	Do	Warrant	Do	Do.	Imp e. d. for 10 years, and fine.	Ct. of Ses., P. Mag., or Mag. 1st class.
328	Administering intent to ca	Do.	Do.	Do.	Do.	Do	Ct. of Ses.
329	Voluntarily c	Do.	Do.	Do	Do.	Trans for life, or imp. e. d for 10 years, and fine.	Do.
330	Voluntarily c	Do	Do.	Bailable.	Do.	Imp e. d. for 7 years, and fine.	Do.
331	Voluntarily c	Cog	Summons	Not B	Do.	Imp e. d for 10 years, and fine.	Do

1	2	3	4	5	6	7	8
Section.	Offence.	Cog. or not.	Warrant or summ.	Bailable or not.	Com. or not.	Punishment under the I. P. C.	By what Ct. triable.
332	Voluntarily causing hurt to deter public servant from his duty.	Cog.	Warrant	Bailable.	Not Com.	Imp. e. d. for 3 years, or fine, or both.	Ct. of Ses., P. M., or Mag. 1st class.
333	Voluntarily causing grievous hurt to deter public servant from his duty.	Do.	Do.	Not B.	Do.	Imp. e. d. for 10 years, and fine.	Ct. of Ses.
334	Voluntarily causing hurt on grave and sudden provocation, not intending to hurt any other than the person who gave the provocation.	Not Cog.	Summons.	Bailable.	Com.	Imp. e. d. for 1 month, or fine of 500 rupees, or both.	Any Mag.
335	Causing grievous hurt on grave and sudden provocation, not intending to hurt any other than the person who gave the provocation.	Cog.	Do.	Do.	Com. with permission of Court.	Imp. e. d. for 4 years, or fine, or both.	Ct. of Ses., P. Mag., or Mag. 1st or 2nd class.
336	Doing any act which endangers human life or the personal safety of others.	Do.	Do.	Do.	Not Com.	Imp. e. d. for 3 months, or fine of Rs. 250, or both.	Any Mag.
337	Causing hurt by an act which endangers human life, etc.	Do.	Do.	Do.	Com. with permission of Court.	Imp. e. d. for 6 months, or fine, or both.	P. Mag., or Mag. 1st or 2nd class.
338	Causing grievous hurt by an act which endangers human life, etc.	Do.	Do.	Do.	Do.	Imp. e. d. for 2 years, or fine, or both.	Do.
<i>Of Wrongful Restraint and Wrongful Confinement.</i>							
341	Wrongfully restraining any person.	Cog.	Summons	Bailable.	Com.	S. I. for 1 month, or fine or both.	Any Mag.
342	Wrongfully confining any person.	Do.	Do.	Do.	Do.	Imp. e. d. for 1 year, or fine, or both.	P. Mag., or Mag. 1st or 2nd class.
343	Wrongfully confining for three or more days.	Do.	Do.	Do.	Com. with Court's permission.	Imp. e. d. for 2 years, or fine, or both.	Do.
344	Wrongfully confining for 10 or more days.	Do.	Do.	Do.	Not Com.	Imp. e. d. for 3 years, and fine.	Ct. of Ses., P. Mag., or Mag. 1st or 2nd class.
345	Keeping any person in wrongful confinement, knowing that a writ has been issued for his liberation.	Not Cog.	Summons	Bailable.	Not Com.	Imp. e. d. for 2 years, in addition to imp. under any other section.	Do.

346	Wrongful confinement in secret	Cog.	Do.	Do.	Do.	Com. with Court's permission.	Do.	Do.
347	Wrongful confinement for the purpose of extorting property, or conspiring to do an illegal act, etc.	Do.	Do.	Do.	Do.	Not Com.	Imp. e. d. for 3 years, and fine.	Do.
348	Wrongful confinement for the purpose of extorting confession or information or of compelling restoration of property, etc.	Do.	Do.	Do.	Do.	Do.	Do.	Ct. of Ses., P. M., or Mag 1st class.
<i>Of Criminal Force and Assault.</i>								
352	Assault or use of criminal force otherwise than on grave provocation	Not Cog	Summons	Bailable.	Com.	Do.	Imp. e. d. for 3 months, or fine, or both.	Any Mag.
353	Assault or use of criminal force to deter a public servant from discharge of his duty	Cog.	Warrant	Do.	Not Com.	Do.	Imp. e. d. for 2 years, or fine, or both.	P. Mag. or Mag. 1st or 2nd class.
354	Assault or use of criminal force to a woman with intent to outrage her modesty.	Do	Do.	Do	Do.	Do	Do	Do.
355	Assault or criminal force with intent to dishonour a person, otherwise than on grave and sudden provocation.	Not Cog	Summons	Bailable.	Com.	Do	Do	Do.
356	Assault or criminal force in attempt to commit theft of property worn or carried on a person	Cog	Warrant	Not B.	Not Com.	Do.	Do.	Any Mag.
357	Assault or use of criminal force in attempt wrongfully to confine a person.	Do.	Do.	Bailable	Com. with Court's permission.	Do.	Imp. e. d. for 1 year, or fine, or both.	Do.
358	Assault or use of criminal force on grave and sudden provocation	Not Cog	Summons	Do	Com.	Do.	S. I. for 1 month, or fine of 200 rupees, or both.	Do.
<i>Of Kidnapping, Abduction, Slavery and Forced Labour.</i>								
363	Kidnapping	Cog.	Warrant	Bailable.	Not Com.	Do.	Imp. e. d. for 7 years, and fine	Ct. of Ses., P. M., or Mag 1st class.
364	Kidnapping or abducting in order to murder.	Do.	Do.	Not B.	Do	Do	Trans for life, or rigorous imp for 10 years and fine.	Ct. of Ses.

Section.	2	3	4	5	6	7	8
	Offence.	Cog or not.	Warrant or summ.	Bailable or not.	Com. or not.	Punishment under the I. P. C.	By what Ct. triable.
365	Kidnapping or abducting with intent secretly and wrongfully to confine a person.	Cog.	Warrant	Not B.	Not Com.	Imp. e. d. for 7 years, and fine.	Ct. of Ses., P. M., or Mag. 1st class.
366	Kidnapping or abducting a woman to compel her marriage or to cause her defilement, etc.	Do.	Do.	Do.	Do.	Imp. e. d. for 10 years, and fine.	Ct. of Ses.
366A	Procuration of minor girl	Do.	Do.	Do.	Do.	Do.	Do.
366B	Importation of girl from foreign country.	Do.	Do.	Do.	Do.	Do.	Do.
367	Kidnapping or abducting in order to subject a person to grievous hurt, slavery, etc.	Do.	Do.	Do.	Do.	Do.	Do.
368	Concealing or keeping in confinement a kidnapped person.	Do.	Do.	Do.	Do.	Punishment for kidnapping and abduction.	Ct. of Ses., P. M., or Mag. 1st class.
369	Kidnapping or abducting a child with intent to take property from the person of such child.	Do.	Do.	Do.	Do.	Imp. e. d. for 7 years, and fine.	Ct. of Ses., P. Mag., or Mag. 1st class.
370	Buying or disposing of any person as a slave.	Not Cog.	Do.	Bailable.	Do.	Do.	Ct. of Ses.
371	Habitual dealing in slaves	Cog.	Do.	Not B.	Do.	Trans. for life, or imp. e. d. for 10 years & fine.	Do.
372	Selling or letting to hire a minor for purpose of prostitution, etc.	Do.	Do.	Do.	Do.	Imp. e. d. for 10 years, and fine.	Ct. of Ses., P. Mag., or Mag. 1st class.
373	Buying or obtaining possession of a minor for the same purposes.	Do.	Do.	Do.	Do.	Do.	Do.
374	Unlawful compulsory labour	Not Cog.	Do.	Bailable.	Com.	Imp. e. d. for 1 year, or fine, or both.	Any Mag.
376	Rape— Sexual intercourse by a man with his own wife not being under 12 years of age.	Not Cog.	Summons	Bailable.	Not Com.	Imp. e. d. for 2 years, or fine, or both.	Ct. of Ses., C. P. Mag. or Dt. Mag.

Of Rape.

	Sexual intercourse by a man with his own wife being under 12 years of age.	Not Cog	Summons	Bailable.	Not Com.	Trans. for life, or imp. e. d. for 10 years, & fine.	Ct. of Ses.
377	In any other case	Cog Do.	Warrant Do.	Not B. Do.	Do. Do.	Do. Trans. for life, or imp. e. d. for 10 years, & fine.	Do. Ct. of Ses., P. Mag., or Mag. 1st class.
CHAPTER XVII—OFFENCES AGAINST PROPERTY.							
<i>Of Theft.</i>							
✓ 379	Theft	Com.	Warrant	Not B.	Not Com.	Imp. e. d. for 3 years, or fine, or both.	Any Mag.
380	Theft in a building, tent or vessel .	Do.	Do.	Do.	Do.	Imp e. d. for 7 years, and fine.	Do.
381	Theft by clerk or servant of property in possession of master or employer.	Do.	Do.	Do.	Do.	Do	Ct. of Ses., P. Mag., or Mag. 1st or 2nd class
382	Theft, preparation having been made for causing death, or hurt, or restraint, or fear of death, or of hurt, or of restraint, in order to the committing of such theft or to returning after committing it, or to retaining property taken by it	Do	Do	Do.	Do.	R. I. for 10 years, and fine.	Ct. of Ses., P. Mag., or Mag. 1st class.
<i>Of Extortion.</i>							
384	Extortion	Not Cog.	Warrant	Bailable.	Not Com.	Imp. e. d. for 3 years, or fine, or both.	Ct. of Ses., P. Mag., or Mag. 1st or 2nd class.
385	Putting or attempting to put in fear of injury, in order to commit extortion.	Do	Do	Do	Do.	Imp e. d for 2 years, or fine, or both.	Do.
386	Extortion by putting a person in fear of death or grievous hurt.	Do.	Do.	Not B.	Do.	Imp. e. d for 10 years, and fine.	Ct. of Ses.
387	Putting or attempting to put a person in fear of death or grievous hurt, in order to commit extortion	Do.	Do.	Do.	Do.	Imp e. d. for 7 years, and fine.	Do
388	Extortion by threat of accusation of an offence punishable with death, transportation for life, or imp for 10 years	Do.	Do.	Bailable.	Do.	Imp e. d. for 10 years, and fine.	Do.

Section.	1	2	3	4	5	6	7	8
		Offence.	Cog. or not.	Warrant or summ.	Bailable or not.	Com. or not.	Punishment under the I. P. C.	By what Ct. triable.
		If an offence threatened by an unnatural offence.	Not Cog.	Warrant	Bailable.	Not Com.	Trans. for life	Ct. of Ses.
389		Putting a person in fear of accusation of offence punishable with death, trans, for life, or with imp. for 10 years, in order to commit extortion	Do.	Do.	Do.	Do.	Imp e d. for 10 years, and fine.	Do.
		If the offence be an unnatural offence.	Do.	Do.	Do.	Do.	Trans. for life	Do.
<i>Of Robbery and Dacoity.</i>								
392	Robbery		Cog.	Warrant	Not B.	Not Com.	R. I. for 10 years, and fine.	Ct. of Ses., P. Mag., or Mag. 1st class.
	If committed on the highway between sunset and sunrise.		Do.	Do.	Do.	Do.	R. I. for 14 years, and fine.	Do.
393	Attempt to commit robbery		Do.	Do.	Do.	Do.	R. I. for 7 years, and fine.	Do.
394	Person voluntarily causing hurt in committing or attempting to commit robbery, or any other person jointly concerned for such robbery.		Do.	Do.	Do.	Do.	Trans. for life, or R. I. for 10 years, and fine.	Do.
395	Dacoity		Do.	Do.	Do.	Do.	Do.	Ct. of Ses.
396	Murder in dacoity		Do.	Do.	Do.	Do.	Death, trans. for life or R. I. for 10 years, and fine.	Do.
397	Robbery or dacoity with attempt to cause death or grievous hurt.		Do.	Do.	Do.	Do.	R. I. for not less than 7 years.	Do.
398	Attempt to commit robbery or dacoity when armed with deadly weapon.		Do.	Do.	Do.	Do.	Do.	Do.
399	Making preparation to commit dacoity.		Do.	Do.	Do.	Do.	R. I. for 10 years, and fine.	Do.
400	Belonging to a gang of persons associated for habitually committing dacoity.		Do.	Do.	Do.	Do.	Trans. for life, or rig. imp. for 10 years and fine.	Do.

401	Belonging to a wandering gang of persons associated for the purpose of habitually committing thefts.	Do.	Do.	Do.	Do.	R. I. for 7 years, and fine.	Ct. of Ses, P. Mag., or Mag. 1st class.
402	Being one of five or more persons assembled for committing dacoity.	Do.	Do.	Do.	Do.	Do.	Ct. of Ses.
<i>Of Criminal Misappropriation of Property.</i>							
403	Dishonest misappropriation of moveable property, or converting it to one's own use.	Not Cog.	Warrant	Do.	Com. with Court's permission.	Imp. e. d. for 2 years, or fine, or both.	Any Mag.
404	Dishonest misappropriation of property, knowing that it was in possession of a deceased person at his death, and that it has not since been in the possession of any person legally entitled to it.	Do.	Do.	Do.	Not Com.	Imp. e. d. for 3 years, and fine.	Ct. of Ses, P. Mag., or Mag. 1st or 2nd class.
	If by a clerk or person employed by deceased.	Do.	Do.	Do.	Do.	Imp. e. d. for 7 years, and fine.	Do.
<i>Of Criminal Breach of Trust.</i>							
406	Criminal breach of trust.	Cog.	Warrant	Not B.	Not Com.	Imp. e. d. for 3 years, or fine, or both.	Ct. of Ses, P. Mag., or Mag. 1st or 2nd class.
407	Criminal breach of trust by a carrier, wharfinger, etc.	Do.	Do.	Do.	Do.	Imp. e. d. for 7 years, and fine.	Ct. of Ses, P. Mag., or Mag. 1st class.
408	Criminal breach of trust by a clerk or servant.	Do.	Do.	Do.	Do.	Do.	Ct. of Ses, P. Mag., or Mag. 1st or 2nd class.
409	Criminal breach of trust by a public servant or by banker, merchant or agent, etc.	Do.	Do.	Do.	Do.	Trans. for life, or imp. e. d. for 10 years, and fine.	Ct. of Ses, P. Mag., or Mag. 1st class.
<i>Of the Receiving of Stolen Property.</i>							
411	Dishonestly receiving stolen property, knowing it to be stolen.	Cog.	Warrant	Not B.	Not Com.	Imp. e. d. for 3 years, or fine, or both.	Ct. of Ses, P. Mag., or Mag. 1st or 2nd class.
412	Dishonestly receiving stolen property, knowing that it was obtained by dacoity.	Do.	Do.	Do.	Do.	Trans. for life, or rig. imp. for 10 years, and fine.	Do.

1	2	3	4	5	6	7	8
Section.	Offence.	Cog. or not.	Warrant or summons	Bailable or not.	Com. or not.	Punishment under the I. P. C.	By what Ct. triable.
413	Habitually dealing in stolen property.	Cog.	Warrant	Not B.	Not Com.	Trans. for life, or imp. e. d. for 10 years, and fine.	Ct. of Ses.
414	Assisting in concealment or disposal of stolen property knowing it to be stolen.	Do.	Do.	Do.	Do.	Imp. e. d. for 3 years, or fine, or both.	Ct. of Ses, P. Mag., or Mag. 1st or 2nd class.
417	Cheating	Not Cog.	Warrant	Bailable.	Com. with Court's permission	Imp. e. d. for 1 year, or fine, or both.	P. Mag., or Mag. 1st or 2nd class.
418	Cheating a person whose interest the offender was bound, either by law or by legal contract, to protect.	Do.	Do.	Do.	Do.	Imp. e. d. for 3 years, or fine, or both.	Ct. of Ses, P. Mag., or Mag. 1st or 2nd class.
419	Cheating by personation.	Cog.	Do.	Do.	Do.	Do.	Do.
420	Cheating and thereby dishonestly inducing delivery of property, or the making alteration or destruction of a valuable security.	Do.	Do.	Do.	Do.	Imp. e. d. for 7 years, or fine.	Ct. of Ses, P. M., or Mag. 1st class.
<i>Of Fraudulent Deeds and Disposition of Property.</i>							
421	Fraudulent removal or concealment of property, etc., to prevent distribution among creditors.	Not Cog.	Warrant	Bailable.	Not Com.	Imp. e. d. for 2 years, or fine, or both.	P. Mag., or Mag. 1st or 2nd class.
422	Fraudulently preventing from being made available for his creditors a debt or demand due to the offender.	Do.	Do.	Do.	Do.	Do.	Do.
423	Fraudulent execution of deed of transfer containing a false statement of consideration.	Do.	Do.	Do.	Do.	Do.	Do.
424	Fraudulent removal or concealment of property, of himself or any other person, or assisting in the doing thereof, or dishonestly releasing any demand or claim to which he is entitled.	Do.	Do.	Do.	Do.	Do.	Do.

1 Section.	2 Offence.	3 Cog. or not.	4 Warrant or summ.	5 Bailable or not.	6 Com. or not.	7 Punishment under the I. P. C.	8 By what Ct. triable.
436	Mischief by fire or explosive substance with intent to destroy a house, etc.	Cog.	Warrant	Not B.	Not Com.	Trans. for life, or imp. e. d. for 10 years, and fine.	Ct. of Ses.
437	Mischief with intent to destroy or make unsafe a decked vessel, or a vessel of 20 tons burden.	Do.	Do.	Do.	Do.	Imp. e. d. for 10 years, and fine.	Do.
438	The mischief described in the last section when committed by fire or any explosive substance.	Do.	Do.	Do.	Do.	Trans. for life, or imp. e. d. for 10 years, and fine.	Do.
439	Running vessel ashore with intent to commit theft, etc.	Do.	Do.	Do.	Do.	Imp. e. d. for 10 years, and fine.	Do.
440	Mischief committed after preparation made for causing death, or hurt, etc.	Do.	Do.	Do.	Do.	Imp. e. d. for 5 years, and fine.	Ct. of Ses., P. M., or Mag. 1st class.
<i>Of Criminal Trespass.</i>							
477	Criminal trespass	Cog.	Summons.	Bailable.	Com.	Imp. e. d. for 3 months, or fine, or both.	Any Mag.
448	House-trespass	Do.	Warrant	Do.	Do.	Imp. e. d. for 1 year, or fine, or both.	Do.
449	House-trespass in order to the commission of an offence punishable with death.	Do.	Do.	Not B.	Not Com.	Trans. for life, or rig. imp. for 10 years, and fine.	Ct. of Ses.
450	House-trespass in order to the commission of an offence punishable with transportation for life.	Do.	Do.	Do.	Do.	Imp. e. d. for 10 years, and fine.	Ct. of Ses.
451	House-trespass in order to the commission of an offence punishable with imprisonment.	Do.	Do.	Bailable.	Com with Ct.'s permission.	Imp. e. d. for 2 years, and fine.	Any Mag.
	If the offence is theft	Do.	Do.	Not B.	Not Com.	Imp. e. d. for 7 years, and fine.	Ct. of Ses., P. Mag., or Mag. 1st or 2nd class.
452	House-trespass having made preparation for causing hurt, assault, etc.	Do.	Do.	Do.	Do.	Do.	Do.

453	Lurking house-trespass or house-breaking	Do.	Do.	Do.	Do.	Imp. e. d. for 2 years, and fine.	P. Mag., or Mag. 1st or 2nd class.
454	Lurking house-trespass or house-breaking in order to the commission of an offence punishable with imprisonment.	Do.	Do.	Do.	Do.	Imp. e. d. for 3 years, and fine.	Ct. of Ses., P. Mag., or Mag. 1st or 2nd class.
	If the offence is theft	Do.	Do.	Do.	Do.	Imp. e. d. for 10 years, and fine.	Do.
455	Lurking house-trespass or house-breaking after preparation made for causing hurt, assault, etc.	Do.	Do.	Do.	Do.	Do.	Ct. of Ses., P. Mag., or Mag. 1st class.
456	Lurking house-trespass or house-breaking by night.	Do.	Do.	Do.	Do.	Imp. e. d. for 3 years, and fine.	Ct. of Ses., P. Mag., or Mag. 1st or 2nd class.
457	Lurking house-trespass or house-breaking by night in order to the commission of an offence punishable with imprisonment.	Do.	Do.	Do.	Do.	Imp. e. d. for 5 years, and fine.	Do.
	If the offence is theft	Do.	Do.	Do.	Do.	Imp. e. d. for 14 years, and fine.	Do.
458	Lurking house-trespass or house-breaking by night, after preparation made for causing hurt, etc.	Do.	Do.	Do.	Do.	Do.	Ct. of Ses., P. Mag., or Mag. 1st class.
459	Grievous hurt caused whilst committing lurking house-trespass or house-breaking	Do.	Do.	Do.	Do.	Trans. for life, or imp. e. d. for 10 years, and fine.	Ct. of Ses.
460	Death or grievous hurt caused by one of several persons jointly concerned in house-breaking by night, etc.	Do.	Do.	Do.	Do.	Do.	Do.
461	Dishonestly breaking open or unfastening any closed receptacle containing or supposed to contain property	Do.	Do.	Bailable.	Do.	Imp. e. d. for 2 years, or fine, or both	P. Mag., or Mag. 1st or 2nd class.
462	Being entrusted with any closed receptacle containing or supposed to contain any property, and fraudulently opening the same	Do.	Do.	Do.	Do.	Imp. e. d. for 3 years, or fine, or both.	Ct. of Ses., P. Mag., or Mag. 1st or 2nd class.
465	Forgery	Not Cog.	Warrant	Bailable.	Not Com.	Imp. e. d. for 2 years, or fine, or both.	Ct. of Ses., P. Mag., or Mag. 1st class.

CHAPTER XVIII—OFFENCES RELATING TO DOCUMENTS AND TO TRADE OR PROPERTY MARKS

1	2	3	4	5	6	7	8
Section	Offence.	Cog. or not.	Warrant or summ.	Bailable or not.	Com. or not.	Punishment under the I. P. C.	By what Ct. triable.
466	Forgery of a record of a Court of Justice or of a Register of Births, etc., kept by a public servant.	Not Cog.	Warrant	Not B.	Not Com.	Imp. e. d. for 7 years, and fine.	Ct. of Ses.
467	Forgery of a valuable security, will, or authority to make or transfer any valuable security, or to receive any money, etc.	Do.	Do.	Do.	Do.	Trans. for life, or imp. e. d. for 10 years, and fine.	Do.
	When the valuable security is a promissory note of the Govt. of India.	Cog.	Do.	Do.	Do.	Do.	Do.
468	Forgery for the purpose of cheating.	Not Cog.	Do.	Do.	Do.	Imp. e. d. for 7 years, and fine.	Ct. of Ses., P. Mag., or Mag. 1st class.
469	Forgery for the purpose of harming the reputation of any person, or knowing that it is likely to be used for that purpose	Do.	Do.	Bailable.	Do.	Imp. e. d. for 3 years, and fine.	Do.
471	Using as genuine a forged document which is known to be forged.	Do.	Do.	Do.	Do.	Punishment for forgery of such document.	Same Ct. as that by which the forgery is triable.
	When the forged document is a promissory note of the Govt. of India.	Cog.	Do.	Do.	Do.	Do.	Ct. of Ses.
472	Making or counterfeiting a seal, plate, etc., with intent to commit a forgery punishable under sec. 467 of the Indian Penal Code, or possessing with like intent any such seal, plate, etc., knowing the same to be counterfeit	Not Cog.	Do.	Do.	Do.	Trans. for life, or imp. e. d. for 7 years, and fine.	Do.
473	Making or counterfeiting a seal, plate, etc., with intent to commit a forgery punishable otherwise than under sec. 467 of the Indian Penal Code, or possessing with like intent any such seal, plate, etc., knowing the same to be counterfeit.	Do.	Do.	Do.	Do.	Imp. e. d. for 7 years, and fine.	Do.

474	Having possession of a document, knowing it to be forged with intent to use it as genuine; if the document is one of the description mentioned in sec. 466 of the Indian Penal Code.	Do.	Do.	Do.	Do.	Do.	Do.	Do.	Do.
	If the document is one of the description mentioned in sec. 467 of the Indian Penal Code	Do.	Do.	Do.	Do.	Do.	Do.	Trans for life, or imp. e. d. for 10 years, and fine.	Do.
475	Counterfeiting a device or mark used for authenticating documents described in sec 467 of the Indian Penal Code, or possessing counterfeit marked material.	Do	Do.	Do.	Do.	Do.	Do.	Do.	Do.
476	Counterfeiting a device or mark used for authenticating documents other than those described in sec. 467 of the Indian Penal Code, or possessing counterfeit marked material.	Do.	Do	Not B.	Do.	Do.	Do.	Imp. e. d. for 7 years, and fine.	Do.
477	Fraudulently destroying or defacing, or attempting to destroy or deface, or secreting a will, etc.	Do.	Do.	Do.	Do.	Do.	Do.	Trans. for life, or imp. e. d. for 7 years, and fine.	Do.
477A	Falsification of accounts . . .	Do.	Do	Bailable	Do.	Do.	Do.	Imp. e. d. for 7 years, or fine, or both	Ct of Ses, P. M., or Mag 1st class.
<i>Of Trade and Property Marks</i>									
482	Using a false trade or property-mark with intent to deceive or injure any person	Not Cog	Warrant	Bailable.	Com with Ct.'s permission	Do.	Do.	Imp. e. d. for 1 year, or fine, or both	P. Mag., or Mag. 1st or 2nd class
483	Counterfeiting a trade or property-mark used by another, with intent to cause damage or injury	Do	Do	Do.	Do.	Do.	Do.	Imp. e. d. for 2 years, or fine, or both.	Do.
484	Counterfeiting a property-mark used by a public servant, or any mark used by him to denote the manufacture, quality, etc., of any property	Do	Summons	Do.	Not Com.	Do.	Do.	Imp e. d. for 3 years, and fine.	Ct. of Ses, P. M., or Mag. 1st class.

1	2	3	4	5	6	7	8
Section.	Offence.	Cog. or not.	Warrant or sumn.	Bailable or not.	Com. or not.	Punishment under the I. P. C.	By what Ct. triable.
466	Forgery of a record of a Court of Justice or of a Register of Births, etc., kept by a public servant.	Not Cog.	Warrant	Not B.	Not Com.	Imp. e. d. for 7 years, and fine.	Ct. of Ses.
467	Forgery of a valuable security, will, or authority to make or transfer any valuable security, or to receive any money, etc.	Do.	Do.	Do.	Do.	Trans. for life, or imp. e. d. for 10 years, and fine.	Do.
468	When the valuable security is a promissory note of the Govt. of India.	Cog.	Do.	Do.	Do.	Do.	Do.
469	Forgery for the purpose of cheating.	Not Cog.	Do.	Do.	Do.	Imp. e. d. for 7 years, and fine.	Ct. of Ses., P. Mag., or Mag. 1st class.
470	Forgery for the purpose of harming the reputation of any person, or knowing that it is likely to be used for that purpose.	Do.	Do.	Bailable.	Do.	Imp. e. d. for 3 years, and fine.	Do.
471	Using as genuine a forged document which is known to be forged.	Do.	Do.	Do.	Do.	Punishment for forgery of such document.	Same Ct. as that by which the forgery is triable.
472	When the forged document is a promissory note of the Govt. of India.	Cog.	Do.	Do.	Do.	Do.	Ct. of Ses.
473	Making or counterfeiting a seal, plate, etc., with intent to commit a forgery punishable under sec. 467 of the Indian Penal Code, or possessing with like intent any such seal, plate, etc., knowing the same to be counterfeit.	Not Cog.	Do.	Do.	Do.	Trans. for life, or imp. e. d. for 7 years, and fine.	Do.
474	Making or counterfeiting a seal, plate, etc., with intent to commit a forgery punishable otherwise than under sec. 467 of the Indian Penal Code, or possessing with like intent any such seal, plate, etc., knowing the same to be counterfeit.	Do.	Do.	Do.	Do.	Imp. e. d. for 7 years, and fine.	Do.

474	Having possession of a document, knowing it to be forged with intent to use it as genuine; if the document is one of the description mentioned in sec. 466 of the Indian Penal Code.	Do.	.	Do.	.	Do.	.	Do.	.	Do.	.	Do.
	If the document is one of the description mentioned in sec. 467 of the Indian Penal Code.	Do	.	Do.	.	Do.	.	Do.	.	Trans for life, or imp. e d for 10 years, and fine.	.	Do.
475	Counterfeiting a device or mark used for authenticating documents described in sec 467 of the Indian Penal Code, or possessing counterfeit marked material.	Do	.	Do.	.	Do.	.	Do.	.	Do.	.	Do.
476	Counterfeiting a device or mark used for authenticating documents other than those described in sec 467 of the Indian Penal Code, or possessing counterfeit marked material	Do	.	Do.	.	Not B.	.	Do.	.	Imp. e. d. for 7 years, and fine.	.	Do.
477	Fraudulently destroying or defacing, or attempting to destroy or deface, or secreting a will, etc.	Do.	.	Do.	.	Do.	.	Do.	.	Trans. for life, or imp. e. d. for 7 years, and fine	.	Do.
477A	Falsification of accounts	Do	.	Do.	.	Balable.	.	Do.	.	Imp. e. d for 7 years, or fine, or both.	.	Ct. of Ses., P. M., or Mag. 1st class
<i>Of Trade and Property Marks</i>												
482	Using a false trade or property-mark with intent to deceive or injure any person.	Not Cog.	.	Warrant	.	Balable.	.	Com with Ct.'s permission	.	Imp. e d for 1 year, or fine, or both.	.	P. Mag, or Mag. 1st or 2nd class.
483	Counterfeiting a trade or property-mark used by another, with intent to cause damage or injury	Do	.	Do	.	Do.	.	Do.	.	Imp. e d for 2 years, or fine, or both	.	Do.
484	Counterfeiting a property-mark used by a public servant, or any mark used by him to denote the manufacture, quality, etc., of any property.	Do	.	Summons	.	Do	.	Not Com	.	Imp e. d. for 3 years, and fine.	.	Ct. of Ses., P. M., or Mag. 1st class

1 Section.	2 Offence.	3 Cog. or not.	4 Warrant or summ.	5 Bailable or not.	6 Com or not.	7 Punishment under the I. P. C.	8 By what Ct. triable.
485	Fraudulently making or having possession of any die, plate, or other instrument for counterfeiting any public or private property or trade-mark.	Not Cog.	Summons	Bailable.	Not Com.	Imp. e. d. for 3 years, or fine, or both.	Ct. of Ses., P. Mag., or Mag. 1st class.
486	Knowingly selling goods marked with a counterfeit property or trade-mark.	Do.	Do.	Do.	Com. with Ct.'s permission.	Imp. e. d. for 1 year, or fine, or both.	P. Mag., or Mag. 1st or 2nd class.
487	Fraudulently making a false mark upon any package or receptacle containing goods, with intent to cause it to be believed that it contains goods which it does not contain, etc.	Do.	Do.	Do.	Not Com.	Imp. e. d. for 3 years, or fine, or both.	Ct. of Ses., P. Mag., or Mag. 1st or 2nd class.
488	Making use of any such false mark.	Do.	Do.	Do.	Do.	Do.	Do.
489	Removing, destroying, or defacing any property-mark with intent to cause injury.	Do.	Do.	Do.	Do.	Imp. e. d. for 1 year, or fine, or both.	P. Mag., or Mag. 1st or 2nd class.
<i>Of Currency Notes and Bank Notes.</i>							
489A	Counterfeiting currency notes or Bank notes.	Cog.	Warrant	Not B.	Not Com.	Trans. for life, or imp. e. d. for 10 years, and fine.	Ct. of Ses.
489B	Using as genuine forged or counterfeit currency notes or bank notes.	Do.	Do.	Do.	Do.	Do.	Do.
489C	Possession of forged or counterfeit currency notes or bank notes.	Do.	Do.	Bailable.	Do.	Imp. e. d. for 7 years, or fine, or both.	Do.
489D	Making or possessing instruments or materials for forging or counterfeiting currency notes or bank notes.	Do.	Do.	Not B.	Do.	Trans. for life, or imp. e. d. for 10 years, and fine.	Do.

CHAPTER XIX.—CRIMINAL BREACH OF CONTRACTS OF SERVICE.

490	Being bound by contract to render personal service during a voyage or journey or to convey or guard any property or person and voluntarily omitting to do so.	Not Cog.	Summons	Bailable.	Com.	Imp. e. d. for 1 month, or fine of 100 rupees, or both.	P. Mag., or Mag. 1st or 2nd class.
491	Being bound to attend on, or supply the wants of, a person who is helpless from youth, unsoundness of mind or disease, and voluntarily omitting to do so	Do.	Do.	Do.	Do.	Imp. e. d. for 3 months, or fine, or both.	Do.
492	Being bound by contract to render personal service for a certain period at a distinct place to which the employee is conveyed at the expense of the employer and voluntarily deserting the service or refusing to perform the duty.	Do.	Do.	Do.	Do.	Imp. e. d. for 1 month, or fine of double the expense incurred, or both.	Do.

CHAPTER XX—OFFENCES RELATING TO MARRIAGE.

493	A man by deceit causing a woman not lawfully married to him to believe that she is lawfully married to him and to cohabit with him in that belief	Not Cog	Warrant	Not B.	Not Com.	Imp. e. d. for 10 years, and fine.	Ct. of Ses.
494	Marrying again during the life-time of a husband or wife	Do	Do.	Bailable.	Com with Ct's permission.	Imp. e. d. for 7 years, and fine.	Ct. of Ses, P. Mag., or Mag. 1st class.
495	Same offence with concealment of the former marriage from the person with whom subsequent marriage is contracted.	Do	Do.	Do.	Not Com.	Imp e. d. for 10 years, and fine.	Ct. of Ses.
496	A person with fraudulent intention going through ceremony of being married knowing that he is not thereby lawfully married	Do	Do.	Not B.	Do.	Imp e. d. for 7 years, and fine.	Ct. of Ses.
497	Adultery	Do	Do.	Bailable.	Com.	Imp e. d. for 5 years, or fine, or both.	Ct. of Ses, P. Mag., or Mag 1st class.

Section.	Offence	Cog. or not.	Warrant or summ.	Bailable or not.	Com. or not.	Punishment under the I. P. C.	By what Ct. triable.
498	Enticing or taking away or detaining with a criminal intent a married woman	Not Cog.	Warrant	Bailable.	Com.	Imp. e. d. for 2 years, or fine, or both.	P. Mag., or Mag. 1st or 2nd class.
CHAPTER XXI—DEFAMATION.							
500	Defamation	Not Cog.	Warrant	Bailable.	Com.	S. I. for 2 years or fine, or both.	Ct. of Ses., P. Mag., or Mag. 1st class.
501	Printing or engraving matter knowing it to be defamatory.	Do.	Do	Do.	Do.	Do.	Do.
502	Sale of printed or engraved substance containing defamatory matter, knowing it to contain such matter.	Do.	Do	Do	Do.	Do.	Do.
CHAPTER XXII.—CRIMINAL INTIMIDATION, INSULT AND ANNOYANCE.							
504	Insult intended to provoke a breach of the peace.	Not Cog.	Warrant	Bailable.	Com.	Imp. e. d. for 2 years.	Any Mag.
505	False statement, rumour, etc., circulated with intent to cause mutiny or offence against the public peace.	Do.	Do.	Not B.	Not Com.	Do.	P. Mag., or Mag. 1st class.
506	Criminal intimidation	Do.	Do.	Bailable.	Com.	Do.	P. Mag., or Mag. 1st or 2nd class.
	If threat be to cause death or grievous hurt, etc.	Do.	Do.	Do.	Not Com.	Imp. e. d. for 7 years, or fine, or both.	Ct. of Ses., P. Mag., or Mag. 1st class.
507	Criminal intimidation by anonymous communication or having taken precaution to conceal whence the threat comes.	Do.	Do	Do	Do.	Imp. e. d. for 2 years, in addition to the punishment under above section.	Do
508	Act caused by inducing a person to believe that he will be rendered an object of Divine displeasure	Do	Do	Do.	Com.	Imp. e. d. for 1 year, or fine, or both.	P. Mag., or Mag. 1st or 2nd class.
509	Uttering any word or making any gesture intended to insult the modesty of a woman, etc.	Do.	Do.	Do.	Com. with Ct.'s permission.	S. I. for 1 year, or fine, or both	P. Mag., or Mag. 1st class.

510 Appearing in a public place, etc., in a state of intoxication, and causing annoyance to any person

Do. Do. S. I. for 24 hours, or fine of 10 rupees, or both.

Not Com.

Do

Do

Do

Any Mag.

CHAPTER XXIII—ATTEMPTS TO COMMIT OFFENCES

511 Attempting to commit offences punishable with transportation or imprisonment and in such attempt doing any act towards the commission of the offence

As in the offence attempted.

As in the offence attempted.

As in the offence attempted.

Trans. or imp. not exceeding half of the longest term provided for the offence, or fine or both.

The Ct by which the offence abetted is triable.

OFFENCES AGAINST OTHER LAWS.

(1) If punishable with death, transportation or imprisonment for 7 years or upwards	Cog	Warrant	Not B	Not Com	....	Ct. of Ses
(2) If punishable with imprisonment for 3 years and upwards, but less than 7 years	Do.	Do.	Do except in cases under the Indian Arms Act, Sec 19, which shall be bailable	Do.	..	Ct of Ses, P. Mag., or Mag. 1st class.
(3) If punishable with imprisonment for 1 year and upwards, but less than 3 years	Not Cog	Summons	Bailable.	Do	.	Ct. of Ses, P. Mag., or Mag. 1st or 2nd class.
(4) If punishable with imprisonment for less than one year, or with fine only	Do	Do	Do.	Do.	....	Any Mag.

SCHEDULE III.

(See section 36.)

ORDINARY POWERS OF PROVINCIAL MAGISTRATES

I.—Ordinary Powers of a Magistrate of the Third Class.

- (1) Power to arrest or direct the arrest of, and to commit to custody, a person committing an offence in his presence, S. 64
- (2) Power to arrest, or direct the arrest in his presence of, an offender, S. 65.
- (3) Power to endorse a warrant, or to order the removal of an accused person arrested under a warrant, Ss. 83, 84 and 86.
- (4) Power to issue proclamation in cases judicially before him, S. 87.
- (5) Power to attach and sell property *and to dispose of claims to attached property* in cases judicially before him, S. 88.
- (6) Power to restore attached property, S. 89
- (7) Power to require search to be made for letters and telegrams, S. 95.
- (8) Power to issue search warrant, S. 96.
- (9) Power to endorse a search warrant and order delivery of thing found, S. 99.
- (10) Power to command unlawful assembly to disperse, S. 127.
- (11) Power to use civil force to disperse unlawful assembly, S. 128.
- (12) Power to require military force to be used to disperse unlawful assembly, S. 130.
- (13) * * * *
- (14) Power to authorise detention, *not being detention in the custody of the Police of a person during a police investigation*, S. 167.
- (14A) *Power to postpone issue of process and inquire into case himself*, S. 202.
- (15) Power to detain an offender found in Court, S. 351.
- (16) * * * *
- (17) Power to apply to District Magistrate to issue commission for examination of witness, S. 506 (2).
- (18) Power to recover forfeited bond for appearance before Magistrate's Court, S. 514; *and to require fresh security*, S. 514A.
- (18A) *Power to make order as to custody and disposal of property pending inquiry or trial*, S. 516A.
- (19) Power to make order as to disposal of property, S. 517.
- (20) Power to sell * * * property of a suspected character, S. 525.
- (21) *Power to require affidavit in support of application*, S. 539A.
- (22) *Power to make local inspection*, S. 539B.

II.—Ordinary Powers of a Magistrate of the Second Class.

- (1) The ordinary powers of a Magistrate of the third class
- (2) Power to order the police to investigate an offence in cases in which the Magistrate has jurisdiction to try or commit for trial, S. 155.
- (3) Power to postpone issue of process *and to inquire into a case or direct investigation*, S. 202.
- (4) * * * *

III.—Ordinary Powers of a Magistrate of the First Class.

- (1) The ordinary powers of a Magistrate of the second class
- (2) Power to issue search-warrant otherwise than in course of an inquiry, S. 98
- (3) Power to issue search-warrant for discovery of persons wrongfully confined, S. 100.
- (4) Power to require security to keep the peace, S. 107.

- (5) Power to require security for good behaviour, S. 109.
- (6) Power to discharge sureties, S. 126A.
- (6A) *Power to make orders as to local nuisances*, S. 133.
- (7) Power to make orders, etc., in possession cases, Ss. 145, 146 and 147.
- (7A) *Power to record statements and confessions during a police investigation*, S. 164.
- (7AA) *Power to authorise detention of a person in the custody of the Police during a police investigation*, S. 167.
- (7B) *Power to hold inquests*, S. 174.
- (8) Power to commit for trial, S. 206.
- (9) Power to stop proceedings when no complaint, S. 249.
- (9A) *Power to tender pardon to accomplice during inquiry into case by himself*, S. 337.
- (10) Power to make orders of maintenance, Ss. 488 and 489.
- (11) Power to take evidence on commission, S. 503.
- (12) Power to recover penalty on forfeited bond, S. 514.
- (12A) *Power to require fresh security*, S. 514A.
- (12B) *Power to recall case made over by him to another Magistrate*, S. 528(4).
- (13) Power to make order as to first offenders, S. 562.
- (14) *Power to order released convicts to notify residence*, S. 565.

IV.—*Ordinary Powers of a Sub-divisional Magistrate appointed under S. 13.*

- (1) The ordinary powers of a Magistrate of the first class.
- (2) Power to direct warrants to landholders, S. 78
- (3) Power to require security for good behaviour, S. 110.
- (4) * * * *
- (5) Power to make orders prohibiting repetitions of nuisances, S. 143
- (6) Power to make orders under S. 144
- (7) Power to depute Subordinate Magistrate to make local inquiry, S. 148
- (8) Power to order police investigation into cognizable cases, S. 156
- (9) Power to receive report of police-officer and pass order, S. 173
- (10) * * * *
- (11) Power to issue process for person within local jurisdiction who has committed an offence outside the local jurisdiction, S. 186
- (12) Power to entertain complaints, S. 190
- (13) Power to receive police-reports, S. 190.
- (14) Power to entertain cases without complaint, S. 190
- (15) Power to transfer cases to a Subordinate Magistrate, S. 192
- (16) Power to pass sentence on proceedings recorded by a subordinate Magistrate, S. 349
- (17) Power to forward record of inferior Court to District Magistrate, S. 435(2)
- (18) Power to sell property alleged or suspected to have been stolen, etc., S. 524.
- (19) Power to withdraw cases other than appeals and to try or refer them for trial, S. 528
- (20) * * * *

V.—*Ordinary Powers of a District Magistrate*

- (1) The ordinary powers of a Sub-Divisional Magistrate
- (1A) *Power to try juvenile offenders*, S. 29B
- (2) Power to require delivery of letters, telegrams, etc., S. 95
- (3) Power to issue search-warrants for documents in custody of postal or telegraph authority, S. 96
- (4) Power to require security for good behaviour in case of sedition, S. 108.
- (5) Power to discharge persons bound to keep the peace or to be of good behaviour, S. 124.
- (6) Power to cancel bond for keeping the peace, S. 125

- (6A) *Power to order preliminary investigation by police-officer not below the rank of Inspector in certain cases*, S. 196B.
- (7) Power to try summarily, S. 260.
- (7A) *Power to tender pardon to accomplice at any stage of a case*, S. 337.
- (8) Power to quash convictions in certain cases, S. 350.
- (9) Power to hear appeals from orders requiring security for keeping the peace or good behaviour, S. 406.
- (9A) *Power to hear appeals from orders of Magistrates refusing to accept or rejecting sureties*, S. 406A.
- (10) Power to hear or refer appeals from convictions by Magistrates of the second and third classes, S. 407.
- (11) Power to call for records, S. 435.
- (12) Power to order inquiry into complaint dismissed or case of accused discharged, S. 436.
- (13) Power to order commitment, S. 437.
- (14) Power to report case to High Court, S. 438
- (15) * * * *
- (16) * * * *
- (17) Power to appoint person to be public prosecutor in particular case, S. 492(2).
- (18) Power to issue commission for examination of witness, Ss 503, 506.
- (19) Power to hear appeals from or revise orders passed under Ss 514, 515.
- (20) Power to compel restoration of abducted female, S. 552.

SCHEDULE IV.

(See sections 37 and 38)

ADDITIONAL POWERS WITH WHICH PROVINCIAL MAGISTRATES MAY BE INVESTED.

POWERS WITH WHICH A MAGISTRATE OF THE FIRST CLASS MAY BE INVESTED.

BY THE LOCAL GOVERNMENT.

BY THE DISTRICT MAGISTRATE.

- (1) Power to require security for good behaviour in case of sedition, S. 108.
- (2) Power to require security for good behaviour, S. 110
- (3) * * *
- (4) Power to make orders prohibiting repetitions of nuisances, S. 143.
- (5) Power to make orders under S. 144.
- (6) * * *
- (7) Power to issue process for person within local jurisdiction who has committed an offence outside local jurisdiction, S. 186.
- (8) Power to take cognizance of offences upon complaints, S. 190
- (9) Power to take cognizance of offences upon Police reports, S. 190.
- (10) Power to take cognizance of offences without complaint, S. 190
- (11) Power to try summarily, S. 260
- (12) Power to hear appeals from convictions by Magistrates of the second and third classes, S. 407.
- (13) Power to sell property alleged or suspected to have been stolen, etc., S. 524.
- (14) * * *
- (15) Power to try cases under S. 124A of the Indian Penal Code.
- (1) Power to make orders prohibiting repetitions of nuisances, S. 143.
- (2) Power to make orders under S. 144.

POWERS WITH WHICH A MAGISTRATE OF THE FIRST CLASS MAY BE INVESTED.

BY THE DISTRICT MAGISTRATE.

- (3) * * *
- (4) Power to take cognizance of offences upon complaint, S. 190.
- (5) Power to take cognizance of offences upon police-reports, S. 190.
- (6) Power to transfer cases, S. 192.

BY THE LOCAL GOVERNMENT.

- (1) * * *
- (2) Power to make orders prohibiting repetitions of nuisances, S. 143.
- (3) Power to make orders under S. 143.
- (3a) *Power to record statements and confessions during a police investigation, S. 164.*
- (3b) *Power to authorise detention of a person in the custody of the police during a police investigation, S. 167.*
- (4) Power to hold inquests, S. 174.
- (5) Power to take cognizance of offences upon complaint, S. 190.
- (6) Power to take cognizance of offences upon police-reports, S. 190.
- (7) Power to take cognizance of offences without complaint, S. 190.
- (8) Power to commit for trial, S. 206.
- (9) Power to make orders as to first offenders, S. 562.

BY THE DISTRICT MAGISTRATE.

- (1) Power to make orders prohibiting repetitions of nuisances, S. 143.
- (2) Power to make orders under S. 144.
- (3) Power to hold inquests, S. 174.
- (4) Power to take cognizance of offences upon complaint, S. 190.
- (5) Power to take cognizance of offences upon police-reports, S. 190.

POWERS WITH WHICH A MAGISTRATE OF THE THIRD CLASS MAY BE INVESTED.

BY THE LOCAL GOVERNMENT

- (1) Power to make orders prohibiting repetitions of nuisances, S. 143.
- (2) * * *
- (3) Power to hold inquests, S. 174.
- (4) Power to take cognizance of offences upon complaint, S. 190.
- (5) Power to take cognizance of offences upon police-reports, S. 190.
- (6) * * *

BY THE DISTRICT MAGISTRATE.

- (1) Power to make orders prohibiting repetitions of nuisances, S. 143.
- (2) * * *
- (3) Power to hold inquests, S. 174.
- (4) Power to take cognizance of offences upon complaint, S. 190.
- (5) Power to take cognizance of offences upon police-reports, S. 190.

POWERS WITH WHICH A SUB-DIVISIONAL MAGISTRATE MAY BE INVESTED.

BY THE LOCAL GOVERNMENT

- Power to call for records, S. 435

found, and whereas it has been shown to my satisfaction that the said (name) has absconded (or is concealing himself to avoid the service of the said warrant).

Proclamation is hereby made that the said _____ of _____ is required to appear at (place) before this Court (or before me) to answer the said complaint on the _____ day of _____ 19 . . .

Dated this _____ day of _____ 19 . . .
(Seal.) _____ (Signature.)

V.—PROCLAMATION REQUIRING THE ATTENDANCE OF A WITNESS

(See section 87.)

WHEREAS complaint has been made before me that (name, description and address) has committed (or is suspected to have committed) the offence of (mention the offence concisely) and a warrant has been issued to compel the attendance of (name, description and address of the witness) before this Court to be examined touching the matter of the said complaint; and whereas it has been returned to the said warrant that the said (name of witness) cannot be served, and it has been shown to my satisfaction that he has absconded (or is concealing himself to avoid the service of the said warrant):

Proclamation is hereby made that the said (name) is required to appear at (place) before the Court of _____ on the _____ day of _____ next at _____ o'clock to be examined touching the offence complained of.

Dated this _____ day of _____ 19 . . .
(Seal.) _____ (Signature.)

VI.—ORDER OF ATTACHMENT TO COMPEL THE ATTENDANCE OF A WITNESS.

(See section 88.)

To the Police-officer in charge of the Police-station at _____

WHEREAS a warrant has been duly issued to compel the attendance of (name, description and address) to testify concerning a complaint pending before this Court, and it has been returned to the said warrant that it cannot be served; and whereas it has been shown to my satisfaction that he has absconded (or is concealing himself to avoid the service of the said warrant); and thereupon a Proclamation has been or is being duly issued and published requiring the said _____ to appear and give evidence at the time and place mentioned therein [. . .]

This is to authorize and require you to attach by seizure the moveable property belonging to the said _____ to the value of rupees _____ which you may find within the District of _____ and to hold the said property under attachment pending the further order of this Court, and to return this warrant with an endorsement certifying the manner of its execution.

Dated this _____ day of _____ 19 . . .
(Seal.) _____ (Signature)

ORDER OF ATTACHMENT TO COMPEL THE APPEARANCE OF A PERSON ACCUSED.

(See section 88)

To (name and designation of the person or persons who is or are to execute the warrant)

WHEREAS complaint has been made before me that (name, description and address) has committed (or is suspected to have committed) the offence of _____ punishable under section _____ of the Indian Penal Code, and it has been

_____ said (name) cannot be found;
_____ he said (name) has absconded
_____ and warrant) and thereupon
_____ ublished requiring the said to
appear to answer the said charge within _____ days; and whereas the
said _____ is possessed of the following property other than land
paying revenue to Government in the village (or town) of _____ in the
District of _____ viz., _____ and an order has been made
for the attachment thereof:

You are hereby required to attach the said property by seizure, and to hold the same under attachment pending the further order of this Court, and to return this warrant with an endorsement certifying the manner of its execution.

Dated this _____ day of _____ 19 . . .
(Seal.) _____ (Signature.)

ORDER AUTHORISING AN ATTACHMENT BY THE DEPUTY COMMISSIONER AS COLLECTOR.

(See section 88.)

To the Deputy Commissioner of the District of

WHEREAS complaint has been made before me that (*name, description, and address*) has committed (*or is suspected to have committed*) the offence of punishable under section _____ of the Indian Penal Code, and it has been returned to a warrant of arrest thereupon issued that the said (*name*) cannot be found; and whereas it has been shown to my satisfaction that the said (*name*) has absconded (*or is concealing himself to avoid the service of the said warrant*) and thereupon a Proclamation has been *or is being* duly issued and published requiring the said to appear to answer the said charge within _____ days [* * *] and whereas the said _____ is possessed of certain land paying revenue to Government in the village (*or town*) of _____ in the district of _____

You are hereby authorized and requested to cause the said land to be attached, and to be held under attachment pending the further order of this Court, and to certify without delay what you may have done in pursuance of the order.

Dated this _____

day of _____

19 _____

(Seal.)

(Signature.)

VII—WARRANT IN THE FIRST INSTANCE TO BRING UP A WITNESS.

(See section 90.)

To (*name and designation of the Police-officer or other person or persons who is or are to execute the warrant.*)

WHEREAS complaint has been made before me that _____ of _____ has (*or is suspected to have*) committed the offence of (*mention the offence concisely*), and it appears likely that (*name, and description of witness*) can give evidence concerning the said complaint; and whereas I have good and sufficient reason to believe that he will not attend as a witness on the hearing of the said complaint unless compelled to do so;

This is to authorize and require you to arrest the said (*name*) and on the _____ day of _____ to bring him before this Court, to be examined touching the offence complained of.

Given under my hand and the seal of the Court, this _____ day

of _____

19 _____

(Seal.)

(Signature.)

VIII—WARRANT TO SEARCH AFTER INFORMATION OF A PARTICULAR OFFENCE.

(See section 96.)

To (*name and designation of the Police-officer or other person or persons who is or are to execute the warrant.*)

WHEREAS information has been received that _____ of the _____ commission (*or suspected comm*) _____ and it has been made to appear _____

_____ to search for the said (*the thing specified*) in _____ and, if found, to produce the same forthwith before this Court, returning that warrant, with an endorsement certifying what you have done under it, immediately upon its execution.

Given under my hand and the seal of the Court, this _____ day

of _____

19 _____

(Seal.)

(Signature.)

IX.—WARRANT TO SEARCH SUSPECTED PLACE OF DEPOSIT.

(See section 88.)

To (*name and designation of a Police-officer above the rank of a constable.*)

WHEREAS information has been laid before me, and on due inquiry thereupon had I have been led to believe that the (*describe the house or other place*) is used as a place for the deposit (*or sale*) of stolen property (*or if for either of the other purposes expressed in the section, state the purpose in the words of the section*);

This is to authorize and require you to enter the said house (*or other place*) with such assistance as shall be required and to use, if necessary, reasonable force for that purpose, and to search every part of the said house (*or other place, or if the search is to be confined to a part, specify the part clearly*) and to seize and take possession of *as the case* *and materials* *documents,* *be*], and *n possession* *everything made you have come under it,*

Given under my hand and the seal of the Court, this _____ day
of _____ 19 _____
(Seal.) _____ (Signature.)

X.—BOND TO KEEP THE PEACE.

(See section 107.)

WHEREAS I (*name*), inhabitant of (*place*) have been called upon to enter into a bond to keep the peace for the term of _____ *or until the completion of the inquiry* _____, or do any act that may _____ *or until the completion of* *the said inquiry*; and in case of my making default therein, I hereby bind myself to forfeit to Her Majesty the Queen, Empress of India, the sum of rupees _____
Dated this _____ day of _____ 19 _____
(Signature.)

XI.—BOND FOR GOOD BEHAVIOUR.

(See section 108, 109 and 110)

WHEREAS I (*name*), inhabitant of (*place*), have been called upon to enter into a bond to be of good behaviour to Her Majesty the Queen, Empress of India, and to all Her subjects for the term of (*state the period*) *or until the completion of the inquiry in the matter of* _____ *now pending in the Court of* _____ I hereby bind myself to be of good behaviour to Her Majesty and to all Her subjects during the said term *or until the completion of the said inquiry*, and, in case of my making default therein, I bind myself to forfeit to Her Majesty the sum of rupees _____
Dated this _____ day of _____ 19 _____
(Signature.)
(Where a bond with sureties is to be executed, add).—We do hereby declare ourselves _____ that he will be of good behaviour to Her _____ and to all Her subjects during the said term *or* _____ and in case of his making default therein, we _____ forfeit to Her Majesty the sum of rupees _____
Dated this _____ day of _____ 19 _____
(Signature.)

XII.—SUMMONS ON INFORMATION OF A PROBABLE BREACH OF THE PEACE.

(See section 114)

To _____ of _____
WHEREAS it has been made to appear to me by credible information that (*state the substance of the information*), and that you are likely to commit a breach of the peace (*or by which act a breach of the peace will probably be occasioned*), you are hereby required to attend in person (*or by a duly authorized agent*) at the Office of the Magistrate of _____ on the _____ day of _____ 19 _____ at ten o'clock in the forenoon to show cause why you should not be required to enter into a bond for rupees _____ [when, sureties are required, add—and also to give security by the bond of one (or two, *as the case may be*) surety (*or sureties*) in the sum of rupees (each if more than one)] that you will keep the peace for the term of _____
Given under my hand and the seal of the Court, this _____ day
of _____ 19 _____
(Seal.) _____ (Signature.)

XIII.—WARRANT OF COMMITMENT ON FAILURE TO FIND SECURITY TO KEEP THE PEACE.

(See section 123.)

To the Superintendent (or Keeper) of the Jail at

WHEREAS (name and address) appeared before me in person (or by his authorised agent) on the day of in obedience to a summons calling upon him to show cause why he should not enter into a bond for rupees with one surety (or a bond with two sureties each in rupees) that he, the said (name) would keep the peace for the period of months; and whereas an order was then made requiring the said (name) to enter into and find such security (state the security ordered when it differs from that mentioned in the summons), and he has failed to comply with the said order;

This is to authorise and require you, the said Superintendent (or Keeper), to receive the said (name) into your custody, together with this warrant and him safely to keep in the said Jail for the said period of (term of imprisonment) unless he shall in the meantime be lawfully ordered to be released, and to return this warrant with an endorsement certifying the manner of its execution.

Given under my hand and the seal of the Court, this day of 19

(Seal.)

(Signature.)

XIV.—WARRANT OF COMMITMENT ON FAILURE TO FIND SECURITY FOR GOOD BEHAVIOUR.

(See section 123.)

WHEREAS it has been made to appear to me that (name and description) has been and is lurking within the district of having no-estensible means of subsistence (or, that he is unable to give any satisfactory account of himself);

or

WHEREAS evidence of the general character of (name and description) has been adduced before me and recorded, from which it appears that he is an habitual robber (or housebreaker, etc., as the case may be);

And whereas an order has been recorded stating the same and requiring the said (name) to furnish security for his good behaviour for the term of (state the period) by entering into a bond with one surety (or two or more sureties, as the case may be) himself for rupees, and the said surety (or each of the said sureties) for rupees, and the said (name) has failed to comply with the said order and for such default has been adjudged imprisonment for (state the term) unless the said security be sooner furnished;

you, the said Superintendent (or Keeper) to receive together with this warrant and him safely to keep in the said Jail for the said period of (term of imprisonment) unless he shall in the meantime be released, and to return this warrant, with an endorsement certifying the manner of its execution.

Given under my hand and the seal of the Court, this day of 19

(Seal.)

(Signature.)

XV.—WARRANT TO DISCHARGE A PERSON IMPRISONED ON FAILURE TO GIVE SECURITY.

(See sections 123 and 124.)

To the Superintendent (or Keeper) of the Jail at

(or the officer in whose custody the prisoner is)

WHEREAS (name and description of prisoner) was committed to your custody under warrant of the Court, dated the day of and has since duly given security under section of the Code of Criminal Procedure;

or

the opinion that he can be released to discharge the said (name) from your custody unless he is liable to be detained for some other cause

Given under my hand and the seal of the Court, this day of 19

(Seal)

(Signature.)

XVI.—ORDER FOR THE REMOVAL OF NUISANCES.

(See section 133.)

To (name, description and address).

WHEREAS it has been made to appear to me that you have caused an obstruction (or nuisance) to persons using the public roadway (or other public place) which, etc., (describe the road or public place), by etc., (state what it is that causes the obstruction or nuisance) and that such obstruction (or nuisance) still exists:

or

WHEREAS it has been made to appear to me that you are carrying on as owner, or manager, the trade or occupation of (state the particular trade or occupation and the place where it is carried on) and that the same is injurious to the public health (or comfort) by reason (state briefly in what manner the injurious effects are caused), and should be suppressed or removed to a different place;

or

by reason of the nuisance (or other obstruction) being carried on (or nuisance) (fenced);

or

WHEREAS etc., etc., (as the case may be);
I do hereby direct and require you within (state the time allowed) to (state what is required to be done to abate the nuisance) or to appear at _____ in the Court _____ on the _____ day of _____ next, and to show cause why this order should not be enforced;

or

I do hereby direct and require you within (state the time allowed) to cease carrying on the said trade or occupation at the said place, and not again to carry on the same, or to remove the said trade from the place where it is now carried on, or to appear, etc.);

or

I do hereby direct and require you within (state the time allowed), to put up a sufficient fence (state the kind of fence and the part to be fenced), or to appear, etc.;

or

I do hereby direct and require you, etc., (as the case may be)
Given under my hand and the seal of the Court, this _____ day
of _____ 19 _____
(Seal.) _____ (Signature)

XVII.—MAGISTRATE'S ORDER CONSTITUTING A JURY

(See section 138)

WHEREAS on the _____ day of _____ 19 _____, an order was issued to (name) requiring him (state the effect of the order), and whereas the said (name) _____ day of _____
I _____
_____ day of _____
_____ or more
_____ Jury to
report their decision within _____ days from the date of this order at my
office at _____

Given under my hand and the seal of the Court, this _____ day
of _____ 19 _____
(Seal.) _____ (Signature)

XVIII.—MAGISTRATE'S NOTICE AND PEREMPTORY ORDER AFTER THE FINDING BY JURY

(See section 140)

To (name, description and address).

I HEREBY give you notice that the Jury duly appointed on the petition presented by you on the _____ day of _____ have found that the order issued on the _____ day of _____ requiring you (state substantially the requisition in the order) is reasonable and proper. Such order has been made

absolute, and I hereby direct and require you to obey the said order within (*state the time allowed*), on peril of the penalty provided by the Indian Penal Code for disobedience thereto.

Given under my hand and the seal of the Court, this _____ day
 of _____ 19 ____
 (Seal.) (Signature.)

XIX.—INJUNCTION TO PROVIDE AGAINST IMMINENT DANGER PENDING INQUIRY BY JURY.

(See section 142.)

To (*name, description and address*).

WHEREAS the inquiry by Jury appointed to try whether my order issued on the _____ day of _____ 19 ____, is reasonable and proper is still to me that the nuisance mentioned in the said _____ us danger to the public as to render necessary ger, I do hereby under the provisions of S. 142 ct and enjoin you forthwith to (*state plainly what is required to be done as a temporary safeguard*), pending the result of the local inquiry by the Jury.

Given under my hand and the seal of the Court, this _____ day
 of _____ 19 ____
 (Seal.) (Signature.)

XX.—MAGISTRATE'S ORDER PROHIBITING THE REPETITION, ETC., OF A NUISANCE.

(See section 143.)

To (*name, description and address*).

WHEREAS it has been made to appear to me that, etc., (*state the proper recital, guided by Form No. XVI or Form No. XXI, as the case may be*); I do hereby strictly order and enjoin you not to repeat the said nuisance by again placing or causing or permitting to be placed, etc., (*as the case may be*).

Given under my hand and the seal of the Court, this _____ day
 of _____ 19 ____
 (Seal.) (Signature.)

XXI.—MAGISTRATE'S ORDER TO PREVENT OBSTRUCTION, RIOT, ETC.

(See section 144.)

To (*name, description and address*).

WHEREAS it has been made to appear to me that you are in possession (*or have the management*) of (*describe clearly the property*), and that, in digging a drain on the said land, you are about to throw or place a portion of the earth and stones dug up upon the adjoining public road, so as to occasion risk of obstruction to persons using the road;

or

to me that you and a number of other persons to meet and proceed in a religious procession (*as the case may be*), and that such procession is likely

or

WHEREAS etc., etc., (*as the case may be*); I do hereby order you not to place or permit to be placed any of the earth of stones dug from land on any part of the said road;

or

I do hereby prohibit the procession passing along the said street, and strictly warn and enjoin you not to take any part in such procession (*or as the case recited may require*).

Given under my hand and the seal of the Court, this _____ day
 of _____ 19 ____
 (Seal.) (Signature.)

XXII.—MAGISTRATE'S ORDER DECLARING PARTY ENTITLED TO RETAIN POSSESSION OF LAND, ETC., IN DISPUTE.

(See section 145)

It appearing to me, on the grounds duly recorded, that a dispute likely to induce
 (state
 on, all
 claims
 as to the fact of actual possession of the said (the subject of dispute), and being
 satisfied by due inquiry had thereupon without reference to the merits of the claim of
 either of the said parties to the legal right of possession, that the claim of actual

of _____ day
(Seal.) 19 _____ (Signature.)

XXIII.—WARRANT OF ATTACHMENT IN THE CASE OF A DISPUTE AS TO POSSESSION OF LAND, ETC.

(See section 146.)

To the Police-officer in charge of the Police-station at
[or.]

of the
resid
the subject of dispute) situate within the limits of my jurisdiction, and the said parties
were thereupon duly called upon to state in writing their respective claims as to the
fact of
inquiry
possession
which

This is to authorise and require you to attach the said *(the subject of dispute)* by taking and keeping possession thereof and to hold the same under attachment until the decree or order of a competent Court determining the rights of the parties or the claim to possession shall have been obtained, and to return this warrant with an endorsement certifying the manner of its execution

Given under my hand and the seal of the Court, this _____ day
of _____ 19____.

(Seal.) (Signature.)

XXIV.—MAGISTRATE'S ORDER PROHIBITING THE DOING OF ANYTHING ON
LAND OR WATER.

(See section 147.)

ate concisely the subject possession of which land ersons), and it appearing er) has been open to the il or a class of persons, hout the year), that the n of the said inquiry (or he last of the seasons at

the decree or order of a competent Court adjudging him (or them) to be entitled to exclusive possession.

Given under my hand and the seal of the Court, this _____ day
of _____ 19____.

absolute, and I hereby direct and require you to obey the said order within (*state the time allowed*), on peril of the penalty provided by the Indian Penal Code for disobedience thereto.

Given under my hand and the seal of the Court, this _____ day
of _____ 19____.

(Seal.) (Signature)

XIX.—INJUNCTION TO PROVIDE AGAINST IMMINENT DANGER PENDING INQUIRY BY JURY.

(See section 142.)

To (name, description and address).

WHEREAS the inquiry by Jury appointed to try whether my order issued on the _____ day of _____, 19____, is reasonable and proper is still pending, and it has been made to appear to me that the nuisance mentioned in the said order is attended with so imminent serious danger to the public as to render necessary immediate measures to prevent such danger, I do hereby under the provisions of S. 142 of the Code of Criminal Procedure, direct and enjoin you forthwith to (*state plainly what is required to be done as a temporary safeguard*), pending the result of the local inquiry by the Jury.

Given under my hand and the seal of the Court, this _____ day
of _____ 19____.

(Seal.) (Signature.)

XX.—MAGISTRATE'S ORDER PROHIBITING THE REPETITION, ETC., OF A NUISANCE.

(See section 143.)

To (name, description and address).

WHEREAS it has been made to appear to me that, etc., (state the proper recital, guided by Form No. XVI or Form No. XXI, as the case may be);

I do hereby strictly order and enjoin you, not to repeat the said nuisance by again placing or causing or permitting to be placed, etc., (as the case may be).

Given under my hand and the seal of the Court, this _____ day
of _____ 19____.

(Seal.) (Signature.)

XXI.—MAGISTRATE'S ORDER TO PREVENT OBSTRUCTION, RIOT, ETC.

(See section 144.)

To (name, description and address).

WHEREAS it has been made to appear to me that you are in possession (or have the management) of (describe clearly the property), and that, in digging a drain on the said land, you are about to throw or place a portion of the earth and stones dug up upon the adjoining public road, so as to occasion risk of obstruction to persons using the road:

OT

WHEREAS it has been made to appear to me that you and a number of other persons (*mention the class of persons*) are about to meet and proceed in a religious procession along the public street, etc., (*as the case may be*), and that such procession is likely to lead to a riot or an affray:

OT

WHEREAS etc., etc., (as the case may be);

I do hereby order you not to place or permit to be placed any of the earth or stones dug from land on any part of the said road;

or

I do hereby prohibit the procession passing along the said street, and strictly warn and enjoin you not to take any part in such procession (or as the case recited may require).

Given under my hand and the seal of the Court, this _____ day
of _____ 19____.

(Seal.) _____ (Signature.) _____

XXII.—MAGISTRATE'S ORDER DECLARING PARTY ENTITLED TO RETAIN
POSSESSION OF LAND, ETC., IN DISPUTE.

(See section 145.)

It appearing to me, on the grounds duly recorded, that a dispute, likely to induce a breach of the peace, existed between (*describe the parties by name and residence, or residence only if the dispute be between bodies of villagers*) concerning certain (*state concisely the subject of dispute*) situate within the local limits of my jurisdiction, all the said parties were called upon to give in a written statement of their respective claims as to the fact of actual possession of the said (*the subject of dispute*), and being satisfied by due inquiry had thereupon without reference to the merits of the claim of either of the said parties to the legal right of possession, that the claim of actual possession by the said (*name or names or description*) is true;

the said (*the*
due course of
the meantime.
day

of

19

(Seal.)

(Signature.)

XXIII.—WARRANT OF ATTACHMENT IN THE CASE OF A DISPUTE AS TO
POSSESSION OF LAND, ETC.

(See section 146.)

To the Police-officer in charge of the Police-station at
[or,

ective claims as to the
and whereas, upon due
he said parties was in
to satisfy myself as to

taking and keeping possession thereof and to hold the same under attachment until the decree or order of a competent Court determining the rights of the parties or the claim to possession shall have been obtained, and to return this warrant with an endorsement certifying the manner of its execution.

Given under my hand and the seal of the Court, this

day

of

19

(Seal.)

(Signature.)

XXIV.—MAGISTRATE'S ORDER PROHIBITING THE DOING OF ANYTHING ON
LAND OR WATER.

(See section 147.)

A DISPUTE having arisen concerning the right of use (*state concisely the subject of dispute*) situate within the limits of my jurisdiction, the possession of which land (*or water*) is claimed exclusively by (*describe the person or persons*), and it appearing to me, on due inquiry into the same, that the said land (*or water*) has been open to the enjoyment of such use by the public (*or if by an individual or a class of persons, describe him or them*) and (*if the use can be enjoyed throughout the year*), that the said use has been enjoyed within three months of the institution of the said inquiry (*or if the use is enjoyable only at particular seasons, say "during the last of the seasons at which the same is capable of being enjoyed"*);

I do order that the said (*the claimant or claimants of possession*), or anyone in interest, shall not take (*or retain*) possession of the said land (*or water*) to the exclusion of the enjoyment of the right of use aforesaid, until he (*or they*) shall obtain the decree or order of a competent Court adjudging him (*or them*) to be entitled to exclusive possession.

Given under my hand and the seal of the Court, this

day

of

19

(Seal.)

(Signature.)

XXV.—BOND AND BAIL-BOND ON A PRELIMINARY INQUIRY BEFORE A POLICE OFFICER.

(See section 169.)

I (name) of _____, being charged with the offence of _____
 and after inquiry required to appear before the Magistrate of _____
 or _____
 and after inquiry called upon to enter into my own recognizance to appear when required,
 do hereby bind myself to appear at _____ day of _____
 in the Court of _____, on the _____ day of _____
 next (or on such day as I may hereafter be required to attend) to answer further to
 the said charge, and, in case of my making default herein, I bind myself to forfeit to
 Her Majesty the Queen, Empress of India, the sum of rupees _____
 Dated this _____ day of _____ 19 _____

(Signature.)

I hereby declare myself (or we jointly and severally declare ourselves and each of
 us) surety (or sureties) for the above said _____ that he shall attend
 at _____, in the Court of _____, on the _____ day of _____
 next (or on such day as he may hereafter be required to attend), further to answer to
 the charge pending against him, and in case of his making default therein, I hereby
 bind myself (or we hereby bind ourselves) to forfeit to Her Majesty the Queen, Empress
 of India, the sum of rupees _____
 Dated this _____ day of _____ 19 _____

(Signature.)

XXVI.—BOND TO PROSECUTE OR GIVE EVIDENCE

(See section 170)

I (name) of (place), do hereby bind myself to attend at _____ day of _____
 in the Court of _____ at _____ o'clock on the _____ day of _____
 next and then and there to prosecute (or to prosecute and give
 evidence) (or to give evidence) in the matter of a charge of _____ against
 one A, B, and in case of making default herein, I bind myself to forfeit to Her Majesty
 the Queen, Empress of India, the sum of rupees _____
 Dated this _____ day of _____ 19 _____

(Signature.)

XXVII.—NOTICE OF COMMITMENT BY MAGISTRATE TO GOVERNMENT PLEADER.

(See section 218.)

The Magistrate of _____ hereby gives notice that he has committed
 one _____ for trial at the next Sessions; and the Magistrate hereby
 instructs the Government Pleader to conduct the prosecution of the said case.
 The charge against the accused is that, etc., (state the offence as in the charge).
 Dated this _____ day of _____ 19 _____

(Signature.)

XXVIII.—CHARGES.

(See sections 221, 222, 223)

(I) CHARGES WITH ONE HEAD.

(a) I [name and office of Magistrate, etc.,] hereby charge you [name of accused
 person] as follows:—

(b) That you, on or about the _____ day of _____, at _____
 waged war against Her Majesty the Queen, Empress of
 India, and thereby committed an offence punishable under
 On Penal Code, sec. 121. sec. 121 of the Indian Penal Code, and within the cogn-
 121. nizance of the Court of Session (when the charge is framed
 by a Presidency Magistrate, for Court of Session substitute High Court).

(c) And I hereby direct that you be tried by the said Court on the said charge.
 [Signature and seal of the Magistrate.]

[To be substituted for (b)]:—

(2) That you, on or about the _____ day of _____ at _____ with
 the intention of inducing the Hon'ble A. B., Member of
 On section 124. the Council of the Governor General of India, to refrain
 from exercising a lawful power as such Member, assaulted
 such Member, and thereby committed an offence punishable under S. 124 of the Indian
 Penal Code and within the cognizance of the Court of Session [or High Court].

(3) That you, being a public servant in the

Department, directly accepted from [state the name], for
On section 161. another party [state the name] a gratification other than
 legal remuneration, as a motive for forbearing to do an
 official act, and thereby committed an offence punishable under sec. 161 of the Indian
 Penal Code, and within the cognizance of the Court of Session [or High Court].

(4) That you, on or about the day of

, at , did [or omitted to do,
On section 166. as the case may be] such conduct being contrary to the
 provisions of Act , section
 and known by you to be prejudicial to
 and thereby committed an offence punishable under sec. 166
 of the Indian Penal Code, and within the cognizance of the Court of Session [or
 High Court].

(5) That you, on or about the day of

at in the course of the trial of
On section 193. before , stated
 in evidence that " " which statement
 you either knew or believed to be false, or did not believe to be true, and thereby
 committed an offence punishable under sec. 193 of the Indian Penal Code, and within
 the cognizance of the Court of Session [or High Court].

(6) That you, on or about the day of

, committed culpable homicide not
On section 304. amounting to murder, causing the death of
 , and thereby committed an offence
 punishable under sec. 304 of the Indian Penal Code, and within the cognizance of the
 Court of Session [or High Court].

(7) That you, on or about the day of

, at
On section 306. abetted the commission of suicide by A. B., a person in a
 state of intoxication, and thereby committed an offence
 punishable under sec. 306 of the Indian Penal Code, and
 within the cognizance of the Court of Session [or High Court]

(8) That you, on or about the day of

, at
On section 325. voluntarily causing grievous hurt to
 and thereby committed an offence
 punishable under sec. 325 of the Indian Penal Code, and
 within the cognizance of the Court of Session [or High Court]

(9) That you, on or about the day of

, at
On section 392 , robbed [state the name], and thereby
 committed an offence punishable under sec. 392 of the
 Indian Penal Code, and within the cognizance of the Court
 of Session [or High Court].

(10) That you, on or about the day of

at , committed dacoity, an
On section 395. offence punishable under sec. 395 of the Indian Penal Code,
 and within the cognizance of the Court of Session [or High
 Court]

[In cases tried by Magistrate, substitute "within my cognizance" for ("within the
 cognizance of the Court of Session," and in (c) omit "by the said Court"]

(II) CHARGES WITH TWO OR MORE HEADS

(a) I [name and office of Magistrate, etc] hereby charge you [name of accused
 person] as follows:—

(b) First—That you, on or about the

day of , at
 , counterfeit, delivered the same to
On . . . A. B., as genuine, and thereby
 punishable under sec. 241 of the
 Court of Session [or High Court].
 Indian . . .

Secondly.—That you, on or about the day of , at
 knowing a coin to be counterfeit attempted to induce
 another person, by name A. B., to receive it as genuine, and thereby committed an
 offence punishable under sec. 241 of the Indian Penal Code and within the cognizance
 of the Court of Session [or High Court].

(c) And I hereby direct that you be tried by the said Court on the said charge.

[Signature and seal of Magistrate.]

[To be substituted for (b)]:—

(2) *First*.—That you, on or about the _____ day of _____, at _____, committed murder by causing the death of _____, and thereby committed an offence punishable under sec. 302 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court].

Secondly.—That you, on or about the _____ day of _____, at _____, by causing the death of _____, committed culpable homicide not amounting to murder, and thereby committed an offence punishable under sec. 304 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court].

(3) *First*.—That you, on or about the _____ day of _____, at _____, committed theft, and thereby committed an offence punishable under sec. 379 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court].

Secondly.—That you, on or about the _____ day of _____, at _____, committed theft, having made preparation for causing death to a person in order to the committing of such theft, and thereby committed an offence punishable under sec. 382 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court].

Thirdly.—That you, on or about the _____ day of _____, at _____, committed theft, having made preparation for causing restraint to a person in order to the effecting of your escape after the committing of such theft, and thereby committed an offence punishable under sec. 382 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court].

Fourthly.—That you, on or about the _____ day of _____, at _____, for causing fear of hurt to a person in or theft, and thereby committed an offence punishable under sec. 382 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court].

(4) That you, on or about the _____ day of _____, in the course of the inquiry into _____, before _____, stated in evidence that "_____ and that you, on or about _____, at _____, in the course of the trial of _____, before _____, one of which statements you either knew or believed to be false, or did not believe to be true, and thereby committed an offence punishable under sec. 193 of the Indian Penal Code, and within the cognizance of the Court Sessions [or High Court].

[In cases tried by Magistrate, substitute "within my cognizance" for "within the cognizance of the Court of Session" and in (c) omit "by the said Court".]

CHARGE FOR THEFT AFTER PREVIOUS CONVICTION.

I (name and office of Magistrate, etc.), hereby charge (name of accused person) as follows:—

That you, on or about the _____ day of _____, at _____, committed theft, and thereby committed an offence punishable under sec. 379 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court or Magistrate, as the case may be].

And you, the said (name of accused), stand further charged that you, before the committing of the said offence, that is to say, on the _____ day of _____, had been convicted by the (state Court by which conviction was had) at _____ of an offence punishable under Chapter XVII of the Indian Penal Code with imprisonment for a term of three years, that is to say, the offence of house-breaking by night (describe the offence in the words in the section under which the accused was convicted), which conviction is still in full force and effect, and that you are liable to enhanced punishment under sec. 75 of the Indian Penal Code.

And I hereby direct that you be tried, etc.

XXIX.—WARRANT OF COMMITMENT OF A SENTENCE OF IMPRISONMENT OR FINE IF
PASSED BY A MAGISTRATE.

(See sections 245 and 258)

To the Superintendent (or Keeper) of the Jail at _____ day of _____ 19____, (name of prisoner),
WHEREAS on the _____ day of _____, _____ prisoner in case No. _____
the (1st, 2nd, as the case may be) _____ of the Calendar for 19____, was convicted before me
(name and official designation) of the offences (mention the offence or offences concisely)
under section (or sections) of the Indian Penal Code (or of Act _____),
_____ (tinctly);
_____ Superintendent (or Keeper), to
_____ said jail, together with this
_____ tion according to law.
_____ day
of _____ 19____.
(Seal.) _____ (Signature.)

XXX.—WARRANT OF IMPRISONMENT ON FAILURE TO RECOVER AMENDS BY ATTACHMENT AND SALE.

(See section 250)

To the Superintendent (or Keeper) of the Jail at
WHEREAS (name and description) has brought against (name and description of the
and the same has been
smussal awards payment
as amends; and
der has been made for
day unless the

sooner paid, and on the
arrant with an endorse-

of 19 .
(Seal.) (Signature.)

XXXI—SUMMONS TO WITNESS

(See sections 68 and 252)

To WHEREAS complaint has been made before me that
has (or is suspected to have) committed the offence of (*state the offence concisely with
time and place*), and it appears to me that you are likely to give material evidence for
the prosecution:
You are hereby summoned to appear before this Court on the
day of _____ next at ten o'clock in the forenoon, to
testify what you know concerning the matter of the said complaint, and not to depart
thence without leave of the Court; and you are hereby warned that, if you shall without
just excuse neglect or refuse to appear on the said date, a warrant will be issued to
compel your attendance
Given under my hand and the seal of the Court, this _____ day
of _____ 19 _____.
(Seal.) (Signature)

XXXII.—PRECEPT TO DISTRICT MAGISTRATE TO SUMMON JURORS AND ASSESSORS.
(See section 326.)

To the District Magistrate of
WHEREAS a Criminal Session is appointed to be held in the Court house at _____ on the _____ day of _____ next,
and the names of the persons herein stated have been duly drawn by lot from among those named in the revised list of Jurors and Assessors furnished to this Court; you are hereby required to summon the said persons to attend at the said Court of Session at _____

[To be substituted for (b)]:—

(2) *First*.—That you, on or about the _____ day of _____, at _____, committed murder by causing the death of _____, and thereby committed an offence punishable under sec. 302 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court].

Secondly.—That you, on or about the _____ day of _____, at _____, by causing the death of _____, committed culpable homicide not amounting to murder, and thereby committed an offence punishable under sec. 304 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court].

(3) *First*.—That you, on or about the _____ day of _____, at _____, committed theft, and thereby committed an offence punishable under sec. 379 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court].

Secondly.—That you, on or about the _____ day of _____, at _____, committed theft, having made preparation for causing death to a person in order to the committing of such theft, and thereby committed an offence punishable under sec. 382 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court].

Thirdly.—That you, on or about the _____ day of _____, at _____, committed theft, having made preparation for causing restraint to a person in order to the effecting of your escape after the committing of such theft, and thereby committed an offence punishable under sec. 382 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court].

Fourthly.—That you, on or about the _____ day of _____, at _____, committed an offence punishable under section 304 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court].

(4) That you, on or about the _____ day of _____, in the course of the inquiry into _____, before _____, stated in evidence that "_____ and that you, on or about _____, at _____, in the course of the trial of _____, before _____, one of which statements you either knew or believed to be false, or did not believe to be true, and thereby committed an offence punishable under sec. 193 of the Indian Penal Code, and within the cognizance of the Court Sessions [or High Court].

[In cases tried by Magistrate, substitute "within my cognizance" for "within the cognizance of the Court of Session" and in (c) omit "by the said Court".]

CHARGE FOR THEFT AFTER PREVIOUS CONVICTION

I (name and office of Magistrate, etc.), hereby charge (name of accused person) as follows:—

That you, on or about the _____ day of _____, at _____, committed theft, and thereby committed an offence punishable under sec. 379 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court or Magistrate, as the case may be].

And you, the said (name of accused), stand further charged that you, before the committing of the said offence, that is to say, on the _____ day of _____, had been convicted by the _____ of _____, of the offence of _____, under which the accused was convicted, and that you are liable to enhanced punishment under the Indian Penal Code.

And I hereby direct that you be tried, etc.

XXIX.—WARRANT OF COMMITMENT OF A SENTENCE OF IMPRISONMENT OR FINE IF PASSED BY A MAGISTRATE.

(See sections 245 and 258.)

To the Superintendent (or Keeper) of the Jail at
 WHEREAS on the _____ day of _____ 19____, (name of prisoner),
 the (1st, 2nd, as the case may be) _____ prisoner in case No. _____
 of the Calendar for 19____, was convicted before me
 (name and official designation) of the offences (mention the offence or offences concisely)
 under section (or sections) of the Indian Penal Code (or of Act _____),
 and was sentenced to (state the punishment fully and distinctly);
 This is to authorize and require you, the said Superintendent (or Keeper), to
 receive the said (prisoner's name) into your custody in the said jail, together with this
 warrant, and there carry the aforesaid sentence into execution according to law.
 Given under my hand and the seal of the Court, this _____ day
 of _____ 19____.
 (Seal.) _____ (Signature.)

XXX.—WARRANT OF IMPRISONMENT ON FAILURE TO RECOVER AMENDS BY ATTACHMENT AND SALE.

(See section 250.)

To the Superintendent (or Keeper) of the Jail at
 WHEREAS (name and description) has brought against (name and description of the
 accused person) the complaint that (mention it concisely) and the same has been
 dismissed as false and frivolous (vexatious) and the order of dismissal awards payment
 by the said (name of complainant) of the sum of rupees _____ as amends; and
 _____ and an order has been made for
 _____ period of _____ day unless the
 _____, the said Superintendent (or Keeper), to receive
 the said (name) into your custody, together with this warrant, and him safely to keep
 in the said jail for the said period of (term of imprisonment), subject to the provisions
 of sec. 69 of the Indian Penal Code, unless the said sum be sooner paid, and on the
 receipt thereof, forthwith to set him at liberty, returning this warrant with an endorse-
 ment certifying the manner of its execution
 Given under my hand and the seal of the Court, this _____ day
 of _____ 19____.
 (Seal.) _____ (Signature.)

XXXI.—SUMMONS TO WITNESS.

(See sections 68 and 252.)

To _____ of _____
 WHEREAS complaint has been made before me that
 has (or is suspected to have) committed the offence of (state the offence concisely with
 time and place), and it appears to me that you are likely to give material evidence for
 the prosecution;
 You are hereby summoned to appear before this Court on the _____
 day of _____ next at ten o'clock in the forenoon, to
 testify what you know concerning the matter of the said complaint, and not to depart
 thence without leave of the Court; and you are hereby warned that, if you shall without
 just excuse neglect or refuse to appear on the said date, a warrant will be issued to
 compel your attendance.
 Given under my hand and the seal of the Court, this _____ day
 of _____ 19____.
 (Seal.) _____ (Signature.)

XXXII.—PRECEPT TO DISTRICT MAGISTRATE TO SUMMON JURORS AND ASSESSORS.

(See section 326.)

To the District Magistrate of _____
 WHEREAS a Criminal Session is appointed to be held in the Court house at _____
 on the _____ day of _____ next,
 and the names of the persons herein stated have been duly drawn by lot from among
 those named in the revised list of Jurors and Assessors furnished to this Court; you are
 hereby required to summon the said persons to attend at the said Court of Session at _____

10 A.M. on the said date, and within such date, to certify that you have done so in pursuance of this precept.

(Here enter the names of Jurors and Assessors.)

Given under my hand and the seal of the Court, this _____ day
of 19 .
(Seal.) (Signature.)

XXXIII.—SUMMONS TO ASSESSOR OR JUROR.

(See section 328.)

To *(name)* of *(place)*.

PURSUANT to a precept directed to me by the Court of Session of requiring your attendance as an Assessor *(or a Juror)* at the next Criminal Session, you are hereby summoned to attend at the said Court of Session at *(place)*, at ten o'clock in the forenoon on the day of _____ next.

Given under my hand and the seal of the Court, this _____ day
of 19 .
(Seal.) (Signature.)

XXXIV.—WARRANT OF COMMITMENT UNDER SENTENCE OF DEATH.

(See section 374.)

To the Superintendent *(or Keeper)* of the Jail at _____
WHEREAS at the Session held before me on the _____ day
of 19 *(name of prisoner)*, the *(1st, 2nd, 3rd, as the case may be)*
prisoner in case No. _____ of the Calendar at the said Session, was duly convicted
of the offence of culpable homicide amounting to murder under section _____ of
the Indian Penal Code, and sentenced to suffer death, subject to the confirmation of the
said sentence by the _____ Court of

This is to authorise and require you, the said Superintendent *(or Keeper)*, to
receive the said *(prisoner's name)* into your custody in the said Jail, together with this
you shall receive the further warrant or order
of the said _____ Court.
the Court, this _____ day

of _____
(Seal.) (Signature.)

XXXV.—WARRANT OF EXECUTION ON A SENTENCE OF DEATH

(See section 381.)

To the Superintendent *(or Keeper)* of the Jail at _____
WHEREAS *(name of prisoner)* the *(1st, 2nd, 3rd, as the case may be)* prisoner in
case No. _____ of the Calendar at the Session held before me on the _____
day of _____ 19 , has been by warrant of this
Court, dated the _____ day of _____, committed to your
custody under sentence of death; and whereas the order of the _____ Court
of _____ confirming the said sentences has been received by this
Court:

_____ to carry
_____ hanged
_____ warrant
_____ ed.
_____ day
of 19 .
(Seal.) (Signature.)

XXXVI.—WARRANT AFTER A COMMUTATION OF A SENTENCE.

(See sections 381 and 382.)

To the Superintendent *(or Keeper)* of the Jail at _____
WHEREAS at a Session held on the _____ day of _____ 19 .
(name of prisoner), the *(1st, 2nd, 3rd, as the case may be)* prisoner in case No. _____
of the Calendar at the said Session, was convicted of the offence of
punishable under sec. _____

of the Indian Penal Code, and sentenced to _____ and was thereupon
 committed to your custody; and whereas by the order of the _____ Court
 of _____ (a duplicate of which is hereunto annexed) the _____
 _____ as been commuted to the punishment of _____
 _____ 2);
 _____ said Superintendent (or Keeper), safely
 tody in the said Jail as by law is required,
 the proper authority and custody for the
 of transportation under said order, or if
 , say after the words "custody in the said
 unishment of imprisonment under the said
 _____ : Court, this _____ day
 of _____ 19 _____
 (Seal.) _____ (Signature)

XXXVII.—WARRANT TO LEVY A FINE BY ATTACHMENT AND SALE

[See section 386 (1) (a)]

To (name and designation of the Police-officer or other person or persons who is or are
 to execute the warrant).

WHEREAS (name and description of the offender) was on the
 day of _____ 19 _____, convicted before me of the offence of (mention
 the offence concisely), and sentenced to pay a fine of rupees _____;
 and whereas the said (name), although required to pay the said fine, has not paid the
 same or any part thereof;

This is to authorize and require
 the same (name) which may be found

_____ Seal of the Court, this _____ day
 of _____ 19 _____
 (Seal) _____ (Signature)

XXXVII-A.—BOND FOR APPEARANCE OF OFFENDER RELEASED PENDING REALISATION OF FINE.

Whereas I, (name) inhabitant of (place), have been sentenced to pay a fine of
 rupees _____ and in default of payment
 thereof to undergo imprisonment for _____; and whereas
 the Court has been pleased to order my release on condition of my executing a bond
 for my appearance on the following date or dates, namely—

I hereby bind myself to appear before the Court of _____
 at _____ o'clock on the following date or dates, namely,
 _____ and in case of making default therein, I bind myself to forfeit
 to His Majesty the King, Emperor of India, the sum of Rupees _____
 Dated this _____ day of _____ 19 _____

(Signature.)

Where a bond with sureties is to be executed add—We do hereby declare ourselves
 sureties for the above-named _____ that
 he will appear before the Court of _____ on the following date
 or dates, namely _____ and, in case of his making default
 therein we bind ourselves jointly and severally to forfeit to His Majesty the King,
 Emperor of India, the sum of rupees _____

(Signature.)

XXXVIII.—WARRANT OF COMMITMENT IN CERTAIN CASES OF CONTEMPT WHEN A FINE IS IMPOSED.

(See section 480)

To the Superintendent (or Keeper) of the Jail at _____

WHEREAS at a Court holden before me on this day (name and description of the
 offender) in the presence (or view) of the Court committed wilful contempt;

And whereas for such contempt the said (name of offender) has been adjudged by
 the Court to pay a fine of rupees _____, or in default to

suffer simple imprisonment for the space of (*state the number of months or days*); This is to authorize and require you, the Superintendent (*or Keeper*) of the said jail to receive the said (*name of offender*) into your custody, together with this warrant, and him safely to keep in the said jail for the said period of (*term of imprisonment*) unless the fine be sooner paid, and on the receipt thereof, forthwith to set him at liberty, returning this warrant with an endorsement certifying the manner of its execution.

Given under my hand and the seal of the Court, this _____ day
of 19 .
(Seal.) (Signature.)

XXXIX.—MAGISTRATE'S OR JUDGE'S WARRANT OF COMMITMENT OF WITNESS REFUSING TO ANSWER.

(See section 485.)

To (*name and description of officer of Court*).

adjudged);

This is to authorize and require you to take the said (*name*) into custody and him safely to keep in your custody for the space of _____ days unless in the meantime he shall consent to be examined and to answer the question asked of him, and on the last of the said days, or forthwith on such consent being known, to bring him before this Court to be dealt with according to law, returning this warrant with an endorsement certifying the manner of its execution.

Given under my hand and the seal of the Court, this _____ day
of 19 .
(Seal.) (Signature.)

XL.—WARRANT OF IMPRISONMENT ON FAILURE TO PAY MAINTENANCE.

(See section 488.)

To the Superintendent (*or Keeper*) of the Jail at

WHEREAS (*name, description and address*) has been proved before me to be possessed of sufficient means to maintain his wife (*name*) [*or his child (name)*], who is by reason of (*state the reason*) unable to maintain herself (*or himself*) and to have neglected (*or refused*) to do so, and an order has been duly made requiring the said (*name*) to allow to his said wife (*or child*) for maintenance the monthly sum of rupees _____; and whereas it has been further proved that

the said (*name*) in wilful disregard of the said order has failed to pay rupees _____, being the amount of the allowance for the month (*or months*) of _____. And thereupon an order was made adjudging him to undergo simple (*or rigorous*) imprisonment in the said jail for the period of _____;

This is to authorize and require you, the said Superintendent (*or Keeper*), to receive the said (*name*) into your custody in the said jail, together with this warrant, and there carry the said order into execution according to law returning this warrant with an endorsement certifying the manner of its execution.

Given under my hand and the seal of the Court, this _____ day
of 19 .
(Seal.) (Signature.)

XLI.—WARRANT TO ENFORCE THE PAYMENT OF MAINTENANCE BY Attachment AND SALE.

(See section 483.)

To (*name and designation of the Police-officer or other person to execute the warrant*).

WHEREAS an order has been duly made requiring (*name*) to allow to his said wife (*or child*) for maintenance the monthly sum of rupees _____, and whereas the said (*name*) in wilful disregard of the said order has failed to pay rupees _____, being the amount of the allowance for the month (*or months*) of _____;

This is to authorize and require you to attach any moveable property belonging to the said (*name*) which may be found within the district of _____ and

if within (state the number of days or hours said sum shall not be paid (or forthwith), to so much thereof as shall be sufficient to satisfy the endorsement certifying what you have done

Given under my hand and the seal of the Court, this _____ day of _____ 19 .
(Seal.) (Signature.)

XLII.—BOND AND BAIL-BOND ON A PRELIMINARY INQUIRY BEFORE A MAGISTRATE.

(See section 496 and 499.)

I do bind myself to attend at the Court of the said Magistrate on every day of the preliminary inquiry into the said charge and should the case be sent for trial by the Court of Session, to be, and appear, before the said Court when called upon to answer the charge against me; and, in case of my making default herein, I bind myself to forfeit to Her Majesty the Queen, Empress of India, the sum of rupees _____

Dated this _____ day of _____ 19 . (Signature.)

I hereby declare myself (or we jointly and severally declare ourselves and each of us) surety (or sureties) for the said (name) that he shall attend at the Court of _____ on every day of the preliminary inquiry into the offence charged against him and, should the case be sent for trial by the Court of Session, that he shall be, and appear, before the said Court to answer the charge against him, and in case of his making default therein, I bind myself (or we bind ourselves) to forfeit to Her Majesty the Queen, Empress of India, the sum of rupees _____

Dated this _____ day of _____ 19 . Signature.

XLIII.—WARRANT TO DISCHARGE A PERSON IMPRISONED ON FAILURE TO GIVE SECURITY.

(See section 500.)

To the Superintendent (or Keeper) of the Jail at _____ (or other officer in whose custody the person is).

WHEREAS (name and description of prisoner) was committed to your custody under warrant of this Court, dated the _____

and has since with his surety (or sureties) duly _____ of Criminal Procedure with to discharge the said (name) from _____ for some other matter.

Court, this _____ day of _____ 19 .
(Seal.) (Signature.)

XLIV.—WARRANT OF ATTACHMENT TO ENFORCE A BOND.

(See section 514.)

to appear on (men-
default forfeited to
ally in the bond);
ed to pay the said
I against him;
operty of the said
by seizure
o sell the property
t aforesaid, and to
pon its execution.

of _____ 19 .
(Seal.) (Signature.)

XLV.—NOTICE TO SURETY ON BREACH OF A BOND.

(See section 514.)

To _____ of _____
 WHEREAS on the _____ day of _____ 19____, you became
 surety for (name) of (place) that he should appear before this Court on the _____
 day of _____ and bound yourself in default
 thereof to forfeit the sum of rupees _____ to Her
 Majesty the Queen, Empress of India, and whereas the said (name) has failed to appear
 before this Court and by reason of such default you have forfeited the aforesaid sum of
 rupees _____
 You are hereby required to pay the said penalty or show cause, within
 days from this date, why payment of the said sum should not be enforced against you.
 Given under my hand and the seal of the Court, this _____ day
 of _____ 19____
 (Seal.) (Signature.)

XLVI.—NOTICE TO SURETY OF FORFEITURE OF BOND FOR GOOD BEHAVIOUR.

(See section 514.)

To _____ of _____
 WHEREAS on the _____ day of _____ 19____, you became
 surety by a bond for (name) of (place) that he would be of good behaviour for the
 period of _____ and bound yourself in default thereof to
 forfeit the sum of rupees _____ to Her Majesty the Queen,
 Empress of India, and whereas the said (name) has been convicted of the offence of
 (mention the offence concisely) committed since you became such surety, whereby
 your security bond has become forfeited;
 You are hereby required to pay the said penalty of rupees _____
 or to show cause within _____ days why it should not be paid.
 Given under my hand and the seal of the Court, this _____ day
 of _____ 19____
 (Seal.) (Signature.)

XLVII.—WARRANT OF ATTACHMENT AGAINST A SURETY.

(See section 514.)

To _____ of _____
 WHEREAS (name, description and address) has bound himself as surety for the
 appearance of (mention the condition of the bond), and the said (name) has made
 default and thereby forfeited to Her Majesty the Queen, Empress of India, the sum of
 rupees _____ (the penalty in the bond);
 This is to authorize and require you to attach any moveable property of the said
 (name) which you may find within the district of _____, by
 seizure and detention; and, if the said amount be not paid within three days, to sell the
 property so attached, or so much of it as may be sufficient to realise the amount
 aforesaid, and make return of what you have done under this warrant immediately upon
 its execution.
 Given under my hand and the seal of the Court, thus _____ day
 of _____ 19____
 (Seal.) (Signature.)

XLVIII.—WARRANT OF COMMITMENT OF THE SURETY OF AN ACCUSED
PERSON ADMITTED TO BAIL.

(See section 514.)

To the Superintendent (or Keeper) of the Jail at _____
 WHEREAS (name and description of surety) has bound himself as a surety for the
 _____ (name) has therein made
 _____ en forfeited to Her
 _____ e of surety) has, on
 _____ cause why payment
 _____ ered by attachment
 _____ for his imprisonment

This is to authorize and require you, the said Superintendent (*or Keeper*), to receive the said (*name*) into your custody with this warrant and him safely to keep in the said jail for the said (*term of imprisonment*) and to return this warrant with an endorsement certifying the manner of its execution.

Given under my hand and the seal of the Court, this _____ day of _____ 19 ____.

(Seal.)

(Signature.)

XLIX.—NOTICE TO THE PRINCIPAL OF FORFEITURE OF A BOND TO KEEP THE PEACE

(See section 514)

To (*name, description and address*).

WHEREAS on the _____ day of _____ 19 __, you entered into a bond not to commit, etc., (*as in the bond*), and proof of the forfeiture of the same has been given before me and duly recorded;

You are hereby called upon to pay the said penalty of rupees _____ or to show cause before me within _____ days why payment of the same should not be enforced against you.

Dated this _____ day of _____ 19 ____.

(Seal.)

(Signature.)

L.—WARRANT TO ATTACH THE PROPERTY OF THE PRINCIPAL ON BREACH OF A BOND TO KEEP THE PEACE

(See section 514)

To (*name and designation of Police-officer*) at the Police-station of _____.

WHEREAS (*name and description*) did on the _____ day of _____ 19 __, enter into a bond for the sum of rupees _____ binding himself not to commit a breach of the peace, etc., (*as in the bond*) and proof of the forfeiture of the said bond has been given before me and duly recorded; and whereas notice has been given to the (*name*) calling upon him to show cause why the said sum should not be paid, and he has failed to do so or to pay the said sum;

seizure moveable property

and, if the said
e property so attached or
make return of what you

have done under this warrant immediately upon its execution

Given under my hand and the seal of the Court, this _____ day of _____ 19 ____.

(Seal.)

(Signature.)

LI.—WARRANT OF IMPRISONMENT ON BREACH OF A BOND TO KEEP THE PEACE.

(See section 514)

To the Superintendent (*or Keeper*) of the Jail at _____.

WHEREAS proof has been given before me and duly recorded that (*name and description*) has committed a breach of the bond entered into by him to keep the peace, whereby he has forfeited to Her Majesty the Queen, Empress of India, the sum of rupees _____, and whereas the said (*name*) has failed to pay the said sum or to show cause why the sum should not be paid, although duly called upon to do so, and payment thereof cannot be enforced by attachment of his moveable property, and an order has been made for the imprisonment of the said (*name*) in the Civil jail for the period of (*term of imprisonment*);

and Superintendent (*or Keeper*) of the
your custody together with this warrant
said period of (*term of imprisonment*)
certifying the manner of its execution

Given under my hand and the seal of the Court, this _____ day of _____ 19 ____.

(Seal.)

(Signature.)

LII.—WARRANT OF ATTACHMENT AND SALE ON FORFEITURE OF BOND FOR GOOD BEHAVIOUR.

(See section 514.)

To the Police-officer in charge of the Police-station at _____ day
 of _____ WHEREAS (*name, description and address*) did, on the _____
 19 _____, give security by bond in the sum of rupees _____
 for the good behaviour of (*name, etc., of the principal*), and proof has been given before me and duly recorded of the commission by the said
 (*name*) of the offence of _____ whereby the said bond has been
 forfeited; and whereas notice has been given to the said (*name*) calling upon him to
 show cause why the said sum should not be paid, and he has failed to do so or to pay
 the said sum;

This is to authorise and require you to attach by seizure moveable property
 belonging to the said (*name*) to the value of rupees _____
 which you may find within the district of _____ and, if the said
 sum be not paid within _____, to sell the property so attached, or so
 much of it as may be sufficient to realise the same, and to make return of what you
 have done under this warrant immediately upon its execution.

Given under my hand and the seal of the Court, this _____ day
 of _____ 19 _____
 (Seal.) _____ (Signature.)

LIII.—WARRANT OF IMPRISONMENT ON FORFEITURE OF BOND FOR GOOD BEHAVIOUR.

(See section 514.)

To the Superintendent (*or Keeper*) of the Civil Jail at _____ day
 of _____ WHEREAS (*name, description and address*) did, on the _____
 19 _____, give security by bond in the sum of rupees _____
 for the good behaviour of (*name, etc., of the principal*), and proof of the breach of the
 said bond has been given before me and duly recorded, whereby the said (*name*) has

of imprisonment);

This is to authorize and require you, Superintendent (*or Keeper*), to receive the
 said (*name*) into your custody, together with this warrant, and him safely to keep in
 the said jail for the said period of (*term of imprisonment*), returning this warrant with
 an endorsement certifying the manner of its execution.

Given under my hand and the seal of the Court, this _____ day
 of _____ 19 _____
 (Seal.) _____ (Signature.)

LII.—WARRANT OF ATTACHMENT AND SALE ON FORFEITURE OF BOND FOR GOOD BEHAVIOUR.

(See section 514.)

To the Police-officer in charge of the Police-station at

WHEREAS (*name, description and address*) did, on the _____ day of _____ 19____, give security by bond in the sum of rupees _____ for the good behaviour of (*name, etc., of the principal*), and proof has been given before me and duly recorded of the commission by the said (*name*) of the offence of _____ whereby the said bond has been forfeited; and whereas notice has been given to the said (*name*) calling upon him to show cause why the said sum should not be paid, and he has failed to do so or to pay the said sum;

This is to authorise and require you to attach by seizure moveable property belonging to the said (*name*) to the value of rupees _____ and, if the said which you may find within the district of _____, to sell the property so attached, or so much of it as may be sufficient to realise the same, and to make return of what you have done under this warrant immediately upon its execution.

Given under my hand and the seal of the Court, this _____ day of _____ 19____.

(Seal.)

(Signature.)

LIII.—WARRANT OF IMPRISONMENT ON FORFEITURE OF BOND FOR GOOD BEHAVIOUR

(See section 514.)

To the Superintendent (*or Keeper*) of the Civil Jail at

WHEREAS (*name, description and address*) did, on the _____ day of _____ 19____, give security by bond in the sum of rupees _____ for the good behaviour of (*name, etc., of the principal*), and proof of the breach of the said bond has been given before me and duly recorded, whereby the said (*name*) has forfeited to Her Majesty the Queen, Empress of India, the sum of rupees _____, and whereas he has failed to pay the said sum or to show cause why the said sum should not be paid although duly called upon to do so, and payment thereof cannot be enforced by attachment of his moveable property, and an order has been made for the imprisonment of the said (*name*) in the Civil jail for the period of (*term of imprisonment*);

This is to authorize and require you, Superintendent (*or Keeper*), to receive the said (*name*) into your custody, together with this warrant, and him safely to keep in the said jail for the said period of (*term of imprisonment*), returning this warrant with an endorsement certifying the manner of its execution.

Given under my hand and the seal of the Court, this _____ day of _____ 19____.

(Seal.)

(Signature.)

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